

NEW LAW ON LOAN MODIFICATION CONSULTANTS

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By Patrick Casey

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The economic downturn over the past two years has led to many people defaulting on their home loans and having to renegotiate their home loans with their lenders. Unfortunately, there are some unscrupulous people out there that have taken advantage of these homeowners by posing as “foreclosure consultants”, “loan modification specialists” or some other catchy name. These shady individuals offer to renegotiate the homeowner’s loan for an up-front fee. But once the homeowner pays the fee, they never hear from this person again. Some of these scam artists have ended up with several million dollars after deceiving thousands of homeowners with offering loan modification services with an up-front fee.

The state and federal government have had many complaints about these crooks and are now actively pursuing them. Governor Schwarzenegger signed Senate Bill 94 on October 11th, which immediately went into effect and made it illegal for any person to charge an up-front fee for any loan modification on any residence or one to four unit building. Senate Bill 94 amends certain provisions of the California Business and Professions Code and the California Civil Code to make it unlawful for any person “to receive any compensation until after the person has fully performed each and every service the person contracted to perform or represented that he or she would perform.” This means that if you hire someone to help you with a loan modification, that person cannot receive any payment from you until he or she has completed all the services that they were obligated to perform. This effectively makes it illegal to charge any advance (or up-front) fee for providing loan modification services.

The scope of this law is quite broad. It applies to any person, including real estate agents, real estate brokers and attorneys. In the past, California law has allowed real estate agents and brokers to charge advance fees for this type of work if the California Department of Real Estate approved the form of contract upon which they were going to charge the advance fee. California law has also allowed attorneys to charge advance fees (which are sometimes called retainers) prior to conducting legal services. However, Senate Bill 94 changes the law to prohibit real estate agents, brokers and attorneys from charging up-front fees for any negotiation or representation in regards to a loan modification. Please keep in mind that this law does not prohibit attorneys from charging advance fees for any legal work that is not related to a loan modification.

Senate Bill 94 applies to loan modifications relating to residential property containing four or less units. Any single family residence, condominium, duplex or building with four or less residential units will be covered by Senate Bill 94. However, it does not apply to an apartment building that has more than four units or to any commercial property. It is interesting to note that Senate Bill 94 is not limited to owner-occupied residences. Senate Bill 94 applies to all

residential property containing four or less units, regardless of whether it is owner-occupied or held as investment property.

Senate Bill 94 imposes significant penalties for violations. A person that violates the new law can be fined up to \$10,000 and sentenced up to one year in county jail. If a business entity (such as a corporation or limited liability company) violates the new law, then they can be fined up to \$50,000. The California Senate specifically established these steep penalties because it really wants to stop all the loan modification scam artists from defrauding consumers. However, the new law is so broad that it also encompasses real estate agents, brokers and attorneys.

One important point to note is that the new law does not apply to any advance fee arrangements that were in existence when the new law went into effect, which was October 11, 2009. Therefore, if you are working with a person that you paid an advance fee prior to this date, then that person can lawfully keep the advance fee so long as they continue to perform the loan modification services for which you contracted with them.

Although the new law prohibits up-front fees, it does not prohibit a person from providing loan modification services if they get paid after the services are completed. Senate Bill 94 requires that any such contract must contain specific language in 14 point bold type stating that (i) a homeowner does not have to pay a third party for loan modification services because the homeowner can negotiate directly with the lender for a loan modification, and (ii) there are nonprofit housing counseling agencies approved by the U.S. Department of Housing and Urban Development that provide these types of services for free. Senate Bill 94 contains the specific disclaimer language that must be included in the contract.

There is one exception to the new law, which is for any person that is offering loan modification services for a loan owned or serviced by that person. For example, if a homeowner has a loan with Chase Bank, then Chase Bank can contact the homeowner and offer a loan modification to the homeowner. The new law does not prohibit Chase Bank from charging a fee for a loan modification. However, it is rare that any lender charges a loan modification fee because a homeowner that is in default on their home loan typically cannot afford the mortgage payments, let alone a fee for a loan modification.

The new law should significantly reduce the number of scam artists that are trying to take advantage of homeowners in a difficult situation. If you are considering hiring a third party to help you with a loan modification, then it is still important to investigate the credentials and qualifications of the third party before providing them with any personal information or signing a contract.

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