

LEGAL NOTES

FROM THE DESK OF HAROLD CHU

It is often said that buying a home is one of the most important and expensive purchases one makes.

In conjunction with the purchase of a residential home, Hawaii law requires the seller to make mandatory disclosure of material facts, past and present. Material facts are facts which a normal person would want to know in connection with the purchase of the property. This requirement is set forth in Hawaii Revised Statutes and is a standard condition in the Purchase Contract, a form typically used in buying or selling residential real property in Hawaii.

Buyers often are caught up in the excitement of the purchase and neglect to review the details. One of the most important document that one should review is the Seller's Real Property Disclosure Statement. Sellers are often reluctant to disclose something for fear it will not be attractive and may discourage potential buyers. This is especially true today in certain areas of Honolulu where the market is slower. While there is always a risk of a buyer being turned off by a disclosure, the cost of a lawsuit for non-disclosure is substantial and can usually involve the parties in litigation for several years. Furthermore, if the seller has failed to disclose, one of the potential consequences is the Purchase Contract can be set aside or there can be substantial damages awarded. It is our recommendation that it is better to disclose.



It is much tougher to get credit these days. Even people with good credit are finding that credit and/or financing is difficult to obtain. A key factor in determining whether you are able to secure the loan or favorable rates is your FICO score. We discussed how your FICO score is calculated by the Fair Isaac scoring system.



After this issue, our newsletter will be published twice a year instead of four times a year. We thank you for the many comments that we have received regarding our newsletters. We are pleased that many of you find them helpful. Many of you especially enjoy the humor in our newsletters. Our newsletters are an effort to provide information to our ongoing clients, to advise you of current concerns and developments, especially in matters related to real estate.

SOME RECENT LAWS

Act 19 became effective April 17, 2008. It requires encryption of Social Security numbers transmitted over the Internet.

Act 86 became effective on July 1, 2008, it provides only the last 4 digit of a person's Social Security number maybe listed on a recorded Judgment, Order, Liens, etc. recorded in the Bureau of Conveyances and the Land Court.

Act 138 became effective on June 3, 2008. A lender in non-judicial foreclosure must be represented by a licensed Hawaii attorney. It also requires the lender to provide the following information:

1. The amount to cure the default, together with the estimated amount of the foreclosing lender's attorney's fees and costs and all other fees and costs estimated to be incurred by the foreclosing lender. This information must be disclosed prior to the auction within five (5) business days of the person's request.
2. The sales prices of the foreclosed property once it has been auctioned.

Act 138 further provides that if the sale is postponed, upon request by a person who is entitled to notice, the lender must provide the date and time of the postponed auction or if the auction has been cancelled.

Act 137 became effective June 3, 2008. It was enacted to prevent various people from taking advantage of homeowners who face property foreclosure, liens or encumbrances. This Act defines a distressed property consultant. A distressed property consultant must have a contract in writing and must fully disclose all services to be performed by the consultant and all of the terms and conditions of the agreement, including the total amount of compensation to be directly or indirectly received by the consultant. The contract must contain on the first page of the contract in at least 14 point type the following:

- ▶ The description of the distressed property.
- ▶ The name, street, address and telephone number of the consultant.
- ▶ The name and address of the consultant to which notice of cancellation is to be delivered.
- ▶ The distressed property consultant contract must be dated and signed by the consultant and all property owners. This consultant contract does not become effective until all the parties in the contract have signed the contract. The contract requires that a cancellation notice be included. The disclosure must be in at least 14 point type.

(See *RECENT LAWS*, Page 3)

Understanding Subprime Mortgages (Part II)

by Christine Daleiden

Laws Intended to Protect Mortgage Consumers

In theory, the laws needed to protect subprime borrowers from questionable lending practices are already in place: the Truth in Lending Act (TILA) and the Real Estate Settlement Procedures Act (RESPA). The Truth in Lending Act was intended to provide consumers with information about credit that is extended to them. Ideally, borrowers could compare the cost of a credit versus cash transaction and could compare rates charged by different lenders. Under the Truth in Lending Act, lenders are required to disclose such things as the annual percentage rate, the method for determining finance charges, the amount to be financed, total payments under the loan, and the schedule of payments. The Truth in Lending Act also provides for the right of consumers to rescind the transaction.

RESPA became law in 1974 and is also essentially a disclosure law. It requires certain disclosures at various points during a loan transaction. At the time of the loan application, RESPA requires that borrowers be provided with consumer information in the form of a booklet, a good faith estimate of the settlement costs, and a statement to the borrower as to whether the lender intends to service the loan itself or transfer it to another lender. Disclosures of affiliated interests are also required. At settlement of the loan, settlement costs of the loan transaction must be disclosed, including estimated taxes, insurance, and other charges. After settlement, borrowers must be provided with an escrow statement on an annual basis, which summarizes all payments made during the year. If the lender sells or assigns the loan, the borrower must be informed.

New Laws

The federal government recently decided to act with respect to the mortgage crisis in several significant ways.

On December 18, 2007, legislation was signed to help subprime borrowers obtain tax relief. The Mortgage Forgiveness Debt Relief Act of 2007 created a three-year period for homeowners to refinance their mortgages and pay no taxes on any debt forgiveness that they receive. This changes current law, where the tax code treats any amounts forgiven by lenders as taxable income.

In addition, the Department of Treasury and the Department of Housing and Urban Development encouraged the formation of a private-sector alliance to help subprime borrowers. The program, entitled the HOPE NOW alliance, coordinates efforts between lenders and mortgage servicers to provide "workouts" to borrowers, which may include lowering an interest rate on a loan, or spreading out the interest payments on the loan.

In August, 2007, the Bush administration acknowledged the market alone may not be able to take care of all of the problems created by the subprime lending industry, and introduced FHA Secure. Under this plan the Federal Housing Administration (FHA), which provides mortgage insurance to borrowers through private lenders, will offer subprime borrowers an option to refinance into loans it insures. To qualify for refinancing, the borrower must have made payments on time for the six months prior to the time the loan reset to higher rates, and the mortgage reset had to occur between June 2005 and December 2009. The lenders will also require the borrowers have at least three percent equity in their homes and can verify their incomes. The FHA expects to insure over 240,000 FHA loans in 2008.



Finally, the Federal Reserve Board proposed a new rule under the Home Ownership and Equity Protection Act. The new rule would not help those borrowers who already have subprime loans, but

does seek to prevent another lending crisis. This rule would protect consumers from predatory lending and advertising practices. Specifically, as it applies to sub-prime loans, creditors would be prohibited from extending credit without considering the borrowers' ability to repay the loan, creditors would be required to verify income and assets, prepayment penalties would only be allowed in certain instances, and escrow accounts would have to be established for taxes and insurance. With regard to advertising, certain deceptive advertising practices would be banned, including making representations that a rate is "fixed" if in fact, it can change.

As can be seen, none of these bailout strategies provide loan forgiveness of any kind to borrowers, but the media term "bailout" implies just that. Should loan forgiveness occur? The public's attitude is split. Fifty-one percent of those polled by CNN said that subprime borrowers whose homes were at risk "willingly accepted risky home loans and are themselves to blame." Forty-six percent said borrowers are the victims of bad lending policies. Unfortunately, whether the proposed plans help or hurt the borrowers, taxpayers, and the economy remains to be seen.

*Christine Daleiden is an attorney and is employed by the State of Hawaii, Department of Commerce and Consumer Affairs, Division of Financial Institutions. Her email address is chrisdaleiden@aol.com. This article was first published in the *Hawaii Bar Journal*, Volume 12, Number 3 (2008)*

SELLER'S REAL PROPERTY DISCLOSURE STATEMENT REQUIREMENTS

Buying a home these days involves filling out and receiving paperwork. All the documents should be reviewed, but there is one document that both buyers and sellers should review with care. That document is the Seller's Real Property Disclosure Statement. The first paragraph in Section C-44 of the standard Purchase Contract provides as follows:

SELLER'S DISCLOSURES (Required by Hawaii Statute for residential real property) **Seller's Obligation to Disclose.** Under **Hawaii law**, Seller is obligated to fully and accurately disclose in writing to Buyer any fact, defect, or condition, past or present, that would be expected to measurably affect the value of the Property to a reasonable person. Within ___ days [ten (10) days if left blank] from the Acceptance Date, Seller shall provide Buyer with a written disclosure statement signed and dated by Seller within six (6) months before or ten (10) days after the Acceptance Date. Such Disclosure shall be prepared in good faith and with due care and shall disclose all material facts relating to the Property that: (i) are within the knowledge or control of Seller; (ii) can be observed from visible, accessible areas; or, (iii) which are required by Section 508D-15 and Section 421J-2 of the Hawaii Revised Statutes.

In the state of Hawaii, sellers are required by law to disclose any material facts about the property and the neighborhood on a four-page disclosure form.

The Seller's Real Property Disclosure Statement form is important because it provides specific disclosures and material information to the buyer about the real property. The buyer can cancel the contract if they decide they don't want the property after reviewing the disclosures and making this election within the designated time period.

The law in Hawaii requires the seller to specifically disclose all material information about the real property. This would include pending lawsuits, existing asbestos, whether the home has ever been damaged, has permitted renovations, and whether there has been any settling or landslides. Anything that is considered a "material fact" must be disclosed. A "material fact", as defined by State law, as any fact, defect or condition, past or present, that would be expected to measurably affect the property value to a reasonable person.

The failure to disclose material facts about the property is a leading cause of lawsuits filed against sellers.

Factors Affecting Your FICO Score

One of the factors in securing a good rate on financing for your home or your car is your FICO score. A FICO score is a scoring system developed by Fair Isaac. Your FICO score is composed of various components of your payment history. The factors are roughly comprised of the following:

- **Payment history: 35 %**
When paying a bill, it is important that you are aware of the due date and that you do not inadvertently make a late payment which would hurt your FICO score.
- **How much credit is used: 30 %**
Fair Isaac measures your utilization of credit. Therefore, home owners have to be careful if their credit card has been charged to the maximum. If you have a certain amount of credit and you used most of that credit and max out your credit cards, this will not help your FICO score.
It is suggested that you use 30% or less of your available credit.
- **Length of credit history: 15 %**
You should keep the card you have the longest. Closing a credit card could hurt your credit more. You may consider not using a card rather than closing the card.
- **Applications for new credit: 10 %**
Adding more credit can make you appear to be a bigger credit risk.
- **Types of credit used: 10 %**
Do you have a mix of credit?

Homeowners who have a homeowners' line of credit need to be careful that the decline in home values may cause their credit line to be frozen. Sometimes it is difficult for Fair Isaac scoring to distinguish a home equity line of credit that has been frozen from a credit card in which you have borrowed to the limit. If you are applying for a mortgage and your home equity line of credit is frozen, this may hurt your FICO score and your effort to secure a mortgage.

(RECENT LAWS, From Page 1)

The distressed property owner can cancel the contract with a distressed property consultant without penalty or obligation at anytime before the distressed property consultant has fully performed each and every service to be provided by the distressed property consultant.

Act 137 prohibits the following specific actions by the consultants:

- Misrepresenting or concealing any material facts.
- Causing the property owners to waive any provisions of Act 137.
- Making any promise or guaranty not fully disclosed in the contract.
- Receiving any compensation until after the distressed property consultant has fully performed every service the distressed property consultant agreed to be performed.
- Receiving any fee or compensation that exceed the two most recent monthly mortgage installment as principal and interest due on the loan secured by the property.
- Receive any consideration from any third parties unless the construction is fully described in the distressed property consultant contract.
- Acquire any interest, directly or indirectly, from a distressed property owner with when they have a contract.

Act 175 will go into effect on January 1, 2009. It is to prevent fraud on the part of a notary. It also makes it a felony to make misrepresentations about a notarized document. This section makes it a crime of misrepresenting a notarized document by submitting or inviting one to rely upon a document that has been altered after the document has been notarized by a notary public.

Attorney:
Harold Chu
hchulaw@lava.net

Publisher/Editor:
Cora Anderson
canders@lava.net

Secretaries:
Cora Anderson
canders@lava.net

Janette Reyes
jreyes@lava.net

Printers:
New Tech Imaging

Phone: (808) 523-7544
Fax: (808) 526-1231



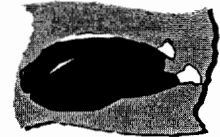
☺ ☹ ☹ **Funny Signs** ☺ ☹ ☺

On a Plumber's truck: 'We repair what your husband fixed.'
On another Plumber's truck: 'Don't sleep with a drip. Call your plumber.'
On a Plastic Surgeon's Office door: 'Hello. Can we pick your nose?'
At a Towing company: 'We don't charge an arm and a leg. We want tows.'
On an Electrician's truck: 'Let us remove your shorts.'
At an Optometrist's Office: 'If you don't see what you're looking for, you've come to the right place.'
On a Fence: 'Salesmen welcome! Dog food is expensive!'
At a Car Dealership: 'The best way to get back on your feet - miss a car payment.'
Outside a Muffler Shop: 'No appointment necessary. We hear you coming.'
In a Veterinarian's waiting room: 'Be back in 5 minutes. Sit! Stay!'
At the Electric Company: 'We would be delighted if you send in your payment. However, if you don't, you will be.'
In a Restaurant window: 'Don't stand there and be hungry. Come on in and get fed up.'
In the front yard of a Funeral Home: 'Drive carefully. We'll wait.'
A Chicago Radiator Shop: 'Best place in town to take a leak.'



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Harold Chu, Attorney at Law,
A Law Corporation
American Savings Bank Tower
1001 Bishop St., Suite 1570
Honolulu, Hawaii 96813

FORWARDING SERVICE REQUESTED