

AGENDA ITEM

Immediate Action Items Loan Modification Abuse Bills

DATE: June 22 2009

TO: Board Committee on Operations

FROM: Anthony Williams, State Bar Legislative Representative

SUBJECT: Immediate Action Items – Loan Modification Abuse Bills: AB 764, SB 94

EXECUTIVE SUMMARY

The State Bar's Office of Governmental Affairs is requesting that the board consider two measures currently scheduled for hearing in the Legislature related to loan modification abuse. These bills are proposed to be amended since the last Board meeting. In addition, the bills will receive consideration by the Legislature before the next Board meeting. The State Bar's Office of Governmental Affairs has reviewed the bills and proposes that the Board Committee on Operations, acting on behalf of the Board of Governors between meetings support the bills as indicated in the following memorandum. Questions regarding this agenda item should be directed to Anthony Williams, State Bar Legislative Representative at (916) 448-4000 or Saul Bercovitch, Legislative Counsel at (415) 538-2306.

BACKGROUND

1. [AB 764 \(Nava\)](#) (As amended June 2, 2009) – Real Estate Mortgage Loans.

Status: Senate Banking and Finance Committee; hearing set for July 1, 2009.

[SB 94 \(Calderon\)](#) (As amended June 11, 2009) – Mortgage Loans.

Status: Assembly Banking and Finance Committee; hearing anticipated July 6, 2009.

Description: **AB 764** would prohibit any person from claiming, demanding, charging, receiving, collecting or contracting for advance fees for performing services for

borrowers in connection with the modification of the terms of a residential mortgage loan, unless the person is a licensed real estate broker. This measure also requires any advance fee agreement used by a real estate broker to be approved by the Department of Real Estate prior to use. In addition, the bill prohibits advertisements used in obtaining loan modification agreements from using words, letters, initials, symbols, or other devices that are similar to those used by a governmental agency or nonprofit entity, and increases the fines for publishing such advertisements without the commissioner's approval and for unlawfully charging advance fees for loan modifications.

As currently drafted, until January 1, 2013, **AB 764** makes a violation of these provisions by an attorney subject to discipline by the State Bar. The relevant provisions are as follows:

Section 6106.4 is added to the Business and Professions Code, to read:

6106.4. (a) It shall constitute cause for the imposition of discipline of an attorney within the meaning of this chapter for an attorney to engage in any conduct prohibited under Section 10085.5 in connection with a one-to-four unit dwelling.

(b) This section shall remain in effect only until January 1, 2013, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2013, deletes or extends that date.

Among other provisions related to real estate licensees and those subject to various finance and lending provisions, **SB 94** would make it unlawful for *any person* who solicits customers for the purpose of helping negotiate a mortgage loan modification or other form of mortgage loan forbearance for a fee or other compensation, or who otherwise offers to perform these services for a borrower for a fee or other compensation, to do any of the following:

- (1) Claim, demand, charge, collect, or 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.
- (2) Take any wage assignment, any lien of any type on real or personal property, or other security to secure the payment of compensation.
- (3) Take any power of attorney from the borrower for any purpose.

SB 94 also requires any person who solicits customers to provide loan modification or forbearance services to provide a specified statement prior to entering into any agreement for those services. The statement essentially indicates that the services may be available at no cost from the lender or a HUD counseling agency. **SB 94's** provisions currently apply only to one-to-four unit "residential" real estate mortgages. Those provisions are also sunset on January 1, 2013.

AB 764 and SB 94 are intended to address the problem of real estate loan modification fraud. According to the Office of the Chief Trial Counsel, the Bar has been receiving

between 850 and 900 complaints per month from consumers related to the foreclosure crisis. In addition, the State Bar Journal reports that attorneys have called the ethics hotline at a rate of more than 200 per month about the foreclosure and loan modification business, some seeking assistance in handling inquiries from loan consultants.

In response to concerns also expressed by attorneys, the Bar's Committee on Professional Responsibility and Conduct issued an "Ethics Alert" on Legal Services to Distressed Homeowners and Foreclosure Consultants and Homeowners. The alert reminds California lawyers of the existing ethical rules that may apply in the event a foreclosure consultant or other non-lawyer requests assistance from a lawyer and/or refers potential distressed homeowner clients to the lawyer. There have been serious concerns about foreclosure consultants and others who are not licensed real estate brokers "collaborating" with attorneys to avoid existing regulations prohibiting advance fee arrangements. The OCTC has also sent a number of notices to attorneys who have advertised foreclosure or loan modification services to ensure that their activities comply with the Rules of Professional Conduct.

The intent of the both measures is to curtail the payment of advance fees for services that may be obtained at no cost from the borrower's lender or a HUD counseling agency, or worse, for the promise of services that are never performed. From a policy and public protection standpoint, there is no logical reason why the same restrictions should not clearly apply to attorneys. In fact, many "foreclosure" and "loan modification" consultants have teamed with attorneys in order to avoid the advance fee restrictions under current law. In addition, unscrupulous attorneys have exploited this loophole to their own advantage under the auspices of their law license. In at least one advertisement for foreclosure/loan modification services, an attorney declared they were "licensed by the State Bar;" in an attempt to give the impression that their services had the imprimatur of the State Bar when, in fact, they are simply licensed to practice law.

An advance fee prohibition would have a salutary preventative effect against improper conduct by attorneys. On the other hand, the prohibition would not be aimed at stopping legitimate lawyers from providing loan modification services and collecting fees only after services have been provided, especially if the client's loan modification case is regarded as a good one. Finally, as a disciplinary matter the current rules require advances for costs and expenses to be held in trust but *do not* impose that same requirement for advance fees. This gives the unscrupulous lawyer a legal basis for immediately pocketing advance fees, and perhaps improperly sharing those fees with foreclosure consultants and others.

Therefore, staff recommends that that State Bar support these measures. Staff also recommends that amendments be requested of **AB 764** to provide a more direct and precise statement that an attorney may not charge advance fees for services in connection with obtaining a loan modification. The recommended amendment would be to replace the current language in Section 1 of the bill with the following:

SECTION 1. Section 6106.4 is added to the Business and Professions Code, to read:

6106.4. (a) It shall constitute cause for the imposition of discipline of an attorney within the meaning of this chapter for an attorney to ~~engage in any conduct prohibited under Section 10085.5~~ claim, demand, charge, receive, or collect a fee from any person to provide services to obtain a legally enforceable modification of the terms of that person's loan secured directly or collaterally by a lien on in connection with a one-to-four unit dwelling single-family residential real property until those services have been provided.

Recommendation: **Support SB 94 and AB 764 with amendments** to apply the provisions of AB 764 to attorneys as indicated above.

RESOLUTION

If the Board Committee on Operations concurs with the staff, the following resolution is suggested:

RESOLVED, that the Board Committee on Operations, acting on behalf of the Board of Governors between meetings, supports Senate Bill 94 (Calderon) as amended June 11, 2009, and supports AB 764 (Nava) as amended June 2, 2009, with the following amendments:

SECTION 1. Section 6106.4 is added to the Business and Professions Code, to read:

6106.4. (a) It shall constitute cause for the imposition of discipline of an attorney within the meaning of this chapter for an attorney to ~~engage in any conduct prohibited under Section 10085.5~~ claim, demand, charge, receive, or collect a fee from any person to provide services to obtain a legally enforceable modification of the terms of that person's loan secured directly or collaterally by a lien on in connection with a one-to-four unit dwelling single-family residential real property until those services have been provided.

AND FURTHER RESOLVED, that the Board of Governors authorizes the State Bar Legislative Representative, under the direction of the Executive Director, to take all steps necessary to communicate the above position to members of the Legislature.