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MEMORANDUM IN OPPOSITION

June 21, 2010

S2614-B Klein (Passed Senate)
A1239-B Lancman (Assembly 3rd Reading Calendar)

AN ACT to amend the real property law, in relation to enacting the "access to justice in lending act"

This memorandum in *opposition* is written on behalf of our client, the New York Bankers Association. The Association is comprised of the community, regional and money center commercial banks and thrift institutions doing business in New York State. In aggregate, members of the Association employ approximately 250,000 New Yorkers and hold more than \$9 trillion in assets.

This legislation would create a new implication in any contract that provided attorneys' fees and costs to foreclosing parties a right for the party being foreclosed on to also collect attorneys' fees and costs if he or she is successful. This legislation is unconstitutional on its face as applied to existing mortgages, is unnecessary and would create uncertainty in the foreclosure process.

This legislation states that whenever a covenant contained in a mortgage on residential real property provides to mortgagees the right to recover attorneys' fees or expenses in any action or proceeding to foreclose on the mortgage, then the mortgage shall contain an implied covenant that the mortgagor will receive attorneys' fees or expenses for any failure by the mortgagee to perform any covenant in the mortgage or for the successful defense of a foreclosure action. The fees and expenses would be recoverable either in an independent action to enforce a mortgage covenant or in a counterclaim in a foreclosure or other action by the mortgagee.

Article 1, section 10 of the United State Constitution states that "No State shall ... pass any ... law impairing the obligation of contracts." This legislation, effective immediately, would by its terms apply to outstanding mortgages. Reading a new implied covenant into an existing contract is certainly impairment of the obligation of contract. This legislation cannot apply to mortgages currently outstanding.

The legislation is also unnecessary. The most commonly asserted defenses are violations of the Truth in Lending Act or violations of the Fair Debt Collection Practices Act. Both those statutes provide attorneys' fees for prevailing plaintiffs. See, 15 USC section 1640 and 15 USC section 1692k. Plaintiffs are therefore entitled to attorneys' fees in circumstances where they can demonstrate that lenders are in violation of applicable laws.

However, this legislation is so broadly drafted that it could give defendants in foreclosure actions the right to attorneys' fees even where a mortgagee would have no such rights. For example, this bill does not limit the right to attorneys' fees to successful or completed actions. In typical foreclosure actions in New York, foreclosure notices may be filed three, four, five or even more times without a foreclosure being actually completed. If a mortgagor elected to hire an attorney and then brought his or her mortgage up to date by paying off arrears, this legislation would provide the mortgagor with the right unfairly to collect attorneys' fees for those uncompleted actions.

For these reasons, the New York Bankers Association *opposes* this legislation and urges that it be held.

Respectfully Submitted,

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

not a "successful
defense"
of a foreclosure
action