



2009 ASSEMBLY BILL 471

October 6, 2009 – Introduced by Representatives YOUNG, TURNER, HRAYCHUCK and CLARK, cosponsored by Senator TAYLOR, by request of The Speaker's Taskforce on Preventing Home Foreclosures. Referred to Committee on Housing.

- 1 **AN ACT** *to amend* 224.79 (title); and *to create* 224.79 (3) of the statutes; **relating**
2 **to:** mortgage broker duties and agency relationships.

Analysis by the Legislative Reference Bureau

Under current law, a person may not act as a mortgage broker unless the person is registered with the Division of Banking in the Department of Financial Institutions (division). In 2009 Wisconsin Act 2 (Act 2), provisions of the federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008 were adopted into state law, including provisions relating to mortgage bankers, mortgage loan originators, and mortgage brokers. These provisions become effective on January 1, 2010, and this discussion of current law includes changes made in Act 2.

Under current law, a mortgage broker is, with certain exceptions, a person who, on behalf of a residential mortgage loan (loan) applicant or an investor and for commission or other compensation, finds a loan or negotiates a loan or loan commitment. However, state and federally chartered financial institutions are not mortgage brokers. A contract for mortgage brokerage services between a mortgage broker and an individual must be in writing and contain all information required by division rules. Before entering into a contract with an individual to provide mortgage brokerage services, a mortgage broker must give the individual a copy of a disclosure statement in a form and content specified by the division and explain the content of the statement. The disclosure statement must contain a brief explanation of the relationship between the individual and the mortgage broker under the proposed contract, a brief explanation of the manner in which the mortgage broker may be compensated under the proposed contract, and any additional information required by division rules.

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Current law imposes various requirements on, and specifies numerous acts and practices prohibited by, mortgage brokers and their principals and agents. For example, no mortgage broker or principal or agent of a mortgage broker may do any of the following: 1) make materially false or deceptive statements or representations, including engaging in bait and switch advertising or falsely representing loan rates, points, or other financing terms or conditions; 2) make false, deceptive, or misleading promises relating to the services being offered or that influence, persuade, or induce a client to act to his or her detriment; 3) act for more than one party in a transaction without the knowledge and consent of all parties on whose behalf the mortgage broker is acting; 4) demonstrate a lack of competency to act as a mortgage broker in a way that safeguards the interests of the public; 5) fail to account for or remit any moneys coming into the mortgage broker's possession that belong to another person; 6) engage in conduct that violates a standard of professional behavior that has become established for mortgage brokers; 7) engage in conduct that constitutes improper, fraudulent, or dishonest dealing; 8) solicit or enter into a contract with a borrower that provides in substance that the mortgage broker may earn a fee or commission through "best efforts" to obtain a loan even though no loan is actually obtained for the borrower; or 9) solicit, advertise, or enter into a contract for specific interest rates, points, or other financing terms unless the terms are actually available at the time of soliciting, advertising, or contracting. Also, a mortgage broker must deposit in a trust account all funds it receives other than nonrefundable fees, pending proper disbursement of the funds. A person who violates the laws regulating mortgage brokers may be fined not more than \$25,000 or imprisoned for not more than nine months or both, may be subject to an administrative forfeiture of not more than \$25,000, may be subject to license revocation or suspension by the division, and may also be subject to civil liability in a private action.

This bill specifies that a mortgage broker has an agency relationship with the residential mortgage loan applicant or investor on whose behalf the mortgage broker provides, or contracts to provide, mortgage brokerage services (borrower). The mortgage broker owes all of the following duties to the borrower:

1. The mortgage broker must act in the borrower's best interest and in the utmost good faith. The mortgage broker may not compromise the borrower's rights or interests in favor of the mortgage broker's or any other person's.

2. The mortgage broker may not accept, give, or charge any undisclosed compensation or realize any undisclosed remuneration that inures to the benefit of the mortgage broker on an expenditure made for the borrower.

3. The mortgage broker must carry out all lawful instructions given by the borrower.

4. The mortgage broker must disclose to the borrower all material facts of which the mortgage broker has knowledge that might reasonably affect the borrower's rights or interests or ability to receive the borrower's intended benefit from the residential mortgage loan. This does not include facts that are reasonably susceptible to the knowledge of the borrower.

5. The mortgage broker must use reasonable care in performing the mortgage broker's duties.

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6. The mortgage broker must account to the borrower for all money and property received by the mortgage broker as the borrower's agent.

The bill does not prohibit a mortgage broker from contracting or collecting a fee for services provided, if the services were disclosed to the borrower before they were provided. The bill also does not require a mortgage broker to obtain a loan containing terms or conditions not available to the mortgage broker or to obtain a loan for the borrower from a mortgage lender with whom the mortgage broker does not have a business relationship.

These duties may not be waived. The bill requires a mortgage broker, in each brokerage services contract and related disclosure statement, to identify the parties' agency relationship and the mortgage broker's duties.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 224.79 (title) of the statutes is amended to read:

2 **224.79 (title) Mortgage brokerage agreements and disclosures;**
3 **mortgage broker agency relationship and duties.**

4 **SECTION 2.** 224.79 (3) of the statutes is created to read:

5 **224.79 (3) MORTGAGE BROKER AGENCY RELATIONSHIP AND DUTIES.** (a) In this
6 subsection, "borrower" means the residential mortgage loan applicant or investor on
7 whose behalf a mortgage broker provides, or contracts to provide, mortgage
8 brokerage services.

9 (b) A mortgage broker, at all times when acting in the capacity of a mortgage
10 broker, has an agency relationship with the borrower.

11 (c) A mortgage broker owes all of the following duties to the borrower:

12 1. The mortgage broker shall act in the borrower's best interest and in the
13 utmost good faith toward the borrower, and may not compromise the borrower's
14 rights or interests in favor of another's rights or interests, including those of the
15 mortgage broker.

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1 2. The mortgage broker may not accept, give, or charge any undisclosed
2 compensation or realize any undisclosed remuneration, through direct or indirect
3 means, that inures to the benefit of the mortgage broker on an expenditure made for
4 the borrower.

5 3. The mortgage broker shall carry out all lawful instructions given by the
6 borrower.

7 4. The mortgage broker shall disclose to the borrower all material facts of which
8 the mortgage broker has knowledge that might reasonably affect the borrower's
9 rights or interests or ability to receive the borrower's intended benefit from the
10 residential mortgage loan, but not facts that are reasonably susceptible to the
11 knowledge of the borrower.

12 5. The mortgage broker shall use reasonable care in performing the mortgage
13 broker's duties.

14 6. The mortgage broker shall account to the borrower for all money and
15 property received by the mortgage broker as the borrower's agent.

16 (d) Nothing in this subsection prohibits a mortgage broker from contracting or
17 collecting a fee for services provided, if the services were disclosed to the borrower
18 before they were provided.

19 (e) Nothing in this subsection requires a mortgage broker to obtain a
20 residential mortgage loan containing terms or conditions not available to the
21 mortgage broker in the mortgage broker's usual course of business or to obtain a
22 residential mortgage loan for the borrower from a mortgage lender with whom the
23 mortgage broker does not have a business relationship.

24 (f) The duties imposed under par. (c) may not be waived.

