

SENATE BILL REPORT

SB 6381

As Amended by House, March 4, 2008

Title: An act relating to fiduciary duties of mortgage brokers.

Brief Description: Establishing fiduciary duties for mortgage brokers.

Sponsors: Senators Weinstein, Kauffman, Tom, Fairley, McAuliffe, Kohl-Welles, Kline and Murray.

Brief History:

Committee Activity: Consumer Protection & Housing: 1/18/08, 1/22/08, 1/25/08 [DP, DNP].

Passed Senate: 2/06/08, 29-19.

SENATE COMMITTEE ON CONSUMER PROTECTION & HOUSING

Majority Report: Do pass.

Signed by Senators Weinstein, Chair; Kauffman, Vice Chair; Haugen, Jacobsen, Kilmer and Tom.

Minority Report: Do not pass.

Signed by Senators Honeyford, Ranking Minority Member; Delvin.

Staff: Vanessa Firnhaber-Baker (786-7471)

Background: The relationship between mortgage brokers and borrowers is governed by the Mortgage Brokers Practices Act (MBPA). Under the MBPA, a mortgage broker's legal relationship with a borrower is defined solely by contract.

A fiduciary duty may be created through statute, contract, or through two parties' legal relationship with each other. A court may also declare that a fiduciary duty is owed when a person has encouraged another to put special confidence and trust in him or her. The general fiduciary duties are loyalty, care, and full disclosure. A breach of a fiduciary duty is an intentional tort and is sufficient grounds to cancel a contract.

Summary of Bill: Mortgage brokers have a fiduciary duty to borrowers. Brokers' fiduciary duties include: acting in the borrower's best interest, good faith, putting the borrower's interests above all others, refusing to accept undisclosed compensation for an expense paid by the borrower, following the borrower's instructions, disclosure of all material facts that could impact

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the borrower's interests, using reasonable care, and providing an accounting to the borrower for all money and property received from the borrower.

Mortgage brokers may collect a fee for services provided if the fee is disclosed to the borrower before the services are provided.

Appropriation: None.

Fiscal Note: Not requested.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony: PRO: This bill will help to increase families' financial security. Abusive practices by mortgage brokers contribute to the risk of foreclosure; the brokers may not consider the borrower's ability to repay the loan or steer borrowers into a loan that is more expensive than the borrower qualifies for. Requiring brokers to owe duties to their borrowers will cut down on those practices. Borrowers have an expectation that brokers are working in their best interest and brokers encourage this expectation through their advertising. It isn't fair for brokers to disclaim an agency relationship in their contract with the borrowers because borrowers think that brokers owe them fiduciary duties. Other professionals, such as lawyers and accountants, owe their clients fiduciary duties; mortgage brokers hold themselves out as professionals so they should too. The language in the bill is very specific and makes it easy to understand exactly what the brokers' duties will be to borrowers. This bill will not harm any of the brokers who already act in borrowers' best interests; it will simply get rid of the bad apples. I thought my mortgage broker had my best interests at heart, but I lost my home to foreclosure because of his deception when I refinanced my home. My broker did not adequately explain the loan and rushed me through the closing; I did not know that I had a pre-payment penalty. The state cannot regulate most banks, but it can regulate brokers so this is a step we can take. The Governor's task force put out a minority report advocating for a fiduciary duty. This is an excellent response to the subprime crisis.

CON: Mortgage brokers already go through extensive processes to determine whether a borrower qualifies for a loan. Brokers have duties to both the lender and the borrower; brokers have an obligation to get good loans for the lender. There is case law holding that mortgage brokers are not fiduciaries. Lenders won't accept loans from brokers unless the borrower has signed a form saying that the broker is an independent contractor. The Governor's task force did not recommend this fiduciary obligation. Customers know that brokers are working to make a profit and that profit is fully disclosed. Brokers are independent contractors and borrowers know that. Banks advertise that they will get the borrower the "best rate" and yet no one wants to subject them to fiduciary duties. The governor's task force discussed and dismissed imposing a fiduciary duty. This will increase litigation. Let the customer decide.

Persons Testifying: PRO: Kim Herman, Washington State Housing Finance Commission; Fred Corbit, Northwest Justice Project; Ari Brown, Brown, Sayre Law Group; Kim Justice, Statewide Poverty Action Network; Bruce Neas, Columbia Legal Services; Reverend Thomas Brooks, Association of Community Organizations for Reform Now.

CON: Michael Young, Dave Ericksen, Washington Association of Mortgage Brokers; Mike Japhet, mortgage broker.

Signed in, Unable to Testify & Submitted Written Testimony: Reverend Tony Brooks, Association of Community Organizations for Reform Now.

House Amendment(s): The Department of Financial Institutions must adopt rules to implement the fiduciary duty provisions. The fiduciary duties that a mortgage broker owes the borrower are limited to those duties enumerated in the bill. Brokers are no longer prohibited from compromising a borrower's interest; however, brokers must disclose all interests to the borrower. Brokers are specifically not required to offer or obtain access to loans or services that are not available to the broker at the time of the transaction.