

July 30, 2009

MYTHS AND FACTS: MORTGAGE RESCUE FRAUD PREVENTION ACT **(ACT 66)**

On May 20, Governor Linda Lingle signed into law Senate Bill 34 as Act 66. The amendments made under the Mortgage Rescue Fraud Prevention Act or Act 137 has created some confusion and reports about what real estate professionals can and cannot do. Here are the facts:

Claim: “Does the requirements in Act 137—distressed property consultant, distressed property consultant contract, distressed property conveyance contract—exempt me?”

Fact: The exemption does not mean that Act 137 has been repealed. The original Act 137 is still law and will continue to protect Hawai'i consumers from persons who prey on homeowners who face property foreclosures. All the provisions of Act 137 can still be imposed upon the real estate transaction, including all notice, rescission, documentation and recordation requirements.

Claim: “I thought REALTORS® were exempt?”

Fact: Yes. Real estate brokers and salespersons are exempt from the original Act 137 provided that the listing agent cannot acquire an ownership interest in the distressed property, directly or indirectly, within 365 days after a listing agreement for the same distressed property has expired or is terminated.

Real estate brokers and salespersons must monitor their transactions closely and be able to recognize whether Act 137 applies in their transaction and insure that the purchase is properly documented in compliance with all applicable laws, including Act 137.

Claim: “What did HAR do after Act 66?”

Fact: The distressed property and short sale addenda were modified and circulated due to the existence of Act 137. The information about distressed property and distressed property consultant in all four addenda are definitions quoted from Act 137.

If, at any time during the pendency of the Purchase Contract, (i) Property becomes a Distressed Property, and (ii) Seller uses, directly or indirectly, the services of a Distressed Property Consultant, Seller shall notify Buyer immediately in writing. Seller and Buyer have been advised and understand that Hawaii's Mortgage Rescue Fraud Prevention Act requires that a Distressed Property Conveyance Contract be used in any Distressed Property Conveyance. Buyer and Seller have further been advised and understand that, pursuant to the Act, the Distressed Property Conveyance Contract must provide, among other things, certain specific notices, specific information concerning the Distressed Property Purchaser, and additional cancellation rights for Seller, none of which appear in the Purchase Contract.

Therefore, Buyer and Seller understand and agree that, upon written notice from Seller being given of Property becoming a Distressed Property and the use of a Distressed Property Consultant, unless Buyer and Seller agree to amend the Purchase Contract to incorporate all of the provisions mandated by the Mortgage Rescue Fraud Prevention Act, the Purchase Contract shall terminate automatically, and Escrow shall return to Buyer all deposits previously made, less the amount of any escrow expenses or fees chargeable to Buyer. Buyer and Seller are advised to obtain advice from a licensed Hawaii attorney.

These addenda require the seller to notify the brokerage firm immediately if the property in question becomes distressed and the seller is using a distressed property consultant. The use of these forms does not necessarily mean the property is currently in distress. *It is beneficial for all parties to know this in the event the property becomes distressed, which may trigger the provisions of Act 137.*

Claim: “Are you mandating the use of the addenda?”

Fact: In an effort to protect the parties of a transaction, HAR encourages the use of the addenda especially since a property that is not distressed at the time of accepting the listing could become a distressed property.

Visit www.hawaiiirealtors.com for more information on the amendments, “ABCs” of Act 66 videos, frequently asked questions, and standard forms changes.