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Is It Time to Reconsider Your In-House Standards for Reviewing Loan Modifications?

In today's housing market, mortgage lenders must consider how to handle a borrower who has fallen behind on his or her payments and, as a result, become a defendant in a foreclosure action. Often times, lenders will attempt to modify that borrower's loan. In doing this, lenders will use mathematical formulas to determine whether a borrower is eligible for a modification. Besides mathematics, a prudent lender will also look to the particular circumstances of a given loan to avoid any indication that it has acted in bad faith.

The opinion authored by the New Jersey Superior Court in *Hudson City Savings Bank v. Mark Colyer, et al*, Docket No. F-001214-12, Bergen County (Chan. Div. Feb. 4, 2013) provides a fair warning to those lenders that still want to rigidly adhere to internal standards only. In *Hudson City Savings Bank*, the Court held that mere adherence to internal guidelines may not establish a lender's good faith. The Court also stated that, to act in good faith, lenders may be required to look at the particular facts and circumstances of a specific loan and, more importantly, review that loan for more than mere satisfaction of internal guidelines. Thus, according to the Court, an intelligent lender will take a slightly holistic view to a borrower's modification request.

With this in mind, here are two additions to in-house standards that may be helpful:

"Down Payment": Lenders may consider allowing a borrower to make a "down payment" on a modification plan, if the down payment will bring the borrower's loan within an acceptable range. Lenders should consider this option for those that have substantial funds in an accessible form, such as a 401(k) account, but insufficient monies to cure all arrears.

"Near-Miss": Lenders may add an additional tier of discretionary review for a borrower who comes close to meeting in-house standards but falls short. Ultimately, lenders should avoid categorically denying a

modification for a “near miss” loan.

In considering these, or any other changes, lenders must remember that they are not obligated to accept a particular proposal. To the contrary, lenders are free to individually evaluate and consider any offer made. What a lender must avoid is categorically rejecting all solutions. The recent opinion of the New Jersey Superior Court give every lender an opportunity to re-consider their loan modification standards and see if they are acting in good faith

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