

Court Decisions and State Statutes Send Warning to “Foreclosure Consultants”

By John C. Murray

© 2008. All rights reserved.

Introduction

According to a recent study by SMR Research Corp., a publisher of industry research studies on the home mortgage and consumer lending business, completed foreclosures are likely to rise by 22% in 2008, compared to 2007.¹ As house prices have fallen, homeowners have lost equity in their homes, which makes it difficult or impossible for them to sell or refinance in today’s market. Borrowers with adjustable-rate mortgages are especially vulnerable because the initial low rates now are being reset to higher current market rates, and many are faced with higher monthly mortgage payments than they can afford. An estimated two million American homeowners face increased monthly mortgage payments in 2008.² According to John Stumpf, president of Wells Fargo & Co., the second-largest U.S. mortgage lender, “We have not seen a nationwide decline in housing like this since the Great Depression.” In November, 2007, major banks and security firms reported an accumulated \$80 billion of losses on their portfolios of mortgage investments and widely cut back on lending.³

In this environment, the appearance of so-called foreclosure consultants, who track foreclosure notices and contact borrowers in distress, has been proliferating. These individuals generally persuade the homeowner in foreclosure to sign a contract whereby the foreclosure consultant (for a fee) agrees to provide such “services” as “saving” the financially-distressed individual’s home, and contacting lenders and other third parties on the homeowner’s behalf in order to delay, postpone (or even cancel) the foreclosure. Such “foreclosure consultant contracts” also often require the homeowner to deed the property to him or her in exchange for a promise to make all delinquent and future mortgage payments in order to help the homeowner restore his or her credit, and grant the homeowner the right to stay in the home as a tenant (at a stipulated rental, often combined with an option to repurchase). Unfortunately, as is usually the case whenever large numbers of people are in financial distress, some foreclosure consultants merely take advantage of homeowners, who soon find out the promised services have not been provided notwithstanding that they have paid full compensation for such services, or else eventually lose their homes in any event.⁴ Although reputable foreclosure consultants (some of whom have been in business for many years) can perform valuable services, recent negative experiences and publicity have resulted in several new state statutes (with more likely to be enacted) restricting and/or regulating the activities of foreclosure consultants. There has also been a significant increase in litigation in this area and an increase in case law finding certain practices of foreclosure consultants unenforceable and void. This article will examine recent statutory and

¹ See *Research: Foreclosures to Jump 22% in 2008, 2007* CREDITANDCOLLECTIONSWORLD.COM.

² See Binyamin Appelbaum, *Fixes Made in 2007 Not Enough to Halt Foreclosures*, THE BOSTON GLOBE, January 2, 2008.

³ See Patrice Hill, *Blame Abounds for Housing Bust* (published at www.washingtontimes.com, on Dec. 26, 2007).

⁴ See Matthew Haggaman, *REAL ESTATE: Foreclosure “Rescue” Deals Shackle Homeowners*, Miami (Fla.) Herald, Aug. 26, 2007 (Page A1).

case law in this area, and the limitations they place on foreclosure consultants and the “services” they provide.

Case and Statutory Law - Deed Construed as Equitable Mortgage

In many cases courts will, when equitable considerations so warrant (or applicable state statutes apply), hold that a purported deed to the lender or to a third party (such as a foreclosure consultant) is in fact an equitable mortgage that must be foreclosed upon to obtain title. For example, in an unpublished decision, *London v. Gregory*,⁵ the Michigan Court of Appeals upheld a trial court decision declaring that a deed given by an owner in foreclosure would be treated as an equitable mortgage, where the facts indicated the parties had unequal bargaining power and there was inadequate consideration for the conveyance.

Here's what happened. Virginia Gregory was the owner of real property against which a mortgage-foreclosure action had been filed. Two days before the foreclosure would be final and the owner's equity of redemption period would expire, Ms. Gregory entered into an agreement (without the assistance of counsel) whereby she conveyed the property to Leslie London by a warranty deed for one dollar. In consideration for this transfer, Ms. London agreed to redeem the property (for the redemption price of \$38,231) and lease it back to Ms. Gregory for eighteen months at a rental of \$400 per month. The agreement also provided Ms. Gregory with an option to repurchase the property at the end of the eighteen months for \$48,239. This purchase option could be exercised only if Ms. Gregory made all rent payments on a timely basis. As it turned out, Ms. Gregory made only one rent payment, which was late. At the end of the lease term, Ms. London served Ms. Gregory with a thirty-day notice to quit, and commenced eviction proceedings.

But the district court declined to evict Ms. Gregory, instead ruling that she could remain in possession of the property and that the deed would be treated as an equitable mortgage -- presumably requiring Ms. London to enforce her rights via a new foreclosure action. In so holding, the court noted the potential inequity in allowing Ms. London to acquire the property, which was worth (according to the court) approximately \$120,000, for an outlay of only \$38,231 (the amount paid to redeem).

Ms. London appealed, and the circuit court affirmed the district court's finding of an equitable mortgage. Ms. London appealed again, to the Michigan Court of Appeals. Ms. London argued, on appeal, that the lower courts erred by refusing to hear testimony about the intention of the parties in entering into their agreement. Specifically, Ms. London claimed that she was not a mortgage lender, that there had been no loan application or discussion of a "loan," and that there had been no discussion of Ms. Gregory's financial condition or ability to repay.

The Michigan Court of Appeals affirmed, again. Acknowledging that "(t)he controlling factor in determining whether a deed absolute on its face should be deemed a mortgage is the intention of the parties,"⁶ the Court of Appeals stated that:

⁵ No. 2164732, 2001 WL 726940 (Mich. App., Feb. 23, 2001) (not reported in N.W. 2d).

⁶ *Id.* at *2.

(S)uch intention may be gathered from the circumstances attending the transaction including the conduct and relative economic positions of the parties and the value of the property in relation to the price fixed in the alleged sale. Under Michigan law, it is well settled that the adverse financial condition of the grantor, coupled with the inadequacy of the purchase price for the property, is sufficient to establish a deed absolute on its face to be a mortgage.⁷

The Court of Appeals found that in this case there was inadequacy of consideration, unequal bargaining positions, and an apparent intention on the part of Ms. Gregory to obtain "a loan that would enable her to redeem her property and extend the debt for eighteen months."⁸ With that, the Court held the deed would be treated as an equitable mortgage. The Court, in support of its decision, cited and discussed earlier Michigan holdings in favor of the homeowner plaintiffs based on similar fact situations.⁹

London is a classic case illustrating how far some (if not most) courts will go to protect parties facing foreclosure, especially where they stand to lose substantial equity -- although such cases are rarely published. While this decision doesn't tell us how Ms. London was put in touch with Ms. Gregory, it's common for public foreclosure notices to be followed by opportunists looking for easy profit.

Courts generally will not permit a mortgagee to evade the requirement of foreclosing a mortgage, and deprive the mortgagor of his or her right of redemption, by subterfuge; *e.g.*, by taking a deed to the property and granting the mortgagor the right to repurchase the property upon payment in full of the debt. This same equitable principle would apply where a third-party "foreclosure consultant" obtains a deed to the property from the mortgagor in exchange for the consultant's agreement to redeem the property from foreclosure and lease it back to the mortgagor with an option to purchase (usually at an inflated price).

Many states have enacted statutes specifically addressing whether a deed given by a mortgagor to a mortgagee may constitute a continuing security device. Some states' statutes make it difficult to challenge a deed that is absolute on its face. In Minnesota, for example, there is a statutory presumption that a conveyance, if absolute in form, is not given as further or new security for the debt.¹⁰ Other states have enacted statutes that expressly permit a party to prove by other written evidence (or, in some cases, parol evidence if necessary) that a deed absolute on its face was in fact a mortgage.¹¹

⁷ *Id.* at *4-5 (internal citations and quotations omitted).

⁸ *Id.* at *5.

⁹ *Koenig v. Van Reken*, 89 Mich. App. 102, 106 (1979) (transaction resulted in plaintiff conveying her equity, worth over \$30,000, for less than \$4,000); *Grant v. Van Reken*, 71 Mich. App. 121, 125 (1976) (defendant ultimately expended only \$2,300 to obtain deed to property worth \$25,000.) *Id.* at *1-2.

¹⁰ See MINN. STAT. ANN. § 559.18. See also GA. CODE ANN. § 44-14-32 (prohibiting use of parol evidence to show that deed absolute on its face is a mortgage, unless there has been fraud in the procurement); MISS. CODE ANN. § 89-1-47 (precluding use of parol evidence to prove that an absolute conveyance or other writing is a mortgage in the absence of fraud).

¹¹ See, *e.g.*, ARIZ. REV. STAT. ANN. § 33-702(A) ("Every transfer of an interest in real property . . . made only as a security for the performance of another act, is a mortgage"); CA. CIV. CODE § 2924(a) ("Every transfer of an interest in property, other than in trust, made only as a security for the performance of another act, is to be deemed a

A few states have statutes that provide that no defeasance to any deed of real property that is absolute on its face is effective to convert the document to a mortgage with respect to third parties unless the grantor's defeasance right is in writing and also is recorded in the mortgage records.¹²

Illinois has a statute that states that "[e]very deed conveying real estate, which shall appear to have been intended only as a security in the nature of a mortgage, though it be an absolute conveyance in terms, shall be considered as a mortgage."¹³ In *Flack v. McClure*,¹⁴ the Illinois Appellate Court stated that the burden of proof rests upon the party asserting a mortgage when a deed absolute was conveyed. The court listed six factors that a court should evaluate in determining the existence of an equitable mortgage: (1) whether a debt exists (which, the court noted, is the essential element to establish an equitable mortgage); (2) the relationship of the parties; (3) whether legal assistance was available; (4) the sophistication and circumstances of each party; (5) the adequacy of consideration; and (6) who retained possession of the property. Based on its analysis of these factors, the court held that the evidence, especially that demonstrating the existence of a debt relationship and grossly inadequate consideration, clearly supported the trial court's finding of an equitable mortgage.¹⁵

The RESTATEMENT (THIRD) OF PROPERTY, MORTGAGES provides that parol evidence is admissible to establish that a deed absolute on its face was in fact intended as security for an obligation and should be deemed a mortgage.¹⁶ The RESTATEMENT also provides that the parties' intention to create a security device must be proved by "clear and convincing evidence."¹⁷ Section 3.2(b) provides that the parties' intention may be shown by the following:

- The statements of the parties.
- The existence of a substantial disparity between the value received by the grantor and the actual value of the real property at the time of conveyance.
- The fact that the grantor retained possession of the real property.

mortgage"); IDAHO CODE § 45-905 ("The fact that a transfer was made subject to defeasance on a condition may, for the purpose of showing such transfer to be a mortgage, be proved . . . though the fact does not appear by the terms of the instrument"); MD. CODE ANN. REAL PROP. § 7-101 (providing that a deed absolute in terms is considered a mortgage when it appears, by any other writing, to be intended merely as additional security for a debt or performance of an obligation); N.Y. REAL PROP. LAW § 320 (providing that any deed conveying real property that appears by any other written instrument to be intended only as a security, must be considered a mortgage even though it appears by its terms to be an absolute conveyance); OKLA. STAT. ANN. tit. 46, § 1 (stating that every instrument purporting to be an absolute conveyance of real estate but intended as security for the payment of money, is deemed a mortgage, and must be recorded and foreclosed as such); UTAH CODE ANN. § 78-40-8 (providing that a mortgage of real property, whatever its actual terms, is deemed a conveyance for the purpose of enabling the owner to avoid the commencement of a foreclosure proceeding to recover possession of the property).

¹² See, e.g., CAL. CIV. CODE § 2950; ME. REV. STAT. ANN. tit. 33, § 202; PA. STAT. ANN. tit. 21, § 951; WYO. STAT. ANN. § 34-1-127.

¹³ 765 ILCS 905/5.

¹⁴ 206 Ill. App.3d 976 (1990).

¹⁵ *Id.* at 985. See generally Josiah H. Kibe, *Closing the Door on Unfair Foreclosure Practices in Colorado*, 74 COLO. L. REV. 241, 262-265 (2003) (discussing states that have laws construing conveyances as equitable mortgages under conditions where overreaching takes place).

¹⁶ RESTATEMENT (THIRD) OF PROPERTY, MORTGAGES (1997) ("RESTATEMENT"), at § 3.2(a).

¹⁷ *Id.*

- The fact that the grantor continued to pay real estate taxes.
- The fact that the grantor made improvements to the real estate subsequent to the conveyance.
- The nature of the parties to the transaction and their relationship both prior to and after the conveyance.¹⁸

The RESTATEMENT also provides that where, in addition to the deed, a separate writing exists indicating that a financing transaction was intended, parol evidence is admissible to establish that the writings, taken together, constitute a single security transaction.¹⁹

The RESTATEMENT further provides that parol evidence is admissible to establish that a deed accompanied by a written agreement conferring on the grantor the right to purchase the property was in fact intended as security for an obligation, and is therefore a mortgage.²⁰ Such intention must be proved by "clear and convincing evidence," and the RESTATEMENT lists several factors from which such intention may be inferred.²¹ The presence of an express negation of the creation of a mortgage in any of the documents is relevant to the parties' intent, but does not preclude a determination that the transaction constitutes a mortgage.²²

"Clogging" issues may also occur in connection with deed-in-lieu transactions (or transactions, such as in *London, supra*, where the property is conveyed to a third party) when the mortgagor retains a residual right -- such as an option to repurchase the property or a right of first refusal -- with respect to the property after the conveyance, or else retains possession of the property under a lease or occupancy agreement from the mortgagee (or third party). If such a continuing right is granted to the mortgagor, a court could conclude²³ that a deed was not intended and that the conveyance actually constitutes an equitable mortgage. If so, the court may void the deed.²⁴

Before granting any continuing possessory rights to the mortgagor, the mortgagee (or third-party grantee) should consult the title insurer to determine if it will agree to insure title without raising an exception for a possible equitable-mortgage claim by the mortgagor. If any such continuing rights are granted, the deed-in-lieu (or other transactional) documents should specifically state that the continuing interest does not transform the deed obtained by the mortgagee (or third-party grantee) into a mortgage and that an absolute conveyance is intended by the parties. In addition, the documentation should provide that the mortgagor will not be entitled to equitable or injunctive relief and that the mortgagor will be limited to an action for damages for breach of contract.

¹⁸ *Id.* at § 3.2(b).

¹⁹ *Id.* at § 3.2(c).

²⁰ *Id.* at 3.3(a).

²¹ *Id.* at 3.3(b).

²² *Id.* at 3.3(c).

²³ As the Michigan Appellate Court did in *London, supra*.

²⁴ See generally John C. Murray, *Clogging Revisited*, 33 REAL PROP. PROB. & TR. J. 279, 306-309 (1998) (discussing clogging issues in connection with transactions where the mortgagor retains a residual right with respect to the property after conveyance of the property, such as an option to repurchase the property or a right of first refusal, or else retains possession of the property under a lease or occupancy agreement from the mortgagee).

The mortgagee in a deed-in-lieu transaction (or other legitimate transaction raising a potential equitable-mortgage claim) generally will require that the mortgagor waive any right to control the manner of use, development, operation, or subsequent disposition of the property by the mortgagee (or other third-party grantee) after conveyance. If the mortgagee leases the property back to the mortgagor, the rental should be set at or near, but not in excess of, the market rate; and the term of the lease should be relatively short. Title insurers are likely to decide whether to insure these types of transactions against an equitable mortgage claim on a case-by-case basis. These considerations become even more important (and problematic) when a third party "foreclosure consultant" takes title to the property and leases it back to the mortgagor with an option to repurchase the property.²⁵

Responses by Other State and Federal Courts

In addition to the *London* case, *supra*, other state courts, as well as federal bankruptcy courts, have ruled against certain actions and practices of foreclosure consultants, based on statutory and/or equitable grounds. For example, although New York does not appear to have a statute directly on point, in the case of *State v. Midland Equities of New York, Inc.*,²⁶ the court held, as alleged by the New York Attorney General, that the defendants operated an improper legal-referral service behind the facade of a mortgage foreclosure consulting service, and would be enjoined from engaging in the business of mortgage foreclosure consultation, from offering legal service to consumers, and from soliciting business from attorneys, because these activities constituted the unauthorized practice of law. The court further ruled that because the defendants had received fees far in excess of value of the "service" provided, they must make restitution to the affected consumers.

Bankruptcy courts also have prohibited foreclosure consultants from certain acts in connection with bankruptcy proceedings filed by or against homeowners, usually on the basis that such acts constitute the unauthorized practice of law or are fraudulent and deceptive. *See, e.g., In re Ali.*²⁷ In this case the New York bankruptcy court ruled that a foreclosure consultant who advised debtors and prepared skeletal bankruptcy petitions engaged in the unauthorized practice of law. The court found that: 1) the foreclosure consultant, as a non-attorney bankruptcy-petition preparer, violated a statutory provision prohibiting him from using the word "legal" or any similar term in his advertising by distributing flyers that advised potential clients that they could, "by law," file multiple petitions; 2) the foreclosure consultant's filing of skeletal Chapter 13 petitions was merely to thwart foreclosure, and; 3) the foreclosure consultant violated Bankruptcy Rule 1006 (b)(3) by receiving payment in full for his services.²⁸ The court therefore found the foreclosure consultant guilty of violating several subsections of § 110 of the Bankruptcy Code (dealing with bankruptcy petition preparers), and further ruled that: "[the

²⁵ *See, e.g., Beeler v. American Trust Co.*, 24 Cal.2d 1, 24 (1944) (holding that even though debtor had executed affidavit contemporaneously with deed declaring that transaction was absolute conveyance and was not intended as mortgage, purported deed in lieu of foreclosure would be treated as mortgage when borrower leased property back and retained option to purchase for amount of debt); *Strike v. Trans-West Discount Corp.*, 92 Cal. App. 3d 735, 743 (1979) (ruling that notwithstanding delivery of "grant deed" to lender, borrowers' retention of possession of property, their payment of all taxes and assessments, and their payment of all insurance, maintenance and utility expenses, evidenced parties' intention to treat deed as security device).

²⁶ 458 N.Y.S.2d 126 (N.Y. Supp. 1982).

²⁷ 230 B.R. 477 (Bankr. E.D.N.Y. 1999).

²⁸ Bankruptcy Rule 1006(b)(3) requires that the filing fee be paid in installments by the debtor in full before the debtor pays an attorney or any other person rendering services to debtor in the case.

consultant's] use of the Flyer and its contents, filing of skeletal Chapter 13 petitions merely to thwart foreclosure, and his acceptance of full payment for services rendered while court filing fees are paid in installments, in violation of the law, constitute 'fraudulent, unfair, and deceptive acts.'"²⁹

Methods Used by Foreclosure Consultants

The typical methods used by many foreclosure consultants in "foreclosure rescue situations" are described by one commentator as follows:

In a foreclosure rescue situation, a homeowner is behind in his mortgage payments. The lender, following the appropriate foreclosure proceedings, enters a notice of default against the homeowner, starting the actual foreclosure.

Foreclosure consultants comb the public records at the county recorder's office searching for these notices, which yield the names of individuals in foreclosure. After the consultant develops his list of individuals in foreclosure, he begins to inundate these people with daily mailings, harassing phone calls, fliers, and even personal appearances at the person's home. Each consultant has his own particular offer and method, but the pitch to the potential victim is the same: "help is on the way even if the situation seems hopeless." The consultant's main ploy is to promise the financially strapped individual the opportunity to save his home in return for an agreement that will, more often than not, lead to the loss of the victim's home or home equity.

.....

While most people in foreclosure will inevitably lose their homes, foreclosure consultants add more stress, costs, and possibly attorney fees to the already arduous and expensive process. One Colorado lawyer called this tactic, "the biggest consumer issue out there, as far as I'm concerned, [because p]eople are getting fleeced every day out of a lifetime's worth of equity."

But the commentator goes on to point out that:

²⁹ *Id.* at 484. See also *In re Ferguson*, 326 B.R. 419, 423-424 (Bkrcty.N.D.Ohio,2005) (under Ohio law, non-attorney "foreclosure consultant" with whom homeowner had entered into a "foreclosure services agreement" for purpose of having the foreclosure of her home "cancelled" engaged in the unauthorized practice of law; agreement contemplated that consultant would insert himself between debtor and mortgage company as an intermediary to advise, counsel, and negotiate on her behalf; consultant held himself out as an expert in matters that were clearly legal in nature, and consultant's inappropriate actions prejudiced homeowner's legal position). See generally Jerome Wahlert, *Matters Constituting Unauthorized Practice of Law in Bankruptcy Proceedings*, 2003 A.L.R.5th 8 (collecting and discussing federal and state cases in which the courts have made determinations based on their reasoning that certain activities constitute the unauthorized practice of law in bankruptcy matters).

Despite the apparent abuse, foreclosure consultants could serve a legitimate function. As long as foreclosure consultants act fairly and frankly in their dealings, they might offer a reasonable alternative to foreclosure and foreclosure proceedings. By presenting fair representations of their abilities to help and the services they provide, foreclosure consultants have the potential to offer assistance while still charging a reasonable premium for their services. Without legislation or some other form of consumer protection, however, the potential for abuse is too great to allow the practice to continue unfettered.³⁰

Specific State Statutory Responses

As a result of the continuing deterioration of the residential real estate market over the past few years and the alarming rate of increase in foreclosures (and in the resulting increasing number of foreclosure consultants), several states have passed consumer-protection legislation specifically aimed at foreclosure consultants. These statutes (which are described below, and are similar in scope and content) generally define a “foreclosure consultant” and subject them to strict disclosure and compensation requirements. Other states have proposed similar legislation, although at the date of this article such proposed legislation has not been enacted into law.³¹

1. California.

In California, lawmakers enacted legislation³² strictly controlling the activities of a "foreclosure consultant," which term is broadly defined as “any person who makes any solicitation , representation, or offer to any owner to perform for compensation or who, for

³⁰ Kibe, note 15 *supra*, 74 COLO. L. REV. at 249-250.

³¹ See, e.g.: 1) Florida S 2214 (posted 2/21/2008), relating to the proposed “Mortgage Rescue Fraud Act,” which provides, among other things, requirements for foreclosure consultant contracts; specifies prohibited activities for foreclosure consultants and foreclosure purchasers; and specifies certain violations as unlawful practices and provides for remedies under the Florida Deceptive and Unfair Trade Practices Act.

2) 2008 Idaho Laws Ch. 192 (S.B. 1431), which states at proposed § 45-1601 (“Legislative findings):

The legislature finds that some persons and businesses are engaging in patterns of conduct that defraud innocent homeowners of their title, equity interest, or other value in residential dwellings under the guise of stopping or postponing a foreclosure sale. The legislature also finds this activity to be contrary to the public policy of this state and therefore establishes notice requirements governing contracts or agreements entered into during the foreclosure period. The legislature further finds that the provisions of this chapter shall be construed in such a manner that it does not inhibit transactions with legitimate lenders and investors.

3) 2008 Oregon Laws 1st Sp. Sess. Ch. 19 (H.B. 3630) (“Mortgage Fraud Protection Act”), which would amend ORS 646.607 and 646.608 and defines “foreclosure consultant” and “foreclosure consulting contract.” The amendments further provide detailed disclosure, notification and cancellation provisions, including prohibiting a foreclosure consultant from claiming, charging, or collecting any fee or other compensation in advance of the performance of the required services or that would exceed nine percent per year of any services performed or any loan advance by the foreclosure consultant.

The ultimate fate of the proposed legislation in the foregoing states, as set forth above, is unclear as of the date of this article.

³² CAL. CIV. CODE § 2945 *et seq.*

compensation, performs any service which the person in any manner represents will in any manner do certain [enumerated activities].”³³ Interestingly, the language at the beginning of the statute, states that: “The Legislature . . . finds that foreclosure consultants have a significant impact on the economy of this state and the welfare of its citizens.”³⁴ The statute further states that the “intent and purposes” of this legislation are:

(1) To require that foreclosure consultant service agreements be expressed in writing; to safeguard the public against deceit and financial hardship; to permit rescission of foreclosure consultation contracts; to prohibit representations that tend to mislead; and to encourage fair dealing in the rendition of foreclosure services.

(2) The provisions of this article shall be liberally construed to effectuate this intent and to achieve these purposes.³⁵

The owner is provided a right to cancel the contract with a foreclosure consultant at any time before the expiration of the third business day after the owner has signed the contract.³⁶ Every contract be must be in writing and disclose certain pertinent information, and contain a special notice printed in boldface type.³⁷ Certain practices are prohibited by foreclosure consultants, including the collection of any compensation until the foreclosure consultant has fully performed the services required under the contract.³⁸ Also, any waiver by an owner of the provisions of the statute shall be deemed void and unenforceable.³⁹ Section 2945.7 provides that

Another provision of the California Civil Code states that:

It is unlawful for any person to initiate, enter into, negotiate, or consummate any transaction involving residential real property in foreclosure . . . if such person, by the terms of such transaction, takes unconscionable advantage of the property owner in foreclosure.⁴⁰

In *People v. Erez*,⁴¹ the California appellate court affirmed the lower court’s decision finding a foreclosure consultant guilty of violating two California statutes.⁴² The court stated that:

The Legislature enacted Civil Code sections 1695 *et seq.* and 2945 *et seq.* to protect homeowners, such as the victims [in this case], who face foreclosure. The Legislature expressly found that these

³³ *Id.* at § 2945.1.(a).

³⁴ *Id.* at § 2945(b).

³⁵ *Id.* at 2945(c)(1).

³⁶ *Id.* at § 2945.2.

³⁷ *Id.* at § 2945.3.

³⁸ *Id.* at § 2945.4. Punishment for any violation described in § 2945.4 shall be punishable by a fine of not more than \$10,000 or imprisonment for not more than one year. *Id.* at § 2945.7.

³⁹ *Id.* at § 2945.5.

⁴⁰ CAL. CIV. CODE § 1695.13.

⁴¹ 2002 WL 596738 (Cal. App. 4 Dist., April 18, 2002).

⁴² CAL. CIV. CODE § 2945 and CAL. CIV. CODE § 1695).

homeowners are vulnerable to unfair, deceptive or fraudulent tactics by those seeking to acquire their residences and those offering paid advice regarding mortgage foreclosures. To ensure the homeowners' protection, the Legislature enacted provisions of sections 1695 *et seq.* and 2945 *et seq.*, which prohibit specific actions by equity purchasers and mortgage foreclosure consultants.⁴³

On March 25, 2008, Inman News reported that Federal officials announced the indictments by a California grand jury of 20 people in two California-based foreclosure-rescue and equity-stripping schemes, which allegedly netted more than \$12 million from more than 100 victims who were left without their homes.⁴⁴ The foreclosure-rescue scheme allegedly involved situations where the victims believed they were making rental payments to “investors”, who were added to the title of the homes. According to the Inman News report, “The investors were actually straw buyers who often replaced homeowners on the title. After taking out a new mortgage to extract the home’s equity, the defendants would sell the victims’ home, stop making the mortgage payments, or begin eviction proceedings against the victims, prosecutors said.”⁴⁵ The scheme netted the 16 indicted individuals \$6.7 million from 47 homeowners, almost all of them in California.

Inman News also noted (in the same report) that, in a separate indictment on March 13, 2008, the California grand jury also indicted seven defendants (including three individuals named in the foreclosure rescue scheme) in the alleged equity-stripping scheme that netted the defendants almost \$6 million from 68 homeowners nationwide.

2. Colorado.

In Colorado, the “Colorado Foreclosure Protection Act”⁴⁶ defines “foreclosure consultant”⁴⁷; defines “foreclosure consulting contract”⁴⁸; sets forth the requirements for a foreclosure consulting contract, which must be in writing and contain a special form of notice in boldface type;⁴⁹ provides for a right of cancellation (at any time) by the homeowner⁵⁰; provides that the foreclosure consulting contract may not contain any waiver provision;⁵¹ prohibits certain acts by the foreclosure consultant, including the collection of any compensation until after the foreclosure consultant has performed all of the services required under the contract.⁵² As one

⁴³ *People v. Erez*, 2002 WL 596738, at *4-5 (internal quotations omitted). See also *In re McNeal*, 286 B.R. 910 (Bankr. N.D. Cal. 2002) (Debtor was entitled to actual damages, in amount of \$750 fee paid to foreclosure consultant, as well as exemplary damages of three times that amount, as a result of consultant’s violation of CAL. CIV. CODE § 2945; consultant demanded and received compensation from debtor before fully performing services and failed to provide proper notice in agreement of debtor’s right to cancel and of statutory restrictions on his ability to collect fee).

⁴⁴ *Industry News, Feds Indict 20 in Foreclosure Rescue Scheme*, INMAN NEWS, March 25, 2008.

⁴⁵ *Id.*

⁴⁶ C.R.S.A. § 6-1-1104 *et seq.*

⁴⁷ *Id.* at § 6-1-1103(4)(a).

⁴⁸ *Id.* at § 6-1-1103(5).

⁴⁹ *Id.* at § 6-1-1104.

⁵⁰ *Id.* at § 6-1-1105.

⁵¹ *Id.* at § 6-1-1106.

⁵² *Id.* at § 6-1-1107. a violation of § 6-1-1107 is a misdemeanor with imprisonment of up to one year, a fine of up to \$25,000, or both. *Id.* at § 6-1-1108.

commentator has noted, certain other statutes enacted in Colorado may be available to homeowners who believe they have been taken unfair advantage of by foreclosure consultants:

Colorado currently employs two particular means of safeguarding consumers that might provide protection outside the realm of the foreclosure statutes. The Colorado Consumer Protection Act (CPA) [C.R.S.A. § 6-1-105 *et seq.*] is meant to deter and punish deceptive trade practices committed by businessmen in their dealings with the public. The recently passed Consumers' Home Ownership Equity Act (HOEA) [C.R.S.A. § 5-3-5-103] provides statutory protections in the area of mortgage lending.⁵³

3. District of Columbia.

Effective as of January 29, 2008, the District of Columbia enacted the Home Equity Protection Act of 2007 (the "Act").⁵⁴ The Act defines "foreclosure rescue service"⁵⁵; and "foreclosure rescue transaction."⁵⁶ The Act provides that it shall be unlawful to promote, arrange, or participate in a foreclosure rescue transaction for compensation with respect to residential property in the District of Columbia;⁵⁷ that it shall be unlawful to advertise, offer, or promote the availability of foreclosure rescue transactions related to foreclosure rescue transactions or services related to foreclosure rescue transactions;⁵⁸ and that it shall be unlawful to advertise, offer, or promote foreclosure rescue services without a full disclosure of the precise goods and services offered and how they will assist persons in delaying or avoiding foreclosure or addressing a default under a residential mortgage loan obligation.⁵⁹ Also, "Any person who advertises, offers, promotes, or provides foreclosure rescue services to a homeowner owes a fiduciary duty to the homeowner and shall discharge that duty in accordance with all applicable laws."⁶⁰ Furthermore, the Act provides for a private right of action in the name of the homeowner (in addition to any action by the Attorney General) and provides that the remedies for violation of the Act are cumulative.⁶¹ A criminal penalty also may be assessed for any violation of the Act by a person who knowingly violates any provision of the Act, with a fine not to exceed \$10,000 or imprisonment for not more than one year, or both.⁶²

⁵³ Kibe, note 15 *supra*, 74 COLO. L. REV. at 257.

⁵⁴ DC CODE § 42-2431-2435 (2007).

⁵⁵ *Id.* at § 42-2431(1). "Foreclosure rescue service" means any good or service related to or promising assistance in connection with:

(A) Avoiding or delaying actual or anticipated foreclosure proceedings concerning residential property; or
(B) Curing or otherwise addressing a default or failure to timely pay with respect to a residential mortgage loan obligation.

⁵⁶ *Id.* at § 42-2431(2). A "foreclosure rescue transaction means "a transaction involving the transfer of title to real property, or an interest in the property, by a homeowner during or incident to a mortgage default, foreclosure, or tax sale proceeding, either by transfer of any interest from the homeowner to another party or by creation of a mortgage, trust, or other lien or encumbrance during the foreclosure process."

⁵⁷ *Id.* at § 42-2432(a).

⁵⁸ *Id.* at § 42-2432(b).

⁵⁹ *Id.* at § 42-2432(c).

⁶⁰ *Id.* at § 42-2433.

⁶¹ *Id.* at § 42-2434.

⁶² *Id.* at § 42-2435.

4. Illinois.

Illinois enacted the Mortgage Rescue Fraud Act (“MRFA”),⁶³ effective as of January 1, 2007. The MFRA (among other things) defines “distressed property”⁶⁴; and provides that a “distressed property consultant”⁶⁵ must enter into a written “distressed property consultant contract.”⁶⁶ The distressed property consultant contract must fully disclose the exact nature of the distressed property consultant’s services and the total amount and terms of compensation, and also must contain certain specified terms designed to protect the party contracting with the distressed property consultant, including not taking any money from the homeowner until the consultant “has completely finished doing everything he or she said he or she should do.”⁶⁷ The MRFA also provides that the homeowner has the right to rescind the contract at any time before the distressed property consultant has performed all the services provided for under the contract;⁶⁸ and further provides that any waiver by an owner of § 940/10 of the MFRA (regarding the requirements of a “distressed property consultant contract”) or § 940/15 of the MFRA (regarding the homeowner’s right to rescind the contract) is void and unenforceable.⁶⁹ The MFRA also contains special restrictions and requirements with respect to a “distressed property conveyance contract”⁷⁰; and describes in detail “violations” under the MFRA by the distressed property consultant.⁷¹ The MFRA provides civil remedies for violations of its provisions, including an action under the provisions of the Illinois Consumer Fraud and Deceptive Business Practice Act, which may be brought by either the Attorney General or the consumer who suffers loss by reason of such violation.⁷² In addition, an action may be brought for “criminal mortgage rescue fraud” if the consultant intentionally violates any of provisions enumerated in § 940/50.⁷³

5. Indiana.

In Indiana, a statute entitled “Mortgage Rescue Protection Fraud,”⁷⁴ defines “foreclosure consultant”⁷⁵; defines a “foreclosure reconveyance”⁷⁶; provides for rescission by a homeowner of any contract with a foreclosure consultant before the end of “the seventh business day after the date the contract is signed”⁷⁷; prohibits certain actions by a foreclosure consultant, including, “enter[ing] or attempt[ing] to enter into a foreclosure consultant contract with a homeowner unless the foreclosure consultant first provides the homeowner written notice of the homeowner’s rights under this article”⁷⁸; prohibits the consultant from demanding or receiving compensation until after the consultant has fully performed all services required under the contract⁷⁹; provides

⁶³ 765 ILCS § 940/1 *et seq.*

⁶⁴ *Id.* § 940/5.

⁶⁵ *Id.*

⁶⁶ *Id.* § 940/10.

⁶⁷ *Id.*

⁶⁸ *Id.* § 940/15.

⁶⁹ *Id.* § 940/20.

⁷⁰ *Id.* §§ 940/25–940/45.

⁷¹ *Id.* § 940/50.

⁷² *Id.* § 940/55.

⁷³ *Id.* §§ 940/60 and 940/65.

⁷⁴ IC 24-5.5-1-1 *et seq.*

⁷⁵ *Id.* 24-5.5-2-2.

⁷⁶ *Id.* 24-5.5-2-4.

⁷⁷ *Id.* 24-5.5-4-1.

⁷⁸ *Id.* 24-5.5-5-2(1).

⁷⁹ *Id.* 24-5.5-5-2(2).

limitations on a purchaser and homeowner entering into a foreclosure reconveyance agreement⁸⁰; and provides that “any person who violates the statute commits a deceptive act that is actionable by the attorney general”⁸¹; the statute also provides a private right of action for homeowners, including the right to collect attorneys’ fees and, if the person knowingly or willingly violated the statute, damages equal to three (3) times the amount of actual damages.⁸²

6. Maryland.

Maryland adopted the Homeowners Protection in Foreclosure Act of 2005 (“HPIFA”).⁸³ The HPIFA applies to “foreclosure consultants”⁸⁴; “foreclosure consulting services”;⁸⁵ and “foreclosure purchasers.”⁸⁶ A “foreclosure consultant” or “foreclosing consulting service” must provide a “foreclosing consultant contract” to the homeowner in foreclosure that fully discloses the exact nature of the foreclosure and the consulting services to be provided, including the prospect of any foreclosure conveyance to a “foreclosure purchaser” who may be involved, as well as the total amount of any compensation to be received by the foreclosure consultant or anyone working in association with the consultant.⁸⁷ The foreclosure consulting contract also must be dated and personally signed by the homeowner and the foreclosure consultant and must be printed in certain large type, including a larger boldface notice setting forth the homeowner's rights.⁸⁸ In addition, the homeowner has the right to rescind the foreclosure consulting contract “at any time.”⁸⁹ The foreclosure consultant also is prohibited from certain actions, including the collection of any compensation until after the foreclosure consultant has performed all of the services required under the contract.⁹⁰ Other sections of the HPIFA deal specifically with foreclosure reconveyances, including notices, rights of rescission, prohibited actions, presumptions, and accounting.⁹¹ The HPIFA also has sections that deal specifically with “foreclosure surplus acquisitions contracts,” including the necessity of a written contract and a special notice in boldface type;⁹² and a right of rescission “at any time within 10 days after the statement of audit account of the foreclosure sale.”⁹³ Also, a homeowner is not permitted to waive any of its rights under the HPIFA, and any such waiver is void and unenforceable.⁹⁴ The Attorney General may seek an injunction for any violation of HPIFA;⁹⁵ and a homeowner may bring an action for damages incurred as a result of any violation.⁹⁶ Criminal misdemeanor

⁸⁰ *Id.* 24-5.5-5-3.

⁸¹ *Id.* 24-5.5-5-6.

⁸² *Id.* 24-5.5-5-6-2,

⁸³ MD. CODE ANN., REAL PROP. §§ 7-301 to 7-321 (Supp.2006).

⁸⁴ *Id.* § 7-301(b).

⁸⁵ *Id.* § 7-301(d).

⁸⁶ *Id.* § 7-301(e).

⁸⁷ *Id.* § 7-306(a).

⁸⁸ *Id.*

⁸⁹ *Id.* § 7-305(a)(1).

⁹⁰ *Id.* at § 7-307.

⁹¹ *Id.* at §§ 7-310 and 7-311.

⁹² *Id.* § 7-314.

⁹³ *Id.* at § 7-315.

⁹⁴ *Id.* § 7-318.

⁹⁵ *Id.* § 7-319.

⁹⁶ *Id.* § 7-320.

penalties are also provided for any violation of HPIFA, including imprisonment not exceeding three years or a fine of \$10,000, or both.⁹⁷

7. Massachusetts.

A regulation prepared and submitted by the Massachusetts Attorney General⁹⁸, which was filed with the Secretary of State's Office, permanently bans predatory, for-profit foreclosure rescue transactions, and also makes it an unfair or deceptive act to market foreclosure-related services without a precise description of how the promoter will assist persons in avoiding or delaying the foreclosure. The Massachusetts Consumer Protection Act⁹⁹ (the "Act"), authorizes the Attorney General to promulgate regulations to identify unfair or deceptive conduct that violates the Act.¹⁰⁰ The regulation defines a "Foreclosure Rescue Transaction" as a transaction designed to avoid foreclosure and where the homeowner transferring the property maintains an option to reacquire the home by maintaining a legal interest in the home.¹⁰¹ "Foreclosure-Related Services" include "promising assistance in connection with (a) avoiding or delaying actual or anticipated foreclosure proceedings concerning residential property; or (b) curing or otherwise addressing a default or failure to timely pay, with respect to a residential mortgage loan operation."¹⁰² The regulation also prohibits all Foreclosure Rescue Transactions with respect to residential property in the Commonwealth of Massachusetts (except with respect to transactions that are not carried out for compensation or gain) and soliciting advance fees for foreclosure-related services.¹⁰³ It is also an unfair or deceptive act to advertise or promote the availability of Foreclosure Rescue Transactions or to advertise, offer or promote such services without clearly disclosing the precise goods and/or services offered and to be provided by the promoter of such services, as well as how the promoter intends to assist persons in avoiding or delaying foreclosure or curing a loan default.¹⁰⁴

On June 1, 2007, the Massachusetts Attorney General announced emergency regulations that placed a temporary ban on these types of "unfair and deceptive foreclosure rescue schemes." The emergency regulations went into effect immediately and were valid for 90 days. After a public hearing on August 30, 2007, the regulations were promulgated as final.

8. Minnesota.

In 1994 Minnesota amended its Mortgage Foreclosures statute,¹⁰⁵ which now (among other things): defines the term "foreclosure consultant,"¹⁰⁶ defines the term "foreclosure reconveyance,"¹⁰⁷ provides for the rescission of any contract with a foreclosure consultant within

⁹⁷ *Id.* § 7-321. *See Johnson v. Wheeler*, 492 F.Supp.2d 492, 506 (2007) (holding that, for purposes of HPIFA, definition of "mortgage foreclosure consultant" is not limited to persons who happen to initiate contact with homeowners).

⁹⁸ 940 CMR 25.

⁹⁹ M.G.L.A. Chapter 93A.

¹⁰⁰ *Id.* § 2.(c).

¹⁰¹ 940 CMR 25.01.

¹⁰² *Id.*

¹⁰³ 940 CMR 25.02.

¹⁰⁴ 940 CMR 25.03.

¹⁰⁵ 20C MNPRAC 325N.01-N.09 (the "Act").

¹⁰⁶ *Id.* 325N.01(a).

¹⁰⁷ *Id.* 325N.01(c).

three business days after the date the homeowner signs the contract;¹⁰⁸ provides that every contract must be in writing and disclose the exact nature of the services being provided, as well as a specified notice in boldface type (which includes the right of the owner to cancel the contract within three days after the date of its execution of the contract)¹⁰⁹; and prohibits foreclosure consultants from (among other things) charging a fee until after the promised services are performed.¹¹⁰ Any waiver by an owner of the provisions of the Act is void and unenforceable as contrary to public policy.¹¹¹ A private cause of action for violation of the Act may be commenced by a foreclosed homeowner against a foreclosure consultant for any violation of the provisions of the Act. Judgment must be entered for actual damages, reasonable attorneys' fees and costs, and appropriate equitable relief.¹¹² In addition, "The court may award exemplary damages up to 1-1/2 times the compensation charged by the foreclosure consultant if the court finds that the foreclosure consultant violated the provisions of section 325N.04, clause (1), (2), or (4) [with respect a foreclosure consultant claiming or receiving any compensation unless all contracted-for services have been performed; receiving any compensation in excess of eight percent of any loan made to the homeowner, which loan must be unsecured; or receiving any consideration from any third party in connection with services rendered to an owner that has not been disclosed to the owner], and the foreclosure consultant's conduct was in bad faith."¹¹³ An action may be brought on the basis of a violation of any of the provisions of the Act by an owner against whom the violation was committed or by the Attorney General.¹¹⁴ Also, "Any person who commits any violation described in section 325N.04 may, upon conviction, be fined not more than \$10,000 or imprisoned not more than one year or both."¹¹⁵ Finally, any provision in a contract entered into on or after August 1, 2004, which attempts or purports to require arbitration of any dispute arising under any of the provisions of the Act, is void at the option of the owner.¹¹⁶

On December 6, 2007, the Minnesota Office of the Attorney General issued a press release advising that it had filed separate lawsuits against two out-of-state foreclosure consultants that charged homeowners in foreclosure up to \$1395 to prevent foreclosure of their homes but allegedly failed to provide the promised assistance to the homeowners. The lawsuits claim that the companies violated the provisions of the aforementioned 1994 Minnesota statute that require foreclosure consultants who charge a fee to have a written contract with the borrower fully disclosing the exact nature of the foreclosure consultant's services and the total amount of consideration, and not to charge any compensation until the foreclosure consultant has fully performed under the contract. The suits also allege violations of state laws against deceptive practices, consumer fraud, and false advertising. Both lawsuits seek injunctive relief, restitution, and civil penalties.

¹⁰⁸ *Id.* 325N.02.

¹⁰⁹ *Id.* at 325N.03.

¹¹⁰ *Id.* 325N.04.

¹¹¹ *Id.* at 325N.05.

¹¹² *Id.* 325N.06(a).

¹¹³ *Id.* 325N.06(c).

¹¹⁴ *Id.* at 325N.06(d).

¹¹⁵ *Id.* 325N.07.

¹¹⁶ *Id.* 325N.09.

9. Missouri

Missouri has a statute¹¹⁷ that defines the term "foreclosure consultant"¹¹⁸; and expressly provides that the property owner has the right to cancel a contract with a foreclosure consultant at any time within the three-day period after the owner signs the contract.¹¹⁹ Every contract must be in writing and disclose the exact nature of the foreclosure consultant's services and the total amount and terms of compensation, and contain a special form of notice in boldface type.¹²⁰ Foreclosure consultants are prohibited from (among other things) charging a fee until after the promised services are performed under the contract.¹²¹ Any waiver by an owner of the provisions of the statute is void and unenforceable.¹²² An owner may bring an action for actual damages against a foreclosure consultant for any violation of the statute, including "attorneys' fees and costs, and appropriate equitable relief"¹²³ and the court "may, at its discretion, award exemplary damages equivalent to at least twice the compensation received by the foreclosure consultant in violation of section 407.940 [regarding the conditions under which the foreclosure consultant shall have the right to demand, charge, collect, or receive any compensation], in addition to any other award of actual damages."¹²⁴ The rights and remedies provided under subsection [regarding a homeowner's right of action against the foreclosure consultant for violation of the statute] "are cumulative to, and not a limitation of, any other rights and remedies provided by law."¹²⁵

10. Nebraska.

Nebraska enacted a statute,¹²⁶ ("Nebraska Foreclosure Protection Act"), which states in the "Legislative Findings and Intent" section,¹²⁷ that:

The Legislature hereby finds, determines, and declares that home ownership and the accumulation of equity in one's home provide significant social and economic benefits to the state and its citizens. Unfortunately, too many homeowners in financial distress, especially the poor, elderly, and financially unsophisticated, are vulnerable to a variety of deceptive or unconscionable business practices designed to dispossess them or otherwise strip the equity from their homes. There is a compelling need to curtail and prevent the most deceptive and unconscionable of these business practices, provide each homeowner with information necessary to make an informed and intelligent decision regarding transactions with certain foreclosure consultants and equity purchasers, provide certain minimum requirements for contracts between such parties,

¹¹⁷ MO. ANN. STAT. § 407.935-.943.

¹¹⁸ *Id.* § 407.935(2).

¹¹⁹ *Id.* § 407.937.

¹²⁰ *Id.* §407.938.

¹²¹ *Id.* § 407.940.

¹²² *Id.* § 407.941.

¹²³ *Id.* § 407.943(1).

¹²⁴ *Id.*

¹²⁵ *Id.* § 407.943(1).

¹²⁶ LAWS 2008, LB 23, § 1.

¹²⁷ *Id.* § 76-2702.

including statutory rights to cancel such contracts, and ensure and foster fair dealing in the sale and purchase of homes in foreclosure. Therefore, it is the intent of the Legislature that all violations of the Nebraska Foreclosure Protection Act have a significant public impact and that the terms of the act be liberally construed to achieve these purposes.

The statute contains the following definitions: “associate,”¹²⁸ “equity purchase contract,”¹²⁹ “equity purchaser,”¹³⁰ “evidence of debt,”¹³¹ “foreclosure consultant,”¹³² “foreclosure consulting contract,”¹³³ “holder of evidence of debt,”¹³⁴ “homeowner,”¹³⁵ and “residence in foreclosure.”¹³⁶ The statute provides that (among other things) the foreclosure consulting contract must be in writing and must be presented to the homeowner for review at least 24 hours before it is signed by the homeowner, and sets forth the form of notice that must be provided in the foreclosure consulting contract.¹³⁷ The statute also provides the homeowner, in addition to any right of rescission under state or federal law, the right to cancel the foreclosure consulting contract at any time.¹³⁸ The statute further provides that the foreclosure consulting contract is void as against public policy if it attempts to provide for the waiver of certain provisions of the statute,¹³⁹ and prohibits a foreclosure consultant from demanding, receiving or collecting any compensation until after the foreclosure consultant has fully performed all required services under the foreclosure consulting contract.¹⁴⁰ The statute provides similar requirements and protections with respect to equity purchase contracts.¹⁴¹ The statute also provides that a transaction in which a homeowner purports to grant a residential property in foreclosure to an equity purchaser by an instrument that appears to be an absolute conveyance, and in which an option to repurchase is reserved to the homeowner or is given by the equity purchaser to the homeowner, shall be permitted only where each of several specific conditions has been met.¹⁴² Finally, the statute provides that a person who violates any provision thereof shall be “guilty of a Class IV felony.”¹⁴³

11. New Hampshire.

New Hampshire enacted a statute¹⁴⁴ (“Foreclosure Consultants and Pre-Foreclosure Conveyances”), which defines, among other things; “foreclosure consultant”¹⁴⁵; “foreclosure

¹²⁸ *Id.* § 2704.

¹²⁹ *Id.* § 2705.

¹³⁰ *Id.* § 2706.

¹³¹ *Id.* § 2707.

¹³² *Id.* § 2708.

¹³³ *Id.* § 2709.

¹³⁴ *Id.* § 2710.

¹³⁵ *Id.* § 2711.

¹³⁶ *Id.* § 2712.

¹³⁷ *Id.* § 2713.

¹³⁸ *Id.* § 2714.

¹³⁹ *Id.* § 2715.

¹⁴⁰ *Id.* § 2716.

¹⁴¹ *Id.* §§ 2719-2722.

¹⁴² *Id.* § 2723.

¹⁴³ *Id.* § 2728.

¹⁴⁴ NH ST § 479-B:1 *et seq.*

¹⁴⁵ *Id.* § 479-B:1 I.

consulting contract”¹⁴⁶; “foreclosure consulting service”¹⁴⁷; “pre-foreclosure purchaser”¹⁴⁸; and “pre-foreclosure conveyance.”¹⁴⁹ The statute also requires the execution of a written foreclosure consulting contract that contains full disclosure of, among other things, the nature of the services to be provided, an accompanying “notice of cancellation,” and no provision attempting to waive any of the rights under the statute.¹⁵⁰ The statute grants the homeowner the unconditional right to cancel the foreclosure consulting contract “at any time,”¹⁵¹ and grants the homeowner the right to cancel a pre-foreclosure conveyance at any time before midnight of the fifth business day after the latter of any conveyance or transfer of the property or delivery of the required statutory notices for pre-foreclosure conveyance.¹⁵² The statute also provides that “[a] foreclosure consultant shall have a fiduciary duty to the homeowner who retains his or her services and shall not act contrary to the interest of the homeowner.”¹⁵³ The statute further prohibits the foreclosure consultant from certain specified acts, including the right to “receive any compensation until after the foreclosure consultant has fully performed each and every service the foreclosure consultant contracted to perform or represented that the foreclosure consultant would perform.”¹⁵⁴ Also, “a person may not induce or attempt to induce a homeowner to waive the homeowner’s rights under the statute,”¹⁵⁵ and any such waiver shall be void.¹⁵⁶ Any violation of this statute is considered a violation of the New Hampshire consumer protection act, and all remedies of that act are available for such violations.¹⁵⁷ In addition, any person who violates any provision of the statute is guilty of a class A misdemeanor.¹⁵⁸

12. New York.

As of February 1, 2007, certain sales of homes that are in foreclosure or default are now governed by a New York State law under the “Home Equity Theft Prevention Act (the “Act”),¹⁵⁹ which became effective on February 1, 2007.

On January 24, 2007, Michael J. Berey, Senior Underwriting Counsel for First American Title Insurance Company of New York, issued the following bulletin explaining the purpose and scope of the Act, which was reprinted by the General Practice Section of the New York State Bar Association¹⁶⁰:

¹⁴⁶ *Id.* § 479-B:1 II.

¹⁴⁷ *Id.* § 479-B:1 III.

¹⁴⁸ *Id.* § 479-B:1 IV.

¹⁴⁹ *Id.* § 479-B:1 V.

¹⁵⁰ *Id.* § 479-B:2 I., III, and V.

¹⁵¹ *Id.* § 79-B:4 I.(a).

¹⁵² § 479-B:4 I.(b).

¹⁵³ Section 479-B:5 I.

¹⁵⁴ *Id.* § 479-B:5 II(b).

¹⁵⁵ *Id.* § 479-B:6 I.

¹⁵⁶ *Id.* § 479-B:6 II.

¹⁵⁷ *Id.* § 479-B:8.

¹⁵⁸ *Id.* § 479-B:9.

¹⁵⁹ Ch. 308 of the New York Laws of 2006, ch. 208

¹⁶⁰ Available at http://nysbar.com/blogs/generalpractice/2007/01/home_equity_theft_prevention_a.html.

First American Title Insurance Company of New York
CURRENT DEVELOPMENTS
SPECIAL EDITION

HOME EQUITY THEFT PREVENTION ACT EFFECTIVE FEBRUARY 1

The "Home Equity Theft Prevention Act" (the "Act"), Chapter 308 of the Laws of 2006, signed into law on July 26, 2006 by then Governor Pataki, is effective on February 1, 2007. The Act amends Section 595 of the Banking Law ("Regulation of mortgage brokers, mortgage bankers and exempt organizations"), adds new Section 265-A ("Home Equity Theft Prevention") to the Real Property Law ("RPL"), and adds new Section 1303 ("Foreclosures; required notices") to the Real Property Actions and Proceedings Law ("RPAPL").

The purpose of the Act is set forth in the legislation:

The Legislature finds and declares that homeowners who are in default of their mortgages or in foreclosure may be vulnerable to fraud, deception, and unfair dealing by Home Equity Purchasers...During the time period between the default on the mortgage and the scheduled foreclosure sale date, homeowners in financial distress, especially poor, elderly and financially unsophisticated homeowners, are vulnerable to aggressive "Equity Purchasers" who induce homeowners to sell their homes for a small fraction of their fair market values, or in some cases even sign away their homes, through the use of schemes which often involve oral and written misrepresentations, deceit, intimidation, and other unreasonable commercial practices.

RPL Section 265-A applies when a natural person (an "Equity Seller") having a record title interest in, and his or her primary residence at, property improved by a one-to-four family dwelling ("Residential Real Property" or "Residence") enters into an agreement (a "Covered Contract") with a person (who can be other than a natural person) or his or her representative (an "Equity Purchaser") to acquire title to the Residence when the Residence is (a) in "Foreclosure" or (b) the Residence is in "Foreclosure" or the Equity Seller is in "Default" (two or more months behind in his or her mortgage payments) and (as to ("b")) the Covered Contract includes a "Reconveyance Arrangement."

A Residence is in "Foreclosure" when a notice of pendency is filed in an action under RPAPL Article 13 or the Residence is on an active tax lien sale list.

A Reconveyance Arrangement is an agreement for an Equity Purchaser to reconvey an interest in the Residence back to the Equity Seller to enable the Equity Seller to regain possession. This can be accomplished by such

means as the execution of a purchase agreement or a lease, or by the granting of an option to purchase. RPL Section 265-A also indicates without explanation that there may be a Reconveyance Arrangement when an Equity Seller mortgages a Residence to an Equity Purchaser.

A Reconveyance Arrangement may be subject to mortgage recording tax. RPL Section 265-A (11-A) provides that "(i)n any transaction in which an Equity Seller purports to grant a residence in foreclosure or default to an Equity Purchaser by any instrument which appears to be an absolute conveyance and reserves to himself or herself or is given by the Equity Purchaser an option to repurchase, such transaction shall create a presumption that the transaction is a loan transaction..."

Specific requirements for "Covered Contracts", such as a requirement that the Equity Seller be afforded a right to cancel, and that there can be no transfer or encumbrance of an interest in the Residence until midnight of the fifth business day following the day on which the Covered Contract is signed, and for the terms and form of required notices (including a "Notice Required by New York Law" informing the Seller(s) of a right to cancel the contract and a form "Notice of Cancellation"), are set forth in RPL Section 265-A. Those requirements are not within the scope of this Bulletin.

An "Equity Purchaser" does *not* include a person acquiring title as follows:

1. To use, and who uses, such property as his or her primary residence;
2. By a deed from a referee in an RPAPL Article 13 mortgage foreclosure;
3. At any sale of property authorized by statute;
4. By an Order or Judgment of any Court;
5. From a spouse, or from a parent, grandparent, child, grandchild or sibling of such person or such person's spouse;
6. As a not-for-profit housing organization or as a public housing agency; or
7. A bona fide purchaser or encumbrancer for value.

A "Bona fide purchaser or encumbrancer for value" is, in particular, defined as: "...anyone acting in good faith who purchases the residential real property from the Equity Purchaser for valuable consideration or provides the Equity Purchaser with a mortgage or provides a subsequent bona fide purchaser with a mortgage, *provided that he or she had no notice* of the Equity Seller's continuing right in, or equity in, the property prior to the acquisition of title or encumbrance, or of any violation of this section by the Equity Purchaser as related to the subject property". (Emphasis added).

A transaction in "material violation" of requirements of RPL Section 265-A is voidable and may be rescinded by the Equity Seller within two years of the

date of the recording of the conveyance to the Equity Purchaser. Rescission is accomplished by the Equity Seller giving a notice of rescission to the Equity Purchaser and his or her successors in interest (if the successor is not a bona fide purchaser or encumbrancer for value), and by recording the notice of rescission in the recording office of the County in which the property is located within two years of the date on which the conveyance to the Equity Purchaser was recorded.

The interest of a bona fide purchaser or encumbrancer acquired before recording of a notice of rescission is not affected. Knowledge that the property was in foreclosure or that the property owner was in default in his or her mortgage payments does not impair the status of a person as a bona fide purchaser or encumbrancer; however, according to RPL Section 265-A, without further explanation, this "shall not be deemed to abrogate any duty of inquiry which exists as to rights or interests of persons in possession of the residential real property in foreclosure, or where applicable, default."

A waiver of the provisions of RPL Section 265-A or a limitation of the Equity Purchaser's liability for a violation of the Section is null and void. A provision in a Covered Contract requiring arbitration is, at the Equity Seller's option, void. The Attorney General of the State of New York is authorized to apply for injunctive relief when there is a violation of the requirements of Section 265-A and a Court, on such application, may impose a civil penalty of not more than \$25,000 for each violation. Further, Banking Law, Section 595-a, as amended by the Act, authorizes the Banking Board to impose fines or penalties when a mortgage loan is made to an Equity Purchaser "if the mortgage banker, mortgage broker or exempt organization had knowledge that the Equity Purchaser was not complying with [RPL Section 265-A] with respect to such transaction".

Lastly, the Act adds new RPAPL Section 1303 requiring the plaintiff in a mortgage foreclosure to deliver with the summons and complaint for the action a notice, on a separate page in bold, fourteen-point type printed on colored paper that is a color other than that of the paper on which the summons and complaint are printed, captioned (in bold twenty-point type) "Help for Homeowners in Foreclosure". The text of the required notice is annexed as Exhibit A to this Bulletin. This notice requirement is not expressly limited to the foreclosure of a mortgage on property improved by a one-to-four family dwelling.

EXHIBIT A *

HELP FOR HOMEOWNERS IN FORECLOSURE

New York State Law requires that we send you this notice about the foreclosure process. Please read it carefully.

Mortgage foreclosure is a complex process. Some people may approach you about "Saving" your home. You should be extremely careful about any such promises.

The State encourages you to become informed about your options in foreclosure. There are government agencies, legal aid entities and other nonprofit organizations ** that you may contact for information about foreclosure while you are working with your lender during this process.

To locate an entity near you, you may call the toll-free helpline maintained by the New York State Banking Department at _____ [enter number] or visit the Department's Website at _____ [enter WEB address]. ***

The State does not guarantee the advice of these agencies.

-----¹⁶¹

* The point type required is not reflected in this Exhibit.

** The Act provides that "(t)he Banking Department shall post on its Website or otherwise make available the name and contact information of government agencies or non-profit organizations that may be contacted for information about the foreclosure process, including maintaining a toll-free help-line to disseminate the information required by this Section."

*** The Act provides that "(t)he Banking Department shall prescribe the telephone number and WEB address to be included in the notice."

12. Oregon.

Oregon has enacted a statute, entitled the "Mortgage Rescue Fraud Protection Act," which contains the following definitions: "foreclosure consultant,"¹⁶² "foreclosure consulting contract,"¹⁶³ "foreclosure consulting service,"¹⁶⁴ "foreclosure purchaser,"¹⁶⁵ "foreclosure reconveyance,"¹⁶⁶ "foreclosure surplus acquisition,"¹⁶⁷ "foreclosure surplus purchaser,"¹⁶⁸ "homeowner,"¹⁶⁹ "residence in foreclosure,"¹⁷⁰ and "Business Day."¹⁷¹ Section 4 of the statute provides that it does not apply to certain individuals or entities¹⁷² (including "A title insurer or producer licensed and authorized to conduct business in the State, while performing title insurance and settlement services in accordance with the person's license,"¹⁷³ as well as mortgage brokers and mortgage lenders properly licensed under Oregon law¹⁷⁴) unless the person or agency is "is engaging in activities or providing services designed or intended to transfer title

¹⁶¹ 2008 OR. LAWS 19.

¹⁶² *Id.* § 2(b).

¹⁶³ *Id.* § 2(c).

¹⁶⁴ *Id.* § 2(d).

¹⁶⁵ *Id.* § 2(e).

¹⁶⁶ *Id.* § 2(f).

¹⁶⁷ *Id.* § 2(g).

¹⁶⁸ *Id.* § 2(g)(1) and (2).

¹⁶⁹ *Id.* § 2(i).

¹⁷⁰ *Id.* § 2(i).

¹⁷¹ *Id.* § 2(j).

¹⁷² *Id.* § 4(a)(1)-(10).

¹⁷³ *Id.* § 4(a)(5).

¹⁷⁴ *Id.* § 4(a)(6).

to a residence in foreclosure directly or indirectly to that individual, or an agent or affiliate of that individual.”¹⁷⁵ The statute further provides the homeowner with the right to (1) rescind a foreclosure consulting contract before the sooner of (i) midnight of the third business day after the day on which the homeowner signs a foreclosure consulting contract or (ii) any foreclosure sale; and (2) rescind a foreclosure reconveyance at any time before the sooner of (i) midnight of the 3rd business day after any conveyance or transfer in any manner of legal or equitable title to a residence in foreclosure, or (ii) any foreclosure sale.¹⁷⁶ Also, Section 5 of the statute provides as follows with respect to any rescission:

(e) As part of the rescission of a foreclosure consulting contract or foreclosure reconveyance, the homeowner shall repay, within 60 (**0 – 60 days**) days from the date of rescission, any funds paid or advanced by the foreclosure consultant or anyone working with the foreclosure consultant under the terms of the foreclosure consulting contract or foreclosure reconveyance, together with interest calculated at the rate of 8% (**0 – 10%; Legal rate in Oregon is 9%**) a year.

(f) The right to rescind may not be conditioned on the repayment of any funds.¹⁷⁷

The statute provides that certain disclosures must be made in the foreclosure consulting contract (which must be provided to the homeowner for review at least 24 hours before signing, and which must contain a prescribed form of notice that includes an explicit right of rescission or cancellation of the contract at any time).¹⁷⁸ The statute also provides that a foreclosure consultant may not engage in certain “prohibited actions,” including (among other things) the following: claim, demand, charge, collect or receive any compensation until after the foreclosure consultant has performed each and every service the consultant contracted to perform; claim, demand, charge, collect, or receive any interest or any other compensation for any loan that the foreclosure consultant makes to the homeowner that exceeds 9% a year; or acquire any interest in a residence in foreclosure from a homeowner with whom the foreclosure consultant has contracted.¹⁷⁹ The statute further provides that if a foreclosure reconveyance is included in a foreclosure consulting contract or arranged after the execution of a foreclosure consulting contract, the foreclosure purchaser shall provide the homeowner with a document entitled “Notice of Transfer of Deed or Title,” which must contain, among other provisions, an express notice (as set forth in the statute) of the right of the homeowner to rescind the transfer of the deed or title to the property any time within three days after the homeowner executes the Notice of Transfer of Deed or Title (with repayment, within 60 days, of any money spent by the foreclosure consultant on behalf of the homeowner, along with interest at 9% a year).¹⁸⁰ The statute also provides that a foreclosure purchaser may not enter into a foreclosure reconveyance with a homeowner unless certain specific requirements have been complied with by the foreclosure purchaser, including a requirement that “the foreclosure purchaser verifies and can

¹⁷⁵ *Id.* § 4(b)(1) and (2).

¹⁷⁶ *Id.* § 5(a)(1) and (2).

¹⁷⁷ *Id.* § 5(e) and (f).

¹⁷⁸ *Id.* § 6.

¹⁷⁹ *Id.* § 7.

¹⁸⁰ *Id.* § 8.

demonstrate that the homeowner has or will have a reasonable ability to pay for the subsequent reconveyance of the property back to the homeowner on completion of the terms of a foreclosure conveyance, or, if the foreclosure conveyance provides for a lease with an option to repurchase the property, the homeowner has or will have a reasonable ability to make the lease payments and repurchase the property within the term of the option to repurchase.”¹⁸¹ The statute further provides that a person may not induce a homeowner to waive any of its rights under the statute, which waiver would be void as against public policy,¹⁸² and provides that the Attorney General may seek an injunction to prohibit a person from engaging or continuing to engage in any violation of the statute, and that a homeowner may bring a private action for damages as well and may collect damages equal to three times the amount of actual damages.¹⁸³ Finally, the statute provides that any person who violates any provision of the statute is guilty of a misdemeanor and is subject to imprisonment not exceeding one year or a fine not exceeding \$10,000, or both.¹⁸⁴

13. Rhode Island.

Rhode Island has a statute¹⁸⁵ that defines “foreclosure consultant”¹⁸⁶; defines “foreclosure reconveyance”¹⁸⁷; defines “service” as any of several types of activities designed to assist or counsel homeowners (or deal with third parties such as creditors of the homeowner) with respect to foreclosures¹⁸⁸; defines “contract” as “any agreement, or any term in any agreement, between a foreclosure consultant and an owner for the rendition of any services as defined in paragraph (e)”¹⁸⁹; provides for the right of the homeowner to rescind a foreclosure consultant contract within three business days after the homeowner has executed the contract¹⁹⁰; provides that “[e]very contract must be in writing and fully disclose the exact nature of the foreclosure consultant’s services and the total amount and terms of compensation,” as well as contain a required form of boldface notice providing, among other things, that the foreclosure consultant may not collect any money until he or she has completely finished his or her obligations under the contract¹⁹¹; provides that it is a violation of the statute for a foreclosure consultant to commit certain acts, including collection of any compensation until after the foreclosure consultant has performed all of its services as required under the foreclosure consultant contract,¹⁹²; and provides that any waiver of any of the provisions of the statute by the homeowner is void and unenforceable.¹⁹³ Also, a private cause of action is available to a foreclosed homeowner against a foreclosure consultant who violates any of the provisions of the statute, including the right to actual damages, reasonable attorneys’ fees and costs, and appropriate equitable relief.¹⁹⁴ In addition, a court may award punitive damages up to one and one-half times the compensation charged by the foreclosure consultant “if the court finds that the foreclosure consultant violated

¹⁸¹ *Id.* § 8(b)(1)(i).

¹⁸² *Id.* § 9.

¹⁸³ *Id.* §§ 8-9.

¹⁸⁴ *Id.* § 14.

¹⁸⁵ R.I. ST. § 5-79-1 *et seq.*

¹⁸⁶ *Id.* § 5-79-1(a).

¹⁸⁷ *Id.* § 5-79-1(c).

¹⁸⁸ *Id.* § 5-79-1(e).

¹⁸⁹ *Id.* § 5-79-1(h).

¹⁹⁰ *Id.* § 5-79-2.

¹⁹¹ *Id.* § 5-79-3.

¹⁹² *Id.* § 5-79-4.

¹⁹³ *Id.* § 5-79-5.

¹⁹⁴ *Id.* § 5-79-6(a).

the provisions of certain subsections of the statute,¹⁹⁵ and the foreclosure consultant's conduct was in bad faith."¹⁹⁶

14. Washington.

The state of Washington has enacted a statute,¹⁹⁷ titled "Property Conveyances – Distressed" and sometimes referred to as the "Distressed Properties Law." This statute, which took effect on June 12, 2008, is summarized as follows in a bulletin issued by the Washington Attorney General's office on June 6, 2008:

NEW LAW HELPS PROTECT DISTRESSED HOMEOWNERS

SEATTLE - A new state law to help protect financially strapped homeowners from equity skimming and foreclosure rescue scams in Washington goes into effect on June 12. The new law provides safeguards for people trying to stop the loss of their home and requires new disclosures and responsibilities for individuals claiming to help homeowners avoid foreclosure.

Attorney General Rob McKenna requested House Bill 2791 ["HB 2791"] to reduce foreclosure rescue schemes that promise to save homes, but all too often add insult to injury, by either stripping the equity from the property and leaving the homeowner with nothing, or by charging exorbitant fees for unnecessary or non-existent services. The bill was amended through the process and signed into law on March 31.

The new law addresses two common types of foreclosure rescue scheme perpetrators:

¹⁹⁵ *Id.* § 5-79-4(1), (2) or (4).

¹⁹⁶ *Id.* § 5-79-6(b). *See generally* Kibe, note 15 *supra*, 74 COLO. L. REV. 241, which describes the increased use of "foreclosure consultants" by homeowners facing foreclosure of their homes, and the efforts of the courts and state legislatures to address consumer complaints of unfair practices by such consultants. (Note: When this article was published in 2003, apparently only California and Missouri had enacted statutes specifically dealing with foreclosure consultants.) According to the author:

One of the largest problems with the California and Missouri statutory definitions is the list of exceptions to the definition of a foreclosure consultant. The statute allows a practicing attorney, an accountant, a real estate licensee, a consumer finance lender (which includes a personal property broker), a mortgage broker, and a prorater to fall outside the purview of the statute. While the list of who is a foreclosure consultant seems very inclusive, the list of who is not a foreclosure consultant seems too inclusive. This exempted list includes the two most common types of foreclosure consultants, the real estate licensee and the consumer finance lender. Because members of these two professions tend to be the primary perpetrators of unjust practices, they should not be exempted from the scope of the statute.

Id. at 267-68.

¹⁹⁷ HB 2791, Chapter 278, Laws of 2008.

- **Distressed home purchasers,**¹⁹⁸ who lead homeowners to sign over the deed to their property by promising to sell the home back once the homeowners get back on their feet financially and allowing them to remain in the home as tenants in the meantime. The homeowners frequently do not understand the transaction, receive little, if any, financial benefit and are ultimately stripped of both their home and whatever equity they had in it.

- **Distressed home consultants,**¹⁹⁹ who offer phantom help to homeowners in financial distress, typically with false promises to “stop the foreclosure” or “save the home.” The consulting services are often of little or no value and serve only to delay homeowners from seeking real assistance from qualified professionals such as mortgage counselors or attorneys.

Distressed Homeowner²⁰⁰ Protections

- Distressed home purchasers must provide homeowners with a written contract²⁰¹ completely describing the terms of the sale and giving the homeowner a right to cancel the sale for five days after the sale.²⁰²

- Prior to the sale, the purchaser must verify that the homeowner has the ability to make rental payments and to buy the home back.²⁰³

- If the homeowner is unable to buy the home back, he or she must receive at least 82 percent of the fair market value of the home at the time homeowner loses possession of the home.²⁰⁴

- A homeowner injured by a violation of the statute may collect up to three times the amount of actual damages, not to exceed \$100,000.²⁰⁵

Distressed Home Consultant Provisions

- Distressed home consultants must provide homeowners with a written contract listing all services and charges.²⁰⁶

- The consultant has what is called a “fiduciary duty”²⁰⁷ to the homeowner, meaning the consultant must act at all times in the best interests of the homeowner.

- Because the Legislature did not exempt licensed real estate sales persons from the law²⁰⁸ (unlike similar statutes in other states), real estate sellers may be asked to sign

¹⁹⁸ Defined in Sec. 1.(6) of HB 2791.

¹⁹⁹ Defined in Sec. 1.(3) of HB 2791.

²⁰⁰ Defined in Sec. 1.(7) of HB 2791.

²⁰¹ As set forth in Sec. 2 of HB 2791.

²⁰² Sec. 7 of HB 2791.

²⁰³ Sec. 10 of HB 2791.

²⁰⁴ Sec. 10.2(b) of HB 2791.

²⁰⁵ Sec. 11.2 of HB 2791.

²⁰⁶ As set forth in Sec. 2 of HB 2791.

²⁰⁷ Sec. 3 of HB 2791.

a revised listing agreement limiting the services offered by the real estate agent or broker or an addendum clarifying the homeowner's status as to foreclosure. Without new or revised agreements, brokers and agents risk unanticipated liability.

Tips for Distressed Homeowners

- Free foreclosure and homeownership counseling is available from the state of Washington. Contact the Washington State Homeownership Information Hotline at 1.877.894.HOME (1.877.894.4663) or visit www.homeownership.wa.gov for a list of counselors in your area.
- Consider alternatives to foreclosure. Your lender may be able to temporarily reduce your mortgage payments or assist you with restructuring or refinancing your loan so that you can stay in your home. If you're unable to afford the house long-term, you may be able to sell before the foreclosure sale and save some of your equity.
- Approach any unsolicited offer of assistance with caution. Seek professional assistance, but carefully select the professionals you choose to help you. Ask for references and check them. Check with state licensing authorities.
- Ignore signs, fliers and hand-written notes offering foreclosure help. Scam artists typically advertise their "services" on posters pinned to telephone poles and fliers dropped on your porch. They also contact people whose homes are listed in public foreclosure notices.
- Read everything and don't sign any papers you don't understand. Once you sign papers, insist on immediately receiving copies that you can keep of all the documents.

.....

There has been much criticism of HB 2791, especially the fiduciary provisions and the definition of parties that could be construed as "Distressed Home Consultant"²⁰⁹ (basically any "person" that contacts a distressed homeowner with an offer to stop or delay a foreclosure sale). According to one commentator:

When House Bill 2791 went into effect June 12, many members of Washington state's real estate community launched into a furor. Though the Bill's intentions were to protect struggling homeowners from foreclosure rescue scams, many say its rush through the legislative process left it filled with holes and vague definitions that are more likely to hurt the real estate market than help it. Fuzzy definitions mean that many licensed real estate professionals and legitimate pre-foreclosure investors could end up owing a fiduciary duty to the seller, meaning they will be required to act in the seller's best interest rather than their own. Many

²⁰⁸ Sec. 1.3 of HB 2791.

²⁰⁹ As defined in Sec. 1.(3) of HB 2791. Sec. 1.(3) discusses "Distressed Home Consultant" as a "person" who performs any of certain enumerated acts. The term "person," in turn, is defined in Sec. 1(15) of HB 2791, and "includes any natural person, corporation, joint stock association, or unincorporated association."

real estate professionals fear inadvertently taking on excessive liability, while many investors feel the law embodies an inherent conflict of interest.²¹⁰

Conclusion

Even without specific state statutes, judges find ways (as noted in this article) to protect owners who may have been prey in foreclosure. This may show itself as a greater willingness to entertain claims of misrepresentation, fraud, forgery, undue influence, duress, unauthorized practice of law, unfair and deceptive acts, false advertising, violation of consumer-protection statutes, or -- as in the *London* case, *supra* -- unequal bargaining power coupled with inadequacy of consideration. The moral of the *London* case (and the other cases and statutes discussed in this article) may be that mortgagors in dire straits as the result of pending foreclosure actions should be very careful when asked to work with "foreclosure consultants." They may charm your socks off -- but then you won't have socks.

²¹⁰ Carl Zimmerman, *The Legislative Labyrinth of HB 2791 – Washington State Distressed Homeowner Legislation Draws Criticism*, NUWIRE Investor, June 16, 2008, <http://www.nuwireinvestor.com/articles/the-legislative-labyrinth-of-hb-2791-51744.aspx>, at p.1.