

AN ACT

RELATING TO PROPERTY; ENACTING THE MORTGAGE FORECLOSURE  
CONSULTANT FRAUD PREVENTION ACT; IMPOSING PENALTIES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SHORT TITLE.--This act may be cited as the  
"Mortgage Foreclosure Consultant Fraud Prevention Act".

Section 2. DEFINITIONS.--As used in the Mortgage  
Foreclosure Consultant Fraud Prevention Act:

A. "compensation" means monetary payment,  
remuneration or other benefits received, including monetary  
donations made in conjunction with the performance of  
services;

B. "foreclosure consultant":

(1) means a person who, directly or  
indirectly, makes a solicitation or offer to an owner to  
perform services for compensation or who, for compensation,  
performs a service that the person represents will:

(a) stop or postpone a foreclosure  
sale;

(b) obtain any forbearance from a  
beneficiary or mortgagee;

(c) assist the owner to exercise the  
right to reinstatement;

(d) obtain an extension of the period

within which the owner may reinstate the owner's obligation;

(e) obtain a waiver of an acceleration clause contained in a promissory note, deed of trust or contract secured by a mortgage on a residence in foreclosure or contained in the mortgage;

(f) assist an owner in foreclosure or loan default to obtain a loan or advance of funds;

(g) avoid or ameliorate the impairment of an owner's credit resulting from the recording of a notice of default or from a foreclosure sale; or

(h) otherwise save an owner's residence from foreclosure; and

(2) does not include:

(a) a person licensed to practice law in this state when the person renders service in the course of the person's practice as an attorney;

(b) a person licensed as a real estate broker or salesperson in this state when the person engages in acts requiring real estate licensure, unless the person is offering services designed to, or purportedly designed to, enable the owner to retain possession of the residence in foreclosure;

(c) a person licensed as an accountant in this state when the person is acting in any capacity for which the person is licensed as an accountant;

(d) a person acting under the express authority or written approval of the United States department of housing and urban development or other department or agency of the United States or this state to provide services;

(e) a person who holds or is owed an obligation secured by a lien on any residence in foreclosure when the person performs services in connection with the obligation or lien if the obligation or lien did not arise as the result of or as part of a proposed foreclosure reconveyance;

(f) a person doing business under any law of this state or of the United States relating to banks, trust companies, savings and loan associations, industrial loan and thrift companies, regulated lenders, credit unions or insurance companies, or a mortgagee that is a United States department of housing and urban development-approved mortgagee or any subsidiary or affiliate of these persons, or any agent or employee of these persons while engaged in the business of these persons;

(g) a person licensed as a residential mortgage originator or servicer pursuant to the New Mexico Mortgage Loan Originator Licensing Act when acting under the authority of that license;

(h) a nonprofit agency or organization registered pursuant to New Mexico law that offers counseling

or advice to an owner of a home in foreclosure or loan default if the nonprofit agency or organization does not contract for services with for-profit lenders or foreclosure purchasers; or

(i) a foreclosure purchaser, including a person who purchases a home in foreclosure at, or subsequent to, a judicial sale of foreclosure property;

C. "foreclosure reconveyance" means a transaction involving:

(1) the transfer of title to real property by a foreclosed homeowner during a foreclosure proceeding on that homeowner's home, either by transfer of interest from the foreclosed homeowner or by creation of a mortgage or other lien or encumbrance during the foreclosure process that allows the acquirer to obtain title to the property by redeeming the property as a junior lienholder;

(2) the subsequent conveyance, or offer or promise of a subsequent conveyance, of an interest back to the foreclosed homeowner by the acquirer or a person acting in participation with the acquirer that allows the foreclosed homeowner to possess either the residence in foreclosure or any other real property, which interest includes, but is not limited to, an interest in a contract for deed, purchase agreement, option to purchase or lease; or

(3) the authorization, solicitation or offer of a proposal to refinance the real estate during the

foreclosure process contingent on participation in any life, term life or periodic insurance arrangement with any third party not providing private mortgage insurance;

D. "owner" means the record owner of a residence in foreclosure at the time a foreclosure notice of pendency was recorded or a summons and complaint for foreclosure was served;

E. "person" means an individual, a partnership, a corporation, a limited liability company, an association or other group, however organized;

F. "residence in foreclosure" means residential real property consisting of one to four family dwelling units, one of which the owner occupies as the owner's principal place of residence, where there is a delinquency or default on any loan payment or debt secured by or attached to the residential real property, including contract for deed payments; and

G. "service" means and includes, but is not limited to, any of the following:

(1) debt, budget or financial counseling of any type;

(2) receiving money for the purpose of distributing it to creditors in payment or partial payment of an obligation secured by a lien on a residence in foreclosure;

(3) contacting creditors on behalf of an owner;

(4) arranging or attempting to arrange for an extension of the period within which the owner of a residence in foreclosure may cure the owner's default and reinstate the owner's obligation;

(5) arranging or attempting to arrange for a delay or postponement of the time of sale of the residence in foreclosure;

(6) advising the filing of any document or assisting in any manner in the preparation of any document for filing with a bankruptcy court; or

(7) giving advice, explanation or instruction to an owner, which in any manner relates to the cure of a default in or the reinstatement of an obligation secured by a lien on the residence in foreclosure, the full satisfaction of that obligation, or the postponement or avoidance of a sale of a residence in foreclosure, pursuant to a power of sale contained in a mortgage.

Section 3. FORECLOSURE CONSULTANT CONTRACT--  
REQUIREMENTS.--

A. A foreclosure consulting contract shall:

(1) be provided to the owner for review at least twenty-four hours before being signed by the owner;

(2) be printed in at least fourteen-point type and written in the same language that was used by the owner in discussions with the foreclosure consultant to

describe the consultant's services or to negotiate the contract;

(3) fully disclose the nature and extent of the foreclosure consulting services to be provided, including any foreclosure reconveyance that may be involved, and the total amount and terms of any compensation to be received by the foreclosure consultant or anyone working in association with the foreclosure consultant;

(4) disclose the names of any other corporations, businesses or entities on behalf of which the consultant does business or with which the consultant is affiliated or employed;

(5) separately itemize all costs, fees or expenses and the purpose of the costs, fees or expenses that are charged to the homeowner during the term of the contract;

(6) be dated and personally signed by the owner and the foreclosure consultant; and

(7) contain the following notice, which shall be printed in at least fourteen-point boldface type, completed with the name of the foreclosure consultant, and located in immediate proximity to the space reserved for the owner's signature:

"NOTICE REQUIRED BY NEW MEXICO LAW

..... (Name) or anyone working for him or her CANNOT ask you to sign or have you sign any lien, mortgage or deed as

part of signing this agreement unless the terms of the transfer are specified in this document and you are given a separate explanation of the nature and extent of the transaction.

..... (Name) or anyone working for him or her CANNOT guarantee you that they will be able to refinance your home or arrange for you to keep your home. Continue making mortgage payments until a refinancing, if applicable, is approved.

If a transfer of the deed or title to your property is involved in any way, you may rescind the transfer any time within 3 days after the date you sign the deed or other document of sale or transfer. See the attached Notice of Rescission form for an explanation of this right. As part of any rescission, you must repay any money spent on your behalf as a result of this agreement within 60 days of receiving commercially reasonable documentation of the payments.

THIS IS AN IMPORTANT LEGAL CONTRACT AND COULD RESULT IN THE LOSS OF YOUR HOME. CONTACT AN ATTORNEY OR COUNSELOR BEFORE SIGNING."

B. A foreclosure consulting contract shall contain on the first page, in at least fourteen-point type:

(1) the name and address of the foreclosure consultant to which the notice of cancellation is to be mailed; and

(2) the date the owner signed the contract.

C. A foreclosure consulting contract shall be accompanied by a completed form in duplicate, captioned "NOTICE OF RESCISSION RIGHTS", which shall:

(1) be on a separate sheet of paper attached to the contract;

(2) be easily detachable; and

(3) contain the following statement printed in at least fifteen-point type:

"NOTICE OF RESCISSION RIGHTS

(Date of Contract)

You may cancel or rescind this contract, without any penalty, at any time until midnight of the third business day after the day on which you sign this contract. If you want to end this contract, mail or deliver a signed and dated copy of this Notice of Rescission, or any other written notice indicating your intent to rescind to (name of foreclosure consultant) at (address of foreclosure consultant, including facsimile and electronic mail).

As part of any rescission, you (the homeowner) must repay any money spent on your behalf as a result of this agreement within 60 days of receiving commercially reasonable documentation of the payments.

THIS IS AN IMPORTANT LEGAL CONTRACT AND COULD RESULT IN THE LOSS OF YOUR HOME. CONTACT AN ATTORNEY OR COUNSELOR BEFORE SIGNING.

RESCISSION OF CONTRACT FORM

TO: (name of foreclosure consultant)

(address of foreclosure consultant, including facsimile and electronic mail)

I hereby rescind this contract.

..... (Date)

..... (Homeowner's signature)".

D. The foreclosure consultant shall provide the owner with a signed and dated copy of the foreclosure consulting contract and the attached notice of rescission rights and rescission of contract form immediately upon execution of the contract.

E. The time during which the owner may rescind the foreclosure consulting contract does not begin to run until the foreclosure consultant has complied with this section and the owner has signed the contract.

Section 4. RESCISSION OF FORECLOSURE CONSULTANT CONTRACT.--

A. In addition to any other right under law to rescind a contract, an owner may rescind a foreclosure consulting contract until midnight of the third business day after the day on which the owner signs a foreclosure consulting contract that complies with the Mortgage Foreclosure Consultant Fraud Prevention Act.

B. Cancellation of a foreclosure consulting

contract occurs when an owner gives written notice of cancellation to the foreclosure consultant at the address specified in the contract.

C. Notice of cancellation, if given by mail, is effective when deposited in the mail properly addressed with postage prepaid.

D. Notice of cancellation given by an owner need not take the particular form as provided with the contract and, however expressed, is effective if it indicates the intention of the owner not to be bound by the contract.

Section 5. VIOLATIONS.--It is a violation of the Mortgage Foreclosure Consultant Fraud Prevention Act for a foreclosure consultant to:

A. claim, demand, charge, collect or receive any compensation until after the foreclosure consultant has fully performed every service the foreclosure consultant contracted to perform or represented the consultant would perform;

B. claim, demand, charge, collect or receive any fee, interest or any other compensation for any reason that exceeds five percent per annum of the amount of any loan that the foreclosure consultant may make to the owner. Such a loan may not be secured by the residence in foreclosure or any other real or personal property;

C. take a wage assignment, lien of any type on real or personal property or other security to secure the

payment of compensation. Any such security is void and unenforceable;

D. receive any consideration from a third party in connection with services rendered to an owner;

E. acquire any interest, directly or indirectly, or by means of a subsidiary or affiliate in a residence in foreclosure from an owner with whom the foreclosure consultant has contracted;

F. take a power of attorney from an owner for any purpose, except to inspect documents as provided by law;

G. include a provision in a foreclosure consulting contract that:

(1) attempts or purports to waive an owner's rights under the Mortgage Foreclosure Consultant Fraud Prevention Act;

(2) requires an owner to consent to jurisdiction for litigation or choice of law in a state other than New Mexico;

(3) provides for venue in a county other than the county in which the residence in foreclosure is located; or

(4) imposes any costs or filing fees greater than the fees required to file an action in a district court; or

H. induce or attempt to induce an owner to enter a

contract that does not comply in all respects with the Mortgage Foreclosure Consultant Fraud Prevention Act.

Section 6. WAIVER NOT ALLOWED.--Any waiver by an owner of the provisions of the Mortgage Foreclosure Consultant Fraud Prevention Act is void and unenforceable as contrary to public policy. Any attempt by a foreclosure consultant to induce an owner to waive the owner's rights under the Mortgage Foreclosure Consultant Fraud Prevention Act is a violation of that act.

Section 7. REMEDIES.--

A. A violation of the Mortgage Foreclosure Consultant Fraud Prevention Act constitutes an unfair trade practice pursuant to the Unfair Practices Act.

B. A prevailing plaintiff in a suit for violation of the Mortgage Foreclosure Consultant Fraud Prevention Act may recover actual damages, reasonable attorney fees and costs and appropriate equitable relief.

C. The rights and remedies provided in Subsection A of this section are cumulative to, and not a limitation of, any other rights and remedies provided by law. Any action brought pursuant to this section must be commenced within four years from the date of the alleged violation.

D. In addition to any other damages, a court may award exemplary damages up to three times the compensation charged by the foreclosure consultant if the court finds that

the foreclosure consultant violated a provision of Section 5 of the Mortgage Foreclosure Consultant Fraud Prevention Act and that the foreclosure consultant's conduct was willful or in bad faith.

E. Notwithstanding any other provision of this section, no action may be brought on the basis of a violation of the Mortgage Foreclosure Consultant Fraud Prevention Act, except by an owner against whom the violation was committed or by the attorney general.

Section 8. PENALTY.--A person who commits a violation of the provisions of Section 5 of the Mortgage Foreclosure Consultant Fraud Prevention Act is guilty of a fourth degree felony and, upon conviction, shall be sentenced pursuant to Section 31-18-15 NMSA 1978. Each violation of the provisions of Section 5 of the Mortgage Foreclosure Consultant Fraud Prevention Act constitutes a distinct offense. The attorney general or the district attorney for the district in which the violation arose may prosecute any violation of Section 5 of the Mortgage Foreclosure Consultant Fraud Prevention Act. Prosecution or conviction for any violation described in Section 5 of the Mortgage Foreclosure Consultant Fraud Prevention Act does not bar prosecution or conviction for any other offenses. These penalties are cumulative to any other remedies or penalties provided by law.

Section 9. SEVERABILITY.--If any provision of the

Mortgage Foreclosure Consultant Fraud Prevention Act or the application of any of its provisions to any person or circumstance is held to be unconstitutional and void, the remainder of the Mortgage Foreclosure Consultant Fraud Prevention Act remains valid.

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