

# Distressed Properties

## Background

Over the past few years there has been a dramatic increase in foreclosures in Washington and around the country. Several types of assistance are currently offered to homeowners who are late or have defaulted on their mortgage. A person may offer a homeowner a "sale-leaseback transaction" where the person buys the homeowner's house and allows the homeowner to continue to live there as a tenant. The buyer makes representations before the sale that after a certain period of time the homeowner will have paid enough rent to get his or her home back. A person may also offer a homeowner a "foreclosure surplus sale" where the homeowner assigns his or her right to the surplus equity to the buyer for a lump sum. When the foreclosed house is auctioned off, the sale may bring more money than is due on the mortgage, a sum termed "surplus equity." In other cases, a person may offer to negotiate with the lender on the homeowner's behalf, or offer to arrange a sale of the home that includes an option for the homeowner to repurchase it in the future.

Many, if not most, of these offers of assistance are made in good faith and are legitimate transactions entered into with the interests of homeowners in mind. Unfortunately, the financial difficulties of homeowners have created a thriving industry of foreclosure scams by people preying on vulnerable people about to lose their homes. These scam artists claim that they can stop the foreclosure and induce homeowners to sign documents that ultimately strip them of all rights to their property. This is known as "equity skimming," and allows scammers to obtain title without paying a fair price for the property in order to take the equity out without satisfying any of the underlying obligations on the property. Homeowners are led to believe their financial woes are over and that they have a contract right to repurchase their home, but those terms are usually vague and unenforceable.

## Current Law

Persons or entities who engage in certain practices involving foreclosure of real property, such as stopping, preventing, or delaying a foreclosure in return for a fee, are governed by Washington law, the Credit Services Organization Act (CSOA), and must be licensed and bonded. Equity skimming is a class B felony, and also a violation of the Consumer Protection Act (CPA). Under the CPA, the Attorney General can bring an action in the name of the state against any person to restrain and prevent an unlawful action. The CPA also allows any person who is injured by a CPA violation to bring a civil action to stop the violator from further actions and recover actual damages plus reasonable attorneys' fees. The court may award the plaintiff treble damages (three times the actual damages sustained) not to exceed \$10,000.

## Recent Legislation

In 2008 the Legislature passed **HB 2791** to prevent the practice of preying on vulnerable people about to lose their homes and give distressed homeowners a real chance to repurchase their homes. Distressed home consultants have a fiduciary duty to distressed homeowners. They must act in homeowners' best interests, disclose all material facts to homeowners, use reasonable care in performing their duties, and provide an accounting to homeowners.

HB 2791 requires written contracts between distressed home consultants and gives distressed homeowners a right to cancel the contract within five business days. It also requires that certain provisions and notices in the contract be written in large boldface type and that certain information be included, such as (1) the total consideration to be provided by the purchaser in connection with the

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sale, (2) a complete description of the terms of payment, (3) the time at which possession is to be transferred to the purchaser, (4) a complete description of the terms of any related agreement designed to allow the foreclosed homeowner to remain in the home, (5) a complete description of the interest, if any, the foreclosed homeowner maintains in the proceeds of the resale of the property, (6) notice of right of cancellation, and (7) notice that the purchaser cannot ask the foreclosed homeowner to sign any deed or other document until the right of cancellation has ended.

The bill defines "distressed homeowners" as owner of a home that is the homeowner's primary residence and is in a single, duplex, triplex, or four-unit family residential building. Homeowners who reside in buildings with more than four units are not covered by the bill.

The bill defines "distressed home conveyance" as any transaction in which a foreclosed homeowner (1) transfers an interest in the distressed property to a distressed home purchaser, (2) the purchaser allows the foreclosed homeowner to occupy the property, and (3) the purchaser conveys or promises to convey the property to the foreclosed homeowner, provides the foreclosed homeowner with an option to purchase the property at a later date, or promises the foreclosed homeowner an interest in the proceeds of any resale of the property.

A "distressed home consultant" is any person who systematically contacts property owners whose homes are in foreclosure or in danger of foreclosure or who contacts a distressed homeowner and offers to perform certain services for the homeowner, such as stopping a foreclosure sale, assisting the homeowner in refinancing a loan, obtaining an option to purchase the distressed property after foreclosure, arranging a repurchase option for the homeowner, or other services.

A property is in danger of foreclosure if the homeowner has defaulted on a mortgage or is at least 30 days delinquent on a loan secured by the property, or the homeowner has a good faith belief that he or she is likely to default on the mortgage within four months and the homeowner reports that belief to certain persons, including a mortgage broker, real estate broker, an attorney, a mortgage or credit counselor, or any other party to a distressed home consulting transaction.

The bill exempts the following from the definition of distressed home consultants: financial institutions, nonprofit credit counseling services, licensed attorneys, persons subject to the mortgage loan servicing laws, and licensed mortgage brokers who procure a nonpurchase mortgage loan for the homeowner.

## **Issues and Outlook**

Licensed real estate brokers and agents originally were not intended to be covered by the provisions of HB 2791. Senate amendments adopted at the end of session added them into the bill. Thus a real estate broker or salesperson could be considered a "distressed home consultant" under HB 2791.

To address this concern, Multiple Listing Service (MLS) lawyers have redrafted their forms and procedures to educate and protect brokers and agents by ensuring that, if they qualify as a distressed home consultant, they comply with the requirements of the bill. At this time, the various parties, including the Attorney General's office, have agreed to work together to make HB 2791 work, and if necessary to draft legislation in 2009 to fix any unworkable or onerous provisions of the bill.