

HOUSE JUDICIARY COMMITTEE SUBSTITUTE FOR
HOUSE BILL 205

49TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2010

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,

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1 performs a service that the person represents will:

2 (a) stop or postpone a foreclosure sale;

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

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

7 (d) obtain an extension of the period
8 within which the owner may reinstate the owner's obligation;

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

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

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

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

20 (2) does not include:

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

24 (b) a person licensed as a real estate
25 broker or salesperson in this state when the person engages in

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1 acts requiring real estate licensure, unless the person is
2 offering services designed to, or purportedly designed to,
3 enable the owner to retain possession of the residence in
4 foreclosure;

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

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

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

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

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1 these persons;

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

6 (h) a nonprofit agency or organization
7 registered pursuant to New Mexico law that offers counseling or
8 advice to an owner of a home in foreclosure or loan default if
9 the nonprofit agency or organization does not contract for
10 services with for-profit lenders or foreclosure purchasers; or

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

14 C. "foreclosure reconveyance" means a transaction
15 involving:

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

23 (2) the subsequent conveyance, or offer or
24 promise of a subsequent conveyance, of an interest back to the
25 foreclosed homeowner by the acquirer or a person acting in

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1 participation with the acquirer that allows the foreclosed
2 homeowner to possess either the residence in foreclosure or any
3 other real property, which interest includes, but is not
4 limited to, an interest in a contract for deed, purchase
5 agreement, option to purchase or lease; or

6 (3) the authorization, solicitation or offer
7 of a proposal to refinance the real estate during the
8 foreclosure process contingent on participation in any life,
9 term life or periodic insurance arrangement with any third
10 party not providing private mortgage insurance;

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

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

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

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

25 (1) debt, budget or financial counseling of

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1 any type;

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

5 (3) contacting creditors on behalf of an
6 owner;

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

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

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

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

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

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1 A. A foreclosure consulting contract shall:

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

4 (2) be printed in at least fourteen-point type
5 and written in the same language that was used by the owner in
6 discussions with the foreclosure consultant to describe the
7 consultant's services or to negotiate the contract;

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

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

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

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

23 (7) contain the following notice, which shall
24 be printed in at least fourteen-point boldface type, completed
25 with the name of the foreclosure consultant, and located in

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1 immediate proximity to the space reserved for the owner's
2 signature:

3 "NOTICE REQUIRED BY NEW MEXICO LAW

4 (Name) or anyone working for him or her CANNOT ask
5 you to sign or have you sign any lien, mortgage or deed as part
6 of signing this agreement unless the terms of the transfer are
7 specified in this document and you are given a separate
8 explanation of the nature and extent of the transaction.

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

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

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

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

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

4 (2) the date the owner signed the contract.

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

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

10 (2) be easily detachable; and

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

13 "NOTICE OF RESCISSION RIGHTS

14 (Date of Contract)

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

23 As part of any rescission, you (the homeowner) must repay any
24 money spent on your behalf as a result of this agreement within
25 60 days of receiving commercially reasonable documentation of

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1 the payments.

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

5 RESCISSION OF CONTRACT FORM

6 TO: (name of foreclosure consultant)
7 (address of foreclosure consultant, including facsimile and
8 electronic mail)

9 I hereby rescind this contract.

10 (Date)

11 (Homeowner's signature)".

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

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

21 Section 4. RESCISSION OF FORECLOSURE CONSULTANT
22 CONTRACT.--

23 A. In addition to any other right under law to
24 rescind a contract, an owner may rescind a foreclosure
25 consulting contract until midnight of the third business day

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1 after the day on which the owner signs a foreclosure consulting
2 contract that complies with the Mortgage Foreclosure Consultant
3 Fraud Prevention Act.

4 B. Cancellation of a foreclosure consulting
5 contract occurs when an owner gives written notice of
6 cancellation to the foreclosure consultant at the address
7 specified in the contract.

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

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

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

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

22 B. claim, demand, charge, collect or receive any
23 fee, interest or any other compensation for any reason that
24 exceeds five percent per annum of the amount of any loan that
25 the foreclosure consultant may make to the owner. Such a loan

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1 may not be secured by the residence in foreclosure or any other
2 real or personal property;

3 C. take a wage assignment, lien of any type on real
4 or personal property or other security to secure the payment of
5 compensation. Any such security is void and unenforceable;

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

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

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

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

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

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

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

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

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1 or

2 H. induce or attempt to induce an owner to enter a
3 contract that does not comply in all respects with the Mortgage
4 Foreclosure Consultant Fraud Prevention Act.

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

12 Section 7. REMEDIES.--

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

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

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

25 D. In addition to any other damages, a court may

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1 award exemplary damages up to three times the compensation
2 charged by the foreclosure consultant if the court finds that
3 the foreclosure consultant violated a provision of Section 5 of
4 the Mortgage Foreclosure Consultant Fraud Prevention Act and
5 that the foreclosure consultant's conduct was willful or in bad
6 faith.

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

12 Section 8. PENALTY.--A person who commits a violation of
13 the provisions of Section 5 of the Mortgage Foreclosure
14 Consultant Fraud Prevention Act is guilty of a fourth degree
15 felony and, upon conviction, shall be sentenced pursuant to
16 Section 31-18-15 NMSA 1978. Each violation of the provisions
17 of Section 5 of the Mortgage Foreclosure Consultant Fraud
18 Prevention Act constitutes a distinct offense. The attorney
19 general or the district attorney for the district in which the
20 violation arose may prosecute any violation of Section 5 of the
21 Mortgage Foreclosure Consultant Fraud Prevention Act.

22 Prosecution or conviction for any violation described in
23 Section 5 of the Mortgage Foreclosure Consultant Fraud
24 Prevention Act does not bar prosecution or conviction for any
25 other offenses. These penalties are cumulative to any other

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1 remedies or penalties provided by law.

2 Section 9. SEVERABILITY.--If any provision of the
3 Mortgage Foreclosure Consultant Fraud Prevention Act or the
4 application of any of its provisions to any person or
5 circumstance is held to be unconstitutional and void, the
6 remainder of the Mortgage Foreclosure Consultant Fraud
7 Prevention Act remains valid.