

UNDERWRITING BULLETIN

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NY000300

Date: January 25, 2007

To: All New York State Office Counsel, Managers and Agents

From: John L. Killea, Senior Vice President and General Counsel

Re: Home Equity Theft Protection Act

On February 1, 2007 the Home Equity Theft Prevention Act (the “Act”) becomes effective in the State of New York. The Act 1) amends paragraphs (e), (f), (g) of Section 595-a of the Banking Law and adds a new paragraph (h) thereto; 2) adds a new section 265-a to the Real Property Law; and 3) adds a new section 1303 to the RPAPL.

The Background

The Legislative intent of the Act is to eradicate the practice of foreclosure rescue scams perpetrated on unwitting homeowners whose properties are in distress as a result of a mortgage that is in default (as defined in the Act) or in foreclosure. Typically, these scams unfold in one of several ways. The rescue entity gets a deed to the property promising that title will be returned as soon as the distressed owner’s credit is restored and immediately mortgages the property (sometimes with the benefit of an inflated appraisal) and cashes out the distressed owner’s equity and walks/defaults, or flips the property to a third party who obtains a mortgage in excess of the value (again at an inflated appraisal). In either instance the distressed homeowner will be confronted with eviction and the loss of his/her home without even knowing a deed was signed over to the foreclosure rescue entity.

The Act

The stated purpose of the Act is to give distressed owners all of the information required to “make an informed and intelligent decision regarding the sale transfer to an Equity Purchaser.” Defined terms in the Act are designated by quotation marks below.

The Act applies when an “Equity Seller” (defined as a natural person who is a record title owner of a residential property comprised of 1-4 Family dwelling units one of which is occupied by him or her as a primary residence) enters into an agreement (a “Covered Contract”) with an “Equity Purchaser” (who does not have to be a natural person) or a “Representative” to “Sell” the Residence in a transaction in which consideration is received by the Equity Seller or title is transferred for no consideration when the “Residence” is in “Foreclosure” or when the Residence is in “Foreclosure” or the Equity Seller is in “Default” and the Covered Contract includes a “Reconveyance Agreement.”

A “Residence” is in “Foreclosure” when there is an active Lis Pendens filed against the subject property or the subject property is on an active property tax lien list. An equity Seller is in “Default” when an two or more months behind on mortgage payments.

An “Equity Purchaser” does not include a person who acquires title:

as a primary residence; at any sale authorized by statute; by order or judgment of a Court; from a spouse, or from a parent , grandparent, child, grandchild or sibling of such person or such person’s spouse; as a not for profit or public housing agency; or as a bona fide purchaser or encumbrancer for value.

A “Bona Fide Purchaser” or “Encumbrancer for Value” is 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 BFP with a mortgage, provided that he or she had no notice of the “Equity Seller’s” continuing right to, or equity in, the property prior to the acquisition of title or encumbrance, or any violation of this Section by the Equity Purchaser as related to the subject property.”

The Act mandates that Covered Contracts contain the entire agreement and set forth specific stringent notice requirements. The Equity Seller is also given the right to rescind the contract within five (5) business days. In addition, it prohibits the Equity Purchaser from making certain representation to the Equity Seller.

The meat of the Act is contained in Section 8(a) which provides that:

“Any transaction...which is in material violation is voidable and the transaction may be rescinded by the Equity Seller within two years of the date of the recording of the conveyance of the residential real property in foreclosure or , where applicable, default.”

Section 8c) provides that the section shall not affect the interest of a BFP but goes on to say that “This subdivision 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.

The Act also includes civil and criminal penalties for its violation.

Finally, the Act adds Section 1303 to the RPAPL regarding required Notices in foreclosure actions with which the plaintiff must comply by attaching a Notice entitled "Help for Homeowners in Foreclosure" to the Summons and Complaint on a different colored paper and in **twenty point bold type**.

The Title Issues and Stewart's Position

As a result of the Act, Stewart policy issuing offices must place increased underwriting scrutiny on covered or related transactions.

Let's start with the easiest one first. For all titles arising out of foreclosure actions that commence on or after the effective date, the following exception must be raised:

Compliance with Section 1303 of the RPAPL requiring the foreclosing lender to provide proof that a Notice to the mortgagor entitled "Help for Homeowners in Foreclosure" was delivered with the Summons and Complaint as statutorily required.

In order to remove this exception, you must obtain a copy of the Notice that should be in the foreclosure file at the respective Clerk's Office. It probably would not be a bad idea for prospective affidavits of service to contain a clause indicating that the required notice was served in addition to the Summons and Complaint.

Now for the harder ones...

What do we do when we are being asked to insure a) a fee policy into an Equity Purchaser; b) a mortgage policy running in favor of the Equity Purchaser's Lender; c) a fee policy in favor of a third party purchaser from an Equity Purchaser; and d) a Loan policy in favor of that Third Party's Lender?

AS A PRELIMINARY MATTER YOUR SEARCHES WILL HAVE TO RUN LPS BOTH OPEN AND DISCHARGED FOR THE PREVIOUS TWO YEARS.

A. Fee Policy to Equity Purchaser

Unless proof in the form of an affidavit and indemnity in the form attached hereto is provided that the purchaser is not an Equity Purchaser as provided under Section 2(e) subdivisions (i)-(vi) of the Act, the transaction cannot be insured without prior written Underwriter approval.

Accordingly, in **all** cases where the property is residential, with an unexpired Notice of Pendency*, and the transaction involves a sale from an Equity Seller (or one who could claim to be) to a possible Equity Purchaser or his/her/its Representative (a straw person), the following exception must appear in your report:

Company will require an affidavit and indemnity in the form attached that the purchaser is not an Equity Purchaser as provided in Real Property Law 265-a Section 2(e) subdivisions (i)-(vi).

***OR ONE DISCHARGED IN PREVIOUS TWO YEARS IN B, C , AND D BELOW**

In order to buttress the affidavit, the contract of sale must be produced and examined. If there is an option for the equity seller to repurchase, approval must be obtained from underwriting counsel.

Accordingly, the following exception must also appear in your report:

Company must be provided with a copy of the contract of sale prior to closing verifying the transaction is either not subject to or is in compliance with the Home Equity Theft Prevention Act RPL Section 265-a.

In addition, you must alert closers to CAREFULLY review all payoff letters for signs that a potential Equity Seller's mortgage is in default. If it so appears the above exception should be raised and the appropriate affidavit and indemnity should be obtained. We should also add a clause in the Common Exception affidavit that the Seller must sign that their loan is not in foreclosure or default.

B. Mortgage Policy to Equity Purchaser's Lender

In light of the above in all such title reports, the following exception must appear in your report:

Company will require an affidavit and indemnity in the form attached that the mortgagor is not an Equity Purchaser as provided in Real Property Law 265-a Section 2(e) subdivisions (i)-(vi).

C. Fee Policy to Third Party from Equity Purchaser

If your transaction involves a property whose chain shows that within the two prior years was residential, with an unexpired Notice of Pendency, and a transaction involved a sale from an Equity Seller (or one who could claim to be) to a possible Equity Purchaser or its Representative (a straw person), the following exception must appear in your report:

Company will require an affidavit and indemnity in the form attached that the (name the Equity Purchaser in the chain) is not an Equity Purchaser as provided in Real Property Law 265-a Section 2(e) subdivisions (i)-(vi).

Any affidavit should also aver that the property is vacant i.e. Equity Seller is no longer in possession.

D. Mortgage Policy to Third Party's Lender

Again as set forth above, if your transaction involves a property whose **chain** shows that within the two prior years the property was residential, with an unexpired Notice of Pendency, and a transaction involved a sale from an Equity Seller (or one who could claim to be) to a possible Equity Purchaser or its Representative (a straw person), the following exception must appear in your report:

Company will require an affidavit and indemnity in the form attached that (name the Equity Purchaser in the chain) is not an Equity Purchaser as provided in Real Property Law 265-a Section 2(e) subdivisions (i)-(vi).

All of this begs the ultimate question "Well what if we get a deal where the Equity Purchaser is claiming compliance with the Act, or a third party can get us proof or claims that there was prior compliance with the Act, can we insure it?"

THE ANSWER IS PROBABLY NOT AND CERTAINLY NOT WITHOUT OBTAINING PRIOR WRITTEN APPROVAL FROM UNDERWRITING COUNSEL FOR PROOF OF STRICT ADHERENCE TO THE ACT.

In light of the serious penalties imposed, the two year right of rescission, and certain ambiguities in the Act, we believe the above procedure is the best course to chart in the short term. As the legislation and the transactions and probable litigation that flow from it see the light of day in the months and years to come we will review our position accordingly.

If you have any questions please feel free to contact Agency Legal Services at 212-922-0050.

THIS BULLETIN IS A CONFIDENTIAL COMMUNICATION BETWEEN STEWART AND THE ADDRESSEE. STEWART DOES NOT AUTHORIZE THE DISCLOSURE OF THIS COMMUNICATION TO ANY THIRD PARTIES WITHOUT ITS PRIOR WRITTEN CONSENT.

References:
Bulletins Replaced: None
Related Bulletins: None
Underwriting Manual: None
Exceptions Manual: None
Forms: One
Attachments: One

Purchaser's/Mortgagor's Affidavit
Home Equity Theft Prevention Act

Title Number: _____
Date: _____

State of _____ }
County of _____ } ss:

The undersigned, does hereby swear, depose and state as follows:

I am not by virtue of this or any previous transaction an "Equity Purchaser" as such term is defined in the Home Equity Theft Prevention Act RPL 265-a for the reasons set below: (Please check as many as are applicable):

I will use the Premises set forth above as my primary residence.

___ I am ___ spouse, ___ parent, ___ grandparent, ___ child, ___ grandchild or ___ sibling of the Equity Seller or ___ such person's spouse.

___ I am the referee in a foreclosure sale conducted pursuant to Article 13 of the Real Property Actions and Proceedings Law.

___ The purchaser is a not-for-profit housing organization or a public housing agency.

___ The purchase is by order or judgment of a Court.

___ The purchase is authorized by statute.

I make this Affidavit in order to induce _____ and Stewart Title Insurance Company (hereinafter together referred to the "Companies") knowing they are relying upon the statements made herein, and are fully entitled to rely upon, the veracity of the statements herein contained as a basis for the issuance of the title policy under the Title Number referenced above and that they would not do so without this affidavit. I hereby agree to protect, defend, indemnify and hold the Companies forever harmless from any loss, liens, claims and costs (including, but not limited to courts costs, legal fees and expenses) which the Companies may incur as a result of the Companies' reliance upon this Affidavit.

Given under my hand and seal this ___ day of _____, 20___.

Sworn to before me this _____ day of _____, 20___.

Notary Public



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**McKINNEY'S 2006 SESSION LAW NEWS OF NEW YORK
229th Legislature**

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Additions are indicated by **Text**; deletions by
~~Text~~. Changes in tables are made but not highlighted.

CHAPTER 308
S. 4744-A

BANKS AND BANKING--REAL PROPERTY--HOME EQUITY THEFT PREVENTION ACT

Approved July 26, 2006, effective as provided in section 5

AN ACT to amend the banking law, the real property law and the real property actions and proceedings law, in relation to enacting the home equity theft prevention act

The People of the State of New York, represented in Senate and Assembly, do
enact as follows:

§ 1. Short title. This act shall be known and may be cited as the "home equity theft prevention act".

§ 2. Paragraphs (e), (f) and (g) of subdivision 1 of section 595-a of the banking law, paragraphs (e) and (f) as added by chapter 571 of the laws of 1986, paragraph (g) as added by chapter 445 of the laws of 1990, are amended and a new paragraph (h) is added to read as follows:

<< NY BANK § 595-a >>

(e) The improper refusal to issue a satisfaction of mortgage; ~~and~~

(f) Engaging in any transaction, practice, or course of business which operates a fraud upon any person in connection with the purchase or sale of any mortgage loan;

(g) Violation of section six-j of this chapter; and

(h) Making a mortgage loan, or indirectly or directly providing for the making of a mortgage loan, to an equity purchaser, as defined in section two hundred sixty-five-a of the real property law, if the mortgage banker, mortgage broker or exempt organization had knowledge that the equity purchaser was not complying with the provisions of section two hundred sixty-five-a of the real property law with respect to such transaction.

§ 3. The real property law is amended by adding a new section 265-a to read as follows:

<< NY REAL PROP § 265-a >>

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§ 265-a. Home equity theft prevention

1. (a) The legislature finds and declares that homeowners who are in default on their mortgages or in foreclosure may be vulnerable to fraud, deception, and unfair dealing by home equity purchasers. The recent rapid escalation of home values throughout urban and rural areas has resulted in a significant increase in home equity, which constitutes the greatest financial asset held by many homeowners of this state. 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.

(b) The legislature declares that it is the express policy of the state to preserve and guard the precious asset of home equity, and the social as well as the economic value of homeownership.

(c) The legislature further finds that equity purchasers may have a significant impact upon the economy and well-being of this state and its local communities, and therefore the provisions of this section are necessary to promote the public welfare.

(d) The intent and purposes of this section are to provide a homeowner with information necessary to make an informed and intelligent decision regarding the sale or transfer of his or her home to an equity purchaser; to require that the sales agreement be expressed in writing; to safeguard equity sellers against deceit and financial hardship; to ensure, foster and encourage fair dealing in the sale and purchase of homes in foreclosure or default; to prohibit representations that tend to mislead; to prohibit or restrict unfair contract terms; to provide a cooling off period for equity sellers who enter into covered contracts; to afford equity sellers a reasonable and meaningful opportunity to rescind sales to equity purchasers; and to preserve and protect home equity for the homeowners of this state.

2. The following definitions shall apply to this section:

(a) "Bona fide purchaser or encumbrancer for value" means 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 to, 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.

(b) "Business day" means any calendar day except Sunday or the public holidays as set forth in section twenty-four of the general construction law.

(c) "Covered contract" means any contract, agreement, or arrangement, or any term thereof, between an equity purchaser and equity seller which:

(i) is incident to the sale of a residence in foreclosure; or

(ii) is incident to the sale of a residence in foreclosure or default where such contract, agreement or arrangement includes a reconveyance arrangement.

For purposes of this section, any reference to the "sale" of a residence by an equity seller to an equity

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purchaser shall include a transaction where an equity seller receives consideration from the equity purchaser, and a transaction involving a transfer of title to the equity purchaser where no consideration is provided to the equity seller.

(d) "Default" means that the equity seller is two months or more behind in his or her mortgage payments.

(e) "Equity purchaser" means any person who acquires title to any residence in foreclosure or, where applicable, default, or his or her representative as defined in this subdivision, except a person who acquires such title as follows:

(i) to use, and who uses, such property as his or her primary residence;

(ii) by a deed from a referee in a foreclosure sale conducted pursuant to article thirteen of the real property actions and proceedings law;

(iii) at any sale of property authorized by statute;

(iv) by order or judgment of any court;

(v) from a spouse, or from a parent, grandparent, child, grandchild or sibling of such person or such person's spouse;

(vi) as a not-for-profit housing organization or as a public housing agency; or

(vii) a bona fide purchaser or encumbrancer for value.

(f) "Equity seller" means a natural person who is a property owner or homeowner at the time of the equity sale.

(g) "Foreclosure" means that there is an active lis pendens filed in court pursuant to article thirteen of the real property actions and proceedings law against the subject property, or the subject property is on an active property tax lien sale list.

(h) "Property owner" or "homeowner" means any or all record title owners of the residential real property in foreclosure or, where applicable, default at the time of the equity sale.

(i) "Reconveyance arrangement" means:

(i) the transfer of title to residential real property by an equity seller who is in default or foreclosure, either by transfer of interest from an equity seller to an equity purchaser or by creation of a mortgage or other lien or encumbrance during the time of default or foreclosure that allows the equity purchaser to obtain legal or equitable title to all or part of the property, and

(ii) the subsequent conveyance, or promise of a subsequent conveyance, of an interest back to the equity seller by the equity purchaser that allows the equity seller to regain possession of the property, which interest shall include but not be limited to a purchase agreement, option to purchase, or lease.

(j) "Representative" means a person who in any manner solicits, induces, arranges, or causes any equity seller to transfer title or solicits any member of the equity seller's family or household to induce or cause any equity seller to transfer title to the residence in foreclosure or, where applicable, default to the equity purchaser.

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(k) "Residence" and "residential real property" means residential real property consisting of one- to four-family dwelling units, one of which the equity seller occupies or occupied at a time immediately prior to the equity sale as his or her primary residence.

3. Every covered contract and notice of cancellation attached thereto shall be written in letters of a size equal to at least twelve-point bold type, in English or in both English and Spanish if Spanish is the primary language of the equity seller, and shall be fully completed and signed and dated by the equity seller and equity purchaser. Any instrument of conveyance shall become effective no sooner than midnight of the fifth business day after the date on which the covered contract is executed.

4. All covered contracts shall contain the entire agreement of the parties and shall include, but not be limited to, the following terms:

(a) The name, business address, and the telephone number of the equity purchaser;

(b) The address of the residence in foreclosure or, where applicable, default;

(c) The total consideration to be given by the equity purchaser in connection with or incident to the sale;

(d) A complete description of the terms of payment or other consideration including, but not limited to, any services of any nature which the equity purchaser represents he or she will perform for the equity seller before or after the sale;

(e) The time, if any, at which physical possession of the residence is to be transferred to the equity purchaser and the residence vacated by the equity seller;

(f) The terms of any rental or lease agreement;

(g) The terms of any reconveyance arrangement;

(h) A notice of cancellation as provided in paragraph (a) of subdivision six of this section; and

(i) The following notice shall appear on the contract in immediate proximity to the space reserved for the equity seller's signature and shall be in at least fourteen-point bold type if the covered contract is printed or in capital letters if the covered contract is typed. The notice must contain the name of the equity purchaser and the date and time by which the covered contract must be cancelled. The notice shall be completed by the equity purchaser:

"NOTICE REQUIRED BY NEW YORK LAW

You may cancel this contract at any time before midnight of _____.
(Date)

(Name of Equity Purchaser)

or anyone working for _____ CANNOT ask you to
(Name of Equity Purchaser)

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sign or have you sign any deed or any other document until your right to cancel this contract has ended. See attached notice of cancellation form for an explanation of this right. You should always consult an attorney or community organization before signing any legal documents concerning your home. It is advisable that you find your own attorney, and not consult with an attorney who has been provided to you by the purchaser. The law requires that this contract contain the entire agreement. You should not rely upon any other written or oral agreement or promise."

The equity purchaser shall accurately enter the date on which the right to cancel ends. The covered contract required by this section shall survive delivery of any instrument of conveyance of the residence in foreclosure or, where applicable, default, and shall have no effect on persons other than the parties to the covered contract.

5. (a) In addition to the right of rescission described in subdivision eight of this section, the equity seller has the right to cancel any covered contract with an equity purchaser until midnight of the fifth business day following the day on which the equity seller and equity purchaser sign a covered contract that complies with this section.

(b) Cancellation occurs when the equity seller, or a representative of the equity seller, personally delivers written notice of cancellation to the address specified in the covered contract or sends a letter via facsimile or other means of written communication, United States mail, or through an established commercial letter delivery service, indicating cancellation to the business address of the equity purchaser listed on the covered contract. Proof of facsimile delivery or proof of mailing creates a presumption that the notice of cancellation has been delivered.

(c) A notice of cancellation given by the equity seller pursuant to paragraph (a) of this subdivision need not take the particular form as provided with the covered contract and, however expressed, is effective if it indicates the intention of the equity seller not to be bound by the covered contract.

(d) Within ten days following receipt of a notice of cancellation given in accordance with this subdivision, the equity purchaser shall return without condition any original covered contract and any other documents signed by the equity seller as well as any fee or other consideration received by the equity purchaser from the equity seller. Cancellation of the contract shall release the equity seller of all obligations to pay fees to the equity purchaser.

6. (a) The covered contract shall be accompanied by a form completed by the equity purchaser in duplicate, captioned "notice of cancellation" in at least twelve-point bold type if the covered contract is printed or in capital letters if the covered contract is typed. This form shall be attached to the covered contract, shall be easily detachable, and shall contain in type of at least twelve-point if the covered contract is printed or in capital letters if the covered contract is typed, the following statement written in the same language as used in the covered contract:

"NOTICE OF CANCELLATION

This contract was entered into on _____
(Enter date covered contract signed)

You may cancel this contract for the sale of your house, without any penalty or obligation, at any time before midnight of _____.

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(Enter date)

To cancel this transaction, personally deliver a signed and dated copy of this cancellation notice, or send it by facsimile, United States mail, or an established commercial letter delivery service, indicating cancellation to _____

_____, at
(Name of purchaser)

(Street address of purchaser's place of business and facsimile number if any)

NOT LATER THAN midnight of _____.
(Enter date)

If you wish to cancel this contract, sign and date both copies and return one copy immediately to the purchaser. I hereby cancel this transaction.

_____/ _____"
(Seller's signature) (Date)

(b) The equity purchaser shall provide each equity seller with two copies of the covered contract and attached notice of cancellation. The equity purchaser shall accurately enter the date on which the right to cancel ends.

7. (a) Before midnight of the fifth business day after the date on which the covered contract is executed, the equity purchaser shall not do any of the following:

(i) accept from any equity seller an execution of, or induce any equity seller to execute, any instrument of conveyance of any interest in the residence in foreclosure or, where applicable, default;

(ii) record with the county clerk any document, including, but not limited to, any instrument of conveyance, signed by the equity seller;

(iii) transfer or encumber or purport to transfer or encumber any interest in the residence in foreclosure or, where applicable, default to any third party;

(iv) pay the equity seller any consideration; or

(v) suggest, encourage, or provide any form which allows the equity seller to waive his or her right to cancel or rescind under this section.

(b) An equity purchaser shall make no false or misleading statement regarding the value of the residence in foreclosure or, where applicable, default; the amount of proceeds the equity seller will receive after a

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foreclosure sale; the timing of the judicial foreclosure process; any contract term; the equity seller's rights or obligations incident to or arising out of the sale transaction; the nature of any document which the equity purchaser induces the equity seller to sign; or any other false or misleading statement concerning the sale of the residence in foreclosure or, where applicable, default, or concerning the reconveyance arrangement.

(c) An equity purchaser is prohibited from representing, directly or indirectly, that:

(i) the equity purchaser is acting as an advisor or a consultant, or in any other manner represents that the equity purchaser is acting on behalf of the equity seller;

(ii) the equity purchaser has certification or licensure that the equity purchaser does not have, or that the equity purchaser is not a member of a licensed profession if he or she is actually such a member;

(iii) the equity purchaser is assisting the equity seller to save the house unless the equity purchaser has a good faith basis for the representation; or

(iv) the equity purchaser is assisting the equity seller in preventing a completed foreclosure unless the equity purchaser has a good faith basis for the representation.

(d) It is unlawful for any equity purchaser to initiate, enter into, negotiate, or consummate any covered contract involving residential real property in foreclosure or, where applicable, default if such person, by the terms of such covered contract, takes unconscionable advantage of the equity seller.

8. (a) Any transaction involving residential real property in foreclosure or, where applicable, default which is in material violation of subdivision three, four, six, seven or eleven of this section is voidable and the transaction may be rescinded by the equity seller within two years of the date of the recording of the conveyance of the residential real property in foreclosure or, where applicable, default.

(b) Such rescission shall be effected by giving written notice to the equity purchaser and his or her successor in interest, if the successor is not a bona fide purchaser or encumbrancer for value as set forth in paragraph (c) of this subdivision, and by recording such notice with the county clerk of the county in which the property is located, within two years of the date of the recording of the conveyance to the equity purchaser. The notice of rescission shall contain the name of the equity seller and the name of the equity purchaser in addition to any successor in interest holding record title to the residential real property and shall particularly describe such residential real property. The equity purchaser and his or her successor in interest if the successor is not a bona fide purchaser or encumbrancer for value as set forth in paragraph (c) of this subdivision, shall have twenty days after the delivery of the notice in which to reconvey title to the property free and clear of encumbrances created subsequent to the rescinded transaction and which are due to the actions of the equity purchaser. As a condition of the reconveyance of title, the equity seller shall return to the equity purchaser any consideration received from the equity purchaser as part of the original transaction. Upon failure to reconvey title within such time, the equity seller may bring an action to enforce the rescission and for cancellation of the covered contract and deed.

(c) The provisions of this subdivision shall not affect the interest of a bona fide purchaser or encumbrancer for value if such purchase or encumbrance occurred prior to the recording of the notice of rescission pursuant to paragraph (b) of this subdivision. Knowledge that the property was residential real property in foreclosure or, where applicable, default shall not impair the status of such persons or entities as bona fide purchasers or encumbrancers for value. This subdivision 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.

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(d) In any action brought to enforce a rescission pursuant to this section, a court may award to a prevailing equity seller costs and reasonable attorneys' fees.

9. An equity seller may bring an action for the recovery of damages or equitable relief against an equity purchaser for a violation of subdivision three, four, six, seven or eleven of this section. A court may award to a prevailing equity seller actual damages plus reasonable attorneys' fees and costs. In addition, the court may award equitable relief, or increase the award in an amount not to exceed three times the equity seller's actual damages, or both, if the court deems such award proper. Any action brought pursuant to this section shall be commenced within six years after the date of the alleged violation.

10. (a) (i) Any equity purchaser who, with intent to defraud, violates subdivision seven of this section or engages in any practice which would operate as a criminal fraud or deceit upon an equity seller shall, upon conviction, be guilty of a class E felony and subject to a fine of not more than twenty-five thousand dollars, imprisonment in accordance with the penal law, or both.

(ii) Any equity purchaser who knowingly violates subdivision seven of this section shall, upon conviction, be guilty of a class A misdemeanor and subject to a fine of not more than twenty-five thousand dollars, imprisonment in accordance with the penal law, or both. A second offense within five years shall be a class E felony and subject to a fine of not more than twenty-five thousand dollars, imprisonment in accordance with the penal law, or both.

(b) An equity purchaser who, when acting in good faith, violates subdivision seven of this section, shall not be deemed to have violated such subdivision if the equity purchaser:

(i) establishes by a preponderance of the evidence that the compliance failure was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid such errors;

(ii) notifies the equity seller within ninety days of the contract date of the compliance failure; and

(iii) makes appropriate restitution to the equity seller and appropriate adjustments to the transaction within ninety days of the contract date. Examples of bona fide errors include, but are not limited to, clerical, calculation, computer malfunction and programming, and printing errors. An error of legal judgment with respect to a person's obligations under this section is not a bona fide error, nor is a failure to provide notices or other material information required by this section.

11. (a) In 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, which may be overcome by clear and convincing evidence to the contrary, and that the purported absolute conveyance is a mortgage.

(b) An equity purchaser shall not enter into a reconveyance arrangement unless:

(i) The equity purchaser verifies by appropriate documentation that the equity seller has or is likely to have a reasonable ability to pay for the subsequent conveyance of an interest back to the equity seller. In the case of a lease with an option to purchase, payment ability also includes the reasonable ability to purchase the property within the term of the option to purchase. There is a rebuttable presumption that the equity purchaser has not verified reasonable payment ability if the equity purchaser has not obtained documents other than a statement by the equity seller of assets, liabilities and income. The standard for determining a reasonable ability to pay shall be the same standard as set forth in paragraph (k) of subdivision two of

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section six-1 of the banking law;

(ii) the equity purchaser and the equity seller complete a closing for any reconveyance arrangement in which the equity purchaser obtains a deed or mortgage from an equity seller. For purposes of this section, "closing" means an in-person meeting to complete final documents incident to the sale of the real property or creation of a mortgage on the real property conducted by an attorney who is not employed by or an affiliate of the equity purchaser;

(iii) the equity purchaser obtains the written consent from the equity seller before the equity purchaser grants any interest in the property to anyone else during such time as the equity seller maintains an interest in the property, including an option to repurchase; and

(iv) the equity purchaser notifies all existing mortgage lien holders of his or her intent to accept conveyance of an interest in the property from the equity seller, and fully complies with all terms and conditions contained in the mortgage lien documents, including but not limited to due-on-sale provisions or meeting all qualification requirements for assuming the repayment of the mortgage.

(c) An equity purchaser shall not enter into repurchase or lease terms as part of the reconveyance arrangement that are unfair or commercially unreasonable, and is prohibited from engaging in any other unfair or unconscionable conduct.

(d) As part of a reconveyance arrangement, an equity purchaser shall either:

(i) ensure that title to the residence is reconveyed to the equity seller; or

(ii) make a payment to the equity seller such that the equity seller has received consideration in an amount of at least eighty-two percent of the fair market value of the property within one hundred twenty days of either the eviction or voluntary relinquishment of possession of the residence by the equity seller. The equity purchaser shall make a detailed accounting of the basis for the payment amount, or a detailed accounting of the reasons for failure to make a payment, including providing written documentation of expenses, within such one hundred twenty-day period. The accounting shall be on a form prescribed by the banking department. For purposes of this subparagraph, the following applies:

(A) there is a rebuttable presumption that an appraisal by a person licensed or certified by an agency of the federal government or this state to appraise real estate establishes the fair market value of the property;

(B) the time for determining the fair market value amount shall be determined in the reconveyance arrangement as either at the time of the execution of the reconveyance arrangement or at resale to a bona fide purchaser. If the covered contract states that the fair market value shall be determined at the time of resale, the fair market value shall be the resale price if it is sold within one hundred twenty days of the eviction or voluntary relinquishment of the property by the equity seller. If the covered contract states that the fair market value shall be determined at the time of resale, and the resale is not completed within one hundred twenty days of the eviction or voluntary relinquishment of the property by the equity seller, the fair market value shall be determined by an appraisal conducted within ten days after the end of such one hundred twenty-day period and payment, if required, shall be made to the equity seller. If payment is not made to the equity seller at such time, the fair market value shall be recalculated as the resale price on resale and payment shall be made to the equity seller within fifteen days of resale. A detailed accounting of the basis for the payment amount shall be made within fifteen days of resale, including providing written documentation of expenses. The accounting shall be on a form prescribed by the banking department;

(C) "consideration" shall mean any payment or thing of value provided to the equity seller, including

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unpaid lease payments owed by the equity seller prior to the date of eviction or voluntary relinquishment of the property, reasonable costs paid to third parties necessary to complete the reconveyance transaction, payment of money to satisfy a debt or legal obligation of the equity seller or the reasonable cost of repairs for damage to the dwelling caused by the equity seller beyond ordinary wear and tear; but shall not include amounts imputed as any fee paid directly or indirectly to the equity purchaser, or his or her representative, incident to a reconveyance arrangement, except for reasonable costs paid to third parties necessary to complete the reconveyance.

(D) "resale" means a bona fide market sale of the property subject to the reconveyance arrangement by the equity purchaser to an unaffiliated third party.

(E) "resale price" means the purchase price of the property on resale.

(e) This subdivision 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 default.

(f) All deeds or conveyances subject to a reconveyance arrangement shall state explicitly on the face of the document that the conveyance is subject to a reconveyance arrangement, and shall state the terms of the reconveyance arrangement. Moreover, all reconveyance arrangements must be simultaneously recorded by the equity purchaser with the subject deed in the county clerk's office where the property is located.

12. Any provision of a covered contract which attempts or purports to limit the liability of the equity purchaser under this section shall be null and void. Inclusion of such provision shall at the option of the equity seller render the covered contract void. The equity purchaser shall be liable to the equity seller for all damages proximately caused by such provision. Any provision in a covered contract which attempts or purports to require arbitration of any dispute arising under this section shall be void at the option of the equity seller.

13. In addition to the other remedies provided, whenever there shall be a violation of this section, application may be made by the attorney general in the name of the people of the state of New York to a court or justice having jurisdiction by a special proceeding to issue an injunction, and upon notice to the defendant of not less than five days, to enjoin and restrain the continuance of such violations; and if it shall appear to the satisfaction of the court or justice that the defendant has, in fact, violated this section, an injunction may be issued by such court or justice, enjoining and restraining any further violation, without requiring proof that any person has, in fact, been injured or damaged thereby. In any such proceeding, the court may make allowances to the attorney general as provided in paragraph six of subdivision (a) of section eighty-three hundred three of the civil practice law and rules, and direct restitution. Whenever the court shall determine that a violation of this section has occurred, the court may impose a civil penalty of not more than twenty-five thousand dollars for each violation. In connection with any such proposed application, the attorney general is authorized to take proof and make a determination of the relevant facts and to issue subpoenas in accordance with the civil practice law and rules.

14. This section shall not apply to a prior lien holder where the lien was properly recorded prior to the execution of any covered contract by both the equity seller and the equity purchaser nor shall any provision of this section be deemed to impair any equity or other available rights of any such prior lien holder.

15. The provisions of this section shall be liberally construed to effectuate the intent and to achieve the purposes set forth in subdivision one of this section.

16. The provisions of this section are not exclusive and are in addition to any other requirements, rights, remedies, and penalties provided by law.

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17. Any waiver of the provisions of this section shall be void and unenforceable as contrary to the public policy.

18. If any provision of this section, or if any application thereof to any person or circumstances is held unconstitutional, the remainder of this section and the application of its provisions to other persons and circumstances shall not be affected thereby.

§ 4. The real property actions and proceedings law is amended by adding a new section 1303 to read as follows:

<< NY RP ACT & PRO § 1303 >>

§ 1303. Foreclosures; required notices

1. The foreclosing party in a mortgage foreclosure action shall provide notice to the mortgagor in accordance with the provisions of this section with regard to information and assistance about the foreclosure process.

2. The notice required by this section shall be delivered with the summons and complaint to commence a foreclosure action. The notice required by this section shall be in bold, fourteen-point type and shall be printed on colored paper that is other than the color of the summons and complaint, and the title of the notice shall be in bold, twenty-point type. The notice shall be on its own page.

3. The notice required by this section shall appear as follows:

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 non-profit 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 tollfree 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.

4. The banking department shall prescribe the telephone number and web address to be included in the notice.

5. The banking department shall post on its website or otherwise make readily 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 tollfree help-line to disseminate the information required by this section.

§ 5. This act shall take effect February 1, 2007 and shall apply to any covered contract entered into on or after such date.

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ALERT

NEW STATUTE - FORECLOSURES TO BECOME MORE PERILOUS IN NEW YORK

Mortgage servicers know all too well that New York is a tough, litigious state in which to prosecute a mortgage foreclosure action. Beginning on February 1, 2007, the potential for more difficulty will increase when the “Home Equity Theft Prevention Act” becomes effective.

Sadly, there are scam artists out there who approach people in foreclosure and find ways to purchase the property and take the equity for themselves - outrageous and despicable of course. In an attempt to prevent these events which occur in only a small minority of cases, the new law creates obligations upon someone buying the property to give warnings and disclosures as well as opportunities to rescind the contract of sale. (The statute is lengthy and detailed.) While all this presents major title company issues, the part relating to foreclosures comes at the end with creation of a new provision of the foreclosure statute (RPAPL §1303).

Here is the imposition and the problem. The foreclosing party is mandated to provide a notice to the mortgagor regarding certain information and assistance about the foreclosure process. This notice must be delivered with the summons and complaint and must be in bold *fourteen-point* type. Still further, it must be printed on colored paper that is other than the color of the summons and complaint. In addition, the title of the notice must be in bold *twenty-point* type.

This notice must be on its own separate page and the language to be included is recited in the statute. (It includes mention of consultation with governmental agencies.)

How certain denominated governmental offices are going to be of help to people in foreclosure (which may violate the Fair Debt Collection Practices Act in any event) is puzzling. Why this notice is even necessary when the statute already requires other notices is likewise perplexing - but there it is. The real difficulty, and servicers can see this one coming, is that borrowers bent on slowing up or defeating the foreclosure will now be empowered to claim (either

during the course of the foreclosure action or after the foreclosure sale) that they never got any such notice. Or they will say that while they got a notice, the type was too small or the page was not of a different color and so they were confused.

Although it seems doubtful that a court would void a foreclosure for such an inconsequential irregularity, one can never be sure. At the very least the statute will provide a basis for yet another attempt to slow-up a foreclosure action. It is certainly unwelcome but it is a statute which obviously must be complied with.

Mr. Bergman, author of the three-volume treatise, *Bergman on New York Mortgage Foreclosures*, Matthew Bender & Co., Inc. (rev. 2006) is a partner with Berkman, Henoch, Peterson & Peddy, P.C. in Garden City, New York. He is also a member of the USFN, The American College of Real Estate Lawyers, The American College of Mortgage Attorneys and an adviser to the New York Times on foreclosure issues.



For further information on this subject, or to add a colleague to the alert list, contact Bruce Bergman at the main phone number listed, directly at (516) 780-0324 or by e-mail at b.bergman@bhpp.com.

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