

STATUTES REGARDING FORECLOSURE AND MORTGAGE RESCUE TRANSACTIONS

Approximately nine states have enacted legislation over the past three years to regulate foreclosure consultants and foreclosure purchasers (exclusive of third party purchasers at a foreclosure sale). Some states have enacted mortgage fraud legislation which is outside the scope of this summary. For example, on May 5, 2005, Georgia became the first state to criminalize mortgage fraud when the Georgia Residential Mortgage Fraud Act (“the Act”) was signed into law. Since the passage of the Georgia Residential Mortgage Fraud Act, many states have introduced legislation aimed at preventing mortgage fraud in general. Generally, the bills fall into one of three categories: those similar to the Georgia law, those significantly different from Georgia and those that provide a private right of action. See, e.g., Arizona, Florida, Michigan, Minnesota, Mississippi, Missouri, New Jersey, Nevada and Texas. Some variations in these states’ bills include requiring a person convicted of mortgage fraud to pay restitution to the victim; creating a “mortgage lending fraud protection fund”; requiring the Attorney General to develop mortgage fraud prosecution guidelines; and providing optional disclosures to borrowers and third parties stating that mortgage fraud is a criminal offense.¹

Rather than enacting general mortgage fraud legislations, some states that have enacted specific legislation regarding foreclosure consultants (aka “distressed property consultants” in Illinois) and foreclosure purchasers. In some states, e.g., Minnesota, there is an overlap. The states with specific legislation regarding foreclosure consultants and purchasers are²:

1. California – California Civil Code Sections 2945, et seq.
2. Colorado – Colorado Revised Statutes Sections 6-1-1102, et seq.
3. Illinois – Illinois Compiled Statutes, Chapter 765, Sections 940/5, et seq.
4. Indiana – Indiana Revised Statutes Sections 24-5.5-2-2, et seq.
5. Maryland – Maryland Real Property Code Sections 7-301, et seq.
6. Minnesota – Minnesota Revised Statutes Chapter 325N.
7. Missouri – Missouri Revised Statutes Chapter 407, 407.935, et seq.
8. New Hampshire – New Hampshire Revised Statutes Sections 479-B:1, et seq.
9. Rhode Island – Rhode Island Revised Statutes Chapter 79, Sections 5-79-1, et seq.

Ohio and Massachusetts are likely to enact legislation in the short term. Massachusetts recently implemented an outright, temporary ban on foreclosures.

¹ Mortgage Bankers Association Data (Chris Oswalt) through July 2007.

² This summary does not address the general foreclosure statutes of the various states. Additionally, there may be some states with statutes that cover some of the topics that are the subject of this summary, but which are not set forth as separate statutes particularly designed to address “mortgage rescue” operations.

<p>B. General Requirements:</p>	<ol style="list-style-type: none"> 4. A prejudgment or post-judgment lien creditor of the homeowner; 5. A person licensed as a mortgage banker or mortgage broker while engaged in any activity for which the person is licensed under the pertinent state statute; 6. A person licensed as a real estate broker, associate real estate broker, or real estate salesperson, while engaged in any activity for which the person is licensed under the pertinent state statute; 7. A nonprofit organization or government entity that offers counseling or advice to homeowners in foreclosure or loan default, if the organization is not directly or indirectly related to and does not contract for services with for-profit lenders, foreclosure consultants, or pre-foreclosure purchasers; or 8. A creditors' committee or trustee participating in a plan of reorganization or repayment through a proceeding under the jurisdiction of the United States Bankruptcy Court. <ol style="list-style-type: none"> 1. Provides limits on when, from whom, and how much compensation foreclosure consultants may receive, and generally precludes any advance demand for compensation. For example, the fee is limited to an amount equal to two monthly mortgage payments. 2. Generally limited to residential properties consisting of 1 – 4 residential units. 3. Requires a writing with delineation regarding font, language, pages, etc. 4. Requires a full disclosure of the nature and extent of the foreclosure consulting services. 5. May prohibit the Foreclosure Consultant from acquiring interest in residence in foreclosure. 6. May limit ability to otherwise contract with the owner. 7. Generally provides a right to cancel. <ol style="list-style-type: none"> a. California: 3 day right to cancel. b. Colorado: Any time. c. Illinois: Any time until after the distressed property consultant has fully performed each service. d. Indiana: 7 days e. Maryland: Any time. f. Minnesota: 3 days. g. Missouri: 3 days. h. New Hampshire: 5 days.
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transfer to bona fide third party purchaser.

4. May limit the consideration to be paid or payment obligations, and preclude any reconveyance agreements in which the existing liens are not paid.

a. California: No reference.

b. Colorado: No reference. All liens must be paid and purchase may not be unconscionable.

c. Illinois: Generally 82% of FMV or elimination of all debt so long as repurchase does not exceed 125% of purchaser's costs.

d. Indiana: 66% of net proceeds to homeowner if sold within 18 months.

e. Maryland: 82% of net proceeds to homeowner if sold within 18 months of conveyance.

f. Minnesota: 82% of net proceeds to homeowner if sold within 15 months of conveyance.

g. Missouri: No reference.

h. New Hampshire: 90% of net proceeds to homeowner if sold within 36 months of conveyance.

i. Rhode Island: No reference.

j. CPA: 82% of net proceeds to homeowner if sold within 18 months.

5. Lease Option Restrictions: Most contain restrictions on entering into a lease with option to purchase arrangement unless the homeowner meets an "ability to pay" standard, with a rebuttable presumption that the homeowner has the ability to pay if certain criteria are met.

a. California: N/A. Precludes foreclosure consultant from purchasing. Doesn't appear to address third party, pre-foreclosure purchasers.

b. Colorado: "Reasonable ability to pay" requirement with presumption that the homeowner has such ability if at 60% debt to income ratio.

c. Illinois: "Reasonable ability to pay" requirement, with presumption that that ability to pay was unreasonable if no backup documentation.

d. Indiana: "Reasonable ability to pay" requirement.

e. Maryland: "Reasonable ability to pay" requirement with presumption that the homeowner has such ability if at 60% debt to income ratio.

f. Minnesota: "Reasonable ability to pay" requirement with presumption that the homeowner has such ability if at 60% debt to income ratio.

g. Missouri: Pertains only to Foreclosure Consultants, who may not purchase.

h. New Hampshire: "Reasonable ability to pay" requirement, with no rebuttable

presumption

- i. Rhode Island: Pertains only to Foreclosure Consultants, who may not purchase.
- j. CPA: "Reasonable ability to pay" requirement with presumption that the homeowner has such ability if at 60% debt to income ratio.

Repurchase Rights:

- a. California: N/A. Precludes foreclosure consultant from purchasing. Doesn't appear to address third party, pre-foreclosure purchasers.
- b. Colorado: Presumption that if the option right to repurchase exceeds by 25% the purchase price, the transaction was unconscionable.
- c. Illinois: 82% of FMV and repurchase not exceeding by 25% the purchase price.
- d. Indiana: May not be unconscionable.
- e. Maryland: May not be unconscionable.
- f. Minnesota: May not be unfair or commercial unreasonable.
- g. Missouri: Pertains only to Foreclosure Consultants, who may not purchase.
- h. New Hampshire: No reference. Any subsequent sale must be at a bona fide market sale.
- i. Rhode Island: Pertains only to Foreclosure Consultants, who may not purchase.
- j. CPA: Open.

6. Generally requires full or formal Settlement and Settlement Agreement at time of both conveyances. "Formal settlement" generally means an in-person, face-to-face meeting with the homeowner to complete final documents incident to the sale or transfer of real property, or the creation of a mortgage or equitable interest in real property, conducted by a settlement agent who is not employed by or an affiliate of the foreclosure purchaser, during which the homeowner must be presented with a completed copy of the HUD-1 settlement form.

7. Penalties: Civil and Criminal penalties and fines similar to Foreclosure Consultants.

8. Some requirements of a post-conveyance accounting if any reconveyance to a third party.

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