

## **LAW REVIEW**

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### **HELPING HOMEOWNERS IN FORECLOSURE**

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My phone is ringing off the hook with foreclosure questions. Too many homeowners are “under water,” meaning the amount of their loans is greater than the value of the home—not a good situation.

In a future column we will explain some of the available options such as “short sales,” deeds-in-lieu of foreclosure, and “walk-aways” where the homeowner-borrower stops making mortgage payments. Each has different benefits, risks, credit consequences and tax liabilities.

When people are in need, there will be those who want to help--and others who want to take advantage. Today's column discusses two California laws that effect borrowers whose residences are in foreclosure, who are as the Civil Code recites, “subject to fraud, deception, harassment, and unfair dealing.”

If you are helping someone whose home is in foreclosure or would like to buy a home in foreclosure, possibly get a good deal, listen up.

#### **Foreclosure Consultants**

Civil Code section 2945 broadly defines a Foreclosure Consultant as anyone who assists or offers to assist a homeowner in foreclosure, which means a Notice of Default (step one in a foreclosure) has been recorded. “Assisting” includes contacting the lender on behalf of the homeowner, offering to stop or

postpone the foreclosure sale, assisting the homeowner to obtain a restructured or modified loan or just offering to help the homeowner in foreclosure after a Notice of Default has been recorded.

Because of abuse by so-called foreclosure consultants, Foreclosure Consultant contracts must be in writing and must contain a 3-day right of termination (5 days as of July 1, 2009). The contract between the homeowner and the Foreclosure Consultant must have special notices, including a notice to the homeowner that the Foreclosure Consultant may not take any money in advance until they have completely finished everything they are required to do under the foreclosure assistance contract. The law includes stiff civil penalties. A violation may result in imprisonment for up to a year. Non-exempt Foreclosure Consultants (see below) must be bonded as of July 1, 2009.

#### Foreclosure Consultant Exemptions

Here's the catch/loophole. There is a list of significant exemptions from the definition of Foreclosure Consultant, which includes: attorneys, residential mortgage lenders, banks, insurance companies, title and escrow companies, and DRE-licensed brokers and agents, provided that no licensed real estate broker or agent may be paid foreclosure consulting fees up front.

If you are not on the exempt list, you are a Foreclosure Consultant. Most importantly, real estate agents assisting residential borrowers, even though technically not Foreclosure Consultants under the code, may not be paid in advance for providing foreclosure consulting services. Any real estate agent assisting with a residential foreclosure must affiliate with a lawyer (or other

exempt person) to receive advance fees. I guess our lobby is more powerful than yours.

### Home Equity Purchases

With declining prices and potentially good deals on the market you might be tempted to purchase a home in foreclosure as an investment. There is nothing wrong with that, except that the California Legislature assumes you are trying to take advantage of the poor, unfortunate homeowner who is unable to keep current on his/her loan. Read Civil Code section 1695 governing Home Equity Purchases.

A home equity purchase occurs when an owner-occupied, 1-4 unit residential property in foreclosure (Notice of Default recorded) is purchased for rental, investment or dealer purposes by a buyer—called an equity purchase investor. If you are buying to live in the home you are not subject to the law.

A Home Equity Purchase contract must be printed in at least 10-pt. bold type and must contain specified notices to the seller, including a 5-day right to cancel. Failure to use the correct form subjects the home equity buyer and any participating real estate agent to liability for losses incurred by the seller-in-foreclosure, plus penalties. Real estate agents involved in negotiating a home equity purchase must disclose they are licensed. The code requirement that such a real estate agent must be bonded was thrown out by the courts. If a purchase of a residential property in foreclosure is unconscionable, there is a 2-year right of rescission.

So if you are part of a “short sale” transaction where you are buying from the homeowner in foreclosure for an investment and the lender is reducing the loan amount, you must use a Home Equity Purchase contract.

#### Win-Win

Bottom line, working with a homeowner in foreclosure can be beneficial for the homeowner and the buyer—the proverbial win-win; however, the Legislature has set a few trip-wires you need to navigate around.

As always, the California Association of Realtors has good forms for Home Equity Purchases.

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