

FINAL BILL REPORT

HB 2791

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Synopsis as Enacted

Brief Description: Concerning distressed home conveyances.

Sponsors: By Representatives Lantz, Rodne and Kelley; by request of Attorney General.

House Committee on Judiciary

Senate Committee on Consumer Protection & Housing

Background:

Credit Services Organization Act and Equity Skimming Laws.

Certain practices involving foreclosure of real property are governed by Washington law. The Credit Services Organization Act (CSOA) applies to any company that performs, or claims it performs, certain services for a person such as stopping, preventing, or delaying a foreclosure, in return for a fee or some other consideration. The CSOA requires licensing and bonding of certain credit service organizations, requires a written contract with a right of cancellation, and makes a violation of the CSOA a Consumer Protection Act (CPA) violation.

"Equity skimming" practices are used to obtain title to properties for the purpose of either taking the equity out of the property or obtaining rents or payments on the property without satisfying any of the underlying obligations that may exist on the property. For example, a person induces a homeowner who is in financial distress to deed the property to the person, with the assurance that the person will assume the underlying debt on the property. The person never assumes the debt, but instead rents or sells the property and diverts value from the property to his or her own personal use. The property is eventually foreclosed. In Washington, equity skimming is a class B felony and a violation of the CPA.

Consumer Protection Act.

Under the CPA, the Attorney General may 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 in his or her business or property by a CPA violation to bring a civil action to stop the violator from further actions and to recover actual damages, plus reasonable attorneys' fees. In addition, the court may award the plaintiff treble damages (three times the actual damages sustained) not to exceed \$10,000.

Foreclosure Rescue Transactions.

Homeowners who are late, or at risk of being late in their mortgage payments or have defaulted on their mortgage, may be approached with offers to assist them with their mortgage problems. Several types of assistance may be offered. First, a person may offer to buy the homeowner's house and allow the homeowner to continue to live there as a tenant. The buyer may make 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. This is commonly referred to as a sale-leaseback transaction. Second, a homeowner may be approached with an offer of a "foreclosure surplus sale." When a foreclosed house is auctioned off, the sale may bring more money than is due on the mortgage. That additional money is called "surplus equity." In a foreclosure surplus sale, the homeowner assigns his or her right to the surplus equity to the buyer for a lump sum. Third, other types of services may be offered to the homeowner. For instance, 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.

Summary:

The equity skimming laws are expanded to cover distressed home consultants and distressed home conveyances.

Distressed Home Consultants.

A distressed home consultant is: (1) a person 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; or (2) a person who systematically contacts property owners whose homes are in foreclosure or in danger of foreclosure. A property is "in danger of foreclosure" if: (1) the homeowner has defaulted on a mortgage or is at least 30 days delinquent on a loan secured by the property; or (2) the homeowner has a good faith belief that he or she is likely to default on the mortgage within four months due to lack of funds and the homeowner reports that belief to any one of a number of 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.

"Distressed home consultant" does not mean a financial institution, a nonprofit credit counseling service, a licensed attorney, a person subject to the mortgage loan servicing laws, or a licensed mortgage broker who procures a nonpurchase mortgage loan for the homeowner.

A distressed home consultant has a fiduciary duty to a distressed homeowner and must act in the homeowner's best interest, disclose all material facts to the homeowner, use reasonable care in performing his or her duties, and provide an accounting to the homeowner. Distressed home consultant transactions must be in writing and contain certain notice to the homeowner. A person may not waive any provisions governing distressed home transactions and distressed home conveyances.

Distressed Home Conveyances.

A distressed home conveyance is a transaction in which: (1) a foreclosed homeowner 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; or provides the foreclosed homeowner with an option to purchase the property at a later date; or promises the foreclosed homeowner an interest in, or portion of, the proceeds of any resale of the property.

A distressed home conveyance must be by written contract and the homeowner has a right to cancel the contract within five business days. The contract must be in at least 12 point boldface type, be in the same language principally used by the parties, and specify certain information, including: the total consideration to be provided by the purchaser in connection with or incident to the sale; a complete description of the terms of payment; the time at which possession is to be transferred to the purchaser; a complete description of the terms of any related agreement designed to allow the foreclosed homeowner to remain in the home; a complete description of the interest, if any, the foreclosed homeowner maintains in the proceeds of, or consideration to be paid upon, the resale of the property; the notice of right of cancellation; and notice that the purchaser cannot ask the foreclosed homeowner to sign any deed or other document until the right of cancellation has ended.

Cancellation occurs when the foreclosed homeowner delivers to the purchaser by any means a written notice of the cancellation. A notice of cancellation is not required to take a particular form, but the purchaser must attach a notice of cancellation form to the contract provided to the foreclosed homeowner.

A distressed home purchaser is prohibited from doing specific acts and practices listed in the bill. The purchaser must not enter into, or attempt to enter into, a distressed home conveyance unless the purchaser verifies and can demonstrate that the foreclosed homeowner has a reasonable ability to pay for the subsequent conveyance of an interest back to the foreclosed homeowner.

A purchaser must either: (1) ensure that title to the property has been reconveyed to the foreclosed homeowner; or (2) make payment to the foreclosed homeowner so that the foreclosed homeowner has received consideration in an amount of at least 82 percent of the fair market value of the property as of the date of the eviction or voluntary relinquishment of possession of the property by the foreclosed homeowner.

The purchaser must extinguish or assume all liens encumbering the distressed home immediately following the conveyance of the distressed home, and must close the conveyance in person before an independent third party authorized to conduct real estate closings within the state. The purchaser must not enter into repurchase or lease terms that are unfair or commercially unreasonable. The purchaser must not represent that he or she is acting as an advisor or consultant or acting on behalf of or in the interests of the foreclosed homeowner or acting to save the home or buy time. Other prohibitions are listed in the bill.

A violation of the act is a per se violation of the CPA. An action for violating the act may only be brought by a foreclosed homeowner against whom the violation was committed or by the Attorney General. In a private right of action under the CPA, the court may double or triple the damages award, subject to the statutory limit. However, if the court determines that the defendant acted in bad faith, the limit for doubling or tripling the damages award may be increased up to \$100,000. A claim for damages must be commenced within four years after the date of the alleged violation. A CPA action is in addition to any other remedy available. An action under the CPA does not affect the rights in the distressed home held by a distressed home purchaser for value under the act or other applicable law.

Unlawful Detainer Actions.

In any unlawful detainer action (eviction) under the Residential Landlord Tenant Act, the plaintiff to the action must disclose to the court whether the defendant/tenant previously held title to the property and explain how the plaintiff came to acquire title. When a defendant claims that the plaintiff acquired title through a distressed home conveyance, there must be an automatic stay of the unlawful detainer action and consolidation of the action with a pending or subsequent quiet title action. In addition, a defendant who previously held title to property that was a distressed home is not required to escrow any money pending trial when a material question of fact exists as to whether the plaintiff acquired title from the defendant directly or indirectly through a distressed home conveyance.

Votes on Final Passage:

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|--------|----|---|---------------------------|
| House | 96 | 0 | |
| Senate | 39 | 6 | (Senate amended) |
| House | | | (House refused to concur) |
| Senate | 46 | 3 | (Senate amended) |
| House | 97 | 0 | (House concurred) |

Effective: June 12, 2008