

HOME EQUITY THEFT PREVENTION ACT

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The "Home Equity Theft Prevention Act" (the "Act"), Chapter 308 of the Laws of 2006, signed into law on July 26, 2006 by then Governor Pataki, became effective on February 1, 2007. The Act amends Section 595 of the Banking Law ("Regulation of mortgage brokers, mortgage bankers and exempt organizations"), adds new Section 265-A ("Home Equity Theft Prevention") to the Real Property LAW ("RPL"), and adds new Section 1303 ("Foreclosures; required notices") to the Real Property Actions and Proceedings Law ("RPAPL").

The purpose of the Act is set forth in Chapter 308:

"The Legislature finds and declares that homeowners who are in default of their mortgages or in foreclosure may be vulnerable to fraud, deception, and unfair dealing by Home Equity Purchasers...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".

RPL Section 265-A applies when a natural person (an "Equity Seller") having a record title interest in, and his or her primary residence at, property improved by a one-to-four family dwelling ("Residential Real Property" or "Residence") enters into an agreement (a "Covered Contract") with a person (who can be other than a natural person) or his or her representative (an "Equity Purchaser") to acquire title to the Residence when the Residence is (a) in "Foreclosure" or (h) the Residence is in "Foreclosure" or the Equity Seller is in "Default" (two or more months behind in his or her mortgage payments) and (as to ("b")) the Covered Contract includes a "Reconveyance Arrangement".

A Residence is in "Foreclosure" when a notice of pendency is filed in an action under RPAPL Article 13 or the Residence is on an active tax lien sale list.

A Reconveyance Arrangement is an agreement for an Equity Purchaser to reconvey an interest in the Residence back to the Equity Seller to enable the Equity Seller to regain possession. This can be accomplished by such means as the execution of a purchase agreement or a lease, or by the granting of an option to purchase. RPL Section 265-A also indicates without explanation that there may be a Reconveyance Arrangement when an Equity Seller mortgages a Residence to an Equity Purchaser.

A Reconveyance Arrangement may be subject to mortgage recording tax. RPL Section 265-A (11-A) provides that "(i)n 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..."

Specific requirements for "Covered Contracts", such as a requirement that the Equity Seller be afforded a right to cancel, and that there can be no transfer or encumbrance of an interest in the Residence until midnight of the fifth business day following the day on which the Covered Contract is signed, and for the terms and form of required notices (including a "Notice Required by New York Law" informing the Seller(s) of a right to cancel the contract and a form "Notice of Cancellation"), are set forth in RPL Section 265-A. Those requirements are not within the scope of this article.

An "Equity Purchaser" does not include a person acquiring title as follows:

1. To use, and who uses, such property as his or her primary residence;
2. By a deed from a referee in an RPAPL Article 13 mortgage foreclosure;
3. At any sale of property authorized by statute;
4. By an Order or Judgment of any Court;
5. From a spouse, or from a parent, grandparent, child, grandchild or sibling of such person or such person's spouse;
6. As a not-for-profit housing organization or as a public housing agency; or
7. A bona fide purchaser or encumbrancer for value.

A "Bona fide purchaser or encumbrancer for value" is, in particular, defined to include:

"...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 in, 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". (Emphasis added)

A transaction in "material violation" of requirements of RPL Section 265-A is voidable and may be rescinded by the Equity Seller within two years of the date of the recording of the conveyance to the Equity Purchaser. Rescission is accomplished by the Equity Seller giving a notice of rescission to the Equity Purchaser and his or her successors in interest (if the successor is not a bona fide purchaser or encumbrancer for value), and by recording the notice of rescission in the recording office of the County in which the property is located within two years of the date on which the conveyance to the Equity Purchaser was recorded.

The interest of a bona fide purchaser or encumbrancer acquired before recording of a notice of rescission is not affected. Knowledge that the property was in foreclosure or that the property owner was in default in his or her mortgage payments does not impair the status of a person as a bona fide purchaser or encumbrancer; however, according to RPL Section 265-A, without further explanation, this "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".

A waiver of the provisions of RPL Section 265-A or a limitation of the Equity Purchaser's liability for a violation of the Section is null and void. A provision in a Covered Contract requiring arbitration is, at the Equity Seller's option, void. The Attorney General of the State of New York is authorized to apply for injunctive relief when there is a violation of the requirements of Section 265-A and a Court, on such application, may impose a civil penalty of not more than \$25,000 for each violation. Further, Banking Law, Section 595-a, as amended by the Act, authorizes the Banking Board to impose fines or penalties when a mortgage loan is made to an Equity Purchaser "if the mortgage banker, mortgage broker or exempt organization had knowledge that the Equity Purchaser was not complying with [RPL Section 265-A] with respect to such transaction".

Lastly, the Act adds new RPAPL Section 1303 requiring the plaintiff in a mortgage foreclosure to deliver with the summons and complaint for the action a notice, on a separate page in bold, fourteen-point type printed on colored paper that is a color other than that of the paper on which the summons and complaint are printed, captioned (in bold twenty-point type) "Help for Homeowners in Foreclosure". The text of the required notice is in Exhibit A to this article. This notice requirement is not expressly limited to the foreclosure of a mortgage on a one-to-four family dwelling.

EXHIBIT A *

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 toll-free helpline maintained by the New York State Banking Department at _____ or visit the Department's Website at _____.

The State does not guarantee the advice of these agencies.

* The point type required is not reflected in this Exhibit

** The Act provides that "(t)he Banking Department shall post (on its Website or otherwise make 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 toll-free help-line to disseminate the information required by this Section".

*** The Act provides that "(t)he Banking Department shall prescribe the telephone number and WEB address to be included in the notice".

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