



The Legislature
of the
State of New Mexico

49th Legislature, 2nd Session

LAWS 2010

CHAPTER 58

HOUSE JUDICIARY COMMITTEE SUBSTITUTE FOR

HOUSE BILL 205

Introduced by



Chapter 58

AN ACT

RELATING TO PROPERTY; ENACTING THE MORTGAGE FORECLOSURE
CONSULTANT FRAUD PREVENTION ACT; IMPOSING PENALTIES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SHORT TITLE.--This act may be cited as the
"Mortgage Foreclosure Consultant Fraud Prevention Act".

Section 2. DEFINITIONS.--As used in the Mortgage
Foreclosure Consultant Fraud Prevention Act:

A. "compensation" means monetary payment,
remuneration or other benefits received, including monetary
donations made in conjunction with the performance of
services;

B. "foreclosure consultant":

(1) means a person who, directly or
indirectly, makes a solicitation or offer to an owner to
perform services for compensation or who, for compensation,
performs a service that the person represents will:

(a) stop or postpone a foreclosure
sale;

(b) obtain any forbearance from a
beneficiary or mortgagee;

(c) assist the owner to exercise the
right to reinstatement;

(d) obtain an extension of the period

1 within which the owner may reinstate the owner's obligation;

2 (e) obtain a waiver of an acceleration
3 clause contained in a promissory note, deed of trust or
4 contract secured by a mortgage on a residence in foreclosure
5 or contained in the mortgage;

6 (f) assist an owner in foreclosure or
7 loan default to obtain a loan or advance of funds;

8 (g) avoid or ameliorate the impairment
9 of an owner's credit resulting from the recording of a notice
10 of default or from a foreclosure sale; or

11 (h) otherwise save an owner's residence
12 from foreclosure; and

13 (2) does not include:

14 (a) a person licensed to practice law
15 in this state when the person renders service in the course of
16 the person's practice as an attorney;

17 (b) a person licensed as a real estate
18 broker or salesperson in this state when the person engages in
19 acts requiring real estate licensure, unless the person is
20 offering services designed to, or purportedly designed to,
21 enable the owner to retain possession of the residence in
22 foreclosure;

23 (c) a person licensed as an accountant
24 in this state when the person is acting in any capacity for
25 which the person is licensed as an accountant;

1 (d) a person acting under the express
2 authority or written approval of the United States department
3 of housing and urban development or other department or agency
4 of the United States or this state to provide services;

5 (e) a person who holds or is owed an
6 obligation secured by a lien on any residence in foreclosure
7 when the person performs services in connection with the
8 obligation or lien if the obligation or lien did not arise as
9 the result of or as part of a proposed foreclosure
10 reconveyance;

11 (f) a person doing business under any
12 law of this state or of the United States relating to banks,
13 trust companies, savings and loan associations, industrial
14 loan and thrift companies, regulated lenders, credit unions or
15 insurance companies, or a mortgagee that is a United States
16 department of housing and urban development-approved mortgagee
17 or any subsidiary or affiliate of these persons, or any agent
18 or employee of these persons while engaged in the business of
19 these persons;

20 (g) a person licensed as a residential
21 mortgage originator or servicer pursuant to the New Mexico
22 Mortgage Loan Originator Licensing Act when acting under the
23 authority of that license;

24 (h) a nonprofit agency or organization
25 registered pursuant to New Mexico law that offers counseling

1 or advice to an owner of a home in foreclosure or loan default
2 if the nonprofit agency or organization does not contract for
3 services with for-profit lenders or foreclosure purchasers; or

4 (i) a foreclosure purchaser, including
5 a person who purchases a home in foreclosure at, or subsequent
6 to, a judicial sale of foreclosure property;

7 C. "foreclosure reconveyance" means a transaction
8 involving:

9 (1) the transfer of title to real property
10 by a foreclosed homeowner during a foreclosure proceeding on
11 that homeowner's home, either by transfer of interest from the
12 foreclosed homeowner or by creation of a mortgage or other
13 lien or encumbrance during the foreclosure process that allows
14 the acquirer to obtain title to the property by redeeming the
15 property as a junior lienholder;

16 (2) the subsequent conveyance, or offer or
17 promise of a subsequent conveyance, of an interest back to the
18 foreclosed homeowner by the acquirer or a person acting in
19 participation with the acquirer that allows the foreclosed
20 homeowner to possess either the residence in foreclosure or
21 any other real property, which interest includes, but is not
22 limited to, an interest in a contract for deed, purchase
23 agreement, option to purchase or lease; or

24 (3) the authorization, solicitation or offer
25 of a proposal to refinance the real estate during the

1 foreclosure process contingent on participation in any life,
2 term life or periodic insurance arrangement with any third
3 party not providing private mortgage insurance;

4 D. "owner" means the record owner of a residence
5 in foreclosure at the time a foreclosure notice of pendency
6 was recorded or a summons and complaint for foreclosure was
7 served;

8 E. "person" means an individual, a partnership, a
9 corporation, a limited liability company, an association or
10 other group, however organized;

11 F. "residence in foreclosure" means residential
12 real property consisting of one to four family dwelling units,
13 one of which the owner occupies as the owner's principal place
14 of residence, where there is a delinquency or default on any
15 loan payment or debt secured by or attached to the residential
16 real property, including contract for deed payments; and

17 G. "service" means and includes, but is not
18 limited to, any of the following:

19 (1) debt, budget or financial counseling of
20 any type;

21 (2) receiving money for the purpose of
22 distributing it to creditors in payment or partial payment of
23 an obligation secured by a lien on a residence in foreclosure;

24 (3) contacting creditors on behalf of an
25 owner;

1 (4) arranging or attempting to arrange for
2 an extension of the period within which the owner of a
3 residence in foreclosure may cure the owner's default and
4 reinstate the owner's obligation;

5 (5) arranging or attempting to arrange for a
6 delay or postponement of the time of sale of the residence in
7 foreclosure;

8 (6) advising the filing of any document or
9 assisting in any manner in the preparation of any document for
10 filing with a bankruptcy court; or

11 (7) giving advice, explanation or
12 instruction to an owner, which in any manner relates to the
13 cure of a default in or the reinstatement of an obligation
14 secured by a lien on the residence in foreclosure, the full
15 satisfaction of that obligation, or the postponement or
16 avoidance of a sale of a residence in foreclosure, pursuant to
17 a power of sale contained in a mortgage.

18 Section 3. FORECLOSURE CONSULTANT CONTRACT--
19 REQUIREMENTS.--

20 A. A foreclosure consulting contract shall:

21 (1) be provided to the owner for review at
22 least twenty-four hours before being signed by the owner;

23 (2) be printed in at least fourteen-point
24 type and written in the same language that was used by the
25 owner in discussions with the foreclosure consultant to

1 describe the consultant's services or to negotiate the
2 contract;

3 (3) fully disclose the nature and extent of
4 the foreclosure consulting services to be provided, including
5 any foreclosure reconveyance that may be involved, and the
6 total amount and terms of any compensation to be received by
7 the foreclosure consultant or anyone working in association
8 with the foreclosure consultant;

9 (4) disclose the names of any other
10 corporations, businesses or entities on behalf of which the
11 consultant does business or with which the consultant is
12 affiliated or employed;

13 (5) separately itemize all costs, fees or
14 expenses and the purpose of the costs, fees or expenses that
15 are charged to the homeowner during the term of the contract;

16 (6) be dated and personally signed by the
17 owner and the foreclosure consultant; and

18 (7) contain the following notice, which
19 shall be printed in at least fourteen-point boldface type,
20 completed with the name of the foreclosure consultant, and
21 located in immediate proximity to the space reserved for the
22 owner's signature:

23 "NOTICE REQUIRED BY NEW MEXICO LAW

24 (Name) or anyone working for him or her CANNOT ask
25 you to sign or have you sign any lien, mortgage or deed as

1 part of signing this agreement unless the terms of the
2 transfer are specified in this document and you are given a
3 separate explanation of the nature and extent of the
4 transaction.

5 (Name) or anyone working for him or her CANNOT
6 guarantee you that they will be able to refinance your home or
7 arrange for you to keep your home. Continue making mortgage
8 payments until a refinancing, if applicable, is approved.

9 If a transfer of the deed or title to your property is
10 involved in any way, you may rescind the transfer any time
11 within 3 days after the date you sign the deed or other
12 document of sale or transfer. See the attached Notice of
13 Rescission form for an explanation of this right. As part of
14 any rescission, you must repay any money spent on your behalf
15 as a result of this agreement within 60 days of receiving
16 commercially reasonable documentation of the payments.

17 THIS IS AN IMPORTANT LEGAL CONTRACT AND COULD RESULT IN THE
18 LOSS OF YOUR HOME. CONTACT AN ATTORNEY OR COUNSELOR BEFORE
19 SIGNING."

20 B. A foreclosure consulting contract shall contain
21 on the first page, in at least fourteen-point type:

22 (1) the name and address of the foreclosure
23 consultant to which the notice of cancellation is to be
24 mailed; and

25 (2) the date the owner signed the contract.

1 C. A foreclosure consulting contract shall be
2 accompanied by a completed form in duplicate, captioned
3 "NOTICE OF RESCISSION RIGHTS", which shall:

4 (1) be on a separate sheet of paper attached
5 to the contract;

6 (2) be easily detachable; and

7 (3) contain the following statement printed
8 in at least fifteen-point type:

9 "NOTICE OF RESCISSION RIGHTS

10 (Date of Contract)

11 You may cancel or rescind this contract, without any penalty,
12 at any time until midnight of the third business day after the
13 day on which you sign this contract. If you want to end this
14 contract, mail or deliver a signed and dated copy of this
15 Notice of Rescission, or any other written notice indicating
16 your intent to rescind to (name of foreclosure consultant) at
17 (address of foreclosure consultant, including facsimile and
18 electronic mail).

19 As part of any rescission, you (the homeowner) must repay any
20 money spent on your behalf as a result of this agreement
21 within 60 days of receiving commercially reasonable
22 documentation of the payments.

23 THIS IS AN IMPORTANT LEGAL CONTRACT AND COULD RESULT IN THE
24 LOSS OF YOUR HOME. CONTACT AN ATTORNEY OR COUNSELOR BEFORE
25 SIGNING.

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RESCISSION OF CONTRACT FORM

TO: (name of foreclosure consultant)
(address of foreclosure consultant, including facsimile and
electronic mail)

I hereby rescind this contract.

..... (Date)

..... (Homeowner's signature)".

D. The foreclosure consultant shall provide the
owner with a signed and dated copy of the foreclosure
consulting contract and the attached notice of rescission
rights and rescission of contract form immediately upon
execution of the contract.

E. The time during which the owner may rescind the
foreclosure consulting contract does not begin to run until
the foreclosure consultant has complied with this section and
the owner has signed the contract.

Section 4. RESCISSION OF FORECLOSURE CONSULTANT
CONTRACT.--

A. In addition to any other right under law to
rescind a contract, an owner may rescind a foreclosure
consulting contract until midnight of the third business day
after the day on which the owner signs a foreclosure
consulting contract that complies with the Mortgage
Foreclosure Consultant Fraud Prevention Act.

B. Cancellation of a foreclosure consulting

1 contract occurs when an owner gives written notice of
2 cancellation to the foreclosure consultant at the address
3 specified in the contract.

4 C. Notice of cancellation, if given by mail, is
5 effective when deposited in the mail properly addressed with
6 postage prepaid.

7 D. Notice of cancellation given by an owner need
8 not take the particular form as provided with the contract
9 and, however expressed, is effective if it indicates the
10 intention of the owner not to be bound by the contract.

11 Section 5. VIOLATIONS.--It is a violation of the
12 Mortgage Foreclosure Consultant Fraud Prevention Act for a
13 foreclosure consultant to:

14 A. claim, demand, charge, collect or receive any
15 compensation until after the foreclosure consultant has fully
16 performed every service the foreclosure consultant contracted
17 to perform or represented the consultant would perform;

18 B. claim, demand, charge, collect or receive any
19 fee, interest or any other compensation for any reason that
20 exceeds five percent per annum of the amount of any loan that
21 the foreclosure consultant may make to the owner. Such a loan
22 may not be secured by the residence in foreclosure or any
23 other real or personal property;

24 C. take a wage assignment, lien of any type on
25 real or personal property or other security to secure the

1 payment of compensation. Any such security is void and
2 unenforceable;

3 D. receive any consideration from a third party in
4 connection with services rendered to an owner;

5 E. acquire any interest, directly or indirectly,
6 or by means of a subsidiary or affiliate in a residence in
7 foreclosure from an owner with whom the foreclosure consultant
8 has contracted;

9 F. take a power of attorney from an owner for any
10 purpose, except to inspect documents as provided by law;

11 G. include a provision in a foreclosure consulting
12 contract that:

13 (1) attempts or purports to waive an owner's
14 rights under the Mortgage Foreclosure Consultant Fraud
15 Prevention Act;

16 (2) requires an owner to consent to
17 jurisdiction for litigation or choice of law in a state other
18 than New Mexico;

19 (3) provides for venue in a county other
20 than the county in which the residence in foreclosure is
21 located; or

22 (4) imposes any costs or filing fees greater
23 than the fees required to file an action in a district court;
24 or

25 H. induce or attempt to induce an owner to enter a HJC/HB 205

1 contract that does not comply in all respects with the
2 Mortgage Foreclosure Consultant Fraud Prevention Act.

3 Section 6. WAIVER NOT ALLOWED.--Any waiver by an owner
4 of the provisions of the Mortgage Foreclosure Consultant Fraud
5 Prevention Act is void and unenforceable as contrary to public
6 policy. Any attempt by a foreclosure consultant to induce an
7 owner to waive the owner's rights under the Mortgage
8 Foreclosure Consultant Fraud Prevention Act is a violation of
9 that act.

10 Section 7. REMEDIES.--

11 A. A violation of the Mortgage Foreclosure
12 Consultant Fraud Prevention Act constitutes an unfair trade
13 practice pursuant to the Unfair Practices Act.

14 B. A prevailing plaintiff in a suit for violation
15 of the Mortgage Foreclosure Consultant Fraud Prevention Act
16 may recover actual damages, reasonable attorney fees and costs
17 and appropriate equitable relief.

18 C. The rights and remedies provided in Subsection
19 A of this section are cumulative to, and not a limitation of,
20 any other rights and remedies provided by law. Any action
21 brought pursuant to this section must be commenced within four
22 years from the date of the alleged violation.

23 D. In addition to any other damages, a court may
24 award exemplary damages up to three times the compensation
25 charged by the foreclosure consultant if the court finds that

1 the foreclosure consultant violated a provision of Section 5
2 of the Mortgage Foreclosure Consultant Fraud Prevention Act
3 and that the foreclosure consultant's conduct was willful or
4 in bad faith.

5 E. Notwithstanding any other provision of this
6 section, no action may be brought on the basis of a violation
7 of the Mortgage Foreclosure Consultant Fraud Prevention Act,
8 except by an owner against whom the violation was committed or
9 by the attorney general.

10 Section 8. PENALTY.--A person who commits a violation
11 of the provisions of Section 5 of the Mortgage Foreclosure
12 Consultant Fraud Prevention Act is guilty of a fourth degree
13 felony and, upon conviction, shall be sentenced pursuant to
14 Section 31-18-15 NMSA 1978. Each violation of the provisions
15 of Section 5 of the Mortgage Foreclosure Consultant Fraud
16 Prevention Act constitutes a distinct offense. The attorney
17 general or the district attorney for the district in which the
18 violation arose may prosecute any violation of Section 5 of
19 the Mortgage Foreclosure Consultant Fraud Prevention Act.
20 Prosecution or conviction for any violation described in
21 Section 5 of the Mortgage Foreclosure Consultant Fraud
22 Prevention Act does not bar prosecution or conviction for any
23 other offenses. These penalties are cumulative to any other
24 remedies or penalties provided by law.

25 Section 9. SEVERABILITY.--If any provision of the

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Mortgage Foreclosure Consultant Fraud Prevention Act or the application of any of its provisions to any person or circumstance is held to be unconstitutional and void, the remainder of the Mortgage Foreclosure Consultant Fraud Prevention Act remains valid.



BEN LUJAN, SPEAKER
HOUSE OF REPRESENTATIVES



STEPHEN R. ARIAS, CHIEF CLERK
HOUSE OF REPRESENTATIVES



DIANE D. DENISH, PRESIDENT
SENATE



LENORE M. NARANJO, CHIEF CLERK
SENATE

Approved by me this 8th day of March, 2010



BILL RICHARDSON, GOVERNOR
STATE OF NEW MEXICO

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