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HOUSE BILL 205

**49TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2010**

INTRODUCED BY

W. Ken Martinez

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. "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

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1 beneficiary or mortgagee;

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

4 (d) obtain an extension of the period  
5 within which the owner may reinstate the owner's obligation;

6 (e) obtain a waiver of an acceleration  
7 clause contained in a promissory note, deed of trust or  
8 contract secured by a mortgage on a residence in foreclosure or  
9 contained in the mortgage;

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

12 (g) avoid or ameliorate the impairment  
13 of an owner's credit resulting from the recording of a notice  
14 of default or from a foreclosure sale; or

15 (h) otherwise save an owner's residence  
16 from foreclosure; and

17 (2) does not include:

18 (a) a person licensed to practice law in  
19 this state when the person renders service in the course of the  
20 person's practice as an attorney;

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

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1 foreclosure;

2 (c) a person licensed as an accountant  
3 in this state when the person is acting in any capacity for  
4 which the person is licensed as an accountant;

5 (d) a person acting under the express  
6 authority or written approval of the United States department  
7 of housing and urban development or other department or agency  
8 of the United States or this state to provide services;

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

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

24 (g) a person licensed as a residential  
25 mortgage originator or servicer pursuant to the New Mexico

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1 Mortgage Loan Originator Licensing Act when acting under the  
2 authority of that license;

3 (h) a nonprofit agency or organization  
4 that offers counseling or advice to an owner of a home in  
5 foreclosure or loan default if the nonprofit agency or  
6 organization does not contract for services with for-profit  
7 lenders or foreclosure purchasers; or

8 (i) a foreclosure purchaser;

9 B. "foreclosure reconveyance" means a transaction  
10 involving:

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

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

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1 C. "owner" means the record owner of a residence in  
2 foreclosure at the time a foreclosure notice of pendency was  
3 recorded or a summons and complaint for foreclosure was served;

4 D. "person" means an individual, a partnership, a  
5 corporation, a limited liability company, an association or  
6 other group, however organized;

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

13 F. "service" means and includes, but is not limited  
14 to, any of the following:

15 (1) debt, budget or financial counseling of  
16 any type;

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

20 (3) contacting creditors on behalf of an  
21 owner;

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

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

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

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

14 Section 3. FORECLOSURE CONSULTANT CONTRACT--  
15 REQUIREMENTS.--

16 A. A foreclosure consulting contract shall:

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

19 (2) be printed in at least fourteen-point type  
20 and written in the same language that was used by the owner in  
21 discussions with the foreclosure consultant to describe the  
22 consultant's services or to negotiate the contract;

23 (3) fully disclose the nature and extent of  
24 the foreclosure consulting services to be provided, including  
25 any foreclosure reconveyance that may be involved, and the

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1 total amount and terms of any compensation to be received by  
2 the foreclosure consultant or anyone working in association  
3 with the foreclosure consultant;

4 (4) be dated and personally signed by the  
5 owner and the foreclosure consultant; and

6 (5) contain the following notice, which shall  
7 be printed in at least fourteen-point boldface type, completed  
8 with the name of the foreclosure consultant, and located in  
9 immediate proximity to the space reserved for the owner's  
10 signature:

11 "NOTICE REQUIRED BY NEW MEXICO LAW

12 ..... (Name) or anyone working for him or her CANNOT ask  
13 you to sign or have you sign any lien, mortgage or deed as part  
14 of signing this agreement unless the terms of the transfer are  
15 specified in this document and you are given a separate  
16 explanation of the nature and extent of the transaction.

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

21 If a transfer of the deed or title to your property is involved  
22 in any way, you may rescind the transfer any time within 3 days  
23 after the date you sign the deed or other document of sale or  
24 transfer. See the attached Notice of Rescission form for an  
25 explanation of this right. As part of any rescission, you must

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1 repay, within 60 days, any money spent on your behalf as a  
2 result of this agreement, along with interest calculated at the  
3 rate of 9% a year.

4 THIS IS AN IMPORTANT LEGAL CONTRACT AND COULD RESULT IN THE  
5 LOSS OF YOUR HOME. CONTACT AN ATTORNEY OR COUNSELOR BEFORE  
6 SIGNING.".

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

9 (1) the name and address of the foreclosure  
10 consultant to which the notice of cancellation is to be mailed;  
11 and

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

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

16 (1) be on a separate sheet of paper attached  
17 to the contract;

18 (2) be easily detachable; and

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

21 "NOTICE OF RESCISSION RIGHTS

22 (Date of Contract)

23 You may cancel or rescind this contract, without any penalty,  
24 at any time until midnight of the third business day after the  
25 day on which you sign this contract. If you want to end this

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1 contract, mail or deliver a signed and dated copy of this  
2 Notice of Rescission, or any other written notice indicating  
3 your intent to rescind to (name of foreclosure consultant) at  
4 (address of foreclosure consultant, including facsimile and  
5 electronic mail).

6 As part of any rescission, you (the homeowner) must repay any  
7 money spent on your behalf as a result of this agreement,  
8 within 60 days, along with interest calculated at the rate of  
9 9% a year. THIS IS AN IMPORTANT LEGAL CONTRACT AND COULD  
10 RESULT IN THE LOSS OF YOUR HOME. CONTACT AN ATTORNEY OR  
11 COUNSELOR BEFORE SIGNING.

12 RESCISSION OF CONTRACT FORM

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

16 I hereby rescind this contract.

17 ..... (Date)  
18 ..... (Homeowner's signature)".

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

24 E. The time during which the owner may rescind the  
25 foreclosure consulting contract does not begin to run until the

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1 foreclosure consultant has complied with this section and the  
2 owner has signed the contract.

3 Section 4. RESCISSION OF FORECLOSURE CONSULTANT  
4 CONTRACT.--

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

11 B. Cancellation of a foreclosure consulting  
12 contract occurs when an owner gives written notice of  
13 cancellation to the foreclosure consultant at the address  
14 specified in the contract.

15 C. Notice of cancellation, if given by mail, is  
16 effective when deposited in the mail properly addressed with  
17 postage prepaid.

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

22 Section 5. VIOLATIONS.--It is a violation of the Mortgage  
23 Foreclosure Consultant Fraud Prevention Act for a foreclosure  
24 consultant to:

25 A. claim, demand, charge, collect or receive any

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1 compensation until after the foreclosure consultant has fully  
2 performed every service the foreclosure consultant contracted  
3 to perform or represented the consultant would perform;

4 B. claim, demand, charge, collect or receive any  
5 fee, interest or any other compensation for any reason that  
6 exceeds eight percent per annum of the amount of any loan that  
7 the foreclosure consultant may make to the owner. Such a loan  
8 may not be secured by the residence in foreclosure or any other  
9 real or personal property;

10 C. take a wage assignment, lien of any type on real  
11 or personal property or other security to secure the payment of  
12 compensation. Any such security is void and unenforceable;

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

15 E. acquire any interest, directly or indirectly, or  
16 by means of a subsidiary or affiliate in a residence in  
17 foreclosure from an owner with whom the foreclosure consultant  
18 has contracted;

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

21 G. include a provision in a foreclosure consulting  
22 contract that:

23 (1) attempts or purports to waive an owner's  
24 rights under the Mortgage Foreclosure Consultant Fraud  
25 Prevention Act;

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

4 (3) provides for venue in a county other than  
5 the county in which the residence in foreclosure is located; or

6 (4) imposes any costs or filing fees greater  
7 than the fees required to file an action in a district court;  
8 or

9 H. induce or attempt to induce an owner to enter a  
10 contract that does not comply in all respects with the Mortgage  
11 Foreclosure Consultant Fraud Prevention Act.

12 Section 6. WAIVER NOT ALLOWED.--Any waiver by an owner of  
13 the provisions of the Mortgage Foreclosure Consultant Fraud  
14 Prevention Act is void and unenforceable as contrary to public  
15 policy. Any attempt by a foreclosure consultant to induce an  
16 owner to waive the owner's rights under the Mortgage  
17 Foreclosure Consultant Fraud Prevention Act is a violation of  
18 that act.

19 Section 7. REMEDIES.--

20 A. A violation of the Mortgage Foreclosure  
21 Consultant Fraud Prevention Act constitutes an unfair trade  
22 practice pursuant to the Unfair Practices Act.

23 B. A prevailing party in a suit for violation of  
24 the Mortgage Foreclosure Consultant Fraud Prevention Act may  
25 recover actual damages, reasonable attorney fees and costs and

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1 appropriate equitable relief.

2 C. The rights and remedies provided in Subsection A  
3 of this section are cumulative to, and not a limitation of, any  
4 other rights and remedies provided by law. Any action brought  
5 pursuant to this section must be commenced within four years  
6 from the date of the alleged violation.

7 D. In addition to any other damages, a court may  
8 award exemplary damages up to one and one-half times the  
9 compensation charged by the foreclosure consultant if the court  
10 finds that the foreclosure consultant violated the provisions  
11 of Subsection A, B or D of Section 5 of the Mortgage  
12 Foreclosure Consultant Fraud Prevention Act and that the  
13 foreclosure consultant's conduct was in bad faith.

14 E. Notwithstanding any other provision of this  
15 section, no action may be brought on the basis of a violation  
16 of the Mortgage Foreclosure Consultant Fraud Prevention Act,  
17 except by an owner against whom the violation was committed or  
18 by the attorney general.

19 Section 8. PENALTY.--A person who commits any violation  
20 of Section 5 of the Mortgage Foreclosure Consultant Fraud  
21 Prevention Act may, upon conviction, be fined not more than ten  
22 thousand dollars (\$10,000) or imprisoned not more than one  
23 year, or both. Prosecution or conviction for any violation  
24 described in Section 5 of the Mortgage Foreclosure Consultant  
25 Fraud Prevention Act does not bar prosecution or conviction for

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1 any other offenses. These penalties are cumulative to any  
2 other remedies or penalties provided by law.

3 Section 9. SEVERABILITY.--If any provision of the  
4 Mortgage Foreclosure Consultant Fraud Prevention Act or the  
5 application of any of its provisions to any person or  
6 circumstance is held to be unconstitutional and void, the  
7 remainder of the Mortgage Foreclosure Consultant Fraud  
8 Prevention Act remains valid.

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