House Engrossed Senate Bill

FILED

KEN BENNETT
SECRETARY OF STATE

State of Arizona
Senate
Forty-ninth Legislature
Second Regular Session
2010

CHAPTER 143

SENATE BILL 1130

AN ACT

AMENDING TITLE 44, CHAPTER 9, ARIZONA REVISED STATUTES, BY ADDING ARTICLE 22; RELATING TO FORECLOSURE CONSULTANTS.

(TEXT OF BILL BEGINS ON NEXT PAGE)

Be it enacted by the Legislature of the State of Arizona:

Section 1. Title 44, chapter 9, Arizona Revised Statutes, is amended by adding article 22, to read:

ARTICLE 22. FORECLOSURE CONSULTANTS

44-1378. Definitions

IN THIS ARTICLE, UNLESS THE CONTEXT OTHERWISE REQUIRES:

1. "COVERED SERVICE" INCLUDES:

(a) FINANCIAL COUNSELING, INCLUDING DEBT COUNSELING AND BUDGET COUNSELING TO ASSIST A HOMEOWNER IN CONNECTION WITH THE HOMEOWNER'S RESIDENCE IN FORECLOSURE.

(b) RECEIVING MONEY FOR THE PURPOSE OF DISTRIBUTING IT TO CREDITORS IN PAYMENT OR PARTIAL PAYMENT OF ANY OBLIGATION SECURED BY A MORTGAGE OR OTHER LIEN ON A RESIDENCE IN FORECLOSURE.

(c) CONTACTING A CREDITOR ON BEHALF OF A HOMEOWNER.

(d) ARRANGING OR ATTEMPTING TO ARRANGE AN EXTENSION OF THE PERIOD WITHIN WHICH A HOMEOWNER MAY CURE THE HOMEOWNER'S DEFAULT AND REINSTATE THE HOMEOWNER'S OBLIGATION PURSUANT TO A NOTE, MORTGAGE OR DEED OF TRUST.

(e) ARRANGING OR ATTEMPTING TO ARRANGE ANY DELAY OR POSTPONEMENT OF THE TIME OF A FORECLOSURE SALE.

(f) ADVISING THE FILING OF ANY DOCUMENT OR ASSISTING IN ANY MANNER IN THE PREPARATION OF ANY DOCUMENT FOR FILING WITH THE UNITED STATES BANKRUPTCY COURT.

(g) GIVING ANY ADVICE, EXPLANATION OR INSTRUCTION TO A HOMEOWNER THAT RELATES TO THE CURE OF A DEFAULT IN OR THE REINSTATEMENT OF AN OBLIGATION SECURED BY A MORTGAGE OR OTHER LIEN ON THE RESIDENCE IN FORECLOSURE, TO THE FULL SATISFACTION OF THE OBLIGATION OR TO THE POSTPONEMENT OR AVOIDANCE OF A FORECLOSURE SALE.

2. "FORECLOSURE CONSULTANT" MEANS A PERSON WHO, DIRECTLY OR INDIRECTLY, MAKES ANY SOLICITATION, REPRESENTATION OR OFFER TO A HOMEOWNER TO PERFORM FOR COMPENSATION OR WHO, FOR COMPENSATION, PERFORMS ANY COVERED SERVICE THAT THE PERSON REPRESENTS WILL DO ANY OF THE FOLLOWING:

(a) PREVENT OR POSTPONE A FORECLOSURE SALE.

(b) OBTAIN ANY FORBEARANCE FROM ANY MORTGAGEE OR BENEFICIARY OF A DEED OF TRUST.

(c) ASSIST THE HOMEOWNER TO EXERCISE THE RIGHT OF REINSTATEMENT PROVIDED IN THE LEGAL DOCUMENTS.

(d) OBTAIN ANY EXTENSION OF THE PERIOD WITHIN WHICH THE HOMEOWNER MAY REINSTATE THE HOMEOWNER'S OBLIGATION.

(e) OBTAIN ANY WAIVER OF AN ACCELERATION CLAUSE CONTAINED IN ANY PROMISSORY NOTE OR CONTRACT SECURED BY A MORTGAGE ON A RESIDENCE IN FORECLOSURE OR INCLUDED IN THE MORTGAGE OR DEED OF TRUST.

(f) ASSIST THE HOMEOWNER IN FORECLOSURE OR LOAN DEFAULT TO OBTAIN A LOAN OR ADVANCE OF MONEY.

(g) AVOID OR AMELIORATE THE IMPAIRMENT OF THE HOMEOWNER'S CREDIT RESULTING FROM THE RECORDING OF A NOTICE OF SALE OR THE OCCURRENCE OF A FORECLOSURE SALE.

(h) SAVE THE HOMEOWNER'S RESIDENCE FROM FORECLOSURE.

(i) ASSIST THE HOMEOWNER TO ACCOMPLISH A FORECLOSURE RECONVEYANCE.

3. "FORECLOSURE RECONVEYANCE" MEANS A TRANSACTION THAT INVOLVES BOTH OF THE FOLLOWING:

(a) THE TRANSFER OF TITLE TO A RESIDENCE IN FORECLOSURE BY A HOMEOWNER DURING A FORECLOSURE PROCEEDING BY EITHER:

(i) THE TRANSFER OF AN INTEREST IN THE RESIDENCE IN FORECLOSURE FROM THE HOMEOWNER.

(ii) THE CREATION OF A MORTGAGE OR OTHER LIEN DURING THE FORECLOSURE PROCESS THAT ALLOWS THE ACQUIRER TO OBTAIN TITLE TO THE RESIDENCE IN FORECLOSURE BY REDEEMING THE PROPERTY AS A JUNIOR LIENHOLDER.

(b) THE SUBSEQUENT CONVEYANCE OR PROMISE OF A SUBSEQUENT CONVEYANCE OF AN INTEREST IN THE RESIDENCE TO THE FORMER HOMEOWNER BY THE ACQUIRER, OR A PERSON ACTING IN CONCERT WITH THE ACQUIRER, THAT ALLOWS THE FORMER HOMEOWNER TO REMAIN IN POSSESSION OF THE RESIDENCE FOLLOWING THE COMPLETION OF THE FORECLOSURE PROCEEDING. FOR THE PURPOSES OF THIS SUBDIVISION, "INTEREST IN THE RESIDENCE" INCLUDES AN INTEREST IN A CONTRACT FOR A DEED, A PURCHASE AGREEMENT AND AN OPTION TO PURCHASE OR LEASE.

4. "FORECLOSURE SALE" MEANS THE SALE OF REAL PROPERTY TO ENFORCE AN OBLIGATION SECURED BY A MORTGAGE OR LIEN ON THE PROPERTY, INCLUDING THE EXERCISE OF A TRUSTEE'S POWER OF SALE.

5. "HOLDER OF EVIDENCE OF DEBT" MEANS THE PERSON IN ACTUAL POSSESSION OF OR OTHERWISE ENTITLED TO ENFORCE AN EVIDENCE OF DEBT BUT DOES NOT INCLUDE A PERSON ACTING AS A NOMINEE SOLELY FOR THE PURPOSE OF HOLDING THE EVIDENCE OF DEBT OR DEED OF TRUST AS AN ELECTRONIC REGISTRY WITHOUT ANY AUTHORITY TO ENFORCE THE EVIDENCE OF DEBT OR DEED OF TRUST.

6. "HOMEOWNER" MEANS THE RECORD OWNER OF A RESIDENCE IN FORECLOSURE AT THE TIME THE NOTICE OF THE PENDENCY OF AN ACTION FOR FORECLOSURE OR THE RECORDING OF A NOTICE OF SALE PURSUANT TO SECTION 33-808.

7. "RESIDENCE IN FORECLOSURE" MEANS RESIDENTIAL REAL PROPERTY CONSISTING OF NOT MORE THAN FOUR FAMILY DWELLING UNITS, ONE OF WHICH THE HOMEOWNER OCCUPIES AS A PRINCIPAL PLACE OF RESIDENCE, AND AGAINST WHICH THERE IS RECORDED AN OUTSTANDING NOTICE OF THE PENDENCY OF AN ACTION FOR FORECLOSURE OR NOTICE OF SALE PURSUANT TO SECTION 33-808.

44-1378.01. Applicability

A. THIS ARTICLE DOES NOT APPLY TO:

1. A PERSON LICENSED TO PRACTICE LAW IN THIS STATE, WHILE PERFORMING ANY ACTIVITY RELATED TO THE PERSON'S ATTORNEY-CLIENT RELATIONSHIP WITH A HOMEOWNER OR WITH THE BENEFICIARY, MORTGAGEE, GRANTEE OR HOLDER OF ANY LIEN BEING ENFORCED BY FORECLOSURE.

2. A HOLDER OR SERVICER OF AN EVIDENCE OF DEBT OR THE ATTORNEY FOR THE HOLDER OR SERVICER OF AN EVIDENCE OF DEBT SECURED BY A DEED OF TRUST OR OTHER LIEN ON ANY RESIDENCE IN FORECLOSURE WHILE THE PERSON PERFORMS SERVICES IN CONNECTION WITH THE EVIDENCE OF DEBT, LIEN, DEED OF TRUST OR OTHER LIEN SECURING THE DEBT. FOR THE PURPOSES OF THIS PARAGRAPH, THE FOLLOWING PERSONS ARE PRESUMED TO BE THE HOLDER OF EVIDENCE OF DEBT:

(a) THE PERSON WHO IS THE OBLIGEE OF AND WHO IS IN POSSESSION OF AN ORIGINAL EVIDENCE OF DEBT.

(b) THE PERSON IN POSSESSION OF AN ORIGINAL EVIDENCE OF DEBT TOGETHER WITH THE PROPER ENDORSEMENT OR ASSIGNMENT.

(c) THE PERSON IN POSSESSION OF A NEGOTIABLE INSTRUMENT EVIDENCING A DEBT THAT HAS BEEN DULY NEGOTIATED TO THE PERSON OR TO BEARER OR ENDORSED IN BLANK.

(d) THE PERSON IN POSSESSION OF AN EVIDENCE OF DEBT WITH AUTHORITY, WHICH MAY BE GRANTED BY THE ORIGINAL EVIDENCE OF DEBT OR DEED OF TRUST, TO ENFORCE THE EVIDENCE OF DEBT AS AGENT, NOMINEE OR TRUSTEE OR IN A SIMILAR CAPACITY FOR THE OBLIGEE OF THE EVIDENCE OF DEBT.

3. A PERSON DOING BUSINESS UNDER ANY LAW OF THIS STATE OR THE UNITED STATES THAT REGULATES BANKS, TRUST COMPANIES, SAVINGS AND LOAN ASSOCIATIONS, CREDIT UNIONS, INSURANCE COMPANIES, TITLE INSURERS, INSURANCE PRODUCERS OR ESCROW COMPANIES AUTHORIZED TO CONDUCT BUSINESS IN THIS STATE, WHILE THE PERSON PERFORMS SERVICES AS PART OF THE PERSON'S NORMAL BUSINESS ACTIVITIES, OR AN AFFILIATE OR SUBSIDIARY, OR AN EMPLOYEE OR AGENT ACTING ON BEHALF OF, ANY OF THE FOREGOING.

4. A PERSON ORIGINATING OR CLOSING A LOAN IN THE PERSON'S NORMAL COURSE OF BUSINESS IF ANY OF THE FOLLOWING IS TRUE:

(a) THE LOAN IS SUBJECT TO THE REQUIREMENTS OF THE REAL ESTATE SETTLEMENT PROCEDURES ACT OF 1974 (P.L. 93-533; 88 STAT. 1724; 12 UNITED STATES CODE SECTIONS 2601 THROUGH 2617).

(b) WITH RESPECT TO ANY SECOND MORTGAGE OR HOME EQUITY LINE OF CREDIT, THE LOAN IS SUBORDINATE TO AND CLOSED SIMULTANEOUSLY WITH A QUALIFIED FIRST MORTGAGE LOAN UNDER SUBDIVISION (a) OF THIS PARAGRAPH OR IS INITIALLY PAYABLE ON THE FACE OF THE NOTE OR CONTRACT TO AN ENTITY INCLUDED IN PARAGRAPH 3.

(c) THE LOAN IS RECORDED IN THE REAL PROPERTY RECORDS OF THE CLERK AND RECORDER OF THE COUNTY WHERE THE RESIDENCE IN FORECLOSURE IS LOCATED AND THE LEGAL ACTION GIVING RISE TO THE JUDGMENT WAS COMMENCED BEFORE THE NOTICE OF ELECTION AND DEMAND FOR SALE.

5. A TITLE INSURANCE COMPANY OR TITLE INSURANCE AGENT AUTHORIZED TO CONDUCT BUSINESS IN THIS STATE WHILE PERFORMING TITLE INSURANCE AND SETTLEMENT SERVICES.

6. A PERSON LICENSED AS A REAL ESTATE BROKER OR REAL ESTATE SALESPERSON UNDER TITLE 32, CHAPTER 20 WHILE THE PERSON ENGAGES IN ANY ACTIVITY FOR WHICH THE PERSON IS LICENSED.

7. A NONPROFIT ORGANIZATION THAT IS EXEMPT FROM TAXATION UNDER SECTION 501(c)(3) OF THE INTERNAL REVENUE CODE AND THAT SOLELY OFFERS COUNSELING OR ADVICE TO HOMEOWNERS IN FORECLOSURE OR LOAN DEFAULT, UNLESS THE ORGANIZATION IS AN ASSOCIATE OF THE FORECLOSURE CONSULTANT.

8. AN INDIVIDUAL OR ENTITY WORKING WITH THE HOMEOWNERS IN FORECLOSURE TO PURCHASE THE RESIDENCE IN FORECLOSURE THROUGH A SHORT SALE PROVIDED THAT THE INDIVIDUAL OR ENTITY DOES NOT CLAIM, DEMAND, CHARGE, COLLECT OR RECEIVE ANY COMPENSATION FOR THE TRANSACTION.

B. NOTHING IN THIS CHAPTER SHALL BE CONSTRUED AS AUTHORIZING CONDUCT FOR WHICH A LICENSE WOULD BE REQUIRED UNDER TITLE 6, CHAPTER 9, ARTICLE 4.

44-1378.02. Prohibited acts

A FORECLOSURE CONSULTANT SHALL NOT:

1. CLAIM, DEMAND, CHARGE, COLLECT OR RECEIVE ANY COMPENSATION UNTIL AFTER THE FORECLOSURE CONSULTANT HAS FULLY PERFORMED EACH COVERED SERVICE THAT THE FORECLOSURE CONSULTANT CONTRACTED TO PERFORM OR REPRESENTED THAT THE FORECLOSURE CONSULTANT WOULD PERFORM.

2. CLAIM, DEMAND, CHARGE, COLLECT OR RECEIVE ANY FEE, INTEREST OR OTHER COMPENSATION FOR ANY REASON THAT IS NOT FULLY DISCLOSED TO THE HOMEOWNER.

3. TAKE ANY WAGE ASSIGNMENT, LIEN ON REAL OR PERSONAL PROPERTY, ASSIGNMENT OF A HOMEOWNER'S EQUITY OR OTHER INTEREST IN A RESIDENCE IN FORECLOSURE OR OTHER SECURITY FOR THE PAYMENT OF COMPENSATION.

4. RECEIVE ANY CONSIDERATION FROM ANY THIRD PARTY IN CONNECTION WITH A COVERED SERVICE PROVIDED TO A HOMEOWNER UNLESS THE CONSIDERATION IS FIRST FULLY DISCLOSED TO THE HOMEOWNER.

5. ACQUIRE, DIRECTLY OR INDIRECTLY, ANY INTEREST IN THE RESIDENCE IN FORECLOSURE OF A HOMEOWNER WITH WHOM THE FORECLOSURE CONSULTANT HAS CONTRACTED TO PERFORM A COVERED SERVICE.

6. ACCEPT A POWER OF ATTORNEY FROM A HOMEOWNER FOR ANY PURPOSE, OTHER THAN TO INSPECT DOCUMENTS AS PROVIDED BY LAW.

44-1378.03. Foreclosure consulting contract

A FORECLOSURE CONSULTING CONTRACT SHALL:

1. BE IN WRITING AND PROVIDED TO AND RETAINED BY THE HOMEOWNER, WITHOUT CHANGES, ALTERATIONS OR MODIFICATIONS, FOR REVIEW AT LEAST TWENTY-FOUR HOURS BEFORE IT IS SIGNED BY THE HOMEOWNER.

2. BE PRINTED IN AT LEAST TWELVE-POINT TYPE AND SHALL INCLUDE THE NAME AND ADDRESS OF THE FORECLOSURE CONSULTANT TO WHICH A NOTICE OF CANCELLATION CAN BE MAILED AND THE DATE THE HOMEOWNER SIGNED THE CONTRACT.

3. FULLY DISCLOSE THE EXACT NATURE OF THE FORECLOSURE CONSULTING SERVICES TO BE PROVIDED AND THE TOTAL AMOUNT AND TERMS OF ANY COMPENSATION THE FORECLOSURE CONSULTANT OR ASSOCIATE WILL RECEIVE.

4. BE DATED AND PERSONALLY SIGNED, WITH EACH PAGE BEING INITIALED, BY EACH HOMEOWNER OF THE RESIDENCE IN FORECLOSURE AND THE FORECLOSURE CONSULTANT AND SHALL BE ACKNOWLEDGED BY A NOTARY PUBLIC IN THE PRESENCE OF THE HOMEOWNER AT THE TIME THE HOMEOWNER SIGNS THE CONTRACT.

44-1378.04. Right of cancellation

A. IN ADDITION TO ANY RIGHT OF RESCISSION AVAILABLE UNDER STATE OR FEDERAL LAW, A HOMEOWNER HAS THE RIGHT TO CANCEL A CONTRACT WITH A FORECLOSURE CONSULTANT UNTIL MIDNIGHT OF THE THIRD BUSINESS DAY FOLLOWING THE DAY ON WHICH THE HOMEOWNER SIGNS A CONTRACT THAT COMPLIES WITH THIS ARTICLE.

B. CANCELLATION OCCURS WHEN THE HOMEOWNER PERSONALLY GIVES WRITTEN NOTICE OF CANCELLATION OF THE FORECLOSURE CONSULTING CONTRACT TO THE FORECLOSURE CONSULTANT AT THE ADDRESS SPECIFIED IN THE CONTRACT OR THROUGH

ANY FAX OR ELECTRONIC MAIL ADDRESS IDENTIFIED IN THE CONTRACT OR OTHER MATERIALS PROVIDED TO THE HOMEOWNER BY THE FORECLOSURE CONSULTANT.

C. NOTICE OF CANCELLATION, IF GIVEN BY MAIL, IS EFFECTIVE ON DEPOSIT OF THE NOTICE IN THE UNITED STATES MAIL, PROPERLY ADDRESSED, WITH POSTAGE PREPAID.

D. A NOTICE OF CANCELLATION GIVEN BY THE HOMEOWNER DOES NOT NEED TO BE IN THE PARTICULAR FORM PROVIDED WITH THE CONTRACT AND, HOWEVER EXPRESSED, IS EFFECTIVE IF IT INDICATES THE INTENTION OF THE HOMEOWNER NOT TO BE BOUND BY THE CONTRACT.

E. AS PART OF THE CANCELLATION OF A FORECLOSURE CONSULTING CONTRACT, THE HOMEOWNER SHALL REPAY, WITHIN SIXTY DAYS AFTER THE NOTICE OF CANCELLATION, ALL MONIES PAID OR ADVANCED IN GOOD FAITH BEFORE THE RECEIPT OF NOTICE OF CANCELLATION BY THE FORECLOSURE CONSULTANT UNDER THE TERMS OF THE FORECLOSURE CONSULTING CONTRACT.

F. THE RIGHT TO CANCEL MAY NOT BE CONDITIONED ON THE REPAYMENT OF ANY MONIES.

44-1378.05. Homeowner action to recover damages

A. A HOMEOWNER WHO IS INJURED AS A RESULT OF A FORECLOSURE CONSULTANT'S VIOLATION OF THIS ARTICLE MAY BRING AN ACTION AGAINST THE FORECLOSURE CONSULTANT TO RECOVER DAMAGES CAUSED BY THE VIOLATION, TOGETHER WITH REASONABLE ATTORNEY FEES AND COSTS.

B. IF THE HOMEOWNER PREVAILS IN THE ACTION, THE COURT MAY AWARD PUNITIVE DAMAGES AS DETERMINED BY A JURY OR BY A COURT SITTING WITHOUT A JURY, BUT THE PUNITIVE DAMAGES SHALL BE AT LEAST ONE AND ONE-HALF TIMES THE AMOUNT AWARDED TO THE HOMEOWNER AS ACTUAL DAMAGES.

44-1378.06. Fraud or deceit against homeowner; classification

A FORECLOSURE CONSULTANT WHO ENGAGES IN ANY CONDUCT THAT CONSTITUTES FRAUD OR DECEIT AGAINST A HOMEOWNER IN CONNECTION WITH A TRANSACTION THAT IS SUBJECT TO THIS ARTICLE, INCLUDING A FORECLOSURE RECONVEYANCE, IS GUILTY OF A CLASS 1 MISDEMEANOR.

44-1378.07. Enforcement

A. THE ATTORNEY GENERAL OR A COUNTY ATTORNEY MAY ENFORCE THE CRIMINAL PROVISIONS OF THIS ARTICLE.

B. AN ACT OR PRACTICE IN VIOLATION OF THIS ARTICLE CONSTITUTES AN UNLAWFUL PRACTICE UNDER SECTION 44-1522. THE ATTORNEY GENERAL MAY INVESTIGATE AND TAKE APPROPRIATE ACTION AS PRESCRIBED BY CHAPTER 10, ARTICLE 7 OF THIS TITLE.

44-1378.08. Cumulative nature of penalties

THE RIGHTS, REMEDIES AND PENALTIES PROVIDED PURSUANT TO THIS ARTICLE ARE CUMULATIVE AND DO NOT ABROGATE AND ARE IN ADDITION TO ANY OTHER RIGHTS, REMEDIES AND PENALTIES THAT MAY EXIST AT LAW OR IN EQUITY.

APPROVED BY THE GOVERNOR APRIL 23, 2010.

FILED IN THE OFFICE OF THE SECRETARY OF STATE APRIL 26, 2010.