

To: House Interim Committee on Consumer Protection  
Senate Interim Committee on Commerce and Labor

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Date: October 16, 2007

## REPORT REGARDING FORECLOSURE AND MORTGAGE RESCUE TRANSACTIONS

**Members of Subcommittee:** Broad spectrum of industry and consumer representatives.

Rep. Susan Bonamici (Beaverton)  
Rep. Greg Macpherson (Lake Oswego)  
Violeta Rubiani, DCBS  
Berri Leslie, DCBS  
Rick Bennett, AARP Oregon's Director of Government Relations  
Aaron Bell, Attorney, Reif, Reif & Thalhofer (Canby, OR)  
Christopher Ambrose, Attorney, Ambrose Law Group (Portland & Bend, OR)  
Louis D Savage, DCBS  
Shane Jackson, Oregon Coalition of Mortgage Originators  
Todd Williams, Oregon Association of Mortgage Professionals  
Paul Cosgrove, Attorney, Lindsay, Hart, Neil & Weigler LLP (Portland, OR)  
Phil Goldsmith, Attorney, Law Offices of Phil Goldsmith, (Portland, OR)  
Keith Karnes, Attorney, Olsen, Olsen & Daines (Salem, OR)  
Linda Johannsen, Attorney, Kirkpatrick & Lockhart Preston Gates Ellis LLP (Portland, OR)  
Steven Way, President and CEO, Silver Falls Bank (Silverton, OR)  
Andrew Shull, Assistant AG, OR Department of Justice

**Purpose of Subcommittee:** Explore merits of "mortgage rescue" operations and, to a lesser extent, the Oregon foreclosure laws.

**Status:** Two Task Force meetings, with overall summary of mortgage rescue operations, and two Subcommittee meetings. Report of Subcommittee at next Task Force meeting on October 17, 2007.

## **MORTGAGE RESCUE STATUTES:**

What are they? Cash payment to third party to "help save" property in foreclosure; transfer of property (e.g., to trust, lease option) with some opportunity for homeowner to get the property back; straw buyer (property to third party who believes buying property with renter, i.e., original homeowner).

Approximately nine states have enacted legislation over the past three years to regulate foreclosure consultants and foreclosure purchasers (exclusive of third party purchasers at a foreclosure sale). Some states have enacted mortgage fraud legislation which is outside the scope of this Subcommittee's work.

Rather than enacting general mortgage fraud legislations, some states have focused on and enacted specific legislation regarding foreclosure consultants (aka "distressed property consultants" in Illinois) and foreclosure purchasers. In some states, e.g., Minnesota, there is an overlap. The states with specific legislation regarding foreclosure consultants and purchasers are<sup>1</sup>:

1. California – California Civil Code Sections 2945, et seq.
2. Colorado – Colorado Revised Statutes Sections 6-1-1102, et seq.
3. Illinois – Illinois Compiled Statutes, Chapter 765, Sections 940/5, et seq.
4. Indiana – Indiana Revised Statutes Sections 24-5.5-2-2, et seq.
5. Maryland – Maryland Real Property Code Sections 7-301, et seq.
6. Minnesota – Minnesota Revised Statutes Chapter 325N.
7. Missouri – Missouri Revised Statutes Chapter 407, 407.935, et seq.
8. New Hampshire – New Hampshire Revised Statutes Sections 479-B:1, et seq.
9. Rhode Island – Rhode Island Revised Statutes Chapter 79, Sections 5-79-1, et seq.

Ohio and Massachusetts are likely to enact legislation in the short term. Massachusetts recently implemented an outright, temporary ban on foreclosures.

Additionally, the Center for Policy Alternatives has drafted model legislation, known as the Mortgage Rescue Fraud Protection Act, to regulate foreclosure consulting and reconveyance contracts.<sup>2</sup> A few of the states have adopted this Act in whole or in part.

In general, most of the states separate their legislation into foreclosure consultants and foreclosure purchasers. California and Rhode Island primarily address only foreclosure consultants.

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<sup>1</sup> This summary does not address the general foreclosure statutes of the various states. Additionally, there may be some states with statutes that cover some of the topics that are the subject of this summary, but which are not set forth as separate statutes particularly designed to address "mortgage rescue" operations.

<sup>2</sup> "The Center for Policy Alternatives (CPA) is the nation's only nonpartisan nonprofit organization working to strengthen the capacity of state legislators to lead and achieve progressive change."  
([www.stateaction.org](http://www.stateaction.org))

General themes, which Subcommittee and Task Force are addressing:

REGULATION	SUMMARY
<p>I. Foreclosure Consultants / Distressed Property Consultants</p>	<p>Generally:</p> <p>"Foreclosure consultant" generally is defined as any person who makes any solicitation, representation, or offer to any owner to perform for compensation or who, for compensation, performs any service which the person in any manner represents will in any manner</p> <ul style="list-style-type: none"><li>(a) Stop or postpone the foreclosure sale,</li><li>(b) Obtain any forbearance from any beneficiary or mortgagee.</li><li>(c) Assist the owner to exercise any right of reinstatement.</li><li>(d) Obtain any extension of the period within which the owner may reinstate his or her obligation.</li><li>(e) Obtain any waiver of an acceleration clause contained in any promissory note or contract secured by a deed of trust or mortgage on a residence in foreclosure or contained that deed of trust or mortgage.</li><li>(f) Assist the owner to obtain a loan or advance of funds.</li><li>(g) Avoid or ameliorate the impairment of the owner's credit resulting from the recording of a notice of default or the conduct of a foreclosure sale.</li><li>(h) Save the owner's residence from foreclosure.</li><li>(i) Assist the owner in obtaining from the beneficiary, mortgagee, trustee under a power of sale, or counsel for the beneficiary, mortgagee, or trustee, the remaining proceeds from the foreclosure sale of the owner's residence.</li></ul> <p>Variations on the foregoing being addressed. General consensus with some variations, e.g., post-foreclosure.</p>
<p>A. Who is exempt:</p>	<p>Generally:</p> <ul style="list-style-type: none"><li>1. A duly licensed attorney at law acting on behalf of a client;</li><li>2. A person who holds or is owed an obligation secured by a lien on any residence in foreclosure while the person performs services in connection with the obligation or lien, if the obligation or lien did not arise as a result of a pre-foreclosure conveyance;</li><li>3. Any bank, trust company, savings and loan association, credit union, or insurance company chartered under the laws of any state or the United States or any subsidiary, affiliate, or agency thereof;</li><li>4. A prejudgment or post-judgment lien creditor of the homeowner;</li><li>5. A person licensed as a mortgage banker or mortgage</li></ul>

<p>B. General Requirements:</p>	<p>broker while engaged in any activity for which the person is licensed under the pertinent state statute;</p> <p>6. A person licensed as a real estate broker, associate real estate broker, or real estate salesperson, while engaged in any activity for which the person is licensed under the pertinent state statute;</p> <p>7. A nonprofit organization or government entity that offers counseling or advice to homeowners in foreclosure or loan default, if the organization is not directly or indirectly related to and does not contract for services with for-profit lenders, foreclosure consultants, or pre-foreclosure purchasers; or</p> <p>8. A creditors' committee or trustee participating in a place of reorganization or repayment through a proceeding under the jurisdiction of the United States Bankruptcy Court.</p> <p>1. Provides limits on when, from whom, and how much compensation foreclosure consultants may receive, and generally precludes any advance demand for compensation. For example, the fee is limited to an amount equal to two monthly mortgage payments. General consensus.</p> <p>2. Generally limited to residential properties consisting of 1 – 4 residential units. General consensus.</p> <p>3. Requires a writing with delineation regarding font, language, pages, etc. General consensus.</p> <p>4. Requires a full disclosure of the nature and extent of the foreclosure consulting services. General consensus.</p> <p>5. May prohibit the Foreclosure Consultant from acquiring interest in residence in foreclosure. General consensus.</p> <p>6. May limit ability to otherwise contract with the owner.</p> <p>7. Generally provides a right to cancel. General consensus regarding a homeowner's right to cancel, with some disagreement regarding timing.</p> <p>8. Right of repayment after cancellation for any advances, i.e., if a foreclosure consultant provides an advance to the homeowner, what are or should be the repayment terms.</p> <p>- General consensus regarding right of repayment with some interest. Competing issues: Motivation to provide advances v. reasonable rate of return.</p> <p>9. Precludes allowing the homeowner to waive the statutory rights, e.g., waiving the right to cancel. General</p>
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which the existing liens are not paid. Significant differences to be explored by Task Force and Subcommittee, e.g., 66-90% of net proceeds if home sold within 18 – 36 months, with possible restriction on amount of repurchase amount.

5. Lease Option Restrictions:

- a. "Ability to Pay": Most contain restrictions on entering into a lease with option to purchase arrangement unless the homeowner meets an "ability to pay" standard, with a rebuttable presumption that the homeowner has the ability to pay if certain criteria are met. General consensus with some differences regarding a presumption for a "reasonable ability to pay," e.g., 60% debt to income ratio.
- b. Repurchase Rights: Right of homeowner to repurchase home and under what circumstances.
- c. Moderate disagreement. Competing interests, e.g., lower purchase price v. lower rental payments.

6. Generally requires full or formal Settlement and Settlement Agreement at time of both conveyances. "Formal settlement" generally means an in-person, face-to-face meeting with the homeowner to complete final documents incident to the sale or transfer of real property, or the creation of a mortgage or equitable interest in real property, conducted by a settlement agent who is not employed by or an affiliate of the foreclosure purchaser, during which the homeowner must be presented with a completed copy of the HUD-1 settlement form. General consensus.

7. Penalties: Civil and Criminal penalties and fines similar to Foreclosure Consultants. Consideration of incorporating fines/penalties of Unfair Trade Practices Act.

8. Some requirements of a post-conveyance accounting if any reconveyance to a third party. General consensus.

#### **OREGON FORECLOSURE LAWS:**

1. Oregon primarily a trust deed state, with the bulk of foreclosures being nonjudicial (advertisement and sale).
2. Process summary:
  - a. Notice of Default and Trustee's Notice of Sale;
  - b. Minimum 120 days process (generally 130 – 140);