

# Regulation of Distressed Property Consultants

## *What You Need to Know When Assisting Homeowners in Foreclosure . . .*

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On August 5, 2008, Governor David A. Paterson signed into law what has been called the “Foreclosure Prevention and Responsible Lending Act” (the “Act”). Part of the Act is intended to provide certain consumer protections for homeowners in on the verge of foreclosure. Effective on September 1, 2008, the Act added provisions to the New York Real Property Law to set certain restrictions and prohibitions on “distressed property consultants.”

These provisions are intended to address foreclosure rescue scams that may take advantage of borrowers when they are most vulnerable. The following summarizes these provisions.

### ***Who is Protected Under The Act?***

These provisions are intended to protect individual borrowers who have mortgages secured by a one to four family owner-occupied residence, and who are in danger of being foreclosed because of one or more defaults under the mortgage that entitle the lender to accelerate full payment of the mortgage and repossess the property.

### ***Who is Regulated Under The Act?***

These provisions seek to regulate "distressed property consultants." A distressed property consultant is defined as an individual or business entity that, directly or indirectly, solicits or undertakes employment to provide consulting services to a homeowner for compensation with respect to a distressed home loan. This section applies to those performing the services as well as those merely soliciting and referring the homeowner to others to perform the services.

Distressed property consultants do not include: (i) attorneys admitted to practice in the state of New York; (ii) persons or entities that are owed an obligation secured by a lien on the property; (iii) judgment creditors of the homeowner, if the claim accrued before the written notice of foreclosure sale is sent; or (iv) bona fide not-for-profit organizations that offer counseling or advice to homeowners in foreclosure or loan defaults.

### ***What Types of Services Are Regulated By The Act?***

Services regulated by this section include any services provided to a homeowner obligated by a distressed home loan that the Consultant represents will help achieve any of the following:

1. Stopping or delaying a foreclosure sale or loss of a home for nonpayment of taxes.
2. Assisting homeowner in reinstating or refinancing a distressed home loan.
3. Assisting the homeowner in obtaining a loan or advance funds.
4. Assisting a homeowner in responding to a foreclosure complaint or otherwise providing information regarding the foreclosure process.

5. Repairing a homeowner's credit which was impaired by a foreclosure or tax sale.
6. Saving the homeowner's property from foreclosure or loss for non-payment of taxes.

### ***What Requirements Are Placed on Distressed Property Consultant?***

The following requirements are now placed on distressed property consultants undertaking any of the services set forth above.

1. Written Contract. The consultant may not perform services without a written contract in the form set forth in the Act.
2. Receiving Payment up Front. The consultant may not "charge for or accept payment for consulting services before the full completion of such services."
3. No Power of Attorney. The consultant may not take a power of attorney from the homeowner.
4. Original Documents. The consultant may not keep any of the homeowner's original loan or other documents (i.e. note, mortgage etc.).

### ***What form should a Distressed Property Consulting Contract Take?***

A distressed property consulting contract must: (i) be in writing; (ii) be given to the homeowner for review prior to signing; (iii) be in 12 point type in the language spoken by the homeowner; (iv) disclose the type of services and amount of payment; (v) provide the name, address and phone number of consultant; (vi) be signed by both parties, witnessed and acknowledged before a notary public; (vii) contain a statutory notice in 14 point bold type allowing cancellation within five (5) days and stating the duties of the consultant and when payment is due.

### ***What Are the Penalties for violations of the Act?***

1. A court may nullify any agreement between the consultant and homeowner.
2. The homeowner may recover actual and consequential damages and costs from the consultant in an action based on this section.
3. If the consultant intentionally or recklessly violates any provision of this section, a court may award treble (triple) damages, attorney's fees and costs.
4. Provisions of the consulting contract that attempt or purports to limit the liability of the consultant shall be null and void. Inclusion of such a provision shall, at the option of the homeowner render the entire contract void.
5. Provisions requiring arbitration of any disputes are voidable by the homeowner.
6. The NYS Attorney General or a court having jurisdiction over such matters, may issue an injunction enjoining the consultant from further activities until the case is heard.
7. Additional civil penalties of not more than \$10,000.00 for each violation of this section.

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The Act was passed with the good intention of preventing foreclosure rescue scams intended to take advantage of borrowers when they are most vulnerable. However, the Act also creates significant liability exposure for those honest practitioners who are providing a valuable and much-needed service for distressed homeowners. Despite the restrictions placed on distressed property consultants, there are ways for such consultants to continue to do business legally and profitably. If

you are an individual or company providing such services as loan modifications, short sale negotiations or credit repair to homeowners you should consult with your attorney to determine what effect this law will have on your business and to devise safe strategies to continue doing business in this field.

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