

By: David Sweis

RE: Mortgage Rescue Fraud Act

This memorandum will outline the relevant provisions of the Mortgage Rescue Fraud Act<sup>i</sup> (“Act”) (765 ILCS 940/1) as they relate to distressed property consultants. The memorandum will then detail the manner in which it regulates the loss mitigation industry and the consequences of any violations whether civil or criminal. Therefore, this memorandum does not cover nor discuss distressed property conveyances (i.e. sales of distressed property) and the purchasers of distressed property. It should be noted that the Act was enacted on January 1, 2008, and therefore, there is scant case law interpreting the language contained therein. The relevant statutes are attached to and incorporated in this memorandum.

## **I. WHAT DOES THE ACT COVER AND WHO IS SUBJECT TO THE ACT?**

Section 5 of the Act defines what **distressed property** is and who is a **distressed property consultant**. **Distressed property** is any residential real estate consisting of one to 6 family dwelling units that (1) is in foreclosure; OR (2) at risk of loss due to non-payment of taxes; OR (3) whose owner is more than 30 days delinquent on any loan that is secured by the property. A “**Distressed property consultant**” (e.g. New Mortgage Payment, Inc) is any person that for compensation from the homeowner, either *directly or indirectly*, makes any (i) solicitation, (ii) representation or (iii) offer to perform any “**service**” that leads to any of the following:

1. *Stop or postpone a foreclosure sale;*
2. *Stop or postpone the loss of the home due to non-payment of taxes;*
3. *Assists the homeowner in the exercise of the right to reinstatement or redemption*
4. *Obtain any new extension of the reinstatement period for the homeowner;*

5. *Obtain a waiver of an acceleration clause contained in a promissory note or contract secured by a mortgage on a **distressed property** or contained in the mortgage;*
6. *Assist the owner in foreclosure, loan default, OR post-tax sale redemption period to obtain a loan or advance funds;*
7. *Avoid or clear up any impairments on the owners credit resulting from a recording of a notice of default or the conduct of a foreclosure sale or tax sale; or*
8. *Save the owners residence from foreclosure or save the owner from loss of home due to nonpayment of taxes.*

The following individuals are not subject to the definition of a **distressed property consultant**: 1) a person or a person's authorized agent acting under the express authority or written approval of HUD (Housing and Urban Development); 2) a person who holds or is owed an obligation secured by a lien on any distressed property, or a person acting under the express written approval of such person when services are rendered in connection with the obligation or lien, *so long as* the obligation or lien did not arise as a result of or as a part of a proposed property conveyance<sup>1</sup>; 3) banks, savings banks, savings and loan associations, credit unions, and insurance companies organized, chartered, or holding a certificate of authority under the laws of this State or any other state or under the laws of the United States; 4) Attorneys licensed in Illinois; 5) a HUD approved mortgagee and any of its affiliates or subsidiaries and their agents and employees while engaged in the business of these persons or entities; 6) a 501(c)(3) Not-For-Profit agency or organization, doing business for no less than 5 years, that offers counseling or advice to an owner of distressed property *so long as* they do not contract for services with a for

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<sup>1</sup> A reasonable interpretation of this language would be that mortgage "servicers" contracted by lenders, as well as person acting under the direction of such a servicer, is not a distressed property consultant. However, a person seeking to buy the property and "rescue" the homeowner by offering a new mortgage would fall under the definition.

profit lender or distressed property purchasers, or any persons who structures or plans such a transaction; 7) licensees of the Consumer Installment Act who are authorized to make loans secured by real property; and 8) licensees of the Real Estate License Act of 2000 when providing licensed activities.

The term “**service**” is also defined in Section 5 as:

- 1) *Debt, budget, or financial counseling of any type<sup>ii</sup>;*
- 2) *Receiving money to pay off creditors in full or in part for any lien against a **distressed property**;*
- 3) *Contacting creditors on behalf of an owner of **distressed property**;*
- 4) *Arranging or attempting to arrange for an extension of the period within which the owner of a **distressed property** may cure a default and reinstate his or her obligation;*
- 5) *Arranging or attempting to arrange for the delay or postponement of the time of sale of a **distressed property**;*
- 6) *Advising the filing of any document or assisting in any manner in the preparation of any document for filing with court; or*
- 7) *Giving any advice, explanation, or instruction to an owner of **distressed property** that in any manner relates to the cure of a default or forfeiture or postponement or avoidance of sale of the **distressed property**.*

## **II. DISTRESSED PROPERTY CONSULTANT COMPENSATION**

The manner in which a distressed property consultant may be compensated is outlined in section 70 of the Act. The section effectively distinguishes compensation for services that would lower an existing payment for five years or more from any other transaction. If the service being rendered lowers the existing payment for a period of 5 years or more, then compensation is restricted to the **LESSER** of 1) the homeowners existing monthly principal and interest payment and 2) the total **NET** savings derived from the lowered monthly principal and interest mortgage payment over the succeeding 12 months. For all other transactions, the fee that a distressed property consultant can charge is limited to 50% of the existing monthly principal and interest payment. The statutory scheme for consultant compensation essentially bars a “flat-fee” or “one-size fits all” type of fee schedule.

## **III. VIOLATIONS AND CIVIL/CRIMINAL PENALTIES**

It is a violation of the act for a distressed property consultant to *claim, demand, charge, collect* or *receive* any compensation until after the distressed property consultant has fully performed each service he/she contracted to perform or represented he/she would perform. Moreover, it is a violation to *claim, demand, charge, collect* or *receive* any fee, interest or any other compensation that does not comply with section 70 above. Other things that are prohibited include: wage assignments, liens (real property or personal property), other security. It is also unlawful; to acquire an interest, *directly or indirectly*, or by means of a subsidiary or affiliate in a distressed property from an owner with whom the distressed property consultant has contract. Power of Attorney documents authorizing anything except document inspection as provided by law is a violation. Lastly, it is a violation to induce or attempt to induce an owner to enter into a contract that does not comply in all respects with sections 10 and 15 (see attachments).

Anyone who intentionally violates this statute is guilty of a Class 2 Felony. Civilly, any violation of the act constitutes a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act. Also, the remedies under the Act are cumulative, meaning you can be sued for several violations individually and collectively if someone chose to do so. It should also be noted that the Consumer Fraud Act allows for attorney's fees and punitive damages.

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<sup>i</sup> The Mortgage Rescue Fraud Act is amended by changing Sections 5 and 50 and by adding Sections 7 and 70 as follows:

(765 ILCS 940/5)

Sec. 5. Definitions. As used in this Act:

"Distressed property" means residential real property consisting of one to 6 family dwelling units that is in foreclosure or at risk of loss due to nonpayment of taxes, or whose owner is more than **[A]** 30 **<A]** **[D]** 90 **<D]** days delinquent on any loan that is secured by the property.

"Distressed property consultant" means any person who, directly or indirectly, for compensation from the owner, makes any solicitation, representation, or offer to perform or who, for compensation from the owner, performs any service that the person represents will in any manner do any of the following:

- (1) stop or postpone the foreclosure sale or **[A]** STOP OR POSTPONE **<A]** the loss of the home due to nonpayment of taxes;
- (2) obtain any forbearance from any beneficiary or mortgagee, or relief with respect to a tax sale of the property;
- (3) assist the owner to exercise any right of reinstatement or right of redemption;
- (4) obtain any extension of the period within which the owner may reinstate the owner's rights with respect to the property;
- (5) obtain any waiver of an acceleration clause contained in any promissory note or contract secured by a mortgage on a distressed property or contained in the mortgage;
- (6) assist the owner in foreclosure, loan default, or post-tax sale redemption period to obtain a loan or advance of funds;
- (7) 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 or tax sale; or
- (8) save the owner's residence from foreclosure or **[A]** SAVE THE OWNER FROM **<A]** loss of home due to nonpayment of taxes.

A "distressed property consultant" does not include any of the following:

- (1) a person or the person's authorized agent acting under the express authority or written approval of the Department of Housing and Urban Development;

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(2) a person who holds or is owed an obligation secured by a lien on any distressed property, or a person acting under the express authorization or written approval of such person, when the person performs services in connection with the obligation or lien, if the obligation or lien did not arise as the result of or as part of a proposed distressed property conveyance;

(3) banks, savings banks, savings and loan associations, credit unions, and insurance companies organized, chartered, or holding a certificate of authority to do business under the laws of this State or any other state or under the laws of the United States;

(4) **[D]** licensed **<D]** attorneys **[A]** LICENSED IN ILLINOIS **<A]** engaged in the practice of law;

(5) a Department of Housing and Urban Development approved mortgagee and any subsidiary or affiliate of these persons or entities, and any agent or employee of these persons or entities, while engaged in the business of these persons or entities;

(6) a 501(c)(3) nonprofit agency or organization, doing business for no less than 5 years, that offers counseling or advice to an owner of a distressed property, if they do not contract for services with for-profit lenders or distressed property purchasers, or any person who structures or plans such a transaction;

(7) **[A]** (BLANK) **<A]** **[D]** licensees of the Residential Mortgage License Act of 1987 **<D]** ;

(8) licensees of the Consumer Installment Loan Act who are authorized to make loans secured by real property; or

(9) licensees of the Real Estate License Act of 2000 when providing licensed activities.

"Distressed property purchaser" means any person who acquires any interest in fee in a distressed property or a beneficial interest in a trust holding title to a distressed property while allowing the owner to possess, occupy, or retain any present or future interest in fee in the property, or any person who participates in a joint venture or joint enterprise involving a distressed property conveyance.

"Distressed property purchaser" does not mean any person who acquires distressed property at a short sale or any person acting in participation with any person who acquires distressed property at a short sale, if that person does not promise to convey an interest in fee back to the owner or does not give the owner an option to purchase the property at a later date.

"Distressed property conveyance" means a transaction in which an owner of a distressed property transfers an interest in fee in the distressed property or in which the holder of all or some part of the beneficial interest in a trust holding title to a distressed property transfers that interest; the acquirer of the property allows the owner of the distressed property to occupy the property; and the acquirer of the property or a person acting in participation with the acquirer of the property conveys or promises to convey an interest in fee back to the owner or gives the owner an option to purchase the property at a later date.

"Person" means any individual, partnership, corporation, limited liability company, association, or other group or entity, however organized.

"Service" means, without limitation, any of the following:

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

(2) receiving money for the purpose of distributing it to creditors in payment or partial payment of any obligation secured by a lien on a distressed property;

(3) contacting creditors on behalf of an owner of a residence that is distressed property;

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(4) arranging or attempting to arrange for an extension of the period within which the owner of a distressed property may cure the owner's default and reinstate his or her obligation;

(5) arranging or attempting to arrange for any delay or postponement of the time of sale of the distressed property;

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

(7) giving any advice, explanation, or instruction to an owner of a distressed property that in any manner relates to the cure of a default or forfeiture or to the postponement or avoidance of sale of the distressed property. (Source: P.A. 94-822, eff. 1-1-07; 95-691, eff. 6-1-08.)

(765 ILCS 940/7 new)

**[A> SEC. 7. RESIDENTIAL MORTGAGE LICENSE ACT OF 1987 LICENSEES. LICENSEES OF THE RESIDENTIAL MORTGAGE LICENSE ACT OF 1987 ARE EXEMPT FROM THE REQUIREMENTS OF SECTIONS 10, 15, 20, 50(A)(4), 50(A)(5), 50(A)(6), AND 50(A)(7). LICENSEES ARE ALSO EXEMPT FROM THE REQUIREMENTS OF SECTION 50(A)(2) AND SECTION 70 FOR ANY TRANSACTION RESULTING IN THE ORIGINATION OF A NEW MORTGAGE LOAN EXTINGUISHING THE EXISTING MORTGAGE LOAN. <A]**

(765 ILCS 940/50)

Sec. 50. Violations.

(a) It is a violation for a distressed property consultant to:

(1) claim, demand, charge, collect, or receive any compensation until after the distressed property consultant has fully performed each service the distressed property consultant contracted to perform or represented he or she would perform;

(2) claim, demand, charge, collect, or receive any fee, interest, or any other compensation **[D>** for any reason **<D]** that **[A> DOES NOT COMPORT WITH SECTION 70 <A]** **[D>** exceeds 2 monthly mortgage payments of principal and interest or the most recent tax installment on the distressed property, whichever is less **<D]** ;

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

(4) receive any consideration from any third party in connection with services rendered to an owner unless the consideration is first fully disclosed to the owner;

(5) acquire any interest, directly or indirectly, or by means of a subsidiary or affiliate in a distressed property from an owner with whom the distressed property consultant has contracted;

(6) take any power of attorney from an owner for any purpose, except to inspect documents as provided by law; or

(7) induce or attempt to induce an owner to enter a contract that does not comply in all respects with Sections 10 and 15 of this Act.

(b) A distressed property purchaser, in the course of a distressed property conveyance, shall not:

(1) enter into, or attempt to enter into, a distressed property conveyance unless the distressed

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property purchaser verifies and can demonstrate that the owner of the distressed property has a reasonable ability to pay for the subsequent conveyance of an interest back to the owner of the distressed property and to make monthly or any other required payments due prior to that time;

(2) fail to make a payment to the owner of the distressed property at the time the title is conveyed so that the owner of the distressed property has received consideration in an amount of at least 82% of the property's fair market value, or, in the alternative, fail to pay the owner of the distressed property no more than the costs necessary to extinguish all of the existing obligations on the distressed property, as set forth in subdivision (b)(10) of Section 45, provided that the owner's costs to repurchase the distressed property pursuant to the terms of the distressed property conveyance contract do not exceed 125% of the distressed property purchaser's costs to purchase the property. If an owner is unable to repurchase the property pursuant to the terms of the distressed property conveyance contract, the distressed property purchaser shall not fail to make a payment to the owner of the distressed property so that the owner of the distressed property has received consideration in an amount of at least 82% of the property's fair market value at the time of conveyance or at the expiration of the owner's option to repurchase.

(3) enter into repurchase or lease terms as part of the subsequent conveyance that are unfair or commercially unreasonable, or engage in any other unfair conduct;

(4) represent, directly or indirectly, that the distressed property purchaser is acting as an advisor or a consultant, or in any other manner represent that the distressed property purchaser is acting on behalf of the homeowner, or the distressed property purchaser is assisting the owner of the distressed property to "save the house", "buy time", or do anything couched in substantially similar language;

(5) misrepresent the distressed property purchaser's status as to licensure or certification;

(6) do any of the following until after the time during which the owner of a distressed property may cancel the transaction:

(A) accept from the owner of the distressed property an execution of any instrument of conveyance of any interest in the distressed property;

(B) induce the owner of the distressed property to execute an instrument of conveyance of any interest in the distressed property; or

(C) record with the county recorder of deeds any document signed by the owner of the distressed property, including but not limited to any instrument of conveyance;

(7) fail to reconvey title to the distressed property when the terms of the conveyance contract have been fulfilled;

(8) induce the owner of the distressed property to execute a quit claim deed when entering into a distressed property conveyance;

(9) enter into a distressed property conveyance where any party to the transaction is represented by power of attorney;

(10) fail to extinguish all liens encumbering the distressed property, immediately following the conveyance of the distressed property, or fail to assume all liability with respect to the lien in foreclosure and prior liens that will not be extinguished by such foreclosure, which assumption shall be accomplished without violations of the terms and conditions of the lien being assumed. Nothing herein shall preclude a lender from enforcing any provision in a contract that is not otherwise prohibited by law;

(11) fail to complete a distressed property conveyance before a notary in the offices of a title company

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licensed by the Department of Financial and Professional Regulation, before an agent of such a title company, a notary in the office of a bank, or a licensed attorney where the notary is employed; or

(12) cause the property to be conveyed or encumbered without the knowledge or permission of the distressed property owner, or in any way frustrate the ability of the distressed property owner to complete the conveyance back to the distressed property owner.

(c) There is a rebuttable presumption that an appraisal by a person licensed or certified by an agency of this State or the federal government is an accurate determination of the fair market value of the property.

(d) "Consideration" in item (2) of subsection (b) means any payment or thing of value provided to the owner of the distressed property, including reasonable costs paid to independent third parties necessary to complete the distressed property conveyance or payment of money to satisfy a debt or legal obligation of the owner of the distressed property.

"Consideration" shall not include amounts imputed as a downpayment or fee to the distressed property purchaser, or a person acting in participation with the distressed property purchaser.

(e) An evaluation of "reasonable ability to pay" under subsection (b)(1) of this Section 50 shall include debt to income ratio, fair market value of the distressed property, and the distressed property owner's payment history. There is a rebuttable presumption that the distressed property purchaser has not verified reasonable payment ability if the distressed property purchaser has not obtained documents of assets, liabilities, and income, other than a statement by the owner of the distressed property. (Source: P.A. 94-822, eff. 1-1-07.)

(765 ILCS 940/70 new)

**[A> SEC. 70. DISTRESSED PROPERTY CONSULTANT COMPENSATION. IN TRANSACTIONS THAT REDUCE THE EXISTING PAYMENT ON A HOMEOWNER'S MORTGAGE LOAN FOR A PERIOD OF NO LESS THAN 5 YEARS, A DISTRESSED PROPERTY CONSULTANT SHALL NOT CLAIM, DEMAND, CHARGE, COLLECT, OR RECEIVE ANY FEE, INTEREST, OR ANY OTHER COMPENSATION THAT EXCEEDS THE LESSER OF THE HOMEOWNER'S: <A]**

**[A> (1) EXISTING MONTHLY PRINCIPAL AND INTEREST MORTGAGE PAYMENT; OR <A]**

**[A> (2) TOTAL NET SAVINGS DERIVED FROM THE LOWERED MONTHLY PRINCIPAL AND INTEREST MORTGAGE PAYMENT OVER THE SUCCEEDING 12 MONTHS. <A]**

**[A> FOR ALL OTHER TRANSACTIONS, A DISTRESSED PROPERTY CONSULTANT SHALL NOT CLAIM, DEMAND, CHARGE, COLLECT, OR RECEIVE ANY FEE, INTEREST, OR ANY OTHER COMPENSATION FOR ANY REASON THAT EXCEEDS 50% OF THE OWNER'S EXISTING MONTHLY PRINCIPAL AND INTEREST MORTGAGE PAYMENTS. <A]**

**[\*97]** Section 97. Severability. The provisions of this Act are severable under Section 1.31 of the Statute on Statutes.

**[\*99]** Section 99. Effective date. This Act takes effect upon becoming law.

**HISTORY:**

Approved: April 6, 2009

Effective: April 6, 2009

<sup>ii</sup> It is unclear whether a forensic audit would fall under this subsection, but it is better to err on the side of caution.