
Mortgage Assistance Relief Scams: What Advocates Should Know & Updates on Regulation

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National Elder Rights Training Project for the National Legal Resource Center
Support from the Administration on Aging
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Overview

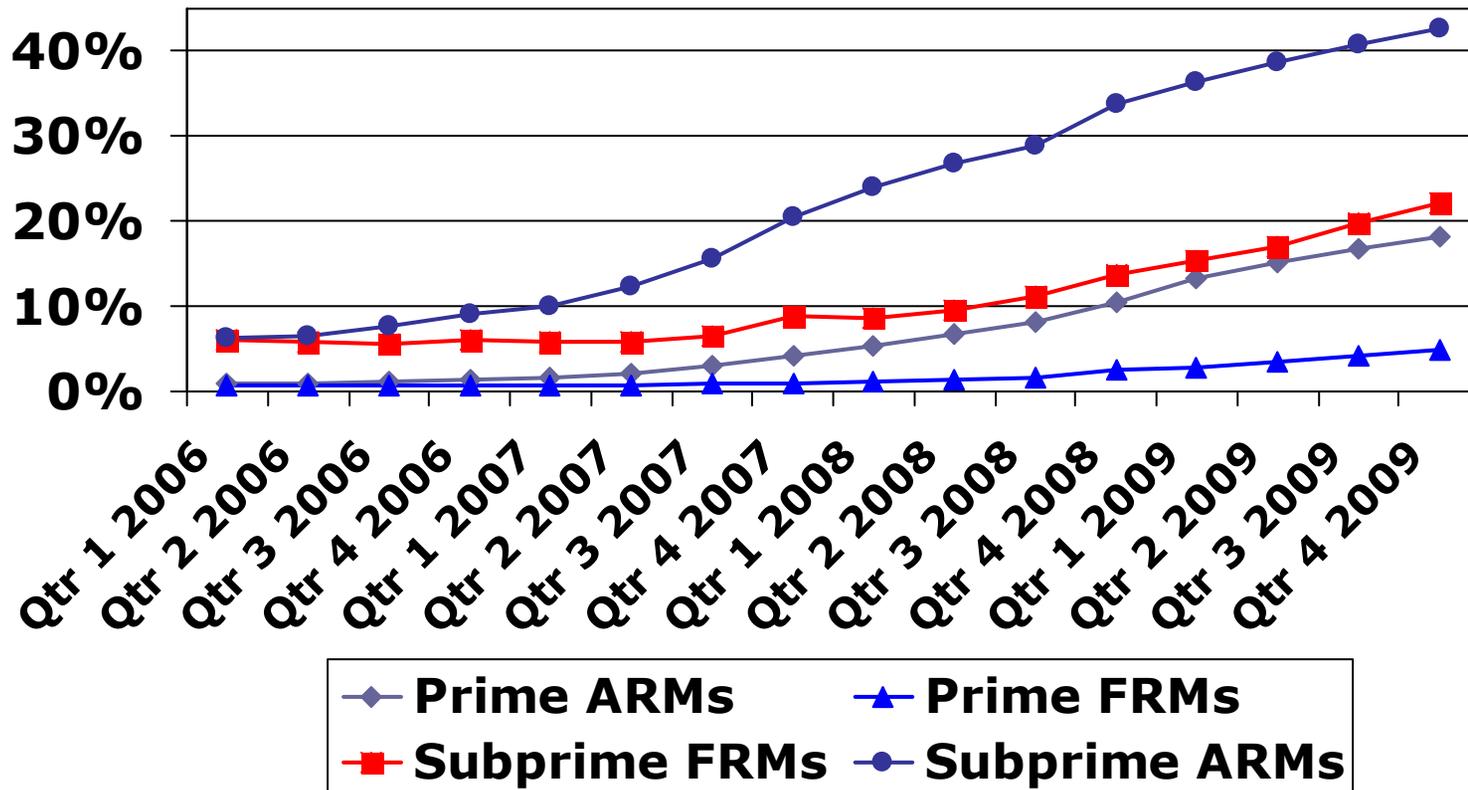
- Why are these scams so widespread?
- What scams are most common?
 - Loan modification scams
 - Loan audits
 - Short sales & We Buy Houses
 - sale-leasebacks
- How to avoid them – Red flags
- Legal strategies for sale-leasebacks
- Shooting for MARS – the FTC’s new rule

Why are these scams so widespread?

- High foreclosure rates
- Inadequate servicer and holder response

Seriously Delinquent (90+ DAYS)

Source: MBA Delinquency Survey, 2006-2009



Why are these scams so widespread?

Inadequate servicer response:

- Long hold times when calling
- Lost documents
- Inconsistent statements from servicer employees

Why are these scams so widespread?

Servicer incentives favor foreclosure:

- Rarely lose money on foreclosures
- Sometimes profit from foreclosure
- Loan mods likely to cost servicer
- Junk fees (late fees, BPOs ...) on loans go to servicer
- Recover advances, expenses upon foreclosure
 - lose them if waived in a loan modification

Source: Diane E. Thompson, Why Servicers Foreclose When They Should Modify and Other Puzzles of Servicer Behavior (NCLC, Oct. 2009).

What scams are most common?

- Loan modification scams
- Loan audits
- Short sales & We Buy Houses
- Sale-leasebacks

Poll – What problems are you seeing?

You may select more than one:

- Loan modification consultants
- “We Buy Houses” customers
- Short sale consultants
- Loan audits
- Equity stripping (ex. sale-leaseback, deed theft)

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Sample Solicitation

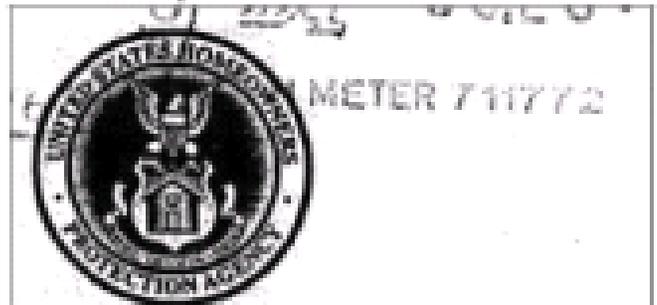


*"to provide information and education
to homeowners on their rights..."*

You are entitled to certain rights that your lender may not have informed you of which could help you save your home. Bankruptcy should be a last alternative because over 75% of those who file it fail within the first year. You have the ability to stop your foreclosure and start making your regular monthly payments again, paying the back mortgage payments either at the end of the loan or in a special repayment plan.

These rights can be exercised even if your mortgage company has denied payment arrangements or has told you that they will only accept payment of your back mortgage payments in full.

Contact the 24 hour automated information hotline immediately at 1-800-284-2690 for free information and counseling on options for saving your home without bankruptcy. Please call immediately - your sale date is pending and you may be losing some of your options by waiting.



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Advertisements . . .



Quick Descriptions

- **Loan mod consultants:**
Third party claims they will negotiate with your servicer to get a loan modification – but doesn't and keeps your money

Quick Descriptions

- **Forensic Loan Audits:**
Service that claims to review your loan docs for violations that will help you avoid foreclosure – worthless but expensive

Quick Descriptions

- **Short sale consultants:**
Claim they will convince servicer to let you sell your house for less than amount due on the loan . . . but can leave you holding the bag
- **We Buy Houses:**
Possible lead generator for one of other scams

Quick Descriptions

- **Sale-leaseback:**

Complicated, deceptive deal to save a house from foreclosure – often presented as a loan but really a sale after which the homeowner becomes a tenant.

Loan Modification Scams

- Version of phantom help – charging for help that is never provided
- Upfront / advance fees
- Claim to having special experience or contacts
- Charge for calls homeowners could have made
- “Don’t call your servicer”
- “Don’t pay your loan”
- Refunds advertised but not given
- Homeowner loses valuable time

Forensic Loan Audits

The sales pitch:

“A successful audit will force the lenders' hands. When facing their options: modification, foreclosure, litigation, or stiff federal fines and penalties, many lenders will choose Loan Modification as the most financially sensible option.”

Forensic Loan Audits



Praying Alone Won't Keep You In Your Home

However, if you have a forensic loan audit - it may help.

State and federal laws require mortgage loans **MUST** comply with regulations to protect consumers.

Any error or omission on the part of the lender or their represented agents constitutes a violation.

The best way to get your mortgage payment reduced is to have the law on your side. We can help!

Forensic Loan Audits

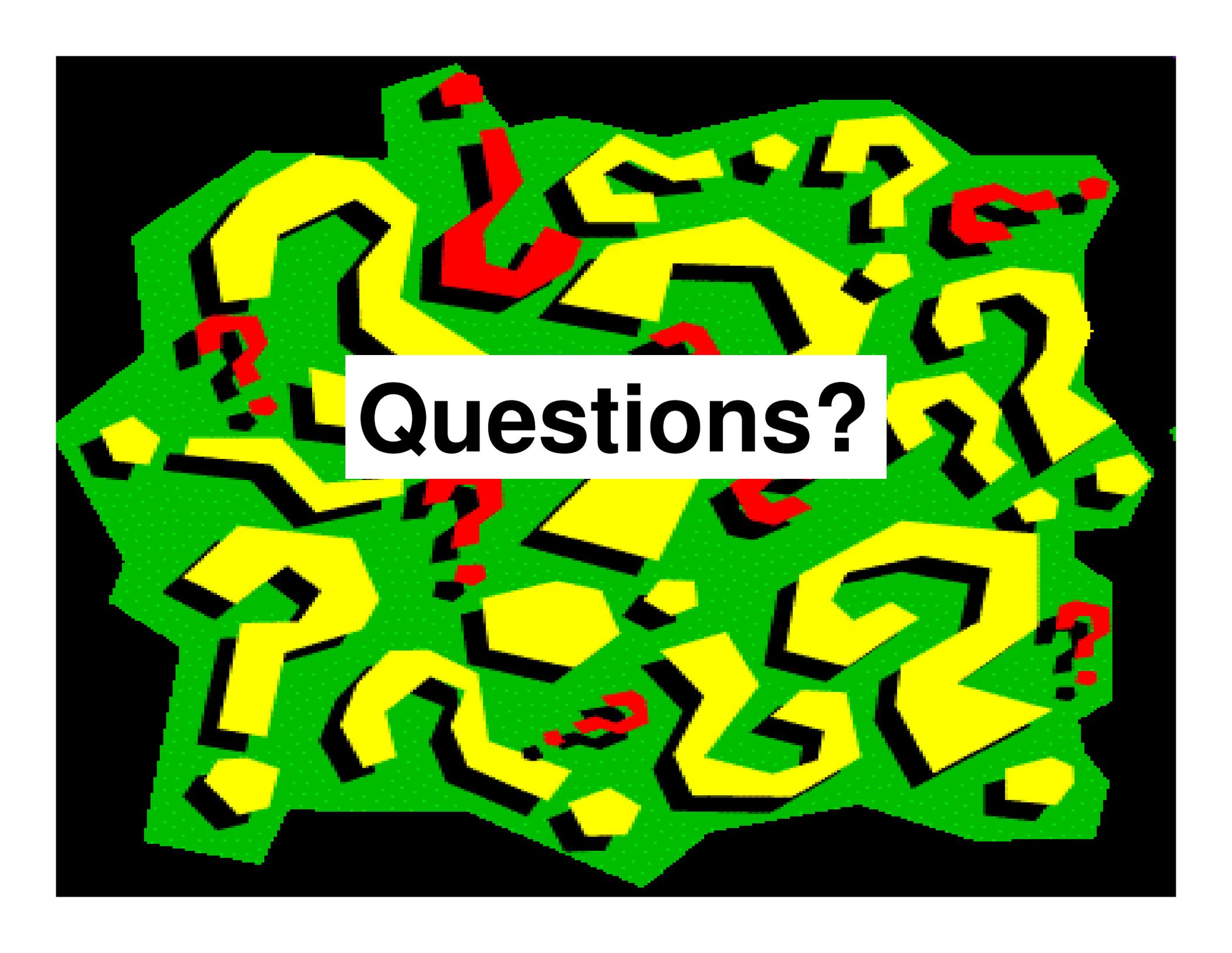
- Inaccurate
- False hope
 - may reject better options
 - make unreasonable demands of servicer
- Unauthorized practice of law
- Waste of money
- Lead generator for loan mod scams
- ¿Contributes to unmerited litigation?

Short Sale Scams

- Version 1: short sale buyer and real estate agent conceal true sale price from holder and share the difference
 - Cheats holder out of higher price
 - Buyer cheated with higher deficiency, or poss. greater taxes on debt forgiveness

Short Sale Scams

- **Version 2: buyer conceals sale from holder but takes over paying seller's mortgage**
 - We Buy Houses franchisee said this works when homeowner only slightly underwater and where the buyer can't qualify for a mortgage so will pay a premium to "assume" an existing one.
 - borrower still on hook for mortgage on default
 - violates due on sale clause, so if holder discovers sale:
 - foreclosure against borrower
 - buyer loses-out too
 - scammer keeps his profit

A complex maze with yellow paths, red question marks, and a white text box. The maze is set against a black background with a green grid. The paths are yellow, and the walls are black. Several red question marks are scattered throughout the maze. A white rectangular box is centered in the middle of the maze, containing the word "Questions?" in black text.

Questions?

Sale-Leasebacks

- The Sale:
 - 1) Homeowner is led to believe refinancing or getting some other assistance that will keep him/her in the home, *but* is actually selling the home, or
 - 2) Homeowner knows is selling but is led to believe they will get the deed back soon.
 - 3) Sometimes involves a forged deed

Result can be eviction
Loss of any remaining equity

Sale-Leasebacks

- The Leaseback
 - Homeowners rent their own home
 - Rent sometimes same as mortgage payment but sometimes more
 - Eviction
- Option to repurchase on unaffordable terms

Sale-Leasebacks

Inter vivos trusts

- Homeowner xfers home to a trust
 - Homeowner is beneficiary
 - Doesn't trigger "due on sale clause" in mortgage
- For small share of trust, rescuer brings loan current
- Homeowner sometimes rents home from trust
- Must buy house back from trust at end or rescuer gets it.

Sale-Leasebacks

- Complications (aside from deception and unreasonable terms):
 - “Rescuer” pays arrears to get mortgage current
 - Does rescuer pay mortgage during lease?
 - Rescuer re-mortgages or sells house and pockets profit
 - No documentation of parties’ true intent
 - Option to repurchase unaffordable
 - Lease terms unreasonably strict – ex. no grace period

Sale-Leasebacks: Example

- Unemployed homeowner in foreclosure - owed \$119k, believed house worth \$125k
 - \$1,100/m payments
- Received foreclosure rescue ad in mail
 - “Second Chance Program” to help save homes from foreclosure; to help homeowner keep the home
- Met rescuer; was assured goal was to avoid foreclosure, help her keep her home; rescuer said they would work with mortgage holder and buy her loan from them

Sale-Leasebacks: Example

- By end of closing, homeowner realized documents included a sale, lease, and option to repurchase
 - largely understood transaction
 - felt had no alternative
- Transaction:
 - residential sale contract for \$140k
 - lease for \$1,200/m w/ \$100 late fee
 - Option to repurchase for \$180k in 1yr or \$190k in 2yrs
- no credit check, “no doc” transaction, rescuer knew was unemployed
- Rescuer paid-off mortgage, property taxes, \$833 in cash to homeowner ... total pymt to homeowner = \$130,493
- After closing house appraised for \$225,000

Strategies for Sale-Leasebacks

Overview

- Initial Considerations
- First Steps
- Attacking the transaction

Strategies for Sale-Leasebacks

Initial Considerations:

- Can homeowner continue to live independently?
 - medical
 - financial
- If homeowner couldn't pay mortgage before, how pay in the future?
- Possibility of damages award in addition to getting deed back?
- Deterrence value of litigation?

Strategies for Sale-Leasebacks

First steps:

- *lis pendens*
- stop the eviction
- examine the documents
- examine land records
- identify the parties

Strategies for Sale-Leasebacks

Attacking the Transaction

- Common law
- Federal and state law
- Bankruptcy

Strategies for Sale-Leasebacks

Common Law

- Equitable mortgage doctrine
- Unconscionability
- Fraud, misrepresentation
- Intentional infliction of emotional distress
- Breach of fiduciary duty
- Breach of Duty of Good Faith and Fair Dealing

Strategies for Sale-Leasebacks

Equitable Mortgage Doctrine

- Shows true nature of transaction – a loan secured by the house
- Transfer of title only gave rescuer a *security interest* – but did not transfer actual ownership
- Goes beyond face of documents
- May use parol evidence to prove parties' intent (Parol evidence rule says a written contract can't be disputed with contrary information not included in the document)

Strategies for Sale-Leasebacks

State and Federal Statutes, Regulations

- Truth in Lending Act (TILA)
Home Ownership & Equity Protection Act (HOEPA)
 - disclosure requirements
 - right to rescind
 - higher requirements and better assignee liability for HOEPA loans
- FTC's MARS rule (later)

Strategies for Sale-Leasebacks

- State foreclosure rescue laws
- State lending laws
 - Should rescuer have been licensed?
- State unfair and deceptive acts and practices laws (UDAP)
- Usury
- State Door-to-Door Sales
- Credit repair laws

Strategies for Sale-Leasebacks

Bankruptcy

- Can stop eviction process
 - complex – consult with a bankruptcy expert first
- Better forum – Judges more familiar with related laws and issues, more willing to void or re-write contracts, have power to void transfers

Strategies for Sale-Leasebacks

Tendering or Paying the Equitable Mortgage

- TILA, HOEPA, common law, state laws
 - Did rescuer paid-off arrearage?
 - Did rescuer refinance borrower's mortgage?
- Use damages as set-off
 - actual, punitive, statutory
- Forfeiture?
- Be creative . . .

Strategies for Sale-Leasebacks

Moore v. Cycon Enterprises, Inc., 2007 WL 475202 (W.D. Mich. Feb. 9, 2007)

Mortgage payoff by scammer	\$215,262
Finance charges canceled by TILA	-25,000
TILA statutory damages	-4,000
Rent paid to scammer	-6,706
Taxes, insurance paid by scammer	+6,462
Tender due	=186,017
- <i>damages from other claims, if any...</i>	

Strategies for Sale-Leasebacks

Moore v. Cycon Enterprises, Inc.

- 120 days to refinance tender amount due
 - traditional mortgage
 - reverse mortgage
 - sell house and move to something more affordable . . .
- Alternatives
 - defendant must accept affordable monthly installments
 - ch. 13 bankruptcy plan
 - unsecured debt in bankruptcy?

Strategies for Sale-Leasebacks

Bona fide third-party purchasers and lenders

- scammers often sell or mortgage property after getting control from distressed borrower
- BFP defense: Court will not force innocent 3rd party purchaser (or mortgagee) to return property to injured homeowner without compensation

Strategies for Sale-Leasebacks

Overcoming the “bona fide third-party” defense

- Forgery – void from inception
- Fraud in the factum too
 - but not fraud in the inducement: voids against rescuer but not bona fide 3rd party
- Actual, constructive, or inquiry notice
 - *lis pendens*, suspicious circumstances
 - varies by state

Strategies for Sale-Leasebacks

Facts putting buyer on inquiry notice

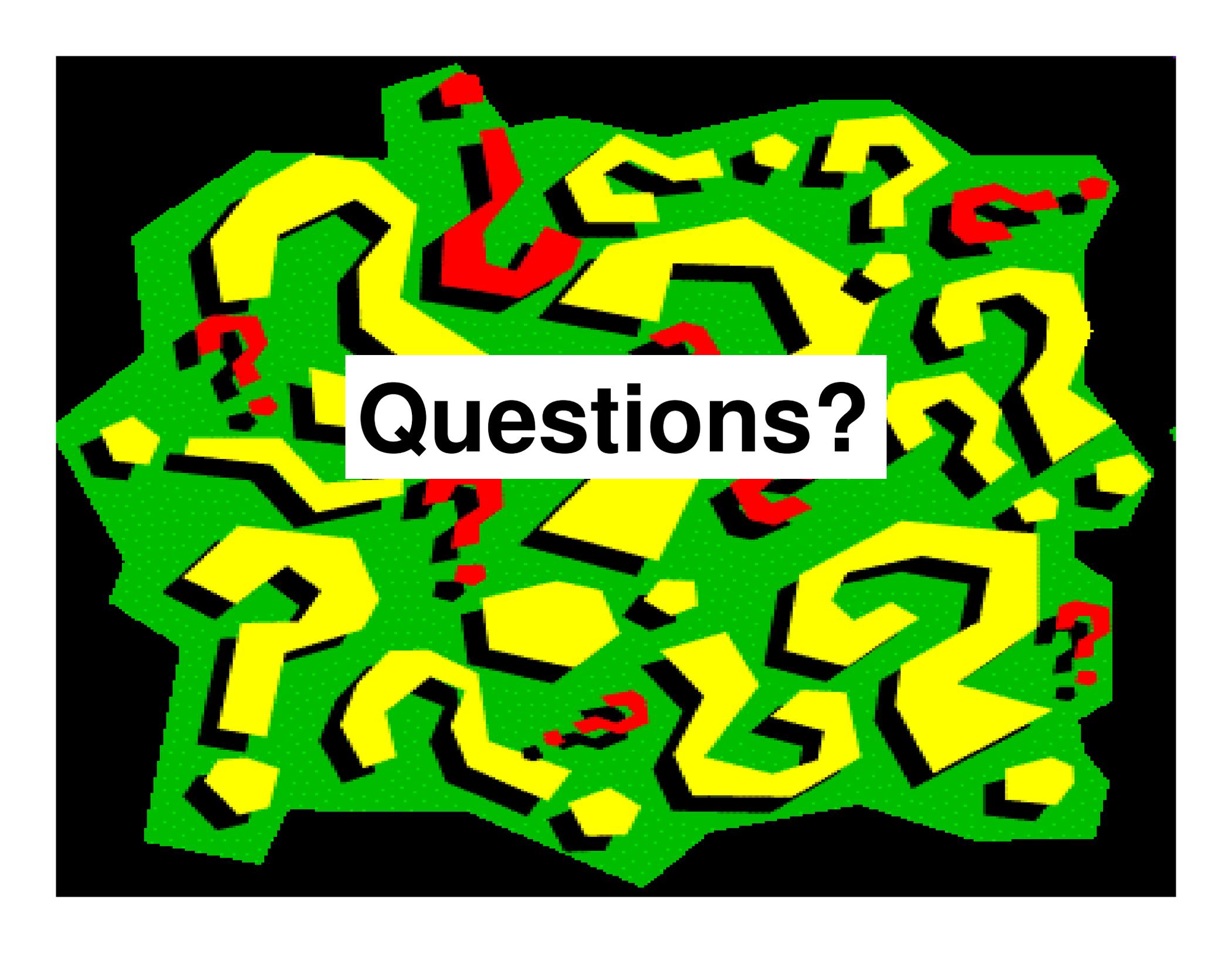
- homeowner's continued possession of the property
- acquisition of title through a quit claim deed, especially if it is one of a series
- purchaser's failure to conduct a title search or to obtain title insurance
- purchaser paid significantly less than market value for the property

Red Flags

- Payment in advance – even if refunds offered
 - Housing counselors do same work for free
- Flashy ads with big promises
 - be skeptical of any ads, unsolicited calls or mailings
- Touting “certified,” “licensed,” “bonded”
 - Even if true, does not mean state approval or qualified
- “Don’t talk to mortgage company” or “Stop paying”
- Asks you to sign papers with blanks, won’t answer questions, or won’t give time to read or show them to others first
- Asks for power of attorney

Red Flags

- For advocates, be suspicious of everyone offering these services except:
 - qualified nonprofits, ex.
 - HUD-certified housing counselors
 - known groups assisting seniors
 - government agencies
 - the mortgage servicer (but watch out for extra fees)
 - some attorneys in your community
 - **must** be licensed in borrower's state to help
 - qualified? who will do the work? beware of “mills”

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Questions?

New Regulations

- Secure and Fair Enforcement Mortgage Licensing Act of 2008 (SAFE Act)
 - licensing and regulation of loan originators
 - implemented by states
 - HUD sets minimum requirements
 - does “loan originator” include 3rd party “loan modification specialists”?

FTC Mortgage Assistance Relief Services

A MARS is: a paid service represented to assist or attempt to assist a consumer with:

- negotiating loan modifications
- stopping or postponing a foreclosure
- getting a forbearance, chg in time of payments
- negotiating time to redeem or cure default
- getting waiver of acceleration clause or balloon pymt
- negotiating a short sale, deed-in-lieu

Includes sale-leasebacks, probably loan audits

FTC Mortgage Assistance Relief Services

Highlights:

- MARS providers prohibited from making false or misleading claims;
- disclose requirements;
- no charging advance fees;
- no payment until all results achieved'
- record-keeping and compliance reqs. based on Telemarketing Sales Rule

FTC Mortgage Assistance Relief Services

More Highlights:

- bans saying “don’t talk to your servicer”
- no payment for loan mods unless permanent or at least 5yrs; meaningful; not forbearance or repayment plan
- bans assisting anyone known to be violating MARS rule
- state AGs, other authorized state officials may enforce rules

FTC Mortgage Assistance Relief Services

Applies to MARS providers = anyone providing a MARS for a fee *except*:

- holder
- servicer
- nonprofits, banks (outside FTC jurisdiction)
- limited attorney exemptions

FTC Mortgage Assistance Relief Services

Attorneys exempt from:

- prohibition on telling client not to speak with servicer
- advance fee ban *but only* when work is in connection with preparing/filing:
 - bankruptcy papers
 - docs for any court or admin proceedings
- not exempt from anything else.

FTC Mortgage Assistance Relief Services

Weaknesses:

- no private right of action
- no right to cancel MARS contracts
- no provisions for unwinding sale-leasebacks
- attorney restrictions likely to force-out good attorneys

Comments to FTC Due 3-29-10

NCLC Resources

Webinar Resources: www.nclc.org/issues/seniors_initiative/webinar_ap.shtml

