



To: State Legislators Interested in Combating Foreclosure Rescue Scams
From: National Consumer Law Center¹
Date: March 11, 2008
Re: NCLC Model Foreclosure Rescue Statute

The foreclosure crisis has presented the perfect opportunity for foreclosure rescue scams. These scams come in two main varieties.² In the first, a foreclosure “consultant” takes an up front payment and promises to arrange refinancing or postpone the foreclosure, but does nothing and costs the homeowner not only money but critical time. In the second, the rescuer takes title to the property “temporarily” with the promise that the homeowner will get it back, a promise that always fails. These sale/leaseback scams are designed to steal the home’s equity.

NCLC has drafted a model state law designed to combat the more complicated sale/leaseback scams. Our model law builds upon but differs from the two approaches that some states have enacted. Several states have regulated foreclosure rescue scams by specifying requirements for the contracts and giving the homeowner a right to cancel. More recently, the Massachusetts Attorney General issued an order under her unfair and deceptive acts and practices authority completely banning foreclosure rescue transactions, and the District of Columbia enacted a similar prohibition by statute. These different approaches have had some success, though they have not completely stopped foreclosure rescue scams.

Our model law builds upon the centuries-old common law equitable mortgage doctrine to call a sale/leaseback transaction what it is: a loan. The model law requires the rescuer to comply with lending laws, deems the rescuer’s deed to be merely a mortgage, and deems the rescuer to be merely a lender, with no right to evict or encumber the property.

The model law has the following advantages over the other approaches:

- It is simple to apply.
- It does not send out a mixed message that it is acceptable to take a homeowner’s title as long as contract requirements are satisfied.
- It may be more appealing to legislatures that are concerned about banning all foreclosure rescue transactions outright.
- It includes a clear, detailed remedy scheme that none of the existing statutes has, showing precisely how to restructure a transaction that looks like a sale into a loan.
- It provides a workable approach to helping homeowners who received some cash from the rescuer that they cannot afford to pay back immediately.
- It clarifies the warning signs that third party lenders, buyers, title insurers and escrow companies should look for to ensure that they do not unwittingly enable these scams.

¹ This memorandum was written by Lauren Saunders, Managing Attorney of NCLC’s Washington, DC office.

² For more background, see NCLC, “Dreams Foreclosed: The Rampant Theft of America’s Homes Through Equity-Stripping “Foreclosure Rescue” Scams (2005), available at www.nclc.org/news/content/ForeclosureReportFinal.pdf,

Our model law makes clear and explicit what the other statutes leave implicit. Under all the existing statutes, once the transaction is found to be unlawful, it is generally necessary to resort to the common law equitable mortgage doctrine or the federal Truth in Lending Act to unwind the transaction. Yet courts are sometimes uncomfortable doing so without clear direction or more recent caselaw than equitable mortgage cases that could be a century old.

In addition, the model law attempts to achieve a more complete remedy and, better yet, to stop the scams from happening by depriving scammers of the unwitting assistance of third parties that are critical to the deals. No matter what approach is taken, scammers will violate the law because they are lawbreakers. But even once the scammer is caught, complete relief is often impossible because the home has been encumbered by a new loan from a bona fide lender, or title has been passed to a bona fide purchaser. The model law specifies the warning signs that should put a third party on notice to inquire into the homeowner's status before getting caught in the middle. Scammers will be unable to complete their transactions if legitimate title or escrow companies will not close their deals, if legitimate lenders will not finance them or enable them to get their money out, and if the scammers cannot flip the properties to legitimate buyers.

Note that the model law's remedy and bona fide purchaser provisions are also adaptable to supplement the existing "regulate it" and "ban it" approaches.

For more information, contact Lauren Saunders in NCLC's Washington office.

About NCLC

National Consumer Law Center is a non-profit organization with nearly 40 years of working experience in consumer issues, especially those affecting low-income consumers. NCLC works with and offers training to thousands of legal-service, government and private attorneys, as well as community groups and organizations representing low-income and elderly people. Note that NCLC does not directly assist individuals.

NCLC has extensive experience in mortgage lending and the problem of foreclosure rescue scams and has published several reports and legal treatises on the issue. More detailed advice on the legal theories used to assist homeowners in foreclosure or to attack foreclosure rescue transactions can be found in the Foreclosure Rescue Scams chapter of *Foreclosures: Defenses, Workouts, and Mortgage Servicing* (2d ed. 2007 & Supp.). Other legal treatises include *Truth in Lending* (6th Ed. 2007 & Supp.) and *Unfair and Deceptive Acts and Practices* (7th ed. Forthcoming 2008). Other publications that can be useful to lay advocates include *Foreclosure Prevention Counseling* (1st ed. 2007); *Stop Predatory Lending* (2d ed. 2007); and *Surviving Debt* (7th ed. 2008). Ordering information can be found on our website.