

**NEW YORK STATE  
HOME EQUITY THEFT PREVENTION ACT**

**Presentation to**

**BUFFALO NIAGARA ASSOCIATION OF REALTORS<sup>®</sup>, INC.**

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## NEW YORK STATE HOME EQUITY THEFT PREVENTION ACT

On February 1, 2007 the Home Equity Theft Prevention Act (the "Act") became effective in the State of New York. The Act (1) amends paragraphs (e), (f), (g) of Section 595-a of the Banking Law and adds a new paragraph (h); (2) adds a new section 265-a to the Real Property Law; and (3) adds a new section 1303 to the Real Property Actions and Proceedings Law.

### The Background

The purpose of the Act is to eradicate foreclosure scams perpetrated on unwitting homeowners whose properties are subject to a mortgage that is in default (as defined in the Act) or in foreclosure. Typically, the would-be rescuer gets a deed to the property promising that title will be returned as soon as the distressed owner's credit is restored and immediately mortgages the property (sometimes with the benefit of an inflated appraisal), cashes out the distressed owner's equity and walks/defaults, or flips the property to a third party. The distressed homeowner may be confronted with eviction and the loss of his/her home, without even knowing a deed was signed over to the foreclosure rescuer, or resold to another person.

In addition, the Act attempts to give distressed owners all of the information required to make an informed and intelligent decision regarding the sale or transfer of a residence to an Equity Purchaser. Defined terms in the Act are designated by quotation marks below.

### The Covered Contract and Other Definitions

The Act applies when an "Equity Seller" enters into a "Covered Contract" with an "Equity Purchaser" or a "Representative" to "Sell" the Residence in a transaction in which consideration is received by the Equity Seller or title is transferred for no consideration when the "Residence" is in "Foreclosure" or the Equity Seller is in "Default" or the Covered Contract includes a "Reconveyance Agreement."

"Residence or residential real property" means a 1-4 family dwelling, one of which units the "Equity Seller" occupies or occupied as his or her primary residence immediately before the sale.

"Equity Seller" is a natural person who owns, either individually or with others or other entities, the residential real property in foreclosure or in default at the time of the equity sale. While the statute is silent as to whether Equity Seller includes a lifetime trust and there is an individual who has a life estate in the property, cautious practice should include the lifetime trust and the life estate holder as an Equity Seller.

"Equity Purchaser" means any person or entity that acquires title to any residence that is in foreclosure or is in default, **except** a person or entity that acquires the residential real property in any of the conditions below:

1. to use, and who uses such property as his or her primary residence. (Note: if the purchaser is not a natural person, this exception cannot apply); or

2. by a deed from a referee in a mortgage or tax lien foreclosure action; or
3. at any sale of property authorized by statute; or
4. by order or judgment of any court; or
5. from a spouse, parent, grandparent, child, grandchild or sibling of such person or such person's spouse; or
6. as a not-for-profit housing organization or as a public housing agency; or
7. as a bona fide purchaser or encumbrancer for value (as later defined).

A "Residence" is in "**Foreclosure**" when a **Notice of Pendency has been filed** against the property or the property is on an **active property tax lien list**. An equity Seller is in "**Default**" when **two or more months in arrears on mortgage payments**.

"Bona fide purchaser or encumbrancer for value" means anyone acting in good faith who purchases the residential real property from the Equity Purchaser for valuable consideration or, as mortgagee, provides the Equity Purchaser with a mortgage or provides a subsequent bona fide purchaser with a mortgage, provided that he or she had no notice of the Equity Seller's continuing right to, or equity in, the property prior to the acquisition of title or encumbrance, or of any violation of the Act by the Equity Purchaser as related to the subject property. Note: a person or entity cannot claim bona fide purchaser or encumbrancer status if, prior to the alleged bona fide purchase or loan, a notice of rescission pursuant to the Act had been filed by the Equity Seller.

"Business day" means any calendar day except Sunday or the public holidays set forth in section twenty-four of the general construction law.

"Covered contract" means any contract, agreement, or arrangement, or any term thereof, between an Equity Purchaser and Equity Seller which:

1. is incident to the sale of a residence in Foreclosure; or
2. is incident to the sale of a residence in Foreclosure or Default where such contract, agreement or arrangement includes a reconveyance arrangement.

For purposes of the Act, any reference to the "sale" of a residence by the Equity Seller to an Equity Purchaser includes a transfer for consideration or a transfer without consideration.

"Reconveyance arrangement" means:

1. the transfer of title to residential real property by an Equity Seller who is in Default or Foreclosure, either by transfer of interest from an Equity Seller to an Equity Purchaser or by creation of a mortgage or other lien or encumbrance during the time of Default or Foreclosure that allows the Equity Purchaser to obtain legal or equitable title to all or part of the property, and

2. the subsequent conveyance, or promise of a subsequent conveyance, of an interest back to the Equity Seller by the Equity Purchaser that allows the Equity Seller to regain possession of the property, which interest shall include but not be limited to a purchase agreement, option to purchase, or lease.

“Representative” means a person who in any manner solicits, induces, arranges, or causes any Equity Seller to transfer title or solicits any member of the Equity Seller’s family or household to induce or cause any Equity Seller to transfer title to the residence in Foreclosure or, where applicable, Default to the Equity Purchaser.

### **The Right to Cancel the Covered Contract**

The Act requires that a Covered Contract contain the entire agreement, sets forth specific contract and notice requirements, and does not contain any false or misleading statements regarding value or seller’s rights. The Equity Seller is also given the right to rescind the Covered Contract and cancel the transaction. In addition, in the event of a proper cancellation, the Act requires the Equity Purchaser to return, without condition, any original Covered Contract and any other documents signed by the Equity Seller, as well as **any fee or other consideration** received by the Equity Purchaser from the Equity Seller.

Significantly, the Act provides that:

**The Equity Seller must be granted a five-day cooling off period with a right to cancel the “Covered Contract” “until midnight of the fifth business day” from the date the Equity Seller and Equity Purchaser sign the Covered Contract.**

**“Any transaction ... which is in material violation is voidable and the transaction may be rescinded by the Equity Seller within two years of the date of the recording of the conveyance of the residential real property in foreclosure or, where applicable, default.”**

Section 8(c) of the Act provides that the section will not affect the interest of a bona fide Purchaser but provides that “This subdivision shall not be deemed to abrogate any duty of inquiry which exists as to rights or interests of persons in possession of the residential real property in foreclosure, or where applicable, default.”

### **Prohibitions Under the Act**

1. Before midnight of the fifth business day after the date on which the covered contract is executed, the Equity Purchaser **shall not do any of the following**:
  - a. accept from any Equity Seller an execution of, or induce any Equity Seller to execute, any instrument of conveyance of any interest in the residence in foreclosure or, where applicable, default;

- b. record with the county clerk any document, including, but not limited to, any instrument of conveyance, signed by the Equity Seller;
  - c. transfer or encumber or purport to transfer or encumber any interest in the residence in foreclosure or, where applicable, default to any third party;
  - d. pay the equity seller any consideration; or
  - e. suggest, encourage, or provide any form which allows the Equity Seller to waive his or her right to cancel or rescind under this section.
2. An Equity Purchaser shall make no false or misleading statement regarding the value of the residence in foreclosure or, where applicable, default; the amount of proceeds the Equity Seller will receive after a foreclosure sale; the timing of the judicial foreclosure process; any contract term; the Equity Seller's rights or obligations incident to or arising out of the sale transaction; the nature of any document which the Equity Purchaser induces the Equity Seller to sign; or any other false or misleading statement concerning the sale of the residence in foreclosure or, where applicable, default, or concerning the reconveyance arrangement.
3. An Equity Purchaser is **prohibited** from representing, directly or indirectly, that:
  - a. the Equity Purchaser is acting as an advisor or a consultant, or in any other manner represents that the Equity Purchaser is acting on behalf of the Equity Seller;
  - b. the Equity Purchaser has certification or licensure that the Equity Purchaser does not have, or that the Equity Purchaser is not a member of a licensed profession if he or she is actually such a member;
  - c. the Equity Purchaser is assisting the Equity Seller to save the house unless the Equity Purchaser has a good faith basis for the representation; or
  - d. the Equity Purchaser is assisting the Equity Seller in preventing a completed foreclosure unless the Equity Purchaser has a good faith basis for the representation.
4. It is unlawful for any Equity Purchaser to initiate, enter into, negotiate, or consummate any covered contract involving residential real property in foreclosure or, where applicable, default if such person, by the terms of such covered contract, **takes unconscionable advantage** of the Equity Seller.

### **Covered Contract Requirements**

Any Covered Contract entered into on or after February 1, 2007 are required to have the following terms and conditions. If the Covered Contract is not in compliance, then it is voidable

and the transaction may be rescinded by the Equity Seller within two years of the date of recording of the conveyance:

1. All contracts must be in type equal to **twelve-point boldface** in English (or in English and Spanish, if Spanish is the primary language of the seller).
2. All contracts are to be effective on the fifth business day after the date on which the contract was executed. Cancellation within five business days occurs when the seller, or their representative, personally delivers written notice of cancellation to the address specified in the covered contract or sends a letter via facsimile or other means of written communication, United States mail, or through an established commercial letter delivery service, indicating cancellation to the business address of the equity purchaser listed on the covered contract. Proof of facsimile delivery or proof of mailing creates a presumption that the notice of cancellation has been delivered.
3. Within ten days following receipt of a notice of cancellation, the Equity Purchaser shall return without condition any original contract and any other documents signed by the Equity Seller as well as any fee or other consideration received by the Equity Purchaser from the Equity Seller. Cancellation of the contract releases the Equity Seller of all obligations to pay fees to the Equity Purchaser.
4. The entire agreement of the parties must include, but are not limited to, the following terms:
  - a. The name, business address, and the telephone number of the Equity Purchaser;
  - b. The address of the residence in foreclosure or, where applicable, default;
  - c. The total consideration to be given by the Equity Purchaser in connection with or incident to the sale;
  - d. A complete description of the terms of payment or other consideration including, but not limited to, any services of any nature which the Equity Purchaser represents he or she will perform for the Equity Seller before or after the sale;
  - e. The time, if any, at which physical possession of the residence is to be transferred to the Equity Purchaser and the residence vacated by the equity seller;
  - f. The terms of any rental or lease agreement;
  - g. The terms of any reconveyance arrangement;
  - h. A notice of cancellation shall appear on the contract in immediate proximity to the space reserved for the Equity Seller's signature and shall

be in at least **fourteen-point bold type** if the contract is printed or in capital letters of the covered contract is typed. The notice must contain the name of the Equity Purchaser and the date and time by which the covered contract must be canceled. The notice shall be completed by the Equity Purchaser.

5. The following is a copy of the notice required by the Act.

NOTICE REQUIRED BY NEW YORK LAW You may cancel this contract at any time before midnight of \_\_\_\_\_.

\_\_\_\_\_  
(Date)

\_\_\_\_\_  
(Name of Equity Purchaser)

or anyone working for \_\_\_\_\_

\_\_\_\_\_  
(Name of Equity Purchaser)

CANNOT ask you to sign or have you sign any deed or any other document until your right to cancel this contract has ended. See attached notice of cancellation form for an explanation of this right. You should always consult an attorney or community organization before signing any legal documents concerning your home. It is advisable that you find your own attorney, and not consult with an attorney who has been provided to you by the purchaser. The law requires that this contract contain the entire agreement. You should not rely upon any other written or oral agreement or promise.

6. The covered contract shall be accompanied by a form completed by the Equity Purchaser in duplicate, captioned "notice of cancellation" in at least **twelve-point bold type** if the covered contract is printed or in capital letters if the covered contract is typed. This form shall be attached to the covered contract, shall be easily detachable, and shall contain in type of at **least twelve-point** if the covered contract is printed or in capital letters if the covered contract is typed, the following statement written in the same language as used in the covered contract. The following is a copy of the notice of cancellation required by the Act.

NOTICE OF CANCELLATION This contract was entered into on \_\_\_\_\_ (enter date covered contract signed). You may cancel this contract for the sale of your house, without any penalty or obligation, at any time before midnight of \_\_\_\_\_ (enter date). To cancel this transaction, personally deliver a signed and dated copy of this cancellation notice, or send it by facsimile, United States mail, or an established commercial letter delivery service, indicating cancellation to \_\_\_\_\_ (name of purchaser), at \_\_\_\_\_ (street address of purchaser's place of business and facsimile number if any), NOT LATER THAN midnight of \_\_\_\_\_ (enter date).

If you wish to cancel this contract, sign and date both copies and return one copy immediately to the purchaser.

I hereby cancel this transaction.

\_\_\_\_\_  
(Seller's signature)

/ \_\_\_\_\_  
(Date)

The Equity Purchaser shall provide each Equity Seller with two copies of the covered contract and attached notice of cancellation. The Equity Purchaser shall accurately enter the date on which the right to cancel ends.

If the Equity Purchaser is in violation of the provisions of the Act, the transaction may be voidable by the Equity Seller for up to two years following the date of recording of the conveyance. If the residential property was subsequently transferred to a bona fide purchaser prior to the filing of a notice of rescission, the bona fide purchaser is not subject to the rescission by the Equity Seller.

Any term in a contract limiting the liability of an Equity Purchaser as it relates to the provisions of the Act shall be null and void, and at the option of the Equity Seller, can render the contract null and void. Likewise, any section requiring arbitration relating to the provisions of the Act shall be null and void at the option of the Equity Seller.

#### **Caution to REALTORS®**

REALTORS® should be aware as to whether or not a seller is in foreclosure or default of their mortgage. If it is found that the seller is, and the purchaser is not going to occupy the property as their primary residence, the REALTOR® should be fully aware of the provisions of the Act and the need for appropriate notices set forth in the Act.

#### **Penalties for Violations**

In addition to the right to rescind the transaction described above, the Act includes civil and criminal penalties (imprisonment and up to \$25,000 fines) for its violation. It provides for recovery of actual damages and treble the actual damages, plus recovery of reasonable attorney fees and costs of litigation.

#### **Mortgage Broker and Bankers**

The Act applies to any person who directly or indirectly makes a mortgage loan to an Equity Purchaser, if the mortgage broker or mortgage banker **“had knowledge that the Equity Purchaser was not complying” with the Act.**

#### **Mortgage Foreclosures**

Finally, the Act adds Section 1303 to the Real Property Actions and Proceedings Law regarding required notices in foreclosure actions with which the plaintiff must comply by attaching a notice entitled “Help for Homeowners in Foreclosure” to the Summons and Complaint on a different colored paper and in **twenty point bold type.**