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CS/HB 643, Engrossed 1

2008 Legislature

1 A bill to be entitled
2 An act relating to foreclosure fraud; creating s.
3 501.1377, F.S.; providing legislative findings and intent
4 with respect to the need to protect homeowners who enter
5 into agreements designed to save their homes from
6 foreclosure; providing definitions; prohibiting a
7 foreclosure-rescue consultant from engaging in certain
8 acts or failing to perform contracted services; requiring
9 that all agreements for foreclosure-related rescue
10 services and foreclosure-rescue transactions be in
11 writing; specifying information that must be in the
12 written agreement; requiring that certain statements in
13 the written agreement be in uppercase letters and of a
14 specified size; providing that the homeowner has a right
15 to cancel the agreement for a specified period and the
16 right may not be waived; providing that the homeowner has
17 a specified period during which to cure a default under
18 certain circumstances; requiring equity purchasers to
19 assume or discharge certain liens; requiring that an
20 equity purchaser verify the homeowner's ability to make
21 payments under a repurchase agreement; providing price
22 limitations for repurchase transactions; providing for a
23 rebuttable presumption of certain transactions being
24 unconscionable under certain circumstances; providing for
25 limited application of the presumption; providing an
26 exclusion; providing that a foreclosure-rescue transaction
27 involving a lease option or other repurchase agreement
28 creates a rebuttable presumption that the transaction is a

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29 loan transaction and the conveyance from the homeowner to
 30 the equity purchaser is a mortgage; providing limited
 31 application of the presumption; providing an exclusion;
 32 providing that a person who violates certain provisions
 33 commits an unfair and deceptive trade practice as defined
 34 in part II of ch. 501, F.S.; providing penalties;
 35 repealing s. 501.2078, F.S., relating to violations
 36 involving individual homeowners during the course of
 37 residential foreclosure proceedings; providing an
 38 effective date.

39

40 Be It Enacted by the Legislature of the State of Florida:

41

42 Section 1. Section 501.1377, Florida Statutes, is created
 43 to read:

44 501.1377 Violations involving homeowners during the course
 45 of residential foreclosure proceedings.--

46 (1) LEGISLATIVE FINDINGS AND INTENT.--The Legislature
 47 finds that homeowners who are in default on their mortgages, in
 48 foreclosure, or at risk of losing their homes due to nonpayment
 49 of taxes may be vulnerable to fraud, deception, and unfair
 50 dealings with foreclosure-rescue consultants or equity
 51 purchasers. The intent of this section is to provide a homeowner
 52 with information necessary to make an informed decision
 53 regarding the sale or transfer of his or her home to an equity
 54 purchaser. It is the further intent of this section to require
 55 that foreclosure-related rescue services agreements be expressed
 56 in writing in order to safeguard homeowners against deceit and

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57 financial hardship; to ensure, foster, and encourage fair
 58 dealing in the sale and purchase of homes in foreclosure or
 59 default; to prohibit representations that tend to mislead; to
 60 prohibit or restrict unfair contract terms; to provide a
 61 cooling-off period for homeowners who enter into contracts for
 62 services related to saving their homes from foreclosure or
 63 preserving their rights to possession of their homes; to afford
 64 homeowners a reasonable and meaningful opportunity to rescind
 65 sales to equity purchasers; and to preserve and protect home
 66 equity for the homeowners of this state.

67 (2) DEFINITIONS.--As used in this section, the term:

68 (a) "Equity purchaser" means any person who acquires a
 69 legal, equitable, or beneficial ownership interest in any
 70 residential real property as a result of a foreclosure-rescue
 71 transaction. The term does not apply to a person who acquires
 72 the legal, equitable, or beneficial interest in such property:

- 73 1. By a certificate of title from a foreclosure sale
 74 conducted under chapter 45;
- 75 2. At a sale of property authorized by statute;
- 76 3. By order or judgment of any court;
- 77 4. From a spouse, parent, grandparent, child, grandchild,
 78 or sibling of the person or the person's spouse; or
- 79 5. As a deed in lieu of foreclosure, a workout agreement,
 80 a bankruptcy plan, or any other agreement between a foreclosing
 81 lender and a homeowner.

82 (b) "Foreclosure-rescue consultant" means a person who
 83 directly or indirectly makes a solicitation, representation, or
 84 offer to a homeowner to provide or perform, in return for

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85 payment of money or other valuable consideration, foreclosure-
 86 related rescue services. The term does not apply to:

87 1. A person excluded under s. 501.212.

88 2. A person acting under the express authority or written
 89 approval of the United States Department of Housing and Urban
 90 Development or other department or agency of the United States
 91 or this state to provide foreclosure-related rescue services.

92 3. A charitable, not-for-profit agency or organization, as
 93 determined by the United States Internal Revenue Service under
 94 s. 501(c)(3) of the Internal Revenue Code, which offers
 95 counseling or advice to an owner of residential real property in
 96 foreclosure or loan default if the agency or organization does
 97 not contract for foreclosure-related rescue services with a for-
 98 profit lender or person facilitating or engaging in foreclosure-
 99 rescue transactions.

100 4. A person who holds or is owed an obligation secured by
 101 a lien on any residential real property in foreclosure if the
 102 person performs foreclosure-related rescue services in
 103 connection with this obligation or lien and the obligation or
 104 lien was not the result of or part of a proposed foreclosure
 105 reconveyance or foreclosure-rescue transaction.

106 5. A financial institution as defined in s. 655.005 and
 107 any parent or subsidiary of the financial institution or of the
 108 parent or subsidiary.

109 6. A licensed mortgage broker, mortgage lender, or
 110 correspondent mortgage lender that provides mortgage counseling
 111 or advice regarding residential real property in foreclosure,
 112 which counseling or advice is within the scope of services set

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113 forth in chapter 494 and is provided without payment of money or
 114 other consideration other than a mortgage brokerage fee as
 115 defined in s. 494.001.

116 (c) "Foreclosure-related rescue services" means any good
 117 or service related to, or promising assistance in connection
 118 with:

119 1. Stopping, avoiding, or delaying foreclosure proceedings
 120 concerning residential real property; or

121 2. Curing or otherwise addressing a default or failure to
 122 timely pay with respect to a residential mortgage loan
 123 obligation.

124 (d) "Foreclosure-rescue transaction" means a transaction:

125 1. By which residential real property in foreclosure is
 126 conveyed to an equity purchaser and the homeowner maintains a
 127 legal or equitable interest in the residential real property
 128 conveyed, including, without limitation, a lease option
 129 interest, an option to acquire the property, an interest as
 130 beneficiary or trustee to a land trust, or other interest in the
 131 property conveyed; and

132 2. That is designed or intended by the parties to stop,
 133 avoid, or delay foreclosure proceedings against a homeowner's
 134 residential real property.

135 (e) "Homeowner" means any record title owner of
 136 residential real property that is the subject of foreclosure
 137 proceedings.

138 (f) "Residential real property" means real property
 139 consisting of one-family to four-family dwelling units, one of

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140 which is occupied by the owner as his or her principal place of
 141 residence.

142 (g) "Residential real property in foreclosure" means
 143 residential real property against which there is an outstanding
 144 notice of the pendency of foreclosure proceedings recorded
 145 pursuant to s. 48.23.

146 (3) PROHIBITED ACTS.--In the course of offering or
 147 providing foreclosure-related rescue services, a foreclosure-
 148 rescue consultant may not:

149 (a) Engage in or initiate foreclosure-related rescue
 150 services without first executing a written agreement with the
 151 homeowner for foreclosure-related rescue services; or

152 (b) Solicit, charge, receive, or attempt to collect or
 153 secure payment, directly or indirectly, for foreclosure-related
 154 rescue services before completing or performing all services
 155 contained in the agreement for foreclosure-related rescue
 156 services.

157 (4) FORECLOSURE-RELATED RESCUE SERVICES; WRITTEN
 158 AGREEMENT.--

159 (a) The written agreement for foreclosure-related rescue
 160 services must be printed in at least 12-point uppercase type and
 161 signed by both parties. The agreement must include the name and
 162 address of the person providing foreclosure-related rescue
 163 services, the exact nature and specific detail of each service
 164 to be provided, the total amount and terms of charges to be paid
 165 by the homeowner for the services, and the date of the
 166 agreement. The date of the agreement may not be earlier than the
 167 date the homeowner signed the agreement. The foreclosure-rescue

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168 consultant must give the homeowner a copy of the agreement to
 169 review not less than 1 business day before the homeowner is to
 170 sign the agreement.

171 (b) The homeowner has the right to cancel the written
 172 agreement without any penalty or obligation if the homeowner
 173 cancels the agreement within 3 business days after signing the
 174 written agreement. The right to cancel may not be waived by the
 175 homeowner or limited in any manner by the foreclosure-rescue
 176 consultant. If the homeowner cancels the agreement, any payments
 177 that have been given to the foreclosure-rescue consultant must
 178 be returned to the homeowner within 10 business days after
 179 receipt of the notice of cancellation.

180 (c) An agreement for foreclosure-related rescue services
 181 must contain, immediately above the signature line, a statement
 182 in at least 12-point uppercase type that substantially complies
 183 with the following:

184
 185 HOMEOWNER'S RIGHT OF CANCELLATION

186
 187 YOU MAY CANCEL THIS AGREEMENT FOR FORECLOSURE-RELATED
 188 RESCUE SERVICES WITHOUT ANY PENALTY OR OBLIGATION WITHIN 3
 189 BUSINESS DAYS FOLLOWING THE DATE THIS AGREEMENT IS SIGNED BY
 190 YOU.

191
 192 THE FORECLOSURE-RESCUE CONSULTANT IS PROHIBITED BY LAW FROM
 193 ACCEPTING ANY MONEY, PROPERTY, OR OTHER FORM OF PAYMENT FROM YOU
 194 UNTIL ALL PROMISED SERVICES ARE COMPLETE. IF FOR ANY REASON YOU
 195 HAVE PAID THE CONSULTANT BEFORE CANCELLATION, YOUR PAYMENT MUST

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196 BE RETURNED TO YOU NO LATER THAN 10 BUSINESS DAYS AFTER THE
 197 CONSULTANT RECEIVES YOUR CANCELLATION NOTICE.

198
 199 TO CANCEL THIS AGREEMENT, A SIGNED AND DATED COPY OF A
 200 STATEMENT THAT YOU ARE CANCELLING THE AGREEMENT SHOULD BE MAILED
 201 (POSTMARKED) OR DELIVERED TO _____ (NAME) AT
 202 _____ (ADDRESS) NO LATER THAN MIDNIGHT OF
 203 _____ (DATE) .

204
 205 IMPORTANT: IT IS RECOMMENDED THAT YOU CONTACT YOUR LENDER
 206 OR MORTGAGE SERVICER BEFORE SIGNING THIS AGREEMENT. YOUR LENDER
 207 OR MORTGAGE SERVICER MAY BE WILLING TO NEGOTIATE A PAYMENT PLAN
 208 OR A RESTRUCTURING WITH YOU FREE OF CHARGE.

209
 210 (d) The inclusion of the statement does not prohibit the
 211 foreclosure-rescue consultant from giving the homeowner more
 212 time in which to cancel the agreement than is set forth in the
 213 statement, provided all other requirements of this subsection
 214 are met.

215 (e) The foreclosure-rescue consultant must give the
 216 homeowner a copy of the signed agreement within 3 hours after
 217 the homeowner signs the agreement.

218 (5) FORECLOSURE-RESCUE TRANSACTIONS; WRITTEN AGREEMENT.--

219 (a)1. A foreclosure-rescue transaction must include a
 220 written agreement prepared in at least 12-point uppercase type
 221 that is completed, signed, and dated by the homeowner and the
 222 equity purchaser before executing any instrument from the
 223 homeowner to the equity purchaser quitclaiming, assigning,

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224 transferring, conveying, or encumbering an interest in the
225 residential real property in foreclosure. The equity purchaser
226 must give the homeowner a copy of the completed agreement within
227 3 hours after the homeowner signs the agreement. The agreement
228 must contain the entire understanding of the parties and must
229 include:

230 a. The name, business address, and telephone number of the
231 equity purchaser.

232 b. The street address and full legal description of the
233 property.

234 c. Clear and conspicuous disclosure of any financial or
235 legal obligations of the homeowner that will be assumed by the
236 equity purchaser.

237 d. The total consideration to be paid by the equity
238 purchaser in connection with or incident to the acquisition of
239 the property by the equity purchaser.

240 e. The terms of payment or other consideration, including,
241 but not limited to, any services that the equity purchaser
242 represents will be performed for the homeowner before or after
243 the sale.

244 f. The date and time when possession of the property is to
245 be transferred to the equity purchaser.

246 2. A foreclosure-rescue transaction agreement must
247 contain, above the signature line, a statement in at least 12-
248 point uppercase type that substantially complies with the
249 following:

250

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251 I UNDERSTAND THAT UNDER THIS AGREEMENT I AM SELLING MY HOME
 252 TO THE OTHER UNDERSIGNED PARTY.

254 3. A foreclosure-rescue transaction agreement must state
 255 the specifications of any option or right to repurchase the
 256 residential real property in foreclosure, including the specific
 257 amounts of any escrow payments or deposit, down payment,
 258 purchase price, closing costs, commissions, or other fees or
 259 costs.

260 4. A foreclosure-rescue transaction agreement must comply
 261 with all applicable provisions of 15 U.S.C. ss. 1600 et seq. and
 262 related regulations.

263 (b) The homeowner may cancel the foreclosure-rescue
 264 transaction agreement without penalty if the homeowner notifies
 265 the equity purchaser of such cancellation no later than 5 p.m.
 266 on the 3rd business day after signing the written agreement. Any
 267 moneys paid by the equity purchaser to the homeowner or by the
 268 homeowner to the equity purchaser must be returned at
 269 cancellation. The right to cancel does not limit or otherwise
 270 affect the homeowner's right to cancel the transaction under any
 271 other law. The right to cancel may not be waived by the
 272 homeowner or limited in any way by the equity purchaser. The
 273 equity purchaser must give the homeowner, at the time the
 274 written agreement is signed, a notice of the homeowner's right
 275 to cancel the foreclosure-rescue transaction as set forth in
 276 this subsection. The notice, which must be set forth on a
 277 separate cover sheet to the written agreement that contains no

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278 other written or pictorial material, must be in at least 12-
 279 point uppercase type, double-spaced, and read as follows:

281 NOTICE TO THE HOMEOWNER/SELLER

282
 283 PLEASE READ THIS FORM COMPLETELY AND CAREFULLY. IT CONTAINS
 284 VALUABLE INFORMATION REGARDING CANCELLATION RIGHTS.

285
 286 BY THIS CONTRACT, YOU ARE AGREEING TO SELL YOUR HOME. YOU
 287 MAY CANCEL THIS TRANSACTION AT ANY TIME BEFORE 5:00 P.M. OF THE
 288 THIRD BUSINESS DAY FOLLOWING RECEIPT OF THIS NOTICE.

289
 290 THIS CANCELLATION RIGHT MAY NOT BE WAIVED IN ANY MANNER BY
 291 YOU OR BY THE PURCHASER.

292
 293 ANY MONEY PAID DIRECTLY TO YOU BY THE PURCHASER MUST BE
 294 RETURNED TO THE PURCHASER AT CANCELLATION. ANY MONEY PAID BY YOU
 295 TO THE PURCHASER MUST BE RETURNED TO YOU AT CANCELLATION.

296
 297 TO CANCEL, SIGN THIS FORM AND RETURN IT TO THE PURCHASER BY
 298 5:00 P.M. ON _____ (DATE) AT _____
 299 (ADDRESS) . IT IS BEST TO MAIL IT BY CERTIFIED MAIL OR OVERNIGHT
 300 DELIVERY, RETURN RECEIPT REQUESTED, AND TO KEEP A PHOTOCOPY OF
 301 THE SIGNED FORM AND YOUR POST OFFICE RECEIPT.

302
 303 I (we) hereby cancel this transaction.

304 _____ Seller's Signature

305 _____ Printed Name of Seller

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306 _____ Seller's Signature
 307 _____ Printed Name of Seller
 308 _____ Date

309
 310 (c) In any foreclosure-rescue transaction in which the
 311 homeowner is provided the right to repurchase the residential
 312 real property, the homeowner has a 30-day right to cure any
 313 default of the terms of the contract with the equity purchaser,
 314 and this right to cure may be exercised on up to three separate
 315 occasions. The homeowner's right to cure must be included in any
 316 written agreement required by this subsection.

317 (d) In any foreclosure-rescue transaction, before or at
 318 the time of conveyance, the equity purchaser must fully assume
 319 or discharge any lien in foreclosure as well as any prior liens
 320 that will not be extinguished by the foreclosure.

321 (e) If the homeowner has the right to repurchase the
 322 residential real property, the equity purchaser must verify and
 323 be able to demonstrate that the homeowner has or will have a
 324 reasonable ability to make the required payments to exercise the
 325 option to repurchase under the written agreement. For purposes
 326 of this subsection, there is a rebuttable presumption that the
 327 homeowner has a reasonable ability to make the payments required
 328 to repurchase the property if the homeowner's monthly payments
 329 for primary housing expenses and regular monthly principal and
 330 interest payments on other personal debt do not exceed 60
 331 percent of the homeowner's monthly gross income.

332 (f) If the homeowner has the right to repurchase the
 333 residential real property, the price the homeowner pays may not

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334 be unconscionable, unfair, or commercially unreasonable. A
 335 rebuttable presumption, solely between the equity purchaser and
 336 the homeowner, arises that the foreclosure-rescue transaction
 337 was unconscionable if the homeowner's repurchase price is
 338 greater than 17 percent per annum more than the total amount
 339 paid by the equity purchaser to acquire, improve, maintain, and
 340 hold the property. Unless the repurchase agreement or a
 341 memorandum of the repurchase agreement is recorded in accordance
 342 with s. 695.01, the presumption arising under this subsection
 343 shall not apply against creditors or subsequent purchasers for a
 344 valuable consideration and without notice.

345 (6) REBUTTABLE PRESUMPTION.--Any foreclosure-rescue
 346 transaction involving a lease option or other repurchase
 347 agreement creates a rebuttable presumption, solely between the
 348 equity purchaser and the homeowner, that the transaction is a
 349 loan transaction and the conveyance from the homeowner to the
 350 equity purchaser is a mortgage under s. 697.01. Unless the lease
 351 option or other repurchase agreement, or a memorandum of the
 352 lease option or other repurchase agreement, is recorded in
 353 accordance with s. 695.01, the presumption created under this
 354 subsection shall not apply against creditors or subsequent
 355 purchasers for a valuable consideration and without notice.

356 (7) VIOLATIONS.--A person who violates any provision of
 357 this section commits an unfair and deceptive trade practice as
 358 defined in part II of this chapter. Violators are subject to the
 359 penalties and remedies provided in part II of this chapter,
 360 including a monetary penalty not to exceed \$15,000 per
 361 violation.

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362 Section 2. Section 501.2078, Florida Statutes, is
363 repealed.
364 Section 3. This act shall take effect October 1, 2008.