



Overview of:
Some Non-Litigation Responses
to Assist Homeowners
with Predatory Loans

Legal Aid Association of California
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as conducted by
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QUESTION: How Legal Service Providers Assist Homeowners with Predatory Loans while not being a Resource to Litigate?

◆ **ANSWER:**

- Performing critical, initial vetting and screening of distressed homeowners for possible:
 - Limited legal services intake (either pre- or non-litigation focused).
 - Referral for both legal (to private bar attorneys &/or for administrative agency complaint filing and possible investigation) and non-legal assistance (e.g., to HUD-certified housing counseling agencies, fair housing organizations).

QUESTION: How Legal Service Providers Assist Homeowners with Predatory Loans while not being a Resource to Litigate?

- ◆ **When Seeking to Accomplish This:**

- Generally, IMPORTANT to keep in mind:
- What is a “Legal” standard for bringing claims (either civil or criminal) for abusive practices.

- ◆ **PLUS: Must do an initial vetting or screening of the homeowner’s story. With re: to this experience, it is important to find out:**

- What Happened – (see sample – in Hand Out IV of HERA PL intake/ screening form)
- What documents / papers do they have or don’t have (see HERA list of key documents – Hand Out I)
- Who (individuals / company’s) may be involved or responsible?
- Who is being harmed – e.g., a senior, person w/disability, person of color, etc.

When Can Initial Non-Litigation Response by a Legal Service Provider Affirmative Help the Homeowner with a Predatory Loan?

- ◆ **Where Appropriate with:**
- ◆ **Foreclosure Rescue Scams –**
 - To assist homeowner to ID need to properly issue and record Cal. CC 1695, et seq. &/or 2945, et seq. “Notice of Rescission or Cancellation.”
- ◆ **TILA Rescission / Cancellation claims –**
 - To assist homeowner to ID where proper legal basis may still exist for issuing notice to cancel / rescind a non-purchase money home.
 - Assisting homeowners who can make qualify presently to make “tender offers” to initially issue the cancellation notice and negotiate for a “loan cram down.”
- ◆ **Cal. Dept. of Real Estate or local D.A. non-civil complaint filings –**
 - To assist homeowner to draft up and submit a non-civil complaint and supporting document packet to one or both of these state regulatory or local gov’t agencies.
- ◆ **Screening and vetting homeowners for further legal or non-legal service referral -**
 - To refer homeowners to local HUD-certified housing counseling agencies and to other resources including possible further civil legal assistance or representation.

Predatory Loan Case Examples – Foreclosure “Rescue” Scams

- ◆ After 4 months, this homeowner can’t make her monthly home loan payments and goes into default and receives a recorded notice of default in the mail. Desperate, she opens her mail and sees an advertisement that says, “Having problems making your home payments? We can help!!”
- ◆ She calls the tel. no. listed and a woman comes to her home and assures her not to worry, “We can help you keep your home.” The woman comes back with another person, and is very reassuring. She asks the homeowner to sign some papers but doesn’t explain what these papers mean.
- ◆ Two weeks later, the homeowner then receives some papers in the mail that seemed to show that she no longer owns her home, has sold her house and now has an option to buy it back in the next 10 years (at a fair market value) provided she is timely also with her monthly \$800 “rent payments.”



Foreclosure Rescue Scams

- ◆ Generally involves homeowner's:
 - Loss of title to home
 - Loss of cash
 - Adding strangers to title

What Do Foreclosure Rescue Scams Look Like?

- ◆ Phantom help. The “rescuer” charges outrageous fees either for light-duty phone calls and paperwork the homeowner could have easily performed, or on a promise of more robust representation that never materializes. In either event the homeowner is usually left without enough assistance to actually save the home but with little or no time left to prevent this grievous loss by the time s/he realizes it.

Wrongdoers In A Foreclosure Rescue Scam Can Be:

- ◆ Realtors – or their salespeople
- ◆ Mortgage Brokers- or their salespeople
- ◆ Other unlicensed marketing people – e.g., - “financial” or “foreclosure” consultants
- ◆ Private investor/lender
- ◆ Contractors
- ◆ Attorneys
- ◆ Notaries
- ◆ Title company staff

Potential Legal Claims/ Defenses:

◆ Foreclosure Rescue Scams

- **Homeowner Sales Contract Act (HESCA - - Civil Code section 1695, *et seq.*)* [NOTE: homeowner who has lost title may still have extended rescission/cancellation rights]**
- **Mortgage Foreclosure Consultants Act (MFCA - Civil Code section 2945, *et seq.*)* [NOTE: same as above]**
- **PLUS:**
 - Breach of fiduciary duty
 - Fraud, Misrepresentation
 - UDAP - **Cal. B. & P. Code Section 17200, *et seq.***
 - State licensing claims (broker, realtor, appraiser, notary, title company, misconduct)

Notice of Cancellation / Rescission - When Does an Extended Right to Cancel Exist?

- ◆ See (per HERA Hand Out III – select provisions of both HESCA at pp. 1 – 5 and of MFCA at pp. 6 - 13)

NOTE: Cal. CC Sec. 1695.5 and CC 2945.3 each currently includes an example of the type of notice of cancellation language the “equity purchaser” is required to give to the “equity seller” in the sales-purchase contract.

Cal. a Civ. Code Sections 1695, et seq. (HESCA)?

- ◆ Homeowner has an extended right to cancel for up to an additional 2 years when:
 - “deed of title” transferring title from the “equity seller” to the “equity purchaser” has been recorded prior to the end of a five (5) day cooling off period – NOTE: the cooling off period begins the day after the homeowner / seller signs the sales contract;
 - Notice to seller or right to cancel the contract within this 5 day cooling off period is not stated in the sales contract;

(continued)

Cal. a Civ. Code Sections 1695, et seq. (HESCA) (*continuation*)

- ◆ **Under Cal. CC Section 1695:** Homeowner also has an extended right to rescind the contract for up to an additional 2 years when:
 - actual Notice of Cancellation / Rescission is not given by the equity purchaser to the “equity seller” homeowner at the time of signing of the purchase-sale agreement or thereafter.

Cal. a Civ. Code Sections 2945, et seq. (MFCA)

- **Under Cal. Civ. Code Section 2945, et seq.:** When a mortgage foreclosure consultant, as defined by this section, is involved in the transaction at the time of closing, s/he or it is required to:
 - Provide homeowner with a written contract for his, her or its services.
 - Similarly, provide the “equity purchaser” with notice of the right to cancel the contract in the sale-purchase contract itself. The “seller,” in this instance, has a 3-day (vs. 5 days under HESCA) right to cancel the contract.

Under Cal. a Civ. Code 2945, et seq. (MFCA)

- ◆ If the “equity seller” homeowner is not given EITHER:
 - notice of right to cancel in the sales contract and/or actual Notice of Right to Cancel/ Rescind at the time of signing of the sales agreement THEN:
 - an extended right to cancel / rescind the sale of the home also exists. Under such circumstances, the “equity seller” is entitled to be return legal ownership and title of the home sold upon presenting to the purchaser a “tender offer.”



Other Relevant Laws To Be Aware Of:

- ◆ State consumer legal remedies act (separate from state UDAP)
- ◆ State fair debt collection laws
- ◆ Door-to-door sales laws
- ◆ State licensing laws (realtors, contractors, mortgage brokers, appraisers, etc.)

Other Relevant Laws To Be Aware Of:

◆ Foreclosure Laws:

- Beware of timeline (e.g., 30, 90, and then 21 day notice triggers)
- Possible opportunity to address predatory lending abuses as part of defense to foreclosure
- **HOWEVER**, before a foreclosure sale – a homeowner may need to file separate, affirmative claim for predatory lending; OR
- Possibly file a Chapter 13 bankruptcy to stop the foreclosure sale (NOTE: need to schedule appt. for consumer credit counseling before filing the petition)

Predatory Loan Case Example – TILA rescission / cancellation homeowner situation

◆ –Homeowner Refinance:

- A homeowner refinances her lower-rate, fixed interest loan with a “fixed” teaser rate loan. A broker convinces the homeowner to roll also her car loan and credit card debt into the mortgage and get some “cash out”. The broker says the monthly payments will stay about the same. What happens next?
- Quick signing of papers at the title co., or at the borrower’s home or at broker’s or the title co.’s office.
- New fixed, monthly loan payment for the first 6 months (or less) which then adjusts upward by hundreds of dollars each month to a much higher payment.
- After loan closing, the homeowner gets a small check for a “cash out” payment which is much less than originally promised.

Truth In Lending Action (TILA). (15 U.S.C. § 1601, et seq. and implementing regulation, Regulation Z, 12 C.F.R. § 226).

- ◆ **Summary:** A “disclosure” statute which covers brokers, lenders and their agents’ conduct. In the context of home loans, TILA covers either: 1) loan document technical reporting violations for closed-end loans; 2) violations that are apparent on the face of the loan documents for “non-purchase money” loans. An exception is a “high cost” loan” where HOEPA (see below) may provide for enhanced protections.
- ◆ **Remedies:**
- ◆ 1. CLOSED END LOANS:
- ◆ a) Penalty damages of \$1,000 (in CA) per statutory violation.
- ◆ b) Actual monetary or enhanced damages depending on type of disclosure violation.
- ◆ c) NON-PURCHASE MONEY LOANS: Cancellation of loan where failure to provide borrower:
 - ◆ (1) timely & proper notices of right to cancel; &
 - ◆ (2) material disclosures: (amount financed, finance charge, APR, payment schedule and total no. of payments).
- ◆ **SOL:**
- ◆ 1) **1 year**
- ◆ 2) **3 years (for rescission).**
- ◆ **Look at:** TILA Disclosure Notice, Notices of Right to Cancel, HUD-1, estimated Buyer / Seller Closing Cost Statement, loan note.

Federal TILA rescission claim

- ◆ What to look for to see if extended three (3) year right to cancel exists:
- ◆ 3-Day Right to Cancel extended when:
 - For non-purchase money loan →
 - Notice to Cancel (duplicate copies for each borrower) are not given at or before time of signing of final loan documents; &/or
 - The Notice is defective (e.g., doesn't include date for cancellation on the notice itself).

Federal TILA rescission claim

- ◆ If homeowner (as a refinance, home improvement or home equity borrower) was not properly provided from the date of consummation of the loan **EITHER:**
 - proper notice(s) of right to cancel (2 for each named borrower); and / or
 - the material disclosures: (amount financed, finance charge, APR, payment schedule and total no. of payments) **THEN****THEN** an extended 3-year right to cancel / rescind the loan exists!

Federal TILA rescission claim

- ◆ Legal Service Agencies can help some of these borrowers to draft and issue BOTH:
 - **Notice of Cancellation / rescission;** (see HERA example of a defective notice of cancellation – at p. 10 in Hand Out I).
 - Legal service agency can assist the homeowner to draft BOTH a **Notice of Cancellation** and **Initial Demand letter** to the original and current loan note holders and current servicer (see HERA example – in Hand Out IV) **presenting :tender offer”** –
 - To issue this letter for the homeowner - need to first calculate what is the proper TENDER offer to present for the borrower; must do a calculation of what monies can now be “deducted” from the original principal loan amount – (e.g., finance charges, closing costs AND all monthly mortgage payments made by the homeowner to date).

Federal TILA rescission claim

- ◆ Legal Service Agencies can *also* help some of these homeowners to:
 - **Negotiate pre-litigation settlements of TILA cancellation / rescission claims** with homeowners current lender/note holder; &
 - **ID and secure local private bar attorneys** who are willing to be referred and will take these TILA cancellation / rescission cases **to file civil complaints on and litigate for the homeowner** WHEN a pre-litigation settlement cannot be achieved by the legal service agency. [NOTE: Remember, statutory attorney fees and costs recovery is provided for under the TILA.]

Federal TILA rescission claim

- ◆ Legal Service Agencies can ALSO help some of these homeowners to:
 - Be referred to local HUD-certified housing counseling agencies to see if presently qualify for any better refinancing options on the market or elsewhere:
 - current prime rate loan;
 - reverse mortgage (for eligible seniors);
 - ACORN Housing Corp. lender refinance products; &
 - NCRC or NACA borrower “bail out” assistance funds.

Why Does Predatory Lending Happen?? How Do They Do It?

- ◆ Trust! Predatory brokers and lenders get you to trust them by telling you what they think you want to hear – speaking your language – going to your church – et cetera.
- ◆ Fear! Home mortgage lending is complex, so it is hard to understand what to do without someone to help you. Predatory brokers/lenders take advantage of our fear.
- ◆ Coercion! Predatory brokers and lenders threaten you with terrible personal disaster if you do not sign what they want you to sign.



How Organizations Can Help Homeowners & Homebuyers?

- Engage in “triaging” to screen homeowners / homebuyers who may have predatory loans and to evaluate if any legally actionable (civil and/or criminal) consumer abuse has occurred.
- Work in partnership with local non-profit agencies to create screening/advice clinic.

How Organizations Can Help Homeowners & Homebuyers?

- Where appropriate and possible, provide needed responsive services to consumers (e.g., negotiate lender work-outs, represent homeowners to pursue meritorious legal claims).
- Keep a record of – i.e., “Track” who are the bad actors (lenders, brokers & realtors) in your local community; assist consumers directly or refer them to other agencies who can help them to file administrative complaints.*

Important Initiative Resources / Potential Partners Include –

- **Non-profit housing counseling agencies, credit counseling and fair housing agencies**
- **Other CBO or gov't agencies (e.g., City Housing and Rehab Development Depts., County Counsel, D.A.'s Office, APS)**
- **Legal resources (non-profit & private bar)**

Triaging- The Role of the Partners

- ◆ **Housing counseling agency** - screen for homeowner's story, negotiate with current lender if house not yet transferred to 3rd party, determine what type of loan the homeowner could have qualified for before the swindle, determine qualification for refinance products at current time as part of process of working with attorney to regain the property.
- ◆ **Local legal aid/ non-profit legal org.** - provide technical assistance to housing counseling agencies to screen and refer appropriate situations for direct legal assistance, obtain eviction documents, help to defend against eviction.
- ◆ **Local private attorney** - prepare lawsuit, seek injunction stopping eviction.

Triaging – During Initial Screening & Referral Stage – Find out: What Stage Is The Homeowner At?

- Has the homeowner received a notice of default or notice of sale?
- Has the homeowner already signed documents of some kind to try to avoid foreclosure?
- ◆ Does the homeowner have an eviction notice? What kind of notice? (e.g. 3-day notice to pay or quit, 30-day notice)
- ◆ Has the homeowner been served with a summons and complaint?
- ◆ Does the homeowner have a court date?

How To Make The Best Homebuying or Refinance Choice

Before AND even after a homeowner/buyer takes out a home loan, he/she should:

1. Consult with a HUD-Certified Housing Counseling Agency. (Go to <http://www.hud.gov/offices/hsg/sfh/hcc/hccp/rof14.cfm> for list in your area, or call (800) 569-4287.
2. Learn what her/his credit (FICO) score is

Legal Assistance May Include:

- Referral for criminal prosecution (e.g., with local District Attorneys Office, Cal. Attorney General's Office); &/or
- Homeowners /consumers filing administrative agency complaints (e.g., with Cal. Dept. of Real Estate, State Contractors' Board, et cetera)

[*NOTE: Many civil claims which private bar or legal services attorneys can pursue for homeowners/consumers allow for statutory fees and costs recovery for the prevailing party from the other side]

D.A or Dept. of Real Estate Complaints

- ◆ See attached: (in Hand-Out IV)
 - HERA PL intake/screening form; &
 - HERA example of homeowner write-up of a predatory home loan situation.
- ◆ Go to the following weblinks for:
 - Cal. Dept. of Real Estate complaint –
 - <http://www.dre.cahwnet.gov/cnsmform.htm>
[NOTE: In English, Spanish and Chinese]
 - D.A. Complaint form example (e.g., Alameda County) -
 - http://www.acgov.org/da/consumer_fraud.htm

Referral to Private Bar Attorneys for Civil Legal Assistance May Include:

- Pursuing civil claims (state and/or federal) for damages*
 - Filing a complaint for injunctive relief to save the home from foreclosure
 - Bankruptcy filing
 - Eviction defense
 - Conservatorship services
- [*NOTE: Many civil claims which private bar or legal services attorneys can pursue for homeowners/consumers allow for statutory fees and costs recovery for the prevailing party from the other side]