



housing and
economic
rights advocates

Select Provisions of Cal. CC Sec. 1695, et seq. (Homeowner Equity Sales Contract Act ‘HESCA’) and Cal. CC Sec. 2945, et seq. (Mortgage Foreclosure Consultant’s Act – MFCA):

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*** THROUGH 2006 CH. 15, APPROVED 3/29/06 ***

CIVIL CODE
DIVISION 3. Obligations
PART 2. Contracts
TITLE 5. Extinction of Contracts
CHAPTER 2.5. Home Equity Sales Contracts

HESCA:

§ 1695.4. Right to cancellation of home equity sales contract

(a) In addition to any other right of rescission, the equity seller has the right to cancel any contract with an equity purchaser until midnight of the fifth business day following the day on which the equity seller signs a contract that complies with this chapter or until 8 a.m. on the day scheduled for the sale of the property pursuant to a power of sale conferred in a deed of trust, whichever occurs first.

(b) Cancellation occurs when the equity seller personally delivers written notice of cancellation to the address specified in the contract or sends a telegram indicating cancellation to that address.

(c) A notice of cancellation given by the equity seller need not take the particular form as provided with the contract and, however expressed, is effective if it indicates the intention of the equity seller not to be bound by the contract.

§ 1695.5. Notice of cancellation; Right to cancel pending compliance

(a) The contract shall contain in immediate proximity to the space reserved for the equity seller's signature a conspicuous statement in a size equal to at least 12-point bold type, if the contract is printed or in capital letters if the contract is typed, as follows:

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fax 510.868.4521

"You may cancel this contract for the sale of your house without any penalty or obligation at any time before -----.

(Date and time of day)

See the attached notice of cancellation form for an explanation of this right."

The equity purchaser shall accurately enter the date and time of day on which the rescission right ends.

(b) The contract shall be accompanied by a completed form in duplicate, captioned "notice of cancellation" in a size equal to 12-point bold type, if the contract is printed or in capital letters if the contract is typed, followed by a space in which the equity purchaser shall enter the date on which the equity seller executes any contract. This form shall be attached to the contract, shall be easily detachable, and shall contain in type of at least 10-point, if the contract is printed or in capital letters if the contract is typed, the following statement written in the same language as used in the contract:

"NOTICE OF CANCELLATION

(Enter date contract signed)

You may cancel this contract for the sale of your house, without any penalty or obligation, at any time before -----.

(Enter date and time of day)

To cancel this transaction, personally deliver a signed and dated copy of this cancellation notice, or send a telegram to

-----,

(Name of purchaser)

at -----

(Street address of purchaser's place of business)

NOT LATER THAN -----.

(Enter date and time of day)

I hereby cancel this transaction -----.

(Date)

(Seller's signature)"

(c) The equity purchaser shall provide the equity seller with a copy of the contract and the attached notice of cancellation.

(d) Until the equity purchaser has complied with this section, the equity seller may cancel the contract.

§ 1695.6. Provision of contract by equity purchaser; Prohibited acts pending end of cancellation period; Misrepresentation by equity purchaser; Encumbrance when there is option to repurchase

(a) The contract as required by Sections 1695.2, 1695.3, and 1695.5, shall be provided and completed in conformity with those sections by the equity purchaser.

(b) Until the time within which the equity seller may cancel the transaction has fully elapsed, the equity purchaser shall not do any of the following:

(1) 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.

(2) Record with the county recorder any document, including, but not limited to, any instrument of conveyance, signed by the equity seller.

(3) Transfer or encumber or purport to transfer or encumber any interest in the residence in foreclosure to any third party, provided no grant of any interest or encumbrance shall be defeated or affected as against a bona fide purchaser or encumbrancer for value and without notice of a violation of this chapter, and knowledge on the part of any such person or entity that the property was "residential real property in foreclosure" shall not constitute notice of a violation of this chapter. This section 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.

(4) Pay the equity seller any consideration.

(c) Within 10 days following receipt of a notice of cancellation given in accordance with Sections 1695.4 and 1695.5, the equity purchaser shall return without condition any original contract and any other documents signed by the equity seller.

(d) An equity purchaser shall make no untrue or misleading statements regarding the value of the residence in foreclosure, the amount of proceeds the equity seller will receive after a foreclosure sale, 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 untrue or misleading statement concerning the sale of the residence in foreclosure to the equity purchaser.

(e) Whenever any equity purchaser purports to hold title as a result of any transaction in which the equity seller grants the residence in foreclosure by any instrument which purports to be an absolute conveyance and reserves or is given by the equity purchaser an option to repurchase such residence, the equity purchaser shall not cause any encumbrance or encumbrances to be placed on such property or grant any interest in such property to any other person without the written consent of the equity seller. Nothing in this subdivision shall preclude the application of paragraph (3) of subdivision (b).

§ 1695.7. Seller's right to bring action; Exemplary damages; Civil penalty; Time limitation

An equity seller may bring an action for the recovery of damages or other equitable relief against an equity purchaser for a violation of any subdivision of Section 1695.6 or Section 1695.13. The equity seller shall recover actual damages plus reasonable attorneys' fees and costs. In addition, the court may award exemplary damages or equitable relief, or both, if the court deems such award proper, but in any event shall award exemplary damages in an amount not less than three times the equity seller's actual damages for any violation of paragraph (3) of subdivision (b) of Section 1695.6 or Section 1695.13 ; or the court may award a civil penalty of up to two thousand five hundred dollars (\$ 2,500), but it may not award both exemplary damages and a civil penalty. Any action brought pursuant to this section shall be commenced within four years after the date of the alleged violation.

§ 1695.8. Violations by equity purchaser; Punishment

Any equity purchaser who violates any subdivision of Section 1695.6 or who engages in any practice which would operate as a fraud or deceit upon an equity seller shall, upon conviction, be punished by a fine of not more than twenty-five thousand dollars (\$ 25,000), by imprisonment in the county jail for not more than one year, or in the state prison, or by both that fine and imprisonment for each violation.

§ 1695.14. Rescission of transactions involving residential real property in foreclosure

(a) In any transaction involving residential real property in foreclosure, as defined in Section 1695.1, which is in violation of Section 1695.13 is voidable and the transaction may be rescinded by the property owner within two years of the date of the recordation of the conveyance of the residential real property in foreclosure.

(b) Such rescission shall be effected by giving written notice as provided in Section 1691 to the equity purchaser and his successor in interest, if the successor is not a bona fide purchaser or encumbrancer for value as set forth in subdivision (c), and by recording such notice with the county recorder of the county in which the property is located, within two years of the date of the recordation of the conveyance to the equity purchaser. The notice of rescission shall contain the names of the property owner and the name of the equity purchaser in addition to any successor in interest holding record title to the real property and shall particularly describe such real property. The equity purchaser and his successor in interest if the successor is not a bona fide purchaser or encumbrancer for value as set forth in subdivision (c), shall have 20 days after the delivery of the notice in which to reconvey title to the property free and clear of encumbrances created subsequent to the rescinded transaction. Upon failure to reconvey title within such time, the rescinding party may bring an action to enforce the rescission and for cancellation of the deed.

(c) The provisions of this section shall not affect the interest of a bona fide purchaser or encumbrancer for value if such purchase or encumbrance occurred prior to the recordation of the notice of rescission pursuant to subdivision (b). Knowledge that the property was residential real property in foreclosure shall not impair the status of such persons or entities as bona fide

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purchasers or encumbrancers for value. 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.

(d) In any action brought to enforce a rescission pursuant to this section, the prevailing party shall be entitled to costs and reasonable attorneys fees.

(e) The remedies provided by this section shall be in addition to any other remedies provided by law.

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CIVIL CODE
DIVISION 3. Obligations
PART 4. Obligations Arising from Particular Transactions
TITLE 14. Lien
CHAPTER 2. Mortgage
ARTICLE 1.5. Mortgage Foreclosure Consultants

MFCA:

§ 2945.1. Definitions

The following definitions apply to this chapter:

(a) "Foreclosure consultant" means any person who makes any solicitation, representation, or offer to any owner to perform for compensation or who, for compensation, performs any service which the person in any manner represents will in any manner do any of the following:

- (1) Stop or postpone the foreclosure sale.
- (2) Obtain any forbearance from any beneficiary or mortgagee.
- (3) Assist the owner to exercise the right of reinstatement provided in Section 2924c.
- (4) Obtain any extension of the period within which the owner may reinstate his or her obligation.
- (5) Obtain any waiver of an acceleration clause contained in any promissory note or contract secured by a deed of trust or mortgage on a residence in foreclosure or contained that deed of trust or mortgage.
- (6) Assist the owner to obtain a loan or advance of funds.
- (7) Avoid or ameliorate the impairment of the owner's credit resulting from the recording of a notice of default or the conduct of a foreclosure sale.
- (8) Save the owner's residence from foreclosure.
- (9) Assist the owner in obtaining from the beneficiary, mortgagee, trustee under a power of sale, or counsel for the beneficiary, mortgagee, or trustee, the remaining proceeds from the foreclosure sale of the owner's residence.

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(b) A foreclosure consultant does not include any of the following:

(1) A person licensed to practice law in this state when the person renders service in the course of his or her practice as an attorney at law.

(2) A person licensed under Division 3 (commencing with Section 12000) of the Financial Code when the person is acting as a prorater as defined therein.

(3) A person licensed under Part 1 (commencing with Section 10000) of Division 4 of the Business and Professions Code when the person makes a direct loan or when the person (A) engages in acts whose performance requires licensure under that part, (B) is entitled to compensation for the acts performed in connection with the sale of a residence in foreclosure or with the arranging of a loan secured by a lien on a residence in foreclosure, (C) does not claim, demand, charge, collect, or receive any compensation until the acts have been performed or cannot be performed because of an owner's failure to make the disclosures set forth in Section 10243 of the Business and Professions Code or failure to accept an offer from a purchaser or lender ready, willing, and able to purchase a residence in foreclosure or make a loan secured by a lien on a residence in foreclosure on the terms prescribed in a listing or a loan agreement, and (D) does not acquire any interest in a residence in foreclosure directly from an owner for whom the person agreed to perform the acts other than as a trustee or beneficiary under a deed of trust given to secure the payment of a loan or that compensation. For the purposes of this paragraph, a "direct loan" means a loan of a real estate broker's own funds secured by a deed of trust on the residence in foreclosure, which loan and deed of trust the broker in good faith attempts to assign to a lender, for an amount at least sufficient to cure all of the defaults on obligations which are then subject to a recorded notice of default, provided that, if a foreclosure sale is conducted with respect to the deed of trust, the person conducting the foreclosure sale has no interest in the residence in foreclosure or in the outcome of the sale and is not owned, controlled, or managed by the lending broker; the lending broker does not acquire any interest in the residence in foreclosure directly from the owner other than as a beneficiary under the deed of trust; and the loan is not made for the purpose or effect of avoiding or evading the provisions of this article.

(4) A person licensed under Chapter 1 (commencing with Section 5000) of Division 3 of the Business and Professions Code when the person is acting in any capacity for which the person is licensed under those provisions.

(5) A person or his or her authorized agent acting under the express authority or written approval of the Department of Housing and Urban Development or other department or agency of the United States or this state to provide services.

(6) A person who holds or is owed an obligation secured by a lien on any residence in foreclosure when the person performs services in connection with this obligation or lien.

(7) Any person licensed to make loans pursuant to Division 9 (commencing with Section 22000), 10 (commencing with Section 24000), or 11 (commencing with Section 26000) of the Financial Code, subject to the authority of the Commissioner of Corporations to terminate this exclusion, after notice and hearing, for any person licensed pursuant to any of those divisions

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upon a finding that the licensee is found to have engaged in practices described in subdivision (a) of Section 2945.

(8) Any person or entity doing business under any law of this state, or of the United States relating to banks, trust companies, savings and loan associations, industrial loan companies, pension trusts, credit unions, insurance companies, or any person or entity authorized under the laws of this state to conduct a title or escrow business, or a mortgagee which is a United States Department of Housing and Urban Development approved mortgagee and any subsidiary or affiliate of the above, and any agent or employee of the above while engaged in the business of these persons or entities.

(9) A person licensed as a residential mortgage lender or servicer pursuant to Division 20 (commencing with Section 50000) of the Financial Code, when acting under the authority of that license.

(c) Notwithstanding subdivision (b), any person who provides services pursuant to paragraph (9) of subdivision (a) is a foreclosure consultant unless he or she is the owner's attorney.

(d) "Person" means any individual, partnership, corporation, limited liability company, association or other group, however organized.

(e) "Service" means and includes, but is not limited to, any of the following:

(1) Debt, budget, or financial counseling of any type.

(2) Receiving money for the purpose of distributing it to creditors in payment or partial payment of any obligation secured by a lien on a residence in foreclosure.

(3) Contacting creditors on behalf of an owner of a residence in foreclosure.

(4) Arranging or attempting to arrange for an extension of the period within which the owner of a residence in foreclosure may cure his or her default and reinstate his or her obligation pursuant to Section 2924c.

(5) Arranging or attempting to arrange for any delay or postponement of the time of sale of the residence in foreclosure.

(6) Advising the filing of any document or assisting in any manner in the preparation of any document for filing with any bankruptcy court.

(7) Giving any advice, explanation or instruction to an owner of a residence in foreclosure which in any manner relates to the cure of a default in or the reinstatement of an obligation secured by a lien on the residence in foreclosure, the full satisfaction of that obligation, or the postponement or avoidance of a sale of a residence in foreclosure pursuant to a power of sale contained in any deed of trust.

(8) Arranging or attempting to arrange for the payment by the beneficiary, mortgagee, trustee under a power of sale, or counsel for the beneficiary, mortgagee, or trustee, of the remaining proceeds to which the owner is entitled from a foreclosure sale of the owner's residence in foreclosure. Arranging or attempting to arrange for the payment shall include any arrangement where the owner transfers or assigns the right to the remaining proceeds of a foreclosure sale to the foreclosure consultant or any person designated by the foreclosure consultant, whether that transfer is effected by agreement, assignment, deed, power of attorney, or assignment of claim.

(f) "Residence in foreclosure" means a residence in foreclosure as defined in Section 1695.1.

(g) "Owner" means a property owner as defined in Section 1695.1.

(h) "Contract" means any agreement, or any term thereof, between a foreclosure consultant and an owner for the rendition of any service as defined in subdivision (e).

§ 2945.2. Owner's right of cancellation; Notice

(a) In addition to any other right under law to rescind a contract, an owner has the right to cancel such a contract until midnight of the third "business day" as defined in subdivision (e) of Section 1689.5 after the day on which the owner signs a contract which complies with Section 2945.3.

(b) Cancellation occurs when the owner gives written notice of cancellation to the foreclosure consultant at the address specified in the contract.

(c) Notice of cancellation, if given by mail, is effective when deposited in the mail properly addressed with postage prepaid.

(d) Notice of cancellation given by the owner need not take the particular form as provided with the contract and, however expressed, is effective if it indicates the intention of the owner not to be bound by the contract.

§ 2945.3. Form and contents of contract; Notice of cancellation; Right to cancel pending compliance; Contract and notice relating to surplus funds

(a) Every contract shall be in writing and shall fully disclose the exact nature of the foreclosure consultant's services and the total amount and terms of compensation.

(b) The following notice, printed in at least 14-point boldface type and completed with the name of the foreclosure consultant, shall be printed immediately above the statement required by subdivision (c):

"NOTICE REQUIRED BY CALIFORNIA LAW
----- or anyone working

phone 510.271.8443
fax 510.868.4521

(Name)
for him or her CANNOT:
(1) Take any money from you or ask you for money
until ----- has

(Name)
completely finished doing everything he or she said
he or she would do; and

(2) Ask you to sign or have you sign any lien,
deed of trust, or deed."

(c) The contract shall be written in the same language as principally used by the foreclosure consultant to describe his or her services or to negotiate the contract; shall be dated and signed by the owner; and shall contain in immediate proximity to the space reserved for the owner's signature a conspicuous statement in a size equal to at least 10-point bold type, as follows: "You, the owner, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation form for an explanation of this right."

(d) The contract shall contain on the first page, in a type size no smaller than that generally used in the body of the document, each of the following:

- (1) The name and address of the foreclosure consultant to which the notice or cancellation is to be mailed.
- (2) The date the owner signed the contract.

(e) The contract shall be accompanied by a completed form in duplicate, captioned "notice of cancellation", which shall be attached to the contract, shall be easily detachable, and shall contain in type of at least 10-point the following statement written in the same language as used in the contract:

"NOTICE OF CANCELLATION

(Enter date of transaction) (Date)

You may cancel this transaction, without any penalty or obligation, within three business days from the above date.

To cancel this transaction, mail or deliver a signed and dated copy of this cancellation notice, or any other written notice, or send a telegram

to -----

(Name of foreclosure consultant)

at -----

(Address of foreclosure consultant's place of business)

NOT LATER THAN MIDNIGHT OF -----.

(Date)

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I hereby cancel this transaction -----.

(Date)

-----"

(Owner's signature)

(f) The foreclosure consultant shall provide the owner with a copy of the contract and the attached notice of cancellation.

(g) Until the foreclosure consultant has complied with this section, the owner may cancel the contract.

(h) After the 65-day period following the foreclosure sale, the foreclosure consultant may enter into a contract to assist the owner in arranging, or arrange for the owner, the release of funds remaining after the foreclosure sale ("surplus funds") from the beneficiary, mortgagee, trustee under a power of sale, or counsel for the beneficiary, mortgagee, or trustee. However, prior to entering into that contract, the foreclosure consultant shall do all of the following:

(1) Prepare and deliver to the owner a notice in 14-point boldface type and substantially in the form set forth below.

(2) Obtain a receipt executed by each owner and acknowledged before a notary public, acknowledging a copy of the notice set forth below.

"NOTICE TO OWNER

(Date of Contract) (Date signed by Owner)

(Date of Foreclosure Sale)

You may be entitled to receive all or a portion of the surplus funds generated from the foreclosure sale of your real property located at: -----, California on ----- without paying any fees or costs of any kind to a third party. You should check directly with the trustee or beneficiary who conducted the foreclosure sale of your property to determine the name, address, and telephone number of the party to whom you can direct inquiries regarding filing a claim for surplus funds without paying a fee to a third party. No person or entity may require you to enter into any agreement requiring the payment of a fee to that person or entity in order to receive the surplus funds from the foreclosure sale to which you may be entitled during the 65 days after the date of the trustee's sale."

§ 2945.4. Violations

It shall be a violation for a foreclosure consultant to:

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(a) Claim, demand, charge, collect, or receive any compensation until after the foreclosure consultant has fully performed each and every service the foreclosure consultant contracted to perform or represented that he or she would perform.

(b) Claim, demand, charge, collect, or receive any fee, interest, or any other compensation for any reason which exceeds 10 percent per annum of the amount of any loan which the foreclosure consultant may make to the owner.

(c) Take any wage assignment, any lien of any type on real or personal property, or other security to secure the payment of compensation. That security shall be void and unenforceable.

(d) Receive any consideration from any third party in connection with services rendered to an owner unless that consideration is fully disclosed to the owner.

(e) Acquire any interest in a residence in foreclosure from an owner with whom the foreclosure consultant has contracted. Any interest acquired in violation of this subdivision shall be voidable, provided that nothing herein shall affect or defeat the title of a bona fide purchaser or encumbrancer for value and without notice of a violation of this article. Knowledge that the property was "residential real property in foreclosure," does not constitute notice of a violation of this article. This subdivision may not be deemed to abrogate any duty of inquiry which exists as to rights or interests of persons in possession of residential real property in foreclosure.

(f) Take any power of attorney from an owner for any purpose, except to inspect documents as provided by law.

(g) Induce or attempt to induce any owner to enter into a contract which does not comply in all respects with Sections 2945.2 and 2945.3.

(h) Enter into an agreement to assist the owner in arranging, or arrange for the owner, the release of surplus funds prior to 65 days after the trustee's sale is conducted, whether the agreement involves direct payment, assignment, deed, power of attorney, or assignment of claim from an owner to the foreclosure consultant or any person designated by the foreclosure consultant.

§ 2945.6. Owner's right of action; Damages; Limitations period

(a) An owner may bring an action against a foreclosure consultant for any violation of this chapter. Judgment shall be entered for actual damages, reasonable attorneys' fees and costs, and appropriate equitable relief. The court also may, in its discretion, award exemplary damages and shall award exemplary damages equivalent to at least three times the compensation received by the foreclosure consultant in violation of subdivision (a), (b), or (d) of Section 2945.4, and three times the owner's actual damages for any violation of subdivision (c), (e), or (g) of Section 2945.4, in addition to any other award of actual or exemplary damages.

(b) The rights and remedies provided in subdivision (a) are cumulative to, and not a limitation of, any other rights and remedies provided by law. Any action brought pursuant to this section shall be commenced within four years from the date of the alleged violation.

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§ 2945.7. Punishment

Any person who commits any violation described in Section 2945.4 shall be punished by a fine of not more than ten thousand dollars (\$ 10,000), by imprisonment in the county jail for not more than one year, or in the state prison, or by both that fine and imprisonment for each violation. These penalties are cumulative to any other remedies or penalties provided by law.