

By: Ellis

S.B. No. 767

A BILL TO BE ENTITLED

AN ACT

relating to the regulation of certain residential mortgage
foreclosure consulting services; providing a criminal penalty.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Title 2, Business & Commerce Code, is amended by
adding Chapter 21 to read as follows:

CHAPTER 21. REGULATION OF CERTAIN RESIDENTIAL FORECLOSURE

CONSULTING SERVICES

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 21.001. DEFINITIONS. (a) In this chapter:

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

(A) prevent or postpone a foreclosure sale;

(B) obtain a forbearance from:

(i) a mortgagee;

(ii) a beneficiary of a deed of trust; or

(iii) another person who holds a lien
secured by the residence in foreclosure;

(C) assist the homeowner:

(i) to cure the default giving rise to the
foreclosure action; or

(ii) to exercise the right of reinstatement

1 of the homeowner's obligation secured by the residence in
2 foreclosure;

3 (D) obtain an extension of the period within
4 which the homeowner may reinstate the homeowner's obligation
5 secured by the residence in foreclosure;

6 (E) obtain a waiver of an acceleration clause
7 contained in a promissory note or contract secured by a deed of
8 trust or mortgage on a residence in foreclosure or contained in the
9 deed of trust or mortgage;

10 (F) assist the homeowner to obtain a loan or
11 advance of funds to prevent foreclosure;

12 (G) avoid or ameliorate the impairment of the
13 homeowner's credit resulting from the recording of a notice of
14 default or the conduct of a foreclosure sale;

15 (H) save the homeowner's residence from
16 foreclosure; or

17 (I) assist the homeowner in obtaining excess
18 proceeds from a foreclosure sale of the homeowner's residence.

19 (2) "Homeowner" means a person that holds record title
20 to a residence in foreclosure at the time the foreclosure action has
21 been commenced.

22 (3) "Residence in foreclosure" means residential real
23 property consisting of not more than four single-family dwelling
24 units, at least one of which is occupied as the property owner's
25 principal place of residence, and against which a foreclosure
26 action has been commenced.

27 (b) For purposes of Subsections (a)(2) and (3), a

foreclosure action has been commenced if:

(1) notice of sale has been filed under Section 51.002(b), Property Code; or

(2) a judicial foreclosure action has been commenced.

Sec. 21.002. EXCEPTION FROM APPLICABILITY OF CHAPTER. (a) Except as provided by Subsection (b), this chapter does not apply to the following persons that perform foreclosure consulting services:

(1) an attorney admitted to practice in this state who performs those services in relation to the attorney's attorney-client relationship with a homeowner or the beneficiary of the lien being foreclosed;

(2) a person that holds or is owed an obligation secured by a lien on a residence in foreclosure if the person performs those services in connection with the obligation or lien;

(3) a mortgage servicer, as defined by Section 51.0001, Property Code, of an obligation secured by a lien on a residence in foreclosure if the servicer performs those services in connection with the obligation or lien;

(4) a person that regulates banks, trust companies, savings and loan associations, credit unions, or insurance companies under the laws of this state or the United States if the person performs those services as part of the person's normal business activities;

(5) an affiliate of a person described by Subdivision (4) if the affiliate performs those services as part of the affiliate's normal business activities;

1 (6) a judgment creditor of the homeowner of the
2 residence in foreclosure, if:

3 (A) the legal action giving rise to the judgment
4 was commenced before the notice of default required under Section
5 5.064, 5.066, or 51.002(d), Property Code; and

6 (B) the judgment is recorded in the real property
7 records of the clerk of the county where the residence in
8 foreclosure is located;

9 (7) a licensed title insurer, title insurance agent,
10 or escrow officer authorized to transact business in this state if
11 the person is performing those services in conjunction with title
12 insurance or settlement services;

13 (8) a licensed real estate broker or real estate
14 salesperson if the person is engaging in an activity for which the
15 person is licensed;

16 (9) a mortgage broker or loan officer licensed under
17 Chapter 156, Finance Code, if the person is engaging in an activity
18 for which the person is licensed; or

19 (10) a nonprofit organization that provides solely
20 counseling or advice to homeowners who have a residence in
21 foreclosure or have defaulted on their home loans, unless the
22 organization is an associate of the foreclosure consultant.

23 (b) This chapter applies to a person described by Subsection
24 (a) if the person is providing foreclosure consulting services
25 designed or intended to transfer title, directly or indirectly, to
26 a residence in foreclosure to that person or the person's
27 associate.

1 Sec. 21.003. CONFLICT WITH OTHER LAW. To the extent of a
2 conflict between this chapter and Chapter 393, Finance Code, this
3 chapter controls.

4 [Sections 21.004-21.050 reserved for expansion]

5 SUBCHAPTER B. CONTRACT FOR SERVICES

6 Sec. 21.051. FORM AND TERMS OF CONTRACT. Each contract for
7 the purchase of the services of a foreclosure consultant by a
8 homeowner of a residence in foreclosure must be in writing, dated,
9 and signed by each homeowner and the foreclosure consultant.

10 Sec. 21.052. REQUIRED DISCLOSURE. Before entering into a
11 contract with a homeowner of a residence in foreclosure for the
12 purchase of the services of a foreclosure consultant, the
13 foreclosure consultant shall provide the homeowner written notice
14 stating the following, in at least 14-point boldfaced type:

15 NOTICE REQUIRED BY TEXAS LAW

16 _____ (Name) or an associate of _____ (Name) cannot ask you to
17 sign or have you sign any document that transfers any interest in
18 your home or property to _____ (Name) or _____ (Name's)
19 associate.

20 _____ (Name) or _____ (Name's) associate cannot guarantee you
21 that they will be able to refinance your home or arrange for you to
22 keep your home.

23 You may, at any time, cancel or rescind this contract, without
24 penalty of any kind.

25 If you want to cancel this contract, mail or deliver a signed and
26 dated copy of this notice of cancellation or rescission, or any
27 other written notice, indicating your intent to cancel or rescind

1 to _____ (Name and address of foreclosure consultant)
2 at _____ (Address of foreclosure consultant,
3 including facsimile and electronic mail address).

4 As part of any cancellation or rescission, you (the homeowner) must
5 repay any money spent on your behalf by _____ (Name
6 of foreclosure consultant) prior to receipt of this notice and as a
7 result of this agreement, within 60 days, along with interest
8 calculated at the rate of eight percent per year.

9 [Sections 21.053-21.100 reserved for expansion]

10 SUBCHAPTER C. LIMITATIONS, PROHIBITIONS, AND DUTIES REGARDING
11 SERVICES

12 Sec. 21.101. RESTRICTIONS ON CHARGE OR RECEIPT OF
13 CONSIDERATION. A foreclosure consultant may not:

14 (1) charge or receive compensation until the
15 foreclosure consultant has fully performed each service the
16 foreclosure consultant has contracted to perform or has represented
17 the foreclosure consultant can or will perform unless the
18 foreclosure consultant has obtained a surety bond or established
19 and maintained a surety account for each location at which the
20 foreclosure consultant conducts business in the manner that
21 Subchapter E, Chapter 393, Finance Code, provides for credit
22 services organizations; or

23 (2) receive any consideration from a third party in
24 connection with foreclosure consulting services provided to the
25 homeowner of a residence in foreclosure unless the consideration is
26 fully disclosed in writing to the homeowner.

27 Sec. 21.102. PROHIBITED CONDUCT. A foreclosure consultant

may not:

(1) take any power of attorney from a homeowner for any purpose other than to inspect documents;

(2) for purposes of securing payment of compensation, acquire an interest, directly or indirectly, in the real or personal property of the homeowner of a residence in foreclosure with whom the foreclosure consultant has contracted to perform services; or

(3) take an assignment of wages to secure payment of compensation.

Sec. 21.103. RETENTION OF RECORDS. (a) A foreclosure consultant shall keep each record and document, including the foreclosure consultant contract, related to foreclosure consulting services performed on behalf of a homeowner.

(b) A foreclosure consultant shall retain the records described by Subsection (a) until at least the third anniversary of the day the foreclosure consultant contract entered into by the consultant and the homeowner was terminated or concluded.

[Sections 21.104-21.150 reserved for expansion]

SUBCHAPTER D. ENFORCEMENT

Sec. 21.151. CRIMINAL PENALTY. (a) A person commits an offense if the person violates this chapter.

(b) An offense under this chapter is a Class C misdemeanor.

Sec. 21.152. DECEPTIVE TRADE PRACTICE. A violation of this chapter is a false, misleading, or deceptive act or practice actionable under Subchapter E, Chapter 17.

SECTION 2. The changes in law made by this Act apply only to

1 a contract entered into on or after the effective date of this Act.
2 A contract entered into before the effective date of this Act is
3 governed by the law in effect on the date the contract was entered
4 into, and the former law is continued in effect for that purpose.

5 SECTION 3. This Act takes effect September 1, 2011.