

## Home Equity Theft Prevention Act

On February 1, 2007, the Home Equity Theft Prevention Act (Chapter 308 of the Laws of 2006; hereinafter the "Act") will become effective in New York. The law amends paragraphs (e), (f) and (g) of Section 595-a of the Banking Law, adds new Section 265 (a) to the Real Property Law and adds new Section 1303 to the Real Property Actions and Proceedings Law. The legislative intent in adopting the Act was to end the practice of home equity theft in New York State. Home equity theft, "deed theft" or "foreclosure rescue" occurs when an investor agrees to pay-off a mortgage usually in foreclosure taken out by a homeowner (usually elderly). In return, the investor induces the homeowner to deed the property over to the investor. Often, the homeowner is unaware that he or she had actually executed a deed. The homeowner is led to believe that the investor will deed the property back to the homeowner at some later date and the investor has "promised" the homeowner that he or she can remain in the property for the rest of his or her life.

We have seen this often enough to know how the story will turn out. The investor immediately mortgages the property, soon stops making the mortgage payments, and in short order, the homeowner finds him or herself facing eviction. Ending this nefarious practice is certainly laudable, but as is often the case, the legislature took a broad ax to a problem which required surgical precision and in the process, made titles coming out of many residential foreclosure actions virtually uninsurable.

The Act covers all transactions between homeowners (referred to as "equity sellers") and purchasers from the homeowners ("equity purchasers") when the subject property is in foreclosure or in "default". "Default" is defined as occurring when a homeowner or "equity seller" is two months behind in payments on the homeowner's mortgage. (Real Property Law ("RPL") Sections 265-a (1) and 2(d)) Transfers to certain equity purchasers such as foreclosing lenders, referees, relatives of the seller, non-profit or governmental housing organizations, and "bona fide purchasers" and most importantly for title purposes, persons who are purchasing the property to use as their primary residence, are exempt from the Act. (Section 263-a (2)) The Act requires that the seller and purchaser memorialize their purchase-sale agreement in a written contract in the seller's native language. The seller has the statutory right to cancel this contract within five (5) days after its date. Certain terms of the contract are also statutorily set. (Sections 265-a (2), (3) and (9))

Most significantly for the title industry, the Act gives the seller, for the period of two (2) years) after the date of the conveyance to the purchaser, the right to rescind the transaction for

certain violations of the Act. If the purchaser has conveyed the property to a “bona fide purchaser” during the two year period, then the seller can only pursue a claim for damages against the original purchaser. Sections 265-a (8) and ((9). The Act also covers sales-leaseback transactions between the seller and buyer. The Act requires the purchase to actually verify that the seller has the means to repurchase the property and further requires that the terms of the agreement be “commercially fair and reasonable”. Finally, the Act imposes severe criminal penalties for violations by equity purchasers. (Section 265-a (7) (B))<sup>1</sup>

There are four (4) features of the Act which have an immediate impact upon title underwriting. Of course, as time goes on, and we become more familiar with the Act, other underwriting issues invariably will develop, but the following four situations demand our immediate attention:

**1. Required Home Equity Theft Foreclosure Notice for All Residential Foreclosures**

The Act adds new Section 1303 to the Real Property Actions and Proceedings Law. This section requires foreclosing lenders to provide a notice entitled “Help for Homeowners in Foreclosure” with the summons and complaint to all borrowers in foreclosure. The Act does not say what “with” means. In the interest of expediency, presumably, foreclosing lenders will provide the borrower with a copy of the Notice at the same time as the lender serves the borrower with the foreclosure summons and complaint. The text of the form is set forth in the statute. A copy is attached for your review. The form must be printed on “colored paper that is other than the color of the summons and complaint; the text of the notice must be 14 point type and the title of the form must be in 20 point type. **This is 14 point type and this is 20 point type.**

Therefore, for all titles coming out of foreclosure actions which commence on or after **February 1, 2007**, please raise the following exception:

**Proof is required that the foreclosing lender complied with Section 1303 of the Real Property Actions and Proceedings Law by delivering a “Help for Homeowners in Foreclosure” notice in the statutorily required form to the homeowner(s) with the foreclosure summons and complaint. The notice must be printed on paper that is a different color than that of the summons and complaint; the title of the notice must be in at least 20 point type; and the text of the notice must be at least 14 point type. Company will require the foreclosing lender to produce a copy of the Notice. Additional exceptions may be raised upon review.**

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<sup>1</sup> The foregoing description of the Act is necessarily brief and does not cover many of its non-title related provisions. For a more complete description of the entire Act, please see Thomas Weiss and Kafi J. Harris, “Impact of Home Equity Theft Act on Investors, Lenders”, New York Law Journal, Nov. 9, 2006, p. 4. And Bruce j. Bergman, “Home Equity Theft, New Law Will Hamper Title Insurability; Foreclosure” New York Law Journal. October 11, 2006, p 5, reprinted in the New York Land Title Association Bulletin, Fall 2006, p. 3. We would be happy to provide you with copies of the foregoing article upon request.

In order to omit this exception, you must obtain a copy of the Help for Homeowners in Foreclosure notice from the foreclosing lender and verify that the lender delivered the Notice to the borrower with the summons and complaint. Presumably, once the Act goes into effect, foreclosing lenders will simply add a copy of the Notice to the Summons and Complaint and serve both on the borrowers simultaneously. A copy of the Notice should therefore be in the foreclosure file at the Clerk's Office. Since the statute does not make the foreclosure action void or voidable if the Notice is not printed on colored paper, we will be assuming a business risk that the wrong color will not defeat our insured's title (until the inevitable error occurs and a borrower litigates the question).

**Also, you must raise the foregoing exception and call for proof from the prior insurer whenever there your title examination reveals that the property came out of foreclosure within the prior two (2) years.**

**2. Affidavit Required When an Exempt Equity Purchaser is Acquiring Title from an Equity Seller in Foreclosure**

If the property to the title of which is to be insured is (1) residential, (2) in foreclosure (subject to an open, unexpired notice of pendency) and (3) the applicant or prospective purchaser is purchasing directly from the seller/borrower (defendant in the foreclosure action) before the date of the foreclosure sale, then the title is insurable only if you receive an affidavit with indemnity from the purchaser that the purchaser is (1) a relative of the seller, (spouse, parent, grandparent, child, grandchild or sibling of the seller or such person's spouse) or (2) will (not "intends to", but "will") occupy the property as the purchaser's primary residence or (3) is the referee for the foreclosing lender, or (4) the sale is authorized by statute, or (5) the sale is pursuant to a court order or (6) the purchaser is not-for-profit housing organization or a public housing agency. Because of the two year rescission provision of the Home Equity Theft Provision Act, conveyances by sellers who are in foreclosure to any person or other legal entity other than the three set forth above, are uninsurable.

In the situation set forth above, please raise the following exception:

**Company will require at closing an affidavit with indemnity from the purchaser that the purchaser is (1) a relative of the seller, (spouse, parent, grandparent, child, grandchild or sibling of the seller or such person's spouse) or (2) will (not "intends to", but "will") occupy the property as the purchaser's primary residence or (3) is the referee for the foreclosing lender or (4) the sale is authorized by statute, or (5) the sale is pursuant to a court order or (6) the purchaser is not-for-profit housing organization or a public housing agency.**

We have attached a form of the affidavit for your use.

3. **Affidavit Required When an Exempt Equity Purchaser Is Acquiring Title From an Equity Seller in Default**

As noted above, the Act also covers transactions where the seller is in default on their mortgage payments. "Default" is defined as being two (2) months behind. We realize that you would never know that a borrower is behind in their mortgage until you have seen and reviewed the mortgage pay-off statement. That may not occur until the parties are at the closing table. However, if you somehow discover that the seller is two months behind in his or her mortgage payments, and the seller is conveying the property to a third party buyer, then you must immediately raise the exceptions and call for the affidavit set forth in paragraph 2 above.

4. **Title Is Not Insurable When a Non-Exempt Purchaser Attempts to Acquire Title from an Equity Seller in Foreclosure Through an Outright Acquisition or through a Sales-Leaseback Arrangement Without Prior Underwriter Approval**

If the property to the title of which is to be insured is (1) residential, (2) in foreclosure (subject to an open, unexpired notice of pendency) and (3) the applicant or prospective purchaser is purchasing directly from the seller/borrower (defendant in the foreclosure action) pursuant to an outright acquisition of title or through a sales-leaseback agreement, then you must obtain prior written approval from one of our underwriting counsels prior to insuring the conveyance. In all likelihood, such transactions will be uninsurable.

We realize that while the intent is laudable, this Act is impractical in its application and a perfect example of overkill. However, the penalty for non-compliance, a two year period after the closing during which the conveyance could be rescinded, is untenable from a claims perspective for title insurers. Therefore, we have no choice but to call for strict adherence to the Act. Because of its complexity, uncertainty and the possibility that certain violations will result in criminal prosecution, the Act may have its intended effect of driving "equity purchasers" out of New York. However, the Act also makes life much more complicated and difficult for those who are engaged in legitimate transactions. It remains to be seen whether the Act will help more people than it hurts.

If you have any questions regarding the Act or its application, please feel free to contact Marvin N. Bagwell, Eastern Divisional Counsel, Edward M. Norton, Senior Counsel, Suzanne M. Garcia, Counsel for Training and Quality Control, Anna Stoll, Assistant Vice-President and State Counsel or Rick Preziosi, Assistant Vice-President and State Counsel, at 1-888-264-8484 or 914-287-0000 if you have any questions or concerns regarding the foregoing. As always, feel free to pass a copy of this [ugtic.com](http://ugtic.com) on to your employees, customers and clients.

## **Help for Homeowners in Foreclosure**

New York State Law requires that we send you this notice about the foreclosure process. Please read it carefully.

Mortgage foreclosure is a complex process. Some people may approach you about “saving” your home. You should be extremely careful about any such promises.

The State encourages you to become informed about your options in foreclosure. There are government agencies, legal aid entities and other non-profit organizations that you may contact for information about foreclosure while you are working with your lender during this process.

To locate an entity near you, you may call the toll-free helpline maintained by the New York Banking Department at \_\_\_\_\_ (enter number) or visit the Department’s website at \_\_\_\_\_ (enter web address).

The State does not guarantee the advice of these agencies.

