

A.R.S. ABSTRACT, LTD.

LEGAL BRIEF

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Re: Home Equity Theft Protection Act

On February 1, 2007, a new section of the Real Property Law 265-(a), "**Home Equity Theft Protection Act**" ("**the Act**") was enacted.

1(a) "The legislature finds and declares that homeowners in default on their mortgages or in foreclosure may be vulnerable to fraud, deception, and unfair dealing by home equity purchasers....During the time period between the default on the mortgage and the scheduled foreclosure sale date, homeowners in financial distress, are vulnerable to aggressive "equity purchasers" who induce homeowners to sell their homes for a small fraction of their fair market values"

(d) "The intent and purposes of this section. . . to afford equity sellers a reasonable and meaningful opportunity to rescind sales to equity purchasers; and to preserve and protect home equity"

1. AN OVERVIEW OF § 265-A:

To accomplish its purpose, the Act creates a presumption that contracts entered into between-

- a. an "**Equity Seller**," defined as **an individual** who owns a residence, and
- b. an "**Equity Purchaser**," defined as **any person or its agent who acquires title to a residence, and**
- c. where such residence, defined as residential real property consisting of **one to four-family dwelling units, is owner occupied at a time immediately prior to the equity sale as [the owner's] primary residence**, which is subject to:
 - i. **a Notice of Pendency filed in an action to foreclose a mortgage, or is shown on an active property tax lien sale list; or**
 - ii. **the owner is in default of the mortgage payments for two months or more;**

and where the contract with the owner who is subject to foreclosure or default contains an agreement or arrangement including a re-conveyance arrangement.

The transaction meeting the criteria set forth above is considered to be a "**Covered Contract**" and is subject to the notice, procedure, rescission and redemption rights under the Act irrespective of whether or not the Equity Seller receives consideration for the sale.

A purchaser ***is not*** an Equity Purchaser subject to the provisions of the Act where such purchaser acquires title-

- 1. to use, and who uses,** such property as his or her **primary residence;**
- 2. by a deed from a referee in a foreclosure sale** conducted pursuant to article thirteen of the Real Property Actions and Proceedings Law;
- 3. at any sale of property authorized by statute;**
- 4. any sale by order of judgment** of any court;
- 5. from a spouse, or from a parent, grandparent, child, grandchild, or sibling** of such person or such person's spouse;
- 6. as a not-for-profit housing organization** or as **a public housing agency;** or
- 7. is a Bona Fide Purchaser or encumbrancer for value.**

A "**bona fide purchaser or encumbrancer for value**" is defined as a party

"acting in good faith who purchases the residential real property from the equity purchaser for valuable consideration or provides the equity purchaser with a mortgage or provides a subsequent bona fide purchaser with a mortgage, provided that he or she had no notice of the equity seller's continuing right to, or equity in, the property prior to the acquisition of title or encumbrance, or of any violation of this section by the equity purchaser as related to the subject property."

Section 265-a(4) requires that **each Covered Contract contain the following information-**

- a. Notice that the instrument of conveyance does not become effective until midnight of the fifth business day after the date of the contract.
- b. Notice the Equity Seller has a right to rescind the transaction not later than midnight of the fifth business day after the date of the contract.
- c. The total consideration to be given by the Equity Purchaser to the Equity Seller in connection with or incident to the sale.
- d. A description of the terms of payment including any services of any nature which the Equity Purchaser represents he or she will perform, either before or after the sale.
- e. The time at which physical possession of the residence is to be transferred to the Equity Purchaser;
- f. The terms of any rental or lease agreement
- g. The Notice of Cancellation.

COVERED CONTRACT FORMS AND FIVE DAY COOLING-OFF PERIOD:

- a. Section 265-a(3) sets forth specific requirements for the type, size, and appearance of the contract and notice of cancellation. The section further states that any instrument of conveyance shall become effective no sooner than midnight of the fifth business day after the date on which the covered contract is executed and expressly prohibits the Equity Purchaser from accepting or inducing a conveyance by the Equity Seller or recording any document;
- b. Section 265-a(4) mandates the specific content of the Contract and Notice of Cancellation that must be part of the Contract;
- c. Section 265-a(7) describes prohibited conduct by the Equity Purchaser and makes it unlawful for the Equity Purchaser to complete any Covered Contract that takes unconscionable advantage of the Equity Seller.

TWO YEAR RIGHT OF RESCISSION:

A material failure of the Equity Purchaser to comply with the Act allows the Equity Seller to rescind the transaction within two years of the date of the recording of the conveyance of the residential real property that was subject to the Covered Contract.

Questions concerning this memo should be directed to my attention.