

RESOLUTION 4-02-06

DIGEST

Home Equity Sales: Increased Warnings to Sellers

Amends Civil Code sections 1695.1 et seq., to increase warnings to home equity sellers and increase penalties for violators.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Civil Code sections 1695.1 et seq., to increase warnings to home equity sellers and increase penalties for violators. This resolution should be approved in principle because it improves warnings given to equity sellers and substantially increases penalties to equity buyers who violate the statutes.

The resolution would make clear to sellers that they in fact are selling their homes, not merely refinancing. The additional warnings do not impose a great burden on the buyer, but will hopefully increase the awareness of sellers that the transaction is more than a mere refinance. A recording requirement for an option to repurchase is added to the statutes that will put purchasers on notice of the equity sale. In addition to increasing maximum fines from \$25,000 to \$100,000 as well as maintaining the potential for jail or imprisonment for up to one year, the statute would create a potential additional fine equal to the appraised value of the residence if sold without compliance with the recording mandate.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Civil Code Section 1695 et seq to read as follows:

- 1 §1695
- 2 (a) The Legislature finds and declares that homeowners whose residences are in
- 3 foreclosure have been subjected to fraud, deception, and unfair dealing by home equity
- 4 purchasers. The recent rapid escalation of home values, particularly in the urban areas, has
- 5 resulted in a significant increase in home equities which are usually the greatest financial
- 6 asset held by the homeowners of this state. During the time period between the
- 7 commencement of foreclosure proceedings and the scheduled foreclosure sale date,
- 8 homeowners in financial distress, especially the poor, elderly, and financially
- 9 unsophisticated, are vulnerable to the importunities of equity purchasers who induce
- 10 homeowners to sell their homes for a small fraction of their fair market values through the
- 11 use of schemes which often involve oral and written misrepresentations, deceit, intimidation,
- 12 and other unreasonable commercial practices.

13 (b) The Legislature declares that it is the express policy of the state to preserve and
14 guard the precious asset of home equity, and the social as well as the economic value of
15 homeownership.

16 (c) The Legislature further finds that equity purchasers have a significant impact
17 upon the economy and well-being of this state and its local communities, and therefore the
18 provisions of this chapter are necessary to promote the public welfare.

19 (d) The intent and purposes of this chapter are the following:

20 (1) To provide each homeowner with information necessary to make an informed
21 and intelligent decision regarding the sale of his or her home to an equity purchaser; to
22 require that the sales agreement be expressed in writing; to safeguard the public against
23 deceit and financial hardship; to insure, foster, and encourage fair dealing in the sale and
24 purchase of homes in foreclosure; to prohibit representations that tend to mislead; to prohibit
25 or restrict unfair contract terms; to afford homeowners a reasonable and meaningful
26 opportunity to rescind sales to equity purchasers; and to preserve and protect home equities
27 for the homeowners of this state.

28 (2) This chapter shall be liberally construed to effectuate this intent and to achieve
29 these purposes.

30
31 §1695.1

32 The following definitions apply to this chapter:

33 (a) "Equity purchaser" means any person who acquires title to any residence in
34 foreclosure, except a person who acquires such title as follows:

35 (1) For the purpose of using such property as a personal residence.

36 (2) By a deed in lieu of foreclosure of any voluntary lien or encumbrance of record.

37 (3) By a deed from a trustee acting under the power of sale contained in a deed of
38 trust or mortgage at a foreclosure sale conducted pursuant to Article 1 (commencing with
39 Section 2920) of Chapter 2 of Title 14 of Part 4 of Division 3.

40 (4) At any sale of property authorized by statute.

41 (5) By order or judgment of any court.

42 (6) From a spouse, blood relative, or blood relative of a spouse.

43 (b) "Residence in foreclosure" and "residential real property in foreclosure" means
44 residential real property consisting of one- to four-family dwelling units, including
45 condominiums, modular homes or mobile homes, and with respect to those consisting of
46 more than one dwelling unit then one of which the owner must occupy ~~occupies one of the~~
47 units as his or her principal place of residence, and against which there is an outstanding
48 notice of default, recorded pursuant to Article 1 (commencing with Section 2920) of Chapter
49 2 of Title 14 of Part 4 of Division 3.

50 (c) "Equity seller" means any seller of a residence in foreclosure.

51 (d) "Business day" means any calendar day except Sunday, or the following business
52 holidays: New Year's Day, Washington's Birthday, Memorial Day, Independence Day,
53 Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.

54 (e) "Contract" means any offer or any contract, agreement, or arrangement, or any
55 term thereof, between an equity purchaser and equity seller incident to the sale of a
56 residence in foreclosure.

57 (f) "Property owner" means the record title owner of the residential real property in
58 foreclosure at the time the notice of default was recorded.

59

60 §1695.2

61 Every contract shall be written in letters of a size equal to 10-point bold type, in the
62 same language principally used by the equity purchaser and equity seller to negotiate the
63 sale of the residence in foreclosure and shall be fully completed and signed and dated by the
64 equity seller and equity purchaser prior to the execution of any instrument of conveyance of
65 the residence in foreclosure.

66

67 §1695.3

68 Every contract shall contain the entire agreement of the parties and shall include the
69 following terms:

70 (a) The name, business address, and the telephone number of the equity purchaser.

71 (b) The address of the residence in foreclosure.

72 (c) The total consideration to be given by the equity purchaser in connection with or
73 incident to the sale.

74 (d) A complete description of the terms of payment or other consideration including,
75 but not limited to, any services of any nature which the equity purchaser represents he will
76 perform for the equity seller before or after the sale.

77 (e) The time at which possession is to be transferred to the equity purchaser.

78 (f) The terms of any rental agreement: between the equity purchaser and equity
79 seller.

80 (g) A notice of cancellation as provided in subdivision (b) of Section 1695.5. (h)
81 The following notice in at least 14-point boldface type, if the contract is printed or in capital
82 letters if the contract is typed, and completed with the name of the equity purchaser,
83 immediately above the statement required by Section 1695.5(a):

84 "NOTICE REQUIRED BY CALIFORNIA LAW

85 Until your right to cancel this contract has ended,

86

87 _____
(Name)

88 or anyone working for _____

89 (Name)

90

91 CANNOT ask you to sign or have you sign any deed or any other document."

92 The contract required by this section shall survive delivery of any instrument of
93 conveyance of the residence in foreclosure, and shall have no effect on persons other than
94 the parties to the contract.

95 (i) The following notice in at least 14-point boldface type, if the contract is printed or
96 in capital letters if the contract is typed, and completed with the name of the equity
97 purchaser:

98 THE PURPOSE OF THIS TRANSACTION IS TO TRANSFER TITLE OF YOUR HOME

99 TO [insert name of equity purchaser here] , _____,

100 AND IS NOT A LOAN OR REFINANCING. WHEN THIS TRANSACTION IS

101 COMPLETED YOU WILL NO LONGER BE A HOMEOWNER, YOU WILL BE A

102 RENTER. IF YOU HAVE AN OPTION TO REPURCHASE THE HOME, THERE WILL

103 BE A PRESUMPTION THAT THE TRANSACTION IS A LOAN; HOWEVER, YOU

104 WILL NOT BE THE OWNER OF THE HOME UNLESS AND UNTIL YOU ACTUALLY
105 REPURCHASE THE HOME.

106 The equity seller is required to sign an acknowledgement that he/she has read and
107 understood the above notice.

108 (j) Any provision in a contract that attempts or purports which consents to
109 jurisdiction for litigation or choice of law to a State other than California is void at the
110 option of the equity seller.

111 (k) Venue for any action taken to enforce any provision of a contract under this Act
112 shall be the county in which the property is located.

113
114 §1695.4

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

120 (b) Cancellation occurs when the equity seller personally delivers written notice of
121 cancellation to the address specified in the contract or sends a telegram indicating
122 cancellation to that address, or deposits in the mail a properly addressed written notice of
123 cancellation with postage prepaid.

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

127 (d) Upon cancellation, the equity seller shall not be required to refund to the equity
128 buyer any monies paid by the equity buyer as consideration for the contract.

129
130 §1695.5

131 (a) The contract shall contain in immediate proximity to the space reserved for the
132 equity seller's signature a conspicuous statement in a size equal to at least 12-point bold
133 type, if the contract is printed or in capital letters if the contract is typed, as follows:
134

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

137 _____
138 **(Date and time of day)**

139
140 **See the attached notice of cancellation form for an explanation of this right."**

141
142 The equity purchaser shall accurately enter the date and time of day on which the
143 Rescission right ends.

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

149 point, if the contract is printed or in capital letters if the contract is typed, the following
150 statement written in the same language as used in the contract:

151

152 "NOTICE OF CANCELLATION

153

154 _____
(Enter date contract signed)

155

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

158

159 _____
(Enter date and time of day)

160

161 To cancel this transaction, personally deliver a signed and dated copy of this cancellation,
162 ~~or send a telegram, or deposits in the mail a properly addressed written notice of~~
163 cancellation with postage prepaid. to

164

165 _____,
(Name of purchaser)

166

167 at _____
(Street address of purchaser's place of business)

168

169 NOT LATER THAN _____.

170

171 (Enter date and time of day)

172

173 I hereby cancel this transaction _____.

174

175 (Date)

176

177 _____"

178

179 (Seller's signature)

180

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

183

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

186

187 §1695.6

188

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

191

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

194

195 (1) Accept from any equity seller an execution of, or induce any equity seller to

196

197 execute, any instrument of conveyance of any interest in the residence in foreclosure.

198

199 (2) Record with the county recorder any document, including, but not limited to, any

200

201 instrument of conveyance, signed by the equity seller.

202

203 (3) Transfer or encumber or purport to transfer or encumber any interest in the

204

205 residence "in foreclosure to any third party, provided no grant of any interest or

194 encumbrance shall be defeated or affected as against a bona fide purchaser or encumbrancer
195 for value and without notice of a violation of this chapter, and knowledge on the part of any
196 such person or entity that the property was "residential real property in foreclosure" shall not
197 constitute notice of a violation of this chapter. This section shall not be deemed to abrogate
198 any duty of inquiry which exists as to rights or interests of persons in possession of the
199 residential real property in foreclosure.

200 (4) Pay the equity seller any consideration.

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

204 (d) An equity purchaser shall make no untrue or misleading statements regarding the
205 value of the residence in foreclosure, the amount of proceeds the equity seller will receive
206 after a foreclosure sale, any contract term, the equity seller's rights or obligations incident to
207 or arising out of the sale transaction, the nature of any document which the equity purchaser
208 induces the equity seller to sign, or any other untrue or misleading statement concerning the
209 sale of the residence in foreclosure to the equity purchaser.

210 (e) Whenever any equity purchaser purports to hold title as a result of any transaction
211 in which the equity seller grants the residence in foreclosure by any instrument which
212 purports to be an absolute conveyance and reserves or is given by the equity purchaser an
213 option to repurchase such residence, the equity purchaser shall not cause any encumbrance
214 or encumbrances to be placed on such property or grant any interest in such property to any
215 other person, ~~without the written consent of the equity seller.~~ Such option to repurchase
216 shall be recorded by the equity purchaser within three days of signing, using a form in
217 compliance with subdivision (f) below, as an exhibit to any document purporting to transfer
218 title in the subject property and shall provide notice of the requirements and obligations of
219 this Act to any purported transferee or encumbrancer. Nothing in this subdivision shall
220 preclude the application of paragraph (3) of subdivision (b).

221 (f) The form used to comply with the requirement of subsection (e) above shall
222 contain the following information:

223
224 Title

225
226 NOTICE OF RIGHT TO REPURCHASE BY EQUITY OWNER

227
228 Purpose

229
230 To evidence that an equity seller has a contractual right of repurchase that impairs the equity
231 purchaser's right to transfer title of encumber the subject property.

232
233 Requirements

- 234
235 1. Name(s) of owner(s) (equity sellers)
236 2. Name(s) of equity purchaser(s)
237 3. Recording reference to document transferring title to subject property
238 4. Description / identification of real property

239 5. Signature(s) of equity purchaser(s)

240
241 Fees

242
243 Regular

244
245 Legal References

246
247 CC – 1695.6 (rec. ref.)

248
249 (g) If the value of the equity in the subject property exceeds by more than \$10,000.00 the
250 consideration paid to the equity seller in a transaction covered by this section, the equity
251 seller will be required to obtain counseling from a certified Housing and Urban
252 Development (HUD) counselor, proof of which shall be evidenced by a writing signed by
253 the HUD counselor that the equity seller understands the nature and consequences of the
254 transaction. The required counseling shall be completed prior to the recordation of the
255 transfer of title from the equity seller to the equity buyer.

256
257 §1695.7

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

268
269 §1695.8

270 Any equity purchaser who violates any subdivision of Section 1695.6 or who
271 engages in any practice which would operate as a fraud or deceit upon an equity seller shall,
272 upon conviction, be punished by a fine of not more than ~~twenty-five~~ one hundred thousand
273 dollars (~~\$25,000~~) (\$100,000), by imprisonment in the county jail for not more than one year,
274 or in the state prison, or by both that fine and imprisonment for each violation. Failure to
275 comply with the recording requirements of Section 1695.6(e) and (f), the failure of which
276 results in the transfer of title to a bona fide purchaser or additional encumbrances to be
277 placed on the property, shall subject an equity purchaser to be punished by an additional fine
278 equal to the total appraised value of the home purchased.

279
280 §1695.9

281 The provisions of this chapter are not exclusive and are in addition to any other
282 requirements, rights, remedies, and penalties provided by law.

284 §1695.10

285 Any waiver of the provisions of this chapter shall be void and unenforceable as
286 contrary to the public policy

287

288 §1695.11

289 If any provision of this chapter, or if any application thereof to any person or
290 circumstances is held unconstitutional, the remainder of this chapter and the application of
291 its provisions to other persons and circumstances shall not be affected thereby.

292

293 §1695.12

294 In any transaction in which an equity seller purports to grant a residence in
295 foreclosure to an equity purchaser by any instrument which appears to be an absolute
296 conveyance and reserves to himself or herself or is given by the equity purchaser an option
297 to repurchase, such transaction shall create a presumption affecting the burden of proof,
298 which may be overcome by clear and convincing evidence to the contrary that the
299 transaction is a loan transaction, and the purported absolute conveyance is a mortgage;
300 however, such presumption shall not apply to a bona fide purchaser or encumbrancer for
301 value without notice of a violation of this chapter, and knowledge on the part of any such
302 person or entity that the property was "residential real property in foreclosure" shall not
303 constitute notice of a violation of this chapter. This section shall not be deemed to abrogate
304 any duty of inquiry which exists as to rights or interests of persons in possession of the
305 residential real property in foreclosure.

306

307 §1695.13

308 It is unlawful for any person to initiate, enter into, negotiate, or consummate any
309 transaction involving residential real property in foreclosure, as defined in Section 1695.1, if
310 such person, by the terms of such transaction, takes unconscionable advantage of the
311 property owner in foreclosure.

312

313 §1695.14

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

318 (b) Such rescission shall be effected by giving written notice as provided in Section
319 1691 to the equity purchaser and his successor in interest, if the successor is not a bona fide
320 purchaser or encumbrancer for value as set forth in subdivision (c), and by recording such
321 notice with the county recorder of the county in which the property is located, within two
322 years of the date of the recordation of the conveyance to the equity purchaser. The notice of
323 rescission shall contain the names of the property owner and the name of the equity
324 purchaser in addition to any successor in interest holding record title to the real property and
325 shall particularly describe such real property. The equity purchaser and his successor in
326 interest if the successor is not a bona fide purchaser or encumbrancer for value as set forth in
327 subdivision (c), shall have 20 days after the delivery of the notice in which to reconvey title
328 to the property free and clear of encumbrances created subsequent to the rescinded

329 transaction. Upon failure to reconvey title within such time, the rescinding party may bring
330 an action to enforce the rescission and for cancellation of the deed.

331 (c) The provisions of this section shall not affect the interest of a bona fide purchaser
332 or encumbrancer for value if such purchase or encumbrance occurred prior to the
333 recordation of the notice of rescission pursuant to subdivision (b). Knowledge that the
334 property was residential real property in foreclosure shall not impair the status of such
335 persons or entities as bona fide purchasers or encumbrancers for value. This subdivision
336 shall not be deemed to abrogate any duty of inquiry which exists as to rights or interests of
337 persons in possession of the residential real property in foreclosure.

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

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

342
343 §1695.15

344 (a) An equity purchaser is liable for all damages resulting from any statement made
345 or act committed by the equity purchaser's representative in any manner connected with the
346 equity purchaser's acquisition of a residence in foreclosure, receipt of any consideration or
347 property from or on behalf of the equity seller, or the performance of any act prohibited by
348 this chapter.

349 (b) "Representative" for the purposes of this section means a person who in any
350 manner solicits, induces, or causes any property owner to transfer title or solicits any
351 member of the property owner's family or household to induce or cause any property owner
352 to transfer title to the residence in foreclosure to the equity purchaser.

353
354 §1695.16

355 (a) Any provision of a contract which attempts or purports to limit the liability of the
356 equity purchaser under Section 1695.15 shall be void and shall at the option of the equity
357 seller render the equity purchase contract void. The equity purchaser shall be liable to the
358 equity seller for all damages proximately caused by that provision. Any provision in a
359 contract which attempts or purports to require arbitration of any dispute arising under this
360 chapter shall be void at the option of the equity seller only upon grounds as exist for the
361 revocation of any contract.

362 (b) This section shall apply to any contract entered into on or after January 1, 1991.

363
364 §1695.17

365 (a) Any representative, as defined in subdivision (b) of Section 1695.15, deemed to
366 be the agent or employee, or both the agent and the employee of the equity purchaser shall
367 be required to provide both of the following:

368 (1) Written proof to the equity seller that the representative has a valid current
369 California Real Estate Sales License and that the representative is bonded by an admitted
370 surety insurer in an amount equal to twice the fair market value of the real property which is
371 the subject of the contract.

372 (2) A statement in writing, under penalty of perjury, that the representative has a
373 valid current California Real Estate Sales License, is bonded by an admitted surety insurer in

374 an amount equal to at least twice the value of the real property which is the subject of the
375 contract and has complied with paragraph (1). The written statement required by this
376 paragraph shall be provided to all parties to the contract prior to the transfer of any interest
377 in the real property which is the subject of the contract.

378 (b) The failure to comply with subdivision (a) shall at the option of the equity seller
379 render the equity purchase contract void and the equity purchaser shall be liable to the equity
380 seller for all damages proximately caused by the failure to comply.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

Existing Law: Permits predatory home equity purchasers to take title to homes in foreclosure for as little as \$100.00 as consideration and provides little or no sanction for a violation of the statutory protections.

This Resolution: Would provide a requirement that the equity seller understand clearly that the transaction is one that will transfer title of their home to the equity purchaser. In those instances in which the equity seller is given an option to repurchase, the proposed changes to the statute prohibit the sale of the property or adding an additional encumbrance on the property; it requires that notice of the repurchase option be recorded along with the deed instrument thereby giving notice to any potential buyer or lender. Finally, the proposed changes increase the criminal penalties for violation of the statute to reflect the real world values of the current transactions. The requirement that the equity seller receive a consultation with a certified HUD counselor is designed to allow the homeowner an opportunity to be told the exact nature of the proposed transaction outside of the intense pressure of the equity purchaser.

The Problem: Many equity sellers are poor and/or unsophisticated homeowners in the late stages of foreclosure. It is not unusual for home equity purchasers to confuse the homeowner and/or intimate that the transaction will “save their homes” for them. Often, the first inkling that the equity seller has that the transaction was not what it seemed is when they are served with an Unlawful Detainer complaint. The existing law, while well intentioned provides a road-map for the unscrupulous financier to obtain many thousands of dollars in equity for \$100.00 or less. Effectively, this statute is a road-map to property theft. While many of the transactions include an option to repurchase the home, many of the equity sellers unknowingly sign agreements that allow additional encumbrances to be placed on the property, which negates the value of the repurchase option. Additionally, the equity purchaser can sell the home to a BFP who will take without notice, thus cutting off the rights of the equity seller to regain possession of his or her home. Finally, the existing criminal penalties do not reflect the monetary value of the crimes being committed.

In accordance with CDCBA rules, BASF timely offers this resolution for consideration. Consistent with traditional CDCBA practice, the Proponent reserves the right to timely withdraw or amend the resolution

IMPACT STATEMENT

This resolution will not affect any other statute, law or rule.

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