



OLDE KEY TITLE

RESIDENTIAL AND COMMERCIAL CLOSING SERVICES SINCE 1982

MEMORANDUM

From: Olde Key Title

Date: July 7, 2009

Re: The Protection of Homeowners in Foreclosure Act (PHIFA) and the Maryland
Credit Services Businesses Act (MCSBA)

Maryland Protection of Homeowners in Foreclosure Act (PHIFA)

Foreclosure Consultant

According to §7-301(c) of the Maryland Protection of Homeowners in Foreclosure Act (PHIFA), a foreclosure consultant is defined as a person who “(1) solicits or contacts a homeowner in writing, in person, or through any electronic or telecommunications medium and directly or indirectly makes a representation or offer to perform any service that the person represents will: (i) stop, enjoin, delay, void, set aside, annul, stay, or postpone a foreclosure sale; (ii) obtain forbearance from any servicer, beneficiary, or mortgagee; (iii) assist the homeowner to exercise a right of reinstatement provided in the loan documents to refinance a loan that is in foreclosure and for which notice of foreclosure proceedings has been published; (iv) obtain an extension of the period within which the homeowner may reinstate the homeowner’s obligation or extend the deadline to object to the ratification; (v) obtain a waiver of an acceleration clause contained in any promissory note or contract secured by the mortgage on a residence in default or contained in the mortgage; (vi) assist the homeowner to obtain a loan or advance of funds; (vii) avoid or ameliorate the impairment of the homeowner’s credit resulting from the filing of an order to docket or a petition to foreclose or the conduct of a foreclosure sale; (viii) save the homeowner’s residence from foreclosure; (ix) purchase or obtain an option to purchase the homeowner’s residence within 20 days of an advertised or docketed foreclosure sale; or (x) arrange for the homeowner to become a lessee or renter entitled to continue to reside in the homeowner’s residence after a sale or transfer; or (2) systematically contacts owners of residences in default to offer foreclosure consulting services.” In accordance with the holding in *Johnson v. Wheeler* (2007, 492 F. Supp. 2d 492), the “definition of ‘foreclosure consultant’ is not limited to persons who happen to initiate contact with homeowners.”

Foreclosure Consulting Services

“Foreclosure consulting services”, defined in §7-301(e), include but are not limited to the following services: “(1) receiving money for the purpose of distributing it to creditors in payment or partial payment of any obligation by a lien on a residence in default; (2) contacting creditors on behalf of a homeowner;... (5) arranging or facilitating the purchase of a homeowner’s equity of redemption or legal or equitable title; (6) arranging or facilitating the sale of a homeowner’s residence or the transfer of legal title, in any form, to another party as an alternative to foreclosure; or (7) arranging for or facilitating a homeowner remaining in the homeowner’s residence after a sale or transfer as a tenant, renter, or lessee under terms provided in a written lease.”

Residence in Default and Residence in Foreclosure

PHIFA applies to residences in default and residences in foreclosure. According to §7-301(j), a “residence in default” is defined as “residential real property located in the State [of Maryland] consisting of not more than four single family dwelling units, one of which is occupied by the owner, or the owner’s spouse or former spouse under a use and possession order issued under Title 8, Subtitle 2 of the Family Law Article, as the individual’s principal place of residence, and on which the mortgage is at least 60 days in default.” According to §7-301(k), the only difference between a “residence in foreclosure” and a “residence in default” is that a residence in foreclosure is “against which an order to docket or a petition to foreclose has been filed.”

Scope of PHIFA

The scope of PHIFA is explained in §7-302. According to §7-302(a), “except as provided in subsection (b) of this section, this subtitle does *not* apply to (1) an individual admitted to practice law in the State [of Maryland], while performing any activity related to the individual’s regular practice of law in the State [of Maryland]; (2) a person who holds or services a mortgage loan secured by a residence in default while the person performs servicing, collection, and loss mitigation activities in regard to that mortgage loan, provided the mortgage loan did not arise as a result of a foreclosure consulting contract; (3) (i) a person doing business under any law of this State or the United States regulating banks, trust companies, savings and loan associations, credit unions, or insurance companies, while the person performs services as a part of the person’s normal business activities, and (ii) any subsidiary, affiliate, or agent of a person described in item (i) of this item, while the subsidiary, affiliate, or agent performs services as a part of [its] normal business activities;... (6) a person licensed as a real estate broker, associate real estate broker, or real estate salesperson under Title 17 of the Business Occupations and Professions Article only (i) while the person (a) engages in any activity for which the person is licensed under Title 17, and (b) does not violate any provision of §7-307 [prohibited actions] of this subtitle or Title 17; and (ii) if the residence in default for which the person is conducting a licensed activity (a) is listed in the local multiple listing service, and (b) is sold or transferred through a settlement, including the conveyance or transfer of deed, title, or establishment of equitable interest...” According to §7-302(b), “this subtitle

does apply to an individual who (1) is functioning in a position listed under subsection (a) of this section; and (2) is engaging in activities or providing services designed or intended to transfer title to a residence in default directly or indirectly to that individual, a relative of that individual, or an agent or affiliate of that individual.” Thus, a person licensed as a real estate broker, associate real estate broker, or real estate salesperson is exempt from PHIFA so long as he/she is acting within the scope of his/her license.

Prohibited Actions

PHIFA prohibits foreclosure consultants from engaging in a number of activities. Such prohibited activities are listed in the below mentioned Commissioner of Financial Regulation Advisory Notice and include, but are not limited to, the following: (1) claiming, demanding, charging, collecting, or receiving any compensation until after the foreclosure consultant has fully performed each and every service the foreclosure consultant contracted to perform or represented that the foreclosure consultant would perform; (2) claiming, demanding, charging, collecting, or receiving any interest or any other compensation for any loan that the foreclosure consultant makes to the homeowner that exceeds 8% a year; (3) receiving any consideration from any third party in connection with foreclosure consulting services provided to a homeowner unless the consideration (i) is first fully disclosed in writing to the homeowner, (ii) is clearly listed on any settlement documents, and (iii) is not in violation of any provision of PHIFA; (4) receiving a commission, regardless of how described, for the sale of a residence in default that exceeds 8% of the sales price; and/or (5) receiving any money to be held in escrow or on a contingent basis on behalf of the homeowner.

Homeowner's Rights of Rescission

As stated in §7-305 of PHIFA, “in addition to any other right under law to cancel or rescind a contract, a homeowner has the right to rescind a foreclosure consulting contract [defined as a written, oral or equitable agreement between a foreclosure consultant and a homeowner for the provision of any foreclosure consulting service] at any time” by giving written notice of rescission to the foreclosure consultant indicating the homeowner’s intention to rescind the foreclosure consulting contract. After such rescission, the homeowner shall repay, within 60 days of rescission, any funds paid or advanced by the foreclosure consultant. A right to rescind “may not be conditioned on the repayment of any funds.” Moreover, in accordance with §7-301(1), “the homeowner of a residence in default has the right to rescind a contract for the sale or transfer of the residence in default within 5 days after the execution of the contract.”

Contracts and Supporting Documentation Requirements

PHIFA describes the required information and specifications as well as required clauses that are to be included in foreclosure consulting contract and its supporting documentation. §7-306(a) dictates the requirements of a foreclosure consulting contract, §7-311 explains the requirements of a document entitled “Notice to Homeowner”, and §7-313 explains the

requirements of a document entitled “Statement About Tenancy”, which is required if a tenancy agreement is included in a contract for the sale or transfer of a residence in default.

Civil and Criminal Penalties

According to §7-320, “in addition to any action by the Attorney General or the Commissioner [of Financial Regulation of the Department of Labor, Licensing, and Regulation] authorized under this subtitle and any other action otherwise authorized by law, a homeowner may bring an action for damages incurred as a result of a practice prohibited by this subtitle.” Such homeowner who is awarded damages may also seek, and the court may award, reasonable attorney’s fees. Should the court find that the “defendant willfully or knowingly violated this subtitle, the court may award damages equal to three times the amount of the actual damages.” According to §7-321(a), “a person who violates any provision of this subtitle is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 3 years or a fine not exceeding \$10,000 or both.”

Summary of PHIFA

To summarize, and to quote from LandAmerica’s Bulletin No. 08-03, “a homeowner who is 60-days in default on the mortgage (or is in a foreclosure) [therefore, a homeowner need not be in foreclosure for PHIFA to apply] at the time of entering into the contract to sell, or agreement to transfer, has the right to rescind the contract for five days, irrespective of whether or not a foreclosure consultant is involved. If the seller sells to a bona fide buyer who leases back the property to the seller, the buyer must provide a ‘Statement About Tenancy’ document to [the] seller and the five-day period will not begin to run until [the] buyer complies.” “If a foreclosure consultant is involved in the transaction (1) any resulting foreclosure rescue transaction [defined as “a transaction designed or intended to delay or prevent an actual or anticipated foreclosure, where the homeowner transfers title to another party, while retaining rights in the property such as a lease-purchase, an option to purchase, and/or any other legal or equitable interest in the property”] is illegal; (2) the foreclosure consultant cannot obtain title to the property, directly or indirectly; (3) substantial disclosures are required; [and] (4) the five-day right to rescind does not begin to run until all required disclosures and other statutory requirements have been met.” Please see the attached checklist, provided by LandAmerica, that illustrates the possible effects of PHIFA on certain transactions.

Sources

Commissioner of Financial Regulation Advisory Notice (revised February 20, 2009), LandAmerica’s Bulletin No. 08-03, and Maryland Protection of Homeowners in Foreclosure Act (PHIFA)

Maryland Credit Services Businesses Act (MCSBA)

According to the Commissioner of Financial Regulation Advisory Notice titled “Loss Mitigation Consulting, Foreclosure Prevention, Mortgage Loan Modification, and Similar Services Under the Maryland Credit Services Businesses Act (MCSBA) and the Protection of Homeowners in Foreclosure Act (PHIFA)”, revised on February 20, 2009 and published by the Commissioner of Financial Regulation, “businesses offering, or contemplating offering, ‘loss mitigation consulting,’ ‘foreclosure prevention,’ ‘mortgage loan modification,’ or similar services” should be aware of and understand the MCSBA as such act potentially applies to the abovementioned services.

According to §14-1901(e)(3), a “credit services business” does *not* include “any person licensed as a real estate broker by this State where the person is acting within the course and scope of that license.” Should such person act outside “the course and scope of that license” the MCSBA applies. Additionally, a “credit services business” does *not* include “an individual admitted to the Bar of the Court of Appeals of Maryland when the individual renders services within the course and scope of practice by the individual as a lawyer and does not engage in the credit services business on a regular and continuing basis. The abovementioned persons that are not included in the definition of “credit services businesses” are only some of the ones (i.e., applicable) listed in §14-1901(e)(3).

Consumer Protections

According to abovementioned Commissioner of Financial Regulation Advisory Notice, the MCSBA provides a number of significant consumer protections, including, but not limited to the following: (1) a credit services business may not charge or receive any up-front fees, or any other fees, before fully performing all contracted services on behalf of consumers; (2) an individual or company offering services under MCSBA must be licensed by the Commissioner of Financial Regulation; (3) a credit services business must enter into a written contract with each consumer; (4) a credit services business must provide each consumer with a written information statement before entering into a contract as well as before receiving any fees (such statement’s requirements are described in §14-1905); (5) consumers have the right to rescind a contract any time prior to midnight of the third business day after the date of the transaction, however, “if the PHIFA is also implicated by particular loan modification services, PHIFA’s ‘unlimited right of rescission’ will apply instead.”

Civil and Criminal Penalties

According to §14-1915 of the MCSBA, “any person who violates any provision of this subtitle is guilty of a misdemeanor and, on conviction, is subject to a fine not exceeding \$5,000 or imprisonment not exceeding 3 years or both, in addition to any civil penalties.”

Sources

Commissioner of Financial Regulation Advisory Notice (revised February 20, 2009) and Maryland Credit Services Business Act (MCSBA)

Violations of PHIFA and MCSBA

The Commissioner of Financial Regulation of the Department of Labor, Licensing, and Regulation will investigate complaints alleging PHIFA and/or MCSBA “violations relating to persons offering loss mitigation consulting, foreclosure prevention, mortgage loan modification, or similar services, and will pursue appropriate remedies. Consumers who wish to file a complaint with the Commissioner may call 888-784-0136 or 410-230-6097.”

Source

Commissioner of Financial Regulation Advisory Notice (revised February 20, 2009)

*** Please note that the above analysis does not include all subsections of each Act. The analysis includes only the most relevant and applicable subsections.**