

CONTACT

POLICY DEPARTMENT
MARIA CILENTI
212.382.6655 | mcilenti@nycbar.org
ELIZABETH KOCIENDA
212.382.4788 | ekocienda@nycbar.org

**REPORT ON LEGISLATION
BY THE COUNCIL ON JUDICIAL ADMINISTRATION
AND THE TASK FORCE ON MORTGAGE FORECLOSURES**

**A.5615
S.1688**

**M. of A. Weinstein
Sen. Montgomery**

AN ACT to amend the real property law, the civil practice law and rules, and the criminal procedure law, in relation to distressed home loans.

THIS LEGISLATION IS APPROVED

The New York City Bar Association supports A.5615/S.1688 (the bill), which would significantly strengthen the Home Equity Theft Protection Act of 2006 (“HETPA”) (RPL 265-a) and the Distressed Property Consultant Law (RPL 265-b) to better protect New York’s vulnerable homeowners, who continue to be victimized by ever-evolving loan modification, short sale and deed theft scams. This bill would address certain procedural obstacles encountered by low-income homeowners seeking to vindicate their rights under HETPA and amend the criminal procedure law to allow for post-trial motions to restore title to the defrauded homeowner.

As New York continues to deal with a protracted foreclosure crisis disproportionately impacting low-income communities of color and seniors, scammers of all sorts have proliferated, devising new and creative ways to take advantage of distressed homeowners seeking to avert foreclosure and preserve family homes. New varieties of deed theft scams continue to evolve, and loan modification scammers have become more creative and have sought to insulate themselves from the statutory protections for consumers by aligning themselves with law offices in order to take advantage of a provision in the Distressed Property Consultant Law meant for attorneys providing legal services to homeowners. Homeowners victimized by the current crop of deed theft scammers, moreover, have been stymied in their efforts to vindicate their rights under HETPA by onerous injunction bond requirements. The bill would correct many of these problems and will strengthen both of these statutes.

Real Property Law (RPL) 265-a, known as HETPA, was enacted in 2006 to protect distressed homeowners from foreclosure rescue scams aimed at stripping the equity from their home. This bill would expand the definition of contracts covered by HETPA to better capture transactions requiring the protection of the statute and extend the period in which homeowners have the right to rescind transactions from five to fourteen days. Also, in order to better address the constantly-evolving predatory schemes employed by equity-stripping scammers in New

York's most vulnerable communities, the bill would prohibit equity purchase contracts that take *undue* advantage of the equity seller. This is preferable to the law's current reference to *unconscionable* advantage, which can be a more stringent standard to meet. Furthermore, in order to vindicate rights under HETPA, the injured homeowner typically needs to seek injunctive relief when commencing an action under the statute—both to enjoin the wrongdoer from further transferring or encumbering the affected property and to enjoin efforts to evict the homeowner from the property. For low-income, vulnerable homeowners victimized by scammers, the requirement to post an injunction bond pursuant to CPLR 6312 can be fatal, as they lack the funds or wherewithal to comply with such bonding requirements. The bill addresses this problem by explicitly stating that the bonding requirement of CPLR 6312 shall not apply to actions brought pursuant to HETPA (RPL 265-a).

The bill would also significantly strengthen the Distressed Property Consultant Law (RPL 265-b), enacted in 2009 to prevent consultants engaged in foreclosure prevention from exploiting distressed homeowners. Among other provisions, the law prohibits such consultants from providing services without a written contract and from charging upfront fees prior to completion of such services. It also affords the homeowner the right of rescission and contains penalties for its breach. However, the statute created a broad exemption for attorneys, which some attorneys have ruthlessly exploited. For example, attorneys would charge homeowners thousands of dollars up-front for their “services”, leading homeowners to believe that their interests were being protected in the foreclosure case, only to learn that the “attorney” neither answered the complaint, appeared at settlement conferences, nor submitted an application for a loan modification. As a result, such attorneys not only failed to procure the promised loan modification but left the homeowner with a default judgment against them. The bill would clarify this provision by stating that the exemption only applies to those attorneys who provide *bona fide* legal representation to clients pursuant to a retainer agreement and who have entered an appearance on behalf of the homeowner. The bill would therefore deter scammers from evading the statute's protections by hiding behind their status as attorneys while all the while taking advantage of vulnerable homeowners.¹

The bill further amends RPL 265-b by particularizing additional prohibited conduct, in light of the many variations of scammer behavior that have proliferated since the law was first enacted. These include: inducing homeowners to transfer ownership of their property to other parties, including the distressed property consultant; pretending to be law enforcement or government representatives; threatening to disclose false information about the homeowner's creditworthiness; harassing homeowners and family members abusively; threatening to enforce non-existent rights; using communications simulating judicial process, and encumbering properties with liens having no contractual or legal basis.

Finally, the bill also amends the Criminal Procedure Law to provide a post trial motion procedure to quiet title after there has been a criminal conviction with respect to fraudulent

¹ The current exemption applies to attorneys admitted to practice in New York when the attorney is directly providing “consulting services” to a homeowner in the regular course of his/her legal practice. The amended language would apply the exemption only to an attorney “who is directly providing legal representation to a homeowner pursuant to a retainer agreement, and has entered an appearance on behalf of a homeowner, in the course of his or her regular legal practice.”

instruments concerning real property transfers. This will afford a mechanism for title to be restored to those victimized by deed theft schemes. Given the limited legal services resources available to pursue civil actions on behalf of victims of deed theft scams, this amendment will substantially benefit low-income communities.

Council on Judicial Administration
Hon. Carolyn E. Demarest (Ret.), Chair

Task Force on Mortgage Foreclosures
Lawrence Mandelker, Chair

Reissued March 2019