

REFERENCE TITLE: foreclosure consultants..

State of Arizona  
House of Representatives  
Forty-ninth Legislature  
Second Regular Session  
2010

# HB 2309

Introduced by  
Representatives Hendrix, Reagan

AN ACT

AMENDING TITLE 44, CHAPTER 9, ARIZONA REVISED STATUTES, BY ADDING ARTICLE 22;  
RELATING TO FORECLOSURE CONSULTANTS.

(TEXT OF BILL BEGINS ON NEXT PAGE)

1 Be it enacted by the Legislature of the State of Arizona:

2 Section 1. Title 44, chapter 9, Arizona Revised Statutes, is amended  
3 by adding article 22, to read:

4 ARTICLE 22. FORECLOSURE CONSULTANTS

5 44-1378. Definitions

6 IN THIS ARTICLE, UNLESS THE CONTEXT OTHERWISE REQUIRES:

7 1. "COVERED SERVICE" INCLUDES:

8 (a) FINANCIAL COUNSELING, INCLUDING DEBT COUNSELING AND BUDGET  
9 COUNSELING.

10 (b) RECEIVING MONEY FOR THE PURPOSE OF DISTRIBUTING IT TO CREDITORS IN  
11 PAYMENT OR PARTIAL PAYMENT OF ANY OBLIGATION SECURED BY A MORTGAGE OR OTHER  
12 LIEN ON A RESIDENCE IN FORECLOSURE.

13 (c) CONTACTING A CREDITOR ON BEHALF OF A HOMEOWNER.

14 (d) ARRANGING OR ATTEMPTING TO ARRANGE AN EXTENSION OF THE PERIOD  
15 WITHIN WHICH A HOMEOWNER MAY CURE THE HOMEOWNER'S DEFAULT AND REINSTATE THE  
16 HOMEOWNER'S OBLIGATION PURSUANT TO A NOTE, MORTGAGE OR DEED OF TRUST.

17 (e) ARRANGING OR ATTEMPTING TO ARRANGE ANY DELAY OR POSTPONEMENT OF  
18 THE TIME OF A FORECLOSURE SALE.

19 (f) ADVISING THE FILING OF ANY DOCUMENT OR ASSISTING IN ANY MANNER IN  
20 THE PREPARATION OF ANY DOCUMENT FOR FILING WITH A BANKRUPTCY COURT.

21 (g) GIVING ANY ADVICE, EXPLANATION OR INSTRUCTION TO A HOMEOWNER THAT  
22 RELATES TO THE CURE OF A DEFAULT IN OR THE REINSTATEMENT OF AN OBLIGATION  
23 SECURED BY A MORTGAGE OR OTHER LIEN ON THE RESIDENCE IN FORECLOSURE, TO THE  
24 FULL SATISFACTION OF THE OBLIGATION OR TO THE POSTPONEMENT OR AVOIDANCE OF A  
25 FORECLOSURE SALE.

26 2. "FORECLOSURE CONSULTANT" MEANS A PERSON WHO, DIRECTLY OR  
27 INDIRECTLY, MAKES ANY SOLICITATION, REPRESENTATION OR OFFER TO A HOMEOWNER TO  
28 PERFORM FOR COMPENSATION OR WHO, FOR COMPENSATION, PERFORMS ANY COVERED  
29 SERVICE THAT THE PERSON REPRESENTS WILL DO ANY OF THE FOLLOWING:

30 (a) PREVENT OR POSTPONE A FORECLOSURE SALE.

31 (b) OBTAIN ANY FORBEARANCE FROM ANY MORTGAGEE OR BENEFICIARY OF A DEED  
32 OF TRUST.

33 (c) ASSIST THE HOMEOWNER TO EXERCISE THE RIGHT OF REINSTATEMENT  
34 PROVIDED IN THE LEGAL DOCUMENTS.

35 (d) OBTAIN ANY EXTENSION OF THE PERIOD WITHIN WHICH THE HOMEOWNER MAY  
36 REINSTATE THE HOMEOWNER'S OBLIGATION.

37 (e) OBTAIN ANY WAIVER OF AN ACCELERATION CLAUSE CONTAINED IN ANY  
38 PROMISSORY NOTE OR CONTRACT SECURED BY A MORTGAGE ON A RESIDENCE IN  
39 FORECLOSURE OR INCLUDED IN THE MORTGAGE OR DEED OF TRUST.

40 (f) ASSIST THE HOMEOWNER IN FORECLOSURE OR LOAN DEFAULT TO OBTAIN A  
41 LOAN OR ADVANCE OF MONEY.

42 (g) AVOID OR AMELIORATE THE IMPAIRMENT OF THE HOMEOWNER'S CREDIT  
43 RESULTING FROM THE RECORDING OF A NOTICE OF DEFAULT OR THE CONDUCT OF A  
44 FORECLOSURE SALE.

45 (h) SAVE THE HOMEOWNER'S RESIDENCE FROM FORECLOSURE.

1 (i) ASSIST THE HOMEOWNER TO OBTAIN A FORECLOSURE RECONVEYANCE.  
2 3. "FORECLOSURE RECONVEYANCE" MEANS A TRANSACTION THAT INVOLVES BOTH  
3 OF THE FOLLOWING:  
4 (a) THE TRANSFER OF TITLE TO A RESIDENCE IN FORECLOSURE BY A HOMEOWNER  
5 DURING A FORECLOSURE PROCEEDING BY EITHER:  
6 (i) THE TRANSFER OF AN INTEREST IN THE RESIDENCE IN FORECLOSURE FROM  
7 THE HOMEOWNER.  
8 (ii) THE CREATION OF A MORTGAGE OR OTHER LIEN DURING THE FORECLOSURE  
9 PROCESS THAT ALLOWS THE ACQUIRER TO OBTAIN TITLE TO THE RESIDENCE IN  
10 FORECLOSURE BY REDEEMING THE PROPERTY AS A JUNIOR LIENHOLDER.  
11 (b) THE SUBSEQUENT CONVEYANCE OR PROMISE OF A SUBSEQUENT CONVEYANCE OF  
12 AN INTEREST IN THE RESIDENCE TO THE FORMER HOMEOWNER BY THE ACQUIRER, OR A  
13 PERSON ACTING IN CONCERT WITH THE ACQUIRER, THAT ALLOWS THE FORMER HOMEOWNER  
14 TO REMAIN IN POSSESSION OF THE RESIDENCE FOLLOWING THE COMPLETION OF THE  
15 FORECLOSURE PROCEEDING. FOR THE PURPOSES OF THIS SUBDIVISION, "INTEREST IN  
16 THE RESIDENCE" INCLUDES AN INTEREST IN A CONTRACT FOR A DEED, A PURCHASE  
17 AGREEMENT AND AN OPTION TO PURCHASE OR LEASE.  
18 4. "FORECLOSURE SALE" MEANS THE SALE OF REAL PROPERTY TO ENFORCE AN  
19 OBLIGATION SECURED BY A MORTGAGE OR LIEN ON THE PROPERTY, INCLUDING THE  
20 EXERCISE OF A TRUSTEE'S POWER OF SALE.  
21 5. "HOLDER OF EVIDENCE OF DEBT" MEANS THE PERSON IN ACTUAL POSSESSION  
22 OF OR OTHERWISE ENTITLED TO ENFORCE AN EVIDENCE OF DEBT BUT DOES NOT INCLUDE  
23 A PERSON ACTING AS A NOMINEE SOLELY FOR THE PURPOSE OF HOLDING THE EVIDENCE  
24 OF DEBT OR DEED OF TRUST AS AN ELECTRONIC REGISTRY WITHOUT ANY AUTHORITY TO  
25 ENFORCE THE EVIDENCE OF DEBT OR DEED OF TRUST.  
26 6. "HOMEOWNER" MEANS THE RECORD OWNER OF A RESIDENCE IN FORECLOSURE AT  
27 THE TIME THE NOTICE OF THE PENDENCY OF AN ACTION FOR FORECLOSURE OR THE  
28 NOTICE OF DEFAULT AND ELECTION TO SELL IS RECORDED.  
29 7. "RESIDENCE IN FORECLOSURE" MEANS RESIDENTIAL REAL PROPERTY  
30 CONSISTING OF NOT MORE THAN FOUR FAMILY DWELLING UNITS, ONE OF WHICH THE  
31 HOMEOWNER OCCUPIES AS A PRINCIPAL PLACE OF RESIDENCE, AND AGAINST WHICH THERE  
32 IS RECORDED AN OUTSTANDING NOTICE OF THE PENDENCY OF AN ACTION FOR  
33 FORECLOSURE OR NOTICE OF DEFAULT AND ELECTION TO SELL.  
34 44-1378.01. Applicability  
35 A. THIS ARTICLE DOES NOT APPLY TO:  
36 1. A PERSON LICENSED TO PRACTICE LAW IN THIS STATE, WHILE PERFORMING  
37 ANY ACTIVITY RELATED TO THE PERSON'S ATTORNEY-CLIENT RELATIONSHIP WITH A  
38 HOMEOWNER OR WITH THE BENEFICIARY, MORTGAGEE, GRANTEE OR HOLDER OF ANY LIEN  
39 BEING ENFORCED BY FORECLOSURE.  
40 2. A HOLDER OR SERVICER OF AN EVIDENCE OF DEBT OR THE ATTORNEY FOR THE  
41 HOLDER OR SERVICER OF AN EVIDENCE OF DEBT SECURED BY A DEED OF TRUST OR OTHER  
42 LIEN ON ANY RESIDENCE IN FORECLOSURE WHILE THE PERSON PERFORMS SERVICES IN  
43 CONNECTION WITH THE EVIDENCE OF DEBT, LIEN, DEED OF TRUST OR OTHER LIEN  
44 SECURING THE DEBT. FOR THE PURPOSES OF THIS PARAGRAPH, THE FOLLOWING PERSONS  
45 ARE PRESUMED TO BE THE HOLDER OF EVIDENCE OF DEBT:

1 (a) THE PERSON WHO IS THE OBLIGEE OF AND WHO IS IN POSSESSION OF AN  
2 ORIGINAL EVIDENCE OF DEBT.

3 (b) THE PERSON IN POSSESSION OF AN ORIGINAL EVIDENCE OF DEBT TOGETHER  
4 WITH THE PROPER ENDORSEMENT OR ASSIGNMENT.

5 (c) THE PERSON IN POSSESSION OF A NEGOTIABLE INSTRUMENT EVIDENCING A  
6 DEBT THAT HAS BEEN DULY NEGOTIATED TO THE PERSON OR TO BEARER OR ENDORSED IN  
7 BLANK.

8 (d) THE PERSON IN POSSESSION OF AN EVIDENCE OF DEBT WITH AUTHORITY,  
9 WHICH MAY BE GRANTED BY THE ORIGINAL EVIDENCE OF DEBT OR DEED OF TRUST, TO  
10 ENFORCE THE EVIDENCE OF DEBT AS AGENT, NOMINEE OR TRUSTEE OR IN A SIMILAR  
11 CAPACITY FOR THE OBLIGEE OF THE EVIDENCE OF DEBT.

12 3. A PERSON DOING BUSINESS UNDER ANY LAW OF THIS STATE OR THE UNITED  
13 STATES THAT REGULATES BANKS, TRUST COMPANIES, SAVINGS AND LOAN ASSOCIATIONS,  
14 CREDIT UNIONS, INSURANCE COMPANIES, TITLE INSURERS, INSURANCE PRODUCERS OR  
15 ESCROW COMPANIES AUTHORIZED TO CONDUCT BUSINESS IN THIS STATE, WHILE THE  
16 PERSON PERFORMS SERVICES AS PART OF THE PERSON'S NORMAL BUSINESS ACTIVITIES,  
17 OR AN AFFILIATE OR SUBSIDIARY, OR AN EMPLOYEE OR AGENT ACTING ON BEHALF OF,  
18 ANY OF THE FOREGOING.

19 4. A PERSON ORIGINATING OR CLOSING A LOAN IN THE PERSON'S NORMAL  
20 COURSE OF BUSINESS IF ANY OF THE FOLLOWING IS TRUE:

21 (a) THE LOAN IS SUBJECT TO THE REQUIREMENTS OF THE REAL ESTATE  
22 SETTLEMENT PROCEDURES ACT OF 1974 (P.L. 93-533; 88 STAT. 1724; 12 UNITED  
23 STATES CODE SECTIONS 2601 THROUGH 2617).

24 (b) WITH RESPECT TO ANY SECOND MORTGAGE OR HOME EQUITY LINE OF CREDIT,  
25 THE LOAN IS SUBORDINATE TO AND CLOSED SIMULTANEOUSLY WITH A QUALIFIED FIRST  
26 MORTGAGE LOAN UNDER SUBDIVISION (a) OF THIS PARAGRAPH OR IS INITIALLY PAYABLE  
27 ON THE FACE OF THE NOTE OR CONTRACT TO AN ENTITY INCLUDED IN PARAGRAPH 3.

28 (c) THE LOAN IS RECORDED IN THE REAL PROPERTY RECORDS OF THE CLERK AND  
29 RECORDER OF THE COUNTY WHERE THE RESIDENCE IN FORECLOSURE IS LOCATED AND THE  
30 LEGAL ACTION GIVING RISE TO THE JUDGMENT WAS COMMENCED BEFORE THE NOTICE OF  
31 ELECTION AND DEMAND FOR SALE.

32 5. A TITLE INSURANCE COMPANY OR TITLE INSURANCE AGENT AUTHORIZED TO  
33 CONDUCT BUSINESS IN THIS STATE WHILE PERFORMING TITLE INSURANCE AND  
34 SETTLEMENT SERVICES.

35 6. A PERSON LICENSED AS A REAL ESTATE BROKER OR REAL ESTATE  
36 SALESPERSON UNDER TITLE 32, CHAPTER 20 WHILE THE PERSON ENGAGES IN ANY  
37 ACTIVITY FOR WHICH THE PERSON IS LICENSED.

38 7. A NONPROFIT ORGANIZATION THAT SOLELY OFFERS COUNSELING OR ADVICE TO  
39 HOMEOWNERS IN FORECLOSURE OR LOAN DEFAULT, UNLESS THE ORGANIZATION IS AN  
40 ASSOCIATE OF THE FORECLOSURE CONSULTANT.

41 B. NOTHING IN THIS CHAPTER SHALL BE CONSTRUED AS AUTHORIZING CONDUCT  
42 FOR WHICH A LICENSE WOULD BE REQUIRED UNDER TITLE 6, CHAPTER 9, ARTICLE 4.

43 44-1378.02. Prohibited acts

44 A FORECLOSURE CONSULTANT SHALL NOT:

1           1. CLAIM, DEMAND, CHARGE, COLLECT OR RECEIVE ANY COMPENSATION UNTIL  
2 AFTER THE FORECLOSURE CONSULTANT HAS FULLY PERFORMED EACH COVERED SERVICE  
3 THAT THE FORECLOSURE CONSULTANT CONTRACTED TO PERFORM OR REPRESENTED THAT THE  
4 FORECLOSURE CONSULTANT WOULD PERFORM.

5           2. CLAIM, DEMAND, CHARGE, COLLECT OR RECEIVE ANY FEE, INTEREST OR  
6 OTHER COMPENSATION FOR ANY REASON THAT IS NOT FULLY DISCLOSED TO THE  
7 HOMEOWNER.

8           3. TAKE ANY WAGE ASSIGNMENT, LIEN ON REAL OR PERSONAL PROPERTY,  
9 ASSIGNMENT OF A HOMEOWNER'S EQUITY OR OTHER INTEREST IN A RESIDENCE IN  
10 FORECLOSURE OR OTHER SECURITY FOR THE PAYMENT OF COMPENSATION. ANY SECURITY  
11 IS VOID AND UNENFORCEABLE.

12           4. RECEIVE ANY CONSIDERATION FROM ANY THIRD PARTY IN CONNECTION WITH A  
13 COVERED SERVICE PROVIDED TO A HOMEOWNER UNLESS THE CONSIDERATION IS FIRST  
14 FULLY DISCLOSED TO THE HOMEOWNER.

15           5. ACQUIRE, DIRECTLY OR INDIRECTLY, ANY INTEREST IN THE RESIDENCE IN  
16 FORECLOSURE OF A HOMEOWNER WITH WHOM THE FORECLOSURE CONSULTANT HAS  
17 CONTRACTED TO PERFORM A COVERED SERVICE.

18           6. ACCEPT A POWER OF ATTORNEY FROM A HOMEOWNER FOR ANY PURPOSE, OTHER  
19 THAN TO INSPECT DOCUMENTS AS PROVIDED BY LAW.

20           44-1378.03. Foreclosure consulting contract

21           A FORECLOSURE CONSULTING CONTRACT SHALL:

22           1. BE IN WRITING AND PROVIDED TO AND RETAINED BY THE HOMEOWNER,  
23 WITHOUT CHANGES, ALTERATIONS OR MODIFICATIONS, FOR REVIEW AT LEAST  
24 TWENTY-FOUR HOURS BEFORE IT IS SIGNED BY THE HOMEOWNER.

25           2. BE PRINTED IN AT LEAST TWELVE-POINT TYPE AND SHALL INCLUDE THE NAME  
26 AND ADDRESS OF THE FORECLOSURE CONSULTANT TO WHICH A NOTICE OF CANCELLATION  
27 CAN BE MAILED AND THE DATE THE HOMEOWNER SIGNED THE CONTRACT.

28           3. FULLY DISCLOSE THE EXACT NATURE OF THE FORECLOSURE CONSULTING  
29 SERVICES TO BE PROVIDED AND THE TOTAL AMOUNT AND TERMS OF ANY COMPENSATION  
30 THE FORECLOSURE CONSULTANT OR ASSOCIATE WILL RECEIVE.

31           4. BE DATED AND PERSONALLY SIGNED, WITH EACH PAGE BEING INITIALED, BY  
32 EACH HOMEOWNER OF THE RESIDENCE IN FORECLOSURE AND THE FORECLOSURE CONSULTANT  
33 AND SHALL BE ACKNOWLEDGED BY A NOTARY PUBLIC IN THE PRESENCE OF THE HOMEOWNER  
34 AT THE TIME THE HOMEOWNER SIGNS THE CONTRACT.

35           44-1378.04. Right of cancellation

36           A. IN ADDITION TO ANY RIGHT OF RESCISSION AVAILABLE UNDER STATE OR  
37 FEDERAL LAW, A HOMEOWNER HAS THE RIGHT TO CANCEL A CONTRACT WITH A  
38 FORECLOSURE CONSULTANT UNTIL MIDNIGHT OF THE THIRD BUSINESS DAY FOLLOWING THE  
39 DAY ON WHICH THE HOMEOWNER SIGNS A CONTRACT THAT COMPLIES WITH THIS ARTICLE.

40           B. CANCELLATION OCCURS WHEN THE HOMEOWNER PERSONALLY GIVES WRITTEN  
41 NOTICE OF CANCELLATION OF THE FORECLOSURE CONSULTING CONTRACT TO THE  
42 FORECLOSURE CONSULTANT AT THE ADDRESS SPECIFIED IN THE CONTRACT OR THROUGH  
43 ANY FAX OR ELECTRONIC MAIL ADDRESS IDENTIFIED IN THE CONTRACT OR OTHER  
44 MATERIALS PROVIDED TO THE HOMEOWNER BY THE FORECLOSURE CONSULTANT.

1 C. NOTICE OF CANCELLATION, IF GIVEN BY MAIL, IS EFFECTIVE ON DEPOSIT  
2 OF THE NOTICE IN THE UNITED STATES MAIL, PROPERLY ADDRESSED, WITH POSTAGE  
3 PREPAID.

4 D. A NOTICE OF CANCELLATION GIVEN BY THE HOMEOWNER DOES NOT NEED TO BE  
5 IN THE PARTICULAR FORM PROVIDED WITH THE CONTRACT AND, HOWEVER EXPRESSED, IS  
6 EFFECTIVE IF IT INDICATES THE INTENTION OF THE HOMEOWNER NOT TO BE BOUND BY  
7 THE CONTRACT.

8 E. AS PART OF THE CANCELLATION OF A FORECLOSURE CONSULTING CONTRACT,  
9 THE HOMEOWNER SHALL REPAY, WITHIN SIXTY DAYS AFTER THE NOTICE OF  
10 CANCELLATION, ALL MONIES PAID OR ADVANCED IN GOOD FAITH BEFORE THE RECEIPT OF  
11 NOTICE OF CANCELLATION BY THE FORECLOSURE CONSULTANT UNDER THE TERMS OF THE  
12 FORECLOSURE CONSULTING CONTRACT.

13 F. THE RIGHT TO CANCEL MAY NOT BE CONDITIONED ON THE REPAYMENT OF ANY  
14 MONIES.

15 44-1378.05. Homeowner action to recover damages

16 A. A HOMEOWNER WHO IS INJURED AS A RESULT OF A FORECLOSURE  
17 CONSULTANT'S VIOLATION OF THIS ARTICLE MAY BRING AN ACTION AGAINST THE  
18 FORECLOSURE CONSULTANT TO RECOVER DAMAGES CAUSED BY THE VIOLATION, TOGETHER  
19 WITH REASONABLE ATTORNEY FEES AND COSTS.

20 B. IF THE HOMEOWNER PREVAILS IN THE ACTION, THE COURT MAY AWARD  
21 PUNITIVE DAMAGES AS DETERMINED BY A JURY OR BY A COURT SITTING WITHOUT A  
22 JURY, BUT THE PUNITIVE DAMAGES SHALL BE AT LEAST ONE AND ONE-HALF TIMES THE  
23 AMOUNT AWARDED TO THE HOMEOWNER AS ACTUAL DAMAGES.

24 44-1378.06. Fraud or deceit against homeowner; classification

25 A FORECLOSURE CONSULTANT WHO ENGAGES IN ANY CONDUCT THAT CONSTITUTES  
26 FRAUD OR DECEIT AGAINST A HOMEOWNER IN CONNECTION WITH A TRANSACTION THAT IS  
27 SUBJECT TO THIS ARTICLE, INCLUDING A FORECLOSURE RECONVEYANCE, IS GUILTY OF A  
28 CLASS 1 MISDEMEANOR.

29 44-1378.07. Enforcement

30 A. THE ATTORNEY GENERAL OR A COUNTY ATTORNEY MAY ENFORCE THE CRIMINAL  
31 PROVISIONS OF THIS ARTICLE.

32 B. AN ACT OR PRACTICE IN VIOLATION OF THIS ARTICLE CONSTITUTES AN  
33 UNLAWFUL PRACTICE UNDER SECTION 44-1522. THE ATTORNEY GENERAL MAY  
34 INVESTIGATE AND TAKE APPROPRIATE ACTION AS PRESCRIBED BY CHAPTER 10, ARTICLE  
35 7 OF THIS TITLE.

36 44-1378.08. Cumulative nature of penalties

37 THE RIGHTS, REMEDIES AND PENALTIES PROVIDED PURSUANT TO THIS ARTICLE  
38 ARE CUMULATIVE AND DO NOT ABROGATE AND ARE IN ADDITION TO ANY OTHER RIGHTS,  
39 REMEDIES AND PENALTIES THAT MAY EXIST AT LAW OR IN EQUITY.