

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

HOUSE BILL 2309

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 HOLDER OR SERVICER OF AN EVIDENCE OF DEBT SECURED BY
14 A DEED OF TRUST OR OTHER LIEN ON A RESIDENCE IN FORECLOSURE ON BEHALF OF A
15 HOMEOWNER.
16 (d) ARRANGING OR ATTEMPTING TO ARRANGE AN EXTENSION OF THE PERIOD
17 WITHIN WHICH A HOMEOWNER MAY CURE THE HOMEOWNER'S DEFAULT AND REINSTATE THE
18 HOMEOWNER'S OBLIGATION PURSUANT TO A NOTE, MORTGAGE OR DEED OF TRUST.
19 (e) ARRANGING OR ATTEMPTING TO ARRANGE ANY DELAY OR POSTPONEMENT OF
20 THE TIME OF A FORECLOSURE SALE.
21 (f) ADVISING THE FILING OF ANY DOCUMENT OR ASSISTING IN ANY MANNER IN
22 THE PREPARATION OF ANY DOCUMENT FOR FILING WITH THE UNITED STATES BANKRUPTCY
23 COURT.
24 (g) GIVING ANY ADVICE, EXPLANATION OR INSTRUCTION TO A HOMEOWNER THAT
25 RELATES TO THE CURE OF A DEFAULT IN OR THE REINSTATEMENT OF AN OBLIGATION
26 SECURED BY A MORTGAGE OR OTHER LIEN ON THE RESIDENCE IN FORECLOSURE, TO THE
27 FULL SATISFACTION OF THE OBLIGATION OR TO THE POSTPONEMENT OR AVOIDANCE OF A
28 FORECLOSURE SALE.
29 2. "FORECLOSURE CONSULTANT" MEANS A PERSON WHO, DIRECTLY OR
30 INDIRECTLY, MAKES ANY SOLICITATION, REPRESENTATION OR OFFER TO A HOMEOWNER TO
31 PERFORM FOR COMPENSATION OR WHO, FOR COMPENSATION, PERFORMS ANY COVERED
32 SERVICE THAT THE PERSON REPRESENTS WILL DO ANY OF THE FOLLOWING:
33 (a) PREVENT OR POSTPONE A FORECLOSURE SALE.
34 (b) OBTAIN ANY FORBEARANCE FROM ANY MORTGAGEE OR BENEFICIARY OF A DEED
35 OF TRUST.
36 (c) ASSIST THE HOMEOWNER TO EXERCISE THE RIGHT OF REINSTATEMENT
37 PROVIDED IN THE LEGAL DOCUMENTS.
38 (d) OBTAIN ANY EXTENSION OF THE PERIOD WITHIN WHICH THE HOMEOWNER MAY
39 REINSTATE THE HOMEOWNER'S OBLIGATION.
40 (e) OBTAIN ANY WAIVER OF AN ACCELERATION CLAUSE CONTAINED IN ANY
41 PROMISSORY NOTE OR CONTRACT SECURED BY A MORTGAGE ON A RESIDENCE IN
42 FORECLOSURE OR INCLUDED IN THE MORTGAGE OR DEED OF TRUST.
43 (f) ASSIST THE HOMEOWNER IN FORECLOSURE OR LOAN DEFAULT TO OBTAIN A
44 LOAN OR ADVANCE OF MONEY.

1 (g) AVOID OR AMELIORATE THE IMPAIRMENT OF THE HOMEOWNER'S CREDIT
2 RESULTING FROM THE RECORDING OF A NOTICE OF SALE OR THE OCCURRENCE OF A
3 FORECLOSURE SALE.

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

5 (i) ASSIST THE HOMEOWNER TO ACCOMPLISH A FORECLOSURE RECONVEYANCE.

6 3. "FORECLOSURE RECONVEYANCE" MEANS A TRANSACTION THAT INVOLVES BOTH
7 OF THE FOLLOWING:

8 (a) THE TRANSFER OF TITLE TO A RESIDENCE IN FORECLOSURE BY A HOMEOWNER
9 DURING A FORECLOSURE PROCEEDING BY EITHER:

10 (i) THE TRANSFER OF AN INTEREST IN THE RESIDENCE IN FORECLOSURE FROM
11 THE HOMEOWNER.

12 (ii) THE CREATION OF A MORTGAGE OR OTHER LIEN DURING THE FORECLOSURE
13 PROCESS THAT ALLOWS THE ACQUIRER TO OBTAIN TITLE TO THE RESIDENCE IN
14 FORECLOSURE BY REDEEMING THE PROPERTY AS A JUNIOR LIENHOLDER.

15 (b) THE SUBSEQUENT CONVEYANCE OR PROMISE OF A SUBSEQUENT CONVEYANCE OF
16 AN INTEREST IN THE RESIDENCE TO THE FORMER HOMEOWNER BY THE ACQUIRER, OR A
17 PERSON ACTING IN CONCERT WITH THE ACQUIRER, THAT ALLOWS THE FORMER HOMEOWNER
18 TO REMAIN IN POSSESSION OF THE RESIDENCE FOLLOWING THE COMPLETION OF THE
19 FORECLOSURE PROCEEDING. FOR THE PURPOSES OF THIS SUBDIVISION, "INTEREST IN
20 THE RESIDENCE" INCLUDES AN INTEREST IN A CONTRACT FOR A DEED, A PURCHASE
21 AGREEMENT AND AN OPTION TO PURCHASE OR LEASE.

22 4. "FORECLOSURE SALE" MEANS THE SALE OF REAL PROPERTY TO ENFORCE AN
23 OBLIGATION SECURED BY A MORTGAGE OR LIEN ON THE PROPERTY, INCLUDING THE
24 EXERCISE OF A TRUSTEE'S POWER OF SALE.

25 5. "HOLDER OF EVIDENCE OF DEBT" MEANS THE PERSON IN ACTUAL POSSESSION
26 OF OR OTHERWISE ENTITLED TO ENFORCE AN EVIDENCE OF DEBT BUT DOES NOT INCLUDE
27 A PERSON ACTING AS A NOMINEE SOLELY FOR THE PURPOSE OF HOLDING THE EVIDENCE
28 OF DEBT OR DEED OF TRUST AS AN ELECTRONIC REGISTRY WITHOUT ANY AUTHORITY TO
29 ENFORCE THE EVIDENCE OF DEBT OR DEED OF TRUST.

30 6. "HOMEOWNER" MEANS THE RECORD OWNER OF A RESIDENCE IN FORECLOSURE AT
31 THE TIME THE NOTICE OF THE PENDENCY OF AN ACTION FOR FORECLOSURE OR THE
32 RECORDING OF A NOTICE OF SALE PURSUANT TO SECTION 33-808.

33 7. "RESIDENCE IN FORECLOSURE" MEANS RESIDENTIAL REAL PROPERTY
34 CONSISTING OF NOT MORE THAN FOUR FAMILY DWELLING UNITS, ONE OF WHICH THE
35 HOMEOWNER OCCUPIES AS A PRINCIPAL PLACE OF RESIDENCE, AND AGAINST WHICH THERE
36 IS RECORDED AN OUTSTANDING NOTICE OF THE PENDENCY OF AN ACTION FOR
37 FORECLOSURE OR NOTICE OF SALE PURSUANT TO SECTION 33-808.

38 44-1378.01. Applicability

39 A. THIS ARTICLE DOES NOT APPLY TO:

40 1. A PERSON LICENSED TO PRACTICE LAW IN THIS STATE, WHILE PERFORMING
41 ANY ACTIVITY RELATED TO THE PERSON'S ATTORNEY-CLIENT RELATIONSHIP WITH A
42 HOMEOWNER OR WITH THE BENEFICIARY, MORTGAGEE, GRANTEE OR HOLDER OF ANY LIEN
43 BEING ENFORCED BY FORECLOSURE.

44 2. A HOLDER OR SERVICER OF AN EVIDENCE OF DEBT OR THE ATTORNEY FOR THE
45 HOLDER OR SERVICER OF AN EVIDENCE OF DEBT SECURED BY A DEED OF TRUST OR OTHER

1 LIEN ON ANY RESIDENCE IN FORECLOSURE WHILE THE PERSON PERFORMS SERVICES IN
2 CONNECTION WITH THE EVIDENCE OF DEBT, LIEN, DEED OF TRUST OR OTHER LIEN
3 SECURING THE DEBT. FOR THE PURPOSES OF THIS PARAGRAPH, THE FOLLOWING PERSONS
4 ARE PRESUMED TO BE THE HOLDER OF EVIDENCE OF DEBT:

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

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

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

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

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

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

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

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

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

36 5. A TITLE INSURANCE COMPANY OR TITLE INSURANCE AGENT AUTHORIZED TO
37 CONDUCT BUSINESS IN THIS STATE WHILE PERFORMING TITLE INSURANCE AND
38 SETTLEMENT SERVICES.

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

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

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

3 44-1378.02. Prohibited acts

4 A FORECLOSURE CONSULTANT SHALL NOT:

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

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

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

16 4. RECEIVE ANY CONSIDERATION FROM ANY THIRD PARTY IN CONNECTION WITH A
17 COVERED SERVICE PROVIDED TO A HOMEOWNER UNLESS THE CONSIDERATION IS FIRST
18 FULLY DISCLOSED TO THE HOMEOWNER.

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

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

24 44-1378.03. Foreclosure consulting contract

25 A FORECLOSURE CONSULTING CONTRACT SHALL:

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

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

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

35 4. BE DATED AND PERSONALLY SIGNED, WITH EACH PAGE BEING INITIALED, BY
36 EACH HOMEOWNER OF THE RESIDENCE IN FORECLOSURE AND THE FORECLOSURE CONSULTANT
37 AND SHALL BE ACKNOWLEDGED BY A NOTARY PUBLIC IN THE PRESENCE OF THE HOMEOWNER
38 AT THE TIME THE HOMEOWNER SIGNS THE CONTRACT.

39 44-1378.04. Right of cancellation

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

1 B. CANCELLATION OCCURS WHEN THE HOMEOWNER PERSONALLY GIVES WRITTEN
2 NOTICE OF CANCELLATION OF THE FORECLOSURE CONSULTING CONTRACT TO THE
3 FORECLOSURE CONSULTANT AT THE ADDRESS SPECIFIED IN THE CONTRACT OR THROUGH
4 ANY FAX OR ELECTRONIC MAIL ADDRESS IDENTIFIED IN THE CONTRACT OR OTHER
5 MATERIALS PROVIDED TO THE HOMEOWNER BY THE FORECLOSURE CONSULTANT.

6 C. NOTICE OF CANCELLATION, IF GIVEN BY MAIL, IS EFFECTIVE ON DEPOSIT
7 OF THE NOTICE IN THE UNITED STATES MAIL, PROPERLY ADDRESSED, WITH POSTAGE
8 PREPAID.

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

13 E. AS PART OF THE CANCELLATION OF A FORECLOSURE CONSULTING CONTRACT,
14 THE HOMEOWNER SHALL REPAY, WITHIN SIXTY DAYS AFTER THE NOTICE OF
15 CANCELLATION, ALL MONIES PAID OR ADVANCED IN GOOD FAITH BEFORE THE RECEIPT OF
16 NOTICE OF CANCELLATION BY THE FORECLOSURE CONSULTANT UNDER THE TERMS OF THE
17 FORECLOSURE CONSULTING CONTRACT.

18 F. THE RIGHT TO CANCEL MAY NOT BE CONDITIONED ON THE REPAYMENT OF ANY
19 MONIES.

20 44-1378.05. Homeowner action to recover damages

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

25 B. IF THE HOMEOWNER PREVAILS IN THE ACTION, THE COURT MAY AWARD
26 PUNITIVE DAMAGES AS DETERMINED BY A JURY OR BY A COURT SITTING WITHOUT A
27 JURY, BUT THE PUNITIVE DAMAGES SHALL BE AT LEAST THREE TIMES THE AMOUNT
28 AWARDED TO THE HOMEOWNER AS ACTUAL DAMAGES.

29 44-1378.06. Fraud or deceit against homeowner; classification

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

34 44-1378.07. Enforcement

35 A. THE ATTORNEY GENERAL OR A COUNTY ATTORNEY MAY ENFORCE THE CRIMINAL
36 PROVISIONS OF THIS ARTICLE.

37 B. AN ACT OR PRACTICE IN VIOLATION OF THIS ARTICLE CONSTITUTES AN
38 UNLAWFUL PRACTICE UNDER SECTION 44-1522. THE ATTORNEY GENERAL MAY
39 INVESTIGATE AND TAKE APPROPRIATE ACTION AS PRESCRIBED BY CHAPTER 10, ARTICLE
40 7 OF THIS TITLE.

41 44-1378.08. Cumulative nature of penalties

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