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FENDING OFF THE PREDATORS: REGULATING DELINQUENT MORTGAGE MODIFICATION COMPANIES

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Webster defines "predator" as one that injures or exploits others for one's own gain. Unfortunately, the current waive of foreclosures has spawned the growth of predatory companies that prey on the victims of the housing crisis. Under the guise of assisting homeowners facing foreclosure, many companies do the opposite, hurting homeowners by taking a substantial upfront payment (better used to pay mortgage arrears) and then providing little or no assistance. Indeed, every few days, newspapers report on a criminal investigation into the activities of another self-professed mortgage workout firm. In some instances, those firms further exacerbate a homeowner's dilemma by discouraging them from seeking independent legal advice. To combat this, new legislation and regulation at both the federal and state are being considered to protect consumers. Before new legislation or regulations are passed, it is useful to examine a recently enacted law that currently protects homeowners from predatory mortgage workout firms.

Last year, New York enacted legislation to address subprime lending and foreclosure problems. While that legislation enhanced consumer protection by imposing new requirements to the mortgage foreclosure process, it also added Real Property Law §265-b to protect consumers from predatory workout companies. The statute does so by prohibiting certain conduct, mandating disclosures and a right of recession, and providing for a private cause of action for violations of the statute.

Real Property Law §265-b focuses on "distressed property consultants." A distressed property consultant is any person or company that seeks to assist a homeowner in: (a) stopping a foreclosure filing or a foreclosure sale; or (b) reinstating or refinancing a home loan that is in danger of being foreclosed. Excluded from the scope of the statute are attorneys admitted in New York, lienholders, judgment creditors, licensed mortgage bankers and brokers, not-for-profit organizations and title insurers.

A distressed property consultant is prohibited from performing services without a written agreement. The agreement must be in at least 12-point type and in the language used by the homeowner. The consultant must use the same language when he or she discusses with the homeowner the services to be performed. Furthermore, to be valid, both the homeowner and the consultant must sign the agreement, and their signatures must be notarized.

A common complaint about predatory consultants is that they take a substantial up front payment and then do little to achieve any result for the client. To combat this, the statute flatly prohibits the consultant from accepting any payment before its services are fully completed. Moreover, the consultant must fully disclose, in the agreement, the services to be provided and the total amount and terms of compensation for the services.

In addition, the agreement must include a notice, in at least 14 point boldface type, that: (a) states the consultant may not take any money before finishing its work; (b) the homeowner should consult with either an attorney not recommended by the consultant or with a government-approved housing counselor; (c) provides the phone number and website address of the New York State Banking Department and stating that a list of housing counselors can be found there; and (d) the homeowner has a right to cancel the contract within 5 days after execution. The consulting contract must be

accompanied by forms the homeowner can use to cancel the contract.

A court can nullify any agreement that violates the statute. To give the statute further bite, a consultant that intentionally or recklessly violates the statute is subject to treble damages and attorney's fees. A court may also impose a civil penalty of (up to) $10,000 for each violation.

Recognizing that cunning operators may attempt to limit their exposure for violations of the statute, the legislature attacked that possibility head on. The statute declares that any provision of a consulting contract that attempts to limit the consultant's exposure is null and void. In addition, a homeowner cannot waive this provision, nor can a homeowner be forced to pursue arbitration to enforce his or her rights under Real Property Law §265-b.

To date, the statute has not been the subject of any reported cases. It is too early to tell what impact it will have, but it contains many important consumer protection components, and is a good first step. The next step should be a campaign to educate the public of their rights under the statute so they can avoid predatory firms. Without an awareness of their rights, the statute will be a paper tiger that does not achieve its worthwhile goals.

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