

TAKING A LOOK AT THE CALIFORNIA FORECLOSURE CONSULTING LAW CIVIL CODE SECTION 2945

A Potential Legal Nightmare for Loan Modification Brokers

First let's get the law out on the table. I will bold the portions to be discussed in this article. I have also put some random comments in here so read through it. My comments are *italicized*. The following is general legal information only, and not legal advice. Consult with an attorney if you have specific questions.

CALIFORNIA CIVIL CODE SECTION 2945-2945.11

2945. (a) The Legislature finds and declares that homeowners whose residences are in foreclosure are subject to fraud, deception, harassment, and unfair dealing by foreclosure consultants from the time a Notice of Default is recorded pursuant to Section 2924 until the time surplus funds from any foreclosure sale are distributed to the homeowner or his or her successor. Foreclosure consultants represent that they can assist homeowners who have defaulted on obligations secured by their residences. These foreclosure consultants, however, often charge high fees, the payment of which is often secured by a deed of trust on the residence to be saved, and perform no service or essentially a worthless service. Homeowners, relying on the foreclosure consultants' promises of help, take no other action, are diverted from lawful businesses which could render beneficial services, and often lose their homes, sometimes to the foreclosure consultants who purchase homes at a fraction of their value before the sale. Vulnerable homeowners are increasingly relying on the services of foreclosure consultants who advise the homeowner that the foreclosure consultant can obtain the remaining funds from the foreclosure sale if the homeowner executes an assignment of the surplus, a deed, or a power of attorney in favor of the foreclosure consultant. This results in the homeowner paying an exorbitant fee for a service when the homeowner could have obtained the remaining funds from the trustee's sale from the trustee directly for minimal cost if the homeowner had consulted legal counsel or had sufficient time to receive notices from the trustee pursuant to Section 2924j regarding how and where to make a claim for excess proceeds.

(b) The Legislature further finds and declares that foreclosure consultants have a significant impact on the economy of this state and on the welfare of its citizens.

(c) The intent and purposes of this article are the following:

(1) **To require that foreclosure consultant service agreements be expressed in writing; to safeguard the public against deceit and financial hardship; to permit rescission of foreclosure consultation contracts; to prohibit representations that tend to mislead; and to encourage fair dealing in the rendition of foreclosure services.**

(2) The provisions of this article shall be liberally construed to effectuate this intent and to achieve these purposes.

2945.1. The following definitions apply to this chapter:

(a) **"Foreclosure consultant" means any person who makes any solicitation, representation, or offer to any owner to perform for compensation or who, for compensation, performs any service which the person in any manner represents will in any manner do any of the following:**

- (1) **Stop or postpone the foreclosure sale.**
- (2) **Obtain any forbearance** from any beneficiary or mortgagee.
- (3) Assist the owner to exercise the right of reinstatement provided in Section 2924c.
- (4) Obtain any **extension** of the period within which the owner may reinstate his or her obligation.
- (5) Obtain any **waiver of an acceleration** clause contained in any promissory note or contract secured by a deed of trust or mortgage on a residence in foreclosure or contained that deed of trust or mortgage.
- (6) Assist the owner to **obtain a loan** or advance of funds.
- (7) Avoid or ameliorate the impairment of the owner's credit resulting from the recording of a notice of default or the conduct of a foreclosure sale.
- (8) **Save the owner's residence from foreclosure.**
- (9) Assist the owner in obtaining from the beneficiary, mortgagee, trustee under a power of sale, or counsel for the beneficiary, mortgagee, or trustee, the remaining proceeds from the foreclosure sale of the owner's residence.

In essence, this means alot of people working in the area of loan modifications are covered under this law

(b) A foreclosure consultant does not include any of the following:

- (1) A person **licensed to practice law** in this state when the

person renders service in the course of his or her practice as an attorney at law.

That means this foreclosure consultant law does not apply to California Lawyers (good for me).

(2) A person licensed under Division 3 (commencing with Section 12000) of the Financial Code when the person is acting as a prorater as defined therein.

That means this foreclosure law does not apply to proraters

(3) A person licensed under Part 1 (commencing with Section 10000) of Division 4 of the Business and Professions Code when the person makes a direct loan or when the person (A) engages in acts whose performance requires licensure under that part, (B) is entitled to compensation for the acts performed in connection with the sale of a residence in foreclosure or with the arranging of a loan secured by a lien on a residence in foreclosure, (C) does not claim, demand, charge, collect, or receive any compensation until the acts have been performed or cannot be performed because of an owner's failure to make the disclosures set forth in Section 10243 of the Business and Professions Code or failure to accept an offer from a purchaser or lender ready, willing, and able to purchase a residence in foreclosure or make a loan secured by a lien on a residence in foreclosure on the terms prescribed in a listing or a loan agreement, and (D) does not acquire any interest in a residence in foreclosure directly from an owner for whom the person agreed to perform the acts other than as a trustee or beneficiary under a deed of trust given to secure the payment of a loan or that compensation. For the purposes of this paragraph, a "direct loan" means a loan of a real estate broker's own funds secured by a deed of trust on the residence in foreclosure, which loan and deed of trust the broker in good faith attempts to assign to a lender, for an amount at least sufficient to cure all of the defaults on obligations which are then subject to a recorded notice of default, provided that, if a foreclosure sale is conducted with respect to the deed of trust, the person conducting the foreclosure sale has no interest in the residence in foreclosure or in the outcome of the sale and is not owned, controlled, or managed by the lending broker; the lending broker does not acquire any interest in the residence in foreclosure directly from the owner other than as a beneficiary under the deed of trust; and the loan is not made for the purpose or effect of avoiding or evading the provisions of this article.

This basically refers to brokers who make direct loans of their own funds, or brokers who sell property in foreclosure or mortgage brokers who refinance someone in foreclosure. Again, this law would not apply in these circumstances.

(4) A person licensed under Chapter 1 (commencing with Section 5000) of Division 3 of the Business and Professions Code when the person is acting in any capacity for which the person is licensed under those provisions.

That means this foreclosure law does not apply to accountants as shown below:

*DIVISION 3. PROFESSIONS AND VOCATIONS GENERALLY
CHAPTER 1. ACCOUNTANTS
Article 1. Administration [5000-5025.3](#)*

good for accountants

(5) A person or his or her authorized agent acting under the express authority or written approval of the Department of Housing and Urban Development or other department or agency of the United States or this state to provide services.

HUD agents are exempt

(6) A person who holds or is owed an obligation secured by a lien on any residence in foreclosure when the person performs services in connection with this obligation or lien.

I think this means loan servicers are exempt

(7) Any person licensed to make loans pursuant to Division 9 (commencing with Section 22000), 10 (commencing with Section 24000), or 11 (commencing with Section 26000) of the Financial Code, subject to the authority of the Commissioner of Corporations to terminate this exclusion, after notice and hearing, for any person licensed pursuant to any of those divisions upon a finding that the licensee

is found to have engaged in practices described in subdivision (a) of Section 2945.

As shown below, this section basically means California Finance Lenders are exempt from the California Foreclosure Consultant Law unless the Commissioner of Corporations rules differently:

*DIVISION 9. CALIFORNIA FINANCE LENDERS LAW
CHAPTER 1. GENERAL PROVISIONS*

*Article 1. Definitions [22000-22011](#)
Article 2. Exemptions [22050-22064](#)
Article 3. Licensing [22100-22112](#)
Article 4. Regulations [22150-22167](#)*

This provision would seem to suggest that it may be wise to obtain a CFL license so that you can collect an advance fee while a homeowner is in foreclosure. Give us a call to discuss filing a CFL license for you.

(8) Any person or entity doing business under any law of this state, or of the United States relating to banks, trust companies, savings and loan associations, industrial loan companies, pension trusts, credit unions, insurance companies, or any person or entity authorized under the laws of this state to conduct a title or escrow business, or a mortgagee which is a United States Department of Housing and Urban Development approved mortgagee and any subsidiary or affiliate of the above, and any agent or employee of the above while engaged in the business of these persons or entities.

(9) A person licensed as a **residential mortgage lender or servicer pursuant to Division 20 (commencing with Section 50000)** of the Financial Code, when acting under the authority of that license.

This means California Mortgage Lenders are exempt from the California Foreclosure Consultant Law Section 2945

*DIVISION 20. CALIFORNIA RESIDENTIAL MORTGAGE LENDING ACT
CHAPTER 1. GENERAL [50000-50006](#)*

(c) Notwithstanding subdivision (b), any **person** who provides **services** pursuant to paragraph (9) of subdivision (a) is a foreclosure consultant unless he or she is the owner's attorney.

basically means all others are foreclosure consultants unless they are an attorney

(d) "**Person**" means any individual, partnership, corporation, limited liability company, association or other group, however organized.

This means you cannot hide behind a company to get around the California Foreclosure Consultant Law Section 2945

(e) "**Service**" means and includes, but is not limited to, any of the following:

(1) Debt, budget, or financial counseling of any type.

(2) Receiving money for the purpose of distributing it to creditors in payment or partial payment of any obligation secured by a lien on a residence in foreclosure.

(3) Contacting creditors on behalf of an owner of a residence in foreclosure.

(4) Arranging or attempting to arrange for an extension of the period within which the owner of a residence in foreclosure may cure his or her default and reinstate his or her obligation pursuant to Section 2924c.

(5) Arranging or attempting to arrange for any delay or postponement of the time of sale of the residence in foreclosure.

(6) Advising the filing of any document or assisting in any manner in the preparation of any document for filing with any bankruptcy court.

(7) Giving any advice, explanation or instruction to an owner of a residence in foreclosure which in any manner relates to the cure of a default in or the reinstatement of an obligation secured by a lien on the residence in foreclosure, the full satisfaction of that obligation, or the postponement or avoidance of a sale of a residence in foreclosure pursuant to a power of sale contained in any deed of trust.

(8) Arranging or attempting to arrange for the payment by the beneficiary, mortgagee, trustee under a power of sale, or counsel for the beneficiary, mortgagee, or trustee, of the remaining proceeds to which the owner is entitled from a foreclosure sale of the owner's residence in foreclosure. Arranging or attempting to arrange for the payment shall include any arrangement where the owner transfers or assigns the right to the remaining proceeds of a foreclosure sale to the foreclosure consultant or any person designated by the

foreclosure consultant, whether that transfer is effected by agreement, assignment, deed, power of attorney, or assignment of claim.

Basically means that almost anything you do for a person in foreclosure is covered by this act

(f) "Residence in foreclosure" means a residence in foreclosure as defined in Section 1695.1.

Let me save you the work in looking this section up:

*1695.1 (b) "Residence in foreclosure" and "residential real property in foreclosure" means residential real property consisting of one- to four-family dwelling units, one of which the owner occupies as his or her principal place of residence, and **against which there is an outstanding notice of default, recorded** pursuant to Article 1 (commencing with Section 2920) of Chapter 2 of Title 14 of Part 4 of Division 3.*

(g) "Owner" means a property owner as defined in Section 1695.1.

*Again, let me do the honors: 1695.1 (f) "Property owner" means the **record title owner** of the residential real property in foreclosure at the time the notice of default was recorded.*

(h) "Contract" means any agreement, or any term thereof, between a foreclosure consultant and an owner for the rendition of any service as defined in subdivision (e).

This next section discusses the owners rights you must respect if the California Foreclosure Consultant Law Applies to you.

2945.2. (a) In addition to any other right under law to rescind a contract, an owner has the **right to cancel such a contract until midnight of the third "business day"** as defined in subdivision (e) of

Section 1689.5 after the day on which the owner signs a contract which complies with Section 2945.3.

(b) Cancellation occurs when the owner gives written notice of cancellation to the foreclosure consultant at the address specified in the contract.

(c) Notice of cancellation, if given by mail, is effective when deposited in the mail properly addressed with postage prepaid.

(d) Notice of cancellation given by the owner need not take the particular form as provided with the contract and, however expressed, is effective if it indicates the intention of the owner not to be bound by the contract.

2945.3. (a) Every contract shall be in writing and shall fully disclose the exact nature of the foreclosure consultant's services and the total amount and terms of compensation.

For all intensive purposes this sounds just like the Advance Fee Agreement that the DRE requires DRE licensed brokers to have.

(b) The following notice, printed in at least 14-point boldface type and completed with the name of the foreclosure consultant, shall be printed immediately above the statement required by subdivision (c):

"NOTICE REQUIRED BY CALIFORNIA LAW

_____ or anyone working
(Name)

for him or her **CANNOT:**

**(1) Take any money from you or ask you for money until _____ has
(Name)**

completely finished doing everything he or she said he or she would do; and

(2) Ask you to sign or have you sign any lien, deed of trust, or deed."

Since California DRE Brokers are not exempt under this law, it means DRE brokers cannot accept any advance fee from any homeowner who is in foreclosure (meaning a notice of default has been filed). For those rare brokers who have an advance fee agreement in place you will probably recognize this language.

The bottom line is that the law in California is clear, if a homeowner is in foreclosure there is no collecting of any fees up front. If you are a home-owner who has paid a broker a fee while you were in foreclosure contact us, there is a very strong possibility that we will be able to get your money back.

(c) The contract shall be written in the same language as principally used by the foreclosure consultant to describe his or her services or to negotiate the contract; shall be dated and signed by the owner; and shall contain in immediate proximity to the space reserved for the owner's signature a conspicuous statement in a size equal to at least 10-point boldface type, as follows: "You, the owner, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation form for an explanation of this right."

(d) The contract shall contain on the first page, in a type size no smaller than that generally used in the body of the document, each of the following:

(1) The name and address of the foreclosure consultant to which the notice or cancellation is to be mailed.

(2) The date the owner signed the contract.

(e) The contract shall be accompanied by a completed form in duplicate, captioned "notice of cancellation," which shall be attached to the contract, shall be easily detachable, and shall contain in type of at least 10-point the following statement written in the same language as used in the contract:

"NOTICE OF CANCELLATION

(Enter date of transaction) (Date)

You may cancel this transaction, without any penalty or obligation, within three business days from the above date.

To cancel this transaction, mail or deliver a signed and dated copy of this cancellation notice, or any other written notice, or send a telegram to

(Name of foreclosure consultant)

at

(Address of foreclosure consultant's place of business)

NOT LATER THAN MIDNIGHT OF _____.
(Date)

I hereby cancel this transaction

_____.
(Date)

(Owner's signature)

(f) The foreclosure consultant shall provide the owner with a copy of the contract and the attached notice of cancellation.

(g) Until the foreclosure consultant has complied with this section, the owner may cancel the contract.

(h) After the 65-day period following the foreclosure sale, the foreclosure consultant may enter into a contract to assist the owner in arranging, or arrange for the owner, the release of funds remaining after the foreclosure sale ("surplus funds") from the beneficiary, mortgagee, trustee under a power of sale, or counsel for the beneficiary, mortgagee, or trustee. However, prior to entering into that contract, the foreclosure consultant shall do all of the following:

(1) Prepare and deliver to the owner a notice in 14-point boldface type and substantially in the form set forth below.

(2) Obtain a receipt executed by each owner and acknowledged before a notary public, acknowledging a copy of the notice set forth below.

"NOTICE TO OWNER

(Date of Contract) (Date signed by Owner)

(Date of Foreclosure Sale)

You may be entitled to receive all or a portion of the surplus funds generated from the foreclosure sale of your real property located at: _____, California on _____ without paying any fees or costs of any kind to a third party. You should check directly with the trustee or beneficiary who conducted the foreclosure sale of your property to determine the name, address, and telephone number of the party to whom you can direct inquiries regarding filing a claim for surplus funds without paying a fee to a third party. No person or entity may require you to enter into any agreement requiring the

payment of a fee to that person or entity in order to receive the surplus funds from the foreclosure sale to which you may be entitled during the 65 days after the date of the trustee's sale."

The following sections clearly set forth violations of the California Foreclosure Consulting Law Section 2945

2945.4. It shall be a violation for a foreclosure consultant to:

(a) Claim, demand, charge, collect, or receive any compensation until after the foreclosure consultant has fully performed each and every service the foreclosure consultant contracted to perform or represented that he or she would perform.

If you are a California Licensed Real Estate Broker and have accepted an advance fee from an owner in foreclosure who has received a notice of default you are in clear violation of the California Foreclosure Consulting Law Section 2945

(b) Claim, demand, charge, collect, or receive any fee, interest, or any other compensation for any reason **which exceeds 10 percent per annum** of the amount of **any loan which the foreclosure consultant may make** to the owner.

(c) Take any wage assignment, any lien of any type on real or personal property, or other security to secure the payment of compensation. That security shall be void and unenforceable.

(d) Receive any consideration from any third party in connection with services rendered to an owner unless that consideration is fully disclosed to the owner.

(e) Acquire any interest in a residence in foreclosure from an owner with whom the foreclosure consultant has contracted. Any interest acquired in violation of this subdivision shall be voidable, provided that nothing herein shall affect or defeat the title of a bona fide purchaser or encumbrancer for value and without notice of a

violation of this article. Knowledge that the property was "residential real property in foreclosure," does not constitute notice of a violation of this article. This subdivision may not be deemed to abrogate any duty of inquiry which exists as to rights or interests of persons in possession of residential real property in foreclosure.

(f) Take any power of attorney from an owner for any purpose, except to inspect documents as provided by law.

(g) Induce or attempt to induce any owner to enter into a contract which does not comply in all respects with Sections 2945.2 and 2945.3.

(h) Enter into an agreement to assist the owner in arranging, or arrange for the owner, the release of surplus funds prior to 65 days after the trustee's sale is conducted, whether the agreement involves direct payment, assignment, deed, power of attorney, or assignment of claim from an owner to the foreclosure consultant or any person designated by the foreclosure consultant.

2945.5. Any waiver by an owner of the provisions of this article shall be deemed void and unenforceable as contrary to public policy. Any attempt by a foreclosure consultant to induce an owner to waive his rights shall be deemed a violation of this article.

ok, so now what are the penalties where a DRE licensed broker accepts an advance fee from a owner in foreclosure who has received a notice of default in violation of the California Foreclosure Consulting Law Section 2945?

2945.6. (a) An owner may bring an action against a foreclosure consultant for any violation of this chapter. **Judgment shall be entered for actual damages, reasonable attorneys' fees and costs, and appropriate equitable relief.** The court also may, in its discretion, award **exemplary damages** and **shall award exemplary damages** equivalent to at **least three times the compensation received** by the foreclosure consultant in violation of subdivision (a), (b), or (d) of Section 2945.4, and three times the owner's actual damages for any

violation of subdivision (c), (e), or (g) of Section 2945.4, in addition to any other award of actual or exemplary damages.

Wow, the Court shall award exemplary (which means punitive damages) in certain circumstances. According a violation of the California Foreclosure Consulting Law Section 2945 can be a costly mistake.

(b) The rights and remedies provided in subdivision (a) are **cumulative to, and not a limitation of, any other rights and remedies provided by law.** Any action brought pursuant to this section shall be commenced within **four years** from the date of the alleged violation.

2945.7. Any person who commits any violation described in Section 2945.4 shall be punished by a fine of not more than ten thousand dollars (\$10,000), by imprisonment in the county jail for not more than one year, or in the state prison, or by both that fine and imprisonment for each violation. These penalties are cumulative to any other remedies or penalties provided by law.

Wow, a 10k fine and possible imprisonment. Amazing. the California Foreclosure Consulting Law Section 2945 packs some serious penalties and has serious legal teeth. And yet strangely most brokers seem to be unaware of this law and are taking advance fees from homeowners who have recieved a notice of default.

2945.8. If any provision of this article or the application thereof to any person or circumstance is held to be unconstitutional, the remainder of the article and the application of such provision to other persons and circumstances shall not be affected thereby.

2945.9. (a) A foreclosure consultant is liable for all damages resulting from any statement made or act committed by the foreclosure consultant's representative in any manner connected with the foreclosure consultant's (1) performance, offer to perform, or contract to perform any of the services described in subdivision (a) of Section 2945.1, (2) receipt of any consideration or property from or on behalf of an owner, or (3) performance of any act prohibited by this article.

Wow, a California Licensed Real Estate Broker is liable under this article for acts of his/her agents and representatives. This could have SERIOUS ramifications if you are a California Licensed Real Estate Broker and have agents working in branch offices doing loan modifications.

(b) "Representative" for the purposes of this section means a person who in any manner solicits, induces, or causes (1) any owner to contract with a foreclosure consultant, (2) any owner to pay any consideration or transfer title to the residence in foreclosure to the foreclosure consultant, or (3) any member of the owner's family or household to induce or cause any owner to pay any consideration or transfer title to the residence in foreclosure to the foreclosure consultant.

2945.10. (a) Any provision in a contract which attempts or purports to limit the liability of the foreclosure consultant under Section 2945.9 shall be void and shall at the option of the owner render the contract void. **The foreclosure consultant shall be liable to the owner for all damages proximately caused by that provision.** Any provision in a contract which attempts or purports to require arbitration of any dispute arising under this chapter shall be void at the option of the owner only upon grounds as exist for the revocation of any contract.

(b) This section shall apply to any contract entered into on or after January 1, 1991.

2945.11. (a) Any representative, as defined in subdivision (b) of Section 2945.9, deemed to be the agent or employee or both the agent and the employee of the foreclosure consultant shall be required to provide both of the following:

(1) Written proof to the owner that the representative has a valid current California Real Estate Sales License and that the representative is bonded by an admitted surety insurer in an amount equal to at least twice the fair market value of the real property that is the subject of the contract.

Query? Did you know about this surety requirement?

(2) A statement in writing, under penalty of perjury, that the representative has a valid current California Real Estate Sales License, that the representative is bonded by an admitted surety insurer in an amount equal to at least twice the value of the real property that is the subject of the contract and has complied with paragraph (1). The written statement required by this paragraph shall be provided to all parties to the contract prior to the transfer of any interest in the real property that is the subject of the contract.

(b) The failure to comply with subdivision (a) shall, at the option of the owner, render the contract void and the foreclosure consultant shall be liable to the owner for all damages proximately caused by the failure to comply.

Morals of the Story:

(1) California Brokers You Need to Have a Well Drafted Advance Fee Agreement in Place if you want to accept an Advance Fee from homeowners for loan modification services. I can draft these for you give me a call. It will likely be the best money you have ever spent.

(2) Even with an advance fee agreement in place, you need to make sure you do not accept any money up-front from an owner facing foreclosure as evidenced by a notice of default. This means you better ask, check and verify. You can check the County Recorder where your Client's property is as a back-up method.

(3) If you have collected an advance fee legally (with a DRE approved advance fee agreement in place) and the owner receives a notice of default, you should not collect or withdraw any money from your Client's Trust Account. Leave the money in there until your services are complete.

(4) Penalties for non-compliance with the **California Foreclosure Consulting Law Section 2495** are staggering including attorney fees, a 10k fine, jail time, and punitive damages

(5) You can be held liable for the acts of your agents and representatives. If you have a branch office in place you better know what's going on. You have a duty to supervise and if your agents and representatives violate the *California Foreclosure Consulting Law Section 2495* you will find yourself in very hot water.

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