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Josiah L. Kibe

# CLOSING THE DOOR ON UNFAIR FORECLOSURE PRACTICES IN COLORADO

JOSIAH L. KIBE*

INTRODUCTION

In the last seven years, the Colorado housing market has experienced tremendous growth, causing home prices to double.[1] Despite this housing boom, many people still face foreclosure on their mortgages, often after missing only one payment.[2] In light of the recent economic downturn, the number of foreclosures has already begun to increase.[3] Specifically, property foreclosures in the Denver metro area posted a 44.4 percent increase from the first quarter of 2001 to the first quarter of 2002.[4] Nationwide, foreclosures have reached their highest level in eleven years, also climbing forty-five percent.[5] Many of the individuals that face such financial difficulty have owned their homes for many years, developing substantial equity from

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* Candidate for Juris Doctor, University of Colorado School of Law, 2003; B.S., United States Military Academy, 1992. The author gratefully thanks the editorial staff of The University of Colorado Law Review and all other individuals who took time out of their busy schedules to read this article for their insightful comments and assistance. The author would most like to thank Andrea and Ethan for their patience and understanding throughout this process.

1. David Olinger, *Foreclosing on Despair*, DENVER POST, Feb. 25, 2001, at 1A, *available at* 2001 WL 6744804.

2. Although this Comment focuses on Colorado foreclosure practices, the following article provides a very useful explanation of these actions and has served as a guide for discussion of these unfair practices throughout this Comment: Norma Paz Garcia, *Dirty Deeds: Abuses and Fraudulent Practices in California's Home Equity Market*, Consumers Union (Oct. 1995), *at* http://www.consumersunion.org/finance/home-ca1.htm.

3. Kristi Arellano, *Metro-area Foreclosures Surge for First Quarter*, DENVER POST, Apr. 3, 2002, at 1C, *available at* 2002 WL 6564301.

4. *Id.*

5. Peter T. Kilborn, *Home Foreclosures Climb: High-Interest Loans Have Most Defaults*, DENVER POST, Nov. 22, 2002, at 22A.

their monthly payments and from the increased home values supplied by the economic boom.[6] Because of the fear of losing their homes through foreclosure, many people have begun to turn to "foreclosure consultants" to help them.

These consultants scan the public foreclosure records daily to find people that are unaware of their options for solving these financial difficulties.[7] As the consultants inundate these individuals with mailings, phone calls, and personal visits promising help, the homeowner begins to view the consultant as a last resort to saving his home.[8] As the homeowner reaches the point of despair, the consultant will encourage the owner to sign several forms, often including a quitclaim deed, in return for "assistance" in fixing his financial difficulties.[9] While this may seem to be a beneficial practice to the casual observer, most of these consultants impose draconian repayment measures. They mainly provide false hope to the person in foreclosure as they drain, in some cases, a lifetime of equity from the homeowner's pockets.

State legislatures and courts deal with these unfair practices in several different ways. Two states, California and Missouri, have enacted statutes that specifically limit and monitor the actions of foreclosure consultants.[10] Specifically, California enacted a pair of statutes in 1979 aimed at protecting homeowners "whose residences are in foreclosure from unfair dealings with home equity purchasers and mortgage foreclosure consultants."[11] As another solution, some states consider a conveyance of real property an equitable mortgage when the actions of one of the parties are unjust.[12] Each of these states differs on the amount of proof necessary to show the party's actual intent.[13] Colorado foreclosure law, however, does not provide any specific protection from inequitable consultant practices although it does provide the homeowner a means of curing

6. Garcia, *supra* note 2.

7. *Id.*

8. *See* Olinger, *supra* note 1.

9. Garcia, *supra* note 2.

10. CAL. CIV. CODE § 2945 (West 1993 & Supp. 2002); MO. ANN. STAT. § 407.935 (West 2001).

11. Cassandra Ferrannini, *Consumer Protection Measures for Homeowners Strengthened*, 29 MCGEORGE L. REV. 469, 470 (1998).

12. *See, e.g.*, 765 ILL. COMP. STAT. ANN. 905/5 (West 2001).

13. *See* Albert Rush & John C. Murray, *Michigan Appellate Court Sends Warning to "Foreclosure Consultants," at* http://firstam.com/faf/html/cust/jm-eqmortgage.html (2001).

his default on his mortgage payments.[14] Unfortunately, because a majority of these Colorado homeowners are poor, elderly, or speak little English, the knowledge of the existence of legitimate methods for keeping their homes upon default is minimal.[15]

While public education on the methods of protecting a homeowner from home loss would provide some relief, statutes providing protection from foreclosure consultants could eliminate the unfair aspect of this practice completely. Many methods for dealing with this practice exist, and most provide strong means of protecting the public from the consultants and the loss of equity. This Comment argues that by combining an equitable mortgage statute with a statute specifically aimed at controlling and regulating, but not eliminating, foreclosure consultants, the Colorado legislature could provide protection under two statutory schemes and eliminate the unjust actions of some of these consultants while allowing legitimate consultants seeking to aid desperate homeowners to continue their practice.

To illustrate the importance of this issue, Part I will outline the hypothetical situation of one individual in Colorado who lost her home to this practice. Part II will describe the different forms of equity abuse as a baseline for understanding the unfair practices used in these situations, focusing on foreclosure rescue as the most invidious form of abuse. Part III will then describe Colorado foreclosure proceedings and current consumer protection statutes that can save a home from foreclosure and provide statutory causes of action to remedy any unfair practices. Part IV will then evaluate other states' statutory protections for homeowners in foreclosure. Part V will outline a proposed solution to this practice in Colorado by analyzing various methods used by other states. Part VI will demonstrate the effectiveness of this proposal by applying it to the hypothetical from Part I and analyzing the benefits this owner would have received from the proposed statute.

14. David Olinger, *Agencies Can Help in Home Dealings*, DENVER POST, Mar. 1, 2001, at 1A, *available at* 2001 WL 6745171.

15. Olinger, *supra* note 1.

## I. THE STORY OF JANE SMITH[16]

The following story describes one hypothetical Colorado victim of unjust foreclosure rescue practices. Although most victims are poor or elderly, this story provides an explanation of how mortgage consultants can harm anyone who finds himself in rough financial waters.

Jane Smith was just trying to save her home. Mrs. Smith and her husband, John, were facing foreclosure and were desperately searching for a way to stop the oncoming eviction. Luckily for her, or so it seemed, help was right in her front yard.[17] Immediately following the Smiths' mortgage company filing of an intent to foreclose notice on the Smiths' home, Jim Jones, a foreclosure consultant, began to send fliers and call the Smiths about assisting them with their foreclosure. With seven days left to sell or refinance their home, Mr. Jones made a visit to the Smiths' home, claiming he could help them, but Mrs. Smith would have to complete some paperwork.

When Mr. Jones arrived at the Smiths' residence, Mr. Smith was not home because he was still at work. Mr. Jones convinced Mrs. Smith that if she did not sign the paperwork, the mortgage company would evict her and her family. Mr. Jones handed Mrs. Smith several pieces of paper, including a quitclaim deed that transferred her home to him. Mr. Jones explained to Mrs. Smith that the documents allowed Mr. Jones to temporarily take control of her home to protect her from foreclosure. Once she completed this transaction, he explained, she could obtain financing from him or any other financial in-

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16. In December 2001, Attorney General Ken Salazar filed a lawsuit against real estate broker Ryan Searle under the Colorado Consumer Protection Act. The allegations brought by the Attorney General on behalf of several homeowners closely mirror Jane Smith's situation. Mr. Searle generally arrived at the homes with a large quantity of paperwork, failing to inform the homeowners of their right to redeem or right to rescind their loan transactions. Additionally, Mr. Searle would have the homeowners transfer the title to their homes, costing each homeowner many thousands of dollars in equity. Press Release, Colorado Attorney General's Office, Attorney General Salazar Sues Real Estate Agent and Companies Engaged in Predatory Home Foreclosure Scheme in Denver, Adams, Arapahoe, Jefferson, Douglas and Elbert Counties (Dec. 19, 2001), http://www.ago.state.co.us/PRESREL/presrl12001/prsrl115.stm [hereinafter Salazar Press Release].

17. It is important to establish that Mrs. Smith received a copy of the notice of the right to cure and her right of redemption required by law to be mailed to the borrower. She, however, did not understand these rights because of the language used in the notice. COLO. REV. STAT. § 38-38-103 (2002).

stitution of her choice. Another piece of paper contained a redemption agreement that allowed Mrs. Smith one month to reclaim ownership for $10,000 and Mr. Jones's expenses.

Mrs. Smith called Mr. Jones the next morning and told him that she did not want to pursue his offer. Mr. Jones informed her that her call was too late because he had already filed the documents, causing the property to transfer to his company. Mrs. Smith then attempted to find financing to reclaim her home as allowed under her redemption agreement. Every mortgage company that she called told her they could not provide financing to her because she did not own the home.

Despite her best efforts to save the home, Mrs. Smith could not overcome the obstacles that Mr. Jones placed in her way. Mrs. Smith, her husband, and their child moved to a homeless shelter while Mr. Jones acquired their home of ten years. Mr. Jones claimed that Mrs. Smith was at fault because she had statutory rights that she could have exercised to allow her to retain her home. Although this is true, Mrs. Smith argued she did not have the information necessary to act on these options because she relied on the representations of Mr. Jones.

This story is merely an example of the widespread effect that these individuals and practices have on people in foreclosure. Although foreclosure consultants may have seemed like their only option at the time, there were several statutory methods for saving the Smiths' home that they did not know about and of which Mr. Jones failed to inform them. The Smiths did not have to experience such great difficulties in trying to retain their home. The next section addresses various types of home equity abuse, focusing in particular on foreclosure consultants.[18]

18. This hypothetical was created using information from two recent Denver Post articles and an on-line consumer protection article. All of the names have been changed. The hypothetical is fashioned to best portray the need for protection from these actions and how this proposed protection would apply to these hypothetical facts. Most examples of foreclosure consultants contain very similar facts. Thus, this example contains presupposed facts to demonstrate this need. The author makes no representations about the truth or veracity of the factual elements from these articles. Olinger, *supra* note 1; Garcia, *supra* note 2; David Olinger, *Family Sues Over $10 'Sale' of Home*, DENVER POST, Mar. 24, 2001, at 1B, *available at* 2001 WL 6747372.

## II. FORMS OF HOME EQUITY ABUSE

Home equity abuse occurs in many forms. This Comment, however, addresses the four principal areas of homeowner fraud in California's booming housing market as identified by a consumer protection watchdog organization.[19] These four areas are home improvement contracts, disaster related home loan abuses, bill consolidation or refinancing offers, and foreclosure rescue.[20] Although many of the individuals offering these services appear to offer "a ray of hope" to homeowners facing financial ruin, their main goal is to leverage the equity in people's homes against high interest rates, balloon payments, and harsh repayment terms which most people cannot meet.[21] When the victim does not meet the terms of these agreements, the lender, salesperson, or consultant[22] will foreclose on the new mortgage, taking the person's home or home equity in the process.

### A. *Home Improvements Scams*

Home improvement scams usually begin with a door-to-door salesman attempting to sell redecorating or home repair services to unsuspecting people, most often the elderly or the poor. These salespeople pressure the homeowners into agreeing to the proffered services for inflated prices and will often offer convenient financing for the work they perform. The trouble with this practice is that when the unsuspecting victim signs the financing paperwork, he is usually agreeing to a home equity loan, using his home as the collateral. Next, a contractor, usually from the same organization, arranges the financing and deducts his exorbitant fees from the loan amount. The worst part of this scheme is that the contractor will often do such a poor job, if any work at all, that the home is

19. Garcia, *supra* note 2.

20. *Id.* This comment focuses on foreclosure rescue. Consequently, the author addresses this issue in great depth in Part II and provides a basic overview of the other three areas in this part.

21. *See* S. REP. on A.B. 3269 (Cal. May 19, 1994) [hereinafter CAL. S. REP.]; Garcia, *supra* note 2.

22. The title of the individual will depend on the service provided. Additionally, an individual can sell the service door-to-door and then serve as the contractor that provides the service. There could be several individuals involved in the process as well.

left uninhabitable. Another unfortunate result occurs when the victim has to move out of his home, adding a new monthly rent payment while still maintaining responsibility for the home equity loan payments for the contractor's poor work.[23]

### *B. Disaster Related Home Loan Abuses*

Although not as prevalent as home improvement scams, the methods used in disaster-related home loans are similar to those used in the home improvement context. In disaster-related cases, a door-to-door salesperson canvases low-income communities with offers of money for repairs after homes are damaged by a natural disaster, such as an earthquake or a flood. Often, these low-income houses will remain damaged for some time because the owners lack insurance to repair the damage. These salespeople seem like angels to the victims of these terrible disasters as "they seek ways to make their homes—and lives—whole again."[24] In actuality, these "wanna-be's looking to take advantage of people's desire to get their lives back to normal"[25] will engage in the same bait-and-switch financing schemes used in the home improvement context, causing the now twice-bitten victim, losing once to nature and now to the salesperson, to lose his equity or even his home.

### *C. Bill Consolidation or Refinancing Offers*

Another lending action that can lead to unfair practices is the promise of a method to lower monthly debt through bill consolidation or refinancing.[26] These offers usually target individuals with poor credit and an immediate cash need who cannot obtain conventional financing. The high interest rates offered on these loans, however, usually lead to higher, not lower, payments because fees accrue at a much faster pace. The victim of these schemes, who used his home as collateral in the first place, will eventually have to obtain a new line of credit to keep his home. Thus, refinancing offers or debt consolidation loans can place the victim in a vicious cycle of trying to keep

23. CAL. S. REP., *supra* note 21; Garcia, *supra* note 2.
24. Garcia, *supra* note 2.
25. *Id.*
26. Debt consolidation can actually be a way to help people experiencing financial difficulties, but also has the potential for abuse inherent in the practice.

his finances afloat as the weight of higher interest rates and fees drags him, and his home equity, down into the quagmire of foreclosure.[27]

Each of these three methods preys on an unsuspecting person that is in need of assistance. This list of home equity abuses, however, is not all-inclusive. While these predatory practices are all unjust methods used by these individuals to take a person's home equity, these practices generally do not involve the use of government records as a source of information for choosing their victims.[28]

### *D. Foreclosure Rescue*

The fourth and possibly most egregious form of home equity abuse is foreclosure rescue. In a foreclosure rescue situation, a homeowner is behind in his mortgage payments. The lender, following the appropriate foreclosure proceedings, enters a notice of default against the homeowner, starting the actual foreclosure.[29]

Foreclosure consultants comb the public records at the county recorder's office searching for these notices, which yield the names of individuals in foreclosure.[30] After the consultant develops his list of individuals in foreclosure, he begins to inundate these people with daily mailings, harassing phone calls, fliers, and even personal appearances at the person's home.[31] Each consultant has his own particular offer and method, but the pitch to the potential victim is the same: "help is on the way even if the situation seems hopeless."[32]

The consultant's main ploy is to promise the financially strapped individual the opportunity to save his home in return for an agreement that will, more often than not, lead to the loss of the victim's home or home equity.[33] The consultant will

> [o]ften . . . persuade an unsuspecting homeowner to deed the property to him by making lofty promises. In exchange for the deed to the property, the "rescuer" promises to make

27. CAL. S. REP., *supra* note 21; *see* Garcia, *supra* note 2.
28. *See* Garcia, *supra* note 2.
29. *See* CAL. S. REP., *supra* note 21; Garcia, *supra* note 2.
30. Garcia, *supra* note 2.
31. Olinger, *supra* note 1.
32. Garcia, *supra* note 2.
33. *See* Olinger, *supra* note 1.

> all mortgage payments, help the homeowner restore his credit, and allow the homeowner a lifelong right to stay in the home as a renter.[34]

While most people in foreclosure will inevitably lose their homes, foreclosure consultants add more stress, costs, and possibly attorney fees to the already arduous and expensive process. One Colorado lawyer called this tactic, "the biggest consumer issue out there, as far as I'm concerned, [because p]eople are getting fleeced every day out of a lifetime's worth of equity."[35]

The consultants, however, claim they provide a valuable service to these financially strapped people by saving their homes.[36] One consultant even maintains a list of valued customers that have benefited from his services. The list includes praise from one couple who found the consultant a "true lifesaver when we were at the end of our hope."[37] One month later, however, those same satisfied customers had different words for their "hero" when they received an eviction notice due to late rent payments.[38] They "did not read the lease agreement before [the consultant] left with it, did not know they had deeded away their home and learned too late it could cost them more than $20,000 to repay [the consultant] for spending about $6,000 to end a foreclosure threat."[39] Another foreclosure consultant summed up the general feeling of those who work in this problem area when he said, "'I took their debt. I did exactly what they wanted me to do.'"[40] He left unsaid, however, that he would likely take their home as well.

Despite the apparent abuse, foreclosure consultants could serve a legitimate function. As long as foreclosure consultants act fairly and frankly in their dealings, they might offer a reasonable alternative to foreclosure and foreclosure proceedings. By presenting fair representations of their abilities to help and the services they provide, foreclosure consultants have the potential to offer assistance while still charging a reasonable

34. Garcia, *supra* note 2.
35. Olinger, *supra* note 1.
36. *See* David Olinger, *Foreclosure Investor Stands by His 'Cure,'* DENVER POST, Feb. 26, 2001, at 3A, *available at* 2001 WL 6744877.
37. *Id.*
38. *Id.*
39. *Id.*
40. Olinger, *supra* note 1.

premium for their services.[41] Without legislation or some other form of consumer protection, however, the potential for abuse is too great to allow the practice to continue unfettered.

As in California in 1979,[42] a call has come from many organizations and legislative figures in Colorado to stop the abuse these victims and potential victims face by showing them how to protect their homes.[43] Some measures already exist in Colorado to protect individuals from these problems. In Denver, the public trustee's office provides a warning with each foreclosure notice that addresses the potential hazards of signing a deed over to a consultant. Additionally, the United States Department of Housing and Urban Development (HUD) has a network of ten agencies in Denver that provide free services to individuals in foreclosure.[44] Furthermore, private organizations, including the Colorado Bar Association, have called for some type of consumer protection legislation to prevent individuals from falling prey to these consultants, but the efforts have achieved no results to date.[45] These measures, however, are not enough. The next section demonstrates how, despite these methods of protection, homeowners are still at risk of becoming victims of foreclosure rescue practices.

## III. FORECLOSURE AND CONSUMER PROTECTION STATUTORY PROCEDURES IN COLORADO

Foreclosure proceedings vary depending on the state statutory scheme.[46] Colorado's foreclosure proceeding is confusing to the layperson and requires in-depth knowledge of the statutes. This brief synopsis of the statutes is merely an overview of the significant events that can affect a person subjected to foreclosure intricacies. This section explains Colorado's foreclosure procedures in order to give background and helps explain why statutory protection from foreclosure consultants is necessary.

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41. *See* CAL. CIV. CODE § 2945 (West 1993 & Supp. 2002).
42. *See* Ferrannini, *supra* note 11, at 470.
43. *See* Olinger, *supra* note 14.
44. *Id.*
45. *Id.*
46. *See, e.g.*, COLO. REV. STAT. § 38-38-101 (2002).

### A. *Real Property Foreclosure Procedures*

Colorado is the only state that has a public trustee foreclosure procedure on deeds of trust, which has generally replaced the mortgage as a security device in the state.[47] Colorado also allows mortgages and deeds of trust to proceed to private trustees, which requires judicial foreclosure to complete this process.[48] Of the two methods, the public trustee seems to be the more expedient and inexpensive of the formats,[49] establishing this method as the preferred foreclosure process in Colorado by attorneys.[50]

To initiate the public trustee foreclosure proceeding, a person with evidence of a debt secured by a deed of trust notifies the public trustee of the county where the property is located of his intent to foreclose.[51] The public trustee then has ten days to initiate the proceeding by recording the notice of the election to foreclose with the county clerk.[52] The trustee then advertises the date, time, and place of sale in a newspaper of general circulation in the county of sale for five consecutive weeks.[53] The trustee also mails the same information to the grantor of the deed of trust, the owner, and additional parties that might have an interest in the property.[54] The date of sale can be no less than forty-five days and no more than sixty days after the recording of the election to foreclose.[55] Additionally, a public

47. *See* Kris E. Jukola, *Real Property Foreclosure Procedures*, *in* COLORADO FORECLOSURE AND REPOSSESSION 21, 21 (NBI, Inc. ed., 1999). A deed of trust is "[a] deed conveying title to real property to a trustee as security until the grantor repays a loan. This type of deed resembles a mortgage." BLACK'S LAW DICTIONARY 423 (7th ed. 1999). A mortgage, on the other hand, is "[a] conveyance of title[—in many states—]to property that is given as security for the payment of a debt or the performance of a duty and that will become void upon payment or performance according to the stipulated terms." *Id.* at 1026. In Colorado, however, a mortgage creates only a lien on the property. COLO. REV. STAT. § 38-35-117.

48. Jukola, *supra* note 47, at 21.

49. *Id.* at 23.

50. *See id.* at 21.

51. COLO. REV. STAT. § 38-38-101(1). This section assumes complete foreclosure on the entire property using the public trustee foreclosure process. Although both types of foreclosures are important, the true focus of this section is the statutory protection afforded to individuals in foreclosure.

52. § 38-38-101(3).

53. § 38-38-101(6).

54. § 38-38-101(7).

55. § 38-38-108(1)(a).

trustee cannot conduct a sale without judicial authorization.[56] The trustee may extend the foreclosure sale for no more than six months after the originally scheduled sale date, but only with good cause or a written request by the person seeking the sale.[57]

Within ten days, the public trustee must also mail a notice to all other parties who have a right to cure or redeem based on a recorded instrument in the county where the property is located.[58] If the debt is the result of nonpayment, the owner, a lienholder, a holder of an easement, or a person with a certificate of sale may notify the trustee at least fifteen days before the sale of his intent to cure the default. If a party files this notice to cure, he can cure until noon of the day before the published sale.[59]

Colorado also guarantees an owner the additional right to redeem the property after the sale is final. The owner of the property will have the right to redeem if he pays the trustee the sale price, with interest and any other costs accrued, within seventy-five days of the sale.[60] If the owner does not redeem within seventy-five days, the lienor with the senior lien may redeem within ten days of the last redemption date of the owner.[61] The statute also allows each junior lienor, based on the priority of his lien, to redeem his recorded interest five days after expiration of the prior lienor's right.[62] Any junior lienor who exercises his redemption rights must pay the full amount of the sale and interest, plus the amount of the prior redeeming lienor's debt, as provided by affidavit to the trustee.[63] If the owner does redeem within seventy-five days, the redemption will nullify the sale but will leave the property subject to any liens except the foreclosed debt.[64] If the owner does not redeem and any lienor redeems during his statutory redemption period, the lienor receives the home and the interest acquired by

56. § 38-38-105.
57. § 38-38-109(1).
58. § 38-38-103.
59. § 38-38-104.
60. § 38-38-302. The redemption period is six months for agricultural real property. *See id.*
61. § 38-38-303(1).
62. *Id.*
63. *Id.*
64. § 38-38-306.

the foreclosure sale buyer, subject to the redemption rights of any subsequent lienors.[65]

Despite the complexities of these proceedings, several options, some implied in this overview and others extraneous to the statutes, exist to alleviate some of the frustrations of foreclosure. The following subsection addresses these options.

### B. *Foreclosure Options*

Colorado foreclosure proceedings are extremely complex, requiring skill in dealing with the details of the statutes. Many of the individuals faced with the problems of foreclosure are "elderly, live alone, speak Spanish, or are unschooled in the complexities of real estate documents."[66] These individuals are presumably unaware that foreclosure and foreclosure consultants are not their only options. In Denver alone, for example, ten agencies established by HUD provide free services and information to people who find themselves in such financially trying situations.[67] The problem with these services is the public's lack of knowledge about their existence.[68] In Adams County, only three hundred out of one thousand people facing foreclosure in 2000 called the local HUD counseling agency for help.[69] Of those that called a housing counselor, one counselor believes that "only two lost their homes."[70] When properly used, these services are a valuable resource.

In contrast to Adams County, over three thousand people received foreclosure notices in the Denver area in 2000.[71] The Denver public trustee's office has begun to combat unfair foreclosure practices by sending an orange warning to each homeowner facing foreclosure. The notice states, "BEFORE SIGNING ANY DOCUMENTS . . . you should seek counseling from a reputable source. QUITCLAIM DEEDS AND WARRANTY DEEDS WILL TRANSFER OWNERSHIP TO ANOTHER PARTY."[72] Unfortunately, Denver County is the

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65. *Id.*
66. Olinger, *supra* note 1.
67. Olinger, *supra* note 14.
68. *Id.*
69. *Id.* These results are part of an informal study by the Adams County Housing Authority with the results published in this article.
70. *Id.*
71. *Id.*
72. Olinger, *supra* note 1.

only county in the Denver metropolitan area that follows this practice, much to the chagrin of housing counselors.[73]

Housing counselors seek to protect homeowners by explaining foreclosure alternatives that can benefit the lender and the borrower. With these alternatives, the borrower can avoid negative credit ratings and possibly overcome his temporary cash flow problems.[74] The lender does not have to institute foreclosure proceedings, will continue to receive loan payments, and can even receive more money from the new terms.[75]

Although education on protection measures is not foolproof, the information provided by housing counselors on a homeowner's available options provides a person in financial strife with an opportunity to keep his home, his credit, or both. When a consumer considers these options, he must decide which one will work best for him and his family.[76] The most important step, however, is ensuring that he has the knowledge to make those choices.[77] Several options exist to remedy foreclosure, namely loan workouts, a deed in lieu of foreclosure, and statutory redemption rights guaranteed to the owner. The next subsections explain these methods.

### 1. Loan Workouts

Although many options exist, loan workouts seem to be the most intuitive solution.[78] Loan workouts, however, are most prevalent in commercial development projects, although homeowners still may utilize them. When a person receives a foreclosure notice in the mail, he may call his mortgage company or other mortgage companies for refinancing options.[79] The mortgage company will often try to find a way to assist the owner when he calls. This alternative is similar to refinancing.[80]

In general, a loan workout occurs when the mortgagor and mortgagee agree "to modify the terms of the existing loan

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73. Olinger, *supra* note 14.

74. Kris E. Jukola, *Is Foreclosure Your Best and Only Option?*, *in* COLORADO FORECLOSURE AND REPOSSESSION 3, 4 (NBI, Inc. ed.. 1999).

75. *See id.*

76. *See id.*

77. *See* Olinger, *supra* note 14.

78. Although this approach works well in theory, it seems less likely to happen in practice than the statutorily-created methods of saving a home from foreclosure.

79. *See* COLO. REV. STAT. § 38-38-302 (2002).

80. *See* Jukola, *supra* note 74, at 5.

documents[, which] can include a reduction in the interest rate, a reduction in payments, [or] an extension of time to repay the loan."[81] The goal of these workouts is to allow the borrower some time to get through a difficult financial period. In all instances, the borrower and lender must agree that this agreement would be mutually beneficial and would not merely delay an inevitable foreclosure proceeding.[82] If foreclosure seems inevitable, then postponing the proceedings would only lead to more problems for the lender and borrower, and most lenders would deny the use of this option to the borrower because it would ultimately harm the lender.[83]

If the parties can determine that the source of the financial difficulties will not continue and lead to actual foreclosure, a loan workout can benefit both parties by allowing them to avoid foreclosure proceedings. In deciding if the mortgagor should consider this option, the lender and owner should look at the financial stability of the owner, the value of the home, and the economic growth potential for the area.[84] If these factors seem positive, a loan workout or refinancing for the homeowner might be the most feasible option for the owner and the lender, allowing both to benefit from this process. The owner benefits by not having to enter foreclosure, thus saving his consumer credit rating, while the bank receives all the money the owner owes it.

### 2. Deed in Lieu of Foreclosure

Another option available to troubled homeowners is a "deed in lieu of foreclosure" transaction. This process involves the owner returning or conveying the property to the mortgage company or bank, depending on which is the lender. There are several variations of the deed in lieu of foreclosure, including a conveyance coupled with monetary compensation and a conveyance to a third party more capable of providing financial security to the home.[85]

Because the property does not enter foreclosure, a lender will guarantee that this type of transaction is most beneficial to

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81. *See id.*
82. *See id.*
83. *See id.* at 5–6.
84. *See id.* at 5.
85. *See id.* at 13–14.

him and the borrower. To ensure their own financial protection, lenders must investigate the status of the home to ensure they will incur no additional liabilities or subordinate their lienor status. If the lender determines the deed in lieu of foreclosure process would not subject him to any liability, then both parties can reap the benefits of this transaction. The lender can avoid the untimely delays and expenses of foreclosure, gaining quicker access to and control of the property. The borrower can dispose of a home he cannot afford, ensure future credit stability, and decrease his liability to the lender.[86] As with loan workouts, a deed in lieu of foreclosure transaction allows the parties to come to an agreement without entering foreclosure.[87]

### 3. Redemption Rights and the Right to Cure Default

Both previous examples of foreclosure alternatives occur before foreclosure. Two other alternatives, the statutory right of redemption and right to cure default, do not actually stop foreclosure proceedings, but do allow the owner to save his home once the property enters foreclosure.[88] These statutory rights, unknown to the layperson, are valuable tools that allow an individual to save his most prized possession.

As part of the statutory foreclosure procedure described in Part III.A., an owner has no less than 120 days to arrange other means of saving his home.[89] The first option available to the homeowner is becoming current on his payments, thereby curing the default that placed him in foreclosure.[90] The owner can notify the trustee of his intent to cure the default, as long as the trustee receives written notification at least fifteen days before the sale.[91] Then the owner has until noon of the day be-

86. *See id.* at 14–15.

87. In a loan workout, the homeowner will keep his home. In a deed in lieu of foreclosure proceeding, the homeowner will not.

88. *See* COLO. REV. STAT. § 38-38-104 (2002); *see also* § 38-38-302.

89. §§ 38-38-101, -108, -302. A party with agricultural property in foreclosure will have approximately eight months to save their property. This eight month period includes the forty-five (or up to sixty) days prior to the foreclosure sale and the six month redemption period.

90. The foreclosure statute requires the public trustee to mail a combined notice of right to cure and right to redeem no more than twenty-five days after the demand for sale, depending on the method of foreclosure, to the owner of the property. § 38-38-103.

91. § 38-38-104(1).

fore the foreclosure sale to settle his default and any costs and expenses incurred by the trustee.[92] If the owner can cure the default, the trustee will halt the sale, placing the owner in the position he was in before the foreclosure proceedings.[93]

If the owner cannot arrange the necessary funds to cure the default, the foreclosure sale will proceed. After the sale, the owner then has an additional seventy-five days to reestablish his ownership rights to the home.[94] If the homeowner can arrange to sell or refinance the home during this seventy-five day window, he can reclaim his ownership rights.[95]

Even though a homeowner enters foreclosure, the statutory rights of cure and redemption still allow him to save or sell his home. Although exercising these rights is not the most attractive of the options because the property actually enters foreclosure, this option does allow an owner the opportunity to solve his financial problems without losing his ownership rights.

These measures provide homeowners the opportunity to save their homes. Despite these available options, most homeowners do not know they exist.[96] Several states have implemented statutory measures that do not require the homeowner to have knowledge of the procedure to receive the benefits of the protection the statutes provide. Section IV addresses these measures. The next subsection, however, addresses additional Colorado statutes that might provide some protection, but do not necessarily guard against this particular type of consumer fraud.

### *C. Current Colorado Consumer Protection Statutes*

Colorado currently employs two particular means of safeguarding consumers that might provide protection outside the

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92. § 38-38-104(2)(c). The sale will not occur until at least forty-five days after the mortgage company files the foreclosure action, so the owner has a minimum of forty-four days to establish financing prior to the actual sale. *See* § 38-38-108.

93. *See* § 38-38-104.

94. § 38-38-302.

95. *Id.*; *see also* Olinger, *supra* note 1. The Olinger article states that an owner can sell his home during the redemption period. The statute does explicitly allow the owner the right to redeem the property by paying the foreclosure sale buyer the amount the buyer's price plus interest and costs incurred. The statute does not specify where the owner can procure the funds.

96. *See* Olinger, *supra* note 14.

realm of the foreclosure statutes. The Colorado Consumer Protection Act (CPA) is meant to deter and punish deceptive trade practices committed by businessmen in their dealings with the public.[97] The recently passed Consumers' Home Ownership Equity Act (HOEA) provides statutory protections in the area of mortgage lending.[98]

### 1. The Colorado Consumer Protection Act[99]

The CPA provides statutory protection from deceptive trade practices.[100] These legislatively recognized deceptive practices include circumstances in which a person:

> (a) [k]nowingly passes off goods, services, or property, as those of another;[101]
>
> . . . .
>
> (b) [k]nowingly makes a false representation as to the source, sponsorship, approval, or certification of goods, services, or property;[102]
>
> . . . .
>
> (l) [m]akes false or misleading statements of fact concerning the price of goods, services, or property or the reasons for, existence of, or amounts of price reductions;[103]
>
> . . . .
>
> (u) [f]ails to disclose material information concerning goods, services, or property which information was known at the time of an advertisement or sale if such failure to disclose such information was intended to induce the customer to enter into a transaction . . . .[104]

This list, however, is not exclusive and the Colorado legislature has continually added to it since the passage of the Act.[105]

The CPA provides several types of relief for victims of the above practices, which include victims of certain foreclosure

97. Showpiece Homes Corp. v. Assurance Co. of America, 38 P.3d 47, 49 (Colo. 2001).

98. 2002 Colo. Sess. Laws 1259 (codified at COLO. REV. STAT. § 5-3.5-101).

99. Attorney General Ken Salazar brought his suit against several foreclosure consultants pursuant to this statute. Salazar Press Release, *supra* note 16.

100. COLO. REV. STAT. § 6-1-105 (2002).

101. § 6-1-105(1)(a).

102. § 6-1-105(1)(b).

103. § 6-1-105(1)(l).

104. § 6-1-105(1)(u).

105. *E.g.*, 2002 Colo. Sess. Laws 1259 (codified at COLO. REV. STAT. § 5-3.5-101).

consultants. A court may "[g]rant injunctive relief restraining the sale or advertisement of any property."[106] Additionally, the CPA allows for "a civil penalty of not more than two thousand dollars for each such violation."[107] If an individual violates a court order issued under the CPA, the civil penalty increases to not more than ten thousand dollars.[108] If the offense is against an elderly person, the fine also increases to not more than ten thousand dollars.[109] The most attractive portion of the CPA, however, is the ability of an aggrieved party to receive compensatory and punitive damages.[110] If an individual uses bad faith when violating the CPA, the injured party can receive "[t]hree times the amount of actual damages sustained."[111]

Although a seemingly inclusive statute, the CPA leaves room for foreclosure consultants to fall outside its confines. The section of the statute that would most likely apply to them establishes that a deceptive trade practice occurs if an individual "[f]ails to disclose material information concerning goods, services, or property which information was known at the time of an advertisement or sale if such failure to disclose such information was intended to induce the consumer to enter into a transaction."[112]

Foreclosure consultants might not disclose material information about their services. Even if they do, however, the disclosure often occurs in a very tense situation and the ability of the person in foreclosure to understand the information is lacking.[113] One subsection of the statute also requires an advertisement or sale.[114] Although a foreclosure consultant does often receive a quitclaim deed, the consideration they provide is that they will assist the person in foreclosure in retaining his home.[115] Therefore, a foreclosure consultant may argue that there was no sale or advertisement.

Although an aggrieved party may find protection under the CPA, it is not an ideal fit. Statutory language and interpreta-

106. § 6-1-109(1)(a).
107. § 6-1-112(1).
108. § 6-1-112(2).
109. § 6-1-112(3).
110. § 6-1-113.
111. § 6-1-113(2)(a)(III).
112. § 6-1-105(1)(u).
113. Olinger, *supra* note 1.
114. § 6-1-105(1)(u).
115. Olinger, *supra* note 1.

tion seemingly leaves room for foreclosure consultants to continue their practices unabated. Therefore, an examination of other alternatives requires some attention.

### 2. Homeowner Equity Protection Act[116]

In their last session, the Colorado Legislature enacted a statute "concerning [the] protection of Consumers' Home Ownership Equity."[117] The new statute prohibits certain actions concerning commercial home loans.[118] It contains a provision requiring a cautionary notice from the lender stating, "[i]f you obtain this loan, the lender will have a mortgage in Colorado; this is a deed of trust on your home. You could lose your home, and any money you have put into it, if you do not meet your obligations under the loan."[119] Additionally, a lender may not "make a covered loan to a consumer based on the consumer's collateral without regard to the consumer's repayment ability, including the consumer's current and expected income, current obligations, and employment."[120]

These protections, however, do not necessarily cover the practice of foreclosure consultants because the consultants are not usually the lender.[121] Foreclosure consultants will most likely become the owner through their practices while the owner will essentially become a renter of his own home. In response to inequitable behavior by foreclosure consultants, California passed two separate acts, addressed below, that regulate equity purchasers[122] and foreclosure consultants.[123] By dealing

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116. The Colorado legislature passed this statute in connection with the Attorney General's suit against several foreclosure consultants that also provided loan services and a letter the Attorney General sent to members of the legislature. The recommendation in the letter only focused on the lending aspect of the predatory practice and not on the individual actions of the consultant. Salazar Press Release, *supra* note 16.

117. Consumer Equity Protection Act, ch. 323, 2002 Colo. Sess. Laws 1594 (to be codified at COLO. REV. STAT. § 5-3.5-103).

118. COLO. REV. STAT. § 5-3.5-103.

119. § 5-3.5-103(1)(a)(I).

120. § 5-3.5-103(1)(b).

121. *See* People v. Erez, No. D035658, 2002 WL 596738, at *4 (Cal. Ct. App. Apr. 18, 2002). This Act may solve predatory lending practices, but not the actions of foreclosure consultants that actually receive title of the property through any misrepresentations.

122. CAL. CIV. CODE § 1695 (West 1993 & Supp. 2002) (Home Equity Sales Contract Act).

123. § 2945 (Mortgage Foreclosure Consultants Act).

with each practice separately, California seemingly adopts the view that the necessity of a statute that specifically addresses the concerns associated with foreclosure consultants requires separate provisions for each type of potentially unfair practice. By enacting separate statutes, California has addressed the concerns particular to each type of potentially unjust practice.

## IV. Other Possible Solutions: Existing Statutory and Judicial Law That Addresses the Unfair Practices of Foreclosure Consultants

The previous sections of this Comment outlined the problems that foreclosure consultants cause for desperate homeowners. Thus, the question arises of how best to protect the interests of the victims while maintaining beneficial ways of assisting them. In foreclosure proceedings, many alternatives exist to the homeowner losing his home. However, the mere availability of these alternatives and attempts to educate people about them are not enough. As the informal study in Adams County demonstrated, only three out of every ten people sought public assistance foreclosure services.[124] So where are the other seven people? Are they lost and confused about their options? Do they feel that they can solve the problem themselves? Are they just so tired of dealing with their financial problems that they stop trying to rectify the situation?

Regardless of the answer to the previous questions, Colorado needs tougher consumer protection measures to ensure that the laws of Colorado protect every homeowner. For example, most foreclosure consultants track every foreclosure notice and will probably appear at the door of the person in foreclosure before he even knows that the bank or mortgage company has initiated the proceeding.[125] Accordingly, if Colorado had tougher measures, all individuals in foreclosure would receive the same protection as those that call a housing counselor or lawyer for help. Other states have applied two methods of homeowner protection to the problem. These methods include the following: calling a conveyance an equitable mortgage when evidence of bad faith on the part of one party exists and passing consumer protection measures that regulate foreclosure

124. Olinger, *supra* note 14.
125. *Id.*

consultants. The following two sections address how these methods protect the people that foreclosure consultants seek to exploit.

### *A. Conveyances as Equitable Mortgages*

Many states have laws that address conveyances that occur under conditions where overreaching takes place. Of the states addressing equitable mortgages by statute, several make a person's attempt to challenge a deed that is absolute on its face virtually impossible (i.e. a deed is a deed and nothing else).[126] Other states have laws that allow written and, in some cases, parol evidence to prove that a deed, absolute on its face, was actually a mortgage when intended as security on an obligation.[127] The result of the process is known as an equitable mortgage.[128]

Additionally, Illinois has a statute that specifically establishes that every deed that is absolute on its face, but intended as security in the form of a mortgage, is a mortgage.[129] In one Illinois case, the court held that the individual claiming the conveyance was actually a mortgage bears the burden of proof.[130] The court established six factors that should be used to determine if the conveyance was, in fact, an equitable mort-

126. *E.g.*, MINN. STAT. ANN. § 559.18 (West 2000) (establishing a statutory presumption that a conveyance absolute on its face is not given as new security on a debt). Other states will not allow the use of parol evidence to establish that a deed absolute on its face is a conveyance unless there is evidence of fraud. *E.g.*, GA. CODE ANN. § 44-14-32 (1997); MISS. CODE ANN. § 89-1-47 (2000).

127. ARIZ. REV. STAT. ANN. § 33-702(A) (West 2000); IDAHO CODE § 45-905 (Michie 1997); MD. CODE ANN., REAL PROP. § 7-101 (1996) (requiring additional writing to prove deed absolute is a mortgage); N.Y. REAL PROP. LAW § 320 (McKinney 1989) (establishing that a deed absolute on its face that conveys real property, coupled with additional writing that shows intent for the deed to be a mortgage, is a mortgage); OKLA. STAT. ANN. tit. 46, § 1 (West 1996); UTAH CODE ANN. § 78-40-8 (1977) (providing that "[a] mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale").

128. An equitable mortgage is "[a] transaction that has the intent but not form of a mortgage, and that a court of equity will treat as a mortgage." BLACK'S LAW DICTIONARY 1027 (7th ed. 1999).

129. 765 ILL. COMP. STAT. ANN. 905/5 (West 2001) (providing that "[e]very deed conveying real estate, which shall appear to have been intended only as a security in the nature of a mortgage, though it be an absolute conveyance in terms, shall be considered as a mortgage."). The author derived the statutes for the last three footnotes from an additional source. Rush & Murray, *supra* note 13.

130. Flack v. McClure, 565 N.E.2d 131, 135 (Ill. App. Ct. 1990).

gage: "whether a debt exists, the relationship of the parties, whether legal assistance was available, the sophistication and circumstances of each party, the adequacy of the consideration and who retained possession of the property."[131]

*The Restatement (Third) of Property: Mortgages* ("Restatement") allows a party to use parol evidence to prove that a deed that is absolute on its face is a mortgage if the parties intended the deed as security for an obligation.[132] The party seeking to establish that the deed is actually a mortgage must prove this intention by "clear and convincing evidence."[133] To establish the necessary intent for an equitable mortgage, a court may consider the following factors:

(1) statements of the parties;
(2) the presence of a substantial disparity between the value received by the grantor and the fair market value of the real estate at the time of the conveyance;
(3) the fact that the grantor retained possession of the real estate;
(4) the fact that the grantor continued to pay real estate taxes;
(5) the fact that the grantor made post-conveyance improvements to the real estate; and
(6) the nature of the parties and their relationships prior to and after the conveyance.[134]

The Restatement also establishes that where another writing exists to indicate the deed was, in fact, security for an obligation, a court can consider the writings as a single security transaction.[135] Additionally, several Colorado cases have established factors, similar to those in the Restatement, that enable the courts to ascertain the true nature of a transaction.[136]

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131. *Id.* at 136; *see also* Rush & Murray, *supra* note 13.
132. RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 3.2(a) (1997).
133. *Id.* § 3.2(b).
134. *Id.*
135. *Id.* § 3.2(c).
136. Jones v. Hazen, 181 P.2d 1016, 1018 (Colo. 1947) (holding that evidence showing an actual value of a piece of property that greatly exceeds the consideration is a mortgage); Taylor v. Briggs, 60 P.2d 1081 (Colo. 1936) (quoting Wilson v. Giem, 5 P.2d 880 (Colo. 1931)) (explaining that value is one test of the nature of a transaction); Reitz v. Humphreys, 125 P. 518, 520–21 (Colo. 1912) (allowing parol evidence to prove that a conveyed deed actually served as security and the true nature of the transaction).

One court in Michigan specifically dealt with the equities of a foreclosure consultant situation. The Michigan court determined that an instrument that seemed to be an absolute conveyance was actually an equitable mortgage intended to secure repayment of a loan.[137] In this case, the defendant owned property in foreclosure. Two days prior to the expiration of the defendant's redemption rights, the defendant executed a warranty deed and signed an agreement with the plaintiff. The plaintiff agreed to lease the property back to the defendant for $400 a month for eighteen months. At the end of this period, the defendant could then buy the property back for $10,000 above what the plaintiff paid for the property in redemption. The plaintiff, however, would only allow the defendant to exercise the purchase option if all rent payments were timely. When the defendant missed the first payment, the plaintiff sent an eviction notice.[138] In determining that the deed was an equitable mortgage, the Michigan court focused on the inadequacy of consideration, the agreement that the parties signed two days before the end of the redemption period, the absence of counsel for the defendant during the signing of the deed, the fact that the defendant retained possession of the property, the unequal bargaining power between the parties, and defendant's belief that the arrangement was a loan.[139]

Courts in Colorado have also concluded they would allow equitable mortgages in certain situations.[140] Although no Colorado court has specifically established case law that would clearly apply in a foreclosure rescue situation, the Colorado Supreme Court has shown signs that the equities of a situation will be very decisive in its determination of the nature of a transaction.[141] Despite the fact that Colorado does not have

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137. London v. Gregory, No. 216473 (Mich. Ct. App. Feb. 23, 2001), *available at* http://www.michbar.org/opinions/home.html?/opinions/appeals/2001/022301/9475.pdf.

138. *Id.* at 1.

139. *Id.* at 3.

140. Alien, Inc. v. Futterman, 924 P.2d 1063, 1070 (Colo. Ct. App. 1995) (requiring an owner of property to convey the property to a creditor and to intend the land as security for the loan to establish an equitable mortgage); Weil v. Colo. Livestock Prod. Credit Ass'n, 494 P.2d 134, 136 (Colo. Ct. App. 1971) (determining that a conveyance was an equitable mortgage when an agreement provides for an extension and terms of a future loan and leaves the party in possession).

141. *See Taylor*, 60 P.2d at 1081. Although a court's power of equity provides great protection, a statutory scheme that provides treble damages seems like more of a deterrent to these practices.

specific statutory protection for individuals, the Colorado Supreme Court has also hinted at possible protection it might provide homeowners duped by these suspicious transactions. In *Taylor v. Briggs,* the court stated:

> To give validity to such a sale by a mortgagor it must be shown that the conduct of the mortgagee was, in all things, fair and frank, and that he paid for the property what it was worth. He must hold no delusive hopes; he must exercise no undue influence; he must take no advantage of the fears or poverty of the other party. Any indirection or obliquity of conduct is fatal to his title. Every doubt will be resolved against him. Where confidential relations and the means of oppression exist, the scrutiny is severer than in cases of different character. The form of the instrument employed is immaterial. If there is vice in the transaction the law, while it will secure to the mortgagee his debt, with interest, will compel him to give back what he has taken with unclean hands. Public policy, sound morals, and the protection due to those whose property is thus involved, require that such be the law.[142]

Colorado does not have specific statutory measures that could guide its courts in determining the appropriate remedy in these situations. Thus, until Colorado courts face a foreclosure rescue situation, or the Colorado legislature fashions an appropriate remedy like those used in other states or as provided in the Restatement, the fate of individuals who find themselves in financial dire straits and in danger of losing their homes to manipulative and dishonest foreclosure consultants remains uncertain.[143]

### *B. Specific Consumer Protection Measures Aimed at Foreclosure Consultants*

Aside from the common law remedy of an equitable mortgage, two states have solved the specific problem presented by foreclosure consultants through statutory provisions. In 1979, the California legislature passed two acts aimed at protecting

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142. *Id.* at 1086 (quoting Villa v. Rodriguez, 79 U.S. (12 Wall.) 323, 339 (1870)). Although the situation in this case was one of mortgagor and mortgagee, the public policy would seem to apply to a conveyance situation just as readily.

143. ARIZ. REV. STAT. ANN. § 33-702(A) (West 2000); 765 ILL. COMP. STAT. ANN. 905/5 (West 2001); MINN. STAT. ANN. § 559.18 (West 2000).

homeowners from unjust foreclosure practices. This section will focus on the act that specifically addresses foreclosure rescue, the Mortgage Foreclosure Consultants Act (the "Act").[144] The legislature found the need for this type of protection vital to the welfare and economic stability of "unsophisticated homeowners."[145] The Missouri legislature, following the language of the California legislature, passed a comparable measure in 1992.[146] The consumer protection provided by both the California and Missouri legislatures against the unjust practices of foreclosure consultants allows unsuspecting homeowners in foreclosure an extremely broad defense against the sophisticated ways of these consultants.

In 1979, California decided to combat foreclosure consultants directly by developing a far-reaching and conclusive act that sought to deter overreaching by these individuals.[147] In the first section of the Act, the California legislature found:

> [H]omeowners 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 . . . until the time of the foreclosure sale. Foreclosure consultants represent that they 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 consultant who purchase homes at a fraction of their value before the sale . . . . The

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144. CAL. CIV. CODE § 1695 (West 1993 & Supp. 2002) (Home Equity Sales Contract Act); CAL. CIV. CODE § 2945 (West 1993 & Supp. 2002) (Mortgage Foreclosure Consultants Act). Although this Comment will apply some of the public policy underlying the Home Equity Sales Contract Act, the Cǫmment will focus on the statutory provisions and policy of the Mortgage Foreclosure Consultants Act.

145. *See* Ferrannini, *supra* note 11, at 469.

146. MO. ANN. STAT. § 407.935 (West 2001). The Missouri legislature adopted this statute in response to a series of articles from the St. Louis Post-Dispatch from 1989. As with Carolyn Black, the consultants would offer to help financially troubled individuals, assume their mortgage, and impose draconian repayment measures that resulted in the eventual loss of that person's home. Virginia Young, *Senate Advances Amendment Seeking Foreclosure Protection*, ST. LOUIS POST-DISPATCH, Apr. 14, 1992, at 1, *available at* 1992 WL 3525801.

147. *See* CAL. CIV. CODE § 2945 (West 1993 & Supp. 2002).

> 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.[148]

The stated purpose of the statute is "[t]o 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."[149]

As a first step, the legislation established the definition of a foreclosure consultant as:

> [a]ny 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 [redemption].
> (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 in any such 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.[150]

One of the largest problems with the California and Missouri statutory definitions is the list of exceptions to the definition of a foreclosure consultant.[151] The statute allows a practic-

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148. § 2945(a), (b).
149. § 2945(c)(1).
150. § 2945.1(a)(1)–(8).
151. Because the California and Missouri statutory compilations are so similar, the author will refer to and quote from the California statute but cite both the

ing attorney, an accountant, a real estate licensee, a consumer finance lender (which includes a personal property broker), a mortgage broker, and a prorater to fall outside the purview of the statute.[152] While the list of who is a foreclosure consultant seems very inclusive, the list of who is *not* a foreclosure consultant seems too inclusive. This exempted list includes the two most common types of foreclosure consultants, the real estate licensee and the consumer finance lender.[153] Because members of these two professions tend to be the primary perpetrators of unjust practices, they should not be exempted from the scope of the statute.[154]

After the definition sections, the statute imposes contractual requirements on the foreclosure consultant.[155] The statute requires the foreclosure consultant to prepare a contract that states the consultant cannot receive money until he provides all services he promised to perform.[156] The contract must also state that the foreclosure consultant or his representative cannot ask the person in foreclosure to sign any deed, lien, or deed of trust.[157] The contract must state that the individual who signs the contract has three business days to rescind.[158] This provision allows the transaction to comply with the rescission period requirement.[159] The foreclosure consultant must also provide a copy of the contract with the appropriate wording to the other party.[160] If the foreclosure consultant fails to comply with any of these provisions, the owner retains the right to cancel until the foreclosure consultant complies with all of the requirements.[161]

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California statute and the parallel Missouri statute, if one exists, throughout the rest of the Comment.

152. CAL. CIV. CODE § 2945.1(b).

153. Garcia, *supra* note 2.

154. The exempted professions are not subject to the provisions of the statute. Therefore, they can continue to practice as foreclosure consultants subject only to all other applicable laws. Thus, this statute would not protect someone from an unjust real estate licensee.

155. CAL. CIV. CODE § 2945.3; MO. ANN. STAT. § 407.938 (West 2001).

156. CAL. CIV. CODE § 2945.3; MO. ANN. STAT. § 407.938.

157. CAL. CIV. CODE § 2945.3; MO. ANN. STAT. § 407.938.

158. CAL. CIV. CODE § 2945.3; MO. ANN. STAT. § 407.938.

159. CAL. CIV. CODE § 2945.2; MO. ANN. STAT. § 407.937.

160. CAL. CIV. CODE § 2945.3; MO. ANN. STAT. § 407.938.

161. CAL. CIV. CODE § 2945.3. Conversely, Missouri does not allow the owner to retain his right of cancellation until the foreclosure consultant complies with all provisions of this section. MO. ANN. STAT. § 407.938.

The California statutory scheme also incorporates many specific violations that require punishment through fines or even prison.[162] First, the statute states that a foreclosure consultant cannot demand compensation until he completes all the services he agreed to provide. Second, any fee cannot exceed ten percent annually of any loan the consultant makes to the owner. Third, the consultant cannot take any security in the form of a lien or wage assignment against any property of the owner and any security of this type is void. Fourth, the consultant cannot receive any consideration from third parties for his services to the owner unless the consultant fully informs the owner about receiving the consideration from the third party. Fifth, the consultant cannot obtain *any* interest in the property in foreclosure in which he has contracted with the owner to provide services. Sixth, the consultant cannot take power of attorney from the homeowner except to inspect documents. Finally, the consultant cannot attempt to induce the owner to sign a contract that does not comply with the requirements of the statutes.[163] Any violation of these requirements will subject the consultant to a fine of $10,000 and a year in state prison. This punishment is cumulative to any other remedy or penalty that might be available for other violations under the statutes.[164]

Likewise, the California statute also protects the uninformed owner through waiver, liability, and limitation provisions. First, an owner cannot waive his rights under these statutes. Any attempt by a foreclosure consultant to induce an owner into waiving his rights is a violation subject to certain statutory remedies under section 2945.6.[165] Additionally, a foreclosure consultant is liable for all damages that result from any statements or acts of his representatives in relation to prohibited subjects under the statutes.[166] Any attempt by the rep-

162. CAL. CIV. CODE §§ 2945.4, 2945.7; MO. ANN. STAT. § 407.940.

163. CAL. CIV. CODE § 2945.4; MO. ANN. STAT. § 407.940.

164. CAL. CIV. CODE § 2945.7. Any violation of the act is a class A misdemeanor under Missouri law. MO. ANN. STAT. § 407.940. A class A misdemeanor is subject to up to a year a prison and up to a $1000 fine. § 558.011 (designating a maximum prison term of one year for a class A misdemeanor); § 560.016 (designating a maximum the statutory fine of $1000 for a class A misdemeanor).

165. CAL. CIV. CODE § 2945.5; MO. ANN. STAT. § 407.941.

166. CAL. CIV. CODE § 2945.9. A representative is:

> [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 foreclo-

resentative of the foreclosure consultant to limit liability or require arbitration in the contract will make the contract void at the choice of the owner.[167] The representative must also provide proof, in writing, that he possesses a license and that "an admitted surety insurer" has bonded him "in an amount equal to at least twice the fair market value of the real property that is the subject of the contract."[168] If the representative and foreclosure consultant fail to comply with these provisions, the owner may choose to void the contract and sue the consultant for "all damages proximately caused by the failure to comply."[169]

Finally, the most advantageous aspect of the statute for a homeowner is the inclusion of an exemplary damages provision.[170] Under this provision, the owner can bring an action against the consultant for "actual damages, reasonable attorneys' fees and costs, and appropriate equitable relief."[171] In addition to the actual damages, the court may award exemplary damages "equivalent *to at least three times* the compensation received by the foreclosure consultant . . . in addition to any other award of actual or exemplary damages."[172] This remedy is cumulative and not a limitation on other remedies.[173] Moreover, one California appellate court has interpreted this provision of the Act to allow a court discretion in awarding damages in any amount it deems appropriate.[174] A court, however, "*must* award exemplary damages in an amount at least three times that of [any] unlawful compensation" for any "section 2945.4 violations."[175] Under this ruling, a court has complete discretion in awarding an appropriate amount of damages, unless the court finds a violation of section 2945.4.[176] If the

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> sure 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.

§ 2945.9(b).

167. § 2945.10.

168. § 2945.11. Any representative must possess "a valid current California Real Estate License." *Id.*

169. *Id.*

170. CAL. CIV. CODE § 2945.6; MO. ANN. STAT. § 407.943.

171. CAL. CIV. CODE § 2945.6; MO. ANN. STAT. § 407.943.

172. CAL. CIV. CODE § 2945.6 (emphasis added); MO. ANN. STAT. § 407.943.

173. CAL. CIV. CODE § 2945.6.

174. Onofrio v. Rice, 64 Cal. Rptr. 2d 74, 80 (Cal. Ct. App. 1997).

175. *Id.*

176. *Id.*

court finds a violation of this section, the court must award at least treble damages in addition to all other damage, fee, and cost awards.

California and Missouri have taken great steps to protect unsuspecting homeowners in the war against unfair foreclosure consultants. The state legislatures in these states found a great need to protect their citizens because of the potential for "fraud, deception, harassment, and unfair dealings by foreclosure consultants."[177] By instituting these provisions, the state legislatures sought to protect homeowners while allowing the consultants to continue their practice as long as they complied with the strict guidelines imposed by the legislation. These state statutes show that protection for the homeowner and foreclosure consultant can simultaneously exist. In essence, the consultant can operate his business in a legitimate and forthcoming manner while the homeowner can keep his home. Without some type of protection, however, homeowners will continue to lose their homes.

## V. PROPOSAL FOR A COLORADO FORECLOSURE CONSUMER PROTECTION STATUTE

The example of Jane Smith illustrates the need for similar measures in Colorado. Consumer protection statutes, such as those implemented in California and Missouri, would also benefit the homeowners of Colorado while allowing legitimate foreclosure consultants to maintain their business in this area.[178] This section proposes an almost complete adoption of the California measures in Colorado, with a few notable differences.[179] This proposal should provide any Colorado legislator with a road map for a solution to the problem of unregulated foreclosure consultants. This solution could protect those people who cannot otherwise protect themselves and subsequently lose their homes.

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177. CAL. CIV. CODE § 2945.

178. Colorado did pass a law similar to California Civil Code § 1695 in July 2002. H.B. 02-1259, 63rd Gen. Assem., 2d Reg. Sess. (Colo. 2002) (codified at COLO. REV. STAT. § 5-3.5-101) [hereinafter Colorado Home Ownership Equity Act]. They have not, however, specifically addressed foreclosure consultants in a sister statute as California did. CAL. CIV. CODE § 2945.

179. Again, the author will address the California statute, unless otherwise mentioned. The reasons for this are that the California statute is more thorough and the Missouri statute is almost identical to California's.

### A. *Conveyances as Equitable Mortgages*

First, Colorado should adopt an equitable mortgage statute. Although the necessity of an equitable mortgage statute might seem redundant with the adoption of a consumer protection measure, the benefits of the additional protection outweigh the redundancy. This statute would complement the recently passed HOEA.[180] If courts do address foreclosure consultant actions as equitable mortgages, then Colorado could regulate foreclosure consultants through the application of these two statutes.

Looking to the three means[181] that other states employ, the best solution seems to be the Illinois approach, which automatically creates an equitable mortgage in all cases where "[the] deed conveying real estate, which [appears] to have been intended only as a security in the nature of a mortgage, though it be an absolute conveyance in terms, shall be considered a mortgage."[182] Automatically labeling any conveyance of this type as an equitable mortgage, without requiring parol evidence, provides the most straightforward solution to foreclosure rescue transactions. Should a particular court need help in assessing the intent of the parties, the Restatement factors, described above in Part IV.A., would provide guidance for determining the actual intent of the parties.[183]

Statutes that allow equitable mortgages but require additional evidence seem to introduce uncertainty and increase the amount of time a court must spend sorting out the details of the transaction.[184] The hard-line approach, stating any conveyance that is absolute on its face cannot be security on a debt, does not consider foreclosure rescue situations and would not provide adequate protection in these transactions.[185] The Illinois approach provides an easy method for holding any fraudulent conveyance as an equitable mortgage when the

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180. Colorado Home Ownership Equity Act, *supra* note 178.

181. These three methods are: treating a conveyance that is absolute on its face as a conveyance, allowing parol evidence to prove the parties intended the conveyance as a mortgage, and treating the conveyance as a mortgage, without requiring additional evidence, if the parties intended the conveyance as a mortgage.

182. 765 ILL. COMP. STAT. ANN. 905/5 (West 2001).

183. RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 3.2(b) (1997).

184. *See, e.g.*, ARIZ. REV. STAT. § 33-702(A) (2000).

185. *See, e.g.*, MINN. STAT. ANN. § 559.18 (2000).

owner thought the conveyance was a security on the assistance these consultants were providing him. Not only does this method protect the owner, it also allows the consultant to keep a creditor's interest in the property for any assistance he actually performs for the distraught homeowner.

### B. *Specific Consumer Protection Measures Aimed at Foreclosure Consultants*

Colorado would also benefit from the adoption of consumer protection methods like those in California and Missouri. These measures protect the public from deceit and fraud, allow foreclosure consultants to continue practicing in this area but only if the contract is in writing, allow rescission of the agreements, prohibit misleading transactions, and require fair dealing in the rendition of these services.[186] By providing similar measures, the Colorado legislature could ensure that all Colorado homeowners receive the benefit of statutory protection while allowing legitimate foreclosure consultants to continue practicing, albeit under strict guidelines and in a way that may actually help distressed homeowners.

The definitions sections from both states provide a thorough discussion of the key phrases and ideas associated with foreclosure consultants.[187] A complete adoption of these sections, however, is not the best solution to the problem. The two statutory provisions allow eight classes of potential consultants, including accountants and proraters.[188] Additionally, the definitions exempt consumer finance lenders and real estate licensees from the statute despite the fact that these two groups account for most of the abuse in this area.[189] Although the California and Missouri statutes do allow this practice to continue, a list of eight professions that are exempted from the statute seems extreme. Including money collection agents in

186. CAL. CIV. CODE § 2945 (West 1993 & Supp. 2002).

187. CAL. CIV. CODE § 2945.1; MO. ANN. STAT. § 407.935 (West 2001).

188. CAL. CIV. CODE § 2945.1. "A prorator is a person who, for compensation engages in . . . the business of receiving money . . . for the purpose of distributing the money . . . among creditors in payment or partial payment of the obligations of the debtor." *Id.*

189. Garcia, *supra* note 2. The exempted professions are not subject to the provisions of the statute. Therefore, they can continue to practice as foreclosure consultants subject only to all other applicable laws. Thus, this statute would not protect someone from a real estate licensee or consumer finance lender.

this class would make the list far too broad. A list exempting consumer lenders, accountants, attorneys, HUD counselors, banks, and real estate licensees seems to be fairly exhaustive and would include most professions that have an interest and the best means to perform these services.[190] Despite the abuses seen in the classes of the consumer lender and real estate licensees, the Colorado legislature should include these two groups because of their expertise in the areas of finance and real estate but ensure that they are subject to the regulatory provisions of the statute.[191] These modified statutory provisions will still provide a means to protect homeowners while strongly discouraging the abuses of foreclosure consultants.

The statute should also include a form contract that explains the rights of the homeowner in explicit terms, and the statute should require that foreclosure consultants use this contract. A form contract would explain what the consultant can and cannot do in relation to the property. The contract also would explain the right of rescission and the method to accomplish the rescission. As California does, Colorado should allow the owner to cancel the contract until all provisions of this section are met.[192] By providing notice to the homeowner of a vehicle to demonstrate the homeowner's explicit rights, the legislature would ensure the freedom to contract while providing protection to the unsophisticated homeowner who may or may not be in such dire straits that his judgment is affected. Additionally, the right of rescission allows a party that might have experienced duress and coercion in signing the contract to discontinue his business dealings with these foreclosure consultants. The Colorado legislature might also consider adding a phrase to the contract that explains that placing the notice of cancellation in the mail by midnight of the third business day suffices to meet the requirements of cancellation.[193]

Colorado should also adopt the prohibited practices-related punishment provisions from the California statute.[194] By including a $10,000 fine and a possible jail term of one year, the legislature could significantly deter fraudulent actions. With the knowledge that failure to comply with the law will result in

190. CAL. CIV. CODE § 2945.1; MO. ANN. STAT. § 407.935.
191. *See* Garcia, *supra* note 2.
192. CAL. CIV. CODE §§ 2945.2–2945.3; MO. ANN. STAT. §§ 407.937–407.938.
193. CAL. CIV. CODE § 2945.3; MO. ANN. STAT. § 407.938.
194. CAL. CIV. CODE §§ 2945.4, 2945.7; MO. ANN. STAT. § 407.940.

a prison sentence and a fairly significant fine, reasonable foreclosure consultants would likely comply with these provisions.[195] Additionally, by making the remedies cumulative, the legislature would provide an extremely strong deterrent that would allow foreclosure consultants to continue practicing while also protecting the citizens of Colorado from any abusive practices.

The inclusion of the restrictions on waivers of rights section, the liability for actions of and requirements to be representatives for a foreclosure consultant section, and the limitation of liability of a foreclosure consultant for the actions of his representatives section all also seem viable and necessary.[196] By allowing foreclosure consultants or their representatives to convince a homeowner to dismiss these statutory rights without allowing the equitable solution of rescission or cancellation, the legislature would be ignoring a potentially important protection for the distressed homeowner.

Finally, the Colorado legislature should incorporate the exemplary damages provisions of the California and Missouri statutes into its own legislative package.[197] These provisions not only punish bad faith and abusive dealings with unsuspecting homeowners but they also deter the coercive practices of foreclosure consultants by allowing the judge the discretion to order treble actual damages and at least three times the compensation the consultant received by engaging in the prohibited practices. In addition to treble damages, the judgment for a homeowner should include actual damages, reasonable attorneys' fees and any equitable solution necessary to ensure the homeowner is made whole.[198]

Colorado should also consider the reasoning in *Onofrio v. Rice* when considering the appropriate wording of the exemplary damages provision.[199] In *Onofrio*, the California Court of Appeals determined that any violation of the prohibited practice provision *must* include treble damages in any judgment for those violations on top of any other fines and actual damages.[200] The court also held that a judge has discretion to

195. CAL. CIV. CODE § 2945.7.
196. CAL. CIV. CODE §§ 2945.5, 2945.9, 2945.11; MO. ANN. STAT. § 407.941.
197. CAL. CIV. CODE § 2945.6; MO. ANN. STAT. § 407.940.
198. CAL. CIV. CODE § 2945.6; MO. ANN. STAT. § 407.940.
199. 64 Cal. Rptr. 2d 74, 80 (Cal. Ct. App. 1997).
200. *Id.* (emphasis added).

award damages outside of any actual violations of the Act, seemingly paving the way for a damage award for abusive behavior that falls within the parameters of other statutory sections.[201]

The California and Missouri legislatures decided that abusive practices that take advantage of homeowners in times of distress are outside the realm of good faith and fair dealing.[202] To combat such practices, the states enacted legislation that deters this behavior through threat of fines, imprisonment,[203] and the award of actual and treble damages.[204] These statutes also allow a homeowner the ability to cancel or rescind the required contract under varying circumstances.[205] At the same time, the statutory provisions do not outright ban the practice of foreclosure consultants, which would infringe on the freedom to contract and a person's ability to seek assistance in solving his financial difficulties.

The Colorado legislature, the Colorado Bar Association, and the Attorney General have all shown interest in rectifying these abuses and practices. For example, the Colorado Bar Association drafted a proposal calling for an effort to fix technical problems in the Colorado foreclosure laws.[206] Additionally, Attorney General Ken Salazar brought a suit against several individuals engaging in the practice of foreclosure rescue in December 2001. This suit, and a letter from the Attorney General to several key legislators, prompted the passage of an act, HOEA, similar to the sister statute of California's foreclosure consultant act.[207] The legislature would only have to look to the statutory provisions of California and Missouri for legislation that directly regulates the actions of foreclosure consultants to provide an additional layer of protection to Colorado homeowners.[208] As additional protection against these fraudulent and coercive transfers of property, the adoption of a statute that makes these suspect transactions an equitable mortgage would protect the homeowner and the legitimate actions of the con-

201. *See id.*
202. CAL. CIV. CODE § 2945; MO. ANN. STAT. § 407.935.
203. CAL. CIV. CODE § 2945.7; MO. ANN. STAT. § 407.940.
204. CAL. CIV. CODE § 2945.6; MO. ANN. STAT. § 407.943.
205. *E.g.*, CAL. CIV. CODE § 2945.6.
206. Olinger, *supra* note 14.
207. Salazar Press Release, *supra* note 16.
208. CAL. CIV. CODE § 2945; MO. ANN. STAT. § 407.935.

sultant.[209] The passage of an equitable mortgage statute might allow for the regulation of foreclosure consultants under the newly adopted HOEA.[210]

Whatever the choice of the Colorado legislature, the choice should not be inaction.[211] Whether the chosen solution is the adoption of legislation similar to that adopted in California, Missouri, or Illinois, or drafting new legislation, the need for this type of protection seems obvious from just reviewing the story of Jane Smith. The California statutory provisions, however, seem to most thoroughly address this issue and would benefit legitimate foreclosure consultants and consumers alike.[212]

## VI. APPLICATION OF THE PROPOSED SOLUTION TO THE STORY OF JANE SMITH

By enacting legislation similar to California and Missouri, Colorado could protect the future Jane Smiths of Colorado. This legislation would allow those people faced with similar situations the opportunity to rescind their contracts,[213] the information necessary to decide whether to pursue the recommendations of a foreclosure consultant,[214] and the right to receive treble damages should the consultant take advantage of the owner in violation of the statute.[215] Applying the provisions suggested in Part V to a hypothetical situation will better explain the suggested terms and provide a first-hand demonstration of a viable solution to the problems that foreclosure consultants create.

Had a statutory scheme similar to California's legislation existed in Colorado, Jane Smith would not have lost her home. She would have had options. First, Mrs. Smith decided the day after she signed the deed not to use the foreclosure consultant's services. Under the California statute, she could have re-

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209. *See, e.g.*, 765 ILL. COMP. STAT. ANN. 905/5 (West 2001).

210. Colorado Home Ownership Equity Act, *supra* note 178.

211. A concept beyond the scope of this article, but worthy of analysis, is the use of the existing real estate commission powers, or a newly formed regulatory agency, to police these practices. *See* COLO. REV. STAT. §§ 12-61-102, 12-61-105, 12-61-113 (2002).

212. CAL. CIV. CODE § 2945.

213. CAL. CIV. CODE § 2945.2; MO. ANN. STAT. § 407.937.

214. CAL. CIV. CODE § 2945.3; MO. ANN. STAT. § 407.938.

215. CAL. CIV. CODE § 2945.6; MO. ANN. STAT. § 407.943.

scinded the contract had one existed.[216] Second, Mrs. Smith could have stated a claim against Mr. Jones for "acquiring [an] interest in a residence in foreclosure from an owner with whom the foreclosure consultant [had] contracted,"[217] triggering a cause of action under a provision similar to California's section 2945.6.[218] Once a cause of action existed, Mrs. Smith could have collected actual damages, reasonable attorney fees, and equitable relief. At a minimum under these provisions, Mrs. Smith could have collected the $10,000 she paid Mr. Jones, received attorneys' fees and court costs, and rescinded her contract.[219]

Additionally, Mrs. Smith could have asked for treble damages for any equity she lost in the house.[220] Since she lost between $90,000 and $100,000 in equity, she could have received up to $300,000 in damages if Colorado adopted provisions similar to the exemplary damages provision of the California and Missouri statutes.[221] In addition to having to pay damages, both actual and exemplary, Mr. Jones would have faced up to one year in prison and an additional $10,000 fine for his violation.[222]

The mere possibility of jail, fines, and large damage awards would probably have deterred Mr. Jones's inequitable behavior. Even if the provisions of the statute did not deter him, the punishment provisions would have allowed Mrs. Smith to regain her property or receive monetary compensation for the large gain Mr. Jones received from exploiting her situation. Either way, Mrs. Smith would have won. Instead, she lost everything.

## CONCLUSION

Jane Smith did not have to lose her home or her equity. California and Missouri protect homeowners in situations like hers from the unfair practices of some foreclosure consultants.[223] Other states create an equitable mortgage or, at least,

216. CAL. CIV. CODE § 2945.2; MO. ANN. STAT. § 407.937.
217. CAL. CIV. CODE § 2945.4; MO. ANN. STAT. § 407.940.
218. CAL. CIV. CODE § 2945.6; MO. ANN. STAT. § 407.943.
219. CAL. CIV. CODE § 2945.6; MO. ANN. STAT. § 407.943.
220. CAL. CIV. CODE § 2945.6.
221. CAL. CIV. CODE § 2945.6; MO. ANN. STAT. § 407.943.
222. CAL. CIV. CODE § 2945.7.
223. CAL. CIV. CODE § 2945; MO. ANN. STAT. § 407.935.

allow parol evidence to prove an equitable mortgage, in transactions similar to the one Mrs. Smith faced.[224] Unfortunately, Colorado provides neither type of protection.

The need for legislative action to protect homeowners from these practices is great. Strong growth in the housing market in the last seven years has caused home values to soar.[225] With a struggling economy, however, the number of individuals struggling to meet their home payments will surely increase, causing a corresponding rise in foreclosures.[226] Indeed, in the first quarter of 2002 foreclosures in the Denver metro area increased by 44.4 percent from the first quarter of 2001. This enlarged pool of distressed homeowners will only augment the market for foreclosure consultants.

California and Missouri's legislative packages addressing this problem provide both deterrence and protection.[227] The case of Jane Smith shows how horrible the situation can be for a distressed homeowner and demonstrates that this situation can happen to anyone. Without more consumer protection for "the biggest consumer issue out there,"[228] Colorado homeowners will continue to suffer at the hands of foreclosure consultants. The Colorado legislature must act quickly before more abuse of the foreclosure process occurs. The legislature, along with the Attorney General, has already demonstrated a desire to stop the spread of unfair lending practices.[229] By providing additional statutory safeguards, like those seen in California, the legislature can effectively eliminate all inequitable actions of these consultants. After all, "[w]hat's more important than your home" and the equity in that home?[230] A home is a person's most valuable asset, and Colorado should protect this interest to the greatest extent possible.[231]

224. *E.g.*, 765 ILL. COMP. STAT. ANN. 905/5 (West 2001).

225. Olinger, *supra* note 1.

226. Arellano, *supra* note 3; Tom Dooley, *Uncertainty Could Hurt Home Sales*, Realtor.org, *at* http://www.realtormag.com/rmomag.nsf/pages/IndWatch200110011?OpenDocument (Oct. 1, 2001).

227. CAL. CIV. CODE § 2945; MO. ANN. STAT. § 407.935.

228. Olinger, *supra* note 1.

229. Colorado Home Ownership Equity Act, *supra* note 178; Salazar Press Release, *supra* note 16.

230. Olinger, *supra* note 1.

231. Garcia, *supra* note 2.