

# To Stop A Predator: Is a Complete Ban on For-Profit Foreclosure Rescue Operations the Best Way to Prevent Equity Stripping?

By Allison D. Matthews \*

## I. Introduction

Crisis presents opportunity, and the U.S. residential foreclosure crisis of 2007-08 is no exception. “Foreclosure rescuers” have capitalized on the unfortunate situation by inducing financially distressed homeowners to enter deceptive and onerous sale-and-repurchase or leaseback agreements under the illusion that the agreements are viable alternatives to foreclosure. On September 1, 2007, Massachusetts became the first state to enact a permanent ban on such for-profit foreclosure rescue practices.<sup>1</sup> The ban was the measure Attorney General Martha Coakley saw as the solution to “an egregious problem at the end of a bad process.”<sup>2</sup> The process to which she refers is the foreclosure process—a common result in the subprime and predatory lending markets.<sup>3</sup>

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\* J.D. Candidate, 2009, Loyola University Chicago School of Law. I would like to thank my husband, David, and my family for their love and support, and Loyola’s Consumer Law Review for its dedication to publishing student articles.

<sup>1</sup> Pia Malbran, *Update: Foreclosure Rescue Scam*, CBSNEWS.COM, Sept. 4, 2007, <http://www.cbsnews.com/blogs/2007/09/04/primarysource/entry3233619.shtml>; *The American Dream Shattered: The Dream of Homeownership and the Reality of Predatory Lending*, COMMONWEALTH OF MASS. OFF. ATT’Y GEN. MARTHA COAKLEY, A REP. ON COMMENTS AND HEARINGS, AND THE NEW CONSUMER PROTECTION REGULATIONS GOVERNING MORTGAGE LENDERS AND BROKERS (Nov. 2007), available at <http://www.mass.gov/Cago/docs/Consumer/mortgagereporter1107.pdf> [hereinafter *The American Dream Shattered*].

<sup>2</sup> Noelle Knox, *Con Artists Circle Over Homeowners on the Edge: ‘Foreclosure Rescue’ Scams Can Rob Victims of House and Hope*, USA TODAY, Nov. 9, 2007, at B1.

<sup>3</sup> *Id.*

This article discusses the legislative efforts states have taken in response to foreclosure rescue fraud perpetrated on vulnerable victims and questions whether anything but a complete ban on such practices can be truly effective enough. Section II explains the conditions leading to the rise of foreclosures and foreclosure rescue scams. Section III describes various forms of foreclosure rescue operations and exposes the scam artists' tactics. Section IV examines several states' laws that target deceptive foreclosure rescue practices. Section V reveals the loopholes in many states' laws and questions the efficacy of such legislation when scam artists fall outside the statutes' purview. Section VI discusses the unprecedented Massachusetts regulation that enacted a complete ban on certain for-profit foreclosure rescue operations and explains why the law provides superior consumer protection. Section VII concludes that many states' laws, while on the right track, still fall short of supplying adequate protection for homeowners. This article argues that more states should follow in the footsteps of Massachusetts and enact a complete ban on the most unscrupulous foreclosure rescue practices.

## II. Destined For Default

The year 2007 saw record highs in foreclosure and delinquency rates.<sup>4</sup> The surge in foreclosures and late payments is directly related to the growth of subprime and predatory lending.<sup>5</sup>

In the last two decades, homeowners with poor credit and low income have had the option of turning to the subprime mortgage market, which can provide them with a loan to purchase a home when they could not otherwise obtain one in the conventional or prime lending market.<sup>6</sup> While this form of lending gives more high-

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<sup>4</sup> Chris Isidore, *Foreclosures Reach Record High*, CNNMONEY.COM, Dec. 6, 2007, [http://money.cnn.com/2007/12/06/real\\_estate/foreclosure\\_delinquencies/index.htm](http://money.cnn.com/2007/12/06/real_estate/foreclosure_delinquencies/index.htm); *Foreclosure Rescue Fraud: Before the S. Spec. Comm. on Aging*, 110<sup>th</sup> Cong. 1 (2008) (prepared statement by Peggy Twohig, Associate Director, Division of Financial Practices, FTC), available at <http://www.ftc.gov/os/testimony/P064814foreclosure.pdf> ("In 2007, there were an estimated 2.2 million foreclosure filings in the United States, a 75% increase from 2006.").

<sup>5</sup> Daniel Lindsey, *Prevent People from Wrongfully Losing Their Homes: A Primer on Mortgage Foreclosure Defense Practice*, 21 CBA RECORD 38 (Oct. 2007) ("...subprime lending rose from a modest \$35 billion in 1994 to over \$600 billion in 2006.").

<sup>6</sup> Creola Johnson, *Stealing the American Dream: Can Foreclosure-Rescue*

credit-risk consumers a shot at the American dream of homeownership, those financing their homes in this manner do so at the substantial cost of high interest rates, fees and balloon payments.<sup>7</sup> Many homeowners, enticed by “exotic mortgage products,”<sup>8</sup> are unable to meet the burdens of these loan terms and wind up in default and eventually facing foreclosure.<sup>9</sup> Although foreclosures may result from default on any form of mortgage, studies indicate that subprime loans end in foreclosure at significantly higher rates than conventional loans.<sup>10</sup>

One primary reason for the correlation between subprime mortgages and foreclosures is the predatory tactics used by some subprime lenders.<sup>11</sup> Predatory lenders seek out unsophisticated buyers and persuade them to enter loan agreements despite knowing these consumers will not be able to afford the onerous payments.<sup>12</sup> These lenders often target minority communities, immigrants and the elderly.<sup>13</sup> Often, the consumers lured into these deceptive agreements are approved for loans in which the monthly payments exceed their monthly income.<sup>14</sup>

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*Companies Circumvent New Laws Designed To Protect Homeowners from Equity Theft?*, 2007 WIS. L. REV. 649, 656 (2007).

<sup>7</sup> Deanne Loonin & Elizabeth Renaurt, *The Life and Debt Cycle: The Growing Debt Burdens Of Older Consumers and Related Policy Recommendations*, 44 HARV. J. ON LEGIS. 167, 177 (2007).

<sup>8</sup> Johnson, *supra* note 6, at 656 (Some appealing options for home buyers are “adjustable-rate mortgages, interest-only loans, no-cost loans, fifty-year mortgages, and loans for more than 100 percent of a home’s value . . .”).

<sup>9</sup> *Id.* at 658-59.

<sup>10</sup> Loonin & Renaurt, *supra* note 7, at 179; News Release, Iowa Assistant Att’y Gen. Patrick Madigan, *Overview of the Subprime Foreclosure Crisis*, Sept. 2007 (updated Oct. 2007), available at [http://www.state.ia.us/government/ag/latest\\_news/releases/sept\\_2007/Foreclosure\\_analysis.pdf](http://www.state.ia.us/government/ag/latest_news/releases/sept_2007/Foreclosure_analysis.pdf).

<sup>11</sup> Knox, *supra* note 2.

<sup>12</sup> *Id.*

<sup>13</sup> Juan Gonzalez, *Set Up For a Fall*, N.Y. DAILY NEWS, Mar. 28, 2007, available at [http://www.nydailynews.com/news/2007/03/28/2007-03-28\\_set\\_up\\_for\\_a\\_fall-3.html](http://www.nydailynews.com/news/2007/03/28/2007-03-28_set_up_for_a_fall-3.html) (In New York, “[t]he foreclosure wave has struck hardest in minority neighborhoods of South Jamaica and Cambria Heights in Queens, Bedford-Stuyvesant and East New York in Brooklyn and Williamsbridge in the north Bronx . . .”).

<sup>14</sup> *Id.*

The skyrocketing rate of foreclosures resulting from these predatory subprime lending practices has paved the way for a “new wave of fraud” – the foreclosure rescue scam.<sup>15</sup>

### III. Foreclosure “Rescue” Tactics

Homeowners faced with the prospect of losing their home are vulnerable and may feel willing to take any shred of assistance or relief available.<sup>16</sup> As the Colorado General Assembly remarked, “too many home owners in financial distress, especially the poor, elderly, and financially unsophisticated, are vulnerable to a variety of deceptive or unconscionable business practices designed to dispossess them or otherwise strip the equity from their homes.”<sup>17</sup> Due to the panic and loss of dignity associated with the inability to make mortgage payments,<sup>18</sup> homeowners desperately attempting to avoid eviction are “often willing to believe the good news offered by purveyors of the new predatory lending: foreclosure rescue fraud.”<sup>19</sup> One does not have to go far to find the “help” these scam artists are offering.

Advertisements for the so-called assistance may be posted in public areas on flyers that read, “[d]o you need instant debt relief and CASH?” or “[s]top foreclosure with just one phone call.”<sup>20</sup> Alternatively, the “rescuers” might find their potential prey by checking public foreclosure notices<sup>21</sup> and leaving flyers in homeowners’ mailboxes or even paying a personal visit.<sup>22</sup> Other, more sly and devious scam artists may court the victim over a period of time to gain his trust by aiding with errands and home repairs

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<sup>15</sup> Paul Davies, *Mortgage Fraud is Prime*, WALL ST. J., Aug. 18, 2007, at B2.

<sup>16</sup> Knox, *supra* note 2, at B1.

<sup>17</sup> COLO. REV. STAT. ANN. § 6-1-1102 (West 2007).

<sup>18</sup> Nathaniel C. Nichols, *Home Alone: Home Mortgage Foreclosure Rescue Scams and the Theft of Equity*, 11 J. AFFORDABLE HOUS. & CMTY. DEV. L. 280, 282, 293 (2002).

<sup>19</sup> Lindsey, *supra* note 5, at 41.

<sup>20</sup> Johnson, *supra* note 6, at 651.

<sup>21</sup> Stuart Rossman, *Selected Hot Topics in Auto, Mortgage and Subprime Lending*, 1590 P.L.I./CORP. L. & PRAC. COURSE HANDBOOK SERIES 41, 56 (2007).

<sup>22</sup> Josiah L. Kibe, *Closing the Door on Unfair Foreclosure Practices in Colorado*, 74 U. COLO. L. REV. 241, 244 (2003).

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before convincing him to sign over a deed or grant power of attorney.<sup>23</sup>

Once they lure or locate their prey, foreclosure rescue scam artists use a variety of tactics to strip the equity of homeowners.<sup>24</sup> Certain relief offered to those facing foreclosure, called the “bait and switch,” comes disguised as a loan that results in the consumer unwittingly signing over the title, after which the rescuer “takes out a second mortgage on the home and pockets the proceeds.”<sup>25</sup> Another practice, known as a “bailout,” involves the homeowner signing over the title under conditions that allow him to remain in the home and lease it back.<sup>26</sup> The homeowner is convinced that the “bailout” will provide him the time necessary to get back on his feet and out of financial distress.<sup>27</sup> Despite the promise that the homeowner will once again hold the title to his home,<sup>28</sup> in the end, the terms of such agreements are worse than or just as burdensome as the mortgage on which they defaulted, and the homeowner often winds up stripped of equity and homeless.<sup>29</sup>

In addition to scams involving transfer of deed, there is the rescue practice of providing “phantom help.”<sup>30</sup> Scam artists employing this tactic have retained the euphemistic name of “foreclosure consultants” and promise expertise in helping homeowners avoid foreclosure.<sup>31</sup> These consultants offer services – for a fee – such as making phone calls to the lender, negotiating, and doing the leg work and paperwork necessary to dig the debtor out of his desperate situation.<sup>32</sup> The aid either never materializes or is usually so negligible that the homeowner simply could have

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<sup>23</sup> Nichols, *supra* note 18, at 284.

<sup>24</sup> Johnson, *supra* note 6, at 651.

<sup>25</sup> Nichols, *supra* note 18, at 280.

<sup>26</sup> Loonin & Renault, *supra* note 7, at 179-80.

<sup>27</sup> James K. Weston, *The Mortgage Rescue Fraud Act*, 95 ILL. B.J. 52 (2007).

<sup>28</sup> Foreclosure Fighter, *Massachusetts Attorney General Makes Temporary Foreclosure Rescue Scam Ban Permanent*, [http://www.foreclosure-fighter.com/foreclosure\\_articles\\_machusetts\\_foreclosure\\_rescue\\_scams\\_ban.asp](http://www.foreclosure-fighter.com/foreclosure_articles_machusetts_foreclosure_rescue_scams_ban.asp) (last visited Mar. 5, 2008).

<sup>29</sup> Johnson, *supra* note 6, at 652.

<sup>30</sup> Loonin & Renault, *supra* note 7, at 179.

<sup>31</sup> Johnson, *supra* note 6, at 667.

<sup>32</sup> Loonin & Renault, *supra* note 7, at 179.

conducted it himself.<sup>33</sup> When all is said and done, the homeowner may still lose his home and has paid for worthless assistance in the process.<sup>34</sup>

Arguments have been asserted that foreclosure rescue operations at least give homeowners facing foreclosure a “second chance” and that state laws preventing and deterring such practices obstruct homeowners’ ability to “sell and lease back their houses to avoid foreclosure.”<sup>35</sup> However, there are few, if any, success stories.<sup>36</sup> Foreclosure rescuers seek out and thrive on unsophisticated victims who “are unaware of their options for solving these financial difficulties.”<sup>37</sup> Although the typical victim is poor or elderly,<sup>38</sup> those facing default for common reasons such as loss of job, illness or death in the family may also be vulnerable enough for the predatory techniques of foreclosure rescuers.<sup>39</sup> The majority of those who succumb to these deceptive practices end up in a more dire and hopeless financial situation than when the foreclosure process began.<sup>40</sup> Once bereft of home and equity, these victims have few options for recourse outside of pro bono legal services.<sup>41</sup>

Many individuals facing foreclosure are unaware of their statutory rights to redeem their mortgages or cure defaults,<sup>42</sup> so they call the number on the flyers left in their mailboxes.<sup>43</sup> However, homeowners do have options apart from entering into foreclosure rescue agreements that may leave them literally empty-handed.<sup>44</sup> Lawful and useful aid is offered by the 2,300 certified counseling agencies of the Department of Housing and Urban Development, as

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<sup>33</sup> Johnson, *supra* note 6, at 651.

<sup>34</sup> *Id.* at 655.

<sup>35</sup> Anna-Katrina S. Christakis, *Consumer Legislation, Regulation, and Litigation Update*, 61 CONSUMER FIN. L.Q. REP. 4, 11 (2007).

<sup>36</sup> *Id.*

<sup>37</sup> Kibe, *supra* note 22, at 242.

<sup>38</sup> *Id.*

<sup>39</sup> Knox, *supra* note 2.

<sup>40</sup> Nichols, *supra* note 18, at 293.

<sup>41</sup> *Id.*

<sup>42</sup> Kibe, *supra* note 22, at 259.

<sup>43</sup> *Id.* at 244.

<sup>44</sup> Knox, *supra* note 2.

well as the Homeownership Preservation Foundation, which homeowners in trouble may call all hours of the day (888-995-HOPE).<sup>45</sup> For those who take advantage of such free assistance, success is often the result.<sup>46</sup>

For the benefit of the countless distressed homeowners who do not get the help they deserve but instead fall victim to the fraudulent practices of foreclosure rescue scam artists, states are responding by passing legislation specifically designed to prevent, deter and punish foreclosure rescue fraud.<sup>47</sup>

#### **IV. An Overview of States' Foreclosure Fraud Legislation**

Foreclosure rescue fraud is a nationwide issue<sup>48</sup> and many states' legislatures are taking action.<sup>49</sup> States such as California, Colorado, Illinois, Maryland, Rhode Island, Minnesota and New York have enacted laws specifically to control the fraud and deception inherent in foreclosure rescue practices.<sup>50</sup> These laws aim to stop fraudulent practices primarily by establishing strict guidelines for the operations of foreclosure "consultants" and "purchasers."<sup>51</sup>

##### **A. Foreclosure Consulting Legislation**

Statutes aimed at regulating foreclosure "consulting" have been passed in California, Colorado, Illinois, Maryland, Minnesota, Missouri and Rhode Island.<sup>52</sup> The laws seek to obliterate "phantom help" schemes by demanding certain criteria be met in service

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<sup>45</sup> *Id.*

<sup>46</sup> Kibe, *supra* note 22, at 253.

<sup>47</sup> Knox, *supra* note 2.

<sup>48</sup> *Id.*

<sup>49</sup> See Johnson, *supra* note 6, at 666-72.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 665.

<sup>52</sup> CAL. CIV. CODE § 2945(a) (West 2008); COLO. REV. STAT. ANN. § 6-1-1103(4)(a) (West 2008); 765 ILL. COMP. STAT. ANN. 940 (West 2008); MD. CODE ANN., REAL PROP. § 7-301(b) (West 2008); MINN. STAT. ANN. § 325N.01(a) (West 2008); MO. ANN. STAT. § 407.935(2)(a) (West 2008); R.I. GEN. LAWS § 5-79-1(a) (West 2008).

contracts offered to homeowners.<sup>53</sup> The following terms are examples of states' statutory attempts at regulating foreclosure consulting agreements: the contract must be written in a readable font size; there must be a term allowing for rescission of the contract within a reasonable time period; every fee must be explained and may not be collected until service is rendered complete; fees charged must not be greater than the state's maximum set forth; and the consultant may not obtain any interest in the property.<sup>54</sup>

### **B. Foreclosure Purchasing Legislation**

In addition to constraining foreclosure consulting, states such as California, Colorado, Georgia, Illinois, Maryland, Minnesota, Missouri, New York and Rhode Island statutorily regulate foreclosure purchasing.<sup>55</sup> These laws aim to prevent fraudulent inducement of title transfer and seek to eliminate exorbitant rates and fees associated with the rental and repurchase of the home.<sup>56</sup> For example, Illinois, Maryland, Minnesota, New York and Rhode Island require home buyers to pay homeowners "at least 82% of the fair market value" of the home subsequent to the homeowner's eviction.<sup>57</sup> Additionally, if the foreclosure rescue agreement involves a sale with a repurchase option, some states, such as Colorado and Illinois, regulate the maximum price that a foreclosure purchaser may charge the homeowner.<sup>58</sup> For example, Illinois law states that a purchaser may not charge the homeowner more than 125% of the purchaser's own acquisition price.<sup>59</sup>

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<sup>53</sup> Johnson, *supra* note 6, at 666-68.

<sup>54</sup> *Id.*

<sup>55</sup> Cal. Civ. Code § 1695.6, 1695.13 (West 2008); Colo. Rev. Stat. Ann. § 6-1-1117 (West 2008); Ga. Code Ann. § 44-14-180 (West 2007); 765 Ill. Comp. Stat. Ann. 940/50(b) (West 2008); Md. Code Ann., Real Prop. § 7-311(b) (West 2008); Minn. Stat. Ann. § 325N.17 (West 2008); N.Y. Real Prop. Law § 265-a(7) (West 2008); R.I. Gen. Laws § 5-80-8 (West 2008).

<sup>56</sup> Johnson, *supra* note 6, at 671-672.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

### C. Remedies Available and Action Taken

Now that legislation is in place, homeowners coming forward as victims of these scams are recouping some or all of their losses. Scam artists in violation of state foreclosure rescue legislation may face both civil suits and criminal prosecution.<sup>60</sup> Legal aid societies have become inundated with complaints, and state prosecutors are hard at work filing lawsuits that are the first of their kind against foreclosure rescue operations.<sup>61</sup> For example, Daniel Lindsey of the Legal Assistance Foundation of Chicago stated foreclosure rescue scams are “the No. 1 problem in terms of calls we’re getting and cases we’re filing.”<sup>62</sup> Since the Illinois statute went into effect on January 1, 2007, the Chicago organization’s Home Ownership Preservation Project has filed a series of complaints against fraudulent foreclosure companies operating in Illinois.<sup>63</sup>

In addition to the legal clinics’ efforts, Attorneys General from several states are cracking down on the scams, taking both proactive and reactive measures. Idaho Attorney General Lawrence Wasden issued a consumer alert in an attempt to warn residents about the scams and certain tactics used by foreclosure rescuers.<sup>64</sup> In August 2007, a Maryland individual “became the first in that state to be criminally prosecuted for a foreclosure-rescue scam.”<sup>65</sup> The Massachusetts Attorney General’s office investigated and filed several suits in 2007 against foreclosure rescue companies, as well as joined forces with local bar associations and legal aid societies to establish the Pro Bono Foreclosure Assistance Hotline during the 2008 fiscal year.<sup>66</sup>

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<sup>60</sup> Davies, *supra* note 15.

<sup>61</sup> *Id.*; Knox, *supra* note 2.

<sup>62</sup> Knox, *supra* note 2.

<sup>63</sup> *Id.*

<sup>64</sup> News Release, State of Idaho Off. of Att’y Gen. Lawrence Wasden, *Attorney General and Department of Finance Warn of “Foreclosure Rescue” Schemes* (June 20, 2007), available at [http://www2.state.id.us/ag/newsrel/2007/ca\\_jun202007.htm](http://www2.state.id.us/ag/newsrel/2007/ca_jun202007.htm).

<sup>65</sup> Davies, *supra* note 15.

<sup>66</sup> COMMONWEALTH OF MASS. ATT’Y GEN. OFF. ANNUAL REPORT, at 18 (2007), available at [http://www.mass.gov/Cago/docs/ourorganization/AnnualReportFY07\\_final.pdf](http://www.mass.gov/Cago/docs/ourorganization/AnnualReportFY07_final.pdf) [hereinafter ANNUAL REPORT].

In addition to state-wide efforts, a scam in Maryland that has been reported as “the most outrageous scam in the United States at this time”<sup>67</sup> is being examined by the Federal Bureau of Investigation.<sup>68</sup> There, a foreclosure rescue company called the Metropolitan Money Store touted itself as helping to prevent over 250 foreclosures.<sup>69</sup> The rescue operation outfit is now facing a class-action lawsuit after it stripped an alleged 60 million dollars in equity from homeowners.<sup>70</sup>

As more scams and their effects are being exposed, more states are considering stepping in to deter such practices. Among those currently trying to pass foreclosure rescue fraud legislation are Wisconsin,<sup>71</sup> Washington,<sup>72</sup> and the District of Columbia.<sup>73</sup>

Apart from the new laws specifically designed to protect homeowners from unsavory foreclosure rescuers, consumers may have recourse under state Unfair and Deceptive Acts and Practices statutes and the federal Truth in Lending Act.<sup>74</sup> However, foreclosure rescue legislation provides more remedies against more of the individuals who may be involved in the schemes, including investors and appraisers.<sup>75</sup> Moreover, foreclosure rescue laws often provide

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<sup>67</sup> *Victims of a Foreclosure “Rescue,”* CBSNEWS.COM, July 13, 2007, [http://www.cbsnews.com/stories/2007/07/13/cbsnews\\_investigates/main3057178.shtml](http://www.cbsnews.com/stories/2007/07/13/cbsnews_investigates/main3057178.shtml) [hereinafter *Victims*].

<sup>68</sup> *Foreclosure Fraud: The D.C. Council Contemplates a Law to Prevent It*, WASH. POST, Oct. 1, 2007, at A18, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/30/AR2007093001215.html> [hereinafter *Foreclosure Fraud*].

<sup>69</sup> *Victims*, *supra* note 67.

<sup>70</sup> *Foreclosure Fraud*, *supra* note 68.

<sup>71</sup> Nathan Phelps, *Sen. Kohl Taking Shot at Predatory Lenders, with audio: Scammers Adding to Foreclosure Mess*, GREENBAYPRESSGAZETTE.COM, Feb. 19, 2008, <http://www.greenbaypressgazette.com/apps/pbcs.dll/article?AID=/20080219/GPG03/802190633/1247>.

<sup>72</sup> Press Release, Wash. State Off. of the Att’y Gen., *Attorney General’s Foreclosure Rescue Fraud and Identity Theft Bills Scheduled for Public Hearings Tomorrow* (Jan 24, 2008), available at <http://www.atg.wa.gov/pressrelease.aspx?id=18820>.

<sup>73</sup> *Foreclosure Fraud*, *supra* note 68.

<sup>74</sup> Rossman, *supra* note 21, at 57.

<sup>75</sup> *Id.* at 59.

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for recovery of attorneys fees and punitive damages, in addition to actual damages.<sup>76</sup>

While this targeted legislation seems promising, and states appear to be strengthening their efforts, an examination of where the laws fall short indicates that more needs to be done.

## V. Finding the Loopholes

Despite states' efforts at preventing fraudulent equity-stripping practices, many scam artists are able to evade the law because they or their tactics are not covered under the statutes. For example, "none of the current statutes regulate what foreclosure companies can promise to do."<sup>77</sup> Illusory promises are prevalent in foreclosure consultants' service advertisements and contracts, and homeowners have no recourse under the current laws for promised aid that never materializes.<sup>78</sup> Even if a consumer may never have to pay the consultant if service is not rendered – a common provision in statutes regulating foreclosure consulting,<sup>79</sup> the foreclosure consultant still has wasted the homeowner's valuable time, which could have been spent seeking legitimate guidance and aid.<sup>80</sup>

Further, the statutes do not require foreclosure rescuers to make a determination about the homeowner's ability to afford the payments, fees or rent associated with various foreclosure rescue agreements.<sup>81</sup> While some statutes require foreclosure purchasers to consider the homeowner's gross income in determining whether they can afford lease-back payments, those numbers are too often misleading because only an evaluation of a homeowner's net income, monthly expenses and a review of assets and liabilities may truly reveal whether he or she can make payments to a foreclosure rescuer.<sup>82</sup>

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<sup>76</sup> *Id.* at 58.

<sup>77</sup> Johnson, *supra* note 6, at 682.

<sup>78</sup> *Id.* at 681-82.

<sup>79</sup> *Id.* at 666.

<sup>80</sup> Issue Brief, National Governors Association for Best Practices, *State Strategies to Address Foreclosures* (Sept. 19, 2007) at 14 [hereinafter *State Strategies*].

<sup>81</sup> Johnson, *supra* note 6, at 685.

<sup>82</sup> *Id.* at 686-87.

Aside from failing to prevent illusory promises and the execution of contracts that consumers are unable to afford, many states' foreclosure rescue statutes contain a long list of practitioners and professionals who benefit from exemptions.<sup>83</sup> For example, California, Missouri and Illinois provide exemptions for most attorneys, consumer finance lenders and real estate licensees.<sup>84</sup> These individuals who hold certifications or licenses can facilitate a foreclosure rescue scam without facing liability;<sup>85</sup> yet, these are some of the most common types of foreclosure consultants and should clearly fall within ambit of the statutes.<sup>86</sup>

One state – Massachusetts – recognized the potential for foreclosure rescue scam artists to beat the system under other states' current statutory schemes and concluded that foreclosure rescue of any kind that lines the rescuer's pocket is no aid at all.<sup>87</sup> Massachusetts' response was unprecedented and drastic: to affect a complete ban on all for-profit foreclosure rescue transactions.<sup>88</sup>

## VI. Massachusetts Bans Foreclosure Rescue Transactions

The year 2007 proved to be difficult for Massachusetts, as the state succumbed to the unforgiving choke-hold of the foreclosure crisis.<sup>89</sup> 102 of Massachusetts' 351 communities experienced "at least a doubling in foreclosure rates," and the Commonwealth as a whole saw 26,500 foreclosure proceedings commenced – which was 76% more than in 2006.<sup>90</sup> Massachusetts Attorney General, Martha Coakley, saw the writing on the wall and wasted no time in

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<sup>83</sup> Weston, *supra* note 27, at 52.

<sup>84</sup> *Id.*

<sup>85</sup> Rossman, *supra* note 21, at 59.

<sup>86</sup> Kibe, *supra* note 22, at 268.

<sup>87</sup> *State Attorney General Bans Foreclosure Rescue Schemes*, DAILY HAMPSHIRE GAZETTE, June 1, 2007, <http://www.gazettenet.com/newsroom/index.cfm/2007/6/1/State-attorney-general-bans-foreclosure-rescue-schemes> [hereinafter DAILY HAMPSHIRE GAZETTE].

<sup>88</sup> *Id.*; *The American Dream Shattered*, *supra* note 1, at 11, B1.

<sup>89</sup> *See The American Dream Shattered*, *supra* note 1, at 2.

<sup>90</sup> *Id.*

exercising her powers to preserve what was left and restore what was lost.<sup>91</sup>

Under the Massachusetts Consumer Protection Act (“Act”), the Attorney General is authorized to interpret the Act and promulgate regulations to deter practices classified as “unfair or deceptive and thus [in violation of] the Act.”<sup>92</sup> On June 1 of 2007, Martha Coakley took advantage of this delegation of power and issued an emergency, temporary ban on all for-profit foreclosure rescue transactions that fraudulently induce a consumer to sign over his home under the false impression that he will eventually be in a position to get it back.<sup>93</sup> The temporary ban was made permanent on September 1, 2007.<sup>94</sup>

This regulation is in stark contrast with those of other states discussed above. First, the law addresses foreclosure “purchasing” and places a blanket ban on any for-profit rescue transactions, the effect of which prevents scams involving a lease-back or repurchase arrangement under which the rescuer pockets any of the homeowner’s cash or equity.<sup>95</sup> A foreclosure rescuer may not even offer, promote, promise, or solicit any such transaction for compensation without violating the law.<sup>96</sup> However, the regulation makes clear that rescue transactions conducted by nonprofit organizations or family members – where absolutely no gain is realized – are permissible.<sup>97</sup>

Additionally, the law also regulates foreclosure consulting, and although it does not place a complete ban on what it calls “Foreclosure-Related Services,” it sets forth a more stringent guideline than other states’ statutes and provides only a few exemptions, which are geared toward only the most legitimate practices.<sup>98</sup> The provision states that no advance fees may be accepted by any person offering foreclosure-related services unless the individual is an attorney collecting a bankruptcy filing fee or a

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<sup>91</sup> *Id.* at 29.

<sup>92</sup> *Id.*; MASS. GEN. LAWS ch. 93A § 2(a) (2008).

<sup>93</sup> DAILY HAMPSHIRE GAZETTE, *supra* note 87.

<sup>94</sup> *The American Dream Shattered*, *supra* note 1, at 11.

<sup>95</sup> *Id.* at B1-B4.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

mortgage lender taking a loan application fee, which must comport further with the laws of the Commissioner of Banks.<sup>99</sup> Moreover, the regulation aims to stop “phantom help,” as it states that no advertisement or offer of foreclosure-related service may be made without “disclosing clearly and conspicuously, (i) the precise goods and/or services offered . . . and (ii) a precise description of how the promoter will assist persons in avoiding or delaying foreclosure . . . .”

Massachusetts’ foreclosure rescue regulations may be considered by some to be a drastic and unnecessary measure.<sup>100</sup> However, the Attorney General and her staff stand by their decision and consider the ban the most effective means to deal with a serious fraudulent crime.<sup>101</sup> While many consumer protection laws provide recourse for victims of fraud, fraud is often difficult to prove.<sup>102</sup> The Massachusetts regulation dispenses with the need to prove intent to defraud consumers by simply banning any foreclosure rescuer operating for profit.<sup>103</sup> Further, representatives from the Attorney General’s office found that for-profit foreclosure rescue transactions were never successful and only added to homeowners’ hardships.<sup>104</sup>

Since the regulation passed, Massachusetts confirmed the effects of the foreclosure crisis and the fraudulent practices that led to and exacerbated it.<sup>105</sup> Public hearings were held in several cities such as Brockton, Worcester, Springfield, and Boston.<sup>106</sup> Homeowners spoke of their personal experiences, and various professionals, public officials and representatives from legal services and housing organizations offered comments regarding the crisis.<sup>107</sup> The findings of the public hearings showed that strong regulations, such as the ban

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<sup>99</sup> *The American Dream Shattered*, *supra* note 1, at B1-B4.

<sup>100</sup> John Grant, *2008 Legislative Preview: NARHRI*, NUWIREINVESTOR, Dec. 11, 2007, <http://www.nuwireinvestor.com/articles/2008-legislative-preview-narhri-51376.aspx>.

<sup>101</sup> DAILY HAMPSHIRE GAZETTE, *supra* note 87.

<sup>102</sup> Malbran, *supra* note 1.

<sup>103</sup> *The American Dream Shattered*, *supra* note 1, at B3-B4.

<sup>104</sup> DAILY HAMPSHIRE GAZETTE, *supra* note 87.

<sup>105</sup> *The American Dream Shattered*, *supra* note 1, at B3-B4.

<sup>106</sup> *Id.* at 12.

<sup>107</sup> *Id.* at 12-13.

on foreclosure rescue transactions, were indeed necessary and crucial to stabilizing Massachusetts' communities.<sup>108</sup>

Massachusetts has taken action in more ways than simply passing foreclosure rescue legislation.<sup>109</sup> To ensure that the foreclosure crisis is slowed, Massachusetts has passed regulations extending foreclosure proceedings to allow homeowners more time to reinstate and redeem their mortgages.<sup>110</sup> Additionally, the Attorney General's office has established the Pro Bono Foreclosure Assistance Hotline and other resources for individuals facing foreclosure so that they may receive prompt and genuine guidance.<sup>111</sup> Massachusetts has also urged mortgage lenders to renegotiate with homeowners and offer workouts to avoid foreclosure.<sup>112</sup> Further, the state established a \$250 million fund to aid victims of fraudulent lending and foreclosure practices in the state.<sup>113</sup> Moreover, in January 2008, Massachusetts issued further regulations seeking to prevent fraudulent practices by brokers and lenders to ensure that homeowners are not coerced into entering mortgage agreements that are destined to fail.<sup>114</sup>

Massachusetts' foreclosure rescue transaction ban has stirred up debate and opposition from investors who participate in foreclosure purchasing.<sup>115</sup> The National Association of Responsible Home Builders and Investors expressed fear that bans such as the one Massachusetts has enacted will become the typical method of dealing with foreclosure rescue fraud.<sup>116</sup> In response, the group has

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<sup>108</sup> *See id.* at 15-22.

<sup>109</sup> ANNUAL REPORT, *supra* note 66, at 18.

<sup>110</sup> *State Strategies*, *supra* note 80, at 17.

<sup>111</sup> ANNUAL REPORT, *supra* note 66, at 18.

<sup>112</sup> *Id.* at 16.

<sup>113</sup> *Id.* at 17.

<sup>114</sup> Press Release, *Attorney General Martha Coakley Files Final Mortgage Regulations; Issues Guidance to the Industry*, COMMONWEALTH OF MASS. OFF. ATT'Y GEN. (Dec. 18, 2007), available at [http://www.mass.gov/?pageID=pressreleases&agId=Cago&prModName=cagopressrelease&prFile=2007\\_12\\_18\\_mortgage\\_regs.xml](http://www.mass.gov/?pageID=pressreleases&agId=Cago&prModName=cagopressrelease&prFile=2007_12_18_mortgage_regs.xml).

<sup>115</sup> *See Grant*, *supra* note 100.

<sup>116</sup> *Id.*

lobbied in states where consumer protection laws are being examined and could soon include regulations for foreclosure rescue fraud.<sup>117</sup>

Despite these objections, Massachusetts had the best interests of consumers in mind in attempting to reduce the number of foreclosures in the state.<sup>118</sup> Foreclosure does not only affect the individual consumer in default on his loan.<sup>119</sup> The crisis affects whole communities, local economies and even crime rates.<sup>120</sup> When several homes face foreclosure in one neighborhood, reports show that surrounding home prices drop and communities become less desirable and more unstable.<sup>121</sup> Therefore, states like Massachusetts have an incentive to lay heavy regulations and enact bans on fraudulent practices that lead to foreclosure.

## VII. Conclusion

States should care about practices that increase the rate of foreclosures and should pass laws that deter and punish fraudulent lending and foreclosure rescue activity.<sup>122</sup> Massachusetts has become the first state to take foreclosure rescue regulation one step further by enacting a complete ban on any for-profit foreclosure rescue transaction.<sup>123</sup> As discussed throughout this article, consumers have no use for rescue companies and individuals who stand to make a profit by deceiving and stripping them of their home equity.<sup>124</sup>

While states have passed laws addressing fraudulent foreclosure consulting and purchasing, the loopholes and exemptions in many statutes allow deceptive practices to continue. Foreclosure is a devastating result for homeowners, families, communities, local economies and even the banks and lenders involved. Massachusetts' foreclosure rescue legislation is the most effective measure in

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<sup>117</sup> *Id.*

<sup>118</sup> *See* Malbran, *supra* note 1; *See* DAILY HAMPSHIRE GAZETTE, *supra* note 87; *See* Davies, *supra* note 15.

<sup>119</sup> *See State Strategies*, *supra* note 80, at 1, 10.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *See* Davies, *supra* note 15; Malbran, *supra* note 1.

<sup>124</sup> *See* DAILY HAMPSHIRE GAZETTE, *supra* note 87.

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detering fraudulent practices that lead to foreclosure. Therefore, more states should follow Massachusetts' lead in providing the strongest and most comprehensive consumer protection available.