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# Chapter 278: Protecting Californians from Predatory Rescue

Vincent G. Buehler

## Code Sections Affected

Civil Code § 2945.45 (new); §§ 1632, 2945.2, 2945.3, 2945.4 (amended).

AB 180 (Bass & Lieu); 2008 STAT. Ch. 278.

## I. INTRODUCTION

One is responsible for the best-selling music album of all time<sup>1</sup> and has declared himself the “King of Pop.”<sup>2</sup> Another serves in the United States House of Representatives representing California’s thirty-seventh Congressional District.<sup>3</sup> The third is a former Major League Baseball Most Valuable Player, a six-time all-star<sup>4</sup> who sat atop the *New York Times*’ “Best Sellers” list as an author for eight weeks.<sup>5</sup> Given these descriptions, it would seem that, apart from personal success, Michael Jackson, Congresswoman Laura Richardson, and Jose Canseco have little else in common. But recently, the three have found a new commonality—potential foreclosure on their California properties.<sup>6</sup>

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1. Niki D’Andrea, *Michael Jackson Resurrects ‘The World’s Biggest Selling Album of All Time’ with Thriller 25*, PHOENIX NEW TIMES, Mar. 4, 2008, <http://www.phoenixnewtimes.com/2008-03-06/music/michael-jackson-resurrects-the-world-s-biggest-selling-album-of-all-time-with-thriller-25/> (on file with the *McGeorge Law Review*).

2. BOB JONES & STACY BROWN, *MICHAEL JACKSON: THE MAN BEHIND THE MASK 2* (2005).

3. Richardson.House.gov, About Congresswoman Laura Richardson, <http://richardson.house.gov/about.shtml> (last visited Feb. 13, 2009) (on file with the *McGeorge Law Review*).

4. *N.L.; Jose Canseco Retires, 38 Homers Shy of 500*, N.Y. TIMES, May 14, 2002, <http://query.nytimes.com/gst/fullpage.html?res=9C04E6D91539F937A25756C0A9649C8B63> (on file with the *McGeorge Law Review*).

5. Darren Rovell, *Jose Canseco: Best Selling (Athlete) Author of All Time?*, CNBC, Apr. 4, 2008, <http://www.cnbc.com/id/23955250/> (on file with the *McGeorge Law Review*).

6. Michael Jackson defaulted on payments for his “Neverland Ranch” property in Santa Barbara, California, which was scheduled to be auctioned off on March 19, 2008. Roger Friedman, *Michael Jackson’s Neverland Foreclosed; Auction Date Set*, FOX NEWS, Feb. 26, 2008, <http://www.foxnews.com/story/0,2933,332776,00.html> (on file with the *McGeorge Law Review*). However, prior to this sale, Michael Jackson’s foreclosure auction was canceled because a private company bought his loan. HuffingtonPost.com, *Colony Capital Buys Michael Jackson’s Loan, Neverland Foreclosure Averted*, May 13, 2008, [http://www.huffingtonpost.com/2008/05/13/colony-capital-buys-micha\\_n\\_101505.html](http://www.huffingtonpost.com/2008/05/13/colony-capital-buys-micha_n_101505.html) (on file with the *McGeorge Law Review*). Despite this, Michael Jackson’s situation still serves as an example of what a defaulting homeowner confronted with potential foreclosure must face.

Laura Richardson received notice of default for her home in Sacramento, California, towards the end of 2007. Anthony York, *Debate Intensifies over Richardson Home Default*, CAP. WKLY., May 22, 2008, [http://www.capitolweekly.net/article.php?\\_adctlid=v%7Cjq2q43wvsl855o%7Cx4qkjhxlldwn8k&issueId=x48gnuowgqsg6o&xid=x4ptlrmv0w0r6x](http://www.capitolweekly.net/article.php?_adctlid=v%7Cjq2q43wvsl855o%7Cx4qkjhxlldwn8k&issueId=x48gnuowgqsg6o&xid=x4ptlrmv0w0r6x) (on file with the *McGeorge Law Review*). The home was auctioned on May 7, 2008. *Id.*

Jose Canseco lost his home in Encino, California, to foreclosure. *Baseball Star Canseco Loses Home to Foreclosure*, REUTERS, May 1, 2008, <http://ca.reuters.com/article/sportsNews/idCAN0144975620080501> (on

Sandra Barranon of San Diego, California, can be added to this group of aforementioned Californians reported in recent news under the topic of foreclosure, but unfortunately, her notoriety is not based upon any personal successes that she may have had during her lifetime.<sup>7</sup> Instead, Ms. Barranon has been reported in the news as an example of the misfortune and vulnerability that can accompany foreclosure, as she was the victim of a dishonest foreclosure consultant.<sup>8</sup> Ms. Barranon paid a foreclosure consultant \$2,000 to “restructure the debt on her house” after falling behind on mortgage payments.<sup>9</sup> Following her consultant’s advice, she did not make mortgage payments for six months, only to find out later that her home had been sold without her notice.<sup>10</sup>

To protect homeowners against such occurrences, the California Legislature enacted Chapter 278, which provides greater protection for consumers and establishes greater regulation of foreclosure consultants.<sup>11</sup>

## II. BACKGROUND

### A. Foreclosure—What’s the Big Deal?

#### 1. By the Numbers

California, like many other states across the nation, faces a weakening housing market that has resulted in stricter mortgage lending standards and contributed to worsening economic conditions.<sup>12</sup> These conditions have made homeowners of all socioeconomic levels vulnerable to foreclosures.<sup>13</sup> In the first quarter of 2008, there were 169,831 foreclosure filings in California,<sup>14</sup> the largest number of filings for any state, and the second highest rate of foreclosure in the country.<sup>15</sup> Foreclosures in 2008 were up 32% from the fourth quarter in 2007 and

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file with the *McGeorge Law Review*).

7. See Emmet Pierce & Lori Weisberg, *Credit Crunch Attracts a Wave of Opportunism*, SAN DIEGO UNION-TRIB., Sept. 16, 2007, [http://www.signonsandiego.com/uniontrib/20070916/news\\_1n16losthome.html](http://www.signonsandiego.com/uniontrib/20070916/news_1n16losthome.html) (on file with the *McGeorge Law Review*) (reporting Sandra Barranon as a victim of foreclosure fraud).

8. See *id.* (reporting Sandra Barranon as a victim of foreclosure fraud).

9. *Id.*

10. *Id.*

11. ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 180, at 2 (Jan. 24, 2008).

12. See *U.S. Home Foreclosures Keep Rising*, CBS NEWS, May 14, 2008, <http://www.cbsnews.com/stories/2008/05/14/business/realestate/main4094991.shtml> (on file with the *McGeorge Law Review*) (“[W]eak housing sales, falling home values, tighter mortgage lending criteria and a slowing U.S. economy has left . . . few[] options to avoid foreclosure.”).

13. *Id.*

14. *U.S. Foreclosure Activity Increases 23 Percent in First Quarter*, REALTYTRAC, Apr. 29, 2008, <http://www.realtytrac.com/ContentManagement/pressrelease.aspx?ChannelID=9&ItemID=4566&acct=64847> (on file with the *McGeorge Law Review*).

15. *Id.*

213% from the first quarter of that same year.<sup>16</sup> Beyond the economic implications<sup>17</sup> of increasing foreclosures, this trend has also created another problem—opportunity for foreclosure fraud.<sup>18</sup>

## 2. Fraudulent “Rescue”

Many foreclosure consultants provide valuable services to individuals who are not fully aware of their options.<sup>19</sup> Unfortunately, some consultants use foreclosure as an opportunity to “defraud homeowners out of the very home they are trying to save.”<sup>20</sup> According to the State Assembly Democratic Caucus,<sup>21</sup> such fraudulent schemes include the “Sign Your Home to Me” Scam,<sup>22</sup> the Equity Skimming Scam,<sup>23</sup> and the Phony Counseling Scam.<sup>24</sup> The California Legislature first sought to address these problems stemming from potential foreclosures in 1979 by enacting the Mortgage Foreclosure Act,<sup>25</sup> which states in relevant part:

The Legislature finds . . . that homeowners whose residences are in foreclosure are subject to fraud, deception, harassment, and unfair dealing by foreclosure consultants from the time a Notice of Default is recorded . . . until the time of the foreclosure sale. Foreclosure consultants represent that they can assist homeowners who have

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16. *Id.*

17. In a report prepared for the United States Conference of Mayors, the “foreclosure crisis” is forecasted to reduce both gross domestic product (GDP) and demand for goods and services, thus resulting in increased unemployment. GLOBALINSIGHT, U.S. METRO ECONOMIES: THE MORTGAGE CRISIS 2 (Nov. 2007), available at <http://www.usmayors.org/metroeconomies/1107/report.pdf> (on file with the *McGeorge Law Review*). Further, home prices are expected to continue to decline, making for less tax revenue for both local and state government, as well as less resale opportunities for troubled homeowners—a problem exacerbated by stricter lending standards. *Id.* at 2-3.

18. See ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 180, at 4 (Jan. 15, 2008) (stating that the increase in foreclosures increases the “opportunities for so-called ‘foreclosure consultants’”).

19. *Id.* at 1.

20. *Id.* at 4.

21. In 2007, in an effort to assist California homeowners facing foreclosure, the state disseminated information regarding mortgages and the potential problems that can accompany foreclosure. Cal. State Assembly, Tools to Help Manage the Crisis, <http://adc.asm.ca.gov/issues/MortgageCrisis/default.aspx> (last visited Feb. 13, 2009) (on file with the *McGeorge Law Review*).

22. Cal. State Assembly, Home Mortgage Crisis: What You Need to Know, Beware of Scams, <http://adc.asm.ca.gov/issues/MortgageCrisis/scams.aspx> (last visited Feb. 13, 2009) (on file with the *McGeorge Law Review*) (outlining the “Sign Your Home to Me Scam” where individuals will coerce the homeowner to sign over title to his or her property by claiming it is necessary to negotiate the mortgage for the homeowner. In no longer holding title to the property, the homeowner effectually becomes a renter while the property is dealt to a third party).

23. *Id.* (“Equity Skimming Scam: A buyer promises to pay your mortgage or sell your home if you sign over the deed and move out. The ‘buyer’ keeps the house and you keep the debt.”).

24. *Id.* (describing the “Phony Counseling Agency Scam” where an individual will charge large amounts of money for advice that the government offers for free).

25. *Onofrio v. Rice*, 55 Cal. App. 4th 413, 418, 64 Cal. Rptr. 2d 74, 76 (4th Dist. 1997) (“When enacting the mortgage consultant foreclosure act in 1979, the Legislature was very specific in delineating its purpose.”).

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.<sup>26</sup>

Chapter 278 seeks to protect homeowners faced with foreclosure in an economic environment where the opportunities for exploitation continue to expand.<sup>27</sup>

## B. Foreclosure Consultants

### 1. Definition

A foreclosure consultant is defined as “any person who makes any solicitation, representation, or offer to . . . [s]ave [an] owner’s residence from foreclosure” for compensation.<sup>28</sup> Foreclosure consultants provide services including the stopping or postponement of a foreclosure sale, obtaining forbearance from a mortgagee or beneficiary, and assisting in exercising a right of reinstatement.<sup>29</sup> In addition, consultants obtain any extension or waiver associated with terms in a deed of trust or mortgage on a residence in foreclosure, assist in obtaining a loan, and help prevent the negative effects that a foreclosure may have on a homeowner’s credit score.<sup>30</sup>

Certain groups of individuals are permitted to obtain compensation for the previously-described services without being considered a foreclosure consultant.<sup>31</sup> For example, attorneys, accountants, check sellers or bill payers,<sup>32</sup> and residential mortgage lenders that are licensed by the State of California are not classified as foreclosure consultants, despite providing foreclosure-related services.<sup>33</sup> Further, businesses such as banks, trust companies, savings and loan associations, industrial loan companies, pension trusts, credit unions, insurance companies, and escrow businesses licensed by California are excepted from classification as foreclosure consultants.<sup>34</sup>

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26. CAL. CIV. CODE § 2945(a) (West 1993 & Supp. 2009).

27. See ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 180, at 4 (Jan. 15, 2008) (“[E]xploitation of homeowners facing foreclosure is an old problem, but according to the author the sub-prime lending and foreclosure crisis is greatly expanding the opportunities for exploitation.”).

28. CAL. CIV. CODE § 2945.1(a)(8).

29. *Id.* § 2945.1(a)(1)-(7).

30. *Id.* However, if a person holds a lien on the property facing foreclosure, he or she can perform services relative to this lien and not be considered a foreclosure consultant. *Id.* § 2945.1(b)(6).

31. See *id.* § 2945.1(b) (containing exceptions to those considered a foreclosure consultant by California Civil Code section 2945.1(a)).

32. Licensed check sellers and bill payers must act in the capacity of a prorater in order to gain the exemption. *Id.* § 2945.1(b)(2). A prorater is considered an individual who is compensated for receiving “money or evidences thereof” and distributes it among creditors in payment on behalf of a debtor. CAL. FIN. CODE § 12002.1 (West 1999).

33. CAL. CIV. CODE § 2945.1(b)(1)-(2), (4), (9).

34. *Id.* § 2945.1(b)(8). Government entities are also given the same privilege as those acting under any

## 2. Limitations

Foreclosure consultants are not subject to any regulations or requirements until a Notice of Default is recorded relative to the residence where services are being provided.<sup>35</sup> However, once this Notice of Default is entered, a foreclosure consultant must abide by certain requirements and the homeowner is vested with certain rights prior to, and upon entering, a contract for services from the foreclosure consultant.<sup>36</sup> The consultant is obligated to ensure that every contract: (1) is in writing, (2) fully discloses the consultant's services, (3) is accompanied by a notice disclosing that the consultant cannot receive payment until all tasks have been completed, and (4) states that the consultant cannot ask the homeowner to sign any "lien, deed of trust, or deed."<sup>37</sup> Further, the consultant must include a Notice of Cancellation with every contract notifying the homeowner of his or her right to rescind.<sup>38</sup>

Foreclosure consultants are also forbidden from taking certain actions when administering their services.<sup>39</sup> In addition to receiving payment only after completing their tasks, foreclosure consultants cannot receive more than ten percent per year of any loan amount that they make to a homeowner.<sup>40</sup> Further, they cannot take any wage assignments, liens, or property for payment; nor can they receive compensation from a third party for services rendered to a homeowner without disclosing these potentially conflicting incentives to the homeowner.<sup>41</sup> Finally, a foreclosure consultant may not gain any interest in the residence in foreclosure from an owner with whom the foreclosure consultant has contracted.<sup>42</sup> Chapter 278 builds upon these rights and regulations.

### III. CHAPTER 278

Chapter 278 further addresses problems arising out of deceitful practices by individuals operating under the guise of foreclosure consultancy.<sup>43</sup> To help protect against such predatory practices, Chapter 278 strengthens homeowners'

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department or agency of the United States, and mortgagees approved by the United States Department of Housing and Urban Development will not be considered a foreclosure consultant. *Id.* § 2945.1(b)(5), (b)(8). California-licensed consumer and commercial lenders and real estate agents may be exempted from being considered a foreclosure consultant, but are subject to further governance before earning that privilege. *Id.* § 2945.1(b)(5).

35. Tomlin v. Cole, 152 Cal. App. 3d 556, 559, 199 Cal. Rptr. 632, 634 (2d Dist. 1984).

36. For a complete discussion of these rights and regulations see *infra* Part III (addressing existing rights and Chapter 278's effect on those rights).

37. CAL. CIV. CODE § 2945.3(a)-(b) (providing the model notice requirement form).

38. *Id.* § 2945.3(c) (providing the model notice of cancellation form).

39. See *id.* § 2945.4 (stating the prohibited practices for foreclosure consultants).

40. *Id.* § 2945.4(a)-(b).

41. *Id.* § 2945.4(c)-(d).

42. *Id.* § 2945.4(e).

43. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 180, at 1 (Jan. 15, 2008).

already existing rights when entering into contracts with foreclosure consultants<sup>44</sup> and places additional limitations on consultants providing services in such a capacity.<sup>45</sup>

#### A. Homeowners' Rights

Chapter 278 begins strengthening homeowners' rights before a contract becomes final; it requires foreclosure consultants to provide a copy of a completed contract in any of the five most common non-English languages spoken by Californians<sup>46</sup> if requested by the owner before the contract is signed.<sup>47</sup> Foreclosure consultants must notify homeowners orally and in writing<sup>48</sup> of their right to contracts written in their choice of these five languages.<sup>49</sup> Once a contract is finalized, Chapter 278 allows homeowners to rescind the contract within five business days,<sup>50</sup> or at any time if the foreclosure proceeding has not fully complied with notice requirements.<sup>51</sup>

#### B. Additional Limitations on Foreclosure Consultants

Chapter 278 also limits the authority of foreclosure consultants<sup>52</sup> by prohibiting them from assisting homeowners in obtaining the remaining proceeds from a foreclosure sale—something that could be done prior to Chapter 278 if

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44. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 180, at 3 (Jan. 28, 2008); *see supra* Part II.B.1 (defining "foreclosure consultant").

45. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 180, at 1 (Jan. 15, 2008).

46. These five languages are Spanish, Chinese, Tagalog, Vietnamese, and Korean. CAL. CIV. CODE § 1632(a)(3) (West Supp. 2009). "Together, these languages are spoken by approximately 83 percent of all Californians who speak a language other than English in their homes." *Id.*

47. *Id.* § 2945.3(c) (amended by Chapter 278). Prior to Chapter 278, foreclosure consultants were only required to provide a contract in the language they used when describing of their services or in negotiating a contract. *Id.* § 2945.3(c) (West 1993 & Supp. 2009). This requirement still remains, and to maintain consistency, Chapter 278 has amended section 1632 of the California Civil Code to add "foreclosure consulting contracts" to the list of enumerated contracts requiring a translation into Spanish, Chinese, Tagalog, Vietnamese, or Korean if the terms of the agreement were negotiated in that language. *Id.* § 1632(b)(7) (amended by Chapter 278).

48. CAL. CIV. CODE § 2945.3(c) (amended by Chapter 278).

49. *See supra* note 46 (discussing available languages).

50. CAL. CIV. CODE § 2945.2(a) (amended by Chapter 278) (stating that the right to rescind lasts until midnight of the fifth business day). Prior to Chapter 278, homeowners were only allowed three days for such rescission. *Id.* § 2945.2(a) (West 1993). Business days are defined as any day that is not a Sunday or on a list of enumerated holidays. *Id.* § 1689.5(e) (West 1985 & Supp. 2009). This right is in addition to any right to rescind the homeowner already has under law. *Id.* § 2945.2(a) (amended by Chapter 278).

51. *See id.* § 2945.3(h) (amended by Chapter 278) (allowing for rescission until the foreclosure consultant has complied with all of section 2945.3). Cancellation becomes effective when written notice is given to the foreclosure consultant via mail, facsimile, or electronic mail. *Id.* § 2945.2(b) (amended by Chapter 278). However, notice of cancellation is not required to take a particular form and is effective if it demonstrates the homeowner's intent not to be bound. *Id.* § 2945.2(d) (West 1993 & Supp. 2009).

52. *See supra* Part II.B.2 (discussing limitations placed on foreclosure consultants prior to the enactment of Chapter 278).

occurring sixty-five days after a sale and meeting certain formal requirements.<sup>53</sup> Further limiting their capabilities, Chapter 278 prohibits consultants from taking power of attorney from a homeowner for any purpose.<sup>54</sup> Finally, Chapter 278 requires all foreclosure consultants to register<sup>55</sup> with the California Department of Justice<sup>56</sup> and maintain a \$100,000 surety bond.<sup>57</sup> Failure to comply with the registration or bond requirement will result in a fine ranging from \$1,000 to \$25,000, up to one-year imprisonment, or some combination of both.<sup>58</sup>

#### IV. ANALYSIS

##### A. Decreasing Homeowner Vulnerability

In 2005, the National Consumer Law Center (NCLC)<sup>59</sup> conducted a nationwide examination of foreclosure scams and produced a list of common tactics that “rescue scammers” use to exploit homeowners facing foreclosure.<sup>60</sup> The NCLC cited a lack of economic sophistication (homeowners’ failure to realize the terms and scope of the deals they enter) as a trait exploited by scam artists.<sup>61</sup> However, not all foreclosure scams result from a homeowner’s lack of knowledge; oftentimes, no matter how sophisticated a homeowner is, he or she

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53. See CAL. CIV. CODE § 2945.4(h) (amended by Chapter 278) (eliminating the ability to facilitate the release of “surplus funds” from a foreclosure sale).

54. *Id.* § 2945.4(f) (amended by Chapter 278). Prior to Chapter 278, a foreclosure consultant could “[t]ake any power of attorney from an owner for any purpose, except to inspect documents as provided by law.” *Id.* § 2945.4(f) (West 1993 & Supp. 2009).

55. Registration consists of the disclosure of the foreclosure consultant’s “name, address, and telephone number . . . , [as well as] all of the names, addresses, telephone numbers, Internet Web sites, and e-mail addresses . . . used in connection with acting as a foreclosure consultant.” *Id.* § 2945.45(a)(1)(A) (enacted by Chapter 278). The foreclosure consultant must also provide the Department of Justice a statement of prior criminal history, and copies of all advertising and promotional materials in connection with acting as a foreclosure consultant. *Id.* § 2945.45(a)(1)(A)-(B) (enacted by Chapter 278).

56. *Id.* § 2945.45(a)(1) (enacted by Chapter 278). The California Department of Justice has the discretion to deny or revoke registration based on a misstatement in the application, a previous violation of law, the failure to maintain the bond requirement, or any violation of Chapter 278. *Id.* § 2945.45(c) (enacted by Chapter 278). Such violations are described in California Civil Code section 2945.45(a)(1)(A).

57. *Id.* § 2945.45(a)(2) (enacted by Chapter 278).

58. *Id.* § 2945.45(d) (enacted by Chapter 278). To fund the administration of the program, Chapter 278 has established the Foreclosure Consultant Regulation Fund in the State Treasury which will consist of the registration fees submitted by foreclosure consultants. *Id.* § 2945.45(b) (enacted by Chapter 278).

59. The NCLC is a non-profit organization specializing in consumer law and has a “top priority . . . [of] providing support on issues involving consumer fraud, debt collection, consumer finance, energy assistance programs, predatory lending, and sustainable home ownership programs.” National Consumer Law Center, About Us, [http://www.consumerlaw.org/about/content/index\\_content.html](http://www.consumerlaw.org/about/content/index_content.html) (last visited Oct. 11, 2008) (on file with the *McGeorge Law Review*).

60. STEVE TRIPOLI & ELIZABETH RENUART, NAT’L CONSUMER LAW CTR., DREAMS FORECLOSED: THE RAMPANT THEFT OF AMERICANS’ HOMES THROUGH EQUITY-STRIPPING FORECLOSURE ‘RESCUE’ SCAMS 10 (2005), available at <http://www.nclc.org/news/content/ForeclosureReportFinal.pdf> (on file with the *McGeorge Law Review*).

61. *Id.*

may be deceived as to his or her rights and can even be outright defrauded.<sup>62</sup> For example, in “bait and switch” scams, homeowners do not realize that they are relinquishing ownership to their home due to the use of fraudulent or forged deeds.<sup>63</sup> Chapter 278 addresses such circumstances by extending the period of contract-rescission with foreclosure consultants from three to five days.<sup>64</sup> In giving homeowners a longer grace period to learn their rights or sift through a potentially fraudulent contract, Chapter 278 decreases the probability that such a scam will be successful.<sup>65</sup>

Chapter 278 requires that the foreclosure consultant acquire a \$100,000 surety bond for the benefit of the homeowner, further minimizing the hardship incurred by defrauded homeowners.<sup>66</sup> The bond’s proceeds are distributed to the homeowner if he or she suffers damages based on the violation of any law by the foreclosure consultant,<sup>67</sup> guaranteeing some recompense if a homeowner is taken advantage of by a foreclosure consultant.

Although foreclosure affects homeowners across all demographics,<sup>68</sup> Chapter 278 provides particular support to immigrant homeowners, a class that has been hit hard by the recent upsurge in foreclosures and a class that is often exploited by scammers.<sup>69</sup> The relatively high rate of foreclosure among immigrant homeowners stems from predominantly lower paying jobs, unfamiliarity with the United States mortgage market, and language difficulties.<sup>70</sup> These particular characteristics have made this class of homeowners particularly vulnerable to foreclosure itself and the fraud that often accompanies such foreclosure.<sup>71</sup>

The use of “affinity marketing,” in which the scam artist targets those of similar race or religion and exploits these commonalities to build trust, often exacerbates the prevalence of foreclosure scams among immigrant homeowners.<sup>72</sup> Chapter 278 addresses this exploitation through its language disclosure requirements.<sup>73</sup> Because homeowners have the right to demand all

62. *Id.* at 8-10.

63. *Id.* at 8-9.

64. See *supra* Part III.A (discussing how Chapter 278 bolsters homeowners’ rights).

65. See TRIPOLI & RENUART, *supra* note 60, at 7 (noting the inherent lack of clarity among homeowners when facing foreclosure as to how much time they have to make “crucial decisions”).

66. See *supra* Part III.A (discussing how Chapter 278 bolsters homeowner’s rights).

67. *Id.*

68. See *supra* Part I (discussing the foreclosure experiences of disparate California citizens).

69. See Kirstin Downey, *Foreclosure Wave Bears Down on Immigrants*, WASH. POST, Mar. 26, 2007, at A1 (“Places where immigrants cluster have been particularly hard-hit.”).

70. *Id.*

71. Creola Johnson, *Stealing the American Dream: Can Foreclosure-Rescue Companies Circumvent New Laws Designed to Protect Homeowners from Equity Theft?*, 2007 WIS. L. REV. 649, 663 (2007) (“Immigrant vulnerability characteristics include language difficulties, lower market familiarity, less support from family and friends, less education, poverty, and undocumented alienage.”).

72. See TRIPOLI & RENUART, *supra* note 60, at 10 (“‘AFFINITY MARKETING,’ where . . . people like you are on your side, and . . . they’re protecting you from those who don’t have your best interests at heart.”).

73. See CAL. CIV. CODE § 2945.3(c) (amended by Chapter 278) (requiring a copy of a completed contract in any of the five most common non-English languages spoken by Californians if requested by the

contracts in one of the five most commonly used languages in California other than English,<sup>74</sup> and because the foreclosure consultant has an obligation to disclose this right,<sup>75</sup> individuals who are not proficient in English are less likely to fall victim to scams involving contracts they can neither read nor understand. Therefore, this newly enacted homeowner's right hinders the ability of the dishonest foreclosure consultant to use trust through a common language as a means to persuade homeowners to enter into a contract that contains unfavorable terms masked by a language deficiency.<sup>76</sup>

### B. Targeting Particular Scams

Among other changes in policy, Chapter 278 places two new explicit limitations on foreclosure consultants: (1) consultants are no longer able to assist homeowners in recovering any surplus proceeds from a foreclosure sale; and (2) consultants cannot attain a power of attorney from a homeowner for any reason.<sup>77</sup> The first limitation seeks to eliminate the "Surplus Funds" scam.<sup>78</sup> For example, if a home is foreclosed and sold at auction, the previous homeowner is entitled to surplus proceeds if the home is sold for more than what is owed on the mortgage, and any additional taxes.<sup>79</sup> A "consultant" may try to charge excessive amounts to apply for these funds on behalf of the prior owner, when in reality it often costs less than \$100 for the individual to do it on his or her own without the assistance of an attorney.<sup>80</sup> By prohibiting a foreclosure consultant from entering into agreements to assist homeowners in attaining such funds,<sup>81</sup> Chapter 278 eliminates the consultant's ability to charge excessive fees and take advantage of unsuspecting homeowners.<sup>82</sup>

home owner).

74. See CAL. CIV. CODE § 1632(a)(3) (West Supp. 2009) (listing Spanish, Chinese, Tagalog, Vietnamese, and Korean as the five most common languages). The five available languages do not account for all languages other than English spoken by Californians. See *id.* (discussing the percentage of Californians who speak one of the five enumerated languages in their household).

75. See *supra* Part III.A (discussing how Chapter 278 bolsters homeowners' rights).

76. See Kelly Bennett, *Foreclosure Wave Said to Hit Latinos Hard*, VOICEOFSDIEGO.ORG, Apr. 13, 2007, <http://www.voiceofsandiego.org/articles/2007/04/18/housing/932foreclosure041307.txt> (on file with the *McGeorge Law Review*) (demonstrating the obstacles facing non-English speaking homeowners in real estate transactions, forcing them to rely on those they deal with when there is no language disclosure requirement).

77. See *supra* Part III.B (discussing Chapter 278's additions to governance of foreclosure consultants).

78. See CAL. CIV. CODE § 2945.4(h) (amended by Chapter 278) (eliminating the ability to facilitate the release of "surplus funds" from a foreclosure sale).

79. See N.J. DIV. OF CONSUMER AFFAIRS, SURPLUS SCAMS: HOW TO AVOID THEM (2007), <http://www.state.nj.us/lps/ca/brief/surplus.pdf> (on file with the *McGeorge Law Review*) (describing the surplus scam as attempted relative to a sheriff's sale).

80. *Id.*

81. See CAL. CIV. CODE § 2945.4(h) (amended by Chapter 278) (eliminating the ability to facilitate the release of "surplus funds" from a foreclosure sale).

82. See N.J. DIV. OF CONSUMER AFFAIRS, *supra* note 79 (describing how a Surplus Funds scam operates)

Chapter 278 also limits a foreclosure consultant's ability to engage in scams involving "equity skimming."<sup>83</sup> In such a scam, a "rescuer" coaxes a homeowner to sign over the deed to his or her property on promises of securing the homeowner a lower-rate mortgage.<sup>84</sup> However, instead of lowering the interest rate, the "rescuer" takes out a bigger mortgage on the property through an accomplice's good credit, pays off the old mortgage, signs over the property to a third party, and keeps the difference between the two mortgages.<sup>85</sup> Thus, the original homeowner loses the house, the "rescuer" ends up with any equity that was left in the house, and the third party accomplice now owns the home.<sup>86</sup> A power of attorney given to the "rescuer" by the homeowner often effectuates the deed transfer because such a document gives the "rescuer" the ability to convey real property on behalf of the homeowner.<sup>87</sup> In prohibiting foreclosure consultants from taking power of attorney from a homeowner, Chapter 278 removes one of the tools necessary to complete such scams.<sup>88</sup>

### C. *Joining the Oversight Regime*

Those dealing in real estate transactions in California are subject to oversight by the State.<sup>89</sup> With the enactment of Chapter 278's registration requirements, foreclosure consultants are now subject to similar governance.<sup>90</sup> The opportunity to provide unscrupulous services relative to real estate transactions prompted California to pass the nation's first real estate licensing law in 1917.<sup>91</sup> Currently, the Commissioner of the California Department of Real Estate enforces these laws for the protection of the public in real estate transactions because the commissioner has the authority "to ascertain that persons acting in the capacity of a broker or salesperson meet certain standards of knowledge and honesty."<sup>92</sup> The

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83. See Robert Gearty, 'Angels' Hit Desperate Homeowners with Foreclosure Scam, N.Y. DAILY NEWS, Oct. 21, 2007, [http://www.nydailynews.com/news/2007/10/21/2007-10-21\\_angels\\_hit\\_desperate\\_homeowners\\_with\\_for.html](http://www.nydailynews.com/news/2007/10/21/2007-10-21_angels_hit_desperate_homeowners_with_for.html) (on file with the *McGeorge Law Review*) (describing how a typical equity skimming scam works).

84. See *id.*

85. See *id.*

86. See *id.*

87. See CAL. PROB. CODE § 4128 (West Supp. 2009) (providing that any durable power of attorney must include a description stating that the power of attorney gives the agent the right to convey real property on behalf of the principal).

88. See Gearty, *supra* note 83 (describing the use of power of attorney in a typical equity skimming scam)

89. See generally CAL. CODE REGS. tit. 10, §§ 2705-3109 (2008) (containing regulations of the Real Estate Commissioner).

90. See *supra* Part III.B (discussing Chapter 278's additions to governance of foreclosure consultants)

91. CAL. DEP'T OF REAL ESTATE, REFERENCE BOOK—A REAL ESTATE GUIDE 1 (2000), available at [http://www.dre.ca.gov/pdf\\_docs/ref01.pdf](http://www.dre.ca.gov/pdf_docs/ref01.pdf) (on file with the *McGeorge Law Review*). The courts declared this law to be unconstitutional; a revised version was passed in 1919 that has since been upheld by the courts. *Id.*

92. *Id.* at 2-3. Business and Professions Code sections 10131, 10131.1-1031.4, 10131.45, and 10131.6 define the scope of a real estate broker's activity that requires licensing. *Id.* at 3.

commissioner can discipline licensed brokers acting in their capacity as either principals or agents of a real estate transaction.<sup>93</sup>

While Chapter 278's newly-enacted governance requirements include government oversight, this oversight is performed by the Department of Justice, not the Department of Real Estate (which is accustomed to dealing with such transactions).<sup>94</sup> Further, such requirements do not include licensing, only a background check.<sup>95</sup> This registration requirement for foreclosure consultants may improve honesty standards within the industry, but it likely will not provide a level of confidence in the system comparable to that of real estate broker licenses—a regulatory regime that requires individuals to pass a test of knowledge regarding real estate subject matter, ultimately attesting to their competency to perform the licensed act. However, the enforcement measures promulgated by Chapter 278 do create confidence that potential foreclosure consultants will participate in the registration requirement, as those not abiding by the requirement can be fined up to \$25,000 and jailed for up to a year.<sup>96</sup> This incentive for potential foreclosure consultants to register helps ensure that those providing services to individuals facing foreclosure are screened for characteristics that would suggest future deceitful practices.

## V. CONCLUSION

“The volume of foreclosed homes keeps rising and isn't likely to tail off soon.”<sup>97</sup> It is expected that the number of foreclosures will not begin to decline until 2010, and California continues to be among the states most heavily affected.<sup>98</sup> Foreclosure scams have existed prior to Chapter 278's enactment and will likely continue to exist beyond its enactment.<sup>99</sup> However, California registration requirements and additional rights for homeowners will help to prevent foreclosure scams by empowering homeowners, targeting prevalent scams, and providing oversight of those conducting such transactions.<sup>100</sup> In case these measures fail, and a homeowner still falls victim to one of these scams, a surety bond requirement will guarantee some relief.<sup>101</sup> While Chapter 278 may do

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93. *Id.*

94. *See supra* Part III.B (discussing Chapter 278's additions to governance of foreclosure consultants).

95. *See id.* (discussing Chapter 278's additions to governance of foreclosure consultants).

96. *See id.* (discussing consequences of violating regulatory provisions).

97. Jerome Idaszak, *Rising Foreclosures Continue to Ripple Through Economy*, KIPLINGER LETTERS, June 9, 2008, [http://www.kiplinger.com/businessresource/forecast/archive/Rising\\_Foreclosures\\_Ripple\\_080609.html](http://www.kiplinger.com/businessresource/forecast/archive/Rising_Foreclosures_Ripple_080609.html) (on file with the *McGeorge Law Review*).

98. *Id.*

99. *See* Jay MacDonald, *Foreclosure Scams*, BANKRATE.COM, Oct. 25, 2007, <http://www.bankrate.com/brm/news/mortgages/20050728a1.asp?caret=6> (on file with the *McGeorge Law Review*) (“Foreclosure ‘rescue’ scams are nothing new.”).

100. *See supra* Part IV (discussing Chapter 278's impact on homeowners' vulnerability, targeted scams, and foreclosure consultant governance).

101. *See supra* Part IV.A (discussing the safeguard Chapter 278's surety bond requirement provides).

very little to keep those such as Michael Jackson, Laura Richardson, and Jose Canseco out of news headlines, hopefully it will make for fewer reports of stories like that of Sandra Barranon.

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