What is the purpose of the law?

The Distressed Property Law was passed during the 2008 Legislative session and signed into law by the Governor on March 30 for the purpose of protecting vulnerable property owners from scam artists who seek to steal the property owner's equity. For example, assume a property owner has $100,000 in equity in their home but loses their job and cannot make their mortgage payments. The property owner does not want to sell because they will be unable to buy another home, or maybe even rent a desirable home, because of the poor credit they have acquired since losing their job. After the notice of foreclosure is filed in the public record, a buyer/scam artist approaches the property owner and offers to take over the property owner's payments in exchange for a quit claim deed to the property. The buyer/scam artist offers to let the property owner stay in the property on a rental basis until the property owner can buy back the property from the scam artist. In reality, the scam artist knows that property owner will not be able to make the rent payments and will never be able to afford to buy the house back. Eventually, the scam artist evicts the property owner, who is now just a tenant, and sells the house, pocketing property owner's $100,000 equity. The law was intended to stop that type of transaction.

When does the law go into effect?

The law took effect June 12, 2008.

How did we get here?

Following is a brief history of how HB 2791 was passed:

1. January 16 — HB 2791 was introduced (see original bill draft as written by the Attorney General's office to help protect financially strapped homeowners from equity skimming and foreclosure rescue scams), and the REALTORS® began tracking it. The bill passed the House, and then went to the Senate. The version of the legislation passed by the House did not include the broad definition for “Distressed Home Consultants” until it was added in the Senate.

2. March 6 — the Senate adopted a striking amendment and approved the amended bill (39-6). This new striking amendment included the language regarding “Distressed Home Consultants” and form requirements from SB 6695 that had died in the Senate.

3. March 8 — (less than a week before the Legislature adjourned) the House sent the bill back to the Senate and asked the Senate to “recede” (back off) from the Senate's amendment.

4. March 11 — (just 48 hours before the Legislature adjourned) a new striking amendment was introduced on the Senate floor and the Senate approved the amended bill (46-3). An amendment to the striking amendment was also introduced, which the Senate adopted, exempting some other professionals from the bill.

5. March 12 — with pressure to ensure the bill addressing problems with distressed home transactions was passed by the legislature before the end of session, and with little time remaining, the House concurred with the Senate amendments and approved the bill (97-0).

6. March 13 — Legislature adjourns.

REALTORS® did not provide input to the striking amendments during the session's final days, relying on the Attorney General's understanding that the House would not agree with the Senate version. Legislators did not fully comprehend the ramifications of the well-intended legislation on the real estate industry, intending for the legislation to only affect distressed property transactions.

REALTOR® lobbyists and real estate attorneys who were following these developments, communicated with the Attorney General's office and key legislators on several occasions to indicate our concerns with certain aspects of the legislation while it was in the policy committees, and after the House refused to concur with the Senate amendments.

What are we doing to fix the problem?

Messages have been sent to every state legislator that we must address the problems created by the legislation. The Attorney General,s Office understands the problems the law creates and has committed to work with us for solutions.

We are in the process of working with real estate attorneys and practitioners to determine the legislative solutions needed (including reviewing all the provisions of the bill and how it impacts the industry, such as liability, short sales, and how the legislation affects buyer's agents and normal real estate transactions). We are finding support for resolving the unintended consequences from both legislators and the Attorney General, and we are confident we will find appropriate solutions. Washington REALTORS® leadership will be meeting with the Attorney General's office to discuss legislative fixes for the bill on July 2. On July 15 the AG's Office, Consumer Protection Division, has invited REALTORS® to participate in a work group to address ways to correct the Distressed Property Law in the 2009 legislative session.

How do we prevent this in the future?

Let's face it. This should not have happened. As Washington REALTORS®, it is our responsibility to protect the industry from legislation such as this. We need to do everything we can to ensure it does not happen again. Therefore, in addition to finding the appropriate legislative fix, we have also meticulously reviewed our legislative process to take steps to make sure we prevent it from happening in the future. Though we reviewed more than four hundred bills this session for their impact on the real estate industry (including HB 2791), we failed to catch the implications of the final version of HB 2791 that was passed during the last 48 hours of the session.

Ultimately, it took a team of industry attorneys several weeks to understand the full impact of HB 2791. This situation has dramatically demonstrated that we must engage our industry attorneys in legal review of legislation (often on short notice) to understand potential legal ramifications on the real estate industry during the often complicated bill-making process.

We hope this provides you with some insight into how the distressed properties law was passed and what REALTORS® are doing to address the challenges created by this legislation. Please let us know if you have any questions or need additional information. We will be updating you regularly on compliance with the law and any progress on solutions for next legislative session.

Why is the law causing changes in the real estate industry?

An unintended consequence of the law has the potential for dramatically increasing the duties owed by a real estate agent to a distressed homeowner. The law defines the term “distressed home consultant” as anyone who helps or offers to help a distressed homeowner in a variety of ways. For example, if agent offers to save the distressed home from foreclosure by selling the home prior to foreclosure, it is possible that the law will be interpreted to mean that agent is a distressed home consultant. If seller is a distressed homeowner and a real estate agent contacts the short sale lender to obtain a reduced payoff or to delay a foreclosure sale, the real estate agent may be a distressed home consultant. If agent writes an offer on a distressed home and the transaction will close within 20 days of a foreclosure sale, buyer's agent may be a distressed home consultant, and the buyer may be a distressed home consultant.

What is required of a distressed home consultant?

Before a distressed home consultant may assist a distressed homeowner, the two must have a written agreement. The current listing agreement does not satisfy the requirements for a distressed home consultant agreement. The distressed home consultant agreement must be in larger type than the existing listing agreements and must contain specific language not contained in existing listing agreements. In addition, a distressed home consultant owes fiduciary duties to the distressed homeowner which are more extensive than the statutory duties owed to a seller under the Agency Law.

Should agents, who already have a signed listing agreement with seller on June 12, ask sellers to sign a new agreement?

Yes. It is the recommendation of the Washington REALTORS® and NWMLS that agents and brokers, who use the statewide listing agreement, require sellers who are in current listing agreements, to sign a new listing agreement or listing agreement addendum. New statewide forms that comply with the law are being drafted and will be released, with comprehensive instructions for their use. The new agreements will need to be signed not later than June 12, the effective date of the law.

What if seller's home is already listed prior to June 12 and seller refuses to sign the new listing agreement?

If agent or broker knows that seller is a distressed homeowner and seller refuses to sign the distressed home consultant agreement, then listing broker will likely have to terminate the listing agreement with seller. The new law provides that a distressed home consultant **MUST** have a written agreement, conforming to the new law's requirements, signed by seller, or the distressed home consultant may not provide services to the seller. In other words, if seller will not sign the distressed home consultant agreement, the new law prohibits broker and agent from providing the services agreed upon under the original listing agreement. Based on the new law, the original listing agreement will likely be unlawful and thus unenforceable.

If agent or broker does not know that seller is a distressed homeowner, there will still be a statewide agreement that broker will need seller to sign but the agreement has not yet been created. More information will be forthcoming on that issue.

In addition, for NWMLS members, new listing agreements will be required because the new listing agreements will protect not just the listing agent and broker, but also the selling agent and broker, and possibly even the buyer. NWMLS will not accept listings on the old listing agreement form effective June 12, 2008.

What should agents tell sellers when explaining the need for a new listing agreement?

Agents should tell sellers that the law has changed, necessitating the signing of some new forms by sellers and brokers. Agents should explain that the law has a valid and legitimate purpose, to protect consumers and prevent fraud, but that the law also requires certain action by real estate agents. The actions required of real estate agents can only be determined based on the warranties that seller can make regarding seller's status as a distressed home consultant.

The Washington REALTORS® is working with the Washington State Attorney

General on the development of literature that will be produced by the Attorney General for dissemination to consumers. At no point should a real estate agent be in the position of trying to explain the law to a client. Rather, it is anticipated that a real estate agent will be able to provide the literature prepared by the Attorney General to a client and advise the client to seek the advice of their own lawyer if more information is needed. As of the writing of these FAQs, there is no firm commitment from the Attorney General that the anticipated literature will be produced, what it will include or when it will be available. If the Attorney General does not prepare any literature, the Washington REALTORS® and NWMLS will prepare a handout for agents to give to seller's to help to explain the new law and the reason for the new listing agreement.

Should multiple listing services, other than NWMLS, develop policies and new listing agreements related to this new law?

Yes. All MLS's will have to develop new policies and new forms related to this new law. Leadership for each local MLS should meet with MLS legal counsel as soon as possible to develop policies and new forms. To the extent that any REALTOR-owned MLS in Washington State chooses to do so, the MLS is welcome to adopt the new policies that NWMLS will implement. Likewise, any REALTOR-owned MLS in Washington State is free to use the statewide listing agreement and the other new listing forms.

Is it true that the listing agreement/distressed home consultant agreement must be printed in seller's first language?

The law requires that the distressed home consultant agreement be written in the language that agent uses to describe his or her services to seller and also in English. In other words, if agent speaks to seller in a language other than English, then agent must translate the listing agreement/distressed home consultant agreement into the language used by seller and agent. Agent is required to achieve total accuracy in the translation. It is the recommendation of the Washington REALTORS® and NWMLS that agents and broker have the agreements professionally translated rather than translating the agreements personally. Seller and agent/broker must sign the translated agreement and the English agreement.

What properties are considered to be "distressed homes?"

A distressed home is owned by a person who falls into any of the following categories:

- the homeowner is at risk of losing the home due to nonpayment of taxes;
- the homeowner is at least 30 days late on a mortgage payment;
- the homeowner is in default of any mortgage term such that the lender could accelerate the balance owing; or
- the homeowner believes they are likely to default on the mortgage within 4 months and tells this to, among others, a real estate agent.

Must a seller identify themselves as a distressed homeowner before the law can protect them?

No. If a property owner fits any of the definitions of a distressed homeowner, then the law protects them as a distressed homeowner even if they never communicate that fact to anyone and even if they do not realize themselves that they are a distressed homeowner.

Are agents and brokers prohibited from participating in any types of real estate transactions?

Yes. The new law defines a particular type of transaction as a "Distressed Home Conveyance (or Reconveyance)." The statewide purchase agreement (Form 21) may not be used to create a Distressed Home Conveyance. A Distressed Home Conveyance is one in which the buyer takes title to the property but allows seller to continue living in the home with the promise that seller can buy the property back from the buyer at a future date or share in the equity of the sale of the property. The new law requires that a Distressed Home Conveyance purchase agreement include certain language that is not contained in Form 21 and that the Distressed Home Conveyance purchase agreement may be terminated by seller within five days following signing. If agent intends to write a purchase agreement that would constitute a Distressed Home Conveyance, agent **MUST** seek legal counsel for assistance drafting that agreement as Form 21 is not intended to meet the requirements of the law related to that type of transaction.

Are there any different requirements for maintaining transaction records under the new law?

Yes. The Distressed Home Consultant Agreement must be kept for at least five years following closing of the sale or termination of the agreement. It is recommended that all transaction records be maintained, at a minimum, for this five year period.

How was this law passed without the Washington REALTORS® intervention?

The Washington REALTORS® closely monitored the legislation as it was proposed by the Attorney General as the legislation progressed through the House and the Senate. Both the Washington REALTORS® and the AG were satisfied that the Bill, as proposed and intended by the AG, did not include the adverse language now causing the problems. However, after the Bill was passed in one form by the House and in a slightly different form by the Senate, it moved into a process that occurs outside the arena where public comment or influence are allowed. It was at that stage that the adverse language was added and the Bill was immediately voted out of the Legislature without any opportunity for the AG or the Washington REALTORS® to testify about the problem.

If the fact that seller is distressed is not disclosed through the MLS printout, does that mean that listing broker must protect that information from other agents in broker's office?

Yes. If listing broker determines that the fact that seller is distressed is not a material fact requiring disclosure through the MLS, then listing broker must protect that information from potential buyer agents in listing broker's office.

When is an owner occupied property no longer owner-occupied?

The law provides that it applies to property that is occupied by the owner as the owner's primary residence. If the owner vacates the home, with the intent not to return, then the property is no longer occupied by the owner as the owner's primary residence. If the owner has no intention of returning to the home, then the owner has most likely removed all of the owner's personal property. If the owner has not removed their personal property, then there should be a

presumption that owner has not vacated the property and something more should be required to substantiate that owner has vacated.

Prior to June 12, buyer purchased property from a seller who is in foreclosure and who occupies the property as seller's primary residence. Buyer has relisted the property through listing broker. Original seller will continue to live in the property while buyer tries to sell the property to another buyer. What implications does this scenario hold for listing broker on June 12?

On June 12, the owner, who is in foreclosure, will still be in title to the property and will still occupy the property as their primary residence. Accordingly, on June 12, the owner will be a distressed seller. The fact that seller signed a purchase agreement with a buyer prior to June 12 will not make the seller something other than a distressed seller.

However, broker's listing agreement is signed not with the distressed seller but with the buyer/new seller. The relevant inquiry is whether the listing broker is a distressed home consultant based on these facts. The new law says that listing broker is a distressed home consultant if listing broker or agent solicits or contacts the seller in almost any manner and represents or offers to save the property from foreclosure among other things.

A significant risk in this scenario is that listing broker will not have the distressed seller sign the DH listing agreement so broker will not have the protections afforded by that agreement. Accordingly, this is a very risky situation. There is a very real possibility that listing broker will be considered a distressed home consultant if listing broker or agent has any contact with the seller, which of course listing agent or broker would if seller is occupying the home. Without the DH listing agreement in place, there is no contractual provision identifying the limits of listing broker's and agent's role to seller. This is a troubling situation at best and if listing broker cannot or chooses not to terminate the listing agreement with buyer, then listing broker should work with their own legal counsel to minimize, if possible, the significant risks associated with this situation.

If broker attaches an addendum to the DH listing agreement specifying that broker or agent will provide Distressed Home Consultant Services, must that addendum also be in 12 point type and must it be translated into a different language if the DH listing agreement is translated into a different language?

Yes. If an addendum is attached to the DH listing agreement specifying Distressed Home Consultant services that listing broker or agent will provide to seller, that addendum must be in 12 point font. Likewise, if the DH listing agreement was translated into a language other than English, because listing agent used a language other than English to describe listing agent's services to seller, then the addendum would also have to be translated into that other language.