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Appeal from the Jefferson County District Court
Honorable Brooke R. Jackson, District Court Judge
Civil Action 2003 CV 3356

Plaintiffs-Appellants and Cross-Appellees:

STEVEN E. DEHERRERA; and
DONNA M. LEWIS

v.

Defendants-Appellees and Cross-Appellants:

EQUITYLINK, LLC; EQUITYLINK I, INC.; RESIDENTIAL MORTGAGE ACQUISITION CORPORATION; RESIDENTIAL PROPERTY MANAGEMENT SPECIALISTS, INC.; WILLIAM J. TURNER; JAMES B. ELDER; and JOHN B. HAMNER

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Case No.: 08CA717

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STATEMENT OF ISSUE PRESENTED FOR REVIEW

1. Whether the district court correctly ruled that the HomeSaver program was not subject to the supervised lending provisions of the Colorado Uniform Consumer Credit Code ("UCCC").

STATEMENT OF FACTS

A. Nature of the Case.

In this case, Appellants, Steven E. DeHerrera and Donna M. Lewis (the "DeHerreras"), seek to have it both ways. The sole issue on appeal is whether a set of sale/leaseback and option-to-repurchase transactions that gave participants a chance to rescue their homes from foreclosure – known as the HomeSaver program – fall within the purview of the UCCC. The trial court concluded that the HomeSaver transactions were loans in substance despite their express sale/leaseback terms. It further held that if the transactions were treated as loans, they must be considered first mortgages, which are exempted from the UCCC. The DeHerreras, however, wish to treat the transactions as loans when it suits them, but as sales for purposes of the first mortgage exemption. This cannot be done. The HomeSaver transactions are either sales or first mortgage loans; but in either event, they are not regulated by the UCCC.

This case below was the largest of a series of suits brought by individuals who participated in the HomeSaver program. The DeHerreras, brought suit against EquityLink, LLC, EquityLink I, Inc., Residential Mortgage Acquisition Corporation, and Residential Property Management Specialist, Inc., along with the companies' principals, William J. Turner, James B. Elder, and John B. Hamner (collectively "EquityLink"), for alleged violations of various consumer protection statutes.

The trial court certified a class of HomeSaver program participants, and the case proceeded to a bench trial on four claims. The DeHerreras prevailed on two claims. They now appeal the court's dismissal of their UCCC claim.

B. Statement of Facts.

1. The HomeSaver Program.

EquityLink's HomeSaver Program provided homeowners in danger of foreclosure a means to rescue their properties and remain in their homes while they sought to regain their financial footing. (Pl.Ex. 1, at 1.) Under the program, EquityLink purchased properties in foreclosure either directly from the owners or from the public trustee after completion of the foreclosure process. (Id.) In either case, the value of the home was determined through an independent appraisal. (Id.; D.Ex. A-1.) The prior owners, called the "optionholders," signed a five-year

lease agreement, allowing them to remain in their homes. (Pl.Ex. 1, at 1-2; Pl.Ex. 19.) The parties also entered into a third contract, a five-year option agreement, which gave the optionholders the right to repurchase the property. (Pl.Ex. 1, at 3; Pl.Ex. 20; Pl.Ex. 21.) The repurchase price was the original appraised value increased by 2.99% to 3.99% per year. (Pl.Ex. 20, ¶9; D.Ex. O, ¶9.) A portion of the optionholders' equity at the time of the sale was set aside as an option deposit and applied to the repurchase price upon exercise of the option. (Pl.Ex. 20, ¶9(b); D.Ex. O, ¶9(b).) After completing these transactions, EquityLink sold the properties to individual investors who were better able to capture the tax benefits generated by the program. (Pl.Ex. 33.) EquityLink retained an interest in the future income generated by the transaction and collected amounts due under the lease and option contracts from the optionholders. (Pl.Ex. 35; Pl.Ex. 36; Pl.Ex. 37.)

The program featured a truly independent appraisal and complete disclosure of all terms. (Pl.Ex. 1.) An escalating monthly payment structure was designed to provide relief – in the form of lower payments – early in the lease period when participants were most likely to be facing a financial crisis. Of the 278 individuals who participated in the program, 67 succeeded in saving their home, and another 68 participants remained in the program at the time of trial. (Trans. No.7745718 at

11.) This was a remarkable success rate given that essentially every participant who entered the program could not afford to make the monthly mortgage payment and was in, or facing almost certain, foreclosure. Although the HomeSaver inherently included an element of risk, it provided an otherwise unavailable opportunity for participants to escape their financial crises.

2. The Anderson Transaction.

Antoinette L. Anderson and Alton P. Anderson ("the Andersons") provide a fairly typical example of a HomeSaver transaction. The Anderson's home was appraised at $210,000. (D.Ex. L-1, at 1, line 400.) They owed, however, $156,000 on a first mortgage, nearly $48,000 on a second mortgage, and had unpaid property taxes. (Id. at 1, ll.504.0. 504.2, 505.) Facing an imminent foreclosure, the Andersons took part in the HomeSaver program. (D.Ex. I-1.)

EquityLink purchased their home for 100% of its appraised value. (D.Ex. L-1, at 1, l.400.) The proceeds were used to pay off the existing debt encumbering the property, and $23,100 was set aside as an option deposit to be credited toward an eventual repurchase. (Id. at 1, ll.504.0. 504.2, 505; id. at 3, l.400.)[1] The parties entered into a five-year lease agreement under which the Andersons agreed to

[1]EquityLink was able to negotiate a discount with the holder of the second mortgage in order to make the transaction viable. (See id. at 3, l.425.)

make monthly rental payments of $954, which rose to $1,165 in the fifth year of the lease. (D.Ex. M-1, ¶6.) They also entered into an option agreement under which the Andersons would make monthly option fee payments starting at $517 and increasing 5.1% per year. (D.Ex. N-1, ¶8.) The Andersons could repurchase the property two years after the initial transaction for $201,622. (Id., ¶9.) Thus, the Andersons were able to avoid foreclosure and remain in their home, and were given an opportunity to repurchase the home in two years for less than their mortgage balances when they were in foreclosure.

3. The DeHerrera Transaction.

The DeHerreras' transaction followed this same basic pattern, although in their case, EquityLink purchased the property from the public trustee after foreclosure. In 1999, the DeHerreras were unable to make payments on their Arvada, Colorado home. (D.Ex. F.) They owed approximately $157,000 on their first mortgage, and another $25,000 on a second mortgage. (Trans. No.7745718 at 4.) Additionally, an attorney who represented the DeHerreras in their bankruptcy proceeding had placed a $3,000 lien on the home, and the DeHerreras were behind on their property taxes. (Id.; Pl.Ex. 23, l.511.) Although their home was appraised at $200,000 – slightly more than the total debt – a real estate agent's commission and other transaction costs would have swallowed up any equity had the

DeHerreras attempted to sell the property. Further, because of their recent bankruptcy and inability to make mortgage payments, refinancing was not an option. (Trans. No.7745718 at 4.)

Faced with the certain loss of their home and equity, the DeHerreras turned to EquityLink as a last best chance. On April 19, 2000, the holder of the first mortgage on the DeHerreras' home purchased it at a foreclosure sale, leaving the DeHerreras 75 days to redeem. (Id. at 6.) Before the redemption period expired, they executed a promissory note in favor of EquityLink secured by the property. (Pl.Ex. 26.) The note provided EquityLink with redemption rights as a junior lien holder. After the second mortgage holder failed to redeem, EquityLink redeemed the property on July 18, 2000 and obtained a Public Trustee's Deed on July 20, 2000. (Pl.Ex. 28, at 2; Pl.Ex. 30.) It financed the purchase with a loan from First Tier Bank. (Pl.Ex. 38, at 1, line 504.)

The DeHerreras agreed to pay EquityLink monthly rental payment that began at $692 the first year and escalated to $834 the fifth year. (Pl.Ex. 18, ¶6.) They further agreed to a monthly option payment that began at $835 and increased by 4.8% per year. (Pl.Ex. 20, ¶8.) The DeHerreras were credited with a $30,000 option deposit, and obtained the right to repurchase the property for $188,123 on July 31, 2004. (Id., ¶¶6, 9.)

Shortly after EquityLink redeemed the property, it sold the property to private investors, the Michaleks, who obtained a loan from Washington Mutual to fund their purchase. (Pl.Ex. 38.) The structure of the program provided tax benefits to the Michaleks, which provided an important incentive for private investor participation. (Pl.Ex. 33.) EquityLink retained the right to a portion of the future income from the transaction, and an interest in a percentage of any repurchase proceeds. (Pl.Ex. 35, at 2, ¶¶13, 15.) Unfortunately, the DeHerreras were unable to keep up with their monthly payment obligations. (See D.Ex. C.) Following an eviction, in 2003 the Michaleks sold the home in 2004. (Pl.Ex. 40.)

C. Procedural History.

On July 26, 2004, the DeHerreras filed a second amended complaint asserting seven claims for relief and seeking to represent a class of HomeSaver program participants. (Trans. No.4026673.) Only the first claim, for violations of the UCCC, is at issue in this appeal.[2] With respect to that claim, the DeHerreras argued that the HomeSaver transaction was a disguised loan rather than a real estate transaction. (Id., ¶51.) Because EquityLink did not possess a license to make supervised loans, as defined in the UCCC, the DeHerreras claimed

[2]The DeHerreras ultimately prevailed on two of their claims. (Trans. No.7745718 at 33, ¶1.) Because the non-UCCC claims are not at issue in this appeal, for the sake of brevity EquityLink omits discussion of them.

EquityLink was liable for three times the amount of the finance charges associated with the "loans." (Id., ¶¶81-83.)

The court certified a class of HomeSaver program participants on May 12, 2004. (Trans. No.3596170.) The DeHerreras were designated as class representatives. (Id. at 7.)

EquityLink moved for summary judgment on the UCCC claim, arguing that the HomeSaver transactions patently were not loans. (Trans. No.4532742.) The court ruled that a genuine dispute of material fact existed as to "whether the transactions in question constitute, in substance, a 'loan' and a 'consumer loan'" and denied the motion (Trans. No.4767838 at 1-2.)

A bench trial was held from October 28 to November 4, 2005. (Trans. No.7745718 at 1.) On December 30, 2005, the court issued a thorough, 34-page Findings of Fact, Conclusions of Law, and Order of Judgment. (the "Order"). (Id.) The court held that the HomeSaver transactions were disguised loans:

> Despite the form of the transaction, its substance was that EquityLink did satisfy the obligations that burdened the property. The DeHerreras did incur debt in the sense that if they wanted to "save their home," which was the hallmark of the program, they had to religiously make their monthly payments, as well as the other payments, that were required to obtain the right to exercise the repurchase option.

(Id. at 15.) After examining the interlocking definitions of the UCCC, however, the court held that if the HomeSaver transactions were to be treated as loans, they must also be treated as first mortgages:

> The Court has looked at the substance of the transaction rather than its form. That is how the Court determined that this transaction, which in form is a lease with an option to purchase, but which in substance is a disguised loan. The Court cannot then ignore the substance and look at the form to find that there is no "first mortgage or deed of trust lien." There may be other "deeds of trust" that are created, such as to secure EquityLink's line of credit or to secure whatever loan is taken out by the investor who purchases the home from EquityLink. However, from the standpoint of the homeowner borrower, I simply cannot understand how the interest in land that secures the loan is anything other in substance than a first mortgage or deed of trust in substance.
>
> Therefore, while I understand that the UCCC must be construed liberally in favor of the consumer, and while I am satisfied that participants in the HomeSaver Program were charged extraordinary finance charges, the only intellectually honest conclusion I can reach after applying the definition of "consumer loan" in the statute is that these transactions were not "consumer loans." Accordingly, the Court does not reach the question whether these were "supervised loans" or the UCCC remedial provisions for making supervised loans without a license.

(Trans. No.7745718 at 21.)

The DeHerreras filed a motion to amend the Order, which was denied. (Trans. No.10523832; Trans. No.10995684 at 1.) Following lengthy post-trial proceedings attempting to establish damages for absent class members on the

successful claims, the court entered a Final Order and Judgment on December 18, 2007. (Trans. No.17700614.) The DeHerreras renewed their motion to amend the judgment, which was again denied. (Trans. No.17861585; Trans No.18674725.) The DeHerreras then timely appealed.

SUMMARY OF THE ARGUMENT

The district court held that the HomeSaver program was not subject to the UCCC. That holding was correct and should be affirmed. If the HomeSaver transactions are treated as loans, they must be considered first mortgages, which are explicitly exempt from the UCCC. The court correctly recognized that treating the HomeSaver transactions as loans in substance means that EquityLink never obtained valid title. Instead, EquityLink "loaned" money to the optionholders in exchange for an equitable mortgage on the property. Because those "loans" were used by the optionholders to either purchase the property or to pay off existing mortgages, they fall squarely within the UCCC's first mortgage exemption.

Moreover, if EquityLink never obtained true ownership of the properties – it had only a lien in the form of an equitable mortgage – it could not have granted valid mortgages to any other party: it is axiomatic that a party cannot convey an interest in real property greater than it possesses. Therefore, the mortgages cited by the DeHerreras are not senior to EquityLink's equitable mortgages. Nor do the

subordination clauses in the Option Agreements render EquityLink's equitable mortgages junior. Those clauses applied only to the repurchase rights held by the optionholders, not to the interests held by EquityLink. Further, the options to repurchase do not exist if the optionholders maintained title because a party cannot have a right to repurchase property it already owns.

The DeHerreras must accept the full consequences of treating the HomeSaver transactions as loans. If EquityLink lent the optionholders money, it did so in exchange for a first mortgage. Alternatively, if the HomeSaver transaction documents are given effect, the transactions are not loans and thus fall outside the scope of the UCCC. In either event, the UCCC does not apply.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY RULED THAT THE HOMESAVER PROGRAM DOES NOT IMPLICATE THE UCCC.

A. UCCC Definitions.

Central to this appeal are the UCCC's definitions of "consumer loan," and its exemption for a "[l]oan primarily secured by an interest in land." Under the UCCC

a "loan" is defined to include the "creation of debt by the lender's payment of or agreement to pay money to the consumer or to a third party for the account of the consumer." Colo. Rev. Stat. § 5-1-301(25)(a)(I). A "consumer loan" is:

> a loan made or arranged by a person regularly engaged in the business of making loans in which:
>
> (I) The consumer is a person other than an organization;
>
> (II) The debt is incurred primarily for a personal, family, or household purpose;
>
> (III) Either the debt is by written agreement payable in installments or a finance charge is made; and
>
> (IV) Either the principal does not exceed seventy-five thousand dollars or the debt is secured by an interest in land.

C.R.S. §5-1-301(16)(a). The definition of consumer loan, however, explicitly excludes any "[l]oan primarily secured by an interest in land." Id. That phrase is defined, in relevant part, as a "consumer loan" that is

> secured by a first mortgage or deed of trust lien against a dwelling to . . . [f]inance the acquisition of that dwelling; or . . . refinance, by amendment, payoff, or otherwise, an existing loan made to finance the acquisition of that dwelling, including a refinance loan providing additional sums for any purpose whether or not related to acquisition or construction.

C.R.S. §5-1-301(26)(a)(II). "First mortgage or deed of trust" means "a mortgage or deed of trust having priority as a lien over the lien of any other mortgage or deed

of trust on the same dwelling and subject to the lien of taxes levied on that dwelling." C.R.S. §5-1-301 (26)(d)(III).

B. If the HomeSaver Transactions Are Treated as Loans, They Fall Within the First Mortgage Exemption.

1. Treating the HomeSaver Transactions as Loans Means That EquityLink Never Obtained Valid Title.

As the district court correctly recognized, treating the HomeSaver program as loans in substance carries with it several consequences. If the form of the transaction is rejected in determining that it was a "loan," the Court "cannot then ignore the substance and look at the form" to determine whether it was a first mortgage. (Trans. No.7745718 at 21.) Characterizing the transactions in substance as loans (which is somewhat counterintuitive in light of their sale/leaseback structure) leads to several equally somewhat counterintuitive – yet logically corollary – conclusions.

The key consequence of treating a HomeSaver transaction as a loan rather than a legitimate sale/ leaseback is that it converts EquityLink from a bona fide purchaser to a lender. That fact – which the DeHerreras wholly fail to recognize – was central to the district court's analysis, and is dispositive of the present appeal. If the HomeSaver program resulted in a loan it could not also have resulted in a transfer of title. In other words, EquityLink either loaned money to the DeHerreras

or it purchased their home – it could not have done both. Colorado's equitable lien statute makes this point clear:

> Mortgages, trust deeds, or other instruments intended to secure the payment of an obligation affecting title to or an interest in real property **shall not be deemed a conveyance, regardless of its terms**, so as to enable the owner of the obligation secured to recover possession of real property without foreclosure and sale, but the same shall be deemed a lien.

C.R.S. §38-35-117 (emphasis added). Thus, when a sale is determined to be a disguised loan, the purported conveyance is ineffective. The "buyer" does not obtain title, but obtains an equitable mortgage, despite whatever terms the transaction documents contain. Consistent with the lien theory of mortgages adopted in Colorado, the holder of a mortgage possesses only a lien, not actual title. See, e.g., Hohn v. Morrison, 870 P.2d 513, 516 (Colo. Ct. App. 1993).

The effect of an equitable mortgage can be demonstrated by reviewing a fairly standard example of one. In Larson v. Hinds, 394 P.2d 129 (Colo. 1964), the Larsons borrowed $800 from Hinds. Id. at 131. They executed a promissory note in favor of Hinds and an escrow agreement setting up a payment schedule. Id. They also issued a warranty deed conveying their home to Hinds. The deed was to be delivered to Hinds, however, only if the Larsons defaulted on the promissory note. Id. After the Larsons defaulted, Hinds filed an unlawful detainer action

seeking to evict them. Id. at 130. The Larsons asserted equitable mortgage as an affirmative defense. Id. at 131. Although the trial court gave effect to the deed, the Colorado Supreme Court reversed, holding that "under the circumstances here present the arrangement was a security transaction as a matter of law and the court erred in holding the same to be an absolute sale." Id. at 133. The Court rejected the form of the transaction and treated it according to its substance: "The deed when executed, being simply a mortgage for the security of a debt, could not thereafter become anything else." Id. (quoting Marshall v. Russell, 158 P. 141, 142 (Colo. 1916)).

Although the HomeSaver transactions were substantially more complicated than the "sale" in Larson, the same basic principles apply. Most importantly, when a purported sale is determined to be a loan in substance, the "buyer" does not actually obtain title. With respect to properties that EquityLink purchased directly from the optionholders, treating the HomeSaver transactions as loans would thus mean:

- EquityLink did not actually purchase the home – instead, it obtained only an equitable mortgage secured by the property;

- The optionholders did not actually sell the home – instead, they retained ownership of the home and received a loan from EquityLink in exchange for an equitable mortgage;
- The "loan" given to the optionholders was used to pay off the existing mortgages or liens on the property;
- The lease and option payments were not lease and option payments – instead, they constituted monthly payments on the "loan" EquityLink provided to the optionholders; and
- When the optionholders exercised their option and repurchased the property, the purchase amount was really a final balloon payment extinguishing the debt owed to EquityLink.

Similarly, with respect to homes that EquityLink purchased out of foreclosure, treating the HomeSaver transactions as loans would mean:

- The optionholders, not EquityLink, redeemed the home from the public trustee. EquityLink instead only made a loan to the optionholders, secured by an equitable mortgage on the property;

- The optionholders did not lease the home from EquityLink – instead, the optionholders retained ownership of the home with the proceeds of the "loan" from EquityLink;
- The lease and option payments were not lease and option payments – instead, they constituted the monthly payments on the "loan" EquityLink provided to the optionholders; and
- When the optionholders exercised their option and repurchased the property, the purchase amount was actually a final balloon payment extinguishing the debt owed to EquityLink.

2. If the HomeSaver Transactions are Characterized as Loans, They Must be Treated as First Mortgages.

Each of the consequences listed above necessarily flows from the recharacterization of the HomeSaver transactions as loans rather than sale/leasebacks with options to repurchase. And with these consequences in view, the conclusion is unavoidable that the "loans" provided by EquityLink constitute "[l]oan[s] primarily secured by an interest in land." C.R.S. §5-1-301(16)(a). When EquityLink purported to purchase homes directly from the prior owners, treating the transaction as a loan means that EquityLink loaned money to the optionholders to pay off the existing debt and obtained an equitable mortgage secured by the

property. In other words, EquityLink provided a loan "secured by a first mortgage or deed of trust lien against a dwelling to . . . refinance, by amendment, payoff, or otherwise, an existing loan made to finance the acquisition of that dwelling." C.R.S. §5-1-301(26)(a)(II). Similarly, when EquityLink purported to purchase a home out of foreclosure, treating the transaction as a loan means that EquityLink loaned money to the optionholders to redeem the home out of foreclosure and obtained an equitable mortgage secured by the property. In other words, EquityLink provided a loan "secured by a first mortgage or deed of trust lien against a dwelling to . . . [f]inance the acquisition of that dwelling." Id.

3. The DeHerreras Attempt to Characterize EquityLink's Equitable Mortgages as Junior Liens Fails.

In their Opening Brief, the DeHerreras argue that EquityLink's interests in the properties do not constitute first mortgages because they would be junior to the loans EquityLink obtained for purchase money. (Open. Br. 8.) This argument fundamentally misconstrues the equitable mortgage doctrine. If the HomeSaver transactions are in fact loans, then EquityLink never obtained valid title to the property. See C.R.S. §38-35-117 (a loan in substance "shall not be deemed a conveyance, regardless of its terms"); Larson, 394 P.2d at 133 (absolute deed disguising a loan in substance "when executed" is "simply a mortgage for the

security of a debt").[3] Without valid title, EquityLink could not have encumbered the property with any mortgage. See Schiffner v. Chicago Title & Trust Co., 244 P. 1012, 1013 (Colo. 1926) ("[T]here can be no mortgage of any kind unless the mortgagor has some real estate to pledge."); Rose v. Roso, 204 P.2d 1075, 1075 (Colo. 1949) (party cannot transfer an interest in property greater than it possesses).

The loans that EquityLink obtained – from First Tier Bank in the DeHerreras case (see Pl.Ex. 38, at 1, l.504) – therefore could not have been senior to EquityLink's equitable mortgage because EquityLink did not have valid title to encumber. Accordingly, those loans did not result in a valid lien in favor of the third party lenders. Instead, treating the HomeSaver transactions as loans means that the funds EquityLink obtained from various banks were unsecured.

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[3]The DeHerrera class did not seek rescission of their HomeSaver transactions, or seek declarations as to title in this lawsuit. (See Trans. No.4026673.) A later class of HomeSaver participants, however, did request rescission in EquityLink's bankruptcy proceeding, and in subsequent suits. See McCool v. Hengeveld, No.07CA2145, at 3-5 (Colo. Ct. App. Oct. 23, 2008) (unpublished, attached hereto as Ex. A.) Those rescission claims were barred when the bankruptcy court confirmed a plan of reorganization premised on the continued operation of the HomeSaver program – a plan for which the class had notice but failed to object. Id. at 16-18. In compliance with this Court's rules governing the citation of unpublished opinions, EquityLink cites the McCool opinion, and provides a copy of it, only to explain the case history.

The same is true of the loans obtained by third party investors, such as the Michaleks, to purchase the property from EquityLink. (Pl.Ex. 38.) Because EquityLink did not obtain valid title, it could not have transferred valid title to the Michaleks, who accordingly could not have granted a security interest. See Schiffner, 244 P. at 1013; Rose, 204 P.2d at 1075. Recharacterizing EquityLink from purchaser to lender breaks the chain of valid title, rendering any subsequent attempts to encumber the property invalid.

In other words, EquityLink argued unsuccessfully below that the HomeSaver transactions were, as the parties intended them to be, sale/leasebacks. The **DeHerreras** argued successfully that the transactions were actually loans. They are now bound by the consequences of their successful argument; if the transactions are to be treated as loans in substance for the purpose of satisfying the definition of "consumer loan," they must be treated that way for purposes of the "first mortgage or deed of trust" exception. Recharacterizing the transactions as loans means that EquityLink never obtained title, and thus could not have encumbered the properties with valid third party mortgages. The other mortgages upon which the DeHerreras rely were thus invalid, and could not have been senior to EquityLink's equitable mortgages. Accordingly, an EquityLink equitable mortgage is a "[f]irst mortgage or deed of trust" because it is "a mortgage or deed

of trust having priority as a lien over the lien of any other mortgage or deed of trust on the same dwelling and subject to the lien of taxes levied on that dwelling," and the UCCC does not apply. C.R.S. §5-1-301 (26)(d)(III).

4. The Option Agreements' Subordination Clauses Do Not Convert EquityLink's Equitable First Mortgages into Junior Liens.

Section 13.1 of the DeHerreras' Option Agreement provides that the option to repurchase obtained by the DeHerreras is subordinate to certain deeds of trust placed on their home. (Pl.Ex. 21 at 9.) The DeHerreras seize on this term to argue that "the equitable lien in favor of the homeowner was junior to the first liens taken by lenders who financed the acquisition of the subject properties, first, by EquityLink and, second, by EquityLink's investors." (Open. Br. 8.) This argument suffers from several errors.

First, if the form of the HomeSaver contracts is respected, the HomeSaver transaction was not a loan. Only by ignoring the express terms of the contracts can the transactions be characterized as loans. (See § I.C, infra.) As the district court correctly recognized, one cannot ignore the terms to find a loan in substance, but then enforce the terms in deciding whether the first mortgage exemption applies. (Trans. No.7745718 at 21.) In fact, the clause upon which the DeHerreras rely provides an excellent example of the absurdity of attempting to pick and choose

various contractual clauses to enforce. When the transaction is treated as a loan, the DeHerreras' option right evaporates. If the DeHerreras possessed title to the property, they could not also possess an option to repurchase that same property. Accordingly, the subrogation provision cannot be applied in the fashion advocated by the DeHerreras.

Second, the provision cited by the DeHerreras simply provides that the DeHerreras' option to repurchase the property would be junior to certain deeds of trust. (Pl.Ex. 21 at 9.) It says nothing about the seniority of EquityLink's equitable mortgage – which is not a creature of contract. Even if the DeHerreras' option rights survived recharacterization – which they did not – the seniority of those option rights is a *non sequitur*. Regardless of the priority of the option rights, EquityLink's equitable mortgage would have priority over "the lien of any other mortgage or deed of trust on the same dwelling." C.R.S. §5-1-301 (26)(d)(III). The UCCC's first mortgage exemption does not rest on seniority over an option to purchase.

Third, the DeHerreras reverse the proper direction of the equitable mortgages. Treating a HomeSaver transaction as a loan in substance does not create an "equitable lien in favor of the homeowner" (Open. Br. 8), as the DeHerreras contend. Instead, the optionholders – referred to as the "homeowners"

by the DeHerreras –hold title to the property. The equitable mortgage created by the court's recharacterization creates a lien in favor of EquityLink, not the DeHerreras. It is that lien – the lien held by EquityLink – that has priority over any other purported lien on the property and is thus subject to the UCCC's exemption. Accordingly, the subordination clauses of the Option Agreements do not alter the fact that if the HomeSaver transactions are treated as loans, EquityLink's interests in the HomeSaver properties constitute first mortgages.

C. Alternatively, This Court Should Affirm the District Court's Dismissal of the DeHerreras' UCCC Claim Because the HomeSaver Program Involved Sales Rather Than Loans.

"[O]n appeal, a party may defend the judgment of the trial court on any ground supported by the record, regardless of whether that ground was relied upon or even contemplated by the trial court." People v. Eppens, 979 P.2d 14, 22 (Colo. 1999); see also People v. Quintana, 882 P.2d 1366, 1371 (Colo. 1994). In this case, EquityLink consistently argued below that the HomeSaver transactions were not loans, but were sale/leasebacks coupled with options to repurchase. (See, e.g., Trans No. 4532742 at 2; Trans No. 7111068 at 2-7.) Accordingly, if this Court concludes that the district court erred in ruling that the HomeSaver transactions were actually loan that create first priority equitable mortgages in favor of EquityLink, the Court should consider whether the court properly dismissed the

DeHerreras' UCCC claim on the alternative ground that the HomeSaver transactions were what they appear on their face to be: sale/leasebacks.

The UCCC applies only to "loans," which are defined as the "creation of debt by the lender's payment of or agreement to pay money to the consumer or to a third party for the account of the consumer." C.R.S. §5-1-301(25)(a)(I). Here, every document involved in the transactions clearly and expressly informs participants that the HomeSaver program is a sale and not a loan. The advanced disclosures provided to participants state that EquityLink operates the program by either:

> a) Purchasing your home directly from you for 100% of its Appraised Value, or
>
> b) Purchasing the "Certificate of Purchase" through the Public Trustee foreclosure process and crediting you with an Option Deposit of 15% of your home's Appraised Value, and
>
> c) Leasing it back to you under our **HomeSaver** plan which gives you the opportunity to repurchase the home during the next five years (the Option).

(Pl.Ex. 1, at 1.)

The contracts that form the HomeSaver transaction are similarly clear that the program results in a sale and leaseback rather than a loan. The initial contract states that EquityLink "will take title to the real property." (Pl.Ex. 2, at 1.) The

Lease Agreement – in addition to being entitled a "Lease Agreement" – states that the Owner is EquityLink, and provides for "Rent" payments. (Pl.Ex. 18, at 1.) The Option Agreement also identifies EquityLink as the "Owner" and grants the optionholders the right to purchase the property. (Pl.Ex. 20, at 1.) None of these documents leave any room for doubt that the transaction was a loan rather than a sale.

The express terms of the documents likewise make it clear that the transaction results in a sale, not the "creation of debt." C.R.S. §5-1-301(25)(a)(I). In fact, this case is substantively identical to Alien, Inc. v. Futterman, 924 P.2d 1063 (Colo. Ct. App. 1995). In that case, Alma Equities Corporation ("Alma") purchased a hotel from Alien, Inc. ("Alien"). Id. at 1065-66. Alien obtained a purchase money loan from Alma, secured by a deed of trust on the property. Id. at 1066. When Alien defaulted on the loan, Alma initiated a "friendly foreclosure" and purchased the property. Id. Following foreclosure, Alma leased the property back to a new company related to Alien, and granted it an option to purchase. Id. Those agreements similarly foundered, leading to litigation. Alien argued that the foreclosure/leaseback and option to repurchase transaction constituted a disguised loan – the precise argument the DeHerreras made in this case. In Alien, Inc.,

however, the district court granted summary judgment against Alien on its equitable mortgage claim, and the Court of Appeals affirmed:

> To constitute a mortgage, equitable or otherwise, a conveyance of property must be meant to secure the payment of an underlying debt or obligation.
>
> Here, the parties agreed that, as consideration for allowing foreclosure of the deed of trust given by Alma to plaintiffs, [Alien's related company] would be given a lease on the property and an option to purchase the property.
>
> There was, however, no underlying debt or obligation secured by the return of title to the property to the plaintiffs and the granting of a lease and option to [the related company]. Any rights Alma had in the property were extinguished upon expiration of the statutory period for redemption following foreclosure.

Id. at 1070.

This analysis applies with equal force here. Like Alien, the DeHerreras' rights to the property were extinguished following foreclosure. There was no underlying debt or obligation. Instead, EquityLink came into title by obtaining a Public Trustee's deed. EquityLink was the cognizable owner under all applicable real property records, including the tax rolls. EquityLink then provided the DeHerreras the right to possess the property and an option to repurchase in exchange for monthly rent and option payments. Like all participants in the HomeSaver program, the DeHerreras were not required to exercise their option

rights. There simply was no debt created by the program, and thus the transactions fall outside the scope of the UCCC.

CONCLUSION

There are two ways to view the HomeSaver program. The first is to enforce the contracts as written, in which case the transactions are sale/leasebacks with options to repurchase. The second is to ignore the terms of the documents and treat the transactions as loans in substance, in which case they are first mortgages. In either event, the UCCC does not apply. For this reason, EquityLink respectfully requests the Court to affirm the district court's dismissal of the DeHerreras' UCCC claim.

Respectfully submitted this 18th day of December, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of December, 2008, a true and correct copy of **APPELLEES' ANSWER BRIEF** was served upon the following via first class mail, postage prepaid, to:

John F. Head
John F. Head & Associates, P.C.
1860 Blake Street, Suite 300
Denver, Colorado 80202

Melissa Nelson

COLORADO COURT OF APPEALS

Court of Appeals No.: 07CA2145
Broomfield County District Court No. 06CV102
Honorable Chris Melonakis, Judge

Gerald A. McCool and Jacqueline J. McCool,

Plaintiffs-Appellants,

v.

Patricia Hengeveld and Delano Grimm,

Defendants-Appellees.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division V
Opinion by: JUDGE GABRIEL
Russel and Márquez*, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced: October 23, 2008

Brownstein Hyatt Farber Shreck, P.C., Richard P. Barkley, Joshua A. Glasgow, Steven E. Abelman, Denver, Colorado, for Plaintiffs-Appellants

No Appearance for Defendants-Appellees

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2008.

Involuntary plaintiffs Gerald A. and Jacqueline J. McCool (McCools) appeal the trial court's August 7, 2007 judgment (Judgment) reforming a series of transactions entered into between and among them, plaintiff EquityLink I, Inc., involuntary plaintiff Rocky Mountain Mortgage Acquisition Corporation (RMAC), and defendants Patricia Hengeveld and Delano Grimm (Hengevelds). We reverse and remand for further proceedings.

I. Background

The Hengevelds were participants in a program operated by EquityLink I, Inc. and various of its affiliated entities, including RMAC (EquityLink I, Inc. and its related entities will be referred to collectively as EquityLink). This program, called the HomeSaver Program, was designed to help homeowners who were facing foreclosure to avoid losing their homes. The HomeSaver Program involved a series of transactions whereby EquityLink would purchase or otherwise acquire the participants' home and then lease the home back to the participants with an option to repurchase the home at a later date, if their financial circumstances were to improve. EquityLink would then resell the home to a third-

party investor, compensating itself through various fees and costs charged to the original homeowner.

Consistent with this program, the Hengevelds sold their home (the Hengeveld Property) to EquityLink, and EquityLink leased the property back to the Hengevelds with an option to purchase. EquityLink then sold the home to the McCools, who were third-party investors. The McCools financed their purchase from EquityLink through a mortgage with Washington Mutual Bank, FA (Washington Mutual). To secure this mortgage, the McCools executed a deed of trust against the Hengeveld Property in favor of Washington Mutual.

The Hengevelds' lease provided for the payment of rent and a monthly option fee, both at an escalating rate. After the McCools purchased the property and assumed the lease with the Hengevelds, they received most of the payments under the lease, although a portion of those payments continued to go to EquityLink. The Hengevelds made all of their payments from the time they entered into the HomeSaver Program until approximately January 2006, when they defaulted, ultimately leading to the current action.

A. Prior Litigation

The HomeSaver Program has spawned a number of lawsuits by dissatisfied participants like the Hengevelds. In *DeHerrera v. EquityLink, L.L.C.*, No. 2003CV3356 (Jefferson County Dist. Ct.) (the *DeHerrera* Class Action), for example, a purported class of participants in the HomeSaver Program sued EquityLink and sought damages arguing, among other things, that EquityLink had violated the Colorado Uniform Consumer Credit Code (UCCC), sections 5-1-101 to 5-9-103, C.R.S. 2008, and the Colorado Consumer Protection Act (CCPA), sections 6-1-101 to 6-1-1120, C.R.S. 2008, and had been engaged in a civil conspiracy. The *DeHerrera* court ultimately certified a class consisting of "all participants in the HomeSaver program during and after the year 1999," which included the Hengevelds. No class member appears to have opted out of that class pursuant to C.R.C.P. 23(c)(2). After a bench trial, the court found for the plaintiff class on the CCPA and civil conspiracy claims and for EquityLink on the UCCC claim.

As a result of the filing of the *DeHerrera* Class Action, EquityLink I, Inc. and an affiliated entity, EquityLink, LLC (together, the Debtors), filed for Chapter 11 bankruptcy protection.

Subsequently, several plaintiffs (Bankruptcy Plaintiffs) commenced an adversary proceeding in the bankruptcy court against the Debtors on behalf of themselves and a purported class of participants in the HomeSaver Program. As defined, this class, too, included the Hengevelds. The Bankruptcy Plaintiffs also asserted claims against RMAC and several third-party investors, including the McCools. The Bankruptcy Plaintiffs sought monetary damages under the Federal Truth in Lending Act, rescission of their HomeSaver transactions, and declaratory relief. In addition, the Bankruptcy Plaintiffs sought to quiet title, restoring title in their respective properties to themselves.

About one year after the adversary proceeding was filed, the bankruptcy court approved an Amended Joint Plan of Reorganization Dated March 29, 2006 (the Plan). We take judicial notice of the Plan and its accompanying disclosure statement, including the exhibits thereto (Disclosure Statement), pursuant to CRE 201. All of these documents were filed in the bankruptcy court, and although courts generally do not take judicial notice of documents filed in other courts, a recognized exception to this rule applies when the documents were filed in a related proceeding

involving the same parties. *See Vento v. Colorado Nat'l Bank*, 985 P.2d 48, 52 (Colo. App. 1999). Notably, the Disclosure Statement lists all of the properties in which the Debtors held an interest at the time they filed for bankruptcy protection. One of those properties is the Hengeveld Property.

In approving the Plan, the bankruptcy court found that the Bankruptcy Plaintiffs had received adequate notice that a claims bar date of April 11, 2005 had been set, but the Bankruptcy Plaintiffs did not file their claims until August 2, 2005. Accordingly, the bankruptcy court held that all of the Bankruptcy Plaintiffs' damages claims were time barred. In addition, the bankruptcy court found that any rescission-based claims that the Bankruptcy Plaintiffs might have had and that sought to unwind their HomeSaver transactions were barred after the confirmation of the Plan. This was because the Plan created a new contract among the parties that was predicated on the assumption that the Debtors would continue to collect monies from the HomeSaver transactions in order to pay their creditors under the Plan. The bankruptcy court further found that the Bankruptcy Plaintiffs had received all required notices regarding the Plan and had been given ample

opportunity to object to the Plan but had not done so. Finally, the bankruptcy court found that it did not have jurisdiction over the damages claims asserted by the Bankruptcy Plaintiffs against RMAC and the third-party investors. As a result of these findings, the bankruptcy court dismissed the adversary proceeding.

B. The Present Litigation

The present case began when EquityLink I, Inc. filed a forcible entry and detainer (FED) action against the Hengevelds in March 2006. The Hengevelds joined the McCools and RMAC as involuntary plaintiffs and filed counterclaims against them seeking rescission of the transaction pursuant to the Federal Truth-in-Lending Act and the UCCC, section 5-5-203, C.R.S. 2008, and requesting declaratory relief. The McCools then filed counterclaims of their own against the Hengevelds, including a claim for breach of lease or, in the alternative, for judicial foreclosure on the Hengeveld Property. The McCools also requested that the trial court quiet title to the Hengeveld Property and find that the Hengevelds' Truth-in-Lending Act claim was barred by the applicable three-year statute of limitations. Subsequently, the McCools also asserted that any of

the Hengevelds' claims seeking rescission should be barred for failure to join an indispensible party, namely, Washington Mutual.

In a lengthy opinion, the trial court dismissed the Hengevelds' claims for rescission, finding that, although the transaction between them and EquityLink had, in actuality, been a loan and not a purchase and sale, it was not a consumer loan and therefore could not be rescinded pursuant to the UCCC, § 5-1-301(15)(a) & (26), C.R.S. 2008. The court further found that the Hengevelds' remaining claims seeking rescission were barred under the applicable federal and state statutes of limitations.

The court next determined that the transaction between the Hengevelds and EquityLink had been an equitable mortgage, not a sale with an option to repurchase. Thus, the court found that EquityLink had obtained an equitable mortgage from the Hengevelds and had then transferred its interest in that mortgage to the McCools. In light of these findings, the court quieted title in the Hengevelds, holding that they were still the owners of the property and that the McCools possessed an equitable mortgage secured by the Hengeveld Property.

The court then reformed the various transaction documents that the parties had signed. In particular, the court found that the equitable mortgage that it determined was now held by the McCools would be governed by the terms of the mortgage entered into between the McCools and Washington Mutual.

Finally, as a result of its determination that title to the property rested with the Hengevelds, the court dismissed the McCools' claim for breach of lease and EquityLink's FED action. The court further found that the McCools' request for dismissal because of the failure to join Washington Mutual was moot because the McCools' indispensible party argument was limited to the Hengevelds' rescission-based claims and the court had dismissed those claims. In light of its findings and conclusions, the court ordered the McCools to pay the Hengevelds' attorney fees and costs, because the McCools had demanded possession of the Hengeveld Property and the Hengevelds were the prevailing parties on that claim pursuant to section 13-40-123, C.R.S. 2008.

The McCools now appeal.