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Denver, Colorado 80203

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COURT OF APPEALS

**DISTRICT COURT, JEFFERSON COUNTY**

The Honorable R. Brooke Jackson  
Civil Action No. 2003cv3356

COURT USE ONLY

Plaintiffs-Appellants:

**STEVEN E. DEHERRERA** and  
**DONNA M. LEWIS**

v.

Defendants-Appellees:

**EQUITYLINK, LLC**, a Colorado limited liability  
company;  
**EQUITYLINK I, INC.**, a Colorado corporation;  
**RESIDENTIAL MORTGAGE ACQUISITION  
CORPORATION**; a Colorado corporation;  
**RESIDENTIAL PROPERTY MANAGEMENT  
SPECIALISTS, INC.**, a Colorado  
corporation;  
**WILLIAM J. TURNER**;  
**JAMES B. ELDER**; and  
**JOHN B. HAMNER**

Case No. 08CA0717

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**APPELLANTS' OPENING BRIEF**

APPEAL FROM THE DISTRICT COURT  
FOR JEFFERSON COUNTY

The Honorable R. Brooke Jackson, District Judge

Appeal brought by Steven E. DeHerrera and Donna M. Lewis

Civil Action No. 2003cv3356

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## **ISSUES PRESENTED FOR REVIEW**

Whether the Trial Court erroneously ruled that the sale/leaseback/option-to-repurchase transaction amounted to a first mortgage or first deed of trust and thus was not subject to the supervised lending provisions of Colo. Rev. Stat. § 5-2-301 *et seq.*

## **STATEMENT OF THE CASE**

### **1. Nature of the Case**

The case below was brought by Steve DeHerrera and Donna Lewis on behalf of themselves and some 279 other Colorado homeowners who were victims of a foreclosure rescue scheme, known as the “HomeSaver Program,” which had been perpetrated by a group of companies known as EquityLink (EquityLink, LLC, EquityLink I, Inc., and Residential Mortgage Acquisition Corporation). After being certified as a class action, the case was tried to the court on several theories, one of which was that the transactions at issue were subject to the supervised lending provisions of the Colorado Uniform Consumer Credit Code.

Under the supervised lending provisions of the Colorado Uniform Consumer Credit Code, consumer loans made by unregulated lenders, with an annual interest rate of more than 12%, which are secured by a dwelling by a lien junior to a mortgage or deed of trust having first priority, are defined as “supervised loans.” A lender who

makes a supervised loan without a supervised lender's license is liable to the borrower for the amount of the finance charges collected.

A HomeSaver transaction had all of the appearances of a bona fide real estate transaction. Structured as a sale/leaseback/option-to-repurchase, the homeowner conveyed title to his or her home to one of the EquityLink companies and simultaneously executed an option to repurchase the home at an escalated repurchase price. Coupled with this sale and option to repurchase was a leaseback to the homeowner so that, during the five-year term of option, the homeowner remained in the home with monthly payments approximating those of a fixed-rate 30-year loan.

Upon closing the HomeSaver transaction, the homeowner lost title to his or her home and all of the equity in it, and was relegated to the status of a renter. In order to reacquire title to the home, the homeowner was required to repurchase it at an escalated repurchase price (the amount of the escalation typically consumed the equity which the homeowner had in it).

As in the typical HomeSaver transaction, Residential Mortgage Acquisition Corporation "RMAC" obtained title to the DeHerrera-Lewis house and, in order to close, RMAC borrowed from a bank on a bridge loan which was collateralized by a first deed of trust on the DeHerrera-Lewis house. Thereupon, RMAC conveyed title to an investor, who took title subject to the lease and option agreement. In order to

close that transaction, the investor borrowed money from a permanent lender, which was also collateralized by a first deed of trust on the property; the permanent lender's deed of trust replaced that held by the bridge lender. The rights of DeHerrera-Lewis to their home under the HomeSaver Program were at all times subject to these deeds of trust by virtue of an express subordination clause in the option agreement.

Central to all of the claims of DeHerrera and Lewis was that the sale/leaseback/option-to-repurchase transaction, which was at the heart of every HomeSaver transaction, was in substance a loan disguised as a real estate transaction. In that DeHerrera and Lewis had rights to repurchase their home which could only be preserved by paying the periodic amounts due under the lease and option agreement, the HomeSaver transaction amounted to an equitable lien which they had on their home. The HomeSaver transaction was expensive; the rents, option fees and other charges under the HomeSaver transaction amounted to more than 12% per year on the money advanced for the benefit of the homeowner. None of the EquityLink entities nor the principals had a supervised lender's license and thus were liable to DeHerrera and Lewis and, members of the class, in the amount of the finance charges which had been collected.

## 2. Course of the Proceedings and Disposition Below

With respect to the claim based upon the supervised lending provisions of the Colorado Uniform Consumer Credit Code, the Trial Court found the HomeSaver transaction to be, in substance, a “loan” within the meaning of Colo. Rev. Stat. § 5-1-301(25).<sup>1</sup> And the Court found that the effective interest rate under the HomeSaver Program to be more than 12% per annum.<sup>2</sup> The Court went on to find that the HomeSaver transaction to be a “consumer loan” within the meaning of Colo. Rev. Stat. § 5-1-301(15)(a).<sup>3</sup> The Court also found that the HomeSaver Program was secured by an interest in real estate.<sup>4</sup>

However, the Court found that the HomeSaver transactions amounted to a first mortgage or deed of trust and thus a “loan primarily secured by an interest in real estate” within the meaning of Colo. Rev. Stat. § 5-1-301(26).<sup>5</sup> This finding that the HomeSaver transaction was, in effect, a first mortgage or deed of trust resulted in the

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<sup>1</sup>Transaction No. 7745718 (Findings of Fact, Conclusions of Law and Order of Judgment), p. 17.

<sup>2</sup>*Id.*, at p. 20.

<sup>3</sup>*Id.*, p. 18.

<sup>4</sup>*Id.*, p. 21.

<sup>5</sup>*Id.*



First Claim for Relief to fail, as the supervised lending provisions of the UCCC only apply to consumer loans which are secured by a junior lien only.

### STATEMENT OF FACTS

1. The HomeSaver Program is a sale-leaseback program designed for homeowners desiring to refinance their homes but unable to do so because of low credit scores, bankruptcy, insufficient equity or imminent foreclosure.<sup>6</sup>

2. The typical HomeSaver transaction took one of two forms:

(a) A purchase from the homeowner, or

(b) A purchase of a Certificate of Purchase in a Public Trustee sale of the homeowner's property.<sup>7</sup>

3. Either way, a contract was entered into between an EquityLink entity and the homeowner pursuant to which EquityLink would refinance the homeowner's home mortgage in exchange for title to the property, subject to the homeowner's right to repurchase the property at some time within five years.<sup>8</sup>

4. At the closing of the contract, the following documents were executed:

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<sup>6</sup>Plaintiffs' Trial Exhibit 10.

<sup>7</sup>Plaintiffs' Trial Exhibit 1, p. 010045.

<sup>8</sup>Plaintiffs' Trial Exhibit 2.

(a) A leaseback of the property from EquityLink to the homeowner.<sup>9</sup>

(b) An option to repurchase pursuant to which the homeowner was granted an option to repurchase.<sup>10</sup>

5. The acquisition of the DeHerrera–Lewis property by EquityLink was financed by a bridge loan from First Tier Bank.<sup>11</sup>

6. Shortly after DeHerrera and Lewis closed the HomeSaver transaction with EquityLink, the property was transferred to EquityLink’s investor, Michael and Carol Michalek, who financed their acquisition of the DeHerrera–Lewis home with a long-term loan from Washington Mutual.<sup>12</sup>

7. To make absolutely sure that each of these lenders would have a first deed of trust, the Option Agreement contained the following subordination clause:

This Option Agreement, and the Option granted, shall be subordinate to any first deed of trust existing on the Effective Date, or any future first deed of trust which may be placed upon the Home within six (6) months from the Effective Date (either, a “Permitted Encumbrance”). This Option Agreement, and the rights of the Optionholder, shall be subject to and subordinate to any Permitted Encumbrance, any and all advances made thereunder,

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<sup>9</sup>Plaintiffs’ Trial Exhibits 18 and 19.

<sup>10</sup>Plaintiffs’ Trial Exhibits 20 and 21.

<sup>11</sup>Plaintiffs’ Trial Exhibit 38.

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

interest thereon or costs incurred and any modifications, renewal supplements, consolidations and replacements thereof.<sup>13</sup>

The HomeSaver transaction – composed of a sale, a leaseback and an option to repurchase – was at all times subordinate to the bridge loan used by RMAC to finance the property when it was acquired from the homeowner or the long-term loan to finance the subsequent transfer from RMAC to the investor.

### **SUMMARY OF THE ARGUMENT**

1. As a consequence of the HomeSaver transaction, the homeowners lost title to their homes. In order to reacquire title, they were required to repurchase their house at an escalated price (the amount of the escalation essentially consumed the equity which the homeowner had). The substance of the transaction was that it was a loan, which, when coupled with the right to repurchase their home, amounted to an equitable lien on the property. The Trial Court has so held and these conclusions are not under appeal.

2. The rents, option fees and other charges under the HomeSaver transaction amounted to more than 12% per year on the money advanced for the benefit of the homeowner. The Trial Court has so held and these conclusions are not under appeal.

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<sup>13</sup>Plaintiffs' Trial Exhibit 21, p. 9, ¶ 13.1.

3. 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 investor.

4. Because the equitable lien in favor of the homeowner was at all times junior to the deeds of trust in favor of the bridge lender or the permanent lender, the HomeSaver transaction was subject to the supervised lending provisions of the Colorado Uniform Consumer Credit Code.

## **ARGUMENT**

### **1. Standard of Review.**

The standard of review is *de novo*. The question presented in this appeal is with regard to the legal effect of the documents which are of record.<sup>14</sup> The issue is whether the deeds of trust in favor of the bridge and long-term lenders, together with a subordination clause, were always a first lien on the subject properties with the equitable liens in favor of the homeowners always junior thereto.

### **2. The Colorado Uniform Consumer Credit Code.**

#### **(a) Purpose.**

The Colorado UCCC was enacted in 1963 to simplify, clarify and modernize the law governing retail installment sales, consumer credit, small loans and usury, and

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<sup>14</sup>*Archangel Diamond Corp. v. Lukoil*, 123 P.3d 1187, 1195 (Colo. 2005).

to protect consumer buyers, lessees, and borrowers against unfair practices by some suppliers of consumer credit. It was designed to protect a typically unsophisticated borrower from a generally sophisticated lender.<sup>15</sup> One of the express purposes of the UCCC is to protect consumer buyers, lessees, and borrowers against unfair practices by suppliers of consumer credit.<sup>16</sup>

**(b) Consumer Loans**

The Colorado UCCC defines a “consumer loan” as:

... 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 person, family, or household purpose;
- (III) 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.<sup>17</sup>

The Trial Court found that, under the foregoing provisions, the HomeSaver transactions were consumer loans.<sup>18</sup>

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<sup>15</sup>*Dikeou v. Dikeou*, 928 P.2d 1286, 1293 (Colo. 1996).

<sup>16</sup>Colo. Rev. Stat. § 5-1-102(2)(d).

<sup>17</sup>Colo. Rev. Stat. § 5-1-301(15)(a).

<sup>18</sup>Transaction No. 7745718 (Findings of Fact, Conclusions of Law and Order of Judgment), p. 18.

**(c) The First Deed of Trust Exception.**

Excepted from consumer loans, as that term is defined by Colo. Rev. Stat. § 5-1-301(15)(a), are loans “primarily secured by an interest in land.”<sup>19</sup> The statute further defines the term, “primarily secured by an interest in land,” to mean a loan that is “secured by a first mortgage or deed of trust lien against a dwelling . . . .”<sup>20</sup> In turn, the term, “first mortgage or deed of trust,” is defined to mean “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.”<sup>21</sup>

The HomeSaver Program does not fall within this exception to the definitions of a consumer loan and the attendant provisions of the UCCC because there is no first deed of trust which secures the obligation. Indeed, the only first deed of trust that is placed against the property is that of the subsequent borrowing by EquityLink and/or its investor against the property.

**CONCLUSION**

The finding that the equitable liens in favor of DeHerrera and Lewis, and members of the class, were, in effect, liens having a first priority was an error of law.

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<sup>19</sup>Colo. Rev. Stat. § 5-1-301(15)(c).

<sup>20</sup>Colo. Rev. Stat. § 5-1-301(26)(a).

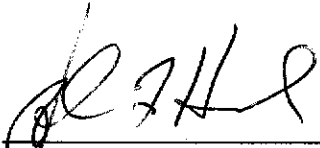
<sup>21</sup>Colo. Rev. Stat. § 5-1-301(26)(d).

The deeds of trust in favor of the bridge lenders and the permanent lenders, coupled with subordination agreements, were in every instance first liens on the homes which DeHerrera and Lewis, and members of the class, had lost. As equitable liens always subordinate to the bridge and permanent lenders, the HomeSaver transactions were subject to the supervised lending provisions of the Colorado Uniform Consumer Credit Code and the Trial Court was in error to have held otherwise. The judgment of the Trial Court in dismissing the First Claim for Relief should be reversed and the case should be remanded for further proceedings.

Dated November 3, 2008.

Respectfully Submitted,

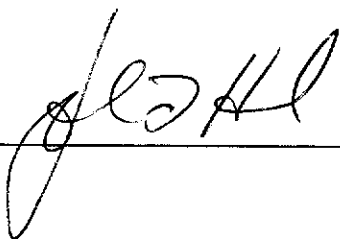
HEAD & ASSOCIATES, P.C.

By:   
\_\_\_\_\_  
John F. Head

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 3, 2008 a true and correct copy of the foregoing was deposited in the U.S. Mail, postage prepaid, properly addressed to:

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