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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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**APPELLEES' ANSWER BRIEF**

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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 "DeHerrerases"), 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 DeHerrerases, 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.)<sup>1</sup> The parties entered into a five-year lease agreement under which the Andersons agreed to

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<sup>1</sup>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 DeHerrerass' transaction followed this same basic pattern, although in their case, EquityLink purchased the property from the public trustee after foreclosure. In 1999, the DeHerrerass 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 DeHerrerass in their bankruptcy proceeding had placed a \$3,000 lien on the home, and the DeHerrerass 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.<sup>2</sup> 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

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<sup>2</sup>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 DeHerrerias 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 DeHerrerias 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