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# California Homeowner Bill of Rights

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The California Homeowner Bill of Rights, which the California Senate and Assembly enacted on July 2, 2012, was very recently signed into law by the Governor on July 12, 2012 ("The Act"). These new foreclosure laws will not go into effect until **January 1, 2013[1]**. The Act resulted from the continuing residential foreclosure crisis that is plaguing California and negatively impacting the California housing market and the state and local economies. The lofty goals of the Act are to help stabilize the California housing economy and to ensure that borrowers who are in the foreclosure process, and who may qualify for foreclosure alternatives, are considered for and given a meaningful opportunity to obtain available foreclosure loss mitigation options, such as loan modifications, forbearance agreements or repayment plans, that are offered by their lenders.

As discussed in detail below, the proponents of the Act state that it seeks to stop alleged current foreclosure abuses by lenders and mortgage servicers relating to "dual tracking" (lenders pursuing foreclosure while at the same time negotiating a loan modification with the borrower), "robo-signing" of foreclosure documents (lenders or mortgage servicers signing foreclosure documents without any investigation of the basis and validity of the underlying loan default), and lenders giving borrowers in default the run around and multiple different points of contact during the various phases of the foreclosure or modification process. The Act seeks to meet these goals by: 1) expanding existing foreclosure protections and the new protections contained in the Act to apply to broadly defined "mortgage servicers"; 2) by preventing mortgage servicers from proceeding with a foreclosure until certain contact has been made or notices have been provided to the borrower and preventing the recordation of a notice of default or notice of sale while a foreclosure prevention alternative is in process; 3) creating the requirement of a single point of contact at the foreclosing party for the borrower once they have requested a foreclosure prevention alternative; and 4) giving borrowers the right to sue the mortgage servicer for injunctive relief, actual damages and treble damages, for violation of the provisions of the Act and the right to recover their attorney's fees and costs if they prevail. The Act and its protections only apply to first lien mortgages or deeds of trust that are secured by owner-occupied residential real property containing no more than four dwelling units. This means that for the Act to apply, the loan in default must be in first position on residential property that is the borrower's principal residence which also serves as the security for a loan made for personal, family or household purposes. Importantly, the Act does not apply to: 1) entity borrowers; 2) borrowers who took out loans to purchase investment property; 3) borrowers in default who are already in bankruptcy; 4) borrowers who have already surrendered their property to the lender; or 5) borrowers who have contracted with someone or an entity whose primary business is advising people on how to extend their foreclosure and avoid their contractual obligations under the loan.. In addition, the Act is mostly directed at larger lenders. Most of the provisions of the Act only apply to lenders that foreclose on more than 175 residential properties per year.

**A. Mortgage Servicer Added.**

The Act broadens the scope of the coverage of the foreclosure protections by making them applicable to residential loan "mortgage servicers" in addition to lenders. The Act broadly defines "mortgager servicer" to include a person or entity who directly services a loan, or who is responsible for interacting with the borrower, managing the loan account on a daily basis either as the current owner of the promissory note or as the current owner's authorized agent to a master servicer by contract. (Civil Code §2920.5(a).) In most situations under the Act, the Act applies to "mortgage servicers" as well as to the mortgagee, trustee, beneficiary, or authorized agent thereof under a deed of trust or mortgage. Under the Act, a mortgage servicer does not include a trustee or a trustee's authorized agent acting under a power of sale in a deed of trust. (Civil Code §2920.5(a).) This is an important change because the proponents of the Act contended that some lenders were contracting with separate entities to manage and service their residential home loans who were thus outside of the scope of earlier foreclosure protection legislation.

**B. Dual Tracking.**

The Act seeks to prevent a lender from proceeding with a foreclosure, while at the same time negotiating with a delinquent residential borrower on a loan modification, a scenario sometimes referred to as “dual tracking.” Dual tracking is a very common situation that lenders find themselves in when a borrower reaches out to them about a loan modification or a loan workout after a lender has already started foreclosure. Under the Act, before a mortgage servicer, as broadly defined, may record a notice of default, the mortgage servicer must, in addition to any already existing contact or notice requirements, send to the borrower: 1) a notice advising that if the borrower is a servicemember, i.e. a member of the United States uniformed military, or dependent they may be entitled to certain additional protections under the law, and 2) a written statement that the borrower may request a copy of the promissory note, deed of trust or mortgage, any assignment of the mortgage or deed of trust, and the borrower’s payment history since the borrower was last less then 60 days past due. (Civil Code §2923.55(b)(1).) Where a borrower submits a complete (meaning all documents requested by the lender have been provided by the borrower) application for a first lien loan modification, a mortgage servicer may not record a notice of default or notice of sale or conduct a trustee’s sale until such time as the borrower’s loan modification process has been completed and the time for an appeal of any adverse decision has passed, or the appeal has been completed, and if a loan modification is entered into, as long as the borrower is not in default under the modification. (Civil Code §2923.6(c)-(d).) Similar provisions in the Act apply to smaller lenders, specifically lenders or licensed individuals who foreclose on 175 or less residential properties per year. (Civil Code §§2923.5(a)(f) & (g) and 2924.18(b).)

These provisions provide that once a borrower submits a completed application for a loan modification, the lender cannot thereafter record a notice of default or a notice of sale or conduct a trustee’s sale until the borrower has completed the loan modification process in all respects. There is no bright line rule or definition set forth in the Act as to what constitutes a complete application for a first lien loan modification other than the vague statement that it means that the borrower has provided all of the documents requested by the lender. Lenders will need to set up very clear loan modification procedures, applications and lists of requested documents in order to help them determine when an application for a loan modification is “complete” under the Act.

**C. Changes to the Loan Modification Process.**

The Act also sets forth new specific requirements that apply to a first lien loan modification. Whenever a borrower submits any document in connection with an application for a first lien loan modification or a complete application for a first lien loan modification, the mortgage servicer must provide the borrower with a written acknowledgement of receipt within five days of the receipt of the document(s) or completed application. (Civil Code §2924.10(a).) The Act does not define the term “document” or what constitutes an “application” for a first lien loan modification. Therefore, to comply with the Act mortgage servicers will have to interpret these terms very broadly. Upon receipt of an application for a loan modification, the mortgage servicer’s written acknowledgment of receipt to the borrower must also include a description of the loan modification process, its timeframes and any deadlines, any expiration dates for documents submitted, and written specification of any deficiencies in the application. (Civil Code §2924.10(a).) Where a borrower submits a complete application for a loan modification, the mortgage servicer must provide the borrower with a written response if the lender denies the application. This written notice must include the specific reasons for the denial and the deadline for the borrower to appeal the denial (30 days). (Civil Code §2923.6(f).)

**D. Single Point of Contact Established.**

The Act requires a mortgage servicer to provide a borrower who has requested a foreclosure prevention alternative with a single point of contact from that point in time forward throughout the loan modification process and with at least one direct method to reach the point of contact. (Civil Code §2923.7(a).) This provision will compel lenders to come up with new processes or procedures that may not have existed before this legislation for insuring that a borrower requesting or going through a loan modification has a single point of contact at the lender throughout the process. The mortgage servicer must ensure that the single point of contact has the knowledge, responsibility and authority to: 1) communicate to the borrower the process by which the borrower may apply for available foreclosure prevention alternatives; 2) coordinating receipt of all necessary documents and notifying the borrower of any missing documents; 3) timely, adequately and accurately inform the borrower of the current status of the foreclosure prevention alternative; 4) ensure the borrower is considered for all of the foreclosure prevention options offered by the mortgage servicer; and 5) have access to persons with the power to stop the foreclosure. (Civil Code §2923.7(a).) In addition, the single point of contact must remain assigned to the borrower's account until all loss mitigation options have been exhausted or the loan is brought current. (Civil Code §2923.7(c).) In an effort to make this requirement less onerous on lenders, the Act allows the single point of contact to be a team of personnel. However, each individual in the team must have the ability and authority to perform each of the tasks set forth above, and each must be knowledgeable about the borrower's status in the foreclosure prevention process. (Civil Code §2923.7(a).)

**E. Robo-Signing Eradicated.**

The Act seeks to do away with a prior lender bureaucratic necessity called "robo-signing." The Act provides that any declaration, notice of default, notice of sale, assignment of a deed of trust, or substitution of trustee recorded in a foreclosure on behalf of a mortgage servicer, or a declaration filed in a court relating to a foreclosure, must be accurate and complete and supported by reliable evidence. (Civil Code §2924.17(a).) In addition, before filing or recording any of these documents, the mortgage servicer shall have reviewed competent and reliable evidence that substantiates the borrower's default and the mortgage servicer's right to foreclose. (Civil Code §2924.17(b).) A court may hold a mortgage servicer liable for a civil penalty of $7,500 per mortgage for repeated violations of this requirement. (Civil Code §2924.17(c).) In addition, no entity shall initiate the foreclosure process or record a notice of default unless and until it is the holder of the beneficial interest under the mortgage or deed of trust, the original or substituted trustee under the deed of trust, or the designated agent of the holder of the beneficial interest. (Civil Code §2924(a)(6).) The Act does not define the term "designated agent." The Act goes on to provide that no agent of the holder of a beneficial interest under the mortgage or deed of trust, original trustee or substituted trustee under a deed of trust may record a notice of default or otherwise commence the foreclosure process except when acting within the scope of the authority designated by the holder of the beneficial interest. (Civil Code §2924(a)(6).)

**F. New Notice Requirements.**

1. **After a Notice of Default Recorded.**

Within five days of the recording of a notice of default, the mortgage servicer that offers foreclosure prevention alternatives must send a written notice to the borrower informing the borrower: 1) that the borrower may be evaluated for a foreclosure prevention alternative or alternatives; 2) whether an application is required in order to be considered for a foreclosure prevention alternative; and 3) the method by which a borrower may obtain an application for a foreclosure prevention alternative. (Civil Code §2924.9(a).) This new notice requirement does not apply to any borrowers who have already exhausted the loan modification process described above in Civil Code section 2924.6.

1. **Postponed Trustee's Sales.**

The Act sets forth an additional notice requirement that benefits borrowers. Until January 18, 2018, whenever a trustee's sale is postponed for a period of at least 10 business days, a mortgagee, beneficiary, or authorized agent shall provide written notice to the borrower of the new sale date and time within five business days of the date of the postponement. (Civil Code §2924(a)(5).) The Act clarifies that a failure to comply with this new notice requirement does not invalidate an otherwise valid a trustee's sale conducted in violation of this provision.

**G. No Application Fees or Late Fees.**

The Act prohibits mortgage servicers from charging borrowers application fees for a first lien loan modification or other foreclosure prevention alternative. Secondly, the Act forbids a mortgage servicer from charging borrowers late fees under the loan for the period during which the loan modification is under consideration, while a borrower has filed an appeal of the denial of a loan modification, or the borrower is making timely modification payments. This removes a prevalent abuse (as perceived by the promoters of this legislation) where a borrower's late fees were still accruing and accumulating while it was attempting to negotiate a loan modification with the lender.

**H. Right to Sue Mortgage Servicers for Injunctive Relief, Damages, Treble Damages, and Right to Attorney's Fees.**

One of the most important provisions of the Act from a lender's perspective is that it provides borrowers with the right to sue mortgage servicers for injunctive relief before the trustee's deed upon sale has recorded, or if it has already recorded, to sue for actual economic damages, if the mortgage servicer has not corrected any "material" violation of certain enumerated portions of the Act before the trustee's deed upon sale recorded. (Civil Code §2924.12(a).) In an area that will certainly open up a Pandora's Box of litigation, the Act does not define what constitutes a "material" violation of the Act. If a court finds that the violation was intentional, reckless or willful, the court can award the borrower the greater of treble (triple) damages or $50,000. (Civil Code §2924.12(b).) Furthermore, a violation of the enumerated provisions of the Act is also deemed to be a violation of the licensing laws if committed by a person licensed as a consumer or commercial finance lender or broker, a residential mortgage lender or servicer, or a licensed real estate broker or salesman. (Civil Code §2924.12(d).) Lastly, in a one-sided attorney's fee provision that only benefits borrowers, the court may award a borrower who obtains an injunction or receives an award of economic damages as a result of the violation of the Act their reasonable attorney's fees and costs as the prevailing party. (Civil Code §2924.12(i).) This provides all the more reason for lenders and mortgage servicers to comply with the terms of the Act. This provision for the recovery by only the borrower of their reasonable attorney's fees makes it more likely that borrowers will file litigation against mortgage lenders or servicers than they otherwise would. Compliance is the lender's or mortgage servicer's best defense to litigation under the Act.

Significantly for lenders, as long as the mortgage servicer remedies the material violation of the Act before the trustee's deed upon sale has recorded, the Act specifically provides that the mortgage servicer shall not be liable under the Act for any violation or damages. (Civil Code §2924.12(b) & (c).) The Act also clarifies that signatories to the National Mortgage Settlement who are in compliance with the terms of that settlement, as they relate to the terms of the Act, will not face liability under the Act. (Civil Code §2924.12(g).)

[1] *Many of the provisions of the Act have sunset provisions for January 1, 2018. However, the Act also includes matching provisions for some of the sunsetting provisions that become operative on January 1, 2018.*

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