



Legal Counsel to the
Financial Services Industry

California's Homeowner Bill of Rights

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Introduction

- Since 2008, more than 1.2 million California homes have been foreclosed upon.
- In 2012, approximately another 700,000 California households were reported to be in the foreclosure pipeline.
- In 2011, the California Attorney General's office received almost 7,000 mortgage-related complaints, and over 44,000 constituents wrote to the Attorney General regarding cracking down on alleged mortgage fraud.

Foreclosure Process

- Foreclosures directed by state law.
- Lenders can take steps to foreclose at least 30 days after contacting borrower to explore options to avoid foreclosure.
- If no foreclosure avoidance plan is worked out, foreclosing entity must record and serve homeowner with Notice of Default (NOD).
- At least 90 days after serving NOD, foreclosing entity can serve Notice of Sale (NOS).
- At least 20 days after service of NOS, property can be sold at trustee sale.

Legislation

- July/Oct. 2012, Gov. Brown signed into law bills constituting “Homeowner Bill of Rights” (“the Act”).
- Follow-up to Feb. 2012 National Mortgage Servicing Settlement (NMSS).
- The Act mirrors and extends upon terms imposed in NMSS.
- Purpose – To ensure borrower has a meaningful opportunity to obtain foreclosure prevention alternatives (FPAs), including meaningful access to loan modification programs like HAMP.
- Effective January 1, 2013.

Legislation (cont.)

- Attorney General Harris:
 - “This legislation will make the mortgage and foreclosure process more fair and transparent” and “will give struggling homeowners a fighting shot to keep their home.”
 - The Homeowner Bill of Rights “will allow my office to continue to prosecute those who take advantage of homeowners who are desperate to stay in their houses.”
- Governor Brown:
 - “Californians should not have to suffer the abusive tactics of those who would push foreclosure behind the back of an unsuspecting homeowner,” and the new rules would ensure that “loan servicers cannot promise one thing while doing the exact opposite.”

Summary of Key Provisions

- Requires servicers to provide notice of right to foreclose.
- Bans “dual-track” foreclosures.
- Requires lender to provide single point of contact.
- Adopts civil penalties of up to \$7,500 per loan for multiple and repeated recordings of unverified foreclosure documents.
- Authorizes borrowers to seek redress of “material” violations of legislation.

Limitations of The Act

- The Act applies fully to:
 - Lenders processing more than 175 foreclosures of residential properties per year.
 - First-lien mortgages secured by owner-occupied residential property with no more than four units.
 - Borrowers.
- The Act more limited as to:
 - Lenders processing 175 or fewer foreclosures of residential properties per year.

Limitations of The Act (cont.)

- The Act does not apply to:
 - Entity borrowers.
 - Borrowers with loans for investment property.
 - Borrowers in default but already in bankruptcy.
 - Borrowers who have already surrendered their property to the lender.
 - Borrowers who have contracted with someone whose primary business is advising people how to extend their foreclosure and avoid their contractual obligations.
 - Servicers who signed and are in compliance with NMSS.

Tools to Prosecute Mortgage Fraud

- Related bills provide the following to strengthen prosecutions of complex, multi-jurisdictional fraud and crimes:
 - Statute of limitations to prosecute mortgage-related crimes extended from one year to three years.
 - Use of statewide grand jury to investigate and indict perpetrators of financial crimes involving victims in multiple counties.

Providing Notice of Default

- Prior to recording NOD, servicer must:
 - Send notice to the borrower including:
 1. Offer to provide documentation of promissory note, deed of trust or mortgage, any assignment of loan; *and*
 2. Borrower's payment history.
 - At least 30 days prior:
 1. Contact the borrower for an “initial contact” or
 2. Satisfy mandated “due diligence” requirements.
 - No dual-track foreclosures.

Filing Notice of Default

- A NOD must include statements:
 - Identifying mortgage;
 - Noting breach has occurred;
 - Setting forth nature of breach and action taken; and
 - Whether default is curable.
- 3 months must elapse before filing NOD, then may file NOS.
- Entity recording the NOD must be holder of beneficial interest.

After Recording Notice of Default

- Within 5 business days of recording NOD, servicer that offers one or more FPAs must send borrower a written communication that includes:
 - A statement that borrower may be evaluated for one or more FPAs;
 - Whether application is required to be considered for those FPAs; and
 - How to obtain application.

FPA Processing

- Servicers must provide written acknowledgment within 5 days of receiving
 - a “complete” modification application; or
 - any document connected to an application.
- Acknowledgment must:
 - describe process and notify borrower of deficiencies in application.
 - include any deadlines or expiration dates.

FPA Processing (cont.)

- Upon acceptance, servicer must provide copy of fully executed agreement.
- Fees: Upon acceptance, the following charges are prohibited:
 - Application, processing, or “other” fees for modification.
 - Late fee for failure to timely make loan payments while application is pending or appealed.
- Upon denial, must provide written response including reasons for denial and deadline for appeal.

FPA Processing (cont.)

- If FPA is approved before NOD is recorded, cannot record NOD if:
 - borrower complies with the terms of FPA; or
 - FPA has been approved and proof of funds/financing is provided.
- If FPA is approved after NOD is recorded, cannot record NOS if:
 - The borrower complies with the terms of the FPA; or
 - FPA has been approved and proof of funds/financing is provided.

Limiting Dual-Track Foreclosures

- Dual tracking refers to when bank continues foreclosure process on property even as application for loan modification is pending.
- NOD or NOS cannot be recorded, and trustee's sale cannot be conducted, if:
 - Borrower has provided a “complete” modification application and it is still pending; OR
 - Borrower's modification or other FPA has been:
 - Approved in writing; AND
 - EITHER:
 - Borrower is in compliance with plan's terms OR
 - Plan is approved by all parties.

Limiting Dual-Track Foreclosures (cont.)

- Once permanent FPA plan is executed, must record a rescission of NOD or cancel any pending trustee's sale.
- No useable definition of what constitutes a “*complete*” application.
 - “[A]n application shall be deemed ‘complete’ when a borrower has supplied the mortgage servicer with all documents required by the mortgage servicer within the reasonable timeframes specified by the mortgage servicer.”

Single Point of Contact

- Servicer must designate a “single point of contact” (SPOC) upon the borrower’s request for FPA.
 - May be an individual or a team of personnel.
- The SPOC must:
 - Communicate application process for all available FPAs;
 - Coordinate receipt of required documents and inform borrower of missing documents;
 - Timely, accurately, and adequately inform borrower of status;
 - Ensure borrower is considered for all FPAs; *and*
 - Have access to persons with ability and authority to stop foreclosure.

Document Verification Procedures

- Certain documents can no longer be filed or recorded without servicer first reviewing “competent and reliable evidence to substantiate the borrower’s default and the right to foreclose.”
 - Documents include:
 - NODs and NOSs
 - Assignments of a deed of trust
 - Substitutions of trustee recorded in a foreclosure
 - Declarations recorded or filed in court relating to foreclosure
- Civil prosecutors may seek up to \$7,500 per loan for repeated, uncorrected violations.

Implications from Litigation Perspective

- Act provides for private right of action for “material” violation.
- Material violations may include:
 - Failing to establish single point of contact after borrower requested loan modification;
 - Processing a “dual-track” foreclosure;
- “Material” violation is undefined term
- Burden on homeowner to show “material” violation.

Implications from Litigation Perspective (cont.)

- Available relief:
 - Injunctive relief: if trustee's deed upon sale has not been recorded.
 - Must consider (1) possibility of harm and (2) likelihood of success on the merits.
 - Actual economic damages: if trustee's deed upon sale has been recorded.
 - Treble damages if trustee's deed upon sale has been recorded and the material violation is “intentional or reckless, or resulted from willful misconduct” (greater of treble actual damages or the statutory damages of \$50,000 if greater).
 - Attorneys' fees and costs: only for prevailing *borrowers*.
 - One-sided and thus likely to lead to more litigation filed by borrowers.

Implications from Litigation Perspective (cont.)

- Are class actions authorized for violations of the Act?
 - Not explicitly authorized.
 - Amenable to class action requirements?
 - Dual-track foreclosure ban: Individualized inquiry into whether each modification application was “complete.”
 - Single point of contact: Officer discretion.
- Affirmative defense: Right to Cure
 - Servicer may avoid liability by curing violation before recordation of deed of sale, but maybe not attorneys’ fees and/or costs.

Implications from Litigation Perspective (cont.)

- Affirmative defense: Statutory exceptions
 - Bankruptcy; surrender.
 - Servicer is signatory and in compliance with the National Mortgage Servicing Settlement.
 - Borrowers contracting with organization “whose primary business is advising people who have decided to leave their homes on how to extend the foreclosure process and avoid their contractual obligations.”

Minimizing Litigation Risks

- Compliance: best defense to litigation under Act.
 - Document everything, including each contact with borrowers seeking FPAs.
 - Keep detailed notes regarding every FPA offered.
 - Track applicable time limits.
- Set precise requirements for FPA eligibility.
 - Create definitive lists of documents required to complete modification application.
 - Adopt expansive view of what documents require a written acknowledgment.

Minimizing Litigation Risks (cont.)

- Implement uniform, thorough training of SPOCs.
- Adopt new disclosure forms.
- Use comprehensive checklists prior to recording trustee's deed after foreclosure sale (triggers money damage claims).
- Adopt robust mechanisms to halt foreclosure processing once requisite FPA documents are submitted.
 - Uniform interpretation of “receipt.”

Anticipated Areas for Litigation

- The scope and meaning of underlying requirements.
- Preemption issues.
- Whether servicers maintain proper documentation.
- Expect a proliferation of individual borrower actions (and potentially class actions).
- Battles over undefined or vague terms such as “material violation,” “willful violation,” “complete application,” “access,” etc.

Unintended Consequences of HBOR

- Could lead to more judicial foreclosures.
- Increased litigation costs to lenders and consequent increased costs to consumers.
- Further substantial delays in non-judicial foreclosures process.
- Enhanced litigation by aggressive borrower's bar.
- Removing threat of foreclosure could erode incentive for short sales.

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