
**SENATE COMMITTEE ON
BANKING AND FINANCIAL INSTITUTIONS**
Senator Steven Bradford, Chair
2019 - 2020 Regular

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Subject: Mortgages and deeds of trust: foreclosure.

SUMMARY This bill expands Homeowner Bill of Rights protections to homeowners who rent their properties out to tenants, as specified; re-enacts a provision of California's advance fee ban that had been allowed to sunset; and expands California's foreclosure consultant law to cover actions taken to prevent foreclosure prior to a mortgage delinquency.

EXISTING LAW

- 1) Provides a series of protections for homeowners, collectively known as the Homeowner Bill of Rights (HBOR), which are intended to prevent avoidable foreclosures on owner-occupied principal residences. Provisions of HBOR apply to first lien mortgages and deeds of trust secured by owner-occupied residential real property containing no more than four dwelling units. A nonexhaustive list of the provisions of HBOR include the following:
 - a) Prohibits servicers from recording a notice of default (NOD) until at least 30 days after making contact with a borrower to discuss options for avoiding foreclosure or undertaking due diligence, as specified, to make borrower contact (Civil Code Section 2923.5).
 - b) Requires servicers to provide a written notice to borrowers informing them that they may request specified account documentation regarding their mortgages and that they may be eligible for protections under the federal Servicemembers' Civil Relief Act (Civil Code Section 2923.55).
 - c) Contains prescriptive, anti-dual tracking provisions prohibiting servicers from taking the next step in the foreclosure process while a complete loan modification application is pending or is under appeal. Allows borrowers to re-apply for a foreclosure prevention alternative following a documented, material change in their financial circumstances. Provides specified timelines for the acceptance of loan modification offers by borrowers. Requires servicers to include specified information in their denial notices. Requires servicers to allow borrowers to appeal loan modification denials. Requires borrowers to submit their final first lien loan modification applications at least five business days before a scheduled foreclosure sale in order to be eligible for HBOR protections (Civil Code Sections 2923.6, 2924.11, and 2924.18).

- d) Requires servicers to notify borrowers in writing whenever a foreclosure sale is postponed for more than ten days (Civil Code Section 2924).
- e) Requires servicers to provide a written notice to borrowers within five business days following recordation of a NOD, advising them of foreclosure prevention alternatives and outlining the loss mitigation process (Civil Code Section 2924.9).
- f) Requires servicers to assign a single point of contact (SPOC) to any borrower who requests a foreclosure prevention alternative. The SPOC is either an individual or a team of personnel, each of whom has the ability and authority to undertake several responsibilities specified in statute, and each of whom is knowledgeable about the borrower's situation and current status in the loss mitigation process. The requirement to offer a SPOC concludes when the servicer determines that all loss mitigation options offered by or through that servicer have been exhausted, or when the borrower's account becomes current (Civil Code Section 2923.7).
- g) Requires servicers to acknowledge receipt of every document submitted by a borrower in connection with their application for a foreclosure prevention alternative, identify any missing items, and provide borrowers with the deadline by which the missing items must be submitted (Civil Code Section 2924.10).
- h) Prohibits servicers from charging application, processing or other fees to borrowers who apply for foreclosure prevention alternatives. Prohibits servicers from charging late fees while they are reviewing loan modification applications or appeals or receiving timely payments under a modified loan. Requires servicers that approve borrowers for a permanent foreclosure prevention alternative to provide borrowers with a fully executed copy of that agreement. Requires servicers to rescind the NOD and cancel any pending trustee's sale once a borrower executes a permanent foreclosure prevention alternative. (Civil Code Section 2924.11).
- i) Before recording any one of several different types of documents that are required in the context of nonjudicial foreclosures, requires a servicer to ensure that it has reviewed competent and reliable evidence to substantiate the borrower's default and the servicer's right to foreclose. Requires all foreclosure-related documents recorded by or on behalf of a mortgage servicer must be accurate and complete and supported by competent and reliable evidence (Civil Code Section 2924.17).
- j) Authorizes state regulators to enforce violations of the aforementioned rules as violations of state lending laws. Authorizes private rights of action for material violations of the aforementioned requirements that go uncorrected by a servicer. Authorizes borrowers to bring actions for injunctive relief prior to the completion of a trustee sale and for actual economic damages following a trustee sale. Successful plaintiffs, defined as those who receive injunctive relief or are awarded damages, are also entitled to reasonable attorney's fees and costs (Civil Code Section 2924.12).

- 2) Pursuant to SB 94 (Calderon), Chapter 630, Statutes of 2009, and subsequent legislation making the provisions of SB 94 permanent:
 - a) Makes it unlawful for any person who negotiates, attempts to negotiate, arranges, attempts to arrange, or otherwise offers to perform a mortgage loan modification or other form of mortgage loan forbearance for a fee or other compensation paid by the borrower, to do any of the following in connection with a mortgage or deed of trust secured by residential real property containing four or fewer dwelling units (Civil Code Section 2944.7 and Business and Professions Code Section 10085.6):
 - i) Claim, demand, charge, collect, or receive any compensation until after the person has fully performed each and every service the person contracted to perform or represented that they would perform.
 - ii) Take any wage assignment, any lien of any type on real or personal property, or other security to secure the payment of compensation.
 - iii) Take any power of attorney from the borrower for any purpose.
 - b) Requires any person who negotiates, attempts to negotiate, arranges, attempts to arrange, or otherwise offers to perform a mortgage loan modification or other form of mortgage loan forbearance for a fee or other compensation paid by the borrower, to provide the following to the borrower, as a separate statement, in not less than 14-point bold type, prior to entering into any fee agreement with the borrower (Civil Code Section 2944.6 and Business and Professions Code Section 10147.6):

“It is not necessary to pay a third party to arrange for a loan modification or other form of forbearance from your mortgage lender or servicer. You may call your lender directly to ask for a change in your loan terms. Nonprofit housing counseling agencies also offer these and other forms of borrower assistance free of charge. A list of nonprofit housing counseling agencies approved by the United States Department of Housing and Urban Development (HUD) is available from your local HUD office or by visiting www.hud.gov.”
 - c) Provides that if loan modification or other mortgage loan forbearance services are offered or negotiated in one of the languages set forth in Civil Code Section 1632, a translated copy of the aforementioned statement must be provided to the borrower in that foreign language (Civil Code Section 2944.6 and Business and Professions Code Section 10147.6).
 - d) Provides that a violation of Civil Code Section 2944.6 by an attorney constitutes cause for the imposition of discipline against that attorney under the State Bar Act.
- 3) Regulates mortgage foreclosure consultants pursuant to Article 1.5 of Chapter 2 of Title 14 of Part 4 of Division 3 of the Civil Code (Civil Code Section 2945 et seq.), as follows:

- a) Contains findings and declarations that homeowners whose residences are in foreclosure are subject to fraud, deception, harassment, and unfair dealing by foreclosure consultants from the time a NOD is recorded until a foreclosure sale is concluded (Civil Code Section 2945).
- b) Defines a foreclosure consultant as any person who makes any solicitation, representation, or offer to any homeowner to perform for compensation, or who, for compensation, performs any service which the person in any manner represents will stop or postpone a foreclosure sale, obtain any forbearance from any beneficiary or mortgagee (i.e., from a lender or servicer), help a homeowner reinstate their ownership of a property, obtain a waiver of an acceleration clause contained in a promissory note secured by a mortgage or deed of trust, help a homeowner obtain a loan or advance of funds, or avoid or mitigate the impairment of a homeowner's credit resulting from the recordation of a NOD or the completion of a foreclosure sale (Civil Code Section 2945.1).
- c) Exempts a variety of professionals from the definition of a foreclosure consultant, including attorneys, as specified; real estate licensees; depository institutions; finance lenders; residential mortgage lenders; proraters; accountants; and persons acting under the express authority of the federal government. These exemptions have the effect of subjecting the exempt entities to the provisions of SB 94, described above (Civil Code Section 2945.1).
- d) Requires foreclosure consultants to register with the Department of Justice (Civil Code Section 2945.45) and prohibits foreclosure consultants from doing any of the following (Civil Code Section 2945.4):
 - i) Claiming, demanding, charging, collecting, or receiving any compensation until after they have fully performed each and every service they have contracted to perform or represented they would perform, as specified.
 - ii) Taking any wage assignment, any lien of any type on real or personal property, or other security to secure the payment of compensation.
 - iii) Acquiring any interest in a residence in foreclosure from a homeowner with whom the foreclosure consultant has contracted.
 - iv) Taking any power of attorney from a homeowner for any purpose.
 - v) Entering into an agreement to help the homeowner secure the release of surplus funds following a foreclosure sale, as specified.
- e) Specifies the wording of contracts used by foreclosure consultants; requires these contracts to be translated into the same language used by the consultant to describe his or her services, as specified; and provides individuals five days in which to rescind a contract with a foreclosure consultant (Civil Code Sections 2945.2 and 2945.3).

THIS BILL

- 1) From January 1, 2021 until January 1, 2023, extends HBOR protections to first lien mortgages and deeds of trust on properties secured by tenant-occupied residential real property containing no more than four dwelling units.
 - a) To qualify for HBOR relief, all of the following conditions must be met:
 - i) The property must be owned by an individual who owns no more than three residential real properties, each of which contains no more than four dwelling units.
 - ii) The property must have been occupied by a tenant pursuant to a lease entered into pursuant to an arm's length transaction, as defined, prior to and in effect on March 4, 2020 (the date of the State of Emergency declared by Governor Newsom in response to the novel coronavirus).
 - iii) The tenant occupying the property must have been unable to pay rent due to a reduction in income resulting from the novel coronavirus.
 - b) Relief is available as long as the property remains the principal residence of a tenant pursuant to a lease entered into in an arm's length transaction, as defined.
- 2) Provides that a violation of Civil Code Section 2944.7 by an attorney constitutes cause for the imposition of discipline against that attorney under the State Bar Act.
- 3) Amends the foreclosure consultant law to cover situations where an economic crisis threatens the ability of a homeowner to afford their mortgage payments, as follows:
 - a) Amends the findings and declarations to recognize that a homeowner whose residence is not yet in foreclosure is at risk of harm from foreclosure consultants from the time an economic crisis threatens that homeowner's ability to afford their mortgage payments.
 - b) Amends the definition of a foreclosure consultant to add the act of stopping or postponing a delinquency on a mortgage or deed of trust.

COMMENTS

- 1) Purpose: This bill is sponsored by the author as a direct response to the economic disruption caused by the COVID-19 pandemic. It is intended to provide protections against foreclosure for mom-and-pop landlords who may be experiencing income disruption due to the virus and close loopholes that could allow unscrupulous individuals to prey on scared and desperate homeowners.
- 2) Background and Discussion: This bill has three provisions, each of which is discussed below.
 - a) *HBOR Expansion*. In 2012, California enacted a comprehensive set of protections for homeowners, which were intended to prevent avoidable

foreclosures on owner-occupied principal residences (HBOR; AB 278, Eng et al., Chapter 86, Statutes of 2012 and SB 900, Leno et al., Chapter 87, Statutes of 2012). California made those provisions permanent in 2018 (SB 818, Beall, Chapter 404, Statutes of 2018). Those provisions should offer California homeowners protection against avoidable foreclosures on their principal residences, if the COVID-19 mortgage relief provided at the state and federal level fails to prevent these homeowners from becoming delinquent on their mortgages. However, existing California law will *not* provide needed relief to individuals who own investment properties that they rent out to tenants, if those tenants' inability to afford their rent payments forces the property owners into mortgage delinquency. Lack of foreclosure protections for owners of rental properties could force tenants onto the streets, if the owners of the homes those tenants are occupying are foreclosed upon.

The provisions of SB 1447 are drafted in a manner intended to keep roofs over tenants' heads while also minimizing the potential for abuse of the mortgage relief. The bill is limited to individuals who own three or fewer residential properties, to focus on mom-and-pop landlords. In order to qualify for relief, a landlord must have had a tenant in the property paying market rate rent as of the date the State of Emergency was declared by Governor Newsom (March 4, 2020), that tenant must have been unable to pay their rent due to a reduction in income related to the novel coronavirus, and the landlord must continue renting the home out while he or she seeks HBOR relief from foreclosure. Notably, the bill does *not* require that the tenant who occupied the property as of March 4, 2020 continue living in the property in order for a homeowner to claim relief. Relief is available as long as the property is occupied by a tenant subject to an arms' length lease. The arms' length lease requirement is intended to minimize the potential for a homeowner to request relief on a home that is unoccupied or is occupied by a squatter.

- b) *Restoring All of the Protections in SB 94 from 2009 (Advance Fee Ban).* In 2009, California led the nation by prohibiting people who offer to help individuals obtain loan modifications or other forms of mortgage relief from collecting money up front for their services (SB 94, Calderon, Chapter 630, Statutes of 2009). SB 94 requires anyone seeking payment for helping a homeowner avoid foreclosure to perform all of the services they are contractually obligated to perform before they may seek payment from the homeowner. Most of that original law is still on the books, but one provision, which expressly allows the State Bar to sanction an attorney who violates the advance fee ban, ended up sunseting due to chaptering issues. This bill restores the sunsetted provision, ensuring that the entirety of SB 94 is permanently restored.

Restoring the sunsetted provision is intended to make it easier for the State Bar to bring disciplinary action against attorneys who violate the advance fee ban. According to policy committee analyses of SB 980 (Vargas) from 2012, during the depths of the foreclosure crisis, the State Bar received over 8,600 complaints alleging misconduct in loan modification matters, resulting in investigations of nearly 800 attorneys, and the imposition of discipline against over 110 of them. One of the key lessons learned during the 2007 to 2009 time period is that it is far easier to proactively put rules in place intended to prevent fraud than it is to

stop fraud once it is prevalent.

- c) *Expanding the Foreclosure Consultant Law to Cover Actions Taken to Prevent Foreclosure Prior to a Borrower Delinquency.* In 2008, AB 180 (Bass), Chapter 278, Statutes of 2008 added extensive new consumer protections to California's mortgage foreclosure consultant law and, among its provisions, required persons wishing to engage in business as mortgage foreclosure consultants to register with the California Department of Justice. However, California's existing foreclosure consultant law only applies once a mortgage is in delinquency; it fails to cover the period of time during a financial hardship, before that hardship leads to a mortgage delinquency. Most of the federal and state homeowner relief announced in response to COVID-19 includes mortgage forbearance, which technically keeps borrowers out of delinquency. Because homeowners who have been provided mortgage forbearance from their servicers are not considered delinquent, they could be preyed upon by unscrupulous individuals not covered by California's foreclosure consultant law. SB 1447 closes that loophole.
- 3) This Bill Would Have Been Double-Referred: Due to the COVID-19 Pandemic and the unprecedented nature of the 2020 Legislative Session, all Senate policy committees are working under a compressed timeline. This timeline does not allow this bill to be referred to and heard by more than one committee, as a typical timeline would allow. In order to fully vet the contents of this measure for the benefit of Senators and the public, Committee staff reached out to Senate Judiciary Committee staff to seek their input on the measure. The analysis above incorporates input provided by Senate Judiciary Committee staff.
- 4) Support:
- a) Housing and Economic Rights Advocates (HERA) writes that "At HERA, we have seen a resurgence of foreclosure rescue scams over the last several years as the homeowner and small property owner population ages and becomes more vulnerable financially, physically and emotionally. Small owners at any age are vulnerable with the expense of a mortgage and fluctuations in cashflow....We are in danger of seeing affordable rental housing lost to foreclosure in our state en masse which includes single family homes, duplexes, triplexes, and four-plexes. SB 1477 takes a significant, necessary step towards giving owners a chance to prevent this loss."
 - b) Consumer Reports echoes those comments and observes, "It is crucial to ensure that homeowners can manage their mortgages effectively during the crisis, to protect them as well as the tenants who rely on them for housing...At a time of grave stress and uncertainty for homeowners, it is imperative that the Legislature take decisive action to prevent servicers and other third parties from interfering with a homeowner's ability to manage their mortgage debt."
 - c) The Center for Responsible Lending echoes the comments of HERA and Consumer Reports and adds, "Policymakers must ensure that they are proactive in making sure unscrupulous individuals cannot take advantage of homeowners who are at risk of predatory activity and scams when they are seeking assistance

against foreclosure. We are glad to see that SB 1447 also takes steps to address this issue.”

5) Opposition: None received.

6) Prior and Related Legislation:

- a) AB 278, Eng et al., Chapter 86, Statutes of 2012 and SB 900, Leno et al., Chapter 87, Statutes of 2012: Enacted the original version of HBOR, which contained some permanent protections and other protections that sunset on January 1, 2018.
- b) SB 818 (Beall), Chapter 404, Statutes of 2018, reenacted and made permanent all of the HBOR provisions that had sunsetted on January 1, 2018, and made additional changes, including automatically assigning a SPOC to any homeowner who requests a foreclosure prevention alternative and requiring a borrower to submit his or her complete application for a first lien loan modification at least five business days before a scheduled foreclosure sale in order to be eligible for HBOR protections.
- c) SB 94 (Calderon), Chapter 630, Statutes of 2009 prohibited persons who offer to help individuals obtain loan modifications or other forms of mortgage relief from collecting money up front for their services and instead required them to perform all of the services they were contractually obligated to perform *before* they could seek payment from the homeowner. Some provisions of SB 94 were permanent; others, including Civil Code Section 2944.7 and the application of Business and Professions Code Section 6106.3 to violations of Civil Code Section 2944.7 by attorneys, sunsetted January 1, 2013.
- d) SB 980 (Vargas), Chapter 563, Statutes of 2012 extended the sunset date on the changes in Civil Code Section 2944.7 and Business and Professions Code Section 6106.3 to January 1, 2017.
- e) AB 1950 (Davis), Chapter 569, Statutes of 2012 made Civil Code Section 2944.7 permanent but failed to make permanent the parallel change to Business and Professions Code Section 6106.3. That provision was allowed to sunset on January 1, 2017.
- f) AB 180 (Bass), Chapter 278, Statutes of 2008 added extensive new consumer protections to California’s mortgage foreclosure consultant law and, among its provisions, required persons wishing to engage in business as mortgage foreclosure consultants to register with the California Department of Justice.

LIST OF REGISTERED SUPPORT/OPPOSITION

Support

Center for Responsible Lending
Consumer Reports
Housing and Economic Rights Advocates

Opposition

None received

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