Date of Hearing: August 12, 2020

ASSEMBLY COMMITTEE ON JUDICIARY
Mark Stone, Chair
SB 1447 (Bradford) – As Amended August 6, 2020

PROPOSED CONSENT

SENATE VOTE: 39-0

SUBJECT: MORTGAGES AND DEEDS OF TRUST: FORECLOSURE

KEY ISSUE: SHOULD THE HOMEOWNER BILL OF RIGHTS BE EXPANDED FOR A TWO-YEAR PERIOD TO APPLY TO SOME TENANT-OCCUPIED SINGLE-FAMILY RESIDENTIAL PROPERTIES SO THAT SMALL LANDLORDS WHOSE TENANTS EXPERIENCE COVID-19-RELATED FINANCIAL HARDSHIPS ARE PROTECTED FROM FORECLOSURE?

SYNOPSIS

This beneficial author-sponsored bill was introduced in direct response to the COVID-19 crisis. It would allow small landlords facing foreclosure to avail themselves, for the first time, of the procedural protections set forth in the Homeowner Bill of Rights, including the ability to halt a non-judicial foreclosure temporarily through the filing of a completed application for a first lien loan modification, and permanently halt such foreclosure proceedings if a loan modification is granted. In order to qualify for these protections, at least one tenant in the property facing foreclosure must have been unable to pay rent due to a COVID-19-related reduction in income, and the landlord may own no more than three residential rental properties of 1-4 units.

In anticipation of increased foreclosure rescue fraud activity, the bill would also expand the definition of "foreclosure consultant" to include a person who acts to stop or postpone a mortgage delinquency in exchange for compensation.

This bill is supported by the California Apartment Association, Center for Responsible Lending, Consumer Reports, and Housing and Economic Rights Advocates. It has no opposition on file.

SUMMARY: Expands, for a two-year period, Homeowner Bill of Rights protections to cover tenant-occupied residential real property of 1-4 units in which at least one tenant has been unable to pay rent due to a COVID-19-related reduction in income. Specifically, **this bill**:

1) Expands protections contained in specified provisions of the Homeowner Bill of Rights (HBOR) to encompass first lien mortgages and deeds of trust secured by residential real property that meets the following criteria:

    a) It is the principal residence of at least one tenant who has been unable to pay rent due to a reduction in income resulting from the novel coronavirus;

    b) It contains no more than four dwelling units;

    c) It is owned by an individual who owns no more than three residential real properties, each of which contains no more than four dwelling units; and

d) It is occupied by a tenant who entered into a lease before, and in effect on, March 4, 2020, which was entered into in good faith and for valuable consideration, and which reflects the fair market value for the rental in the open market between informed and willing parties.

2) Clarifies that relief shall be available under HBOR only for so long as the real property remains the principal residence of a tenant pursuant to a lease that meets the criteria set forth in 1) d) above.

3) Sunsets the expanded protections referenced in 1) above as of January 1, 2023 except for borrowers who meet the following criteria:

a) The borrower was approved in writing for a first lien loan modification or other foreclosure prevention alternative.

b) The borrower submitted a complete application for a first lien loan modification before January 1, 2023 but, as of that date, either (i) the mortgage servicer had not yet determined whether the borrower qualified for the modification, or (ii) the appeal period from a denial had not yet expired.

4) Amends the list of activities that a person may offer to perform for compensation, so as to meet the definition of "foreclosure consultant," to include the act of stopping or postponing a delinquency on a mortgage or deed of trust.

EXISTING LAW:

1) States that the purpose of enacting the Homeowner Bill of Rights is to ensure that, as part of the nonjudicial foreclosure process, borrowers are considered for, and have a meaningful opportunity to obtain, loss mitigation services such as loan modifications or other alternatives to foreclosure, while in no way requiring that the process yield a particular result. (Civil Code Section 2923.4.)

2) Requires mortgage servicers to, at least 30 days prior to the filing of a notice of default against a property, contact the borrower in order to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure. (Civil Code Section 2923.5.)

3) Excuses a servicer's failure to contact a borrower if the failure occurs despite the servicer's "due diligence," as defined. (*Ibid*.)

4) Enumerates additional actions that must be taken prior to recording a notice of default, including providing specified written information to the borrower and properly handling any complete application for a first lien loan modification that a borrower submits. (Civil Code Section 2923.55.)

5) Prohibits recording a notice of default or notice of sale, or conducting a trustee's sale, while the borrower's complete first lien loan modification application is pending. Provides procedures to address the denial of such an application, including a right of appeal. Specifies that the mortgage servicer has no duty to evaluate successive applications submitted by the borrower unless the borrower has had a material change in their financial circumstances and provides documentation of this change. (Civil Code Section 2923.6.)

6) Requires the mortgage servicer to provide a "single point of contact," as defined, to a borrower who requests a foreclosure prevention alternative, until such time as all loss mitigation options offered by, or through, the servicer have been exhausted or the borrower's account becomes current. (Civil Code Section 2923.7.)

7) Requires a mortgage servicer, within five business days of recording a notice of default, to provide the borrower with specified information regarding foreclosure prevention alternatives, unless the borrower has already exhausted the loan modification process offered by, or through, the servicer. (Civil Code Section 2924.9.)

8) Requires a mortgage servicer to provide written acknowledgment within five business days of receiving a complete first lien modification application submitted by a borrower or any document submitted in connection with such an application. Specifies information that must be included in the initial acknowledgment, including an estimate of how long it will take to make a decision regarding the application, the amount of time the borrower will have to consider a loan modification offer, identification of any omissions in the application, and deadlines for submitting missing documents. (Civil Code Section 2924.10.)

9) Prohibits a servicer from charging an application, processing, or other fee for a first lien loan modification or other foreclosure prevention alternative. Also prohibits a servicer from collecting late fees while a complete first lien loan modification application is under consideration or a denial is being appealed, the borrower is making timely modification payments, or a foreclosure prevention alternative is being evaluated or utilized. (Civil Code Section 2924.11.)

10) Clarifies that neither a notice of default nor a notice of sale may be recorded, and a trustee's sale may not be conducted, if the borrower is in compliance with the terms of a loan modification, forbearance, or repayment plan, or if a foreclosure prevention alternative has been approved in writing by all parties and proof of funds or financing has been provided to the servicer. (*Ibid.*)

11) Requires that if the borrower is approved for a first lien loan modification or other foreclosure prevention alternative, and the servicing of that borrower's loan is transferred or sold, then the subsequent servicer must honor that previously-approved alternative. (*Ibid.*)

12) Forbids, if a borrower submits an application for a first lien loan modification no later than five business days before a scheduled foreclosure sale, the recording of a notice of default or notice of sale, or conducting a trustee's sale, until the borrower has been provided with a written determination by the servicer regarding the borrower's eligibility for the modification. (Civil Code Section 2924.18.)

13) Provides that 2)-12) above apply only to first lien mortgages or deeds of trust that are secured by owner-occupied residential real property containing no more than four dwelling units. (Civil Code Section 2924.15.)

14) Requires that a notice of default, notice of sale, assignment of a deed of trust, substitution of trustee, and specified declarations be accurate, complete, and supported by competent and reliable evidence, and that before recording or filing any of these documents, that the servicer ensure that it has reviewed such evidence to substantiate the underlying default and the right to foreclosure. (Civil Code Section 2924.17.)

15) Authorizes enforcement of 4)-9) and 14) above by a borrower through an action for injunctive relief or actual damages, as appropriate. (Civil Code Section 2924.12.)

16) Permits a previously-noticed foreclosure sale to be postponed for a period of up to 365 days from the date listed in the original notice of sale. (Civil Code Section 2924g (c).)

17) Requires that a borrower is provided with written notice of any foreclosure sale that has been postponed by at least 10 business days, and that this notice include the new sale date and time. (Civil Code Section 2924 (a)(5).)

18) Makes findings and declarations regarding the risk to homeowners of fraud, deception, harassment, and unfair dealing by foreclosure consultants. (Civil Code Section 2945 (a).)

19) Defines a "foreclosure consultant" as any person who either offers to, or does, perform for compensation any of nine enumerated services which the person represents will assist a homeowner facing foreclosure, including stopping or postponing a foreclosure sale, obtaining a forbearance from the lender, avoiding or ameliorating an impairment of credit, and recovering the residual proceeds from a foreclosure sale. (Civil Code Section 2945.1 (a).)

20) Exempts persons licensed in California as accountants, attorneys, proraters, or real estate brokers from the definition of "foreclosure consultant." (Civil Code Section 2945.1 (b).)

21) Establishes a statutory scheme regulating the activities of foreclosure consultants, including a requirement to register with the California Department of Justice before performing designated foreclosure consultant services. (Civil Code Sections 2945-2945.11.)

FISCAL EFFECT: As currently in print this bill is keyed non-fiscal.

COMMENTS: Less than a decade after California last endured a foreclosure crisis, the ongoing economic harms caused by the COVID-19 pandemic threatens to trigger another wave of foreclosures, once again displacing homeowners and tenants throughout the state.

The pandemic is causing many tenants to lose income, whether due to unemployment, reduced working hours, or small business closures. Their loss of income, in turn, may mean that they are unable to pay their full rent. Landlords' consequent loss of rental income means that some are unable to pay the mortgages on their rental properties, increasing the risk that they will be foreclosed on. A foreclosure sale can result ultimately in the eviction and displacement of the tenants who live in the property, which risks exacerbating the state's homelessness crisis and increasing the spread of COVID-19.

In response to the last foreclosure crisis, California enacted the Homeowner Bill of Rights (HBOR), a set of procedural protections meant to avert avoidable foreclosure on *owner-occupied* residential real property that contains no more than four units. This bill proposes to mitigate the anticipated harms outlined in the previous paragraph by extending HBOR to many *tenant-occupied* residential real properties of no more than four units. These additional protections would remain in place for a two-year period, beginning on January 1, 2021.

The bill would also permanently expand the statutory definition of "foreclosure consultant" to include a person who engages in the act of stopping or postponing a delinquency on a mortgage

or deed of trust, thereby reducing the chances that vulnerable homeowners are preyed upon as they seek to stave off a mortgage default.

According to the author:

> In 2012, California enacted a comprehensive set of protections for homeowners, which were intended to prevent avoidable foreclosures on owner-occupied principal residences (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, if the COVID-19 mortgage relief provided at the state and federal level fails to keep these homeowners from falling delinquent on their mortgages. However, existing California law will *not* provide needed relief to individuals who own investment properties 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. […]
>
> SB 1447 is a direct response to the economic devastation being caused by COVID-19. SB 1447 focuses on keeping roofs over peoples' heads by building on legislation we enacted during the 2007-2009 foreclosure crisis. The measure provides protections against foreclosure for mom-and-pop landlords. […] I firmly believe that the state will have to do a great deal more to protect vulnerable Californians from the economic devastation caused by COVID-19, but I hope this measure can provide some incremental relief to homeowners who are struggling and are desperate to keep their homes.

Central argument for this bill: ensuring housing stability during and after the COVID-19 state of emergency. The central argument for this bill is that it will increase housing stability for small landlords and their tenants who are struggling to cope with the economic effects of the COVID-19 pandemic.

Some five months after Governor Newsom first proclaimed the COVID-19 State of Emergency in California, Americans now collectively owe more than $21.5 billion in past-due rent. (Michelle Conlin, *U.S. renters owe $21.5 billion in back rent; Republicans offer no eviction relief*, Reuters, (Jul. 29, 2020) *available at* https://www.reuters.com/article/us-usa-housing-evictions/u-s-renters-owe-21-5-billion-in-back-rent-republicans-offer-no-eviction-relief-idUSKCN24U394.) An estimated 21% of tenants nationally did not pay their rent in July. (*Ibid.*) This non-payment of rent is particularly hard for landlords who depend on rental income to pay the mortgages on their rental property, heightening their risk of default and foreclosure. A recent report by the U.C. Berkeley Terner Center for Housing Innovation notes that "[r]enters have been disproportionately impacted by job losses, [which] has had a profound effect not only on tenants but also on landlords who aren't as capitalized as large rental properties." (Terner Center, *How are Smaller Landlords Weathering the COVID-19 Pandemic* (Jul. 2020), available at http://ternercenter.berkeley.edu/uploads/NAHREP-Terner-Center-Survey-Factsheet-July-2020.pdf.) Accompanying survey results revealed that fewer than 50% of tenants paid their full rent in the previous month, and that two in five landlords lacked confidence that they would be able to cover their operating costs in the 3rd quarter of 2020. (*Ibid.*)

Law professor Emily Benfer summarizes the logical outcome of this situation as follows: "Risk of eviction increases, risk of foreclosure and bankruptcy follows, property taxes go unpaid leaving communities and schools under-resourced." (Conlin, *supra*.)

This bill is a meaningful attempt to help mitigate an entirely-foreseeable disaster.

How would an expanded HBOR protect small landlords facing foreclosure (and their tenants)? Current protections under the Homeowner Bill of Rights apply to owners of residential property containing up to four units include the following:

- At least 30 days before filing a Notice of Default, the mortgage servicer must contact the borrower to explore foreclosure prevention alternatives.

- The servicer must provide a "single point of contact," who is knowledgeable about the borrower's situation, to any borrower seeking a foreclosure prevention alternative.

- If the borrower submits a first lien modification application or supporting documents, the servicer must provide written acknowledgement of receipt and provide important additional information, such as an estimate of how long it will take to make a decision regarding the application, the amount of time the borrower will have to consider a loan modification offer, a description of any omissions in the application, and deadlines for submitting missing documents

- If the borrower submits a complete first lien loan modification application, the foreclosure process must halt while the application is being considered.

- If a borrower is denied a loan modification, the borrower has a right of appeal.

- If the servicing rights on the loan are transferred, the new servicer must honor any foreclosure prevention alternative offered by the previous servicer.

- The borrower must be notified of any postponement in a foreclosure sale that lasts ten business days or longer.

However, under HBOR, these protections are currently only available to borrowers who live in a property facing foreclosure. Under this bill, these protections would be expanded to a fully tenant-occupied property with one to four units, if the following conditions were met:

1. The landlord owns no more than three such residential real properties, each of which contains no more than four dwelling units.

2. The property for which the landlord is seeking protection is occupied by at least one tenant who has been unable to pay rent due to COVID-19 reduction in income.

3. The property for which the landlord is seeking protection is occupied by at least one tenant who entered into a market-rate lease that was in effect on March 4, 2020. The property must continue to be the principal residence of such a tenant throughout the time the landlord is seeking HBOR protections.

These conditions are meant to ensure that the temporary HBOR expansion applies only to small landlords who are facing a loss of income due to COVID and who continue to house at least one bona fide tenant.

Ensuring expanded protections last beyond the sunset date for borrowers in the HBOR process. The expansion of HBOR to tenant-occupied properties under this bill will sunset after two years. This date was chosen because the author currently projects that 2021 will see a substantial increase in mortgage defaults by small landlords, numbers that should fall by the end of 2022. If the state of the economy in 2022 indicates that small landlords will need these protections for a longer period of time, the Legislature could then extend the sunset date.

Regardless of whether the sunset date is extended in the future, the existence of the sunset might create problems for landlords who are in the midst of being considered for a foreclosure alternative when the bill's provisions expire. To take the simplest example, what happens if a landlord applies for a loan modification in November 2022, is approved for the modification in late December 2022, and the servicing rights transfer in January 2023, before the landlord and the previous servicer enter into a binding agreement? Civil Code Section 2924.11 (g) requires that the new servicer honor the previously-approved modification. But absent that provision, and given that "[t]he normal rule in a civil case is that we judge it in accordance with the law as it exists at the time of our decision," (*Tully v. Mobil Oil Corp.* (1982) 455 U.S. 245, 247), a court might find that the new servicer is under no obligation to honor the loan modification. This principle is echoed in the California Government Code, which provides: "Any statute may be repealed at any time, except when vested rights would be impaired. Persons acting under any statute act in contemplation of this power of repeal." (Government Code Section 9606.)

In order to avoid such a result, and to ensure that landlords in the midst of the HBOR process continue to be able to complete their search for a foreclosure alternative, this bill now includes a saving clause. A landlord will continue to be eligible for the expanded protections under the bill, even after the sunset, as long as they are approved in writing for a foreclosure prevention alternative or submitted a complete application for a first lien loan modification before the sunset date.

In the author's view, the affirmative step of submitting a completed first lien mortgage loan modification application provides a bright-line delineation between those landlords who are actively working to stave off foreclosure and those who may not be exercising their rights. This standard may disadvantage landlords who default shortly before the sunset date and are unable to timely file a loan modification application, but it does give servicers and lenders certainty as to their ongoing obligations. If foreclosures are still at a heightened level in 2022 and it appears that many more small landlords may need HBOR protections, the Legislature would have the opportunity to address this issue by extending the bill's sunset date at that time.

Expansion of definition of "foreclosure consultant." The state's last foreclosure crisis yielded a rash of fraudulent foreclosure prevention and rescue scams in which desperate homeowners were cheated out of their remaining savings by individuals who falsely promised to save their homes from foreclosure. The Legislature passed several bills in response to these scams, including AB 2325 (Lieu, Stats. 2010, Chap. 596) which amended the statutory definition of "foreclosure consultant" to include individuals who offered to arrange a forensic audit of a loan secured by a home in foreclosure in exchange for compensation.

This bill would similarly amend the definition of "foreclosure consultant" to include individuals who offer to stop or postpone a delinquency on a mortgage or deed of trust. The rationale for this amendment is described by the author as follows:

> California's existing foreclosure consultant law only applies once a home 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. 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.

It is hoped that amending the definition of "foreclosure consultant" in this manner will help protect homeowners during the ongoing COVID-19 crisis.

Deletion of provision addressing cause for attorney discipline. One other aspect of this bill necessitates comment. As originally introduced, this bill would have amended Business & Professions Code Section 6106.3 to provide that conduct in violation of Civil Code Section 2944.7 constitutes cause for attorney discipline. At the request of the Committee, the author agreed to remove this provision from the bill. An explanation of the Committee's reasoning in making this request follows.

Existing Business and Professions Code Section 6106.3 provides that "[i]t shall constitute cause for the imposition of discipline of an attorney within the meaning of [chapter 4 of the Business and Professions Code, regulating attorneys] for an attorney to engage in any conduct in violation of Section 2944.6 of the Civil Code." Section 2944.6, in turn, requires that any person who offers, in exchange for compensation, to assist a homeowner in obtaining a mortgage loan modification or forbearance must provide a statutorily-required notice to the homeowner before entering into a fee agreement. Therefore, Section 2944.6, by its own terms, applies to attorneys; attorneys are not exempt from its requirements. The inclusion of Section 2944.6 in the Business and Professions Code as cause for attorney discipline makes it easier for the State Bar of California to prosecute violations of the statute.

Civil Code Section 2944.7, which this bill originally included as "cause" for attorney discipline, provides, in pertinent part:

> (a) Notwithstanding any other law, it shall be 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:
>
> (1) 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 he or she would perform.
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> (2) Take any wage assignment, any lien of any type on real or personal property, or other security to secure the payment of compensation.
>
> (3) Take any power of attorney from the borrower for any purpose.

Essentially, Section 2944.7 forbids any person from charging or accepting upfront compensation in exchange for offering to obtain a mortgage loan modification or forbearance for a borrower; a person can only charge or accept compensation after the service is performed. As with Section 2944.6, there is no exception for attorneys or any other licensed professionals from the requirements of Section 2944.7.

From 2009 until 2017, Business and Professions Code Section 6106.3 stated that Section 2944.7 was cause for attorney discipline; however, this provision expired as the result of a sunset provision on January 1, 2017. It is the Committee's view that this sunset was appropriate because the inclusion of the Section 2944.7 as cause for discipline previously led to overzealous, overinclusive prosecution by the State Bar of attorneys who were seeking loan modifications for their clients as part of their good-faith litigation-related activities.

There is an inherent tension between Section 2944.7 (which became effective in 2009) and the Homeowner Bill of Rights (which became effective four years later), for at least three reasons. First, HBOR contemplates attorney representation of a homeowner in that it provides homeowners with a private right of action for HBOR violations. Second, the principal device that HBOR offers to avoid foreclosure is the submission of an application for a loan modification. If litigation is necessary to enforce HBOR and stave off foreclosure, it is almost inevitable that an attorney will eventually have to assist a client in submitting an application for a loan modification, typically in settlement discussions. Third, it is difficult for an attorney to take an HBOR case on a contingency basis because HBOR's attorney fee provision is permissive ("A court *may* award a prevailing borrower reasonable attorney's fees and costs in an action brought pursuant to this section"), not mandatory, meaning that an attorney may prevail in litigation, yet not be awarded fees by the court. The risk of non-payment is too great for most private attorneys to take such cases, meaning that they have to enter into hybrid fee agreements with their clients, in which they are paid a retainer for conducting the litigation that will at least cover their costs if it fails to yield an attorney fee award.

Yet if the attorney is paid to represent an HBOR client in litigation and submits a loan modification application on behalf of their client, that attorney is technically in violation of Civil Code Section 2944.7. The reality is that borrowers who sue their servicers don't always get loan modifications through no fault of the attorney. For example, a borrower may sue their servicer, enter into a trial payment plan as a condition of obtaining a permanent loan modification, but then fail to complete the trial plan because the borrower lost their job.

This is not a hypothetical situation. Clients who are unhappy with such outcomes (i.e. no loan modification but fees owed to their former attorney) can, and do, file complaints with the State Bar. As a result any California attorneys who believed they were submitting loan modification applications in good faith as part of HBOR litigation but faced inquiries or discipline from the State Bar for allegedly violating Section 2944.7 contacted the Committee to express their dismay prior to January 1, 2017, when violations of Section 2944.7 explicitly were cause for attorney discipline. The Committee concluded that the Bar was employing "cause for imposition of discipline" in a non-nuanced way, by pursuing attorneys acting in good faith under HBOR. When Committee staff met with the State Bar Office of Chief Trial Counsel (OCTC) seeking more nuanced prosecutions, OCTC refused and insisted that if the Legislature wanted a change in prosecutorial practices, then it should change the law. After the earlier version of Business and Professions Code Section 6106.3 expired, complaints to the Committee of overzealous discipline have largely ceased.

The State Bar of California advocates for re-inserting Section 2944.7 into Business and Professions Code Section 6106.3, writing:

> In 2017, the section of 6106.3 that specified that it was a "cause" for discipline to accept advanced fees for a loan modification, sunsetted.
> . . .
>
> After the sunset, attorneys and their defenders have argued that it is not an ethical violation to accept upfront fees. The argument is that if the legislature had intended it to be, they would not have allowed the sunset.
>
> We have taken the position, successfully, that because it is still a violation under Civil Code 2944.7, OCTC can bring a charge under Business and Professions Code section 6068(a) which is a catch-all - "obey all laws" statute.
>
> So, as a practical matter, we can still bring charges against attorneys who take fees for loan modifications upfront. But, as a policy matter: 1) it is inconsistent, on the one hand, to specify that it is a cause for discipline not to give up-front notices and on the other, not treat the actual collection of the up-front fees the same way and; 2) by removing it as a specific "cause for discipline" statute, it has sent an erroneous message to the public and attorney licensees that it is no longer an ethical violation.

The Committee is not blind to the fact that a new foreclosure crisis may lead to a new wave of attorney foreclosure fraud, of the sort that led to the passage of SB 94 (Calderon, Stats. 2009, Chap. 630), which enacted Section 2944.7. As noted by this Committee in its analysis of SB 980 (Vargas, Stats. 2012, Chap. 563), dated July 3, 2012:

> Since the enactment of SB 94 in October of [2009], the State Bar alone has received over 8,600 complaints alleging misconduct in loan modification matters. These complaints have resulted in investigations against nearly 800 attorneys. Over 110 attorneys have been disciplined, 50 cases are pending before the State Bar Court, and 50 attorneys are awaiting discipline by the Supreme Court

Nonetheless, without minimizing the harms caused by attorney fraud in this area, these numbers must be balanced against the danger that attorneys will be unwilling to take HBOR cases if Section 2944.7 were again specified to be a cause for attorney discipline. That chilling effect could be so great that it would offset any protections that HBOR already provides for homeowners, and that HBOR would provide in the future to small landlords if this bill were enacted. If a servicer flouts its obligations under HBOR, borrowers will have little recourse if lawyers are unwilling to represent them in asserting these protections.

Omitting Civil Code Section 2944.7 as an explicit basis of attorney discipline in Business and Professions Code Section 6106.3 seems to strike the appropriate balance between these competing interests for two persuasive reasons. First, Section 2944.7, even taken alone, already appears to be the strongest law prohibiting attorney foreclosure rescue fraud in the United States. While there are a plethora of federal and state laws that address foreclosure rescue fraud, all of which include attorney exemptions. (*See, e.g.*, 12 CFR Section 1015.7 ["An attorney is exempt from this part, with the exception of Section 1015.5, if the attorney…."], New Jersey Statutes Section 46:10B-54 ["'Foreclosure consultant'…shall not include…a person licensed to practice law in this State while acting under the authority of that license…."], Colorado Revised Statutes

Section 6-1-1103 ['Foreclosure consultant' does not include…[a] person licensed to practice law in this state while performing any activity related to the person's attorney-client relationship with a home owner….].) None of these exemptions are backstopped by prohibitions of the kind currently in Civil Code Section 2944.7.

The second point—one acknowledged by the State Bar itself—is that attorney violations of Civil Code Section 2944.7 can be prosecuted by its Office of Chief Trial Counsel under Business and Professions Code Section 6068 (a). While such a prosecution may be more difficult than if Civil Code Section 2944.7 were once again explicitly made cause for attorney discipline, this additional hurdle also requires OCTC to examine the details of the particular alleged violation in order to distinguish actual malefactors from attorneys representing clients in good faith.

The Committee acknowledges the inconsistency pointed out by the State Bar, that violations of Section 2944.6 remain explicit cause for attorney discipline under the Business and Professions Code, while violations of Section 2944.7 do not. The solution to this contradiction is not to re-insert Section 2944.7 as cause for discipline, thereby once again leading to overinclusive prosecution by the State Bar and clients in need of HBOR representation being unable to retain attorneys. Rather, the solution is to establish a more nuanced regulatory scheme in this area. The demands of the present legislative session, shortened as it has been by the pandemic, preclude such a solution at this time. Nevertheless, Committee staff is committed to working with the author's office, the State Bar, and attorneys practicing in this area in an effort to resolve these contradictions and find a way to protect the public from attorneys who are acting in bad faith, without chilling the desire of attorneys to take on these cases in good faith and assist clients seeking foreclosure relief.

ARGUMENTS IN SUPPORT: The California Apartment Association celebrates the author's efforts to protect small landlords:

> We appreciate your work to expand the protections of the Homeowner Bill of Rights, especially for mom and pop landlords who can be exposed to these scams during times of economic crises. SB 1447 will help to ensure that they keep their housing and keep their tenants in place. You are taking the important steps needed to prevent unscrupulous servicers and other third parties from interfering with a homeowner's ability to manage their mortgage debt successfully.

Consumer Reports recognizes the need to broaden the definition of "foreclosure consultant":

> The bill would also expand protections in the foreclosure consultant law (SB 94) passed after the last financial crisis to prevent unscrupulous foreclosure consultants from marketing expensive services to homeowners falling behind on their mortgages. The law bans advance fees and requires company registration with the Department of Justice; however, it currently only covers services marketed to borrowers already in delinquency. SB 1447 would apply these requirements to companies offering to help stop or postpone delinquency, so that homeowners still in forbearance are also protected.

REGISTERED SUPPORT / OPPOSITION:

Support

California Apartment Association

Center for Responsible Lending
Consumer Reports
Housing and Economic Rights Advocates

Opposition

None on file

Analysis Prepared by: Jith Meganathan / JUD. / (916) 319-2334