

California's Homeowner Bill of Rights Brings Transparency

On January 1, 2013, the mortgage and foreclosure process in California will arguably be more fair and transparent according to Attorney General Kamala Harris, who practically authored the legislation, thanks to California's new Homeowner Bill of Rights (HBOR) (introduced as Senate Bill 900/Assembly Bill 278), which will become effective in the new year and will expire on January 1, 2018, unless the legislature extends or amends it.

HBOR is an extension and enhancement of the existing (Perata) Mortgage Relief Bill (MRB) that took effect in 2008 under Senate Bill 1137. To fully understand why there was ever a need for the MRB and to fully understand why there is a current need for its extension and enhancement, the HBOR, it is important to understand the extraordinary threat we faced regarding the housing market at that time the MRB was enacted.

The language of SB 1137 summarizes the threat as follows: "California, as well as the nation, is facing an unprecedented threat to the economy and housing market due to increasing numbers of foreclosures caused by mortgage payment defaults. In 2007, more than 254,000 California households defaulted on their loans, and a total of more than 84,000 homes were lost to foreclosure. The United States Conference of Mayors reports that California cities may see a four billion dollar decline in property, sales, and transfer taxes as a result of the present housing crisis."

Vincent D. Howard is the managing shareholder at Howard Law, P.C. in Costa Mesa. He focuses his practice on wrongful foreclosure, personal injury, and social security benefits. He has represented homeowners who have faced abusive foreclosures tactics since the meltdown of the housing market. Mr. Howard can be contacted at vhoward@howard-lawpc.com.

NUTS & BOLTS



VINCENT D. HOWARD, ESQ.

The language in the bill paints a pretty grim picture of what the housing market in California was like when the bill was enacted. Additional numbers and statistics from the Center for Responsible Lending provide greater detail about the crisis at that time. On average, more than 500 California families have lost their homes every day since the fourth quarter of 2007, and the data show few signs of a return to the pre-crisis housing market. California foreclosure activity remains elevated, with more than 30,000 completed foreclosures each quarter, compared to less than 3,500 foreclosures in the third quarter of 2006. In addition, large numbers of California homeowners continue to fall behind in their payments, and would benefit from more effective policies to prevent avoidable foreclosures.

The intent of the MBR and even the HBOR was and is to stop the tidal wave of preventable foreclosures from happening by forcing lenders to adhere to the law and by encouraging lenders and servicers to reach out to homeowners and look for meaningful alternatives to foreclosure.

Perata Mortgage Relief Bill

Since the HBOR is an extension and enhancement of the MRB, it is important to understand what the legislation requires. The MRB requires the following:

- Prior to filing a notice of default, lenders must contact borrowers to set up a meeting where the lenders and consumers will discuss potential ways to avoid foreclosure.
- Applies to loans made between January 1, 2003 and December 31, 2007, when most of the loans that are causing the problems we face today were made.
- Tenants will get notice (in six different languages) once a notice of sale has been posted on a property.
- The bill increases the current notice required to be given to residential tenants of foreclosed properties to 60 days prior to eviction.
- Locals can impose a \$1,000-per-day fine on financial institutions that don't maintain vacant properties if problems are not fixed within 14 days.

Homeowner Bill of Rights

In spite of the MRB, foreclosures continued to rise and lenders were not encouraged to offer a more meaningful number of loan modifications or offer other alternatives to foreclosure. In fact, based on numbers reported, the number of foreclosures doubled after the enactment of the MRB.

Because of the increase in the number of foreclosures it was necessary to come up with additional legislation to ensure that as part of the non-judicial foreclosure process, borrowers are considered for, and have a meaningful opportunity to obtain, available loss mitigation options. This wasn't accomplished under the MRB because we have

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seen throughout the years that unless there is some sort of meaningful enforcement mechanism in place, servicers simply refuse to follow servicing rules. Moreover, they have repeatedly demonstrated that they are not interested in reviewing homeowners for available loss mitigation options including loan modifications they may qualify for.

The HBOR made several changes to California's non-judicial foreclosure process. The biggest change to the process is the allowance of a private right of action. A summary of the HBOR is below.

Who Is Subject to the HBOR?

The HBOR applies to a depository institution chartered under state or federal law, a person licensed as a California Finance Lender or under the Residential Mortgage Lending Act or a licensed real estate broker, acting as a servicer that during its immediate preceding annual reporting period, foreclosed on more than 175 residential properties located in California.

Scope of Application

The new legislation, like its predecessor, applies only to mortgages or deeds of trust that are secured by owner-occupied residential real property containing no more than four dwelling units. "Owner-occupied" means that the property is the principal residence of the borrower. The HBOR limits the scope of loss mitigation requirements and activities to first lien mortgages only and has a sunset provisions date set for January 1, 2018.

HBOR New Requirements

Some of the highlights of the new legislation are as follows:

Section 2923.55: Requires, in addition to the aforementioned existing requirements for attempting contact with borrowers at thirty days prior to default, that a servicer send a notice to the borrower including

information regarding loss mitigation and the group of loan documents that can be requested by the borrower.

Section 2923.6: Prohibitions on foreclosure filing while loan modification is pending. This is known as "dual-tracking." This section also establishes an appeal process, deadlines, and requires a detailed denial notice.

Section 2923.7: Requires that each homeowner who is seeking assistance is provided with a single point of contact (SPOC). The SPOC can be an individual or a team of individuals.

Section 2924.9: Requires that within five days of recordation of a notice of default (NOD), the servicer must send the borrower notice of their loss mitigation options.

Section 2924.10: Requires that the servicer respond within five days to the borrower's written communication.

HBOR Remedies and Enforcement

The available remedies and enforcement under the HBOR are as follows:

Injunctive relief: A homeowner/borrower may seek injunctive relief for a "material violation" (which is not defined) of any of the provisions of the HBOR if a Trustee's Deed Upon Sale (TDUS) (the document transferring title to a buyer after a foreclosure sale has occurred) has not been recorded. If the court injunction is granted, it may remain in place unless or until the court determines that the servicer has corrected the violation. Alternatively, a servicer may move to dissolve an injunction after showing the material violation has been remedied.

Attorney fees: A court may award a "prevailing borrower" reasonable attorney fees and costs if the borrower obtained injunctive relief or damages.

Monetary damages: After a trustee's deed has been recorded, the mortgage servicer or mortgagee, trustee, or beneficiary shall be liable for actual economic damages

resulting from a material violation that is not corrected and remedied prior to the recordation of the trustee's deed.

Treble damages: If the violation was intentional or reckless, or resulted from willful misconduct the court may award the borrower the greater of treble damages or statutory damages of \$50,000.

Safe harbor: Specifies that a mortgage servicer shall not be liable for a violation that has been corrected and remedied prior to recordation of the trustee's deed.

License violation: A violation by a person licensed by the Department of Corporations (DOC), Department of Financial Institutions (DFI), or Department of Real Estate (DRE) shall be deemed to be a violation of that person's licensing law.

No affect on validity of foreclosure sale: No violation shall effect the validity of a sale in favor of a bona fide purchaser. This is the same under the MRB.

National Mortgage Settlement Exemption: A signatory to the national mortgage settlement that is in compliance with the relevant terms for the Settlement Term Sheet of that consent judgment with respect to the borrower who brought an action while the consent judgment is in effect shall have no liability for a violation of the HBOR.

It is important to note that nothing in the HBOR requires a servicer or lender to offer a distressed homeowner a loan modification. However, it should encourage servicers to offer modifications to homeowners who otherwise qualify and prevent abusive practices. Moreover, it brings transparency to an otherwise murky process.