2018 Changes to Homeowner Bill of Rights

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The California Legislature enacted the Homeowner Bill of Rights ("HBOR") in 2012 to provide protections for homeowners facing non-judicial foreclosure and to modify certain aspects of the foreclosure process.[1] Many (but not all) HBOR statutes were scheduled to sunset on January 1, 2018. Of the statutes that were scheduled to sunset, many (but not all) were replaced by parallel statutes that became operative the same day. The changes add some new homeowner protections, but remove others, and modify still other protections in ambiguous ways. This article explores how a mortgage servicer's obligations toward its defaulted borrowers changed effective January 1, 2018, and how courts and litigators are responding.

Who Is Covered

As before, the HBOR covers only a natural person who is the borrower on a first-position deed of trust encumbering California residential real property containing no more than four dwelling units and that serves as the borrower's principal residence.[2] However, many former HBOR requirements did not apply to "small" mortgage servicers that foreclosed on 175 or fewer residential real properties in California during the previous year.[3] The HBOR now largely omits the distinction between large and small servicers, except with respect to the servicer's obligation to appoint a single point of contact for the borrower, which still does not apply to small servicers.[4]

Pre-Notice of Default Contact

The servicer's obligation to contact its borrower to explore alternatives to foreclosure before initiating foreclosure has largely been re-codified from Civil Code section 2923.55 to section 2923.5 without material change.[5] The servicer may not record a Notice of Default until at least thirty days after initial contact is made or after having satisfied due diligence requirements, which include sending a first-class letter, attempting to call the borrower by telephone at least three times at different hours and on different days, and then sending a certified letter.[6]

Post-Notice of Default Contact

Before January 1, 2018, servicers were required to send a letter to the borrower after they recorded a Notice of Default, explaining what loss mitigation options were potentially available and the process by which the borrower could apply for assistance.[7] The 2018 HBOR amendments repealed the servicer's obligation to send such a letter to the borrower.

The HBOR revision dispensed with other pre-foreclosure contact requirements as well. Before, a servicer was obligated to send a statement to the borrower that he or she may be entitled to certain protections under the Servicemembers Civil Relief Act.[8] Not anymore.

Also, a servicer no longer must send a letter explaining that the borrower may request a copy of the borrower's promissory note and deed of trust, the borrower's recent payment history on the property, or a copy of "any assignment" of the borrower's deed of trust "required to demonstrate the right of the mortgage servicer to foreclose."[9] The omission will be welcomed by servicers and their attorneys, as it remained unclear until the day the statute was repealed what "assignment" was required to demonstrate a servicer's right to foreclose. A written Assignment of Deed of Trust is not required to be recorded—or even exist—to transfer a debt secured

by real estate.[10] The repealed statute caused unnecessary disputes about what servicing contracts and securitization instruments could be responsive.

Single Point of Contact

The statute setting forth a large servicer's obligation to designate a single point of contact for the borrower upon request was not repealed, and remains in effect.[11]

Application Acknowledgment

Previously, a servicer was required to provide a written acknowledgment of an application for assistance within ten days of receipt.[12] The HBOR no longer requires a written acknowledgment. However, confirming that the application was received and is being processed may remain the best practice, to facilitate communication and transparency and avoid confusion about the application's status.

Dual Tracking

The HBOR prohibition on "dual tracking" means that a servicer may not record a Notice of Default or Notice of Trustee's Sale, or complete a foreclosure sale, while a complete application is pending. Dual tracking remains prohibited, but the operative language that was contained in section 2923.6 is now, confusingly, divided between section 2923.5, subdivision (a)(1)(A) (dual tracking with respect to a Notice of Default), and section 2924.11, subdivision (a) (Notice of Trustee's Sale and conducting a sale). As before, a "complete" application means that the borrower has provided all documents and information required by the servicer within a reasonable time frame specified by the servicer.[13] But there are substantive—and significant—changes as well.

Before, the HBOR prohibited dual tracking only after the servicer had received an application for a "first lien modification."[14] By inference, a servicer could therefore record a Notice of Default or Notice of Trustee's Sale, or complete a sale, while in possession of an application for lesser relief such as a temporary forbearance, short sale, or deed in lieu of foreclosure. No longer.

The HBOR now applies to any application for a "foreclosure prevention alternative," which means a first lien loan modification "or another available loss mitigation option."[15] The dual tracking prohibition therefore appears to extend to a forbearance, short sale, deed in lieu of foreclosure, or other relief short of a permanent modification.[16]

Denial Letter

Before the 2018 changes, a denial letter following a servicer's decision not to offer a loan modification was required to comply with detailed and very specific requirements. To comply with the HBOR, the letter had to specify why the investor disallowed the modification (if applicable), or the income and property values if the application was denied due to insufficient net present value ("NPV") , and to include a statement that the borrower could request the NPV inputs.[17] The requirements were extensive, but it was clear exactly what was required of servicers. That is no longer the case.

Now, the HBOR requires that the denial letter state "with specificity" the reason for the denial and that the borrower may request unspecified "additional documentation supporting the denial decision" from the servicer.[18] The vague standard invites litigation.

It is possible that the former notice requirements will establish the level of "specificity" required in describing the reason for denial and the scope of documentation that the borrower may request. But federal Magistrate Judge Laurel Beeler of California's Northern District has specifically rejected this approach, stating the "Legislature's repeal of a prior statute together with its enactment of a new statute on the same subject . . . with significant differences in language, strongly suggests the Legislature intended to change the law."[19] Magistrate Judge Beeler found that the more generalized language employed in the new HBOR statute dispensed with the requirement to provide NPV inputs and other specific data, but she did not opine as to what documentation or information a servicer is required to disclose.[20]

Right to Appeal

Without question, one of the most significant changes to the HBOR is the loss of the borrower's right to appeal a loan modification decision by explaining to the servicer within thirty days why its determination was in error.[21] The present version of HBOR omits the requirement.[22]

As a result, the HBOR allows a servicer to resume foreclosure proceedings immediately upon providing the written denial.[23] Before, the dual tracking prohibition prevented a servicer from recording a Notice of Default or Notice of Trustee's Sale, or proceeding to sale, until

after the time to appeal had expired, and, if the borrower appealed, until fifteen days after the servicer's denial of the appeal.[24]

Repeat Applications

For servicers, a less-welcome change to the HBOR involves the obligation to re-review a borrower who applies for assistance after the servicer denied the borrower. Before, the servicer was not obligated to re-review a borrower unless there was a material change in the borrower's financial condition that the borrower documented and provided to the servicer.[25] HBOR expressly stated that the purpose was "to minimize the risk of borrowers submitting multiple applications for first lien loan modifications for the purpose of delay."[26]

The current version of the HBOR omits this requirement, which appears to be an oversight, given the Legislature's demonstrated concern about misuse of the modification process. Strictly speaking, the HBOR does not restrict any number of repeat applications, or even prohibit the same application from being submitted again and again. However, the law does not require idle acts,[27] and the legislative history of the HBOR illustrates that the Legislature sought to avoid improper efforts to delay legitimate foreclosure activity.[28] Indeed, this is specifically why the Legislature narrowed the borrower's private right of action: so that a servicer could be sued only to enjoin a "material" statutory violation of select HBOR statutes, as described further below.[29]

Loss Mitigation Fees

Several HBOR requirements regarding fees charged for loss mitigation services and during loss mitigation review no longer apply. Before, the HBOR prohibited servicers from charging loss mitigation application fees.[30] The replacement statute does not.[31] Likewise, the HBOR formerly prohibited servicers from charging late fees while an application was under review.[32] Not anymore.[33]

Postponement of Foreclosure Sale

One change of particular note to attorneys representing nonjudicial foreclosure trustees concerns notice of postponement of a foreclosure sale. Before, a borrower was entitled to written notice by mail of any postponement of more than ten days.[34] This requirement no longer exists, leaving the postponement procedure set forth in Civil Code section 2924g, which provides that the postponement is verbally announced at the time set for sale on the Notice of Trustee's Sale.

Post-Modification Changes

The HBOR now dispenses with several procedural requirements after a modification has been offered and agreed to by the servicer. Before, the HBOR obligated a servicer to provide a fully executed copy of the modification agreement.[35] Not anymore.[36] Also, the HBOR formerly required the servicer to record a rescission of a Notice of Default after formalizing the modification.[37] This requirement was repealed.[38]

Penalties and Remedies

The HBOR was, and remains, highly unusual in the right of action it provides. Before a foreclosure sale has occurred, a borrower is limited to obtaining a preliminary injunction to restrain a "material" violation of four HBOR statutes: section 2923.5 (pre-Notice of Default contact), section 2923.7 (single point of contact), section 2924.11 (dual tracking), or section 2924.17 (accurate and complete declarations, supported by competent and reliable evidence). The injunction is dissolved when the servicer demonstrates that any violation has been remedied.[39] Uniquely, a borrower who obtains a preliminary injunction is entitled to his or her attorney's fees and costs.[40]

If the foreclosure sale has already occurred, the borrower may bring an action for monetary damages incurred from a material violation of the same four statutes, where the lender did not remedy the violation before the sale. The borrower may also recover a statutory penalty of the greater of $50,000 and treble damages if the violation was intentional or reckless.[41] These remedies remain the same in the current HBOR.

However, the right of California government entities to seek civil penalties against servicers that engaged in repeated violations of section 2924.17 (requiring servicers to review competent and reliable evidence substantiating borrower's default and servicer's right to foreclose) was repealed.[42]

One as-yet unresolved issue is whether a borrower may bring an action to remedy a violation of an HBOR statute that was repealed after the cause of action accrued. It seems clear that a borrower's pre-foreclosure action should only be brought to enforce the HBOR version currently in effect, because the only pre-foreclosure

remedy is a preliminary injunction. Injunctions operate prospectively.[43] In cases involving injunctive relief, courts generally apply the then-existing law in effect.[44] A court is unlikely to grant a preliminary injunction to enforce a repealed version of HBOR.

It is less clear whether a borrower may bring a post-foreclosure action for damages based upon a violation of a subsequently repealed HBOR statute. Generally, repeal of a statute terminates all claims under that statute, even for alleged violations of the statute that occurred before the repeal.[45] But "[w]here the Legislature repeals a statute but intends to save the rights of litigants in pending actions, it may accomplish that purpose by including an express saving clause in the repealing act."[46] The HBOR contains no such express saving clause. Magistrate Judge Beeler rejected a borrower's argument that the newly operative HBOR statutes impliedly preserved a right of action that had accrued under a repealed statute.[47] The question will continue to be hotly litigated as borrowers and servicers grapple with the effects of the 2018 changes to the HBOR.

The Future of HBOR

On January 3, 2018—only two days after the changes took place—Senator Jim Beall (D-San Jose) introduced Senate Bill 818 to re-enact many of the repealed HBOR statutes and amend others, including to restore the borrower's right to appeal the servicer's denial of a loan modification and prevent the servicer from proceeding with foreclosure during the appeal process. The pending legislation would add several requirements not appearing in either version of the HBOR, such as amending the dual tracking prohibition to require that the servicer appoint a single point of contact for the borrower as soon as the borrower requests a foreclosure prevention alternative, rather than waiting to receive a request for a single point of contact. Interestingly, the proposed legislation includes a saving clause in the form of a statement of legislative intent that any amendment, addition, or repeal of a HBOR statute will not extinguish or change any liability incurred under the statute then in effect.[48] The bill passed the Senate Banking and Financial Institutions Committee and the Senate Judiciary Committee and is now before the entire Senate. The legislation was approved by the Senate on May 10, 2018, and, as of June 25, 2018, was pending before the Assembly Committee on the Judiciary.

Endnotes

1 Cal. Civ. Code § 2923.4; Patera v. Citibank, N.A., 79 F. Supp. 3d 1074, 1087 (N.D. Cal. 2015).

2 Cal. Civ. Code § 2924.15(a).

3 Cal. Civ. Code §§ 2924.18(b), 2923.55(g), 2924.19 (former rules).

4 Cal. Civ. Code § 2923.7(g).

5 All further statutory references are to the California Civil Code unless otherwise stated.

6 Cal. Civ. Code § 2923.5(e).

7 Cal. Civ. Code § 2923.9 (former rule).

8 50 U.S.C. § 501, *et seq*.; Cal. Civ. Code § 2923.55(b)(1)(A) (former rule).

9 Cal. Civ. Code § 2923.55(b)(1)(B) (former rule).

10 Calvo v. HSBC Bank, 199 Cal. App. 4th 118, 123 (2011); Yvanova v. New Century Mortg. Corp., 62 Cal. 4th 919, 927 (2016).

11 Cal. Civ. Code § 2923.7.

12 Cal. Civ. Code § 2924.10 (former rule).

13 Cal. Civ. Code § 2924.11(f).

14 Cal. Civ. Code § 2923.6(c) (former rule).

15 Cal. Civ. Code §§ 2924.11(a), 2920.5(c).

16 It should be noted that dual tracking has been held an unfair business practice in violation of California Business & Professions Code section 17200 and may also support a wrongful foreclosure tort claim. Majd v. Bank of America, N.A., 243 Cal. App. 4th 1293, 1303 (2015).

17 Cal. Civ. Code § 2923.6(f) (former rule).

18 Cal. Civ. Code § 2924.11(b).

19 Jacobik v. Wells Fargo Bank, N.A., 2018 WL 1184812, at *4 (N.D. Cal. Mar. 7, 2018) (quoting Goodman v. Lozano, 47 Cal. 4th 1327, 1337 (2010)).

20 *Jacobik,* 2018 WL 1184812, at *4-5.

21 Cal. Civ. Code § 2923.6(d) (former rule); *see* Berman v. HSBC Bank USA, N.A., 11 Cal. App. 5th 465 (2017).

22 As with other elements of the loss mitigation process, federal regulations may still apply even if the HBOR is now silent. *See, e.g.*, 12 C.F.R. § 1024.41(h) (obligating a servicer to provide a right of appeal in some cases.).

23 Cal. Civ. Code § 2924.11(a); *see Jacobik*, 2018 WL 1184812, at *5.

24 Cal. Civ. Code § 2923.6(e) (former rule).

25 § 2923.6(g) (former rule).

26 *Id*.

27 § 3532.

28 *See* Cal. S. Rules Comm., Floor Analysis, Conf. Rep. 1 of Assemb. B. 278, 2011-2012 Sess. at 28-29 (June 27, 2012); Cal. S. Rules Comm., Floor Analysis, Conf. Rep. 1 of S.B. 900, 2011-2012 Sess. at 28-29 (June 27, 2012).

29 *See* Cal. S. Rules Comm., Floor Analysis, Conf. Rep. 1 of Assemb. B. 278, 2011-2012 Sess. at 28-29; Cal. S. Rules Comm.,

Floor Analysis, Conf. Rep. 1 of S.B. 900, 2011-2012 Sess. at 28-29.

30 Cal. Civ. Code § 2924.11(e) (former rule, section operative until Jan. 1, 2018).

31 *See* Cal. Civ. Code § 2924.11.

32 Cal. Civ. Code § 2924.11(f) (former rule).

33 *See* Cal. Civ. Code § 2924.11.

34 Cal. Civ. Code § 2924(a)(5).

35 Cal. Civ. Code § 2924.11(c) (former rule).

36 *See* Cal. Civ. Code § 2924.11.

37 Cal. Civ. Code § 2924.11(d) (former rule).

38 *See* Cal. Civ. Code § 2924.11.

39 Cal. Civ. Code § 2924.12(a).

40 Monterossa v. Super. Ct., 237 Cal. App. 4th 747, 754-55 (2015).

41 Cal. Civ. Code § 2924.12(b).

42 Cal. Civ. Code § 2924.17(c) (former rule).

43 Engle v. City of Oroville, 238 Cal. App. 2d 266, 270 (1965) ("Equity acts in the present tense and not in the past tense.").

44 *See* City of Watsonville v. State Dept. of Health Servs., 133 Cal. App. 4th 875, 884 (2005).

45 Beverly Hilton Hotel v. Workers' Comp. Appeal Bd., 176 Cal. App. 4th 1597, 1602, 1611 (2009);Younger v. Super. Ct., 21 Cal. 3d 102, 109 (1978); Cal. Gov. Code § 9606.

46 Bourquez v. Super. Ct., 156 Cal. App. 4th 1275, 1284 (2007).

47 Jacobik v. Wells Fargo Bank, N.A., 2018 WL 1184812, at *4-5. (N.D. Cal. Mar. 7, 2018).

48 S.B. 818, 2017-2018 Reg. Sess., §§ 25-26.