

California Enacts “Homeowner’s Bill of Rights,” a Foreclosure Reform 2.0 Legislative Package (2012)

By Melissa Richards, CMB and Neil Rubenstein, Esq.

On July 11, 2012, California Governor Jerry Brown signed into law the “Homeowner’s Bill of Rights,” AB 278/SB 900, marking the first U.S. state to adopt into law the residential mortgage foreclosure reform principles outlined in the February 2012 **National Mortgage Servicing Settlement** with the nation’s top five mortgage servicers. California Attorney General Kamala Harris, along with leadership in both the Senate and Assembly, sponsored the “Homeowner’s Bill of Rights.” AB 278/SB 900 takes effect January 1, 2013, making changes to nonjudicial foreclosure protocols for first lien residential mortgage loans (consumer purpose, owner-occupied dwellings only).

Legislature Concludes Further Reform Needed to Stem California’s Housing Crisis

A series of bills was considered in a **Legislative Conference Committee** and hours of testimony heard on pros and cons of making permanent here in California many of the aspects of the National Mortgage Servicing Settlement. Even the Federal Housing Finance Agency, federal regulator/conservator for Fannie Mae and Freddie Mac weighed in by formal comment letter. The California Legislature came to the conclusion that AB 278/SB 900 was necessary to provide stability to California’s statewide and regional economies due to these findings:

- California’s housing crisis has had a devastating economic impact on the state and local governments.
- 900,000 completed foreclosures occurred between 2007-2011, during the time in which California’s SB 1137 foreclosure reform (1.0) has been in place, and due to sunset January 1, 2013.
- Every foreclosure imposes on average \$19,229 in costs on local governments.
- More than 2 million “underwater” mortgages remain in California.

Features of the “Homeowner’s Bill of Rights”

This Lender Alert does not describe all provisions of the law that are covered in 16 separate sections of the Civil Code. The following are highlighted features we want BN Clients to be aware of that may warrant a more extensive analysis.

- The law distinguishes between regulated/licensed lenders who conduct 175 or fewer residential mortgage foreclosures per year in California (“Smaller Residential Mortgage Lenders”), and other lenders (“Larger Residential Mortgage Lenders”).
- Starting January 1, 2013, the provisions of SB 1137 (2008) are extended and expanded, to ensure that qualified first mortgage borrowers are afforded the right to explore any available alternative to foreclosure with their mortgage servicer before a California nonjudicial foreclosure can commence and/or be completed through foreclosure sale. The procedures that must be followed are much more detailed for Larger Residential Mortgage Lenders than for Smaller Residential Mortgage Lenders. [Civil Code §§ 2923.4(a), 2923.5, 2923.55.]
- Most provisions discussed in this Lender Alert are in effect through January 1, 2018. The law contains alternate provisions that are effective on and after that date.
- The law places the burden of compliance on the “**Mortgage Servicer**”—the person who services the loan or is responsible for interacting with the borrower, either as the current owner of the note or as the owner’s agent. [Civil Code § 2920.5(a).]
- The law defines “**Foreclosure Prevention Alternative**” as any available loss mitigation option, including first lien loan modification. [Civil Code § 2920.5(b).] Consumers are **not** afforded the right to receive a foreclosure prevention alternative under the California “Homeowner’s Bill of Rights,” but simply the



opportunity to explore with their mortgage servicer any available alternatives. [Civil Code §2923.4(a).]

- Except for Civil Code Sections 2924(a)(6) and 2924.17, discussed below, the law applies only to any **first lien, consumer purpose residential mortgage loans** secured by a one-to-four family residence that is occupied by the borrower. The “borrower” must be a natural person who is the trustor under the deed of trust. [Civil Code §§ 2920.5, 2924.15.] Unlike SB 1137 coverage scope, AB 278/SB 900 is **not limited to** vintage 2003-2007 residential mortgage loans.
- A mortgage servicer, mortgagee, trustee, beneficiary or authorized agent may not record a **Notice of Default** until 30 days after (a) initial contact is made, employing existing SB 1137 protocols, to assess the borrower’s financial situation and explore options for foreclosure avoidance, or (b) SB 1137 due diligence requirements for locating the borrower(s) have been met with no borrower response. A (modified) **declaration of compliance** must be attached to the notice of default. [Civil Code §§ 2923.5(a), 2923.55(a).]
- The law prohibits “**dual tracking**”—a mortgage servicer, mortgagee, trustee, beneficiary or authorized agent may not record a Notice of Default (NOD) or a Notice of Sale (NOS), and may not conduct a nonjudicial foreclosure sale while a “**complete**” **first lien loan modification application** is pending, during any applicable appeal period following initial denial of the application, or while the borrower is in compliance with an approved loan modification agreement. [Civil Code §§ 2923.5, 2923.55, 2923.6, 2924.11, 2924.18.]
- Upon borrower request for a foreclosure prevention alternative from a Larger Residential Mortgage Lender, the mortgage servicer must establish a “**single point of contact**” (individual or team) and provide the borrower with one or more direct means of communication with their single point of contact. [Civil Code §2923.7.] The practical application of this statutory requirement will be to assign the mortgage servicer’s “single point of contact” to a borrower at the time of initial outreach efforts to explore available foreclosure prevention alternatives with a borrower.
- For Larger Residential Mortgage Lenders, a mortgage servicer may not charge any **application, processing or other fee** for any first lien loan foreclosure prevention alternative. [Civil Code §2924.11(e).] While a foreclosure prevention alternative is being considered, or denial is being appealed, a mortgage servicer cannot collect **late fees**. [Civil Code § 2924.11(e), (f).]
- A nonjudicial foreclosure may not be initiated by anyone other than the holder of a beneficial interest under the deed of trust, the holder’s designated agent, or the trustee under the deed of trust. [Civil Code § 2924(a)(6).] This requirement is not limited to residential mortgage loans.
- For Larger Residential Mortgage Lenders, a **new disclosure** must be included in the borrower’s pre-NOD outreach package that includes (a) a statement that the borrower may be entitled to certain protections under the federal Servicemembers Civil Relief Act, and (b) a statement informing the borrower that he or she may request a copy of his or her note and deed of trust, a copy of any assignment of the deed of trust required to demonstrate the mortgage servicer’s right to foreclose, and a copy of borrower’s payment history since he or she was last less than 60 days past due. [Civil Code §2923.55(b)(1).]
- Recording “**robodocs**” is prohibited on *ALL mortgage-related* notices of default and supporting declarations (including declarations recorded pursuant to Civil Code §§ 2923.5 or 2923.55), notices of sale, assignments of deed of trust, and substitutions of trustee recorded in connection with a nonjudicial foreclosure, as well as declarations filed in court with respect to any foreclosure proceeding. Documents must be accurate, complete and supported by competent and relevant evidence. [Civil Code § 2924.17.] Until January 1, 2018, a mortgage servicer that engages in multiple and repeated uncorrected violations of these requirements is subject to a \$7,500 civil money penalty per mortgage or deed of trust levied by a government entity, including the mortgage servicer’s primary California regulator, if any.
- **The law affords a private right of action.** Borrowers may seek a court injunction for a material violation of aforementioned provisions **up until a foreclosure sale is completed**, and may seek attorney’s fees. Mortgage servicers may move to dissolve the injunction based on a showing that the material violation has been corrected and remedied. [Civil Code §§ 2924.12(a), 2924.19(a).]
After foreclosure sale is completed, borrowers can seek court recovery for actual damages suffered as a result of a material violation that was not corrected



prior to the foreclosure sale, plus attorney's fees, and can even be awarded the greater of **\$50,000 civil money penalty or treble damages** upon a court's finding of willful, reckless and/or intentional material violations committed by a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent. [Civil Code §§ 2924.12(b), 2924.19(b).]

- **The law further affords a right to cure violations up to foreclosure sale.** A mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent can avoid liability for any violation that it has corrected and remedied directly or through a third party contractor prior to recordation of a trustee's deed upon sale. [Civil Code §§ 2924.12(c), 2924.19(c).]
- **Violations of the "Homeowner's Bill of Rights" are subject to regulatory agency enforcement.** Material violations are also deemed to be a violation of a California charter or lender license and subject to agency administrative enforcement that could jeopardize continued engagement in California lending/servicing business. [Civil Code §§ 2924.12(d), 2924.19(d).]



Melissa Richards is a Shareholder in the firm's Corporate and Bank and Finance Practice Groups in the San Francisco office. She can be reached at (415) 227.3549 or mrichards@buchalter.com.



Neil J. Rubenstein is a Shareholder in the firm's Bank and Finance and Real Estate Practice Groups in the San Francisco office. He can be reached at (415) 227.3559 or nrubenstein@buchalter.com