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MODIFICATIONS TO THE CALIFORNIA HOMEOWNER BILL OF RIGHTS

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On January 1, 2018, certain provisions of the California Homeowner Bill of Rights ("HBOR") expired. But contrary to what many assumed, the January 1, 2018 expiration date did not apply to all of the HBOR's provisions, and many provisions have been replaced by new regulations. We've prepared the below summary of some of the substantial changes to the law and how they will affect HBOR litigation in the future.

- The new HBOR removes many of the distinctions between servicers conducting more/less than 175 annual foreclosures. In most but not all respects, all servicers are treated the same going forward.

- Changes in the private right of action/relief.
  - The HBOR still has a private cause of action, but only for material violations of section 2923.5 (pre-NOD notice requirements), 2923.7 (single point of contact), 2924.11 (dual tracking), and 2924.17 (accuracy of NOD declaration; substantiate right to foreclose).
  - Injunctive relief is available prior to the recording of a trustee's deed. After a trustee's deed is recorded, a servicer may be liable for actual economic damage and the greater of treble or actual damages for material violations that are intentional or reckless. Attorney's fees are still available if the borrower prevails.
  - However, mortgage servicers who have engaged in "multiple and repeated uncorrected violations" of section 2924.17 are no longer liable for a $7,500 penalty.

- Section 2923.55 is no longer in effect. Instead, section 2923.5 sets forth the pre-NOD contact requirements. The new section is similar to the old section, except that prior to filing a notice of default, the servicer is not required to provide:
  - The written notice regarding service members.
  - The statement that the borrower may request a copy of the note, deed of trust, assignment, or payment history.

- Section 2923.6 (dual tracking) is replaced by a new version of section 2924.11.
  - 11 prohibits recording a notice of default or conducting a foreclosure sale upon receipt of a "complete application for a foreclosure prevention alternative." Notably, the old version applied only to *loan modification* applications, not all foreclosure prevention alternative applications, so the new law is broader.
  - Also important, the statute does not directly address what happens when a servicer receives last-minute *complete* loan modification applications. As long as the modification is "complete," a servicer should probably review it even if submitted the day of the foreclosure sale. It is uncertain how courts will treat these types of last-minute applications, and this is bound to be a ripe area for litigation. It is possible, for example, that courts might find that a servicer can immediately reject the completed application based on internal underwriting guidelines for not allowing sufficient time for review.
  - 11, unlike the prior statute, does not require an appeal period following a written denial. If the borrower does try to appeal though, it is not clear whether the servicer is required to consider the appeal. While the statute does not appear to require it, it's possible that courts could find a common law duty to review.

- 11 disposes of 2923.6(g)'s safe harbor for multiple loan modification applications, meaning that a servicer must review multiple applications regardless of whether there has been a change in circumstances. However, because there is no mandatory appeal period, presumably borrowers will not be allowed to submit applications indefinitely. As soon as an application is denied, a foreclosure sale can occur.
- Servicers are no longer prohibited from collecting late fees while a loan modification application is under review.

- Section 2924(a)(5) expires, meaning that servicers/trustees no longer have to provide written notice to a borrower when a sale is postponed more than 10 business days.
- Section 2924.9 expires, meaning that servicers are no longer required to contact borrowers in writing within 5 business days of recording a notice of default to describe possible foreclosure prevention alternatives.

In sum, mortgage servicers with California foreclosures need to adjust their foreclosure process and loss mitigation policies in accordance with the revised statutes. In terms of litigation, these changes are unlikely to impact any current litigation or new lawsuits in the short term, as such cases will likely implicate the pre-January 1, 2018 statute. Moving forward, however, we may see an increase in cases because the new statute extends the dual tracking restrictions to all foreclosure prevention alternatives and does away with the safe harbor for loans that have been previously modified.

Notably, on January 3, 2018, the California Senate introduced a new bill that would largely put the HBOR back to the way it was prior to January 1, 2018. We will continue to monitor that bill and any other relevant legislation that is introduced.

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