The Game Changer – The California Bill of Rights

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Pull quote: To avoid multiple lawsuits requiring proof of authority to record the NOD, the foreclosure industry may return to recording the SOT before the NODs.

As many of you may already know, California recently passed a series of new bills collectively labeled the "Homeowner Bill of Rights" ("HBR"). With the help of many industry groups, including the United Trustees Association, CMBA and others, we successfully eliminated many of the worst provisions of the HBR and tempered many other provisions to make them more manageable. Notwithstanding these gains, the HBR is still a game changer for Servicers and Trustees.

In total, the HBR adds or amends over 15 new provisions to the foreclosure-related statutes. With that in mind, there is no way to cover all of the changes in one article. Instead, this article will focus on some of the HBR's key provisions and underlying themes. As an overview:

- Key codes changes or additions: *Civil Code* sections 2923.5, 2923.55, 2923.6, 2923.7, 2924, 2924.9, 2924.10, 2924.11, 2924.12, 2924.17 and 2924.18. (End note – all future references to any code section refers to the Civil Code)
- Most of the new laws kick-in on January 1, 2013, while others will start January 1, 2018.
- The HBR applies only to *first* liens, secured by owner-occupied residential properties with four (4) units or less.
- The HBR does not override the requirements of the parties to the AG Settlement.
- At the very last second, the court specifically excluded trustees from the definition of Mortgage Servicer ("MS"). Without that change, a trustee would have arguably been treated the same as a MS, increasing the obligations and risks for trustees. Please thank Mike Belote when you see him!
- The HBR establishes an annual volume threshold of 175 annual foreclosures for many of its provisions. For instance, 2923.5 and 2924.18 only apply to certain entities who annually conduct less than 175 residential foreclosures.

Beyond the specifics of the HBR, it contains several underlying themes. The first is "dual tracking" – the practice of simultaneously pursuing foreclosure while at the same time exploring loss mitigation options with a borrower. Many of the new provisions specifically aim to stop this practice. For instance, the MS cannot record the NOD, NOS or go to sale while a loan modification application is "pending". Likewise, the MS cannot take the next step in the foreclosure until the borrower has been notified in writing that the loan modification was denied, the reasons for the denial and waits 30 days for an appeal. The goal of these provisions is clear – the foreclosure must be placed on hold until all loss mitigation efforts have been exhausted.

Another target of the bill is increasing the transparency of the loss mitigation process. While there are several examples of the requirement of more open communication in the HBR, three of the clearest examples are the Single Point of Contact ("SPOC") requirement, the additional notice requirement of 2924(a)(5) and the new restrictions on who can record the NOD. SPOC is a term created during the AG Settlement discussions. While there's probably very little debate that assigning one person to handle all

loss mitigation discussions with the borrower would be more effective, there is even less debate (amongst those in the know) that this is entirely impractical. Fortunately, California lawmakers succumbed to pressure from the industry on this point and fell short of requiring a true single point of contact on each loan. Instead, the MS must assign an individual or team to hold the borrower's hand through the loss mitigation process. How big that team can be, will be the subject of further discussion at the servicer level.

Continuing with the communication theme, 2924(a)(5) requires that the MS provide written notice any time that the foreclosure sale is postponed for "at least 10 business days". Whether the notice will come from MS or the Trustee will be the subject of many discussions. Likewise, I suspect there will be a closer examination of how long a sale should be postponed. For short postponements, it may make sense to postpone less than 10 business days. But, on the other hand, this will require working up a sale every nine days. For longer postponements, it may make sense to postpone for 60 or 90 days rather than the usual 30 days. All of this will have to be explored by the MS and its Trustees.

The HBR's last clear transparency requirement is that only the beneficiary, trustee or ***authorized*** agent of the beneficiary can record the NOD. This provision is intended to target the consumer's claim that the party recording the NOD often is a stranger to the DOT. In the Trustee industry this process is called a "sub-by-code", which is specifically authorized by 2934a. On the surface, the new provision does not appear to change the sub-by-code process. However, the new law specifically requires that the agent must be authorized by the beneficiary to record the NOD. While there is little doubt that this authority exists, the new provision is an easy mechanism for borrowers and their attorneys to file suit, requiring that the MS and trustee prove that authority in court. To avoid multiple lawsuits requiring proof of authority to record the NOD, the foreclosure industry may return to recording the SOT before the NODs. If that happens, just be happy that we were able to add the word "trustee" to those entitled to record the NOD. One week before the HBR was passed, the legislature was still refusing to include Trustees!

Next, the HBR tackled "robo-signing", requiring that all foreclosure documents be "complete, accurate and supported by competent and reliable evidence". While this language is not exactly clear, at least it is better than earlier versions that more simplistically said that the industry cannot "robo-sign" documents. The final version is not perfect, but at least it's a step in the right direction.

Lastly, the HBR addressed the lack of a private right of action under 2923.5. In its most simplistic terms – an individual does not have the right to sue for a statutory violation unless that statute specifically provides the right to sue, which is called a "private right of action". As part of the *Mabry* ruling in 2010, the industry succeeded in limiting the private right of action under 2923.5 to a mere postponement of the foreclosure sale. The HBR completely eliminates the gains from the *Mabry* decision. 2924.12 provides that an uncorrected post-TDUS violation of almost every provision of the HBR is actionable by the borrower. The new code sections goes even further, giving the borrower the chance to recover his or her attorneys' fees *and* the greater of triple actual damages or $50,000 for intentional violations. Pre-TDUS violations, however, only merit a postponement of the foreclosure sale. This means that the time period between the sale and recording the TDUS is key to finding and resolving any code violations and avoiding potential liability.

As mentioned at the outset, there is no way one article could cover all of the new requirements. For a more detailed discussion on the HBR's requirements, please contact your in-house

counsel. Alternatively, please feel free to contact Robert Finlay at rfinlay@wrightlegal.net or 949-477-5059.

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