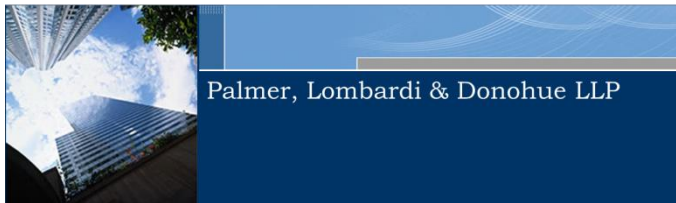


California's Homeowner Bill of Rights

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California's Homeowner Bill of Rights ("HOBR")

Introduction

- Arises from the financial crises of 2009
- Codified in California's Foreclosure statutes
 - Civil Code §§2920.5, 2923.4-2923.7, 2924.7-2924.18
- Strengthens earlier "meet and confer" provisions
- Basic Requirements
 - Gives Borrowers a right to a single point of contact
 - Requires a meeting or attempt to meet to discuss alternatives to foreclosure
 - Requires postponement of a foreclosure sale while a loan modification application is pending
 - Creates obligations to respond to loan modification applications

HOBOR - Federal Preemption under the Home Owner's Loan Act and National Bank Act

Federal Preemption

- Types
 - 1) express preemption;
 - 2) field preemption; and
 - 3) conflict preemption.

Home Owner's Loan Act ("HOLA")

- Applies to Banks formerly regulated by the Office of Thrift Supervision
- Altered by the Dodd-Frank Act (HOLA preemption is now analyzed under the National Bank Act ("NBA"))
- Not retroactive--Pre-2010 actions analyzed under HOLA
- HOLA preempts field. *Silvas v. E*Trade Mortg. Corp.*, 514 F.3d 1001, 1005-1006 (9th Cir. 2008)

HOBR - Federal Preemption under the Home Owner's Loan Act and National Bank Act (cont.)

Home Owner's Loan Act ("HOLA") (cont.)

- Regulations preempt state laws on "The terms of credit, including . . . adjustments to the interest rate, balance, payments due, or term to maturity of the loan . . . Processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages . . . Disbursements and repayments". 12 C.F.R. §560.2

NBA Preemption

- NBA does not occupy field, so some state regulation is permitted
- Regulations preempt state laws on "The terms of credit, including . . . adjustments to the interest rate, balance, payments due, or term to maturity of the loan . . . Processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages . . . Disbursements and repayments". 12 C.F.R. §34.4.

HOBOR - Federal Preemption under the Home Owner's Loan Act and National Bank Act (cont.)

Courts seem to accept HOLA preemption for loans issued by HOLA regulated lenders and still serviced by HOLA regulated lenders

- Courts reluctant to apply HOLA preemption to later, non-HOLA entities (especially for later conduct)
 - Kenery v. Wells Fargo, N.A., 5:13-CV-02411-BLF, 2014 WL 4183274 (N.D. Cal. Aug. 22, 2014)
 - Hixson v. Wells Fargo Bank NA, C 14-285 SI, 2014 WL 3870004 (N.D. Cal. Aug. 6, 2014)
- HOLA regulated lenders/services have better luck
 - Mohamed Elhanafy, et al. v. Flagstar Bank, FSB, 5:14-cv-00864-JGB-SP
 - Babb v. Wachovia Mortg., FSB, No. SA CV 12-02038 BRO (JPRx), 2013 3985001, at *5 (C.D. Cal. July 26, 2013)
 - Nga Do v. Wells Fargo Bank, N.A., No. CV 12-5645 PA (AGRx), 2012 U.S. LEXIS 126768, at *14-16 (C.D. Cal. Aug. 27, 2012)

HOBOR – Pre-Foreclosure Contact

Pre-Foreclosure Contact Efforts – Civil Code sections 2923.5 and 2923.55

- **Compliance**

- SCRA notice (2923.55)
- Notice of right to request documents (note, deed of trust, assignment, pay history) (2923.55)
- Borrower contact efforts at least 30 days before recording Notice of Default
 - Assess financial condition;
 - Discuss alternatives to foreclosure;
 - Advise of HUD counseling and right to follow up meeting within 14 days; or
 - Due diligence (letter, 3 calls different days and times, certified letter).
 - Servicer must provide toll free number and informational web site
- Declaration of contact or due diligence recorded with Notice of Default

HOBRR – Pre-Foreclosure Contact (cont.)

Pre-Foreclosure Contact Efforts – Civil Code sections 2923.5 and 2923.55

- **Common Claims and Issues**

- Failure to contact
 - Factual issue: *Intengan, v. BAC Home Loans Servicing LP*, 214 Cal.App.4th 1047 (1st Dist., Div. 5 2013)(State court will not take judicial notice of compliance in notice of default); *but see, Aghajanyan v. Greenpoint Mortg. Funding*, 2014 WL 4748277 (C.D.Cal. Sept. 22, 2014)(US District Court takes judicial notice of compliance in notice of default).
- Failure to assess financial condition properly or in good faith
 - Level of inquiry not set by statute: *Rosenfeld v. JPMorgan Chase Bank, N.A.*, 732 F.Supp.2d 952 (N.D.Cal. 2010)(Acknowledgement of inquiry into borrower condition complies with statute); *Cordero v. U.S. Bank, N.A.*, 2014 WL 4658757 (S.D.Cal. Sept. 17, 2014)(No requirement borrower be satisfied with the results of contact); *Mosarah v. SunTrust*, 2012 WL 2117166 (E.D. Cal. June 11, 2012) (contact does not require assessment to be correct or in good faith)
 - Modification discussion is compliance: *Brown v. U.S. Bancorp*, 2012 WL 665900 (C.D. Cal. Feb. 27, 2012) (admission that loan modification discussed well before the notice of default was recorded).

HOBRE – Single Point of Contact

Single Point of Contact (SPOC) - Civil Code section 2923.7 and 2924.10

- **Compliance**
- If borrower requests foreclosure prevention alternative, then:
 - SPOC (individual or team) assigned to communicate with borrower,
 - Within 5 days of loan mod application, acknowledgement with list of missing docs for “initial” acknowledgement and information about process and dates,
 - SPOC coordinates documents,
 - Advises of missing documents and foreclosure status,
 - Ensures consideration for “all” foreclosure prevention alternatives,
 - Stays with borrower through exhaustion of alternatives or loan becomes current.

HOBOR – Single Point of Contact (cont.)

Single Point of Contact (SPOC) - Civil Code section 2923.7 and 2924.10

- **Common Claims and Issues**

- No single contact:
 - Team may be used but must be knowledgeable. *Lapper v. SunTrust Mortg. N.A.*, 2013 WL 2929377 (C.D. Cal. June 7, 2013).
- Failure to timely acknowledge or communicate:
 - Factual issues: *Garcia v. Wells Fargo Bank N.A.*, 2014 WL 458208 (N.D.Cal. Jan.31, 2014).
- Material violation required:
 - See, *Cordero v. U.S. Bank, N.A.*, 2014 WL 4658757 (S.D.Cal Sept. 17, 2014) (Admission that borrower submitted loan modification application moots claims re: failure to assign SPOC knowledgeable about foreclosure prevention alternatives).

HOBOR – Dual Tracking

Dual Tracking - Civil Code sections 2923.6, 2924.11 and 2924.18

- **Compliance**

- No recording of notices of default or sale or conducting sale if:
 - Complete loan mod application under review; or
 - Mod offered and accepted within 14 days, or
 - If mod denied, then 30 days after denial
 - Denial must be in writing and give specific reason for denial
 - Denial must include appeal rights (30 days to appeal)
- If appeal made, no recording of notices or conducting sale for 15 days after denial of appeal.
- Short sale: dual tracking applies if short sale approved in writing by all parties concerned (2924.11).

HOBOR – Dual Tracking (cont.)

Dual Tracking - Civil Code sections 2923.6, 2924.11 and 2924.18

- **Common Claims and Issues**

- Complete application required:

- All documents required by the servicer within a reasonable time specified by the servicer. Civil Code section 2923.6(h). *Stokes v. CitiMortgage, Inc.*, 2014 WL 4359193 (C.D.Cal. Sept. 3, 2014)(Conclusionary allegation that application is “complete” does not meet *Iqbal* standard as plaintiff must allege facts showing application is complete).

- Successive loan modification applications:

- Repeated applications permitted after prior denial where borrower documents material change in financial circumstances. Civil Code section 2923.6(g); borrower must “document” material change. *Winterbower v. Wells Fargo Bank, N.A.* 2013 WL 1232997 (CD Cal. Mar. 27, 2013).

HOBOR – Remedies

HOBOR provides remedies for violations, but they are dependent on status of Foreclosure Sale

Remedies Pre-Foreclosure Sale (Civil Code §2924.12(a))

- Injunction for violation of §§2923.55, 2923.6, 2923.7, 2924.9, 2924.10, 2924.11, or 2924.17
 - Stays in place until violation corrected
 - If enjoined, servicer can move to dissolve injunction if violation is corrected
 - No liability if violation is corrected before Trustee's Deed Upon Sale is recorded

Remedies Post-Foreclosure Sale (Civil Code §2924.12(b))

- Provided for material violation of §§ 2923.55, 2923.6, 2923.7, 2924.9, 2924.10, 2924.11, or 2924.17
 - Liable for actual damages
 - Liable for treble actual damages or \$50,000 if material violation was intentional or reckless, or resulted from willful misconduct
- NMS signatories are excluded if compliant with NMS term sheet.

HOBOR and RESPA (Regulation X)

The Real Estate Settlement Procedures Act (“RESPA”) Amendments

- RESPA (Reg. X) Amendments Contain HOBOR-like Provisions
- Cannot commence foreclosure unless:
 - 1) 120 days in default have elapsed; or
 - 2) borrower violated due on sale clause; or
 - 3) servicer is joining junior lienholder’s action
- Must complete the application process before starting a foreclosure

HOBRE and Reg. X – Some Key Distinctions

Covered loans

- HOBRE – 1st position liens on owner occupied residential 1-4 units
- Reg. X - first or *subordinate lien* on residential real property, residential 1-4 units

Initial Contact

- HOBRE – no contact required unless borrower requests or servicer wishes to foreclose
- Reg. X – Live contact by 36th day of delinquency; written contact by 45th day

HOBRE and Reg. X – Some Key Distinctions (cont.)

Dual Tracking

- HOBRE – foreclosure bar requires complete loan modification application
- Reg. X – Initial 120 day hold on foreclosure

Loan Modification Application

- HOBRE – written notice of incomplete documents
- Reg. X – servicer must take reasonable steps to obtain missing documentation to complete application

HOBRE and Reg. X – Some Key Distinctions (cont.)

Review of Loan Modification Application

- HOBRE – complete application submitted at any time before foreclosure sale.
- Reg. X – complete application submitted 38 or more days before scheduled sale.

Loan Modification Application – Denial/Appeal

- HOBRE – 30 days to appeal denial
- Reg. X – appeal right only if complete application submitted 90 or more days from scheduled sale

HOBRE and Reg. X – Some Key Distinctions (cont.)

Loan Modification Application – Appeal Review

- HOBRE – no time limit for review; bar on foreclosure for at least 15 days after appeal denied
- Reg. X – 30 days to resolve appeal with appeal reviewed by different personnel

Number of Applications

- HOBRE – multiple if borrower “documents material change in financial circumstances” in subsequent application(s)
- Reg. X – one complete loss mitigation application

HOBOR - Other Issues

Authority to Foreclose

- California case law indicates Borrower has no authority/standing to challenge foreclosure, *Gomes v. Countrywide Home Loans, Inc.*, 192 Cal.App.4th 1149, 1156, 121 Cal.Rptr.3d 819 (2011); *Robinson v. Countrywide Home Loans, Inc.*, 199 Cal.App.4th 42, 45-46, 130 Cal.Rptr.3d 811 (2011); *Jenkins v. JP Morgan Chase Bank, N.A.*, 216 Cal.App.4th 497, 512, 156 Cal.Rptr.3d 912 (2013); *Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal.App.4th 256, 272, 129 Cal.Rptr.3d 467 (2011); *Siliga v. Mortgage Elec. Registration Sys., Inc.*, 219 Cal.App.4th 75, 85, 161 Cal.Rptr.3d 500 (2013); *Calvo v. HSBC Bank USA, N.A.*, 199 Cal.App.4th 118, 125, 130 Cal.Rptr.3d 815 (2011); *Rosberg v. Bank of Am., N.A.*, 219 Cal.App.4th 1481, 1496, 162 Cal.Rptr.3d 525 (2013).

HOBOR - Other Issues (cont.)

Authority to Foreclose (cont.)

- Glaski—held that if loan was securitized, failure to add loan to loan pool before security trust closes voids loan, and voids foreclosure. *Glaski v. Bank of Am., Nat'l Ass'n*, 218 Cal.App.4th 1079, 1099, 160 Cal.Rptr.3d 449, 465 (2013)
- Glaski has been universally rejected. See *Mendoza v. JPMorgan Chase Bank, N.A.*, 228 Cal.App.4th 1020, 1034, 175 Cal.Rptr.3d 880, 890-91 (2014); *Keshtgar v. U.S. Bank, N.A.*, 226 Cal.App.4th 1201, 1203, 172 Cal.Rptr.3d 818, 819 (2014); *Flores v. EMC Mortgage Co.*, 997 F.Supp.2d 1088, 1104 (E.D. Cal. 2014); *Rajamin v. Deutsche Bank Nat. Trust Co.*, 757 F.3d 79, 90 (2d Cir. 2014).

HOBOR - Other Issues (cont.)

Negligent Loan Modification Handling

- Split in Courts of Appeal
- Traditional View – No Negligence Duty
 - Nymark v. Heart Federal Sav. & Loan Ass'n., 231 Cal.App.3d 1089 (1991)(lender when operating in role as lender of money, owes borrower no negligence duty).
 - Lueras v. BAC Homes Loans Servicing, LP, 2013 WL 5848859 (4th Dist, Div. 3 Oct. 31, 2013)(loan modification negotiations akin to lending money and thus negligence duty arises, but lender/servicer can be liable for misrepresentations).
- Developing View – Negligence Duty
 - Jolley v. Chase Home Finance, LLC, 213 Cal. App. 4th 872 (2013)(lender owed negligence duty to borrower in context of investment property and construction loan draws and re-negotiation).
 - Alvarez v. BAC Homes Loans Servicing LP 2014 WL 38832282 (Aug 7, 2014)(lender/servicer owes negligence duty to borrower in handling of loan modification)

Defending against HOBR Claims

Defending against HOBR Claims

- Document all contacts and actions
- Have procedures in place to follow HOBR and RESPA
- Control vendors
 - Do not allow solicitations for loan modifications unless explicitly authorized
- Make decisions in a timely manner
- Have controls for receiving documents and make clear that updated documents will be needed
- Keep all documents (and keep them complete)

QUESTIONS?