

New California Homeowner's Bill of Rights May Trigger New Borrower Rights, Lawsuits with Damages!

2013. In California, we may have finally reached a turning point and entered into a (short) period of enhanced borrower rights. With the advent of the recent legislative and regulatory enactments, case law, standards, compliance duties, and best practices, mortgage servicers, foreclosure trustees, lender's and its agents are now duty bound to conduct its businesses according to uniform and objective standards.

Recent impetus to change came from or include: HAMP (Supplemental Directives), National Mortgage Settlement (NMS), The California Commitment (and the new Homeowner Bill of Rights), California Foreclosure Reduction Act, Consumer Financial Protection Bureau, Dodd-Frank Wall Street Reform, Consumer Protection Act, FHFA, OCC and the GSE national servicing guidelines including FannieMae Announcement SVC-2011-08R (9/2/2011).

Perspective: The author and CEO of the American Legal & Financial Network *began* a national debate on policy and mortgage servicing best practices back in 2007 and 2008:

Rydstrom: Best practices are tools of offense and defense. Best practices should be embraced in every aspect of business; not only as management efficiency controls, but also as litigation defensive measures and risk mitigation devices.

Although best practices are not mandatory or law, they can set a reasonable standard and act as an operational risk mitigator, efficiency tool and litigation-defense device. We need to embrace new best practices as operational-certainty controls.

Leroy: We should note right here that one of the first to step up and set out best practices in the related mortgage banking and bankruptcy field was the National Association of Chapter 13 Trustees (NACTT). NACTT's bankruptcy best practices should be reviewed and implemented as procedural controls. These best practices will be the DNA for standardization in the mortgage servicing industry.

Link: Best Practices MortgageOrb; Leroy, Rydstrom:
http://www.mortgageorb.com/e107_plugins/content/content.php?content.2102

See RICHARD RYDSTROM KEYNOTE ADDRESS JULY 17 2008 AFN Leadership & Default Conference Lake Tahoe, Incline Village Hyatt: Link:
http://www.procouncil.com/AFN_KEYNOTE_ADDRESS_RYDSTROM_JULY_17_2008_WEB_buzzword5_1_.pdf

See CMIS/AFN Leadership Conference in DC with Rich Rydstrom, Wilbur Ross, Leroy; June 2008:
http://www.cmisfocus.com/CMIS_eMAGAZINE_Q1_2009_W.pdf

In 2013, especially in California, changes in legislative and regulatory enactments, case law, standards, compliance duties, and best practices now encompass numerous standards and practices that will require compliance in the mortgage servicing and foreclosure functions.

The National Mortgage Settlement example:

The NMS sets new standards that define best practices which require in part: personal knowledge affidavits to avoid robo-signing, and prohibitions of dual-tracking (precluding foreclosure during modification evaluation). An example of some of the other NMS requirements that define new standards and practices include:

- Servicers must verify default and its right to foreclose: Servicer in non-judicial foreclosures are accurate and complete and are supported by competent and reliable evidence. Before a loan is referred to non-judicial foreclosure, Servicer shall ensure that it has reviewed competent and reliable evidence to substantiate the borrower's default and the right to foreclose, including the borrower's loan status and loan information. (Consent Decree / Bank of America Consent Judgment, Para. 1A et seq.) (http://www.justice.gov/opa/opa_documents.htm)
- A servicer must send a borrower a statement setting forth facts supporting Servicer's or holder's right to foreclose 14 days before the loan is referred to a foreclosure attorney or trustee: In all states, Servicer shall send borrowers a statement setting forth facts supporting Servicer's or holder's right to foreclose and containing the information required in paragraphs I.B.6 (items available upon borrower request), I.B.10 (account statement), I.C.2 and I.C.3 (ownership statement), and IV.B.13 (loss mitigation statement) herein. Servicer shall send this statement to the borrower in one or more communications no later than 14 days prior to referral to foreclosure attorney or foreclosure trustee. Servicer shall provide the Monitoring Committee with copies of proposed form statements for review before implementation. (Consent Decree / Bank of America Consent Judgment, Para. 2/18) (http://www.justice.gov/opa/opa_documents.htm)
- A potential borrower must be notified of his/her potential currently available loss mitigation options prior to foreclosure referral: Servicer shall be required to notify potentially eligible borrowers of currently available loss mitigation options prior to foreclosure referral. Upon the timely receipt of a complete loan modification application, Servicer shall evaluate borrowers for all available loan modification options for which they are eligible prior to referring a borrower to foreclosure and shall facilitate the submission and review of loss mitigation applications. The foregoing notwithstanding, Servicer shall have no obligation to solicit borrowers who are in bankruptcy. (Consent Decree / Bank of America Consent Judgment, IV A/1) (http://www.justice.gov/opa/opa_documents.htm)
- Loan Modification Timelines: The Servicer shall provide written acknowledgment of various events during the application process including the receipt of documentation submitted by the borrower (3 business days), notification of known deficiency in the submission information (no later than 5 business days), allow for 30 days for borrower

to supplement information, make determination of modification disposition (no later than 30 days after receipt of complete application), notification of final denial within 10 business days). (Consent Decree / Bank of America Consent Judgment, F/1) (http://www.justice.gov/opa/opa_documents.htm)

- Independent Evaluation of First Lien Modification Denial: Except when evaluated as provided in paragraphs IV.B.8 or IV.B.9, Servicer's initial denial of an eligible borrower's request for first lien loan modification following the submission of a A-26 Case 1:12-cv-00361-RMC Document 1-4 Filed 03/12/12 Page 121 of 317 Case 1:12-cv-00361-RMC Document 11-1 Filed 04/04/12 Page 28 of 224 complete loan modification application shall be subject to an independent evaluation. Such evaluation shall be performed by an independent entity or a different employee who has not been involved with the particular loan modification. (Consent Decree / Bank of America Consent Judgment, G/1) (http://www.justice.gov/opa/opa_documents.htm)
- Denial: If the modification is denied after independent review, the servicer shall send a written non-approval notice to the borrower explaining the reasons for denial, information used, and a notification that borrower has 30 days to provide evidence that the "eligibility determination was in error." (Consent Decree / Bank of America Consent Judgment, G/2) (http://www.justice.gov/opa/opa_documents.htm)
- Appeal: The servicer must notify the borrower of his/her right to appeal and obtain independent review of the denial, along with other available loss mitigation including short sales and deeds in lieu of foreclosure. (Consent Decree / Bank of America Consent Judgment, G/3) (http://www.justice.gov/opa/opa_documents.htm)

Also, servicers must establish a single-point-of-contact (SPOC) for each potentially eligible first lien mortgage borrower, and create outreach programs to communicate loss mitigation options for to all potentially eligible delinquent borrowers. The standards also warn that ineffective "contact" efforts or prerecorded automatic messages without actual contact will not be sufficient to satisfy due diligence and contact requirements. The standards also impose enforcement monitors to oversee the servicers and ensure compliance with the consent judgments, requiring regular reports detailing compliance, with the consequence of potential actions for enforcement, including injunctive relief and or civil penalties. The NMS and the servicing standards shall be in force for three and a half years from the date of entry of the judgment(s).

The California Example:

California is one of the best state examples of setting forth further standards and consequences. The new California Homeowner's Bill of Rights became effective on January 1,

2013. California's law may be more restrictive and expansive at the same time as it also creates a private right of action and codifies the right of the borrower to sue for actual damages, treble damages, statutory damages, and attorney fees. California AG, Kamala Harris set the foundational work to implement these changes in California with ***The California Commitment***. Link:<http://ebookbrowse.com/june-2012-ag-harris-interview-of-rich-rydstrom-pdf-d372746271>

The California Homeowner's Bill of Rights, termed HOBR requires that "licensees" will be responsible for maintaining evidence of compliance with all of the new requirements. "Such evidence includes, but not be limited to, phone conversation logs, copies of correspondence, notices, declarations and operations manuals that establish a mortgage servicer's policies and procedures. A licensee's books and records should establish that required correspondence and notices occur within the time periods set forth in the law." California has in effect defined these items, as the documents and evidence at issue in the ordinary course of conduct, which would be used in court or for other enforcement actions. New best practices which are crafted to create and verify such evidence should be of serious concern. Evidence of compliance is now critical, but more objective.

HOBR also sets forth the following, in part:

- HOBR does not supersede the NMS;
 - If 175 foreclosures or fewer were conducted (preceding year):
 - Foreclosure Communication Requirements: "A mortgage servicer is required to contact or attempt to contact a borrower before commencing the foreclosure process, and to record a declaration of compliance with the Notice of Default ("NOD"). After January 1, 2013, the borrower outreach requirements apply to all loans, regardless of when those loans were first recorded." HOBR prohibits a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent from recording a notice of default (NOD) until at least 30 days has passed after either: (1) initial contact with the borrower, by telephone or in person, to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure, or (2) the servicer satisfied certain specified due diligence requirements in attempting to reach the borrower. (Civ. Code 2923.5 (Section 4))
 - Review of Foreclosure Documents (Civil Code 2924.17): "Before commencing foreclosure, a mortgage servicer is required to review competent and reliable evidence to substantiate the borrower's default and its right to foreclose. In addition, every recorded declaration, affidavit, NOD, Notice of Sale ("NOS"), assignment, and

substitution of trustee must be accurate and complete, and supported by competent and reliable evidence. This provision does not sunset.” If the borrower has submitted a “complete application” for a first mortgage lien loan modification, the mortgage servicer must issue a “written determination” regarding the borrower’s eligibility for the modification. Borrower is defined as any natural person who is a mortgagor or trustor and who is potentially eligible for any federal, state, or proprietary first lien loan modification (secured by owner-occupied residential real property containing no more than four (4) dwelling units) or other available loss mitigation option offered by or through his or her mortgage servicer; except for individuals who filed bankruptcy.

▪ Prohibition on Dual Tracking (Civil Code 2923.4 (Section 4) and 2924.18:

- “A mortgage servicer is prohibited from commencing or continuing the foreclosure process (i.e.. recording a NOD or NOS, or continuing a trustee’s sale) pending a completed review of a loan modification application submitted by a borrower and until after a borrower has been provided with a written decision about eligibility for a loan modification.” (Gov. Brown, Release No. 65-Fs (Revised))
- If the bank foreclosure on more than 175 residential homes in the preceding year in California, then the additional requirements are also required before an NOD can be recorded:
 - Written information on the rights of borrower who serve in the military (SCRA Notice);
 - Must advise each borrower as to his right to request information including a copy of the promissory note, a copy of the deed of trust, a copy of any assignment of the deed of trust, and a copy of the borrower’s payment history since the borrower was last less than 60 days past due.
 - Written Denial Notice with reasons for the denial;
 - A servicer is prohibited from recording a NOD until at least 31 days after the borrower has been notified in writing of the DENIAL and no appeal has been filed.
 - Provide written Appeal instructions;
 - If Borrower files an APPEAL; no NOD can be filed until the later of 15 days after the denial of the appeal or 14

- days after the modification is offered after appeal but not accepted;
- Or if Accepted after Appeal; the date on which borrower Defaults (on first payment) or otherwise breaches the terms of the offer;
 - Servicer required to Acknowledge Receipt in writing of any document related to MOD application;
 - After NOD recorded:
 - Servicer must send Borrower *Foreclosure Prevention Alternatives* (unless borrower exhausted MOD process);
 - NOD must contain Declaration of Compliance (due diligence) and “be accurate and complete and supported by competent and reliable evidence.” And “ensure that it has reviewed competent and reliable evidence to substantiate the borrower’s default and the right to foreclose, including the borrower’s loan status and loan information.”
 - Precluded from recording the NOD or otherwise initiating the foreclosure process, unless it holds:
 - “the beneficial interest under the mortgage or deed of trust, or [are] the original trustee or the substituted trustee under the deed of trust, or the designated agent of the holder of the beneficial interest.”
 - For Trustee sales: Whenever a trustee sale is postponed for 10 business days or more (CC 2924g), a mortgage, beneficiary, or authorized agent shall provide written notice to the borrower within five (5) business days of the postponement.

Note that California Trustees will start to use different Due Diligence forms for trustees who have foreclosures with less than 175 pursuant to California Civil Code 2923.55 (b), 2923.5(a)(2), 2923.5(e), 2924.15(a) or more than 175 foreclosures pursuant to California Civil Code 2923.55 (c), 2923.55 (b)(2), 2923.55 (f), 2924.15(a).

Dual tracking is banned for all mortgage servicers; and can no longer record a NOD while borrower has an application for a modification pending. First the servicer must make a written determination that the borrower is ineligible.

New Violations / New Private Right of Action / New Damages:

Any servicer who “engages in multiple and repeated uncorrected violations” of this provision is liable for a civil penalty of up to \$7,500 per mortgage or deed of trust in an action by the government. If the borrower requests a foreclosure prevention alternative, the servicer “shall promptly establish a single point of contact and provide to the borrower one or more direct means of communication with the single point of contact.”

If Trustee’s Deed Upon Sale is Not Recorded, then a borrower may sue to enjoin material violations of the law.

If Trustee’s Deed Upon Sale is Recorded, then a borrower may sue for “**actual economic damages**” caused by the violation – if not corrected or remedied before the trustee’s deed was recorded. If the court finds the material violation was intentional, reckless, or resulted from willful misconduct, the court may award the borrower **treble the actual damages or statutory damages of \$50,000**. A prevailing BORROWER may also be awarded reasonable attorney fees and costs.

Provisions of HOBR sunset on January 1, 2018, and other provisions then become effective.

It is clear from our view of these examples, that numerous and onerous requirements are being imposed upon the industry regarding mortgage servicing, modifications and foreclosure procedures. New best practices must be developed in harmony with the various new requirements, and create compliance evidence in the ordinary course of business. New best practices can be an operational, compliance and risk mitigation tool, if the industry embraces it.

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