

THE CALIFORNIA HOMEOWNERS' BILL OF RIGHTS: **THE SAFE HARBOR PROVISION**

The California Homeowners Bill of Rights (“CHBOR”) requires servicers (and owners) of loans which are secured by first lien mortgages or deeds of trust recorded against owner-occupied residential real property containing no more than four dwelling units to comply with the requirements of the CHBOR. *Cal. Civ. Code* §§ 2920.5(d) and 2924.15(a). The purpose of the CHBOR is to ensure that, “as part of the nonjudicial foreclosure process, borrowers are considered for, and have a meaningful opportunity to obtain, available loss mitigation options, if any, offered by or through the borrower’s mortgage servicer, such as loan modifications or other alternatives to foreclosure.” *Cal. Civ. Code* § 2923.4(a).

In order to effectuate the purpose of the CHBOR, the California Legislature created certain legal remedies that borrowers may pursue against servicers (and owners) that do not comply with the CHBOR. These remedies include substantial penalties which may be imposed against servicers (and owners) that do not comply with the following portions of the CHBOR: *Cal. Civ. Code*

§§ 2923.5 and 2923.55 (requirements before recording a notice of default), 2923.6 (conditions for recording a notice of default or sale or conducting a foreclosure sale), 2923.7 (single point of contact), 2924.9 (required written communications), 2924.10 (steps which must be taken after receiving a complete application for a first lien modification), 2924.11 and 2924.18 (obligations after a foreclosure prevention alternative is approved) and 2924.17 (requiring accurate information in foreclosure related documents).

When a borrower discovers a material violation of one of the CHBOR provisions discussed above prior to a trustee’s deed upon sale being recorded, that borrower may obtain an injunction stopping the foreclosure process until the servicer (or owner) complies with the CHBOR. *Cal. Civ. Code* § 2924.12(a)(1)- (2) and 2924.19(a)(1)- (2). If the borrower succeeds in obtaining an injunction under the CHBOR, the borrower will recover the attorneys’ fees it incurred in obtaining the injunction. *Cal. Civ. Code* §§ 2924.12(i) and 2924.19(h). If a violation of the CHBOR is discovered after a trustee’s deed upon sale has been recorded, a

borrower may recover all actual economic damages the borrower has incurred, which actual damages may be trebled if the violation is deemed intentional, reckless or the result of wilful misconduct. Attorneys' fees and a \$50,000 penalty may also be recovered by the borrower. *Cal. Civ. Code* §§ 2924.12(b) and (i) and 2924.19(b) and (h).

In light of the draconian penalties inflicted on servicers (and owners) by the California Legislature, it must be noted that the CHBOR, does include certain "safe- harbor" provisions which allow a servicer (or owner) to avoid all potential liability under the CHBOR:

"A mortgage servicer, mortgagee, beneficiary, or authorized agent shall not be liable for any violation that it has corrected and remedied prior to the recordation of the trustee's deed upon sale, or that has been corrected and remedied by third parties working on its behalf prior to the recordation of the trustee's deed upon sale." *Cal. Civ. Code* §§ 2924.12(c) and 2924.19(c).

As discussed above, there are many sections of the CHBOR which, if violated, may result in the entry of an injunction, damages, penalties or attorneys' fees against a servicer (or owner). Accordingly, a detailed analysis of each section of the CHBOR and how violations of each of those sections may be remedied are beyond the scope of this article.

Nevertheless, this article is designed to provide servicers (and owners) with reassurance that the discovery or notification of a violation of the CHBOR does not necessarily mean that liability to a borrower for damages is inevitable. We look forward to serving clients who need assistance with prevention and avoidance of liability under the CHBOR so that the servicer (or owner) can look at the discovery or notification of a violation of the CHBOR as an opportunity to correct the violation which previously occurred in the context of reevaluating its practices and procedures so that the violation does not reoccur. By doing so, the servicer (or owner) will have placed itself in the position where it has no potential for liability under the CHBOR.