California: Homeowner Bill of Rights (AB 278 and SB 900)

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Phil Adleson, Esq. (CMA Legal Counsel) Adleson, Hess & Kelly, a PC 577 Salmar Avenue, Second Floor Campbell, CA 95008 Phone: 408-341-0234 E-mail: padleson@ahklaw.com	ADLESON HESS & KELLY ATTORNEYS AT LAW A PROFESSIONAL CORPORATION
T. Robert Finlay, Esq. Wright, Finlay & Zak, LLP 4665 MacArthur Court, Suite 280 Newport Beach, CA 92660 Main Phone: (949) 477-5050	WRIGHT FINLAY & ZAK LLP ATTORNEYS AT LAW
Noah Furie Budget Mortgage Corp 1849 Sawtelle Blvd., Suite 700 Los Angeles, CA 90025 Phone: 800-225-6267 E-Mail: noah@budgetmortgagecorp.com	BUDGET MORTGAGE CORP
Elizabeth Knight PLM Lender Services, Inc. 46 N. Second Street Campbell, CA 95008 Phone: 408-370-4030 E-Mail: liz@plmweb.com	PLM Lender Services, Inc. Foreclosure - Loan Servicing - Doc Prep 800-829-1585

SPEAKERS & CONTRIBUTORS

PHILLIP M. ADLESON

Mr. Adleson has been a real estate attorney since 1976 and is a licensed California real estate broker. He is the senior shareholder in the law firm of Adleson, Hess & Kelly, a Professional Corporation. He graduated with a Juris Doctor, cum laude, from University of Santa Clara School of Law, 1976. Mr. Adleson and his firm are rated "AV" (the highest rating available for both legal ability and ethics) by Martindale-Hubbell, Inc., the oldest and most respected attorney information publication in the country. He is listed in Northern California Super Lawyers magazine in the area of real estate, a designation conferred upon him by San Francisco magazine and by nomination of his peers.

Mr. Adleson is corporate counsel for both the California Mortgage Association ("CMA") and for the United Trustee's Association ("UTA"; a multi-state association for the default services industry). Mr. Adleson is a past President and Legislative Chairman for UTA's predecessor, the California Trustees Association ("CTA") and currently he serves as a director of UTA. Mr. Adleson has represented numerous lenders, trustees, purchasers, sellers, title companies and others in trials, arbitrations, DRE licensee administrative hearings, appeals, amicus curiae briefs, class actions, unfair business practices actions and in many other areas involving real estate, lending and foreclosure. Mr. Adleson is a past instructor of real estate and foreclosure classes at DeAnza Community College and San Jose State University and has taught numerous DRE and CLE approved continuing education classes throughout the world. He has also presented legal update programs for CMA, UTA, the National Business Institute, and bar associations and` has been a speaker for CMBA, REOMAC, as well as for numerous other groups. Mr. Adleson is a former attorney for the California Court of Appeal and has testified before the judiciary committees of both the California Assembly and California Senate, in addition to drafting proposed legislation that has ultimately become law in California. He has frequently been called upon to testify as an expert witness throughout California.

T. ROBERT FINLAY, ESQ.

Robert Finlay graduated from the University of Southern California School of Law in 1993. Mr. Finlay's entire legal career has been dedicated to representing members of the mortgage industry. In 2001, Robert co-founded Wright, Finlay & Zak, specializing in representing lenders, loan servicers, foreclosure trustees and title companies in all aspects of real estate and mortgage-related litigation.

Mr. Finlay is a regular contributor to the industry periodicals, having recently authored the following articles:

- At What Point is a Property Vacant to Exclude Insurance Coverage?
- Borrower's Willful Demolition of Property - Is It An Insurable Loss?

- The TRO is Back
- With the Fires Out: Who Gets the Insurance Proceeds?
- Foreclosure Purchasers Who Back Out and Wrongfully Stop Payment Can be.
- Liable for Lost Profits and For Fraud
- The Mitchell Roth Chronicles

Mr. Finlay has presented on mortgage panels for the UTA, AFN and CMBA. He is also an annual guest lecturer at the USC Law Center for

Professor Lefcoe's Real Estate Transactions Class. His published opinions include Bostanian v. Liberty Saving Bank, (1997) 52 Cal.App.4th.

In 2008, he served as the co-chair for the Legal Issues Committee. In 2009, he was elected to the UTA as a board member.

Wright, Finlay & Zak is a proud member of the UTA, CMBA, AFN and MBA, and was recently selected by Fannie Mae to be a member of its

Newly organized Retained Attorney Network. He can be reached at 949-477-5050 or rfinlay@wrightlegal.net

NOAH FURIE

Chief Operating Officer and Co-Founder of Budget Mortgage Corp., a Los Angeles based lender and loan servicer. Noah is the Chief Compliance officer for Budget and is responsible for compliance with Federal, State and laws and regulations.

Noah has been a speaker at seminars, including the Mortgage Association of California and its predecessors where his topics have included Truth in Lending Compliance, Fair Lending and ECOA Compliance, Understanding the Finance Lenders Law and updates on state and federal laws and regulations. He has been a member of the Legislative Committee of the California Mortgage Association and is Chair of the CMA Legal Resource Center.

Noah is a former member of the Real Estate Commissioner's Real Estate Finance Advisory Committee (REFAC), the Department of Corporation's Multi Lender and Securities Task Force and the City of Los Angeles Anti-Predatory Lending Advisory Group and Technical Subcommittee.

Noah has consulted on compliance and operational issues relating to private money lending, servicing and asset management. Noah has testified as an expert witness and before the judiciary committee of the California Assembly, in addition to drafting mortgage lending and land use statues that has become law.

Noah has many years of land use and entitlement experience as a part time Planning and Cultural Heritage commissioner for a California City.

Noah has been licensed as a Real Estate Broker for 30 years and has operated lending companies licensed by the DRE and the DOC.

ELIZABETH M. KNIGHT

President/CEO of the PLM family of companies. PLM Loan Management Services, Inc., an independent trustee service which specializes in non-judicial foreclosures, PLM Lender Services, Inc., an independent private investor loan servicing and fund administration service and PLM Loan Processing Center, Inc., an independent document drawing service.

Elizabeth has been in the foreclosure and loan servicing field since 1981. PLM is celebrating its 31st year in business. Elizabeth has been in the real estate field (with emphasis on escrow and loan documents prior to 1981) since 1977. She currently holds the position of Director on the board of the California Mortgage Association and Secretary/Director for the United Trustees Association. Elizabeth is a graduate of St. Mary's College (Moraga) with her Bachelor's degree in Business Management with a minor in English and an Associate's degree in Business with a minor in real estate from West Valley College (Saratoga). She is a speaker for various trade associations and groups. She is a court qualified expert in the field of foreclosure and loan servicing and is a licensed California Real Estate Broker with her NMLS endorsement.

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1. INTRODUCTION.

This program is a basic review of AB 278 and SB 900 (identical bills) passed in 2012 commonly referred to as the Homeowner's Bill of Rights ("HOBR"). The materials and the speakers comments are solely for educational purposes and for discussion and should not be construed as legal advice or relied upon in any way as legal advice. Each attendee is encouraged to obtain a thoroughly legally vetted compliance program or advice from a competent attorney whose practice emphasizes lending, servicing and foreclosures. (See, CMA disclaimer above.)

A. The Attorney General's Overview

The California Attorney General ("AG") was one of the major moving forces behind the passage the HOBR. The AG's website contains the following statement about the HOBR.

> On July 11, 2012, Governor Jerry Brown signed the California Homeowner Bill of Rights into law to bring fairness, accountability and transparency to the state's mortgage and foreclosure process.
>
> The Homeowner Bill of Rights goes into effect on January 1, 2013.
>
> More than one million California homes were lost to foreclosure between 2008 and 2011—with an additional 700,000 currently in the foreclosure pipeline. Seven of the nation's 10 hardest-hit cities by foreclosure rate in 2011 were in California.
>
> The California Homeowner Bill of Rights marks the third step in Attorney General Harris' response to the state's foreclosure and mortgage crisis. The first step was to create the Mortgage Fraud Strike Force, which has been investigating and prosecuting misconduct at all stages of the mortgage process. The second step was to extract a commitment from the nation's five largest banks of an estimated $18 billion for California borrowers. The settlement contained thoughtful reforms but are only applicable for three years, and only to loans serviced by the settling banks.
>
> Two key bills of the Homeowner Bill of Rights contain significant mortgage and foreclosure reforms. The major provisions of AB 278 (Eng/Feuer/Mitchell) and SB 900 (Leno/Corbett/DeSaulnier/Evans) include:
>
> **Dual track foreclosure ban:** Mortgage servicers will be required to render a decision on a loan modification application before advancing the foreclosure process by filing a notice of default ("NOD") or notice of sale ("NOS"), or by conducting a trustee's sale. The foreclosure process is essentially paused upon the completion of a loan modification application for the duration of the lender's review of that application.

Single point of contact: Mortgage servicers will be required to designate a "single point of contact" for borrowers who are potentially eligible for a federal or proprietary loan modification application. The single point of contact is an individual or team with knowledge of the borrower's status and foreclosure prevention alternatives, access to decision makers, and the responsibility to coordinate the flow of documentation between borrower and mortgage servicer.

Enforceability: Borrowers will have authority to seek redress of "material" violations of the California Homeowner Bill of Rights. Injunctive relief will be available prior to a foreclosure sale and recovery of damages will be available following a sale.

Verification of documents: The recording and filing of multiple unverified documents will be subject to a civil penalty of up to $7,500 per loan in an action brought by a civil prosecutor. Enforcement will also be allowed under a violator's licensing statute by the Department of Corporations, Department of Real Estate or Department of Financial Institution.

B. Overview

The AG's summary states but a fraction of what is covered in the HOBR and, of course, does not provide any guidance on compliance.

Most of its provisions will become effective January 1, 2013. Given the far reaching implications of the HOBR, all lenders, mortgage servicers ("MS"), foreclosure agents, trustees and others providing default services will have to understand how the HOBR impacts their policies and procedures. This will include understanding the new law and how it differs from existing law, reviewing regulations yet to be issued by the regulators and adopting the applicable procedures to effect compliance.

In most cases, an array of new forms will need to be implemented for optimal compliance. Some forms will be required by the law and others may be necessary to evidence compliance (i.e., to protect of the lender, MS, trustee and others involved in the nonjudicial foreclosure process.

The HOBR is fraught with ambiguities and new risks. Undoubtedly the HBOR will lead to massive litigation by borrowers making the flood of lawsuits after the passage of SB 1137 in 2008 seem minuscule. However, many of these risks can be mitigated through a diligent compliance program that errs on the side of caution until the courts or clean-up legislation answers some of the uncertainties in the law.

C. Important Thresholds for Smaller Mortgage Servicers

Most CMA members either service their own loans or retain other brokers to act as a mortgage servicer or sub-servicer. CMA was able to negotiate into the bill a threshold whereby a number of the provisions of the HOBR do not apply to lenders and servicers. As we go through the HOBR, it is important to determine which provisions apply to MS's whose lenders are over or under the designated threshold.

We will refer to applicable sections as applying to MSs or their lenders that are either "over the threshold" or "under the threshold". Most CMA members should fall under the HOBR threshold.

(1) Who is below the Threshold Initially?

In general, those who are below the threshold are: a depository institution chartered under state or federal law, a person licensed as a California Finance Lender (Fin. Code §§ 22000 et seq.) or a California Residential Mortgage Lender (Fin. Code §§ 50000 et seq.), or a person licensed as a Real Estate Broker (Bus. & Profs. Code §§ 10000 et seq.), that, during its immediately preceding annual reporting period, as established with its primary regulator, foreclosed on 175 or fewer residential real properties, containing no more than four dwelling units, that are located in California. (See, Civil Code §§ 2923.7(g)(1)&(2); 2924.18(b)&(c).)[1]

> **Comment:** The HOBR fails to address how to deal with non-licensed lenders servicing their own loans like a mom and pop holding three loans secured by a 1-4 residential property that is owner-occupied.
>
> Unfortunately, these threshold provisions fail to state whether loans secured by 1-4 dwelling unit, residential real properties exclude those that are not owner-occupied. Most of the other substantive provisions of the HOBR clearly apply only to first deeds of trust or mortgages secured by 1-4 residential properties that are "owner occupied." We may need to wait for the regulator's to issue regulations to know the answer to this and other questions.

(2) What if you initially are below the threshold but later exceed it?

- Within three months after the close of any calendar year or annual reporting period as established with its primary applicable regulator an entity or person exceeds the threshold of 175 applicable loans foreclosed upon, that entity must notify:

- Its primary regulator, in a manner acceptable to its primary regulator; *and,*

[1] All code section references are to the Cal. Civil Code unless otherwise noted.

- *Aany mortgagor or trustor who is delinquent on a residential mortgage loan serviced by that entity of the date on which that entity will be subject* to the applicable section, which date shall be the first day of the first month that is six months after the close of the calendar year or annual reporting period during which that entity exceeded the threshold.

(3) What are the forms used to report the applicable foreclosures and what is the annual reporting period?

Currently, any real estate brokers who arrange (broker), fund or service one or more residential mortgage loans in a calendar year will complete the Business Activity Report (RE 881). The Business Activity Report will include loan activity from all of a broker's MLOs. (See Bus. & Profs. Code § Section 10166.07 for a description of the information that will be required.) Business Activity Reports will be due 90 days after the end of the broker's fiscal year. The new proposed RE 881 (6/12) can be found at http://www.dre.ca.gov/files/pdf/forms/re881_preview.pdf. Unfortunately, this form does not clearly distinguish foreclosures that are subject to the HOBR and those that are not.

While the DOC regulating RML and CFL licensees has an annual report, to comply with HBOR that form will likely have to be revised. For more information consult the DOC website at http://www.corp.ca.gov/.

D. Summary of the Bill

The following is a summary of the key main provisions of the HBOR with editorial comments.

(1) Effective date

Most provisions will become effective 1/1/13 and expire 1/1/18 at which time other provisions will become effective. **Caution:** In reading the bills for compliance commencing on 1-1-13, make sure only to focus on those provisions that take effect on 1-1-13 (as opposed to those that will take effect on 1-1-18). We will only focus on the provisions taking effect on 1-1-13 as there is plenty of time to address those provisions that will take effect on 1-1-18. It is highly likely that there will be statutory amendments to the HOBR before 1-1-18.

E. Summary of HOBR Specific Provisions

Most of the provisions of the HOBR are discussed below with an emphasis on those that apply to Mortgage Servicers over or under the thresholds.

(1) Addition of Civil Code section 2920.5 (definitions):

Section 2920.5 defines a number of key terms used in the HOBR, including explaining who is covered by the bill and who must comply with the bill.

- Section 2920.5(a) provides that a "Mortgage servicer" **("MS")** "means a person or entity who directly services a loan, or who is responsible for interacting with the borrower, managing the loan account on a daily basis including collecting and crediting periodic loan payments, managing any escrow account, *or enforcing the note and security instrument, either as the current owner of the promissory note or as the current owner's authorized agent.* "Mortgage servicer" also means a subservicing agent to a master servicer by contract. "Mortgage servicer" shall not include a trustee, or a trustee's authorized agent, acting under a power of sale pursuant to a deed of trust."

> **Comment:** While there is an express exemption from the definition of an MS, it is unclear if a trustee providing services not required of a trustee in exercising the power of sale may be a MS. This is particularly relevant for those brokers who operate both loan servicing and nonjudicial foreclosures under the same entity.
>
> In addition, many of the provisions in the HOBR expressly apply to trustees requiring each provision to be read carefully.
>
> Servicers and Trustees should discuss with counsel the risk of continuing to use the "sub-by-code" process (i.e., using an agent to initiate the foreclosure with the actual trustee substituting in prior to the notice of sale. For the past year or so at CMA we have been recommending having all assignments and substitutions of trustee recorded before the NOD, not because it is required by law but because borrower attorneys keep filing lawsuits on this basis even those they repeatedly lose these arguments in the appellate courts.

- Section 2920.5(b) provides that: "Foreclosure prevention alternative" ("FPA") means a first lien loan modification or another available loss mitigation option.

> **Comment:** It is unclear the extent to which this provision may affect pure forbearance agreements where the lender forbears on defaults but has no intention of entering into any form of permanent or trial modification agreement. The best practice until appellate decisions clarify this area is to treat any forbearance (e.g., with catch up payments or capitalization of the defaults) other than a pure postponement agreement as if they are covered by the HOBR.

- Section 2920.5(c)(1) provides that: "[u]nless otherwise provided and for purposes of Sections 2923.4, 2923.5, 2923.55, 2923.6, 2923.7, 2924.9, 2924.10, 2924.11, 2924.18, and 2924.19, **"borrower"** *means any* ***natural***

person *who is a* ***mortgagor or trustor*** *and who is potentially eligible for any federal, state, or proprietary foreclosure prevention alternative program offered by, or through, his or her mortgage servicer.*

Comment: While this definition of "borrower" does not include an "owner-occupied" limitation, § 2924.15 discussed below clarifies that most of the HBOR provision apply only to "first liens mortgages or first deeds of trust secured by an owner-occupied residential real property containing no more than four dwelling units "

Comment on Business Purpose Loans. The definitions of "borrower" as a "natural person" and of "owner-occupied" are significant and were the result of input from CMA legislative advocates. In essence, these definitions are similar to the definition of a consumer loan used in TILA, RESPA, Finance Code § 4970 ("Covered Loan Law"). In essence, if the borrower or loan does not meet these definitions, the loan is not covered by the HOBR creating an "entity" (non-natural person) and business purpose exemption. While no standards are provided in the HOBR, it is reasonable to presume that the same procedures used to verify an "exempt entity" or business purpose loan for the TILA and RESPA can likely be used to document that a business purpose loan is not subject to most of the provisions of the HOBR.

If you primarily make or arrange business purpose loans which are occasionally secured by 1-4 residential properties (land purchase loan with the developer's house as additional security), you should consider the following:

Make sure you know how to properly document a business purpose loan and understand the risks of taking 1-4 residential property that is owner-occupied; and,

There is a "look and feel" risk with taking an owner-occupied 1-4 residential property as additional security, not necessarily based upon the law. After the enactment of SB 1137, many borrowers' attorneys failed to read the details of the statute, resulting in meritless lawsuits being filed against lenders with loans not covered by SB 1137.

Comment: The use of the terms "trustor" and "mortgagor" in the definition of "borrower" in § 2920.5, appears to be limiting to a person who executed a deed of trust (i.e., as opposed to a co-signer or successor in interest).

In addition, the language "who is potentially eligible for any federal, state, *or proprietary foreclosure prevention alternative program offered by, or through, his or her mortgage servicer*" may be a real problem because persons other than the "trustor or mortgagor" may be argued to be "borrowers, although the statutory language does not expressly authorize this conclusion.

This language is also problematic for private lenders and MSs because they generally are not subject to federal or state modification programs, but they may have employed a number of proprietary foreclosure prevention alternatives. Private lender and servicers will have to be careful in making representations to a borrower or on their websites in describing any "proprietary foreclosure prevention alternative programs". In reality, most private lenders have no general modification or foreclosure alternative programs and each case is analyzed on a case-by-case basis.

- Section 2920.5(c)(2) excludes borrowers who:
    - Have surrendered the secured property as evidenced by either a letter confirming the surrender or delivery of the keys to the property to the mortgagee, trustee, beneficiary, or authorized agent.

Comment: This is similar to current § 2923.5 (SB 1137) and be sure to document in a similar fashion as been used for compliance with that section.

    - Have contracted with an organization, person, or entity whose primary business is advising people who have decided to leave their homes on how to extend the foreclosure process and avoid their contractual obligations to mortgagees or beneficiaries.

Comment: This is similar to current § 2923.5 (SB 1137) but it has never proven to be a reliable exemption as the MS would have to have facts to base this exemption on and obtaining those facts is difficult.

    - Have filed a Bankruptcy and the bankruptcy court has not entered an order closing or dismissing the bankruptcy case, or granting relief from a stay of foreclosure.

(2) Addition of Civil Code § 2924.15 – Defining Covered Loans for most HOBR Provisions.

- **Covered properties Defined for most of the HOBR provisions.** Section 2924.15(a) provides that **unless otherwise provided,** paragraph (5) of subdivision (a) of Section 2924, and Sections 2923.5, 2923.55, 2923.6, 2923.7, 2924.9, 2924.10, 2924.11, and 2924.18 *shall apply only to:*

    - ***First lien mortgages or deeds of trust*** that are secured by owner-occupied residential real property containing no more than four dwelling units.

    - For these purposes, "owner-occupied" means that the property is the ***principal residence*** of the borrower and is ***security for a loan made for personal, family, or household purposes***.

> **Comment:** The "owner-occupancy" as defined in the pre-HOBR version of § 2923.5 was based upon the original loan documents. The amended definition of "owner-occupancy" as defined in § 2924.15 is ambiguous as it cannot be determined at what point in time must the property be owner-occupied to be covered? Is it at the inception of the loan? Later? What if the original loan was not for a personal, family or business purpose but the borrower subsequently moves into it as his/her personal residence? Hopefully, this uncertainty can be remedied by clean-up legislation.

(3) Addition of Civil Code section 2923.4 – Purpose of HOBR

Section 2923.4 sets forth the legislative purpose underlying the HOBR. The specific language is important both for MS's and their attorneys. Section 2923.4(a) states, in pertinent part:

- "The purpose of the [HOBR] 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. ***Nothing in the act that added this section, however, shall be interpreted to require a particular result of that process."*** [Emphasis added].

> **Comment:** Frequently statutes with ambiguous provisions like the HOBR either do not state their specific purpose or it is in non-codified provisions (e.g. SB 389 regarding non-traditional mortgages). In the HOBR we have an express stated intent or purpose that can be referred to in designing compliance programs.More importantly, the stated intent can

be used in litigation over other ambiguous provisions of the HOBR. The emphasized terms make relatively clear that:

The purpose of HOBR only applies to "available loss mitigation options", if any exist. This is more problematic for private lenders because often no "one size fits all" "loss mitigation or other alternatives to foreclosure" ("LMFA") exists as such issues are handled on a case-by-case basis requiring lender approval or, at least in a multi-lender loan approval, by the investor holding the majority of the beneficial interest. (See Bus. & Profs. Code § 10238(i) and Civ. Code § 2941.9.) However, each servicer for private lenders holding loans secured by 1-4 owner-occupied residential property has likely engaged in loss mitigation of some sort over the past five years indicating that some form of LMFA has been available. While it is not certain that a MS for private lenders cannot state that "no LMFA" exists, the better approach is for private lenders or their MS to put together a list of LMFA programs that have been used and set standards for their availability. Such programs may include, among other things:

Simple forbearances (no change in terms, just a delay in exercising remedies;

Forbearance that includes terms to address the arrearage only but with no change in the terms of the note other than provisions to make up the default (i.e., capitalize the defaulted amounts; make-up payments; deferral of default where the default is merely added to the end of the loan).

Combination forbearance/workout and modification agreements that include some modification of the loan terms (e.g.., lower interest and payments for a short period of time)

Short sales;

Deeds-in-lieu of foreclosure;

Modification agreements;

Refinancing on better terms.

Whatever standards are applied, they should be conservative in nature so that there is a real likelihood of a borrower being considered for a program.

Because many private investors are older in age and are likely to have a shorter term horizon for repayment than institutional lenders, consideration should be given and indicated wherever LMFAs are mentioned (e.g., on the MS's website) **that loans held by private investors are subject to investor review and approval and not all private investors of the MS offer any LMFA program.**

Consideration must be given to the fact that under the multi-lender rule the holder of more than 50% has the right to control the foreclosure or loss mitigation proceed leaving the broker powerless to do anything.

Once standard for available LMFA are created, the MS or lender should create procedures and documentation to show that the borrower was "***considered for***", and had a ***meaningful opportunity*** to obtain LMFA's offered by, or through, the MS.

- Section 2923.4 expressly states that the HOBR shall not be interpreted to require a particular result of that process.

- Section 2923.4(b) also provides that nothing in the HOBR shall obviate or supersede obligations of the signatories to the AG Settlement. This should not impact any private lender or their MSs.

(4) Amendments of Civil Code § 2923.5 only apply to lenders under the threshold (originally added by SB 1137)

- One majors change in § 2923.5 is that it ***only applies*** to lenders who fall under the threshold (i.e., 175 or less covered loans). Lenders exceeding the threshold are required to comply with new § 2923.55 and other provisions of the HOBR.

- The provision limiting covered loans under § 2923.5 to "mortgages or deeds of trust recorded from January 1, 2003, to December 31, 2007, inclusive," has been removed. Therefore, if the loan otherwise is covered under § 2923.5 (and related provisions), it does not matter when the loan was made or recorded.

- While the amended language of § 2923.5 is substantially similar to the prior version of the statute, with one minor exception, its adds "mortgage servicer" throughout the statute in place of the "mortgagee, beneficiary, or authorized agent" as the person or entity that could provide § 2923.5 compliance.

Comment: This raises the question of whether anyone other than the MS may perform any of the tasks in § 2923.5. Some commentators have suggested that only a MS may now provide compliance pursuant to § 2923.5. While this is the conservative approach, the definition in § 2920.5 (discussed above) is very broad and appears to recognize agents such as "sub-servicers". A number of real estate licensees provide subservicing for a master servicer and they would appear to qualify as a MS to perform § 2923.5 compliance. Regardless of how an agent may characterize itself, it should be kept in mind if an agent engages in conduct that qualifies it as a MS as defined in § 2920.5, that agent will likely have all of the obligations and duties of a MS under the HBOR, regardless of how it

defines itself. Other than a MS or subservicer, anyone who desires to engage in § 2923.5 compliance for a lender or MS, should do so only upon advice of counsel until these new provisions have been interpreted by the courts.

- Section 2923.5(a) provides that a *MS, mortgagee, trustee, beneficiary, or authorized* agent may not record a NOD until ***both***:
    - Either 30 days after the initial contact is made (if contact is achieved) or 30 days after satisfying the alternative due diligence requirements. (Section 2923.5(a)(1)(A)&(B); **and**
    - The MS complies with Section 2924.18(a)(1) if the borrower has provided a complete application defined in that code section. This is new and will be discussed in detail later. **[New]**

Comment: While adding the term MS, § 2923.5(a)(1), setting preconditions to recording of a NOD, is the only subdivision of the section retaining the terms *mortgagee, trustee, beneficiary, or authorized agent".*

- Much of the balance of § 2923.5 is similar to the version that existed prior to the enactment of the HOBR.
- The contact with the borrower and alternative due diligence provisions remain the same except for they all require that the MS contact the borrower. (§ 2923.5(a), (c) - (e)).
- Declaration -- Section 2923.5(b) has been modified slightly to state: "A [NOD] recorded pursuant to Section 2924 shall include a declaration that the mortgage servicer has contacted the borrower, has tried with due diligence to contact the borrower as required by this section, ***or that no contact was required because the individual did not meet the definition of "borrower" pursuant to subdivision (c) of Section 2920.5."***

Comment: The prior version of § 2923.5(b) did not expressly provide for a statement that the loan was not covered. As such, many trustees and MSs included such a statement when applicable. The amended version of § 2923.5(b) expressly provides for a statement that the individual does not meet the definition of "borrower" under the HOBR. (See italicized and bold language above). However, the amended version does not provide what to do if the loan is not a covered loan (i.e., not a first deed of trust or where the loan was not the borrower's "personal residence" or not considered to be "owner-occupied" because the loan was not for "personal, family or household purposes") (See, § 2924.15(a) which expressly referenced § 2923.5).

- Nothing in § 2923.5(b) now requires that the declaration must be that of the MS (as opposed to the prior language which stated that the mortgagee, beneficiary, or authorized agent contacted the borrower under § 2923.5. This raises question such as, does the declaration contained in the NOD must be signed by the MS or can it be signed by the trustee or other authorized person as the MSs authorized agent? This raises three possibilities:

    - Attach to the NOD a MS signed declaration meeting the requirements of § 2923.5(b); or,

    - Have the MS sign the NOD containing [?]; or,

    - Have a subservicing or agency agreement where an agent can sign the NOD with the MS providing a signed declaration in the agent's file.

Comment: Nothing in § 2923.5 actually requires that the declaration be signed or that it be signed under penalty of perjury. However, when combined with other provisions of the HOBR, the first two options referenced above are the better practices because borrowers' attorneys are sure to raise the issue of whether the declaration was that of the MS. Even if the trustee or authorized agent has the MS's declaration and an agency agreement in the file to prove that the declaration is that of the MS, who wants to be unnecessarily sued?

- Section 2923.5(d) dealing with designated agents for borrowers has changed the terms "any foreclosure prevention alternative" to "[a]ny loan modification or workout plan offered" referring to plans offered at the meeting between the MS and the borrower. The addition of Civil Code § 2923.55 males applicable to Lenders over the threshold.

(5) Addition of Section 2923.55 which applies only to lenders above the threshold.

- Section 2923.55, which applies only to lenders above the threshold, while similar is some respects to § 2923.5, is far more extensive.

- Section 2923.55 applies to the same type of loans and borrowers covered by § 2923.5.

- Section 2923.55(a) provides that a mortgage servicer, mortgagee, trustee, beneficiary, or authorized recording cannot record a NOD until all of the following have occurred:

- The MS must satisfy the requirements of 2923.55(b)(1) by sending the borrower certain required information.

- Thirty (30) days are required for making contract required by 2923.55(b)(2) or 30 days after satisfying the due diligence provisions of § 2923.55(f).

- The MS complies with Section 2923.6(c), if the borrower has provided a complete application as defined in Section 2923.6(h). [discussed below].

- Section 2923.55(b)(1) requires that the MS "shall send" the following information to the borrower in "writing":

  - "A statement that if the borrower is a servicemember or a dependent of a servicemember, he or she may be entitled to certain protections under the federal Servicemembers Civil Relief Act (50 U.S.C. Sec. 501 et seq.) regarding the servicemember's interest rate and the risk of foreclosure, and counseling for covered servicemembers that is available at agencies such as Military OneSource and Armed Forces Legal Assistance."

  - A statement that the borrower may request a copy of: (1) "the borrower's promissory note or other evidence of indebtedness; (2) the borrower's deed of trust or mortgage; (3) any assignment, if applicable, of the borrower's mortgage or deed of trust required to demonstrate the right of the mortgage servicer to foreclose; and, (4) the borrower's payment history since the borrower was last less than 60 days past due.

> **Comment:** It is unclear "how" this notice is to be sent. In addition as to the copy of the payment history, while not required by § 2923.55(b)(1), consideration should be given to sending a loan history that predates any defaults, as the borrower or his attorney is likely to make a qualified written request ("QWR") and the QWR will not have the limitations of § 2923.55(b)(1). Make sure that any loan history sent is consistent with statements and prior loan histories sent to the borrower or his/her attorney).

- ***Borrower meeting, contact provisions*** and web page provisions found in § 2923.55(b)(2) and in 2923.55(d)-(f), with one exception, are substantially similar to those in § 2923.5 (although renumbered) including the same minor changes.

- **Due diligence alternative.** The due diligence alternative for contacting the borrower is essentially the same as § 2923.5(e)(3) except where the borrower fails within two weeks to respond to the MS's phone calls, **must**

now include in the letter "the toll-free telephone number made available by HUD to find a HUD–certified housing counseling agency."

Comment: For lenders over the threshold and subject to § 2923.55, they will have to amend their form letter to add this additional information that is not required of lenders under the threshold operating under § 2923.5. However, it is unlikely that including such additional statement would create any harm and doing so would make the letters from MSs for non-threshold lenders have the same look and feel as those sent by MS's for lenders over the threshold.

(6) Amendment to § 2923.6 (some provisions apply to all lenders)

- Sections 2923.6*(a) and (b)* are *applicable to MSs regardless of whether their lender is above or below the threshold.* Those provisions as amended state:

2923.6. (a) The Legislature finds and declares that any duty that mortgage servicers may have to maximize net present value under their pooling and servicing agreements *is owed to all parties in a loan pool, or to all investors under a pooling and servicing agreement*, not to any particular party in the loan pool or investor under a pooling and servicing agreement, and that a mortgage servicer acts in the best interests of all parties to the loan pool or investors in the pooling and servicing agreement if it agrees to or implements a loan modification or workout plan for which both of the following apply:

(1) The loan is in payment default, or payment default is reasonably foreseeable.

(2) Anticipated recovery under the loan modification or workout plan exceeds the anticipated recovery through foreclosure on a net present value basis.

(b) It is the intent of the Legislature that the mortgage servicer offer the borrower a loan modification or workout plan if such a modification or plan is consistent with its contractual or other authority.

Comment: Section 2923.6 subdivisions (a) & (b) were actually a provision in SB 1137 (2008) requested by mortgage servicers to protect them from investor suits when they made reasonable modification or workout agreements with borrowers. Except for substituting MS for "mortgagee, beneficiary, or authorized agent" in § 2923.6(b), the amendments to these subdivisions are minor. Previously, borrowers' attorneys misinterpreted § 2923.6(b) as a mandate that lenders and MSs had a duty to provide a modification or workout plan to a borrower.

However, court decisions interpreting the pre-amendment version of § 2923.6(a)&(b) have held this section creates no such duty to the borrower and is intended to protect MSs from being sued by pools or investors for breach of duty when the loan modification or workout plan exceeds the net present value. There is no reason to think the courts will interpret these provisions differently.

This section should have application to a multi-lender loan where the holder of the majority in beneficiary interest agrees to a loan modification but non-majority beneficiaries object and threaten to sue the servicing broker.

- Section 2923.6(c)-(h) apply **only to MSs for lenders above the threshold [New]**.

- Section 2923.6(c) provides: if a borrower *submits* a ***complete*** application for a first lien loan modification offered by, or through, the borrower's MS, a MS, mortgagee, trustee, beneficiary, or authorized agent shall not record a NOD or NOS, or conduct a trustee's sale, while the complete first lien loan modification application is *pending*. A MS, mortgagee, trustee, beneficiary, or authorized agent shall not record a NOD or NOS or conduct a trustee's sale until any of the following occurs:

    - The MS makes a *written determination* that the borrower is not eligible for a first lien loan modification, and any appeal period has expired.

Comment: We are not told whether the starting date is when the written determination is "made", "mailed" to the borrower, or when it is "received" by the borrower. Court opinions on other foreclosure sections have held that notices are valid when properly mailed and receipt is not determinative. It may be wise to adopt a moderate approach, measuring from when the written determination is mailed to the borrower. In addition, while no method of delivery of the written determination is specified making regular mail a viable option, as a matter of creating evidence of compliance, the MS should consider sending such written determinations to the borrower both by certified mail, return receipt and by regular mail although not required by the statute.

    - The borrower does not accept an offered first lien loan modification within 14 days of the offer. [Again, the issue if from what date is the 14 days measured].

    - The borrower accepts a written first lien loan modification, but defaults on, or otherwise breaches the borrower's obligations under, the first lien loan modification.

Comment: No guidance is given whether the word "accept" means traditional contract acceptance requiring delivery of acceptance to the offeror or some lesser standard such as used under TILA with respect to rescission of a loan during the 3-day rescission period (i.e., oral communications acceptable).

- **Right of Appeal.** Section 2923.6(d) provides that if the borrower's application for a first lien loan modification is denied, the borrower shall have at least 30 days from the date of the written denial to appeal the denial and to provide evidence that the MS's determination was in error.

Comment: As with § 2923.6(c), we are not told whether the starting date for calculating the 30-day period is when the written denial is "made", "mailed" to the borrower, or when it is "received" by the borrower. It may be wise to send such written determinations to the borrower by certified mail, return receipt and by regular mail although not required by statue.

More significant is that there are no clarification as to: whether the loan application has to be in good faith; what are the grounds for appeal; or, what are the procedures and standards for the appeal. Until some published case law is established, it may be a good practice for the MS to reconsider on appeal any application for a loan modification where the borrower can show that the material facts relied upon by the MS or lender in rejecting the loan modification were incorrect.

- **Denial of Borrower's loan application.** Section 2923.6(e) provides that if the borrower's application for a first lien loan modification is denied, the MS, mortgagee, trustee, beneficiary, or authorized agent shall not record a NOD or, if a NOD has already been recorded, record a NOS or conduct a trustee's sale until the later of:

    - Thirty-one (31) days after *"the borrower is notified in writing"* of the denial.

    - If the borrower appeals the denial, the later of 15 days after the denial of the appeal or 14 days after a first lien loan modification is offered after appeal but declined by the borrower, or, if a first lien loan modification is offered and accepted after appeal, the date on which the borrower fails to timely submit the first payment or otherwise breaches the terms of the offer.

Comment: Because all of the time periods in § 2923.6 may create potential liability for the MS, trustee, beneficiary or authorized agent, it is important that the MS, lenders and trustees create business record forms documenting each step in the loan modification process. For example, the date when a complete loan modification application is received by the MS from the borrower; the date the MS makes a written determination on the

borrower's loan modification application; the date the written determination is sent to the borrower and how; the date any appeal of denial is received by the MS from the borrower; the date that the appeal was denied or granted; the date of communication to the borrower or granting or denying their appeal; and the first dates that the NOD, NOS or Trustee's sale, whichever is applicable, may be recorded/conducted based upon denial of a loan modification or as the result of an appeal.

Communication of this information to the trustee will be critical so that the trustee does not proceed with a NOD, NOS or trustee's sale before compliance with section 2923.6(c)-(h).

- **Reasons for Denial Letter.** Section 2923.6(f) provides that following the denial of a first lien loan modification application, the mortgage servicer shall send a ***written notice*** to the borrower identifying the reasons for denial, including the following:

  - The amount of time from the date of the denial letter in which the borrower may request an appeal of the denial of the first lien loan modification and instructions regarding how to appeal the denial.

  - If the denial was based on investor disallowance, the specific reasons for the investor disallowance.

  - If the denial is the result of a net present value calculation, the monthly gross income and property value used to calculate the net present value and a statement that the borrower may obtain all of the inputs used in the net present value calculation upon written request to the mortgage servicer.

Comment: Although "net present value" is used in private and public loan modification programs, no definition or reference to an outside standard is provided or referenced in § 2923.6. Using "net present value" as a ground for denial, is likely to be regularly appealed by borrowers.

  - If applicable, a finding that the borrower was previously offered a first lien loan modification and failed to successfully make payments under the terms of the modified loan.

  - If applicable, a description of other foreclosure prevention alternatives for which the borrower may be eligible, and a list of the steps the borrower must take in order to be considered for those options. If the MS has already approved the borrower for another foreclosure prevention alternative, information necessary to complete the foreclosure prevention alternative.

Comment: A standard denial letter will have to be prepared by the MS setting forth each statutory option. Ideally, these letters will have substantially the same look and feel.

- **Protection from multiple applications.** Section 2923.6(g) provides that: "In order to minimize the risk of borrowers submitting multiple applications for first lien loan modifications for the purpose of delay, the MS shall not be obligated to evaluate applications from borrowers who have already been ***evaluated or afforded a fair opportunity to be evaluated*** for a first lien loan modification prior to January 1, 2013, or who have been evaluated or afforded a fair opportunity to be evaluated consistent with the requirements of § 2923.6, ***unless there has been a material change in the borrower's financial circumstances since the date of the borrower's previous application and that change is documented by the borrower and submitted to the mortgage servicer.***

Comment: This provision, although allegedly for the protection of the lender or MS, is fraught with problems. While the lender or MS should be able to determine whether a loan modification was evaluated before 1-1-13, there is no guidance on what "a fair opportunity to be evaluated" means.

There is no guidance on what is a "material change in the borrower's financial circumstances", which until defined by appellate courts, will encourage borrowers to claim all kind of financial changes justifying a second bite at the modification apple.

- **Completed Application.** Section 2923.6(h) provides "that an application shall be deemed "complete" when a borrower has supplied the mortgage servicer ***with all documents required by the [MS] within the reasonable timeframes specified by the mortgage servicer.***" This definition is critical as it is the trigger for § 2923.6(c) which prevents the MS, mortgagee, trustee, beneficiary, or authorized agent from recording an NOD or proceeding to move the foreclosure forward (e.g., recording the NOS or conducting the trustee's sale).

Comment: To avoid a borrower prematurely claiming that a loan application is "complete" before the MS or lender has sufficient information to make a decision, the MS should consider preparing letters, based on the lender's standards, to send to borrowers detailing precisely what they will require including any items that may be needed if the application does not provide sufficient information for the lender or MS to approve or deny the loan modification. It may be better to require a thorough documentation to avoid multiple requests from the borrower for additional information.

There is no statement of what time periods will be "reasonable". This too will likely be resolved by litigation. The time period provided should be stated in the letter to the borrower with a loan modification application and should provide sufficient time for a borrower to obtain and deliver the information to the MS. The letter should specify when, where, to whom and the manner of delivery so that there is no question about what the borrower must do.

Caution: Under the prior version of § 2923.6, appellate courts had held that there was no private right of action. This will change, at least as to § 2923.6(c)-(h) when it is read together with the private right of action created by the addition of § 2924.17 [discussed later].

(7) Addition of Civil Code § 2923.7 – Single Point of Contact ("SPC")for borrower with MS's (for lenders over the threshold)

- **Single Point of Contact ("SPC").** Section 2923.7(a) requires that: "Upon request from a borrower who requests a foreclosure prevention alternative, the [MS] ***shall promptly establish a ["SPC"]*** and ***provide to the borrower one or more direct means of communication with the single point of contact.***" (Brackets and emphasis added).

- **Duties of SPC.** Section 2923.7(b) ("SPC duties" requires that the SPC shall be responsible for doing all of the following:

    - Communicating the process by which a borrower may apply for an available foreclosure prevention alternative and the deadline for any required submissions to be considered for these options.

    - Coordinating receipt of all documents associated with available foreclosure prevention alternatives and notifying the borrower of any missing documents necessary to complete the application.

    - Having access to current information and personnel sufficient to timely, accurately, and adequately inform the borrower of the current status of the foreclosure prevention alternative.

    - Ensuring that a borrower is considered for all foreclosure prevention alternatives *offered by, or through, the mortgage servicer, if any.*

    - Having access to individuals with the ability and authority to stop foreclosure proceedings when necessary.

- **Duration of SPC.** Section 2923.7(c) provides that "[t]he single point of contact shall remain assigned to the borrower's account until the [MS] determines *that all loss mitigation options offered by, or through, the mortgage servicer have been exhausted or the borrower's account becomes current.*"

- **Elevation to Supervisor.** Section 2923.7(d) requires that the MS "shall ensure that a single point of contact refers and transfers a borrower to an appropriate supervisor upon request of the borrower, if the single point of contact has a supervisor.

- **Definition of SPC and Duty to Supervise.** Section 2923.7(e) defines "single point of contact" as "an individual or team of personnel each of whom has the ability and authority to perform the responsibilities described. (§ 2923.7(b)-(d), inclusive). The MS shall ensure that each member of the team is knowledgeable about the borrower's situation and current status in the alternatives to foreclosure process.

- **Report to Regulators by any lender who exceeds the threshold in a calendar year.** Section 2923.7(g)(1) excludes MS for lenders under the threshold from the SPC provisions of § 2923.7. However, §2923.7(g)(2) requires that within three months after the close of any calendar year or annual reporting period as established with its primary regulator during which an entity or person [non-threshold lender] exceeds the threshold of 175 foreclosed loans secured by residential real properties, containing no more than four dwelling units, that are located in California, that entity shall notify its primary regulator, in a manner acceptable to its primary regulator, and any mortgagor or trustor who is delinquent on a residential mortgage loan serviced by that entity of the date on which that entity will be subject to section 2923.7, which date shall be the first day of the first month that is six months after the close of the calendar year or annual reporting period during which that entity exceeded the threshold.

> **Comment:** Any lender that is close to the threshold should carefully monitor the number of loans subject to the threshold since failure to report could result in license or regulatory discipline but also in dire consequences if the lender and MS do not comply with the elevated compliance required of MS for lenders above the threshold.

(8) Amendments to § 2924.

- Civil Code § 2924 is the historical start of California's comprehensive nonjudicial foreclosure framework. HOBR amends § 2924 adding subdivisions (a)(5) and (6).

- **New Written Notice of Postponement.** Section 2924(a)(5) provides that until January 1, 2018 for loans covered by HOBR (§ 2924.15(a)), whenever a sale is postponed for a period of at least 10 business days pursuant to § 2924g:

    - A mortgagee, beneficiary, or authorized agent ***shall provide written notice to a borrower regarding the new sale date and time, within five business days following the postponement.***

    - The information provided in the written notice shall not constitute the public declaration required 2924g(d).

    - Failure to comply with this paragraph shall not invalidate any sale that would otherwise be valid under Section 2924f.

Comment: What does "provide written notice" mean? Sections 2924 et. seq. have generally required that foreclosure notices be "mailed" to the BR, but case law has made it clear that receipt is not required. The new requirement is not clear.

- Section 2924(a)(6) provides that ***no entity shall record or cause a notice of default to be recorded or otherwise initiate the foreclosure process*** unless it is:

    - The holder of the beneficial interest under the mortgage or deed of trust;

    - The original trustee or the substituted trustee under the deed of trust; or,

    - The designated agent of the holder of the beneficial interest. No agent of the holder of the beneficial interest under the mortgage or deed of trust, original trustee or substituted trustee under the deed of trust ***may record a notice of default or otherwise commence the foreclosure process except when acting within the scope of authority designated by the holder of the beneficial interest.***

Comment: The most common way of initiating a foreclosure in the past 10+ years has been having a foreclosure agent sign and record the NOD and then substituting in a new trustee prior to recording the NOS. (Sub-by-code procedure). New Section 2924(a)(6) will take away the incentive to use the sub-by-code process. Clearly the NOD may be recorded or caused to be recorded by the beneficiary, the original or substitute trustee or by the designated agent of the holder of the beneficial interest. To use a foreclosure agent to record the NOD, the trustee, MS and "holder of the beneficial interest" will have to have an agency agreement specifying the agent's authority. Since the authority must be

given by the **holder of the beneficial interest**, the MS must be authorized to process a nonjudicial foreclosure on behalf of the holder of the beneficial interest and to delegate such duties to a subagent. The foreclosure agent will need an agency agreement directly from the holder of the beneficial interest or possibly through the MSs where the MS has an agency agreement authorizing it to delegate to a subagent the duties to initiate and process a nonjudicial foreclosure on behalf of the holders of the beneficial interest. Some commentators suggest that the authority for all subagents e.g., foreclosure agent, title company or anyone else that physically brings the NOD to the recorder's office, must qualify under the agency exception. While this is unlikely, it makes sense to have all agency agreements from the holder of the beneficial interest to the title company or servicing recording the NOD to have an agency agreement tracking its authority to the beneficiaries.

Comment: Section 2924a(6) may be viewed as ambiguous when read together with § 2924(a)(1) which proves that the "trustee, mortgagee, or beneficiary, or any of their authorized agents" may file the NOD. For a number of years, borrowers' attorneys have attempted to claim, in the appellate courts without success, that the agent for the trustee or for the beneficiary who signs the NOD did not have authority to initiate the nonjudicial foreclosure for the actual owner of the loan and therefore the NOD and nonjudicial foreclosure are void.

The **bottom line** is that: if the beneficiary, trustee, or substitute trustee of record signs and records the NOD (or causes it to be recorded), MSs, lenders and trustees will eliminate frivolous challenges to authority by borrowers' attorneys. As such, it may be wise to substitute in a new trustee, if necessary, before recording the NOD as they generally prepare, process and record the NOD.

(9) Addition of Civil Code § 2924.9 5-Day Notice after NOD regarding Foreclosure Prevention Alternatives ("FPA") – applies only to MS handling lenders who are over the threshold.

- Section 2924.9(a) provides that unless a borrower has previously exhausted the first lien loan modification process offered by, or through, his or her MS described in Section 2923.6, within *five business days after recording a NOD pursuant to § 2924*, a ***MS that offers one or more foreclosure prevention alternatives shall send a written communication*** to the borrower that includes all of the following information:

- That the borrower may be evaluated for a foreclosure prevention alternative, or if applicable, foreclosure prevention alternatives.

- Whether an application is required to be submitted by the borrower in order to be considered for a foreclosure prevention alternative.

- The means and process by which a borrower may obtain an application for a foreclosure prevention alternative.

Comment: This section raised the following concerns:

No method of sending the written 5-day notice is specified.

The MS, not the trustee, is directed to send the notice. As such the trustee and MS will have to closely coordinate on when the NOD was filed because of the short 5-business day trigger for the MS to send the 5-day letter.

Business Day is defined in the Civil Code § 9.

No remedy is provided, so what happens if the 5-day notice is sent on the 6th business day? Does the foreclosure have to be restarted? Or, can the foreclosure be delayed until the notice has been sent?

Because this provision only applies to MS for lenders over the threshold, we can expect a number of "look and feel" lawsuits because not all nonjudicial foreclosures will involve the same type of documents and procedures.

(10) Addition of Civil Code § 2924.10 – 5-business day acknowledgment of receipt for loan modification application and other documents -- (Only applies to MS for lender's over the threshold)

- **Five Business Day Notice of Acknowledgment of Receipt.** Section 2924.10(a) provides: when a borrower submits a complete first lien modification application or any document in connection with a first lien modification application, the MS **shall provide** written acknowledgment of the receipt of the documentation ***within five business days of receipt***. In its ***initial acknowledgment of receipt of the loan modification application***, the mortgage servicer shall include the following information:

  - A description of the loan modification process, including an estimate of when a decision on the loan modification will be made after a complete application has been submitted by the borrower and the length of time the borrower will have to consider an offer of a loan modification or other FPA.

- Any deadlines, including deadlines to submit missing documentation, that would affect the processing of a first lien loan modification application.

- Any expiration dates for submitted documents.

- Any deficiency in the borrower's first lien loan modification application.

- The borrower's first lien loan modification application shall be deemed to be "complete" when a borrower has supplied the mortgage servicer with all documents required by the mortgage servicer within the reasonable timeframes specified by the mortgage servicer.

Comment: Section 2924.10 appears to contemplate that that acknowledgments of receipt will be used both when the MS receives the borrower initial loan modification application and when the MS receives any document in connection with a first lien modification application.

There is absolutely no definition of what "shall provide" means. Can it be sent by e-mail or must the written acknowledgment be sent by mail and, if so, what type.

Because of the "look and feel issue", MS for lenders under the threshold might want to consider sending acknowledgments of receipt for loan modification applications and documents.

(11) Addition of Civil Code § 2924.11 -- Prohibits Dual Tracking – Only applies to MS on loans for lenders over the threshold.

- **No Dual Tracking where an FPA is approved before filing NOD.** Section 2924.11 (a) provides that if a FPA is approved *in writing prior to the recordation of a NOD*, a MS, mortgagee, trustee, beneficiary, or authorized agent ***shall not record a notice of default*** under either of the following circumstances:

  - The borrower is in compliance with the terms of a written trial or permanent loan modification, forbearance, or repayment plan.

  - A FPA has been approved in writing by all parties, including, for example, the first lien investor, junior lienholder, and mortgage insurer, as applicable, and proof of funds or financing has been provided to the MS.

- **No Dual Tracking where an FPA is approved after filing NOD.** Section 2924.11(b) provides that if a FPA is approved in writing after the recordation of a NOD, a MS, mortgagee, trustee, beneficiary, or authorized agent shall

not record a NOS or conduct a trustee's sale under either of the following circumstances:

- The borrower is in compliance with the terms of a written trial or permanent loan modification, *forbearance*, or repayment plan.
- A foreclosure prevention alternative has been approved in writing by all parties, including, for example, the first lien investor, junior lienholder, and mortgage insurer, as applicable, and proof of funds or financing has been provided to the servicer.

- **Comment:** Most significantly, most forbearance agreements have traditionally provided for dual tracking with a postponement of the trustee's sale so long as the borrower is in compliance. This allows lenders to extend forbearances to borrowers they otherwise might not consider. Section 2924.11(a)&(b) appear to prohibit this for lenders over the threshold. This may create a "look and feel" problem for those MSs servicing lenders under the threshold. Nothing appears to prohibit a forbearance agreement to be for a limited period of time. That is, a lender appears to be able to forbear for a specific number of payments allowing the borrower to find ways to cure the default. However, during this time, the MS cannot move the foreclosure forward.
- It will be critical that MSs communicate to trustees when a FPA has been approved (i.e., put files on hold).
- Trustees will need to document that the MS has been put on hold due to an accepted FPA and that the MS has taken the foreclosure off hold when it no longer applies.
- There is no definition of what is meant by "proof of funds or financing". Everyone who has been in business for more than a week has seen an array of phony letters (e.g., "my brother's loaning me the money") or conditional loans commitments that are meaningless without actual funding. This section appears to recognize that junior lienholder consent may be required to a first loan modification.

- **Copy of loan modification of FPA to borrower.** Section 2924.11(c) provides that *when a borrower accepts* an offered first lien loan modification or other FPA, the MS shall provide the borrower with a copy of the fully executed loan modification agreement or agreement evidencing the FPA following receipt of the executed copy from the borrower.

Comment: No timing is specified in the statute.

- ***Rescission of NOD or cancellation of sale when permanent loan modification is approved.*** Section 2924.11(d) provides that a mortgagee, beneficiary, or authorized agent shall record a rescission of a NOD or

cancel a pending trustee's sale, if applicable, upon the borrower executing a permanent foreclosure prevention alternative.

- In the case of a short sale, the rescission or cancellation of the pending trustee's sale shall occur when the short sale has been approved by all parties and proof of funds or financing has been provided to the mortgagee, beneficiary, or authorized agent.

Comment: MS and lenders should be very careful in approving short sales, because once all parties have approved the short sale, the only other condition is "proof of funds or financing," which is not defined. See the prior comment regarding "proof of funds or financing". This risk is: that the lender or MS approves a short sale with the borrower but the financing fails. Nonetheless, if proof of funds or financing was provided to the MS or lender, they would have to cancel the trustee's sale.

- **No fees.** Section 2924.11(e) prohibits the MS from charging any application, processing, or other fee for a first lien loan modification or other FPA.

- ***No Late Fee while Borrowers application for a loan modification is considered.*** Section 2924.11(f) provides that the MS shall not collect any late fees for periods during which:

  - A complete first lien loan modification application is under consideration or a denial is being appealed;

  - The borrower is making timely modification payments; or,

  - A foreclosure prevention alternative is being evaluated or exercised.

- **A successor MS is bound by any approved loan modification or FPA approve by its predecessor MS.** Section 2924.11(g) provides if a borrower has been approved in writing for a first lien loan modification or other FPA, and the servicing of that borrower's loan is transferred or sold to another mortgage servicer, the subsequent mortgage servicer shall continue to honor any previously approved first lien loan modification or other FPA, in accordance with the provisions the HOBR.

(12) Addition of Civil Code § 2924.18 Dual Tracking for MS for lenders under the threshold (still applies to HOBR covered loans only).

- **No Dual Tracking where a complete first lien loan modification is pending.** Section 2924.18(a)(1) provides, if a borrower submits a ***complete application*** for a first lien loan modification offered by, or through, the borrower's MS, a MS, trustee, mortgagee, beneficiary, or

authorized agent *shall not record a NOD, NOS, or conduct a trustee's sale while the complete first lien loan modification application is pending, and until the borrower has been provided with a written determination by the MS regarding that borrower's eligibility for the requested loan modification.*

- Foreclosure Prevention Act

- **No Dual Tracking where an FPA is approved before filing NOD.** Section 2924.18(a)(2) provides if a FPA has been approved in writing prior to the recordation of a NOD, a MS, mortgagee, trustee, beneficiary, or authorized agent shall not record a notice of default under either of the following circumstances:

    - The borrower is in compliance with the terms of a written trial or permanent loan modification, forbearance, or repayment plan.

    - A foreclosure prevention alternative has been approved in writing by all parties, including, for example, the first lien investor, junior lienholder, and mortgage insurer, as applicable, and proof of funds or financing has been provided to the servicer.

- **No Dual Tracking where an FPA is approved after filing NOD.** Section 2924.18(a)(3) provides that if a FPA is approved in writing after the recordation of a NOD, a MS, mortgagee, trustee, beneficiary, or authorized agent shall not record a NOS or conduct a trustee's sale under either of the following circumstances:

    - The borrower is in compliance with the terms of a written trial or permanent loan modification, forbearance, or repayment plan.

    - A FPA has been approved in writing by all parties, including, for example, the first lien investor, junior lienholder, and mortgage insurer, as applicable, and proof of funds or financing has been provided to the servicer.

- **Application for those under the threshold.** Section 2924.18(b) provides that § 2924.18 only applies to persons or entities under the threshold.

- § 2924.18(c) provides that within three months after the close of any calendar year or annual reporting period as established with its primary regulator during *which an entity or person* described in 2924.18(b) exceeds the threshold of 175 specified in 2924.18(b), **that entity shall notify**:

    - It primary regulator, in a manner acceptable to its primary regulator; and,

    - Any mortgagor or trustor who is delinquent on a residential mortgage loan serviced by that entity of the date on which that entity will be subject to Sections 2923.55, 2923.6, 2923.7, 2924.9, 2924.10, 2924.11, and 2924.12, which date shall be the first day of the first

month that is six months after the close of the calendar year or annual reporting period during which that entity exceeded the threshold.

Comment: This provision requires that the regulated or licensed person, who has moved from being under the threshold to being over the threshold, must notify delinquent borrower covered by the sections applicable to those who are over the threshold. Anyone who might move from being below to being above the threshold should be tracking their foreclosures so that they can identify those borrowers entitled to notice. This will require a full understanding of and compliance with compliance procedures for persons exceeding the threshold.

- **Definition of complete application.** Section 2924.18(d) provides an application shall be deemed "complete" when a borrower has supplied the mortgage servicer with all documents required by the mortgage servicer within the reasonable timeframes specified by the mortgage servicer. [See prior comment regarding this definition above].

- **A successor MS is bound by any approved loan modification or FPA approved by its predecessor MS.** Section 2924.18(e) provides that if a borrower has been approved in writing for a first lien loan modification or other FPA, and the servicing of the borrower's loan is transferred or sold to another MS, the subsequent MS shall continue to honor any previously approved first lien loan modification or other FPA, in accordance with the provisions of HOBR.

(13) Addition of Civil Code § 2924.12 (Private Right of Action) – applies to MS above the threshold only.

- **Borrower may bring an Injunction for Certain Violations where trustee's deed not recorded.** Section 2924.12(a)(1) provides if a trustee's deed upon sale has not been recorded, a borrower may bring an action for injunctive relief to enjoin a ***material violation*** of Section 2923.55, 2923.6, 2923.7, 2924.9, 2924.10, 2924.11, or 2924.17.

Comment: Except for § 2923.6(a)&(b) which have no real substantive provisions and § 2924.17 discussed later, the enumerated provisions only apply to MSs whose lenders exceed the threshold. For those lenders, the question is: what is a "material violation" of the designated statutes? We will only have an answer to this after the appellate courts have issued published decisions.

Section 2924.12 does not address the issue of tender. Further, it fails to address the issue of the difference between a temporary restraining order ("TRO") which is easily obtained without a thorough review of the evidence and without the court hearing argument, and a preliminary

injunction where the court reviews evidence and arguments before making its order.

- **Duration of the injunction.** Section 2924.12(a)(2) provides that any injunction shall remain in place and any trustee's sale shall be enjoined *until the court determines that the MS, mortgagee, trustee, beneficiary, or authorized agent has corrected and remedied the violation or violations giving rise to the action for injunctive relief.* An enjoined entity may move to dissolve an injunction based on a showing that the material violation has been corrected and remedied.

Comment: This section ignores the possibility that the court issues a TRO and then finds that there is no violation to correct or remedy. The general standard for granting a preliminary injunction is that the plaintiff has a reasonable probability of prevailing. Counsel for MS, lenders, etc. should prepare thorough and competent declarations and evidence showing compliance with the provisions alleged to have been violated. Too many times under the current version of § 2923.5, a borrower's counsel alleges non-compliance with § 2923.5 when they have no factual basis and the lender's file show complete compliance. Failure to take the preliminary injunction seriously may result in the borrower having the injunction last through trial.

- **Damages after the trustee's deed is recorded.** Section 2924.12(b) provides that after a trustee's deed upon sale has been recorded, a MS, mortgagee, trustee, beneficiary, or authorized agent shall be liable to a borrower for ***actual economic damages pursuant to § 3281***, resulting from a **material violation** of Section 2923.55, 2923.6, 2923.7, 2924.9, 2924.10, 2924.11, or 2924.17 by that MS, mortgagee, trustee, beneficiary, or authorized agent where the violation was not corrected and remedied prior to the recordation of the trustee's deed upon sale.

    - If the court finds that the ***material violation was intentional or reckless, or resulted from willful misconduct*** by a MS, mortgagee, trustee, beneficiary, or authorized agent, the court may award the borrower **the greater of treble actual damages or statutory damages of fifty thousand dollars ($50,000)**.

Comment: Under former § 2923.5 there was a conflict in the courts over whether the borrower had a private right of action (i.e., right to sue for damages). In the case entitled *Mabry v. Superior Court* (2010), 185 Cal.App.4th 208 (2010) the United Trustees Association, California Mortgage Association and others in the industry were successful in getting the court of appeal to limit the private right of action available under 2923.5 to a postponement of the foreclosure sale only.

The language of 2924.12 substantially nullifies these gains made in the *Mabry* decision at least for MSs whose lenders are over the threshold.

Section 2924.12(b) makes is clear that the borrower has a private right to sue and it provides for treble or statutory damages. The fact that this damages section applies *after a trustee's deed is recorded* obviously creates a huge incentive for MSs, beneficiaries and trustees to carefully audit their servicing file and foreclosure file before issuing a trustee's deed. Unfortunately, even with good communications and written statements from the MS, a trustee will not likely know of the MS's violations under this statute. The statute does not address what happens if a recorded trustee's deed is rescinded. In addition, while § 2924.12(b) references that the borrower can get "economic damages" *pursuant to § 3281*. This creates an ambiguity in that § 3281 is not limited to economic damages. However, it is likely that the borrower's damages will be limited to economic damages.

- **Corrections before trustee's deed is recorded.** Section 2924.12(c) provides that a MS, mortgagee, trustee, beneficiary, or authorized agent shall not be liable for any violation that it has corrected and remedied prior to the recordation of a trustee's deed upon sale, or that has been corrected and remedied by third parties working on its behalf prior to the recordation of a trustee's deed upon sale.

- **License discipline.** Section 2924.12(d) provides that a violation of Section 2923.55, 2923.6, 2923.7, 2924.9, 2924.10, 2924.11, or 2924.17 by *a person licensed* by the Department of Corporations, Department of Financial Institutions, or Department of Real Estate shall be deemed to be a violation of that person's licensing law.

Comment: Except for § 2923.6(a)&(b) which have no real substantive provisions and § 2924.17 discussed later, the enumerated provisions only apply to MSs whose lenders exceed the threshold. However, because this section applies to licensed persons and not to lenders, it appears that discipline could be imposed on a licensee who works for a lender, MS or trustee that would be subject to the provisions.

- **B.F.P.s and B.F.E.s protected.** Section 2924.12(e) provides that no violation of this article [§§ 2920 to 2944.7] shall affect the validity of a sale in favor of a bona fide purchaser and any of its encumbrancers for value without notice.

- **Third Party Encumbrancer not relieved of liability by sale to BFP.** Section 2924.12(f) provides that a third-party encumbrancer *shall not be relieved of liability resulting from violations of Section 2923.55, 2923.6, 2923.7, 2924.9, 2924.10, 2924.11, or 2924.17* committed by that third-party

encumbrancer, that occurred prior to the sale of the subject property to the bona fide purchaser.

> **Comment:** Again, the enumerated sections except for § 2924.17 primarily apply to MSs etc. servicing loans for lenders over the threshold.

- **Exempts signators to consent decree.** Section 2924.12(g) provides a signatory to the A.G.'s consent in *U.S. et al. v. Bank of America Corporation et al.*, that is in compliance with the relevant terms of the Settlement Term Sheet of that consent judgment with respect to the borrower who brought an action pursuant to this section while the consent judgment is in effect *shall have no liability for a violation of Section 2923.55, 2923.6, 2923.7, 2924.9, 2924.10, 2924.11, or 2924.17.*

- **Remedies cumulative.** Section 2924.12(h) provides that the rights, remedies, and procedures in § 2924.12 are in addition to and independent of any other rights, remedies, or procedures under any other law.

- **Attorneys' fees for prevailing borrower.** Section 2924.12(i) provides that a court may award a *prevailing borrower reasonable attorney's fees and costs* in an action brought pursuant to Section 2924.12. A borrower shall be deemed to have prevailed if the borrower obtained injunctive relief or was awarded damages pursuant to Section 2924.12.

> **Comment:** This will undoubtedly result in abuse by borrower's attorneys claiming the borrower who has obtained a TRO is entitled to attorneys' fees. We believe notwithstanding the ambiguity in the statute, most courts will recognize the discretionary wording of the statute. However, where a preliminary injunction is issued against a MS, lender or trustee, it is far more likely that a court will award attorney's fees.

(14) Addition of Civil Code § 2924.19 (Private Right of Action) – applies to MS *under* the threshold only.

- **Borrower may bring an Injunction for Certain Violations where trustee's deed not recorded.** Section 2924.19(a)(1) provides if a trustee's deed upon sale has not been recorded, a borrower may bring an action for injunctive relief to enjoin a material violation of §§ 2923.5, 2924.17, or 2924.18.

- **Duration of the injunction.** Section 2924.19(a)(2) provides that any injunction shall remain in place and any trustee's sale shall be enjoined until the court determines that the MS, mortgagee, beneficiary, or authorized agent has corrected and remedied the violation or violations giving rise to the action for injunctive relief. An enjoined entity may move to dissolve an

injunction based on a showing that the material violation has been corrected and remedied.

- **Damages after the trustee's deed is recorded.** Section 2924.19(b) provides that after a trustee's deed upon sale has been recorded, a MS, mortgagee, beneficiary, or authorized agent shall be liable to a borrower for actual economic damages pursuant to § 3281, resulting from a material violation of §§ 2923.5, 2924.17, or 2924.18 by that MS, mortgagee, beneficiary, or authorized agent where the violation was not corrected and remedied prior to the recordation of the trustee's deed upon sale.

    - If the court finds that the material violation was intentional or reckless, or resulted from willful misconduct by a mortgage servicer, mortgagee, beneficiary, or authorized agent, the court may award the borrower the greater of treble actual damages or statutory damages of fifty thousand dollars ($50,000).

- **Corrections before trustee's deed is recorded.** Section 2924.19(c) provides a MS, 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.

- **License discipline.** Section 2924.19(d) provides that a violation of Section 2923.5, 2924.17, or 2917.18 by a person licensed by the DOC, the DFI, or the DRE shall be deemed to be a violation of that person's licensing law.

- **B.F.P.s and B.F.E.s protected.** Section 2924.19(e) provides that no violation of this article [§§ 2920-2944.7] shall affect the validity of a sale in favor of a bona fide purchaser and any of its encumbrancers for value without notice.

- **Third Party Encumbrancer not relieved of liability by sale to BFP.** Section 2924.19(f) provides that a third-party encumbrancer shall not be relieved of liability resulting from violations of Section 2923.5, 2924.17 or 2924.18, committed by that third-party encumbrancer that occurred prior to the sale of the subject property to the bona fide purchaser.

- **Remedies cumulative.** Section 2924.19(g) provides that the rights, remedies, and procedures provided by this section are in addition to and independent of any other rights, remedies, or procedures under any other law. Nothing in this section shall be construed to alter, limit, or negate any other rights, remedies, or procedures provided by law.

- Section 2924.19(h) provides that a court *may* award a prevailing borrower reasonable attorney's fees and costs in an action brought pursuant to this

section. A borrower shall be deemed to have prevailed for purposes of section 2924.19(h) if the borrower obtained injunctive relief or damages pursuant to 2924.19.

(15) Addition of Civil Code §2924.17 not limited to covered properties or by type of lender.

- **Accuracy of declarations and documents.** Section 2924.17(a) provides that a declaration recorded pursuant to § 2923.5 or pursuant to § 2923.55, a NOD, NOS, assignment of a deed of trust, or substitution of trustee recorded by or on behalf of a MS in connection with a foreclosure subject to the requirements of § 2924, or a declaration or affidavit filed in any court relative to a foreclosure proceeding *shall be accurate and complete and supported by competent and reliable evidence*.

Comment: Can you only imagine if this were applicable to borrowers and their attorneys?

- **Review by MS.** Section 2924.17(b) requires that before recording or filing any of the documents described in subdivision (a), a MS *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.*

- **Damages for Multiple violations.** Section 2924.17(c) provides that any MS that engages in multiple and repeated uncorrected violations of Section 2924.17(b) in recording documents or filing documents in any court relative to a foreclosure proceeding shall be liable for a civil penalty of up to seven thousand five hundred dollars ($7,500) per mortgage or deed of trust in an ***action brought by a government entity*** identified in Business and Professions Code § 17204, or in an ***administrative proceeding*** brought by the Department of Corporations, the Department of Real Estate, or the Department of Financial Institutions against a respective licensee, in addition to any other remedies available to these entities.

(16) Addition of Civil Code § 2924.20 – Regulations.

- Section 2924.20 authorizes the DOC, DRE and DFI to adopt regulations applicable to any entity or person under their respective jurisdictions that are necessary to carry out the purposes of the HOBR. A violation of the regulations adopted pursuant to this section shall only be enforceable by the regulatory agency.

Comment: No regulations have, as yet, been issued by any of these entities. Hopefully, regulations can clear up some of the ambiguities in the HOBR.