

Date of Hearing: June 17, 2024

ASSEMBLY COMMITTEE ON BANKING AND FINANCE

Timothy Grayson, Chair

SB 1146 (Wilk) – As Amended June 3, 2024

SENATE VOTE: 37-0

SUBJECT: Mortgages

SUMMARY: Makes technical and clarifying changes to laws related to mortgage servicing and non-judicial foreclosure processes.

Specifically, **this bill:**

- 1) Clarifies that a specified exemption from the California Constitution’s usury limit related to the forbearance of loans secured by real property includes a forbearance arranged by a licensed real estate broker who may differ from the broker who previously made or arranged the loan. Adds to the existing exemption the extension or modification of a loan secured by real property that is made or arranged by a real estate broker.
- 2) Adds the following exemption to the provision requiring a mortgage servicer to establish a single point of contact when a borrower requests a foreclosure prevention alternative, as specified: a person or entity that makes and services seven or fewer loans for the purchase of residential real property in a calendar year.
- 3) Provides that a person or entity that makes and services seven or fewer loans for the purchase of residential property in a calendar year is prohibited from taking the next step in the foreclosure process while a complete first lien loan modification application is pending and until the borrower has been provided with a written determination regarding his or her eligibility for the requested loan modification. If a foreclosure prevention alternative is approved, prohibits the person or entity from taking the next step in the foreclosure process so long as the borrower remains in compliance with the terms of the foreclosure prevention alternative.
- 4) Deletes specified provisions of the Homeowner Bill of Rights that pertained to certain real property occupied by a tenant, until January 1, 2023.
- 5) Clarifies that a trustee is not required to record a notice of rescission, as specified, related to a declaration of default and demand for sale upon a trustor or mortgagor curing the default if the mortgage or deed of trust is paid in full and a full reconveyance or certificate of discharge is properly recorded.
- 6) Authorizes a trustee to postpone a sale of property under the power of sale contained in a deed of trust or mortgage if an act of force majeure prevents access to the sale location at the time of sale.
- 7) Authorizes a trustee, in conducting a trustee’s sale to require a noncash bid to be made directly to the trustee, if that requirement is set for by the trustee in the notice of sale, and to require the successful bidder to replace a check drawn by a credit union or a savings and loan

association or cash equivalent with a check or cash equivalent made directly payable to the trustee if necessary for the funds to be made available to the trustee.

- 8) Prohibits a trustee, in relation to a bid from an eligible bidder during the 45 days after a trustee's sale, from receiving any bid that is not sent by certified mail with the U.S. Postal Service or by another overnight mail courier service with tracking information that confirms the recipient's signature and the date and time of receipt and delivery.

EXISTING LAW:

- 1) Exempts from the usury limitation set forth in Section 1 of Article XV of the California Constitution a loan or forbearance made or arranged by any person licensed as a real estate broker by the State of California, and secured, directly or collaterally, in whole or in part on real property. (Civil Code Section 1916.1.)
- 2) Requires a mortgage servicer to establish a single point of contact when a borrower requests a foreclosure prevention alternative, as specified. Exempts from this requirement the following categories of persons that foreclosed on 175 or fewer residential real properties in the previous year: a depository institution chartered under state or federal law, a person licensed pursuant to the California Financing Law or California Residential Mortgage Lending Act, or a person licensed under the Real Estate Law. (Civil Code Section 2923.7)
- 3) Prohibits certain mortgage servicers from taking the next step in the foreclosure process while a complete first lien loan modification application is pending and until the borrower has been provided with a written determination regarding his or her eligibility for the requested loan modification. If a foreclosure prevention alternative is approved, prohibits the servicer from taking the next step in the foreclosure process so long as the borrower remains in compliance with the terms of the foreclosure prevention alternative. This section applies to categories of persons that foreclosed on 175 or fewer residential real properties in the previous year: a depository institution chartered under state or federal law, a person licensed pursuant to the California Financing Law or California Residential Mortgage Lending Act, or a person licensed under the Real Estate Law. (Civil Code Section 2924.18)
- 4) Extended specified protections provided by the Homeowner Bill of Rights to certain real property occupied by a tenant, until January 1, 2023. (Civil Code Section 2924.15(a)(2))
- 5) Requires a trustee to record a notice of rescission, as specified, related to a declaration of default and demand for sale upon a trustor or mortgagor curing the default. (Civil Code Section 2924c(a)(2))
- 6) Specifies the process for a trustee's sale, including the time and location of the sale, postponement of the sales, and how a postponement of the sale must be announced. (Civil Code Section 2924g)
- 7) Authorizes a trustee to require specified conditions related to bidders at a trustee's sale. (Civil Code Section 2924h(b) and (c))
- 8) Provides a process for a specified eligible bidder or eligible tenant buyer to meet or exceed the highest bid at a trustee's sale. (Civil Code Section 2924m)

FISCAL EFFECT: Unknown. This bill is keyed Nonfiscal by Legislative Counsel.

COMMENTS:

1) Purpose.

According to the author:

SB 1146 is an omnibus style, cleanup measure to California's non-judicial foreclosure and mortgage laws. Sponsored by the California Mortgage Association and the United Trustees Association, this bill seeks to make 6 changes to clarify the trustee sale procedures, how bids are made payable, and when to automatically postpone a trustee's sale. Specifically, this bill seeks to clarify whether the Homeowners Bill of Rights (HBOR) reporting and other requirements should apply to very small entities, which make such few loans that these entities are not required to be licensed in California.

2) How do foreclosure sales work?

Broadly speaking, foreclosure is the process by which a lender (the mortgagee) forces the sale of a home after the borrower (the mortgagor) fails to make housing payments. A deed of trust contains a power of sale clause allowing the lender to sell the home without going to court. This nonjudicial foreclosure process, while occurring outside of the court system, nevertheless requires lenders and the foreclosure trustee (the third party managing the foreclosure process) to comply with a number of timeline and notification requirements meant to create an orderly process for all parties.

Generally, the nonjudicial foreclosure process works like this: A lender records a Notice of Default with the county registrar, and this notice tells the borrower the amount owed. Once the Notice of Default is recorded, the borrower has 90 days to pay what is owed. If the borrower is unable to pay that amount, the next step is the recording of a Notice of Trustee Sale, which establishes the date and location where the auction will occur. The Notice of Trustee Sale also starts new timelines for the borrower to pay off the loan or reach an agreement with the lender. If no agreement is made, the trustee sale will take place, bids will be collected, and the home will be sold to a third party. The homeowner receives any surplus balance that exists, if there is any, once the foreclosure trustee, the lender, or any other creditors with priority liens on the property are paid.

California's three-stepped non-judicial foreclosure process (Notice of Default, Notice of Trustee Sale, and Trustee Sale/Auction) added a fourth step in 2021 with the passage of SB 1079 (Skinner), Chapter 202, Statutes of 2020. SB 1079 establishes a post-auction sale that gives eligible bidders, including nonprofits or potential owner-occupants, an opportunity to match or exceed the last and highest bid made on single-family homes. This process, which must happen within 45 days of the foreclosure sale, is intended to increase owner occupancy of single-family homes, safeguard against tenant displacement, and protect communities from corporate investors buying up large quantities of foreclosed homes.

3) Homeowner Bill of Rights (HBOR).

The California HBOR protects homeowners facing foreclosure by establishing notification requirements. When the HBOR first went into effect in 2013 following the passage of SB 900 (Leno), Chapter 87, Statutes of 2012, the effects of the 2008 mortgage crisis still lingered, and distressed homeowners were still plagued by a number of procedural and administrative challenges that stacked the deck against them in the foreclosure process. Borrowers complained about what was called “dual tracking,” which occurred when the foreclosure process proceeded even while the borrower was separately discussing loan modification options with their servicer, the entity handling the day-to-day tasks of managing the loan. Other notable problems were the lack of a single person they could talk to about their specific situation, lost paperwork, and a lack of written commitments from servicers despite verbal promises made over the phone. While in theory borrowers may have had access to interventions such as loan medications or loan forbearance that could help keep them in their homes, in practice homeowners experienced a maze of procedural hurdles that made success extraordinarily difficult.

The HBOR, revised and extended by SB 818 (Beall), Chapter 404, Statutes of 2018, contains a number of important procedural protections, including:

- Restrictions on dual tracking: A mortgage servicer must generally pause the foreclosure process while it is deciding on a loan modification application and until after a period during which the homeowner can appeal a denial. Moreover, HBOR prohibits foreclosure while the borrower remains compliant with the terms of a loan modification or another foreclosure-prevention option.
- Notification of foreclosure-prevention options: HBOR requires a loan servicer to try to contact a borrower at least 30 days before starting the foreclosure process to discuss options to avoid foreclosure.
- Rules related to customer service. HBOR also contains rules meant to prevent servicers from evading or misleading distressed homeowners. For example, a servicer must assign the borrower a single point of contact when the borrower requests a loan modification or other foreclosure prevention option. Also, the servicer must notify the applicant if there is missing or incorrect information in the application.

4) What does SB 1146 do?

SB 1146 makes technical changes to laws governing mortgage servicing, trustee sales, and the post-auction sale allowed under SB 1079. Major provisions include:

- Usury exemption clarifications.

Article 15 of the California Constitution states that no person may charge a higher rate of interest than 10% per year on any loan or forbearance of money, goods, or things in action, but there are a variety of exemptions for licensed lenders. The Civil Code clarifies that exemption for loans secured by real property and the forbearance of those loans, so long as those loans and that forbearance are made and arranged by a licensed real estate broker. However, as written, this exemption implies that the forbearance must be arranged by the same real estate broker for the usury exemption to apply. SB 1146 would

clarify this exemption to ensure that a different real estate broker could arrange the forbearance, modification, or extension.

SB 1146's sponsor explains the issue, and the impact of a recent court decision, as follows:

In a recent case known as in re Moon, a federal court recently strictly construed Civil Code Section 1916.1 relating to the application of the real estate broker exemption from usury to forbearances and extensions of loans. First, although the present law references forbearances, the law does not consistently refer to forbearances, modifications and extensions of loans, all of which might be used to assist borrowers. Second, the decision seems to suggest that *only* the real estate broker who assisted in the original loan can assist in the subsequent forbearance, modification or extension of the loan in order for the usury exemption to apply. The obvious problem is that the original broker may be retired, out of state, or even deceased, and therefore would be unavailable to assist the borrower in avoiding foreclosure. The amendments correct these two ambiguities to the benefit of consumers looking to avoid foreclosure.

- HBOR clarifications

SB 1146 clarifies how certain HBOR provisions apply to unlicensed lenders who make and service fewer than eight loans per year and aligns these requirements for licensed servicers who foreclose on no more than 175 properties a year. First, this bill exempts these lenders from HBOR's requirement to establish a single point of contact. Second, SB 1146 extends to these unlicensed lenders a prohibition on smaller servicers from taking the next step in the foreclosure process when a loan modification request is being processed or when a borrower is in compliance with a foreclosure prevention alternative.

According to the bill's sponsor, these HBOR changes are necessary because under HBOR, "unlicensed tiny lenders and servicers must comply with the more substantial requirements intended for the larger entities. Unfortunately, these tiny lenders do not have the robust loss mitigation departments, policies, or procedures to comply with these substantial requirements. SB 1146 seeks to address this issue by clarifying that these tiny lenders and servicers shall comply with the more streamlined HOBR obligations."

- Force majeure

This bill establishes procedures for the postponement of a trustee sale if an act of force majeure prevents access to the location of the sale. The doctrine of force majeure refers to an unexpected, impossible to overcome interference that effectively prevents at least one party to a contract from performing their duties under the contract. Such interference includes acts of God, like fire or flood, but can also include civil disorder or infrastructure failures (e.g., transportation delay or failure).

Trustee sales take place at the time and location specified in the notice of sale, as required by state law. In many cases, these sales take place on the courthouse steps in the county where the property is located. Any postponement is required to be announced at the time and location specified in the notice of sale. To address these unexpected events that

cannot be avoided or prevented, this bill specifies that, if an act of force majeure prevents access to the sale location at the time of sale, then the sale is postponed to the next business day at the same time and location.

- Method of payment

Existing law provides that a trustee, in conducting a trustee sale, may require a bidder to show evidence of the bidder's ability to pay the full amount of their bid in cash or check and for the trustee to conditionally accept and hold these amounts for the duration of the sale. Under procedures in place today, a bidder may provide checks or cashier's checks made payable to the bidder themselves or to "cash." Some financial institutions have been reluctant to accept checks made payable to the bidder or to cash, making it difficult for the trustee to access funds, likely due to fraud mitigation practices employed by those financial institutions. This bill proposes to authorize a trustee to require that such checks be made payable to the trustee so that the trustee does not have problems accessing funds necessary to complete the sale process.

- Eligible bids in the post-auction bidding window

SB 1146 aims to address an ambiguity in the post-trustee sale bid process created by SB 1079, described in greater detail in Comment #2. Specifically, the amendment clarifies that the bid must be sent by certified mail with the US Postal Service or by another overnight mail courier service with tracking information that confirms the recipient's signature and the date and time of receipt and delivery.

5) Arguments in support.

The United Trustees Association and California Mortgage Association, as sponsors, write in support:

[Under the Homeowner Bill of Rights], unlicensed tiny lenders and servicers must comply with the more substantial requirements intended for the larger entities. Unfortunately, these tiny lenders do not have the robust loss mitigation departments, policies, or procedures to comply with these substantial requirements. SB 1146 seeks to address this issue by clarifying that these tiny lenders and servicers shall comply with the more streamlined HOBR obligations.

When a borrower goes into foreclosure, the lender or the trustee may sell the property at a trustee's sale. Trustees who conduct nonjudicial foreclosures of real estate loans must strictly conform with the requirements of the California Civil Code. If a trustee fails to strictly adhere then the foreclosure may be invalidated; thus, it is important that nonjudicial foreclosure laws are precise. The fair and equal administration of the foreclosure statutes is critical to maintaining lender and borrower confidence in our system of real estate finance. SB 1146 seeks to make various clarifying and technical changes to these nonjudicial foreclosure

REGISTERED SUPPORT / OPPOSITION:

Support

United Trustees Association and California Mortgage Association

Opposition

None on file.

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