BY DAVID NEWMAN

OUT OF THE COURTS

Finding ways to deal with the prohibition on dual-tracking is a key part of avoiding foreclosure litigation

THE FORECLOSURE crisis hit California hard. In 2007, more than 84,375 residential properties were foreclosed, and another 254,824 loans went into default.[1] The numbers were equally grim across the rest of the country, with nearly 1 percent of all U.S. households in some stage of foreclosure during that year.[2] Nearly 10 years later, high foreclosure rates persist. In February 2016 alone, over 8,000 properties were in some stage of the foreclosure process in California.[3] Currently, nearly 1 in every 1,700 properties in Los Angeles County is in some state of the foreclosure process, with rates more than double in some areas.[4]

In response to the initial crisis, California took a series of steps to modify the foreclosure laws: first, with a relatively small revision to the Civil Code in 2008, and, second, with a major reform in 2013 known as the Homeowner Bill of Rights (HBOR).[5] Three years after enactment of the HBOR, foreclosure rates have decreased, and many homeowners have obtained loan modifications and other forms of payment assistance from their lenders.[6] Yet the HBOR's creation of a private right of action for borrowers to sue lenders,[7] including preemptive lawsuits even before foreclosures are finalized, has converted a process that was designed to avoid the legal system into one regularly involving the legal system. California state and federal courts are overwhelmed with loan modification and foreclosure-related litigation. Revisions to the HBOR could reduce litigation while preserving the long-standing goal of making foreclosures relatively quick and inexpensive, and done without judicial intervention.[8] The background that led to the HBOR is important to understanding the key changes that it has made to California law as well as possible revisions to the HBOR that may be required to improve and streamline the nonjudicial foreclosure process while achieving its goals of encouraging solutions other than foreclosure.

Nonjudicial Foreclosures

The purchase of real property in California most commonly involves borrowing money from a lender.[9] As part of the purchase transaction, most lenders require that borrowers sign a deed of trust, which enables lenders to take ownership of the real property through a trustee's sale, in the event that borrowers fail to repay the loan.[10] In California, this process generally occurs outside the judicial system. The nonjudicial foreclosure process, embodied in Civil Code Sections 2924 et seq., has been authorized by statute since 1872.[11] Historically, Section 2924 covered "every aspect" of the nonjudicial foreclosure process.[12] Since the rules

David Newman is an attorney at Anglin Flewelling Rasmussen Campbell & Trytten, LLP, in Pasadena. His practice covers state and federal litigation with an emphasis on business disputes and lender liability matters.

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set forth in these statutes are "exhaustive… California appellate courts have refused to read any additional requirements into the nonjudicial foreclosure statute."[13]

Prior to 2008, the nonjudicial foreclosure process could proceed rather quickly. Once borrowers stopped making loan payments, the first step for lenders was a notice of default and election to sell (NOD).[14] Lenders provided the NOD—a publicly recorded document—to borrowers, who had 90 days to "reinstate" the loan by repaying the default amount.[15] If, after 90 days, there was no reinstatement, lenders could issue a notice of trustee's sale (NOTS), which set the date for the proposed sale and notified borrowers of the total amount of money owed.[16] The foreclosure sale could proceed as early as 20 days after the issuance of the NOTS if borrowers did not repay the debt.[17] In all, the process could last as little as 110 days.[18] The expediency of this process served one of the foundational purposes of Section 2924 to "provide a creditor or beneficiary with a quick, inexpensive and efficient remedy against a defaulting debtor."[19] The system was designed to avoid court intervention and to minimize borrower challenges to foreclosures when the default is not disputed.[20]

In addition, the legal framework for nonjudicial foreclosures was—and is—designed to benefit borrowers by prohibiting lenders from seeking a post-foreclosure deficiency judgment. If at the time of the foreclosure sale a borrower owes $500,000 to the lender but the property sells for only $200,000, the lender is prohibited from subsequently suing the borrower for $300,000.[21] This ensures that borrowers are not faced with the threat of owing more money to the lender even after a foreclosure sale.

In 2008, the California legislature responded to the foreclosure crisis by enacting Civil Code Section 2923.5.[22] Its most notable change was to prohibit lenders from initiating the foreclosure process unless they first contact—or at least attempt to contact—borrowers to assess their financial situation and explore possible alternatives to foreclosure.[23] If lenders fail to satisfy Section 2923.5, the statute creates a private right of action for borrowers to obtain a postponement of an impending foreclosure sale to force compliance.[24]

Despite the enactment of Section 2923.5, foreclosures in California increased. A total of 632,573 California properties were in the foreclosure process in 2009, an increase of nearly 21 percent from 2008.[25] In 2010, the number of completed foreclosures represented 44 percent of all home sales. In 2012, over 30 percent of residential properties were underwater (i.e., with mortgage debt exceeding the value of the home), and the serious delinquency rate (90 days or more) was at 7 percent.[26] The 7 percent rate was unprecedented, as the rate had never been higher than 1.5 percent in the preceding three decades.[27]

HBOR

In 2012, California took additional steps to try to combat residential foreclosures.[28] The most significant legislative step was the enactment of broader revisions to Civil Code Sections 2924 et seq,[29] which became known as the HBOR and were effective January 1, 2013. Attorney General Kamala Harris, who spearheaded the effort to enact it, described it as legislation "designed to protect homeowners from unfair practices by banks and mortgage companies and to help consumers and communities cope with the state's urgent mortgage and foreclosure crisis."[30] The HBOR's stated goal was "to ensure that, as part of the nonjudicial foreclosure process, borrowers are considered for, and have a meaningful opportunity to obtain…loan modifications or other alternatives to foreclosure."[31]

The HBOR was enacted just months after attorneys general in 49 states, including California, signed the National Mortgage Settlement (NMS) with five of the largest mortgage servicers in the country.[32] The HBOR was modeled on the NMS, enacted to ensure that the provisions of the NMS applied to all mortgage servicers doing business in California and that individual borrowers could assert a private right of action against lenders for a violation of the HBOR.[33]

The HBOR includes a number of key provisions. It requires that lenders provide borrowers with a "single point of contact" who knows the facts of their case, has their paperwork, and can communicate with them about their account status and the results of any application for a loan modification.[34] It allows borrowers to sue for injunctive relief to enjoin a pending sale or for monetary damages post-sale, if lenders violate specific statutory provisions.[35] Finally, and perhaps most notably, is the prohibition on dual-tracking—the practice of evaluating borrowers for a loan modification while concurrently proceeding with the foreclosure process.[36] Dual-tracking can occur by either recording a NOD, NOTS, or actually conducting a sale while the "borrower is seeking a loan modification."[37]

The dual-tracking prohibition was the most crucial impetus behind the HBOR.[38] To trigger the anti-dual tracking provision of the HBOR, borrowers must submit a complete loan modification application to lenders.[39] If this occurs, lenders cannot proceed with the foreclosure process until review of the application is finished. If lenders deny an application, borrowers have the right to appeal within 30 days, and no foreclosure can proceed during that time.[40] If the appeal is subsequently denied, lenders must wait at least 15 days to continue with the foreclosure process.[41]

The HBOR does not set forth specific deadlines for when borrowers can submit loan modification applications. Borrowers potentially could submit applications up to and including the day of a scheduled foreclosure sale, which would then prohibit the sale from proceeding because it would be considered dual-tracking.[42] Notably, the absence of any deadline for submission of a loan modification application contrasts with a deadline in Civil Code Section 2924 for borrowers to reinstate a loan—i.e., cure the amount in default—prior to a scheduled sale. Borrowers must reinstate a loan no less than five business days before a sale, or the sale may proceed.[43] Yet, revised Section 2923.6 seems to contain a loophole allowing borrowers to avoid that five-day deadline. It is unclear why the legislature did not adhere to the five-day deadline regarding the submission of loan modification applications. Also unclear is why the legislature did not follow the NMS, which only mandates that applications submitted more than 15 days before a scheduled foreclosure sale be reviewed and sales postponed.[44] The absence of any deadline potentially enables borrowers to claim that they submitted an application seconds before a scheduled foreclosure sale, and if the sale is not postponed at the last second (which, as a practical matter, is difficult), to sue for damages under the HBOR.

Moreover, nothing in the HBOR prohibits borrowers from reapplying for a modification immediately following a denial. There is no set number of applications that borrowers can submit, nor is there any minimum waiting time before borrowers can submit new applications. The absence of this restriction is noteworthy because it contrasts with a parallel federal regulation that prohibits lenders from dual-tracking in connection with the first application submitted by borrowers.[45] Unlike the HBOR, the federal regulation allows the foreclosure process to proceed if borrowers submit subsequent applications, even following a denial.

In an attempt to prevent borrowers from delaying the foreclosure process by repeatedly submitting new applications immediately following a denial, the legislature enacted Section 2923.6(g) as part of the HBOR. The provision permits servicers to decline to re-review borrowers unless there has been a "material change in the borrower's financial circumstances." It provides:

> In order to minimize the risk of borrowers submitting multiple applications for first lien loan modifications for the purpose of delay, the mortgage servicer 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

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1. The first step in the nonjudicial foreclosure process is the issuance of a notice of trustee's sale.
True.
False.

2. The Homeowner Bill of Rights (HBOR) creates a private right of action that enables borrowers to sue lenders for statutory violations during the nonjudicial foreclosure process.
True.
False.

3. Borrowers can prevent a nonjudicial foreclosure sale from proceeding by reinstating their debt at any time before the sale is scheduled to occur.
True.
False.

4. If a lender opts for nonjudicial foreclosure, it cannot also pursue a deficiency judgment against the borrower.
True.
False.

5. The HBOR and the Code of Federal Regulations contain identical provisions regarding the timing and number of loan modification applications that could potentially constitute dual-tracking.
True.
False.

6. Civil Code Section 2923.5 changed the nonjudicial foreclosure process by requiring lenders to contact (or attempt to contact) borrowers to explore possible alternatives to foreclosure prior to the initiation of the foreclosure process.
True.
False.

7. Injunctive relief is not available under Civil Code Section 2923.5.
True.
False.

8. The HBOR's private right of action only arises once a notice of default has been recorded.
True.
False.

9. Dual-tracking occurs if a lender reviews a loan modification application and concurrently records a notice of default or notice of trustee's sale, or actually conducts a sale.
True.
False.

10. The HBOR requires that lenders only need to review a loan modification application that is submitted at least 15 days before a scheduled foreclosure sale.
True.
False.

11. Either an increase or a decrease in a borrower's income could constitute a material change in financial circumstances that would require a lender to review a loan modification application.
True.
False.

12. Borrowers can submit a maximum of three loan modification applications in one calendar year under the HBOR.
True.
False.

13. The National Mortgage Settlement excludes the five largest mortgage servicers in the country.
True.
False.

14. Under the HBOR, a lender can refuse to re-review a loan modification application if the borrower has not experienced a material change in financial circumstances.
True.
False.

15. Any person who has filed for bankruptcy within 365 days of a foreclosure sale is not entitled to the protections of the HBOR.
True.
False.

16. The HBOR requires that evidence of a material change in financial circumstances be documented.
True.
False.

17. The HBOR authorizes recovery of monetary damages only if a foreclosure sale has been completed.
True.
False.

18. The HBOR allows borrowers to appeal at any time a decision by a lender to deny a loan modification.
True.
False.

19. The HBOR require that lenders review borrowers for a loan modification even if borrowers do not submit a complete application.
True.
False.

20. California is not a party to the National Mortgage Settlement.
True.
False.

MCLE Answer Sheet #264

OUT OF THE COURTS

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Mark your answers to the test by checking the appropriate boxes below. Each question has only one answer.

1.	☐ True	☐ False
2.	☐ True	☐ False
3.	☐ True	☐ False
4.	☐ True	☐ False
5.	☐ True	☐ False
6.	☐ True	☐ False
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8.	☐ True	☐ False
9.	☐ True	☐ False
10.	☐ True	☐ False
11.	☐ True	☐ False
12.	☐ True	☐ False
13.	☐ True	☐ False
14.	☐ True	☐ False
15.	☐ True	☐ False
16.	☐ True	☐ False
17.	☐ True	☐ False
18.	☐ True	☐ False
19.	☐ True	☐ False
20.	☐ True	☐ False

1, 2013, or who have been evaluated or afforded a fair opportunity to be evaluated consistent with the requirements of this section, 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.[46]

If an application does not reveal a material change, the dual-tracking provision does not apply, and lenders can proceed with foreclosure despite the submission of a new loan modification application. Indeed, under the strict language of the statute, lenders need not even review new applications absent a "material change… that [has been] documented."[47] Yet the statute fails to take into account the practical reality that lenders must first review an application to determine whether a material change has occurred in the first place. The very act of determining whether there has been a material change arguably places the application under review, which qualifies borrowers for the HBOR's dual-tracking protections.[48] Thus, lenders have to issue formal denials, which allows borrowers to appeal an action that, among others, in turn forces lenders to review the appeal. If borrowers were so inclined, they could be in a perpetual state of review, effectively delaying the foreclosure process for an unlimited amount of time. Thus, the purpose of Section 2923.6(g)—to prevent borrowers from endlessly delaying a foreclosure sale without any basis to be re-reviewed—may be negated by its own language.

Moreover, the statute does not provide a definition for "material change," leaving lenders to establish their own standards.[49] This predictably has led to significant litigation concerning what the term means, and state and federal courts have grappled with the issue without reaching a consensus. Even a generous review of case law on the subject reveals that what constitutes a material change can vary widely from one court to the next. Courts have reached different outcomes on whether an increase or decrease in income constitutes a material change, and what amount of increase or decrease is required either in absolute terms or as a percentage to constitute a material change.[50] For example, one federal court in California noted that "even if Plaintiff had a 70 percent increase in income," the lender could have determined that "this change was not sufficiently material to warrant granting Plaintiff a second loan modification."[51] Another California federal court held that the mere allegation that a borrower was "gaining new employment with a higher income" satisfied a HBOR requirement of establishing a "material change."[52] Courts have also wrestled with whether elimination of debt, as well as financial contributions from a relative, constitute a material change.[53] One court suggested that when an application had been denied on the basis that the borrower's gross income was "too high to qualify for a loan modification," any further increase in income documented in a subsequent application—no matter how large—would not constitute a "material" change under Section 2923.6.[54]

Another issue with the material change requirement is that there is nothing in the HBOR that requires borrowers to demonstrate how or why a change is actually "material," i.e., how it might affect the outcome of a subsequent review. A borrower may have a significant change in income—for example, a 50 percent increase of the hourly wage, from $10 to $15—but if a prior application was denied because the borrower needed to make an hourly wage of at least $40 to qualify for a modification, the change from $10 to $15 would not be considered material for the purpose of obtaining a modification.

It is also unclear whether the material change requirement is triggered by borrowers' notifying lenders that their financial circumstances have changed or whether that change has to be affirmatively documented to lenders.[55] Courts have varied widely on exactly what is required for borrowers to document a material change in their financial circumstances. Some courts have required only that borrowers state (orally or in writing) that there has been a change, while other courts have held that the statute requires extensive documentation of the exact nature of the change. For example, one court held that a "verbal overview of plaintiffs' financial situation" was insufficient to satisfy the requirement that the material change be documented.[56] Similarly, another court found that a two-page letter that "simply states that borrowers' financial circumstances have materially changed as their income and expenses have changed since they last submitted an application for foreclosure alternatives" was "barebones [and] bereft of any details or documentation."[57] On the other hand, one court held that a "statement in the letter regarding… elimination of credit card debt," without any further explanation or documentation, was sufficient to satisfy the documentation requirement of a material change under the HBOR.[58]

Finally, the HBOR's interplay with a common tactic used by borrowers—filing for bankruptcy to obtain an automatic stay that prevents foreclosure—frequently does not achieve the desired goal of the HBOR. The HBOR excludes from the definition of "borrower" any person who has a pending bankruptcy case, and only borrowers are afforded HBOR protections.[59] However, once a bankruptcy case ceases, borrowers are no longer excluded from the HBOR's provisions. Borrowers are free to file for bankruptcy to prevent a foreclosure sale, obtain an automatic stay against foreclosure, allow the bankruptcy case to be dismissed, and then immediately apply for a loan modification claiming that circumstances have changed in light of the bankruptcy, which would continue the prohibition against dual-tracking pursuant to the HBOR.[60]

Possible Revisions to the HBOR

The HBOR has had both positive and negative impacts. There are some indications that it may be reducing foreclosures and increasing the number of loan modifications offered to borrowers.[61] Through the HBOR and related federal programs, hundreds of thousands of homeowners in California have received significant assistance from lenders through debt forgiveness, loan modifications, or other forms of relief.[62] However, the HBOR has brought with it significant litigation that has pulled resources away from an already understaffed and underfunded court system. The HBOR has altered a policy in place for over a century to keep the judiciary out of the foreclosure process and afford lenders a relatively quick and efficient way to foreclose when borrowers fail to repay their debt, even if minor statutory violations occur that result in no actual prejudice to borrowers.[63] Under these circumstances, revisions to the HBOR might reduce litigation, while ensuring that the goal of finding alternatives to foreclosure are met.

One potential revision would be to limit the number of applications that would invoke the dual-tracking prohibition. A parallel federal regulation that prohibits dual-tracking for the first loan modification application enables borrowers to be reviewed for alternatives to foreclosure while ensuring that the process does not indefinitely extend foreclosure proceedings if an application previously has been denied.[64]

Another possible revision would be to impose a deadline by which applications must be submitted in order to halt the foreclosure process. The HBOR could align itself with long-standing California law that imposes a five-day deadline prior to a foreclosure sale for borrowers to reinstate their loans to avoid foreclosure. The HBOR could be revised to include a provision that applications must be submitted no later than five business days before a scheduled sale in order to invoke the dual-tracking prohibition. Alternatively, it could be revised to follow the NMS requirement that applications submitted more than 15 days before a scheduled foreclosure sale be reviewed and necessitate postponement of a sale.[65] Either way, this could reduce the number of last-minute applications that are submitted solely to invoke the anti-dual tracking protections of the HBOR but have no realistic chance of resulting in a modification. Since a foreclosure sale must occur at least 111 days after lenders have notified borrowers of a possible foreclosure sale, there is sufficient time for borrowers to apply before the eve of a scheduled sale.

The HBOR could also be revised to limit the ban on dual-tracking to borrowers who have recently filed for bankruptcy. As it stands now, borrowers who are not in bankruptcy at the time an application is submitted are entitled to full HBOR protections. This exposes the HBOR to abuse by potentially incentivizing borrowers to use bankruptcy as a vehicle to delay foreclosure sales without any real desire to improve their finances, and then rely on the fact of the bankruptcy to claim a material change in their finances. If borrowers file for bankruptcy, that is their opportunity to seek assistance from the lenders regarding their loan payments. Indeed, the very purpose of bankruptcy is to afford borrowers, as debtors, an opportunity to communicate with any creditor, including lenders, to try to arrange an affordable and fair payment plan.[66] The HBOR could therefore be revised to exclude from the definition of "borrower" anyone who is currently in bankruptcy or has filed a bankruptcy case within the previous 365 days. Doing so might encourage borrowers to file for bankruptcy only for legitimate reasons, thus discouraging frivolous bankruptcy filings used solely to delay foreclosures.

Finally, the legislature could refine the language in Section 2923.6(g) regarding material change. As it stands, to invoke the anti-dual tracking provision, borrowers must show only that there has been a material change since their prior application in order to obtain a subsequent modification review. An additional requirement could be added to the statute that borrowers must also establish how that material change may actually entitle them to obtain a modification upon a subsequent review. Borrowers would have to tie the material change to the reason for the prior denial. Otherwise, the mere fact that there has been a material change is meaningless unless it could actually impact the outcome on a subsequent application.[67] This would ensure that borrowers are afforded a fair opportunity for review but discourages them from reapplying without any real justification for doing so.

In the more than three years since its enactment, the HBOR has been shown to have both positive and negative impacts on the nonjudicial foreclosure process. It remains to be seen whether the legislature will take steps to modify certain provisions to ensure that the needs and goals of both borrowers and lenders are adequately met. ■

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1 *See* S.B. 1137, Ch.69, §1 (An act to add and repeal Civ. Code §§2923.5, 2923.6, 2924.8, 2929.3 and Code Civ. Proc. §1161(b) (Cal. July 8, 2008), *available at* http://www.legislature.ca.gov (last visited Nov. 14, 2016).

2 *U.S. Foreclosure Activity Increases 75 Percent in 2007*, RealtyTrac (Jan. 30, 2008), available at http://www.realtytrac.com/content/press-releases/us-foreclosure-activity-increases-75-percent-in-2007-3604.

3 California Real Estate Trends & Market Info, RealtyTrac (Oct. 2016) *available at* http://www.realtytrac.com/statsandtrends/foreclosuretrends/ca/los-angeles-county (last visited Nov. 14, 2016).

4 *Id.*

5 *See* California Homeowner Bill of Rights, *available at* https://oag.ca.gov/hbor.

6 California continues to consider new laws to combat the foreclosure crisis., e.g., S.B. 1150, which would expand some of the previously enacted protections for homeowners to their heirs.

7 *See* Civ. Code §§2924.12, 2924.19.

8 *Id.*

9 *Cash sales of homes in L.A. area decline from a year ago*, L.A. Biz (Dec. 21, 2015), http://www.bizjournals.com/losangeles/news/2015/12/21/cash-sales-of-homes-in-l-a-area-decline-from-a.html.

10 Alliance Mortgage Co. v. Rothwell, 10 Cal. 4th 1226, 1235 (1995).

11 Civ. Code §2924.

12 I. E. Associates v. Safeco Title Ins. Co., 39 Cal. 3d 281, 285 (1985).

13 Lane v. Vitek Real Estate Industries Group, 713 F. Supp.2d 1092, 1098 (E.D. Cal. 2010).

14 Kachlon v. Markowitz, 168 Cal. App. 4th 316, 334 (2008).

15 Civ. Code §2924c.

16 Civ. Code §2924f.

17 *Id.*

18 With the passage of Civ. Code §2923.5 in 2008, an extra 30 days were added to the process because the notice of default could not be recorded until at least 30 days after lenders contacted, or attempted to contact, borrowers to explore alternatives to foreclosure.

19 Millennium Rock Mortg., Inc. v. T.D. Serv. Co., 179 Cal. App.4th 804, 809 (2009); Najah v. Scottsdale Ins. Co., 230 Cal. App. 4th 125, 130 (2014) (citing Moeller v. Lien, 25 Cal. App. 4th 822, 830 (1994)).

20 Frank S. Alexander et al., *Legislative Responses to the Foreclosure Crisis in Nonjudicial Foreclosure States*, 31 Rev. Banking & Fin. L. 341, 335 (2011).

21 Code Civ. Proc. §§580d, 726(b).

22 Mabry v. Superior Ct., 185 Cal. App. 4th 208, 219 (2010); *see also* Ortiz v. Accredited Home Lenders, Inc., 639 F. Supp. 2d 1159, 1166 (S.D. Cal. 2009).

23 Civ. Code §2923.5(a).

24 Mabry, 185 Cal. App. 4th at 214.

25 Daren Blomquist, *A Record 2.8 Million Properties Receive Foreclosure Notices In 2009*, RealtyTrac, *available at* http://www.realtytrac.com/landing/2009-year-end-foreclosure-report.html (last visited Nov. 14, 2016).

26 By The Numbers: Mortgage Relief Across California, the Fourth Report of the California Monitor (Sept. 24, 2013), *available at* https://oag.ca.gov/sites/all/files/agweb/pdfs/mortgage_settlement/04-report-by-the-numbers.pdf.

27 *California Delinquencies Diminish, Recovery Underway*, First Tuesday J., Aug.18, 2015, *available at* http://journal.firsttuesday.us.

28 California's Attorney General Office reached a $12 billion agreement with Bank of America, JP Morgan Chase, and Wells Fargo to provide mortgage assistance to homeowners. That was in addition to the $25 billion settlement National Mortgage Settlement. *See* Federal Government and State Attorneys General Reach $25 Billion Agreement with Five Largest Mortgage Servicers to Address Mortgage Loan Servicing and Foreclosure Abuses, U.S. Dep't of Justice (Feb. 9, 2012), *available at* https://www.justice.gov; Dollars to Date: The California Mortgage Agreement, The Second Report of the California Monitor (Nov. 19, 2012), *available at* https://oag.ca.gov/sites/all/files/agweb/pdfs/mortgage_settlement/02-report-dollars-to-date.pdf. *See also* National Mortgage Settlement, Joint State-Federal Mortgage Servicing Settlement Agreements, http://www.nationalmortgagesettlement.com (last visited Nov. 13, 2016).

29 Press Release, State of Cal. Dep't of Justice, Off. of the Att'y Gen., Attorney General Kamala D. Harris Announces Final Components of California Homeowner Bill of Rights Signed into Law (Sept. 25, 2012), *available at* http://oag.ca.gov.

30 Press Release, State of Cal. Dep't of Justice, Off. of the Att'y Gen., Attorney General Kamala D. Harris Joins Legislative Leaders to Unveil California Homeowner Bill of Rights (Feb. 29, 2012), *available at* http://oag.ca.gov. Some commentators criticized the manner in which the HBOR became law and anticipated significant future litigation. *See, e.g., Dem maneuver in Legislature could slam housing market*, CalWatchDog.com (April 20, 2012), *available at* http://calwatchdog.com (noting that sponsors of the legislation "bypass[ed] the entire committee policy and finance process [to] avoid scrutiny by the public"); Kerry Ann Panchuk, *California hands trial lawyers 'nuclear weapon' to use against mortgage industry: legal expert*, Housingwire Magazine (Oct. 5, 2012), available at http://www.housingwire.com ("The Homeowner Bill of Rights launched in California not only changed hundreds of years of real estate law, it may have turned the West Coast state into a judicial foreclosure state with financial firms on high alert….").

31 Civ. Code 2923.4(a).

32 United States v. Bank of Am., No. 1:12-cv-00361-RMC (D.D.C. March 12, 2012).

33 Press Release, State of Cal. Dep't of Justice, Off. of the Att'y Gen., California Homeowner Bill of Rights Takes Key Step to Passage, (June 27, 2012), *available at* http://oag.ca.gov ("The goal of the Homeowner Bill of Rights is to take many of the mortgage reforms extracted from banks in a national mortgage settlement and write them into California law so they could apply to all mortgage-holders in the state.").

34 Civ. Code §2923.7.

35 Civ. Code §2924.12.

36 A servicer "shall not record a notice of default or notice of sale or conduct a trustee's sale" while the application is pending. Civ. Code §2923.6(c).

37 Lindberg v. Wells Fargo Bank N.A., 2013 U.S. Dist. LEXIS 57457, at *9 (N.D. Cal. Apr. 22, 2013) (internal citation omitted).

38 Jolley v. Chase Home Fin., LLC, 213 Cal. App. 4th 872, 904 (2013).

39 Civ. Code §2923.6. The issue of what constitutes a "complete" application remains unsettled. Gilmore v. Wells Fargo Bank, N.A., 2014 WL 3749984, at *5 (N.D. Cal. July 29, 2014); *cf.* Stokes v. CitiMortgage, 2014 WL 4359193, at *7 (C.D. Cal. Sept. 3, 2014).

40 Civ. Code §2923.6(d).

41 Civ. Code §2923.6(e)(2).

42 Civ. Code §2923.6(c).

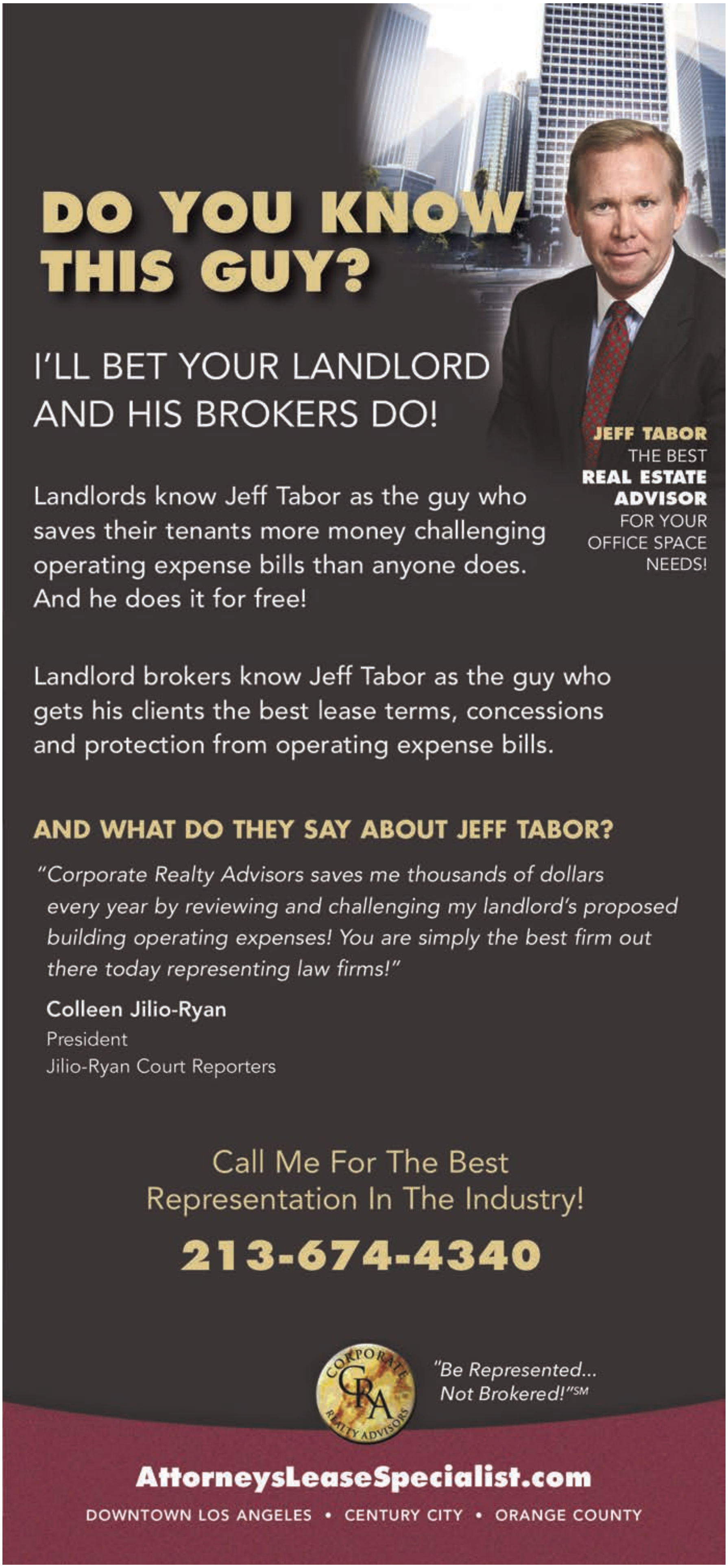
43 Civ. Code §2924c(e).

44 NMS Term Sheet at A-19, ¶ IV.B.9.

45 12 C.F.R. §1024.41(i) ("Duplicative requests. A servicer is only required to comply with the requirements of this section for a single complete loss mitigation application for a borrower's mortgage loan account.") The HBOR also deviates from federal regulations concerning the timing of an application. Under the federal regulations, the dual-tracking prohibition does not apply if a borrower submits a loan modification application less than 37 days before a scheduled foreclosure sale. 12 C.F.R. §1024.41(g).

46 Civ. Code §2923.6(g).

47 *Id.*



48 Civ. Code §2923.6(c).

49 Federal HAMP guidelines similarly do not specify what constitutes a change in circumstances but states that servicers "must have an internal written policy which defines what they consider a change in circumstance, which policy must be consistently applied for all similarly situated borrowers." However, unlike California law, HAMP provides that "servicers may limit the number of reconsideration requests in accordance with its written policy and must apply the policy consistently for all similarly situated borrowers." HAMP Supplemental Directive 12-05 (Aug. 7, 2012).

50 Valentino v. Select Portfolio Servicing, Inc., 2015 U.S. Dist. LEXIS 16210, at *14 (N.D. Cal. Feb. 10, 2015); Ivey v. Chase Bank, 2015 U.S. Dist. LEXIS 7414, at *5 (N.D. Cal. Jan. 22, 2015).

51 Caldwell v. Wells Fargo Bank, N.A., 2013 U.S. Dist. LEXIS 100107, at *18 (N.D. Cal. July 16, 2013); *see also* McLaughlin v. Aurora Loan Servs., LLC, 2015 U.S. Dist. LEXIS 58308, at *15-16 (C.D. Cal. Apr. 28, 2015) (Even though the new "application indicated a $1,166 increase in monthly income since the October 2012 application [it] did not specify from which employer the increased income was obtained or provide any detail as to the source of the increased income. Without such details or any other documentation, the June 2013 application is insufficient to trigger the material change exception.").

52 Vasquez v. Bank of Am., N.A., 2013 U.S. Dist. LEXIS 161244, at *25 (N.D. Cal. Nov. 9, 2013).

53 Rosenfeld v. Nationstar Mortg., LLC, 2014 U.S. Dist. LEXIS 14034, at *13 (C.D. Cal. Feb. 3, 2014); Salazar v. U.S. Bank N.A., 2015 U.S. Dist. LEXIS 49172, at *11 (C.D. Cal. Apr. 6, 2015); Winterbower v. Wells Fargo Bank, N.A., 2013 WL 1232997, at *3 (C.D. Cal. Mar. 27, 2013).

54 Fink v. Wells Fargo Bank, N.A., 2015 U.S. Dist. LEXIS 67296, at *14-15 (N.D. Cal. May 21, 2015).

55 Williams v. Wells Fargo Bank, NA, 2014 U.S. Dist. LEXIS 17215, at *5 (C.D. Cal. Jan. 27, 2014).

56 Mann v. Bank of Am., N.A., 2014 U.S. Dist. LEXIS 15111, at *1 (C.D. Cal. Feb. 3, 2014); *see also* Saber v. JPMorgan Chase Bank, N.A., 2014 U.S. Dist. LEXIS 8718, at *2 (C.D. Cal. Jan. 23, 2014); Winterbower v. Wells Fargo Bank, N.A., 2013 U.S. Dist. LEXIS 44087, at *3 (C.D. Cal. Mar. 27, 2013).

57 Ware v. Bayview Loan Servicing, LLC, 2013 U.S. Dist. LEXIS 163346, at *6 (S.D. Cal. Oct. 29, 2013).

58 Rosenfeld v. Nationstar Mortg., LLC, 2014 U.S. Dist. LEXIS 14034, at *13 (C.D. Cal. Feb. 3, 2014).

59 Civ. Code §2920.5(c)(2)(C).

60 *See, e.g.,* Barragan v. Deutsche Bank Nat'l Trust Co., 2015 U.S. Dist. LEXIS 74625, at *19 (C.D. Cal. June 9, 2015).

61 National Foreclosure Report January 2015, *available at* http://www.corelogic.com/research/foreclosure report /national-foreclosure-report-january-2015.pdf.

62 According to Joseph A. Smith, Jr., Monitor of the National Mortgage Settlement, over 186,000 homeowners in California received some form of assistance worth more than $20 billion in relief as of June 2013. Final Progress Report, Off. of Mortgage Settlement Oversight (Aug. 22, 2013), *available at* https://www .jasmithmonitoring.com.

63 Shuster v. BAC Home Loans Servicing, LP, 211 Cal. App. 4th 505, 513 (2012).

64 12 C.F.R. §1024.41(g).

65 NMS Term Sheet at A-19, ¶ IV.B.9.

66 In re Jorgensen, 66 B.R. 104, 109 (B.A.P. 9th Cir. Wash. 1986).

67 There is a similar requirement in family law: to modify a court order regarding spousal support or custody, the moving party must demonstrate both a "material change in circumstances" as well as how that changes warrants reconsideration of the prior order. In re Marriage of McLoren, 202 Cal. App. 3d 108, 111-112, 114 (1988).

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