

FAQ for Homeowners

1. What is the Homeowner Bill of Rights (HBOR)?

Answer: HBOR is a [series of California laws](#) that became effective January 1, 2013.

This landmark legislation was created to combat the foreclosure crisis and hold banks accountable for exacerbating it by not working with homeowners to create sustainable loan modifications. HBOR includes more than twenty statutes, but on a broad level, these provisions prohibit dual tracking (see question 4) and require servicers to reach out to homeowners to explore foreclosure alternatives *before* recording a notice of default. HBOR only applies to foreclosures on first-liens, or the first mortgages on the home. In other words, HBOR does not apply to second liens, such as home equity lines of credit. Importantly, HBOR does not protect homeowners in active bankruptcy unless the bankruptcy court has given relief from the automatic stay.

2. What did HBOR change?

Answer: Homeowners now have a private right of action: they can take banks to court for violating various parts of California's statutory, nonjudicial foreclosure system (see question 3). Under HBOR, homeowners can obtain injunctions to stop a

pending foreclosure sale, but they can also recover damages *after* a sale, when getting the house back is not an option. HBOR also allows homeowners' attorneys to recover attorney fees from servicers if the homeowner prevails. These provisions were designed to give homeowners at least more control over the nonjudicial foreclosure process.

3. What is the difference between judicial and nonjudicial foreclosure? Why does this matter?

Answer: California is a primarily nonjudicial foreclosure state. Mortgage servicers have two options when they want to foreclose: 1) go through the court system and obtain a judicial foreclosure; or 2) conduct a foreclosure privately through the use of a trustee under the nonjudicial foreclosure process. Because it is far cheaper, quicker, and easier, most foreclosures in California are conducted nonjudicially and without court oversight. Servicers need only follow the serving and recording requirements for notices of default and trustee sales, and they can foreclose without stepping foot in a courtroom. This distinction is important because if there is no judge to oversee foreclosure proceedings, homeowners themselves must use HBOR to make sure their rights are not being violated. If necessary, this includes filing suit and forcing the courts to get involved.

In judicial foreclosures, courts oversee the entire foreclosure process, so homeowners are fully informed about every step. By contrast, notice and recording requirements are *presumed* fulfilled in nonjudicial foreclosures, once a trustee's deed upon sale is recorded. Foreclosing entities have always required servicers to

possess the authority to foreclose, but HBOR codified this requirement.

Homeowners should only bring wrongful foreclosure claims, however, by asserting very specific reasons why they believe the servicer that is foreclosing on their home has no authority under their deed of trust. Trying to force the foreclosing entity to *prove* they possess the authority to foreclose will not usually work.

4. What is dual tracking? How does HBOR rein it in?

Answer: Dual tracking refers to the servicer practice of evaluating a homeowner for a modification while simultaneously proceeding with foreclosure. Whether through negligence or malicious intent, dual tracking happened too often. HBOR was passed, in large part, to stop this practice. Both large and small servicers are prevented from moving forward with foreclosures—through recording a notice of default, notice of trustee sale, or by conducting the sale itself—while a complete, first lien loan modification is pending. Basically, the servicer must deny the loan application and wait for the 30-day appeal period to expire before moving forward with foreclosure.

5. What is a complete, first lien loan modification application?

Answer: It is necessary to trigger dual tracking protections.

HBOR's dual tracking provisions only protect homeowners if they submit a complete, first lien loan modification application. Applications to modify second liens, like home equity lines of credit, do not trigger dual tracking protections. If a homeowner submitted a first lien loan modification application *before* HBOR went

into effect, in 2012 for example, their servicer is still prevented from moving forward with a foreclosure on or after January 1, 2013 if the servicer never gave the homeowner a determination on that 2012 modification application. If the servicer denied that application, the servicer may proceed with foreclosure.

“Complete” is defined as: “when the borrower has supplied the mortgage servicer with all documents required by the mortgage servicer within the reasonable timeframes specified by the mortgage servicer.” Courts have interpreted this definition in a number of different ways, but homeowners should be prepared to show that they timely complied with all of servicer’s requests for documentation.

6. What if my financial circumstances have changed since my last modification application? Can I submit a second application?

Answer: Yes, and dual tracking protections can still apply.

Dual tracking protections can also protect homeowners who have been previously denied a modification, if the homeowner documents and submits a “material change in financial circumstances.” Courts have generally not accepted single-page letters to servicers declaring a “change in financial circumstances,” if not accompanied by supporting documentation, as meeting this requirement. Homeowners should submit another complete modification application, explaining why their finances are different compared to their last application. Did their income increase? Did their expenses decrease? Homeowners should provide as much evidence for this change as possible. If they successfully submit another modification application under these circumstances, then they are again protected by HBOR’s dual tracking prohibitions.

7. What is robo signing?

Answer: Robo signing refers to the practice of signing documents without personal knowledge of the accuracy of their contents. Servicers often hired third-party document processing companies to sign foreclosure paperwork and the employees of these companies often lacked any personal knowledge pertaining to the statements of these documents. This practice has been widely covered in the press and, in some respects, misunderstood. It is distinct from, for example, forgery (signing someone else's name without permission), which is a separately actionable claim. HBOR legislated against robo signing, but only as it pertains to notices of default, notices of trustee sales, assignments of a deed of trust, substitutions of trustee, and foreclosure filings in court. Before recording or filing these documents, a servicer must "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." Besides a required declaration accompanying a notice of default, however, servicers are not required to *affirm* compliance with this robo signing statute.

8. Does my servicer have to modify my loan?

Answer: No.

A common misconception is that HBOR not only prevents dual tracking, but that it *requires* servicers to grant modifications to homeowners who qualify. This is not true, and courts have been very hostile to this argument. A servicer is only required

to reach out to the homeowner before recording a notice of default, and is prevented from moving forward with a foreclosure while a first lien loan modification application is pending. Nothing in HBOR requires servicers to actually modify a loan. HBOR is meant to *encourage* servicers to modify loans by reforming the nonjudicial foreclosure process and by providing homeowners more procedural protections.

9. What is the National Mortgage Settlement (NMS)? What is the difference between the NMS and HBOR?

Answer: The [NMS](#) is a settlement between 49 state attorneys general (every state participated except Oklahoma) with five of the country's largest mortgage servicers: Bank of America, Ally/GMAC, Citigroup, JP Morgan Chase, and Wells Fargo. These servicers agreed to provide over \$20 billion worth of mortgage-related relief to homeowners and to abide by new servicing standards meant to address some of the worst foreclosure abuses, like robo-signing and dual tracking. A major difference between the NMS and HBOR is enforcement. Under the NMS, only state attorneys general can sue noncompliant banks; under HBOR, homeowners themselves can sue servicers for noncompliance. Another major difference, and another reason why HBOR was necessary, is the NMS's applicability to only the five banks listed above, who participated in the Settlement. If a homeowner in Wisconsin has a loan serviced by a Nationstar, for example, Nationstar is not bound by the NMS servicing standards (some exceptions may apply if servicing was transferred to Nationstar from an NMS signatory, like Bank of America). In California, *all*

servicers must comply with HBOR (though there are some separate rules for large and small servicers, see question 11, and some differences in obligation for signatories of the NMS, see question 10). The [California Monitor's Office](#) audits compliance with the NMS in California and investigates complaints from individual homeowners in cases of noncompliance. For more information on the National Mortgage Settlement, especially as it applies in California, refer to the California Monitor's Office [report](#).

10. If my servicer was part of the NMS, does HBOR apply to them?

Answer: It depends.

There is a carve-out in HBOR that exempts NMS signatories from some HBOR liability. If your servicer is one of the big five who signed the NMS (Citi, Ally/GMAC, Bank of America, JP Morgan Chase, or Wells Fargo), and if the servicer is compliant with the NMS servicing rules *toward you*, the specific homeowner, then they cannot be sued for HBOR violations concerning pre-notice of default outreach, dual tracking, assigning a single-point-of-contact, certain requirements for acknowledging a modification application, or robo-signing. If your servicer is *not* compliant with the NMS on any one of those topics, they may be liable for HBOR violations. Homeowners should consult an attorney if they think this is the case. The NMS settlements, outlining the NMS servicing standards, are available [here](#).

11. Does HBOR apply to large and small servicers differently?

Answer: Yes.

In general, large servicers are held to more exacting standards than small servicers. In limited circumstances, for example, large servicers are prevented from continuing with a foreclosure if a homeowner submits a second or third modification application (the homeowner must show a material change in financial circumstances since their last modification application, see question 6). Small servicers are under no such obligation. Homeowners with small servicers, then, only get one opportunity to apply for a modification application and be simultaneously protected by HBOR dual tracking prohibitions. HBOR applies to large and small servicers differently in other ways—attorneys can contact the HBOR Collaborative for more information on this topic.

12. How can I find out if my servicer is “large” or “small”?

Answer: A “small” servicer is defined in HBOR as conducting fewer than 175 foreclosures on residential properties with four dwelling units or less, in California, in the previous fiscal year. Consequently, extremely few servicers qualify as “small servicers” under HBOR. All the large, commonly known banks are “large” servicers. If your lesser-known servicer appears on [this list](#), it is also a “large” servicer. If your servicer has an unique or unfamiliar name and does *not* appear on that list, look them up at the [California Department of Business Oversight](#) to verify their

licensing. You can also contact the servicer directly to ask them if they are a “small” servicer as defined by California law.

13. Where can I get help obtaining a loan modification?

Answer: A CAG grantee or a HUD-certified housing counseling agency.

The California Attorney General’s Office made grants to many organizations throughout California, specifically to help homeowners modify their mortgages. The organizations are listed geographically on this [map](#). If you want to apply for a HAMP modification, you can also [contact](#) your local HUD-certified housing counselor to explore your options.

14. Where can I get help defending a post-foreclosure eviction?

Answer: Your local legal services organization or the private bar.

Many legal aid organizations offer advice or representation in eviction cases. Most, however, have income threshold requirements because their funding is limited to assisting low-income clients. Homeowners should be aware of this when they are searching for free legal advice or representation. Tenants Together is a tenant-specific organization, but their statewide [directory](#) of legal service organizations can help homeowners connect with legal assistance. If you are interested in retaining a private attorney, or are unable to qualify for free legal services, the State Bar of California explains referrals and gives information for referral services on their [website](#).

15. What should I tell my tenants residing in my foreclosed home?

Answer: You are legally required to disclose the foreclosure to prospective tenants; existing tenants have post-foreclosure protections.

If you have received a notice of default and are looking to rent the home, you are required by law to disclose the notice of default, in writing, to any prospective tenant before executing a lease agreement. [Cal. Civ. Code 2924.85](#). The wording of the disclosure is provided in the statute.

If your rental house is in foreclosure and/or ultimately foreclosed upon, any existing tenants are protected by federal and state (and possibly local) law. You can refer your tenants to our tenant [FAQ](#), and to the Tenants Together [hotline](#).

16. What is the HBOR Collaborative?

Answer: The HBOR Collaborative is a partnership of four housing advocacy organizations, led by the [National Housing Law Project](#) (NHLP) and funded by the [Office of the California Attorney General](#) under the [National Mortgage Settlement](#). NHLP and its partners, [Western Center on Law & Poverty](#), [National Consumer Law Center](#), and [Tenants Together](#), offer free training, technical assistance, litigation support, and legal resources to California's consumer attorneys and the judiciary on all aspects of the new California Homeowner Bill of Rights, including its new tenant protections. The goal of the Collaborative is to ensure that California's homeowners and tenants receive the intended benefits of

rights newly secured for them under HBOR by providing their legal representation with a broad array of support services and practice resources.

The HBOR Collaborative does not directly represent homeowners or tenants. We are happy to refer you to organizations that can help with foreclosure issues but please also refer to the CAG grantee [map](#) to find an organization near you. If you have legal representation already, please refer them directly to the Collaborative.

17. What is the Consumer Financial Protection Bureau and what are the CFPB servicing rules? What makes them different from HBOR or the NMS?

Answer: The CFPB is a new government agency dedicated to protecting American consumers, like homeowners. They educate the public about consumer protection rules, enforce those rules on banks, mortgage servicers, and other financial companies, and look for ways to improve existing law. Their new “servicing rules” will take effect January 10, 2014. Broadly, the servicing rules amend the Real Estate Settlement Procedures Act (RESPA) and the Truth in Lending Act (TILA), and by doing so, implement the mortgage servicing reforms of the Dodd-Frank Act. Servicers will have different, and more stringent, obligations to communicate with homeowners about their mortgage accounts, and stricter rules on when servicers can force-place insurance on homeowners. The rules also aim to streamline the modification evaluation process, providing homeowners with “continuity of contact” and effectively communicating which loss mitigation programs are available to homeowners. Finally, the rules provide more guidance on the servicing of loans,

including how to credit mortgage payments, how to notify borrowers of adjustments in adjustable rate mortgages, etc. Read more about the servicing standards on the CFPB [website](#).

There are many, sometimes minor, differences between the CFPB rules, HBOR, and the NMS (see this [chart](#) on the different dual tracking rules, for example) but the major point to keep in mind is that the CFPB rules are implemented through federal law (RESPA and TILA) and can be enforced by homeowners themselves. HBOR provides the same type of privately enforceable protection, but is only available to borrowers in California. The NMS applies nationally, but only to the five participating servicers (Citi, Wells Fargo, Bank of America, JP Morgan Chase, and GMAC/Ally) and does not include a private right of action.