

## **FAQ for Homeowners about California's Homeowner Bill of Rights**

Updated August 2017

### **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 enacted to combat the foreclosure crisis by requiring loan servicers to provide borrowers in financial distress with a meaningful opportunity to avoid unnecessary foreclosures and allowing homeowners to hold servicers accountable if they did not comply. HBOR includes more than twenty code sections, but at its heart are the provisions that (a) require servicers to communicate with homeowners about foreclosure alternatives both before and after recording a notice of default and (b) sharply restrict the practice of dual-tracking (discussed below in the response to Question 4). HBOR does not apply to every borrower or every home loan. For example, HBOR only applies to first mortgages on one-four unit dwellings and does not provide protections with respect to junior liens, such as home equity lines of credit. HBOR also does not protect homeowners in active bankruptcy unless the bankruptcy court has granted relief from the automatic stay of foreclosure. See the responses to Questions 5-8 below for more information about the limitations on HBOR's coverage.

While many HBOR provisions are permanent, others are scheduled to sunset as of January 1, 2018. See our [June 2017 newsletter](#) for more information about the provisions that are scheduled to sunset.

## **2. What did HBOR change?**

**Answer:** Before HBOR was enacted, it was very difficult for homeowners to hold loan servicers accountable for wrongful acts the servicers committed when homeowners sought assistance to avoid foreclosure. HBOR spells out a servicer's responsibilities during the loss mitigation process and allows a homeowner to sue the servicer in court for certain specified violations. With HBOR, a homeowner is able to obtain an injunction to stop a pending foreclosure sale until the loan servicer complies with its statutory obligations. If a foreclosure sale has already taken place in violation of the law, HBOR allows a homeowner to recover damages from the servicer. HBOR also allows homeowners' attorneys to recover attorney fees from servicers if the homeowner prevails, making it more likely that homeowners will be able to find legal representation.

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

**Answer:** In California, lenders 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 statutory nonjudicial foreclosure process. Because it is far cheaper, quicker, and easier, almost every foreclosure in California is conducted nonjudicially without any court oversight. Lenders need only record certain notices with the county recorder and provide them to the homeowner, and they can foreclose without stepping foot in a courtroom.

This distinction is important because if there is no judge to oversee the foreclosure proceedings, homeowners whose servicers violate foreclosure laws must rely on laws like HBOR to make sure their rights are protected, including, when necessary, by filing suit against the servicer in court.

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

**Answer:** Dual tracking refers to the practice of moving ahead with the foreclosure process while simultaneously evaluating a homeowner for a loan modification or other assistance. Whether through negligence or malicious intent, dual tracking was a very common practice in the industry, and HBOR was passed, in large part, to rein it in. 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 provide a written denial and wait for an appeal period to expire before moving forward with foreclosure.

#### **5. What is a complete, first lien loan modification application and why is it important?**

**Answer:** HBOR's dual tracking provisions only protect homeowners once they have submitted a complete, first lien loan modification application. Applications to modify second liens, like home equity lines of credit, do not trigger dual tracking protections. An application is “complete” for purposes of HBOR “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 must be prepared to show that they timely complied with all of servicer’s requests for documentation, for example, with an electronic or written delivery confirmation.

**6. Does HBOR protect a homeowner who submits more than one loan modification application?**

**Answer:** HBOR’s dual tracking protections do not apply to subsequent loan modification applications unless the homeowner demonstrates a “material change in financial circumstances” since any prior application was submitted and reviewed. A material change might be a significant increase or decrease in income or expenses. In order to trigger HBOR’s dual tracking protections, a homeowner should both explain and document the change as part of any subsequent loan modification application. Courts generally reject “material change” claims when a borrower has only submitted a statement to the servicer asserting a change in financial circumstances without substantiating the change.

**7. Does HBOR require my servicer 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 and after recording a

notice of default, and is prevented from moving forward with a foreclosure while a complete first lien loan modification application is pending. Nothing in HBOR requires servicers to actually modify a loan. HBOR is meant to *encourage* more modifications by making sure homeowners have every opportunity to be thoroughly reviewed for assistance, but it only requires compliance with certain procedures and does not dictate a particular outcome.

**8. Does HBOR impose different requirements on large and small servicers?**

**Answer:** Yes. In general, small servicers are held to less exacting standards than large servicers. 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. “Large servicers” are generally the large, well-known banks and the entities listed on the California Department of Business Oversight’s website, available at [click here](#).

DBO released a report in July 2016 that includes licensees’ foreclosure volumes from 2015: [click here](#) at p. 12. An updated list should be available in 2017.

Advocates can also try to verify a lesser-known servicer’s licensing status online at [click here](#), or request foreclosure volume information for the relevant year from the servicer

**9. What is the difference between HBOR and federal loan servicing regulations created by the Consumer Financial Protection Bureau?**

**Answer:** New federal rules governing residential mortgage loan servicing went into effect on January 10, 2014. While these federal rules are similar to HBOR in some respects, HBOR generally provides greater protection and better remedies to homeowners. For examples, the federal rules do not provide for injunctions against foreclosure sales, but injunctive relief is available under HBOR before a sale is completed.

The two sets of laws both include pre-foreclosure outreach requirements and dual tracking provisions, but there are significant differences in how these requirements operate. First, with respect to the initiation of foreclosure, the federal rules prohibit servicers from recording a notice of default until a borrower is more than 120 days delinquent. HBOR, by contrast, only prevents servicers from recording a notice of default for 30 days after servicer has made (or attempted to make) contact with a delinquent borrower. The types of contact required are also different, with HBOR requiring a post-NOD notice, while the federal rules do not. The federal rules apply to both non-judicial and judicial foreclosures in California, while HBOR covers only non-judicial foreclosures.

Generally, HBOR provides greater dual tracking protections. First, borrowers may submit more than one modification application under HBOR, if they can document

and submit a material change in financial circumstances to their servicer. By contrast, the current version of the federal rules (as of August 2017) only apply to one foreclosure alternative application, no matter how significantly a borrower's financial circumstances change after that application is reviewed. This "one bite at the apple" limitation in the federal rules will change, however, as of October 17, 2017, when a revised version of the RESPA dual tracking regulation goes into effect. In addition, HBOR does not condition dual tracking protections on when the borrower submits a complete loan modification application; as long as a borrower submits a complete application before a foreclosure sale, the servicer may not move ahead with the sale while that application is "pending." The federal rules, in contrast, provide a tiered set of protections depending on how early the borrower submits an application. Borrowers receive full dual tracking protections – including a notice listing any missing documents and a right to appeal a denial, when they submit an application within the first 120 days of a delinquency or before the loan is referred to foreclosure, or, if a Notice of Default has been recorded, 90 or more days before a scheduled sale date. After that, the rights conferred by the federal rules diminish. Applications submitted between 89 and 45 days before a scheduled sale date do not trigger the right to appeal a denial. Applications submitted after the 45-day mark do not entitle the borrower to a notice listing any missing documents. Applications submitted by 37 days before a scheduled sale require a servicer to refrain from conducting the sale until making a determination on the application, but only if the application is complete. Borrowers who submit their application less

than 37 days before a scheduled foreclosure sale receive no dual tracking protections under the federal rules. In contrast, under HBOR, all borrowers (with large servicers) receive full dual tracking protections, including the right to an appeal.

Some of the federal dual tracking rules are more protective than HBOR. For instance, a “facially complete application” (where a servicer receives all requested information but later determines that more information or clarification is necessary), must be treated as “complete” as of the date that it was facially complete. HBOR contains no such distinctions and leaves the “completeness” of an application up to the servicer and to the courts. Because the federal rules do not define borrower, case law under those rules has been more favorable to successors-in-interest than under HBOR, which has a statutory definition. However, as discussed below in Question 10, SB 1150, effective January 1, 2017, has expanded HBOR’s coverage to include most successors.

Advocates should note that in October 2016 the Consumer Financial Protection Bureau finalized rules amending the existing servicing regulations. Major proposed revisions include more robust protections for successors-in-interest, more regulations governing servicing transfers, and a rule requiring servicers to notify borrowers when applications are “complete.” However, most provisions of the revised rule will not be effective until October 19, 2017, and the new servicing requirements for successors-in-interest do not go into effect until April 19, 2018.

**10. Does HBOR protect a successor-in-interest to the home after the original borrower on the loan has died?**

**Answer:** To date, most courts looking at the issue of whether HBOR itself covers successors-in-interest have ruled that it does not (although if the successor signed the Deed of Trust, they may qualify as a “borrower” under HBOR). However, [SB 1150, the “Survivor Bill of Rights,”](#) went into effect on January 1, 2017, and this new law extends HBOR dual tracking protections and remedies to successors who successfully document their successor status after the death of a borrower.

**11. Where can a homeowner whose mortgage is in default get help?**

**Answer:** Free foreclosure prevention services are available through HUD-certified housing counseling agencies and some legal aid offices. Homeowners can [contact](#) a local HUD-certified housing counselor to find out more about their services. California also has a federally funded program called Keep Your Home California that offers assistance to homeowners who cannot afford or have fallen behind on their mortgages. Information about these programs is available at [www.keepyourhomecalifornia.org](http://www.keepyourhomecalifornia.org) .

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

**Answer:** 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 and many only provide assistance to tenants in foreclosed properties and not to former homeowners. Tenants Together is a tenant-specific organization, but their statewide [directory](#) of legal service organizations may help homeowners facing eviction connect with legal assistance. Homeowners interested in retaining a private attorney, or unable to qualify for free legal services, should check the [website](#) of the State Bar of California for information about legal referrals.

### **13. What should I tell my tenants residing in my foreclosed home?**

**Answer:** If you have received a notice of default and are looking to rent out your 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](#).