Attachment 4b

BILL ANALYSIS

SENATE BANKING & FINANCIAL INSTITUTIONS COMMITTEE
Senator Juan Vargas, Chair

SB 1471 (DeSaulnier and Pavley) Hearing Date: April 18, 2012

As Amended: April 10, 2012
Fiscal: Yes
Urgency: No

SUMMARY Would require servicers, as defined, to offer borrowers a single point of contact with whom those borrowers may communicate regarding options that may be available to avoid foreclosure, would prohibit any robosigned document, as defined, from being recorded or filed with any court, and would enact rules relating to the ability of an entity to exercise the power of sale in a mortgage or deed of trust.

DESCRIPTION

1. Would define "mortgage servicer" as a person or entity responsible for the day-to-day management of a mortgage loan account, including collecting and crediting periodic loan payments, managing any escrow account, or enforcing mortgage loan terms, either as the holder of the loan note or on behalf of the holder of the loan note.

(This differs from the federal Real Estate Settlement Procedures Act ÝRESPA] definition of a servicer. Under RESPA, servicing is defined as "receiving any scheduled periodic payments from a borrower pursuant to the terms of any mortgage loan, including amounts for escrow accounts, and making the payments to the owner of the loan or other third parties of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the mortgage servicing loan documents or servicing contract").

2. Effective July 1, 2013, would provide that, if a borrower is 60 days or more delinquent, the mortgage servicer must inform that borrower that if the borrower wishes to pursue an alternative to foreclosure, the servicer will establish a single point of contact (SPOC) for the borrower. Servicers must provide the identity of and contact information for a

SPOC, within 10 business days of written or telephonic request for loss mitigation assistance from a borrower who

is 60 or more days delinquent. Servicers must provide updated contact information for a SPOC, within five business days of a change in the SPOC.

This provision differs from the SPOC requirements of the mortgage settlement (page A-21). The settlement requires servicers to promptly establish an easily accessible and reliable SPOC for each potentially-eligible first lien mortgage borrower who requests loss mitigation assistance. Servicers are also required to provide updated contact information to the borrower if the designated SPOC is reassigned, no longer employed by the servicer, or otherwise unable to act as the primary point of contact. Although the settlement does not expressly define potentially-eligible borrowers in the section covering SPOCs, page A-1 of the settlement states that its provisions are generally intended to apply to loans secured by owner-occupied properties that serve as the primary residence of the borrower.

The key difference between the SPOC provisions of this bill and the settlement relate to which party (the borrower or the servicer) has the responsibility to initiate contact regarding a SPOC. This bill requires servicers to reach out to borrowers and offer them a SPOC. The settlement requires borrowers to reach out to servicers and request a SPOC. This bill and the settlement also differ in their coverage of borrowers (as drafted, this bill would offer a SPOC to any type of borrower who is at least 60 days delinquent on any type of loan, while the settlement restricts SPOCs to potentially-eligible first lien borrowers). Finally, this bill is silent on specific situations that could lead to the need for a new SPOC (these situations are detailed in the settlement). Other differences exist ("promptly" in the settlement, versus either 10 or 5 days, depending on the situation, in the bill) but are less significant.

3. Would require the SPOC to be responsible for all of the following:

   a. Communicating the options available to the borrower, the actions the borrower must take to be considered for those options, and the status of the mortgage servicer's evaluation of the borrower for those options (language taken directly from the settlement; page A-21).

   b. Coordinating receipt of all documents associated with loan modification or loss mitigation activities and notifying the borrower of any missing documents (language taken directly from the settlement; page A-21).

   c. Maintaining and providing accurate information about the borrower's situation and current status in the loss mitigation process (language based on, but slightly different than language in the settlement; the settlement requires the SPOC to be knowledgeable about these issues, not to maintain and provide accurate information about

them; page A-21).

d. Ensuring that a borrower, who is not eligible for a federal Making Home Affordable (MHA) Program, is considered for proprietary or other investor loss mitigation options (language based on, but slightly different than language in the settlement; the settlement refers to MHA programs (plural), not to a single MHA program; page A-22).

e. Having access to individuals with the ability to stop foreclosure proceedings when necessary to comply with the MHA program or California law (language taken directly from the settlement; page A-22).

4. Would require a SPOC to remain assigned to a borrower's account until the mortgage servicer determines that all loss mitigation options have been exhausted, the borrower's account becomes current, or, in the case of a borrower in bankruptcy, the borrower has exhausted all loss mitigation options for which the borrower is potentially eligible and has applied (taken directly from the settlement; page A-22).

5. Would require a mortgage servicer to ensure that a SPOC refers and transfers a borrower to an appropriate supervisor upon request of the borrower (based on language in the settlement; page A-23).

6. Would prohibit an entity from recording or causing a notice of default to be recorded, or otherwise initiating the foreclosure process, unless it is the holder of the beneficial interest under the deed of trust. Would provide that an agent shall not record a notice of default or otherwise commence the foreclosure process without the

specific direction of the actual owner of the beneficial interest under the deed of trust. (This language is not based on the settlement).

7. Would define a "robosigned document" as any document that contains factual assertions that are not accurate, are incomplete, or are unsupported by competent, reliable evidence, and would provide that a "robosigned document" also means any document that has not been reviewed by its signer to substantiate the factual assertions contained in the document. Would clarify that for purposes of the definition, multiple people may verify the document or statement, as long as the document or statement specifies the portions verified by each signer.

(The settlement handles the issue of document accuracy very differently. It does not contain a definition of robosigned document. Instead (pages A-1 and A-2), it requires that notices of default, notices of sale, and similar notices submitted by or on behalf of servicers in non-judicial foreclosures are accurate and complete, and are supported by competent and reliable evidence. Before referring a loan to

nonjudicial foreclosure, the settlement requires servicers to ensure that they have reviewed competent and reliable evidence to substantiate the borrower's default and the right to foreclose. Affidavits, sworn statements, and declarations may not contain information that is false or unsubstantiated).

8. Would provide that, where a power to sell real property is given to a mortgagee, trustee, beneficiary of a deed of trust, or other encumbrancer, in an instrument intended to secure the payment of money, the power of sale is part of the security and vests in any person who by assignment becomes entitled to payment of the money secured by the instrument. Would further provide that the power of sale may be exercised by the assignee, only if the assignment is duly acknowledged and recorded. (This language is not based on the settlement. Existing law already contains this provision, but does not include the word "only" where italicized above, nor does it refer to trustees or beneficiaries of deeds of trust, where italicized).

REMEDIES

9. Would provide that any entity which records a robosigned

document or files a robosigned document in any court, relative to a foreclosure proceeding, is liable for a civil penalty of $10,000 per robosigned document, and would authorize any governmental entity identified in Section 17204 of the Business and Professions Code (Attorney General, district attorneys, county counsel, and city attorneys), as well as the Department of Real Estate, Department of Corporations, and Department of Financial Institutions, to bring a civil action seeking those penalties (the Departments would only be authorized to bring actions against their licensees). The civil penalties provided for in the bill would be separate from and exclusive of any other remedies or liabilities that might apply.

10. Would authorize a borrower, who reasonably believes that a mortgagee, trustee, beneficiary, or authorized agent has failed to comply with the requirements of the bill, to seek an order to enjoin any pending trustee's sale in any court having jurisdiction, if a notice of sale has been recorded. Would entitle borrowers who obtain injunctions to reasonable attorneys' fees and costs, and would provide that any injunction must remain in place until the mortgagee, trustee, beneficiary, or authorized agent has complied with the provisions of the bill. Would not allow a borrower to obtain relief for any violation that is technical or de minimis in nature, such that it did not impact the borrower's ability to pursue an alternative to foreclosure.

11. Following a trustee's sale, would authorize a borrower, who reasonably believes that a mortgagee, trustee, beneficiary, or authorized agent has failed to comply with the

requirements of the bill, to seek to recover the greater of actual damages or $10,000, plus reasonable attorneys' fees and costs, in any court of competent jurisdiction. Would authorize a court to award a borrower the greater of treble actual damages or statutory damages of $50,000, plus attorneys' fees and costs, if it finds that a violation of the bill was intentional, reckless, or resulted from willful misconduct by a mortgagee, trustee, beneficiary, or authorized agent. Would not allow a borrower to obtain relief for any violation that is technical or de minimis in nature, such that it did not impact the borrower's ability to pursue an alternative to foreclosure.

12. Would provide that a violation of the provisions of the

bill shall not affect the validity of a sale in favor of a bona fide purchaser and any of its encumbrancers for value without notice (i.e., that arms' length sales of foreclosed properties to third party purchasers will not be deemed invalid as a result of any violation of the bill, and that the interests of parties who hold liens secured by those properties, following the sales of those properties to bona fide third party purchasers, will not be invalidated).

13. Would provide an affirmative defense to liability for violations of the bill to signatories to the settlement agreement, which are in compliance with that agreement, as specified.

EXISTING LAW Discussed in the body of the analysis, where relevant.

COMMENTS

1. Purpose: The author states, "California is the midst of a major crisis in homeownership. It is estimated that 500,000 more homes will be subject to foreclosure in the next year to eighteen months. According to the Attorney General, there is a need for reforms to California's non-judicial foreclosure process to ensure fairness for homeowners. This bill would address two widespread problems.

Distressed homeowners seeking a loan modification or other form of loss mitigation complain that they cannot effectively communicate with their banks. They are required to speak to multiple people, none of whom are familiar with their circumstances. They are required to submit the same documents repeatedly, and the conversation takes months, often resulting in foreclosure when a successful loan modification process might have been possible if the communications were more effective.

This bill requires banks to designate a single point of contact, who would be responsible for guiding the homeowner through the loss-mitigation process, and for receiving

documentation and handling other communications with the borrower. The single point of contact is a concept that has been agreed to by the signatory banks to the National Mortgage Settlement, and should be made available to all

Californians.

Another significant problem in California has been the "robosigning" of documents in the foreclosure process. The Attorney General reports that in particular the declaration required to be recorded with the notice of default to demonstrate that the lender has communicated with the borrower and apprised them to their right to pursue a loan modification or other loss mitigation measure with their lender, has been widely robosigned. This means that it either contained false factual statements, or was signed by an individual without knowledge of the documents contents or veracity. When this document has been robosigned, we cannot have assurance that the borrower have been apprised of all their rights under California law. This undermines the foreclosure process, which in California is not supervised by the courts." _

2. Background: On March 12, 2012, the United States Department of Justice, U.S. Department of Housing and Urban Development, and 49 state Attorneys General, including California's Attorney General Kamala Harris, announced the filing of a settlement agreement with the nation's five largest mortgage servicers (Ally/GMAC, Bank of America, Citi, JPMorgan Chase, and Wells Fargo). As part of the settlement, six documents were filed with the court: a complaint, which details the bad acts alleged by the plaintiffs to have been committed by the servicers, and five separate consent judgments (one for each of the servicers), in which the terms of the agreement between each servicer and the plaintiffs is detailed. All of these documents can be downloaded from www.nationalmortgagesettlement.com .

Although the terms of each of the five consent judgments are slightly different, each of the judgments shares many similarities. Three elements of the judgments which are identical, and which are relevant for purposes of this analysis, include the settlement term sheet (referenced in each of the settlements as Exhibit A), the enforcement provisions (Exhibits E and E-1), and the releases from prosecution that were granted to the servicers (Exhibits F and G). Other key elements of the judgments, which will not be discussed further in this analysis, include discussions of how much money each of the servicers must pay in connection with the settlement, how that money is allocated among states, how credit toward servicers' monetary

obligations is calculated under the settlement (different types of consumer relief count differently toward servicers' monetary obligations), and how servicemembers and their dependents are covered by the settlement.

The settlement term sheet formed the basis for many of the provisions of this bill and its companion, SB 1470, and is widely expected to form the basis for national servicing standards that the federal Consumer Financial Protection Bureau is expected to propose sometime this summer.

3. How will the settlement be enforced/How does the settlement handle private rights of action? Responsibility for enforcing the terms of the settlement agreement rests with a federal enforcement monitor (Joseph Smith, former banking commissioner of North Carolina) and a Monitoring Committee, which consists of state attorneys general, state financial regulators, the U.S. Department of Justice, and the U.S. Department of Housing and Urban Development. This Monitoring Committee or any party to the consent judgments are the only entities that may bring actions to enforce the judgments. All actions must be brought in the U.S. District Court for the District of Columbia. Actions may only be brought if the time to cure a potential violation (see discussion below) has expired.

When people assert that the settlement preserves private rights of action, they are not referring to private rights to enforce the provisions of the settlement. Instead, they are referring to the fact that the state and federal releases in the settlement preserve individuals' ability to file suit for violations of residential mortgage loan origination and servicing laws, and for violations of residential foreclosure practices. The releases from prosecution contained in the settlement prohibit any of the 49 state attorneys general, any other state government entities in any of the 49 states signing the agreement, or the federal government from prosecuting civil claims related to the residential mortgage loan servicing, residential mortgage loan origination practices, and residential foreclosure practices of the signatories prior to the date of the settlement. Because these releases did not cover individual claims, individuals may continue to sue the signatories for violating state or federal law governing residential mortgage loan servicing, residential mortgage loan origination practices, or residential foreclosure

practices. It is these private rights of action that the settlement preserved, not private rights of action to enforce the terms of the settlement.

If individuals can't enforce the provisions of the settlement agreement, how will it be enforced? As noted immediately above, the terms of the settlement are enforced by the

federal enforcement monitor and the Monitoring Committee. Attorney General Harris has also appointed Irvine Law School Professor Katherine Porter to assist her in monitoring servicers' commitments to California.

Under the terms of the settlement, only two types of relief may be granted by the court (page E-15):

a. Non-monetary equitable relief, which may include injunctive relief, direct certain specific actions be taken under the terms of the consent judgment, or comprise other non-monetary corrective action; and

b. Civil penalties of not more than $1 million per uncured violation ($5 million in the event of a second uncured violation, when the first uncured violation involves widespread noncompliance). Civil penalties are distributed either to the United States, the state that prosecuted the violation, or to all states in proportion to their payouts under the terms of the settlement, depending on the nature of the violation.

Identifying Potential Violations: Each servicer is required to establish an internal quality control (QC) group that is independent from the line of business whose performance is being measured under the terms of the consent judgment. The settlement contains a series of metrics, each of which must be measured by these internal QC groups and reported upon quarterly to the monitor (page E-3).

These metrics cover all stages of the loss mitigation and foreclosure process, from initial contact through loan modification review, decision, and appeal, through foreclosure sale, as well as other topics of the consent judgment outside of the foreclosure process, such as the calculation of fees and imposition of force-placed insurance. Generally speaking, the metrics are designed to

numerically evaluate servicers' performance across all aspects of the consent judgment. Small error rates require remediation, but do not trigger official violations. Error rates in excess of the threshold error rates identified in the consent judgment trigger official violations (what the settlement defines as potential violations; Exhibit E-1).

Servicer Right to Cure: Whenever a potential violation occurs (i.e., whenever a servicer exceeds the threshold error rate for a given metric in a given quarter), the servicer must meet and confer with the Monitoring Committee within 15 days of the submission of a report showing the violation. Servicers have a right to cure any potential violation. Potential violations are deemed cured if: a) a corrective action plan approved by the monitor is determined by the monitor to have been successfully completed, b) a quarterly report covering the cure period shows that the

threshold error rate has not been exceeded for that same metric during that period, and c) the monitor confirms the accuracy of that quarterly report (pages E-11 and E-12).

In addition to a servicer's obligation to cure a potential violation via a corrective action plan, servicers must remediate any material harm to particular borrowers identified through work performed by the servicer. Furthermore, if a servicer has a potential violation so far in excess of the threshold error rate that the monitor concludes the error is widespread, the servicer must identify other borrowers who may have been harmed by such noncompliance and remediate all such harms (page E-12).

4. Summary of Arguments in Support:

a. Attorney General Kamala Harris is sponsoring SB 1471, and sees the bill as an important part of her Homeowner Bill of Rights legislative package. Together with other bills in the Attorney General's legislative package, the provisions of SB 1471 will help preserve homeownership for thousands of Californians who are able to make payments under modified loan terms over the long term, if given a chance. Eliminating unnecessary foreclosures will stabilize families, preserve communities, reduce blight, and allow California's housing market to recover sooner. Ms. Harris' investigations have revealed that the foreclosure process has been undermined by opaque industry practices that have caused chaos in the loan modification process. This has prejudiced homeowners' ability to prevent foreclosures and has, in some cases, resulted in wrongful foreclosures. Under some circumstances, homeowners have little recourse to challenge foreclosures that may have been completed unlawfully.

The SPOC provision of SB 1471 was included in the bill, as a response to homeowners' frustration regarding their inability to contact a bank representative who knows the status of their loan modification application. The

robosigning provision was included, based on the Attorney General's observation of robosigning involving the declaration required by Civil Code Section 2923.5.

b. Consumers' Union (CU) asserts that preventing unnecessary foreclosures in California at the earliest stage possible is in everyone's best interest. CU cites the findings of an audit commissioned by San Francisco Assessor-Recorder Phil Ting, which found significant improprieties in the nonjudicial foreclosures conducted in the City and County of San Francisco. CU believes that the San Francisco experience is just the tip of the iceberg of a much larger problem plaguing California. SB 1471 would prevent the types of improprieties documented in the San Francisco audit and would bring much-needed relief to homeowners navigating the complex foreclosure process, by requiring that servicers provide homeowners with a specific person to talk to at their lending institution.

The Center for Responsible Lending (CRL) is supportive of SB 1471 for the same reasons as CU. CRL adds, "SB 1471 will enhance fairness in the foreclosure and modification processes by requiring that banks use accurate and reliable documents when pursuing foreclosure, and by improving the quality of information provided to homeowners who are subject to foreclosure."

Similar expressions of support were submitted by San Francisco Assessor-Recorder Phil Ting, PICO California, the California Professional Firefighters, SEIU, AFSCME, and the Lutheran Office of Public Policy-California.

5. Summary of Arguments in Opposition:

a. A coalition of trade associations representing the financial services industry and the secondary mortgage market raised several concerns in their letter of opposition. Well-intentioned efforts to help distressed borrowers may further restrict access to credit in the future and have a real impact on viable new homebuyers seeking to achieve the American Dream. Advancing legislation that creates additional procedural hurdles or conflicting layers of bureaucracy for loan servicers, without addressing the borrower's underlying financial condition, may ultimately miss the mark of resolving core economic issues, and will ultimately prove unsuccessful at solving this complex problem. A few of the specific comments from the coalition's letter are summarized below.

i. Robosigning was a criticism in judicial foreclosure states. While the proponents have stated that declarations filed under the borrower outreach provisions of Civil Code Section 2923.5 were robo-signed, those assertions are contrary to the

findings of the appellate court decision in Mabry v. Aurora Loan Services. In that decision, the court found that the declaration required pursuant to Section 2923.5 need not be signed under penalty of perjury, and further stated that the way Section 2923.5 is set up, too many people are necessarily involved in the process for any one person to likely be in the position where he or she could swear that all the requirements of the declaration were met.

ii. A temporary situation does not require a permanent solution. SB 1471 proposes permanent changes to law that are extraordinarily restrictive and draconian. The nationwide mortgage settlement has a sunset date, and SB 1471 should, as well.

iii. SB 1471 fails to narrowly target at-risk borrowers, and applies too broadly. It promotes strategic defaults, allows investors and speculators to crowd out borrowers with financial hardship, applies to commercial property, and fails to require tender by borrowers as a symbol of good faith. For borrowers who strategically default and have no intention of remaining in their homes, the bill will be used as a delay and a leveraging tactic.

iv. SB 1471 will invite litigation through the inclusion of private rights of action. Exposing entities and individuals to excessive litigation risk will not attract and encourage creditors and investors to inject the capital necessary to revive California's residential housing marketplace.

a. The California Land Title Association (CLTA) acknowledges that the inclusion of language intended to protect bona fide purchasers and bona fide encumbrancers will provide them with an affirmative defense against claims asserting the invalidity of title transfer. CLTA notes, however, that this defense must be asserted by a new homebuyer/BFP after he or she is sued, and will do nothing to dissuade delinquent borrowers and their attorneys from naming BFPs in litigation that is likely to flow from the enactment of SB 1471. These new homebuyers will be saddled with legal costs in the thousands of dollars, simply to hire attorneys to file motions to dismiss based on the BFP protections in the bill. Homebuyers fortunate enough to have purchased a homeowner's title policy following a foreclosure sale will be able to have their title insurer defend them, but they will have to pay a significant premium to obtain their new title policies for that reason.

CLTA observes that SB 1471 will have a negative impact on California's real estate economy and the secondary market. Currently, lender's title policies (i.e.,

policies to protect the lender's security interest in a home) attach to a borrower's loan and follow that loan, if it is sold into the secondary market. SB 1471 will introduce several new risks to title and will likely cause the title industry to reevaluate what coverage it will be able to offer to lenders. The likelihood that lenders will be unable to obtain title policies that limit their potential for risk and loss will translate to diminished secondary market interest in the loans these lenders make. Secondary market buyers seeking to assemble securitized pools of loans will look less favorably on loans that carry a potential for risk and loss due to title challenges.

b. The California Association of Realtors characterizes SB 1471 as excessive and premature. It will reduce the availability of mortgage credit and increase the cost of funds for legitimate, qualified borrowers attempting to participate in the emerging recovery of the California real estate market. It is premature to lock into California statute some version of the settlement before it has been proven in the market.

Furthermore, codifying a robosigning offense in California law is an inappropriate borrowing from the judicial foreclosure process, and blurs the distinction between judicial and nonjudicial foreclosure. Pushing lenders and servicers toward the use of judicial foreclosure would dramatically increase the cost to the state of enforcing legitimate security claims, and doubtless increase the costs of funds to homeowners. Preliminary reports from Nevada suggest that its experiment with a similar certification rule has had a dramatically negative effect on the ability to utilize legitimate nonjudicial foreclosure processes.

c. The California Chamber of Commerce labels SB 1471 a job-killer bill, because it will impede California's housing market recovery by allowing all borrowers, including strategic defaulters and investors, to interrupt the foreclosure process to forestall legitimate foreclosures. The enforcement provisions of SB 1471 will incent litigation by imposing strict liability with no right to cure, and inflicting statutory, actual, treble, and punitive damages. The measure will likely limit future access to credit, discourage investment capital

for the purposes of residential mortgage lending, or impose a significant risk-based premium, resulting in

higher costs for consumers. Forestalling the foreclosure process will further frustrate local governments struggling with properties in disrepair during the foreclosure process, continue in the trend of reduced property tax revenue for local governments, and artificially sustain depressed property values.

d. The Civil Justice Association of California believes that SB 1471 will force nonjudicial foreclosures into court. The bill creates expansive, new obligations that are enforceable with lucrative penalties, statutory damages, and attorney's fees. The bill's requirements and prohibitions are ambiguous and are outside of the carefully negotiated national mortgage settlement. California's foreclosure process is already highly regulated. There is no need to insert lawyers and lawsuits into the process.

6. Amendments:

a. Should this bill's definition of a mortgage servicer be amended to match the RESPA definition? RESPA is the federal law that regulates servicing activities, and seems relevant to the discussion, particularly if the nationwide servicing standards anticipated to be released by the CFPB utilize the RESPA definition of servicer and servicing.

b. Amendments are necessary to clarify the scope of the bill (i.e., to clarify what types of mortgages and deeds of trust are intended to be covered by the provisions of the bill). As drafted, the bill would apply to all mortgages and deeds of trust on which nonjudicial foreclosures are initiated, including single-family residential (both owner-occupied and non owner-occupied), multi-family residential, and commercial properties. The settlement generally applies to owner-occupied properties that serve as the primary residence of the borrower. SB 1137 (Chapter 69, Statutes of 2008) also applied only to owner-occupied principal residences.

Staff suggests the following amendments to clarify this bill's scope. They amendments are drafted in a manner intended to conform the bill to the owner-occupied,

residential real property scope of SB 1137 and the settlement. If the authors and sponsor wish to select a different scope, they need only substitute different language for the following:

Insert the following on page 5, between lines 5 and 6; page 8, between lines 20 and 21: "This section shall apply only to mortgages and deeds of trust that are secured by owner-occupied residential real property containing no more than four dwelling units. For purposes of this section, "owner-occupied" means that the residence is the principal residence of the borrower as indicated to the

lender in loan documents."

c. As noted above, this bill differs from the settlement regarding the manner in which servicers are required to assign a SPOC. Under the settlement, servicers are required to promptly establish an easily accessible and reliable SPOC for each potentially-eligible first lien mortgage borrower who requests loss mitigation assistance. Borrowers need not be at least 60 days delinquent before requesting a SPOC. Under the bill, servicers are required to contact every borrower who is at least 60 days delinquent and inform them that they may request a SPOC.

If the authors and sponsor wish to more closely conform the SPOC assignment language of the bill to similar language in the settlement, the following amendments are suggested:

Page 3, strike lines 10 through 19, page 4, strike lines 1 through 5, and page 5, strike "within 10 business days" and insert: (a) A mortgagee, beneficiary, or authorized agent shall establish an easily accessible and reliable single point of contact (SPOC) for each potentially-eligible first lien mortgage borrower who requests loss mitigation assistance, within 10 business days of receiving a borrower's request. For purposes of this section, a potentially-eligible borrower is one who owns and occupies as their principal residence the property that secures the loan for which the borrower is requesting loss mitigation assistance. Requests for a SPOC may be made in writing or telephonically."

d. This bill includes a provision (page 6, lines 19

through 25) that would prohibit an entity from recording or causing a notice of default to be recorded, or otherwise initiating the foreclosure process, unless it is the holder of the beneficial interest under the deed of trust. The second sentence of this provision provides that an agent shall not record a notice of default or otherwise commence the foreclosure process without the specific direction of the actual owner of the beneficial interest under the deed of trust. This language is not based on the settlement and is unclear, as drafted.

At a minimum, this provision requires technical amendments. The first sentence refers only to deeds of trust, and should probably refer to mortgages and deeds of trust. The second sentence refers to "an agent," but fails to identify which agent. Presumably, the second sentence is intended to refer to an agent acting on behalf of the holder of the beneficial interest, but this requires clarification. Finally, the two sentences refer differently to the party with authority to initiate a foreclosure; the first sentence refers to the "holder" of the beneficial interest, while the second sentence refers

to the "actual owner" of the interest. The two sentences should be conformed.

More generally, it might also be helpful if the logic behind the inclusion of this provision were clarified. This bill's sponsor has indicated that the language is intended to codify the so-called "Gomes" decision (Jose Gomes v. Countrywide Home Loans, Inc., 192 Cal. App. 4th 1149, February 18, 2011). In that decision, the Fourth Appellate District of the California Court of Appeal ruled against the plaintiff, and found that the borrower had not identified a legal basis on which to challenge his foreclosure. Because the Gomes court did not find the existence of a problem with California law, it is unclear from a reading of this provision what problem it is trying to address. This clarity would be extremely useful, given the likelihood that the meaning of this section will be litigated.

e. The provision of this bill, which attempts to provide protections to bona fide purchasers of foreclosed properties, and to those who hold liens secured by the properties purchased by these bona fide purchasers, appears to be broader than intended (page 9, lines 5

through 7). As drafted, the bill states that a violation of "this article" shall not affect the validity of sales to so-called BFPs, where article refers to an article of the Civil Code governing Mortgages in General. Staff understands that the authors and sponsors intended to provide BFP protections for violations of "this act," not "this article."

Page 9, line 5, strike "article" and insert: act

f. The private rights of action authorized by this bill would benefit from clarification (page 8, lines 22 through 40 and page 9, lines 1 through 4). As drafted, they allow a borrower to seek an order to enjoin a trustee sale, or an order seeking damages, if the borrower has a reasonable belief that a mortgagee, trustee, beneficiary, or authorized agent failed to comply with specified provisions of the bill. The bill implies, but does not expressly direct the court to find that a violation has occurred, before issuing an injunction or awarding damages. The bill also contains language intended to protect servicers from lawsuits over violations of the bill that were technical or de minimis in nature, and which did not impact a borrower's ability to pursue an alternative to foreclosure, but this language appears in a separate subdivision as the private rights, and is unclear regarding what constitutes an "ability to pursue an alternative to foreclosure."

The following language is suggested, in lieu of the existing language of 2924.18(a) (page 8, lines 22 through 31), to ensure that: i) an injunction or awarding of

damages only occurs after a court finds that a violation has occurred, and ii) a borrower is only entitled to relief, if that violation resulted in that borrower being denied approval for a foreclosure avoidance alternative for which he or she applied:

"A court of competent jurisdiction may enjoin a pending trustee's sale, if a notice of sale has been recorded, and a borrower presents evidence satisfactory to the court, regarding the existence of a violation of Section 2923.7, 2924, 2924.9, or 2923.5 by a mortgagee, trustee, beneficiary, or authorized agent, which resulted in the borrower being denied approval for a foreclosure avoidance alternative for which that borrower applied.

Any injunction shall remain in place until the mortgagee, trustee, beneficiary, or authorized agent has complied with the requirements of the section or sections that were violated. A borrower who obtains an injunction shall be entitled to reasonable attorneys' fees and costs."

The following is suggested in lieu of the existing language of 2924.18(b) (page 8, lines 32 through 38): "A court of competent jurisdiction may award a borrower the greater of actual damages or ten thousand dollars ($10,000), plus reasonable attorney's fees and costs, if a trustee's sale has been concluded, and a borrower presents evidence satisfactory to the court regarding the existence of a violation of Section 2923.7, 2924, 2924.9, or 2923.5 by a mortgagee, trustee, beneficiary, or authorized agent, which resulted in the borrower being denied approval for a foreclosure avoidance alternative for which that borrower applied."

If these amendments are accepted, the text on page 9, lines 8 through 12, should be deleted.

g. If the amendments described in "f" immediately above are not accepted by the authors and sponsor, the subdivision of Section 2924.18, which refers to violations that are technical or de minimis in nature, requires technical amendment to add a few words that are missing from SB 1471, but which appear in a virtually identical section of SB 1470.

Page 9, line 10, strike "that" and insert: "such that it"

h. This bill is silent on whether it intends to authorize class action lawsuits to enforce its provisions. Staff understands that neither the sponsor nor this bill's authors intend class actions. The following language is suggested as an addition to Section 6 of the bill (Civil Code Section 2924.18) to clarify this intent:

Page 9, between lines 4 and 5, insert: (c) The provisions

of this act shall not be enforceable through a class action lawsuit. No court shall have authority to certify a class of plaintiffs in a class action lawsuit brought to enforce the provisions of this bill.

a. The provision which provides signatories to the settlement with an affirmative defense to liability for violations of the bill under certain circumstances is unclear as to its intent and its effect (page 9, lines 13 through 19). It also incorrectly refers to the settlement agreement (it only references the agreement reached with Bank of America, and not the agreements reached with the other four signatories). Substitute language is not suggested at this time, because discussions between the signatories and the authors and sponsor on this topic are still preliminary.

Staff observes, however, that while a compromise on this language is currently unclear, the existing disagreement on this issue is quite clear. The signatories favor language that would exempt them from the provisions of the bill that are based on the settlement, during the pendency of the settlement. Their argument is based on the fact that the settlement already contains enforcement mechanisms. The settlement does not authorize individuals to bring suit against the signatories for violations of the settlement, and they do not believe it is appropriate for California law to authorize such suits.

Those who would like to see the signatories subject to private rights of action for violations of this bill believe that signatories and non-signatories alike should be answerable for their compliance (or noncompliance) with this bill. They are concerned that individuals do not have redress against servicers who violate the settlement, and view this bill as a way to provide such redress.

a. Should this bill have a sunset date? Virtually all of the problems it is trying to address occurred as a result of the foreclosure crisis, a lengthy period of economic stagnation which will eventually end. Will the requirements of this bill still be appropriate, after California's housing market has returned to the position of strength it has traditionally held within California's economy, and once foreclosures occur most frequently on properties that hold more value than is owed to the foreclosing beneficiary?

b. Both this bill and SB 1470 amend Section 2924 of the Civil Code, but do so in different ways. The sponsor of both this bill and SB 1470 also envision having the Office of Homeowner Protection handle borrower questions and complaints regarding the provisions of both bills. Double-jointing amendments will be necessary, and contingent enactment may be advisable, once the bills are closer to their final forms.

7. Related Legislation:

a. SB 1470 (Leno et al) and AB 1602 (Eng and Feuer), 2011-12 Legislative Session: Would enact several changes to the rules governing the nonjudicial foreclosure process for residential real property, establish an Office of Homeowner Protection to help respond to borrower inquiries about and complaints regarding compliance with the new rules, and provide for enforcement mechanisms, as specified. SB 1470 is pending a hearing in this Committee. AB 1602 is pending a hearing in the Assembly Banking and Finance Committee.

b. AB 2425 (Mitchell): Identical to this bill. Pending a hearing in the Assembly Banking and Finance Committee.

LIST OF REGISTERED SUPPORT/OPPOSITION

Support

Attorney General Kamala Harris (sponsor)
AFSCME
California Professional Firefighters
Center for Responsible Lending
Consumers Union
Lutheran Office of Public Policy-California
PICO California
San Francisco Office of the Assessor-Recorder
SEIU

Opposition

California Association of Realtors
California Bankers Association
California Chamber of Commerce

California Chamber of Commerce
California Credit Union League
California Financial Services Association
California Independent Bankers
California Land Title Association
California Mortgage Association
California Mortgage Bankers Association

Civil Justice Association of California
Securities Industry and Financial Markets Association
United Trustees Association

Consultant: Eileen Newhall (916) 651-4102