HERA

housing and economic rights advocates

**<u>HOME PRESERVATION IN THE AGE OF COVID-19</u>**
**Practising Law Institute**
**Prepared for HERA Training on Homeownership and Tenancy Preservation in Time of Covid-19**
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## I. OVERVIEW

The COVID-19 crisis is having a devastating impact on homeowners. With unprecedented job losses and shocking numbers of infections and deaths, many families and individuals are faced with the choice of paying for life necessities, like food, or paying their mortgage and other housing costs. Mortgage delinquencies have sharply increased since the outset of the pandemic. According to the Mortgage Bankers Association (MBA), the national mortgage delinquency rate increased nearly four percentage points to 8.22% at the end of the second quarter of 2020, which is the largest quarterly rise in the history of MBA's surveys, which began in 1979.[1] While the federal Coronavirus Aid, Relief, and Economic Security (CARES) Act[2] has offered respite with a foreclosure moratorium and forbearance relief for borrowers of federally-backed mortgages,[3] as well as protection for some tenants, those protections will be coming to an end soon, and the protections do not protect the approximately 30% of mortgages held by lenders who are not covered by the CARES Act. Additionally, people are at risk of losing their homes from other housing expenses as well, including falling behind on their property taxes or homeowners associates dues. This presentation provides an overview of these foreclosure risks and key options for home preservation in this critical time of crisis from the perspective of a non-profit legal services advocate.

## II. FORECLOSURE RISKS FOR HOMEOWNERS

[1] Natalie Campisi, "Mortgage Delinquencies Spike Due To COVID-19: What To Do If You Can't Pay Your Loan," FORBES, Aug 18, 2020. The most recent MBA surveys are detailed at https://www.mba.org/news-research-and-resources/newsroom
[2] *See* 15 U.S.C. § 9056 (CARES Act § 4022).
[3] "Federally-backed mortgages" include those purchased or securitized by Fannie Mae or Freddie Mac; insured by the Federal Housing Administration; guaranteed or insured by the Department of Veterans Affairs or Department of Agriculture; or made by the Department of Agriculture. *See* 15 U.S.C. § 9056(a)(2).

**Mortgages**

Before we embark on the options available in this current crisis, it behooves us to traverse a general background on the risks that we have been dealing with all along in the aftermath of the last financial crisis. Starting with the basics, mortgages are home loans or home loan refinances that are secured by the property. The loan Note contains the terms of the loan (principal amount borrowed, interest rate, term, etc.) and in California the deed of trust is generally the security instrument recorded with in official county public records that gives the trustee for the lender or its assignees the power to sell the property in foreclosure if there is a default.[4] Borrowers typically interface with a mortgage servicer that is not necessarily the lender, but is the company that manages the loan, including sending statements, responding to questions, and keeping track of the principal, interest, and, if applicable, escrow payments.[5] Whereas in the past it was common for the lender to also service the mortgage, as in the case of Wells Fargo or Bank of America, companies that focus solely on mortgage servicing and collecting (like Select Portfolio Servicing, Shellpoint Mortgage Servicing, Fay Servicing, etc.) have proliferated over the past decade. These companies can be difficult for borrowers to work with.

Different kinds of mortgages can lead to different foreclosure risks. Conventional 30-year fixed interest rates loans are generally considered the safest. Borrowers qualified for those loans based on their credit history and income and should be able to make timely payments unless they experience a loss of income or unexpected emergency expense. Adjustable Rate Mortgages (ARMs) have an interest rate that changes periodically based on an index rate, and Hybrid ARMs have an initial fixed rate period followed by an adjustable rate period. These types of mortgages can lead to significantly higher monthly payments when interest rates go up, which can cause borrowers to fall behind. Open-ended lines of credit, such as Home Equity Lines of Credit (HELOCs), increase homeowners' monthly housing costs as second mortgages.

Hard money loans are shorter term, high interest loans secured by property typically made by individuals or companies but not mortgage lenders. They are often made without consideration of the borrower's creditworthiness because the lender may be just as interested in foreclosing on the home and reselling it. These are loans of last resort that carry a high foreclosure risk.

Whether a loan is federally-backed or no also makes a huge difference in terms of the level of protection available to borrowers when they fall behind on their payments. Federally-backed mortgages, such as FHA, VA, USDA, Fannie Mae and Freddie Mac mortgages have transparent and well-defined options for borrowers who fall behind that can make it easier for them to avoid foreclosure, whereas privately securitized and large bank portfolio loans do not.

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[4] California statutory provisions relating to mortgages and foreclosure are generally contained at Cal. Civ. Code §§ 2920-2944.10.

[5] *See* Cal. Civ. Code § 2920.5 (defining "mortgage servicer" as "a person or entity who directly services a loan, or who is responsible for interacting with the borrower, managing the loan account on a daily basis including collecting and crediting periodic loan payments, managing any escrow account, or enforcing the note and security instrument, either as the current owner of the promissory note or as the current owner's authorized agent.")

Mortgage servicers, with limited exceptions,[6] must comply with mortgage servicing rules set forth in federal Regulation X, promulgated by the Consumer Financial Protection Bureau (CFPB) pursuant to the Real Estate Settlement and Procedures Act (RESPA).[7] Under RESPA Regulation X, a lender may initiate the foreclosure process once the borrower is more than 120 days delinquent on the mortgage.[8] "Delinquency" begins when a payment sufficient to cover principal, interest, and escrow, if applicable, is due but unpaid and lasts until the borrower brings the account current.[9]

Federally-insured reverse mortgages (called Home Equity Conversion Mortgages or HECMs) generally do not require monthly payments and are subject to different events that can make the loan due and payable and subject to foreclosure, such as if the borrower moves out of the house, fails to pay property taxes or homeowners insurance, or does not keep the home in good repair.[10]

**<u>Escrow Issues</u>**

Many lenders require escrow accounts for certain types of loans, including FHA, VA and certain high cost loans. Regulation X sets forth the requirements for escrow accounts created by a lender, including limits for escrow accounts using calculations based on monthly payments and disbursements within a calendar year.[11] The mortgage servicer calculates the monthly escrow payment each year by adding all payments due for the escrowed items (insurance and/or property taxes) and a "cushion" of two months' additional payments and dividing that amount by twelve months.[12] These homeowners pay an extra amount in their monthly mortgage, in addition to their principal and interest that is deposited into an escrow account that the lender uses to pay property taxes and sometimes also homeowners insurance when they are due. If the homeowner experiences an unexpected increase in property taxes or insurance, this can raise their escrow payment, and hence their monthly mortgage payment, significantly to the point of becoming un-affordable and cause them to fall behind on their mortgage payment. Once they fall 120 days behind, the mortgage lender can initiate the foreclosure process.[13]

This can happen for a number of reasons. In California, the assessed property value used to calculate the 1% property tax may only be adjusted upward 2% each year.[14] However, many properties' assessed value for calculating the property was temporarily reduced due to market conditions during and after the 2007 financial crisis. The county assessor reviews the assessed

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[6] RESPA applies to "federally related loans," which is includes federally-backed loans but is more expansive and also includes mortgages "made in whole or in part by any "creditor", as defined in section 1602(f) of title 15, who makes or invests in residential real estate loans aggregating more than $1,000,000 per year." 15 U.S.C. § 2602.
[7] See 12 U.S.C. § 2605. Regulation X mortgage servicing rules are contained in 12 CFR §§ 1024.30-1024.
[8] 12 CFR § 1024.41(f)(1)(i).
[9] 12 CFR § 1024.31.
[10] *See* 24 CFR § 206.205(e)(2) (taxes and insurance); 24 CFR § 206.11 (occupancy).
[11] *See* 12 CFR § 1024.17.
[12] *See id.* § 1024.17(c)(1).
[13] *See* 12 CFR § 1024.41(f)(1).
[14] *See* Cal. Tax & Revenue Code § 50.

value of these properties every year and can adjust the value upward more than 2% so long as that is not higher than the maximum adjustment had the property value not been temporarily reduced. The 2% cap may also be removed when ownership of the property is transferred, except in the case of transfers between spouses, parents and children, grandparents and grandchildren; and transfers to joint owns and trusts. But even then, the county may reassess the value of the property if the new owner does not submit the proper change of ownership and/or exemption forms.

Another reason escrow may increase dramatically, discussed in greater detail in Section V below is where a Property Assessed Clean Energy (PACE) assessment is added to the property tax bill to pay off home improvement financing. PACE financing pays for energy efficient home improvements through a tax lien on the borrower's property that must be paid back in assessments added to their annual property tax bill.[15] PACE assessments are typically add thousands of dollars to a homeowner's annual property tax bill, in some cases multiplying the amount due by several times to the point of un-affordability. When borrowers pay their taxes through an escrow account they may not know or face the impact of the substantial increase until their mortgage servicer runs its annual escrow analysis and raises the monthly escrow payment significantly.

Another reason the monthly escrow payment may go up is if the borrower's homeowners' insurance lapsed and the lender purchases force placed insurance (FPI) at a much higher cost and charges it to the borrower's escrow account. Before the lender can charge the borrower for FPI premiums, its mortgage servicer is required to send notice to the borrower requesting that the borrower provide proof of insurance or it has or will purchase FPI that may cost significantly more than insurance purchased by the borrower.[16]

Borrowers that experience unexpected increases in their escrow payments should check their mortgage servicer's escrow analysis to see if it was calculated correctly, which they should receive every year. If they cannot locate it, the borrower or their advocate can request it from the mortgage servicer in a Request for Information under RESPA Regulation X, which requires the servicer to respond to written requests for information related to the servicing of the loan.[17] If not required by the lender, the borrower can close the escrow the account and pay their property taxes and/or homeowners' insurance separately, though that will not relieve them of the obligation to pay back any negative escrow balance.

Mortgage-related default is the most typical foreclosure risk, but it is not the only one. Section V below provides a less extensive overview of non-mortgage foreclosure risks and common strategies to address them. Sections III-IV focus on the foreclosure process and home retention options for mortgage-related foreclosures.

[15] *See* Cal. Streets & Highways Code §§ 5902, 5913.

[16] 12 CFR § § 1024.37.

[17] *See* 12 C.F.R. § 1024.36. The borrower must send the written request to the address designated by the servicer for such requests. The servicer must respond within 30 business days of receipt. *See id.*

## III. THE FORECLOSURE PROCESS IN CALIFORNIA

### A. Judicial Foreclosure

Judicial foreclosure is rare in California, as it is a more expensive option for lenders that involves filing a lawsuit for a court ordered sale of the property. Mortgages are typically secured by a deed of trust with a power-of-sale clause that allows the lender or current owner of the loan to proceed under the non-judicial foreclosure process instead, which they typically do because it is cheaper to conduct than a judicial foreclosure. Under federal law, a covered mortgage lender or servicer cannot initiate judicial (or non-judicial) foreclosure until after the borrower falls 120 days delinquent.[18] The borrower can buy back the property from the buyer within three months (if there is no deficiency due after the sale) or one year of the sale (if there is a deficiency still owing) by exercising the right to redemption provided for in California's judicial foreclosure statute.[19]

### B. Non-Judicial Foreclosure

The vast majority of foreclosures in California proceed in a non-judicial (out of court) process. As noted above, a mortgage servicer cannot initiate the foreclosure process until after the borrower falls 120 days behind. Under California law, the foreclosure process cannot start until 30 days after the mortgage servicer contacts the borrower (or exercises due diligence but fails to do so) to assess their financial situation, discuss foreclosure alternatives, and provide the toll-free number made available by the United States Department of Housing and Urban Development (HUD) to find a HUD-approved housing counseling agency.[20]

Once these time frames have passed, the lender's foreclosure trustee can record a Notice of Default (NOD) and election to sell the with the county recorder's office and send a copy to the borrower.[21] After the NOD is recorded, the trustee must wait three months before it can give written notice of the foreclosure sale date, time and location in a Notice of Trustee Sale (NOTS).[22] After passage of the three month period, the NOTS must be published, posted and mailed 20 days before the sale and recorded 14 days before the sale.[23]

The borrower can prevent the foreclosure by making payments to reinstate the loan until five business days prior to the date of the sale, including any postponement.[24] The borrower can exercise a right of redemption by paying all amounts due at any time prior to the sale to avoid loss of the property.[25] However, distressed borrowers will typically not have the financial wherewithal to reinstate or pay off the loan and should seek a work out of the delinquency with their mortgage servicer, which is typically done by requesting some form of foreclosure alternative, such as forbearance, a repayment, or a loan modification.

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[18] 12 CFR § 1024.41(f)(1)(i).
[19] Cal. Civ. Code Proc. § 729.030.
[20] Cal. Civ. Code §§ 2923.5, 2923.55.
[21] Cal. Civ. Code § 2924.
[22] *Id.* § 2924(b).
[23] Cal. Civ. Code § 2924f.
[24] Cal. Civ. Code §§ 2924c(a)(1), (e).
[25] Cal. Civ. Code §§ 2903, 2905.

## III. PROHIBITIONS ON DUAL-TRACKING

Both federal and California law prohibit "dual tracking" – when a mortgage servicer proceeds with foreclosure during the pendency of its review of a complete loss mitigation application for a foreclosure alternative.

Regulation X contains the federal dual tracking ban and applies to first and subordinate liens on the borrower's principal residence.[26] Under Regulation X, mortgage servicers cannot initiate foreclosure if the borrower has submitted a "complete loss mitigation application" within 120 days after default.[27] Servicers cannot conduct a foreclosure sale if the borrower submitted a complete application more than 37 days before the sale date.[28] Foreclosure can proceed if the appeal is denied, the time to appeal expires, or the borrower rejects or does not perform under an offered option.[29]

The California Homeowner Bill of Rights (HBOR) only applies to first lien mortgages on owner-occupied property with one to four dwelling units.[30] HBOR prohibits the mortgage servicer from recording a Notice of Default or Notice of Trustee Sale if the borrower has submitted complete loan modification application, or if an appeal is pending or the 30 day time period to appeal has not yet expired.[31] The borrower must submit the complete application at least five business days before the scheduled foreclosure sale.[32]

The most difficult hurdle to invoking the dual tracking protections and to having a loss mitigation application reviewed is submitting the "complete application." Under both Regulation X and HBOR, an application is not "complete" unless the borrower submits all the documents or information required by the mortgage servicer.[33] Under Regulation X, the servicer must request any missing documentation within five business days of receiving the application. The servicer must evaluate an incomplete loss mitigation application if possible after exercising reasonable diligence to obtain missing materials.[34]

HBOR requires that the required documentation be submitted "within the reasonable timeframes specified by the mortgage servicer."[35] The servicer must acknowledge receipt of the application within five business days and identify any deficiencies in the application.[36] Under HBOR, the servicer is not required to evaluate an incomplete application.[37]

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[26] 12 CFR §§ 1024.2(b), 1024.41.
[27] 12 CFR § 1024.41.
[28] *Id.*
[29] *Id.*
[30] Cal. Civ. Code § 2924.15.
[31] Cal. Civ. Code § 2923.6.
[32] *Id.*
[33] *See* 12 CFR § 1024.41(b)(1); Cal. Civ. Code § 2923.6(h).
[34] *See* 12 CFR § 1024.41.
[35] Cal. Civ. Code § 2923.6(h).
[36] Cal. Civ. Code § 2923.11.
[37] Cal. Civ. Code § 2923.6.

Typically, borrowers go through numerous rounds of submitting documents and having the servicer tell them they need more documentation to complete their application, which can be very challenging and frustrating. Borrowers can argue that a servicer is acting unreasonably if it repeatedly requests additional information or documents when the borrower has provided ample current information.

Under Regulation X, the servicer need only evaluate one complete loss mitigation application. The servicer must provide the borrower with a written determination within 30 days of receipt of the application.[38] By contrast, HBOR there is no deadline for the review process, and HBOR requires a servicer to review additional complete applications if they document a "material change in the financial circumstances" of the borrower.[39]

Under HBOR, a borrower can appeal the servicer's denial of the application within 30 days. The servicer may not engage in foreclosure activity for at least 14 days after an appeal is denied.[40] In contrast, Regulation X only permits an appeal if the application was submitted at least 90 days before a foreclosure sale and the servicer has 30 days to grant or deny it.[41]

If a mortgage servicer engages in dual tracking by moving forward with foreclosure despite the pendency of a complete application, the borrower or their advocate can send a RESPA Notice of Error[42] explaining the dual tracking violation under HBOR and/or Regulation X and requesting the servicer to correct the error by ceasing foreclosure activity.

HBOR provides a private right of action for injunctive relief prior to foreclosure or damages if the foreclosure sale has already occurred.[43] If the borrower prevails in the action, they are entitled to an award of attorneys' fees and costs.[44] Regulation X's dual tracking prohibition is enforceable under the RESPA private right action for actual and statutory damages and attorneys' fees and costs are recoverable as well.[45]

## IV. MORTGAGE OPTIONS FOR KEEPING THE HOME

### A. PANDEMIC-RELATED OPTIONS

#### 1. The CARES Act

As noted above, the CARES Act protects homeowners with federally-backed mortgages, which includes Fannie Mae and Freddie Mac (the Government Sponsored Enterprises or "GSEs"), and VA, FHA, and USDA loans and is estimated to be about 70% of current mortgag-

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[38] 12 CFR § 1024.41.
[39] Cal. Civ. Code § 2923.6.
[40] *Id.*
[41] 12 CFR 1024.41.
[42] 12 CFR § 1024.35.
[43] *See* Cal. Civ. Code § 2924.12.
[44] *Id.* § 2924.12(h).
[45] *See* 12 U.S.C. § 2605(f).

es. Mortgages that are not federally-backed are *not* covered by the CARES Act and its protections. The CARES Act provided for a **moratorium** on judicial and non-judicial foreclosures on properties secured with covered loans that initially lasted until August 31, 2020 that has been extended by each of the covered entities until December 31, 2020.[46]

The CARES Act also provides for **forbearance** for up to 180 days for "financial hardship due, directly or indirectly, to the COVID-19 emergency."[47]

The FHA, Fannie Mae and Freddie Mac have developed **streamlined COVID-19 loss mitigation protocols** to provide options to borrowers who come out of forbearance so that they can avoid having to pay a lump sum to reinstate. Other federally-backed programs have not developed COVID-19 specific protocols, but have well-defined disaster relief and regular loss mitigation guidelines.

Unfortunately, borrowers with non-federally-backed loans will not have these kind of options and will be subject to proprietary loss mitigation options defined by investor guidelines that are not generally publicly available that could range from unaffordable repayment plans to loan modification options that may or may not work out for them. If the servicer does not approve a request for loss mitigation, then the borrower is faced with having to make a lump sum repayment to reinstate their account or face foreclosure.

Borrowers may not know whether their mortgage is covered by the CARES Act or not. They can look up their loans to check if they are Fannie Mae or Freddie Mac mortgages on their respective websites:

Fannie Mae: https://ww3.freddiemac.com/loanlookup/
Freddie Mac: https://www.knowyouroptions.com/loanlookup

They can check the loan agreement (note) and deed of trust to see if "Department of Veteran Affairs" is listed (indicating a VA loan) or if there is an FHA number present (indicating an FHA loan). USDA loans can be indicated by the presence of a guarantee attached to the loan note or in the HUD-1 closing statement for the loan. Borrowers can also call the applicable agency to try to find out, or submit a RESPA Request for Information asking for the identity of the owner/investor on the loan. Regulation X requires that the servicer respond to such a request within 10 business days and not the 30 business day response deadline imposed on requests for other information related to the servicing of the loan.[48]

### 2. Forbearance

#### a. COVID-19 related forbearance programs available

[46] *See* 15 U.S.C. § 9056(c)(2); FHA Mortgagee Letter (ML) 2020-27; Federal Housing Finance Agency Press Release (Aug. 27, 2020) https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Extends-Foreclosure-and-REO-Eviction-Moratoriums.aspx (Fannie Mae and Freddie Mac); VA Circular 26-20-30 - August 24, 2020; USDA website, https://www.rd.usda.gov/newsroom/news-release/usda-extends-foreclosure-and-eviction-relief-single-family-housing-direct-and

[47] 15 U.S.C. § 9056(b).

[48] *See* 12 CFR § 1024.36(d)(2)(i)(A).

Forbearance is a temporary pause on given to the borrower on their obligation to pay the mortgage during a specified period of time during which the mortgage servicer cannot proceed with foreclosure. Forbearance does not forgive missed payments and borrowers are required to pay back missed or reduced payments after the forbearance period ends.

Under the CARES Act, borrowers with federally-backed mortgages "experiencing a financial hardship due, directly or indirectly, to the COVID–19 emergency may request forbearance…, regardless of delinquency status, by … submitting a request to the borrower's servicer; and …affirming that the borrower is experiencing a financial hardship during the COVID–19 emergency."[49] The forbearance can be granted for up to 180 days, and can be extended for an additional 180 days at the request of the borrower.[50] During forbearance, "no fees, penalties, or interest beyond the amounts scheduled or calculated as if the borrower made all contractual payments on time and in full under the terms of the mortgage contract, shall accrue on the borrower's account."[51]

The CARES Act explicitly provides that the servicer *shall* provide the forbearance upon request of the borrower "with no additional documentation required other than the borrower's attestation to a financial hardship caused by the COVID–19 emergency…."[52] Thus, no written application or documentation is needed for approval, and servicers should not be requesting them from borrowers. All that is needed is for the borrower to call their servicer attest to their COVID-19 related hardship.

The CARES Act also provides that the servicer *shall* provide an extension of the forbearance for an additional 180 "at the request of the borrower, provided that, the borrower's request for an extension is made during the covered period."[53] Guidance to mortgage servicers issues by the FHA, VA, and USDA makes clear that "[s]ervicers *must* approve the forbearance for the amount and time that the borrower requests," and "[u]nder the CARES Act, this is done at the borrowers' request and for as long as they request, up to 360 days in total (initial up to 180 days and then up to another 180 days, if requested)," (emphasis added).[54] Fannie Mae guidance to servicers states that "[i]f the borrower's COVID-19 related hardship has not been resolved during an incremental forbearance period, the servicer *must* extend the borrower's forbearance period, not to exceed 12 months total," (emphasis added).[55] Advocates should check the applicable agency or government sponsored entity (Fannie Mae, Freddie Mac) website for updates on guidance to borrowers and servicers about CARES Act forbearance.

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[49] *Id.* § 9056(b)(1).
[50] *Id.* § 9056(b)(2).
[51] *Id.* § 9056(b)(3).
[52] *Id.* § 9056(c)(1).
[53] *Id.*
[54] CARES Act Forbearance Fact Sheet for Mortgagees and Servicers of FHA, VA, or USDA Loans available at https://benefits.va.gov/homeloans/cares-act-frequently-asked-questions.asp .
[55] What does Fannie Mae Lender Letter LL 2020-02 state about forbearance plan terms for borrowers impacted by COVID-19? available at https://servicing-guide.fanniemae.com/COVID-19/COVID-LL-2020-02/LL-2020-02-Q-A/1881407271/What-does-Fannie-Mae-Lender-Letter-LL-2020-02-state-about-forbearance-plan-terms-for-borrowers-impacted-by-COVID-19.htm?touchpoint=guide .

Borrowers not protected by the CARES Act may still request forbearance from their mortgage servicers. Citigroup, JP Morgan Chase, U.S. Bank, Wells Fargo, and nearly 200 state-chartered banks, credit unions, and mortgage lenders and servicers voluntarily committed to providing relief for homeowners in California after it declared a public health emergency in March 2020.[56] Under this commitment, the cooperating institutions agreed to provide forbearances of up to 90 days for borrowers with COVID-19 related hardships.[57] Unlike lenders and servicers covered by the CARES Act, the institutions committing to provide this voluntary relief may require documentation from the borrower.[58] They also committed to providing the opportunity to extend the forbearance if the borrower continues to experience hardship due to COVID-19; to waive or refund mortgage-related fees for at least 90 days; and not report any late or missed payments of those receiving COVID-19 related relief.[59] While they agreed to a 60-day foreclosure moratorium, that time period elapsed. Although these institutions have made this voluntary commitment, there are not publicly available guidelines to hold them accountable other than the basis description of these commitments provided on the California Department of Financial Protection and Innovation website.

Other mortgage lenders and servicers, though not required to, have also offered COVID-19 related forbearances and repayment plans. The only way to know what they are offering is to communicate with them to find out. This can be done informally, or through a RESPA Request for Information that asks for a description of the COVID-19 related options available to the borrower.

Borrowers who have limited or no English abilities and speak another language often have difficulty in communicating with mortgage servicers and understanding what their options are. Effective August 1, 2020 in California, "[a] mortgage servicer shall communicate about forbearance and post[-]forbearance options described in this article in the borrower's preferred language when the mortgage servicer regularly communicates with any borrower in that language."[60]

### b. Best practices for borrowers during forbearance

Advocates anticipate numerous problems arising as a result of forbearance, but there are actions that borrowers can take to minimize the risk of those occurring:

- Keep any documentation they receive (letters, mortgage statements, emails) confirming the existence of the forbearance in case the mortgage servicer (or a new servicer, if servicing is transferred) mistakenly fails to treat the loan as in forbearance and charges late

[56] *See* Cal. Dept. of Financial Protection and Innovation (DFPI) website at https://dfpi.ca.gov/2020/03/25/covid19/ . A list of participating financial institutions is located on this website.
[57] *Id.*
[58] *Id.*
[59] *Id.*.
[60] Cal. Civ. Code § 3273.14.

fees, initiates foreclosure, or reports the account as past due to the credit reporting agencies.[61]

- If borrowers are making payments automatically directly from their bank accounts, they should stop those auto-payments.

- Check mortgage statements for errors to make that no fees, penalties, or interest beyond the amounts scheduled or calculated as if the borrower made timely payments.

- Check mortgage statements and escrow analyses for errors in the servicer's calculation and charging of escrow payments for property taxes and/or insurance, if applicable.

- If the mortgage servicer pays property taxes and/or homeowners' insurance through an escrow account, confirm that the mortgage servicer is continuing to pay them. Note that this will likely create an escrow shortage (not enough funds in the escrow account to pay taxes and/or insurance in the next 12 months) that will result in an additional monthly amount added to the escrow portion of the monthly mortgage pate over the course of 2-5 years.

- Borrowers who do not pay taxes and/or insurance through an escrow account should continue to pay their property taxes, insurance, HOA fees, and other home-related expenses to the extent possible to avoid financial pressure and foreclosure risk from those items.

- Request an extension of the forbearance if still experiencing hardship.

- Check their credit reports regularly. If borrowers were current on their payments before forbearance, their servicer/lender must report that as current during forbearance. If they were behind, they cannot advance the delinquent status beyond what it was before forbearance.[62]

- Save money to the extent possible in preparation for any lump sum or high payments that may become due after forbearance ends.

- Borrowers should resume payments once their income is restored. Otherwise, the amount that they will need to repay will continue to grow, which is particularly risky for loans not covered by the CARES Act.[63]

- Apply for post-forbearance loan workout with their mortgage servicer.

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[61] Borrowers must receive written notice of any servicing transfer under Regulation X. *See* 12 CFR § 1024.33. TILA, 15 U.S.C § 1641(g) requires notice of transfer of ownership of a consumer credit transaction that is secured by the consumer's principal dwelling.

[62] *See* 15 U.S.C. § 1681s-2(a)(1)(F)(i)(I) (CARES Act amendment to the Fair Credit Reporting Act).

[63] These tips are adapted from the Consumer Financial Protection Bureau's website at https://www.consumerfinance.gov/coronavirus/mortgage-and-housing-assistance/after-you-receive-relief/

### 3. Post-Forbearance

When forbearance ends, borrowers will need to figure out what options to pursue to repay the past due amounts that can no longer be delayed from repayment. Their options will depend on what type of loan they have. Borrowers approaching the end of their forbearance (or their advocates) should affirmatively reach out to their mortgage servicers to find out about the available options and the process for applying. Some jurisdictions also may have grant or low interest loan programs that can be helpful or used in combination with loan modification.

The FHA, VA, Fannie Mae, Freddie Mac have developed COVID-19 specific options for borrowers coming out of forbearance that do not require lump sum payments.

**FHA Options**

FHA options are currently set forth in the U.S. Department of Housing and Urban Development (HUD) Mortgage Letter 2020-22.[64] The FHA requires mortgage servicers of FHA loans to assess owner-occupant borrowers' eligibility for a series of post-forbearance options in sequence. First, they must assess the borrower for the **COVID-19 National Emergency Standalone Partial Claim** option no by the end of the forbearance period.[65] This option places amounts owed by the borrower into a zero interest, no fee junior lien (partial claim) that is repaid when the mortgage is paid off due to refinancing or a home sale. To qualify for this option, (1) the borrower must have been current or less than 30 days past due as of March 1, 2020, (2) the borrower must indicate that they are able to resume making timely mortgage payments under the prior terms of the loan, and (3) the amount of all partial claims (past and current) cannot exceed 30% of the unpaid principal balance as of the default date for the first partial claim made on the loan.[66]

Borrowers who do not qualify for the COVID-19 Standalone Partial Claim must next be evaluated by their servicers for a **COVID-19 Owner-Occupant Loan Modification**.[67] Under this option, past due interest and escrow advances are capitalized into the principal balance of a modified loan and spread over a term of 30 years at an interest rate no greater than the HUD-defined market rate.[68] To qualify for this option, the borrower (1) must have been current or less than 30 days past due as of March 1, 2020, and (2) must indicate that they have the ability to pay the modified mortgage payments.[69]

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[64] *See* U.S. Department of Housing and Urban Development (HUD) Mortgagee Letter 2020-22 (July 8, 2020). HUD Mortgagee Letters provide guidance to servicers of FHA loans and are available online at https://www.hud.gov/program_offices/administration/hudclips/letters/mortgagee . Mortgagee Letters applicable to single family housing are incorporated into the HUD Single Family Housing Policy Handbook 4000.1, which is available online at: https://www.hud.gov/program_offices/housing/sfh/handbook_4000-1

[65] *See* U.S. Department of Housing and Urban Development (HUD) Mortgagee Letter 2020-22 (July 8, 2020) at 5. HUD Mortgagee Letters provide guidance to servicers of FHA loans and are available online at https://www.hud.gov/program_offices/administration/hudclips/letters/mortgagee .

[66] *Id.* at 6.

[67] *Id.* at 7.

[68] *Id.*

[69] *Id.*

Borrowers who do not qualify for the COVID-19 Owner-Occupant Loan Modification because their modified monthly mortgage will increase (and cannot bring the mortgage current through the COVID-19 Standalone Partial Claim because the total arrearage exceeds the maximum for partial claims) must next be evaluated for the **COVID-19 Combination Partial Claim and Loan Modification**.[70] Under this option, a partial claim is created and the arrearage amount that cannot be applied to the partial claim must be capitalized into a modified mortgage for a term of 30 years at the HUD market rate.[71] To qualify for this option, (1) the borrower must have been current or less than 30 days past due as of March 1, 2020, (2) the borrower must indicate that they have the ability to make the modified mortgage payment, and (3) the amount of all partial claims (past and current) cannot exceed the 30% statutory maximum value of all partial claims for an FHA-insured mortgage.[72]

All of the above options should not involve submitting documentation, as the information required is readily available to the servicer and the borrower need only indicate whether they are able to afford the required monthly payments. Borrowers who do not qualify for the COVID-19 Combination Partial Claim and Loan Modification may provide income documentation to be reviewed for the **COVID-19 FHA-HAMP Combination Loan Modification and Partial Claim**, as detailed in the July 8, 2020 HUD Mortgagee Letter 2020-22.[73] The Mortgage Letter also provides guidelines for a COVID-19 Non-Occupant Loan Modification.

**Fannie Mae/Freddie Mac Options**

The options for borrowers with Fannie Mae loans are the same as those with Freddie Mac. Servicers of Fannie Mae and Freddie Mac loans must first determine whether the borrower can reinstate the mortgage or afford a repayment plan, which is unlikely for borrowers coming out of forbearance.[74] Then they consider them for a COVID-19 Payment Deferral that defers repayment of the arrears to end of loan term without charging interest on that amount. Borrowers are eligible for this option if they (1) are at least one month delinquent but no more than twelve months delinquent, (2) in COVID-19 forbearance or experiencing a COVID-19 related financial hardship, (3) able to resume making the full regular monthly payment, and (4) were current or less than two months behind on their mortgage (Fannie Mae)/less than 31 days behind (Freddie Mac) as of March 1, 2020.[75] No documentation is required to show a COVID-19 hardship.

Borrowers that do not qualify for the Deferral option must be considered for a Flex Modification with Reduced Eligibility, which capitalizes arrears and extends the term to 480 months at the standard Fannie Mae/Freddie Mac modification rate (currently 3%). To qualify for this

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[70] *Id.* at 8.
[71] *Id.* at 9.
[72] *Id.*
[73] *Id.* at 10.
[74] *See* Fannie Mae Lender Letter, Lender Letter (LL-2020-05), available at https://singlefamily.fanniemae.com/news-events/lender-letter-ll-2020-05-payment-deferral
[75] *See id.* and https://sf.freddiemac.com/working-with-us/servicing/servicing-solutions/payment-deferral

option, the borrower (1) must have a COVID-19 related hardship, (2) current or less than two months behind on their mortgage (Fannie Mae)/less than 31 days behind (Freddie Mac) as of March 1, 2020, and (3) be current or less than two months behind on their mortgage as of March 1, 2020 and be 90 days or more delinquent.[76] This option is available only for first lien mortgages on owner-occupied properties.

**VA**

The Veterans Administration (VA) has made an exception to its normal servicing guidelines for COVID-19 related hardships and made deferment available:

> Deferment as a Loss Mitigation Option. VA understands that some servicers are considering whether they may offer borrowers exiting a CARES Act forbearance a deferment as a loss mitigation option, in which the servicer defers payment of the total amount of forborne payments (principal, interest, taxes, and insurance), to the loan maturity date or until a borrower refinances the loan, transfers the property, or otherwise pays off of the loan, whichever occurs first, and with no added cost, fees, or interest to the borrower, including no penalty for early payment of the deferred amount. The deferment as a COVID-19 loss mitigation alternative may be used in cases when the veteran is able to resume making the monthly payment as scheduled under the loan contract. For VA's purposes, the servicer does not need and should not enter into a modification agreement that alters the terms of the existing loan for the purpose of applying a deferment. To ensure compliance with servicing laws more generally, servicers should seek specific advice from their legal counsel. Deferment is not allowed in cases where the veteran will need a post-forbearance payment reduction. Instead, the servicer must assess the suitability of other loss mitigation options.[77]

In addition, the normal VA loss mitigation options are available, as explained on the VA website:

> **Repayment plan:** If you missed a few mortgage payments, you and your mortgage servicer can agree to terms where you pay a specified amount paid above the regular monthly mortgage payment to bring your loan current over time.
>
> **Loan Modification:** As mentioned above, a modification may be appropriate, if you resolved or plan to resolve the reason for default and can resume making regular monthly mortgage payments, but you can't afford to pay the additional amount to make up the missed payments over time. Your mortgage servicer may offer an option to modify your existing mortgage note to extend the *term* (time to repay) of your loan. Missed payments

[76] *See* Freddie Mac Bulletin 2020-7 at https://guide.freddiemac.com/app/guide/bulletin/2020-7 and Fannie Mae Servicing Guide D2-3.2-07: Fannie Mae Flex Modification (09/09/2020) at https://servicing-guide.fanniemae.com/THE-SERVICING-GUIDE/Part-D-Providing-Solutions-to-a-Borrower/Subpart-D2-Assisting-a-Borrower-Who-is-Facing-Default-or/Chapter-D2-3-Fannie-Mae-s-Home-Retention-and-Liquidation/Section-D2-3-2-Home-Retention-Workout-Options/D2-3-2-06-Fannie-Mae-Flex-Modification/1042575201/D2-3-2-06-Fannie-Mae-Flex-Modification-09-18-2018.htm?touchpoint=guide

[77] *See* VA Circular 26-20-33 - Deferment as a COVID-19 Loss Mitigation Option for CARES Act Forbearance Cases at https://www.benefits.va.gov/HOMELOANS/resources_circulars_valeri.asp

are included in the loan amount and your new principal balance is *amortized* (paid off) over the new remaining term of your loan to reduce the burden of repayment. Keep in mind that a loan modification may change your interest rate.[78]

The VA Servicer Handbook M26-4 contains the servicer guidelines for VA loans applicable to these options.[79] The VA has a disaster loan modification option that may be available to borrowers impacted by COVID-19.[80]

### USDA

The United States Department of Agriculture (USDA) allows modifications under its Guaranteed Loan program for "…borrowers who are in default or facing imminent default due to a documented hardship"; borrowers may "…have payments reduced or suspended by their lender for a period not to exceed 12 months delinquency. Once the hardship is resolved, the lender can modify the loan to cure the delinquency or make up the missed payments based on the borrower's individual circumstances."[81] USDA Direct Loan borrowers "experiencing a reduction of income by more than 10 percent can request a Payment Assistance package to see if [they are] eligible for payment assistance or for more assistance than currently received."[82]

## B. OPTIONS FOR BORROWERS WHO DO NOT HAVE FEDERALLY-BACKED LOANS

From 2012 until the end of 2016, most borrowers, including those without federally backed loans, could apply for loan modifications under the federal Home Affordable Modification Program (HAMP), which was designed to help distressed homeowners remain in their homes when they could show documented financial hardship and an ability to make their monthly mortgage payments after a modification. There were transparent, accessible HAMP guidelines that allowed borrowers and their advocates and counselors with guidance on the factors considered by mortgage servicers and the ability to hold servicers accountable for errors through well-defined escalation processes.

Since HAMP expired, borrowers without federally backed loans are subject to the loss mitigation guidelines of the owners/investors of their loans, which are not publicly accessible and are generally not shared with the borrowers. Borrowers can ask their mortgage servicers about home retention options. Servicers will generally provide only a general description; however, during the COVID-19 emergency, many servicers have provided information about options for COVID-19 related loss mitigation on their websites. Borrowers can also send a RESPA Request for Information to seek these options and/or the investor guidelines for loss mitigation.

**Repayment Plans.** Unfortunately, a common option being offered to borrowers without federally backed loans coming out of forbearance is a repayment plan that is typically unafforda-

[78] https://benefits.va.gov/homeloans/cares-act-frequently-asked-questions.asp#FAQ8
[79] Available at https://www.benefits.va.gov/WARMS/M26_4.asp
[80] *See id.*
[81] *See* https://www.rd.usda.gov/node/17179
[82] *Id.*

ble. For example, a borrower with a $3,000 monthly payment who came out of forbearance $48,000 past due is offered a twelve month repayment plan with $7,000 monthly payments ($3,000 applied to the regular monthly payment and $4,000 applied to the past due amount). If the borrower could not afford a $3,000 monthly payment, they certainly cannot afford a $7,000 monthly payment. Such unreasonable repayment plans are a recipe for disaster that almost certainly return the borrower into foreclosure status or push them to non-retention options, like a deed-in-lieu of foreclosure.

**Loan Modifications.** The most common home retention alternative available is a loan modification, which is a change in the mortgage loan terms achieved by adding the past due interest and any escrow advances to the unpaid principal balance and recasting that amount over a longer time period at a lower interest rate (or interest rate steps that start lower and gradually rise at set intervals). Servicers vary in how the investor/owner of the loans they service evaluate borrowers for loan modifications. As noted above, these guidelines are not publicly available and are often not divulged until after a denial of an application, though borrowers can request them with a RESPA Request for Information. Some of them appear to be similar to the criteria used for the former HAMP program, which focuses on default and foreclosure status, modifying to a lower monthly payment, sustainability (the ability of the borrower to afford the modified payment and other housing costs), and the value of the property.

Default and Foreclosure status: A loan modification is typically only available when the borrower is in default or facing financial hardship that makes default reasonably foreseeable. Borrowers coming out of forbearance will be in default because their missed payments are not forgiven. As noted above, under California's HBOR, a loan modification must be submitted at least five business days before a scheduled foreclosure sale.

Lower Modified Payment: Investor guidelines typically require that the modified monthly payment be lower than the current payment. If that cannot be achieved after the new unpaid principal balance is recast over the new term at the new interest rate, then the application may be denied.

Sustainability: Investor guidelines typically require that borrower be able to afford the modified monthly payment and apply some measure of affordability. This measure is typically a requirement that the borrower's total housing cost after the modification (including the modified monthly mortgage payment, property taxes, homeowners' insurance, and HOA dues, if applicable) be no greater than 31% of the borrower's gross monthly household income. When this is not achievable with the borrower's current household income, they can explore including the income of a non-borrowing financial contributor, such as a family member, to increase household income. Servicers usually require that the non-borrower provide documentation that they reside at the home. Another way to increase income is to rent out rooms to boarders, and servicers usually require that the borrower submit rental contracts for the boarders and bank statements showing deposit of the rental payments.

Value of the property: A loan modification application is more likely to be approved when there is little or no equity in the property. Investor guidelines typically require that their recovery under the loan modification exceed the anticipated recovery through foreclosure. Servicers typically use a "net present value" (NPV) test to evaluate this factor. The NPV test NPV compares the value of the property today to the present value of the modified mortgage to see if a modification would be more profitable than foreclosing on the property and selling it at fair market value. When HAMP was in place, there were transparent guidelines on the use of the NPV test and its impact on HAMP modification applications. Those no longer apply.

**Hard Money Lenders.** Hard money lenders usually do not have any loan modification or loss mitigation programs available, as they are typically individuals or small companies. As noted above, these lenders are often just as interested in foreclosing on the property as they are in making a profit from the loan terms. This makes them very difficult to deal with and the success rate for avoiding foreclosure for borrowers with these loans is much lower than with conventional mortgages. Borrowers and their advocates can always see if the lender is amenable to modifying the terms of the loan, though this is rarely successful. If the lender is agreeable, the borrower's advocate can draft a loan modification agreement and generate an amortization table showing monthly interest and principal payments based on the new terms.[83]

Another strategy that may yield results is to scrutinize the loan terms. The federal Home Ownership Equity Protection Act (HOEPA) imposes strict disclosure and origination requirements on "high cost mortgage" transactions secured by a consumer's principal residence.[84] Similarly, California's Predatory Loan Act imposes requirements on certain high cost loans secured by a consumer's principal dwelling that hard money lenders often fail to comply with, including consider the borrower's ability to repay the loan, failing to provide specified disclosures.[85] Borrowers and their advocates can use the lender's failure to comply with these or other potentially applicable laws to leverage a settlement that modifies the terms of the loan or buys the borrower more time to repay the past due amount. Hard money lenders will often try to avoid HOEPA coverage by characterizing the transaction as a commercial loan, which can make it difficult to pursue this approach unless this was misrepresented to the borrower as a residential loan.

Another strategy is to scrutinize the lender's calculation of past due amounts and fees, as there are often errors in these. The lender may or not be subject to RESPA,[86] but in either case, the borrower can send a Request for Information for the loan transaction history to review and a

[83] Mortgage calculators that generate amortization schedules are readily available on the internet at no cost.

[84] The exact tests for whether a mortgage is covered under HOEPA is set forth in the Regulation Z, promulgated pursuant to the Truth in Lending Act, at 12 CFR § 1026.23(a)(1).

[85] Cal. Fin. Code § 4970-4979.8. A "covered loan" is one secured by real property with a principal balance that is not greater than the conforming loan limit for a single-family first mortgage loan established by Fannie Mae (varies by county but currently at $765,600 in higher priced real estate markets and $510,400 in others) and either (1) an APR of more than 8% of the yield on Treasury securities bearing a comparable period of maturity, or (2) total points and fees paid at closing exceeding 6% of the total loan amount. *See* Cal. Fin. Code § 4970(b). Fannie Mae conforming loan limits are available at https://www.fhfa.gov/DataTools/Downloads/Pages/Conforming-Loan-Limits.aspx .

[86] RESPA applies to "federally related loans," which is includes federally-backed loans but is more expansive and also includes mortgages "made in whole or in part by any "creditor", as defined in section 1602(f) of title 15, who makes or invests in residential real estate loans aggregating more than $1,000,000 per year." 15 U.S.C. § 2602.

Notice of Error if errors are found. This may also lead to modified terms or accommodations that at least temporarily avoid foreclosure.

**Local Emergency Financial Assistance.** Some local governments provide emergency financial assistance to their resident homeowners in danger of imminent displacement that can provide one time grants to reinstate the borrower's mortgage, including:

- Alameda County Housing Secure: https://www.centrolegal.org/achousingsecure/ (applicants can contact us, Housing and Economic Rights Advocates (HERA) | www.heraca.org | (510) 271-8443 x300)
- San Francisco Home COVID-19 Homeowner Emergency Loan Program : https://sfmohcd.org/help-loan
- City of Oakland Keep Oakland Housed COVID-19 as well as non-Covid Oakland Housing Secure homeowner assistance - https://www.oaklandca.gov/resources/keep-oakland-housed-covid-19-relief-financial-assistance (applicants can contact us, Housing and Economic Rights Advocates (HERA) | www.heraca.org | (510) 271-8443 x300)

**Reverse Mortgage.** In a reverse mortgage, a portion of the equity built in the home can be cashed out as a line of credit or lump sum payment. Homeowners who are 62 years or older and have a low enough mortgage balance to be paid off at closing with the loan proceeds and have enough resources to pay ongoing property taxes and insurance can qualify for a reverse mortgage. This is a potential option to avoid foreclosure for borrowers if the reverse mortgage proceeds are sufficient to pay off the existing mortgage balance, which typically requires that a lot of equity exist in the home. However, it comes with some disadvantages, including the inability to pass on the home to the borrower's heirs unless they can pay off the loan and the risk that the home may fall back into foreclosure if the borrower fails to occupy their home continuously or falls behind on their property taxes and insurance.

**Litigation.** Litigation may be one of the only remaining options if a borrower is facing an imminent foreclosure without any loss mitigation offered from their mortgage servicer. As noted above, private rights of action for dual tracking violations are available under RESPA and California's Homeowner Bill of Rights (HBOR), and HBOR provides for injunctive relief to stop a sale. Unless a temporary restraining order or preliminary injunction can be obtained before the sale date (or a postponement of the sale negotiated), litigation does not move quickly enough to prevent a sale, and the borrower may be lose their home and be left with a case for seeking damages.

**Bankruptcy.** Bankruptcy is an option of last resort that can sometimes lead to a home retention work out plan. The filing of a bankruptcy petition triggers an automatic stay on debt collection and any pending foreclosure sale must be stopped unless and until the lender obtains an order from the bankruptcy court for relief from the stay. In a Chapter 13 bankruptcy, the borrower can cure their arrearages in a 3-5 year repayment plan if they are financially solvent and have the financial wherewithal. Under the CARES Act, a confirmed Chapter 13 plan can be modified to extend repayment up to 84 months if the plan was confirmed prior to March 27, 2020, the extension must be due to COVID-19 related hardship, and the court approves the modification by March 27, 2021.[87] However, for many borrowers, this may not lead to a viable solution because they must simultaneously repay the arrearages and make their currently due payments, which can be onerous and unaffordable. In bankruptcy, borrowers can also litigate any legal claims they have against the mortgage servicer and lender in an adversary proceeding and there are opportunities to mediate and try to voluntary reach a mutually agreeable loan modification. Borrowers should consult with attorneys who specialize in bankruptcy and be wary of people (often non-attorneys) who offer to merely file the petition and not help them through the entire complicated bankruptcy process.

Sometimes a borrower files a petition for bankruptcy and the mortgage servicer goes forward with the sale anyway in violation of the automatic stay, often due to a lack of communication within the mortgage servicer's different departments. In these cases, the mortgage servicer will often attempt to undue the sale and restore ownership to the borrower after the borrower shows the servicer that the petition was filed before the sale.

**Avoiding Scams.** Homeowners in foreclosure are flooded with numerous mailings from companies purporting to offer foreclosure relief and they may even receive front door visits from people offering this service. They often tell the homeowner they can take over communications with the mortgage servicer and prepare a loan modification application and may even ask the homeowner to send them the mortgage payment. They will typically offer to help for an up-front payment. This is not only unnecessary, as borrowers can receive free assistance from HUD-approved housing counselors or legal services attorneys, it is also unlawful. Federal regulations prohibit mortgage relief services from collecting fees prior to the completion of the provider's services and the consumer's acceptance of the results.[88] California law prohibits any person who offers to perform a mortgage loan modification or forbearance for compensation paid by the borrower to charge the borrower "until after the person has fully performed each and every service the person contracted to perform or represented that he or she would perform."[89]

California's Mortgage Foreclosure Consultant Law (FCL) also prohibits the collection of advance fees and other practices.[90] "Foreclosure consultant" includes any person who offers for compensation to stop or postpone the foreclosure sale, obtain a forbearance, assist with reinstatement of the mortgage, obtain an extension on the deadline to reinstate, assist the homeowner in getting a loan to pay off the defaulted mortgage, or assist the owner in obtaining the remaining proceeds from the foreclosure sale of the owner's residence.[91] The FCL requires that foreclosure consultant contracts "be in writing and shall fully disclose the exact nature of the foreclosure consultant's services and the total amount and terms of compensation" and contain a specified notice.[92] Foreclosure consultants are prohibited from charging any compensation until after per-

[87] 11 U.S.C. § 1329(d)(1).
[88] 16 C.F.R. § 322.5(a).
[89] Cal. Civ. Code § 2944.7.
[90] Cal. Civ. Code § 2945 *et al.*
[91] Cal. Civ. Code § 2945.1(a).
[92] Cal. Civ. Code § 2945.3.

forming the agreed upon service.[93] They also may not take any lien on the property as compensation, or acquire any interest in the residence in foreclosure.[94] They are prohibited from taking a power of attorney for the homeowner in foreclosure.

After a foreclosure sale, any amount remaining from the sale proceeds after all liens are paid off are surplus funds to which the former homeowner is usually entitled after submitting a claim for the funds to the trustee.[95] Predatory companies target former homeowners offering to assist them in making a claim for the funds for a share of the funds. Under the FCL, foreclosure consultants may not enter into any agreement "to assist the owner in arranging, or arrange for the owner, the release of surplus funds after the trustee's sale is conducted."[96] Former homeowners can obtain assistance in claiming surplus funds from non-profits and legal services organizations, like HERA.

One predatory trap we have seen is an investor who offers to pay to reinstate the borrower's mortgage in exchange for an option to buy the property under certain conditions, such as future default on the mortgage. This arrangement violates the FCL because it results in the foreclosure consultant acquiring an interest in the residence in foreclosure.

Another predatory trap to avoid is an offer from investors to purchase the home and rent it back to the borrower. This can sound attractive to a homeowner who sees no other way out of losing their home, but this can lead to some negative outcomes, including the sale of the home for far less than market value and being evicted after the initial lease term runs out. There are non-profit community land trusts with the goal of helping people stay in their homes through a sale or affordable refinance with the land trust that have the homeowner's interest in mind.

### C. RIGHTS OF SURVIVORS

When a borrower passes away, and the borrower's surviving spouse or co-owner is not on the mortgage or has heirs that inherit the home and are not on the mortgage, they may face hardships and hurdles in dealing with the mortgage lender or servicer, particularly if the mortgage account is past due. Since they are not the borrower, they are not entitled to loss mitigation options and the mortgage servicer may even refuse to communicate with them.

RESPA Regulation X provides some protections to survivors of deceased borrowers who can show an ownership interest in the home. Under Regulation X, confirmed "successors in interest" must be treated as the "borrower" for purposes of RESPA and the "consumer" for purposes of the Truth in Lending Act (TILA) regardless of whether they have assumed the mortgage.[97] Regulation X defines "successor in interest" as:

> A person to whom an ownership interest in a property securing a mortgage loan subject to [Regulation X] is transferred from a borrower, provided that the transfer is:

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[93] Cal. Civ. Code § 2945.4.
[94] *Id.*
[95] *See* Cal. Civ. Code § 2924j.
[96] Cal. Civ. Code § 2945.4.
[97] 12 CFR §§ 1024.30(d), 1026.2(11).

(1) A transfer by devise, descent, or operation of law on the death of a joint tenant or tenant by the entirety;

(2) A transfer to a relative resulting from the death of a borrower;

(3) A transfer where the spouse or children of the borrower become an owner of the property;

(4) A transfer resulting from a decree of a dissolution of marriage, legal separation agreement, or from an incidental property settlement agreement, by which the spouse of the borrower becomes an owner of the property; or

(5) A transfer into an inter vivos trust in which the borrower is and remains a beneficiary and which does not relate to a transfer of rights of occupancy in the property.[98]

The mortgage servicer must provide a potential successor in interest with a written description of the documents reasonably required to confirm the person's identity and ownership interest after receiving any written request that contains the name of the borrower and identifying loan information and indicates that the person requesting information may be a successor in interest.[99]

Once a servicer has confirmed the successor's identity and ownership interest in the property, the confirmed successor is entitled to the protections of Regulation X's mortgage servicing rules.[100] Thus, the servicer is required to provide them with information on loss mitigation options, evaluate their applications for loss mitigation, refrain from dual tracking, and timely respond to complaints regarding errors and requests for information, among other things.

Additionally, the servicer must acknowledge receipt within five business days and respond substantively within thirty business days. However, depending on the specific circumstances, a servicer may be required to respond more quickly in order to comply with the policies and procedures requirement in the mortgage serving law.

## V. NON-MORTGAGE FORECLOSURE RISKS

While mortgage defaults are the most common causes of foreclosures, there are other foreclosure risks associated with housing costs.

**HOA Assessments (Dues):** Delinquencies in property tax and HOA payments can result in foreclosure sales. In California, HOAs have the right to initiate foreclosure on an HOA member's property when the amount of assessments owed (excluding late fees, interest, costs of collection, or other amounts) is more than $1,800 or more than 12 months old.[101] The HOA cannot foreclose on the home to collect fines or fees, as opposed to assessments.[102] Homeowners have the right to submit a request to meet with the Board of the HOA to discuss a payment plan for the

[98] 12 CFR §§ 1024.31.
[99] 12 CFR § 1024.36(i).
[100] *See* 12 CFR §§ 1024.30-1024.41 (mortgage servicing rules).
[101] *See* Cal. Civ. Code § 5720.
[102] Cal. Civ. Code § 5685.

debt.[103] The homeowner does have a right of redemption to keep ownership of their home by paying the delinquent assessments plus interest and attorneys' fees within 90 days after a non-judicial foreclosure sale.[104]

**Property Taxes:** In California, a home is subject to a tax sale by the county when the owner falls five years behind on tax payments.[105] As noted above, tax delinquencies can also trigger foreclosure much earlier if the homeowner is paying their property taxes through an escrow account. One option for homeowners to try to avoid a tax sale of their home is to enter into a repayment plan with their County Assessor's Office. However, this is often unaffordable because it requires a down payment of 20% of the delinquent amount and four equal payments of the remaining delinquency over the next four years.[106]

In addition, HUD rules applicable to federally-insured reverse mortgages or HECMs (and typically the reverse mortgage loan agreements) allow servicers to advance funds to pay for past due property taxes (as well as past due homeowners insurance and HOA dues) and to declare the borrower delinquent and call the loan due and payable if borrower fails to repay the advances.[107] One option to try to avoid foreclosure in this situation is to request a repayment plan to reimburse the mortgage servicer for the amounts it advanced. Recently issued guidance from HUD allows mortgage servicers to offer HECM borrowers a repayment plan for unpaid property by waiving prior limitations and caps and allowing them to repay property tax arrearages of any amount if they are unable to make two consecutive payments during the COVID-19 National Emergency effective through December 31, 2020.[108]

**Homeowners Insurance:** Most security instruments require that the homeowner maintains hazard insurance on the property. As noted above, mortgage services can purchase FPI and charge the borrower in their escrow payment, which can cause the borrower to fall behind. As noted above, the failure to maintain homeowners insurance can trigger a reverse mortgage servicer to advance funds to pay the insurance and call the loan due and payable if the borrower does not reimburse the lender for payments made for insurance.

**Blight/Disrepair**: Homeowners who are home rich but cash poor due to a fixed income or disability may find their home falling into disrepair and can even face code enforcement violation fines from their city or county. Unpaid fines can later result in liens being placed on the property. In addition, many mortgage contracts require the borrower to keep the property from deteriorating or causing damage that lowers the value of the home and allow the servicer to accelerate the loan pay the full balance by a certain deadline. If the borrower fails to do so, then they become delinquent and after 120 days of delinquency, the servicer can initiate foreclosure. There are local home repair grants and loans, as well as FHA loans, available to low income homeowners in different cities and counties that assist homeowners in repairing their homes.

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[103] Cal. Civ. Code § 5665.
[104] Cal. Civ. Code § 5715(b).
[105] *See* Cal. Rev. & Tax. Code § 3691.
[106] *See* Cal. Rev. & Tax Code § 4837.5.
[107] *See* 24 C.F.R. §206.205(e)(2).
[108] *See* FHA INFO #20-80 (Oct. 3, 2020), https://www.hud.gov/program_offices/housing/sfh/FHA_info_messages

**PACE:** Unfortunately, there are also many unscrupulous home improvement contractors and lenders who have lured homeowners into expensive and predatory loans, including Property Assessed Clean Energy (PACE) financing. PACE is a method of financing energy efficient home improvements by placing a priority tax lien on the borrower's property that must be paid back in assessments charged to their property taxes.[109] PACE financing is generally solicited by the contractors offering home repairs and their salespeople, and they often target In many cases, a PACE assessment can result in property tax increases of several thousands of dollars, more than doubling the homeowner's prior tax bills. There have been numerous problems associated with the PACE program due to how they are solicited and structured, and many homeowners do not realize that the financing results in significantly increased property taxes and a super-priority tax lien. If a borrower is paying into an escrow account used by the lender to pay the property taxes, they may not realize that they have a PACE assessment until the lender pays the larger tax bill and then increases the escrow payment due on the monthly mortgage. Dramatically increased property taxes due to PACE assessments have led to large numbers of homeowners falling behind on their mortgages and being put at risk of foreclosure.

PACE also assessment contracts pose a separate foreclosure risk for borrowers who pay their property taxes on their own (not through an escrow account with their mortgage) because those contracts typically give the contracting PACE authority the right to pursue judicial foreclosure to recover unpaid assessments. Though this appears to be a rare occurrence, it has happened.[110]

In California, consumer protections applicable to PACE financing unfortunately depend on when the contract was executed. For contracts executed on April 1, 2018 or afterward, PACE program administrators were prohibited from approving PACE financing unless they determined "that the property owner has a reasonable ability to pay the annual payment obligations for the PACE assessment."[111] For contracts executed on January 1, 2019 or thereafter, the program administrator must also make oral confirmation of the key terms of the contract, disclose that the home improvement is being financed by a PACE assessment, that the assessment will appear on the borrower's property tax bill and be paid as part of their annual property taxes, give an estimate of the total annual cost and the average monthly funds the borrower would need to save to pay that annual cost.[112] In addition, beginning on January 1, 2019, the program administrator must "deliver a translation of the disclosures, contract, or agreement in the language in which the oral confirmation was conducted, that includes a translation of every term and condition in that contract or agreement" before execution of the PACE contract.[113] Significantly, the California Department of Financial Protection and Innovation (DFPI) assumed regulatory authority over

[109] *See* Cal. Streets & Highways Code §§ 5902, 5913.
[110] *See California Statewide Communities Development Authority v. Corbin*, No. RG19015383 (Alameda Cty. Super. Ct.); *California Statewide Communities Development Authority v. Hiner*, No. RG19015582 (Alameda Cty. Super. Ct.).
[111] Cal. Fin. Code § 22686 (original effective date stated in stats. 2017 ch.475 (AB 1284)). *See also* Cal. Fin. Code § 22687 (setting forth the factors the program administrator must consider in making its determination).
[112] Cal. Streets & Highways Code § 5913(a)(1).
[113] *Id.* § 5913(e)(2).

PACE program administrators on January 1, 2019, and consumers may file complain to the DFPI if they believe a PACE program administrator has violated the law or acted improperly.[114]

As a result of a 2019 stipulated judgment in a civil enforcement action brought by numerous counties, Renovate America agreed to create a fund that pays for legal advice and assistance for California consumers with PACE-related legal and financing issues.[115] Consumers with PACE-related legal issues can submit a PACE assistance form to the Riverside County District Attorney's office to request assistance from the legal services organizations hired under the judgment to provide assistance.[116] California consumer advocates and legal aid organizations have established lines of communication with the five state-licenses PACE program administrators (Renovate America, Renew Financial, PACE Funding Group, FortiFi Financial, and Ygrene Energy Fund) to escalate homeowner complaints and engage in informal dispute resolution. Some borrowers have filed assessment appeals with their county tax collector challenging the PACE assessments on their property as unlawful. Borrowers have also filed litigation against PACE programs and contractors alleging fraud, misrepresentation, breach of contract, financial elder abuse and violations of numerous consumer protection laws.

Chapter 13 bankruptcy is an option of last resort to try to resolve disputes about PACE financing and/or work out a repayment plan to avoid foreclosure caused by the PACE assessment.

**Mechanics Liens**: Home improvement contractors can record a mechanic's lien against a customer's property if they do not pay for the goods or services provided.[117] The contractor must first provide a 20-day notice to the homeowner.[118] After the lien is recorded, the property is subject to a court-ordered foreclosure if the contractor files suit within 90 days of recording the lien.[119] Borrowers facing a judicial foreclosure lawsuit based on a mechanic's lien may have viable defenses if the entity placing the lien did not comply with these notice and time limit requirements. Sometimes a complaint filed with the Contractors State License Board can also lead to a resolution that involves release of the lien.

## VI. GOVERNMENT AND NON-PROFIT RESOURCES

### Administrative Complaints

Borrowers encountering problems with their mortgage servicers and lenders can complain to the Consumer Financial Protection Bureau (CFPB).[120] In the current administration, the

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[114] Information about DFPI complaints and an online portal to submit them are located on the internet at https://dfpi.ca.gov/file-a-complaint/ .

[115] *See* Final Judgment Pursuant to Stipulation, *People v. Renovate America, Inc* ., Case No. RIC 1904068 (Riverside Cty. Super. Ct. Aug. 9, 2019).

[116] *See* Riverside County District Attorney website at https://rivcoda.org/resources/consumer-information .

[117] *See* Cal. Civ. Code §§ 8400-8404.

[118] Cal. Civ. Code § 8410.

[119] Cal. Civ. Code § 3144.

[120] An online complaint portal is located at https://www.consumerfinance.gov/complaint/

CFPB does not investigate the vast majority of complaints, but it does require that the regulated institution respond to consumer complaints. Sometimes filing a CFPB complaint is a good way to get the mortgage servicer to at least respond to a borrower's complaints when other communications go unanswered. The CFPB's website has some useful guides on mortgage options during the COVID-19 emergency.[121]

Many mortgage servicers and lenders are licensed in California by the Department of Financial Protection and Innovation (DFPI, formerly the Department of Business Oversight). Consumers can submit complaints to the DFPI regarding a licensee's unlawful or improper conduct.[122] Before doing so, it is best to do a license search for the institution to make sure that they are licensed by the DFPI.[123] The DFPI's website has some information on mortgage options during the COVID-19 emergency.[124]

Borrowers with federally-backed mortgages can also escalate their concerns with the applicable GSE or agency. If you need to complain about Fannie or Freddie, then contact their parent, "Fuffa" (that's just my nickname for the Federal Housing Finance Agency).[125] The federal agencies also have their own dedicated complaint channels for borrowers.[126]

**<u>Consumer Advocacy Resources</u>**

The National Consumer Law Center (NCLC) is a clearinghouse for the latest information and strategies for consumers and their advocates. They have a wonderful summary of the current state of COVID-19 relief for borrowers on their website at https://library.nclc.org/mortgage-relief-homeowners-affected-covid-19 . They can also provide excellent guidance and technical assistance to consumer advocates.

The National Housing Law Project (NHLP) is another excellent resource for guidance and has its own summary of the CARES Act and related federal protections at https://www.nhlp.org/campaign/protecting-renter-and-homeowner-rights-during-our-national-health-crisis-2/ . NHLP is available to provide technical assistance and resources to attorneys, advocates and organizers.

My organization, Housing and Economic Rights Advocates (HERA), provides a unique mix of direct services, policy advocacy, litigation, community education, and technical assistance statewide in California. HERA administers the Alameda County Anti-Displacement, Oakland Cares Act, and Oakland Housing Secure emergency financial assistance programs. HERA

[121] *See* https://www.consumerfinance.gov/coronavirus/mortgage-and-housing-assistance/mortgage-relief/
[122] Complaints can be submitted on DFPI's online portal at https://dfpi.ca.gov/file-a-complaint/
[123] A license search can be conducted on the DFPI website at https://docqnet.dfpi.ca.gov/licensesearch/
[124] *See* https://dfpi.ca.gov/2020/03/25/covid19/
[125] *See* https://www.fhfa.gov/Homeownersbuyer/MortgageAssistance/Pages/ComplaintsConcernsQuestions.aspx
[126] *See* https://www.hud.gov/complaints/customer_service ; https://www.blogs.va.gov/VAntage/43234/va-and-the-consumer-financial-protection-bureau-warn-against-home-loan-refinancing-offers-that-sound-too-good-to-be-true/ ("If you have questions about your current VA loan, contact VA at (877) 827-3702."); https://pubmai.sc.egov.usda.gov/contactus.html

also directly assists homeowner with their home retention options with their mortgage servicers and homeowners' associations. HERA has successfully resolved numerous cases via non-litigation advocacy and through litigation in favor of homeowners. And we are available for technical assistance to other legal services providers, housing counselors, and borrower advocates. Contact us at inquiries@heraca.org or leave a message at 510 271-8443 ext. 30.

HERA collaborates with legal aid and non-profit legal services organizations as well as HUD-approved housing counselors who also assist distressed homeowners with home retention options. We encourage collaboration to stem the tide of financial distress Californians are facing by helping them figure out options and giving them the best service to try to keep their homes.