

AMENDED IN ASSEMBLY JANUARY 6, 2014

AMENDED IN ASSEMBLY APRIL 18, 2013

CALIFORNIA LEGISLATURE—2013–14 REGULAR SESSION

ASSEMBLY BILL

No. 1072

Introduced by Assembly Member Wagner

February 22, 2013

An act to amend Section 2944.7 of, *and to add Sections 2944.8, 2944.9, and 2944.10 to*, the Civil Code, relating to mortgages.

LEGISLATIVE COUNSEL'S DIGEST

AB 1072, as amended, Wagner. Mortgage loan modification.

Existing law, applicable to residential mortgages, prohibits a person who negotiates, arranges, or otherwise offers to perform a mortgage loan modification or other form of mortgage loan forbearance for a fee or other compensation from, among other things, demanding or receiving any compensation until every service that the person contracted to perform or represented that he or she would perform is accomplished. Existing law makes a violation of these provisions by a natural person a misdemeanor punishable by a specified fine or imprisonment, or both.

This bill would authorize a violation of these provisions to be punished as a felony with imprisonment, as specified. By changing the definition of a crime, the bill would impose a state-mandated local program.

This bill would also prohibit a person who engages in mortgage loan modification from accepting payment for services in advance of the loan modification approval. The bill would assess civil penalties for various related violations and would authorize designated state and local government officials to commence civil actions to recover those penalties. The bill would specify the manner of distribution of penalties

recovered and would establish the Mortgage Loan Modification Fraud Account in the General Fund for deposit of funds payable to the state, to be available for expenditure upon appropriation by the Legislature.

This bill would, in addition to the civil penalties described above, authorize further civil penalties for unlawful or fraudulent mortgage modifications perpetrated against seniors or disabled persons, as defined, and provide criteria for the assessment of these additional penalties. The bill would authorize a court to order the offender to pay restitution to the senior or disabled victim, as specified.

This bill would also authorize the court to provide injunctive relief, and would provide that a person who intentionally violates an injunction prohibiting offering loan modification services for a fee under these provisions is subject to civil penalties. The bill would authorize designated state and local government officials to commence civil actions to recover those penalties, and would specify the manner of distribution of penalties recovered.

This bill would impose a 4-year statute of limitations for actions brought pursuant to these provisions.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 2944.7 of the Civil Code is amended to
- 2 read:
- 3 2944.7. (a) Notwithstanding any other ~~provision~~ of law, it
- 4 shall be unlawful for any person who negotiates, attempts to
- 5 negotiate, arranges, attempts to arrange, or otherwise offers to
- 6 perform a mortgage loan modification or other form of mortgage
- 7 loan forbearance for a fee or other compensation paid by the
- 8 borrower, to do any of the following:
- 9 (1) Claim, demand, charge, collect, or receive any compensation
- 10 until after the person has fully performed each and every service
- 11 the person contracted to perform or represented that he or she
- 12 would perform.

1 (2) Take any wage assignment, any lien of any type on real or
2 personal property, or other security to secure the payment of
3 compensation.

4 (3) Take any power of attorney from the borrower for any
5 purpose.

6 (b) A violation of this section by a natural person is a punishable
7 by a fine not exceeding ten thousand dollars (\$10,000), by
8 imprisonment in the county jail for a term not to exceed one year
9 or imprisonment pursuant to subdivision (h) of Section 1170 of
10 the Penal Code, or by both that fine and imprisonment, or if by a
11 business entity, the violation is punishable by a fine not exceeding
12 fifty thousand dollars (\$50,000). These penalties are cumulative
13 to any other remedies or penalties provided by law.

14 (c) *Any person who engages, has engaged, or proposes to*
15 *engage in the mortgage loan modification business who accepts*
16 *a payment for the service in advance of the approval of the loan*
17 *modification shall be liable for a civil penalty not to exceed twenty*
18 *thousand dollars (\$20,000) for each violation, which shall be*
19 *assessed and recovered in a civil action brought in the name of*
20 *the people of the State of California by the Attorney General, by*
21 *any district attorney, by any county counsel authorized by*
22 *agreement with the district attorney in actions involving violation*
23 *of a county ordinance, by any city attorney of a city having a*
24 *population in excess of 750,000, by any city attorney of any city*
25 *and county, or, with the consent of the district attorney, by a city*
26 *prosecutor in any city having a full-time city prosecutor, in any*
27 *court of competent jurisdiction.*

28 (d) *A violation of this section shall be deemed a fraud upon the*
29 *contracting parties and upon the state. The court shall impose a*
30 *civil penalty for each individual violation of this statute. In*
31 *assessing the amount of the civil penalty, the court shall consider*
32 *any one or more of the relevant circumstances presented by any*
33 *of the parties to the case, including, but not limited to, the*
34 *following:*

35 (1) *The nature and seriousness of the misconduct, the number*
36 *of violations.*

37 (2) *The persistence of the misconduct.*

38 (3) *The length of time over which the misconduct occurred.*

39 (4) *The willfulness of the defendant's misconduct.*

40 (5) *The defendant's assets, liabilities, and net worth.*

1 (e) If the action is brought by the Attorney General, one-half of
2 the penalty collected shall be paid to the treasurer of the county
3 in which the judgment was entered and one-half to the Mortgage
4 Loan Modification Fraud Account, established by this section
5 within the General Fund. If the action is brought by a district
6 attorney or county counsel, the penalty collected shall be paid to
7 the treasurer of the county in which the judgment was entered.
8 Except as provided in subdivision (e), if the action is brought by
9 a city attorney or city prosecutor, one-half of the penalty collected
10 shall be paid to the treasurer of the city in which the judgment was
11 entered, and one-half to the treasurer of the county in which the
12 judgment was entered. The funds described above shall be for the
13 exclusive use by the Attorney General, the district attorney, the
14 county counsel, and the city attorney for the enforcement of
15 consumer protection laws.

16 (f) The Mortgage Loan Modification Fraud Account is hereby
17 created as an account within the General Fund in the State
18 Treasury. The portion of penalties that is payable to the General
19 Fund or to the Treasurer recovered by the Attorney General from
20 an action or settlement of a claim made by the Attorney General
21 pursuant to this chapter shall be deposited into this fund. Moneys
22 in this account, upon appropriation by the Legislature, shall be
23 used by the Attorney General to support investigations and
24 prosecutions of California's mortgage loan modification fraud,
25 including implementation of judgments obtained from these
26 prosecutions or investigations and other activities which are in
27 furtherance of this chapter.

28 (g) (1) If the action is brought at the request of a board within
29 the Department of Consumer Affairs or a local consumer affairs
30 agency, the court shall determine the reasonable expenses incurred
31 by the board or local agency in the investigation and prosecution
32 of the action.

33 (2) Before any penalty collected is paid out pursuant to
34 subdivision (c), the amount of any reasonable expenses incurred
35 by the board shall be paid to the Treasurer for deposit in the
36 special fund of that board. If the board has no such special fund,
37 the moneys shall be paid to the Treasurer. The amount of any
38 reasonable expenses incurred by a local consumer affairs agency
39 shall be paid to the general fund of the municipality or county that
40 funds that local agency.

1 (h) *If the action is brought by a city attorney of a city and*
2 *county, the entire amount of the penalty collected shall be paid to*
3 *the treasurer of the city and county in which the judgment was*
4 *entered for the exclusive use by the city attorney for the*
5 *enforcement of consumer protection laws.*

6 ~~(e)~~

7 (i) *Nothing in this section precludes a person, or an agent acting*
8 *on that person’s behalf, who offers loan modification or other loan*
9 *forbearance services for a loan owned or serviced by that person,*
10 *from doing any of the following:*

11 (1) *Collecting principal, interest, or other charges under the*
12 *terms of a loan, before the loan is modified, including charges to*
13 *establish a new payment schedule for a nondelinquent loan, after*
14 *the borrower reduces the unpaid principal balance of that loan for*
15 *the express purpose of lowering the monthly payment due under*
16 *the terms of the loan.*

17 (2) *Collecting principal, interest, or other charges under the*
18 *terms of a loan, after the loan is modified.*

19 (3) *Accepting payment from a federal agency in connection*
20 *with the federal Making Home Affordable Plan or other federal*
21 *plan intended to help borrowers refinance or modify their loans*
22 *or otherwise avoid foreclosures.*

23 ~~(d)~~

24 (j) *This section shall apply only to mortgages and deeds of trust*
25 *secured by residential real property containing four or fewer*
26 *dwelling units.*

27 *SEC. 2. Section 2944.8 is added to the Civil Code, to read:*

28 2944.8. (a) *In addition to any liability for a civil penalty*
29 *pursuant to Section 2944.7, if a person violates this chapter with*
30 *respect to a victim who is a senior citizen or a disabled person,*
31 *the violator may be liable for a civil penalty not to exceed two*
32 *thousand five hundred dollars (\$2,500) for each violation, which*
33 *may be assessed and recovered in a civil action.*

34 (b) *Subject to subdivision (e), any civil penalty shall be paid as*
35 *prescribed by subdivisions (b) and (c) of Section 2944.7.*

36 (c) *As used in this section, the following terms have the following*
37 *meanings:*

38 (1) *“Disabled person” means a person who has a physical or*
39 *mental impairment that substantially limits one or more major life*
40 *activities.*

1 (2) “Major life activities” means functions that include caring
2 for one’s self, performing manual tasks, walking, seeing, hearing,
3 speaking, breathing, learning, and working.

4 (3) “Physical or mental impairment” means any of the
5 following:

6 (A) A physiological disorder or condition, cosmetic
7 disfigurement, or anatomical loss substantially affecting one or
8 more of the following body systems: neurological, musculoskeletal,
9 special sense organs, respiratory, including speech organs,
10 cardiovascular, reproductive, digestive, genitourinary, hemic and
11 lymphatic, skin, or endocrine.

12 (B) A mental or psychological disorder, including intellectual
13 disability, organic brain syndrome, emotional or mental illness,
14 and specific learning disabilities.

15 (C) Diseases and conditions including orthopedic, visual, speech
16 and hearing impairment, cerebral palsy, epilepsy, muscular
17 dystrophy, multiple sclerosis, cancer, heart disease, diabetes,
18 intellectual disability, and emotional illness.

19 (4) “Senior citizen” means a person who is 65 years of age or
20 older.

21 (d) In determining whether to impose a civil penalty pursuant
22 to subdivision (a) and the amount thereof, the court shall consider,
23 in addition to any other appropriate factors, the extent to which
24 one or more of the following factors are present:

25 (1) Whether the defendant knew or should have known that his
26 or her conduct was directed to one or more senior citizens or
27 disabled persons.

28 (2) Whether the defendant’s conduct caused one or more senior
29 citizens or disabled persons to suffer any of the following: loss or
30 encumbrance of a primary residence, principal employment, or
31 source of income, substantial loss of property set aside for
32 retirement, or for personal or family care and maintenance, or
33 substantial loss of payments received under a pension or retirement
34 plan or a government benefits program, or assets essential to the
35 health or welfare of the senior citizen or disabled person.

36 (3) Whether one or more senior citizens or disabled persons
37 are substantially more vulnerable than other members of the public
38 to the defendant’s conduct because of age, poor health or infirmity,
39 impaired understanding, restricted mobility, or disability, and

1 *actually suffered substantial physical, emotional, or economic*
2 *damage resulting from the defendant's conduct.*

3 *(e) A court of competent jurisdiction hearing an action pursuant*
4 *to this section may make orders and judgments as necessary to*
5 *restore to a senior citizen or disabled person money or property,*
6 *real or personal, that may have been acquired by means of a*
7 *violation of this chapter. Restitution ordered pursuant to this*
8 *subdivision shall be given priority over recovery of a civil penalty*
9 *imposed by the court pursuant to subdivision (a), but shall not be*
10 *given priority over a civil penalty imposed pursuant to subdivision*
11 *(c) of Section 2944.7. If the court determines that full restitution*
12 *cannot be made to those senior citizens or disabled persons, either*
13 *at the time of judgment or by a future date determined by the court,*
14 *then restitution under this subdivision shall be made on a pro rata*
15 *basis depending on the amount of loss.*

16 *SEC. 3. Section 2944.9 is added to the Civil Code, to read:*

17 *2944.9. (a) In addition to any civil penalty imposed, the court*
18 *is authorized to provide injunctive relief in response to a violation*
19 *of Section 2944.7 or Section 2944.8*

20 *(b) Any person who intentionally violates any injunction*
21 *prohibiting offering loan modification services for a fee issued*
22 *pursuant to Section 2944.7 shall be liable for a civil penalty not*
23 *to exceed ten thousand dollars (\$10,000) for each violation. Where*
24 *the conduct constituting a violation is of a continuing nature, each*
25 *day of that conduct is a separate and distinct violation. In*
26 *determining the amount of the civil penalty, the court shall consider*
27 *all relevant circumstances, including:*

28 *(1) The extent of the harm caused by the conduct constituting*
29 *a violation.*

30 *(2) The nature and persistence of that conduct.*

31 *(3) The length of time over which the conduct occurred.*

32 *(4) The assets, liabilities, and net worth of the person, whether*
33 *corporate or individual.*

34 *(5) Any corrective action taken by the defendant.*

35 *(c) The civil penalty prescribed by this section shall be assessed*
36 *and recovered in a civil action brought in any county in which the*
37 *violation occurs or where the injunction was issued in the name*
38 *of the people of the State of California by the Attorney General or*
39 *by any district attorney, any county counsel authorized by*
40 *agreement with the district attorney in actions involving violation*

1 of a county ordinance, or any city attorney in any court of
2 competent jurisdiction within his or her jurisdiction without regard
3 to the county from which the original injunction was issued. An
4 action brought pursuant to this section to recover civil penalties
5 shall take precedence over all civil matters on the calendar of the
6 court, except those matters to which equal or greater precedence
7 on the calendar is granted by law.

8 (d) If such an action is brought by the Attorney General, one-half
9 of the penalty collected pursuant to this section shall be paid to
10 the treasurer of the county in which the judgment was entered,
11 and one-half to the State Treasurer. If brought by a district attorney
12 or county counsel the entire amount of the penalty collected shall
13 be paid to the treasurer of the county in which the judgment is
14 entered. If brought by a city attorney or city prosecutor, one-half
15 of the penalty shall be paid to the treasurer of the county in which
16 the judgment was entered and one-half to the city, except that if
17 the action was brought by a city attorney of a city and county the
18 entire amount of the penalty collected shall be paid to the treasurer
19 of the city and county in which the judgment is entered.

20 (e) If the action is brought at the request of a board within the
21 Department of Consumer Affairs or a local consumer affairs
22 agency, the court shall determine the reasonable expenses incurred
23 by the board or local agency in the investigation and prosecution
24 of the action.

25 Before any penalty collected is paid out pursuant to subdivision
26 (c), the amount of the reasonable expenses incurred by the board
27 shall be paid to the Treasurer for deposit in the special fund of the
28 board described above. If the board has no such special fund, the
29 moneys shall be paid to the Treasurer. The amount of the
30 reasonable expenses incurred by a local consumer affairs agency
31 shall be paid to the general fund of the municipality or county
32 which funds the local agency.

33 SEC. 4. Section 2944.10 is added to the Civil Code, to read:
34 2944.10. Any action to enforce any cause of action pursuant
35 to Section 2944.7, 2944.8, or 2944.9, shall be commenced within
36 four years after the cause of action accrued. No cause of action
37 barred under existing law on the effective date of this section shall
38 be revived by its enactment.

1 ~~SEC. 2.~~

2 *SEC. 5.* No reimbursement is required by this act pursuant to
3 Section 6 of Article XIII B of the California Constitution because
4 the only costs that may be incurred by a local agency or school
5 district will be incurred because this act creates a new crime or
6 infraction, eliminates a crime or infraction, or changes the penalty
7 for a crime or infraction, within the meaning of Section 17556 of
8 the Government Code, or changes the definition of a crime within
9 the meaning of Section 6 of Article XIII B of the California
10 Constitution.

O