

ASSEMBLY BILL

No. 1730

Introduced by Assembly Member Wagner

February 14, 2014

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 1730, as introduced, 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 any 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 a senior citizen or disabled person, 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 citizen or disabled person, 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.

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

1 (3) Take any power of attorney from the borrower for any
2 purpose.

3 (b) A violation of this section by a natural person is a public
4 offense punishable by a fine not exceeding ten thousand dollars
5 (\$10,000), by imprisonment in the county jail for a term not to
6 exceed one year, ~~or~~ *or imprisonment pursuant to subdivision (h)*
7 *of Section 1170 of the Penal Code, or by both that fine and*
8 *imprisonment, or if by a business entity, the violation is punishable*
9 *by a fine not exceeding fifty thousand dollars (\$50,000). These*
10 *penalties are cumulative to any other remedies or penalties*
11 *provided by law.*

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

26 (d) *A violation of this section shall be deemed a fraud upon the*
27 *contracting parties and upon the state. A party described in*
28 *subdivision (c) shall file a civil action for each individual violation*
29 *of this section and shall recover the costs of investigation and*
30 *prosecution. In assessing the amount of the civil penalty, the court*
31 *shall consider any one or more of the relevant circumstances*
32 *presented by any of the parties to the case, including, but not*
33 *limited to, the following:*

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

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

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

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

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

1 (6) *The amount taken from each complaining witness by the*
2 *defendant individual.*

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

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

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

35 (2) *Before any penalty collected is paid out pursuant to*
36 *subdivision (c), the amount of any reasonable expenses incurred*
37 *by the board within the Department of Consumer Affairs or a local*
38 *consumer affairs agency shall be paid to the Treasurer for deposit*
39 *in the special fund of that board. If the board within the*
40 *Department of Consumer Affairs or a local consumer affairs*

1 *agency has no such special fund, the moneys shall be paid to the*
2 *Treasurer. The amount of any reasonable expenses incurred by a*
3 *local consumer affairs agency shall be paid to the general fund of*
4 *the municipality or county that funds that local agency.*

5 *(h) If the action is brought by the city attorney of the city and*
6 *county of San Francisco, the entire amount of the penalty collected*
7 *shall be paid to the treasurer of the city and county in which the*
8 *judgment was entered for the exclusive use by the city attorney for*
9 *the enforcement of consumer protection laws.*

10 ~~(e)~~

11 *(i) Nothing in this section precludes a person, or an agent acting*
12 *on that person's behalf, who offers loan modification or other loan*
13 *forbearance services for a loan owned or serviced by that person,*
14 *from doing any of the following:*

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

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

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

27 ~~(d)~~

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

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

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

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

1 (c) As used in this section, the following terms have the
2 following meanings:

3 (1) “Disabled person” means a person who has a physical or
4 mental impairment that substantially limits one or more major life
5 activities.

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

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

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

16 (B) A mental or psychological disorder, including intellectual
17 disability, organic brain syndrome, emotional or mental illness,
18 and specific learning disabilities.

19 (C) Diseases and conditions including orthopedic, visual, speech
20 and hearing impairment, cerebral palsy, epilepsy, muscular
21 dystrophy, multiple sclerosis, cancer, heart disease, diabetes,
22 intellectual disability, and emotional illness.

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

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

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

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

1 (3) Whether one or more senior citizens or disabled persons are
2 substantially more vulnerable than other members of the public to
3 the defendant's conduct because of age, poor health or infirmity,
4 impaired understanding, restricted mobility, or disability, and
5 actually suffered substantial physical, emotional, or economic
6 damage resulting from the defendant's conduct.

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

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

21 2944.9. (a) In addition to any civil penalty imposed, the court
22 is authorized to provide injunctive relief in response to a violation
23 of Sections 2944.7 or Sections 2944.8

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

32 (1) The extent of the harm caused by the conduct constituting
33 a violation.

34 (2) The nature and persistence of that conduct.

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

36 (4) The assets, liabilities, and net worth of the person, whether
37 corporate or individual.

38 (5) Any corrective action taken by the defendant.

39 (c) The civil penalty prescribed by this section shall be assessed
40 and recovered in a civil action brought in any county in which the

1 violation occurs or where the injunction was issued in the name
 2 of the people of the State of California by the Attorney General
 3 or by any district attorney, any county counsel authorized by
 4 agreement with the district attorney in actions involving violation
 5 of a county ordinance, or any city attorney in any court of
 6 competent jurisdiction within his or her jurisdiction without regard
 7 to the county from which the original injunction was issued. An
 8 action brought pursuant to this section to recover civil penalties
 9 shall take precedence over all civil matters on the calendar of the
 10 court, except those matters to which equal or greater precedence
 11 on the calendar is granted by law.

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

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

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

37 SEC. 4. Section 2944.10 is added to the Civil Code, to read:

38 2944.10. Any action to enforce any cause of action pursuant
 39 to Section 2944.7, 2944.8, or 2944.9, shall be commenced within
 40 four years after the cause of action accrued. No cause of action

1 barred under existing law on the effective date of this section shall
2 be revived by its enactment.

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

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