



1-1-2017

Chapter 838: Foreclosing Preventable Foreclosures for Closure: Successors in Interest

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Recommended Citation

Gary Menes, *Chapter 838: Foreclosing Preventable Foreclosures for Closure: Successors in Interest*, 48 U. PAC. L. REV. 498 (2017).

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Chapter 838: Foreclosing Preventable Foreclosures for Closure: Successors in Interest

Gary Menes*

Code Section Affected

Civil Code § 2920.7 (new)
SB 1150 (Leno); 2016 STAT. Ch. 838.

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I. INTRODUCTION

Legal aid and consumer advocacy organizations report that family members of deceased mortgagors throughout the country face unreasonable hurdles in assuming or modifying mortgages.¹ One woman in California made five years of mortgage payments on the home her mother left her after she passed—until she

* Thank you to *The University of the Pacific Law Review*, Volume 48 Board of Editors for this opportunity, and every staff member who helped edit this article.

1. See generally *Examples of Cases Where Successors in Interest and Similar Parties Faced Challenges Seeking Loan Modifications and Communicating with Mortgage Servicers*, NAT’L CONSUMER LAW CTR. 1, 1 (July 1, 2014), available at https://www.nclc.org/images/pdf/foreclosure_mortgage/mortgage_servicing/successor-stories-2014.pdf (on file with *The University of the Pacific Law Review*) (providing stories of surviving family members of deceased mortgagors throughout the country who have experienced issues with modifying and assuming mortgages).

lost her job, requested a modification, and was denied because Chase required her mother's signature.²

The subprime mortgage crisis has been written about extensively.³ It played a central role in the great recession and the continuing global financial crisis.⁴ California was hit particularly hard as it witnessed record numbers of foreclosures.⁵ In response, California lawmakers introduced legislation known as the Homeowners Bill of Rights (HBOR) in 2013.⁶ The HBOR is regarded by proponents as pioneering legislation with better enforcement against wrongful and preventable foreclosures than the federal legislation and regulations that preceded it.⁷ Recently, however, stories like that of the California woman mentioned above are resurfacing concerns about mortgage servicing practices.⁸

Widows, widowers, and heirs of mortgagors, who are not parties to the mortgage loan, face uncooperative servicers and dilatory red-tape when trying to assume or modify a loan after their family member passes.⁹ Senators Mark Leno and Cathleen Galgiani, co-authors of what is being referred to by some as the Homeowner Survivors Bill of Rights, introduced Senate Bill 1150 (SB 1150)—now Chapter 838—to ameliorate this new issue.¹⁰

What distinguishes Chapter 838 from the HBOR of 2012 is that existing federal regulations, as well as new regulations in the pipeline in the form of informal rulemaking from the Consumer Financial Protections Bureau (CFPB)—some recently published—address the exact issue identified by Chapter 838.¹¹ Opponents of Chapter 838 question whether the California legislation is distinguishable from federal regulations or is redundant legislation causing unnecessary confusion in the mortgage servicing industry.¹²

2. *Id.* at 12.

3. See generally Lawrence E. Mitchell, *The Morals of the Marketplace: A Cautionary Essay for our Time*, 20 STAN. L. & POL'Y REV. 171, 182 (2009) (explaining the danger of not managing the growth of risk management and providing the mortgage crisis as a prime example); Richard M. Hynes, *Securitization, Agency Costs, and the Subprime Crisis*, 4 VA. L. & BUS. REV. 231, 233 (2009) (providing the effects of the mortgage crisis on agency costs); Jo Becker, Sheryl Gay Stolberg & Stephen Labaton, *White House Philosophy Stoked the Mortgage Bonfire*, N.Y. TIMES (Dec. 20, 2008), available at <http://www.nytimes.com/2008/12/21/business/21admin.html> (on file with *The University of the Pacific Law Review*) (providing another example of the mortgage crisis and the overly aggressive push towards giving loans to those who could not afford them).

4. *Infra* Part II.

5. *Infra* Part II.

6. Attorney General Kamala D. Harris Announces Support for SB 1150, Homeowner Survivor Bill of Rights, Press Release, Kamala D. Harris, CAL. DEPT. OF JUST. (Apr. 20, 2016), [hereinafter Press Release] <https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-announces-support-sb-1150-homeowner-survivor> (on file with *The University of the Pacific Law Review*).

7. *Infra* Part II.

8. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1150, at 1 (June 28, 2016).

9. *Id.*

10. *Infra* Part II.

11. *Infra* Part IV.

12. *Infra* Part IV.

The next section provides an overview of the historical context and background issues preceding Chapter 838.¹³ The following section lays out the essential provisions of Chapter 838.¹⁴ Lastly, this article discusses some of the legal issues relevant to Chapter 838.¹⁵

II. LEGAL BACKGROUND

Homeownership is a hallmark of the American Dream.¹⁶ America's housing market, on the other hand, wields more power than the romantic cultural ideal supporting it would suggest, as evidenced by the effect of the subprime mortgage crisis on the global financial crisis.¹⁷ In the early 2000's, a mixture of the Bush administration's pro-homeownership policies¹⁸ and ubiquitous use of mortgage-backed securities to distance lenders from risk—their traditional incentive for careful lending practices—created the subprime mortgage crisis.¹⁹ Demand for mortgages increased after housing prices jumped, and major lenders, selling the risk of default from their balance sheets via packages of mortgages—mortgage-backed securities—as investments, were afforded more liquidity in order to do more lending.²⁰ In short, the economic justification of more liquidity for lenders leading to more mortgages won the day and complimented Washington's pro-homeownership bias.²¹ To be sure, lenders were less prudent in choosing who they extended loans to (subprime mortgagors).²² Soon enough, around 2006, banks began foreclosing on subprime mortgagors throughout the country, and investments in mortgage-backed securities by other sectors of the economy, such as pension funds, were not paying off.²³

Following the subprime mortgage crisis and record number of non-judicial foreclosures (foreclosures which do not require a court order) that ensued, California enacted legislation that built upon on the National Mortgage Settlement (NMS) with the country's major mortgage servicers and new federal

13. *Infra* Part II.

14. *Infra* Part III.

15. *Infra* Part IV.

16. Emily Badger, *Where the 'American Dream' of Homeownership is Fading the Most*, WASH. POST (Feb. 2016), available at <https://www.washingtonpost.com/news/wonk/wp/2016/02/16/where-the-american-dream-of-homeownership-is-fading-the-most/> (on file with *The University of the Pacific Law Review*).

17. *Cf.* Mitchell, *supra* note 3, at 187 (explaining how the American subprime mortgage bubble impacted global credit markets).

18. Becker et al., *supra* note 3.

19. Mitchell, *supra* note 3, at 183.

20. *Id.*

21. Becker et al., *supra* note 3.

22. Mitchell, *supra* note 3, at 184.

23. Hynes, *supra* note 3, at 241.

regulations.²⁴ In 2012, the same year as the NMS, California's legislature introduced Assembly Bill 278, the central bill in a series of bills known collectively as California's HBOR.²⁵ Existing law under the HBOR is widely regarded as landmark legislation, yet new mortgage servicing concerns relating to successors in interest have emerged through the cracks, issues unaccounted for either federally or in the first iteration California's HBOR.²⁶

Widowed spouses and other successors in interest of deceased borrowers who are not a party to their decedent's loan continue to struggle to protect their real or future property interests while communicating with uncooperative mortgage servicers.²⁷ Thus, avoidable non-judicial foreclosures on mortgages which successors could have assumed or modified following the death of their loved one, have occurred.²⁸

This new successor in interest issue, raising familiar concerns about mortgage servicing practices in non-judicial foreclosure states, inspired new federal guidelines and regulations from the CFPB, but the California Department of Justice reports that "mortgage servicers are refusing or failing to communicate with successors in interest."²⁹ Similar to the enactment of the HBOR following the subprime mortgage crisis, democratic lawmakers in California seek more statutory protection and enforcement to prevent eligible successors in interest from losing their home after losing a loved one.³⁰ Thus, California Senators Mark Leno and Cathleen Galgiani co-authored Chapter 838 to expand existing law by including certain successors in interest within the ambit of the HBOR; thus, bolstering the new federal regulations and guidelines which proponents of Chapter 838 view as insufficient.³¹

Section A provides an overview of existing federal regulation relating to mortgage servicing.³² The following sections discuss existing California law, and new efforts to expand it.³³

24. SB 1150 Fact Sheet, *Homeowner Survivor Bill of Rights: To Preserve the Family Home and Age in Place*, OFF. OF S. MARK LENO 1 (Mar. 9, 2016), available at <http://laaconline.org/wp-content/uploads/030916-SB-1150-Leno-Homeowner-Survivor-Bill-of-Rights-Fact-Sheet.pdf> [hereinafter SB 1150 Fact Sheet] (on file with *The University of the Pacific Law Review*).

25. See CAL. CIV. CODE §§ 2920.5, 2923.4, 2923.5, 2923.55, 2923.6, 2923.7, 2924, 2924.9, 2924.10, 2924.11, 2924.12, 2924.17, 2924.18, 2924.19 (enacted by 2012 Stat. Ch. 86, 87) (comprising what is commonly referred to as the HBOR).

26. Andrew Khouri, *Why More Widowed Homeowners are Struggling to Prevent a Foreclosure*, L.A. TIMES (May 3, 2016, 3:00 AM), available at <http://www.latimes.com/business/realestate/la-fi-widow-foreclosures-20160503-story.html> (on file with *The University of the Pacific Law Review*).

27. Press Release, *supra* note 6.

28. SB 1150 Fact Sheet, *supra* note 24, at 1.

29. Press Release, *supra* note 6.

30. SB 1150 Fact Sheet, *supra* note 24, at 2.

31. Press Release, *supra* note 6.

32. *Infra* Part II.A.

33. *Infra* Part II.B–C.

A. *Federal Regulations Relating to Successors in Interest*

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) took effect in 2010.³⁴ The organic statute of the Dodd-Frank Act created the Consumer Financial Protection Bureau (CFPB), an executive agency designed to regulate and set standards for mortgage servicing.³⁵ In 2012, the National Mortgage Settlement (NMS) was reached between the country's five largest mortgage servicers, the federal government, and 49 state attorney generals.³⁶ The NMS imposed new mortgage servicing requirements designed to curb avoidable foreclosures and rein in certain servicing tactics perceived as unfair to borrowers.³⁷ The \$26 billion settlement, while historic, was no panacea.³⁸ Only the servicers who were signatories to the NMS were bound, raising the issue of how to regulate successive servicers.³⁹ Nonetheless, over half of the settlement went to homeowners in the two hardest hit states (California and Florida), highlighting California's central role in the national subprime mortgage crisis.⁴⁰

In 2013, the CFPB issued two final rules relating to mortgage servicing.⁴¹ Regulation X, or the "Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act [RESPA]," which amended existing federal law under the RESPA,⁴² and Regulation Z, the Truth In Lending Act (TILA),⁴³ to ameliorate the crisis.⁴⁴ Further acknowledging the challenges facing successors in interest dealing with mortgage servicers, the CFPB issued a guidance letter

34. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (codified as 12 U.S.C.A. § 5301).

35. Recent Legislation, *Administrative Law--Agency Design--Dodd-Frank Act Creates the Consumer Financial Protection Bureau--Dodd-Frank Act*, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (to be Codified in Scattered Sections of the U.S. Code), 124 HARV. L. REV. 2123, 2123 (2011).

36. William M. Hensley, *The California Homeowner Bill of Rights: Its Origins, Its Protections, and Its Practical Implications*, LEXISNEXIS EMERGING ISSUES ANALYSIS (Sept. 2012), <https://www.lexisnexis.com/legalnewsroom/real-estate/b/real-estate-law-blog/archive/2012/09/17/the-california-homeowner-bill-of-rights-its-origins-its-protections-and-its-practical-implications.aspx?Redirected=true>.

37. Kirk H. Nakamura, *Dwellings on California Foreclosure Law: The New Homeowner's Bill of Rights*, 55 ORANGE CTY. LAW. 12, 12 (2013).

38. Nelson D. Schwartz & Julie Creswell, *Mortgage Plan Gives Billions to Homeowners, but with Exceptions*, N.Y. TIMES (Feb. 9, 2012), available at <http://www.nytimes.com/2012/02/10/business/states-negotiate-26-billion-agreement-for-homeowners.html> (on file with *The University of the Pacific Law Review*).

39. Cf. Nakamura, *supra* note 37, at 12 (raising the fact that the NMS was expanded to all servicers under the HBOR).

40. Schwartz et al., *supra* note 38.

41. *Code of Federal Regulations*, CFPB, available at <http://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/code-federal-regulations/> (on file with *The University of the Pacific Law Review*).

42. Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 44686-01 (July 24, 2013) (to be codified at 12 C.F.R. §§ 1024, 1026).

43. *Id.*

44. *Id.*

addressing the issue in 2013.⁴⁵ The proposal resulted in a final rule, effective October 3, 2015.⁴⁶

Under the CFPB rule, mortgage servicers must “have policies and procedures . . . reasonably designed to ensure that the servicer can[,] [u]pon notification of the death of a borrower, promptly identify and facilitate communication with the successor in interest of the deceased borrower with respect to the property secured by the deceased borrower’s mortgage loan.”⁴⁷ Democratic leaders in California, such as Attorney General Kamala Harris, however, are eager to increase state protections afforded to successors in interest.⁴⁸ “Despite this guidance, the California Department of Justice continues to receive reports that mortgage servicers are refusing or failing to communicate with widows and orphans of deceased homeowners.”⁴⁹

B. California’s Homeowner Bill of Rights

AB 278 and SB 900 are central bills that established the enforcement scheme of the HBOR, and all of California’s HBOR’s protections are codified in a series of statutes.⁵⁰ Existing law under the HBOR mandates procedures and rules designed to facilitate reliable communication between borrowers and mortgage servicers about foreclosure prevention.⁵¹ The HBOR increased the scope of the NMS by holding all mortgage servicers operating in California accountable, as opposed to only the five signatories to the settlement.⁵²

The first notable protection secured by the HBOR is a ban on what are called “dual track” foreclosures.⁵³ This means that a mortgage servicer is precluded from proceeding with exercising a power of sale clause in a deed of trust while a borrower is simultaneously seeking loan modification.⁵⁴ A second significant protection contained in the HBOR is the requirement that mortgage servicers designate authority to someone to be the single point of contact between

45. CFPB Bulletin 2013-12, *Implementation Guidance for Certain Mortgage Servicing Rules*, CFPB (Oct. 15, 2013), available at http://files.consumerfinance.gov/f/201310_cfpb_mortgage-servicing_bulletin.pdf (on file with *The University of the Pacific Law Review*).

46. § 1024.38 *General Servicing Policies, Procedures, and Requirements*, CFPB, available at <http://www.consumerfinance.gov/eregulations/1024-38/2015-18239#1024-38-a> (last visited Sept. 8, 2016) (on file with *The University of the Pacific Law Review*).

47. *Id.*

48. Press Release, *supra* note 6.

49. *Id.*

50. See CAL. CIV. CODE §§ 2920.5, 2923.4, 2923.5, 2923.55, 2923.6, 2923.7, 2924, 2924.9, 2924.10, 2924.11, 2924.12, 2924.17, 2924.18, 2924.19 (enacted by 2012 Stat. Ch. 86, 87) (comprising what is commonly referred to as the HBOR).

51. SB 1150 Fact Sheet, *supra* note 24, at 2.

52. Nakamura, *supra* note 37, at 12.

53. Hensley, *supra* note 36, at n. 8.

54. Press Release, *supra* note 6.

borrowers and mortgage servicers.⁵⁵ Lastly, the HBOR also contains measures requiring servicers to document and verify every action in the foreclosure process with supporting evidence to eliminate practices such as “robo-signing.”⁵⁶

The goal of these provisions of the HBOR is to eliminate the obfuscation of information and red-tape standing between borrowers and objective information about their rights and foreclosure alternatives.⁵⁷ Significantly, the HBOR also gave teeth to these newly mandated protections for borrowers by creating new methods of enforcement.⁵⁸

The remedies for borrowers under the HBOR include injunctions and statutory damages.⁵⁹ A borrower may enjoin a servicer who fails to comply with the HBOR any time prior to the recordation of a deed upon sale.⁶⁰ Recovery of statutory damages and attorney fees is available if a foreclosure sale is completed in violation of the HBOR.⁶¹ These codified remedies and causes of action are not found in the newly published CFPB final rule.⁶²

C. *Impetus for a Homeowner Survivor Bill of Rights*

Facing issues similar to those that originally inspired the Dodd-Frank Act, the NMS and California’s HBOR, surviving spouses “are being consumed by a labyrinth of processes in an attempt to assume or modify existing home loans after the primary mortgage holder passes away.”⁶³ A 2013 survey of 84 legal aid service attorneys and nonprofit housing counselors found that over 80 percent of respondents had clients who were surviving successors in interest facing unnecessary foreclosures due to the difficulties of communicating with loan servicers.⁶⁴

55. *Id.*

56. See Hensley, *supra* note 36, at n.8 (explaining the issue of robo-signing whereby mortgage servicers rubber-stamp affidavits and declarations during the foreclosure process without verifying the information).

57. See Press Release, *supra* note 6 (describing how successors in interest face a “labyrinth of paperwork . . . and conflicting directions and requests” instead of objective information about the loan).

58. Jeremy F. Koo, Comment and Note, *Saving the California Homeowner Bill of Rights from Federal Banking Preemption*, 48 U.S.F. L. REV. 189, 200 (2013).

59. Hensley, *supra* note 36, at n.8.

60. Koo, *supra* note 58, at 200.

61. *Id.*

62. *Amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z)*, CFPB 58 (Aug. 2, 2016), available at http://files.consumerfinance.gov/f/documents/20160804_cfpb_Final_Rule_Amendments_to_the_2013_Mortgage_Rules.pdf [hereinafter *Amendments to the 2013 Mortgage Rules*] (on file with *The University of the Pacific Law Review*).

63. Jacob Passy, *California Senate Approves Bill to Expand Rights of Widowed Spouses*, NAT’L MORTGAGE NEWS (June 2, 2016), <http://www.nationalmortgagenews.com/news/compliance-regulation/california-senate-approves-bill-to-expand-rights-of-widowed-spouses-1079251-1.html> (on file with *The University of the Pacific Law Review*).

64. SB 1150 Fact Sheet, *supra* note 24, at 2.

Against the backdrop of the subprime housing crisis, California's original HBOR is credited with slowing the rate of foreclosures and stabilizing families and local economies.⁶⁵ Because the California legislature increased the scope and enforceability of federal regulations with the HBOR, and the reforms codified in the HBOR are "a mere continuation of compromises already reached by 49 state attorney generals under the [NMS]," it follows to further extend the protections to successors in interest facing similar servicing issues.⁶⁶ That is the goal of California Senators Mark Leno and Cathleen Galgiani, co-authors of the Homeowner Survivors Bill of Rights.⁶⁷

III. CHAPTER 838

Chapter 838 adds another layer to the existing legal obligations of mortgage servicers toward original borrowers under California's Homeowner Bill of Rights by extending its protections to eligible successors in interest of deceased mortgagors.⁶⁸ Chapter 838 enacts Civil Code section 2920.7, placing procedural requirements on mortgage servicers to regulate their communications with survivors of a decedent mortgagor.⁶⁹ The provisions establish liability unless mortgage servicers comply prior to initiating a foreclosure against the property securing the loan under a mortgage or deed of trust,⁷⁰ Additionally, if a servicer contravenes Chapter 838, and a notice of default is filed and foreclosure sale is completed, Chapter 838 further codifies that eligible successors in interest maintain a statutory private right of action against the mortgage servicer.⁷¹

A. *The Reach of Chapter 838*

Chapter 838 only applies to "first lien mortgages or deeds of trust that are secured by owner-occupied residential real property containing no more than four dwelling units. 'Owner-occupied' means that the property was the principal residence of the deceased borrower."⁷² Adopting the definition of a mortgage servicer within Civil Code Section 2920.5, Chapter 838 covers "any person or entity who directly services a loan, or is responsible for interacting with the borrower, and managing the loan account on a daily basis."⁷³

65. *Id.*

66. Hensley, *supra* note 36, at n. 8.

67. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 1150, at 1 (May 28, 2016).

68. *See generally id.* at 4 (explaining the HBOR provisions and arguing for expanding the scope to include successors in interest).

69. CAL. CIV. CODE § 2920.7 (enacted by Chapter 838).

70. *Id.* at § 2920.7(e)(1)–(5).

71. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 1150, at 4 (May 28, 2016).

72. CAL. CIV. CODE § 2920.7(j).

73. *Id.* at § 2920.7(i)(2); CAL. CIV. CODE § 2920.5(a) (West 2016).

A successor in interest under Chapter 838 is defined as “a natural person who provides the mortgage servicer with notification of the [deceased] mortgagor or trustor and reasonable documentation showing that the person is [an eligible successor in interest].”⁷⁴ The list of eligible successors codified in Chapter 838 essentially includes family members,⁷⁵ but the definition is qualified by the limitation that the successor must have “occupied the property as his or her principal residence within the last six continuous months prior to the deceased borrower’s death and who currently resides in the property.”⁷⁶

Eligible successors under Chapter 838 must be allowed to apply to assume a deceased borrower’s outstanding mortgage loan, subject to a creditworthiness check.⁷⁷ Further, successors can simultaneously apply for a foreclosure prevention alternative that “may be offered by, or available through, the mortgage loan servicer.”⁷⁸ Lastly, the provisions of Chapter 838 extend to all eligible successors in interest, and are applied by servicers “in accordance with the terms of the loan and federal and state laws and regulations.”⁷⁹

B. Mortgage Servicing Obligations Under Chapter 838

The protections of Chapter 838 are applicable once an eligible successor in interest notifies a mortgage servicer of the deceased borrower’s death.⁸⁰ The mortgage servicer is then precluded from filing a notice of default until it requests, and allows reasonable time for a successor to produce, documentation establishing both the death of the borrower and status of the claimant as a successor in interest in the real property.⁸¹

Once a claimant’s status as a successor in interest is established, the mortgage servicer has ten days to provide written information regarding the status of the loan.⁸² Next, the mortgage servicer must allow the successor in interest to either apply to assume the deceased borrower’s loan to the extent allowed under the terms of the loan, as well as state and federal laws and regulations, or simultaneously apply for an applicable foreclosure prevention

74. CAL. CIV. CODE § 2920.7(G)(4).

75. *See id.* (listing the eligible successors as either “the spouse, domestic partner, joint tenant as evidenced by grant deed, parent, grandparent, adult child, adult grandchild, or adult sibling of the deceased borrower”).

76. *Id.*

77. *Id.* at § 2920.7(d)(1).

78. *Id.* at § 2920.7(d)(2).

79. *Id.* at § 2920.7(b)(2)

80. *Id.* at § 2920.7(a).

81. *Id.* at § 2920.7(a)(1)–(2).

82. *See id.* at § 2920.7(3)(c) (requiring at least “[the] loan balance, interest rate and interest reset dates and amounts, balloon payments if any, prepayment penalties if any, default or delinquency status, the monthly payment amount, and payoff amounts”).

alternative if they seek one.⁸³ Under Chapter 838, a successor in interest effectively holds the same rights and remedies as an original borrower does under the HBOR.⁸⁴

C. Remedies for Violations of Chapter 838

If a trustee initiates a non-judicial foreclosure in violation of the provisions of Chapter 838, a successor in interest may seek an injunction at any point before the trustee's deed of sale is recorded.⁸⁵ Awarded injunctions are effective until either the mortgage servicer remedies each violation to the satisfaction of the court, or moves to dissolve the injunction with a demonstration that the procedures previously followed are now corrected in compliance with Chapter 838.⁸⁶

In the event that a trustee's deed upon sale is recorded prior to correcting a violation of the provisions of Chapter 838, the mortgage servicer is liable to the successor in interest for economic damages pursuant to Civil Code section 3281.⁸⁷ If the servicer's violation of Chapter 838 is found to have been reckless or the result of willful misconduct, courts may award a successor in interest statutory damages of \$50,000 for their total actual damages, whichever is greater.⁸⁸ Lastly, a prevailing successor in interest may receive attorney fees and costs at the court's discretion.⁸⁹

IV. ANALYSIS

California's enactment of the Homeowner Bill of Rights is acclaimed for building upon the federal regulations to ameliorate the subprime mortgage and foreclosure crisis.⁹⁰ Chapter 838—California's Homeowner Survivor Bill of Rights—increases the scope of the HBOR's statutory scheme by expanding the class of individuals with standing to include eligible successors in interest to real

83. *Id.* at § 2920.7(d).

84. *See id.* at § 2920.7(e)(1) (enacted by Chapter 838) (listing each section of the HBOR protections for original borrowers and mandating that successors in interest have the same rights and remedies).

85. *Id.* at § 2920.7(e)(2).

86. *Id.*

87. *Id.* at § 2920.7(e)(3).

88. *Id.*

89. *Id.* at § 2920.7(e)(4).

90. *See generally* Press Release, *supra* note 6 (explaining the variety of ways in which the Homeowner Survivor Bill of Rights helps homeowners with over burdensome home loans); Cheryl Aptowitz, "To Borrow, To Borrow . . . Should Not Cause Such Sorrow": Why New Jersey Should Enact Legislation Incorporating a Homeowner Bill of Rights (HBOR) and a Servicer's Duty of Loss Mitigation, 39 SETON HALL LEGIS. J. 205, 206 (2015) (describing the attempt to correct the mortgage crisis and the rationalization that something similar needs to be done in New Jersey).

property that has been used as security by deceased mortgagors.⁹¹ Again, California is addressing an issue that is already, at least ostensibly, regulated at a national level.⁹² The Consumer Financial Protection Bureau announced amendments to its mortgage servicing rules on December 15, 2014, which, in part, sought to address the issue in the crosshairs of Chapter 838: unreliable communication and dilatory practices from mortgage servicers toward successors in interest seeking to assume and or modify a mortgage.⁹³

The million dollar question is whether Chapter 838 follows suit and is another example of California legislation that builds upon what some view as weak federal regulation in this area,⁹⁴ or whether it is redundant and risks unnecessary, expensive litigation and delayed foreclosures.⁹⁵ Section A analyzes the major arguments advanced by opponents and supporters of Chapter 838, and section B examines the amendments made to Chapter 838 as it was originally drafted.⁹⁶ Section C evaluates the likely effect of Chapter 838 on non-judicial foreclosures in California in light of the existing, and newly published, federal regulations addressing successors in interest.⁹⁷

A. *Is Chapter 838 Proactive or Unnecessary Legislation?*

Opponents of Chapter 838 argue that it is premature and redundant given the existing and newly released federal regulations.⁹⁸ For example, the informal rulemaking of the CFPB resulting in the 2013 guidance letter previously announced a rule that servicers must have “policies and procedures . . . reasonabl[y] designed to ensure that the servicer . . . promptly provide to [successors in interest] a description of the documents the servicer reasonably requires to confirm the person’s identity and ownership interest. . . .”⁹⁹

Opponents of Chapter 838 also argue that mortgage servicers will be unreasonably burdened by having two inconsistent regulatory schemes

91. *E.g.*, SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 1150, at 1 (May 28, 2016) (explaining that the bill will now include successors in interest to help further the objectives of the HBOR).

92. *See supra* Part II (explaining how the HBOR was a response to the NMS).

93. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1150, at 1 (June 28, 2016).

94. *See* Press Release, *supra* note 6.

95. *See* Valerie Nera, *Housing Job Killer Bill to Be Heard in Senate Committee*, CALCHAMBER ADVOC. (Apr. 20, 2016), <http://advocacy.calchamber.com/2016/04/20/housing-job-killer-bill-to-be-heard-in-senate-committee/> (explaining that Chapter 838 may have been premature and may cause burdens in the foreclosure process by allowing a family member of the deceased to become involved in probate of the home).

96. *See infra* Parts IV.A.–B. (explaining some of the thoughts of those who oppose and support Chapter 838 and the likely effect of the final text of the new law).

97. *See infra* Part IV.C. (explaining that while Chapter 838, at first glance, appears to overly broaden the availability for a family member to slow down the foreclosure process, only those who are eligible will be able to get involved in the probate of a property).

98. Nera, *supra* note 95; ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1150, at 9 (June 28, 2016).

99. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1150, at 8 (June 28, 2016).

addressing the same underlying problem between mortgage servicers and successors in interest.¹⁰⁰ As a result, opponents of Chapter 838 in the California Legislature successfully pushed for a safe harbor provision to avoid such a scenario.¹⁰¹ Advocating against new state regulations, the opposition opined “if there are deficiencies in the published [federal] regulations, we welcome a legislative opportunity to discuss further refinements, if necessary.”¹⁰²

The California Chamber of Commerce, a registered opponent of Chapter 838, argued it will kill jobs in the housing industry, limit available housing, interfere with proper foreclosures, and “establishes new, lopsided, private rights of action with draconian penalties, injunctive relief and attorney’s fees only for the prevailing successor in interest.”¹⁰³ Opponents also argue that Chapter 838 is not sufficiently clear in areas such as how servicers are to ensure compliance in the event of multiple successors in interest to the property (not named on the note) securing the loan.¹⁰⁴

Supporters counter that servicers already fail to comply with both the letter and spirit of federal regulations and the HBOR, and with respect to multiple successor scenarios, argue that “any servicer that does not have a “multiple successors” policy in place is in violation of existing federal rules.”¹⁰⁵ Further, fearing that a safe harbor provision would render Chapter 838 moot, given the uncertainty surrounding whether the notice and comment rulemaking procedure of the CFPB would produce a new rule, supporters of Chapter 838 keenly proposed amendments to clarify that it would not become effective until the new regulation was promulgated.¹⁰⁶

Supporters of Chapter 838 also question the efficacy of the existing and anticipated CFPB amendments, for what appears to be good reason.¹⁰⁷ The notice and comment period of the informal rulemaking initiated by the CFPB ended in March, 2014.¹⁰⁸ Yet the CFPB did not publish its final rule until August 4, 2016, and it does not create a private right of action for successors in interest, as Chapter 838 does.¹⁰⁹ Thus, it appears California is again providing stronger

100. *2013 Real Estate Settlement Procedures Act (Regulation X) and Truth in Lending Act (Regulation Z) Mortgage Servicing Final Rule*, CFPB 77 (Nov. 3, 2014), available at http://files.consumerfinance.gov/f/201411_cfpb_small-entity-compliance-guide_tila-respa.pdf (on file with *The University of the Pacific Law Review*).

101. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1150, at 10 (June 28, 2016).

102. *Id.* at 9.

103. Nera, *supra* note 95.

104. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1150, at 10 (June 28, 2016).

105. *Id.*

106. *Id.*

107. See Press Release, *supra* note 6 (explaining how federal regulations have largely been ignored).

108. Robert Finlay, *California Loss-Mitigation Bill Creates More Problems Than it Solves*, HOUSINGWIRE (Apr. 29, 2016), available at <http://www.housingwire.com/blogs/1-rewired/post/36919-california-loss-mitigation-bill-creates-more-problems-than-it-solves> (on file with *The University of the Pacific Law Review*).

109. *Amendments to the 2013 Mortgage Rules*, *supra* note 62, at 58.

consumer protections for borrowers in this area.¹¹⁰ And further, because the CFPB's rules are structured specifically to be "consistent with the NMS and mirror requirements set out in . . . California[s] HBOR," the opposition's concern about conflicting obligations is likely without merit; Chapter 838's private right of action represents stronger state enforcement toward the same end as the CFPB's regulations—a relationship similar to that between the HBOR and the NMS.¹¹¹

B. Effects of the Amendments to Chapter 838

Opponents of Chapter 838 are concerned about "allowing a party not on the mortgage loan to interfere with appropriate foreclosures and creat[ing] a private right of action for violations of overly complex and burdensome requirements."¹¹² These were among the concerns that manifested in the form of concessions, or clarifications, depending on your perspective, to the text of the new law.¹¹³

One significant amendment to the text of Chapter 838, as introduced, is the narrowed definition of a successor in interest.¹¹⁴ Originally, it did not require that the claimant occupy the property as their principal residence for six continuous months—only that they currently live in the property or make it their principal residence once they assume the loan—thus, concern over non-parties interfering with appropriate foreclosures is appeased somewhat.¹¹⁵ Further, opponents clarified that servicer duties to successors in interest regarding loan assumption and modification are not expanded beyond their duties to original borrowers.¹¹⁶ Thus, servicers may "evaluate the creditworthiness of the successor in interest, subject to applicable investor requirements and guidelines."¹¹⁷ Lastly, concern about delaying proper foreclosures in the event of multiple successors in interest is evident in the provision excluding successors in interest from the protections of Chapter 838 if they are involved in a legal dispute over the property.¹¹⁸

110. *See id.* (explaining the CFPB's stance that the regulatory scheme will address the concerns of successor, without a private right of action).

111. Aptowitz, *supra* note 90, at 210

112. Nera, *supra* note 95.

113. *See* ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1150, at 8 (June 28, 2016) (explaining the concerns of the opposition to Chapter 838).

114. CAL. CIV. CODE § 2920.7(G)(4) (enacted by Chapter 838).

115. *Compare id.* (requiring that the claimant lived in the property for the last six continuous months prior to the deceased borrowers death and currently resides in the property), *with* SB 1150, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (as amended on June 23, 2016, but not enacted) (requiring only that the claimant occupy the property as their principal residence at the time of the mortgagors death or will within 60 days of loan assumption).

116. *Id.* at § 2920.7(b)(3).

117. *Id.* at § 2920.7(d)(1).

118. *Id.* at § 2920.7(k)(2)(l).

These amendments to the text of Chapter 838 address some of the concerns of the opposition; however, following the CFPB's newly published final rule, the most significant amendment appears to favor proponents of Chapter 838.¹¹⁹ The response to the requested safe harbor provision clarified that any safe harbor would only be effective if and when the CFPB issued a final rule, preventing Chapter 838 from being hamstrung by the CFPB's slow moving informal rulemaking procedure.¹²⁰ Thus, the statutory private right of action extended to eligible successors in interest under Chapter 838—the primary distinguishing feature from the new CFPB rule—has immediate effect.¹²¹

C. Is Chapter 838 a Magic Bullet?

Expanding the scope of parties protected by the statutory remedies under the scheme of the HBOR will likely reduce preventable foreclosures.¹²² More likely than not, considering the statutory enforcement mechanisms of the HBOR, Chapter 838 will reduce future red-tape foreclosures suffered by qualified successors in interest.¹²³ The original HBOR resulted “in a steep decline in foreclosures,” which—after all—was the goal.¹²⁴

Further, prior to California's HBOR, plaintiffs were rarely successful litigating what they believed were wrongful foreclosures, as few legal theories proved viable.¹²⁵ Following the enactment of the HBOR, borrowers have availed themselves of its statutory remedies.¹²⁶

Part of the reason California legislators were compelled to introduce the HBOR in the first place is the fact that California is a non-judicial foreclosure state.¹²⁷ The lack of judicial oversight and reduced cost make this option attractive to mortgage servicers and, combined with California's population and central role in the housing crisis, means it would likely be naïve to assume Chapter 838 will close the book on preventable foreclosures in California.¹²⁸

119. See *Amendments to the 2013 Mortgage Rules*, *supra* note 62, at 58 (describing how the agency refused the private right of action).

120. Cf. Finlay, *supra* note 108 (describing the lengthy informal rulemaking of the CFPB).

121. See *Amendments to the 2013 Mortgage Rules*, *supra* note 62, at 58 (refusing to create a private cause of action).

122. See Aptowitz, *supra* note 90, at 206 (recognizing the positive impact of the original HBOR on preventing avoidable foreclosures).

123. See ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1150, at 1 (June 28, 2016) (June 28, 2016) (explaining the statutory causes of action afforded by the HBOR).

124. Aptowitz, *supra* note 90, at 206.

125. Nakamura, *supra* note 37, at 13.

126. See *e.g.* Mungai v. Wells Fargo Bank, No. C-14-00289, 2014 WL 2508090, at *9 (N.D. Cal. June 3, 2014) (holding a violation of the single point of contact requirement in CAL. CIV. CODE. § 2923.7 (HBOR) is triggered by a borrower simply requesting a foreclosure prevention alternative).

127. Aptowitz, *supra* note 90, at 206.

128. See Schwartz et al., *supra* note 38 (explaining California's high rate of foreclosures as a result of the subprime mortgage crisis).

Another potential hurdle for Chapter 838 is that some California courts have held the HBOR only applies to mortgages, not deeds of trust; thus, trustees can still potentially foreclose on a successor wishing to assume a mortgage.¹²⁹

Another issue opponents of Chapter 838 raise is overlapping laws and regulations, and the potential unnecessary burden with the risk of federal preemption.¹³⁰ This likely will not be an issue for Chapter 838, however, because the Supreme Court of the United States has long recognized and deferred to the strong state interests in regulating the foreclosure process.¹³¹ And further, the Ninth Circuit held in 2011 that state statutes regulating foreclosures are not preempted by federal field or conflict preemption following the Dodd-Frank Act.¹³² Other California Courts have followed, holding that federal preemption from the National Banking Act does not preempt the HBOR's revision of Civil Code Section 2923.5 after the enactment AB 278—and SB 1150 (now Chapter 838), or California's Homeowner Survivors Bill of Rights, is only a refinement of the existing statutory scheme.¹³³

Lastly, due to large number of non-profit and free legal aid organizations who registered support for Chapter 838, it seems that those most adversely affected by the red-tape foreclosures preventing family members from remaining in their homes are the elderly and those without the resources to pursue litigation.¹³⁴ Thus, Chapter 838, while extending HBOR protections to a larger pool of people to slow the rate of foreclosures and force servicers to genuinely consider prevention alternatives, does have the narrow focus of protecting only those successors with the means to assume or qualify for modification of a decedent's mortgage.¹³⁵ Nonetheless, expanding the statutory right of action is significant because the CFPB, "[d]espite the urging of consumer advocacy groups, [just published a] final rule [that] does not provide potential successors in interest a private right of action . . . for claims that a servicer made an inaccurate determination about successorship status or failed to comply."¹³⁶

V. CONCLUSION

Chapter 838 attempts to correct a mortgage servicing issue unaddressed by California's response to the subprime mortgage crisis—the Homeowner's Bill of

129. *Rossberg v. Bank of America, N.A.*, 162 Cal.Rptr.3d 525, 538 (Cal.Ct.App.).

130. *Nera*, *supra* note 95.

131. *Koo*, *supra* note 58, at 219.

132. *Id.* at 214.

133. *See Tamburri v. Suntrust Mortg., Inc.*, 875 F.Supp.2d 1009, 1016–22 (N.D. Cal. 2012) (reasoning that neither field nor conflict preemption existed from the National Banking Act preempting state law claims based on decades of California state regulation of the foreclosure process).

134. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1150, at 1 (June 28, 2016).

135. *See id.* (explaining the requirement of Chapter 838 that successors be subject to a creditworthiness check).

136. *Amendments to the 2013 Mortgage Rules*, *supra* note 62, at 58.

Rights.¹³⁷ Qualified family members, particularly widows and widowers of deceased mortgagors, now enjoy the same statutory rights and remedies as original borrowers.¹³⁸ The codified private causes of action and statutory damages—hallmarks of the original HBOR—provide a deterrent to further mortgage servicer misconduct and red-tape foreclosures, and some argue represent model legislation for other states.¹³⁹ To be sure, time will reveal the efficacy of the added layer of HBOR protections, but Chapter 838 appears to compliment and strengthen the spirit of the new federal regulations addressing successors in interest; just as the HBOR did—by codifying consequences.¹⁴⁰

137. *See supra* Part II (explaining the unanticipated plight of successors in interest).

138. CAL. CIV. CODE. § 2920.7(e)(1) (enacted by Chapter 838).

139. *See Aptowitz*, *supra* note 90, at 222 (arguing for New Jersey to adopt a HBOR modeled after the California legislation).

140. *See supra* Part II (describing how HBOR built upon the federal regulations by creating a statutory private right of action).