Hitting Gangs Where It Hurts the Most: Chapter 244 Helps the Innocent Reclaim Their Homes

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Code Sections Affected
Civil Code § 3486 (new), § 3485 (amended), §§ 3485, 3486 (repealed); Code of Civil Procedure § 1161 (amended); Health and Safety Code § 11571.1 (new), § 11571.1 (repealed); AB 530 (Krekorian); 2009 STAT. Ch. 244.

I. INTRODUCTION

Gang violence has been a constant issue in California since the early 1990s, with Los Angeles claiming title as the “gang capital of the United States of America.”¹ One study cited Los Angeles as home to some 40,000 members in 700 gangs.² Yet, gang violence is not just a Los Angeles issue. Many California cities suffer from the same epidemic and seek more effective tools to combat gangs.³ One of these tools is an experimental program that attacks gang residences, the base of their operations.⁴

Rental apartments often serve as a base of operations for gang members who use their residences as storehouses for drugs and weapons.⁵ However, figuring out exactly how to dismantle these places of business is a difficult task.⁶

In 2008, the City of Sacramento tried to completely shut down and evict all residents of “the Compound,” an apartment complex that gang members used and that had become one of the city’s hot spots for drug activity.⁷ “Police responded

³ See Pesick, supra note 3 ("One of five anti-gang bills Gov. Arnold Schwarzenegger signed . . . targets tenants keeping weapons in their homes illegally.").
⁴ ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 530, at 4 (Apr. 21, 2009).
to 633 calls at the complex over a two-year period . . . .”8 However, the attempted eviction ended in a fine for the owners of the apartment complex and an order to keep the building free from drug dealers and prostitutes.9 The trial judge added that he “ha[d] few if any tools available to address the problem.”10

Fortunately, help is on the way. Chapter 244 is designed to disassemble gang residences by expanding and reauthorizing existing pilot programs that allow certain cities to evict individual problem tenants from their residences on the basis of documented drug and firearm offenses, while allowing innocent tenants to remain in their homes.11

II. LEGAL BACKGROUND

Chapter 244 reenacts a pilot program started in the late 1990s to address gang violence in the City of Los Angeles.12 Over the years, the program was modified to create a system that can both deal with the problem and accurately assess its effectiveness.13

A. The Pilot Program

1. The Problem

In 1992, the City of Los Angeles instituted a special crime task force called the FALCON Unit14 “to encourage the abatement of nuisances caused by illegal drug sales” around rental properties.15 However, the City found that “arrests alone [did] not stop the drug activity.”16

One of the key problems was that courts had “no authority to issue a ‘partial eviction’ order.”17 Instead, a landlord could bring an unlawful detainer18 action

8. Id.
9. Furillo, Owners of Crime-Ridden North Apartments Fined, supra note 6 (“A judge Friday fined the owners of a crime-wrecked North Sacramento apartment building $25,000 and ordered them to keep the complex free of drug dealers and prostitutes. But in a blow to the Sacramento County City Attorney’s Office, the judge refused its request to shut the place down.”).
10. Id.
11. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 530, at 4-5 (Apr. 21, 2009).
12. Id. at 1.
13. Id. at 4-5.
15. Id. at 1-2.
16. Id.
17. Id. at 2.
18. Unlawful detainer is an “unjustifiable retention of the possession of real property by one whose original entry was lawful, as when a tenant holds over after lease termination despite the landlord’s demand for possession.” BLACK’S LAW DICTIONARY 513 (8th ed. 2004). An unlawful detainer proceeding is “[a]n action to return a wrongfully held tenancy . . . to its owner.” Id. at 1678.
against all the tenants of an apartment, including those who were innocent of
drug-related nuisances.²⁹ However, many landlords were afraid of bringing
unlawful detainer actions for fear of retaliation.²⁰

2. *The Answer*

In 1998, the Legislature enacted California Health and Safety Code section
11571.1 to respond to the concerns of landlords and to abate the nuisances caused
by specific narcotics offenses.²¹ The law provided that a city attorney or
prosecutor could bring an unlawful detainer action on behalf of the people
against any individual tenant engaging in the manufacture, sale, furnishing,
possession, or possession for sale of various drugs.²² A key provision of the bill
allowed for partial eviction proceedings against guilty tenants, leaving innocent
tenants undisturbed.²³ Eviction permanently barred former tenants from returning,
even if they were invited back by those lawfully on the premises.²⁴

Procedural requirements directed the city attorney or prosecutor to initiate
the action by giving the property owner notice to file an unlawful detainer
proceeding against the offending tenant within fifteen days.²⁵ A copy of this
notice was also given to the offending tenant.²⁶ If the property owner failed to
initiate a proceeding, the city attorney or prosecutor could proceed against the
tenant with an unlawful detainer action and name the property owner as a
defendant in the action.²⁷

The program ran for three years and required Los Angeles municipalities
using the program to keep specific records of the proceedings.²⁸ These records

²⁰. *See id.* (“Moreover, Los Angeles City prosecutors who have been working with the program have
found that many landlords are generally afraid to evict the drug offender, for fear of retaliation.”).
²¹. *See id.* at 2-3 (noting that the pilot program would be enacted in judicial districts throughout Los
Angeles, including the Los Cerritos, Southeast, and Long Beach districts).
²². *CAL. HEALTH & SAFETY CODE § 11571.1(c)* (West 2007). The statute specifies which drugs
constitute controlled substance nuisances for purposes of an unlawful detainer proceeding. The drugs include
cocaine, PCP, heroin, LSD, Crack, and marijuana. *Id.* These controlled substance nuisance actions coincide
with violations of other sections of the Health and Safety Code. *Id.*
²³. *Id.* § 11571.1(b); *SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1384*, at 5 (Aug. 4,
1998).
²⁴. *SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1384*, at 5-6 (Aug. 4, 1998)
(“Eviction could permanently bar evicted tenant from returning to premises . . . . [T]he court may further order
that the remaining tenants shall not give permission to or invite any person who has been evicted to return to or
reenter any portion of the entire premises.”).
²⁵. *Id.* at 2-3. Procedural requirements followed existing law for unlawful detainer actions, subject to a
few additional directions. *Id.*
²⁶. *Id.* at 3.
²⁷. *Id.* at 3, 6. If the action was successful, the city attorney could recoup the costs of the proceedings
against the defendant property owner, subject to a maximum amount of $600 for the cost of investigation,
discovery, and attorney’s fees. *Id.*
²⁸. *Id.* at 1.
were supposed to be evaluated by the Judicial Council for a report to the Legislature in 2001.  

B. Later Amendments

Unfortunately, the 2001 Judicial Council was unable to evaluate the merits of the program due to insufficient data collection and lack of cooperation from all the municipalities. That same year, the Legislature enacted AB 815, thereby reauthorizing the program and allowing it to run for an additional six years, with another Judicial Council evaluation scheduled at the close of the program. While AB 815 allowed the program to proceed, the bill sought to facilitate better evaluations by requiring participating city attorneys and prosecutors to submit more specific information to the Judicial Council.

In 2004, the Legislature enacted AB 2523, once again reauthorizing the program and allowing it to run for five more years. AB 2523 included a sunset date, scheduled for January 1, 2010. Moreover, the bill directed technical changes on how eviction proceedings should be initiated. Instead of giving the

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29. Id. at 3.
30. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 815, at 4-5 (July 10, 2001). Of the five counties authorized to participate in the program, two decided not to participate. Id. at 5. The Judicial Council was unable to evaluate the usefulness of the program because of insufficient data and a lack of meaningful use of the program. Id. at 2, 5.
32. However, the program was “re-designed” to reflect the redistricting and unification of the trial courts. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 815, at 2 (July 10, 2001).
33. 2001 Cal. Stat. ch. 431, § 1 (amending CAL. HEALTH & SAFETY CODE § 11571.1). The bill required cities to report the following information to the Judicial Council:
   1. The number of notices filed by the public prosecutor.
   2. The number of cases filed by an owner upon receipt of such notice.
   3. The number of cases continued by the city attorney or city prosecutor.
   4. The number of three and thirty day notices issued by the city attorney or prosecutor.
   5. The number of cases filed by the city attorney or prosecutor.
   6. The number of times and owner is joined as a defendant in the action.
   7. The number of judgments entered as a result of the proceedings and their disposition.
   8. The number of partial evictions.
   9. The number of instances a tenant voluntarily vacated the unit either after or before receiving a notice.
   10. The number of notices that led to a trial, whether an appeal was taken from the trial, and the result of the appeal.
34. 2004 Cal. Stat. ch. 304, § 1 (amending CAL. HEALTH & SAFETY CODE § 11571.1). The bill also made minor modifications to the program and expanded it to include San Diego and Oakland. Id.
35. CAL. HEALTH & SAFETY CODE § 11571.1(h) (West 2007) (“This section shall remain in effect only until January 1, 2010 . . . .”).
36. See SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2523, at 3-4 (June 15, 2004).
tenant fifteen days notice before the commencement of an unlawful detainer proceeding, AB 2523 provided for thirty days notice.\textsuperscript{37}

An important amendment in AB 2523 added a new section on tenant’s notice.\textsuperscript{38} The new section required notice to include language that advised the tenant to seek legal assistance in the event that he or she fell within a certain category.\textsuperscript{39} Additionally, the new section called for notice to include a list of places where the tenant could obtain free legal aid.\textsuperscript{40} The reporting requirements allowed the Judicial Council to analyze data more efficiently.\textsuperscript{41} The Judicial Council had stated in its previous report that it was unable to offer anything more than anecdotal evidence that the programs were working.\textsuperscript{42} The bill required the Judicial Council to submit an evaluation of the program to the Legislature in 2007 and 2009.\textsuperscript{43}

New legislation in 2007 added the City of Palmdale to the pilot program.\textsuperscript{44} It also modified the existing program by providing that unlawful detainer actions could only be brought on the basis of “an arrest report or on another action or report by a law enforcement agency.”\textsuperscript{45}

C. The Addition of a New Pilot Program

In 2007, the Legislature enacted another pilot program.\textsuperscript{46} While similar to the program mentioned in the previous section, this program was enacted to abate the nuisance caused by “tenants who commit specified weapons and ammunitions offenses on rental property.”\textsuperscript{47} The program applied in Long Beach, Los Angeles, Oakland, Sacramento, and San Diego, and a sunset date was scheduled for January 1, 2010.\textsuperscript{48} AB 1013 tracked the pilot program allowing for unlawful detainer actions against tenants using controlled substances by adopting the same

\textsuperscript{37} Id. at 4.
\textsuperscript{38} Id. at 7-8.
\textsuperscript{39} CAL. HEALTH & SAFETY CODE § 11571.1(a)(1)(C) (West 2007). These categories included cases where the recipient was not named in the notice; persons named in the notice did not live with the recipient; the person named in the notice permanently moved; the person named in the notice was not known to the recipient; or the recipient had any other legal defense or legal reason to stop the eviction. Id.
\textsuperscript{40} CAL. HEALTH & SAFETY CODE § 11571.1(a)(1)(C) (West 2007); SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2523, at 7 (June 15, 2004).
\textsuperscript{41} SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2523, at 7-8 (June 15, 2004).
\textsuperscript{42} Augmentations included the number of proceedings instituted, the number of proceedings withdrawn, and the number of actions where the tenant prevailed. The changes were instituted to eliminate inaccuracies resulting from misuse of the proceedings by landlords and to gain more accurate results. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2523, at 5, 7-8 (June 15, 2004).
\textsuperscript{43} Id. at 2.
\textsuperscript{44} See CAL. HEALTH & SAFETY CODE § 11571.1(f)(1) (West Supp. 2009); SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 706, at 3 (Apr. 17, 2007).
\textsuperscript{45} SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 706, at 6 (Apr. 17, 2007).
\textsuperscript{47} Id.
\textsuperscript{48} CAL. CIV. CODE § 3485(f), (h) (amended by Chapter 244).
provisions and standards. However, the specified offenses that triggered AB 1013 involved firearms. Participating counties were required to submit reporting data to the Judicial Council at the same time that they submitted data on the controlled substance pilot program.

### III. CHAPTER 244

Chapter 244 extends the sunset date for the programs that allow unlawful detainer actions to be filed in response to controlled substance and firearms offenses to January 1, 2014, and allows courts with jurisdiction over real property in the City of Sacramento to participate in the controlled substances program. For the program that allows for unlawful detainer actions to be filed in response to controlled substance violations, courts with jurisdiction over real property in the City of Los Angeles are exempt from the sunset date, provided that the City regularly reports to the Judicial Council until 2014. Chapter 244 provides for additional technical changes. Notable changes require that notice be provided in fourteen-point font and in five languages and that information be provided to the tenant and the landlord about requesting partial evictions.

Chapter 244 requires that every city attorney and prosecutor who participates in the programs report specific data to the California Research Bureau on or before January 20th of each year. The reporting requirements were modified to allow for better evaluations of each program’s effectiveness. Chapter 244 directs the California Research Bureau to use this information to compile a report evaluating the merits of the pilot programs. The Bureau must then submit its report to both the Senate and Assembly Committees on Judiciary on or before

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50. CAL. CIV. CODE § 3485(a) (West 2007). Specified offenses that are the basis for an unlawful detainer action include the “illegal manufacture, causing to be manufactured, importation, possession, possession for sale, sale, furnishing, or giving away” of any firearm, ammunition for a firearm, assault weapon, .50 BMG rifle, or tear gas. Id. § 3485(c).
51. Id. § 3485(g)(2).
52. Id. § 3485(h) (amended by Chapter 244).
53. Id. § 3485(f)(4) (amended by Chapter 244); id. § 3486(f)(4) (enacted by Chapter 244).
54. Id. § 3486(g) (enacted by Chapter 244).
55. Id. § 3485(a)(1)(C) (amended by Chapter 244); id. § 3486(a)(1)(C) (enacted by Chapter 244).
56. CAL. CIV. CODE § 3485(a)(1)(C) (amended by Chapter 244); id. § 3486(a)(1)(C) (enacted by Chapter 244).
57. Id. § 3485(g) (amended by Chapter 244); id. § 3486(g) (enacted by Chapter 244). Reporting data previously went to the Judicial Council. See ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 530, at 3-4 (Apr. 21, 2009).
58. ASSEMBLY COMMITTEE ON JUDICIARY, ANALYSIS OF AB 530, at 6 (Apr. 21, 2009).
59. CAL. CIV. CODE § 3485(g)(2)(B) (amended by Chapter 244); id. § 3486(g)(2)(B) (enacted by Chapter 244).
March 20, 2011, and March 20, 2013. 60 Finally, Chapter 244 makes technical changes regarding implementation of the programs. 61

IV. ANALYSIS

Chapter 244 allows both programs to run for sixteen years. 62 The programs have been modified to better gauge their effectiveness. 63 Although there are concerns over the social implications of these programs, 64 the prescribed procedures should effectively evaluate whether these concerns are legitimate. 65

A. Expanding and Continuing the Pilot Programs

Chapter 244 gives local governments another tool to combat gang violence by extending the sunset date on the unlawful detainer programs for controlled substances and firearms until 2014. 66 However, the effectiveness of these programs ultimately depends on how much they are used. 67 Previous reports noted that cities authorized to use these programs have either elected not to do so or are unaware of their ability to participate. 68 However, anecdotal evidence shows that the programs are effective when properly used. 69

Sacramento is a “compelling example” of the effectiveness of the firearms program. 70 Two of the four unlawful detainer actions brought by Sacramento involved crime families living in the same apartment complex. 71 “Shortly after the eviction of one of the families was commenced, a member of the other family

60. CAL. CIV. CODE § 3485(g) (amended by Chapter 244); id. § 3486(g) (enacted by Chapter 244).
61. See CAL. CODE CIV. PROC. § 1161 (amended by Chapter 244) (detailing new procedures for implementing the programs).
62. See infra Part IV.A.
63. ASSEMBLY COMMITTEE ON JUDICIARY, ANALYSIS OF AB 530, at 5 (Apr. 21, 2009).
64. See Bryan M. Seiler, Note, Moving from “Broken Windows” to Healthy Neighborhood Policy: Reforming Urban Nuisance Law in Public and Private Sectors, 92 MINN. L. REV. 883 (2008) (noting two main concerns of programs similar to Chapter 244 are whether they have an impact on the target behavior as opposed to just dispersing residents and whether they have a disparate impact on minorities).
65. See, e.g., id. (proposing statutory reforms to public nuisance statutes mirroring those enacted by Chapter 244).
66. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 530, at 1-2 (June 16, 2009).
67. See JUD. COUNCIL OF CAL., UNLAWFUL DETAINER PILOT PROGRAM: REPORT TO THE CALIFORNIA LEGISLATURE UNDER HEALTH AND SAFETY CODE SECTION 11571.1 AND CIVIL CODE SECTION 3485, at 12-14 (2009) (noting that data evaluating the effectiveness of the programs was limited). Several cities did not use the programs and therefore did not report statistics. Id. at 13-14. The cities that did use the programs reported them to be “a useful tool for combating gang activity in the neighborhoods.” Id. at 14.
68. Id. at 13.
69. See id. at 13-14 (“All representatives interviewed said that the statutes provided a useful tool for combating gang activity in the neighborhoods.”); Dominic Berbeo, 196 Evicted Under Program: Police, Landlords Force Drug Dealers Out, L.A. DAILY NEWS, Oct. 29, 1999, at News (detailing the use of the program to clean up a Los Angeles neighborhood).
70. JUD. COUNCIL OF CAL., supra note 67, at 14.
71. Id.
was murdered by a rival gang. The ability to swiftly evict both families resulted in an immediate and noticeable relief to the remaining tenants in the complex." Other city attorneys state that the programs are an effective tool to combat gang activity in neighborhoods.  

By re-codifying the programs into consecutive sections of the Civil Code, Chapter 244 should increase participation in the programs. Re-codification should also lead to an increase in the simultaneous use of both programs. Chapter 244 authorizes almost all of the cities that use one program to use the other. Since gang members often "use their residences for illegal drug activities and to stockpile illegal weapons and ammunition," Chapter 244 should help to dismantle these storehouses.

Additionally, Chapter 244 eliminates the sunset date for the City of Los Angeles’s controlled substances program, provided that it continues to report information until 2014. Los Angeles has participated in the program for over ten years. Even the Western Center on Law and Poverty, a group opposed to Chapter 244 as introduced, was “complimentary” about Los Angeles’s implementation of the program and did not object to exemption from the sunset date.

B. Protecting the Innocent

Chapter 244 continues to provide needed relief for landowners and property managers “who are intimidated by tenants engaged in crimes that involve illegal possession of weapons or ammunition on the rental property.” By allowing city
attorneys and prosecutors to “step into the shoes” of frightened landlords, Chapter 244 prevents landlords from “becoming the target of retaliation by the evicted tenant.”

Initially, opponents of the original version of Chapter 244 voiced concerns over the protection of innocent tenants. However, as enacted, Chapter 244 addresses these concerns by requiring that initial notice be given to landlords and tenants in a larger type font and in five different languages. Chapter 244 continues to protect innocent tenants by allowing partial evictions and also gives instructions on how a tenant may request a partial eviction order from the court.

C. Evaluating the Programs’ Effectiveness

Chapter 244 transfers the responsibility of receiving reporting data from the Judicial Council to the California Research Bureau (CRB). The transfer was based on the possibility that the CRB is better able to analyze the data and report on the programs’ effectiveness. Chapter 244 mandates that additional data relating to the demographics of individuals prosecuted under the programs be reported. Hopefully, the data will lead to better evaluations. Although exempt

Assembly Jud. Comm. (Apr. 15, 2009) (on file with the McGeorge Law Review) (stating that Chapter 244 provides “welcome relief to rental property managers of residential properties who are intimidated by tenants engaged in crimes that involve illegal possession of weapons or ammunition on the rental property”); Letter from Monica Guillen, V.P. of Pub. Affairs, Cal. Apartment Ass’n, to Paul Krekorian, Assembly Member, Cal. State Assembly (Mar. 25, 2009) (on file with the McGeorge Law Review) (stating that Chapter 244 helps rental property owners keep the communities they rent safe by allowing city prosecutors and attorneys to evict those tenants guilty of unlawful firearm and ammunition possession).

82. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 530, at 5 (Apr. 21, 2009).
83. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 530, at 6 (June 16, 2009).
84. Id. at 4, 6. The languages are specified in CAL. CIV. CODE § 1632(a) (West 2009).
85. Prior law provided that only the court and the city attorney or prosecutor could initiate a partial eviction proceeding. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 530, at 6 (June 16, 2009). Prior law created a situation where, for example, a grandparent who was unaware of partial eviction procedures was evicted because of a grandchild’s drug or weapon related offense. Id. Chapter 244 gives notice that innocent tenants should contact the city attorney or prosecutor, or a legal assistance provider, if they want to request that only the guilty tenant be evicted. Id. at 6-7.
86. CAL. CIV. CODE § 3485(g)(2)(A) (amended by Chapter 244); id. § 3486(g)(1) (enacted by Chapter 244).
87. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 530, at 6 (Apr. 21, 2009).
88. CAL. CIV. CODE § 3485(g) (amended by Chapter 244); id. § 3486(g) (enacted by Chapter 244).
89. See CAL. CIV. CODE § 3485(g) (amended by Chapter 244) (listing the demographic reporting requirements under the firearms unlawful detainer program); id. § 3486(g) (enacted by Chapter 244) (listing the reporting requirements under the controlled substances unlawful detainer program). The additional data requirements include:
The name and age, as provided by the landlord, of each person residing at the noticed address. . . . Whether the person has previously received a notice pursuant to [the relevant eviction program] from the reporting city attorney or prosecutor, and if so, whether the tenant vacated or was evicted as a result. . . . For the tenant receiving the notice, whether the tenant receiving the notice has previously been arrested (other than the arrest that is the basis of [the current] notice) for any of the offenses specified [under the relevant eviction section]. . . . For each case in which a notice was issued and the tenants either vacated the premises before a judgment in the unlawful detainer action.
from the sunset date for the controlled substances program, the City of Los Angeles is still required to provide data to the CRB. The exemption from the sunset date is contingent on the continued reporting of data to the CRB.

D. National Comparison of Similar Programs

Allowing the public to bring unlawful detainer actions against problem tenants for drug and firearms violations is not a novel concept. Many state and local governments are using these actions to tackle problem properties and urban blight. Some of the more hard-line statutes have not escaped judicial scrutiny because of Due Process concerns and alleged violations of the Fifth Amendment’s Takings Clause. However, other statutes have been upheld, although still criticized for their implications.

E. Due Process Concerns

“Publicly brought” evictions implicate the Due Process rights of tenants and defendant landlords. In most major cities, the process for beginning a drug or firearm eviction procedure is two-fold: there must be public complaints relating to drug and firearms violations by the tenants, and the public office in charge of reviewing complaints must assess the situation to determine if there is a basis for an eviction proceeding. Nonetheless, concerns arise over what constitutes a sufficient basis to initiate eviction proceedings. Additionally, there are concerns over whether this process is being used to circumvent the due process requirements inherent in criminal law. The eviction requirements “incorporate the criminal law directly but do not address the different burdens of proof and procedural protections of criminal statutes.”

or were evicted, the street address, city, and ZIP Code of residence where the tenants relocated, to the extent known.

Id. § 3485(g) (amended by Chapter 244); id. § 3486(g) (enacted by Chapter 244).

90. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 530, at 8 (June 16, 2009).

91. Id.

92. See Seiler, supra note 64, at 883-84 (noting that a family’s experience with an unlawful detainer proceeding was “hardly unique”).

93. Id. at 884.

94. See id. at 895-906 (discussing the issues raised when public actors prosecute nuisance violations in civil courts and how courts have responded to these actions).

95. Id.

96. See id. at 900-02.

97. Id. at 896.

98. See infra notes 101-103 and accompanying text.

99. Seiler, supra note 64, at 899.

100. Id.
A California Court of Appeal struck down one such statute by the City of Buena Park, because the statute did not require an actual arrest report or documentation of offenses to initiate an eviction proceeding. While the court in that case did not express an opinion on the constitutionality of the pilot programs, it noted that the programs contained considerably more Due Process protections than the local ordinance programs. To support that contention, the court cited to the pilot programs’ requirement that initial notice contain actual arrest reports and documentation of offenses sufficiently-specific to aid in eviction proceedings.

Chapter 244 provides the same Due Process protections to landlords. In *Cook v. City of Buena Park*, the local ordinance required the landlord to bring a successful eviction action and pay a fine if an eviction did not occur. In contrast, Chapter 244 allows a city to collect fines from landlords in the event that the landlords are named as defendants because of refusals to bring their own actions against problem tenants.

### F. Social Criticisms

The two main concerns about programs like those extended by Chapter 244 are whether they have an impact on the targeted behavior as opposed to just dispersing residents and whether they have a disparate impact on minorities. However, Chapter 244 has the potential to alleviate these concerns with empirical evidence.

A concern about programs similar to those extended by Chapter 244 is that, rather than decreasing the regulated behavior, they merely disperse the problem. This concern is hard to resolve because of the lack of conclusive empirical data due to the “difficulty in tracking individuals” who are displaced. However, Chapter 244 has the potential to allow collection of this much needed empirical data. Those cities employing the eviction programs are required to...

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102. *Id.* at 7-8, 23 Cal. Rptr. 3d 704-06.
103. *Id.*
104. *Id.*
105. *Id.* at 8-9, 23 Cal. Rptr. 3d 705-06.
106. *Id.* at 7-8, 23 Cal. Rptr. 3d at 705. Furthermore, the amount of recovery against the landlord for failing to bring an eviction action is limited to a maximum figure of $600. *Cal. Civ. Code* § 3485(a)(1)(E) (amended by Chapter 244); *id.* § 3486(a)(1)(E) (enacted by Chapter 244).
108. *Id.*
109. *See* ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 530, at 7 (Apr. 21, 2009) (discussing the addition of new data items to the reporting requirements).
111. *Id.* at 904.
112. *Cal. Civ. Code* § 3485(g) (amended by Chapter 244) (requiring participating cites to report certain data not previously required); *id.* § 3486(g) (enacted by Chapter 244) (same).
keep data on individuals who are evicted or voluntarily leave as a result of proceedings initiated against them.\textsuperscript{113} The data on these individuals includes information on where they relocate and whether they were part of prior eviction proceedings under the pilot programs.\textsuperscript{114} Although this will provide additional empirical research on the effectiveness of the programs, the research could be furthered by monitoring the recidivism rates of those previously evicted.

Programs like Chapter 244 are also accused of having a disparate impact on racial minorities.\textsuperscript{115} Some scholars argue that even if this assertion is true, the programs “do[] not indicate a discriminatory purpose.”\textsuperscript{116} Rather, “the prosecution of criminals need not be racially balanced if the offenders are concentrated in racial groups.”\textsuperscript{117} Regardless of this view, concern for disparate impact on minorities arises out of the concept that eviction proceedings are used to circumvent the criminal law and attack an ethnic group that is typically economically disadvantaged.\textsuperscript{118} Chapter 244 addresses this concern, because the program has several Due Process protections and requires information about places that provide free legal aid to be provided to individuals subject to eviction.\textsuperscript{119}

V. CONCLUSION

Chapter 244 reauthorizes two existing pilot programs for evictions based on firearm and drug violations.\textsuperscript{120} Chapter 244 re-codifies the programs into consecutive sections of the Civil Code and notifies cities authorized to participate in the programs of their eligibility.\textsuperscript{121} The CRB will take additional data from participating cities in order to evaluate the effectiveness of the programs.\textsuperscript{122} However, whether the additional information will provide more than anecdotal evidence as to the programs’ effectiveness remains to be seen.

\begin{thebibliography}{99}
\bibitem{113} CAL. CIV. CODE § 3485(g)(1)(J) (amended by Chapter 244); \textit{id.} § 3486(g)(1)(J) (enacted by Chapter 244).
\bibitem{114} \textit{id.} § 3485(g)(1)(K) (amended by Chapter 244); \textit{id.} § 3486(g)(1)(K) (enacted by Chapter 244).
\bibitem{115} Seiler, \textit{supra} note 64, at 904.
\bibitem{116} \textit{id.} at 905.
\bibitem{117} \textit{id.}
\bibitem{118} \textit{See id.} (discussing the implications of eviction proceedings on poor minorities).
\bibitem{119} \textit{Supra} Part IV.E (outlining the Due Process protections of Chapter 244).
\bibitem{120} \textsc{Assembly Committee on Judiciary, Committee Analysis of AB 530, at 1-2 (Apr. 21, 2009).}
\bibitem{121} \textit{See McNamara Letter, supra note 74; supra note 74 and accompanying text.}
\bibitem{122} \textsc{Assembly Committee on Judiciary, Committee Analysis of AB 530, at 6 (Apr. 21, 2009).}
\end{thebibliography}

Michael F. Hearn

Code Sections Affected
Civil Code §§ 2923.52, 2923.53, 2923.54, 2923.55, 2924 (new); § 2924 (amended).
SBX2 7 (Corbett); 2009 STAT. Ch. 4.

I. INTRODUCTION

In 1997, Dennis and Grace Chavez bought a home in the Santa Cruz Mountains. They both had jobs and could afford the payments on their ten-year adjustable-rate mortgage (ARM). Their plan, like so many others’ entering into ARMs at the time, was to eventually use their home equity to refinance into a fixed rate mortgage before their loan adjusted and payments increased.

The Chavez’s plan appeared on track until they were both diagnosed with cancer within a four-year period. To receive treatment, both had to quit working. Due to their growing medical bills and reduced income, they relied on credit cards and borrowed against their home equity to pay their bills. As their debt continued to mount, it became increasingly difficult for the Chavezes to make their payments.

After more than six months of treatment for lymphoma, Dennis Chavez returned to his manufacturing job. Grace Chavez, following a year of treatment for sarcoma, returned to work as a teacher. Together, their household income was nearly $90,000, but they could not afford more than the minimum mortgage

2. Id.; see also Bd. of Governors for the Fed. Reserve System, Interest-Only Mortgage Payments and Payment-Option ARMs—Are They For You?, Oct. 2006, at 12, http://www.fdic.gov/consumers/consumer/interest-only/mortgage_interestonly.pdf (on file with the McGeorge Law Review). An adjustable-rate mortgage (ARM) is “[a] mortgage that does not have a fixed interest rate. The rate changes during the life of the loan in line with movements in an index rate, such as the rate for Treasury securities or the Cost of Funds Index.” Id.
3. McAllister, supra note 1; see also David Streitfeld, They’re in—But Not Home Free, L.A. TIMES, Apr. 3, 2005, at A1 (reporting that many homeowners used refinancing based on increased home values to get out of risky loans).
4. Id.
5. Id.
7. McAllister, supra note 1.
8. Id.
9. Id.
payment. As a result, “the principle balance on their first mortgage [was] growing” at a faster rate than they could pay each month.

In 2007, seeking decreased payments to avoid default and potential foreclosure, the Chavezes contacted lenders to refinance or modify their loan at a lower interest rate. Mr. Chavez’s initial calls were repeatedly transferred and often dropped, and when he finally spoke to the lender, he was told that “they had no programs to deal with that type of thing.”

Fortunately for the Chavezes, their lender eventually offered them a fixed-rate loan at 7.6 percent on their first mortgage and allowed for negative amortization payments. Although their home equity line of credit could not be modified, the lender permitted the Chavezes to skip a payment and have it added to the end of their loan.

Unfortunately, for many homeowners struggling to make mortgage payments, loan modification has not been a viable option. According to a 2007 study, at the beginning of the current foreclosure crisis, foreclosure was the most common outcome for a borrower unable to make payments, followed by short sales. In contrast, loan modification was rarely used and often did not address long-term affordability. In part, this is because lenders could earn more from the sale of the home than from modifying the existing loan.

Since 2007, the number of households facing foreclosure has multiplied, along with a corresponding need for loan modification. Housing prices have been rapidly falling and many borrowers who purchased homes in the past several years are finding themselves owing more on their home than it is worth. Without equity,

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10. Id.
11. Id.
12. Id.
14. Id.; see also Bd. of Governors for the Fed. Reserve System, supra note 2, at 14. Negative amortization “[o]ccurs when the monthly payments do not cover all the interest owed. The interest that is not paid in the monthly payment is added to the loan balance. This means that even after making many payments, you could owe more than you did at the beginning of the loan.” Id.
15. McAllister, supra note 1.
17. Id. at 3.
18. Id. at 2-3.
21. The median housing price peaked in 2007 at $560,300, declined to $346,400 in 2008, and was expected to be $248,000 in 2009. CAL. ASS’N OF REALTORS, 2009 HOUSING MARKET FORECAST,
these borrowers often lack the ability to refinance their mortgages, leaving those with ARMs to face increases in their monthly mortgage payments.\textsuperscript{22} At the same time, these households cannot afford their mortgage payments, primarily due to the down economy and high unemployment rate.\textsuperscript{23} Unlike years prior, lenders are also apt to lose money through foreclosure because homes are selling for less than the value of the loans.\textsuperscript{24} As a result, loan modification is often the only remaining option for a borrower to keep his or her home, and it is the best option for a lender to recover as much of its loan balance as possible.\textsuperscript{25}

In response, the Governor and the Legislature have attempted to craft agreements and legislation that promote the creation of loan modification programs that support long-term affordability.\textsuperscript{26} The Legislature’s most recent effort is Chapter 4, the California Foreclosure Prevention Act of 2009 (the Act), which establishes loan modification program standards and delays the foreclosure process to provide more time for homeowners in default to secure loan modifications.\textsuperscript{27}

\section*{II. LEGAL BACKGROUND}

\subsection*{A. California’s Foreclosure Crisis}

The United States is amidst one of the worst economic downturns it has experienced in decades.\textsuperscript{28} One of the areas hardest hit by the recession is residential

\begin{itemize}
  \item \textsuperscript{22} See U.S. Dep’t of the Treasury, Making Home Affordable: Updated Detailed Program Description, Mar. 4, 2009, at 2, http://www.ustreas.gov/press/releases/reports/housing_fact_sheet.pdf [hereinafter Making Home Affordable] (on file with the \textit{McGeorge Law Review}) (noting that refinancing “generally requ[i]res the borrower to have twenty percent in home equity”).
  \item \textsuperscript{23} See \textit{Levy}, supra note 20 (discussing the economic downturn and increasing unemployment rate).
  \item \textsuperscript{26} Press Release, Office of the Governor, Gov. Schwarzenegger Works with Lenders to Help Homeowners Avoid Foreclosure (Nov. 20, 2007), http://gov.ca.gov/press-release/8147/ (on file with the \textit{McGeorge Law Review}); see also 2008 Cal. Stat. ch. 69 (adding a thirty-day delay to the foreclosure process and requiring lenders to assist borrowers in default to avoid foreclosure).
  \item \textsuperscript{27} See Carolyn Said, \textit{State Prods Banks to Aid Borrowers}, S.F. CHRON., June 16, 2009, at C1 (quoting Assembly Member Ted Lieu, a co-author of the bill).
\end{itemize}
real estate, where values have been falling precipitously from what had been all-time high.

Borrowers who purchased homes during the real estate “boom” preceding the recession are increasingly finding themselves owing more on their properties than the properties are worth—or finding themselves “upside down” on their home loans. At the same time, the ability of borrowers to afford loan payments is decreasing, given increased unemployment and decreased sources of lending. This has resulted in an increased number of loans in default and a sharp rise in the number of foreclosures.

California led the nation during the housing boom, with a median house price of $560,300 in 2007, more than double the national average. Despite high price tags, the percentage of Californians who own homes also increased over the past decade with assistance from relaxed and creative lending policies, including subprime mortgages, Alternative A-paper mortgages, and Option ARMs.

As a result, California now leads the nation in the housing bust, as reflected in sharply decreasing values and high foreclosure rates. The median price of a California home declined by 38.2 percent between 2007 and 2008 and is

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34. Streitfeld, supra note 3.

Confronted with soaring home prices, Californians are adopting a “buy now, pay later” strategy on a massive scale. The boom in interest-only loans—nearly half the state’s home buyers used them last year, up from virtually none in 2001—is the engine behind California’s surging home prices. But all that borrowed money might be living on borrowed time. When higher bills start coming due . . . hundreds of thousands of other homeowners in the state will have to find ways to cope—or will have to sell.

Id.; see also Danielle Bonk, The ARM Crisis: A Pending Mortgage Meltdown, http://www.personalhome loanmortgages.com/articles_adjustable-rate-mortgage-bubble-about-to-burst.asp (last visited Feb. 16, 2010) (on file with the McGeorge Law Review) (explaining the differences between and allure of subprime mortgages, which were often provided to those who did not qualify for conventional mortgages due to poor credit scores; Alternative A-paper mortgages, which did account for credit scores, but required less paperwork than prime mortgages; and Option ARMs, which were provided to upper-tier homebuyers at temporarily low “teaser” interest rates that increased over time).

35. Levy, supra note 20 (“U.S. foreclosure filings exceeded 250,000 for the 10th straight month in January [2009] . . . and payrolls plunged by 598,000, pushing the unemployment rate to the highest since 1992 . . .”).
expected to continue to decline.36 As of January 2009, “California had the second-highest state foreclosure rate” in the country, with one in every 173 homes receiving a filing.37 Furthermore, California is home to “six of the [country’s] top ten metropolitan areas with the highest foreclosure rates.”38

Residential foreclosures also have an economic and social ripple effect that extends beyond families to local communities and the state.39 Families that lose their homes to foreclosure are forced to move, have damaged credit scores, and are under tremendous stress.40 The surrounding neighborhoods suffer decreased property values due to the resulting vacant properties and bank-owned sales at prices often below equivalent non-foreclosed homes.41 The community and state also lose the property tax revenues that they depend on to provide services.42 The statewide implications of the foreclosure crisis have prompted the Legislature to take statewide action.

B. California Foreclosure Law Before the Act

Prior to 2008, California law governing non-judicial foreclosure was focused primarily on ensuring notice to those in default.43 State law required entities foreclosing on a residential property to record a notice of default and allow three months before setting a date of sale.44 The notice of sale had to be made at least twenty days prior to the date of sale and was required to be made available in

36. See CAL. ASS’N OF REALTORS, supra note 21 (predicting a 28.4% decrease in single-family home sales in 2009).
37. SENATE FLOOR, BILL ANALYSIS OF SBX2 7, at 9 (Feb. 14, 2009).
38. Id.
42. Consumer Home Mortgage Information, supra note 39 (forecasting that California’s cities will lose $4 billion in property, sales, and transfer taxes in 2008 alone due to the drop in property values).
43. CAL. CIV. CODE § 2924 (West 2009). Non-judicial foreclosure occurs when, “according to the mortgage instrument and a state statute, the mortgaged property is sold at a nonjudicial public sale by a public official, the mortgagee, or a trustee, without the stringent notice requirements, procedural burdens, or delays of a judicial foreclosure.” BLACK’S LAW DICTIONARY 658 (7th ed. 1999).
44. CAL. CIV. CODE § 2924(a)(1)-(2) (West 2009).
several languages. As a result, the foreclosure timeline was 116 days from delinquency to sale.

In 2008, the Legislature took its first steps to slow the number of mounting foreclosures by enacting SB 1137. This bill added requirements for residential home loans made between January 1, 2003, and December 31, 2007. It required loan servicers to provide additional information and support to assist borrowers facing foreclosure. These requirements are set to sunset in January 2013. Senate Bill 1137 also provided for a thirty-day delay in the foreclosure process. As a result, the statutory timeline from delinquency to foreclosure sale was extended to 146 days.

C. Foreclosure Timelines in Other States

The foreclosure timelines of other states vary widely. Prior to the Act, Maine was home to the longest period in the country at 209 days. In contrast, Tennessee gives borrowers in default the shortest period at thirty-three days. The national average of a statutorily required foreclosure timeline is estimated at 120 days.

According to a 2008 Freddie Mac study on foreclosures, the actual amount of time for a foreclosure is significantly longer than that which is statutorily required. The study estimated that it took 266 days for the entire California
foreclosure process. The California State Senate Budget and Finance Committee analysis estimated this average to be significantly lower, “around 150 to 180 days.” To promote loan modification, the Act requires at least 236 days between default and foreclosure sale on qualifying loans.

III. CHAPTER 4

The Legislature passed and the Governor signed Chapter 4, known as the California Foreclosure Prevention Act of 2009, as an effort to stem the increase in residential foreclosures in California during the recent economic downturn. Specifically, the Act delays the foreclosure process by an additional ninety days, with the expectation that it will allow borrowers in default “to pursue a loan modification to prevent foreclosure.” Administrative regulations implementing Chapter 4 were added to the California Code of Regulations on June 1, 2009. Most provisions of the Act are scheduled to sunset on January 1, 2011.

The Act targets borrowers who defaulted on a first loan on a primary residence that was recorded between January 1, 2003, and January 1, 2008. However, the Act does not apply to a borrower who has already surrendered his or her property, claimed bankruptcy, or contracted with a firm “whose primary business is advising people who have decided to leave their homes regarding how to extend the foreclosure process and avoid their contractual obligations to mortgagees or beneficiaries.”

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59. SENATE FLOOR, BILL ANALYSIS OF SBX2 7, at 10 (Feb. 14, 2009).
60. Id. at 1, 9 (adding 90 days to the existing 146-day foreclosure period “to allow parties to pursue a loan modification to prevent foreclosure”).
61. Id. at 8-9.
62. CAL. CIV. CODE § 2924(a)(2) (amended by Chapter 4).
63. SENATE FLOOR, BILL ANALYSIS OF SBX2 7, at 1 (Feb. 14, 2009); see also CAL. CIV. CODE § 2923.53(a) (amended by Chapter 4).
65. CAL. CIV. CODE § 2923.52(e) (amended by Chapter 4).
66. Id. § 2923.52(a) (amended by Chapter 4).
67. Id. § 2923.55(a) (amended by Chapter 4).
68. Id. § 2923.55(c) (amended by Chapter 4).
69. Id. § 2923.55(b) (amended by Chapter 4); see also David Gibbs, California Foreclosure Prevention Act of 2009, KNOL, July 3, 2009, http://knol.google.com/k/david-gibbs/california-foreclosure-prevention-
The Act does not apply to all loan servicers.70 A mortgage loan servicer may receive an order of exemption from the State if it has a comprehensive loan modification program or is awaiting a final decision on its application for exemption.71 In addition, loans made, purchased, serviced, or used as collateral for securities purchased by the State of California or a local public housing agency or authority are also exempt.72

For those mortgage loan servicers that are not exempt, a violation of the Act is treated as a violation of the license law.73 However, a loan servicer’s non-compliance with the Act is not considered a violation if compliance would have required a violation of its contractual agreement for an investor-owned loan.74 Loan modification is also not required when the borrower “is not willing or able to pay under the modification.”75

To track the Act’s implementation and impact, the Secretary of the Business, Transportation and Housing Agency is required to report to the Legislature on a regular basis regarding the Agency’s actions and the number of applications received.76 The Act also includes provisions requiring that this data and the identity of exempted loan servicers be made public.77

IV. ANALYSIS

Despite the urgency with which the Legislature ushered the Act into existence,78 there remains much skepticism that it will deliver on its intended

70. See CAL. CIV. CODE § 2923.53(a) (amended by Chapter 4) (providing that the Act only applies to loan servicers who have “implemented a comprehensive loan modification program that meets the requirements” of the Act).
71. Id. § 2923.53(b)(1) (amended by Chapter 4). To receive an exemption, the comprehensive loan modification program must: (1) intend to keep borrowers in homes when their anticipated recovery under the program exceeds the anticipated recovery through the foreclosure process; (2) target a ratio of the borrower’s housing-related debt to gross income of thirty-eight percent or less; and (3) provide a combination of several features, including interest rate reductions, extension of amortization period, deferral or reduction of principal amount, and other factors determined by the commissioner. Id. § 2923.53(a) (amended by Chapter 4).
72. Id. § 2923.52(c) (amended by Chapter 4).
73. Id. § 2923.53(h) (amended by Chapter 4); CAL. FIN. CODE § 50130(a) (West 1999) (requiring a mortgage loan servicer to obtain a license in order to service loans in the state).
74. CAL. CIV. CODE § 2923.53(i) (amended by Chapter 4).
75. Id.
76. SENATE FLOOR, BILL ANALYSIS OF SBX2 7, at 4 (Feb. 14, 2009) (noting that the Secretary of the Business, Transportation and Housing Agency must report three months and six months after the program begins and then every six months thereafter).
77. CAL. CIV. CODE § 2923.52(f) (amended by Chapter 4).
78. See Current Bill Status of SBX2 7, http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0001-0050/sbx2_7_bill_20090220_history.html (last visited Feb. 16, 2010) (on file with the McGeorge Law Review) (reporting that the legislation was introduced on Feb. 11, 2009, was passed by the California State Senate on Feb. 14, 2009, was passed by the California State Assembly on Feb. 15, 2009, and was approved by the
goal.79 After all, “[t]here is no guarantee in the law or anywhere else that anybody is going to get a loan modification.”80 This section explores the Act’s provisions in more detail to distinguish its actual potential from its political promises.

A. Postponing Foreclosure

It remains uncertain whether extending the foreclosure process by ninety days will prevent foreclosures.81 There is little data to suggest that the extension of a foreclosure period, which was tried at least as far back as the 1890s and as recently as SB 1137 in 2008, actually reduces foreclosures over the long-term.82 SB 1137’s thirty-day extension resulted in a sharp decrease in the number of foreclosures; however, the trend of foreclosures resumed immediately upon the expiration of the extension.83 Some predict this Act will produce the same result.84 Currently, there is no data available to track the number of foreclosures averted due to loan modifications that would have occurred without the Act’s time extension.85

Even if it was known that an extension of the foreclosure period was beneficial, the actual impact of the ninety-day statutory extension is not clear.86 As noted above, a 2008 Freddie Mac study of actual foreclosure periods estimated that the average length of a foreclosure in California is 266 days.87

79. See Mary Kane, A False Fix for the Mortgage Crisis, WASH. INDEP., Nov. 11, 2008 (on file with the McGeorge Law Review) (questioning the effectiveness of foreclosure moratoriums, which were ineffective when introduced in the 1890s and when used during the Great Depression); Mortgage Bankers Ass’n, Mandatory Foreclosure Moratorium Has Severe Implications for Borrowers and Industry, at 1, Jan. 23, 2009, http://www.mbaa.org/files/AU/IssueBriefs/ForeclosureMoratoriumIssueBrief.pdf (on file with the McGeorge Law Review) (contending that delaying the foreclosure process will cause more harm than good).
80. See Said, supra note 27 (quoting the California Department of Corporations’ spokesperson, Mark Leyes).
81. See Kane, supra note 79 (“[T]here’s no solid evidence that moratoriums alone do much more than put off a foreclosure for a few months.”).
82. See id. (“[F]oreclosure freezes haven’t shown themselves to be much of a success since they first were called for in 1890.”).
84. Id.
85. See SENATE FLOOR, BILL ANALYSIS OF SBX2 7, at 4 (Feb. 14, 2009) (noting that reports are required three and six months after the program starts and every six months thereafter).
86. Compare Cutts & Merrill, supra note 57, at app. tbl. A1 (estimating the foreclosure period under existing law in California to be 268 days), with SENATE FLOOR, BILL ANALYSIS OF SBX2 7, at 1, 9 (Feb. 14, 2009) (adding ninety days to the existing 146-day statutory foreclosure period, which only provides a foreclosure period of 236 days).
Including the Act’s ninety-day extension, the statutorily required period is 236 days, 30 days less than preexisting estimates.\(^{88}\) In addition to providing defaulting borrowers time to seek loan modification, the ninety-day extension may help slow down foreclosure in other ways. For example, the extra time may allow those in default due to job loss to find employment and improve their financial positions.\(^{89}\) However, since the passage of the Act in February 2009, employment opportunities have decreased.\(^{90}\) In fact, “[t]he average length of official unemployment increased to 24.5 weeks, the longest since government began tracking this data in 1948.”\(^{91}\)

Critics of the Act believe that the ninety-day delay only serves to delay many inevitable foreclosures.\(^{92}\) In fact, some are concerned that postponement of foreclosures may do more harm than good.\(^{93}\) First, by artificially manipulating the market, the Act may prevent the housing market from making a sorely needed self-adjustment.\(^{94}\) Second, the ninety-day period allows defaulting homeowners the ability to avoid payments for three additional months before leaving their homes.\(^{95}\) These delays place more strain on the servicers that need to cover missed payments.\(^{96}\)

**B. Exempting Many Loans from Extension**

The Act provides many mortgage loan servicers the opportunity to be exempted from the ninety-day extension.\(^{97}\) Specifically, this exemption is provided to loan servicers that have comprehensive loan modification programs or are awaiting final decisions on their applications for exemption.\(^{98}\)

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88. SENATE FLOOR, BILL ANALYSIS OF SBX2 7, at 9-10 (Feb. 14, 2009).
90. See Mortimer Zuckerman, The Economy Is Even Worse than You Think, WALL ST. J., July 14, 2009, at A13 (“The cumulative job losses over the last six months have been greater than for any other half year period since World War II . . . .”)
91. Id.
92. Mortgage Bankers Ass’n, supra note 79.
94. Id.; see also MyBudget360.com, supra note 83 (arguing that foreclosures will allow the market to “bottom out” on its own).
95. Mortgage Bankers Ass’n, supra note 79.
96. Id.
97. SENATE FLOOR, BILL ANALYSIS OF SBX2 7, at 1-2 (Feb. 14, 2009).
98. See supra notes 70-71 and accompanying text.
As of September 16, 2009, more than fifty loan servicers have applied for and received exemptions. Among the companies qualifying for the exemption are the largest mortgage loan servicers in the United States, including Bank of America, Wells Fargo, Chase, and Citimortgage. Consequently, it is likely that many of the mortgage loans held by Californians will not be eligible for the ninety-day extension.

The Act’s skeptics see these exemptions as a sign that the Act is too loan-servicer-friendly and will have little impact. Stoking these concerns is the fact that several loan servicers received exemptions within twenty-four hours of submitting their applications and within twenty-four hours of the enactment of the law.

In response, proponents of the exemption can point to the fact that the exemption is conditional upon the loan servicer establishing a loan modification program meeting the requirements of the Act. As a result, while the exemption may not delay the foreclosure process for homeowners who work with exempted loan servicers, it will ensure that a loan modification program is in place. Given the significant number of exemptions, it is likely that the Act’s ultimate impact will largely be determined by loan servicers’ comprehensive loan modification programs.

C. Creating New Unsustainable Loans

To avoid the ninety-day delay in the foreclosure process, the Act requires that the servicer implement a comprehensive loan modification program. For a program to qualify, it must contain a combination of characteristics, which include: “[a]n interest rate reduction . . . for a fixed term” of at least five years; “[a]n extension of the amortization period for the loan term” to no more than forty years; “[d]eferral of some portion of the principal amount of the unpaid

99. See Cal. Dep’t of Corporations, List of Licensees that Have Received an Exemption from Civil Code Section 2923.52(a), http://www.corp.ca.gov/FSD/CFP/pdf/ExemptList.pdf (last visited Feb. 16, 2010) [hereinafter List of Exempt Licensees] (on file with the McGeorge Law Review) (showing that only seven applications have been denied and two remain pending).


101. Compare National Mortgage News, supra note 100 (listing the top mortgage loan servicers in 2009), with List of Exempt Licensees, supra note 99 (listing most of the top-ten servicers from 2009 as exempt from the Act’s ninety-day delay requirement).

102. Gibbs, supra note 69 (questioning the expedited exemptions received by certain lenders).

103. Id.

104. CAL. CIV. CODE § 2923.53(a) (amended by Chapter 4).

105. See id. (requiring loan servicers to implement a loan modification program in order to receive an exemption from the Act’s ninety-day foreclosure delay).

106. Id.
balance until maturity of the loan”; “[r]eduction of principal”; and “[c]ompliance with the federally mandated loan modification program.”

However, there is no guarantee that the combinations adopted by servicers will result in sustainable new loans. In fact, many loan servicers already had qualifying modification programs in place prior to the Act. Because loan servicers are free to select the characteristics of their own programs, many programs combine temporary interest rate reductions with an extension of the loan amortization period. In contrast, few if any loan servicers have offered to decrease the principle of the loan, even though it is likely the most sustainable modification option.

Critics of the Act believe that loan modifications based on temporary interest rate decreases and extended amortization periods are just creating a second round of unsustainable mortgages. Temporary interest rate reductions are identical to the ARMs that make up many of the defaults experienced today. An extension of the amortization period allowing for the deferral of principal is identical to the negative amortization schemes of Option ARMs. Since these loan methods proved unsustainable the first time, critics are concerned that they will fail again, prolonging the foreclosure crisis.

Studies suggest that recent loan modifications have not been sustainable. According to one government study, more than four out of every ten homeowners who obtained loan modifications in 2008 quickly fell into trouble again. Another study found that rates of re-default are twice as high among those whose modifications left their mortgage payments unchanged or increased.

107. Id.
109. Id.
110. Id.
111. Id.
112. Id.
113. Id.
114. Id. (criticizing loan modifications for relying on the same unsustainable loan vehicles that initially created the foreclosure crisis).
115. Id.
116. See Kirk Haverkamp, Many Re-Default Following Mortgage Modification, MORTGAGELOAN.COM, Apr. 3, 2009, http://www.mortgageloan.com/many-redefault-following-mortgage-modification-3032 (on file with the McGeorge Law Review) (citing government figures showing that more than four out of ten homeowners obtaining loan modifications in 2008 quickly fell into trouble again); Alan Zibel, Homeowners in Financial Trouble Often Redefault, MIAMI HERALD, Sept. 30, 2009, available at http://www.miamiherald.com/business/5min/story/1260461.html (“About one in three borrowers whose monthly payments were reduced by 20 percent or more had fallen behind again within a year. That compares with more than 60 percent for borrowers whose loan payments were left unchanged or increased.”).
than those whose monthly payments decreased by twenty percent or more. To qualify for an exemption under the Act, there is no requirement that the loan modification reduce the monthly mortgage payment.

The Act does request that loan servicers “[t]arget[] a ratio of the borrower’s housing-related debt to borrower’s gross income of 38 percent or less.” However, this rate is significantly less stringent than the thirty-one-percent ratio of the federal Making Home Affordable program.

While wide-scale loan modifications may assist some homeowners, they also provide opportunities for abuse. “The information asymmetry often critiqued in the loan origination context is even worse in the loss mitigation process.”

Given the susceptibility of defaulting borrowers, there is an increased risk that servicers may earn unreasonable fees and compel the borrowers to include waiver-of-claims provisions into the contracts.

D. Contractual Obstacles to Modification

The Act contains a provision that exempts violations of the Act if compliance would “require a servicer to violate contractual agreements for investor-owned loans or provide a modification to a borrower who is not willing or able to pay under the modification.” This is significant, because a “large percentage of California mortgages [over the last decade] were securitized and sold to investors.” Therefore, the loan servicer’s ability to modify a loan may be limited to the terms of its contract with the investor. Unfortunately, some of these agreements prohibit loan modifications without the consent of the investor or junior lender, thereby leaving a needy borrower and willing servicer unable to act on their own.

118. Haverkamp, supra note 116.

119. CAL. CIV. CODE § 2923.53(a)(2) (enacted by Chapter 4).

120. See Temple, supra note 93 (stating that the federal Homeowner Affordability and Stability Plan seeks to lower payments to thirty-one percent of income); Making Home Affordable, supra note 22, at 4 (stating that the program will assist in reducing borrower debt-to-income ratios to thirty-one percent).


122. Id.

123. Id.

124. CAL. CIV. CODE § 2923.53(i) (enacted by Chapter 4).


126. CAL. CIV. CODE § 2923.53(i) (enacted by Chapter 4) (permitting non-compliance with the Act if compliance would require a violation of the loan servicer’s agreement with an investor); see also Lauren Spiegel, California’s New Foreclosure Prevention Act Signed into Law: Impact to Be Determined, Mar. 5, 2009, http://www.jdsupra.com/documents/f400fa50-fe5e-4956-a773-45a89546c98d.pdf (on file with the McGeorge Law Review) (noting that agreements with investors and junior lien holders can limit the loan servicer’s ability to modify a loan).

127. Spiegel, supra note 126 (”[I]n many instances, even if the servicer believes that a loan modification
V. CONCLUSION

In February 2009, the California Foreclosure Prevention Act was quickly ushered into existence to ameliorate the real and growing problem of home foreclosure.\textsuperscript{128} The recent foreclosure crisis has hit California particularly hard, and its long-lasting financial and social implications have been felt throughout families, communities, and municipalities.\textsuperscript{129}

Despite the good intentions of the Legislature, a review of the Act’s provisions raises questions concerning its ability to decrease foreclosures and help homeowners facing default.\textsuperscript{130} While the Act is likely to delay foreclosures, there remains no evidence that it will ultimately prevent foreclosures or result in loan modifications that are sustainable and would not have occurred otherwise.\textsuperscript{131}

Ultimately, time will tell whether the Act achieves its goal. Regulations implementing the Act went into effect on June 15, 2009, and the first report on its progress should be published soon.\textsuperscript{132} However, true success cannot be measured for several more years, at which point we will know whether loan modification makes owning a home affordable again or merely delays the inevitable.

\textsuperscript{128} See Current Bill Status of SBX2 7, http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0001-0050/sbx2_7_bill_20090225_status.html (last visited Mar. 19, 2010) (on file with the McGeorge Law Review) (reporting that the bill was introduced and signed into law within two weeks); SENATE FLOOR, BILL ANALYSIS OF SBX2 7, at 8-10 (Feb. 14, 2009) (explaining that the law is intended to help stop the foreclosure crisis).

\textsuperscript{129} SENATE FLOOR, BILL ANALYSIS OF SBX2 7, at 8-10 (Feb. 14, 2009); Consumer Home Mortgage Information, supra note 39; Hall, supra note 40.

\textsuperscript{130} See supra Part IV.

\textsuperscript{131} See, e.g., Kane, supra note 79 (“[T]here’s no solid evidence that moratoriums alone do much more than put off a foreclosure for a few months.”).

\textsuperscript{132} See CAL. CIV. CODE § 2923.53(e) (enacted by Chapter 4) (requiring the Secretary of the Business, Transportation and Housing Agency to report on progress three months after the program begins); CAL. CODE REGS. tit. 10, §§ 2031.1-2031.10 (2009); FAQs, supra note 64.
Chapter 264: The Buyer’s Choice Act

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Code Sections Affected
Civil Code §§ 1103.20, 1103.21, 1103.22, 1103.23 (new and repealed).
AB 957 (Galgiani); 2009 STAT. Ch. 264 (Effective October 11, 2009).

I. INTRODUCTION

If you are in the market to buy a house and searching for a bargain, choosing one that is in foreclosure may be a wise decision.1 However, this will not be an easy choice to make, since there are many real properties in or approaching foreclosure that are currently for sale.2 “Some three million foreclosures are expected this year alone.”3 “A total of 1,905,723 foreclosure filings . . . were reported on 1,528,364 U.S. properties in the first six months of 2009, a 9 percent increase in total properties from the previous six months and a nearly 15 percent increase in total properties from the first six months of 2008.”4 California posted the nation’s highest foreclosure totals (391,611 properties) in the first half of 2009.5 Banks own approximately sixty percent of houses that are for sale in California.6 Although the foreclosure market has created opportunity for some buyers, it has also created many adverse consequences.7

One of these adverse consequences occurred within the Real Estate Owned (REO) foreclosure resale market over the past couple of years.8 Banks or other lending institutions, which have primarily taken possession of REO properties, are increasingly requiring that buyers of these properties use pre-selected escrow and title insurance companies with which the banks have pre-existing contracts.9 This practice causes local homebuyers to pay up to twice as much in fees to

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2. Id.
3. Id.
5. Id.
7. See id. (noting that some local mortgage brokers are witnessing “a disturbing trend” in California’s foreclosure market).
8. See SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 957, at 4 (June 22, 2009) (expressing concerns about a troubling trend that has recently developed in California’s foreclosure market).
9. Id.
escrow and title companies out of the area that provide inadequate services to the buyers.\footnote{See Banks Benefit from Foreclosure Opportunity, supra note 6 (reporting that these banks “really have the borrowers backed into a corner” (quoting Brad L’engle, a Sacramento area loan consultant))).}

Michael McClure, a Sacramento resident, is among those adversely affected by this practice.\footnote{See id. (reporting that a seller bank forced McClure to use a title and escrow company in Southern California that allegedly charged higher fees than Northern California companies normally charge).} McClure found a great deal on a bank-owned house in October 2008 when he bought his first home.\footnote{id.} However, an unexpected problem arose in the process: the seller bank required McClure to purchase escrow services from a pre-selected provider in San Diego at a much higher price than the local companies would have charged.\footnote{Id. The San Diego escrow company even “charged McClure a mobile notary fee.”\footnote{Id. McClure’s friend in Sacramento could have provided the same notary service for free.} “I was at the bank’s mercy more or less,” said McClure.\footnote{Id. Chapter 264 protects home buyers like McClure from this disturbing practice in California’s foreclosure market.}} The San Diego escrow company even “charged McClure a mobile notary fee.”\footnote{Id. McClure’s friend in Sacramento could have provided the same notary service for free.} “I was at the bank’s mercy more or less,” said McClure.\footnote{Id. Chapter 264 protects home buyers like McClure from this disturbing practice in California’s foreclosure market.} Chapter 264 protects home buyers like McClure from this disturbing practice in California’s foreclosure market.

II. LEGAL BACKGROUND

“In California, the nonjudicial foreclosure process begins with the filing of a Notice of Default and concludes with a trustee’s sale where the property is sold to the highest bidder.”\footnote{SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 957, at 1 (June 22, 2009).} The mortgage lender, usually a bank, places the opening bid.\footnote{Id. If there are no buyers with offers above the opening bid, the property reverts back to the bank and becomes an REO.\footnote{Id. The banks then end up selling or auctioning off those properties.} During the past couple of years, many of those banks have required the buyers of the REO properties to purchase title insurance or escrow services from the banks’ preferred service providers with whom the banks usually have contracts.\footnote{Id. Chapter 264 shields the buyers of REO properties from such illegal practices by reinforcing existing federal and state laws.} Chapter 264 shields the buyers of REO properties from such illegal practices by reinforcing existing federal and state laws.\footnote{Id. at 4.}}
A. Existing Federal Law

The Real Estate Settlement Procedures Act (RESPA)\(^\text{24}\) generally regulates the conveyance of real property by requiring sellers or mortgage lenders to inform buyers about the real estate closing costs to avoid “unnecessarily high settlement charges caused by certain abusive practices.”\(^\text{25}\) The Secretary of the United States Department of Housing and Urban Development (HUD) is responsible for enforcing RESPA.\(^\text{26}\) Specifically, the statute provides: “No seller of property that will be purchased with the assistance of a federally related mortgage loan shall require directly or indirectly, as a condition to selling the property, that title insurance covering the property be purchased by the buyer from any particular title company.”\(^\text{27}\) Moreover, a buyer may sue a seller who violates this provision,\(^\text{24}\) \[^\text{25}\text{12 U.S.C.A. § 2601(a).}\] It is the purpose of this chapter to effect certain changes in the settlement process for residential real estate that will result—
(1) in more effective advance disclosure to home buyers and sellers of settlement costs;
(2) in the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services;
(3) in a reduction in the amounts home buyers are required to place in escrow accounts established to insure the payment of real estate taxes and insurance; and
(4) in significant reform and modernization of local recordkeeping of land title information.

\[\text{Id. § 2601(b).}\]

\[\text{25. 12 U.S.C.A. § 2601(a).}\]

\[\text{26. See id. § 2617 (explaining the Secretary’s authority under RESPA); see also 42 U.S.C.A. § 3532 (West 2003) (listing the duties of the Secretary of HUD).}\]


\[\text{[T]he term “federally related mortgage loan” includes any loan (other than temporary financing such as a construction loan) which—}\]
(A) is secured by a first or subordinate lien on residential real property (including individual units of condominiums and cooperatives) designed principally for the occupancy of from one to four families, including any such secured loan, the proceeds of which are used to prepay or pay off an existing loan secured by the same property; and
(B)(i) is made in whole or in part by any lender the deposits or accounts of which are insured by any agency of the Federal Government, or is made in whole or in part by any lender which is regulated by any agency of the Federal Government, or
(ii) is made in whole or in part, or insured, guaranteed, supplemented, or assisted in any way, by the Secretary or any other officer or agency of the Federal Government or under or in connection with a housing or urban development program administered by the Secretary or a housing or related program administered by any other such officer or agency; or
(iii) is intended to be sold by the originating lender to the Federal National Mortgage Association, the Government National Mortgage Association, the Federal Home Loan Mortgage Corporation, or a financial institution from which it is to be purchased by the Federal Home Loan Mortgage Corporation; or
(iv) is 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, except that for the purpose of this chapter, the term “creditor” does not include any agency or instrumentality of any State.

\[\text{Id. § 2602(1).}\]
subject to a one-year statute of limitations, “in an amount equal to three times all charges made for such title insurance.”

Although RESPA may already prohibit banks from choosing title and escrow service providers for the buyers, California needs to reinforce that prohibition throughout the state, especially in regards to the sale of REO properties. In fact, HUD asserted that “[t]he effectiveness of RESPA could be enhanced by assuring that creative business structures do not defeat the purposes . . . of RESPA, and by providing the Secretary and State regulators with the necessary tools to enforce the statute.” Chapter 264 ensures the statewide statutory enforcement of RESPA in California.

B. Existing California Law

Existing California law confers on the Department of Corporations the authority and responsibility of licensing escrow agents and regulating licensees who violate any provision of RESPA. California law expressly provides that any person who violates any provision of RESPA, or “any regulation promulgated thereunder,” also violates the corresponding provisions in state law.

Under existing state law, “[i]t is unlawful for any title insurer, underwritten title company or controlled escrow company to pay, directly or indirectly, any commission, compensation, or other consideration to any person as an inducement for the placement or referral of title business.” However, existing state law does not specifically prohibit a seller from requiring a buyer to purchase title insurance or escrow services from the seller’s preferred provider as a condition for sale of a foreclosed home. Chapter 264 fills this gap in California law to provide foreclosed-home buyers with adequate protection—similar to the protection provided by RESPA.

III. CHAPTER 264

Chapter 264, the “Buyer’s Choice Act,” is an urgency statute designed to prohibit a seller of “residential real property improved by four or fewer dwelling units” from requiring the buyer to purchase title insurance or escrow services

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28. Id. § 2608(b).
29. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 957, at 3-4 (Sept. 2, 2009)
30. Id. at 4 (quoting a previous statement from HUD).
31. Id.
33. CAL. FIN. CODE § 17425 (West Supp. 2009).
34. CAL. INS. CODE § 12404(a) (West 2005 & Supp. 2009).
35. CAL. CIV. CODE § 1103.21(a)(6) (enacted by Chapter 264).
36. Id. § 1103.21(a)(7) (enacted by Chapter 264).
from a company chosen by the seller as a condition of receiving offers or selling that real property to the buyer. However, Chapter 264 does not prohibit a buyer from voluntarily accepting the seller’s recommended title insurance or escrow service provider as long as the seller provides the buyer with “written notice of the right to make an independent selection of those services.”

Chapter 264 defines “seller” as “a mortgagee or beneficiary under a deed of trust who acquired title to residential real property improved by four or fewer dwelling units at a foreclosure sale, including a trustee, agent, officer, or other employee of any such mortgagee or beneficiary.” “Residential real estate” is “improved real property that is used or intended to be used as a residence and contains not more than four dwelling units.” A “dwelling” is “a residential structure or mobile home which contains one to four family housing units, or individual units of condominiums or cooperatives.”

A seller who violates the provisions of Chapter 264 must pay the buyer damages “in an amount equal to three times all charges made for the title insurance or escrow service.” Furthermore, the sellers who violate these provisions are liable for breach of their licensing agreements and are subject to discipline by their licensing entities.

Finally, Chapter 264 will be automatically repealed on January 1, 2015, unless the Legislature removes or extends the sunset date.

IV. ANALYSIS

A. The Need for the Prohibitions Imposed by Chapter 264

As a result of a major outbreak of foreclosures caused by California’s troubled real estate market, a disturbing trend has unfolded in the foreclosure market that is adversely affecting the buyers of REO properties. Banks, as sellers of REO properties, are requiring the buyers of these foreclosed properties to purchase title insurance and escrow services from specific bank-preferred providers regardless of the price. Consequently, the buyers are left with no choice, because the banks will only accept offers from buyers who agree to use the bank-preferred title and escrow service providers.
Furthermore, local small businesses, which are “the undisputed heart of the American economy,” will suffer because of these anti-competitive tactics. By excluding local businesses from competition for title and escrow services, these banks impair the local job market and economy. Local businesses are the best resources in providing the most efficient and cost effective services to the home buyers, because non-local service providers are “often unfamiliar with local practices and laws and statutes in the cities, counties and states where these REO properties are located.” Local businesses can help mitigate the current housing crisis by speeding up the process of sale and transfer of foreclosed properties to buyers.

Conversely, the banks’ “pre-selected service providers” are usually unaware of these local rules and common practices; consequently, buyers, their real estate agents, and the lenders are frustrated because the sale and transfer of foreclosed properties are hindered and these houses remain on the market and unoccupied for many months. Allowing banks to conduct business this way will exacerbate California’s current housing crisis.

Chapter 264 provides buyers with the “choice” to freely negotiate with the sellers and get the benefits of their bargains by choosing their own title and escrow service providers.

B. The Scope of Chapter 264 as It Relates to RESPA

Under RESPA, a “seller of property that will be purchased with the assistance of a federally related mortgage loan” is prohibited from requiring the buyer, as a condition of selling the property, to purchase title insurance from “any particular title company.” Therefore, the prohibition of RESPA is only

Cal. State Assembly Banking and Fin. Comm. (Apr. 10, 2009) [hereinafter Egan Letter] (on file with the McGeorge Law Review) (“What we are witnessing in the REO marketplace is anti-competitive monopoly where banks direct the flow of the sale of foreclosure properties to pre-selected settlement service providers regardless of service or cost, and if a potential buyer does not agree to use these service providers their purchase offer will not be submitted or if reviewed by the lender will be denied.”).

48. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 957, at 5-6 (Aug. 24, 2009); see also Letter from Belinda Bales, Certified Senior Escrow Officer, Elite Escrow Services of San Diego, to Cathleen Galgiani, Assembly Member (undated) [hereinafter Bales Letter] (on file with the McGeorge Law Review) (stating that her business has been suffering because her company is “being excluded from a large share of the business that is available”).

49. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 957, at 5-6 (Aug. 24, 2009).

50. Egan Letter, supra note 47.

51. See id. (stating that the use of pre-selected service providers slows down the resale process after foreclosure).

52. Id.

53. See id. (“This bank-centric, one-sided way of doing business is business as usual and is further compounding the housing crisis, and does not address national and state policy priorities of ridding banks of ‘toxic’ mortgages.”).

54. Id.

applicable when a real property is purchased with a “federally-related mortgage loan,” and it only applies to the purchase of title insurance. Chapter 264 imposes a similar prohibition, but unlike RESPA, it applies to both federally related and non-federally related mortgage loans, and it covers the purchase of escrow services as well as title insurance.

Furthermore, Chapter 264 only applies to residential real properties that are acquired “at a foreclosure sale.” RESPA applies only to cases where the above requirement is a condition of selling a property, whereas Chapter 264 also prohibits the seller from imposing this requirement on the buyer as a condition of the seller receiving offers.

It should be stressed, however, that Chapter 264 encourages negotiations between a buyer and a seller by emphasizing that it does not prohibit a buyer from using a seller-recommended service provider if the seller first provides the buyer with “written notice of the right to make an independent selection of those services.” Chapter 264 builds upon RESPA to strengthen the state law in protecting the buyers of REO properties from the sellers (often banks) imposing their pre-selected service providers on the buyers as the condition of the sale or of receiving offers.

Nevertheless, Chapter 264 does not answer the question of which state regulator is authorized to enforce the Act’s provisions. Perhaps the California Attorney General could bring suits to enforce the provisions or individuals could file civil law suits against the violators. It is also possible that there will be future amendments to the Act that will deal with this issue.

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56. See supra note 27 (defining “federally related mortgage loan”).
57. 12 U.S.C.A § 2608(a).
58. See CAL. CIV. CODE § 1103.22(a) (enacted by Chapter 264) (making no distinction as to the type of loan with which the property should be purchased); see also SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 957, at 9 (June 22, 2009) (comparing the Buyer’s Choice Act with RESPA).
59. See CAL. CIV. CODE § 1103.22(b)(2) (enacted by Chapter 264) (defining “seller” as “a mortgagee or beneficiary . . . who acquired title to residential real property . . . at a foreclosure sale”); see also SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 957, at 9 (June 22, 2009) (explaining the differences between Chapter 264 and RESPA).
60. See CAL. CIV. CODE § 1103.21(b) (enacted by Chapter 264) (stating that “the sale of a residential real property is deemed to include the receipt of an offer to purchase that residential real property”); see also 12 U.S.C.A. § 2608(a) (prohibiting sellers from requiring buyers to purchase title insurance services from any specific provider “as a condition to selling the property”).
61. CAL. CIV. CODE § 1103.22(a) (enacted by Chapter 264).
62. Id. § 1103.21 (enacted by Chapter 264).
63. See ASSEMBLY COMMITTEE ON BANKING AND FINANCE, COMMITTEE ANALYSIS OF AB 957, at 3 (Apr. 17, 2009) (expressing concern about the enforceability of Chapter 264).
64. Id.
65. See id. (stating that Chapter 264 should be added to the Financial Code instead of the Civil Code so that “a regulator such as the Department of Corporations (DOC) would clearly be required to make sure the law is enforced”).
V. CONCLUSION

“A total of 391,611 California properties received a foreclosure filing in the first half of 2009 . . . the nation’s fourth highest state foreclosure rate.” The number of houses owned by banks is expected to rise in the coming months. Buyers are not the only ones taking advantage of this situation. The banks that own and sell REO properties are taking advantage of the current foreclosure market at the expense of unfortunate buyers. These banks are frustrating the buyers by requiring them to use pre-selected title insurance and escrow companies regardless of the cost. Although RESPA prohibits these kinds of practices, it is not free of loopholes. Moreover, there were no state laws that specifically addressed this issue. Chapter 264 ensures further enforcement of RESPA at the state level and strengthens state law to further curtail these illegal practices and adequately protect California’s home buyers.

66. Realty Trac Staff, 1.9 Million Foreclosure Filings, supra note 4.
68. See Realty Trac & Trulia Staff, Survey: Interest in Purchasing Foreclosed Homes Spikes, REALTYTRAC.COM, May 20, 2009, http://www.realtytrac.com/ContentManagement/PressRelease.aspx?channelid=9&ItemID=6391 (on file with the McGeorge Law Review) (noting that “consumer interest in buying foreclosed homes has increased,” because the rising foreclosure market has created “a tremendous opportunity for consumers to buy homes at significantly lower prices” (quoting Pete Flint, CEO and co-founder of Trulia)).
69. See Banks Benefit from Foreclosure Opportunity, supra note 6 (giving an example of a Sacramento resident who went through the struggles of buying a foreclosed house from one of these banks).
70. Id.
71. See SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 957, at 8 (June 22, 2009) (explaining the shortcomings of RESPA as it compares to Chapter 264).
72. See CAL. CIV. CODE § 1103.21(a)(6) (enacted by Chapter 264) (emphasizing on the need for Chapter 264).
73. See id. § 1103.21(a)(7) (enacted by Chapter 264) (“It is necessary to add this act to California law to provide to a home buyer protection that follows the RESPA model . . . .”).