SENATE JUDICIARY COMMITTEE
Senator Hannah-Beth Jackson, Chair
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AB 3088 (Chiu)
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SUBJECT

Tenancy: termination: rent caps

DIGEST

This bill proposes a set of temporary measures designed to prevent widespread loss of housing through evictions and foreclosures resulting from the economic impacts of the COVID-19 pandemic. Specifically, the bill: (1) establishes a legal framework limiting, until January 31, 2021, evictions in circumstances in which a residential tenant has fallen behind on rent or other payment obligations under their lease due to financial hardship caused by the pandemic; and (2) establishes procedural protections for small landlords who become delinquent on their mortgage payments and a right to a written explanation for borrowers with mortgages on properties with one-to-four residential units when they are denied forbearance. Separately, the bill makes technical and clarifying modifications to the statewide just cause for eviction and anti-rent gouging laws enacted last year pursuant to AB 1482 (Chiu, Ch. 597, Stats. 2019).

EXECUTIVE SUMMARY

The COVID-19 pandemic has caused widespread unemployment, business closures, and an economic contraction that threatens to metastasize into a potentially catastrophic wave of evictions and foreclosures. To date, the combination of a judicially-imposed freeze on most evictions and federal financial assistance have combined to forestall such a calamity. However, the judicial moratorium is scheduled to end on September 1, 2020, much of the federal assistance has expired, and it is uncertain whether more federal help will materialize. Where they have not done so already, it is highly likely that many tenants and homeowners will soon default on their mortgage or rent payments. If tenants cannot pay their rents, many landlords will be unable to keep up on their mortgage payments also. Evictions and foreclosures would ensue, leading to residential overcrowding and a dramatic increase in homelessness, two things that, on top of everything else, would likely undermine efforts to contain further COVID-19 spread.

This bill offers a temporary, stop-gap solution intended to stave off the worst levels of eviction and foreclosure. In effect, it creates a path for tenants who are in financial distress, as a result of the COVID-19 pandemic, to stay in their homes until at least the end of January 2021. At the same time, the bill provides some procedural protections through which it may sometimes be possible for small landlords to avoid foreclosure, and a new notice requirement when a mortgage servicer denies a homeowner or small landlord's request for forbearance.

The bill is author-sponsored. As the primary content of the bill was only recently added, there is no support or opposition on file with the Committee.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Provides, pursuant to the Coronavirus Aid, Relief, and Economic Security (CARES) Act, that, as to federally backed mortgages securing one-to-four unit properties, a lender must provide up to 360 days forbearance to a borrower who requests such forbearance during the period beginning March 13, 2020 and ending at an undefined time (but likely December 31, 2020), subject only to an affirmation from the borrower that the borrower has a financial hardship due to the COVID-19 pandemic. (15 U.S.C. § 9056.)

2) Provides, pursuant to the CARES Act, that, as to federally backed mortgages securing multifamily (five or more units) properties, a lender must provide up to 90 days forbearance to a borrower who requests such forbearance during the period beginning March 13, 2020 and ending when the nationwide COVID-19 state of emergency ends or December 31, 2020, whichever is earlier, subject only to an affirmation from the borrower that the borrower has a financial hardship due to the COVID-19 pandemic and a requirement that the lender document the hardship. (15 U.S.C. § 9057.)

3) Requires, pursuant to the Homeowner Bill of Rights, that a lender who foreclosed on 175 or more homes in the last year must undertake a series of steps to explore loan modification and loss mitigation with a residential owner-occupant borrower who is delinquent on their home loan, prior to foreclosing on the home. (Civ. Code §§ 2923.6, 2923.7, 2923.55, 2924.9, 2924.10, 2924.11, and 2924.17.)

4) Specifies that a tenant is guilty of an unlawful detainer and subject to court-ordered eviction if, within three days of a demand to vacate the premises or pay rent that lawfully accrued within the last 12 months, the tenant does neither. (Code of Civ. Proc. § 1161(2).)

5) Specifies that a tenant is guilty of an unlawful detainer and subject to court-ordered eviction if, within three days of a demand to vacate the premises or comply with a material obligation under the lease other than the payment of rent, the tenant does neither. (Code of Civ. Proc. § 1161(3).)

6) Authorizes a mobilehome park to terminate the tenancy of a mobilehome owner in the mobilehome park for non-payment of rent, utility charges, or reasonable incidental service charges only when:
   a) the amount has been due for five days;
   b) the park thereafter serves the mobilehome owner with a demand to pay the amount due or vacate the premises within three days, unless the mobilehome park owner has already been served with three or more three-day notices of this type in the last 12 months;
   c) the mobilehome owner neither vacates nor pays within the three days given; and
   d) the park also gives the mobilehome owner a 60-day notice terminating the tenancy. (Civ. Code § 798.56(e).)

7) Provides, pursuant to the CARES Act, that, as to properties subject to a federally-backed mortgage, the landlord may not seek to evict a tenant for non-payment of rent or other fees or charges for 120 days after March 27, 2020 and, thereafter, can only require the tenant to vacate upon 30 days' notice. (15 U.S.C. § 9058.)

8) Provides, pursuant to the CARES Act, that as to multi-family properties subject to a federally-backed mortgage, the landlord may not seek to evict a tenant for non-payment of rent or other fees or charges while the landlord is in forbearance and for 30 days afterward. (15 U.S.C. § 9057(d).)

This bill:

1) Makes a series of findings and declarations regarding the economic consequences of the COVID-19 pandemic and the resulting threat of widespread residential evictions and foreclosures.

2) Increases by tenfold the potential liability of a landlord who attempts or succeeds in evicting a tenant against the tenant's will and outside the court process before February 1, 2021.

3) Prohibits a landlord from retaliating against a tenant prior to February 1, 2021 for having fallen behind on rent or other payment obligations under the lease due to financial impact from COVID-19.

4) Extends the procedural anti-foreclosure protections of the Homeowners Bill of Rights to small landlords, as specified, until 2023.

5) Requires a mortgage servicer to provide the borrower with a written explanation if the servicer denies a borrower's request for forbearance on mortgage payments for a property consisting of no more than four residential units. Establishes an aggrieved borrower's ability to enforce these rights in court if necessary.

6) Requires a mortgage servicer to provide a borrower to whom forbearance is given with post-forbearance options that are consistent with the CARES Act and the guidance of a number of different specified federal agencies. Establishes an aggrieved borrower's ability to enforce these rights in court if necessary.

7) Expands small claims court jurisdiction to allow landlords to sue in that forum, regardless of the total amount claimed, for any rent or other payment obligations under the lease for the period March 1, 2020 to January 31, 2021.

8) Restricts public access to court files for eviction cases based on non-payment of rent filed between March 1, 2020 and January 31, 2021.

9) Prohibits a court from issuing a summons on a complaint for eviction based on nonpayment of rent or other payment obligations under the lease until October 5, 2020. Requires landlords to file a case cover sheet indicating whether this prohibition applies.

10) Establishes a legal framework to address circumstances where a tenant has fallen behind on rent or other payment obligations under the lease due to financial hardship caused by the COVID-19 pandemic as follows:
    a) provided the tenant follows specified procedures, including providing specified documentation of the hardship if the tenant is a high-income tenant, as defined, then:
        i) unpaid rent and other payment obligations under the lease accrued between March 1, 2020 and August 31, 2020 are converted to consumer debts and cannot form the basis for an eviction ever;
        ii) unpaid rent and other payment obligations under the lease accrued between September 1, 2020 and January 31, 2021 cannot form the basis for an eviction until after January 31, 2021. In addition, if the tenant pays at least 25 percent of any amount that the landlord demands after it comes due, the remaining unpaid balance is converted to consumer debt and cannot form the basis for an eviction ever;
    b) the usual three-day window that a tenant has to respond to a demand to meet rent or other payment obligations under the lease is expanded to 15 days until February 1, 2021.

11) Requires landlords to provide all tenants with a notice informing them of their rights under this bill by September 30, 2020 or before or contemporaneously with

the services of any notice demanding rent or other payment obligations under the lease corresponding to the period March 1, 2020 to January 21, 2021.

12) Specifies that any ordinance, resolution, regulation, or administrative action adopted by a city, county, or city and county in response to the COVID-19 pandemic to protect tenants from eviction is subject to all of the following:
    a) any extension, expansion, renewal, reenactment, or new adoption of a measure, however delineated, that occurs between August 19, 2020, and January 31, 2021, shall have no effect before February 1, 2021;
    b) any provision which allows a tenant a specified period of time in which to repay COVID-19 rental debt shall be subject to all of the following:
        i) if the provision in effect on August 19, 2020, required the repayment period to commence on a specific date on or before March 1, 2021, any extension of that date made after August 19, 2020, shall have no effect;
        ii) if the provision in effect on August 19, 2020, required the repayment period to commence on a specific date after March 1, 2021, or conditioned commencement of the repayment period on the termination of a proclamation of state of emergency or local emergency, the repayment period is deemed to begin on March 1, 2021; and
        iii) the specified period of time during which a tenant is permitted to repay COVID-19 rental debt may not extend beyond the period that was in effect on August 19, 2020. In addition, a provision may not permit a tenant a period of time that extends beyond March 31, 2022, to repay COVID-19 rental debt.

13) Clarifies that local jurisdiction may extend, expand, renew, reenact, or newly adopt an ordinance that requires just cause for termination of a residential tenancy or amend existing ordinances that require just cause for termination of a residential tenancy and that provide greater protection than state law, but any provision enacted or amended after August 19, 2020, cannot apply to rental payments that came due between March 1, 2020, and January 31, 2021.

14) Specifies that the one-year limitation provided in subdivision (2) of Section 1161 is tolled during any time period that a landlord is or was prohibited by any ordinance, resolution, regulation, or administrative action adopted by a city, county, or city and county in response to the COVID-19 pandemic to protect tenants from eviction based on nonpayment of rental payments from serving a notice that demands payment of COVID-19 rental debt pursuant to subdivision (e) of Section 798.56 of the Civil Code or paragraph (2) of Section 1161.

15) Requires the Business, Consumer Services and Housing Agency and the Department of Finance to engage with stakeholders about how to spend any future federal stimulus funding on housing stabilization.

16) Sunsets as of February 1, 2025, where it does not explicitly sunset earlier.

17) Contains a severability clause.

18) Contains an urgency clause.

COMMENTS

1. Antecedents and framework of the bill

AB 1436 (Chiu, 2020) was composed of two primary components. One provided rent deferral and eviction protections for tenants impacted by the COVID-19 pandemic. The other gave COVID-19 impacted small landlords and homeowners access to mortgage forbearance for their homes and rental properties. This Committee passed AB 1436 by a vote of six to zero on August 18, 2020.

After AB 1436 passed out of this Committee, proposals for how to handle both the rent deferral and eviction protections as well as the mortgage forbearance components evolved. The results of that evolution have now been added to this bill, AB 3088, whose earlier content was limited to the more modest project of cleaning up technical issues leftover from the passage of the landmark statewide just cause and anti-rent gouging measure, AB 1482 (Chiu, Ch. 597, Stats. 2019), last year. That earlier version of AB 3088 passed out of this Committee by a vote of nine to zero on July 30, 2020.

According to the author, this new version of AB 3088 "provides renters a chance to get back on their feet without the fear of losing their home, while also giving landlords a path to be made whole without having to resort to immediate evictions."

2. Analysis of this bill's rent deferral and eviction protection provisions

a. The context: where we stand today on rent payment and eviction

The Senate Judiciary Committee analysis of AB 1436 goes into detail about the current state of the law in California as it relates to tenants' obligations to stay current on the rent and tenants' protections against eviction in light of the current COVID-19 related economic crisis. In summary, there are many local ordinances that provide some degree of protection against eviction and frequently also create some pathway for tenants to make up any unpaid balance they accumulate. The only significant statewide protections will come to an end on September 1, 2020, however, with the expiration of the Judicial Council's Emergency Rule 1, while the limited federal protections have either expired or have little practical effect. There is, as a result, a strong and urgent need for state legislation in this area.

b. What this bill would do, phase by phase

At its most basic, this bill provides a pathway for tenants enduring financial hardship due to the COVID-19 pandemic to remain in their homes through the end of January 2021. However, the bill does not "forgive" or "cancel" any payment obligations that a tenant has under the lease. Instead, depending on the circumstances, some or all of any unpaid amount essentially turns into consumer debt, meaning that the landlord can sue the tenant for failing to pay the money and can use any of the standard legal methods (bank levy, wage garnishment, etc.) to collect it, but the unpaid amount cannot serve as a basis for throwing the tenant out of the home.

To achieve that basic outcome, the bill operates in different phases.

(i) Phase One – September 2, 2020 to October 4, 2020

Beginning on September 2, 2020, when the Judicial Council's Emergency Rule 1 expires, landlords will once again be able to proceed with eviction cases in court for any lawful cause – meaning a grounds for eviction that is permissible under federal law, state law, and any applicable local ordinance -- other than non-payment of rent or any other financial obligation under the lease. The only exception is that, whereas state law ordinarily allows landlords to evict a tenant in order to demolish a unit or substantially remodel it (subject to payment of a month's rent to compensate the tenant for relocating), under this bill landlords can only evict for this purpose if the demolition or substantial remodel is necessary to address serious problems with the basic conditions of the unit.

Until October 5, 2020, landlords will not be able to proceed with eviction cases if the grounds for the eviction is nonpayment of rent or other payment obligations under the lease. This delay is intended to allow time for the courts, the Judicial Council, landlords, tenants, and the attorneys who represent them to prepare for the new rules governing nonpayment cases that will take effect in Phase Two.

(ii) Phase Two – October 5, 2020 to January 31, 2021

Beginning on October 5, 2020, in addition to proceeding with evictions for any other lawful cause as set forth in the description of Phase One, above, landlords will now be able to seek to have their tenants evicted for nonpayment of rent or other charges due under the lease. However, up until the end of January 2021, such cases will be subject to the following rules designed to protect tenants with COVID-19 related financial hardships from losing their homes, at least until February of 2021.

If a landlord intends to try to evict a tenant for nonpayment of rent or other charges due under the lease, the landlord must serve a notice giving the tenant a fifteen business day window in which to make one of the following choices: pay the demanded amount, vacate the premises, or return a declaration to the landlord, signed under penalty of

perjury, indicating that the tenant cannot pay the rent in full and on time because of a COVID-19 related financial hardship. What constitutes a COVID-19 related financial hardship is both stated in the bill and included in the text of the fifteen-day notice that the landlord must provide to the tenant.

If the tenant returns the signed declaration of COVID-19 related financial hardship to the landlord within the fifteen days given, then the tenant receives protection against eviction. How long that protection lasts depends on when the unpaid rent accrued. For unpaid rent and other charges that accrued between March 1, 2020 and August 31, 2020, returning a signed declaration of COVID-19 related financial hardship permanently protects the tenant against eviction. The tenant still owes that money to the landlord, but it becomes consumer debt: something the landlord can sue the tenant for if the tenant does not pay it back voluntarily, but not the basis for an eviction. For unpaid rent and other charges that accrue between September 1, 2020 and January 31, 2021, returning a signed declaration of COVID-19 related financial hardship only protects the tenant against eviction until February 1, 2021. However, if the tenant returns the signed declaration of COVID-19 related financial hardship and also manages, before February 1, 2021, to pay the landlord at least 25 percent of the rent still due for September 1, 2020 to January 31, 2021 period, then the tenant is permanently protected against eviction for failure to pay the balance. That balance is not forgiven or cancelled, though. It, too, becomes consumer debt that the tenant can be sued for if the tenant does not eventually pay it voluntarily.

(iii) Phase Three – February 1, 2021 - Forward

Going forward from February 2021, tenants will once again be bound by the pre-COVID rules relating to payment of rent and other charges due under the lease. Specifically, tenants who do not pay their monthly rent and other charges on time as they come due must be given at least a three-day window in which to either pay the required amount or vacate. If the tenant does not comply within the three days given, the tenant is thereafter subject to eviction. (Code of Civ. Proc. § 1161(2) and (3).) Mobilehome owners are subject to similarly strict rules, though their three-day window to pay or vacate cannot start until five days after the rent is due, and they are also entitled to 60-day notice giving them the opportunity to try to remove the mobilehome from the park or sell it. (Civ. Code § 798.56(e).)

c. Additional aspects of the rent deferral and eviction protection component of the bill

In addition to the phases of the bill described above, there are several other aspects of the rent deferral and eviction protection components of the bill that warrant attention.

i. Expanded small claims court jurisdiction

As explained in the preceding discussion about the phases of the bill, the bill achieves the goal of trying to keep people from losing their homes while still obligating tenants to pay their landlords in full by converting some unpaid rent into what are, in effect, consumer debts. This means that, though tenants cannot be evicted for not paying these amounts to their landlord, the landlord can sue the tenant for the unpaid money and then use any of the usual legal means to force the tenant to pay up. Ordinarily, however, bringing a lawsuit for a consumer debt is time-consuming and usually requires hiring an attorney. To make it easier for landlords to go after tenants who cannot or do not repay what they owe their landlord voluntarily, this bill temporary opens California's small claims courts for such cases, even if the amount demanded is beyond the usual small claims court limits.

ii. Documentation requirement for high-income tenants

A significant point of contention in relation to this bill's predecessor, AB 1436 (Chiu, 2020), was whether tenants should be required to provide documentation to their landlords to back up a declaration of COVID-19 related financial hardship. Some landlords worried that without a documentation requirement, unscrupulous tenants would lie and claim a hardship even when they could actually perfectly well pay the rent. Others pointed out that, especially given the economic and social upheaval brought about by the pandemic, there are legitimate reasons why tenants – low-income and otherwise vulnerable tenants in particular – might not be able to document their hardship. (*See* Sen. Judic. Com. Analysis of AB 1436 (2019-2020 Reg. Sess.) pp. 23-24 for a detailed discussion of these issues.)

This bill strikes a compromise. It defines a high-income tenant as a household making more than $100,000 annually or more than 130 percent of the median income for the county, whichever is higher. Under the bill, if, before serving a fifteen-day notice pursuant to this bill, a landlord already has proof that the tenant is a high-income tenant, and the tenant proceeds to claim a COVID-19 related financial hardship, then the landlord can demand specified documentation from that high-income tenant. All other tenants cannot be subjected to such documentation requests; their declaration under penalty of perjury is alone sufficient to establish the COVID-19 related financial hardship.

This compromise should achieve the dual aims of preventing well-to-do tenants from gaming the system without inviting landlords to go on fishing expeditions through their tenants' personal finances, burdening lower-income tenants with having to track down documents that may be difficult or impossible to obtain, and clogging the courts with disputes over whether or not the provided documentation is sufficient.

iii. Increased liability for carrying out extrajudicial evictions

Under California law, landlords must obtain a judicial order in order to evict a tenant and the county sheriff's department is charged with executing that order. Landlords themselves are prohibited from carrying out evictions on their own. (Civ. Code § 789.3.) Despite these rules, even in ordinary times, unscrupulous landlords undertake an unknown number of extrajudicial evictions by shutting off utilities, changing locks, throwing tenants' belongings out into the street, or using threats and violence.

Pursuant to the Judicial Council's Emergency Rule 1, the courts have not been processing evictions since April of this year, except in cases involving threats to the public health and safety. There have been media reports that landlords, frustrated by their inability to use the legal system to kick out tenants who are behind on rent, have increasingly resorting to extrajudicial evictions. This trend is likely to continue and might grow if this bill is enacted. To combat that possibility, the bill includes a temporary, tenfold increase in a landlord's potential liability for carrying out an illegal, extrajudicial eviction.

This provision – and the existing law on which it is based – would be stronger if it were not accompanied by a two-way fee-shifting provision. Even those displaced tenants who can muster the wherewithal to try to sue the landlord that unlawfully kicked them out may easily be dissuaded from proceeding by the risk that, in addition to simply losing if something goes wrong with the case, they could end up having to pay the landlord's attorney's fees as well. If extrajudicial evictions continue to be a problem in California, this could be an issue that future Legislatures may wish to revisit.

iv. Protections against retaliatory or pretextual evictions

Aside from resorting to extrajudicial evictions, another obvious way that landlords could skirt the intended protections offered by this bill is by seeking to evict tenants who have fallen behind on rent because of COVID-19 based on some other pretext. As explained in the discussion about the various phases of the bill, above, landlords will be able to begin filing cases to evict tenants for any lawful reason other than non-payment of rent beginning on September 2, 2020. Knowing this, a landlord who wishes to get rid of a tenant who has a COVID-19 related financial hardship might, for example, suddenly decide to get picky about compliance with previously unenforced terms in the lease or try to upgrade children playing loudly into a "nuisance." In situations where it remains permissible – meaning, largely, single-family residences in places where no local just cause ordinance applies – a landlord could even terminate the tenancy of someone with a COVID-19 related financial hardship without providing any justification at all.

To try to prevent this sort of pretextual eviction, the bill includes a provision that temporarily includes having COVID-19 rental debt as one of the things for which a

landlord cannot retaliate against a tenant. Though useful as a way to highlight the issue, it should be noted that the inclusion of this provision is redundant. This bill gives COVID-19 impacted tenants the right to carry certain unpaid rental and other balances under the lease. Existing law already prohibits a landlord from taking adverse action against a tenant for "lawfully and peacefully exercising any rights under the law." (Civ. Code § 1942.5(d).) Therefore, a tenant lawfully and peacefully having a COVID-19 related rental debt would be protected against pretextual or retaliatory adverse action under the existing law even absent the explicit inclusion provided by this bill.

v. Record masking

Under existing law, eviction cases are automatically masked from the general public during the first 60 days after they are filed, though journalists and other interested parties can petition to get access to the case files. These masking laws were enacted to prevent unscrupulous "eviction defense" operations from charging distressed tenants fees to drag out unlawful detainer cases when in fact there was little or no hope that the tenant would be able to prevail in the case and remain in the home. Masking can serve to preserve a tenant's ability to obtain new rental housing as well. With that in mind, this bill contains a provision directing the courts to permanently mask any unlawful detainer case based on nonpayment of rent that was filed between March 1, 2020 and January 31, 2021. This should generally make it easier for tenants who fell behind on rent during this period to obtain alternative housing in the event they get evicted.

iv. Interaction with local ordinances

The bill contains a lengthy and complex section governing how it interacts with the many local ordinances that also address the deferral of rent payments and protections against eviction in light of the COVID-19 pandemic. This section appears to set forth a compromise intended to freeze the local ordinance status quo until February 1, 2021. It declares that existing local ordinances apply until they expire, but if locals enact anything new, including through modification of existing ordinances, it has no effect until after February 1, 2021. The section also specifies that if a local ordinance gives tenants a period in which to pay off an unpaid rental balance, that period must begin at least by March 1, 2021 and has to end no later than March 31, 2022.

3. Analysis of the bill's foreclosure avoidance and mortgage forbearance provisions

This bill's foreclosure avoidance and mortgage forbearance provisions both build off of existing law. In terms of foreclosure avoidance, the bill proposes to take the existing Homeowners Bill of Rights (HBOR), which currently covers homeowners only, and apply it to small landlords as well. In the case of mortgage forbearance, the bill proposes to require mortgage services to provide post-forbearance options that are consistent with the federal CARES Act and associated federal agency guidance, at least where a mortgage servicer elects to provide forbearance at all.

Compared with the more robust protections for small landlords and homeowners proposed in AB 1436 (Chiu, 2020), the precursor to this bill that passed out of this Committee on August 18, 2020, by a vote of six to zero, these proposals represent a significant step back. Nonetheless, they do offer some additional procedural protections that, particularly with regard to the extension of HBOR protections to small landlords, could in some cases help to slow or stave off some of the most dire predictions of widespread foreclosures.

a. Mortgage forbearance proposal

Since the bill's mortgage forbearance provisions build around existing federally-mandated forbearance requirements pursuant to the CARES Act, it may be useful to begin with a refresher regarding those requirements. By way of background, there are essentially two general categories of loans for residential housing: those that are owned, insured, or guaranteed by an agency within the federal government ("federally-backed" mortgages or loans), and those that are not ("non-federally-backed" or "privately-backed" mortgages or loans). Since the federal agencies have a financial stake in federally-backed loans, the federal government maintains authority to regulate much about how those loans are handled. According to the Senate Banking and Financial Institutions Committee, roughly 70 to 80 percent of California mortgages are federally-backed. (*See* Sen. Banking and Financial Institutions Com. contribution to Sen. Judiciary Com. Analysis of AB 1436 (2019-2020 Reg. Sess.) at p. 17.) The remainder are not.

Pursuant to the CARES Act and agency guidance emanating from it, the federal government has exercised its authority over federally-backed loans to establish the following temporary forbearance regime. Starting March 13, 2020, when the federal government declared a nationwide state of emergency in response to COVID-19, and presumably continuing until December 31, 2020,[1] owners of property with one to four residential units on it and a federally-backed mortgage may request forbearance on their loan payments by calling or writing to their mortgage servicer. (CARES Act § 4022(b).) So long as the borrower "affirms" that they are "experiencing a financial hardship during the COVID–19 emergency," the mortgage servicer must "with no additional documentation required other than the borrower's attestation," provide the borrower with up to 180 days of forbearance, with an option to extend that forbearance for up to an additional 180 days. (*Ibid*.) During the forbearance, the mortgage servicer is forbidden from charging the borrower any fees, penalties, or interest beyond the amounts scheduled or calculated as if the borrower made all contractual payments on time and in full under the terms of the mortgage contract. (CARES Act § 4022(c).)

[1] Due to what may have been a drafting oversight, Section 4022 of the CARES Act does not actually define the "covered period" during which its provisions apply, but the related Section 4023 of the bill defines "covered period" to mean March 13, 2020 until the nationwide state of emergency ends or December 31, 2020, whichever comes earlier. (CARES Act § 4023(f)(5).)

The CARES Act does not specify the terms on which the borrower must make up the amount unpaid once the forbearance ends. Instead, the various federal agencies that oversee these loans – Fannie Mae, Freddie Mac, the Federal Housing Administration of the Department of Housing and Urban Development, the Department of Veterans Affairs, and the Rural Development division of the Department of Agriculture – have all promulgated their own guidance to mortgage servicers about what the mortgage servicers can and cannot offer to borrowers.

In sum, the CARES Act creates a simple framework that generally allows distressed borrowers to obtain forbearance from their mortgage servicer quickly and easily upon request. Critically, however, *the CARES Act does not cover privately-backed loans*. This means that, while financially distressed California borrowers – be they landlords or homeowners – with federally-backed loans on one-to-four unit properties can rest assured that they can currently obtain forbearance upon request and will probably be able to do so for the remainder of the calendar year, their counterparts with privately backed mortgages have no such guarantee. For the time being, it appears that most servicers have been willing to work voluntarily with their borrowers who have privately-backed mortgages, but as things stand, such borrowers have no guarantee this will continue.

This bill does not directly address the problem. It does not create any additional rights to forbearance that do not already exist, nor does it provide borrowers with any additional time, either before the foreclosure process begins or once the borrower is in the foreclosure process, in which improving financial circumstances might permit the borrower to get caught up.

What the bill does require is that, if a mortgage servicer denies a borrower's request for forbearance, the mortgage service must provide the borrower with a notice that gives the borrower a specific reason for the denial. Other than requiring that a specific reason be given, the bill is largely silent as to what that reason can be. The bill does indicate that if the denial is due to an incomplete application or missing information from the borrower, then the mortgage servicer is required to give the borrower 21 days to correct the omission. Even if the application is fully and correctly completed, however, the bill does not appear to require a servicer to grant forbearance.

In contrast, once a mortgage servicer does elect to provide a borrower with forbearance, the bill does appear to require the mortgage servicer to review a customer for a post-forbearance "solution" that is consistent with guidance provided by the federal agencies that oversee federally-backed loans. Since there are several of these federal agencies and their guidance regarding options following forbearance varies widely, the meaning of this provision is unclear. Presumably, however, since the solution must be "consistent" with the guidance produced by the various agencies, the mortgage servicer must review the borrower for each and every possible "solution" that any of the various agencies permit.

To enable borrowers to enforce their rights under the forbearance provisions of the bill, the bill authorizes a borrower who has been materially impacted by a violation of the bill to enforce the borrower's rights in court. As a practical matter, however, it is highly unlikely that many of these cases will arise, even if violations of the bill's provisions are rampant. This is because, in contrast to HBOR and the version of AB 1436 that passed out of this Committee, this bill does not provide for an award of attorney's fees to a borrower who prevails in an action seeking injunctive relief to save their home from being sold at a foreclosure auction.

These are complex cases for which legal representation is essential, but absent a guarantee of obtaining attorney's fees if the borrower prevails, no economically rational attorney would ever take such a case. The borrower is highly unlikely to be able to pay, since if the borrower had sufficient money to pay an attorney, the borrower would have paid the mortgage. As a result, the attorney faces the strong possibility that the attorney will never get paid, even if it crystal clear that the mortgage servicer violated the law to the detriment of the borrower.

b. Extension of the Homeowners Bill of Rights to small landlords

This bill extends the procedural protections of the Homeowners Bill of Rights (HBOR) to small landlords, meaning one or more individuals who collectively own no more than three residential properties, each of which contains no more than four units. HBOR provides protections to borrowers once they have missed a few mortgage payments and are therefore delinquent on their loans. It is at this point that lenders may initiate foreclosure. HBOR requires that mortgage servicers contact borrowers before starting the foreclosure process to discuss foreclosure prevention options. Under HBOR, if a borrower asks to be evaluated for a loan modification, then the mortgage servicer must follow specified standards while working through the application process. Perhaps most significantly, HBOR prohibits "dual-tracking," meaning that the mortgage servicer must refrain from continuing the foreclosure process while it is evaluating a borrower's application for a loan modification.

Under this bill, HBOR protections would be expanded to a fully tenant-occupied property with one to four units, if the following conditions were met: (1) the landlord owns no more than three such residential real properties, each of which contains no more than four dwelling units; (2) the property for which the landlord is seeking protection is occupied by at least one tenant who has been unable to pay rent due to COVID-19 reduction in income; and (3) the property for which the landlord is seeking protection is occupied by at least one tenant who entered into a market-rate lease that was in effect on March 4, 2020. The property must continue to be the principal residence of such a tenant throughout the time the landlord is seeking HBOR protections. These conditions are meant to ensure that the temporary HBOR expansion applies only to small landlords who are facing a loss of income due to COVID and who continue to house at least one bona fide tenant.

The HBOR expansion will sunset on January 1, 2023. Regardless of whether that sunset date is extended in the future, the existence of any sunset may create problems for landlords who are in the midst of being considered for a foreclosure alternative when the bill's provisions expire. In the coming session, therefore, the Legislature may therefore wish to consider adding a saving clause extending these protections for landlords who are already in-process for a loan modification at the time the bill sunsets.

Extending HBOR's procedural protections against foreclosure to small landlords would have the benefit of establishing for those small landlords a legally enforceable right to engage in a conversation with the mortgage servicer about ways that the small landlord might be able to avoid foreclosure. The prohibition on dual-tracking also assures that a small landlord is not careening toward foreclosure at the same time the small landlord is undergoing evaluation for possible loan modifications. At the same time, it may be worth noting what HBOR does not provide. Extending HBOR to small landlords does not provide them with forbearance and, ultimately, HBOR offers no guarantee at all that foreclosure can be delayed or avoided. HBOR provides procedural remedies. It requires mortgage servicers to evaluate borrowers to see if they are eligible for loan modifications but it does not require mortgage servicers to provide borrowers with any particular substantive outcome.

4. Analysis of the bill's technical clean-up of AB 1482 (Chiu

AB 1482 (Chiu, Ch. 597, Stats. 2019), California's landmark legislation requiring just cause for eviction statewide and prohibiting residential rent-gouging, was the product of lengthy, complex, and shifting negotiations between stakeholders, both houses of the Legislature, and, eventually, the Governor's Office. Though the principal components of the bill are clear, hindsight has shown a handful of provisions at the margins that require further refinement in order to eliminate possible confusion. AB 1482's author therefore reconvened the principal stakeholders to the original bill and asked them to seek consensus language that could iron out these policy wrinkles. This component of this bill is the result of that effort. Each source of potential confusion from AB 1482 is described below, accompanied by a brief explanation of the solution proposed in this bill.

a. *Determining the applicable rate of inflation*

AB 1482 sought to cut down on rent-gouging by prohibiting annual rent increases in excess of five percent plus inflation up to a maximum cap of 10 percent. AB 1482 specified that the rate of inflation for any particular property is the percentage change in the regional Consumer Price Index for the region where the residential real property is located from April 1 of the prior year to April 1 of the current year, as published by the United States Bureau of Labor Statistics. If no regional index is available for the property in question, then inflation is to be calculated using the California Consumer

Price Index for All Urban Consumers for all items, as determined by the Department of Industrial Relations.

While conceptually simple, hindsight has revealed some ambiguities in this formulation. For example, if a landlord seeks to raise the rent in February, how does the landlord know what the regional CPI for April 1 of the current year will be?

This bill revises the formula for calculating inflation, eliminating points of potential confusion in the process. The new formulation is intended to cover as many contingencies as possible while making it relatively simple to follow.

b. Clarification of how housing structures with two units are to be treated under the bill

AB 1482 exempted from its provisions duplexes in which the owner occupies one of the two units. In practice, however, the term duplex has no standard legal definition. As a result, there was some confusion about exactly what rental property is, and is not, exempt. To clarify the matter, this bill specifies that the exemption applies to property containing two separate dwelling units within a single structure, where neither unit is an accessory dwelling unit or a junior accessory dwelling unit, and the property owner occupies one of the units as a principal residence.

c. Correction of erroneous cross-reference in notice of exemption to tenant

AB 1482 requires that, in order to be exempt from the rent cap and just cause provisions, a property owner must both qualify for the exemption and provide notice of that exemption to the tenants. The bill specifies the exact language that must be contained in these notices. In the legislative swirl accompanying negotiation and passage of AB 1482, two erroneous cross-references within the text for one of the required notices went undetected. As a result, landlords wishing to claim an exemption face a dilemma: they can use the exact text as it appears in the bill, but they will then be providing inaccurate information to their tenants; or alter the text of the notice to provide accurate information, but violate the statute – at least in a very technical sense – in the process. This bill corrects the cross-reference, thus eliminating this problem.

d. Aligning definitions of school dormitories

AB 1482 contained exemptions for school dormitories from both the just cause provisions and the anti-rent gouging provisions. At some point in the legislative process, however, the language describing one of the exemptions was changed, but the other did not. This mismatch was unintentional. Accordingly, this bill brings the two exemptions into alignment.

e. Clarifying the scope of laws with which housing providers must comply before establishing initial rates after the expiration of affordability covenants

In order to qualify for special financing, many housing providers must agree to keep the rent affordable for a specified period of time. AB 1482 provided that, upon the expiration of that period, housing providers could initially establish new rental rates without necessarily staying within the rent increase caps imposed by AB 1482. Before establishing these new initial rental rates, however, the housing provider had to demonstrate compliance with other laws designed to preserve affordable housing. As drafted, however, AB 1482 was not completely consistent about exactly what laws housing providers had to follow. This bill clarifies that the housing provider must demonstrate compliance with all applicable federal, state, and local laws. The bill further specifies that AB 1482 does not preempt any local laws that may also apply.

SUPPORT

None known

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation:

SB 915 (Leyva, 2020) temporarily prohibits mobilehome parks from evicting residents who timely notify park management that they have been impacted, as defined, by COVID 19. The bill further mandates that mobilehome parks give COVID 19-impacted residents at least a year to comply with demands to repay outstanding rent, utilities or other charges, and up to a year to cure violations of park rules and regulations. The bill also prohibits parks from increasing rent or other charges during the period of repayment or cure. SB 915 is currently pending consideration on the Assembly Floor.

SB 1410 (Caballero, 2020) establishes a program under which landlords and tenants impacted economically by COVID-19 could enter into a specified agreement in lieu of rent payments. On the basis of this agreement, the landlord could apply to the Franchise Tax Board for tax credits equal in value to the rent not paid by the tenant. The tenant would be obligated to pay the amount of the unpaid rent to the Franchise Tax Board in yearly installments over ten years beginning in 2024, with specified discounts and forgiveness for low-income individuals. SB 1410 was held in the Assembly Appropriations Committee.

SB 1447 (Bradford, 2020), prior to being gutted and amended to address unrelated matters on August 27, 2020, would have allowed specified small landlords facing foreclosure to avail themselves of the procedural protections set forth in the Homeowner Bill of Rights, including the ability to halt a non-judicial foreclosure

temporarily through the filing of a completed application for a first lien loan modification, and permanently halt such foreclosure proceedings if a loan modification is granted. SB 1447, with unrelated content, is currently pending consideration on the Assembly Floor.

AB 828 (Ting, 2020) establishes a moratorium on foreclosures for the duration of the COVID-19 state of emergency plus 90 days and prohibits evictions during a similar period except in cases addressing issues of damage to the property, nuisance, or health and safety. The bill also gives tenants who can document COVID-19 related financial hardship a one-year deferral on rent accrued during the state of emergency. AB 828 is currently pending consideration before the Senate Judiciary Committee.

AB 1436 (Chiu, 2020) enables small landlords, homeowners, and tenants in financial distress because of the COVID-19 pandemic, to temporarily defer their mortgage or rental payments until, it is hoped, the worst of the public health emergency passes and its financial consequences begin to ease. The bill also establishes timelines and a framework for full repayment of any amounts deferred. AB 1436 is currently pending further referral in the Senate Rules Committee.

Prior Legislation:

SB 939 (Wiener, 2020) would have established, for specified commercial tenants, a temporary moratorium on evictions for the duration of the COVID-19 related state of emergency, and a yearlong period afterward in which to make up rental payments missed during that state of emergency. In addition, for specified businesses that have been especially impacted by the public health protocols resulting from the COVID-19 pandemic, including restaurants and bars, the bill would have created procedures for renegotiating or terminating existing leases that were based on pre-COVID-19 expectations. SB 939 was held in the Senate Appropriations Committee.

AB 1482 (Chiu, Ch. 597, Stats. 2019) limited rent-gouging in California by placing an upper limit on annual rent increases: five percent plus inflation up to a hard cap of 10 percent. To prevent landlords from engaging in rent-gouging by evicting tenants, this bill also requires that a landlord have and state a just cause, as specified, in order to evict tenants who have occupied the premises for a year. Both the rent cap and the just cause provisions are subject to exemptions including, among others: housing built in the past 15 years and single family residences unless owned by a real estate trust or a corporation. AB 1482 sunsets after ten years and does not preempt any local rent control ordinances.

AB 56 (Moore, Ch. 53, Stats. 1992) provided relief to tenants who were unable to respond to unlawful detainer actions because of court closures due to the Rodney King riots in Los Angeles.

PRIOR VOTES:

NOTE: Significant new content was added to this bill on August 28, 2020. All prior votes on the bill relate only to the part of this bill that provides technical cleanup to AB 1482 (Chiu, Ch. 597, Stats. 2019), the just cause for eviction and anti-rent gouging bill passed by the Legislature last year.

Senate Judiciary Committee (Ayes 9, Noes 0)
Assembly Floor (Ayes 70, Noes 0)
Assembly Housing and Community Development Committee (Ayes 7, Noes 0)

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