



## *Legal Guide H-1*

# REGULATION OF HOMESTEAD FILING SERVICES

*March 2010*

## **What is a Homestead Filing Service?**

The term “homestead filing service” means any service offered or performed for compensation in connection with the preparation or completion of a homestead declaration. This includes the preparation of a homestead declaration, assistance in preparing a homestead declaration, recording a homestead declaration, and any combination of these.<sup>1</sup> The offer and sale of homestead filing services are regulated by California law.<sup>2</sup>

## **Who is subject to this law?**

The provisions of the law apply to anyone who provides homestead filing services.

However, the statute does *not* apply to attorneys, or to those who work under the direction and supervision of attorneys, with respect to legal services that are provided to a client who has retained the attorney to provide those services.<sup>3</sup> Once you hire an attorney to advise you regarding a homestead, neither the kinds of service that are furnished by an attorney, nor the charges for those services, are covered by this law.

## **What is a Homestead Declaration?**

A homestead declaration is a written statement, made under penalty of perjury, that claims a particular “dwelling” (for example, a house, condominium, boat, or similar property) as the owner’s *principal* place of residence. For simplicity, this guide uses the word “home” to describe any principal dwelling.

When a homestead declaration is (1) signed by a homeowner, (2) acknowledged (i.e., notarized) by a notary, and (3) recorded, it helps to protect the home against loss to creditors. “Recorded” means that the original signed and notarized homestead declaration is filed in the clerk’s or recorder’s office for the county in which the home is located. (The Department of Consumer Affairs is **not** an agency that records such declarations, **nor** can it file a homestead declaration with any clerk or recorder’s office.) A properly prepared and recorded homestead declaration immunizes the home (and the land on which it is situated) from many (but not all) legal enforcement measures. For example, if a homeowner files a petition in bankruptcy, it may be possible, because of a homestead declaration, to retain the home, or at least a portion of the equity in the property, instead of losing it to creditors.<sup>4</sup>

## **What Protections Does This Law Provide?**

The law that regulates those who for compensation offer or provide homestead filing services: (a) prohibits certain misstatements; (b) requires certain disclosures; (c) defines the minimum kinds of services that *must* be provided by anyone who provides homestead filing services; and (d) limits the fees that can be charged.<sup>5</sup>

### *Minimum Services to be Provided*

The law requires that in addition to any other service such as preparing or completing a homestead declaration, the provider shall deliver each notarized homestead declaration to the appropriate county, and pay all fees in connection with the notarization and recording of the declaration. The service provider must deliver the declaration to the appropriate county recorder as soon as needed, but no later than 10 days after it is notarized.<sup>6</sup>

### *Fees*

The law limits the fee that can be charged for the service to \$25, including notary and recording fees.<sup>7</sup> The homestead filing service cannot charge, demand, or collect the fee until after the homestead declaration is recorded.<sup>8</sup> This may mean that the amount that a consumer pays for a homestead declaration will be paid to a third-party “escrow,” who will disburse the money to the homestead filing service only after the homestead is recorded.

### *Required Disclosure*

To help ensure that a homeowner is not misled about the need for filing a homestead declaration or the protection that this provides, a homestead filing service must include a prescribed disclosure at the top of each page of every advertisement or promotional material before the time when the owner is obligated to pay for the service.<sup>9</sup> In the case of an oral solicitation or a broadcast advertisement, the disclosure must be recited at the beginning of each presentation and delivered in printed form before each person who responds to the oral solicitation or broadcast is obligated to pay for the service.<sup>10</sup>

In all situations, the printed disclosure must be in 12-point boldface type and enclosed in a box formed by a heavy line.<sup>11</sup> The following statement must be made:

**THIS HOMESTEAD FILING SERVICE IS NOT ASSOCIATED WITH ANY GOVERNMENT AGENCY.**

**YOU DO NOT HAVE TO RECORD A HOMESTEAD DECLARATION.**

**RECORDING A HOMESTEAD DECLARATION DOES NOT PROTECT YOUR HOME AGAINST FORCED SALE BY A CREDITOR. YOU MAY WISH TO CONSULT A LAWYER ABOUT THE BENEFITS OF RECORDING A HOMESTEAD DECLARATION.**

**IF YOU WANT TO RECORD A HOMESTEAD, YOU CAN FILL OUT A HOMESTEAD DECLARATION FORM BY YOURSELF, HAVE YOUR SIGNATURE NOTARIZED AND HAVE THE FORM RECORDED BY THE COUNTY RECORDER.<sup>12</sup>**

## *Prohibitions*

The law makes it unlawful for those offering or providing homestead filing services to make certain statements about the *homestead law* or the *particular service* that the provider is offering:

- First, all statements that are *untrue* or *misleading* are prohibited.<sup>13</sup>
- Second, certain kinds of representations are altogether prohibited, including the following<sup>14</sup>:
  - That the preparation or recording of a homestead declaration will prevent the forced sale of a judgment debtor's dwelling.
  - That the preparation or recording of a homestead declaration will prevent the foreclosure of a mortgage, deed of trust, or mechanic's lien.
  - That the protections of the homestead law are available only to persons who prepare or record a homestead declaration.
  - That a homestead declaration is in any way related to obtaining a homeowner's exemption to real property taxes.
  - That the preparation or recording of a homestead declaration is required by law.
  - That the homestead filing service has a file or record covering a person to whom a solicitation is made.
  - That the homestead filing service is, or is affiliated with, a charitable or public service entity - unless it is or is so affiliated.<sup>15</sup>
  - That the homestead filing service is, or is affiliated with, any government entity, including the misleading use of a government seal or emblem; using any business name that includes such words as "agency," "bureau," "county," or "city"; or in the name of any city or county; or other title usually associated with a government body, or to use an envelope that simulates an envelope containing a government check, tax bill or other notice.

As noted above, a person who provides homestead filing services has certain statutory duties once that person is hired.<sup>16</sup> The provider must:

- a) prepare or complete, or assist in the preparation or completion, of the homestead declaration,
- b) ensure that the declaration is notarized,
- c) deliver the signed and notarized declaration to the appropriate county recorder for recordation,
- d) pay all fees charged in connection with the notarization and recordation of the homestead declaration, and

- e) complete the recordation process within the time required by the homeowner, but not later than 10 days after the declaration is notarized.

### **Why Was This Law Adopted?**

The homestead filing service law was adopted because some providers of homestead filing services were misrepresenting the need for, or character of, the services. A common misrepresentation was that a recorded declaration of homestead protects against enforcement measures by *all* creditors. In fact, filing a homestead declaration does not protect against creditors whose claims are secured by a prior mortgage or deed of trust on the property, or against a business that has a mechanic's lien on the property as a result of providing services or improvements. Also, some providers concealed the existence of the automatic homestead protection in order to sell homestead filing services to those who did not need such services.

### **Sources and Enforcement of Law**

The homestead law (covering both automatic homesteads and declared homesteads) is found at California Code of Civil Procedure §§ 704.910-704.995. The law that regulates persons who provide homestead filing services is codified at California Business and Professions Code § 17537.6. Any violation of § 17537.6 is a misdemeanor. (Bus. & Prof. Code § 17534.)

In addition, the California Attorney General or a district attorney, and certain city attorneys, may recover a civil penalty of up to \$2,500 for each violation of Business and Professions Code § 17537.6. (Bus. & Prof. Code § 17206.) Suits for an injunction prohibiting violations and securing restitution of amounts paid by victims may be maintained by both law enforcement agencies and private parties. (Bus. & Prof. Code §§ 17203, 17535.)

### **Should *You* File a Homestead Declaration?**

The filing of a declared homestead *does* add to the homestead protection that the law automatically provides to all homeowners. Similar protections of a home, or the equity in a property, are enjoyed by homeowners who have *not* recorded a homestead declaration, but those protections are not quite as extensive as those provided by a properly recorded written homestead declaration.<sup>17</sup> For that reason, homeowners who are in financial trouble, or who expect to be in financial trouble, should consult an attorney for advice on the need for filing a homestead declaration.

The following are some of the reasons that a homeowner who is or expects to be in financial trouble should file a declared homestead and not rely exclusively on the automatic homestead:

- The owner who files a declared homestead can choose which of several different dwellings will be protected as the person's home.
- The protection that is provided by a *declared* homestead will continue to apply to that homestead even if the owner *moves*. If a declared homestead has *not* been recorded, the automatic homestead protection may be lost if the owner moves.
- The protection that is provided by a *declared* homestead will apply to the *proceeds of a voluntary sale*. If no declared homestead has been recorded, the protection of the owner's equity in a home may be lost in the event of a voluntary sale of the home. (This

means that the proceeds of the voluntary sale of the home will go to the judgment creditor or creditors rather than the owner.)

- If a *declared* homestead *has* been recorded, the law is clear that the proceeds of sale (up to the dollar limits of the homestead law) can be used to purchase another home.
- Only if a *declared* homestead *has* been recorded will the proceeds of a voluntary sale assuredly be protected after they are used to purchase another home; only then will the protection given to the first home be carried over to the second home.

However, neither the automatic homestead nor the declared homestead will protect a homeowner against the loss of his or her home to a secured creditor -- such as the lender who has financed the original purchase, or a lender who extended a second mortgage loan, or to a contractor, subcontractor or laborer who has filed a valid claim of mechanic's lien. The protections of both the declared and automatic homesteads, however, extend to most other kinds of creditors.

A homeowner who is in financial trouble, or one who expects to encounter financial trouble, should consult an attorney for advice on how to protect their home.

A homeowner may prepare and file a homestead declaration by carefully following a good "do-it-yourself" guidebook.

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## ENDNOTES

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<sup>1</sup> Bus. & Prof. Code §§ 17537.6. (c), (e)(1).

<sup>2</sup> Bus. & Prof. Code § 17537.6.

<sup>3</sup> Bus. & Prof. Code § 17537.6(e)(1); but see *In re Morse* (1995) 11 Cal.4th 184, 203-204 [44 Cal.Rptr.2d 620, 630-631].

<sup>4</sup> The homestead law (covering both automatic homesteads and declared homesteads) is found at Code of Civil Procedure §§ 704.710-704.995.

<sup>5</sup> Bus. & Prof. Code § 17537.6(a)-(d).

<sup>6</sup> Bus. & Prof. Code § 17537.6(c).

<sup>7</sup> Bus. & Prof. Code § 17537.6(d).

<sup>8</sup> Bus. & Prof. Code § 17537.6(d).

<sup>9</sup> Bus. & Prof. Code § 17537.6(b)(2).

<sup>10</sup> Bus. & Prof. Code § 17537.6(b)(3).

<sup>11</sup> Bus. & Prof. Code § 17537.6(b)(2).

<sup>12</sup> Bus. & Prof. Code § 17537.6(b)(1).

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<sup>13</sup> Bus. & Prof. Code § 17537.6(a).

<sup>14</sup> Bus. & Prof. Code § 17537.6(a).

<sup>15</sup> To so represent, the service must be, or be affiliated with, a charitable organization that has qualified for a tax exemption under section 501(c)(3) of the Internal Revenue Code.

<sup>16</sup> Bus. & Prof. Code § 17537.6(c).

<sup>17</sup> For an analysis of the two homestead alternatives, see *In re Morse* (1995) 11 Cal.4th 184 [44 Cal.Rptr.2d 620].