

## LAW REVIEW

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### NEW FORECLOSURE LAWS IN EFFECT – TAKE ONE

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It is a strange new world out there folks.

Business is down, firms are downsizing, stores are closing, commercial rents are being renegotiated, long-time employees are being laid off, and you know what is happening to your investments. It will get better but I don't think it will be anytime soon. And frankly, I'm skeptical that the trillion dollar bail-outs are going to help much. I can see us a year from now asking what happened to all that money.

As of September 6, 2008, and as recently as February 20, 2009, a batch of new laws was put into play in California giving borrowers additional protections from residential foreclosures. And new federal home loan programs are on the horizon (a future column).

That's good because according to *ABC News*, a quarter of a million U.S. homeowners are receiving foreclosure notices every month, 9,000 a day. That number is expected to triple in 2009.

In today's column we will discuss California's new foreclosure laws that became effective September 6, 2008. Next week we will explain an even more significant foreclosure law effective *this week*. The purpose of the new laws is to

require lenders to attempt workouts and modifications of existing residential loans.

### Foreclosure Process

Prior to these recent changes, the usual so-called non-judicial foreclosure process in California was relatively simple, in fact it still is. Once a debtor goes into default, the lender records and mails the borrower a Notice of Default, waits three months, then records and notifies the borrower with a Notice of Sale. The Notice of Sale is posted on the property and published once a week over three weeks, then the property is sold at auction, with the lender generally bidding what is owed, which usually results in the lender owning the home. The entire foreclosure process takes about four months, unless there is a bankruptcy or some other delaying event.

### New Foreclosure Requirement

Under new Civil Code section 2923.5, effective September 6, 2008, a lender may not start the foreclosure process without contacting the borrower in person or by telephone (not a message) 30 days before filing a Notice of Default in order to assess the borrower's financial situation and explore options to avoid foreclosure. Other information must be provided to the borrower in that initial contact.

Also, the Notice of Default must include a precise declaration that the lender contacted the borrower or tried with due diligence to contact the borrower. If the Notice of Default does not include that magic phrase, the Notice should be void per the new code.

If the lender had already filed a Notice of Default on September 6, 2008, then the special declaration that the lender attempted to contact the borrower must be included in the Notice of Sale.

Under Civil Code section 2923.5, if the lender is unable to contact the borrower, there is a laundry list of six different things the lender must do to show its due diligence in attempting to contact the borrower, including sending a certified letter with return receipt requested, posting a prominent link on its web site explaining options for borrowers and providing a toll-free telephone number. If you believe the new laws are valid, and I don't know why they wouldn't be, failure to comply voids any foreclosure process in California.

Section 2923.5 applies to owner-occupied residential loans made from January 1, 2003 through December 31, 2007.

I doubt these laws are actually resulting in successful loan work outs with lenders, in part because many lenders are upside down themselves and in total disarray and/or unavailable, but it's a step in the right direction.

#### Posting Notice of Sale

As noted, one of the last steps of foreclosing involves publishing and posting a Notice of Sale, informing the borrower and the world, when and where the foreclosure sale will take place.

Under new Civil Code section 2924.8, a residential lender or foreclosing company must also post a notice (at the property) in English and other languages (as applicable) that the property is subject to foreclosure if the loan billing address is different than the property address.

And in that case the lender must mail a Notice of Foreclosure to the property in an envelope addressed to: "Resident of Property Subject to Foreclosure Sale," which notice must also say that if you are renting the residence, the new owner (after the foreclosure) must give you a 60-day eviction notice (recently changed from 30 days). (If you are the owner being foreclosed upon still in possession, the notice of eviction is a 3-day notice to vacate.)

### Maintaining Property

Another new law effective September 6, 2008 governing residential foreclosures requires any foreclosing lender or the purchaser at a foreclosure to maintain the vacant residential property or be subject to a \$1,000 per day, per violation fine. "Failure to maintain" includes failure to care for the exterior of the property, failure to prevent trespassers from remaining on the property, and most interestingly, failure to prevent mosquito larvae growth in standing water.

### "Where's The Note?"

Here's an odd-ball, interesting tip gleaned from a pro-consumer TV piece.

A consumer group encourages borrowers being foreclosed upon to demand from the foreclosing company and the lender, the original (or at least a copy) of the signed promissory note that is being foreclosed upon. Apparently in today's world of sub-prime mortgages and mortgages sold and re-sold, sometimes the promissory note signed by the borrower is unavailable or missing from the file. It seems a little strange asking the foreclosing company for the note but it may stall the foreclosure.

Next week we explain a 90-day foreclosure delay law signed by Governor Arnie last week.

(To find the California Civil Codes referenced in this article go to [www.portersimon.com](http://www.portersimon.com) and click on resources at the top of the page then click on legal resources and finally on the link under California law entitled California Codes. At the bottom of the page you will find a search box where you can enter the code(s) you are looking for.)

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