

Across the Line

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NEW FORECLOSURE LAWS TAKE EFFECT

On September 6, 2008, and as recently as February 20, 2009, a batch of new bills were put into play in California giving borrowers additional protection from residential foreclosures. The purpose of the new laws is to require lenders to attempt workouts and modifications of existing residential loans.

Additionally, new federal home loan programs are on the horizon.

That's good because a quarter of a million U.S. homeowners are receiving foreclosure notices every month, 9,000 a day. That number is expected to triple this year.

California Foreclosure Process

Prior to these recent changes, the usual 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 mails 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 taking back the property. The entire foreclosure process takes about four months unless there is a bankruptcy or some other delaying

event. Unlike Nevada, the loan may be reinstated up to five business days before the auction sale.

Civil Code Section 2923.5

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 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--January 1, 2008 (inclusive).

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. Only in California.

New Civil Code Section 2923.52 (SB 7)

Under new Civil Code section 2923.52, the California Foreclosure Prevention Act, the lender is delayed from mailing, recording and posting a Notice of Sale for 90 days. The purpose is to allow the lender and borrower to try and workout a loan modification to prevent foreclosure.

Section 2923.52 applies to loans recorded from January 1, 2003, to December 31, 2007, secured by California residential real property. The property must have been the borrower's primary residence and the borrower must have occupied the property at the time the loan became delinquent. The new law, which applies only to first trust deeds, was signed by Governor Arnie on February 6, 2009 and expires on January 1, 2011.

Failure to conform to the 90-day delay on foreclosing does not void a foreclosure but subjects the lender to license disciplinary proceedings by the Commissioner of Corporations, the Commissioner of Financial Institutions or the Real Estate Commissioner depending on who regulates the lender.

Loan Modification Program

Section 2923.52 has a significant exception. It does not apply if the lender has recently adopted a comprehensive loan modification program that has been approved by one of the Commissioners mentioned above. The Code specifies

what must be included in a loan modification program, which may include an interest rate reduction, an extension of the loan term, a deferral of some portion of the loan principal to the end of the loan, or even a reduction of the principal.

Supporters of the California Foreclosure Prevention Act, which appears to take effect on May 21, 2009 although it is difficult to tell, hail it as significant while detractors argue the new law is not tough enough to be meaningful. It remains to be seen whether lenders will adopt loan modification programs that are really beneficial for borrowers in trouble.

Remember, Nevada and California foreclosure consultants are prohibited from taking upfront fees from homeowners looking for assistance in modifying their home loans.

New Federal Refinancing Laws

The big news for home borrowers in trouble is coming from the Obama Administration. To find out more about refinancing or modifying home loans you can search the internet using these key words: Home Owner Affordability and Stability Plan Fact Sheet (HASP), Home Owner Stability Initiative, and Making Homes Affordable. Visit the Mortgage Law Network website at www.mortgagelawnetwork.com. Also look at the US Treasury Loan Modification program at www.ustreas.gov/news.

Many of the federal programs are applicable only for loans financed through or backed by Fannie Mae or Freddie Mac. For more information on those programs go to www.fanniemae.com/homeaffordable or www.freddiemac.com/avoidforeclosure. We have all been hearing the

cliché “who’s going to bail me out?” The feds are lining up billions of dollars to help homeowners in financial trouble. Your clients may be eligible.

(To find the California Civil Codes referenced in this article go to 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 you are looking for.)

This is another of a series of articles on California law - for Nevada lawyers - authored by members of the Truckee, South Lake Tahoe, Incline Village and Reno law firm of Porter Simon.

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