

Bankruptcy e-Bulletin

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Dear Insolvency Law Committee Constituency List Members:

Governor Schwarzenegger signed legislation on July 8, 2008, effective immediately, regarding all California residential mortgage foreclosures.

Civil Code sections 2923.5, 2923.6, 2924.8 and 2929.3 and Code of Civil Procedure section 1161b are added to the California Codes to address the influx of mortgage foreclosures in California.

Requirements to Contact Borrower re Workout Options Prior to Foreclosure and to Provide Declaration re Same with Notice of Default and/or Notice of Sale

Civil Code section 2923.5 applies to loans initiated from January 1, 2003 to December 31, 2007 secured by residential real property for owner-occupied residences. Owner-occupied means it is the borrower's principal residence.

The section provides that a mortgagee, beneficiary or authorized agent, which can be the prospective foreclosure trustee (collectively hereafter "beneficiary"), may not file a Notice of Default under section 2924 until 30 days after contacting the borrower as prescribed below or a diligent effort as described below is made to contact the borrower.

The beneficiary shall contact the borrower in person or by telephone to assess "the borrower's financial situation and explore options for the borrower to avoid foreclosure." During the initial contact, the beneficiary must:

1. Advise the borrower that he or she has the right to request a subsequent meeting to be scheduled by the beneficiary within 14 days; and
2. Provide the borrower with the toll free number made available by the US Dept of Housing and Urban Development to find a HUD certified housing counseling agency [(800) 569-4287].

The Notice of Default must now include a declaration from the beneficiary that it has contacted the borrower or conducted due diligence to do so unless the borrower has surrendered the property to the beneficiary. If the Notice of Default was recorded before July 8, 2008, a declaration must accompany the Notice of Sale when it is recorded, stating that the borrower was contacted to assess the financial situation and explore options to avoid the foreclosure or list the efforts made to

contact the borrower if no contact was made.

Diligent efforts to contact the borrower shall “require and mean:”

1. Sending a first class letter that includes the toll free HUD number; and

2. Attempting to contact the borrower, after the letter has been sent, at least three times by telephone call to the primary number on file at different times on different days—an automated system is ok so long as a live representative connects if the borrower answers, and the telephone requirements are met if after trying the contact, the number is disconnected; and

3. Two weeks after the telephone contact attempts are satisfied, if the borrower does not respond, the beneficiary must send a certified letter that includes a toll free number to contact a live representative; and

4. The beneficiary has posted a “prominent” link on the homepage of its internet website, if any, with the following information:

- a. Options may be available to borrowers who cannot afford their mortgage and the instructions on how to explore the options;
- b. A list of financial documents borrowers should collect to discuss options with the beneficiary;
- c. A toll free number to discuss the options; and
- d. The HUD toll free counseling number;

Contacting the borrower or diligent efforts to do so are not required if:

1. The borrower surrenders the property by turning over the keys or by sending a letter to the beneficiary; or

2. The borrower has contracted with a person or organization whose primary business is advising how to extend the foreclosure process and how to avoid contractual obligations; or

3. The borrower has filed bankruptcy.

Duty of Servicing Agents to Enter into Workouts or Modifications

Section 2923.6 provides that servicing agents for loan pools owe a duty to all parties in the pool so that a workout or modification is in the best interests of the parties if the loan is in default or default is reasonably foreseeable, and the recovery on the workout exceeds the anticipated recovery through a foreclosure based on the current value of the property.

Notice to Tenants Living in Foreclosed Property of Extended Eviction Period

Section 2924.8 applies to residential real property when the billing address is different than the property address, i.e. there are potentially tenants living in the property. It provides for an additional notice to be mailed and posted with the Notice of Sale, addressed to “Resident of

property subject to foreclosure sale.” The notice shall say in English and other languages as required by Civil Code section 1632, if the agreement was negotiated in another language:

Foreclosure process has begun on this property, which may affect your right to continue to live in this property. Twenty days or more after the date of this notice, this property may be sold at foreclosure. If you are renting this property, the new property owner may either give you a new lease or rental agreement or provide you with a 60-day eviction notice. However, other laws may prohibit an eviction in this circumstance or provide you with a longer notice before eviction. You may wish to contact a lawyer or your local legal aid or housing counseling agency to discuss any rights you may have.

Maintenance of Foreclosed Properties and Fines for Failure to Do So

Section 2929.3 applies to vacant residential real property purchased at a foreclosure sale and requires the purchaser to maintain the property. Failure to maintain means failure to care for the exterior of the property and includes, but is not limited to:

1. Letting the foliage grow so that it diminishes the property values;
2. Failing to take action to keep squatters and trespassers off the property; and
3. Failing to abate mosquito larvae growth or other public nuisances.

The local governmental entity must provide a 14-day notice to the property owner with 30 days to complete the remediation. Thereafter, the governmental entity may impose \$1,000 per day fines until the situation is rectified. The section provides for a hearing to contest the fines and requires the governmental entity to take into account good faith efforts to remedy the problem. If the condition threatens public health or safety, the compliance period may be shortened.

60-Day Eviction Notice for Tenants in Foreclosed Properties

Finally, Code of Civil Procedure section 1161b provides that tenants in foreclosed properties must be given a 60-day eviction notice. The section does not apply if any party to the foreclosed note remains a tenant, subtenant or occupant in the property.

These materials were written by Donna T. Parkinson, Chair of the Insolvency Law Committee.

Best regards,
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Insolvency Law Committee, Co Vice Chair

The Insolvency Law Committee of the Business Law Section of the California State Bar provides a forum for interested bankruptcy practitioners to act for the benefit of all lawyers in the areas of legislation, education and promoting efficiency of practice. For more information about the Insolvency Law Committee, please see the committee's Web site: www.calbar.org/buslaw/insolvency.

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