

Assembly Bill No. 7

CHAPTER 5

An act to amend, repeal, and add Section 2924 of, and to add and repeal Sections 2923.52, 2923.53, 2923.54, and 2923.55 of, the Civil Code, relating to residential mortgage loans.

[Approved by Governor February 20, 2009. Filed with Secretary of State February 20, 2009.]

LEGISLATIVE COUNSEL'S DIGEST

AB 7, Lieu. Residential mortgage loans: foreclosure.

Existing law requires that, upon a breach of the obligation of a mortgage or transfer of an interest in property, the trustee, mortgagee, or beneficiary record a notice of default in the office of the county recorder where the mortgaged or trust property is situated and mail the notice of default to the mortgagor or trustor. Existing law provides that, after not less than 3 months after the filing of the notice of default, the parties described above may give notice of sale, stating the time and place of the sale, as specified.

This bill, until January 1, 2011, and only with respect to specified loans that were recorded between January 1, 2003, to January 1, 2008, would prohibit a mortgagee, trustee, or other person authorized to take sale from giving a notice of sale for an additional 90 days if the loan at issue is the first mortgage or deed of trust that the property secures, the borrower occupied the property as his or her principal residence at the time the loan became delinquent, and the notice of default has been filed. The bill would exempt certain loans from this prohibition, including, upon order of the Commissioner of Corporations, the Commissioner of Financial Institutions, or the Real Estate Commissioner, as applicable, the loans of a mortgage loan servicer, as defined, if the mortgage loan servicer applies to the commissioner for an exemption indicating that it has implemented a loan modification program with specified features and the commissioner concludes that the program meets specified requirements. The bill would permit a mortgage loan servicer to submit a revised application if its application is denied, and would permit the commissioner to revoke an exemption under certain circumstances. The bill would require the commissioners to adopt regulations in this regard, as specified. The bill would require the Secretary of Business, Transportation and Housing to report to the Legislature 3 months after the first exemption is granted regarding the details of the actions on exemption of loans serviced by a mortgage loan servicer under a loan modification program and to submit subsequent reports every 6 months thereafter. The bill would require the secretary to post specified information on the exemption program on the agency's Internet Web site.

The bill would provide that a person who violates these provisions is deemed to have violated his or her license law. The bill would provide that the failure to comply with the provisions described above does not invalidate a sale that is otherwise valid under specified provisions. The bill would require that a notice of sale include a declaration from the mortgage loan servicer regarding the issuance of a temporary or final order of exemption from the commissioner pursuant to these provisions and the timeframe applicable to the notice of sale. The bill would make a statement of legislative findings.

The people of the State of California do enact as follows:

SECTION 1. This act shall be known as the California Foreclosure Prevention Act.

SEC. 2. The Legislature finds and declares all of the following:

(a) California is facing an unprecedented threat to its state and local economies due to skyrocketing residential property foreclosure rates in California. Those high foreclosure rates have adversely affected property values in California, and will have even greater adverse consequences as foreclosure rates continue to rise.

(b) It is essential to the economic health of California for the state to ameliorate the deleterious effects that will result from the continued high rate of foreclosure of residential properties by modifying the foreclosure process to provide additional time for borrowers to work out loan modifications while providing an exemption for mortgage loan servicers that have implemented a comprehensive loan modification program. This change in accessing the state's foreclosure process is essential to ensure that the process does not exacerbate the current crisis by adding more foreclosures to the glut of foreclosed properties already on the market if the foreclosure may be avoided through a loan modification. Those additional foreclosures could further destabilize the housing market with significant, corresponding deleterious effects on the state and local economies.

SEC. 3. Section 2923.52 is added to the Civil Code, to read:

2923.52. (a) Notwithstanding paragraph (3) of subdivision (a) of Section 2924, a mortgagee, trustee, or other person authorized to take sale shall not give notice of sale until at least 90 days after the lapse of three months as set forth in paragraph (2) of subdivision (a) of Section 2924, in order to allow the parties to pursue a loan modification to prevent foreclosure, if all of the following conditions exist:

(1) The loan was recorded during the period of January 1, 2003, to January 1, 2008, inclusive, and is secured by residential real property.

(2) The loan at issue is the first mortgage or deed of trust that the property secures.

(3) The borrower occupied the property as the borrower's principal residence at the time the loan became delinquent.

(4) The notice of default has been recorded on the property.

(b) This section does not apply to loans serviced by a mortgage loan servicer if that mortgage loan servicer has obtained a temporary or final order of exemption pursuant to Section 2923.53 that is current and valid at the time the notice of sale is given.

(c) This section does not apply to loans made, purchased, or serviced by:

(1) A California state or local public housing agency or authority, including state or local housing finance agencies established under Division 31 (commencing with Section 50000) of the Health and Safety Code and Chapter 6 (commencing with Section 980) of Division 4 of the Military and Veterans Code.

(2) Loans that are collateral for securities purchased by an agency or authority described in paragraph (1).

(d) This section shall become operative 14 days after the issuance of regulations, which shall include the form of the application for mortgage loan servicers, by the commissioner pursuant to subdivision (d) of Section 2923.53.

(e) This section shall remain in effect only until January 1, 2011, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2011, deletes or extends that date.

SEC. 4. Section 2923.53 is added to the Civil Code, to read:

2923.53. (a) A mortgage loan servicer that has implemented a comprehensive loan modification program that meets the requirements of this section shall have the loans that it services exempted from the provisions of Section 2923.52, upon order of the commissioner. A comprehensive loan modification program shall include all of the following features:

(1) The loan modification program is intended to keep borrowers whose principal residences are homes located in California in those homes when the anticipated recovery under the loan modification or workout plan exceeds the anticipated recovery through foreclosure on a net present value basis.

(2) The loan modification program targets a ratio of the borrower's housing-related debt to the borrower's gross income of 38 percent or less, on an aggregate basis in the program.

(3) The loan modification program includes some combination of the following features:

(A) An interest rate reduction, as needed, for a fixed term of at least five years.

(B) An extension of the amortization period for the loan term, to no more than 40 years from the original date of the loan.

(C) Deferral of some portion of the principal amount of the unpaid principal balance until maturity of the loan.

(D) Reduction of principal.

(E) Compliance with a federally mandated loan modification program.

(F) Other factors that the commissioner determines are appropriate. In determining those factors, the commissioner may consider efforts implemented in other jurisdictions that have resulted in a reduction in foreclosures.

(4) When determining a loan modification solution for a borrower under the loan modification program, the servicer seeks to achieve long-term sustainability for the borrower.

(b) (1) A mortgage loan servicer may apply to the commissioner for an order exempting loans that it services from Section 2923.52. If the mortgage loan servicer elects to apply for an order, the application shall be in the form and manner determined by the commissioner.

(2) Upon receipt of an initial application for exemption under this section, the commissioner shall immediately notify the applicant of the date of receipt of the application and shall issue a temporary order, effective from that date of receipt, exempting the mortgage loan servicer from the provisions of subdivision (a) of Section 2923.52. The temporary order shall remain in effect until a final order has been issued by the commissioner pursuant to paragraph (3). If the initial application for exemption is denied pursuant to paragraph (3), the temporary order shall remain in effect for 30 days after the date of denial.

(3) Within 30 days of receipt of an initial or revised application, the commissioner shall make a final determination on whether the application meets the criteria of subdivision (a). If, after review of the application, the commissioner concludes that the mortgage loan servicer has a comprehensive loan modification program that meets the requirements of subdivision (a), the commissioner shall issue a final order exempting the mortgage loan servicer from the requirements of Section 2923.52. If the commissioner concludes that the loan modification program does not meet the requirements of subdivision (a), the application for exemption shall be denied and a final order shall not be issued.

(4) A mortgage loan servicer may submit a revised application if its application for exemption is denied.

(c) The commissioner may revoke a final order, upon reasonable notice and an opportunity to be heard, if the mortgage loan servicer has submitted a materially false or misleading application or if the approved loan modification program has been materially altered from the loan modification program on which the exemption was based. A revocation by the commissioner shall not be retroactive.

(d) The commissioner shall adopt, no later than 10 days after the date this section takes effect, emergency and final regulations to clarify the application of this section and Section 2923.52, including the creation of the application for mortgage loan servicers and requirements regarding the reporting of loan modification data by mortgage loan servicers.

(e) Three months after the first exemption is issued pursuant to subdivision (b) by order of any commissioner specified in paragraph (1) of subdivision (j), the Secretary of Business, Transportation and Housing shall submit a report to the Legislature regarding the details of the actions taken to implement this section and the numbers of applications received and orders issued. The secretary shall submit an additional report six months from the date of the submission of the first report and every six months thereafter. Within existing resources, the commissioners shall collect, from

some or all mortgage loan servicers, data regarding loan modifications accomplished pursuant to this section and shall make the data available on an Internet Web site at least quarterly.

(f) The Secretary of Business, Transportation and Housing shall maintain on an Internet Web site a publicly available list disclosing the final orders granting exemptions, the date of each order, and a link to Internet Web sites describing the loan modification programs.

(g) Until January 1, 2010, the commissioner is authorized to contract for goods and services necessary to implement the provisions of this section and Section 2923.52, and any such contract shall be exempt from Chapter 2 (commencing with Section 10290) of Part 2 of Division 2 of the Public Contract Code. Not less than 30 days prior to awarding any contract under this section, the commissioner shall provide the pending contract documents to the Joint Legislative Budget Committee.

(h) Any person who violates any provision of this section or Section 2923.52 shall be deemed to have violated his or her license law as it relates to these provisions.

(i) Nothing in this section or Section 2923.52 shall require a servicer to violate contractual agreements for investor-owned loans or provide a modification to a borrower who is not willing or able to pay under the modification.

(j) The submission of an application for an exemption under this section, the reliance upon such an exemption, or the provision to the commissioner of data related to the loan modification program shall not confer on the commissioner visitorial authority over a federally chartered financial institution. Nothing in this subdivision is intended to affect the authority of the commissioner over a federally chartered financial institution pursuant to federal law or regulation.

(k) For purposes of this section and Sections 2923.52 and 2923.54:

(1) “Commissioner” means any of the following:

(A) The Commissioner of Corporations for licensed residential mortgage lenders and servicers and licensed finance lenders and brokers servicing mortgage loans and any other entities servicing mortgage loans that are not described in subparagraph (B) or (C).

(B) The Commissioner of Financial Institutions for commercial and industrial banks and savings associations and credit unions organized in this state servicing mortgage loans.

(C) The Real Estate Commissioner for licensed real estate brokers servicing mortgage loans.

(2) “Housing-related debt” means debt that includes loan principal, interest, property taxes, hazard insurance, flood insurance, mortgage insurance, and homeowner association fees.

(3) “Mortgage loan servicer” means a person or entity that receives or has the right to receive installment payments of principal, interest, or other amounts placed in escrow, pursuant to the terms of a mortgage loan or deed of trust, and performs services relating to that receipt or enforcement as the holder of the note or on behalf of the holder of the note evidencing that loan.

(l) This section shall remain in effect only until January 1, 2011, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2011, deletes or extends that date.

SEC. 5. Section 2923.54 is added to the Civil Code, to read:

2923.54. (a) A notice of sale filed pursuant to Section 2924f shall include a declaration from the mortgage loan servicer stating both of the following:

(1) Whether or not the mortgage loan servicer has obtained from the commissioner a final or temporary order of exemption pursuant to Section 2923.53 that is current and valid on the date the notice of sale is filed.

(2) Whether the timeframe for giving notice of sale specified in subdivision (a) of Section 2923.52 does not apply pursuant to Section 2923.52 or 2923.55.

(b) Failure to comply with Section 2923.52 or 2923.53 shall not invalidate any sale that would otherwise be valid under Section 2924f.

(c) This section shall remain in effect only until January 1, 2011, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2011, deletes or extends that date.

SEC. 6. Section 2923.55 is added to the Civil Code, to read:

2923.55. Section 2923.52 shall not apply if any of the following occurs:

(a) The borrower has surrendered the property, as evidenced by either a letter confirming the surrender or delivery of the keys to the property to the mortgagee, trustee, beneficiary, or authorized agent.

(b) The borrower has contracted with an organization, person, or entity whose primary business is advising people who have decided to leave their homes regarding how to extend the foreclosure process and avoid their contractual obligations to mortgagees or beneficiaries.

(c) A case has been filed by the borrower under Chapter 7, 11, 12, or 13 of Title 11 of the United States Code, and the bankruptcy court has not entered an order closing or dismissing the bankruptcy case or granting relief from a stay of foreclosure.

(d) This section shall remain in effect only until January 1, 2011, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2011, deletes or extends that date.

SEC. 7. Section 2924 of the Civil Code is amended to read:

2924. (a) Every transfer of an interest in property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage, except when in the case of personal property it is accompanied by actual change of possession, in which case it is to be deemed a pledge. Where, by a mortgage created after July 27, 1917, of any estate in real property, other than an estate at will or for years, less than two, or in any transfer in trust made after July 27, 1917, of a like estate to secure the performance of an obligation, a power of sale is conferred upon the mortgagee, trustee, or any other person, to be exercised after a breach of the obligation for which that mortgage or transfer is a security, the power shall not be exercised except where the mortgage or transfer is made pursuant to an order, judgment, or decree of a court of record, or to secure the payment of bonds or other evidences of indebtedness authorized or permitted to be

issued by the Commissioner of Corporations, or is made by a public utility subject to the provisions of the Public Utilities Act, until all of the following apply:

(1) The trustee, mortgagee, or beneficiary, or any of their authorized agents shall first file for record, in the office of the recorder of each county wherein the mortgaged or trust property or some part or parcel thereof is situated, a notice of default. That notice of default shall include all of the following:

(A) A statement identifying the mortgage or deed of trust by stating the name or names of the trustor or trustors and giving the book and page, or instrument number, if applicable, where the mortgage or deed of trust is recorded or a description of the mortgaged or trust property.

(B) A statement that a breach of the obligation for which the mortgage or transfer in trust is security has occurred.

(C) A statement setting forth the nature of each breach actually known to the beneficiary and of his or her election to sell or cause to be sold the property to satisfy that obligation and any other obligation secured by the deed of trust or mortgage that is in default.

(D) If the default is curable pursuant to Section 2924c, the statement specified in paragraph (1) of subdivision (b) of Section 2924c.

(2) Not less than three months shall elapse from the filing of the notice of default.

(3) Except as provided in Section 2923.52, after the lapse of the three months described in paragraph (2), the mortgagee, trustee or other person authorized to take the sale shall give notice of sale, stating the time and place thereof, in the manner and for a time not less than that set forth in Section 2924f.

(b) In performing acts required by this article, the trustee shall incur no liability for any good faith error resulting from reliance on information provided in good faith by the beneficiary regarding the nature and the amount of the default under the secured obligation, deed of trust, or mortgage. In performing the acts required by this article, a trustee shall not be subject to Title 1.6c (commencing with Section 1788) of Part 4.

(c) A recital in the deed executed pursuant to the power of sale of compliance with all requirements of law regarding the mailing of copies of notices or the publication of a copy of the notice of default or the personal delivery of the copy of the notice of default or the posting of copies of the notice of sale or the publication of a copy thereof shall constitute prima facie evidence of compliance with these requirements and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value and without notice.

(d) All of the following shall constitute privileged communications pursuant to Section 47:

(1) The mailing, publication, and delivery of notices as required by this section.

(2) Performance of the procedures set forth in this article.

(3) Performance of the functions and procedures set forth in this article if those functions and procedures are necessary to carry out the duties described in Sections 729.040, 729.050, and 729.080 of the Code of Civil Procedure.

(e) There is a rebuttable presumption that the beneficiary actually knew of all unpaid loan payments on the obligation owed to the beneficiary and secured by the deed of trust or mortgage subject to the notice of default. However, the failure to include an actually known default shall not invalidate the notice of sale and the beneficiary shall not be precluded from asserting a claim to this omitted default or defaults in a separate notice of default.

(f) This section shall remain in effect only until January 1, 2011, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2011, deletes or extends that date.

SEC. 8. Section 2924 is added to the Civil Code, to read:

2924. (a) Every transfer of an interest in property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage, except when in the case of personal property it is accompanied by actual change of possession, in which case it is to be deemed a pledge. Where, by a mortgage created after July 27, 1917, of any estate in real property, other than an estate at will or for years, less than two, or in any transfer in trust made after July 27, 1917, of a like estate to secure the performance of an obligation, a power of sale is conferred upon the mortgagee, trustee, or any other person, to be exercised after a breach of the obligation for which that mortgage or transfer is a security, the power shall not be exercised except where the mortgage or transfer is made pursuant to an order, judgment, or decree of a court of record, or to secure the payment of bonds or other evidences of indebtedness authorized or permitted to be issued by the Commissioner of Corporations, or is made by a public utility subject to the provisions of the Public Utilities Act, until all of the following apply:

(1) The trustee, mortgagee, or beneficiary, or any of their authorized agents shall first file for record, in the office of the recorder of each county wherein the mortgaged or trust property or some part or parcel thereof is situated, a notice of default. That notice of default shall include all of the following:

(A) A statement identifying the mortgage or deed of trust by stating the name or names of the trustor or trustors and giving the book and page, or instrument number, if applicable, where the mortgage or deed of trust is recorded or a description of the mortgaged or trust property.

(B) A statement that a breach of the obligation for which the mortgage or transfer in trust is security has occurred.

(C) A statement setting forth the nature of each breach actually known to the beneficiary and of his or her election to sell or cause to be sold the property to satisfy that obligation and any other obligation secured by the deed of trust or mortgage that is in default.

(D) If the default is curable pursuant to Section 2924c, the statement specified in paragraph (1) of subdivision (b) of Section 2924c.

(2) Not less than three months shall elapse from the filing of the notice of default.

(3) After the lapse of the three months described in paragraph (2), the mortgagee, trustee, or other person authorized to take the sale shall give notice of sale, stating the time and place thereof, in the manner and for a time not less than that set forth in Section 2924f.

(b) In performing acts required by this article, the trustee shall incur no liability for any good faith error resulting from reliance on information provided in good faith by the beneficiary regarding the nature and the amount of the default under the secured obligation, deed of trust, or mortgage. In performing the acts required by this article, a trustee shall not be subject to Title 1.6c (commencing with Section 1788) of Part 4.

(c) A recital in the deed executed pursuant to the power of sale of compliance with all requirements of law regarding the mailing of copies of notices or the publication of a copy of the notice of default or the personal delivery of the copy of the notice of default or the posting of copies of the notice of sale or the publication of a copy thereof shall constitute prima facie evidence of compliance with these requirements and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value and without notice.

(d) All of the following shall constitute privileged communications pursuant to Section 47:

(1) The mailing, publication, and delivery of notices as required by this section.

(2) Performance of the procedures set forth in this article.

(3) Performance of the functions and procedures set forth in this article if those functions and procedures are necessary to carry out the duties described in Sections 729.040, 729.050, and 729.080 of the Code of Civil Procedure.

(e) There is a rebuttable presumption that the beneficiary actually knew of all unpaid loan payments on the obligation owed to the beneficiary and secured by the deed of trust or mortgage subject to the notice of default. However, the failure to include an actually known default shall not invalidate the notice of sale and the beneficiary shall not be precluded from asserting a claim to this omitted default or defaults in a separate notice of default.

(f) This section shall become operative on January 1, 2011.

SEC. 9. The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

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