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What is 2923 Doing To Us Now?

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Prior to September 6, 2008, the nonjudicial foreclosure process in California was quite simple: the trustee recorded a Notice of Default; three months later, the trustee noticed the foreclosure sale. The loan servicers and foreclosure trustees went about their job and the California legislature left everyone alone. Since the enactment of §2923.5, that is no longer the case.

In July 2008, in response to the sevenfold increase in the number of foreclosures from 2006 to 2007,[1] and in anticipation of another wave of foreclosures looming on the horizon, California's Legislature decided to intervene in the non-judicial foreclosure process and introduced Senate Bill 1137, enacted by *Civil Code* §2923.5 and 2923.6. In enacting *Civil Code* §2923.5, the Legislature's goal was to prevent future foreclosures by encouraging lenders and servicers to explore alternatives to foreclosure prior to initiating the foreclosure. While the Legislature had good intentions, in practice, the requirements imposed by *Civil Code* §2923.5 have created additional obligations with little to no guidance, giving delinquent borrowers new ways to challenge and further stall otherwise legitimate foreclosures.

> ***Because the issues concerning Civil Code §2923.5 statutory compliance are yet to be conclusively determined, lenders, servicers and trustees should discuss with their respective counsel whether the prudent course is for the entity complying with Civil Code §2923.5 to sign the declaration under penalty of perjury.***

The Requirements of *Civil Code* §2923.5

Since its enactment, services and trustees have been bombarded with information on §2923.5. With that in mind, this summary is simplified to its core to explain the latest problems with §2923.5. *Civil Code* §2923.5 requires that the lender, servicer or an authorized agent contact the borrower in person or by telephone to assess the borrower's financial situation and to explore options for the borrower to avoid foreclosure. This "contact must be completed before the lender may record a Notice of Default. Further, the Notice of Default must include a declaration that the lender has tried with due diligence to contact the borrower but was unsuccessful (the "2923.5 Declaration"). The form of the 2923.5 Declaration is what is at issue in this article.

Recent Judicial Interpretation of *Civil Code* §2923.5

Because of the administrative complexities of the statute itself, servicers and trustees are increasingly finding themselves charged with failing to comply with the requirements of the statute. At first, borrowers challenged the foreclosure on the basis that they were not contacted to have their financial situation assessed and to explore alternatives to foreclosure. Borrowers then started to argue that the foreclosure was non-compliant on the basis that a declaration of the due diligence efforts was not included in either the Notice of Default or the Notice of Sale. Most recently, borrowers are arguing that the 2923.5 Declaration must be executed by someone with personal knowledge and under penalty of perjury. In fact, Moses Hall, a champion of *Civil Code* 2923.5 recently filed a class action on many of these *Civil Code* 2923.5 issues.[2]

At the moment, there is no definitive rule outlining what constitutes compliance with *Civil Code* §2923.5 or what form of the 2923.5 Declaration is acceptable. In fact, the handful of California court decisions governing *Civil Code* §2923.5 providing judicial interpretation have produced often conflicting decisions yet to be clarified on appeal. Notwithstanding, several recent federal and state court decisions provide the beginnings of interpretive guidance for those most impacted by the laws at issue. For example, many lower courts have held that no private right of action exists under which to bring suit for violations of *Civil Code* §2923.5.[3] Other courts have determined that,

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in the case of federally chartered banks, *Civil Code* §2923.5 is preempted by Federal Home Owners' Loan Act.[4]

Unfortunately, whether the 2923.5 Declaration must be signed under penalty is still the subject of ongoing debate. Recently, several superior courts ruled that the 2923.5 Declaration must be signed under penalty of perjury in accordance with *Code of Civil Procedures* §2015.5. But, then in other cases, the court held that if the declaration was required to be made under penalty of perjury, the legislature would have specifically required it in *Civil Code* §2923.5. In recognizing the confusion this created for those in the audience, one judge welcomed the audience members to take the penalty of perjury issue on appeal.

Ensuring Statutory Compliance

Because the issues concerning *Civil Code* §2923.5 statutory compliance are yet to be conclusively determined, lenders, servicers and trustees should discuss with their counsel whether the prudent course is for the entity complying with *Civil Code* §2923.5 to sign the declaration under penalty of perjury. While signing a declaration under penalty of perjury carries with it additional risk, such as criminal charges and liability, for those confident that that their company complies with the procedures of §2923.5 leading up to the signing the declaration, any additional risk should be minimal. Finally, it is critical for those in direct and indirect contact with the borrowers (e.g. customer service and loss mitigation personnel) to document and retain all contact with borrowers, any steps taken to contact the borrower, that an analysis of a borrowers' financial situation was conducted, and all records of any proposed workout terms. This information is key when trying to later show compliance with §2923.5.

Conclusion

The administrative complexities of the statute itself have found many lenders, servicers and trustees increasingly charged with allegedly failing to comply with the requirements of §2923.5. While the industry awaits further guidance from judicial interpretation, it would be the best practice to make and keep documented records of all due diligence in contacting the borrower and sign the declaration under penalty of perjury. Nevertheless, issues of statutory compliance should be discussed internally with management, the compliance team or with counsel.

1 Senate Bill 1137, Section 1(a).

2 *Mabry v. Aurora Loan Services, et al*., Orange Superior Court Case No. 30-2009-00309696.

3 See *Gaitan v. Mortgage Electronic Registration Systems*, No. EDCV 09-1009 VAP (MANx), 2009 WL 3244729 (C.D.Cal.)); *Yulaeva v. Greenpoint Mortgage Funding, Inc*., No. CIV. S-09-1504 LKK/KJM, 2009 WL 2880393, at *11 (E.D.Cal.); *Dunn-Edwards Corp. v. Bay Area Air Quality Management Dist*., 9 Cal.App. 4th 644, 658 (1992); *Vicko Ins. Servs., Inc. v. Ohio Indemnity Co*., 70 Cal.App. 4th 55, 62-63 (1999), quoting *Moradi-Shalal v. Fireman's Fund Ins. Companies*, 46 Cal.3d 287, 305 (1988).

4 See *Silvas v. E*Trade Mortg. Corp*., 514 F.3d 1001, 1005 (9th Cir.2008); *Naulty v. Greenpoint Mortg. Funding, Inc.,* 2009 U.S. Dist. LEXIS 79250, at *12-13 (N.D.Cal.), accord *Andrade v. Wachovia Mortgage,* 2009 U.S. Dist. LEXIS 34872, at *7 (S.D.Cal.); *Curcio v. Wachovia Mortgage Corporation*, No. 09-CV-1498-IEG (NLS), 2009 WL 3320499 (S.D.Cal.).

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