

Tenants Protected Under Newly Revised California Foreclosure Law by Rick Gibson

Seeking to encourage workouts rather than foreclosures, the California Legislature passed and the Governor signed Senate Bill number 1137, which was effective September 8, 2008. The bill applies only to home mortgages made between January 2003 and December 2007.

Delay and Discuss Before Foreclosure

Under existing law, the first step is the filing of a “notice of default,” after a missed payment. Now, a notice of default may not be filed until thirty (30) days after the lender contacts the borrower to “explore options ... to avoid foreclosure.” *Civil Code Section 2923.5*.

A lender must comply with specific rules. *CC 2923.59(g)*. A letter must be sent with a toll-free telephone number to find a HUD-certified counseling agency. *CC 2923.5(g)(1)*. The lender must make three attempts to call, at different times and on different days. Automated dialing machines may be used, but if the borrower answers, a live representative must speak. *CC 2923.5(g)(2)*. If the borrower does not respond within two weeks, the lender must send a certified letter. *CC 2923.5(g)(3)*.

The lender or its agent must provide “a means for the borrower to contact in a timely manner, including a toll-free telephone number that will provide access to a live representative during business hours.” *CC 29.23.5(g)(4)*. Finally, *CC 2923.5(g)(5)* gives a detailed listing of what information the lender must post prominently on its website. These rules do not apply if the borrower has surrendered the property, filed bankruptcy or signed up with a business intended simply to cause delay before abandoning the home. *CC 2923.5(h)*.

Can Unreasonable Lenders Be Sued?

Often, the mortgage is for more than the house is worth. If the lender forecloses, it gets the house, minus the delay, expense and aggravation of foreclosure. The lender, thus often make more, long term, if it reduces the loan so the borrower can pay. Lenders often refuse to consider this, however, because they see it as their duty to be “tough.”

CC 2923.6 tries to change this logic. It provides that “any duty servicers may have to maximize net present value under their pooling and servicing agreements is owed to all parties in a loan pool, not to any particular parties...” It further provides “that a servicer acts in the best interests of all parties” if it agrees to modify a troubled loan in such a way that the anticipated long term recovery is greater than that would be obtained in foreclosure.

What does this mean? The obvious intent of the law is to shield loan servicing agents who are sued by their clients for being reasonable to borrowers.

Is the law also a sword? Can borrowers sue lenders or their agents, if they refuse to be reasonable? The law does not say. Expect to see a borrower's lawyer make this argument soon, and for the loser to take the issue up to the Court of Appeal.

Tenants in Foreclosed Properties Protected

Gibson Law has had many clients approach us with the following situation. The client leases a house and has paid rent. The homeowner, however, has not paid the mortgage so the property is being foreclosed upon. What are the tenant's rights?

Newly enacted *Civil Code Section 2924.8* gives tenants two new protections. First, the tenant must be given notice of the foreclosure sale, via posting on the property. Second, the thirty day notice period before eviction is increased to sixty days. *Code of Civil Procedure Section 1161b*.

Foreclosed Properties Must Be Maintained; \$1,000 a Day Fines

With the great increase in home foreclosures, many houses are now owned by institutions, which may not maintain them. Civic Code Section 2923.6 provides that properties obtained in foreclosure must be maintained. "Maintaining" a property is defined to include caring for the exterior of the property, including cutting the grass and other plants, evicting trespassers or squatters, and not permitting mosquito larvae to grow in standing water. Violators of this law may be fined up to \$1,000 a day by local government agencies.

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