

**SENATE BILL**

**No. 38**

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**Introduced by Senators Corbett and Steinberg  
(Coauthor: Senator Leno)**

February 8, 2010

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An act to amend Section 2923.5 of, and to add and repeal Sections 2923.4, 2923.7, 2923.73, and 2923.75 of, the Civil Code, relating to mortgages.

LEGISLATIVE COUNSEL'S DIGEST

SB 38, as introduced, Corbett. Mortgages: foreclosures.

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.

Existing law requires, until January 1, 2013, a mortgagee, trustee, beneficiary, or authorized agent to contact the borrower, as defined, prior to filing a notice of default, in order to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure. Existing law requires the notice of default to include a specified declaration from the mortgagee, beneficiary, or authorized agent regarding its contact with the borrower.

This bill would, until January 1, 2013, require a mortgagee, trustee, beneficiary, or authorized agent, prior to the filing of a notice of default, to provide the borrower with an application for a loan modification and

other foreclosure avoidance options and a specified notice regarding the borrower's rights during the foreclosure process, subject to specified exceptions. The bill would require an unspecified state entity to make that notice available in English and specified languages.

This bill would prohibit the mortgagee, beneficiary, or authorized agent from combining collections activity with communication with the borrower about foreclosure avoidance options. The bill would delete the requirement that the notice of default contain a specified declaration, and would instead require the mortgagee, beneficiary, or authorized agent to, concurrently with the filing of a notice of default, record a declaration of compliance that attests to specified facts, and mail the borrower a notice stating that these requirements have been met. The bill would provide that failure to record a declaration of compliance, or recordation of a declaration of compliance that fails to meet the specified requirements, would constitute grounds for the borrower to bring an action to void the foreclosure, or to recover either treble damages or statutory damages in the amount of \$10,000, whichever is greater, from the mortgagee, trustee, beneficiary, or authorized agent, if specified conditions exist.

The California Constitution authorizes the Governor to declare a fiscal emergency and to call the Legislature into special session for that purpose. The Governor issued a proclamation declaring a fiscal emergency, and calling a special session for this purpose, on January 8, 2010.

This bill would state that it addresses the fiscal emergency declared by the Governor by proclamation issued on January 8, 2010, pursuant to the California Constitution.

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: no.

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

- 1 SECTION 1. Section 2923.4 is added to the Civil Code, to
- 2 read:
- 3 2923.4. (a) A mortgagee, trustee, beneficiary, or authorized
- 4 agent shall provide a borrower with a copy of the notice described
- 5 in subdivision (b) and an application for a loan modification and
- 6 other foreclosure avoidance options prior to filing a notice of
- 7 default pursuant to Section 2924.

(b) A state government entity shall create the following notice in at least 12-point type and make it available in English and the languages set forth in subdivision (b) of Section 1632:

“Important Notice Regarding Your Rights And Foreclosure Avoidance Options: California law requires that you receive this notice of your legal rights before the foreclosure process begins.

ARE YOU HAVING TROUBLE PAYING YOUR MORTGAGE?

If you are having trouble paying your mortgage, you should contact your loan servicer as soon as possible to discuss options for avoiding foreclosure. Your loan servicer is the company listed on your mortgage bills as the party to which your mortgage payment should be sent. You are also entitled to receive a telephone call and a letter from your loan servicer inviting you to discuss foreclosure avoidance options.

POTENTIAL FORECLOSURE AVOIDANCE OPTIONS

One potential option for avoiding foreclosure is a loan modification. Your loan servicer may be participating in the federal loan modification program called the Home Affordable Modification Program, which has specific requirements and guidelines. To see if your servicer is participating, or to find out more about this program, visit [http://www.makinghomeaffordable.gov/contact\\_servicer.html](http://www.makinghomeaffordable.gov/contact_servicer.html). Your servicer may also offer other loan modification programs. You may also qualify for other options for avoiding foreclosure, including loan refinancing, forbearance, short sale, or a deed in lieu of foreclosure.

With this notice, you should have received an application from your servicer for a loan modification and other foreclosure relief. If you request that your loan servicer consider you for a loan modification or other alternative to foreclosure, your servicer is required to inform you of its decision before filing a document called a Notice of Default, which is the first step in the foreclosure process. If your servicer denies your application, it must send you a detailed letter describing the reasons for the denial.

THE FORECLOSURE PROCESS

If your servicer has complied with these requirements, but has denied your application and complied with the contact requirements

described in Section 2923.5 of the Civil Code, it may proceed with the foreclosure process.

Notice of Default: Your loan servicer may not foreclose on your home without filing official documents with the county recorder. You are entitled to receive copies of those documents. The first step in the foreclosure process is the filing of a notice of default. If your loan servicer records a notice of default on your loan, it must mail you a copy of that notice and must wait at least 90 days before taking further steps to sell your home.

Notice of Sale: Once 90 days have passed from the filing of the notice of default, your servicer may file a notice of sale. Your servicer must post that notice of sale on your property, mail you a copy of that notice, and wait at least 20 days before selling your home. Your notice of sale will include the contact information of the person or company to call if you want more information about your sale date.

Please seek legal help if you believe that you have been denied your legal foreclosure rights. It is illegal for any person, including a lawyer, to charge you for helping you with a loan modification or other effort to avoid foreclosure before providing the services promised.”

(c) This section shall not apply if any of the following occurs:

(1) 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.

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

(3) 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 apply only to mortgages or deeds of trust recorded prior to December 31, 2009, that are secured by owner-occupied residential real property containing no more than four dwelling units. For purposes of this subdivision,

“owner-occupied” means that the residence is the principal residence of the borrower as indicated to the lender in loan documents.

(e) This section shall remain in effect only until January 1, 2013, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2013, deletes or extends that date.

SEC. 2. Section 2923.5 of the Civil Code, as amended by Section 1 of Chapter 43 of the Statutes of 2009, is amended to read:

2923.5. (a) (1) A mortgagee, trustee, beneficiary, or authorized agent may not file a notice of default pursuant to Section 2924 until 30 days after initial contact is made as required by paragraph (2) or 30 days after satisfying the due diligence requirements as described in subdivision (g).

(2) A mortgagee, beneficiary, or authorized agent shall contact the borrower in person or by telephone in order to assess the borrower’s financial situation and explore options for the borrower to avoid foreclosure. *This communication and attempted communication shall be clearly identified as attempts to initiate discussion with the borrower about foreclosure avoidance options, and may not be combined with collections activity.* During the initial contact, the mortgagee, beneficiary, or authorized agent shall advise the borrower that he or she has the right to request a subsequent meeting and, if requested, the mortgagee, beneficiary, or authorized agent shall schedule the meeting to occur within 14 days. The assessment of the borrower’s financial situation and discussion of options may occur during the first contact, or at the subsequent meeting scheduled for that purpose. In either case, the borrower shall be provided the toll-free telephone number made available by the United States Department of Housing and Urban Development (HUD) to find a HUD-certified housing counseling agency. Any meeting may occur telephonically.

~~(b) A notice of default filed pursuant to Section 2924 shall include a declaration that the mortgagee, beneficiary, or authorized agent has contacted the borrower, has tried with due diligence to contact the borrower as required by this section, or that no contact was required pursuant to subdivision (h).~~

*(b) The mortgagee, beneficiary, or authorized agent, concurrently with the filing of a notice of default, shall do both of the following:*

1     (1) *Record a declaration of compliance pursuant to Section*  
2     *2923.7.*

3     (2) *Mail the borrower a notice stating that the requirements of*  
4     *this section have been met. That notice shall be sent by certified*  
5     *mail and shall include the dates and times of, and addresses and*  
6     *telephone numbers used for, the contact or attempted contact*  
7     *required by paragraph (2) of subdivision (a) and subdivision (g).*

8     (c) If a mortgagee, trustee, beneficiary, or authorized agent had  
9     already filed the notice of default prior to the enactment of this  
10    section and did not subsequently file a notice of rescission, then  
11    the mortgagee, trustee, beneficiary, or authorized agent shall, as  
12    part of the notice of sale filed pursuant to Section 2924f, include  
13    a declaration that either:

14    (1) States that the borrower was contacted to assess the  
15    borrower's financial situation and to explore options for the  
16    borrower to avoid foreclosure.

17    (2) Lists the efforts made, if any, to contact the borrower in the  
18    event no contact was made.

19    (d) A mortgagee's, beneficiary's, or authorized agent's loss  
20    mitigation personnel may participate by telephone during any  
21    contact required by this section.

22    (e) For purposes of this section, a "borrower" shall include a  
23    mortgagor or trustor.

24    (f) A borrower may designate, with consent given in writing, a  
25    HUD-certified housing counseling agency, attorney, or other  
26    advisor to discuss with the mortgagee, beneficiary, or authorized  
27    agent, on the borrower's behalf, the borrowers financial situation  
28    and options for the borrower to avoid foreclosure. That contact  
29    made at the direction of the borrower shall satisfy the contact  
30    requirements of paragraph (2) of subdivision (a). Any loan  
31    modification or workout plan offered at the meeting by the  
32    mortgagee, beneficiary, or authorized agent is subject to approval  
33    by the borrower.

34    (g) A notice of default may be filed pursuant to Section 2924  
35    when a mortgagee, beneficiary, or authorized agent has not  
36    contacted a borrower as required by paragraph (2) of subdivision  
37    (a) provided that the failure to contact the borrower occurred  
38    despite the due diligence of the mortgagee, beneficiary, or  
39    authorized agent. For purposes of this section, "due diligence"  
40    shall require and mean all of the following:

1 (1) A mortgagee, beneficiary, or authorized agent shall first  
2 attempt to contact a borrower by sending a first-class letter that  
3 includes the toll-free telephone number made available by HUD  
4 to find a HUD-certified housing counseling agency.

5 (2) (A) After the letter has been sent, the mortgagee,  
6 beneficiary, or authorized agent shall attempt to contact the  
7 borrower by telephone at least three times at different hours and  
8 on different days. Telephone calls shall be made to the primary  
9 telephone number on file.

10 (B) A mortgagee, beneficiary, or authorized agent may attempt  
11 to contact a borrower using an automated system to dial borrowers,  
12 provided that, if the telephone call is answered, the call is  
13 connected to a live representative of the mortgagee, beneficiary,  
14 or authorized agent.

15 (C) A mortgagee, beneficiary, or authorized agent satisfies the  
16 telephone contact requirements of this paragraph if it determines,  
17 after attempting contact pursuant to this paragraph, that the  
18 borrower's primary telephone number and secondary telephone  
19 number or numbers on file, if any, have been disconnected.

20 (3) If the borrower does not respond within two weeks after the  
21 telephone call requirements of paragraph (2) have been satisfied,  
22 the mortgagee, beneficiary, or authorized agent shall then send a  
23 certified letter, with return receipt requested.

24 (4) The mortgagee, beneficiary, or authorized agent shall provide  
25 a means for the borrower to contact it in a timely manner, including  
26 a toll-free telephone number that will provide access to a live  
27 representative during business hours.

28 (5) The mortgagee, beneficiary, or authorized agent has posted  
29 a prominent link on the homepage of its Internet Web site, if any,  
30 to the following information:

31 (A) Options that may be available to borrowers who are unable  
32 to afford their mortgage payments and who wish to avoid  
33 foreclosure, and instructions to borrowers advising them on steps  
34 to take to explore those options.

35 (B) A list of financial documents borrowers should collect and  
36 be prepared to present to the mortgagee, beneficiary, or authorized  
37 agent when discussing options for avoiding foreclosure.

38 (C) A toll-free telephone number for borrowers who wish to  
39 discuss options for avoiding foreclosure with their mortgagee,  
40 beneficiary, or authorized agent.

(D) The toll-free telephone number made available by HUD to find a HUD-certified housing counseling agency.

(h) Subdivisions (a), (c), and (g) shall not apply if any of the following occurs:

(1) 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.

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

(3) 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.

(i) This section shall apply only to mortgages or deeds of trust recorded ~~from January 1, 2003, to December 31, 2007, inclusive~~ prior to December 31, 2009, that are secured by owner-occupied residential real property containing no more than four dwelling units. For purposes of this subdivision, “owner-occupied” means that the residence is the principal residence of the borrower as indicated to the lender in loan documents.

(j) This section shall remain in effect only until January 1, 2013, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2013, deletes or extends that date.

SEC. 3. Section 2923.7 is added to the Civil Code, to read:

2923.7. (a) A declaration of compliance shall be attached to every notice of default filed pursuant to Section 2924. That declaration shall be signed by an individual having personal knowledge of the facts stated within and be substantially similar to the following form:

DECLARATION OF COMPLIANCE  
BORROWER CONTACT

☐ This loan is not subject to Cal. Civil Code § 2923.5, pursuant to the following provisions (check all that apply):

☐ Cal. Civil Code § 2923.5(h).

☐ Cal. Civil Code § 2923.5(i).

☐ This loan is subject to Cal. Civil Code § 2923.5, and the mortgagee, beneficiary, or authorized agent has complied with the requirements of Cal. Civil Code § 2923.5 by doing the following (check one):

☐ Making contact with the borrower pursuant to Cal. Civil Code § 2923.5(a)(2) and sending the letter required by Cal. Civil Code § 2923.5(b).

☐ Satisfying the due diligence requirements described in Cal. Civil Code § 2923.5(g) and sending the letter required by Cal. Civil Code § 2923.5(b).

#### FORECLOSURE AVOIDANCE REVIEW

☐ This loan is not subject to Cal. Civil Code § 2923.73.

☐ This loan is subject to Cal. Civil Code § 2923.73 and (check one):

☐ The borrower did not submit a written request to modify the loan that is the subject of the accompanying notice of default or otherwise apply for a loan modification according to the mortgagee, beneficiary, or authorized agent's applicable procedures.

☐ The borrower submitted a written request to modify the loan that is the subject of the accompanying notice of default or otherwise applied for a loan modification according to the mortgagee, beneficiary, or authorized agent's applicable procedures, the request was denied, and the mortgagee, beneficiary, or authorized agent sent the borrower a denial explanation letter in compliance with the requirements of Cal. Civil Code § 2923.73(a).

☐ The borrower's request to modify the loan that is the subject of the accompanying notice of default was approved, but the borrower did not accept the modification offered or did not comply with the terms of the modification.

(b) This section shall remain in effect only until January 1, 2013, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2013, deletes or extends that date.

SEC. 4. Section 2923.73 is added to the Civil Code, to read:

1 2923.73. (a) If a borrower submits a written request for a loan  
2 modification and that request is denied, the declaration of  
3 compliance shall attest to the fact that the mortgagee, trustee, or  
4 other person authorized to take sale sent the borrower a denial  
5 explanation letter by certified mail, at least 15 days prior to  
6 recording the declaration of compliance, which included all of the  
7 following:

8 (1) The date a completed application for a loan modification  
9 was received from the borrower.

10 (2) The date on which a decision was made regarding the  
11 borrower's application.

12 (3) The final decision made by the mortgagee or beneficiary,  
13 which shall indicate what alternatives to foreclosure were  
14 considered, such as forbearance, short sale, deed in lieu of  
15 foreclosure, or modification, and the decision made on each option.

16 (4) If the borrower was considered for a federal Home  
17 Affordable Modification, the information required to be provided  
18 in the borrower notice described in the federal Home Affordable  
19 Modification Guidelines Supplemental Directive 09-08, issued  
20 November 3, 2009.

21 (5) If the borrower was considered for another type of  
22 modification or for an option other than a modification, information  
23 detailing the reasons the borrower did not qualify for each of those  
24 alternatives, including quantitative data supporting the decision.  
25 This documentation may include a finding that the borrower was  
26 previously offered a loan modification and failed to successfully  
27 make payments under the terms of the modified loan.

28 (6) The name and contact information of the holder of the note.

29 (7) Instructions regarding how to dispute the written decisions  
30 described in the denial explanation letter.

31 (b) This section shall not apply if any of the following occurs:

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

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

1 (3) A case has been filed by the borrower under Chapter 7, 11,  
2 12, or 13 of Title 11 of the United States Code, and the bankruptcy  
3 court has not entered an order closing or dismissing the bankruptcy  
4 case or granting relief from a stay of foreclosure.

5 (c) This section shall apply only to mortgages or deeds of trust  
6 recorded prior to December 31, 2009, that are secured by  
7 owner-occupied residential real property containing no more than  
8 four dwelling units. For purposes of this subdivision,  
9 “owner-occupied” means that the residence is the principal  
10 residence of the borrower as indicated to the lender in loan  
11 documents.

12 (d) This section shall remain in effect only until January 1, 2013,  
13 and as of that date is repealed, unless a later enacted statute, that  
14 is enacted before January 1, 2013, deletes or extends that date.

15 SEC. 5. Section 2923.75 is added to the Civil Code, to read:

16 2923.75. (a) Failure to record a declaration of compliance in  
17 accordance with Section 2923.7, or recordation of a declaration  
18 of compliance that does not comply with the requirements of  
19 Sections 2923.7 and 2923.73, shall constitute grounds for a  
20 borrower to pursue either of the following options:

21 (1) If the property that is the subject of the declaration of  
22 compliance is sold to a bona fide purchaser at a trustee sale  
23 conducted in accordance with Section 2924f, the borrower may  
24 recover the greater of treble damages or statutory damages in the  
25 amount of ten thousand dollars (\$10,000) from the mortgagee,  
26 trustee, beneficiary, or authorized agent that failed to comply with  
27 Section 2923.7 or 2923.73.

28 (2) If the property that is the subject of the declaration of  
29 compliance is sold to the foreclosing party at a trustee sale  
30 conducted in accordance with Section 2924f, the borrower may  
31 bring an action to void the foreclosure sale.

32 (b) This section shall remain in effect only until January 1, 2013,  
33 and as of that date is repealed, unless a later enacted statute, that  
34 is enacted before January 1, 2013, deletes or extends that date.

35 SEC. 6. The provisions of this act are severable. If any  
36 provision of this act or its application is held invalid, that invalidity  
37 shall not affect other provisions or applications that can be given  
38 effect without the invalid provision or application.

39 SEC. 7. This act addresses the fiscal emergency declared by  
40 the Governor by proclamation on January 8, 2010, pursuant to

- 1 subdivision (f) of Section 10 of Article IV of the California
- 2 Constitution.

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