

Introduced by Senator HarmanFebruary 23, 2012

An act to amend Sections 1367.1, 1367.4, and 2924g of the Civil Code, relating to foreclosure procedures.

LEGISLATIVE COUNSEL'S DIGEST

SB 1244, as introduced, Harman. Foreclosure procedures.

(1) The Davis-Stirling Common Interest Development Act defines and regulates common interest developments and authorizes the association that manages the development to levy assessments to fulfill its obligations. The act provides that a regular or special assessment of the association, late charges, reasonable costs of collection, attorney's fees, and interest, as specified, are a debt of the owner of the separate interest at the time the assessment or other sums are levied, and are a lien on the owner's separate interest when the association records a notice of delinquent assessment and follows a specified process. The act permits the association to enforce the lien in any manner permitted by law. The act requires, in cases of a default, that a notice of default be served by the association on the owner of the separate interest's legal representative in accordance with specified provisions.

This bill would authorize the association, if after reasonable diligence the notice is not able to be served on an owner's representative in accordance with those provisions, to post a copy on the owner's separate interest in a manner most likely to give actual notice to the party to be served and to mail a copy of the notice by certified mail and first-class mail to the owner's legal representative at the address of the owner's separate interest.

(2) The Davis-Stirling Common Interest Development Act authorizes a homeowner association to use judicial or nonjudicial foreclosure,

subject to certain conditions, in order to collect delinquent regular or special assessments of an amount of \$1,800 or more, not including any accelerated assessments, late charges, fees and costs of collection, attorney's fees, or interest, or any assessments secured by the lien that are more than 12 months delinquent. In order to collect these assessments pursuant to these provisions, existing law requires the association to, among other things, provide notice by personal service, as specified, to an owner of a separate interest who occupies the separate interest or to the owner's legal representative, if the board votes to foreclose upon the separate interest.

This bill would authorize the association, if after reasonable diligence the notice is not able to be personally served on an owner of the separate interest who occupies the separate interest, to post a copy on the owner's separate interest in a manner most likely to give actual notice to the party to be served and to mail a copy of the notice by certified mail and first-class mail to the owner at the address of the owner's separate interest.

(3) Existing law requires all sales of property under the power of sale contained in any deed of trust or mortgage to be held in the county where the property or some part thereof is situated, and to be made at auction, to the highest bidder, as specified. Existing law authorizes postponement of a sale and requires that the notice of each postponement and the reason therefor be given by public declaration by the trustee at the time and place last appointed for sale. Existing law also requires a public declaration of postponement to set forth the new date, time, and place of sale and requires the place of sale to be the same place as originally fixed by the trustee for the sale.

This bill would instead, for such a postponement, authorize the place of the sale to be different than the place originally fixed by the trustee or subsequently relocated by the trustee for the sale. The bill would require a change in the location of the sale proceedings, if any, whether due to the requirement of a public entity, emergency, or other circumstances that preclude the use of the published location, to be announced at the time of postponement.

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

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

1 SECTION 1. Section 1367.1 of the Civil Code is amended to
2 read:

3 1367.1. (a) A regular or special assessment and any late
4 charges, reasonable fees and costs of collection, reasonable
5 attorney’s fees, if any, and interest, if any, as determined in
6 accordance with Section 1366, shall be a debt of the owner of the
7 separate interest at the time the assessment or other sums are levied.
8 At least 30 days prior to recording a lien upon the separate interest
9 of the owner of record to collect a debt that is past due under this
10 subdivision, the association shall notify the owner of record in
11 writing by certified mail of the following:

12 (1) A general description of the collection and lien enforcement
13 procedures of the association and the method of calculation of the
14 amount, a statement that the owner of the separate interest has the
15 right to inspect the association records, pursuant to Section 8333
16 of the Corporations Code, and the following statement in 14-point
17 boldface type, if printed, or in capital letters, if typed:
18 “IMPORTANT NOTICE: IF YOUR SEPARATE INTEREST IS
19 PLACED IN FORECLOSURE BECAUSE YOU ARE BEHIND
20 IN YOUR ASSESSMENTS, IT MAY BE SOLD WITHOUT
21 COURT ACTION.”

22 (2) An itemized statement of the charges owed by the owner,
23 including items on the statement which indicate the amount of any
24 delinquent assessments, the fees and reasonable costs of collection,
25 reasonable attorney’s fees, any late charges, and interest, if any.

26 (3) A statement that the owner shall not be liable to pay the
27 charges, interest, and costs of collection, if it is determined the
28 assessment was paid on time to the association.

29 (4) The right to request a meeting with the board as provided
30 by paragraph (3) of subdivision (c).

31 (5) The right to dispute the assessment debt by submitting a
32 written request for dispute resolution to the association pursuant
33 to the association’s “meet and confer” program required in Article
34 5 (commencing with Section 1363.810) of Chapter 4.

35 (6) The right to request alternative dispute resolution with a
36 neutral third party pursuant to Article 2 (commencing with Section
37 1369.510) of Chapter 7 before the association may initiate
38 foreclosure against the owner’s separate interest, except that

1 binding arbitration shall not be available if the association intends
2 to initiate a judicial foreclosure.

3 (b) Any payments made by the owner of a separate interest
4 toward the debt set forth, as required in subdivision (a), shall first
5 be applied to the assessments owed, and, only after the assessments
6 owed are paid in full shall the payments be applied to the fees and
7 costs of collection, attorney’s fees, late charges, or interest. When
8 an owner makes a payment, the owner may request a receipt and
9 the association shall provide it. The receipt shall indicate the date
10 of payment and the person who received it. The association shall
11 provide a mailing address for overnight payment of assessments.

12 (c) (1) (A) Prior to recording a lien for delinquent assessments,
13 an association shall offer the owner and, if so requested by the
14 owner, participate in dispute resolution pursuant to the association’s
15 “meet and confer” program required in Article 5 (commencing
16 with Section 1363.810) of Chapter 4.

17 (B) Prior to initiating a foreclosure for delinquent assessments,
18 an association shall offer the owner and, if so requested by the
19 owner, shall participate in dispute resolution pursuant to the
20 association’s “meet and confer” program required in Article 5
21 (commencing with Section 1363.810) of Chapter 4 or alternative
22 dispute resolution with a neutral third party pursuant to Article 2
23 (commencing with Section 1369.510) of Chapter 7. The decision
24 to pursue dispute resolution or a particular type of alternative
25 dispute resolution shall be the choice of the owner, except that
26 binding arbitration shall not be available if the association intends
27 to initiate a judicial foreclosure.

28 (2) For liens recorded on or after January 1, 2006, the decision
29 to record a lien for delinquent assessments shall be made only by
30 the board of directors of the association and may not be delegated
31 to an agent of the association. The board shall approve the decision
32 by a majority vote of the board members in an open meeting. The
33 board shall record the vote in the minutes of that meeting.

34 (3) An owner, other than an owner of any interest that is
35 described in Section 11212 of the Business and Professions Code
36 that is not otherwise exempt from this section pursuant to
37 subdivision (a) of Section 11211.7, may submit a written request
38 to meet with the board to discuss a payment plan for the debt
39 noticed pursuant to subdivision (a). The association shall provide
40 the owners the standards for payment plans, if any exist. The board

1 shall meet with the owner in executive session within 45 days of
2 the postmark of the request, if the request is mailed within 15 days
3 of the date of the postmark of the notice, unless there is no regularly
4 scheduled board meeting within that period, in which case the
5 board may designate a committee of one or more members to meet
6 with the owner. Payment plans may incorporate any assessments
7 that accrue during the payment plan period. Payment plans shall
8 not impede an association's ability to record a lien on the owner's
9 separate interest to secure payment of delinquent assessments.
10 Additional late fees shall not accrue during the payment plan period
11 if the owner is in compliance with the terms of the payment plan.
12 In the event of a default on any payment plan, the association may
13 resume its efforts to collect the delinquent assessments from the
14 time prior to entering into the payment plan.

15 (d) The amount of the assessment, plus any costs of collection,
16 late charges, and interest assessed in accordance with Section 1366,
17 shall be a lien on the owner's separate interest in the common
18 interest development from and after the time the association causes
19 to be recorded with the county recorder of the county in which the
20 separate interest is located, a notice of delinquent assessment,
21 which shall state the amount of the assessment and other sums
22 imposed in accordance with Section 1366, a legal description of
23 the owner's separate interest in the common interest development
24 against which the assessment and other sums are levied, and the
25 name of the record owner of the separate interest in the common
26 interest development against which the lien is imposed. The
27 itemized statement of the charges owed by the owner described in
28 paragraph (2) of subdivision (a) shall be recorded together with
29 the notice of delinquent assessment. In order for the lien to be
30 enforced by nonjudicial foreclosure as provided in subdivision (g),
31 the notice of delinquent assessment shall state the name and address
32 of the trustee authorized by the association to enforce the lien by
33 sale. The notice of delinquent assessment shall be signed by the
34 person designated in the declaration or by the association for that
35 purpose, or if no one is designated, by the president of the
36 association. A copy of the recorded notice of delinquent assessment
37 shall be mailed by certified mail to every person whose name is
38 shown as an owner of the separate interest in the association's
39 records, and the notice shall be mailed no later than 10 calendar
40 days after recordation. Within 21 days of the payment of the sums

1 specified in the notice of delinquent assessment, the association
2 shall record or cause to be recorded in the office of the county
3 recorder in which the notice of delinquent assessment is recorded
4 a lien release or notice of rescission and provide the owner of the
5 separate interest a copy of the lien release or notice that the
6 delinquent assessment has been satisfied. A monetary charge
7 imposed by the association as a means of reimbursing the
8 association for costs incurred by the association in the repair of
9 damage to common areas and facilities for which the member or
10 the member's guests or tenants were responsible may become a
11 lien against the member's separate interest enforceable by the sale
12 of the interest under Sections 2924, 2924b, and 2924c, provided
13 the authority to impose a lien is set forth in the governing
14 documents. It is the intent of the Legislature not to contravene
15 Section 2792.26 of Title 10 of the California Code of Regulations,
16 as that section appeared on January 1, 1996, for associations of
17 subdivisions that are being sold under authority of a subdivision
18 public report, pursuant to Part 2 (commencing with Section 11000)
19 of Division 4 of the Business and Professions Code.

20 (e) Except as indicated in subdivision (d), a monetary penalty
21 imposed by the association as a disciplinary measure for failure
22 of a member to comply with the governing instruments, except for
23 the late payments, may not be characterized nor treated in the
24 governing instruments as an assessment that may become a lien
25 against the member's subdivision separate interest enforceable by
26 the sale of the interest under Sections 2924, 2924b, and 2924c.

27 (f) A lien created pursuant to subdivision (d) shall be prior to
28 all other liens recorded subsequent to the notice of assessment,
29 except that the declaration may provide for the subordination
30 thereof to any other liens and encumbrances.

31 (g) An association may not voluntarily assign or pledge the
32 association's right to collect payments or assessments, or to enforce
33 or foreclose a lien to a third party, except when the assignment or
34 pledge is made to a financial institution or lender chartered or
35 licensed under federal or state law, when acting within the scope
36 of that charter or license, as security for a loan obtained by the
37 association; however, the foregoing provision may not restrict the
38 right or ability of an association to assign any unpaid obligations
39 of a former member to a third party for purposes of collection.
40 Subject to the limitations of this subdivision, after the expiration

1 of 30 days following the recording of a lien created pursuant to
2 subdivision (d), the lien may be enforced in any manner permitted
3 by law, including sale by the court, sale by the trustee designated
4 in the notice of delinquent assessment, or sale by a trustee
5 substituted pursuant to Section 2934a. Any sale by the trustee shall
6 be conducted in accordance with Sections 2924, 2924b, and 2924c
7 applicable to the exercise of powers of sale in mortgages and deeds
8 of trust. The fees of a trustee may not exceed the amounts
9 prescribed in Sections 2924c and 2924d, plus the cost of service
10 for either of the following:

11 (1) The notice of default pursuant to subdivision (j) of Section
12 1367.1.

13 (2) The decision of the board to foreclose upon the separate
14 interest of an owner as described in paragraph (3) of subdivision
15 (c) of Section 1367.4.

16 (h) Nothing in this section or in subdivision (a) of Section 726
17 of the Code of Civil Procedure prohibits actions against the owner
18 of a separate interest to recover sums for which a lien is created
19 pursuant to this section or prohibits an association from taking a
20 deed in lieu of foreclosure.

21 (i) If it is determined that a lien previously recorded against the
22 separate interest was recorded in error, the party who recorded the
23 lien shall, within 21 calendar days, record or cause to be recorded
24 in the office of the county recorder in which the notice of
25 delinquent assessment is recorded a lien release or notice of
26 rescission and provide the owner of the separate interest with a
27 declaration that the lien filing or recording was in error and a copy
28 of the lien release or notice of rescission.

29 (j) In addition to the requirements of Section 2924, a notice of
30 default shall be served by the association on the owner's legal
31 representative in accordance with the manner of service of
32 summons in Article 3 (commencing with Section 415.10) of
33 Chapter 4 of Title 5 of Part 2 of the Code of Civil Procedure. The
34 owner's legal representative shall be the person whose name is
35 shown as the owner of a separate interest in the association's
36 records, unless another person has been previously designated by
37 the owner as his or her legal representative in writing and mailed
38 to the association in a manner that indicates that the association
39 has received it. *If after reasonable diligence the notice is not able*
40 *to be served on an owner's representative in accordance with the*

1 *manner of service of summons set forth in this subdivision, the*
2 *association may post a copy on the owner's separate interest in a*
3 *manner most likely to give actual notice to the party to be served*
4 *and mail a copy of the notice by certified mail and first-class mail*
5 *to the owner's legal representative at the address of the owner's*
6 *separate interest.*

7 (k) Upon receipt of a written request by an owner identifying a
8 secondary address for purposes of collection notices, the
9 association shall send additional copies of any notices required by
10 this section to the secondary address provided. The association
11 shall notify owners of their right to submit secondary addresses to
12 the association, at the time the association issues the pro forma
13 operating budget pursuant to Section 1365. The owner's request
14 shall be in writing and shall be mailed to the association in a
15 manner that shall indicate the association has received it. The
16 owner may identify or change a secondary address at any time,
17 provided that, if a secondary address is identified or changed during
18 the collection process, the association shall only be required to
19 send notices to the indicated secondary address from the point the
20 association receives the request.

21 (l) (1) An association that fails to comply with the procedures
22 set forth in this section shall, prior to recording a lien, recommence
23 the required notice process.

24 (2) Any costs associated with recommencing the notice process
25 shall be borne by the association and not by the owner of a separate
26 interest.

27 (m) This section only applies to liens recorded on or after
28 January 1, 2003.

29 (n) This section is subordinate to, and shall be interpreted in
30 conformity with, Section 1367.4.

31 SEC. 2. Section 1367.4 of the Civil Code is amended to read:

32 1367.4. (a) Notwithstanding any law or any provisions of the
33 governing documents to the contrary, this section shall apply to
34 debts for assessments that arise on and after January 1, 2006.

35 (b) An association that seeks to collect delinquent regular or
36 special assessments of an amount less than one thousand eight
37 hundred dollars (\$1,800), not including any accelerated
38 assessments, late charges, fees and costs of collection, attorney's
39 fees, or interest, may not collect that debt through judicial or

1 nonjudicial foreclosure, but may attempt to collect or secure that
2 debt in any of the following ways:

3 (1) By a civil action in small claims court, pursuant to Chapter
4 5.5 (commencing with Section 116.110) of Title 1 of the Code of
5 Civil Procedure. An association that chooses to proceed by an
6 action in small claims court, and prevails, may enforce the
7 judgment as permitted under Article 8 (commencing with Section
8 116.810) of Title 1 of the Code of Civil Procedure. The amount
9 that may be recovered in small claims court to collect upon a debt
10 for delinquent assessments may not exceed the jurisdictional limits
11 of the small claims court and shall be the sum of the following:

12 (A) The amount owed as of the date of filing the complaint in
13 the small claims court proceeding.

14 (B) In the discretion of the court, an additional amount to that
15 described in subparagraph (A) equal to the amount owed for the
16 period from the date the complaint is filed until satisfaction of the
17 judgment, which total amount may include accruing unpaid
18 assessments and any reasonable late charges, fees and costs of
19 collection, attorney’s fees, and interest, up to the jurisdictional
20 limits of the small claims court.

21 (2) By recording a lien on the owner’s separate interest upon
22 which the association may not foreclose until the amount of the
23 delinquent assessments secured by the lien, exclusive of any
24 accelerated assessments, late charges, fees and costs of collection,
25 attorney’s fees, or interest, equals or exceeds one thousand eight
26 hundred dollars (\$1,800) or the assessments secured by the lien
27 are more than 12 months delinquent. An association that chooses
28 to record a lien under these provisions, prior to recording the lien,
29 shall offer the owner and, if so requested by the owner, participate
30 in dispute resolution as set forth in Article 5 (commencing with
31 Section 1363.810) of Chapter 4.

32 (3) Any other manner provided by law, except for judicial or
33 nonjudicial foreclosure.

34 (c) An association that seeks to collect delinquent regular or
35 special assessments of an amount of one thousand eight hundred
36 dollars (\$1,800) or more, not including any accelerated
37 assessments, late charges, fees and costs of collection, attorney’s
38 fees, or interest, or any assessments secured by the lien that are
39 more than 12 months delinquent, may use judicial or nonjudicial
40 foreclosure subject to the following conditions:

1 (1) Prior to initiating a foreclosure on an owner's separate
2 interest, the association shall offer the owner and, if so requested
3 by the owner, participate in dispute resolution pursuant to the
4 association's "meet and confer" program required in Article 5
5 (commencing with Section 1363.810) of Chapter 4 or alternative
6 dispute resolution as set forth in Article 2 (commencing with
7 Section 1369.510) of Chapter 7. The decision to pursue dispute
8 resolution or a particular type of alternative dispute resolution shall
9 be the choice of the owner, except that binding arbitration shall
10 not be available if the association intends to initiate a judicial
11 foreclosure.

12 (2) The decision to initiate foreclosure of a lien for delinquent
13 assessments that has been validly recorded shall be made only by
14 the board of directors of the association and may not be delegated
15 to an agent of the association. The board shall approve the decision
16 by a majority vote of the board members in an executive session.
17 The board shall record the vote in the minutes of the next meeting
18 of the board open to all members. The board shall maintain the
19 confidentiality of the owner or owners of the separate interest by
20 identifying the matter in the minutes by the parcel number of the
21 property, rather than the name of the owner or owners. A board
22 vote to approve foreclosure of a lien shall take place at least 30
23 days prior to any public sale.

24 (3) The board shall provide notice by personal service in
25 accordance with the manner of service of summons in Article 3
26 (commencing with Section 415.10) of Chapter 4 of Title 5 of Part
27 2 of the Code of Civil Procedure to an owner of a separate interest
28 who occupies the separate interest or to the owner's legal
29 representative, if the board votes to foreclose upon the separate
30 interest. *If after reasonable diligence the notice is not able to be*
31 *personally served on an owner of the separate interest who*
32 *occupies the separate interest, the association may post a copy on*
33 *the owner's separate interest in a manner most likely to give actual*
34 *notice to the party to be served and mail a copy of the notice by*
35 *certified mail and first-class mail to the owner at the address of*
36 *the owner's separate interest.* The board shall provide written
37 notice to an owner of a separate interest who does not occupy the
38 separate interest by first-class mail, postage prepaid, at the most
39 current address shown on the books of the association. In the
40 absence of written notification by the owner to the association, the

1 address of the owner's separate interest may be treated as the
2 owner's mailing address.

3 (4) A nonjudicial foreclosure by an association to collect upon
4 a debt for delinquent assessments shall be subject to a right of
5 redemption. The redemption period within which the separate
6 interest may be redeemed from a foreclosure sale under this
7 paragraph ends 90 days after the sale. In addition to the
8 requirements of Section 2924f, a notice of sale in connection with
9 an association's foreclosure of a separate interest in a common
10 interest development shall include a statement that the property is
11 being sold subject to the right of redemption created in this
12 paragraph.

13 (d) The limitation on foreclosure of assessment liens for amounts
14 under the stated minimum in this section does not apply to
15 assessments owed by owners of separate interests in timeshare
16 estates, as defined in subdivision (x) of Section 11112 of the
17 Business and Professions Code, or to assessments owed by
18 developers.

19 SEC. 3. Section 2924g of the Civil Code is amended to read:

20 2924g. (a) All sales of property under the power of sale
21 contained in any deed of trust or mortgage shall be held in the
22 county where the property or some part thereof is situated, and
23 shall be made at auction, to the highest bidder, between the hours
24 of 9 a.m. and 5 p.m. on any business day, Monday through Friday.

25 The sale shall commence at the time and location specified in
26 the notice of sale. Any postponement shall be announced at the
27 time and location specified in the notice of sale for commencement
28 of the sale or pursuant to paragraph (1) of subdivision (c).

29 If the sale of more than one parcel of real property has been
30 scheduled for the same time and location by the same trustee, (1)
31 any postponement of any of the sales shall be announced at the
32 time published in the notice of sale, (2) the first sale shall
33 commence at the time published in the notice of sale or
34 immediately after the announcement of any postponement, and
35 (3) each subsequent sale shall take place as soon as possible after
36 the preceding sale has been completed.

37 (b) When the property consists of several known lots or parcels,
38 they shall be sold separately unless the deed of trust or mortgage
39 provides otherwise. When a portion of the property is claimed by
40 a third person, who requires it to be sold separately, the portion

1 subject to the claim may be thus sold. The trustor, if present at the
2 sale, may also, unless the deed of trust or mortgage otherwise
3 provides, direct the order in which property shall be sold, when
4 the property consists of several known lots or parcels which may
5 be sold to advantage separately, and the trustee shall follow that
6 direction. After sufficient property has been sold to satisfy the
7 indebtedness, no more can be sold.

8 If the property under power of sale is in two or more counties,
9 the public auction sale of all of the property under the power of
10 sale may take place in any one of the counties where the property
11 or a portion thereof is located.

12 (c) (1) There may be a postponement or postponements of the
13 sale proceedings, including a postponement upon instruction by
14 the beneficiary to the trustee that the sale proceedings be
15 postponed, at any time prior to the completion of the sale for any
16 period of time not to exceed a total of 365 days from the date set
17 forth in the notice of sale. *A change in the location of the sale*
18 *proceedings, if any, whether due to the requirement of a public*
19 *entity, emergency, or other circumstances that preclude the use*
20 *of the published location, shall be announced at the time of*
21 *postponement.* The trustee shall postpone the sale in accordance
22 with any of the following:

23 (A) Upon the order of any court of competent jurisdiction.

24 (B) If stayed by operation of law.

25 (C) By mutual agreement, whether oral or in writing, of any
26 trustor and any beneficiary or any mortgagor and any mortgagee.

27 (D) At the discretion of the trustee.

28 (2) In the event that the sale proceedings are postponed for a
29 period or periods totaling more than 365 days, the scheduling of
30 any further sale proceedings shall be preceded by giving a new
31 notice of sale in the manner prescribed in Section 2924f. New fees
32 incurred for the new notice of sale shall not exceed the amounts
33 specified in Sections 2924c and 2924d, and shall not exceed
34 reasonable costs that are necessary to comply with this paragraph.

35 (d) The notice of each postponement and the reason therefor
36 shall be given by public declaration by the trustee at the time and
37 place last appointed for sale. A public declaration of postponement
38 shall also set forth the new date, time, and place of sale and the
39 place of sale ~~shall be the same place as originally fixed by the~~
40 ~~trustee for the sale~~ *may be other than the place originally fixed by*

1 *the trustee or subsequently relocated by the trustee for the sale.*
2 No other notice of postponement need be given. However, the sale
3 shall be conducted no sooner than on the seventh day after the
4 earlier of (1) dismissal of the action or (2) expiration or termination
5 of the injunction, restraining order, or stay that required
6 postponement of the sale, whether by entry of an order by a court
7 of competent jurisdiction, operation of law, or otherwise, unless
8 the injunction, restraining order, or subsequent order expressly
9 directs the conduct of the sale within that seven-day period. For
10 purposes of this subdivision, the seven-day period shall not include
11 the day on which the action is dismissed, or the day on which the
12 injunction, restraining order, or stay expires or is terminated. If
13 the sale had been scheduled to occur, but this subdivision precludes
14 its conduct during that seven-day period, a new notice of
15 postponement shall be given if the sale had been scheduled to
16 occur during that seven-day period. The trustee shall maintain
17 records of each postponement and the reason therefor.

18 (e) Notwithstanding the time periods established under
19 subdivision (d), if postponement of a sale is based on a stay
20 imposed by Title 11 of the United States Code (bankruptcy), the
21 sale shall be conducted no sooner than the expiration of the stay
22 imposed by that title and the seven-day provision of subdivision
23 (d) shall not apply.