AMENDED IN SENATE APRIL 21, 2009

SENATE BILL No. 306

Introduced by Senator Calderon

February 25, 2009

An act to amend Sections 2923.5, 2923.6, 2924.8, and 2943 of the Civil Code, and to amend Section 17312 of the Financial Code, relating to real property transactions.

LEGISLATIVE COUNSEL'S DIGEST

SB 306, as amended, Calderon. Real property transactions.

(1) 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, until January 1, 2013, prohibits a mortgagee, trustee, beneficiary, or authorized agent from filing a notice of default for an additional 30 days on loans made between January 1, 2003, to December 31, 2007, that secure residential real property, under certain circumstances.

This bill would, until January 1, 2013, ~~for the purposes of these provisions, redefine the term borrower to mean a natural person or persons who are original signators to a note or other obligation secured by a mortgage or deed of trust on a residence, as defined. The bill would~~ provide that these provisions apply to mortgages and deeds of trust recorded between January 1, 2003, to December 31, 2007, secured by owner-occupied residential real property containing no more than 4 dwelling units. The bill would also, among other things, revise the declaration that is required to be filed in this connection with the notice of default.

(2) Existing law states legislative findings and declarations with regard to the duty loan servicers have to maximize net present value under their pooling and servicing agreements, stating that their duty is owed to all parties in a loan pool, not to any particular parties, and that a servicer acts in the best interests of all parties if it agrees to or implements a loan modification or workout plan, as specified.

This bill would specify the application of these findings and declarations to certain investors.

(3) Existing law requires a trustee or authorized agent, upon posting a notice of sale, to post and mail a specified notice addressed to residents of property subject to foreclosure upon posting a notice of sale.

This bill would specify how and when this notice is to be mailed.

(4) Existing law requires a beneficiary on a deed of trust or a mortgagee on a mortgage to prepare and deliver a beneficiary statement or a pay-off demand statement within 21 days of receipt of a written demand from specified entitled parties. Existing law requires the written statement to include information reasonably necessary to calculate the payoff amount on a per diem basis for the period of time, not to exceed 30 days, during which the per diem amount is not changed by the terms of the note.

This bill would revise the period of time during which the information reasonably necessary to calculate the payoff amount may be prepared.

The bill would also require a beneficiary to prepare and deliver, within 21 days upon written demand, a short-pay demand statement, which would be a written statement, conditioned on the existence of a short-pay agreement, that is prepared in response to a request from an entitled person or authorized agent, setting forth an amount less than the outstanding debt, together with any terms and conditions, under which the beneficiary would execute and deliver a reconveyance of the deed of trust securing the note that is the subject of the short-pay demand statement. The bill would provide that the short-pay agreement is an agreement in writing in which the beneficiary agrees to release its lien on a property in return for payment of an amount less than the secured obligation. The bill would permit a beneficiary that elects not to proceed with the transaction that is the subject of the demand to refuse to provide a short-pay demand statement, but would require that he or she provide a written statement, indicating that the beneficiary has elected not to proceed. The bill would provide that if the terms and conditions of the short-pay agreement require approval by the beneficiary of a closing statement prepared by an escrowholder, approval or disapproval shall be provided not more than 4 days after receipt by the beneficiary of the closing statement, or the closing statement shall be deemed approved, except as specified.

(5) The Escrow Law provides for licensing and regulation of escrow agents, other than certain exempt persons, by the Commissioner of Corporations. The law requires licensees to apply for membership in the Escrow Agents' Fidelity Corporation, a nonprofit mutual benefit corporation, which is established to indemnify its members against loss of trust obligations. The law limits required membership in the Escrow Agents' Fidelity Corporation who engage in certain kinds of business. Existing law defines and regulates the activities of exchange facilitators and excepts from the definition of exchange facilitator escrow companies, under specified circumstances.

This bill would provide escrow transactions that involve money or property held or deposited with a person acting as an exchange facilitator are not transactions that require a licensee to have membership in the Escrow Agents' Fidelity Corporation.

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

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

SECTION 1. Section 2923.5 of the Civil Code 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. 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, ~~or~~ has tried with due diligence to contact the borrower as required by this section, *or that no contact was required pursuant to subdivision (h)*.

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

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

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

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

(e) For purposes of this section, a “borrower” ~~means a natural person or persons who are original signators to a note or other obligation secured by a mortgage or deed of trust on a residence described in subdivision (i).~~ *shall include a mortgagor or trustor.*

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

(g) A notice of default may be filed pursuant to Section 2924 when a mortgagee, beneficiary, or authorized agent has not contacted a borrower as required by paragraph (2) of subdivision

(a) provided that the failure to contact the borrower occurred despite the due diligence of the mortgagee, beneficiary, or authorized agent. For purposes of this section, “due diligence” shall require and mean all of the following:

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

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

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

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

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

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

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

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

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

(C) A toll-free telephone number for borrowers who wish to discuss options for avoiding foreclosure with their mortgagee, 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), ~~(b),~~ (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, 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. 2. Section 2923.6 of the Civil Code is amended to read:

2923.6. (a) The Legislature finds and declares 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, or to all investors under a pooling and servicing agreement, not to any particular party in the loan pool or investor under a polling and servicing agreement, and that a servicer acts in the best interests of all parties to the loan pool or investors in the pooling and servicing agreement if it agrees to or implements a loan modification or workout plan for which both of the following apply:

(1) The loan is in payment default, or payment default is reasonably foreseeable.

(2) Anticipated recovery under the loan modification or workout plan exceeds the anticipated recovery through foreclosure on a net present value basis.

(b) It is the intent of the Legislature that the mortgagee, beneficiary, or authorized agent offer the borrower a loan modification or workout plan if such a modification or plan is consistent with its contractual or other authority.

(c) 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 2924.8 of the Civil Code is amended to read:

2924.8. (a) Upon posting a notice of sale pursuant to Section 2924f, a trustee or authorized agent shall also post the following notice, in the manner required for posting the notice of sale on the property to be sold, and a mortgagee, trustee, beneficiary, or authorized agent, concurrently with the mailing of the notice of sale pursuant to Section 2924b, shall send by first-class mail in an envelope addressed to the "Resident of property subject to foreclosure sale" the following notice in English and the languages described in Section 1632: "Foreclosure process has begun on this property, which may affect your right to continue to live in this property. Twenty days or more after the date of this notice, this property may be sold at foreclosure. If you are renting this property, the new property owner may either give you a new lease or rental agreement or provide you with a 60-day eviction notice. However, other laws may prohibit an eviction in this circumstance or provide you with a longer notice before eviction. You may wish to contact a lawyer or your local legal aid or housing counseling agency to discuss any rights you may have."

(b) It shall be an infraction to tear down the notice described in subdivision (a) within 72 hours of posting. Violators shall be subject to a fine of one hundred dollars ($100).

(c) A state government entity shall make available translations of the notice described in subdivision (a) which may be used by a mortgagee, trustee, beneficiary, or authorized agent to satisfy the requirements of this section.

(d) This section shall only apply to loans secured by residential real property, and if the billing address for the mortgage note is different than the property address.

(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. 4. Section 2943 of the Civil Code is amended to read:

2943. (a) As used in this section:

(1) "Beneficiary" means a mortgagee or beneficiary of a mortgage or deed of trust, or his or her assignees.

(2) "Beneficiary statement" means a written statement showing:

(A) The amount of the unpaid balance of the obligation secured by the mortgage or deed of trust and the interest rate, together with the total amounts, if any, of all overdue installments of either principal or interest, or both.

(B) The amounts of periodic payments, if any.

(C) The date on which the obligation is due in whole or in part.

(D) The date to which real estate taxes and special assessments have been paid to the extent the information is known to the beneficiary.

(E) The amount of hazard insurance in effect and the term and premium of that insurance to the extent the information is known to the beneficiary.

(F) The amount in an account, if any, maintained for the accumulation of funds with which to pay taxes and insurance premiums.

(G) The nature and, if known, the amount of any additional charges, costs, or expenses paid or incurred by the beneficiary which have become a lien on the real property involved.

(H) Whether the obligation secured by the mortgage or deed of trust can or may be transferred to a new borrower.

(3) "Delivery" means depositing or causing to be deposited in the United States mail an envelope with postage prepaid, containing a copy of the document to be delivered, addressed to the person whose name and address is set forth in the demand therefor. The document may also be transmitted by facsimile machine to the person whose name and address is set forth in the demand therefor.

(4) "Entitled person" means the trustor or mortgagor of, or his or her successor in interest in, the mortgaged or trust property or any part thereof, any beneficiary under a deed of trust, any person having a subordinate lien or encumbrance of record thereon, the escrowholder licensed as an agent pursuant to Division 6 (commencing with Section 17000) of the Financial Code, or the party exempt by virtue of Section 17006 of the Financial Code who is acting as the escrowholder.

(5) "Payoff demand statement" means a written statement, prepared in response to a written demand made by an entitled person or authorized agent, setting forth the amounts required as of the date of preparation by the beneficiary, to fully satisfy all obligations secured by the loan that is the subject of the payoff demand statement. The written statement shall include information reasonably necessary to calculate the payoff amount on a per diem basis for the period of time during which the per diem amount is not changed by the terms of the note. The period of time shall not be greater than 30 days from the date of preparation by the beneficiary and not less than the lesser of the following:

(A) Ten days from the date of preparation by the beneficiary.

(B) The number of days from the date of preparation by the beneficiary days until the terms of the note result in a change in the per diem amount.

(6) "Short-pay agreement" means an agreement in writing in which the beneficiary agrees to release its lien on a property in return for payment of an amount less than the secured obligation.

(7) "Short-pay demand statement" means a written statement, conditioned on the existence of a short-pay agreement, that is prepared in response to a written demand made by an entitled person or authorized agent, setting forth an amount less than the outstanding debt, together with any terms and conditions, under which the beneficiary will execute and deliver a reconveyance of the deed of trust securing the note that is the subject of the short-pay demand statement. The period shall not be greater than 30 days from the date of preparation by the beneficiary and not less than the lesser of the following:

(A) Ten days from the date of preparation by the beneficiary.

(B) The number of days from the date of preparation by the beneficiary days until the terms of the note result in a change in the per diem amount.

(b) (1) A beneficiary, or his or her authorized agent, shall, within 21 days of the receipt of a written demand by an entitled person or his or her authorized agent, prepare and deliver to the person demanding it a true, correct, and complete copy of the note or other evidence of indebtedness with any modification thereto, and a beneficiary statement.

(2) A request pursuant to this subdivision may be made by an entitled person or his or her authorized agent at any time before, or within two months after, the recording of a notice of default under a mortgage or deed of trust, or may otherwise be made more than 30 days prior to the entry of the decree of foreclosure.

(c) (1) A beneficiary, or his or her authorized agent, shall, on the written demand of an entitled person, or his or her authorized agent, prepare and deliver a payoff demand statement to the person demanding it within 21 days of the receipt of the demand. However, if the loan is subject to a recorded notice of default or a filed complaint commencing a judicial foreclosure, the beneficiary shall have no obligation to prepare and deliver this statement as prescribed unless the written demand is received prior to the first publication of a notice of sale or the notice of the first date of sale established by a court.

(2) Except as provided in this subdivision, a beneficiary, or his or her authorized agent, shall, on the written demand of an entitled person, or his or her authorized agent, prepare and deliver a short-pay demand statement to the person demanding it within 21 days of the receipt of the demand. A beneficiary, or his or her authorized agent that elects not to proceed with the transaction that is the subject of the written demand may refuse to provide a short-pay demand statement for that transaction, but shall provide a written statement to the person demanding it, indicating that the beneficiary elects not to proceed with the proposed transaction, within 21 days of the receipt of the demand. If the terms and conditions of the short-pay agreement require approval by the beneficiary of a closing statement or similar document prepared by an escrowholder, approval or disapproval shall be provided not more than four days after receipt by the beneficiary of the closing statement, or the closing statement shall be deemed approved, provided that the statement is not clearly contrary to the terms of the short-pay agreement or to any short-pay demand statement previously provided to the escrow holder.

(d) (1) A beneficiary statement, payoff demand statement, or short-pay demand statement may be relied upon by the entitled person or his or her authorized agent in accordance with its terms, including with respect to the payoff demand statement or short-pay demand statement reliance for the purpose of establishing the amount necessary to pay the obligation in full. If the beneficiary notifies the entitled person or his or her authorized agent of any amendment to the statement, then the amended statement may be relied upon by the entitled person or his or her authorized agent as provided in this subdivision.

(2) If notification of any amendment to the statement is not given in writing, then a written amendment to the statement shall be delivered to the entitled person or his or her authorized agent no later than the next business day after notification.

(3) Upon the dates specified in subparagraphs (A) and (B) any sums that were due and for any reason not included in the statement or amended statement shall continue to be recoverable by the beneficiary as an unsecured obligation of the obligor pursuant to the terms of the note and existing provisions of law.

(A) If the transaction is voluntary, the entitled party or his or her authorized agent may rely upon the statement or amended statement upon the earlier of (i) the close of escrow, (ii) transfer of title, or (iii) recordation of a lien.

(B) If the loan is subject to a recorded notice of default or a filed complaint commencing a judicial foreclosure, the entitled party or his or her authorized agent may rely upon the statement or amended statement upon the acceptance of the last and highest bid at a trustee's sale or a court supervised sale.

(e) The following provisions apply to a demand for either a beneficiary statement or a payoff demand statement:

(1) If an entitled person or his or her authorized agent requests a statement pursuant to this section and does not specify a beneficiary statement, a payoff demand statement, or short-pay demand statement the beneficiary shall treat the request as a request for a payoff demand statement.

(2) If the entitled person or the entitled person's authorized agent includes in the written demand a specific request for a copy of the deed of trust or mortgage, it shall be furnished with the written statement at no additional charge.

(3) The beneficiary may, before delivering a statement, require reasonable proof that the person making the demand is, in fact, an entitled person or an authorized agent of an entitled person, in which event the beneficiary shall not be subject to the penalties of this section until 21 days after receipt of the proof herein provided for. A statement in writing signed by the entitled person appointing an authorized agent when delivered personally to the beneficiary or delivered by registered return receipt mail shall constitute reasonable proof as to the identity of an agent. Similar delivery of a policy of title insurance, preliminary report issued by a title company, original or photographic copy of a grant deed or certified copy of letters testamentary, guardianship, or conservatorship shall constitute reasonable proof as to the identity of a successor in interest, provided the person demanding a statement is named as successor in interest in the document.

(4) If a beneficiary for a period of 21 days after receipt of the written demand willfully fails to prepare and deliver the statement, he or she is liable to the entitled person for all damages which he or she may sustain by reason of the refusal and, whether or not actual damages are sustained, he or she shall forfeit to the entitled person the sum of three hundred dollars ($300). Each failure to prepare and deliver the statement, occurring at a time when, pursuant to this section, the beneficiary is required to prepare and deliver the statement, creates a separate cause of action, but a judgment awarding an entitled person a forfeiture, or damages and forfeiture, for any failure to prepare and deliver a statement bars recovery of damages and forfeiture for any other failure to prepare and deliver a statement, with respect to the same obligation, in compliance with a demand therefor made within six months before or after the demand as to which the award was made. For the purposes of this subdivision, "willfully" means an intentional failure to comply with the requirements of this section without just cause or excuse.

(5) If the beneficiary has more than one branch, office, or other place of business, then the demand shall be made to the branch or office address set forth in the payment billing notice or payment book, and the statement, unless it specifies otherwise, shall be deemed to apply only to the unpaid balance of the single obligation named in the request and secured by the mortgage or deed of trust

which is payable at the branch or office whose address appears on the aforesaid billing notice or payment book.

(6) The beneficiary may make a charge not to exceed thirty dollars ($30) for furnishing each required statement. The provisions of this paragraph shall not apply to mortgages or deeds of trust insured by the Federal Housing Administrator or guaranteed by the Administrator of Veterans Affairs.

(f) The preparation and delivery of a beneficiary statement, a payoff demand statement, or short-pay demand statement pursuant to this section shall not change a date of sale established pursuant to Section 2924g.

SEC. 5. Section 17312 of the Financial Code is amended to read:

17312. (a) Each person licensed pursuant to this division who is engaged in the business of receiving escrows specified in subdivision (c) and whose escrow business location is located within the State of California shall participate as a member in Fidelity Corporation in accordance with this chapter and rules established by the board of directors of Fidelity Corporation. Fidelity Corporation shall not deny membership to any escrow agent holding a valid unrevoked license under the Escrow Law who is required to be a member under this subdivision.

(b) Upon filing a new application for licensure as required by Section 17201, persons required to be a member of Fidelity Corporation shall file a copy thereof concurrently with Fidelity Corporation. If an application for licensure submitted to Fidelity Corporation contains personal or confidential information, Fidelity Corporation and its board shall maintain this information in confidence to protect the privacy of the information. The copy of the application shall include the three thousand dollar ($3,000) fee specified in subdivision (a) of Section 17320 and all required Fidelity Corporation Certificates set forth in Sections 17331 and 17331.1. Fidelity Corporation shall promptly furnish to the commissioner a compliance letter confirming that the applicant has satisfied the requirements to be a member of Fidelity Corporation.

(c) The required membership in Fidelity Corporation shall be limited to those licensees whose escrow business location is located within the State of California and who engage, in whole or in part, in the business of receiving escrows for deposit or delivery in the following types of transactions:

(1) Real property escrows, including, but not limited to, the sale, encumbrance, lease, exchange, or transfer of title, and loans or other obligations to be secured by a lien upon real property, excluding money or property held or deposited with a person acting as an exchange facilitator pursuant to Division 20.5 (commencing with Section 51000).

(2) Bulk sale escrows, including, but not limited to, the sale or transfer of title to a business entity and the transfer of liquor licenses or other types of business licenses or permits.

(3) Fund or joint control escrows, including, but not limited to, transactions specified in Section 17005.1, and contracts specified in Section 10263 of the Public Contract Code.

(4) The sale, transfer of title, or refinance escrows for manufactured homes or mobilehomes.

(5) Reservation deposits required under Article 2 (commencing with Section 11010) of Chapter 1 of Part 2 of Division 4 of the Business and Professions Code or by regulation of the Department of Real Estate to be held in an escrow account.

(6) Escrows for sale, transfer, modification, assignment, or hypothecation of promissory notes secured by deeds of trust.

(d) Coverage required to be provided by Fidelity Corporation under this chapter shall be provided to members only for loss of trust obligations with respect to those types of transactions specified in subdivision (c). If a loss covered by Fidelity Corporation is also covered by a member's general liability, dishonesty, or indemnity policy, or other private insurance policy, then the member's private policy shall first be applied as the primary indemnity to cover the loss. However, the failure of the member's private primary policy to indemnify the member's loss within the time specified for Fidelity Corporation indemnity in subdivision (a) of Section 17314 shall not limit the indemnity obligations of Fidelity Corporation as defined in this chapter. Indemnity coverage for those types of transactions not specified in subdivision (c) shall be provided by escrow agents in accordance with Section 17203.1.

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