AMENDED IN ASSEMBLY APRIL 9, 2012

california legislature—2011–12 regular session

ASSEMBLY BILL No. 2425

Introduced by Assembly Member Mitchell
(Coauthor: Senator DeSaulnier)

February 24, 2012

~~An act relating to mortgages.~~ *An act to amend Section 2932.5 of, to amend and repeal Section 2924 of, and to add Sections 2920.5, 2923.7, 2924.17, and 2924.18 to, the Civil Code, relating to mortgages.*

legislative counsel's digest

AB 2425, as amended, Mitchell. Mortgages and deeds of trust: foreclosure.

(1) Existing law prescribes foreclosure procedures, including, among other things, procedures for recording a notice of default, recording a notice of sale, and conducting a foreclosure sale.

This bill would define a mortgage servicer, and would, commencing July 1, 2013, require a mortgage servicer to establish a single point of contact when a borrower on a residential mortgage or deed of trust is 60 or more days delinquent, has had a notice of default recorded, or is seeking a loan modification or other loss mitigation, as specified. The bill would impose various obligations on the single point of contact in connection with loan modification or other loss mitigation options.

(2) Existing law imposes various requirements that must be satisfied prior to exercising a power of sale under a mortgage or deed of trust, including, among other things, recording a notice of default.

This bill would prohibit an entity from recording a notice of default or otherwise initiating foreclosure procedures unless the entity is the holder of the beneficial interest under the deed of trust, and would *prohibit an entity acting as an agent from doing so without specific direction from the actual owner of the beneficial interest under the deed of trust.*

(3) Existing law authorizes the recording by the county recorder of various documents.

This bill would provide that a document that contains factual assertions that are not accurate, are incomplete, or are unsupported by competent, reliable evidence, or a document that has not been reviewed by its signer to substantiate the factual assertions contained in the document is a robosigned document. The bill would provide that any entity that records a robosigned document, or files a robosigned document in a court relative to a foreclosure proceeding is liable for a civil penalty of $10,000 for each robosigned document. The bill would authorize specified governmental entities to enforce the civil penalty, and would authorize the Department of Real Estate, the Department of Corporations, and the Department of Financial Institutions to enforce the civil penalty provisions against their respective licensees.

(4) The bill would authorize a borrower to seek an injunction of a pending trustee's sale, if a notice of sale has been recorded and the borrower reasonably believes that the mortgagee, trustee, beneficiary, or authorized agent failed to comply with specified requirements. The bill would authorize the greater of actual damages or $10,000 in statutory damages if there is a failure to comply with specified requirements by the mortgagee, trustee, beneficiary, or authorized agent and the property is sold at a foreclosure sale. The bill would authorize the greater of treble damages or $50,000 in statutory damages if the failure to comply is found to be intentional or reckless or resulted from willful misconduct, as specified.

(5) Existing law provides that where the power to sell real property is given to a mortgagee or other encumbrancer, in an instrument intended to secure the payment of money, the power is part of the security and vests with any person who by assignment becomes entitled to payment of the money.

This bill would expand these provisions to include a power to sell real property given to a trustee or a beneficiary of a deed of trust in an instrument intended to secure the payment of money.

(6) The bill would repeal duplicate provisions of law.

~~Existing law generally regulates mortgages and deeds of trust, including establishing procedures for foreclosure in the case of default.~~

~~This bill would express the intent of Legislature to enact legislation to amend the state's foreclosure laws to implement and make permanent the servicing standards and other provisions of the National Mortgage Settlement.~~

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

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

SECTION 1. Section 2920.5 is added to the Civil Code, to read:

2920.5. For purposes of this article, "mortgage servicer" means a person or entity responsible for the day-to-day management of a mortgage loan account, including collecting and crediting periodic loan payments, managing any escrow account, or enforcing mortgage loan terms either as the holder of the loan note or on behalf of the holder of the loan note.

SEC. 2. Section 2923.7 is added to the Civil Code, to read:

2923.7. (a) If a borrower is 60 or more days delinquent, the mortgage servicer shall inform the borrower that if the borrower wishes to pursue a loan modification or other foreclosure prevention alternative, the mortgage servicer shall establish a single point of contact (SPOC) for the borrower.

(b) Upon written or telephonic communication from a borrower who is 60 or more days delinquent and who requests loss mitigation assistance, the identity of and contact information for the SPOC shall be provided to the borrower within 10 business days. The mortgage servicer shall provide updated contact information to the borrower if the designated SPOC is changed no later than five business days after the change.

(c) The SPOC shall be responsible for all of the following:

(1) Communicating the options available to the borrower, the actions the borrower must take to be considered for those options, and the status of the mortgage servicer's evaluation of the borrower for those options.

(2) Coordinating receipt of all documents associated with loan modification or loss mitigation activities and notifying the borrower of any missing documents.

(3) Maintaining and providing accurate information about the borrower's situation and current status in the loss mitigation process.

(4) Ensuring that a borrower, who is not eligible for a federal Making Home Affordable (MHA) program, is considered for proprietary or other investor loss mitigation options.

(5) Having access to individuals with the ability to stop foreclosure proceedings when necessary to comply with the MHA program or California law.

(d) The SPOC shall remain assigned to the borrower's account until the mortgage servicer determines that all loss mitigation options have been exhausted, the borrower's account becomes current, or, in the case of a borrower in bankruptcy, the borrower has exhausted all loss mitigation options for which the borrower is potentially eligible and has applied.

(e) The mortgage servicer shall ensure that a SPOC refers and transfers a borrower to an appropriate supervisor upon request of the borrower.

(f) This section shall become operative on July 1, 2013.

SEC. 3. Section 2924 of the Civil Code, as amended by Section 1 of Chapter 180 of the Statutes of 2010, is amended to read:

2924. (a) Every transfer of an interest in property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage, except when in the case of personal property it is accompanied by actual change of possession, in which case it is to be deemed a pledge. Where, by a mortgage created after July 27, 1917, of any estate in real property, other than an estate at will or for years, less than two, or in any transfer in trust made after July 27, 1917, of a like estate to secure the performance of an obligation, a power of sale is conferred upon the mortgagee, trustee, or any other person, to be exercised after a breach of the obligation for which that mortgage or transfer is a security, the power shall not be exercised except where the mortgage or transfer is made pursuant to an order, judgment, or decree of a court of record, or to secure the payment of bonds or other evidences of indebtedness authorized or permitted to be issued by the Commissioner of Corporations, or is made by a public utility subject to the provisions of the Public Utilities Act, until all of the following apply:

(1) The trustee, mortgagee, or beneficiary, or any of their authorized agents shall first file for record, in the office of the recorder of each county wherein the mortgaged or trust property

or some part or parcel thereof is situated, a notice of default. That notice of default shall include all of the following:

(A) A statement identifying the mortgage or deed of trust by stating the name or names of the trustor or trustors and giving the book and page, or instrument number, if applicable, where the mortgage or deed of trust is recorded or a description of the mortgaged or trust property.

(B) A statement that a breach of the obligation for which the mortgage or transfer in trust is security has occurred.

(C) A statement setting forth the nature of each breach actually known to the beneficiary and of his or her election to sell or cause to be sold the property to satisfy that obligation and any other obligation secured by the deed of trust or mortgage that is in default.

(D) If the default is curable pursuant to Section 2924c, the statement specified in paragraph (1) of subdivision (b) of Section 2924c.

(2) Not less than three months shall elapse from the filing of the notice of default.

(3) Except as provided in paragraph (4), after the lapse of the three months described in paragraph (2), the mortgagee, trustee, or other person authorized to take the sale shall give notice of sale, stating the time and place thereof, in the manner and for a time not less than that set forth in Section 2924f.

(4) Notwithstanding paragraph (3), the mortgagee, trustee, or other person authorized to take sale may file a notice of sale pursuant to Section 2924f up to five days before the lapse of the three-month period described in paragraph (2), provided that the date of sale is no earlier than three months and 20 days after the filing of the notice of default.

(5) An entity shall not record or cause a notice of default to be recorded or otherwise initiate the foreclosure process unless it is the holder of the beneficial interest under the deed of trust. An agent shall not record a notice of default or otherwise commence the foreclosure process without the specific direction of the actual owner of the beneficial interest under the deed of trust.

(b) In performing acts required by this article, the trustee shall incur no liability for any good faith error resulting from reliance on information provided in good faith by the beneficiary regarding the nature and the amount of the default under the secured obligation, deed of trust, or mortgage. In performing the acts required by this article, a trustee shall not be subject to Title 1.6c (commencing with Section 1788) of Part 4.

(c) A recital in the deed executed pursuant to the power of sale of compliance with all requirements of law regarding the mailing of copies of notices or the publication of a copy of the notice of default or the personal delivery of the copy of the notice of default or the posting of copies of the notice of sale or the publication of a copy thereof shall constitute prima facie evidence of compliance with these requirements and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value and without notice.

(d) All of the following shall constitute privileged communications pursuant to Section 47:

(1) The mailing, publication, and delivery of notices as required by this section.

(2) Performance of the procedures set forth in this article.

(3) Performance of the functions and procedures set forth in this article if those functions and procedures are necessary to carry out the duties described in Sections 729.040, 729.050, and 729.080 of the Code of Civil Procedure.

(e) There is a rebuttable presumption that the beneficiary actually knew of all unpaid loan payments on the obligation owed to the beneficiary and secured by the deed of trust or mortgage subject to the notice of default. However, the failure to include an actually known default shall not invalidate the notice of sale and the beneficiary shall not be precluded from asserting a claim to this omitted default or defaults in a separate notice of default.

~~(f) This section shall become operative on January 1, 2011.~~

SEC. 4. Section 2924 of the Civil Code, as amended by Section 2 of Chapter 180 of the Statutes of 2010, is repealed.

~~2924. (a) Every transfer of an interest in property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage, except when in the case of personal property it is accompanied by actual change of possession, in which case it is to be deemed a pledge. Where, by a mortgage created after July 27, 1917, of any estate in real property, other than an estate at will or for years, less than two, or in any transfer in trust made after July 27, 1917, of a like estate to secure the performance of an obligation, a power of sale is conferred upon~~

~~the mortgagee, trustee, or any other person, to be exercised after a breach of the obligation for which that mortgage or transfer is a security, the power shall not be exercised except where the mortgage or transfer is made pursuant to an order, judgment, or decree of a court of record, or to secure the payment of bonds or other evidences of indebtedness authorized or permitted to be issued by the Commissioner of Corporations, or is made by a public utility subject to the provisions of the Public Utilities Act, until all of the following apply:~~

~~(1) The trustee, mortgagee, or beneficiary, or any of their authorized agents shall first file for record, in the office of the recorder of each county wherein the mortgaged or trust property or some part or parcel thereof is situated, a notice of default. That notice of default shall include all of the following:~~

~~(A) A statement identifying the mortgage or deed of trust by stating the name or names of the trustor or trustors and giving the book and page, or instrument number, if applicable, where the mortgage or deed of trust is recorded or a description of the mortgaged or trust property.~~

~~(B) A statement that a breach of the obligation for which the mortgage or transfer in trust is security has occurred.~~

~~(C) A statement setting forth the nature of each breach actually known to the beneficiary and of his or her election to sell or cause to be sold the property to satisfy that obligation and any other obligation secured by the deed of trust or mortgage that is in default.~~

~~(D) If the default is curable pursuant to Section 2924c, the statement specified in paragraph (1) of subdivision (b) of Section 2924c.~~

~~(2) Not less than three months shall elapse from the filing of the notice of default.~~

~~(3) Except as provided in paragraph (4), after the lapse of the three months described in paragraph (2), the mortgagee, trustee, or other person authorized to take the sale shall give notice of sale, stating the time and place thereof, in the manner and for a time not less than that set forth in Section 2924f.~~

~~(4) Notwithstanding paragraph (3), the mortgagee, trustee, or other person authorized to take sale may file a notice of sale pursuant to Section 2924f up to five days before the lapse of the three-month period described in paragraph (2), provided that the~~

~~date of sale is no earlier than three months and 20 days after the filing of the notice of default.~~

~~(b) In performing acts required by this article, the trustee shall incur no liability for any good faith error resulting from reliance on information provided in good faith by the beneficiary regarding the nature and the amount of the default under the secured obligation, deed of trust, or mortgage. In performing the acts required by this article, a trustee shall not be subject to Title 1.6c (commencing with Section 1788) of Part 4.~~

~~(c) A recital in the deed executed pursuant to the power of sale of compliance with all requirements of law regarding the mailing of copies of notices or the publication of a copy of the notice of default or the personal delivery of the copy of the notice of default or the posting of copies of the notice of sale or the publication of a copy thereof shall constitute prima facie evidence of compliance with these requirements and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value and without notice.~~

~~(d) All of the following shall constitute privileged communications pursuant to Section 47:~~

~~(1) The mailing, publication, and delivery of notices as required by this section.~~

~~(2) Performance of the procedures set forth in this article.~~

~~(3) Performance of the functions and procedures set forth in this article if those functions and procedures are necessary to carry out the duties described in Sections 729.040, 729.050, and 729.080 of the Code of Civil Procedure.~~

~~(e) There is a rebuttable presumption that the beneficiary actually knew of all unpaid loan payments on the obligation owed to the beneficiary and secured by the deed of trust or mortgage subject to the notice of default. However, the failure to include an actually known default shall not invalidate the notice of sale and the beneficiary shall not be precluded from asserting a claim to this omitted default or defaults in a separate notice of default.~~

~~(f) This section shall become operative on January 1, 2011.~~

SEC. 5. Section 2924.17 is added to the Civil Code, to read:

2924.17. (a) For purposes of this section, a "robosigned document" means any document that contains factual assertions that are not accurate, are incomplete, or are unsupported by competent, reliable evidence. A "robosigned document" also *means any document that has not been reviewed by its signer to substantiate the factual assertions contained in the document. For purposes of this definition, multiple people may verify the document or statement so long as the document or statement specifies the portions verified by each signer.*

(b) Any entity that records a robosigned document or files a robosigned document in any court relative to a foreclosure proceeding shall be liable for a civil penalty of ten thousand dollars ($10,000) per robosigned document. The civil penalty may be enforced by any governmental entity identified in Section 17204 of the Business and Professions Code. In addition, the Department of Real Estate, the Department of Corporations, and the Department of Financial Institutions may enforce the civil penalties under this section against any of their respective licensees. The civil penalties under this section are separate from and exclusive of any other remedies or liabilities that may apply. This section is not intended to limit the type of actions regarding robosigned documents that may be filed by any governmental entity identified in Section 17204 of the Business and Professions Code.

SEC. 6. Section 2924.18 is added to the Civil Code, to read:

2924.18. (a) A borrower may seek an order in any court having jurisdiction to enjoin any pending trustee's sale, if a notice of sale has been recorded, and the borrower reasonably believes that the mortgagee, trustee, beneficiary, or authorized agent failed to comply with the requirements of Section 2923.7, 2924, 2924.9, or 2932.5. Any injunction shall remain in place until the mortgagee, trustee, beneficiary, or authorized agent has complied with the requirements of Section 2923.7, 2924, 2924.9, or 2932.5. A borrower who obtains an injunction shall be awarded reasonable attorneys' fees and costs.

(b) (1) Following a trustee's sale, a borrower may recover the greater of actual damages or ten thousand dollars ($10,000) plus reasonable attorney's fees and costs in any court of competent jurisdiction, if the borrower reasonably believes that the mortgagee, trustee, beneficiary, or authorized agent failed to comply with the requirements of Section 2923.7, 2924, 2924.9, or 2932.5.

(2) A court may award a borrower the greater of treble actual damages or statutory damages of fifty thousand dollars ($50,000), plus attorney's fees and costs, if it finds that the violation of Section

2923.7, 2924, 2924.9, or 2932.5 was intentional, reckless, or resulted from willful misconduct by a mortgagee, trustee, beneficiary, or authorized agent.

(c) A violation of this article shall not affect the validity of a sale in favor of a bona fide purchaser and any of its encumbrancers for value without notice.

(d) Notwithstanding subdivisions (a) and (b), a borrower may not obtain relief under this section for any violation that was technical or de minimis in nature that it did not impact the borrower's ability to pursue an alternative to foreclosure as provided by this article.

(e) It shall be an affirmative defense to any liability for violation of Sections 2920.5, 2923.5, 2923.7, 2924, and 2924.9, that a signatory to a consent judgment entered in the case entitled United States of America v. Bank of America Corporation, filed in the Federal District Court for the District of Washington, D.C., case number 1:12-cv-00361 RMC, is in compliance with that consent judgment while the consent judgment is in effect.

(f) A third-party encumbrancer shall not be relieved from liability resulting from violations of Section 2923.7, 2924, 2924.17, or 2932.5 committed by that third-party encumbrancer, that occurred prior to the sale of the subject property to the bona fide purchaser.

SEC. 7. Section 2932.5 of the Civil Code is amended to read:

2932.5. Where a power to sell real property is given to a mortgagee, *trustee, beneficiary of a deed of trust,* or other encumbrancer, in an instrument intended to secure the payment of money, the power is part of the security and vests in any person who by assignment becomes entitled to payment of the money secured by the instrument. The power of sale may be exercised by the assignee if the assignment is duly acknowledged and recorded.

~~SECTION 1. It is the intent of the Legislature to enact legislation to amend the state's foreclosure laws to implement and make permanent the servicing standards and other provisions of the National Mortgage Settlement.~~

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