

## **MORTGAGE RELIEF BILL IMPOSES NEW FORECLOSURE REQUIREMENTS**

***By Kit James Gardner***

On July 8, 2008, Governor Schwarzenegger signed into law California's Mortgage Relief Bill (the "Bill"). The Bill imposes myriad new requirements on lenders foreclosing on residential real properties in California. However, it is limited in its scope, applying only to loans made from January 1, 2003, to December 31, 2007, that are secured by residential real property that serve as the principal residence of the borrower. Thus, if the loan was made outside of that timeframe, or if the property is an investment property, then the new requirements will not apply.

The Bill sets forth new requirements that affect each such phase of the foreclosure process. This article is intended to inform both borrowers and lenders of the new requirements in a concise way. Additional information can be obtained by reading the text of the Bill, or by contacting the author.

### **NEW PRE-FORECLOSURE REQUIREMENTS**

Pre-foreclosure, a mortgagee, beneficiary, or authorized agent ("Lender") may not file a notice of default until 30 days after "contact" is made with the borrower *or* until 30 days after completing certain "due diligence" requirements designed to locate the borrowers and inform them of their rights.

Notices of Default must now include a declaration from the Lender that it has contacted the borrower, tried with due diligence to contact the borrower as required by this section, or the borrower has surrendered the property to the Lender.<sup>1</sup>

#### **Step 1: Determining Whether the Pre-Foreclosure Rules Apply**

The new pre-foreclosure requirement that a Lender wait 30 days after contacting the borrower or attempting with due diligence to locate the borrower before filing a Notice of Default does not apply under the following circumstances:

(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 Lender.

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<sup>1</sup> The new law does not mention the scenario where the requirements of the Bill do not apply such as where, for example, the loan was made prior to January 1, 2003. In the event that the Bill's requirements do not apply, Lenders should attach a declaration stating the basis for their decision.

(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) The borrower has filed for bankruptcy, and the proceedings have not been finalized.

## **Step 2: Contacting the Borrower**

Assuming that the new rules apply, a Lender must 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 lender or its agent *must* advise the borrower that he or she has the right to request a subsequent meeting. If requested, the lender 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.

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.

## **Step 3: Attempting with Due Diligence to Locate the Borrower**

In the event that contact is not made with the Borrower, the lender must attempt to inform the borrower of his or her rights using so-called “due diligence.” The term “due diligence” in the new Bill has a very specific meaning. For purposes of the Bill, “due diligence” shall require and mean all of the following:

(1) 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) *After* the letter has been sent, attempting to contact the borrower by telephone at least *three* times at different hours and on different days to the *primary* telephone number on file. The lender may use an automated system to dial borrowers, provided that, if the telephone call is answered, the call is connected to a live representative. The lender satisfies the calling requirement if it determines, after attempting contact, that the borrower's primary *and* secondary telephone number or other 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 lender shall then send a certified letter, with return receipt requested.

Furthermore, the lender must 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.

Also, the Lender must have posted on its website a prominent link 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.

## **NEW FORECLOSURE REQUIREMENTS**

In addition to seeking to provide additional protections to homeowners, the Bill imposes new requirements designed to protect renters.

Thus, if the billing address for the mortgage note is different than the property address that is being foreclosed then, upon posting notice of a Trustee's Sale, the trustee or authorized agent must also post a notice informing the occupants of their rights. The specific language of the notice is dictated by the Bill, and can be found in California Civil Code section 2924.8(a). At the same time, the Lender must mail the same notice addressed to the "Resident of property subject to foreclosure sale."

The Bill now provides tenants or subtenants with a 60 day time period to vacate the property, instead of the previous 30 days.

## **NEW POST-FORECLOSURE REQUIREMENTS**

The most significant rule affecting Lenders following a foreclosure can be found in California Civil Code section 2929.3, which now requires legal owners (e.g., the Lender in a successful credit-bid) to maintain the property. Owner/Lenders who fail to maintain the property can be subject to a one thousand dollar (\$1,000) *per day* violation by a local governmental entity.

For purposes of the Bill, a "failure to maintain" property means a failure to care for the exterior of the property, including (but not limited to) permitting excessive foliage growth that diminishes the value of surrounding properties,

failing to take action to prevent trespassers or squatters from remaining on the property, or failing to take action to prevent mosquito larvae from growing in standing water, or other conditions that create a public nuisance.

If a governmental entity elects to assess a fine, it must provide written notice to the Owner/Lender and permit it to correct the violation within 30 days. In determining the amount of the fine, the governmental entity shall take into consideration any timely and good faith efforts by the legal owner to remedy the violation.

## **CONCLUSION**

The new Bill's requirements contain a number of pitfalls for the unwary Lender. The new pre-foreclosure requirements, for example, follow specific guidelines, and a failure to adhere to one guideline could place the Lender's foreclosure in jeopardy. However, the new bill does not impose fines or damages on Lenders for failing to adhere to the new contact requirements, or failing to provide tenants with notice of their rights (although it does authorize local governments to impose fines of \$1,000 per day for failing to maintain foreclosed properties). Still, the prospect of being compelled to begin the process anew in the event of a violation of any of the new Bill's provisions may in itself be a strong incentive to strictly comply with the new measures.

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