

The Details of California Foreclosure Law S.B. 1137

On July 8, 2008, the Governor signed S.B. 1137, an emergency bill designed to assist homeowners in foreclosure and tenants in foreclosed property.

Because it was an emergency bill, many of the changes took place immediately. The bill applies only to loans made between January 1, 2003 and December 31, 2007 - which are the loans most likely to go into foreclosure.

60 Days Notice for Tenants in Foreclosed Homes: Until January 1, 2013, this bill requires that a tenant or sub-tenant in possession of a rental housing unit at the time the property is sold in foreclosure shall be given 60 days' written notice to quit pursuant to Section 1162 before they may be removed from the property. This section shall not apply if any party to the note remains in the property as a tenant, subtenant, or occupant.

Maintenance of Property: This is intended to prevent foreclosures from ruining a neighborhood by requiring the legal owner to maintain vacant residential property.

Defines "failure to maintain" as 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, failing to take action to prevent mosquito larvae from growing in standing water or other conditions that create a public nuisance. Fines of up to \$1,000 per day should ensure compliance. This provision takes effect immediately.

Required Notifications prior to filing a Notice of Default: At least 30 days prior to filing a N.O.D. the lender or their representative must meet with the borrower either in person or by phone to assess the borrower's financial situation and discuss foreclosure options. During the initial contact, the mortgagee, beneficiary, or authorized agent must advise the borrower that he/she has the right to request a subsequent meeting and that, if the meeting is requested, the mortgagee, beneficiary, or authorized agent must schedule the meeting within 14 days.

The borrower must be provided a toll-free number for HUD certified housing counseling agencies.

This notification can only be waived if the lender demonstrates reasonable "due diligence" by following a number of prescribed steps and still is unable to contact the borrower:

- a) The entity sends a first class letter that includes the toll-free number available for the borrower to find a HUD-certified housing counseling agency; and,
- b) Subsequent to the sending of the letter the entity attempts to contact the borrower by telephone at least three times at different hours and on different days.

If the borrower does not respond to the lender within two weeks after the telephone call requirements have been satisfied, they are required to send a certified letter to the borrower, return receipt requested. The lender must maintain a toll-free number for borrowers that will provide access to a live representative during business hours. If they have an

Internet Website, they must post a prominent link on their homepage with the following information:

- a) Options available to borrowers who cannot afford their mortgage payments and who wish to avoid foreclosure, and instructions to borrowers on steps to take to explore these options; and,
- b) A list of documents borrowers should collect and be prepared to submit when discussing options to avoid foreclosure.

Upon posting of a notice of sale, the lender shall mail to the borrower a notice in English and Spanish, Chinese, Tagalog, Vietnamese, or Korean that states: "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."

These notice and contact requirements do not apply in the following circumstances:

- a) The borrower has surrendered the property as evidenced via a letter or delivery of keys to the property to the entity;
- b) The borrower has contacted a person or organization whose primary business is advising people who have decided to leave their homes on how to extend the foreclosure process and avoid the contractual obligations; or,
- c) The borrower has filed for bankruptcy.

This provision became operative **September 6, 2008**, to allow lenders time to set up procedures. N.O.D.s filed before then apparently are exempt.

Provisions to Encourage Loan Modifications: This makes it easier for the loan servicer to act in the best interest of all parties by agreeing to, or implementing a loan modification workout plan that meets three specific requirements:

1. The loan is in payment default, or payment default is reasonably foreseeable: In other words, the borrower is in trouble. Quite likely it will require a "hardship letter" with supporting evidence.
2. It looks like the lender will lose less money with a workout than with a foreclosure.
3. The loan modification is consistent with the servicer's contractual or other authority.

This act is necessary to avoid unnecessary foreclosures of residential properties and thereby provide stability to California's statewide and regional economies and housing market by requiring early contact and communications between mortgagees, beneficiaries, or authorized agents and specified borrowers to explore options that could avoid foreclosure and by facilitating the modification or restructuring of loans in appropriate circumstances. To read the actual legislation go to:

http://info.sen.ca.gov/pub/07-08/bill/sen/sb_1101-1150/sb_1137_bill_20080708_chaptered.pdf

Senate Bill 1137 Questions & Answers ⇒⇒⇒

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CALIFORNIA SENATE BILL 1137

QUESTIONS & ANSWERS

Q. When does this bill take effect and become law?

A. The Governor signed SB1137 on July 8, 2008 and the statute took effect immediately. However, the new requirements in Section 2 for Notices of Default and Notice of Sale and Section 4 for Notices of Sale became operative on September 6, 2008.

Q. Can the Section 2 declaration required re Contact, Due Diligence, or Surrender to be included in the Notice of Default or does it have to be a separate declaration?

A. There is no requirement in SB 3711 that the Notice of Default declaration re Contact, Due Diligence, or Surrender be a separate document, or that it be notarized.

Q. If the billing address is different from the property address, where does the trustee get the Spanish, Chinese, Tagalog, Vietnamese and Korean language translations of the Notice to Residents required to be posted and mailed to the resident of the property with the Notice of Sale if the billing address is different from the property address?

A. The foreign language translations were done by the State of California and are posted on the California Department of Corporations website at:

http://www.corp.ca.gov/FSD/pdf/Notice_of_Sale.pdf

Q. Is there any harm in treating all residential loans assigned for foreclosure as being an owner occupied loan made from January 1, 2003 to December 31, 2007 and complying with the Section 2 requirements adding CC §2923.5, rather than making that determination for each residential loan going into foreclosure?

A. Probably not, however the Section 2 requirements are only for owner-occupied residential properties. You would still have to comply with the new Section 4 requirements of posting and mailing the Notice to Residents in all six languages for loans where the "note address" is different from the mailing address, and the Section 4 notice is regardless of the date when the loan was made.

Q. Is there any harm in treating all foreclosures of loans secured by residential properties as having a "note address" different from the mailing address and complying with the Section 4 Notice to Residents requirement to avoid differentiating between loans?

A. Probably not. The statute places different foreclosure requirements in Section 2 on owner occupied residential properties with loans made within a certain period than in Section 4 on a residential property with a different billing address regardless of when the loan was made, which can be problematic. It would seem understandable to want a standardized process.

Q. Who is to sign the declaration re Contact, Due Diligence, or Surrender to be included in a Notice of Default?

A. The beneficiary or their authorized agent. Since all the requirements are to be made at least 30 days prior to initiating foreclosure, the beneficiary or servicer will usually be performing these requirements as part of their pre-foreclosure loss mitigation program. However, this is a complicated question that may require that the trustee consult with experienced legal counsel to integrate this new declaration procedure into its policies, practices and forms.

Q. If the trustee-to-be is requested to execute the Section 2 Notice of Default declaration re Contact, Due Diligence, or Surrender as the authorized agent, similar to the execution of many current Notices of Default, will it affect the trustee's ability to claim the protections of Civil Code §2924I to file a Declaration of Nonmonetary Status in a subsequent civil action?

A. Not by merely executing the declaration. Civil Code §294I protects the trustee and the acts of an authorized agent performing duties within CC §2924, *et. seq.* and named in a civil action. However, the authorized agent would be relying upon the beneficiary or their servicer as to the validity of the declaration and any authorized agent should review their power of attorney or agency documents and may wish to consult their legal counsel regarding indemnification.

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