Date of Hearing: June 10, 2013

ASSEMBLY COMMITTEE ON BANKING AND FINANCE
Roger Dickinson, Chair
SB 310 (Calderon) – As Amended: May 14, 2013

SENATE VOTE: 37-0

SUBJECT: Mortgages: foreclosure notices: title companies.

SUMMARY: This bill would exempt a licensed title company or underwritten title company, except when it is acting as a trustee, from liability for a violation of the Homeowners' Bill of Rights (HOBR) if it records or causes to record a notice of default (NOD) or notice of sale (NOS) at the request of a trustee, substitute trustee, or beneficiary, in good faith and in the normal course of its business activities. Specifically, this bill:

1) Provides that when a title company or underwritten title company records a NOD or NOS and is acting at the request of the mortgage loan servicer then the title company or underwritten title company shall not be liable for violations of HOBR resulting from a failure to halt foreclosure when a loan modification is under consideration.

2) Clarifies that the limited liability should not be construed to affect the liability of a trustee, substitute trustee, or beneficiary that requests a licensed title company or underwritten title company to record a NOD or NOS.

EXISTING LAW

1) Regulates the nonjudicial foreclosure of properties pursuant to the power of sale contained within a mortgage contract. To commence the process, existing law requires the trustee, mortgagee, or beneficiary to record a notice of default (NOD) and allow three months to lapse before setting a date for sale of the property. Existing law requires a notice of nonjudicial foreclosure sale to be officially noticed in a newspaper of general circulation, posted on the property, and recorded at least 20 days before the sale date. (Civ. Code Secs. 2924, 2924f.)

2) Provides that from January 1, 2013 through December 31, 2017, generally prohibits a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent from recording a NOD until at least 30 days after establishing contact with a delinquent borrower or complying with specified due diligence requirements to establish contact, and, if a borrower submits a complete application for a first lien loan modification, before that borrower has been provided with a written determination by the servicer regarding that borrower's eligibility for that loan modification. (Civ. Code Sec. 2923.5.)

3) States that beginning on January 1, 2018, generally prohibits a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent from recording an NOD until at least 30 days after establishing contact with a delinquent borrower or complying with specified due diligence requirements to establish contact, and, if a borrower submits a complete application for a foreclosure prevention alternative, before that borrower has been provided with a written

determination by the servicer regarding eligibility for the requested alternative. (Civ. Code Sec. 2923.5.)

4) Provides that from January 1, 2013 through December 31, 2017, generally prohibits a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent from recording a NOD: (1) until the servicer provides specified information to the borrower; (2) until at least 30 days after the servicer establishes contact with a delinquent borrower or complies with specified due diligence requirements to establish contact; (3) while a complete first lien loan modification is pending review; and (4) if a complete first lien loan modification application has been submitted by a borrower, until any of the following occurs: the servicer makes a written determination that the borrower is not eligible for a first lien loan modification, and any appeal period has expired; the borrower does not accept an offered first lien loan modification within 14 days of its offer; or, the borrower accepts a written first lien loan modification, but defaults on or otherwise breaches his or her obligation under that loan modification agreement. (Civ. Code Sec. 2923.55.)

5) Requires that from January 1, 2013 through December 31, 2017, generally prohibits a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent from recording a NOD or NOS, or from conducting a trustee's sale: (1) while a complete first lien loan modification is pending review; (2) if a complete first lien loan modification application has been submitted by a borrower, until any of the following occurs: (a) the servicer makes a written determination that the borrower is not eligible for a first lien loan modification, and any appeal period has expired; (b) the borrower does not accept an offered first lien loan modification within 14 days of its offer; or, (3) the borrower accepts a written first lien loan modification, but defaults or otherwise breaches his or her obligation under that loan modification agreement. (Civ. Code Sec. 2923.6.)

6) States that from January 1, 2013 through December 31, 2017, generally prohibits a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent from recording a NOD or NOS, or conducting a trustee's sale, once a borrower has been approved for a foreclosure prevention alternative in writing, and as long as one of the following two conditions are met: (1) the borrower is in compliance with the terms of a written trial or permanent loan modification, forbearance, or repayment plan; or (2) a foreclosure prevention alternative has been approved in writing by all parties, and proof of funds or financing has been provided to the servicer. (Civ. Code Sec. 2924.11.)

7) Mandates that beginning on January 1, 2018, prohibits a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent from: (1) recording a NOS or conducting a trustee's sale while a complete application for a foreclosure prevention alternative is pending, and until the borrower has been provided with a written determination by the servicer regarding that borrower's eligibility for the requested foreclosure prevention alternative; and (2) recording a NOD or NOS, or conducting a trustee's sale, once a foreclosure prevention alternative is approved in writing, and as long as one of the following two conditions is met: (a) the borrower is in compliance with the terms of a written trial or permanent loan modification, forbearance, or repayment plan; or (b) a foreclosure prevention alternative has been approved in writing by all parties, and proof of funds or financing has been provided to the servicer. (Civ. Code Sec. 2924.11.)

8) Requires from January 1, 2013 through December 31, 2017, generally prohibits a mortgage servicer, trustee, mortgagee, beneficiary, or authorized agent from recording a NOD or NOS, or from conducting a trustee's sale: (1) while a complete first lien loan modification application is pending, and until the borrower has been provided with a written determination by the servicer regarding that borrower's eligibility for that loan modification; and (2) under either of the following circumstances, if a borrower has been approved for a foreclosure prevention alternative in writing by the servicer: (a) the borrower is in compliance with the terms of a written trial or permanent loan modification, forbearance, or repayment plan; or (b) a foreclosure prevention alternative has been approved in writing by all parties, and proof of funds or financing has been provided to the servicer. (Civ. Code Sec. 2924.18.)

9) Provides for various remedies for violations of the above provisions, including treble actual damages and statutory damages. (Civ. Code Secs. 2924.12, 2924.19.)

FISCAL EFFECT: None

COMMENTS:

According to the author:

> Civil Code Sections 2923.5, 2923.55 and 2924.11 provide that "*[a] mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent may not record a notice of default pursuant to Section 2924 until*…" specified pre-notice of default requirements have been satisfied. Additionally, Civil Code Section 2924 (a) (6) provides that "*[n]o entity shall record or cause a notice of default to be recorded*…" unless specified pre-notice of default requirements have been satisfied.
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> . . . Licensed title companies and underwritten title companies routinely record notices of default at the direction of and acting as an "authorized agent" to a mortgage servicer, mortgagee, trustee or beneficiary. The recordation is a ministerial act and the title company or underwritten title company does so in the regular course of their business and in reliance upon a good faith belief that the mortgage servicer, mortgagee, trustee or beneficiary complied with law.

The author asserts that this bill would close a loophole that could otherwise result in liability for the title company if they record a NOD, in good faith, but in violation of HOBR.

On June 27, 2012, the Conference Committee on the California Foreclosure Crisis passed HOBR (AB 278 & SB 900) in order to protect homeowners in the mortgage market, help keep families in their homes, and revive the state's economy following historic foreclosure rates and rampant abuse, fraud, and deception that caused more than one million Californian's to lose their homes. That bill package sought to: (1) stop the practice of "dual-tracking;"[1] (2) establish a single point of contact for homeowners with their lenders; and (3) mandate a chain of title of the property. The HOBR also included various remedies for violations of its provisions, including treble and statutory damages.

[1] "Dual tracking" generally refers the practice of a lender pursue foreclosure even though the homeowner is applying for a mortgage modification.

Since the provisions of the HOBR are violated if foreclosure documents (a NOD or NOS) are recorded without satisfying the requirements of the act, the title insurance industry expressed concern that the language of the legislation could result in unintended liability for title insurers. That concern is based on the assertion that title insurers routinely record foreclosure documents at the direction of mortgage servicers and trustees – title insurers assert that they cannot verify information about the compliance of a mortgage servicer or trustee because that information does not appear in recorded documents. As a result of those concerns, Assemblymember Mike Eng, co-chair of the Conference Committee, submitted the following letter to the Journal on September 1, 2012 to clarify the issue of liability for title companies:

> On July 2, 2012, the California State Assembly passed Assembly Bill 278 and Senate Bill 900. Both bills were Chaptered by the Secretary of State on July 11, 2012, as Chapter 86 and Chapter 87, Statutes of 2012, respectively. I am providing this letter to the Journal to clarify the intent of those bills.
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> Under existing law, pursuant to Civil Code Section 2924(b), trustees do not have liability for any good faith error when relying on information provided by the beneficiary regarding the nature and amount of a default. Similarly, the conference committee amendments were not intended to impose liability on an entity that records documents at the direction of a trustee, substitute trustee, or beneficiary who is acting within the scope of authority designated by the holder of the beneficial interest and where the entity is carrying out its recording duties in good faith in the normal course of their activity.

Accordingly, this bill seeks to codify the intent, as stated in that letter to the journal, that title companies not be held liable for a violation of HOBR when they record a NOD or NOS in good faith and in the normal course of their business activities.

REGISTERED SUPPORT / OPPOSITION:

Support

California Land Title Association (CLTA)
Fidelity National Financial (FNF)
First American Financial Corporation

Opposition

None on file.

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