

Date of Hearing: June 27, 2011

ASSEMBLY COMMITTEE ON BANKING AND FINANCE

Mike Eng, Chair

SB 4 (Calderon & Vargas) – As Amended: June 21, 2011

SENATE VOTE: 40-0

SUBJECT: Mortgages.

SUMMARY: Provides additional information to property owners and bidders regarding residential foreclosure auction sales. Specifically, this bill:

- 1) Requires a notice of sale on real property containing one to four single family residences to contain language informing potential bidders on the nature of the process, potential risks, and resources to assist them.
- 2) Requires the notice of sale to provide information to the property owner whose property is subject to auction regarding the auction sale date and postponements that may occur.
- 3) Requires a mortgagee, beneficiary, trustee or authorized agent to make a good faith effort in providing up-to-date information regarding sale dates and postponements.
- 4) Limits the rights and remedies for failure to comply with these provisions.

EXISTING LAW

- 1) Regulates the non-judicial foreclosure process pursuant to the power of sale contained within a mortgage contract, and provides that in order to commence the process, a trustee, mortgagee, or beneficiary must record a notice of default (NOD) and allow three months to lapse before setting a notice of sale for the property. (Civil Code, Section 2924)
- 2) Provides that the mortgagee, trustee or other person authorized to make the sale must give notice of sale, and requires notice of the sale to be made, as specified, at least 20 days prior to the date of sale. (Civil Code, Section 2924f)
- 3) Provides that a mortgage, trustee, beneficiary, or authorized agent (entities) may not file a NOD until 30 days after contact has been made with the borrower who is in default. (Civil Code, Section 2923.5a)
- 4) Requires an entity to maintain a toll-free number for borrowers that will provide access to a live representative during business hours and requires the entity to maintain a link on the main page of its Internet Web site containing the following information:
 - a) Options that may be available to borrowers who are unable to afford their mortgage payments and who wish to avoid foreclose, and instructions to borrowers advising them 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. (Civil Code, Section 2923g (5))
- 5) Provides that a notice of sale postponement may occur at any time prior to the completion of a sale for any period of time not to exceed a total of 365 days from the date set in the notice of sale. (Civil Code, Section 2924g)
- 6) Specifies that if sale proceedings are postponed for a period totaling more than 365 days, the scheduling of any further proceedings shall be preceded by giving a new notice of sale. (Civil Code, Section 2924g)

FISCAL EFFECT: None.

COMMENTS:

The foreclosure crisis raised a number of issues related to the loan modification and foreclosure process. This bill attempts to clarify two issues. First, beginning on or after April 1, 2012, applying to all deeds of trust or mortgage containing a power of sale secured by real property containing one to four single family residences, the notice of sale shall include language that notifies potential bidders of the risks associated with bidding on foreclosed homes. Second, beginning on or after April 1, 2012, applying to all deeds of trust or mortgages containing a power of sale secured by real property containing one to four single family residences, the notice of sale shall also include information informing the property owner of the sale date and ways to get information regarding a postponement.

This measure also requires mortgagee, beneficiaries, trustees or authorized agents to make a good faith effort in providing up to day information regarding sale dates and postponements. It is a lot noted in SB 4 that failing to comply with any portions of this measure would not invalidate any sale that would otherwise be valid under Civil Code, Section 2924f.

Notice to Property Owner: Often a notice of sale is postponed for various reasons. Under existing law, a homeowner must be notified 20 days before the notice of sale is set, but the law is unclear on whether this 20 day requirement applies if a notice of sale is postponed. While homeowners receive the initial notification of the notice of sale, it seems many do not receive another notification of the new notice of sale date and instead find out after the fact that their home has been auctioned off.

Under existing law, there may be a postponement or postponements of the sale proceedings, including a postponement upon instruction by the beneficiary to the trustee that the sale proceedings be postponed, at any time prior to the completion of the sale for any period of time not to exceed a total of 365 days from the date set forth in the notice of sale. The trustee can postpone the sale for any of the following reasons: upon the order of any court of competent jurisdiction; if stayed by operation of law; by mutual agreement, whether oral or in writing, of any trustor and any beneficiary or any mortgagor and any mortgagee; at the discretion of the trustee.

According to the author, most homeowners who receive notices of sale in the mail are unaware of the postponement rules. If a few days pass, following the sale date and time listed in their notice of sale, and there is no knock on the door from someone with an official-looking piece of

paper, ordering them to leave their home, most homeowners breathe a sigh of relief, and believe that they have avoided the loss of their home. They are often unaware that the date and time of their foreclosure sale was merely postponed and equally unaware how they might learn when that new sale date and time have been scheduled.

This measure does not require an additional notice if the foreclosure sale is postponed but requires on the initial notice of sale additional information that should help property owners find the necessary information regarding a postponement. While this measure does initially put the burden on the mortgagee, trustee, beneficiary or authorized agent to put the notice in the notice of sale, the measure then puts the responsibility onto the property owner to look on a website or make a phone call to determine if the sale has been postponed and to what date it has been postponed to.

Notice to Potential Bidders: According to the author, when a trustee sale auction is held, the sale is made to the party that offers the highest bid, subject to the rules set forth in California statute. Generally speaking, these rules require any third party bidder (i.e., any bidder other than the foreclosing beneficiary) to supply the amount of his or her winning bid in cash or via cashier's check. Most individuals understand that they must come to an auction, prepared to pay cash or bring cashier's checks in the full amount they bid. However, unsophisticated bidders incorrectly believe that their "winning" bid entitles them to free and clear ownership of the property that is the subject of the sale; these bidders are often unaware that, under the law, their "winning" bid entitles them only to whatever interest in the property was held by the foreclosing beneficiary.

In a few recent instances, a lender foreclosed on a junior lien, and an unwitting bidder purchased that junior lien at the foreclosure sale, only to learn that they were now responsible for satisfying the outstanding, senior lien(s) on the property, before they could take clear title. In both known instances, neither "winning" bidder was able to afford to pay off the outstanding senior lien(s) against the property, and both ended up losing all of the money – several hundred thousand dollars – that they had bid at the foreclosure sale. The situations in which these unknowing bidders lost money are perfectly legal. SB 4 attempts to notify bidders of the potential consequences when placing a bid at a foreclosure sale.

PREVIOUS LEGISLATION

AB 2678 (Fuentes, 2010 Legislative Session) would have prohibited a mortgagee, trustee, beneficiary, or authorized agent from giving notice of sale if the mortgagee, trustee, beneficiary, or authorized agent is currently in negotiations to modify the existing loan and would have provided that if the sale proceedings have been postponed, the borrower shall receive a new notification of the notice of sale before the date of the actual sale. Failed Passage in the Assembly Banking and Finance Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

California Bankers Association (CBA)
United Trustees Association (UTA)

Opposition

None on file.

Analysis Prepared by: Kathleen O'Malley / B. & F. / (916) 319-3081