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Legal Alert

California Enacts Statute that Places Significant Burdens on Parties Seeking to Foreclose on Owner-Occupied, Residential Real Property

On September 6, 2008, section 2923.5 of the California Civil Code became effective. This statute was enacted to provide foreclosure relief to California homeowners and requires a party seeking to foreclose on owner-occupied, residential real property to contact the borrower "in order to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure." Section 2923.5 affects any entity seeking to foreclose on owner-occupied, residential real property in connection with loans made from January 1, 2003 through December 31, 2007, inclusive.

The requirements of section 2923.5 even affect a foreclosure proceeding that was initiated prior to September 6, 2008. Specifically, if a foreclosing party recorded a notice of default prior to September 6, 2008, but did not record its notice of sale in accordance with California Civil Code section 2924f prior to September 6, 2008, the notice of sale must include a declaration that states that "the borrower was contacted to assess the borrower's financial situation and to explore options to avoid foreclosure" or if no contact was made, the declaration must list "the efforts made" to contact the borrower.

Section 2923.5 is complex and imposes a litany of requirements on the mortgagee, trustee, beneficiary, or authorized agent. Further, the contact requirements of section 2923.5 are very specific. The mortgagee, trustee, beneficiary, or authorized agent must contact the borrower, in person or by telephone, to assess the borrower's financial situation and explore options to avoid foreclosure. If contact is made with the borrower, the foreclosing party must discuss the borrower's financial situation and provide certain information and direction to the borrower, including offering specific foreclosure avoidance options. If contact is not made by phone with the borrower, the foreclosing party must send a certified letter to the borrower with a return receipt requested. Alternatively, if the foreclosing party is unable to contact the borrower, the foreclosing party must fulfill certain due-diligence requirements as outlined in section 2923.5. Additionally, section 2923.5 imposes a 30-day waiting period after the foreclosing party fulfills the contact or due-diligence requirements.

After the foreclosing party has met the requirements of section 2923.5, in order to ensure compliance, the foreclosing party must submit a

declaration along with the recording of any notice of default or its notice of sale, if the foreclosure proceedings were initiated prior to September 6, 2008.

The mortgagee, trustee, beneficiary, or authorized agent does not have to meet section 2923.5's requirements in certain limited situations, including: (1) if the borrower surrendered the property; (2) the borrower contracted with an organization, person or entity whose primary business is to advise people who have decided to leave their home and seek to extend the foreclosure process and avoid their contractual obligations; or (3) the borrower filed for bankruptcy and the proceeding has "not been finalized."

Unquestionably, section 2923.5 places a large additional burden on a party seeking to foreclose on owner-occupied, residential real estate. If you are the holder of an obligation secured by residential real estate and are seeking to foreclose, a close analysis of the requirements of section 2923.5 is necessary. Given that this is a new statute, it is unclear how courts will interpret section 2923.5's requirements. As a result, the interpretation of section 2923.5 will continue to be a developing area of law and must be monitored closely.

If you have any questions regarding this alert or need assistance understanding how section 2923.5 may affect your business, please contact us.

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