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ARTICLE

THE PERATA FORECLOSURE BILL (SB 1137): NEW RIGHTS FOR DEFAULTING BORROWERS AND TENANTS; NEW COMPLICATIONS FOR FORECLOSING LENDERS

By Karl E. Geier*

On July 8, 2008, Governor Schwarzenegger signed into law Senate Bill 1137[1] ("SB 1137"), also known as the "Perata Mortgage Relief Bill" in honor of its principal author, Senator John Perata of Oakland, California. The statute, with exceptions, became effective immediately as urgency legislation upon signature by the Governor.

The Perata Bill implements three categories of "protections" for borrowers and tenants in foreclosure:

First, it imposes a mandatory notification, meeting and consultation process that must be made available to the borrower by the foreclosing lender *prior to* filing a notice of default under Civil Code § 2924.

Second, it requires tenants of residential property to be given a minimum of 60 days' written notice to quit before the tenant can be evicted following foreclosure.

Third, it authorizes local governments to impose civil fines of up to $1,000 per day for failure of a lender or other purchaser in foreclosure to maintain vacant residential property in good condition and repair.

As discussed in this article, the Perata Bill reflects the Legislature's desire to take some action in response to the "foreclosure crisis," not only for the protection of borrowers in foreclosure, but also to remedy some of the potential social impacts of blight and pubic health concerns arising

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out of the foreclosure process. In the process of doing so, the Legislature also may have created as many problems as it solved. The pre-foreclosure consultation process burdens lenders with procedural hurdles, delays, and the potential for recalcitrant borrowers to simply prolong their tenure at the lender's cost when there is no realistic possibility they can afford their mortgages—and may be construed as compelling a lender to offer a reduced payment plan or forbearance before being allowed to foreclose, or else face a legal challenge to the validity of its notice of default. The tenant protections may have given all residential tenants the practical equivalent of guaranteed occupancy of their units for 60 days after all foreclosures, whether or not they have defaulted under their leases before or after foreclosure. The onerous penalties for failure to maintain the property may lead lenders to push the properties back into the rental or resale market faster than they otherwise would do so. Of these possibly inadvertent results of the Perata Bill, only the third can be considered a predominantly beneficial result of the legislation.

Most of the provisions of SB 1137 affect *all* residential foreclosures, not solely single-family, owner-occupied, or one- to four-family residential properties. Thus, the statute imposes rules applicable to apartment projects as well as rural acreage with residential units and mixed use development projects that include residential properties. None of the provisions are dependent upon the type of lender or purchaser in foreclosure, and they may be assumed to apply to all non-institutional lenders, probably including seller-carryback note holders, as well as institutional lenders. Some of the provisions may be construed as applying to non-residential property, as well.

1. THE PRE-FORECLOSURE CONSULTATION AND WORK-OUT PROCESS:

Under existing law, upon an event of default, the mortgagee or beneficiary under a mortgage or deed of trust containing a power of sale may file a notice of default meeting certain statutory requirements, and after three months have elapsed, if the loan remains in default, proceed to file a notice of sale and complete a foreclosure over an additional period of 21 days.[2] Although certain notices required by the mortgage instrument may be necessary before the lender can deem the borrower in default and file a notice of default,[3] previously there were no other statutory notification or consultation requirements to be observed by the lender *except* for certain "balloon payment mortgages" on one- to four-family residences.[4]

The Perata Bill changes this. Effective September 6, 2008,[5] any notice of default filed on "residential property that is owner-occupied under a loan made between January 1, 2003 and December 31, 2007," must be preceded by a series of notifications and opportunities for meetings and consultation, prescribed in the statute, all of which must be satisfied *before* the notice of default may be validly filed.[6] These procedural and notification standards are intended to provide an opportunity for the "exploration of alternatives to foreclosure."[7]

The requirements of this statute *seem* to be primarily procedural in nature, and do not *appear* to mandate the extension of any particular offer of an extension, grace period, forbearance or other modification of the loan by the lender. Whether they will be construed to require the lender to make a good faith offer of a loan extension, payment reduction or other work-out proposal has not yet been determined, and probably will be a subject of future litigation.

(a) Applicability of Pre-Foreclosure Notice and Consultation Requirements to Residential Foreclosures:

The pre-foreclosure consultation and notification process imposed by Civil Code § 2923.5 applies only to "loans" which are "made" between January 1, 2003 and December 31, 2007, inclusive.[8] The term "loan" is not defined. It is an open question whether a seller-carryback note secured by a deed of trust, not traditionally considered a "loan" in other contexts,[9] but generally governed by the same rules as other credit transactions for purposes of applying the real property security remedies of a deed of trust,[10] will be covered by the new legislation. Although when a loan is "made" is not further described in the statute, it is fair to assume that the loan is "made" either when it is "closed" or when it is "funded." Loan documents which are dated prior to January 1, 2003 likely would be governed by this process if the closing and funding occurred after that date. On the other hand, if a loan closed and funded *after* December 31, 2007, but the loan documents are dated prior to that date, then the best assumption still would be that the pre-foreclosure procedures of the new legislation are applicable.

The statute also does not define "residential property," but the pre-foreclosure notification and consultation requirements of § 2923.5 apply only if the loan is secured by "residential property," the property is "owner occupied" as the "principal residence of the borrower," and the loan is "for" an owner-occupied residence.[11] Any property that contains a dwelling unit occupied by the borrower/owner under a mortgage or deed of trust, whether the property is predominantly commercial or mixed use in nature, or consists of rural or agricultural land with one or more residential dwellings, or a multiple unit apartment project with at least one unit occupied by the owner, probably would be subject to this statute. It would not be applicable in most cases to second homes or investment properties or to properties owned by legal entities.

The statute only imposes restrictions on a mortgagee, trustee, beneficiary or authorized agent *filing a notice of default* pursuant to § 2924.[12] Thus, compliance with § 2923.5 would not be a prerequisite to filing an action under Code of Civil Procedure § 726 to foreclose the loan *judicially*.

The pre-foreclosure notification and consultation provisions of the statute take effect September 6, 2008 and cease to be applicable expire January 1, 2013 unless extended by the Legislature.[13]

(b) Effect of the Statute on Pending Foreclosures:

Although the pre-foreclosure notification and consultation provisions of § 2923.5 do not take effect until September 6, 2008, they *do apply* to foreclosure processes which began prior to that date under mortgages and deeds of trust that are subject to the statute. If a notice of default was already filed prior to "enactment of this section" (*i.e.*, July 8, 2008), then the notice of sale filed pursuant to § 2924f must include a declaration of the trustee's, mortgagee's, beneficiary's or authorized agent's efforts to contact the borrower and "explore options for the borrower to avoid foreclosure."[14] This declaration must state either that the borrower was contacted, or, if the borrower was not contacted, must list the efforts made to contact to the borrower.

This portion of the statute creates a potential trap for the foreclosing lender. Although the provisions of § 2923.5 generally "become operative" sixty days after the governor's signature,[15] § 2923.5, subd. (c), provides that the notice of sale must contain the required declaration if the notice of default had already been filed "prior to the enactment of this section." If the notice of default was filed prior to July 8, 2008, but the notice of sale is filed between July 8 and September 6, 2008, the statute would not require the notice of sale to contain the required declaration, but if the notice of sale is filed after September 6, 2008, this provision would require the notice of sale to contain these recitals. If the notice of default is filed after July 8, 2008 (the date of "enactment"), but prior to September 6, 2008 (the date of "effectiveness" of the other requirements of the statute mandating pre-foreclosure notifications and consultation), then the notice of sale cannot be filed until three months later, under existing Civil Code § 2924, subd. (a)(3); as a result, the notice of sale would be filed after the operative date of the statute, September 6, 2008, and the notice of sale therefore would have to contain these recitals.

In either case, the *notice of sale* must recite whether any efforts were made to contact the borrower and whether the borrower had been permitted to "explore alternatives to foreclosure," even though the statute did not require such notifications and contacts at the time the lender filed the notice of default. If the notice of sale falsely states that such contacts were attempted or occurred, possibly the notice of sale is defective and could be set aside. Conversely, if the notice of sale truthfully states that *no* contacts or discussion were attempted or occurred, then the lender may effectively have admitted noncompliance with the highly ambiguous and uncertain "servicers" and "loan pool" provisions of § 2923.6, subd. (b), also added by SB 1137, which takes effect *immediately* rather than sixty days after enactment.[16] These transitional ambiguities would suggest a need for caution in completing any pending foreclosure, even if the notice of default is filed prior to September 6, 2008.

(c) Notification and "Contact" Requirements:

The pre-foreclosure notification requirements of SB 1137 require an initial effort to contact the borrower "in person or by telephone" in order to assess the borrower's financial condition and explore options for the borrower to avoid foreclosure.[17] This contact must include notification to the borrower that he or she has a right to request a subsequent meeting, and "if requested, this meeting must be scheduled to occur within 14 days."[18] It is noteworthy that the statute does not permit this "initial contact" to be in writing, by email or other written document, but rather would require *some form of voice to voice contact* by the lender with the borrower. Even though the lender may use automatic dialing equipment to contact borrowers, the equipment must roll over to a live employee if the call is answered.[19]

A notice of default on a covered loan may not be filed until 30 days after "contact is made" as required by these provisions, or 30 days after satisfying due diligence requirements for a failed effort to contact the borrower.[20] The word "contact" probably means the initial contact required under § 2923.5, subd. (a)(2), and not the meeting required to be scheduled under that provision 14 days later. In effect, therefore, the statute creates a minimum window of 30 days following the initial contact before the notice of default may be filed. The provision requires a meeting to be scheduled if the borrower requests, but does not state whether the request must be made *during* the initial contact or whether it may be made *after* the initial contact. If the meeting is requested later, it is unclear whether the lender is required to schedule a meeting or, if a meeting is scheduled, to postpone filing a notice of default pending the scheduled meeting. Since the "initial contact" must be voice-to-voice, the potential for dispute on this subject is substantial, and lenders are best advised to adopt a routine practice of scheduling a meeting anyway.

If the initial contact is unsuccessful, the provisions that require a demonstration of "due diligence" on the part of the lender to contact the borrower result in a longer 45-day delay in initiating the notice of default. Any notice of default must either state that the mortgagee has contacted the borrower as required[21] or that there has been failure to contact the borrower "despite the due diligence of the mortgagee, beneficiary or authorized agent."[22] The statute defines "due diligence" to include *first* a mailed first class letter including a toll-free telephone number available from HUD to find a HUD-certified housing counseling agency,[23] *plus* three *separate* telephonic efforts to contact the borrower at different hours and on different days made to the "primary telephone number on file."[24] These contacts may occur through an automated telephone system *provided* that the call must be connected to a "live representative of the mortgagee, beneficiary or authorized agent" if the call is answered.[25] After all the follow-up telephone call requirements of this section have been satisfied (which necessarily involves a lapse of at least 3 calendar days), if the borrower has not responded within an additional *two weeks* after that time, then a second letter must be sent to the borrower by certified mail, return receipt requested,[26] and the beneficiary must wait an additional 30 days before filing the notice of default.[27]

Presumably, if the borrower has not attempted to contact the lender during any of these timeframes, then the lender is free to proceed with the notice of default provided it contains the required declaration of due diligence under Civil Code § 2923.5, subd. (g). However, the statute is less than clear on the obligations of the lender if the borrower does attempt to contact the lender in response to one of the telephonic or mailed notices required under § 2923.5, subd. (g). The best assumption is that once this actual contact occurs, the lender is required under § 2923.5, subd. (a)(1), to complete the process of conferring telephonically or in person and then to offer to schedule a meeting within 14 days thereafter, and wait the full 30 days, or at least until after the meeting, before filing the notice of default.[28] Needless to say, a lender must have a well-constructed process for fielding telephone calls and vetting all communications, since there are no requirements that the "request" be in writing or that the borrower contact *solely* the address or telephone number provided by the lender.

(d) Technology and Personnel Issues:

The statute imposes certain technological and communications requirements applicable to all lenders. While perhaps not burdensome for established institutional lenders, these provisions may be particularly difficult for "mom and pop" types of lenders or seller carryback noteholders to comply with. These include the following requirements:

(i) The statute requires that the "mortgagee, beneficiary, or authorized agent" 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."[29] It would seem that this would apply to any individual or small organizational holder of a note secured by residential property (whether or not single family residential) containing an owner occupant dwelling. If so, this will virtually compel individuals who conduct foreclosures on their own behalf to engage a professional agent who maintains the necessary telephone availability and personnel to meet this standard.

(ii) The statute also requires any internet website of a lender to contain specific information about options that may be available to borrowers who are unable to afford mortgage payments and who wish to avoid foreclosure, including instructions advising them on steps to take to explore these options.[30] It also requires a list of financial documents that borrowers should collect and be prepared to present to the mortgagee, beneficiary or other agent when discussing "options to avoid foreclosure."[31] The website must include a toll free telephone number for borrowers to contact the mortgagee, beneficiary or agent to discuss options for avoiding foreclosure.[32] It must also include a toll free number made available by HUD to find a HUD-certified housing counseling agency.[33] By their terms, these provisions would not apply if the mortgagee, beneficiary or authorized agent does not have a website, and the due diligence requirements of the statute would not seem to require that a website be established. However, a mortgagee who does not have a *toll-free telephone number* for the necessary contacts during business hours will be unable to truthfully declare, as required by § 2923.5, subd. (g), that it has exercised "due diligence" but has been unable to contact the borrower prior to filing the notice of default.

(iii) The statute permits, but does not require, the use of an automated telephone system to dial borrowers. If the call is answered, however, the call must be directed to a "live representative" of the lender or its agent.[34]

(iv) The required meetings are not required to be face-to-face, and may occur telephonically,[35] but the borrower is entitled to designate a representative who may be a HUD-certified housing counseling agency, attorney or "other advisor" to represent it at the meeting.[36] A lender's "loss mitigation personnel" may participate by *telephone*,[37] but the statute is silent as to whether the lender may utilize an attorney or other representative in the meetings and other contacts.

(e) Does the Statute Require the Lender to Offer a Forbearance, a Payment Reduction, or Other Proposed Work-Out Terms?

Although, as noted, the statute is primarily procedural and requires "notifications," "meetings," "contacts" and "consultation" without specifying standards, a serious question exists as to the nature of the conversations and discussions that must occur on the part of the lender before proceeding with the notice of default. In its expression of legislative intention, the statute states that it is "*modifying the foreclosure process* to require mortgagees, beneficiaries, or authorized agents to contact borrowers *and explore options that could avoid foreclosure*"[38] and also that it requires "*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*."[39] The operative language of the statute requires the lender to make "assessment of the borrower's financial situation and discussion of options."[40] The required internet content includes "options that may be available to borrowers *who are unable to afford their mortgage payments*"[41], which implies at least some level of willingness on the part of the lender to accept less than the amount of scheduled monthly payments.

Certain provisions of the statute assume, if not require, that the lender will make a specific proposal to enable the borrower to avoid foreclosure. The lender is required to "assess the borrower's financial condition," either in the initial contact or the subsequent meeting.[42] The discussion *must* include the "exploration of options to avoid foreclosure," and there must be a "discussion of options."[43] Thus, the statute clearly assumes there will be some options to explore, *regardless* of the borrower's financial condition. The statute does not seem to allow for the possibility that no feasible options exist to foreclosure -- although in most cases that is the likely outcome of any lender's financial analysis of a defaulting borrower.

Although the statute is silent on what the "options" that must be discussed might be, it requires no great stretch of imagination to assume that they include one of the following: (i) an offer to postpone the due date for payments that the borrower cannot currently afford, if there is at least some chance the borrower could afford them in the future; (ii) an offer to consider a reduction in the interest rate, a partial interest deferral or other payment reductions in order to make the monthly payments affordable for the borrower; (iii) an offer to refinance the loan (or to procure a refinance loan from a third party lender) in order to make the mortgage payments more affordable; or (iv) some other form of workout mechanism. While not directly stating that some of these alternatives *must* be offered, the statute clearly contemplates that the lender *may* or *should* offer a work-out plan or loan modification.[44]

This raises the question, not directly answered by the statute, of whether discussion alone is sufficient, or whether some good faith meaningful work-out proposal is mandated by the statute. It is probably not enough for the lender to simply sit down and commiserate with the borrower about the borrower's inability to pay his or her obligations, and then go ahead and foreclose anyway.

Since the statute does not disclaim an intention to compel lenders to make some meaningful offer, it can be anticipated that some borrowers, by litigation, will attempt to postpone or avoid foreclosure -- or even seek the remedy of damages from the lender and an offset against the debt -- if meaningful work-out and postponement proposals do not materialize in their meetings with the lenders. For this reason, institutional lenders, in particular, will be well-advised to develop standards and procedures for reviewing the borrower's financial information, for documenting the results of the financial analysis and any communications with the borrower, and for determining whether some concessions should be offered to borrowers who evidence at least some ability and willingness to meet an adjusted schedule for payment of their debts. Lenders should also consider meaningful work-out discussions and offering forbearances or payment reductions in circumstances where a borrower's inability to pay is either temporary or a result of an extraordinarily high interest rate.

(f) Additional Obligations for Servicers of "Mortgage Pools"—and Possibly for All Lenders on All Types of Real Property:

SB 1137 adds a new Civil Code § 2923.6 which includes a somewhat unusual provision affecting "loan pools and servicers" and which further supports the assertion that the Perata Bill is not solely a "notify and wait" type of statute. In fact, it may be read as directly compelling *all* lenders on *all* types of real property, not solely "servicers" on "residential property" to offer specific forbearances, payment reductions, postponements, interest rate reductions or other work-out terms to the borrowers before initiating foreclosure.

This new section of the Civil Code initially states that it concerns the obligations of "servicers" to "all parties in a loan pool, not any particular parties."[45] It then goes on to state that the Legislature "finds and declares" that a servicer acts in the best interest of all parties" to a loan pool "if it agrees to or implements a loan modification or workout plan" if there has been payment default by the borrower and the workout plan offers a greater net return than foreclosure will yield to the parties.[46] The provision then goes on to state:

> It is the intent of the Legislature that the mortgagee, beneficiary or authorized agent *offer the borrower a loan modification or work-out plan* if such a modification or plan is consistent with its *contractual or other authority*."[47]

Evidently the intention of this language is that *if* the terms of the servicing agent's authority under its servicing agreement are broad enough to give that agent the power to offer loan modifications or work-out plans, then the agent is *required* to offer such a modification or work-out plan to the borrower. In this context, at least, the statute seems to *mandate* some offer of a change in loan terms or a forbearance to avoid foreclosure, although it may be no more than a statement of desire on the part of the Legislature rather than a mandatory obligation of lenders.[48]

Unlike all other portions of the Perata Bill (and unlike a similar provision in the Federal Housing Finance Regulatory Reform Act of 2008, which is limited to owner-occupied residential property as defined in the Truth in Lending Act),[49] the provision is not explicitly limited to *residential* properties and is not restricted to loans made between 2001 and 2007. The only thing clear about this part of the statute is that it expires on January 1, 2013 unless it is extended.[50]

A lender servicing a loan in its own portfolio may not be exempt from having to propose such a loan modification or work-out plan, just as a loan pool servicer would be required to make such an offer to the borrower if its servicing agreement so permits. If the lender holds the loan for its own account, then by definition the mortgagee has "authority" to tender such an offer.[51] Section 2923.6, subd. (b) states:

> The Legislature finds and declares "…that a servicer acts in the best interests of all parties [in a loan pool] if it agrees to or implements a loan modification or work-out plan when (1) the loan is in a payment default or a payment default is reasonably foreseeable, and (2) the anticipated recovery under a loan modification or work-out plan exceeds the anticipated recovery through foreclosure on a "net present value basis."[52]

This provision could be construed as requiring the "servicer" to act in the best interests *both of the borrower and of the owners of the debt*, and to require the servicer to consider the probable recovery through foreclosure and sale of the collateral (and the time value of the eventual proceeds taking into account the delay in realizing on the collateral) versus the present value of a continuing payment stream from the borrower under a modification or reduced payment plan. Since the statute does not define "loan pool" or "servicers," the scope of this provision is ambiguous and unclear.[53]

It should be pointed out that unlike the provisions concerning pre-foreclosure notification and consultation with borrowers (§ 2923.5) and notification of tenants (§ 2923.8), these provisions of the statute took effect *immediately* on July 8, 2008.[54] To further complicate the analysis, this portion of the statute does not specifically apply only to residential property (unlike all of the other provisions of SB 1137). There is no language in § 2923.6 which limits its application to residential mortgage loans, much less to owner-occupied residences. Rather, § 2923.6 simply says that it is the intent of the legislature that "the mortgagee, beneficiary or authorized agent offer the borrower a loan modification or work-out plan."[55] Borrowers on commercial projects which are non-residential or non-owner occupied may assert an obligation of lenders to make work-out proposals on commercial debt based on this provision. Lenders' arguments against this position will be based either on (a) the assertion that § 2923.6 is an expression of desire, not duty, and is therefore surplusage despite being cast as a separate codified section of statutory law,[56] or else (b) an implicit assumption that § 2923.6 was intended only to govern residential property because the rest of the statute was so intended, or that borrowers are not "parties to the mortgage pool" -- neither of which arguments is inarguably supported by the statutory language.[57]

(g) Specified Exclusions From Notification and Consultation Requirements:

The restrictions on filing notices of default prior to the necessary contacts or demonstrations of due diligence in the effort to contact the borrower of Civil Code § 2923.5 do not apply, even for owner occupied residential property, in the following three circumstances:

(i) If the borrower has surrendered the property, and acknowledged it is doing so by letter or by delivery of the keys, then none of the preconditions to filing a notice of default or notice of sale would apply.[58] As a matter of caution, a notice of default and notice of sale based on this provision should recite that the required notifications and opportunities to meet or due diligence under the other provisions of the statute are not applicable by reason of the surrender of the property by the borrower.

(ii) If 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," then none of these pre-foreclosure notification and meeting requirements apply.[59] The statute does not describe or define what sorts of organizations are involved or what sort of conduct would trigger this provision. A lender's judgment as to who has "contracted" with its borrower, or whose "primary business" is advising persons who wish to "avoid their contractual obligations" will undoubtedly be subject to dispute. Therefore, reliance on this provision is fraught with uncertainty for the lender, if for no other reason than that the sorts of borrowers who would "contract" with such an "organization, person or entity" most likely would be best positioned to exploit the alleged failure by the lender to satisfy its statutory obligations to contact and discuss alternatives with the borrower.

(iii) If the borrower has filed for bankruptcy and the proceedings have not been finalized, none of these pre-foreclosure contacts requirements apply.[60] Of course, in this context, the lender would have to have obtained relief from the automatic stay imposed on all collection and foreclosure actions by the bankruptcy filing, through appropriate motions in the bankruptcy court.[61] Again, although the statute does not specifically provide for such a statement, it would be advisable for a notice of default or notice of sale following such a bankruptcy filing and relief from stay to recite the basis under which the foreclosure is exempt from the requirements of §§ 2923.5, subds. (a) and (g).

Since the "servicer" and "loan pool" provisions of § 2923.6 are not qualified by any of these provisions, there is at least an ambiguity in the statute concerning the obligations of a servicer to make a forbearance or work-out proposal *even if* one of these exemptions is applicable.[62]

(h) Federal Preemption of SB 1137 as to Certain Lenders:

Several provisions of the pre-foreclosure notification and consultation process might be preempted by federal law applicable to certain types of loans and to certain types of lenders. Since the statute is new and no litigation has been reported, the following analysis is only suggestive. However, it seems incontestable that lenders under federal agency loans and federally-insured FHA, VA, SBA and HUD loans will not be subject to these requirements,[63] and it can be anticipated that federally-related lenders (particularly federal savings associations and national banks) will assert that they are not bound by some of the provisions of SB 1137 as a result of the Supremacy Clause of the United States Constitution.[64]

(i) Federal Savings Associations:

Under the Home Ownership Loan Act[65] (HOLA), Congress has created a system of federal associations now regulated by the Office of Thrift Supervision (OTS) which has plenary and exclusive authority to regulate all aspects of federal savings associations.[66] While the general real estate laws of a state are binding on federally chartered savings associations,[67] most state law restrictions on lending practices are inapplicable to federal associations under the operation of 12 C.F.R. § 560.2, which expressly "occupies the field" and preempts state law as applied to federal savings associations in a broad variety of categories.[68]

The question of whether § 560.2, subd. (b) preempts the Perata Bill with respect to federal associations may depend on how SB 1137 is interpreted. Because the Perata Bill arguably contains no express substantive restrictions on loan terms, interest rates and payment amounts, and arguably contains only a "notification and consultation" requirement, consumer advocates and borrowers may argue that it does not unreasonably burden a federal association and only imposes a limited timing constraint upon the pursuit of remedies that are in no other way restricted by the statute. However, the case law directly holds that § 560.2, subd. (b) preempts all state law limitations which conflict with the practices and procedures adopted by federal savings associations and not solely their "operations."[69] The absence of a specific prohibition of a particular state regulation in 12 C.F.R. § 560.2 does *not* mean that OTS has left the topic open for state regulation to affect lending practices and policies of federally chartered savings associations.[70] While the preemptive effect of § 560.2, subd. (b) on "notice and consultation" requirements may be debatable, if SB 1137 is construed as requiring specific work-out proposals, payment plans, interest rate reductions, forbearances, or other substantive work-out terms, and not solely a discussion about these ideas, then it would seem squarely to fall under the prohibition of 12 C.F.R. §560.2, subd. (b)(4), which, as an example of the type of state regulation that is preempted, mentions the following:

> (4) The terms of credit, including amortization of loans and the deferral and capitalization of interest and adjustments to the interest rate, balance, payments due or term to maturity of the loan, *including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan*.[71] (Emphasis added.)

The Office of Thrift Supervision Chief Counsel has opined that provisions of several states' legislation which require creditors to accept partial payments made or tendered in response to a default notice, or which reinstate the borrower to the same position as if a default had not occurred and nullified an acceleration of an obligation, or prohibit charges, fees, or penalties by reason of a loan default, are preempted from applying to federal savings associations by reason of 12 C.F.R. § 560.2, subd. (b)(4).[72] Similar reasoning will apply if SB 1137 is construed as delaying foreclosure and forcing loan forbearances and modifications on federally chartered savings associations.

(ii) National Banks:

Preemption of state laws as applied to the activities of national banks under the National Banking Act,[73] is governed by a different set of regulations and statutes under the jurisdiction of the Office of the Comptroller of the Currency (OCC).[74] National banks are subject to state laws of general application when such laws do not conflict with the general purposes of the National Banking Act, including state usury laws, contract law and real property law.[75] "Visitorial regulation" (*i.e.*, oversight, suspension and auditing) of national bank mortgage lending operations by states is preempted,[76] but "states retain power to regulate national banks in such areas as contracts, debt collection, acquisition and development of property, and taxation, zoning, criminal and tort law."[77] Although the disposition of the issue may depend both on a fluctuating attitude about preemption on the Supreme Court,[78] as well as on the exact manner in which the state regulation is enforced, the application of SB 1137 to the pre-foreclosure activities of national banks likely is not to be held preempted by federal laws and regulations now in existence.

(iii) Summary of Preemption:

The extent to which SB 1137 may be preempted by federal laws and regulations may be rendered moot by the adoption of similar federal legislation requiring lenders to consult with or offer alternatives to foreclosure to borrowers before foreclosing. Otherwise, the potential exists for the impact of SB 1137 to be diluted significantly by the prevalence of federal savings associations in the home mortgage market and the probable inapplicability of most if not all of the statute to their pre-foreclosure activities.

2. THE TENANT NOTIFICATION AND EVICTION PROTECTIONS OF THE PERATA BILL:

SB 1137 contains two provisions for the general protection of tenants. The first is a requirement that upon posting a notice of a trustee's sale, the trustee or authorized agent must also *post and mail* to the current resident of the property being foreclosed, a notice that foreclosure has commenced.[79] This notice must be provided in English and all of the other languages described in Civil Code § 1632, *i.e.*, Spanish, Chinese, Tagalog, Vietnamese and Korean.[80] Whereas existing law required mailed notice only to the address specified in a deed of trust or a *recorded* request for notice of default,[81] the new statute would seemingly require the foreclosing party to ascertain the identity and mailing addresses of all tenants, none of which are recorded or necessarily ascertainable with certainty, in order to conduct a proper trustee's sale foreclosure.[82] Although

Civil Code § 1632 normally requires the provision of written documents in a language other than English *only* if the transaction was primarily negotiated in the other language,[83] the language of the Perata Bill is not so limited, and the implication is that the statutory notice should be printed in all six languages (including English) when posted and mailed as provided in this section.[84] The statute also makes it an "infraction" subject to a fine of up to $100.00, for any person to tear down the notice within 72 hours of posting.[85]

The second protection for tenants added by SB 1137 is the direct prohibition upon eviction prior to a date 60 days after the date of the foreclosure. SB 1137 adds a new § 1161b to the Code of Civil Procedure which changes the usual procedure for service of a 3-day Notice to Quit under § 1161a. It mandates that *all tenants or subtenants in the foreclosed property* must be given a minimum of 60 days written notice to quit before they may be removed from the property.[86] The notice must be delivered personally to the tenant or left with a responsible person of suitable age and discretion *and* mailed to the tenant at their place of residence, or by posting and delivery, as provided in Code of Civil Procedure § 1162.[87] The new statute does not explicitly prohibit giving the notice before the foreclosure or trustee's sale has occurred. However, since the provision only applies to "a tenant or a subtenant in possession of a rental housing unit at the time the property is sold in foreclosure," it would seem by implication that a notice given prior to foreclosure potentially will have been given *to* the wrong party and it may have been given *by* the wrong party, as well.

While possibly intended to give tenants a grace period against being evicted solely because the property ownership has changed, the statute seems to give even defaulting tenants the practical equivalent of a 60-day guaranteed occupancy period following the foreclosure.[88] The statute contains no provision allowing for an earlier eviction even if the tenant could have been evicted summarily on 3 days notice for nonpayment of rent or other breaches of the lease by the prior landlord, or is subsequently in default and would otherwise be subject to eviction on 3 days notice for defaults *after* the foreclosure. Nothing in the statute will permit an eviction prior to the elapsing of the 60-day notice period *following* foreclosure; to the contrary, the statute would appear to prohibit such an eviction *under all circumstances*.[89] As should be clear from the nature of the notification and the parties entitled to the 60-day pre-eviction notification, this part of SB 1137 applies to any residential unit occupied by a tenant or subtenant who was not a borrower on the foreclosed loan.[90]

The notification of foreclosure required under Civil Code § 2924.8 and the 60-day tenant eviction notice required under Code of Civil Procedure

§ 1161b both apply to any "residential property."[91] The term "residential real property" is not defined. By definition, it will not be limited to owner-occupied residential property, and there is no implication in either section that multi-family residential properties are excluded. It more likely includes all single family, 2 to 4 units and multi-family residential property. The potential exists, therefore, that Senator Perata's Bill both ensures that every tenant in a multi-unit apartment project will be apprised of a pending foreclosure *and* that the tenants will be able to withhold rent without risking eviction for the first 60 days after the foreclosure is completed. While the tenants may remain liable to the foreclosure sale purchaser for payment of the rent, their continued occupancy will not be affected by nonpayment of rent during this period, and the purchaser can be compelled to sue for collection of rent rather than recover immediate possession of the unit.

The new notification and eviction provisions for tenants apply only until January 1, 2013, at which time they are repealed unless extended by the Legislature.[92] Both the notification and posting requirements and the eviction restrictions take effect *immediately* upon enactment of the statute (July 8, 2008),[93] and are not postponed to September 6, 2008 as with certain other provisions in SB 1137.[94]

3. POST-FORECLOSURE MAINTENANCE OBLIGATIONS AND LIABILITIES OF LENDERS AND OTHER PURCHASERS IN FORECLOSURE:

SB 1137 creates certain maintenance obligations applicable to any "residential real property" acquired at a foreclosure sale. If the property is vacant, then the *legal owner* is required to maintain the property if it was (a) purchased by that owner at a foreclosure sale, or (b) acquired by that owner through foreclosure under a mortgage or deed of trust.[95] In other words, the statute applies whether the party who acquired the property in foreclosure was the lender or other holder of the foreclosed deed of trust or a third party bidder. This portion of SB 1137 applies to any residential property, but "residential" is not defined and therefore presumably could include single family, 1 to 4 family or multi-family housing as well as the residential portions of mixed use properties and agricultural properties, whether or not the foreclosed-out owner was an owner-occupant of the property.

The enforcement mechanism for compelling maintenance of vacant residential property is through an unspecified "governmental entity's" imposition of a civil fine of up to $1,000 per day per violation. The statute appears to be self-executing, i.e., it appears to impose an immediate obligation upon owners of vacant property acquired in foreclosure, but the statute also does not preempt any local ordinance and does not specify which entity should enforce compliance.[96]

Since the statute only applies to a person who acquired the property in foreclosure and only applies to *vacant* residential property,[97] it would appear that the foreclosing party could avoid the responsibility imposed by § 2929.3 either (i) by conveying the property through sale or transfer to a third party or to a subsidiary entity, or (ii) by renting the property out, thereby rendering it non-vacant. The first approach (conveying to a third party) may exonerate the lender, but a conveyance to a subsidiary or other controlled entity will invite claims of collusion and induce efforts to pierce the corporate veil by local governments. The second alternative (rental of the unit) fulfills a probable policy objective of the statute of encouraging the continued availability of foreclosed housing for rental or resale to the public after foreclosure.

Although the statute is not abundantly clear, the intention seems to have been to permit local municipal governments to enforce the statute by notifying non-compliant owners and imposing fines following a notice and a hearing if the owner fails to comply. The statute allows for a civil fine of up to $1,000 *per day* for violation. Prior to imposing the fine, the governmental entity is required to give notice of the violation, including the conditions and the entity's intent to assess the fine if violation is not commenced within a period of less than 14 days and completed within a period of not less than 30 days. This notice must be mailed to the address provided in the deed or other recorded instrument by which the property was acquired, or else to the address provided in the recorded instrument for mailing of tax statements under Government Code § 27321.5.[98] Prior to assessing the fine, the governmental entity must take into consideration any timely and good faith efforts to remedy, and the fine may not be imposed until the day following the expiration of the period to remedy the violation has elapsed.[99] The governmental entity may establish a different compliance period for different conditions on the same property if it specifies this in the notice.[100]

The statute 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, or failing to take action to prevent mosquito larvae from growing in standing water or other conditions that create a public nuisance."[101] This language creates certain ambiguities, *i.e.*, is it simply the failure to care for the exterior of the property, or must the failure rise to the level of creating a "public nuisance?" Issues such as peeling paint, debris clogging drains, downspouts or other parts of the property, or unmown grass in the rear of a home may not be considered to rise to the level of "failure to maintain" whereas the more deleterious failure to mow and trim front yard grass, causing a diminution in value of surrounding properties, would rise to the level of a public nuisance. The actual application of this statute to specific properties through notices and opportunities for compliance followed by notice and an opportunity for a hearing before a fine is imposed provide some protection against arbitrary and capricious demands for maintenance, but the tension between such demands and the foreclosing party's objective of limiting costs of maintenance while seeking a tenant or purchaser is obvious.

The maintenance requirements of SB 1137 are not intended to preempt any local ordinance or to supersede any other rights and remedies provided by law.[102] However, the $1,000 per day fine cannot be imposed under this statute on top of other fines imposed under local ordinances.[103] These provisions take effect immediately upon enactment (July 8, 2008).[104] As with other provisions of SB 1137, the provisions sunset and are repealed as of January 1, 2013, unless extended by the Legislature prior to that date.[105]

Unlike the provisions for pre-foreclosure notification and consultation, the limitations on tenant evictions and the mandatory maintenance obligations imposed by SB 1137, apply not only to lenders but to all purchasers or owners of foreclosed property that otherwise meets the statutory requirements. Accordingly, these provisions likely are not preempted by any of the federally related lender protections described in the preceding section of this article. They do not affect lending practices and they appear to fall within the rubric of "real estate laws" of 12 C.F.R. 560.2, subd. (c)(2), as laws which "only incidentally affect the lending programs of federal savings associations or are otherwise consistent with" the exercise of lending powers in accordance with the uniform federal scheme of regulation.[106]

4. CONCLUSION:

The Perata legislation is not a panacea for borrowers, but it does impose certain delays, burdens and expenses on lenders, some of which may be particularly difficult and costly for non-institutional lenders to satisfy. As a general rule, the required contacts and meetings and the procedures for compliance with the statute's pre-foreclosure notification and consultation requirements are sufficiently clear that they should not prevent a lender from complying procedurally or from eventually pursuing and obtaining a notice of default and completing the foreclosure. The central problem with the statute is its failure to clarify whether and to what extent the lender may be legally obligated to offer concrete payment reductions, interest deferrals or other work-outs or forbearances as a condition of being allowed to foreclose. The statute contains sufficient ambiguity about the nature of any good faith negotiation requirements for forbearances or loan modifications, that in some instances it could result in significant litigation delays and added expense for lenders while providing dubious benefits, at best, to defaulting borrowers.

Other provisions of the statute are probably less problematic. The post-foreclosure rights of tenants to remain in possession up to 60 days are relatively clear and easily complied with, although they have the effect of forcing lenders to leave property in the hands of potentially irresponsible, non-paying tenants longer than they would otherwise prefer. The post-foreclosure maintenance obligations for *vacant* property and the potentially punitive sanctions for daily violations are a potential deterrent to evicting both owners and tenants from foreclosed real estate. These provisions will necessitate either that lenders incur necessary costs for security, maintenance, and upkeep of residences after foreclosure or that they secure tenants to occupy the foreclosed premises and remove the property from the "vacant" status to which the statute applies. The public policy benefits of these aspects of the statute are debatable, but the obligations of lenders to comply with them are not.

NOTES

1. Stats. 2008, ch. 69 (SB 1137), signed into law July 8, 2008, as an urgency measure.
2. Civ. Code, §§ 2924 et seq.
3. See 4 Miller & Starr, California Real Estate 3d ed., Deeds of Trust, §§ 10:134 to 10:136.
4. Under Civ. Code, § 2966, the holder of a "balloon payment note" must give a preliminary notice not less than 90 or more than 150 days before the balloon payment is due, delivered by first-class mail with a certificate of mailing from the postal service, containing specified information, including the date the balloon payment is required to be paid, the amount of the payment, including interest and other charges, and any applicable rights of refinance. A failure to give the required notice postpones the date that the balloon payment is actually due and thereby postpones the time that a notice of default may be filed by the lender.
5. Pursuant to § 10, subd. (b), of SB 1137, the provisions of § 2923.5 of the Civ. Code as added by the Act "become operative 60 days after the effective date," i.e., 60 days after signature by the Governor on July 8, 2008.
6. Civ. Code, § 2923.5, subd. (i).
7. Civ. Code, § 2923.5, subd. (f).
8. Civ. Code, § 2923.5, subd. (i).
9. See 8 Miller & Starr, California Real Estate 3d., Usury, § 21:5 (sale or lease of property). The one exception is that such seller-carryback credit obligations are subject to the special anti-deficiency protections of Code Civ. Proc., § 580b.
10. See 4 Miller & Starr, California Real Estate 3d., Deeds of Trust, §§ 10:236 et seq. (purchase money security instruments).
11. Civ. Code, § 2923.5, subd. (i). The statute states "for purposes of this subdivision, 'owner occupied' means that *the residence* is the *principal residence* of the borrower (emphasis added)." The double reference to the term "residence" might suggest an intention that the

statute be limited to single family residences, but there is no explicit exclusion of duplex, two to four family, or larger residential properties.
12. See Civ. Code, § 2923.5, subd. (a)(1).
13. 2008 Stats., ch. 69, § 10, subd. (b) (SB 1137); Civ. Code, § 2923.5, subd. (j).
14. Civ. Code, § 2923.5, subd. (c).
15. SB 1137, § 10, subd. (b).
16. See discussion accompanying notes 45 to 56, below.
17. Civ. Code, § 2923.5, subd. (a)(2).
18. Civ. Code, § 2923.5, subd. (a)(2). It is not clear whether the request must be made at the time of "initial contact," or whether the borrower may make the request later.
19. Civ. Code, § 2923.5, subd. (g)(2)(B).
20. Civ. Code, § 2923.5, subd. (a)(1).
21. Civ. Code, § 2923.5, subd. (b).
22. Civ. Code, § 2923.5, subd. (g).
23. Civ. Code, § 2923.5, subd. (g)(1).
24. Civ. Code, § 2923.5, subd. (g)(2).
25. Civ. Code, § 2923.5, subd. (g)(2)(B).
26. Civ. Code, § 2923.5, subd. (g)(3).
27. Civ. Code, § 2923.5, subd. (a)(2).
28. Civ. Code, § 2923.5, subd. (a)(1), prohibits filing the notice of default until 30 days after contact is made or 30 days after the due diligence requests are satisfied. Arguably, if contact is made, the meeting occurring during the 14 days would not result in an extension of the 30-day period following the initial contact. If the request for a meeting is made after the initial contact, however, the statute does not address whether a further postponement of default notices must occur.
29. Civ. Code, § 2923.5, subd. (g)(4).
30. Civ. Code, § 2923.5, subd. (g)(5)(A).
31. Civ. Code, § 2923.5, subd. (g)(5)(B).
32. Civ. Code, § 2923.5, subd. (g)(5)(C).
33. Civ. Code, § 2923.5, subd. (g)(5)(D). Currently, this telephone number is listed as (800) 569-4287, at http://www.hud.gov/offices/hsg/sfh/hcc/hccprof14.cfm.
34. Civ. Code, § 2923.5, subd. (g)(2)(B).
35. Civ. Code, § 2923.5, subd. (a)(2).
36. Civ. Code, § 2923.5, subd. (f).
37. Civ. Code, § 2923.5, subd. (d).
38. 2007 Stats., ch. 69, § 1, subd. (d) (SB 1137) (emphasis added).
39. 2007 Stats., ch. 69, SB 1137, § 1, subd. (g) (SB 1137) (emphasis added.).
40. Civ. Code, § 2923.5, subd. (a)(2).
41. Civ. Code, § 2923.5, subd. (g)(5)(a) (emphasis added).
42. Civ. Code, § 2923.5, subd. (a)(2).
43. Civ. Code, § 2923.5, subd. (a)(2).
44. See Civ. Code, § 2923.5, subd. (f), which provides that if the borrower elects to have a representative in the meeting with the lender, "[a]ny loan modification or work-out plan offered at the meeting" by the lender "is subject to approval by the borrower."
45. Civ. Code, § 2923.6.
46. Civ. Code, § 2923.6, subd. (a).
47. Civ. Code, § 2923.6, subd. (b) (emphasis added).
48. It has been suggested that § 2923.6, subd. (a), is simply a non-directory legislative "finding" and that § 2923.6, subd. (b), is a precatory, non-directive statement of legislative intent, due to the introductory phrase, "It is the intent of the Legislature that …." Even so, it adds weight to the argument that in the context of owner-occupied residential properties, a

meaningful good faith work-out proposal must be offered under Civ. Code, § 2923.5, as discussed in the text accompanying footnotes 38 to 44, above.

49. Section 1403 of the Federal Housing Finance Regulatory Reform Act of 2008, Pub. L. No. 110-___ (July 28, 2008), § 1403, adds a new § 129A to the Truth in Lending Act, 15 U.S.C. §§ 1601 et seq. ("TILA"), *requiring* servicers of mortgage pools to maximize the net value of pooled mortgages in the interest of all "investors," and provides that a modification or work-out plan of *an owner-occupied residential loan* (*i.e.*, as such loans are defined in TILA), is deemed in the best interest of all investors if the modification or work-out plan provides a greater net return on a present value basis than foreclosure
50. Civ. Code, § 2923.6, subd. (c).
51. The language of § 2923.6, subd. (b), quoted in the text, above, is not directly limited to the notice and consultation provisions of § 2923.5. Also, while the lead in language of § 2923.6, subd. (a), speaks in terms of pooling and servicing agreements, the language of § 2923.6, subd. (b), has no ascertainable connection to such pools or servicers, and it is unclear how the two subsections relate to each other.
52. Civ. Code, § 2923.6, subd. (a).
53. The Federal Housing Finance Regulatory Reform Act of 2008, discussed in endnote 49, above, includes provisions which have the effect of shielding servicers and sellers of mortgage pools and mortgage-backed securities from liability to investors for entering into forbearances and loan modifications if the anticipated recovery on the principal of the loan as so modified exceeds, on a net present value basis, the anticipated recovery of principal that would be achieved by foreclosure of the loan. The statute specifies that the servicers' duties are owed to all of the *investors* in the mortgage pool, and that the obligation of the servicer is to maximize the net present value of the pooled mortgages in such an investment to all investors and parties having a direct or indirect interest in such *investment*, not to any individual party or group of parties (Pub. L. No. 110-___ (July 28, 2008), § 1403, adding § 129A(a) of the Truth in Lending Act ("TILA")). Not only does the federal legislation exclude the *borrower* from the definition of the parties to be benefited by the servicers' decision-making with respect to such matters, the provision goes on to provide that "servicer" means "the person responsible for servicing the mortgage loan, including the person making the loan if such person also services the loan." (*Id.*, § 129A(b).) SB 1137 has no similar definitional language.
54. See 2007 SB 1137, § 10, subds. (a), (b).
55. Civ. Code, § 2923.6, subd. (b).
56. This argument is based on the preface of subdivisions (a) and (b) of Civ. Code, § 2923.6, i.e., "The Legislature finds and declares" and "It is the intent of the Legislature," respecting the argument would essentially render all of § 2923.6 as surplusage, despite the general principle that *nothing* in a statute is surplusage. See, e.g., *Reno v. Baird* (1988) 18 Cal.4th 640, 658; *Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 22; *State of South Dakota v. Brown* (1978) 20 Cal.3d 765, 776-77.
57. The statement of legislative findings and intent contained in Section 1 of SB 1137, as adopted, provides "this act is necessary to avoid unnecessary foreclosure of residential property" (SB 1137, § 1, subd. (g)), which may imply an intention that *none* of the statutory provisions apply to non-residential property. This preamble to the statute also provides that "modifications of loans" may be deemed "in the best interest of investors" (SB 1137, § 1, subd. (c)), which may imply that lenders holding for their own account are under no compulsion to offer a work-out proposal. Neither of these arguments is conclusive, given the unqualified statutory language quoted in the text. The similar federal legislation which became effective July 28, 2008 expressly limits the obligation of servicers to enter into loan modifications and work-out plans to owner-occupied residential property. See endnote 49, *supra*.
58. Civ. Code, § 2923.5, subd. (h)(1).
59. Civ. Code, § 2923.5, subd. (h)(2).
60. Civ. Code, § 2923.5, subd. (h)(3).

61. See 4 Miller & Starr, California Real Estate 3d ed., Deeds of Trust, § 150 (effect of the automatic stay).
62. See text accompanying notes 45-56, above.
63. See generally 4 Miller & Starr, California Real Estate, 3d ed., Deeds of Trust, §§ 10:126 (application of state debtor protection rules to loans issued or guaranteed by federal agencies).
64. U.S. Const., Art. VI, § 2.
65. 12 U.S.C. §§ 1461 et seq.
66. See, e.g., Fidelity Federal Sav. & Loan Assn. v. de la Cuesta (1982) 458 U.S. 141, 155-57; Lopez v. World Sav. & Loan Assn. (2003) 105 Cal.App.4th 729, 734; Washington Mutual Bank, F.S.L. v. Superior Court (2d Dist. 2002) 95 Cal.App.4th 606, 617-19.
67. 12 C.F.R. § 560.2, subd. (c)(2).
68. 12 C.F.R. § 560.2, subd. (b).
69. *Fidelity Federal Sav. & Loan Assn. v. de la Cuesta* (1982) 458 U.S. 141, 159, 161-63, 170 n. 23; *Lopez v. World Sav. & Loan Assn*. (2003) 205 Cal.App.3d 729, 739-40.
70. *Washington Mutual Bank v. Superior Court* (2002) 95 Cal.App.4th 606, 618-19; *Lopez v. World Sav. & Loan Assn.* (2003) 105 Cal.App.3d 729, 739-40.
71. 12 C.F.R. § 560.2, subd. (b)(4).
72. See CCH Federal Banking Law Reporter, OTS General Counsel Opinions, ¶83-361, at pp. 94, 281-282 (Sept. 2, 2003), stating the view of OTS that state law limitations on the ability of a federal association to foreclose upon a loan or which "substantially interfere" with foreclosures are preempted as inconsistent with the Homeowner's Loan Act under 12 C.F.R. § 560.2. Even if the loan documents select the law of the state in which the property is located as the governing law under the deed of trust, such a provision will not be construed as an election to have state law override federal law on issues in which federal laws or regulations occupy the field. See *Fidelity Federal Sav. & Loan Assn. v. de la Cuesta* (1982) 458 U.S. 141, 157.
73. 12 U.S.C. §§ 1 et seq., ch. 106, 13 stat. 99 (1864).
74. See, *e.g.*, *Watters v. Wachovia Bank, N.A.* (2007) ___ U.S. ___, 127 S.Ct. 1559, 1567; *Wells Fargo Bank, N.A. v. Boutris* (9th Cir. 2003) 419 F.3d 949, 957.
75. *Watters v. Wachovia Bank, N.A.* (2007) ___ U.S. ___, 127 S.Ct. 1559. (This is subject to the caveat, in the context of usury, that federal parity regulations permit a national bank to charge any rate of interest allowed in its home state or in the state in which a loan is made. See 8 Miller & Starr, California Real Estate 3d, Usury, § 21:35, at 148, for extended discussion of the usury parity statutes.)
76. *Watters v. Wachovia Bank, N.A.* (2002) ___ U.S. ___, 127 S.Ct. 1559, 1568.
77. *Wells Fargo Bank, N.A. v. Boutris* (9th Cir. 2003) 419 F.3d 949, 963 (quoting *Barnett Bank of Marion County, N.A. v. Nelson* (1996) 517 U.S. 25, 32) .
78. See the dissenting opinion by Justice Stevens in *Watters v. Wachovia Bank*, *supra*, ___ U.S. ___, 127 S.Ct. 1559, 1573, arguing persuasively that federal preemption of state regulation of national banks historically has been far more attenuated than Justice Ginsberg's majority opinion suggests.
79. Civ. Code, § 2924.8, subd. (a). The statute prescribes the text of this notice as follows: "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."
80. Civ. Code, §§1632, 2924.8, subd. (a).
81. Civ. Code, §§ 2924, 2924b. See 4 Miller & Starr, California Real Estate 3d, Deeds of Trust, § 10:185 (recording and mailing notice of default).

82. See Civ. Code, § 2924.8 (requires mailing addressed to "Resident of property subject to foreclosure sale" without accounting for the possibility of multiple tenants and multiple addresses of the property, and without specifying which address shall be used for mailing purposes).
83. Civ. Code, § 1632, subd. (b)(2).
84. Under § 2924.8, subd. (c), an unspecified "state government entity" is required to make available translations of the notice into these languages which may be used by the foreclosing party to satisfy these requirements.
85. Civ. Code, § 2924.8, subd. (b).
86. Code Civ. Proc., § 1161b, subd. (a).
87. Code Civ. Proc., §§ 1161b, subd. (a), 1162.
88. The Legislative Counsel's summary of the statute states that "Existing law [presumably a reference to Civ. Code, §§ 1946 and 1946.1] governs the termination of tenancies and generally requires 30 days notice of the termination thereof, except under specified circumstances. Existing law also establishes the criteria for determining when a tenant is guilty of unlawful detainer…this bill would give the tenant…60 days to remove himself or herself from the property, as specified." (SB 1137, Legislative Counsel's Summary). The author of the legislation, Senator Perata, reportedly refused to accept amendments clarifying whether tenants in default could be evicted on shorter notice. An uncodified section of the statute also provides that SB 1137 "is not intended to affect any local just-cause eviction ordinance." 2008 Stats. Ch. 69, § 7 (SB 1137).
89. See Code Civ. Proc., § 1161, subd. (a), quoted above.
90. This 60-day period to quit the premises is not available if "any party to the note remains in the property as a tenant, subtenant or occupant." (Code Civ. Proc., § 1161b, subd. (b).) Thus, it would not apply to a borrower occupant. However, under existing law, Code Civ. Proc., § 1161a, subd. (b)(3), such a person may be evicted upon 3 days notice, if the property was sold under a *deed of trust* executed by such person, or against any other person "under whom such person claims," whereas a tenant or subtenant in possession must receive at least 30 days notice. (Code Civ. Proc., § 1161a, subd. (c).) As a result, a non-owning signatory of a note who happens to occupy the residence may be entitled to a 30-day notice to quit whereas the owner who signed the deed of trust may only be entitled to a 3-day notice to quit as a result of the operation of said SB 1137.
91. Civ. Code, § 2924.8, subd. (d); Code Civ. Proc., § 1161b, subd. (g).
92. Civ. Code, § 2924.8, subd. (e), Code Civ. Proc., § 1161b, subd. (c).
93. 2008 Stats., ch. 69, § 10, subd. (a) (SB 1137).
94. See 2008 Stats., ch. 69, § 10, subd. (b) (SB 1137).
95. Civ. Code, § 2929.3, subd. (a)(1).
96. See Civ. Code, § 2929.3, subds. (a)(1), (e), (f).
97. See Civ. Code, § 2929.3, subd. (a)(1).
98. Civ. Code, § 2929.3, subd. (a)(1).
99. Civ. Code, § 2929.3, subd. (a)(2).
100. Civ. Code, § 2929.3, subd. (a)(3).
101. Civ. Code, § 2929.3, subd. (b).
102. Civ. Code, § 2929.3, subds. (f), (h).
103. Civ. Code, § 2929.3, subd. (e). Local governments are required to apply fines and penalties collected under § 2929.3 to "local nuisance abatement programs." (Civ. Code, § 2929.3, subd. (d).)
104. 2008 Stats., ch. 69, § 10(a), (b).
105. Civ. Code, § 2929.3, subd. (i).
106. See 12 C.F.R. 560.2, subd. (c)(2).

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