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California Foreclosure Proceedings

Recent court decisions may illustrate trends in foreclosure-avoidance actions

At the height of the residential foreclosure crisis, the California legislature enacted California Civil Code Section 2923.5, which imposes new obligations on foreclosing lenders and their agents. Among these obligations, this new section provides that a foreclosing lender or its agent cannot record a notice of default until the lender or its agent contacts a defaulting borrower to discuss alternatives to foreclosure, or failing that, attempts with due diligence to do so. The goal of this section — like the recently enacted California Homeowners Bill of Rights, which includes a similar requirement — is to ensure that mortgage lenders and their agents make an attempt to address foreclosure alternatives with defaulting borrowers before the actual foreclosure process.

To that end, this section also requires a foreclosing lender or its agent to attach a declaration attesting to Section 2923.5 compliance to all recorded notices of default. Mortgage bankers and lenders should be aware that, since its enactment, the obligations imposed by this section have served as useful tools for defaulting borrowers seeking to avoid foreclosure to commence and pursue protracted litigation based on alleged Section 2923.5 noncompliance, thereby prolonging the foreclosure process.

Nonetheless, mortgage lenders and their agents can take some comfort in the fact that many California courts may take judicial notice of Section 2923.5 compliance if and when they're provided with a true and correct copy of the requisite Section 2923.5 declaration. Courts often treat the contents of the declaration as establishing the "fact" of compliance at the pleading stage in connection with a lender's request for the dismissal of a borrower's lawsuit, thereby complicating the borrower's efforts to delay foreclosure by litigation.

That said, as reflected in a recent opinion from the California Court of Appeal — 2013's Intengan v. BAC Home Loans Servicing LP — establishing Section 2923.5 compliance via judicial notice of the contents of a recorded document is more complicated than some mortgage banks and lenders may believe. With that in mind, it can be useful for mortgage organizations operating in California to review the nuances of several recent court cases, as these proceedings may illuminate growing trends of foreclosure litigation. Learning more about these cases may be helpful even to mortgage companies outside of California, as trends in foreclosure litigation can eventually affect the entire mortgage marketplace.

Mabry v. Superior Court

California's most prominent case regarding Section 2923.5 compliance — 2010's Mabry v. Superior Court — held, among other things, that a defaulting borrower's remedy for a violation of Section 2923.5 was limited to postponing a pending foreclosure sale until a lender complied with the statute. The Mabry court rejected the position that the required declaration had to be made under penalty of perjury, noting: "The way section 2923.5 is set up, too many people are necessarily involved in the process for any one person to likely be in the position where he or she could swear that all ... requirements of the declaration ... were met."

In other words, the Mabry court recognized that the person signing a Section 2923.5 declaration on behalf of a foreclosing lender likely would have to rely on records and representations provided by others in the loan-servicing chain. As a consequence, the court said, the declaration need not be signed under penalty of perjury.

In defending against wrongful foreclosure actions brought on by defaulting borrowers at the pleading stage, mortgage lenders in California often have relied on the Mabry decision in tandem with other decisions that authorize courts — in examining proof of compliance — to take judicial notice as proof of both the existence of documents recorded against real property and the contents of those documents, as well. Relying on these same authorities, courts have regularly granted such requests for judicial notice, thereby allowing lenders to establish the "fact" of their compliance very early in a case, resulting in the dismissal of numerous baseless foreclosure-avoidance actions at the pleading stage.

Intengan v. BAC Home Loans

Another court decision — the aforementioned Intengan v. BAC Home Loans Servicing LP — serves as a reminder that the manner in which courts interpret these statutes may affect how foreclosure-avoidance actions are litigated and how long that litigation may last.

In this case, the California Court of Appeal rejected a lender's contention that a

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trial court was authorized to take judicial notice of both the existence of a Section 2923.5 declaration attesting to statutory compliance, and accordingly, the lender's actual compliance with the statute, at least in cases where a defaulting borrower alleged that a lender or its agents had failed to comply with the statute. Although also approving of certain previous cases, the Intengan court held: "While judicial notice could be … taken of the existence of [a] declaration, it could not be taken of the facts of compliance asserted in the declaration, at least where … [a plaintiff] has alleged and argued that the declaration is false and the facts asserted in the declaration are reasonably subject to dispute." In other words, the Intengan court held that, at least in certain circumstances, trial courts may not be able to take judicial notice of the "fact" of Section 2923.5 compliance despite their taking judicial notice of the existence of a Section 2923.5 declaration.

Cynical readers of the Intengan decision might conclude that it allows for a defaulting borrower to convert any proper nonjudicial foreclosure into a judicial proceeding simply by alleging noncompliance with Section 2923.5. This is not necessarily so. If you take a closer look at the case, the Intengan court's reasoning only applies where a defaulting borrower claims noncompliance and the facts asserted in the subject declaration are reasonably subject to dispute.

This will not always be the case, however. For instance, foreclosing lenders often retain U.S. Postal Service records of delivery of Section 2923.5 contact materials, which may be judicially noticed. As such, it is possible that the effects of the Intengan decision ultimately may not be widespread.

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Mortgage lenders and their agents should be prepared for the possibility that certain foreclosure-avoidance actions now may proceed to summary judgment — even if similar actions were dismissed at the pleading stage in previous scenarios. As a consequence, it is more important than ever for lenders and their agents to prepare and retain copious, detailed records of compliance with all statutory obligations relevant in the foreclosure context, as these materials may be key evidence in subsequent summary judgment proceedings.

Lenders faced with extended litigation based on alleged statutory noncompliance might also consider conducting early discovery to establish the truthfulness of any challenged Section 2923.5 declaration, which could underlie a lender's request for sanctions were it determined that litigation was being prosecuted in bad faith. ●

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