

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

AB 295 (Lowenthal)
Version: April 25, 2024
Hearing Date: June 11, 2024
Fiscal: No
Urgency: Yes
ID

SUBJECT

Residential real property: foreclosure

DIGEST

This bill prohibits individuals from contacting a foreclosed borrower within 90 days after the sale of the foreclosed property has been recorded, and makes other changes relating to the foreclosure process and trustees' allowable charges.

EXECUTIVE SUMMARY

"Surplus chasers," or individuals who contact foreclosed borrowers to convince the borrowers to pay them to obtain the surplus proceeds from the foreclosure sale, continue to target California homeowners in precarious situations. These surplus chasers sometimes charge exorbitant fees to collect the surplus proceeds that the borrower is already entitled to receive. To address this practice, this bill places a prohibition on any person from contacting, soliciting, or initiating communication with a foreclosed-upon homeowner until 90 days after the foreclosure sale has been recorded. This bill also makes a number of other changes to foreclosure law, including limiting trustees' liability for a good faith error in providing repayment or reinstatement information to a borrower after relying on information provided by the lender in good faith. This bill also amends the types of costs and expenses a trustee can collect to include costs and expenses that will be incurred in processing a mortgage reinstatement payment, for the postponement of the trustee's sale, and in the recording of a notice of rescission. In addition, this bill makes numerous changes to the "AB 1079 post-sale bidding process" that allows certain, eligible bidders to bid on a foreclosed property within a certain timeframe from a winning bid being selected. AB 295 is substantially similar to AB 1043 that was passed by the Senate Judiciary Committee and the Senate last year before failing on concurrence in the Assembly. AB 295 also contains an urgency clause. This bill is sponsored and supported by the United Trustees Association. The Committee has not received timely opposition to this bill.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Establishes comprehensive procedures for conducting a non-judicial foreclosure sale, pursuant to a power of sale in the deed or mortgage, through an auction conducted by a trustee (also known as the “trustee’s sale”). (Civ. Code § 2924g and 2924h.)
- 2) Requires a trustee to send written notice of the remaining proceeds to all persons with recorded interests in the real property within 30 days of the foreclosure sale. (Civ. Code § 2924j(a).)
- 3) Requires a trustee to distribute the proceeds of a trustee’s sale in an order of priority, starting with the costs and expenses of the sale, the payment obligation secured by the mortgage that is the subject of the sale, any junior liens, and then to the borrower. (Civ. Code § 2924k.)
- 4) Requires a trustee to provide notice of a trustee sale by publishing notice of sale in a newspaper of general circulation where the property is located, containing information such as the borrower’s name and the amount owed, at least 20 days before the sale date. (Civ. Code § 2924f.)
- 5) Declares that vulnerable homeowners are increasingly relying on the services of foreclosure consultants, who often charge an exorbitant fee for a service when the homeowner could have obtained the remaining funds from the trustee’s sale from the trustees directly if the homeowner had sufficient time to receive notices from the trustee regarding how and where to make a claim for excess proceeds. (Civ. Code § 2945 (a).)
- 6) Defines “foreclosure consultant” as any person who, for compensation, offers a homeowner any services relating to a pending foreclosure, including, among other things, representations that the consultant will stop or postpone the foreclosure sale; obtain any forbearances from any beneficiary or mortgagee; assist the owner to obtain a loan or advance of funds; assist the owner in exercising or extending the right of reinstatement; ameliorate damage caused to the homeowners credit as a result of the foreclosure; or assist the owner in obtaining any remaining proceeds from a foreclosure sale. Excludes from the definition of “foreclosure consultant” certain licensed professionals, such as attorneys or mortgage lenders, engaged in the practice of their profession. (Civ. Code § 2945.1 (a).)
- 7) Prohibits a foreclosure consultant from entering into a contract to recover surplus funds after a foreclosure sale. (Civ. Code § 2945.4 (h).)

- 8) Enacts a statutory scheme whereby eligible bidders may acquire properties consisting of one to four residential dwelling units offered at a foreclosure auction by matching or exceeding the last and highest offer made at the auction. (Civ. Code § 2924m.)
 - a) Provides tenants, prospective owner-occupants, nonprofit affordable housing providers, and public entities a 45-day window to purchase residential properties of 1 to 4 units if they are able to match or exceed the highest bid at a preceding foreclosure auction.
- 9) Provides liability protection to trustees in performing any required acts for any good faith error resulting from reliance on information provided in good faith by the lender concerning the amount or nature of the default. (Civ. Code § 2924 (b).)
- 10) Permits a trustee to recover reasonable costs and expenses actually incurred in enforcing the terms of the obligation, deed of trust, or mortgage, and trustee's or attorney's fees. (Civ. Code § 2924c (a)(1).)
- 11) Permits a trustee to collect costs and expenses associated with recording, mailing, publishing, and posting certain required notices. Permits a trustee to collect \$50 for each postponement of a trustee's sale. (Civ. Code § 2924c (c).)
- 12) Prohibits bidders from submitting successive bids. (Civ. Code § 2924m (c)(3).)
- 13) Requires a trustee to submit a recorded deed for any successful transaction conducted under SB 1079's post-sale bid process to the Attorney General's Office, and to attach any affidavit from a successful bidder attesting to their eligibility to bid in the SB 1079 post-sale bid process. (Civ. Code § 2924m (i)(4).)
- 14) Requires a mortgage servicer who denies a forbearance request to provide a declaration that they contacted the borrower, have tried with due diligence to contact the borrower, or that no contact was required pursuant to applicable rules, as well as a statement as to whether a forbearance was or was not subsequently denied. (Civ. Code § 3273.10(c).)
- 15) Establishes the Rosenthal Fair Debt Collection Practices Act to govern debt collection agency practices of creditors and third-party collectors for personal debts. (Civ. Code § 1788 et seq.)

This bill:

- 1) Prohibits any person from contacting, soliciting, or initiating communication with an owner to claim the surplus funds from a foreclosure sale of the owner's residence until 90 days after the trustee's deed has been recorded.

- 2) Extends liability protection, and exemption from the Rosenthal Fair Debt Collection Practices Act, to trustees for responding to requests for payoff or reinstatement information for any good faith error resulting from reliance on information provided to the trustee by the lender concerning the amount or nature of the default.
- 3) Permits a trustee to recover reasonable costs and expenses that will be incurred as a direct result of outstanding payment obligations being paid off by the borrower.
- 4) Permits a trustee to collect costs and expenses associated with recording a notice of rescission in the event the borrower makes the outstanding payment obligations and obtains a reinstatement of their mortgage.
- 5) Increases the permitted fee a trustee may charge for each postponement of a trustee's sale from \$50 to \$100.
- 6) Revises and remedies an erroneous cross-reference in existing law regarding when a trustee's sale is deemed final when an eligible bidder under the SB 1079 post-sale process submits a notice of intent to bid.
- 7) Provides that the cross-reference revision in 6) is declarative of existing law.
- 8) Makes revisions that clarify that the successive bids prohibition in existing law for the SB 1079 post-sale bid process applies to all eligible bidders, not just bidder-tenants.
- 9) Clarifies that, if a successful bidder in the SB 1079 post-sale bid process is not required to submit an affidavit of their eligibility as a bidder, the trustee must attach to the trustee's deed an exhibit stating that no affidavit or declaration is required, and provides that the lack of an affidavit or declaration will not prevent the deed from being recorded or invalidate the transfer of title.
- 10) Clarifies that title to a property subject to the SB 1079 post-sale bid process shall remain with the mortgagor or trustor, or successor in interest, until the property sale is deemed final, as provided.
- 11) Clarifies that a trustee is to transmit the trustee's deed to the Attorney General upon the deed's execution, and not upon its recordation.
- 12) Clarifies that a mortgage servicer's obligation to provide notice of their forbearance denial applies only to forbearance requests made during the effective time period, as specified.

- 13) Provides that it is an urgency statute necessary for the immediate preservation of the public peace, health, or safety, and shall go into immediate effect. States as the facts supporting the necessity of the urgency as:
- a) To stop the proliferation of lawsuits against foreclosure trustees, to enable the smooth and predictable process of foreclosure, and to protect consumers impacted by the foreclosure process.

COMMENTS

1. Author's statement

According to the author:

AB 295 helps strengthen consumer protection laws for people going through foreclosure and makes other technical and clarifying changes. Foreclosure trustees are seeing an increase in predatory activity from surplus fund chasers, who are individuals seeking to collect surplus funds on behalf of someone already entitled to these funds. These chasers seek out people going through foreclosure and offer to help assist in getting "as much money from their foreclosure as possible." Existing law already requires a trustee to send all surplus funds back to the former homeowner after all fees and expenses are paid off. These chasers are simply scamming vulnerable Californians out of their equity. AB 295 restricts surplus fund chasers from seeking to contact the former homeowner or anyone else entitled to surplus funds until 90 days after the trustee's deed recording; thus giving trustees the opportunity to find everyone who is entitled to these funds without costly third-party intervention.

2. Foreclosure and the problem of unscrupulous foreclosure consultants

One of the biggest expenses that a person usually makes is purchasing a home. With the dramatic increase in home values in California over the past decade, this is the case even more. Unfortunately, sometimes California homeowners find themselves in difficult financial situations, and cannot make the mortgage payments on what they owe on their homes. When this happens, the borrower becomes in default on their home loan, and the lender can begin the foreclosure process to retake the lender's home and sell it to pay off the loan in default. This process is begun when a "declaration of default" is filed. If the borrower's mortgage or deed contains a power of sale clause, as most in the United States do, the foreclosure process can occur through a non-judicial process, called the trustee's sale, that takes place without a court proceeding on the foreclosure.

The non-judicial foreclosure process begins when a notice of default, or declaration of default, is recorded by the lender, stating the amount owed that is in default. A borrower has 90 days from the date of the notice of default to pay what they owe or

enter into an alternative to foreclosure, or the lender can proceed with the foreclosure. If the borrower is still in default after 90 days, a notice of trustee sale is recorded setting the date for the property to be sold at auction.

The trustee's sale is the process whereby a foreclosed property is sold at auction in order to recover the money the borrower owes the lender. The trustee's sale is set and ran by the trustee, a neutral, third-party entity designated to manage the foreclosure process. California laws tightly regulate how the trustee is to conduct the trustee's sale, and what fees a trustee can charge. The proceeds from the trustee's sale are used to cover the amount the borrower owed to the lender. Sometimes there are excess funds after the sale. Excess funds are any proceeds from the sale that exceed the amount owed on the defaulted loan, and these funds are distributed according to a specific process. According to existing law, the trustee must first deduct any expenses associated with the sale, including trustee fees and costs incurred during the foreclosure process. The trustee must then also pay off the outstanding debt owed to the lender. Once these expenses are paid, any remaining funds are distributed to the parties with an interest in the property, according to their lien priority. Finally, if anything is left over, the original borrower is entitled to those funds.

Notice of the sale, the name of the borrower, and the amount due is published in a newspaper at least 20 days prior to the sale so that all interested parties have an opportunity to claim their share of any excess proceeds. While this public notice increases transparency, it also provides highly accessible information about homeowners who are in dire financial circumstances. "Surplus chasers" are individuals who use this information to target borrowers in foreclosure, promising to help them recover the surplus proceeds the borrower is already entitled to receive. The author asserts that such surplus chasers often charged large amounts for this, including upwards of 40 percent of the surplus funds owed to the borrower.

3. How AB 295 addresses unscrupulous foreclosure consultants

AB 295 is substantially similar to AB 1043 (Essayli, 2023), which passed the Senate Judiciary Committee unanimously last year and was passed by the Senate before failing on concurrence in the Assembly.

To address concerns that bad actors are using public notices of trustee sales to target Californians in the desperate situation of a foreclosure, AB 295 places a general prohibition on any individual, whether or not they fall within the definition of a foreclosure consultant under Section 2945, from "soliciting, contacting or initiating communication with an owner to claim the surplus funds from a foreclosure sale of the owner's residence for 90 days after the trustee's deed has been recorded." By placing a blanket prohibition on any solicitation for 90 days, the bill provides the trustee with enough time to meet their statutory obligation to distribute funds based on priority, and

then alert the borrower directly regarding any remaining surplus funds the borrower is entitled to, before a scammer can get to the borrower.

4. AB 295 changes the fees a trustee can charge for reinstatement of a mortgage

A borrower sometimes may reinstate their mortgage and close the foreclosure proceedings if they are able to make a full payment of what they owe before the trustee's sale is completed. (Cal. Civ. Code § 2924c(a)(1).) The civil code allows for this reinstatement if the payment is made for:

- a. all amounts of principal, interest, taxes, assessments, premiums for insurance, or advances that are in default;
- b. all amounts in default on recurring obligations not in the notice of default; and
- c. all reasonable costs and expenses that are actually incurred in enforcing the obligation, and trustee's or attorney's fees. (Cal. Civ. Code § 2924c(a)(1).)

Once a payment has been made to cure the default on the loan and reinstate the mortgage, the lender must execute and deliver a notice of rescission of the declaration of default to the trustee within 21 days of the reinstatement. (Cal. Civ. Code § 2924c(a)(2).) The trustee must then record the notice of rescission within 30 days. This provision of the civil code specifically states that no charge, except for the recording fee, shall be charged to the borrower for execution and recording of the notice of rescission.

Another part of section 2924c provides a further explanation of the costs and expenses that may be charged by a trustee. That section limits such charges to costs incurred for recording, mailing, including certified and express mail charges, publishing, posting notices, postponement of a foreclosure sale, and for a trustee's sale or litigation guarantee. (Cal. Civ. Code § 2924c(c).)

AB 295 changes the language in these sections to allow the trustee to collect additional fees from the borrower. It amends the provision that requires the borrower to pay the reasonable costs and expenses actually incurred to include costs that will be incurred as a direct result of the payment being tendered. In so doing, it is providing trustees with more latitude to require that the borrower, when trying to get out of foreclosure through payment and reinstatement, pay fees for the trustee's work or potential work after the borrower tenders payment for reinstatement of their mortgage. There are no specific limits on what these charges for costs not yet incurred by the trustee can be. Borrowers and lenders need clarity for when a borrower has successfully paid the amount required to have their mortgage reinstated, and allowing a trustee to return to the lender after the lender tendered a large payment to request that the lender pay an additional fee for their payment to meet the requirement for reinstatement could result in an imbalance of power between the borrower and the trustee and lender. On the other side, trustees may well argue that they should be able to receive fees for the work they perform in ending a trustee's sale and reinstating the mortgage.

The bill also amends section 2924c(c) to include costs and expenses for recording a notice of rescission of the declaration of default. This would allow the trustee to charge, as part of completing a reinstatement of the borrower's mortgage, the costs for recording the rescission that is required by the law. It should be noted that the provision related to reinstatement specifically states that no charge should be made for the execution and recording of the notice of rescission, as stated above. This provision of AB 295 would instead state that such charges are allowed.

The last provision of AB 295 increases the fee that a trustee may charge for a postponement of the trustee's sale. The sale may be postponed in a number of circumstances, including by mutual agreement of the parties, by operation of law, by court decree, or by the discretion of the trustee. Current law allows a trustee to charge a \$50 fee for each postponement of the trustee's sale. AB 295 increases this allowable fee to \$100. The author argues that this is necessary to keep up with inflation, as the last time that the postponement fee was adjusted occurred in the 1980's, such that it has not been raised in some time.

5. AB 295 extends a trustee's limitation on liability to erroneous reinstatement or repayment quotes made to struggling homeowners

Civil Code Section 2924(c) states that, in performing acts required by the article, the trustee cannot be found liable for any good faith error resulting from the trustee's reliance on information provided in good faith by the lender regarding the nature and amount of the borrower's default. AB 295 amends this section to include an exemption from liability for trustees when they respond to requests for payoff or mortgage reinstatement information (such as a repayment quote) to the borrower. Thus, if a borrower asks for a quote to payoff what they owe and end the foreclosure proceedings, and the trustee provides an amount that turns out to be less than the actual amount required when the borrower actually proceeds to make a full payment to pay off the default, the borrower cannot hold the trustee liable for the fact that the quote they provided and the borrower relied upon was incorrect. The sponsors assert that they are obligated to present the borrower with the exact pay off quote figure provided to them by the lender, and for this reason should not be held responsible if they pass on erroneous information to the borrower that was provided by the lender in good faith.

AB 295 also specifies that a trustee is exempt from the Rosenthal Fair Debt Collection Practices Act for responding to requests for payoff or reinstatement information, not just for any of a trustee's duties provided under the foreclosure provisions. The Rosenthal Fair Debt Collection Practices Act is the state's law for governing debt collection agency practices to prevent abusive, deceptive, and unfair debt collection practices. Trustees are arguably already exempt from the Rosenthal Fair Debt Collection Practices Act for their duties under the act; this amendment would simply explicitly state that this exemption also applies to when they provide payoff or reinstatement information to a borrower. Providing such information is arguably not part of the

trustee's duties, so specifying that they are not liable and exempt from the Rosenthal Act for such actions would ensure that the exemptions and protections from liability apply.

6. AB 295 makes some minor changes relating to foreclosures

AB 295 makes additional, minor changes to Section 2924, mostly to clean up or clarify certain provisions. In 2020, the Legislature passed SB 1079 (Skinner, Ch. 202, Stats. 2020) to create a process (known as the "SB 1079 post-sale process") in which certain eligible bidders (prospective owner-occupants; existing tenants living in the property; and designated entities, including nonprofit affordable housing providers, community land trusts, limited-equity housing cooperatives, and public entities) could acquire single-family homes by matching or exceeding bids placed at foreclosure auctions. AB 1837 (Bonta, Ch. 642, Stats. 2022), sought to remedy some of SB 1079's implementation challenges. Current law states that eligible bidders must provide an affidavit or declaration regarding their eligibility under certain circumstances, which the trustee may rely on regarding bidder eligibility. The trustee is required to attach the affidavits or declarations as an exhibit to the deed. The bill fixes some erroneous cross references and makes other clarifying changes to the provisions of law that were enacted through AB 1837. This bill also clarifies that, if the winning bidder is not required to submit an affidavit or declaration, the trustee must attach to the deed an exhibit stating that an affidavit or declaration is not required, and clarifies that the lack of an affidavit or declaration shall not prevent the deed from being recorded or invalidate the transfer of title.

7. AB 295 is an urgency measure

AB 295 is an urgency measure. As such, it must pass the Legislature by a two-thirds' vote, must include justification for why it is necessary under specified reasons that it be an urgency measure, and will take effect immediately upon enactment. The reason provided by the language of AB 295 is that it is necessary that AB 295 be an urgency measure to "stop the proliferation of lawsuits against foreclosure trustees, to enable the smooth and predictable process of foreclosure, and to protect consumers impacted by the foreclosure process."

8. Amendment

To conform the statement of necessity for AB 295's urgency clause with the bill's purpose, the author has agreed to take amendments to eliminate the phrase "to stop the proliferation of lawsuits against foreclosure trustees." Those amendments will be as follows:

SEC. 7.

This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the California Constitution and shall go into immediate effect. The facts constituting the necessity are:

~~To stop the proliferation of lawsuits against foreclosure trustees,~~ to enable the smooth and predictable process of foreclosure, and to protect consumers impacted by the foreclosure process, it is necessary for this act to take effect immediately.

SUPPORT

United Trustees Association (sponsor)

OPPOSITION

None received

RELATED LEGISLATION

Pending Legislation:

SB 1146 (Wilk, 2024) exempts certain small mortgage servicers from the requirements of the homeowner's bill of rights, and makes a variety of changes to the mortgage and non-judicial foreclosure process, including to allow postponement of a trustee's sale due to an act of force majeure. SB 1146 is currently in the Assembly Banking and Finance Committee.

AB 2424 (Schiavo, 2024) requires certain notice be provided to specified parties that a third party may record a request to receive copies of any notice of default, prohibits a foreclosure sale until the expiration of a specified time period if certain conditions are met, and requires a lender, beneficiary, or their agent to provide the trustee in a trustee's sale with the fair market value of the property at least 10 days prior to the initially scheduled date of sale, and prohibits the trustee from selling the property at the initial sale for less than 75% the fair market value. AB 2424 is currently in the Senate Rules Committee.

Prior Legislation:

AB 1043 (Essayli, 2023) made substantially the same changes to the foreclosure process and to combat "surplus chasers" as does this bill. AB 1043 failed to pass the Assembly on concurrence of Senate amendments.

AB 430 (Bennett, 2023) among other provisions, revises the definition of “community land trust” for the purposes of eligible bidders in the AB 1079 post-sale bidding process during a non-judicial foreclosure proceeding, and for the purposes of the Foreclosure Intervention Housing Preservation Program. AB 430 was held in the Senate Appropriations Committee.

AB 1837 (Bonta, Ch. 642, Stats. 2022) made anti-fraud modifications and other operational improvements to the SB 1079 process for certain eligible bidders to buy a foreclosed property.

AB 175 (Budget, Ch. 255, Stats. 2021) clarified several provisions of SB 1079, such as the form of affidavit or declaration that eligible bidders must use.

AB 140 (Budget, Ch. 111, Stats. 2021) enacted the Foreclosure Intervention Housing Preservation Program, allocating \$500 million over a ten-year period to enhance occupant ownership and nonprofit ownership of residential real property. The bill also made the acquisition of properties through the SB 1079 process eligible for funding.

SB 1079 (Skinner, Ch. 202, Stats. 2020) provided tenants, prospective owner-occupants, nonprofit affordable housing providers, and public entities a 45-day window to purchase residential properties of one to four units if they are able to match or exceed the highest bid at a preceding foreclosure auction.

PRIOR VOTES:

Assembly Floor (Ayes 80, Noes 0)

Assembly Appropriations Committee (Ayes 15, Noes 0)

Assembly Transportation Committee (Ayes 15, Noes 0)
