

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

AB 2424 (Schiavo)
Version: June 24, 2024
Hearing Date: July 2, 2024
Fiscal: No
Urgency: No
ID

SUBJECT

Mortgages: foreclosure

DIGEST

This bill requires notice be provided to a borrower of a residential home mortgage that a third party, as specified, may record a request to receive copies of any notice of default or sale; requires postponement of the trustee sale if the borrower is pursuing a real estate sale through a real estate broker; and prohibits a trustee from selling a property in an initial foreclosure sale for less than 67% of the fair market value.

EXECUTIVE SUMMARY

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. Homeownership also represents one of the most significant sources for wealth accumulation, providing a valuable tool for families as they look to build and pass down wealth to their children. Unfortunately, sometimes California homeowners find themselves in difficult financial situations or unanticipated circumstances, and cannot make the mortgage payments on what they owe on their homes. In this case, the lender may foreclose upon their home and sell it at a public auction, often for much less than the value of the home. This bill provides a variety of protections for homeowners so they can avoid the foreclosure sale and retain the earned equity in their homes. It requires notice that third parties may request to receive copies of any notices of default or sale, requires a foreclosure sale to be postponed 45 days if the borrower lists the home for sale through a real estate broker or receives a purchase offer, and prohibits a trustee from selling a home at an initial foreclosure sale for less than 67% of the fair market value. AB 2424 is sponsored by the Consumer Federation of California and is supported by a variety of consumer rights and housing organizations. The Committee has received no timely opposition. AB 2424 passed out of the Senate Banking and Financial Institutions Committee by a vote of 6 to 0.

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) Prohibits a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent from recording a notice of default until specified actions have been taken, including the following:
 - a) the mortgage servicer contacts the borrower in person or by telephone at least 30 days before the recording of the notice of default to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure;
 - b) the mortgage servicer processes a complete application for a first lien loan modification application. (Civ. Code §§ 2923.5(a)(2) and 2923.55(b)(2).)
- 3) If the mortgage servicer has not been able to contact the borrower in person or by telephone despite due diligence, the mortgage servicer may notify the borrower pursuant to (2), above, by mailing a first-class letter that includes the telephone number provided by HUD to find a HUD-certified housing counseling agency. (Civ. Code §§ 2923.5(e)(1) and 2923.55(f)(1).)
- 4) Authorizes any person to record a request to receive copies of any notice of default or notice of sale related to a deed of trust or mortgage. (Civ. Code § 2924b.)
- 5) Requires that at least 90 days has elapsed since the filing of the notice of default before the trustee may provide notice of a trustee sale by publishing the notice of sale at least 20 days before the sale date in a newspaper of general circulation where the property is located, containing information such as the borrower's name and the amount owed. (Civ. Code § 2924f.)
- 6) 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).)
- 7) 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.)

- 8) Prohibits the mortgage servicer, trustee, mortgagee, beneficiary, or authorized agent from recording a notice of default, notice of sale, or conducting a trustee's sale while a complete application for a first lien loan modification is pending, if the borrower submits a complete application at least five business days before the scheduled foreclosure sale. Prohibits the recording of a notice of default if a foreclosure prevention alternative has been approved prior to the recordation of the notice of default, as specified. (Civ. Code § 2924.18.)

This bill:

- 1) Requires a mortgage servicer to notify a defaulting borrower during the initial contact required by law that a third party, such as a family member, HUD-certified housing counselor, or attorney, may record a request to receive copies of any notice of default and a notice of sale, and that receiving a copy of those documents may allow the third party to assist the borrower in avoiding foreclosure.
- 2) Requires the mortgage servicer, mortgagee, beneficiary, or authorized agent to provide a borrower before the signing of the mortgage or deed of trust with a written disclosure that a third party, such as a family member, HUD-certified housing counselor, or attorney, may record a request to receive copies of any notice of default and a notice of sale.
- 3) Requires that a foreclosure sale of a residential property of no more than four dwelling units may not be conducted for an additional 45 days from the original scheduled sale date if the borrower delivers to the trustee and mortgage servicer by certified mail a listing agreement with a California licensed real estate broker or agency at least five business days before the scheduled foreclosure sale. Prohibits a foreclosure sale from being postponed under this procedure more than once.
 - a) Specifies that the timeline for a borrower to request reinstatement of the mortgage is extended based on the new scheduled sale date.
- 4) If a foreclosure sale is postponed pursuant to (3), above, and the borrower delivers to the trustee and mortgage servicer by certified mail at least five business days before the re-scheduled sale a copy of a purchase agreement for the sale of the property, the trustee is required to postpone the foreclosure sale another 45 days. Specifies that this postponement may only be used once.
- 5) Defines a "purchase agreement" as a bona fide and fully executed contract for the sale of the property that is subject to a power of sale that includes the name of the buyer, the sales price, the agreed closing date, and acceptance by the designated escrow agent.
- 6) Requires a mortgagee, beneficiary, or authorized agent to provide the trustee in a foreclosure sale of a residential property of no more than four dwelling units with

the fair market value of the property at least 10 days prior to the initially scheduled foreclosure sale.

- 7) Prohibits the trustee from selling the residential property at the foreclosure sale for less than 67% of the fair market value of the property; and, if the property remains unsold at that value, requires the trustee to postpone the sale at least seven days, at which time the property may be sold to the highest bidder.
- 8) Defines “fair market value of the property” as an estimate of the fair market value of the property made within six months of the first scheduled foreclosure sale, made by an opinion of a licensed real estate broker, an appraisal from a licensed appraiser, a value from a commercially-utilized automated valuation model, or a value from a computerized property valuation system that is used to derive a real property value.

COMMENTS

1. Author’s statement

According to the author:

Sadly, in too many real world situations, 120 days of failure to make a mortgage payment is not enough time to correct the situation. For example, in instances of a divorce, or the passing of an owner, four months just isn't sufficient for the marital, or deceased estate to make arrangements to either bring the loan current, or to otherwise sell the property for fair market value.

Under the current system, even if the home is listed for sale, the mortgage holder is within their rights and in fact frequently does move, shortly after 120 days has elapsed, to schedule a foreclosure auction. If a foreclosure auction occurs, the mortgage holder is not obligated to sell the property for fair market value. In many instances the home is sold for substantially less than FMV; selling for at, or slightly more than the outstanding mortgage. In those instances, the estate loses substantial equity in the home.

AB 2424 doesn't seek to prevent the mortgage holder from getting repaid, it only seeks to balance the equities, so that both the bank and the owner(s) of the property get their fair share of their interest in the value of the home.

For some families, a home is their only substantial asset. 2424 will reform the rules somewhat when payments have fallen behind due to unforeseen circumstances. AB 2424 seeks to preserve a minimal amount of equity in the property, while assuring the banks also get repaid.

2. The non-judicial mortgage foreclosure process

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. Homeownership also represents one of the most significant sources for wealth accumulation, providing a valuable tool for families as they look to build and pass down wealth to their children. Most homeowners do not buy their home outright, but rather use the home as security for a mortgage loan to cover the amount of the home value that they do not cover with their down payment.

Unfortunately, sometimes California homeowners find themselves in difficult financial situations, and cannot make the mortgage payments on what they owe on their homes. In addition, if a homeowner passes away or gets divorced from their partner with whom they owned the home, keeping up with mortgage payments may be difficult. When this happens, the borrower is 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. 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. Under federal regulations, the notice of default may only be filed if 120 days have passed since the missed payment. (12 C.F.R. § 1024.41.) Before filing a notice of default, the mortgage servicer must first contact the borrower to discuss alternatives to foreclosure at least 30 days before the notice of default is recorded. (Civ. Code § 2923.5.) After the notice of default is recorded, the 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. (Civ. Code § 2924.) 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 a public auction 21 days later. (*Id.*) If the delinquent borrower pays the delinquent balance or submits a complete application for a loan modification anytime at least five days before the scheduled foreclosure sale, the lender must consider the application and cannot proceed with the sale. (*Id.*)

The foreclosure sale is set and ran by the trustee, which is 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. The proceeds from the trustee's sale are used to cover the amount the borrower owed to the lender. The trustee must first deduct any expenses associated with the sale, and then pay off the outstanding debt owed to the lender. Any remaining funds are distributed to parties with an interest in the property, according to their lien priority. 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, and so that interested buyers of the property may appear at the sale. However, foreclosure sales often net lower than a market rate price for the foreclosed-upon home, as the process is expedited and bidders must pay the full bid amount without any contingencies or inspections that otherwise are often part of the real estate sale process.

3. AB 2424 revises the non-judicial foreclosure process to provide greater protections to homeowners

AB 2424 proposes a number of changes to the foreclosure process to add additional protections to homeowners who are trying to avoid the foreclosure sale and maintain the equity they have built in their home. The author asserts that this is necessary because homeowners lose a substantial amount of the equity in the home through the foreclosure sale process because the home is sold below value; therefore, AB 2424's provisions aim to provide the homeowner with alternatives to the foreclosure sale through which they will be able to realize their accumulated equity in the home and the lender will still be paid for the delinquent mortgage.

AB 2424 does three primary things:

1. **Requires specified notice.** AB 2424 requires notice be provided to a defaulting borrower that a specified individual or entity may request to receive copies of any future notice of default or notice of sale. This provision requires the notice be provided during the initial required contact the mortgage servicer must make 30 days before recording a notice of default, as well as to the borrower before the borrower and lender sign the deed of trust establishing the mortgage. According to the author, this provision is meant to allow the specified third-party to assist the borrower in avoiding foreclosure, should a non-judicial foreclosure proceeding begin, ostensibly because the designated person or entity could contact the borrower about the default and work with them to find an alternative to a foreclosure sale. Under current law, any person may record a request to receive copies of any notice of default or notice of sale related to a deed of trust or mortgage. (Civ. Code § 2924b.)
2. **Delays the foreclosure sale for the homeowner to sell the home pursuant to a listing agreement with a real estate agent.** AB 2424 delays the foreclosure sale at least 45 days if the home is listed for sale on a publicly-available multiple listing service (MLS) at least five days before the scheduled foreclosure sale, and the borrower provides the trustee conducting the sale and the mortgage servicer a copy of the listing agreement with a licensed real estate broker or agency. A borrower may only utilize this provision to delay the foreclosure sale once. Doing so will also allow the borrower to extend the period before the sale during

which they may reinstate the mortgage by paying the delinquent balance and any accumulated fees. If, after the property has been listed on an MLS service to be sold, and the borrower signs a purchase agreement with a buyer, the borrower may postpone the foreclosure sale for another 45 days upon delivery of the purchase agreement to the trustee, as long as the purchase agreement is delivered to the trustee and mortgage servicer at least five days before the foreclosure sale. Through this process, a homeowner may be able to avoid the foreclosure process by selling their home on the normal real estate market, thereby keeping the equity they may otherwise lose in a foreclosure auction.

- 3. Guarantees a minimum return in a foreclosure sale.** If the foreclosure sale proceeds, AB 2424 would place limits on how much below value a foreclosed home may be sold. It requires that the lender provide the trustee conducting the foreclosure sale a fair market value of the property at least 10 days before the foreclosure sale, and prohibits the trustee from then selling the home at the foreclosure sale for less than 67% of the fair market value. If the property receives no bids that are at least 67% of the fair market value, then the trustee must hold another sale seven days later, at which the home can be sold to the highest bidder at whatever price.

SUPPORT

Consumer Federation of California (sponsor)
California Advocates for Nursing Home Reform
California Elder Justice Coalition (CEJC)
California Low-income Consumer Coalition
California School Employees Association
Elder Law & Advocacy
Housing and Economic Rights Advocates (HERA)
Justice in Aging
National Association of Consumer Advocates (NACA)
National Consumer Law Center
National Housing Law Project
Public Law Center
Rise Economy

OPPOSITION

None received

RELATED LEGISLATION

Pending Legislation:

SB 1146 (Wilk, 2024) provides that a trustee may postpone a foreclosure sale for seven days if a force majeure prevents access to the location at which the sale is to take place, and makes various other changes to the mortgage process. SB 1146 is currently in the Assembly Judiciary Committee.

AB 3100 (Low, 2024) requires that mortgage lenders of a conventional loan originated on or after January 1, 2027 for a property containing four or fewer dwelling units to include provisions in the loan allowing any borrower to purchase the property of another borrower and assume their portion of the mortgage in connection to a divorce or separation, if the assuming borrower qualifies for the underlying loan, as determined by the lender. AB 3100 is currently in this Committee.

Prior Legislation:

SB 1323 (Archuleta, 2021) preserved homeowners' earned equity in the foreclosure process by requiring efforts to sell the home through a real estate multiple listing service before utilizing a foreclosure sale. SB 1323 died on the Assembly inactive file.

SB 1079 (Skinner, Ch. 202, Stats. 2020) created a process by which tenants, prospective owner-occupants, non-profit housing providers, and public entities could match or exceed the highest bid made at a foreclosure auction within 45 days of the foreclosure sale, and thereby purchase the property.

SB 818 (Beall, Ch. 404, Stats. 2018) made permanent all of the Homeowners' Bill of Rights (HBOR) provisions that had been repealed on January 1, 2018, and made additional changes, including automatically assigning a single point of contact to any homeowner who requests a foreclosure prevention alternative and requiring a borrower to submit their complete application for a first lien loan modification at least five business days before a scheduled foreclosure sale in order to be eligible for HBOR protections.

SB 900 (Leno, Ch. 87, Stats. 2012) enacted the HBOR to provide procedural protections to homeowners at risk of losing their homes to foreclosure. SB 900 prohibited loan servicers from pursuing foreclosure while a loan modification was under consideration (a process called "dual-tracking"), mandated that loan servicers provide borrowers with a single point of contact to obtain information about their status, required loan servicers to notify borrowers of their rights, and created a set of enforcement mechanisms to prevent improper foreclosures from proceeding.

PRIOR VOTES:

Senate Banking and Financial Institutions Committee (Ayes 6, Noes 0)

Assembly Floor (Ayes 71, Noes 0)

Assembly Appropriations Committee (Ayes 15, Noes 0)

Assembly Judiciary Committee (Ayes 11, Noes 0)

Assembly Banking and Finance Committee (Ayes 9, Noes 0)
