

DESPERATE MEASURES

WHEN AND HOW CAN A DELINQUENT LOAN BE CURED IN CALIFORNIA?

by Michelle A. Mierzwa, Esq.

It happens all the time. The week before a scheduled foreclosure sale, the lender or foreclosure trustee receives a frantic call from someone who is not the borrower identified in the loan documents, desperately pleading for information on how to stop the sale. Outside of a last-minute bankruptcy filing by the borrower or other material party, California statutes provide rights within certain timeframes to specified entitled parties regarding the reinstatement or cure of the default under a loan subject to foreclosure or the ability to pay off a loan. Despite these statutory rights, in light of recent heightened concerns around financial information privacy, many lenders and servicers are not clear as to when they can and should provide loan information to parties who are not identified as a borrower or trustor in the loan documents. Often, a refusal to provide information requested by a statutorily-entitled party, while intending to protect financial privacy of a borrower, can result in liability against the lender, servicer or trustee. Following is a review of applicable statutes and recent case law providing insight on these issues.

Who Can Reinstate the Default?

Civil Code section 2924c(a) provides that following the commencement of non-judicial foreclosure proceedings: “the **trustor or mortgagor or their successor in interest** in the mortgaged or trust property or any part thereof, or **any beneficiary under a subordinate deed of trust or any other person having a subordinate lien or encumbrance of record thereon**, at any time within the period specified in subdivision (e), if the power of sale therein is to be exercised, or, otherwise at any time prior to entry of the decree of foreclosure, may pay to the beneficiary or the mortgagee or their successors in interest, respectively, the entire amount due, at the time payment

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is tendered...” Based on the above language, there are several parties (aside from those who signed the promissory note or deed of trust) who are entitled to reinstate the default to protect their interests in the property. From a practical standpoint, it makes sense for these parties to receive limited loan information that is narrowly tailored to allow them to protect their interests in real property from foreclosure.

When Can Entitled Parties Reinstate?

Civil Code section 2924c(e) provides: “(e) Reinstatement of a monetary default under the terms of an obligation secured by a deed of trust, or mortgage may be made at any time within the period commencing with the date of recordation of the notice of default **until five business days prior to the date of sale set forth in the initial recorded notice of sale.**” However, if a new notice of sale is required to be recorded, the right to reinstate will continue “until five business days prior to the date of sale set forth in the subsequently recorded notice of sale.” In addition, if the initially scheduled sale date or a subsequent sale date is postponed for more than five business days, “then the right of reinstatement is revived as of the date of postponement and shall continue from that date until five business days prior to the date of sale declared at the time of the postponement.” For the avoidance of doubt, the statute clarifies that there is **no “right of reinstatement during the period of five business days prior to the date of sale, whether the date of sale is noticed in a notice of sale or declared at a postponement of sale” and “no beneficiary, trustee, mortgagee, or their agents or successors shall be liable** in any manner to a trustor, mortgagor, their agents or successors or any beneficiary under a subordinate deed of trust or mortgage or any other person having a subordinate lien or encumbrance of record thereon for the failure to allow a reinstatement of the obligation secured by a deed of trust or mortgage **during the period of five business days² prior to the sale of the security property.**” Thus, if a borrower or other statutorily-entitled party remits reinstatement funds less than five business days prior to the scheduled sale date, **the lender is not required to accept the funds**, but the lender may accept them if the lender desires. It is important to note that under Civil Code sections 7 and 9, only Sundays and statutorily-specified holidays are not considered business days, so Saturdays appear to be counted as a business day unless they are also designated as a statutory holiday or optional bank holiday.

Who Can Obtain Payoff Information?



Civil Code section 2943(a) provides: “(4) “Entitled person” means the **trustor or mortgagor** of, or his or her **successor in interest in, the mortgaged or trust property or any part thereof, any beneficiary under a deed of trust, any person having a subordinate lien or encumbrance of record thereon, the escrowholder licensed as an agent pursuant to Division 6** (commencing with Section 17000) of the Financial Code, or the **party exempt by virtue of Section 17006 of the Financial Code who is acting as the escrowholder.** (5) “Payoff demand statement” means a written statement, **prepared in response to a written demand made by an entitled person or authorized agent**, setting forth the amounts required as of the date of preparation by the beneficiary, to fully satisfy all obligations secured by the loan that is the subject of the payoff demand statement. The written statement shall include information reasonably necessary to calculate the payoff amount on a per diem basis for the period of time, not to exceed 30 days, during which the per diem amount is not changed by the terms of the note.” [Emphasis added.]

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² As used in this subdivision, the term “business day” has the same meaning as specified in Civil Code Section 9: “All other days than those mentioned in Section 7 are business days for all purposes,” except for optional bank holidays under Section 7.1. Section 7 provides: “Holidays within the meaning of this code are every Sunday and such other days as are specified or provided for as holidays in the Government Code of the State of California.”

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Civil Code section 2943(c) provides: “(c) A **beneficiary**, or his or her authorized agent, **shall, on the written demand of an entitled person, or his or her authorized agent, prepare and deliver a payoff demand statement to the person demanding it within 21 days of the receipt of the demand.** However, if the loan is subject to a recorded notice of default or a filed complaint commencing a judicial foreclosure, the beneficiary shall have no obligation to prepare and deliver this statement as prescribed unless the **written demand is received prior to the first publication of a notice of sale** or the notice of the first date of sale established by a court.” [Emphasis added.]³

In addition, Civil Code section 2943(e)(3) provides: “(3) The beneficiary may, before delivering a statement, **require reasonable proof that the person making the demand is, in fact, an entitled person or an authorized agent of an entitled person**, in which event the beneficiary shall not be subject to the penalties of this section until 21 days after receipt of the proof herein provided for. A statement in writing signed by the entitled person appointing an authorized agent when **delivered personally to the beneficiary or delivered by registered return receipt mail** shall constitute reasonable proof as to the identity of an agent. Similar delivery of a policy of title insurance, preliminary report issued by a title company, original or photographic copy of a grant deed or certified copy of letters testamentary, guardianship, or conservatorship shall constitute reasonable proof as to the identity of a successor in interest, provided the person demanding a statement is named as successor in interest in the document.”

Civil Code section 2943(e)(4) provides for an award of damages to an entitled party: “(4) If a beneficiary for a period of 21 days after receipt of the written demand willfully fails to prepare and deliver the statement, he or she is liable to the entitled person for all damages which he or she may sustain by reason of the refusal and, whether or not actual damages are sustained, he or she shall forfeit to the entitled person the sum of three hundred dollars (\$300). Each failure to prepare and deliver the statement, occurring at a time when, pursuant to this section, the beneficiary is required to prepare and deliver the statement, creates a separate cause of action.”

Similar to the reinstatement statutes, it makes sense for these parties to receive limited loan information that is narrowly tailored to allow them to protect their interests in real property from foreclosure by paying off the loan.

When Can Entitled Parties Pay Off The Loan?

A loan can be paid off by an entitled party at any time prior to the acceptance of the last and highest bid at the live nonjudicial foreclosure sale cried pursuant to Civil Code section 2924h or before the loan is judicially foreclosed, subject to any statutory right of redemption. See Civil Code section 2903; *Moeller v. Lien* (1994) 25 Cal. App. 4th 822, 830 (“In addition to the right of reinstatement, the trustor also possesses an equity of redemption, which permits the trustor to pay all sums due prior to the sale of the property at foreclosure and thus avoid the sale.”)

Additional statutes provide clarity regarding the right and timing of loan payoff. Civil Code section 2924h(e) provides: “Any postponement of or discontinuance of the sale proceedings shall be a cancellation of the last bid.” This code section would allow the trustee to discontinue or postpone sale proceedings that have already started but not yet terminated in a highest bid. For example, if an entitled party delivered funds in an amount sufficient to pay off the loan before the live sale auction was complete, the trustee could postpone the sale to allow for the deposit of the payoff check or instrument.

Also, Civil Code section 2943(f) governing payoff demand statements contains clarifying language which provides: “(f) The preparation and delivery of a beneficiary statement or a payoff demand statement pursuant to this section shall not change a date of sale established pursuant to Section 2924g.” Thus, just because a payoff demand statement is issued with a good through date that is beyond the date of a scheduled foreclosure sale does not impact that foreclosure sale date or mandate a postponement beyond that existing foreclosure sale date. That being said, to avoid confusion on the part of a borrower or other entitled party, it is a best practice to ensure that a beneficiary statement or payoff demand statement is only issued good through the date of the currently pending foreclosure sale date, unless the lender intends to postpone the sale.

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³ Federal loan servicing statutes also contain requirements to provide payoff information to a borrower or any person acting on behalf of the borrower. See 12 C.F.R. 1026.36(c)(3)(loans secured by dwellings) and 12 C.F.R. 1026.34(a)(9) (high cost loans).

*Curing Delinquent Loans in California (continued from page 11)***Recent Case Law**

Shetty v. HSBC Bank USA, N.A., (2023) 91 Cal.App.5th 796 confirmed that a successor in interest to title to the mortgaged property had a right of reinstatement under Civil Code § 2924c.

<https://casetext.com/case/shetty-v-hsbc-bank-us-1?q=%2291%20Cal.App.5th%20796%22&sort=relevance&p=1&type=case>

Facts:

Plaintiff purchased property at a HOA assessment lien foreclosure sale and recorded a trustee's deed upon sale. Thereafter, the senior lienholder on the property commenced its own foreclosure. Plaintiff, who had not assumed the senior loan, made several attempts to obtain information from the senior lienholder and its servicer to enable Plaintiff to cure the default on the loan and keep it current; however, they refused to provide the information as he was not the borrower and had not assumed the loan. Plaintiff sued for wrongful foreclosure, declaratory relief, and an accounting, and defendants demurred based on his lack of standing. The trial court sustained the demurrer without leave to amend. Plaintiff appealed.

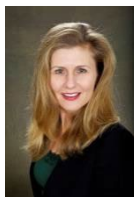
Ruling:

The Court of Appeal reversed. The sole issue on appeal was whether Plaintiff had standing to reinstate the loan pursuant to Civil Code § 2924c. The Court first noted that the appeal was not rendered moot by Plaintiff having, in the interim, paid off the senior loan in its entirety since Plaintiff argued he was still entitled to seek damages instead of just injunctive relief. The Court went on to hold that Civil Code § 2924c provided standing to Plaintiff because it expressly allowed reinstatement of the loan by a successor-in-interest *to the property*, not limiting it to just a successor-in-interest to the loan secured by that property.

Take Away:

The right to reinstate a loan that is in default in order to avoid foreclosure runs with the land, not with the loan. Thus, a new owner is entitled to information as to the amount in arrears and the amount needed for monthly payments in order to cure the default, even if the new owner has not assumed the loan. However, the new owner is not entitled to otherwise be treated as if they were the borrower absent formal assumption of the loan that is approved by the lender.⁴

Based on the above, it is important for lenders, servicers and trustees to note that certain persons and entities other than a borrower or trustor under the note and deed of trust are entitled to receive a payoff demand statement, as long as they timely submit a written request and provide the requested proof that they are an entitled party. Moreover, specified persons or entities are also entitled to obtain limited information about the amounts required to reinstate a delinquent loan. Failure to comply with the statutory rights afforded to entitled parties can subject a lender, servicer or trustee to costly litigation, with an award of compensatory or statutory damages to the plaintiff. If you have questions regarding this summary or the right of any particular party to reinstate or pay off a loan, contact Michelle Mierzwa at mmierzwa@wrightlegal.net.



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⁴ Federal loan servicing statutes may also provide additional rights and obligations with respect to potential and confirmed successors in interest as defined in 12 C.F.R. 1026.2(27), but these rights and obligations are beyond the scope of this article.