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The Mabry Tale Has Come To Its End

By T. Robert Finlay, Esq., and Jennifer A. Johnson, Esq., Wright, Finlay & Zak, LLP

One of the most important cases to the trustee industry in recent history, *Mabry v. Superior Court of Orange Co.* (2010) 185 Cal. App. 4th 208., was established as final law when the Supreme Court of California denied the Mabrys' petition for review. As we reported in the Summer 2010 issue of the UTA Quarterly, the Court of Appeal ruled, in a published opinion, on several issues that were causing significant litigation for lenders, loan servicers, and trustees. While the rulings affecting lenders and servicers were not entirely favorable, the court provided clear instructions to the trustee industry as to how to comply with Civil Code §2923.5.

Specifically, the Court of Appeal held that the declaration required by Civil Code §2923.5 does not need to be signed under penalty of perjury and that the language contained in the declaration could track the statute itself, instead of having to identify the specific method by which the servicer complied with the requirements of Civil Code §2923.5. The court also clarified that the remedy available to borrowers who claim that either the lender/servicer failed to contact them as required by Civil Code §2923.5, or that the trustee failed to include a proper declaration, is limited only to a postponement of the trustee's sale. In the event the sale has already taken place, there is no remedy available and any lawsuit based on purported violations of Civil Code §2923.5 is moot.

Considering the importance of the *Mabry* decision, let's take a look at Civil Code §2923.5 and how we got to where we are.

Foreclosure Relief Legislation

During the last several years, the California Legislature has been trying to reduce the number of homes that enter the foreclosure process. One such effort was SB 1137, which became operative on September 6, 2008. SB 1137 was designed to prevent "unnecessary foreclosures." The result of this legislation, *California Civil Code* §2923.5, includes both "substantive" requirements – what the lender/servicer needs to do to comply with the code – and "technical" requirements – what the trustee needs to do to demonstrate that the lender/servicer has complied with the code.

The California Legislature believed that they could reduce the number of homes sold via trustee's sale by requiring lenders (or, more realistically, their servicers) to contact borrowers in default prior to recording a notice of default. During the contact, the borrower and lender/servicer are to try to work out a loan modification or some other type of agreement that would allow the borrower to remedy their default and avoid foreclosure. Specifically, the lender is required to "assess" the borrower's financial situation, "explore" options to avoid foreclosure, and provide the telephone number for HUD-certified housing counseling agencies.

> "**Mabry** *is controlling law as to the requirements and remedies of Civil Code §2923.5.*"

In order to prevent a borrower from evading the foreclosure process by just not answering his or her phone, the bill lays out a framework of what is to be done if the lender cannot reach the borrower, which includes sending letters and repeatedly attempting to contact the borrower by phone. After weeks of such attempts, the lender has exerted the necessary "due diligence" and may proceed with the foreclosure process.

Once the "contact" step has been completed, the lender/servicer has complied with the "substantive" requirements of Civil Code §2923.5. The lender may then instruct the trustee to record the notice of default. The notice of default must include a "declaration" stating that the lender, or its agent, has contacted the borrower, has tried with due diligence to contact the borrower, or that no contact was required because one of the exceptions outlined in Civil Code §2923.5(h) applied. (There are exceptions to the contact requirement if the borrower has surrendered the property, contracted with a person or organiza-

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tion advising the borrower on how to extend the foreclosure process and avoid their obligations under their loan, or has filed a bankruptcy case.)

In summary, a lender or its servicer must make one last attempt to contact the borrower and try to work out an alternative to a trustee's sale. Once the lender meets the substantive requirements of Civil Code §2923.5 described above, the trustee may record the notice of default, including the additional technical requirements described in Civil Code §2923.5 – the declaration of compliance. It seems pretty straight forward. However, borrowers have been using this legislation to challenge trustee's sales since Civil Code §2923.5 went into effect.

Litigation

Thousands of borrowers sued their lenders and trustees claiming that a pending or completed trustee's sale is or was "wrongful" because: (1) the lender did not fulfill the contact requirements of Civil Code §2923.5 prior to recording the Notice of Default, (2) the 2923.5 declaration was not signed under penalty of perjury, and/or (3) the declaration repeated the statutory language regarding the form of compliance – that the lender contacted the borrower, made a due diligence effort to contact the borrower, or an exception applied – instead of indicating which of these three categories applied to the specific loan.

Because Civil Code §2923.5 was so new, trial courts throughout California were making inconsistent rulings as to the substantive and technical requirements of the statute, as well as what relief the Legislature intended to allow if a lender/servicer or trustee actually violated the statute. Until an opinion was published by a Court of Appeal or rendered by the California Supreme Court, the requirements and impact of Civil Code §2923.5 seemed to depend on which judge heard the case. This brings us to the *Mabry* case.

The *Mabry* Case and Decision

The *Mabry* case follows the typical pattern for Civil Code §2923.5 litigation. The Mabrys refinanced their home in Corona, California in December 2006, borrowing $688,000. They began missing payments in August 2008. According to the servicer, they had frequent contacts with the Mabrys both before and after their default, discussing options to avoid foreclosure, including loan modification, short sale, deed-in-lieu of foreclosure, and a special forbearance agreement. The servicer contends that these contacts, as well as a number of attempted contacts, fulfilled their obligations under Civil Code §2923.5. (According to Mr. Mabry's declaration, the Mabrys were never contacted by the servicer in person, by telephone, or by mail to explore foreclosure alternatives.)

All of the necessary steps were taken and the foreclosure was moving along. Then, one week prior to the scheduled sale, the Mabrys filed a suit, alleging, among other things, that they were never contacted as required by Civil Code §2923.5, and that the declaration contained in the notice of default was defective because it was not signed under penalty of perjury and did not detail the specific method of compliance. Based on these allegations, the Mabrys asked the court to stop the foreclosure sale. After granting a brief temporary restraining order, the court denied the Mabrys' request for a preliminary injunction, and the lender was free to proceed with the sale. The Mabrys filed a writ of mandate in the Court of Appeal, challenging the lower court's order denying injunctive relief.

In the Appeal, our office filed an Amici Curiae brief on behalf of the UTA and California Mortgage Association, advocating on behalf of the mortgage and trustee industries. The Court of Appeal granted the writ in part, clarifying the impact of Civil Code §2923.5 and several of its technicalities. Specifically, the Court of Appeal held that borrowers have a private right of action and that federally-regulated entities are subject to its requirements, but the private right of action is limited to postponing the sale until the lender has fulfilled the contact requirements. The Court reinforced that there is no right to a loan modification, and that all a lender/servicer needs to do to "assess" the borrower's financial situation is to merely inquire as to why the borrower has not made his or her loan payments, and all the lender needs to do to "explore" options to avoid foreclosure is to simply recite the traditional ways that foreclosure may be avoided. Under *Mabry,* a lender has no obligation to offer a loan modification, or even take information for a loan modification over the phone.

The Court went on to address the technical aspects of Civil Code §2923.5 whereby it held that the declaration contained in the notice of default does <u>not</u> need to be signed under the

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penalty of perjury, and it is sufficient to regurgitate the statutory language without delineating which of the three categories (contact, due diligence, or exception) applied in the specific case. Finally, the Court held that alleged violations of Civil Code §2923.5 cannot be used to challenge title to property following the foreclosure sale.

Shortly after the Court of Appeal ruling, the Mabrys filed a petition for review with the Supreme Court of California, challenging the Court of Appeal ruling in *Mabry* as it applies to properties that were sold at a trustee's sale, but the buyer at the sale was the foreclosing lender. As of August 18, 2010, the Supreme Court denied the Mabrys' petition for review, leaving the Court of Appeal's ruling fully intact.

What's Next?

At this time, *Mabry* is controlling law as to the requirements and remedies of Civil Code §2923.5. However, SB 1275 which has passed in the Senate and is currently before the Assembly, re-writes the technical requirements of Civil Code §2923.5. Stay tuned for updates from the UTA as this year's legislative session comes to an end.

Robert Finlay is a partner with Wright Finlay & Zak, LLP and a member of the UTA, CMBA, MBA and AFN. He specializes in representing lenders, foreclosure trustees and title companies in mortgage and title related litigation throughout California. Mr. Finlay can be reached at (949) 477-505 or via email at rfinlay@wrightlegal.net.

Jennifer Johnsen is an attorney with Wright, Finlay & Zak, LLP specializing in litigation and representation involving mortgage banking, loan servicing, general business and real estate as well as bankruptcy and eviction matters. She can be emailed at jjohnson@wrightlegal.net.

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