

Riding off into the Sunset: The End of The Ninety Day Foreclosure Delay Under the California Foreclosure Prevention Act

In 2009, the California Assembly passed the California Foreclosure Prevention Act. The purpose of the Act was to stymie the foreclosures that were rampant throughout California at the time and encourage foreclosing parties to explore loan modifications with distressed borrowers. The legislature declared that state and local economies were being threatened by the unprecedented “skyrocketing residential property foreclosure rates.” (ABX2 7, 2nd Ex. Sess., § 2(a)) and that legislation was needed to modify “the foreclosure process to provide additional time for borrowers to work out loan modifications.” (ABX2 7, 2nd Ex. Sess., § 2(b)). California Civil Code sections 2923.52-2923.55 were codified to implement the Act and took effect on May 21, 2009.

Specifically, California Civil Code § 2923.52 was drafted to slow foreclosures by imposing an additional 90-day delay in the normal foreclosure process. Before section 2923.52 was enacted, there was a minimum of three months between the recording of the notice of default and the giving of the notice of sale. (§ 2924(a)(3)). After the enactment of section 2923.52, *at least for certain covered loans*, another 90 days had to be included “in order to allow parties to pursue a loan modification to prevent foreclosure.” This effectively extended the time between the recording of a notice of default and the giving of the notice of sale from three months to three months and 90 days (essentially doubling the period). However, California Civil Code section 2923.53 allowed for an exemption to that 90 day delay if lenders implemented a loan modification program that met certain criteria as set forth in section 2923.53(a) and received an order of exemption from the appropriate commissioner.

California Civil Code § 2923.52(e) contains a “**sunset provision**” for the statute and states that “this section shall remain in effect only until January 1, 2011, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2011, deletes or extends that date.” No statute was enacted extending or deleting the January 1, 2011 termination date and the code section is no longer effective. This however, creates an interesting issue for foreclosing parties that recorded a notice of default before January 1, 2011. Does the additional 90 day period relate back, or apply, to notices of default filed prior to the January 1st sunset date? Could a foreclosing party that recorded its notice of default on October 2, 2010 legally give notice of sale on January 2, 2011 since three months had passed? Or would the foreclosing party have to wait the additional 90 days as set forth under section 2923.52?

A review of the applicable Legislative Counsel’s Digest suggests a foreclosing party **would not** have to wait the additional 90 days. The Legislative Counsel’s Digest explains what the bill would prohibit: “This bill, until January 1, 2011, and only with respect to specified loans that were recorded between January 1, 2003, to January 1, 2008, would prohibit a mortgagee, trustee, or other person authorized to take sale from **giving a notice of sale** for an additional 90 days if the loan at issue is the first mortgage or deed of trust that the property secures, the borrower

occupied the property as his or her principal residence at the time the loan became delinquent, and the notice of default has been filed.” As set forth in the Legislative Counsel’s Digest, and reiterated in the Code, the operative event is the giving/recording of the Notice of Sale. This is congruent with the heading of California Civil Code 2923.52 which is “Notice of sale; conditions, exclusions.” Thus the Code section, provided a condition to giving the notice of sale which was waiting the additional 90 days, unless an exclusion was met. Starting on January 2, 2011, notices of sale may be given as long as three months have passed from the recording of the notice of default, no matter when the notice of default was recorded. California Civil Code § 2923.52 is now below the horizon.

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Please be advised that this is our legal opinion and interpretation of the statute. We did not find any cases where a court has decided the issue. Should you have any further questions, please contact the California Department of Real Estate or California Department of Corporations.