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May 6, 2009

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California Department of Corporations
Office of Legislation and Policy
Attn: Karen Fong
1515 K St., Suite 200
Sacramento, CA 95814

RE: California Foreclosure Prevention Act (PRO 05-09)
Comments from the United Trustees Association ("UTA")

Dear Ms. Fong and Commissioners:

Our law firm represents the United Trustees Association ("UTA") which is a multi-state organization comprised of trustees under deeds of trust and other members providing services to the default services industry. A significant number of UTA's members do business in California and are concerned with maintaining the integrity and certainty of the nonjudicial foreclosure system. UTA writes in response to the "Invitation for Comments Draft California Foreclosure Prevention Act Regulations" ("Draft Regulations).

UTA's trustee members range from totally independent trustees to in-house trustees for large institutional lenders. Some trustee's are affiliated with loan servicers while most are not.
UTA's primary concern with the provisions of SBx2-7/ABx2-7 and with the Draft Regulations is that these laws and regulations do not create more confusion and ambiguity in the nonjudicial foreclosure system leading to unnecessary litigation.

While the Draft Regulations are fine in many respects, UTA believes that some modifications are necessary to avoid creating further ambiguity and confusion in the nonjudicial foreclosure system.

We have extensively reviewed the draft "California Foreclosure Prevention Act Regulations issued on April 21, 2009 ("Draft Regulations") and have the following comments:

1. Commissioner's Authority.

SBx2-7/ABx2-7 delegates broad authority to the Commissioners to issue regulations to clarify the application of §§ 2923.52 and 2923.53 and to adopt other factors deemed appropriate with respect to a "comprehensive loan modification program."[1]

2. Incorporation of Some Comments Submitted by Others.

Both SBx2-7/ABx2-7 and the Draft Regulations appear directed primarily toward institutional lenders servicing their own loans or servicing large portfolios of loans held by other institutional lenders or by secondary market purchasers. The California Mortgage Association ("CMA") on May 6, 2009, submitted a lengthy letter commenting on the Draft Regulations ("CMA Comments"). UTA does not intend to comment on many of the lender and loan servicer issues raised in the CMA comments. However, to save the Commissioners and staff from unnecessary repetition, UTA adopts, approves and incorporates the CMA comments with respect to the Draft Regulations relating to the role of lenders, trustees and of loan servicers; the notice of sale, the ability of lenders to recover foreclosure fees and costs as part of a modification plan[2] and as to the declarations to be "included" in the notice of sale.

3. Definition of "Default" Should Be Modified.

One of the problems inherent in SBx2-7/ABx2-7 is that a covered borrower is one who "occupied the property as his or her principal residence at the time the loan became delinquent."[3] The Draft Regulation (probably unintentionally) narrows the definition of "delinquent" to failure to make payment of an installment within 30 or more days after the date it is due.[4] UTA recommends the following change in Draft Regulation I.A.(b):

> For purposes of these regulations, "delinquent" means that ~~an installment has not been paid~~ *the borrower has defaulted on an obligation in the note, deed of trust, mortgage or related loan documents for* 30 or more days. ~~after the date the installment payment was due~~ *"Delinquent" does not include defaults based upon failure to pay at maturity except where maturity has been accelerated and is subject to reinstatement pursuant to Civil Code § 2924c.*

Defaults can occur for many reasons including, but not limited to failure to pay: (1) property taxes; (2) premiums on insurance; (3) lender advances; and/or, (4) obligations secured by a

[1] Civil Code §§ 2923.53(a)(3)(F) & 2923.53(d).
[2] Such fees and costs would not be recoverable from the borrower where prohibited by law e.g., the Home Affordable Modification Program Guidelines ("HAMPG") issued by the Department of the Treasury on March 4, 2009.
[3] Draft Regulation I.A.(a) 2), p. 1; Civil Code § 2923.52(a)(3).
[4] Draft Regulation I.A.(b), p. 2

senior lien.[5] Broadening the definition of "delinquent" makes sense as the borrower's predicament is no less serious just because the default is other than failure to pay an installment due under the promissory note.

4. "Borrower" should be Defined.

"Borrower" as used in Civil Code §§ 2923.52 et seq. and in the Draft Regulations should be defined to identify the class of person to be included. One of the problems in writing compliance for SB 1137 (Civil Code § 2923.5) was that it contained a poor and ambiguous definition of "borrower". Civil Code §§ 2923.52 et seq. contains no definition of "borrower". Borrower should be defined in the Draft Regulations as follows:

> "'Borrower' means a person who was the original obligor on the note or other secured obligation and who is the trustor or mortgagor under the security device. Borrower shall include a person who has formally assumed the secured obligations with the written consent of the beneficiary or mortgagee"

Frequently, properties are transferred (in whole or in part) to successors (non-assuming grantees) without the knowledge or consent of the lender or loan servicer. No lender or loan servicer constantly checks the public record to see if their security has been transferred without their consent. It is difficult if not impossible for a lender to know that the property is owned by a non-assuming grantee and even more difficult to know if the property is occupied by a non-assuming grantee at the time of a default.

Civil Code § 2923.52(a)(3) provides: "The borrower occupied the property as the borrower's principal residence at the time the loan became delinquent." This definition creates a practical problem for lenders, loan servicers and trustees. Particularly, if the loan was not originated as an owner-occupied primary residence, how is a lender to determine that the property at the time of default is: (1) owner-occupied; and, (2) the borrower's primary residence. At a minimum this ambiguity can be partially addressed by defining "borrower" as set forth above and by the comprehensive loan modification plan requiring proof of these facts.

5. Amend Draft Regulation I.C.(a) 2.(E) and (F).

Undoubtedly, loan servicers and their lenders who will apply for approval of a "comprehensive loan modification program" will want to be responsive to borrowers who apply for such approved programs. Unfortunately, besides borrowers who act in good faith in attempting to resolve their delinquencies, there is a significant minority who abuse laws such as Civil Code §§ 2923.52 et seq. simply to prolong the foreclosure process without any intention of acting in good faith. These individuals will apply for a loan modification after the notice of sale is processed

[5] Civil Code § 2924.7

and most likely just before the date set for the trustee's sale. The problem with Draft Regulation I.C.(a) 2.(E) is not that it requires the servicer in general to act within a "reasonable time period", but rather what is "reasonable" is not defined and may vary depending on the facts. Qualifying a borrower for a comprehensive loan modification program is much like underwriting a new loan. It is going to take some time and definitely will require borrower cooperation. The time period between the mailing and the notice of sale is generally 21-days.[6] If an application comes in after the notice of sale is mailed, UTA is concerned that it will be difficult or impossible for loan servicers to conclude a modification in that amount of time even if a borrower fully cooperates. It is possible that a court may interpret the "reasonable time period" to be very short as the trustee's sale approaches. This will encourage borrowers and their counsel to apply at the last minute knowing that it will compel the loan servicer, lender or trustee to postpone the trustee's sale. This will discourage servicers from applying for approval of loan modification programs.

Because trustees are often dragged into disputes between borrowers and lenders, UTA is concerned that in the absence of further clarification Draft Regulation I.C.(a) 2.(E), its members will become embroiled in unnecessary litigation over what a is meant by "reasonable time period" and whether the loan servicer afford the borrower "reasonable time period". In addition, this uncertainty will cause uncertainly in titles at trustee's sales chilling bidding at trustee's sales. While the Draft Regulation covers the most significant problem in these situations i.e., lack of borrower cooperation or follow through, there must be some cutoff date or safe harbor for lenders, servicers, and trustees. By that we mean, because borrowers will be informed of the availability of a comprehensive loan modification program at the time of Civil Code § 2923.5 notifications (i.e., prior to the notice of default being recorded), borrowers have over 3 months to contact the loan servicer to apply and for the loan servicer to respond in a reasonable period of time.

Draft Regulation I.C.(a) 2.(E) should be modified as follows:

> "(E) *For any application submitted by a borrower and received by the mortgage loan servicer prior to the expiration of 3 months following the recording of a notice of default,* ~~A~~ a servicer shall act on an application to modify a loan within a reasonable time period, and shall have procedures and processes in place to ensure that delays in the process not caused by a borrower do not adversely impact a borrower in the modification or foreclosure process. *Nothing herein is intended to prevent a mortgage loan servicer from accepting and processing borrower applications for a Commissioner approved comprehensive loan modification program received after three months from the date the notice of default is recorded. However,*

[6] Civil Code § 2924f.

failure of the loan servicer to approve such a borrower by the date of the scheduled trustee's sale shall not be deemed to be "unreasonable".

6. Clarify That a Loan May Only Be Modified Once.

Draft Regulation I.C.(a) 2.(H) provides: "A servicer is not required to modify a loan more than once." This sentence should be clarified. Many loans have already been subject to outstanding modification or forbearance agreements that were entered into prior to the operative date of SBx2-7 and ABx2-7. UTA believes Draft Regulation I.C.(a) 2.(H) should be amended as follows:

"A servicer, *beneficiary or mortgagee* is not required to modify a loan more than once *regardless of whether the modification was entered into prior to the operative date of Civil Code sections 2923.52 through 2923.55 or thereafter pursuant to a comprehensive loan modification program approved by the Commissioner*."

Failure to make the recommended change will encourage a borrower currently operating under a modification agreement negotiated prior to the operative date of Civil Code §§2923.52 et seq. (who is not already in default under the modification agreements), to default so that they can obtain another bite of the apple under the approved loan modification program.

7. Requirement of Providing Notice of Sale with Application.

The Draft Regulations regarding the application requires that the applicant "must submit with this application a revised "Notice of Sale" document that meets the disclosure requirement of Civil Code Section 2923.54. The amended "Notice of Sale" must contain a declaration stating whether the servicer has obtained an order of exemption from the Commissioner that is current and valid on the date the Notice of Sale is recorded, and whether the additional 90-day period is applicable. This language does not recognize the distinction between the loan servicer and the trustee (most often not the same entity).

UTA recommends that this requirement be amended as set forth below.

"In addition to other required documentation, an applicant must submit with this application ~~a~~ *declarations* ~~revised "Notice of Sale" document~~ that meets the disclosure requirements of Civil Code Section 2923.54 *and which the applicant shall instruct the trustee to include in the Notice of Sale. The declarations submitted with the application* ~~The amended "Notice of Sale"~~ must *state* ~~contain a declaration stating~~ whether the servicer has obtained an order of exemption from the Commissioner that is current and valid on the

date the Notice of Sale is ~~filed~~ *recorded*, and whether the additional 90-day period is applicable."[7]

In addition, page 18 of the Draft Regulations should be amended as follows:

"Exhibit (2): *Copies of the forms of declarations the applicant will instruct its trustee to include in its notice of sale* ~~A NOTICE OF SALE form~~ in compliance with Civil Code Section 2923.54.

The reason for these amendments is that mortgage loan servicers do not prepare Notices of Sale although they submit to the trustee instructions for sale on behalf of the lender. Trustees under deeds of trust provide and prepare notices of sale. While much of the content of a notice of sale is mandated by Code[8], each trustee's specific form may differ in form and in optional content. Many notices of sale include optional or additional information (e.g., opening bid information,[9] disclosures regarding the property or statements regarding unified sales which include the sale of mixed collateral) some of which is not required by Code. Trustees have cumulatively spent millions of dollars programming into their computer software forms that comply with Civil Code §§ 2924 et seq. Most systems have been developed, however, to add optional information or declarations. When Civil Code § 2923.5 (SB 1137) became effective, trustees "included" in their notices of default and notices of sale, where required, the new declarations required by Civil Code § 2923.5. The same can be done with the requirements in Civil Code §§ 2923.52 et seq. without any change in the general form of notice of sale used by a particular trustee except for the insertion of the necessary declaration which must be "included" in the notice of sale.

This is particularly important because many lenders/servicers use multiple trustees or may want to switch trustees from time to time. The approval of a particular notice of sale, as part of the application process, would mandate (or imply) that the specific approved form must be used. Such a requirement could risk unnecessary litigation where the form deviates from the approved form even where the notice of sale "includes" all of the required declarations. This is not necessary to achieve the goals of SBx2-7/ABx2-7 and may prevent mortgage loan servicers from being able to switch trustees as necessary. The better approach, as suggested above, is to merely require the applicant (loan servicer) to submit for approval the language of the required declarations that the mortgage loan servicer intends to instruct the foreclosure trustee to include in its trustee's form of notice of sale. This amendment would allow the required declarations,

[7] Draft Regulations, Application p. 13.
[8] Civil Code § 2924f.
[9] Civil code § 2924f requires that the notice of sale include the total amount of the obligation being foreclosed upon as well as a reasonable estimate of the foreclosure fees and costs. That section, does not require (nor prohibit) the inclusion of an opening bid where the beneficiary (as is often done) decides to start bidding with an underbid as opposed to a full credit bid (i.e., total amount owed).

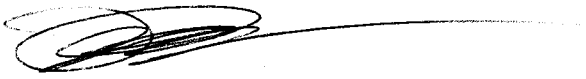
approved by the Commissioner as part of the application for exemption, to be included in the notice of sale of whichever foreclosure trustee is used by the mortgage loan servicer.

Similar to the requirements in SB 1137 (regarding notices of sale and notices of default),[10] SBx7-7/ABx2-7 expressly requires that the "declaration" be "included" in the notice of sale. However, nothing in either statute requires the declaration to be in "sworn" or "under penalty of perjury". (Compare Civ. Code § 2923.5 and Code of Civ. Proc. § 2015.5.) Generally, when the legislature intends for a "declaration" to be sworn or under penalty of perjury, it states so in the statute. For example, Civil Code § 2941.7 (i.e., where a beneficiary cannot be found or where the beneficiary refuses to reconvey after payoff), specifically states that: "The declaration provided for in this section [2924.7] shall be signed by the mortgagor or trustor under penalty of perjury." Civil Code 2923.54 merely requires that the notice of sale "include" the servicer's declaration. Currently, the application for approval of a comprehensive modification program requires that the applicant sign under penalty of perjury. Once the declarations are approved by the Commissioner, the loan servicer should merely instruct and authorize the trustee to "include" the approved declaration in the trustee's notice of sale.

Thank you for your time and consideration regarding this important matter. If you have any questions, feel free to call, e-mail or write.

Respectfully submitted,

ADLESON, HESS & KELLY, a PC



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[10] Civil Code 2923.5(b).