

SENATE JUDICIARY COMMITTEE
Senator Hannah-Beth Jackson, Chair
2019-2020 Regular Session

SB 1148 (Jones)

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AWM

SUBJECT

Mortgages and deeds of trust: foreclosure

DIGEST

This bill alters the default geographic range in which a mortgage trustee may publish a notice of foreclosure sale in a nonjudicial foreclosure, which will, in some circumstances, expand the scope of permissible newspapers in which to publish, with the goal of increasing competition among newspapers and a reduction in publication costs. This bill also attempts to end certain courts' practice of charging first-filing or motion filing fees for declarations of nonmonetary status, filed when a mortgage trustee is a party to an action solely by virtue of their status as trustee, by stating that a mortgage trustee's declaration of nonmonetary status is not a motion or responsive filing.

EXECUTIVE SUMMARY

Existing law requires a mortgage trustee in a nonjudicial foreclosure proceeding to publish a notice of sale three times prior to the sale of the foreclosed property. The notice must be published in a newspaper of general circulation, the location of which is determined by statute. The default requirement is that the notice be published in a newspaper of general circulation in the city in which the property is located all or in part. If the property is not located in a city, or there is no newspaper of general circulation published there, the notice must be published in a qualifying newspaper located in the public notice district where the property is located; if there is no qualifying newspaper in the public notice district, the notice must be published in the county where the property is located; and if there is no qualifying newspaper in the county, the notice must be published in an adjacent county. Existing law is also ambiguous as to the proper filing fee (if any) for a trustee's declaration of nonmonetary status, filed when a trustee believes they have been named as a party solely because of their status as a trustee.

This bill, which is sponsored by the United Trustees Association, would eliminate the initial requirement that the notice be published in the city which the property is located, so that the default publication area is the public notice district in which where the property is located, in hopes that newspapers will reduce their publication costs in response to increased competition. This bill also states that declarations of nonmonetary status are not motions or responsive pleadings, with the goal of preventing courts from charging motion or first-paper filing fees for such declarations. There is no known opposition to the bill.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Permits nonjudicial foreclosure of mortgages and deeds of trust secured by an interest in real property by the beneficiary of the loan (the lender) or the trustee (the party holding the property for the beneficiary), or their agents (collectively, “the trustee”), when the trustor (the borrower) is in default. (Civ. Code, § 2924.)¹
- 2) Sets forth procedures for the trustee to sell the real property securing the mortgage or deed of trust to satisfy the defaulted-on obligation, where permitted by a power of sale clause contained in the mortgage or deed of trust. (Civ. Code, § 2924.)²
- 3) Requires the trustee to publish, at least once a week for three consecutive weeks starting at least 20 days before the sale (Civ. Code, § 2924f(b)(1)), notice of the sale in a newspaper of general circulation, the location of which is determined as follows:
 - a) If the property, or any part of it, is located in a city with at least one newspaper of general circulation, the notice must be published in a newspaper of general circulation published within that city. (Civ. Code, § 2924f(b)(2).)
 - b) If the property is located in a city without a newspaper of general circulation, or is not located in a city, the notice must be published in a newspaper of general circulation published within the public notice district in which the property or some part of it is located. (Civ. Code, § 2924f(b)(2).)
 - c) If the property is located in a public notice district without a newspaper of general circulation, the notice must be published in a newspaper of general circulation published within the county in which the property or some part of it is located. (Civ. Code, § 2924f(b)(2).)

¹ California has a robust statutory scheme setting forth the steps a beneficiary/trustee/agent must follow to foreclose on first-lien home loans secured by owner-occupied residential property containing no more than four dwelling units. (*See, e.g.*, Civ. Code, §§ 2923.5, 2923.55, 2923.6, 2923.7, 2924.10, 2924.11, 2924.15, 2924.18, 2924f(d), 2924i.) Because SB 1148 does not address the pre-sale consumer protection portions of the nonjudicial foreclosure process, this analysis does not discuss them in detail.

² The sale of the property via nonjudicial foreclosure extinguishes the trustee’s right to seek a deficiency judgment from the trustor, even if the sale price was less than the outstanding debt. (Code Civ. Proc., § 580d.; *see, e.g., Passanisi v. Merit-McBride Realtors, Inc.* (1987) 190 Cal.App.3d 1496, 1504.)

- d) If the property is located in a county without a newspaper of general circulation, the notice must be published in a newspaper of general circulation published in a county in California that is contiguous to the county in which the property is located, and, in comparison to the other contiguous counties, has the highest county population. (Civ. Code, § 2924f(b)(1).)
- 4) Does not cap the cost of publishing a notice of sale. (Civ. Code, § 2924c(c).)
 - 5) Permits the trustee to recover from the trustor certain expenses incurred during the foreclosure process, including the cost of publishing the notice of sale, in two circumstances:
 - a) When the trustor is able to cure the default, reinstate the mortgage, and keep their home by repaying all amounts in default plus certain costs expended by the trustee in connection with the foreclosure sale; the costs that must be reimbursed by the trustor to the trustee include the cost of publishing the notice of sale (Civ. Code, §§ 2924c(a)(1), 2924d(a)); or
 - b) When the trustee sells the home at the foreclosure sale and the sales price exceeds the unpaid amount of the loan, the excess is first used to pay the trustee's costs; the costs taken from the excess include the cost of publishing the notice of sale, resulting in a lower payment back to the trustor. (Civ. Code, § 2924k.)
 - 6) Permits the trustee to recover the expenses incurred, including publication costs, from the beneficiary, if the trustor does not cure the default and the property is sold for a price at or lower of the amount remaining on the loan. (Civ. Code, §§ 2924d(b), 2924k.)
 - 7) Permits a trustee, where the trustee has been named in an action or proceeding in which that deed of trust is the subject, and the trustee maintains a reasonable belief that it has been named in the action or proceeding solely in its capacity as trustee and not arising out of the wrongful acts or omissions on its part in the performance of its duties as trustee, to file a declaration of nonmonetary status in the action. (Civ. Code, § 2924l(a).)
 - a) The declaration of nonmonetary status must set forth the status of the trustee as trustee under the deed of trust; that the trustee knows or maintains a reasonable belief that it has been named as a defendant in the proceeding solely in its capacity as a trustee under the deed of trust; the trustee's reasonable belief that it has not been named as a defendant due to any acts or omissions on its part in the performance of its duties as trustee; the basis for that knowledge or reasonable belief; and that the trustee agrees to be bound by whatever order or judgment is issued by the court regarding the subject deed of trust. (Civ. Code, § 2924l(b).)
 - b) The parties to the action have 15 days from service of a declaration of nonmonetary status to object to the declaration. If no objection is served, the trustee shall not be required to participate in the proceeding (including

discovery) and shall be bound by any court order relating to the deed of trust at issue. If a timely objection is served, the trustee shall be required to participate in the action. (Civ. Code, § 2924l(c)-(e).)

- 8) Does not specify whether a declaration of nonmonetary status constitutes a responsive pleading or motion for purposes of determining the appropriate filing fee under Government Code sections 70600-70640.

This bill:

- 1) Eliminates the requirement that, for properties located all or in part in a city in which at least one newspaper of general circulation is published, the notice of sale must be published in a newspaper of general circulation within that city. Instead, the notice could be published in any newspaper of general circulation within the public notice district in which the property is located all or in part.
- 2) States that the filing of a declaration of nonmonetary status, filed by a trustee in an action in which the deed of trust in the subject and the trustee reasonably believes it has been named solely in its capacity as trustee, does not constitute a motion or responsive pleading in the action or proceedings.

COMMENTS

1. Author's comment

According to the author:

SB 1148 proposes two changes to the Civil Code provisions relating to nonjudicial foreclosures of mortgages and deeds of trust. The Civil Code contains comprehensive procedures for nonjudicial foreclosures, which must be strictly complied with. [...]

Nonjudicial foreclosures begin with the recording of a Notice of Default. If the default is not cured within 90 days, the trustee is authorized to record a Notice of Sale. The contents for each notice are specified in the Civil Code. In addition to recording and posting the Notice of Sale, Civil Code section 2924f requires publication once per week for three consecutive weeks in newspapers of general circulation. The place of publication is also specified in the Civil Code; first, in a newspaper of general circulation in the city where the property is located, if any; second, in a newspaper of general circulation in the "public notice district" where the property is located, if any; and finally, in a newspaper of general circulation in the county where the property is located.

Although maximum trustee fees are specified in the statute, there are no limits on publication costs. All allowable fees, including the trustee fees and publication fees, must be paid by borrowers in order to cure defaults and redeem their properties, so it is important that all fees be reasonable. The sponsor believes that publication costs vary significantly around the state, from as low as a few hundred dollars to over \$4000. It appears that areas where there [are] only one allowable newspaper of general circulation contribute[] to higher rates; SB 1148 is designed to incrementally encourage competition, thereby helping keep costs reasonable, by eliminating the reference to newspapers of general circulation in cities. If enacted, trustees would first look to public notice districts for a newspaper of general circulation, and then to counties. The California News Publishers Association has been consulted about this proposal and is neutral.

Second, SB 1148 proposed to amend Civil Code section 2924*l*, relating to the filing of a document known as the "declaration of nonmonetary status." For many years the law has allowed trustees to record this declaration, when they believe they have been named in a lawsuit simply because of their status as trustees, and not because of any act or omission. In the declaration, trustees indicate that they will be bound by any order or judgment issued by the court. The declaration is served on the parties, who have 15 days to object, in which case the trustee is required to participate in the action or proceeding.

Courts differ on how they treat the filing of this declaration, which is basically a paper withdrawing from any defense in the underlying action. Some courts treat the filing as an answer subject to the first filing fee, while others accept the document without fee. SB 1148 clarifies that the declaration is not a motion or responsive pleading. Of course, should the trustee be required to participate in the action, an answer would be required.

2. Widening the geographic range in which notices of sale may be published may result in lower publication costs and savings to some homeowners.

Based on information provided by the author, it appears that publication costs for notices of sale vary widely around the state, ranging from a few hundred dollars to a few thousand. In many cases, the cost of publishing a single notice of sale could exceed the homeowner's monthly mortgage payment. Given that a trustee must publish three notices of sale prior to the foreclosure sale,³ the high publication costs in some parts of the state can significantly increase the price of foreclosure – a price that is ultimately borne by California consumers when (1) they are able to cure the default by paying the back-due mortgage payments and all costs incurred, or (2) the foreclosure sale price is greater than the amount due on the mortgage, and the costs incurred are deducted from the homeowner's excess.⁴ In circumstances where the homeowner cannot cure the default and there is no excess, publication costs are ultimately paid by the foreclosing lender.⁵

This bill proposes to encourage newspapers to reduce their publication costs by expanding the default publication range for notices of foreclosure sales: instead of being required to publish the sales notice in a newspaper of general circulation in the city where the property is located, the trustee would be required to publish the sales notice in a newspaper of general circulation in the public notice district where the property is located.⁶ To the extent that many public notice districts are coterminous with cities, this bill would have no effect on competition in those areas.⁷ But in other areas, widening the default publication range could result in trustees having a larger selection of newspapers in which to publish the notice of sale, which could, in turn, result in newspapers lowering the cost of publishing such notices in order to remain competitive.

3. The proposed clarification to the nature of the declaration of nonmonetary status would create a more uniform approach among courts with respect to filing fees.

A trustee may file a declaration of nonmonetary status when the trustee, in good faith, believes that they have been added as a party to an action solely in their capacity as trustee and not due to their acts or omissions.⁸ If no party challenges the declaration, the trustee is excused from participating in the lawsuit and need not file a responsive pleading (answer) to the complaint.⁹

³ Civ. Code, § 2924f(b)(1).

⁴ Civ. Code, §§ 2924c(a)(1), 2924d(a), 2924k.

⁵ Civ. Code, §§ 2924d(b).

⁶ This default rule applies only to properties located all or in part in cities in which there is at least one newspaper of general circulation. (Civ. Code, § 2924d.) For cities not located all or in part in a city, or not located all or in part in a city with a newspaper of general circulation, the default publishing range is already the public notice district in which the property is located all or in part. (*Ibid.*)

⁷ See, e.g., Gov. Code, § (Imperial County public notice districts are all individual cities).

⁸ Civ. Code, § 2924l.

⁹ *Bae v. T.D. Service Co. of Arizona* (2016) 245 Cal.App.4th 89, 105.

The Government Code does not set a filing fee for declarations of nonmonetary status.¹⁰ In the absence of a statutory fee, different courts around the state charge different fees, or no fees at all. According to the author, most courts charge no fee, but some courts charge a first-paper filing fee (despite case law making clear that a trustee who files a declaration need not file an answer) and others charge a motion filing fee. First-paper filing fees are generally over \$400,¹¹ while motion fees tend to be \$60.¹² Trustees are thus presented with a wide range of potential filing costs under the current piecemeal approach. This bill's statement that declarations of nonmonetary status are not motions or responsive pleadings could be used to inform clerks that it is improper to charge fees for those documents. As discussed below, however, the author's goal of preventing courts from charging a filing fee might be better accomplished with a minor amendment. And while the courts currently charging first-paper or motion filing fees would lose some revenue under this bill, there has been no opposition or other information provided suggesting that the loss of those filing fees would be significant.

4. Amendment

The bill as currently drafted does not expressly state that courts may not charge a filing fee for the filing of a declaration of nonmonetary status; it merely states that a declaration of nonmonetary status is not a motion or responsive pleading, and does not mention filing fees at all. There is, therefore, nothing to prevent courts from devising other filing fees to impose on declarations, even if this bill passes.

In order to more directly accomplish the goal of preventing filing fees being charged for declarations of nonmonetary status, the author has agreed to the following amendment:

Proposed Amendment

(h) A fee shall not be charged for the filing of a declaration of nonmonetary status pursuant to this section. ~~The filing of a declaration of nonmonetary status pursuant to this section does not constitute a motion or responsive pleading in the action or proceedings.~~

¹⁰ See Govt. Code, §§ 70600-70640.

¹¹ The state minimum for answer filing fees is \$435 (see Gov. Code, §§ 70602.5, 70602.6, 70612), but certain jurisdictions charge more (see, e.g., Superior Court of Riverside, Civil Fee Schedule for 2020 (effective 1/20/20) [\$450 first paper/answer fee]).

¹² Gov. Code, § 70617, subd. (a).

SUPPORT

United Trustees Association (sponsor)

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation: None known.