

**SENATE JUDICIARY COMMITTEE**  
**Senator Thomas Umberg, Chair**  
**2021-2022 Regular Session**

SB 1323 (Archuleta)  
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Hearing Date: May 3, 2022  
Fiscal: No  
Urgency: No  
TSG

**SUBJECT**

Foreclosure: equity sale: multiple listing

**DIGEST**

This bill inserts a new stage into California's non-judicial foreclosure process during which an attempt would be made to sell the property through a multiple-listing service before the property is auctioned off, if the total amount owed by the homeowner does not exceed 90 percent of the appraised market value of the property.

**EXECUTIVE SUMMARY**

Under California's non-judicial foreclosure system, sale of a property that has been foreclosed upon is accomplished through a trustee sale. A trustee sale is a public auction. At a trustee sale auction, bidders must be prepared to pay on the spot, in full, and they must be willing to accept the property in "as is" condition. The highest bidder gets the property and the trustee distributes the proceeds. First, the trustee pays off the lender for the outstanding balance on the loan plus the costs of the foreclosure. Then, if there is a balance left over, the trustee returns that money to the former homeowner.

The use of auctions to carry out trustee sales has the virtue of being relatively simple and efficient but can be criticized for at least two reasons. First, trustee sales by auction facilitate the consolidation of residential properties in the hands of institutional investors at the expense of owner-occupants. The nature of trustee sale auctions means that only investors with ready access to large amounts of cash have any realistic chance of purchasing the property that has been foreclosed upon. There is little to no realistic possibility that future owner-occupants will be able to buy the property at the auction itself. Second, trustee sales by auction can cause the former homeowners to lose part – and sometimes a lot – of any equity they have built up in the property. This can happen if there is some sort of collusion taking place on the part of the trustee or the competitors at the auction. Even where everything is done properly, however, standard economic theory dictates that trustee sales will generally yield a lower price than the property would fetch on the open market, because the pool of people competing to buy

the property at a trustee sale is restricted to those who can purchase the property outright and excludes potential buyers who might be willing to pay more, but would have to rely on financing to do it. The author and sponsors of this bill cite examples and studies indicating that homeowners – in particular homeowners who are elderly, limited-English proficient, and/or homeowners of color – have lost hundreds of thousands of dollars of equity as a result of these dynamics, thus contributing heavily to racial wealth gaps that endure over generations.

This bill proposes a market-based solution to addressing the shortcomings of trustee sales by auction. Specifically, in those cases where there is sufficient equity in the property, this bill would insert a step in the non-judicial foreclosure process prior to a trustee's sale. During this step, the trustee would task a real estate agent with trying to sell the home through a multiple-listing service, much as most properties are sold outside of the foreclosure context. This would expand the pool of prospective buyers to include owner-occupants and others needing to finance the purchase, thereby driving up sale prices and helping to ensure that homeowners lose as little equity as possible through the foreclosure process.

The bill is sponsored the Consumer Federation of California. Support comes from consumer advocates who laud the bill's potential to ensure homeowners are not stripped of the equity they have built up in their homes. Opposition comes from trustee trade associations, who contend that the bill would encroach on homeowners' rights and options in the foreclosure process and might not offer adequate protections for the people purchasing properties in foreclosure. The bill's proposed changes have no direct fiscal impact on the state. If the bill passes out of this Committee, it will next be heard on the Senate Floor.

### **PROPOSED CHANGES TO THE LAW**

Existing law:

- 1) Sets forth non-judicial procedures through which a lender may foreclose upon the property securing the loan and, through the power of sale contained in any deed of trust or mortgage, force sale of the property at auction. (Civ. Code §§ 2920-2944.10.)
- 2) Specifies that all sales of property under the power of sale contained in any deed of trust or mortgage shall be held in the county where the property or some part thereof is situated, and shall be made at auction, to the highest bidder, between the hours of 9 a.m. and 5 p.m. on any business day, Monday through Friday. (Civ. Code § 2924g.)

This bill:

- 1) Defines the following terms, among other things:

- a) "Equity sale" means a sale of property under the power of sale contained in any deed of trust or mortgage where the total amount of the indebtedness does not exceed 90 percent of the appraised market value of the property.
  - b) "Nonequity auction sale" means a sale of property under the power of sale contained in any deed of trust or mortgage, where the total value of the indebtedness exceeds 90 percent of the appraised market value of the property.
  - c) "Equity threshold" means 111.1 percent of the total value sum of the indebtedness plus other encumbrances.
  - d) "Qualifying offer" means an offer meeting or exceeding the listed sale price of the property at the time the offer is received by the trustee that is accompanied by evidence satisfactory to the trustee that the prospective purchaser has either the funds to purchase the property or preapproval by a lender to finance the purchase.
- 2) Provides that a trustee shall conduct a nonequity auction sale by public auction in accordance with existing law.
  - 3) Provides that a trustee shall conduct an equity sale by:
    - a) hiring a licensed realtor in the county where the property or some part of the property is situated;
    - b) publicly listing the property for sale on the California Multiple Listing Service with an initial listing price at the property's appraised value;
    - c) selling the property in its then-existing, "as is" condition with no obligation for the mortgagee, trustee, beneficiary, or authorized agent to stage, repair, or otherwise improve the property;
    - d) accepting any qualifying offer and if there are multiple qualifying offers, then selecting between the qualifying offers based on price, contingencies, financing, closing date, and any other factor ;
    - e) reducing the list price by four percent if the trustee has not received a qualifying offer within 20 days of listing the property and repeated this reduction for up to six times; and
    - f) selling the property at public auction in accordance with existing law if no qualifying offer has been received after six price reductions or if further price reduction would make the list price lower than the equity threshold.
  - 4) Specifies that in an equity sale that is not an auction, all of the following apply:
    - a) each offer made by a prospective purchaser shall be deemed to be a revocable offer that may also be made contingent upon the purchaser's satisfactory inspection of the property and ability to obtain financing;
    - b) an offer for the purchase of the property shall not be accepted by the mortgagee, trustee, beneficiary, or authorized agent without evidence that the prospective purchaser has either the funds to purchase the property or preapproval by a lender for financing the purchase;
    - c) a subsequent offer by the same prospective purchaser shall be a cancellation of the prior offer;

- d) the trustee's equity sale shall be deemed final upon acceptance and removal of all contingencies of the last and highest offer from an offeror; and
  - e) a sale under this subdivision shall be automatically rescinded for a failure of consideration if the purchase funds are not available for withdrawal, as defined, or if the offeror fails to remove a contingency as required by the purchase agreement.
- 5) If an equity sale that is not an auction is automatically rescinded pursuant to 4(e), above, then the trustee shall send a notice of rescission for a failure of consideration to the offeror subject to the rescission if the address of the offeror is known to the trustee and the interest of any lienholder shall be reinstated in the same priority as if the previous sale had not occurred.
  - 6) Authorizes a trustee to charge up to \$500 from the proceeds of the property sale to cover costs incurred for any appraisal of the property.
  - 7) Makes any person who willfully commits any act to mischaracterize an equity sale as a nonequity auction sale, including intentional appraisal below market value, liable for wrongful foreclosure.
  - 8) Makes the trustee liable to the homeowner for the difference between the sale price and the amount of the qualifying offer if the trustee negligently fails to accept a qualifying offer within three business days of receiving it.
  - 9) Makes any person who willfully restrains an offer in an equity sale liable to the homeowners for the difference between the sale price and the listed price at the time the action to restrain the offer occurred.
  - 10) Modifies the content of required notices to conform with the bill's substance.
  - 11) Make other technical and conforming changes.

### COMMENTS

#### 1. Background on the non-judicial foreclosure process in California

When a homeowner falls behind on paying their mortgage, the lender becomes entitled to foreclose on the property. California gives mortgage lenders two ways to foreclose on a property. The lender can proceed through the judicial process. (Code Civ. Proc. §§ 725a - 730.5.) Although judicial foreclosures hold out to the lender the possibility of obtaining a money judgment against the homeowner for any remaining balance still owed after the foreclosure sale, the process is slow and cumbersome. As a result, in the vast majority of California foreclosures, the lender proceeds on a non-judicial

foreclosure track. The modifications proposed by this bill apply only to such nonjudicial foreclosures.

The nonjudicial foreclosure process includes many nuanced requirements, but the basic outline is relatively simple. When homeowners miss a mortgage payment, the lender can initiate the foreclosure process by sending the borrower an official Notice of Default. (Civ. Code § 2924.) The borrower then has 90 days to try to cure the default. If the borrower is unable to do so, then the lender can proceed to file a 21-day Notice of Trustee's Sale indicating to the borrower that the property will soon be sold to cover the delinquency. However, the borrower has until up to five days before the sale to cure the default and thereby stop the trustee sale.

Under existing law, the trustee sale itself is a public auction that must be conducted openly in the county where the property is located. (Civ. Code § 2924g.) In theory, any member of the public can bid to purchase the property. However, the winning bidder must pay the trustee the amount of the bid immediately and accept the property in "as is" condition. As a practical matter, therefore, the people who bid on property at trustee sales are typically investors with access to large amounts of liquid assets and a certain tolerance for the risk that the properties they purchase at auction may require major rehabilitation.

Once the trustee sale is complete, the trustee distributes the proceeds. First, the remaining balance on the mortgage and the costs associated with the foreclosure get paid. If there is any money left over after that, the trustee returns it to the former homeowner.

## 2. Evidence of the problem the bill is intended to address

The fundamental premise behind this bill is that the current process for conducting trustee sales does not result in a sale of the property at its fair market value. Instead, the winning bids at trustee sales are frequently below – and sometimes way below – what the property could fetch if it were sold on the open market. As a result, many homeowners whose properties are worth more than they have left to pay on the mortgage often end up losing some or all of that equity in the foreclosure process.

To illustrate the problem, the author and sponsors offer the following examples:

- Teresita Pobre's \$800,000 San Francisco home was sold by Wells Fargo at a foreclosure auction for only \$51,837.21.<sup>1</sup> Over 24 years of home ownership, Ms. Pobre had built up a lifetime savings of nearly \$750,000 in home equity, but she

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<sup>1</sup> *Teresita Pobre v. Wells Fargo, et al.*; Superior Court of California, County of San Francisco, Case No. CGC-18-571147, Second Amended Complaint. The author and sponsor report that this case was ultimately settled out of court, the merits of the allegations were never ruled upon by a judge or jury, and Defendants, including Wells Fargo, admit no liability.

was only entitled to only one single penny after the auction was done. Her life savings was extinguished, and an investor took title to her property after paying only 7% of its market value. Ms. Pobre was 77-years old, a widow, an immigrant, retired after a career as a teacher's aide, and the caretaker for her dependent adult daughter. Her home and her entire life savings in home equity were taken from her and she was being evicted from her own home with nowhere to go.

- Johnnie Brown's two properties (her Oakland residential home and Oakland rental property), worth over \$1.6M combined, were bundled and sold in a single foreclosure auction for only \$205,000.<sup>2</sup> Johnnie Brown was 86 years old with the onset of cognitive decline, and she built up her substantial life savings over a career as a postal worker. Ms. Brown lost over \$700,000 in home equity (her entire life savings), her home, and her rental property. Ms. Brown, at 86 years old, is now at risk of homelessness, as is the rest of her immediate family, who relied on her for financial and housing support.

Academic research suggests that the stories above are but extreme examples of wider phenomenon. Using real estate data, researchers at UC Berkeley and the National Institute of Economic Research (NIER) recently calculated that there were 21,000, 17,000, 15,000, and 12,000 foreclosure auction sales in California during the years 2017-2020 with an average estimated equity loss of \$115,000 or 22 percent off of the market price for each. Though the researchers noted that such calculations are "difficult" and "not necessarily interpretable as the average loss of equity for a foreclosed mortgagor due to the auction process" alone,<sup>3</sup> any differential between fair market value and the auction price has the potential to strip homeowners of equity.

Because they have often been paying their mortgages over many years, elderly homeowners are among those most likely to have significant equity built up in their homes. For that reason, they are among those with the most equity to lose in a foreclosure scenario. The UC Berkeley and NIER researchers also found that equity stripping through the foreclosure process had a disparate racial impact.<sup>4</sup> Putting this altogether and aggregating this data, the author and sponsor of this bill conclude that "on average, approximately \$1.85 billion in accrued home equity is taken out of California's most vulnerable communities through foreclosure losses every year." The direct beneficiaries of this transfer of wealth are institutional investors and other financial prospectors who are able to purchase these properties at the foreclosure auction.

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<sup>2</sup> *Johnnie Brown v. Ali Abayachi, et al.*, Superior Court of California, County of Alameda, Case No. RG20079500, Plaintiff's Third Amended Complaint.

<sup>3</sup> E-Mail Correspondence Between Sil Vossler and Francis Wong (Mar. 29, 2022) on file with the Committee.

<sup>4</sup> Kermani & Wong. *Racial Disparities in Housing Returns* (Mar. 22, 2022) [https://www.dropbox.com/s/8s9zvd39wk7gzjp/kermani\\_wong\\_returns.pdf?dl=0](https://www.dropbox.com/s/8s9zvd39wk7gzjp/kermani_wong_returns.pdf?dl=0) (as of Apr. 28, 2022) at p. 1.

### 3. Why trustee sales tend to fall short of fair market value

Trustee sales are public auctions held out in the open. In theory, that competitive bidding should result in the maximum possible price for the property that has been foreclosed upon. In practice, there are at least three reasons why trustee sales fail to result in the highest possible sale price.

One possibility is that the trustee sale could be corrupt. Two cases from around the time of the 2008 financial crisis illustrate this problem.<sup>5</sup> According to the sentencing memoranda, in these cases, a group of people allegedly conspired to rig the trustee sales for “thousands of properties.” The group apparently arranged to restrain the bidding at the trustee sale auctions so that particular investors could win the auction at a lower price point. Each rigged auction resulted in “hundreds of thousands of dollars” in lost equity for the former homeowners.

Even where no corruption is involved, however, standard economic theory supports the conclusion that trustee sales are not the optimal way to obtain the highest possible price for the property being foreclosed upon. Under the best conditions for competition at a trustee sale, the pool of competitors is limited to those who can pay immediately and in full. In many cases, therefore, the winning bid will be lower than it would be if people purchasing with financing were competing as well.

Finally, since bidders at a foreclosure auction must accept the property in “as is” condition, there is often some risk that the property will turn out to be in such bad shape that significant investment in repairs will have to be made. Auction bids may reflect investors’ concerns about this risk.

### 4. The solution proposed by this bill

To address the shortcomings of trustee sales conducted by public auction, this bill proposes a common-sense, market-based solution: if there is equity in a property undergoing foreclosure then, before resorting to a public auction, try selling the property on the open market first.

Specifically, the bill would direct a foreclosure trustee to have the property appraised before issuing the Notice of Sale. If the amount that the homeowner owes is more than 90 percent of the appraised value of the property, then the bill directs the trustee to sell the property at public auction, just as the trustee would under existing law. However, if the homeowner owes 90 percent or less than the appraised value of the property, then the bill directs the trustee to hire a real estate agent to list the property for sale through

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<sup>5</sup> See *United States v. Michael Marr* (The Marr Case), U.S. District Court – Northern District of California, Case No. 14-cr-0580-PJH - sentencing memorandum; *United States v. Javier Sanchez* (The Sanchez Case), U.S. District Court – Northern District of California, Case No. R 4:14-00580 PJH. Sentencing memorandum.

a multiple listing service, much as most homes are bought and sold outside of the foreclosure context.

Initially, the agent would list the property at its appraised value. If someone offers to buy it for that amount and demonstrates that they have the cash or financing to make the purchase, then the trustee would be obliged to accept the offer and proceed with the sale. If multiple offers come in at or above the appraised value, the trustee would have discretion to choose between them based on the price offered as well as other factors like the closing date, contingencies, and financing. If no one offers to buy the property at the appraised value after 20 days, then the trustee is authorized to reduce the list price for the property by four percent. This pattern repeats with further price reductions every 20 days. If the property still has not sold after six price reductions or if the price reductions result in a situation where it is no longer clear that the proceeds of the sale will result in the return of any money to the homeowner, then the trustee simply reverts to selling the property at auction.

The author and sponsors point out that this framework is consistent with the recommendations of a 2018 Yale Law & Policy Review article by University of Minnesota Law Professor Ann Burkhardt, titled “Fixing Foreclosure.” (36 Yale L. & Pol’y Rev. 315.) After reviewing the origins of the foreclosure system and its flaws, Professor Burkhardt concludes that foreclosures should be conducted by: “Initially listing the property for sale with a real estate agent, rather than first auctioning it [...]” (*Id.* at 318.)

##### 5. Potential benefits of this solution

There are at least two clear potential benefits to the bill’s proposal to have trustees attempt sell the property on the open market before resorting immediately to an auction.

*a. Ensure that the homeowner receives the equity that they have built up in the home*

For the reasons previously discussed in this analysis, opening up sale of the property to everyone should result, on average, in higher sales prices for the properties. In turn, this means that, on average, trustees will return more money to homeowners in the wake of foreclosure. While this will not prevent people from losing their homes, it should ensure that they do not lose whatever equity they have built up along with it.

*b. Broaden access to the market for homes that have been foreclosed upon*

The immediate impetus for this bill appears to have been cases like those described in the Comment 2, above, where elderly homeowners lost a lifetime of equity when their homes sold at auction for a small fraction of the actual value. Yet the bill also broadens access to the market for foreclosures. As things stand presently, only investors with large amounts of cash immediately available stand a chance of purchasing a property



that has been foreclosed upon. Ordinary people interested in buying a home to live in are effectively excluded. The result is that today's foreclosure process often results in the transfer of ownership from owner-occupants to institutional investors who may elect to rent the home out or even to leave it vacant while the investor waits for its value to appreciate.

By contrast, this bill enables anyone to try to buy foreclosed homes, whether they have the cash in hand to make the purchase, or have to rely on financing. This means that potential owner-occupants will have at least the possibility of purchasing a home that has just been foreclosed.

## 6. Opposition claims

Opposition to this bill comes from a coalition of lenders and mortgage-related service providers. The opponents raise what are essentially four objections.

### *a. The robust real estate market renders this bill unnecessary*

SB 1323's opponents begin by suggesting that this bill is unnecessary at present because foreclosure rates are low and bidding at trustee sale auctions is robust when they do happen. In this regard, it is true that the current real estate market is strong, but this also means that homeowners have more equity in their homes than usual and therefore more to lose if that equity is stripped from them. Moreover, if bidding at trustee sale auctions is robust at present, it stands to reason that offers on the open market would be robust as well, so it is not immediately clear that any harm would come from opening up foreclosure sales in the way this bill proposes. Finally, the history of the real estate market is one of boom and bust: low foreclosure rates now are not necessarily indicative of where real estate will stand just a few years or months from now. Improving foreclosure procedures now may represent a wise hedge against more difficult times in the future.

### *b. The specter of fraud or collusion*

The opponents to the bill next raise the prospect of fraud or collusion under this bill's proposed framework. The idea seems to be that the appraiser, trustee, and real estate agent might conspire together to lowball the value of the property and then sell it at that reduced value on the open market. The bill contains two mechanisms that should reduce the risk that any such collusion could take place. First, the bill requires that the appraiser to be a "licensed neutral third-party appraiser" meaning "an appraiser licensed by the Bureau of Real Estate Appraisers who is not an employee of the beneficiary, trustee, mortgagee, or their agents or successors." Second, the bill specifies that anyone who willfully commits any act to mischaracterize an equity sale as a nonequity auction sale, *including intentional appraisal below market value*, is liable for wrongful foreclosure.

It is not immediately clear why such corruption is any more likely in the context of an open market listing than it would be in the context of a foreclosure auction. The opponents seem to rely on the ostensibly open, public nature of the auction as providing an extra layer of protection against foul play, but as the cases described in Comment 2, above, illustrate, that reliance may be misplaced.

*c. Interaction with homeowners' other legal options*

As a third possible concern about the bill, the opponents assert that having trustees hire a real estate agent and attempt to sell the property on the open market might interfere with the homeowners' ability to exercise legal options that the homeowner has. Specifically, the opponents point out that homeowners in foreclosure can attempt to redeem the property, endeavor to sell the property themselves, or try to put a halt to the foreclosure process by declaring bankruptcy.

As the author and sponsors respond, however, SB 1323 merely changes the method of accomplishing the trustee sale, not anything else about the process. Thus, just as a homeowner can file for bankruptcy at any point before the public auction under current law, a homeowner could file for bankruptcy at any point prior to the acceptance of an offer to purchase the property made under the bill. The effect of filing bankruptcy – an immediate stay of the foreclosure process pending further direction from the bankruptcy court – would be the same in either instance. In fact, because it will likely take longer for a trustee sale to be completed through listing on the open market, the bill may actually provide homeowners with more time in which to file bankruptcy, should they elect to pursue that option, than they have under existing law.

Similarly, under existing law, the homeowner faces a deadline of five days prior to the trustee sale to find some way to redeem the property by curing the default, perhaps through refinancing or assistance from a relative, for instance. (Civ. Code § 2924c(e).) SB 1323 operates with the same deadline. The only difference is what happens at the end of those five days: under existing law, it is an auction; under SB 1323, it might be the listing of the property for sale on a multiple listing service instead. Still, the opponents state that, in practice, trustees often allow homeowners to redeem their properties even after the technical five-day deadline has passed. It is not clear why trustees could not continue to do this under SB 1323 and, again, because sale of the property through a multiple listing service is likely to take longer than an auction would, the homeowner would probably have more of this post-deadline time in which to find a way to redeem the property under SB 1323 than they do now.

The opponents' concerns about the bill arguably have more traction as they relate to a scenario in which the homeowner makes their own attempt to sell the property. In such a scenario, SB 1323 could result in two simultaneous and competing real estate listings for the same property. The author and sponsors contend that such scenarios are likely to be rare; after all, a homeowner who is aware that selling the property would prevent

foreclosure is likely to have exercised that option before the process reaches the point of a trustee sale. In any event, they argue, in the worst case scenario the homeowner's competing effort to sell the property would only result in the sale of the property at auction, as it would be under existing law.

*d. Impacts on post-foreclosure buyers*

As a fourth source of concern about the bill, the opponents argue that the bill could lead unsuspecting buyers to purchase properties that turn out to be in terrible condition. Under the present system of trustee sales by auction, the bidders must accept the property in "as is" condition, but these bidders account for the associated risk and, in any event, they do not plan to try to occupy the property as their home. The bill would enable any member of the public looking to buy a home to put in an offer on foreclosed property. Unlike an ordinary real estate transaction, however, the appraiser and real estate agent may not have had much access to the property. That, combined with the homeowner's understandable unhappiness about losing their home, significantly increases the chances that the buyers will encounter problems with properties only after making the purchase. Depending on the severity of those problems, they could wind up being quite costly for the purchasers.

In response, the author and sponsors point out that the bill enables buyers to protect themselves against these bad outcomes by placing contingencies on their purchase offer. For example, the offer might be made contingent on the property passing an inspection. If the homeowner refused to allow the inspection to take place, the contingency would not be met and the prospective purchaser would not be held to their offer. Of course, a potential buyer might elect to forgo or waive contingencies in order to complete the purchase. In a hot real estate market, the pressure to do so may be strong. However, there does not appear to be any reason why that dynamic would be more acute in relation to properties on the market due to foreclosure than it is in relation to any other property.

*e. The resistant homeowner scenario*

Finally, the opponents emphasize that sale of a home on the open market ordinarily involves a willing, cooperative seller. That seller voluntarily provides access to the property for appraisals, inspections, and open houses, for instance, and can usually be trusted to turn over possession of the property without damaging it. By contrast, the opponents point out, someone losing their home through foreclosure is not a voluntary participant in the sale of the property – it is a forced sale, taking place against the homeowner's will. The opponents are highly skeptical that homeowners in this predicament will provide the kind of access to the property that is ordinarily part and parcel of a real estate sale. They further raise the specter of disgruntled former homeowners trashing the property or stripping it of valuable parts on their way out. The proponents of the bill respond that the use of contingencies should operate protect

buyers against most of these potential scenarios. If the contingencies are rarely met, however, few offers will ever go through, which could mean that the bill's required attempt to accomplish sale of the property by listing it on the open market would often turn out to be a futile endeavor.

It should also be noted that the use of contingencies would not solve the problem if a homeowner refused to provide access to the property for the initial appraisal. Such a scenario would inhibit proper assessment of the fair market value of the property, which is a linchpin for how this bill operates. By the terms of the bill, the appraised value determines what method will be used to sell the property and, if the property is to be sold on the open market, then it also determines what constitutes a qualifying offer that the trustee must accept. Given the importance of a proper appraisal at the outset, the author may wish to consider enabling the trustee to proceed by auction in scenarios where the independent appraiser indicates that resistance from the homeowner has made it impossible for them to assess the fair market value of the property adequately.

7. Why would a person with equity in their home wind up facing a foreclosure sale?

This bill only alters the trustee sale procedures when there is equity in the home that is going through foreclosure. In other words, the home is worth more than what the homeowner still owes on the mortgage note. A homeowner in this position should have several options other than losing the home through foreclosure. The homeowner might be able to refinance the loan, use the equity in the home to secure other sources of credit, or sell the property themselves and pay off the outstanding balance. Exercising those options may not always be easy and may not save the person's home, especially where the homeowner's current income is insufficient to support a revised payment plan. Still, a logical question in connection with the bill is why anyone with equity in their home would ever end up facing the sale of their home through foreclosure in the first place?

The short answer to this question is twofold. First, homeowners are not always aware of their options due to any number of factors including language barriers, cognitive decline, lack of access to legal advice, reluctance to seek legal advice, or some combination of all of the above.<sup>6</sup> Second, even in the absence of these factors, people are not always rational economic actors when it comes to their homes. Faced with the prospect of foreclosure, some homeowners become something like the proverbial deer in the headlights: objective reasoning and financial self-interest may all indicate that

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<sup>6</sup> See *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-income Americans* (Jun. 2017) Legal Services Corporation (prepared by NORC at the University of Chicago) <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> (as of Apr. 28, 2022) at pp. 29-30.

taking action to avoid foreclosure is the best path forward, but homeowners may refuse to take action nonetheless.<sup>7</sup>

It can be argued that more should be done to prevent homeowners with equity in their property from ever reaching the point of facing a foreclosure sale. For example, as an alternative to this bill, the opponents suggest development of increased notification to homeowners about their options in the face of foreclosure. As no specific proposal along these lines has been made, it is not possible to evaluate the merits of the idea in detail. However, two things may be worth noting about the concept in general. First, the Legislature and the lending industry have already taken a number of steps, mostly in the wake of the last foreclosure crisis, to provide more notice, counseling, and information to homeowners at risk of losing their homes. (*See, e.g.*, legislation related to the Homeowners Bill of Rights (HBOR), detailed under Prior Legislation, below.) For instance, the law now requires pre-foreclosure notices to be provided in multiple languages and lenders must contact borrowers who have fallen behind in order to go over options for avoiding foreclosure. In other words, the Legislature and the industry have already explored and enacted measures to try to avoid foreclosures that can be prevented, yet some people with equity in their homes continue to go through foreclosure anyway. Second, nothing in SB 1323 would inhibit the pursuit of additional policies to prevent people with equity in their homes from going into foreclosure in the first place. In the meantime, however, enactment of SB 1323 would probably help to ensure that when these scenarios do arise, the homeowner is not deprived of the equity that they have built up in their home.

#### 8. Arguments in support of the bill

According to the author:

California's foreclosure process obscures and legitimizes the large-scale extraction of billions of dollars of wealth from low-income communities. Foreclosed homeowners are often low-income, elderly, immigrant, or disabled members of California's most vulnerable communities. For members of these communities, their home is often their only asset, and home equity is their only lifetime savings. Yet, due to the way foreclosure auctions are performed, the foreclosed homeowner often loses tens or hundreds of thousands of dollars of accrued home equity unnecessarily in foreclosure, because the lender will sell their property for below market value to cash investors at auction. For the homeowner, the loss of even a single dollar of this equity is irreplaceable, putting them at increased risk of poverty and homelessness. This bill

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<sup>7</sup> *See, generally, Low, Psychic Moving Costs and Mortgage Default with Positive Equity* (March 31, 2022). Consumer Financial Protection Bureau Office of Research Working Paper No. 2021-01 <https://ssrn.com/abstract=3974020> (as of Apr. 28, 2022).

addresses this problem by allowing for the foreclosed home to be sold for its appraised value by a licensed realtor on a Multiple Listing Service, allowing the homeowner to recover their full equity in every applicable sale. This is a social justice issue that will combat the racial wealth gap by allowing predominantly low income and communities of color to preserve their home equity in foreclosure sales.

As sponsor of the bill, the Consumer Federation of California writes:

The auction process, on aggregate, results in billions of dollars of home equity taken out of California's most vulnerable communities by cash investors at auction. This process is far too often inhumane, putting low-income people at risk of housing instability and even homelessness. It also inhibits the social mobility of low-income families and serves to perpetuate the racial wealth gap in California. The current process disproportionately affects minority communities and eliminates generational wealth gains in those communities. SB 1323 would end this unfair practice, allowing California's most vulnerable communities to retain their accrued wealth.

9. Arguments in opposition to the bill

In opposition to the bill, a coalition of eight banking and lending-related trade associations writes:

The bill proposes radical changes to California's nonjudicial foreclosure process which go back nearly a century, by creating a process for foreclosure trustees to list and sell homes without the consent or involvement of the homeowner. Although well-intentioned, we believe that the new sales process ignores the legitimate rights of homeowners, creates fraud risks which would harm the very homeowners the bill is designed to protect, and subjects buyers to enormous risks of not receiving the kind and quality of homes they have contracted to purchase.

**SUPPORT**

Consumer Federation of California (sponsor)  
Aho Financial Forensics  
Bet Tzedek Legal Services  
California Advocates for Nursing Home Reform  
California Elder Justice Coalition  
California Low-Income Consumer Coalition

California Reinvestment Coalition  
Choice in Aging  
Consumer Attorneys of California  
Disability Rights California  
Elder Law & Advocacy  
Housing and Economic Rights Advocates  
Indivisible South Bay Los Angeles  
Justice in Aging  
Law Foundation of Silicon Valley  
Law Office of Dennis Fordham  
Law Office of Peter S. Stern  
Legal Assistance for Seniors  
National Adult Protective Services Association  
National Association of Consumer Advocates  
National Consumer Law Center  
National Housing Law Project  
Open Door Legal  
Public Counsel  
Public Interest Law Project  
Wilcox Law Firm, P.C.  
WISE & Healthy Aging

#### **OPPOSITION**

California Bankers Association  
California Credit Union League  
California Community Banking Network  
California Escrow Association  
California Land Title Association  
California Mortgage Association  
California Mortgage Bankers Associations  
United Trustees Association

#### **RELATED LEGISLATION**

Pending Legislation: None known.

Prior Legislation:

SB 1079 (Skinner, Ch. 202, Stats. 2020) gave tenants, prospective owner-occupants, non-profit housing providers, and public entities a 45-day window in which to match or exceed the highest offer made at a foreclosure auction and thereby purchase the property.

SB 818 (Beall, Ch. 404, Stats. 2018) reenacted and made permanent all of the Homeowners' Bill of Rights (HBOR) provisions that had sunsetted on January 1, 2018, and made additional changes, including automatically assigning a single point of contact to any homeowner who requests a foreclosure prevention alternative and requiring a borrower to submit their complete application for a first lien loan modification at least five business days before a scheduled foreclosure sale in order to be eligible for HBOR protections.

SB 900 (Leno, Ch. 87, Stats. 2012) enacted HBOR which provided procedural protections to homeowners at risk of losing their homes to foreclosure. Of particular note, SB 900 prohibited loan servicers from pursuing foreclosure while a loan modification was under consideration (so-called "dual-tracking"), mandated that loan servicers provide borrowers with a single point of contact to obtain information about their status, required loan servicers to notify borrowers of their rights, and created a set of enforcement mechanisms to prevent improper foreclosures from proceeding.

AB 278 (Eng, Ch. 86, Stats. 2012) was a nearly identical companion bill to SB 900.

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