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PRIVATE ACTION UNDER LAW REQUIRING LENDER TO EXPLORE OPTIONS BEFORE FORECLOSING

Question: Does a private right of action exist under California Civil Code § 2923.5, which prohibits a lender from filing a notice of default until it has contacted the borrower to "assess the borrower's financial situation and explore options for the borrower to avoid foreclosure"?

Answer: Yes, according to the Fourth Appellate District, Division 3, in *Mabry v. Superior Court* (G042911), decided June 4, 2010.

Plaintiffs Terry and Michael Mabry refinanced the loan on their home, borrowing about $700,000. They missed a payment, and the lender recorded a notice of default. The parties disagreed about whether the lender, before recording the notice of default, complied with the requirements of section 2923.5 of the Civil Code. That section prohibits a lender from recording a notice of default before it has contacted the borrower in person or by telephone to "assess" the borrower's financial situation and "explore" options to prevent foreclosure.

After the lender filed a notice of default, the Mabrys filed a class action alleging violations of the statute. The trial court ruled that section 2923.5 (1) does not provide for a private right of action, and (2) is preempted by federal law.

The Court of Appeal disagreed on both counts. First, as to the private right of action, the Court reviewed the legislative history of the statute and found an "outcome of silence, not a clear statement that there should be no individual enforcement." It also noted that this "silence is consonant with the idea that section 2923.5 was a result of a legislative compromise, with each side content to let the courts struggle with the issue."

In struggling, the Court turned to the language, structure, and function of section 2923.5. In particular, the Court reasoned that the "obvious goal" of the statute was "forcing parties to *communicate*. . . ." And this goal, in turn, "necessarily confers an individual right." "The alternative would mean that the Legislature conferred a right on *individual* borrowers in section 2923.5 without any means of enforcing that right."

In reaching this conclusion, the Court rejected two alternatives: (1) enforcement by the servicer of cooling agreements (which would involve the "facially unworkable problem of fitting individual situations into collective pools") and (2) exclusive enforcement by the Attorney General's Office ("the same individual-

collective problem would dog Attorney General enforcement of the statute").

Second, as to preemption, the Court's answer was, "No—as long as relief under section 2923.5 is limited to just postponement." In other words, the Court held the statute did not create a right to a loan modification; it merely required the lender to "assess" and "explore" modifications with the borrower before foreclosing. Construing § 2923.5 narrowly in this fashion, the Court observed, tends to minimize the likelihood that the statute would create "burdens on federal savings banks that might arguably push the statute out of the permissible category of state foreclosure law and into the federally preempted category of loan servicing or loan-making." And, "for the time being, and certainly on this record," the court concluded it "cannot say that section 2923.5, narrowly construed, strays over the line."

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