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## Postponement and reinstatement of trustee sales: Hicks v E.T. Legg, 2001

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## **Postponement and reinstatement of trustee sales:**

### ***Hicks v E.T. Legg, 2001***

**Roger Bernhardt**

*Hicks v E.T. Legg & Assocs.* (2001) 89 CA4th 496, 108 CR2d 10

Under CC §2924c(e), trustors on deeds of trust have the right to reinstate a defaulted loan until five business days before the date set for the foreclosure sale. If the sale is postponed for more than five business days, the right of reinstatement is revived as of the date of the postponement and continues until five business days before the new sale date declared at the postponement.

In 1991, Hicks borrowed \$935,000, encumbering his property with a deed of trust in favor of the lender. Some years later, Hicks defaulted on the loan, the trustee recorded a notice of trustee sale, and Hicks filed a petition under Chapter 11. On June 27, the bankruptcy court lifted the automatic stay, but ordered that the foreclosure sale be delayed until July 28 to permit Hicks “a small window of time” to reinstate the loan. On July 24, Hicks obtained a temporary restraining order prohibiting the foreclosure sale, but failed to notify the lender’s successor (Legg) of the ex parte TRO hearing, as required by local court rule. The trustee began postponing the trustee sales for successive periods of five days or less. Between August and December, the sale was postponed 25 times. During that period, Hicks sought to pay the sum owed and reinstate the loan several times, but Legg rejected the offers, on the ground the reinstatement period had expired. The bankruptcy court dissolved the TRO (finding it improperly granted) and, on December 4, Legg acquired the property at the trustee sale. Hicks, pursuing the suit to set aside the foreclosure sale, argued that (1) repeated postponements of the foreclosure sale for periods of five days or less were prohibited as a matter of law by the foreclosure statutes; and (2) Legg’s conduct was a breach of the implied covenant of good faith and fair dealing. The jury found for Legg.

The court of appeal affirmed. The court took note of CC §2924g(d), which mandates a minimum seven-day period between the expiration or termination of an injunction, restraining order, or stay (that requires postponement of the sale) and the trustee sale. Hicks argued that the purpose of this minimum seven-day wait was to permit reinstatement. The court, however, held that the purpose of the seven-day waiting period of CC §2924g is “wholly unrelated” to the right of reinstatement, and would not “attribute to the Legislature an intent to prohibit, as a matter of law, the postponement of a foreclosure sale for successive periods of five or fewer business days during the period a sale is precluded by an injunction or bankruptcy stay.” 89 CA4th at 508.

The court also noted CC §2924g(c)(1), which requires a new notice of sale—and a new reinstatement period—after three postponements at the beneficiary’s request. Under that statute, however, postponements due to court orders, stays, or by mutual agreement of the beneficiary and trustors are not counted as postponements for the purpose of determining whether a new notice of sale is required.

Finally, the court of appeal concluded that the jury did not abuse its discretion in deciding that Legg did not violate the implied covenant of good faith and fair dealing. Alluding to Hicks’s surreptitious obtaining of the TRO, the court observed that Hicks could not thereafter “reasonably expect a revival of the reinstatement period to be a benefit of the contract.”

►**THE EDITOR'S TAKE:** I hope the following helps as a brief summary of what CC §§2924c(e), 2924g(c), and 2924g(d) say about lenders' postponements of trustee sales and borrowers' rights to loan reinstatement:

1. For the first three-month period following a notice of default, and for the first 15 days of the 20-day period following the notice of sale, there is a right of reinstatement, *i.e.*, a right to have the trustee sale cancelled by paying all the arrearages without having to pay the entire debt.

2. During the final five business days before the scheduled sale, there is no right of reinstatement. There is only the right of redemption, *i.e.*, the right to pay the entire debt before the hammer falls.

3. A sale date can be rescheduled either by a new notice of sale, or by a notice of postponement. While a new notice of sale must comply with all the formalities of the original notice of sale, the notice of postponement is accomplished by a making a "public statement" at the time and place of the original sale.

4. A new notice of sale also carries with it a new five-day reinstatement right; whereas a notice of postponement does not revive the right of reinstatement unless the new date is more than five days in the future. (Thus, a four-day postponement during the final five-day period does not revive the right of reinstatement.)

5. *But*, the beneficiary can make only three notices of postponement, after which the beneficiary must send out a new notice of sale, which revives a right of reinstatement. (So a beneficiary seeking to avoid that revival should (a) postpone rather than renote a sale, (b) set each new date less than five days hence, and (c) not postpone more than three times.)

6. The three-postponement limit does not apply to postponements made while federal or state stays or injunctions are in effect. Such postponements can be made as often as necessary, without thereby reviving the right to reinstate. (This makes it rather silly to limit such postponements to four-day periods, but that is probably what the code sections require.)

7. There must be a seven-day wait before going to sale after the stay or injunction has been lifted. According to this decision, however, that does not mean that the postponements necessary to get through that week have to be for seven-day periods; two four-day postponements are permissible (assuming that the three-postponement quota has not been used up), and will keep reinstatement rights from reviving.

8. *But*, the beneficiary should not delay furnishing the trustor with a statement of the amount necessary for reinstatement until the final five-day period has arrived. He got away with that here only because the trustors' mala fides seemed to exceed his own. —Roger Bernhardt