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Summer 2015

The United States Supreme Court Rules On What A Borrower Must Do Under The Federal Truth-in-Lending Act To Rescind A Loan During The Three-year time period provided in 15 U.S.C. § 1635

By Phillip M. Adleson, Esq.[1], Adleson, Hess & Kelly

In *Jesinoski v. Countrywide Home Loans, Inc.* (2015) 135 S.Ct. 790, the United States Supreme Court held that 15 U.S.C. § 1635 of the Federal Truth-in-Lending Act ("TILA") only requires that the borrower give written notice of rescission within the three (3) year period after consummation of the loan[2].

In any ***"consumer credit transaction"*** in which the security interest is or will be retained or acquired in any property which is used as the ***principal dwelling of the person*** to whom credit is extended, the borrower (obligor) shall have the right to rescind the transaction until midnight of the third business day following the later of: (1) consummation of the transaction; (2) the delivery of two copies of a proper notice of rescission; or, (3) delivery of all the material disclosures correctly made[3].

Where proper TILA disclosures have not been provided to the borrower by the creditor, "[a]n obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first.[4]"

> ***"… when a borrower does not receive proper TILA disclosures where such disclosures are required, the borrower may rescind the loan secured by the borrower's principal residence simply by sending the creditor notice of rescission …"***

Prior to the Supreme Court's decision in *Jesinoski*, some courts of appeal have held that where proper TILA disclosures had not been given to the borrower, the borrower had to file a lawsuit for rescission within 3 years of consummation of the loan transaction and not merely send a notice of rescission[5].

The facts in the *Jesinoski* case (i.e., where the borrower alleged proper TILA disclosures were not given) raised the issue of what actions are necessary for a borrower to exercise the borrower's right of rescission under TILA. Exactly three years after consummation of a home loan from Countrywide Home Loans, Inc., (Lender), to refinance their home mortgage, Larry and Cheryle Jesinoski (Borrowers) sent Countrywide and Bank of America Home Loans (which had acquired Countrywide), a letter purporting to rescind

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To foster, improve and promote integrity of services in the default mortgage servicing industry through a level of excellence, education, local outreach and legislative advocacy.

Randy Newman
2015 UTA President

President's Message

Can you believe that 2015 is almost half over? We're going to blink and it will be time to celebrate our 40th Annual Conference in Las Vegas come November.

Recently we held our California basic trustee certification course in Santa Ana (thank you to Tai Alailima and Carrington Mortgage Services for graciously welcoming us into their office and hosting the event), where we had 13 students take the class and listen to me for 3 ½ hours. Following the class, we offered a certification exam (in order to be certified, the attendee must be a UTA member). We were able to certify eight people who passed the exam (FYI, everyone who took the exam did pass).

By the time you receive this issue of *UTA Quarterly*, we will have completed dinner meetings in Orange County and in San Diego, presenting issues of interest to trustees (in Orange County we focused on bulk file transfers and in San Diego on the proliferation of municipal registry ordinances). Please join us on June 24th when we will be having a networking get together at the Improv in Irvine, CA. Look for upcoming invitations for dinner events in Dallas, TX and Burbank, CA over the summer.

I am sure that it is not a surprise to anyone that our membership numbers are down again this year, following a trend of lots of industry consolidations and closings, brought about not only by the improving economy and real estate market, but by the incredible amount of regulation to which we (and our clients) have been subject. If you know someone who would benefit from a UTA membership, please let us know so we can get them some information on our incredible organization. Susan Pettem (our membership committee chair) and I hosted a cocktail hour at the Texas MBA conference in San Antonio in May where we identified several potential members.

UTA, like most non-profits, relies on volunteers from our membership to serve on committees such as our Conference and Education committee, and our Membership, Financial, Legislative and Legal Resources committees. You do not have to be on the board to participate or even lead one of these committees. We need your help! Please get involved (most assignments take less than an hour per month)! Feel free to contact me or Richard Meyers with your interests and we'll be happy to help you participate.

Please make sure you mark the dates for our 2015 Conference at the M Hotel in Las Vegas, NV on November 8th to 10th. We will be offering certification courses (in all except California Basic) on Saturday, November 7th, and our conference committee will have some great activities planned for Sunday prior to the kickoff of our conference (yes, golf will be one of those activities).

Finally, thanks for your continuing support of UTA. If you have any questions, comments, or concerns, please call me.

Best,

Randy

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Featured Article

Bankruptcy Judge Limits Use of Family Contributions Offered by Debtors to Create Feasible Chapter 13 Plans

By Mark S. Blackman, Esq., Alpert Barr & Grant

A recent trend in Chapter 13 cases being employed by debtors to delay foreclosure when it is otherwise clear that the debtor may not be able to save their residence is to claim that a debtor's friends or family members will assist them in meeting their obligations by making monthly contributions.

Often, this is no more than a delaying tactic.

In April 2015, Judge Scott Yun issued a memorandum decision denying confirmation in a Chapter 13 case. In *In re Carolyn Deutsch*, 2015 Bankr. Lexis. 1368, Judge Yun stated:

> "Chapter 13 plans premised on contributions from family or friends are much too common before the court, and are often proposed by debtors in their impractical and mostly futile attempts to save homes that are over encumbered by secured debts. Many of these Chapter 13 plans not only fail to meet the requirements for confirmation under §1325 [of the Bankruptcy Code] but also defeat the primary purpose of bankruptcy for individual debtors – that of the fresh start." *In re Deutsch, supra*, 2015 Bankr. Lexis 1368, 1.

The Court suggests that rather than providing a fresh start, a plan that relies on contributions spreads the burden of satisfying the debtor's debts to others and is the very antithesis of a fresh start. *In re Deutsch, supra*, 2015 Bankr. Lexus 1368, 2.

In the *Deutsch* case, the debtor filed a Chapter 7 case. Just prior to discharge, debtor converted to Chapter 13 and proposed to fund the plan, in part with a $700 per month contribution from her boyfriend. The plan proposed to pay $490.00 per month to creditors for 57 months and $1,188 for three months. In other words, without the $700.00 contribution each month, debtor had no funds with which to fund her plan (except for a small sum at the end of the plan).

Debtor's boyfriend submitted a declaration to the Court stating that (1) he lived with debtor; (2) that he had a regular income; (3) that "he intends to contribute money to the debtor **for as long as he can financially afford to do so**" and (4) provided two unauthenticated paystubs.

A trustee, loan servicer or lender should review Chapter 13 plans which assert that family contributions will make up the debtor's continuing shortfall between income and debt or will be used to make the trustee plan payments.

Another person, debtor's mother, submitted a declaration stating that in the event the boyfriend failed to pay all or part of the $700.00, she would step in and make the contribution from supplemental Social Security Income and business income. The debtor's mother provided only a bank account statement showing both deposits but few other sums in her bank account.

The Court noted at the outset that but for the contributions, debtor's own take home income was insufficient to meet her monthly expenses (debtor's expenses exceeded her income by $210.00 per month).

Citing 11 USC §1325(a)(6):

In order for a Chapter 13 plan to be confirmed, a debtor must demonstrate that she "will be able to make all payments under the plan and to comply with the plan."

In *In re: Schwalb*, 347 B.R. 726, 759 (Bankr. D. Nev. 2006) case, that court held that "reliance on contributions from family is disfavored, but not prohibited."

The Court in *Deutsch* analyzed the debtor's plan as to both Feasibility and Eligibility.

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Featured Article

Promissory Estoppel Application Prior to Enactment of Homeowner's Bill of Rights

By David C. Scott, Esq., McCarthy & Holthus, LLP

In *Jones v. Wachovia Bank*, 230 Cal. App. 4th 935 (2014), the main issue on appeal was the application of promissory estoppel to postpone a 2009 nonjudicial foreclosure sale – prior to the enactment of the Homeowner's Bill of Rights. The California appellate court found that promissory estoppel did not apply because the borrowers failed to establish detrimental reliance, failed to establish an injury, and failed to establish damages.

After the borrowers defaulted on their loan and received a Notice of Default, the borrowers and the lender entered into a forbearance agreement requiring the borrowers to pay $10,000 and bring their loan current by October 27, 2008. The borrowers made the $10,000 payment, but failed to bring the loan current.

On January 13, 2009, the trustee recorded a Notice of Trustee's Sale of the borrowers' property. At the request of the borrowers, the lender postponed the sale date twice, and one of the borrowers confirmed each of the postponements. The borrowers contended that on April 15, 2009, two days before the sale date, the lender agreed during a telephone call that the sale would be postponed to June 18, 2009. However, at the April 17, 2009 sale, the auctioneer announced the postponement to June 8, 2009. Despite having done so for the previous two postponements, the borrowers did not confirm the new sale date with the trustee. On June 8, 2009, the property sold to a third party purchaser.

The borrowers filed suit against the lender arguing that they had the funds to cure the outstanding default prior to June 18, 2009, but needed additional time to submit the funds to the lender. The borrowers further argued that they were unable to reinstate the loan because the sale took place on June 8, 2009, ten days earlier than the lender had told them the sale would be held. Finally, the borrowers argued that they lost equity in the property because of the early sale date and the sale price was disproportionate to the value of the home.

The lender filed a Motion for Summary Judgment attacking the breach of contract claim and the borrowers' failure to properly plead promissory estoppel. The trial court granted the motion holding that no written agreement was breached, and any oral agreement was not only barred by the Statute of Frauds, but also failed for lack of consideration. The trial court rejected the borrowers' promissory estoppel claim on alternative grounds: "A promissory estoppel claim was not pleaded in the First Amended Complaint, and [the borrowers] failed to demonstrate estoppel sufficient to overcome the statute of frauds." The trial court concluded that the borrowers failed to plead or show a material change in position resulting in substantial hardship amounting to unconscionable injury. The borrowers appealed.

Promissory estoppel is a doctrine which 'employs equitable principles to satisfy the requirement that consideration must be given in exchange for the promise sought to be enforced.'

On appeal, the court first reviewed the case in the context of the Statute of Frauds, which requires certain contracts to be made in writing to be enforceable. Civil Code Section 1698 codifies modification to contracts including deeds of trust, and requires that any agreement to modify the terms of the Note and Deed of Trust must be made in writing to be enforceable. Likewise, an agreement to forbear from foreclosing is unenforceable unless it is written and signed by the party who it is being enforced against. The appellate court concluded that, based on these authorities, the borrowers could not state a breach of contract claim because they had no modification in writing. But that did not preclude them from arguing equitable doctrines such as estoppel.

Promissory estoppel is a doctrine which "employs equitable principles to satisfy the requirement that consideration must be given in exchange for the promise sought to be enforced" (citation omitted). *Jones* at 944-945. The elements required for a claim under promissory estoppel, are "(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) [the] reliance must be both reasonable

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Featured Article

Fulfilling Your Chapter 7 Trustee Duties Or Feathering Your Nest? (Carve Out Agreements and Overcoming the Presumption of Impropriety)

By Reilly Wilkinson, Esq., Scheer Law Group, LLP

INTRODUCTION

There are valid reasons why a bankruptcy Trustee should be allowed to sell assets that have no equity. For example, a creditor may want the protection and certainty of a court order passing title. Conversely, if the primary benefit of such a sale is to give the Trustee and Trustee's counsel the opportunity to collect fees, it would appear improper[1]. This article explores the boundaries between the legitimate use of the Trustee's powers to sell assets that are fully encumbered and the limits of propriety established by the Courts to avoid abuse.

Pursuant to 11 U.S.C. §704(a)(1), a Chapter 7 Trustee has an affirmative duty to collect and reduce to money the property of the estate for which the trustee serves. 11 U.S.C. §363(b) empowers the Trustee to sell property of the estate for the benefit of the debtor's creditors. When an asset is fully encumbered and the Chapter 7 Trustee attempts to sell collateral for the benefit of unsecured creditors it is called a "carve out". "The term 'carve out' is one of those uniquely bankruptcy phrases, much like 'cram down,' that appears nowhere in the bankruptcy statute but connotes definite meaning to parties. It is an agreement by a party secured by all or some of the assets of the estate to allow some portion of its lien proceeds to be paid to others, i.e., to carve out of its lien position.[2]"

> *"Even with the past abuses of carve-out agreements for fully encumbered assets, the presumption of impropriety, and the official handbook for Chapter 7 Trustees generally advising against these types of arrangements, carve-out agreements of fully encumbered assets can be approved by the bankruptcy court."*

However, a presumption of impropriety arises when a Chapter 7 Trustee attempts to sell fully encumbered assets. This rule is supported by case law as well as the official Handbook for Chapter 7 Trustees. Courts have historically denied such agreements and generally presume they are improper. The Bankruptcy Appellate Panel for the Ninth Circuit recently dealt with this issue in the *In re KVN Corp.*, 514 B.R. 1 (B.A.P. 9th Cir. 2014) case and provided an a road map for Chapter 7 Trustees to follow in order to overcome the presumption of impropriety.

FACTS

In the case of *In re KVN Corp.* the Debtor owned a sporting goods store. The Bank held a note secured by the Debtor's real property and substantially all of its business assets which included firearms. The Debtor failed to list the Banks security interest in the business assets, including the firearms, in her schedules. Believing the firearms to have value to the estate and not to be encumbered, the Chapter 7 Trustee removed the firearms and placed them in storage. She also employed an auctioneer to conduct a public sale of the firearms. Upon her review of public records, the Chapter 7 Trustee became aware of the Bank's security interest and the fact that the firearms were fully-encumbered by the Bank's lien. The Trustee contacted the Bank and informed it that it could retrieve the firearms. The Bank responded by asking for the Trustee's assistance in selling the firearms through the auctioneer.

The Chapter 7 Trustee and the Bank agreed to split the proceeds of the sale of the firearms and entered into a stipulation. The Chapter 7 Trustee estimated that the transaction would net between $4,200 and $4,400 for the benefit of unsecured creditors. After the hearing on the Trustee's motion to approve the stipulation, the Court denied the motion on the grounds that the Court did not believe that the Trustee should liquidate fully-encumbered assets and there was no benefit to unsecured creditors. Although the

Featured Article

Trustee and the Bank emphasized that there was full disclosure and the parties were not acting in an improper manner, the Court maintained its position that the Chapter 7 Trustee should not be liquidating fully encumbered assets as such actions have a presumption of impropriety and that presumption had not been rebutted[3].

As stated above, there are instances where a fully secured creditor might want the certainty and protection of a carve-out order and trustee's sale. It appears that the Bank believed this to be the case in *In re KVN*, but the Court did not comment on that issue.

GENERAL RULE

As the Court in *In re KVN* expounded "[i]t is universally recognized, however, that the sale of a fully encumbered asset is generally prohibited.[4]" This general rule is also included in the official handbook for Chapter 7 Trustees. The official handbook provides "when property is fully encumbered and of nominal value to the estate, the trustee must immediately abandon the asset… [5]" The reason for this rule is to avoid attempts by the trustee to churn property worthless to the estate just to increase fees[6].

This general rule and the presumption of impropriety is based on past abuses. Courts have found that it is not rare for secured creditors to approach trustees for assistance in liquidating fully encumbered assets. The secured creditor will add a little "sweetener" to the deal by agreeing to pay funds to the trustee and to pay other administrative costs. The trustee will then pay a small pittance to creditors. This arrangement is beneficial to the secured creditor as they do not have to pay for foreclosure of the assets and beneficial to the trustee as she will earn a commission even though the estate receives a meaningless distribution[7].

NO PER SE RULE AGAINST CARVE OUT

"Despite the general rule prohibiting the sale of fully encumbered property, the Chapter 7 Trustee may seek to justify the sale through a negotiated carve-out agreement with a secured creditor.[8]" The Handbook also provides guidance. It provides that a trustee may sell assets only if the sale will result in a meaningful distribution to creditors.

Upon review of the record in *In re KVN*, the BAP found that the bankruptcy court made no findings as to whether the Trustee had fulfilled her basic duties to ensure a meaningful distribution. The case was remanded for factual findings regarding whether or not there would be a meaningful distribution. Accordingly, the Court appears to focus solely on the benefit and the amount of the benefit to unsecured creditors, not the fact that the creditor might also want certainty and cooperation of the estate.

WHAT CONSTITUTES "MEANINGFUL DISTRIBUTION"?

As any carve-out agreement must provide a meaning distribution to creditors, it is necessary to understand what constitutes a meaningful distribution. Again, the official handbook for Chapter 7 Trustees provides guidance and outlines the issues that must be considered when determining whether the distribution is meaningful[9]:

> *(1)The fair market value of the property. Value can be determined in various ways. The trustee can consult with the debtor and the debtor's attorney, have the secured party provide documentation as well as the pay-off statement, obtain price lists, conduct physical inspections or appraisals, and use common sense. Other valuation methods include the NADA book for automobiles; information acquired from real estate agents; county records regarding recent sales of comparable real property; Internet searches and web sites; and advertisements for the sale of like goods. The basis for the value must be documented. 28 U.S.C.§ 586.*
>
> *(2)The amount, validity and perfection of purported security interests against such property. Since the trustee has a duty to use the trustee's avoidance powers under sections 544, 545, 547, and 548, to the extent a purported lien is invalid or could be avoided by the trustee, the property must not be abandoned if the value thereof without the lien would benefit the estate.*
>
> *(3)Exemptions.*
>
> *(4)Tax considerations, including any section 724(b) issues.*

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Featured Article

Bankruptcy Debtor's Cause of Action Against Lender for Violation of Trial Period Plan Was Property of the Bankruptcy Estate Since it Accrued Prepetition

By Dennis Baranowski, Esq., Geraci Law Firm

The title of this article does not contain any groundbreaking information. In fact, for most who have graciously ventured to continue reading, the statement is common knowledge. The Bankruptcy Code, as interpreted by applicable case law, provides that a cause of action that arises in favor of a bankruptcy debtor prior to the filing of the bankruptcy petition constitutes property of the bankruptcy estate. 11 U.S.C.A. § 541(a)(1). Conversely, I do not think that many would argue with the general statement that if the cause of action arises after the bankruptcy filing, it would not be deemed an asset of the bankruptcy estate. However, what if the events giving rise to the debtor's claim arose prior to the filing, but the specific right to sue was not acknowledged in case law until after the bankruptcy is filed? The United States Bankruptcy Appellate Panel for the Ninth Circuit ("BAP") recently considered this question in *Goldstein v. Wells Fargo Bank, N.A. (In re Goldstein),* 526 B.R. 13 (B.A.P. 9th Cir. 2015).

"*A cause of action that arises in favor of a bankruptcy debtor prior to the filing of the bankruptcy petition constitutes property of the bankruptcy estate . . . what if the events giving rise to the debtor's claim arose prior to the filing, but the specific right to sue was not acknowledged in case law until after the bankruptcy is filed?*

Specifically, the BAP considered whether the Goldsteins' claim against Wells Fargo and Bank of America (collectively "Lender") arising from Lender's failure to comply with the requirements of the Home Affordable Modification Program ("HAMP") accrued prior to the Goldsteins' filing for relief under Chapter 7 of the Bankruptcy Code, where the bankruptcy was filed in August 2010 after HAMP became effective, but before the rendering of judicial decisions in 2011 recognizing a borrower's right to sue for a mortgage lender's failure to comply with HAMP.

In 2009, the Goldsteins applied for a modification of the loan secured by their residence. Lender granted a three-month trial period plan ("TPP") pursuant to HAMP. The TPP provided that if the Goldsteins complied with the TPP and certain representations made by the Goldsteins remained true, Lender would provide them with a permanent modification. The Goldsteins complied with the TPP and their representations continued to be true; however, Lender neither provided them with a permanent loan modification agreement, nor notified the Goldsteins that their application was denied. The Goldsteins continued to make monthly payments for a couple of months without ever receiving notification from Lender approving or denying the modification. In August 2010, the Goldsteins filed for relief under Chapter 7 to stop the foreclosure of their home. The bankruptcy schedules filed by the Goldsteins did not identify any claims against Lender as assets. The case was deemed a no asset case and the Goldsteins were granted a discharge in December 2010.

In October 2012, almost two years after obtaining a discharge, the Goldsteins filed a lawsuit against several defendants, including Lender, alleging thirteen causes of action, including four that arose from allegations related to the TPP. Lender challenged the lawsuit, claiming that all causes of action arose prior to the Goldsteins' bankruptcy, and that since the claims were not included in the bankruptcy schedules, they were still property of the bankruptcy estate.

The Goldsteins reopened their bankruptcy for the purpose of

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amending the schedules to include the claims against Lender. They filed an Amended Schedule B to include a contingent and unliquidated claim against Lender for $22,000. The amendment included a statement that the Goldsteins believed that the TPP related allegations arose postpetition and were therefore not property of the bankruptcy estate. After the Goldsteins' bankruptcy was reopened and amid various motions by the parties, Lender entered into a written agreement with the Chapter 7 Trustee settling the TPP related claims ("Settlement"). The Trustee filed a motion for approval of the Settlement asserting that the TPP claims accrued prepetition and were thus property of the bankruptcy estate. The Goldsteins opposed the motion on the grounds that the TPP claims were not property of the bankruptcy estate because (1) the TPP claims were not "complete" until Lender issued a written denial of a permanent HAMP modification two weeks after the bankruptcy was filed and (2) at the time the bankruptcy was filed, there was no case law that allowed them to sue Lender for not providing a permanent modification despite their full performance of the TPP. The bankruptcy court ruled that the claims existed prepetition and were therefore assets of the bankruptcy estate. In reaching its holding, the bankruptcy court found that (1) the facts underlying the TPP claims all occurred prior to the bankruptcy filing and that Lender's obligation to act arose once the Goldsteins fully performed the TPP, which was prior to the filing and (2) there was no controlling case law prohibiting the Goldsteins from pursuing their claims. The BAP upheld the ruling of the bankruptcy court.

The BAP rejected the Goldsteins' first argument that the TPP related claims did not accrue until they learned postpetition that Lender denied their permanent modification. In rejecting this argument, the BAP looked to California law concerning when a cause of action accrues, which is "upon the occurrence

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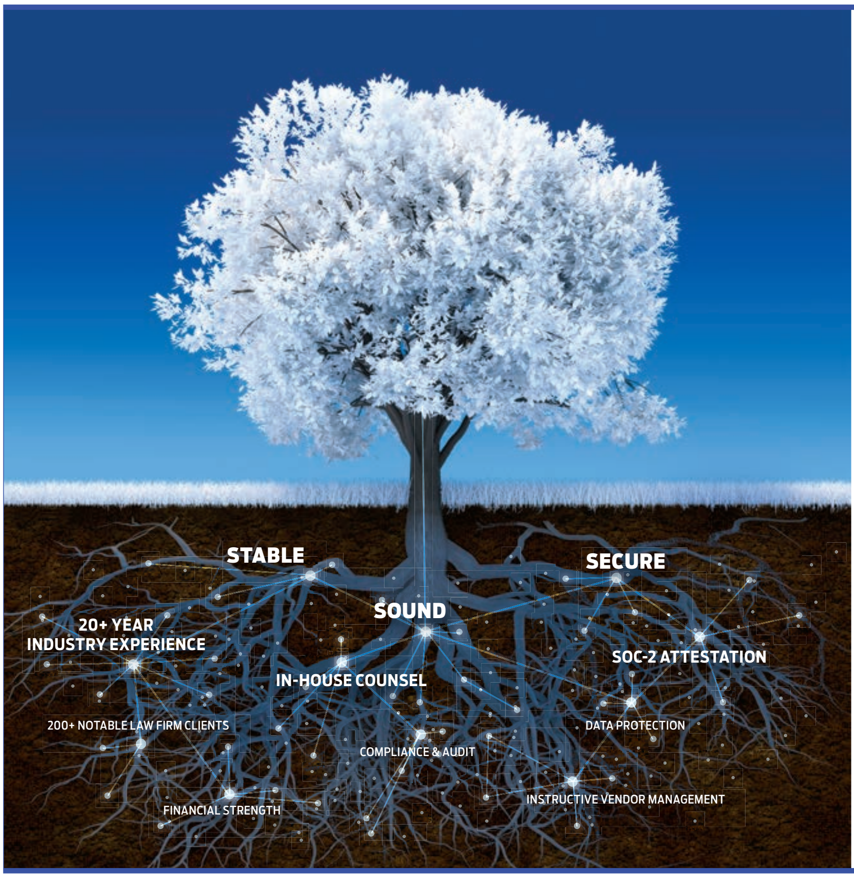

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Will Senate Bill 306 Ease Lenders' Pain From the *SFR v. US Bank* Decision?

By T. Robert Finlay, Esq., & Robin P. Wright, Esq., Wright, Finlay & Zak, LLP

Will Senate Bill 306 Ease Lenders' Pain From the *SFR v. US Bank* Decision? No, but it will provide safeguards against future loses. Senate Bill 306 is in direct response to Nevada's super-lien priority debacle, which culminated in the well-chronicled *SFR* decision on September 18, 2014[1]. For the better part of 20 years before the *SFR* decision, lenders, loan servicers, HOAs and others believed that the foreclosure of an HOA lien would have no impact on an otherwise first priority deed of trust. In 2011, with HOAs facing increased delinquencies and traditional deed of trust holders straddled with vague and often conflicting new foreclosure laws, HOAs began to more aggressively take their liens for unpaid dues to foreclosure sale. These sales created a cottage industry of investors buying properties at the HOA foreclosure sales, often for pennies on the dollar. Slowly, the purchasers at the HOA sales started claiming that the HOA foreclosure wiped out the senior deed of trust and that they held title free and clear of all liens. At first, the mortgage industry collectively said, "No way!" and most state and federal district court judges agreed. That was, of course, until the Nevada Supreme Court decided *SFR*, holding that a properly conducted judicial or nonjudicial foreclosure of an HOA lien did, in fact, eliminate an otherwise first priority deed of trust. The mortgage servicing industry in Nevada went into a tailspin.

> *SB 306 is not retroactive and will have no effect on HOAs sales occurring prior to its effective date. But, if passed, it will provide significant protections to lienholders and mortgage servicers going forward.*

In the ashes of the *SFR* decision, the mortgage industry searched for legal, legislative and practical solutions. For starters, mortgage servicers began recording Requests for Notice under NRS 116.31163, NRS 116.61168 and NRS 107.090. These requests required the HOAs to furnish written notice of the foreclosure, giving mortgage servicers time to protect their deeds of trust. Meanwhile, lawsuits from all sides flooded the courts to determine, among other things, whether the HOA's foreclosure was valid, what liens remained on the property (if any) and whether the HOA was liable for the investors' loss. Against the backdrop of the battle in the courts on *past* HOA sales, both the HOA and mortgage industries searched for a legislative solution to better define the HOA lien and foreclosure process. SB 306 is the product of those efforts.

For starters, SB 306 is not retroactive and will have no effect on HOAs sales occurring prior to its effective date. But, if passed, it will provide significant protections to lienholders and mortgage servicers going forward. Below is a list of the key proposed amendments and their corresponding section:

- **Right of Redemption:** From the mortgage industry's perspective, this is probably the most important amendment. Section 6 of SB 306 proposes to amend NRS 116.61166 to provide a right of redemption to the foreclosed out owner ***and*** "any holder of a recorded security interest". Specifically, within 60 days following an HOA foreclosure sale, any lienholder may redeem the property for the HOA sale price plus 1% interest, HOA dues paid by the purchaser post-sale, certain specified costs of improvement and any senior liens (for example, if a second mortgage holder wanted to redeem, it would have to also pay the amount owed the first mortgage holder). Upon redemption, title would vest in the name of the redeeming lienholder. In other words, the lienholder could skip its own foreclosure and market the property as an REO. Since the redemption amount and process will be new, we suggest contacting counsel before redeeming any property following an HOA sale.

- **Pre-Sale Right to Pay Off the HOA Lien:** Section 6 of SB 306 amends NRS 116.61166(1) to provide that, if a lienholder pays the super-lien priority portion of the HOA lien "not later than 10 days before the date of sale" ***and*** records notice of "such payment" in the appropriate county recorder's office "not later than 5 days before the date of sale", the HOA sale will not extinguish the lienholder's interest.

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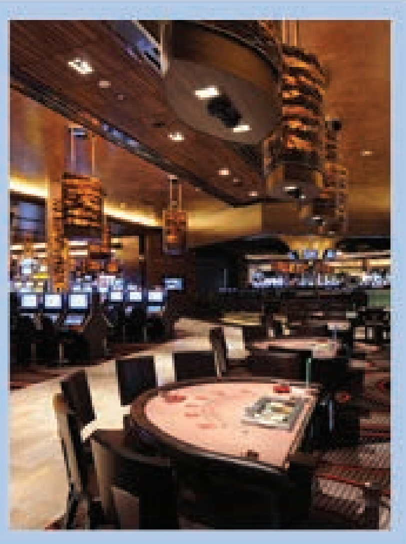

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When Adjudication on the Merits Isn't Really: The Trap of *Hardy v. America's Best Home Loans*

By Kate Heidbrink, Esq., Bergstrom Law, Ltd.

Trustees know that enterprising borrowers will try a variety of legal tactics to stall foreclosure, or rescind it after the fact. However, servicers usually cannot be sued twice for the same foreclosure under the twin doctrines of claim preclusion and issue preclusion, which prevent parties to a lawsuit from relitigating the same issues. "Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties…Collateral estoppel, or issue preclusion, precludes relitigation of issues argued and decided in prior proceedings." *Mycogen Corp. v. Monsanto Co.*, 28 Cal.4th 888, 896 (2002), *qtd. in Hardy v. America's Best Home Loans, et al.*, Super. Ct. No. 651557, F067389 (Cal. App., 5th Dist., Dec. 22, 2014).

Trustees and their lender-clients should be aware that a procedural dismissal in federal court under Rule 41(b) cannot be used to prevent or dismiss subsequent borrower lawsuits in state court.

In the recent case of *Hardy v. America's Best Home Loans, et al.*, the California Court of Appeal for the Fifth Appellate District permitted a borrower to relitigate a foreclosure case through a creative interpretation of the plain language of Rule 41(b) of the Federal Rules of Civil Procedure. By doing so, the court emphasized that only a prior judgment on the merits prevents a borrower from relitigating a wrongful foreclosure in California.

In July 2009, borrower Knowledge Hardy, *in pro per* (without counsel), filed suit in the United States District Court for the Eastern District of California against a variety of servicer-lenders, the trustee, MERS, and the real estate broker. Hardy alleged that an unscrupulous real estate broker induced him to refinance his loan in 2006, resulting in very poor loan terms and an eventual foreclosure. The federal case asserted federal question jurisdiction over America's Best based on alleged RESPA violations. The case also brought a variety of California state law claims, including negligence, breach of fiduciary duty, fraud, violations of California's Unfair Competition Law (UCL), breach of contract, and breach of the implied covenant of good faith and fair dealing.

In the federal action, America's Best moved to dismiss some of Hardy's claims. The district court then granted America's Best's motion to dismiss as to Hardy's claims for breach of contract and breach of the implied covenant of good faith and fair dealing, but denied dismissal of the claims alleging RESPA violations, fraud, and UCL violations. The district court dismissed the contract claims alleged against America's Best without prejudice, and ordered Hardy to file a second amended complaint no later than October 5, 2009.

After Hardy failed to file a second amended complaint by the deadline, America's Best moved for an entry of dismissal under Rule 41(b) of the Federal Rules of Civil Procedure. Hardy did not file a timely opposition to the motion. The district court then dismissed America's Best with prejudice based on Hardy's failure to file a second amended complaint. MERS was similarly dismissed with prejudice under Rule 41(b), and the district court issued an order to show cause why the remaining defendants should not be dismissed.

In response, Hardy filed an "untimely and unintelligible response" and notice of voluntary dismissal without prejudice. *Hardy v. IndyMac Federal Bank,* 2009 WL 3871910, CV-F 09-935, E.D.Cal. Nov. 13, 2009, *unpub'd opinion.* In response, the district court entered a subsequent order reaffirming its prior order dismissing America's Best and MERS with prejudice. The district court explained that, unlike a voluntary dismissal, a dismissal pursuant to Rule 41(b) "operates as an adjudication on the merits" and that Hardy had no right to dismiss America's Best and MERS without prejudice "once the merits of his claims against them have been considered by this Court." *Id.* at p. 3. The district court dismissed the remaining defendants without

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prejudice pursuant to Hardy's notice of voluntary dismissal and closed the action. *Id.*

In 2010, Hardy, *in pro per,* sued the same set of defendants in state court in the Superior Court of Stanislaus County, adding defendant OneWest Bank, which acquired the property at the foreclosure sale. In the state court action, Hardy alleged the following causes of action: fraud, breach of contract or rescission, negligence, breach of fiduciary duty, and violations of the UCL.

The case proceeded to trial against America's Best only. Seven days before trial, America's Best filed an ex parte application for an order granting leave to amend their answer to add res judicata and collateral estoppel (claim and issue preclusion) as affirmative defenses. The trial court denied the application, but America's Best filed a motion for judgment on pleadings based on res judicata and collateral estoppel. The trial court heard oral argument on that motion at the trial. America's Best argued that collateral estoppel barred the state court action because the issues had been "fully and fairly litigated" in the federal action. Hardy argued America's Best was raising issues about res judicata on a case that was dismissed for failure to prosecute and never decided on its merits. The trial court found that the federal court proceeding resulted in a ruling "on the merits" and granted the motion for judgment on the pleadings.

Hardy appealed the trial court judgment, arguing that the federal action was dismissed, not on the merits, but for failure to prosecute, which does not have a res judicata or collateral estoppel effect under California law.

The court of appeals noted that, under the California doctrine of collateral estoppel, a prior decision precludes relitigation of an

Continued on page 44

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No Need for Foreclosing Trustee to Record a New Notice of Sale Upon Third Time Postponement

By Randy Newman, Esq., Total Lender Solutions

The Nevada Supreme Court recently confirmed in a March 5, 2015, decision that pursuant to NRS §107.082(2), as long as the trustee's sale was held on the third postponed date at the time and location set in the notice of sale, no new notice of sale was required.

In two consolidated cases (numbers 63092 and 63359) both styled *JED Property, LLC v. Coastline RE Holdings NV Corp*, 131 Nev. Advance Opinion 11 (2015), trustor's counsel sued the beneficiary for, *inter alia*, wrongful foreclosure based on a novel and seemingly misguided interpretation of NRS §107.082(2).

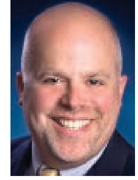
Both the trustor and the beneficiary agreed that the sale had been orally postponed three times and that the sale occurred on the date announced and at the time and place set forth in the original notice of sale. The relevant portion of NRS §107.082(2) provides that: "If such a sale has been postponed by oral proclamation three times, **any new sale information** must be provided by notice as provided in NRS 107.080." [emphasis added]

> ***The Nevada Supreme Court held that "as long as the information regarding the sale's date, time, and place remains the same after the third oral postponement, there is no new sale information to provide that would require a new notice …"***

The trustor argued that the statute's plain meaning mandated a new notice of sale upon the crying of the third oral postponement, rather than after the third oral postponement. The beneficiary, on the other hand, argued that the plain meaning of the statute required a new notice of sale only if the sale did not occur on the date (and at the time and place) set during the third oral postponement. Upon a motion for summary judgment, the trial court held in favor of the beneficiary finding that the plain meaning of the statute was clear and awarded attorneys' fees. The trustor then appealed to the Nevada Supreme Court.[1]

The Nevada Supreme Court held that NRS §107.082(2) was unambiguous, especially when read in connection with NRS §107.080, the statute to which it refers. The Nevada Supreme Court held that "as long as the information regarding the sale's date, time, and place remains the same after the third oral postponement, there is no new sale information to provide that would require a new notice under NRS §107.082(2)." The court further held that a new notice of sale would only be required if the time, date, or place changed after the third oral postponement, thereby validating the position taken by virtually trustee practicing in Nevada. The Court further affirmed the awarding of attorneys' fees and costs to the beneficiary.

1 In Nevada, appeals from the District (trial) Courts are heard directly by the Nevada Supreme Court.



Randy Newman is the founder and president of Total Lender Solutions, an independent trustee based in San Diego and is the current president of UTA. He is licensed as an attorney in NY & NJ and has over 30 years of experience in real estate and default servicing. Randy can be reached at RNewman@TotalLenderSolutions.com.

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Respect Court Orders – Or Forfeit The Right To Appeal!

By Dean T. Kirby, Jr., Kirby & McGuinn, A P.C.

Recent decisions of the California Courts of Appeal have highlighted a less well known but powerful rule of law called the "disentitlement doctrine." Under the disentitlement doctrine, a losing litigant who flouts a judgment while at the same time appealing it, can lose the right to appeal. Within the last few months, the courts have dismissed appeals by litigants who were found to have willfully disobeyed trial court orders or to have engaged in bad faith tactics to obstruct enforcement of a judgment. These cases are *Gwartz v. Weilert,* 231 Cal. App. 4th 750 (2014) review denied (Feb. 18, 2015), and *Blumberg v. Minthorne,* 233 Cal. App. 4th 1384, review denied (Apr. 22, 2015).

Gwartz was an action by buyer of real property against the seller, alleging breach of contract, fraud and related claims. After a jury trial, a money judgment was entered against the sellers (Dr. and Ms. Weilert) in the amount of $1,500,000. The Weilerts appealed, but did not post a bond in order to obtain a stay of enforcement of the judgment pending the completion of their appeal.

While the Weilerts' appeal was proceeding, they were subjected to a judgment debtor's examination which uncovered significant assets, including entities which the Weilerts owned or controlled. The plaintiff judgment creditors applied for and obtained a turnover order as to certain assets, including vehicles, horses, securities, and distributions or draws from various entities. The turnover order was also a "freeze order" which enjoined the Weilerts and their entities from further transfers or dissipation of their assets.

The Weilerts were claimed by the plaintiff judgment creditors to have engaged in 47 separate transactions which violated the freeze order, including 13 transfers, totaling $285,000.00 from Dr. Weilert's bank account to entities controlled by the Weilerts. These violations of the freeze order pre-dated the filing of a bankruptcy petition on behalf of the Weilerts. The bankruptcy court entered an order granting relief from the automatic stay to allow the appeal to proceed, but not to allow enforcement of the judgment against bankruptcy estate assets.

The Court of Appeals was thus confronted with a situation in which trial court orders directed at enforcing the judgment had been clearly violated by the appellants.[1] The Court granted the judgment creditor's motion to dismiss, without ever reaching the merits of the appeal, by applying the disentitlement doctrine. The Court held that the appeal should be dismissed because "[t]he record shows that defendants are seeking the benefits of an appeal while willfully disobeying the trial court's valid orders and thereby frustrating defendants' legitimate efforts to enforce the judgment."

> *A party to an action cannot, with right or reason, ask the aid and assistance of a court in hearing his demands while he stands in an attitude of contempt to legal orders and processes of the courts of this state.*

The disentitlement doctrine may[2] also be applied to enforcement of certain non-money judgments. In *Blumberg v. Minthorne,* 233 Cal. App. 4th 1384, (2015), a trust beneficiary filed a motion to remove a trustee and recover trust property. The defendant trustee refused to comply with an order directing her to transfer the property to a successor trustee by quitclaim deed. The Court of Appeal dismissed the trustee's appeal, stating that a "party to an action cannot, with right or reason, ask the aid and assistance of a court in hearing his demands while he stands in an attitude of contempt to legal orders and processes of the courts of this state."[3]

Application of the disentitlement doctrine is in the discretion of the appellate court. A motion to dismiss an appeal under this rule is more likely to be granted if no fact finding is necessary (for example, if the appellant has been held in contempt by the trial court).[4] If a proper record is made, a motion to dismiss under the disentitlement doctrine can result in dismissal of an appeal even without a contempt finding. A well-supported dismissal motion filed in good faith, even if not granted, will

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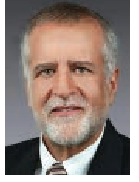
bring to the appellate court's attention unsavory facts which will not otherwise appear in the appellate record.

1 The Weilerts had in effect admitted the transfers in their Statement of Financial affairs, required to be filed in the bankruptcy case. They essentially made the same admission in their response to the motion to dismiss their appeal.

2 As the Court noted in *Blumberg,* "Ordinarily, mandatory injunctions are stayed pending an appeal . . . ." 233 Cal.App.4th at 1392. However, the order on the petition was subject to Probate Code section 1310 subd. (d) and Code of Civil Procedure section 917.9 which states "(a) The perfecting of an appeal shall not stay enforcement of the judgment or order ... if the trial court, in its discretion, requires an undertaking and the undertaking is not given, in any of the following cases: (1) Appellant was found to possess money or other property belonging to respondent [or](2) Appellant is required to perform an act for respondent's benefit pursuant to judgment or order under appeal."

3 *Blumberg,* 233 Cal. App. 4th at1390-91, quoting *MacPherson v. MacPherson*, 13 Cal.2d 271, 277 (1939).

4 Cf. *Phelps v. Bishop,* 2015 WL 3417321 (Cal. Ct. App. May 28, 2015) in which the Court declined to engage in fact finding to determine whether the appellant landlord had transferred an apartment building to his daughter without consideration in order to avoid enforcement of a judgment in favor of his tenant.



Dean T. Kirby, Jr. is a member of the firm of Kirby & McGuinn, A P.C. Dean is a certified specialist in Creditors Rights and in Bankruptcy, with over 30 years' experience in those fields. His practice is confined to the representation of lenders, creditors and fiduciaries in foreclosure, bankruptcy, commercial collection and receiverships. He can be reached at DKirby@kirbymac.com.

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The Perils of a Foreclosed Junior Lienholder Soliciting Voluntary Payment on an Unenforceable Debt

By Kathy Shakibi, Esq.

In 1989 California enacted Code of Civil Procedure §580b, one of a number of anti-deficiency statutes offering protection to borrowers in residential real estate transactions. A deficiency, as determined in a judicial foreclosure, is the liability of a borrower to the lender, for the amount of the loan in excess of the value of the property. The statute prohibits deficiency judgments in a few circumstances, including a purchase money transaction, where a borrower purchases a dwelling with the loan funds. Once a lien securing a purchase money loan is foreclosed upon, no deficiency judgment can be pursued against the borrower, regardless of the method of foreclosure. This prohibition extends to any foreclosed out junior lienholder and prevents the pursuit of a legal action against the borrower for personal liability on the promissory note.

While a borrower cannot be pursued in a court for personal liability, some foreclosed out junior lenders, following the non-judicial foreclosure of an unrelated senior lienholder, contacted borrowers attempting to collect voluntary payment. The rationale was that a debt may still be owed while not enforceable in a court. This voluntary payment collection practice was addressed in the 2013 legislative session, and the statute was amended to extend the prohibition so that "no deficiency shall be owed or collected" in the circumstances covered by the statute. In March 2015, the Appellate Court in *Alborzian v. JP Morgan Chase Bank N.A.*, 235 Cal. App. 4th 29 (2015) found one such collection letter soliciting voluntary payment to be deceptive under the FDCPA, Rosenthal Act and Unfair Competition laws for the mere implication that the unenforceable debt might still be enforceable.

The 'unspoken but unmistakable premise'- an implication- in a collection communication can be found deceptive under the FDCPA.

ALBORZIAN FACTS

Borrower obtained purchase money loans from two different lenders secured by a first and second deed of trust. The senior lienholder non-judicially foreclosed on the property. Following the sale, the foreclosed out unrelated junior lienholder sent two letters to the borrowers, attempting to collect voluntary payment toward the junior loan. The junior lender and the Court in *Alborzian* conceded that the junior loan was not enforceable meaning the borrower could not be personally held liable in a civil action. The issue in *Alborzian* was the junior lender's attempt to collect voluntary payment, specifically the language of the collection letters, which the Court found to imply that the debt was still enforceable.

THE LANGUAGE WHICH THE COURT FOUND DECEPTIVE

The FDCPA (15 U.S.C. § 1692e) generally prohibits a debt collector from using false, deceptive, or misleading representation in connection with collection of a debt covered by the FDCPA. The two letters sent by the *Alborzian* junior lender stated that borrowers owed a balance on their loan, and offered a settlement for less than the loan balance. The letters provided a short window of opportunity for the borrowers to resolve their delinquency before the debt was accelerated, set a deadline beyond which the offer became null and void, and warned that a delay would leave the borrowers fewer options. The letters contained a disclaimer that they were not an attempt to collect a debt or to impose personal liability to the extent the borrowers' obligation had been discharged. In addition to the junior lender, the borrowers also sued a collection agency that appears to have made collection calls.

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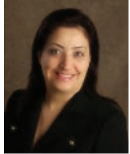
AN AMBIGUOUS LETTER IS A PERILOUS LETTER

Whether a debt collection effort involves false representation, threat or deception is judged from the perspective of the least sophisticated debtor. The Court found that the language of the letters offering to settle a debt owed, by giving windows of opportunity that, if missed, left borrowers with fewer options and resulted in loan acceleration, implied that the borrowers debt was still valid, due and owing, in other words, enforceable. Although CCP §580b in effect discharges a borrower's personal liability, and the letters contained a discharged debt disclaimer, the Court held the least sophisticated debtor would not know that his or her obligation is discharged. The implication of the letters was that the debt was still enforceable. The Court reasoned that the junior lender could have avoided any ambiguity by disclosing that the debt was no longer enforceable against the borrower, and that the lender was merely seeking voluntary repayment of an unenforceable debt. The Court cited *Gonzales v. Arrow Fin. Servs., LLC* (9th Cir. 2011) 660 F.3d 1055, for the premise that "When language in a debt collection letter can reasonably be interpreted to imply that the debt collector will take action it has no intention or ability to undertake, the debt collector that fails to clarify that ambiguity does so at its own peril." The Court held that the junior lender and the collection agency walked a perilous path, and borrowers had alleged enough of a misrepresentation or deception to get past a demurrer on their FDCPA, Rosenthal Act, and Unfair Competition claims.

PRE-2013 TRANSACTIONS AND ACTIONABLE MISREPRESENTATION

Alborzian Court notes that for loans executed on or after January 1, 2013, any attempt to collect on the loan is barred. However, for loans executed before January 1, 2013, like the Alborzian loan, a lienholder is not barred from soliciting voluntary payment, with the caveat that the lender cannot violate other laws in the course of so doing. The pre and post 2013 loan transaction distinction was added to the statute via an earlier amendment in the 2012 legislative session (see endnotes 1 and 2). Even if such collection attempts are not barred for pre-2013 loan transactions, the language of any such communication needs to be evaluated in light of *Alborzian* finding that certain words and concepts, such as "owe, debt, settle, acceleration, window of opportunity, fewer options" can be ambiguous and deceptive to the least sophisticated debtor, who is not expected to be familiar with California statutes. Should any such communication contain a disclosure that the subject debt is unenforceable and any payment sought is voluntary? The *Alborzian* Court references such disclosure. In light of *Alborzian* ruling, collection efforts need to be mindful of the implications of communications, which a court may find deceptive.



Kathy Shakibi is an active member of the United Trustees Association, and a regular contributor to UTA Quarterly. Kathy Shakibi has represented loan servicers, lenders and trustees in all aspects of mortgage banking law. She can be reached at 949-307-8611.

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New Supreme Court Case of *Bank of America N.A. v Caulkett*: A "Tempest in a Tea Pot" or New Opportunity for Secured Creditors?

By Spencer Scheer, Esq., Scheer Law Group, LLP

The recent opinion of the Supreme Court case of *Bank of America, N.A. v Caulkett* (United States Supreme Court, Docket # 13-1421, decided June 1, 2015), denied claims by a debtor that a wholly unsecured second position lien could be avoided/stripped in a Chapter 7 proceeding. The holding in the *Caulkett* case was an extension of a prior holding by the Supreme Court in the case *of Dewsnup v. Timm*, 502 U.S. 410 (1992). The difference in *Caulkett* and *Dewsnip* was that in *Dewsnup* the debtor attempted to have a partially secured **first** position lien reduced/stripped to the actual value of the property, which was denied. Debtor advocates in the *Caulkett* case thought they might get "another bite at the apple" by taking aim at **junior** liens which obviously had no equity to support the lien. However, this attempt was denied by the Court in *Caulkett*, which in essence reaffirmed the principle that valid liens pass through bankruptcy unaffected.

With the recent holding in Caulkett it appears that secured creditors can now argue that there is no basis to remove a lien that is entitled to the anti-modification protections allowed in the bankruptcy code, as long as the lender's claim is "allowed" and "secured".

At first glance, the ruling may appear to be a "tempest in a teapot", just extending the holding in Dewsnip that you can't reduce/strip off a mortgage lien in a Chapter 7. However, a closer reading of the holding in *Caulkett* may allow creditors to challenge lien strips/cramdowns in Chapter 13 cases when a loan is solely secured by the debtor's principal residence. This protection was previously taken away from creditors in jurisdictions such as the 9th Circuit, which includes California, but was not decided by the Supreme Court.

Under the ruling of the case of In re: Lam, 211 B.R. 36 (B.A.P. 9th Cir. 1997), courts in the 9th Circuit took away anti-loan modification protections allowed to lenders under 11 U.S.C. §1322(b)(2) and 11 U.S.C. §1123(b)(5). Simply stated, the bankruptcy code provides that loans solely secured by debtor's principal residence could not be modified/stripped in a Chapter 13 or Chapter 11 case. To get around this, courts in the 9th Circuit (via *Lam* and its progeny, see e.g. *Zimmer v. PSB Lending Corp. (in Re Zimmer), 313 F.3d 1220 (9th Cir. Cal. 2002)*) found that this protection only applies if the lien has equity or value supporting it. If there is no equity, then the anti- modification provisions don't apply and the Debtor can remove or strip the lien. This is often referred to as a "cramdown." It happens all the time in the bankruptcy courts in the Ninth Circuit and is often a result of economic swings to the downside, which can provide a debtor with a windfall if the property regains value.

With the recent holding in *Caulkett* it appears that secured creditors can now argue that there is no basis to remove a lien that is entitled to the anti-modification protections allowed in the bankruptcy code, as long as the lender's claim is "allowed" and "secured". The Supreme Court clearly did not go this far in its holding and did not address whether the anti-modification provisions protect against cramdown/lien stripping even if there is no equity supporting the claim, but the implication is there. While debtor proponents will argue that the Supreme Court's holding is "apples and oranges" in respect to the anti -modification provisions in the *Lam* case, I believe that someone will raise the argument, asserting that the Supreme Court decision in *Caulkett* does impact the *Lam* decision overturning the anti-modification protections given to Lenders. The hold-

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ings in *Lam* and its progeny were never validated one way or another by the Supreme Court. I think this will happen soon.

Accordingly, whether the *Caulkett* case is a "Tempest in a Tea Pot" or will be extended to recapture ground taken away from secured creditors by *Lam*, is an issue to keep an eye on.

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Irony In Funding Affordable Housing

By Michael Belote, Esq., UTA California Lobbyist, California Advocates

Like so much in life, including nonjudicial foreclosures, the legislative process in California moves from a series of deadline to deadline. During the first part of the year, the end of February deadline is to have new bills introduced for the year. As this column is written, the Assembly and Senate are facing floor deadlines to send bills to the other house. The whole process winds up in the fall, when the fall recess begins on September 11 and Governor Brown faces a 30-day deadline to sign or veto the many hundreds of bills sent to him.

In order to meet the "house of origin" deadline, where the Assembly and Senate pass their own bills and send them to the "second house" for consideration, hundreds of bills will be considered in a very few days. A number of the more than three dozen bills relevant to UTA will be considered during these marathon floor sessions. While there are really no "stop the press" foreclosure bills, there are still important issues affecting UTA and allied real estate organizations.

Among those issues is a proposal to fund the development of affordable housing through a surcharge on recording fees, included in AB 1335 (Atkins). Assembly Member Atkins serves as Speaker of the Assembly, which provides very considerable political heft to the effort. Ms. Atkins also has been dedicated for housing issues for many years, including her time spent in local government in San Diego. Everyone in Sacramento acknowledges the sincerity of the Speaker's commitment to housing.

The proposal to surcharge the recording of real estate documents to fund affordable housing has failed previously in the California legislature. There are at least two key differences in 2015, however. The first is the involvement of Speaker Atkins, and the 19 co-authors she has assembled in support of the measure. The second difference is that this year, amendments to the bill have brought the very powerful California Association of Realtors into a position of support. More on that shortly.

As before, AB 1335 proposes a $75 dollar surcharge on every real estate document presented for recordation, except that expressly exempted from paying recording fees, those subject to the imposition of a documentary transfer tax, and those recorded "in connection" with transfers "to an owner-occupier". The bill contains a non-exclusive list of those documents to which the surcharge expressly *will* apply, and that list includes notices of default and notices of trustees sale.

In contrast with previous years, this year's bill includes a cap on the surcharge of $225, "per each single transaction per parcel of real property". The bill thus raises a number of questions which will likely be sorted out by recorders in 58 different counties. Out of the hundreds of documents eligible for recordation, which are real estate instruments, papers or notices subject to the surcharge, others than those expressly included? What is a "single transaction per parcel of real property", such that the aggregation limit of $225 will apply? At this point, it seems unlikely that the bill will provide this level of detail if it reaches the Governor's desk.

Not unnoticed by UTA members is the irony of requiring homeowners struggling to stay in their homes by reinstating their loans to pay surcharges for those who lack housing. But there are other interesting disconnects in the bill. For example, the surcharge will apply statewide, and thus be imposed on documents recorded in dozens of largely rural counties where no affordable housing is ever likely to be constructed.

For legal reasons, AB 1335 requires a two-thirds vote of each house of the legislature, rather than a simple majority. Because Democrats are (just) shy of two-thirds in both the Assembly and Senate, some Republican votes will be required to pass the bill, assuming that every Democrat votes "AYE". Can the Speaker convince a small number of Republicans to support the bill?

Here the support of the California Association of Realtors could be significant. As amended on April 30, AB 1335 creates the "Building Homes and Jobs Trust Fund Governing Board" to administer the money generated by the surcharge. In language specifying the membership of the Governing Board, the following sentence is included: "The governing board shall consist of not less than two real estate licensees, one from northern California and one from southern California, each with not less

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than 10 years of real estate experience and membership in a real estate trade organization with not less than 20,000 licensees".

The legislative process is endlessly fascinating.

Michael Belote has represented the United Trustees Association for 26 years before the California legislature and state regulators. Mike's activities in the legislative process have spanned a broad array of issues, including financial services, real estate, health care, and the judiciary and local government. He can be emailed at mbelote@caladvocates.com.

Wright, Finlay & Zak, LLP provides high quality and cost-effective representation in mortgage banking, loan servicing, and foreclosure related matters in California, Nevada, Arizona, Washington and Oregon.

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Affordable Housing Laws May Presage Foreclosure Activity

By Holly Chisa, HPC Advocacy, LLC, UTA Washington Lobbyist

As part of the on-going discussions around foreclosure law, issues around housing **affordability** are often raised. The home market is stabilizing, home values are increasing, and now, instead of arguments about how to keep people in their homes, we hear questions about how to get people into affordable housing in the first place.

With the shift to providing affordable housing, as opposed to "managing" (read ending) foreclosures, advocates are focusing on loan origination, rental agreements, rent controls, and, recently, loan rates for mobile homes. As home prices rise and there are shortages in both the rental and retail housing markets, people focus concerns to whether individuals can afford to live in urban areas, or afford their first home. We saw these issues before the housing market collapse in the 2000's. In the urban markets in Washington State, there were closed bidding wars over available homes, and prices were extraordinarily high. Rental pricing was also high to compete with the homeowner market. It was during this time that some lenders began using mortgage tools that encouraged potential buyers to borrow money they may not have had the resources to afford. Advocates are concerned this pattern will emerge again as the housing market gets hot again.

And what do these efforts look like? The City of Seattle continues to debate before its Council whether high density housing and micro-apartments should be allowed to be built in urban neighborhoods. Community groups continue to advocate for eminent domain (as we've addressed in previous columns.) As part of the minimum wage debate, individuals are also pushing for the ability to pass a local ordinances for rent control. Housing advocates would like to repeal a preemption in state law that prevents rent control ordinances from being passed by local governments. Since Seattle has already begun the process of increasing its minimum wage rate to $15 an hour, there is now a belief that, even with that wage increase, affordable housing will remain elusive. Increasing wages means increasing rents and home prices, which, again, puts people at a disadvantage.

Couple with this an in-depth article from the *Seattle Times* on lending for mobile homes by Clayton Homes. The articles, published in April of 2015, debate the integrated relationship of Clayton Homes, and its ownership of the manufacturers, suppliers, and lenders of mobile homes. Accusations in the store are made about kick-backs to retailers from lenders if they're able to get buyers to sign for these "predatory loans." Future articles highlight attempts by Congress in Washington, D.C., to further deregulate financial industry regulations, including provisions relating to mobile homes. The article from May, 2015, describes the "looser" changes in mobile home lending as a "boon for [the] Buffet company."

For trustees, the ever-changing real estate market means an ever-changing dynamic in property laws. If rental properties are required to follow a City-structured pricing schematic, it may be difficult for property owners to maintain their own payments, causing more foreclosures in the market. Mandatory housing pricing and requirements for density restrict flexibility in the marketplace, and could adversely affect the housing market in Washington. The United Trustees Association continues to monitor legislation in Washington State not just for laws specific to foreclosure and the Deed of Trust Act, but other legislation that might inadvertently harm or overregulate the housing market as a whole. While UTA may not take a formal position on these bills, we do monitor their potential impact to the real estate market to keep our members informed of changes to the law. This is especially important when local governments make changes, which can affect only portions of the market. UTA will continue to watch state agencies and local governments as they consider policies that may inadvertently affect the stabilizing housing market.

Holly Chisa is UTA's Washington Lobbyist. She has over 15 years of political experience, including campaign work and individual work as staff with Members of the Washing-ton Legislature and the U.S. Congress. She can be reached at hollychi-sa@hpcadvocacy.com.

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Arizona Legislative Update

By Rex C. Anderson, Esq., Attorney at Law

The annual Arizona legislature adjourned on April 3, 2015, which means that absent special language, the new laws passed this session will take effect on July 3, 2015. Only one bill affecting the foreclosure process made it through the gauntlet this year to become law, and it requires significant changes to the first paragraph of any Notice of Trustee's Sale recorded in Arizona on or after July 3, 2015. There is no downside to making the change now as many Arizona trustees have already done.

The bill officially titled Senate Bill 1448, and unofficially called the UCA made additions to Arizona Revised Statutes section 33-808(C), which is the section that describes what must be included in a Notice of Trustee's Sale. Effective July 3, 2015, this statute reads in part:

> The Notice of Sale shall contain …
>
> …. [several things you already know];
> 8. the following statement in the first paragraph of the notice of sale, printed in boldface and capitalized type:
>
> **"NOTICE! IF YOU BELIEVE THERE IS A DEFENSE TO THE TRUSTEE SALE OR IF YOU HAVE AN OBJECTION TO THE TRUSTEE SALE, YOU MUST FILE AN ACTION AND OBTAIN A COURT ORDER PURSUANT TO RULE 65, ARIZONA RULES OF CIVIL PROCEDURE, STOPPING THE SALE NO LATER THAN 5:00 P.M. MOUNTAIN STANDARD TIME ON THE LAST BUSINESS DAY BEFORE THE SCHEDULED DATE OF THE SALE, OR YOU MAY HAVE WAIVED ANY DEFENSES OR OBJECTIONS TO THE SALE. UNLESS YOU OBTAIN AN ORDER, THE SALE WILL BE FINAL."**

The statute was also amended to show the suggested place of this screaming admonition is right after the first sentence, making the notice now nearly unreadable. The second revision to this statute now provides that the Notice of Trustee's Sale is now "sufficient if in substantially the following form":

> "The following legally described trust property will be sold, pursuant to the power of sale under that certain trust deed recorded in docket __________ at page ____________ records of ___________ county, Arizona. **NOTICE! IF YOU BELIEVE THERE IS A DEFENSE TO THE TRUSTEE SALE OF IF YOU HAVE AN OBJECTION TO THE TRUSTEE SALE, YOU MUST FILE AN ACTION AND OBTAIN A COURT ORDER PURSUANT TO RULE 65, ARIZONA RULES OF CIVIL PROCEDURE, STOPPING THE SALE NO LATER THAN 5:00 P.M. MOUNTAIN STANDARD TIME ON THE LAST BUSINESS DAY BEFORE THE SCHEDULED DATE OF THE SALE, OR YOU MAY HAVE WAIVED ANY DEFENSES OR OBJECTIONS TO THE SALE. UNLESS YOU OBTAIN AN ORDER, THE SALE WILL BE FINAL AND WILL OCCUR** at public auction to the highest bidder at …. (location information), etc."

Or, in other words:

> Notice, some property will be sold under a deed of trust. **NOTICE! GET A COURT ORDER BY THE DEADLINE OR YOU WILL WAIVE YOUR OBJECTIONS AND DEFENSES, AND THE SALE WILL BE FINAL AND WILL OCCUR** at public auction to the high bidder…

I have received questions asking if there were alternative ways of wording or sequencing the required parts of this first paragraph to make it more readable and less confusing. I prefer that my Notice of Trustee's Sale documents be readable by the least sophisticated person, rather than trigger an immediate phone call to my office from every recipient asking: "I don't understand this notice and how do I get a court order?"

The bold, capitalized newly added text must appear in the first paragraph, but the document is more readable from the beginning if the new language is placed at the end of the paragraph, rather than in the middle. Here is a possible alternative wording for this document:

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Notice of Trustee's Sale

Notice, the property described below will be sold at public auction to the highest bidder, pursuant to the power of sale given in that certain Deed of Trust recorded on <Recording Date> at <Recording Reference Information>, in the office of the County Recorder of <County Name>, Arizona. The public auction will be held at <Auction Location> on <Sale Date & Time>. **NOTICE! IF YOU BELIEVE THERE IS A DEFENSE TO THE TRUSTEE SALE OR IF YOU HAVE AN OBJECTION TO THE TRUSTEE SALE, YOU MUST FILE AN ACTION AND OBTAIN A COURT ORDER PURSUANT TO RULE 65, ARIZONA RULES OF CIVIL PROCEDURE, STOPPING THE SALE NO LATER THAN 5:00 P.M. MOUNTAIN STANDARD TIME ON THE LAST BUSINESS DAY BEFORE THE SCHEDULED DATE OF THE SALE, OR YOU MAY HAVE WAIVED ANY DEFENSES OR OBJECTIONS TO THE SALE. UNLESS YOU OBTAIN AN ORDER, THE SALE WILL BE FINAL.**

The property is generally described as
<street address>.

The property is legally described as
<legal description>.

The Tax Parcel number is
<Assessor's Tax Parcel Number>.

The Original Principal Balance owed was
<Original Balance>.

The name and address of the Beneficiary is <Beneficiary's name & address – and not "in care of" the Trustee's address>.
The name and address of the Original Trustor is <Original Trustor's name & address>.

The name, address, and telephone number of the trustee is <your name, address and phone number>.

The trustee qualifies to act as the trustee under the deed of trust described above pursuant to A.R.S. section 33-803(A)___, as a <Describe why you meet the qualifications, and show the correct NUMBER (1 through 6) of A.R.S. 33-803(A)>, and is regulated by <Describe your licensing or regulatory authority>.

Dated this ___ day of <Month, Year>
<Signature of Trustee>
Notary Seal (Acknowledgement)

Your notice need not copy or duplicate this format or sequence, although the right to do so is freely given to any reader. What is important is that you take steps now to add in this bold, capitalized language somewhere into the first paragraph of your Notice of Trustee's sale.

The original version of this bill included changes that would have weakened the finality and binding effect of a completed trustee's sale. These changes were removed during the several conversations with the sponsor of the bill and his interested constituents. Any weakening of the finality of the trustee's sale process will suppress open and active bidding on these properties by the investor community. Another unworkable change would have created rebuttable presumption that any unrecorded transfer of a deed of trust was invalid. Many thanks are owed to Rick Chambliss, the Arizona Trustee Association, and their lobbyist for working with the sponsor to remove these unworkable provisions.

As much as possible the new language in your Notice of Trustee's Sale parrots the requirements and deadlines spelled out under Arizona Revised Statutes section 33-811(C). That statute expressly states that the Trustor (borrower) and everyone else that is mailed a copy of the Notice of Trustee's Sale is deemed to have waived all of their defenses and objections to the trustee's sale unless they obtain an injunction issued under Arizona civil procedure Rule 65 prior to 5:00 p.m. (Mountain Standard Time) on the last business day before the scheduled sale date. The new language in your Notice of Trustee's Sale does not create any new rights or remedies for the borrower or other interested creditors; it merely warns them of the consequences of not complying with this the existing law.

There were no other bills introduced in the recent legislative session that addressed the foreclosure process. However, there was one additional bill addressing liens against real property. That bill (House Bill 2311) allows judgment creditors to record a certified copy of a judgment issued by a Justice Court or Municipal Court. Previously, judgments from those lower courts would have to be first filed with the clerk of the superior court and must be for an amount in excess of $15. Now, with

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this change, judgment creditors who obtain judgments in any amounts in the lower courts (which have lesser filing fees) can record a certified judgment directly without having to first go through the interim step at the superior court. As a result, you will likely start to see certified copies of judgments from Justice Courts and Municipal Courts on your title reports, recorded after December 31, 2015.

Rex C. Anderson is a practicing solo attorney who limits his practice to representing other foreclosure trustees doing business in Arizona and handling foreclosures for a select group of small mortgage lenders. While we make every effort to insure this information is accurate, this article is not legal advice and its use does not create an attorney-client relationship. If you have any questions or concerns about this article, he can be reached at 888-675-7809 or by email at RCA@RexAndersonLaw.com.

UTA Amicus is Victorious in Washington

The Western District Court of Washington has reversed the Bankruptcy Court's decision in *Meyer v. U.S. Bank* in its entirety. UTA had filed an amicus brief in the case. Ann Marshall, Esq., of Bishop, Marshall & Wiebel, filed the brief on behalf of the Association.

In the case, the court had originally held that even though the correct note holder was identified in the NOD and NOS, the trustee could not rely on the servicer for identifying the note holder. The court ruled that the borrower was damaged and with attorney fees the judgment against the trustee exceeded $74,000. The trial court had found the trustee was liable for damages under Washington's Deeds of Trust Act and violation of Washington's Consumer Protection Act, based upon the representations made by the beneficiary. UTA's brief argued that "These actions did not violate the trustee's duties under the DTA, did not prejudice the grantors of the deed of trust, nor did they violate Washington's Consumer Protection Act."

The District court held:

The Meyers's claims were not barred by judicial estoppel when they failed to amend their schedules to include this claim, because it would inequitable as the case law underlying their claims arose two years after the Meyers filed bankruptcy. The assertion of the claims against NWTS was not clearly inconsistent with their failure to list the claims in their schedules. Thus the court went on to evaluate the merits of the claims.

- There can be no cause of action for violation of the Deed of Trust Act when the foreclosure sale did not occur. (Citing Frias.)
- The trustee did not breach its duty of good faith by not investigating whether the servicer had the requisite authority to issue the Beneficiary Declaration, and by accepting the Loss Mitigation Form from ASC without evidence that ASC was the authorized agent of U.S. Bank.
- A trustee has a duty to investigate only when it knew about conflicting information regarding its right to initiate foreclosure, or when the beneficiary declaration contained an inherent ambiguity. (Citing Lyons).
- A technical violation of the Deed of Trust Act is not in itself sufficient to constitute an unfair or deceptive practice.
- The fact that the trustee issued the Notice of Default as the beneficiary's agent was not a deceptive practice. The trustee "indisputably had authority either way to issue the Notice," and because the Meyers made no showing of prejudice by the trustee's reference to itself as an agent rather than trustee.
- Inclusion of the same address for the Owner and Servicer in the Notice of Default did not violate the Consumer Protection Act because the Meyers were unable to point to any way in which they were deceived or otherwise prejudiced by only receiving a phone number for the servicer. Even if the trustee did not strictly comply with the statute, its deviation was only a technical one, and liability cannot lie where the Meyers could not show at trial that the practice was likely to deceive.
- The damages alleged were not proximately caused by any of the alleged unfair or deceptive acts.

The court held "In essence, as amici [UTA] point out, Judge Overstreet held NWTS to an affirmative duty to investigate the veracity of the representations contained in the declarations on which it relied."

State News

2015 Utah Legislative Changes

By Scott Lundberg, Esq., Lundberg & Associates

For mortgage lenders and servicers, 2015 was a fairly quiet legislative year in Utah. Senate Bill 0120 (Regulation of Reverse Mortgages), discussed below, is of special interest to default servicers. House Bill 0227 (Real Estate Amendments), also discussed briefly below, addresses only origination issues. Both became effective May 12, 2015.

Senate Bill 0120

Senate Bill 0120 (Regulation of Reverse Mortgages) enacted the Utah Reverse Mortgage Act, Utah Code sections 57-28-101 et seq. It sets forth requirements for reverse mortgages in Utah and addresses the treatment of reverse mortgage loan proceeds, priority, foreclosure and lender default. It contains a safe harbor for lenders originating reverse mortgages insured by the United States Department of Housing and Urban development if they comply with the requirements found in 12 U.S.C. section 1715z-20 and 24 C.F.R. Part 206.

The safe harbor does not apply to foreclosure. For defaulted reverse mortgages, the bill requires that, before commencing foreclosure, the servicer must give the borrower written notice of the default and provide at least 30 days after the day on which the borrower **receives** the notice to cure the borrower's default. This requirement will necessitate a change in the breach or demand letters for servicers that currently allow 30 days from the day the letter or notice is **sent**.

This requirement poses several challenges for servicers. First, the servicer will need to use some form of return receipt request with the notices in order to be able to determine when the borrower receives the notice. Even that doesn't eliminate the fact that notices may go unclaimed or undeliverable. Since most defaults under reverse mortgages are the result of the borrower's death, this is likely to be a commonplace happening. The statute is not clear on what happens in that event.

Corrective legislation is anticipated in next year's session. However, for the next year, servicers of reverse mortgages will have to give careful consideration to this issue.

House Bill 0227

House Bill 0227 (Real Estate Amendments) amends a number of provisions relating to real estate. The principal areas of interest in the bill to mortgage servicers are (a) modification of licensing requirements, (b) affirmative disclosure requirements associated with the lending process, and (c) prohibited conduct for those engaged in the business of residential mortgage loans.

Scott Lundberg founded Lundberg & Associates in 1991. He represents mortgage lenders and servicers in foreclosure, loss mitigation, eviction, bankruptcy, collection, lender liability and title insurance litigation. He regularly speaks and writes on these topics. He is a member of the Utah Bar Association and the American Bar Association. Lundberg & Associates is a long standing member of the USFN and the ALFN.

State News

Michigan Updates - 2015

By Jonathan L. Engman, Esq., Fabrizio & Brook, P.C.

AFFIDAVITS TO RECORD LOST MORTGAGES

There were some important changes to Michigan's recording statutes dealing with lost mortgages. Specifically, the recording requirements statute (MCL §565.201) was amended to allow a copy of a mortgage to be recorded if the copy is legible and attached to a lost mortgage affidavit. Most importantly, the statute affirms that the mortgage lien is perfected as of the date the affidavit is recorded. This amendment arose from a bankruptcy court ruling that had previously held a lost mortgage affidavit did not perfect a mortgage lien. *In re Neal*, 406 B.R. 288 (E.D. Mich. 2009).

In addition, Michigan's recording statute pertaining to affidavits (MCL §565.451a) was amended to specify what the lost mortgage affidavit must include to make it recordable. Specifically, the affidavit must state:

a) The names of the parties,

b) The legal description and tax identification number,

c) The fact that the original mortgage has been lost or destroyed,

d) That, to the best of the affiant's knowledge, the original mortgage was delivered from the mortgagor to the mortgagee, and

e) The affidavit and unrecorded mortgage was (i) mailed to the mortgagor by certified or registered mail to the mortgagor's last known address or (ii) personally served on the mortgagor.

Both of these changes have retroactive effect for previously recorded lost mortgage affidavits. These are positive changes in Michigan that allow a lender to perfect a lost mortgage. To do so, lenders will want to maintain legible copies of the mortgage from the closing and make sure the affidavit includes the necessary language.

NEW STATUTES RE: SQUATTING

There have been changes to Michigan law that now make squatting a crime. MCL 750.553 makes a first offense of squatting a misdemeanor punishable by imprisonment up to 180 days and a second or subsequent offense a felony punishable by imprisonment up to two years. The statute defines a squatter as an individual who occupies a residential building and has not at any time during that period occupied with the owner's consent for an agreed upon consideration. The criminalization of squatting should be helpful to owners in certain jurisdictions where police used to consider squatting a civil matter and would refuse to intervene, forcing the owner through multiple eviction actions to remove individuals who would simply retake possession.

In addition, Michigan law now allows an owner to use force to remove squatters. When gaining entry to property, the general rule in Michigan is that entry must be made peaceably. However, MCL 600.5711 allows an owner to enter a premises by force if the occupant took possession by forcible entry, holds possession by force, or came into possession by trespass without the right of a possessory interest. The caveat is that the owner may not commit a criminal battery when exercising this right. Therefore, prudence would dictate that if the individual is physically on the property, the owner should use the eviction process to obtain a court order.

MORTGAGEE CAN NOT EXTINGUISH SHERIFF'S SALE THAT'S NOT VOID

In a recently published opinion, *Trademark Properties of Michigan, LLC v Federal National Mortgage Association*, 308 Mich. App. 132 (2014), the Michigan Court of Appeals held that the foreclosing entity may not file an affidavit to set aside a sheriff's sale when the foreclosure sale was not actually void. In this case, the borrower defaulted on a mortgage held by MERS and MERS subsequently foreclosed. Fannie Mae purchased the property at the sheriff's sale, which was not redeemed by the borrower. After the redemption period expired, the condo association recorded a lien and then foreclosed at which time

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the Plaintiff purchased the property. During this redemption period MERS recorded an affidavit purporting to expunge its sheriff's sale to Fannie Mae and reinstate it's mortgage. The Plaintiff then filed a suit to quiet title alleging that the MERS affidavit could not revive the prior mortgage thereby invalidating Plaintiff's interest.

Citing established Michigan case law, the court held that the foreclosure of a mortgage extinguishes the mortgage and the purchaser's interest ripens into legal title if not defeated by redemption. It went on to hold that statutory foreclosures should not be set aside without a strong case of fraud, irregularity or some peculiar exigency. MERS' claim that it's interest in the property was established by the mere filing of an affidavit attesting that the foreclosure sale was void was without merit since the sale was in fact not void.

Jonathan L. Engman is a shareholder of Fabrizio & Brook, P.C. where he is the supervising partner for the Real Estate and Litigation Departments. Jon obtained his Juris Doctorate from the University of Detroit Mercy School of Law. He concentrates his law practice in the area of real estate, mortgage lending, curative title, contracts, and has extensive experience litigating foreclosure and quiet title cases. Jon has organized and presented seminars for the National Business Institute and has given talks on property preservation, loss mitigation and foreclosures at conferences throughout the country in addition to educational seminars for clients on topics related to real estate and mortgage lending. He can be reached at jonengman@fabriziobrook.com.

UTA & Industry News

UTA Submits Amicus Brief in Case Involving Title Claim

UTA has submitted an amicus brief in the case of *Yvanova v. New Century Mortgage Corporation.* The brief was drafted and filed by Jonathan D. Fink, Esq., Wright Finlay & Zak, on behalf of UTA. The case involves the question of whether a borrower has standing to challenge the right to foreclose based on claimed defects in the securitization process and the assignment of the deed of trust.

The amicus brief asserts that it would be contrary to law and public policy to allow a borrower, as a non-party to the securitization and assignment, to attack those agreements. The principal points discussed are:

1. Allowing borrowers standing would upset the careful balance crafted by the Legislature in enacting the non-judicial foreclosure laws and any change in that balance should come from the Legislature not the Courts;

2. The typical "defects" claimed by borrowers would, even if true, merely render the transaction voidable, not void;

3. Only parties to the agreements have the right to avoid a transaction that is merely voidable;

4. The challenged transactions do not result in any prejudice to the borrowers; and

5. Allowing borrowers standing to challenge the securitization and assignment would create considerable additional expense and uncertainty and have potentially damaging effects on the economy."

Comments by CMA Address Concerns with Proposed CFPB Rules

The California Mortgage Association (CMA) provided detailed comments to CFPB in response to the agency's proposed rules to expand foreclosure protections for mortgage borrowers – specifically surviving family members and other homeowners with the same protections as the original borrower. UTA provided input into the comments.

The new rules would expand the definition of "borrower" to include potential 'successors-in-interest', and expand that definition to include parties who may not have a record title interest. The detailed comments address the definition of 'successor in interest'; address privacy issues associated with applying the servicing rules to successors in interest; and address the concern with applying the servicing rules to unconfirmed successors.

Featured Article

TRUTH IN LENDING — Continued from Page 1

the transaction under TILA. Bank of America replied, refusing to acknowledge the rescission's validity. One year and one day later, the Borrowers filed suit in federal court, seeking a declaration of rescission and damages.

The District Court (trial court) entered judgment on the pleadings for Lender, concluding that a borrower can exercise the TILA right to rescind a loan only by filing a lawsuit within three years of the date the loan was consummated[6]. The Borrowers did not file their rescission action until four years and one day after the loan's consummation, thus it was ineffective[7]. The Eighth Circuit Federal Court of Appeal affirmed[8].

As pointed out by Justice Scalia, writing the opinion for the Supreme Court:

> "A borrower exercising his right to rescind under the Act need only provide written notice to his lender within the 3–year period, not file suit within that period. Section 1635(a)'s unequivocal terms—a borrower "shall have the right to rescind ... *by notifying the creditor ... of his intention to do so*" (emphasis added)—leave no doubt that rescission is effected when the borrower notifies the creditor of his intention to rescind. This conclusion is not altered by § 1635(f), which states when the right to rescind must be exercised, but says nothing about how that right is exercised. Nor does § 1635(g)—which states that "in addition to rescission the court may award relief ... not relating to the right to rescind"—support respondents' view that rescission is necessarily a consequence of judicial action. And the fact that the Act modified the common-law condition precedent to rescission at law, see § 1635(b), hardly implies that the Act thereby codified rescission in equity."

The Court's opinion is primarily founded upon the clear language of the statute. While the Lender in the *Jesinoski* case argued that looking at common law rescission, more than mere notice of rescission should be required before the borrower can rescind a loan, the Court rejected this argument holding that this is a case where statutory law modifies common law[9].

After the *Jesinoski* case, it is clear that when a borrower does not receive proper TILA disclosures where such disclosures are required, the borrower may rescind the loan secured by the borrower's principal residence simply by sending the creditor notice of rescission (i.e., the filing of a lawsuit is not required) within 3 years after consummation of the loan transaction or before the sale of the property, whichever occurs first. As such, lenders who make loans subject to the TILA right of rescission will have to respond to a borrower's notice of rescission sent within the applicable 3-year time period, and can no longer assert that the borrower must file a lawsuit to exercise the borrower's right of rescission under TILA.

Unfortunately, the Supreme Court's opinion in the *Jesinoski* case was limited to the facts before the Court and it gave no guidance on circumstances under which a notice of rescission would have merit; and the procedures a lender must follow to respond to such notices of rescission, particularly where they are meritless or questionable[10]. The problem the *Jesinoski* opinion does not address is that many borrowers and their counsel throw in unfounded or gratuitous requests for rescission in qualified written requests (i.e., request for information or request for documents), fair debt collection practice notices, or as in other legal notices or requests to the lender or servicer. No doubt, after *Jesinoski,* upon receipt of notice of rescission from the borrower or from the borrower's counsel, lenders will have to make a quick and accurate decision regarding the merits of the borrower's attempt to rescind. In doubtful or arguable cases, the lender may want to explore with counsel whether to immediately file a declaratory relief action coupled with a petition for injunctive relief conditioning reconveying of the lender's security upon the court determining that the borrower can tender all amounts required under TILA.

1 Corporate Counsel for the United Trustees Association and for the California Mortgage Association.
2 This article presumes that the borrower has not sold the secured property prior to 3-years after consummation of the loan, as that would immediately terminate the borrower's right to rescind.
3 15 U.S.C. § 1635(a); Reg Z § 1026.23(a)(3).
4 15 U.S.C. § 1635(f); Reg Z § 1026.23(a)(3)(1).
5 *Jesinoski v. Countrywide Home Loans, Inc. (*2015) 135 S.Ct. 790, 792, citing *Keiran v. Home Capital, Inc.* (2013) 720 F.3d 721, 727-728.
6 *Jesinoski v. Countrywide Home Loans, Inc.,* supra at 791.
7 Id.
8 Id.
9 Id. at 793.
10 See, *Merritt v. Countrywide Financial Corp.* (9th Cir. 2014) 759 F. 3d 1023.

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CHAPTER 13 — Continued from Page 6

1. Feasibility

The Court in *Schwalb* held that a Chapter 13 plan which relies upon contributions can be feasible where there is a firm commitment by the family member to make the contribution and **a long and undisputed history of providing for the debtor**. *In re Schwalb*, 347 B.R. 726 at 759-760. (emphasis added)

On the other hand, where no evidence of the support is submitted, the plan is not feasible. (*See In re Kahn* 2015 WL 739854 at 3-4 (Bank. D. Colo. Feb. 19, 2015))

In the *Kahn* case, the court held that the plan was not feasible where business income was speculative and "occasional contributions" from the wife's family were not documented or otherwise supported by the evidence.

Similar rejections of family contributions were made in Arkansas, Pennsylvania and Idaho bankruptcy courts.

In *In re Crowder*, 179 B.R. 571, 574 (Bankr. E.D. Ark. 1995), the court dismissed a Chapter 13 case where debtor's father did not affirm a specific amount or other assistance that would continue for the duration of the plan.

In *In re: Norwood*, 178 B.R. 683, 691 (Bankr. E.D. Penn. 1995), confirmation was denied where the debtor failed to provide evidence of the amount of the mother's or sister's income or their other expenses and liabilities.

In *In re Welsh*, 2003, WL 25273855 at 3 (Bankr. D. Idaho, February 26, 2003) that court held that the question of feasibility is fact-specific and dependent upon evidence submitted by the debtor. Evidence which would support the feasibility of a non-debtor contribution includes evidence as to ability, motivation and unqualified commitment by the non-debtor to make the contributions. *Id.* at *3 n. 5

Judge Yun identified several factors in the cases which are commonly considered in determining feasibility of a Chapter 13 plan based in part on contributions of non-debtors:

"(1) the non-debtor's relationship to the debtor and motivation in making the contributions;

(2) the non-debtor's long and undisputed history of making the contributions otherwise providing support for the debtor;

(3) the unqualified commitment of the non-debtor to make the contributions in a specific amount for the duration of the Chapter 13 plan; and

(4) the financial ability of the non-debtor to make the proposed contributions, including expenses and liabilities of the non-debtor that might take precedence over the contributions.

In re Deutsch, supra, 2015 Bankr. Lexis 1268 *7, 8

The court citing the 9th Circuit decision in *Meyer v. Hill* (*In re Hill*) 268 B.R. 548, 552 (B.A.P. 9th Cir. 2001) held that the "Debtor as the Chapter 13 plan proponent has the burden of proof on all elements of plan confirmation," and that therefore, debtor has the burden of providing admissible evidence to support each of the enumerated factors. *In re Deutsch,* supra, 2015 Bankr. Lexis 1268 *8

In *Deutsch*, the court ruled that with regard to the boyfriend's contribution, the relationship was relatively recent, implying that it might not be a reliable relationship or strong motivation to make the payments for five years. Additionally, there was no long and undisputed history of making contributions or supporting the debtor. Debtor's boyfriend stated further that he **intends to contribute only for so long as he is financially able**. The court found such commitment to be qualified and conditional rather than a firm or unqualified commitment and that the contributions could stop at any time. Finally, the court held that debtor's boyfriend showed only $864.69 in net monthly income with no evidence for the basis of the boyfriend's employment.

The court also suggested that a contributor should be required to provide at least 6 months of financial information to support the feasibility of debtor's contributions.

With regard to the debtor's mother's back up contributions, the court held that while it could be inferred that the familial connection provides her motivation for supporting her daughter, the debtor has been employed with the same employer for eight years and there was no evident legal or moral obligation for the

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mother to support the daughter.

Additionally, there was no evidence of a history of contributing money to the debtor or of supporting her in any manner as an adult.

The court held that the third factor is satisfied because the mother testified that she will pay any portion of the $700.00 not paid by the boyfriend.

The debtor failed to provide evidence on the fourth factor – to show that the mother was financially able to make the promised contribution.

The court concluded that as to feasibility that the contributions by the boyfriend or the mother are not supported by sufficient evidence to prove reliability or likelihood of continuing through the plan. Without the contribution, debtor's net monthly income drops to a shortfall of $210.00 just on monthly expenses and no funds whatsoever to make the $490.00 per month trustee payment.

In re Deutsch, supra, 2015 Bankr. Lexis 1260, *13, 14

2. Eligibility

The court in *Deutsch* also considered the issue of eligibility to be a Chapter 13 debtor.

11 U.S.C. §109(e) specifies that to be an eligible Chapter 13 debtor, one must be an "individual" with a regular income." This term is defined in 11 U.S.C. §101 (30) as "an individual whose income is sufficiently stable and regular to enable such individual to make payments under a plan under Chapter 13."

In this case, with debtor's income of $4,300.00 and regular monthly expenses of $4,510.00, while her income was stable, it was not sufficient to enable the debtor to make any Chapter 13 plan payment and thus, she must rely on contributions of others.

A number of courts have held that gratuitous payments from family members and third parties do not generally constitute "regular income" for purposes of 11 U.S.C. §101 (30). *In re Porter*, 276 B.R. 32, 39 (Bankr. D. Mass. 2002); *In re Jordan*, 226 B.R. 117, 119 (Bankr. D. Mont. 1998) (citing *In re Antoine*, 208 B.R. 17, 19-20) (Bankr. E.D. NY 1997); *In re Campbell*, 38 B.R. 193, 196 (Bankr. E.D. NY 1984)

These cases have stated that contributions may be considered "regular income where the contribution is based upon moral and legal obligations, the non-debtor is jointly liable for some debts, the contributions have been made in the past or where there is direct evidence of the non-debtor's consent to assume the responsibility for funding the debtor's plan. *In re Porter*, 276 B.R. 32 at 38; *In re Jordan*, 226 B.R. 117, 119

Applied to the *Deutsch* case, the court held that there was insufficient evidence to support any of the exceptions acknowledged by other courts:

(1) no evident moral or legal obligation for the boyfriend to support his relatively recent girlfriend or for the mother to support her adult daughter

(2) no evidence of joint liability for any of the debts

(3) no evidence of contributions made in the past

(4) no agreement to assume the responsibility for funding debtor's plan, and

(5) no evidence of ability to pay the contribution. *In re Deutsch, supra*, 2015 Bankr. Lexis 1368, *15

Finally, turning to specific cases regarding support by boyfriends/girlfriends, the court cites a number of cases which generally reject such contribution (*In re Jordan, supra*, 226 B.R. at 119-120; *In re Heck*, 355 B.R. 813, 824-825 (Bankr. D. Kan. 2006); *In re Fischel*, 103 B.R. 44, 49 (Bankr. N.D. NY 1989). On occasion, the court will accept such contributions such as where the debtor shared a household for 11 years, was supported by the boyfriend who had cared for the debtor, his children and elderly mother and had executed an affidavit with an unconditional promise to make payments until plan completion. (*In re Murphy*, 226 B.R. 601, 604, Bankr. M.D. Tenn 1998)

Likewise, while more compelling, the debtor's mother's contributions are insufficient because they were not supported by evidence that the contributions were of a stable and regular nature. While handled on a case by case basis, Judge Yun held that the factors considered include: (a) state mandated contributions (*In re Varian*, 91 B.R. 653, 654-55 (Bankr. D. Conn. 1988); (b) joint obligations on a mortgage and substantial self-interest in completing the plan. *In re Campbell*, 38 B.R. 193, 196 (Bankr.

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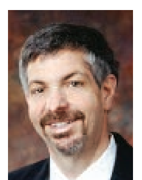
E.D. NY 1984); or (c) family member making contribution for 5 years. *Rowe v. Conners* (*In re Rowe*), 110 B.R. 712, 718 (Bankr. E.D. Penn. 1990). *In re Deutsch, supra*, 2015 Bankr. Lexis 1368, *1718

While Judge Yun's approach requires a practical and sensible analysis to consider whether contributions to make an infeasible plan appear to be feasible, other courts have declined to follow *In re Deutsch* thus far. At least one other judge has stated the Central District of California has long considered and accepted such family contributions.

Judge Yun's approach provides a creditor with the ability to ask a court to look behind the line item statement of family contribution to determine feasibility/eligibility issues and most importantly, to determine whether such contributions are no more than illusory smokescreens to get past plan confirmation and to delay.

A trustee, loan servicer or lender should review Chapter 13 plans which assert that family contributions will make up the debtor's continuing shortfall between income and debt or will be used to make the trustee plan payments. The analysis in *In re Deutsch* may assist a creditor objecting to Chapter 13 plan confirmation when, but for the family/third party contribution, there is no real chance that the debtor will be able to sustain a Chapter 13 plan the minute the debtor's contributors stop paying.



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PROMISSORY ESTOPPEL APPLICATION — Continued from Page 8

and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance" (citation omitted.) Id. at 945.

The borrowers argued that the lender told them the new sale date was June 18, 2009, and if the lender had told them the actual sale date was June 8, 2009, they would have paid off their loan prior to that actual sale date. The borrowers relied on *Wade v. Markwell & Co.*, 118 Cal. App. 2d 410 (1953), *Garcia v. World Savings, FSB*, 183 Cal. App. 4th 1031(2010)., and *Aceves v. U.S. Bank, N.A.*, 192 Cal. App. 4th 218 (2011) to support their position.

The appellate court found each of the cases cited by the borrowers to be distinguishable. In *Wade*, a coat owner gave the defendant a $3,750 mink coat as security for a 30-day $300 loan. After the expiration of 30-days, the lender sent the coat owner written notice requesting that she repay the loan and reclaim the coat. The coat owner informed the lender by telephone that she intended to immediately pay and redeem her coat, and the lender stated she could make her payment and redeem her coat the following week. The coat owner went to the lender's office within the time period, but she was told her coat had been sold and account closed. The court held that because the coat owner that was prepared to reclaim her coat "was induced by defendant's representations to forbear from immediately redeeming under the assurance that it would be held for her for at least another week," and thus she had satisfied the requirement of detrimental reliance.

In Garcia, the court found the existence of detrimental reliance in borrowers having procured "a high cost, high interest loan by using other property they owned as security" for purposes of paying off the loan under which the lender had foreclosed. In that context, the borrowers changed their position by procuring another loan in an effort to obtain funds to cure the loan that was in default.

In *Aceves*, a bank reached out to the borrower who had filed a Chapter 7 bankruptcy and promised to negotiate a loan modification if the borrower did not convert her bankruptcy to a Chapter 13 or oppose the bank's motion to lift the automatic stay. In reliance on the promise, the borrower did not take steps to convert the bankruptcy to a Chapter 13 and did not oppose the Motion for Relief from Stay brought by the bank. When the bank thereafter broke its promise by foreclosing, the court ruled that the borrower had alleged sufficient detrimental reliance for a promissory estoppel claim.

Unlike *Wade* where the coat owner was prepared to redeem her coat, the borrowers in the present case were not induced to forebear paying their deficiency by the postponement of the trustee's sale. Unlike *Garcia*, the borrowers did not actually change their position based on the postponement. And unlike *Aceves*, the borrowers did not relinquish any legal right to stay the bank's foreclosure. Therefore, the appellate court ruled there is no detrimental reliance as a matter of law.

In addition to the lack of detrimental reliance, the appellate court also found the Jones plaintiffs had not shown an injury that would support a promissory estoppel claim. The lender was able to establish that the borrowers intended to request another postponement three or four days prior to the June 18, 2009 sale. If the lender refused to a third sale postponement, the borrowers claim they would have cured the default. The appellate court ruled that the borrowers' intent to cure the default three to four days prior to the sale violates California Civil Code section 2924c(e), which only allows the borrowers to reinstate up to five business days before the sale. *Jones* at 949. Because the borrowers intended to untimely cure their default, they failed to establish an injury.

Finally, the appellate court found the borrowers failed to establish damages. In October 2009, the third party purchaser sold the property for $555,000. The borrowers argued the $555,000 was below market value. But the court found the borrowers' evidence of the property value lacked evidentiary foundation.

The analysis of the appellate court might have been different if the Homeowner's Bill of Rights applied to the above facts. Under the same facts today, the appellate court might have found a violation for dual tracking under California Civil Code section 2923.6.

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The trustee must consider the tax consequences of a sale in determining whether to administer an asset. 11 U.S.C. § 704. When estate property is sold, the estate recognizes a taxable gain or loss. Any resulting tax liability is treated as an administrative expense. The gain on the sale of an individual chapter 7 debtor's residence is excluded from gross income of the debtor's bankruptcy estate to the extent provided by 26 U.S.C. § 121.

(4) Administrative expenses and litigation costs to be borne by the estate resulting from the recovery and sale of the property.

As this a factual issue, there is no definitive algorithm that can be used to determine whether the carve-out agreement will result in a meaningful distribution to unsecured creditors. If a trustee is seeking approval of a carve-out agreement, she will need to not only determine whether the agreement will provide a meaningful distribution to unsecured creditors, but she will need to provide that analysis to the court in a demonstrable way that passes the standard laid out in the *In re KVN* case.

CONCLUSION

Upon review, the BAP in the *In re KVN* case held that there was sufficient facts to support the contention that the Trustee had fully disclosed terms of the carve-out agreement and the only issue left to be determined was whether the carve-out agreement would result in a meaningful distribution to unsecured creditors. As the record did not contain facts sufficient to make a decision as to whether a meaningful distribution would result, the case was remanded back to the bankruptcy court.

Even with the past abuses of carve-out agreements for fully encumbered assets, the presumption of impropriety, and the official handbook for Chapter 7 Trustees generally advising against these types of arrangements, carve-out agreements of fully encumbered assets can be approved by the bankruptcy court.

As long as the trustee proves that she has fulfilled her basic duties (i.e. the terms of the carve-out agreement are fully disclosed and there will be a meaningful distribution to unsecured creditors) the agreement may be approved. It is essential that the trustee provide a detailed analysis explaining why the carve-out agreement will provide a meaningful distribution and all terms of the agreement with the creditor are fully disclosed. If these actions are taken, then the Chapter 7 trustee stands a chance to rebut the presumption of impropriety and have the carve-out agreement approved.

1 e.g. A Chapter 7 Trustee refuses to abandon real property that is over-encumbered and attempts to force a "short sale" in order to collect fees and provide a nominal amount for unsecured creditors.

2 *In re White Glove*, 1998 Bankr. LEXIS 1303, 22-23 (Bankr. E.D. Pa. Oct. 14, 1998)

3 In his ruling, the Court referenced Charles Duck, a former Chapter 7 Trustee, who made a habit of making deals with secured creditors even though there was no equity and he would liquidate the asset and have various arrangements for sharing the proceeds. In essence, the primary motivation of the sale appeared to be to get Mr. Duck paid. Mr. Duck was convicted for embezzling more than $1.9 million from various bankruptcy estates (See *Dickinson v Duck (In re Duck)*, 122 B.R. 403, 404 (Bankr. N.D. Cal. 1990).

4 *Carey v. Pauline (In re Pauline)*, 119 B.R. 727, 728 (9th Cir. BAP 1990); *In re Scimeca Found., Inc.*, 497 B.R. 753, 781 (Bankr. E.D. Pa. 2013) ("It is generally recognized that a chapter 7 trustee should not liquidate fully encumbered assets, for such action yields no benefit to unsecured creditors.") *(citing Morgan v. K.C. Mach. & Tool Co. (In re K.C. Mach. & Tool Co.)*, 816 F.2d 238, 245-46 (6th Cir.1987)); *In re Covington*, 368 B.R. 38, 41 (Bankr. E.D. Cal. 2006) ("[W]hen an asset is fully encumbered by a lien, it is considered improper for a chapter 7 trustee to liquidate the asset."); *In re Feinstein Family P'ship*, 247 B.R. 502, 507 (Bankr. M.D. Fla. 2000) ("Clearly, the Code never contemplated that a Chapter 7 trustee should act as a liquidating agent for secured creditors who should liquidate their own collateral."); *In re Preston Lumber Corp.*, 199 B.R. 415, 416 (Bankr. N.D. Cal. 1996) (actual conflict of interest arises when the trustee sees he can make more money for himself by liquidating collateral for a secured creditor than he can by asserting a claim against the secured creditor on behalf of the estate); *In re Tobin, 202* B.R. 339, 340 (Bankr. D.R.I. 1996) ("The mission of the Chapter 7 trustee is also to enhance the debtor's estate for the benefit of unsecured creditors.").

5 See U.S. DOJ Exec. Office for U.S. Trs., Handbook for Chapter 7 Trustees at 4.

6 See *In re K.C. Mach & Tool Co.,* 816 F.2d at 246.

7 See *In re Feinstein Family P'ship*, 247 B.R. at 507

8 See *In re KVN Corp.*, 514 B.R. 1, at 6 (B.A.P. 9th Cir. 2014)

9 See official handbook of Chapter 7 Trustees, Page 4-5.

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of the last element essential for the cause of action." *Goldstein*, 526 B.R. at 21 (citing *Howard Jarvis Taxpayers Assn. v. City of La Habra*, 25 Cal.4th 809, 815 (2001)). The BAP found that under the terms of the TPP, Lender agreed to provide the Goldsteins with a permanent modification if they complied with the TPP or notify them after the final payment under the TPP if they did not qualify. Since the final payment was due January 1, 2010, Lender was required to act at that time but did not. Therefore, the BAP concluded that the Goldsteins could have filed their action alleging the TPP claims prior to filing the bankruptcy later that year in August.

The Goldsteins' second argument that as a matter of law they could not have brought the TPP related claims was dismissed by the BAP as well. The BAP reasoned that the cases identified by the Goldsteins as creating new causes of action did not actually create new claims under HAMP; but instead interpreted existing state law as it related to violations of HAMP and therefore could have been brought by the Goldsteins prior to their bankruptcy. The BAP went further stating that the plaintiffs in the cases cited by the Goldsteins were faced with the exact same state of the law as the Goldsteins; and if the Goldsteins would had filed an action at the same time as the other plaintiffs and persevered, they could have obtained the same result.

While the decision in *Goldstein* does not carry the same impact as some other recent appellate rulings, it provides a valuable framework to determine when a cause of action accrues for bankruptcy purposes. In addition, it provides a sound strategy for defending lawsuits based on TPP related violations of HAMP where the borrower has obtained a discharge in a Chapter 7 bankruptcy and now seeks to sue the lender for HAMP violations which occurred prior to the filing of the bankruptcy.

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SENATE BILL 306— Continued from Page 14

- **Description of the Super-Priority Amounts:** Section 2 proposes to amend NRS 116.31162 to require that the Notice of Default ("NOD")specifically describe the (1) amount of the HOA lien that is senior to the first priority deed of trust; (2) the nature of those amounts, i.e., dues versus other items; (3) the costs of enforcing the HOA lien; and (4) that, foreclosure on these amounts will eliminate a first priority lien.

- **Sets Recoverable Fees for the HOA:** Section 1 proposes to amend NRS 116.3116 by adding subsection 5, which specifically sets the collection costs that will be senior to a first priority deed of trust – demand letter ($150); notice of delinquent assessment ($325); intent to record a NOD ($90); NOD ($400); and Trustees Sale Guaranty ($400), for a total of $1365. No other enforcement costs, including attorneys' fees, will be senior to a first priority deed of trust. This provision will provide some well needed clarity in what the mortgage lienholder must pay to pay off the HOA lien and protect the mortgage from extinguishment.

- **Payment to HOA is Additional Debt under the Deed of Trust:** As long as it does not conflict with any other provisions of federal or state law, any payments by a lienholder of an amount due to the HOA in accordance with NRS 116.3116(1) "becomes" additional debt owed by the property owner. (Section 1 of SB 306, amending NRS 116.6116(16).)

- **Nevada Mediation Protection Modified:** Under existing law, the HOA cannot foreclose between the date that a first priority lienholder records its NOD and the date the Foreclosure Mediation Program Certificate records. Section 2 of SB 306 proposes to amend NRS 116.61162 to provide an exception to the above limitation if the owner is not paying the HOA dues while the property is in the Mediation Program. Of course, that will generally be the case. Additionally, Section 8 of SB 306 proposes to amend NRS 107.086(2)(d), by requiring that the mortgage lienholder's foreclosure trustee notify the HOA within 10 days after mailing the NOD, that the property is subject to the Mediation Program. Further, NRS 107.086(9) is amended to require that the mortgage lienholder's fore-

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closure trustee provide notice of the Mediation Certificate to the HOA within 10 days of receipt.

- **Notice to Lienholders:** Section 3 of SB 306 proposes to amend NRS 116.31163 specifically requires that the HOA mail a copy of the NOD to any recorded lienholder (recorded prior to the NOD) or, if applicable, its registered agent for service of process. Section 4 proposes the same require for the Notice of Sale (NRS 116.311635(1)(d).) This means that lienholders must ensure that their registered agents for service of process can recognize the NOD or NOS and know where to send it upon receipt. SB 306, section 4, also requires that the HOA post and publish the Notice of Sale (NRS 116.311635(1)(a) and (b)).

- **Sale Process Must be Commercially Reasonable:** While way too late, section 5 of SB 306 will amend NRS 3116.31164 to require that the HOA sale process must be "commercially reasonable."

- **Clarification of the Request for Notice Process:** Section 7 of SB 306 proposes to clean up the Request for Notice provisions of NRS 116.31168. The proposed language will require that the Request for Notice provide (1) the name and address of the person requesting notice; (2) identify the recorded document that request is being made under; and (3) the names of the "unit's owner" and the HOA. Since the name of the owner can be different than the lienholder's borrower, this provision may continue to provide trouble for mortgage servicers. And as servicers have found since the *SFR* decision, it is often quite difficult to identify the name of the HOA or the HOAs for the given unit without paying vendors or ordering the CC&Rs for the HOA. If these procedures are followed, the HOA will be required to mail a copy of the NOD and NOS to the party requesting notice.

- **Impact on a Bona Fide Purchaser for Value:** If passed, section 6 of SB 306 will add NRS 116.31166(13), providing that, after the redemption period expires, any violation of NRS 116.3116 to 116.61168, will not affect the sale of the property to a BFP.

While SB 306 is not the cure-all that many in the mortgage servicer industry had hoped for, a retroactive solution was never likely. While most mortgage servicers have already designed procedures to maximize the opportunity to cure a delinquent Nevada HOA lien before sale, SB 306 will provide additional security. Most importantly, in the unlikely event that a Nevada HOA sale mistakenly goes forward, the foreclosed out lienholder will have 60 days to redeem the property, taking title directly, rather than having to go through its own foreclosure.

If SB 306 – or something close to it – is enacted, the future of HOA foreclosures in Nevada should become clearer, and we can all get back to litigating all the past HOA sales.

Editor's Note: At press time, SB 306 passed in the Nevada Senate.

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issue only if five requirements are met: (1) The issue is identical to that in the former case; (2) The issue was actually litigated in the former case; (3) The issue was decided in the former case; (4) The decision in the former case was final and on the merits; and (5) The party against whom preclusion is sought must be the same as the party to the former proceeding.

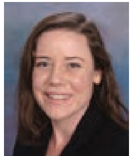
Hardy analogized the dismissal in the federal case under Rule 41(b) to a dismissal for failure to prosecute in state court, and thus argued that collateral estoppel did not apply under California state law because the dismissal of the federal action was not on the merits. The court thus agreed with Hardy's theory that collateral estoppel did not apply in the state court action.

However, America's Best argued that the plain language of the dismissal order and of Rule 41(b) indicated that the dismissal in the federal action was a dismissal on the merits. Rule 41(b) provides in part: "Unless the dismissal order states otherwise, a dismissal under this subdivision…operates as an adjudication on the merits." However, the court of appeals noted that the United States Supreme Court has determined that Rule 41(b) is not a claim-preclusion rule, but merely a procedural rule, citing *Semtek Int'l Inc. v. Lockheed Martin Corp.,* 531 U.S. 497 (2001). *Semtek* also dealt with a federal case arising under California law and dismissed under similar circumstances, so the court of appeals cited that case extensively to support Hardy's right to relitigate the same claims against America's Best. In *Semtek,* the United States Supreme Court held that Rule 41(b) "operating as an adjudication on the merits" only prevented refiling in the same federal court, not refiling in a different federal or state court.

After further discussion as to why Hardy was not precluded from bringing his claims against America's Best based on state or federal law, the court of appeals ultimately reversed the trial court's judgment.

The court of appeals noted throughout its opinion that Hardy was representing himself without an attorney. While not one of its legal arguments, the court appears to be especially dismissive of the lender's claim that the borrower shouldn't be able to relitigate in state court because of the procedural nature of the federal dismissal.

In any case, trustees and their lender-clients should be aware that a procedural dismissal in federal court under Rule 41(b) cannot be used to prevent or dismiss subsequent borrower lawsuits in state court. Despite the plain language of Rule 41(b), federal and state interpretation has made the phrase "operating as an adjudication on the merits" a trap for the unwary when it comes to defending against subsequent actions.



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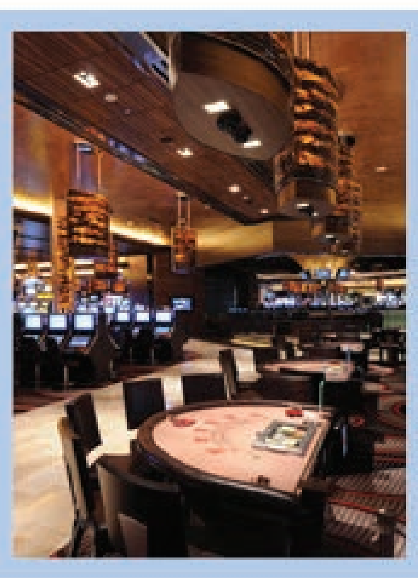

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