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Post-*Yvanova* Landspace: Appellate Courts Chime In While Supreme Court Punts

By Kathy Shakibi, Esq., McCarthy Holthus, LLP

A few months have passed since the California Supreme Court answered one question in *Yvanova*,[1] and left a few more unanswered in its trail. The *Yvanova* gaps are necessarily being filled by appellate opinions, forming a landscape of case law on challenges to authority to foreclose. The appellate opinions so far have been diverse, if not unexpected. What has been equally unforeseen is the Supreme Court passing up on opportunity to clarify *Yvanova* further, as if the Supreme Court signals- do not lift the lid off of the standing stew for now....let it simmer. Below is a summary of the simmering effect since *Yvanova* issued.

> *The Yvanova gaps are necessarily being filled by appellate opinions, forming a landscape of case law on challenges to authority to foreclose.*

FIRST POST-*YVANOVA* APPELLATE RULING -*SATERBAK*

As the first post-*Yvanova* appellate ruling, *Saterbak*[2] set precedent by distinguishing itself from *Yvanova* and undertaking to establish parameters for *Yvanova*'s narrow framework. *Saterbak* made a distinction between a pre-foreclosure and post-foreclosure challenge to authority to foreclose, construing that *Yvanova*'s ruling is limited to post-foreclosure scenarios only. *Saterbak*'s interpretation is a plausible one as what was before the Court in *Yvanova* was a completed foreclosure. Next, *Saterbak* provided guidance on what constitutes a void versus a voidable assignment of a deed of trust. The analysis was much needed to fill a gaping *Yvanova* gap. As the first post-*Yvanova* ruling, *Saterbak* has garnered much attention and been explored for its significance as well as its nuances. *Saterbak* kick started the standing stew that continues to simmer.

SECOND POST-*YVANOVA* APPELLATE RULING- *BROWN*

Next came *Brown*,[3] which also involves a pre-foreclosure challenge to authority to foreclose. *Brown* however, declined to decide the threshold issue of whether a borrower has standing to bring a preemptive challenge to an entity's authority to foreclose. *Brown* side-stepped the issue by looking to the judicially noticed documents, and deciding that the judicially noticed documents, in this case a Purchase and Assumption Agreement, contradicted the borrower's contention about the lack of authority to foreclose. *Brown* rested on the specific facts of the case.

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STATE NEWS

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Mission Statement

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

Randy Newman
2016 UTA President

President's Message

Ahhhh, Summer. For a lot of people that means things slow down, schools are out, traffic lightens, and playtime increases. For a lot of other people not much changes and for some the workload increases as we take over for our colleagues on vacation.

So much goes on behind the scenes at UTA that it's hard to believe how smoothly everything runs. We have an amazing group of dedicated volunteers who work tirelessly along with an incredible executive director who knows when to push, when to pull, and when to get the heck out of the way.

The education committee has put together a great dinner program for our Dallas area members on July 14th. Our speakers are both from Fannie Mae: Scott Luttrull, the associate general counsel and Teresa Marianos, the managing director and deputy general counsel. They will be talking about Fannie Mae in Texas along with multi-state issues. It promises to be a very informative meeting. My personal thanks to Cathe Cole-Sherburn, Chris Pummill, and Chet Sconyers for coordinating and hosting this event.

Our annual conference in November is in the final stages of planning. This year we return to the beautiful La Quinta Resort on November 6th to 8th. We have planned some great activities for Sunday including a cooking class, an Adventure Hummer Tour, Biking and Hiking, and of course, our annual golf tournament. Given the interesting political climate this year, our theme is "Red, White, & Blue." No costume party this year, but we encourage you to dress "patriotically." Look for our flyer and registration information in the next few weeks.

Please note that our conference ends on Election Day (Tuesday, November 8th). With all the upheaval in the world lately (Brexit, anyone?), please make arrangements to get an absentee or mail-in ballot to ensure your voice is heard.

As I write this, the 4th of July is upon us. Please have fun and stay safe. I look forward to seeing you at our conference.

Best.

Randy

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Featured Article

Oregon Appellate Cases Take Spotlight from Quiet Legislative Session

By John M. Thomas, Esq., RCO Legal, P.S.

Oregon's legislature was relatively quiet during its non-regular 2016 session with regard to foreclosure legislation. However, two notable Oregon appellate cases have been issued in the past year: *Hucke* set forth certain parameters to prevail on MERS assignment challenges; and, *Wolf* partially opened the door to certain post-sale challenges in potentially requiring some trial court evidentiary record to be made in the face of a borrower's lawsuit challenging a non-judicial foreclosure, as to who held the promissory note, or alternatively, MERS' authority to act for the loan beneficiary.

Wolf: ORS § 86.797 (1) provides that the property interest of a person, such as a borrower, who received proper notice of a trustee's sale is foreclosed and terminated by the trustee's sale. A number of Oregon state and federal courts have concluded that the statute bars post-sale challenges by borrowers who had proper notice of the sale, but did not file suit to challenge it pre-sale. However, recently, in *Wolf v. GMAC* Mortgage, 276 Or.App. 541 (2016), the Oregon Court of Appeals held that this statutory bar applies only to a "trustee's sale," and thus, does not necessarily preclude a post-sale challenge to the sale of a borrower's property by someone who was not, in fact, the trustee.

Wolf and Hucke underscore the importance for trustees, servicers, and lenders of ensuring that the standing of the foreclosing entity can be established and withstand judicial scrutiny.

The borrower in *Wolf* filed suit after the sale but during the eviction efforts, arguing that that the appointment of LSI Title Company by MERS was invalid because MERS was neither the beneficiary nor did it have authority to do so; the borrower also argued that LSI was not qualified as a "trustee." In initially ruling for the lender, the trial court appeared to rely solely on the post-sale statutory bar, and not an analysis of whether the trustee had authority to foreclose. Arguably, though, *Wolf* is limited to its facts, as the appellate court stated:

> "We need not resolve, however, whether [ORS 86.797] requires strict compliance with every provision of the [Oregon Trust Deed Act] before a person's property interests will be terminated by a trustee's sale." *Id.* at 546.

Notably, the appellate court did not address the rights of bona fide purchasers in post-sale challenges. *Wolf*'s contours may be refined further before the end of 2016 as there is at least one other case in the Oregon Court of Appeals concerning the scope of the statutory bar to post-sale challenges.

Hucke: In *Hucke v. BAC Home Loans Servicing, L.P.*, 272 Or.App. 94 (2015), the Oregon Court of Appeals reversed the trial court's judgment voiding a trustee's sale, holding that the fact that an assignment of the trust deed was not recorded did not preclude nonjudicial foreclosure. In *Hucke*, the borrower filed suit asserting that the recorded assignment of the trust deed from MERS, as beneficiary, to Fannie Mae was not effective because MERS was not a "beneficiary" under the Oregon Trust Deed Act ("OTDA"). However, because the trial court record demonstrated that the originator, GreenPoint Mortgage Funding, Inc. assigned the trust deed to Fannie Mae when it transferred the promissory note to Fannie Mae, and because that transfer was not a formal, recordable assignment, it did not need to be recorded. Applying the Oregon Supreme Court's 2013 rulings in *Niday* and *Brandrup* on the issue, the appellate court found that transfers of promissory notes need not be recorded before nonjudicial foreclosures can proceed. As a result, the appellate court determined that Fannie Mae was a successor beneficiary under the OTDA--Fannie Mae therefore could appoint a successor trustee and initiate foreclosure proceedings, and the MERS assignment to Fannie Mae was inconsequential to the validity of the foreclosure sale.

Wolf and *Hucke* underscore the importance for trustees, servicers, and lenders of ensuring that the standing of the foreclosing entity can be established and withstand judicial scrutiny. The cases also demonstrate that it is possible to establish the validity of a non-judicial foreclosure challenged post-sale

Featured Article

through other evidence which may not have been apparent in the public title records.

John Thomas is Senior Counsel at RCO Legal, P.S. John's practice areas include general real estate litigation, including trustee's sale disputes. John has practiced law for 14 years, including work as in-house counsel for a national loan servicer; he is licensed in Oregon and Washington and can be reached at (503) 517-7180 or jthomas@rcolegal.com.

Featured Article

How To Lose The Homestead Exemption

By Seth Harris, Esq., McCarthy Holthus, LLP

It is not uncommon to see debtors try and hide their assets when filing bankruptcy. It is human nature to cling onto everything one has, especially when it comes to a residence. However, as we learn from *Elliott v. Weill (In re Elliot)* 544 B.R. 421, there are significant consequences once a bankruptcy trustee discovers that the debtor has been concealing assets – including a potential waiver of the homestead exemption.

In re Elliott has been before the United States Bankruptcy Appellate Panel ("BAP") three times. Each appeal dealt with the debtor's property which he had concealed during the pendency of his bankruptcy. Prior to filing his bankruptcy, Elliott transferred his real property residence to his wholly-owned corporation. Elliott ultimately transferred the property back to himself once he received his chapter 7 discharge. However, neither the residence nor his corporation were included in Elliott's bankruptcy schedules. Elliott additionally lied about his address and did not disclose creditors from a 2006 fraud judgment or any creditors holding secured claims. It was not until the fraud judgment creditors discovered Elliott's discharge, that the bankruptcy was reopened and the chapter 7 trustee ultimately discovered Elliott's residence.

Once forced to disclose the real property, Elliott claimed a $175,000 homestead exemption on his residence. The homestead exemption protects a portion of the debtor's interest in real property from unsecured creditors. The trustee initially objected to Elliott's claimed homestead exemption solely based on bad faith and won. However, the BAP reversed this ruling and held based on the Supreme Court's ruling in *Law v. Siegel*, 134 S.Ct. 1188 (2014) that bankruptcy courts were precluded from denying claimed exemptions based on bad faith.

Finding that Elliott's residence offered a benefit to the estate, the bankruptcy court granted the trustee's motion to turn over the property to the trustee for liquidation and distribution. Then the court set out to revisit the issue of whether the Trustee's objection to Elliott's homestead exemption could be sustained. This time, the trustee relied on 11 U.S.C. § 522(g)(1)(B) which only allows a debtor to exempt recovered property if the debtor did not conceal the property. The bankruptcy court sustained the objection to the homestead exemption and after Elliott appealed, the BAP affirmed.

The court held that the trustee successfully recovered property that the debtor had transferred to a company he solely owned and then transferred it back to himself once he received his discharge. As such, this case fell squarely under § 522 and its limitations and upheld the objection to the homestead exemption.

> *… there are multiple tools in the trustee's box which allow him to attack exemptions specifically, even if not broadly.*

This case and its multiple rulings has taught the industry some important lessons. First, mere bad faith is not enough to take away a debtors right to exemptions. Just because a debtor does something wrong, doesn't mean he can't still benefit from exemptions once property is discovered. However, the second lesson is that there are multiple tools in the trustee's box which allow him to attack exemptions specifically, even if not broadly. Bad faith is still a very important element to creditors, but when it comes to exemptions, finding a specific exception may be key.

The BAP is sending a clear message that justice will prevail. As the Supreme Court has stated, the "purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'"

Seth M. Harris is an associate in the Civil Litigation Department at McCarthy & Holthus. Mr. Harris handles complex litigation and appeals and has developed specialties in eminent domain and receivership actions. He can be reached at sharris@mccarthyholthus.com.

Featured Article

When 'Who' Is To Blame Is More Important Than 'Why': Obtaining Relief From a Judgment Under Attorney-Fault Provision of Cal Cal.C.C.P. § 473(b)

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

INTRODUCTION

Sometimes taking a default judgment will work out worse for the party obtaining the judgment. Recent 9th circuit authority in the case of *Martin Potts and Associates, Inc. v Corsair, LLC*, 244 Cal. App. 4th 432, 197 Cal. Rptr. 3d 856 (2016), illustrates this. In essence, if a default is entered due to the admitted neglect of the attorney for the defaulting party, it will always be set aside. The practical result is that there is a six month window where a default judgment can always be attacked based on the negligence of counsel. This should be kept in mind under the adage "don't count your chickens before they are hatched"

The following is the Court's analysis.

Cal.C.C.P. § 473(b) allows a court to vacate a judgment dismissing an action on two separate grounds.

First, "[t]he court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." Such an application must be made within a "reasonable time," but in no event more than six months after the dismissal or other action.

Second, which is the so-called "attorney-fault" provision, which makes relief from dismissal mandatory if accompanied by an attorney's sworn affidavit attesting to the attorney's "mistake, inadvertence, surprise, or neglect" which resulted in the dismissal, unless the court finds that, in fact, the dismissal did not result from such conduct. Unlike the "discretionary" ground for relief, a motion based on "attorney fault" relief need not show diligence in seeking relief. The purpose of this rule is "to alleviate the hardship on parties who lose their day in court due solely to an inexcusable failure to act on the part of their attorneys."[1]

The "attorney-fault" provision, although mandatory, has been challenged on the grounds that the reasons for the attorney mistake was not clearly articulated. The Court in *Martin Potts and Associates, Inc. v Corsair, LLC*, 244 Cal. App. 4th 432, 197 Cal. Rptr. 3d 856 (2016) provided clarity as to what information must be provided when seeking relief pursuant to Cal.C.C.P. § 473(b)

> *"Sometimes taking a default judgment will work out worse for the party obtaining the judgment."*

FACTS

In the case of *Martin Potts and Associates, Inc. v Corsair, LLC*, Corsair was developing a real estate project and hired Marin Potts and Associates ("Potts") to provide management services. Corsair failed to pay Potts and Potts sued Corsair for the outstanding amounts owed. Corsair failed to respond to the lawsuit and its default was taken on March 25, 2014. On August 15, 2014, a default judgment was entered against Corsair in the amount of $101,760.00.

On October 1, 2014, Corsair moved to set aside the default and the default judgment pursuant to Cal.C.C.P. § 473(b). In support of its motion, Corsair submitted an affidavit of it managing member as well as two affidavits from its counsel. The affidavits merely stated that counsel had represented Corsair for over 15 years and that the managing member had sent his counsel the complaint but he failed to take action. The only explanation provided was "[i]t was these failures on my part, as counsel for [Corsair] that allowed the Default and Default judgment to be entered in this matter," and that "my failure to protect the interest of [Corsair], as its counsel, is the sole reason the default was

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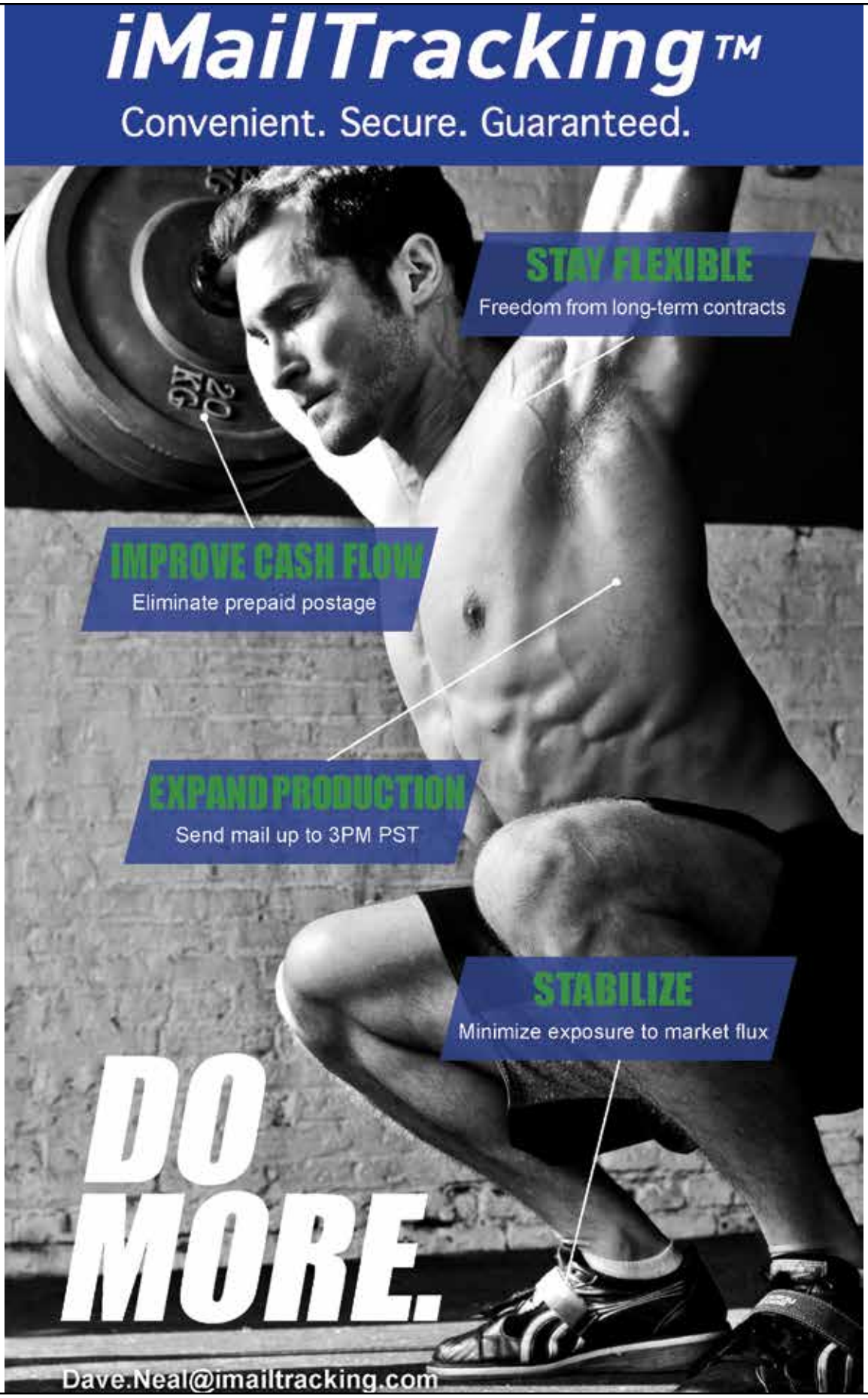
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Featured Article

Nevada Supreme Court Defines Homeowner Association's Superpriority Lien To Include Only Nine Months of Assessments

By Sherry A. Moore, Esq., Zieve, Brodnax & Steele, LLP

In the spring 2016 issue of this journal, *Shadow Wood HOA v. NY Community Bancorp*[1] was briefed in depth. As that author noted, while the hope for *Shadow Wood* was much-needed clarity regarding NRS 116.3116 et seq. post-*SFR*[2], it actually led to more questions than answers. Specifically, the Court said that, "[t]he question of whether and, if so, to what extent costs and fees are recoverable in the context of an HOA superpriority lien is open, particularly as to foreclosures that pre-date the 2015 amendments to NRS Chapter 116."[3]

On April 28th, 2016, the Court put that issue to bed in *Horizons at Seven Hills Homeowners Association v. Ikon Holdings, LLC*.[4] The Court held that an NRS 116.3116 superpriority lien is limited to an amount equal to the common expense assessments due during the 9 months before foreclosure and specifically excludes collection fees and foreclosure costs incurred by the HOA.

> ***"The [Horizons] Court held that [a] superpriority lien is limited to an amount equal to the common expense assessments due during the 9 months..."***

First, in arguing that NRS 116.3116 does include fees and costs, plaintiff association Horizons argued that since NAC 116.470 allows a cap of $1,950.00, reading NRS 116.3116 as excluding costs would render NAC 116.470 meaningless because it would remove the need for a cap. In rejecting this argument, the Court ruled that NRS 116.3116's legislative history reveals the Legislature did not intend for fees and costs to be included in the superpriority lien, and that NAC 116.470 and NRS 116.3116 are easily reconciled, with the former speaking to the cap for fees and costs and the latter speaking to priority.

Second, *Horizons* urged the Court to adopt the advisory opinion of the Commission for Common Interest Communities and Condominium Hotels (CCICCH), which stated that the superpriority lien included collection costs, late charges for assessments, and interest. However, the Court was unpersuaded, noting that unlike Nevada Real Estate Division ("NRED"), whose authority to issue advisory opinions is reserved by NRS 116, CCICCH has no such authority. The Court therefore finally adopted the NRED's December 2012 advisory opinion that defines the superpriority lien as including only 9 months of assessments and nothing more.[5]

Further, *Ikon* upholds *SFR*'s ruling that HOA CC&R's are superseded by NRS 116.3116. Although the language in the Horizon CC&R's attempted to define that the common assessments were limited to 6 rather than 9 months and included certain fees and foreclosure costs, the Court held that NRS 116.3116 controls over any conflicting provision in the CC&'R's. While this holding may not be surprising in light of *SFR*, the Court essentially held that the superseding effect of NRS 116.3116 works both ways: first, for the HOA in rejecting the enforcement of the mortgage savings clause and second, for the first deed of trust holder in rejecting the enforcement of any CC&R provision allowing for the collection of any fees and costs above and beyond the 9 months of assessments. Most importantly, the impact of *Ikon* in conjunction with *Shadow Wood* make a stronger case for setting aside a HOA sale where there is evidence of a rejected tender in an amount equaling 9 months of assessments, or where the HOA or its agent refused to provide a payoff defining the superpriority portion of the lien.

So not only are *Shadow Wood* and *Ikon* encouraging to lenders attempting to protect their rights post-HOA sale, but at least one state district court judge has set aside a HOA sale post-*Shadow Wood* on the basis of equity.[6] However, the court also noted that a sale cannot be set aside on commercial unreasonableness grounds due to insufficiency of price alone, even if that sales price is less than 20% of the fair market value of the Property at the time of the sale. Thus, the court held that similar to the two-prong test in *Long v. Towne* (98 Nev. 11, 639 P.2d 528 (1982), there must be a showing of "something more," namely evidence of fraud, unfairness, or oppression in addition to the inadequate price.

Other district court judges are following suit in ruling that the first deed of trust holder must demonstrate "something more" to set aside a HOA sale on commercial unreasonableness grounds.[7] Particularly troubling about these rulings is that such an interpretation appears to contradict *Shadow Wood*'s adoption of the

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Featured Article

In Re Perl: Ninth Circuit Court of Appeal Permits a Sheriff to Enforce An Entered Judgment for Possession

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

In January 2016, the United States Court of Appeals for the Ninth Circuit gave landlords a small amount of relief from borrowers using the Bankruptcy Court to delay lawful evictions. In *Eden Place, LLC v. Perl* (*In re Perl*) 811 F.3d 1120 (9th Cir. 2016), the 9th Circuit Court of Appeals held that if a landlord or foreclosing creditor has obtained a judgment for possession and the Court has issued a writ of possession, the Sheriff may enforce the writ notwithstanding a subsequently filed bankruptcy petition.

PROCEDURAL HISTORY

Sholem Perl ("Debtor") owned a single family duplex in Los Angeles. Debtor defaulted on his mortgage payment and Bank of America instituted foreclosure proceedings. Eden Place a third party buyer, acquired title at the foreclosure sale in 2013.

Debtor refused to vacate the property. Eden Place commenced two unlawful detainer actions (one for each duplex unit). Debtor filed a separate lawsuit seeking to set aside the foreclosure sale and recorded a lis pendens. Eden Place cross-complained for damages, trespass and interference with prospective economic advantage.

On June 11, 2013, the State Court entered judgment in the Unlawful Detainer Actions for restitution and possession. Three days later, the Court issue a writ of possession. Within the next ten days, the Sheriff posted the lockout notice.

On June 19, 2013, the State Court heard Debtor's motion to stay the unlawful detainer proceedings and set various conditions for a stay. Debtor failed to meet the conditions and the judgment for possession remained in effect.

BANKRUPTCY COURT PROCEEDINGS

Instead of complying with the State Court conditions, Debtor filed a face-page "skeletal" bankruptcy petition failing to list Eden Place as a creditor. Eden Place learned of the filing from Debtor's State Court counsel.

Debtor sought to remove the State Court action to the bankruptcy court. Eden Place sought to remand the matter to state court. Eden Place also filed a motion for relief from stay. Eden Place also argued that the property was not property of the bankruptcy estate (in light of (a) its purchase at the foreclosure sale; (b) its unlawful detainer judgment, and (c) its writ of possession.

> *"… if the Plaintiff in an unlawful detainer action has a judgment for possession entered and a writ of possession … a Sheriff may execute on the judgment …"*

Before the relief from stay hearing, the Sheriff evicted Debtor. Debtor filed an emergency motion to enforce the automatic stay, arguing that the eviction interfered with Debtor's protectable equitable interests based on his continued possessory interest in the property.

The bankruptcy court held that Debtor's "bare possessory interest, coupled with the possibility of some sort of relief [from the pending litigation] gave the bankruptcy court a protected interest subject to the automatic stay." Eden Place 811 F. 3d 1120, 1124. Accordingly, the Bankruptcy Court determined that Eden Place violated the automatic stay.

Eden Place appealed to the Bankruptcy Appellate Panel. The BAP affirmed, holding that Debtor's ownership interest was terminated pre-petition when Eden Place purchased the property at the trustee's sale, but held that Debtor had a recognizable equitable interest in the property by virtue of his physical occupancy.

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Featured Article

Anti-Deficiency Waiver on a Short Sale? Not So Fast, Says California Supreme Court

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

In *Coker v. JPMorgan Chase Bank, N.A., et al.* (Cal. 2016) S213137, the California Supreme Court explicitly stated that the anti-deficiency protections of Cal. Code of Civ. Pro. Sec. (CCP) 580b apply to short sales on purchase money deeds of trust, or deeds of trust securing owner-occupied real property. Under CCP 580b, when an individual borrows money from a bank to buy a home and the lender forecloses on the home, the lender can collect the proceeds from the foreclosure sale, but nothing more. The lender cannot obtain a deficiency judgment against the borrower if the sale proceeds are not enough to repay the loan.

During the recent market crash, many lenders would agree to a short sale in exchange for the borrower's express waiver of any applicable anti-deficiency protections on the unpaid balance. In response to that common practice, in 2010, the California legislature added CCP 580e barring recovery of a deficiency after a short sale. In *Coker,* the California Supreme Court added implied anti-deficiency protection after short sales to its interpretation of CCP 580b, voiding any collections on post-short sale deficiency balances arising prior to the enactment of CCP 580e. The Court held that the statute applies to short sales, not just foreclosure sales.

> *In California, the deficiency advantage of most short sales has been foreclosed by Coker and CCP 580e.*

Coker arose from a borrower's 2004 purchase of a San Diego County condominium with a $452,000 purchase money loan secured by a deed of trust. When the borrower defaulted on her payments, the lender JPMorgan Chase Bank, N.A. (Chase) recorded a Notice of Default on March 10, 2010. The borrower then asked Chase if it would release its security interest so that she could sell the property to a third party for $400,000.

Chase approved the $400,000 short sale with a June 21, 2010 letter that had a number of provisions, including a clause that read: "The amount paid to Chase is for the release of Chase's security interest(s) only, and the Borrower is still responsible for all deficiency balances remaining on the Loan…" The borrower accepted the terms and completed a short sale prior to the legislature's enactment of CCP 580e.

In 2011, the borrower received a demand letter from one of Chase's authorized collections agencies for the balance remaining on her loan after the short sale. The borrower then filed suit for declaratory relief in San Diego County Superior Court to bar Chase from collecting the deficiency balance. The trial court sustained Chase's demurrer without leave to amend. But the Court of Appeal reversed, holding that any effort by Chase to recovery the deficiency was barred by CCP 580b, and that the borrower's agreement to pay the deficiency balance was an unenforceable waiver of the statute. The Court of Appeal also rejected Chase's argument that because the borrower waived her rights under CCP 726 (California's "One Action" or "Security First" Rule requiring a secured creditor to elect remedies and to foreclose on a borrower's property before seeking a personal judgment), CCP 580b did not apply. The California Supreme Court granted review and concurred with the Court of Appeal as to both issues.

CCP 580b absolutely prohibits a deficiency against the borrower for purchase money loans. The California Supreme Court considers this prohibition "a stabilizing factor in land sales" for two reasons. *Coker* at 5, internal citation omitted. First, lenders are less likely to overvalue homes financed when they cannot hold borrowers personally liable for any deficiency. Second, in a bad economy, the statute "prevents the aggravation of the downturn that would result if defaulting purchasers were burdened with large personal liability." *Coker* at 6. The Court rejected Chase's argument that the statute only applied in post-foreclosure situations, citing a lengthy half century's worth of cases in which CCP 580b was applied to a foreclosed-out junior lienholder that received nothing after a completed senior foreclosure, to a real estate commission at closing paid by a deed of trust, and to a post-foreclosure action for waste, none of which would technically be

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a deficiency judgment on the note after a foreclosure by the collecting lienholder, but each of which was barred by CCP 580b. Conversely, in the Court's exhaustive review of the case law, the handful of cases where the purchase money nature of the deed of trust changed resulted in CCP 580b not applying: a deed of trust on a completely unrelated property to finance a hotel; a post-origination subordination agreement, with deficiency waiver as a condition. The Court concluded "the statute limits a lender's recovery on any standard purchase money loan, regardless of how the security has been exhausted and regardless of whether a sale has occurred under the deed of trust securing the unpaid loan." *Coker* at 15. Since the loan at issue was a standard purchase money deed of trust, the Court held that CCP 580b applied. The Court then argued at length about how this holding is consistent with the public policy behind CCP 580b. Finally, the Court addressed Chase's argument that, even if CCP 580b applies to short sales, it cannot have applied in this case because the borrower waived her rights under the Security First Rule (CCP 726). The Court quoted *Security Pacific National Bank v. Wozab* (1990) 51 Cal.3d, which noted that if a lender sues on the note prior to foreclosing, the borrower can raise CCP 726 as an affirmative defense, therefore requiring the creditor to foreclose first. However, if the Security First Rule (CCP 726) is not raised as a defense, the creditor can proceed to judgment on the note, but is then barred from foreclosing. *Coker* at 30; *Wozab* at 1004-1005.

Chase relied on *Bank of America, N.A. v. Roberts* (2013) 217 Cal. App.4th 1386. In *Roberts,* a borrower obtained a non-purchase money loan from Bank of America, using her home as collateral. To avoid foreclosure, the borrower arranged a short sale with Bank of America, and Bank of America consented in exchange for the borrower's promise to remain personally liable for the total amount of the loan. After the sale, Bank of America sued to recover the debt. The borrower raised CCP 726 as a defense,

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It's A Mad World, Where HAMP = UCL In Cali

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

The California Court of Appeal, Fourth District Division 3, has held that the denial of a loan modification sought under HAMP may give rise to a claim for wrongful foreclosure, and under California's Unfair Competition Law ("UCL"). The opinion in *Majd v. Bank of America,* 243 Cal.App.4th 1293 (2016) also followed recent cases eroding the "tender rule" requiring a pre-foreclosure tender of payment of the secured debt as a condition to setting aside a foreclosure sale. There are also troubling references in the opinion to the failure to name the trustee as a party defendant.

> ***Although the Majd opinion does not directly discuss the issue, applying the UCL to alleged HAMP violations allows borrowers to sue even though federal law provides no private right of action based on the HAMP guidelines.***

The Plaintiff Kazem Majd obtained an interest-only adjustable rate first mortgage loan from Country Wide Home Loans in 2006, and alleged that his payments jumped from $3,231.56 to $5,311.92 by the spring of 2011. After Country Wide's merger with Bank of America, Mr. Majd applied to BofA for a loan modification. Since 2009, BofA has been a participant in the Treasury's Home Affordable Modification Program (HAMP).

At about the time that Mr. Majd applied for a loan modification, BofA had assigned the loan to Citibank, as trustee for a securitized trust.[1] Wells Fargo Bank acted as "master servicer" but BofA apparently continued to deal with Mr. Majd, perhaps under some subservicing arrangement. The complaint alleged that sometime after the foreclosure "plaintiff's attorney was notified that [BofA] recently transferred the servicing . . . to Nationstar while in negotiations for resolution with [BofA]." The Court of Appeal upheld the dismissal of Wells Fargo and Nationstar because the complaint contained no allegations of wrongdoing by either of them.

The complaint alleged that BofA denied the application, stating that Mr. Majd was not eligible for a HAMP modification because he "did not provide us with the documents we requested." Mr. Majd alleged that he had provided the documents, and provided them again, and that BofA then "stated that the foreclosure would not go forward during the loan modification process." Mr. Majd alleged that he contacted the BofA underwrite three days before the scheduled trustee's sale and was told that he had no reason for concern as the underwriter had already processed a request for postponement and "the postponement is usually granted the day before the sale date." On the evening before the sale date the underwriter emailed Mr. Majd to tell him that the trustee's sale would not be postponed. The sale was held on the following day. Five days after that, BofA notified Mr. Majd that the "loan was not eligible for a modification because you did not provide us with the documents we requested."

The Court noted that the complaint alleged acts that violated the HAMP guidelines, including holding a foreclosure sale less than 30 days after terminating the modification process, and falsely asserting that requested documents had not been submitted. Following an earlier case,[2] the Court held that violation of the HAMP guidelines constitutes an "unfair practice under California's Unfair Competition Law ("UCL").[3] Although the *Majd* opinion does not directly discuss the issue, applying the UCL to alleged HAMP violations allows borrowers to sue even though federal law provides no private right of action based on the HAMP guidelines.[4]

BofA argued that Mr. Majd was not prejudiced because "HAMP does not require a loan servicer or lender to provide a borrower with a HAMP modification even where the borrower meets all of HAMP's eligibility requirements." The opinion in *Majd* rejects a series of published and (mostly) unpublished federal cases to that effect.[5] The Court cited HAMP guidelines that use mandatory language requiring a modification for eligible borrowers.

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The Court further held that the action was not barred by the failure or Mr. Majd to tender the amount of the secured debt prior to the foreclosure, citing a series of recent California cases which have recognized exceptions to the tender requirement.[6] The Court reasoned that "[t]he purpose of the modification rules is to avoid a foreclosure despite the borrower being incapable of complying with the terms of the original loan. It would be contradictory to require the borrower to tender the amount due on the original loan in such circumstances."[7]

Finally, the opinion contains some troubling language that, quoted out of context, could pose problems for lawyers defending foreclosure trustees. The Court observed that "the wrongful foreclosure claim suffers a fundamental defect—the foreclosure was performed by Recontrust. Recontrust is not a party, and there is no allegation that Recontrust was Bank of America's agent, or that Recontrust was otherwise acting on Bank of America's instructions. This defect, however, would seem to be easily remedied by amendment."[8] Properly read in context, these words do not indicate that Recontrust should have been named as a party, or that Recontrust should be sued for wrongful foreclosure because it acted as BofA's agent in some relation to its alleged wrongful acts. Further remarks by the Court hopefully make clear that it would be enough to have allege that BofA caused the foreclosure to take place by instructing Recontrust to proceed, or by failing to instruct Recontrust to postpone the sale.

1 The complaint included a cause of action seeking to declare the foreclosure void because the loan was purportedly assigned to Citibank as trustee of the securitization trust after the trust was closed to new loans. That portion of the *Majd* opinion which affirmed dismissal of this cause of action was not published. The *Majd* case was decided just prior to the Supreme Court's decision in *Yvanova v. New Century Mortgage Corp.*, 62 Cal. 4th 919 (2016), which in a narrowly limited ruling allowed a foreclosure challenge based the allegation that one of the loan assignments in the title chain was void (rather than merely voidable). *Yvanova* expressly did not reach the issue of whether a purported transfer to a "closed" trust is void or voidable.

2 *Lueras v. BAC Home Loans Servicing, LP*, 221 Cal.App.4th 49 (2013).

3 Cal. Bus. & Prof. Code §§ 17200 et seq. The UCL applies to "any unlawful, unfair or fraudulent business act or practice." Id. The facts in Majd occurred before the enactment of the California Homeowner Bill of Rights ("HOBOR" Cal. Civ. Code §§ 2913.5 et seq.) effective January 1, 2013. The Court noted that the foreclosure would have violated HOBOR's prohibition against "double-tracking," i.e., continuing the foreclosure process while an application for a loan modification is pending. The Court also noted that even where HOBOR doesn't apply, its provisions have been found relevant to determinations that a foreclosure practice was "unfair." See, *Jolley v. Chase Home Finance, LLC* 213 Cal.App.4th 872 (2013). The may also be true for the HAMP guidelines.

4 The leading case holding that state law remedies based on violation of HAMP are not pre-empted by federal law is *Wigod v. Wells Fargo Bank, N.A.* 673 F.3d 547 (7th Cir. 2012), discussed at length in *Daniels v. Select Portfolio Servicing, Inc.,* 246 Cal. App. 4th 1150, 1174, 201 Cal. Rptr. 3d 390, 412 (2016)

5 The opinion in *Kimball v. Flagstar Bank F.S.B.,* 881 F. Supp. 2d 1209, 1224 (S.D. Cal. 2012) states: "As district courts have recognized, "it would be unreasonable for a qualified borrower seeking a loan modification to rely on the HAMP servicer's agreement as granting him enforceable rights since the agreement does not actually require that the servicer modify all eligible loans. [citation]." The *Majd* court rejected Kimball as "simply incorrect."

6 See. e.g., Fonteno v. Wells Fargo Bank, 228 Cal.App.4th 1358 (2014).

7 243 Cal.App.4th at 1306.

8 243 Cal. App. 4th at 1307.

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A Cautionary DNMS tale: *Bae v. T.D. Service Company*

By Marvin B. Adviento, Esq. and T. Robert Finlay, Esq., Wright, Finlay & Zak, LLP

Many times, a borrower will drag a foreclosure trustee into his wrongful foreclosure lawsuit only because it happened to be the trustee named on the various recorded notices. While a Declaration of Non-Monetary Status (DNMS) under California *Civil Code*, section 2924l (Section 2924l) provides trustees with a useful tool to avoid liability for damages or attorney's fees in connection with a nonjudicial foreclosure, filing one does not mean that a trustee can simply forget about the lawsuit. As the trustee in *Bae v. T.D. Service Company* discovered, only the due diligence of the trustee and its counsel can ensure its continuing non-monetary status in the action.

In November 2010, the borrower, James Bae (Bae) filed a wrongful foreclosure lawsuit, alleging several theories of liability, including failure to provide the Notice of Default, emotional distress, and violation of the automatic bankruptcy stay when the lender, Center Bank, foreclosed on the subject property.

On January 27, 2011, TD Service Company of Arizona (TD Service) filed its DNMS under Section 2924l. Under the DNMS, TD Service disclaimed any financial interest in the loan or property, and asserted that it reasonably believed it was named as a defendant solely because "it was the trustee…on the subject [d]eed of [t]rust." Bae did not object within the statutory 15 days following the filing of the DNMS.

> ***While a DNMS provides trustees with a useful tool to avoid liability for damages or attorney's fees in connection with a nonjudicial foreclosure, filing one does not mean that a trustee can simply forget about the lawsuit.***

Bae subsequently filed a First Amended Complaint (FAC) in March 2011. Believing that it was no longer required to participate in the lawsuit because of the January 2011 DNMS, TD Service did not respond to the FAC.

In July 2011, Bae filed two requests for entry of TD Service's default, which the clerk entered. Bae's counsel mailed copies of the Requests for Entry of Default directly to TD Service, but none to TD Service's attorney of record. In August 2012, Bae requested a default judgment for damages of $3,000,000.00. In the request for default judgment, Bae's counsel declared falsely that TD Service never appeared in the lawsuit, despite knowing that TD Service filed its DNMS in January 2011. The Court subsequently entered default judgment, awarding Plaintiff $3,000,000.00 in damages against TD Service. The judgment did not appear to be served on TD Service or its counsel.

On November 20, 2014, more than two years after judgment was entered, TD Service filed a Motion to Set Aside the Default and Default Judgment. Counsel for TD Service provided a declaration wherein he asserted that he never received any pleadings after the DNMS was filed and that he only learned of the default judgment after Bae began levying TD Service's bank accounts. At a hearing on January 23, 2015, the court set aside the default and default judgment. Bae boldly appealed.

The Court of Appeals went through an extensive analysis of the grounds for obtaining relief from default and default judgment, and it reviewed the trial court's order from the perspective of a court's inherent authority to vacate a default and default judgment on equitable grounds such extrinsic fraud or extrinsic mistake under *Rappleyea v. Campbell* (1994) 8 Cal.4th 975. Specifically, the appellate court considered extrinsic mistake, available here when the clerk or trial court erred in entering default and default judgment. Under *Rappleyea*, the appellate court examined whether the circumstances met a "stringent three-part formula": 1) was there a meritorious defense, 2) was there a satisfactory excuse for not presenting its defense, and 3) was TD Service diligent in seeking to set aside default and default judgment. The appellate court resoundingly agreed that the facts met all three factors.

- First, a meritorious defense existed because TD Service, in its DNMS, effectively denied any alleged improper conduct regarding the foreclosure and required notices. In addition, Bae's failure to object to the DNMS established a defense to the relief sought of $3,000,000.00. Further, TD Service submitted evidence that the sale actually took place *after* Plaintiff's bankruptcy was dismissed.
- Second, the unchallenged DNMS absolved TD Service of

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any further obligation to answer or file any other responsive pleading, and as such, TD Service had a satisfactory excuse for not presenting its defense. Further, the clerk erroneously entered default, despite the fact that a DNMS was filed.

- Third, the appellate court held that TD Service did act diligently in seeking to set aside the default and default judgment. Bae's failure to serve TD Service's attorney of record denied TD Service or its counsel of notice that it needed to seek relief two years earlier. Moreover, TD Service was entitled to rely on its DNMS to shield it from the default. Thus, the trial court's order setting aside the default and default judgment was upheld.

Even then, the appellate court had other grounds to find the trial court's ruling valid on the basis of extrinsic fraud. The court mentioned in passing that extrinsic fraud "usually arises when a party is denied a fair adversary hearing because he has been 'deliberately kept in ignorance of the action or proceeding, or in some other way fraudulently prevented from presenting his claim or defense.'" Here, Bae still sought to take TD Service's default and obtain a $3,000,000.00 judgment despite knowing of the DNMS and failing to serve TD Service, in contravention of the procedural requirement that he do so. By not serving TD Service's counsel with the Request for Entry of Default or the Judgment, Bae kept TD Service in the dark of his erstwhile intentions. Moreover, there was no record that Bae's counsel even served the actual Judgment, once she obtained it, further keeping TD Service in the dark as to its need to set aside the default and default judgment.

Although all ended well for the trustee, it still required years of litigation and thousands of dollars in attorneys' fees. As a result, all trustees can learn from this cautionary tale. While the appellate court affirmatively ruled that an unchallenged DNMS will prevent a wrongful foreclosure plaintiff from ultimately obtaining a money judgment against it, trustees and counsel must remain vigilant and periodically check the docket to ensure that an unwitting clerk has not been lulled into rubber-stamping a default or default judgment and to prevent plaintiffs' counsel from doing an end-run past the DNMS to obtain judgment. This risk is even greater with pro per plaintiffs and unscrupulous or uneducated borrower's counsel.

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State News

UTA Bills Move Forward

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

There are at least a couple of inescapable truths about sponsoring bills in the California Legislature. The first is that the bill you cause to be introduced is likely to be changed as it moves through the process. People who expect their prized bill to proceed through the system without amendments of any kind are setting themselves up for disappointment.

The second represents a very basic lesson in civics: we have a bicameral legislature, meaning that two houses have a chance to review and vote on the bill. In California, both the Senate and Assembly have to approve the bill before the final "vote" that counts, a signature by the Governor. If any of the three entities do not go along, the bill fails, as most do. That is why there is at least one more inescapable truth: it is always easier to defeat bills than to pass them.

"The good news is that in the Senate at least, the trustees fee increase was non-controversial, achieving a 38-0 vote on the Senate floor."

For 2016, UTA has two "sponsored" measures in California. The concept of a sponsored bill is somewhat unique to California; this non-legal term simply denotes the organization causing the introduction and seeking passage of a bill. Both UTA bills are moving forward at the halfway point in the legislative year, although, consistent with the inescapable truths discussed above, neither have survived unscathed.

The first bill is SB 983 (Morrell). Originally introduced with four elements, the bill has been narrowed to provide an increase in base trustees fees throughout the nonjudicial foreclosure process. Other ideas, including technical changes to the wording of the "notice to potential bidders" and clarification that trustees are not "owners" for purposes of obligations to register and maintain foreclosed properties, were amended out of the bill in the Senate Judiciary Committee. The good news is that in the Senate at least, the trustees fee increase was non-controversial, achieving a 38-0 vote on the Senate floor. The bill next moves to the Assembly for consideration.

UTA's second sponsored bill is SB 918 by Senator Andy Vidak. The Senator has been stalwart in continuing to help push for resolution of a narrow but persistent problem relating to assessment lien foreclosures. Present law requires both the notice of intention to foreclose, and the notice of default itself, to be personally served on unit owners subject to the Davis-Stirling Common Interest Development Act. Unfortunately the law does not provide a remedy for unit owners who simply cannot be located, or who might be evading service.

UTA members, especially Gary Wisham and Albert Garcia, literally spent months discussing the issue and attempting to negotiate a reasonable compromise with organizations which take credit for causing enactment of the personal service requirement. A consultant for the Senate Judiciary Committee also dedicated enormous time to the effort to find common ground. At the end of the day, the other side opposed any and all efforts to provide a remedy when personal service cannot be effected. SB 918 was amended to require unit owners to provide annually an address to which documents can be sent; while such a concept might help incrementally in having good addresses to serve documents, it does nothing to address the evading service problem.

As amended, SB 918 also passed the Senate unanimously. UTA is not giving up on the service of process problem.

There are a series of other bills pending which impact trustees, including a bill relating to successors in interest under the Homeowners Bill of Rights, and one dealing with priority of PACE liens. These and other bills will be resolved by the August 31, 2016 adjournment deadline for the Legislature, and will be covered extensively at the UTA Conference in

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.

State News

With CFPB Reguluations Looming, California Looks to Jump the Gun and Implement Its Own Regulations For Working With Successors To A Deceased Borrower

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

Despite the Consummer Finance Protection Bureau's (CFPB) promise to issue guidelines this summer, directing loan servicers on how to work with successors to a deceased borrower, the California Legislature moves forward with its effort to duplicate and undoubtedly confuse servicer's efforts to work with these affected individuals. Last year, a similar effort to give non-borrowing successors the same rights as a borrower, failed in the face of strong opposition and obvious conflicts with federal privacy laws. This year, SB 1150 is gaining momentum having just passed the Senate. To date, the hearings have been reportedly long and contentious, with Senior Citizen groups, consummer groups and the State Attorney General sending representatives to argue in favor of the bill. Consummers also testified as to the problems they experienced with servicers purportedly not working with widows and widowers to assume and modify mortgage loans. At the same time, the California Mortgage Bankers Association, California Bankers Association, Credit Union League and others testified to the many problematic provisions and the harm the bill will cause for borrowers, lenders and the housing market. Despite the strong opposition, the bill passed the Senate and is under review by the House.

> *"Despite the CFPB's promise to issue guidelines this summer, directing loan servicers on how to work with successors to a deceased borrower, the California Legislature moves forward with its effort to duplicate and undoubtedly confuse servicer's efforts to work with these affected individuals."*

Some of the key provisions and the corresponding potential issues are set forth below:

a. Proposed 2920.7(a) provides that the servicer cannot record a NOD until it does both of the following: (1) provides the claimant a reasonable period of time, not less than 30 days, to provide proof of the BR's death; and (2) provides the claimant with a reasonable period of time, not less than 90 days, to provide proof of that person's interest in the real property. In addition to adding at least 90 days to the pre-foreclosure process, the proposed language leaves the servicer exposed to several potential problems. For example: (i) although the legislature attempts to define "reasonable documentation", it is still left for interpretation, which welcomes litigation; or (ii) what if the loan is in probate and the reasonable documentation could take years.

b. 2920.7(b)(1) and (2) provide that, once the claimant provides the above required proof, he or she is defined as a "successor in interest" ("SIT"). The statute specifically states that there can be more than one SIT. How is a servicer supposed to handle multiply SITs – can it require all that all the SITs assume the loan? What if one SIT want to assume the loan and another does not? What if one wants a loan mod and one does not? The statute provides no guidance.

c. 2920.7(c) provides that, within 10 days of the claimant becoming a SIT, the servicer must provide the SIT with key information on the loan. The statute does not address the fact that providing some of that information would violate applicable Federal Law. In addition, 10 days is a very short period of time to provide the necessary information.

d. 2920.7(d) provides that the servicer "shall" allow a SIT to either: (1) assume the loan, unless assumption is prohibited by the terms of the loan, state or federal law; or (2) where the

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State News

Arizona Legislative Update

By Rex C. Anderson, Esq., The Law Office of Rex C. Anderson, P.C.

The 2016 Arizona legislature adjourned for the final time on Saturday, May 7, 2016 at 5:45 A.M. after finalizing budget disputes for the coming year. There will be no further bills considered by the Arizona Legislature until next session. No actual changes were made to the foreclosure procedures or laws. Here are a few items of interest.

There are more Supremes. The number of justices sitting on the Arizona Supreme Court was increased from five to seven (HB 2537). The purpose was to "spread power" and provide additional diversity on the court, without pointing any fingers at any specific sitting justice or recent court decisions. Without any other serious issues a driving this change, the next reason given was that most other states with similar populations have seven sitting justices on the state supreme court.

The House Majority Leader is ultimately more powerful than the Newspapers. In January of this year, our local government-focused newspaper, the *Arizona Capital Times*, ran several articles highlighting the use by several legislators of government vehicles for non-government travel or detailing the reimbursement of legislators' travel expenses that were outside the scope of government business. One of those named was Rep. Gowan, the House Majority Leader, who soon repaid $12,000 in prior reimbursements, and has since been on a mission to otherwise take his revenge.

First was implementing a rule in early April that prohibited reporters from entering the House floor (where they had been permitted for decades) in the Arizona Capital unless they passed a rigorous background check, including examination of their criminal, civil, and driving records, and listed specific offenses including misdemeanors like trespassing. Any such violation would automatically disqualify a reporter from being on the House floor for up to 10 years. This was significant, because the author of the *Arizona Capital Times* article that scrutinized Rep. Gowan's use of a state vehicle had been convicted of misdemeanor trespass following a bar fight in Wickenburg a few years ago. (A "bar fight" is an hourly event every evening in Wickenburg and as common as shuffleboard in Florida, so don't be so outraged.) Rep. Gowan cited safety concerns although there had never been any incident on the floor of the House and legislators in Arizona were recently given permission to carry guns on the House floor. The idea soon died in practice when no reporter signed the form that would authorize the exam and the Arizona Department of Public Safety refused to help with the bankruptcy checks. A few days later, Rep. Gowan dropped the new requirement.

A legislator's childish behavior is not necessarily interesting to foreclosure trustees, except his later act, pushed through as part of the deal to pass the state budget. In that omnibus deal was the passage of HB 2447. This bill directs the Arizona Corporation Commission to create and maintain an on-line database, applicable in the two largest counties in Arizona, that eliminates the requirement for businesses to publish in a newspaper several standardized changes to business records. In the past, businesses were required by law file affidavits confirming the publication of notices of significant changes, such as the formation, dissolution, reorganization, or merger of a corporation, or the formation, amendment or merger of a limited liability company. These kinds of public notices are all under the supervision of the Arizona Corporation Commission, which is now required to timely enter the information into the public database and makes the newspaper publication an option. The obvious effect of this change is to eliminate the publication requirement and the associated newspaper revenue from those publishing those notices.

> *"This may be the first in steps toward permitting or requiring on-line publication of private documents with legal significance, such a Notice of Trustee's Sale, further impacting newspaper revenue and our friends in the Pub & Post market."*

This may be the first in steps toward permitting or requiring on-line publication of private documents with legal significance, such a Notice of Trustee's Sale, further impacting newspaper revenue and our friends in the Pub & Post market.

A recorded money judgment is not a lien against the real property if ... Common belief is that if you record a money judgment it becomes a lien against any and all real property

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State News

2016 Utah Legislative Changes Affecting Trustees

By J. Scott Lundberg, Esq., Lundberg & Associates, PC

The 2016 Utah legislature passed two bills affecting Utah trustees. The effective date for both bills is May 10, 2016. Senate Bill 0022, Foreclosure of Residential Rental Property, created state law protections for tenants of foreclosed residential rental property and requires notification to tenants of those protections as a part of the foreclosure process. Senate Bill 0220, Non-Judicial Foreclosure Amendments, made a number of helpful changes, including an amendment to last year's Utah Reverse Mortgage Act which eliminates the challenge of ensuring that a deceased borrower *receives* the required pre-foreclosure notice.

TENANT PROTECTION

Senate Bill 0022 enacts certain protections for tenants occupying foreclosed property following foreclosure sale. The statute requiring the notification of tenants of their rights following foreclosure was modified to remove references to the former federal Protecting Tenants at Foreclosure Act and adding references concerning new protections enacted by Utah Code section 57-1-25.5. That section allows a "bona fide tenant" to remain in the foreclosed property for up to one year after foreclosure, subject to the right of the new owner to terminate the tenancy upon 45 days' notice if the new owner (immediate purchaser of the foreclosed property only) intends to occupy the property as the new owner's primary residence.

> ***"Senate Bill 0220 changed the statute to only require that the servicer give the borrower 30 days after the day on which the servicer sends the notice to cure the default."***

A "bona fide tenant" is defined as an individual who is not a child, spouse, or parent of the trustor of the foreclosed deed of trust, whose rental agreement or lease was entered into in an arm's-length transaction before foreclosure was commenced, and whose rent is not substantially less than fair market rent for the property.

As a practical matter, the period of time during which a tenant will be able to remain in the property after foreclosure will be much less than a year. To meet the "bona fide" qualification, the lease can't be for a period longer than a year and it had to be entered into prior to the commencement of foreclosure. Since foreclosure requires four and one-half to five months, the actual amount of time a tenant will typically be able to remain in foreclosed property is limited to six or seven months at the most.

This new section (57-1-25.5) will sunset on July 1, 2018.

FORECLOSURE AMENDMENTS

As indicated, Senate Bill 0220 made a number of helpful changes to statutes governing different aspects of non-judicial foreclosures. Two of the most helpful changes were a modification to the statute of limitations for non-judicial foreclosures, and a revision to the requirements for giving pre-foreclosure notice to reverse mortgage borrowers.

Statute of Limitations. Utah Code section 57-1-34 which previously required that a non-judicial foreclosure be *completed* within the six-year statute of limitations, now requires only that the foreclosure be *commenced* within that time period. This change will be beneficial to mortgage servicers in light of the increasing number of loans facing statute of limitations issues as a result of multiple loss mitigation or foreclosure relief applications.

Pre-Foreclosure Notice to Reverse Mortgage Borrowers. Utah Code section 57-28-304, enacted in 2015, required that, before foreclosure proceedings could be commenced for a reverse mortgage, the servicer had to send the borrower written notice and give the borrower 30 days after the day the borrower *received* the notice to cure the default. For many reverse mortgage loans, the event of default is the borrower's death. Since a deceased borrower could not receive the notice, servicers were, for all intents and purposes, unable to proceed with foreclosure with confidence that the property would be insurable following foreclosure. Senate Bill 0220 changed the statute to only require that the servicer give the borrower 30 days after the day on which the servicer *sends* the notice to cure the default. This

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State News

Michigan Updates

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

EVICTION NOTIFICATION BY EMAIL

The legislature has passed a law allowing eviction notices to be served by email, however, the decision to use email may not be unilateral. MCL 600.5718(1) provides that the tenant must specifically consent to the electronic service and the landlord must affirmatively acknowledge the tenant's consent by email. One would expect to see leases incorporating this consent in the future, however the statute specifically states that a landlord may not refuse to lease property to a tenant if the tenant declines to consent to service by email.

> *... eviction notices [may] be served by email, however, the decision to use email may not be unilateral.*

FULL CREDIT BID RULE DOES NOT LIMIT LIABILITY OF THIRD PARTIES

In a recently published opinion, *Bank of America, NA v First American Title Insurance Co.,* 2016 (Mich. Lexis 660), the Michigan Supreme Court held that a mortgagee's full credit bid at its foreclosure sale does ***not*** bar it from bringing suit against non-borrower third parties for claims such as fraud and breach of contract. This opinion affirmatively overruled prior case law to the contrary. The Supreme Court reasoned that the full credit bid rule was related to the anti-deficiency statute to provide a defense to a borrower and there was no justification for extending the protections of the rule to alter contractual responsibilities between a mortgagee and a non-borrower third party

SURPLUS FUNDS: LIENHOLDERS MUST ACT TIMELY AND NOTICE NOT REQUIRED

Michigan statute allows junior lienholders to file a claim for surplus funds, if available, following a foreclosure sale. In a recent case before the Michigan court of Appeals, the court had to decide what constituted a timely claim and if notice to other junior lienholders was statutorily required. In *Moon Lake Condominium Association v RBS Citizens Bank*, 2015 (Mich. App. Lexis 2104), RBS Citizens Bank, a junior mortgagee, filed a claim for surplus proceeds approximately two weeks after the senior mortgagee's foreclosure sale. Citizens then filed a motion for release of the funds noting that it was the only junior lienholder that had filed a claim. The court released the funds to Citizens. Thereafter, the condo association, which also had a junior lien against the property, appealed claiming that Citizens had not provided the association notice of its claim and the association had a right to the surplus. In upholding the lower court's ruling, the Court of Appeals found that the association had the same notice Citizens did of the foreclosure sale, but did not file a claim for over ten weeks. The court held that the statute is silent as to a time constraint to file a claim; therefore, a "reasonable time" is implied. Based on this, the association's claim was found untimely. Finally, the court found that the statute only requires a lienholder give notice of its claim to the sheriff and does not require it to give notice to other lienholders. This case is an important reminder to junior mortgagees that they must closely monitor senior sales if they want an opportunity to go after surplus proceeds.

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State News

Changes To The funding For The Foreclosure Fairness Act in Washington State

By Holly Chisa, HPC Advocacy, UTA Washington State Lobbyist

Washington state did little with the Foreclosure Fairness Act (FFA) this session, or with the Deed of Trust Act as a whole. The only significant change was the funding source for the FFA. Under previous statutes, certain beneficiaries were required to pay a $250 fee for each Notice of Default issued to a homeowner. This fee is only paid by those financial institutions that process more than 250 NODs in the previous year. Funding collected by this fee is shared among a number of agencies. The vast majority of that funding is used to pay for housing counsellors, provided free of charge to homeowners that don't have legal representation. Funding is also provided to the WA Department of Commerce to administration of the FFA, and to the Office of the Attorney General. The OAG investigates complaints against financial institutions and trustees and other parties involved in the foreclosure process, and may bring legal action.

> *"... the involved agencies, financial institutions, and UTA have agreed to have the fee of $250 be applied to notices of trustee's sale recorded, not NODs."*

Because there is a significantly reduced number of NODs being processed by financial institutions, there has been a significant reduction in the fees being collected. To manage the FFA and pay for housing counsellors, there is a baseline dollar amount needed by the agencies to run the program. Under the current funding structure, the program would no longer be self-sustaining. In an effort to keep the program afloat, the parties met to negotiate a new funding structure. Under this new agreement, the involved agencies, financial institutions, and UTA have agreed to have the fee of $250 be applied to notices of trustee's sale recorded, not NODs. This fee does NOT apply to amended NOS. The threshold for which financial institutions required to pay the fee is lowered to those who have less than 50 NOS' per year. This does NOT change the threshold for which financial institutions must participate in the mediation program, just which financial institutions pay the fee.

In exchange for this change, the agencies funded by these fees changed their allocation. The bulk of the funding again is reserved for housing counsellors, a primary request for financial institutions. The Department of Commerce also receives a significant contribution to ensure proper staffing levels and management of the FFA. Other agencies, including the Office of the Attorney General, offered to reduce their budgets to allow for the funding of housing counsellors and Commerce.

So why should trustees care about this legislation? The underlying bill was not the focus of the United Trustees Association this session. It was the hearings in the House and Senate Committees on these bills that we focused on. At EVERY hearing there were people testifying about losing their homes, that mediation doesn't work, that the FFA still has barriers that prevent access to meaningful mediation. Financial institutions are not genuinely participating in mediation, come unprepared, and should be further investigated by the Office of the Attorney General and the Legislature. Lawmakers listened to this testimony and scheduled separate work sessions just on these issues. These additional meetings provided the public with a specific forum to air their grievances with the system. Add to this a number of relatively new lawmakers that aren't familiar with the previous work done on the FFA and the DOTA, and you find a willing audience wanting to "fix" the programs with mediation and the FFA.

There will be work to do over the summer and fall to meet with lawmakers from these hearings to help them understand the intense negations that have gone on to build the FFA and mediation program as they stand today. Additionally, more meetings will need to take place among the various stakeholders - advocates, financial institutions, UTA members, and agencies - as we continue to adjust the mediation program and DOTA. This is a campaign year, and the UTA's summer focus will be meeting with potential candidates and educating them on the role of the trustee in the foreclosure process. Additionally, there will be significant number of hearings outside of the DOTA that involve the rent control and fair housing issues that may affect the FFA. Any time there is a discussion around the cost of housing and/or rental properties, there is a conversation about how to

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Featured Article

YVANOVA Continued from Page 1

THIRD POST-*YVANOVA* APPELLATE RULING- *SCIARRATTA*

The *Sciarratta*[4] ruling is the latest published on the subject of a borrower's standing to challenge the authority to foreclose. *Sciarratta* involves a post-foreclosure challenge based on the allegation of a void assignment of deed of trust. The deed of trust assignments in *Sciarratta* are disconnected. Due to the disconnected chain of assignments, the *Sciarratta* court declared that there was a void assignment. Under that circumstance *Sciarratta* ruled on how a plaintiff needs to allege the elements of a wrongful foreclosure claim at the pleading stage, specifically, the element of prejudice. *Sciarratta* was an appeal from a ruling on a demurrer, and did not discuss the claim elements, past the pleading stage.

THE SUPREME COURT PUNTS ON *KESHTGAR* AND OTHERS

The *Yvanova* and *Keshtgar*[5] appellate rulings were companions of sorts. Both involve a borrower's challenge to the authority to foreclose, both appellate opinions issued around the same time and both were accepted for review by the California Supreme Court. In March 2016, when *Saterbak* made a distinction between pre-foreclosure and post-foreclosure scenarios, the anticipation for a Supreme Court ruling on *Keshtgar* heightened. Unlike *Yvanova*, *Keshtgar* involves a pre-foreclosure challenge to the authority to foreclose, and the Supreme Court could have taken the opportunity to clarify *Yvanova* further, if only one aspect of it.

In an unpredicted turn, the Supreme Court passed on the opportunity. In April 2016, the Supreme Court dismissed review in one case, and transferred six cases, previously accepted for review, back to the lower courts, all for reconsideration in light of *Yvanova*. *Keshtgar* was one of the six cases that got transferred. The California Supreme Court is not inclined to lift the lid off of the standing stew, giving the appellate courts time to chime in with their interpretations, and letting the stew simmer, for the time being.

1 *Yvanova* v. *New Century Mortgage Corp.*, 62 Cal.4th 919(2016).

2 *Saterbak* v. *JP Morgan Chase Bank, N.A.*, 245 Cal. App. 4th 808 (2016).

3 *Brown* v. *Deutsche Bank National Trust Co.*, 2016 Cal. App. LEXIS 375.

4 *Sciarratta* v. *U.S. Bank National Assn.*, 2016 Cal. App. LEXIS 399.

5 *Keshtgar* v. *U.S. Bank*, 334 P.3d 686(2014).

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WHO IS TO BLAME — Continued from Page 10

allowed to occur".[2] Nothing further was offered.

Potts opposed Corsair's motion to set aside the default , but the trial court granted the motion and Potts appealed. Potts argued that relief under Section 437(b) should only be granted when the reasons for the attorney's "mistake, inadvertence, surprise, or neglect" are clearly articulated. The Appellate Court disagreed and confirmed that relief under Section 437(b) is mandatory and does not require explanation as to the reasons of the default if the attorney is at fault. The Appellate Court affirmed the order granting Corsair relief from default.

GENERAL RULE

Under Section 473(b), relief from a default or default judgment is mandatory if the court finds that "an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect". If this is done then the court must "vacate any (1) resulting default entered by the clerk against his or her client, . . . or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect."

There are three policies triggered by Section 473(b) motions - (1) to alleviate the hardship on parties who lose their day in court due solely to an inexcusable failure to act on the part of their attorneys; (2) to place the burden on counsel; and (3) to discourage additional litigation in the form of malpractice actions by the defaulted client against the errant attorney - the actual reasons for the attorney's omissions are typically irrelevant to such considerations.

Cal Civ Code 437(b) does not require an explication of reasons as a prerequisite to mandatory relief.[3] In fact the text makes relief mandatory only if the request for relief "is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect." What must be attested to is the mistake, inadvertence, surprise, or neglect, not the reasons for it.[4]

In upholding the order granting relief from default and default judgment, the appellate court noted that mandatory relief is available only if the default or dismissal "was ... in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." Such relief is not available when the error is the client's alone.[5] Further, the Court provided that "[w]here the cause of the default or dismissal is in dispute, the attorney's affidavit can serve as the 'a causation testing device " a statement of reasons may be quite probative regarding who is at fault.[6]

In order to avoid lack of clarity as to who is the cause of the default or dismissal, practice guides recommend that that attorney "include *detailed* factual explanations as to how the claimed 'mistake' or 'neglect' occurred".[7] Even in light of this, the appellate court held that, although it may be a good idea to provide detailed explanation of the attorney fault, it is not a requirement of Section 437(b).

Since relief is mandatory when an attorney affidavit of fault is filed, most of these cases should be handled outside of the court. Before proceeding with a motion, the best practice would be to contact opposing counsel in an attempt to resolve the matter to minimize cost and time.

CONCLUSION

The Court in *Martin Potts & Associates, Inc. v. Corsair, LLC* made it clear that "the purpose of the mandatory relief provision under section 437, subdivision (b) is achieved by focusing on who is to blame, not why…[i]ndeed, in many cases, the reasons for the attorney's mistake, inadvertence, surprise, or neglect will be irrelevant; that is because…the mandatory relief provision entitles a party to relief even when his or her attorney's error is inexcusable."

As long as the application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect the court must vacate any (1) resulting default entered by the clerk against his or her client or (2) resulting default judgment or dismissal entered against his or her client. The only limitation is that the court may deny relief if it finds the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect, relief will be granted.

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1 See Zamora v Clayborn Contracting Group, Inc. 28 Cal. 4th 249, 257 (2002)

2 *Martin Potts & Associates, Inc. v. Corsair, LLC,* 244 Cal. App. 4th 432, 436, 197 Cal. Rptr. 3d 856, 858 (2016)

3 "Statutory analysis begins with the plain language of [a] statute, and if that language is unambiguous, the inquiry ends there" as well. (*KB Home Greater Los Angeles, Inc. v. Superior Court* (2014) 223 Cal.App.4th 1471, 1476, 168 Cal.Rptr.3d 142.)

4 *State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 609, 109 Cal.Rptr.2d 256 (*Pietak*

5 *odd v. Thrifty Corp.*, 34 Cal. App. 4th 986, 40 Cal. Rptr. 2d 727 (1995)

6 *Todd,* at pp. 991–992, 40 Cal.Rptr.2d 727[looking to attorney's affidavit]; *Johnson v. Pratt & Whitney Canada, Inc.* (1994) 28 Cal.App.4th 613, 621–623, 34 Cal.Rptr.2d 26

7 Weil & Brown, Civil Procedure Before Trial, (1st ed., 2015 supp.) § 5:390.1

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NEVADA SUPREME COURT— Continued from Page 12

Restatement (Third) of Property, which provides that "a court is warranted in invalidating a sale where the price is less than 20 percent of fair market value and, absent other foreclosure defects, is usually not warranted in invalidating a sale that yields in excess of that amount"). *See* Restatement (Third) of Property: Mortgages 8.3 § cmt. b (1997).

While *Long v. Towne* was not overturned by *Shadow Wood*, these two cases are easily reconciled: for those sales that are at least 20% fair market value, the two-prong test in *Long v. Towne* applies and for those sales less than 20%, the sales price is grossly inadequate by operation of law and that alone warrants the setting aside of the sale. To interpret *Shadow Wood* in any other way is misguided and nonsensical, i.e., if there must always be a showing of fraud, unfairness, or oppression, then why did the Supreme Court reference the 20% benchmark and quote the Restatement? But then, given the history of the Nevada Supreme Court and other post-*SFR* rulings, the creation of yet another unanswered question is par for the course.

Assuming that the *Long v. Towne* two-prong test applies irrespective of the sales price, *Ikon* potentially gives first deed of trust holders other grounds to set aside the sale. If the HOA or its agent failed to provide the superpriority payoff or rejected tender of an amount comprising the first deed of trust holder's best estimation of the superpriority, this may constitute "fraud, unfairness, or oppression" to warrant setting aside the sale under commercial unreasonableness.

In the recent *Nationstar Mortgage LLC v. SFR Investments Pool 1, LLC*, the court noted that "proof of tender (or sufficiently attempted tender) of the superpriority portion of a lien followed by a denial of the continuing validity of the first mortgage can constitute unfairness and oppression under Nevada law."[8] In contrast, the aforementioned state district court judge who set aside the sale under *Shadow Wood* ruled that the HOA agent's failure to serve the notice of default on the beneficiary did not constitute "oppression" or "unfairness" under a commercial unreasonableness analysis.

Moreover, in *Nationstar*, the property sold for $9,200 but SFR produced an expert report indicating the fair market value at the time of the sale was $9,000, whereas Nationstar produced an export report indicating a value of $130,000.[9] The court held "that a reasonable jury could accept the theory that the appropriate measure of market value should focus not on 'traditional' sales of comparable properties but HOA sales of comparable properties."[10] If the jury were to accept $9,000 as the fair market value, then naturally it would be impossible for Nationstar to prove that the sales price was grossly inadequate to set aside the sale under commercial reasonableness. In light of the unpredictability in establishing an inadequate sales price or "fraud, unfairness, or oppression," first deed of trust holders seeking to invalidate sales under *Shadow Wood* and *Ikon* might try focusing their analysis on the broader "equity" standard.

While these HOA-litigated matters are not going away anytime soon, *Shadow Wood* and now *Ikon* finally deliver some hope to first deed of trust holders attempting to set aside HOA sales on the basis of equity or commercial unreasonableness grounds.

1 132 Nev. Adv. Op. 5 (Jan. 28, 2016).≠
2 *SFR Invest. Pool I, LLC v. U.S. Bank, N.A. et al*, 334 P.3d 408 (Nev. Sept. 18, 2014)(ruling that a homeowner's association's non-judicial foreclosure sale to recover the superpriority amount of its lien extinguishes a first position deed of trust).
3 *Shadow Wood*, 132 Nev. Adv. Op. at *17.
4 132 Nev. Adv. Op. 35 (April 28, 2016).
5 *Nev. Op. Dep't of Bus & Indus., Real Estate Div. Adv. Op. 13-01* (Dec. 12, 2012)
6 *See* Court Minutes, Case No. A-13-684846-C (April 12, 2016), *available at* https://www.clarkcountycourts.us/Anonymous/default.aspx.
7 *See Nationstar Mortgage LLC v. SFR Investments Pool 1, LLC*, 2006 WL 1718374, at *3 (D. Nev. April 29, 2016) (court analyzed the two-prong *Long v. Towne* case to determine if the sale should be set aside for commercial unreasonableness).
8 2006 WL 1718374, at *3.
9 *Id.*
10 *Id.*

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NINTH CIRCUIT COURT OF APPEAL

Eden Place appealed to the Ninth Circuit Court of Appeals. In reaching the merits of the case- whether Eden Place violated the automatic stay, the court concluded that the issue was whether Perl had any remaining legal or equitable interest in the property after Eden Place properly recorded the trustee's deed and the court fully adjudicated in the unlawful detainer Perl's remaining possessory interest.

In 1994, the California legislature enacted California *Code of Civil Procedure* §715.050 which provided that:

> "Except with respect to enforcement of a judgment for money, a writ of possession issued pursuant to a judgment for possession in an unlawful detainer action shall be enforced pursuant to this chapter without delay notwithstanding the receipt of notice of filing by the Defendant of a bankruptcy proceeding."

Shortly after its enactment, the Bankruptcy Court granted a permanent injunction against the enforcement of §715.050. At that time, the Bankruptcy Court held that the debtors had an equitable interest in the property – a possessory interest in the premises. The Court also held that California *Code of Civil Procedure* §715.050 was pre-empted by bankruptcy law and unconstitutional on its face.

The decision was appealed to the United States District Court for the Central District of California. *DiGiorgio v. Lee (In re DiGiorgio)* (1996) 200 B.R. 664.

The Court in *DiGiorgio* held that although the debtors had no possessory interest in the tenancy at the time they filed their petition, they remained an equitable possessory interest in the tenancy by virtue of their physical presence. *DiGiorgio, supra*, 670-671.

The holding in *DiGiorgio* was upheld in *In re Butler* (271 BR 867 (Bankr. ED Cal 2002)) and adopted by the BAP in *In re Williams* 323 BR 691 (9th Cir. BAP 2005)

In *Butler*, the Court relied on California *Civil Code* §1006 "Title by Occupancy: extent"

> "Occupancy for any period confers a title sufficient against all except the state and those who have title by prescription accession, transfer, will or succession, but the title conferred by occupancy is not a sufficient interest in real property to enable the occupant or the occupant's privies to commence or maintain an action to quiet title unless the occupancy has ripened into title by prescription."

The Bankruptcy Court concluded that mere possession of real estate is constantly treated as property, which may be purchased and sold, and for the recovery of which *an action may be maintained against one having no better title. In re Butler* 27, BR at 871.

Fourteen years after *Butler* and twenty years after the enactment of California *Code of Civil Procedure* §715.050, the United States Court of Appeals essentially overruled the Bankruptcy Court's earlier decisions holding

> "The flaw in the Bankruptcy Court's analysis is that the Unlawful Detainer proceedings under [CCP] 1161(a) are expressly designed to determine who has superior title to the property [citing *Vella v. Hudgins* (Cal. 1977) 572 P.2d at 28, 30]. As a result, the prevailing party in the unlawful detainer proceeding under §1161a has "better title" than the evicted resident. [*In re Butler* 271 BR at 871]. The conclusion that the occupying resident retains any equitable possessory interest is inconsistent with §1161a which contemplates a final and binding adjudication of legal title and rights of immediate possession. [Citations omitted.] We therefore conclude that because *Perl* had no remaining interest in the property, legal or equitable, when the bankruptcy petition was filed, the Bankruptcy Court erred in concluding that Eden Place violated the automatic stay by executing the writ of possession." *In re Perl, supra*, 811 F.3d 1120, 1130.

Based on *In re Perl*, if the Plaintiff in an unlawful detainer action has a judgment for possession entered and a writ of possession entered pursuant to California *Code of Civil Procedure* §415.46 (which includes not only named but unnamed occupants), a Sheriff may execute on the judgment (enforce the judgment for possession regardless of whether a bankruptcy petition has been filed.)

Featured Article

Twenty years after California *Code of Civil Procedure* §715.050 was enacted, it may now be enforced as it applies to last ditch efforts to use the bankruptcy court to extend an occupant's unlawful occupancy of foreclosed property.

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but the Court of Appeal rejected that argument, noting the borrower's consent to the short sale that resulted in the release of the security, which made foreclosure impossible.

However, unlike *Roberts,* in *Coker,* the borrower's loan was a purchase money loan. As such, "the court in *Roberts* had no occasion to consider the relationship between" CCP 726 and CCP 580b. *Coker* at 31. The Court held that CCP 726 requires a lender to follow a particular procedure to recover on a defaulting borrower, whereas CCP 580b places a limit on the assets a lender can collect from a purchase money borrower. The Court concluded: "When a borrower waives her rights under" CCP 726 by agreeing to a short sale, CCP 580b "remains a barrier to any deficiency judgment after the lender collects the full value of its security from the sale." *Id.*

As a takeaway, both the California legislature and California Supreme Court have tightened anti-deficiency protections in recent years, including repeated tinkering with the text of CCP 580 by the legislature from 2010 to 2014. The additions to CCP 580 include CCP 580b(b), which prohibits deficiency judgments on refinances of purchase money loans (or refinances of refinances), and CCP 580e, which expressly prohibits deficiency judgment after short sales on purchase money loans. Many lender-clients may not yet be aware of these changes in California law, and may still seek to recover a deficiency balance after a short sale on purchase money mortgages, particularly given the recent *Roberts* holding. Counsel for these lenders should carefully review the nature of each post-short sale deficiency balance against the statute, and, if necessary, advise the lender-client that it's unrecoverable. Meanwhile, in California, the deficiency advantage of most short sales has been foreclosed by *Coker* and CCP 580e.

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SIT of an assumable loan also wants a foreclosure prevention alternative, simultaneously apply for both. As drafted, there is no requirement that the SIT qualify to assume the loan. In addition, the statute is unclear on whether the servicer can require that the SIT assume personal responsibility for the loan and what happens if the SIT refuses or delays in signing the assumption documents. SB 1150 does not provide any guidance on how long the servicer must give the SIT to assume the loan or apply for loss mitigation.

e. 2920.7(e)(1) gives the SIT all the same rights as a borrower under HOBR. But, what happens if the servicer had already complied with the provisions of HOBR as to the borrower and then the borrower passes on the eve of recording the NOD? The statute is unclear whether the servicer must re-comply with all same provisions as to the SIT or, can it pick up mid-stream?

f. 2920.7(e)(2) thru (4) give the SIT the same private right of action afforded to BRs, including the right to an injunction (pre-sale), damages (post-recording of the TDUS) and attorneys' fees.

g. 2920.7(f)(4) defines who can be a SIT. But, those definitions include a "personal representative" under Probate Code 58 or a trustee of the deceased BR's trust. That begs the question – who is entitled to assume the loan or qualify for a loan mod – the representative, the trustee?

Opponents do not generally oppose the concept of the Bill. After all, it would be hard to oppose something labeled as the Widows and Orphans Bill. Instead, opponents object to several conflicting and troubling provisions in the Bill. For starters, the Bill requires disclosure to third parties of key loan information protected by federal privacy rights. Since federal privacy law is likely to trump state law, it puts servicers in a tough position and exposes them to unnecessary litigation. The Bill also requires that the servicer allow the deceased borrower's successor (or successors) to assume the loan WITHOUT qualifying. While the Bill's drafters tried to address this concern by adding an amendment stating that the successor(s) can assume the loan "to the extent permitted under state and federal law and the terms of the loan", it does not remedy the concern because neither state or federal law, nor the language of most deeds of trust, prohibit the assumption of the loan. In other words, assumption is likely to be mandatory regardless of the successor's ability to repay the loan. Lastly, the Bill makes a feeble attempt to address the CFPB's anticipated guidelines in the same arena. "It is the intent of the Legislature that this act work in conjunction with federal [CFPB] servicing guidelines." This language does not concretely resolve potential inconsistencies with the anticipate CFPB servicing guidelines amendments. The Bill needs to say that compliance with the CFPB guidelines, will be deemed compliance with SB 1150.

As anyone can see, the Bill has several problems. Fortunately, there is still time to address these issues. Industry lobbyists continue to work with members of the House to remedy these and other issues. But, servicers should expect some version of this Bill passing later this summer and being signed into law by September.

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is a welcome change for reverse mortgage lenders and servicers.

Senate Bill 0220 made a number of other changes to Utah's non-judicial foreclosure statutes. A short summary follows:

- The statute now affirmatively allows the appointment of a trustee for a deed of trust where the original trustee was not eligible to serve as a trustee or where no trustee was named in the original deed of trust. (Utah Code §57-1-22)

- A new Utah Code section provides that a party to a legal action involving a deed of trust need not join the trustee as a party unless the action pertains to a breach of the trustee's obligations. If a party does join the trustee and the trustee is able to have itself dismissed from the action, the trustee is entitled to reasonable attorney fees resulting from its having been joined. (Utah Code §57-1-22.1)

- Successful third party bidders at non-judicial foreclosure sales who fail to pay the bid price will forfeit their bidder's deposit. The forfeited funds will be treated as additional sale proceeds. Previously, defaulting bidders were only liable for any loss resulting from their refusal to pay the bid price. This change should effectively eliminate defaulting bidders in the future. (Utah Code §57-1-27)

- A clarifying change was made to the provisions regarding postponement of scheduled non-judicial foreclosure sales. Previously, it was unclear whether the trustee could make multiple postponements without re-noticing the sale so long as each postponement did not exceed 45 days from the last scheduled sale date. As amended by the bill, the statute now provides that postponement can only be for a period of up to 45 days after the date designated in the original notice of sale. Beyond that, the sale must be re-noticed. (Utah Code §57-1-27)

- The bill repealed former Utah Code section 57-1-24.5 which required a foreclosure trustee to give the borrower notice if the servicer did not delay foreclosure proceedings while engaging in loss mitigation or foreclosure relief efforts. With the ban on dual tracking found in the CFPB's regulations beginning January 2014, that requirement was no longer needed.

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.

Vote Absentee Ballot and Attend the UTA Conference

Please note that November 8th – the final day of the 2016 Annual Conference – is Election Day, so please register for absentee voting ahead of time. Registration materials will be online in July.

Non-Member Conference Registration fees will be increased in 2016. The Association's 41st conference will be held at the La Quinta Resort & Club in La Quinta (Palm Springs) California, November 6-8th, 2016.

"The 41st Annual Conference will be held at the La Quinta Resort which was very popular with our attendees in 2014," said UTA President, Randy Newman of Total Lender Solutions. "We expect a nice turnout."

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owned by the debtor in the county where the judgment was recorded. This gives the creditor who runs the gauntlet of winning a court case and obtaining a money judgment against a debtor a means to recover for their loss. However … in Arizona, one of the major exceptions to this general principal was recently amended.

Retroactively applied back to any money judgment recorded on or after January 1, 1997, is a change that such judgment "SHALL NOT BECOME A LIEN ON REAL PROPERTY" until a separate Information Statement is attached to the judgment. (HB 2555, which amended Arizona Revised Statutes section 33-961). The Information Statement is a cover page that specifies certain details about the judgment, a list of which are detailed in the referenced statute. We have long had a requirement for this Information Statement, but some creditors failed to comply, thus prompting court cases to decide what happens if you omit the Information Statement. This legislative change settled the question. No Information Statement equals No Lien. However, this requirement does not apply to a civil judgment in favor of the State of Arizona. All other creditors have to comply with this requirement.

Rex C. Anderson is an Arizona attorney helping other Arizona trustees evaluate non-routine cases and has served as a resource on Arizona foreclosure laws and practices for the past 26 years. His practice includes handling excess proceeds for other Arizona trustees and conducting trustee's sale for a small group of long-time clients. He can be reached by telephone at (888) 675 7809, or by email at RCA@RexAndersonLaw.com.

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make housing "affordable" and allow people to buy and STAY IN their homes. All of these discussions will have to be monitored. And, of course, there is always the issue of owner/holder/actual holder...

It's going to be a busy summer in Washington, but hopefully a productive one for our members. As always, please let me know if you are interested in engaging with lawmakers on these issues.

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 Washington Legislature and the U.S. Congress. She can be reached at hollychisa@hpcadvocacy.com.