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UTA Quarterly

Hey *Ho*! Trustees *May* Not Be 'Debt Collectors' Under The Fair Debt Collection Practices Act

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

The Ninth Circuit Court of Appeals, in a split decision subject to a dissent, has held that the trustee under a California deed of trust does not, by performing the statutory foreclosure requirements, become a "debt collector" subject to the federal Fair Debt Collection Practices Act (FDCPA). The decision in *Ho v. ReconTrust Company, NA*, 840 F.3d 618 (9th Cir. 2016) is still subject to being reconsidered en banc, i.e., by an expanded panel of eleven Ninth Circuit judges. If it is not altered by the Ninth Circuit en banc, the decision will likely be the subject of a petition for review by the United States Supreme Court. If the decision sticks, California trustees have achieved a major victory protecting them from suit by borrowers under the FDCPA.

> ***The Ho opinion emphasizes that a trustee might become a 'debt collector' … if he did something in addition to the actions required to enforce a security interest.***

Ms. Ho financed the purchase of her home in Long Beach with a $548,000 loan from Countrywide Bank in 2007. In March, 2009 ReconTrust (a subsidiary of Bank of America) commenced foreclosure by recording a Notice of Default. In July, 2009 ReconTrust published a Notice of Trustee's Sale. [1]

Ms. Ho filed an action in the United States District Court for the Central District of California naming as defendants ReconTrust, Countrywide and the loan servicer, predecessor by merger to Bank of America.[2] Ms. Ho alleged that the NOD and the NOTS contained inaccurate amounts for the debt and the arrearage. Ms. Ho alleged that ReconTrust was a "debt collector" as defined by FDCPA, and had violated the FDCPA's prohibition against the use of "false, deceptive or misleading representation[s]." 15 U.S.C. § 1692e(2)(A).

Ms. Ho's claim that ReconTrust was a "debt collector" under FDCPA was based on the argument that because the NOD and NOTS "threatened foreclosure unless [she] brought her account current, she reasonably viewed those documents as an inducement to pay up."[3] In support, the lawyers for Ms. Ho cited two cases from sister circuits: *Glazer v.Chase Home Fin. LLC*, 704 F.3d 453, 461 (6th Cir. 2013) and *Wilson v. Draper & Goldberg*, P.L.L.C., 443 F.3d 373, 378–79 (4th Cir. 2006). Both *Wilson* and *Glazer* held that the defendants, who were each lawyers retained to foreclose a mortgage, were "debt collectors" under FDCPA.

Continued on page 6

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Randy Newman

President's Message

This is my final message as President and what an incredible ride it has been. For the last two years, I've been entrusted with the stewardship of UTA and learned more than I thought possible. I want to thank the board for their commitment, dedication, and selflessness in helping to keep UTA afloat during these past several years. With the state of the economy, consolidations, and increasing regulation, our membership has, not surprisingly, decreased considerably. However, we remain solvent and are poised to remain a relevant and loud voice for trustees.

As was revealed in the *eNews* and in this issue, our new board members, voted in at our annual meeting, are (in alphabetical order) Phil Adelson of Adelson, Hess & Kelly, Cathe Cole-Sherburn of Trustees Corps, Robert Cullen of Redwood Trust Deed Services, and Robert Finlay of Wright, Finlay and Zak. I want to personally welcome them to the board and to wish them and the incoming officers (Cathe Cole-Sherburn, President, Elizabeth Knight, Vice-President, Michelle Mierzwa, Secretary, and Chet Sconyers, CFO) the best of luck. Their combined years of experience will only enhance the quality of the board.

The question now is what will 2017 bring? What will affect our industry? Which economist has the correct outlook? How do we prepare? The answer to all these questions is simply that no one knows. In 2018, in hindsight, we can say, "oh, yeah, he/she/they was/were right." The one thing that I have taken away from UTA all these years is that together we are much stronger than we are alone. Although we are to some extent competitors, we are also a family. The friendships I have developed and the people I have encountered through UTA are second to none.

Sometimes I feel that I sound like a broken record, but please get involved. Join a committee. Write an article. Submit an idea. Refer a new member. And, yes, when we ask for your help while fundraising for an amicus brief, please contribute. Every single dollar helps. You will have the appreciation of your fellow members and more importantly, you will be helping UTA and our industry take a stand and educate the courts as to who we are and what we do. In the long run, it will be less expensive than having to deal with a bad ruling or more regulation because we were unable to have a voice.

In closing, enjoy the holiday season. Whatever you celebrate, take time to step back and be with your friends and family in both body and spirit. May 2017 be the best ever for each of you.

Best.

Randy

Randy Newman is the President of Total Lender Solutions, an independent trustee based in San Diego. He can be reached at RNewman@TotalLenderSolutions.com.

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FAIR DEBT — Continued from Page 1

Wilson, supra, was an action against a Maryland lawyer who sent a dunning letter to the borrower threatening foreclosure. The letter included the FDCPA "Miranda" notice that the lawyer was a debt collector. The borrower promptly sent a verification request to the lawyer which (assuming the lawyer to be a "debt collector") triggered the requirement under FDCPA to cease collection activities until verification was provided.[4] The lawyer did not provide verification and instead commenced a judicial foreclosure.

Glazer, supra., was an action against a lawyer who commenced a judicial foreclosure action in Ohio. Ohio law permits a foreclosure to be completed by either non-judicial sale or in a judicial foreclosure action. In an Ohio judicial foreclosure, a deficiency judgment is available. The plaintiff in *Glazer* alleged that the judicial foreclosure plaintiff, Chase, did not actually own the loan. The *Glazer* opinion noted that "[a]s one commentator has observed, the existence of redemption rights and the potential for deficiency judgments demonstrate that the purpose of foreclosure is to obtain payment on the underlying home loan. Such remedies would not exist if foreclosure were not undertaken for the purpose of obtaining payment. ... Accordingly, mortgage foreclosure is debt collection under the FDCPA." [5]

The U.S. District Court dismissed the claim for relief under the FDCPA. In so doing it followed the majority of lower court decisions, including the leading case of *Hulse v. Ocwen Federal Bank*, 195 F. Supp. 2d 1188, 1204 (D. Or. 2002), which held that "foreclosing on a trust deed is an entirely different path" than "collecting funds from a debtor." The Ninth Circuit upheld the dismissal, and in the process expressly disapproved the holdings of the Fourth Circuit in *Wilson*, supra., and the Sixth Circuit in *Glazer*, supra.

The Ninth Circuit acknowledged that the FDCPA specifically defines "debt collector" to include "any business the principal purpose of which is to enforce security interests." However, this expanded definition is applicable only to more limited prohibitions against threatening repossession or eviction where no immediate right of possession exists.[6] A trustee which threatened a borrower with eviction, would become a "debt collector" and subject to the FDCPA for purposes of that specific prohibition. But such a threat goes beyond enforcing a security interest. The *Ho* opinion makes clear that [a]n entity does *not* become a general "debt collector" if its "only role in the debt collection process is the enforcement of a security interest."[7]

The *Ho* opinion emphasizes that a trustee "might become a 'debt collector' under the general definition if he did something in addition to the actions required to enforce a security interest."[8] This is *Ho's* most important lesson. The statutory foreclosure notices refer borrowers to the beneficiary or servicer to communicate about the secured debt, including the amounts necessary to reinstate or pay in full. Trustees who communicate with the borrower on these, or any other subjects beyond foreclosure dates and deadlines, do so at their peril. Only one of the risks incurred in doing so is liability under the FDCPA.

The United Trustees Association, together with other organizations,[9] filed an amicus brief opposing the appeal and arguing that trustees are not "debt collectors" under the FDCPA. In its opinion, the Ninth Circuit cited and quoted the UTA amicus brief, in stating that holding trustees liable as debt collectors would "'literally prevent [California's foreclosure] system from functioning.'" As only one example, while the FDCPA generally prohibits a debt collector from communicating with third parties about the debt, the California trustee is required to record the NOD and mail it to junior lienholders, and to record, mail, post and publish the NOTS.

Prior to hearing argument the Ninth Circuit panel invited the Consumer Financial Protection Bureau to also file an amicus brief, and it did so.[10] On request, the Ninth Circuit granted Ms. Ho an extension of time, until December 19, 2016, to file an application for a re-hearing en banc. The CFPB can be expected to file papers in support of the petition. The chances for a re-hearing en banc, and potentially for a review by the United States Supreme Court if the ruling stands, are increased due to the fact that the Ninth Circuit in deciding *Ho* in a split decision has brought itself into conflict with two sister circuits. Stay tuned.

1 The opinion notes that the servicer approved a loan modification a few days before the foreclosure sale, and that it was "not clear from the record that a trustee's sale ever occurred." *Ho*, supra., 840 F.3d at 620 fn. 1. A public records search indicates that Ms. Ho is still the owner of the home.

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2 The servicer entity was BAC Home Loans Servicing, L.P., and was not correctly named in the Complaint. The District Court also dismissed claims for relief against the lender and servicer under the RICO, TILA and RESPA, as well as the FDCPA. The Ninth Circuit upheld the dismissal of the alphabet soup claims in a separate, unpublished memorandum decision. *Ho v. ReconTrust Company, NA*, 2106 WL 6093200 (9th Cir. Oct. 19, 2016.

3 *Ho*, supra., 840 F.3d at 620.

4 15 U.S.C. §1692g(a)(4) & (b).

5 *Glazer*, supra., 704 F.3d at 461

6 15 U.S.C. §1692f(6).

7 *Ho*, supra., at 622, quoting *Wilson*, supra, 443 F.3d at 378; and citing *Glazer*, 704 F.3d at 464. The opinion states that this was the "central premise" of *Wilson* and *Glazer*, but that beyond this point, "our paths diverge. We view all of ReconTrust's activities as falling under the umbrella of 'enforcement of a security interest.'" Ho, Id.

8 *Ho*, supra., at 625.

9 The others included the California Bankers Association, American Legal and Financial Network and Arizona Trustee Association, who all contributed to the cost of submitting the amicus brief. The *Ho* opinion mentions, and quotes, the UTA amicus brief.

10 The *Ho* opinion noted that the CFPB "has not exercised its authority to promulgate a rule interpreting the term 'debt collector.' Thus, we accord deference to the agency's interpretation of that phrase only to the extent that we find that interpretation persuasive. . . . We are unpersuaded by the agency's reading of the statute and do not defer to it." Ho, supra, at 624 fn. 9.

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Homeowner Bill of Rights Provides No Remedy For Borrowers Seeking To Enjoin Allegedly Unauthorized Foreclosure

By Melissa Robbins Coutts, Esq., McCarthy & Holthus, LLP

There has been much discussion in California regarding lenders' authority to foreclose – and borrowers' standing to challenge that authority – following the Supreme Court's decision in *Yvanova v. New Century Mortgage Corp.* earlier this year, where the Court held that borrowers may bring post-foreclosure wrongful foreclosure claims predicated on void assignments of deeds of trust. But the debate over borrowers' ability to challenge assignments is far from over, as *Yvanova* raised more questions than it answered. One such question is how California's Homeowner Bill of Rights (HBOR) factors into the equation. That question has been partially answered in the case of *Lucioni v. Bank of America*.

> ***… for pre-foreclosure challenges, HBOR's provisions will be read narrowly to authorize only the relief explicitly set forth by the Legislature …***

The issue framed by the court in *Lucioni* was whether the HBOR allows a homeowner to seek injunctive relief based on one of its provisions, Civil Code section 2924(a)(6), which requires the entity initiating foreclosure to be either the beneficiary of the deed of trust, the original or substituted trustee, or an authorized agent. Mr. Lucioni had brought a cause of action for "Lack of Standing under Civil Code section 2924(a)(6)," contending that due to certain breaks in the chain of title it was impossible to determine who held the beneficial interest. Under that cause of action, he sought to enjoin the nonjudicial foreclosure.

The Court of Appeal agreed with the trial court in finding that no claim for injunctive relief could be based on an alleged violation of Section 2924(a)(6) because that was not included among the HBOR provisions for which the Legislature chose to grant a remedy.

Remedies for violation of HBOR are limited by statute to either a pre-foreclosure injunction or post-foreclosure damages under section 2924.12(b). But the code expressly limits those remedies to material violations of certain enumerated HBOR provisions, and Section 2924(a)(6) is not included in that list. The Court of Appeal held that the Legislature's decision to provide injunctive relief for other violations of HBOR but not for violation of Section 2924(a)(6) precluded that remedy. "Under the HBOR, then, a plaintiff may not seek to enjoin a foreclosure based on a claim that the foreclosing party lacked the necessary authority to foreclose." *Lucioni v. Bank of America*, 3 Cal.App.5th 150, 158.

The borrower tried to save his case by seeking leave to amend his cause of action to allege a violation of another HBOR provision, Civil Code section 2924.17, which he claimed requires the foreclosing entity to affirmatively show it has the right to foreclose. The Court rejected this contention as well, finding that Section 2924.17 only imposes requirements on the mortgage servicer to review documentation before signing a declaration to substantiate the borrower's default and right to foreclose. The statute did not shift the burden to the servicer to affirmatively prove their authority to foreclose.

The Court was careful to note that a borrower still retains the right to bring a wrongful foreclosure claim after a completed foreclosure, and may obtain monetary damages or an order setting aside the sale if it is proven that an entity foreclosed without authority. But for pre-foreclosure challenges, HBOR's provisions will be read narrowly to authorize only the relief explicitly set forth by the Legislature, and only for the violations that the Legislature chose to provide remedies for. The *Lucioni* decision will provide a valuable precedent for

Continued on page 13

Featured Article

Borrower Cannot Bring A Post-Sale Challenge Based On Assertion That Trustee's Notice Of Sale Did Not Correctly Identify The Beneficiary

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

The Oregon Court of Appeals held on October 12, 2016 that a borrower cannot challenge a completed non-judicial foreclosure based on her allegation that the trustee's foreclosure notice did not correctly identify the beneficiary. *DiGregorio v. Bayview Loan Servicing, LLC*, 281 Or. App. 484 (2016).

BACKGROUND

Borrower defaulted on her mortgage (trust deed) in 2010. There were two assignments of the mortgage recorded: first, from MERS to the original lender, First Horizon, and then, from First Horizon to Bayview Loan Servicing LLC, who was the holder and servicer of the promissory note. Bayview appointed a successor trustee, Quality Loan Service Corporation (QLS), who conducted a non-judicial foreclosure at Bayview's direction. The borrower received QLS's notice of sale, which identified the beneficiary as it was described in the mortgage, MERS as nominee for First Horizon.

The property reverted to Bayview at the trustee's sale in 2012. Following the sale, in 2013, Bayview filed an eviction action against the borrower. The borrower separately filed an action for declaratory relief against Bayview claiming the foreclosure notice was invalid because it did not reflect the current beneficiary. Both actions were consolidated.

ORS 86.771 (1) requires a trustee's notice of sale list the beneficiary "in the trust deed." The trial court did not reach the issue of whether the trustee's notice of sale identified the correct beneficiary, but instead granted summary judgment in Bayview's favor on the basis that the borrower received the foreclosure notice and did not bring suit until after the sale. ORS 86.797 (1) provides that a borrower's interest is terminated by a trustee's sale provided the borrower had notice, among other requirements.

HOLDING ON APPEAL

The Oregon Court of Appeals affirmed the trial court's decision, opining that a borrower cannot undermine a completed trustee's based on a single asserted defect in the content of the trustee's notice of sale under ORS 86.771, which she received (and did not challenge) prior to the sale. The court of appeals harmonized its ruling with its prior holding in *Wolf v. GMAC Mortgage, LLC*, 276 Or App 541, 546, 370 P3d 1254 (2016) (declining to resolve whether ORS 86.797 "requires strict compliance with every provision of the OTDA before a person's property interests will be terminated by a trustee's sale").

> *"[The Oregon case] is positive for the industry …."*

As of this writing, the borrower may petition the Oregon Supreme Court for review, so the recent outcome on appeal may change.

CONCLUSION

DiGregorio further defines the contours of emerging foreclosure law in Oregon following the *Wolf* decision, which had permitted a post-sale challenge based on the borrower's assertion that the foreclosure trustee was not validly appointed and did not meet the statutory definition of a trustee. *DiGregorio* is positive for the industry and should promote greater certainty and finality of nonjudicial foreclosures for trustees, title insurers, and servicers.

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.

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How A "Flyspeck"[1] Case Nearly Upended The Constitutional Authority Of The 9TH Cir. BAP

By Cassandra J. Richey, Esq., Prober & Raphael

The 9th Circuit issued a 3 Judge panel ruling on March 25, 2016 from an Appeal from the 9th Circuit BAP on the "sexy" issue of mandamus writs, identified throughout as "*Ozenne I*"; the subsequent 9th Circuit en banc panel ruling issued a ruling on November 9, 2016, identified as "*Ozenne II*" throughout this article to distinguish the two 9th Circuit Court rulings.

The 9th Cir. en banc panel in *Ozenne II* took a step back from the brink and ruled that if a case can be disposed on other grounds (rather than mandamus jurisdiction); the BAP has constitutional authority to do so.

I've been a bankruptcy attorney for twenty-five years and the disdain shown by District Court Judges and appellate Courts for their Bankruptcy Court brethren is shocking at times. I once had a District Court Judge opine to the combined experience of two bankruptcy attorneys' of nearly 75 years experience that "he knew more about bankruptcy law than the two of us combined." He said that we "likely thought he was going to get it wrong." As the losing side, I can say that I felt that he got it wrong, but having both won and lost appellate battles for truly idiosyncratic reasons, the statement "in effect" that a Bankruptcy Court Appellate panel is "not a Court" is amazingly breathtaking and par for the course.

Of course, the *Ozenne I* 9th circuit panel was "shooting from the hip" without briefing or oral argument. Judge Bybee (in *Ozenne I's* dissent) pointed out that the Constitutionality of the BAP Court for the 9th Circuit should not have even been in play because there were so many other grounds to say "no" to Mr. Ozenne, and his untimely mandamus writ.

> ***"The ruling Ozenne I panel made the determination that the BAP is not a 'Court' thus calling into question the BAP's ability to issue any Orders, because it lacked 'constitutional jurisdiction' delegated directly from Congress."***

But I digress; no Court has ruled that Mr. Ozenne has a case. But the issue is the reasoning that got the Courts to say "no" and dismiss Mr. Ozenne's mandamus writ. All Courts came to the same conclusion, the Appellant, Gary Lawrence Ozenne, had no case. Not without trying, as the *Ozenne II* En Banc opinion pointed out, Mr. Ozenne filed five Chapter 13 cases dating back to 1997, in an effort to stop the foreclosure sale (the second of two) that occurred on *July 31, 2002*. Mr. Ozenne was not deterred by a mere foreclosure, and proceeded to make numerous attempts to re-open his case (or cases) in order to obtain damages for alleged violations of the automatic stay stemming from the foreclosure sale. The District Court in 2003 weighed in that no, Mr. Ozenne had no remedy because too long had passed to re-open the fifth bankruptcy case. The 9th Cir. affirmed June 24, 2005 and the Supreme Court denied *certiorari*, *Ozenne v. Chase Manhattan Bank, 546 U.S. 1178 (2006).* There was another trip up the appellate Courts, and the Supreme Court denied *certiorari*, again in 2010, *Ozenne v. Chase Manhattan Bank,* 559 U.S. 943 (2010).

Ozenne I caused consternation when on the way to tossing Mr. Ozenne out the Courthouse door, two of the three Judges on the *Ozenne I* panel stated that the grounds for doing so was that since BAP Courts are not Article III judges with lifetime appointments (neither are Bankruptcy Judges who make of the BAP "panels"), that they could not be a "court established *directly* by Act of Congress" and thus had no jurisdiction to hear the mandamus writ.

The constitutionality of the Bankruptcy Courts since_*N. Pipeline Construction. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 63-64 (1982) has been the bugbear of constitutional law.

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The Supreme Court when it wants to make a point trots out the distinction with little thought to the earthquakes and tremors that follow in its wake. As the dissent outlines in footnote 4 of *Ozenne I* at page 30, "there is more than a little confusion over the constitutional source of Congress's power to establish the Bankruptcy Courts."

BAP Court judgments, post *Stern v. Marshall*, 131 S. Ct. 2594, 2619 (2011) are subject to review of Article III judges absent "consent of the parties", But see, *Wellness Int.'l Network, LTC v. Sharif*, 575 U.S.___, (2015) No. 13-935 Slip Opinion (May 26, 2015) n.7 (Thomas, J., dissenting) (noting that the *Northern Pipeline* plurality was "considering whether Article III imposes limits on Congress' bankruptcy power," not "whether Congress has the power to establish bankruptcy courts as an antecedent matter.")

Mr. Ozenne, as a Pro Se appellate litigant, jumped the line in procedure and filed a Mandamus Writ with the 9th Cir. BAP without obtaining consent of the other interested parties in the case (or filing the required timely appeal in the underlying Bankruptcy Court). The BAP quickly disposed of the decades old dispute, and ruled that the BAP had jurisdiction to deny the Writ based upon prior case law, *citing In re Salter*, 279 B.R. 281 (9th Cir. BAP 2002). Mr. Ozenne, forseeably, appealed the BAP's ruling. The *Ozenne I* panel took the bait provided by Mr. Ozenne to "sua sponte" find that *In re Salter* was overruled, and while the BAP panel didn't have jurisdiction because not an "Article III" Court, the *Ozenne I* panel did have the proper jurisdiction to deny the Mandamus Writ. In the course of this analysis, the ruling *Ozenne I* panel made the determination that the BAP is not a "Court" thus calling into question the BAP's ability to issue any Orders, because it lacked "constitutional jurisdiction" delegated *directly* from Congress.

In the interim, the American Bar Association requested an "en banc panel" revisit the decision due to the impact losing the BAP Courts would have on pending Bankruptcy litigation were the District Courts the only remedy available.

Ozenne II righted the BAP's jurisdiction by vacating the ruling in *Ozenne I*, and finding that the Debtor's Mandamus Writ was untimely and could not substitute for a timely appeal. Thus, there was no need to review judicial standing or the constitutionality of the basis for the BAP to dispose of Mr. Ozenne and his Mandamus Writ. The actual ruling states that the debtor could not substitute filing a timely appeal with a mandamus petition. (A Mandamus Writ may not side step the appellate process, and as recited above, Mr. Ozenne had already made it up to the Supreme Court twice where *certiorari* was denied on the same issues.)

For those unfamiliar with a "mandamus writ" (not ordinarily encountered in the bankruptcy Courts), a "writ" is an Order issued by a Court directing an action. The "All Writs Act" permits federal appellate courts to issue necessary "writs" (i.e. orders) appropriate *to their jurisdiction* and principles of law." A "mandamus" writ is one that is "mandatory" or required under the law where there is a clear legal right in the plaintiff for such direction or command." Such "mandamus" writs have traditionally been issued where there has been an "abuse of power." The irony is not lost on this bankruptcy practitioner. (Here, the abuse of power was the *Ozenne I's* overreaction to a "wild card" mandamus writ by overreaching to "kick" the BAP in its appellate jurisdiction).

How does a bankruptcy practitioner help a creditor client avoid a 20 year case worthy of Dickens? The key appears to be 1) pay attention to violations of the automatic stay (even when alleged) and take the necessary actions to cure timely; 2) Here, if the Trustee's Deed Upon Sale had been properly rescinded at the time of the 2001 bankruptcy case, the Pro Se Debtor would not have had a leg to stand on through the numerous appeals. Although in Mr. Ozenne's case, I'm sure he would have tried something else. At some point, a vexatious litigant Order may be necessary and required if your client does not want 20 years of legal bills.[2]

As to appellate Courts leaning over backwards to help a Debtor obtain "alleged damages from an alleged violation of automatic stay nearly 20 years old"? Flyspecks can still cause major damage in the gears of Appellate Jurisdiction, unless we have the Judge Bybee's of the world paying attention. At the end of this day, *Ozenne II* and Judge Bybee give us all hope that Bankruptcy Courts may continue to do their necessary work unimpeded.

1 Honorable Judge Jay S. Bybee, in his dissent in Ozenne I (9th Cir. opinion entered March 25, 2016 on BAP appeal no. 11-1208, no. 11-60039, In re Gary Lawrence Ozenne, Debtor and Appellant) (identified throughout as Ozenne I) refers to the underlying bankruptcy case as a "flyspeck" case for which there is no dispute that the Debtor has no remedy. The exact quote (page 18 is "I am going to start with an observation: even among flyspecks this case is nothing").

2 Although the Trustee's Deed Upon Sale was "void" due to the bankruptcy

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filing, (which was evidently the basis over the years for the allegation of a violation of the automatic stay) and the subsequent dismissal brought the parties to the point they would have been at Dismissal- Bankruptcy Court Judge Meredith Jury was rightly concerned that there was a "wild deed" in having two foreclosure sales on the same Deed of Trust back in 2002, one of the Trustee's Deeds Upon Sale was retroactively rescinded in 2003.

Cassandra J. Richey has over 25 years' experience as a bankruptcy attorney, and for the last ten years has specialized in a secured creditor consumer practice with Prober & Raphael, ALC. She has experience as a staff attorney for a Chapter 13 Trustee and externed for a bankruptcy Judge. She can be reached at crichey@pralc.com.

BILL OF RIGHTS— Continued from Page 9

trustees' and servicers' counsel encouraging judges to draw narrow interpretations of HBOR in other aspects as well.

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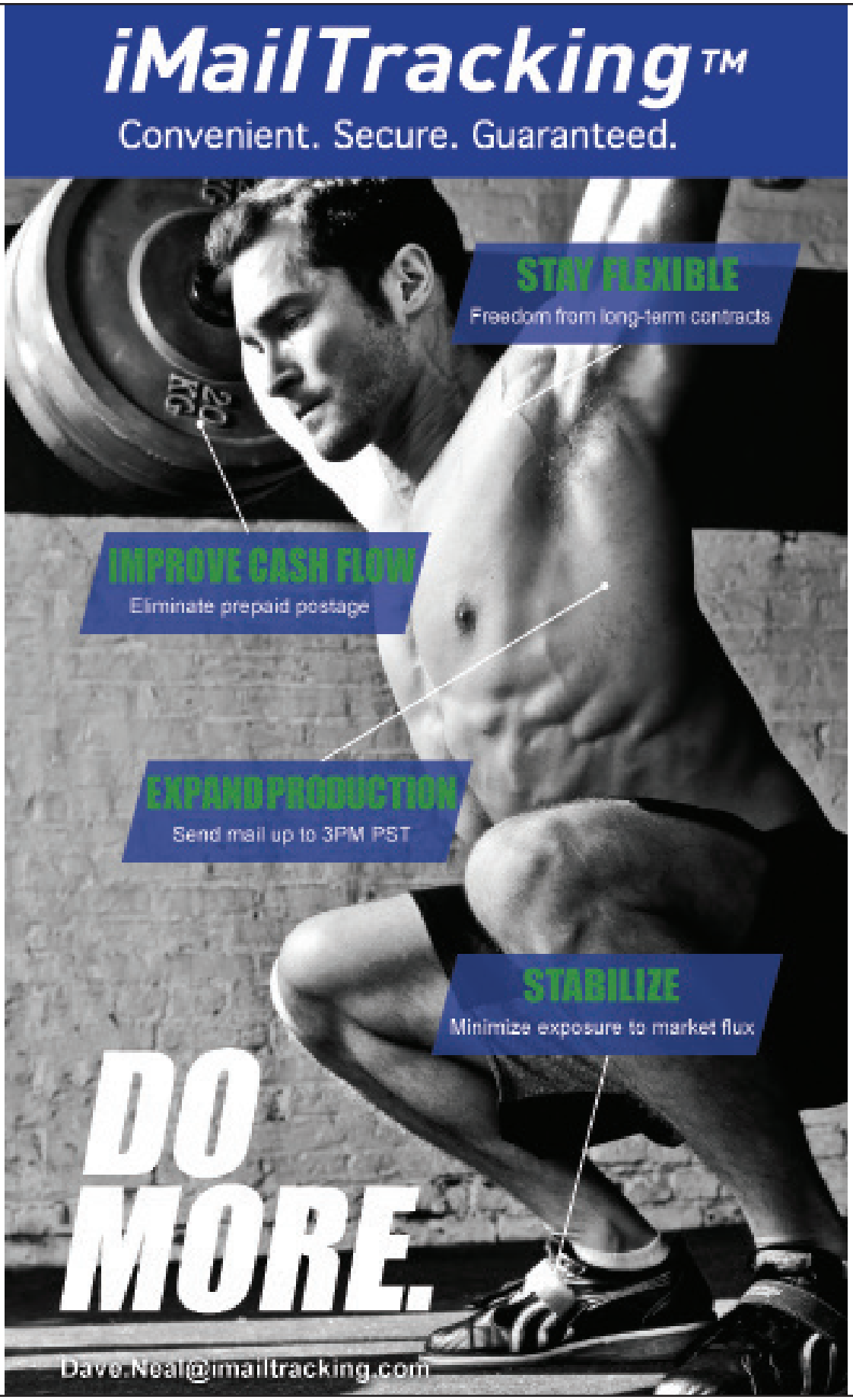
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To Writ Or Not To Writ? Interim Order Denying Attorney's Fees For Preliminary Injunction Issued Under Homeowner Bill Of Rights Is Not Appealable

By James F. Lewin, The Mortgage Law Firm, PLC

In a restriction of Borrower appellate rights under the California Homeowner Bill of Rights, on July 22, 2016, the Court of Appeal for the Third District of California ("Third District") held that a trial court order denying a motion for interim attorney's fees made after a preliminary injunction was granted under Civil Code § 2924.12(i) is not an appealable order. Interestingly, on June 12, 2015, under similar facts, in *Monterossa v. Superior Court of Sacramento County* (2015) 237 Cal.App.4th 747, the Third District issued a writ of mandate which preserved a Borrower's right to seek interim attorney's fees.

In *Sese v. Wells Fargo Bank N.A.* (2016) 2 Cal.App.5th 710, the trustor ("Sese") filed a complaint against Wells Fargo for alleged violations of the California Homeowner Bill of Rights. Sese also filed an application for a preliminary injunction to enjoin a pending t≠rustee's sale of residential real property. Wells Fargo opposed the application. The trial court granted the preliminary injunction and explained: . . . "A lender must make a written determination that the borrower is not eligible for a loan modification before it may proceed with the foreclosure process. (Civil Code § 2923.6(c)(1).) Sese's evidence indicates that Wells Fargo issued the Notice of Trustee's Sale before it issued any determination of his eligibility for a loan modification. This is sufficient to demonstrate Wells Fargo's failure to comply with ... § 2923.6 and shift the burden to Wells Fargo to refute Sese's showing."

Sese moved for attorney fees as the prevailing party. Wells Fargo opposed the motion. During a hearing on the motion, the trial court raised a question about the implication of Sese's argument that fees should be awarded immediately after the granting of a preliminary injunction:

> "THE COURT: So a minute ago in the last motion you were talking about how the greedy banks are trying to take over the situation by imposing too high a bond [to secure the preliminary injunction]. But here if the court's granting of the preliminary injunction was improvident, and so found at trial, hypothetically, what happens to that money [awarded as attorney fees]?" Sese's attorney responded Wells Fargo would be entitled to recoup the fees. The trial court noted the "absurd" consequence the attorney fee money would "keep floating back and forth."

> ***"Monterossa left open the issue we decide in this appeal. And as we have explained, the order denying interim attorney fees under section 2924.12 is not an appealable order."***

The trial court denied Sese's motion for interim attorney fees. Shortly thereafter, Sese filed a notice of appeal from the order. On appeal, Wells Fargo contended that the order denying Sese's motion for interim attorney fees under section 2924.12 was not an appealable order.

THE ONE FINAL JUDGEMENT RULE

The Third District explained that Sese's notice of appeal was filed before a final judgment in the underlying case was entered. Under California's 'one final judgment' rule, a judgment that fails to dispose of all the causes of action pending between the parties is generally not appealable. Code Civ. Proc., § 904.1, subd. (a). *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 740–741. When there is no final judgment, the issue is whether the order from which the appeal has been taken fits within an exception to the one final judgment rule codified in section 904.1. *Kinoshita v. Horio* (1986) 186 Cal.App.3d 959,

Featured Article

962-963. An additional recognized exception to the 'one final judgment' rule is that an interim order is appealable if: 1. The order is collateral to the subject matter of the litigation, 2. The order is final as to the collateral matter, and 3. The order directs the payment of money by the appellant or the performance of an act by or against appellant." *Marsh v. Mountain Zephyr, Inc.* (1996) 43 Cal.App.4th 289, 297–298.

APPEALABILITY OF SESE'S ORDER DENYING THE MOTION FOR INTERIM ATTORNEY'S FEES

Sese asserted the order denying attorney's fees was appealable under exception subdivisions subdivisions (6), (8), (11), and (12) of Code Civ. Proc. § 904.1.

Code Civ. Proc. § 904.1 provides in relevant part that "(a) ... An appeal ... may be taken from any of the following: (6) From an order granting or dissolving an injunction, or refusing to grant or dissolve an injunction. (8) From an interlocutory judgment, order, or decree, hereafter made or entered in an action to redeem real or personal property from a mortgage thereof, or a lien thereon, determining the right to redeem and directing an accounting. (11) From an interlocutory judgment directing payment of monetary sanctions by a party or an attorney for a party if the amount exceeds five thousand dollars ($5,000). (12) From an order directing payment of monetary sanctions by a party or an attorney for a party if the amount exceeds five thousand dollars ($5,000)."

The Third District found that each of these subdivisions was inapplicable.

Subdivision (6) was inapplicable because Sese was not challenging the granting or denial of an injunction. He was not arguing the preliminary injunction should be dissolved. Instead, he contended only that attorney fees should be awarded.

Subdivision (8) was inapplicable because Sese's complaint did not seek redemption of the residential property. Instead, his only cause of action sought relief under the California Homeowner Bill of Rights. He did not seek to redeem the property by paying the full amount owed.

Subdivisions (11) and (12) were inapplicable because the order did not direct payment of sanctions. The court stated: "In short, an order denying interim attorney fees under section 2924.12 is not included among appealable orders in Code of Civil Procedure section 904.1.'

The Third District additionally found that under the "collateral order exception" the order denying interim attorney fees was not appealable as a collateral order. The order did not direct the payment of any money. Neither did it compel an act by or against Sese. The Court found, instead, that the order represented a denial of fees that was not appealable as a collateral order.

Finally, the Third District emphasized although it previously held in *Monterossa v. Superior Court of Sacramento County* (2015) 237 Cal.App.4th 747 that a borrower who obtains only a preliminary rather than permanent injunction may nonetheless be entitled to attorney fees, it made a point to further explain the holding in *Monterossa* as follows:

"Because *Monterossa* came before us by writ petition, we "expressly decline[d] to determine whether an order denying attorney fees and costs under section 2924.12 is immediately appealable or is reviewable upon appeal from a final judgment in the case." (*Monterossa*, at p. 751, fn. 3.) Thus, *Monterossa* left open the issue we decide in this appeal. And as we have explained, the order denying interim attorney fees under section 2924.12 is not an appealable order."

The *Sese* opinion cuts both ways. Although borrowers will be unable to immediately appeal an interim denial of fees incurred for obtaining a preliminary injunction under section 2924.12, trustees and servicers will also be unable to immediately appeal an excessive interim award of attorney's fees to a Borrower under section 2924.12. To challenge an erroneous interim ruling, either side must either wait until after a final judgment has been entered in the case or proceed in the appellate court by petition for writ of mandate which is a completely discretionary appellate remedy.

James F. Lewin is counsel with the Mortgage Law Firm, PLC. James represents trustees, mortgage lenders, servicers and investors in foreclosure and bankruptcy litigation in state and federal courts with approximately twenty (20) years of experience. James is admitted to practice in the states of California and Washington and before the 9th Circuit Court of Appeals. He may be reached at (619) 694-4607 or at james.lewin@mtglawfirm.com.

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Can the Buyer Of A Property At A HOA Foreclosure Sale Destroy Diversity Jurisdiction By Joining The Former Homeowner?

By Dana Jonathon Nitz, Esq., Wright, Finlay & Zak, LLP

In this HOA lien foreclosure case, the Homeowner took out a loan from Wells Fargo to purchase the property. Homeowner fell behind on her HOA dues, and the HOA recorded an assessment lien under NRS 116.3116 (the "Statute"). According to the Nevada Supreme Court in the seminal *SFR* case, the Statute provided that HOA liens take priority over all other liens, including previously recorded Deeds of Trust, for up to the nine months of unpaid HOA dues. The HOA foreclosed, with a third party Buyer purchasing the property. Shortly, thereafter, the Buyer sued Wells Fargo and the former Homeowner to Quiet Title. The Weeping Hollow suit was one of the earlier complaints by buyers to quiet title in a field which would grow over the next few years to several thousand similar cases in Nevada state and federal courts.

> ***The Weeping Hollow suit was one of the earlier complaints by buyers to quiet title in a field which would grow over the next few years to several thousand similar cases in Nevada state and federal courts.***

For context, the complaint was filed less than two months after the Nevada Real Estate Division which issued an Advisory Opinion 13-01, on December 12, 2012, suggesting that the HOA would always want to enforce its lien for assessments by starting the *nonjudicial* foreclosure process to trigger the super priority lien and force the first security interest holder to pay that amount. Up to that point, most players in the industry – HOAs, their collection agents, buyers, lenders, title companies and servicers – as well as legislators and courts, believed that the super priority lien constituted a payment priority only over the first deed of trust, which, if non-judicially foreclosed upon would not extinguish a first deed of trust. The NRED Advisory Opinion helped lead to a flood of quiet title actions by buyers seeking title free and clear of all liens, including the first deed of trust.

The Weeping Hollow complaint was over a year and a half before the Nevada Supreme Court turned the industry on its head in *SFR Investments Pool I, LLC v. U.S. Bank*, 334 P.3d 408 (Nev. September 18, 2014), holding that NRS 116.3116(2) gives an HOA a true superpriority lien, proper foreclosure of which – whether by judicial or nonjudicial means –will extinguish a first deed of trust.

Shortly after the Weeping Willow complaint was filed, Wells Fargo removed the case to federal court based on Diversity Jurisdiction. The case was removed for many reasons including because, at that time, many state court judges were refusing to decide the issue and federal courts had a shortened period for discovery so the matters could be heard sooner, and, at that time, "Every federal court in this district to decide this issue has held that an HOA's super-priority lien does not extinguish a first position deed of trust."[1]

Federal statutes permit removal of certain actions from state courts if the amount in controversy exceeds $75,000 and there is "complete diversity" between the plaintiff and all defendants – that is, the plaintiff must be a "citizen" of a different state than every defendant. If there is not complete diversity, and there is no other basis for federal jurisdiction, such as the case involves the U.S. Constitution or federal statute or other federal question, the federal court cannot hear the case. The Plaintiff Buyer and the Defendant Homeowner are both citizens of Nevada, thus appearing to have foreclosed the federal district court from exercising diversity jurisdiction, but Wells Fargo argued that the joinder of the former Homeowner in the lawsuit was a "fraudulent joinder," with the sole purpose of interfering with possible removal. Consequently, her citizenship could be ignored. The

Featured Article

district court agreed the Homeowner was fraudulently joined. It later dismissed the Buyer's case, concluding that the 2012 HOA foreclosure sale did not extinguish Wells Fargo's 2008 deed of trust because NRS 116.3116(2)(c) (2012) created only a payment priority for the super-priority lien, the foreclosure of which could not extinguish an earlier recorded security interest.

After the district court issued its ruling, the Nevada Supreme Court issued the *SFR* opinion that expressly rejected the district court's interpretation of the Statute. Buyer appealed to Ninth Circuit arguing that *SFR* required reversal in the Weeping Willow case. The Ninth Circuit first had to assure itself that it had jurisdiction. But for the fraudulent-joinder doctrine, the court could have easily concluded the district court lacked jurisdiction because Weeping Hollow and Spencer are not diverse: both are citizens of Nevada.

Under the fraudulent-joinder doctrine, the joinder of a non-diverse defendant is deemed fraudulent, and that defendant's presence in the lawsuit is ignored for purposes of determining diversity, if the plaintiff fails to state a cause of action against the resident defendant, and the failure is obvious according to the settled rules of the state. Wells Fargo had a heavy burden to show that the Plaintiff Buyer obviously failed to state a quiet title cause of action against the former Homeowner. Given that, for the purposes of its quiet title claim, the Buyer needed to show it had superior claim to *all* others, the Ninth Circuit found it was reasonable to join the former Homeowner because Nevada law could permit the former Homeowner to bring claims to the Property by challenging the completed HOA sale on equitable grounds[2] as late as five years after the sale. Thus, absent a fraudulent joinder, and absent complete diversity, the district court lacked jurisdiction to hear the case. The Ninth Circuit reversed the dismissal, and remanded with instructions to send the case back to state court. Wells Fargo sought to substantively challenge the Nevada HOA statute on constitutional and state-law grounds, but the Ninth Circuit did not reach the merits of those challenges"[s]ince this case should never have made it into federal court."

Going forward, the decision may not have much impact on new suits filed originally in federal court or filed originally in state court and removed to federal court as the lender, servicer or beneficiary of record could allege other grounds for federal jurisdiction like federal question jurisdiction based on the apparent violation of the Due Process Clause because the Statute does not expressly require notice of the HOA sale to be given to the first secured interest holder.[3] But it could have far-reaching consequences to existing suits where the only reason the claims are in federal court is potentially defective diversity jurisdiction.

1 *Premier One Holdings, Inc. v. BAC Home Loans Servicing LP*, 2013 U.S. Dist. LEXIS 112590*8. By the end of 2013 that had changed as at least two federal judges held in favor of the buyers, most notably in *7912 Limbwood Court Trust v. Wells Fargo Bank, N.A.*, 2013 WL 5780793 (D. Nev. Oct. 28, 2013).

2 Homeowner could have challenged the HOA sale from which Weeping Hollow gained title on the grounds that the sale was fraudulent, unfair or oppressive, even if the Homeowner was no longer in possession of the property. *Long v. Towne*, 639 P.2d 528, 530 (Nev. 1982); and *Shadow Wood HOA v. N.Y. Cmty. Bancorp.*, 366 P.3d 1105, 1107 (Nev. 2016).

3 The Ninth Circuit recently determined that the Statute does in fact violate the Due Process Clause in *Bourne Valley Court Trust v. Wells Fargo Bank, N.A.*, 832 F.3d 1154, 2016 U.S. App. LEXIS 14857 (August 12, 2016). The Nevada Supreme Court has not decided the issue but it currently has the issue before it on several cases, including *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortgage, N.A.*, NSC Case No. 68630, argued September 8, 2016.

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State News

Legislative Year Over, But What Lies Ahead?

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

The 2015-2016 two-year session of the California Legislature is now officially over. In all, nearly 1,000 bills were presented to Governor Brown for his signature or veto, and almost 900 were signed into law. Most go into effect on January 1, 2017.

Before addressing with more specificity the UTA-relevant legislation signed into law *this* year, perhaps we should begin with a few words about *next* year. Truly, California zigged while the country zagged. While the Senate, House of Representatives and White House are all now controlled by Republicans, the exact opposite is true in California. The differences are so stark that the morning after the election, the California Assembly Speaker and Senate President pro Tem issued a joint press release indicating that they woke up as "strangers in a foreign land."

Going into the general elections, the Democrat advantage over Republicans in the 80-member California Assembly was 52-28, with 54 votes constituting a two-thirds supermajority. The advantage in the 40-member state senate was 26-14, with 27 votes amounting to two-thirds. Thus, Democrats were only two votes short of a supermajority in the Assembly, and one in the Senate.

Following the elections, Democrats have 55 members in the Assembly, and 27 in the Senate. At least theoretically, this permits Democrats to raise taxes, place initiatives on the ballot, and override gubernatorial vetoes, all without Republican votes. Although those sorts of drastic actions may be unlikely, given the fact that Democrats do not tend to act monolithically, the large vote disparity will make it harder to defeat problem bills, or to pass bills that raise Democratic concerns.

The bottom line is that California moved left while the nation moved right. The joint press release mentioned above indicated that the California Legislature would be committed to upholding California values in spite of the national elections. Exactly how that plays out in 2017 will begin to be revealed when the legislature returns in January.

Meanwhile, we now know exactly what was enacted into law this year with relevance to UTA members. The following bills were discussed at the very successful UTA conference held recently in La Quinta, and all are available through the UTA website:

- AB 1974: Re-recording of Documents. Requires documents submitted to county recorders for re-recording to be re-executed and re-recorded, unless the problem with the documents falls within a narrow set of defined "minor corrections".
- AB 2143: Electronic Recording. Broadens the authority of counties to permit electronic recording, heretofore limited primarily to title companies and underwritten title companies, by expanding the ability to become an "authorized submitter."
- AB 2217: Notary Fees. Increases the allowable fee for notary acknowledgements from $10 to $15.
- AB 2291: Property Taxes: Partial Payments. Permits counties to impose a fee to recover the reasonable costs of instituting and maintaining an arrangement for partial payments of property taxes.
- AB 2562: Military Service. Broadens and simplifies the parameters of military service veterans who qualify for deferred payments on mortgages, credit cards and other obligations.
- AB 2566: Notaries: Acceptance of Identification. Broadens the list of identification documents which are authorized for acceptance by notaries to include valid consular identification documents issued by a consulate from the applicant's country of citizenship.
- AB 2693: PACE Financing. Expands disclosures required to be provided to applicants for PACE financing, and creates a

State News

three-day right to cancel PACE contractual assessments.

- SB 918: Common Interest Developments. UTA-sponsored bill which modifies the Davis-Stirling Common Interest Development Act to require boards to annually solicit information from unit owners about current addresses for required documents.
- SB 983: Trustees Fees. Increases allowable base trustee's fees under the Civil Code by $50 for each phase of the non-judicial foreclosure process.
- SB 1150: Successors in Interest. Creates a very specific standard for situations where servicers must extend Homeowner's Bill of Rights protections to successors in interest of deceased borrowers.

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.

Nevada Mediation Program to End

The Nevada Foreclosure Mediation Program will come to an end.

Overseen by the Nevada Supreme Court, the Foreclosure Mediation Program was created by the Nevada Legislature in 2009. As reported by the *Las Vegas Review-Journal*, according to statistics presented during a May subcommittee hearing, completed mediations have declined from a high of 7,558 in 2011 to a projected low of 662 in 2017. "Effectiveness is also waning," the *Review-Journal* noted. "In 2010, 40 percent of homeowners who went through the program retained their homes. Projections estimate 15 percent by the end of the upcoming fiscal year."

The program has announced deadlines for Accepting Mediation Enrollments. The last recorded day of Notice of Defaults was November 30, 2016. The last day to accept any Notice of Default is December 31, 2016. Enrollments will not be accepted after December 31, 2016. Mediations must be completed by April 30, 2017. District Court may not remand any cases for further mediation after March 31, 2017. The Program will come to an end on June 30, 2017.

State News

Washington State Supreme Court Decision on *NationStar* Issue Changes the Dynamics for Abandoned Properties

By Holly Chisa, HPC Advocacy, UTA Washington State Lobbyist

For homeowners AND financial institutions, Washington law is no longer clear when a financial institution may enter a home, or when a home can be determined to be "vacant." In *Jordan vs. NationStar*, the Washington State Supreme Court ruled that financial institutions cannot take possession of a property unless it has foreclosed. This would sound reasonable except in the high number of cases when a homeowner walks away from a property, and that property is neglected. What, then, is the financial institution's obligation to maintain that property, and can that obligation be required by a municipality or HOA before the NOTS?

> *"The Supreme Court ruling in* **Jordan vs. NationStar** *creates ambiguities in the law that go beyond the scope of what may have been intended by the Court."*

The Supreme Court ruling in *Jordan vs. NationStar* creates ambiguities in the law that go beyond the scope of what may have been intended by the Court. While there have been limited standards for addressing the rights of homeowners and financial institutions when a home is clearly occupied, it becomes far less obvious when the homeowner has walked away from a property, or has told the financial institution the family has left, and yet remains. Once the home becomes a neighborhood blight, or if there is a public health or safety risk with the property – say, a water leak – when can the financial institution enter the home or change the locks? Because of the expansive nature of the NationStar ruling, many financial institutions have decided not to work on a property until after the filing of the NOTS, or until after the sale. This creates conflicts with local governments who are trying to address blighted or nuisance properties that financial institutions now will not touch.

A coalition of interests is working to determine whether legislation can pass to resolve this issue. Lawmakers, advocates for homeowners, financial institutions, and the UTA are meeting together to discuss proposed language and the reasons that a financial institution should be able to enter a home. Local governments have joined this discussion, as their costs to address blighted and abandoned properties have escalated over time. These discussions are complicated – when is the home considered to be abandoned, how does a financial institution determine that a homeowner has moved out, if there's an error, how should the financial institution respond to the homeowner to correct the situation, etc. And, from the cities' perspective, what are the responsibilities of the financial institution when a home is considered a blighted property, but the financial institution is unclear whether the homeowner has abandoned the property?

This is not a primary issue for trustees specifically, but goes to the larger issue of how to address properties that don't follow the normal "flow" of a property in delinquency or foreclosure. While many foreclosures follow a couple of traditional, expected paths, foreclosures can extend on for years because of their complexity. A small number of foreclosures can come with unique circumstances – an elderly individual that is hospitalized, and his children or estate is managing the property, for example. These circumstances can extend the foreclosure process indefinitely, and make it ambiguous for financial institutions to know when they can and cannot take possession of a blighted property. Couple with this the frustrations of neighbors concerned with a perceived abandoned property by their house, or a Homeowners Association that wants the property maintained during a foreclosure, and the situation can become complex in a hurry.

The 2017 Washington Legislature is scheduled to meet for at least 105 days, which gives this coalition several months to determine what agreements can be reached on *NationStar*. It is likely other issues will also be placed before the Legislature,

State News

including the advocates' suggested changes the the 2015 Brown decision. During the session, UTA members that operate in Washington state are encouraged to join us for the annual Day on the Hill at the state capitol. The NationStar case, as well as other pieces of legislation, will be discussed with lawmakers from throughout the state. Lawmakers will draft and pass legislation that directly affects how UTA members work through the Deed of Trust Act, and your input is critical. As always, any language proposed in Washington will be shared among the UTA members for your review, input and corrections. We look forward to working with you both on the NationStar issue, any other bills before the Washington Legislature in 2017.

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.

Members May Obtain Copy of UTA's 2016 Financial Statement

Members may obtain a copy of the year-end UTA Financial Statement. Simply contact the UTA office and ask for a copy. The office phone number is (949) 260-9020 or you can email UTA's Executive Director, Richard Meyers at rmeyers@unitedtrustees.com.

UTA's Annual Conference

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The Reviews Are In for UTA's 41st Annual Conference

UTA's 41st Annual Educational Conference, held November 6th -8th at the La Quinta Resort in La Quinta California received very high reviews by attendees.

- The Education sessions received positive reviews from members;
- On the "Economic Outlook" session sponsored by **Daily Journa**l with **Rick Sharga** – "Great presentation. Very informative."
- On the "**Analyzing Risk Assessment/Managing Your Business" session sponsored by Auction**.com and featuring **Sheryl Vacca** – "Fantastic!! Great to see some change to sessions.
- On the "How The Two-Owner Uninsured Report Will Affect You" session sponsored by **STOX** and featuring **Chet Sconyers, Ruth Hernandez, Dale Pitman, Olivia Todd and Rick Waldau** – "Excellent discussion, very useful dialogue."
- On the "CFPB Servicing/Foreclosure Updates" session sponsored by **Carrington Foreclosure Services** featuring **Amy Quester** – "Amy was very clear and well-spoken. Her slide materials are an excellent resource and she answered questions so well. Great addition to the conference, thank you!
- On the "Foreclosure and Title Issues From A Servicer Perspective" session sponsored by **iMailTracking** featuring **Cathe Cole-Sherburn, Tarin Gaddis, Drew Louis and Manny Mata** – "Great session and interaction. Definitely things needed to put in place and helpful for my company. Good to have servicers present.
- On the "Case Law Updates" session, sponsored by **Metropolitan News Company featuring Phillip Adleson, Esq., Martin T. McGuinn, Esq., Rex C. Anderson, Esq., Robert Forster, Esq., and Dana Nitz, Esq**. – "Very knowledgeable and entertaining panel!"
- On the "Bankruptcy Update" panel sponsored by **ServiceLink** featuring **Patric J. Kelly, Esq., Benjamin R. Levinson, Esq., Lee Raphael, Esq., and Mark S. Blackman, Esq.**, – "Always a good program."
- On the "Legislative Updates" session sponsored by **Trustee's Assistance Corp**. featuring **T. Robert Finlay, Esq., Michael Belote, Esq., Rex C. Anderson, Esq., Scott Lundberg, Esq. and Ryan Bourgeois, Esq**.– "Always a highlight of the conference! Did not disappoint!"
- On the "Keeping PACE" session sponsored by **iMailTracking** and featuring **Phillip M. Adleson, Esq., Elizabeth Knight and Martin T. MicGuinn, Esq.** – "Best session. Trustees won't know why untul they have to deal with it."

Breakfast during the conference was enjoyed and sponsored by **Foreclosure Solution** and **STOX**. The Annual Business Meeting luncheon and exhibitor raffle lunch was sponsored by **Auction.com** and **Daily Journal**. Beverage breaks were sponsored by **Trustee's Assistance Corp.; ServiceLink; Metropolitan News Company; and iMailTracking.**

Additionally, members enjoyed a first-rate dinner event held on the Main Lawn of the La Quinta Resort featuring All-American barbecue food, a carnival with games, dancing, and 'Jeopardy!' Twenty-One Silent Auction items were won by attendees; and many exhibitor prizes were won by attendees as well.

"Palm Desert is my favorite place for this conference! Love this hotel," wrote one attendee.

Participants in the golf tournament and the Cooking Class and the Adventure Hummer Tour had a great time at those events as well.

Awards were also presented to **Marsha Townsend of Mortgage Lender Services**, recipient of the Dorothy Schick Veteran Member of the Year Award and to **Andrew Boylan of McCarthy Holthus**, recipient of the Suzanne Kelly New Member of the Year Award. UTA President for the past two years, **Randy Newman of Total Lender Solutions**, received a Lifetime Achievement award. **Michelle Stephens and Ani Ghahreman of Daily Journal** along with **Vahn Babigian of Metropolitan News Company** were honored for their years of service to the Association.

Membership Chair Susan Pettem presented a plaque to **Sue**

Education News

Skene of Title Solutions, in honor of **Mike Skene**, a long-time beloved member of UTA, who recently passed away.

"It was a good conference and we received a lot of great suggestions and recommendations for next year," said Chris Pummill, UTA's Conference Committee Co-Chair.

"Perfect weather and beautiful grounds made for a memorable annual dinner event," said Gary Wisham Co-Chair.

The 41st Annual Education Conference was sponsored by Gold Sponsor; **Auction.com** and Silver Sponsors **Foreclosure Solution; iMailTracking; ServiceLink; Metropolitan News Company; STOX; TAC; Daily Journal; and Carrington Foreclosure Services**.

Cooking Class and Hummer Tours Well Attended

ATTENDEES ENJOY ADVENTURE HUMMER TOUR

This year's conference introduced two new social networking activities – a cooking class and an open-air Hummer Jeep Tour. 20 participants collectively prepared a three-course meal under the guidance of Chef Gavin: a locally sourced organic roast butternut salad; a warm seared salmon(cooked sous vide) and a dessert of lemon tart with torched meringue and cookie crumbs.

16 members enjoyed a beautiful desert jeep tour highlighted by a an eco-walk in the third-largest oasis in the world.

"I loved the Jeep Tour," said Cherie Maples of Assured Lender Services. "The tour guides were amazing and the oasis was beautiful."

UTA Silent Auction and Raffles Raise $5,300

THANKS TO OUR CONTRIBUTORS, THE SILENT AUCTION WAS A GREAT SUCCESS

Twenty-One Silent Auction items were sold during the course of the 41st Annual Education Conference raising $3,500 for the Association. Additionally, another $1,800 was raised from raffle ticket sales. UTA thanks the companies who contributed the excellent and exciting silent auction and raffle prizes that led to such a successful event.

- Manny Ojeda gave the winning bid on an X-Box One donated by **Cathe Cole-Sherburn of Trustee Corps.**
- Eddie Ramirez of Summit Trustee Services gave the winning bid on a mini LED Projector donated by **JC Stock of STOX Posting & Publishing**.
- Eddie Ramirez of Summit Trustee Services gave the winning bid on two Clippers tickets with VIP Chairman Tunnel passes donated by **Ron Hacker of Intellectual Capital Management.**
- Cathe Cole-Sherburn of Trustee Corps gave the winning bid on two Clippers tickets with VIP Chairman Tunnel passes donated by **Ron Hacker of Intellectual Capital Management.**
- Ruth Hernandez of The Money Source gave the winning bid on an Italian-themed basket from **Liz Naughton of the Southern California News Group**.
- Tai Alailima of Carrington Foreclosure Services gave the winning bid on an Amazon Echo donated by **Gary Wisham of Allied Trustee Services**.

Education News

- Drew Louis of Del Toro Loan Servicing gave the winning bid on a BB-8 Droid Little Robot donated by **Renee Patrick-Nord of Trustee's Assistance Corp**.
- Drew Louis of Del Toro Loan Servicing gave the winning bid on a Nordstrom Gift Card donated by **Sue Skene of First Priority Title Solutions**.
- Joyce Copeland-Clark of Wright, Finlay & Zak, gave the winning bid on a Hero 5 donated by **Mike Belote of California Advocates**.
- Robert Finlay of Wright, Finlay & Zak, gave the winning bid on a two-night stay at the La Quinta Resort, donated by the **La Quinta Resort**.
- Robert Finlay of Wright, Finlay & Zak, gave the winning bid on a Fitbit Blaze, donated by **Randall Wong of First Priority Title Solutions**.
- Stephen Godwin of Crazy River Management Group, gave the winning bid on a Bose Soundlink donated by **Ani Ghahreman of Daily Journal**.
- Kayo Manson-Thompkins of The Wolf Firm, gave the winning bid on a Google Speaker, donated by **Vahn Babigian of Metropolitan News Company**.
- Randy Newman of Total Lender Solutions, gave the winning bid on a Fitbit Blaze donated by **Robin Wright of Wright, Finlay & Zak**.
- Carla Asmundson of Digital First Media, gave the winning bid on a champagne package donated by **Glenn Wechsler of Law Offices of Glenn H. Wechsler**.
- Susan Pettem of Novare Settlement Services, gave the winning bid on a champagne package donated by **Phil Adleson of Adleson, Hess & Kelly**.
- Gary Wisham of Allied Trustee Services gave the winning bid on a Nest Thermostat, donated by **Debbie Sullivan of Auction.com**.
- Rande Johnsen of Trustee Corps gave the winning bid on an Apple Watch, donated by **Martin McGuinn of Kirby & McGuinn**.
- Rande Johnsen of Trustee Corps gave the winning bid on a three classic baseball cards donated **anonymously**.
- Steve Croker with ServiceLink gave the winning bid on an Ipad Mini 2 donated by **Randy Newman of Total Lender Solutions.**
- Debbie Sullivan of Auction.com gave the winning bid on a Fitbit charge 2 donated by **Liz Knight of PLM Lender Services.**

Tremendous prizes were also donated from several exhibitors.

UTA's Annual Dinner Event Pays Homage To America

JC STOCK, RON JANTZEN AND CASPER RANKIN FIRE AWAY

UTA's 2016 Annual Dinner event paid homage to democracy and election day with an evening outdoor 'Red, White and Blue' barbecue and carnival featuring several carnival games, dancing and 'Jeopardy!'

Jeopardy's categories included, 'Presidents'; 'Hollywood'; and the 'States' – as well as 'Foreclosure'; Field Services'; and 'Bankruptcy'. Several attendees noted that Palm desert was their favorite UTA conference location and that they particularly enjoyed the La Quinta Resort for it's beautiful grounds.

Education News

Golfers Enjoy Beautiful Course and Many Surprises

BEAUTIFUL DUNES GOLF COURSE AT LA QUINTA

The 23rd Annual UTA Golf Tournament was pure pleasure this year as 28 duffers enjoyed the beautiful Dunes Course at La Quinta – which has hosted the PGA Club Professional Championship.

The winners of the Scramble format Golf Tournament were the team of Patric Kelly, Kevin Hubbard, Martin McGuinn and Robert Cullen. Kevin Hubbard won the putting contest; Robert Cullen and Lana Kacludis won the Men's and Women's Long Drive competitions, respectively, and Carrie Gregg won the 'Closest to the Pin' contest.

Golfers had opportunities to win prizes at four par-3 holes with a hole-in-one. Hole 8 offered a $10,000 cash prize. Hole 6 offered a set of TaylorMade Speedblade HL Irons 4-SW. Hole 13 offered a head to toe signature outfit plus a $500 shopping spree while the 16th hole's hole-in-one prize was 3 nites/2 days and two rounds of golf at TPC Las Vegas (travel not included). None of the duffers was able to claim a prize.

Awards were presented at the post-golf reception. Thank you to sponsors **Auction.com** and **Del Toro Loan Servicing**.

Thank you to our conference sponsors!

UTA is pleased to acknowledge and thank our conference sponsors.

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Membership News

Four Members Elected to UTA Board

The United Trustees Association held an election of the general membership at the Association's Annual Meeting on November 7th, 2016. The election was mandated by the Association's bylaws. Elected as Directors to four open seats were Phil Adleson, Adleson, Hess & Kelly: Cathe Cole-Sherburn, Trustee Corps; Robert Finlay, Wright, Finlay & Zak; and Robert Cullen, Redwood Trust Deed Services.

Terms for each of the Directorships are three years beginning on January 1, 2017 and ending on December 31, 2019. The Board of Directors oversees the policy, budget and operations of the UTA, a non-profit corporation. Only 'Regular' Members (as opposed to 'Educational Members') have voting privileges and were provided with a ballot. Numbered ballots were mailed to the membership prior to the election to allow Regular members who could not attend the meeting to vote and to ensure that no member voted twice.

As mandated by the bylaws, UTA President Randy Newman appointed three members – UTA Secretary Chet Sconyers of First American Trustee Servicing Solutions; Ben Levinson of the Law Offices of Benjamin R. Levinson; and Richard Witkin of Witkin & Neal, Inc./Witkin & Eisinger to serve as inspectors of the election. They counted and cross-checked the ballots prior to reporting the results.

United Trustees Association Board of Directors 2017

Term Expires (Dec.)	Name (Term)	Company
2019	Cathe Cole-Sherburn (2)	Trustee Corps
2019	T. Robert Finlay, Esq. (1)	Wright, Finlay & Zak
2019	Phillip Adleson (1)	Adleson, Hess & Kelly
2019	Robert Cullen (1)	Redwood Trust Deed Services
2018	Susan Pettem (2)	Novare Settlement Services
2018	Gary Wisham (2)	Allied Trustee Services
2018	Ben Levinson (1)	Law Office of Benjamin Levinson
2018	Tai Alailima (1)	Carrington Foreclosure Services
2018	Chet Sconyers (1)	First American Trustee Servicing Solutions
2017	Michelle Mierzwa (2)	Wright, Finlay & Zak
2017	Randy Newman (2)	Total Lender Solutions
2017	Chris Pummill (2)	
2017	Albert Garcia (1)	Allied Trustee Services
2017	Martin McGuinn (1)	Kirby & McGuinn
2017	Elizabeth Knight (1)	PLM Lender Services

Membership News

Marsha Townsend and Andrew Boylan Receive Member of the Year Awards

MARSHA TOWNSEND AND ANDREW BOYLAND RECEIVED AWARD FROM RANDY NEWMAN

Marsha Townsend of Mortgage Lender Services was awarded the Dorothy Schick Veteran Member of the Year Award while Andrew Boylan, Esq. of McCarthy Holthus was the recipient of the Association's Suzanne Kelly New Member of the Year award at the UTA's annual meeting, held November 7th during the Association's 41st Annual Education Conference.

Marsha Townsend received the Dorothy Schick Veteran Member of the Year Award for her work as a Board member for many years; her great work as the Association's Chief Financial Officer for two years; her service on the Nomination Committee for several years. "She also often provides UTA with regulatory information and updates," said UTA President Randy Newman in presenting the award.

Andrew Boylan received the Suzanne Kelly New Member of the Year Award for "being actively involved in lobbying in both Sacramento and Olympia, Washington; for drafting legislative language on several issues affecting trustees in California; and for speaking at a UTA dinner event," said Newman.

The awards honor members for their service and contributions to the Association and the industry and are given to a member who has elevated the Association in its mission to foster and promote the quality of the default services industry through their extraordinary efforts and dedication. Award winners are nominated by UTA's Committee Chairs and Board Members with a final determination of the winner made by the Board of Directors.

Dorothy Schick Veteran Member of the Year Winners

2016 – Marsha Townsend
2015 – Patric Kelly
2014 – Martin McGuinn
2013 – Cathe Cole-Sherburn
2012 – Gary Wisham
2011 – Deborah Kaufman
2010 – Susan Pettem
2009 – Scott Sibley
2008 – Felita Kealing
2007 – Linda Kidder
2006 – Deborah Brignac
2005 – Lorrie Womack

Suzanne Kelly New Member of the Year Winners

2016 – Andrew Boylan
2015 – Kate Heidbrink
2014 – Albert Garcia
2013 – Victoria Adams
2012 – Kathy Shakibi
2011 – Linda Frink
2010 – Michelle Mierzwa
2009 – Randy Newman
2008 – Mary Speidel
2007 – David Fennell
2006 – Rex Anderson and Christopher Perry
2005 – Michael Brooks

Membership News

Randy Newman Honored for UTA Achievements

CATHE COLE-SHERBURN AND RANDY NEWMAN

Outgoing UTA President Randy Newman of Total Lender Solutions was honored by the Association for his tremendous contributions to UTA during UTA's Annual Meeting Luncheon, held November 7th at the La Quinta Resort in La Quinta, California.

"Randy Newman served two years as President of the Association – and he guided us with a steady hand and with wisdom during a period of difficulty for the industry," said UTA Vice-President, Cathe Cole-Sherburn.

"Prior to serving as President, he served as Chief Financial Officer for two years. He has taught numerous California certification classes to new members and non-members over the past decade and he has provided specific and accurate updates to the information taught, as well. And the reviews consistently rated him as an excellent teacher. He has served as a speaker at several dinner events over the past few years, always providing informative information for members. He has actively lobbied on behalf of UTA at our annual lobby days.," said Sherburn. "And don't forget, what a great host he was during 70's night's 'Dating Game' at last year's conference!" she added.

UTA Thanks Stephens, Gharahman and Babigian For Extraordinary Service

UTA PRESIDENT RANDY NEWMAN WITH MICHELLE STEPHENS, ANI GHARAHMAN AND VAHN BABIGIAN

UTA President Randy Newman presented Michelle Stephens and Ani Gharahman of *The Daily Journal* as well as Vahn Babigian of Metropolitan News Company with appreciation and acknowledgement during the Association's Annual Business Meeting on November 7th during the 41st Annual Education Conference.

"*The Daily Journal*, and specifically Ani Gharahman and Michelle Stephens have been stalwart supporters of UTA for many years," said Newman. "They have been exhibitors and conference supporters at every conference UTA. They have provided raffle gifts for every dinner event for many years."

In honoring Vahn Babigian, Newman stated; "We would like to honor and thank the *Metropolitan News Company*, and specifically Vahn Babigian who has been a stalwart supporter of UTA. He has exhibited and been a conference supporter for UTA for many years and Vahn has sponsored many dinner events for the past few years – and who can forget his 'candy flowers' for each table – as well as the great prize that he always brings for the dinner raffle?"

Membership News

UTA Honors Mike Skene

SUE SKENE ACCEPTED PLAQUE ON BEHALF OF HER HUSBAND, MIKE SKENE

UTA honored Mike Skene of Title Solutions for his many contributions to UTA at the Association's annual meeting on November 7th. Mike passed away in October.

"On behalf of the Board of Directors of the United Trustees Association, I am saddened to report the tragic recent loss of Mike Skene, a longtime member and supporter of UTA. He will be missed very much," said Susan Pettem of Novare Settlement Services, UTA Membership Chair, and a friend of Skene's in presenting a plaque commemorating appreciation for his service to the Association.

"Mike was a member of the United Trustees Association and its predecessor, CTA, for over thirty years in various capacities as a title executive. Mike and his wife Sue were one of the most beautiful couples we've seen. Mike's infectious laugh was often heard throughout the exhibit hall. He was a pleasure to work with and an absolute treasure. When UTA asked for his support, Mike was always there to give to UTA and CTA. We would like to offer our sincere and heartfelt condolences to his lovely wife, Sue Skene, and to their beloved daughters on behalf of the entire organization," said Pettem.

Rande Johnsen of Trustee Corps also paid tribute to Skene with a touching tribute to their friendship.

Pettem and Johnsen presented the plaque to Mike's wife Sue Skene, also a long-time UTA member.

UTA Announces 2017 Officers

UTA PRESIDENT-ELECT CATHE COLE-SHERBURN

UTA's Board of Directors has voted in the Association's Officers for 2017. They will assume their positions beginning February 1, 2017.

Cathe Cole-Sherburn of Trustee Corps, based in Irvine, California will serve as the Association's President. The President is the Chief Executive Officer of the Association, and subject to the control of the Board, oversees the general supervision, direction and control of the affairs of the corporation.

Elizabeth Knight of PLM Lender Services, based in Campbell, California will serve as the Association's Vice President. The Vice President performs duties as assigned by the President and performs and exercises the powers of the President in the absence of the President.

Chet Sconyers of First American Trustee Servicing Solutions, based in Westlake, Texas will serve as the Association's Chief Financial Officer. The CFO is responsible for safeguarding all funds received by the Association, and for their proper disbursement.

Michelle Mierzwa, Esq., of Wright, Finlay & Zak based in Newport Beach will serve as the Association's Secretary. The Secretary ensures that the Association is operating in compliance with the Bylaws.

Randy Newman of Total Lender Solutions, based in San Diego, California will serve as the Immediate Past President.

The five Officers are empowered to cumulatively make policy decisions that require immediate action between board meetings.