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PLEASE REPLY TO: CAMPBELL

July 2, 2015

Re: *Andre Torigian v. WT Capital Lenders Services*
Fifth District Court of Appeal Case No. F068393
(Fresno County Superior Court No. 10CECG03800)
URGENT ATTENTION REQUIRED

Dear Trustee, UTA Member or Counsel:

Request for Publication

On June 24, 2015, the California Court of Appeal (5th Dist.) handed down its opinion (discussed below) in *Torigian v. WT Capital Lenders Services* ("the Trustee"). The United Trustees Association ("UTA") filed an amicus brief in support of the Trustee. Unfortunately, the court of appeal did not certify the opinion for publication. ***It is critical to trustees, foreclosure agents and others in the default services industry that the Torigian case be published.*** To get the court of appeal to certify its opinion for publication we need interested trustees, foreclosure agents, and their attorneys to file a Request for Publication ***no later than July 14, 2015.*** Attached are copies of the Request for Publication filed by WT Capital and by UTA. Although it is best if each Request for Publication is individualized, also attached is a simple sample request for publication you may use.

The 5th District Court of Appeal only accepts filings through TrueFiling (its e-filing system) and not by mail. You can either register for TrueFiling at the Fifth District Court of Appeal Website (www.courts.ca.gov), or, you can e-mail your Request for Publication to Tammy Clark, Adleson, Hess & Kelly, APC at tclark@ahklaw.com and she will add the required proof of service and attempt to TrueFile it for you.

The Torigian Opinion

The *Torigian* case involved a dispute between the borrower and lender as to payment of the loan resulting in the borrower suing the beneficiary and the trustee for quiet title, declaratory relief and for an injunction ("equitable actions") and the trustee for

negligence and slander of title (“tort actions”) relating to the foreclosure. The Trustee filed a Civil Code § 2924/ declaration of nonmonetary status (“DNMS”) as to the equitable actions and a demurrer to the tort actions only. The borrower filed a belated objection to the DNMS that was not opposed. The Trustee remained neutral in the equitable claims all the way through trial and, prior to trial, obtained summary judgment in its favor on the monetary (tort) claims. The trial court ruled in favor of the borrower on all equitable actions against both the beneficiary and the Trustee. Both the borrower and the Trustee claimed to be the prevailing party and each filed a motion for attorney’s fees and costs. Even though the Trustee remained neutral on the equitable actions and prevailed in the tort actions, the trial court awarded the borrower attorney’s fees and costs against the Trustee and Lender and denied the Trustee’s claim for fees and costs. The Trustee appealed attorney fees and costs order only. The court of appeal reversed holding that it was an abuse of discretion for the trial court to determine that the borrower (rather than the Trustee) was the prevailing party for the purposes of attorney’s fees and costs. Significant points regarding the *Torigian* Opinion are:

- It is the first court decision since Civil Code § 2924/ was enacted in 1995 to thoroughly discuss and explain that section and the impact of a trustee remaining neutral even after the borrower files an objection to the DNMS.
- The mere fact that a borrower obtained relief on his/her equitable/contract claims does not mean that the borrower is the prevailing party as to the trustee for the purposes of awarding attorney’s fees and costs particularly where the borrower obtained *no better relief* than the borrower would have obtained had it not objected to the trustee’s DNMS and where the trustee otherwise remained neutral on the contract/equitable claims after the borrower’s objection to the DNMS.
- In determining the prevailing party for an award of attorney’s fees and costs, the trial court must separately consider the roles of the trustee and the beneficiary where the trustee remained neutral and breached no duty.
- Where the trustee obtained judgment on the monetary (tort) claims but the borrower is granted relief on its equitable claims (e.g., injunction, declaratory relief, etc.) that the trustee did not oppose, it is an abuse of discretion for the trial court to find the borrower and not the trustee as the prevailing party for the purposes of attorney’s fees and costs.

We request that you immediately write a request for publication to the court of appeal and file it through TrueFiling or, if you are not registered with TrueFiling, we will file and serve it for you. If you file and serve your request for publication, attached is a form of proof of service that must accompany your filing.

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We believe that publication of the *Torigian* opinion will greatly help trustees and their counsel in future cases. If you have any questions, please feel free to email me.

Very truly yours,

ADLESON, HESS & KELLY, APC

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

PHILLIP M. ADLESON, Attorney for
WT Capital Lender Services

PMA/tlc
Attachments