UTA Quarterly
United Trustees Association
Summer 2017

The Ninth Circuit Backs Up Its Ruling That Trustees Are Not "Debt Collectors" – Now Off To The Supreme Court?

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

The Winter 2016 edition of *UTA Quarterly* reported on *Ho v. ReconTrust Company, NA,*[1] a decision of critical importance to our members. In *Ho*, the Ninth Circuit Court of Appeals held that the trustee under a California deed of trust does not, by following statutory foreclosure procedures, become a "debt collector" subject to all of the problematic requirements of the federal Fair Debt Collection Practices Act (FDCPA). New developments in the *Ho* case, and in *Dowers v. Nationstar Mortg., LLC,* 852 F.3d 964 (9th Cir. 2017), a new Ninth Circuit opinion published a few weeks ago, add both clarity and confusion to this issue.

A detailed analysis of *Ho v. ReconTrust* appeared in the previous article. Briefly, Ms. Ho filed an action alleging that ReconTrust violated the FDCPA when it included an incorrect amount in its Notice of Default and Notice of Trustee's Sale. The inclusion of the incorrect amount was alleged to be a "false, deceptive or misleading representation" prohibited by the FDCPA.

> "*Dowers* . . . leaves open the possibility that a trustee which does nothing other than send the required statutory notices may be sued under the FDCPA if the complaint alleges that there was 'no present right' to foreclose."

As explained in detail in the previous article, two other circuit courts had already ruled, in broad terms, that mortgage foreclosure is debt collection, subjecting parties conducting foreclosures to a host of technical requirements, including providing repeated "mini-Miranda" warnings, mailing of verification notices and the requirement that all activity cease pending verification of the debt by the lender or servicer. Breach of any of these technical requirements would subject the violator to liability for statutory and actual damages, and for attorney fees incurred by the consumer. Class actions are permissible under the FDCPA.

In arguing that a nonjudicial foreclosure does not make the California trustee a "debt collector," ReconTrust was not only battling unfavorable precedent from other circuits, but also the government and a consumer advocacy group as well. In addition to the pro bono attorneys representing Ms. Ho, the Consumer Financial Protection Bureau ("CFPB") filed an amicus brief[2] in support of her position. The National Association of Consumer Advocates also filed an amicus brief in support.

The UTA, together with other industry groups,[3] filed an amicus brief in support of ReconTrust. The UTA brief was cited and quoted[4] by Ninth Circuit Judge Alex Kozinski in his opinion, filed October 19, 2016, affirming the dismissal of the FDCPA claim. The ruling was a 2-1 majority decision, with Judge Edward R. Korman[5] filing a lengthy dissent.

Ms. Ho immediately filed a petition requesting that the Ninth Circuit reconsider the case by conducting a new hearing en banc, i.e., by an expanded panel of eleven Ninth Circuit judges.

Continued on Page 6

Inside This Issue

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Cathe Cole-Sherburn

President's Message

Now that we're halfway through 2017, where are we at this moment? A lot of us are now working to better understand the directives of the revised Nevada Foreclosure Mediation Program, and how to be compliant as Trustees. With the help of our Nevada Representatives - Michael Brooks and Rami Hernandez – as well as the collective wisdom of our membership – we are doing just that.

In addition, many of us are wondering how the proposed Financial Choice Act will affect us if changes are made. There are lots and lots of questions indeed, which means there is never a dull moment for any of us. Thank goodness we have an association like UTA, in which we can network and discuss how new rulings or requirements may affect us as Trustees, and how best to make sure that we are all interpreting and creating processes that are similar. And we have altered many draft bills and affected – and created - numerous pieces of legislation over the years that have protected the rights of Trustees. UTA has been essential to our practice and even to our existence.

I'm proud to say that UTA has come a long way in our membership. We value our experienced members to assist with guidance, provide insight, and encourage all new members to network and become involved. We now have conference calls open to all members, where we collectively discuss issues that affect us and figure out how best to address them. I can still remember the time when it was taboo to discuss your processes with a competitor, and/or you developed a small core of people you trusted and only discussed issues with them.

I encourage you all to participate. UTA tries to bring the most up-to-date hot topics to our dinner meetings and, more importantly, our annual conference. If there is something you feel is important that needs to be added to the agenda, please speak up.

Thank you to all of you who have been participating on the Nevada calls recently regarding the Foreclosure Mediation Program - and assisting with recommendations for.

Whether it's legislative changes, file inventories, or having to make staffing adjustments, the phrase, it's "Business as Usual", is a good slogan for our environment, especially when defined as "*an unchanging state of affairs despite difficulties or disturbances*". With everyone having to juggle different hats daily while still remaining successful, I applaud all of you!

Cathe Cole-Sherburn is the Senior Vice President of Default Operations of Trustee Corps, one of the leading, full-service default and foreclosure services companies in the country. She can be reached at ccole@trusteecorps.com.

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Featured Article

The Ninth Circuit Backs Up Its Ruling… Continued from Page 1

The case was considered by many to be a prime candidate for en banc review because it: (i) was a majority decision with a strong dissent; (ii) resolved a major issue in consumer law; and (iii) brought the Ninth Circuit into conflict with two sister circuits.

After a vote of all circuit judges, the Court entered an order denying the request for a rehearing en banc. At the same time the Court issued an Amended Opinion which expanded and strengthened its reasoning. The Amended Opinion holds that a California trustee falls under an exception to the FDCPA's general definition of "debt collector." The Amended Opinion now states: "The FDCPA excludes from the term "debt collector" an entity whose activities are "incidental to . . . a bona fide escrow arrangement." 15 U.S.C. § 1692a(6)(F). A California mortgage trustee— which holds legal title on behalf of the borrower and lender—functions as an escrow."[6]

The Amended Opinion expressly declines to hold that trustees fall within another statutory exception: "The FDCPA also excludes from its definition of "debt collector" an entity that acts "incidental to a bona fide fiduciary obligation." 15 U.S.C. § 1692a(6)(F). But because California courts have consistently held that a trustee is not a fiduciary, we are reluctant to rely on this provision here."[7]

The Ninth Circuit's Order denying the en banc petition leaves open only one avenue for further consideration – a petition for certiorari to the United States Supreme Court.[8] While only a small fraction of these petitions are granted, the possibility of review by the Supreme Court is greater in this case because of the conflicting circuit court rulings.

Notwithstanding that it represents a major victory for trustees, the decision in *Ho v. ReconTrust* still leaves open the possibility that trustees may be sued under the FDCPA. The opinion emphasizes that a trustee "might become a 'debt collector' under the general definition if he does something in addition to the actions required to enforce a security interest." 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 serving the required foreclosure notices, do so at their peril. Only one of the risks incurred in doing so is becoming subject to all of the FDCPA's requirements, with liability for violating those requirements.

The opinion in *Ho v. ReconTrust* is careful to state that Recontrust was not a "general debt collector," i.e., subject to all of the requirements of the FDCPA. In making this distinction the Court was taking into account FDCPA Section 1692a(6), which states that "For the purpose of section 1692f(6) of this title [debt collector] also includes . . . any business the principal purpose of which is the enforcement of security interests. . . ."

FDCPA Section 1692f(6) states that the following is a violation of the FDCPA:

> (6) Taking or threatening to take any non-judicial action to effect dispossession or disablement of property if—
>
> > (A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;
> >
> > (B) there is no present intention to take possession of the property; or
> >
> > (C) the property is exempt by law from such dispossession or disablement.

While UTA members would have to concede that they are a "business the principal purpose of which is the enforcement of security interests" they would certainly argue that non judicial foreclosure activities do not themselves threaten the "dispossession" or "disablement" of property. Possession of the property only becomes an issue after foreclosure is completed. The above-quoted section 1692f(6) seems intended to apply to agents involved in *eviction* from real property or repossession of personal property.

On March 31, 2017 the Ninth Circuit published its opinion in *Dowers v. Nationstar Mortg., LLC,* 852 F.3d 964 (9th Cir. 2017). *Dowers* was an action by a Nevada borrower against a loan servicer alleging that it had proceeded with a foreclosure after the mediation office refused to issue a Certificate of Foreclosure, due in part to failure to produce the original of the secured note. The opinion states[9] in part:

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The Ninth Circuit Backs Up Its Ruling...

Plaintiffs alleged that Nationstar threatened to take non-judicial action to dispossess Plaintiffs of their home without a legal ability to do so. Such conduct is exactly what Section 1692f(6) protects borrowers against. As a result, the district court should not have dismissed Count Four on the ground that Nationstar was engaging in conduct related to non-judicial foreclosure.

The *Dowers* decision assumes, without analysis or discussion, that a nonjudicial foreclosure which results in a transfer of *title* to property would effect the "dispossession" of that property, thus bringing into play FDCPA section 1692f(6). Although *Dowers* was an action against a loan servicer and not a trustee, the holding leaves open the possibility that a trustee which does nothing other than send the required statutory notices may be sued under the FDCPA if the complaint alleges that there was "no present right" to foreclose.

To emphasize, *Dowers* does not subject a trustee to all of the requirements of FDCPA, such as the giving of the "mini-Miranda" and verification notices. It does, unfortunately suggest a basis for inclusion of trustees as defendants in wrongful foreclosure lawsuits, by stating claims under the FDCPA.

Finally, members should be aware that the above discussion applies only to the foreclosure of trust deeds. A trustee which sends out demands on behalf of a homeowners association and then records and forecloses an assessment lien has been held to be a debt collector. An article on this subject written by attorney Benjamin Levinson, reporting on the recent Ninth Circuit case of *Mashiri v. Epsten Grinnell & Howell,* 845 F.3d 984 (9th Cir. 2017), appeared in the Spring, 2017 *UTA Quarterly*.

[1] The original opinion, published on October 19, 2016, appears at 840 F.3d 618 (9th Cir. 2016). An Amended Opinion, discussed in this Article, was published on May 22, 2017 at 2016 WL 9019610. The official citation is not yet available.
[2] The CFPB was invited by the Court to file an amicus brief.
[3] Joining with the UTA in funding the amicus effort were the California Bankers Association, California Mortgage Association, the Arizona Trustees Association and the American Legal and Financial Network.
[4] 2016 WL 9019610 at *6.
[5] Senior District Judge Korman, out of the Eastern District of New York, participated on the panel by designation.
[6] 2016 WL 9019610 at *5
[7] 2016 WL 9019610 at *5
[8] By Order entered May 25, 2017 the Ninth Circuit granted a motion filed by Ms. Ho to stay issuance of the Mandate to the District Court pending her application for a writ of certiori.
[9] 852 F.3d at 971.

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A Case Of The Denials

By Andrew J. Boylan, Esq., and Katie Jo Keeling, Esq., McCarthy & Holthus, LLP

On May 3, 2017, the Court of Appeal for the State of California certified for publication its ruling in *Berman v. HSBC Bank USA, N.A.*[1] This was truly a case of the denials dealing with: denial letters, a lender allegedly in denial, and a borrower being denied. The court didn't hold back within its opinion making it abundantly clear that the statutes must be strictly complied with, despite any alleged frivolous intentions or other delay tactics being used by the borrower.

The nonjudicial foreclosure process in California is primarily governed by statute. This becomes problematic when the relevant sections utilize subjective terms like "material" and "reasonable." In a highly litigious industry like ours, it's not surprising that these terms routinely become the focal point of lawsuits. One of these recent cases, *Berman v. HSBC Bank USA, N.A.*[2], focused on what constitutes a "material violation" of the California Homeowner's Bill of Rights.

The appellate court reversed the trial court's ruling by holding that the listing of a 15-day appeal period in a denial letter (instead of providing the required 30 days) amounted to a "material violation" of the California Homeowner's Bill of Rights.

> Cal. Civ. Code 2923.6(d) reads as follows, "If the borrower's application for a first lien loan modification is denied, the borrower shall have at least 30 days from the date of the written denial to appeal the denial and to provide evidence that the mortgage servicer's determination was in error." Furthermore, the statute provides in relevant part that the servicer, "shall not record a notice of default or, if a notice of default has already been recorded, record a notice of sale or conduct a trustee's sale until the later of: (1) Thirty-one days after the borrower is notified in writing of the denial …"

In this case, the borrower never appealed the denial and a trustee's sale never occurred. Nonetheless, the court held that by providing the borrower with 15 days within the letter instead of the required 30 days, a "material violation" of the statute had occurred. This "material violation" triggered the injunctive relief available to the borrower under Cal. Civ. Code 2924.12, and the court ruled that this would remain in place until the court determines that the lender has corrected and remedied the violation – which can be done by issuing an amended denial letter providing a period of no less than 30 days for the borrower to appeal.

> "...the occurrence of the 'material violation' triggered the injunctive relief provided in the statute"

At the conclusion of the opinion, the court addressed Respondent's claim that the "meritless action is nothing more than a delay tactic" by commenting that any alleged frivolous intent would have no bearing on the Appellant's right to relief. Simply put, the occurrence of the "material violation" triggered the injunctive relief provided in the statute. In responding to Respondent's comments as to the delays caused by the litigation, the court rather blatantly calls out the "stubborn refusal to correct [the] error in the intervening two and one-half years."

This case reinforces the importance of reviewing notice templates and business processes at the state level to ensure full legal compliance. Notably, there are many provisions under the California and Nevada Homeowner's Bill of Rights that go above and beyond the federal CFPB servicing regulations. One of these areas is the consumer/borrower right to appeal.

In California, if a complete application for a first lien loan modification has been submitted and subsequently denied then the statute provides a qualifying borrower with at least 30 days from the date of the written denial letter to appeal the decision.[3] In Nevada, if a complete application for a foreclosure prevention alternative has been submitted and subsequently denied then the statute forbids the servicer from proceeding

Featured Article

A Case Of The Denials…

with the next foreclosure milestone until at least 31 calendar days after the borrower was sent the written denial statement.[4] Under the relevant CFPB regulations, a qualifying consumer is afforded the right to appeal a denied loan modification if their application was submitted at least 90 days before a scheduled foreclosure sale or if no foreclosure sale had been scheduled.[5]

Although these requirements read similarly, there are important differences. For example, the CA HBOR and CFPB regulations provide the right to appeal decisions concerning loan modifications, but the NV HBOR statutes open the appeal to any foreclosure prevention alternative. Additionally, although the CFPB's right to appeal is only triggered if the consumer had submitted the package at least 90 days before a scheduled foreclosure sale or if no foreclosure sale had been scheduled, in California and Nevada the statutory sale period can be less than 30 days. Therefore, there can be situations where because a sale date has not been set when the consumer submits an application the CFPB regulations can be triggered at what would end up being around 30 days before the sale.

Nuances like with the above denial/appeal provisions underscore the importance of working with local counsel to ensure full compliance with both federal and state law.

[1] *Berman v. HSBC Bank USA, N.A.*, 11 Cal. App. 5th 465, 2017 Cal. App. LEXIS 416 (Cal. App. 3d Dist. Apr. 11, 2017)
[2] *Id.*
[3] Cal. Civ. Code 2923.6
[4] NRS 107.530
[5] 12 CFR 1024.41(h)

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An Abstract Thought On The Misidentified Judgment Lien

By Roberto Martinez, Esq., Malcolm Cisneros

The judgment creditor is protected once again—this time, in the context of obtaining and recording a judgment lien against the real property of a person who is *not* the judgment debtor. Homeowner Peggy O'Neil-Rosales filed a lawsuit against Citibank and its retained counsel alleging FDCPA and RFDCPA violations for obtaining and recording a judgment lien against her property even though she was not the one who owed the debt. The trial court dismissed Plaintiff's lawsuit and awarded attorneys' fees to the Defendants. Then on May 10, 2017, the California Court of Appeals in *O'Neil-Rosales v. Citibank et al.* published its decision affirming the lower court's decision to dismiss Plaintiff's FDCPA/RFDCPA claims and award Defendants their attorneys' fees.

The Defendants' tool of choice: California's anti-SLAPP statute. Simply put, the anti-SLAPP statute is a procedural method of dismissing a case brought against a person for exercising their constitutional rights. It has long been held that a creditor's enforcement of a judgment is constitutionally protected. But in the context of a judgment lien identifying a property that the judgment debtor *used to* own, but hadn't actually owned for a couple years, the Court of Appeals reasoned that the "defendants' acts of obtaining an abstract of judgment and recording it as a real property lien fell within the categories of section 425.16"—the anti-SLAPP statute.

It is important to note that the abstract of judgment form, Judicial Council Form EJ-001, does not specify what particular real property interests it encumbers. It is not supposed to, since a judgment lien attaches to both the real property interests *presently held* by the debtor and those acquired *in the future*. Nevertheless, Form EJ-001 still calls for entries of the "last known address" of the judgment debtor as well as the "address to serve summons."

The abstract of judgment recorded by Citibank specifically identified the previous owner as the judgment debtor by providing his name and the last four digits of his social security number. While nothing in the document identified Plaintiff (and it clearly applied to the judgment debtor), the abstract of judgment listed Plaintiff's property as both the "address to serve the summons" on the debtor and the place of his "last known address." The Appellate Court makes reference to this discrepancy, noting that "Neither entry—nor any entry on the form—purports to identify the location of real property in which the judgment debtor has, or may have, a real property interest." However, the Court does not provide an appropriate remedy for a person to clear a misidentified abstract of judgment.

> "...the unintended consequences of abstracts of judgment that often appear on title searches."

The Court notes that, in this case, the homeowner's remedy "was not to file a lawsuit under the FDCPA and the RFDCPA," but instead suggests that the Plaintiff could have "filed a motion to correct the abstract and/or deliver a recordable document releasing the erroneous judgment lien." But these suggestions still imply a financial burden on the homeowner for the judgment creditor's apparent mistake. This case arose from the homeowner's inability to refinance her mortgage until the judgment and lien were removed or proved invalid. If in fact the judgment creditor did not violate the FDCPA or RFDCPA for incorrectly obtaining and recording a judgment lien against the property of an arguably innocent property owner, is the homeowner inevitably stuck with the lien?

The bottom line is that if the homeowner wants to refinance her mortgage (or even sell her property to a third-party), the judgment lien must be removed, requiring a demand for a release of the abstract. But if the judgment creditor is unwilling to release the lien and a title company is unwilling to insure around the deficient lien, the homeowner is stuck. He or she is left weighing the costs of filing a lawsuit to have the lien declared invalid or paying off the lien. And if the judgment is only for a small amount, it might be cheaper for homeowners to pay the lien themselves rather than pay the legal costs to clear title.

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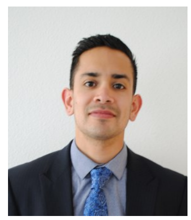
An Abstract Thought …

And what then for the creditor recording its judgment against an insolvent debtor who recently sold his properties to more financially sound buyers? Is the creditor simply exercising its constitutional rights if it files its judgment lien against these properties now owned by persons or entities showing a more promising repayment?

There is without a doubt a broader question to be raised about the unintended consequences of abstracts of judgment that often appear on title searches. Because Form EJ-001 is broadly drafted, judgment creditors must be diligent in verifying last known addresses of the judgment debtors. In the event the judgment lien incorrectly identifies the property address as that of the judgment debtor, the title examiner may very well be in the best position to determine the validity of the underlying abstract.

The Appellate Court in *O'Neil-Rosales* was correctly decided and puts to rest any ambiguity about a creditor's and its attorney's liability under the FDCPA and RFDCPA for the recordation of an abstract of judgment against a property once, but no longer, owned by the judgment debtor.



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Nevada Super-Priority Litigation Update

By: Michael R. Brooks, Esq., Brooks Hubley, LLP

The ongoing litigation surrounding homeowners associations' superpriority lien rights is now five years old and still going strong. The biggest news is that the resolution of the issues surrounding HOA assessment liens may rest with the United States Supreme Court and a holding regarding what constitutes state action. While a favorable ruling for lenders could end many of the superpriority claims, there are plenty of other issues and arguments concerning NRS 116.3116, *et seq.* that affect a lender's lien rights.

Superpriority Analytical Framework:

In an effort to sort through all of the cases decided, unpublished, or even pending, it is helpful to follow the analytical framework laid out by the Nevada Supreme Court in the *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*[1] In *SFR*, the Supreme Court majority described NRS 116.3116 as a three -step statute: 1) the rule of assessment lien priority[2]; 2) the first deed of trust exception to the rule[3]; and 3) the superpriority exception to the first deed of trust exception[4]. Applying the longstanding Nevada legal principle that the party that seeks to invoke an exception bears the burden of proving the exception, we see that the burden of proof shifts twice in a superpriority litigation matter, and concludes with constitutional analysis, as follows:[5]

Step 1: Purchaser bears the burden of proving a valid assessment lien sale;
Step 1a: Affected parties bear burden of proving defenses to valid HOA Lien sale;
Step 2: First security interest holder bears the burden of proving exception;
Step 3: Purchaser bears the burden of proving superpriority exception to first deed of trust;
Step 3a: First security interest holder can assert legal or equitable defenses to superpriority exception;
Step 4: Constitutional Issues.[6]

Step 1: Validity Of The Underlying Foreclosure Sale And Related Defenses

When it comes to proving a valid assessment lien sale, the question is what combination of evidence and evidence substitutes (i.e., conclusive presumptions) is needed to prove a valid assessment lien sale. The question has not been answered in an official reported decision of the Nevada Supreme Court, but a few orders have given us a clue.

Regarding the four statutory conclusive presumptions in NRS 116.31166(8), the Supreme Court has found that they do not exist when there is evidence of statutory non-compliance.[7] Even when they might exist, the Supreme Court has not given them the weight that purchasers had hoped. In the reported *Shadow Wood* decision, the conclusive presumptions were not sufficient to trump equitable defenses to the foreclosure sale.[8] In fact, a significant number of orders granting summary judgment have been reversed and remanded by the Supreme Court based on the failure of the lower court to consider evidence that may be sufficient to declare the sale commercially unreasonable. Moreover, the conclusive presumptions were given little weight or simply bypassed in two unreported decisions.[9] As a result, an HOA lien sale purchaser must show more than the recorded foreclosure deed to succeed on its claims to the property. [10]

Without the benefit of conclusive presumptions, purchasers are required to present evidence to establish the completion of all of the necessary steps to a foreclosure. It appears that a properly conducted HOA assessment lien sale would require more than 15 separate service actions in the form of mailing, recording, posting and publishing.[11] The Supreme Court has seemed to indicate that only substantial compliance will be required to validate an assessment lien sale.[12]

Regarding defenses to a valid assessment lien sale, the Court has invalidated assessment lien sales that were conducted in violation of the automatic stay in bankruptcy.[13] Another defense that may require Supreme Court resolution is whether an assessment lien sale can be properly conducted if the assessment lien was based, in whole, or in part, on violations assessed by the association.

A defense that has been eliminated, for all practical purposes, is the stale lien defense based on the statute that a lien is

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unenforceable unless "proceedings are commenced" within three years of the Notice of Delinquent Assessment lien. The Supreme Court rejected the argument and held that as long as a Notice of Default is recorded within 3-years of a Notice of Delinquent Assessment Lien, the lien does not go stale.[14]

Step 2: First Deed Of Trust Holder Evidence
Purchasers do not generally challenge the lender's evidence of a first deed of trust holder status. However, lenders should always be prepared to prove their status as holders of a first position security interest.

Step 3: Super-Priority Evidence And Related Defenses
The requirements for proving the existence and enforcement of superpriority lien rights has not been fully addressed by the Supreme Court.[15] In the absence of direct, published guidance, there have generally been two outcomes: 1) some courts conclude that assessment liens possess superpriority rights because they "generally include monthly assessments"[16]; and, 2) other courts require evidence of superpriority separate and apart from what is generally in monthly assessments. [17]

This first conclusion which finds superpriority without more than what is generally in an assessment lien is troublesome on many levels. First, if monthly assessments have 'two parts', or distinct priorities, as the Supreme Court held in *SFR,* how does the court tell the difference between the two parts of the monthly assessments? If a court concludes that all that is needed is evidence of monthly assessments, it hasn't answered the question of which priority was enforced. Put another way, the conclusion that monthly assessments and superpriority rights are the same cannot logically be true when *SFR* tells us that the two priorities are not coextensive or identical.

Secondly, equating any monthly assessments with superpriority assessments is inconsistent with the language of the statute.[18] Principally, *SFR* stated that "[i]f subsection 2 ended there, a first deed of trust would have complete priority over an HOA lien."[19] If the Bank has "complete priority" over an assessment lien as part of the balancing of the parties' interests, then something more than simple monthly assessments is necessary to establish superpriority. In addition, superpriority rights are subject to qualification and limitation of monthly assessments. Courts that conclude monthly assessments are superpriority are dispensing with the qualification and limitation language of the statute.

Another problem equating any monthly assessments to superpriority assessments is that it is inconsistent with the legislative intent of NRS 116.3116. By conflating superpriority with regular monthly assessments, any protections given to the lenders in the form of lien priority is essentially written out of the law because it would never be realizable by lenders.[20]

Conversely, several lower courts have now recognized that the question of the presence and enforcement of superpriority liens is a factual question.[21] Specifically, when determining whether the assessment lien sale was a superpriority lien sale, the court will apply traditional deed interpretation techniques and determine the intent of the parties based upon the totality of circumstances surrounding the sale.[22] This approach allows the court to look at the entirety of the situation and ask several questions, including but not limited to:

1) Are mortgagee protection clauses found in CC&Rs an expression of intent not to foreclose on superpriority?;
2) Did the association or its collection agent believe that they were enforcing superpriority rights?;
3) Did the foreclosure notices communicate the enforcement of superpriority rights?;
4) Did the collection agent's post-sale distribution reveal its intent to exercise only subpriority rights?

In the end, it will be the answer to these questions, and others, which will determine whether an assessment lien sale is a superpriority assessment lien sale.

Step 3a: Lender Defenses To Superpriority Lien Claims:
Even if the purchaser can prove that an assessment lien sale is a superpriority assessment lien sale, lenders have numerous defenses. These include:

- The federal foreclosure preemption law which protects any loan held by Fannie Mae or Freddie Mac;[23]
- Limited purpose associations;[24]
- Tender/satisfaction of superpriority lien arguments;[25]
- Equitable defense of a commercially unreasonable sale as set forth in *Shadow Wood*;[26]
- Equitable defense prohibiting the retroactive application of the law.[27]

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While the viability of some of these defenses are currently being challenged in various courts of appeal, the successful assertion of these defenses would allow the lender to maintain its first position deed of trust. Meanwhile, this outcome allows the purchaser to retain its interest in the property and either satisfy the indebtedness, or rent the property until the lender completes a foreclosure.

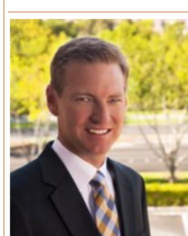
Step 4: Constitutional Challenges:

Finally, there is the constitutional challenges to the "opt-in" notice provisions for junior lienholders in NRS 116. Both the 9th Circuit Court of Appeals and the Nevada Supreme Court have issued rulings on the issue and have come down with competing conclusions.[28] At least one of the litigants has reportedly sought United States Supreme Court review. As of today's date, whether the review will be granted is unclear.

Conclusion:

There is still reason to be hopeful that the litigation of the superpriority matters will be resolved. However, as the relative evidentiary burdens are resolved among the parties, the outcomes may become much clearer.

1. 130 Nev. Adv. Op. 75, 334 P.3d 408 (2014)
2. Id. at 418 (NRS 116.3116(2) elevates the priority of the HOA lien over other liens except for three itemized exceptions, one of which is a first security interest.)
3. Id. ("If subsection 2 ended there, a first deed of trust would have complete priority over an HOA lien.")
4. Id. (NRS 116.3116 ". . . goes on to carve out a partial exception to subparagraph (2)(b)'s exception for first security interests.")
5. Nev. Ass'n Servs. v. Eighth Judicial Dist. Court of Nev. 130 Nev., Adv.Op. 94, 338 P.3d 1250, 1254 (2014)(Defendant bears the burden of proving the applicability of an affirmative defense.)
6. This analysis only applies to sales that occurred prior to the 2015 legislative amendments to NRS 116.3116, *et seq.*
7. Centeno, et al. v. Mort. Elec. Reg. Sys., et al. Sup.Ct. Case No. 64998 (June 23, 2016)(unpublished)(Affirmed that presumptions do not apply when Notice of Trustees Sale was rescinded prior to sale.)
8. Shadow Wood Homeowners Ass'n v. New York Community Bancorp, Inc. 132 Nev., Adv.Op. 5, 366 P.3d 1105, 1111 (2016).
9. Wells Fargo Bank, N.A. v. Premier One Holdings, Inc. Sup.Ct. Case No. 67873, 2016 Nev. LEXIS 578 (June 22, 2016)(unpublished)(Foreclosure Deed alone is not enough); *PNC Bank, N.A. v. Saticoy Bay LLC Series 9320 Mt. Cash Ave. UT 103,* Sup.Ct. Case No. 69595, 2017 Nev. Unpub. LEXIS 395 (Conclusive presumptions were deemed unnecessary in affirming lower court decision).
10. Wells Fargo Bank, N.A. v. Premier One Holdings, Inc., *supra.*
11. NRS 116.31162 through NRS 116.31168.
12. Centeno, et al. v. Mort. Elec. Reg. Sys., et al., *supra.* (Affirmed the validity of an HOA assessment lien sale subject to first deed of trust despite evidence that Notice of Trustees Sale was rescinded prior to sale.)
13. Ditech Financial LLC fka Green Tree Servicing, LLC v. Teal Petals St. Trust, Sup.Ct. Case No. 69295 (Oct. 17, 2016)(unpublished); *SFR Investments Pool 1, LLC v. Green Tree Servicing, LLC*, Sup.Ct. Case No. 68324 (October 18, 2016)(unpublished).
14. Saticoy Bay LLC Series 2021 Gray Eagle Way v. JP Morgan Chase Bank, N.A. Sup.Ct. Case No. 68431 (Jan. 26, 2017)(unpublished).
15. E.g., Wells Fargo Bank, N.A. v. Premier One Holdings, Inc., supra. ("In *SFR*, we primarily decided two issues: whether an HOA superpriority lien foreclosure extinguishes a first deed of trust, and whether it can be foreclosed nonjudicially.")
16. SFR Investments, supra. at 418; see also, PNC Bank, N.A., supra., (Conclusive presumptions were deemed unnecessary in affirming lower court decision).
17. E.g., Augusta Investment Mgmt. v. Bank of New York Mellon, A-14-711294-C (Nev. Dis. Ct., Nov. 9, 2016) (unpublished); *Kal-Mor-USA, LLC v. The Bank of New York Mellon, f/k/a The Bank of New York, as Trustee for the Certificateholders of the CWABS, Inc., Asset-Backed Certificates, Series 2006-10*, A-14-703039-C (Nev. Dis. Ct., Apr. 6, 2017) (unpublished).
18 .NRS 116.3116.
19. SFR Investments, supra.
20. SFR, supra. (NRS 116.3116 ". . . is a specially devised mechanism designed to 'strike [] equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders."
21. Laurent v. JP Morgan Chase, N.A., No. 2:14-CV-00080-APG, 2016 WL 1270992 *6 (D. Nev. Mar. 31, 2016); *Augusta Investment Mgmt. v. Bank of New York Mellon*, A-14-711294-C (Nev. Dis. Ct., Nov. 9, 2016) (unpublished); *Kal-Mor-USA, LLC v. The Bank of New York Mellon, f/k/a The Bank of New York, as Trustee for the Certificateholders of the CWABS, Inc., Asset-Backed Certificates, Series 2006-10*, A-14-703039-C (Nev. Dis. Ct., Apr. 6, 2017) (unpublished)
22. Laurent v. JP Morgan Chase, supra., at *6
23. 12 U.S.C. sec. 4617(j)(3)
24. NRS sec. 116.1203
25. Stone Hollow Avenue Trust v. Bank of Am., N.A., Sup. Ct. Case No. 64955 (December 21, 2016)(unpublished)
26. Shadow Wood HOA v. New York Community Bancorp, Supra.
27. K&P Homes v. Christiana Trust, Sup.Ct. Case No. 69966 (Certified question from United States District Court; submitted for decision.)
28. Bourne Valley Court Trust v. Wells Fargo Bank, N.A., 832 F.3d 1154 (9th Cir. 2016); *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mort.* 133 Nev. Adv. Op. 5, 388 P.3d 970 (2017)



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Too Much, Too Late: Plaintiff's Repetitive Late Claims Disallowed on Appeal in *Ivanoff v. Bank of America, N.A.*

By Kate Heidbrink, Esq., Shapiro, DiCaro & Barak, LLC

The California Court of Appeals recently affirmed the dismissal of a *pro. per.* litigant's second lawsuit against Bank of America for various causes of action related to the bank's nonjudicial foreclosure of her West Los Angeles condominium. In *Ivanoff v. Bank of America, N.A.* (Mar. 13, 2017), B271035 (Cal. Ct. App.), the Second District of the California Court of Appeals affirmed the dismissal of the plaintiff's complaint for violations of the federal Truth in Lending Act (TILA; 15 U.S.C. § 1601 et seq.) and California's unfair competition law (UCL; Bus. & Prof. Code § 17200 et seq.), primarily on the grounds that each primary cause of action was time-barred by the relevant Statute of Limitations. However, the Court of Appeals disagreed with the lower court's ruling that the TILA claim was subject to claim preclusion or issue preclusion.

The *Ivanoff* case had a tangled litigation history before it ever reached the Court of Appeals. The borrower plaintiff originally sued the bank and related foreclosure defendants in July 2013, asserting causes of action for breach of contract, temporary restraining order and preliminary injunction, violation of the UCL, specific performance and equitable rescission. The borrower had originally purchased her condominium in 2004 with a purchase money loan from Washington Mutual Bank. In 2006 and 2007, the borrower refinanced her home with Countrywide, Bank of America's predecessor-in-interest, and the refinancing closed in December 2007. The borrower alleged in her first complaint that undisclosed fees and penalties increased the refinance balance from the expected $636,000 to $711,000. The borrower also alleged that the resulting difference in monthly payments caused her default.

In October 2010, the borrower requested a permanent loan modification from Bank of America, after successful completion of a trial loan modification. The permanent loan modification reduced the interest rate to 2% and extended the term to 40 years, with a modification effective date of February 1, 2011. The modified monthly loan payments were in the amount of $2,567.93 each. However, the borrower appears to have been confused by the fact that the impounded modified loan had higher total payments once the escrow portion of the monthly payment was included. In her first complaint, she called this an additional monthly sum for "escrow option insurance," claiming that the total payment amount was undisclosed and unaffordable.

The defendants demurred (moved to dismiss) the first case on numerous grounds. The trial court sustained the defendants' demurrer in the first case because the plaintiff had not properly pleaded contract causes of action at oral, written, or implied, attached copies of the relevant contracts to the complaint or alleged the material terms of the contracts with the requisite detail; and because certain of the claims were barred by the statute of limitations or the statue of frauds. The plaintiff was given leave to amend her first complaint, but the complaint remained roughly the same after amendment. As a result, the first case was dismissed when the trial court sustained the defendants' demurrer to the first amended complaint without leave to amend. The Court of Appeal affirmed dismissal of the first case, and the California Supreme Court denied review of the appellate dismissal of the first case.

> "… injunctive relief is not a proper cause of action under California state law."

Thereafter, on August 20, 2015, the plaintiff borrower again sued the same bank defendants, along with two additional bank employees, in the second complaint for violation of TILA, the UCL, fraudulent omission/concealment, and injunctive relief from the pending nonjudicial foreclosure sale. The factual allegations in the second case were the same as in the first case. Again, copies of the relevant contracts were not attached to the complaint.

The heart of the second case was an allegation that the escrow option insurance in the modified loan violated TILA as an

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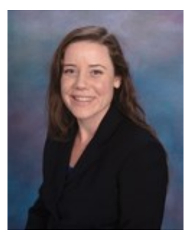
undisclosed term. The UCL cause of action was linked to this alleged TILA violation under state law.

Bank of America again demurred, contending that the second case should be dismissed as a matter of law by the doctrines of claim preclusion and issue preclusion. The bank argued that the plaintiff was asserting the same primary right as in the first case (claim preclusion) and that the issues alleged had been actually litigated and decided against her on the merits (issue preclusion). The bank also alleged that the TILA and fraud claims were time-barred (outside the statute of limitations), that the plaintiff lacked standing to assert a UCL claim due to her failure to allege lost money or property, and that the claim for injunctive relief against the pending foreclosure sale was improper because injunctive relief is a remedy, not a cause of action. In reply, the plaintiff argued that she had not pleaded either violation of TILA or fraud in the first case. The trial court sustained the demurrer in the second case without leave to amend, asserting that the plaintiff's claims were barred by res judicata (claim and issue preclusion) because they asserted claims relating to the same "primary right" in both actions. The trial court also found that the claims each failed independently. This case is the Appellate Court's decision on appeal of the second case.

On appeal, the California Court of Appeals found against the trial court as to the issues of res judicata concerning the TILA claim, and as to the standing issue with the UCL claim. Concerning claim or issue preclusion with the TILA claim, the Court of Appeals found that, although the same underlying facts applied in both the first and second cases, the two cases did not involve the same primary rights. The purpose of TILA is to promote the informed use of credit by consumers (i.e. provide disclosures to consumers in credit transactions), which the Court of Appeals found distinct from the common law right to have enforced only the contractual terms to which the borrower agreed at issue in the first case. Additionally, issue preclusion did not apply to the TILA claims because the judgment in the first case was at the demurrer stage, not a final judgment on the merits. Similarly, the Court of Appeals overruled the lack of standing argument as to the UCL, finding that the plaintiff had satisfied the showing of financial damage anticipated by the California voters in the Proposition 64 addition to the UCL.

However, the Court of Appeals ultimately affirmed the trial court's dismissal. It found that each cause of action was clearly time-barred under the relevant statutes, with the exception of the injunctive relief claim. In the case of the injunctive relief claim, the Court of Appeals agreed with the lower court that injunctive relief is not a proper cause of action under California state law. The Court of Appeals also discussed tolling of the various statutes of limitation until the *pro. per.* plaintiff discovered the alleged undisclosed and unfair terms, but found that, even if the statutes were tolled, the suit was still brought too late. As a result, the dismissal of the second case was ultimately affirmed on appeal. This was a case of too much litigation, too late on the part of the unrepresented borrower in foreclosure. However, this case may also invite separate lawsuits for the same foreclosure-related facts by savvier plaintiff borrowers in the future.



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Oskoui v. J.P. Morgan Chase Bank, N.A. - Lessons In What To Say And Not To Say In Loss Mitigation

By Stephen T. Hicklin, Esq., Law Offices of Michelle Ghidotti

On March 13, 2017, a unanimous three judge panel of the U.S. Court of Appeals for the Ninth Circuit handed down its decision in *Mahin Oskoui v. J.P. Morgan Chase, N.A., et al*. The opinion, written by Circuit Judge Stephen S. Trott, outlines just how careful lenders and servicers must be when communicating with borrowers regarding loss mitigation. Saying either too much or too little can lead to exposure.

Factual Background

Plaintiff Mahin Oskoui was a 68 year old registered nurse when she first sought a loan modification from defendant J.P. Morgan Chase. In 1990, Oskoui bought a home in Los Angeles but refinanced that loan in March, 2007 with a new loan from Washington Mutual. The next eighteen months saw momentous changes for Oskoui, Washington Mutual, and the mortgage industry as a whole. By November, 2008, the "housing bubble" had burst, Washington Mutual had been seized by the FDIC and its assets had been transferred to J.P. Morgan Chase, and Oskoui had begun missing her monthly mortgage payments. In January, 2009, Oskoui submitted a loan modification application to Washington Mutual. On May 21, 2009, Chase sent Oskoui a letter offering her a loan modification "Trial Plan Agreement", but did not specify what was required of her, other than to make three specified trial plan payments, or what would qualify her for a final loan modification. Instead, it said "[i]f you comply with all the terms of this Agreement, we'll consider a permanent workout solution for your loan once the Trial Plan has been completed." Oskoui made the three trial plan payments as requested.

"Saying either too much or too little can lead to exposure."

On November 10, 2009, Chase informed Oskoui that she did not qualify for either the federal Making Home Affordable Program with the incongruous acronym "HAMP" or for Chase's own program, "CHAMP". For reasons not entirely clear, Chase told Oskoui that she was being denied because "[y]our income is insufficient for the amount of credit you have requested." However, Chase's internal records indicated that Oskoui was also denied for HAMP because the unpaid principle balance on her loan was $833,000, higher than the program's limit. Other internal records indicate she was denied for CHAMP because she did not pass the "net present value" test, which compares cash flow with and without a loan modification; if the NPV test is passed, the borrower qualified for a loan modification and, if not, modification was optional. Chase did not share with Oskoui either of these additional reasons for her HAMP and CHAMP denials.

Although she was ineligible for both HAMP and CHAMP, Chase told Oskoui that "we may be able to offer other alternatives to help avoid the negative impact" of foreclosure and a deficiency judgment, without specifying these other alternatives. Oskoui responded by submitting a second loan modification application to Chase in January, 2010. On March 1, 2010, Chase responded to this second application by sending Oskoui a second Trial Period Plan calling for three trial plan payments. Page 1 of the March 1 letter stated, in relevant part: "After successful completion of the Trial Period Plan, CHASE will send you a Modification Agreement for your signature which will modify the Loan as necessary to reflect this new payment amount." On Page 2 of this letter, Chase tempered the earlier statement by noting: "[i]f all payments are made as scheduled, we will consider a permanent workout solution for your Loan." The next day, March 2, 2010, Chase sent Oskoui a letter telling her she was not eligible for HAMP because of her loan balance, but that she "may be eligible for other modification programs or "other alternatives." The March 2, 2010 letter made no mention the failed NPV test. Oskoui made not three but seven payments consistent with the new trial period plan. Then, on October 25, 2010 what the Court describes as a foreclosure notice (presumably a Notice of Sale) was posted on Oskoui's front door setting the foreclosure sale for November 18, 2010. On November 1, 2010, Oskoui received another letter inviting her to work with Chase on a modification of her loan, at which point Oskoui stopped

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Oskoui v. J.P. Morgan Chase Bank …

pursuing a loan modification. Finally, on January 4, 2011, Chase wrote to Oskoui and told her she would not be offered a HAMP or CHAMP modification "because you did not provide us with the documents we requested."

Procedural History

The opinion does not specify when Oskoui filed her pro se suit, but it contained claims under California's Unfair Competition Law ("UCL") pursuant to Bus. & Prof. Code, § 17200 et seq. and for "breach of the covenant of good faith and fair dealing." The District Court granted Chase's Motion to Dismiss the contract-related claim but overruled the motion as to the UCL claim. The District Court later granted Chase's motion for summary judgment as to the UCL claim. Oskoui, represented by counsel, appealed these decisions. The Ninth Circuit panel reversed, ruling that Oskoui had stated an actionable UCL claim, she had stated an actionable breach of contract claim, and that she should be allowed to amend her first amended complaint to state a Truth in Lending Act rescission claim.

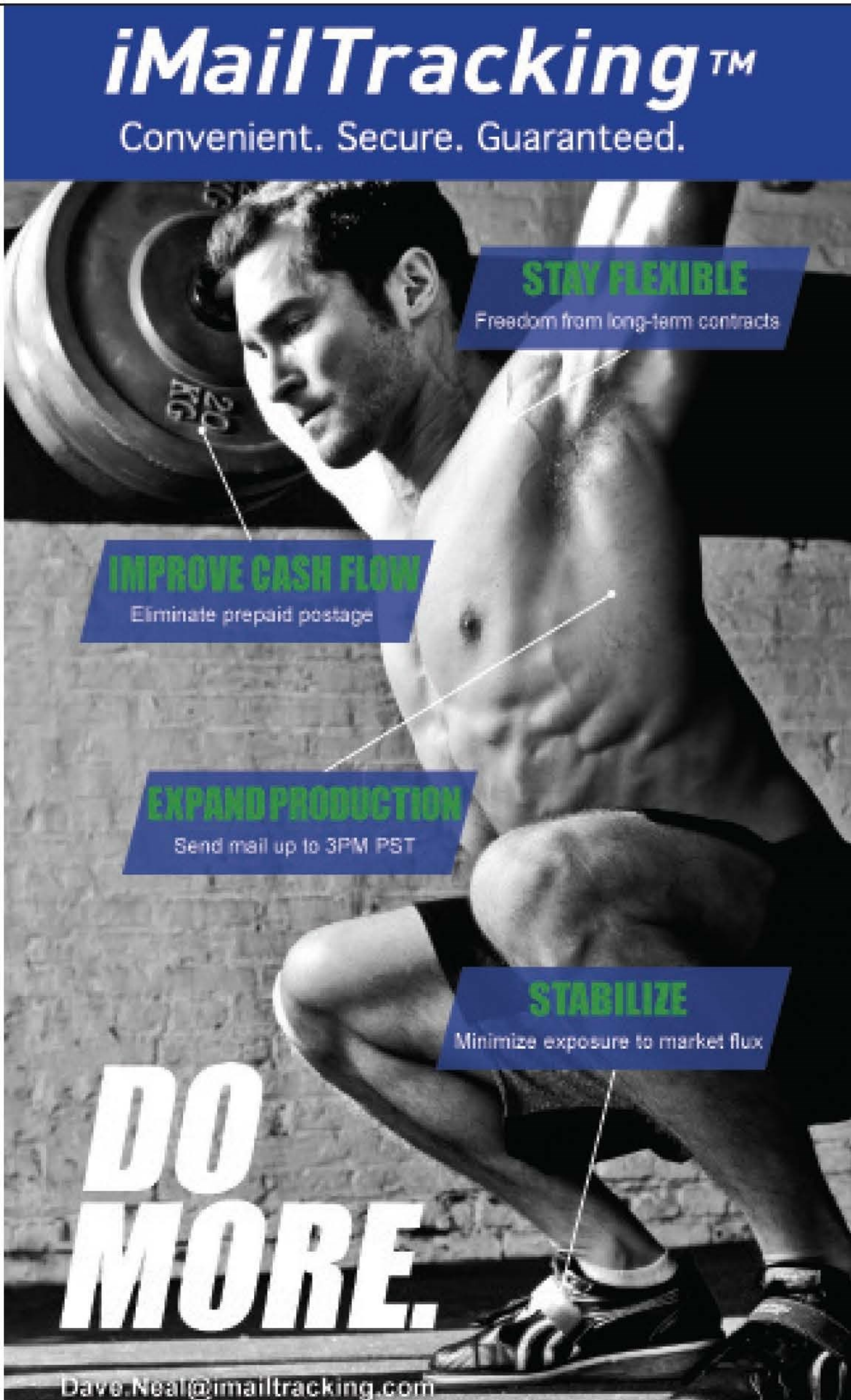
The Circuit Court's Opinion

It is important at the outset to keep in mind when the salient facts in this case occurred. Oskoui fell into default in 2008 and applied for assistance in January, 2009. HAMP was rolled out in 2009 in a well-intentioned effort to ameliorate the impact of increasing unemployment, which made making mortgage payments difficult or impossible for many. Falling home values made it impossible to sell many properties as a way out of foreclosure. Almost no one anticipated or was fully prepared for the volume of applications for loan modifications and short sales, among other forms of relief, coming from borrowers in distress. Policies and procedures for complying with HAMP guidelines had to be drafted, approved, and disseminated. Staff had to be hired and trained. Communications with borrowers had to be created, revised, and approved by lenders and their regulators. The Treasury Department, the Office of Thrift Supervision and the Office of the Comptroller of the Currency strongly encouraged lenders and servicers to keep working with borrowers who had failed to qualify for one program by evaluating them for other forms of relief.

Against this backdrop, Oskoui applied for a loan modification. The Court was troubled by the fact that Oskoui had applied for both HAMP and CHAMP loan modifications and by 2009, Chase knew, at least internally, that she did not qualify for either program because of her loan balance and the NPV test results. Yet, Chase did not tell her the full reasons for her denial and encouraged her to reapply, leading to what the Court calls "Kafkaesque conduct…." Of course, in the early days of HAMP, regulations allowed servicers to deny applications referencing just the first ground for denial without listing every potential, alternate reason. Servicers were also "encouraged" to continue to evaluate borrowers for other forms of relief, e.g. even if they had been turned down for a loan modification. It is certainly true that the language used in the May 21, 2009 and March 1, 2010 letters setting Oskoui up on trial payment plans suggested that all she had to do to get a final modification was to make the trial payments as agreed, something Oskoui admittedly did. The Court held that despite language calling for a re-evaluation once the trial plan was over in the March 1, 2010 letter, the ambiguity coupled with Oskoui's timely tender of all the trial plan payments, meant Oskoui had become entitled to a permanent modification. The Court citied *Wigod v. Wells Fargo Bank, N.A.* (7th Cir. 2012) 673 F.3d 547, 561 which ruled the same way on similar facts with approval.

For all its chastising, this case really breaks no new ground. It recalls the early days of HAMP and the pre-Homeowners Bill Of Rights period in California and, predictably, relies on familiar cases and arguments to reach its conclusions. It does, however, remind us of the need for precision both as to what we say and don't say when dealing with borrowers.

Steve Hicklin has been practicing law since 1988. He has served as General Counsel for Northwest Trustee Services and as Chief Compliance Officer for ReconTrust Company, NA, among other in house positions. He is also an experienced litigator, having worked for Wright, Finlay & Zak, Countrywide Financial Services and WMC Mortgage Corp. Steve is currently managing litigation for the Law Offices of Michelle Ghidotti in Anaheim Hills. He can be reached at shicklin@ghidottilaw.com.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California: Successor In Interest Legislation (SB1150) Effective January 1, 2017

By Caren Jacobs Castle, Esq., The Wolf Firm

Editor's note: This article is reprinted with permission and consent from USFN. Pertinent dates have been updated.

The California Legislature passed a bill (signed by the governor on September 29, 2016), which creates additional requirements as well as potential liability for servicers when dealing with "successors in interest" to a deceased borrower. The purpose of SB1150 is to allow successors in interest to step into the shoes of the deceased borrower with respect to home retention and loss mitigation opportunities. The bill was effective January 1, 2017. Highlights of the new legislation are discussed below.

Definitions

SB1150 applies to first lien mortgages or deeds of trust that are secured by owner-occupied residential property containing no more than four dwelling units. "Owner-occupied" is defined as the principal residence of the borrower at the time of the borrower's death. The definition of successor in interest has been greatly limited through the legislative process. "Successor in interest" is defined in the bill as a natural person, who notifies the servicer of the death of the mortgagor, **and** can provide documentation that the person is the spouse, domestic partner, parent, grandparent, adult child, adult grandchild, adult sibling, or joint tenant of the deceased borrower. Additionally the successor in interest **must** have occupied the subject property as his/her principal residence at the time of the borrower's death and continuously for the six months prior to the borrower's death.

Successor in Interest Determination: Timing & Process

There are several time frames built into the SB1150 process. Upon notification to the servicer (from a person claiming to be a successor in interest) that the borrower has died, the servicer may not proceed with the recordation of a notice of default. The bill specifically requires that the foreclosure not commence and/or proceed in any fashion until the successor in interest process is completed. The cumulative review/delay time frame stated within the legislation is a minimum period of 120 days. Upon notification of death, the servicer shall request in writing that the party provide evidence of the death of the borrower. The bill allows 30 days to provide this documentation. The evidence may be a death certificate or "other written evidence." Once the evidence of death is validated, the servicer must request in writing that the party provide written proof that he/she is a successor in interest as defined above. SB1150 deems 90 days as a reasonable time frame for the party to provide "reasonable documentation."

Once the documentation is received, the servicer must evaluate whether the party qualifies as a successor in interest; in other words, determine that the original borrower is deceased, the party has an ownership interest in the property, and that the party has occupied the home for six continuous months prior to the borrower's death as his/her principal residence. While SB1150 recognizes that there may be multiple successors in interest, it only provides a statement that the servicer shall apply the provisions of the loan documents as well as federal and state law when there are multiple parties.

> "Successors in interest will have the same rights and remedies as the borrower under the California Homeowner's Bill of Rights (HBOR), which allows a private right of action."

Successor in Interest Entitlements

Within 10 days of determining that there is a successor in interest, the servicer shall provide to the party, at a minimum, the following loan information: loan balance, interest rate and any reset dates/amounts, balloon payments, pre-payment penalties, default information, delinquency status, monthly payment amount, and payoff amount.

The servicer shall further allow the successor in interest to apply to assume the loan and may evaluate the creditworthiness of the successor subject to applicable investor guidelines. If the loan is assumable, and the successor requests a foreclosure prevention alternative simultaneously with the assumption process, the party shall be allowed to apply for an alternative that would have been available to the deceased borrower. If the

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California: Successor In Interest …

successor qualifies for an alternative, the servicer shall also allow the party to assume the loan.

Successors in interest will have the same rights and remedies as the borrower under the California Homeowner's Bill of Rights (HBOR), which allows a private right of action. This includes the right to seek an injunction preventing the foreclosure sale from going forward — as well as the right to seek economic damages, and potentially punitive damages for intentional or reckless violations equal to the greater of $50,000 or treble damages, if a sale occurred in violation of SB1150. The successor in interest is also entitled to attorney's fees if it is the prevailing party. Unfortunately, there is no attorney fee provision should the servicer be the prevailing party. The servicer will not be liable under SB1150 if violations are remediated prior to the recordation of the trustee's deed upon sale.

SB1150 provides that compliance with the Consumer Financial Protection Bureau (CFPB) regulations regarding successors in interest will be deemed compliance with California law. (The new CFPB rules regarding successors in interest are to take effect in April 2018.) The California bill will sunset January 1, 2020, unless extended.

Issue Areas

There are several issues that remain problematic with SB1150:

1. **Delays in foreclosure.** Upon notification of a borrower's death by a potential successor in interest, there is built into the process a minimum of a 120-day delay (30 days for evidence of death, and 90 days for reasonable documentation to prove successor in interest).

2. **Determination of a successor in interest.** The bill puts the servicer in the position of having to make a legal conclusion that a party is in fact a successor in interest. This may include having to review last wills and testaments, trusts, deeds, etc. It also may require that the servicer file a court action to determine if the party is in fact a successor in interest.

3. **Conflicting successors in interest.** Although the bill acknowledges that there may be more than one successor in interest, it does not deal with the issue of adverse successors. Again, this may require that the servicer file a court action to resolve any and all conflicts. Note, however, that the requirements under SB1150 will not apply if the potential successor is involved in a legal dispute over the rights to the subject property.

4. **Privacy/Fair Debt Collection Practices Act (FDCPA) issues.** SB1150 requires that the servicer, upon determination that a party is a successor in interest, provide specified loan information without written authorization of the borrower or court order, which may violate federal privacy laws and FDCPA. The California legislature has thus far been unwilling to address these conflict of statutes/preemption issues.

Caren Jacobs Castle is a Senior Mortgage Servicing Attorney at The Wolf Firm, A Law Corporation. Ms. Castle has over 30 years of experience in the mortgage servicing industry. She is a past president of USFN and was the organization's first female president and received the USFN member of the year award in 2012. She can be reached at caren.castle@wolffirm.com.

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State News

The Impact Of Supermajorities In California

By Mike Belote, California Advocates, UTA California Lobbyist

For those even casually following California politics, the November 2016 general elections moved an already blue California to electric blue, neon blue, pretty much the bluest blue you can imagine. Both the California Senate and Assembly are now constituted with two-thirds supermajorities by Democrats, every statewide constitutional office is held by a Democrat, and in the U.S. Senate race, no Republican even appeared on the November ballot, because none finished in the top two.

Experts believe that it is possible, if not likely, that no Republican candidate will finish in the top two for next year's gubernatorial race either, leading to another Democrat-on-Democrat general election contest. We are really, deeply blue and potentially becoming even bluer.

In theory, having two-thirds supermajorities gives Democrats the power to raise taxes, place items on the statewide ballot, and override governor's vetoes, all without Republican votes. In reality, the situation is far more nuanced. When it comes to defeating undesirable legislation promoted by Democrats, or passing legislation opposed by Democrats, it is certainly true that the supermajorities make the mission far more difficult. To defeat majority vote bills, for example, opponents must convince 15 Democrats in the Assembly, or 7 in the Senate, to vote against their Democratic colleagues. It happens occasionally, but it is very difficult.

When it comes to taxes, the equation is different. Under the California Constitution, tax increases require a two-thirds vote by each house of the legislature. This was achieved, barely, in the recent vote to increase gas taxes and car registration fees. But when one Democrat in the Senate refused to vote for the gas tax package, Democrats had to convince a Republican Senator to vote for the package. The one Senator they found is scheduled to leave office next year due to term limits. And one Democratic Senator who voted for the package may be facing a recall later this year. The vote to raise gas taxes and registration fees was a tough, wrenching decision for legislators.

The point is that passing tax increases is very hard, even with two-thirds supermajorities. This is relevant to a bill opposed by UTA, SB 2. This bill would impose a $75 surcharge on recording real estate documents, including notices of default and notices of sale, in order to fund affordable housing. This represents a tax increase, and therefore requires a two-thirds vote. Even though California has been described as having not a housing crisis, but a housing catastrophe, obtaining a two-thirds vote and a Governor's signature on SB 2 is going to represent a big challenge for proponents.

SB 2 is hardly the only issue pending in California of interest to UTA, and some of the others are majority vote bills. We have been working on SB 242, for example, designed to provide additional consumer protections in PACE transactions. In general, the idea is to treat PACE loans more like real estate loans, but the devil, as they say, is in the details. UTA has been evaluating language relating to forbearances to make sure that SB 242 does not impact nonjudicial foreclosures.

Another majority vote bill is UTA-sponsored SB 467 (Morrell). The bill is intended to address an inadvertent omission in legislation from last year relating to trustee's fees. While last year's bill increased base fees by $50, the bill failed to raise the fee applicable upon the trustee's sale. This year's bill will correct that omission, but we have been trying to also address the situation where trustees are being fined for the failure to register, inspect, and maintain foreclosed properties. We believe strongly that these are not trustee functions, but state law expressly gives local governments the power to establish their own rules in this area. Thus far we have been unable to convince legislators to override local government authority on this subject, but meetings are being scheduled with representatives of cities and counties to continue the discussion.

In all, UTA is following more than 60 different pieces of legislation for the 2017 legislative year. The mission is to protect nonjudicial foreclosure practice and trustees generally, and UTA is quite successful. But the next time you wonder how the legislature could possibly pass a given bill, or why the Assembly and Senate might refuse to pass a particular idea, remember the lyrics of the old song "blue on blue, heartache on heartache"!

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

Negotiations Stall on NationStar Fix, Funding for the Foreclosure Fairness Act

By Holly Chisa, UTA Washington Lobbyist, HPC Advocacy

After eight months of negotiations, hours of discussions, and input from stakeholders across the financial spectrum, it appears no agreement will be reached on a solution for the *Jordan vs. NationStar* case. Without resolution to this issue, there will also not be resolution to other issues of interest to trustees, including successor in interest and the ability to petition for non-monitory interest.

It also leaves the Foreclosure Fairness Act program, administered by the Washington Department of Commerce, short financially in its operations for the coming year.

At the time of this writing, negotiations had hit a significant stumbling block around the NationStar "fix," specifically the retroactivity piece. Stakeholders have spent the last eight months discussing the many aspects of the NationStar case. The core debates centered around how a financial institution, either as its own entity or through a contractor, can approach an abandoned property when that property is in the process of foreclosure, but prior to the financial institution actually taking possession of the home. The advocates, including the attorney that represented Ms. Jordan, want severe limitations on the ability for a financial institution to enter the property, and even more limitations on entering the home itself. Financial institutions were concerned that limitations will prevent them from preserving properties that may be damaged or occupied by trespassers and squatters. Everyone agreed that if the homeowner is in the house it should be considered occupied, and that homes that are truly abandoned and are becoming a community health risk, should be able to be maintained by financial institutions. The debate centered on how to determine when a home is truly abandoned.

The advocates and financial institutions were unable to reach final agreement on how to address this issue. Portions of a new law were drafted to address local governments' concerns with nuisance properties and a tentative structure was built for a duty of maintain for financial institutions. Additionally, there was tentative language drafted to address how a financial institution or its representative could approach a property, and when circumstances were appropriate to enter a home. Final bill language was not agreed to, but concepts were developed.

Negotiations broke down over retroactivity. Financial institutions argued that, prior to the NationStar decision, they and their contractors entered properties under what they understood to be lawful circumstances and should not carry liability. Advocates did not agree. Even with hours of negotiation, the parties could not reach agreement.

This issue matters to trustees not because they are heavily involved in the underlying issue around NationStar. It matters because of what was tied TO the agreement on NationStar. Funding for the Foreclosure Fairness Act program (FFA) is tied to financial institutions, which pay an annual fee to the state. The FFA is underwater, and needs additional funding. Financial institutions would not agree to a fee increase without resolution to NationStar. If there had been resolution on NationStar, fees would have increased and been spread over all NOTS for one-of-four residential property. This would have required trustees to float those higher fees and cost trustee firms a significant expense. For trustees to agree to the new "float," trustees wanted language on non-monitory interest, similar to what is offered in California. Negotiations between the advocate attorneys and trustees on this language ran concurrently with the discussions on NationStar. As part of those side negotiations, attempts were also made to resolve the long-standing advocate request to provide the beneficiary declaration at the NOD, in exchange for language to bring successor in interest foreclosures to the non-judiciary process.

While language was developed and exchanged between the advocates and trustee lawyers, these issues were not finalized because of the breakdown in negotiations on NationStar. It did provide us with a foundation, however, for language on both non-monitory interest and successors in interest to be run in future sessions.

Even with the Washington Legislature well into its second special session (scheduled to end June 22), it is unlikely we will be able to resolve out the high number of issues still

State News

Negotiations Stall …

outstanding before the end of session. If negotiations restart in the coming months, the United Trustees Association will participate in the discussion of NationStar, and the concurrent discussions on non-monitory interest and successor in interest for non-judicial foreclosures. For now, it is unclear how the Washington Department of Commerce and other agencies will continue to administer the FFA with lesser funding. It is clear, however, that without a fix to NationStar, financial institutions and their contractors will be unable to enter properties until the foreclosure is complete.

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.

Nevada Foreclosure Mediation Bill Is Signed By Governor Sandoval

By Ramir Hernandez, Esq., Brooks Hubley, UTA Nevada Representative

On June 12, 2017, Governor Brian Sandoval of Nevada signed SB 490, a bill that resurrects the previously scheduled to sunset Nevada foreclosure mediation program. The state's original foreclosure mediation program was established in 2009 and administered by the Nevada Supreme Court. The new program shifts administration of the program to Home Means Nevada, Inc., the non-profit entity that the state has set up to administer Nevada's share of the Hardest Hit Fund. Under the new program, borrowers may petition the district court where the home is located so as to opt in to a court administered mediation. The district court will then assign the mediators, and, if necessary, review the findings of the mediators. To fund the program, the legislature has raised the fee for a notice of default from $45 to $95 and has raised the mediation fees from $400 to $500. The latter cost is split between the parties. The authors of the bill anticipate 6,000 foreclosures per year over the next two years. Operationally, mediations will generally work under the same document and attendance requirements under the current program. One exception is that beneficiaries will have to bring to the mediation "any documents created in connection with a loan modification." Notably, the new program will create a portal, similar to one used by the bankruptcy courts, to schedule mediations and exchange documents.

The new program comes at a time when foreclosures are at the lowest in Las Vegas that they have been in years. On June 12, the Las Vegas Review Journal published an article entitled "Foreclosure rate in Las Vegas drops sharply from 2016". According to the article, one in every 1,000 homes in the Las Vegas area in May received a foreclosure related filing. This represents a 21.8 drop from May of last year. And Las Vegas is not number one among Metro areas in the nation: Las Vegas is 23rd. While the act becomes effective upon passage, indications are that the program will need a few months to set up the portal, which could cause delays to any new or recent foreclosure filings. We will monitor the new program and provide any updates regarding implementation and compliance requirements.

Ramir ("Rami") M. Hernandez is an associate attorney with Brooks Hubley LLP. Mr. Hernandez focuses his practice on civil litigation, real estate law, family law, and government. Mr. Hernandez is admitted to practice in the State Bar of Nevada and the United States District Court for the State of Nevada. He can be reached at RHernandez@brookshubley.com.

UTA

State News

Texas Legislative Update 2017

By Ryan Bourgeois, Esq., Barrett Daffin Frappier Turner & Engel, LLP

The Texas Legislature only meets every other year, and 2017 marked the 85th Regular Legislative Session. The session ended in May, and there were four bills passed of note to those in the mortgage default industry. Below is a brief summary of those bills.

HB 1128

Like several other states, Texas is a "Super Tuesday" state in which foreclosure sales are always conducted on the first Tuesday of the month. However unlike several other "Super Tuesday" states, Texas Law does not allow the sale date to be moved when it falls on January 1st or July 4th. HB 1128 resolves this and moves the foreclosure sale to the first Wednesday of the month should the first Tuesday fall on either January 1st or July 4th. The bill does not take effect until September 1, 2017 so it will not affect the July 2017 foreclosure which will still occur on July 4, 2017. Foreclosure providers will have to wait until January 1, 2019 to take advantage of this new law.

HB 1470

The HUD CWOCT and similar programs by FNMA and FHLMC has led to the increased use of auction companies in the foreclosure process. Since Texas Law has no provisions related to auction companies, the Texas Legislature sought to clarify the duties and responsibilities of both the auction company and also the individual trustee with the passage of HB 1470. Chapter 22 of Texas Business and Commerce Code traditionally governs auctioneers and auction companies, and HB 1470 clarifies the definition of "auction company" to account for the current practices in today's market. HB 1470 codifies the requirement that it is a trustee's duty to sell and market the property and distribute any excess proceeds, but the bill now allows the trustee to retain an auction company to market the foreclosure sale and most importantly allows a trustee to retain an attorney to distribute the proceeds. The bill allows the trustee or attorney for the trustee to collect reasonable fees and costs to distribute the proceeds of the sale. The bill sets reasonable fees at the lesser of 2.5% of the foreclosure sale price or $5000.

Lastly, HB 1470 also requires a winning bidder at a foreclosure sale to provide certain minimum information including but not limited to a government issued ID. This will provide the basic information a trustee needs to complete the sale, and for mortgage servicers or their attorneys to comply with other regulations such as conducting OFAC searches.

SJR 60

In Texas liens on homestead property are governed by the Texas Constitution. Texas was the last state to allow home equity lending and has strict guidelines for the origination of home equity loans. SJR 60 proposes certain changes related to origination guidelines for home equity loans. Specifically it would establish a lower amount for expenses that can be charged to a borrower and would remove certain financing expense limitations. It would establish certain authorized lenders to make a home equity loan, change certain options related to the refinancing of home equity loans, change the threshold for an advance of a home equity line of credit, and allow home equity loans on agricultural homesteads. If voters adopt the bill at the November election, it will take effect for all Texas home equity loans originated and/or refinanced after January 1, 2018.

HB 1217

HB 1217 brings notarization into the 21st century and authorizes the use of online notarization. The bill sets out qualification and other rules to become an e-notary, and creates rules to govern the actual notarization process. The Secretary of State is to create additional rules and regulations related to online notarization. The bill takes effect on January 1, 2018

Ryan Bourgeois is partner with Barrett, Daffin, Frappier, Turner and Engel and manages the Texas, California and Georgia foreclosure groups. Mr. Bourgeois has presented at several real estate CLE's in Texas. He can be reached at RyanB@bdfgroup.com

State News

2017 Utah Legislative Changes Affecting Default Mortgage Servicing

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

The 2017 Utah legislature passed a number of bills affecting Utah foreclosures and evictions. The effective date for these bills was May 9, 2017. Senate Bill 0203, Real Estate Trustee Amendments, slightly expanded the definition of an authorized nonjudicial foreclosure trustee. Senate Bill 0052, Rental Amendments, and House Bill 0376, Landlord-Tenant Rights, both made important changes to Utah eviction actions and the rights of the respective parties therein. House Bill 0320, Notaries Public Amendments, set forth updated definitions and new templates for various acceptable notarial acts. Finally, Utah's legislature enacted a uniform law with the adoption of House Bill 0013, Uniform Fiduciary Access to Digital Assets Act.

Nonjudicial Foreclosure Trustee

Senate Bill 0203 expanded the definition of a non-judicial foreclosure trustee to include law firms, in addition to individual members of the Utah State Bar and licensed title insurance companies. To be eligible, a law firm must employ at least one active member of the Utah State Bar, be licensed to do business in Utah, and maintain an office in the state where borrowers or other interested parties may meet with the trustee. Further, foreclosure documents signed on behalf of the firm, as trustee, may only be signed by an attorney currently licensed in Utah.

Additionally, the bill imposed a filing fee to $50.00 for any parties petitioning to receive surplus foreclosure sale proceeds deposited with the court. The bill also extended the time period for filing affidavits or counter-petitions in conjunction with claims for surplus foreclosure sale proceeds deposited with the court from 45 days to 60 days. It is anticipated that this additional provision may help deter the filing of unwarranted claims in excess proceed matters.

Eviction Amendments

As indicated, two bills enacted this year will affect evictions in Utah. First, Senate Bill 0052 was passed in an effort to reduce the number of bad faith claims being made in eviction actions. The legislation specifically affected fees and costs recoverable in an unlawful detainer action or an action under the Utah Fit Premises Act. Judges now have discretion to award reasonable fees and costs to the prevailing party in those proceedings.

Second, House Bill 0376 amended Utah's unlawful detainer (eviction) statute. Previously, only certain Utah evictions were eligible for expedited treatment in the courts. This new statute made available expedited proceedings for all types of eviction actions, including those involving commercial tenants. The bill requires the court, upon the request of either party, to schedule an evidentiary hearing to determine who has the right of occupancy during the litigation's pendency and said hearing must occur within 10 business days of the filing of the defendant's answer or any other response by the defendant to the complaint. This provision will serve to limit a tenant's ability to delay eviction proceedings by filing a motion or other pleading simply to avoid the filing of an answer, which heretofore was the only responsive pleading that would trigger the expedited eviction timeline.

Notaries Public

House Bill 0320 amended the Notaries Public Reform Act by altering the statutory definitions of "jurat" and "notarial certificate" while adding "signature witnessing" as a newly available notarial act in Utah. The bill also clarified reapplication procedures and requirements for a notary public whose commission has expired. The bill created a new section within the act with templates of example language for a jurat and an acknowledgement in the state of Utah. Finally, the bill added provisions to permit a licensed escrow agent who is also a notary public to notarize certain documents that the licensed escrow agent signs.

Digital Assets

Utah followed the Uniform Law Commission with its adoption of House Bill 0013, Uniform Fiduciary Access to Digital Assets Act. This bill created a new chapter within the Utah Uniform Probate Code addressing who has access to the digital assets (i.e., email, social media, and e-commerce accounts and their contents) of an incapacitated or deceased person. Additionally, the bill set out responsibilities for agents and fiduciaries with access to a person's digital assets. It also stated the responsibilities of the custodian of a digital asset upon request of an agent or fiduciary. Understanding and compliance with the provisions of this bill will be important when dealing with representatives of deceased or incapacitated customers.

Mr. Lundberg serves as President and Managing Attorney for Lundberg and Associates. His practice includes representing financial institutions, lenders, and mortgage servicers in business and real estate litigation, title disputes, regulatory compliance, and a variety of foreclosure, creditors' rights, collection, and eviction matters He can be reached at Brigham.Lundberg@Lundbergfirm.com.

State News

Nevada Bill Revises Fee and Requirements for Recording of Documents

UTA's Nevada Representative, Rami Hernandez, summarized legislation (AB 169) in the Nevada Assembly that would make revisions to the recording statutes affecting the public recording of documents.

"First, the bill allows County Recorders to accept and record documents that do not meet the formatting requirements. Additionally, the bill revises the fee structure for documents that are not formatted properly and eliminates the fee for recording documents that are more than one page. It also raises the fees collected for certain documents from $3 to $5.

The bill cleared the Assembly on April 21 but was amended by the Senate on May 19th. It now heads back to the Assembly to either concur with or recede from the Amendment. If the Assembly does not concur, the bill may be sent to a conference committee to work out the differences."

Texas Legislation Addresses Trustee Delegation of Functions to Auction Companies and Attorneys

Legislation has been introduced in Texas (HB 1470 / SB 1405) that addresses trustee delegation of certain functions to auction companies and to attorneys. UTA has taken a neutral position on this legislation. The House Bill has unified with the Senate Bill which has been recommended by the Senate to be placed on the local and uncontested calendar. Once placed upon the calendar, it will head directly to the Governor for signature.

A summary of the bill, as written by Robert D. Forster, II of BDF Law Group follows:

(1) Updates the language in the substitute trustee exception under the auction code to clarify that it applies to all security instruments and not just "deeds of trust." This is a small change but perhaps important in light of the fact that in modern practice, security instruments come in many different flavors and have many different descriptions;

(2) Assures that 'auction companies' are authorized to provide auction services like those under the HUD and GSE programs. Under current law, an auctioneer (which is defined in the auction licensing statute broad enough to include persons selling real property at a public sale) may not work as an auctioneer for an entity unless that entity is an auction company owned or operated by an individual who has a Texas auctioneering license. Most auction companies do not meet this definition under current Texas law. Because the trustee sale exception for foreclosure applies only to "a foreclosure sale personally conducted by a trustee under a deed of trust" it is far from clear that the current auction companies are authorized to do what they are doing by arranging, coordinating and marketing sales. There is some ambiguity in the law as to whether auction companies may do what they do without a license. This bill cuts off the confusion, and the risk, by authorizing trustees to contract with auction companies and attorneys to perform some or even all of the trustee's functions;

(3) Provides for minimum information a purchaser at sale must give to the trustee and protects the trustee by allowing the trustee to immediately resell the property if the purchaser refuses. This will further assist trustees, law firms, and auction companies to ensure compliance with OFACs;

(4) Provides that when a trustee conducts a sale, the trustee is entitled to reasonable trustee and trustees' attorney's fees. In Texas, this is extremely important. The typical foreclosure attorney fee does not contemplate the substantial work required after completion of the sale to locate claimants to the proceeds, determine their priority, and deal with litigation matters into which trustees are unfortunately too often embroiled. All of this work is the trustee's duty under both the deed of trust and the Texas foreclosure statute. We believe that the standard deed of trust provides for this already, but have been involved in a fair amount of costly litigation over alleged ambiguities in the deed of trust. The bill holds that a prevailing trustee in a lawsuit based on a groundless claim is entitled to recover reasonable attorney's fees necessary associated with defense of the claim. Furthermore, the bill cuts through the confusion created by the ambiguities in the deed of trust by specifying that such fees are allowed and presumed reasonable if below certain thresholds (<2.5% of sale proceeds or $5000 for trustee's fees and 1.5% for trustee's attorney's fees); and

(5) The percentage and cap are proposed to protect consumers and are consistent with custom in the residential realm. The bill further ensures the senior purchase money lien gets paid first in priority over the trustee's fee. This favors the lender and alters the priority in deeds of trust, which nearly universally call for the trustee's fees to be paid as costs of sale before any other claim is paid, including the mortgage. The bill's statutory provision, however, recognizes the reality that where the first lien soaks up all the proceeds of a sale, the trustee does not usually need to undertake the costly project of managing or distributing cash or finding other claimants through a rigorous title search back to inception. We feel this feature in the bill protects lenders and consumers.

UTA & Industry News

Martin McGuinn to Serve as UTA General Counsel

Martin T. McGuinn, Esq.

Martin T. McGuinn, Esq., of Kirby & McGuinn, will serve as UTA's General Counsel. The position had been held by Phil Adleson for decades. Adleson, passed away on March 1st.

McGuinn has served the association for decades as a Board Member and Chair of the Legal Resources Committee, overseeing UTA's amicus brief program.

As General Counsel, McGuinn will ensure that the organization is made aware of applicable state, federal laws and regulations; ensure that all policies and procedures as outlined in the Association's Bylaws are followed; provide support and advice to the UTA Board on legal matters; and provide counsel on litigation brought by and against UTA.

"I'm honored to serve as General Counsel for an organization and its members that I have the utmost respect for," said McGuinn. "And I'm honored to follow my great friend and colleague, Phil Adleson, in this important role. I request any member that If you are involved in a case where an appeal is pending and the ruling in the trial court impacts trustees in the practices or interprets the Civil Code adversely to the trustee, please contact me to see if UTA can assist."

UTA Requests Publication of Court Decision In Surplus Funds Distribution Case

UTA has requested that the California Court of Appeal order the publication of the court's decision in the *R.E.F.S. Inc. v. G. Gregory Williams, et al* case. That request was denied. The *R.E.F.S., Inc.* decision provided clarity for trustees to make the distribution of surplus funds without incurring liability to the purchaser. The publication request was prepared by UTA General Counsel, Martin T. McGuinn of Kirby & McGuinn.

2017 UTA Directory Available

The 2017 Directory is now available to members only via an online .pdf. The Directory includes a listing of members alphabetized by both last name and by company name; a list of members certified in each state in which UTA provides certification; The Board of Directors; Five-Star Member companies; and prominently placed ads from our 2017 advertisers. If you have questions on how to access the Directory, please contact Richard Meyers at *rmeyers@unitedtrustees.com.*

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