47th Annual UTA Education Conference & Trade Show

AUGUST 20-23, 2022

LAS VEGAS, NV

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Foreclosure Solution, Inc. has been in business for nearly 30 years, with many of our clients working with us for 20+ years. Our priorities are user-friendly, customized foreclosure software and impeccable customer service. Our staff includes foreclosure professionals with years of foreclosure processing experience.

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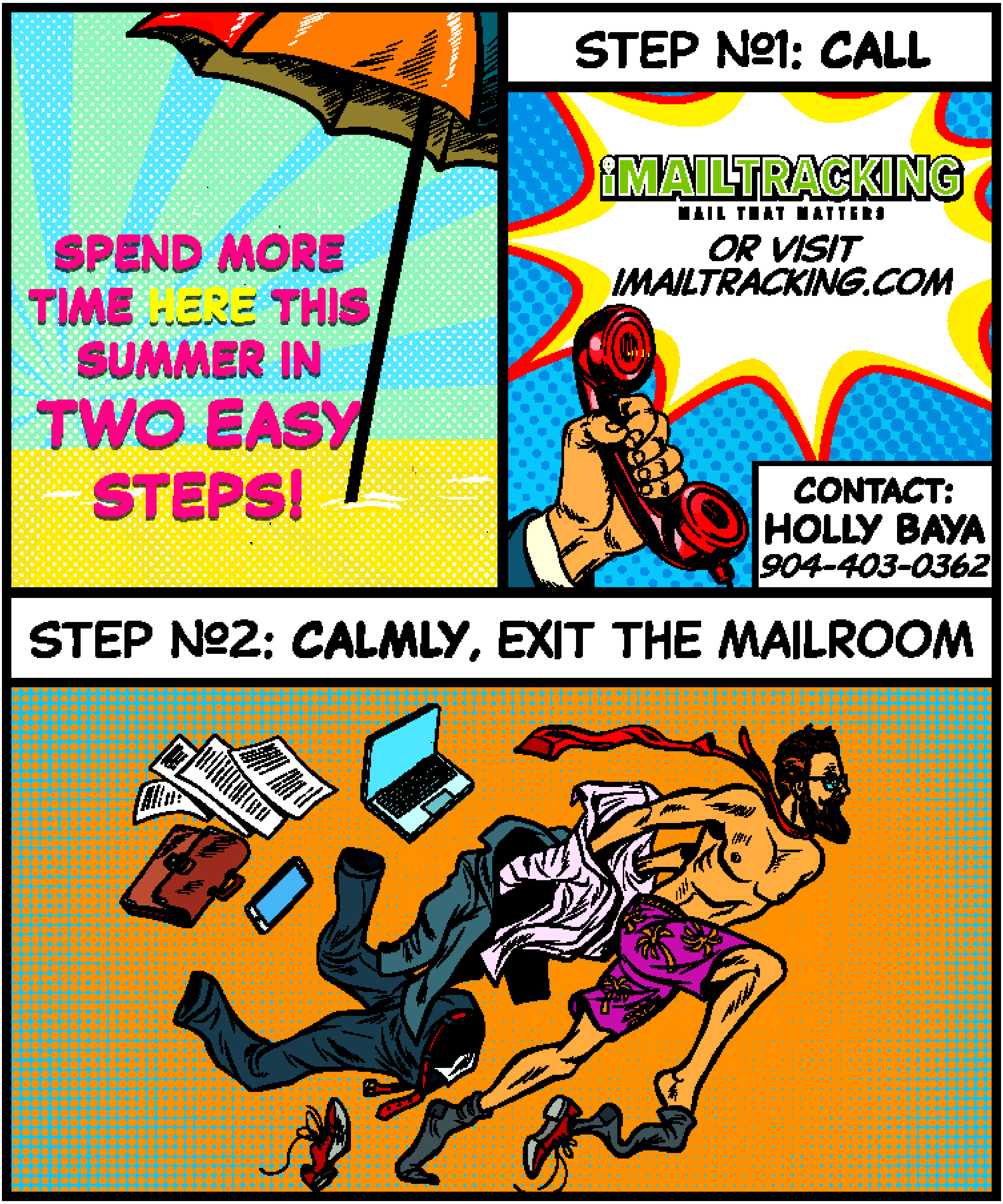

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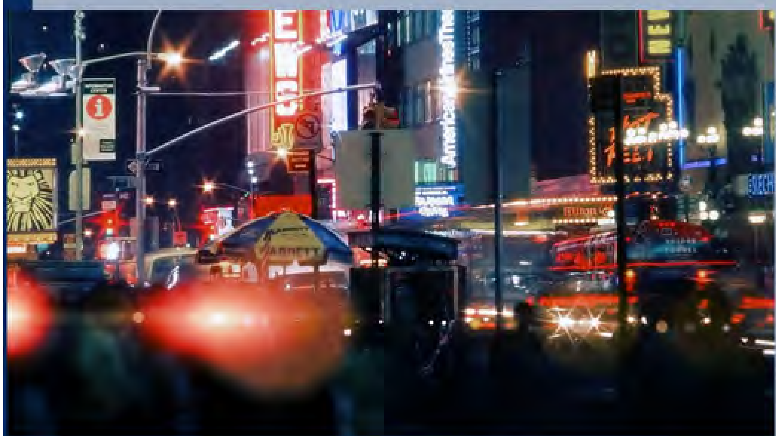

How Does the United Trustees Association Help Me?

With the UTA Edge on Nonjudicial Default Servicing.

- Industry's best educational workshops, conference and trade show (MCLE Accredited)
- Relevant cast law updates
- Essential legislative advocacy
- Networking with trustee and default servicing professionals
- Trustee Certification Program

Contact UTA at 714.716.4030 or visit our website at ***www.unitedtrustees.com***

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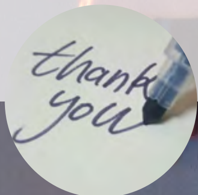

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(CLICKABLE SESSION TITLES)

MESSAGE FROM THE PRESIDENT

Welcome to the United Trustees Association's **47th Annual Education Conference**. This is the first time we are holding our meeting in August!

We kick things off with an opening presentation from **Rick Sharga, Executive Vice President of Market Intelligence at ATTOM**, the country's leading provider of comprehensive nationwide real estate data. Rick will offer an Economic Forecast for Default Servicing.

Our second session is 'can't miss': Representatives from **Fannie Mae, Nevada Affordable Housing Assistance Corporation, and Mr. Cooper Group**, who will address what has changed since all the moratoriums have lifted, effectiveness of loss mitigation programs and what is forecasted for the future.

As always, our conference features exceptional educational programs. This year's CLE sessions will include a **Bankruptcy Panel with two Judges; Case Law Updates; Legislative Updates; our Large and Small Trustees Roundtables** and a session on **'The Push and Pull Between Employers and Employees.'**

What would a UTA Conference be without our **Monday evening party**? We'll enjoy roving dining and networking along and a 30-minute 'Show Me The Money' performance by Rob Anderson, one of Las Vegas' finest magicians. And, of course, we'll have our annual silent auction. Our Polynesian-themed night of roving dining and networking includes a limbo competition, hula dance instruction, and awards for the craziest Hawaiian shirt.

Our **exhibit floor** will feature nine exhibitors, social networking and delicious beverages.

We are proud of the effort our Conference Committee invests in this event each year and we hope you enjoy every session.

Have a wonderful conference!

Randy Newman

Randy Newman
President

MESSAGE FROM THE CONFERENCE CHAIR

Welcome to the 47th Annual Education Conference!

I would like to acknowledge and thank the Education and Vendor Relations Committees for all of their hard work in preparation of the conference. The members are: UTA President Randy Newman of Total Lender Solutions; Mark Blackman of Barrett Daffin Frappier Treder & Weiss; Robert Cullen of Redwood Trust Deed Services; David Dutcher of iMailTracking; Susan Pettem of Novare National Settlement Service; Katie TerBush of MK Consultants and Gary Wisham of Allied Trustee Services.

Our Session Evaluation Forms and Conference Evaluation Forms will be available online and will be emailed to attendees right at the conclusion of each session. Please complete these as we read every one of them in order to assist us in providing you with quality programs.

As I am sure you are aware, we would not be able to conduct our conference without the support of our generous sponsors at each level of sponsorship. As such, I would like to acknowledge our sponsors.

Gold Conference Sponsors:

- **Foreclosure Solution**
- **iMailTracking**
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- **STOX**

Silver Conference Sponsors:

- **Daily Journal**
- **First American Mortgage Solutions**
- **Harmony Title Agency**
- **Metropolitan News Company**
- **The Hicklin Firm**
- **Xome**

Again, thank you for participating in the 2022 Conference and for your continued support of the United Trustees Association.

Sincerely,

Cathe Cole-Sherburn

Cathe Cole-Sherburn
Conference Chair

2022 UTA ADVOCATES

Advocate, Partner, and Supporter companies are those who support the UTA and its mission with at least 3, 4, or 5 members represented in the United Trustees Association from their company. We thank them for their support of the association.

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Trustee Corps

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Ghidotti Berger, LLP
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UNITED TRUSTEES ASSOCIATION
2022 ANNUAL EDUCATION CONFERENCE
SCHEDULE AT-A-GLANCE

Sunday

10:00 AM - 1:30 PM

CALIFORNIA BASIC FORECLOSURE CERTIFICATION COURSE (LEVEL 1)

Napa Room c

1:30 PM - 3:30 PM

APPS, DRINKS, AND HIGH-TECH GOLF

Top Golf Las Vegas

6:30 PM - 8:00 PM

WELCOME RECEPTION

Conference Center Foyer

UNITED TRUSTEES ASSOCIATION
2022 ANNUAL EDUCATION CONFERENCE
SCHEDULE AT-A-GLANCE

Monday

8:00 AM - 9:00 AM

CONTINENTAL BREAKFAST
Sonoma Room C

9:00 AM - 9:45 AM

DEFAULT SERVICING ECONOMIC FORECAST
Sonoma Room A

9:45 AM - 10:15 AM

REFRESHMENT BREAK
Sonoma Room C

10:15 AM - 11:30 AM

WHERE ARE WE NOW THAT MORATORIUMS HAVE LIFTED?
Sonoma Room A

UNITED TRUSTEES ASSOCIATION
2022 ANNUAL EDUCATION CONFERENCE
SCHEDULE AT-A-GLANCE

11:30 AM - 12:30 AM

LUNCH AND 2022 AWARD WINNERS

Sonoma Room B

ServiceLink

12:30 PM - 2:00 PM

BANKRUPTCY UPDATES

Sonoma Room A

First American MORTGAGE SOLUTIONS

2:00 PM - 2:30 PM

REFRESHMENT BREAK

Sonoma Room C

harmonytitle AGENCY

2:30 PM - 4:00 PM

SMALL TRUSTEES ROUNDTABLE

Napa Room C

Daily Journal CORPORATION

2:30 PM - 4:00 PM

LARGE TRUSTEES ROUNDTABLE

Napa Room D

MNC Metropolitan News Company

UNITED TRUSTEES ASSOCIATION
2022 ANNUAL EDUCATION CONFERENCE
SCHEDULE AT-A-GLANCE

6:00 PM - 9:00 PM

SHOW ME THE MONEY: AN EVENING OF DINNER, NETWORKING, FRIENDSHIP, MAGIC … AND LIMBO!

Grandview Lounge

Tuesday

8:00 AM - 9:00 AM

CONTINENTAL BREAKFAST

Sonoma Room C

9:00 AM - 10:00 AM

THE PUSH AND PULL BETWEEN EMPLOYERS AND EMPLOYEES

Sonoma Room A

10:00 AM - 10:30 AM

REFRESHMENT BREAK

Sonoma Room C

UTA

UNITED TRUSTEES ASSOCIATION
2022 ANNUAL EDUCATION CONFERENCE
SCHEDULE AT-A-GLANCE

10:30 AM - 11:45 AM

LEGISLATIVE UPDATE

Sonoma Room A

THE HICKLIN FIRM

12:00 PM - 1:00 PM

LUNCH AND EXHIBITOR RAFFLE

Sonoma Room B

STOX

1:30 PM - 2:45 PM

CASE LAW UPDATES

Sonoma Room A

xome

2:45 PM - 3:00 PM

ICE CREAM BREAK

FSI FORECLOSURE SOLUTION, INC.

END OF CONFERENCE

Sunday

Sunday, August 21, 10:00 AM - 1:30 PM

CALIFORNIA BASIC FORECLOSURE CERTIFICATION COURSE (LEVEL 1)

This two and a half hour course syllabus followed by a one-hour open-book online exam covers state foreclosure procedures; monetary and non-monetary defaults; judicial vs. nonjudicial foreclosures; what a lender provides to the Trustee what a trustee does; notice of default; notice of sale; review of Trustee's Sale Guarantees; reinstatement; presale redemption; sale; Trustee's Deed; Proceeds of Sale; and Bankruptcy.

Registration fee of $100 not included with conference registration.

Instructor: Randy Newman, Esq., Total Lender Solutions

Sunday, August 21, 1:30 PM - 3:30 PM

APPS, DRINKS, AND HIGH-TECH GOLF

This event is all about having fun with your colleagues. We'll enjoy great food, full-service bars, upscale amenities and non-competitive and competitive fun for everyone. Topgolf is an entertainment complex that features a high-tech golf game that everyone can enjoy in climate-controlled hitting bays with great music. Join your colleagues and experience the energetic hum that you can feel right when you walk through the door.

Registration Fee of $99 is not included with registration.

2022 ANNUAL EDUCATION CONFERENCE SCHEDULE OF EVENTS

Sunday, August 21, 6:30 PM - 8:00 PM

WELCOME RECEPTION

(Sponsored by ***MK Consultants***
STOX, ServiceLink, iMailTracking, Foreclosure Solutions, First American Mortgage Solutions, , Metropolitan News Company, The Hicklin Firm , Xome, Harmony Title, Daily Journal)

After a hard afternoon socializing in an energetic environment, relax and catch up with friends and colleagues at UTA's Welcome Reception.

Monday

Monday, August 22, 8:00 AM - 9:00 AM

CONTINENTAL BREAKFAST

(Sponsored by Foreclosure Solutions)

Monday, August 22, 9:00 AM - 9:45 AM

DEFAULT SERVICING ECONOMIC FORECAST

(Sponsored by *STOX*)

Rick Sharga returns to forecast trends for the default servicing industry. Rick's presentation will provide information and analysis that forecasts the economic environment, housing activity, mortgage analysis, and foreclosure analysis.

One of the country's most frequently-quoted sources on real estate, mortgage, and foreclosure trends, Rick has appeared regularly over the past 15 years on CNBC, the CBS Evening News, NBC Nightly News, CNN, ABC World News, FOX, Bloomberg, and NPR.

- Rick Sharga, EVP, Market Intelligence, ATTOM

2022 ANNUAL EDUCATION CONFERENCE SCHEDULE OF EVENTS

Monday, August 22, 9:45 AM - 10:15 AM

REFRESHMENT BREAK

(Sponsored by *Title 365*)

Enjoy coffee or tea while mingling with exhibitors and colleagues.

Monday, August 22, 10:15 AM - 11:30 AM

WHERE ARE WE NOW THAT MORATORIUMS HAVE LIFTED?

(Sponsored by iMailTracking)

Fannie Mae, Freddie Mac, and Mr. Cooper who will address what has changed since all the moratoriums have lifted, effectiveness of loss mitigation programs and what is forecasted for the future.

- ***Cathe Cole Sherburn, Sr. VP of Operations, Trustee Corps (moderator)***
- ***Todd Barton, Esq., VP and Deputy General Counsel, Fannie Mae***
- ***Verise Campbell, CEO, Nevada Affordable Housing Assistance Corporation***
- ***Dean Meyer, Director, Non-performing Loan Management, Freddie Mac***
- ***Erica Johnson-Seck, Vice President, Foreclosure & REO Oversight, Mr. Cooper Group***

Monday, August 22, 11:30 AM - 12:30 PM

LUNCH AND 2022 AWARD WINNERS

(Sponsored by *ServiceLink*)

During lunch, we will present the 2022 Phil Adleson Award, and the 2022 Dorothy Schick Veteran Member of the Year Award.

- ***Randy Newman Esq., President Total Lender Solutions, and UTA President***

2022 ANNUAL EDUCATION CONFERENCE SCHEDULE OF EVENTS

Monday, August 22, 12:30 PM - 2:00 PM

BANKRUPTCY UPDATES

(Sponsored by *First American Mortgage Solutions*)

Our session featuring Bankruptcy Judges will address Court decisions and recent legislation that affects UTA members in their day-to-day business of servicing, collection, and foreclosure.

- ***Hon. August B. Landis, District of Nevada***
- ***Hon. Scott C. Clarkson, Central District of California***
- ***Mark Blackman, Esq., Barrett Daffin Frappier Treder & Weiss***
- ***Benjamin R. Levinson, Esq., Law Office of Benjamin R. Levinson***

Monday, August 22, 2:00 PM - 2:30 PM

REFRESHMENT BREAK

(Sponsored by Harmony Title)

Enjoy a 'sweet' break with our exhibitors while snacking on your choice of cookies and sodas.

Monday, August 22, 2:30 PM - 4:00 PM

SMALL TRUSTEES ROUNDTABLE

(Sponsored by Daily Journal)

This 90 minutes session allows Small Trustees to exchange information concerning operations and best practices within this small networking group of colleagues.

- ***Randy Newman Esq., President Total Lender Solutions, and UTA President***
- ***Robert Cullen, Redwood Trust Deed Service***

2022 ANNUAL EDUCATION CONFERENCE SCHEDULE OF EVENTS

Monday, August 22, 2:30 PM - 4:00 PM

LARGE TRUSTEES ROUNDTABLE

(Sponsored by Metropolitan News Company)

This 90 minutes session allows Large Trustees to exchange information concerning operations and best practices within this small networking group of colleagues.

— ***Cathe Cole Sherburn, Sr. VP of Operations, Trustee Corps***

Monday, August 22, 6:00 PM - 9:00 PM

SHOW ME THE MONEY: AN EVENING OF DINNER, NETWORKING, FRIENDSHIP, MAGIC ... AND LIMBO!

Sponsored by STOX, ServiceLink, iMailTracking, Foreclosure Solutions, First American Mortgage Solutions, , Metropolitan News Company, The Hicklin Firm , Xome, Harmony Title, Daily Journal)

Our Polynesian-themed night of roving dining and networking includes a limbo competition, hula dance instruction, and awards for the craziest Hawaiian shirt.

We'll also have Rob Anderson, one of Las Vegas' finest magicians, for an exclusive 30-minute 'Show Me The Money' performance. So put on your grass skirts, and get ready to have fun, and of course, bid on UTA's always great Silent Auction items.

Rob Anderson

2022 ANNUAL EDUCATION CONFERENCE
SCHEDULE OF EVENTS

UTA

Tuesday

Tuesday, August 23, 8:00 AM - 9:00 AM

CONTINENTAL BREAKFAST
(Sponsored by iMailTracking)

Tuesday, August 23, 9:00 AM - 10:00 AM

THE PUSH AND PULL BETWEEN EMPLOYERS AND EMPLOYEES
(Sponsored by Trustee Corps)

It's a new world in the workplace. Between 'the great resignation', working remotely vs. in the office, millennial's expectations and how to react to it, there are a bevy of new issues that seem to have cropped up all at once. This session, led by an expert in client training and compliance techniques, will address how management can handle and address the new workplace world.

- Dennis A. Davis, Ph.D., Director of Client Training, Ogletree Deakins

Tuesday, August 23, 10:00 AM - 10:30 AM

REFRESHMENT BREAK
(Sponsored by ServiceLink)

Tuesday, August 23, 10:30 AM - 11:45 AM

LEGISLATIVE UPDATE
(Sponsored by The Hicklin Firm)

Our legislative update panel will provide us with detailed summaries of the key issues and bills addressed this year in California, Washington, Oregon, Utah, Arizona, and Idaho. We'll also be discussing and soliciting our 2023 legislative 'wishlist'.

- Michelle Mierzwa, Esq. Wright Finlay & Zak (moderator)
- Mike Belote, Esq., California Advocates
- Holly Chisa, HPC Advocacy
- Kent Cammack, Esq., Gust Rosenfeld
- Brigham Lundberg, Esq., Lundberg & Associates, PC

2022 ANNUAL EDUCATION CONFERENCE SCHEDULE OF EVENTS

Tuesday, August 23, 12:00 PM - 1:00 PM

LUNCH AND EXHIBITOR RAFFLE

(Sponsored by STOX)

Enjoy a buffet deli lunch while our gracious exhibitors announce their prize winners.

- ***Cathe Cole-Sherburn, Trustee Corps, UTA Education Chair***

Tuesday, August 23, 1:30 PM - 2:45 PM

CASE LAW UPDATES

(Sponsored by *Xome*)

Our case law panel will address 2022 cases that impact foreclosure in California and all Western states. This session covers all of the key relevant court cases from the past year in a rapid-fire, yet detailed format that provides informative and practical information.

- ***Andrew Boylan, Esq., McCarthy Holthus***
- ***Kent Cammack, Esq., Gust Rosenfeld***
- ***Stephen T. Hicklin, Esq., The Hicklin Firm***
- ***Martin T. McGuinn, Esq., Kirby & McGuinn***

Tuesday, August 23, 2:45 PM - 3:00 PM

ICE CREAM BREAK

(Sponsored by Foreclosure Solutions)

Time to say your goodbyes to your friends and colleagues - and enjoy an ice cream bar of your choice.

UTA

THE ROLE OF THE TRUSTEE

The real property trustee performs a little understood but crucial role in the real estate industry. In order to understand this role, a distinction must be drawn between the historic use of mortgages in real estate lending and the more modern use of deeds of trust. Many states now secure real estate loans almost exclusively with deeds of trust, to the exclusion of mortgages.

Whereas a mortgage consists of a two-party arrangement between the lender and the borrower, the deed of trust involves three parties. The borrower, or the “trustor”, conveys a technical form of title to the “trustee” for the benefit of the lender, also known as the “beneficiary”. In simple terms, the obligation of the trustee is to re-convey title to the borrower when the loan is paid off, or to commence foreclosure on behalf of the lender in the event of default.

The trustee thus helps clear title to real property in the event of lien satisfaction, and helps lenders protect their security in the unfortunate circumstances of nonpayment. While the law in all states permits lenders to seek foreclosure in court, many states allow trustees to act under a power of sale granted in the deed of trust to foreclose non-judicially. This helps keep costs down, to the benefit of all parties.

In summary, the trustee serves two functions:

1) To process a non-judicial foreclosure
2) To re-convey the Deed of Trust

iNTRODUCTION

UTA membership is comprised of those acting as trustees under real property deeds of trust, including trustees, attorneys and loan servicing professionals from title companies, financial institutions, law firms and independent companies as well as allied and support organizations such as posting & publishing companies and computer service firms.

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

UTA MEMBER BENEFITS

Members of the United Trustees Association enjoy the following benefits:

EDUCATION

- The industry's Best Educational Conference & Trade Show: Our annual fall educational conference (CLE accredited) and trade show keeps members current on all practice issues of interest to trustees and provides a marketplace for service providers to interact with you to improve your practice.

- Trustee Certification Program: Both UTA's Basic and Advanced Foreclosure Certification Course & Exams are taught by leading experts in the foreclosure, title and legal communities and give employers confidence in the recipient's basic knowledge of the non-judicial foreclosure process.

COMMUNICATION

- UTA Quarterly: Our acclaimed quarterly publication provides practice hints and services available to trustees along with updates for members on changes to the law. UTA Quarterly provides vital information to members with new and thought-provoking developments and trends relating to the non-judicial foreclosure process.

- UTA eNews: The UTA eNews provides essential, relevant case law updates, news and happenings.

LEGAL UPDATES AND CASE LAW REVIEW

- Case Law Program: Supervised by practicing real estate attorneys, UTA participates as amicus curiae (friend of the court) in cases of major importance, drafting and submitting briefs in order to assist courts in rendering a just result and ensuring a level playing field for trustee practice.

- Essential Legislative Advocacy: UTA's California and Washington lobbyists ensure that we help write real estate laws in the areas of distribution of foreclosure sales proceeds and collection of defaults under deeds of trust as well as draft appropriate language for recorded notices of default, re-conveyances and others. Our efforts in other states take place on a case-by-case basis as issues arise.

NETWORKING & BUSINESS GROWTH

- Regional Dinner Meetings: Networking opportunities with the most respected trustee and default servicing professionals including trustees, attorneys, loan servicing professionals and industry vendors - and introductions to new business ideas that will help your practice immeasurably.

- Advertising Opportunities: Advertising and sponsorship opportunities in all our publications including our annual Membership Directory and our events allowing member vendors to easily reach their target audience.

- Association Job Board: Allowing members to post and reply to industry positions.

The United Trustees Association is a non-profit corporation.

CODE OF ETHICS

The Trustee, under a Deed of Trust, is the instrumentality through which foreclosure and re-conveyance activity is affected. The responsibilities and obligations undertaken in such actions are of the utmost importance. All United Trustees Association members (UTA Member(s)), therefore should strive to maintain and improve the standards of their calling, as well as sharing with their fellow members a common responsibility for integrity and honor.

All member classes identified in the Bylaws of the United Trustees Association pledge to observe the spirit of, and to conduct their business in accordance with, the following Code of Ethics.

Article I

A UTA Member shall conduct trustee business in a professional manner, keeping himself informed as to statutes, regulations and common provisions of notes and security instruments relating to non-judicial foreclosures and to the re-conveyance process, as well as other matters relating to the trustee profession in which he participates.

Article II

Protection of the public against fraud, misrepresentation and unethical practices in the trustee profession shall be uppermost in the mind of the UTA Members and the UTA Member shall report such fraud, misrepresentation or unethical practices to the appropriate government entity.

Article III

Much of the information contained in a trustee's file is confidential and should not be revealed or disclosed to any person not entitled to such information, except where such information is disclosed with the consent of an entitled person or is required to be revealed by subpoena or process of law.

Article IV

A UTA Member shall not be a party to the falsification of any of the facts relative to a non-judicial foreclosure or re-conveyance.

Article V

A UTA Member shall not engage in activities that constitute the unauthorized practice of law and should never hesitate to recommend that parties seek independent legal counsel in connection with a non-judicial foreclosure or re-conveyance.

Article VI

A UTA Member shall act in conformity with all applicable laws, regulations and terms of the security agreement and shall cooperate, without being required to waive any legal rights he may have, with all government agencies.

Article VII

If a UTA Member is charged with unethical practices, he shall place all pertinent facts before the proper tribunal of the National Association to which he/she belongs for investigation or decision.

Article VIII

A UTA Member shall never knowingly provide false information with respect to a fellow UTA Member nor shall he disparage the professional practice of a competitor or volunteer an opinion of the competitor's services for the purpose of obtaining a competitive advantage.

Article IX

A UTA Member shall assist to the best of his abilities in furthering the work and goals of UTA and willingly share lessons of his study and experience with his fellow members.

Article X

A UTA Member shall maintain all monies received on behalf of others in a prudent and identifiable manner and shall disburse these funds to the persons entitled thereto or, if the persons entitled thereto cannot be reasonably determined, as provided by law.

Article XI

A UTA Member shall not discriminate on the basis of race, color, sex, religion, marital status, national origin or age in conducting trustee business.

Article XII

A UTA Member shall cooperate with the National board of directors or duly appointed committee of either board in furnishing information relating to any UTA investigation of alleged violations of the Bylaws and/or of these Code of Ethics.

Article XIII

In the best interest of the trustee profession, UTA Members, and of society, a UTA Member shall be loyal to the National Association and shall actively participate in these associations' work and conform to the Bylaws of and Code of Ethics of the National Association.

UTA DISCLAIMER

This program and these materials are being presented by the United Trustees Association (UTA). UTA promotes forums of open discussion of current events, legal issues and educational issues related to Trustees. It does not endorse the views and opinions expressed by any author, contributor, speaker or advertiser. UTA does, however, recognize the First Amendment right of every author, contributor, speaker and advertiser to express his or her views.

The views of any person expressed in these materials, or in the related program, do not necessarily represent those of the UTA, its directors, officers or members nor are they to be construed, in whole or in part, as legal advice. For legal advice, please consult an attorney.

47TH ANNUAL EDUCATION CONFERENCE

Attendee List as of 8/18/2022

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UTA

2022 Annual Education Conference

DEFAULT SERVICING ECONOMIC FORECAST

Presented by

Rick Sharga
ATTOM

STOX

Rick Sharga

Rick is the Executive Vice President of Market Intelligence for ATTOM, a market-leading provider of real estate and property data, including tax, mortgage, deed, foreclosure, natural hazard, environmental risk, and neighborhood data.

One of the country's most frequently-quoted sources on real estate, mortgage and foreclosure trends, Rick has appeared on CNBC, CBS News, NBC News, CNN, ABC News, FOX, Bloomberg and NPR. Rick is a founding member of the Five Star National Mortgage Servicing Association, on the Board of Directors of the National Association of Default Professionals, and was twice named to the Inman News Inman 100, an annual list of the most influential real estate leaders.

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United Trustee Association Market Update

August 22, 2022

1

What We'll Cover Today

- What's happening in the U.S. Economy
- A look at the housing market
- Foreclosure activity & outlook
- What lies ahead
- Q&A

2

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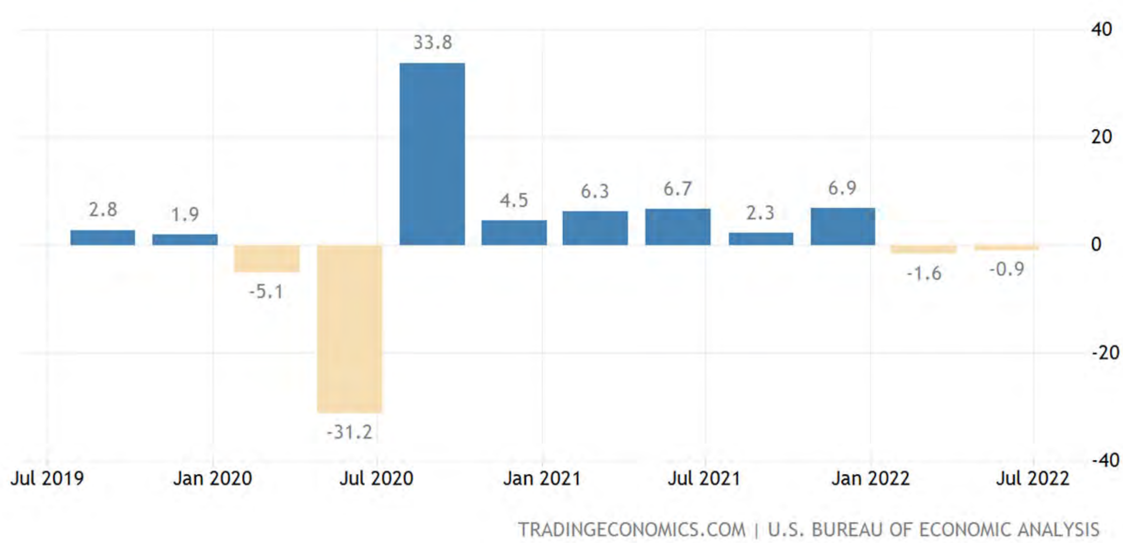
3

GDP Goes Negative for Second Consecutive Quarter



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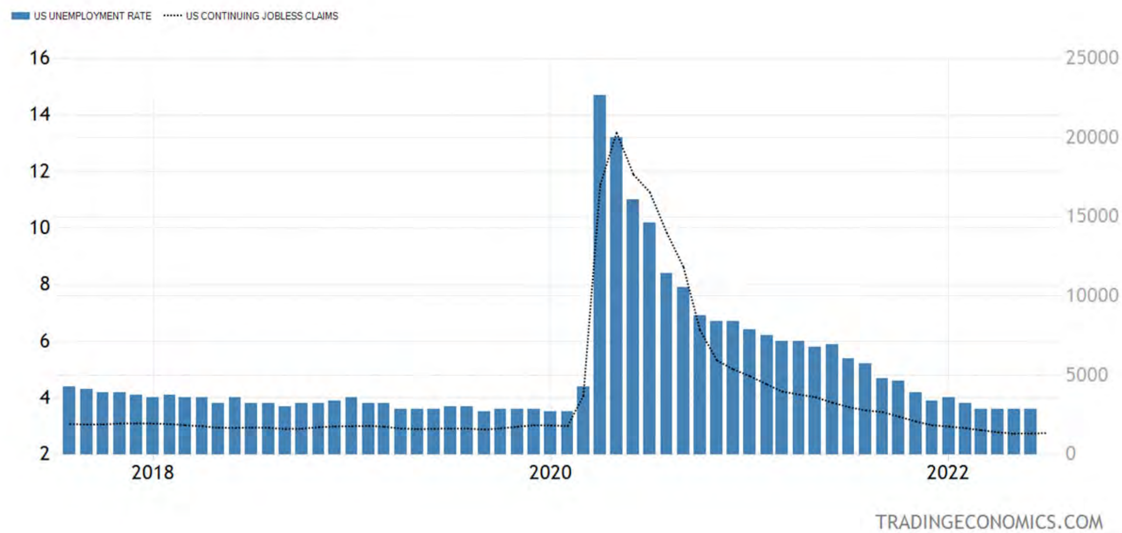
Employment Has Almost Fully Recovered



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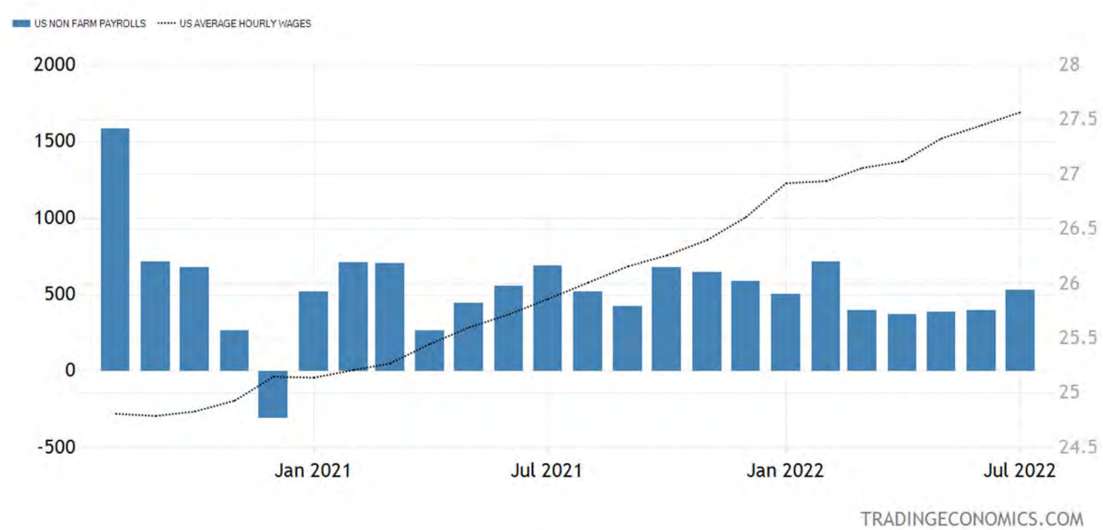
Jobs, Wages Continue to Grow



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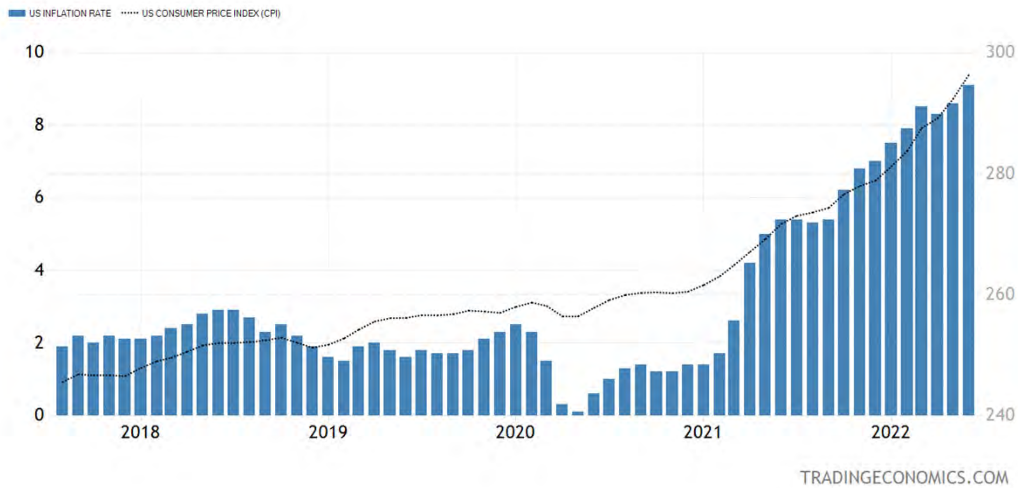
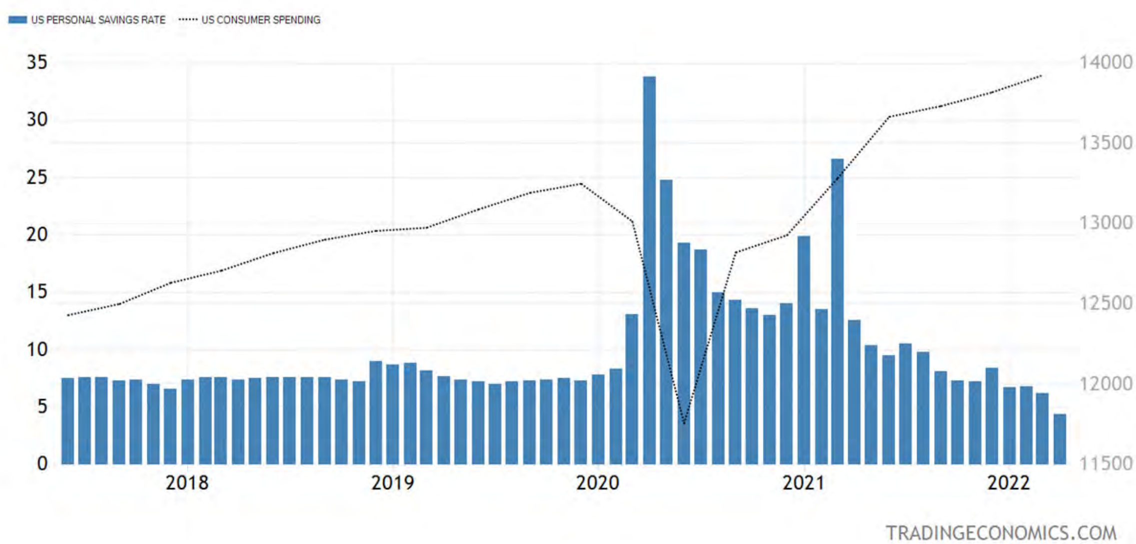
But Inflation is at its Highest Rate in Over 40 Years



7

Consumer Spending Soars, While Confidence Plummets



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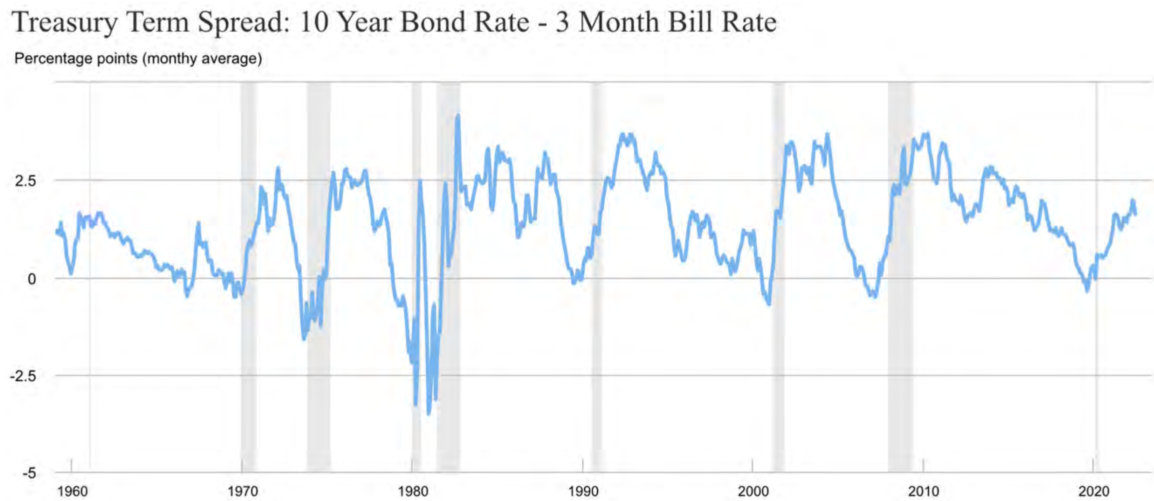
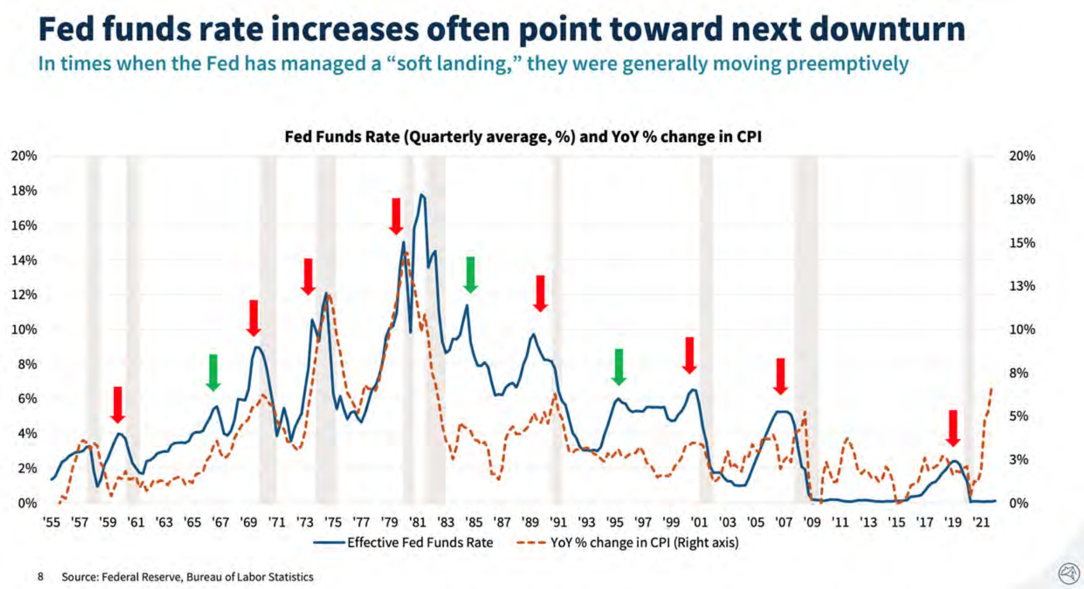
Yield Curve Inversion: Is a Recession Inevitable?



Sources: Board of Governors of the Federal Reserve; National Bureau of Economic Research; authors' calculations.

Can the Federal Reserve Avoid a Recession?



The U.S. Housing Market

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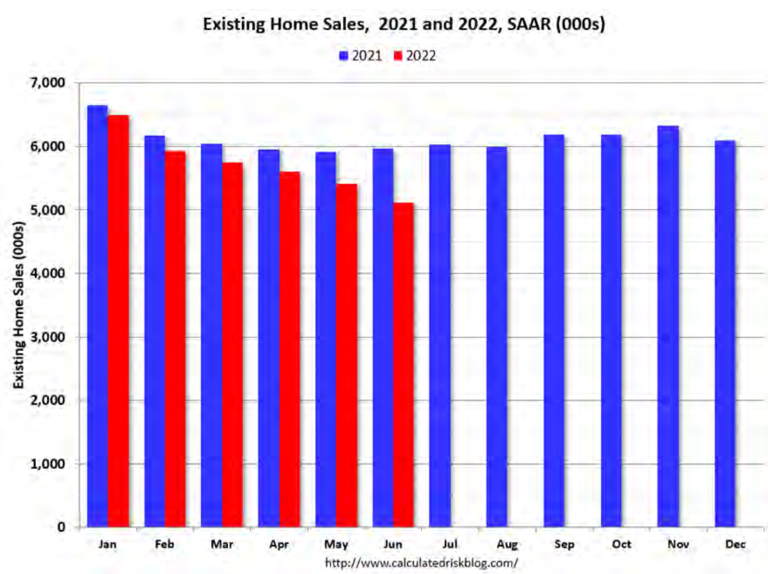
June: 11th Straight Month of Lower Existing Home Sales



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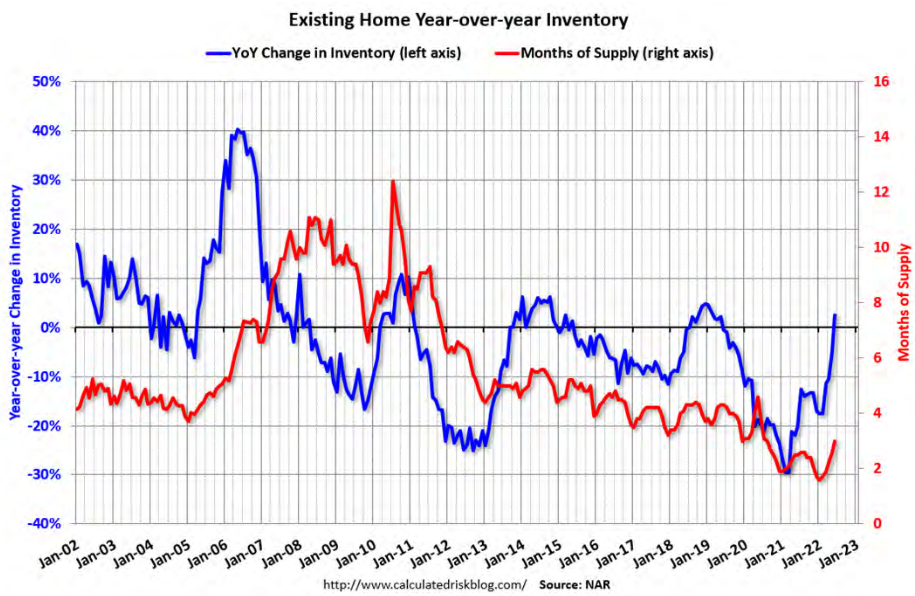
Inventory Improving but Still at 50% of Normal Levels



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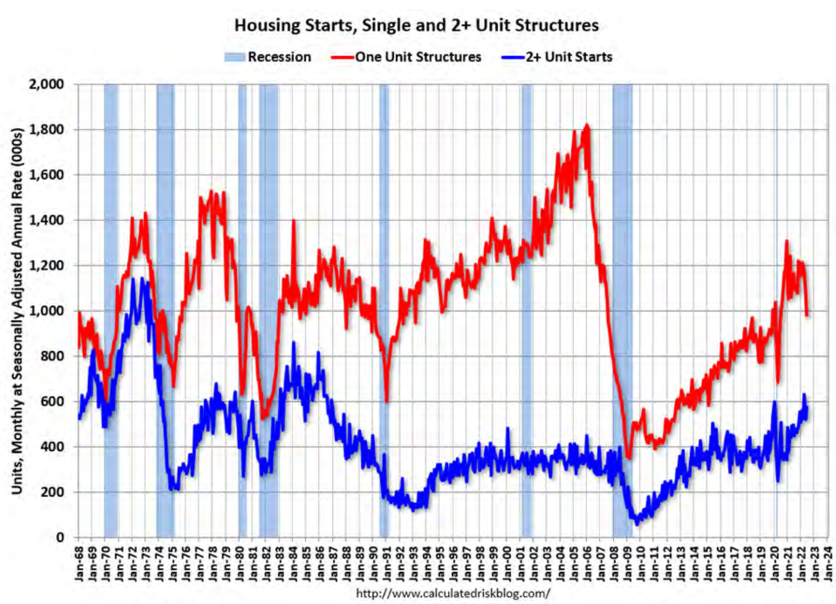
Housing Starts Weaken as Sales Fall Off



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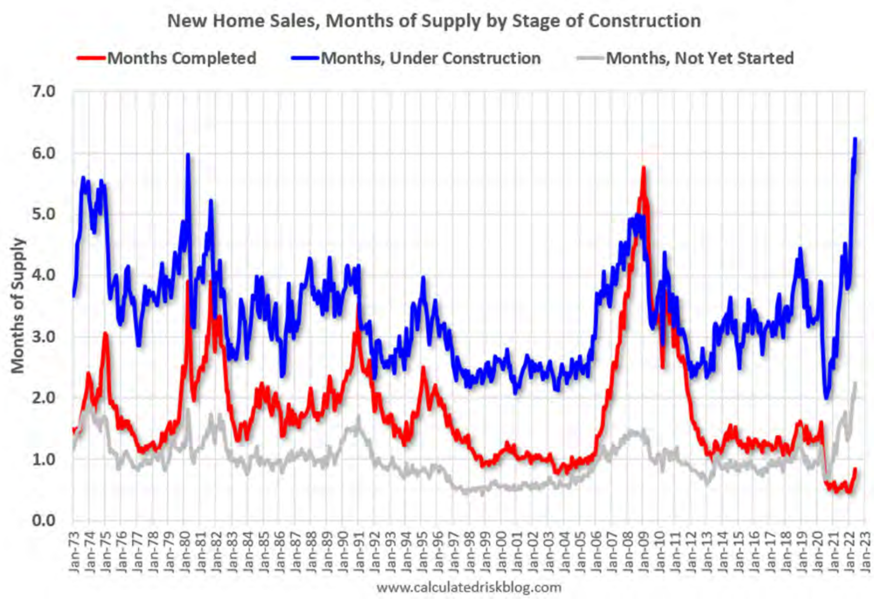
Builders Failing to Keep Pace With Demand



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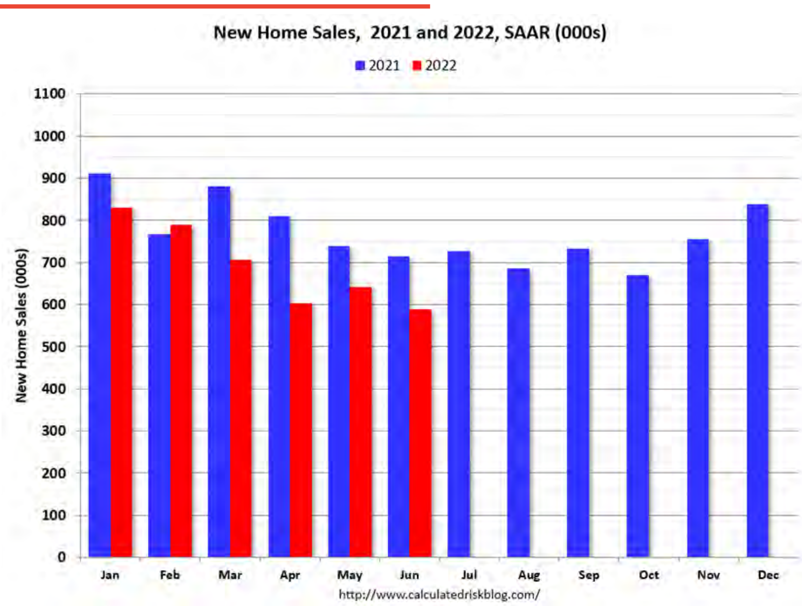
New Home Sales Falling Even More Quickly



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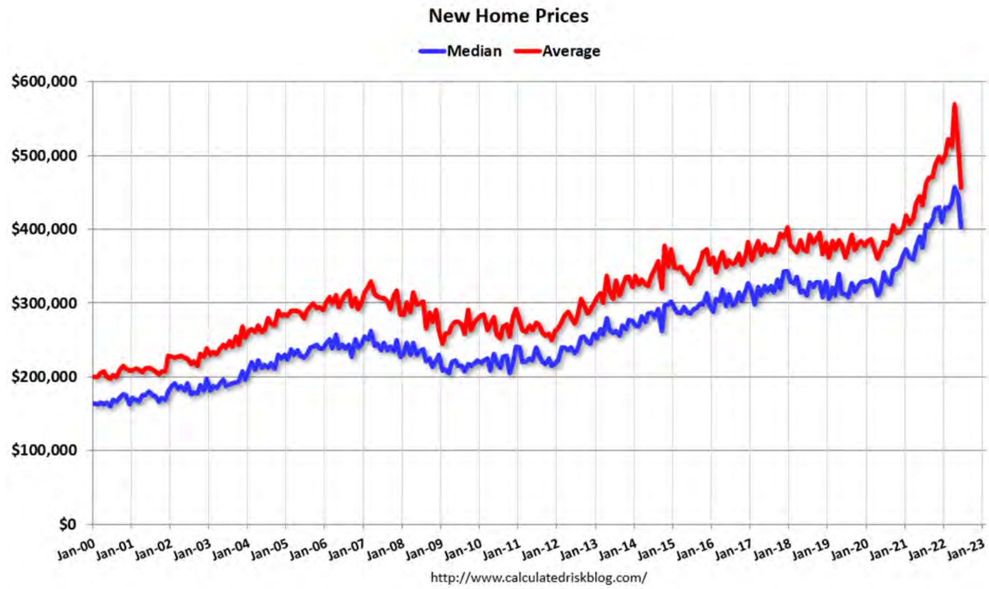
New Home Prices Slow from Record Pace



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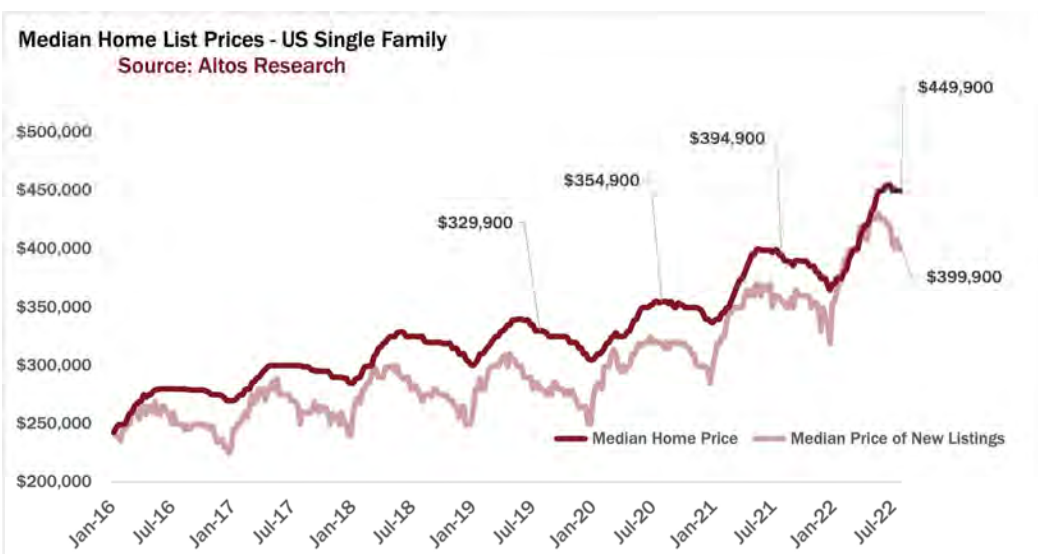
And Existing Home Price Increases Slow Down



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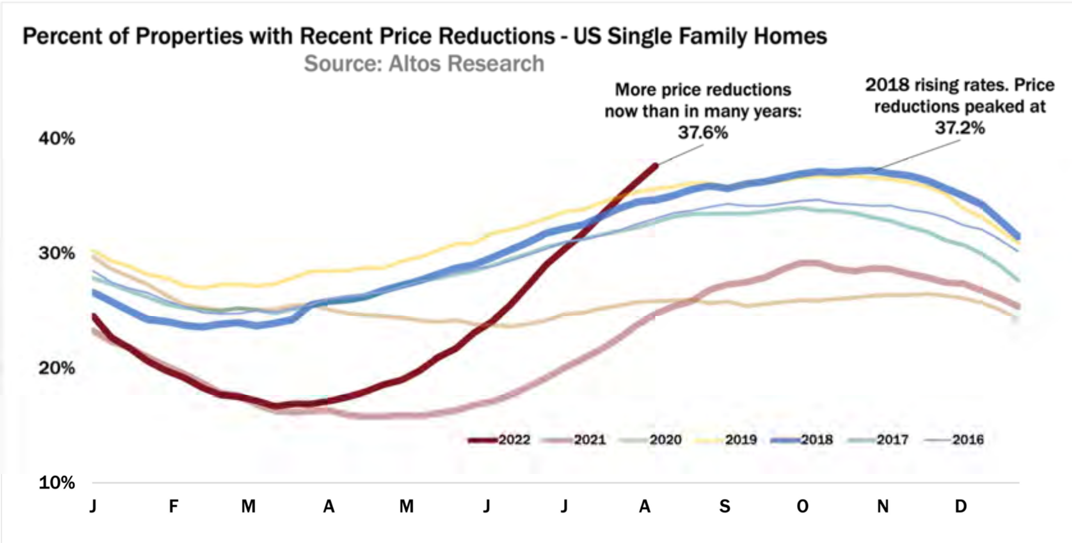
Price Reductions Accelerating Beyond Seasonal Norms



 19

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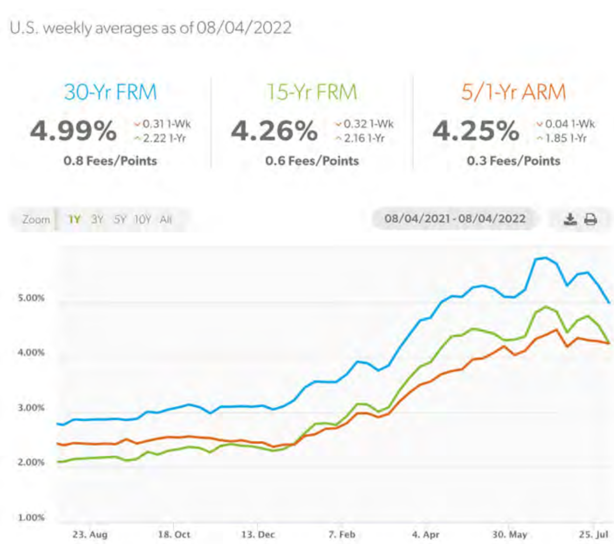
Interest Rates Off Slightly – Has This Cycle Peaked?



Source: Freddie Mac Primary Mortgage Market Survey®

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Trends Impacting the Real Estate Environment

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Housing Demand is Driven by Demographics

Demographic forces support housing demand

Section Title Goes Here

EXHIBIT 4A

Number of 25-34 year olds

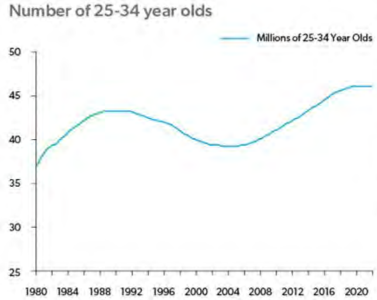
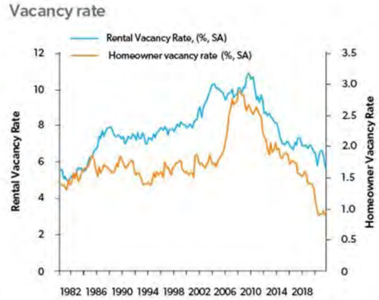


EXHIBIT 4B

Vacancy rate



Sources: Census/Moody's Analytics/Freddie Mac

Freddie Mac Research Note: "What Drove Home Price Growth and Can it Continue?"
https://www.freddiemac.com/research/insight/20220609-what-drove-home-price-growth-and-can-it-continue

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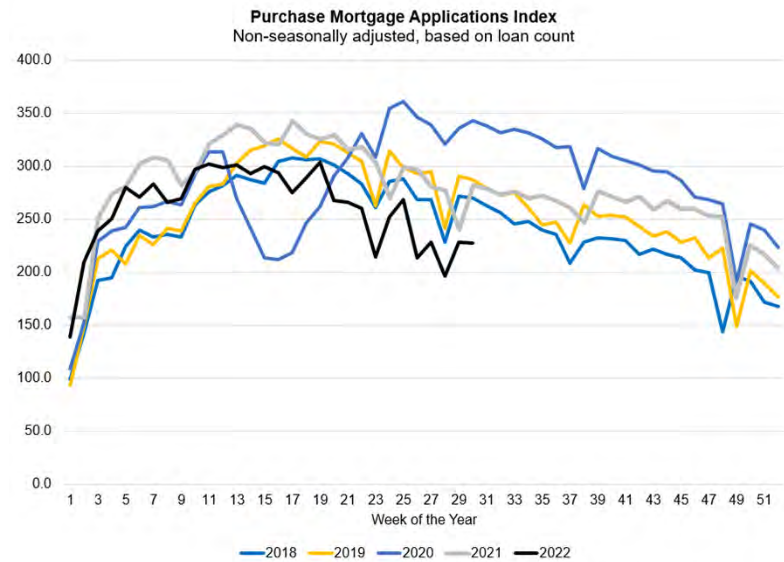
But Demand is Weakening – Purchase Loan Apps off 20%



Source: MBA's Weekly Application Survey: www.mba.org/weeklyapps

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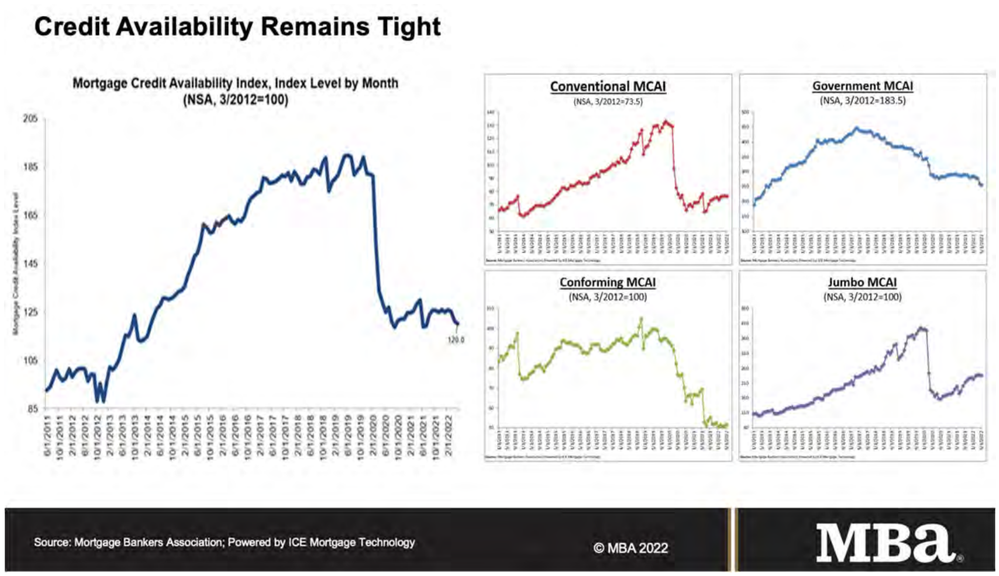
Lenders Aren't Loosening Credit Box…Yet



 24

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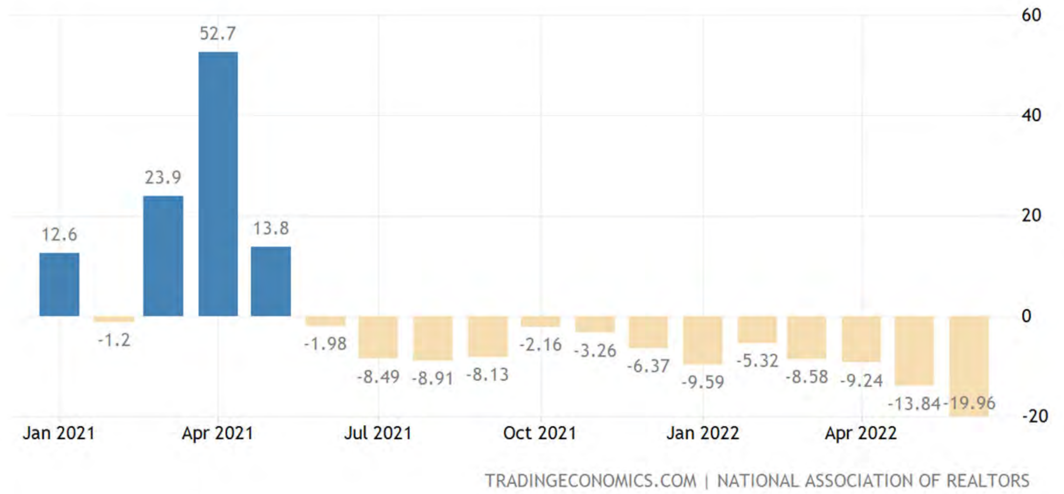
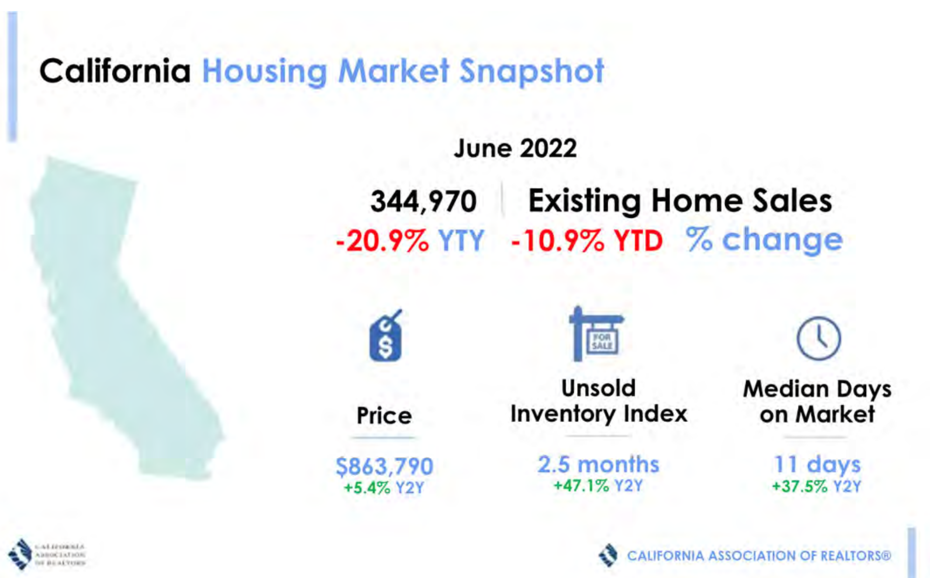
Pending Home Sales Down 13 Straight Months

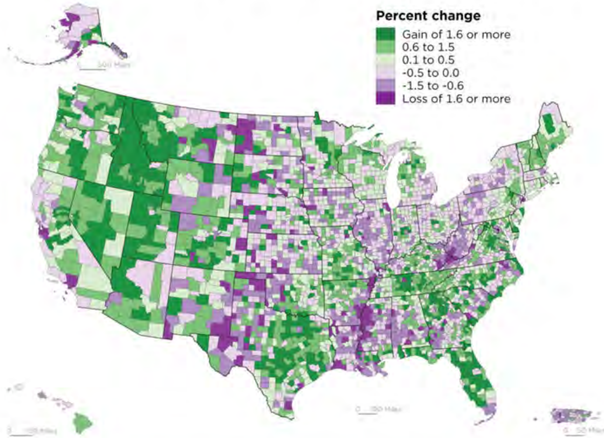


California Home Sales Down



WFH Migration Away from High Cost/High Tax States

Percent Change in Population by County, 2020 to 2021



Largest Percentage Gains:
St. George, UT
Coeur d'Alene, ID
Myrtle Beach-Conway-North Myrtle Beach, SC-NC
Punta Gorda, FL
The Villages, FL
Boise City, ID
Lakeland- Winter Haven, FL
Provo-Orem, UT
Cape-Coral-Fort Myers, FL
Logan, UT-ID

Largest Percentage Losses:
Lake Charles, LA
Odessa, TX
San Francisco-Oakland-Berkeley, CA
San Jose-Sunnyvale-Santa Clara, CA
New York-Newark-Jersey City, NY-NJ-PA
Los Angeles-Long Beach-Anaheim, CA
Midland, TX
Urban Honolulu, HI
Decatur, IL
Enid, OK

Source: US Census, Morgan Stanley Research

 11 MBA

Investor Purchase Activity Increasing Modestly

Investor purchases are only modestly elevated and are of secondary importance to first-time homebuyers

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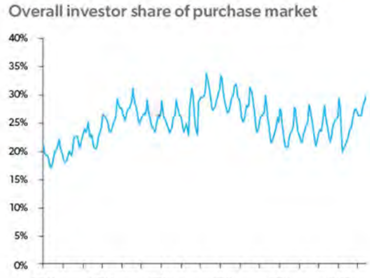
EXHIBIT 7A

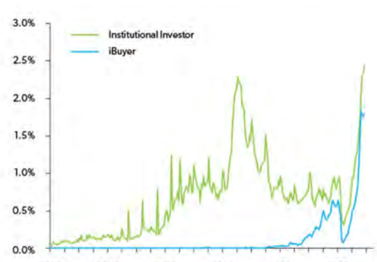
Overall investor share of purchase market



Source: Freddie Mac Economics & Housing Research estimates based on public records data. Small investor = 1-9 properties, Mid-sized = 10-99 properties, and Institutional = 100+ properties purchased in the past 12 months. We identify second homes via mortgage riders in Black Knight data, so we miss all-cash second home purchases.

EXHIBIT 7B

Large corporate buyer share of purchase market



Source: Freddie Mac Economics & Housing Research estimates based on public records data. Small investor = 1-9 properties, Mid-sized = 10-99 properties, and Institutional = 100+ properties purchased in the past 12 months. We identify second homes via mortgage riders in Black Knight data, so we miss all-cash second home purchases.

Freddie Mac Research Note: "What Drove Home Price Growth and Can it Continue?"
https://www.freddiemac.com/research/insight/20220609-what-drove-home-price-growth-and-can-it-continue

2022 Q1 Economic and Housing Market Outlook Prepared by Economic and Housing Research © Freddie Mac 13

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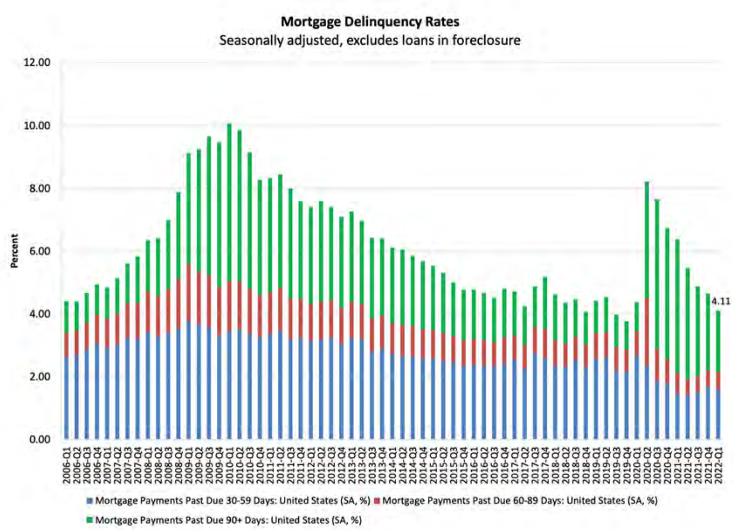
Delinquencies Approach Pre-Pandemic Levels



Source: MBA National Delinquency Survey Q1 2021

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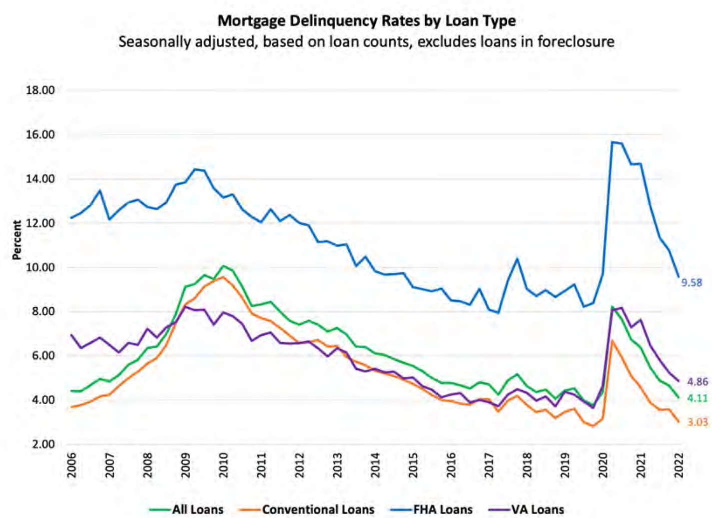
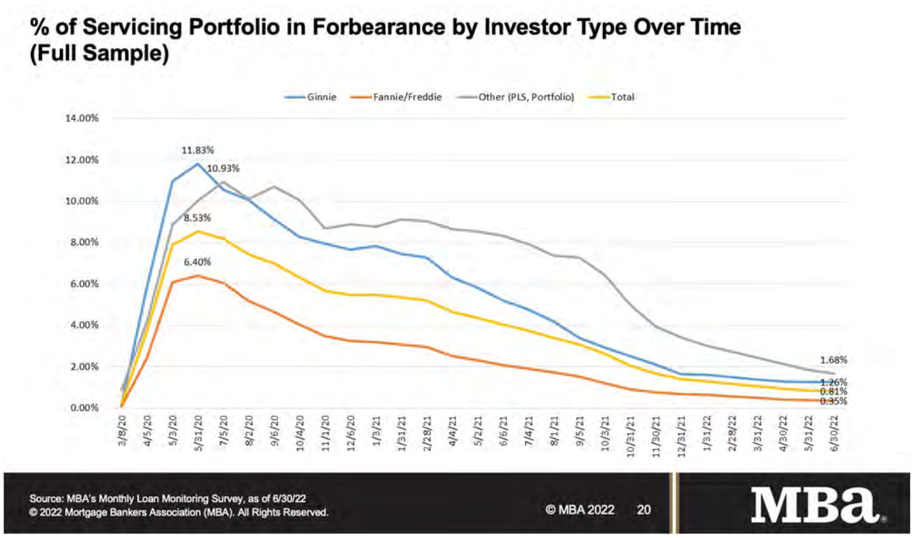
Only FHA, VA Portfolios Lag in Recovery

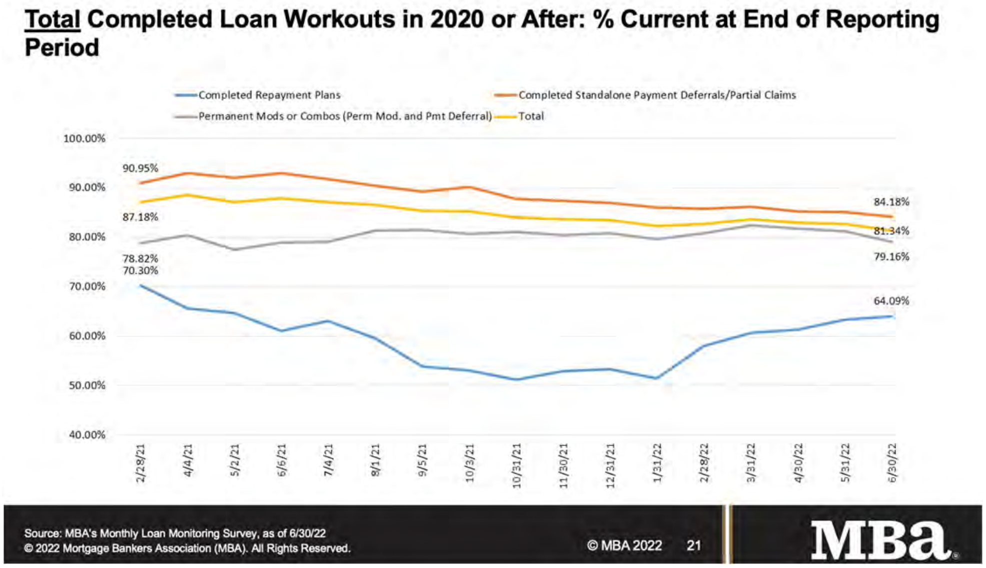


Source: MBA National Delinquency Survey Q1 2021

Loans Exiting Forbearance Impact Delinquency Rates



And 81% of Exiting Loans are Staying Current



Foreclosures Increasing, but Still Well Below Normal

Foreclosures Starts Show Significant Growth

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35

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Outlook for 2022-2023

Economy continues to be resilient, but there's a very real possibility (probability) of a recession in the next 12-18 months

Rising mortgage rates, home prices, and inflation making affordability a real issue for prospective homebuyers – sales volume likely to slow down, prices likely to follow

Housing crash highly unlikely, but localized market corrections a definite possibility

Investors – especially cash buyers – well-positioned in changing market environment

Foreclosure activity will continue to increase steadily, but not reach "normal" levels until sometime in 2023 – a recession could change that forecast significantly

- More distressed sales during pre-foreclosure phase, and higher sell-through rates at auctions means less inventory going to REO status

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Rick Sharga, EVP Market Intelligence

Visit https://www.attomdata.com/ for more information on ATTOM and to discover market trends and insight.

Thank you

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UTA

2022 Annual Education Conference

WHERE ARE WE NOW THAT MORATORIUMS HAVE LIFTED?

Presented by

Cathe Cole Sherburn
Trustee Corps (moderator)

Todd Barton Esq.
Fannie Mae

Verise Campbell
Nevada Affordable Housing Assistance Corporation

Dean Meyer
Freddie Mac

Erica Johnson-Seck
Mr. Cooper Group

Cathe Cole Sherburn

Cathe Cole-Sherburn serves as Senior Vice President of Default Operations for Trustee Corps and their affiliated companies. She is responsible for oversight of all aspects of operations, including audit, compliance and strategic planning and development of all companies and offices.

Cathe brings over 35 years of all aspects of real estate mortgage default experience to the company.

Before joining Trustee Corps, Cathe was with the First American Title Company, where she was Senior Vice President. While there, her duties included the oversight and management of the Trustee Division. Prior to that, she was with the firm of Routh Crabtree Olsen/Northwest Trustee Services, where she was the Director of Operations and instrumental in setting up the AZ, CA, and HI offices. Prior to that, she was the Director of Operations for the Law Offices of Steven J. Melmet, Inc., for 14 years.

Cathe has served as President of the United Trustees Association, as well as a Board member of the Women in Legal Leadership for American Legal & Financial Network. She is also a member of Arizona Trustee Association, Mortgage Bankers Association, California Mortgage Bankers Association, National Association of Professional Women and Society of Corporate Compliance and Ethics.

Cathe can be seen as a Moderator and/or Panelist at various industry conferences and provides seminars/training to our existing clients. She can be reached at ccole@trusteecorps.com

Todd Barton

Todd Barton is Fannie Mae's Vice President and Deputy General Counsel. Barton is responsible for overseeing legal support for counterparty issues, foreclosures, bankruptcies, real estate owned, and Fannie Mae's mortgage default counsel program. He also provides support on Texas Home Equity Loans. Before joining Fannie Mae in 2003, Barton was a Partner with the Dallas law firm of Carrington, Coleman, Sloman, and Blumenthal, LLP. His 14-year practice with the firm included complex commercial litigation and bankruptcy matters.

Verise Campbell

Verise V. Campbell is the Chief Operating Officer/Chief Executive Officer for Nevada Affordable Housing Assistance Corporation (NAHAC). NAHAC is the administrator of the Nevada Homeowner Assistance Fund (HAF). The Nevada HAF is federally funded by the United States Department of the Treasury (Treasury) (through the State of Nevada) and assists Nevada homeowners struggling to pay their mortgages due to financial hardships caused by the COVID-19 pandemic. Nevada received approximately $120 million to help qualified Nevada homeowners in their time of need.

NAHAC was also the State of Nevada's designated administrative entity for distribution of the Nevada's Hardest Hit Fund (HHF). The HHF was launched to assisted families in states that were hardest hit by the economic and housing market downturn. The Nevada HHF program was also federally funded by Treasury and included successful distribution of approximately $200 million on behalf of Nevada homeowners under Ms. Campbell's leadership.

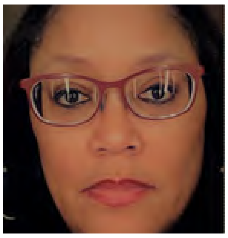
Ms. Campbell previously served as the Deputy Director of the State of Nevada Foreclosure Mediation Program (FMP) for approximately seven years. The FMP provides a forum for homeowners and lenders to meet to discuss alternatives to foreclosure. Ms. Campbell was responsible for implementing, organizing, managing, and operating the FMP from its inception

Dean Meyer

Dean Meyer is responsible for business management of Freddie Mac's Non-routine litigation. This includes representing the company in litigated matters where Freddie Mac is a named party. He is also responsible for oversight of Freddie Mac's foreclosure/bankruptcy loan inventory and the servicers managing these loans. This includes foreclosure timeline management and compensatory fees management for nonperforming loans.

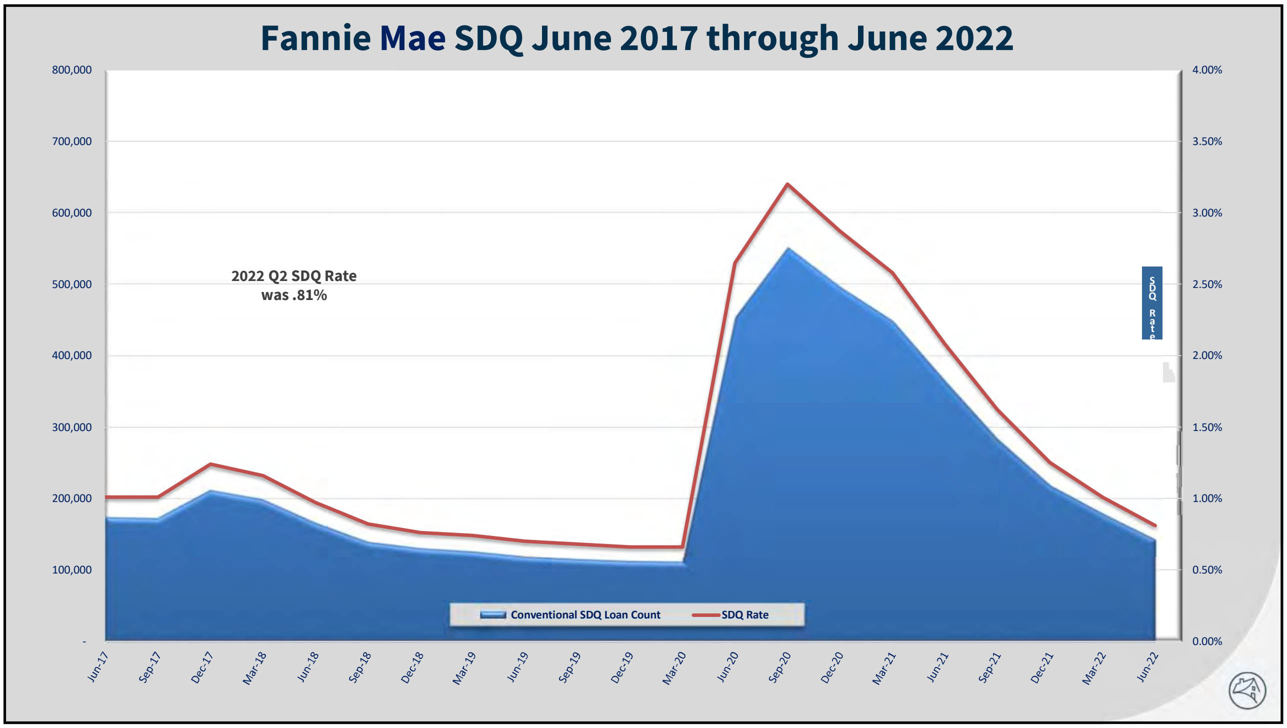
Prior to joining the Nonperforming Loan Management team, Dean served as the Director of Servicing Operations Policy and was responsible for developing and publishing of all servicing polices for Freddie Mac's Single Family Seller/Servicer Guide.

Dean has been employed with Freddie Mac for over 18 years and has over 29 years of experience in the mortgage business. Prior to Freddie Mac, he worked in various management positions in nonperforming loan management for several large and small mortgage companies. Dean has also worked on contracts with FHA managing servicing operations audits and claim reviews.



Erica Johnson-Seck

Erica is a Vice President of foreclosure at Mr. Cooper. Over the course of her career, she has held management positions with increasing responsibility within the default servicing space for both forward and reverse mortgages. Before beginning her employment with Mr. Cooper, Erica served as the First Vice President of default at Celink. Erica has a passion for process reengineering and efficiently building and turning around underperforming divisions and business cycles. Erica holds both an MBA with a concentration in finance from the University of Dallas and a Juris Doctorate from Taft Law School.



1

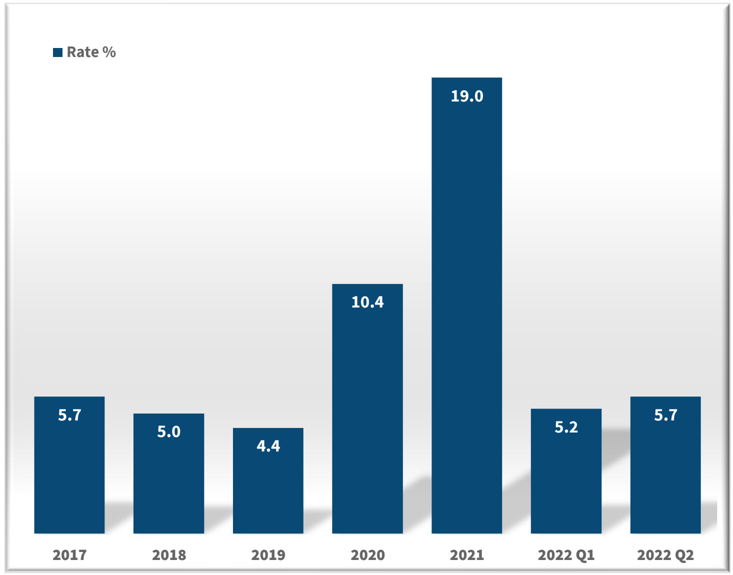
Fannie Mae Loans That Received a Forbearance By Status*

	Number of Loans	Percent of Loans by Category	Notes
Paid Off	596,508	41	
Payment Deferral	387,215	27	91% of Payment Deferral Loans were Current
Reinstated	274,443	19	
Modification	87,993	6	88% of Modified Loans were Current
Active Forbearance	57,793	4	96% of Loans that Received a Forbearance have Exited Forbearance
Delinquent at Time of Exit or Repayment Plan	43,018	3	
Total Loans that have Received a Forbearance	1,446,970	100	

*Data as of June 30, 2022, from Fannie Mae Form 10-Q

2

Single-Family Home Price Growth Rate*



*Source: Fannie Mae 2021 Form 10-K and 2022 Q2 Form 10-Q using property data on loans purchased by Fannie Mae, Freddie Mae, and other third-party home sales data.

3

Estimated Mark-to-Market LTV Ratio	Percentage of Book Outstanding	Percentage of Seriously Delinquent Loans **	Serious Delinquent Rate %
<=60%	70	80	0.82
60.01% to 70%	16	12	0.83
70.01% to 80%	9	5	0.67
80.01% to 90%	4	2	0.52
90.01% to 100%	1	1	0.46
Greater than 100%	< 0.5%	< 0.5%	9.40

Fannie Mae Single-Family Conventional Book Estimated Mark-to-Market LTV Ratio*

*Data as of June 30, 2022, from Fannie Mae Form 10-Q. Consists of unpaid principal balance of the loan divided by the estimated current value of the property.

**Calculated based on the number of single-family loans that were seriously delinquent for each category divided by the total number of seriously delinquent loans.

4

Fannie Mae SDQ Loans by Vintage*

	Percent of Single-Family Conventional Guaranty Book of Business Based on UPB	Percentage of SDQ	Serious Delinquency Rate %
2004 and Prior	1%	11%	2.75%
2005 - 2008	1%	15%	4.45%
2009 - 2022	98%	74%	0.63%

*Data as of June 30, 2022, from Fannie Mae Form 10-Q

**Based on loan count, consists of loans that were 90 days or more past due or in the foreclosure process.

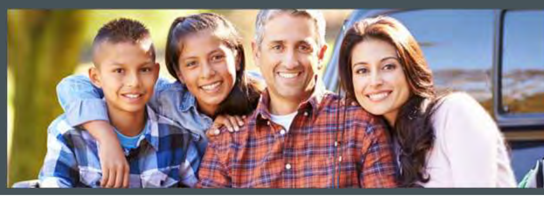
5

NEVADA HOMEOWNER ASSISTANCE FUND

NEVADA AFFORDABLE HOUSING ASSISTANCE CORPORATION

United Trustee Association
Annual Conference

August 22, 2022



1

NAHAC

- Nevada Affordable Housing Assistance Corporation (NAHAC) was formed in 2003 by the Nevada Housing Division, Department of Business and Industry.
- Purpose: to provide subsidies or other benefits to targeted populations within the State, such as those provided through the Nevada Homeowner Assistance Fund (HAF).
- Administrators of the Nevada Hardest Hit Fund (completed) and Nevada HAF.
- Board of Directors comprised of two members from Nevada Housing Division, one member from Nevada's Department of Business and Industry, and two independent members with experience in real estate and mortgage lending.

2

HAF OBJECTIVES

HAF was established as part of the American Rescue Plan Act (ARP) enacted in March 2021. In April 2021, the United States Department of the Treasury issued the following guidance:

1. HAF funds may be used prevent mortgage delinquencies, defaults, foreclosures and displacement of homeowners experiencing financial hardships. Other eligible uses may include (but are not limited to):

   A. Homeowner utilities
   B. Property taxes and insurance
   C. Homeowner's association fees or liens

2. Eligible applicants must have experienced a qualified financial hardship after January 21, 2020 as a result of the coronavirus pandemic

3

3

ALLOCATION

1. Nevada awarded approximately $121 Million
2. Up to 15% may be used for administrative expenses
3. Up to 5% may be used to support housing counseling and legal services.
4. Eligible homeowners must meet income at or less than 150% of the area median income (AMI).

NAHAC - NEVADA HAF AUGUST 2022 4

4

TARGET POPULATION

Other requirements:

- 60% shall assist homeowners earning no greater than 100 percent of Area Median Income (AMI) or 100% of the median income for the United States*, whichever is greater.
- Prioritization will be made to "socially disadvantaged individuals," which include individuals who have been subjected to racial or ethnic prejudice or cultural bias as defined in the HAF Guidance provided by Treasury

* $79,900

5

UNEMPLOYMENT MORTGAGE ASSISTANCE PROGRAM (UMA)

- Provides temporary financial assistance to eligible Nevada homeowners who wish to remain in their homes but have suffered a loss of income due to unemployment or underemployment
- Available for current and delinquent first mortgage loans; will reinstate a delinquent first mortgage loan and delinquent dues or assessments
- Up to $54,000 per household in total
- Up to twelve monthly payments
- Households expected to fund: 4,766

6

MORTGAGE REINSTATEMENT ASSISTANCE PROGRAM (MRAP)

- Provides funds to help eligible Nevada homeowners cure their delinquent first mortgage loan arrearages
- Assists with curing delinquent, non-escrowed property taxes, homeowner's insurance, and HOA dues or assessments
- Available on properties wherein the mortgage loan is current, paid off or has a Home Equity Conversion Mortgage (HECM) (Reverse Mortgage)
- Up to $50,000 per household in total for reinstatement of principal, interest, taxes, insurance and association dues
- Housing to Income affordability required post assistance
- Up to additional $50,000 in Principal Reduction on eligible mortgage loans to achieve an affordable payment
- Available in a single, lump sum disbursement
- Households expected to fund: 2,222

ADDITIONAL CRITERIA (ALL PROGRAMS)

1. Homeowner must own and occupy a single-family Nevada home (1-4 unit) as their primary residence.
2. A 3-year or 5-year lien will be required. The Principal Reduction component requires a 5-year lien.
3. Eligible financial hardship must have occurred after the purchase of the home and within the timeframe specified above.
4. Homeowner cannot be in an active bankruptcy.
5. Properties with 1st priority mortgage secured by a Home Equity Line of Credit (HELOC) are not eligible.

HOW TO APPLY?

Go to: www.nahac.org
(Available 24 hours/7 day a week)

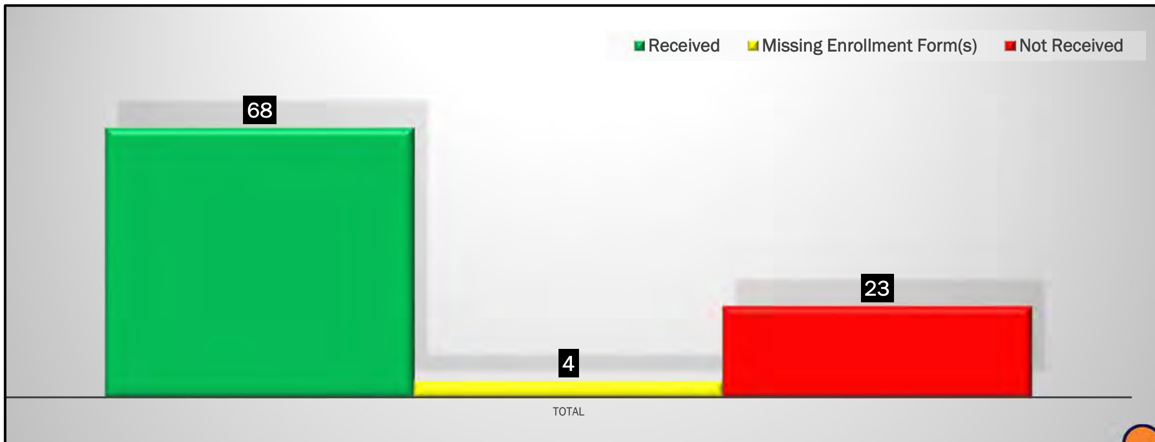
1. Click "Get Qualified"
2. Pass pre-screening
3. Create account
4. Complete online application and upload documents
5. Sign and submit application
6. File submitted and reviewed by underwriter

FUNDING CHART

	Amount	# of Households
Paid	$2,663,913	184
Allocated	$3,389,526	

Total Applications Initiated	2,672
Total in Process	371

SERVICER PARTICIPATION AGREEMENT (SPA) SCORECARD



as of 08.10.22

11

NEVADA HOMEOWNER ASSISTANCE FUND

NEVADA AFFORDABLE HOUSING ASSISTANCE CORPORATION

Q & A

12

THANK YOU !!!

Verise Campbell, CEO/COO
vcampbell@nahac.org
702-570-5579

NEVADA
HOMEOWNER
ASSISTANCE FUND
NEVADA AFFORDABLE HOUSING ASSISTANCE CORPORATION

2022 Annual Education Conference

BANKRUPTCY UPDATES

Presented by

Hon. August B. Landis
District of Nevada

Hon. Scott C. Clarkson
Central District of California

Mark Blackman, Esq.
Barrett Daffin Frappier Treder & Weiss

Benjamin R. Levinson, Esq.
Law Office of Benjamin R. Levinson

First American
MORTGAGE SOLUTIONS

Benjamin R. Levinson, Esq.

Benjamin R. Levinson has been representing private mortgage lenders, foreclosure trustees, and receivers in State Courts and all Bankruptcy Courts in California since 1985. His practice emphasizes defending lenders, foreclosure trustees, and third party purchasers in foreclosure-related litigation; lender and receiver representation in state court receivership actions; lender representation in judicial foreclosures and post-foreclosure evictions; and representation of secured and unsecured creditors in bankruptcy.

Mr. Levinson has been a seminar speaker for the California Mortgage Association and the United Trustees Association on various foreclosure and bankruptcy topics over the last thirty-four years. Mr. Levinson is licensed to practice in all of the Superior and Appellate courts for the State of California and the Supreme Court for the State of California. He has extensive experience in litigating various real property cases in State Courts throughout the State of California.

Mr. Levinson is also licensed to practice in all Federal District Courts and Bankruptcy Courts in California and the Ninth Circuit Court of Appeals and he has extensive experience handling real estate and bankruptcy matters in those courts as well.

Mr. Levinson is a member of the State Bar of California, the Santa Clara County Bar Association, the Bar Association of San Francisco, the California Mortgage Association, the American Bankruptcy Institute, the Bay Area Bankruptcy Forum, the San Jose chapter of American Inns of Court solely dedicated to bankruptcy reorganization practice, and on the Board of Directors for the United Trustees Association.

Mr. Levinson received his Juris Doctorate from the University of Santa Clara in 1984 and his Bachelor of Arts from the University of California Santa Barbara in 1979.

Mr. Levinson can be reached at ben@benlevinsonlaw.com.

Hon. Scott C. Clarkson

Hon. Scott C. Clarkson is a U.S. Bankruptcy Judge for the Central District of California in Santa Ana and Riverside, appointed on Jan. 20, 2011, and has also sat on the Ninth Circuit Bankruptcy Appellate Panel. Prior to his appointment, Judge Clarkson practiced bankruptcy law and bankruptcy litigation for more than 20 years in Los Angeles, and he served as chair of the Los Angeles County Bar Association's Commercial Law and Bankruptcy Section from 2008-09. He is a board member of the Orange County Federal Bar Association and has lectured on ethics and civility for the annual Los Angeles Federal Bar Association Ethics Program. He was a member of Virginia, the District of Columbia, and California bars. From 1977-82, Judge Clarkson was a legislative assistant to U.S. Congressman Harold L. Volkmer in Washington, D.C., and was assigned to the U.S. House of Representatives Judiciary Committee, where he was a direct observer of and participant in the creation of the 1978 Bankruptcy Code in the House. He later clerked for Hon. William L. Hungate, U.S. District Judge for the Eastern District of Missouri. Judge Clarkson has also been an established documentary photographer in the U.S., Southeast, and Central Asia, and South America for more than 20 years. He also traveled to Afghanistan, Pakistan, and Kashmir in 2008-09, and Jordan and Israel in 2014, cover- ing recent events in these regions of the world. Judge Clarkson received his undergraduate degree from Indiana University in Bloomington in 1979 and his J.D. from George Mason University School of Law in 1982.

Hon. August B. Landis

August B. Landis was appointed as a United States Bankruptcy Judge for the District of Nevada on November 27, 2013. Between 2005 and his appointment to the bench, he served as the Acting U.S. Trustee for Region 17; as the U.S. Trustee Programs first Acting Associate General Counsel for Chapter 11 Practice; and as an Assistant U.S. Trustee for the District of Nevada in Las Vegas. Prior to joining the U.S. Trustee Program, he was an attorney in private practice with the Des Moines, Iowa, firms of Neiman, Neiman, Stone & Spellman (1987 1990) and Whitfield & Eddy, P.L.C. (1990 2005), mostly representing creditors rights in commercial litigation, secured transactions, and bankruptcy cases. Judge Landis received his J.D. from Drake Law School in Des Moines, and is a member of the Iowa State Bar Association. He is also admitted to practice before the U.S. Supreme Court, the Eighth and Ninth Circuit Courts of Appeals, and the U.S. District Courts for the Northern and Southern Districts of Iowa.

Mark S. Blackman, Esq.

Mark S. Blackman is an experienced bankruptcy, business, and real estate litigator. He represents clients in all aspects of creditors' rights matters including, but not limited to, bankruptcy proceedings, judicial foreclosures, real property foreclosures, title and escrow company disputes, interpleaders, and all aspects of bankruptcy, manufactured housing and mobile home transactions and litigation. Mr. Blackman, recently joined the law firm of Barrett, Daffin, Frappier, Treder & Weiss, LLP ("BDF Law Group"), and is licensed to practice law in California and Nevada.

Memberships/Accomplishments:
Mr. Blackman is a former president of the San Fernando Valley Bar Association ("SFVBA"). He has served as the chair for the SFVBA's Community Service Committee and Blanket the Homeless Program for almost 30 years. Mr. Blackman has also served on the Board of Directors for the Valley Community Legal Foundation for over six years.

Additionally, Mr. Blackman presently serves on the Board for the Clark County Bar Association and serves as co-chair of the CCBA's Community Service Committee which works with many local organizations in Las Vegas.
Mr. Blackman also serves on the Board for the California Manufactured Housing Institute.

Mr. Blackman previously served as a board member for the Los Angeles Chapter of the California Trustees Association and the United Trustees Association. He has served as a member of the Loyola Law School Board of Governors, as a member of the Formation Committee for the Woodland Hills-Warner Center Neighborhood Council which is part of the City of Los Angeles Department of Neighborhood Empowerment and as a member of the Board of Directors for the Valley Cultural Center.

Mr. Blackman has conducted programs on bankruptcy law unlawful detainers (evictions) and mobile home foreclosures for the San Fernando Valley Bar Association, the Los Angeles Chapter of the California Trustees Association and the United Trustees Association. Mr. Blackman is also a regular contributor to the UTA Quarterly.

Before joining BDF Law Group in 2019, Mr. Blackman was a partner with Alpert, Barr & Grant, APLC for almost 30 years, and was of Counsel to Wright, Finlay and Zak, LLP.

Education/Court Admissions:
• Bachelor of Arts in Political Science from UCLA
• Juris Doctor from Loyola University School of Law, 1985.
• Licensed to practice in California and Nevada and before the United States District Courts for the Central, Northern, Southern and Eastern Districts of California and the District of Nevada.

Mr. Blackman can be reached at 661-371-7046 and markbl@bdflawgroup.com

UNITED TRUSTEES ASSOCIATION
An Association of Default Services Professionals

2022 BANKRUPTCY UPDATE

August 22, 2022 - 12:30 p.m. – 2:00 p.m.

SPEAKERS

HONORABLE SCOTT C. CLARKSON
Bankruptcy Judge
Central District of California

HONORABLE AUGUST B. LANDIS
Bankruptcy Judge
District of Nevada

Benjamin R. Levinson, Esq.
Law Office of Benjamin R. Levinson, APC
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markbl@bdfgroup.com
(626) 371-7046

Honorable Scott C. Clarkson

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Benjamin R. Levinson, Esq.

Benjamin R. Levinson has been representing litigants in bankruptcy, federal and state court actions for 36 years. His clients include private mortgage lenders, institutional lenders, foreclosure trustees, receivers, third party purchasers, landlords, bankruptcy creditors, and real property litigants in all California District Courts and Bankruptcy Courts and all California state courts.

Mr. Levinson's practice emphasizes creditor bankruptcy representation, defending lenders and trustees in foreclosure-related litigation, lender and receiver representation in state court receivership actions, and lender representation in judicial foreclosure actions to seek a deficiency under the loan.

Mr. Levinson is a member of the State Bar of California, the Santa Clara County Bar Association, the Bar Association of San Francisco, the American Bankruptcy Institute, the Bay Area Bankruptcy Forum, the San Jose chapter of American Inns of Court solely dedicated to bankruptcy reorganization practice, the California Mortgage Association and the United Trustees Association.

Mr. Levinson has been a seminar speaker for the California Mortgage Association, the California Trustees Association and its successor organization, the United Trustees Association on various bankruptcy, foreclosure, eviction, and interpleader topics over the last thirty-six years.

Published appellate cases that Mr. Levinson has been counsel for the prevailing party include, *Melendrez v. D & I Investment, Inc.,* (2005) 127 Cal.App.4th 1238; which held that a bona fide purchaser for value at a trustee's sale could include those persons that regularly bid at such sales and which held that the conclusive presumptions of the Trustee's Deed given to BFP's only apply to the statutory procedures with respect to the default and sale notices and do not apply to other requirements of the foreclosure process; *Resolution Trust Corporation v. Bayside Developers,* 43 F.3d 1230 (9th Cir. 1994); where the 9th Circuit Court of Appeals affirmed the reversal by the District Court of the California Sixth Appellate District and held that the sale by the court appointed receiver of real property assets that was part of the lender's collateral did not violate the one-action rule of California Civil Procedure § 726; and *Pacific Loan Management v. Superior Court,* (1987) 196 Cal.App.3d 148; which specifically provided for the right of a foreclosure trustee to interplead surplus funds.

Mr. Levinson received his Juris Doctorate from the University of Santa Clara in 1984 and his Bachelor of Arts in Law and Society from the University of California Santa Barbara in 1979. He is licensed to practice in the Northern, Eastern, Central, and Southern District Bankruptcy Courts in California and he has extensive experience handling bankruptcy matters in all of these Districts.

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Mr. Blackman is a former president of the San Fernando Valley Bar Association. He has served as the chair for the Bar Association's annual Law Day programs, which provides free legal services to members of the community. He has also served as the chair of the Bar Association's Blanket the Homeless program for over 25 years and has been on the Board of Directors for the Valley Community Legal Foundation (which provides grants to organizations which provide legal services to families and the poor) for over six years.

Mr. Blackman has served as a board member for the Los Angeles Chapter of the California Trustees Association and the United Trustees Association. He has served as a member of the Loyola Law School Board of Governors. Mr. Blackman also served as a member of the Formation Committee for the Woodland Hills-Warner Center Neighborhood Council which is part of the City of Los Angeles Department of Neighborhood Empowerment. Mr. Blackman also served on the Board of Directors for the Valley Cultural Center. Mr. Blackman presently serves on the Board for the Clark County Bar Association. After joining the Clark County Bar Association, Mr. Blackman helped establish a Second Blanket the Homeless program for Clark County Nevada where an additional 2000 blankets per year are distributed to the homeless.

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TOPICS OF DISCUSSION

I. ARE BANKRUPTCY CASES DECREASING, RISING, OR STAYING THE SAME POST-PANDEMIC IN YOUR DISTRICT?

A. DO YOU EXPECT ANY CHANGES WHEN PROGRAMS PROVIDING MONEY TO BORROWERS AND TENANTS EXPIRE AND OTHER MORATORIUMS EXPIRE?

II. ANY CHANGE IN PROCEDURES IN YOUR DISTRICT AS TO REOPENING THE COURTROOMS AND ALSO HANDLING MATTERS REMOTELY, INCLUDING TRIALS.

III. YOUR PHILOSOPHY IN DETERMINING A CRAM-DOWN INTEREST RATE FOR LOANS SECURED BY FIRST DEEDS OF TRUST AND SECURED BY SECOND DEEDS OF TRUST.

A. WHAT FACTORS DO YOU USE IN DECIDING AN INTEREST RATE TO BE APPLIED IN THE PLAN?

IV. THE ATTACK ON FORECLOSURES AS A FRAUDULENT CONVEYANCE WHEN THE PRICE PAID IS MINIMAL AT THE SALE.

BFP V. RESOLUTION TRUST 511 U.S. 531 (1994)— the price paid at a mortgage foreclosure sale conclusively established "reasonably equivalent value" as long as the state's foreclosure laws were met.

GUNSALUS V. COUNTY OF ONTARIO, NEW YORK 37 F. 4TH 859 (2ND Cir. 2022)—The court allowed an attack on a tax sale foreclosure as a fraudulent transfer that could be set aside in the bankruptcy.

V. WHO GETS THE APPRECIATION IN A HOME WHEN A CHAPTER 13 CASE CONVERTS TO CHAPTER 7--SPLIT IN AUTHORITY.

IN RE CASTLEMAN 2022 WL 2392058 (WD Wash 2022)

The post-petition, pre-conversion appreciation of the house belonged to the Chapter 7 Trustee.

VI. ANY CHANGE IN YOUR JUDICIAL POSITION REGARDING THE APPLICABILITY OF § 362(c)(3) WHERE A SECOND BANKRUPTCY IS FILED WITHIN A CALENDAR YEAR OF THE DISMISSAL OF A PRIOR CASE.

<u>IN RE RAMSEY</u> (J. NAKAGAWA) 2021 WL 1499319 (NV BK 2021)—Stay only terminates as to Debtor and not estate property.

<u>IN RE MADSEN</u> (J. SARGIS) 639 B.R. 761 (CA BK 2022)-- Stay only terminates as to Debtor and not estate property.

VII. YOUR PHILOSOPHY ON THE ALLOWANCE OF DEFAULT INTEREST IN CHAPTER 11 CASES FOR SECURED LENDERS.

A. WHAT FACTORS DO YOU USE IN DECIDING WHETHER DEFAULT INTEREST IS ALLOWED?

VIII. VIOLATIONS OF THE STAY AND VIOLATION OF THE DISCHARGE INJUNCTION.

<u>IN RE GO,</u> (J. Nakagawa) (Bk. NV 2022)

Contempt for violation of the discharge injunction.

IX. DID YOUR COURT SEE ANY MOTIONS TO MODIFY PLANS TO EXTEND THEM UP 7 YEARS UNDER § 1329(d) PRIOR TO THAT SECTION BEING REPEALED ON MARCH 27, 2022?

FRAUDULENT CONVEYANCE CASES

<u>BFP V. RESOLUTION TRUST</u> 511 U.S. 531 (1994)

<u>GUNSALUS V. COUNTY OF ONTARIO, NEW YORK</u>
37 F. 4TH 859 (2ND Cir. 2022)

114 S.Ct. 1757
Supreme Court of the United States

BFP, Petitioner
v.
RESOLUTION TRUST CORPORATION, as Receiver of Imperial Federal Savings Association, et al.

No. 92–1370.
|
Argued Dec. 7, 1993.
|
Decided May 23, 1994.
|
Rehearing Denied June 27, 1994.
|
See 512 U.S. 1247, 114 S.Ct. 2771.

Synopsis
Chapter 11 debtor brought fraudulent transfer proceeding to avoid mortgage foreclosure sale, on theory that price received at mortgage foreclosure sale was less than "reasonably equivalent value" of property. The United States Bankruptcy Court for the Central District of California, John E. Ryan, J., entered summary judgment in favor of defendant, and debtor appealed. The Bankruptcy Appellate Panel, Jones, J., 132 B.R. 748, affirmed, and debtor again appealed. The Court of Appeals, Sneed, Circuit Judge, 974 F.2d 1144, affirmed, and debtor petitioned for writ of certiorari. The Supreme Court, Justice Scalia, held that price received at mortgage foreclosure sale conclusively established "reasonably equivalent value" of mortgage property, as long as requirements of state's foreclosure law were met.

Affirmed.

Justice Souter dissented and filed opinion, in which Justices Blackmun, Stevens and Ginsburg joined.

West Headnotes (7)

[1] **Bankruptcy**Price at foreclosure, judicial, or trustee sale

"Reasonably equivalent value" under bankruptcy fraudulent transfer provision is not to be equated, in context of mortgage foreclosure sales, either with fair market value or with fair foreclosure price; rather, "reasonably equivalent value" for foreclosed property is the price in fact received at foreclosure sale, as long as all of the requirements of state's foreclosure law have been met. Bankr.Code, 11 U.S.C.A. § 548(a)(2).

599 Cases that cite this headnote

[2] **Statutes**Express mention and implied exclusion; expressio unius est exclusio alterius

It is generally presumed that Congress acts intentionally and purposefully when it includes particular language in one section of statute but omits it in another, particularly where omission entails the replacement of standard legal terminology with neologism.

195 Cases that cite this headnote

[3] **States**Federal Supremacy; Preemption

Before federal statute will be construed to displace traditional state regulation in manner which radically readjusts balance of state and national authority, such a federal statutory purpose must be clear and manifest.

46 Cases that cite this headnote

[4] **Bankruptcy**Price at foreclosure, judicial, or trustee sale

Any irregularity in conduct of mortgage foreclosure sale that would permit judicial invalidation of sale under applicable state law deprives sales price of its conclusive force as "reasonably equivalent value" for property under bankruptcy fraudulent transfer provision, and foreclosure sale may be avoided as fraudulent transfer if sales price was not reasonably equivalent to property's actual value at time of sale (i.e., to foreclosure sale price that would have been received if foreclosure sale had proceeded according to law). Bankr.Code, 11 U.S.C.A. § 548(a)(2).

581 Cases that cite this headnote

[5] **Bankruptcy**Application of state or federal law in general

When meaning of bankruptcy code's text is clear, its operation is unimpeded by contrary state law or prior practice.

51 Cases that cite this headnote

[6] **States**⇐Federal Supremacy; Preemption

Federal statute may override historical state practice by implication, and not just expressly, if implication is unambiguous.

13 Cases that cite this headnote

[7] **States**⇐Federal Supremacy; Preemption

When congressional intent to override historical state practice is doubtful, court must defer to long established traditions of state regulation in interpreting statute.

23 Cases that cite this headnote

****1758** *Syllabus**

***531** Petitioner BFP took title to a California home subject to, *inter alia,* a deed of trust in favor of Imperial Savings Association. After Imperial entered a notice of default because its loan was not being serviced, the home was purchased by respondent Osborne for $433,000 at a properly noticed foreclosure sale. BFP soon petitioned for bankruptcy and, acting as a debtor in possession, filed a complaint to set aside the sale to Osborne as a fraudulent transfer, claiming that the home was worth over $725,000 when sold and thus was not exchanged for a "reasonably equivalent value" under 11 U.S.C. § 548(a)(2). The Bankruptcy Court granted summary judgment to Imperial. The District Court affirmed the dismissal, and a bankruptcy appellate panel affirmed the judgment, holding that consideration received in a noncollusive and regularly conducted nonjudicial foreclosure sale establishes " reasonably equivalent value" as a matter of law. The Court of Appeals affirmed.

Held: A "reasonably equivalent value" for foreclosed real property is the price in fact received at the foreclosure sale, so long as all the requirements of the State's foreclosure law have been complied with. Pp. 1760–1767.

(a) Contrary to the positions taken by some Courts of Appeals, fair market value is not necessarily the benchmark against which determination of reasonably equivalent value is to be measured. It may be presumed that Congress acted intentionally when it used the term "fair market value" elsewhere in the Bankruptcy Code but not in § 548, particularly when the omission entails replacing standard legal terminology with a neologism.

Moreover, fair market value presumes market conditions that, by definition, do not obtain in the forced-sale context, since property sold within the time and manner strictures of state-prescribed foreclosure is simply worth less than property sold without such restrictions. "Reasonably equivalent value" also cannot be read to mean a "reasonable" or "fair" forced-sale price, such as a percentage of fair market value. To specify a federal minimum sale price beyond what state foreclosure law requires would extend bankruptcy law well beyond the traditional field of fraudulent transfers and upset the coexistence that ***532** fraudulent transfer law and foreclosure law have enjoyed for over 400 years. While, under fraudulent transfer law, a "grossly inadequate price" raises a rebuttable presumption of actual fraudulent intent, it is black letter foreclosure law that, when a State's procedures are followed, the mere inadequacy of a foreclosure sale price is no basis for setting the sale aside. Absent clearer textual guidance than the phrase "reasonably equivalent value"—a phrase entirely compatible with pre-existing practice—the Court will not presume that Congress intended to displace traditional state regulation with an interpretation that would profoundly affect the important state interest in the security and stability of title to real property. Pp. 1760–1765.

(b) The conclusion reached here does not render § 548(a)(2) superfluous. The "reasonably equivalent value" criterion will continue to have independent meaning outside the foreclosure context, and § 548(a)(2) ****1759** will continue to be an exclusive means of invalidating foreclosure sales that, while not intentionally fraudulent, nevertheless fail to comply with all governing state laws. P. 1765.

974 F.2d 1144 (C.A. 9 1992), affirmed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and O'CONNOR, KENNEDY, and THOMAS, JJ., joined. SOUTER, J., filed a dissenting opinion, in which BLACKMUN, STEVENS, and GINSBURG, JJ., joined, *post,* p. 1767.

Attorneys and Law Firms

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Ronald J. Mann, Washington, DC, for federal respondent.

Michael R. Sment, Los Angeles, CA, for respondents, Paul Osborne, et al.

Opinion

***533** Justice SCALIA delivered the opinion of the Court.

This case presents the question whether the consideration received from a noncollusive, real estate mortgage foreclosure sale conducted in conformance with applicable state law conclusively satisfies the Bankruptcy Code's requirement that transfers of property by insolvent debtors within one year prior to the filing of a bankruptcy petition be in exchange for "a reasonably equivalent value." 11 U.S.C. § 548(a)(2).

I

Petitioner BFP is a partnership, formed by Wayne and Marlene Pedersen and Russell Barton in 1987, for the purpose of buying a home in Newport Beach, California, from Sheldon and Ann Foreman. Petitioner took title subject to a first deed of trust in favor of Imperial Savings Association (Imperial)[1] to secure payment of a loan of $356,250 made to the Pedersens in connection with petitioner's acquisition of the home. Petitioner granted a second deed of trust to the Foremans as security for a $200,000 promissory note. Subsequently, Imperial, whose loan was not being serviced, entered a notice of default under the first deed of trust and scheduled a properly noticed foreclosure sale. The foreclosure proceedings were temporarily delayed by the filing of an involuntary bankruptcy petition on behalf of petitioner. After the dismissal of that petition in June 1989, Imperial's ***534** foreclosure proceeding was completed at a foreclosure sale on July 12, 1989. The home was purchased by respondent Paul Osborne for $433,000.

In October 1989, petitioner filed for bankruptcy under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 1101–1174. Acting as a debtor in possession, petitioner filed a complaint in Bankruptcy Court seeking to set aside the conveyance of the home to respondent Osborne on the grounds that the foreclosure sale constituted a fraudulent transfer under § 548 of the Code, 11 U.S.C. § 548. Petitioner alleged that the home was actually worth over $725,000 at the time of the sale to Osborne. Acting on separate motions, the Bankruptcy Court dismissed the complaint as to the private respondents and granted summary judgment in favor of Imperial. The Bankruptcy Court found, *inter alia,* that the foreclosure sale had been conducted in compliance with California law and was neither collusive nor fraudulent. In an unpublished opinion, the District Court affirmed the Bankruptcy Court's granting of the private respondents' motion to dismiss. A divided bankruptcy appellate panel affirmed the Bankruptcy Court's entry of summary judgment for Imperial. 132 B.R. 748 (1991). Applying the analysis set forth in *In re Madrid,* 21 B.R. 424 (Bkrtcy.App.Pan. CA9 1982), affirmed on other grounds, 725 F.2d 1197 (CA9), cert. denied, ****1760** 469 U.S. 833, 105 S.Ct. 125, 83 L.Ed.2d 66 (1984), the panel majority held that a "non-collusive and regularly conducted nonjudicial foreclosure sale ... cannot be challenged as a fraudulent conveyance because the consideration received in such a sale establishes 'reasonably equivalent value' as a matter of law." 132 B.R., at 750.

Petitioner sought review of both decisions in the Court of Appeals for the Ninth Circuit, which consolidated the appeals. The Court of Appeals affirmed. *In re BFP,* 974 F.2d 1144 (1992). BFP filed a petition for certiorari, which we granted. 508 U.S. 938, 113 S.Ct. 2411, 124 L.Ed.2d 635 (1993).

***535** II

[1] Section 548 of the Bankruptcy Code, 11 U.S.C. § 548, sets forth the powers of a trustee in bankruptcy (or, in a Chapter 11 case, a debtor in possession) to avoid fraudulent transfers.[2] It permits to be set aside not only transfers infected by actual fraud but certain other transfers as well—so-called constructively fraudulent transfers. The constructive fraud provision at issue in this case applies to transfers by insolvent debtors. It permits avoidance if the trustee can establish (1) that the debtor had an interest in property; (2) that a transfer of that interest occurred within one year of the filing of the bankruptcy petition; (3) that the debtor was insolvent at the time of the transfer or became insolvent as a result thereof; and (4) that the debtor received "less than a reasonably equivalent value in exchange for such transfer." 11 U.S.C. § 548(a)(2)(A). It is the last of these four elements that presents the issue in the case before us.

Section 548 applies to any "transfer," which includes "foreclosure of the debtor's equity of redemption." 11 U.S.C. § 101(54) (1988 ed., Supp. IV). Of the three critical terms "reasonably equivalent value," only the last is defined: "value" means, for purposes of § 548, "property, or satisfaction or securing of a ... debt of the debtor," ***536** 11 U.S.C. § 548(d)(2)(A). The question presented here, therefore, is whether the amount of debt (to the first and second lienholders) satisfied at the foreclosure sale (viz., a total of $433,000) is "reasonably equivalent" to the worth of the real estate conveyed. The Courts of Appeals have divided on the meaning of those undefined terms. In *Durrett v. Washington Nat. Ins. Co.,* 621 F.2d 201 (1980), the Fifth Circuit, interpreting a provision of the old Bankruptcy Act analogous to § 548(a)(2), held that a foreclosure sale that yielded 57% of the property's fair market value could be set aside, and indicated in dicta that any such sale for less than 70% of fair market value should be invalidated. *Id.,* at 203–204. This "*Durrett* rule" has continued to be applied by some courts under § 548 of the new Bankruptcy Code. See *In re Littleton,* 888 F.2d 90, 92, n. 5 (CA11 1989). In *In re Bundles,* 856 F.2d 815, 820 (1988), the Seventh Circuit rejected the *Durrett* rule in favor of a case-by-case, "all facts and circumstances" approach to the question of reasonably equivalent value, with a *rebuttable* presumption that the foreclosure sale price is sufficient to withstand attack under § 548(a)(2). 856 F.2d, at 824–825; see also *In re Grissom,* 955 F.2d 1440, 1445–1446 (CA11 1992). In this case the Ninth Circuit, agreeing with the Sixth Circuit, see *In re Winshall Settlor's Trust,* 758 F.2d 1136, 1139 (CA6 1985), adopted the position first put forward in *In re Madrid,* 21 B.R. 424 (Bkrtcy.App.Pan. CA9 1982), affirmed on other grounds, 725 F.2d 1197 (CA9), cert. ****1761** denied, 469 U.S. 833, 105 S.Ct. 125, 83 L.Ed.2d 66 (1984), that the consideration received at a noncollusive, regularly conducted real estate foreclosure sale constitutes a reasonably equivalent value under § 548(a)(2)(A). The Court of Appeals acknowledged that it "necessarily part[ed] from the positions taken by the Fifth Circuit in *Durrett* ... and the Seventh Circuit in *Bundles.*" 974 F.2d, at 1148.

[2] In contrast to the approach adopted by the Ninth Circuit in the present case, both *Durrett* and *Bundles* refer to fair market value as the benchmark against which determination ***537** of reasonably equivalent value is to be measured. In the context of an otherwise lawful mortgage foreclosure sale of real estate,[3] such reference is in our opinion not consistent with the text of the Bankruptcy Code. The term "fair market value," though it is a well-established concept, does not appear in § 548. In contrast, § 522, dealing with a debtor's exemptions, specifically provides that, for purposes of that section, " 'value' means fair market value as of the date of the filing of the petition." 11 U.S.C. § 522(a)(2). "Fair market value" also appears in the Code provision that defines the extent to which indebtedness with respect to an equity security is not forgiven for the purpose of determining whether the debtor's estate has realized taxable income. § 346(j)(7)(B). Section 548, on the other hand, seemingly goes out of its way to avoid that standard term. It might readily have said "received less than fair market value in exchange for such transfer or obligation," or perhaps "less than a reasonable equivalent of fair market value." Instead, it used the (as far as we are aware) entirely novel phrase "reasonably equivalent value." "[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another," *Chicago v. Environmental Defense Fund,* 511 U.S. 328, 338, 114 S.Ct. 1588, 1593, 128 L.Ed.2d 302 (1994) (internal quotation marks omitted), and that presumption is even stronger when the omission entails the replacement of standard legal terminology with a neologism. One must suspect the language means that fair market value cannot—or at least cannot *always*—be the benchmark.

That suspicion becomes a certitude when one considers that market value, as it is commonly understood, has no applicability in the forced-sale context; indeed, it is the very *antithesis* of forced-sale value. "The market value of ... a ***538** piece of property is the price which it might be expected to bring if offered for sale in a fair market; not the price which might be obtained on a sale at public auction or a sale forced by the necessities of the owner, but such a price as would be fixed by negotiation and mutual agreement, after ample time to find a purchaser, as between a vendor who is willing (but not compelled) to sell and a purchaser who desires to buy but is not compelled to take the particular ... piece of property." Black's Law Dictionary 971 (6th ed. 1990). In short, "fair market value" presumes market conditions that, by definition, simply do not obtain in the context of a forced sale. See, *e.g., East Bay Municipal Utility District v. Kieffer,* 99 Cal.App. 240, 255, 278 P. 476, 482 (1929), overruled on other grounds by *County of San Diego v. Miller,* 13 Cal.3d 684, 119 Cal.Rptr. 491, 532 P.2d 139 (1975) (in bank); *Nevada Nat. Leasing Co. v. Hereford,* 36 Cal.3d 146, 152, 203 Cal.Rptr. 118, 121, 680 P.2d 1077, 1080 (1984) (in bank); *Guardian Loan Co. v. Early,* 47 N.Y.2d 515, 521, 419 N.Y.S.2d 56, 60–61, 392 N.E.2d 1240, 1244 (1979).

Neither petitioner, petitioner's *amici,* nor any federal court adopting the *Durrett* or the *Bundles* analysis has come to grips with this glaring discrepancy between the factors relevant to an appraisal of a property's market value, on the one hand, and the strictures of the foreclosure process on the other. Market value cannot be the criterion of equivalence ****1762** in the foreclosure-sale context.[4] The language of § 548(a)(2)(A) ("received less than a reasonably equivalent ***539** value in exchange") requires judicial inquiry into whether the foreclosed property was sold for a price that approximated its worth at the time of sale. An appraiser's reconstruction of "fair market value" could show what similar property would be worth if it did not have to be sold within the time and manner strictures of state-prescribed foreclosure. But property that *must* be sold within those strictures is simply *worth less.* No one would pay as much to own such property as he would pay to own real estate that could be sold at leisure and pursuant to normal marketing techniques. And it is no more realistic to ignore that characteristic of the property (the fact that state foreclosure law permits the mortgagee to sell it at forced sale) than it is to ignore other price-affecting characteristics (such as the fact that state zoning law permits the owner of the neighboring lot to open a gas station).[5] Absent a clear statutory requirement to the contrary, we must assume the validity of this state-law regulatory background and take due account of its effect. "The existence and force and function of established ***540** institutions of local government are always in the consciousness of lawmakers and, while their weight may vary, they may never be completely overlooked in the task of interpretation." *Davies Warehouse Co.*

v. Bowles, 321 U.S. 144, 154, 64 S.Ct. 474, 480, 88 L.Ed. 635 (1944). Cf. *Gregory v. Ashcroft,* 501 U.S. 452, 460–462, 111 S.Ct. 2395, 2400–2402, 115 L.Ed.2d 410 (1991).

There is another artificially constructed criterion we might look to instead of "fair market price." One might judge there to be such a thing as a "reasonable" or "fair" forced-sale price. Such a conviction must lie behind the *Bundles* inquiry into whether the state foreclosure proceedings "were calculated ... to return to the debtor-mortgagor his equity in the property." 856 F.2d, at 824. And perhaps that is what the courts that follow the *Durrett* rule have in mind when they select 70% of fair market value as the outer limit of "reasonably equivalent value" for forecloseable property (we have no idea where else such an arbitrary percentage could have come from). The problem is that such judgments represent policy determinations that the Bankruptcy Code gives us no apparent authority to make. How closely the price received in a forced sale is likely to ****1763** approximate fair market value depends upon the terms of the forced sale—how quickly it may be made, what sort of public notice must be given, etc. But the terms for foreclosure sale are not *standard.* They vary considerably from State to State, depending upon, among other things, how the particular State values the divergent interests of debtor and creditor. To specify a federal "reasonable" foreclosure-sale price is to extend federal bankruptcy law well beyond the traditional field of fraudulent transfers, into realms of policy where it has not ventured before. Some sense of history is needed to appreciate this.

The modern law of fraudulent transfers had its origin in the Statute of 13 Elizabeth, which invalidated "covinous and fraudulent" transfers designed "to delay, hinder or defraud creditors and others." 13 Eliz., ch. 5 (1570). English courts ***541** soon developed the doctrine of "badges of fraud": proof by a creditor of certain objective facts (for example, a transfer to a close relative, a secret transfer, a transfer of title without transfer of possession, or grossly inadequate consideration) would raise a rebuttable presumption of actual fraudulent intent. See *Twyne's Case,* 3 Coke Rep. 80b, 76 Eng.Rep. 809 (K.B. 1601); O. Bump, Fraudulent Conveyances: A Treatise upon Conveyances Made by Debtors to Defraud Creditors 31–60 (3d ed. 1882). Every American bankruptcy law has incorporated a fraudulent transfer provision; the 1898 Act specifically adopted the language of the Statute of 13 Elizabeth. Bankruptcy Act of July 1, 1898, ch. 541, § 67(e), 30 Stat. 564–565.

The history of foreclosure law also begins in England, where courts of chancery developed the "equity of redemption"—the equitable right of a borrower to buy back, or redeem, property conveyed as security by paying the secured debt on a later date than "law day," the original due date. The courts' continued expansion of the period of redemption left lenders in a quandary, since title to forfeited property could remain clouded for years after law day. To meet this problem, courts created the equitable remedy of foreclosure: after a certain date the borrower would be forever foreclosed from exercising his equity of redemption. This remedy was called strict foreclosure because the borrower's entire interest in the property was forfeited, regardless of any accumulated equity. See G. Glenn, 1 Mortgages 3–18, 358–362, 395–406 (1943); G. Osborne, Mortgages 144 (2d ed. 1970). The next major change took place in 19th–century America, with the development of foreclosure by sale (with the surplus over the debt refunded to the debtor) as a means of avoiding the draconian consequences of strict foreclosure. *Id.,* at 661–663; Glenn, *supra,* at 460–462, 622. Since then, the States have created diverse networks of judicially and legislatively crafted rules governing the foreclosure process, to achieve what each of them considers the proper balance between the ***542** needs of lenders and borrowers. All States permit judicial foreclosure, conducted under direct judicial oversight; about half of the States also permit foreclosure by exercising a private power of sale provided in the mortgage documents. See Zinman, Houle, & Weiss, Fraudulent Transfers According to Alden, Gross and Borowitz: A Tale of Two Circuits, 39 Bus.Law. 977, 1004–1005 (1984). Foreclosure laws typically require notice to the defaulting borrower, a substantial lead time before the commencement of foreclosure proceedings, publication of a notice of sale, and strict adherence to prescribed bidding rules and auction procedures. Many States require that the auction be conducted by a government official, and some forbid the property to be sold for less than a specified fraction of a mandatory presale fair-market-value appraisal. See *id.,* at 1002, 1004–1005; Osborne, *supra,* at 683, 733–735; G. Osborne, G. Nelson, & D. Whitman, Real Estate Finance Law 9, 446–447, 475–477 (1979). When these procedures have been followed, however, it is "black letter" law that mere inadequacy of the foreclosure sale price is no basis for setting the sale aside, though it may be set aside (*under state foreclosure law,* rather than fraudulent transfer law) if the price is so low as to "shock the conscience or ****1764** raise a presumption of fraud or unfairness." Osborne, Nelson, & Whitman, *supra,* at 469; see also *Gelfert v. National City Bank of N.Y.,* 313 U.S. 221, 232, 61 S.Ct. 898, 902, 85 L.Ed. 1299 (1941); *Ballentyne v. Smith,* 205 U.S. 285, 290, 27 S.Ct. 527, 528, 51 L.Ed. 803 (1907).

Fraudulent transfer law and foreclosure law enjoyed over 400 years of peaceful coexistence in Anglo–American jurisprudence until the Fifth Circuit's unprecedented 1980 decision in *Durrett.* To our knowledge no prior decision had ever applied the "grossly inadequate price" badge of fraud under fraudulent transfer law to set aside a foreclosure sale.[6] To say that the "reasonably equivalent value" language in ***543** the fraudulent transfer provision of the Bankruptcy Code requires a foreclosure sale to yield a certain minimum price beyond what state foreclosure law requires, is to say, in essence, that the Code has adopted *Durrett* or *Bundles.* Surely Congress has the power pursuant to its constitutional grant of authority over bankruptcy, U.S. Const., Art. I, § 8, cl. 4, to disrupt the ancient harmony that foreclosure law and fraudulent conveyance law, those two pillars of debtor-creditor jurisprudence, have heretofore enjoyed. But absent clearer textual guidance than the phrase "reasonably equivalent value"—a phrase entirely compatible with pre-existing practice—we will not presume such a radical departure. See *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.,* 484 U.S. 365, 380, 108 S.Ct. 626, 635, 98 L.Ed.2d 740 (1988); *Midlantic Nat. Bank v. New Jersey Dept. of Environmental Protection,* 474 U.S. 494, 501, 106 S.Ct. 755, 759–760, 88 L.Ed.2d 859 (1986); cf. *United States v. Texas,* 507 U.S. 529, 534, 113 S.Ct. 1631, 1634, 123 L.Ed.2d 245 (1993) (statutes that invade common law must be read with presumption favoring retention of long-established principles absent evident statutory purpose to the contrary).[7]

[3] ***544** Federal statutes impinging upon important state interests "cannot ... be construed without regard to the implications of our dual system of government.... [W]hen the Federal Government takes over ... local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit." Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum.L.Rev. 527, 539–540 (1947), quoted in *Kelly v. Robinson,* 479 U.S. 36, 49–50, n. 11, 107 S.Ct. 353, 360–362, n. 11, 93 L.Ed.2d 216 (1986). It is beyond question that an essential state interest is at issue here: We have said that "the general welfare of society is involved in the security of the titles to real estate" and the power to ensure that security "inheres in the very ****1765** nature of [state] government." *American Land Co. v. Zeiss,* 219 U.S. 47, 60, 31 S.Ct. 200, 204, 55 L.Ed. 82 (1911). Nor is there any doubt that the interpretation urged by petitioner would have a profound effect upon that interest: The title of every piece of realty purchased at foreclosure would be under a federally created cloud. (Already, title insurers have reacted to the *Durrett* rule by including specially crafted exceptions from coverage in many policies issued for properties purchased at foreclosure sales. See, *e.g.,* L. Cherkis & L. King, Collier Real Estate Transactions and the Bankruptcy Code, pp. 5–18 to 5–19 (1992).) To displace traditional state regulation in such a manner, the federal statutory purpose must be "clear and manifest," *English v. General Elec. Co.,* 496 U.S. 72, 79, 110 S.Ct. 2270, 2275, 110

L.Ed.2d 65 (1990). Cf. *Gregory v. Ashcroft,* 501 U.S., at 460–461, 111 S.Ct., at 2400–2401.[8] Otherwise, the Bankruptcy ***545** Code will be construed to adopt, rather than to displace, pre-existing state law. See *Kelly, supra,* 479 U.S., at 49, 107 S.Ct., at 360–361; *Butner v. United States,* 440 U.S. 48, 54–55, 99 S.Ct. 914, 917–918, 59 L.Ed.2d 136 (1979); *Vanston Bondholders Protective Comm. v. Green,* 329 U.S. 156, 171, 67 S.Ct. 237, 244, 91 L.Ed. 162 (1946) (Frankfurter, J., concurring).

For the reasons described, we decline to read the phrase "reasonably equivalent value" in § 548(a)(2) to mean, in its application to mortgage foreclosure sales, either "fair market value" or "fair foreclosure price" (whether calculated as a percentage of fair market value or otherwise). We deem, as the law has always deemed, that a fair and proper price, or a "reasonably equivalent value," for foreclosed property, is the price in fact received at the foreclosure sale, so long as all the requirements of the State's foreclosure law have been complied with.

[4] This conclusion does not render § 548(a)(2) superfluous, since the "reasonably equivalent value" criterion will continue to have independent meaning (ordinarily a meaning similar to fair market value) outside the foreclosure context. Indeed, § 548(a)(2) will even continue to be an exclusive means of invalidating some foreclosure sales. Although *collusive* foreclosure sales are likely subject to attack under § 548(a)(1), which authorizes the trustee to avoid transfers "made ... with actual intent to hinder, delay, or defraud" creditors, that provision may not reach foreclosure sales that, while not intentionally fraudulent, nevertheless fail to comply with all governing state laws. Cf. 4 L. King, Collier on Bankruptcy ¶ 548.02, p. 548–35 (15th ed. 1993) (contrasting subsections (a)(1) and (a)(2)(A) of § 548). Any irregularity in the conduct of the sale that would permit judicial invalidation of the sale under applicable state law deprives the sale ***546** price of its conclusive force under § 548(a)(2)(A), and the transfer may be avoided if the price received was not reasonably equivalent to the property's actual value at the time of the sale (which we think would be the price that would have been received if the foreclosure sale had proceeded according to law).

III

[5] [6] [7] A few words may be added in general response to the dissent. We have no quarrel with the dissent's assertion that where the "meaning of the Bankruptcy Code's text is itself clear," *post,* at 1775, its operation is unimpeded by contrary state law or prior practice. Nor do we contend that Congress must override historical state

practice "expressly or not at all." *Ibid.* The Bankruptcy Code can of course override by implication when the implication is unambiguous. But where the intent to override is doubtful, our federal system demands deference **1766 to long-established traditions of state regulation.

The dissent's insistence that here no doubt exists—that our reading of the statute is "in derogation of the *straightforward language* used by Congress," *post,* at 1767 (emphasis added)—does not withstand scrutiny. The problem is not that we disagree with the dissent's proffered "plain meaning" of § 548(a)(2)(A) ("[T]he bankruptcy court must compare the price received by the insolvent debtor and the worth of the item when sold and set aside the transfer if the former was substantially ('[un]reasonabl[y]') 'less than' the latter," *post,* at 1769)—which indeed echoes our own framing of the question presented ("whether the amount of debt ... satisfied at the foreclosure sale ... is 'reasonably equivalent' to the worth of the real estate conveyed," *supra,* at 1760). There is no doubt that this provision directs an inquiry into the relationship of the value received by the debtor to the worth of the property transferred. The problem, however, as any "ordinary speaker of English would have no difficulty grasping," *post,* at 1768, is that this highly generalized reformulation *547 of the "plain meaning" of "reasonably equivalent value" continues to leave unanswered the one question central to this case, wherein the ambiguity lies: *What is a foreclosed property worth?* Obviously, until that is determined, we cannot know whether the value received in exchange for foreclosed property is "reasonably equivalent." We have considered three (not, as the dissent insists, only two, see *post,* at 1767) possible answers to this question—fair market value, *supra,* at 1761–1762, reasonable forced-sale price, *supra,* at 1762, and the foreclosure-sale price itself—and have settled on the last. We would have expected the dissent to opt for one of the other two, or perhaps even to concoct a fourth; but one searches Justice SOUTER's opinion in vain for any alternative response to the question of the transferred property's worth. Instead, the dissent simply reiterates the "single meaning" of "reasonably equivalent value" (with which we entirely agree): "[A] court should discern the 'value' of the property transferred and determine whether the price paid was, under the circumstances, 'less than reasonabl[e].' " *Post,* at 1772. Well and good. But what *is* the "value"? The dissent has no response, evidently thinking that, in order to establish that the law is clear, it suffices to show that "the eminent sense of the natural reading," *post,* at 1775, provides an unanswered question.

Instead of answering the question, the dissent gives us hope that someone else will answer it, exhorting us "to believe that [bankruptcy courts], familiar with these cases (and with local conditions) as we are not, will give ["reasonably equivalent value"] sensible content in evaluating particular transfers on foreclosure." *Post,* at 1772. While we share the dissent's confidence in the capabilities of the United States Bankruptcy Courts, it is the proper function of *this* Court to give "sensible content" to the provisions of the United States Code. It is surely the case that bankruptcy "courts regularly make ... determinations about the 'reasonably equivalent value' of assets transferred through other ***548** means than foreclosure sales." *Post,* at 1772. But in the vast majority of those cases, they can refer to the traditional common-law notion of fair market value as the benchmark. As we have demonstrated, this generally useful concept simply has no application in the foreclosure-sale context, *supra,* at 1760–1763.

Although the dissent's conception of what constitutes a property's "value" is unclear, it does *seem* to take account of the fact that the property is subject to forced sale. The dissent refers, for example, to a reasonable price "under the circumstances," *post,* at 1772, and to the "worth of the item *when sold,* " *post,* at 1769 (emphasis added). But just as we are never told how the broader question of a property's "worth" is to be answered, neither are we informed how the lesser included inquiry into the impact of forced sale is to be conducted. Once again, we are called upon to have faith that bankruptcy courts will be able to determine whether a property's foreclosure-sale price falls unreasonably short of its "optimal value," *post,* at 1772, whatever that may be. ****1767** This, the dissent tells us, is the statute's plain meaning.

We take issue with the dissent's characterization of our interpretation as carving out an "exception" for foreclosure sales, *post,* at 1767, or as giving "two different and inconsistent meanings," *post,* at 1771, to "reasonably equivalent value." As we have emphasized, the inquiry under § 548(a)(2)(A)—whether the debtor has received value that is substantially comparable to the worth of the transferred property—is the same for all transfers. But as we have also explained, the fact that a piece of property is legally subject to forced sale, like any other fact bearing upon the property's use or alienability, necessarily affects its worth. *Unlike* most other legal restrictions, however, foreclosure has the effect of completely redefining the market in which the property is offered for sale; normal free-market rules of exchange are replaced by the far more restrictive rules governing forced sales. Given this altered reality, and the concomitant inutility ***549** of the normal tool for determining what property is worth (fair market value), the only legitimate evidence of the property's value at the time it is sold is the foreclosure-sale price itself.

* * *

For the foregoing reasons, the

judgment of the Court of Appeals for the Ninth Circuit is

Affirmed.

Justice SOUTER, with whom Justice BLACKMUN, Justice STEVENS, and Justice GINSBURG join, dissenting.

The Court today holds that by the terms of the Bankruptcy Code Congress intended a peppercorn paid at a noncollusive and procedurally regular foreclosure sale to be treated as the "reasonabl[e] equivalent" of the value of a California beachfront estate. Because the Court's reasoning fails both to overcome the implausibility of that proposition and to justify engrafting a foreclosure-sale exception onto 11 U.S.C. § 548(a)(2)(A), in derogation of the straightforward language used by Congress, I respectfully dissent.

I

A

The majority presents our task of giving meaning to § 548(a)(2)(A) in this case as essentially entailing a choice between two provisions that Congress might have enacted, but did not. One would allow a bankruptcy trustee to avoid a recent foreclosure-sale transfer from an insolvent debtor whenever anything less than fair market value was obtained, while the second would limit the avoidance power to cases where the foreclosure sale was collusive or had failed to comply with state-prescribed procedures. The Court then argues that, given the unexceptionable proposition that forced sales rarely yield as high a price as sales held under ideal, "market" conditions, Congress's "omission" from ***550** § 548(a)(2)(A) of the phrase "fair market value" means that the latter, narrowly procedural reading of § 548(a)(2)(A) is the preferable one.

If those in fact were the interpretive alternatives, the majority's choice might be a defensible one.[1] The first, equating "reasonably ****1768** equivalent value" at a foreclosure sale with "fair market value" has little to recommend it. Forced-sale prices may not be (as the majority calls them) the "very antithesis" of market value, see *ante,* at 1761, but they fail to bring in what voluntary sales realize, and rejecting such a ***551** reading of the statute is as easy as statutory interpretation is likely to get. On the majority's view, laying waste to this straw man necessitates accepting as adequate value whatever results from noncollusive adherence to state foreclosure requirements. Because properties are "simply worth less," *ante,* at 1762, on foreclosure sale, the Court posits, they must have been "worth" whatever price was paid. That, however, is neither a plausible interpretation of the statute, nor its only remaining alternative reading.[2]

***552** The question before the Court is whether the price received at a foreclosure sale after compliance with state procedural rules in a noncollusive sale must be treated conclusively as the "reasonably equivalent value" of the mortgaged property and in answering that question, the words and meaning of § 548(a)(2)(A) are plain. See *Patterson v. Shumate,* 504 U.S. 753, 760, 112 S.Ct. 2242, 2248, 119 L.Ed.2d 519 (1992) (party seeking to defeat plain meaning of Bankruptcy Code text bears an "exceptionally heavy burden") (internal quotation marks omitted); *Perrin v. United States,* 444 U.S. 37, 42, 100 S.Ct. 311, 314, 62 L.Ed.2d 199 (1979) (statutory words should be given their ordinary meaning). A trustee is authorized to avoid certain recent prebankruptcy transfers, including those on foreclosure sales, that a bankruptcy court determines were not made in exchange for "a reasonably equivalent value." Although this formulation makes no pretense to mathematical precision, an ordinary speaker of English would have no difficulty grasping its basic ****1769** thrust: the bankruptcy court must compare the price received by the insolvent debtor and the worth of the item when sold and set aside the transfer if the former was substantially ("[un]reasonabl[y]") "less than" the latter.[3] Nor would any ordinary English speaker, concerned to determine whether a foreclosure sale was collusive or procedurally irregular (an enquiry going exclusively to the process by which a transaction was consummated), direct an adjudicator, as the Court now holds Congress did, to ascertain whether the sale had realized "less than a reasonably equivalent value" (an enquiry described in quintessentially substantive terms).[4]

***553** Closer familiarity with the text, structure, and history of the disputed provision (and relevant amendments), confirms the soundness of the plain reading. Before 1984, the question whether foreclosure sales fell within bankruptcy courts' power to set aside transfers for "too little in return" was, potentially, a difficult one. Then, it might plausibly have been contended that § 548 was most concerned with "fraudulent" conduct by debtors on the brink of bankruptcy, misbehavior unlikely to be afoot when an insolvent debtor's property is sold, against his wishes, at foreclosure.[5] Indeed, it could further have been argued, again consonantly with the text of the earlier version of the Bankruptcy Code, that Congress had not understood foreclosure to involve a "transfer" within the ambit of § 548, see, *e.g., Abramson v. Lakewood Bank & Trust Co.,* 647 F.2d 547, 549 (CA5 1981) (Clark, J., ***554** dissenting)

(Bankruptcy Act case), cert. denied, 454 U.S. 1164, 102 S.Ct. 1038, 71 L.Ed.2d 320 (1982), on the theory that the "transfer" from mortgagor to mortgagee occurs, once and for all, when the security interest is first created. See generally *In re Madrid,* 725 F.2d 1197 (CA9), cert. denied, 469 U.S. 833, 105 S.Ct. 125, 83 L.Ed.2d 66 (1984).

In 1984, however, Congress pulled the rug out from under these previously serious arguments, by amending the Code in two relevant respects. See Bankruptcy Amendments and Federal Judgeship Act of 1984, §§ 401(1), 463(a), 98 Stat. 366, 368. One amendment provided expressly that "involuntar[y]" transfers are no less within the trustee's § 548 avoidance powers than "voluntar[y]" ones, and another provided that the "foreclosure of the debtor's equity of redemption" itself is a "transfer" for purposes of bankruptcy law. See 11 U.S.C. § 101(54) (1988 ed., Supp. IV).[6] Thus, whether or not ****1770** one believes (as the majority seemingly does not) that foreclosure sales rightfully belong within the historic domain of "fraudulent conveyance" law, that is exactly where Congress has now put them, cf. *In re Ehring,* 900 F.2d 184, 187 (CA9 1990), and our duty is to give effect to these new amendments, along with every other clause of the Bankruptcy Code. See, *e.g., United States v. Nordic Village, Inc.,* 503 U.S. 30, 36, 112 S.Ct. 1011, 1015, 117 L.Ed.2d 181 (1992); *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.,* 484 U.S. 365, 374–375, 108 S.Ct. 626, 632–633, 98 L.Ed.2d 740 (1988); see also *Dewsnup v. Timm,* 502 U.S. 410, 426, 112 S.Ct. 773, 783, 116 L.Ed.2d 903 (1992) (SCALIA, J., dissenting). The Court's attempt to escape the ***555** plain effect of § 548(a)(2)(A) opens it to some equally plain objections.

The first and most obvious of these objections is the very enigma of the Court's reading. If a property's "value" is conclusively presumed to be whatever it sold for, the "less than reasonabl[e] equivalen[ce]" question will never be worth asking, and the bankruptcy avoidance power will apparently be a dead letter in reviewing real estate foreclosures. Cf. 11 U.S.C. § 361(3) ("indubitable equivalent").[7] The Court answers that the section is not totally moribund: it still furnishes a way to attack collusive or procedurally deficient real property foreclosures, and it enjoys a vital role in authorizing challenges to other transfers than those occurring on real estate foreclosure. The first answer, however, just runs up against a new objection. If indeed the statute fails to reach noncollusive, procedurally correct real estate foreclosures, then the recent amendments discussed above were probably superfluous. There is a persuasive case that collusive or seriously irregular real estate sales were already subject to avoidance in bankruptcy, see, *e.g., In re Worcester,* 811 F.2d 1224, 1228, 1232 (CA9 1987) (interpreting § 541(a)), and neither the Court nor the respondents and their *amici* identify any specific case in which a court pronounced itself powerless to avoid a collusive foreclosure sale. But cf. *Madrid, supra,* at 1204 (Farris, J., concurring). It would seem peculiar, ***556** then, that for no sound reason, Congress would have tinkered with these closely watched sections of the Bankruptcy Code, for the sole purpose of endowing bankruptcy courts with authority that had not been found wanting in the first place.[8]

****1771** The Court's second answer to the objection that it renders the statute a dead letter is to remind us that the statute applies to all sorts of transfers, not just to real estate foreclosures, and as to all the others, the provision enjoys great vitality, calling for true comparison between value received for the property and its "reasonably equivalent value." (Indeed, the Court has no trouble acknowledging that something "similar to" fair market value may supply the benchmark of reasonable equivalence when such a sale is not initiated by a mortgagee, *ante,* at 1765.) This answer, however, is less tenable than the first. A common rule of construction ***557** calls for a single definition of a common term occurring in several places within a statute, see *Bray v. Alexandria Women's Health Clinic,* 506 U.S. 263, 283, 113 S.Ct. 753, 766, 122 L.Ed.2d 34 (1993); *Dewsnup v. Timm,* 502 U.S., at 422, 112 S.Ct., at 780 (SCALIA, J., dissenting) (" '[N]ormal rule[s] of statutory construction' " require that "identical words *[used] in the same section of the same enactment* " must be given the same effect) (emphasis in original), and the case for different definitions within a single text is difficult to make, cf. *Bray, supra,* at 292, 113 S.Ct., at 771 (SOUTER, J., concurring in part). But to give a single term two different and inconsistent meanings (one procedural, one substantive) for a single occurrence is an offense so unlikely that no common prohibition has ever been thought necessary to guard against it.[9] Cf. *Owen v. Owen,* 500 U.S. 305, 313, 111 S.Ct. 1833, 1838, 114 L.Ed.2d 350 (1991) (declining to "create a distinction [between state and federal exemptions] that the words of the statute do not contain"); *Union Bank v. Wolas,* 502 U.S. 151, 162, 112 S.Ct. 527, 533, 116 L.Ed.2d 514 (1991) (the "statutory text ... makes no distinction between short-term debt and long-term debt"). Unless whimsy is attributed to Congress, the term in question cannot be exclusively procedural in one class of cases and entirely substantive in all others. To be sure, there are real differences between sales on mortgage foreclosures and other transfers, as Congress no doubt understood, but these differences may be addressed simply and consistently with the statute's plain meaning.[10]

****1772 *558** The "neologism," *ante,* at 1761, "reasonably equivalent value" (read in light of the amendments confirming that foreclosures are to be judged under the same standard as are ***559** other transfers) has a single meaning in the one provision in which it figures: a court should discern the "value" of the property transferred and determine whether the price paid was, under the circumstances, "less than reasonabl[e]." There is thus no reason to rebuke the Courts of Appeals for having failed to "come to grips," *ante,* at 1761, with the implications of the fact that foreclosure sales cannot be expected to yield fair market value. The statute has done so for them. As courts considering nonforeclosure transfers often acknowledge, the qualification "reasonably equivalent" itself embodies both an awareness that the assets of insolvent debtors are commonly transferred under conditions that will yield less than their optimal value and a judgment that avoidance in bankruptcy (unsettling as it does the expectations of parties who may have dealt with the debtor in good faith) should only occur when it is clear that the bankruptcy estate will be substantially augmented. See, *e.g., In re Southmark Corp.,* 138 B.R. 820, 829–830 (Bkrtcy.Ct.ND Tex.1992) (court must compare "the value of what went out with the value of what came in," but the equivalence need not be "dollar for dollar") (citation omitted); *In re Countdown of Conn., Inc.,* 115 B.R. 18, 21 (Bkrtcy.Ct.Conn.1990) ("[S]ome disparity between the value of the collateral and the value of debt does not necessarily lead to a finding of lack of reasonably equivalent value").[11]

***560** B

I do not share in my colleagues' apparently extreme discomfort at the prospect of vesting bankruptcy courts with responsibility for determining whether "reasonably equivalent value" was received in cases like this one, nor is the suggestion well taken that doing so is an improper abdication. Those courts regularly make comparably difficult (and contestable) determinations about the "reasonably equivalent value" of assets transferred through other means than foreclosure sales, see, *e.g., Covey v. Commercial Nat. Bank,* 960 F.2d 657, 661–662 (CA7 1992) (rejecting creditor's claim that resale price may be presumed to be "reasonably equivalent value" when that creditor "seiz[es] an asset and sell[s] it for just enough to cover its loan (even if it would have been worth substantially ****1773** more as part of an ongoing enterprise)"); *In re Morris Communications NC, Inc.,* 914 F.2d 458 (CA4 1990) (for "reasonably equivalent value" purposes, worth of entry in cellular phone license "lottery" should be discounted to reflect probability of winning); cf. *In re Royal Coach Country, Inc.,* 125 B.R. 668, 673–674 (Bkrtcy.Ct.MD Fla.1991) (avoiding exchange of 1984 truck valued at $2,800 for 1981 car valued at $500), and there is every reason to believe that they, familiar with these cases (and with local conditions) as we are not, will give the term sensible content in evaluating particular transfers on foreclosure, cf. *United*

States v. Energy Resources Co., 495 U.S. 545, 549, 110 S.Ct. 2139, 2142, 109 L.Ed.2d 580 (1990); *NLRB v. Bildisco & Bildisco,* 465 U.S. 513, 527, 104 S.Ct. 1188, 1196, 79 L.Ed.2d 482 (1984); *Rosen v. Barclays Bank of N.Y.,* 115 B.R. 433 (EDNY 1990).[12] As in other § 548(a)(2) cases, a trustee seeking ***561** avoidance of a foreclosure-sale transfer must persuade the bankruptcy court that the price obtained on prebankruptcy transfer was "unreasonabl[y]" low, and as in other cases under the provision, the gravamen of such a claim will be that the challenged transfer significantly and needlessly diminished the bankruptcy estate, *i.e.,* that it extinguished a substantial equity interest of the debtor and that the foreclosing mortgagee failed to take measures which (consistently with state law, if not required by it) would have augmented the price realized.[13]

***562** Whether that enquiry is described as a search for a benchmark " 'fair' forced-sale price," *ante,* at 1762, or for the price that was reasonable under the circumstances, cf. *ante,* at 1762, n. 4, is ultimately, as the Court itself seems to acknowledge, see *ante,* at 1762, of no greater moment than whether the rule the Court discerns in the provision is styled an "exception," an "irrebuttable presumption," or a rule of *per se* validity. The majority seems to invoke these largely synonymous terms in service of its thesis that the provision's text is "ambiguous" (and therefore ripe for application of policy-based construction rules), but the question presented here, ****1774** whether the term "less than reasonably equivalent value" may be read to forestall all enquiry beyond whether state-law foreclosure procedures were adhered to, admits only two answers, and only one of these, in the negative, is within the "apparent authority," *ibid.* conferred on courts by the text of the Bankruptcy Code.[14]

C

What plain meaning requires and courts can provide, indeed, the policies underlying a national bankruptcy law fully ***563** support. This case is a far cry from the rare one where the effect of implementing the ordinary meaning of the statutory text would be "patent absurdity," see *INS v. Cardoza–Fonseca,* 480 U.S. 421, 452, 107 S.Ct. 1207, 1223, 94 L.Ed.2d 434 (1987) (SCALIA, J., concurring in judgment), or "demonstrably at odds with the intentions of its drafters," *United States v. Ron Pair Enterprises, Inc.,* 489 U.S. 235, 244, 109 S.Ct. 1026, 1032, 103 L.Ed.2d 290 (1989) (internal quotation marks omitted).[15] Permitting avoidance of procedurally regular foreclosure sales for low prices (and thereby returning a valuable asset to the bankruptcy estate) is plainly consistent with those policies of obtaining a maximum and equitable distribution for creditors and ensuring a "fresh start" for individual debtors, which the Court has often said are at the core of federal bankruptcy law. See *Stellwagen v. Clum,* 245 U.S. 605, 617, 38 S.Ct. 215, 218, 62 L.Ed. 507 (1918); *Williams v. United States Fidelity & Guaranty Co.,* 236 U.S. 549, 554–555, 35 S.Ct. 289, 290, 59 L.Ed. 713 (1915). They are not, of course, any less the policies of federal bankruptcy law simply because state courts will not, for a mortgagor's benefit, set aside a foreclosure sale for "price inadequacy" alone.[16] The unwillingness ***564** of the state courts to upset a foreclosure sale for that reason does not address the question of what "reasonably equivalent value" means in bankruptcy law, any more than the refusal of those same courts to set aside a contract for "mere inadequacy of consideration," see Restatement (Second) of Contracts § 79 (1981), would define the scope of the trustee's power to reject executory contracts. See 11 U.S.C. § 365 (1988 ed. and Supp. IV). On the contrary, a central premise of the bankruptcy avoidance powers is that what state law plainly allows ****1775** as acceptable or "fair," as between a debtor and a particular creditor, may be set aside because of its impact on other creditors or on the debtor's chances for a fresh start.

When the prospect of such avoidance is absent, indeed, the economic interests of a foreclosing mortgagee often stand in stark opposition to those of the debtor himself and of his other creditors. At a typical foreclosure sale, a mortgagee has no incentive to bid any more than the amount of the indebtedness, since any "surplus" would be turned over to the debtor (or junior lienholder), and, in some States, it can even be advantageous for the creditor to bid less and seek a deficiency judgment. See generally Washburn, The Judicial and Legislative Response to Price Inadequacy in Mortgage Foreclosure Sales, 53 S.Cal.L.Rev. 843, 847–851 (1980); Ehrlich, Avoidance of Foreclosure Sales as Fraudulent Conveyances: Accommodating State and Federal Objectives, 71 Va.L.Rev. 933, 959–962 (1985); G. Osborne, G. Nelson, & D. Whitman, Real Estate Finance Law § 8.3, p. 528 (1979). And where a property is obviously worth more than the amount of the indebtedness, the lending mortgagee's interests are served best if the foreclosure sale is poorly attended; then, the lender is more likely to take the property by bidding the amount of indebtedness, retaining for itself any profits from resale. While state foreclosure procedures may somewhat mitigate the potential for this sort of opportunism (by requiring for publication of notice, for example), it surely ***565** is plausible that Congress, in drafting the Bankruptcy Code, would find it intolerable that a debtor's assets be wasted and the bankruptcy estate diminished, solely to speed a mortgagee's recovery.

II

Confronted with the eminent sense of the natural reading, the Court seeks finally to place this case in a line of decisions, *e.g., Gregory v. Ashcroft,* 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991), in which we have held that something more than mere plain language is required.[17] Because the stability of title in real property may be said to be an "important" state interest, the Court suggests, see *ante,* at 1764, the statute must be presumed to contain an implicit foreclosure-sale exception, which Congress must override expressly or not at all. Our cases impose no such burden on Congress, however. To be sure, they do offer support for the proposition that when the Bankruptcy Code is truly silent or ambiguous, it should not be ***566** read as departing from previous practice, see, *e.g., Dewsnup v. Timm,* 502 U.S. 410, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992); *Butner v. United States,* 440 U.S. 48, 54, 99 S.Ct. 914, 917, 59 L.Ed.2d 136 (1979). But we have never required Congress to supply "clearer textual guidance" when the apparent meaning of the Bankruptcy Code's text is itself clear, as it is here. See *Ron Pair,* 489 U.S., at 240, 109 S.Ct., at 1029 ("[I]t is not appropriate or realistic to expect Congress to have explained with particularity each step it ****1776** took. Rather, as long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute"); cf. *Dewsnup, supra,* 502 U.S., at 434, 112 S.Ct., at 787 (SCALIA, J., dissenting) (Court should not "venerat[e] 'pre-Code law' " at the expense of plain statutory meaning).[18]

We have, on many prior occasions, refused to depart from plain Code meaning in spite of arguments that doing that would vindicate similar, and presumably equally "important," state interests. In *Owen v. Owen,* 500 U.S. 305, 111 S.Ct. 1833, 114 L.Ed.2d 350 (1991), for example, the Court refused to hold that the state "opt-out" policy embodied in § 522(b)(1) required immunity from avoidance under § 522(f) for a lien binding under Florida's exemption rules. We emphasized that "[n]othing in the text of § 522(f) remotely justifies treating the [state and federal] exemptions differently." 500 U.S., at 313, 111 S.Ct., at 1838. And in *Johnson v. Home State Bank,* 501 U.S. 78, 111 S.Ct. 2150, 115 L.Ed.2d 66 (1991), we relied on plain Code language to allow a debtor who had "stripped" himself of personal mortgage liability under Chapter 7 to reschedule the remaining indebtedness under Chapter 13, notwithstanding a plausible contrary argument based on Code structure and a complete dearth of precedent for the manoeuver under state law and prior bankruptcy practice.

***567** The Court has indeed given full effect to Bankruptcy Code terms even in cases where the Code would appear to have cut closer to the heart of state power than it does here. No "clearer textual guidance" than a general definitional provision was required, for example, to hold that criminal restitution could be a "debt" dischargeable under Chapter 13, see *Davenport,* 495 U.S., at 563–564, 110 S.Ct., at 2133 (declining to "carve out a broad judicial exception" from statutory term, even to avoid "hamper[ing] the flexibility of state criminal judges"). Nor, in *Perez v. Campbell,* 402 U.S. 637, 91 S.Ct. 1704, 29 L.Ed.2d 233 (1971), did we require an express reference to state highway safety laws before construing the generally worded discharge provision of the Bankruptcy Act to bar application of a state statute suspending the driver's licenses of uninsured tortfeasors.[19]

Rather than allow state practice to trump the plain meaning of federal statutes, cf. *Adams Fruit Co. v. Barrett,* 494 U.S. 638, 648, 110 S.Ct. 1384, 1390, 108 L.Ed.2d 585 (1990), our cases describe a contrary rule: whether or not Congress has used any special "pre-emptive" language, state regulation must yield to the extent it actually conflicts with federal law. This is no less true of laws enacted under Congress's power to "establish ... uniform Laws on the subject of Bankruptcies," U.S. Const., Art. I, § 8, cl. 4 than of those passed under its Commerce Clause power. See generally *Perez v. Campbell, supra;* cf. ***568** *id.,* at 651–652, 91 S.Ct., at 1712 (rejecting the "aberrational doctrine ... that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration"); *Cipollone v.* ****1777** *Liggett Group, Inc.,* 505 U.S. 504, 545, 546, 112 S.Ct. 2608, 2632, 2633, 120 L.Ed.2d 407 (1992) (SCALIA, J., concurring in judgment in part and dissenting in part) (arguing against a "presumption against ... pre-emption" of "historic police powers") (internal quotation marks omitted).

Nor, finally, is it appropriate for the Court to look to "field pre-emption" cases, see *ante,* at 1764–1765, to support the higher duty of clarity it seeks to impose on Congress. As written and as applied by the majority of Courts of Appeals to construe it, the disputed Code provision comes nowhere near working the fundamental displacement of the state law of foreclosure procedure that the majority's rhetoric conjures.[20] ***569** To the contrary, construing § 548(a)(2)(A) as authorizing avoidance of an insolvent's recent foreclosure-sale transfer in which "less than a reasonably equivalent value" was obtained is no more pre-emptive of state foreclosure procedures than the trustee's power to set aside transfers by marital dissolution decree, see *Britt v. Damson,* 334 F.2d 896 (CA9 1964), cert. denied, 379 U.S. 966, 85 S.Ct. 661, 13 L.Ed.2d 560 (1965); *In re Lange,* 35 B.R. 579 (Bkrtcy.Ct.Ed.Mo.1983), "pre-empts" state domestic relations law,[21] or the power to reject executory contracts, see 11 U.S.C. § 365, "displaces" the state law of voluntary obligation. While it is surely true that if the provision were accorded its plain meaning, some States (and many mortgagees) would take steps to diminish the risk that particular transactions would be set aside, such voluntary action should not be cause for dismay: it would advance core Bankruptcy Code purposes of augmenting the bankruptcy estate and improving the debtor's prospects for a "fresh start," without compromising lenders' state-law rights to move expeditiously against the property for the money owed. To the extent, in any event, that the respondents and their numerous *amici* are correct that the "important" policy favoring security of title should count more and the "important" bankruptcy policies should count less, Congress, and not this Court, is the appropriate body to provide a foreclosure-sale exception. See *Wolas,* 502 U.S., at 162, 112 S.Ct., at 533. See also S. 1358, 100th Cong., 1st Sess. (1987) (proposed amendment creating foreclosure-sale exception).

III

Like the Court, I understand this case to involve a choice between two possible statutory provisions: one authorizing ***570** the trustee to avoid "involuntar[y] ... transfers [including foreclosure sales] ... [for] less than a reasonably equivalent value," see 11 U.S.C. § 548(a), and another precluding such avoidance when "[a] secured party or third party purchaser ... obtains title to an interest of the debtor in property pursuant to a good faith prepetition foreclosure ... proceeding ****1778** ... permitting ... the realization of security upon default of the borrower," see S. 445, 98th Cong., 1st Sess., § 360 (1983). But that choice is not ours to make, for Congress made it in 1984, by enacting the former alternative into law and not the latter. Without some indication that doing so would frustrate Congress's clear intention or yield patent absurdity, our obligation is to apply the statute as Congress wrote it. Doing that in this case would produce no frustration or absurdity, but quite the opposite.

All Citations

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 Respondent Resolution Trust Corporation (RTC) acts in this case as receiver of Imperial Federal Savings Association (Imperial Federal), which was organized pursuant to a June 22, 1990, order of the Director of the Office of Thrift Supervision, and into which RTC transferred certain assets and liabilities of Imperial. The Director previously had appointed RTC as receiver of Imperial. For convenience we refer to all respondents other than RTC and Imperial as the private respondents.

2 Title 11 U.S.C. § 548 provides in relevant part:

"(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily—

"(1) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

"(2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

"(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation...."

3 We emphasize that our opinion today covers only mortgage foreclosures of real estate. The considerations bearing upon other foreclosures and forced sales (to satisfy tax liens, for example) may be different.

4 Our discussion assumes that the phrase "reasonably equivalent" means "approximately equivalent," or "roughly equivalent." One could, we suppose, torture it into meaning "as close to equivalent as can reasonably be expected"—in which event even a vast divergence from equivalent value would be permissible so long as there is good reason for it. On such an analysis, fair market value *could* be the criterion of equivalence, even in a forced-sale context; the forced sale would be the reason why gross inequivalence is nonetheless reasonable equivalence. Such word-gaming would deprive the criterion of all meaning. If "reasonably equivalent value" means only "as close to equivalent value as is reasonable," the statute might as well have said "reasonably infinite value."

5 We are baffled by the dissent's perception of a "patent" difference between zoning and foreclosure laws insofar as impact upon property value is concerned, *post,* at 1771–1772, n. 10. The only distinction we perceive is that the former constitute permanent restrictions upon use of the subject property, while the latter apply for a brief period of time and restrict only the manner of its sale. This difference says nothing about how significantly the respective regimes affect the property's value when they are operative. The dissent characterizes foreclosure rules as "merely procedural," and asserts that this renders them, unlike "substantive" zoning regulations, irrelevant in bankruptcy. We are not sure we agree with the characterization. But in any event, the cases relied on for this distinction all address creditors' attempts to claim the benefit of state rules of law (whether procedural or substantive) as property rights, in a bankruptcy proceeding. See *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.,* 484 U.S. 365, 370–371, 108 S.Ct. 626, 629–630, 98 L.Ed.2d 740 (1988); *Owen v. Owen,* 500 U.S. 305, 313, 111 S.Ct. 1833, 1837–1838, 114 L.Ed.2d 350 (1991); *United States v. Whiting Pools, Inc.,* 462 U.S. 198, 206–207, and nn. 14, 15, 103 S.Ct. 2309, 2314–2315, and nn. 14, 15, 76 L.Ed.2d 515 (1983). None of them declares or even intimates that state laws, procedural or otherwise, are irrelevant to prebankruptcy valuation questions such as that presented by § 548(a)(2)(A).

6 The only case cited by *Durrett* in support of its extension of fraudulent transfer doctrine, *Schafer v. Hammond,* 456 F.2d 15 (CA10 1972), involved a direct sale, not a foreclosure.

7 We are unpersuaded by petitioner's argument that the 1984 amendments to the Bankruptcy Code codified the *Durrett* rule. Those amendments expanded the definition of "transfer" to include "foreclosure of the debtor's equity of redemption," 11 U.S.C. § 101(54) (1988 ed., Supp. IV), and added the words "voluntarily or involuntarily" as modifiers of the term "transfer" in § 548(a). The first of these provisions establishes that foreclosure sales fall within the general definition of "transfers" that may be avoided under several statutory provisions, including (but not limited to) § 548. See § 522(h) (transfers of exempt property), § 544 (transfers voidable under state law), § 547 (preferential transfers), § 549 (postpetition transfers). The second of them establishes that a transfer may be avoided as fraudulent even if it was against the debtor's will. See *In re Madrid,* 725 F.2d 1197, 1199 (CA9 1984) (preamendment decision holding that a foreclosure sale is not a "transfer" under § 548). Neither of these consequences has any bearing upon the meaning of "reasonably equivalent value" in the context of a foreclosure sale.

Nor does our reading render these amendments "superfluous," as the dissent contends, *post,* at 1770. Prior to 1984, it was at least open to question whether § 548 could be used to invalidate even a *collusive* foreclosure sale, see *Madrid, supra,* at 1204 (Farris, J., concurring). It is no superfluity for Congress to clarify what had been at best unclear, which is what it did here by making the provision apply to involuntary as well as voluntary transfers and by including foreclosures within the definition of "transfer." See *infra,* at 1765–1766.

8 The dissent criticizes our partial reliance on *Gregory* because the States' authority to "defin[e] and adjus[t] the relations between debtors and creditors ... [cannot] fairly be called essential to their independence." *Post,* at 1775, n. 17 (internal quotation marks omitted). This ignores the fact that it is not state authority over debtor-creditor law *in general* that is at stake in this case, but the essential sovereign interest in the security and stability of title to land. See *American Land Co. v. Zeiss,* 219 U.S. 47, 60, 31 S.Ct. 200, 204–205, 55 L.Ed. 82 (1911).

1 I note, however, two preliminary embarrassments: first, the gloss on § 548(a)(2)(A) the Court embraces is less than entirely hypothetical. In the course of amending the Bankruptcy Code in 1984, see *infra,* at 1769, Congress considered, but did not enact, an amendment that said precisely what the majority now says the current provision means, *i.e.,* that the avoidance power is confined to foreclosures involving collusion or procedural irregularity. See S. 445, 98th Cong., 1st Sess., § 360 (1983). Even if one is careful not to attach too much significance to such a legislative nonoccurrence, it surely cautions against undue reliance on a different, entirely speculative congressional "omission." See *ante,* at 1761 (the statute "seemingly goes out of its way to avoid" using "fair market value"); but cf. *ante,* at 1765 (reasonably equivalent value will "continue" to have a meaning "similar to fair market value" outside the foreclosure-sale context).

In this case, such caution would be rewarded. While the assertedly "standard," *ante,* at 1761, phrase "fair market value" appears in more than 150 distinct provisions of the Tax Code, it figures in only two Bankruptcy Code provisions, one of which is entitled, suggestively, "Special tax provisions." See 11 U.S.C. § 346. The term of choice in the bankruptcy setting seems to be "value," unadorned and undefined, which appears in more than 30 sections of the Bankruptcy Code, but which is, with respect to many of them, read to mean "fair market value." See also § 549(c) ("present fair equivalent value"); § 506(a) ("value [is to] be determined in light of the purpose of the valuation and of the proposed disposition or use of such property"); S.Rep. No. 95–989, p. 54 (1978) U.S.Code Cong. & Admin.News 1978, pp. 5787, 5840 ("[M]atters [of valuation under § 361] are left to case-by-case interpretation and development.... Value [does not] mean, in every case, forced sale liquidation value or full going concern value. There is wide latitude between those two extremes ..."). To the extent, therefore, that this negative implication supplies ground to "suspect," see *ante,* at 1761, that Congress could not have meant what the statute says, such suspicion is misplaced.

2 The majority's statutory argument depends similarly heavily on the success of its effort to relegate "fair market value" to complete pariah status. But it is no short leap from the (entirely correct) observation that a property's fair market value will not be dispositive of whether "less than a reasonably equivalent value" was obtained on foreclosure to the assertion that market value has "no applicability," *ante,* at 1761, or is not "legitimate evidence," *ante,* at 1767 (emphasis added), of whether the statutory standard was met. As is explored more fully *infra,* the assessed value of a parcel of real estate at the time of foreclosure sale is not to be ignored. On the contrary, that figure plainly is relevant to the Bankruptcy Code determination, both because it provides a proper measure of the rights received by the transferee and because it is indicative of the extent of the debtor's equity in the property, an asset which, but for the prebankruptcy transfer under review, would have been available to the bankruptcy estate, see *infra,* at 1773–1775.

It is also somewhat misleading, similarly, to suggest that "[n]o one would pay as much," *ante,* at 1762, for a foreclosed property as he would for the same real estate purchased under leisurely, market conditions. Buyers no doubt hope for bargains at foreclosure sales, but an investor with a million dollars cash in his pocket might be ready to pay "as much" for a desired parcel of property on forced sale, at least if a rival, equally determined millionaire were to appear at the same auction. The principal reason such sales yield low prices is not so much that the properties become momentarily *"worth less," Ibid.* (on the contrary, foreclosure-sale purchasers receive a bundle of rights essentially similar to what they get when they buy on the market) or that foreclosing mortgagees are under the compulsion of state law to make no more than the most desultory efforts to encourage higher bidding, but rather that such free-spending millionaires are in short supply, and those who do exist are unlikely to read the fine print which fills the "legal notice" columns of their morning newspaper. Nor, similarly, is market value justly known as the "antithesis" of foreclosure-sale price, for the important (if intuitive) reason that properties with higher market values can be expected to sell for more on foreclosure.

3 Indeed, it is striking that this is what the Court says the statute (probably) does mean, with respect to almost every transfer other than a sale of property upon foreclosure. See *ante,* at 1765.

4 The Court protests, *ante,* at 1766, that its formulation, see *ante,* at 1760, deviates only subtly from the reading advanced here and purports not to disagree that the statute compels an enquiry "into the relationship of the value received and the worth of the property transferred," *ante,* at 1766. Reassuring as such carefully chosen words may sound, they cannot obscure the fact that the "comparison" the majority envisions is an empty ritual. See n. 10, *infra.*

5 The Court notes correctly that fraudulent conveyance laws were directed first against insolvent debtors' passing assets to friends or relatives, in order to keep them beyond their creditors' reach (the proverbial "Elizabethan deadbeat who sells his sheep to his brother for a pittance," see Baird & Jackson, Fraudulent Conveyance Law and Its Proper Domain, 38 Vand.L.Rev. 829, 852 (1985)), and then later against conduct said to carry the "badges" of such misconduct, but bankruptcy law had, well before 1984, turned decisively away from the notion that the debtor's state of mind, and not the objective effects on creditors, should determine the scope of the avoidance power. Thus, the 1938 Chandler Act, Bankruptcy Revision, provided that a transfer could be set aside without proving any intent to "hinder, delay, or defraud," provided that the insolvent debtor obtained less than "fair consideration" in return, see 11 U.S.C. § 107(d)(2) (1976), and the 1978 Bankruptcy Code eliminated scrutiny of the transacting parties' "good faith." Cf. 11 U.S.C. § 107(d)(1)(e) (1976). At the time when bankruptcy law was more narrowly concerned with debtors' turpitude, moreover, the available "remedies" were strikingly different, as well. See, *e.g.,* 21 Jac. I., ch. 19, § 6 (1623), 4 Statutes of the Realm 1228 (insolvent debtor who fraudulently conceals assets is subject to have his ear nailed to pillory and cut off).

6 As noted at n. 7, an earlier version of the Senate bill contained a provision that would have added to § 548 the conclusive presumption the Court implies here. See S. 445, 98th Cong., 1st Sess., § 360 (1983) ("A secured party or third party purchaser who obtains title to an interest of the debtor in property pursuant to a good faith prepetition foreclosure, power of sale, or other proceeding or provision of nonbankruptcy law permitting or providing for the realization of security upon default of the borrower under a mortgage, deed of trust, or other security agreement takes for reasonably equivalent value within the meaning of this section"). The provision was deleted from the legislation enacted by Congress.

7 Evidently, many States take a less Panglossian view than does the majority about the prices paid at sales conducted in accordance with their prescribed procedures. If foreclosure-sale prices truly represented what properties are "worth," *ante,* at 1762, or their "fair and proper price," *ante,* at 1765, it would stand to reason that deficiency judgments would be awarded simply by calculating the difference between the debt owed and the "value," as established by the sale. Instead, in those jurisdictions permitting creditors to seek deficiency judgments it is quite common to require them to show that the foreclosure price roughly approximated the property's (appraised) value. See, *e.g.,* Tex.Prop.Code Ann. §§ 51.003–51.005 (Supp.1992); see generally *Gelfert v. National City Bank of N.Y.,* 313 U.S. 221, 61 S.Ct. 898, 85 L.Ed. 1299 (1941); cf. *id.,* at 233, 61 S.Ct., at 902 ("[T]he price which property commands at a forced sale may be hardly even a rough measure of its value").

8 That is not the only aspect of the majority's approach that is hard to square with the amended text. By redefining "transfer" in § 101, Congress authorized the trustee to avoid any "foreclosure of the equity of redemption" for "less than a reasonably equivalent value." In light of the fact, see, *e.g.,* Lifton, Real Estate in Trouble: Lender's Remedies Need an Overhaul, 31 Bus.Law 1927, 1937 (1976), that most foreclosure properties are sold (at noncollusive and procedurally unassailable sales, we may presume) for the precise amount of the outstanding indebtedness, when some (but by no means all) are worth more, see generally Wechsler, Through the Looking Glass: Foreclosure by Sale as *De Facto* Strict Foreclosure—An Empirical Study of Mortgage Foreclosure and Subsequent Resale, 70 Cornell L.Rev. 850 (1985), it seems particularly curious that Congress would amend a statute to recognize that a debtor "transfers" an "interest in property," when the equity of redemption is foreclosed, fully intending that the "reasonably equivalent value" of that interest would, in the majority of cases, be presumed conclusively to be zero.

To the extent that the Court believes the amended § 548(a)(2)(A) to be addressed to "collusive" sales, meanwhile, a surprisingly indirect means was chosen. Cf. 11 U.S.C. § 363(n) (authorizing trustee avoidance of postpetition sale, or, in the alternative, recovery of the difference between the "value" of the property and the "sale price," when the "sale price was controlled by an agreement"). Cf. *ante,* at 1761 (citing *Chicago v. Environmental Defense Fund,* 511 U.S. 328, 338, 114 S.Ct. 1588, 1593, 128 L.Ed.2d 302 (1994)).

9 Indeed, the Court candidly acknowledges that the proliferation of meanings may not stop at two: not only does "reasonably equivalent value" mean one thing for foreclosure sales and another for other transfers, but tax sales and other transactions may require still other, unspecified "benchmark[s]." See *ante,* at 1761, and n. 3.

10 The Court's somewhat mischievous efforts to dress its narrowly procedural gloss in respectable, substantive garb, see *ante,* at 1761–1762, 1765–1766, make little sense. The majority suggests that even if the statute must be read to require a comparison, the one it compels dooms the trustee always to come up short. A property's "value," the Court would have us believe, should be determined with reference to a State's rules governing creditors' enforcement of their rights, in the same fashion that it might encompass a zoning rule governing (as a matter of state law) a neighboring landowner's entitlement to build a gas station. But the analogy proposed ignores the patent difference between these two aspects of the "regulatory background," *ante,* at 1762: while the zoning ordinance would reduce the value of the property "to the world," foreclosure rules affect not the price any purchaser "would pay," *Ibid.* but rather the means by which the mortgagee is permitted to extract its entitlement

from the entire "value" of the property.

Such distinctions are a mainstay of bankruptcy law, where it is commonly said that creditors' "substantive" state law rights "survive" in bankruptcy, while their "procedural" or "remedial" rights under state debtor-creditor law give way, see, *e.g., United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.,* 484 U.S. 365, 370–371, 108 S.Ct. 626, 629–630, 98 L.Ed.2d 740 (1988) (refusing to treat "right to immediate foreclosure" as an "interest in property" under applicable nonbankruptcy law); *Owen v. Owen,* 500 U.S. 305, 111 S.Ct. 1833, 114 L.Ed.2d 350 (1991) (bankruptcy exemption does not incorporate state law with respect to liens); *United States v. Whiting Pools, Inc.,* 462 U.S. 198, 206–207, 103 S.Ct. 2309, 2314, 76 L.Ed.2d 515 (1983); see also *Gelfert v. National City Bank of N.Y.,* 313 U.S., at 234, 61 S.Ct., at 903 ("[T]he advantages of a forced sale" are not "a ... property right" under the Constitution). And while state foreclosure rules reflect, *inter alia,* an understandable judgment that creditors should not be forced to wait indefinitely as their defaulting debtors waste the value of loan collateral, bankruptcy law affords mortgagees distinct and presumably adequate protections for their interest, see 11 U.S.C. §§ 362(d), 548(c), 550(d)(1); *Wright v. Union Central Life Ins. Co.,* 311 U.S. 273, 278–279, 61 S.Ct. 196, 199–200, 85 L.Ed. 184 (1940), along with the general promise that the debtor's estate will, effectively, be maximized in the interest of creditors.

The majority professes to be "baffled," *ante,* at 1762, n. 5, by this common-sense distinction between state zoning laws and state foreclosure procedures. But a zoning rule is not merely "price-affecting," *ante,* at 1762: it affects the property's value (*i.e.,* the price for which any transferee can expect to resell). State-mandated foreclosure procedures, by contrast, might be called "price-affecting," in the sense that adherence solely to their minimal requirements will no doubt keep sale prices low. But state rules hardly forbid mortgagees to make efforts to encourage more robust bidding at foreclosure sales; they simply fail to furnish sellers any reason to do so, see *infra.*

11 Indeed, it is not clear from its opinion that the Court has "come to grips," *ante,* at 1761, with the reality that "involuntary" transfers occur outside the real property setting, that legally voluntary transfers can be involuntary in fact, and that, where insolvent debtors on the threshold of bankruptcy are concerned, transfers for full, "fair market" price are more likely the exception than the rule. On the Court's reading, for example, nothing would prevent a debtor who deeded property to a mortgagee "in lieu of foreclosure" prior to bankruptcy from having the transaction set aside, under the "ordinar[y]," *ante,* at 1765, substantive standard.

12 It is only by renewing, see *ante,* at 1766, its extreme claim, but see n. 2, *supra,* that market value is wholly irrelevant to the analysis of foreclosure-sale transfer (and that bankruptcy courts are debarred from even "referring" to it) that the Court is able to support its assertion that evaluations of such transactions are somehow uniquely beyond their ken.

The majority, as part of its last-ditch effort to salvage some vitality for the provision, itself would require bankruptcy judges to speculate as to the price "that would have been received if the foreclosure sale had proceeded according to [state] law." *ante,* at 1765; cf. *ante,* at 1762 (expressing skepticism about judicial competence to determine "such a thing" as a "fair" forced-sale price).

13 In this regard and in its professions of deference to the processes of local self-government, the Court wrongly elides any distinction between what state law commands and what the States permit. While foreclosure sales "under state law" may typically be sparsely attended and yield low prices, see *infra,* at 1775, these are perhaps less the result of state law "strictures," *ante,* at 1761, than of what state law fails to supply, incentives for foreclosing lenders to seek higher prices (by availing themselves of advertising or brokerage services, for example). Thus, in judging the reasonableness of an apparently low price, it will surely make sense to take into account (as the Court holds a bankruptcy court is forbidden to) whether a mortgagee who promptly resold the property at a large profit answers, "I did the most that could be expected of me" or "I did the least I was allowed to."

I also do not join my colleagues in their special scorn for the "70% rule" associated with *Durrett v. Washington Nat. Ins. Co.,* 621 F.2d 201 (CA5 1980), which they decry, *ante,* at 1762, as less an exercise in statutory interpretation than one of "policy determinatio[n]." Such, of course, it may be, in the limited sense that the statute's text no more mentions the 70% figure than it singles out procedurally regular foreclosure sales for the special treatment the Court accords them. But the *Durrett* "rule," as its expositor has long made clear, claims only to be a description of what foreclosure prices have, in practice, been found "reasonabl[e]," and as such, it is consistent (as the majority's "policy determination" is not), with the textual directive that one value be compared to another, the transfer being set aside when one is unreasonably "less than" the other. To the extent, moreover, that *Durrett* is said to have announced a "rule," it is better understood as recognizing a "safe harbor" or affirmative defense for bidding mortgagees or other transferees who paid 70% or more of a property's appraised value at the time of sale.

14 The Court's criticism, *ante,* at 1765–1767, deftly conflates two distinct questions: is the price on procedurally correct and noncollusive sale presumed irrebuttably to be reasonably equivalent value (the question before us) and, if not, what are the criteria (a question not raised here but explored by courts that have rejected the irrebuttable presumption)? What is "plain" is the answer to the first question, thanks to the plain language, whose meaning is confirmed by policy and statutory history. The answer to the second may not be plain in the sense that the criteria might be self-evidence, see n. 13, *supra* but want of self-evidence hardly justifies retreat from the obvious answer to the first question. Courts routinely derive criteria, unexpressed in a statute, to implement standards that are statutorily expressed, and in a proper case this Court could (but for the majority's decision) weigh the relative merits of the subtly different approaches taken by courts that have rejected the irrebuttable presumption.

15 Tellingly, while the Court's opinion celebrates fraudulent conveyance law and state foreclosure law as the "twin pillars" of creditor-debtor regulation, it evinces no special appreciation of the fact that this case arises under the Bankruptcy Code, which, in maintaining the national system of credit and commerce, embodies policies distinct from those of state debtor-creditor law, see generally *Stellwagen v. Clum,* 245 U.S. 605, 617, 38 S.Ct. 215, 218, 62 L.Ed. 507 (1918), and which accordingly endows trustees with avoidance power beyond what state law provides, see *Board of Trade of Chicago v. Johnson,* 264 U.S. 1, 10, 44 S.Ct. 232, 234, 68 L.Ed. 533 (1924); *Stellwagen, supra,* 245 U.S. at 617, 38 S.Ct. at 218; 11 U.S.C. §§ 541(a), 544(a).

16 Although the majority accurately states this " 'black letter' " law, it also acknowledges that courts will avoid a foreclosure sale for a price that "shock[s] the conscience," see *ante,* at 1763 (internal quotation marks omitted), a standard that has been invoked to justify setting aside sales yielding as much as 87% of appraised value. See generally Washburn, The Judicial and Legislative Response to Price Inadequacy in Mortgage Foreclosure Sales, 53 S.Cal.L.Rev. 843, 862–870 (1980). Moreover, while price inadequacy "alone" may not be enough to set aside a sale, such inadequacy will often induce a court to undertake a sort of "strict scrutiny" of a sale's compliance with state procedures. See, *e.g., id.,* at 861.

17 The Court dangles the possibility that *Gregory* itself is somehow pertinent to this case, but that cannot be so. There, invoking principles of constitutional avoidance, we recognized a "plain statement" rule, whereby Congress could supplant state powers "reserved under the Tenth Amendment" and "at the heart of representative government," only by making its intent to do so unmistakably clear. Unlike the States' authority to "determine the qualifications of their most important government officials," 501 U.S., at 463, 111 S.Ct., at 2402 (*e.g.,* to enforce a retirement age for state judges mandated by the State Constitution, at issue in *Gregory*), the authority of the States in defining and adjusting the relations between debtors and creditors has never been plenary, nor could it fairly be called "essential to their independence." In making the improbable contrary assertion, the Court converts a stray phrase in *American Land Co. v. Zeiss,* 219 U.S. 47, 31 S.Ct. 200, 55 L.Ed. 82 (1911), which upheld against substantive due process challenge the power of a State to legislate with respect to land titles (California's effort to restore order after title records had been destroyed in the calamitous 1906 San Francisco earthquake) into a pronouncement about the allocation of responsibility between the National Government and the States. Cf. *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 546, 112 S.Ct. 2608, 2633, 120 L.Ed.2d 407 (1992) (SCALIA, J., concurring in judgment in part and dissenting in part) (emphasizing the inapplicability of "clear-statement" rules to

ordinary pre-emption cases).

18 Even if plain language is insufficiently "clear guidance" for the Court, further guidance is at hand here. The provision at hand was amended in the face of judicial decisions driven by the same policy concerns that animate the Court, to make plain that foreclosure sales and other "involuntary" transfers are within the sweep of the avoidance power.

19 Only over vigorous dissent did the Court read the trustee's generally worded abandonment power, 11 U.S.C. § 554, as not authorizing abandonment "in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards." *Midlantic Nat. Bank v. New Jersey Dept. of Environmental Protection,* 474 U.S. 494, 505, 106 S.Ct. 755, 760, 88 L.Ed.2d 859 (1986); cf. *id.,* at 513, 106 S.Ct., at 765 (REHNQUIST, J., dissenting) ("Congress knew how to draft an exception covering the exercise of 'certain' police powers when it wanted to"); cf. also L. Cherkis & L. King, Collier Real Estate Transactions and the Bankruptcy Code, p. 6–24 (1992) (post-*Midlantic* cases suggest that "if the hazardous substances on the property do not pose immediate danger to the public, and if the trustee has promptly notified local environmental authorities of the contamination and cooperated with them, abandonment may be permitted").

20 Talk of " 'radica[l] adjust[ments to] the balance of state and national authority,' " *ante,* at 1764, notwithstanding, the Court's submission with respect to "displacement" consists solely of the fact that some private companies in *Durrett* jurisdictions have required purchasers of title insurance to accept policies with "specially crafted exceptions from coverage in many policies issued for properties purchased at foreclosure sales." *ante,* at 1765 (citing Cherkis & King, *supra,* at 5–18 to 5–19). The source cited by the Court reports that these exceptions have been demanded when mortgagees are the purchasers, but have not been required in policies issued to third-party purchasers or their transferees, Cherkis & King, *supra,* at 5–18 to 5–19, and that such clauses have neither been limited to *Durrett* jurisdictions, nor confined to avoidance under federal bankruptcy law. See Cherkis & King, *supra,* at 5–10 (noting one standard exclusion from coverage for "[a]ny claim, which arises ... by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws"). Nothing in the Bankruptcy Code, moreover, deprives the States of their broad powers to regulate directly the terms and conditions of title insurance policies.

The "federally created cloud" on title seems hardly to be the Damoclean specter that the Court makes it out to be. In the nearly 14 years since the *Durrett* decision, the bankruptcy reports have included a relative handful of decisions actually setting aside foreclosure sales, nor do the States, either inside or outside *Durrett* jurisdictions, seem to have ventured major changes in the "diverse networks of ... rules governing the foreclosure process." See *ante,* at 1763.

21 But cf. *Wetmore v. Markoe,* 196 U.S. 68, 25 S.Ct. 172, 49 L.Ed. 390 (1904) (alimony is not a "debt" subject to discharge under the Bankruptcy Act).

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37 F.4th 859
United States Court of Appeals,
Second Circuit.

Brian L. GUNSALUS, Gliee V. Gunsalus, Plaintiffs-Appellees,
v.
COUNTY OF ONTARIO, NEW YORK, Defendant-Appellant.*
No. 20-3865-bk
|
August Term, 2021
|
Argued December 16, 2021
|
Decided June 27, 2022

Synopsis
Background: Chapter 13 debtors brought separate adversary proceeding to avoid transfer of title of their home to county-creditor, which was occasioned by strict foreclosure of tax lien on home. The United States Bankruptcy Court for the Western District of New York, Paul R. Warren, J., 576 B.R. 302, granted county-creditor's motion to dismiss for failure to state claim. Debtors appealed. The United States District Court for the Western District of New York, Frank P. Geraci, Jr., Chief Judge, 588 B.R. 671, reversed and remanded and instructed Bankruptcy Court to determine whether transfer should be set aside as constructively fraudulent. The Bankruptcy Court, Warren, J., 613 B.R. 1 and 2020 WL 833045, entered judgment avoiding transfer as fraudulent conveyance on ground that debtors did not receive reasonably equivalent value. The United States District Court for the Western District of New York, Frank P. Geraci, Jr., Chief Judge, 2020 WL 3469692, granted county-creditor's motion to certify direct appeal.

Holdings: The Court of Appeals, Parker, Circuit Judge, held that:

[1] debtors had standing to bring adversary proceeding seeking avoidance of transfer, and

[2] county-creditor was not entitled to presumption that debtor received reasonably equivalent value for transfer of home in exchange for satisfaction of tax debt.

Affirmed.

West Headnotes (7)

[1] **Federal Courts**—Questions of Law in General

The Court of Appeals reviews legal determinations de novo.

[2] **Bankruptcy**Liens Avoidable

Bankruptcy Code section stating that certain exempted property remains liable for tax lien did not deprive Chapter 13 debtors of standing, which they possessed as debtors eligible to claim federal homestead exemption, to bring adversary proceeding seeking to avoid transfer of their home to county-creditor that was occasioned by strict foreclosure of tax lien on home; in seeking avoidance of transfer, debtors would remain liable for unpaid taxes even if their action was successful, and Chapter 13 plan provided that county would retain its lien until its secured claim for tax arrears was paid in full. 11 U.S.C.A. §§ 522(c)(2)(B), 522(h).

1 Cases that cite this headnote

[3] **Bankruptcy**Fraudulent conveyances in general

The Bankruptcy Code empowers debtors to set aside a transfer of property if (1) the debtor had an interest in property; (2) a transfer of that interest occurred on or within two years of the bankruptcy petition; (3) the debtor was insolvent at the time of the transfer or became insolvent as a result of the transfer; and (4) the debtor received less than a reasonably equivalent value in exchange for such transfer. 11 U.S.C.A. § 548(a).

[4] **Bankruptcy**"Reasonably equivalent value" in general

To decide whether a transfer is for "reasonably equivalent value" for avoidance purposes, courts consider whether debtor has received value that is substantially comparable to worth of transferred property. 11 U.S.C.A. § 548(a).

[5] **Bankruptcy**Price at foreclosure, judicial, or trustee sale
BankruptcyFraudulent transfers

In Chapter 13 debtors' adversary proceeding to avoid, as constructively fraudulent, transfer of home to county-creditor occasioned by strict foreclosure of tax lien on home, county-creditor was not entitled to presumption that debtors received reasonably equivalent value, because unlike mortgage foreclosure proceedings, strict foreclosure proceedings offered far fewer debtor protections to ensure that debtors received reasonably equivalent value, and extending presumption to strict foreclosure proceedings could potentially result in windfall for creditors if value of home greatly exceeded tax liability. 11 U.S.C.A. § 548(a).

1 Cases that cite this headnote

[6] **Bankruptcy**"Reasonably equivalent value" in general

A county's legitimate interest in tax collection cannot overcome Congress' policy choice that "reasonably equivalent value" must be obtained for a transfer of a debtor's property in the bankruptcy context. 11 U.S.C.A. § 548(a).

[7] **Bankruptcy**Fraudulent transfers

In the context of transfer avoidance in bankruptcy, there is a strong presumption of not allowing a secured creditor to take more than its interest. 11 U.S.C.A. § 548(a).

***861** Appeal from the United States District Court for the Western District of New York, No. 20-cv-6134, Frank P. Geraci, Jr., Chief Judge, Presiding.

Attorneys and Law Firms

Kari A. Talbott (Mark Wattenberg, on the brief), Legal Assistance of Western New York, Inc., for Plaintiffs-Appellees.

Jason S. DiPonzio, Jason S. DiPonzio, P.C., for Defendant-Appellant.

Before: CABRANES, PARKER, and LEE, Circuit Judges.

Barrington D. Parker, Circuit Judge:

BACKGROUND

This case arises from the foreclosure of a tax lien on a home in Ontario County, New York, owned by a married couple, Brian and Gliee Gunsalus, which resulted in the loss of title to their home. Following the foreclosure, the couple filed for protection under Chapter 13 of the Bankruptcy Code and filed a complaint seeking to avoid the loss of their home on the grounds that it was a fraudulent conveyance. The Bankruptcy Court set aside the transfer, and the County appeals, raising two questions. The first is whether the Gunsaluses had standing to bring the avoidance proceeding. The second is whether the transfer effected by Ontario County in foreclosing on the lien was entitled to the presumption of having yielded "reasonably equivalent value" under Section 548 of the Bankruptcy Code. We answer yes and no, respectively.

The property in question is a modest family home. Mrs. Gunsalus has lived there her entire life and for the past fifteen years she and Mr. Gunsalus have lived there with their disabled adult son. They owned the home free and clear of mortgages. Due to a temporary reduction in Mr. Gunsalus' wages, the couple was unable to pay their real estate taxes, and the property became subject to a tax lien in the amount of unpaid taxes, $1,290.

After the lien remained unpaid for a number of months, the County instituted proceedings pursuant to Article 11 of New York's Real Property Tax Law ("RPTL") to enforce the lien. *See* RPTL §§ 1120 *et seq.* The County first included the property on the "List of Delinquent Taxes" filed in the County Clerk's Office. *See id.* § 1122. The County then filed a petition that commenced an *in rem* tax foreclosure action.

The Gunsaluses answered the petition and the County, in turn, moved for summary judgment. The Gunsaluses opposed that motion and cross-moved for an extension of time to pay the overdue taxes. The Ontario County Supreme Court denied the cross-motion and granted the County's motion. In June 2016, the Ontario County Supreme Court entered a final judgment of foreclosure awarding the County possession of, and title to, the home. The Gunsaluses were permitted to continue residing in the property pending the outcome of this litigation.

***862** In May 2017, the County scheduled an auction of the property, which was sold to a third party for $22,000. The unpaid taxes, as noted, had amounted to $1,290. Pursuant to Article 11, the County pocketed the difference ($20,710), which meant that the Gunsaluses were required to forfeit to the County all of their accumulated equity.

These procedures, authorized by Article 11, are known as "strict foreclosure." Under "strict foreclosure," a creditor (here the County) asks the court to set a deadline for payment of a debt (here unpaid taxes) secured by the tax lien. If the lien is not paid by the deadline, as occurred here, the court enters an order transferring title and possession of the property to the creditor. There is no foreclosure sale. Instead, the transfer occurs by court order and the transferee can then sell the property, as the County did.

Approximately three weeks before the auction, the Gunsaluses filed for protection under Chapter 13 of the Bankruptcy Code. To qualify under Chapter 13, a debtor must present a plan that, among other things, provides "adequate protection" to secured creditors like the County. Moreover, under Chapter 13, the County retains its lien until the tax arrears is paid in full. *See* 11 USC § 1325(a)(5)(B)(i)(I). Accordingly, the Gunsaluses' Chapter 13 plan provided that the County would receive all delinquent real estate taxes plus 12% interest. The Gunsaluses have made all delinquent tax payments, and they have continued to pay the new property taxes that have accrued since the judgment of foreclosure. During the bankruptcy proceedings, the Gunsaluses sought to avail themselves of the federal homestead exemption under Section 522(d)(1), which allows a debtor to exclude a home from the bankruptcy estate.

Shortly after the Chapter 13 filing, the Gunsaluses commenced a proceeding in Bankruptcy Court to set aside the transfer of their home to the County on the grounds that it was a fraudulent conveyance under Sections 548 and 522 of the Code. To establish a fraudulent conveyance, a debtor must prove, among other things, that the debtor received less than a reasonably equivalent value in exchange for the transfer. *See* 11 U.S.C. § 548(a).

The Bankruptcy Court dismissed the complaint. Relying on the United States Supreme Court's opinion in *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994), the Bankruptcy Court held that a tax lien foreclosure proceeding conducted in compliance with Article 11 of the RPTL, like the mortgage foreclosure at issue in *BFP*, "is conclusively presumed to have provided reasonably equivalent value for purposes of 11 U.S.C. § 548(a)(1)(B)(i)." App'x 121.

On appeal, the District Court reversed. It reasoned that the mortgage foreclosure procedures at issue in *BFP* differed in material respects from the tax foreclosure procedures in the RPTL, explaining that

> [t]he Court in *BFP* expressly stated that state foreclosure laws had evolved to "avoid the draconian consequences of strict foreclosure," ... but the RPTL has not. Unlike the foreclosure law in *BFP* and the "typical" state laws that the Supreme Court described before reaching its holding, the RPTL is a strict foreclosure regime that does not provide for a *pre-seizure* auction

> whereby the debtor may recovery equity. This difference between the RPTL and the state laws the *BFP* Court considered is significant to fraudulent conveyance analysis.

App'x 11 (footnote omitted). The District Court remanded the case to the Bankruptcy Court for trial on the fraudulent conveyance claim, where the Gunsaluses prevailed. The Bankruptcy Court found that ***863** the Gunsaluses had met their burden of proving that the transfer of their home worth at least $22,000 in exchange for satisfaction of the $1,290 tax debt owed Ontario County was, among other things, not for "reasonably equivalent value."[1]

[1]This appeal followed. *See* 28 U.S.C. § 158(d)(1). We review legal determinations *de novo*. *See In re Anderson*, 884 F.3d 382, 387 (2d Cir. 2018).

DISCUSSION

The County seeks reversal on two grounds. First, the County argues that the Gunsaluses lack standing to challenge the transfer of their property. Secondly, the County argues that the District Court erred by refusing to extend the holding of *BFP* from the mortgage foreclosure regime at issue there to the tax lien foreclosure regime at issue here.

I

[2]We first turn to the County's contention that 11 U.S.C. § 522(c)(2)(B) of the Code deprived the Gunsaluses of standing to bring the avoidance proceeding. We review this issue *de novo*. *See Bank Brussels Lambert v. Coan (In Re AROChem Corp.)*, 176 F.3d 610, 620 (2d Cir. 1999).

Section 522 of the Code authorizes debtors to exempt certain transfers of property. *See* 11 U.S.C. § 522. In Bankruptcy Court, the Gunsaluses claimed the federal homestead exemption, which allows a debtor to exempt a home from the bankruptcy estate. *See id.* § 522(d)(1). The Code provides that debtors who are eligible for the federal homestead exemption have standing to bring avoidance actions. *See id.* § 522(h); *Deel Rent-A-Car, Inc. v. Levine*, 721 F.2d 750, 754 (11th Cir. 1983).

The Code also provides, however, that exempted property is subject to certain limitations. Under Section 522(c)(2)(B), for example, certain exempted property remains liable for a tax lien:

> Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose ... before the commencement of the case, except ...
>
> (2) a debt secured by a lien that

is—

> (B) a tax lien, notice of which is properly filed.

The County contends that this Section renders the Gunsaluses ineligible for the federal homestead exemption and deprives them of standing. We disagree. Section 522(c)(2)(B) is straightforward. It merely requires that the Gunsaluses—who seek to avoid the transfer of their home and *not* to avoid paying off the tax lien on that home—remain liable for the unpaid taxes even if the fraudulent conveyance action succeeds.

The Gunsaluses' Chapter 13 plan achieves just that result. In accordance with 11 U.S.C § 1325, the plan provides that the County retains its lien until its secured claim for tax arrears is paid in full. The plan affords the Gunsaluses five years to pay their delinquent real estate taxes in full and, as noted, they are paying off that obligation in accordance with the plan.

The County thus incorrectly interprets Section 522(c)(2)(B) as barring the Gunsaluses from claiming the federal homestead exemption, when it merely provides that exempt property remains liable for a tax lien. They are not, as the County would ***864** have it, attempting to avoid paying the tax lien; they are attempting to avoid a transfer of the property. Accordingly, Section 522(c)(2)(B) does not deprive the Gunsaluses of standing under Section 522(h).

II

A

[3]Next, the County challenges the District Court's holding that the forfeiture of the Gunsaluses' home is not entitled to the presumption of an exchange for "reasonably equivalent value" under Section 548(a). The Bankruptcy Code empowers debtors to set aside a transfer of property if (1) the debtor had an interest in property; (2) a transfer of that interest occurred on or within two years of the bankruptcy petition; (3) the debtor was insolvent at the time of the transfer or became insolvent as a result of the transfer; and (4) the debtor received "less than a reasonably equivalent value in exchange for such transfer[,]" 11 U.S.C. § 548(a); *see id.* § 522(h). The parties agree that this case concerns only the fourth element. *See id.* § 548(a)(1)(B)(i).

[4]Of the three statutory terms—"reasonably," "equivalent," and "value"—only the last is defined. "Value" means, for purposes of Section 548, "property, or satisfaction or securing of a ... debt of the debtor," 11 U.S.C. § 548(d)(2)(A). *See BFP*, 511 U.S. at 535-36, 114 S.Ct. 1757. To decide whether a transfer is for "reasonably equivalent value," courts consider "whether the debtor has

received value that is substantially comparable to the worth of the transferred property." *Id.* at 548, 114 S.Ct. 1757. Were we writing on a clean slate, we would easily conclude that the transfer here is not entitled to the legal presumption of being in exchange for "reasonably equivalent value." Common sense dictates that receipt of $1,290 for a property that was sold for $22,000 fails the "reasonably equivalent value" test. But the County contends that this approach does not resolve this appeal because in the mortgage foreclosure context, the Supreme Court in *BFP* weighed in on the meaning of "reasonably equivalent value."

In *BFP*, the debtor, a partnership formed to buy a home in California, defaulted on its home loan payments. *Id.* at 533, 114 S.Ct. 1757. The home later sold at a mortgage foreclosure sale for $433,000. *Id.* at 533-34, 114 S.Ct. 1757. The debtor alleged that the home was actually valued at $725,000 and therefore challenged the sale as constructively fraudulent because the $433,000 it received was not, in the debtor's view, "reasonably equivalent" to the $725,000 it alleged the home was worth. *Id.* at 534, 114 S.Ct. 1757.

The Supreme Court rejected that argument. It held that when a mortgage foreclosure sale is conducted in compliance with state law, the price received at that sale is the worth of the home—and, consequently, is "reasonably equivalent value." *Id.* at 545, 114 S.Ct. 1757. In reaching this result, the Court emphasized that over the years, many state mortgage foreclosure laws had evolved from a system of strict foreclosures to one of foreclosures by sale. *See id.* at 541-42, 114 S.Ct. 1757. Under the strict foreclosure regime (like that of RPTL Article 11), when a debtor had failed to make past due mortgage payments, after a certain time period, his entire interest in the property was forfeited, regardless of any accumulated equity. *Id.* at 541, 114 S.Ct. 1757. By contrast, foreclosures by sale—such as the sale in *BFP*—ensured that (1) foreclosures would occur by sale, (2) the proceeds of that sale would be used to satisfy the debt, and (3) any surplus over the debt would be refunded to the debtor. *See id.* Foreclosures by sale, the Court noted, emerged to "avoid[ ] the draconian consequences of strict foreclosure." ***865** *Id.* "Since then," the Court went on, "States have created diverse networks of judicially and legislatively crafted rules governing the foreclosure process, to achieve what each of them considers the proper balance between the needs of lenders and borrowers." *Id.* at 541-42, 114 S.Ct. 1757. The Court adverted to the protections afforded by the current mortgage foreclosure laws of many states, including notice to the defaulting borrower, a substantial lead time before the commencement of foreclosure proceedings, publication of a notice of sale, strict adherence to prescribed bidding rules and auction procedure, and perhaps most importantly, foreclosure by sale with the surplus reverting to the debtor. *Id.*

at 542, 114 S.Ct. 1757. "When these procedures have been followed," the Court stated, "mere inadequacy of the foreclosure sale price is no basis for setting the sale aside ...." *Id.*

Ultimately, the Court held that "the consideration received from a noncollusive, real estate mortgage foreclosure sale conducted in conformance with applicable state law" is conclusively presumed to be an exchange for "reasonably equivalent value" under 11 U.S.C. § 548(a). *Id.* at 533, 114 S.Ct. 1757. Critical to that conclusion was the existence of an auction or sale which would permit some degree of market forces to set the value of the property even in distressed circumstances. *Id.* at 545-49, 114 S.Ct. 1757. Because distressed properties that must be sold in the time and manner established by state mortgage foreclosure law are, the Court reasoned, "simply worth less," "reasonably equivalent value" in the mortgage foreclosure context is the foreclosure sale price itself. *Id.* at 549, 114 S.Ct. 1757 (emphases omitted).

For those reasons, the Court explained, courts may not engage in the policy judgment of setting aside a mortgage foreclosure sale merely because the sale itself yielded a price that a court deemed inadequate. *See id.* at 542, 114 S.Ct. 1757. The Court therefore rejected the debtor's view that the $433,000 home was actually worth $725,000. Instead, because the sale was conducted in compliance with state foreclosure-by-sale law, the home was worth $433,000. And because the value received by the debtor was equal to what the home was "worth," the Court held that the debtor had necessarily received "reasonably equivalent value" under Section 548.

B

[5]In the County's view, *BFP* instructs that so long as state foreclosure law provides a debtor with (1) notice; (2) ample opportunity to cure; and (3) judicial oversight of the process, any foreclosure conducted in compliance with state foreclosure law necessarily yields "reasonably equivalent value" under Section 548. Here, the County contends that the RPTL contains those elements and that the transfer was conducted in compliance with the RPTL. Consequently, the County argues, *BFP* compels the conclusion that the transfer of the Gunsaluses' home was necessarily in exchange for "reasonably equivalent value."

For a host of reasons, we disagree. First, *BFP* itself rejects this contention. As Justice Scalia noted, *BFP* "covers only mortgage foreclosures of real estate. The considerations bearing upon other foreclosures and forced sales (*to satisfy tax liens, for example*) may be different." 511 U.S. at 537 n.3, 114 S.Ct. 1757 (emphasis added). That admonition is dispositive because, as we have seen, the strict foreclosure procedures under the RPTL offer far fewer debtor protections than the mortgage foreclosure procedures at issue in *BFP*. *See In re Smith*, 811 F.3d 228, 239 (7th Cir. 2016) (finding that a state's tax foreclosure protections ***866** must compare favorably to the mortgage foreclosure protections in *BFP* in order to receive a presumption of "reasonably equivalent value"); *In re Hackler & Stelzle*, 938 F.3d 473, 479 (3d Cir. 2019) (same).

Although the County eventually sold the Gunsaluses' home, unlike the sale in *BFP*, the sale occurred *after* foreclosure. The transfer of the Gunsaluses' title, equity and all their interests in the home—the transfer that is relevant for Section 548(a)(1)(B) purposes—had already occurred by the time the County auctioned off the property. The auction was conducted solely for the benefit of the County and the amount of the proceeds bears no relation to the amount of the tax debt that led to the foreclosure. Moreover, under the RPTL, the County pockets the difference between the tax debt and the sales proceeds and is not accountable to other creditors for what it does with the proceeds. Suffice it to say that under no reasonable calculus do these procedures convey to the debtor value that is substantially comparable to the worth of the transferred property. *See BFP*, 511 U.S. at 548, 114 S.Ct. 1757. In short, because the RPTL procedures are fundamentally different from the protections in place in *BFP*, that case is of little assistance to the County.

In addition, the County's position would produce results that are fundamentally at odds with the goals of bankruptcy law. Here, it would give the County a windfall at the expense of the estate, the other creditors, and the debtor—which is precisely what the Code's fraudulent conveyance provisions are intended to prevent. *See In re Smith*, 811 F.3d at 238-39. For these reasons, we agree with the District Court that the transfer here should not be presumed to be in exchange for "reasonably equivalent value" under Section 548.

[6] [7]Finally, the County expresses concerns that our reading of Section 548 will hamper its ability to collect delinquent real property taxes. We are not insensitive to those concerns, but they do not carry the day on this appeal. First, Ontario County's legitimate interest in tax collection cannot overcome Congress' policy choice that "reasonably equivalent value" must be obtained for a transfer of a debtor's property in the bankruptcy context. *See In re Murphy*, 331 B.R. 107, 120 (Bankr. S.D.N.Y. 2005). As we have previously admonished, "there is a strong presumption of not allowing a secured creditor to take more than its interest." *In re Harris*, 464 F.3d 263, 273 (2d Cir. 2006); *see also In re Smith*, 811 F.3d at 238 (noting that one goal of fraudulent conveyance law is to avoid a "windfall to one creditor at the expense of others"). Second, the County's concerns are unfounded in this case. As noted, the Gunsaluses have proposed in

their Chapter 13 plan to pay the County all delinquent real estate taxes plus 12% interest. The Gunsaluses have also made all tax payments that have subsequently come due under the plan. Third, even to the extent that today's ruling could, as the County cautions, introduce a degree of disruption to the County's collection of delinquent property taxes, that disruption arises from the interplay between the strict foreclosure regime of the RPTL and a Bankruptcy Code fashioned by Congress to afford relief to debtors. By its very nature, the Code upsets common and state law property interests and recalibrates the relationship between debtors and creditors.

For these reasons, we conclude that the District Court correctly held that the transfer of the Gunsaluses' home to the County was not entitled to the presumption of having provided "reasonably equivalent value" under Section 548.

*867 CONCLUSION

We **AFFIRM** the judgment of the District Court.

All Citations

37 F.4th 859, 71 Bankr.Ct.Dec. 180

Footnotes

* The Clerk of Court is respectfully directed to amend the official caption as set forth above.

1 Both the Bankruptcy Court and the District Court conducted proceedings in the present case alongside those raised by another similarly situation set of property owners, Joseph M. Hampton and Brenda S. Hampton. Before us, the County has also appealed the District Court's judgment in the Hamptons' case in Appeal No. 20-3868.

APPRECIATION AFTER CONVERSION

<u>IN RE CASTLEMAN</u> 2022 WL 2392058 (WD Wash 2022)

2022 WL 2392058
Only the Westlaw citation is currently available.
United States District Court, W.D. Washington,
at Seattle.

IN RE: John Felix CASTLEMAN, Sr., and Kimberly Kay Castleman, Debtors.

CASE NO. 2:21-cv-00829-JHC
|
Signed July 1, 2022

Attorneys and Law Firms

Steven Charles Hathaway, Bellingham, WA, for Debtors.

ORDER AFFIRMING THE BANKRUPTCY COURT'S MEMORANDUM DECISION

John H. Chun, United States District Judge

I.

Introduction

***1** This appeal arises from the bankruptcy court's June 4, 2021 memorandum decision and order that, upon conversion from Chapter 13 to Chapter 7, the Chapter 7 estate includes the post-petition, pre-conversion increase in equity in the Debtors' house. Dkt. #1 at 14. Having considered the briefs of the Debtors and the Trustee, the applicable law, and the file herein, the Court affirms the bankruptcy court's decision.

II.

Background

The parties do not dispute these facts:

On June 13, 2019, John Felix Castleman, Sr. and Kimberly Kay Castleman ("Debtors") filed for bankruptcy under Chapter 13. Dkt. # 6–1 at 2. On September 25, 2019, the bankruptcy court confirmed their Chapter 13 plan. *Id.* at 5–6. At the time of filing, the Debtors listed their house in their original schedules with a value of $500,000.00. Dkt. # 9 at 17. They claimed a homestead exemption of $124,923.00 and listed a mortgage of $375,077.00. *Id.* at 24, 28. Later, their circumstances changed such that they could no longer adhere to their Chapter 13 plan and, on February 5, 2021, they exercised their right to convert their case to Chapter 7. Dkt. # 9 at 107, 124; Dkt. # 6–1 at 9. Between the time of filing and conversion, their house appreciated about $200,000.00, and the Trustee claims that it is currently worth at least $700,000.00. Dkt. # 9 at 119. This action arose out of the Trustee's motion to sell the house (Dkt. # 9 at 117), and the Debtors' objection to the motion (*Id.* at 123).

The Debtors claim that they are entitled to the homestead exemption as well as the increase in equity over the Chapter 13 period, including equity derived from mortgage payments and appreciation. Dkt. # 8. The Trustee claims that the Debtors are entitled to only the homestead exemption, and that the Trustee may sell the residence for its present market value and use any nonexempt equity to pay creditors. Dkt. # 11.

The bankruptcy court concluded that the post-petition, pre-conversion equity in the Debtors' house belongs to the bankruptcy estate. Dkt. # 1 at 14. The Debtors appeal.

III.

Standard of Review

This Court reviews a bankruptcy court's interpretation of the Bankruptcy Code de novo. *See Einstein/Noah Bagel Corp. v. Smith (In re BCE W., L.P.)*, 319 F.3d 1166, 1170 (9th Cir. 2003).

IV.

Analysis

A. Interpretation of 11 U.S.C. § 348(f)(1)(A)

Because this case involves a conversion from Chapter 13 to Chapter 7, the Court first looks to 11 U.S.C. § 348(f)(1)(A), which states:

> (1) Except as provided in paragraph (2), when a case under chapter 13 of this title is converted to a case under another chapter under this title—
> (A) property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion;[1]

***2** The statute unambiguously provides that property acquired after the initial Chapter 13 petition but before the conversion to Chapter 7 inures to the debtor. *See, e.g., Harris v. Viegelahn*, 575 U.S. 510, 514 (2015) (holding that post-petition, pre-conversion wages earned by the debtor are excluded from the estate). But its plain language does not address whether the increase in equity of a pre-petition asset qualifies as a separate, after-acquired property interest—as with after-acquired wages—or whether it is inseparable from the asset itself. Put another way, § 348(f)(1)(A) does not indicate whether "property of the estate, as of the date of filing of the petition" refers to property as it existed at the time of filing, with all its attributes, including equity interests.

Based on the subsection's silence on this issue, the Debtors assert that the statute is ambiguous.[2] They urge the Court to look to alternate sources of authority such as the legislative history, which they argue shows Congress's intent to classify increased equity in a pre-petition asset as a separate and after-acquired property interest. Dkt. # 8 at 12–13. But before looking beyond the plain language of the provision, the Court must first seek to interpret section 348(f)(1)(A) based on the full statutory context of the Bankruptcy Code. *See, e.g., Food Mktg. Inst. v. Argus Leader Media,* 139 S. Ct. 2356, 2364 (2019) ("In statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself ... Where ... that examination yields a clear answer, judges must stop." (internal citations omitted)); *see also Robinson v. Shell Oil Co.,* 519 U.S. 337, 340 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.").

To gather evidence of statutory meaning, a Court may turn to the rest of the provision, *see, e.g., NLRB v. SW Gen., Inc.,* 137 S. Ct. 929, 938–39 (2017) (considering disputed terms from statutory subsection individually and then considering them as a whole); the act as a whole, *see, e.g., FCC v. AT&T Inc.,* 562 U.S. 397, 407–08 (2011) (considering meaning of "personal privacy" given its use in a distinct but similar exemption within the same statute); or similar provisions elsewhere in the law, *see, e.g., Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.,* 142 S. Ct. 941, 947 (2022) (looking to how "nearby statutory provisions" use a specific word). As the Supreme Court stated in *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.,* 484 U.S. 365, 371 (1988), "Statutory construction ... is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme ..."

B. 11 U.S.C. § 541(a)

Section 541(a) broadly defines the contents of the bankruptcy estate. It provides that property of the estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case," "wherever located and by whomever held." 11 U.S.C. § 541(a)(1). Property of the estate also includes "[p]roceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case." 11 U.S.C. § 541(a)(6).

***3** In *Wilson v. Rigby,* 909 F.3d 306, 309 (9th Cir. 2018), the Ninth Circuit interpreted these provisions together, in the Chapter 7 context, to mean that post-petition appreciation in a debtor's home inures to the estate. It found that the debtor's residence transferred to the estate upon filing of the petition under section 541(a)(1), and that any post-petition appreciation was encompassed in section 541(a)(6)'s definition of "[p]roceeds, product, offspring, rents, or profits" of the property. *Id.*[3] Although the Debtors emphasize that *Wilson* is not a conversion case, they do not argue that the terms, "proceeds," "product," "offspring," "rents," or "profits" should carry different meanings in the conversion context; nor does the Court see why they should.

The Ninth Circuit's interpretation of section 541(a) illuminates the meaning of section 348(f)(1). It is well settled that in a Chapter 7 case, all property that the debtor acquires post-petition is excluded from the estate. *See, e.g., Harris,* 575 U.S. at 514 (citing § 541(a)(1)). Therefore, if appreciation were a separate, after-acquired property interest, it would have to inure to the debtor. The Ninth Circuit, in finding that appreciation inures to the estate under 541(a)(6), has necessarily found that increased equity in a pre-petition asset cannot be a separate, after-acquired property interest. This logic applies with equal force in a conversion case. Thus, although section 348(f)(1)(A) may appear ambiguous at first blush, the Court concludes that it is unambiguous when considered in the context of the Code as a whole and under the Ninth Circuit's holding in *Wilson.*

Here, as in *Wilson,* it is undisputed that the Debtors' residence was property of the bankruptcy estate at the petition date, and that the Debtors remained in possession of the residence at the date of conversion. Further, under *Wilson*, any changes in value are classified as "[p]roceeds, product, offspring, rents, or profits" under section 541(a)(6). Therefore, the increased equity is property of the bankruptcy estate, and the trustee may sell the residence including the appreciation to pay creditors. To the extent that the Debtors have made any mortgage payments on the property, they may file a motion for payment of administrative expenses under 11 U.S.C. § 503(b).[4]

V.

Conclusion

Given the above, the Court affirms the decision of the bankruptcy court.

All Citations

Slip Copy, 2022 WL 2392058

Footnotes

1 The briefing in this case—and particularly Trustee's brief—references 11 U.S.C. § 348(f)(1)(B), which concerns valuations of property and of allowed secured claims in conversion cases. But this provision does not apply because a valuation is not needed to determine whether the post-petition, pre-conversion equity in the house inures to the Debtors or to the estate. None of the cases cited by the parties rely on section 348(f)(1)(B) in addressing this issue. The provision is more appropriately applied in cases involving redemption, *see, e.g., In re Airhart,* 473 B.R. 178 (Bankr. S.D. Tex. 2012), and lien avoidance/bifurcation, *see, e.g., In re Martinez*, No. 7-10-11101 JA, 2015 WL 3814935, at *1 (Bankr. D.N.M. June 18, 2015). The briefing also references 11 U.S.C. § 348(f)(2), which concerns the contents of the estate when a debtor converts to Chapter 7 in bad faith. Neither party alleges, nor is there any evidence in the record to suggest, that the Debtors converted in bad faith.

2 The Debtors also point to the varying ways courts have interpreted the provision in the context of post-petition, pre-conversion equity as reflective of ambiguity. *Compare In re Barrera,* 620 B.R. 645 (Bankr. D. Colo. 2020), aff'd, No. BAP CO-20-003, 2020 WL 5869458 (10th Cir. BAP Oct. 2, 2020) (holding that post-petition, pre-conversion equity gain inures to the debtor) *and In re Cofer*, 625 B.R. 194, 202 (Bankr. D. Idaho 2021) (same) *with In re Goins*, 539 B.R. 510, 516 (Bankr. E.D. Va. 2015) (holding that post-petition, pre-conversion equity gain inures to the estate) *and In re Peter*, 309 B.R. 792, 795 (Bankr. D. Or. 2004) (same).

3 The Court notes that *Wilson* interprets the plain meaning of the terms, "proceeds, product, offspring, rents, or profits" to include appreciation *even if* a sale has not yet occurred. But the Court recognizes that it is bound by the Ninth Circuit's decision.

4 The Court notes that, in jurisdictions not bound by the Ninth Circuit's decision in *Wilson*, section 348(f)(1)(A) is amenable to a different interpretation. In particular, the legislative history of that provision suggests that Congress did, in fact, intend for post-petition equity in a pre-petition asset to be excluded from the bankruptcy estate. *See* H.R.Rep. No. 103-835 at 57 (1994), as reprinted in 1994 U.S.C.C.A.N. 3340, 3366. But the Court does not reach the legislative history because the Ninth Circuit's interpretation of the Bankruptcy Code as a whole clarifies the meaning of section 348(f)(1)(A).

End of Document

11 USC § 363(c)(3)

<u>IN RE RAMSEY</u> 2021 WL 1499319 (NV BK 2021)

<u>IN RE MADSEN</u> 639 B.R. 761 (CA BK 2022)

2021 WL 1499319
Only the Westlaw citation is currently available.
United States Bankruptcy Court, D. Nevada.

IN RE: Elizabeth Ann RAMSEY, Debtor.

Case No.: 21-10230-MKN
|
Date: February 10, 2021 Time: 2:30 p.m.
|
Signed February 17, 2021

Attorneys and Law Firms

Christopher Patrick Burke, Steven L. Yarmy, Las Vegas, NV, For Debtor.

ORDER ON AMENDED MOTION FOR CONTINUATION OF AUTOMATIC STAY AFTER PRIOR DISMISSAL WITHIN YEAR OF FILING PURSUANT TO 11 U.S.C. § 362(c)(3)(B) AND (C)[1]

Mike K. Nakagawa, United States Bankruptcy Judge

***1** On February 10, 2021, the court heard the Amended Motion for Continuance of Automatic Stay After Prior Dismissal Within Year of Filing Pursuant to 11 U.S.C. § 362(c)(3)(B) and (C) (the "Motion"), brought by Elizabeth Ann Ramsey ("Debtor"). The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

BACKGROUND

On April 7, 2020, Debtor filed a voluntary Chapter 13 petition commencing Case No. 20-11877-MKN ("Chapter 13 Case").[2] Debtor was represented by counsel, Steven L. Yarmy, Attorney at Law. On her Chapter 13 petition, Debtor identified her residence as 1201 Westlund Drive, Las Vegas, Nevada 89102 ("Residence"). She attached a list of creditors to her Chapter 13 petition, which included Shamrock Painting, Inc. and Eugene Tumbarello (collectively "Tumbarello").[3] Debtor did not, however, file any of the information required by Section 521(a), by way of schedules of assets and liabilities, a statement of financial affairs, or any other documents.[4]

***2** On July 21, 2020, an order was entered granting Tumbarello's uncontested motion to dismiss the Chapter 13 Case and imposing a 180-day bar to commencement of another bankruptcy proceeding.[5]

On January 19, 2021, Debtor commenced the current bankruptcy proceeding by filing a voluntary Chapter 7 petition ("Chapter 7 Case"). (ECF No. 1).[6] Debtor is represented by the same counsel who represented her in the Chapter 13 Case. The current Chapter 7 Case is assigned for administration to Chapter 7 bankruptcy trustee Lenard Schwartzer ("Chapter 7 Trustee"). The same Residence is identified on the Chapter 7 petition. On the same date, a Notice of Chapter 7 Bankruptcy Case – No Proof of Claim Deadline ("Bankruptcy Notice") was filed. (ECF No. 6). The Bankruptcy Notice was served by first class mail on the parties identified in the mailing matrix provided by the Debtor as well as by electronic notice. (ECF No. 16). Parties were informed that the Chapter 7 Trustee would conduct a creditors meeting on February 10, 2021, and that April 12, 2021 is the deadline to pursue objections to discharge or dischargeability of particular debts.

On January 21, 2021, Debtor filed the instant Motion. (ECF No. 10). The Motion is supported by the declaration of the Debtor ("Ramsey Declaration"). (ECF No. 11).

On January 22, 2021, an order was entered shortening time so that the Motion could be heard on February 10, 2021. (ECF No. 15).[7]

On February 1, 2021, Tumbarello filed an amended opposition to the Motion ("Opposition"). (ECF Nos. 20 and 22).

On February 2, 2021, Debtor filed her schedules of assets and liabilities ("Schedules"), statement of financial affairs ("SOFA"), and statement of intention ("Intention Statement"). (ECF No. 23). On the same date, Debtor filed her Chapter 7 Statement of Your Currently Monthly Income ("CMI Statement") and Chapter 7 Means Test Calculation ("Means Test Statement"). (ECF No. 24).

On February 9, 2021, Debtor filed an amended Schedule A/B ("Amended Schedule"). (ECF No. 27). On the same date, Tumbarello filed a supplemental opposition to the instant Motion ("Supplemental Opposition"). (ECF No. 28).

DISCUSSION

***3** Under Section 362(c)(3)(A), the automatic stay arising from the filing of the current Chapter 7 Case expires after thirty days because the Debtor's prior Chapter 13 Case was dismissed within one year. Under Section 362(c)(3)(B), the Debtor may seek a continuation of the automatic stay beyond thirty days if she files a motion seeking a continuation before the thirty-day period expires. The hearing on the motion must be completed within the thirty-day period. See 11 U.S.C. § 362(c)(3)(B). If a prior case by an individual debtor was dismissed within one year of the new case due to a debtor's failure to file (without substantial excuse) documents required by court order or Section 521, a presumption arises that the new case was not filed in good faith. See 11 U.S.C. § 362(c)(3)(C)(i)(II)(aa). To obtain an extension of the automatic stay beyond thirty days, the debtor must rebut the presumption of a lack of good faith by clear and convincing evidence. Id. "[C]lear and convincing evidence 'indicat[es] that the thing to be proved is highly probable or reasonably certain. This is a greater burden than preponderance of the evidence, ... but less than evidence beyond a reasonable doubt." U.S. v. Jordan, 256 F.3d 922, 930 (9th Cir. 2001), quoting Black's Law Dictionary 577 (7th ed. 1999).

In this instance, Debtor's prior Chapter 13 Case was dismissed, in pertinent part, because she did not file the information required by Section 521(a) without substantial excuse. Debtor commenced her current Chapter 7 Case on January 19, 2021 and the automatic stay arose under Section 362(a). The thirty-day period under 362(c)(3)(A) will expire on February 18, 2021. Debtor filed the instant Motion on January 21, 2021, and the hearing on the Motion was concluded on February 10, 2021. Because the Motion is timely and the hearing was concluded timely, the court determines only whether the Debtor has overcome by clear and convincing evidence the presumption of a lack of good faith in the commencement of the current Chapter 7 Case.

A. The Record Before the Court.

The evidentiary record before the court includes the Ramsey Declaration, the Schedules and related documents filed by the Debtor under penalty of perjury, and the matters for which the court may take judicial notice. The court also considers the oral and written representations of counsel, as well as the exhibits attached to counsel's written materials. No objections to consideration of those exhibits has been made and any such objections therefore have been waived.

In her declaration, Debtor attests that she filed the Chapter 13 Case to address the consequences of the rulings in the State Court Action as it pertains to a homestead she claimed in the Residence, but that she subsequently realized that she "did not want a chapter 13 plan." See Ramsey Declaration at ¶¶3 and 4. Debtor attests that the Residence was sold to Tumbarello for $55,000.00 pursuant to a sale in execution of the March 8, 2019 Order, but that she redeemed the Property pursuant to NRS 21.210 by paying the execution sale price and interest within one year. Id. at ¶¶6 and 7. She attests that the redemption price was paid using her pension funds. Id. at ¶7. After redeeming the Residence, Debtor attests that she claimed a Nevada homestead exemption but that the State Court rejected her claim of exemption. Id. at ¶¶9 and 10. Debtor disputes the factual and legal basis for the State Court's ruling, see id. at ¶¶ 5 and 8, and attests that the ruling is being appealed. Id. at ¶11. She attests to her belief that she has a great chance of prevailing on appeal. Id. at ¶12. Debtor further attests that she has substantial equity in the Residence and has worked out a loan modification with the mortgage lender. Id. at ¶¶15 and 16.

In her Schedules and Amended Schedule A/B, Debtor attests that the Residence has a value of $420,000.00. She also attests that she has five different retirement or pension accounts, two of which are described in her Schedules and

Amended Schedule A/B as "403(b)" and three of which are described as "IRA." The accounts range in amount from $7,335.55 to $94,841.00.[8] On her Schedule C, she claims an exemption in the Residence in the amount of $285,229.82 based on NRS 21.090(1)(l), 115.005, 115.010, and 115.050.[9] Debtor also claims an exemption in the various retirement or pension accounts based on NRS 21.090(1)(r). On secured creditor Schedule D, Debtor lists Guild Mortgage Company with a claim in the amount of $222,391.00, secured by collateral having a value of $0.00, resulting in an unsecured claim in the amount of $222,391.00. In spite of including Guild Mortgage on secured creditor Schedule D and attesting that the claim is secured by a "Real Estate Mortgage," Debtor does not identify the real property collateral. Debtor does not list Tumbarello as asserting a secured claim - whether contingent, unliquidated or disputed. On her unsecured creditor Schedule E/F, Debtor does not list Guild Mortgage at all, but lists "Midland Mortgage, A Division of MidFirst Bank" as having a disputed claim in an unknown amount with respect to a mortgage relating to the Residence. She does list Tumbarello as asserting a disputed unsecured claim in an unknown amount based on the March 8, 2019 Order. On her income Schedule I, Debtor attests that she receives monthly gross income of $5,522.00, out of which $2,167.00 is deducted as "voluntary contributions for retirement plans." Those voluntary contributions apparently relate to the five retirement or pension accounts identified in her Schedule A/B. After all deductions including the voluntary retirement contributions are made, Debtor calculates her average monthly income as $2,116.00. On her expense Schedule J, Debtor attests that she has average monthly expenses totaling $4,118.00. After deducting her monthly income of $2,116.00, Debtor attests that her average monthly net income is a negative $2,002.00.

*4 In her SOFA, Debtor attests that the Residence was sold at a sheriff's sale on August 1, 2019, apparently to enforce the March 8, 2019 Order. She also attests that she redeemed the Residence from the execution sale on July 18, 2020, by paying the sale price of $55,000.00 and $6,600.00 in required interest.

In her Means Test Statement, Debtor attests that her gross income is $5,522.13 based on line 11 of the CMI Statement and that she has Internal Revenue Service expense allowances of $2,291.00, resulting in monthly disposable income of $3,231.13 under Section 707(b)(2). Over a sixty month period, Debtor apparently attests that she would have $193,867.80 available to pay creditors.

In her Intention Statement, Debtor lists Guild Mortgage as having a claim secured by a real estate mortgage on unidentified property and explains that she will retain the property through "appeal denial homestead exemption." Only Guild Mortgage is listed as a secured creditor and not Tumbarello.

In its initial written response, Tumbarello offers five separate exhibits. Exhibit 1 is a copy of this bankruptcy court's July 21, 2020 order dismissing the prior Chapter 13 Case. Exhibit 2 is a copy of the State Court's order signed on July 15, 2019 and entered on July 22, 2019,[10] denying Debtor's claim to a homestead exemption in the Residence ("July 22, 2019 Order").[11] After acknowledging that the Debtor had the burden of proving her entitlement to a claimed homestead exemption, the July 22, 2019 Order provides: "**THE COURT FURTHER FINDS** that the homestead asserted by Judgment Debtor ELIZABETH RAMSEY in and to the 1201 Westlund property does not apply and that Judgment Debtor ELIZABETH RAMSEY has failed to meet her burden to prove that Judgment Debtor is entitled to the claimed exemptions in the 1201 Westlund property. Maki v. Chong, 119 Nev. 390, 394, 75 P.3d 376, 379 (2003)." Exhibit 3 is a copy, *inter alia*, of the State Court's order signed on September 30, 2020,[12] denying Debtor's claim to a homestead exemption in the Residence ("October 8, 2020 Order").[13] After again acknowledging that the Debtor had the burden of proving her entitlement to a claimed homestead exemption, the October 8, 2020 Order provides: "**THE COURT FURTHER FINDS** that this Court has ruled in 2019 that any homestead asserted by Judgment Debtor ELIZABETH RAMSEY in and to the 1201 Westlund property does not apply because an individual using fraudulently obtained funds to purchase real property should not be protected by the homestead exemption because the exemption's purpose is to provide protection to individuals who file the homestead exemption in good faith and that Judgment Debtor ELIZABETH RAMSEY had failed to meet her burden to prove that Judgment Debtor is entitled to the claimed exemptions in the 1201 Westlund property. Maki v. Chong, 119 Nev. 390, 394, 75 P.3d 376, 379 (2003)." (Emphasis underlined.) Exhibit 4 is a copy of a notice of appeal filed on January 21, 2021, in the State Court on behalf of the Debtor ("Notice of Appeal"), with respect to the October 8, 2020 Order, as well as with respect to a subsequent order denying reconsideration. Exhibit 5 is a copy of an unpublished decision of the Nevada Supreme Court in a case entitled Superpumper, Inc. v. Leonard, 2020 WL 1129882 (Mar. 6, 2020). In its Supplemental Opposition, Tumbarello offers two additional exhibits. Supplemental Exhibit 1 is a copy of an unpublished decision of the Ninth Circuit Court of Appeals in a case entitled Bouzaglou v. v. Haworth (In re Bouzaglou), 803 Fed.Appx. 147 (May 1, 2020). Supplemental Exhibit 2 is a copy of the Notice of Appeal indicating that it was electronically filed with the Nevada Supreme Court on January 28, 2021, i.e., after the Debtor commenced her Chapter 7 proceeding on January 19, 2021.

***5** In its proof of claim filed in the Chapter 13 Case, Tumbarello attached as

Exhibit 1 a document recorded in Clark County on March 8, 2019. The recorded document includes a copy of the March 8, 2019 Order.[14] Attached as Exhibit 2 to the Tumbarello POC is a copy of Amended Findings of Fact, Conclusions of Law and Judgment signed on November 26, 2019, and entered on November 27, 2019, by the Justice Court for the Las Vegas Township, Clark County, Nevada ("Justice Court"), in an eviction proceeding brought by Tumbarello against the Debtor, denominated Case No. 19C024136. Attached as Exhibit 3 to the Tumbarello POC is a copy of another document recorded in Clark County on January 17, 2020. That document includes a copy of a Judgment by the Justice Court signed and entered on January 16, 2020, awarding attorneys' fees and costs in favor of Tumbarello in the eviction proceeding. Attached as Exhibit 4 to the Tumbarello POC is a copy of another document recorded in Clark County on March 5, 2020. That document includes a copy of an order of contempt of court by the State Court signed on March 2, 2020, and entered on March 4, 2020, holding the Debtor in contempt and ordering her to pay Tumbarello fees and costs totaling $23,033.35. Attached as Exhibit 5 to the Tumbarello POC is a copy of a summary prepared by the claimant listing and explaining the various judgments and amounts evidenced by the other exhibits.

B. Analysis.

The court having considered the record concludes that the Debtor has failed to overcome the presumption of a lack of good faith by clear and convincing evidence. The court makes no finding whether or not the Chapter 7 Case was filed in good faith, but concludes only that the Debtor has not met her evidentiary burden. Several reasons lead to this conclusion.

First, Section 362(c)(3) applies to individuals who file petitions under Chapter 7, 11 or 13. Section 362(c)(3)(B) creates a presumption that a later case under any of those Chapters is not filed in good faith if there is an earlier case dismissed within the previous year. The consequence of failing to timely overcome the presumption concerns the automatic stay rather than whether the individual will obtain a discharge or will be able to retain property. This reality is pronounced in Chapter 7 proceedings where a lack of good faith is not a basis for dismissal of a case, and, of course, not a basis for denying confirmation of a plan. Compare 11 U.S.C. § 707(b) (dismissal for individual consumer Chapter 7 cases for abuse), with 11 U.S.C. §§ 1325(a)(3) and 1325(a)(7) (Chapter 13 plan confirmation requires plan to be filed in good faith and debtor's filing of Chapter 13 petition to be in good faith) and 11 U.S.C. § 1129(a)(3) (Chapter 11 plan confirmation requires plan to be proposed in good faith).[15] Thus, whatever may be the sincerity of Debtor's desire to retain the Residence through filing for bankruptcy protection is of minimal importance to whether the automatic stay continues in effect.

*6 Second, Debtor acknowledges that she commenced the prior Chapter 13 Case and did not oppose dismissal because she later decided that she did not want to file a Chapter 13 plan. She does not dispute that she never filed any of the information required by Section 521(a)[16] Debtor now has filed the instant Chapter 7 Case through the same legal counsel seeking a discharge of her prepetition debts without having to complete the payments that would be required under a confirmed Chapter 13 plan. See 11 U.S.C. § 1328(a)("[A]s soon as practicable after completion by the debtor of all payments under the plan ... the court shall grant the debtor a discharge of all debts provided for by the plan ..."). As previously mentioned, however, Debtor attests in her Means Test Statement that she may have significant monthly disposable income available to pay creditors[17] through Chapter 13.[18] While it is uncertain whether the United States Trustee or a creditor will seek to dismiss the instant Chapter 7 Case for abuse under Section 707(b), Debtor's deduction of $2,167.00 each month for voluntary contributions to her retirement plans may or may not be subject to challenge.[19] In other words, while the Debtor and other individuals should be encouraged as a matter of public policy to plan for retirement, it might not be appropriate to ask creditors to fund a debtor's retirement in a Chapter 7[20] proceeding.[21]

*7 Third, Debtor has claimed an exemption in the Residence based on the Nevada homestead provisions. She is permitted to do so because the State of Nevada has opted out of the limited bankruptcy exemptions otherwise provided under Section 522(d). See NRS 21.090(3). Under FRBP 4003(b)(1), any party in interest, including a bankruptcy trustee or creditor, may object to a claimed exemption "within 30 days after the meeting of creditors ... is concluded or within 30 days after any amendment to the ... schedules is filed, whichever is later." Section 522(l) clearly specifies the importance of claiming the exemption: "Unless a party in interest objects, the property claimed as exempt on such list is exempt." 11 U.S.C. § 522(l) (emphasis added). It is well-settled that absent a timely objection before the 30-day deadline expires, the claimed exemption is allowed in bankruptcy even if the exemption lacks a proper legal basis. See Taylor v. Freeland & Kronz, 503 U.S. 638, 643-644 (1992)("The Bankruptcy Court did not extend the 30-day period. Section 522(l) therefore has made the property exempt. Taylor cannot contest the exemption at this time whether or not Davis had a colorable statutory basis for claiming it."). In this instance, the deadline to object to Debtor's exemptions has not commenced because the meeting of creditors was continued to February 24, 2021, and has not been concluded. More important, Debtor has claimed an exemption in the Residence despite prior rulings by the State Court that she is not entitled to a Nevada homestead exemption.[22] Debtor filed an appeal from the October 8, 2020 Order, even though she conceded at the hearing that filing the Notice of Appeal was not authorized, was in violation of the automatic stay,[23] and therefore is a void act under well-settled law in this circuit. See Schwartz v. U.S. (In re Schwartz), 954 F.2d 569, 571 (9th Cir. 1992) (acts in violation of the automatic stay are *void ab initio*, rather than voidable).[24] So while the Debtor could simply rely on the language of Section 522(l) and hope that parties in interest ignore the deadline to object, the Debtor's claim of a homestead exemption under Nevada law appears to be subject to objection simply based on Nevada principles of issue preclusion. See, e.g., Univ. of Nevada v. Tarkanian, 110 Nev. 581, 598-599, 879 P.2d 1180, 1191 (1994)(issue decided in prior litigation must be identical, the decision must be on the merits and become final[25], the party bound must be the same or in privity, and the issue was actually and necessarily litigated).[26] Despite the Debtor's belief that she has a good chance of prevailing on appeal, she offers no evidence other than her own optimistic opinion that supports her belief. This hardly constitutes clear and convincing evidence to overcome the statutory presumption that arises in this Chapter 7 Case under Section 362(c)(3)(C)(i)(II)(aa).

***8** Finally, Debtor has presented the Chapter 7 Trustee with a Residence that, according to the Debtor's Schedules, is valued at $420,000.00 and which is subject to a mortgage having an apparent balance of $222,391.00.[27] By her own numbers, Debtor may have $197,609.00 of equity in the Residence, i.e., $420,000.00 minus $222,391.00. Despite her own testimony as to the value of the Residence and the amount owed to the lender, Debtor claims an exemption in the amount of $285,229.82 under the Nevada homestead statutes. For that amount to be claimed, the Residence would have to be worth $87,620.82 more than the value the Debtor attests. While these discrepancies may be the result of unintentional errors, the presence of such inconsistencies militate against a conclusion that the Debtor has provided the clear and convincing evidence required to grant the Motion.[28]

Under these circumstances, the court concludes that Debtor has not overcome by clear and convincing evidence the presumption of a lack of good faith. Under Section 362(c)(3)(A), the automatic stay will "terminate with respect to the debtor" on the 30th day after the Chapter 7 petition was filed, i.e., February 18, 2021.[29] The automatic stay in this Chapter 7 proceeding will not terminate in its entirety as to property of the bankruptcy estate, which currently encompasses the Residence. See In re Thu Thi Dao, 616 B.R. 103, 116-117 (Bankr. E.D. Cal. 2020).[30] Sections 362(a)(2), 362(a)(3), and 362(a)(4) specifically prohibit Tumbarello from enforcing the March 8, 2019 Order or any other State Court orders against property of the estate, from taking any act to obtain possession or to exercise control over property of the estate, and from taking any act to perfect or enforce any judicial lien or deed of trust against property of the estate. Nothing prohibits Tumbarello from seeking relief from the automatic stay under Section 362(d)[31] to avoid the imposition of sanctions under Section 362(k), or seeking other relief in this Chapter 7 Case.[32]

***9 IT IS THEREFORE ORDERED** that the Amended Motion for Continuance of Automatic Stay After Prior Dismissal Within Year of Filing Pursuant to 11 U.S.C. § 362(c)(3)(B) and (C), brought by Elizabeth Ann Ramsey, Docket No. 10, be, and the same hereby is, **DENIED**.

All Citations

Slip Copy, 2021 WL 1499319

Footnotes

1 In this Order, all references to "ECF No." are to the numbers assigned to the documents filed in the above-captioned case as they appear on the docket maintained by the clerk of the court. All references to "Section" are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to "NRS" are to provisions of the Nevada Revised Statutes. All references to "FRBP" are to provisions of the Federal Rules of Bankruptcy Procedure. All references to "FRE" are to the Federal Rules of Evidence.

2 Pursuant to FRE 201(b), the court takes judicial notice of all materials appearing on the bankruptcy court docket. See U.S. v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980). See also Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank, 136 F.3d 1360, 1364 (9th Cir. 1998) (taking judicial notice of court filings in a state court case where the same plaintiff asserted similar claims); Bank of Am., N.A. v. CD-04, Inc. (In re Owner Mgmt. Serv., LLC Trustee Corps.), 530 B.R. 711, 717 (Bankr. C.D. Cal. 2015), aff'd sub nom. OMS, LLC v. Bank of America, N.A., 2015 WL 1271307 (C.D. Cal. 2015)("The Court may consider the records in this case, the underlying bankruptcy case and public records.").

3 On April 15, 2020, Tumbarello filed in the prior Chapter 13 Case a proof of claim ("Tumbarello POC") in the amount of $284,841.78, of which $274,841.78 was described as being secured pursuant to an order entered on March 8, 2019 ("March 8, 2019 Order"), by the Eighth Judicial District Court, Clark County, Nevada ("State Court"), in Case No. A-17-763560-C, entitled *Eugene Tumbarello, etc. v. Elizabeth Ramsey and Gregg Chambers* ("State Court Action"). That order granted Tumbarello's motion to enforce settlement terms, for sale of the Residence in satisfaction of the settlement, and for attorney's fees. Debtor's co-defendant in the State Court Action currently is a voluntary Chapter 7 debtor in this bankruptcy court, Case No. 20-12895-MKN ("Chambers Chapter 7"), which is assigned for administration to Chapter 7 bankruptcy trustee Ryan A. Andersen. On July 27, 2020, Tumbarello filed a proof of claim in the Chambers case in the total amount of $293,925.79, based in part on the same March 8, 2019 Order. Tumbarello also commenced an adversary proceeding in the Chambers Chapter 7, denominated Adversary No. 20-01119-MKN, seeking a determination that its claims are nondischargeable under Sections 523(a)(2, 4 and 6).

4 Even though the Debtor did not file schedules or a statement of financial affairs in the prior Chapter 13 Case, various creditors filed proofs of claim. Guild Mortgage Company filed a proof of claim on May 11, 2020, in the secured amount of $228,304.46, based on a deed of trust against the Residence ("Guild POC"). The proof of claim also attested that there was a default in payments totaling $7,476.29 as of the Chapter 13 petition date.

5 On December 16, 2020, in the prior Chapter 13 Case, the court heard and denied Debtor's request for relief from the 180-day bar to filing a new case. The 180-day bar date expired on January 17, 2021.

6 The Chapter 7 petition was a "bare bones" or "skeleton" petition because it did not include the schedules and statements providing the information required under Section 521(a).

7 The order shortening time was entered at the request of the Debtor that was accompanied by the declaration of her counsel. (ECF Nos. 12 and 13). Counsel's declaration concludes at Paragraph 5 by attesting: "The debtor has filed the instant motion in good faith and <u>will be able to present a feasible and reasonable plan and pay unsecured creditors disposable income</u>." (Emphasis added). Because a plan for payment of creditors from disposable income is never proposed in a Chapter 7 case, it is not clear whether the Debtor actually intended to seek a financial adjustment of her finances under Chapter 13 rather than to simply liquidate her nonexempt assets under Chapter 7.

8 In her Amended Schedule A/B, Debtor also adds property constituting a "financial asset" which she describes as "Appeal from Eighth District Court, Clark County, Nevada, Decision Case No. A-17-763560-C, dening (sic) Debtor's Homestead Exemption to 1201 Westlund Drive, Las Vegas, NV 89102."

9 At the hearing, counsel informed the court that, at the Debtor's request, the meeting of creditors was continued by the Chapter 7 Trustee to February 24, 2021. (ECF No. 31).

10 The docket of the State Court reflects that the order was filed on July 22, 2019.

11 As previously mentioned, the Residence apparently was sold to Tumbarello through a sheriff's sale conducted on August 1, 2019, i.e., after the State Court entered the July 22, 2019 Order denying the Nevada homestead exemption.

12 The docket of the State Court reflects that the order was signed on September 30, 2020, but filed on <u>both</u> September 30, 2020, and October 8, 2020. For purposes of the instant order only, this bankruptcy court describes the State Court order by reference to the later date.

13 As previously mentioned, Debtor apparently redeemed the Residence on July 18,2020, after it was sold to Tumbarello through the sheriff's sale. Thereafter, the State Court again denied Debtor's claim to the Nevada homestead exemption.

14 Page 8 of the March 8, 2019 Order includes a paragraph stating, in pertinent part, as follows: "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiffs <u>shall be awarded an enforceable and secured interest in and to 1201 Westlund Drive</u>, Las Vegas, Nevada 89102 ... in the sum of $221,735.99 and that this sum shall be and hereby is further reduced to Judgment in favor of EUGENE TUMBARELLO and SHAMROCK PAINTING and against Defendants ELIZABETH RAMSEY and GREGG CHAMBERS." (Emphasis added.) Page 9 of that order also includes a paragraph stating, in pertinent part, as follows: "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the total Judgment Sum for enforcement of the Settlement Agreement shall be $221,735.99, that this Judgment Sum <u>shall constitute a deed of trust lien on the ... 1201 Westlund property</u> and shall accrue post-judgment interest in accordance with the terms of this Judgment." (Emphasis added.)

15 Lack of good faith is not specified as a basis for dismissal of a case under Section 707, Section 1307, or Section 1112, or for relief from the automatic stay under Section 362(d). Proof of bad faith, however, may provide cause for dismissal, or relief from stay under all three Chapters. <u>See, e.g.</u>, <u>In re Zegzula</u>, 2018 WL 6179302 (Chapter 7 dismissed because it was filed in bad faith by a serial filer); <u>Leavitt v. Soto (In re Leavitt)</u>, 171 F.3d 1219 (9th Cir. 1999)(Chapter 13 petition dismissed because it was filed in bad faith); <u>In re Korean Western Presbyterian Church of Los Angeles</u>, 2020 WL 3635882 (Bankr. C.D. Cal. Apr. 21, 2020)(Chapter 11 proceeding may be dismissed or a Chapter 11 trustee may be appointed upon a determination that the case was filed in bad faith); <u>In re Blas</u>, 614 B.R. 334 (Bankr. D. Alaska 2019)(Chapter 7 relief from stay granted because of individual debtor's bad faith in pursuing case to prevent home foreclosure); <u>In re Casey</u>,

428 B.R. 519 (Bankr. S.D. Cal. 2010)(Chapter 13 relief from stay may be granted if petition is filed in bad faith); In re 31801 Via Coyote LLC, 2020 WL 1227195 (B.A.P. 9th Cir. Mar. 6, 2020)(Chapter 11 relief from stay granted because of debtor's bad faith formation and acquisition of property immediately prior to filing Chapter 11 petition).

16 Because the Debtor never filed schedules of assets and liabilities in the Chapter 13 Case, nor a statement of financial affairs, there is no information provided under penalty of perjury reflecting what she owned at that time or what transfers or payments were made during certain periods before that case was filed. She was represented in the prior Chapter 13 Case by the same counsel representing her in the current Chapter 7 Case. Debtor has identified no substantial change in circumstances from the prior case, such as a change in employment or family obligations, new debts, different assets, retention of more experienced counsel, or the like. Rather than attempting to convert her prior Chapter 13 Case to a case under Chapter 7 as permitted by Section 1307(a), she allowed the prior case to be dismissed simply to file another bankruptcy petition that triggered another automatic stay.

17 At the hearing, Debtor's counsel acknowledged that Debtor is current on her monthly mortgage payment, presumably as a result of the loan modification.

18 It appears that the Means Test Statement form comports with the calculations required by Section 707(b)(2), including the allowance of various monthly expense deductions identified in Section 707(b)(2)(A)(ii, iii and iv). Because Debtor appears to be above median income, she may be required in a Chapter 13 proceeding to apply those same monthly expense deductions to meet the "projected disposable income" requirement for confirmation of a plan under Section 1325(b)(1)(B). See Keith M. Lundin, Lundin on Chapter 13, § 94.1, at ¶5. LundinOnChapter13.com (last visited February 14, 2021). A similar projected disposable income result might follow if the Debtor attempts to confirm a plan in a Chapter 11 proceeding that does not pay allowed unsecured claims in full. See 11 U.S.C. § 1129(a)(15)(B). In a Chapter 11 proceeding, Debtor would have a further complication: in addition to contributing disposable income, Debtor likely would face the so-called "double whammy" of having to satisfy the "absolute priority rule" to confirm a Chapter 11 plan. See Zachary v. Cal. Bank & Trust (In re Zachary), 811 F.3d 1191, 1199 (9th Cir. 2016)("[U]nder ... § 1129(a)(15), [debtor] 'must dedicate at least five years' disposable income to the payment of unsecured creditors, and - unlike a debtor in Chapter 13 – is also subject to the absolute-priority rule (and thus cannot retain any pre-petition property) if he does not pay those creditors in full.' ").

19 FRBP 1017(e)(1) requires a motion to dismiss under Section 707(b) to be brought within sixty days after the first date set for the meeting of creditors. In the instant case, that first date was February 10, 2021. Because the sixtieth day falls on a Sunday, the deadline to seek dismissal under Section 707(b) would fall on Monday, April 12, 2021. That date also is the deadline to object to discharge or dischargeability of debts in this Chapter 7 Case.

20 The Means Test Statement begins with the amount of current monthly income taken from line 11 of Debtor's CMI Statement, i.e., $5,522.13. Section 541(b)(7) excludes from an individual's bankruptcy estate "any amount ... withheld by an employer from the wages of employees for payment as contributions to certain employee benefit plans, deferred compensation plans, or tax-deferred annuities." See 11 U.S.C. § 541(b)(7)(A)(i)(I, II and III). This section specifically provides that these employer withholding amounts "shall not constitute disposable income as defined in section 1325(b)(2)." (Emphasis added.) Because the pension and retirement accounts listed on Debtor's Amended Schedule A/B may include both employer-withheld funds (403(b)) as well as individual retirement accounts (IRA), the entire $2,167.00 in monthly deductions appearing on Schedule I might not be excluded from disposable income in Chapter 13. Moreover, because only the provisions of Chapter 13 require consideration of a debtor's disposable income, this exclusion from property of the bankruptcy estate might not insulate an above-median Chapter 7 debtor from a presumption of abuse under Sections 707(b)(1) and (b)(2)(A)(i). In other words, the deductions for pensions and retirement contributions identified in the Debtor's Schedule I might be safe in Chapter 13, but might not

be permissible monthly expenses in Chapter 7 under Section 707(b)(2)(A)(ii, iii and iv). The court makes no determination regarding these factual and legal issues.

21 For a Chapter 13 debtor whose income is above the median for the relevant judicial district, the "applicable commitment period" for a proposed plan is five years. See 11 U.S.C. § 1325(b)(4)(A)(ii). If an assigned Chapter 13 trustee or a creditor with an allowed unsecured claim objects to confirmation of a plan that does not pay unsecured claims in full, the debtor typically must commit his or her projected disposable income to payment of allowed unsecured claims for the entire applicable commitment period. See 11 U.S.C. § 1325(b)(1)(B) (if the plan does not pay allowed unsecured claims in full, the plan must provide that "all of the debtor's projected disposable income to be received in the applicable commitment period ... will be applied to make payments to unsecured creditors under the plan."). In determining disposable income, the above-median income debtor is permitted to deduct the "[a]mounts reasonably necessary to be expended" that are identified in Section 707(b)(2)(A) and 707(b)(2)(B). See 11 U.S.C. § 1325(b)(3).

22 As previously mentioned at 7-8, supra, in both the July 22, 2019 Order and the October 8, 2020 Order, the State Court concluded that the Debtor could not claim the Nevada homestead exemption, and each time cited the Nevada Supreme Court's decision in Maki v. Chong, 119 Nev. 390, 394, 75 P.3d 376, 379 (2003). The State Court apparently found that funds had been fraudulently obtained from Tumbarello and were used by the Debtor to acquire the Residence. Under Maki, the State Court's factual finding appears to have been sufficient to reject the Debtor's homestead exemption. Compare In re Tarkanian, 562 B.R. 424, 448-450 (Bankr. D. Nev. 2014) (Maki not applied where debtors used their own funds to acquire their residence).

23 Debtor's Amended Schedule A/B listed the appeal as a financial asset that she did not originally disclose as property of the Chapter 7 estate. See note 8, supra.

24 Whether the deadline to appeal the October 8, 2020 Order expired before the Chapter 7 Case was commenced is not before the court. Likewise, whether the extension of time under Section 108(a) to meet non-bankruptcy deadlines would apply also is not before the court.

25 Because the Notice of Appeal was filed by the Debtor on January 28, 2021, in violation of the automatic stay, it is void and there is no pending appeal of the October 8, 2020 Order. Even if an appeal of the October 8, 2020 Order is pending, however, it is still treated as final and may be afforded issue preclusive effect under Nevada law. See Edwards v. Ghandour, 123 Nev. 105, 115 n.17, 159 P.3d 1086, 1093 n.17 (2007), *abrogated on other grounds* by Five Star Cap. Corp. v. Ruby, 124 Nev. 1048, 194 P.3d 709, 712-713 (2008). See also Bayuk v. Leonard (In re Morabito), 2020 WL 5814364, at *4 (B.A.P. 9th Cir. Sept. 29, 2020).

26 As previously mentioned, Tumbarello was not listed on Debtor's Schedule D as a secured creditor. Instead, Tumbarello is listed on Schedule E/F as having a disputed unsecured claim. Also as previously discussed at note 14, supra, the March 8, 2019 Order created a "secured interest" and a "deed of trust" against the Residence in favor of Tumbarello. Ordinarily, Section 522(f) allows a debtor to avoid the fixing of a judicial lien "to the extent that such lien impairs an exemption to which the debtor would have been entitled ..." 11 U.S.C. § 522(f)(1)(A). Debtor apparently takes the position that Tumbarello does not have a judicial lien because it was not listed in her Schedule D. If that is the case, Debtor might be hard pressed to seek to avoid Tumbarello's apparent judicial lien that may exist as a result of the March 8, 2019 Order that was recorded in the county records. On the other hand, if there is no timely objection to the Debtor's claim of a homestead exemption, a party in interest would not have standing to challenge the validity of the exemption if the Debtor later seeks relief under Section 522(f)(1). See Jue v. Liu (In re Liu), 2020 WL 718072, at *5 (B.A.P. 9th Cir. Feb. 11, 2020).

27 As discussed in note 4, supra, the Guild POC filed in the Chapter 13 Case was in the secured amount of $228,304.46. It appears that Debtor's loan modification may have reduced that balance to $222,391.00 by the Chapter 7 petition date.

28 In the Tumbarello POC, the value of the Residence is alleged to be $540,000.00, i.e., $120,000.00 more than suggested in Debtor's Schedule A/B. It is unclear why the Debtor attested to a value lower than Tumbarello's estimate but still claimed a homestead exemption exceeding her own figures.

29 Termination of the automatic stay as to the Debtor will not prohibit her from seeking injunctive relief, if necessary, in a court of competent jurisdiction, including through an adversary proceeding. See, e.g., Lattin v. Midland Mort. Co. (In re Lattin), 461 B.R. 832 (Bankr. D. Nev. 2011) (injunction to prevent foreclosure permissible in successive Chapter 13 proceedings after automatic stay expires under Section 362(c)(3)(A)).

30 Reswick v. Reswick (In re Reswick), 446 B.R. 362 (B.A.P. 9th Cir. 2011) was a Chapter 13 case involving an individual debtor who had a prior Chapter 13 proceeding dismissed within the prior year. The bankruptcy appellate panel adopted a minority view that Section 362(c)(3)(A) operates to terminate the automatic stay in its entirety rather than merely "with respect to the debtor." 446 B.R. at 366-367. Neither the Chapter 13 debtor nor the Chapter 13 trustee had sought or obtained an order under Section 362(c)(3)(B) continuing the automatic stay. As a result, the Chapter 13 debtor's postpetition earnings that otherwise were property of the Chapter 13 estate under Section 1306(a)(2), were subject to a postpetition wage garnishment obtained by the debtor's former spouse.

Dao was a Chapter 7 case where the individual debtor had a prior Chapter 7 proceeding dismissed within the prior year. The bankruptcy court distinguished Reswick in light of the burdens and duties on a Chapter 7 trustee, the indefinite duration of estate property resulting from the language of Section 362(c)(1), the narrow language of Section 362(c)(3), and the impact of Sections 362(h)(1) and 362(h)(2) with respect to personal property that might secure a creditor's claim. These concerns were not addressed in Reswick. After addressing each of these concerns, the bankruptcy court in Dao adopted the majority view which limits termination of the automatic stay under Section 362(c)(3)(A) to the individual debtor, while continuing the stay's protection of estate property that may be administered by a Chapter 7 trustee. The reasoning expressed in Dao has particular application in the present case because the automatic stay would otherwise terminate on February 18, 2021, before the Chapter 7 Trustee can examine the Debtor at the continued meeting of creditors on February 24, 2021. The source of the dispute regarding the Debtor's homestead exemption was not described until Debtor filed her Amended Schedule A/B on February 9, 2021, i.e., the day before the initial date set for the creditors meeting. See note 8, supra. Not surprisingly, the Chapter 7 Trustee has made no appearance in connection with the instant Motion because he would have little or no basis to overcome the statutory presumption by clear and convincing evidence. Bankruptcy trustees already face too many pitfalls if they depend on debtors to monitor the interests of creditors and the bankruptcy estate. See, e.g., Samson v. Western Capital Partners, LLC (In re Blixseth), 684 F.3d 865 (9th Cir. 2012) (Chapter 7 debtor's failure to timely file a statement of intention results in all personal property collateral being removed from the estate and the automatic stay terminating even if the debtor failed to schedule the personal property). For these reasons, this court agrees with the analysis articulated by the bankruptcy court in Dao and adopts its rationale in this Chapter 7 case. Compare In re Rinard, 451 B.R. 12 (Bankr. C.D. Cal. 2011)(preliminary injunction granted barring postpetition foreclosure sale of commercial real property by concluding, *inter alia*, that 362(c)(3)(A) terminated the automatic stay solely with respect to the individual Chapter 7 debtor). See also Dao, 616 B.R. at 116 ("Is there a way to harmonize the chapter 13 minority view with chapter 7? Not really. One might attempt to draw a distinction between property of the estate under the control of a chapter 7 trustee and property of the estate under the control of a debtor in possession in chapter 11 or 13. But such an effort seems doomed to create more problems than it resolves.").

31 As mentioned in note 28, supra, Debtor and Tumbarello differ significantly in their estimates of the value of the Residence. It is unclear whether there is a sufficient equity cushion in the Residence to prevent any lienholder from seeking relief from stay under Section 362(d)(1). Although it appears that the Residence is not necessary for an effective reorganization (that the Debtor does not currently seek), it also is not clear how much equity, if any, exists in the Residence. Accordingly, it also is not clear whether relief from stay would be warranted under Section 362(d)(2).

32 Likewise, nothing prohibits the Chapter 7 Trustee from immediately objecting to the Debtor's homestead exemption so that he can attempt to liquidate the Residence for an amount in excess of the existing mortgage. Moreover, if the right to appeal the October 8, 2020 Order is property of the estate that is controlled by the Chapter 7 Trustee rather than by the Debtor in a Chapter 13 or a Chapter 11, can the Chapter 7 Trustee simply abandon any appeal of the State Court rulings in order to liquidate a non-exempt asset for the benefit of creditors of the Chapter 7 estate? If so, could he then rely on the State Court rulings to object to the Debtor's claim to a homestead under Nevada law? Moreover, if Tumbarello still has a lien by way of a judgment or a deed of trust resulting from the March 8, 2019 Order, can the Chapter 7 Trustee sell the Residence free and clear of liens under Section 363(f), with any disputed liens attaching to the proceeds of sale?

End of Document

639 B.R. 761
United States Bankruptcy Court,
E.D. California.

IN RE Nelson A. MADSEN and
Sharon L. Burns, Debtors.

Case No. 22-20157-E-13
|
Docket Control No. KL-1
|
Signed April 27, 2022

Synopsis
Background: Bank sought order determining that the automatic stay terminated with respect to the debtor, for all property of the bankruptcy estate, and in its entirety in current bankruptcy case filed by debtor within one year of prior bankruptcy case.

[Holding:] The Bankruptcy Court, Ronald H. Sargis, J., held that termination of stay "with respect to the debtor" did not terminate stay for all property of the estate or in its entirety in bankruptcy case.

Motion denied.

West Headnotes (16)

[1] **Statutes**⇔Plain Language; Plain, Ordinary, or Common Meaning

To construe what Congress has enacted, court always begins with plain language of statute.

[2] **Statutes**⇔Language
Statutes⇔Context

In construing a statute, court must consider language itself, specific context in which that language is used, and broader context of statute as whole.

[3] **Statutes**⇔Plain Language; Plain, Ordinary, or Common Meaning
Statutes⇔Statute as a Whole; Relation of Parts to Whole and to One Another

Courts discern plain meaning of statute in its entirety, rather than just plain meaning of isolated sentences.

[4] **Statutes**⇒Construction based on multiple factors

When the language of a statute is plain, the court cannot disregard its plain terms and must rely on the law as written.

[5] **Statutes**⇒Plain, literal, or clear meaning; ambiguity

Even legislative history can never defeat unambiguous statutory text.

[6] **Statutes**⇒Construction as written
Statutes⇒Plain Language; Plain, Ordinary, or Common Meaning

Where a statute's language is plain, the sole function of the courts is to enforce it according to its terms.

[7] **Statutes**⇒Undefined terms

Courts interpret undefined terms in statutory text using term's ordinary or common meaning.

[8] **Statutes**⇒Defined terms; definitional provisions

When Congress provides express definition for term in statutory text, courts follow that express definition, even if such definition differs from term's ordinary meaning.

[9] **Statutes**⇒In general; factors considered

Court looks to interpretive tools to determine statute's meaning only where statutory text is ambiguous.

[10] **Statutes**⇒What constitutes

ambiguity; how determined

Merely because there is division in judicial authority does not render statute ambiguous.

[11] **Statutes**⇐Giving effect to statute or language; construction as written

Even if court is more persuaded by policy implications of one judicial authority that law should have been written to say something other than plan language of statute, court must apply unambiguous law as it is written.

[12] **Statutes**⇐Plain Language; Plain, Ordinary, or Common Meaning
Statutes⇐Statutory scheme in general

So long as statutory scheme is coherent and consistent, courts need not inquire beyond the plain language of the statutory text.

[13] **Bankruptcy**⇐Abandonment

Though property of debtor becomes property of bankruptcy estate, that does not mean that debtor cannot regain ownership of such property from the estate, such as when property is abandoned by the estate to debtor. 11 U.S.C.A. §§ 541, 554.

[14] **Bankruptcy**⇐Effect

When property of bankruptcy estate is abandoned by the estate to debtor, trustee obtains order abandoning property back to debtor, and debtor becomes owner of such property postpetition. 11 U.S.C.A. §§ 541, 554.

[15] **Bankruptcy**⇐Sale or Assignment of Property

Debtor may purchase property

from bankruptcy estate to avoid trustee selling it and giving debtor that portion of proceeds from sale of property to third party. 11 U.S.C.A. § 363.

[16] **Bankruptcy**⚖Simultaneous or successive proceedings
Bankruptcy⚖Duration and termination

Termination of the automatic stay "with respect to the debtor" 30 days after a second bankruptcy case is filed by an individual within one year of a prior case having been pending and dismissed, unless the court extends the stay, did not terminate stay for all property of the estate or in its entirety in bankruptcy case; Bankruptcy Code's term "with respect to the debtor" in provision governing stay had legal significance, was not ambiguous, was not mere surplusage, and the legal effect thereof was not uncertain. 11 U.S.C.A. § 362(c)(3)(A).

Attorneys and Law Firms

***762** Office of the U.S. Trustee, Sacramento, CA, Douglas H. Kraft, Esq., Gold River, CA, for Attorney(s) for the Debtor(s).

MEMORANDUM OPINION AND DECISION

Ronald H. Sargis, United States Bankruptcy Judge

****1** Tri Counties Bank ("Movant") has filed its Motion for the court to enter an order pursuant to 11 U.S.C. § 362(j) determinating that the automatic stay has been terminated pursuant to 11 U.S.C. § 362(c)(3)(A) with respect to the Debtor, for all property of the Bankruptcy Estate, and in its entirety in this Bankruptcy Case.[1]

As addressed in this Decision, the court does not find the plain language used by Congress in 11 U.S.C. § 362(c)(3) to be ambiguous as to the scope of the termination of the stay, and the requested relief is denied.[2]

*763 DISCUSSION

On January 24, 2022, Debtor commenced the current Bankruptcy Case. Debtor had one prior bankruptcy case (21-22819) that was pending and dismissed (January 10, 2022) within one year of the commencement of the current Bankruptcy Case.

Congress addressed what it perceived as non-good faith repeat bankruptcy debtors as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), which included enacting 11 U.S.C. § 362(c)(3) and (c)(4). In 11 U.S.C. § 362(c)(3)(A) Congress provides for the termination of the automatic stay "with respect to the debtor" as follows [emphasis added]:

> (3) if a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13, and **if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed**, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b)—
>
> > (A) the stay under subsection (a) with respect to **any action taken with respect to a debt or property securing such debt** or with respect to any lease **shall terminate <u>with respect to the debtor</u>** on the 30th day after the filing of the later case; ....

****2** The plain language of this section states that the automatic stay with respect to a debt (obligation owed by a debtor) and any property securing the debt shall terminate, but only terminate with respect to the debtor after the expiration of the thirty (30) day period. No termination of the automatic stay, other than with respect to the debtor, is provided in 11 U.S.C. § 362(c)(3)(A).

11 U.S.C. § 362(a) provides a series of automatic stay provisions which give rights and protections to the debtor on the one hand, and the bankruptcy trustee, bankruptcy estate, and the interests of creditors with unsecured claims or junior lien secured claims[3] on the other hand.[4] The provision of 11 U.S.C. § 362(a) provide for specific and extensive statutory injunctive relief, stating (different emphasis added for "debtor" and "property of the estate"):

> [a] petition filed under section 301, 302, or 303 of this title ... operates as a stay, applicable to all entities, of—
>
> (1) the commencement or continuation, of judicial, administrative, or other action or proceeding against the debtor which was or could have been commenced prior to commencement of the bankruptcy case or recover a claim that arose prior to the commencement of the bankruptcy case;
>
> (2) enforcement against the debtor **or** <u>property of the estate</u> a judgment obtained ***764** before the commencement of the bankruptcy case;

> (3) act to obtain possession of property of the bankruptcy estate, from the bankruptcy estate, or exercise control over property of the bankruptcy estate;
>
> (4) act to create, perfect, or enforce any lien against property of the bankruptcy estate;
>
> (5) act to create, perfect, or enforce against property of the debtor any lien that secured a claim that arose before the commencement of the bankruptcy case;
>
> (6) act to collect, assess, or recover a claim against the debtor that arose before the commencement of the bankruptcy case;
>
> (7) setoff any debt owing to the debtor that arose before the commencement of the case against any claim against the debtor;

11 U.S.C. § 362(a)(1)-(7).

It is clear that Congress has created automatic stays which arise to benefit and protect several different entities: (1) **the debtor** and (2) the bankruptcy estate, trustee, and creditors with unsecured claims to be paid from the bankruptcy estate. In the plain language above, there is an automatic stay created in paragraph (4) to protect property of the bankruptcy estate from the creation, perfection, or enforcement of liens (which necessarily had to secure a pre-petition debt of the debtor or a post-petition debt secured by a lien authorized by the bankruptcy court). Then, in paragraph (5) there is an automatic stay to protect **property of the debtor** from the creation, perfection, or enforcement of a lien for a pre-petition debt. These paragraphs create two separate automatic stays protecting two different sets of property. If **property of the Debtor** was to include property of the bankruptcy estate, these provisions would be redundant of the other.

****3** In 11 U.S.C. § 362(c)(3)(A), Congress recognizes that a debtor filing a second case may be improperly attempting to use a second bankruptcy case filed shortly after the dismissal of a prior case as a front for having an automatic stay to shield the debtor personally and not for any good faith prosecution of such debtor's bankruptcy rights and administration of property of the bankruptcy estate. However, Congress does not provide for such bad faith by the debtor to cause the "property of the bankruptcy estate baby" being thrown out with the "bad faith debtor bath water."

Legal Authority Cited By Movant

Movant provides one case citation (and no legal analysis) as the legal basis in its Memorandum of Points and Authorities in Support of Motion (Dckt. 35) for the proposition that Congress, stating in 11 U.S.C. § 362(c)(3)(A) that the automatic stay **terminates with respect to the**

debtor, actually means that the automatic stay terminates **with respect to the debtor** and <u>with respect to the bankruptcy estate and property of the bankruptcy estate</u> (which is a separate legal entity from the Debtor). The one sole legal citation provided by Movant is *Reswick v. Reswick (In re Reswick)*, 446 B.R. 362, 368 (B.A.P. 9th 2011).

In *Reswick* the Bankruptcy Appellate Panel addressed what it found to be confusing language in 11 U.S.C. § 362(c)(3) – concluding that the minority view of interpreting this language to mean that the term "terminates with respect to the debtor" actually means that it "terminates the automatic stay in its entirety" in the bankruptcy case, resulting in there being no automatic stay for property of the bankruptcy estate. At the core of the Bankruptcy Appellate Panel concluding that there was not "plain language" to be read in ***765** 11 U.S.C. § 362(c)(3)(A), the panel in *Reswick* stated:

> If the phrase "with respect to the debtor" meant that the automatic stay only terminated as to the debtor personally and as to non-estate property, the opening clause of section 362(c)(3)(A) would be surplusage. There would be no reason for section 362(c)(3)(A) to reference actions "with respect to a debtor or property securing debt or with respect to any lease" if the interpretation of the Debtor and the majority were correct.

Reswick v. Reswick (In re Reswick), 446 B.R. 362, 368 (B.A.P. 9th 2011).

The Bankruptcy Appellate Panel's conclusion that the reference to "property" must refer to property of the bankruptcy estate, appears to assume that all property of a debtor or "property securing a debt of a debtor" must be and can only be "property of the bankruptcy estate."

It appears that the Bankruptcy Appellate Panel in *Reswick* did not consider that a debtor, who was protected by the automatic stay, might have an obligation that was secured by property owned by other persons (father, mother, business associate, or friend). And that for such obligation, the creditor could be stayed by the statutory injunction granted for the debtor in 11 U.S.C. § 362(a)(6) of any "act to collect, assess, or recover a claim against the debtor that arose before the commencement of the bankruptcy case."

Additionally, it does not appear that the Panel considered that there could be property of a debtor that is claimed as exempt which is initially included in the bankruptcy estate, with no value in the property after the liens on the property and exemption claimed by the debtor. In such situations, it is common for a trustee to quickly abandon such property back to the debtor during the pendency of the bankruptcy case because such property is burdensome (cost of insurance and other expenses to preserve the value of the property as property of the bankruptcy estate, or subject the bankruptcy estate to significant tax consequences if a foreclosure sale occurs while it is property of the bankruptcy estate) or of inconsequential value to the bankruptcy estate. 11 U.S.C. § 554(a). When abandoned to the debtor, the termination of the stay with respect to the debtor would allow the creditor to proceed against such property.

****4** Finally, as discussed below, there is a wide range of property that while owned by the debtor as of the commencement of the case, never becomes property of the bankruptcy estate (and thus not protected by the automatic stay as it applies to property of the bankruptcy estate). These exclusions are found in 11 U.S.C. § 541(b)(1)-(10) and (d). For such property, the termination of the stay as to the debtor would be effective for a creditor having a lien to enforce against such property.

PLAIN LANGUAGE OF 11 U.S.C. § 362(c)(3)(A)

The court's analysis of this contention for interpreting the plain language of 11 U.S.C. § 362(c)(3)(A) begins with the basic rules of statutory construction as enunciated by the United States Supreme Court.

Statutory Interpretation of 11 U.S.C. § 362(c)(3)

[1] [2] [3]To construe what Congress has enacted, judges (and lawyers) always begin with the plain language of the statute. *Duncan v. Walker*, 533 U.S. 167, 172, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001). The court must consider the language itself, the specific context in which that language is used, and the broader context of the statute as a whole. *JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props.*, 881 F.3d 724, 725 (9th Cir. 2018). More specifically, courts discern the plain ***766** meaning of the statute in its entirety, rather than just the plain meaning of "isolated sentences." *Beecham v. U.S.*, 511 U.S. 368, 372, 114 S.Ct. 1669, 128 L.Ed.2d 383 (1994).

[4] [5]When the language of a statute is "plain," the court cannot disregard its plain terms and must rely on the law as written. *Bostock v. Clayton Cty., Georgia*, —— U.S. ——, 140 S. Ct. 1731, 1749, 207 L.Ed.2d 218 (2020). Even legislative history can never defeat unambiguous statutory text. *Id.* at 1750. As stated in the plain language of the Supreme Court:

> [6]The task of resolving the dispute over the meaning of § 506(b) begins where all such inquiries must begin: with the language of the statute itself. *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 [105 S.Ct. 2297, 85 L.Ed.2d 692] (1985). In this case it is also where the inquiry should end, for where, as

> here, the statute's language is plain, "the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 [37 S.Ct. 192, 61 L.Ed. 442] (1917).

U.S. v. Ron Pair Enterprises., 489 U.S. 235, 242, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989).

[7] [8]Courts interpret undefined terms in the statutory text using the term's "ordinary or common meaning." *Smith v. United States*, 508 U.S. 223, 228, 113 S.Ct. 2050, 124 L.Ed.2d 138 (1993). When Congress provides an express definition for a term in the statutory text, courts follow that express definition even if such definition differs from the term's ordinary meaning. *Stenberg v. Carhart*, 530 U.S. 914, 942, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000).

[9]A court looks to other interpretive tools to determine a statute's meaning "[o]nly where the statutory text is ambiguous...." *Transwest Resort Props.*, 881 F.3d at 725.

[10] [11]Merely because there is a division in judicial authority does not render a statute ambiguous. *Reno v. Koray*, 515 U.S. 50, 65, 115 S.Ct. 2021, 132 L.Ed.2d 46 (1995). Even if a court is more persuaded by the policy implications of one judicial authority that "the law should have been written to say something other than the plan language of the statue," the court must apply the unambiguous law as it is written. *United States v. Rodgers*, 466 U.S. 475, 484, 104 S.Ct. 1942, 80 L.Ed.2d 492 (1984).

If the plain language of the statute is being applied differently than Congress's intent, "It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think, perhaps along with some Member of Congress, is the preferred result." *United States v. Granderson*, 511 U.S. 39, 68, 114 S.Ct. 1259, 127 L.Ed.2d 611, (1994) (Justice Anthony M. Kennedy concurring opinion).

****5** [12]Finally, it is important to note that the process of formulating the modern Bankruptcy Code took Congress nearly a decade to complete, and its evolution through amendments continues to this day. The modern Code has significantly changed both substantively and procedurally. *U.S. v. Ron Pair Enters.*, 489 U.S. at 240, 109 S.Ct. 1026. Considering the transformative overhaul of the bankruptcy system, "it is not appropriate or realistic to expect Congress to have explained with particularity each step it took." *Id.* So long as the statutory scheme is "coherent and consistent," courts need not inquire beyond the plain language of the statutory text. *Id.*

Reviewing 11 U.S.C. § 362(a), Congress has clearly created four provisions that expressly apply to "the debtor" and three ***767** that expressly apply to property of the bankruptcy estate, and others that can apply to both. Congress clearly distinguishes between the "debtor" and the "property of the bankruptcy estate" when imposing the automatic stay for multiple purposes.

Collier on Bankruptcy provides the following discussion and citations supporting its analysis that the termination of the automatic stay "with respect to debtor" as provided in 11 U.S.C. § 362(c)(3)(A) is not termination of the stay as to "property of the bankruptcy estate," including:

> [a] Scope of Stay Limitation
>
> There are certain limitations arising from the express wording of subsection (c)(3). First, the **stay terminates under this provision only "with respect to the debtor."** As in other provisions in section 362, Congress sought in subsection (c)(3) to **distinguish between actions taken against property of the debtor and property of the estate.**[18] This intent to limit the stay termination to actions against the debtor is made abundantly clear when the language in subsection (c)(3) is compared to the much broader scope of the parallel stay termination provision in subsection (c)(4)[19] for a debtor who has had two dismissed cases within the prior year, particularly since both provisions were enacted at the same time as part of the 2005 amendments.[20] Thus, if there has been a stay termination based on the operation of subsection (c)(3) in a case filed within a year of a prior dismissal, the automatic stay provided under section 362(a) continues to apply in that case as to actions taken against property of the estate, but not as to actions against the debtor or property of the debtor that is not property of the estate.[21]
>
> 18 *See, e.g.*, 11 U.S.C. § 362(a)(1) ("against the debtor"), 362(a)(2) ("against the debtor or against property of the estate"), 362(a)(3) ("property of the estate or of property from the estate"), 362(a)(4) ("against property of the estate"), 362(a)(5) ("against property of the debtor"), 362(a)(6) ("against the debtor"). 1911 U.S.C. § 362(c)(4)(i); see ¶ 362.06[4] infra.
>
> 20 *See Jumpp v. Chase Home Fin., LLC (In re Jumpp)*, 356 B.R. 789 (B.A.P. 1st Cir. 2006); *In re Moon*, 339 B.R. 668, 671 (Bankr. N.D. Ohio 2006) ("Had the drafters of this provision intended that the whole of the automatic stay would terminate, they could have easily just referenced § 362(a) as they did in § 362(c)(4)(A) ('the stay under subsection (a) shall not go into effect upon the filing of the later case').").
>
> 21 *Rose v. Select Portfolio Servicing, Inc.*, 945 F.3d 226 (5th Cir. 2019); *In re Holcomb*, 380 B.R. 813 (B.A.P. 10th Cir. 2008); *In re McGrath*, 621 B.R. 260 (Bankr. D.N.M. 2020); *In re Thu Thi Dao*, 616 B.R. 103 (Bankr. E.D. Cal. 2020); *In re Roach*, 555 B.R. 840 (Bankr. M.D.

Ala. 2016); *In re Hale*, 535 B.R. 520 (Bankr. E.D.N.Y. 2015); *In re Scott-Hood*, 473 B.R. 133 (Bankr. W.D. Tex. 2012); *In re Alvarez*, 432 B.R. 839 (Bankr. S.D. Cal. 2010); *In re Jones*, 339 B.R. 360 (Bankr. E.D.N.C. 2006); *In re Johnson*, 335 B.R. 805 (Bankr. W.D. Tenn. 2006). *But see Smith v. Maine Bureau of Revenue Servs. (In re Smith)*, 910 F.3d 576 (1st Cir. 2018); *In re Reswick*, 446 B.R. 362 (B.A.P. 9th Cir. 2011); *Vitalich v. Bank of N.Y. Mellon*, 569 B.R. 502 (N.D. Cal. 2016); *St. Anne's Credit Union v. Ackell*, 490 B.R. 141 (D. Mass. 2013); *In re Daniel*, 404 B.R. 318 (Bankr. N.D. Ill. 2009); *In re Jupiter*, 344 B.R. 754 (Bankr. D.S.C. 2006).

****6 *768** 3 Collier on Bankruptcy P 362.06 (16th 2021) (emphasis added).

Statutory Definitions and Related Law Concerning the Debtor, the Bankruptcy Estate, and Property of the Bankruptcy Estate

In addressing the contention that "as to the debtor" means as to the "estate and all other parties in interest," Congress has not left the courts, attorneys, and parties to scavenge the vast desert of "common meanings" to discern what is meant by "debtor," "bankruptcy estate," or "property of the bankruptcy estate."

<u>Definition of Debtor</u>

The terms "debtor" and "bankruptcy estate" are not undefined theoretical concepts for courts to develop in the future. First, Congress does not leave who or what is a "debtor" for argument of parties and to be divined by the court, but defines "debtor" in 11 U.S.C. § 101(13) to be:

> (13) The term "debtor" means person or municipality concerning which a case under this title has been commenced.

<u>Definition of Person</u>

Congress then makes sure there is no dispute as to who or what constitutes a "person" providing the statutory definition in 11 U.S.C. § 101(41), as:

> (41) The term "person" includes individual, partnership, and corporation, but does not include governmental unit, except that a governmental unit that– ....

Then in 11 U.S.C. § 301, 302, and 303 that voluntary, joint, and involuntary bankruptcy cases are commenced by or for the "debtor" in that bankruptcy case.

Thus, the "debtor" is the person who has put him/her/itself voluntarily into bankruptcy or has been placed into bankruptcy involuntarily by creditors. Such a person is not "property."

Definition of Property of the Bankruptcy Estate

For what constitutes a "property of the bankruptcy estate," Congress provides the federal law by which the bankruptcy estate is create and what it is comprised of in 11 U.S.C. § 541.

In 11 U.S.C. § 541(a)(1)-(7), the property of the bankruptcy estate is the property which the debtor had as of the commencement of the bankruptcy case, proceeds of that property of the estate, specified interests in property acquired within 180 days of the commencement of the bankruptcy case (such as inheritance, life insurance benefit, or property settlement), avoidable pre-petition transfers, and any interest in property that the bankruptcy estate acquires post-petition.

Exclusion of Property From Bankruptcy Estate

However, in 11 U.S.C. § 541(b)(1) - (10) Congress then excludes from property of the bankruptcy estate specifically identified property consisting of: (1) property for which the debtor can exercise power only for the benefit of a person other than the debtor (i.e. power of attorney, administrator, authorized signatory on another person's account); (2) a pre-petition terminated nonresidential lease; (3) higher education assistance program funding; (4) specified oil and gas interests; (5) specified education individual retirement accounts; (6) specified funds in accordance tuition account in accordance with 26 U.S.C. § 529(b)(1); (7) specified employer withholding specified retirement, insurance, and deferred plans; (8) property transferred in exchange for loans or advances for which debtor has no obligation to repay or redeem the property (i.e. pawnbroker); (9) specified money orders; and (10) qualifying state ABLE program contributions.

7 ***769 Congress goes further in excluding from property of the bankruptcy estate any property in which the debtor holds bare legal title and no equitable interest in the property. 11 U.S.C. § 541(d). These include being trustee of a trust, a constructive or resulting trust, and statutory trusts.

It is clear under the Bankruptcy Code that there can be property which a debtor has as of the commencement of the bankruptcy case, which does not become property of the bankruptcy estate, remains property of the debtor, and will be protected by the automatic stay provisions of 11 U.S.C. § 362(a) that protect the debtor and property of the debtor (which never becomes property of the bankruptcy estate).

Recovery of Property from the Bankruptcy Estate by the Debtor

[13] [14]Though property of a debtor becomes property of the bankruptcy estate, that does not mean that the debtor cannot regain ownership of such property from the bankruptcy estate. One way for the property of the bankruptcy estate is for it to be abandoned by the bankruptcy estate to the debtor. 11 U.S.C. § 554(a) provides that the bankruptcy trustee (or the debtor in possession, Chapter 12 debtor, or Chapter 13 debtor exercising the rights, powers, and duties of a bankruptcy trustee as the fiduciary administering property of the bankruptcy estate) may abandon property of the bankruptcy estate "that is burdensome to the estate or that is of inconsequential value and benefit to the estate." In such situations, the bankruptcy trustee obtains an order abandoning the property back to the debtor, and the debtor, not the bankruptcy estate, becomes the owner of such property post-petition.

[15]Additionally, a debtor may purchase the property from the bankruptcy estate (pursuant to an order of the court, 11 U.S.C. § 363) to avoid the bankruptcy trustee selling it and giving the debtor that portion of the proceeds from a sale of the property to a third party. The property subject to the debtor's exemption may be of greater value to the debtor than the exemption proceeds. In such situations the debtor will pay the bankruptcy estate for the value that would have been received by the bankruptcy estate if the property had been sold.

As demonstrated above, there can be a plethora of property which is not property of the bankruptcy estate but is property of the debtor or someone else who can be protected by the automatic stay given to the debtor and property of the debtor (11 U.S.C. § 362(a)(1), (2), (5), (6), and 11 U.S.C. § 1201, § 1301 co-debtor stays). It is not illogical for Congress to provide relief from the stay with respect to the debtor to allow creditors who have rights that can be enforced post-petition against a debtor to do so when there is a repeat filing that is not in good faith. Merely because a bad faith debtor is not to be protected does not mean that Congress conflated debtor and property of the debtor with property of the bankruptcy estate, stripping the bankruptcy estate, and its creditors, of the automatic stay protecting property of the bankruptcy estate.

Legislative History

Although this court finds the plain language of 11 U.S.C. § 362(c)(3) unambiguous, and therefore no look into the legislative history is warranted (or justifiable in interpreting the plain language of 11 U.S.C. § 362(c)(3)(A)), such review is instructive and consistent with the plain language of the statute. The House Report on these provisions of the Bankruptcy Code includes the following discussion of the automatic stay provisions of 11 U.S.C. § 362(a) [emphasis added]:

> ****8** The automatic stay is **one of the fundamental debtor protections provided *770 by the bankruptcy laws**. It gives the debtor **a breathing spell** from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.
>
> The **automatic stay also provides creditor protection**. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors. **Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally**. A race of diligence by creditors for the debtor's assets prevents that.
>
> ...
>
> Paragraph (2) stays the enforcement, against the debtor **or** <u>against property of the estate</u> [recognizing that the bankruptcy estate is legally something separate and apart from the debtor], of a judgment obtained before the commencement of the bankruptcy case. Thus, **execution and levy against** the debtors' **prepetition property** [which is property of the bankruptcy estate, and not debtor, once the case is filed] are stayed, and attempts to collect a judgment from the debtor personally are stayed.
>
> Paragraph (3) stays any act to obtain possession of <u>property of the estate</u> (that is, property of the debtor as of the date of the filing of the petition), or <u>property from the estate</u> (property over which the estate has control or possession). The purpose of this provision is to **prevent dismemberment of the estate**. Liquidation must proceed in an orderly fashion. **Any distribution of property must be by the trustee** after he has had an opportunity to familiarize himself with the various rights and interests involved and with the property available for distribution.
>
> Paragraph (4) **stays lien creation against property of the estate** [not property of the debtor]. Thus, taking possession to perfect a lien or obtaining court process is prohibited. To permit lien creation after bankruptcy would give certain creditors preferential treatment by making them secured instead of unsecured.
>
> Paragraph (5) stays any act to create or enforce a lien against **property of**

> **the debtor**, that is, most **property** that is **acquired** [by the debtor] **after the date of the filing of the petition**, **property** that is exempted, or property **that does not pass to the estate**, to the extent that the lien secures a prepetition claim. Again, to permit postbankruptcy lien creation or enforcement would permit certain creditors to receive preferential treatment. It may also circumvent the debtors' discharge.

***771** H. Rept. No. 95-595 to accompany H.R. 8200, 95th Cong., 1st Sess. (1977) pp. 340–344 (emphasis added).

This portion of the legislative history, consistent with the plain language of the statute and statutory definitions, acknowledges that property of a debtor post-petition is something other than what is property of the bankruptcy estate.

> Paragraph (6) prevents creditors from attempting in any way to collect a prepetition debt. Creditors in consumer cases occasionally telephone debtors to encourage repayment in spite of bankruptcy. Inexperienced, frightened, or ill-counseled debtors may succumb to suggestions to repay notwithstanding their bankruptcy. This provision prevents evasion of the purpose of the bankruptcy laws by sophisticated creditors.

****9** H. Rept. No. 95-595 to accompany H.R. 8200, 95th Cong., 1st Sess. (1977) pp. 340-344. As shown in the Legislative History, Congress understood that there are statutory injunction under § 362(a) created for the debtor and separate statutory injunctions created for "property of the bankruptcy estate," with some applying to protect both.

Application of the Explosive Provisions of 11 U.S.C. § 362(c)(4)

Congress has not ignored that a situation may exist where a debtor repeatedly files bankruptcy cases to protect property that will be property of the bankruptcy estate, with such filings being solely for the purpose of delaying creditors who have liens on what becomes property of the bankruptcy estate, with no intention to prosecute the bankruptcy case and administer the property of the bankruptcy estate in good faith. Because 11 U.S.C. § 362(c)(3)(A) only terminates the stay as to the debtor, such a bad faith debtor could then hide repeatedly behind the stay protecting property of the bankruptcy estate, effectively nullifying the practical effect of 11 U.S.C. § 362(c)(3)(A). In such situations the property may be of no economic value to the bankruptcy estate (the liens encumbering the property and exemptions claimed by the debtor exceeding the value of the property), so the bankruptcy trustee and creditors do not push to administer such property or oppose dismissal when such debtor fails to prosecute the bankruptcy case.

Recognizing that such a situation may exist, and to avoid trustees having to file motions to abandon, creditors file motions for relief, and the creditor body as a whole having to go through the time and expense of multiple bad faith bankruptcy proceedings, Congress has expressly provided such relief in the plain language of 11 U.S.C. § 362(c)(4)(A).

In 11 U.S.C. § 362(c)(4)(A), the plain language provides that if there were two or more prior bankruptcy cases pending and dismissed in the one-year period preceding the current case before the court, then no automatic stay goes into effect in the third, fourth, fifth, or however many cases in the prior year were pending for the debtor and dismissed.

Congress does not state in 11 U.S.C. § 362(c)(4)(A) that the automatic stay does not go into effect with "respect to the debtor" in the later filed case. Congress chose to use a different legal term for 11 U.S.C. § 362(c)(4)(A), stating that the § 362(a) stay does not go into effect in the later filed bankruptcy case, with no qualification or limitations providing that it is only "with respect to the debtor" or any other party in the bankruptcy case. As addressed above, the "bankruptcy case" is the federal judicial proceeding as provided in 11 U.S.C. §§ 301, 302, and 303, and is not merely the debtor, or the bankruptcy estate, or a related proceeding. It is the bankruptcy case in which the debtor, the bankruptcy estate, the trustee, and creditors are brought together for the application of the Federal Bankruptcy Laws.[5]

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****10** [16]As the court has addressed above, the provisions of 11 U.S.C. § 362(c)(3)(A) provide for the termination of the automatic stay with respect to the debtor thirty (30) days after a second bankruptcy case is filed by an individual within one year of a prior case having been pending and dismissed, unless the court extends the stay. The term "with respect to the debtor" has legal significance, is not ambiguous, is not mere surplusage, and the legal effect thereof is not uncertain. The construct of the Bankruptcy Code, what constitutes property of the bankruptcy estate, what prepetition assets of a debtor are excluded from the bankruptcy estate, the express provisions of 11 U.S.C. § 362(a) which distinctly reference separately "the debtor" and "property of the bankruptcy estate" clearly show that different rights and interests of various parties in interest and the bankruptcy estate are protected.

Movant's assertion that termination of the automatic stay "with respect to the debtor" actually terminates the automatic stay in the bankruptcy case and all of the property of the bankruptcy estate is "free for the pickings" is not correct. The court denies the requested relief for an order saying that the termination of the automatic stay "with respect to the debtor" also is a termination of the automatic stay with respect to property of the bankruptcy estate.

The court also denies Movant's oral request that the court bifurcate the conjunctive relief originally requested in the Motion and issue an order stating that the stay terminated as to the Debtor only. Movant could articulate no necessary, legitimate reason for such relief. Movant has sought the order stating that there is no stay so it can proceed with a foreclosure on property of the bankruptcy estate. Being no identifiable reason for issuing an order concerning the stay having terminated "with respect to the Debtor," the court declines the opportunity to issue an order that may be misconstrued by non-lawyers working for Movant into thinking that there is no automatic stay imposed by Congress protecting the property of the Bankruptcy Estate in this case.

The court shall issue a separate order denying the Motion for all relief requested therein.

All Citations

639 B.R. 761, 2022 WL 1272583, 71 Bankr.Ct.Dec. 150

Footnotes

1 Motion, p. 2:7-17; Dckt. 33.

2 At the hearing, Counsel for Movant requested that the court bifurcate the conjunctive relief requested and issue an order stating that the stay terminated as to the Debtor only. When Counsel was asked for what purpose was such relief requested, he could not state any reason or rights Movant would seek to act on just with respect to the Debtor. Given that the acts sought to be taken are against property of the Bankruptcy Estate (foreclose on property of the Bankruptcy Estate), the court declined the request to revise the conjunctive relief requested, there being no proper reason for such relief being provided.

The court's concerns included that if it were to issue an order granting relief "with respect to the Debtor" and then a non-lawyer representative of the Movant improperly believed that such was also termination of the automatic stay as to property of the Bankruptcy Estate, then the court would be faced with a situation where the Debtor, on behalf of the Bankruptcy Estate, would be asserting a claim for relief for knowing violation of the automatic stay. Then the court would be presented with determining the amount of a corrective sanctions necessary to deter Movant from such knowing violation of the 11 U.S.C. § 362(a) statutory injunction on the future.

3 In the vast majority of cases, it is the class of creditors with unsecured claims that need the protection of the automatic stay to protect the bankruptcy estate so that all of the value of the property of the bankruptcy estate can be obtained and there be a distribution to creditors with unsecured claims. Without such protections, the creditors with secured claims could quickly strip the estate of property, which foreclosure sales or lien sales may not result in recovering the fair market value of such property, but only a distressed foreclosure or lien sale value.

In referencing this protected group of creditors - those with unsecured claims and those with junior lien claims which may only be partially secured - the court references the group as "creditors with unsecured claims."

4 Congress provides for even greater protection under the Bankruptcy Code beyond the debtor and separately for bankruptcy estate, trustee, and creditors with unsecured claims, including 11 U.S.C. § 1301 and § 1201 which provides automatic stay protections for non-bankruptcy third-party who are coobligors on consumer obligations with the debtor.

5 This distinction of "with respect to the debtor" in 11 U.S.C. § 362(c)(3)(A) and "in the bankruptcy case" in 11 U.S.C. § 362(c)(4)(A) also recognizes a practical aspect of multiple bankruptcy filings by a bad faith debtor. The first case may be filed, stumble forward for a short time, and then be dismissed. Creditors receive notice of the case, start to act in a manner consistent with a good faith prosecution of a bankruptcy case timeline, and then have the case quickly dismissed.

When the second case is filed within a year of the dismissal of the prior case, the creditors and other parties in interest are forewarned of multiple filings and know to act promptly to protect property of the bankruptcy estate and have it administered for the benefit of creditors. Not assuming that the debtor is going to prosecute the bankruptcy case in good faith, there may be motions to convert the case, appoint a trustee, or other action to protect the bankruptcy estate.

However, if the creditors and other parties in interest are asleep at the switch and allow the second bankruptcy case filed in bad faith dismissed, then they do not get the benefit of the automatic stay in the third or more cases filed that fall within 11 U.S.C. § 362(c)(4)(A). They will then have to seek the court imposing the § 362(a) stay.

End of Document

VIOLATIONS OF THE STAY AND DISCHARGE INJUNCTION

<u>IN RE GO,</u> (J. Nakagawa) (Bk. NV 2022)

Honorable Mike K. Nakagawa
United States Bankruptcy Judge

Entered on Docket
June 29, 2022

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

* * * * * *

In re: ROLANDO RAMIL JALLORES GO aka ROLANDO RAMIL J. GO and CHERRY ANN MACAISA TIJAM aka CHERRY A.M. TIJAM aka CHERRY M. TIJAM, Debtors.	Case No.: 21-12657-MKN Chapter 7 Date: January 12, 2022 Time: 2:30 p.m.

ORDER ON MOTION FOR CONTEMPT FOR VIOLATION OF THE DISCHARGE INJUNCTION 11 U.S.C. §524(a)(2)[1]

On January 12, 2022, the court heard the Motion for Contempt for Violation of the Discharge Injunction 11 U.S.C. §524(a)(2) ("Contempt Motion"), brought in the above-captioned case.[2] The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

[1] In this Order, all references to "ECF No." are to the numbers assigned to the documents filed in the case as they appear on the docket maintained by the clerk of the court. All references to "Section" or "§§ 101-1532" are to the provisions of the Bankruptcy Code. All references to "FRE" are to the Federal Rules of Evidence. All references to "LR" are to the bankruptcy provisions of the Local Rules of Practice for the District of Nevada. All references to "NRS" are to the Nevada Revised Statutes.

[2] Debtors submitted 12 documents marked as Exhibits 1 through 12 ("Debtor Ex. ___") attached to the Contempt Motion and their reply ("Reply). 21st Mortgage Corporation ("Lender") submitted 2 documents marked as Exhibits A and B ("Lender Ex. ___") attached to its opposition ("Opposition") to the Contempt Motion. Neither party in this proceeding objects to the court's consideration of any of the exhibits.

BACKGROUND[3]

On or about February 19, 2020, Rolando Ramil Jallores Go ("Rolando") and Cherry Ann Macaisa Tijam (jointly, "Debtors") purchased a manufactured home ("Residence"). The Residence is situated on real property that the Debtors do not own. To finance the purchase, they borrowed $62,918 from the Lender pursuant to a Consumer Loan Note, Security Agreement and Disclosure Statement ("Secured Note"). See Lender Ex. A. Title to the Residence is held by the Debtors as reflected in the Manufactured Home Title Information obtained from the Nevada Housing Division of the Department of Business and Industry ("Title Information"). See Lender Ex. B.

Under the Secured Note, Debtors are obligated to commence 276 monthly payments on April 1, 2020, in the amount of $530.57. The Secured Note includes a specific section in capitalized, bold type entitled "**DELINQUENCY AND DEFAULT**." Among other things, this section provides that a 5% late charge will be applied if any monthly payment is more than 15 days late. The Secured Note identifies five specific events of default as follows:

> Borrower will be in default under this Note if: (1) Borrower fails to make any payment when due; (2) Borrower otherwise fails to perform any of Borrower's obligations under this Note or under any mortgage or deed of trust which secures this Note; (3) Borrower dies or becomes legally unable to manage Borrower's affairs; (4) any statement of fact, representation or warranty Borrower makes to Lender in Borrower's application for credit, any other document submitted to Lender or signed by Borrower in connection with this Note, or in any Note document is false, misleading, inaccurate, or incomplete; or (5) Borrower files a petition in bankruptcy, or a party files a petition in bankruptcy against Borrower.

The fifth ground – a default based on the occurrence of an event such as a bankruptcy filing – is known as an "ipso facto" clause. See, e.g., In re Wright, 622 B.R. 779, 794 (Bankr. D. Ore. 2020) ("Although certain Code provisions limit the enforceability of contract clauses that put a party in default for filing for bankruptcy (ipso factor clauses), the Code lacks a general

[3] Pursuant to FRE 201(b), the court takes judicial notice of all materials appearing on the docket in the above-captioned bankruptcy case. See U.S. v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980). See also Bank of Am., N.A. v. CD-04, Inc. (In re Owner Mgmt. Serv., LLC Trustee Corps.), 530 B.R. 711, 717 (Bankr. C.D. Cal. 2015) ("The Court may consider the records in this case, the underlying bankruptcy case and public records.").

prohibition on their enforceability. In the context of chapter 7 cases affecting collateral not subject to an executory contract or unexpired lease (see § 365(e)(1)), the Code affirmatively states in § 521(d) that it does not affect an ipso facto clause's enforceability…").[4] The **DELINQUENCY AND DEFAULT** section also specifically provides as follows:

> In the event of Borrower's default, Lender <u>will give Borrower</u> notice of the default and <u>right to cure the default</u> ("Notice of Default"). Borrower is not entitled to a Notice of Default if Borrower abandons or voluntarily surrenders the Manufactured Home, or it other extreme circumstances exist.

The Secured Note further provides:

> <u>If Borrower does not cure the default</u> within 30 days after the postmarked date of the Notice of Default, or if a Notice of Default is not required to be sent, Lender may (1) <u>accelerate the maturity date of the debt and require Borrower to pay Lender the entire remaining balance and all other amounts due under the Note,</u> (2) require Borrower to make the Manufactured Home available to the Lender, (3) take legal action against the Borrower, (4) <u>repossess the Manufactured Home,</u> (5) enforce such rights and remedies available to Lender under the Uniform Commercial Code and other applicable law, and (6) foreclose on the real property, if applicable.

(Emphasis added.)

On May 24, 2021, Debtors filed a voluntary Chapter 7 petition to which they attached their Schedules of Assets and Liabilities ("Schedules"), Statement of Financial Affairs ("SOFA") and Statement of Intention for Individual Filing Under Chapter 7 ("Statement of Intention"). Notice of the Chapter 7 proceeding was given to all creditors, including Lender. On property Schedule "A/B," the Residence was listed as property of the bankruptcy estate. On Schedule "C," Debtors claimed the Residence as exempt. On Schedule "D," Lender was listed as a creditor secured by a first mortgage against the Residence. On their Statement of Intention, Debtors listed the Lender as being secured by the Residence and identified their intention to "Retain and pay current." No party in interest objected to the claimed exemptions. No party in

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[4] The court in <u>Wright</u> goes on to state: "For the reasons outlined above, Debtors in this case have failed to satisfy § 521(a)(2) and paragraphs (1) and (2) of § 362(h). Thus, nothing under the Bankruptcy Code prevents or limits the operation of an ipso facto clause contained in Debtors' underlying agreements with [creditor]. § 521(d). As *Dumont* instructs, § 521(d) does not give [creditor] any additional substantive rights to the collateral; it simply 'removes the last remaining impediment under federal bankruptcy law to enforcement of an ipso facto clause that already exists.' 581 F.3d at 1115." 622 B.R. at 794.

interest objected to the Debtors' discharge or to dischargeability of any particular debt. No party in interest filed a proposed agreement to reaffirm any consumer debt.

On August 24, 2021, Debtors received their Chapter 7 discharge. (ECF No. 23).

On August 26, 2021, a Certificate of Notice was entered attesting that a copy of the Order of Discharge was transmitted to all creditors and parties in interest, including the Lender. (ECF No. 24).

On August 27, 2021, the Chapter 7 case was closed. (ECF No. 25).

On or about September 10, 2021, Lender sent Rolando a "Mortgage Statement" setting a payment due date of 10/1/2021 in the payment amount of $653.25. See Debtor Ex. 2. The Mortgage Statement acknowledged that the Lender has received a customer payment in the same amount on 9/8/2021. The Mortgage Statement also includes an information box entitled "Bankruptcy Message" stating as follows: "Our records indicate that either you are a debtor in bankruptcy or you discharged personal liability for your mortgage loan in bankruptcy. We are sending this statement to you for information and compliances purposes only. It is not an attempt to collect a debt against you. If you want to stop receiving statements, write to us at the General Correspondence address listed on page 2 of this statement."

On or about September 15, 2021, Lender sent the Debtors separate, but identical documents by certified mail. See Debtor Ex. 3. Both are entitled "Non-Monetary Notice of Default." Both notices ("Non-Monetary Notice of Default") recite the events of default stated in the Secured Note, and then specify:

> **Due to your Bankruptcy filing, you are now in default**. [Lender] intends to move forward with replevin/foreclosure action to repossess the collateral.

Immediately thereafter, the Non-Monetary Notice of Default states:

> **Methods to Cure Default:** (1) Send in the full payoff; (2) Voluntarily Vacate; (3) Re-open Bankruptcy & file a Reaffirmation Agreement. (Emphasis added.)

Like its Mortgage Statement, the Lender's Non-Monetary Notice of Default also includes bankruptcy language as follows: "Please be advised further that this letter constitutes neither a demand for payment of the captioned debt nor a notice of personal liability to any recipient hereof who might have received a discharge of such debt in accordance with applicable bankruptcy… This letter is being sent to any such parties merely to comply with applicable state law governing foreclosure of liens pursuant to contractual powers of sale.."[5]

On or about October 11, 2021, Lender sent Rolando another "Mortgage Statement" setting a payment due date of 11/1/2021, in the payment amount of $653.25. See Debtor Ex. 5. The Mortgage Statement acknowledged that the Lender had received a customer payment in the same amount on 10/4/2021. Unlike the prior Mortgage Statement, this one indicated that on 9/14/2021, a payment of $653.25 was reversed, that on 9/17/2021, a late fee of $26.53 was charged, and that on 10/4/2021, another payment of $653.25 was received. The Mortgage Statement also includes an information box entitled "Bankruptcy Message" identical to the prior statement.

On or about October 26, 2021, Lender sent Rolando a letter. See Debtor Ex. 6. The letter states as follows:

> This letter is to inform you that 21st Mortgage Corporation received a payment in the amount of $653.25, on 10/04/2021. **Your account is currently in default due to your Bankruptcy filing;** therefore, 21st Mortgage Corporation is unable to accept payments, and, as such, these funds will be returned to you. You received a Non-Monetary Notice of Default on or about 9/21/2021. Per the Notice of Default, you have three (3) options: (1) Voluntarily Vacate; (2) Send in the full payoff [payoff quote]; or (3) Reopen the Bankruptcy & file a Reaffirmation Agreement. This Notice of Default expired 10/16/2021.

Accompanying the letter is another page stating in bold type "****PLEASE TAKE NOTICE**.**" It then goes on to state, *inter alia*, as follows:

> This is an attempt to collect a debt and any information obtained will be used for that purpose.
>
> Please be advised further that this letter constitutes neither demand for payment of the captioned debt nor a notice of personal liability to any recipient hereof who might have received a discharge of such debt in accordance with applicable bankruptcy laws…

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[5] Lender issued a check payable to Rolando dated 9/10/21 in the amount of $653.25, apparently to return the payment Lender received on 9/08/21. See Debtor Ex. 4.

Apparently, included with the October 26, 2021 letter was a check from the Lender dated 10/22/2021, in the amount of $653.25, payable to Rolando.

On or about October 27, 2021, Rolando sent a letter to the Lender. See Debtor Ex. 7. Among other things, Debtors informed the Lender that they did not wish to lose their Residence, that they had not cashed Lender's two checks for the prior loan payments, and that they had consulted a lawyer regarding the situation.[6]

On or around November 4, 2021, Debtors were sent a common letter by certified mail from a law firm representing the Lender. See Debtor Ex.8. The letters sent from the law firm stated, among other things, that the Lender intended to foreclose it's lien against the Residence or repossess the Residence. It directs the Debtors to contact the Lender within 30 days to avoid such actions. Page 2 to the letter states in bold type "**IMPORTANT INFORMATION BELOW.**" The information below states as follows:

> **ATTENTION TO ANY DEBTOR IN BANKRUPTCY OR ANY DEBTOR WHO HAS RECEIVED A DISCHARGE IN BANKRUPTCY OR WHO MAY HAVE PAID OR SETTLED, OR OTHERWISE IS NOT OBLIGATED UNDER, THE LOAN.** Please be advised that this letter constitutes neither a demand for payment of the Loan nor a notice of personal liability to nor action against any recipient hereof who might have received a discharge of the Loan in accordance with applicable bankruptcy laws or who might be subject to the automatic stay of Section 362 of the United States Bankruptcy Code, or who has paid or settled or is otherwise not obligated by law for the Loan.

On or about November 10, 2021, Lender sent Rolando another "Mortgage Statement" setting a payment due date of 12/1/2021, in the payment amount of $2,012.61. See Debtor Ex. 9.

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[6] The October 27, 2021, letter from the Debtors to the Lender explained their situation, in pertinent part, as follows: "We filed for bankruptcy due to the unforeseen circumstances with our financials because Cherry is diagnosed with End Stage Renal Disease, currently on dialysis 3 x week and waiting for kidney transplant. I, Rolando resigned on my job because I don't want to risk my wife's health due to this pandemic. We cannot afford to loose our home since at this time Cherry is currently needing wheelchair for her mobility and we have built a ramp for her easy access. This is exactly the size of the house that Cherry can mobilize without any difficulty. We prioritized our remaining funds to make sure we pay our loan on time. We never cash out nor intended to cash out the 2 returned checks from 21st Mortgage Corporation (#05239032 and #05250150). When we received your letter I (Rolando) observed Cherry to be very stressed out. With this pandemic situation an additional stress for us is too much to deal with."

The Mortgage Statement acknowledged that the Lender has received a customer payment in the same amount on 10/25/2021. Like the prior Mortgage Statement, this one indicated that on 10/25/2021, a payment of $653.25 was reversed, that on 10/26/2021, a late fee of $26.53 was charged, and that on 11/4/2021, another payment of $653.25 was received. The Mortgage Statement also includes an information box entitled "Bankruptcy Message" that is identical to the prior statements.

On or about November 16, 2021, Lender sent Rolando a letter. <u>See</u> Debtor Ex. 10. The letter states as follows:

> This letter is to inform you that 21st Mortgage Corporation received a payment in the amount of $653.25, on 11/04/2021. **Your account is currently in default due to your Bankruptcy filing;** therefore, 21st Mortgage Corporation is unable to accept payments, and, as such, these funds will be returned to you. You received a Non-Monetary Notice of Default on or about 9/21/2021. Per the Notice of Default, you have three (3) options: (1) Voluntarily Vacate; (2) Send in the full payoff [payoff quote]; or (3) Reopen the Bankruptcy & file a Reaffirmation Agreement. This Notice of Default expired 10/16/2021. (Emphasis added.)

Accompanying the letter is another page containing language in bold type **"**PLEASE TAKE NOTICE**."** The language that follows is the same that was included with the prior letter of October 26, 2021. Additionally, the letter was accompanied by a check from the Lender payable to Rolando, dated 11/11/21, in the amount of $653.25.[7]

On December 3, 2021, Debtors filed an ex parte motion to reopen their Chapter 7 case for the purposes of pursuing a motion for contempt against the Lender for violating the discharge injunction under Section 524(a)(2). (ECF No. 26). On this same day, an order was entered granting Debtors' request to reopen their Chapter 7 case. (ECF No. 27).

On or about December 10, 2021, Lender sent Rolando another "Mortgage Statement" setting a payment due date of 1/1/2022, in the payment amount of $2,692.59. <u>See</u> Debtor Ex. 12. The Mortgage Statement acknowledged that the Lender has received a customer payment in the

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[7] Debtors allege that it is the Lender's common practice to declare a default for purchasers of manufactured homes based on a bankruptcy filing. <u>See</u> Contempt Motion at 11:2-3. Debtors submitted as Debtor Ex. 11, a letter from the same Lender transmitting a proposed reaffirmation agreement in a different bankruptcy case.

same amount on 11/12/2021. The Mortgage Statement indicated that on 11/12/2021, a payment of $653.25 was reversed, that on 11/17/2021, a late fee of $26.53 was charged, and that on 12/3/2021, another payment of $653.25 was received. The Mortgage Statement also includes an information box entitled "Bankruptcy Message" identical to the prior statement.

On December 10, 2021, Debtors filed the instant Contempt Motion to which 11 exhibits are attached. (ECF No. 29) Debtor Ex. 1 is a declaration of Rolando Ramil Jallores Go dated December 9, 2021. The other ten documents are marked as Debtor Ex. 2 through Debtor Ex. 11.

On January 4, 2022, Lender filed its amended Opposition to the Contempt Motion. Attached to the Opposition is a declaration of Josh Williamson. (ECF No. 37). Lender Ex. A and Ex. B consist of copies of the Secured Note and the Title Information.

On January 5, 2022, Debtors filed their Reply to the amended Opposition. (ECF No. 38). Debtor Ex. 12 is attached to the Reply.

APPLICABLE LEGAL STANDARDS

A discharge entered in any bankruptcy case "operates as an injunction against the commencement or continuation of…an act, to collect, recover or offset any such debt as a personal liability of the debtor…" 11 U.S.C. § 524(a)(2). Parties who violate the statutory injunction imposed by Section 524(a)(2) may be held in contempt under Section 105(a). <u>See</u> <u>Taggart v. Lorenzen</u>, 139 S.Ct. 1795, 1801 (2019) ("In our view, these provisions authorize a court to impose civil contempt sanctions when there is <u>no objectively reasonable basis</u> for concluding that the creditor's conduct might be lawful under the discharge order.") (emphasis added). "To find a party in civil contempt, the movant must <u>prove by clear and convincing evidence</u> that the alleged contemnor violated a specific and definite order of the court." <u>Bateman v. GemCap Lending I, LLC (In re Bateman)</u>, 2019 WL 3731532, at *6 (B.A.P. 9th Cir. Aug. 7, 2019) (emphasis added), <u>citing</u> <u>Knupfer v. Lindblace (In re Dyer)</u>, 322 F.3d 1178, 1190-91 (9th Cir. 2003).

"The standard for evaluating civil contempt, thus, is an objective one." <u>Bateman</u>, 2019 WL 3731532, at *6, <u>citing</u> <u>Taggart</u>, 139 S.Ct. at 1804. The Supreme Court has explained "'that a party's subjective belief that she was complying with an order ordinarily will not insulate her from civil contempt if that belief was objectively unreasonable.'" Freeman v. Nationstar Mortg. LLC (In re Freeman), 608 B.R. 228, 234 (B.A.P. 9th Cir. 2019), quoting Taggart, 139 S.Ct. at 1802. "That said, subjective intent is not always irrelevant: 'Our cases suggest, for example, that civil contempt sanctions may be warranted when a party acts in bad faith.'...On the other hand, a party's good faith, even if it does not prevent a finding of civil contempt, might help determine the appropriate sanction." Freeman, 608 B.R. at 234, quoting Taggart, 139 S.Ct. at 1802.

DISCUSSION

As previously recited, the Secured Note specifies five events of default: (1) failure to make timely payments, (2) failure to perform any other obligations under the Secured Note, (3) death or legal incompetency to manage financial affairs, (4) statements of false, misleading, inaccurate, or incomplete facts in the Debtors' credit application or any other document submitted to the Lender, or (5) the filing of a bankruptcy petition. To proceed based on any of these grounds, the Secured Note obligates the Lender to "give Borrower notice of the default and right to cure the default." Debtors' sole default under the Secured Note is expressly declared by the Lender in its Non-Monetary Notice of Default: "your filing for Bankruptcy."

There is no question that the Lender sent the Debtors the Non-Monetary Notice of Default.[8] That notice, however, does not provide the Debtors a right to cure the only default specified inasmuch as the act of filing for bankruptcy relief cannot be undone. Instead, the Non-Monetary Notice of Default states that the Debtors can (1) send the full balance of the Secured Note, (2) voluntarily vacate the Residence, or (3) re-open the Chapter 7 case and file a reaffirmation agreement.

Debtors' filing for bankruptcy relief occurred on May 24, 2021, and the Lender has identified no method for that act to be cured because it is impossible to do so. Moreover, reopening of the Chapter 7 proceeding and reaffirming the debt arising from the Secured Note is

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[8] Both the October 26, 2021, and November 16, 2021, letters from the Lender to Rolando refer to the same Non-Monetary Notice of Default. Both letters state that the Non-Monetary Notice of Default expired on 11/16/2021. No other Non-Monetary Notice of Default appears in the record.

legally impossible. Section 524(c) permits the court to approve a reaffirmation agreement, but "only if – (1) such agreement was made before the granting of the discharge under section 727... of this title." 11 U.S.C. §524(c)(1) (emphasis added). Because a reaffirmation agreement eliminates the benefit of a bankruptcy discharge by continuing a debtor's personal liability for a prebankruptcy debt, any proposed reaffirmation agreement must include a variety of express disclosures to the debtor, including the effect of a reaffirmation agreement on the debtor's personal liability and the enforceability of any liens. See 11 U.S.C. § 324(k)(3)(J)(i). A lender who obtains a reaffirmation agreement preserves its ability to pursue the full amount of the debt as a personal liability of the debtor. So while the Lender in the instant case apparently assumes that a reaffirmation would cure the legal consequence of the Debtors' bankruptcy discharge, rather than the actual event of default on which it relies, that purported method of cure is not even available.[9] Lender's provision of the Non-Monetary Notice of Default to its borrower simply did not give the Debtors a right to cure at all. Because the Lender has not provided a Notice of Default that is required by the plain language of the Secured Note, the Lender also does not have the ability to accelerate the maturity date of the obligation or to repossess the Residence.

In response to the Contempt Motion, Lender maintains that the Debtors failed to file a valid Statement of Intention in compliance with Section 521(a)(2)(A). See Opposition at 3:21 to 4:16.[10] Instead of checking one of the boxes for surrender of the Residence, reaffirmation of the Secured Note under Section 524(c), or redemption of the Residence from the Lender's secured claim under Section 722, Debtors checked the box specifying "other" and inserted the "retain

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[9] It is not entirely clear why the Lender, who had notice of the Debtors bankruptcy proceeding, did not offer a reaffirmation agreement before the Debtors received their discharge on August 24, 2021.

[10] Debtors argue that the Lender's response to the Contempt Motion was filed late under the court's local rules and should be stricken or go unheard. See Reply at 2:2-3. While the Opposition was filed untimely under LR 9014(d)(1), the court has discretion to allow a late filing. See LR 1001(d). No prejudice to the Debtors exists in considering the Lender's arguments in addition to the copy of the Secured Note and Title Information necessary to the resolution of this matter. Debtors' request to strike the Opposition is denied.

and pay current" language. Lender is correct that a "retain and pay" or "ride through" alternative to surrender, reaffirmation, or redemption of the relevant property generally did not survive the bankruptcy law amendments enacted by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). See Dumont v. Ford Motor Credit (In re Dumont), 581 F.3d 1104, 1118 (9th Cir. 2009).[11] In Nevada, the so-called "ride through" option effectively was supplanted by the Nevada legislature through enactment of NRS 97.299, et seq. See In re Henderson, 492 B.R. 537 (Bankr. D. Nev. 2013).[12]

Debtors' failure to select a permissible option on the Statement of Intention arguably triggered Section 362(h). That provision specifies the consequence when an individual Chapter 7 debtor fails to timely file or perform a statement of intention required by Section 521(a)(2): all of the personal property that is subject to the secured creditor's lien is no longer property of the Chapter 7 estate and the automatic stay protecting the property terminates. See Samson v. Western Capital Partners (In re Blixseth), 684 F.3d 865, 870-71 (9th Cir. 2012). Although these failures may have serious consequences to the bankruptcy estate and the debtor, the failures do not prevent the debtor's personal liability from being discharged, nor does it relieve creditors from complying with a Chapter 7 discharge. More important, the Debtors' failure in this case to

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[11] The "ride through" alternative to the authorized treatments of secured consumer debt should not be confused with the "pass through" treatment of liens generally in bankruptcy. See The Bank of New York Mellon v. Lane (In re Lane), 589 B.R. 399, 409-410 & n. 6 (B.A.P. 9th Cir. 2018, citing Dewsnup v. Timm, 502 U.S. 410, 417 (1992). No steps were taken during the Chapter 7 to avoid the Lender's lien against the Residence, and the Lender took no steps to prevent the Debtors' discharge of their personal liability under the Secured Note. As a result, Lender can enforce its lien rights against the Residence if it complies with the terms of the Secured Note, but it cannot enforce its rights to collect the balance of the Secured Note as a personal liability of the Debtors.

[12] In this instance, the Residence is a manufactured home and not a vehicle that would be protected by NRS 97.299. That provision governs motor vehicle sales contracts in Nevada entered after October 1, 2011. The Nevada statute effectively eliminated bankruptcy ipso facto clauses by allowing a lender to repossess a motor vehicle only upon a payment default, or if the lender establishes a significant impairment of its prospect for repayment or realization of its collateral. In view of these protections afforded under applicable non-bankruptcy law, entry into a reaffirmation agreement for a Nevada motor vehicle purchase is almost never in the best interests of individual debtors who are current on their payments.

identify an available option in their Statement of Intention also did not excuse the Lender from complying with the requirements of the Secured Note to pursue its remedies against the Residence.

Lender's ipso facto clause is based on a borrower's filing of a bankruptcy case rather than a borrower's receipt of a bankruptcy discharge. This is significant because many bankruptcy cases are filed but may be dismissed or otherwise concluded without a discharge being entered. After a discharge is granted, a debtor and a creditor can avoid the effect of the discharge through voluntary repayment of the debt. See 11 U.S.C. §524(f). Before a discharge is granted, a debtor and a creditor can negotiate a reaffirmation of the debt to prevent the debt from being discharged. See 11 U.S.C. §524(c)(1).[13] Under no circumstances can the debtor and creditor cure the fact of a bankruptcy filing.[14] Once filed, a bankruptcy petition cannot be unfiled.

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[13] If the Debtors had reaffirmed the Secured Note, the Debtors would have remained personally liable for the unpaid balance and the Lender would still have its lien against the Residence. Thereafter, upon a payment default, a Notice of Default providing the possibility of an actual cure could have been provided. After providing the Notice of Default and an actual right to cure, Lender could have accelerated the Secured Note and pursued foreclosure. Resort to the ill-conceived bankruptcy ipso facto event of default would have been unnecessary. It is still unclear why the Lender did not pursue a reaffirmation agreement before the discharge was entered when it had been provided notice of the Debtors' bankruptcy proceeding. In other words, the instant dispute apparently could have been prevented if the Lender had acted timely upon receiving notice of the bankruptcy rather than trying to recover after the discharge was entered.

[14] When a debtor or trustee seeks to assume an executory contract or unexpired lease, Section 365 permits the contract or lease to be assumed despite the presence of an ipso facto clause, unless the contract is for a loan or other debt financing. See 11 U.S.C. §365(e)(2)(B). Thus, even if the Secured Note was encompassed by Section 365, it still could not be assumed because it is a contract for a loan. Compare 11 U.S.C. § 521(d) (ipso facto clause not prevented or limited where individual debtor fails to timely reaffirm or redeem, or fails to timely file or perform a statement of intention). More important, Section 365 conditions the assumption of contracts on a cure of defaults other than defaults that are "impossible for the trustee to cure." 11 U.S.C. § 365(b)(1)(A). See 3 COLLIER ON BANKRUPTCY ¶ 365.06[4] (Richard Levin & Henry J. Sommer, eds., 16th ed. 2021) ("The [cure] requirements of section 365(b)(1) do not apply to defaults that relate to…the commencement of the case…In the context of the cure requirement, the exception is particularly important because the trustee cannot possibly cure a default flowing, for example, from the debtor's commencement of a case…If a provision stating that the contract was in default upon the filing of a bankruptcy petition could be enforced, parties could write contracts that could never be assumed by a trustee or debtor in possession..") (emphasis added).

In this case, the express terms of the Secured Note required the Lender to give the Debtors a right to cure the default by providing a Notice of Default. In this case, only after providing a Notice of Default can the Lender accelerate the obligation under the Secured Note and take steps to repossess the Residence. In this case, the Debtors have not volunteered to repay a discharged debt as permitted by Section 524(f), the parties cannot enter into a reaffirmation agreement under Section 524(c), and the Lender has not offered a cure for the only default asserted under the Secured Note. The Lender does not even suggest that any other specified event of default applied when it sent the Non-Monetary Notice of Default: Debtors had not missed a payment; Debtors had not failed to perform any other obligations; Debtors were not dead or incompetent; and Debtors had not made any false, misleading, inaccurate or incomplete statements, representations or warranties. The uncontradicted record demonstrates that the Debtors have attempted to make the monthly payments required by the Secured Note while the Lender has relied on a provision of its own contract creating an event of default that is impossible to cure while also requiring the Lender to provide a right to cure. In essence, the record establishes a purely self-inflicted wound.

Under these circumstances, it appears that the Lender is attempting to collect the balance outstanding under the Secured Note by asserting a right to accelerate and repossess that the Lender does not have under the language of the same Secured Note. Because it cannot enforce its lien under the Secured Note, the court concludes that its demands for payment seek to collect the balance of the outstanding amount as a personal liability of the Debtors. The offer of a legally impermissible reaffirmation agreement to the Debtors appears to confirm that the Lender's conduct is designed to pursue the balance as a personal liability. Such demands violate the discharge injunction protecting the Debtors under Section 524(a)(2).

To impose civil contempt sanctions under Section 105(a), the court must determine whether the Lender had an objectively reasonable basis for concluding that its conduct might be

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In this instance, the Lender's own contract included an event of default that is impossible to cure and the same contract also obligated the Lender to provide a right to a cure before the Lender could accelerate and repossess the Residence. In other words, the Lender's action against the Debtors in this case appears to violate the terms of its own agreement.

lawful. Civil contempt sanctions may not be appropriate where there is a "fair ground of doubt as to the wrongfulness" of a creditor's conduct. See Taggart, 139 S.Ct. at 1801-02, citing California Artificial Stone Paving Co. v. Molitor, 113 U.S. 609, 618 (1885). "Under the fair ground of doubt standard, civil contempt therefore may be appropriate when the creditor violates the discharge order based on an objectively unreasonable understanding of the discharge order or the statutes governing its scope." Id.

In this instance, there is no dispute that the Lender had knowledge of the Debtors' discharge: the Mortgage Statement sent on or about September 10, 2021, acknowledged the Debtors' bankruptcy filing, and the Order of Discharge was sent to the Lender on or about August 24, 2021. There also is no dispute that the Lender knew it could not attempt to collect a discharged debt as a personal liability; the Bankruptcy Message included in the Mortgage Statements for September, October, November, and December, 2021, confirms that understanding. Despite such knowledge, however, Lender attempted to collect the balance of the Secured Note from the Debtors through lien enforcement methods that are unavailable under a plain reading of the same Secured Note.[15] Under these circumstances, the court concludes that there was no objectively reasonable basis for the Lender to conclude that its attempts to accelerate the Secured Note and to seek possession of the Residence were lawful. Accordingly, imposition of civil contempt sanctions are appropriate.

An evidentiary hearing will be required to determine the actual damages, if any, that are appropriate in this matter. An award of reasonable attorney's fees also will be considered. A status conference to schedule the evidentiary hearing, as well as to set any discovery or briefing deadlines, will be scheduled. The parties are, of course, encouraged to discuss a settlement of this matter.

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[15] The court expresses no view on whether, outside the bankruptcy context, the Debtors would have other remedies against the Lender under the terms of the Secured Note, including legal remedies based on breach of contract or equitable remedies for declaratory and injunctive relief.

IT IS THEREFORE ORDERED that the Motion for Contempt for Violation of the Discharge Injunction 11 U.S.C. §524(a)(2), Docket No. 29, be, and the same hereby is, **GRANTED** subject to a further hearing to address any appropriate damages and attorney's fees.

IT IS FURTHER ORDERED that a status conference will be conducted on July 20, 2022, at 2:30 p.m., to discuss further proceedings.

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2022 Annual Education Conference

SMALL TRUSTEES ROUNDTABLE

Facilitators

Robert Cullen
Redwood Trust Deed Service

Randy Newman Esq.
Total Lender Solutions

Daily Journal Corporation

Robert Cullen

Robert Cullen has 30 plus years of real estate experience which encompass both trustee and loan servicing related operations. He started his career in 1989 as a Trustee Sale Officer for a small mortgage company processing their own foreclosures. He helped found Redwood Trust Deed Services, Inc. in 1992 as a small independent foreclosure trustee. As the owner and operator, Robert has experienced first-hand the myriad of changes, both good and bad, in the foreclosure industry. He has processed foreclosures for a wide variety of lenders, both private and institutional. He helped Redwood Trust Deed Services add loan servicing to its list of services and continues to be intimately involved in the day to day activities. Robert is certified by the United Trustees Association as a Trustee Sale Officer, Level II California. He is a licensed California Real Estate Broker who has recently served on the Board of Directors for UTA as well as being a Director and Chief Financial Officer for the Bay Area Chapter of UTA's predecessor, CTA. Robert received UTA's Dorothy Schick Member Of The Year Award in 2020. He can be reached at robert@redwoodtrustdeed.com.

Randy Newman

Randy Newman is one of the principals of Total Lender Solutions. Licensed as an attorney in New York since 1989 and New Jersey since 1994, Randy has personally represented hundreds of buyers, sellers, owners, and lenders in connection with the sale, purchase, finance, lease, and foreclosure of residential and commercial real property throughout the United States. Randy holds a BBA in Accounting and is licensed as a real estate broker in California. Randy is certified by the United Trustees Association as a Trustee Sale Officer, Level II California. Randy has previously been an adjunct assistant professor of business law and currently teaches Real Estate Principles to aspiring new real estate licensees and trains new real estate agents on contracts and real estate transactions in California. He can be reached at rnewman@totallendersolutions.com

UTA

2022 Annual Education Conference

LARGE TRUSTEES ROUNDTABLE

Facilitators

Cathe Cole-Sherburn
Trustee Corps

MNC
Metropolitan News Company

Cathe Cole-Sherburn

Cathe Cole-Sherburn serves as Senior Vice President of Default Operations for Trustee Corps and their affiliated companies. She is responsible for oversight of all aspects of operations, including audit, compliance and strategic planning and development of all companies and offices.

Cathe brings over 35 years of all aspects of real estate mortgage default experience to the company.

Before joining Trustee Corps, Cathe was with the First American Title Company, where she was Senior Vice President. While there, her duties included the oversight and management of the Trustee Division. Prior to that, she was with the firm of Routh Crabtree Olsen/Northwest Trustee Services, where she was the Director of Operations and instrumental in setting up the AZ, CA, and HI offices. Prior to that, she was the Director of Operations for the Law Offices of Steven J. Melmet, Inc., for 14 years.

Cathe has served as President of the United Trustees Association, as well as a Board member of the Women in Legal Leadership for American Legal & Financial Network. She is also a member of Arizona Trustee Association, Mortgage Bankers Association, California Mortgage Bankers Association, National Association of Professional Women and Society of Corporate Compliance and Ethics.

Cathe can be seen as a Moderator and/or Panelist at various industry conferences and provides seminars/training to our existing clients. She can be reached at ccole@trusteecorps.com

2022 Annual Education Conference

THE PUSH AND PULL BETWEEN EMPLOYERS AND EMPLOYEES

Presented by

Dennis A. Davis, Ph.D.
Ogletree Deakins

TRUSTEE CORPS
Experience. Trust. Integrity.

Dennis A. Davis, Ph.D.

Dennis A. Davis, Ph.D., is recognized nationally as an expert on Workplace Violence Prevention, Workplace Bullying, Conflict Resolution, Sexual Harassment, and Cultural Diversity.

Since 2008 Dennis has served as Ogletree Deakins' National Director of Client Training. In that capacity he develops and implements training programs which are designed to minimize the risks associated with inappropriate employee behavior.

Dennis spent more than ten years consulting to federal, state, and local law enforcement agencies, where he used his education in Clinical Psychology to teach willful compliance techniques.

Pushing/Pulling…
What Employees Want

Dennis A. Davis, Ph.D.

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Goal

- It is my goal to give you pointers on dealing with the current employee demands in a healthier manner
- It is for you to pass on to your employees…
- If is for YOU as well
- It is believed that the issues we will discuss here are applicable both professionally AND personally

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The Problem(s)

- Employee retention
- Lowered morale
- Uncertainty
- Employee detachment

What is employee engagement?

- Employee engagement is the relationship between an organization and its employees. An engaged employee is one who is enthusiastic about their work and takes positive action to further the organization's reputation and interests.
- The employee's performance shows commitment to the organization and its goals.

Why is employee engagement important?

- Employee engagement is ALWAYS important, but it is especially important now…
- We are living in an uncertain world
- There is more and more competition in the area

Statistics

- **A Gallup Management Journal article showed:**

29%	54%	17%
Actively engaged	Not fully engaged	Actively disengaged

THE LEADERSHIP CHALLENGE:

- **Increase actively engaged employees**

The 10 C's of Engagement

(Dan Crim, Gerard Seijts)

The 10 C's of engagement

- **CONNECT**
  Leaders show that they value their employees
- **CAREER**
  Leaders provide challenging and meaningful work
- **CLARITY**
  Managers communicate a clear vision
- **CONVEY**
  Expectations are made clear and managers provide positive feedback

The 10 C's of engagement

- **CONTRIBUTE**
  Allow employees to provide feedback
- **CONTROL**
  Empower employees to have some control over the flow and pace of their work
- **COLLABORATE**
  Create opportunities for teamwork to develop trust and respect among the team

The 10 C's of engagement

- **CREDIBILITY**
  Provide transparency about the organization to earn employees' trust
- **CONFIDENCE**
  Provide positive feedback about employees' work
- **COMMUNICATION**
  Keep the workforce informed of business decisions and performance

Post-Traumatic Stress Disorder (PTSD)

- Defined as:

  … psychological reaction to exposure to a traumatic event such as sexual assault, warfare, traffic collision, child abuse, or any threat to a person's life

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Post-Traumatic Stress Disorder (PTSD)

- Symptoms may include:
  - Disturbing thoughts/dreams
  - Anxiety
  - Depression
  - Suicidal ideation
  - Sleeplessness
  - Loss of appetite
  - Decreased libido

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PTSD: Historical Perspective

- The term came into use in the 1970's largely due to military veterans and their service in Vietnam conflict
- However, historically (as far back as the 19th century) we see other terms used to describe similar conditions
  - Railway spine
  - Shell shock
  - Battle fatigue
  - Combat stress reaction (CSR)

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Recent History

- The general concept that trauma can lead to growth and positive change has been around in religious and philosophical teachings for thousands of years
- Some early theorists (Viktor Frankl) wrote about finding meaning and purpose in the face of adversity

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Post-Traumatic Growth (PTG)

- In 1995, two psychologists (Richard Tedeschi and Lawrence Calhoun) coined the term PTG
- Defined as …
  - Positive psychological and emotional change experienced as a result of adversity, trauma, and other challenges that raise an individual's level of functioning in or quality of life

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Why Does PTG Occur?

- Researchers believe that major traumatic events (e.g., natural disasters, life-threatening illnesses, near death experiences, terrorism, and the death of a loved one) are most likely to lead to significant growth. Why?
  - It is believed that major events disrupt or threaten our core beliefs and mindsets about how the world works
  - The largest traumas puncture our ridged beliefs and behavioral patterns
  - This forces us to revisit/revise our core beliefs and reprioritize

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Growth in Major Areas

- The data suggests that PTG can occur in 5 major areas of our lives

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PTG Occurs in 5 Areas

1. Appreciation of Life
   - We can become less likely to take our lives for granted
   - We can better appreciate the challenges that we DON'T have

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PTG Occurs in 5 Areas

2. Relationships with Others
   - Often we experience deeper and richer relationships with others
   - Our compassion for others and emotional intimacy increases

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PTG Occurs in 5 Areas

3. New Possibilities in Life
   - Reconsideration of what is and what is not possible
   - Often times post-trauma, we pursue opportunities that had been left on the table prior to the trauma

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PTG Occurs in 5 Areas

4. Personal Strength
   - Confidence in self often grows following trauma, as the thinking becomes, “I got through this, I can get through anything.”

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PTG Occurs in 5 Areas

5. Spiritual Change
   - Very often following traumatic events, we have a
     - Clarity of life's meaning;
     - Seeking/finding of one's purpose in life;
     - Improved sense of harmony with the world; and
     - (Sometimes) deeper feeling of connectedness with God, the Universe, or all of existence.

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Keys to PTG

- The research tells us that we can simultaneously discourage PTSD and encourage PTG
- So how do you encourage PTG?

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Keys to PTG

1. Don't Deny the Trauma/Stress
   - Sometimes we want to get right on to the fix and deny the pain
   - Research suggests that people who do not allow themselves to fully experience the pain (numbing) are far more likely to be stuck
   - Talk to close friends, spouses, therapists…
   - Journaling is very effective
     - Periodically, stream of consciousness, no second-guessing or intellectualizing, no censuring

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Keys to PTG

2. Arrest the Downward Spiral
   - We often speak to ourselves in a negative manner, such as "We are never going to get out of this," "I hate being at home so much," or "My practice is suffering"
   - This is a good time to be in the here and now
   - The "workout philosophy"
   - "This discomfort is going to make me stronger"

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Keys to PTG

3. Find the Meaning/Growth Opportunity
   - In the midst of trauma, we often get caught up in the resentment and victimhood
   - We unconsciously assume the event to be only a burden
   - To combat that, we can consciously focus our attention on the opportunities
   - Here are some questions to start with…

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Finding the Growth Opportunity

- What should prioritize once I re-enter my life that will make my life more meaningful?
- What harmful emotional pattern can I work on?
- What small change can I make to become a better spouse, parent, shareholder, etc.?

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Finding the Growth Opportunity

- What attachment can I let go of?
- Is it time to let go of resentment?
- What challenges have I successfully navigated that might offer me some insight into how to handle the current situation?

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Thank you!

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Ogletree Deakins

2022 Annual Education Conference

LEGISLATIVE UPDATES

Presented by

Michelle Mierzwa, Esq.
Wright Finlay & Zak (Moderator)

Michael Belote, Esq.
California Advocates

Holly Chisa
HPC Advocacy

Kent Cammack, Esq.
Gust Rosenfeld

Brigham Lundberg, Esq.
Lundberg & Associates, PC

THE HICKLIN FIRM

Michelle Mierzwa, Esq.

Michelle A. Mierzwa joined Wright, Finlay & Zak's Compliance, Licensing and Regulatory Division in 2015, providing loan originators, lenders, servicers, trustees, and others in the mortgage industry with state and federal compliance and regulatory counsel. Since 1998, her accomplishments include the management and resolution of litigated matters through jury and bench trials and appellate practice, creating the legal department for one of the largest non-judicial foreclosure trustees in the Western United States, the coordination of compliance audits, and managing the California branch of a national law firm. Ms. Mierzwa has worked with lenders and mortgage servicers of all sizes to ensure their compliance with state and federal laws, including, but not limited to, California Consumer Privacy Act, California and Nevada Homeowner Bill of Rights, state and federal FDCPA, RESPA, TILA, SCRA, Washington Foreclosure Fairness Act, Nevada, Oregon, and Washington Foreclosure Mediation Programs, Dodd-Frank Act and CFPB Rules, state licensing laws, and governmental and regulatory agency investigations.

Ms. Mierzwa is serving her third three-year term on the Board of Directors of the United Trustees Association (UTA) and is a member of the Legislative Committees of the California Mortgage Bankers Association and the UTA. She has monitored, proposed, and analyzed new legislation affecting the industry, has participated on speaking panels for national lending industry conferences, and has provided education and clarification to the industry regarding the Dodd-Frank Act and the Servicing Rules of the Consumer Finance Protection Bureau. Prior to her in-house and management experience, Ms. Mierzwa was a litigation and appellate attorney at a default services firm for ten years and worked in loan originations for three years. Ms. Mierzwa is licensed to practice in California and Washington. She can be reached at mmierzwa@wrightlegal.net

Michael Belote, Esq.

Mike Belote is president of California Advocates, Inc., one of Sacramento's oldest contract lobbying firms. His 35-year lobbying career began with association lobbying jobs with CPAs, Realtors and title companies, and he has been a contract lobbyist since 1990. Specialties include issues relating to the judicial branch, real estate, and financial services, including judges, civil defense lawyers, employment law, and more. Mike has represented the United Trustees Association for nearly 30 years. He also represents a diverse range of other clients including new car dealers and Apple. A division of Belote's firm also is one of Sacramento's biggest association management providers. He is known for philanthropic work relating to domestic violence and veteran's services, and he sponsors a lecture series every year discussing a key issue of California policy. He can be reached at mbelote@caladvocates.com.

Holly Chisa

Holly Chisa has been active in state, local and federal government issues for over 20 years. Currently, Holly is the owner of her own lobbying firm, HPC Advocacy, LLC and works to provide her clients with the best representation possible in the Washington state Legislature and local municipalities.

Holly's involvement in government affairs began in 1994. She has worked as a campaign consultant, and also as House and Senate staff. She also worked in the 106th Congress as District Field Representative for U.S. Congressman Adam Smith. In 2001, she began lobbying as the Governmental Affairs Manager for the Washington Food Industry (WFI), primarily representing retail grocery, pharmacy, and food manufacturers' interests. In 2003, she opened HPC Advocacy, her privately owned lobbying firm.

Through this work Holly has developed a broad-based knowledge of the issues facing employers. She focuses primarily on reforming major employer programs, including workers' compensation and health care. She also works with environmental legislation, regulatory reform, beverage and spirit issues, and foreclosure law. In addition to working the halls of state government, Holly has also worked extensively with local governments, protecting client interests with both large and small municipalities on local ordinances, tax issues, and regulatory requirements.

She can be reached at *HollyChisa@hpcadvocacy.com*.

Brigham Lundberg, Esq.

Mr. Lundberg joined the firm in 2009. He currently serves as President and Managing Attorney for the firm. 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 is a Martindale-Hubbell "AV-Preeminent" rated attorney. He can be reached at Brigham.Lundberg@Lundbergfirm.com

Kent Cammack, Esq.

Kent Cammack focuses his practice on resolving commercial disputes. He has extensive litigation and trial experience in both the state and federal courts, as well as in mediations and arbitrations. Kent's more than forty years of experience includes a variety of cases regarding real estate, secured lending, receiverships, lender liability, landlord/tenant, purchase and sale contracts (both real and personal property), and employment issues (including non-competition agreements and workplace harassment).

Kent is a recognized authority on foreclosure law, including related topics of state court receiverships, collection of deficiencies, and developing strategies for the collection of defaulted real estate loans and the structuring of "workouts." He has testified as an expert witness in a variety of foreclosure matters.

Kent is one of the authors of Ins and Outs of Foreclosures, published by the State Bar of Arizona, and he is the author of numerous educational materials. He is a popular speaker at state and county bar seminars and private seminars on all aspects of foreclosure law. He has also testified in hearings before the Arizona senate regarding proposed legislation governing mortgages, deeds of trust, and lien enforcement.
Kent also serves as a mediator and arbitrator in various commercial disputes.

Kent is AV® Preeminent™ rated by Martindale-Hubbell®, representing the highest rating in legal ability and ethical standards.

Arizona

UTA 2022

While You Were Stuck Guarding The Home(stead):
Issues From the Last Few Covid Years

Legislative Updates

By Kent Cammack, Gust Rosenfeld PLC

GUST ROSENFELD
ATTORNEYS SINCE 1921 P.L.C.

UTA 2022

While You Were Stuck Guarding The Home(stead): Issues From the Last Few Covid Years

Legislative Updates

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1. **<u>Homesteads/Judgment Liens</u>.**
   Feels Like Home (Randy Newman)

   Legislative and judicial updates.

   Effective January 1, 2022, A.R.S. § 33-1103 was amended to increase the statutory homestead amount to $250,000, but it also now provides that a recorded judgment, i.e., a non-consensual lien, is a lien on the debtor's homestead property.

   The Arizona Supreme Court recently dived into the lien issue as regards homestead property. *In Re Todd Michael McLauchlan,* 252 Ariz. 324, 502 P.3d 975 (2022). The Court was asked to answer a certified question from the Bankruptcy Court under the *pre-existing* (i.e., before the 2022 amendments) version of the statute, namely: "Whether a recorded judgment lien attaches to homestead property where the judgment debtor has equity in excess of the amount exempt under Arizona law?" An earlier Arizona Court of Appeals case had held that a recorded judgment was *not* a lien on homestead property, at least not since a 2007 statutory amendments.

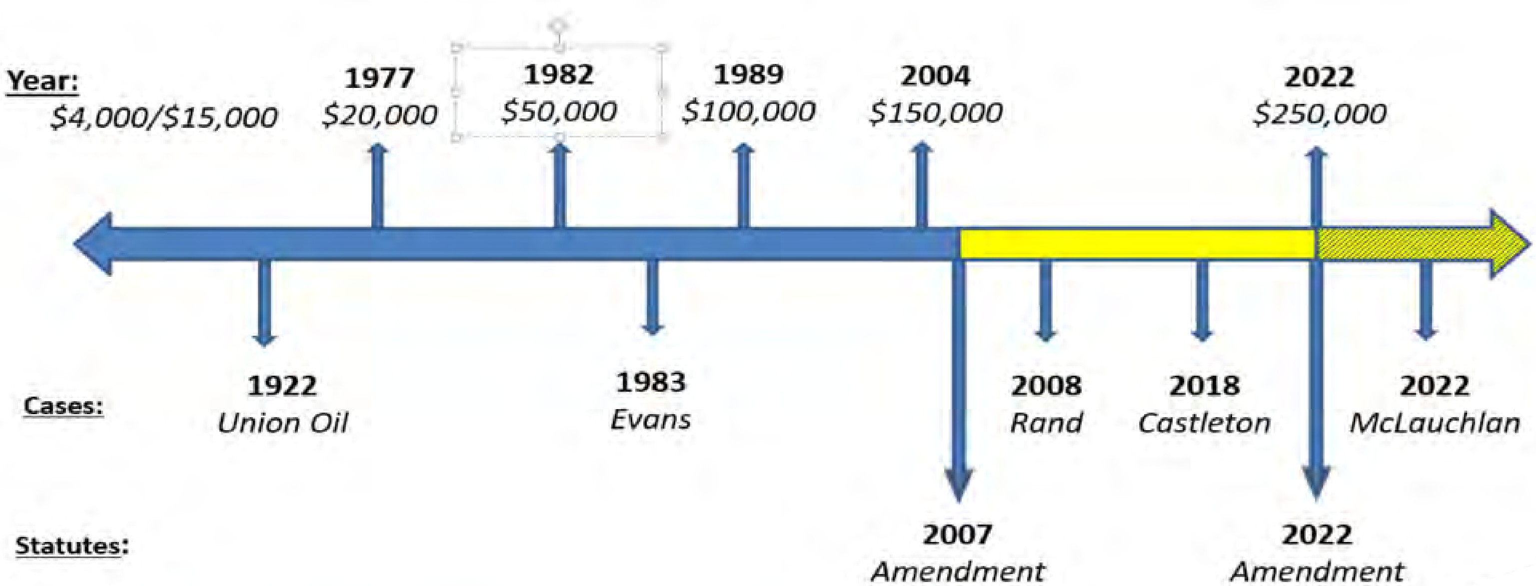
   The Arizona Supreme Court's answer: "Yes" A recorded judgment *is* a lien on the homestead property even prior to the effect of the 2022 amendments.

   The following chart and timeline provides an overview of the history and current state of Arizona homestead law as regards judgment liens.

   Note: There is an Initiative titled the "Predatory Debt Collection Act" which may make it onto the ballot this November. As part of its broad and controversial scope of asserted protections as regards medical and other debts, it would also increase the homestead amount to $400,000.

Homestead Timeline

(Exemption amounts and key past case decisions and statutory amendments)



ARIZONA
2022 HOMESTEAD/JUDGMENT STATUTE

SALES

What the new statutory amendments do for 2022 (and after) sales:

1. If a judgment debtor/seller's proceeds do not exceed 80% (i.e. \$200,000) of the \$250,000 homestead amount, the title company may record a release of the judgment lien as to the subject property (but not a release of the entire judgment lien).

2. If a judgment debtor/seller is to receive \$200,000 or more in sale proceeds, advance notice must be sent to the judgment lien holder, among other things.

REFINANCES

What the new statutory amendments do for 2022 (and after) refinances:

1. For a *no*-cash-out refinance, escrow may close without payment of the judgment, and the title company may record a subordination of the judgment lien on the subject property.

2. For a cash-out refinance, a judgment debtor may not receive any refinance proceeds until the judgment lien is released as to the subject property or the judgment satisfied.

Idaho

Utah

2022 Utah & Idaho Legislative Changes Affecting Default Mortgage Servicing

by Brigham J. Lundberg
Lundberg & Associates, PC

With the New Year came a methodical recommencement of default mortgage legal work, much of which had been on hold for the prior two years. Given the stark lack of foreclosures and evictions over the preceding 22 months, it was no surprise that most legislation introduced in the Utah and Idaho legislative sessions commencing in early 2022 had little to do with default mortgage servicing. However, a few pieces of legislation are worth noting, to ensure that your entity remains in compliance with Utah and Idaho state law, as it relates to mortgage defaults and associated legal work. Summaries of the pertinent bills are provided below with their respective effective dates.

IDAHO SENATE BILL 1355

Foreclosed-Out Junior Lienholder Notification Requirements – Effective 7/1/2022

Senate Bill 1355 establishes a required notification process for a credit transaction that is secured by a subordinate lien on real property when the senior mortgage or other senior secured interest on real property is foreclosed. These notification requirements apply only to loans originated on or after July 1, 2022 that are secured by subordinate liens on a borrower's principal residence—mainly home equity loans and other second mortgages. Specifically, if a senior mortgage is foreclosed and a consumer is in default on a junior lien, then within 90 days after the foreclosure sale date, the sold-out junior lienholder must send to the consumer's last known address a written notice of the consumer's continuing liability under the outstanding obligation. The statute requires such notice to include the following statement:

> "Your liability under this account is subject to a statute of limitations, which may bar recovery after a date certain. This notification is not intended to provide legal advice, and you should seek your own legal counsel to determine your rights and obligations."

Additionally, if the foreclosed-out junior lienholder were thereafter to sell or assign the loan obligation, the new creditor or assignee must send written notice to the consumer, at the consumer's last known address, notifying the consumer of his continuing obligation under the outstanding obligation, and such notice must also contain the boilerplate statement listed above. Interestingly, the legislation states that a party's failure to provide the notice required by this legislation will not invalidate or otherwise alter or impair a creditor's right to attempt to collect the obligation owed by the consumer.

Impact Analysis: The idea behind this law was to make sure consumers understand they are still liable for loans secured by a junior mortgage even though the property has been foreclosed by the senior lienholder. In 2021, an Idaho bill was introduced that would have required foreclosed-out junior lienholders to file a lawsuit on the debt within 90 days after the senior lien foreclosure. That 2021 bill was not passed.

Rather than being required to file suit within 90 days, section 2(a) of this new law requires the foreclosed-out junior lienholder to send a notice to the borrower essentially letting the borrower know that he/she still owes the debt. The notice is required if the consumer/borrower is in default on the obligation. A summary of obligation and amount owed (whether accelerated or not) is probably necessary, along with the required boilerplate notice about the statute of limitations.

Servicers have inquired as to whether the servicer or local counsel should send this notice. That decision probably depends on the circumstances of each case. If local counsel has been referred the junior position loan to monitor the senior lien foreclosure, then local counsel would be in a position to send the notice after the foreclosure sale. Often, however, there is no local counsel assigned to a junior position lien when the senior lien forecloses, and thus the lender or servicer would need to send the notice. The senior lien foreclosing attorney does not send the notice; it is the lender/servicer of the junior loan interest that bears this responsibility.

Moreover, section 2(b) of the new law requires a similar notice to be sent any time the account is sold or assigned. We interpret this to mean a sale or assignment of the account itself, and not merely a transfer of the servicing rights. Again, the logic seems to be that the notice tells the borrower that the borrower remains liable for the debt even though the collateral has been foreclosed by a senior lienholder and the debt has been sold or assigned to a new creditor. The boilerplate statute of limitation language must also be included with any sale/assignment notification.

UTAH SENATE BILL 80

Real Property Recording Amendments – Effective 7/1/2022

Senate Bill 80 codifies a long-practiced requirement for (i) a legal description of real property and (ii) a tax parcel identification number, if one exists, to be included in any document to be recorded with a county recorder. This legislation is meant to assist county recorders by codifying their best practice requiring legal descriptions and tax parcel ID numbers to be included in all documents for recording. This will aid county recorders in more accurately abstracting documents to the relevant parcels. It will also limit some parties' practice of omitting legal descriptions and tax parcel ID numbers by simply referring to other previously recorded documents on the same property (e.g., Assignment of Trust Deed referring to previously recorded Deed of Trust, but not including a legal description).

Impact Analysis: Many law firms and title providers already include legal descriptions and tax parcel ID numbers on all their documents to be recorded. Lenders and loan servicers that utilize vendors to draft foreclosure documents for recording (e.g., Assignments) will want to verify that their vendors are properly including legal descriptions and tax parcel ID numbers in all documents for recording in Utah.

UTAH HOUSE BILL 276

Joint Tenancy Presumption Amendments – Effective 5/4/2022

House Bill 276 clarifies the joint tenancy presumption regarding ownership interests in real estate in the state of Utah. Since 1997, Utah law has stated that an ownership interest in real estate granted to two persons *designated as husband and wife* in the granting documents is presumed to be a joint tenancy with rights of survivorship unless severed, converted, or otherwise expressly declared. Beginning May 4, 2022, the law now states that the same joint tenancy presumption is granted to 2 persons *designated as spouses* in the granting documents.

UTAH HOUSE BILL 291

Real Estate Interest Termination Amendments – Effective 5/4/2022

House Bill 291 amends provisions related to the termination of an interest in real estate, including the disclosing of a termination of interest upon the death of a tenant. This legislation expands Utah Code section 57-1-5.1, which previously stated that certain interests in real estates *may* be terminated by recording with the county an affidavit describing the death of the owner whose interest is being terminated. The new version of section 57-1-5.1 now states that termination of a joint tenancy, tenancy by the entirety, or life estate interest in real estate automatically terminates upon the death of a tenant holding the interest, and that such termination *may be disclosed* by recording an affidavit with the county recorder. This bill also describes the necessary elements of and provides suggested language for such an affidavit. Finally, the bill indicates that a determinable or conditional interest in real estate may also be terminated by an affidavit, provided that the affidavit includes certain necessary information.

UTAH SENATE BILL 227

Utah Consumer Privacy Act – Effective 12/31/2023

Senate Bill 227 applies to controllers or processors that do business in Utah or produce a product or service that is targeted to consumers who are Utah residents; have annual revenue of $25 million or more; and either (a) control or process personal data of 100,000 or more consumers in Utah during a calendar year, or (b) derive over 50% of the entity's gross revenue from the sale of personal data and control or process the personal data of 25,000 or more consumers. The law does not include a private right of action; rather, it will be enforced by the Utah Attorney General's office. To give organizations a chance to adapt to the new requirements, the law will not go into effect until December 31, 2023.

The law vests consumers with the right to confirm whether a controller is processing their personal data, access and deletion rights, and opt-out rights. It requires controllers and processors to provide notice that (1) identifies categories of and purposes for which personal data are processed, (2) informs consumers how they may exercise a right, (3) categories of personal data the controller shares with third parties, and (4) the categories of third parties with whom the controller shares personal data. The law also includes a 30-day right to cure. Moreover, the law neither vests the Attorney General with rulemaking authority, nor does it provide consumers the ability to opt-out of processing using a global privacy control.

While the Utah law will likely not significantly change compliance requirements for businesses subject to the similar privacy laws (in states such as California, Colorado, or Virginia), it will create new obligations for some companies. It also serves as a reminder that states will continue to take different approaches, expanding the patchwork of varying legal requirements in the privacy field. Lenders and loan servicers will want to ensure that their privacy practices comply with Utah's newly enacted law.

Additional Information

For any questions regarding this article or the new laws summarized herein, please contact Brigham J. Lundberg, Managing Attorney of Lundberg & Associates, PC at brigham.lundberg@lundbergfirm.com.

Washington

Washington Legislative Update

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Overview

- 2022 Legislative Summary – Still 100% remote – some access at the very end and some lawmakers in the building
- Less focus on funding for programs as it wasn't a "traditional" budget year – but still an increase in spending by another $5 billion from the previous year – 2021-2023 budget now $64 billion
- End of the foreclosure and eviction moratoriums of the foreclosure moratorium by the Governor
- Seattle housing/rental ordinances – permanent law changes remain

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And…What's on Tap for 2023?

- Results of the Dept of Financial Institutions trustee study
- Budget year in 2023 – what do the advocates have on tap
- Tighter majorities in the House and Senate? What will be our legislative make-up?
- Post Washington primary results – little movement among the targeted seats means a likely continued majority of Democrats

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Washington Legislative Updates

- What did lawmakers buy with an additional $5 billion in surplus from 2021 to 2022?
- Rapid Capitol Housing Acquisition Program received $300 million to convert properties to emergency and affordable public housing
- $174 million (2021 ARPA) and $9 million (2022 new dollars) provided for the homeowner assistance program for housing counselors and foreclosure assistance through the FFA
- $140,000 for a trustee study by the Department of Financial Institutions (we'll discuss this in just a moment)

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HB 1951 - Seller Disclosure Document Change

- Requires disclosure by the seller for damage to the home from animals
- Removes the seller's ability to declare "I don't know" to the document
- Removes the knowingly standard for a seller
- House Bill 1951 is a laudable attempt to even the playing field between buyers and sellers, but the existence of case law in Washington would create the immediate effect of the appellate courts finding the statute does not override existing cases. Washington courts have concluded that a buyer has the full duty to discover what defects may exist in a property if there is something suggesting to the buyer that there is a defect, so the full burden is on a buyer to discover matters relevant to a property. The "don't know" option should not be removed, but other changes to the bill could help restore other causes of action for buyers, including negligent misrepresentation and innocent misrepresentation as alternative claims for buyers. – Summary of comments from Catherine Clark, attorney working in commercial and real estate law

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HB 2097 - Changing the definition of First-Time Home Buyer

- Modifies the definition of "first-time home buyer" under the Housing Trust Fund program
- 1986 program that provides grants/loans for specific lower-income communities and for individuals with different abilities and lower incomes
- Originally the definition was for individual or the spouse of an individual who had not purchased a home within three years and met other criteria (different ability, income level)
- In the 2021-2023 Capitol Budget the definition was expanded
- a single parent who has only owned a home with a former spouse while married; an individual who is a displaced homemaker and has only owned a home with a spouse; • an individual who has only owned a principal residence not permanently affixed to a permanent foundation; and • an individual who has only owned a property that is discerned to be uninhabitable by a licensed building inspector.
- That temporary definition is now codified

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HB 2088 – Protecting Homeowners Navigating the Foreclosure Process

Bill was based on the failed negotiations from Fall, 2021, and contained changes to statute proposed by advocates:

- A borrower would be referred to mediation after the NOD "has been issued but no later than 90 days prior to the date of sale listed in the notice of trustee's sale" - change from 20 days from the date a notice of trustees sale is recorded
- The referral to mediation may be made any time after a NOD has been issued but no later than "90 days prior to the date of the sale listed in the notice of trustee's sale" – change from 20 days after the date NOTS has been recorded

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Other requests for changes to the DOTA statute

- Advocates wanted to delay the delivery of the title post-sale and have the title held from the buyer to 15 days post-sale. The specific request was to hold for eleven days post-sale, then file between 12 to 15 days after the sale
  - They believe that disputes post-sale are easier to resolve if nothing has yet been filed
- Successors in Interest – Trustees would have a duty to SII that aren't obligated on the loan – resolution of a court case lost by homeowner advocates
- Advocates want some kind of evidence that a document has been mailed at the same day that it's recorded to make sure the timelines sync for homeowners to receive the documents at the same time they're filed with no delays – require the mailings the same date as the filings, for example

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Evictions, Extensions, the Governor & the Mayor Protecting Renters and Homeowners

- Governor Inslee eviction restrictions end October 31, 2021
- Seattle ends its eviction moratorium on February 28, 2022; HOWEVER

Seattle eviction protections remain:

- Proof of COVID-19 related inability to pay – Delinquent rent between March 3, 2020, and current day
- Limitations on school year evictions (cannot evict if there is a student or educator on the property during the academic year)
- Limitations on evictions December 1 to March 1 due to cold weather
- Free legal council is provided through the Housing Justice Project

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Section 152 of the Operating Budget includes a study of trustees by the WA Dept of Financial Institutions

- The language of the budget proviso reads as follows:
- The entire appropriation is provided solely for the department of financial institutions to conduct a survey of foreclosure trustees doing business in the state of Washington for owner-occupied residential real property between January 1, 2017, and December 31, 2019
- (1) The survey must include:
- (a) The name and place of business of the trustee, its owner, and any affiliated firms or businesses that do business in Washington; (b) The number of notices of trustee sale filed each year for each beneficiary; (c) Templates without personally identifiable information of all notices sent to borrowers within the survey period; and (d) Samples of service contracts between the trustee and each beneficiary.
- (2) By January 1, 2023, the department of financial institutions shall submit a report to the legislature on the results of the survey and include a discussion of the regulation of foreclosure trustees in Washington's nonjudicial foreclosure system.

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Study of trustees by the WA Dept of Financial Institutions (cont.)

- Study will be staffed by Marco Andrade, intern with DFI

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Timeline:

Mid-July – Marco comes on board DFI

Written survey questions shared with trustees

Have meeting with Marco (August 29 tentatively scheduled)

Draft up and allow for review by trustees

Potentially follow up meeting

Final report due January 1, 2023

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What's Next in 2023

- Results of the Department of Financial Institutions study and survey
- Delivery of the trustees deed after 12 days
- Mailing notice extension
- Deceased borrower notification

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And What's on the Advocates' List?

1. Licensing and regulation of trustees as they are paid for by the beneficiary and thus biased toward beneficiary
2. Mediations should require presence of same rep from bene at all meetings
3. The Notice of Default should expire
4. The Beneficiary Declaration should have to be signed by someone employed directly by the Beneficiary
5. The Statute of Limitations should apply to non-judicial foreclosure
6. Changes to the Deceased borrower process – contacting those under age 16, mailing requirements
7. All loan modifications should have to be recorded
8. We need to "deal" with the NPV issue
9. The Trustee's Deed should not be allowed to be issued until 11 days after the sale
10. The trustee should be required to "timely" deposit surplus funds
11. The local contact (required physical presence in WA) for the trustee must know everything about the individual foreclosure when someone calls

California

United Trustees Association - Active Legislative Status Report as of 8/15/2022

AB 1093 **(Jones-Sawyer D)** **Remote online notaries public.** (Amended: 6/13/2022 html pdf)

Status: 7/1/2022-Failed Deadline pursuant to Rule 61(b)(14). (Last location was S. JUD on 5/4/2022)

Location: 7/1/2022-S. DEAD

Summary: Existing law authorizes the Secretary of State to appoint and commission notaries public in the number the Secretary of State deems necessary for the public convenience. Existing law requires a notary public to keep one active sequential journal at a time of all official acts performed as a notary public. Existing law authorizes notaries public to act as notaries in any part of the state and prescribes the manner and method of notarizations. Existing law establishes various requirements to ensure the security of notary seals and imposes a civil penalty for a violation of those provisions. This bill would authorize a notary public or an applicant for appointment as a notary public to apply for registration with the secretary to be a notary public authorized to perform online notarizations by submitting an application that meets certain requirements. The bill would also require an entity to register with the Secretary of State as an online notarization platform or depository before providing an online notarization system or depository, as defined, to an online notary public. The bill would require a representative of an online notarization platform to certify compliance with applicable laws under penalty of perjury. The bill also creates a civil cause of action against an online notarization platform or depository for a violation of those laws. The bill would require the Secretary of State to develop an application for registration and establish rules to implement the bill by January 1, 2025. This bill contains other related provisions and other existing laws.

Position

AB 1208 **(Ting D)** **Unclaimed property: secure payment of claims.** (Introduced: 2/19/2021 html pdf)

Status: 8/11/2022-From committee: Do pass. (Ayes 7. Noes 0.) (August 11). Read second time. Ordered to third reading.

Location: 8/11/2022-S. THIRD READING

Calendar: 8/15/2022 #546 SENATE ASSEMBLY BILLS - THIRD READING FILE

Summary: The Unclaimed Property Law governs the disposition of unclaimed property, including the escheat of certain property to the state. Those provisions require a person holding funds or other property escheated to the state to report to the Controller certain information regarding the property and the owner, and set forth procedures whereby a person may file a claim to the property or to the net proceeds from its sale.This bill would authorize the Controller to implement additional measures designed to streamline the secure payment of claims, as specified.

Position

AB 1381 **(Gallagher R)** **Limited liability companies: statement of information: Secretary of State: notice.** (Amended: 6/13/2022 html pdf)

Status: 8/11/2022-In committee: Held under submission.

Location: 6/27/2022-S. APPR. SUSPENSE FILE

Summary: Existing law requires every limited liability company and every foreign limited liability company registered to transact intrastate business in this state to deliver to the Secretary of State a statement of information containing specified information. In lieu of filing the statement of information, if there has been no change in the information contained in the last filed statement of information, it may advise the Secretary of State that no changes in the required information have occurred during the applicable filing period. If the required information has changed, as specified, a current statement is required to be filed that will supersede any previously filed statement, as specified. This bill would require the Secretary of State, by January 1, 2024, to create and implement a procedure to transmit a notice to a limited liability company or a foreign limited liability company stating that an updated statement of information has been filed for the limited liability company or for the foreign limited liability company, as specified. The bill would also make other conforming changes and remove obsolete language regarding the operative date of these provisions.

Position

AB 1410 (**Rodriguez** D) **Common interest developments.** (Amended: 6/30/2022 html pdf)

Status: 6/30/2022-Read second time and amended. Ordered to third reading.

Location: 6/30/2022-S. THIRD READING

Calendar: 8/15/2022 #290 SENATE ASSEMBLY BILLS - THIRD READING FILE

Summary: Existing law, the Davis-Stirling Common Interest Development Act, regulates common interest developments and associations, as defined. Existing law also regulates governing documents, as defined, and protects certain uses of a homeowner's separate property. That law, among other things, prohibits an association from restricting specified rights of a homeowner. These rights include the right to peacefully assemble, to invite public officials or other speakers to discuss matters of public interest, to distribute literature related to common interest development living, and to rent or lease a separate interest unless the governing document or amendment that restricts a homeowner's right to rent or lease their separate interest existed prior to the homeowner acquiring title to the separate interest.This bill would prohibit the governing documents from prohibiting a member or resident of a common interest development from using social media or other online resources to discuss specified issues even if the content is critical of the association or its governance, including, among other issues, development living and association elections. The bill would additionally prohibit an association from retaliating against a member or a resident for exercising certain rights, including the right to peacefully assemble or to use social media or other online resources to discuss certain issues.This bill contains other related provisions and other existing laws.

Position

AB 1837 (**Bonta, Mia** D) **Residential real property: foreclosure.** (Amended: 8/11/2022 html pdf)

Status: 8/11/2022-From committee: Amend, and do pass as amended. (Ayes 5. Noes 2.) (August 11). Read second time and amended. Ordered returned to second reading. (Text Published 8/12/2022)

Location: 8/11/2022-S. SECOND READING

Calendar: 8/15/2022 #54 SENATE ASSEMBLY BILLS - SECOND READING FILE

Summary: Existing law prescribes various requirements to be satisfied before the exercise of a power of sale under a mortgage or deed of trust and prescribes a procedure for the exercise of that power. Existing law authorizes a trustee, or their agent or successor in interest, upon the sale of property pursuant to a power of sale, to demand and receive from a beneficiary, or their agent or successor in interest, or deduct from the proceeds of the sale, specified reasonable costs and expenses that are actually incurred in enforcing the terms of the obligation and trustee's or attorney's fees. Existing law, until January 1, 2026, requires a specified notice to tenants and prescribes a process in connection with a trustee's sale of property under a power of sale contained in a deed of trust or mortgage on real property containing 1 to 4 residential units, inclusive. Under existing law, if a prospective owner-occupant, as defined, is the last highest bidder, the date upon which specified conditions required of the bidder at the trustee sale to become final are met. This bill would revise the process described above and extend its operation and the operation of the related provisions described above until January 1, 2031, and make conforming changes. The bill would revise the definition of an eligible tenant buyer to, among other things, also describe natural people who are occupying property under a rental or lease agreement with a mortgagor's or trustor's predecessor in interest. The bill would also revise the definitions of an eligible nonprofit corporation and limited liability company for purposes of making them eligible bidders. The bill would expand affidavit and declaration requirements for eligible bidders if they are winning bidders to address new requirements that the bill would impose regarding the use of properties as affordable housing and the treatment of tenants following purchase. By extending the operation of the provisions described above, and by expanding the requirements for affidavits and declarations provided under penalty of perjury, the bill would expand the definition of a crime, thus imposing a state-mandated local program. This bill contains other related provisions and other existing laws.

Position

Support

AB 1839 (**Choi** R) **Property tax: tax-defaulted property sales.** (Amended: 3/22/2022 html pdf)

Status: 4/29/2022-Failed Deadline pursuant to Rule 61(b)(5). (Last location was REV. & TAX on 2/18/2022)

Location: 4/29/2022-A. DEAD

Summary: Existing law governs the sale to certain entities of a property that has been tax defaulted for 5 years or more, or 3 years or more, as applicable, in an applicable county, including by authorizing the state, county, any revenue district the taxes of which on the property are collected by county officers, or a redevelopment agency created pursuant to the California Community Redevelopment Law, to purchase the property or any part thereof, as prescribed. Existing law also authorizes a nonprofit organization to purchase, with the approval of the board of supervisors of the county in which it is located, a residential or vacant property that has been tax-defaulted for 5 years or more, or 3 years or more if the property is subject to a nuisance abatement lien, as prescribed. Existing law requires the sales price of a property sold pursuant to the provisions described or referenced above to include certain amounts, including all defaulted taxes and assessments and all associated penalties and costs. This bill would prohibit a property or property interest from being offered for sale under the provisions described above if that property or property interest has not been offered for sale under the provisions described below. This bill contains other related provisions and other existing laws.

Position

AB 1905 (**Kiley** R) **Notaries public.** (Introduced: 2/9/2022 html pdf)

Status: 4/29/2022-Failed Deadline pursuant to Rule 61(b)(5). (Last location was PRINT on 2/9/2022)

Location: 4/29/2022-A. DEAD

Summary: Existing law authorizes the Secretary of State to appoint and commission notaries public in a number as the secretary deems necessary for the public convenience, and requires the secretary to administer the provisions governing notaries public. Existing law requires a notary public, when requested, to fulfill certain duties, including, among others, to demand acceptance and payment of foreign and inland bills of exchange or promissory notes, and to take the acknowledgment or proof of specified documents and to give a certificate of that proof or acknowledgment endorsed on or attached to the instrument.This bill would make nonsubstantive changes to the provisions imposing the above-described duties.

Position

AB 1933 (**Friedman** D) **Property taxation: welfare exemption: nonprofit corporation: low-income families.** (Amended: 6/28/2022 html pdf)

Status: 8/11/2022-From committee: Do pass. (Ayes 7. Noes 0.) (August 11). Read second time. Ordered to third reading.

Location: 8/11/2022-S. THIRD READING

Calendar: 8/15/2022 #583 SENATE ASSEMBLY BILLS - THIRD READING FILE

Summary: Existing property tax law, in accordance with the California Constitution, provides for a “welfare exemption” for property used exclusively for religious, hospital, scientific, or charitable purposes and that is owned or operated by certain types of nonprofit entities, if certain qualifying criteria are met. Existing property tax law states that property is within that welfare exemption if the property is owned and operated by a nonprofit corporation, otherwise qualifying for the welfare exemption, that is organized and operated for the specific and primary purpose of building and rehabilitating single or multifamily residences for sale at cost to low-income families, with financing in the form of a zero interest rate loan and without regard to religion, race, national origin, or the sex of the head of household. This bill would also provide, for lien dates occurring on or after January 1, 2023, and before January 1, 2028, that property is fully exempt from property taxation and is also within that welfare exemption if that property is owned and operated by a nonprofit corporation, as described, that is organized and operated for the specific and primary purpose of building and rehabilitating single or multifamily residential units and the property has units that meet specified requirements. The bill would limit the exemption to the portion of the property proposed to be built or rehabilitated with units meeting the requirements and would limit, following completion of construction, the exemption to the portion of the property with units that meet the requirements, as specified. The bill would prohibit the denial of this exemption for property not previously designated as open space on the basis that the property does not currently include a single or multifamily residential unit, as described, or a single or multifamily residential unit, as described, that is in the course of construction. This bill contains other related provisions and other existing laws.

Position

AB 1993 (**Wicks** D) **Employment: COVID-19 vaccination requirements.** (Introduced: 2/10/2022 html pdf)

Status: 4/29/2022-Failed Deadline pursuant to Rule 61(b)(5). (Last location was L. & E. on 2/10/2022)

Location: 4/29/2022-A. DEAD

Summary: Existing law, the California Fair Employment and Housing Act (FEHA), establishes the Department of Fair Employment and Housing within the Business, Consumer Services, and Housing Agency and sets forth its powers and duties relating to the enforcement of civil rights laws with respect to housing and employment. This bill would require an employer to require each person who is an employee or independent contractor, and who is eligible to receive the COVID-19 vaccine, to show proof to the employer, or an authorized agent thereof, that the person has been vaccinated against COVID-19. This bill would establish an exception from this vaccination requirement for a person who is ineligible to receive a COVID-19 vaccine due to a medical condition or disability or because of a sincerely held religious belief, as specified, and would require compliance with various other state and federal laws. The bill would require proof-of-vaccination status to be obtained in a manner that complies with federal and state privacy laws and not be retained by the employer, unless the person authorizes the employer to retain proof. This bill contains other related provisions and other existing laws.

Position

AB 2123 (**Villapudua** D) **Bringing Health Care into Communities Act of 2023.** (Amended: 4/7/2022 html pdf)

Status: 4/29/2022-Failed Deadline pursuant to Rule 61(b)(5). (Last location was H. & C.D. on 3/28/2022)

Location: 4/29/2022-A. DEAD

Summary: Existing law establishes various programs, including the Family Homelessness Challenge Grants and Technical Assistance Program, with the goal of providing housing. Existing law charges various agencies with the administration of these programs, including the Department of Housing and Community Development and the California Housing Finance Agency. Existing law also establishes various programs to facilitate the expansion of the health care workforce in rural and underserved communities, including, but not limited to, the Health Professions Career Opportunity Program and the California Registered Nurse Education Program. This bill, the Bringing Health Care into Communities Act of 2023, would establish the Bringing Health Care into Communities Program to be administered by the agency to provide housing grants to specified health professionals to be used for mortgage payments for a permanent residence in a health professional shortage area, as specified. Under the bill, a health professional would be eligible for a grant for up to 5 years. The bill would make its provisions operative upon appropriation by the Legislature.

Position

AB 2170 (**Grayson** D) **Residential real property: foreclosure sales.** (Amended: 6/23/2022 html pdf)

Status: 8/11/2022-From committee: Do pass. (Ayes 7. Noes 0.) (August 11). Read second time. Ordered to third reading.

Location: 8/11/2022-S. THIRD READING

Calendar: 8/15/2022 #610 SENATE ASSEMBLY BILLS - THIRD READING FILE

Summary: Existing law prescribes various requirements to be satisfied before the exercise of a power of sale under a mortgage or deed of trust and prescribes a procedure for the exercise of that power. Existing law, until January 1, 2026, prescribes a process in connection with a trustee's sale of property under a power of sale contained in a deed of trust or mortgage on real property containing one to 4 residential units, inclusive, that provides specified bidding priorities to certain parties, including prospective owner-occupants. This bill would prescribe requirements that would apply to sales of real property containing one to 4 residential dwelling units, inclusive, that is acquired through foreclosure under a mortgage or deed of trust by an institution or that is acquired at a foreclosure sale by an institution, as defined. The bill would require the institution, during the first 30 days after a property is listed, as specified, to only accept offers from eligible bidders, as defined, and to respond, in writing, to all offers received from eligible bidders before considering any other offers. This bill contains other related provisions and other existing laws.

Position

AB 2224 (**McCarty** D) **Real estate: transactions: iBuyers.** (Amended: 4/27/2022 html pdf)

Status: 7/5/2022-Failed Deadline pursuant to Rule 61(b)(14). (Last location was S. B., P. & E.D. on 5/18/2022)

Location: 7/5/2022-S. DEAD

Summary: Existing law, the Real Estate Law, establishes the Department of Real Estate, with the Real Estate Commissioner as its chief officer, and sets forth the powers and duties of the commissioner relating to the licensure and regulation of real estate brokers and imposes various requirements on real estate transactions. This bill would require an iBuyer, defined by the bill as a specified online real estate company, to work with a local real estate broker, as defined, when selling real property in California. The bill would exempt from this requirement the initial sale of real property containing new construction.

Position

AB 2258 (**Wood** D) **Local government: wildfire safety improvements.** (Amended: 4/21/2022 html pdf)

Status: 5/6/2022-Failed Deadline pursuant to Rule 61(b)(6). (Last location was A. B. & F. on 4/20/2022)

Location: 5/6/2022-A. DEAD

Summary: Existing law, the Improvement Act of 1911, authorizes a public agency, as defined, to determine that it would be convenient, advantageous, and in the public interest to designate an area within which public agency officials and individual property owners may enter into voluntary contractual assessments to finance the installation of specified improvements that are permanently fixed to those owners' real property, as specified. Existing law also authorizes a legislative body of any public agency, defined to mean a city, county, or city and county, that has accepted the designation of very high fire hazard severity zone to designate an area for contractual assessments to finance the installation of wildfire safety improvements, as defined, that are permanently fixed to real property. This bill would expand this authority to public agencies in areas of the state that have been reasonably designated as very high or high fire hazard severity zones by the State Fire Marshal, as specified. The bill would also remove the requirement that wildfire safety improvements be made to existing real property and would authorize a voluntary contractual assessment for wildfire safety improvements to be used to acquire or construct wildfire safety improvements in connection with the rebuilding or reconstruction of property if the wildfire safety improvements are in addition to or an improvement to, and were not part of, the property as it existed immediately prior to the destruction or damage to the property by fire. The bill, except as specified, would also provide that wildfire resiliency and safety improvements that contribute to the defensible space Zone 1 of a property, as specified, are wildfire safety improvements for purposes of those provisions.

Position

AB 2280 (**Reyes** D) **Unclaimed property: interest assessments and disclosure of records.** (Amended: 5/19/2022 html pdf)

Status: 8/11/2022-From committee: Do pass. (Ayes 7. Noes 0.) (August 11). Read second time. Ordered to third reading.

Location: 8/11/2022-S. THIRD READING

Calendar: 8/15/2022 #618 SENATE ASSEMBLY BILLS - THIRD READING FILE

Summary: Under existing law, property held by a person that belongs to another and that is unclaimed for more than specified periods escheats to the state. Existing law requires persons holding unclaimed property to report and pay or deliver it to the Controller within a prescribed time period, except as specified, and imposes interest payments for a failure to do so. Existing law requires the holder, if the property is not subject to escheat after the report is filed and before payment or delivery is made, to file another report instead of paying or delivering the property. Existing law limits the interest payable to $10,000 if a holder pays or delivers unclaimed property in a timely manner, but files a report that is not in substantial compliance with certain statutory requirements. Existing law provides that a holder is not subject to interest payments if the holder's failure to report in substantial compliance with the requirements described above is due to reasonable cause. This bill would, in addition, impose the limit of $10,000 on interest payable if a holder files a report, after the initial report and before payment or delivery is made for property that may not be subject to escheat, that is not in substantial compliance with statutory requirements. The bill would authorize the Controller to waive interest payable if the holder's failure to report in substantial compliance with specified requirements is due to reasonable cause. The bill would require the Controller to waive interest payable if the holder participates in and completes all of the requirements of the California Voluntary Compliance Program, subject to the Controller's right to reinstate, as specified. This bill contains other related provisions and other existing laws.

Position

AB 2324 (**Irwin** D) **Oath of office: health officers.** (Chaptered: 7/19/2022 html pdf)

Status: 7/19/2022-Approved by the Governor. Chaptered by Secretary of State - Chapter 124, Statutes of 2022.

Location: 7/19/2022-A. CHAPTERED

Summary: The California Constitution requires members of the Legislature, and all public officers and employees, to take and subscribe a specified oath of office or affirmation. The California Constitution permits inferior officers and employees to be exempted by law from this requirement. Existing law, in the case of particular officers, requires the oath, after being administered, to be filed in designated offices. This bill would require a health officer, as specified, in addition to their existing filing duties, to file their oath in the office of the Secretary of State. Because this bill would impose new duties on local officials, this bill would impose a state-mandated local program. This bill contains other related provisions and other existing laws.

Position

AB 2650 (**Arambula** D) **The Neng Thao Drowning Prevention Safety Act.** (Amended: 4/5/2022 html pdf)

Status: 4/29/2022-Failed Deadline pursuant to Rule 61(b)(5). (Last location was ED. on 4/7/2022)

Location: 4/29/2022-A. DEAD

Summary: Existing law requires the Division of Boating and Waterways, in cooperation with the State Department of Education and other appropriate entities involved with water safety, to develop an aquatic safety program to be made available for use at an appropriate grade level in public elementary schools at no expense to the schools. Existing law requires the division to notify schools and school districts of the availability of the aquatic safety program once it is developed. This bill would authorize specified organizations to provide informational materials, in electronic or hard copy form, to a public elementary school regarding specified topics relating to drowning prevention. The bill would require, beginning with the 2022–23 school year, upon receipt of the informational materials, a public elementary school to provide the informational materials to parents, legal guardians, or caregivers of pupils in kindergarten to grade 3, inclusive, at the time the pupil enrolls at the school and at the beginning of each school year. Because this bill would impose requirements on public elementary schools, this bill would impose a state-mandated local program. This bill contains other related provisions and other existing laws.

Position

AB 2662 (**Kalra** D) **Department of Fair Employment and Housing.** (Chaptered: 6/21/2022 html pdf)

Status: 6/21/2022-Approved by the Governor. Chaptered by Secretary of State - Chapter 35, Statutes of 2022.

Location: 6/21/2022-A. CHAPTERED

Summary: Existing law, the California Fair Employment and Housing Act (FEHA), establishes the Department of Fair Employment and Housing (DFEH) within the Business, Consumer Services, and Housing Agency, under the direction of the Director of Fair Employment and Housing, to enforce civil rights laws with respect to housing and employment and to protect and safeguard the right of all persons to obtain and hold employment without discrimination based on specified characteristics or status.This bill would provide that, by performing the functions and duties and exercising the powers set forth in the FEHA, the DFEH represents the interests of the state and effectuates the declared public policy of the state to protect and safeguard the rights and opportunities of all persons from unlawful discrimination and other violations of the FEHA and that this statement is declarative of existing law as stated in specified case law. The bill would specify that the DFEH is acting in the public interest in bringing these civil actions.

Position

AB 2672 (**Flora** R) **Fire prevention: defensible space inspections: statewide defensible space and home hardening platform.** (Amended: 4/28/2022 html pdf)

Status: 5/20/2022-Failed Deadline pursuant to Rule 61(b)(8). (Last location was A. APPR. SUSPENSE FILE on 5/11/2022)

Location: 5/20/2022-A. DEAD

Summary: Existing law requires a person who owns, leases, controls, operates, or maintains a building or structure in, upon, or adjoining a mountainous area, forest-covered lands, shrub-covered lands, grass-covered lands, or land that is covered with flammable material, to at all times maintain a defensible space of 100 feet from each side and from the front and rear of the structure, as provided. Existing law requires a seller of real property that is located in a high or very high fire hazard severity zone to provide the buyer documentation stating that the property is in compliance with that defensible space requirement. This bill would authorize the Director of Forestry and Fire Protection, using specified funds, to procure or establish a statewide defensible space and home hardening platform that would allow property owners to support and augment the Department of Forestry and Fire Protection in defensible space inspection requests, as provided. The bill would require the platform to have specified features, including a functionality that would allow for live video and audio interaction between a fire safety official and a property owner. The bill would require the director to establish any necessary quality control measures to ensure that the inspection information that is shared on the platform is accurate, reliable, and auditable. The bill would authorize a seller of real property to use the platform for purposes of providing specified documentation relating to defensible space requirements, as provided. The bill would subject a property owner to a specified civil penalty if the property owner provides false information, omits information requested by a fire safety official, or otherwise seeks to use the platform to provide false or misleading information for the purpose of providing the documentation described above.

Position

AB 2679 (**Fong** R) **Fictitious business names: statements: publication.** (Introduced: 2/18/2022 html pdf)

Status: 5/6/2022-Failed Deadline pursuant to Rule 61(b)(6). (Last location was A. B.&P. on 3/10/2022)

Location: 5/6/2022-A. DEAD

Summary: Existing law requires a person who regularly transacts business in this state for profit under a fictitious business name to file a fictitious business name statement within 40 days of commencing to transact business. Existing law requires the registrant, within 30 days after filing, to cause a statement to be published in a newspaper of general circulation, as prescribed, and to file with the county clerk an affidavit showing the publication of the statement. Existing law provides that the same publication and corresponding affidavit requirements are used upon ceasing to transact business under a fictitious business name and filing a statement of abandonment of use of fictitious business name, and withdrawing as a general partner and filing a statement of withdrawal from a partnership operating under a fictitious business name, as specified. Existing law also authorizes a county clerk to accept an electronic acknowledgment verifying the identity of the registrant using a remote identity proofing process ensuring the registrant’s identification, as specified, for purposes of filing fictitious business name statements, as provided. This bill would authorize those publication and corresponding affidavit requirements to be fulfilled through publication online on the internet website or open-source portal of the county clerk for the county where the fictitious business name statement was filed continually for 4 weeks, if that county clerk elects to provide that service, and, if that online publication method is selected, require the county clerk to create and file an affidavit showing the publication of the statement. The bill would also provide that the registrant has within 60 days after filing to meet those publication and corresponding affidavit requirements.

Position

AB 2689 (**Cunningham** R) **Virtual currency: payment for goods and services.** (Introduced: 2/18/2022 html pdf)

Status: 4/29/2022-Failed Deadline pursuant to Rule 61(b)(5). (Last location was B. & F. on 3/10/2022)

Location: 4/29/2022-A. DEAD

Summary: Existing law generally prohibits a person from engaging in the business of money transmission without a license from the Commissioner of Business Oversight. Existing law defines money transmission as selling or issuing payment instruments, selling or issuing stored value, and receiving money for transmission. Existing law, the Uniform Commercial Code, among other things, regulates the issuance and transfer of securities and prescribes rules pursuant to which entitlements for securities held by a securities intermediary are to be determined. Existing law prohibits a corporation, social purpose corporation, association, or individual from issuing or putting in circulation, as money, anything but the lawful money of the United States.This bill would authorize a private or public entity in the state to accept virtual currency, as defined, as a method of payment for the provision of any good or service, including any governmental service. The bill would define public entity for these purposes to include the state and every state entity, including the Legislature, the judicial branch, the University of California, and the California State University, and a political subdivision of the state, including a city, county, city and county, charter city, charter county, school district, community college district, joint powers authority, joint powers agency, and any public agency, authority, board, commission, or district.

Position

AB 2710 (**Kalra** D) **Residential real property: sale of rental properties: right of first offer.** (Amended: 4/18/2022 html pdf)

Status: 4/29/2022-Failed Deadline pursuant to Rule 61(b)(5). (Last location was H. & C.D. on 4/19/2022)

Location: 4/29/2022-A. DEAD

Summary: Existing law establishes various real estate disclosure requirements applicable to the transfer of residential real property. This bill would require an owner of residential real property, defined to include a single-family residential property that is occupied by a tenant or a multifamily residential property except as specified, to take various actions before offering the residential real property for sale to any purchaser, soliciting any offer to purchase the residential real property, or otherwise entering into a contract for sale of the residential real property. The bill would exempt certain transfers of a residential real property from its provisions, including, among others, a transfer between spouses, domestic partners, parent and child, siblings, grandparent and grandchild, a transfer pursuant to a court order, and a transfer by eminent domain. This bill contains other related provisions and other existing laws.

Position

AB 2834 (**Kiley** R) **Notaries public: certificate corrections.** (Amended: 4/27/2022 html pdf)

Status: 5/20/2022-Failed Deadline pursuant to Rule 61(b)(8). (Last location was A. APPR. SUSPENSE FILE on 5/11/2022)

Location: 5/20/2022-A. DEAD

Summary: Existing law authorizes the Secretary of State to appoint and commission notaries public in a number as the secretary deems necessary for the public convenience, and requires the secretary to administer the provisions governing notaries public. Existing law requires a notary public, when requested, to take the acknowledgment or proof of specified documents and to give a certificate of that proof or acknowledgment endorsed on or attached to the instrument. Existing law requires the notary public to sign the certificate in the notary public's own handwriting. Existing law prohibits a notary public from accepting any acknowledgment or proof of any instrument that is incomplete. Existing law also requires a notary public to keep one active sequential journal at a time of all official acts performed as a notary public, as specified. This bill would authorize a notary public to correct an error on a certificate under specified circumstances, including that the notary public who makes the correction is the same notary public who originally completed the certificate, the error is in a certificate attached to a grant deed, mortgage, deed of trust, quitclaim deed, security agreement, or other instrument affecting real property that is to be recorded with a county recorder, the error is of a kind that prevents the county recorder from recording the document, and a copy of the original record and notarial certificate are returned to the notary with a written request for correction from the county recorder, as specified. The bill would require a notary public that corrects an error on a certificate to indicate the correction on the original entry for the certificate in the journal and to initial and date the correction on an updated certificate or indicate that a new certificate was issued.

Position

ACA 9 **(Kiley R) Property taxation: transfers of principal residences.** (Introduced: 5/3/2021 html pdf)

Status: 5/4/2021-From printer. May be heard in committee June 4.

Location: 5/3/2021-A. PRINT

Summary: The California Constitution limits the amount of ad valorem taxes on real property to 1% of the full cash value of that property, defined as the county assessor's valuation of real property as shown on the 1975–76 tax bill and, thereafter, the appraised value of the real property when purchased, newly constructed, or a change in ownership occurs after the 1975 assessment, subject to an annual inflation adjustment not to exceed 2%. The California Constitution, until February 15, 2021, excluded from classification as a "purchase" or "change in ownership" requiring reppraisal the purchase or transfer of a principal residence and the first $1,000,000 of other real property of a transferor in the case of a transfer between parents and their children, or between grandparents and their grandchildren if all the parents of those grandchildren are deceased. On November 3, 2020, the voters approved Proposition 19. Pursuant to Proposition 19, the California Constitution, on and after February 16, 2021, removes the above-described exclusion from classification as a "purchase" and "change in ownership" requiring reappraisal, and instead excludes from classification as a "purchase" and "change in ownership" the purchase or transfer of a family home or family farm, as those terms are defined, of the transferor in the case of a transfer between parents and their children, or between grandparents and their grandchildren if all the parents of those grandchildren are deceased, if the property continues as the family home or family farm of the transferee. In the case of the exclusion so provided to a transfer of a family home, the California Constitution, pursuant to Proposition 19, requires the transferee to claim the homeowner's or disabled veteran's exemption within one year of the transfer.This measure would repeal the above-described provisions of Proposition 19. The measure would reinstate the prior rule excluding from classification as a "purchase" or "change in ownership" requiring reappraisal the purchase or transfer of the principal residence and the first $1,000,000 of other real property of a transferor in the case of a transfer between parents and their children, or between grandparents and their grandchildren if all the parents of those grandchildren are deceased. The measure would apply retroactively to all effected purchases or transfers occurring on or after February 16, 2021.

Position

SB 140 **(Committee on Budget and Fiscal Review) Budget Act of 2022.** (Amended: 2/15/2022 html pdf)

Status: 2/15/2022-From committee with author's amendments. Read second time and amended. Re-referred to Com. on BUDGET.

Location: 2/15/2022-A. BUDGET

Summary: This bill would express the intent of the Legislature to enact statutory changes relating to the Budget Act of 2022.

Position

SB 175 **(Committee on Budget and Fiscal Review) Budget Act of 2022.** (Amended: 2/15/2022 html pdf)

Status: 2/15/2022-From committee with author's amendments. Read second time and amended. Re-referred to Com. on BUDGET. (Amended on 2/15/2022)

Location: 2/15/2022-A. BUDGET

Summary: This bill would express the intent of the Legislature to enact statutory changes relating to the Budget Act of 2022.

Position

SB 454 **(Bates R) Child support: enforcement.** (Amended: 6/3/2021 html pdf)

Status: 8/27/2021-Failed Deadline pursuant to Rule 61(a)(12). (Last location was APPR. SUSPENSE FILE on 7/14/2021)(May be acted upon Jan 2022)

Location: 8/27/2021-A. 2 YEAR

Summary: Existing law imposes a general obligation on both parents of a minor child to support their child in the manner suitable to the child's circumstances. Existing law establishes the statewide uniform guidelines for calculating court-ordered child support, based on the income of both parents and the time each parent spends with the child. Existing law authorizes, if a support obligor is delinquent in paying child support and the local child support agency is enforcing a support obligation, a lien for child support against the personal property of the obligor in specified circumstances. Existing law defines "support obligor is delinquent in payment of support" to mean that the support obligor has failed to make a payment equal to one month's support obligation.This bill would instead define "support obligor is delinquent in payment of support" to mean that the support obligor is over $1,000 in arrears on their support obligation or has failed to make payments equal to 3 months of their support obligation, whichever occurs first. The bill would instead authorize a child support agency to record a notice of support judgment when overdue support exceeds $1,000 or when the support obligor has failed to make payments equal to 3 months of their support obligation, whichever occurs first, regardless of whether the amounts of overdue support have been adjudicated or otherwise determined. This bill contains other related provisions and other existing laws.

Position

SB 633 **(Limón D) Consumer credit contracts: translations.** (Enrollment: 8/10/2022 html pdf)

Status: 8/10/2022-Enrolled and presented to the Governor at 2 p.m.

Location: 8/10/2022-S. ENROLLED

Summary: Existing law requires, unless the persons are married to each other, each creditor who obtains the signature of more than one person on a consumer credit contract to deliver to specified persons prior to those persons becoming obligated on the contract a notice in English and Spanish, as described. Existing law requires, unless the persons are married to each other, a lessor under a lease to deliver to each person who does not in fact receive the vehicle which is the subject of the lease contract, prior to that person becoming liable on the lease contract, a specified notice in English and Spanish in lieu of the notice required of creditors. Existing law authorizes these notices to be provided on a separate sheet, as described, or in the text of the consumer credit contract or other document establishing liability of the person. Existing law also provides that if federal law or regulations require or permit the use of a notice substantially similar to the notice required as described above, the use of the federally sanctioned notice and an accurate Spanish translation constitutes compliance. This bill would require the notice described above to be provided to specified persons regardless of whether the persons are married to each other and would expand the languages into which the notices are required to be translated. The bill would require the Department of Financial Protection and Innovation to make translations of the notices available in the required languages on its internet website by January 1, 2023, and would require additional translations of any languages subsequently added to state law. The bill would require the notice to be provided only on a separate sheet preceding the contract, as specified. The bill would also make conforming changes.

Position

SB 975 **(Min D)** **Debt: coerced debts.** (Amended: 8/15/2022 html pdf)

Status: 8/11/2022-From committee: Do pass as amended. (Ayes 12. Noes 3.) (August 11). (Amended Text Relased 8/15/2022)

Location: 8/11/2022-A. SECOND READING

Calendar: 8/15/2022 #56 ASSEMBLY SECOND READING FILE -- SENATE BILLS

Summary: Existing law regulates various practices related to debt, including its sale and collection. Existing law provides for various private rights of action, including for a patient against a psychotherapist for sexual contact, as defined and specified, a peace officer against an individual who has filed a false complaint with the officer's employing agency, as specified, and a person against another for sexual harassment, as defined and specified.This bill would require a claimant, upon receipt from the debtor of adequate documentation, a sworn written statement that some or all of the debt being collected is coerced debt, and other specified documentation, to cease collection activities until the claimant completes a review, as defined and specified. The bill would also create a right of action that would allow a debtor to bring an action or a claim against a claimant to establish that a particular debt, or portion thereof, is coerced debt, as specified. If a debtor establishes that a particular debt, or portion thereof, is coerced debt, the bill would entitle that debtor to specified relief, including an injunction prohibiting the claimant from holding or attempting to hold the debtor personally liable on the particular debt, or portion thereof, that is coerced debt, or from enforcing a judgment related to the particular debt, or portion thereof, that is coerced debt against the debtor. The bill would apply only to debts incurred on or after January 1, 2023, except as specified. The bill would declare that its provisions are severable. This bill contains other related provisions and other existing laws.

Position

SB 1200 **(Skinner D)** **Enforcement of judgments: renewal and interest.** (Amended: 8/11/2022 html pdf)

Status: 8/11/2022-Read third time and amended. (Ayes 44. Noes 16.) Ordered to third reading.

Location: 8/1/2022-A. THIRD READING

Calendar: 8/15/2022 #322 ASSEMBLY THIRD READING FILE - SENATE BILLS

Summary: Existing law provides that a judgment is enforceable upon entry, except as specified, and generally permits a judgment creditor to bring an action on a judgment, provided that it is brought within ten years. Existing law provides that the period of enforceability of a money judgment or a judgment for possession or sale of property may be extended by renewal of the judgment upon application by the judgment creditor filed with the court in which the judgment was entered. Existing law allows a judgment debtor to make a motion to vacate or modify the renewal within 30 days of service of a notice of renewal of the judgment. This bill would increase the amount of days after service of the notice of renewal that a judgment debtor may make a motion to vacate or modify a renewal to 60 days. The bill would allow a judgment creditor to renew the period of enforceability in cases of a money judgment of under $200,000 that remains unsatisfied for a claim relating to medical expenses and for a money judgment of under $50,000 that remains unsatisfied for a claim related to personal debt, as specified, only once and for a period of 5 years from the date the application is filed. The bill would prohibit a judgment creditor from bringing an action on those types of money judgments. The bill would prohibit an application for renewal of a judgment from being filed if the judgment was renewed on or before December 31, 2022. This bill contains other related provisions and other existing laws.

Position

SB 1202 **(Limón D) Business entities: Secretary of State: document filings.** (Amended: 6/8/2022 html pdf)

Status: 8/8/2022-From consent calendar on motion of Assembly Member Reyes. Ordered to third reading.

Location: 8/8/2022-A. THIRD READING

Calendar: 8/15/2022 #355 ASSEMBLY THIRD READING FILE - SENATE BILLS

Summary: Existing law, the Commercial and Industrial Common Interest Development Act, requires each association, to assist with the identification of commercial or industrial common interest developments, to submit to the Secretary of State specified information concerning the association and development that it manages. Existing law requires the Secretary of State to make the name, address, and either the daytime telephone number or email address of the association's onsite office or managing agent available only for governmental purposes and only to Members of the Legislature and the Business, Consumer Services, and Housing Agency, upon written request. Existing law provides that all other information submitted pursuant to this provision is subject to public inspection pursuant to the California Public Records Act and shall be made available for governmental or public inspection. This bill would delete the above provision requiring the Secretary of State to make the above-described information available only for governmental purposes and specifying other information is subject to public inspection pursuant to the California Public Records Act. This bill contains other related provisions and other existing laws.

Position

SB 1261 **(Stern D) Energy: low-emissions buildings.** (Amended: 6/15/2022 html pdf)

Status: 6/27/2022-Re-referred to Com. on RLS. pursuant to Assembly Rule 96.

Location: 6/27/2022-A. RLS.

Summary: Existing law requires the Department of Community Services and Development to develop and administer the Energy Efficiency Low-Income Weatherization Program. This bill would require the department, upon appropriation by the Legislature, to develop and administer the Multifamily Rapid Deployment Building Decarbonization and Extreme Heat Program to identify and deploy replicable, scalable, and affordable upgrades for multifamily building types that reduce emissions of greenhouse gases and improve the health and comfort of residents in multifamily buildings, as provided. The bill would require the department to develop the guidelines for the program on or before April 1, 2023, and to begin implementing the program on or before September 30, 2023.

Position

SB 1264 **(Dahle R) Property Assessed Clean Energy program: wildfire safety improvements.** (Introduced: 2/17/2022 html pdf)

Status: 5/6/2022-Failed Deadline pursuant to Rule 61(b)(6). (Last location was S. GOV. & F. on 3/2/2022)

Location: 5/6/2022-S. DEAD

Summary: Existing law, known commonly as the Property Assessed Clean Energy (PACE) program, authorizes a public agency, by making specified findings, to authorize public agency officials and property owners to enter into voluntary contractual assessments to finance the installation of distributed generation renewable energy sources or energy or water efficiency improvements that are permanently fixed to real property.This bill would instead authorize specified public agencies to enter into voluntary contractual assessments with property owners to finance the installation of wildfire safety improvements, as defined, that are permanently fixed to real property, and would repeal the requirement that the improvement be fixed to existing real property. The bill would also repeal the requirement that the legislative body make specified determinations by adopting a resolution. The bill would provide that wildfire resiliency and safety improvements that contribute to the defensible space Zones 1 and 2 of a property, as specified, are wildfire safety improvements for purposes of those provisions. This bill contains other existing laws.

Position

SB 1323 (**Archuleta** D) **Foreclosure: equity sale: multiple listing.** (Amended: 8/15/2022 html pdf)

Status: 8/11/2022-From committee: Do pass as amended. (Ayes 11. Noes 5.) (August 11).

Location: 8/11/2022-A. SECOND READING

Calendar: 8/15/2022 #107 ASSEMBLY SECOND READING FILE -- SENATE BILLS

Summary: Existing law imposes various requirements to be satisfied before exercising a power of sale under a mortgage or deed of trust, including recording a notice of default, providing a mortgagor or trustor a copy of the recorded notice of default, providing notice of the time and place scheduled for the public auction sale of the real property and other notices related to the sale, determining the fees and expenses that may be paid from the sale, determining who may conduct the sale and act in the sale as an auctioneer for the trustee, determining the time and place where the auction sale may occur, and specifying how bids may be made and accepted at the auction sale.This bill would recast these provisions to require that an equity sale, as defined, of property under a power of sale of a mortgage or deed of trust be made by a real estate licensee, as defined, and by publicly listing the property for sale on a multiple listing service with an initial listing price at the property's appraised value, as specified. If the trustee receives multiple qualifying offers, as defined, the bill would require the trustee to make counter offers to each offeror, as specified, and comply with prescribed procedures. The bill would require the trustee to reduce the listed price of the property if the trustee does not receive a qualifying offer within 30 days of listing the property, and every 30 days thereafter, as specified. offer offer offer This bill contains other related provisions and other existing laws.

Position

Oppose

SB 1457 (**Hertzberg** D) **Housing: California Family Home Construction and Homeownership Bond Act of 2022.** (Amended: 4/19/2022 html pdf)

Status: 6/15/2022-June 15 set for first hearing canceled at the request of author.

Location: 6/2/2022-A. H. & C.D.

Summary: Existing law, the Veterans and Affordable Housing Bond Act of 2018, which was approved by the voters as Proposition 1 at the November 6, 2018, statewide general election, authorizes the issuance of bonds in the amount of $4,000,000,000 pursuant to the State General Obligation Bond Law and requires the proceeds from the sale of these bonds to be used to finance various housing programs and a specified program for farm, home, and mobilehome purchase assistance for veterans, as provided. This bill would enact the California Family Home Construction and Homeownership Bond Act of 2022 (bond act), which, if adopted, would authorize the issuance of bonds in the amount of $25,000,000,000 pursuant to the State General Obligation Bond Law to finance the California Family Home Construction and Homeownership Program, established as part of the bond act. The bill would authorize the California Housing Finance Agency to award California Socially Responsible Second Mortgage Loans to eligible applicants to use as a down payment or to pay closing costs on the purchase of a new home. The bill would also authorize the agency to award Family Homeownership Opportunity Infrastructure Improvement Loans to developers to be used for predevelopment infrastructure improvements and other upfront costs typically incurred in connection with new home construction, under specified conditions. The bill would require that moneys received from a loan recipient for the repayment of financing provided under the program be used to pay debt service when due on bonds issued pursuant to the bond act. The bill would also authorize the agency to issue revenue bonds for the purposes of financing the program, as specified. This bill contains other related provisions.

Position

Total Measures: 34
Total Tracking Forms: 34

2022 Annual Education Conference

CASE LAW UPDATES

Presented by

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Kent Cammack focuses his practice on resolving commercial disputes. He has extensive litigation and trial experience in both the state and federal courts, as well as in mediations and arbitrations. Kent's more than forty years of experience includes a variety of cases regarding real estate, secured lending, receiverships, lender liability, landlord/tenant, purchase and sale contracts (both real and personal property), and employment issues (including non-competition agreements and workplace harassment).

Kent is a recognized authority on foreclosure law, including related topics of state court receiverships, collection of deficiencies, and developing strategies for the collection of defaulted real estate loans and the structuring of "workouts." He has testified as an expert witness in a variety of foreclosure matters.

Kent is one of the authors of Ins and Outs of Foreclosures, published by the State Bar of Arizona, and he is the author of numerous educational materials. He is a popular speaker at state and county bar seminars and private seminars on all aspects of foreclosure law. He has also testified in hearings before the Arizona senate regarding proposed legislation governing mortgages, deeds of trust, and lien enforcement.
Kent also serves as a mediator and arbitrator in various commercial disputes.

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Steve Hicklin has worked in the mortgage banking industry for more than thirty years. He has litigated cases as in-house counsel for a number of lenders and servicers, including WMC Mortgage Corp., Glendale Federal Bank, and Countrywide Home Loans. In 2006, Steve began as the Compliance Manager and later as the Chief Compliance Officer, for ReconTrust Company, Inc., at one time the nation's largest foreclosure trustee. He has since served as General Counsel for Northwest Trustee Services and as the Managing Attorney for the California office of Bonial & Associates, P.C. In 2018, Steve founded The Hicklin Firm, an Orange County litigation boutique, and in 2020 became Of Counsel to Bonial & Associates, P.C. Steve was awarded the UTA's Dorothy Schick Veteran Member of the Year in 2019 and is a frequent speaker at industry events. He is admitted to the California, Texas, and Washington state bars. He can be reached at shicklin@thehicklinfirm.com

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Marty has extensive experience in representing creditors, fiduciaries, loan servicers and foreclosure trustees in complex bankruptcy, foreclosure and lender liability litigation, including class actions. He acts as an expert witness on foreclosure and lending issues on cases throughout California.

Marty has served as a Director and State Legislative Chairman of the United Trustee's Association. He is a member of the Legal Issues Committee of the Mortgage Bankers Association of America and Loan Servicing Committee of the California Mortgage Bankers Association. Marty also served as a member of the Legal Resource Panel of the California Mortgage Association (formerly the California Trust Deed Brokers Association). He is a member of the American Bankruptcy Institute, the REO Managers Association and of the San Diego Bankruptcy Forum.

Marty is rated AV® by Martindale-Hubbell, their highest rating of skill and integrity, indicating very high to pre-eminent legal ability and very high ethical standards as established by confidential opinions from members of the bar. He can be reached at mmcguinn@kirbymac.com.

Arizona

UTA 2022

While You Were Stuck Guarding The Home(stead):
Issues From the Last Few Covid Years

By Kent Cammack, Gust Rosenfeld PLC

GUST ROSENFELD
ATTORNEYS SINCE 1921 P.L.C.

UTA 2022

While You Were Stuck Guarding The Home(stead): Issues From the Last Few Covid Years

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And after being home long enough, you realized you need to get out and that:

Life is a Highway **(Tom Cochrane)**
(You were thinking Rascal Flatts, weren't you?)

1. **Debt Acceleration/Statute of Limitations.**

How did we get here? A little pre-2022 background.

A. Statutes of Limitation – When Does the Cause of Action Accrue?
The Hot Rod Race (Arkie Shibley and His Mountain Dew Boys)

Navy Federal Credit Union v. Jones, 187 Ariz. 493, 930 P.2d 1007 (App. 1996).

(a) Action to recover unmatured future installments accrued on the date the credit union exercised its optional acceleration clause as to those installments; and

(b) Action to recover unpaid installments accrued on date each installment became due.

B. Acceleration
The Little Old Lady from Pasadena (Jan and Dean)

What does it take to accelerate?

To exercise an optional acceleration the "creditor 'must undertake some affirmative act to make *clear to the debtor* it has accelerated the obligation,' even if the parties contractually agree the option to accelerate a debt need not require a notice to the debtor." *Andra R Miller Designs LLC v. US Bank NA*, 244 Ariz. 265, 418 P.3d 1038 (App. 2018)

Examples:

- Demand Full Payment
- Notice of Acceleration
- Recording Notice of Trustee's Sale with an Acceleration Provision

"Absent an express statement of acceleration in the notice of trustee's sale . . . recording a notice of trustee's sale, by itself, does not accelerate debt." *Bridges v. Nationstar Mortgage., LLC*, 250 Ariz. 475, 481 P.3d 701 (App. 2021).

C. Deceleration
49 Mercury Blues ("Damn brakes locked up in the rain") (Brian Setzer)

What does it take to revoke an acceleration?

"[A] unilateral revocation of the debt's acceleration requires an affirmative act by the creditor that communicates to the debtor that the creditor has revoked the debt's acceleration." *Andra R Miller Designs,* above.

Caution:

- "[M]ere recordation of a cancellation notice is not, by itself, an affirmative act sufficient to revoke the acceleration of the debt, although it cancels the trustee's sale." *Id.*

- [T]he notice of cancellation must also contain a statement that the acceleration of the debt has been withdrawn." *Id.*

D. Write-offs are not an acceleration
No Particular Place to Go (Chuck Berry)

Baseline Financial Services v. Madison, 229 Ariz. 543, 278 P.3d 321 (App. 2012)

- The cause of action as to future installments on a vehicle purchase agreement accrued on the date the bank repossessed the automobile, not on the date the bank wrote off the debt.

- The bank's internal write off was simply an "accounting procedure" and not an affirmative exercise of the optional acceleration clause.

- In order to accelerate the debt, the lender "must undertake some affirmative act to make clear to the debtor that it has accelerated the obligation."

E. Credit card debt
(O Lord, won't you buy me a Mercedes Benz) (Janis Joplin)

Mertola, LLC v. Santos, 244 Ariz. 488, 422 P.3d 1028 (App. 2018)

- The debtor argued that the cause of action to collect the entire debt accrued after the first missed payment.

- The creditor argued that the first missed payment gives the Creditor only the right to sue for that payment, and that the cause of action for the entire debt could not accrue until the creditor accelerated the debt.

So, who wins?

- The court held as a matter of first impression that when a credit-card contract contains an optional acceleration clause, a cause of action to collect the entire outstanding debt accrues upon the first uncured missed payment.

As a result, if the debtor makes a payment that cures the past due amount, the limitations period is restarted.

However, if the tendered payment does not cure the default, the loan remains in default and the limitations period is not restarted.

F. Home Equity Line of Credit ("HELOC")
Take Me Home, Country Roads (John Denver)

Webster Bank NA v. Mutka, 250 Ariz. 498, 481 P.3d 1173 (App. 2021)

- Unlike a typical credit card, a HELOC has a defined maturity date.

- Following the reasoning of credit card cases, the borrower argued that the HELOC limitations period began to run upon his first missed payment. See *Mertola*.

- The court distinguished a HELOC from a credit card and held that the lender's cause of action to recover unpaid installments under a HELOC agreement with a defined maturity date accrued on the date of each matured but unpaid installment. As with traditional mortgage loans, the cause of action for a future payment not yet due accrues on the date that payment is missed – unless the lender accelerates the loan.

- Therefore, the *Mutka* court held that a lender's cause of action to recover unmatured future installments under a HELOC agreement with a defined maturity date accrued on the date the lender exercised the optional acceleration clause.

G. Summary: Different Rules for Credit Card Agreements and HELOCs: *On the Road Again* (Willie Nelson)

Mertola
Hot Rod Lincoln (Commander Cody and His Lost Planet Airmen)

- Credit Card – Open Ended Debt

- The amount owed each month and the principal balance due may fluctuate.

- A credit card typically does not have a fixed maturity date.

- Unsecured – The lender has no incentive to accelerate the debt in order to pursue the collateral.

- Instead, the creditor may choose to extend the statute of limitations unilaterally by not accelerating the debt and allowing interest to accrue at higher default rates.

Mutka
Fun, Fun, Fun ('til her daddy takes the T-Bird away) (Beach Boys)

- A HELOC with a defined maturity date becomes a closed-end debt because of the fixed maturity.

- The HELOC has a defined schedule or specified repayment amount that establishes the size, frequency, and number of payments – until paid in full.

- While (like a credit card) the principal may fluctuate, the fixed maturity date distinguishes it from a credit card. It functions as a fixed rather than open-end debt.

H. Bankruptcy Discharge as Impacting Acceleration and the Secured Lien.

Backwards **(Rascal Flatts)**

A bankruptcy discharge of the debtor affects only the debtor's personal liability; it does not accelerate the debt. Neither does it extinguish the lien.

Diaz v. BBVA U.S., 252 Ariz. 436, 504 P.3d 945 (App. 2022).

In April 2005, the Diazes executed a note and deed of trust for a HELOC with Compass Bank (now BBVA). The deed of trust's maturity date was April 9, 2040.

The HELOC had a $145,000 limit, and the Diazes could borrow funds at their discretion up to the limit. Each payment would replenish the amount available to the Diazes.

The Diazes' last payment was made in March 2012. They filed for bankruptcy protection that same month, and were granted a discharge of the debt in August 2012.

In August 2020, eight years later, the Diazes filed a quiet title action against BBVA, contending that the six-year statute of limitations began to run on the date of the "last payment owed," when they received their discharge in August 2012.

BBVA filed a motion to dismiss on the grounds that the statute of limitations would not begin to run until the earlier of the April 9, 2040 maturity date or BHBVA's election to accelerate the debt. The motion to dismiss was granted, and the Diazes appealed.

Citing *Mertola*, above, the Court observed that under Arizona law, "when a credit card agreement contains an optional acceleration clause, the statute of limitations for a creditor to collect the entire outstanding debt begins to accrue upon the first defaulted payment." However, "[w]hen a fixed debt is payable in installments, the statute of limitations 'commences on the due date of each matured but unpaid installment and, as to unmatured future installments, the period commences on the date the creditor exercises the optional acceleration clause.'" (Quoting *Navy Federal Credit*, above).

The *Diaz* court also held that while the discharge of a debt in bankruptcy relieves the debtor from risk of *in personam* suit or personal judgment on the debt, "a bankruptcy discharge does not extinguish a lien . . . or bar an *in rem* suit to enforce it."

Luu v. New Rez, LLC, 1 CA-CV 21-0007 (Ariz. Ct. App. Apr. 12, 2022).

The borrower, Nguyen, secured a $63,200 loan with a second deed of trust on improved real property, co-owned by Luu. Payments were due monthly, with a maturity date of January 1, 2031.

Nguyen stopped making payments in 2011, but the lender did not take any affirmative action to accelerate the debt.

Nguyen and Luu filed a Chapter 7 bankruptcy petition in August 2011, and received a discharge three months later.

In 2020, Nguyen and Luu demanded that the lender release the lien of the deed of trust. When the lender refused, Nguyen filed suit to quiet title on the grounds that collection of the loan was unenforceable based on the statute of limitations. The trial court dismissed the complaint.

The court of appeals affirmed the trial court's ruling: "[A] bankruptcy discharge does not commence the limitations period on the lender's ability to foreclose, nor does a bankruptcy discharge trigger an optional acceleration clause, which is exercisable only at the lender's discretion." The court rejected the so-called "Washington Rule" that a discharge operates as a maturation of the loan and triggers the running of the statute of limitations for *in rem* remedies. The court held: "Where a matter concerns the nature and extent of a security interest – like the applicability of a statute of limitations to a deed of trust – such issues are determined by state law, not federal bankruptcy law."

Quoting the *Diaz* holding that while a bankruptcy discharges personal liability for a debt it does not extinguish a lien, the court held that "a bankruptcy discharge does not preclude an action to foreclose on a deed of trust." The court distinguished the existence of a debt from its enforceability against the debtor: "[A] debtor's bankruptcy discharge does not eliminate the debtor's debts. . . . Instead, a bankruptcy discharge 'operates as an injunction' preventing lenders from taking any action 'to collect . . . any such debt as a personal liability of the debtor.'" (Internal citations omitted.) The court then concluded that "[b]ecause a bankruptcy discharge does not eliminate the debt under an installment contract, each installment continues to become due under the original contract" . . . and "the lender's acceleration powers are preserved even after a bankruptcy discharge."

In order to accelerate the debt, the lender "must undertake some affirmative act to make clear to the debtor that has accelerated the obligation." (Citing *Madison,* above). "As long as the lender may exercise the acceleration clause, the statute of limitations does not begin to run until the lender does so."

2. <u>Homesteads/Judgment Liens</u>.

Feels Like Home (Randy Newman)

Legislative and judicial updates.

Effective January 1, 2022, A.R.S. § 33-1103 was amended to increase the statutory homestead amount to $250,000, but it also now provides that a recorded judgment, i.e., a non-consensual lien, is a lien on the debtor's homestead property.

The Arizona Supreme Court recently dived into the lien issue as regards homestead property. *In Re Todd Michael McLauchlan,* 252 Ariz. 324, 502 P.3d 975 (2022). The Court was asked to answer a certified question from the Bankruptcy Court under the *pre-existing* (i.e., before the 2022 amendments) version of the statute, namely: "Whether a recorded judgment lien attaches to homestead property where the judgment debtor has equity in excess of the amount exempt under Arizona law?" An earlier Arizona Court of Appeals case had held that a recorded judgment was *not* a lien on homestead property, at least not since a 2007 statutory amendments.

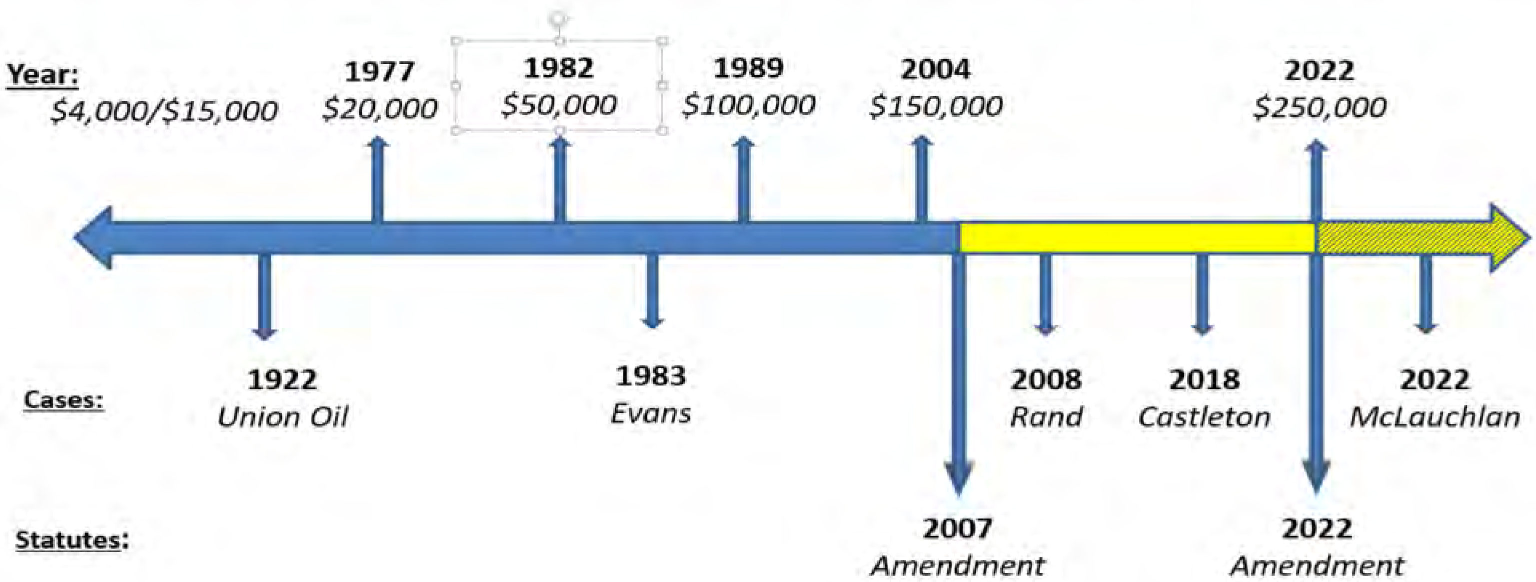
The Arizona Supreme Court's answer: "Yes" A recorded judgment *is* a lien on the homestead property even prior to the effect of the 2022 amendments.

The following chart and timeline provides an overview of the history and current state of Arizona homestead law as regards judgment liens.

Note: There is an Initiative titled the "Predatory Debt Collection Act" which may make it onto the ballot this November. As part of its broad and controversial scope of asserted protections as regards medical and other debts, it would also increase the homestead amount to $400,000.

Homestead Timeline

(Exemption amounts and key past case decisions and statutory amendments)



ARIZONA
2022 HOMESTEAD/JUDGMENT STATUTE

SALES

What the new statutory amendments do for 2022 (and after) sales:

1. If a judgment debtor/seller's proceeds do not exceed 80% (i.e. $200,000) of the $250,000 homestead amount, the title company may record a release of the judgment lien as to the subject property (but not a release of the entire judgment lien).

2. If a judgment debtor/seller is to receive $200,000 or more in sale proceeds, advance notice must be sent to the judgment lien holder, among other things.

REFINANCES

What the new statutory amendments do for 2022 (and after) refinances:

1. For a *no*-cash-out refinance, escrow may close without payment of the judgment, and the title company may record a subordination of the judgment lien on the subject property.

2. For a cash-out refinance, a judgment debtor may not receive any refinance proceeds until the judgment lien is released as to the subject property or the judgment satisfied.

3. **<u>Hel[vetica]: construction v. home improvement, not much of a difference, right?</u>**

Yet it can matter a lot for a loan secured by the home.

Helvetica v. Pasquan, 249 Ariz. 349, 470 P.3d 155 (2020).
What a Fool Believes (Doobie Brothers)

What distinguishes a construction loan from a home improvement loan with regard to the "purchase money" prong of the Arizona anti-deficiency statute? If the loan is deemed a construction loan, then the loan is purchase money, and the borrower falls within the protective ambit of the anti-deficiency statutes. If it's a home improvement loan, then not.

In grappling with that issue, the Arizona Supreme Court disagreed with the analysis of a prior lower court that a loan is for home improvement if the borrowers did not build the home from scratch. The Court noted that the "built from scratch standard" does not further the legislative objectives of the anti-deficiency statutes:

- It does not "protect a borrower who obtains what would otherwise be a construction loan, but which does not fit within the narrow definition of a home built from scratch."

- The legislative objective "was to protect homeowners against deficiency judgments arising from the purchase of a home."

- "Anti-deficiency protection reflects a legislative policy decision to place the risk of inadequate security on lenders rather than borrowers."

Describing "a substantial grey area between a loan used to finance a newly constructed, built from scratch home and a loan used to remodel the kitchen," the Court offered five "non-exclusive factors" to sort out the differences between the two:

1. whether there was a complete or substantially complete demolition of an existing structure and a new building constructed in its place;

2. the intent of the parties when executing the loan documents;

3. whether the structure was inhabitable or inhabited during construction;
4. whether the structure was largely preserved and improved or substantially expanded;
5. whether the project is characterized as 'home improvement' or 'construction' in the loan documents and in the permits or other official documents.

Because in the case at issue the borrowers had a loan that met criteria on both sides of the debate, the Arizona Supreme Court did what appellate courts often do: remanded the case so that the trial court can consider "the totality of the circumstances" and make a factual determination as to whether the loan was for construction or home improvement.

4. Assignments of Deeds of Trust Re Credit Bidding at the Trustee's Sale.

Who is the beneficiary and thus proper credit bidder at a trustee' sale?
Who Are You? (The Who)

Edmonds Trustee of CJE Living Trust v LSREF2 Cobalt (IL), 2019 WL 5701802 (Ariz. App. November 5, 2019).

Edmonds purchased land subject to a deed of trust in favor of ALC Financial Corporation.

Ultimately, the deed of trust was assigned to LSREF2 Cobalt (AZ) (Cobalt AZ), who recorded a notice of trustee's sale. Edmonds was unaware that the property was included in the sale. At the sale, LSREF2 Cobalt (IL) (Cobalt IL) entered the successful bid. It appears that as a result of the similar names and common ownership of both entities, the property was struck off to Cobalt AZ pursuant to Cobalt IL's credit bid.

Edmonds argued that "because the credit bid purchaser was not the beneficiary of the deed of trust, the sale is invalid."

The court of appeals pointed out that Edmonds' argument was "simply an alternative method of pursuing the wrongful foreclosure claim." Because Arizona does not recognize wrongful foreclosure as a cognizable claim, Edmonds did not have a claim.

Edmonds also lost her quiet title claim because she named the entity that did not claim an interest in the property.

Also, interpreting an earlier Arizona case, the Arizona Court of Appeals held that a wrongful foreclosure claim is not recognized in Arizona.

5. **Trustee's Deed Not Recorded**.

Issues when the Trustee's Deed is not, or not timely, recorded.
Delay Delay (The Heartbreakers)

*AZ JV XII, LLC v. Rob Rutledge***,** 2019 WL 6003213, U.S. Dist. Ct. (AZ), November 14, 2019.

The borrowers defaulted on their mortgage payments, and a trustee's sale followed. A third party, Rutledge, purchased the property at the trustee's sale. The title company failed to record the trustee's deed.

More than eight years later, an investor approached the homeowner about the property. The homeowner told the investor that he thought he had lost the property in a foreclosure. The investor found the deed of trust and the notice of trustee's sale in the public record. However, apparently based on his failure to uncover a trustee's deed, the investor paid the borrower $5000 in exchange for a warranty deed. The investor then sued Rutledge, claiming ownership of the property.

The District Court found that the borrower's statement about losing the property in foreclosure "alone put AZ JV on inquiry notice of potentially adverse claims, which AZ JV was required to exercise due diligence in investigating." Combined with the fact that the investor knew the property was subject to a deed of trust, that a trustee's sale had been set for October 8, 2009, and that a tenant not renting from the original homeowner was living there, the Court found that "no reasonable finder of fact could conclude that he conducted a sufficiently prudent inquiry."

The investor was not a subsequent purchaser for value without notice.

6. Excess Proceeds.

Who, when and how entitled?
Money, Money, Money (ABBA)

Ashton Ranch Community Association, Inc. v. Jones, 2020 WL 582347 (Ariz. App. February 6, 2020).

The Arizona Court of Appeals held that excess proceeds are paid to junior lien holders only as they exist at the time of the foreclosure sale. A buyer at the trustee's sale is not a lienholder for such purposes.

Bramnick v. Treasurer of Maricopa County Arizona, 2019 WL 6125921 (Ariz. App. November 19, 2019). The Arizona Court of Appeals held that a claimant to excess proceeds after a trustee's sale is required to establish the basis for its claim at the required hearing held at another claimant's request. The Court further held that the trustee's sale extinguished the claim to proceeds due to claimant's failure to establish that its *lis pendens* had priority over the deed of trust.

Distribution of excess sale proceeds to ***junior*** *lienholders in the order of their priority.*
Peel Me a Grape (Diana Krall)

Tortosa Homeowners Assoc. v. Garcia, __Ariz. __, Ariz. Ct. App. No. 2CA-CV 2021-0014, August 1, 2022.

Arizona's statute governing distribution of excess proceeds from a trustee's sale, A.R.S. § 33-812 makes it clear that excess proceeds shall be distributed to homeowner's associations with *subordinate* liens, then to *junior* lienholders, and then to the trustor (owner).

The statute applicable to judicial foreclosure sales, A.R.S. § 33-727, is not as precise. It speaks of applying excess proceeds to "other liens" in their order. Seizing on the "other lien" language, the holder of what was a senior deed of trust argued that proceeds should be distributed to that senior lienholder first. (The holder of that interest claimed it under the doctrine of equitable subrogation, but the court did not address those arguments.)

The court disagreed: "[W]hen read in conjunction with related statutes, it is clear that in a foreclosure by a junior lienholder, a senior lienholder's rights are not impacted by the sale."

The Arizona Court of Appeals analyzed the judicial sale statute in the context of the trustee's sale statute and the Restatement (Third) of Property (Mortgages) (1997), which states that excess proceeds are "applied to liens and other interests terminated by the foreclosure in the order of their priority." By defining the recipients as those whose interests are terminated by the foreclosure, a senior lienholder is not entitled to such a distribution. Its interests are not affected by the foreclosure.

The opinion contains a good discussion of the rights of junior and senior lienholders, emphasizing that foreclosure has no effect on the interests of lienholders senior to the interest being foreclosed.

7. 33-811(C): 5:00 p.m. The Day Before--They Really Mean It.

Must make it to the Court on time under A.R.S. §33-811(C).
Hit the Road, Jack (Ray Charles)

In 2002, Arizona added a *speak-now-or-forever-hold-your-peace* provision to its statutory scheme for non-judicial foreclosure making trustee's sales less susceptible to later attack. To wit:

> The trustor, its successors or assigns, and all persons to whom the trustee mails a notice of a sale under a trust deed …shall waive all defenses and objections to the sale not raised in an action that results in the issuance of a court order granting relief pursuant to Rule 65, Arizona Rules of Civil Procedure [dealing with injunctions and temporary restraining orders] entered before 5:00 p.m. mountain standard time on the last business day before the scheduled date of the sale. A copy of the order, the application for the order and the complaint shall be delivered to the trustee within twenty-four hours after entering the order.

A.R.S. § 33-811(C) (emphasis added).

An Arizona appellate case confirmed the necessity of actually obtaining, and not just asking for, an injunction by the 5 p.m. deadline on peril of waiving all claims and defenses to the next day's trustee's sale. In that case, the borrower obtained a state court temporary restraining order on the morning of--though still before--the scheduled trustee's sale. The trustee was never provided a copy of the TRO on the day of sale and could not independently confirm its issuance, and so went ahead with the sale.

The appellate court held that the borrower's TRO was obtained "a day too late," noting the strict compliance demanded by the plain *5 p.m.-day-before* language of the statute. *Bornstein v. Nationstar Mortgage LLC*, No. 1 CA-CV 19-0108, 2019 WL 7187286 (Ariz. Ct. App. Dec. 26, 2019).

This case follows the line of a handful of Arizona cases which have addressed not only the procedural timing but also, more substantively, what matters comprise the claims and defenses to a trustee's sale which fall within the scope of the statutory waiver. *See, e.g.*, *Zubia v. Shapiro*, 243 Ariz.412, 408 P.3d 1248 (2018) (the statutory time stricture encompasses both actions to void the sale and those that are dependent on the sale but not claims independent of the sale); *BT Capital, LLC v. TD Service Co. of Arizona*, 229 Ariz, 299, 275 P.3d 598 (2012) (injunctive relief is only avenue for a person who has defenses or objections to a properly noticed sale); *Bank of America, N.A., v. Felco Business Services, Inc. 401(K) Profit Sharing Plan*, 243 Ariz. 150, 403 P.3d 150 (App.2017), *review denied* (equitable subrogation and lien priority disputes do not fall within the ambit of the statute); *Morgan AZ Financial, L.L.C. v. Gotses*, 235 Ariz. 21, 326 P.3d 288 (App. 2014), *review denied* (lack of injunction did not waive ability to bring action for damages for false recorded documents); *Sitton v. Deutsche Bank National Trust Co*., 233 Ariz. 215, 311 P.3d 237 (App. 2013) (no bar when claims are independent of the sale); *Madison v. Groseth*, 230 Ariz. 8, 279 P.3d 633 (App. 2012) (filing of a lis pendens did not negate statutory timely injunction requirement); *Snyder v. HSBC Bank, USA, N.A.* 913 F. Supp. 32d 755 (D. Ariz. 2012) *review denied* (homeowner not precluded from asserting claims for relief independent of voiding the sale).

More recently, *9540 LLC v. Edmonds Trustee of CJE Living Trust,* 2021 WL 6143690 (Ariz. App. December 30, 2021), held that the mandatory injunction requirement of 33-811(C) applied to a claim about a credit bid discrepancy occurring on the day of the trustee's sale (or after its completion) even where the complainant could not have known about any objection or defense at the time of the trustee's sale.

To the extent some common thread can be gleaned from the 811(C) cases, it involves the independent v. dependent distinction on the claims as relate to the trustee's sale itself. That then raises a question about another longer-standing part of the trustee's sale statutes, which also deals with timing on the day before a trustee's sale. That provision requires the trustee to timely disclose information about the expected credit bid at the trustee's sale, or postpone the sale until compliance is made:

> Beginning at 9:00 a.m. and continuing until 5:00 p.m. mountain standard time on the last business day preceding the day of sale and beginning at 9:00 a.m. mountain standard time and continuing until the time of sale on the day of the sale, the trustee shall make available the actual bid or a good faith estimate of the credit bid the beneficiary is entitled to make at the sale. If the actual bid or good faith estimate is not available during the prescribed time period, the trustee shall postpone the sale until the trustee is able to comply with this subsection.

A.R.S. § 33-809(F).

Consider then the interplay of Sections 811 and 809 to a situation where the trustee is asked by an appropriate person on the day before the scheduled trustee's sale for the actual or estimated credit bid, but the trustee, for whatever reason, does not provide the information that day. And then, the next day, and without postponement, the trustee goes forward with the trustee's sale.

Utah

UTA Utah 2022 Case Law Updates

Bradsen v. Shellpoint Mortgage Services, 505 P.3d 1109 (Utah App. 2022)
"Classified" ("She use a little oil but outside a' that, she's cherry"): (C. W. McCall)

A short timeline may provide context for this case.

June 2007: Bradsen received a loan from Sand Canyon Corporation (Sand Canyon), with an adjustable rate note. The debt was secured by a deed of trust on Bradsen's property. Sand Canyon sold the note almost immediately to Saxon Mortgage Services, Inc. (Saxon).

March 2009: Bradsen stopped making payments, and Saxon executed a notice of default and election to sell. Saxon accelerated the loan in the notice.

May 2012: Saxon had not pursued collection or foreclosure, and instead sent Bradsen a letter telling her that the loan servicing will be transferred from Saxon to Residential Credit Solutions, Inc. (RCS) and that RCS would be her new servicer.

July 2013: The trust deed was purportedly assigned to RCS, but the assignment listed Sand Canyon, not Saxon, as the assignor.

January 2014: Bradsen wrote to RCS seeking a loan modification. In her letter, she wrote: "I write this letter regarding my reason for my late payments on my mortgage loan" and identified her "original loan amount" as $258,400. She acknowledged that her loan ballooned "to over $400 thousand" and identified "my payment" as $2,409.02 per month. In addition, she noted that she filed a federal lawsuit "to see if the loan could be cancelled" based on TILA allegations, but that she was now "appealing to [RCS] for what [she] wanted in the first place, to modify [her] loan to make [her] mortgage payment more affordable." Bradsen also sought relief under the federal government's "Making Home Affordable" program, and acknowledged that she was seeking "mortgage relief" or "mortgage assistance" regarding her "existing mortgage."

September 2017: Sand Canyon recorded a Rescission of Assignment of Deed of Trust, saying that the 2007 assignment of the deed of trust to Saxon was "erroneously filed" and claimed that it was "withdrawn, canceled and declared of no force or effect, and that the lien on the [Bradsen] property ... shall in no way be affected by such erroneous instrument."

October 2017: RCS purported to assign the trust deed to Ditech Financial, LLC (Ditech). Ditech then executed an Affidavit of Lost Assignment, asserting that Saxon "is no longer in business and a replacement assignment is therefore unavailable."

December 2017: Ditech recorded a Cancellation of Notice of Default, canceling the 2009 notice of default recorded by Saxon. Ditech also recorded its own Notice of Default and

Election to Sell, based on Bradsen's failure to make the payments. The notice also accelerated the debt and elected to foreclose.

January 2019: Saxon recorded a Corrected and Restated Assignment of Trust Deed, purporting to correct the named assignor in the 2013 assignment, and restating that assignment as having been between Saxon and RCS.

Ditech filed bankruptcy and the trust deed was assigned to Shellpoint during the bankruptcy.

Before a trustee's sale was begun, Bradsen filed an action against Shellpoint seeking to enjoin any foreclosure and to quiet title in her name, free and clear of the deed of trust. Shellpoint counterclaimed seeking enforcement of the note and judicial foreclosure.

Bradsen argued that any foreclosure was barred by Utah's six-year statute of limitations, contending that because Saxon accelerated the note on August 20, 2009, any foreclosure action was time-barred after August 20, 2015. Bradsen also argued that because the note was no longer enforceable, the court should quiet title in her name free of the lien of the deed of trust.

Shellpoint countered that when Bradsen applied for a loan modification in 2014, she affirmed the obligation and restarted the statute of limitations. Regarding the assignment issue, Shellpoint acknowledged that Bradsen questioned its standing because the chain of title was broken when in 2013, Sand Canyon – rather than Saxon – purported to assign the trust deed to RCS.

Both sides moved for summary judgment.

The trial court granted Shellpoint's motion on the grounds that the statute of limitations restarted when Bradsen acknowledged the debt on January 22, 2014.

The Utah Court of Appeals ruled that:

- "To restart a statute of limitations, an acknowledgment of a debt must be 'clear, distinct, direct, unqualified, and intentional.'" (*quoting Daniels v. Deutsche Bank Nat'l Trust,* 2021 UT App 105, 500 P.3d 891, which in turn quoted *Wells Fargo Bank, N. A. v. Temple View Invs.,* 2003 UT App 441, 82 P. 3d 655). "Further, 'an acknowledgment 'must be more than a hint, a reference, or a discussion of an old debt; it must amount to a clear recognition of the claim and liability as presently existing.'" (quoting *Beck v. Dutchman Coal Mines Co.,* 2 Utah 2d 104, 269 P.2d 867, 870, (1954).

  The court noted that Bradsen acknowledged her debt, recognized her late payments on her mortgage loan, identified the original loan amount, and stated that her loan amount ballooned when she refinanced. Moreover, she repeatedly referred to herself as "Borrower," and explained that she was seeking mortgage relief under her "existing mortgage."

The court found that Bradsen's statements amounted to a "'clear, distinct, direct, unqualified, and intentional" acknowledgment of her outstanding debt.

- Noting that Utah law allows a party to correct retroactively a minor typographical or clerical error by recording a correction to the document, "significant changes in deeds – such as the improper characterization of a grantee, the omission of a grantee, and the conveyance of an incorrect parcel of land – were not minor typographical or clerical errors that could be remedied" by a corrective deed or affidavit (quoting *Pioneer Builders Co. of Nevada, Inc. v. K D A Corp.,* 2012 UT 74, 292 P.3d 672).

  The court observed that "[t]his is not a situation where Saxon merely mistyped its own name. It was not even a party to the document."

  Pointing out that Shellpoint had not proved that the September 2017 Rescission of Assignment of Deed of Trust operated to void the 2007 assignment retroactively, the court held that neither the rescission nor the Corrected and Restated Assignment of Trust Deed proved that Shellpoint's claimed chain of title to the deed of trust was intact.

The appellate court affirmed summary judgment in favor of Shellpoint on the statute of limitations issue, but reversed the trial court on the chain of title issue, and remanded the case to the trial court to sort it out.

"Danger Zone" (Kenny Loggins)

Daniels v. Deutsche Bank National Trust and Ocwen Loan Servicing, LLC, 2021 UT App 105, 500 P.3d 891 (Utah App. 2021)

Following a default in making the payments due to the bank, the Daniels continued to make some payments on the loan, but not all. The bank accelerated the debt, but then did not pursue foreclosure. The Daniels explained their financial hardship to the bank and requested a modification of the debt through the federal Home Affordable Modification Program (HAMP). Their application contained repeated references to the note, deed of trust, monthly loan payments and the like.

The bank agreed to modify the loan on certain conditions, including a trial period in which the Daniels would make three monthly payments at approximately $1000 less than the original payments. The Daniels made the first two payments, but before they made the third payment, the bank informed them that the trial plan was canceled due to tax lien issues.

The Daniels sent three additional letters seeking a loan modification. They notified the bank that the debt had been discharged in a bankruptcy proceeding in 2009, the year before they made their last payment on February 25, 2010, and argued that the discharge would make it easier for them to make payments, and submitted new financial information.

The Daniels' last payment was made on February 25, 2010. At that time, the Utah statute provided that in order to meet the statute of limitations, the bank needed to either complete a trustee's sale or commence a judicial foreclosure action within 6 years. (The statute was later amended to provide that the lender must record a notice of default – rather than complete a non-judicial foreclosure – before the limitations period ran.)

The Utah Court of Appeals rejected each of the bank's arguments, and held:

- The Daniels' communications seeking a loan modification did not constitute an acknowledgment of the debt in order to restart the statute of limitations.

- Tolling of the statute of limitations in connection with the 2009 bankruptcy discharge did not "allow[] the 'banking' of the time tolled by a past action such that it can be applied to a limitations period yet to be commenced by a new triggering event.

- The 90-day period between recording a notice of trustee's sale and conducting the sale did not toll the limitations period.

- The Daniels' actions in seeking a loan modification were not inconsistent with maintaining that their personal liability on the debt had been discharged, and therefore did not create an equitable estoppel.

Because the statute of limitations had expired, the trust deed was no longer enforceable, and an order quieting title in favor of the Daniels was appropriate. The court also awarded the Daniels their attorneys' fees.

"Mercury Blues" (Alan Jackson)

Kelly v. Timber Lakes Property Owners Association, 2022 UT App. 23, 507 P.3d 357 (Utah App. 2022).

Utah allows HOA liens to be foreclosed in the manner provided for deeds of trust. Utah Code Ann. Section 57-8a-302(1)(a). Utah trustee's sale procedure requires that the trustee wait three months after recording the Notice of Default before recording the Notice of Trustee's Sale. *Id.* Section 57-1-24. The waiting period provides a window in which the homeowner can cure the default and avoid the foreclosure.

Following Kelly's failure to pay assessments, the Timber Lakes Property Owners Association (Timber Lakes) recorded a Notice of Default on May 2, 2016. In "early July," Timber Lakes recorded and published its Notice of Trustee's Sale, with a scheduled sale date of August 1. Kelly asked Timber Lakes to postpone the sale, but took no affirmative action to enjoin the sale. Timber Lakes did postpone the sale to August 18, one day after the next board meeting, but Timber Lakes did not agree to any further postponements.

Citing the Utah Supreme Court's decision in *Bank of Am. v Adamson,* 2017 UT 2, 391 P.3d 196, the court held that "'failure of the trustee to strictly comply with the statutory requirements of the Trust Deed Act' renders the deed issued following the nonjudicial foreclosure sale at most voidable, and the debtor is still required to show prejudice and 'a causal connection between the defect and the prejudice' before the deed will be set aside.'" The court noted that absent exceptional circumstances, when dealing with procedural irregularities, the proper remedy is an injunction before the sale. In this case, Kelly did not show prejudice, and did not seek an injunction. The sale was not void *ab initio*.

Utah law recognizes CC&Rs as contracts. Seeking to benefit from the familiar principle that prior breach by one party may excuse further performance from the other party, Kelly argued that Timber Lakes was the first to breach its agreement with Kelly by failing to wait the requisite three months after recording its Notice of Default before recording the Notice of Trustee's Sale. Therefore, according to Kelly, he was excused from paying the delinquent assessments. The court did not agree, finding that the Notice of Default and the Notice of Trustee's Sale were recorded as the next step to enforce Kelly's agreement to pay past due assessments. They were a contractual remedy in response to Kelly's prior breach.

The court of appeals upheld the trial court's award of attorneys' fees to Timber Lakes based on Kelly's bad faith pursuit of his claims after the court granted summary judgment on key issues. Among other things, the trial court found that Kelly had submitted and relied on a receipt that the court determined was forged.

> Note: Kelly urged the court of appeals to accept argument on issues that were not preserved in the trial court. Kelly argued that the court should consider all issues, preserved or not, based on the plain error doctrine. This case contains an interesting discussion of how the adversarial model has shaped the appellate courts' attempts to find the "correct balance between law and equity and the scope of review on appeal." The origins and development of appellate jurisprudence are beyond the scope of these notes. But it is an interesting read, and it explains why Utah recognizes three exceptions to the preservation rule (that a court will not consider an issue not raised in the court below): (1) plain error, (2) ineffective assistance of counsel, and (3) exceptional circumstances. After a thorough discussion, the court concluded that the plain error exception to Utah's preservation rule does not apply to ordinary civil appeals unless expressly authorized by statute.

Nevada Oregon


2022 UTA CASE LAW UPDATES AND TRENDS
Nevada and Pacific Northwest
Not Intended for External Distribution Without Express Written Consent

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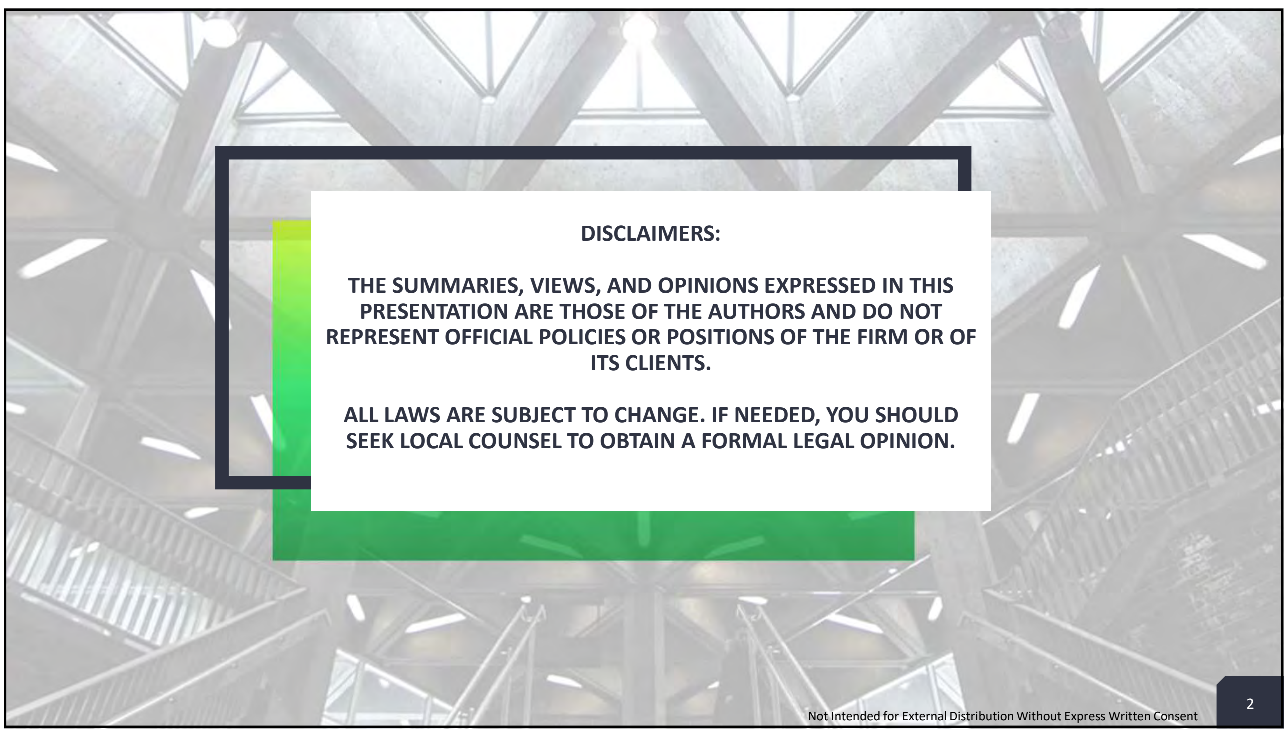
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2

NEVADA CASE LAW UPDATES

NEVADA LITIGATION TRENDS

As files are coming off hold and trustee sales are being set, we're seeing new rounds of litigation:

- Rescissions of Notices of Default and Deceleration Issues,
- Possession of the Original Promissory Note,
- Failure to Respond to Statutory Requests for Information under NRS 107.200 and/or NRS 107.210, and
- Distribution of Surplus Funds.

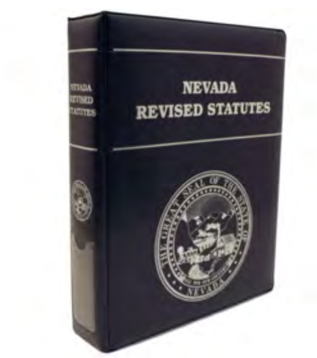
DISTRIBUTION OF SURPLUS FUNDS

- One of the hotly contested issues arising from Nevada HOA sales has been the distribution of surplus funds after the sale of the real property to a third party purchaser by the HOA.
- While the statute provides for distribution to “subordinate” claims of record, the third party purchasers have been arguing that even where the super-priority lien was paid prior to the HOA foreclosure sale that the first deed of trust was a “subordinate” claim of record.
- The HOA purchaser is demanding that the money that they paid to purchase the property at auction be applied to the deed of trust, or awarded to themselves, essentially reimbursing themselves for their bid.

SATICOY BAY, LLC SERIES 34 INNISBROOK V. THORNBURG MORTGAGE (138 NEV. ADV. OP 35, MAY 26, 2022)

The Supreme Court again affirmed that there was, prior to 2015, no requirement to record any acknowledgment of tender or payment of the super-priority lien. On the topic of the distribution of surplus funds after an HOA foreclosure sale, the Supreme Court held that the statute, NRS 116.31164(8)(b), means exactly what it says regarding the order of distribution of funds, the trustee is entitled to an award of its reasonable attorney’s fees and other legal expenses [(8)(B)(2)] and the association is entitled to payment of its lien. Further, subordinate claims of record [(8)(b)(4)] are paid. Finally, any remainder is distributed to the unit’s owner. The court expressly held that in light of its super-priority tender, the first deed of trust was not a “subordinate” interest in the property. Therefore, the remainder of the surplus funds were correctly awarded to the owner of the real property prior to the HOA foreclosure sale.

This decision is specific to those instances where there was either a tender, attempted tender, an excused tender, or actual payment of the super-priority lien. In those cases where the HOA purchaser took title to the property subject to the deed but without releasing the super-priority portion of the lien, the deed of trust may still be considered subordinate to the HOA lien. In addition, the Supreme Court did not resolve the untimely presented question whether on a theory of equitable subrogation, the excess proceeds should have been awarded to either the first deed of trust holder or Saticoy Bay.



STATEMENTS REGARDING DEBT SECURED BY A DEED OF TRUST AND STATEMENTS OF AMOUNT NECESSARY TO DISCHARGE A DEBT

- The junior lienholder or titleholder of the property is required to send the request to the address to which the periodic payments are made or if periodic payments are not made then to the address of the beneficiary listed on the deed of trust. That being the case, these requests could be routed to a department that may not be best equipped to handle them accordingly.
- Failure to timely respond to the request (within 21 days after receiving it) carries a statutory penalty of $300 and any actual damages suffered by the person who requested the statement.
- We are seeing titleholders allege that the interest, fees and costs that are accrued after the 21-day deadline amount to “actual damages.”

7

NRS 107.200 AND NRS 107.210 STATUTORY REQUIREMENTS

When required, a statement under NRS 107.200 must include:

- The amount of the unpaid balance of the debt secured by the deed of trust, the rate of interest on the unpaid balance and the total amount of principal and interest which is due and has not been paid.
- The amount of the periodic payments, if any, required under the note.
- The date the payment of the debt is due.
- The period for which real estate taxes and special assessments have been paid, if that information is known to the beneficiary.
- The amount of property insurance covering the real property and the term and premium of that insurance, if that information is known to the beneficiary.
- The amount in an account, if any, maintained for the accumulation of money for the payment of taxes and insurance premiums.
- The amount of any additional charges, costs or expenses paid or incurred by the beneficiary which is a lien on the real property described in the deed of trust.
- Whether the debt secured by the deed of trust may be transferred to a person other than the grantor.

When a statement under NRS 107.210 is requested, it needs to include:

- The identity of the trustee or the trustee’s personal representative or assignee, the current holder of the note secured by the deed of trust, the beneficiary of record and the servicers of the obligation or debt secured by the deed of trust;
- The amount of money necessary to discharge the debt secured by the deed of trust on the date the statement is prepared by the beneficiary;
- The information necessary to determine the amount of money required to discharge the debt on a per diem basis for a period, not to exceed 30 days, after the statement is prepared by the beneficiary; and,
- If the debt is in default, the amount in default, the principal amount of the obligation or debt secured by the deed of trust, the interest accrued and unpaid on the obligation or debt secured by the deed of trust, all fees imposed because of the default and the costs and fees charged to the debtor in connection with the exercise of the power of sale.

8

SFR INVS. POOL 1, LLC V. NATIONSTAR MORTG. LLC, NO. 222CV00373APGNJK, 2022 WL 2068203, AT *1 (D. NEV. JUNE 8, 2022)

In *SFR v. Nationstar Mortgage et. al.* the Federal District Court granted a Motion to Dismiss in the context of an action alleging that a failure to timely respond to an NRS 107.200 et. seq. request was a basis to preclude foreclosure.

NRS 107.200 et. seq. enables a party on title to real property to provide evidence of their title interest and to request certain information from the beneficiary of the deed of trust. The request must be sent to an address where payments are received by the beneficiary (or its servicer) and upon receipt the beneficiary has 21 days to supply the information. The third party purchasers who acquired title to property from HOA foreclosure sales, finding themselves subject to the deed of trust, have latched onto NRS 107.200 et seq. as a basis for alleging wrongful foreclosure and seeking to quiet title free and clear of the deed of trust.

Here, while SFR was provided with some information as required by NRS 107.200, it was not provided with the requested (and required) copy of the promissory note. SFR alleged that "other" information was also not provided but failed to describe what else was missing. The court determined that there was no right of action under NRS 107.260 for failure to provide the Note, as NRS 107.300, which provides for action for failure to respond, only includes reference to NRS 107.200 and NRS 107.210.

The Court further addressed SFR's contentions that a document prior to the NOD accelerated the loan more than 10 years prior to the current foreclosure, and held that an unrecorded instrument could not accelerate the loan for the purpose of NRS 10.240. Finally, the Court addressed the other "hot" cause of action, that the note and deed of trust were split and the beneficiary did not have possession of the note, holding that "SFR has not plausibly alleged a factual basis for its allegations that U.S. Bank does not possess the note or that the deed of trust was not properly assigned to U.S. Bank." And "Nevada law generally presumes that the note is transferred with the deed of trust. See *Jones v. U.S. Bank Nat'l Ass'n, as Tr. for TBW Mortg.-Backed Pass-Through Certificates, Series 2006-3*, 460 P.3d 958, 961 (Nev. 2020)."

RESCISSIONS OF NOTICES OF DEFAULT AND DECELERATION ISSUES

In July 2020, the Nevada Supreme Court issued an unpublished opinion in *Glass v. Select Portfolio Servicing* (78325, Jul. 1, 2020) answering a question about the effect of a Rescission of Notice of Default. In *Glass*, the non-borrower title-holder alleged that a Notice of Default recorded in 2008, accelerated all amounts due under the loan, thereby making the loan "wholly due" for the purposes of NRS 106.240 (the ancient lien statute holding that 10 years after a debt secured by a deed of trust is conclusively presumed terminated 10 years after it is wholly due). The parties in *Glass* did not dispute that the Notice of Default accelerated the debt making it wholly due, but disputed the effect of the Rescission of the Notice of Default. Glass argued that the Rescission of the Notice of Default did not decelerate the debt and the beneficiary of the deed of trust argued that the Rescission of the Notice of Default reset any acceleration. Multiple other cases at the State and Federal level followed the holding in *Glass* finding that rescinding the Notice of Default acted to decelerate the debt rendering the 10 year period in NRS 106.240 inapplicable.

In September 2020, the Nevada Supreme Court issued another unpublished opinion in *SFR v. U.S. Bank*, again holding that the Rescission of the Notice of Default decelerated the debt as set forth in *Glass*.

*DAISY TR. V. FED. NAT'L MORTG. ASS'N, NO. 21-15595, 2022 WL 874634, AT *2 (9TH CIR. MAR. 24, 2022)*

In 2012, Daisy Trust purchased a piece of real property at an HOA foreclosure sale in Nevada. From 2014 to 2019 Daisy Trust was in litigation over the effect of the HOA foreclosure sale on the subject Deed of Trust. After much litigation and an appeal (that was ultimately dismissed by Daisy Trust in 2019) it was confirmed that the HOA foreclosure sale did not wipe out the Deed of Trust. In 2020, after not receiving their windfall, Daisy Trust brought a new suit alleging that the Deed of Trust was extinguished by operation of law.

Daisy Trust's new theory was that the Deed of Trust was extinguished because the debt had been accelerated more than 10 years prior which then made the Deed of Trust "wholly due" under NRS 106.240, thereby extinguishing the ability to foreclose on the Deed of Trust. Daisy Trust's theory was that either the debt was accelerated by the recording of the Notice of Default in 2010, or by the issuance of a demand letter "not later than between 45 and 62 days after March 1, 2009" (the due date of the debt).

The Ninth Circuit reviewed Nevada foreclosure law and stated that "acceleration cannot occur until the conclusion of the 35-day period allotted for the borrower to cure the deficiency—and that this period does not begin to run until the Notice of Default has been recorded. Accordingly, whether an unrecorded acceleration notice was issued in 2009 is legally irrelevant. Such a notice could not have rendered its debt wholly due." The Court further stated that even if acceleration did occur by the recording of the Notice of Default – the subsequent rescission decelerated the debt and reset the statutory clock. Nevada statutes and case law provide that a valid rescission decelerates the debt and restores the contracting parties to their previous positions.

SFR INVS. POOL 1, LLC V. U.S. BANK N.A., 138 NEV. ADV. OP. 22 (2022)

In April 2022, the Nevada Supreme Court issued a public decision addressing the contentions of SFR and holding, consistent with *Glass*, that rescinding the Notice of Default revokes any acceleration.

SFR first argued that the Notice of Default stated that the beneficiary had accelerated the debt prior to the recording of the Notice of Default by using the phrase "has declared" the amounts due. The Supreme Court found that the following language "and hereby does declare" served to re-declare the acceleration, and that when the Notice of Default was rescinded it canceled all accelerations, including any that may have occurred prior to the recording of the Notice of Default.

Next, SFR contended that the Supreme Court overlooked language in the rescission that limited the Rescission of the Notice of Default to only impacting the foreclosure, thereby leaving the acceleration intact. The Supreme Court disagreed, holding that reading the rescission in such a manner would make the entire loan balance perpetually due and would eliminate NRS 107.080(3)'s right to cure the deficiency in performance 35 days after the recording of the Notice of Default meaningless.

Interestingly, the State District Court ruled that NRS 106.240 did not apply on two completely different grounds, not addressed by the Supreme Court. First, that the prior quiet title lawsuit tolled the 10 year period under NRS 106.240 and second, that NRS 106.240 does not apply when the party asserting NRS 106.240 is not personally liable for the debt.

OREGON CASE LAW UPDATE

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WASHINGTON CASE LAW UPDATES

14

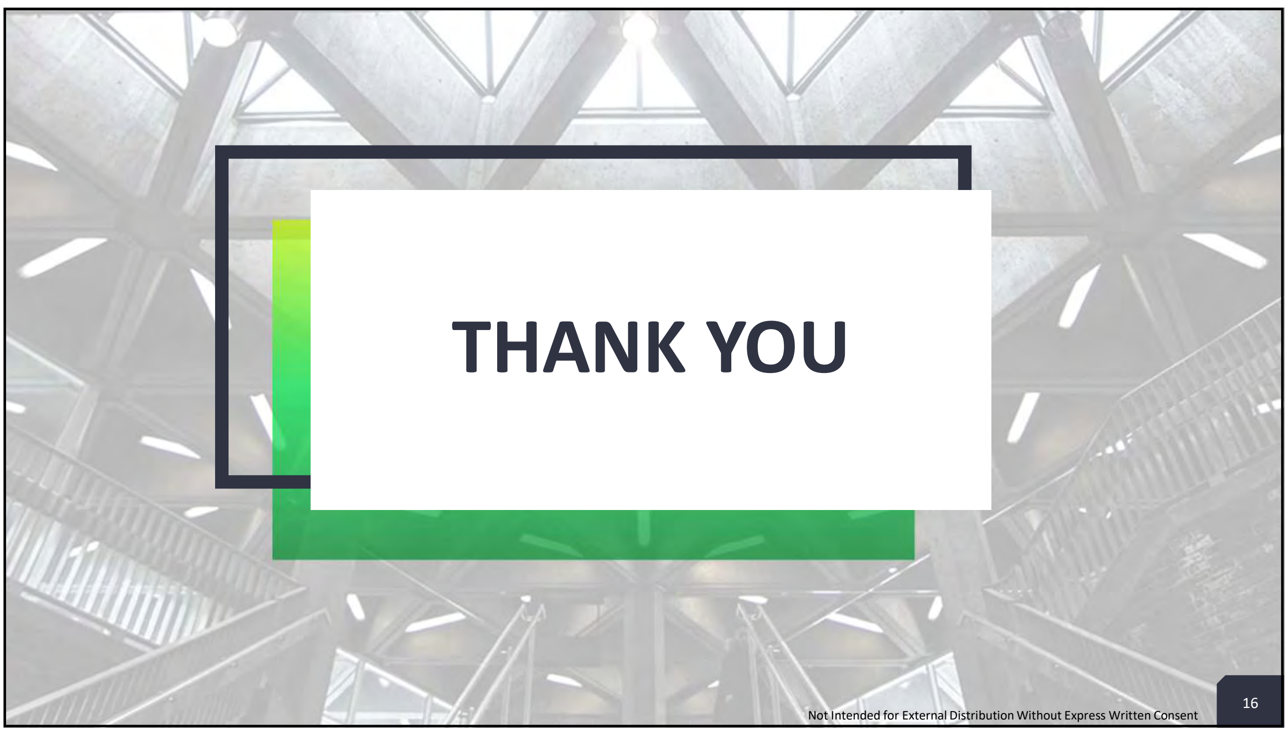
COPPER CREEK (MARYSVILLE) HOMEOWNERS ASS'N V. KURTZ, *NO. 82083-4-I, 2022 WL 152492 (WASH. CT. APP. JAN. 18, 2022).*

In January 2022, Division I of the Washington Court of Appeals published a landmark opinion holding that, contrary to prior poorly reasoned decisions, discharge in bankruptcy does not accelerate the maturity date of an installment promissory note. Accordingly, the holder of a security interest may still foreclose for failure to pay any debt that is not time-barred. The court also held, in a case of first impression, that active military service tolls the statute of limitation under 50 U.S.C. § 3936(a), the Servicemembers Civil Relief Act (SCRA). With these conclusions, the appellate court vacated the trial court's order quieting title to the Plaintiff and reversed the trial court's attorney fee award in favor of Plaintiff. Further, the court awarded attorney's fees and costs to the loan servicer on the basis that the Plaintiff, because it had acquired its interest from the borrowers through a deed in lieu of foreclosure, was subject to the terms of that deed of trust, including the attorney's fees clause.

In the lawsuit advanced by the Homeowner's Association, Plaintiff sought to restrain a trustee's sale to protect interests that it was pursuing through its own judicial foreclosure. The association argued that the statute of limitation barred enforcement of the beneficiary's deed of trust. Both the loan servicer and trustee challenged the association's standing to seek quiet title on the basis that the statute of limitation period had been tolled by the stay imposed as a result of the borrower's active duty status. During the course of the litigation, the association obtained a deed in lieu of foreclosure from the borrowers, presumably to, among other things, address the standing issue. Ultimately, the trial court granted summary judgment in favor of the association, quieting title free and clear of the deed of trust and awarding attorney's fees in the amount of approximately $96,000 against the beneficiary.

On appeal, the court made clear that the several federal court decisions and prior lower court and appellate decisions holding that discharge accelerates an installment note were in error. The court further clarified that nothing under Washington law provides that a discharge in bankruptcy changes the debt, the note, or the payment schedule. Discharge merely eliminates the personal liability of the borrower. Because the discharge does not accelerate the note, the statute of limitation does not run on the entirety of the debt, but only on those payments due six years prior to a resort of remedies under the deed of trust.

This is a major change to how courts in Washington had recently been interpreting prior holdings of the Washington Court of Appeals.



Texas

SUMMARY OF SELECT TEXAS AND CALIFORNIA CASES

Presented by Stephen T. Hicklin, The Hicklin Firm

United Trustees Association 47th Annual Conference

Las Vegas, Nevada – August 23, 2022

1

Texas

- **CROSS v. BANK OF NEW YORK MELLON (2022) 2022 U.S.App. LEXIS 9550*; 2022 WL 1056093**

- This case illustrates a lender's ability to "decelerate" an accelerated loan, thereby resetting the statute of limitations on foreclosure. Bank of New York Mellon ("BONY") first accelerated Cross's loan on February 11, 2016. It sought to foreclose in 2018 and 2019 but was thwarted by temporary restraining orders. The district court found that BONY's servicer had effectively decelerated the loan by letter dated February 14, 2020 which was still within the four year statute of limitations because the TROs had tolled the statute for at least 30 days, while they were in effect and prohibited the foreclosure. The Fifth Circuit agreed and held that, "In Texas, 'a lender may unilaterally abandon acceleration of the note,' thereby restoring the original maturity date and resetting the running of the of limitations, 'by sending notice to the borrower that the lender is no longer seeking to collect the full balance of the loan and will permit the borrower to cure its default by providing sufficient payment to bring the note current under its original terms.'" (Citations omitted.) In this case, the ability to foreclose was preserved by applying both tolling and deceleration concepts.

2

Texas

• **U.S. BANK, N.A. AS TRUSTEE FOR CSMC MORTGAGE-BACKED TRUST 2007-3 v. JOSEF M. LAMELL (2022) 5th Cir., 2022 U.S.App. LEXIS 15251*; 2022 WL 1800860**

• This case is a cautionary tale about the limited res judicata effect of a declaratory relief cause of action. In this case, borrower Josef Lamell ("Lamell") failed to make timely monthly mortgage payments starting in 2006 and, by 2010, the prior servicer of his mortgage accelerated the debt for the first time. Lamell immediately sued in Texas state court, claiming fraud in the servicing of his loan and demanding that the foreclosure be stopped. Between 2013 and 2019, several other servicers sent Lamell several more letters accelerating his debt. In 2019, Lamell amended his suit asserting that the pending foreclosure was time-barred; that action settled and judgment was entered for the servicer defendants. Thereafter, U.S. Bank, N.A. ("US Bank") and PHH Mortgage Corporation ("PHH") sent yet another acceleration letter and the next day filed a declaratory relief action in U.S. District Court seeking declarations that they: (1) were not time-barred from foreclosing on Lamell's mortgage or collecting on the related note; (2) that they were entitled to advance taxes on the property; (3) they were entitled to pursue foreclosure; and (4) they could assert both equitable and contractual subrogation. (Continued on next page).

3

Texas

• **U.S. BANK, N.A. AS TRUSTEE FOR CSMC MORTGAGE-BACKED TRUST 2007-3 v. JOSEF M. LAMELL (2022) 5th Cir., 2022 U.S.App. LEXIS 15251*; 2022 WL 1800860**

• Judge Edith Brown Clement, writing for the Fifth Circuit, held that summary judgment for the servicers had to be reversed. The court reviewed both Texas and federal law with regard to the res judicata effect to give a prior adjudication in a pending declaratory relief case. The Court held that in a declaratory relief case a settlement cannot be the basis of a summary judgment motion because declaratory relief necessarily contemplates further litigation. All it does is define the parties' contractual rights. Then the parties have to take that guidance and put it into next steps to conclude the case. The court reversed and remanded the matter to the district court.

4

California

California

- **<u>LILLIAN MORRIS v. JP MORGAN CHASE BANK, N.A.</u> (2022) 78 Cal.App.5th 279 (Cal. Court of Appeal, First Dist.)**

- This Dickensian saga began in 2008 when plaintiff Morris and her husband fell into default on the loan secured by their Lafayette home. Morris negotiated a loan modification but fell into default again, then filed to bankruptcies; during the second her husband passed away. Morris tried to negotiate another loan modification but was unsuccessful and so filed a third bankruptcy. After obtaining relief from stay in Morris's third bankruptcy, JP Morgan Chase ("Chase") took the property to foreclosure sale. Morris filed suit against Chase and Rushmore as the new loan servicer including 11 causes of action. The defendants demurred to all causes of action and supported the demurrer with a 17-document request for judicial notice. The trail court sustained demurrers to all causes of action and Morris appealed. She also filed a fourth bankruptcy petition.

- (Continued on next slide.)

5

California

- **<u>LILLIAN MORRIS v. JP MORGAN CHASE BANK, N.A.</u> (2022) 78 Cal.App.5th 279 (Cal. Court of Appeal, First Dist.)**

- The court of appeal sustained the demurrers to all but three causes of action for: (1) failure to appoint a single point of contact; (2) violation of the prohibition on dual tracking; and (3) failure to properly mail the NOD and NOSes to Morris. The court first concluded that Morris's many bankruptcy proceedings did not necessarily preclude the possibility that she was a "borrower" for purposes of the HOBR despite the fact that a "borrower" cannot be in bankruptcy and invoke the protections of the HOBR. Moreover, even if Morris had ignored the trial court's instructions and failed to amend her original complaint to properly allege she was not in bankruptcy at the time defendants violated the HOBR leave to amend should have been granted. Having concluded Morris could be a borrower for purposes of the HOBR, the court of appeal turned to her specific causes of action.

- (Continued on next slide)

6

California

- **LILLIAN MORRIS v. JP MORGAN CHASE BANK, N.A. (2022) 78 Cal.App.5th 279 (Cal. Court of Appeal, First Dist.)**
- The SPOC Requirement
- Morris's first cause of action alleges she was not assigned a single point of contact, or a "SPOC". Both Chase and Rushmore claimed they had no legal obligation to appoint a SPOC as Morris admitted she had been verbally informed her most recent loan modification application had been denied at the time the NOD and NOSes were recorded and when the sale was held. The court of appeal held that a verbal decision on a pending loan modification – which Morris conceded she got – is insufficient as the denial has to be in writing, the reasons for the denial have to be specified, and the right to appeal has to be disclosed. Because Morris allegedly got no written denial, her loan modification application was still pending and a SPOC had to be appointed. The court also resolved a split in federal district courts by holding that a borrower does not have to specifically request a SPOC, only request that they be evaluated for ways to keep their property from foreclosure. (*See*, Hatton v. Bank of America, N.A. (E.D.Cal.) and its progeny.) The court concluded that Morris was entitled to have a SPOC appointed for her and while a failure to allege "actual economic damages" "resulting from" a "material violation" of the SPOC requirement would be fatal to the claim, in this case Morris alleged she incurred expenses hiring someone to help her with her application and incurred other costs, as well as lost equity in her home, allegations sufficient to overcome a demurrer. (Continued on next slide)

7

California

- **LILLIAN MORRIS v. JP MORGAN CHASE BANK, N.A. (2022) 78 Cal.App.5th 279 (Cal. Court of Appeal, First Dist.)**
- Dual Tracking
- Morris's second cause of action to survive demurrer was the allegation she had been "dual tracked". The court first concluded that the dual tracking prohibition survived the sunsetting of Section 2923.6, finding it had been reenacted effective January 1, 2019, and during the brief period when it was not explicitly on the books it had been included for the most part in former section 2924.11. The court of appeal again rejected the defendants' claim that their verbal denial of Morris's loan modification application was sufficient and precluded Morris's claim she was materially injured by the dual tracking.
- The court of appeal concluded that Morris's allegations that she would have qualified for a loan modification had she not been dual tracked was a sufficient allegation of material injury to overcome demurrer. (Continued on next slide)

8

California

- **LILLIAN MORRIS v. JP MORGAN CHASE BANK, N.A. (2022) 78 Cal.App.5th 279 (Cal. Court of Appeal, First Dist.)**
- Failure To Mail The NOD and NOSes
- Morris's final surviving cause of action is for violation of Civil Code 2924b's requirement to mail an NOD and an NOS to the borrower alleged only against Chase. Chase argued that this was not a material violation of the HOBR, to which the court of appeal responded it was still a statutory violation and a notice defect which precluded Morris from taking steps to stop the foreclosure. Chase responded by pointing out Morris declared bankruptcy in response to the notices. The court of appeal retorted that was only one possible interpretation of Morris's filing but not conclusive on demurrer. The court of appeal then concluded, "What counts for pleading purposes is that Morris alleges she heard for the first time about the trustee's sale after the sale had been conducted. On demurrer we must accept that allegation. It is not necessarily refuted by pleaded or judicially noticed facts." The court of appeal remanded the case to the trial court for proceedings on the three referenced causes of action.

9

California

- **MENDOZA v. WELLS FARGO BANK, N.A. (2011) 2021 WL 4932732**
- In this case the plaintiffs both sent Wells Fargo Notice of Error and Request for Information (QWR) letters to which Wells Fargo partially responded. Plaintiffs sued Wells Fargo under RESPA, seeking both actual and statutory damages. The court granted Wells Fargo's motion to dismiss the plaintiffs' complaints on the grounds that plaintiffs had not alleged actual damages and, in the absence of actual damages, statutory damages are not available under RESPA's QWR provisions.

10

California

- **<u>ABRAMS v. PLANET HOME LENDING, LLC</u> (2022) 2022 WL 2101920 (U.S.D.C., C.D. CA, Hon. Michael Fitzgerald)**
- This case builds on *Obdusky*, 139 S.Ct. 1029 (2019) and *Barnes*, 963 F.3d 993 (9th Cir. 2020). It concludes succinctly that "…a person who enforces a security interest is a "debt collector" (for purposes of the FDCPA) only for the purposes of the prohibitions in § 1692f(6), which regulates the enforcement of security interests." That section prohibits taking or threatening to take non-judicial actions to effect dispossession or disablement or property if" there is no right to do so, there is no present intention to do so, or the property is exempt for such a process. Without alleging a violation of that section, plaintiffs had not alleged that the loan servicer was a "debt collector" for purposes of the FDCPA and the operative complaint and its pendant state claims were dismissed.

11

California

- **<u>TSASU v. U.S. BANK TRUST, N.A.</u> (2021) 62 Cal.App.5th 704 (Cal. Court of Appeal, Second Dist.)**
- In 2007, the aptly-named Cassandra Celestine ("Celestine") borrowed the purchase money for property from CIT Group/Consumer Finance ("CIT") and secured repayment with a deed of trust. Celestine made three payments, then stopped. In 2014, the note was assigned to DLJ Mortgage Capital, which immediately recorded the assignment and then sent Celestine a Notice of Default within 30 days of the assignment. In the meantime, Celestine filed a quiet title action against CIT Group, which no longer held an interest in the property; she did not name DLJ. Nonetheless, in 2016 the court signed an order declaring the CIT Group DOT to be "Reversed, Cancelled, Set Aside and Made Null and Void, Ab Initio, for all purposes." Later in 2016, DLJ assigned the note to U.S. Bank. In 2016, the loan servicer appeared in the Celestine action, obtained an order setting aside the quiet title judgment, and obtained an order expunging the judgment. In 2016, before the judgment in her case was set aside, Celestine borrowed $285,000 from plaintiff Tsasu, LLC ("Tsasu") and promptly stopped paying on it. (Continued on next slide.)

12

California

- **<u>TSASU v. U.S. BANK TRUST, N.A.</u> (2021) 62 Cal.App.5th 704 (Cal. Court of Appeal, Second Dist.)**
- This case was brought by Tsasu to prevent U.S. Bank from foreclosing on the CIT DOT to protect Tsasu's junior interest. Tsasu argued that it was entitled to rely on the state of the title at the time it made its loan, so it was an bona fide encumbrancer for value without notice of a defect in its title. The trial court granted summary judgment for U.S. Bank, concluding that the Celestine quiet title judgment as to CIT was obviously defective because of the recorded assignment to DLJ. That assignment put Tsasu on constructive notice of a problem with the quiet title judgment and it should have investigated the defect before making its loan. The court of appeal affirmed.

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California

- **<u>SEVIOUR-ILOFF v. LaPAILLE</u> (2022) 2022 WL 2314114 (CA Court of Appeal, First District)**
- This case holds that a tenant who pays "rent" by performing services for his landlord is actually an employee entitled to the statutory minimum page. Plaintiffs worked at a small complex of rental units and a post office in unincorporated Humbolt County served by its own water system. In exchange for "rent" of $650 per month, plaintiffs agreed to maintain the water system and to perform on-site landlord and handyman services. When that relationship soured, plaintiffs brought a Labor Department claim against their landlord contending they were actually employees. The Labor Commissioner awarded plaintiffs damages and the landlord appealed. After a five-day trial, the court agreed with the Labor Commissioner and awarded plaintiffs the statutory minimum wage for the time they spent on the landlord's tasks (limited in time by the applicable statute of limitations), interest, and waiting time penalties. The Court of Appeal affirmed much of the trial court's judgment.

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California

- **MOGAN v. SACKS, RICKETTS & CASE LLP (2022) 2022 WL 2918901 (U.S.D.C., N.D. CA, Hon. Thomas Hixson, Magistrate Judge)**
- This case is an application of the rule that sanctions for misconduct are an exception to the automatic stay under 11 U.S.C. 362. Plaintiff sued a number of defendants in federal district court but lost on a motion to dismiss. Defendants in the district court case were awarded almost $200,000 in attorney's fees and costs. In the meantime, the plaintiff filed bankruptcy, appealed the district court's dismissal of his action, and sought a waiver of the bond on appeal and a stay of the judgment against him while the appeal was pending. The magistrate judge cogently denied the request to waive the bond on appeal on the grounds that the plaintiff's bankruptcy filing called into question his ability to pay the judgment at the conclusion of the appeal – the very reason a bond on appeal is required. He was sanctioned by the magistrate judge under FRCP, Rule 11. Finally, in response to the plaintiff's claim that the sanctions award was stayed by his bankruptcy filing, the magistrate judge held that a Rule 11 award is an exception to the automatic stay, concluding: "The purpose of this exception "is to prevent the bankruptcy court from becoming a haven for wrongdoers.", citing *CFTC v. Co Petro Marketing Group, Inc.* (9^{th} Cir. 1983) 700 F.2d 1279, 1283.

15

California

- **TRANSCON FINANCIAL, INC. v. REID & HELLYER APC (2022) 2022 WL 2900857**
- This case is an homage to procrastination. The trial court granted defendant's motions for sanctions against plaintiff and its counsel pursuant to Cal. Code Civ. Proc., §§ 128.5 and 128.7. Plaintiff and its counsel appealed the award on the grounds the motions were untimely. Specifically, both Section 128.5 and 128.7 provide "safe harbor" periods of 21 days during which the motion must be held before filing in order to give the subject of the motion a full 21 days to withdraw or otherwise cure the offending pleading, in this case a complaint. The defendant filed the motions on the 21^{st} day, depriving the plaintiff of the last day on which it could cure the problem. The court of appeal held the motions were untimely and reversed the sanctions award – and awarded the plaintiff and its counsel their costs on appeal.

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California

- **FIELD v. U.S. BANK, N.A. (2022) 79 Cal.App.5th 703 (Cal. Court of Appeal, Second Dist.)**

- In this wrongful foreclosure case, defendant U.S. Bank served interrogatories on plaintiff Beth Field in anticipation of its motion for summary judgment. Specifically, U.S. Bank asked Field if she contended that the Notice of Sale of her property was not properly mailed to her in compliance with Cal. Civ. Code, § 2924b. Field responded with the single word: "Unsure". U.S. Bank moved for summary judgment and, in response, Field said that she contended that she had not been properly served with the NOS. Curiously, she did not seek to amend her discovery response pursuant to Cal. Code Civ. Proc., § 2030.310. The trial court granted U.S. Bank's motion and Field appealed, arguing that her response to the motion raised a triable issue of material fact as to service of the NOS. The Court of Appeal affirmed the summary judgment for U.S. Bank. It held, "A party opposing summary judgment may not move the target after the proponent has launched its arrow." (*Field*, 294 Cal.Rptr.3d 822, 825.) In sum, Field was stuck with her evasive and ambiguous interrogatory response and she could not use that ambiguity to her advantage when opposing the MSJ.

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California

- **SPAHN v. RICHARDS (2021) 2021 WL 5576615 (Cal. Court of Appeal, First Dist.)**

- This is for breach of an alleged oral contract to demolish and then rebuild a single-family home. The plaintiff is a lawyer who sued his purported contractor for failure to build his new home for $515,000. But the defendant had not submitted a bid and had not signed a written agreement containing the material terms of the construction contract, although he had agreed to the terms of the written demolition contract which he fully performed. Another contractor completed the construction for $1 million. The defendant contractor served requests for admissions asking the plaintiff to admit: (1) the parties did not enter into an oral construction contract; (2) there was no meeting of the minds as to the terms of the alleged contract; and (3) the alleged oral agreement was unenforceable. The plaintiff denied all of the RFAs. After a jury returned a defense verdict, the defendant moved for and was awarded roughly $240,000 in attorney's fees and costs pursuant to Cal. Code Civ. Proc., § 2033.420 as costs of proving the items denied by plaintiff in the RFAs. The Court of Appeal upheld the award finding no abuse of discretion in awarding the fees. The plaintiff did not have reasonable grounds to believe he would prevail at trial so the defendant's costs associated with trying the case were appropriately *awarded* for the discovery abuse.

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U.T.A. Legal Update
California Edition

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2022 Litigation Landscape

- Much more difficult to extract lenders, servicers and trustee in the early stages of a case. Merely stating a notice was not sent (which is a question of fact) is sufficient to move the case forward to discovery.
- Federal Court removal is highly beneficial as it allows a greater range of documents for judicial notice consideration on ruling on a motion to dismiss. Unfortunately, borrower's counsel are wise to the risk of removal, so no federal claims are alleged. Usually, the only basis is diversity rather than federal question and the former requires at least $75,000 in damages to stay in federal court.

3

2022 Trends

- A claim for usury is becoming a part of any private money loan litigation with allegations that the "beneficiary" is not licensed. Borrower ignores the licensed party who arranged the loan.
- May become another issue that becomes a question of fact and survives initial pleading stage.
- Misuse of HBOR for non-residential property and junior liens. While the latter is less problematical the former is becoming an issue where the trial court refuses to take judicial notice of the county/city building record searches. Pot farms, agricultural property without a single permitted structure, properties that have been red-tagged by the City or County for years are now personal residences.

4

2022 Trends cont'd

- Courts are finally catching on to discovery abuses and are punishing parties who engage in delay tactics.
- Use of Code of Civil Procedure 2033.42 for requests for admissions that are improperly denied is a real weapon. CCP 2033.420 permits a prevailing party whose RFAs were denied to seek the legal fees incurred to prove the denied admission. Several cases Steve has prepared will discuss.
- Attorneys Fees. Does a full credit bid and a subsequent suit filed by the borrower cut off the right to fees. Listen and Learn.

5

In Re Moon
639 B.R. 190 (Bankr. N.D. Cal.)

- Bankruptcy Judge Montali applied California law to find that a "settlement agreement" extending the term of a business purpose mortgage loan was usurious, and that a late charge, applied to a balloon payment was unenforceable as liquidated damages.
- The Moons borrowed $759,000 for business purposes from Milestone Financial, LLC, secured by their residence. The Moons were represented by a California licensed real estate broker.
- Milestone did not have a real estate broker's license and was not licensed as a mortgage loan originator under the California Finance Law or the California Residential Mortgage Lending Act.
- Two months earlier, the California Department of Real Estate had issued a cease and desist order forbidding Milestone from making mortgage loans until the appropriate licenses were obtained.
- The loan required monthly payments of interest only at 11.3% per annum and was all due and payable in two years. The promissory note ("Note") provided for a 10% late charge on delinquent monthly payments and a default interest rate of 17.3% plus late fees.

6

In Re Moon cont'd

- Both provisions were supported by language reciting that these were reasonable liquidated damages. The Note included a savings clause that limited the interest charged to the applicable legal rate (10%) in the event that a court found that the interest charged was "in excess of applicable law."
- In August 2016, Milestone and the Moons entered into an agreement titled "Settlement Agreement, Indemnity, and First Amendment to Promissory Note Secured by Deed of Trust" (the "Extension").

7

In re Moon cont'd

- The Extension moved back the loan maturity date for an additional two years and provided for a slightly reduced interest rate of 11.05%. It recited that the new principal balance was $902,525.34. It increased the default interest rate and added language which applied the late charge to "any payment then due, including the fin al balloon.
- In March 2019, the Moons sought to refinance the loan and requested a payoff demand from Milestone. The demand was for $1,288,792.28, and included a "prepayment penalty" of $115,615.06 which Milestone later referred to in the litigation as a late charge on the (balloon) payment."

8

In re Moon Cont'd

- The Moons filed state court action and when injunction denied filed a bankruptcy which was converted to Chapter 11. State Court suit removed to federal bankruptcy court.
- The Moons presented unpleaded claims in their motion, viz. that the loan was usurious, that the "prepayment penalty" was unenforceable, and that Milestone could not impose both a late charge and default interest.
- The Court granted partial summary judgment to the Moons on their claim relating to usury and also sustained their challenge to the "prepayment penalty." It refused summary judgment on the remaining claims.

9

In re Moon Cont'd

- The Court's ruling on the usury issues involved the exacting application of California Civil Code section 1916.1, which exempts from the usury law a loan or forbearance arranged by a licensed real estate broker.
- The Court quoted its own decision in In re Arce Riverside, LLC, 538 B.R. 563, 571 (Bankr. N.D. Cal. 2015) in defining "forbearance" as "an agreement not to insist upon payment at the date of maturity of a debt, or the giving of further time to pay."

10

In Re Moon Cont'd

- Civil Code ("C.C.")1916.1 provides that "[i]n order for a loan to be arranged by a broker, the broker must act "for compensation or in expectation of compensation for soliciting, negotiating, or arranging the loan for another ."
- The provision involving forbearances is more limited: it refers only to "a forbearance, extension, or refinancing of any loan secured by real property in connection with a past transaction in which the broker had acted for compensation or in expectation of compensation for **selling, buying, leasing, exchanging, or negotiating the sale, purchase, lease, or exchange of real property** or a business".

11

In re Moon Cont'd

- Exemption did not apply to a simple loan of money secured by real estate with no sale, lease or other transaction involved.
- The Extension supplemented but did not extinguish the original note.
- Prepayment fee on balloon is unreasonable liquidated damages. Loans arranged by real estate brokers cannot contain such provisions. 10% charge for late payments is permitted.

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In Re Moon - Takeaways

- Closely examine the amounts demanded by a lender where the obligation has been **amended or the subject of a forbearance agreement where the interest rate exceeds 10%,** either because the lender is charging default interest upon maturity or due to a payment default.
- Where a primary residence is used to secure a business purpose loan mere reliance on CC 2924(b) may not be sufficient under these circumstances.
- Statutory Damages are treble, double and all payments applied to principal.

13

1197 W. 39th Street LLC v Seterus Inc. 2022 WL 3038369 (2nd District Div. 7 unpublished)

- The importance of this case is that it makes clear that a party who acquires title to real property **subject to** an existing trust deed it are not entitled to either declaratory relief or a claim under C.C. 2943 if loan originated by a Federal Savings Bank prior to July 21, 2010.
- New owner acquires title through a bankruptcy purchase or through foreclosure on a junior lien.
- Loans originated by a Federal Savings & Loan or Federal Savings Bank prior to July 2010 entitled to HOLA preemption for the life of the loan regardless of the transfer of the loan to a non-federal party.

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1197 W. 39th Street LLC v Seterus Inc.

- Seterus and FNMA argued consistently that the plaintiff lacked standing to assert claims for declaratory relief or under C.C. 2943 because it was not a party to the contract between the borrower and FNMA. The argument was partially successful in the trial court and a judgment under C.C. 2943 for $88,000.00 in damages based upon a rise in interest rates was reversed on appeal.
- The Home Owners' Loan Act (12 U.S.C. § 1461 et seq.) (HOLA) and regulations promulgated pursuant to HOLA by the Office of Thrift Supervision (OTS)

15

1197 W. 39th Street LLC v Seterus Inc.

- Whether state law is preempted by federal law depends on whether Congress intended that federal law supersede state law." (Lopez v. World Savings & Loan Assn. (2003) 105 Cal.App.4th 729, 736, 130 Cal.Rptr.2d 42 (Lopez); accord, Peatros v. Bank of America (2000) 22 Cal.4th 147, 157, 91 Cal.Rptr.2d 659, 990 P.2d 539.
- The OTS in 1996 adopted 12 Code of Federal Regulations part 560.2, in which, at paragraph (a), the OTS made clear it "occupie[d] the entire field of lending regulation for federal savings associations." (61 Fed.Reg. 50951-50952, 50965-50966 (Sept. 30, 1996); 12 C.F.R. § 560.2(a)

16

1197 W. 39th Street LLC v Seterus Inc.

- What is preempted: 9), "[d]isclosure and advertising, including laws requiring specific statements, information, or other content to be included in ... billing statements ... or other credit-related documents" and, at subparagraph (10), "[p]rocessing, origination, servicing, sale or purchase of, or investment or participation in, mortgages." (12 C.F.R. § 560.2(b)(9) & (10).). After Dodd Frank OTS merged into the OCC but regulations effective for existing loans.
- HOLA regs effective even if FNMA not a federal savings bank. HOLA preemption "), 2018 WL 1071269 p.5, 2018 U.S.Dist. Lexis 31742 p. *13; runs with the loan." (Faught v. Wells Fargo Bank, N.A. (E.D.Cal. 2018).

17

1197 W. 39th Street LLC v Seterus Inc.

- Because plaintiff did not assume loan it "had no rights or duties under either instrument and, given the nature of the Company's contentions and setting aside for the moment any standing arising from section 2943, lacked standing to seek a declaration of the outstanding balance due on that loan." (See, e.g., Otay Land Co. v. Royal Indemnity Co. (2008) 169 Cal.App.4th 556, 565-566.
- Result different if federal preemption not involved.
- Attorneys Fees consider Saucedo v Mercury S&L (1980) 111 Cal. App. 3d 309 re rights of non assuming grantee.

18

Chen v Valstock
2022 W.L. 3009418

- In a landlord tenant dispute the trial court awarded a group of plaintiffs approximately $1.1 million in attorney's fees under Civil Code section 1717 after granting their motion for summary adjudication of the sole cause of action on the contract in this case, before trial or disposition of the remaining non-contract causes of action.
- It is established law that “[a]n order granting partial summary judgment—or summary adjudication—is not an appealable order.” (Tucker Ellis LLP v. Superior Court (Nelson) (2017) 12 Cal.App.5th 1233, 1240, 220 Cal.Rptr.3d 382.) Because the summary adjudication order was not appealable, it was an interim ruling, not a final resolution. (Robbins v. Los Angeles Unified School Dist. (1992) 3 Cal.App.4th 313, 317, 4 Cal.Rptr.2d 649

Chen v Valstock

- The tenants try to obfuscate this point by citing Code of Civil Procedure section 1060’s statement that a declaratory judgment “shall have the force of a final judgment,” which has been in the statute since the Legislature first enacted it in 1921.
- The “one final judgment” rule, which “prohibits review of intermediate rulings by appeal until final resolution of the case.”
- The ‘trial court retains the inherent authority to change its decision at any time prior to the entry of judgment.’ ” (Le Francois v. Goel (2005) 35 Cal.4th 1094, 1100,(Griset v. Fair Political Practices Com. (2001) 25 Cal.4th 688, 697.

Chen v Valstock

- C.C. 1717 states fees “shall be awarded either to one of the parties or to the prevailing party then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.”
- The inclusion of section 1717 fees as an element of costs is significant because costs are awarded at the end of an action. Section 1032 of the Code of Civil Procedure defines the prevailing party entitled to costs in terms of the total outcome of the litigation.

21

Shiheiber v JP Morgan Chase et al 2022 W.L. 2951016

- Lender brought foreclosure against borrower. Lender filed motion for sanctions against borrower's attorneys, seeking $37,587.50 in sanctions.
- Trial Court ruled that $950,00 was an appropriate sanction for the violations which was deemed by the appellate court to be a “love tap”. The amount was below the amount where the attorney has to report the sanctions to the state bar.
- Attorney appealed the $950.00 sanctions order as they were awarded under a local San Mateo Superior Court rule governing non compliance with local rules.

22

Shiheiber v JP Morgan Chase et al

- Key ruling when sanctions are awarded for failure to comply with local court rules trial court was not required to find “bad faith” on behalf of the attorney.
- The lack of a need to prove bad faith vs. inadvertence or sheer incompetence is a major benefit in being able to seek sanction as the dilatory and obstreperous conduct of attorneys.
- Court found attorney did not timely serve or file her motions in limine, did not timely file oppositions to lender's motions in limine, and failed to provide sufficient copies of trial exhibits to court; causing significant delay in proceedings.

23

Shiheiber v JP Morgan Chase et al

- Chase sought sanctions under C.C.P. 128.5, section 575.2 and San Mateo County Local Court Rules, rules 2.20 and 2.22. The trial court ruled: “not attorney's fees. They are sanctions for violating the ... Local Rules, and they're awarded under Code of Civil Procedure [section] 575.2.”
- Violations of C.C.P. 575.2 payable by counsel NOT party.
- Sanctions under local rules are a viable method to collect fees incurred due to the litigation tactics of opposing counsel.

24

Shiheiber v. J.P. Morgan Chase et al 2022 W.L. 2980078 (Shiheiber II)

- After losing at trial on both jury and non jury claims Chase sought an award of attorney fees based upon clauses in its note and trust deed.
- Note that fee awards unlike many appeals are considered "de novo" by the court of appeal. However, the amount of fees awards is determined on appeal by an abuse of discretion standard of review.
- Borrower argued that after the foreclosure sale the provisions of the note and trust deed were extinguished and no longer enforceable.
- Borrower also contended that the defense of her tort claims was not covered by the attorney fees provision of the note.

25

Shiheiber II Fees

- Neither case addressed the issue.
- Court cited Passanisi v. Merit-McBride Realtors, Inc. (1987) 190 Cal.App.3d 1496 (Passanisi). There, a defaulting borrower brought an action to enjoin a nonjudicial foreclosure sale; lost; and then the lender was awarded attorney fees under an attorney fee clause in the deed of trust. (Id. at p. 1501.). Then the sale occurred. Lender entitled to recover fees.
- Passanisi also observed that to preclude the lender from recovering its attorney fees for defending a meritless lawsuit brought by the borrower would violate the reciprocity principles of Civil Code section 1717.

26

Shiheiber II Fees

- Plaintiff's claims (and the trial) focused on Chase's foreclosure of borrower's property after a loan officer had made an allegedly false promise to her about how she could reinstate her loan and avoid foreclosure after the loan had become delinquent.
- Alliance Mortgage Co. v. Rothwell (1995) 10 Cal.4th 1226 (Alliance Mortgage) and Smith v. Allen (1968) 68 Cal.2d 93 (Smith), Shiheiber argues support her argument that the attorney fees provisions contained in the promissory note and deed of trust are (in effect) unenforceable, because all of her obligations under those instruments were "extinguished" by the foreclosure sale.

27

Shiheiber II Fees

- Passanisi was followed by Flynn v. Page (1990) 218 Cal.App.3d 342 (Flynn upheld an award of contractual attorney fees to lenders (there, two sellers who issued a purchase money deed of trust in connection with the sale of their property) who prevailed in an action brought against them by the defaulting borrowers who asserted various tort and other claims (such as fraud, negligent misrepresentation and tortious breach of the implied covenant of good faith and fair dealing). (Id. at pp. 344-345, 349.)
- The borrowers had sought a variety of remedies, including various forms of both injunctive and monetary relief (such as specific performance, constructive trust, rescission and restitution). (See id. at p. 344.) **Flynn held it was immaterial that the lender was awarded attorney fees after the foreclosure sale took place, because application of the principles discussed in Passanisi do not depend on the timing of the foreclosure sale.** (Flynn, at p. 349.)

28

Shiheiber II Fees

- Jones v. Union Bank of California (2005) 127 Cal.App.4th 542 (Jones) which, like Flynn, extended Passanisi to an action brought by a defaulting borrower to attack the validity of a foreclosure sale that had already taken place. There, a lender was awarded contractual attorney fees under the loan instruments after prevailing in an action brought by the defaulting borrower to set aside the foreclosure sale. (Jones, at pp. 544-546.)
- It is settled under Passanisi, Flynn and Jones that a foreclosure sale does not extinguish or preclude enforcement of a prevailing party attorney fee clause in the loan instruments.

Shiheiber II Fees

- Borrower cited 612 South LLC v. Laconic Limited Partnership (2010) 184 Cal.App.4th 1270 (612 South LLC), to claim where there is no attempt to set aside sale, lender has no right to fees.
- 612 South LLC supra case involved a foreclosure sale of a bond under section 6615 of the Streets and Highways Code. Deficiencies
- Yoon v. Cam IX Trust (2021) 60 Cal.App.5th 388 affirmed an award of attorney fees to a lender are prohibited under that statute. Yoon involved similar claims of lender misleading borrower. Court held the key point is that borrower suit is to avoid enforcement of the note regardless of how the claim is pled.

Najarian Holdings LLC v Corevest American Finance Lender LLC et al - 2021 W.L. 5630679 (ND Cal).*

- Plaintiffs Najarian Capital LLC (“Najarian Capital”) and Najarian Holdings LLC (“Najarian Holdings”) purchase homes and “flip” them to third-party purchasers. In 2014 the parties entered into an agreement with Corevest’s predecessor whereby funds would be lent to Najarian entities under a revolving line of credit up to $5 Million secured by trust deeds on each property acquired by Najarian entities.
- Najarian was frequently delinquent and failed to pay the monthly interest payments due. In 2015 a new line of credit was negotiated which contained a release of any prior claims Najarian may have at the time the new agreement was signed.

Najarian Holdings LLC v Corevest

- In 2017 Najarian contested three items (1) the $250.00 release fee charged by the lender, (2) the 10% late charge on installment payments missed and (3) the default interest rate of 20% up from the normal rate of 8% upon maturity of each individual loan.
- Trial Court granted Motion for Summary Judgment on all three claims.
- Regarding the release issue, the Court held that: “Folsom v. Butte Cty. Assn. of Governments, 32 Cal. 3d 668, 677 (1982). “[A] general release can be completely enforceable and act as a complete bar to all claims (known or unknown at the time of the release) despite protestations by one of the parties that he did not intend to release certain types of claims.”

Najarian Holdings LLC v Corevest

- The opinion does not state if the lender was licensed or used a licensed entity or individual to arrange the loan.
- California Civil Code § 1671(b) states that "a provision in a contract liquidating the damages for the breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made."
- The lender argued that its loss for late payments included the loss of use of the lender's money, as well as increased costs of obtaining funding from third-parties, increased investment risk, and increased personnel and resources dedicated to managing plaintiffs' accounts and ensuring payment of overdue amounts

33

Najarian Holdings LLC v Corevest

- The Court also approved the default interest rate. default late charge more closely comports with California law, which provides that a late charge, "'if the principal or interest is not paid as it becomes due' is not to be treated as a penalty, but as a contract to pay such higher rate upon and commencing with the happening of one of the contingencies specified in the note, to wit, the failure to make payment of any sum when due." Garrett v. Coast & Southern Fed. Sav. & Loan Ass'n, 9 Cal. 3d 731, 736 (1973), (quoting Thompson v. Gorner, 104 Cal. 168, 170-71 (1894)). Here the event was the maturity of the loan.
- See also Altadena Lincoln Crossing 598 B.R. 633 at 639-641. (Bankr. C.D. Cal 2019)

34

Wen v Greenpoint Mortgage Funding Inc. 2021 W.L. 5449048 (N.D. Cal.)

- The case involves whether the borrower can overcome statute of limitations problems with all her claims by contending the "continuing violation doctrine" prevents the SOL from running out.
- The HELOC in question was assigned to Greenpoint on May 19, 2017, and suit was not filed until August 20, 2021.
- Wen's claims for (i) breach of contract; (ii) breach of covenant of good faith and fair dealing; (iii) unjust enrichment; (iv) violation of Rosenthal Fair Debt Collection Practices Act ("Rosenthal"); (v) Unfair Competition-violation of Business and Professions Code §§ 17200, et seq. ("UCL"); (vi) for fraud all had SOLs of 4 years or less.

35

Wen v Greenpoint

- Key takeaway is that the continuing violation doctrine cannot be used in either state or federal courts to extend the statute of limitations for tort and contract claims.
- However, the "delayed discovery" doctrine is still viable for such claims but only if the plaintiff meets strict requirements of the rule.
- A plaintiff relying on the discovery rule to toll a statute of limitations must plead the time and manner of discovery, the inability to have made earlier discovery despite reasonable diligence, and facts demonstrating reasonable diligence. See WA Southwest 2, LLC v First American Title Insurance Company (2015) 240 Cal. App. 4th 148.

36

Wen v Greenpoint

- Wen cites two cases for the proposition that the "continuing violation doctrine aggregates a series of wrongs or injuries for purposes of the statute of limitations." Id* 9 (Richards v. CH2M Hill, Inc. 26 Cal.4th 798, 811-818 (2001); National Railroad Passenger Corporation v. Morgan, 536 U.S. 101, 118 (2002)).
- However, both cases involved claims of employment discrimination, and the courts in each case described the doctrine in terms confined to claims in that specific context. The doctrine has also been applied to civil rights cases. Bird v. Dep't of Hum. Servs., 935 F.3d 738, 746 (9th Cir. 2019) ("Although the continuing violations doctrine is most frequently seen in the context of employment discrimination suits, we have held that the continuing violations doctrine also applies to § 1983 claims."); Cherosky v. Henderson, 330 F.3d 1243, 1246 n.3 (9th Cir. 2003).

37

Hogan v Central Loan Administration et al 2022 W.L. 1228787 (N.D. Cal.)

- Plaintiffs brought action against lender and servicer for 1) breach of contract; (2) negligence; and (3) negligent misrepresentation. Both defendants moved to dismiss.
- Plaintiffs allege that in April 2019, plaintiffs were advised by a Citibank personal banker to pay their monthly mortgage in two payments and that their second payment would not be deemed late as long as it was received by Cenlar before the 15-day grace period ended. Plaintiffs changed their monthly payment into bi-monthly payments and allege the total amount of the two payments per month exceeded the minimum monthly payment

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Hogan v Central Loan Administration et al

- Plaintiffs noticed that Cenlar was applying early payments to the loan principal and rejecting the second payments as partial payments.
- Plaintiffs phone call with a Cenlar rep and the parties allegedly orally agreed that plaintiffs would pay $4,000.00 to cure arrearages and reset payments to once a month. Later the plaintiffs tried to obtain a new loan and discovered that the payments were continuing to be misapplied.

39

Hogan v Central Loan Administration et al

- Plaintiff’s claims focused on Cenlar’s agreement alleged agreement to recharacterize past payments, remove negative credit, and waive late fees.
- Key: NO allegations Citibank agreed to anything or ratified what Cenlar had allegedly agreed to. Any agreement concerning interest in real property is governed by the statute of frauds and must be in writing and signed by the party against whom the agreement is enforced. Cal. Civ. Code § 1624. Because a mortgage loan is subject to the statute of frauds, any modification to its terms is also subject to the statute of frauds. See Secrest v. Sec. Nat'l Mortg. Loan Tr. 2002-2, 167 Cal. App. 4th 544, 553-54 (4th Dist. 2008).

40

Hogan v Central Loan Administration et al

- Under California law, “where assertion of the statute of frauds would cause unconscionable injury, part performance allows specific enforcement of a contract that lacks the requisite writing.”
- See In Re Marriage of Benson, 36 Cal. 4th 1096, 1108 (2005). “[T]o constitute part performance, the relevant acts must either unequivocally refer to the contract ... or clearly relate to its terms,” which “satisfies the evidentiary function of the statute of frauds.” Id. at 1109.

41

Hogan v Central Loan Administration et al

- The elements of negligent misrepresentation under California law are: ‘(1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage.’ ” Argueta v. J.P. Morgan Chase, No. 2:11–cv-441 WBS GGH, 2011 WL 6012323, at *4 (E.D. Cal. Dec. 1, 2011) (citing Apollo Cap. Fund, LLC v. Roth Cap. Partners, LLC, 158 Cal. App. 4th 226, 243 (2d Dist. 2007)).

42

Hogan v Central Loan Administration et al

- Plaintiffs only allege "misrepresentations" that are promises Cenlar made as part of the purported contractual agreement. (FAC ¶ 41.) These are not misrepresentations of a "past or existing material fact," rather they are allegedly false promises of future action, which cannot form the basis for a negligent misrepresentation claim.
- See UMG Recordings, Inc. v. Glob. Eagle Ent., Inc., No. CV 14-3466 MMM, 2015 WL 12746208, at *18 (C.D. Cal. Oct. 20, 2015) (citing Tarmann v. State Farm Mut. Auto Ins. Co., 2 Cal. App. 4th 153, 158 (6th Dist. 1991)) ("California law does not recognize a claim for negligent misrepresentation on the basis of a false promise").

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Hogan v Central Loan Administration et al

- Here, borrowers alleged performance (paid money and changed payment back to once a month) and unconscionable injury. The negative credit and inability to get another loan formed the latter. Thus, although no claim against beneficiary, the breach of contract claim against the servicer was upheld.
- To prove a cause of action for negligence, plaintiff must show a legal duty owed to plaintiff by the defendant. Mendoza v. City of Los Angeles, 66 Cal. App. 4th 1333, 1339 (2d Dist. 1998) (citation omitted). A lender or servicer owes no duty of care in its "customary role in arms-length lending and servicing." Id. at 635. Sheen v. Wells Fargo Bank, N.A., 12 Cal. 5th 905, (2022)

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Sheen v Wells Fargo Bank (2022) 12 Cal. 5th 905 (Cal. Supreme Court)

- The California Supreme Court ruled that a lender does not owe a borrower a duty of care when engaging in loss mitigation activity that does not go beyond the lender's role as a traditional commercial lender.
- UTA filed an amicus brief along with the CMA, CMBA co-authored by Wright Finlay firm along with Kirby & McGuinn.
- The issue of duty is a legal one that can be decided at the early stages of the litigation.

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Sheen v Wells Fargo Bank

- The bad news is that the many concurring opinions issued by the Court point out in detail all the other claims a borrower might use to bring a claim against a lender or loan servicer who allegedly does not perform loss mitigation efforts to the borrower's satisfaction.
- The issue of duty has divided California Courts of Appeal. Compare Weimer v. Nationstar Mortgage, LLC, 47 Cal.App.5th 341, 260 Cal.Rptr.3d 712, Rossetta v. CitiMortgage, Inc., 18 Cal.App.5th 628, 227 Cal.Rptr.3d 598, Daniels v. Select Portfolio Servicing, Inc., 246 Cal.App.4th 1150, 201 Cal.Rptr.3d 390, and Alvarez v. BAC Home Loans Servicing, L.P., 228 Cal.App.4th 941, 176 Cal.Rptr.3d 304 which held there was a duty were disapproved.

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Sheen v Wells Fargo Bank

- Mortgage lender's mere acceptance of applications for loan modification did not give rise to a tort duty to process, review, and respond carefully and completely to the loan modification applications.
- Even when parties are actively negotiating a contract, there is no **liability in tort for economic loss caused by negligence during such negotiations**.
- However, there is liability under HBOR, BPC 17200, breach of contract, violation of consumer protection statutes.

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Sheen v Wells Fargo Bank

- It should be noted that the loan which was the subject of the litigation was a junior lien which Wells Fargo had sold to a third party who four years later in 2014 foreclosed on Sheen’s property.
- In 2010 Wells Fargo advised the borrower the loan was charged off and that Wells would take any action it deemed necessary to protect its interests.
- Plaintiff thought that meant the loans were unsecured and the property would never be sold at a foreclosure auction.

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Sheen v Wells Fargo Bank

- To impose a tort duty in such circumstances would go further than creating obligations unnegotiated or agreed to by the parties; it would dictate terms that ***845 are contrary to the parties' allocation of rights and responsibilities. The proposed duty would impede Wells Fargo's right to foreclose by permitting foreclosure only after Wells Fargo discharges a tort duty to "process, review and respond carefully and completely to [a borrower's] loan modification application[s]."

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Sheen v Wells Fargo Bank

- Plaintiff maintains that the affirmative duty to act — to process, review, and respond to the loan modification applications — is outside Nymark's reach because that decision's holding "is limited to the loan origination context." Processing loan modifications is clearly within the scope of a lender's usual activities.
- …"we have rejected arguments that employment contracts, performance bonds, or even "an insurance company's breach of the covenant [of good ***849 faith and fair dealing] when it retroactively overcharges a premium it knows is not owed" are sufficiently analogous to the core insurance cases to warrant extension of tort remedies into those areas."

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Sheen v Wells Fargo

- Negligent misrepresentation and promissory estoppel *951 “may offer recourse to borrowers.
- The court states that “without more,” a “lender's handling of a modification application” “does not ‘exceed the scope of [an institution's] conventional role as a mere lender of money.’ ” (Maj. opn., ante, 290 Cal.Rptr.3d at p. 847.

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Sheen v Wells Fargo

- The only exception is between an insured and an insurer.
- Within the insurance context, these special characteristics include the fact that “when an insurer in bad faith refuses to pay a claim or to accept a settlement offer within policy limits,” “the insured cannot turn to the marketplace to find another insurance company willing to pay for the loss already incurred.” (Foley, supra, 47 Cal.3d at p. 692.
- “Not every modification application results in a successful modification, but the possibility of benefiting from the transaction means a lender normally has an incentive to engage in the negotiation.”

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Sheen v Wells Fargo

- AG argues that residential borrowers suffer from optimism bias and therefore do not bargain over obligations that would arise only when they default. But if the problem is undue optimism, then legislation requiring information to temper that optimism — or a new mandatory insurance scheme, whereby all homeowners, no matter how optimistic, are forced to pay for the cost of "help from their servicers to avoid foreclosure" — would seem more appropriate and directly responsive than tort liability." p. 946

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Sheen v Wells Fargo

- Plaintiff's claim here is not independent of the original mortgage contract, not because his claim merely relates to the subject of that agreement, but because it is based on an asserted duty that is contrary to the rights and obligations clearly expressed in the loan contract. Id. P. 845.
- Court relied on Nymark v. Heart Fed. Savings & Loan Assn. (1991) 231 Cal.App.3d 1089, (Nymark). In Nymark, the court stated a "general rule" precluding certain tort claims in the lender-borrower context: "[A] financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money." (Id. at p. 1096.)

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Thank you and enjoy your evening.

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