WRIGHT, FINLAY & ZAK, LLP

THE WFZ QUARTERLY

Summer 2016 Issue Vol. 1, No. 2

In this Issue

NEVADA SUPREME COURT LIMITS HOA SUPER-PRIORITY LIENS

by Shadd A. Wade, Esq. and Robin P. Wright, Esq.

In the landmark case of Horizon at Seven Hills Homeowners Association v. Ikon Holdings, LLC, 132 Nev. Adv. Op. 35, 2016 ("*Ikon*"), the Nevada Supreme Court continued its recent trend by issuing another decision that narrows the scope and negative impact of an HOA lien. Specifically, *Ikon* held that *only* the statutorily set period (6 or 9 months) of outstanding HOA dues is entitled to super-priority lien status. HOA collections costs, sometimes amounting to thousands of dollars, are *not* part of the super-priority lien. This is a major win for lenders, who are often strong-armed into paying overreaching HOA collection costs that sometimes exceed the outstanding HOA dues themselves. The full scope and benefit of the decision is explained below.

Background

The first deed of trust holder foreclosed its lien in June 2010, selling the property to a third-party, which then conveyed title to Ikon Holdings. HOA contacted Ikon to demand payment of its super-priority lien, which survived the bank's foreclosure. As is common, the HOA's demand included its collection and foreclosure fees and costs, which it contended survived extinguishment as part of the super-priority lien. Ikon disagreed, and also contended that HOA's CC&Rs limited its super-priority lien to 6 months of assessments. When the parties could not resolve the matter, Ikon sued for declaratory relief. The district court awarded Ikon partial relief and the HOA appealed to the Nevada Supreme Court.

The Nevada Supreme Court considered and decided two main issues:

1) Whether a super-priority lien for common expense assessments pursuant to NRS 116.3116(2) includes collection fees and foreclosure costs.

   Holding 1: The super-priority lien under NRS 116.3116(2) does not include fees or collection costs related to foreclosure.

2) Whether HOA CC&R's super-priority lien definition supersedes the definition provided by statute.

   Holding 2: The CC&Rs are superseded by the statute pursuant to NRS 116.1206(1), and thus the statute controls.

Continued on page 2

Nevada Supreme Court (continued from page 1)

What does this decision mean going forward?

After years of HOA's demanding payment of their fees and costs as part of the super-priority lien after a bank foreclosure, this ruling serves to clarify the definition of the super-priority lien, confirming the servicer's position that the super-priority lien is limited to nine (9) months of assessments (or 6 months for Fannie Mae and Freddie Mac), and does not include any HOA-related fees and costs.

This ruling will strengthen the lender's position where the lender calculated and tendered nine months of assessments to satisfy the HOA super-priority lien before the HOA foreclosure, whether or not it was accepted. Before this decision, there was uncertainty as to whether this amount, without fees and costs, would fully satisfy a super-priority lien, in order to preclude extinguishment of the first deed of trust. This clarification by the Court will support summary judgment in cases where only nine months of assessments were tendered to the HOA or its agents.

"***…this ruling serves to clarify the definition of the super-priority lien…that the super-priority lien is limited to nine (9) months of assessments…and does not include any related fees and costs incurred by the HOA.***"

This ruling may also help in cases where the lender requested a super-priority payoff statement, but the HOA either refused to provide one, or provided a full lien payoff statement only. Lenders have a right to protect their security interest by paying the lien amount enjoying priority to the first deed of trust. This clarification of the super-priority lien amount may support the lender's argument that the HOA had a duty to provide lenders with a statement of that amount, without fees and costs, and that failure to do so violated the HOA's duty under the statute. The failure to provide a super-priority payoff statement upon a lender's request may also enable the lender to show the element of unfairness, which goes to showing the HOA sale was commercially unreasonable. Both of these arguments strengthen the lender's position in invalidating the HOA's sale.

The Court's clarification of the super-priority lien also supports a lender's claims for unjust enrichment against the HOA. After foreclosure of an HOA lien, HOAs routinely paid themselves their full lien amount as well as all incurred collection fees and costs, leaving a diminished amount of excess proceeds (if any) available to lenders. As the Nevada Supreme Court has now confirmed the portion of an HOA lien prior to a first deed of trust is limited to a maximum of nine months of assessments only, the HOAs' practice of satisfying its entire lien (both the super-priority and sub-priority portions) is no longer risk-free as it can give rise to lenders' claims that the HOAs were unjustly enriched to the extent they retained sale proceeds beyond nine months of assessments.

The Court's clarification of the super-priority lien may also support claims by the lender in interpleader cases. If the trustee has filed an interpleader action to deposit the excess proceeds from the HOA sale, the lender could argue the trustee retained more of the funds than it should have for fees and costs and should have paid the first lienholder its share before paying the HOA its sub-priority portion of the lien. The lender would seek to require the trustee to deposit more where it retained more than 9 months and retained pre and post-sale collection fees and costs. This could increase recovery where the lender has opted to pursue excess proceeds in lieu of suing the HOA buyer to quiet tile.

Continued on page 3

Nevada Supreme Court (continued from page 2)

The post-sale distribution statute in NRS Chapter 116 (116.31164) creates an unresolved conflict between the Nevada Supreme Court's interpretation of lien priority in the SFR decision, and how funds are to be distributed under the statute. This issue will need to be litigated in order for lenders to recoup sales proceeds wrongfully retained by HOAs.

Important Note

It is important to note that this decision and its application will be limited to HOA foreclosure sales occurring before the October 1, 2015 amendments to NRS Chapter 116.

If you have any questions about the holding in *Ikon*, its impact on one of your loans or regarding the recovery of amounts that you may have overpaid to HOAs, please contact Robin Wright.

Shadd A. Wade, Esq.
swade@wrightlegal.net

Robin P. Wright, Esq.
rwright@wrightlegal.net

DEALERS' CHOICE

by Nicholas G. Hood, Esq.

In addition to its litigation expertise, Wright, Finlay & Zak LLP ("WFZ") also offers a vigorous and experienced transactional practice, specializing in commercial real estate development (including purchase and sale agreements, ground leases, management agreements, and loan documentation), commercial leasing (both landlord and tenant representation) and general business matters.

The transactional team is headed by Scott S. Pollard, who has over thirty five years of experience in the field and who represents powerhouse developers such as R.D. Olson Development, Red Mountain and Rael Development Corporation.

Most recently in the hospitality sector, WFZ has served as counsel in the development of the recently opened *Paséa Hotel & Spa* in Huntington Beach; the successful ground lease negotiations with the City of Newport on the upcoming *Lido House Hotel*; the sale of the *Burbank SpringHill Suites*, *Tustin Fairfield Inn & Suites*, *Tustin Residence Inn* and *San Juan Capistrano Residence Inn* to a publicly traded REIT; the refinancing of the *Irvine Spectrum Marriott Courtyard*; the acquisition of land purchased from The Irvine Company for a full service Marriott hotel adjacent to the Irvine Spectrum Marriott Courtyard; and the construction financing for the *Andaz Palm Springs*.

In the retail sector, WFZ has negotiated leases with national tenants such as *Starbucks*, *Taco Bell*, *Del Taco*, *AutoZone*, *Gold's Gym*, *Pieology*, *Planet Blue*, *ZPizza*, *Jersey Mike's*, and *Chipotle*.

In the student housing sector, WFZ has handled the acquisition and development of student housing projects near *Western Washington University*, *East Carolina University*, *Missouri State University*, and the *University of Memphis*.

Continued on page 4

Dealers' Choice (continued from page 3)

WFZ offers a full service commercial real estate transactional team that can draft and negotiate all contracts and documents required for a commercial real estate venture. WFZ is also well equipped to handle general business transactional matters, such as organizational documents, necessary governmental filings and general contracts.

Contact Scott Pollard at WFZ today at (949) 646-1300 or spollard@wrightlegal.net to discuss how we can help your deal.

Nicholas G. Hood, Esq.
nhood@wrightlegal.net

AN OFFER YOU SHOULD REFUSE (TO MAKE):

REQUIRING AN UNSPECIFIED SETTLEMENT AGREEMENT IN A § 998 OFFER CAN RENDER THE OFFER INVALID

by Michael J. Gilligan, Esq.

In a case of first impression, *Sanford v. Rasnick* (2016) 246 Cal.App.4th 1121, a California appellate court recently held that inclusion in a *California Code of Civil Procedure* ("CCP") § 998 of a requirement that the offeree execute a settlement agreement, which is undescribed and unexplained in the offer, invalidates the offer, thereby depriving the offeror of the cost shifting provisions of that Section.

The normal rule in California is that a prevailing party in a lawsuit or arbitration is entitled to costs incurred in connection with the litigation. *CCP* §§ 1032 and 1033.5. However, in an effort to encourage the settlement of cases before trial, the legislature in 1971 "borrowed a controversial cost-shifting approach from England" and passed *CCP* § 998 which "authorizes either party to submit a written, binding settlement offer. If the other party chooses to refuse this offer, it proceeds to trial at its own risk. Even if the refusing party prevails at trial it must obtain a judgment more favorable than the settlement offer or it will not receive its own costs and, moreover, will be liable for its opponent's costs." (*Valentino v. Elliott Sav-On Gas, Inc.* (1988) 201 Cal.App.3d 692, 696-697.) Section 998 offers are thus an attractive option where the exposure is likely to be less than the offer but the other side is reluctant to enter into a reasonable settlement.

It is clear that an offer to settle under § 998 may contain a release provision. *Linthicum v. Butterfield* (2009) 175 Cal.App.4th 259; *Goodstein v. Bank of San Pedro* (1994) 27 Cal.App.4th 899. However, the release provision <u>must pertain only to the claims raised in the lawsuit that is being settled</u>. Attempts to include claims which may arise outside of the lawsuit, such as bad faith claims against insurance companies, or claims against other parties, will invalidate the offer. *Valentino, supra,* at 701. In *Valentino*, Ms. Valentino was required to file a "Notice of Acceptance" with the court which not only terminated the personal injury action against defendant but also released defendant, its attorneys and insurance carrier from any and all claims and causes of action arising out of appellant's claims including insurance bad faith and violation of *Insurance Code* § 790.03. *Id.* at 695. The court found that the inclusion of that release of claims beyond the ones that were actually the subject of the lawsuit rendered the § 998 offer invalid.

Continued on page 5

An Offer You Should Refuse (To Make) (continued from page 4)

In *Sanford, supra*, the court extended the *Valentino* holding (that a release that includes more than the claims contained within the lawsuit render the § 998 offer invalid) to offers that include a requirement that the accepting party provide a settlement agreement, which is not defined in the offer. In *Sanford*, the court examined a § 998 offer made by the defendants which included a requirement that the plaintiff provide a written settlement agreement and general release. Sanford, who had been injured in a motor vehicle accident caused by Rasnick, filed suit. Prior to trial, Rasnick served the § 998 offer which proposed to pay Sanford $130,000 in exchange for dismissal of the case with prejudice and the delivery of the aforementioned settlement agreement. The offer was not accepted, and the case proceeded to trial. The jury returned a special verdict which, after adjusting for comparative negligence and adding Sanford's pre-offer costs, resulted in a net judgment of about $122,000 – less than the § 998 offer. Had the § 998 offer been valid, Sanford would not have recovered his post-offer costs of about $7800, and could even have been required to pay Rasnick's post-offer costs of over $28,000. The trial court found that the § 998 offer was valid and granted Rasnick's motion to tax Sanford's costs, on the basis that Sanford's recovery was not greater than the § 998 offer. Sanford appealed.

"***The [Sanford] court's statement … would suggest that this court, at least, might be hostile to <u>any</u> § 998 offer which included even a specific settlement agreement requirement.***"

On appeal, the court found that the inclusion of the requirement that Sanford execute and deliver a notarized written settlement agreement and general release rendered the § 998 offer invalid. *Id*. at 1132. After noting that release requirements contained in § 998 offers are valid (unless they include claims other than those contained in the lawsuit), the court stated that "a release is not a settlement agreement, and the Rasnicks have cited no case, and we have found none, holding that a valid section 998 offer can include a settlement agreement, let alone one undescribed and unexplained." *Id*. at 1130. Although the Rasnicks tried to explain that their offer was standard in the automobile insurance defense industry, the court declined to make that finding. The court went on to analyze the problems which arise when parties agree to a settlement agreement and then need to negotiate the terms of that settlement agreement. In particular, the court points out that settlement agreements typically contain a waiver of all claims "known and unknown" (a provision common in settlement agreements involving lender issues) which had previously been held in other cases to invalidate a § 998 offer. (See *McKenzie v. Ford Motor Co*. (2015) 238 Cal.App.4th 695 and *Valentino*.)

Left undecided by *Sanford* is whether the inclusion of all terms of the proposed settlement agreement in the § 998 offer (perhaps by attaching a draft agreement) would thereby render the offer valid. The court's statement that it found no cases holding that "a valid section 998 offer can include a settlement agreement, let alone one undescribed and unexplained" would suggest that this court, at least, might be hostile to <u>any</u> § 998 offer which included even a specific settlement agreement requirement. Considering that a § 998 offer must be accepted within 30 days (or before the commencement of trial, whichever is sooner), and considering the not uncommon problems that arise in hammering out the terms of a settlement agreement, *Sanford* dictates caution in proceeding with requiring as part of the offer, the execution of a settlement agreement, unless it is absolutely necessary. The safer course would be to just require a release, limited to the subject matter of the lawsuit.

Michael J. Gilligan, Esq.
mgilligan@wrightlegal.net

WFZ HAS "*NO OBJECTION*" FROM THE GSEs IN 4 STATES

by Joyce Copeland Clark

Fannie Mae and Freddie Mac have given many nationwide loan servicers the green light ("no objection") from Fannie Mae and Freddie Mac to use WFZ for their default related matters in **California**, **Arizona**, **Nevada** and **Washington**. This includes non-judicial foreclosure processing, bankruptcy representation, deed in lieu processing, loss mitigation and REO. Our non-judicial foreclosures are processed by our network of the industry's leading independent foreclosure trustees who work hand-in-hand with our attorneys and staff with mortgage industry expertise to make sure all Government-Sponsored Enterprise ("GSE") or other investor guidelines are met. For more information on WFZ's *Foreclosure and Default Services Division*, please feel free to contact Joyce Copeland Clark.

Joyce Copeland Clark
Director of Default Operations
jclark@wrightlegal.net

THE NEW BANKRUPTCY TREND:

CREDIT REPORTING VIOLATIONS FOLLOWING CHAPTER 13 DISCHARGE

by Renee M. Parker, Esq. and T. Robert Finlay, Esq.

As bankruptcy filings steadily decrease nationwide, there has been a corresponding increase in state court litigation and adversary proceedings related to claims of credit reporting violations under the Fair Credit Reporting Act ("FCRA"). Particularly in Nevada, California and Arizona, bankruptcy attorneys are trolling through their database of prior bankruptcy clients, looking for potential credit reporting violations to sue over. While this article may appear long, a complete analysis is necessary to understand the interplay between credit reporting and bankruptcy discharge to best defend these cases and to avoid further ones.

Discharged debtors are claiming violations arising from credit reports made to Credit Reporting Agencies ("CRAs") after their debts were more frequently discharged under Chapter 13 of the Bankruptcy Code. These allegations typically challenge whether mortgage debt can or should be reported after discharge and, if so, what type of report must be made.

The decision whether to report a mortgage debt can be complex since a credit report can be regarded as a personal ("*in personam*") liability, as opposed to liability against property of the debtor ("*in rem*").

> ***"Three main milestones for reporting debt over the life of a bankruptcy:***
>
> ***1) While the bankruptcy is pending.***
>
> ***2) When the Chapter 13 Plan is confirmed.***
>
> ***3) When the Chapter 13 Plan is completed."***

Personal liability arises where the debtor has a personal obligation to pay a debt. However, a debt is different from a lien – although the two are often confused. A secured lien, which is an *in rem* liability, passes through a bankruptcy unaffected unless some act is taken against that lien and is granted or sustained (such as a lien avoidance action, successful objection to a proof of claim, or other determination as to validity of the lien).

Continued on page 7

The New Bankruptcy Trend (continued from page 6)

After discharge, all personal liability to repay debt is eliminated *except* where that obligation is not discharged either by statute[1] or after a determination of non-dischargeability is made by the Bankruptcy Court. That said, without more, discharge does not eliminate an *in rem* liability. *Dewsnup v. Timm*, 502 U.S. 410, 418 (1992).

What this means is that a debtor is no longer *personally* required to pay a mortgage loan and, where payment is not made, no acts to collect against the debtor (including auto-dialer calls or a deficiency judgment), can be made.[2] But because the *in rem* obligation is not discharged, failure to pay the debt still allows a creditor to enforce its non-bankruptcy rights, including foreclosure, against the property subject to the lien.

The case law and other authorities are mixed on the topic of how credit reporting on mortgage debt is affected by a bankruptcy discharge. For example, NOLO.com states that after discharge, *all* debts must be reported as having a zero balance and must further indicate that it was included and/or discharged in a bankruptcy.[3] A myriad of other proprietary websites, blogs, and articles promulgate differing opinions on reporting of secured debt, and run the gamut from showing the debt as fully paid to reporting the full balance as due and owing despite discharge. Both extremes seem excessive, if not unwise, and the better reasoned result may lie somewhere in between. Adding to the confusion, some articles distinguish between whether the mortgage debt is for a primary or non-primary residence.

To state a claim under the FCRA against a furnisher of credit information (such as a lender/beneficiary or its servicer), a plaintiff must allege that: (1) he contacted the credit reporting agency ("CRA"); (2) the CRA pursued the claim; and (3) the CRA contacted the Defendants regarding the dispute, triggering the Defendants' duty to investigate. The duty to investigate under FCRA is not triggered by direct communications between the borrower and the lender/servicer. 15 USC § 1681s-2(b).

Consequently, the issue is whether the lender discharged its duty to investigate, and not just the mere act of reporting a discharged debt in some other manner. After discharge, the courts generally will not find an FCRA violation occurred unless it can be shown that the creditor was reporting a debt improperly after discharge, the debtor notified the CRA and/or creditor about the discharge, and the report was intentionally or negligently not corrected. *See, e.g., Hanks v. Talbots Classics Nat'l. Bank*, 2012 U.S. Dist. LEXIS 109934 (N.D. Cal. August 6, 2012); *Wakefield v. Cavalry Portfolio Services, LLC*, 2006 U.S. Dist. LEXIS 79987 (D. Or. November 1, 2006); *Henry v. Saxon Mortg., Inc.*, 2011 U.S. Dist. LEXIS 128841, *10, 2011 WL 5331679 (D. Ariz. Nov. 7, 2011).

Where the property is the debtor's primary residence, persuasive case law further provides that personal liability on the mortgage debt is not discharged by the bankruptcy case at all. *In re Rodriguez*, 421 B.R. 356, 365 (Bankr. S.D. Tex., 2009) ("Section 1322(b)(5) allows mortgage payments to be cured and maintained, but does not provide a discharge mechanism. The applicable discharge provisions are contained in §§ 524 and 1328….Read in concert with § 1322(a)(2), §§ 1322(b)(5) and 1328(a)(1) bar the discharge of home mortgage debts.").

In addition to §§ 1322 and 1328, exception to discharge of mortgage debt is addressed by 11 U.S.C. § 524(j), which states: "Subsection (a)(2) [the discharge injunction itself] does not operate as an injunction against an act by a creditor that is the holder of a secured claim, if— **(1)** such creditor retains a security interest in real property that is the principal residence of the debtor; **(2)** such act is in the ordinary course of business between the creditor and the debtor; and **(3)** such act is limited to seeking or obtaining periodic payments associated with a valid security interest in lieu of pursuit of in rem relief to enforce the lien." Interpretation of this statute means there is never in personam discharge of secured mortgage debt on a debtor's primary residence, but it is noted that a majority of the Bankruptcy Courts have carved-out exceptions to this rule.

Another aspect of the current crop of litigation references reporting standards under the "Metro 2 Format" of the Consumer Data Industry Association ("CDIA") "Credit Reporting Resource Guide." The Metro 2 Format is a detailed reporting format accepted by all CRAs. According to the 2015 CDIA Guide, most notably FAQ Nos. 28-29, there appear to be three main milestones for reporting debt over the life of a bankruptcy:

Continued on page 8

The New Bankruptcy Trend (continued from page 7)

1. While the bankruptcy is pending, at which time the mortgage is reported as follows:	2. When the Chapter 13 Plan is confirmed:	3. When the Chapter 13 Plan is completed as to secured debt (such as a mortgage account):
● CII (Consumer Information Indicator) = Blank (previous value reported is retained) or D (Petition for Chapter 13 Bankruptcy) ● Account Status = status at time of petition ● Payment History = increment first position with value 'D' (plus history reported prior to BK filing) ● Current Balance = outstanding balance amount ● Scheduled Monthly Payment Amount = contractual monthly payment amount ● Amount Past Due = dependent on status ● Date of Account Information = current month's date	● CII = Blank or D ● Account Status = status at time of petition ● Payment History = increment with value 'D' (plus prior months' history) ● Current Balance = Chapter 13 Plan balance or, if no confirmed amount is received from the bankruptcy court, the outstanding balance. This amount should decrease monthly as payments are made. ● Scheduled Monthly Payment Amount = Chapter 13 plan payment amount ● Amount Past Due = zero ● Date of Account Information = current month's date ● Terms Duration & Terms Frequency = report changed values, if applicable	● CII = Q (Removes previously reported Bankruptcy Indicator … Also used to report Bankruptcies that have been closed or terminated without being discharged or dismissed.) ● Account Status = status that applies ● Payment History = first month, increment first position with value 'D'; in subsequent months, increment based on prior month's status ● Current Balance = outstanding balance amount ● Scheduled Monthly Payment Amount = updated contractual monthly payment amount ● Amount Past Due = dependent on status ● Date of Account Information = current month's date

CDIA reporting guidelines seem to support the conclusion of *In re Rodriguez* in that the post-discharge status of the mortgage for a primary residence can be accurately reported, even where it is delinquent after pre-petition arrears are cured and the discharge is entered. Since pre-petition arrears are assumed to be cured through the Chapter 13 Plan, those would not be reported.[4]

Unfortunately, the case law in this area is mixed. **Compare** *Torres v. Chase Bank USA, N.A. (In re Torres)* 367 B.R. 478, 486 (Bankr. S.D.N.Y. 2007) (collecting cases and recognizing that a report to a CRA, even without other acts to collect the debt (such as auto-dialer calls or dunning letters) can "constitute an act to extract payment of a debt in violation of Section 524(a)(2).") with *In re Mahoney*, 368 B.R. 579, 589 (Bankr. W.D. Tex. 2007) ("[R]eporting of a debt to a credit reporting agency—without any evidence of harassment, coercion, or some other linkage to show that the act is one likely to be effective as a debt collection device—fails to qualify on its own as an 'act' that violates section 524."); *In re Irby*, 337 B.R. 293, 296 (Bankr. N.D. Ohio 2005) ("[T]he Court cannot conclude[] that [] the sole act of reporting a debt . . . violates the discharge injunction."); *In re Vogt*, 257 B.R. 65, 71 (Bankr. D. Colo. 2000) ("False reporting, if not done to extract payment of the debt, is simply not an act proscribed by the Code."). *In Irby*, *supra*, at 295, the court explained that although a discharge eliminates a debtor's personal liability for the debt, it does not eliminate the debt itself. Conversely, *In re Torres*, *supra*, held:

> [A] credit report that continues to show a discharged debt as 'outstanding,' 'charged off,' or 'past due' is unquestionably inaccurate and misleading, because end users will construe it to mean that the lender still has the ability to enforce the debt personally against the debtor, that is, that the debtor has not received a discharge, that she has reaffirmed the debt notwithstanding the discharge, or that the debt has been declared non-dischargeable.

Continued on page 9

The New Bankruptcy Trend (continued from page 8)

As suggested by the court in *Lance v. PNC Bank, N.A.*, 2015 U.S. Dist. LEXIS 122676 at *8-9 (D. Mass, Sept. 15, 2015), it may be possible to reconcile these seemingly disparate views by holding that, *absent a showing of additional coercive conduct* (as was the case in *In re Torres*), credit reporting alone is not enough of a basis to impose liability under § 524 (a), especially if the reporting is otherwise accurate.

Thus far, the Ninth Circuit (covering California, Nevada and most of the West Coast) has been silent on whether reporting a balance to a CRA constitutes an attempt to collect a debt and it is unclear whether it will favor the approach of *In re Torres* or that of *In re Irby*, *In re Mahoney*, and *In re Vogt*. However, in *Mortimer v. Bank of Am., N.A.*, 2013 U.S. Dist. LEXIS 51877 at *27-32 (N.D. Cal. Apr. 10, 2013), the district court's analysis at least suggests that accurate reporting will still be protected.

Unfortunately, when it comes to post-discharge credit reporting, FCRA violations are not the Servicer's only concern. A separate but equally pressing question remains as to whether reporting secured debt to a CRA following the bankruptcy discharge is an improper attempt to collect that debt might run afoul of the Fair Debt Collection Practices Act ("FDCPA"). *See Haynes v. Chase Bank USA, N.A.*, 2015 U.S. Dist. LEXIS 27400 (S.D.N.Y. Mar. 5, 2015). Here, too, the Ninth Circuit has yet to rule though several district courts within the Circuit appear to have adopted the rule that the FDCPA does not apply to mortgage foreclosures as they are not debt collection. *See, e.g. Hulse v. Ocwen Fed. Bank,* 195 F.Supp.2d 1188, 1204 (D. Or.2002). Any such claims would need to be pursued in district court as they would be beyond the bankruptcy court's jurisdiction post-discharge. *See Hye Rhee Kong v. Kelkris Assocs.*, 2013 Bankr. LEXIS 5493 at *8-9 (Bankr. N.D. Cal. Nov. 15, 2013).

Where does all of this analysis leave us? Unfortunately, there is no easy answer and it is often not worth the cost to litigate the issue on a one-off basis. This is exactly what attorneys like David Krieger (NV) and others hope – that rather than litigate an unsettled question of law, Servicer's will settle each individual lawsuit for $3k - $5k. With that mindset, they file case after case, often filing separate lawsuits for the husband and wife and separate lawsuits based on each credit report, i.e., Experian and Equifax. Until the case law is settled and someone stands up to these repeat filings, this practice is likely to continue.

To discuss these issues further or for post-discharge litigation or compliance issues, please contact Robert Finlay at rfinlay@wrightlegal.net.

---

[1] *See*, 11 U.S.C. § 523 for a list of debts that are excepted from discharge of personal liability.

[2] Accordingly, as a prudent, proactive, protection measure, all notices and billing statements <u>must</u> contain a conspicuous disclaimer that if the debt was discharged in bankruptcy the document does not act to collect the debt from the borrower.

[3] http://www.nolo.com/legal-encyclopedia/can-debts-discharged-bankruptcy-appear-my-credit-report.html.

[4] Note: a confirmed chapter 13 plan is binding on creditors. See, e.g., *Trulis v. Barton (In re Trulis),* 107 F.3d 685 (9th Cir.1995) (once a plan is confirmed it has res judicata effect on all parties and questions pertaining to the plan); *Lawrence Tractor Co. v. Gregory (In Matter of Gregory),* 705 F.2d 1118 (9th Cir.1983) (recognizing finality of confirmed plans); *Great Lakes Higher Education Corp. v. Pardee (In re Pardee),* 193 F.3d 1083 (9th Cir.1999) (confirmed plan will be recognized as final even if the provisions of the plan would not be permitted by Code).

Renee M. Parker, Esq.
rparker@wrightlegal.net

T. Robert Finlay, Esq.
rfinlay@wrightlegal.net

A FAVORABLE SPIN ON *SPOKEO*:

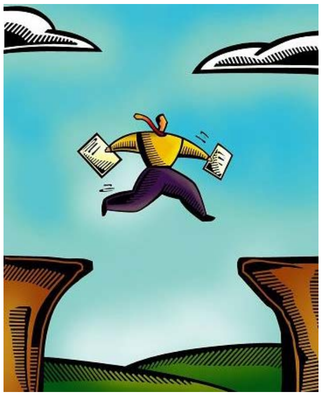
RAISING THE BAR FOR PLEADING FCRA AND FDCPA CLAIMS

by Sean N. Payne, Esq. and Jonathan D. Fink, Esq.

The United State Supreme Court's recent opinion in *Spokeo, Inc. v. Robins*, ___ U.S. ___, 136 S. Ct. 1540 (2016), raises the bar for plaintiffs seeking statutory damages for violations of federal statutory rights. Plaintiffs can no longer plead bare statutory violations unaccompanied by any allegation of an actual injury in fact. While the holding has the potential to impact a wide array of industries, it has particular relevance for mortgage loan servicers and financial institutions. This decision comes as a breath of fresh air, particularly in a climate where mortgage loan servicers and financial institutions have experienced a steady increase in litigation commenced by borrowers and consumers seeking statutory damages for alleged, "technical" violations of the Fair Credit Reporting Act (FCRA) and Fair Debt Collection Practices Act (FDCPA).

A fundamental requirement for maintaining an action in federal court is standing; absent standing, the court lacks subject matter jurisdiction. To satisfy the "irreducible constitutional minimum" of standing, a plaintiff bears the burden of demonstrating (1) an injury in fact; (2) that is fairly traceable to the challenged conduct of the defendant; and (3) that is likely to be redressed by a favorable judicial decision. *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 560-561, 112 S. Ct. 2130 (1992).

In *Spokeo, Inc.*, the plaintiff sued Spokeo, Inc., claiming it was a consumer reporting agency, for allegedly reporting inaccurate information about him that he alleged actually harmed his employment prospects, costing him money. The district court for the Central District of California dismissed the case due to plaintiff's failure to plead an injury in fact, reasoning that plaintiff lacked standing because the alleged harm to his employment prospects was too speculative to satisfy Article III standing requirements. The Ninth Circuit reversed, holding that an alleged violation of plaintiff's statutory rights is sufficient to satisfy Article III's injury in fact requirement. The Supreme Court granted certiorari to analyze whether Congress may confer Article III standing upon a plaintiff who has suffered no concrete harm, and who therefore could not otherwise invoke federal jurisdiction, by authorizing a private right of action based on a bare violation of a federal statute.



The Supreme Court reversed the Ninth Circuit, holding that: "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.' Lujan, 504 U.S., at 560" *Spokeo, Inc.* ___ U.S. at ___, 136 S. Ct. at 1548. The Court then went on to explain that: "For an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.' Ibid., n. 1" and that "A 'concrete' injury must be 'de facto'; that is, it must actually exist." *Spokeo, Inc. supra*, 136 S.Ct. at 1548.

The Court did caution, though, that the term "concrete" was not synonymous with the word "tangible" and intangible injuries could suffice as long as they could be found to result in potential harm. However, a mere technical violation of a procedural provision of FCRA would *not* suffice. By way of example, the Court noted that providing an incorrect Zip Code for a consumer would be a violation (as inaccurate information about the consumer) but could not conceivably lead to remediable harm. Similarly, a failure to provide a user of the information with a statutorily required notice would not itself negate the accuracy of that information.

The reason for this is simple: "Article III standing requires a concrete injury even in the context of a statutory violation." *Spokeo, Inc.*, ___ U.S. at ___, 136 S. Ct. at 1549. Congress cannot circumvent this Constitutional requirement by "statutorily granting the right to sue to a plaintiff who would not otherwise have standing." Id. Accordingly, a plaintiff cannot "allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." Id.

Continued on page 11

A Favorable Spin (continued from page 10)

This decision has important ramifications for all cases wherein plaintiffs are seeking statutory damages for alleged violations, not just of the FCRA – which was the statute at issue in *Spokeo, Inc.* – but also for claims brought under the FDCPA and other statutes governing financial institutions. Counsel for loan servicers and other financial institutions would do well to re-evaluate all pending and future FCRA (and FDCPA) litigation in light of the holding in *Spokeo, Inc.*, and determine whether plaintiffs have indeed plead an actual injury in fact. If plaintiffs are basing their claims solely on technical violations of these federal statutes, defendants should consider seeking dismissal rather than doling out thousands of dollars to settle claims in an effort to avoid litigation.

If you have any questions about the holding in *Spokeo* or its impact on an existing or potential claim, please contact Jonathan Fink at jfink@wrightlegal.net.

Sean N. Payne, Esq.
spayne@wrightlegal.net

Jonathan D. Fink, Esq.
jfink@wrightlegal.net

WFZ PROFILE:
RYAN M. CARSON, ESQ.
MANAGING ATTORNEY, WASHINGTON OFFICE

Ryan M. Carson, Esq.
rcarson@wrightlegal.net

Ryan M. Carson, Esq. manages Wright, Finlay & Zak's growing Washington practice, which is located in Seattle. Mr. Carson focuses his practice in the field of real estate, representing clients in mortgage banking, loan servicing and other foreclosure litigation matters in the State of Washington. In his eight years of litigation experience, Mr. Carson established a Washington branch of a national law firm, advised banks, loan servicers and trustees on compliance with state and federal law applicable to foreclosure matters and has mediated a substantial number of Washington Foreclosure Fairness Act mediations.

Mr. Carson's experience with litigated disputes derives from three different phases of his career to date. He has worked inside the court system as a clerk for Justice Susan Owens of the Washington State Supreme Court, where he developed a keen sense for how judges evaluate the strength and weaknesses of various types of argument, and what pragmatic considerations go into a judge's decision making process. His practice began in high-value personal injury, environmental, and civil rights cases. In 2011, his practice changed and he began defending the rights of lending institutions, trustees, and loan servicers, which has remained his focus ever since.

Having practiced in all three dimensions of litigated disputes, Mr. Carson brings a unique perspective to defending and prosecuting the rights of the firm's clients. From his time in practice, Mr. Carson has established a thoughtful and circumspect style while maintaining his commitment to strong advocacy with a constant eye on beneficial resolution for the firm's clients.

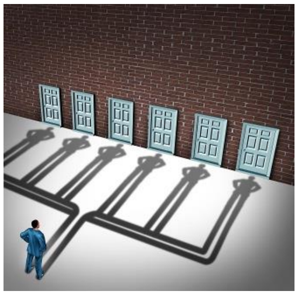
Mr. Carson is also licensed to practice in Nevada.

CRITICAL MASS:

PRACTICAL LIMITS ON JOINDER

by Magdalena D. Kozinska, Esq.

For the past several years, a popular ploy among some borrowers' lawyers seeking to challenge their clients' real estate secured loans has been to bring "mass joinder" lawsuits. These are actions in which a multitude of plaintiffs seek to bring together in one complaint what should have been separate actions as they involve different borrowers and properties spread all across the State and, indeed, often include borrowers and Properties from other States. Sometimes, the only nexus with California is that the plaintiffs' attorney is located there.



A "mass action" differs from a "class action" as, in a "mass action," there are not multiple claimants arising out of the same incident or series of incidents. In a "mass action," each *plaintiff's* claim must be analyzed separately and cannot simply bootstrap off of the existence of other, similar claims by other plaintiffs. The advantages of a "mass action" are that it enables what would otherwise be individual lawsuits to be brought under one caption as a cost-sharing device to maximize the profit of Plaintiffs' counsel and to minimize Plaintiffs' individual expense. Usually, each plaintiff pays a monthly, fixed fee to participate in the "mass action." However, as the fee is not tied to actual work being performed, there is little incentive for plaintiffs' counsel to do any more work than is necessary to keep the case alive for as long as possible. From the borrowers' perspective, especially, if they are seeking a loan modification or otherwise trying to avoid foreclosure, this is not necessarily a bad thing as it often keeps them in their homes longer than a more active approach might achieve and gives them further opportunities to obtain loss mitigation options from the lender or servicer.[1]

Although the model of the pleading, and the theories of recovery asserted, has varied over time (trying to adapt after each successful defense decision), typically, the complaint includes a disparate array of dozens of borrowers who seek to assert generic claims against the lender or servicer. Notably, the complaint includes few actual, individual facts provided for each plaintiff. Indeed, it is not uncommon for the pleadings to merely include the individual borrower's name and loan number, attempting to hide their residence and the property's location to minimize the cost as well as the risk of removal to the federal courts—which have tended to be particularly hostile to the tactic—and/or challenges based on venue and jurisdiction. For this reason, most recent iterations of the mass action complaint specifically do not include any federal claims and limit the number of plaintiffs to avoid reaching the minimums needed for removal under the Class Act Fairness Act. Some of the mass action complaints have even gone so far as to expressly state that they are waiving any recovery in excess of $75,000 as to each plaintiff in order to avoid the possibility of removal.

On June 12, 2014, a Los Angeles Superior Court Judge brought together as related actions 22 of these mass joinder lawsuits that were pending in that Court (involving a total of approximately 222 plaintiffs), as they were all brought by the same law firm (RELC) and all alleged the same cookie cutter claims albeit against different financial institutions. After relating the 22 mass action lawsuits, the Superior Court ordered Plaintiffs to file and serve one Omnibus Complaint, incorporating all the related mass action lawsuits. On June 30, 2014, RELC filed the Omnibus Complaint, alleging causes of action for: (1) Fraud; (2) Conspiracy to Commit Fraud; (3) Conversion; (4) Conspiracy to Convert; (5) Violation of Rosenthal Act (Civil Code § 1788 et seq.); (6) Unfair Business Practices (Bus. & Prof. Code § 17200); and (7) Unjust Enrichment. The Omnibus Complaint was devoid of individual facts and, instead, relied on similar cookie cutter allegations as its predecessors. The various Defendants demurred to the Omnibus Complaint and the Superior Court sustained the demurrers without leave to amend holding that: "after four attempts to allege a justiciable action, the Court finds that there is no reasonable possibility that additional amendment will change that basic characteristic of this action." RELC appealed this decision.

Continued on page 13

Critical Mass (continued from page 12)

The Court of Appeal affirmed the Superior Court's judgment in a recently published opinion, *Aghaji v. Bank of Am., N.A.*, No. B261971, 2016 Cal. App. LEXIS 431 (May 31, 2016). Notably, the Court of Appeal held that the claims in mass action lawsuits were misjoined under Code of Civil Procedure § 378 because the claims arose from distinct transactions presenting different issues of fact. The Court also upheld the rule that "California's unfair competition law does not apply extraterritorially" therefore, requiring plaintiffs who are not California residents to allege facts to show that the alleged violations occurred within California.

Although both welcome and correct, the Appellate Court's decision is somewhat surprising as the Superior Court had expressly declined to focus on the issue of misjoinder despite Defendants' attempts to assert it. Pursuant to *Code of Civil Procedure* § 378, plaintiffs may join in one action if "[t]hey assert any right to relief jointly, severally, or in the alternative, in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action." *Aghaji*, *supra* at *21. Here, however, based on the Plaintiffs' allegations, the Court of Appeal held that "Each of these claims clearly arises from a different transaction or occurrence and presents distinct questions of law or fact. Therefore, even if plaintiffs presented sufficient facts to state valid UCL claims (which they did not), they could not be presented in a joint action under section 378." *Aghaji*, *supra* at *24. For support, the Court of Appeal cited to "*Visendi v. Bank of America, N.A.* (9th Cir. 2013) 733 F.3d 863, 870 [finding misjoinder under Fed. Rules of Civ.Proc., rule 20 (28 U.S.C.) in case involving allegations of invalid assignment of mortgages, noting that "Plaintiffs own separate and unrelated properties across the country, they entered into separate loan transactions, and their dealings with Defendants were necessarily varied. Nothing unites all of these Plaintiffs but the superficial similarity of their allegations and their common choice of counsel. Further, the three claims that Plaintiffs now assert—invalid assignment, mistake, and negligence—each require particularized factual analysis. Plaintiffs merely allege that Defendants violated the same laws in comparable ways. Rule 20(a) requires more"]." *Aghaji*, *supra* at *22-23.

Based on the ruling in *Aghaji*, it has now become exponentially more difficult for future mass joinder claims to survive a dispositive pleading motion, particularly where they rely merely on generic allegations, as the misjoinder concerns are now likely to prove fatal. While *Aghaji* probably does not peal the death knell for mass joinder actions, it certainly should toll their use as a litigation tactic.

Magdalena D. Kozinska, Esq.
mkozinska@wrightlegal.net

[1] Nonetheless, some of the lawyers who have been active proponents of "mass joinder" actions have been disciplined or face charges as a result of investigations that have determined that they offer little actual value to the borrowers and, in some instances, were initiated and maintained without the borrowers' knowledge and consent, were fraudulent, and/or made matters worse. *See https://www.ftc.gov/news-events/press-releases/2016/06/ftc-halts-california-based-mortgage-relief-scam*

UPCOMING INDUSTRY EVENTS

August 14-16	CMBA	21st Annual Western States Loan Servicing Conference	San Diego, CA
September 7-9	CMBA	19th Annual Western States CREF Conference	Las Vegas, NV
September 11-13	Five Star	Five Star Conference and Expo	Dallas, TX
September 26-27	ACI	Residential Mortgage Regulatory Enforcement & Litigation	Dallas, TX
October 23-26	MBA	Annual Convention & Expo	Boston, MA
November 6-8	UTA	41st Annual Educational Conference	La Quinta, CA

A CAUTIONARY DNMS TALE:

BAE V. T.D. SERVICE COMPANY

by Marvin B. Adviento, Esq. and T. Robert Finlay, Esq.

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

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

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

"…trustees and counsel must remain vigilant and periodically check the docket to ensure that an unwitting clerk has not been lulled into rubber-stamping a default or default judgment and to prevent plaintiffs' counsel from doing an end-run past the DNMS to obtain judgment."

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

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

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

The Court of Appeals went through an extensive analysis of the grounds for obtaining relief from default and default judgment, and it reviewed the trial court's order from the perspective of a court's inherent authority to vacate a default and default judgment on equitable grounds such extrinsic fraud or extrinsic mistake under *Rappleyea v. Campbell* (1994) 8 Cal.4th 975. Specifically, the appellate court considered extrinsic mistake, available here when the clerk or trial court erred in entering default and default judgment. Under *Rappleyea*, the appellate court examined whether the circumstances met a "stringent three-part formula":

1) Was there a meritorious defense?
2) Was there a satisfactory excuse for not presenting its defense?
3) Was TD Service diligent in seeking to set aside default and default judgment?

The appellate court resoundingly agreed that the facts met all three factors.

Continued on page 15

A Cautionary DMS Tale (continued from page 14)

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

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

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

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

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

Marvin B. Adviento, Esq.
madviento@wrightlegal.net

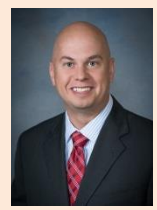
T. Robert Finlay, Esq.
rfinlay@wrightlegal.net

WFZ FIRM NEWS

WFZ'S GROWING UTAH PRACTICE IN THE NEVADA OFFICE

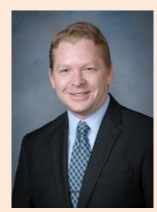
The WFZ Utah Team now has 4 attorneys based out of the Nevada office. Our practice in Utah continues to grow at a steady pace. In addition to the standard residential mortgage banking litigation we are able to handle commercial banking litigation, probate, estate planning, transactional, entity formation, commercial landlord-tenant, construction, bankruptcy and business operations cases. Please let us know if we can assist you with any of these issues in Utah.

WFZ WELCOMES ITS NEW ATTORNEYS



MICHAEL S. KELLEY
Mr. Kelly joins our Las Vegas office and brings litigation experience in commercial and business matters, ranging from small court disputes to multi-million dollar disputes and their subsequent appeals. His experience also includes a diverse commercial litigation practice, including contract, construction, partnership disputes, and deficiency actions. Mr. Kelley is licensed to practice in Nevada and Utah.

JAKE R. SPENCER
Mr. Spencer joins our Las Vegas office and brings litigation experience in commercial and real estate matters, with an emphasis on lender and servicer liability defense, wrongful foreclosure defense, HOA lien law and general commercial litigation matters. Mr. Spencer is licensed to practice in Nevada and Utah.



J. STEPHEN DOLEMBO
Mr. Dolembo joins our Las Vegas office and brings litigation experience in civil matters and served as in-house defense counsel for a major insurance carrier. He also brings litigation experience in real estate matters, including lender and servicer liability defense, wrongful foreclosure defense, fair debt collection practices defense, title disputes, and general commercial litigation and contract negotiation. Mr. Dolembo is licensed to practice in Nevada.

JOHN J. DALLER
Congratulations to former WFZ law clerk, John J. Daller, who passed the California State Bar Exam and has joined our Newport Beach office. Mr. Daller earned his B.A. degree in Political Science from the University of California, Riverside; M.A. degree in Kinesiology from California State University, Long Beach; and his J.D. from University of California, Davis. His practice includes Litigation and representation involving lender and servicer liability defense, wrongful foreclosure defense, fair debt collection practices defense, and title disputes. Mr. Daller is licensed to practice in California.

THE WFZ QUARTERLY is published quarterly and distributed via email. The views expressed in this newsletter should not be relied upon as legal advice. Please consult your own counsel before relying on any information provided in this newsletter. If you have any questions, comments or suggestions for future articles, please send an email to wfznews@wrightlegal.net.