WRIGHT, FINLAY & ZAK, LLP

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WRIGHT, FINLAY & ZAK CERTIFIED BY THE WOMEN'S BUSINESS ENTERPRISE NATIONAL COUNCIL (WBENC)

Wright, Finlay & Zak is very pleased to announce that it has received national certification as a Women's Business Enterprise by the Women's Business Enterprise Counsel-West, a regional certifying partner of the Women's Business Enterprise National Council (WBENC). With its new certification, Wright, Finlay & Zak has also applied to join The National Association of Minority & Women Owned Law Firms (NAMWOLF).

WBENC's national standard of certification is implemented by the Women's Business Enterprise Counsel-West and involves a meticulous process including an in-depth review of the business and site inspection. The certification process is designed to confirm the business is at least 51% owned, operated and controlled by a woman or women. By including women-owned businesses among their suppliers, corporations and government agencies demonstrate their commitment to fostering diversity and the continued development of their supplier diversity programs.

"We are both excited and proud to count Wright, Finlay & Zak as one of the 13,500 certified WBEs in the U.S.," said Pamela S. Williamson, Ph.D., President/CEO, Women's Business Enterprise Council – West.

Robin Wright, Managing Partner and co-founding partner of Wright, Finlay & Zak, said, "We appreciate and honor the significance of this important certification. We wholeheartedly believe in WBENC's mission to promote diversity and facilitate the development of women-owned businesses, as we apply its principles to better serve our clients and business community."

In this Issue

UPCOMING INDUSTRY EVENTS

Aug. 30-Sep. 1	ATA	30th Annual Arizona Trustee Association Convention	Sedona, AZ
September 6-8	CMBA	20th Annual Western States CREF Conference	Las Vegas, NV
September 11-13	Five Star	Five Star Conference and Expo	Dallas, TX
September 17-19	MBA	Regulatory Compliance Conference	Washington, DC
October 22-25	MBA	Annual Convention & Expo	Denver, CO
October 26-27	CMA	2017 Fall Seminar	Las Vegas, NV

ARE YOU IN OR ARE YOU OUT?

THE NITTY-GRITTY ON NEVADA PROPERTY TAX SALES

by Sarah E. Greenberg Davis, Esq.

Yikes! What do you mean no one paid the Nevada property taxes for over two years? What do you mean the property is deeded to the County Treasurer? Is the mortgage lost? Can I redeem? What do I do now? Not questions anyone wants to be asking themselves. But chances are most of you reading this article have dealt with at least one Nevada property containing the unpleasant surprise of unknown unpaid property taxes.

In Nevada, the property tax sale process, which is governed by Nev. Rev. Stat. Sections 361.570-620, is a complex process which can take years to complete. To make matters worse, Nevada creates extra confusion because a deed is created even though the property may not yet be lost.

In general, Nevada counties proceed to sale on properties that are at least 2½ years delinquent on their taxes. The first step in the counties' process is issuance of a tax certificate. If taxes for a property are delinquent at 5:00 p.m. on the first Monday in June, the local tax receiver issues to the County Treasurer a certificate to hold the property in trust, subject to a two year redemption period, running from the date the receiver issues the certificate. If no cure is made within the redemption period, the property is deeded to the Treasurer as trustee for the County and the State and the County may then sell or auction off the property. Once the property is deeded to the Treasurer, redemption rights are more limited, and depend mainly on whether or not a tax sale has been scheduled. But once the property is sold by the Treasurer, the sale is final and absolute, and no redemption is possible.

When can I redeem?

A tax sale cannot be scheduled until the two year tax certificate redemption period expires and the property is first deeded to the local County Treasurer. The right to redeem during this two year redemption period is absolute. A mortgagor redeems the property by payment of past due taxes and penalties anytime within two years from the date the tax certificate is issued to the County.

However, once deeded to the County Treasurer, the redemption rights are more limited and mostly depend on whether or not the County Treasurer has scheduled the property for sale. If no sale is scheduled, the mortgagor generally only needs to contact the County Treasurer and obtain a payoff amount.

If a sale has been scheduled, the analysis is more complicated. In order to sell a property, Nevada statute requires the County Treasurer send notice of the tax sale by certified mail to the owner and all lienholders. This notice of sale impacts the right to redeem in very significant ways. First, the right to redeem is cut off three business days before the property's actual sale date. Second, and even more importantly, the right to redeem is lost 90 days after service of the notice of sale. Thus, even if the sale date is postponed for any reason, the owner/lender may still lose the right to redeem based on the service date of the notice of sale.

A County Treasurer might nonetheless be willing to accept a redemption payment even after the right to redeem expired, BUT they are not required to do so, and may legally reject your payment. Do not rely on the kindness of the County Treasurer. If you receive a sale notice, act quickly to redeem and protect your interest.

If the property has already been sold at tax sale, repurchase from the successful bidder is the only mechanism available to recover the property; however, the successful bidder is under no obligation to sell the property back to you as the mortgage liens have been extinguished at this point. **There is no redemption period once the properties are sold at tax sale.**

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Are You In or Are You Out? (continued from page 2)

How Do I Redeem?

If you are within the two year tax certificate redemption period, contact the County Treasurer's office and tender payment of the amount specified. If the property has been deeded to the County, but not yet sold at auction, contact the County Treasurer and determine if a Notice of Sale has been served. If within 90 days from the service date of the Notice of Sale, and more than three days before the scheduled sale date, tender the redemption amount to the County Treasurer.

If a Notice of Sale was served and you are past 90 days from the service date, ask the County Treasurer if you may still redeem. Be prepared that they may say no, particularly if a sale date is upcoming. In our experience, counties will usually allow redemption on properties that were offered at tax sale but received no bids, as long as the redemption is made prior to the property being listed on an upcoming tax sale auction list. Clark County, which includes the City of Las Vegas, generally sells properties twice during the year, once in spring and once in fall. Other counties will vary in the frequency and timing of sales.

Consequence of a Tax Sale

As stated above, no redemption period exists once the property is sold at tax sale. The successful bidder takes title free and clear of any existing mortgage or lien (excluding utility, city and government liens, all of which survive the sale). The County Treasurer will usually provide you with the contact information of the successful bidder if you wish to pursue a repurchase. However, any repurchase is likely to be at market value and the prior mortgage no longer exists.

We hope you never need the above advice; but if you do, please contact counsel to assist as soon as possible.

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Sarah Greenberg is an associate in WFZ's California Office and licensed to practice in California. This article was written with input from WFZ's Nevada Legal Team.

THE FIZZLED FUSE:

YVANOVA – 18 MONTHS LATER

by Joshua R. Hernandez, Esq.

On February 18, 2016, the California Supreme Court published its highly anticipated (and, depending on which side you were rooting for, much hoped or feared) opinion in the matter of *Yvanova v. New Century Mortg. Corp.*, 62 Cal. 4th 919 (2016). The Court had sought to contain expectations by expressly limiting its review to a single issue: "In an action for wrongful foreclosure on a deed of trust securing a home loan, does the borrower have standing to challenge an assignment of the note and deed of trust on the basis of defects allegedly rendering the assignment void?"

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The Fizzled Fuse (continued from page 3)

Despite the narrow question being weighed, interest groups on both sides of the issue awaited the answer with great eagerness as it was nonetheless the threshold question which determined whether borrowers could tie up thousands of foreclosures with minimal effort. Several amicus briefs were filed for each side, predicting dire consequences should the Court rule in favor of the other side. Ultimately, though, even though the Court unanimously answered the specific question it had posed in the affirmative, the decision was filled with so many conditions and exceptions that the *Yvanova* opinion has turned out not to be as industry-shaking as consumers' counsel had hoped, nor as devastating as lenders' counsel had feared. This has become ever more apparent as lower California State courts and Federal courts have continued to weigh in on the effect of the *Yvanova* decision.

In *Yvanova*, the California Supreme Court made what was, intentionally, a very narrow ruling: "Our ruling in this case is a narrow one. We hold only that a borrower who has suffered a nonjudicial foreclosure does not lack standing to sue for wrongful foreclosure based on an allegedly void assignment merely because he or she was in default on the loan and was not a party to the challenged assignment." *Yvanova*, *supra*, at 924. In so holding, the court approved *Glaski v. Bank of America*, 218 Cal.App.4th 1079 (2013), an opinion that, until *Yvanova*, had been widely rejected in the State and Federal courts in California. *See*, *Pannabecker v. U.S. Bank N.A.*, 2015 U.S. Dist. LEXIS 27300, at *11 (C.D. Cal. Mar. 5, 2015) ("Glaski has been rejected by the majority of courts in California." (citing cases))." Further, the *Yvanova* Court expressly disapproved several leading cases on the issue, including *Jenkins v. JPMorgan Chase Bank, N.A.*, 216 Cal. App. 4th 497 (2013) and *Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal. App. 4th 256 (2011), but only to the extent that those cases had held borrowers lack standing to challenge a void assignment of the deed of trust. *Yvanova, supra*, at 939 n. 13.

> ***"…one of the major questions left unanswered by Yvanova was whether an assignment of a deed of trust recorded after the closing date of the securitized trust to which it was assigned is void, or merely voidable?"***

Underscoring this point, the *Yvanova* opinion cautioned: "We do not hold or suggest that a borrower may attempt to preempt a threatened nonjudicial foreclosure by a suit questioning the foreclosing party's right to proceed." *Yvanova*, *supra*, at 924. Accordingly, the *Yvanova* court left *Jenkins*' holding on this issue entirely untouched: "This aspect of *Jenkins*, disallowing the use of a lawsuit to preempt a nonjudicial foreclosure, is not within the scope of our review, which is limited to a borrower's standing to challenge an assignment in an action seeking remedies for *wrongful foreclosure*." *Yvanova*, *supra*, at 934 (emphasis in original). Accordingly, *Jenkins* is still good law for the rule that California does not recognize a preemptive pre-foreclosure lawsuit by a borrower challenging a lender's authority to foreclose. Perhaps even more notably, *Yvanova* also discussed *Kan v. Guild Mortg. Co.*, (2014) 230 Cal.App.4th 736, which had rejected borrower standing in a pre-foreclosure challenging the right to foreclose, and found that *Kan* was distinguishable from *Glaski*, *supra*, because *Glaski* was a post-foreclosure action, while *Kan* was a pre-foreclosure action. *Yvanova, supra*, at 941. The court in *Kan*, *supra*, at 745 had itself recognized this distinction in its own opinion: "Because California's nonjudicial foreclosure statutes provide Kan with no basis to challenge the authority of the entity initiating the foreclosure process, respondents' demurrer was properly sustained." Accordingly, "As explained in *Jenkins*…, allowing a plaintiff to assert a preemptive action like the one [plaintiff] proposes 'would result in the impermissible interjection of the courts into a nonjudicial scheme enacted by the California Legislature.'" *Kan*, *supra*, at 743, *citing*, *Jenkins*, *supra*, at 513. The *Yvanova* Court *did not* disapprove of either the holding in *Kan* or that in *Jenkins* regarding borrowers' lack of standing to bring preemptive lawsuits.

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The *Yvanova* opinion also declined to rule on a key issue that has since been repeatedly addressed by the lower State courts and the Federal courts in the Ninth Circuit in the near 18 months since *Yvanova* was published. Many borrowers, including Ms. Yvanova, argued the foreclosure was wrongful based on defects in the securitization of the loan. Their argument typically flows along the lines that the assignment of deed of trust was void because it was assigned after the closing date of the securitized trust specified in the trust's pooling and servicing agreement ("PSA") and the State law governing the trusts (often New York law) and/or the Federal statutes concerning the tax treatment of the trusts prohibited such late assignments. Although *Glaski supra*, at 1096-1098, had also held that, at least at the pleading stage, it was sufficient to allege that such an assignment was void, the Supreme Court in *Yvanova* chose to side-step that issue as well: "We did not include in our order the question of whether a postclosing date transfer into a New York securitized trust is void or merely voidable, and though the parties' briefs address it, we express no opinion on the question here." *Yvanova*, *supra*, at 931. Thus, one of the major questions left unanswered by *Yvanova* was whether an assignment of a deed of trust recorded after the closing date of the securitized trust to which it was assigned is void, or merely voidable?

The Court of Appeal in *Saterbak v. JPMorgan Chase Bank, N.A.*, 245 Cal. App. 4th 808 (2016) was the first published decision to weigh in on this issue, less than a month after *Yvanova* was handed down. The borrower in *Saterbak* had sued to stop the pending foreclosure sale, arguing that the assignment of the deed of trust was void as it was made after the securitized trust's closing date pursuant to its PSA. The *Saterbak* court rejected this claim, holding that the borrower lacked standing to pursue these theories. *Saterbak*, *supra*, at 814. The court recognized that because this lawsuit was in the pre-sale context, *Yvanova* did not apply. *Saterbak*, *supra*, at 815. Although plaintiff's lawsuit failed on that issue alone, the court went on to address the issue of whether her allegations of a late assignment rendered the document void or voidable. The *Saterbak* court concluded that "an untimely assignment to a securitized trust made after the trust's closing date…is merely voidable." *Saterbak*, *supra*, at 815. Therefore, plaintiff lacked standing to challenge the alleged defects in the assignment of deed of trust.

About three months after *Yvanova*, the Court of Appeal in *Sciarratta v. U.S. Bank Nat'l Assn.*, 247 Cal. App. 4th 552 (2016) issued a more borrower-friendly opinion. In *Sciarratta*, the borrower claimed that the lender foreclosed under a void assignment. Here, the court looked at the chain of recorded assignments and found a legitimate break whereby the assignment to the foreclosing party was actually done by the assignor who had *already previously assigned* the deed of trust to another entity. The court concluded that the assignment was therefore void, and not merely voidable. *Sciarratta*, *supra*, at 564. Accordingly, because this was a post-sale action involving a void assignment, this plaintiff has standing to sue for wrongful foreclosure under *Yvanova*. *Sciarratta*, *supra*, at 565. The *Sciarratta* court also addressed an issue not answered by *Yvanova*, which is whether such facts sufficiently prejudice a borrower, which is an element of the tort of wrongful foreclosure. The *Yvanova* court chose not to address "any of the substantive elements of the wrongful foreclosure tort or the factual showing necessary to meet those elements." *Yvanova*, *supra*, at 924. In *Sciarratta*, on the other hand, the court weighed in on the element of prejudice, and held "a homeowner who has been foreclosed on by one with no right to do so—by those facts alone—sustains prejudice or harm sufficient to constitute a cause of action for wrongful foreclosure." *Sciarratta*, *supra*, at 555.

On July 29, 2016, the Court of Appeal in *Yhudai v. IMPAC Funding Corp.*, 1 Cal. App. 5th 1252 (2016) issued a similar ruling as the *Saterbak* court, but, significantly, this time, in the post-foreclosure context. On appeal, the plaintiff's sole contention as to the invalidity of the foreclosure sale was that the assignment of deed of trust was void because it occurred after the securitized trust's closing date pursuant to its PSA, which here was governed by New York law. After reviewing *Yvanova*, and the applicable New York case law interpreting New York trust law, the court concluded that "a postclosing assignment of a loan to an investment trust that violates the terms of the trust renders the assignment voidable, not void, under New York law." *Yhudai*, *supra*, at 1259. Accordingly, the court held that plaintiff lacked standing to sue.

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The Fizzled Fuse (continued from page 5)

On the same day the *Yhudai* opinion was filed, the Court of Appeal in *Yvanova* issued its opinion following the Supreme Court's remand of the matter. Unfortunately, the opinion was unpublished. *See*, *Yvanova v. New Century Mortg. Corp.*, 2016 Cal. App. Unpub. LEXIS 5622 (Ct. App. July 29, 2016); however, as in *Yhudai*, the Court of Appeal in *Yvanova* answered the question left unanswered by the California Supreme Court, holding that the post-closing assignment was voidable, not void, and therefore Ms. Yvanova lacked standing to bring her claim.

On December 13, 2016, following remand by the California Supreme Court for reconsideration in light of the *Yvanova* decision, the Court of Appeal filed its opinion in *Mendoza v. JPMorgan Chase Bank, N.A.*, 6 Cal. App. 5th 802 (2016). The main issue in *Mendoza* was again, whether a post-closing date transfer into a New York securitized trust, in violation of the trust's PSA is void or merely voidable. The court noted that both *Saterbak* and *Yhudai* "have embraced the emerging consensus that assignments, which allegedly violate PSA's and federal law are voidable rather than void, and as a result, borrowers do not have standing to challenge late transfers or other defects in the securitization process." *Mendoza*, *supra*, at 815. Accordingly, the court chose to follow the emerging consensus, and held that plaintiff lacked standing to sue. *Mendoza*, *supra*, at 816. The court also held that allegedly robo-signed documents are voidable, and not void. *Mendoza*, *supra*, at 819.

Almost one year after *Yvanova*, the Court of Appeal decided *Kalnoki v. First Am. Tr. Servicing Sols., LLC*, 8 Cal. App. 5th 23 (2017). The opinion was only partially published, with the published portion dealing with the borrower's allegations of "documentary fraud" whereby the borrower challenged the completed sale on the basis that the recorded foreclosure documents were fraudulent and void. In deciding in favor of the foreclosing parties, the court in *Kalnoki* joined the growing consensus of opinions, and held that an "assignment to a securitized trust made after the trust's closing date is merely voidable." *Kalnoki*, *supra*, at 43. The *Kalnoki* court also chose to distinguish the case of *Sciarratta* on the issue of prejudice required to state a wrongful foreclosure claim. The court recognized that in *Sciarratta*, the borrower had stated sufficient facts that the wrong party had foreclosed, and thus, the borrower was prejudiced. Conversely, in *Kalnoki*, based on the review of the judicially noticeable recorded documents, the court found that the proper party had foreclosed, and therefore, the borrower was not prejudiced. The court then went a step further by holding that even if the assignment was done without authority, "it is difficult to conceive how the Kalnokis were prejudiced by the Assignment." *Kalnoki*, *supra*, at 48. This is because a borrower must anticipate that a promissory note might be transferred to another creditor, and the assignment did not change the plaintiffs' obligations under the note, nor did it interfere with their ability to pay. *Kalnoki*, *supra*, at 48-49. Notably, the California Supreme Court denied the petition for review in *Kalnoki*, just as it did in *Saterbak*, *Yhudai* and *Mendoza*.

Federal courts have also weighed in on these issues. In *Morgan v. Aurora Loan Servs., LLC*, 646 F. App'x 546, 550 (9th Cir. 2016), the U.S. Ninth Circuit Court of Appeals issued an unpublished opinion holding that "because an act in violation of a trust agreement is voidable—not void—under New York law, which governs the Pooling and Servicing Agreement (PSA) at issue, [Plaintiff] lacks standing here." However, at least one Federal District Court judge in California believes that the California Supreme Court would reject the holding in *Jenkins* to the extent it applies to pre-foreclosure actions, if that issue were ever to be directly addressed by the Court. In *Lundy v. Selene Fin., LP*, 2016 U.S. Dist. LEXIS 35547, at *32 (N.D. Cal. Mar. 17, 2016), Judge Tigar of the U.S. District Court for the Northern District of California concluded that the Court "will again reject Jenkins's conclusion that pre-foreclosure plaintiffs are not prejudiced by initiation of foreclosure proceedings based on an allegedly void assignment." Judge Tigar is decidedly in the minority in his views on that issue.

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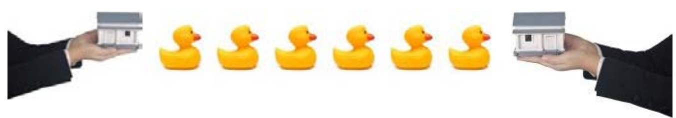
The Fizzled Fuse (continued from page 6)

Thus, the majority view remains that, in order to determine whether a borrower has standing to challenge a foreclosure after *Yvanova*, courts must first look to whether the foreclosure has been completed. Under cases such as *Kan* and *Jenkins*, borrowers clearly lack standing to bring a preemptive, pre-foreclosure lawsuit challenging a pending foreclosure sale on the grounds that the foreclosing parties lack authority to foreclose. It is therefore arguably a moot point in the pre-foreclosure context whether the assignment of deed of trust is being challenged as voidable or void because borrowers would lack standing to bring their claims regardless. However, even in a post-foreclosure lawsuit, a borrower would only have standing to sue to challenge a completed foreclosure sale if the assignment of deed of trust were void, not merely voidable.

The *Yvanova* opinion could have had a devastating impact on the lending industry *or* it could have put an end to borrowers' questionable challenges to a party's right to foreclose. Instead, the California Supreme Court chose to rule on a single issue, and did so very narrowly. In the year since *Yvanova* was published, lower State and Federal courts have done a good job of picking up where *Yvanova* fell short. The main question left unanswered by *Yvanova*, namely, whether a late assignment of deed of trust rendered it void or voidable, has been unmistakably answered by the lower courts. Therefore, *Yvanova*'s reach really has been limited thus far, and does not give borrowers much ground to state a viable wrongful foreclosure claim going forward, at least if the claim is based on purely technical or timing defects affecting the foreclosing party's authority to foreclose. *Saterbak*, *Yhudai*, and the other cases cited above hold that borrowers lack standing to sue as such facts would only render the foreclosure voidable. The success of any future challenges to completed foreclosures will therefore rest on the facts. Lenders should be careful to make sure that the recorded chain of assignments of their deeds of trust demonstrate a clear line from the original beneficiary to the foreclosing beneficiary as, under *Sciarratta*, that appears to be one of the grounds for a viable wrongful foreclosure remaining after *Yvanova*.



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JUST WHEN YOU THOUGHT IT WAS SAFE TO GO BACK INTO THE WATER:

NEW NEVADA FORECLOSURE MEDIATION PROGRAM BILL INTRODUCED

by Robin P. Wright, Esq.

Nevada's Foreclosure Mediation Program ("FMP") we have come to know and loathe is sinking back beneath the waves. The borrowers' last day to request FMP ended December 1, 2016 and the last mediation was heard on June 30, 2017. However, it might be best to take a deep breath before diving back in the Nevada waters since a *new* mediation bill (SB 490) was recently enacted that not only resuscitates but enhances the FMP program, making the FMP a <u>permanent</u> fixture in the lender's foreclosure process in Nevada. The new program would be administered by the Homes Means Nevada, Inc. rather than the Supreme Court. Homes Means Nevada, Inc. is a non-profit entity that the state of Nevada created to administer Nevada's share of the Hardest Hit Fund. Verise Campbell, who ran the prior FMP, is now running Homes Means Nevada, Inc. and will be running the new FMP, as well.

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Just When You Thought It Was Safe To Go Back Into The Water (continued from page 7)

The process for the borrower's participation in the new FMP is very similar to the existing version. One major difference, though, is that, instead of automatic enrollment into FMP, the new process requires a borrower who wishes to participate in mediation to file a Petition with the District Court (paying a $25 filing fee) within 30 days of receiving the lender's Notice of Default and to serve a copy of the Petition via certified return receipt to the beneficiary and trustee of record, Homes Means Nevada, Inc., and the District Court. Because the new FMP requires borrowers to file documents with the court and serving them, the process will likely encourage borrowers to involve more consumer attorneys into the FMP process to assist the borrowers with these steps. This, of course, increases the risk of ancillary claims being brought against the lender or servicer, thus increasing the time and expense of resolving the defaulted debt and increasing the risk to the lender and servicer. The mediation fees have been raised from $400 to $600, are still split between the parties, and go directly to the District Court.

Sec. 9.5.

1. Notwithstanding any other provision of law, a person may enroll in the Foreclosure Mediation Program if:

   (a) The person otherwise could have enrolled in the Foreclosure Mediation Program after December 31, 2016, or was mailed a notice of default and election to sell pursuant to NRS 107.080 after December 2, 2016;

   (b) Before the effective date of this act, the person received a notice of default required by NRS 107.080 or a civil action was commenced against the person pursuant to NRS 40.430; and

   (c) Before the effective date of this act, the property has not been sold.

2. A person described in subsection 1 shall have until 30 days after the effective date of this act to enroll in the Foreclosure Mediation Program.

Based on the information received from the Nevada Housing Authority, the new form has been released. The good news is that it does not appear that foreclosure trustees will need to send out FMP notices to homeowners for Notices of Defaults issued prior to the effective date of the Bill. In addition, it appears that the thirty-day grace period for "gap period" Notices of Default within which homeowners could apply for entry into the new FMP will NOT be extended beyond the thirty days, ending July 12, 2017. However, the FMP does plan to honor written requests from homeowners received by the Nevada Housing Authority, Home Means Nevada, foreclosure trustees, lenders or the District Court, even if the request was not made in the proper form of a District Court petition. Thus, it is important to confirm that no such informal written requests were received before proceeding to issue a Notice of Default or request a certificate. If such an informal written request was received by the District Court, Nevada Housing Authority or Home Means Nevada without notice to the foreclosure trustee or lender, the FMP would likely refuse to issue a certificate until a mediation is completed.

One troubling aspect to the new FMP is that it now requires the lender bring the mediation "**any documents created in connection with a loan modification**." Created by *who*? What does "in connection" mean? Assuming it is referring to a loan modification connected to the subject borrower requesting mediation, which loan modification---a past, present or a prospective loan modification? If the mediator and parties are not on the same page as to what the lender is supposed to bring to the mediation as it concerns modification documents, a denial of the foreclosure certificate, **sanctions** and/or litigation is highly likely.

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Just When You Thought It Was Safe To Go Back Into The Water (continued from page 8)

Severe sanctions can be imposed if the lender does not bring the required documents, or otherwise does not comply with the FMP rules. One such sanction is that the court can impose a **loan modification of the court's choosing**! NRS section 107.086(6) provides:

> *"If the beneficiary of the deed of trust or the representative fails to attend the mediation, fails to participate in the mediation in good faith or does not bring to the mediation each document required by subsection 5 or does not have the authority or access to a person with the authority required by subsection 5, the mediator shall prepare and submit to the Mediation Administrator a petition and recommendation concerning the imposition of sanctions against the beneficiary of the deed of trust or the representative. The court may issue an order imposing such sanctions against the beneficiary of the deed of trust or the representative as the court determines appropriate, including, without limitation, requiring a loan modification in the manner determined proper by the court."*

Unfortunately, while certainly an improvement over what it was and might have been, the State of Nevada still has an ambiguous FMP law that can increase the tide of litigation and exacerbate the delays and costs of enforcement of the loan that threaten to swamp the Industry.

Good luck.

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INTRODUCING TWO NEW ATTORNEYS TO WFZ'S TRANSACTIONAL TEAM

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Mr. Matthews brings 35 years of transactional experience in general business and real property. Mr. Matthews represents entities, individuals and public sector clients in finance (representation of both lenders and borrowers), acquisitions, construction, development of all product types, leasing, environmental, entity formation, owners associations, operational matters and negotiation and review of contracts.

Ms. Schmidt assists domestic and international clients with a broad range of transactional matters, including entity formation and compliance, commercial contracts, intellectual property, general corporate and employment matters. Ms. Schmidt currently focuses her practice on real estate law, with an emphasis on advising clients in the acquisition, disposition, leasing and day-to-day management and operation of commercial real estate, including office, retail, restaurants and industrial properties.

TIME AND TIDE:
DEVELOPMENTS AFFECTING ENFORCEMENT OF AGED DEFAULTS IN WASHINGTON

by Ryan M. Carson, Esq.

In recent years, lenders have seen a substantial increase in challenges to their right to collect against the aged debt in Washington state. The trend began with an unreported court of appeals decision wherein the court held that certain language in a Notice of Trustee's Sale constituted an acceleration of sums due under a promissory note and thus triggered the start of the statute of limitations period of enforcement. With that decision the floodgates opened, and debtors' counsel wasted no time searching title records for aged but incomplete foreclosures to sue on and seek orders from the court extinguishing lender's liens. Fortunately, more recent—and more importantly, *reported*—decisions by the Washington court of appeals have dammed the flood and set clear direction for lenders seeking to pursue enforcement of mortgages with aged defaults. This article will discuss three aspects of the Statute of Limitations issue in Washington state: first, the basic parameters of the statute of limitations as applied to nonjudicial foreclosures in Washington; second, the two recent decisions of the Washington Court of Appeals; and third, the implications of these decisions for lenders seeking to enforce aged mortgage debt.

<u>Basic law of Statute of Limitation on Nonjudicial Foreclosures</u>

Under Washington law, there is no statute of limitations expressly applicable to nonjudicial foreclosures. Rather, Washington courts have consistently applied the 6-year statute of limitations intended for written contracts to non-judicial foreclosures. RCW 4.16.040; *Westar Funding, Inc. v. Sorrels*, 157 Wash. App. 777, 239 P.3d 1109 (2010). The key question is when the 6-years statute starts to run.

A cause of action for enforcing the Note's terms arises on default. Common mortgage notes call for periodic payments of principal and interest over a period of time. Thus, a cause of action for enforcement of the note accrues upon the first missed payment. *Herzog v. Herzog*, 23 Wash. 2d 382, 161 P.2d 142 (1945). Normally, the statute of limitation will not run on the entirety of the debt until it is either matured or accelerated by the lender. *Wash. Fed., N.A. v. Azure Chelan LLC*, ---Wash. App.---, 2016 Wash. App. LEXIS 1566, *24 (2016). A lender therefore must initiate its foreclosure within the statutory period or risk being thereafter barred from doing so. *See Westar Funding, Inc.*, 157 Wash. App. at 785. What constitutes initiation has been a point of dispute, though.

<u>Recent Cases</u>

Edmundson v. Bank of America, N.A.

In *Edmundson v. Bank of America, N.A.*, the court of appeals clarified two significant issues. 194 Wash. App. 920, 927-932, 378 P.3d 273 (2016). First, the court ruled that an issuance of a Notice of Default under RCW 61.24.030(8) is sufficient evidence of "resort to the remedies of the Deeds of Trust Act for the [loan] defaults." *Id*. at 930. Because the loan default considered by the court had occurred when the borrower missed the November 1, 2008 payment, the court reasoned that the lender had to invoke its nonjudicial remedies by November 1, 2014 in order to satisfy the statute of limitations. A Notice of Default was transmitted on October 23, 2014, and the court was satisfied that the lender had therefore timely initiated its foreclosure. The court's holding answers the question of what action constitutes initiation of the foreclosure for the purpose of satisfying the statute of limitation.

Continued on page 11

Time and Tide (continued from page 10)

Second, the court reiterated the law that the statute of limitations begins to run on default *only as to the defaulted payment*. The court applied the holding in *Herzog v. Herzog*, 23 Wn.2d 382, 161 P.2d 142 (1945), a case not involving foreclosure or any property-related contracts, to establish the point of law within the realm of nonjudicial foreclosures. The implication of the court's reasoning is that while a lender may have a portion of its loan rendered unenforceable as time-barred, it will not be precluded from seeking the remedy of a trustee's sale. So long as the Notice of Default issues six years or less from the defaulting events stated within, lenders may proceed with foreclosure to enforce their security interest as to any portion of the debt *less than* six years old.

4518 S. 256th, LLC v. Gibbon

The court of appeals in *4518 S. 256th, LLC v. Gibbon* significantly limits lenders' risk as to aged loans in their portfolios. 195 Wash. App. 423, ---P.3d--- (2016). There, the court considered claims by an owner of a mortgaged property for quiet title and declaratory relief against a lender. RCW 7.28.300 allows an owner of real property maintain an action to strip a lender's Deed of Trust off title if enforcement of the underlying loan would be barred by the statute of limitations. In *Gibbon*, the lender had previously scheduled trustee's sale on November 14, 2008. 195 Wash. App. at 429. The notice of sale contained required statutory language informing the borrowers that as of 11 days before the trustee's sale (November 3, 2008), payment of the entire unpaid balance of principal and interest would be required to discontinue the trustee's sale. The owners sued in 2015 and argued that the language in the notice of sale constituted an acceleration of the debt and that the lender was barred from enforcement of the debt under the statute of limitations.

The court rejected the owner's argument and held that foreclosure and acceleration are different and distinct options for a lender, *Id*. at 434, and that a notice of sale containing the statutorily required language does not accelerate the maturity of a loan, *Id*. at 438. For a loan to be accelerated, the court recognized that "some affirmative action . . . by which the holder of the note makes known to the payors that he intends to declare the whole debt due." *Id*. at 436 (quoting *Weinberg v. Naher*, 51 Wash. 591, 594, 99 P. 736 (1909)). The court reasoned that none of the notices sent to the borrowers by the lender contained any language to suggest the lender was accelerating the debt.

The court further held that nonjudicial foreclosure does not require acceleration of the underlying debt, *Id*. at 439-40. Because the prerequisites for a trustee's sale are set forth specifically in RCW 61.24.030, the court reasoned that had the legislature intended for acceleration to be required, some mention of it would be drafted into the statue. *Id*. at 449. Finding none, the court looked to the language of the Deed of Trust itself and concluded that paragraph 22 of the standard form deed of trust sets out foreclosure and acceleration as two separate and distinct options for the lender upon default. *Id*. at 441. The court characterized acceleration as "permissive," *id*., and ruled that a lender was not required to accelerate before invoking the power of sale, *id*.

Most importantly, the court rejected the owner's argument that the statutorily mandated language in a notice of sale setting forth the steps needed to cure a default within the period of 11 days before the sale was an acceleration, or that the language somehow required the lender to accelerate before completing the foreclosure. *Id*. at 445. Instead, the court reasoned that the notice of sale language was a restraint on acceleration, because under the statute the borrower would always have until 11 days before the sale to cure the arrears and avoid foreclosure. *Id*. at 444.

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Time and Tide (continued from page 11)

Implications

While it cannot be said that *Edmundson* and *Gibbon* will put an end to borrowers' challenges to foreclosure based on the statute of limitation, the cases do provide substantial guidance for lenders faced with aged debts. Lenders should take heed to excise time-barred periodic payment amounts from their Notices of Default and other demands, so as to avoid legal challenges based on the statute of limitation and to limit exposure to actions based on state and federal consumer protection laws. However, lenders should remain confident in their ability to enforce deeds of trust through the power of sale.

On the other hand, Borrowers will not be able to simply point to old notices of sale to make their case to extinguish the lender's deed of trust. Borrowers will need to produce actual evidence of acceleration before challenging an entire debt as time-barred. In turn, lenders should exercise caution when addressing acceleration as a possible remedy, and be cognizant of the language used in any notices to borrowers concerning acceleration as a consequence of default. Equivocal language should generally be used if foreclosure remains a viable option for the lender to enforce the terms of a security instrument.

On the whole, the holdings in *Edmundson* and *Gibbon* are positive developments for lenders carrying aged debt in their portfolios. Both opinions preserve lenders' options for enforcing mortgages through the nonjudicial process despite the age of the default, and both limit a borrower or owner's options for challenging a foreclosure or a lien on statute of limitations grounds. That said, we recommend that all loan servicers audit their aged loan portfolios in Washington and all other Western states to avoid exceeding the applicable statute of limitations.

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WFZ PROFILE:
GWEN H. RIBAR, ESQ.
PARTNER

Gwen H. Ribar, Esq.
gribar@wrightlegal.net

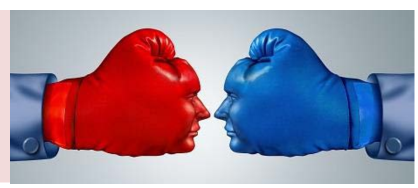
At the end of last year, one of our long-time partners, Gwen H. Ribar, purchased a minority stake in the firm. Robin Wright, Robert Finlay and Gwen have worked together on mortgage matters for close to 20 years. During that time, Gwen has grown from a junior associate to partner and now owner. Gwen's relentless commitment to client satisfaction has helped the firm grow from 6 attorneys exclusively in California to 69 attorneys covering Arizona, Nevada, New Mexico, Utah, Oregon, Washington, Idaho, Hawaii and California. Gwen's addition to the firm's ownership is a natural and welcomed next step for the firm.

As an added bonus to including Gwen as an equity partner, the firm was able to meet the stringent standards to become a Certified Woman-Owned business. WFZ's new certification will help many of its litigation, compliance and transactional clients meet their Diversity goals or requirements.

Gwen's extensive skill set includes expertise in litigation and representation involving mortgage banking, loan servicing, foreclosure trustee defense, general business and real estate, as well as bankruptcy and eviction matters. She also specializes in nationwide and regional litigation management. Gwen takes a lot of pride in ensuring proper and timely client communication and maintaining client satisfaction.

Gwen grew up in Brea, California and went to Disneyland as often as possible. Before getting her law degree, she attended USC, graduating with a degree in Business Entrepreneurship. Gwen now lives in Huntington Beach with her husband Rob and 7 year old daughter Hailey. Gwen loves riding her bike at the beach, weekend get-a-ways, and cooking healthy meals for her family.

SATICOY BAY:
THE FINAL ROUND OF THE ONGOING HOA POST-FORECLOSURE FIGHT
by Dana Jonathon Nitz, Esq.



Anyone who has followed HOA post-foreclosure litigation over the past two years is well aware that the chronology of the battle between banks/lenders and investors has been akin to the heavyweight boxing trilogy of Ali vs. Frazier. The investors won the first bout in *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. Adv. Op. 75, 334 P. 3d 408 (2014) case ("SFR Decision"). The banks/lenders struck back in *Bourne Valley Court Tr. v. Wells Fargo Bank, NA*, 2016 U.S. App. LEXIS 14857 (9th Cir. (Nev.) Aug. 12, 2016) ("Bourne Valley Decision"). The banks/lenders have delivered some sound hits in between with decisions such as *Shadow Wood Homeowners Ass'n v. New York Cmty. Bancorp, Inc.*, 132 Nev. Adv. Op. 5, 366 P.3d 1105, (2016), *Horizons at Seven Hills Homeowners Ass'n v. Ikon Holdings, LLC*, 132 Nev. Adv. Op. 35, 373 P.3d 66 (2016), *SFR Investments Pool 1 v. Green Tree Servicing*, NSC Case No. 68324 (Oct. 18, 2016), and *Stone Hollow Ave. Trust v. Bank of America, N.A.*, NSC Case No. 64955 (unpublished) (August 11, 2016), *vacated* (December 21, 2016) (unpublished), but had yet to deal even a technical knockout blow. On January 26, 2017, the Nevada Supreme Court issued a decision in *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortgage, N.A.*, 133 Nev. Adv. Op. 5 (2017) ("Saticoy Bay Decision"), that appears to have delivered a heavy blow in favor of investors/HOA purchasers.

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Saticoy Bay (continued from page 13)

Now, we are left with two completely contrary holdings with the Ninth Circuit's Bourne Valley Decision and the Nevada Supreme Court's Saticoy Bay Decision.[1] Some experts had expected such divergent opinions would cause the United States Supreme Court to weigh in on the issue. But unfortunately, they declined, rendering both decisions final.

Before discussing the impact of each decision, a brief overview of what's at stake is in order. HOA post-foreclosure litigation primarily arises out of the Nevada Revised Statutes 116.3116 governing HOA lien foreclosures. The primary issue addressed in both decisions hinges on whether or not this statute as written violates the Due Process and Takings Clauses of the United States Constitution, and, thus, is void. Banks/lenders favor the Bourne Valley Decision, where the statute was found to violate the Due Process Clause. However, investors favor the Saticoy Bay Decision, where statute was found to not violate that clause or the Takings Clause because the HOA foreclosures take place without a "state actor."

Bourne Valley

Banks/lenders argued in *Bourne Valley* that NRS 116.3116 is facially void and unenforceable because it violates constitutional due process rights and fails to include provisions requiring lenders to receive actual notice of the potential loss of their deed of trust. Liens are unconstitutional because they impair a property right unless the holder of the security interest receives notice of the lien and an "opportunity to be heard" to protect its interest. Here, NRS 116.3116 does not include any provisions making it mandatory for the HOA or its foreclosure trustee to mail the foreclosures notices to the holder of the first security interest. Instead, the holder of the security interest must specifically record or mail a request for a copy of the notices. Thus, the statute fails to ensure all beneficiaries under the first deed of trust receive notice that their property interest could be lost. The Ninth Circuit agreed, holding that the Statute's "opt-in" notice scheme, which required a HOA to alert a mortgage lender that it intended to foreclose only if the lender and specifically requested notice, facially violated the lender's constitutional rights. The statute was also defective because only homeowners' associations knew when and to what extent a homeowner had defaulted on their dues, and the burden was placed on the mortgage lender to ask the HOAs to advise of their foreclosure plans. Because the statutory scheme under which the banks/lenders could lose their secured interests under the deeds of trust after the SFR Decision was unconstitutional, that secured interest could not have been extinguished, meaning that the HOA buyers bought the properties subject to the existing senior deeds of trust.

Saticoy Bay

As in *Bourne Valley*, the investors/HOA sale purchasers in the *Saticoy Bay* argued that the provisions of NRS 116.3116 were appropriately written and approved by the Nevada Legislature and should not be disturbed. They argued that the statute, in existence for years, stands for the proposition that an HOA foreclosure extinguishes a first deed of trust against a property. In other words, if an HOA foreclosure sale occurs and the super-priority portion of the lien has not been paid or cured by the bank, the bank loses its interest in the property in its entirety. The SFR Decision affirmed this position and specifically suggested an obligation by banks or lenders to either determine the super-priority amount of the lien and tender it, or pay the HOA lien in full to protect their interest in a property. They insisted that NRS Chapter 116 did not implicate Due Process violations because no exclusive government functions take place. In other words, the HOA is a private actor, asserting a private remedy, defined by statute using a private HOA trustee.

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[1] Both courts considered the Statute before it was amended by Senate Bill 306, effective October 1, 2015, largely to rectify the application of the Statute in the wake of the SFR Decision.

Saticoy Bay (continued from page 14)

In a unanimous decision the Nevada Supreme Court sided with the HOA buyers. The Court applied the test from *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982), to determine whether the deprivation of a property interest is the result of state action under both the state and federal Due Process Clauses. While the first element of the test was satisfied because "the deprivation [was] caused by the exercise of some right or privilege created by the State," the second element was not met because the HOA acting pursuant to the Statute cannot be determined to be a state actor. For the same reasons, the Court also held the extinguishment of a subordinate deed of trust through an HOA's nonjudicial foreclosure does not constitute a governmental "taking" under the Takings Clause.

Therefore, the effect of this decision is that, if the banks/lenders are to prevail in quiet title actions with the investors and avoid extinguishment of their deeds of trust, it cannot be on the basis that the Statute is unconstitutional. The Saticoy Bay Decision has no effect, however, on other recognized defenses such as lack of actual notice, tender of the super-priority lien, borrower bankruptcy and commercially unreasonable purchase price at the HOA sale.

The Next Step

Through the issuance of the Saticoy Bay and Bourne Valley Decisions, the highest court of Nevada and the federal appellate court in which Nevada sits are squared off against each other regarding the constitutionality of the Statute. While the state district courts are required to follow the Saticoy Bay Decision, the federal district courts are required to follow the Bourne Valley Decision. Going forward, we can anticipate that many cases, which had been stayed pending a final decision on the constitutionality issue, will push forward towards resolution. If in federal court, lenders are free to move for summary judgments relying on the Bourne Valley decision. Meanwhile, in state court, cases will proceed forward based on tender, commercial reasonableness and other fact-based arguments.

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Dana Nitz is the Managing Partner of WFZ's Nevada office.

LOOKING FORWARD OR LOOKING BACK?

THE NEVADA SUPREME COURT CONFIRMS THAT ITS SFR DECISION APPLIES RETROACTIVELY

By T. Robert Finlay, Esq. and Natalie C. Lehman, Esq.

Recently, in the case of *K&P Homes vs. Christiana Trust*, the Nevada Supreme Court addressed the certified question as to whether the Court's seminal *SFR* decision from September 18, 2014, should only be applied prospectively to HOA foreclosure sales occurring after that date. On July 27, 2017, the Nevada Supreme Court answered the question in the negative for the lending industry. 133 Nev., Advance Opinion 51.

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Looking Forward or Looking Back? (continued from page 15)

On September 18, 2014, the Court issued its opinion in *SFR*--a decision that rocked the residential mortgage industry--holding that a non-judicial HOA foreclosure on their super priority lien created not just a payment priority lien but actually extinguished a lender's first position deed of trust, even if the HOA documents contained a mortgage protection clause. This was a case of first impression and represented a significant departure from the prior, general understanding of all the players. Overnight, lenders lost millions of dollars in secured loans. The total industry loss likely exceeds a billion dollars. A tsunami of quiet title litigation ensued, with servicers and investors arguing, among other things, that the HOA foreclosure statutes are unconstitutional, the HOA sales were not commercially reasonable, the HOA cannot take property of the FHFA without their consent, etc. The Nevada legislature thereafter enacted an amendment to ameliorate some of the adverse consequences lenders faced as a result of the *SFR* decision; however, it did not address the general rule that the *SFR* decision applies "retroactively" to all sales occurring since the enactment of the prior statute in the 1990s.

Notwithstanding the general rule of retroactive application, Federal Court Judge Jones ruled in early 2016 that the *SFR* decision should not receive the standard retroactive application and, instead, should only be applied prospectively to HOA sales that occurred after the *SFR* decision (September 18, 2014). Specifically, Judge Jones applied the *Chevron Oil* factors, holding that the *SFR* decision (1) established new principle of law; (2) its retroactive application would not further the purposes of NRS 116.3116; and (3) its retroactive application would produce inequitable results. *Chevron Oil v. Huson*, 404 U.S. 97 (1971). At the core of Judge Jones' decision was that, while the *SFR* decision was interpreting an existing statute, its interpretation was so fundamentally contrary to the statute's application across the industry, that *SFR* should only be applied prospectively to sales after September 18, 2014. Since most of the HOA sales occurred pre-dated *SFR*, Judge Jones' decision had the potential to positively impact the majority of HOA sales.

As expected, the Federal Court certified the question of retroactivity for review by the Nevada Supreme Court. Specifically, the Nevada Supreme Court was asked, "Does the rule of [SFR] that foreclosures under NRS 116.3116 extinguish a first security interests apply retroactively to foreclosures occurring prior to the date of that decision?" WFZ briefed the matter for the lienholder, Christiana Trust. Meanwhile, the FHFA, Mortgage Bankers Association, Nevada Bankers Association and Nevada Mortgage Lenders Association filed Amicus briefs supporting our position.

On July 27, 2017, the Nevada Supreme Court held that the *Chevron Oil* factors cited above do not apply. Instead, the NSC chose to apply *Nevada Yellow Cab Corp*, holding that "[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Christiana Trust, 4*; citing, *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-313 (1994). The Court went on to reason that "[i]n concluding that NRS 116.3116 established a true superpriority lien, this court did no more than interpret the will of the enacting legislature." See *Nev. Yellow Cab* … (stating that "this court's function is to declare what the law is, not to create the law"). *Christiana Trust*, 5. By choosing to apply *Nevada Yellow Cab* rather than the *Chevron Oil* factors, the Nevada Supreme Court may have sealed the mortgage industry's fate on this issue.

What next? It's been a rough 2017 for the mortgage industry thus far. With unconstitutionality no longer a viable argument in State Court and with the hope of preventing a retroactive application gone, the industry's options are narrowing. Unless a case is in Federal Court or it involves a GSE loan, commercial reasonableness, tender and a possible bankruptcy violation remain our best arguments to re-establish a lender's lien. Otherwise, a straight breach of contract claim against the HOA may be the best option to recoup a lost lien.

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Looking Forward or Looking Back? (continued from page 16)

If you have questions or would like further information about these issues, please contact either Natalie Lehman at nlehman@wrightlegal.net or T. Robert Finlay at rfinlay@wrightlegal.net.

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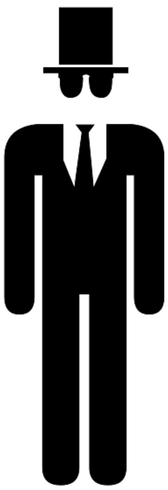
FORECLOSING ON TRUSTEE LIABILITY UNDER THE FDCPA

by Jonathan D. Fink, Esq.



In the wake of the Ninth Circuit's decision last year in *Ho v. ReconTrust Co.*, 840 F.3d 618 (9th Cir. 2016) and as amended at 858 F.3d 568 (9th Cir. 2017), [essentially holding that, as a general rule, a foreclosure trustee acting within the course and scope of its duties as a foreclosure trustee was not a "debt collector" and was not engaged in "debt collection" for purposes of the Fair Debt Collection Practices Act ("FDCPA")], borrowers' counsel have continued to test the limits of that ruling in an attempt to find a basis for still asserting potential liability. They took some comfort from the subsequent ruling by the Ninth Circuit in *Mashiri v. Epsten Grinnell & Howell*, 845 F.3d 984 (9th Cir. 2017), which held that a law firm representing an HOA in enforcing a lien could not avoid liability under the FDCPA based on a defense that its communications were designed to perfect the HOA's security interest and preserve its right to record a lien in the future. The Court noted the communications also expressly sought to collect the amount of the past due assessment and that sufficed to make the law firm a debt collector engaged in debt collection activities cover by the FDCPA. Some borrowers' counsel have sought to bootstrap that analysis to argue that foreclosure trustees should similarly be held liable under the FDCPA since the foreclosure notices all provide notice of the amounts owed and an opportunity to avoid sale if that amount is paid to the creditor. These efforts have not gained much traction in this Circuit.

Most recently, the Ninth Circuit had another opportunity to express its views on this subject in D*owers v. Nationstar Mortgage, LLC*, a published opinion issued on March 31, 2017. In *Dowers*, the Court affirmed in part and reversed in part an order from the Federal District Court in Nevada in favor of Defendants. Specifically, it held that the district court had properly dismissed plaintiffs' claims of violations of 15 U.S.C. §§ 1692c(a)(2), 1692d, and 1692e; IIED; and violation of the Nevada Deceptive Trade Practices Act. However, it also found that the district court had erred in dismissing plaintiffs' claim under 15 U.S.C. § 1692f(6). Why the distinction?

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RECENT WFZ SPEAKING ENGAGEMENTS

July 2017	**Ongoing Challenges with HOBR and CFPB and Upcoming Changes to the CFPB and CA HOBR** *presented by T. Robert Finlay, Esq. and Gwen H. Ribar, Esq.*	ACI's 29th Annual Advanced Forum on Consumer Finance Class Actions & Litigation Conference
July 2017	**Foreclosure – Some Basics and Some Not-So-Basics** *presented by Michelle M. Mierzwa, Esq.*	California Mortgage Association Summer Seminar

Foreclosing on Trustee Liability Under the FDCPA (continued from page 17)

The claims under §§ 1692c(a)(2), 1692d, and 1692e failed because, as the Court had held in *Ho*, Defendants were not engaged in debt collection activities *but rather were merely seeking to enforce a security interest*, *which was not covered by those provisions*. As noted by the Court: "*Ho* commands that Plaintiffs cannot assert a claim under those FDCPA provisions unless Nationstar was collecting a money debt." Section 1692f(6), on the other hand, expressly encompasses enforcement of a security interest, prohibiting: "Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if – (A) there is no present right to possession of the property claimed as collateral through an enforceable security interest; (B) there is no present intention to take possession of the property; or (C) the property is exempt by law from such dispossession or disablement." This is neither new nor surprising; cases have long held that § 1692f(6) can be invoked, even against foreclosure trustees, if its preconditions are met. In *Dowers*, the Court found that they were: "Here, Plaintiffs alleged that Nationstar threatened to take non-judicial action to dispossess Plaintiffs of their home without a legal ability to do so. Such conduct is exactly what Section 1692f(6) protects borrowers against."

The path this provides for borrowers counsel is a narrow one--though, of late, one frequently trod (primarily under a theory akin to § 1692f(6)(A), even if that Section is not specifically invoked). To succeed, they need to allege--and, ultimately, prove--that the right to sell the Property does not exist (whether because the defendants are not the ones entitled to do so or because the sale is legally barred, e.g. by bankruptcy or injunction) or that the threat of sale was a mere tactic without the intent to follow through. While a carefully pleaded complaint might allege enough for a claim under § 1692f(6)(A) to survive at the pleading stage (though courts in California, at least, are increasingly skeptical of challenges to the right to foreclose, especially pre-foreclosure), in most instances the theory will not last through summary judgment as it is relatively rare for the foreclosing entity to actually lack the right to do so and discovery should quickly reveal the borrower's lack of proof otherwise.

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QUOTE OF THE QUARTER:

"No official with an IQ greater than room temperature in Alaska could claim that he or she did not know that the conduct at the center of this case violated both state and federal law."

Justice Stephen Trott of the 9th Cir. Ct. of Appeals in HARDWICK V. VREEKEN, Filed January 3, 2017

WFZ FIRM NEWS

WFZ WELCOMES ITS NEW ATTORNEYS!

CORBIN S. MOORE

Mr. Moore joins our Newport Beach office after passing the California State Bar Exam. He earned his Juris Doctor degree from Chapman University Dale E. Fowler School of Law. Prior to law school, Mr. Moore received his Bachelor of Arts degree in Economics at Pepperdine University, and played four years of Division I basketball there. Mr. Moore specializes in real estate litigation, wrongful foreclosure and title disputes. Mr. Moore is licensed to practice in California.

YANXIONG "MICHAEL" LI

Mr. Li joins our Las Vegas office and brings substantial litigation experience representing lenders/servicers and homeowners in protecting their property rights from extinguishment as a result of HOA super-priority lien foreclosures. He regularly represents lenders/servicers in litigation arising from mortgage and HOA foreclosures in connection with the origination or servicing of residential and commercial mortgages and home equity lines of credit. Mr. Li is licensed to practice in Nevada.

ROBERT A. "BOBBY" RIETHER

Mr. Riether, whose background includes having worked as an auditor with PricewaterhouseCoopers LLP in New York City before returning to graduate school and earning a combined Juris Doctor and Master of Business Administration, joins our Las Vegas office. He is also a Certified Public Accountant licensed in both Nevada and New York. Mr. Riether is licensed to practice in Nevada, Arizona, New York and New Jersey.

JAMIE S. HENDRICKSON

Mr. Hendrickson joins our Las Vegas office and brings experience as an auditor, specializing in small cap and micro-cap companies registered with the Securities and Exchange Commission, defending developers in construction defect matters, consumer bankruptcy and criminal defense. His practice focuses primarily on real estate litigation, including lender and servicer liability defense, wrongful foreclosure defense, fair debt collection practices defense, and title disputes. Mr. Hendrickson is licensed to practice in Nevada.

PATRICK J. DAVIS

Mr. Davis, a native Idahoan, joins our Las Vegas office. He earned his Juris Doctor degree from the University of Idaho College of Law after receiving his Bachelor of Arts degree in English, *magna cum laude*, from Utah Valley University. Following law school Mr. Davis clerked for the Honorable Thomas L. Stockard in the Tenth Judicial District Court while obtaining his license to practice in Nevada. Mr. Davis is licensed to practice in Nevada and Idaho.

LAURA N. COUGHLIN

Ms. Coughlin joins our Seattle office and brings experience representing mortgage servicers and lenders in judicial foreclosure, unlawful detainer and title clearing matters. Her practice focuses primarily on real estate litigation, including lender and servicer liability defense, wrongful foreclosure defense, fair debt collection practices defense, and title disputes. Ms. Coughlin is licensed to practice in Washington and is an active member of the Washington Women Lawyers.

WFZ WELCOMES ITS NEW ATTORNEYS! *(CONTD.)*

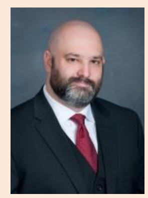
LINDSAY D. ROBBINS

Ms. Robbins, a native of Southern California, joins our Las Vegas office. She earned her Juris Doctor degree from the Thomas Jefferson School of Law, magna cum laude, after receiving her Bachelor of Arts degree from the University of California, Davis. Ms. Robbins' practice focuses primarily on real estate litigation, including lender and servicer liability defense, wrongful foreclosure defense, fair debt collection practices defense, and title disputes. Ms. Robbins is licensed to practice law in Nevada.

STACY H. RUBIN

Ms. Rubin joins our Las Vegas office and brings extensive experience in civil and commercial litigation matters and bankruptcy actions. Prior to joining WFZ, Ms. Rubin worked as an associate attorney representing the interests of creditors, lenders and loan servicers. Ms. Rubin has presented seminars in areas of debt collection and creditor's rights and has also published articles in several California industry-related publications. Ms. Rubin is licensed to practice law in Nevada and California.

MATTHEW S. CARTER

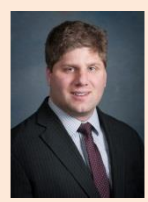


Mr. Carter joins our Las Vegas office and brings extensive trial and appellate litigation experience. He has served as counsel on several complex litigation cases before the trial and appellate courts of Nevada, as well as the Ninth Circuit Court of Appeals and the United States Supreme Court. Mr. Carter is an AV-rated trial and appellate attorney on Martindale Hubbell and is an active member of the Clark County Bar Association. Mr. Carter is licensed to practice law in Nevada and California.

CHRISTINA M. CONNOLLY

Ms. Connolly joins our Las Vegas office and brings experience in defense of general liability, premises liability, personal injury, and construction defect matters. She earned her Juris Doctor degree from the William S. Boyd School of Law, after receiving her Bachelor of Arts degree from the University of Nevada, Reno. Ms. Connolly also volunteers as a pro bono attorney representing abused and neglected children through the Legal Aid Center's Children's Attorneys Project. Ms. Connolly is licensed to practice law in Nevada.

JOSEPH A. DRAGON



Mr. Dragon joins our Las Vegas office after working at a civil litigation firm in Carson City, Nevada. He earned his Juris Doctor degree from the University of Idaho College of Law, after receiving his Bachelor of Arts degree from the University of Nevada, Reno. Since joining WFZ, Mr. Dragon has focused primarily on business civil litigation including real estate litigation, business ownership dispute, wrongful foreclosure defense, business tort defense, and similar civil litigation issues. Mr. Dragon is licensed to practice law in Nevada.

JOHN F. PATTON

Mr. Patton joins the Bankruptcy Division of our Newport Beach office. He also brings considerable experience representing individual and corporate taxpayers with federal and state income tax controversies. Mr. Patton specializes in all areas of bankruptcy law including Chapter 7, 11 and 13 matters, adversary litigation, relief from stay matters, proofs of claim, plan objections and all other substantive bankruptcy motions. Mr. Patton is licensed to practice law in California and Oregon.