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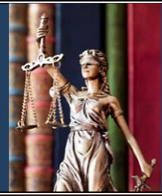

Spring 2018 Issue Vol. 3, No. 1

TOO TENDER FOR THIS WORLD?

THE RISE (AND POSSIBLE FALL) OF THE TENDER RULE

by Todd E. Chvat, Esq. and T. Robert Finlay, Esq.

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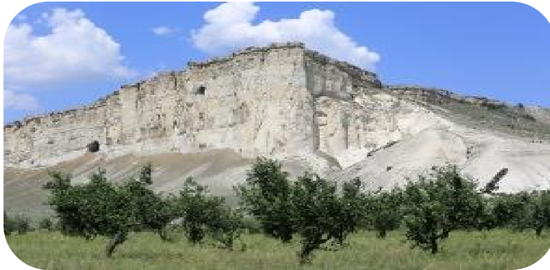
Like the erosion of even the tallest peak, so too is the once-mighty, and often cited, Tender Rule being slowly worn away by judicial opinions. Not long ago, a foreclosure defense attorney could simply protest to the court, "Your honor, the tender rule applies," to which the judge would usually respond, "case dismissed for lack of tender." In the words of Bob Dylan, "the times they are a changin'."



In the context of California wrongful foreclosure practice, the Tender Rule was born well over a hundred years ago, beginning with cases such as *Humboldt Savings Bank v. McCleverty* (1911) 161 Cal. 285. In 1911, the California Supreme Court held that, "an action to set aside a sale by trustees or on foreclosure for irregularities *of any kind* should ordinarily be accompanied by an offer to redeem by paying the sum due." (emphasis added). *Humboldt*, supra, at 290. The Rule was "based upon the equitable maxim that a court of equity will not order a useless act performed." *F.P.B.I. Rehab 01 v. E&G Investments, Ltd.* (1989) 207 Cal.App.3d 1018, 1021. In essence, it was deemed that any irregularities in the foreclosure sale would be harmless to the borrower if the borrower could not otherwise have avoided the foreclosure sale by the payment of all the indebtedness under the loan. *Id.*; See 4 Miller & Starr, Cal. Real Estate (2d ed. 1989) § 9:154, pp. 507–508.

Beginning in the 80's, courts expanded the Tender Rule beyond its application to mere equitable causes of action to include *any* cause of action that was "implicitly integrated" with the allegations of an irregular foreclosure sale. *Arnolds Management Corp. v. Eischen* (1984) 158 Cal.App.3d 575, 579. Further hampering the borrower's ability to challenge the enforcement of their loans, the California courts had long since held that to be valid, an offer to tender required the party to plead facts to show that they actually had the funds requisite to make good on the offer. *T.G. McCarthy v. Grider* (1925) 72 Cal.App.393, 405. As borrowers facing foreclosure were likely already in dire financial circumstances, this proved to be a major roadblock to a borrower's foreclosure challenges and, accordingly, was heavily relied upon by lenders and loan servicers alike.

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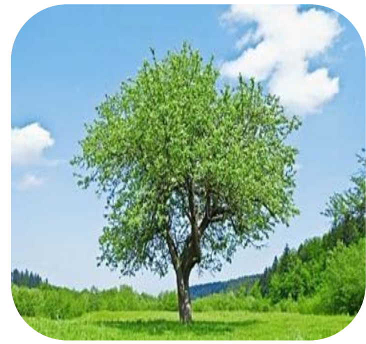
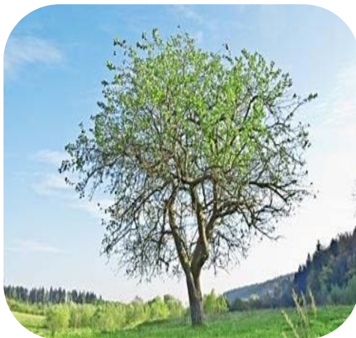
Too Tender For This World (continued from page 1)

However, beginning with the enactment of *Civil Code* section 2923.5 and its interpretation by the courts, the Tender Rule's sway began to weaken. Under section 2923.5, a notice of default (which is a necessary recording to initiate a non-judicial foreclosure proceeding) could not be recorded until at least 30 days after the borrower had been contacted to "assess" and "explore" alternatives to foreclosure. After much debate, the landmark *Mabry* case made it clear that the Tender Rule did not apply to any claimed violation of section 2923.5. Per *Mabry*, "the whole point of section 2923.5 is to create a new, even if limited, right to be contacted about the possibility of *alternatives* to full payment of arrearages. It would be contradictory to thwart the very operation of the statute if enforcement were predicated on full tender." *Mabry v. Superior Court* (2010) 185 Cal.App.4th 208, 225-226.



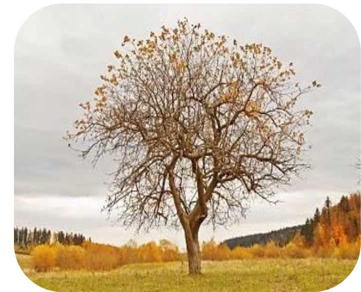
And with respect to non-2923.5 claims, the California appellate courts slowly began recognizing additional "exceptions" to the Tender Rule. In 2011, *Lona v. Citibank* laid out the recognized exceptions in one opinion:

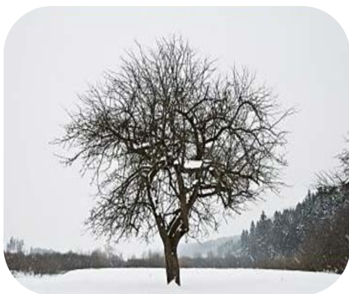


- First, if the borrower's action attacks the validity of the underlying debt, a tender is not required since it would constitute an affirmation of the debt.
- Second, a tender will not be required when the person who seeks to set aside the trustee's sale has a counterclaim or setoff against the beneficiary.
- Third, a tender may not be required where it would be inequitable to impose such a condition on the party challenging the sale.
- Fourth, no tender will be required when the trustor is not required to rely on equity to attack the deed because the trustee's deed is void on its face.

Lona v. Citibank, N.A. (2011) 202 Cal.App.4th 89, 112-113.

Thereafter, the effect of the Tender Rule was further diminished by cases such as *Intengan v. BAC Home Loans Servicing LP* (2013) 214 Cal.App.4th 1047, 1053-1054 [holding that the tender requirement "does not apply to actions seeking to *enjoin* a foreclosure sale"] and *Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 198-199 [holding that a borrower's failure to tender the amount due did not preclude her claim that her bank improperly assessed late charges and other fees that would not have otherwise been incurred]. Thus, in addition to the above exceptions, the Tender Rule was now deemed inapplicable to actions seeking to stop a sale from occurring and cases where a borrower challenged the accuracy of the amount of their default.





Then, in 2014/2015, the Tender Rule was further eviscerated by cases such as *Rufini v. CitiMortgage* (2014) 227 Cal.App.4th 299 [holding that a tender is not required where a borrower is seeking damages and not seeking to set aside the foreclosure sale], *Valbuena v. Ocwen Loan Servicing, LLC* (2015) 237 Cal.App.4th 1267 [holding that it was not necessary for a borrower to tender the loan balance in an action to set aside a trustee's sale based on alleged violations of the Homeowner's Bill of Rights], and *Majd v. Bank of America* (2015) 243 Cal.App.4th 1293 [holding that a borrower is not required to tender the amount owed on the debt where a lender allegedly fails to comply with requirements for considering a modification of the loan].

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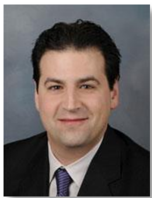
Arguably, under these cases, the Tender rule would now only apply to cases where the borrower does not dispute his/her default and only seeks to set aside a conducted foreclosure sale based on a procedural formality. If so, even a non-attorney borrower would theoretically be able to creatively plead around this rule with a one sentence allegation in a complaint.

However, the Rule has not been rendered obsolete, or even toothless. Instead, while many old, established paths to invoking the Rule have been worn away by time and the tide of changing judicial views, a few still remain and new ones may yet be discovered. The key is to hire the right guide.

Wright, Finlay & Zak, LLP specializes in mortgage-related litigation, compliance and regulatory matters for its clients throughout the Western United States, including California, Nevada, Arizona, Washington, Utah, Oregon, New Mexico, Idaho and Hawaii. If you have any questions regarding the new fees imposed by California Government Code section 27388.1 or any other matter, please contact Todd Chvat at tchvat@wrightlegal.net or Robert Finlay at rfinlay@wrightlegal.net.



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FEE SIMPLE

UNDERSTANDING CALIFORNIA'S NEW RECORDING FEES

by Joan Spaeder-Younkin, Esq. and Michelle A. Mierzwa, Esq.

The Rule

On September 29, 2017, Governor Jerry Brown signed Senate Bill 2, the Building Homes and Jobs Act (the "Act"), authored by Senator Toni Atkins (D-San Diego). The Act creates a new source of funding for affordable homes by charging a $75 fee for recording certain types of real estate documents. It is estimated that the new fee will generate $250 million each year. The Act, which became effective immediately, is part of a comprehensive package of legislation that aims to address California's housing dilemma by imposing a new duty on counties to send quarterly revenues from this fee, after deduction of administrative costs, to the State Controller for deposit in the Building Homes and Jobs Fund, created within the State Treasury.[1]

The Act adds California Government Code section 27388.1, requiring a $75 fee per document to be paid, commencing January 1, 2018, at the time of the recording "of every real estate instrument, paper, or notice required or permitted by law to be recorded . . ., per each single transaction per parcel of real property." The fee is capped at $225 for transactions involving the recording of multiple documents. Section 27388.1(a)(1) defines "real estate instrument, paper, or notice" to mean "a document relating to real property, including but not limited to, the following: deed, grant deed, trustee's deed, deed of trust, reconveyance, quit claim deed, fictitious deed of trust, assignment of deed of trust, request for notice of default, abstract of judgment, subordination agreement, declaration of homestead, abandonment of homestead, notice of default, release or discharge, easement, notice of trustee sale, notice of completion, UCC financing statement, mechanic's lien, maps, and covenants, conditions, and restrictions."[2] The statute does not limit the definition to a finite list; other real property related documents not specifically listed in the code section also remain subject to the fee, unless an exception applies.

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Fee Simple (continued from page 3)

Exceptions

Section 21388.1(a)(2) provides for certain exceptions to the $75 fee, including transactions involving a transfer/sale of real property that is subject to the imposition of a documentary transfer tax, as defined by California Revenue and Taxation Code section 11911. Transactions covered by the documentary transfer tax under Revenue & Taxation Code section 11911 involve a purchase and sale or change of ownership when the consideration or value of the interest or property conveyed exceeds $100.[3] This exception would apply to transfers of real property by court order, or pursuant to an eminent domain judgment, for example, since Revenue & Taxation Code section 11911 is not limited to voluntary vs. involuntary sales.[4] Additionally, easements that may potentially endure for a substantial period of time, such as perpetual easements and easements for life, are also subject to the provisions of the Documentary Transfer Tax Act, and thus also should be subject to an exception from the new fee.[5] Section 2 of the Bill further describes the intention of the exception as follows: "In order to promote housing and homeownership opportunities, the recording fee imposed by this act shall not be applied to any recording made in connection with a sale of real property. Purchasing a home is likely the largest purchase made by Californians, and it is the intent of this act to not increase transaction costs associated with these transfers."

Section 21388.1(a)(2) also provides an exemption from the new fee in connection with a transfer of property to a grantee who will occupy the dwelling as a principal residence, even if the documentary transfer tax is not imposed on the transfer. Thus, documents recorded as part of a refinance loan on an owner occupied property, including, for example, transfer deeds, i.e., in and out of a trust, are exempt. However, in the same type of refinance transaction regarding a non-owner occupied property, the fee would be imposed as to both the deed transferring the ownership interest out of the trust and the deed transferring it back into the trust.

As a practical matter, county recorders do not take it upon themselves to determine whether a document is subject to the fee or the exception. Title companies have confirmed with the county recorders that any exception for payment of the fee on an individual document must be set forth on the face of the document or in a cover sheet when the document is presented for recording. A few select counties require inclusion of a declaration under penalty of perjury that an exception applies.

Interpreting the $225 fee cap

For purposes of the $225 fee cap, documents included in a single transaction are those presented together and related to the same parties and property.[6] The Legislature's imposition of the cap "*per each single transaction per parcel of real property*" suggests that the $225 fee limit is not intended to be for the life of a loan, but rather is a cap for all documents submitted simultaneously in one transaction. Multiple documents that relate to a sale or transfer transaction of real property received from one party may include multiple "SB2" transactions. If not otherwise exempt, the fee would be $75 for each recorded document, up to the cap of $225. Trailing documents that come in days or weeks after the other documents in a transaction would not be included in the calculation of the $225 cap and would require payment of the $75 fee if not otherwise exempt. Thus, for example, a transfer or assignment of a loan after origination (other than a simultaneous assignment of the loan upon origination), commencement of foreclosure proceedings, or reconveyance of the loan would be considered separate transactions for purposes of the statute, even though they may relate to the same parties to the loan.[7]

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Fee Simple (continued from page 4)

Practical Applications for lenders and loan servicers

From a practical standpoint, lenders and loan servicers should now begin to include in their payoff demand statements an additional $150 in recording fees for the recording of a Substitution of Trustee and Full Reconveyance ($75.00 for each "title" on the document), necessary for the release of the loan following a full payoff. Additional examples of a multiple title document include a Substitution of Trustee and Notice of Default, Deed of Trust with Assignment of Rents (also $150), and an Assignment of Deed of Trust, Substitution of Trustee and Notice of Default combination ($225). Title companies and county recorders have advised that such multi-purpose documents will be assessed the new fee for each title.

With respect to the disclosure of fee estimates on a new loan, it is advisable to obtain an estimate from the title company handling the closing, so that the loan estimate is as close as possible to the actual fees to be incurred. While there is currently some uncertainty about the disclosure of good faith fee estimates for transactions and how many documents will need to be recorded in each transaction, once the Act is put into practice and closing agents gain experience, the fee estimates will become easier. In the meantime, it appears that the preferred method is to disclose the transaction maximum of $225[8], as a refund that can be given through an amended settlement statement in the event actual recording fees are lower. Otherwise, if the lender under-discloses and the difference exceeds applicable tolerances, the lender would be responsible for payment of the tolerance cure on every such transaction.[9] These amounts could certainly add up over the course of many transactions!

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[1] Legislative Counsel's Digest, SB 2, Atkins. Building Homes and Jobs Act; See newly added Cal. Health & Saf. Code § 50470.
[2] Cal. Gov. Code §12388.1(a)(1).
[3] California Revenue & Taxation Code §11911(a).
[4] *People ex rel. Department of Public Works v. County of Santa Clara* (Cal. App. 1st Dist. 1969), 275 Cal. App. 2d 372, 79 Cal. Rptr. 787, 1969 Cal. App. LEXIS 1927.
[5] 62 Ops. Cal. Atty. Gen. 87.
[6] California Mortgage Bankers Association SB2 Compliance Webinar, January 25, 2018, Lisa Tyler, Fidelity National Financial, Inc., who has worked with all 58 County Recorders' Offices regarding implementation of the Bill.
[7] California Mortgage Bankers Association SB2 Compliance Webinar, January 25, 2018, Lisa Tyler, Fidelity National Financial, Inc., who has worked with all 58 County Recorders' Offices regarding implementation of the Bill.
[8] The disclosed finance charge is considered accurate if it is not understated by more than $100, but overstatements are not violations. 12 C.F.R §1026.18(d).
[9] 12 C.F.R. §1026.19(f)(2)(v)

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KEEPING "PACE" WITH CLEAN ENERGY FINANCE LAWS

by Sonia Plesset Edwards, Esq. and T. Robert Finlay, Esq.

With global warming and other environmental issues at the forefront of national policy, the creation of programs to finance energy-efficient improvements soon followed. In thirty-five states, and in the District of Colombia, the primary means of financing these improvements is through Property Assessed Clean Energy ("PACE") programs. While PACE operates in various degrees in the states in which it is available, PACE is regulated at the state level only, and as such, currently operates under the state law of the participating states. On a national level, however, PACE programs have been affected by Fannie Mae and Freddie Mac's refusal to back mortgages with PACE liens, and HUD's announcement that PACE liens must be subordinate to any FHA guaranteed mortgages. Thus, it is not surprising that while PACE regulation varies from state to state, common issues will arise.

Like any new program, PACE has not been without issues, many of which did not become apparent until its implementation. California, the state in which PACE originated, is no exception.

Last fall, California implemented a major overhaul of the PACE program in the form of SB 242 and AB 1284, which will take effect on January 1, 2018, and January 1, 2019. These new laws, which supplemented existing law and will be renamed "California Finance Lenders Laws", are intended to establish a uniform, statewide set of regulations with the dual goal of consumer protection and ensuring the future of financing for environmental improvements under an existing financing program. Like with the PACE program itself, other states are likely to follow California's lead in regulating PACE loans.

PACE Before the New Laws

In 2007, the State of California first introduced PACE to provide commercial and residential financing for renewable and clean energy improvements for existing and new structures. The programs enabled homeowners and businesses alike to install a wide range of efficiency-increasing upgrades, such as solar windows and panels, LED lighting, insulation, and, in the commercial context, seismic retrofitting, as well as the installation of vehicle-charging stations for electric cars.

The PACE program really took off in 2010, when the California Legislature set up the State's Loan Loss Residential Fund for Residential PACE programs. These programs provide various sources of financing, usually through local governments obtaining financing from private lenders in the form of bonds of various duration, ranging from a few months up to twenty years. Once recorded, the assessment contracts become liens against the property that secured repayments that appeared twice a year on the property tax bills of the affected properties as a line item, and were repaid through the localities. Like property taxes, PACE assessments created liens that were superior to any existing lien, including senior mortgages. These liens were not eliminated by foreclosure, and could be foreclosed in the same manner as delinquent property taxes. For a senior lender, the consequences were clear: these assessments, if delinquent, had to be advanced by the lender in order to protect the lender's security interest. The advances could, however, then be added to the balance due on the loan.

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PACE (continued from page 6)

It is important to note that, in the *residential context*, there is no notice requirement to the existing senior lienholder at the time of their creation. Thus, the liens are created without any consideration of the impact of the assessment on the existing lienholders. They are in effect, imposed on the lienholders. Thus, PACE assessments created a de facto "super lien."

In addition, the PACE assessments ran with the land, not the borrower. As a result, prior to the enactment of the new law, PACE financing decisions were based entirely on the amount of equity in the property, a cursory review of the borrower's payment history of property taxes, and the absence of a recent bankruptcy. No consideration was given to the borrower's credit worthiness, his/her income, assets, existing liabilities (including the current mortgage), or overall ability to repay. Moreover, because PACE contracts did not require lending disclosures many borrowers did not understand the extent to which they were increasing their monthly obligations. In fact, many were lured into the often-false belief that, with tax credits and energy savings, the improvements would virtually "pay for themselves". More often than not, the results were disastrous, because the extra burden of the assessment caused not only default in the payment of the assessment, but potentially in the underlying loan obligation. In addition, the PACE assessments created a new category of essentially mandatory advances for mortgage lenders, on par with delinquent property taxes. In a declining real estate market, these advances could potentially become losses, and make reinstatement less likely for the borrower.

The fact that the PACE liens ran with the land gave rise to another unexpected consequence for borrowers: Namely, most borrowers were not informed that the presence of the negative impact of PACE liens on the sale of the property or the refinance of their loans, primarily due to the fact that the majority of lenders refuse to finance loans on properties with existing PACE liens. This limitation stemmed in part from the fact that, in 2010, Fannie Mae and Freddie Mac refused to back mortgages with PACE liens on them. Likewise, in 2015, HUD announced that FHA loans on homes with PACE liens would not be made absent a subordination agreement of the PACE lien. These limitations thus affected the marketability of the properties burdened by PACE liens, and in many instances required borrowers to pay off the liens before selling the home; something which was not always be feasible.

The New PACE Regulation

The two assembly bills are intended to address what was seen by the Legislature as critical defects in the existing law, namely, 1) the lack of oversight and regulation in the industry, 2) the lack of proper underwriting requirements, and specifically the lack of concern for the ability to repay 3) the lack of disclosures and a right of rescission and 4) Fraud prevention, including, false advertising.

The most significant modification to address these concerns is the creation under AB 1284 of a licensing and regulatory framework for the PACE industry, under the supervision of the California Department of Business Oversight (DBO).

Beginning January 1, 2019, AB 1284 will require, among other things, that PACE Program administrators be licensed, that new underwritings standards be established based on income verification, and ability- to- repay consideration, that includes repayment not only of the PACE obligation, but of all debt, including existing mortgage debt; require PACE providers to undergo background investigations and satisfy net worth requirements to obtain a license; require PACE providers to train home improvement contractors and their sales representatives, and will hold PACE administrators responsible for screening and monitoring of contractors and their sales representatives and finally, empower the DBO to take action against noncompliant PACE administrators, by among other things, prohibiting them from working with certain contractors and their employees who have engaged in activity harmful to consumers.

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PACE (continued from page 7)

In addition, SB 242[1], requires that, beginning on January 1, 2018, prior to the execution of any assessment agreement, PACE providers engage in a recorded telephone call with the borrower(s), which sets forth a "confirmation" of the terms of the assessment contract, and all of the newly-mandated written disclosures concerning the terms of repayment under the contract, including the monthly and annual costs of the assessment, a notification that the cost may not be offset or reduced by the improvements, and a disclosure regarding the inability to guarantee the existence or amount of any taxable deductions. SB 242 also expands the three-day right of rescission on the PACE financing agreement to the separate home improvement contract. Under the new law, a contractor that commences the work prematurely will be responsible for restoring the property to its original condition, at no cost to the homeowner. Finally, SB 242 prevents kickbacks from contractors, requires a same price as cash quote for financed improvements, and prevents the disclosure to the contractor by the PACE provider of the amount of financing for which a homeowner qualifies.

"…any financing that increases a borrower's obligation while creating a lien that has priority over a prior existing deed of trust, is going to negatively impact the holder of that deed of trust."

SB 242 also includes a foreign language requirement for the confirmation call for five supported languages, and beginning on January 1, 2019, will require that confirmation calls in languages other than English, will need to be accompanied by all operative documents in the same language as the call. Currently the five supported languages include Spanish, Chinese, Korean, Tagalog and Vietnamese.

The New Laws and Their Impact on Existing Lenders

While receiving the full support of the mortgage and servicing industry, it is clear that the legislation was advanced by consumer groups, many of which continue to claim that the new legislation, while a step in the right direction, is still lacking. Thus the only significant benefits to mortgage lenders would be incidental, at best. One such benefit would likely be that, if applied properly, the new underwriting requirements should reduce the number of overburdened borrowers, and the ensuing defaults. However, this reduction will not eliminate the fact that any financing that increases a borrower's obligation while creating a lien that has priority over a prior existing deed of trust, is going to negatively impact the holder of that deed of trust. The new laws still allow residential borrowers to take on additional debt that could potentially increase the risk of default, and still creates a superior lien, without any type of prior notice to that lender. Even with the most conscientious underwriting techniques, new debt creates an additional risk that was not contemplated at the time of the origination of the mortgage as it not only increases the possibility of default, but potentially creates an additional obligation to the mortgage lender since it takes the form of a lien that not only places the mortgage lender's own security at risk, but that survives the mortgage lender's foreclosure and will have to be repaid even if title reverts to the lender.

While overall, these new laws seem like they will have a positive impact on mortgage lenders, only time will tell. Increased regulation and a new overseeing entity may create more questions than answers, and possibly a new type of litigation that ties up properties for extended periods of time. As with all new legislation, even the best of intentions can give rise to unanticipated problems. It will also be interesting to see if other states follow California's lead in updating their own programs. Hopefully, states without current programs will be cognizant of the issues that arose in California and other pioneer states, and craft laws that will mitigate them from the onset.

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PACE (continued from page 8)

In the meantime, the DBO has invited commentaries and input from the lending industry. Now is the time for the mortgage industry to bring up their concerns, and join forces with the DBO in the hope of finding solutions that are beneficial to lenders and homeowners alike.

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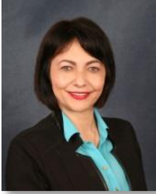

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[1] SB 242 only applies to residential properties with fewer than four units.

THE MANDATORY OPTIONS

LOSS MITIGATION AND THE SUCCESSOR SERVICER

by Jennifer A. Brady, Esq. and Kristina M. Pelletier, Esq.

In the "bad old days," borrowers on real estate secured loans who were in default and unable to make the payments on their loan usually had few options other than bankruptcy, a deed in lieu of foreclosure, or a short sale to try to avoid the consequences of foreclosure (though the latter two still meant they would lose their home). Now, as a result of changes in the law and industry practice, borrowers have several more—and stronger--foreclosure prevention alternatives for which they can—and sometimes must—at least be considered.

Perhaps the more common alternative now available is a loan modification. State and Federal laws may require that borrowers at least be given the opportunity to apply for such a modification, and to be provided with protections against foreclosure while that application is being considered. While an application for a loan modification may provide a great benefit to the borrower and, perhaps, even the lender/servicer, by making a non-performing loan performing again, the obligations imposed on a successor loan servicer during a service transfer can lead to unexpected burdens.

Increasing that peril is the fluid nature of the regulatory landscape. For example, in August 2016, the Consumer Financial Protection Bureau ("CFPB") issued a final rule amending many of the mortgage servicing provisions found in both Regulations Z ("Truth in Lending Act," or "TILA") and X ("Real Estate Settlement Procedures Act", or "RESPA"). Changes to loss mitigation procedures, among others, became effective in October 2017. However, while the CFPB, a federal government entity, sets forth the minimum requirements governing loss mitigation, states can, and have, enacted their own even more restrictive requirements, such as the California Homeowner's Bill of Rights ("HOBR") or the Nevada equivalent.

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The Mandatory Options (continued from page 9)

There are nonetheless a few common scenarios that successor servicers now tend to see and knowing what to do under each scenario can greatly minimize the successor servicer's risk of the ending up in court.

1. *Where the Prior Servicer Approved the Borrower for a First Lien Loan Modification or Other Foreclosure Prevention Alternative.*

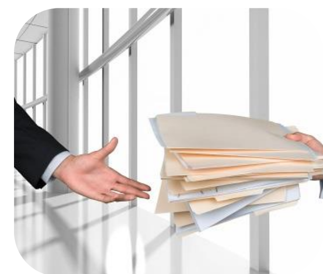
In some instances, at the time of the service transfer, the borrower has already been approved for a loan modification (or other foreclosure alternative). Both the CFPB (12 CFR 1024.41) and California *Civil Code* Section 2924.11(g) requires that subsequent mortgage servicers honor any previously approved first lien loan modification or other foreclosure prevention alternative after the servicing of the loan is transferred or sold to another mortgage servicer. The best case scenario is where the borrower already received and returned the loan modification to the prior servicer and the successor servicer just has to make sure the loan modification has been implemented.

If the borrower was offered the loan modification, but has not yet accepted it by the time of the service transfer, the successor servicer will need to wait for the time to accept to expire. Under the CFPB (12 CFR 1024 (k)(ii)(5)) not only must the successor servicer allow the borrower the unexpired balance of application time, but a borrower may accept or reject a pending loss mitigation offer made by the prior servicer by contacting the *prior servicer even after* the transfer date. To address these new restrictions, the CFPB requires that the successor servicer establish policies and procedures for ensuring the timely transfer of documents with the prior servicer.

A more complicated scenario is where the prior servicer approved the borrower for a trial payment plan ("TPP") that has not been completed at the time of the service transfer. In this scenario, the successor servicer will need to be sure to accept any remaining trial payments from the borrower and assess whether the trial payment plan requires the servicer to offer specific permanent modification terms. Failure to do so could result not only in a lawsuit against the successor servicer, but also a claim for breach of contract for failure to honor the terms of the TPP (assuming the TPP includes language that the loan "will be" modified).

2. *Where the Borrower Submitted an Application Prior to the Service Transfer but has yet to Receive a Response.*

Under the CFPB rules (12 CFR 1024.24 (c-h)), a borrower retains the rights and protections he/she had with respect to their loss mitigation application *before* the loan was service transferred. While this is great news for the borrower, this means even more requirements and restrictions for the successor servicer. In particular, the successor servicer must comply with the loss mitigation requirements within the same timeframes that applied to the transferor servicer (with limited extensions of these timeframes). In addition, an application is deemed complete based on when the documents were received by the *prior servicer*. Another important change in the CFPB effective October 2017 is that borrowers now have another opportunity to submit a loan modification application on the loan *if* the loan is brought current between the last application and the next default. Previously, borrowers were only provided one shot.



Under HOBR, *Civil Code* Section 2923.6(g) excuses servicers from having to review multiple loan modification applications; unless the borrower can demonstrate that he/she experienced a "material change in financial circumstances." Unfortunately, this provision of HOBR was repealed January 1, 2018, and there was no replacement. Thus, it is possible that servicers may have to review multiple applications, regardless of whether there has been any material change in financial circumstances. However, effective January 1, 2018, Section 2923.6 was repealed so such claims would be based on violations of the new Sections 2923.5, 2923.7, 2924.11, or 2924.17.

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The Mandatory Options (continued from page 10)

How this breaks down timing wise under the CFPB rules is if a borrower submits an application shortly before transfer, the successor servicer must send an acknowledgment notice within 10 business days of the transfer date (excluding legal public holidays, Saturdays and Sundays). If the borrower's application was complete prior to the servicing transfer, the successor servicer must evaluate it within 30 days of the transfer date. If the successor servicer needs more information to evaluate the application, the successor servicer must not make the first notice or filing required by law for either judicial or non-judicial foreclosure, until *after* the reasonable date given to the borrower to submit missing documents in the notice. If the borrower submits an appeal, the new servicer has 30 days to make a determination on the appeal. The appeal must be reviewed by *different personnel* than those who reviewed and rejected the application initially.

The CFPB rules states that servicers are only obligated to review a complete or facially complete loan modification application that is submitted at least Thirty-Seven days prior to any foreclosure sale. In California, however, there is no set cutoff. HOBR's restrictions on proceeding with foreclosure are not triggered until a "complete loan modification application" is pending. HOBR defines a "complete" application as one where the borrower "has supplied the mortgage servicer with all documents required by the mortgage servicer *within the reasonable timeframes specified by the mortgage servicer*." Arguably, the servicer could follow the CFPB and designate Thirty-Seven days as the "reasonable timeframe," but this has yet to be tested in the California Courts. Generally, servicers set cut-offs of a week before sale, which is a more prudent approach in the event the borrower seeks to challenge a rejected application. If a servicer is to designate a certain cut-off this need to be clearly communicated to borrowers and explicitly set forth in the servicer's loss mitigation correspondence so there can be no question about the borrowers' knowledge of this cut-off.

3. Where the Loan is in Default and No Loss Mitigation Request is Pending.

Depending on where the loan stands in the foreclosure process, the successor servicer will need to ensure that all required notices are in compliance with the CFPB and HOBR. In some instances, the loan is in default at the time of the service transfer and a Notice of Default has already been recorded by the prior servicer. Even if the successor servicer has nothing to do with the prior recorded Notice of Default or Notice of Sale, if either instrument is defective for any reason and the successor servicer proceeds with a foreclosure based on these defective instruments, the successor servicer could find itself liable under HOBR and/or federal law. To minimize the risk of this problem, successor servicers should always carefully review any prior recorded foreclosure notices and review the prior servicer's records to ensure that they were recorded in compliance with State and Federal law. If there is any doubt as to the prior servicer's compliance, the prudent successor servicer will seek to remedy this by rescinding the defective notices, ensuring compliance and re-recording a new, compliant notice.

Unfortunately, there is no fail-safe way to prevent a lawsuit arising from claimed violations of the CFPB or HOBR. Indeed, many lawsuits that are filed are last-ditch efforts by borrowers to prevent and/or delay an inevitable foreclosure, even where the servicer did comply with the law. The good news is that successor servicers can minimize the risk of lawsuits and in the unfortunate situation where they are sued, increase their chance of success, by carefully reviewing the records of the prior servicer as quickly as possible to assess whether any of the above three scenarios, or other problems, exist and, if so, take corrective steps to address them. Of course, when it is unclear how best to proceed, counsel should be consulted.

Jennifer A. Brady, Esq.
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Jennifer Brady is a Senior Associate in WFZ's California Office.

Kristina M. Pelletier, Esq.
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Kristina Pelletier is a WFZ Associate located in Northern California.

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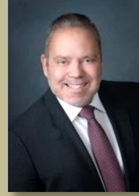
WFZ PROFILE:
BRADLEY T. WIBICKI, ESQ.
PARTNER IN CHARGE OF THE FIRM'S INSURANCE DEFENSE DIVISION



Bradley T. Wibicki, Esq.
bwibicki@wrightlegal.net

Bradley is a Partner in the Nevada office of Wright Finlay & Zak and is responsible for developing and managing the entire firm's civil litigation defense practice. He possesses a diverse professional background, focusing on the practices areas of personal injury, product liability, premise liability, short-term lessor liability, general liability, insurance issues and employment law.

Mr. Wibicki has represented individuals to businesses of all sizes, including, but not limited to, insurance companies, car dealerships, casinos, nurseries, supermarkets, restaurants and car rental agencies. Potential exposure of the matters he has handled has ranged from less than $50,000.00 to multi-million dollars. He holds an impressive track record in achieving favorable resolutions by way of alternative dispute resolution or defense verdicts in matters that could not be resolved short of arbitration or trial.

Mr. Wibicki is from Chicago, Illinois. He earned his B.S. from Iowa State University in 2009 and is a member of the Sigma Chi Fraternity. After graduation, Mr. Wibicki returned to Chicago, Illinois where he earned his J.D. from The John Marshall Law School in 2005. During his graduate career, Mr. Wibicki served as a student-licensed attorney for the City of Chicago Department of Building and Land Usage.

Mr. Wibicki takes great pride in his practice of the law. He understands that regardless of the type and/or extent of damages sought, the outcome is always of the utmost importance to his clients and he works exceptionally hard to ensure that these interests are protected. He also understands that the law is always evolving and enjoys holding presentations on current areas of interest.

When Mr. Wibicki is not working, he enjoys spending time with his family and friends. He is a diehard Chicago Cubs supporter who also enjoys cooking and traveling internationally.

UPCOMING INDUSTRY EVENTS

Date	Org	Event	Location
April 23-24	ALFN	Advocacy Day & Willpower Summit	Dallas, TX
April 24-25	MBA	National Advocacy Conference 2018	Washington, DC
April 29-May 2	MBA	Legal Issues and Regulatory Compliance Conference	Los Angeles, CA
May 8-9	CREFC	Commercial Real Estate Finance Summit – West	Santa Monica, CA
May 20-23	ICSC	RECon The Global Retail Real Estate Convention	Las Vegas, NV
May 20-23	MBA	National Secondary Market Conference & Expo	New York, NY
May 20-23	MBA	Commercial/Multifamily Servicing & Technology Conference	Miami, FL
June 13-15	USFN	Loan Management & Servicing Seminar	Newport Beach, CA
June 18-21	WBENC	21st Annual National Conference & Business Fair	Detroit, MI
June 20-22	NBA	Nevada, Oregon and Idaho Annual Conference	Incline Village, NV
July 12-13	USFN	Legal Issues in Mortgage Servicing	Chicago, IL
July 12-13	CMA	2018 Summer Seminar	San Diego, CA
July 16-18	CMBA	46th Annual Western Secondary Market Conference	San Francisco, CA
July 22-25	ALFN	16th Annual Leadership Conference	Santa Barbara, CA

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WFZ FIRM NEWS

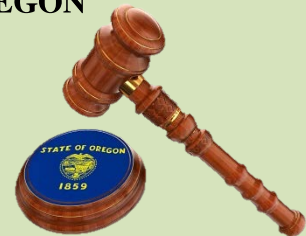
WFZ OPENS ITS OREGON OFFICE!

AND WELCOMES TONY KULLEN AS ITS MANAGING ATTORNEY

WRIGHT, FINLAY & ZAK, LLP IS PLEASED TO ANNOUNCE THAT

THE FIRM HAS OPENED A NEW OFFICE IN OREGON

WRIGHT, FINLAY & ZAK, LLP
121 SW MORRISON ST., SUITE 1875
PORTLAND, OR 97204
(949) 477-5050



WRIGHT, FINLAY & ZAK, LLP IS ALSO PLEASED TO ANNOUNCE THAT

TONY KULLEN, ESQ.

HAS JOINED THE FIRM AS THE MANAGING ATTORNEY OF OUR OREGON OFFICE

Mr. Kullen joined Wright, Finlay & Zak as Managing Attorney for its Oregon office in January 2018, after serving in that capacity with another law firm in 2015, and as Counsel with the Business Transactions Group of another law firm from 2015 through 2017. Mr. Kullen focuses his practice on creditors' rights issues, real estate litigation, including lender and servicer liability defense, wrongful foreclosure defense, fair debt collection practices defense, title disputes, and general business transactions. Mr. Kullen is an active member of the Oregon State Bar Debtor-Creditor Section's Public Education and Legislative Committees, and the Credit Union National Association; is a volunteer coach for the "We the People Constitutional Law" debate program for a local high school; and serves as Chair of the Supervisory Committee of Rivermark Community Credit Union. Mr. Kullen is also licensed to practice in the States of Washington and New York.

YOU CAN REACH TONY KULLEN AT
(503) 479-8871
TKULLEN@WRIGHTLEGAL.NET

If you have any questions regarding any of our offices or the services that we provide throughout California, Nevada, Arizona, Oregon, Washington, Utah, New Mexico and Hawaii, please feel free to contact Robert Finlay or Robin Wright at (949) 477-5050 or via email at rfinlay@wrightlegal.net or rwright@wrightlegal.net. Additional information about the firm can also be found on our web site at www.wrightlegal.net.

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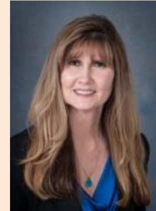
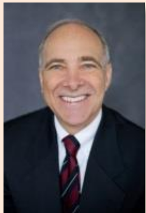
WFZ FIRM NEWS

WFZ WELCOMES ITS NEW ATTORNEYS!

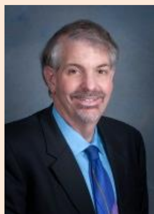


CHERI L. SHAINE
Ms. Shaine joins our Las Vegas office as a Senior Associate and practices in the Insurance Defense Division, which focuses primarily on personal injury, product liability, premise liability, and transportation law. Ms. Shaine also concentrates in mortgage litigation, both lender and servicer liability defense, wrongful foreclosure defense, fair debt collection practices defense, title disputes and complex corporate transactions. Ms. Shaine was named as one of the top 4% of the Legal Elite Lawyers in Southern Nevada in 2017 by Nevada Business Journal. Ms. Shaine is licensed to practice in Nevada.



STEVEN K. LINKON
Mr. Linkon joins our Las Vegas office as a Senior Associate and his practice areas include commercial foreclosures, note collection, Chapter 11 reorganization and receiverships, residential wrongful foreclosure, origination and title curative litigation. Mr. Linkon has served as an expert witness for the government and United States Trustee in prosecution of cases involving foreclosure consultants and home equity purchase agreements. He is a founding director of the Orange County Bankruptcy Forum and past director of the California Receiver's Forum. Mr. Linkon is licensed to practice in Washington, California and Nevada.

TONY KULLEN
Mr. Kullen joins WFZ as Managing Attorney of our newly opened Oregon office. Mr. Kullen was admitted to the New York bar after graduating from St. John's University School of Law in June 2006. Mr. Kullen moved back to Portland, Oregon, in August 2009, and has been engaged in litigation and transactional work related to secured and unsecured debt, real estate, corporate finance, and bankruptcy ever since. In his spare time, Mr. Kullen enjoys attending concerts, playing bass guitar, and sailing. Mr. Kullen is licensed to practice in Oregon, Washington and New York.



MARK S. BLACKMAN
Mr. Blackman joins our Las Vegas office as an Of Counsel attorney. Prior to joining Wright, Finlay & Zak, Mr. Blackman was a partner with a local Nevada firm that handled all types of litigation and compliance matters involving lending laws, creditors' rights and title disputes from manufactured housing and real estate foreclosures to bankruptcy, unlawful detainer (landlord-tenant) and collection/creditor's rights matters. Mr. Blackman is a member of the United Trustees Association and California Manufactured Housing Institute and is licensed to practice in Nevada and California.

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