WRIGHT, FINLAY & ZAK, LLP

THE WFZ QUARTERLY

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WELCOME TO *THE WFZ QUARTERLY*

by Robin P. Wright, Esq. and T. Robert Finlay, Esq.

Welcome to Wright, Finlay & Zak, LLP's inaugural newsletter! The purpose of this quarterly newsletter is to provide you with insightful articles on the ever-changing legal landscape, provide timely analysis on important case decisions, proposed and newly enacted state statutes, and keep you up to date with the latest legal news, trends and strategies in the Western States we cover – California, Nevada, Arizona, Washington, Oregon, Utah, New Mexico and Hawaii, as well as news about Wright, Finlay & Zak and its people.

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We hope you enjoy this issue and would like to hear from you. If you have a comment, question or suggestion for an upcoming issue, please contact us at wfznews@wrightlegal.net.

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In this Issue

RIGHT OF REDEMPTION ON HOA SALES

A SOLUTION OR JUST ANOTHER PROBLEM FOR SERVICERS IN NEVADA?

by Robin P. Wright, Esq. and T. Robert Finlay, Esq.

Between 2010 and 2014, Loan Servicers and Investors in Nevada had thousands of liens potentially wiped out by HOA foreclosures. The reason – poorly written statutory language that, unbeknownst to just about everyone, including HOAs, loan originators and title companies, created a super-lien for HOA dues that could wipe out an otherwise 1st position Deed of Trust at foreclosure. In response to what could be billions of dollars in losses and the ensuing title wave of litigation over the HOA sales, the Nevada Legislature passed SB 306, which became effective on October 1, 2015. SB 306 did not provide any relief to Investors and Servicers who may have already lost their liens, but it did provide some prospective relief by requiring notice to the lienholders before extinguishing their deeds of trusts, limiting HOA collection costs, and otherwise providing more structure to the HOA lien and foreclosure process. The crown jewel of SB 306 is the right of redemption in the event an HOA foreclosure sale slips through the cracks. On its surface, the right of redemption is a well-needed safety valve for lenders AND homeowners; however, its application may be challenging.

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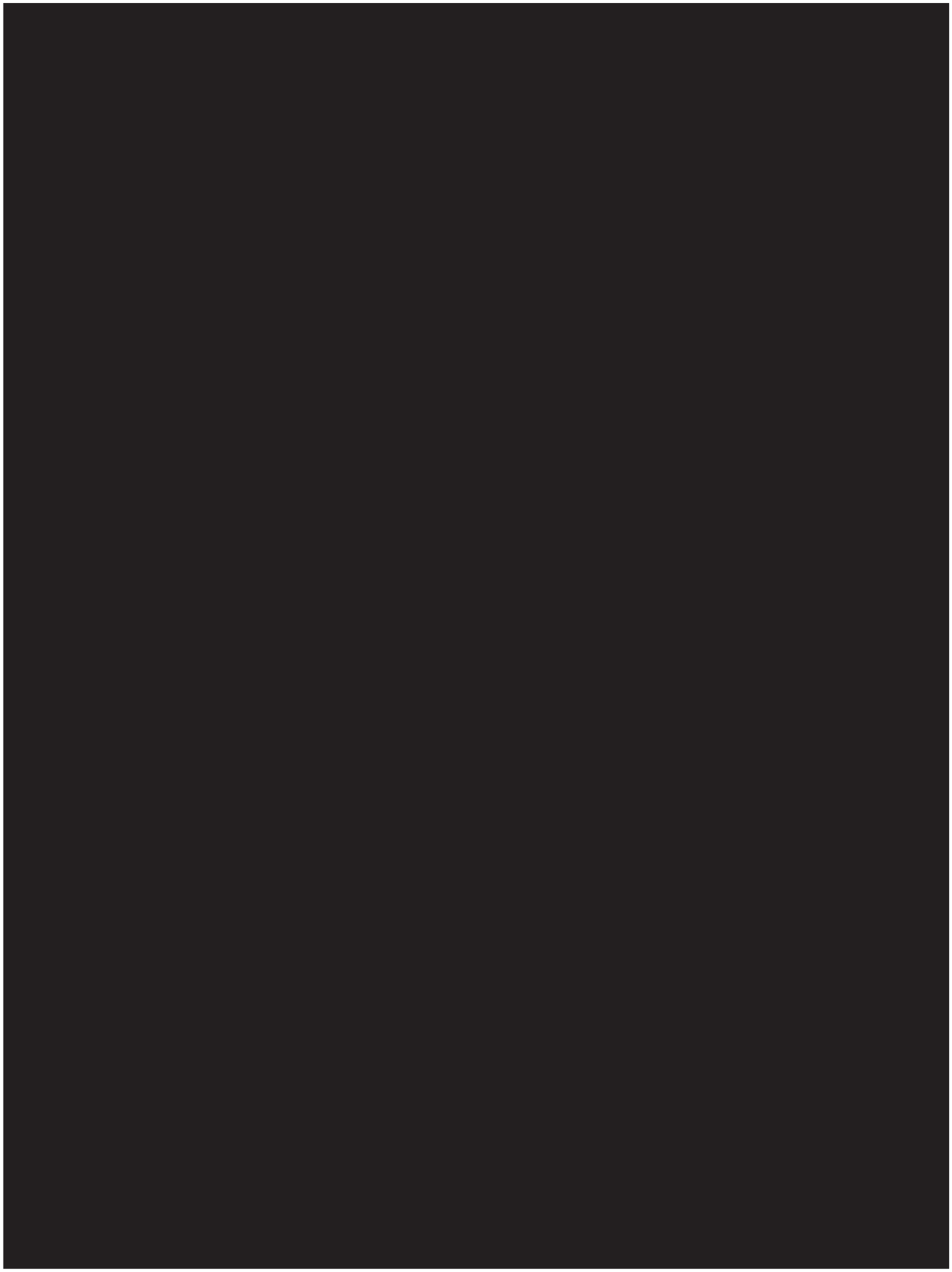
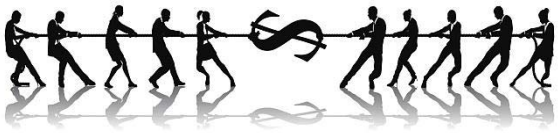


CALIFORNIA HOBR

WHEN IS A BORROWER ENTITLED TO ATTORNEYS' FEES AFTER ENJOINING A FORECLOSURE SALE?

by Nicole S. Dunn, Esq. and T. Robert Finlay, Esq.

Although it has been effective since January 1, 2013, California's Homeowner's Bill of Rights (HOBR) is still working its way through the trial and appellate courts, searching for clarification on many of its unclear provisions. One issue ripe for interpretation is under what circumstance is the borrower deemed the prevailing party and entitled to attorneys' fees. *Civil Code* Sections 2924.12(i) and 2924.19(h)[1] give the court the discretion to award reasonable attorney fees and costs to the "prevailing borrower" who is defined as a borrower that "obtained injunctive relief or was awarded damages." There is no question that borrowers who prevail on their HOBR claims at trial are entitled to their fees. Likewise, under the recent Court of Appeals decision in *Monterossa v Superior Court*[2], it is now equally as clear that borrowers obtaining a preliminary injunction under HOBR are entitled to their fees in bringing the injunction. But, is the granting of a temporary restraining order ("TRO") considered injunctive relief for purposes of obtaining attorney fees under HOBR? If so, what is to preclude borrowers from systematically applying for TROs (which are often unopposed and usually granted) for the express purpose of funding the litigation with an award of attorneys' fees obtained due to the preparation of the Complaint and other pre-litigation matters?



To determine whether obtaining a basic TRO entitles borrowers to a fee award requires a closer examination of Section 2924.12(i) and the *Monterossa* decision. In *Monterossa*, the court addressed whether Section 2924.12(i) allows for an interim award of attorneys' fees after the borrower obtains a preliminary injunction as a result of a violation of *Civil Code* §§ 2923.55, 2923.6, 2923.7, 2924.9, 2924.10, 2924.11, or 2924.17. In *Monterossa*, the Borrowers/Petitioners filed an ex parte application for a TRO and request for issuance of an order to show cause regarding a preliminary injunction, seeking to prevent the trustee's sale of their residence. At the preliminary injunction hearing, the court found (on undisputed evidence since the lender offered no evidence to oppose the borrowers' claim) that the lender had engaged in "dual tracking" by recording a notice of trustee's sale while engaged in the loan modification process (prohibited by *Civil Code* §2924.6(c)) and granted the preliminary injunction. Thereafter, Petitioners filed a motion for attorney fees and costs, which the superior court denied, reasoning that the language of the applicable statute was consistent with the award of attorney fees at the conclusion of the action.

The Court of Appeal reversed and concluded that a borrower who obtains a preliminary injunction under Section 2924.12 is a prevailing borrower within the meaning of the statute. In short, trial courts may award attorney fees upon issuance of injunctive relief, which includes the issuance of a preliminary injunction, as well as a permanent injunction. The *Monterossa* court opined that the statute refers to "injunctive relief," which plainly incorporates both preliminary and permanent injunctive relief. However, *Monterossa* did not address the issue of whether the statute also provided for such an award where the borrower obtains a TRO, *but no preliminary injunction*. Although there are similarities between a TRO and a preliminary injunction, a TRO does not fall within the "injunctive relief" set forth in the statute which would entitle a prevailing borrower to attorney fees.

A TRO is an injunction in the sense that it enjoins a particular act pending a hearing on preliminary injunction. *Chico Feminist Women's Health Center v. Scully*, (1989) 208 Cal.App.3d 230, 237, fn. 1. However, it is distinguishable in the following ways:

1. A TRO may be issued "ex parte" and notice may be dispensed as its purpose is to preserve the status quo[3];
2. In contrast to the ex parte TRO proceeding, a hearing on the preliminary injunction is a full evidentiary hearing giving all parties the opportunity to present arguments and evidence. Civ. Proc. Code (CCP) § 527;

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California HOBR (continued from page 4)

3. A bond is not essential for a TRO unlike a preliminary injunction which is not effective until the undertaking is filed. *CCP* § 529;

4. The TRO is transitory in nature and terminates automatically when a preliminary injunction is issued or denied. *Landmark Holding Group v. Superior Court*, (1987) 193 Cal.App.3d 525, 529.

The differences between the TRO and a preliminary injunction demonstrate that a borrower who obtains only a TRO rather than a preliminary injunction or permanent injunction, has not obtained "injunctive relief" and has not "prevailed" under *Civil Code* § 2924(i) as interpreted by *Monterossa*. Granting of a TRO does not reflect on the merits of the underlying dispute, and does not qualify the enjoining party to "prevailing party" status. *Thomas v. Quintero*, (2005) 126 Cal.App.4th 635, 652, 664, fn. 21.

"Although there are similarities between a TRO and a preliminary injunction, a TRO does not fall within the "injunctive relief" set forth in the statute which would entitle a prevailing borrower to attorney fees."

In the context of what *Monterossa* recognizes as a unique statutory scheme of HOBR, the best a plaintiff can hope for is a preliminary injunction. HOBR provides an opportunity for a servicer, mortgagee, trustee, beneficiary or authorized agent to correct and remedy a HOBR violation, which gives rise to the action of injunctive relief, and then move to dissolve the preliminary injunction pursuant to Section 2924.12(i). This compliance with HOBR could potentially moot the borrower's request for a permanent injunction. Given that the borrower has effectively prevailed in the action by obtaining a preliminary injunction forcing compliance with the statute, the Legislature must have intended to authorize attorney fees and costs pursuant to Section 2924.12(i). *Monterossa, supra*, at 754. However, that same rationale is not present in connection with a TRO that can be issued on an ex parte basis, without a bond, where the arguments have not been fully presented, where a defendant may not have appeared in the action yet, and which was only intended to last pending the hearing on the preliminary injunction. A borrower might obtain a TRO for a short period of time and then fail to obtain a preliminary injunction because of the failure to demonstrate a likelihood of success on the merits with respect to an alleged HOBR violation. A borrower in that situation cannot be deemed a "prevailing borrower" because they would not have obtained a preliminary injunction forcing compliance with the statute as set forth in *Monterossa*.

In sum, if attorney's fees are allowable for the mere issuance of a TRO in a HOBR matter, then plaintiffs in these types of cases would receive an absolute windfall at the outset of the matter (1) with little to no evidentiary proof of a HOBR violation; (2) without an objection by defendants who have not yet retained counsel, or who are unable to prepare an opposition and/or attend the TRO due to the short notice of the hearing; and (3) without allowing defendants an opportunity to remedy the alleged violation as contemplated by HOBR. Not only would this be unfair, but it also was not what the Legislature intended.

Final thoughts and recommendations:

While *Monterossa* held that attorneys' fees are *available* to borrowers who obtain a preliminary injunction, it does not necessarily mean that every borrower receiving a preliminary injunction will also get a fee award. There are several additional considerations to keep in mind. First, was the injunction granted based on a HOBR claim? Most California cases involve a hybrid of HOBR and non-HOBR claims. It is important for defense counsel to clarify under which theory the court is granting the injunction. We recommend raising this in the opposition to the OSC re: Preliminary Injunction or at the injunction hearing, rather than after the court has granted the injunction. Second, it is key to clarify whether the injunction is conditioned upon the posting of a bond. If so, and the borrower fails to timely post the bond, one could argue that the preliminary injunction never took effect and, therefore, the borrower is not the prevailing party under Section 2924.12(i). Lastly, the requested attorneys' fees must be "reasonable." At most, a prevailing borrower would only be entitled to fees incurred in obtaining that relief.

We have seen many borrowers seek excessive litigation and pre-litigation fees in obtaining an injunction. Arguing that the fees must be "reasonable" can help limit the fee recovery.

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[1] *Civil Code* Section 2924.12(i) applies to servicer's who conduct more than 175 qualifying foreclosures a year. Section 2924.19(h) applies to those under 175 annual qualifying foreclosures.

[2] *Monterossa v Superior Court*, (2015) 237 Cal.App.4th 747.

[3] Under current California ex parte requirements, a borrower could file suit Tuesday morning, give notice by Tuesday at 10:00 a.m. for an ex parte TRO hearing the next day at 8:30 a.m. Given the tight time frame, many servicers are not able to hire counsel fast enough to oppose the TRO hearing.

Nicole S. Dunn, Esq.
ndunn@wrightlegal.net

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

Right of Redemption on HOA Sales (continued from page 2)

SB 306, codified as Nevada Revised Statute (NRS) 116.31166(3)-(6), provides that the homeowner or any lienholder can redeem the property within 60 calendar days following an HOA foreclosure sale by paying the following:

- To the HOA property purchaser ("Purchaser"), the purchase price plus 1% interest per month;
- Any "assessments (e.g., HOA dues), taxes or payments toward liens" paid by the Purchaser at, or after, the HOA sale;
- If the Purchaser was a lienholder, whose lien was superior to that of the redeeming party, then the amount of that lien with interest;
- Any "reasonable amount expended by the [P]urchaser which is reasonably necessary to maintain and repair the unit …"; and
- If the redeemer is a junior lienholder, any lien that is senior to its lien (i.e., if a 2nd lienholder redeems the property, it must pay off the 1st lien.)

Along with payment, the redeeming party must "serve" a Notice of Redemption on the Purchaser and the party conducting the sale, i.e., the HOA foreclosure trustee or collection agency. If a lienholder is the one redeeming, the Notice of Redemption must provide the original or certified copy of the Deed of Trust, a copy of any Assignment establishing the redeemer's interest in the Deed of Trust along with a supporting affidavit, and a payoff statement with a supporting affidavit showing the amount "then actually due" on the redeemer's lien. After redeeming the property, the foreclosing agent must convey title to the redeeming party in the form of a deed, and must also deliver a copy of the deed to the Office of the Ombudsman for Common-Interest Communities within thirty days after the deed is delivered to the redeeming lien holder or its agent.

Once the first lienholder redeems, it takes title to the property free and clear of any liens and free of the homeowner's interest. The redeeming lienholder no longer holds a Deed of Trust and no longer has a loan. Therefore, the lienholder no longer has to foreclose in order to obtain title to the property, as it will already have title via the redemption. The lienholder can go straight to eviction of the homeowner. The homeowner may not understand this harsh result, especially if the homeowner was working with the lender on getting a loan modification or worse, current on the lender's mortgage loan (which oddly enough, happens.) Litigation can result.

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Right of Redemption on HOA Sales (continued from page 6)

If, on the other hand, the homeowner is the redeeming party, the homeowner would take title back to his/her property subject to all liens previously on record title (unless the Purchaser was also a lien holder; then the homeowner would have to pay off that lienholder at redemption.) So, if the lender or loan Servicer misses the HOA sale and misses the right of redemption period, there is still a chance that the homeowner will timely redeem the property, which would save the lender's Deed of Trust.

Not only will the Servicer pay more in the way of HOA dues and collection costs with redemption than paying just nine months of super-priority dues before the foreclosure (putting aside the cost savings of bypassing the foreclosure process!), the redemption process requires several hoops to jump through making the process cumbersome and risky. First, the redemption must be completed within 60 calendar days from the HOA sale. This seems like a lot of time, but if the Loan Servicer missed the HOA sale due to a notice defect or a deficiency in its internal process, it may not even learn about the HOA sale in time to exercise its right of redemption. Even with the full 60 days to redeem, challenges abound. The lien holder must draft and send notices, locate all assignments, obtain a certified copy of its Deed of Trust from a title company, obtain payoff numbers of its loan, request/obtain redemption numbers from the HOA Purchaser (the servicer should do this in writing), calculate interest on the purchase price, draft and execute an affidavit attesting to the correctness of the Deed of Trust, the Assignment(s) and the payoff numbers, cut checks, etc. There is no time to waste. Upon realization of an HOA foreclosure, the Loan Servicer should immediately reach out to the foreclosing agent for sale amount and the Purchaser's contact information. Next, the Servicer must determine what, if any, senior liens existed and what is owed thereunder. The Servicer must reach out to the Purchaser (in writing) to find out: (1) if the Purchaser was a lienholder, the amount owed on that lien at the time of the HOA sale and any interest incurred thereafter; and (2) what "reasonable" amounts expended by the Purchaser that were "reasonably" necessary to maintain and repair the property.

> ***"If the Purchaser drags its heals or outright refuses to respond, the Servicer (or even homeowner) is left to guess at what is owed and risks losing its right of redemption."***

In addition to chasing down parties and documents, the most obvious road block is counting on the HOA Purchaser - who has no incentive to timely do anything – to provide necessary information. The Purchaser has a huge upside if the redemption time period lapses. Unfortunately, the redemption process necessitates the ascertaining of certain expenses that only the Purchaser can provide. If the Purchaser drags its heals or outright refuses to respond, the Servicer (or even homeowner) is left to guess at what is owed and risks losing its right of redemption. In one matter that our office recently handled, the HOA Purchaser took the ridiculous legal position that despite the black letter law of SB 306, the lienholders have no right of redemption! Luckily, we were able to resolve just in time to exercise our right; if not, we would have been forced to file suit.

If the Servicer learns of the HOA sale shortly thereafter and the Purchaser timely cooperates, redemption should not be a problem. But, if the time to redeem is about to expire, the Purchaser will not timely cooperate or demands unreasonable amounts, the Servicer should timely tender to the Purchaser its best guestimate of the redemption amount. Further, the Servicer should consider filing a lawsuit (and a lis pendens) to force the Purchaser to cooperate and seek a TRO enjoining the HOA trustee from issuing the final deed to the Purchaser. The suit should include an allegation of timely tender of the amounts the Servicer and its' counsel reasonably believe are necessary to redeem the property.

Other issues in the redemption process: What does "serve" mean, and how does the redeeming party "serve" both the Purchaser and the HOA trustee an original Deed of Trust? What kind of Affidavit is required and what does it need to state? What are reasonable amounts that are reasonably necessary to maintain and repair the property that the Purchaser can add to the redemption price? SB 306 does not provide any mechanism for the redeeming lienholder or homeowner to challenge costs that could be considered unreasonable or not reasonably necessary. As written, the redeeming party must pay the Purchaser's demand or lose its ability to redeem the property.

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Right of Redemption on HOA Sales (continued from page 7)

The intent of SB 306 was to provide Servicers and HOAs with clarity, structure and protections with post-October 1, 2015 HOA liens and foreclosures. In addition, it provided the framework for a tremendously valuable protection – the right to redeem the property following the HOA sale. Unfortunately, the mechanisms to redeem are not clear. More problematic is that redemption requires timely and reasonable cooperation by the Purchasers, the same Purchasers that the Servicers have been litigating with for the last several years. As a result, exercising the right of redemption could very well lead the Servicer into quiet title litigation—again.

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

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

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July 25-27	CMBA	44th Annual Western Secondary Market Conference	San Francisco, CA
August 14-16	CMBA	21st Annual Western States Loan Servicing Conference	San Diego, CA
September 7-9	CMBA	19th Annual Western States CREF Conference	Las Vegas, NV
September 11-13	Five Star	Five Star Conference and Expo	Dallas, TX

TURNING THE TIDE

FURTHER LIMITATIONS ON THE HOLDING IN *SFR INVESTMENTS POOL 1, LLC V. U.S. BANK*

by T. Robert Finlay, Esq.

Last November, Judge Jones of the Federal District Court in Nevada agreed with WFZ's argument that the ***SFR* decision (interpreting NRS Chapter 116) should not be applied retroactively**. His opinion was that the *SFR* decision should only be applied to HOA foreclosure sales that occurred after that September 18, 2014 ruling.

In reaching his decision, Judge Jones looked to the factors announced in the *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971):

"**First**, the decision to be applied non-retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, (citation omitted) or by deciding an issue of first impression whose resolution was not clearly foreshadowed (citation omitted). **Second**, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation (citation omitted). **Finally**, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of non-retroactivity."

As to the first factor, Judge Jones ruled that it weighed heavily in favor of non-retroactivity, stating, "[i]t is not disputed that both state and federal trial courts were in sharp disagreement as to whether an HOA foreclosure sale under NRS 116.3116 extinguished a prior-recorded first mortgage … [and that] the practice in the real estate industry prior to the announcement of [the SFR decision] was to treat such sales as not extinguishing first mortgages, such that traditional investors would not bother to bid at such sales where the home was worth less than the first mortgage."

As to the second factor, it also weighs heavily in favor of non-retroactivity because "retroactive application of the rule would not further the purpose of the rule." He stated that he could not find a case in which the HOA was unable to fully satisfy its entire lien, let alone its smaller super-priority portion.

As to the third factor, it also favors non-retroactivity because allowing the extinguishment of a first deed of trust where in the notice to the mortgagee "is not robust enough to satisfy basic principles of due process were the foreclosing entity a state actor and where the extinguishment rule was not only unclear but presumed within the relevant industry to at the time of the foreclosure to be to the contrary, would be an extremely, not just substantially, inequitable result."

While this ruling was from a Federal District Court and was not binding on State court cases, it was a major step in the right direction and provided much needed support for similar arguments that could be made even in State court. We hoped the decision was a sign of trends to come. As a further harbinger, Judge Jones has recently certified this very important question to the Nevada Supreme Court. If the Nevada Supreme Court accepts, it will set a briefing schedule. In anticipation that the issue will be accepted, we have already started looking into the amicus options to support our position.

Since most HOA sales pre-date the *SFR* decision, if the Supreme Court follows Judge Jones's ruling, it would be a huge game-changer for the lenders and servicers' fight against the purchasers at HOA sales.

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

ARE THE NOTICE RECITALS IN THE HOA'S TRUSTEE'S DEED CONCLUSIVE AS TO THE LENDER'S ABILITY TO CHALLENGE THE HOA SALE? NOT ANYMORE.

by Edgar C. Smith, Esq. and Robin P. Wright, Esq.

We have some good news in Nevada! No longer can HOA buyers simply waive the Trustee's Deed Upon Sale ("TDUS") in front of the court with a copy of the SFR decision and get summary judgment. The Supreme Court in *Shadow Wood Homeowners Association v. New York Community Bancorp* (132 Nev. Adv. Opinion 5) ruled that the TDUS notice recitals alone will not prevent someone (like a lender) from challenging the HOA sale and even setting aside the HOA sale on equitable grounds. This ruling could have a significant impact on the course of pending and future HOA litigation, because prior to *Shadow Wood*, many judges felt compelled to follow the SFR case holding and summarily rule that if the recitals are present in the TDUS, the HOA buyer is a BFP (bona fide purchaser for value), and HOA sale cannot be set aside for any reason. With *Shadow Wood*, there is no longer an "easy out" for courts by simply pointing to the TDUS.

On January 28, 2016, the Nevada Supreme Court issued its 25-page decision, and the HOA and third party purchaser appealed an order granting summary judgment to the lender and denying their countermotion for summary judgment.

The lender argued that the foreclosure sale was not commercially reasonable and not conducted in good faith because the HOA, through its sale trustee, acted unfairly, oppressively, and perhaps fraudulently by overstating its lien delinquency, rejecting a valid tender of the amount due, and selling the property for a grossly inadequate price. The HOA buyer and the HOA's primary argument in response was that recitals in the TDUS are conclusive, so that any post-sale attack on the HOA sale is barred. The Nevada Supreme Court rejected that argument, but reversed the order granting summary judgment in the lender's favor and remanded the case to the trial court for further proceedings because there remained questions of fact about the disclosure of the amount of the lien to the owner and its impact on the HOA sale.

The key legal points in this decision were:

- Recitals in the TDUS will not insulate the buyer from the former owner's or the lender's equitable claim for quiet title. "A community association's non-judicial foreclosure sale may be set aside, just as a power of sale foreclosure sale may be set aside, upon a showing of grossly inadequate price plus 'fraud, unfairness, or oppression.'" Id. at 9-10. "Courts retain the power to grant equitable relief from a defective foreclosure sale when appropriate despite NRS 116.31166." Id. at 11.

- A showing of "inadequate price" without also showing "fraud, unfairness, or oppression" is generally not sufficient to set aside the sale on the grounds it was commercially unreasonable. The Court however twice implied that a court would be warranted in setting aside a sale where the sales price was not equal to or greater than twenty percent of the property's value even without "other foreclosure defects." Yet the Court did not expressly state that an HOA sale for less than the twenty percent of value threshold is enough to warrant setting aside the sale. The Court also suggested that the relevant inquiry is a comparison of the sale price to "the property's fair market value on the foreclosure sale date," rather than a recent appraisal, making it prudent to engage an appraiser to make that valuation.

- The lender can also use the HOA sale trustee's response to a payoff request may support a showing of fraud, unfairness or oppression, where, as in this case, the sale trustee is (i) initially non-responsive; (ii) sends conflicting payoff statements; or (3) included fees and

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HOA's Trustees Deed (continued from page 10)

costs in the lien amount that are not permitted under the statute. If these things rise "to the level of misrepresentations and nondisclosures that indeed prevented [the lender's] ability to cure the default", they *might* support the court setting aside the sale. The Court, however, did not answer the question what fees and costs were permissible under the statute because "the parties did not develop in district court what the fees and costs represent, when they were incurred, their (un)reasonableness, and the impact, if any, of Shadow Wood's covenants, conditions and restrictions (CC&Rs) on their allowance." These questions were left to the trial court to consider on remand. Sale trustees who refuse to disclose information sufficient to permit the lender to cure the super priority amount do so at risk of the invalidating of their sale.

- Proof of a tender of the full lien amount, or possibly just the super-priority amount, which is rejected by the HOA or its trustee may be sufficient to set aside the sale. The lender must be able to "point to uncontroverted evidence in the record to show exactly what [the HOA] was entitled to … up until the association foreclosure sale."

- The HOA was entitled to the 9-month super-priority amount that existed before the lender's foreclosure sale on the Deed of Trust and all assessments after that sale. The trial court therefore erred in finding that the HOA acted unfairly and oppressively in attempting to recover more than the nine months of assessments.

- The "innocent purchaser" (intermingled with "Bona Fide Purchaser") may be protected from having the sale set aside. A less-than-market value selling price is nonetheless "value" and meets the standard for innocent purchaser / BFP status. The buyer's recognition that the former owner may bring suit to challenge the validity of the sale will not defeat BFP status but knowledge of a pre-sale dispute between the lender and the HOA, attempts by the lender to pay the lien and prevent the sale, or an HOA claim of lien for more than was actually owed might. This seems to support the argument that the sale may be invalid if the lien is more than 3 years old at the time of the sale or all or part of the lien was discharged in the homeowner's bankruptcy, among others.

"Proof of a tender of the full lien amount, or possibly just the super-priority amount, which is rejected by the HOA or its trustee may be sufficient to set aside the sale."

- The yardstick for measuring whether a sale should be set aside is based upon the "totality of the circumstances." This includes whether the remedy is unfair to the innocent purchaser, the degree to which the purchaser can be charged with notice of the dispute, and the actions (or inactions) of the lender.

In sum, this case was overall favorable to the lenders. The court has the discretion to set aside HOA sales based on equitable grounds, such as when the HOA rejects tender or when the sale was commercially unreasonable. The district court must now look at the "totality of circumstances" and balance the equities between the buyer and the lender. The Court identified many issues of fact that must be answered before either the buyer or the lender is entitled to summary judgment. The district courts should now be hard-pressed to deny a request to conduct discovery to answer these questions, and an HOA trustee that refuses to disclose information about the items in the lien does so at risk to its sale.

Edgar C. Smith, Esq.
esmith@wrightlegal.net

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

WFZ PROFILE: MICHELLE A. MIERZWA, ESQ. PARTNER, COMPLIANCE DIVISION

Michelle A. Mierzwa, Esq.
mmierzwa@wrightlegal.net

Michelle A. Mierzwa, Esq. recently joined Wright, Finlay & Zak's Compliance Division, providing loan originators, lenders, servicers, trustees and others in the mortgage industry with state and federal compliance and regulatory counsel.

For over 17 years, Ms. Mierzwa has specialized in the representation of residential finance lenders, servicers, investors and trustees. Her past accomplishments include creating the legal department for one of the largest non-judicial foreclosure trustees in the Western United States, the management and resolution of litigated matters through jury and bench trials and appellate practice, the coordination of compliance audits, and managing the California branch of a national law firm. She worked with mortgage servicers of all sizes to ensure their compliance with state and federal laws, including, but not limited to, California and Nevada Homeowner Bill of Rights, state and federal FDCPA, RESPA, TILA, Washington Foreclosure Fairness Act, Nevada, Oregon and Washington Foreclosure Mediation Programs, Servicemembers Civil Relief Act, Dodd-Frank Act and subsequent CFPB Rules.

Ms. Mierzwa is currently serving her second three-year term on the Board of Directors of the United Trustees Association. She has monitored, proposed and analyzed new legislation affecting the industry, has participated on speaking panels for national default industry conferences, and has provided education and clarification to the industry regarding the Dodd-Frank Act and the Servicing Rules of the Consumer Finance Protection Bureau.

Ms. Mierzwa is licensed to practice in California and Washington.

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

Wright, Finlay & Zak, LLP is pleased to announce the opening of its Washington office located at 3600 15th Avenue West, Suite 200, Seattle, WA 98119 with ***Ryan M. Carson*** as its Managing Attorney. With nearly a decade of litigation experience, Mr. Carson established a Washington branch of a national law firm, advised banks, loan servicers and trustees on compliance with state and federal law applicable to foreclosure matters and has mediated a substantial number of Washington Foreclosure Fairness Act mediations.

OUR ARIZONA OFFICE HAS MOVED

Wright, Finlay & Zak, LLP's office in Phoenix, Arizona has moved to a new location in nearby Scottsdale. The new address is:

16427 N. Scottsdale Road, Suite 300
Scottsdale, AZ 85254

Our phone and fax numbers have remained the same.

WFZ WELCOMES ITS NEW ATTORNEYS

SHERI M. KANESAKA
Ms. Kanesaka joins our Newport Beach office and brings litigation experience in mortgage banking, loan servicing, foreclosure trustee defense, general business and real estate matters, and title disputes. Ms. Kanesaka is licensed to practice in California.

ERIC S. POWERS
Mr. Powers joins our Las Vegas office and brings litigation experience in banking, securities, business, commercial, intellectual property, construction defect, eminent domain litigation, and property related disputes including quiet title actions, HOA litigation, accounting, and FHFA disputes. Mr. Powers is licensed to practice in Nevada.

AARON D. LANCASTER
Mr. Lancaster joins our Las Vegas office and brings litigation experience in business, commercial, real estate, insurance defense, and construction. He also brings experience in transactional matters regarding business formation, business matters, construction, and real estate. Mr. Lancaster is licensed to practice in Nevada and Utah.

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