WRIGHT, FINLAY & ZAK, LLP

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NEVADA HOA LIEN FORECLOSURES UNCONSTITUTIONAL AS A MATTER OF LAW? THE NINTH CIRCUIT SAYS, "YES!"

by Dana Jonathon Nitz, Esq. and Sarah E. Greenberg Davis, Esq.

On August 12, 2016, the Ninth Circuit Court of Appeals handed down the decision in *Bourne Valley Court Trust v. Wells Fargo Bank, N.A.*, Case No. 15-15233 ("Bourne Valley"), holding the Nevada HOA lien foreclosure statute, NRS Chapter 116, facially unconstitutional under the due process provisions of the U.S. Constitution. In short, the Court determined the Statute's "opt-in" notice provisions violated the constitutional rights of mortgage lenders because the Statute did not require the HOAs to provide lenders with notice of the foreclosure sale prior to sale. The decision, if upheld, undoes most of the harm caused to the mortgage banking industry by the Nevada Supreme Court decision, *SFR Investments Pool 1 v. U.S. Bank*, 334 P.3d 408 (2014), almost two years earlier.

For close to 20 years before *SFR*, lenders, title companies, borrowers, HOAs and buyers at HOA sales interpreted NRS 116.3116 to mean that an HOA lien for delinquent dues was junior to a first priority deed of trust and the buyer of a property at an HOA foreclosure sale would take title subject to the first deed of trust. In *SFR*, the Court rejected the commonly held belief and held the HOA's lien was actually superior to the first deed of trust, and a properly conducted HOA foreclosure sale could wipe out the first deed of trust and leave the investor with title free and clear. The main problem with the decision for lenders was that the Court presumed that the lenders would get notice and would have an opportunity to protect the deed of trust, when in fact NRS 116.3116 had long ago deleted any mandatory requirement that the first deed of trust holder be given notice of the default or the sale. Changes by the 2015 Nevada Legislature corrected that deficiency for sales occurring after October 1, 2015; and *Bourne Valley* righted this inequity for sales occurring prior to the statutory changes.

1. The Court's Basis for Holding the Statute Unconstitutional

In *Bourne Valley*, the plaintiff obtained a quitclaim deed to a property following an HOA's foreclosure sale. The plaintiff then filed suit to quiet title against the senior mortgage lender. The district court granted summary judgment to plaintiff, holding the HOA's sale extinguished the lender's interest under the Nevada Supreme Court's decision in *SFR*. On appeal, the Ninth Circuit found NRS Chapter 116's "opt-in" notice scheme "not only strange [but] also unconstitutional" because it "required a homeowners' association to alert a mortgage lender that it intended to foreclose only if the lender had affirmatively requested notice."

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Nevada HOA Lien Foreclosures (continued from page 1)

The Court explained that before a state can take an action that adversely affects an interest in life, liberty, or property, it must provide notice "reasonably calculated, under all circumstances," to apprise all interested parties of the pendency of the action. In practice, the Court confirmed that notice by mail or other means certain to ensure actual notice is a constitutionally mandated prerequisite.

The Court took issue with NRS Chapter 116 because it shifted the burden of ensuring adequate notice from the foreclosing homeowners' association to the mortgage lender. It did so without regard for: (1) whether the mortgage lender was aware that the homeowner had defaulted on her dues to the homeowners' association, (2) whether the mortgage lender's interest had been recorded such that it would have been easily discoverable through a title search, or (3) whether the homeowners' association had made any effort whatsoever to contact the mortgage lender. For these reasons, the Court held the Statute's notice provisions did not satisfy the U.S. Constitution's due process notice requirements.

"While the Bourne Valley decision provides lenders with support in their efforts to defend against HOA sales occurring prior to SFR, it is critical to note it does not end all Nevada HOA litigation. We urge caution…"

Prior to *Bourne Valley*, many state and federal judges rejected the due process argument because the HOA foreclosure sales did not involve a "state actor," for, absent state action, no constitutional violation can exist. The Ninth Circuit disagreed. First, the Court explained a homeowners' association's foreclosure could not extinguish a lender's interest absent the Statute's statutory scheme, so, the enactment of the Statute by the Nevada Legislature qualified as sufficient "state action." Second, the Court noted that a homeowners' association's ability to extinguish a lender's lien "arose directly and exclusively" from NRS Chapter 116, since the associations and mortgage lenders did not have a preexisting relationship, contractual or otherwise. For these reasons, the Court determined sufficient state action existed.

2. The Long Term Impact of *Bourne Valley* is Currently Unclear

While the *Bourne Valley* decision provides lenders with support in their efforts to defend against HOA sales occurring prior to *SFR*, it is critical to note it does not end all Nevada HOA litigation. We urge caution for the following reasons:

First, although the Ninth Circuit recently rejected plaintiff's request for en banc review, essentially a new hearing before an eleven judge panel, appellate review remains ongoing. We anticipate plaintiff will seek to have the United States Supreme Court review the case. It is likely the Supreme Court will refuse to take the case, however the case is not final until all appellate measures are exhausted.

Second, while the *Bourne Valley* decision is binding on the federal district courts, it is not binding on the Nevada Supreme Court, or even the state district courts. However, the exact same issue is currently pending before the Nevada Supreme Court, which heard oral argument on September 8, 2016, in *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortgage, N.A.*, No. 68630 (Nev.). Notably, the Nevada Supreme Court requested oral argument on the issue the same day *Bourne Valley* was handed down. Coincidence or a signal that the Nevada Supreme Court does not agree with the *Bourne Valley* rationale? Should the Nevada Supreme Court hold differently than the Ninth Circuit Court of Appeals, a split would exist between the Nevada federal and state courts that only the United States Supreme Court could resolve.

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Nevada HOA Lien Foreclosures (continued from page 2)

Third, the opinion does not address a circumstance where the lender received actual notice, but did not act to protect its first deed of trust. In many cases, the HOA did in fact send notice to the lender, even if not required by the Statute. In these cases, the HOA and the buyer argue due process was satisfied because the particular facts of that case reveal actual notice to the lender. The *SFR* Court briefly looked at whether the Statute provided due process but characterized the argument as a "non-starter" where all parties admitted that notice was received. Future courts may find this argument persuasive, undermining the impact of the *Bourne Valley* decision on other cases where the lender also had actual notice.

Fourth, many Nevada judges in both federal and state court do not believe *Bourne Valley* will survive and have expressed very critical opinions of it. Some state judges have pointedly advised they were more persuaded by the dissenting opinion and will not be following the opinion at all. At least three federal judges have decided to simply stay all of their cases pending further review of the *Bourne Valley* decision. Now, many state judges are following suit based on both *Bourne Valley* and *Saticoy Bay*.

For all of these reasons, while there is some cause for celebration by lenders as the devastating effect of *SFR* may be muted, they should proceed cautiously until the Ninth Circuit handles the procedural challenges and orders the *Bourne Valley* decision published and until the Nevada Supreme Court decides *Saticoy Bay*. Until then, it makes sense for lenders to file quiet title actions in federal court challenging the buyer's claim to superior title, and hope *Bourne Valley* continues to be good law.

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NEVADA FORECLOSURE MEDIATION COMES TO AN END

(AT LEAST FOR NOW!)

by Robin P. Wright, Esq.

In case you have not yet heard, Nevada SB 512 created a sunset timeline for the Nevada Foreclosure Mediation Program ("FMP") beginning December 1, 2016 and a full repeal of the foreclosure mediation statute, NRS 107.086, effective June 30, 2017. The FMP will no longer apply to non-judicial foreclosures in which the Notices of Default are mailed after December 1, 2016. **FMP election documents will no longer be mailed to homeowners after December 1st.**

But, let's not get too comfortable! The Nevada Legislature begins its next regular session on February 6, 2017, and **it is possible that it enacts a replacement to the FMP.**

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Nevada Foreclosure Mediation Comes to an End (continued from page 3)

Important dates for your reference:

1. All foreclosures initiated with NOD mailings after **December 2, 2016** on forward will not require participation in the FMP;
2. **December 31, 2016** is the last date for a borrower to elect and pay fees for mediation.
3. **March 31, 2017** is the last day district courts may order cases for further mediation;
4. **April 30, 2017** is when all pending mediations must be completed; and
5. **June 30, 2017** is when the FMP under NRS 107.086 ends.

Please feel free to contact us if you have any questions concerning the sun-setting of the FMP program, or any other Nevada legal issue.

SB 512 also created a different pre-foreclosure "opt-in" mediation program if the homeowner makes a proper request to the mediation program on or before December 31, 2016 (NRS 107.0865). A proper request contains a certification from a HUD-approved counseling agency showing that the homeowner has a documented financial hardship and is in imminent risk of default. This opt-in program provides the homeowner an avenue to enroll into the mediation program through* ***December 31, 2016**.*

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UPCOMING INDUSTRY EVENTS

Date	Organization	Event	Location
February 14-17	MBA	National Mortgage Servicing Conference & Expo	Grapevine, TX
February 19-22	ABA	National Conference for Community Bankers	Orlando, FL
February 19-22	MBA	CREF/Multifamily Housing Convention & Expo	San Diego, CA
March 1-4	MBA	Mid-Winter Housing Finance Conference	Avon, CO
March 8-9	USFN	Loan Management & Servicing Seminar	Jacksonville, FL
March 14-15	IMN	7th Annual Bank & Financial Institutions Special Assets Forum on Real Estate, C&I and SBA Loans	Fort Lauderdale, FL
March 26-28	REOMAC	Annual Education Summit & Expo	Palm Springs, CA
April 3	CMBA	California Legislative Day	Sacramento, CA
April 3-4	ALFN	Advocacy Day & Willpower Summit	Washington, DC
April 6-7	CMA	2017 Spring Seminar	San Francisco, CA
April 30-May 3	MBA	National Secondary Market Conference & Expo	New York, NY

CRACKING THE CODE:
AVOIDING POTENTIAL PITFALLS OF COURT APPOINTED REAL PROPERTY RECEIVERS

by Ruby J. Chavez, Esq. and T. Robert Finlay, Esq.

Having a Receiver appointed to cure a code violation is one of the worst things that can happen to a loan servicer. It can subject the servicer to tens of thousands of dollars in unnecessary costs on top of the already over-the-top penalties for the code violation. Even more troublesome – in many instances, these charges (in excess of $100,000 at times), can become super-priority liens against property. This article will examine some of the pitfalls associated with the appointment of a Receiver to cure code violations, how to handle a property with a Receiver and how to attempt to avoid the appointment to begin with.

Unfortunately, borrowers often fail to maintain their property to the level required by the city or county. While Deeds of Trust generally give the lender or servicer the right to enter, inspect and repair the property if necessary to preserve the security; it is not always practical or prudent for them to do so—especially if the borrower balks at allowing access—before foreclosure. (Note issues in Washington State addressed in another article in the Newsletter.) Post-foreclosure is another story. Technically, as agent for the owner, the servicer has the right to access the property and make repairs. But, as many servicers have learned to their dismay, it is sometimes easier said than done. Uncooperative occupants, vandalism, limited resources, and even a lack of notice of the code violations often prevent servicers from properly maintaining REO properties and curing code violations.

These factors have increasingly led to instances of nuisance and blight involving the property, a problem most prevalent in (but not exclusive to) poorer neighborhoods. As a result, City, County and other local government agencies have taken not only notice but action to rectify these problems. For example, the City of Los Angeles requires secured lenders to, among other things, register with the City for each property for which they have recorded a notice of default (within thirty (30) days of recording), to conduct monthly inspections of the property, to maintain the property as needed, and to provide monthly reports (with photograph) to the City [Chapter 4 of Title XVI of the Los Angeles Municipal Code]. Likewise, several counties and cities throughout California and the other Western States WFZ covers, have enacted "daily" penalties for code violation, ranging from a few hundred dollars to $1,000 ***per day per violation***.

In California, another, more widely available (and increasingly used) tool is for the local agency to seek a court-appointed receiver for the property under California Health & Safety Code §§ 17980, *et seq*. Once appointed, the Receiver is charged with, and can charge for, turning substandard properties into marketable and safe homes for the community. This offers an inexpensive and quick fix for the cities since the Receiver is reimbursed through a super-priority lien against the property which encompasses any loans the Receiver might take out to facilitate bringing the property up to code. As great as this may be for local officials, repayment of the Receiver's loan obtained to pay for rehabilitation costs (including loan origination fees and interest on the loan), property management fees, high hourly receiver fees, related city attorneys' fees and underlying city penalties, reduces the available equity to repay the secured lender's loan. In some instances, these fees and costs can collectively exceed $150,000. Since many of these properties are already underwater, that means $150,000 less recovery for the secured lender. Obviously, it is in the lender's best interests if the Receiver is never appointed.

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Cracking the Code (continued from page 5)

To attempt to avoid the appointment of a Receiver, the servicer must act diligently and quickly. Generally, a Receiver will only be appointed as a last resort, when no one else has stepped up to maintain and secure the property. As such, the local agency is required to give notice of, and time to cure, the code violations before seeking approval from the Court to appoint a Receiver. Whether the property is in REO or not, it is up to the servicer to act swiftly upon learning of a code violation and, even quicker if the agency is seeking court approval for a Receiver. Just because the servicer has not yet foreclosed or the borrower is still in the property, does not mean that a Receiver will not be appointed or that his or her fees will not take priority over your loan.

The remainder of this article will focus on some general and specific steps that can help to avoid having a Receiver appointed and how to handle the property if one is appointed. However, before designing your internal procedures or for help on a specific property, it is important to consult with your in-house counsel or hire outside counsel.

Receiving Notice of Code Violations

After a city or county code enforcement officer inspects a property and determines that it contains code violations, the local agency will typically issue a written notice to all parties with a recorded interest in the property, including the secured lender. If the violations are not cured within a specified time, the local agencies might impose penalties and fines to the extent provided for by its municipal code and/or regulations. These fines may be recorded as liens against the property and in many instances will take priority over your Deed of Trust. Some local agencies might record a Notice of Pendency of Action and hold an administrative hearing to determine whether the conditions on the property violate the law. The hearing officer often is empowered to order daily civil penalties, which can be added to the property tax bill, which also has priority over the secured loan(s) on the property.

Note – the code violation notices are often sent to the owner of record, who may or may not be the current beneficiary and, in many instances, is not the loan servicer. This is a major sticking point with local agencies and the impetus behind the push for registration requirements, super-priority liens and per-day fines. It is important to make sure that record title will result in notices reaching the servicer and also that the servicer knows what to do after it receives those notices. Servicers may want to regularly check on their properties that are abandoned or vacant in Riverside and surrounding cities, where exorbitant city fines are often issued. In Riverside, the City posts a list of open code enforcement cases on riversideca.gov/code so that a servicer could cross-check any questionable properties to find out if there is a case number and officer assigned.

Prompt Action is Needed After Receiving Notice

It is important for secured lenders and loan servicers to promptly take action when they receive a notice of code violation, a code-related lis pendens or a notice of administrative hearing. If the property is occupied, they should try to work with borrowers to remedy the violations. However, if the borrowers refuse to remedy the violations or cooperate with the lender/servicer's efforts to do so, the lender/servicer should assess the cost of repairs required, the risk involved in making repairs (including of legal action by the borrower and/or occupant of the property), and the likelihood and amount of expense that they will face for any governmental expenses, fines and fees for not making the required repairs. A proactive stance, which might include the lender/servicer seeking a court order authorizing its entry to make the repairs, might go a long way towards ameliorating the government's concerns, as well as the potential exposure of the lender/servicer. Likewise, reaching out to the governing entity to explain your willingness and desire to assist can help in persuading the entity to defer having a Receiver appointed and/or in later negotiating down the fines.

If you get notice before the Receiver is appointed, immediately hire counsel to oppose the appointment. Stopping the Receiver from being appointed will potentially save a servicer thousands of dollars, if not more.

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Cracking the Code (continued from page 6)

Foreclose Before Civil Penalties Add Up

If it is not possible to remedy the violations and fines while the borrower is still on the property, proceeding with the foreclosure and eviction might be the best option. However, before taking title, consult an attorney (not a foreclosure trustee) to determine whether foreclosing will obligate you to pay the delinquent fines, fees and costs. Likewise, be careful when entering into a Deed-in-Lieu as it could likewise obligate you to pay the outstanding amounts. Other loss mitigation options can also be complicated by code violations. For instance, liens could hold up a short sale or loan modification. At the same time, when allowable, loss mitigation options can be a perfect opportunity to enlist the borrower's support to assist in remedying the code violation.

Contact the Government to Work on a Rehabilitation Plan

A typical refrain heard in governmental complaints and motions to appoint a Receiver, is that the lender/servicer did nothing to remediate the property despite receiving multiple notices and/or orders. After all "[i]n appointing a receiver, the court shall consider whether the owner has been afforded a reasonable opportunity to correct the conditions cited in the notice of violation." California Health & Safety Code section 17980.7(c)(1). Thus, it is important to be proactive by promptly contacting the government entity to work on a plan to rehabilitate the property. If the property is not yet in REO, it is just as important to reach out to let them know your efforts and plan to rehabilitate the property. Even if you can only maintain the outside of the property, this would help show that the violations are not causing a "public" nuisance. Moreover, it is important to actually—and timely—act on that plan so the local agency knows you are serious and that a Receiver is not necessary. Cooperation is often your best weapon when opposing a Motion to Appoint a Receiver. It can also mitigate against the fines and fees that would otherwise be assessed.

What if a Receiver is Appointed

If a Receiver is appointed pursuant to California Health & Safety Code §17980.7, the Receiver will have control over the property and can pay expenses, obtain estimates for repairs and rehab, enter into contracts with contractors to perform necessary repairs, borrow funds to pay for repairs, relocate tenants, sell the property, or even demolish the property. The Order Appointing the Receiver will likely state that the Receiver's lien will take priority over all existing liens on the property. Also, § 17980.7(c)(4)(G) allows the Receiver to borrow funds to pay for repairs and secure that debt with a lien on the property. Section 17980.7(c)(15) states that a court may require the owner of the property to pay for all unrecovered costs associated with the Receivership, while § 17980.7(d)(1) provides that the court can order the owner to pay the reasonable and actual costs of the enforcement agency, including, but not limited to inspection costs, investigation costs, enforcement costs, attorney fees or costs, and all costs of prosecution." While the fees must be "reasonable" and approved by the Court, in our experience the fees are often excessive and the contractor hired by the Receiver charges more than it would cost the servicer for similar work. In some instances, it feels like the Receiver has a "blank check", at the servicer's expense.

California Health & Safety Code section 17980.7(f) states the term "owner," for the purposes of this section, shall include the owner … at the time of the initial notice or order *and any successor in interest* who had actual or constructive knowledge of the notice, order, or prosecution." Thus, the foreclosing lender can become the "owner" subject to all costs of the receivership action if it had actual or constructive knowledge of the notice, order, or prosecution.

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Cracking the Code (continued from page 7)

Receivers are a drastic and expensive remedy to resolve health and safety concerns. However, even if a Receiver is ultimately appointed, the government and the Receiver may be willing to work with the lender/servicer and/or the borrower on an agreed upon rehabilitation plan (generally with Receiver oversight). This allows the parties to avoid *some* of the costs of a full-blown Receiver rehabilitation and most importantly, potentially avoid the super-priority loan that would otherwise exist if the Receiver is the one who has to rehabilitate the property. At nearly every stage, the servicer should object to having the Receiver do any work that the servicer can do itself. If the servicer is unable to do the work, the servicer should stipulate to a mutually agreeable plan with the City and the Receiver to avoid litigation costs the City and the Receiver will incur in bringing Motions to seek court approval of the various steps in the rehab.

The servicer should, of course, consider all its options when deciding if it is economically feasible to make the repairs given the estimated cost, the amount owed on the loan, the value of the property, the foreclosure status, and potential fines. However, once a Receiver is appointed, the choice to incur those costs is no longer the servicer's to make– it is in the hands of the Receiver, who has no interest in minimizing the expense or risk the lender might face as a result.

If you have any questions regarding code violations, local fines, receiverships, or if you learn that a Receiver has been or will be appointed on one of your properties, please feel free to contact Robert Finlay at rfinlay@wrightlegal.net.

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Aaron D. Lancaster, Esq. is the managing attorney of Wright, Finlay & Zak's recently opened office in Lehi, Utah. Mr. Lancaster has over 10 years of experience in business law, construction law, and commercial litigation, including lender and servicer liability defense, wrongful foreclosure defense, fair debt collection practices defense, and title disputes. Prior to joining Wright, Finlay & Zak, Mr. Lancaster worked at Utah and Nevada firms specializing in both transactional and litigation matters concerning business, construction, and real estate.

Mr. Lancaster has represented clients structuring and negotiating multi-million dollar transactions, as well as represented clients in litigation involving potential damages in excess of $100 million. Having experience in both transactional and litigation, Mr. Lancaster provides his clients with advise and services to allow them to succeed with their business ventures. Being a native Utahan and practicing law for years in Utah, Mr. Lancaster knows the local environment and has the relationships to provide clients with optimum results.

Mr. Lancaster is a member of the Utah and Nevada State Bar Associations. He is admitted in State/Federal Courts for Utah and Nevada, and will soon be admitted to practice before the United States Court of Appeals for the Ninth and Tenth Circuits.

Aaron enjoys spending time in the beautiful surrounding mountains and lakes throughout Utah. He also participated in sporting events throughout his youth, including playing baseball for Utah Valley University and Southern Utah University. Aaron has been married to his beautiful wife, Shannon, for over 15 years and they have five amazing children.

WATCHING THE WATCHERS

by Jonathan D. Fink, Esq.

The Consumer Financial Protection Bureau ("CFPB") was created as part of the Dodd-Frank Act in 2010 and was almost immediately controversial. Over the ensuing half dozen years, it has been a favorite target of Conservatives in Congress and the financial industry, who have repeatedly challenged it and called for its abolition. Recently, they came close to getting their wish.

On October 11, 2016, the D.C. Circuit issued its opinion in *PHH Corporation v. Consumer Financial Protection Bureau*, ruling, among other things, that the *structure* of the CFPB was unconstitutional in that it was set up as a truly independent agency *with a single Director*, rather than (as is true for most other federal agencies) as a part of the Executive Branch or as a commission with several bipartisan board members being appointed and serving staggered terms so that the commission is viewed as "balanced." In other words, the Dodd-Frank Act had granted the Director of the CFPB unprecedented and sweeping authority over the financial services industry and, essentially, immunized the agency from oversight by the President and Congress—indeed, as set up, the Director of the CFPB could only be removed "for cause" compared to other agency heads who serve at the pleasure of the President or are at least part of a commission so that there are other members to act as a check against any abuse of power.

This unique structure was deliberate—an attempt to immunize the CFPB from the vagaries of political whim so that it could carry out its mandate to protect consumers unfettered. Therein lay the rub.

In 2014, the CFPB initiated an administrative action against PHH Corporation, accusing it of violating § 2607 of the Real Estate Settlement Procedures Act ("RESPA") by referring its borrowers to mortgage insurers that used the reinsurance services of its captive reinsurer, Atrium Insurance Corporation. Section 2607 prohibits a mortgage insurer's paying a lender for the lender's referral of borrower to that mortgage insurer; however, prior to the CFPB's administrative action, that prohibition had long been interpreted by the federal government (HUD) as subject to an exception which allowed captive reinsurance arrangements so long as the mortgage insurer paid *no more than* reasonable market value for the reinsurance. PHH claims that it relied on this interpretation in its referrals.

Nonetheless, the CFPB rejected the long-standing HUD interpretation and found instead that the practice violated the anti-kickback provisions of § 2607 and imposed a $109,000,000 disgorgement penalty on PHH *based on the referrals it had made* <u>*prior*</u> *to the CFPB's new interpretation* and enjoined PHH from entering into similar agreements in the future.

PHH responded by filing a petition to the D.C. Circuit Court which not only challenged the retroactive enforcement of the new CFPB interpretation but the constitutionality of the CFPB itself, urging that the agency be abolished.

PHH drew a panel which included Judge Brett Kavanaugh, a jurist who is a staunch advocate of the Separation of Powers doctrine under the U.S. Constitution. In a lengthy opinion, Judge Kavanaugh not only ruled that the CFPB had misinterpreted § 2607 in its ruling (and, in any event, could not retroactively change the interpretation of that Section without violating PHH's Due Process rights) <u>but that the *structure* of the CFPB was itself unconstitutional</u>.

The former part of Judge Kavanaugh's ruling was not much of a surprise given the long history of the prior interpretation of the statute and the antipathy with which the law treats most retroactive prohibitions. As Judge Kavanaugh wrote:

> Imagine that a police officer tells a pedestrian that the pedestrian can lawfully cross the street at a certain place. The pedestrian carefully and precisely follows the officer's direction. After the pedestrian arrives at the other side of the street, however, the officer hands the pedestrian a $1,000 jaywalking ticket. No one would seriously contend that the officer had acted fairly or in a manner consistent with basic due process in that situation.

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Watching the Watchers (continued from page 9)

This would have been an ample basis upon which to reverse the CFPB's order; however, Judge Kavanaugh chose a more dramatic approach, he went on to rule that the CFPB's unique structure was itself unconstitutional, finding that:

> Because the Director alone heads the agency without Presidential supervision, and in light of the CFPB's broad authority over the U.S. economy, the Director enjoys significantly more *unilateral* power than any single member of any other independent agency. By "unilateral power," we mean power that is not checked by the President or by other colleagues. Indeed, other than the President, the Director of the CFPB is the single most powerful official in the entire United States Government, at least when measured in terms of unilateral power.

Under a Separation of Powers analysis, this exercise of unilateral authority by a single agency head was an anathema to the Court, which observed:

> Independent agencies lack the ordinary constitutional checks and balances that come from Presidential supervision and direction. But to ensure some check against arbitrary decision-making and to help preserve individual liberty, independent agencies have traditionally been structured as multi-member bodies where the commissioners or board members can check one another. The check from other commissioners or board members substitutes for the check by the President. As an independent agency with just a single Director, the CFPB represents a sharp break from historical practice, lacks the critical internal check on arbitrary decision-making, and poses a far greater threat to individual liberty than does a multi-member independent agency. All of that raises grave constitutional doubts about the CFPB's single-Director structure.

"…other than the President, the Director of the CFPB is the single most powerful official in the entire United States Government, at least when measured in terms of unilateral power…"

After analyzing, and rejecting, the various arguments supporting keeping the CFPB structure intact, the Court (with a partial dissent by Judge Henderson, who deemed it more appropriate for the Court to have avoided ruling on the constitutional issues in light of Supreme Court precedent declaring: "an established part of our constitutional jurisprudence that we do not ordinarily reach out to make novel or unnecessarily broad pronouncements on constitutional issues when a case can be fully resolved on a narrower ground.") held that the CFPB's structure violated Article II of the U.S. Constitution. Significantly, though, the Court declined PHH's invitation to declare the agency itself (or even the Dodd-Frank Act) unconstitutional, rather, the Court ruled more narrowly that: "the CFPB now will operate as an executive agency. The President of the United States now has the power to supervise and direct the Director of the CFPB, and may remove the Director at will at any time." The extent to which this change might actually affect any pending or future CFPB remains to be seen.

Senator Elizabeth Warren, who was the prime mover behind the creation of the CFPB (and was once being considered as its first Director), has vowed that the Court's decision will be appealed and has predicted it will be overturned. Given the current make-up of the U.S. Supreme Court, that prediction might be overly optimistic. Nonetheless, at least for the time-being, the CFPB continues to function and to enforce its view of the laws, albeit it might now take pause before applying that view retroactively. Despite the headlines to the contrary in some publications in the immediate aftermath of the Court's opinion, (to paraphrase Mark Twain) the rumors of the CFPB's demise have been greatly exaggerated.

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CFPB FINAL RULES…FINALLY!

by Michelle A. Mierzwa, Esq.

The Consumer Financial Protection Bureau ("CFPB") issued Proposed Amendments to its Mortgage Servicing Rules in November of 2014. The comment period for the Proposed Amendments ended in March of 2015. At last, the long-anticipated 2016 Mortgage Servicing Rule ("Final Rule") with commentary was issued by the CFPB in 901 pages on August 4, 2016, and servicers are just beginning to digest the substantial changes. The Final Rule amended nine specific subject matter areas within the Servicing Rules and made a variety of technical corrections and clarifications. A summary of the substantial amendments follows.

Successors in Interest

One of the most controversial amendments, and the section upon which the CFPB received the most interested party comments, is the amendment relating to the enhancement of rights for successors in interest to the borrower. The categories of successors in interest described in the Final Rule make the definition of successor in interest in Subpart C of Regulation X and Regulation Z consistent with the Garn-St. Germain Act and now include successors who obtain their interest in a secured property as a result of:

(1) Transfer by devise, descent or operation of law following death of joint tenant or tenant by the entirety;

(2) Transfer to a relative resulting from the death of a borrower;

(3) Transfer in which the spouse or children of a borrower become an owner of the property;

(4) Transfer to a spouse resulting from divorce decree, legal separation or settlement agreement; or

(5) Transfer to an inter vivos trust where borrower remains a beneficiary and still occupies property.

These categories represent an expansion of the Rules' treatment of successors in interest to include not only those successors who obtain their interest following the death of the borrower but also other categories of successor. The Final Rule not only expanded the categories of persons who are considered successors in interest to a borrower, but also formalized the process for confirmation of a successor and substantially expanded the rights and entitlements of a confirmed successor.

The existing Servicing Rules regarding successors in interest require only that servicers maintain policies and procedures that are reasonably designed to ensure that a servicer, upon notification of a borrower's death, promptly identify and facilitate communication with the borrower's successor in interest concerning the secured property. Although a guidance bulletin regarding the successor in interest policies and procedures was issued in October of 2013, the bulletin was limited to examples of components of such policies that the CFPB would consider reasonable, with no hard and fast requirements or statutory rights for successors. The Final Rules amend the applicable Code of Federal Regulation provisions to address the following areas:

(1) Requirements for how a servicer must confirm a successor's identity and interest in the property

(2) Requirements to respond to written request from potential successor

(3) Requirements to provide descriptions of documents required to confirm identity and ownership interest of the successor

(4) Requirements to provide contact information for further assistance

(5) Requirements for enhanced policies and procedures designed to: promptly provide description of documents required to confirm identity and ownership interest and upon receipt of documents, to notify the successor of the servicer's determination regarding successor status or request additional documents

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CFPB Final Rules (continued from page 11)

The Final Rule dictates that a confirmed successor in interest shall be considered a borrower/consumer for purposes of: Regulation X servicing provisions (servicing transfer, error resolution, request for information, early intervention, continuity of contact, loss mitigation, force placed insurance, and escrow) and Regulation Z servicing provisions (periodic statements, interest rate adjustment notices, prompt payment processing & payoff statements, mortgage transfer notices).

While the amendments to the existing Servicing Rules are expansive, there are some limitations. The small servicer exemptions to the relevant code sections apply. There are also some limitations on responding to requests for information, whereby the servicer can omit location, contact and personal financial information of a borrower or one successor when responding to another successor's request. Loss mitigation evaluation of a successor is only required if the secured property is the principal residence of a confirmed successor. While a servicer cannot require assumption of the loan prior to evaluating a successor's loss mitigation application, it can condition a loss mitigation offer on assumption under state law. Finally, regarding statements and notices, a servicer is only required to send to one borrower, and there is an opt-in process servicers can use to avoid the need to create separate versions of statements and notices for successors in interest as opposed to borrowers.

Much to the disappointment of servicers, the new successor in interest provisions now have teeth. The CFPB's commentary to the Final Rule specifically verifies that a confirmed successor in interest has all of the rights of a borrower under the Rule, including the rights of action set forth in 12 U.S.C. 2605(f). This section will apply to violations of: early intervention rules (12 C.F.R. 1024.39), loss mitigation rules (12 C.F.R. 1024.41), notice of error rules (12 C.F.R.1024.35), and request for information rules (12 C.F.R. 1024.36). 12 U.S.C. 2605(f) does NOT apply to violations of continuity of contact rules (12 C.F.R. 1024.40). Moreover, unlike some state consumer protection laws, the Final Rule does not provide a private remedy for injunctive relief.

Definition of Delinquency

The Final Rule adds a general definition of delinquency to 12 C.F.R. 1024.31, which will apply to Regulation X servicing provisions (early intervention and 120-day rule) and Regulation Z periodic statement provisions. The Final Rule confirms that for all applicable sections, a loan is delinquent beginning on the date a periodic payment sufficient to cover principal, interest and escrow, if applicable, becomes due and unpaid, until such time as no periodic payment is due and unpaid. This amendment clarifies that no contractual grace period is considered for purposes of any section that addresses delinquency.

Requests for Information

In addition to the amendments related to treatment of requests from successors in interests, the Final Rule clarifies the obligation of a servicer to respond to owner or assignee information requests within ten days. Under the current version of the Servicing Rules, the servicer is to provide the name of the trust, the trustee's name, address, and contact information for securitized loan trusts and identify if Fannie Mae or Freddie Mac is the owner. The Final Rule clarifies that the servicer is only required to provide the number of the trust or pool on Fannie Mae and Freddie Mac loans if it is specifically requested by the borrower.

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CFPB Final Rules (continued from page 12)

Force-Placed Insurance

The Final Rule provides clarification to allow a servicer to force place insurance when the borrower has insufficient coverage, in addition to expiring/expired coverage, and applies the same timing and notice requirements to insufficient coverage situations. The Final Rule also amends the safe harbor forms to allow a servicer to include a loan number on force-placed insurance notices.

Early Intervention

The Final Rule provides clarification regarding a servicer's early intervention live contact and revises the existing exemptions for borrowers in bankruptcy or subject to cease communication protections pursuant to the Fair Debt Collection Practices Act ("FDCPA"). With respect to early intervention, the Final Rule confirms that a servicer is only required to comply with the written notice process once within a 180-day period, but must provide written notice again if the borrower remains delinquent 180 days after the prior written notice. With respect to early intervention, the Final Rule provides that a servicer is exempt from the live contact requirements if any borrower on the loan is in bankruptcy or the servicer is a debt collector under FDCPA and any borrower on the loan has invoked the FDCPA cease communication provisions with respect to the loan. With respect to early intervention written requirements, the Final Rule provides that if either of the above conditions is met, the servicer is also exempt from the written requirements if no loss mitigation option is available. However, if any loss mitigation alternative is available, the servicer must provide a modified written notice unless any borrower on the loan is in bankruptcy AND the servicer is a debt collector and any borrower has invoked the FDCPA cease communication protections. In addition, the Final Rule requires that a servicer resume early intervention communications once the bankruptcy is closed or dismissed or the borrower reaffirms personal liability for the loan. If personal liability has been discharged in the bankruptcy, a servicer is also required to resume written notice communications if the borrower has made any partial or periodic payment on the loan after the commencement of the bankruptcy case.

Loss Mitigation

The Final Rule also makes substantial amendments and enhancements to existing loss mitigation provisions. The scope of the amendments is too broad to cover in detail in this article, but a brief summary of the relevant changes effected by the Final Rule follows:

(1) Allows a subsequent round of loss mitigation evaluation each time the borrower brings a loan current following a previous complete loss mitigation application (the "second bite at the apple" provision);

(2) Clarifies an exemption to the 120-day rule to allow a servicer to join the foreclosure action of a superior lienholder in addition to a subordinate lienholder;

(3) Clarifies how a servicer should determine a reasonable date for borrowers to remit information and documents needed to complete a loss mitigation application;

(4) Enhances the prohibitory language relating to dual tracking following receipt of a complete loss mitigation application more than 37 days prior to foreclosure sale (or before a sale date is set), and a servicer's obligations to instruct foreclosure counsel to ensure no prohibited activity occurs;

(5) Requires a new written notice to a borrower within five (5) business days of receipt of a complete loss mitigation application, including specified information;

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CFPB Final Rules (continued from page 13)

(6) Clarifies a servicer's obligations with respect to loss mitigation applications that require information from third parties, including enhanced communication to the borrower and evaluations of all possible steps notwithstanding the lack of the third party information;

(7) Clarifies that a servicer may offer a short term forbearance or repayment plan based on evaluation of an incomplete application and requires written notice of particular terms; however, this process does not satisfy the evaluation of a complete application for purposes of duplicative request limitations;

(8) Clarifies that a servicer may cease collecting information and documents from a borrower for a particular loss mitigation option only if the borrower is ineligible for that option based on established requirements, but not solely based on the borrower's preference for another alternative; and

(9) Clarifies timelines for loss mitigation procedures and response periods upon servicing transfer during a pending application.

Prompt Payment Crediting

The Final Rule clarifies how a servicer is to handle periodic payments by a borrower under temporary loss mitigation alternatives or permanent loan modifications. Periodic payments under temporary alternatives would be credited to the contractual due date, and applied to a suspense account if partial contractual payments. Once a permanent loan modification is consummated, periodic payments are to be applied under the terms of the modification.

Periodic Statements

This section of the Final Rule also invoked substantial communication from interested parties during the comment period, particularly with respect to the elimination of the blanket bankruptcy exemption under the current Servicing Rules, in favor of mandatory issuance of modified periodic statements during bankruptcy, subject to certain exemptions. The Final Rule includes sample forms with varying content to address borrowers who are debtors in different chapters of bankruptcy.

In addition to statements during bankruptcy, the Final Rule amends the periodic statement requirements with respect to accelerated, charged-off and permanently modified loans, and addresses loans in temporary loss mitigation programs. The Final Rule confirms an exemption for issuance of periodic statements by servicers for charged-off loans if a servicer will not charge interest or fees on the loan going forward and provides the borrower a specified written disclosure regarding the effects of charge off.

Small Servicer

Under the current Servicing Rules, a small servicer is one that, together with any affiliates, services 5,000 or fewer mortgage loans for which the servicer (or an affiliate) is the assignee. The Final Rule excludes certain seller-financed transactions and mortgage loans that are voluntarily serviced for a non-affiliate, even if the non-affiliate is not a creditor or assignee, from being counted toward the limit of 5,000 loans.

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CFPB Final Rules (continued from page 14)

FDCPA Interpretive Rule

Concurrently with the issuance of the Final Rule on August 4, 2016, the CFPB issued the 2016 FDCPA Interpretive Rule ("Interpretive Rule"), addressing the apparent conflict between federal privacy and debt collection protective statutes and the Final Rule. The Interpretive Rule provides specified safe harbors for a servicer acting in compliance with the Final Rule in the following situations:

(1) Communicating about a borrower's loan with a confirmed successor in interest as required by the Final Rule;

(2) Providing written early intervention notices to a borrower who has invoked cease communication protections under FDCPA; and

(3) Responding to communications initiated by the borrower concerning loss mitigation after that borrower has invoked cease communication protections under FDCPA.

Effective Date

The effective date of the Final Rule regarding successors in interest and periodic statements is eighteen months after publication of Final Rule in the Federal Register. All other Final Rule provisions will be effective twelve months after publication of the Final Rule in the Federal Register. The Final Rule was published in the Federal Register on October 19, 2016. Accordingly, the Final Rule regarding successors in interest and periodic statements is effective April 19, 2018, and the effective date for all other provisions is October 19, 2017. If you have questions or would like a more detailed analysis of any of the provisions discussed above, please contact Compliance Partner, Michelle Mierzwa. Ms. Mierzwa can be reached via email at mmierzwa@wrightlegal.net.

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LOCKED OUT:

CAN NEW WASHINGTON STATE LEGISLATION FIX *JORDAN*?

by Ryan M. Carson, Esq. and Michelle A. Mierzwa, Esq.

On July 7, 2016, the Washington Supreme Court in *Jordan v. Nationstar Mortgage, LLC* (No. 92081-8) ruled that a loan servicer cannot enter and secure real property pre-foreclosure in Washington, which is normally allowed under standard provisions of the lender's deed of trust. **Fortunately, new legislation to undo the effects of *Jordan* may be in the works.**

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To recap what happened in *Jordan*, Nationstar's property preservation agents determined the house to be vacant, changed the lock to the front door and placed a lockbox on the door with a notice that advised the borrower to call for access. The borrower did call Nationstar, informing it she had not vacated the property, and Nationstar provided her with the lockbox code. She gained access to the property, and the following day promptly vacated. Thereafter, the borrower sued, and a class was certified in the U.S. District Court for the Eastern District of Washington.

Subsequently, the question certified before the Washington Supreme Court was whether, under Washington's lien theory of mortgages and RCW 7.28.230(1) [Washington's lien statute that bars pre-foreclosure possession of property], a borrower and lender can enter into a valid contractual agreement prior to default that allows the lender to enter, maintain, and secure the encumbered property prior to foreclosure. In the Court's opinion, the certified question turned on whether or not the lender was authorized by the deed of trust to take actual possession of the property before foreclosure. Actual possession, the court reasoned, required a certain degree of physical control. The court stated: "[t]his action of changing the locks and allowing her a key only after contacting Nationstar for the lockbox code is a clear expression of control." In answering the certified question, the court indicated that the entry provisions are unenforceable. The Court described the "entry provisions" as the portions of the deed of trust which allow the lender to enter, maintain, and secure the property after the borrower's default or abandonment.

So, as Washington state law stands, a lender or servicer will be required to either obtain the consent of the borrower, appointment of a receiver, or other court order prior to making any pre-foreclosure efforts toward preserving real property in Washington.

To the dismay of local municipalities and lenders, the opinion has placed substantial roadblocks to standard property preservation efforts like grass-cutting, securing and winterization of vacant properties, as well as more substantive abatement efforts regarding neglected and abandoned properties. The good news is that although a motion for reconsideration of *Jordan* was denied, new legislation is being proposed by a group of lending industry advocates. Meetings with housing advocates have occurred to determine if joint legislation can be crafted to address the problems caused by *Jordan*. Industry advocates have suggested an amendment to the Washington statutes, and if no agreement can be reached, lenders may introduce their own bill. The current draft proposal would add a new section, **RCW 61.24.137**, and amend **RCW 7.28.230** as follows:

61.24.137 Property preservation

(1) Before foreclosure and sale according to law, a beneficiary may enter into possession of the real property subject to a deed of trust for the purpose of securing and preserving the property in accordance with subsections (2)-(3).

(2) A beneficiary may take the actions authorized by subsection (1) if all of the following conditions are met:

> *a) The deed of trust authorizes the beneficiary to enter, secure and preserve the property.*
>
> *b) From an external inspection of the property, the beneficiary reasonably believes that it is vacant, abandoned or unsecured or that there is a substantial risk that it will suffer or cause serious harm to person or property.*

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c) The beneficiary has posted a notice, on the exterior of the front door, stating: (i) the beneficiary has determined the property to be vacated, abandoned, or a danger to person or property, (ii) the date that the property was last inspected, (iii) the beneficiary may enter, secure and preserve the property in three days after that date unless the borrower contacts it first, and (iii) the 24-hour, toll-free telephone number at which the borrower may contact the beneficiary.

d) After waiting at least three days after posting the notice, the beneficiary (i) has conducted a second exterior inspection which shows the property remains vacant, abandoned, unsecured or a substantial risk, and (ii) has not been contacted by the borrower

e) If the beneficiary reasonably believes that there is a substantial risk that the property will suffer or cause serious damage in less than three days, it may enter, secure and preserve the property without first meeting the conditions described in subsections (c)-(d).

(3) For purposes of this section, "securing and preserving" the property includes, but is not limited to, entering the property to change locks, make repairs, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off.

(4) A beneficiary shall not be subject to liability for actions authorized by this section, if taken before the section's effective date so long as the conditions described in subsections (2)(a) and (b) were met.

Amend existing RCW 7.28.230:

7.28.230 Mortgagee cannot maintain action for possession--Possession to collect mortgaged, pledged, or assigned rents and profits--Perfection of security interest—Property preservation not possession

(1)-(3) would remain unchanged.

(4) Nothing in this section shall be construed as any limitation upon the right of the owner of real property to agree that the mortgagee or beneficiary of a deed of trust may enter, secure and preserve the property before foreclosure and sale according to law, nor as prohibiting the mortgagee, beneficiary from entering into possession of any real property for the purpose of securing and preserving the property in accordance with section 61.24.137. This subsection is declaratory of existing law, abrogating the decision in Jordan v. Nationstar Mortgage LLC, 185 Wn.2d 876, 374 P.3d 1195 (2016), and shall be applied retroactively.

Obviously, **a legislative fix cannot come soon enough!** But please remember, the above proposal is only under initial discussion and has not yet been submitted to the legislature in the form of a bill. Until new legislation is actually enacted, or until there are other cases interpreting the *Jordan* decision, prudence cautions that taking *any* non-consensual, pre-foreclosure action requiring entry on a property could result in the borrower suing the lender/servicer and its agents. Thus, it is important to consult with counsel regarding the language of the particular entry provisions at issue and to evaluate the risk tolerance of your organization with respect to future property entry, preservation policies, compliance with anti-blight laws, and available remedies in the state of Washington.

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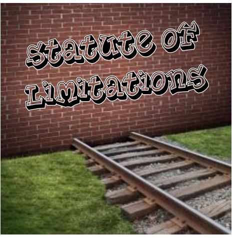
STATUTE OF LIMITATIONS ISSUES JUMP COASTS HITTING THE PACIFIC NORTHWEST AND SOUTHWEST

CAN WAIVING ACCELERATION AVOID THE STATUTE OF LIMITATIONS' BAR TO FORECLOSURE?

by Jamin S. Neil, Esq. and T. Robert Finlay, Esq.
As published in DSNews, October 2016
(http://www.dsnews.com/uncategorized/10-20-2016/statute-limitations-issues-jump-coasts-hitting-pacific-northwest-southwest)

There are many who hope the expression "time heals all wounds" will prove to apply to the financial crisis of 2008-2009, but that same passage of time has an alternate -- and potentially severe -- consequence for mortgage lenders and servicers ("Servicers"): the loss of their ability to enforce the loan after they accelerate the debt.

The expiration of the statute of limitations ("SOL") on a Servicer's right to foreclose has long been an issue in New York and Florida. But, it is becoming an increasingly common defense and attack raised by property owners in the Pacific Northwest and Southwest as well. Opportunistic investors in states like Arizona are scouring title records, looking to acquire loans that have long been in default without the completion of a judicial or non-judicial sale. Borrowers too, in states like Oregon, Washington and Utah, are jumping on the bandwagon, claiming that the Servicer is prohibited, by its delay, from now foreclosing on the loan. Consequently, Servicers must take a close look at their loan portfolio to determine whether the SOL has run or is close to expiring. Most importantly, Servicers must know what can be done to stop any further running of the SOL clock.



For Servicers to understand their options, they must first understand what a SOL is and the risk of letting it expire. In the most simplistic terms, a SOL is the outward time limit of when a Servicer can enforce its Deed of Trust following a particular default. For example, if the SOL is six (6) years, the Servicer must complete its foreclosure within 6 years. If the Servicer fails to foreclose within 6 years, it is arguably prevented from ever foreclosing on its lien, effectively giving the borrower or owner the property free and clear of the Deed of Trust. Needless to say, this is a less than desirable result!

The key question for any outward limit is what triggers the clock to start running on the SOL? Contrary to popular belief, it is not the default itself that starts the clock running; but, rather the issuance of a notice from the Servicer declaring the loan to be in default and that all sums are immediately due (*i.e*. acceleration). The problem is that, in many instances, the debt was accelerated long ago (often by a prior servicer as part of a previous foreclosure attempt). In that event, the current Servicer could have a ticking time bomb on its hands.

The SOL defense is generally raised years after a notice of acceleration has issued. At that point, Servicers (and their legal teams) are left scrambling to review the entire loan file to determine when the first acceleration occurred, whether there were any tolling events preventing the SOL from having already run, and, most importantly, was the loan ever "de-accelerated".

As we are now several years removed from the height of the financial crisis, the **six year** SOL on foreclosures in Arizona, Oregon, Washington and Utah are becoming an increasingly bigger problem for Servicers in these states. Indeed, because Servicers may not be aware that acceleration of the loan arguably starts the SOL running, proving that the loan was de-accelerated (or that the running of the statute was tolled) may prove crucial to avoiding the bar to foreclosure.[1] This article discusses the applicable SOL period in all four states, what events or actions Servicers take that could commence its running, Servicers' ability to waive acceleration and the need to create further precedent confirming this right.

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Statute of Limitations Issues (continued from page 18)

State	Limitations Period	Accrual Date	Acceleration
ARIZONA	Six years for foreclosure under a deed of trust.[2]	The statute begins to run either on the due date of each matured installment payment[3] or, as to unmatured future installments, the date on which the Servicer exercises the deed of trust's optional acceleration clause.[4]	Occurs when a Servicer undertakes some affirmative act to make clear to the borrower that the Servicer has accelerated the obligation.[5] Demanding full payment before all installments are due and filing suit to collect the entire debt are arguably sufficient affirmative acts to constitute acceleration.[6]
OREGON	Six years for an action on the Note. Ten years for foreclosure under a deed of trust.[7] It is unsettled in Oregon whether a non-judicial foreclosure is barred if the limitations period on an action under the Note has already expired. Accordingly, Servicers should exercise caution and utilize the 6 year limitations period.	Where an instrument gives the creditor an election to accelerate maturity of the debt and it is accelerated, the statute of limitations begins to run from the time of the election to accelerate.[8]	An affirmative act evidencing an intention to exercise the option to accelerate is required.[9]
WASHINGTON	Six years for foreclosure under a deed of trust.[10]	The statute begins to run when the amount becomes due.[11] The full amount becomes due either upon maturity of the note or if an obligation to pay in installments is fully accelerated.[12]	Acceleration requires some affirmative act by the Servicer, in a clear and unequivocal manner, which effectively apprises the borrower that the Servicer has exercised its right to accelerate the payment date.[13] This exercise of the option may take different forms including, but not limited to: Giving the borrower formal notice that the whole debt is declared due; or by the commencement of an action to recover the debt.[14]

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Statute of Limitations Issues (continued from page 19)

State	Limitations Period	Accrual Date	Acceleration
UTAH	Six years for an action on the Note (not a non-judicial foreclosure).[15] Recent case law provides that even if an action under the Note is barred by the limitations period, the Deed of Trust may still be valid and enforceable.[16] However, this issue is not settled in Utah. Accordingly, Servicers should exercise caution and utilize the 6 year limitations period	An action for recovery of a debt may be brought within the applicable statute of limitations from the date: (a) the debt arose; (b) a written acknowledgment of the debt or a promise to pay is made by the debtor; or (c) a payment is made on the debt by the debtor.[17] However, acceleration of all amounts due triggers the running of the SOL as to the entire debt.[18]	An affirmative act evidencing an intention to exercise the option to accelerate is required. It appears from recently case law that a loan can be de-accelerated to stop the running of the statute. The Deed of Trust's maturity date commences the SOL on non-judicial foreclosure.[19]

NON-JUDICIAL FORECLOSURE

If the Servicer has not already sent notice to the borrower advising that the loan was accelerated, the question arises as to whether the initiation of non-judicial foreclosure proceedings suffices to start the running of the statute. Although there are no decisions from the above states addressing whether (or at what stage) the initiation of non-judicial foreclosure proceedings might constitute an acceleration of all amounts due under the loan, it is arguably analogous to the commencement of a foreclosure lawsuit and, thus, *could* constitute an affirmative act demonstrating acceleration.

WAIVER OF ACCELERATION (OR DE-ACCELERATION)

In general, the exercise of an option to accelerate is not irrevocable, and a Servicer who has exercised the option of considering the whole amount due may subsequently waive this right and permit the obligation to continue in force under its original terms.[20] The waiver may be express or implied.[21]

The requirements for establishing waiver of an optional acceleration under a Deed of Trust have not yet been set in Arizona, Oregon and Washington;[22] however, courts in Florida, New York, Texas and Utah have unanimously held that Servicers can waive the acceleration.[23] As the Florida and New York decisions are in the context of judicial foreclosure sales, the decisions from Texas and Utah relating to non-judicial foreclosures are most applicable to Arizona, Oregon and Washington where the primary mode of foreclosure is non-judicial.

In Texas, Arizona, Oregon and Washington, "waiver" is defined as the intentional relinquishment of a known right that can be implied as well as express.[24] Texas courts intermingle the terms waiver and abandonment in reference to de-acceleration and conclude that when a Servicer sends a subsequent notice of default and intent to accelerate to a borrower, such notice abandons any prior acceleration as a matter of law. This abandonment or waiver of acceleration effectively restores the note's original maturity date.[25]

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Statute of Limitations Issues (continued from page 20)

Stated differently, a subsequent notice of default unequivocally manifests a Servicer's intent to abandon the previous acceleration and provides the borrower with an opportunity to avoid foreclosure if he or she cures the arrearage. Accordingly, the SOL ceases to run at this point.[26] While this may be the law in Texas, there are no appellate decisions reaching the same conclusion in Arizona, Oregon, Washington or Utah. However, the logic behind Texas decisions could arguably cross borders into these states as well.

Servicers should look to their loan files for correspondence and notices indicating whether the loan was no longer accelerated and, therefore, that a prior acceleration was waived. Most Servicers' loan history notes will not indicate a change in the loan's accelerated or de- accelerated status, but rather will only reflect the commencement or cancellation of foreclosure proceedings. It is nonetheless crucial for Servicers to provide evidence that the loan was not still accelerated after a particular foreclosure was cancelled.

BEST PRACTICES TO AVOID LETTING THE "SOL" RUN

Unfortunately, "what's done is done" in the context of a SOL that has already expired. But, Servicers can prevent the expiration of another SOL next week, next month or next year by taking certain steps to protect its loan portfolios. For starters, it is essential to identify which loans may be close to surpassing the six year SOL in Arizona, Oregon, Washington and Utah. To do that, a Servicer must audit its defaulted loans in these states to determine when the SOL may have started to run. Once this cross-section of loans has been identified, the Servicer or its legal counsel should identify which loans are at imminent risk of hitting the six year mark. If the foreclosure on those loans cannot be completed before the SOL expires, the Servicer should consider taking overt steps to waive prior accelerations.

After the loans at immediate risk are addressed, Servicers may next want to consider implementing procedures to "flag" loans as they near the expiring SOL. And, remember to check for SOL risk on any incoming servicing transfers!

Of course, none of this should be relied upon as legal advice. Before addressing any SOL issues in Arizona, Oregon, Washington, Utah or any other state, Servicers should consult with their in-house legal counsel or hire outside counsel.

For additional reference, please see the ***Statute of Limitations Chart*** on pages 23-24.

If you have questions about the subject matter of this article, the applicable SOL in any states on the West Coast or in the Southwest, desires assistance in auditing your loan portfolios or developing SOL protocol, please feel free to contact Robert Finlay at rfinlay@wrightlegal.net, who will coordinate with our team of attorneys in Arizona, Oregon, Washington and Utah.

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Statute of Limitations Issues (continued from page 21)

FOOTNOTES: STATUTE OF LIMITATIONS ISSUES

[1] A variety of terms are used to describe de-acceleration, including: waiver, abandonment; revocation; and rescission.

[2] A.R.S. § 33-816 and A.R.S. § 12-548(A)(1).

[3] *Navy Fed. Credit Union v. Jones*, 187 Ariz. 493, 494, 930 P.2d 1007, 1008 (App. 1996).

[4] *Id*.

[5] *Baseline Fin. Servs. v. Madison*, 229 Ariz. 543, 544, 278 P.3d 321, 322 (App. 2012).

[6] *Id*.

[7] ORS § 12.080; ORS § 86.815 and ORS § 88.110. Oregon also has a statutory exception to the 10 year statute of limitations codified at ORS § 88.120.

[8] *Fed. Recovery of Wash., Inc. v. Wingfield*, 162 Ore. App. 150, 156-57, 986 P.2d 67, 71 (1999).

[9] *Salishan Hills, Inc. v. Krieger*, 62 Ore. App. 84, 90, 660 P.2d 160, 164 (1983).

[10] *Walcker v. Benson & McLaughlin*, 79 Wn. App. 739, 743, 904 P.2d 1176, 1178 (1995) (The six year statute of limitations on an action for a contract in writing applies to the foreclosure of a mortgage on real property. Since Washington's deed of trust statute, RCW 61.24, does not refer to any limitation period for non-judicial foreclosures, the limitation period for foreclosure of mortgages applies.).

[11] *Westar Funding, Inc. v. Sorrels*, 157 Wn. App. 777, 239 P.3d 1109, 1113 (Wash. Ct. App. 2010).

[12] *Kirsch v. Cranberry Fin., LLC*, No. 69959-8-I, 2013 Wash. App. LEXIS 2871, 2013 WL 6835195, at *4 (Wash. Ct. App. Dec. 23, 2013).

[13] *Glassmaker v. Ricard*, 23 Wn. App. 35, 38, 593 P.2d 179 (1979).

[14] *Weinberg v. Naher*, 51 Wn. 591, 594, 99 P. 736 (1909).

[15] UCA § 78B-2-309.

[16] *Koyle v. Sand Canyon Corp.*, 2:15-cv-00239 (May 2016).

[17] UCA § 78B-2-113.

[18] *Olsen v. Fair Co.,* 216 UT App 46, 369 P.3d 473, 479; see also *Koyle v. Sand Canyon Corp.,* 2:15-cv-00239 (May 2016); *Anderson v. Davis,* 2008 UT App 86 (Utah Ct. App. 2008); *Cottage Capital, LLC v. Red Ledges Land Dev.,* 2015 UT 27, 345 P.3d 642 (Utah 2015).

[19] *Koyle v. Sand Canyon Corp.,* 2:15-cv-00239 (May 2016); *Anderson v. Davis*, 2008 UT App 86 (Utah Ct. App. 2008); *Cottage Capital, LLC v. Red Ledges Land Dev.,* 2015 UT 27, 345 P.3d 642 (Utah 2015).

[20] 11 Am. Jur. 2d Bills and Notes § 170 (2nd 2015).

[21] *Id*.

[22] The Arizona Court of Appeals has discussed revocation of acceleration in the context of a judicial foreclosure action in an unpublished opinion. See *Wood v. Fitz-Simmons*, No. 2 CA-CV 2008-0041, 2009 Ariz. App. Unpub. LEXIS 1431, at *5 (App. Mar. 6, 2009). The Oregon Supreme Court, however, concluded that a Servicer may waive its previous election to accelerate and reinstate the terms of the note so long as the borrower does not change his or her position in reliance on the acceleration. *W. Portland Dev. Co. v. Ward Cook, Inc.*, 246 Ore. 67, 71, 424 P.2d 212, 214 (1967).

[23] See *Deutsche Bank Tr. Co. Ams. v. Beauvais*, 41 Fla. L. Weekly 933 (Dist. Ct. App. 2016) ("[U]pon dismissal [of a judicial foreclosure action], acceleration of a note and mortgage is abandoned with the parties returned to the status quo that existed prior to the filing of the dismissed action, leaving the lender free to accelerate and foreclose on subsequent defaults."); *Fed. Nat'l Mortg. Ass'n v. Mebane*, 208 A.D.2d 892, 894, 618 N.Y.S.2d 88, 89 (App. Div. 1994) ("[A] lender may revoke its election to accelerate all sums due under an optional acceleration clause in a mortgage provided that there is no change in the borrower's position in reliance thereon…"); *Denbina v. Hurst*, 516 S.W.2d 460, 463 (Tex. Civ. App. 1974) (explaining that a holder may "waive the exercise of the option" to accelerate a note after it "already exercised its option"); *Dallas Joint Stock Land Bank*, 167 S.W.2d at 247 (holding that a Servicer may "waive or rescind" its option to accelerate after exercising it); *Koyle v. Sand Canyon Corp.,* 2:15-cv-00239 (May 2016) (a beneficiary or trustee can unilaterally cancel a default under circumstances such as here where the default has not been cured and no mutual agreement has been reached by the parties). While the cases in these States differ on what constitute a waiver of the acceleration, they all agree that a Servicer can waive the acceleration.

[24] See *Ray v. Tucson Med. Ctr*., 72 Ariz. 22, 32 (1951); *Gable v. State*, 203 Ore. App. 710, 730, 126 P.3d 739, 751 (2006); *Gage v. Langford*, 582 S.W.2d 203, 207 (Tex. Civ. App. 1979); *G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 511 (Tex. 2015); *Schuster v. Prestige Senior Mgmt., LLC*, 193 Wn. App. 616, 631-633 (2016).

[25] *Khan v. GBAK Props*., 371 S.W.3d 347, 354 n.1 (Tex. App. 2012); *Phillips v. JPMorgan Chase Bank, N.A*., No. A-16-CA-287-SS, 2016 U.S. Dist. LEXIS 63843, at *8 (W.D. Tex. May 14, 2016) *citing Khan v. GBAK Props*., 371 S.W.3d 347, 356 (Tex. App. 2012).

[26] *Phillips*, 2016 U.S. Dist. LEXIS 63843, at *8 *citing Boren v. U.S. Nat'l Bank Ass'n*, 807 F.3d 99, 105 (5th Cir. 2015).

STATUTE OF LIMITATIONS CHART

WRIGHT FINLAY & ZAK LLP
ATTORNEYS AT LAW

Statute of Limitations Chart

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	Arizona	California	Nevada	New Mexico
SOL Timeframe	• Sue on the Note: 6 years • Judicial Foreclosure: 6 years • Non-Judicial Foreclosure: 6 years (completed within this time)	• Sue on the Note: 4 years • Judicial Foreclosure: 4 years • Non-Judicial Foreclosure: No SOL. However, the Marketable Record Title Act bars trustee sales after 10 years from maturity or 60 years after DOT recording if no maturity listed.	• Sue on the Note: 6 years • Judicial Foreclosure: 6 years • Non-Judicial Foreclosure: No SOL. Instead, there is a "Statute of Repose" (10 years from maturity.)	• Sue on the Note: 6 years • Judicial Foreclosure: 6 years • Non-Judicial Foreclosure: None, however, non-judicial sales are rare.
What tolling is permitted, i.e. can we carve out time in Bankruptcy, Mediation or Litigation?	Bankruptcy may toll the SOL if it expires while the bankruptcy case is active. The Borrower's absence from the State may also toll the SOL. Equitable tolling or pending litigation may toll the SOL, however, these tolling options are less clearly available for enforcement of loans and deeds of trust.	Bankruptcy may toll the SOL if it expires while the bankruptcy case is active. The Borrower's absence from the State may also toll the SOL. Equitable tolling or pending litigation may toll the SOL, however, these tolling options are less clearly available for enforcement of loans and deeds of trust.	Bankruptcy may toll the SOL if it expires while the bankruptcy case is active. The Borrower's absence from the State may also toll the SOL. Equitable tolling or pending litigation may toll the SOL, however, these tolling options are less clearly available for enforcement of loans and deeds of trust.	Bankruptcy may toll the SOL if it expires while the bankruptcy case is active. The Borrower's absence from the State may also toll the SOL. Equitable tolling or pending litigation may toll the SOL, however, these tolling options are less clearly available for enforcement of loans and deeds of trust.
What event determines the start date of the SOL Timeframe? Is it due date, demand date or first legal action?	The date of each default under the Note. However, acceleration of all amounts due and owing triggers the running of the SOL as to the entire debt. An affirmative act by the creditor is needed to invoke acceleration where the Note/Deed of Trust contain an optional acceleration clause (most do). It is unclear, but likely, that a loan can be de-accelerated to stop the running of the statute. Absent acceleration, it is the maturity date of the loan that triggers the running as to the entire debt.	The date of each default to file suit under the Note. However, acceleration of all amounts due and owing triggers the running of the SOL as to the entire debt. An affirmative act by the creditor is needed to invoke acceleration where the Note/Deed of Trust contain an optional acceleration clause (most do). It is unclear, but likely, that a loan can be de-accelerated to stop the running of the statute. The Deed of Trust's maturity date commences the SOL on non-judicial foreclosure.	The date of each default under the Note. However, acceleration of all amounts due and owing triggers the running of the SOL as to the entire debt. An affirmative act by the creditor is needed to invoke acceleration where the Note/Deed of Trust contain an optional acceleration clause (most do). It is unclear, but likely, that a loan can be de-accelerated to stop the running of the statute. Absent acceleration, it is the maturity date of the loan that triggers the running as to the entire debt.	The SOL begins to run at maturity of the Note. However, if there is an acceleration clause, the SOL begins to run as of the date of the default in the payment of interest.

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STATUTE OF LIMITATIONS CHART

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Statute of Limitations Chart

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	Oregon	Washington	Utah
SOL Timeframe	• Sue on the Note: 6 years • Judicial Foreclosure: 6 years • Non-Judicial Foreclosure: 10 years	• Sue on the Note: 6 years • Judicial Foreclosure: 6 years • Non-Judicial Foreclosure: 6 years (completed within this time)	• Sue on the Note: 6 years • Judicial Foreclosure: 6 years • Non-Judicial Foreclosure: 6 years
What tolling is permitted, i.e. can we carve out time in Bankruptcy, Mediation or Litigation?	Bankruptcy may toll the SOL if it expires while the bankruptcy case is active. The Borrower's absence from the State may also toll the SOL. Equitable tolling or pending litigation may toll the SOL, however, these tolling options are less clearly available for enforcement of loans and deeds of trust.	Bankruptcy may toll the SOL if it expires while the bankruptcy case is active. The Borrower's absence from the State may also toll the SOL. Equitable tolling or pending litigation may toll the SOL, however, these tolling options are less clearly available for enforcement of loans and deeds of trust.	The duration of an injunction or statutory prohibition (including bankruptcy) which delays the filing of an action may not be counted as part of the statute of limitations. UCA §78B-2-112.
What event determines the start date of the SOL Timeframe? Is it due date, demand date or first legal action?	The date of each default under the Note. However, acceleration of all amounts due and owing triggers the running of the SOL as to the entire debt. An affirmative act by the creditor is needed to invoke acceleration where the Note/Deed of Trust contain an optional acceleration clause (most do). It is unclear, but likely, that a loan can be de-accelerated to stop the running of the statute. Absent acceleration, it is the maturity date of the loan that triggers the running as to the entire debt.	The date of each default under the Note. However, acceleration of all amounts due and owing triggers the running of the SOL as to the entire debt. An affirmative act by the creditor is needed to invoke acceleration where the Note/Deed of Trust contain an optional acceleration clause (most do). It is unclear, but likely, that a loan can be de-accelerated to stop the running of the statute. Absent acceleration, it is the maturity date of the loan that triggers the running as to the entire debt.	An action for recovery of a debt may be brought within the applicable statute of limitations from the date: (a) the debt arose; (b) a written acknowledgment of the debt or a promise to pay is made by the debtor; or (c) a payment is made on the debt by the debtor. (78B-2-113) However, acceleration of all amounts due triggers the running of the SOL as to the entire debt. An affirmative act by the creditor is needed to invoke acceleration where the Note/Deed of Trust contain an optional acceleration clause (most do). It is unclear, but likely, that a loan can be de-accelerated to stop the running of the statute. The Deed of Trust's maturity date commences the SOL on non-judicial foreclosure.

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QUIETING QUIET TITLE ACTIONS

by Samantha S. Smith, Esq. and Jonathan D. Fink, Esq.

Plaintiffs' counsel seeking to challenge the enforcement of a deed of trust against their clients' property will often argue that there is no statute of limitations on quiet title actions. However, as confirmed by the recent decision of Division 1 of the 4th Appellate District in *Walters v. Boosinger* (August 12, 2016), these arguments are incorrect. Although the decision does not involve an action by or against a lender, *Walters* confirmed that, as a general proposition, where the challenge to title is based on the claim that an instrument was void *ab initio*, the three-year statute of limitations for fraud applies. [*See* California Code of Civil Proc., § 338 (d), providing a three-year statute of limitation for "[a]n action for relief on the ground of fraud or mistake"].

Factual Background

Walters involved a dispute over the ownership of certain real property ("Property") between appellant Scott Walters ("Scott"), as the administrator of the estate of his father, Randy Walters ("Randy"), and Randy's former girlfriend, Valerie Boosinger. Scott's claims for quiet title and partition stemmed from a 2003 grant deed, naming Randy and Boosinger as owners in joint tenancy of the Property. Upon Randy's death in 2013, Boosinger claimed sole ownership of the Property as the surviving joint tenant. Scott challenged Boosinger's claim to title on the theory that the 2003 grant deed was void *ab initio*.

Scott attached the 2003 grant deed to his first amended complaint ("FAC"), and acknowledged that the 2003 deed was recorded as a result of Randy and Boosinger's decision to refinance a loan on the Property. The 2003 deed grants ownership of the Property from "[Randy], an Unmarried Man as to an undivided 2/3 interest, and [Boosinger], a Single Woman as Joint Tenants." Notwithstanding the language of the 2003 deed, Scott alleged that Randy and Boosinger never owned the Property as joint tenants. In support of this allegation, Scott alleged that Randy never intended to create a joint tenancy with Boosinger. In addition, Scott alleged that Boosinger's friend Susan O'Connor ("O'Connor"), who served as the broker's representative in connection with the 2003 refinancing, breached her duty to Randy because she knew or should have known that Randy was chemically dependent and an alcoholic during the 2003 refinancing process. Scott alleged that O'Connor failed to ensure that Randy understood the nature of the documents that he signed in connection with the refinance. Scott contended that Randy had not intended to create the joint tenancy and that the purposed conveyance of ownership and transfer into a joint tenancy was therefore, void.

Scott further alleged that, upon Randy's death, Randy's two-thirds interest in the Property had passed to Randy's estate to be probated by Scott as the administrator of Randy's estate.

In his partition cause of action, Scott requested that Boosinger either purchase Scott's two-third interest in the Property or that a forced sale of the Property be held such that Scott's interest would be liquidated.

Boosinger demurred to both claims, arguing that any claim that the joint tenancy was void was barred by the statute of limitations. In support of this argument, Boosinger argued that Scott's claim was premised on "[Randy's] mistake or fraud in getting him to sign a grant deed conveying the Property to himself and Boosinger as Joint Tenants," and thus, the three-year statute of limitations contained in section 338, subd. (d) applied to Scott's claim. Boosinger contended that Scott's cause of action had accrued no later than April 2007 when judicially noticeable documents demonstrated that Randy had actual notice "that Boosinger claimed half of the Property as joint owner", a fact which Randy disputed. Boosinger claimed that the statute barred Scott's quiet title claim premised on the theory that the 2003 deed was void because the claim had not been brought prior to April 2010. Boosinger further maintained that Scott could not properly state a cause of action for partition because he had no interest in the Property.

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Quieting Quiet Title Actions (continued from page 25)

The trial court sustained Boosinger's demurrer to Scott's quiet title cause of action on the ground that the claim was barred by the three-year statute of limitations under § 338. The court reasoned that, because Scott alleged that his father was defrauded into signing a grant deed naming the owners as joint tenants instead of tenants in common, his theory of relief sought was fraud. The court found that Randy was aware in 2003 of Boosinger's adverse claim arising from alleged fraud. The court concluded that, since Scott did not file his complaint within the three-year period, the statute of limitations barred his claim.

The trial court also sustained Boosinger's demurrer to Scott's cause of action for partition on the ground that Scott had no interest in the Property after the death of Randy. Thereafter, the court entered a written order sustaining the demurrer to the FAC without leave to amend and dismissing the complaint.

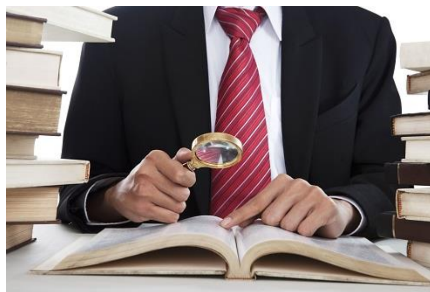
Appellate Court's Analysis

Scott timely appealed from the order of dismissal, claiming that the trial court erred in determining his quiet title claim was time barred. In support of his contention, Scott contended that a quiet title claim that is based on the theory that a deed is void *ab initio* is not subject to *any* statute of limitation and that "an action thereon can be brought at *any time*. To support that contention, Scott cited to portions of *Costa Serena Owners Coalition v. Costa Serena Architectural Com*. (2009) 175 Cal.App.4th 1175 (*Costa Serena*) and *Erickson v. Bohne* (1955) 130 Cal.App.2d 553 (*Erickson*).

The Appellate Court found that the portions of the *Costa Serena* and *Erickson* opinions relied upon and cited by Scott were dicta because in *Costa Serena*, the court held that the amendments at issue were merely *voidable* and that the party's claim was untimely. Moreover, *Erickson* did not involve a statute of limitations question. Rather, there, the court cited a legal encyclopedia for the proposition in *Costa Serena* that an action to cancel a legal instrument premised on a claim that "one party was induced to execute an agreement totally different from that which he apparently made" is a claim that the instrument is void *ab initio*, and may be brought at any time. (*Erickson, supra*, at p. 556).

The *Walters* court pointed out that in *Salazar v. Thomas* (2015) 236 Cal.App.4th 467, at pages 476-477, the court outlined the following general principles of law that govern the determination of the statute of limitations for a quiet title action:

> "The Legislature has not established a specific statute of limitations for actions to quiet title. Therefore, courts refer to the underlying theory of relief to determine the applicable period of limitations. An inquiry into the underlying theory requires the court to identify the nature (i.e., the 'gravamen') of the cause of action. Generally, the most likely time limits for a quiet title action are the five-year limitations period for adverse possession, the four-year limitations period for the cancellation of an instrument, or the three-year limitations period for claims based on fraud and mistake."



The *Walters* court went on to analyze *Robertson v. Superior Court* (2001) 90 Cal.App.4th 1319 (*Robertson*), in which the court considered the validity of the *Hironymous v. Hiatt* (1921) 52 Cal.App. 727, 736 (*Hiatt*) decision where the court stated that "an action to cancel a wholly void instrument can be brought at any time." *Robertson, supra*, at p. 1324, quoting *Hiatt, supra*, at p. 736. The *Robertson* court concluded that "[t]he *Hiatt* court's view of things is especially inappropriate when applied, as here, to action involved the title to or possession of real property." (*Robertson, supra*, at p. 1327.)

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Quieting Quiet Title Actions (continued from page 26)

In *Robertson*, the plaintiff filed a first amended complaint in 2000 requesting that the court declare void a 1949 quitclaim deed executed by his mother on the ground that she was mentally incompetent at the time she executed the deed. The defendant demurred on the ground that the statute of limitations barred plaintiff's claim. The trial court first overruled the demurrer, ruling that an action to "cancel a wholly void instrument can be brought at any time, i.e., is not subject to any statute of limitations." (*Robertson, supra*, at p. 1321.) The *Robertson* court thereafter granted the defendant's petition for writ of mandate and directed the trial court to vacate its order overruling the demurrer and to enter an order sustaining the demurrer.

"…the Walters opinion now clarifies that such a claim may be barred if not brought within three years of when the borrower discovered, or in the exercise of reasonable diligence, should have discovered that the instrument was void."

The *Robertson* court concluded that the *Hiatt* court was "flatly wrong" in concluding that there was no applicable statute of limitations to an action to cancel an instrument as being "wholly void." The *Robertson* court noted that numerous courts had reached similar results, including *Zakaessian v. Zakaessian* (1945) 70 Cal.App.2d 721, 725 (*Zakaessian*), which found that, ordinarily a suit to set aside and cancel a void instrument is governed by § 343 of the Code of Civil Procedure. The only exception to this rule, the *Zakaessian* court indicated, would be as and when fraud or mistake were involved, in which case the three-year period would apply. The *Robertson* court concluded that, if there were ever any merit to the position that there is no limitations period for actions brought under Civil Code section 3412 to declare an instrument void, post-*Zakaessian* there certainly is none. (*Robertson, supra*, at pp. 1325-1327).

What the *Walters* Holding means for Lenders and Servicers

In many instances, borrowers attacking the right to enforce a deed of trust attempt to argue that, for one reason or another, the deed (or the later assignment of that deed) was void *ab initio*. At least for purposes of a quiet title claim, the *Walters* opinion now clarifies that such a claim may be barred if not brought within three years of when the borrower discovered or, in the exercise of reasonable diligence, should have discovered that the instrument was void. As a result of the *Walters* opinion, lenders and servicers might now be able to more quickly quash quiet title claims by borrowers alleging that an instrument is void *ab initio* where the claim is based on allegations of fraud or mistake. However, you can also expect borrowers' counsel to urge that the statute of limitations is tolled because of late discovery or fraudulent concealment by the lender or servicer—arguments which might render the quiet title claim not as susceptible to disposition on a demurrer or motion to dismiss. Nonetheless, the statute of limitations argument would remain as a useful—and potentially fatal—affirmative defense.

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WFZ FIRM NEWS

WFZ CONGRATULATES ITS NEWLY LICENSED ATTORNEYS

NICHOLE L. GLOWIN
Ms. Glowin passed the Nevada State Bar Exam in October 2016. As the firm's Managing Bankruptcy Attorney, Ms. Glowin can now personally handle all types of bankruptcy matters in both California and Nevada.

BRADFORD E. KLEIN
In October and November 2016, Mr. Klein obtained his licenses to practice in the States of New Mexico and Oregon, respectively. He is also licensed to practice in California, Arizona and Washington. Mr. Klein's practice includes general civil litigation, focusing on title insurance issues and mortgage banking litigation, including lender, loan servicer, and trustee defense.

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