UTA
United Trustees Association
UTA Quarterly
Summer 2009

California Foreclosure Prevention Act Ready or Not, Here it Comes

By Phillip M. Adelson, Esq., Adelson, Hess & Kelly[1]

Two recent California bills, SBx2 7 and ABx2 7 (identical bills), were signed by the Governor on February 20, 2009 creating the California Foreclosure Prevention Act ("CFPA")[2]. CFPA becomes operative on June 15, 2009. The primary impact of CFPA is that, after recording a notice of default on certain residential loans, the beneficiary and trustee must wait an additional 90 days beyond the current 3 month waiting period before a notice of trustee's sale may be given except where the loan servicer (as defined in CFPA) has an approved Commissioner's Exemption.

Purpose of this Article

This article was written to address the basic provisions of the CFPA that impact trustees. There are many ambiguities and nuances in the CFPA and in the Emergency Regulations enacted to implement the CFPA. We will not cover the very complex provisions of the CFPA and Emergency regulations relating to a loan servicer's application for a Commissioner's Exemption. Both trustees and loan servicers should seek the advice of knowledgeable compliance counsel in implementing a CFPA compliance program or in applying for a Commissioner's Exemption.

> ***…the beneficiary and trustee must wait an additional 90 days beyond the current 3 month waiting period before a notice of trustee's sale may be given except where the loan servicer (as defined in CFPA) has an approved Commissioner's Exemption.***

The Emergency Regulations

Emergency Regulations were filed on June 1, 2009 interpreting CFPA. Copies of the final version of the CFPA and the Emergency Regulations can be obtained on the UTA website at *ww.unitedtrustees.com.*[3] Beneficiaries, loan servicers and trustees must have CFPA compliance in place before CFPA becomes operative on June 15, 2009.

While the Draft Regulations and initial Emergency Regulations were vague and difficult to apply, the Commissioner responded to numerous suggestions of UTA, CMA and other affected organizations.

The most important change in the final Emergency Regulations an amendment stating that the Emergency Regulations clarify both the provisions of the CFPA

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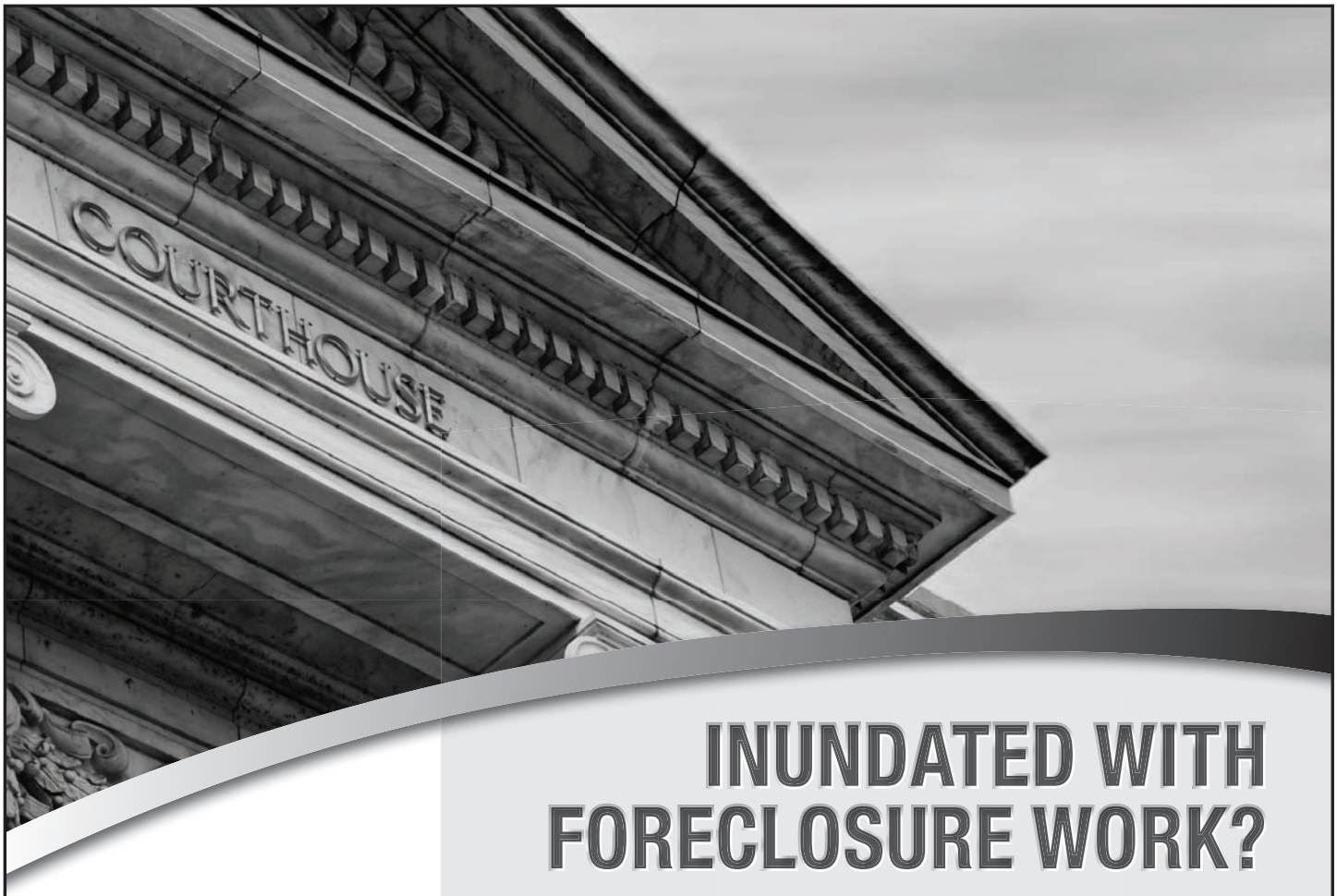

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Mission Statement

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Stemming the Tide of Rising Foreclosures

By Mark Blackman, Esq., Alpert Barr & Grant

In July 2008, the California Legislature attempted to stem the rising tide of foreclosures by enacting Senate Bill 1137, which amended California's foreclosure statutes and required that loan servicers and lenders contact their borrowers to discuss their financial condition and the alternatives to foreclosure before they could commence a foreclosure. Since Senate Bill 1137 contained no actual requirement that a loan modification be offered to borrowers, the previous legislation prolonged the foreclosure process without achieving its desired effect. As a result, on Feb. 20, 2009, a second set of amendments to the foreclosure statutes were enacted by the state Senate and Assembly, SB 7.

The California Legislature, finding that the state is facing an unprecedented threat to state and local economies due to skyrocketing foreclosure rates that have adversely affected California residential property values, the foreclosure rate will have greater adverse consequences as foreclosure rates rise and it is essential to avoid such harmful effects on the residential housing market, determined that the foreclosure process must be modified to ensure the current crisis does not become exacerbated by adding more foreclosures to the glut of foreclosed properties already on the market.

> ***"…an exemption from this new 90-day waiting period if a lender or loan servicer applies for and obtains a valid order of exemption from its regulating entity at the time the notice of sale is given to the borrower on or after the date of the notice of default expires…"***

Beginning May 20, 2009, SB 7 extends the time a lender must wait to record a notice of sale--from three months to three months plus 90 days -- unless the lender or loan servicer obtains an exemption order from the commissioner of one of the three California governmental entities regulating that particular lender or loan servicer.

Industrial banks, savings associations and credit unions that make mortgage loans will be governed by the Department of Financial Institutions; licensed real estate brokers servicing mortgage loans will be governed by the Department of Real Estate; and residential mortgage lenders and servicers and finance lenders and brokers servicing mortgage loans and all other loans not serviced by the identified departments will be governed by the Department of Corporations.

Exemption orders will certify that the lender or loan servicer has implemented a loan modification program that meets specified standards set forth in SB 7 and will be implemented by regulations issued by the state.

Loans Affected by SB 7

As with Senate Bill 1137, the Legislature designated only certain types of loans and exempted others. Specifically, SB 7 applies only to loans as set forth in California Civil Code Section 2923.52(a) and applies only where all four of the following conditions are met: loans where the deeds of trust were recorded between Jan. 1, 2003, and Jan. 1, 2008; first mortgages or deeds of trust; loans where the borrower occupied the property as the borrower's principal residence at the time the loan became delinquent; and loans where the notice of default has been recorded on the property (covered loans).

Even if a loan is a covered loan, it may be exempted if: the borrower has surrendered the property (evidenced by a letter from the borrower or delivery of the keys to the lender or its agent); the borrower has contracted with an entity whose primary

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Relief From Stay To Pursue State Court Claims Limited To The Causes Of Action Pled *At The Time Of Motion*

By Joshua Scheer, Scheer Law Group, LLP

A bankruptcy filing can be an effective tool for a debtor-defendant in a state court action to avoid a trial. The automatic stay of 11 USC §362 immediately stops the state court litigation upon the filing. However, the filing of the bankruptcy by a defendant is not "the end of the line" for the plaintiff in the state court action. There are a variety of considerations that a plaintiff must review and resolve when determining if and how to proceed against the debtor and the remaining defendants in the state court action. The failure to do so can lead to a waiver of rights and complications at a later date. The case of *Griffin v. Wardrobe (In re Wardrobe)*, 559 F.3d 932 (9th Cir. 2009) illustrates this fact.

A bankruptcy filing by a defendant in a state court action should trigger an immediate analysis of what action should be taken against the debtor-defendant in the bankruptcy court. Experienced bankruptcy counsel will act quickly to file a proof of claim in the bankruptcy court and determine whether the plaintiff has a valid claim against the filing defendant for non-discharge of the debt that is the subject of the state court action. If a valid claim exists, an action for non-discharge of the debt is usually filed in the bankruptcy court.

Alternatively, a plaintiff in the midst of complex state court litigation may want to continue with the state court action, either against the debtor-defendant or against third parties or both. The plaintiff may want to finalize the judgment in the state court action in order to assert a claim against the debtor-defendant in the bankruptcy proceeding. While most state court judgments against a debtor will be discharged in bankruptcy, issues litigated in state court relating to certain non-dischargeable acts taken by the debtor (i.e., fraud)[1] can sometimes have **preclusive effect** in the bankruptcy court.[2] This can result in the debt being excepted from discharge *without the need for full re-litigation of a particular issue.*[3] This provides some incentive for plaintiffs to litigate their "non-dischargeable" claims in state court, instead of being forced to litigate their claim in an unfamiliar setting such as a federal bankruptcy court.This also allows a plaintiff to pursue all of the defendants in the same forum without removing the entire state court action to the bankruptcy court.[4]

> ***"Relief orders are strictly construed and should not be taken as a "free pass" to take all actions against a debtor or third parties in state court which the creditor believes are appropriate."***

However, this course of action can present significant risks to plaintiffs. In addition to the inherent risk that the bankruptcy court will not give collateral estoppel effect to a judgment or order entered in the state court matter,[5] proceeding in state court (even after relief from stay is granted for that purpose) can result in liability to the plaintiff if he takes actions beyond that allowed by the bankruptcy court.

In order to continue with *any* action where the debtor is a defendant, a plaintiff must first seek relief from the automatic stay of 11 U.S.C. § 362. However, in most instances, a plaintiff obtaining relief from stay to return to state court against the debtor-defendant, will only have limited rights in the state court action. A recent example of this is the *Wardrobe* case which revealed what can happen when a creditor-plaintiff seeks to continue with state court litigation, asks the bankruptcy court for relief from stay to do so, but goes well beyond what is allowed in the relief order.

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The 9th Circuit Court of Appeals held in *Wardrobe*, that an order for relief is effective only as to those claims actually pending in state court at the time the order is issued or those claims that were expressly brought to the attention of the bankruptcy court during the relief from stay proceeding.[6] Effectively the court ruled that a relief from stay order does not give the creditor broad discretion in pursuing new causes of action in state court *without specific bankruptcy court authorization.*

In *Wardrobe*, the Plaintiff sued the Defendant in state court for *breach of contract* relating to a home repair job. Just three days before trial, the Defendant filed bankruptcy in order to avoid going to trial. The Plaintiff then filed a motion for relief in the bankruptcy court that specifically requested relief from stay to proceed **against the insurance/bonding company** and to compel the Debtor to testify at trial. Relief was granted as requested in the motion. However, the court specifically noted in its order that the creditor "*may not proceed to enforce that judgment against the Debtor, or property of the estate without further order of [the] court*".[7]

Subsequently, with the discharge date nearing, the Plaintiff filed a motion to extend the last day to file a non-discharge action, claiming that she believed that the debt that was the subject of the state court action was non-dischargeable. She requested that the last day to object to discharge be extended *until 30 days after there had been a notice of entry of judgment in the state court action* pending between the parties. The court granted the motion as it was unopposed by the Debtor. The Plaintiff then entered into a settlement with the Defendant bonding company.

The Plaintiff, presumably relying on authority provided to her in the previously entered relief order, amended her complaint in state court to include a fraud cause of action **against the**

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The "Show Me the Note" Defense Rejected by District Court in California

By Richard Bauer, Esq., Miles, Bauer, Bergsrom & Winters, LLP

It recent months debtors and bankruptcy trustees have been advancing a theory that one must be in possession of an original promissory note in order to bring a motion for relief from the automatic stay or to conduct a non-judicial foreclosure under a deed of trust. *See*, *In re Hwang*, 396 B.R. 511 (Bankr. C.D. Cal. 2008)(only holder of note entitled to maintain motion for relief from stay).

Spurred by such calls to action the consumer bar has been challenging the ability of any entity to maintain a foreclosure action or bring a motion for relief from stay unless that entity is the holder and beneficial owner of the original promissory note. The proponents of this theory find support primarily with reference to Article 3 of the Uniform Commercial Code.

It has even been suggested that the use of Mortgage Electronic Registration System, Inc. (MERS) to register recorded deeds of trust subjects the lender's security interest to possible avoidance as somehow impermissibly separating the security interest from the debt that is secured. *See*, *LaSalle Bank v. Lamy*, 12 Misc. 3d. 1191,824 N.Y.S. 2d 769 (N.Y. Supp. 2006) These theories have made their way from the scholarly press into more main stream media where stories have aired regarding the "mortgage melt down" with the suggestion that if borrowers are having problems paying their secured obligations that they make demand to see the original promissory note.

Some Courts recently have flatly rejected the "show me the note" defense to conduct a non-judicial foreclosure. One such case was recently decided in San Diego County, California. The borrower obtained a loan of $472,000.00 from Axiom Financial Services ("Axiom") to buy a home in El Cajon. The borrower executed a promissory note and the deed of trust was recorded in San Diego County. Capital One Escrow was the original trustee for Axiom, and Mortgage Electronic Registration Systems, Inc. ("MERS") was Axiom's nominee to receive the benefits of the deed of trust. Later, the beneficial interest in the deed of trust was assigned from MERS to HSBC. The borrower defaulted and the trustee notified the borrower that he was in default and that his home would be sold.

The borrower filed suit in San Diego Superior Court alleging unfair debt collection practices, predatory lending practices, RICO violations, and standing issues. Defendants removed the suit to Federal District Court and brought a motion to dismiss the action. *See*, *Sicairos vs. NDEX West, LLC*,_2009 WL 385855 (S.D. Cal. 2009)(Burns, D.J.). The plaintiff in Sicairos argued that the foreclosing party must be in possession of the original promissory note before it can proceed with the nonjudicial foreclosure remedy.

> ***"The plaintiff in Sicairos argued that the foreclosing party must be in possession of the original promissory note before it can proceed with the nonjudicial foreclosure remedy."***

The Court in *Sicairos* reasoned simply that the proponents of the "show me the note" challenges are simply applying the wrong body of law, saying:

> The legal premise of the plaintiff's lawsuit is that a foreclosing party must have the **original promissory note** before it can proceed. "Enforcement of a note which is a negotiable instrument, by foreclosure or otherwise, requires that the party seeking payments may be in possession of the original note." (Letter, 2) Plaintiff cites chiefly to Article 3 of the Uniform Commercial Code. (Comp. para. 17.) Wrong law. In fact, the California Court of Appeal has held that "[California] Civil Code

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> Sections 2924 through 2924k provide for a comprehensive framework for the regulation of a nonjudicial foreclosure sale pursuant to a power of sale contained in a deed of trust."

Citing, *Moeller v. Lien*, 25 Cal.App.4th 822, 830, 30 Cal.Rptr.2d 777 (1994).

The Court in *Sicairos* followed the reasoning of the Court of Appeals that the comprehensive framework of the foreclosure statute was designed to exhaustively govern nonjudical sales. The Court believes it would be inconsistent with such a comprehensive and exhaustive statutory scheme as set forth in California Civil Code § 2924 through 2924k to incorporate another unrelated provision into statutory nonjudicial foreclosure proceedings.

The holding of the *Sicairos* Court is thus crystal clear. The Court held that under California Civil Code section 2924 no party needs to physically possess the promissory note. Instead, the foreclosure process is commenced by the recording of a notice of default and election to foreclose by the trustee. Id., *citing Moeller*, 25 Cal.App.4th at 830, 30 Cal.Rptr.2d 777.

Richard Bauer, Jr. is the Managing Partner, Bankruptcy and Eviction, of Miles, Bauer, Bergstrom & Winters, LLP. He served as a panelist on the Los Angeles Bankruptcy Fraud Task Force, whose purpose was to reduce the number of fraudulent bankruptcy filings in the State of California. Mr. Bauer primarily practices bankruptcy, eviction and real estate litigation. He can be reached at rbauer@mileslegal.com.

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Foreclosure Law Updates

By Ralph T. Wutscher, Esq., Kahrl Wutscher, LLP

10th Circuit Says Wrong Lot Number Does Not Allow Trustee To Void Mortgage

The U.S. Court of Appeals for the Tenth Circuit recently reversed a lower court opinion that had allowed a bankruptcy trustee to avoid a mortgage lien on the basis that the legal description in the mortgage contained the wrong lot number. (*In re: Colon v. WaMu)*

The Court noted that a bankruptcy trustee, who acts in the interests of the debtor's general creditors, may acquire for the bankruptcy estate a greater right to a debtor's real property than the debtor himself had. In particular, if there is a lien on a piece of property, the bankruptcy estate may avoid the lien if the lien would not bind a hypothetical bona fide purchaser of the property from the debtor.

> ***"…a bankruptcy trustee, who acts in the interests of the debtor's general creditors, may acquire for the bankruptcy estate a greater right to a debtor's real property than the debtor himself had."***

The mortgage recited the correct street address and parcel identification number for the house, but misstated the lot number. The bankruptcy court, affirmed by the Tenth Circuit's Bankruptcy Appellate Panel, held under Kansas law that because of this error a bona fide purchaser would not be on constructive notice of the mortgage, and therefore allowed the bankruptcy trustee to avoid the mortgage.

However, on further appeal from the Tenth Circuit's BAP, the Tenth Circuit reversed, holding that a purchaser is deemed to know the contents of recorded documents in the debtors' chain of title and, armed with this knowledge, a reasonably prudent purchaser would readily discover that the mortgage encumbers the debtors' house. Therefore, the Court held, the mortgage could not be avoided by the trustee.

6th Cir Allows Mobile Home Loan Cramdown Even Though Lender Also Secured in Land

The U.S. Court of Appeals for the Sixth Circuit recently upheld a lower court's order confirming a Chapter 13 debtors' reorganization plan which modified a lender's secured claim on a mobile home and real estate to the current estimated value of the properties, even though the lender was secured by both the mobile home and the land. (*In re: Christopher C. Reinhardt and Tina M. Reinhardt*)

The debtors paid no money down for a mobile home and related real estate, financing the purchase of the land through a mortgage agreement and financing the mobile home through a retail installment sale contract containing a security agreement. The lender obtained a security interest in both the real property and the mobile home.

The borrowers filed for Chapter 13 and submitted a proposed plan involving a cramdown of the mobile home loan and bifurcation of the lender's claim into secured and unsecured components. The parties stipulated that the lender held a valid mortgage on Debtors' real property and a valid lien on the title to the mobile home. Accordingly, the only issue in dispute was whether the proposed cramdown was permissible under the Bankruptcy Code, namely 11 U.S.C. § 1322(b)(2), which permits a bankruptcy court to modify secured creditors' rights with respect to any claim "other than a claim secured only by

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a security interest in real property that is the debtor's principal residence."

Under the Bankruptcy Code, "'debtor's principal residence' (A) means a residential structure, including incidental property, without regard to whether that structure is attached to real property; and (B) includes an individual condominium or cooperative unit, a mobile or manufactured home, or trailer." § 101(13A).

Thus, the issue was whether § 1322(b)(2) of the Code precludes the modification of a secured interest in an unattached mobile home if the secured creditor also holds a security interest in the real property beneath the home.

The Sixth Circuit held that § 1322(b)(2) contains two requirements: (1) that the property be real property; and (2) that it be the debtor's principal residence.

The Court noted that, because the Bankruptcy Code does not define "real property," courts look to state law to determine whether a mobile home constituted real property. Under the relevant state law law (i.e., Ohio law), a mobile home is generally considered personal property, and only becomes real property if (1) "[t]he home is affixed to a permanent foundation . . . and is located on land owned by the owner of the home," and (2) [t]he certificate of title for the [mobile] home has been inactivated by the clerk of the court of common pleas that issued it[.]" Ohio Rev. Code § 5701.02(B)(2).

Accordingly, the Sixth Circuit upheld the lower court's opinion bifurcating the lender's claim and cramming down the secured portion.

Ralph Wutscher's practice focuses on representing depository and non-depository mortgage lenders and automobile finance companies, as well as mortgage loan servicers, mortgage loan investors, distressed asset buyers, loss mitigation companies, and other consumer lending industry participants. He represents the lending industry as a litigator, and as regulatory compliance counsel. He can be emailed via RWutscher@krw-llp.com.

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Rule 17 "Real Party in Interest" & Arkansas Statutory Foreclosures

By Angela Martin, Wilson & Associates, PLLC

With the up-tick in foreclosures over the last year, it is not surprising to see a similar increase in the number of contested cases. While the majority of contests usually rely on arguments that the foreclosing party or its attorney has failed to comply with the statute, more recent contests have included arguments about the foreclosing entity's interest, or lack thereof, in the property.

This issue is encompassed in a range of arguments, usually centering around a lack of assignment or other recorded interest in the property when the foreclosure has been initiated by someone other than the original mortgagee. Additionally, many pro se filers have argued that the foreclosing party cannot proceed with a non-judicial foreclosure because it is not the real party in interest. While this argument has its base in the fact (or allegation) that the party does not have a recorded assignment, it is generally couched as a Rule 17 argument.

Rule 17(a) of the Arkansas Rules of Civil Procedure provides that every action shall be prosecuted in the name of the real party in interest. However, filers pursuing the Rule 17 argument fail to understand that the Rules of Civil Procedure do not apply to statutory foreclosures. Both Rule 1 and Rule 81 state that the rules govern the procedure in the circuit court and apply to all civil proceedings cognizable in the state's circuit courts.

This reading of the rules has been upheld in several Arkansas Supreme Court cases. In *Sosebee v. County Line School District, t*he Arkansas Supreme Court defined a civil action as "an ordinary proceeding in a court of justice". *Sosebee v. County Line Sc. Dist.*, 320 Ark. 412, 897 S.W.2d 556 (1995). Prior to the *Sosebee* case, the Court was asked to determine whether the rules specifically applied to non-judicial foreclosure actions. *Union National Bank v. Nichols,* 305 Ark. 274, 807 S.W.2d 26. The mortgagors claimed that the calculation of the number of days under a specific statutory foreclosure provision had to be read in conjunction with the calculation method provided for in the rules. *Id.* at 278, 38. The Court stated that the statutory foreclosure act was "designed to be effectuated without resorting to the state's court system, and therefore, is not a procedure cognizable in the circuit court". *Id.* As such, the Court ruled that the rules did not apply. *Id.*

> ***…any argument by a buyer that Rule 17 does or should apply can be easily disposed of.***

As Rule 17 goes, then, the argument against its application to statutory foreclosure actions is well established. Therefore, any argument by a borrower that Rule 17 does or should apply can be easily disposed of. However, as stated in the introductory paragraphs, this argument is almost always accompanied by additional arguments that the foreclosing entity lacks a recorded assignment or other recorded interest and cannot bring the foreclosure. Unlike the Rule 17 argument, allegations involving lack of an assignment or interest may not be easily overcome without proper documentation. As such, mortgagees are cautioned to maintain the chain of assignments in order to avoid protracted litigation. Even where a contest can be easily set aside, maintaining the appropriate documentation and recording the necessary chain may allow a mortgagee to avoid less serious litigation that adds both time and expense to the foreclosure.

Angela Martin is a real estate attorney in the Litigation Department of Wilson & Associates. Her areas of practice have included foreclosure, title, REO closings, and asset recovery. She can be reached at amartin@wilson-assoc.com.

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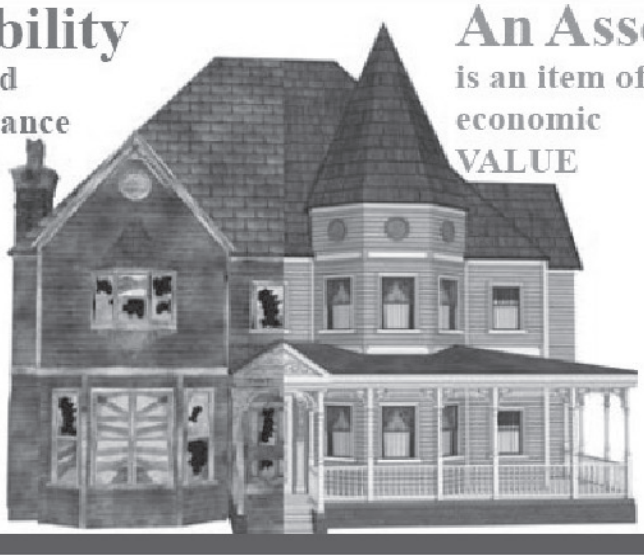

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State News

Throwing Everything In The Air

By Michael Belote, Esq.

Given the fiscal Armageddon facing the State of California (this isn't Purgatorio, folks, this is Inferno), one might assume that all attention is on the state budget. In fact, a breathtaking array of real estate-related bills are pending in the California Legislature, with very real consequences for how people buy, sell, borrow and foreclose. Just as lenders, trustees and others are coming to grips with legislation already adopted, new ideas are being debated.

As this column is written, the state is days away from the effective date of SBx2 7, which imposes a 90-day delay on residential foreclosures, unless the lender has submitted a comprehensive loan modification program to the appropriate state regulator. Regulations are now available, and UTA has submitted comments on them. But the purpose of this column is to describe what might be coming *next.*

> ***…new ideas are already being debated.***

The following bills illustrate the broad-ranging proposals currently alive in the California Legislature:

- AB 33 (Nava): Financial Services. This bill would collapse the current Department of Corporations and the Department of Financial Institutions into a new Department of Financial Services. Additionally, regulation of mortgage brokers currently under the Department of Real Estate would be moved to the new department. The Schwarzenegger administration is interested in the plan as a way to make state regulation more efficient and economical.

- AB 34 (Nava): Mortgage Loan Originators. New federal law, known as the "Safe Act" requires the licensure or regulation of all mortgage loan originators, including loan agent employees of federally-chartered lenders. New testing, pre-license education, and continuing education requirements will be imposed. This is an enormously comprehensive proposal involving the interaction of existing California regulators with a new federal bureaucracy, but California *must* pass an implementation bill or federal law requires that HUD take over regulating mortgage loan originators in this state!

- AB 260 (Lieu): Mortgage Loans. Designed to enact additional regulation of "higher-priced mortgage loans", AB 260 limits prepayment penalties and yield spread premiums, and codifies the fiduciary duty between brokers and borrowers. The bill was vetoed by Governor Schwarzenegger last year, but re-introduced in the same form again this year.

- AB 313 (Fletcher): HOA Assessments. Limits the ability of homeowners associations to base assessments on the assessed value of individual units, unless such a system was in place prior to the end of this year.

- AB 329 (Feuer): Reverse Mortgages. Imposes extensive new requirements on the origination of reverse mortgages, including limitations on referrals and specific new counseling obligations.

- AB 331 (Hall): Rental Property. Requires disclosure to prospective tenants in 1-4 unit residential properties if the property is subject to a recorded NOD or action on a tax lien. Lender groups seem to have concluded that this requirement is not unreasonable.

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- AB 603 (Price): Tenancies. Prohibits an owner of residential property who acquired title as a result of a foreclosure from taking any action to terminate tenancies until one year after the foreclosure. This is an exceedingly controversial proposal among lender groups.

- AB 919 (Nava): Deeds of Trust. Requires deeds of trust securing residential property to be accompanied by a rider which lists the broker, loan originator, lender and appraiser in the underlying transaction. The bill is presently unclear on exactly *which* service provider is to prepare the rider.

- AB 957 (Galgiani): REO. Prohibits lenders selling REO property from requiring the use of title or escrow services chosen by the seller. This bill is in response to contentions that title and escrow providers are being "locked out" of transactions because of national contracts with providers, and other providers have suggested that the bill should go beyond title and escrow services.

- AB 1160 (Fong): Contract Translations. Would expand the translation requirements presently contained in Civil Code Section 1632, with extensive penalties for noncompliance. Lender groups are specifically concerned with language permitting rescission.

- SB 94 (Calderon): Advance Fees. Would prohibit the collection of any fee in advance of providing services relating to loan modifications. The bill is in response to what is perceived as an avalanche of solicitations of distressed borrowers by loan modification consultants, who provide little or no service to borrowers.

- SB 109 (Calderon): Auctioneers. Imposes new requirements on auctioneers of real estate, but not including trustee's sales. UTA has obtained amendments clarifying that the provisions would not cover sales pursuant to Civil Code 2924, judicial foreclosures, or sales pursuant to the Commercial Code.

- SB 127 (Calderon): Trustees. Proposes new obligations on trustees to post information on a website or telephone service, and to provide prospective borrowers with information relating to liens and encumbrances on properties headed towards sale. UTA has worked extensively with the author's staff on this bill, which is likely to be held until 2010 to see if appropriate language can be crafted that all parties will find acceptable.

- SB 306 (Calderon): SB 1137 Clean-Up. Among other provisions, SB 306 contains changes suggested by UTA to resolve ambiguities in SB 1137 from last year. The intent is that the changes would be noncontroversial items to eliminate confusion.

Michael Belote has represented the United Trustees Association for over twenty-six years before the California legislature and state regulators. Mike's activities in the legislative process have spanned a broad array of issues, including financial services, real estate, health care, and the judiciary and local government. He can be emailed at mbelote@caladvocates.com.

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Final Washington State Bill Signed Into Law Is Reasonable For Trustees

By Holly Chisa, Tower Ltd.

During the 2009 legislative session the primary issue the Washington lobby team focused on was SB 5810, relating to foreclosure. The original intent of the legislation was to protect tenants who were living in foreclosed homes. Tenants are often not aware of the foreclosure until after the final decision, and then receive a notice to evict, which put a black mark on their records as they look for a new place to live.

The Legislature attempted to address this issue by introducing legislation at the request of the Governor which was intended to be focused on tenant notification and advanced messaging to both the homeowner and the renter about rights during the foreclosure process. However, as the session wore on, additional issues were brought into the bill. Advocates for homeowners wanted beneficiaries to complete a lengthy check-list of phone calls and letters of notice before a foreclosure could begin. The bill also would have required the trustee to specifically act in the borrower's best interest, and in the utmost good faith of the borrower, and carry out all lawful requests of the borrower. As drafted the borrower could ask the trustee to stop the foreclosure, and the trustee would have been required to comply if it were in the homeowner's best interest.

> ***"Several times during the negotiations efforts were made to move towards judicial foreclosure, and accusations were made by certain advocates that trustees were slanted towards financial institutions and were not objective through the foreclosure process."***

Perhaps most disconcerting were statements made by the advocates of the legislation implying that judicial foreclosure was more beneficial to the homeowner than nonjudicial foreclosure. Several times during the negotiations efforts were made to move towards judicial foreclosure, and accusations were made by certain advocates that trustees were slanted towards financial institutions and were not objective through the foreclosure process.

Additionally, advocates attempted to change the liability statutes to ensure that a homeowner could sue any and all parties involved in the foreclosure, and advocates wanted the right to unwind the sale after a foreclosure if one of the parties was later found to have violated the statute. They included trustees in the liability, sighting a breach of duty of impartiality by the trustee to be subject to the consumer protection act.

The bill as passed by the Senate with significant problems, and without willingness from Senators to make the needed changes. As the bill moved to the House of Representatives for additional consideration, Representatives Pedersen and Orwall stepped in to address all of the conflicts among the parties to reach final resolution of the bill. Their leadership proved instrumental in our success to change the legislation to workable language that is reasonable and appropriate for beneficiaries and trustees during the foreclosure process.

The final bill created the following requirements within the foreclosure process for residential property:

- The trustee has a duty of good faith to the borrower, beneficiary, and grantor
- A trustee is subject to lawsuit if they fail to marginally comply with the law, or violate the consumer protection act. This liability remains for up to two years.
- The trustee must verify that the beneficiary is the owner of the note; a signed declaration will qualify as proof for the trustee.
- Any agent used by the trustee must be licensed with the Office of the Insurance Commissioner (current law)

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- These requirements preserve the impartial role of the trustee but do impact the foreclosure process.
- The law is effective June 26, 2009.

Additionally, Tower Ltd. also monitored legislation which would have potentially impacted the trustee sale of property. SB 6062 would have required that sales tax be applied to sales at the courthouse. This tax is currently paid by the beneficiary at the time of sale of the property to another homeowner, and would not have generated any additional money for the state. However, it could have put the trustee in the role of calculating sales tax and collecting that tax for remittance to the state. We worked to exempt trustees from the tax collection process, and in the end the bill failed to pass.

Holly Chisa is UTA's Washington Lobbyist. The owner of HPC Advocacy, LLC in Washington State and a partner of Tower Ltd., she has over 15 years of political experience, including campaign work and individual work as staff with Members of the Washington Legislature and the U.S. Congress. She can be reached at hollychisa@towerltd.org.

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Nevada Legislative Session Report

By Rocky Finseth, Managing Partner, Carrara Nevada

With the conclusion of the 2009 legislative session in Nevada on June 1st, the United Trustees Association closed the door on a tumultuous session where the role of the trustee in a foreclosure sale was largely misunderstood and under assault.

As legislators focused in on addressing the problems of foreclosures in the state, policymakers did not lack ideas at the start of the legislative session. With Nevada leading the nation in the number of foreclosures, pressure mounted on legislators to "solve" the problem and protect consumers who were losing their homes at alarming rates, especially in southern Nevada, where 80% of legislators reside. After 14 months of work to address the issue, legislators were determined to pass sweeping reforms to the trustee sale process in the state. The UTA ensured that revisions were achieved that assured its members that their role in the process was preserved and proposed monumental burdens on the trustee were avoided.

> ***"The UTA ensured that revisions were achieved that assured its members that their role in the process was preserved and proposed monumental burdens on the trustee were avoided."***

With the session well underway, and measures moving at lightning speed, the UTA lobbying team set about to work on the critical bills which were identified as priority measures for the association and Nevada's legislative leadership. Your lobbying team sought and obtained changes in a number of key pieces of legislation to protect and preserve the role of the trustee, while also focusing on defeating other measures. Let's focus on a few high priority issues for the UTA.

Loan Mediation Program (AB 149)

The lynchpin of Nevada's legislative leadership to address the foreclosure crisis, this measure created a loan mediation program through the Nevada Supreme Court. In its original form, the measure placed all of the burdens of the negotiations on the trustees, not the lenders. Since the banking and lending industries in the state supported the measure, the UTA was forced to focus on the role of the trustee and educated legislators on the role that the trustee plays in the sale itself and the need for a trustee to not play a role in the formal mediation process. The engrossed version of the measure sent to the Governor reflected a much better mediation process than originally contemplated, while also refining the role of the trustee in the process.

The State Supreme Court will be drafting regulations to carry out the provisions of AB 149, and it is critically important that the UTA remains engaged as the Court promulgates these regulations. The bill was signed by the Governor and will take effect on July 1st.

Tenant Protection in Foreclosure (AB 140)

The other pillar of Nevada's legislative leadership plan to protect tenants in the foreclosure process, this measure placed notification requirements on the trustees in owner occupied properties. Like AB 149, this measure in its initial version placed huge burdens on the trustee prior to executing a trustee sale. As the banking and lending communities also supported this bill; the UTA was forced to focus on the role of the trustee and worked closely with the bill sponsor to better define the role of the trustee in the notification process.

As of the writing of this article, the bill has been delivered to the Governor, who has not yet indicated his intention to sign or veto this measure.

Recordation in Trustee Sale (SB 128)

Another cornerstone of the state's legislative leadership strategy,

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Oregon Legislation: Mandatory Mediation Compromise Emerges

By Drew Hagedorn, Esq., Conkling, Fiskum & McCormick

UTA killed legislation before the Oregon Senate Consumer Protection Committee that would have made the foreclosure process even more complicated and risky for trustees.

As originally composed, Senate Bill 628, legislation sponsored by Oregon-based consumer advocacy groups, would have thrust foreclosure trustees into a mandated mediation process with borrowers prior to a foreclosure sale. The bill also would have required trustees to pay for the mediation process, in addition to mandating translation of mediation notices to multiple languages.

> ***"The compromise … replaced the original bill with a watered down alternative aimed at enhancing mediation notice requirements to grantors."***

Given strong industry opposition, the committee's chair, Sen. Suzanne Bonamici, (D-Beaverton), punted the bill to the Senate Rules Committee in advance of a key legislative deadline to keep the bill alive. Bonamici, who supported the bill in its original form, agreed to address the UTA's concerns with a complete overhaul of the legislation.

The compromise, approved by the Senate Rules Committee, replaced the original bill with a watered down alternative aimed at enhancing mediation notice requirements to grantors. The bill also includes language allowing grantors to petition lenders for a modification of their loan. None of the burdensome requirements upon trustees were included in the amended bill.

Senate Bill 628 now heads to the Joint Ways and Means Committee, Oregon's appropriations panel, for further review.

UTA Kills Adverse Amendment, Negotiates a Win for Trustees

UTA successfully killed an amendment proposed by lobbyists for bidders that would have required trustees, at their own expense, to cover the cost of providing notice to speculative purchasers of foreclosed properties.

The amendment, which the proponents attempted to tack on to House Bill 3004, a measure unrelated to the bidders' proposal, prompted negotiations between the bidders and the UTA. That produced a consensus amendment which allows trustees simply to post a true copy or a link to a true copy of an amended notice of sale on the trustee's web site or via mail, if the trustee prefers. In late May, the House Rules Committee approved the amendment to HB 3004 which UTA lobbyists anticipate will advance from the Senate Rules Committee this week.

Drew Hagedorn, UTA's Oregon Lobbyist, is Partner/General Counsel with Conkling Fiskum & McCormick, Inc. He can be reached via email at drewh@cfmpdx.com.

THANK YOU TO OUR MEMBERS WHO HAVE CONTRIBUTED TO OUR LEGISLATIVE FUND THIS YEAR

"These are extraordinary times for the default servicing industry. We are under siege. While we continue to do our good work assiduously, the publicity of the foreclosure wave has resulted in a myriad of state legislative initiatives that UTA has been compelled to address.

Thank you to our members who have contributed this year. While we are still short of our goal, the following members' contribution has us off to a great start. Without these members, we simply could not address legislation that is impractical, unreasonable and dangerous to our practice."

- Rande Johnsen, UTA President

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Utah Legislation Enacted Affecting Trustees And Foreclosures

By Stuart T. Matheson, Esq., Matheson, Mortenson, Olsen & Jeppson, P.C.

The following represents a brief summary of various legislation enacted by the State of Utah, 2009 General Session and the 1st Special Session, affecting the Utah Code Annotated (UCA) relating to or of interest to lenders, title insurance entities, and trust deed trustees. Topics include trustees, mortgages, foreclosures, trustee sales, liens, conveyances and title.

1. **SB208**: This law enacts new sections and amends existing notice of Trustee's sale publishing requirements. The date when the electronic publishing becomes effective is January 1, 2010. The cost of the electronic publishing will be $10.00 or less than. Further, no charge can be imposed prior to January 1, 2012. The law requires additional electronic publishing on a website to be established for the publishing of all required notices. It amends Section 57-1-24 to require electronic publishing of the notice of trustee's sale for a thirty (30) day period prior to the sale on the to-be-established electronic notice publishing website. The notice which must be published is substantially the same with respect to the notice of trustee's sale content.

2. **HB 1001 (2009 1st Special Session), Subdivision Approval Amendments**. This bill modifies county land use provisions relating to subdivisions. This bill: authorizes an owner of at least 100 contiguous acres of agricultural land within a county of the third, fourth, fifth, or sixth class to divide from the land a single lot without complying with subdivision plat requirements or county subdivision ordinances; and prohibits a county of the third, fourth, fifth, or sixth class from denying a building permit to an owner of a minor subdivision lot if the lot meets the county's reasonable health, safety, and access standards that the county has established and made public. It amends Section 17-27a-605.

3. **SB 107 Communications and Mortgage Fraud Penalty Amendments**. This bill modifies the Criminal Code regarding communications fraud. This bill: modifies the penalties for communications fraud and mortgage fraud by removing the provision regarding obtaining or attempting to obtain something that does not have monetary value. It amends Sections 76-6-1204 and 76-10-1801.

4. **HB 243 Rental Restrictions on Condominiums and Common Interest Communities**. This bill modifies the powers of an association of unit owners or association to create rental restrictions. This bill modifies the powers an association of unit owners or association to: create reasonable restrictions on the number and terms of rental units or lots; include rental restrictions in the association of unit owners' recorded declaration or association's recorded governing documents; include a hardship exemption in the rental restrictions; include a grandfather clause for existing rental units or lots; and create procedures to track the number of rental units or lots; creates notification procedures to lenders if a declaration is amended; and makes technical corrections. This bill amends Section 57-8-10 and enacts Sections 57-8-41, 57-8a-209, and 57-8a-210.

5. **HB 320 Collection Agency Amendments**. This bill modifies the title addressing collection agencies to expand exemptions. This bill expands the exemptions for the title addressing collection agencies to include title insurance agencies and producers; and makes technical changes. This bill amends Section 12-1-7.

6. **SB 53. Awarding of Attorney Fees**. This bill limits when a court may award attorney fees. This bill provides that attorney fees may not be awarded under the private attorney general doctrine. This bill enacts Section 78B-5-825.5.

Continued on page 24

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7. **SB 31. Utah Residential Mortgage Practices and Licensing Act**. This bill modifies the Utah Residential Mortgage Practices Act to address requirements under federal law and to make other changes. This bill: modifies the definition provision; imposes additional duties on the division related to rulemaking, reporting, or other requirements related to Secure and Fair Enforcement for Mortgage Licensing; modifies the scope and exemptions from the chapter; modifies licensing requirements and procedures, including: (a) modifying requirements related to examinations, prelicensing education, and continuing education; (b) removing the authorization for issuing conditional licenses; (c) addressing requirements to reactivate an inactive license; and (d) providing for a transition and changes related to Secure and Fair Enforcement for Mortgage Licensing; imposes requirements related to reports of condition; clarifies language related to disciplinary action and prohibited conduct; modifies renewal requirements; addresses the affect on a license of the division paying a judgment creditor from the Residential Mortgage Loan Education, Research, and Recovery Fund; and makes technical and conforming amendments, including making terminology consistent. This bill affects approximately twenty (20) sections of the Utah Code and enacts Sections 61-2c-204.1, 61-2c-205.1, and 63I-2-261.

8. **HB 286. Regulation of Lending by the Department of Financial Institutions**. This bill modifies the Utah Consumer Credit Code, and mortgage lending and servicing provisions to address the regulation of consumer and residential mortgage loans by the Department of Financial Institutions. This bill: clarifies the requirements to file notification with the department under the Utah Consumer Credit Code; clarifies provisions administered by the department related to a lender, broker, or servicer of a mortgage loan; enacts the Financial Institution Loan Originator Licensing Act including: (a) providing definitions; (b) establishing the general powers and duties of the commissioner, including rulemaking authority; (c) establishing when licensure is required; (d) creating qualifications for licensure, including bonding requirements; (e) creating a licensing process; (f) requiring the commissioner to create a process for challenging information in the nationwide database; (g) addressing education requirements; (h) imposing operational requirements and prohibitions; and (i) providing for enforcement; repeals intent language; and makes technical and conforming amendments. This bill amends approximately twenty (20) sections and enacts title 70D-1-101, *et seq.*

9. **HB 86 Division of Real Estate Amendments**. This bill amends provisions administered or enforced by the Division of Real Estate. This bill: increases a civil penalty that the division may impose under the Utah Uniform Land Sales Practices Act; addresses exemptions under the Utah Uniform Land Sales Practices Act; modifies provisions related to registration of a salesperson under the Timeshare and Camp Resort Act; addresses grounds under which the division may take action under the Timeshare and Camp

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Resort Act; modifies education requirements for a real estate broker or sales agent; modifies reporting requirements for a real estate broker or sales agent; modifies provisions related to renewal of a real estate license; provides for the modification of sanctions for a real estate licensee complying with court ordered restitution; addresses what constitutes grounds for disciplinary action; clarifies criminal penalties against a person required to be licensed as a real estate licensee; provides definitions related to the Real Estate Education, Research, and Recovery Fund, including what constitutes a judgment; increases caps on recovery from the Real Estate Education, Research, and Recovery Fund; clarifies notice requirements for the Real Estate Education, Research, and Recovery Fund; requires criminal background checks and addresses other requirements for trainees registered under appraisal provisions; provides for conditional registration of a trainee pending the criminal background check; modifies renewal requirements for a license or certificate under appraisal provisions; addresses rulemaking of the appraisal board related to the Uniform Standards of Professional Appraisal Practices; requires notification of the division of certain events by a person licensed, certified, or registered under appraisal provisions; provides for the modification of sanctions under appraisal provisions for a person complying with court ordered restitution; clarifies criminal penalties against a person required to be licensed, certified, or registered under appraisal provisions; addresses disposal of records by a residential mortgage licensee; repeals a requirement that the division by rule provide for certain licensing processes; provides for the modification of sanctions under residential mortgage provisions for a person complying with court ordered restitution; clarifies criminal penalties against a person required to be licensed or certified under residential mortgage provisions; provides that criminal restitution judgments may be recovered from the Residential Mortgage Loan Education, Research, and Recovery Fund; modifies notification requirements related to the Residential Mortgage Loan Education, Research, and Recovery Fund; restricts recovery by a lender from the Residential Mortgage Loan Education, Research, and Recovery Fund; and makes technical and conforming amendments. This bill amends a number of sections in Title 57 and 61.

Mr. Matheson is a co-founder and current president of the law firm of Matheson, Mortensen, Olsen & Jeppson, where he practices in the areas of lender representation, creditors' rights and real property law. He earned his B.A. degree from the University of Utah (History) and his J.D. degree from Brigham Young University, J. Reuben Clark Law School, charter class. Mr. Matheson has served as trustee and officer on various non-profit boards, organizations, and committees, including the New Lawyer Continuing Legal Education Committee for the Utah State Bar, of which he has been a member since 1976. He has published nationally, and is a frequent presenter at CLE seminars related to real property, foreclosure, creditors' rights and bankruptcy. Representative clients include several of the nation's largest lenders as well as regional and local financial institutions. He can be reached via email at Matheson@mmojlaw.com.

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2009 Colorado Foreclosure Law Updates

By Robert J. Hopp, Esq., The Hopp Law Firm

The 2008-2009 session of the Colorado General Assembly has been busy. The continuing number of foreclosures and concern about deteriorating home values has driven new legislative efforts ranging from continued foreclosure law reform to additional regulation throughout the real estate and mortgage related industries. To follow is a summary of the highlights from this past session and the Bills impacting foreclosures.

House Bill 09-1207 – Procedures to Enforce a Lien Related to Real Property

On April 22, 2009, Colorado Governor Bill Ritter signed House Bill 09-1207 into law. House Bill 09-1207 affects foreclosure procedures found in Title 38, Article 38 of the Colorado Revised Statutes. These legislative changes refine the major overhaul Colorado received in 2008 on its unique Public Trustee Foreclosure System. The legislature took a phased approach at implementing the changes with some going into effect September 2009 and the balance of the changes beginning January 2010.

Excess Proceeds

The major change beginning September 1, 2009 will affect the distribution of proceeds at a Public Trustee Sale. If the property is sold for more than the lender's bid, the excess proceeds will immediately be applied toward any deficiency on the bid. Formerly the excess proceeds were held in escrow until the expiration of all redemption periods.

Public Trustee Powers

The new statute expands, to a small degree, the Public Trustee's power. First, a Public Trustee may, on its own volition, correct minor typos and mistakes on documents filed with its office. This provision could save lender time and resources by avoiding Public Trustee rejections for minor errors. Additionally, the fee deposit required by the Public Trustee for a foreclosure sale will be increased from $500 to $650.

House Bill 09–1276 – Delay in Foreclosure of Residential Property for Eligible Borrowers

On June 2, 2009, Colorado Governor Bill Ritter signed House Bill 09-1276 into law. House Bill 09-1276 affects foreclosures filed sixty (60) days following the Bill passage and lays out the procedures and requirements for a borrower seeking a foreclosure delay or deferment.

Eligible Borrowers

This new law is awaiting the Governor's signature as of the writing of this update but is intended to give eligible borrowers an opportunity to defer a foreclosure proceeding against their property if they chose to timely apply and qualify. The qualifications under this Act are for the borrower to (1) be personally obligated on the debt which was incurred primarily for personal, family or household purposes which must be less than $500,000, (2) be an actual resident occupying the property being foreclosed as his or her primary residence at the time of filing the Notice of Election and Demand for Foreclosure, (3) have occupied the property as his or her primary residence for at least ninety (90) days following the date of the Deed of Trust being foreclosed, and (4) intend to continue to reside in the property.

Lender Notices

A foreclosing party must, no later than fifteen (15) calendar days of commencing a foreclosure action, post the notice of the deferment opportunities under this Act in a conspicuous place on the property describing the deferment opportunity and the procedures under which the eligible borrower may

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take to apply for deferment of the foreclosure action upon their property. An affidavit of such notice signed by the foreclosing party is then required to be submitted to the Public Trustee no later than twenty (20) days following the commencement of the foreclosure action. The penalty for delays in either posting the required notice or filing the required affidavit is a delay of the foreclosure.

Foreclosure Deferment

Once an Eligible Borrower applies for assistance, the foreclosing party will be notified and will then have an obligation writing ten (10) calendar days notify the counselor and Borrower in writing of the address to which payments are to be made. If a Public Trustee is then notified by a counselor that the Borrower qualifies for assistance, the Public Trustee must immediately cancel any remaining publications, not send any further notices and shall continue any scheduled sale. The sale shall then be continued until the deferment is terminated or ninety (90) calendar days have elapsed. After the termination of expiration of the ninety (90) day deferment, the foreclosing party shall an additional $75 fee and all proceedings shall re-commence.
During the deferment period the Borrower and foreclosing party are required to negotiate the terms of the repayment; however, the Borrower shall make monthly payments equal to two-thirds of the monthly payment due prior to the delinquency, less any portion that represents taxes and insurance. In the event that the Borrower is responsible for paying taxes and insurance the Borrower shall pay 1/12th of the annual premium or obligation along with the deferment payment.

Robert J. Hopp, has been practicing law in Colorado since 1995 as a business, estate planning and transactional attorney. In 2005-2007 Robert was selected and served as the drafter of the new Colorado Foreclosure Laws. Throughout his practice, he has served businesses and individuals in both real estate transactional and litigation matters focusing on real estate, entity structure, formation, mergers and acquisitions. He can be emailed at R.Hopp@hopplawfirm.com.

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New Michigan Laws Impact Foreclosure

By Jonathan Engman, Esq., Fabrizio & Brook, P.C.

There have been several major bills that became laws during the last year in Michigan.

Public Act 138 of 2008, effective May 21, 2008, modified the foreclosure by advertisement statute by adding MCL §600.3285 dealing with mortgagors in active duty with the military. Specifically, if the mortgagor is a service member and either gave the mortgage before becoming a service member, or is deployed in overseas service, a mortgagee may not foreclose during the person's period of military service or within 6 months following the end of military service without conducting a judicial foreclosure and obtaining a court order. It is important to note that in reading the statute, it appears to protect a service member who gives a mortgage **after** joining the military if that service member is deployed overseas prior to the foreclosure sale taking place. A mortgagee who knowingly violates this section is subject to a civil fine of $2,000.00. If the mortgagee chooses to conduct a judicial foreclosure, MCL §600.3185 states that the court shall stay the foreclosure proceedings unless the court determines that the ability of the mortgagor to comply with the note was not materially affected by the military service.

> ***"… a law that further amends the foreclosure by advertisement statutes by adding a mandatory workout period prior to commencing foreclosure on property that is the principal residence of the mortgagor."***

More recently and of greater impact, is a law that further amends the foreclosure by advertisement statutes by adding a mandatory workout period prior to commencing foreclosure on property that is the principal residence of the mortgagor. Specifically, before proceeding with a foreclosure by advertisement, the mortgagee must send out a written notice containing specific statutory language and information, including amount due and owing, a specific representative who the mortgagor can contact who has the authority to perform workouts, a list of housing counselors published by the state, and legal aid numbers. Within 7 days, the mortgagee must then publish the notice one time in the same manner as a notice to foreclose.

The mortgagor has 14 days after the notice is mailed to contact a housing counselor. The counselor must inform the lender's specified representative in writing of the mortgagor's intent to work out the default. The specified representative may then request the borrower to provide all documents necessary to determine if the mortgagor would qualify for a loan modification. The housing counselor must then schedule a meeting between the mortgagor and the lender's specified representative to attempt to work out a modification. If the mortgagor has responded to the notice, the lender may not foreclosure by advertisement until 90 days after the notice is mailed to the mortgagor.

In addition, section 3205c has been added setting forth specific features the loan modification program must include based on the model developed by the FDIC. If the mortgagor is not eligible for modification the lender may proceed to foreclose by advertisement. However, if the borrower is eligible for a loan modification, the lender may only foreclose judicially.

Jonathan Engman is a shareholder of Fabrizio & Brook, P.C. He is the supervising attorney for the Real Estate Department where he oversees all foreclosure and REO files for the firm. Jon concentrates his law practice in the area of real estate, mortgage lending, curative title, contracts, and has extensive experience litigating foreclosure and quiet title cases. He can be reached at jonengman@fabriziobrook.com.

State News

Arizona Legislature Considers Several Foreclosure Bills

The Arizona Legislature is currently struggling to approve the State's budget for 2010 and is unlikely to consider a significant number of bills. At one time it appeared there would not be enough time to consider any pending legislation. It is possible that a budget might be approved in the near future, leaving time for the consideration of some legislation. It is not known whether the following bills will be considered.

The following provides a summary of Foreclosure Legislation in Arizona along with commentary:

S1275: PROPERTY DEEDS; FORECLOSURES; ID

In every property deed recorded, if the new owner is a financial institution, corporation or partnership, certain information is required, including, the grantee's name, address and state (or country) where the grantee is chartered or incorporated.

Comment: This bill has some traction. The League of Cities is supporting the bill. Their goal is be able to contact the bidder at the foreclosure sale (usually the beneficiary) regarding conditions at the property (weeds, stagnant pools, etc.). The bill currently obligates the trustee to add the required information to the trustees deed. The sponsor of the bill is considering a request by UTA member Board Member Christopher Perry, Esq., Perry & Shapiro, to put the obligation on the purchaser. If this passes, while it will be common practice for foreclosure trustees to attach the disclosure information to trustees deeds which go to their client, third party sale still do occur, and it is not reasonable for the trustee to have to get the information requested from the third party purchaser.

H2269: LANDLORDS; TENANTS; FORECLOSURES

If a rented residential property is being foreclosed, notification must be given to the tenants in a form substantially similar to what is given in this bill. Once title of the property is conveyed, the rights of the tenant to the property or to whatever prepaid rent or security may have been tendered are terminated.

Comment: This bill requires all trustees to mail notice of the sale to the "current occupant" and gives tenants 30 days to vacate the property (as opposed to the current 5 days). This bill may pass.

H2545: FORECLOSURES; TERMS; NOTICE

If a lender on a mortgage fails to negotiate in good faith with the owner of a residence subject to foreclosure regarding restructuring the terms of the loan (including providing contact information for housing counselors), the property will not be foreclosed upon for one year after the notice of foreclosure sale is recorded.

Comment: This bill will be opposed if it starts to move forward and is not likely to pass.

H2601: FORECLOSURES; LIMITATION; AFFIDAVIT

When the owner of a property receives notice of a foreclosure sale pending on the property, the owner, if eligible according to a set of prescribed criteria, may request a postponement of the sale for a minimum of 60 days. The trustee must agree to the postponement during which the owner shall have the opportunity to renegotiate the terms of the loan. The trustee must assist in providing information and facilitating meetings between the owner and the lender. Self-repeals on July 1, 2012. Severability clause.

Comment: This bill will be opposed if it starts to move forward and is not likely to pass.

(Bill information provided by Jane Myrick of Security Title Agency. Commentary provided by Christopher Perry, Esq., Perry & Shapiro)

State News

California Foreclosure Prevention Act Regulations Issued

The California Foreclosure Prevention Act ("CFPA" a.k.a. "SBx2 7/ABx2 7") becomes effective on June 15, 2009. The CFPA will impose on foreclosures certain owner occupied residential properties an additional 90-day waiting period before a notice of sale may be given.

The CFPA requires that various commissioners issue implementing regulations. Taking the leading oar on behalf of all of the commissioners, the California Corporations Commissioner filed emergency regulations to the CFPA. The updated California Code of Regulations ("CCR") § 2923.1 et seq. were effective June 1, 2009. Prior Draft Regulations and Emergency Regulations were amended several times to take into account many of the suggestions of UTA and other commentators. The reader should make sure only to refer to the May 21, 2009 version of the Emergency Regulations and not to earlier versions. The Emergency Regulations may be amended before they become final regulations.

If you would like obtain a copy of the regulations and obtain a copy of UTA's comments to the heretofore Draft Regulations. Prepared by UTA Corporate Counsel, Phil Adleson, Esq., Adleson, Hess & Kelly, APC, please contact the UTA office.

HB836 Affecting Required Notice on Missouri Evictions Pursuant to Foreclosure

Missouri HB 836 was Truly Agreed and Finally Passed on May 5, 2009, and sent to Governor Nixon for signature. HB 836 requires certain notices to occupants of residential property in cases of foreclosure – before the new owner may bring an action seeking possession of the property. Although Governor Nixon's signature is anticipated and a veto not expected, HB 836 has not yet been signed into law. Governor Nixon has until July 13, 2009, to act on the bill.

HB 836 provides that in any case where a foreclosed property is occupied prior to the foreclosure, by a person who was a residential tenant, known as an occupant and not in violation of the terms of the lease, the new owner of the property shall give the occupant notice that:

1. The sale has occurred;
2. That they are the new owner; and
3. That if the new owner is seeking possession, the occupant has not less than ten business days from the date of the notice to vacate the premises.

No action for unlawful detainer may be commenced before ten business days have expired from the effective date of the notice. The notice must be sent by certified or registered mail to the name of occupant if known. If the name is unknown, then the notice shall be sent regular mail and addressed to "occupant". In this instance, the envelope shall have the following printed on the face of the envelope: "Notice to Occupant Following Foreclosure". The notice must also be posted on the premises. HB836 provides the exact language that must be contained in the notice and the proposed effective date is August 28, 2009.

Additionally, the U.S. Congress recently passed the Helping Families Save Their Homes Act (S. 896) which was signed into law by President Obama on May 20, 2009, and is effective immediately. In the case of any foreclosure on a federally-related mortgage loan, as defined by the act, or on any dwelling or residential property, bona fide tenants are allowed to remain in the residence, pursuant to their lease, unless the property is

State News

sold to an owner-occupant. A lease is bona fide if the tenant is not the mortgagor, child, spouse or parent of the mortgagor, the lease was the result of an arms-length transaction, and the rent is not substantially less than fair market rent, reduced, or subsidized. If the property is sold to an owner-occupant, the tenant must receive notice to vacate at least 90 days prior to the effective date of such notice.

Written by Desarae Harrah, attorney with Martin, Leigh, Laws & Fritzlen, P.C. Ms. Harrah can be reached at dgh@mllfpc.com.

Wisconsin Act Allows Tenants To Remain In Property 90 Days After Foreclosure Process Is Concluded

The Wisconsin Economic Recovery Act was recently enacted. The Act was effective March 7, 2009. The Act requires that the plaintiff in a foreclosure action provide notice to tenants three different times during the foreclosure. It also gives the tenant the right to remain in a foreclosed property for 90 days after the foreclosure process has been concluded.

Missouri City Ordinances Require Owners And Lenders To Register Vacant Properties Or In Foreclosure

Four Missouri cities have ordinances requiring property owners and lenders to register properties that are vacant, in the process of being foreclosed or that have been foreclosed. Although most Missouri ordinances have similar requirements and some appear to be modeled after each other, there are differences between them.

Members may obtain a copy of a Vacant Property Ordinance "Cheat Sheet" created by South & Associates by contacting the UTA office.

Information provided by South & Associates, P.C. based in Overland Park, Kansas.

Rhode Island Post-Foreclosure Bankruptcy Filings No Longer Void Foreclosure

Judge Votolato's April 1, 2009 decision in In re Medaglia represents a major change to the effect of a bankruptcy filing on a foreclosure in Rhode Island where the foreclosure deed has not yet been recorded. Under In re Glenwood, his 1991 decision, a bankruptcy filing before deed recording would void the foreclosure. Because of a change in the Bankruptcy Code, 11 U.S.C. § 1322 (c)(1), he has now found that the foreclosure sale is complete "when the gavel goes down" at the foreclosure sale.

Assuming that the foreclosure was conducted in accordance with Rhode Island state law, it will no longer be necessary to obtain relief from the stay or wait until the bankruptcy is closed and then re-do the foreclosure. So long as the bankruptcy is filed after the foreclosure sale is conducted, the foreclosure will survive the bankruptcy filing.

Written by Charles A. Lovell, Esq., Patridge Snow & Hahn, LLP. Mr. Lovell can be reached via cal@psh.com.

State News

Cook County Illinois Suspends Scheduling of Certain Floreclosure Cases

The Presiding Judge of the Chancery Division of Cook County (the division that hears all mortgage foreclosure cases) has issued an Administrative Order, effective April 1, 2009, that suspends all scheduling of certain foreclosure cases. The Administrative Order in summary sets forth the following:

1. Effective immediately April 1, 2009 no foreclosure cases filed 1/1/09 or after will be allowed to be scheduled for entry of a judgment of foreclosure or entry of an order approving the sale. This suspension of scheduling of 2009 cases will continue through August 31, 2009. The only exception to this rule is that a plaintiff may proceed with one of these motions on a 2009 case if a court order permitting such scheduling is first obtained "for good cause". An example of "good cause" would be a property inspection, completed within the past 30 days, with an accompanying affidavit, showing that the property is vacant and abandoned.

2. Effective immediately cases filed prior to 1/1/09 will continue to be allowed to be scheduled for entry of a judgment of foreclosure or entry of an order approving the sale; however, no cases at all (including cases filed prior to 1/1/09) will be heard for the entry of either of these motions, on any of the foreclosure court's default calls, during the months of July and August 2009. A case is put on a court's default call if no answer or responsive pleading is filed by any defendant in the case, the filing of an appearance only (with no answer or responsive pleading) does not remove the case from the default call to the contested call.

3. All cases filed prior to April 1, 2009 will be scheduled for a court appearance on a Calendar Call during the months of July and August 2009 (these are the months that no cases whatsoever can be scheduled on the default calls). Plaintiff's attorneys will be required to appear on these scheduled calendar calls to advise of the status of the case.

Clearly these new requirements will have a significant effect on foreclosure time lines in Cook County.

Information provided by Jill D. Rein, Esq., Managing Attorney, Pierce & Associates. Ms. Rein can be contacted at JRein@atty-pierce.com.

Public Hearing on Draft Nevada Regulations Scheduled

NEVADA CHIEF JUSTICE JAMES HARDESY

Nevada State Supreme Court Chief Justice James W. Hardesty has informed Rocky Finseth, UTA's Nevada Lobbyist, that the regulations for AB 149 will be available in the next couple of days for public review. The court held a public hearing in Carson City on June 16th at 4 pm and will hold one on June 26th at 12:00 to review the proposed regulations. UTA will provide input into the regulations.

Idaho Removes Yellow Paper Requirement for Notices

Legislation has been signed into law by the Governor of Idaho that removes the requirement that a Deed of Trust be printed on canary yellow paper. This requirement had been made as part of legislation signed into law in the State last year. The new law goes into effect July 1, 2009

State News

Recent Massachusetts Land Court Cases Delay Foreclosures

A case decided in March 2009 by the Massachusetts Land Court invalidated two out of three Massachusetts foreclosure sales and questioned the validity of the Real Estate Bar Association's (REBA's) Title Standard No. 58 which addresses the issues raised with regard to mortgage assignments and mortgage discharges. The practice of including an effective date in the assignment which is prior to the date the assignment is executed is at issue. The rationale for the Land Court's decision is the concern that potential foreclosure bidders should be able to contact the foreclosure attorney to obtain proof of the foreclosing entity's interest in the mortgage. A motion to vacate the judgment in the Land Court decision was filed by one of the plaintiffs on April 2, 2009.

The decision, if applied retroactively to foreclosures that are in process and that have already been completed, would create problems with many titles where assignments were obtained subsequent to publication of foreclosure notices and the foreclosure sale. As a result, title insurance companies may refuse to insure titles to foreclosed properties where executed assignments were not in the hands of the foreclosure attorney prior to publication and sale. This action will cause delays in foreclosure timeline compliance as foreclosure attorneys wait for servicers to supply executed assignments. Moreover, there are potential future consequences such as case law or title insurance company action dictating that foreclosure complaints not be filed until the assignments are on record, further delaying the foreclosure process.

The procedure followed by Partridge Snow & Hahn LLP continues to be that publication and sale are not commenced until the assignment is recorded.

Written by Patricia Antonelli, Esq. and Charles A. Lovell, Esq., Patridge Snow & Hahn, LLP. Ms. Antonelli can be reached at pa@psh.com. Mr. Lovell can be reached via cal@psh.com.

Massachusetts Bankruptcy Court Issues Standing Order Addressing Borrower Contact for Loan Modifications and Escrow Issues

In an effort to resolve questions involving whether loan modification negotiations are prohibited by bankruptcy, Standing Order No. 09-03 was signed by the Judges of the United States Bankruptcy Court for the District of Massachusetts on May 6, 2009. Standing Order No. 09-03 provides that secured creditors may negotiate loan modification terms with borrowers without seeking separate "relief from the automatic stay" orders. Relief from stay is deemed to have been granted for this limited purpose by virtue of the Standing Order. The secured creditor must discuss the proposed modification with the borrower's counsel, if represented, or directly with the borrower if counsel has provided written authorization to do so. Please note that the final version of any loan modification agreement must be approved by the Bankruptcy Court so long as the collateral at issue is deemed "property of the estate".

The Standing Order also allows a secured creditor or its representative to contact a borrower in bankruptcy when a borrower's payment changes due to increases in charges for escrow items such as taxes and insurance premiums. A secured creditor is also permitted under the Standing Order to send other written correspondence to the borrower (debtor), with a copy to counsel, concerning mortgage statements, payment coupons, escrow analyses, insurance coverage and the like. Caution is recommended as no demands for payment or foreclosure threats can be made.

Creditor contact with the borrower must cease upon the borrower or his counsel's written request to cease communication.

Written by Patricia Antonelli, Esq. and Catherine V. Eastwood, Esq., Patridge Snow & Hahn, LLP. Ms. Antonelli can be reached at pa@psh.com. Ms. Eastwood can be reached via cve@psh.com.

UTA and Industry News

Federal Mortgage Legislation Signed into Law

The Federal Mortgage Law Bill - officially the 'Helping Families Save Their Homes Act' – was signed into law by President Obama on May 20th. The new law will "expand federal efforts to prevent mortgage foreclosures, shield mortgage service companies from lawsuits if they participate in federal loan modification programs, and give renters of foreclosed properties at least 90 days' notice before eviction" according to The New York Times. The bill passed the House of Representatives by a vote of 367-54 and the Senate by a vote of 91-5.

The law though, does not include a provision that would have allowed bankruptcy judges to modify the terms of primary mortgages. That provision failed to get the 60 votes need in the Senate (See Box).

According to the Los Angeles Times, the law will "expand a $300 billion program that encourages lenders to write down an individual's mortgage if the homeowner agrees to pay an insurance premium. The program, set to expire in 2011, would swap out a homeowner's high interest rate for a 30-year fixed loan backed by the Federal Housing Administration.

For a copy of the law as passed, or a summary of the bill, please contact the UTA office.

Administrator of National Banks Provides Bulletin on Loan Mod/Foreclosure Rescue Scams

A Bulletin from the Office of Comptroller of the Currency (OCC), (the Administrator of National Banks of the U.S. Department of Treasury) on Loan Modification/ Foreclosure Rescue Scams is of interest. It provides information on an advisory that instructs banks to use the term "foreclosure rescue scam" when completing a Suspicious Activity Report (SAR) that involved a loan modification/foreclosure rescue scam. The advisory also provides a list of "red flags," which may be indicative of the presence of a foreclosure rescue scam. For a copy of the bulletin, please contact the UTA offices.

UTA Website Now Features Legislative Update Articles in 'Easy-Read' Format

UTA's website has a new members-only feature. The Legislative section of the UTA site now provides a practical, attractive and easy-to-read chronological summary of UTA legislative articles. The stories are easily accessed simply by scrolling through the page.

Also available is a cross-reference of stories and summaries written by UTA delineated by State along with a link to each State legislature's website.

All legislative information, eNews stories and job board information on the UTA website is now accessible only to UTA members.

UTA and Industry News

U.S. SENATE DEFEATS CRAMDOWN LEGISLATION

A key provision of the Federal Mortgage Law Bill containing cramdowns - supported by the White House yet widely opposed by the financial industry - was defeated. As reported by *The Hill*, a Capitol Hill newspaper, "the bill, known as cramdown in the financial industry, would have allowed homeowners to turn to bankruptcy judges to write down the principal and interest payments for their primary home mortgages. "The newspaper reported on April 30th that "Democrats fell 15 votes short of the 60 necessary to pass the bill, with 12 Democrats including Sen. Arlen Specter (Pa.) voting no. The 45-51 vote was a stinging loss for Senate Majority Whip Dick Durbin (D-Ill.), who has tried and failed to pass the bankruptcy measure through the Senate for two years. Durbin spent weeks in negotiations with Senate staff and industry officials but could not produce a compromise that would pass the Senate. It passed the House in March, but immediately ran into trouble in the Senate. Supporters argue that it is an important tool to force mortgage servicers to modify loans and reduce the mounting foreclosures that continue to dog the housing market."

While JPMorgan Chase & Co., Wells Fargo, Bank of America and The Credit Union National Association discussed a compromise with Durbin, the financial industry trade associations were broadly opposed to the measure. Senate Democrats took aim at the banking lobby on Thursday. A dozen trade associations, including the American Bankers Association, Financial Services Roundtable and Independent Community Bankers of America, wrote to senators this week that the bill "would make things worse by adding even more risk to the mortgage market."

California Foreclosure Prevention Act Update: CFPA Exemptions List Available

Many members have asked about where they can find listings of temporary or final exemptions obtained by their loan servicer clients under the California Foreclosure Prevention Act ("CFPA" aka SBx2_7; Civil Code §§ 2923.52 et seq.) Following are the websites for the California Department of Financial Institutions ("DFI"); for the California Department of Real Estate ("DRE") and for the California Department of Corporations ("DOC"). Unfortunately, members must check all three websites as different loan servicers are regulated by different regulators. The good news is that each of the websites links to each of the other agency's websites.

In addition, the DFI, DOC and DRE each have their own Emergency Regulations. While the DFI and DOC regulations are identical, unfortunately the DRE regulations differ in certain respects. Each member should check with their counsel to determine the significance of these differences. Copies of all three sets of the final emergency regulations can be found on the UTA website's forms and documents page (www.unitedtrustees.com/forms.php). Members who are using prior versions of draft regulations or prior versions of the Emergency Regulations should discard them as they have been replaced by the final versions filed on June 1, 2009. The final versions of the emergency regulations can also be found on the UTA website.

Department of Corporations ("DOC") exemptions are listed at www.corp.ca.gov/ under "CFPA Exempt Leaders"

The Department of Financial Institutions ("DFI") exemptions are listed at dfi.ca.gov/cfpa/default.asp

Department of Real Estate ("DRE") exemptions are listed at http://www.dre.ca.gov/ind_cfpa_exemptlist.asp

Education News

Education Committee Developing Annual Conference Session Topics

UTA's 34th Annual Education Conference, held at the Red Rock Resort in Las Vegas November 15-17th will once again feature the hottest, most exciting and relevant education sessions for attendees. This year's conference will feature a general sessions on how regulations affect the foreclosure process as well as the ever-popular Judges Panel; Legal Updates and Bankruptcy Panels. This year's Legislative Session will feature UTA Lobbyists from four states and a Trustee's Roundtable will provide a forum for trustees to discuss default servicing with their peers. A session on dealing with attempts to stop foreclosure during the default servicing process will also be offered.

In addition to the MCLE accredited sessions, this year's conference features a trade show, an exciting Monday evening dinner / social networking event featuring The Peter Monroy Band; the 17th Annual golf tournament; the 2nd Annual Fun Bowling Tournament; many exciting raffle giveaways and UTA's Foreclosure Certification Course and Exams for California, Arizona and Nevada (offered on Saturday, November 14th).

Returning to the site of last year's conference, the 34th Annual will be held at the popular Red Rock Resort and Spa, the first billion-dollar resort to be built off the Las Vegas strip, featuring the most expensive rooms built in Las Vegas. Each elegantly appointed room is filled with luxury amenities, including 42" high-definition TVs, 15" LCD TVs in the bathroom; iPod docking stations, guest robes and slippers, automated private bars and "ooh-la-la" linens. All rooms offer spectacular views of the Las Vegas strip or the Red Rock Mountains. The resort also features a three-acre pool and beach area.

The Peter Monroy Band Headlines Annual Dinner Gala

The Peter Monroy Band

UTA attendees will party the night away on Monday November 16th at the Association's annual dinner gala event, as Peter Monroy and his band bring the stage to life, taking attendees on a fantastic musical journey. UTA members will thoroughly enjoy many classics from the 70's, 80's and today's diverse mainstream pop genres, from Usher and Nickelback to classic rock artists like Santana, Bad Company and the Rolling Stones and disco artists such as KC & The Sunshine Band, and the Bee Gees.

Audience members can't resist a romantic slow dance when Peter goes into ballads like "Unchained Melody" by the Righteous Brothers and "You'll Never Find (Another Love Like Mine)" by Lou Rawls. As one fan put it: "No matter what age you are, there's a song for everybody, and when Peter performs, everyone enjoys all of the music, no matter what type of music they prefer. I don't know how he does it."

This smooth, sleek band performs hit songs with style, high energy and a dedicated respect for the originals. Fueled by Peter's powerful vocals and four-octave range, the group also features the "sex-suous" vocals and dancing of Cecilia Serano and Melissa Armstrong. With Kevin Woodall on guitar, "Jazzy"

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	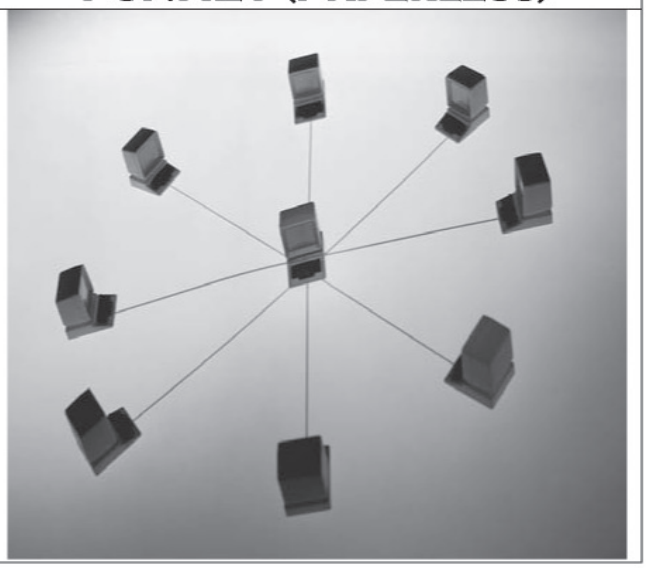

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Education News

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on Keys, David Brock groovin' on the drums and Jason Meadows on bass, the band is as cool as they come.

Throughout the elegant evening, UTA will also be raffling off prizes, including a 50" flat-screen TV and offering many surprises as well.

The 34th annual's dinner gala event will be held Monday evening, November 16th at the Red Rock Hotel. While the dinner gala event will be included in the registration fee for the annual conference, members are encouraged to make this special dinner and entertainment event available to their entire staff, selected clients, and significant others for $125 per person.

The 34th Annual Conference Program and Registration materials will be available in July.

Annual Conference Hotel Room Reservations Are Available

Hotel room reservations are now being accepted for the 2009 UTA Annual Education Conference & Trade Show. Certification Courses will be held on Saturday, November 14th. The annual golf tournament and Bowling Event will be on Sunday, November 15th (the opening reception is Sunday evening). The education sessions will be held Monday and Tuesday, November 16-17th. UTA's annual dinner event will be Monday evening.

This year's annual conference and trade show will be held again at the beautiful Red Rock Resort, Casino & Spa. Room rates at the five-star resort will be $190 per night single/double

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ANNUAL CONFERENCE OFFERS BOWLING FUN & GOLF TOURNAMENT

Remember to mark your calendars for Sunday November 15th. That's the day that UTA will offer two social networking activities at the 34th Annual Conference in Las Vegas.

Following the tremendous success of last year's inaugural bowling tournament, UTA will once again offer this fun bowling event – held right at the Red Rock Hotel & Casino's VIP Bowling Suites. The beautiful VIP lanes add a twist to the traditional bowling experience - providing contemporary lounge style seating with leather sofas, giant LCD screens, a state-of-the art sound system and privately hosted beverage service.

Prizes will be awarded for highest score and for special 'challenges', including, bowling with your feet; bowling between another team member's legs; spinning three times and bowling; and bowling off of one foot.

Not to be outdone, the 17th Annual UTA Golf Tournament will be held at the beautiful Arroyo Golf Club at Red Rock. The Arroyo course is an Arnold Palmer Signature Course 6,883 Yard Par 72 links style layout with Bermuda grass fairways and Bentgrass greens. Coordinated by Jeremy Harmon of First American National Default Title Services, the golf tournament will again feature prizes for winning team; longest drive; and closest to the pin. High value hole-in-one prizes will again be offered.

The 34th Annual Conference Program and Registration materials will be available in July.

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Education News

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for UTA conference registrants. To reserve your hotel room, please contact the hotel directly at 1-866-767-7773 and note that you are with "UTA ED CONFERENCE". The Red Rock Resort will honor these rates three (3) days prior and three (3) days following our conference dates, based on availability. To guarantee availability and rates, reservations must be made prior to October 5th.

Because there is a major convention in Las Vegas during these dates, we recommend that you make your reservations as soon as possible to guarantee a room in the resort. Remember, you can cancel your room reservation without penalty three days prior to the conference.

The conference brochure and registration materials for the 34th Annual Fall Education Conference & Trade Show will be available in July.

Orange County Dinner Examines California Legislation, TILA and Litigation

One Hundred Four attendees enjoyed a dinner presentation in Orange County by UTA's Legislative Committee Chair Ronald D. Roup, Esq., of Roup & Associates." Ron addressed ABx2 7 in California, loan modification legislation and attorney TILA solicitations and litigation. The dinner event included a vigorous question and answer session with members discussing their experiences and practices.

The excellent dinner event was sponsored by RSVP. Attendees enjoyed great raffle giveaways from RSVP; LPS ASAP; First American Title; Daily Journal Corp.; Trustees Assistance Corp.; Priority Posting & Publishing.; and UTA.
For a list of upcoming UTA dinners, please consult the Calendar section of the Association's website.

Foreclosure 101 Course Is Popular

Sixteen new industry members attended UTA's California Foreclosure 101 course taught in Concord on June 2nd. The course instructors were June Christy of Standard Trust Deed and Elizabeth Knight of PLM Lender Services. Thirty-Five new industry members had attended the course taught in San Diego on Saturday, April 25th. The course instructor for that class was Randy Newman, Esq., of National Foreclosure Service. And thirty-two new industry members had attended the course taught in Buena Park, California on February 27th. Course instructors on that date were Randy Newman and Richard Witkin, Esq., Attorney at Law.

Eighty-Three new industry members have attended UTA's California Foreclosure 101 this year while 160 took the course last year.

The three-hour Foreclosure 101 courses cover basic industry terminology; what foreclosure is; and what information the lender provides, and why. After taking the course, attendees have an understanding of all phases in the trustee's timeline. The course also reviews and provides samples of relevant documents and provides basic information concerning TSGs and other title issues. Basic legal issues affecting the foreclosure process are also addressed.

Membership News

Pioneer Lender Trustee Services Provides Foreclosure, Recon & TSG Service to Nevada and Idaho

We caught up with Ron Jantzen of Pioneer Lender Trustee Services. Based in Idaho, Ron's company writes a large percentage of the TSG products in the state. His experience allows him to handle complex title issues.

Tell us about your background and how you got into the industry.

I started out with Professional Foreclosure Corporation (PFC) in 1992 as a Foreclosure Processor. That was just before the industry introduced foreclosure tracking systems, so the entire process was tracked on archaic spreadsheets and tickle boxes. After two years I moved and joined up with the Buckley Firm and then onto Option One Mortgage Corporation as the in-house Trustee Manager for ten years. In February 2005 I moved my family to Boise Idaho where I started Veritas Trustee Services, and after 3 years of being self-employed hired on with Pioneer Lender Trustee Services.

Can you give us a brief background of your company?

Pioneer Lender Trustee Services processes Idaho nonjudicial foreclosures for community and regional banks as well as private beneficiaries. We process Nevada foreclosures in addition to Reconveyance services. We also coordinate Idaho TSG title work and title resolution for many companies around the U.S. We also conduct 15-20 foreclosure auctions per day.

Tell me something unique about your company?

Being one of the only companies that has an active Foreclosure Department in the state of Idaho, we've managed to carve out a niche in the local foreclosure arena. We do a lot of presentations and seminars for local lenders who are not familiar with foreclosure nuances.

With the explosion in work over the last two years, what has changed within your company?

High volume changes everything. According to RealtyTrak in April and May, Idaho was ranked 5th in the nation for foreclosures, i.e., 1 out of every 358 properties were in foreclosure. My parent company writes approximately 60% of the TSG products in the state of Idaho, so despite the adversity we see in the housing market – we've managed to avoid layoffs as a result of the foreclosure volume.

How do changes in the law impact you?

We are greatly impacted by changes in laws affecting real estate, but Idaho hasn't experienced the sweeping changes that we've been seeing in the Southwest.

What service has the most potential for growth?

I think there will be a glut of bank-owned properties in the Northwest over the next six months which will create investment opportunities and create a need for property preservation work.

What do you enjoy most about your job?

I enjoy working with clients; meeting with them face-to-face and sharing my knowledge and expertise as well as learning new things from them, which I do every day. Representing private beneficiaries always presents new challenges for us. We receive multi-collateral, mixed collateral, commercial and sub-division foreclosures. So being challenged with new situations is also enjoyable.

What are your responsibilities?

I manage a staff of nine employees and I report directly to the General Counsel for Pioneer Title Company. Marketing, Quality Control and resolving complex title issues are amongst the many hats I wear with the company.

What motivates you? How do you motivate others?

Recognition and praise for a job well done motivates me as does my associates … money doesn't hurt either. We have a generous profit sharing plan, so we have a stake in our success as well as the companies.

Membership News

What is your proudest accomplishment with your company?

Doubling the year over year volumes and income for my company, and receiving the Board of Directors Achievement Award.

What is your company's greatest challenge over the next year? Or over the next several years?

Our greatest challenge in the coming year and beyond is keeping up with foreclosure volumes while maintaining quality control.

What does your company get out of – or hope to get out of – its membership in UTA?

Networking with other trustees, keeping up with industry standards and practices, and receiving legislative updates from the industry experts.

How do you spend time outside of work? What are your hobbies?

I like to play tennis, camp with my wife and 5 children and run & mountain bike through the Boise, Idaho foothills.

REMINDER: CALIFORNIA BASIC FORECLOSURE CERTIFICATION COURSE IS AVAILABLE ON DVD

UTA's California Basic Foreclosure Certification Course is available on DVD. The DVD course is three hours in length total and includes powerpoint summary slides along with the course instruction. An accompanying CD produces all of the written course materials and exhibits.

The Basic Foreclosure Certification Course Syllabus includes: Outline of state foreclosure procedures; Monetary and non-monetary defaults; Judicial v. nonjudicial foreclosures; What a Lender provides to the Trustee; What a Trustee does; Notice of Default (NOD); What a Lender receives from a Trustee; Review of Trustee's Sale Guarantees; Reinstatement; Notice of Sale (NOS); Presale Redemption; Sale; Trustee's Deed; Proceeds of Sale; Bankruptcy.

After completing the course, an exam can be scheduled at a location and time of convenience or you may challenge the exam at the annual conference in Las Vegas. The Trustees Sale Officer certification exam is a one-hour open book exam and costs $100.

Randy Newman, the DVD Course Instructor, is one of the principals of National Foreclosure Service. Since 1982, he has been involved in real estate when he began work as a paralegal. Licensed as an attorney in New York since 1989 and New Jersey since 1994, Randy has personally represented hundreds of buyers, sellers, owners, and lenders in connection with the sale, purchase, finance, lease, and foreclosure of residential and commercial real property throughout the United States.

Randy holds a BBA in Accounting and is licensed as a real estate broker in California. Randy is certified by the United Trustees Association as a Trustee Sale Officer, Level II California. Randy has previously been an adjunct assistant professor of business law and currently teaches Real Estate Principles to aspiring new real estate licensees and trains new real estate agents on contracts and real estate transactions in California.

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CFPA — *Continued from Page 1*

relating to the new 90 day additional waiting period as well as the provisions relating to applying for a Commissioner's Exemption from the CFPA.[4]

What is a "Covered Loan" under CFPA?

A "Covered Loan" under the CFPA exists if *all* of the following conditions apply: (1) it was *recorded* between January 1, 2003 to and including January 1, 2008 ("Covered Loan Period"), and is secured by *residential real property*; (2) it is secured by a first mortgage or deed of trust; (3) the borrower occupied the property as the borrower's principal residence *at the time the loan became delinquent*;[5] and, (4) A notice of default has been recorded on the property.

What happens under CFPA if I am foreclosing on a Covered Loan?

For a Covered Loan where there is no current and valid Commissioner's Exemption, before a beneficiary or trustee can "give" notice of sale, the beneficiary and trustee must wait an additional 90 days beyond the 3 month period already required by California law.[6] Unfortunately the word "give" relating to notice of sale is not currently clarified in either the CFPA or in the Emergency Regulations.

Exemptions from Provisions of CFPA (Civil Code § 2923.52)

The following exemptions apply to the new 90 day requirement of Civil Code § 2923.52:

- Where the mortgage loan servicer has obtained a temporary or final order of exemption from the Commissioner that is current and valid at the time the notice of sale is given ("Commissioner's Exemption").
- Loans made, purchased, or serviced by a California state or local public housing agency or authority, including (but not limited to) state or local housing finance agencies established Cal-Vet Loans.
- Loans that are collateral for securities purchased by a state or local agency or authority described in the preceding paragraph.
- `The borrower has surrendered the property, as evidenced by either a letter confirming the surrender or delivery of the keys to the property to the mortgagee, trustee, beneficiary, or authorized agent.
- The borrower has contracted with an organization, person, or entity whose primary business is advising people who have decided to leave their homes regarding how to extend the foreclosure process and avoid their contractual obligations to mortgagees or beneficiaries.
- Where the borrower has filed a bankruptcy, and the bankruptcy court has not entered an order closing or dismissing the bankruptcy case or granting relief from a stay of foreclosure.

Who is a Mortgage Loan Servicer and who can apply for an exemption?

Under CFPA a "mortgage loan servicer" is "a person or entity that receives or has the right to receive installment payments of principal, interest, or other amounts placed in escrow, pursuant to the terms of a mortgage loan or deed of trust, and performs services relating to that receipt or enforcement as the holder of the note or on behalf of the holder of the note evidencing that loan."

Therefore, whether a lender services its own loans or the loans held by others, it will be considered a "mortgage loan servicer" under CFPA.

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How does a mortgage loan servicer apply for an exemption from the 90 day waiting period under CFPA?

A mortgage loan servicer is exempt from the 90 day additional waiting period if the servicer has applied with the Commissioner for approval of a "comprehensive loan modification program" and the servicer has received from the Commissioner a temporary or final order of exemption. The requirements for a comprehensive loan modification plan are complex. However, servicers who have a comprehensive loan modification program approved by the Treasury Department under the Home Affordable Modification Program ("HAMP")[7] or under certain other federal programs will be presumed to have a comprehensive loan modification program for CFPA purposes. These loan servicers will still have to apply for a Commissioner's exemption, but the application process will be much simpler for them.

Who Is the Commissioner?

The "Commissioner" will be different for loan servicers regulated by different entities. The three Commissioners are those overseeing three different departments of the State of California. The following describes where various applicants should apply.

- Applicants licensed by the Department of Corporations under either the California Finance Lenders Law ("CFL") or the California Residential Mortgage Lending Act ("RML"), and any other entities servicing residential mortgage loans that are not regulated by the Commissioners listed below (catch-all), shall file their application with the Department of Corporations.
- Commercial or industrial banks, savings associations, or credit unions organized in California shall file their application with the Department of Financial Institutions. For purposes of the regulation, the phrase "organized in this state" means institutions headquartered in California.
- Applicants licensed by the Department of Real Estate under the Real Estate Law shall file their application with the Department of Real Estate.

When does the mortgage loan servicer's exemption become effective?

Upon receipt of a loan servicer's application, a temporary exemption order will be issued by the Commissioner that is good until a final order of exemption is issued or 30 days after the date of denial of an application. The Commissioner has 30 days from receipt of an original or revised application to approve or deny the exemption. If the Commissioner grants the final order of exemption, it continues in effect unless revoked.

If the application is denied, and the loan servicer reapplies, a temporary order of exemption ***may not*** be extended beyond 30 days from the denial of the original application.

It will be important for trustees to obtain instructions from loan servicers and/or beneficiaries to determine: (1) whether the loan to be foreclosed upon is a Covered Loan; (2) whether statutory exemptions apply; and (3) whether the loan servicer has a current and valid Commission's Exemption at the time the notice of sale is given. It is conceivable and likely that a temporary order of exemption will be current and valid at the time the trustee receives its initial foreclosure instructions but it may have expired before notice of sale is given. Similarly, final orders of exemption may be revoked. There will be a California government website set up soon that will list the names and exemptions obtained by loan servicers.[8] Trustees will be able to access that website to check on whether exemptions are current and valid at the time the notice of sale is given.

New Declarations required in every notice of sale given on or after June 15, 2009

CFPA requires that all notices of sale recorded pursuant to Section 2924f shall ***include a declaration from the mortgage loan servicer stating both of the following***:

- Whether or not the mortgage loan servicer has obtained from the commissioner a final or temporary order of exemption pursuant to Section 2923.53 that is current and valid on the date the notice of sale is filed.
- Whether the timeframe for giving notice of sale specified in subdivision (a) of Section 2923.52 does not apply pursuant to Section 2923.52 or 2923.55."

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Civil Code § 2924f does not currently limit the inclusion of such a declaration to the foreclosure of Covered Loans. While that may have been the intention of the legislature, it appears the best practice is to include such a declaration in every notice of sale.

Under the Emergency Regulations, a loan servicer must submit copies of the declarations to be included in the notice of sale or of the notice of sale itself including the proposed declarations as part of the loan servicer's application for an exemption.[9] Since trustees use slightly different notice of sale forms, the best practice for loan servicers is to submit with its application to the Commissioner a sample declaration (not a complete Notice of Sale) so that the approved declaration form can be inserted into any trustee's notice of sale form. The precise wording of the declarations should be reviewed with qualified, compliance counsel. Presumably Commissioner approved declarations would create a safe harbor as to the language and form of declaration used.

Integration of CFPA with existing SB 1137 procedures (Civil Code § 2923.5)

Last year the legislature enacted SB 1137[10] which requires loan servicers to implement certain procedures to contact borrowers with loans secured by residential properties to discuss the borrower's financial situation and options for avoiding foreclosure. Because of similarities between SB 1137 and CFPA, unified beneficiary instructions may be used but they must account for subtle differences between the two laws.

The Emergency Regulations implementing CFPA require that, for an applicant to obtain an order of exemption, the comprehensive loan modification program shall, at a minimum, be made available to any borrower meeting the eligibility requirements of the Emergency Regulations who calls, writes, or otherwise communicates with the mortgage loan servicer to notify the servicer of a financial hardship or to explore modifications to an existing loan, and shall be made available to borrowers ***as part of the contact required under Civil Code Section 2923.5 [i.e., SB 1137]***. In addition, every loan servicer that contacts a borrower in writing under Civil Code Section 2923.5 (SB 1137) will be required to notify the borrower of the availability of the servicer's comprehensive loan modification program. As such, SB 1137 borrower contact letters and loan servicer's websites will have to be modified where the loan servicer has obtained a temporary or final Commissioner's order of Exemption. Therefore, loan servicers applying for, or receiving, a Commissioner's exemption, must modify their compliance program under SB 1137 (Civil Code § 2923.5).

Conclusion

The CFPA presents yet another challenge to trustees, beneficiaries and loan servicers attempting to foreclose on owner-occupied residential properties. Notwithstanding substantial ambiguity in this new law, most trustees, with the aid of compliance counsel, should be able to establish a compliance program which substantially complies with the CFPA.

Undoubtedly, the law of unintended consequences will come into play since the legislature has applied the CFPA to all first mortgages on residential properties that are owner-occupied at the time they became delinquent. Many borrowers in foreclosure simply will not qualify for loan modifications yet the 90 day additional waiting period will apply to them as well as borrowers who may qualify for modifications. As a result, these borrowers will have little incentive to take care of their properties. Many of these properties will remain uncared for and create blight in the neighborhoods in which they are located. In addition, just as SB 1137 did, the CFPA will delay foreclosures giving the initial appearance that foreclosure sales have diminished only to have record trustee's sales 3 to 6 months flooding the market with REO properties. Lastly, the addition time and holding costs combined with new lending laws will substantially exacerbate the liquidly crisis, drying up financing for the purchase and refinance of residential properties.

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1 Phillip M. Adleson, Esq. is Corporate Counsel for the United Trustee's Association and for the California Mortgage Association. He has written compliance programs for numerous trustees, beneficiaries and loan servicers relating to the California Foreclosure Prevention Act and SB 1137.

2 See, new Cal. Civil Code §§ 2923.52 et seq. and amended Civil Code § 2924.

3 The reader should be very careful as earlier versions of the Draft Regulations and Emergency Regulations are substantially different that the final Emergency Regulations filed on June 1, 2009.

4 10 Cal. Code of Regulations ("CCR") 2923.1(a).

5 The Emergency Regulation 10 CCR § 2923.2(b) should be consulted as it defines what "delinquent" means.

6 See, Civil Code § 2924 and 2923.52.

7 See, 10 CCR § 2923.5(a) and the Department of the Treasury Home Affordable Modification Program Guidelines.

8 See, Civil Code § 2923.53(f).

9 See, 10 Cal. Code of Regulations ("CCR") 2923.9, Exhibit (2).

10 Civil Code § 2923.5.

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this measure focused in on the need to require properties to be recorded in a timely fashion following a trustee sale. Like the other two measures, the bill, in its original form, placed a tremendous amount of burden on the trustee in the recordation process. Following extensive work within the real estate community and the leadership of the Senate, the engrossed version of the measure, signed into law by Governor Gibbons, achieves the policy objectives of leadership of the State, while placing the recordation burden on the successful bidder of the trustee sale, not the trustee themselves. This measure will take effect on July 1st.

Next Steps

While the 2009 session brought much change to the role of the trustees in Nevada, those changes were inevitable given the high priority of the issue by state policymakers and Nevada's unprecedented foreclosure actions. As the doors close on the 2009 session and our focus turns to the 2011 session, the UTA will need to remain engaged in the legislative process in Nevada as the pendulum swings back and the state emerges from the leading the nation in foreclosures, and a further review of the statutes addressing the role of trustees are re-examined. The lesson learned in Nevada is that during the interim between legislative sessions, a lot of action impacting trustees occurred and that discussions and education of legislators needs to occur outside of the legislative session, not in the heat of the legislative process.

I would like to provide a special 'thank you' to UTA members **Michael Brooks of Jolley Urga Wirth Woodbury & Standish and Scott Sibley of Nevada Legal News** for their hard work and assistance in Nevada.

Rocky Finseth, UTA's Nevada Lobbyist, is the President & CEO of Carrara Nevada, a government affairs and lobbying firm in Nevada. He can be contacted at rockyf@carraranv.com.

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Rising Foreclosures — *Continued from Page 4*

business is to advise debtors how to extend the foreclosure process and avoid their contractual obligations to their lenders; or a bankruptcy case has been filed and no dismissal, order of closure or relief from stay has been obtained.

New Requirements Imposed on Covered Loans

If a loan is a covered loan, the new law modifies existing California foreclosure law in order to allow the parties to pursue a loan modification to prevent foreclosure.

Existing California foreclosure law requires that a borrower be given only three months to cure a default before a notice of sale may be recorded. California Civil Code Section 2923.52(a) enacted under SB 7 requires that at the end of the three months set forth in Civil Code Section 2924, a notice of sale may not be recorded for an additional 90 days.

For first trust deed lenders, in addition to the requirements imposed in July 2008 (under SB 1137) to contact the borrower to discuss the borrower's financial status and the alternatives to foreclosure (followed by a 30-day waiting period), the lender must now wait an additional 90 days before it may record a notice of sale. The foreclosure process, which prior to July 2008 took approximately four months, will now take eight to nine months.

To encourage implementation of loan modification programs, SB 7 includes an exemption from this new 90-day waiting period if a lender or loan servicer applies for and obtains a valid order of exemption from its regulating entity at the time the notice of sale is given to the borrower on or after the date of the notice of default expires (three months after recordation). Specifically, Section 2923.53 requires a lender to implement a comprehensive loan modification program, which includes all of the following features: the program must be intended to keep borrowers whose principal residences are California homes in those homes when the anticipated recovery or workout plan exceeds the anticipated recovery through foreclosure on a net present value basis; The loan modification program must also target a borrower's housing-related debt - (principal, interest, property taxes, hazard insurance, flood insurance, mortgage insurance and homeowner association fees) to-gross income of 38 percent or less on an aggregate basis.

The program may also include a combination of the following features: An interest rate reduction, as needed, of at least five years; an extension of the loan amortization period to no more than 40 years from the original loan date; a deferral of some portion of the unpaid principal balance until maturity of the loan; a principal reduction; compliance with a federally mandated loan modification program; or other factors determined by the regulatory agency commissioner. The commissioner may consider efforts in other jurisdictions that have resulted in foreclosure reductions.

When determining a loan modification solution under the program, the servicer must seek to achieve long-term sustainability for the borrower.

Implementation

SB 7 should be implemented in early June 2009. While the new laws become effective on May 20, Civil Code Section 2923.53(d) requires state regulators to promulgate regulations related to the loan modification program exemption provisions within 10 days after the law becomes effective. Civil Code Section 2923.52(d) provides that the extended foreclosure period does not become effective until 14 days after the regulations are issued.

Any person or entity that violates the new foreclosure law will be deemed to have violated the obligations under his, her, or its license to lend or service loans. Nothing in the new law requires a servicer to violate contractual agreements for investor-owned loans or to provide a modification to a borrower who is not willing or able to pay under the modification.

Notices of sale recorded for covered loans must state whether the loan servicer obtained an exemption that is valid on the

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Can you?!

Announcing the 2009 UTA Conference
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Rising Foreclosures — *Continued from Page 50*

date the notice is recorded or whether the timeframe for giving notice does not apply because the loans are either exempt or are otherwise not covered loans.

Obtaining a Loan Servicing Exemption Order

To implement a loan modification program, the commissioners of the California governmental department that govern lenders and loan servicers will create a form application that must be completed and returned by the loan servicer or lender to the appropriate department. Upon receipt and review of the exemption application by the commissioner, the commissioner will: --notify the applicant of the date of receipt of the application and issue a temporary order effective from the date of receipt exempting the mortgage loan servicer from the new 90-day stay of foreclosure.

The temporary order will remain in effect until a final order is issued (which must occur within 30 days of receipt of the application). If the initial exemption application is denied, the temporary order will remain in effect for an additional 30 days in order to permit the lender or loan servicer to submit a revised application. After review of the application, the commissioner will issue a final order exempting the loan servicer from Civil Code Section 2923.52, if the program meets the requirements.

If the commissioner determines the program does not meet the requirements, the application will be denied, however, a loan servicer may submit a revised application. The commissioner may later revoke a final order following reasonable notice and opportunity to be heard if the loan servicer submitted a materially false or misleading applicant; or if the approved program has been materially altered.

A revocation will not be retroactive. Whether the latest efforts of the California Legislature results in more loan modifications and less foreclosures remains to be seen, but the goal is in line with recent federal efforts to slow and ultimately reverse the mortgage meltdown that has plagued the state for the better part of the last two years.

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Relief From Stay — *Continued from Page 7*

Debtor-Defendant. The Debtor-Defendant failed to answer the amended complaint and a default judgment was obtained against the Debtor-Defendant for fraud. Immediately after entry of the judgment, the Plaintiff filed a non-discharge action in bankruptcy court objecting to the discharge of the **fraud** judgment in accordance with 11 U.S.C. § 523(a)(2)(A). The Bankruptcy Court gave the judgment preclusive effect, and deemed the judgment non-dischargeable without a trial.

On appeal to the Bankruptcy Appellate Panel ("BAP"), the court reversed the decision and ruled that the Plaintiff's actions in obtaining a state court judgment against the Debtor-Defendant **were in violation of the automatic stay** and therefore "*void and without preclusive effect*".[8] The BAP's decision was upheld by the 9th Circuit Court of Appeals. The court held that relief from stay orders are "*strictly construed*" and that standards of due process apply to limit a creditor's ability to pursue actions not specifically prayed for in her relief from stay motion. While the creditor claimed that the motion to extend the bar date placed the debtor on notice of her intention to amend her complaint in state court, she had not specifically asked for relief from stay to amend her complaint, and therefore the court could not "grant relief greater than requested".[9]

The appeals court noted that while a court "has equitable judicial power, its power is confined by ordinary standards of notice and opportunity to be heard".[10] In *Wardrobe*, the court had not authorized the creditor to pursue a fraud cause of action against the debtor; it only authorized specific acts which were requested in the motion. The court could not condone activities taken by the creditor which were not specifically disclosed to the court and the debtor *in the relief from stay motion*.

Essentially the *Wardrobe* court is promoting "full disclosure" on relief from stay motions to ensure due process and to uphold the sanctity of the stay. The decision *"discourages creditors from misrepresenting the actual or potential scope of the cause of action pending before a state court and thereby tends to ensure that the bankruptcy court is fully informed as to the potential effect of any order granting relief from the automatic stay."* [11] This allows the court an opportunity to decide whether there is "cause" under 11 U.S.C. § 362(d)(1) to grant relief from stay as to specific actions to be taken by the creditor in state court.

A plaintiff who wishes to litigate an issue against a debtor-defendant in state court should do so with the utmost disclosure. While a creditor is not required to disclose his entire litigation strategy, he cannot merely "pull a fast one" on the debtor-defendant by pursuing new claims in state court without relief from stay specifying the claim he is pursuing. The creditor in *Wardrobe* relied on a relief order that allowed limited action, yet took new actions which were not specifically disclosed to the court *at the time of the motion*.

The court in *Wardrobe* reasoned that "*[a] bankruptcy stay protects both a debtor and his or her creditors by protecting the debtor's assets from collection efforts so that a repayment or reorganization plan can be developed. Allowing one creditor to amend a pending complaint after a relief from stay order has been issued undermines this protection and could threaten the debtor's reorganization or repayment plan.*"[12] This reasoning stresses the importance of the stay to not only protect the debtor, but also to protect third party creditors who have an interest in knowing the extent of the debtor's assets and liabilities.

The automatic stay is a powerful tool for debtors and should not be taken lightly. Although not specifically discussed in *Wardrobe,* there can be drastic implications for a creditor who willfully violates the stay. The "misinterpretation" of a relief order can have severe repercussions beyond merely voiding a state court judgment or discharging a particular debt. Intentional actions taken by the creditor in violation of the stay could subject the creditor to an attack *by the debtor* for damages under 11 U.S.C. § 362(k)(1), including actual damages, sanctions and even ***punitive*** damages.[13]

The decision, while slightly arduous to creditors by forcing them to "look ahead" and to map out their course of action when filing relief from stay motions, offers clear guidance to creditors when faced with a similar situation. A creditor can either petition the court for a broad relief order that would encompass the actions it wishes to take or it can return to court

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to seek an order clarifying the scope of the previous entered relief order.[14] The process is clear. A creditor cannot get what he does not ask for. Relief orders are strictly construed and should not be taken as a "free pass" to take all actions against a debtor or third parties in state court which the creditor *believes* are appropriate. A relief order obtained to pursue a state court action *only applies to those causes of action already pending or those disclosed to the court in the creditor's motion*. If it is not in the relief order, it is probably not an option.

1 *See* 11 U.S.C. § 523, et seq.

2 The idea of recognizing judgments or orders obtained in state court stems from rights afforded to litigants under the U.S. Constitution which requires federal bankruptcy courts to give "full faith and credit" to state court judgments. *See* 28 U.S.C. § 1738; *See also Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 380, 105 S.Ct. 1327, 84 L. Ed. 2d 274 (1985). However, it has been held that the doctrine of res judicata has no place in dischargeability proceedings because of the Bankruptcy Court's exclusive jurisdiction to determine non-dischargeability of debts. While this may be the case, principles of collateral estoppel can apply so that issues which have been fully litigated in prior state court cases need not be re-litigated. *See In re Freeman* (1987, BC MD Pa) 68 BR 904; *See also Jorge v Mannie (In re Mannie)* (2001, BC ND Cal) 258 BR 440

2 Creditors should note that this works both ways. A debtor can attempt to preclude a creditor from asserting a particular non-discharge issue in bankruptcy if the debtor has been successful *in defending* a similar claim in state court (See for example, *Hays v. Ransbury (In re Ransbury)*, 2009 Bankr. LEXIS 810 (Bankr. C.D. Cal. Mar. 23, 2009).

3 Removal to bankruptcy court is another viable option, but will not be discussed in this article.

4 Under the Full Faith and Credit Act, 28 U.S.C. § 1738, the preclusive effect of a state court judgment in a subsequent bankruptcy proceeding is determined by the preclusion law of the state in which the judgment was issued. *See Gayden v. Nourbakhsh (In re Nourbakhsh)*, 67 F.3d 798, 800 (9th Cir. 1995) (citing *Marrese v. Am. Acad. of Orthopaedic Surgeons,* 470 U.S. 373, 380, 84 L. Ed. 2d 274, 105 S. Ct. 1327 (1985)). For example, California courts will apply collateral estoppel only if certain threshold requirements are met, *and* if application of preclusion furthers the public policies underlying the doctrine. *Baldwin v. Kilpatrick (In re Baldwin)*, 249 F.3d 912, 917-8 (9th Cir. Cal. 2001). In California, issue preclusion bars re-litigation of an issue of fact or issue that: (1) is identical to a fact or issue determined in an earlier proceeding, (2) was actually decided by a court in an earlier action, (3) the issue was necessary to the judgment in such action, (4) there was a final judgment on the merits, and (5) the parties are the same. *Lopez v. Emergency Serv. Restoration, Inc. (In re Lopez)*, 367 B.R. 99, 105 (B.A.P. 9th Cir. 2007) (citing *Harmon v. Kobrin (In re Harmon)*, 250 F.3d 1240, 1245 (9th Cir. 2001).

5 *Wardrobe* at 937.

6 *Id.* at 933.

7 *Id.* at 934.

8 *Id.* at 934 citing *Thornburg v. Lynch (In re Thornburg)*, 277 B.R. 719, 726-27 (Bankr. E.D. Tex. 2002).

0 *Id.* at 936.

10 *Id.* at 935.

11 *Id.* at 936.

12 *See In re Atamian*, 344 B.R. 200 (Bankr. D. Mass. 2006); *See also Morris v. Allen (In re Morris)*, 2008 Bankr. LEXIS 3087 (Bankr. N.D. Tex. Nov. 19, 2008).

13 *Wardrobe* at 937.

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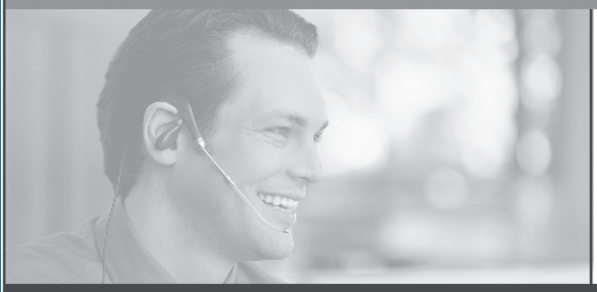

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