WRIGHT, FINLAY & ZAK, LLP

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ARE YOU READY FOR THE RETURN OF CALIFORNIA'S "ORIGINAL" HOBR?

WITH TWO IMPORTANT CHANGES, SB 818 REENACTS CA'S CONTROVERSIAL HOBR, EFFECTIVE JANUARY 1, 2019

by T. Robert Finlay, Esq.

In this Issue

When California passed its far reaching Homeowner Bill of Rights (HOBR) in 2012, it was intended to only last through the mortgage "crisis" ("Original HOBR"). In fact, many of Original HOBR's most onerous provisions were automatically repealed on December 31, 2017, replaced by similar but less demanding sections. When the Legislature convened in 2017, most industry experts expected consumer groups to propose a bill resurrecting Original HOBR; but, nothing was introduced. A year later, after servicers adapted their procedures to comply with the scaled back 2018 version of HOBR ("2018 HOBR"), Senator Bell proposed SB 818.

SB 818 brings back the original HOBR, almost verbatim. Efforts to derail the bill in the Senate were crushed, showing the Legislature's support for the bill. Legislators did not care about the impact on servicers of having to, yet again, adapt their procedures. Nor did they appreciate the lack of defaults or the CFPB rules that went into effect since enacting the Original HOBR. As a result, SB 818 steamrolled through the State Senate and House. Changing their tact, industry lobbyists focused on easing several of the most troubling aspects of the Original HOBR. After much effort, we were able to negotiate two key deviations from the Original HOBR:

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Original HOBR (continued from page 1)

1. A five (5) business day cut-off for the submission of a complete application. The biggest challenge under the Original, 2018 and SB 818 versions of HOBR were last minute loan mod applications. Technically, a complete application submitted a minute, hour or day before the scheduled sale was arguably sufficient to stop the sale. However, from a practical standpoint, servicers could not even review the application that fast, let alone stop the sale. As a result, many servicers adopted their own internal cut-off date out of necessity. However, any cut-off date came with risks. Under the deal struck by lobbyists, the version of HOBR that will go into effect January 1, 2019 ("New HOBR") includes a provision that the servicer does not have to consider loan modification applications received less than five (5) business days before the scheduled foreclosure sale. While a longer cut-off would have been preferred, the 5-day cut-off will be a welcome relief to servicers.

2. Adding a "cease and desist" exception from the required telephone outreach for both 2923.5 and 2923.55. Servicers still struggle with the conflict between state and federal law. New HOBR resolves that conflict and allows servicers to honor a borrower's request not to be contacted.

The above changes notwithstanding, the rest of the Original HOBR was approved verbatim. This includes the return of the confusing, yet useful, limitation on successive loan modification applications to only those containing a "material change in circumstances". New HOBR becomes effective January 1, 2019 so there is still time to set up your new compliance procedures. If you have any questions or need assistance in updating your compliance procedures and borrower correspondence, please do not hesitate to contact **Robert Finlay** at **rfinlay@wrightlegal.net** or **Robin Wright** at **rwright@wrightlegal.net**.

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AS A RULE

SUMMARY OF LOAN SERVICING RULE CHANGES UNDER WASHINGTON'S CONSUMER LOAN ACT

by Laura N. Coughlin, Esq. and Michelle A. Mierzwa, Esq.

I. INTRODUCTION

Effective September 1, 2018, Washington State made several changes to the Washington Administrative Code ("WAC") that will directly affect the servicing of residential loans in Washington State – WAC 208-610. The changes are regulated by the Washington State Department of Financial Institutions ("DFI"). WAC 208-610, together with section 31.04 of the Revised Code of Washington ("RCW"), comprises the Washington Consumer Loan Act ("CLA"). Also noted are additional proposed changes that are not yet enacted, but which will likely go into effect in October 2018.

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Washington's Consumer Loan Act (continued from page 2)

II. SUMMARY OF CHANGES

The following changes are organized in level of anticipated impact, starting with the most impactful. The highest impact changes listed first.

A. Loss Mitigation:

1) WAC 208-620-920 – The time period for response to a borrower's written request for information has been extended from 15 days to 30 business days, or by following the response times required with any loss mitigation program (set forth below).

2) WAC 208-620-930 – The requirements outlined below were previously only required if a servicer was not using a HAMP or GSE modification program. However, the changes will now make the below requirements applicable to ANY modification program. The servicer must:

   a) By September 1, 2018, develop an electronic system, or add to an existing system, the ability for borrowers to check the status of a modification, at no cost. It must also allow communication from housing counselors. The system must also be updated every 10 business days.

   b) Review and make a determination on a completed package within 30 days of receipt.

   c) If the modification request is denied, the loan modification denial notice must state the reason for the denial and provide a borrower the opportunity to rebut within 30 days.

      i) If the denial was due to the terms of an agreement with the investor, the investor's name and summary of the reason must be provided.

      ii) If the denial is due to an NPV, the servicer must provide the inputs used to calculate the NPV.

      iii) Any denial must be internally reviewed by an independent evaluation process within 30 days of the denial or mailing of the notice of denial, whichever is earlier.

   d) Review and consider a complete modification package before referring to foreclosure.

   e) Give the borrower 10 business days to correct any deficiencies in the application.

   f) Stop the foreclosure from proceeding further if a complete package is received.

   g) If a modification is accepted, verbally or in writing, or a trial payment is received, the foreclosure must be suspended until a time when the borrower fails to perform. Note – this does not mean that, if the borrower defaults on a permanent loan modification, the servicer can pick the foreclosure up where it stopped.

   h) Review and consider a complete loan modification package if received more than 37 days before a scheduled foreclosure sale. If a modification is offered, the foreclosure sale must be delayed to allow the borrower 14 days to accept or deny the offer. If accepted, the foreclosure sale must be suspended until a time the borrower fails to perform.

   i) If a completed package is received between 37 and 15 days before the scheduled foreclosure sale, an expedited review must be completed. If a modification is offered, the foreclosure sale must be delayed to allow the borrower 14 days to accept or deny the offer. If accepted, the foreclosure sale must be suspended until a time the borrower fails to perform.

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Washington's Consumer Loan Act (continued from page 3)

B. Prohibited Business Practices:

1) WAC 208-620-550 – The time period allowed to reconvey title on collateral after the loan was paid in full was extended to 60 days from the original 30. However, "unless conditions exist that make compliance unreasonable" language was removed.

   (a) This section is likely to be further amended in October 2018 to add a violation of "failing to timely and completely comply with any directive, subpoena, or order issued by the department." Also, the intentional element was removed from the violation of delaying the closing of a residential mortgage loan along the intent element. Now, it is a violation for "negligently delaying the closing of a residential mortgage loan which results in increased interest, cost, fees or charges payable by the borrower."

2) WAC 208-620-551 – Mortgage loan servicers are now also prohibited from knowingly or recklessly improperly onboarding a residential mortgage loan into their loan servicing systems.

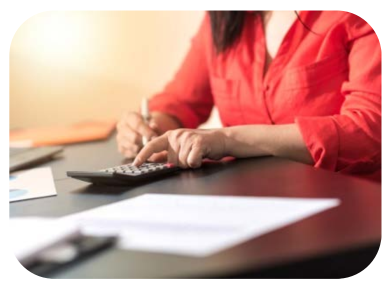
C. Location of Loan Servicing Activities:

1) WAC 208-620-553 – This is a new section added to address what loan servicing activities are required to be in the US and which are expressly permitted outside of the US.

   a) The following servicing activities must be completed in the US: 1) receiving payments and maintaining payment records; 2) collection activities; 3) any communications with consumers; 4) receipt of data from or disbursement of data to borrowers.

   b) The following servicing activities are permitted to be completed outside of the US: 1) data entry; 2) document review; 3) recommendation for action; 4) records searches; 5) credit dispute analysis; and 6) escrow account analysis.

D. Annual Assessments, Bonds and Capital:



1) WAC 208-620-441(1)(b) – The calculation of the annual assessment for nonmortgage activity and residential mortgage activity were separated and the assessment value for calculating that assessment has been codified. A master servicer is required to report its volume but is not assessed for servicing conducted by a licensed subservicer pursuant to a servicing agreement. Each servicer or subservicer must pay an annual assessment to the DFI, with the minimum and maximum amount remaining the same, and it is calculated as follows:

   a) Total annual volume of WA loans serviced during the reporting year – adjusted loan value of the loans being assessed multiplied by .00000746624

2) WAC 208-620-441(3) – The calculations for the assessments on reverse mortgages were also clarified. Assessments on advances made at origination are calculated by multiplying the dollar amount of advances made in the prior year by .000180271. The assessment on advances made and accrued interest during servicing will be multiplied by .00000746624.

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Washington's Consumer Loan Act (continued from page 4)

E. Records Retention and Requirements:

1) WAC 208-620-251 – The requirement for pre-approval to have records maintained out of state was removed and replaced with a requirement that the location of the records and books be updated in the NMLS with access provided to the director of the DFI.

2) WAC 208-620-520 –Servicing agreements must be kept as part of the records. All notices from GSEs, if applicable, must also be kept. All recorded telephone calls with consumers must be kept for 3 years after the call or longer if required by another law.

F. Reporting:

1) WAC 208-620-490 (2) – Servicers must amend their NMLS record within 10 days after a change in the location of their books and records or if their capital falls below the required governmental sponsored entity (GSE) minimum requirements, if applicable.

   a) There is a proposed further change to this section. The change in information on registered agent, closure of surrender of your license, termination of sponsorship of loan originator, change in primary contact information, and a change in response to a disclosure question, with document uploaded, must all be updated in NMLS within 10 days of any of these changes occurring.

2) WAC 208-620-490 (3) – Servicers must amend their NMLS record within 20 days of notification of termination from the GSE, if applicable.

3) WAC 208-620-490 (4) – Servicers must amend their NMLS record after receiving notification from the GSE of a breach of contract, waiver or nonperformance if the reason for the notification remains unresolved for more than 90 days.

G. Compliance Management System (CMS):

1) WAC 208-620-567 – This is a new section with requirements for the loan servicer's CMS. They are in conformity with the requirements of the FDIC that the servicer have board and management oversight; and a compliance program that includes policies and procedures, trailing, monitoring and/or audit, and consumer complaint response.

H. Reverse Mortgage Program Requirements:

1) WAC 208-620-825 – For reverse mortgage programs, in order to obtain approval before offering or making reverse mortgages, a servicer must now provide copies of residential mortgage loan servicing policies and procedures. If approval has already been obtained, it is likely that these disclosures will be required upon annual review.

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Washington's Consumer Loan Act *(continued from page 5)*

I. Definitions interpreted by the DFI:

1) WAC 208-620-011 – Clarified that servicers, master servicers, and subservicers are all regulated under the code. Also clarified that investors, "persons holding securities or other types of instruments backed by pools of residential loans"; and note buyers, "persons who purchase mortgage loans without servicing rights and who are not servicers, master servicers or subservicers" are not regulated by the code.

The following are additional proposed changes that have not yet been enacted. They are expected to be enacted around October 1, 2018.

J. Annual Assessments, Bonds and Capital:

1) WAC 208-620-320 – The language for the surety bond requirements for a consumer loan license was modified to be calculated based upon volume of activity in the prior years, not just loan origination.

2) WAC 208-620-322 – The capital required for a nondepository residential mortgage loan servicer applicant and licensee servicing loans not guaranteed by a GSE and/or corporation is now calculated based on its nationwide servicing portfolio. The requirement for waiver of the capital requirement was clarified to be limited to servicers with only 25 or fewer Washington loans being serviced.

K. Reporting:

1) WAC 208-620-490 (1) – The change of the name and mailing address of the registered agent and the closure or surrender of license are no longer required more than 10 days before either of these events occur. Instead, these are being required within 10 days after they occur within the NLMS system.

2) WAC 208-620-490 (3) – Written notice to the DFI, not amendments to the NMLS, is required within 10 days of 1) the cancellation or expiration of a Washington state business license; 2) change in standing with the WA Secretary of State; 3) failure to maintain unimpaired capital; 4) receipt of cancellation of your surety bond; 5) receipt of notification of a claim against bond.

III. CONCLUSION

The changes effective September 1, 2018 were intended primarily to bring the Washington Consumer Loan Act in conformity with the federal regulations for servicers. However, as cautioned above, Washington has gone beyond some federal requirements for mortgage loan servicers. If you have any questions or concerns regarding the changes or any issues in Washington, please contact **Michelle Mierzwa** at **mmierzwa@wrightlegal.net** or **Laura Coughlin** at **lcoughlin@wrightlegal.net**.

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When representing corporate clients the business records exception to the hearsay rule is an invaluable tool to introduce evidence of an act, condition, or event that occurred; but, where no one at the corporation has direct, personal knowledge of the event. However, to take advantage of the business records exception, certain elements must be strictly followed. Unfortunately, as the court's scrutiny over lending and servicing practices has grown, so has the court's scrutiny over the use of the business records exception.

For loan servicers, the business records exception to the hearsay rule is crucial to successfully defending borrower litigation as, often, the most relevant defense documents were created by persons no longer employed by the servicer, or even by a prior servicer or an originating lender (both of which might no longer be in business by the time the lawsuit was filed). This article will examine case law from California and other jurisdictions on the introduction of records created by a prior entity, and will offer strategy on how to maximize the chances a trial court will be willing to accept prior servicer records despite the current servicer's alleged lack of personal knowledge of one or more of the foundational elements.

To understand the business records exception, one must first understand the Hearsay Rule. Simplistically, hearsay evidence is evidence of a statement offered to prove the truth of a matter and that was made by someone other than the witness or declarant. In other words, Person A cannot testify as to what Person B stated; or a manager cannot testify as to what a collection representative said to a borrower. That is, unless one of several exceptions to the Hearsay Rule apply, i.e., the business records exception.

The foundational requirements for invoking the business record exception are: (1) the writing was made in the regular course of a business; (2) the writing was made at or near the time of the act, condition or event; (3) the custodian or other qualified witness testified to its identity and the mode of its preparation; and (4) the sources of information and method and time of preparation were such as to indicate its trustworthiness. Cal. Evid. Code § 1271. Similarly, evidence of the absence from the records of a business of a record of an act, condition, or event may be introduced to prove the nonoccurrence of that event provided it was: (1) the regular course of that business to make records of all such acts, conditions or events at or near the time of said act, condition, or event and to preserve them; and (2) the sources of information and method and time of preparation of the records of that business were such that the absence of a record of an act, condition, or event is a trustworthy indication that the act or event did not occur or the condition did not exist. Cal. Evid. Code § 1272. In both instances, the foundational elements serve as an evidentiary gatekeeper, ensuring that the acts, conditions, or events reflected within the documents at issue (or lack thereof) are both trustworthy and reliable. Without the business records exception, loan servicers would practically have no way to introduce their loss mitigation or servicing history or, that of the prior servicer.

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Prior Servicing Records in California (continued from page 7)

The most common challenge to a servicer's attempt to introduce servicer records is that the corporate representative seeking to lay the foundation for introduction of those records lacks personal knowledge of one or more of these elements. In particular, the challenge is often based on a claim that although the representative laying the foundation may have personal knowledge of the manner in which the current servicer documents are prepared, that same representative lacks the requisite personal knowledge to testify to the mode of preparation of documents created by a prior servicer or the originating lender and whether said documents were in fact made in the regular course of business. Overcoming such a challenge is not easy in California and the case law is replete with examples of courts refusing to consider records created by a prior business where the witness testifying as to their authenticity lacks the requisite personal knowledge to establish one or more of the foundational elements.

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A review of California decisions reveals that Courts in this State have been mostly reluctant to allow a party to introduce records under the business records exception to the hearsay rule where that party did not personally create the records and could not testify as to the manner of preparation of those documents or that the documents were made in the regular course of business by the entity that created them.

In *Remington Investments, Inc. v. Hamedani*, an action brought by an investment company that had acquired the assets of a failed bank from the Federal Deposit Insurance Corporation (FDIC) against an individual for the amount allegedly owing on a revolving line of credit, the Second District held that the trial court correctly sustained defendant's hearsay objection to a handwritten document entitled "Note Ledger," since the evidence was not supported by the foundation specified in Evidence Code § 1271. Although plaintiff's own vice president attempted to lay a foundation for admission of the Note Ledger, declaring that he had found the document in the records plaintiff received from the FDIC, the appellate court held that Congress has never enacted a statute providing that any document found by the FDIC in the records of a failed bank is presumed accurate and is therefore admissible to impose liability on a bank customer. Furthermore, since plaintiff was only the assignee of the creditor's position in a revolving line of credit, no evidentiary presumption applied to shift the burden to defendant to prove that the debt had been paid (Evid. Code § 635) (applicable to uncancelled promissory note for a sum certain). *Remington Investments, Inc. v. Hamedani*, 55 Cal. App. 4th 1033 (1997), *review denied*, *Remington Invs. v. Hamedani*, 1997 Cal LEXIS 5741, cert. denied, *Remington Invs. v. Hamedani*, 523 U.S. 1004 (1998).

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Prior Servicing Records in California (continued from page 8)

In *Herrera v. Deutsche Bank Nat.Trust Co.*, a suit challenging a nonjudicial foreclosure sale, a recorded assignment of deed of trust and substitution of trustee did not qualify as business records under Evidence Code section 1271, subdivision (d), absent evidence of trustworthiness and their mode of preparation by the prior entities that had created such documents. *Herrera v. Deutsche Bank Nat.Trust Co.*, 196 Cal. App. 4th 1366 (2011).

In *Sierra Managed Asset Plan, LLC v. Hale*, no qualified witness established a foundation for the business records exception to the hearsay rule with regard to credit card account documents because a testifying witness knew only that an assignee had received records concerning the account from the original creditor, the debtor objected to the declaration of the creditor's custodian of records, and no witness testified at trial who had personal knowledge of the original creditor's business record creation and maintenance practices. *Sierra Managed Asset Plan, LLC v. Hale,* 240 Cal. App. 4th Supp. 1 (2015).

Despite the foregoing, there are two helpful California cases when seeking to introduce prior servicer records. In *People v. Dorsey,* the court held that the criteria for establishing that a document is subject to the business record exception to the hearsay rule may be inferred from the circumstances. *People v. Dorsey,* 43 Cal. App. 3d 953, 961 (1974). ("Indeed, it is presumed in the preparation of the records not only that the regular course of business is followed but that the books and papers of the business truly reflect the facts set forth in the records brought to court. [citations.]" *Ibid.* Based on the foregoing law, the court in *Unifund CCR, LLC v. Dear,* found that where a creditor's assignee submitted substantial credible evidence that its authorized representative was the custodian of its records of the credit card statements, the representative was competent to establish the authenticity of such records, and her declaration, which was served prior to trial in accordance with CCP § 98(a)(1) (declarations in lieu of testimony in limited civil actions), was properly admitted. The assignee's representative asserted she had personal knowledge of the manner, methods and practices by which the assignee maintained its business records and otherwise did business and stated computerized ledgers maintained by the assignee constituted the principal records for amounts due and owing for all transaction that occurred when the debtor used the credit card account, which testimony was enough for the court to allow introduction of the original creditor's records. *Unifund CCR, LLC v. Dear,* 243 Cal.App.4th Supp 1 (2015). Particularly persuasive to the court in *Unifund,* was the lack of evidence or argument on defendant's part as to how the failure to specifically detail the mode of preparation of the business records caused any prejudice. *Id.* at p. 9.

Courts in other jurisdictions have also allowed the introduction of documents generated by a prior business under the business records exception under various rationale. Many courts have held that evidence that the documents in question were acquired from a prior business, subsequently integrated into the current business' records and relied upon by that business was sufficient to satisfy the business records exception. See *In re Hudson* (B.A.P. 9th Cir. Jan. 14, 2014) 504 B.R. 569, 575-576 ("Where a business has a substantial interest in the trustworthiness and accuracy of the records, documents received from another business are admissible as business records under FRE 803(6)."); accord *U.S. v. Childs* (9th Cir. Sept. 28, 1993) 5 F.3d 1328, 1334 (admitting records on the grounds they were maintained by business in the regular course of its business and relied upon though not originally created by that business); accord *United States v. Adefehinti* (D.C. Cir. 2007) 510 F.3d 319, 326 (Where a business takes custody of another business's records and integrates them within its own records, the acquired records are treated as having been "made" by the successor business, such that both records constitute the successor business's singular "business record."); accord *United States v. Carranco* (10th Cir. 1977) 551 F.2d 1197, 1200 (holding that freight bills, though drafted by other companies, were business records of a shipping company because they were "adopted and relied upon by" the shipping company); accord *Deutsche Bank Nat'l Trust Co. v. Olson* 2016 WI App. 14 (2015) (where the elements of the business records exception are otherwise met, third party records can fall within the business records exception where the party offering the records for admission into evidence establishes that the third party's records are integrated into that party's business records and relied upon because the problem of proving debt that has been assigned several times is of great important to mortgage lenders and financial institutions).

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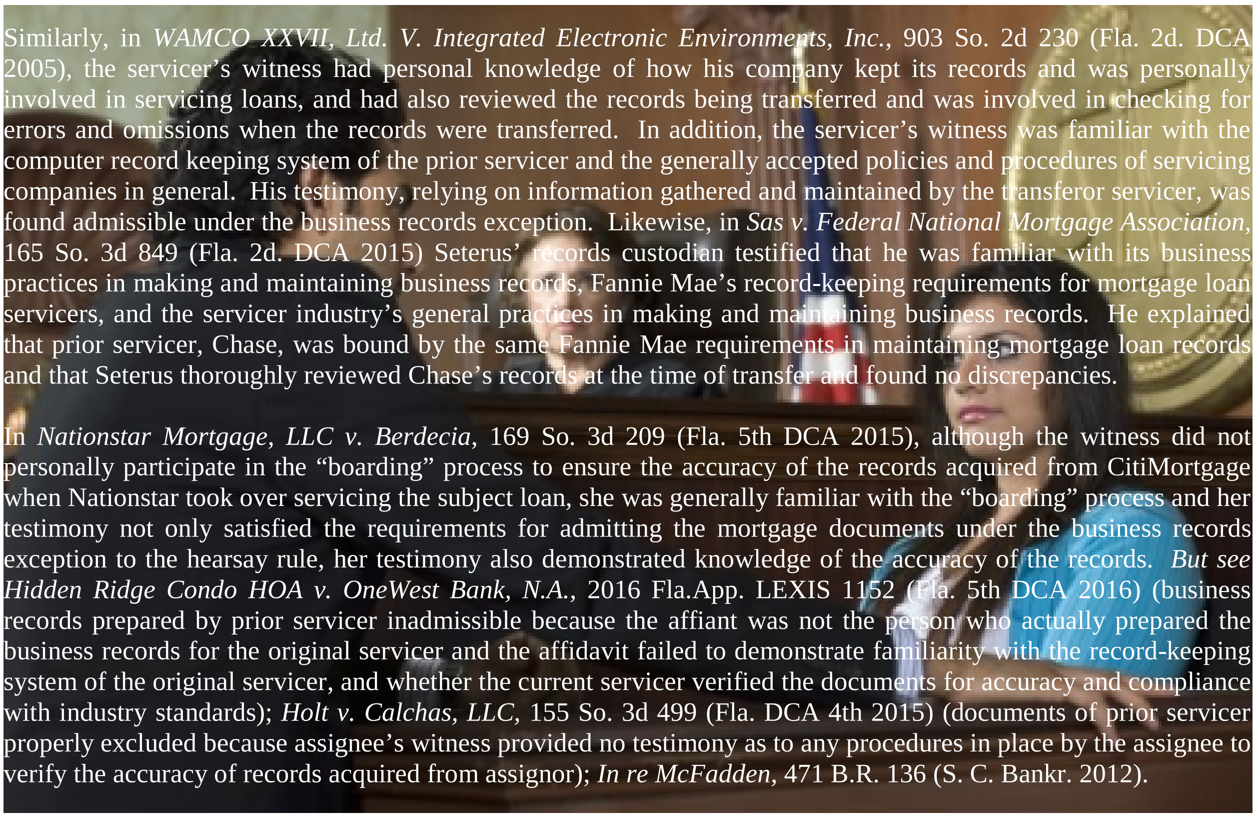
Prior Servicing Records in California (continued from page 9)

Other courts require that the business introducing the record provide some evidence that those records were reviewed for accuracy prior to integration in that business' records. In *Bank of N.Y. v. Calloway*, 157 So. 3d 1064 (Fla. App. 2015), a foreclosure action, the Florida Court of Appeal for the Fifth Circuit reversed a trial court ruling excluding a mortgage borrower's payment history created by a prior servicer where the current servicer had provided evidence that the prior servicer's records were reviewed for accuracy prior to being incorporated into the current servicer's records. The court relied, in part, on the Massachusetts Supreme Court's holding in *Beal Bank, SSB v. Eurich*, 444 Mass. 813, 831 N.E.2d 909, 914 (Mass. 2005), that noted that, based on the normal practice of banks buying and selling loans, it is therefore also a normal business practice in the loan industry to maintain accurate records regarding such loan and to provide them to those acquiring the loans.



Similarly, in *WAMCO XXVII, Ltd. V. Integrated Electronic Environments, Inc.*, 903 So. 2d 230 (Fla. 2d. DCA 2005), the servicer's witness had personal knowledge of how his company kept its records and was personally involved in servicing loans, and had also reviewed the records being transferred and was involved in checking for errors and omissions when the records were transferred. In addition, the servicer's witness was familiar with the computer record keeping system of the prior servicer and the generally accepted policies and procedures of servicing companies in general. His testimony, relying on information gathered and maintained by the transferor servicer, was found admissible under the business records exception. Likewise, in *Sas v. Federal National Mortgage Association*, 165 So. 3d 849 (Fla. 2d. DCA 2015) Seterus' records custodian testified that he was familiar with its business practices in making and maintaining business records, Fannie Mae's record-keeping requirements for mortgage loan servicers, and the servicer industry's general practices in making and maintaining business records. He explained that prior servicer, Chase, was bound by the same Fannie Mae requirements in maintaining mortgage loan records and that Seterus thoroughly reviewed Chase's records at the time of transfer and found no discrepancies.

In *Nationstar Mortgage, LLC v. Berdecia*, 169 So. 3d 209 (Fla. 5th DCA 2015), although the witness did not personally participate in the "boarding" process to ensure the accuracy of the records acquired from CitiMortgage when Nationstar took over servicing the subject loan, she was generally familiar with the "boarding" process and her testimony not only satisfied the requirements for admitting the mortgage documents under the business records exception to the hearsay rule, her testimony also demonstrated knowledge of the accuracy of the records. *But see Hidden Ridge Condo HOA v. OneWest Bank, N.A.*, 2016 Fla.App. LEXIS 1152 (Fla. 5th DCA 2016) (business records prepared by prior servicer inadmissible because the affiant was not the person who actually prepared the business records for the original servicer and the affidavit failed to demonstrate familiarity with the record-keeping system of the original servicer, and whether the current servicer verified the documents for accuracy and compliance with industry standards); *Holt v. Calchas, LLC*, 155 So. 3d 499 (Fla. DCA 4th 2015) (documents of prior servicer properly excluded because assignee's witness provided no testimony as to any procedures in place by the assignee to verify the accuracy of records acquired from assignor); *In re McFadden*, 471 B.R. 136 (S. C. Bankr. 2012).

Based on the foregoing legal authority, there are a number of strategies that can and should be implemented to maximize the chances that a trial court will allow introduction of prior servicer records under the business records exception.

First, in the loan servicing industry it is not uncommon for witnesses to have worked for one or more prior servicers over the course of their careers, including servicers that are no longer in business. Thus, the most logical, yet sometimes overlooked, first step is to always ask the loan servicer if any of the corporate witnesses previously worked for the prior servicer involved in that particular case and, if so, has personal knowledge as to how a prior servicer or lender maintained and created its records.

If that is not an option, it may be useful to ask the prior servicer to testify at trial or sign a declaration laying out the elements of the business records exception for the prior servicer. While prior servicers may not want to voluntarily make a witness available, their contract with the investor or their ongoing relationship with the new servicer may encourage it to provide a witness or declaration. Worst case scenario, the new servicer could subpoena the prior servicer to testify.

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Prior Servicing Records in California (continued from page 10)

If none of these options are available, the servicer needs to present evidence that will tend to show the trustworthiness and reliability of the documents sought to be introduced. This includes statements by the current servicer as to the manner in which the documents were acquired from the prior servicer, and any steps taken by the current servicer to review those documents for accuracy. For instance, it is not uncommon for servicers to have entire "boarding" departments whose sole responsibility is to review recently acquired loan file for completeness and discrepancies. Including such evidence will show that the current servicer has not simply accepted the prior servicer's records as complete and accurate, but has actively reviewed the same in an effort to confirm the accuracy and trustworthiness of the records and ensure that they comply with industry standards.

It is also helpful to include testimony to inform and educate the court as to the custom and practice in the loan servicing industry, where it is commonplace for the servicer to change many times, resulting in a loan file that may include documents prepared by several different servicers. The witness should be prepared to testify that it is a common practice in the loan servicing industry to obtain the loan documents from the prior servicer, and to rely on the completeness and accuracy of that information throughout the life of the loan at issue, thereby establishing that the current servicer, as well as any prior servicer, has a substantial interest in the accuracy and trustworthiness of the records at issue and acts on that basis.

It is further good practice to provide the court with evidence linking the loan documents together to show that the information therein has remained constant and consistent. For example, if a loan was originated and serviced by two separate servicers, it is useful to set out the specific time periods in question during which a prior servicer was servicing the loan, including the begin and end date along with supporting documentation. This will further show reliability and trustworthiness of the documents as it will establish a consistent chain of custody of the documents from inception through to the present date which, presumably, will reflect the same and consistent information even though different servicers may have created those documents.

Lastly, sometimes the best defense is a good offense. Often times the challenges faced by servicers to introduction of various prior servicer records is one of form over substance, namely, an objection that the witness testifying as to the documents lacks the personal knowledge of one or more of the foundational requirements needed to prove that the documents in question are business records. Rarely is there ever any substantive objection, evidence, or argument that the documents sought to be introduced are inaccurate, manufactured, or that they were not created in the ordinary course of business at or near the time of the act or event which they reflect. If that is the case, it should be emphasized to the court that the objecting party has failed to submit any evidence or argument of prejudice by introduction of the records.

In conclusion, "[a] trial judge has broad discretion in admitting business records under Evidence Code section 1271," and the elements of the business records exception to the hearsay rule may sometimes be established by evidence short of personal knowledge of each and every element necessary to establish that a particular document was indeed a business record of a prior servicer, provided there is sufficient evidence before the court to establish the reliability and trustworthiness of the documents at issue. *People v. Dorsey*, 43 Cal. App. 3d 953, 961 (1974).

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DON'T GET BURNED

SOLAR ENERGY LOAN PROGRAMS LIKE PACE DON'T ALWAYS SPREAD SUNSHINE

by Cori B. Jones, Esq.

It's no secret that energy rates in California are high; in fact, they are the 7th highest in the nation. In May, 2017, the California Public Utilities Commission approved a $5 billion dollar rate hike and utility customers began to see the increase on their June 2017 bills. Utility customers saw an average increase in rates of 19%, while high volume users saw up to an 80% increase. Many homeowners are turning to solar power to off-set the ever climbing rates, and why not?! California has plenty of sunshine.

Installing solar panels can be a large expense for homeowners, but California has long been a leader in the solar energy field, originally offering its residents rebates for installing solar panels. Later, solar providers began leasing their equipment to homeowners at little to no upfront cost. The average cost to install a system for the typical homeowner in California is about $35,000.00, so it's no surprise that homeowners seek out leasing or financing to procure their solar systems.

With a lease, the provider installs the panels at no up-front cost and enters into a Power Purchase Agreement with the homeowner. Solar equipment leases typically last from 10 to 20 years. The solar provider then sells the power back to the homeowner at a much lower rate than the traditional electric company rates. Under this arrangement the solar provider places a lien on the property to secure their investment. These kinds of liens typically <u>cannot be subordinated</u> and homeowners can thus find this to present a challenge when they try to re-finance or sell their homes. While posing problems for the homeowner, these liens remain subordinate to any pre-existing trust deed and therefore pose no threat to a lender's lien priority.

Other homeowners turn to private financing loans to purchase and install the solar equipment. In the case of a privately financed loan, the solar energy lender places a lien on the property. If the homeowners wish to refinance, the lien would need to be subordinated; however, most financing companies will not agree to do so and the contract itself may preclude subordination. Unless they can find a lender willing to accept a junior lien position, homeowners in this situation often find themselves with only two choices: pay off the solar lien or forego a refinance opportunity. Again, this may prove to be a problem for the homeowner, but any prior lender's lien position remains intact.

However, other homeowners turn to their municipalities for loans to purchase and install solar equipment. This is attractive because the financing can be up to 100% of the installation cost. These loans are offered under an umbrella program called Property Assessed Clean Energy or PACE and provide residents a chance to own their solar system, and other "green" home improvements, with no upfront cost much like a lease. The main difference is that, at the end of the loan, the solar system is paid in full and the customer is left to enjoy the energy free of any additional cost. Many municipalities offer State backed loans such as Home Energy Renovation Opportunity (HERO). The HERO loan is the most popular type of PACE program and operates by collecting the loan payments through a special county property tax assessment, rather than direct monthly payments. And just like all the other financing programs, a lien is placed on the property. This lien is different though, as it is placed on the property by the county tax assessor, creating a super-priority tax lien that eclipses even a 1st priority mortgage lien. And if there's one lesson we have all learned, it's that the tax assessor always gets its money first!

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Solar Energy Loan Programs (continued from page 12)

Many HERO loan providers do not notify or obtain the consent of the senior lien holder prior to fixing the assessment on the property and the first time a mortgage loan servicer might learn of the assessment is when it receives the semi-annual property tax bill with the new assessment. This means that, if the borrower has an impound account or defaults on his or her assessments, the mortgage servicer will likely be required to use a corporate advance to pay the annual fee and, if allowed by the Deed of Trust, will need to recalculate the homeowners impound account. Most loan documents and impound agreements do not address PACE or HERO financing that is obtained after the trust deed is recorded. This may impact the lender or servicer's obligations under RESPA. (*Note – in 2017 and 2018, the California Legislature passed a series of bills that authorize the Department of Business Oversight (DBO) to enact laws intended to protect the consumer and increase transparency to existing lienholders. The DBO is in the process of designing those laws.*)

So, what can a lender do when a super-priority lien is placed on the property without its prior knowledge and consent? There are some options for lenders if a PACE or HERO lien is placed on the property after the mortgage lien is recorded. First, a lender may condition its consent to the senior PACE or HERO lien subject to the borrower's agreeing to a modified impound agreement that specifically includes the PACE or HERO payments. Second, the lender can insist upon a subordination agreement from the PACE or HERO lender, subordinating the PACE or HERO financing. Indeed, FHA already requires PACE and HERO lenders to agree to subordination of their liens. Finally, restrictions in the Deed of Trust may restrict the homeowner's ability to obtain this kind of loan without prior lender approval or provide a default event if this type of loan is obtained.

With the rise in utility rates, California can expect to see many more solar systems installed and mortgage lenders may see their liens give way to solar energy liens in a foreclosure situation. Additionally, many solar lenders retain ownership of the equipment. Therefore, when the solar loan goes unpaid, the solar lender may have the right to remove the equipment, leaving the potential for damage to the roof and/or structure. Homeowners will likely always desire the ability to re-finance their homes to tap their equity and with the current state of solar equipment liens, this may not be an option for many unsuspecting homeowners. While lending guidelines are beginning to catch up to this new wave of issues that come along with solar leases and loans, a review of their guidelines and standard documents is appropriate in the face of the popularity of solar systems. As a start, lenders can review their impound agreements and deeds of trust to ensure that they allow the lender the most protection against PACE and HERO loans. In the light of day, homeowners and lenders may both get burned by these solar energy programs unless they first apply proper SPF in the form of education and planning.

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ANOTHER NAIL IN THE COFFIN

THE NINTH CIRCUIT HAMMERS AWAY AT THE ATTACKS ON HERA IN HOA SUPER-PRIORITY CASES

by Christina V. Miller, Esq.

In August 2017, we saw the first controlling decision published by the Ninth Circuit Court of Appeals concerning the application of the Housing and Economic Recovery Act of 2008 ("HERA") in the context of a Nevada homeowners' association non-judicial foreclosure sale. *Berezovsky v. Moniz*, 869 F.3d 923 (9th Cir. 2017). Under HERA's asset protection clause, 12 U.S.C. §4617(j)(3), affectionately referred to as the "Federal Foreclosure Bar," no property of FHFA shall be subject to foreclosure without the consent of FHFA. The Ninth Circuit held that the Federal Foreclosure Bar is not limited to tax liens and does not require FHFA to actively resist a foreclosure to ensure it does not impliedly consent. Addressing also whether the Federal Foreclosure Bar preempts the State Foreclosure Statute (NRS 116.3116 et seq.), the Ninth Circuit held that HERA implicitly demonstrates a clear intent to preempt Nevada's super-priority lien law. Lastly, the Ninth Circuit analyzed Freddie Mac's ownership interest under Nevada law, concluding that Nevada recognizes that a note owner - such as Freddie Mac or Fannie Mae - remains a secured creditor with a property interest even if the recorded deed of trust names only the owner's nominee or servicer. Most importantly, the Ninth Circuit found that Freddie Mac's database printouts and excerpts of its Single-Family Seller/Servicing Guide, along with a declaration from Freddie Mac's employee explaining that the records show when Freddie Mac owned the loan, were sufficient to prove Freddie Mac's interest. As a result of the Ninth Circuit's reliance on limited evidence to prove the GSE's ownership interest, we have had success in similarly limiting and streamlining discovery in HERA-based actions in Federal Court.

But the story does not stop there. Out of *Berezovsky* came several creative, although misguided, attacks to the Federal Foreclosure Bar, notably including: the "Securitization" and "Due Process" arguments. Under the Securitization argument, numerous HOA buyers argued that FHFA did not "succeed to" mortgages "held in trust"[1] because Congress omitted the phrase "shall succeed to" from the general exceptions set forth in subsection §4617(b)(19)(B), titled "Mortgages held in trust." Under the Due Process argument, HOA buyers argued that FHFA deprived the buyer of its constitutionally-protected interest in real property it purchased at an HOA foreclosure sale by affirmatively determining not to consent to the HOA foreclosure sale; an ironic position in light of buyers' earlier argument that an "opt-in" notice requirement satisfied lenders' right to due process.

Almost a year later, in its second controlling decision published in June 2018, the Ninth Circuit has now disapproved both attacks on the Federal Foreclosure Bar, expressing that both the Securitization and Due Process arguments lack any merit. *Federal Home Loan Mortgage Corporation v. SFR Investments Pool 1, LLC*, 893 F.3d 1136 (9th Cir. 2018).

In rejecting the Securitization argument, the Ninth Circuit concluded that the HOA buyers' interpretation of the text of HERA would be an absurd reading of HERA, focusing on the intent behind enacting HERA in 2008 and the goal of protecting the GSEs' property as their mortgage portfolios constituted nearly half of the United States mortgage market. The Ninth Circuit also noted the importance of providing additional safeguards to loans backing mortgage-backed securities "to combat further systemic breakdown in the American housing market." In rejecting the Due Process argument, the Ninth Circuit concluded that the State Foreclosure Statute does not function to provide HOA buyers with a constitutionally-protected interest in purchasing free and clear title to real property. Even if there was a theoretical deprivation of due process under the Federal Foreclosure Bar, it would actually implicate the seller - the foreclosing HOA - not the buyer.

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[1] HERA mandates that FHFA shall "succeed to" the GSEs' assets. 12 U.S.C. §4617(b)(2)(A)(i). Subsection §4617(b)(2) is titled "General Powers." Compare with subsection §4617(b)(19), titled "General Exceptions."

Attacks on HERA in HOA Super-Priority Cases (continued from page 14)

The Nevada Supreme Court, on the other hand, appears to be shy in publishing any opinions on the Federal Foreclosure Bar, presumably while it waited to see where the Ninth Circuit falls on the same issues. However, in a recent stream of unpublished opinions, the Nevada Supreme Court appears to be peeking out favorably upon *Berezovsky* and its progeny.

In March 2018, the Nevada Supreme Court held that the Federal Foreclosure Bar preempts the State Foreclosure Statute, finding that State Foreclosure Statute is in direct conflict with Congress' clear and manifest goal to protect Fannie Mae's property interest while under FHFA's conservatorship and, thus, the Federal Foreclosure Bar implicitly preempts the State Foreclosure Statute. *Saticoy Bay LLC Series 9641 Christine View v. Federal National Mortgage Association*, 134 Nev. Adv. Op. 36, 417 P.3d 363 (2018).[2] In this decision, the Nevada Supreme Court also agreed with the Ninth Circuit that FHFA does not implicitly consent to foreclosure - the Federal Foreclosure Bar does not require FHFA to actively resist foreclosure - citing favorably to the Ninth Circuit's *Berezovsky* opinion.

In June 2018, the Nevada Supreme Court held that a loan owner - Fannie Mae - can maintain a secured property interest while its loan servicer - Bank of America and, subsequently, Nationstar - appears as the recorded beneficiary of the deed of trust.[3] *Nationstar Mortgage, LLC v. Guberland LLC - Series 3*, 420 P.3d 556, 2018 WL 3025919 (2018) (unpub.). The Nevada Supreme Court cited, with approval, to its decision in *Christine View*, as well as the Ninth Circuit's *Berezovsky* opinion.

Most recently, on July 10, 2018, the Nevada Supreme Court rejected the Securitization and Due Process challenges to the Federal Foreclosure Bar, concluding: first, that Due Process argument failed because the action complained of is Congress's enactment of the Federal Foreclosure Bar but the HOA buyer did not have a property interest at that time, and the legislative process provided all the process that was due; and, second, assuming the loan was securitized at the time of the HOA foreclosure sale, it remained the property of Fannie Mae while under FHFA's conservatorship because Fannie Mae is the trustee, and therefore the legal owner, of the pool of loans it securitizes. *A&I LLC Series 3 v. Federal National Mortgage Association et al.*, --- P.3d ---, 2018 WL 3387787 (2018) (Unpub.). Tellingly, the Nevada Supreme Court again looked to the Federal Courts for guidance citing to both District Court and Ninth Circuit decisions.[4]

Although it appears that these particular attacks are dead, the HOA buyers will not go quietly. Instead, we expect they will attempt to raise new attacks or, at least, whittle down the protections afforded by these cases. Nevertheless, the mortgage industry can enjoy a well needed win for now!

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[2] Although originally unpublished, this opinion was reissued as a published opinion in May 2018.
[3] Relying on its earlier opinion in *In re Montierth*, 131 Nev. 543, 547, 354 P.3d 648, 650-651 (2015) (the note remains secured "if there is *either* a principal-agent relationship between the note holder and the mortgage holder, *or* the mortgage holder 'otherwise has authority to foreclose in the [note holder]'s behalf.").
[4] Both the June 2018 *Guberland* and July 2018 *A&I LLC* decisions remain unpublished. Nationstar and FHFA moved to have the *Guberland* decision reissued as a published opinion; however, Guberland LLC has also moved for rehearing.

WFZ PROFILE:
JAMIN S. NEIL, ESQ.
SENIOR ASSOCIATE
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Jamin S. Neil is the self-proclaimed "Statute of Limitations Guy." Overseeing all of the firm's Arizona cases, his area of practice is extensive – from providing guidance on relatively simplistic consumer bankruptcy cases to arguing post-trial appeals following extensive complex commercial litigation. Mr. Neil represents dozens of financial institutions of varying size.

Mr. Neil has co-authored articles warning mortgage loan servicing institutions about the impending statute of limitations challenges to long-term delinquent debt; a novel issue for many of the Firm's clients in the Southwest and West Coast. (*What Servicers Need to Know About the Statute of Limitations*, DSNews, October 2016. *Overcoming Statute of Limitations in Foreclosures*, Mortgage Daily, November 2017.)

The legal theories and recommendations from these articles were soon tested. In *In re Va Bene Trist, LLC*, BK-17-00993-DPC (October 26, 2017), the United States Bankruptcy Court, for the District of Arizona, adopted Mr. Neil's argument that the imposition of the automatic bankruptcy stay, for nearly a decade, tolled any limitations period on the bank's right to enforce its secured interest in real property. Similar success followed in *Ayala v. Carrington Mortgage Services*, CV-16-2156-PHX-ROS (October 30, 2017), where the United States District Court, District of Arizona, agreed with Mr. Neil that prior acceleration of all amounts due under an installment contract could be revoked by the implied conduct of the lender.

Mr. Neil is from a small suburb of Los Angeles, California. He received his B.A. from the University of Arizona and his J.D. from Thomas Jefferson School of Law in San Diego, California. Opting for the desert heat instead of the cool ocean breeze, Mr. Neil returned to Arizona where the 2008 financial crisis had manifested (in the legal world) in the form of mortgage-related litigation. Thus, his relationship with counseling and defending financial institutions was born and expanded significantly over the years as the legal needs of these clients began to change.

Recently, Mr. Neil was recognized by Super Lawyers Magazine as one of the Southwest's Rising Stars in 2018.

When not practicing law, Mr. Neil can be found on one of Scottsdale, Arizona's many golf courses, surfing with his father and brothers in Southern California, or navigating rugged mountain hikes. He recently completed the 17 mile trek from Yosemite Valley to the top of Half Dome.

UPCOMING INDUSTRY EVENTS

October 2-5	WBA	40th Annual Regulatory Compliance Conference	Sacramento, CA
October 14-17	MBA	Annual Convention & Expo	Washington, DC
October 21-23	ABA	ABA Annual Convention	New York, NY
October 22-24	ACI	Residential Mortgage Regulatory Enforcement & Litigation	Dallas, TX
November 4-6	UTA	43rd Annual Educational Conference	Las Vegas, NV
November 5-6	IMN	1st Annual The Residential Mortgage Servicing Rights Forum	Los Angeles, CA
November 27-28	MBA	Summit on Diversity and Inclusion	Washington, DC
December 3-4	CMBA	Legal Issues and Regulatory Compliance Conference	Newport Beach, CA

A RENEWED LEASE ON LIFE FOR THE PTFA

by Jonathan D. Fink, Esq.

Effective June 23, 2018, the previously expired federal Protecting Tenants at Foreclosure Act ("PTFA") is back in force. As a reminder, the law provides that, after a foreclosure sale of a federally related mortgage on real property (or chattel manufactured homes), title shall be taken subject to any pre-existing lease held by a bona fide tenant. A "bona fide tenant" is a person in possession of the property with or without a lease provided that (1) the occupant is not the mortgagor or his/her immediate family; (2) the lease or tenancy was the result of an arm's length transaction; and (3) the lease or tenancy calls for the payment or rent that is not substantially less than fair market rent for that unit). Thus, in order to qualify for protection under PTFA, the occupant must be in possession of the property prior to the "foreclosure date" (the date complete title was transferred to a successor by court order or deed). If an occupant qualifies under the PTFA, he or she is entitled to stay until the end of the lease as long as there is compliance with the lease terms including payment of rent to the new owner. There is an exception if the purchaser at the sale intends to occupy the property as his or her principal residence. In that situation, the present occupants must be given a 90 day notice to quit before the commencement of eviction proceedings. A bona fide tenant without a lease or a lease terminable at will under state law is also entitled to a 90 day notice. Finally, it should be noted that some state laws (e.g., in California) or local rent control ordinances may impose additional requirements to remove an occupant. If you have any questions about the new/old law or would like to discuss how it interacts with any state laws in the states we cover (CA, NV, AZ, UT, WA, OR, NM, ID or HI), please let us know.

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Jonathan Fink is a
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FANNIE MAE'S HOURLY RATES ARE ON THE RISE

by Robin P. Wright, Esq.

In April, Fannie Mae announced that the non-routine litigation hourly attorney rates will increase to $225 for any attorney with less than five (5) years of experience and $275 for an attorney with five (5) or more years of experience. Fannie will also pay $85 per hour for a paralegal.

"Non-routine" litigation fits into the three categories below, and must be reported to Fannie Mae as non-routine litigation:

1. Actions that seek damages against Fannie or its officers, directors, or employees;
2. Actions that challenge the priority, validity or enforceability of Fannie's loan or REO; and
3. Actions that present an issue that may pose a significant legal or reputational risk to Fannie.

Since 2013, Fannie has maintained its hourly rates at $215 for non-routine litigation. Law firms handling mortgage default litigation for Fannie Mae can implement the new rates, which went into effect June 1, 2018.

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Robin Wright is the Managing
Partner of WFZ.

WFZ FIRM NEWS

WFZ WELCOMES ITS NEW ATTORNEYS!

BRIAN J. WAGNER

Mr. Wagner, WFZ's newest Partner, joins our Newport Beach office. He has extensive experience with trials, mediations, arbitrations and appeals. Prior to joining the firm, Mr. Wagner was a senior litigator with a national law firm where he handled a variety of consumer finance matters, including actions brought under California's Homeowners Bill of Rights, FDCPA, FCRA, as well as title disputes. He has recently tried consumer finance matters through jury trial and has argued numerous cases before the Courts of Appeal. Mr. Wagner is licensed to practice in California and Texas.

TAYLOR E. HUBBARD

Mr. Hubbard joins our Newport Beach office as an Associate after working at WFZ as a Law Clerk. His prior experience included processing non-judicial foreclosures, supporting property management services, and handling title curative related issues. Since joining Wright, Finlay & Zak, Mr. Hubbard has focused primarily on real estate litigation, including lender and servicer liability defense, wrongful foreclosure defense, fair debt collection practices defense, title curative matters and title disputes. Mr. Hubbard is a member of the California Mortgage Association and is licensed to practice in California.

JOSEPH T. MCCORMICK, III

Mr. McCormick joins our Seattle office as an Associate. He was admitted to the Florida State Bar after graduating from Stetson University College of Law in June 2010. Mr. McCormick practiced real estate law in Florida before earning admission to the Washington State Bar in 2015 and moving to Seattle. His practice focuses on real estate litigation, wrongful foreclosure defense, and consumer litigation. Mr. McCormick is licensed to practice in Washington.

WFZ DIVERSITY RECOGNIZED

WFZ was recently recognized as the second largest women-owned law firm in Orange County (36th largest overall – all business types), in the annual List of Women-Owned Businesses, published in the July 9, 2018 issue of the Orange County Business Journal.

WOMEN OWNED™

Also, compared to the national averages reported in the 2017 Report on Diversity in U.S. Law Firms by the NALP ("National Association for Law Placement"), the percentage of WFZ's women partners, women lawyers and Hispanic lawyers exceeded NALP's nationwide averages.

WFZ RECEIVES "NO OBJECTION" FOR UTAH AND OREGON

WFZ recently received a "no objection" from Federal National Mortgage Association (FNMA) and Federal Home Loan Mortgage Corporation (FHLMC) for the States of Utah and Oregon. FNMA and FHLMC's "no objection" designation for our clients allow us to handle their FNMA and FHLMC default related matters, including non-judicial foreclosure, bankruptcy and other loss mitigation issues in Utah and Oregon. WFZ is committed to providing the same high level of quality and service for our clients in these states. For additional information, please contact ***Joyce Clark*** at ***jclark@wrightlegal.net***.