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SUMMARY OF THE TENANT PROTECTION ACT OF 2019 AND HOW IT AFFECTS LENDING AND SERVICING

by T. Robert Finlay, Esq.

In this Issue

What Is the Tenant Protection Act of 2019 (AB 1482)?

California recently approved the Tenant Protection Act of 2019 (TPA) in an effort to help stabilize rent for California residents. Effective January 1, 2020, the TPA significantly changes traditional landlord/tenant relationships in two ways: (1) caps the amount that a landlord may increase the tenants rent during a 12 month period; and (2) requires "just cause" for evictions. This article will outline the TPA's key provisions and discuss its potential impact on landlords, lenders and loan servicers.

Rent Limits

Beginning on January 1, 2020, landlords cannot increase the gross rental amount during a 12 month period, by more than **5% plus the cost of living** as determined by the regional CPI (in any event no more than a total of 10%).

- The gross rental amount cannot be raised more than two times in a calendar year, and the total cannot exceed the allowable increase.
- Any rent discounts, incentives, concessions, or credits offered by the owner and accepted by the tenant are excluded from the calculation of the gross rental amount (and should be documented in the lease).
- Additionally, a tenant that subleases a covered property also cannot raise the rent above the allowable rental rate.
- The landlord can adjust the rents to market rate after a tenant vacates the property.

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Rent from March 15, 2019 – January 1, 2020

Although the law goes into effect on January 1, 2020, it applies retroactively to March 15, 2019. Thus, ***landlords who raised rents between March 15, 2019 and January 1, 2020, must roll the rents back*** to the allowable 12 month increase based on rent as of March 15, 2019 (i.e., March 15th rents + 5% + CPI). However, to the extent an owner collected rents between March 15, 2019 and January 1, 2020 over the allowable amount, it does NOT have to refund those amounts.

Many landlords chose to raise rents in anticipation of the January 1st effective date and, when the tenants refused to pay, initiated eviction actions. While not technically improper, some cities are lashing back. For instance, Los Angeles City passed a moratorium on evictions until the end of the year. Please feel free to contact Robert Finlay at rfinlay@wrightlegal.net for additional information.

Notice

In order to increase the rent, a landlord must give the tenant adequate notice in accordance with existing law (Cal. Civ. Code Section 827). The notice must be given in writing by mail or personal service and the notice must be given at least 30 days prior to the effective date of the increase.

Exceptions

The only properties excluded from the rent limitations are:

- Housing that has been issued a certificate of occupancy within the last 15 years;
- Residential property that is alienable separate from the title to any other dwelling unit ***(i.e., single family homes or condos)*** provided that (1) the owner is not a real estate investment trust, a corporation, or an LLC with at least one member that is a corporation, **and** (2) the tenant has been provided with written notice that says:

  > "This property is not subject to the rent limits imposed by Section 1947.12 of the Civil Code and is not subject to the just cause requirements of Section 1946.2 of the Civil Code. This property meets the requirements of Sections 1947.12 (d)(5) and 1946.2 (e)(8) of the Civil Code and the owner is not any of the following: (1) a real estate investment trust, as defined by Section 856 of the Internal Revenue Code; (2) a corporation; or (3) a limited liability company in which at least one member is a corporation."

- A duplex in which the owner occupied one of the units as the owner's principal place of residency at the beginning of the tenancy, and continues to occupy the unit; and
- Housing restricted by deed, regulatory restriction contained in an agreement with a government agency of other recorded document as affordable housing for persons and families of very low, low, or moderate income;
- College dormitories; and
- Housing subject to rent control through a public entity's valid exercise of its police power.

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Tenant Protection Act of 2019 (continued from page 2)

Just Cause Eviction

For all tenants that lawfully and continuously occupy a property for 12 months (or if at least one tenant has occupied the property for 24 months), the landlord must have "just cause" to either evict the tenant or refuse to renew the tenant's lease. There are two forms of just cause: (a) at-fault just cause and (b) no-fault just cause. If there is just cause, the tenant **must be notified** in a timely manner of the eviction or non-renewal of the lease. Finally, if the landlord evicts or declines to renew a lease with "no-fault just cause," the Act requires the landlord to pay for relocation assistance to the tenant.

If the landlord is terminating the lease for a reason that may be fixed by the tenant, the landlord must first provide the tenant with written notice of the violation and provide the tenant with an opportunity to cure the problem.

At-Fault Just Cause

A landlord may evict a tenant or refuse to renew a fixed term lease if the tenant is "at fault", which includes:

- Non-payment of rent;
- A breach of a material term of the lease;
- Maintaining, committing, or permitting a nuisance;
- Committing waste;
- If the lease term ends and, after a demand from the landlord, the tenant refused to execute a renewal or extension of the lease;
- Criminal activity by the tenant;
- An assignment or sublease of the lease that violates the terms of the lease;
- Refusal to allow the owner to enter the premises;
- Use of the property for an unlawful purpose;
- If the tenant was an employee, agent, or licensee of the landlord, failure to vacate the premises after the termination of such relationship; and
- If the tenant previously provided the landlord with notice to vacate and the tenant fails to deliver possession of the property.

No-Fault Just Cause

A landlord can evict a tenant or refuse to renew a lease for "no-fault" reasons, which include:

- The owner intends to use the property for themselves, their spouse, domestic partner, children, grandchildren, parents or grandparents;
    - However, if the lease is entered into on or after July 1, 2020, the tenant must agree in writing OR the lease must provide a provision that allows for the termination of the lease in the event of this situation;
- Withdrawal of the property from the rental market;

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Tenant Protection Act of 2019 (continued from page 3)

- Intent to demolish or substantially remodel the property; and
- In compliance with the law (such as an order relating to habitability, an order to vacate, or a local order that necessitated the vacating of the residence).

Relocation Assistance

If the tenant is evicted or the lease is not renewed due to "No-Fault Just Cause," the landlord ***must*** provide the tenant with relocation assistance. The relocation payment must be the amount of ***one month's rent*** when the owner issued the notice to terminate, and the Landlord ***must inform the tenant of their right to relocation assistance***. It may be provided either as (a) direct payment to the tenant within 15 days of service of notice OR (b) waiver of the last month's rent prior to the time when that payment is due (the notice shall state the amount of rent waived and that no rent is due).

Exceptions to Relocation Assistance

An owner is not required to provide the tenant with relocation assistance if the tenant was evicted due to "At-Fault For Cause" or if the government has already determined that the tenant is the cause of the eviction (such as an order relating to habitability, an order to vacate, or a local order that necessitated the vacating of the residence). Additionally, if the tenant fails to vacate the property after no-fault termination notice is given, relocation assistance must still be made; however, it may be recovered as damages. Finally, if there is another law that requires relocation assistance, this payment of relocation assistance may be credited to such other required payment.

Notice to the Tenant

For covered properties, the landlord must provide notice to the tenant that the residential real property is subject to this section. That says (in 12 point font):

> "California law limits the amount your rent can be increased. See Section 1947.12 of the Civil Code for more information. California law also provides that after all of the tenants have continuously and lawfully occupied the property for 12 months or more or at least one of the tenants has continuously and lawfully occupied the property for 24 months or more, a landlord must provide a statement of cause in any notice to terminate a tenancy. See Section 1946.2 of the Civil Code for more information."

If the lease begins on or after July 1, 2020, the notice can be (1) an addendum to the lease or agreement or (2) a written agreement signed by the tenant, with a copy provided to the tenant. If the lease exists prior to July 1, 2020, written notice must be given to the tenant no later than August 1, 2020, or as an addendum to the lease or rental agreement.

Properties Excluded From the Just Cause Requirement

The only properties excluded from the "just cause" requirement are:

- Housing that has been issued a certificate of tenancy within the previous 15 years;
- Residential real property that is alienable separate from the title to any other dwelling unit **(i.e., single family homes and condos)** and (1) the owner is not a real estate investment trust, a corporation, or an LLC where at least one member is a corporation AND (2) the tenant was given written notice that the property is exempt:

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  - "This property is not subject to the rent limits imposed by Section 1947.12 of the Civil Code and is not subject to the just cause requirements of Section 1946.2 of the Civil Code. This property meets the requirements of Sections 1947.12 (d)(5) and 1946.2 (e)(8) of the Civil Code and the owner is not any of the following: (1) a real estate investment trust, as defined by Section 856 of the Internal Revenue Code; (2) a corporation; or (3) a limited liability company in which at least one member is a corporation."
- Single-family owner occupied residences (including one where the owner-occupant rents or leases no more than two units or bedrooms);
- A duplex in which the owner occupied one of the units as the owner's principal place of residence at the beginning of the tenancy and continues tenancy;
- Transient and tourist hotel occupancy;
- Housing accommodations in a nonprofit hospital, religious facility, extended care; facility, licensed residential care facility for the elderly, or an adult residential facility;
- Dormitories operated by higher education or a kindergarten and grades 1-12 inclusive;
- Housing accommodations where the tenant shares a bathroom and/or kitchen with the owner; and
- Housing restricted by deed, regulatory restriction contained in an agreement with a government agency or otherwise reflected as affordable housing.

The Law Applies to My Property, What Should I do?

First, review all your properties to see if they are covered by the new law. If this law applies to your property, we suggest that you take the following steps in order to comply with the law:

- Update leases (or add addendums) regarding:
  - That the property is not covered;
  - That a covered property is subject to limitations on rental increases;
  - Add a provision to new leases or renewals that states that the tenant may be evicted if the current (or future) landlord decides to put a family member in the unit.; and
  - Consider putting in a provision that prohibits subleasing.
- Update any termination notices and notices to quit;
- Draft a relocation notice;
- Calculate rent increases and calendar the dates when rent can be increased;
- Consider a strategy to terminate tenancies of problematic tenant's prior to the 12 month (or 24 month deadline)

<u>What if my city has its own rent control laws?</u>

If the local law is "more restrictive" (meaning that the local law contains all of the provisions of the Tenant Protection Act of 2019 and has additional provisions), the local law is enforceable. However, if it is "less restrictive" (meaning it does not contain all of the provisions of the Tenant Protection Act of 2019), the Tenant Protection Act of 2019 governs rather than the local law.

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Tenant Protection Act of 2019 (continued from page 5)

How Does the New Law Impact Lenders and Loan Servicers?

While the law is intended to impact landlord/tenant relationships, it could spill over to impact lenders and loan servicers in a variety of ways:

- **REO Properties (covered):** A single family property or condo that is rented and reverts at a foreclosure sale to a real estate investment trust, corporation or a LLC where at least once member is a corporation, is likely covered by the TPA. Likewise, if the REO property does not fall under one of the other exceptions, it would likewise be covered by the TPA. If so, the tenants are entitled to the protections of the TPA, including rental limits and the requirement for "just cause" evictions. Upon foreclosing, we recommend immediately sending any required notices about whether the property is covered under TPA (in case the prior owner failed to do so).
    - **Note –** the TPA protections would arguably apply to a SFR where the prior owner was renting an illegal unit.
    - **Possible Exposure –** anyone taking back a covered property at foreclosure could be liable for collecting rents in violation of the TPA ***if*** the prior owner had raised rents above the allowable limits.
- **REO Properties (not covered SFR or Condos):** If title at the foreclosure sale is NOT taken by a REIT, corporation or LLC (with one member who is a corporation), the owner must provide the required notice that the property is not covered.
- **Evictions:** In addition to the "just cause" limitations on covered properties, all evictions in Los Angeles and other cities sympathetic to tenants could be delayed in the short term while the cities and courts differentiate between evictions involving the TPA and standard post-foreclosure evictions.
- **Lending on Covered Properties:** The annual amount of rents on rental properties is a key element to determining a rental property's value. A property's value often determines allowable loan limits. An overvalued property as a result of inflated rents could affect a lender's decision to lend, the amount of the loan or its' rate. As a result, its' important for lenders on covered properties to know whether the prospective property's rents are compliant with the TPA. Lenders considering loans on covered properties may want to have the borrower sign an estoppel certificate, certifying that the rents fall within the allowable rental amounts under the TPA. Lenders could also require that the borrower recertify annually that rents are still compliant. The Deed of Trust could also be drafted to state that a failure to do so could be grounds for default under the loan.
- **Conflicting Laws:** In addition to complying with the TPA, lenders and loan servicers must also be aware of existing local ordinances that offer tenants additional protections.
- **Copy Cat Local Ordinances:** Some cities, counties and local municipalities are taking steps to enact their own versions of the TPA. Of course, some will "tweak" the TPA, offering greater protections to tenants. Lenders and loan servicers will need to be aware of these local ordinances to see whether they impact a particular property.

For any additional questions regarding the implications of this law on your property contact Robert Finlay at rfinlay@wrightlegal.net or at (949) 477-5050.

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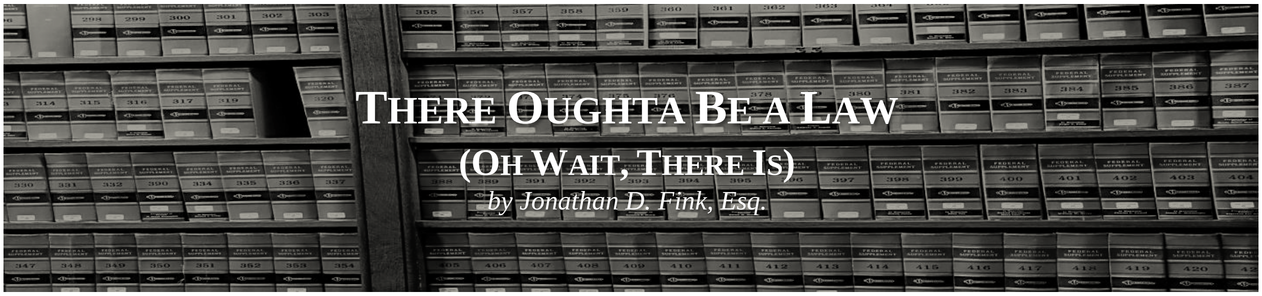

THERE OUGHTA BE A LAW
(OH WAIT, THERE IS)
by Jonathan D. Fink, Esq.

As one year ends and a new one begins, a young attorney's fancy lightly turns to thoughts of law. Specifically, the recently enacted laws that will help or plague his or her clients. In an effort to help you adjust to the new realities and burdens imposed by the State legislatures in their infinite wisdom, here is a <u>non-exhaustive</u> selection of some of the key laws in some of the States in which we might represent your interests, and of which you should be aware:

<u>Arizona</u>

1. Effective July 1, 2020 the newly established Department of Insurance and Financial Institutions (DIFI) will assume the responsibilities of the Arizona Department of Financial Institutions and the Automobile Theft Authority. The Department of Financial Institutions will become a division within DIFI.

2. Effective August 27, 2019, Arizona adopted a modified version of the Uniform Commercial Real Estate Receivership Act ("UCRERA"), governing the procedures for a receivership on an interest in commercial real property and any personal property related to or used in operating the real property, but *does not apply* to a receivership of an interest in real property improved by one to four dwelling units unless the dwelling units were used as part of a commercial enterprise.

3. Effective August 27, 2019, and interest in real property conveyed by a "beneficiary deed" is treated as the separate property of the named grantee beneficiary and not community property, unless otherwise stated in the beneficiary deed. If none of the grantee beneficiaries named in the beneficiary deed survives the owner, the beneficiary deed is void.

4. Effective August 27, 2019, an HOA lien for unpaid assessments is extinguished unless proceedings to enforce the lien are instituted within six years after the full amount of the assessment becomes due.

<u>California</u>

1. As a result of the California Supreme Court's decision in *Dynamex Operations West, Inc. v. Superior Court*, the California Legislature has enacted a new law, effective January 1, 2020, that provides that a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that all three of the following conditions are satisfied:

   (A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.

   (B) The person performs work that is outside the usual course of the hiring entity's business. <u>AND</u>

   (C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

   There are certain exemptions from the law, including one for real estate licensees, lawyers, investment broker/advisors, and accountants. ***Please see related article in this Newsletter, discussing the new law in detail.***

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2. As of January 1, 2020, debt collectors are required to leave at least $1,724 in a person's combined bank accounts. The law does not forgive the debt or prohibit the collector from going after debt by other means, such as garnishing paychecks; it just ensures that a person's bank account will be left with the minimum amount that the State has deemed a family of four needs to survive for a month.

3. As of January 1, 2020, licensed finance lenders making loans of between $2,500 and less than $10,000 are limited to charging simple interest of 36% per annum above the Federal Fund rate. The statute also limits the fees that may be charged.

4. Effective January 1, 2020, but applicable to rents increased on or after March 15, 2018, rent increases are capped at 5% each year plus inflation until January 1, 2030. Landlords are also banned from evicting tenants without just cause, meaning someone can't be evicted so the landlord can raise the rent for a new tenant. NOTE: This does not preempt more restrictive local rent control laws. ***Please see the detailed article in this Newsletter for more information.***

5. Starting January 1, 2020, local governments can set up banks to handle taxpayer money and make loans. The public banks would be required to adhere to many of the same regulations as private banks, such as being FDIC insured. Only 10 such banks can be open at a time and no more than 2 can be approved in a calendar year.

6. The Rosenthal Fair Debt Collection Act has been amended, effective January 1, 2020, to now expressly *include* mortgage debt and to <u>remove</u> the prior exemption for attorneys from the term "debt collector."

<u>Nevada</u>

1. Effective June 8, 2019, Nevada has extended the protections of the Federal Employees Civil Relief Act into Nevada law, prohibits foreclosure sale of an owner-occupied residential home of a federal, state, or tribal worker, or under certain circumstances a household member or landlord of such a worker, when the government shuts down, and extends the prohibition for 90 days after the shutdown ends. There is also the potential for a stay of a pending judicial foreclosure action during the shutdown period, unless the court determines that the shutdown does not materially affect the borrower's ability to comply with his or her loan obligations. As an alternative, the court, during a pending judicial foreclosure, may also adjust the obligations to preserve the interests of the parties. This prohibition only applies to loans secured prior to the shutdown. Any person who knowingly violates this new law is guilty of a misdemeanor and may be liable for attorney's fees and costs incurred by the injured party. With respect to this potential liability, the court is required to take into consideration due diligence used by the person prior to initiating the foreclosure sale. Importantly, the misdemeanor and liability provisions do not apply to a foreclosure trustee who initiates the foreclosure sale at the direction of another person. Similar to the Servicemembers Civil Relief Act, this law requires that a borrower be notified of these protection provisions prior to the recording of a notice of default or the commencement of a judicial foreclosure. For non-judicial foreclosures, this notice is to be included in the "SB 321" letter to be issued at least 30 days prior to the recording of the Notice of Default.

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There Oughta Be a Law (continued from page 8)

2. Effective July 1, 2019, Nevada has changed the procedures and timeframes for both commercial and residential evictions and now echoes the Federal Protecting Tenants at Foreclosure Act by providing that a tenant of a property sold at a residential sale retains the rights held under the lease. The new law also requires the prior owner to transfer the security deposit to the new owner. Finally, the new owner must notify the tenant of the change of ownership within 30 days after the transfer or sale and that a failure to pay rent may result in an eviction. However, there is express language in the new law indicating that a new owner who obtains title to property "sold as a residential foreclosure" is exempt from the new provisions and still retains the right to remove the tenant under existing provisions after a notice of change of ownership is issued, a 60-day notice is posted, and the current unlawful detainer procedures are followed. In a nutshell, this law transfers the lease rights of the prior owner to the new owner and affirms the tenant's rights under the lease for residential property sales other than foreclosure sales, and it does not apply to property transferred by residential foreclosure sale or prevent a 60-day eviction notice from being posted and enforced through an unlawful detainer if the property was obtained through foreclosure.

3. In a clean-up bill, effective October 1, 2019, Nevada has modified some of the terms utilized in its statutes governing deeds of trust and assignments of rent. The term "trustee" in NRS 107.0805, formerly defined as "ascribed in NRS 107.080", is now defined as "the trustee of record," which is how it was defined in NRS 107.080. The prior term "trust agreement" has now been changed to "deed of trust". While these changes are not material, they do make the statutes easier to read, cite, and interpret. The other change of note is that the language found in NRS 40.050, that a mortgage shall not be a deemed a conveyance "without a foreclosure and sale", has been updated to read "in the absence of a foreclosure sale or in accordance with NRS 32.100 to 32.370, inclusive, NRS 107.100 or chapter 107A of NRS." Put simply, the foreclosure sale requirement remains but has been updated to include: (1) the provisions of NRS 32, which allow for a mortgagee to request that the court appoint a receiver when a mortgaged property is in danger of being lost; (2) the provisions of NRS 107.100, which also allow for a receiver to be appointed where personal and real property subject to the deed of trust is in danger of being lost; and (3) the provisions of NRS 107A, which allow for the assignment of rents from a security instrument.

<u>Oregon</u>

1. Oregon now caps annual rent increases at 7% plus the change in consumer price index (this year about 3%). The bill, which took effect upon passage, also prohibits landlords from evicting month-to-month renters without cause after 12 months of residency.

2. Effective January 1, 2020, anyone holding a lien against real property may request from a person that holds another lien against that property an itemized statement of the amount that is necessary to pay off that other lien. The statement must include the per diem interest that accrues after the date of the statement if the obligation that the lien secures bears interest. The obligor's consent is not a condition of providing the information unless another State or Federal law so requires.

3. Effective January 1, 2020, a Sheriff conducting an execution sale of real property must now also provide a Notice to Debtors in substantially the following form:

    "NOTICE TO DEBTOR
    You should be careful about offers to sell rights to surplus funds.

    You may have a right to surplus funds remaining after payment of costs and satisfaction of the judgment, as provided in ORS 18.950 (4).

    If you transfer or sell your right to redemption, you might not have the right to surplus funds."

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There Oughta Be a Law (continued from page 9)

4. Effective January 1, 2020, a complaint in a suit to foreclose a residential trust deed on the lien debtor must include as an attachment a copy of a notice to lien debtors, in substantially the following form and printed in at least 14-point type:

> "WARNING: You may get offers from people who tell you they can help you keep your property. You may get offers from people who want to buy your "redemption rights" or "all rights under ORS chapter 18." You should be careful about those offers, as a sale of your rights to a property in foreclosure may include your right to claim any surplus funds arising from the foreclosure sale. Make sure you understand any papers you are asked to sign. If you have any questions, talk to a lawyer or one of the organizations mentioned below before signing.

> There are government agencies and nonprofit organizations that can give you information about foreclosure and help you decide what to do. For the name and telephone number of an organization near you, please call the statewide telephone contact number at __________. You may also wish to talk to a lawyer. If you need help finding a lawyer, you may call the Oregon State Bar's Lawyer Referral Service at __________ or toll-free in Oregon at __________ or you may visit its website at: __________. Legal assistance may be available if you have a low income and meet federal poverty guidelines. For more information and a directory of legal aid programs, go to __________."

5. Also effective January 1, 2020, a <u>purchaser</u> of rights in real property during a pending judicial foreclosure and prior to the end of the redemption period must provide a "notice in clear and conspicuous type" advising the *seller* that the transfer of an interest in real property during a foreclosure may include the transfer of redemption rights and the right to claim surplus funds arising from the foreclosure sale. The <u>purchaser</u> is required to record an affidavit of compliance with the notice provision prior to, or concurrently with, recording the deed that transfers the interest. Specifically, the notice is required to be in at least 14 point type and state:

> "WARNING: You should be careful about this kind of transfer of property. Make sure you understand the documents that you sign. You may still own interests in this property. If you sign the deed to transfer this property, you may be giving up all of your interests in this property, such as redemption rights and rights to "surplus funds." "Surplus funds" are any extra money if the property is sold at the sheriff's execution sale for more than what is owed on the property. If you have questions, talk to a lawyer before signing."

<u>Utah</u>

1. Effective May 14, 2019, Utah amended its laws governing residential loan licensees to, among other things: (a) establishes criteria and parameters for temporary authorization to act as a mortgage loan originator; (b) beginning January 1, 2020, requires a background check for certain licenses to include ongoing monitoring through the Federal Bureau of Investigation's Next Generation Identification System's Rap Back Service; (c) requires the Division of Real Estate to establish a fee for background checks; and (d) revise the grounds for disciplinary action against a sales agent, principal broker, or association broker.

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Washington

1. Effective July 28, 2019, landlords (or managers acting on their behalf) seeking to collect and/or evict for unpaid rent (or other reoccurring fees) on a residential property need to provide 14 days' notice. This 14-Day notice to Pay Rent or vacate has express minimum language requirements.

2. Also effective July 28, 2019, notices to increase rent have a 60-day advance notice requirement with express minimum language mandated.

3. Effective July 27, 2019, a debtor on a judgment for consumer debt may now claim as exempt up to $2,000 in his or her bank account.

4. Unless a different rate is specified in the contract, and that rate is also reflected by the judgment, the post-judgment interest rate is now *lowered* to 9% as of July 28, 2019.

If you have questions about these or any other State laws affecting your business, please feel free to contact one of our attorneys.

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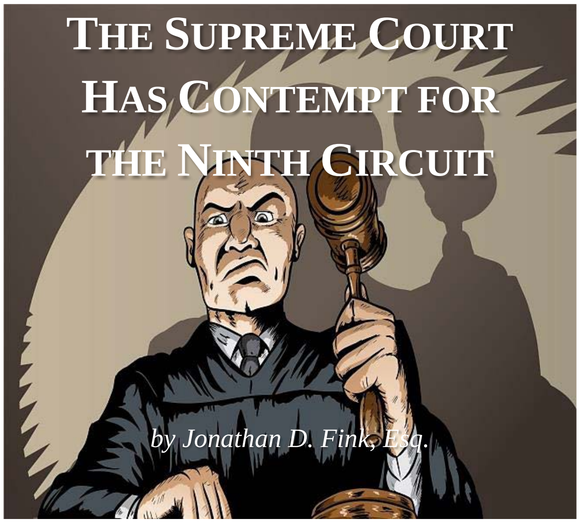
UPCOMING INDUSTRY EVENTS

January 13-15	CREFC	CRE Finance Council January Conference	Miami, FL
January 21-23	NAHB	2020 International Builders' Show	Las Vegas, NV
January 22-24	IMN	Winter Forum on Real Estate Opportunity & Private Fund Investing	Laguna Beach, CA
January 23-24	CMA	2020 Winter Seminar	Newport Beach, CA
January 27-28	ACI	False Claims and Qui Tam Enforcement	New York, NY
February 3-6	MBA	Independent Mortgage Bankers Conference	New Orleans, LA
February 9-12	ABA	National Conference for Community Bankers	Orlando, FL
February 9-12	MBA	CREF/Multifamily Housing Convention & Expo	San Diego, CA
February 10-11	IMN	The NPL Notes & Default Servicing Forum (East)	Fort Lauderdale, FL
February 17-20	Texas MBA	Southern Secondary Market Conference	Houston, TX
February 23-26	MBA	Servicing Solutions Conference & Expo	Orlando, FL
February 24-25	IMN	Bank Special Assets & Credit Officer's Forum	Miami, FL
Feb. 29-Mar. 4	WBA	2020 Annual Conference & Directors Forum	Scottsdale, AZ



In a unanimous decision, the U.S. Supreme Court has upended the Ninth Circuit's standard for finding a creditor in contempt for violating the bankruptcy discharge injunction under 11 USC § 524(a)(2).

The June 3, 2019 decision in *Taggart v. Lorenzen* arose from an Oregon bankruptcy court order finding a creditor in contempt under a "strict liability" standard to the effect that a creditor would be liable for contempt sanctions "irrespective of the creditor's beliefs, so long as the creditor was '"aware of the discharge"' order and '"intended the actions which violate[d]"' it." The bankruptcy court order was appealed and the Ninth Circuit reversed, finding that the correct standard was "'that a court cannot hold a creditor in civil contempt if the creditor has a "good faith belief" that the discharge order "does not apply to the creditor's claim…' even if the creditor's belief is unreasonable.'"

The U.S. Supreme Court granted certiorari and rejected both standards, holding that, instead, the correct standard to apply was that;

> [A] court may hold a creditor in civil contempt for violating a discharge order if there is no fair ground of doubt as to whether the order barred the creditor's conduct. In other words, civil contempt may be appropriate if there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful.

The Supreme Court based its analysis on the origins of the Bankruptcy contempt power from traditional civil contempt proceedings, finding that those standards came along with the statutes authorizing a limited contempt power for the Bankruptcy courts. The Court found that the Ninth Circuit's standard was not only inconsistent with the traditional civil contempt principles but was also reliant on an often too difficult to prove subjective state-of-mind and could lead creditors with dubious claims to try to improperly collect from discharged debtors. The Court was equally contemptuous of the "strict liability" approach advocated by debtor, observing that it would "risk additional federal litigation, additional costs, and additional delays. That result would interfere with 'a chief purpose of the bankruptcy laws': '"to secure a prompt and effectual'" resolution of bankruptcy cases…. These negative consequences, especially the costs associated with the added need to appear in federal proceedings, could work to the disadvantage of debtors as well as creditors."

Although the Supreme Court opined that this new standard struck a "careful balance between the interests of creditors and debtors," the question remains as to how the standard will actually be applied by the Bankruptcy courts since the standard is bereft of guidelines. It seems likely that, pending further clarification by subsequent decisions, some Bankruptcy judges who favored the "strict liability" standard will still find contempt by concluding that there was no objectively reasonable basis upon which a creditor who knew of the discharge but sought to collect on the debt anyway could have thought its conduct to be lawful. Nonetheless, by rejecting the "strict liability" standard outright, the Supreme Court has at least preserved the hope that fairer, better reasoned decisions will ensue.

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THE PENALTY FOR OFFENSIVE HOLDING IS MORE THAN JUST 10 YARDS

By Jonathan D. Fink, Esq.

It is not uncommon for financial institutions which acquire real properties by foreclosure to be forced to hold them for a while, either because of litigation, potential rights of redemption, or just the difficulties of marketing the properties. These "Other Real Estate Owned" ("OREO") properties may, however, be subject to regulations limiting how long the institution can hold them; for example, national banking associations generally must dispose of such properties within five (5) years under 12 U.S.C. § 29 and 12 C.F.R. § 34.82. The OCC recently found that Citibank had engaged in repeated violations of the statutory holding period for OREOs and imposed a $30,000,000 penalty. The penalty was imposed based on a finding that the bank utilized deficient processes and controls in the identification and monitoring of the OREO holding period and had failed to implement corrective actions after being informed of the violations. The penalty might itself be seen as unnecessary roughness but the flag on the play is clear: check and monitor your deadlines for disposing of OREOs.

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Cathy K. Robinson rejoined Wright, Finlay & Zak as a Partner in November 2019. Ms. Robinson was an associate with the firm in 2003 through 2005, and is pleased to be reunited with the firm. Ms. Robinson is licensed in California and South Dakota, and for the last fourteen years has focused her practice on the representation of lenders, loan servicers, investors and business owners in litigation and transactional matters in both states. Ms. Robinson has practiced in the fields of bank & finance, commercial, and real estate litigation since 2003, representing a diverse variety of financial institutions, private lenders, loan servicers, investors, and business owners in both California and South Dakota State and Federal Courts. Ms. Robinson has also appeared before the California Appellate Courts, the California Supreme Court and the South Dakota Supreme Court.

Ms. Robinson is originally from rural South Dakota. She earned her B.S. degree from the University of South Dakota and then attended the University of South Dakota School of Law. During law school, Ms. Robinson competed in six national moot court competitions, published a brief in the New Orleans Sports Law Journal, and earned the Order of Barristers from the national honorary organization for excellence in oral advocacy and brief writing skills, as well as earned the CALI Excellence for the Future Awards for highest achievement in Remedies and Trial Techniques. After graduation, Ms. Robinson moved to California and worked with the General Counsel of Re/Max Associates in San Diego before joining Wright, Finlay & Zak as an associate attorney.

Ms. Robinson takes pride in her relationships with clients and is always available to them. Ms. Robinson is active with the Mortgage Bankers Association, California Mortgage Bankers Association, and has spoken on industry panels. Ms. Robinson revisits the University of South Dakota School of Law to judge various law school competitions, and enjoys mentoring young attorneys in both California and South Dakota.

When not working, Ms. Robinson enjoys time with family, traveling, sports and outdoor activities. Ms. Robinson has three children and currently resides in California, but frequently returns to South Dakota to visit family and handle client matters as necessary. Ms. Robinson will oversee representation of the firm's clients in South Dakota.

IS YOUR INDEPENDENT CONTRACTOR NOW AN EMPLOYEE?

EFFECTIVE JANUARY 1, 2020, CALIFORNIA CODIFIES THE GROUND BREAKING *DYNAMEX* DECISION

By Charles C. McKenna, Esq. and T. Robert Finlay, Esq.

Uber and Lyft just lost another battle, and their drivers are one step closer to becoming employees. But they are far from alone. On September 10, 2019, California's Senate voted 29-11 in favor of Assembly Bill ("AB") 5, and Governor Gavin Newsom signed the bill on September 18, making the law effective January 1, 2020. This statute will not only make it harder to deem workers as independent contractors going forward, but will also apply retroactively. California businesses of many stripes, including lenders and appraisal companies, now face the challenge of determining if their "independent contractor" is really an employee.

AB 5 codifies the California Supreme Court's ground breaking 2018 decision in *Dynamex Operations West, Inc., v. Superior Court*, as well as the Federal Court of Appeals decision in *Vazquez v. Jan-Pro Franchising International, Inc.*, which applied *Dynamex* retroactively. Intentionally or not, however, AB 5 actually goes much farther than the *Dynamex* decision, which was limited to wage orders, and essentially applied all California Labor Code protections to workers covered by the bill. When AB 5 goes into effect, it has the potential to turn many industries upside down, and not just those in the gig economy, where companies rely on hundreds of thousands of independent contractors. From truckers to real estate appraisers to (potentially) real estate licensees, including loan brokers, workers traditionally classified as independent contractors may now be employees and could receive all Labor Code protections and benefits that employees get, from minimum wage to unemployment insurance to employee reimbursements, as well as being able to unionize. The impact on businesses has the potential to be enormous.

By way of background, in *Dynamex* the Supreme Court held that workers are presumed to be employees, unless the employer proves otherwise. Thus, to be properly classified as an independent contractor, an employer must prove all three of the following factors, in what is called the ABC test:

A. The worker must be free, in everyday tasks, from the hirer's control and direction;

B. ***The work performed must be outside the usual course of the hiring entity's business***; and

C. The worker must be customarily engaged in an independent occupation or business of the same type as the work he or she is performing for the hiring entity.

Factor A, the right to control, is nothing new. And Factor C is usually not that hard to establish – most independent contractors operate independently in the field for which they are hired.

Factor B, however, presents an extremely difficult obstacle to overcome. For example, it will be challenging for Uber and Lyft to claim that the drivers they use are performing work outside the usual course of their business – driving is precise focus of their businesses. And the same could be true for appraisal companies that hire independent appraisers; trucking companies that hire independent drivers; cleaning companies that hire independent cleaners, etc. To safely overcome Factor B, the worker must be clearly hired to do something outside the company's scope of business, such as an appraisal company hiring someone to clean their office. AB 5 codified the *Dynamex* ABC test, and unless the employer proves all three factors, workers must be classified and treated as employees for purposes of California law, with the failure to do so potentially subjecting companies to liability for non-compliance not only with California's wage orders, such as minimum wage, meal breaks, and overtime pay, but the entirety of Labor Code protections, such as the obligation to reimburse employees for all necessary expenditures or losses incurred in the discharge of their job duties.

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AB 5 also adopts the holding in *Vazquez v. Jan-Pro Franchising International, Inc.*, a federal case involving a complaint brought by a class of janitors based on their being classified as independent contractors prior to the issuance of the *Dynamex* decision. The Court of Appeals sent the case back to the trial court to apply the ABC test to determine whether janitors were misclassified as independent contractors, even though their claims accrued before the *Dynamex* decision was issued. Thus, exposure for misclassification extends to claims that accrued before the decision in *Dynamex* was even issued, so long as those claims are not barred by the statute of limitations.

There is some good news for certain businesses, including the mortgage industry. AB 5 contains specific exemptions for many professionals, who remain governed by the pre-*Dynamex* test for determining classification. Those exempt include, but are not limited to, doctors, dentists, lawyers, architects, insurance agents, accountants, engineers, securities brokers/dealers, financial advisers, direct sales salespersons, commercial fishermen, real estate licensees and hair stylists who rent booths. Additionally, contracts for certain professional services may be exempt if the hiring entity demonstrates true independence of the contractor, pursuant to nine very specific factors set forth in the statute. Moreover, AB 5 does not apply to the relationship between a contractor and an individual performing work pursuant to a subcontract in the construction industry. These industries successfully lobbied for exempt status.

One of the biggest questions facing the lending industry is whether entities licensed as loan brokers are exempt or whether those entities have to apply the *Dynamex* factors to workers, which would be very difficult. The answer may depend on the type of license the loan broker holds. Pursuant to AB 5, Department of Real Estate ("DRE") licensees, i.e., those licensed by the State of California pursuant to Division 4 (commencing with Section 10000) of the Business and Professions Code, are exempt from the *Dynamex* factors. However, California Financing Law licensees, for example, are not exempt and, therefore, would likely be deemed employees.

However, whether you employ DRE licensees or some other exempt worker, it does NOT automatically mean that every worker can be deemed an independent contractor. Being exempt simply means that the difficult *Dynamex* factors do not apply; yet, the pre-*Dynamex* factors laid out in the "*Borello*" decision DO apply (stemming from the 1989 decision in *S.G. Borello & Sons, Inc. v. Dep. of Industrial Relations)*. While these factors are easier to comply with than the *Dynamex* factors, they are too numerous to discuss in this article.

The most important take-away from this article and AB 5 is that California business owners using independent contractors face new challenges and uncertainty. First, businesses must determine if their worker is exempt. If exempt, do other areas of the law control, such as the Labor Code. Next, even if exempt, does the relationship meet the easier *Borello* test? Answering this last question may depend on how the business documents the relationship with its potential independent contractor. We strongly encourage all of our clients to consult with our office or their independent legal counsel before deeming anyone an independent contractor. It's not impossible, but it will take some work!

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WFZ FIRM NEWS

THE WASHINGTON OFFICE HAS MOVED

Please note, our new address is 612 Lucile Street, Suite 300, Seattle, WA 98108.

WFZ WELCOMES ITS NEW ATTORNEYS!

SYNOVA M.L. EDWARDS
Ms. Edwards joins our Seattle, Washington office as a Senior Associate. Her practice focuses on real estate litigation, including lender and servicer liability defense, wrongful foreclosure defense, and title disputes. Prior to joining the Wright, Finlay & Zak, Ms. Edwards represented mortgage servicers and lenders in mediations, judicial foreclosures, and unlawful detainer matters. Ms. Edwards is licensed to practice in Washington and Oregon.

RYAN C. THOMASON
Mr. Thomason joins our Newport Beach, California office as an Associate. He obtained his Juris Doctorate from Whittier College School of Law and was admitted to the California State Bar in the Spring of 2019. Prior to joining Wright, Finlay & Zak, Mr. Thomason worked as a law clerk at several law firms specializing in real estate, personal injury, and civil litigation. Mr. Thomason is licensed to practice in California.

ARNOLD L. GRAFF
Mr. Graff joins our Newport Beach, California office as a Senior Associate. His practice focuses on bankruptcy, real property, unlawful detainer, creditor collections, and foreclosure-related litigation. Mr. Graff also specializes in all areas of bankruptcy law, including Chapter 11, 13 and 7 matters, and adversary litigation. Mr. Graff is licensed to practice in California, Nevada, Utah, and Wisconsin.

KIMBERLY S. EARP
Mrs. Earp joins our Phoenix, Arizona office as an Associate. She has been practicing in estate planning, probate and guardianship since 2015, representing a variety of clients with varying domestic relationships. Mrs. Earp has also practiced in the fields of creditor rights, bankruptcy and real estate since 2016. Mrs. Earp is licensed to practice in Arizona.

EMMA M. LAMMAWIN
Ms. Lammawin joins our Newport Beach, California office as an Associate. She obtained her Juris Doctorate from Chapman University, Fowler School of Law. During law school, Ms. Lammawin worked as a law clerk at several firms specializing in entertainment, intellectual property, and business law. Ms. Lammawin is licensed to practice in California.