ACI's 25th National Conference on Consumer Finance Class Actions & Litigation

April 7-8, 2016

Residential Mortgage: Recent Trends

Terry C. Frank, Esq.,
Partner
Kaufman & Canoles, P.C.

W. Clark Goodman
Womble Carlyle Sandridge & Rice, LLP

David Piper, Shareholder
Keesal, Young & Logan

Tweeting about this conference?

@ACI_Finance #ACIConsumerFinance

Foreclosure and Loss Mitigation Issues for Property Secured by FHA Loans

Terry C. Frank
Kaufman & Canoles, P.C.
Two James Center
1021 East Cary Street, Suite 1400
Richmond, VA 23219-4058
T (804) 771.5745
F (888) 360.9092
tcfrank@kaufcan.com
www.kaufCAN.com

FHA Face-To-Face Overview

- The Federal Housing Administration ("FHA"), under the Department of Housing and Urban Development ("HUD"), insures certain loans made by independent lenders to qualifying homebuyers.
- As a result, the FHA requires that lenders comply with certain servicing practices for the loans
- One of these practices—the "face-to-face-requirement"—obligates mortgagees to meet with borrowers to discuss loss mitigation under certain circumstances, or make a reasonable attempt to do so, prior to initiating foreclosure.

FHA Face-To-Face Overview

"The mortgagee must have a face-to-face interview with the mortgagor, **or make a reasonable effort to arrange such a meeting**, before three full monthly installments due on the mortgage are unpaid. If default occurs in a repayment plan arranged other than during a personal interview, the mortgagee must have a face-to-face meeting with the mortgagor, or make a reasonable attempt to arrange such a meeting within 30 days after such default and at least 30 days before foreclosure is commenced . . . ." 24 CFR § 203.604(b)

FHA Face-To-Face Overview

- A "**reasonable effort** to arrange a face-to-face meeting" requires at least two things:

  (1) "[O]ne letter sent to the mortgagor certified by the Postal Service as having been dispatched," **and**

  (2) "[A]t least one trip to see the mortgagor at the mortgaged property" (unless the mortgaged property is more than 200 miles from the mortgagee, its servicer, or a branch office of either, or it is known that the mortgagor is not residing in the mortgaged property)

- 24 CFR § 203.604(d)

FHA Face-To-Face Overview

- A face-to-face meeting is not required in the following scenarios:

  (1) The mortgagor does not reside in the mortgaged property;

  (2) The mortgaged property is not within 200 miles of the mortgagee, its servicer, or a branch office of either;

  (3) The mortgagor has clearly indicated that he will not cooperate in the interview;

  (4) A repayment plan consistent with the mortgagor's circumstances is entered into to bring the mortgagor's account current thus making a meeting unnecessary, and payments thereunder are current; or

  (5) A reasonable effort to arrange a meeting is unsuccessful.

- 24 CFR § 203.604(c)

Face-to-Face Incorporation in Loan Documents

- FHA regulatory requirements, including the face-to-face condition, typically are "enforceable" by borrowers through provisions incorporating applicable regulations in loan documents.

- Courts have found that satisfaction of these requirements is a condition precedent to a foreclosure.

Face-to-Face Incorporation in Loan Documents

- Mathews v. PHH Mortgage Corp., 283 Va. 723, 724 S.E.2d 196 (2012):
  - "[T]he terms used in . . . the Deed of Trust clearly state that the rights of acceleration and foreclosure accrue only if permitted by HUD's regulations. 24 C.F.R. §§ 203.500 and 203.606(a) clearly express HUD's intent that foreclosure proceedings are not permitted unless the lender has complied with the Regulation. The Regulation therefore is incorporated as a condition precedent in the Deed of Trust." Id. at 734-37, 724 S.E.2d at 201-03.
- The deed of trust in Mathews provided as follows:
  - **"(d) Regulations of HUD Secretary.** In many circumstances regulations issued by the Secretary will limit [the l]ender's rights, in the case of payment defaults, to require immediate payment in full and foreclose if not paid. This Security Instrument does not authorize acceleration or foreclosure if not permitted by the regulations of the Secretary."

Face-to-Face Incorporation in Loan Documents

- The Mathews court found this language was clear and unambiguous, and that it "express[ed] the intent of the parties that the rights of acceleration and foreclosure do not accrue under the Deed of Trust unless permitted by HUD's regulations."
- "Therefore, the Deed of Trust expressly withholds authorization to accelerate or foreclose if the Regulation does not permit [the lender] to do so."

Face-to-Face Incorporation in Loan Documents

- The Mathews decision was adopted as California law by the 1st District Court of Appeals in Pfeifer v. Countrywide Home Loans, Inc., where the court also met a pre-foreclosure challenge based on face-to-face violations.

- "We hold that the Pfeifers can request the court to enjoin the nonjudicial foreclosure procedure based on the failure to conduct a face-to-face interview as mandated by the FHA deed of trust and can request declaratory relief stating that the lenders do not have the authority to proceed with a nonjudicial foreclosure until they comply with the HUD servicing regulations." 211 Cal. App. 4th 1250, 1281, 150 Cal. Rptr. 3d 673, 698 (Cal. App. 1st Dist. 2012).

HUD Guidelines (Servicing Handbook)

- In addition to the above regulations, HUD publishes a guidance document entitled "Administration of Insured Home Mortgages (4330.1)" (the "Handbook") (available at http://portal.hud.gov).

- The Handbook imposes an additional requirement on mortgagees—that the interviewer sent to the mortgaged property for the face-to-face interview must have de facto underwriting authority.

HUD Guidelines (Servicing Handbook)

"3. Interviewer's Authority. The employee representing the mortgagee at these interviews **needs to have the authority to propose and accept reasonable repayment plans and/or limit their actions to the realm of that authority**. The interview has little value if the mortgagee's representative must take proposals back to a superior for a decision.

NOTE: Where a mortgagee's representative exceeds his/her authority by agreeing to a repayment plan at the time of the interview, the fact that he overstepped his/her authority is not sufficient justification for the mortgagee not accept repayment plan agreed to by the mortgagee's representative."

Handbook § 7-7(c)(3)

HUD Guidelines (Servicing Handbook)

- Plaintiff's attorneys have used the foregoing Handbook provision to manufacture a cause of action for violating FHA rules even where the regulatory language in 24 CFR § 203.604(b) has been complied with, by claiming that any representative sent to the property does not have authority to propose and accept repayment plans.

- Many higher courts have not yet determined whether loan documents incorporate the additional interviewer authority condition stated in the Handbook.

HUD Guidelines (Servicing Handbook)

- Courts have used HUD guidelines in similar contexts only for interpretative guidance, not mandatory additional requirements.

- See, e.g., Mathews, 283 Va. at 740, 724 S.E.2d at 204-05 (noting a HUD online FAQ "would not control because it was not promulgated under the procedures for substantive rulemaking required by the Administrative Procedure Act," and "therefore does not have the force of law"); Wells Fargo Bank, N.A. v. Cook, 87 Mass. App. Ct. 382, 385-89, 31 N.E.3d 1125, 1129-31 (Mass. App. Ct. 2015) ("Although the HUD Handbook is not binding on the court, it is relevant interpretive guidance that should be used when construing the HUD regulations."); Mortgage Assocs. v. Smith, No. 86 C 1, 1986 U.S. Dist. LEXIS 16907, at *4 (N.D. Ill. Dec. 4, 1986) ("The controlling authority is the C.F.R. provision which plainly requires certified mail. Therefore, the court will not consider the HUD Handbook provision.")

Relevant Face-to-Face Case Law

- Borrowers have been successful in asserting certain causes of action, both pre and post-foreclosure, predicated on purported face-to-face violations.
- Mathews v. PHH Mortgage Corp., 283 Va. 723, 724 S.E.2d 196 (2012) is a seminal case on the FHA face-to-face requirements.
- Mathews was a pre-foreclosure declaratory judgment action where the court found that an **impending** foreclosure could be prevented via a declaratory judgment action where the face-to-face requirements were not met. See also Pfeifer v. Countrywide Home Loans, Inc., 211 Cal. App. 4th 1250, 1281, 150 Cal. Rptr. 3d 673, 698 (Cal. App. 1st Dist. 2012).

Relevant Face-to-Face Case Law

- The Supreme Court of Virginia next met the FHA face-to-face requirement in Squire v. Va. Hous. Dev. Auth., 287 Va. 507, 758 S.E.2d 55 (2014). Squire dealt with a post-foreclosure action for breach of contract, breach of fiduciary duty, rescission, and quiet title.

- The Squire court found a borrower pleaded valid claims for breach of contract and breach of fiduciary duty against her lender and the substitute trustee, respectively, based on a failure to make a reasonable effort to arrange a face to face.

- The Squire court did, however, reject borrower's contention that a prior foreclosure sale should be rescinded based on inadequate price and notice to the purchaser.

Relevant Face-to-Face Case Law

- In Chief Justice Kinser's Squire dissent, she found that "[c]ourts are split . . . on the question whether a mortgagor may maintain a post-foreclosure breach of contract action based on a mortgagee's non-compliance with HUD regulations, even when the HUD regulations are incorporated in a deed of trust."

- Only a "minority of jurisdictions, however, have reasoned that when HUD regulations are incorporated in a deed of trust, non-compliance can serve as the basis for a post-foreclosure breach of contract action against a mortgagee."

Relevant Face-to-Face Case Law

- In Soto v. Wells Fargo Bank, N.A. for example, the court held as follows:
  - Wells Fargo says this claim fails because plaintiff does not have a private cause of action under 24 C.F.R. § 203.604. Wells Fargo is correct. **It is well-established that the National Housing Act and attending regulations do not expressly or implicitly create a private right of action to mortgagors for a mortgagee's noncompliance with the Act or regulations**. Federal Nat. Mortg. Ass'n v. LeCrone, 868 F.2d 190, 193 (6th Cir. 1989) (no express or implied right of action in favor of the mortgagor exists for violation of HUD mortgage servicing policies); Wells Fargo Bank, N.A. v. Favino, 2011 U.S. Dist. LEXIS 35618, 2011 WL 1256771 (N.D. Ohio Mar. 31, 2011).
- No. 11-14064, 2012 U.S. Dist. LEXIS 4195, at *12 (E.D. Mich. Jan. 13, 2012) (emphasis added).

Relevant Face-to-Face Case Law

- California courts later extended Pfeifer by holding that "the fact that [a] trustee sale was completed . . . does not bar plaintiffs from seeking the equitable cancellation of the trustee's deed." Fonteno v. Wells Fargo Bank, N.A., 228 Cal. App. 4th 1358, 1371, 176 Cal. Rptr. 3d 676, 687 (Cal. App. 1st Dist. 2014).

- "The Pfeifers were allowed to pursue equitable relief because, although brought as part of an affirmative claim for wrongful foreclosure, it was essentially defensive in nature, i.e., a proverbial shield, while their pursuit of damages was not allowed because it was offensive in nature, i.e., a proverbial sword."

Actions Based on Other FHA Provisions

- In addition to the face-to-face requirements, plaintiff's attorneys have predicated causes of action on the incorporation of other FHA regulations in loan documents.

- For example, in Young v. Wells Fargo Bank, N.A. et al., Case No. CL14-7547 (Va. Cir. Ct. 2015) (on appeal to Virginia Supreme Court), the plaintiff claimed his lender violated 24 CFR § 203.501, which requires that lenders consider comparative effects of servicing actions (i.e., loss mitigation), and take such action that "can reasonably be expected to generate the smallest financial loss to" HUD.

Actions Based on Other FHA Provisions

- In Young, after an initial short sale price was approved, the buyer raised the purchase price due to interior conditions of the property. Borrower's subsequent short sale request was rejected and foreclosure was initiated.

- Borrower claimed that his lender should have (1) obtained an appraisal, (2) discussed the condition of the property's interior with the agent and purchaser, and (3) requested a detailed statement to determine whether foreclosure would generate the smallest loss to HUD.

- The Young court dismissed that case with prejudice, finding that "Defendants have clearly met [their] requirement by not only considering, but also approving Plaintiff's initial short sale proposal. Defendants are not required to approve a lower purchase price via short sale provided they take appropriate actions which could reasonably have been expected to result in the least amount of financial loss to HUD."

Residential Mortgage: Recent Litigation

- Issues arising out of 2014 RESPA Amendments and a View from the South

  - W. Clark Goodman
    - Partner, Womble Carlyle, Sandridge & Rice, LLP
    - Charlotte, NC

RESPA Amendments - 12 C.F.R. § 1024.41

- Creates two new obligations for loan servicers and lenders servicing their own loans:
  - Servicers must conduct full review of a loss mitigation application within 30 days of receipt.
  - Dual-Tracking is now prohibited by regulation.
- Why does this matter in 2016?
  - *Laverpool v. Taylor, Bean & Whitaker Mortgage Corp.*, 2015 WL 8179844, (N.D. Ga. Dec. 7, 2015)
    - A borrower may enforce the provisions of § 1024.41 pursuant to section 6(f) of RESPA (12 U.S.C. § 2605(f)).
    - Private Right of Action.

RESPA Amendments - 12 C.F.R. § 1024.41

- Comprehensive review of complete loss mitigation application
  - Within 5 days of receipt of a complete loss mitigation application, servicer must respond and indicate whether the application is complete.
  - Once complete application received, a comprehensive loss mitigation review must be conducted within 30 days.
  - Post-2014, a servicers only required to comply with the requirements of this section for a single complete loss mitigation application.
- Nothing in § 1024.41 imposes a duty on a servicer to provide any borrower with any specific loss mitigation option.

RESPA Amendments - 12 C.F.R. § 1024.41

- What if Borrower was denied multiple times before January 10, 2014?
  - Still have to conduct a full review.
  - *Bennett v. Bank of Am., N.A.*, 2015 WL 5063271, (E.D. Ky. Aug. 26, 2015)
    - New review required in 2014 despite multiple 2010-2013 denials.
  - *Austerberry v. Wells Fargo Home Mortgage*, 2015 WL 8031857, at *5 (E.D. Mich. Dec. 7, 2015)
    - Recognizing cause of action for failure to review loss mitigation application and provide written resolution within 30 days.

RESPA Amendments - 12 C.F.R. § 1024.41

- Dual Tracking Prohibited
  - If servicer receives a complete loss mitigation application more than 37 days before a foreclosure sale, the servicer must complete the following before the sale or any motion for foreclosure judgment:
    - Review for all l/m options;
    - Provide written notice of options/denial
    - If denied, provide specific reasons,
    - Provide deadline for appeal.
  - New Appeal Process Created

RESPA Amendments - 12 C.F.R. § 1024.41

- Dual Tracking, con't.
  - A servicer shall not make the first notice or filing required by applicable law for any foreclosure proceeding unless:
    - borrower is more than 120 days delinquent;
    - foreclosure is based on a violation of a due-on-sale clause; or
    - the servicer is joining foreclosure action of a subordinate lienholder.

RESPA Amendments - 12 C.F.R. § 1024.41

- Dual Tracking, con't.
  - If Borrower submits an application before the servicer has made the first notice or filing required for foreclosure, the servicer shall not make the first notice or filing unless:
    - a denial letter has been sent regarding loss mitigation options & appeals are exhausted; or
    - the borrower fails to perform under a loss mitigation agreement.

RESPA Amendments - 12 C.F.R. § 1024.41

- Dual Tracking in the Courts
  - *Wentzell v. JPMorgan Chase Bank, Nat. Ass'n.*, 2015 WL 5752605 (5th Cir. 2015) (citing *Houle v. Green Tree Servicing*, 2015 WL 1867526, at *3 (E.D. Mich. Apr. 23, 2015))
    - § 1024.41 creates a federal cause of action against a servicer for dual-tracking .
  - *Ramos v. WFBNA*, 2016 WL 233142 (S.D. Fl. Jan. 13, 2016)
    - Allowing dual-tracking claim to proceed past 12(b)(6) arguments.

RESPA Amendments - 12 C.F.R. § 1024.41

- Dual Tracking in the Courts
  - Damages
    - No injunctive relief available.
    - Actual damages do not consist of FMV of the Property
    - Emotional damages may be available if properly pled
    - Statutory damages available
      - *Austerberry v. Wells Fargo Home Mortgage*, 2015 WL 8031857, at *5 (E.D. Mich. Dec. 7, 2015)

A View from the South – Lender Liability Theories

- *Synovus Bank v. Tracy*, 603 F. App'x 121 (4th Cir. 2015)
  - Citing *Dallaire v. Bank of Am., N.A.*, 367 N.C. 363, 760 S.E.2d 263 (2014) - Ordinary borrower-lender transactions are arms-length, and do not create fiduciary duty
  - District Court decision rejected wide range of liability theories
    - Negligent misrepresentation
    - Fraud
    - Unfair/deceptive trade practices
    - ILSA

A View from the South – Lender Liability Theories

- *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 781 S.E.2d 1 (N.C. 2015)
  - Rejected "indirect reliance" based on approval of loan

"Here the complaint alleges that the appraiser defendants fabricated and overstated appraisals, and concealed from plaintiffs this conduct, all of which became the basis for the approval of financing for plaintiffs' purchases. In this way, plaintiffs allege they relied on the appraisals, regardless of whether they personally viewed them…. Further, this conclusion is bolstered by common sense and everyday experience. When buying a house, parties commonly understand that unless the house appraises for the contract price (at least), the lender will not approve a loan to finance the purchase. Therefore, even though the appraisers here were hired by the lender, to which it supplied the appraisals, plaintiffs allege that the appraisals were essential to the transaction and were relied upon by the parties to the purchase."

Arnesen at 16, Hudson, J. dissenting

A View from the South – Lender Liability Theories

- *Lawrie v. Ginn Development, Fifth Third, Wachovia Bank, Suntrust Mortgage,* 2014 WL 4788067 (M.D. Florida 2014)
  - Putative class action
  - Four attempts at asserting the claims
  - Rejected theories of fraud on the marketplace and inflated price as grounds for RICO conspiracy, civil conspiracy, breach of fiduciary duty, and negligent supervision

A View from the South – Lender Liability Theories

- A question for you – FIRREA theories?

A View from the South - Foreclosure

- Eleventh Circuit/GA
  - *Edward v. BAC Home Loan Servicing, L.P.,* 534 Appx. 888 (11th Cir. 2013).
    - Under Georgia law, no wrongful foreclosure claim can be brought unless Plaintiff alleges tender of funds sufficient to satisfy debt
  - *Moore v. McCalla Raymer,* 916 F.Supp.2d 1332 (N.D. Ga. Jan. 2, 2013)
    - Borrower has no standing to challenge assignment of mortgage
  - *You v. JPMorgan Chase Bank*, 293 Ga. 67 (2013)
    - Holder of Security Deed can pursue foreclosure.
    - No requirement that the Deed holder hold the Note as well.

David D. Piper
Keesal, Young & Logan

Yvanova v. New Century Mortgage Corporation 62 Cal 4th 919 (2016)

KEESAL YOUNG & LOGAN

AMERICAN CONFERENCE INSTITUTE

Holding is *extremely* narrow

"Our ruling in this case is a narrow one. We hold only that **a borrower who has suffered a nonjudicial foreclosure does not lack standing to sue for wrongful foreclosure based on an allegedly void assignment** merely because he or she was in default on the loan and was not a party to the challenged assignment."
(62 Cal. 4th at 924.)

Three Components of the Holding

- IF the borrower:
  - Suffered a nonjudicial foreclosure, and
  - Alleges an assignment of the DOT is void, then
- Borrower has "legal authority to challenge the validity of an assignment." (62 Cal. 4th at 928.)

WHAT *YVANOVA* DOES NOT HOLD

Yvanova Does Not Apply to Pre-Foreclosure Claims

- "We do not hold or suggest that a borrower may attempt to preempt a threatened nonjudicial foreclosure by a suit questioning the party's right to proceed."
  (62 Cal. 4th at 924.)

Yvanova Does Not Attempt to Determine the Merits of Yvanova's Claim

- "Nor do we hold or suggest that plaintiff in this case has alleged the facts showing the assignment is void or that, to the extent she has, she will be able to prove those facts."
(62 Cal. 4th at 924.)

Yvanova Addresses Only the Standing Issue

- "Nor, finally, in rejecting defendants' arguments on standing do we address any of the substantive elements of the wrongful foreclosure tort or the factual showing necessary to meet those elements." (62 Cal. 4th at 924.)

Yvanova Offers No Guidance as to whether Tender Must Be Alleged in a Wrongful Foreclosure Action

- "Our review being limited to the standing question, we express no opinion as to whether plaintiff Yvanova must allege tender to state a cause of action for wrongful foreclosure under the circumstances of this case."
  (62 Cal. 4th at 929, fn. 4.)

Yvanova Offers No Guidance with regard to Available Remedies in the Wrongful Foreclosure Context

- "Nor do we discuss potential remedies for a plaintiff in Yvanova's circumstances." (62 Cal. 4th at 929, fn. 4.)

Yvanova Does Not Preclude the Use of the "Prejudice" Defense

- "As to prejudice, we do not address it as an element of wrongful foreclosure."
  (62 Cal. 4th at 929, fn. 4.)

Yvanova Does Not Decide whether the "Timing/Securitization" Issue Is a "Void or Voidable" Challenge

- "[Glaski's "timing/securitization" allegations that assignments occurring after the closing date of a trust render an assignment void as opposed to voidable] are not before us."
(62 Cal. 4th at 931.)

What to Expect?

- Look for a judicial primer on the meaning of void versus voidable. Although intuitively simple, the application of the distinction can be difficult. The entire *Yvanova* opinion rides on this distinction.
- Look for courts to refuse to apply *Yvanova* to pre-foreclosure claims. *Saterbak* has already done so.

What to Expect?

- Pro-banking courts remain armed with their pre-existing arsenal to dismiss claims that attempt to alter nonjudicial foreclosure scheme.
- While *Jenkins* and others may have been disapproved as to their stance on standing, they remain viable when considering the substantive elements of the wrongful foreclosure claim.

What to Expect?

- The primary problem with the opinion is that it has preserved the inconsistency arising from the initial *Glaski* decision.
- Expect demurrers to be replaced with more expensive motions for summary judgment seeking to resolve factual issues, at least until opinions like *Saterbak* predominate.

But Wait, It Isn't That Bad

- *Saterbak v. JPMorgan Chase Bank, N.A.*, 2016 Cal. App. LEXIS 197 (March 16, 2016) (4th District, Division One) is here to help!

Quick Facts

- Saterbak, who defaulted on her loan, sought to enjoin a nonjudicial foreclosure by alleging that the DOT was transferred to a trust after its closing date, and therefore, the assignment invalid.
- She also claimed that the assignment document was robo-signed and forged.
- Saterbak also sought to cancel the assignment pursuant to CC 3412.
- The trial court rejected Saterbak's arguments, sustaining the bank's demurrer to second amended complaint.

The Borrower Lacked Standing

- Borrower was unable to demonstrate that "she has some beneficial interest that is concrete and actual, not conjectural or hypothetical." (citing, *Holmes v. California Nat. Guard* (2001) 90 Cal. App.4th 297, 315.)

Jenkins Is Alive and Well

- The court's analysis started with *Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal. App.4th 497, 513 and noted that *Jenkins* refused to allow preemptive suits seeking to enjoin foreclosure because they resulted in an impermissible interjection of the courts into a nonjudicial scheme enacted by the legislature.
- Citing to *Gomes v.Countrywide Home Loans, Inc.* (2011) 192 Cal. App.4th 1149, 1156, the court emphasized that the borrower was not seeking to remedy misconduct but instead was attempting to impose an additional requirement on lenders that they prove they are authorized to initiate a foreclosure.

Is *Yvanova's* Void vs. Voidable Distinction Viable?

- The court confirmed that *Yvanova* standing only exists as to void, as opposed to voidable claims.
- Citing to *Rajamin v. Deutsche Bank Nat'l Trust Co.* (2014) 757 F.3d 79, 88-89, the court held that the "timing/securitization challenge [argued by Saterbak] was merely voidable, and therefore unaffected by Yvanova."

Other Nuggets from *Saterbak*

- With regard to *Glaski v. Bank of America* (2013) Cal. App.4th 1079, which *Yvanova* attempted to resuscitate, the *Saterbak* court merely advised that the New York case upon which *Glaski* had relied had been overturned, and declined to follow its reasoning.

Saterbak

- Saterbak argued the deed of trust conferred standing.
- The court rejected this argument and held the provisions of the deed of trust cited by Saterbak "do not change her standing obligations under California law; they merely give Saterbak the power to argue any defense the *borrower* may have to avoid foreclosure. As explained *ante*, Saterbak lacks standing to challenge the assignment as invalid under the PSA."

Saterbak

- Saterback's adhesion contract argument was also rejected.
  - Because the note is a negotiable instrument, a borrower must anticipate that it can and might be transferred to another creditor.
  - Saterbak had no reasonable expectation that she could challenge future assignments.

Saterbak

- Saterbak's Cancelation of instrument claim (CC Section 3412) was rejected:
  - Saterbak failed to allege "serious injury."
  - Even if the assignment was invalid, Saterbak could not allege "serious injury" because her obligations under the note remained unchanged.
  - Saterbak was in default so the assignment could not cause serious injury.
  - Saterbak failed to allege tender.

Final Thoughts

- *Yvanova* will continue to be limited to its facts.
- Based on post-*Glaski* sentiment, we will continue to see more decisions in line with *Saterbak*.
- If you have a foreclosure appeal:
  - You would much rather be:
    - In Fourth District, Division One instead of
    - In First District

HOMEOWNER BILL OF RIGHTS

Homeowner Bill of Rights

- Recent Prevalent Issues
  - Prohibition on Dual Tracking – Civil Code Section 2923.6(c)
    - Complete Application – CC 2923.6(h)
    - Prior Reviews – CC 2923.6(g) – Borrower Evaluated prior to January 1, 2013

Homeowner Bill of Rights

- Single Point of Contact – CC 2923.7
  - Means "individual or team of personnel each of whom has the ability and authority to perform the responbilities described [in the statute]. The mortgage servicer shall ensure that each member of the team is knowledgeable about the borrower's situation and current status in the alternatives to foreclosure process."
    (CC 2923.7(c))

Homeowner Bill of Rights

- Single Point of Contact – CC 2923.7
  - Must
    - Communicate with the borrower about foreclosure prevention alternatives and deadlines
    - Coordinate receipt of all documents and notify the borrower of missing documents.
    - Have access to current information and personnel to timely inform the borrower of the status of the foreclosure prevention alternative.
    - Ensure that borrower is considered for all available alternatives.
    - Have access to individuals with the ability and authority to stop foreclosure, when necessary.
      (CC 2923.7(b))

Thoughts Regarding Trends

- Pre-Sale Relief – Limited to injunctive relief (CC 2924.12(a)(1)).
- Post-Sale Relief – Actual damages (CC 2924.12(b))
- Can you cure? – "A mortgage servicer … shall not be liable for *any* violation that it has corrected and remedied prior to the recordation of the trustee's deed upon sale …" (CC 2924.12(c))

Thoughts Regarding Trends

- Attorneys Fees – Be wary of borrowers' lawyers seeking fees.
  - "A court may award a prevailing borrower reasonable attorney's fees and costs in an action brought pursuant to his section. A borrower shall be deemed to have prevailed for purposes of this subdivision if the borrower obtained injunctive relief or was awarded damages pursuant to this section." (CC 2924.12(i))
    - Preliminary Injunctions?
    - TROs?
    - Stipulated Relief?

Attorneys' Fees

- Borrowers can recover attorneys fees for obtaining a preliminary injunction.
  - *Monterossa v. Superior Court*, (2015) 237 Cal. App. 4th 747
  - *Pearson v. Green Treee Servicing, LLC*, 2015 U.S. Dist. LEXIS 18297 (N.D. Cal. 2015)

Questions