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CONSUMER FINANCE REPORT

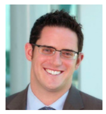
CALIFORNIA DEVELOPMENTS FROM A BUSINESS PERSPECTIVE

Kerry W. Franich and Elizabeth Holt Andrews, Editors

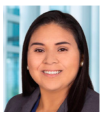
Winter 2019

When to Bring in a Trial Attorney . . . and What That Means

By:
Kristin L. Walker-Probst



By:
David A. Berkley



By:
Katherine Figueroa

Introduction

Less than one percent of all civil cases filed in California result in jury trials. Yet, in California, the number of attorneys continues to increase. These glaring statistics lead to the reality that the vast majority of attorneys who handle civil cases have <u>no</u> experience actually trying a case. Does it matter? It well might, especially if a case ends up in trial. Moreover, experienced trial attorneys see cases through a unique lens—the lens of the jury. This perspective can be invaluable at all stages of litigation, including discovery, settlement discussions and, of course, the trial itself.

Importantly, civil attorneys spend their careers studying legal issues, often with a focus toward dispositive motions and settlement. But, a trial attorney adds the perspective of how a jury will view the case. Incorporating that perspective early on—in deposition testimony, discovery responses, and educating the court through motion practice, can make a difference in the value of the case. That can translate to better settlements and verdicts at trial.

Trial attorneys are adept at developing a theme and enticing jurors by telling a story they can follow, digest, and ultimately side with. Ideally, this process does not happen overnight. Instead, the trial attorney studies the evidence and positions the case early on. From there, a story is born, which will be baked into every stage of the case. Similarly, the theme, which will determine the scope of the story told, is omnipresent and critically important at trial.

Given the above, should a case incorporate a trial attorney? And, if so, when? For the reasons outlined below, that decision should be thoughtful and perhaps based on more than just budget and case exposure.

More Attorneys, Fewer Trials, and Lack of Experience

It is a known fact in the legal community that less than one percent of all civil cases filed in California

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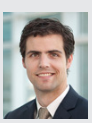
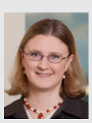
LETTER FROM THE EDITORS



By:
Kerry Franich



By:
Elizabeth Holt Andrews

Welcome to the Winter 2019 Consumer Finance Newsletter! In this issue, you'll find a feature article by Kristin Walker-Probst, David Berkley, and Katherine Figueroa that examines the increasing number of California attorneys, the decreasing frequency of trials, and what those trends mean for clients whose businesses must defend high-volume litigation.

In addition, this issue focuses on several noteworthy industry developments. Mark Wraight discusses how a recent amendment to Regulation CC might change liability in disputes where an original negotiable instrument is no longer available. Diane Cragg analyzes how California's recently enacted Consumer Privacy Act might apply in the employment context. And Loren Coe examines how a decision now pending in the California Supreme Court might impact the rights of sold-out junior lienholders. And, Don Querio and Erik Kemp provide their thoughts on the latest in class arbitration.

Meanwhile, in advance of *Jesinoski*'s four-year anniversary, Stephen Britt takes stock of how the Supreme Court's ground-shifting opinion has aged and what defenses remain in TILA-related litigation.

Finally, appellate attorneys Jan Chilton and Elizabeth Andrews supply the latest summaries of noteworthy financial-services opinions drawn from the Ninth Circuit and California's appellate courts.

We hope you enjoy this edition of the newsletter. If there are topics you'd like to see included in the next issue, please let us know at kwf@severson.com and eha@severson.com.

IN THIS ISSUE

state courts result in jury trials.[1] Moreover, the number of civil cases actually tried in federal court has followed an almost identical downward trend.[2] For example, in 1962, the number of federal trials "peaked at 12,529 and account[ed] for 4.7 percent of the cases terminated that year."[3] In 2006, only 3,555 civil cases, that is 1.3 percent, actually went to trial.[4]

Yet the number of attorneys admitted to the California State Bar has increased. In 2017, California had a total of 170,444 resident active attorneys—an increase of up to .08% from 2016. In short, there are more attorneys, but fewer cases to try.

The shortage of civil cases going to trial has prevented many attorneys from gaining invaluable trial experience. In a nationwide survey with 1,358 responses from litigation attorneys in 45 different states (hereinafter the "Litigation Survey")[5], 30% of respondents with ten years of experience had never tried a case to a jury, and only 36% had tried two or more.

Overall, the survey found that a majority of its responding litigators had not tried a single case to a jury until they had about seven years of experience in litigation.

The effect of this reality is consequential. The scarcity of civil cases actually going to trial has created an entire pool of attorneys lacking the skills and trial experience to obtain the best possible resolution for their client.[6]

<u>Trial Is A Show</u>

Trial attorneys understand that jurors need to be engaged in the story that is being told so that, at the end of the day, they are motivated—perhaps subconsciously—to root for one side over another. To accomplish this, trial attorneys carefully weave their theme throughout the trial. They vary their tone, their pace, and their volume. They are thoughtful about everything in the trial: the order of events in their examinations, witness order, exhibit order, when to use visual aids—and when to use silence, just to name a few. The production that is trial is as much about the show as it is the law—perhaps more. As such, "a good trial lawyer is a showman . . . because a trial lawyer knows how to build suspense and deliver in ways that leave the jury with a lasting impression."[7]

As jurors watch the trial, they identify which witnesses and attorneys they relate to and believe. In the end, they may be more motivated by what they view as "fair" versus what is legally sound—a concept referred to as "jury nullification." Trial lawyers understand that verdicts that stray from legal reasoning can often be the norm rather than the exception. Thus, they may focus less on discrete legal issues and more on the big picture—or the story from their client's perspective. While trial attorneys appreciate that the production begins once the prospective jurors are led into the courtroom, the focus on a persuasive story starts the moment the file comes in the door.

<u>It's Not Just About the Verdict</u>

In the Litigation Survey, 87 percent responded that their clients heed their advice regarding dispute resolution methods at least three-fourths of the time. This means that decisions impacting case value and trial are

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[1] *See* Judicial Council Of California, *2017 Court Statistics Report: Statewide Caseload Trends 2006–2007 Through 2015–2016* (2017), available at http://www.courts.ca.gov/documents/2017-Court-Statistics-Report.pdf (last visited December 7, 2018).

[2] Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Court,* Journal of Empirical Legal Studies (Nov. 2014), available at http://epstein.wustl.edu/research/courses.judpol.Galanter.pdf (last visited December 7, 2018).

[3] Terry Carter, *The Endangered Trial Lawyer*, ABA Journal (March 2009), available at http://www.abajournal.com/magazine/article/the_endangered_trial_lawyer (last visited December 7, 2018).

[4] *Id.*; *see* Sally Herships, *The American Bar Association Is Trying To Address A Shortage Of Trial Lawyers*, Marketplace (Aug. 3, 2017, 1:00 PM), https://www.marketplace.org/2017/07/14/world/aba-seeks-address-shortage-trial-lawyersexperience ("After a slow decades-long decline, only about two percent of civil cases, such as divorce, product liability and family squabbles over wills, now make it to trial.").

[5] Tracy Walters McCormack & Christopher J. Bodnar, *Honesty Is The Best Policy: It's Time to Disclose Lack of Jury Trial Experience*, University of Texas School of Law, Public Law Research Paper No. 151 (Apr. 8, 2009), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1375103 (last visited December 7, 2018).

[6] Carter, *supra* note 3.

[7] Chris Arledge, *Litigators v. Trial Lawyers: The Differences and Why They Matter*, California Lawyer (July 6, 2017), available at http://legacy.callawyer.com/2017/07/litigators-v-trial-lawyers-the-differences-and-why-they-matter/ (last visited December 7, 2018).

(continues on page 3)

likely being made based on advice from attorneys who have little or no trial experience. [8]

But, when assessing a case to obtain the best result, trial experience matters. Reaping the benefits of having an experienced trial lawyer on your team does not begin at jury selection. Indeed, having trial counsel participate in initial case assessment can properly shape the direction of how a matter is handled. A trial attorney's experience and outlook can inform the decision making of each stage of litigation and greatly affect the outcome of the matter.[9]

Moreover, getting a trial attorney involved during all facets of discovery can prove critical. For example, during depositions, experienced trial lawyers know to ask the necessary follow up questions and cover all bases in order to frame their client's story and "box in" witnesses to specific responses. Also, it may be helpful to consult a trial attorney when deciding whether or not to videotape a deposition. Many litigators quickly opt against videotaping in order to save costs. But this may be short-sighted, because impeachment through video testimony can be substantially more impactful for jurors than merely reading from a deposition transcript. This reality can impact the value of the case—not just at trial but during settlement negotiations too.

Trial counsel can also ensure that the right kinds of discovery are taken so that all necessary evidence is marshaled in advance of trial. Follow up discovery to percipient witnesses—or even third parties—may prove invaluable to ensure admissibility, bolster the client's case or impeach the opponent.

Leverage

Retaining experienced trial counsel can also result in more favorable settlements. One reason for this is the message it sends to the opposing party.

First, including experienced trial counsel in settlement negotiations can signal that the client is willing to go to trial, if necessary. Merely including experienced trial counsel can lend credibility to the position that your client has presented its "best and final" offer.

Second, trial attorneys not only develop an affirmative story. They are constantly considering what weaknesses their opponent's story may have. Thus, they are adept at exposing sensitive pressure points that may lead to more favorable settlements.

Finally, as discussed above, trial attorneys may be best situated to properly value a case, should it go to jury. Thus, including them in settlement negotiations can be invaluable as they have a more accurate idea of what a jury would actually award.

Motion Practice

Trials also include a significant amount of motion practice. From pre-trial motions in limine to mid-trial submissions to post verdict requests, trial lawyers often find themselves burning the midnight oil drafting necessary briefs. Retaining experience in this regard can pay dividends.

For instance, experienced trial counsel knows exactly what to *include*, and more importantly what to *exclude*, from a trial brief. The trial brief should be a road map or even a "*cheat sheet*" for the judge to reference for the material facts and issues to be presented throughout the case. That said, it need not include each exhibit or all substantive legal authorities. In fact, often times, less is more. Having the seasoned trial counsel distill the key points in advance in a concise manner can make the difference between having a judge appreciate your trial preparation and various positions, on the one hand, and a judge who does not even bother to read the brief, on the other.

Further, filing the right motions in limine to exclude certain evidence can set the tone for the entire trial. Experienced trial attorneys appreciate the necessary balance between presenting the most critical issues to the trial court in pre-trial motion practice while simultaneously not inundating the court with too many requests. Too many pre-trial motions can numb the court and result in a blanket denial of all motions. This balancing test requires a prioritization that an experienced trial lawyer appreciates.

Moreover, drafting the right set of well-crafted motions in limine serves a dual purpose. First and foremost, the obvious goal is to exclude certain evidence

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8 The Litigation Survey also received responses from both individual and institutional clients to estimate the number of jury trials they believed a civil litigator would have tried in their first five years of practice. The individual clients, median response indicated that they believe civil litigators with five years' experience tried 10-16 trials. For corporate clients, their average response was eight trials with five trials being the most frequent estimation. Both of these estimates were far in excess—the Litigation Survey showed that 96.7 percent of respondents with five years of litigation experience had tried less than five cases to a jury and none more than six.

9 McCormack & Bodnar, *supra* note 5.

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from being introduced at trial. But seasoned trial counsel also appreciates the fact that pre-trial motions, even if unsuccessful, can be a useful opportunity to educate judges on the critical issues that must be presented to the jury. Often, judges refrain from making evidentiary calls until the evidence is presented before the jury. But litigating the right pre-trial motion in advance of opening statements will have planted the necessary seeds in the court's mind on *why* certain evidence should or should not be excluded. Having the court understand the rationale behind pre-trial requests is tantamount in getting judges to see the case through the client's lens.

The Trial Itself

Needless to say, from the time counsel reports to trial through the moment a jury returns a verdict, having experienced trial attorneys at the helm will prove beneficial. It is important that the attorney trying the case understand the difference between communicating with jurors and oral advocacy in front of a judge only. It is different. Connecting with jurors requires the simplification of complex issues, and getting jurors to relate to the client's story can be challenging. This communication begins during jury selection and carries through closing arguments.

The various phases of trial require a thoughtful approach regarding how much to include, what to include, how to present, and when to stop. There is an art to navigating concepts like where to stand, when to move, where to position demonstratives and how to fix evidentiary problems without appearing defeated. Flexibility is also key as rarely does a trial go as expected. In fact, most of the time, the opposite is true.

But, communicating with the jury is not limited to jury selection, opening statement and closing argument. During trial, the attorneys are indirectly communicating to jurors throughout the presentation of evidence when conducting direct and cross-examination of witnesses. It is not simply what questions are asked to witnesses but also how questions are posed and in what order. Also essential is that the attorneys critically *listen* to witnesses answers in shaping their next line of questions. Being flexible and able to "think on your feet" is undeniably one of the most important traits for an attorney at trial. Presenting witness testimony in a natural, dynamic, and conversational manner will not only keep the jurors' attention but also ensure that the appropriate inquiries are being made.

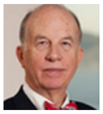
Conclusion

We repeatedly hear from litigants that the failure to involve seasoned trial counsel in the process early and often is their biggest regret. Indeed, the decision to involve a trial attorney at the outset or later on can have a significant impact on the outcome of a matter. As explained in detail throughout this article, experienced trial attorneys see cases through a unique lens. Seasoned trial lawyers see cases from the perspective of jurors: they entice the jury by developing themes and telling stories they can follow, digest, and ultimately side with. However, developing the manner to tell a client's story takes significant time and is baked in everything a trial attorney does. Accordingly, having trial counsel participate in initial case assessment from the outset can properly shape the direction of how a matter is handled and in turn, can actually save costs.

So, should a trial attorney be brought into a case? And if so, when? Of course, those answers depend on practical issues such as budget and case exposure. That said, budget and case exposure should not be the *only* considerations. Bottom line: whether or not the case is headed to trial, the decision of whether or not to include experienced trial counsel should be a thoughtful one that considers all of the issues presented above.

To learn more about Severson's active and diverse trial practice, please contact Kristen L. Walker-Probst at klw@severson.com, David Berkley at db@severson.com, or Katherine Figueroa at kf@severson.com.

Taking the Sting Out of Arbitration?



By:
Donald J. Querio

By:
Erik Kemp

In recent years, enormous strides have been made in replacing the lawyer-driven, one-size-fits-all class action system of litigation for consumer complaints with a system of arbitration that resolves the real claims of individual consumers. This revolution has been fostered by a series of decisions from the United States Supreme Court enforcing the plain language of the Federal Arbitration Act ("FAA"). *Concepcion v. AT&T Mobility*, 563 U.S. 333 (2011); *see also Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013); *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662 (2010). This term, the High Court will hear another FAA case which, if the trend continues, will reinforce *Concepcion*'s holding that class actions are fundamentally inconsistent with arbitration. *Lamps Plus, Inc. v. Varela*, 701 Fed. App'x 670 (9th Cir. 2017), *cert. granted*, 86 U.S.L.W. 3556 (U.S. Apr. 30, 2018) (No. 17-988).

Major companies, especially financial institutions, have encouraged this trend to provide relief for their shareholders from oppressive class actions and also to provide their customers with a quick and inexpensive forum to resolve legitimate disputes. Still, smaller companies such as auto dealers and other independent retailers have been skittish about arbitration because of the potential of runaway awards with only limited appeal rights. In automobile sales financing, it is customary for the arbitration clause to be located in the contract between the customer and the dealer that is subsequently assigned to a bank or finance company. Many such assignees require the inclusion of an arbitration clause as a condition of purchasing dealer-generated installment contracts and leases.

For example, the problem arises where an independent local dealer enters into a sales finance or lease contract with a customer who later presses a claim against the dealer for non-economic damages such as emotional distress, punitive damages and an injunction aimed at the dealer's basic business. The claims can arise out of the vehicle purchase or subsequent services. Although rare, there are instances where individual arbitrators have run amok and entered awards, both monetary and injunctive, that could cripple or kill such a small business. Correspondingly, there are cases where a customer's counsel works diligently on a meritorious case and encounters an arbitrator who is seriously misguided as to the legal merits of plaintiff's claim and sends him or her home with the proverbial goose egg. What recourse do the parties have where there is a serious mistake by an arbitrator?

Under the FAA, which will govern most sales of goods shipped interstate, the remedies for an errant award are very limited. The losing party may file a petition before the federal district court to vacate the arbitration award on the narrow grounds listed in Section 10(a) of the FAA:

(1) where the award was procured by corruption, fraud, or undue means;
(2) where there was evident partiality or corruption in the arbitrators, or either of them;
(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a). A few Circuit Courts have slightly expanded the grounds stated in Sections 10(a)(3) and (4) to include "manifest disregard of the law" by the arbitrator as a catch-all ground for vacating a runaway award. Subsequently, the U.S. Supreme Court held that Section 10(a) provides the "exclusive grounds" for vacating arbitration awards. *Hall St. Assocs. LLC v. Mattel, Inc.*, 552 U.S. 576, 584 (2008). Whether the *Hall* decision precludes the use of "manifest disregard" as an alternative grounds is undecided.

One later decision by the Second Circuit discusses the split in authority while reaffirming its adherence to the "manifest disregard" standard. *Sutherland Global Services v. Adam Technologies*, 639 Fed. App'x 697, 699–701 (2d Cir. 2016). At the same time, *Sutherland* also makes clear that a mere error of law does not rise to the level of "manifest disregard." *Id.* at 699. So, even in those circuits that employ the expanded standard, the petition to vacate faces a steep uphill battle.

The remedies in state court are even less certain, even for contracts within the jurisdictional reach of the FAA. Unless the parties expressly choose the FAA's procedural rules, the state's procedural rules on arbitration may govern the remedies available for vacating an arbitrator's erroneous award. Not surprisingly, California is one state that prefers its own procedural rules to the FAA. *Cronus Investments, Inc. v. Concierge Services*, 35 Cal. 4th 376, 394 (2005). While some states do permit review of arbitration awards for manifest error or on similar grounds, the standard remains high. So, in state court, too,

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the chances of convincing a court to reverse an arbitrator's award, even for a clear error of law, are slim.

Yet, there is hope. It lies in the drafting of the arbitration clause itself. Because arbitration is a creature formed by the parties' contract, there is room for the parties to create their own appeal rights within the arbitration. Oddly enough, the leading authority for the creation of this sort of appellate right comes from the California Supreme Court, which otherwise has been in the forefront of resisting the federal mandate to enforce arbitration in consumer and employment contracts. *Sanchez v. Valencia Holding Co., LLC*, 61 Cal. 4th 899 (2015). In *Sanchez*, a customer filed a class action seeking relief from an auto dealer for, among other things, failing to properly distinguish between licensing and registration fees in the itemization of charges in an installment contract. The dealer moved to compel individual arbitration and plaintiff countered that the arbitration clause was unconscionable on a number of grounds, one of which was the inclusion of the following appeal right:

> [A]n arbitrator's award "shall be final and binding on all parties, except that in the event the arbitrator's award for a party is $0 or against a party is in excess of $100,000, or includes an award of injunctive relief against a party, that party may request a new arbitration under the rules of the arbitration organization by a three-arbitrator panel."

Id. at 915 (quoting from the relevant arbitration clause). The customer complained that the appeal relating to the monetary award was imbalanced. The Court found that although there may be an appearance of imbalance, it was still enforceable:

> We agree with Valencia that the appeal threshold provision does not, on its face, obviously favor the drafting party. Assuming, as the parties do, the likely scenario of the buyer as plaintiff and the seller as defendant, the unavailability of an appeal from an award that is greater than $0 but not greater than $100,000 means that the buyer may not appeal from a non-$0 award that he or she believes to be too small, nor may the seller appeal from a quite substantial award (up to $100,000) that it believes to be too big. It may be reasonable to assume that the ability to appeal a $0 award will favor the buyer, while the ability to appeal a $100,000 or greater award will favor the seller. But nothing in the record indicates that the latter provision is substantially more likely to be invoked than the former. We cannot say that the risks imposed on the parties are one-sided, much less unreasonably so.

Id. at 916–17. Likewise, while noting that appellate review from an injunction is more likely to be sought by the dealer than the car buyer, the Court approved it.

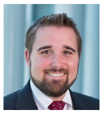
> [W]e find significant [the dealer's] concern that the scope of an injunction can extend well beyond the transaction at issue and can compel a car seller to change its business practices. Because of the broad impact that injunctive relief may have on the car seller's business, the additional arbitral review when such relief is granted furnishes a margin of safety that provides the party with superior bargaining strength a type of extra protection for which it has a legitimate commercial need. The potentially far-reaching nature of an injunctive relief remedy, which [plaintiff] does not dispute, is sufficiently apparent here to justify the extra protection of additional arbitral review.

Id. at 916 (internal citations omitted).

The appeal provision in *Sanchez* does not specify what the standard for review might be. It appears to call for an arbitration de novo before a three-arbitrator panel, but the parties could adopt any standard on which they agree, including a review based on errors of law alone. The parties would also be well advised to use arbitration services such as JAMS, whose members are largely retired trial court and appellate justices. What's important is that California's highest court has acceded to the parties' right to create an appellate right within the arbitration process in order to prevent nonsensical or extreme results. Small commercial entities should be encouraged by this potential right and larger institutional parties should be careful to build in such provisions in their form arbitration clauses.

For more information on appeal rights in arbitrations, please contact Donald J. Querio at djq@severson.com or Erik Kemp at ek@severson.com.

TILA Rescission Requests Based On Failure to Provide Material Disclosures During Loan Origination



By:
Stephen D. Britt

The Truth in Lending Act ("TILA"), 15 U.S.C. § 1635, allows a borrower to rescind a loan until midnight the third business day after origination if all material disclosures are provided during loan origination. The situation becomes more complex when a lender fails to provide material disclosures. In that circumstance, TILA provides a borrower with an extended period to request rescission: either (a) three years after loan consummation or (b) prior to any sale of the property—whichever comes first. 15 U.S.C. § 1635(f).

January 2019 marks the four-year anniversary of the High Court's opinion in *Jesinoski v. Countrywide Home Loans, Inc*., 135 S.Ct. 790 (2015). *Jesinoski* held that when a lender fails to provide material disclosures to a borrower during loan origination, TILA rescission requests are considered timely if they are received within three years of loan consummation. Since *Jesinoski*, borrowers have filed a growing number of lawsuits based on similar allegations. It therefore is worthwhile to revisit TILA's disclosure requirements, explore issues created by this extended three-year "rescission window," and review some developments in TILA rescission litigation post-*Jesinoski.*

Required "Material" Disclosures Under TILA

TILA requires lenders to provide a complete disclosure of all significant costs of the financing to a borrower during loan origination, including: (1) the amount of the finance charge, (2) the annual percentage rate, (3) the method of calculating finance charges and the balance upon which a finance charge will be imposed, (4) the total payments, (5) the number and amount of payments, and (6) the due dates or schedule of payments to pay the indebtedness. 15 U.S.C. § 1602(v). These disclosures must be made "clearly and conspicuously so that a person against whom it is to operate could reasonably be expected to have noticed it and understood its meaning." 15 U.S.C. § 1602(k). Additionally, lenders must provide at least two copies of the notice of a borrower's to rescind. 15 U.S.C. § 1635(a).

Initial disclosures are not considered defective for purposes of TILA, unless there is an error in one of the aforementioned "material" disclosures. Misstatements of other loan charges such as estimated property taxes, escrow fees, title insurance charges, adjustable rate mortgage endorsement charges, or recorder service/courier fees are not considered "material." *Bonte v. U.S. Bank, N.A*., 624 F.3d 461, 465–66 (7th Cir. 2010).

The Effect Of Assignments, Borrowers' Refinancing, And Foreclosure Proceedings On TILA Rescission Requests

The extension of a borrower's rescission right creates a number of unique questions.

Is an assigned creditor required to honor a timely rescission request? Under 15 U.S.C. § 1641(c), borrowers still have an extended three-year right to rescind based on the original lender's failure to provide material disclosures.

Can borrowers still rescind their original loan even after refinancing? The Ninth Circuit has taken the seemingly most logical position that a borrower who has refinanced their original loan forfeits their right to rescind that loan, since "there is nothing left to rescind." *King v. State of Cal*., 784 F.2d 910, 913 (9th Cir. 1986). At least one California appellate court, however, has rejected this holding by finding that the right to rescind survives refinancing of the original loan. *Pacific Shore Funding v. Lozo*, 138 Cal. App. 4th 1342, 1353–55 (2006).

What effect do foreclosure proceedings have on timely rescission requests? Under 15 U.S.C. § 1635(i), if foreclosure proceedings have been initiated against the property, the borrower still maintains the right to request rescission of the loan. But, a number of cases have firmly held that if the a foreclosure sale has been *completed*, the borrower's right to rescind is effectively terminated. *See, e.g.*, *Mehta v. Wells Fargo Bank, N.A*., 737 F. Supp. 2d 1185, 1192 (S.D. Cal. 2010); *Nool v. HomeQ Servicing*, 653 F. Supp. 2d 1047, 1051 (E.D. Cal. 2009).

Actions Required Upon Receipt Of Timely TILA Rescission Requests

What is a creditor required to do upon receipt of a timely TILA rescission request? Under 12 C.F.R. § 1026.23(d), creditors have 20 days from receipt of a request to return anything of value received from the borrower, including all interest, costs and fees. In *Merritt v. Countrywide Fin. Corp.*, 759 F.3d 1023, 1032–33 (9th Cir. 2014), the Ninth Circuit held borrowers need not tender their original loan funds with their initial rescission request to trigger a creditor's required response. Only after the creditor has returned all money received from the borrower (including finance charges) is the borrower required to return the loan proceeds. *Id.* at 1033.

Even though TILA, as interpreted by *Jesinoski*, provides that rescission is effected at the time a rescission request is received, it does not mandate immediate voiding of the corresponding security instrument. Numerous federal decisions have held that courts have discretion on

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a case-by-case basis to determine the borrower's ability to tender, or to actually require tender before effectuating rescission. *See, e.g.*, *Yamamoto v. Bank of New York*, 329 F.3d 1167, 1173 (9th Cir. 2003); *Briosos v. Wells Fargo Bank*, 737 F. Supp. 2d 1018, 1028 (N.D. Cal. 2010); *Sipe v. Countrywide Bank*, 690 F. Supp. 2d 1141, 1150 (E.D. Cal. 2010); *Garcia v. Wachovia Mortg. Corp.*, 676 F. Supp. 2d 895, 901 (C.D. Cal. 2009); *Carmichael v. JPMorgan Chase Bank, N.A.*, Civil No. 15cv1064 JAH(DHB), 2016 WL 9023431, at *4 (S.D. Cal. July 13, 2016).

Statutes of Limitations in TILA Litigation

Rescission Claims. Even after *Jesinoski*, courts continue to maintain that equitable tolling does not apply to TILA rescission claims: the three-year window to request rescission remains absolute. *Harms v. The Bank of New York Mellon*, No. C 16-01585 CW, 2017 WL 6049402, at *9 (N.D. Cal. Apr. 5, 2017); *Best v. Deutsche Bank Nat'l Trust Co.*, No. EDCV 16-02308-JGB (SPx), 2017 WL 7859406, at *8 (C.D. Cal. Mar. 14, 2017). Borrowers must also specify in their complaints what disclosures were not made during loan origination. *Kang v. Wells Fargo Bank, N.A.*, No. 18cv332-MMA (JMA), 2018 WL 1427081, at *8 (S.D. Cal. Mar. 22, 2018).

The Ninth Circuit recently resolved the issue of how long after a rescission request a borrower may wait to bring suit to enforce the request. In *Hoang v. Bank of America, N.A.*, No. 17-35993, 2018 U.S. App. LEXIS 34375 (9th Cir. Dec. 6, 2018), the Court explained that TILA does not provide a limitations period for a borrower's suit to enforce his or her rescission notice. So the court adopted what it considered to be the most closely analogous state law limitations period, which was the limitations period for suit on a written contract. In California, claims for breach of a written contract must be brought within four years. *Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1320 (9th Cir. 1998).

Damages Claims. Jesinoski has also affected the statute of limitations for borrowers to bring TILA damages claims. Under 15 U.S.C. § 1640(e), borrowers have one year to file suit seeking damages after a timely TILA rescission request is received (and the creditor fails to take action to effectuate the rescission). Since *Jesinoski*, several courts have allowed borrowers to file claims up to four years after origination if they can demonstrate: (a) they did not receive required material disclosures during origination, and (b) they timely sent rescission requests within the three-year window to do so. *Patino v. Franklin Credit Mgmt. Corp.*, 2017 WL 2289192, at *6 (N.D. Cal. 2017).

Given these harsh results, one thing remains very clear: ensuring compliance with TILA's disclosure requirements during loan origination continues to be the only way for creditors to avoid falling victim to a borrower's belated case of "buyer's remorse."

For more information about the Truth in Lending Act and defending claims arising from the Act, please contact Stephen Britt at sxb@severson.com.

BANK OPERATIONS

A Presumption of Alteration: Amendment to Regulation CC Resolves An Issue of Liability

By:
Mark Wraight

Modern payments law has centuries-old roots. In 1762 the Court of King's Bench in England articulated the "final payment rule" in the case of *Price v. Neal*, 97 Eng. Rep. 871 (1762). This rule, which places the loss on the drawee (or payor bank) for checks not authorized by the drawer, has been codified in the Uniform Commercial Code ("UCC"). But as technological innovation produces changes to payment systems and process, the law has struggled to keep pace. One example of tension between legacy payments law and modern-day payment systems is how to allocate liability for negotiable instruments under the *Price* final payment rule when an original negotiable instrument has been truncated and all that remains is a substitute check or electronic copy of the original. Without the original item, it can be difficult, if not impossible, to determine whether the check bears a forged maker's signature (as in the case of a counterfeit item) or instead has an altered payee or amount. This gap in payments law has created uncertainty for financial institutions.

In September 2018, the Board of Governors of the Federal Reserve System attempted to resolve this uncertainty by approving an amendment to Subpart C of Regulation CC. Effective January 1, 2019, when a dispute arises between financial institutions over liability for a check, and the original is no longer available, there will be a presumption that the check is altered and not a counterfeit item. *See* 12 C.F.R. § 229.38(i). Although the presumption

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is rebuttable, this gives the drawee a decisive advantage in pursuing a warranty claim against the upstream depository institution. There are strategies for rebutting this new evidentiary presumption. But before considering those strategies, it is helpful to understand the legal precedent that resulted in this significant change to Reg CC.

The Fourth Circuit Court of Appeals was one of the first courts to tackle the issue of how to allocate loss between the depository institution and the drawee when the original check is not available. In *Chevy Chase Bank, F.S.B. v. Wachovia Bank, N.A.*, 208 F. App'x 232 (4th Cir. 2006), a check payable to "Kon Pesicka/CJ International" in the amount of $341,187.45 was deposited into an account at Chevy Chase Bank. The drawer of the check, however, made the original check payable to "Hearst Magazines Division." Pursuant to its policy, Wachovia, the drawee, had truncated the original check after storing a digital copy. The drawer altered Wachovia to the fraud. Wachovia credited its customer's account and then sought repayment from Chevy Chase. Chevy Chase initiated the lawsuit, filing a complaint for declaratory relief. Wachovia responded with a cross-claim for breach of warranty. After the parties filed cross-motions for summary judgment, the trial court granted Chevy Chase's motion and denied Wachovia's. The Court of Appeal affirmed, finding that "Wachovia may not recover on its claim for breach of warranty unless it proves that the check it received from Chevy Chase was altered. The district court found that Wachovia failed to carry its burden on this issue. We agree." *Id.* at 235.

In finding that Wachovia failed to meet is burden of proving the check was altered, the Court was critical of the fact that Wachovia presented no evidence about its receipt of the check or the condition of the check. Most importantly, the Court determined that without the original check, Wachovia simply could not meet its burden of proof. "If Wachovia had produced the actual check itself, an examination of the check may have shed light on whether the check was altered. For example, the check may have contained smudges, erasures, chemical bleach marks, broken fibers, or other signs of alteration. Without the original, even Wachovia's own forensic expert testified that he could not say, with a reasonable degree of scientific certainty, that the check had been altered rather than forged or copied (and therefore counterfeit)." *Id*.

Although the *Chevy Chase* decision dealt an initial blow to downstream drawees, the Seventh Circuit reached the opposite result shortly thereafter. In *Wachovia Bank v. Foster Bancshares*, 457 F.3d 619 (7th Cir. 2006), Ms. Choi deposited a $133,026 check into her Foster Bank account. Although the check deposited was payable to Choi, the drawer originally issued the check to "CMP Media." The original item had been destroyed in the payment process. Wachovia, the drawee, sued Foster Bank seeking a declaratory judgment for indemnification based on Foster Bank's breach of its statutory presentment and transfer warranties under UCC sections 3-416, 3-417, 4-207, and 4-208. The trial court granted Wachovia's motion for summary judgment. Foster Bank appealed, making the same argument Chevy Chase Bank successfully made: because the original check had been destroyed by Wachovia, Wachovia could not prove that the check had been altered. Foster Bank's argument focused on the possibility that "Choi used sophisticated copying technology to produce a copy that was identical in every respect to the original check . . . except for an undetectable change of the payee's name." *Wachovia Bank*, 457 F.3d at 621.

The Court of Appeal summarized the issue as follows: "[s]o the case comes down to whether, in cases of doubt, forgery should be assumed or alteration should be assumed. If the former, Foster wins, and if the latter, Wachovia." *Id.* at 622. Although the Fourth Circuit resolved this issue in favor of finding a forgery, the Seventh Circuit resolved the issue in favor of finding an alteration and establishing a new rule "that the tie should go to the drawer bank." *Id*. The Court's reasoning was based on the notion that physical alteration was the traditional method used by crooks and thieves. It dismissed the use of modern technology to create a counterfeit check as a "novel method" and an "[un]common method of bank fraud." The court also suggested that even in the case of counterfeit items, the bank of deposit might still be the "cheaper cost avoider." *Id.* at 623. Although the court may have overlooked the extent of the impact technological advances would have on financial crime, the *Wachovia* rule came to be favored by subsequent courts.

For example, in *Bank of America v. Mazon State Bank*, 500 F. Supp. 2d 803 (N.D. Ill. 2007), George and Cathlyn Murdaugh deposited a $200,000 check issued by the Pharmaceutical Research and Manufacturers of America into their Mazon State Bank account. The check was originally made payable to the "University of Chicago Law School." After the Murdaughs made off with the funds, the fraud was discovered and the original check was turned over the FBI. The FBI apparently indicated that "from the naked eye, it did not appear that the check had been altered and they would have to send it to their laboratory." *Id.* at 805. Bank of America sued Mazon State Bank for breach of the presentment warranty and moved for summary judgment. The trial court originally denied the motion. Bank of America relied on the "tie goes to the drawee" rule established in *Wachovia*. But the Court agreed with Mazon State Bank that the cases should be distinguished, because unlike *Wachovia*, the original check was still available. The Court hypothesized that Mazon

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State Bank might be able to prove at trial that the check was forged. In denying the motion, the Court cautioned that its decision "should not be read as a repudiation of the *Wachovia* rule. . . . Rather, my ruling means simply that I am unwilling, at this stage, to declare the question a tie. Mazon is entitled to an opportunity to prove at trial that the check was forged." *Id.* at 807.

However, on reconsideration and after reassignment, the trial court granted summary judgment for Bank of America. The Court found that any differences between the facts of the case and the facts of *Wachovia* were "distinctions without a difference" and that the "*Wachovia* rule" controlled. *Bank of America, N.A. v. Mazon State Bank*, No. 05 C 7165, 2007 WL 2714117, at *3 (N.D. Ill. Sept. 17, 2007). In finally granting summary judgment for Bank of America, the Court was persuaded by evidence presented by Mason State Bank's expert witness. The expert examined the original check at the FBI headquarters and determined that "no conclusion could be drawn as to whether the check was altered or forged." *Id*. So even in a case where the original check was available for inspection, the depository bank was unable to marshall evidence to overcome the "tie goes to the drawee" rule.

Finally, in *J. Walter Thompson, U.S.A., Inc. v. First BankAmericano*, 518 F.3d 128, 134–35 (2d Cir. 2008), the plaintiff, J. Walter Thompson, issued a $382,210.15 check payable to its vendor, Outdoor Life Network. The check was drawn on a Bank of America account. A check in the same amount, but payable to "Diversified Business Enterprises, Inc." was later deposited into an account at First BankAmericano. The fraud was discovered after Bank of America paid the check. First BankAmericano refused Bank of America's demand for return of the funds. In the ensuing litigation, Bank of America brought warranty claims against First BankAmericano. The trial court granted Bank of America's motion for summary judgment. The Court of Appeals affirmed.

The Court did not offer any analysis of how loss should be allocated between financial institutions when the original check is unavailable, but did observe that technology "may render the distinction between forgery and alteration, and its loss allocation rules, obsolete." *J. Walter Thompson,* 518 F.3d at 139. And despite affirming the order granting summary judgment, the Court commented that "it is the role of the U.C.C. drafters, not this Court, to determine whether the [loss allocation] rule should be reconsidered in light of the changing technological landscape." *Id*.

With its amendment to Reg CC, the Federal Reserve has now stepped into the role the *J. Walter Thompson* Court was unwilling to fill. Reg CC's formal codification of the *Wachovia* rule begs the question: how can depository institutions defend warranty claims by rebutting the evidentiary presumption of alteration? There are a few practical strategies.

• For starters, the depository bank should determine whether the original item is available. The presumption only applies if the original item is no longer available. While almost all checks are routinely truncated during today's post-Check 21 collection process, in the rare care where the depository bank did not truncate the check, the bank should confirm whether the original was truncated by a downstream bank.

• Additionally, the depository bank should seek discovery from the drawer, including copies of other checks issued by the drawer. Valuable comparisons can be made between the questioned check and known, authorized exemplars. For example, comparisons can be made of borders, backgrounds, locations of logos and other elements, font sizes and styles, and other visible security features. All of these characteristics should match an altered item identically. But a counterfeiter would need to replicate all of these elements. Any observable or measurable differences would be evidence of a counterfeit item.

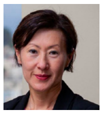
• The questioned check can also be examined for any misaligned text for the dollar amount and payee. Misalignment is more likely to occur in an altered item than a counterfeit item as the check stock is run through a printer multiple times.

• Finally, the dollar amount and payee lines of the questioned check can be examined for atypical information that might have been included to cover up traces of an alteration.

Reasonable minds can disagree whether the presumption of alteration is the correct rule for updating payments law. But at a minimum, the rule goes a long way to ending financial institutions' uncertainty created by the prevalence of substitute and electronic checks. The rule will benefit institutions when they are downstream in the check collection and payment process. And while the evidentiary presumption will place upstream institutions in a less advantageous position, there are strategies for rebutting that presumption.

For more information regarding check forgery claims and the amendment to Reg CC, please contact Mark I. Wraight at miw@severson.com.

The California Consumer Privacy Act – Does it Apply in the Employment Context?



By:
Diane Cragg

The California Consumer Privacy Act ("CCPA") takes effect on January 1, 2020. It will give California residents the right: 1) to know what personal information is being collected about them; 2) to know whether their personal information is sold or otherwise disclosed, and to whom; 3) to "opt out" and prevent businesses from selling their personal information; 4) to access their personal information, and request deletion under certain circumstances; and 5) to receive equal service and price, even if they exercise their rights under the CCPA.

Not all businesses will be covered by the CCPA. Only businesses that collect consumers' personal information, and determine the purpose and means of processing such information will be governed by the CCPA, if: 1) they have an annual gross revenue above $25 million; 2) they annually buy, sell, receive for commercial purposes or share for commercial purposes the personal information of 50,000 or more consumers or households; or 3) derive 50 percent or more of their annual revenue from selling consumers' personal information.

Before the CCPA takes effect, employers who meet these criteria should keep an eye out for legislation that clarifies whether "personal information" includes employee information gathered by employers in the employment context. For a number of reasons, it does not appear the CCPA was intended to apply to employers. Nevertheless, until clarifying language is introduced, employers should be aware of the CCPA's potential impact on personal information collected in the context of the employment relationship.

"Consumer" is defined in the CCPA as a natural person who is a California resident. Because the word "consumer" is defined so broadly, employees would also qualify as consumers. Therefore, the CCPA could easily increase the rights afforded to employees, while placing additional burdens on employers who qualify as businesses covered under the CCPA.

Personal information in the context of an employment relationship include the contents of an employee's personnel file—resume, tax documents, medical history, residence history, performance evaluations, characteristics of a protected class, biometric information and other professional or employment related information. Though employers in California are already obligated under Cal. Labor Code § 1198.5 to provide current and former employees with copies of their personnel files, the extent of accessible information would be broader under the CCPA. Under the CCPA, an employer would also be required to provide personal information that it collects through standard workplace monitoring. For example, if the employer has a record of internet sites the employee visited while using the employer's computers, that information would also have to be provided to the employee, as well as the employee's computer search history and interactions with websites, applications or advertisements. In addition, the employer would be required to provide any images of the employee, such as those obtained through the employer's security cameras, and an employee's geolocation data obtained through GPS tracking devices in employer-issued vehicles and phones.

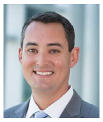
The CCPA would also require employers to disclose whether or not their employees' personal information is being sold or disclosed to third parties for "business purposes." Employers generally do not sell their employees' personal information. However, they are required in some circumstances to disclose their employees' personal information to third parties—such as providing employees' biometric information to payroll processing services.

Though an employee would have the right under the CCPA to request that his or her personal information be deleted, that deletion right does *not* apply to personal information that an employer must retain to comply with legal obligations. For example, employers are legally obligated under Cal. Labor Code § 1198.5 to retain employees' personnel records for at least three years after termination, and to retain employees' payroll records for at least three years pursuant to Cal. Labor Code § 226.

The additional burdens placed on employers could be significant. And while it is unlikely that the CCPA applies to personal information collected in the context of the employment relationship, employers should be prepared to confront the implications if the legislature fails to clarify that the CCPA is not applicable to personal information maintained in the employment context.

Ms. Cragg represents businesses and non-profit organizations in employment lawsuits and pre-litigation claims, including charges of wrongful termination, discrimination, harassment, retaliation, wage and hour violations, accommodation, whistleblowing and hiring practices. She can be reached at dpc@severson.com.

Will *Black Sky Capital, LLC v. Cobb* Restore The Rights Of "Sold Out" Junior Lienholders?



By:
Loren W. Coe

There is no dispute that California's anti-deficiency laws preclude a junior lienor that forecloses its own lien from seeking a deficiency judgment. Indeed, Code of Civil Procedure section 580d clearly states that "no deficiency shall be owed or collected . . . for a deficiency on a note secured by a deed of trust . . . on real property . . . in any case in which the real property . . . has been sold by . . . the trustee under power of sale contained in the . . . deed of trust."

Less clear is how the anti-deficiency laws should be applied to a junior lienor when a senior lienor conducts a non-judicial foreclosure sale. That issue was seemingly resolved by the California Supreme Court in *Roseleaf Corp. v. Chierighino*, 59 Cal.2d 35 (1963). There, Roseleaf Corporation sold a hotel to Chierighino in exchange for several promissory notes, three of which were secured by second trust deeds on real property owned by Chierighino. The senior lienholders non-judicially foreclosed on all three properties. The second trust deeds held by Roseleaf were not protected at the sales and were rendered valueless. Roseleaf filed an action on the three notes secured by the second trust deeds. Chierighino argued that the actions were barred by section 580d.

The court disagreed, holding that the plain language of the statute applies only to the "instrument securing the note sued upon." Section 580d refers to a singular note, a singular deed of trust, and a singular trustee selling the property at issue under the power of sale. The statute does not contemplate junior lienors, and therefore does not apply to junior lienors. In addition to its textual analysis, the court found policy reasons justifying its holding: namely, applying section 580d to sold-out junior lienors robs them of their only available remedy after a senior's nonjudicial foreclosure sale. In sum, the rule enunciated by *Roseleaf* is that section 580d does not apply to sold-out junior lienors because a junior's right to recover should not be controlled by the "whim of the senior," and there is no reason to extend the language of section 580d to reach that result.

Unfortunately for junior lienors, the broad protections created by *Roseleaf* were substantially narrowed by *Simon v. Superior Court*, 4 Cal. App. 4th 63 (1992), where the court held that section 580d does preclude a deficiency judgment when the same lender is both the senior lienholder and the junior lienholder. In *Simon*, the lender made two simultaneous loans secured by first and second trust deeds. The Simons defaulted and the lender non-judicially foreclosed on its senior trust deed. The lender then sued the Simons for the amount due on the junior note. The Simons argued that section 580d barred the lender from seeking a deficiency judgment on the note secured by the second trust deed. The appellate court agreed, holding that the rule set forth in *Roseleaf* was contingent on the fact that the various lienors were different parties. Accordingly, the policy reasons justifying the holding in *Roseleaf* did not exist in *Simon* because the senior and junior lienors were the same entity: "Unlike a true third party sold-out junior, [the lender's] right to recover as a junior lienor which is also the purchasing senior lienor is obviously not controlled by the 'whim of the senior.'" The court also expressed concern that, in the absence of its holding, lenders would circumvent the anti-deficiency statutes by issuing simultaneous loans secured by successive liens.

Several courts have expressed agreement with the *Simon* rule. In *Evans v. California Trailer Court, Inc.*, 28 Cal. App. 4th 540 (1994) and *Ostayan v. Serrano Reconveyance Co.*, 77 Cal. App. 4th 1411 (2000), the courts adopted the *Simon* rule based on its fairness and policy considerations.

In *Bank of America, N.A. v. Mitchell*, 204 Cal. App. 4th 1199 (2012), the court expanded the *Simon* rule to situations in which a single lender assigns its junior lien after non-judicially foreclosing on its senior lien. The Court held that *Simon* was dispositive of the case and that the assignee, Bank of America, could not recover a deficiency judgment because section 580d would not have allowed the foreclosing lender to do so.

More recently, however, courts have begun denouncing the *Simon* rule. In *Cadlerock Joint Venture, L.P. v. Lobel*, 206 Cal. App. 4th 1531 (2012), the lender made two loans secured by first and second trust deeds against the property. The second loan was immediately assigned to a different entity. Several years later, the beneficiary under the first trust deed foreclosed. After the foreclosure, the second loan was assigned to Cadlerock, who filed a lawsuit on the note. Relying on the *Simon* rule, the defendant argued that section 580d precluded Cadlerock from seeking a deficiency judgment. The Court disagreed, holding that *Simon* did not apply because the senior and a junior loans were not held by the same lender at the time of the foreclosure sale. Accordingly, like *Roseleaf*, the junior lienor was controlled by the "whim of the senior" at the time of the senior's foreclosure sale.

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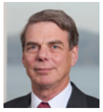
**“Will Black Sky Capital, LLC... ”
— from page 12**

Black Sky Capital, LLC v. Cobb, 12 Cal. App. 5th 887 (2017), *review granted*, 402 P.3d 415 (Cal. Sept. 27, 2017) (No. S243294), concurs with *Cadlerock* and further calls *Simon* into question. In *Black Sky*, the lender made a loan secured by a first trust deed in 2005, and in 2007 made another loan to the same borrower secured by a second trust deed against the same property. Black Sky obtained both loans via assignment and non-judicially foreclosed on the first trust deed, causing itself to become a sold-out junior as to the second trust deed. Black Sky then sought to recover a money judgment as to the second loan. On appeal from a grant of summary judgment in favor of the borrower, the Court of Appeal held that neither the *Simon* rule nor section 580d applied to limit Black Sky's ability to seek a deficiency judgment. Unlike in *Simon*, where the loans were made simultaneously, the second loan in *Black Sky* was issued two years after the first loan, and the default did not occur until seven years later. There was accordingly nothing to support the conclusion reached in *Simon* that the second loan was an attempt to circumvent the anti-deficiency statutes. The Court also outright disagreed with *Simon*'s contortion of the holding in *Roseleaf*: "*Roseleaf*'s holding that section 580d does not apply to nonselling junior lienholders cannot be contorted into a rule that section 580d somehow does apply to preclude a lienholder from seeking damages under the junior if it, in its capacity as the senior lienholder, has exercised its right to conduct a private sale of the property rather than seeking a judicial foreclosure."

On September 27, 2017, the California Supreme Court granted a petition for review in *Black Sky*. Pending a decision by the Supreme Court, a split in authority remains as to when a sold-out junior lienor may file suit for a personal judgment against a debtor after its security is exhausted from a senior foreclosure sale. Per *Simon* and its progeny, section 580d precludes a deficiency judgment when the same lender is both the senior lienholder and the junior lienholder. *Black Sky* disagrees, holding that section 580d by its own terms does not apply to sold out junior lienholders.

We await clarification from the Supreme Court. Until then, for questions relating to anti-deficiency laws, foreclosures, or other real property or mortgage banking issues, please contact Loren Coe at 949-442-7110 or lwc@severson.com.

Appellate Highlights



By:
Jan T. Chilton

By:
Elizabeth Holt Andrews

PRE-EMPTION

Lusnak v. Bank of America, N.A.
883 F.3d 1185 (9th Cir. Mar. 2, 2018) (Nguyen, J)

The National Bank Act does not preempt California's statute requiring lenders to pay interest on home loan escrow accounts.

The National Bank Act does not preempt California Civil Code section 2954.8, which requires lenders to pay 2% interest on funds held in mortgage escrow accounts. The state statute does not prevent or significantly impair the lender's exercise of its national bank powers. Also, 15 U.S.C. § 1639(g)(3), enacted as part of the Dodd-Frank Act, requires lenders to pay interest on mortgage escrow accounts if prescribed by applicable law, showing that the federal government has allowed state law to govern this issue.

DEBT COLLECTION

Davidson v. Seterus
21 Cal. App. 5th 283 (4th App. Dist., Div. 1, Mar. 13, 2018) (Aaron, J.)

Lenders and loan servicers who act to collect on conventional real-estate-secured loans are "debt collectors" for purposes of California's Rosenthal Fair Debt Collection Practices Act.

This decision holds that lenders and loan servicers who act to collect on real-estate-secured loans are "debt collectors" regulated by California's Rosenthal Fair Debt Collection Practices Act. The Rosenthal Act defines a "debt collector" as "any person who, in the ordinary course of business, regularly, on behalf of himself or herself or others, engaged in debt collection." Civ. Code § 1788.2(c). Debt collection is defined as the collection of consumer debt, and consumer debt is defined as money due from a natural person as a result of a transaction in which property, services or money by that person primarily for personal, family or household purposes. Civ. Code § 1788.2(b), (e), (f). These definitions are broad enough to cover a lender or loan servicer of a conventional home loan. And given the statute's remedial purpose there is no reason to construe it more narrowly.

Tourgeman v. Nelson & Kennard
900 F.3d 1105 (9th Cir. Aug. 20, 2018) (Tallman, J.)

In a class action under the Fair Debt Collection Practices Act, statutory damages are limited to the lesser of $500,000 or 1% of the defendant's net worth, and the net worth calculation is the plaintiff's burden to prove just as all the other elements are.

In a class action under the Fair Debt Collection Practices Act, statutory damages are limited to the lesser of $500,000 or 1% of the defendant's net worth. 15 U.S.C. § 1692k(a)(2)(B). This decision holds that the statute, though silent as to who bears the burden of proving net worth, necessarily imposes that burden on the plaintiff since the statute makes evidence of the defendant's net worth essential to an award of class statutory damages. Plaintiff normally bears the burden of proving all facts necessary to support his claim, and there is nothing in this statute to create an exception to that rule.

TRUTH IN LENDING ACT

Hoang v. Bank of America, N.A., No. 17-35993, 2018 U.S. App. LEXIS 34375 (9th Cir. Dec. 6, 2018) (Smith, N.R.)

The statute of limitations for rescission enforcement actions under the Truth in Lending Act is determined on a state-by-state basis, depending on the length of the limitations period for breach of written contract in the state where the action is brought.

As *Jesinoski v. Countrywide Home Loans, Inc.*, 135 S. Ct. 790 (2015) holds, a borrower need only provide the lender written notice of rescission within the 3-day or 3-year time limits set by 15 U.S.C. § 1635(f). If the lender does not then voluntarily void its security interest to effect the rescission, the borrower can sue to enforce the rescission. TILA does not state any statute of limitations for the borrower's suit to enforce rescission, so the court must adopt the most closely analogous state limitations period, which for this purpose is the limitations period for suit on a written contract—six years in Washington, four years in California.

SERVICEMEMBERS CIVIL RELIEF ACT

McGreevey v. PHH Mortgage Corp.
897 F.3d 1037 (9th Cir. July 26, 2018) (Antoon, J., sitting by designation)

The catch-all federal four-year statute of limitations applies to violations of the foreclosure prohibitions in the Servicemembers Civil Relief Act.

Section 303(c) of the Servicemembers Civil Relief Act, 50 U.S.C. § 3953(c), prohibits foreclosure of servicemembers' property in some circumstances. This decision holds that the statute of limitations applicable

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to a claim for violation of that section is four years under the catch-all federal limitations provision, 28 U.S.C. § 1658(a). Though the prohibition on foreclosures predated the 1990 enactment of section 1658, Congress first enacted legislation granting a private right of action for violation of the foreclosure ban in 2003. This decision holds that there was no pre-existing implied right of action. Since the claim first arose post-1990, it is governed by section 1658's four-year limitations period.

<u>SETTLEMENT</u>

Monster Energy v. Schechter
26 Cal. App. 5th 54 (4th App. Dist., Div. 2, Aug. 13, 2018) (Ramirez, P.J.), *review granted*, 2018 Cal. LEXIS 9029 (Cal. Nov. 14, 2018) (No. S251392)

Recently taken up by the California Supreme Court, this is a cautionary tale for all those who draft and review settlement agreements: plaintiff's attorney who breached confidentiality clause in settlement agreement could not be liable for breach of contract, since he signed off on the agreement only by indicating his "approval as to form and content" and therefore could not be considered a signatory or party to the contract.

The settlement agreement contained a confidentiality clause stating that the settling plaintiff and his counsel agreed to keep the settlement confidential. The plaintiff's lawyer signed the settlement agreement under the words "approved as to form and content." This decision holds that the plaintiff's attorney is not bound by the settlement agreement or its confidentiality clause and so cannot be sued for breaching it by publicizing the settlement. No matter how plainly the contract provided that plaintiff's attorneys were bound, he could not actually be bound unless he manifested his consent. He did not do so in the settlement agreement. The attorney was not listed as a party to the agreement in the opening recital of identifying the parties to the settlement and he did not sign the agreement as a party to it but only as approving its contents. The settlement agreement's provision that plaintiff and his counsel agree on means that the plaintiff agrees to direct his attorney to keep the settlement confidential and the plaintiff can be sued for breach if the attorney fails to do so. But the settling defendant cannot sue the attorney directly for breaching the agreement. The approved-as-to-form-and-content language above the attorney's signature means only that the attorney states the agreement is in proper form and embodies the parties' deal, not that the attorney agrees thereby to be bound by the agreement. To bind the attorney to the confidentiality clause, the settling defendant should have drafted the settlement agreement to explicitly make the attorney a party to the settlement agreement (even if only to its confidentiality provision) and explicitly require the attorney to sign the agreement in that capacity.

<u>ARBITRATION</u>

Juarez v. Wash DepotHoldings, Inc.
24 Cal. App. 5th 1197 (2nd App. Dist., Div. 6, July 3, 2018) (Gilbert, P.J.)

A botched Spanish translation felled an employer's arbitration clause, creating a fatal ambiguity as to the severability of an impermissible waiver of the right to bring a Private Attorney General Act claim.

An employer's handbook required employees to agree to arbitrate employment disputes. It contained a waiver of the right to bring suit or seek arbitration as a private attorney general. Though the English language version of the handbook said the waiver was severable, the Spanish language translation said the waiver was not severable. Held, the trial court properly denied a motion to compel arbitration of employee's wage and hour claims (brought in a single action with a PAGA claim). Under *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014), an employee's right to bring a PAGA suit cannot be waived. The trial court did not abuse its discretion in declining to sever the unenforceable waiver. Even though the handbook said the English language version was controlling, the difference between the two versions rendered the provision ambiguous and the ambiguity was properly interpreted against the employer who drafted it.

Jan T. Chilton chairs the Firm's appellate practice group. He is a member and former President of the California Academy of Appellate Lawyers and a fellow of the American Academy of Appellate Lawyers. For more information about these case summaries or the Firm's appellate work, please contact him at jtc@severson.com.

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