

hearsay!

The Law Offices of Hemar, Rouso & Heald, LLP

MAKING OUR MARK FOR MORE THAN 30 YEARS

Sidebar



Springtime, traditionally a time of change, coincides

this year with unprecedented changes in our government's role in managing and monitoring financial

markets and institutions. This issue highlights important recent amendments to California's foreclosure statute that impose moderate hurdles upon foreclosing lenders. Conversely, we also draw attention to an important appellate case that provides creditors with a powerful weapon to assist in recovering legal fees during judgment enforcement. We hope you find this *Hearsay!* issue informative and useful.

— Daniel A. Heald, IV

In this Issue

- Damming the Waters
- HRH's Newest Partner
- A Second Bite of the Apple
- HRH Happenings

Damming the Waters

Keeping California's Foreclosure Tsunami in Check

The nation — and California is no exception — has endured an alarming tidal wave of foreclosures and displaced homeowners in the past two years. California's foreclosure rate rose 327% between 2007 and 2008. Lenders are under increasing financial and governmental pressure to provide defaulting homeowners with a lifeline, but until now lenders in California had no legal obligation to do so.

To stem the rising tsunami of foreclosures and to assist defaulting California homeowners in finding a safe harbor, the state legislature recently passed amendments to the *California Civil Code*. They impose additional hurdles on foreclosing lenders. These *Civil Code* amendments will remain in effect until January 1, 2013, unless extended by the legislature. They are summarized below.

“Pre Notice” Required Prior to Foreclosure

In California, the first step to initiate a foreclosure is the filing of a “notice of default” after a missed payment (or other default under the loan). Under the newly revised statute, a notice of default may not be filed until thirty (30) days after the lender contacts the borrower to “explore options...

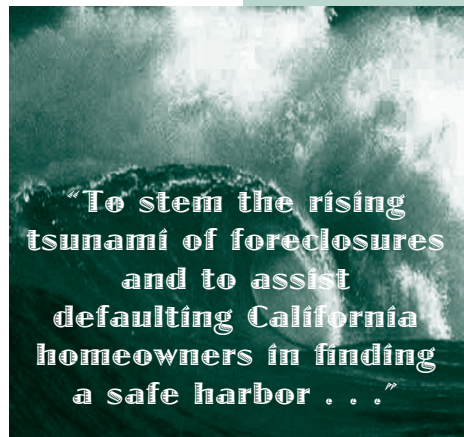
to avoid foreclosure.” *Cal. Civil Code* § 2923.5(a)(1) and (a)(2).

In preparing this new “notice of default” a lender must comply with specific rules, as set forth in *Cal. Civil Code* § 2923.5(g). These requirements are: 1) a letter must be sent, with a toll-free telephone number that assists the borrower to locate a U.S. Department of Housing and Urban Development (HUD)-certified counseling agency, attorney or

other advisor; 2) the lender must make three attempts to call the borrower, at different times and on different days, to discuss the default. Automated dialing machines may be used, but if the borrower answers, a live representative must speak to him or her; 3) if the borrower does not

respond in two weeks, the lender must send a certified letter addressing the default and options to cure; 4) the lender or its agent must provide “a means for the borrower to contact it in a timely manner, including a toll-free telephone number that will provide access to a live representative during business hours;” and finally, 5) the lender must post prominently on its website certain information describing available options to avoid foreclosure, and how the borrower can contact the lender to discuss those options.

(continues page 2)



Damming the Waters

(continued from page 1)

These rules only apply to residential mortgage loans made from January 1, 2003, to December 31, 2007, inclusive, and which involve owner-occupied residences. But these rules do not apply if the borrower 1) has surrendered the property; 2) filed for bankruptcy protection and the proceedings have not been finalized; or 3) signed up with an organization or person whose primary business is advising homeowners how to delay foreclosure and avoid their contractual obligations before abandoning the home. *Cal. Civil Code § 2923.5(h)*.

Encouraging Workouts — Can Unreasonable Lenders be Sued?

Housing prices have been steadily declining for the past two years. This means that the amount of a typical defaulted mortgage is often far more than the home's current market value. This makes foreclosure a less attractive option for lenders these days. Foreclosures take time, are expensive and can saddle the lender with upkeep, property taxes and maintenance for repossessed homes that cannot find an able and credit-worthy buyer (the REO scenario). Consumer advocates have long argued that a lender can often maximize long-term profits under such challenging conditions if it enters into a "workout" with the borrower by reducing the loan principal (and/or the interest rate) and sometimes re-amortizing the loan to afford the borrower financial breathing room. Lenders often find this tactic unpalatable because it requires an affirmative reduction of a legal debt rather than one imposed upon the lender by law.

Cal. Civil Code § 2923.6 tries to change this logic. It provides that "any duty servicers may have to maximize net present value under their pooling and servicing agreements is owed to all

parties in a loan pool, not to any particular parties..." It further provides "that a servicer acts in the best interests of all parties " if it agrees to modify a troubled loan in such a way that the anticipated long term recovery is greater than that would be obtained in foreclosure."

What does this mean? The obvious intent of the law is to shield loan servicing agents who are sued by their clients for being reasonable to borrowers.

Is the law also a sword? Can borrowers sue lenders or their agents if they refuse to be reasonable? The law does not say. Expect to see a borrower's lawyer make this argument soon, and for the loser to take the issue up with the Court of Appeal.

Tenants in Foreclosed Properties Protected

Once a lender has foreclosed, and taken the property as a REO, it is faced with the need to evict the borrower, or the borrower's tenant. Often, the borrower has leased the house out and is collecting the rent despite the foreclosure. What are the tenant's rights once the lender has foreclosed?

Under current law the lender could evict the tenant from a foreclosed property after providing a thirty-day notice to quit. Newly enacted *Cal. Civil Code § 2924.8* extends that and increases the lender's burden. It provides tenants two new protections: First, the tenant must be given notice of the foreclosure sale via posting on the property. Second, the thirty-day notice period before eviction is increased to sixty days.

Foreclosed Properties Must be Maintained; \$1,000-a-Day Fines

With the significant up-tick in home foreclosures, many houses are now

owned by financial institutions, which may not always maintain them in a reasonable or aesthetically pleasing manner. *Cal. Civil Code § 2923.6* provides that properties obtained in foreclosure must be properly maintained. "Maintaining" a property is defined to include caring for the exterior of the property, including cutting the grass and other plants, evicting trespassers or squatters, and not permitting mosquito larvae to grow in standing water. Violators may be fined up to \$1,000 a day by local government agencies.

With the recent rise in home foreclosures, we anticipate further interesting legal scenarios will arise, and we, at HRH, will continue to keep you apprised of them.

— Stephen E. Jenkins

HEMAR, ROUSSO & HEALD'S NEWEST PARTNER

Jennifer Witherell Crastz



On March 23, 2009, the firm announced that Jennifer Witherell Crastz was made a partner. As Richard Hemar said at the time of the announcement, "Jennifer has done a great job over the years in terms of successfully handling cases on a very high level. We hope you will all join us in congratulating Jennifer."

A Second Bite of the Apple Recovering Post-Judgment Legal Fees

As creditors' attorneys we often have to pursue debtors through multiple courts — state court to bankruptcy court and back again. Along the way the client racks up significant legal expenses trying to enforce its judgment. Are all of those fees and costs recoverable in the state court proceeding? A recent appellate case answers that question with a resounding yes.

A little background: In 1992, the California Legislature amended *Cal. Code of Civil Procedure* § 685.040 to provide that if an underlying judgment includes an award of contractually-based attorney fees, then post-judgment attorney fees can also be awarded. There are two requirements: (1) the post-judgment attorney fees must have been incurred in efforts to enforce the underlying judgment; and (2) the underlying judgment had to include an award for attorney fees based upon a contractual attorney fees clause.

Therefore, an analysis regarding the allowance of post-judgment attorney fees begs the question: What actions are considered enforcing a judgment for Section 685.040 purposes?

In *Jaffe v. Pacelli* (2008) 165 Cal.App.4th 927, the California Court of Appeal answers that question and, more specifically, whether those fees can include efforts to make the judgment non-dischargeable in bankruptcy court. The facts: In 1996, plaintiff Jaffe was awarded a state court judgment, which included an award for attorney fees based upon the underlying contract, against defendant Pacelli. She was a highly evasive debtor. By 2003, after several unsuccessful appeals by Pacelli, the judgment had grown to \$900,660.99, with the accumulation of interest, attorney fees and costs.

In 2004, Pacelli filed a Chapter 7 bankruptcy petition. Jaffe's judgment was listed as her sole debt in the bankruptcy petition. Jaffe then filed an adversary proceeding to declare the judgment non-dischargeable on the basis of fraud and concealment of assets. In November 2005, the bankruptcy court entered a default judgment against Pacelli. After another round of unsuccessful appeals, the bankruptcy court dismissed Pacelli's bankruptcy case in early 2007. The state court judgment remained enforceable.



Back in state court, Jaffe brought a motion seeking an award for attorney fees and costs incurred between the renewal of the state court judgment on March 4, 2003, and February 28, 2007, the conclusion of the bankruptcy proceedings. Although the trial court awarded some state court-related legal fees and costs, Jaffe's request for a fee award was denied with regard to any bankruptcy-related legal work. The trial court reasoned that bankruptcy proceedings were an "entirely different proceeding," and therefore, not necessary for defending a state court judgment. Further, the trial court noted that the bankruptcy court did not award legal fees or costs to Jaffe in those proceedings.

Jaffe appealed and won. In reversing the trial court, the appellate court ruled that a party, such as Jaffe, may recover

legal fees expended in bankruptcy proceedings to enforce a judgment in state court, under Section 685.040. Specifically, the court held that "Jaffe [was] entitled to request in state court an award of attorney fees and costs ... even if the bankruptcy court had the discretion to make such an award as a penalty or sanction" and did not do so.

The appellate court next faced the question as to whether Jaffe's efforts in the bankruptcy proceedings were incurred to "enforce" the underlying judgment.

The appellate court noted that if Pacelli had been successful in her bankruptcy proceeding, the trial court judgment would have been extinguished once her discharge was obtained. It further found that Jaffe's participation in the bankruptcy proceedings was preventive and was "directly related to the continued enforceability" of the state court judgment because his actions helped maintain, preserve, and protect that enforceability. As such, Section 685.040 applied and entitled "Jaffe to a post-judgment order awarding him compensation for the attorney fees and costs expended in those proceedings."

The bottom line of this important appellate decision is that preventative actions by a creditor in bankruptcy court can be considered as actions "enforcing" a judgment, and therefore, the associated legal fees and costs can be recovered in later state court proceedings to enforce the judgment. Such fees are recoverable under *Cal. Code of Civil Procedure* § 685.040, regardless of whether the bankruptcy court refused to award legal fees directly. In essence, this is a second "bite of the apple" for the recovery of legal expenses for a creditor who has spent considerable effort and expense pursuing an evasive debtor from state court to bankruptcy court and back again.

— Edward S. Kim

**SUSAN K. BREEN JOINS
HRH AS “OF COUNSEL”**



HRH PREVAILS IN MAJOR FEDERAL COURT RULING

HRH is excited to share with you the news of a recent favorable decision by the Ninth Circuit Court of Appeals in a case we filed on behalf of a debt assignee. The bankrupt debtors argued that an assignee could not obtain a section 523(a)(2)(b) non-discharge because it had not actually relied upon the borrowers’ false financial statements — the original creditor had. The Ninth Circuit rejected that reasoning and sided with our client. In our next issue of *Hearsay!*, associate Jeannine Del Monte Kowal will discuss the *Boyajian v. New Falls* decision, which all financial institutions that are assigned debt or sell debt will want to read.

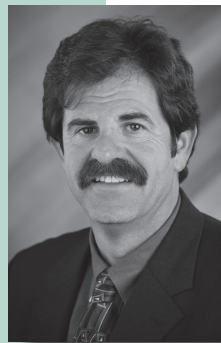
Hemar, Rousso & Heald’s Newborns



Partner Jennifer Witherell Crastz and her husband Jorge Crastz are the very proud parents of Caroline Witherell Crastz. Caroline was born on October 27, 2008 and entered this world weighing 6 pounds, 8 ounces and measuring 20 inches long. Reports are that beautiful little Caroline’s two older brothers, Lucas and Will, love having a little girl in the house.



Associate Raffi Khatchadourian and his wife Edita are proud first time parents. Their daughter Natalie was born on January 30, 2009. She weighed 6 pounds 3 ounces and measured 18 ¾ inches. She already has daddy wrapped around her finger.



Irwin Wittlin’s Video Presentation

Associate Irwin Wittlin routinely speaks and participates on legal panels addressing topics such as lease interpretation, enforcement and equipment recovery. An outgrowth of his public speaking led to an invitation to tape a lecture on equipment leasing law for the National Equipment Finance Association. It will be available on video to its members.

The Law Offices of Hemar, Rousso & Heald, LLP 15910 Ventura Blvd., 12th Floor, Encino, CA 91436, 818/501-3800, FAX 818/501-2985. The firm specializes in the fields of commercial and consumer litigation, collections, bankruptcy and general corporate matters. Individual lecturers on the topics contained herein, as well as others on request.

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