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HOMEOWNER BILL OF RIGHTS PROVIDES NO REMEDY FOR BORROWERS SEEKING TO ENJOIN ALLEGEDLY UNAUTHORIZED FORECLOSURE

By Melissa Robbins Coutts, Esq., McCarthy & Holthus, LLP

There has been much discussion in California regarding lenders' authority to foreclose – and borrowers' standing to challenge that authority – following the Supreme Court's decision in *Yvanova v. New Century Mortgage Corp.* earlier this year, where the Court held that borrowers may bring post-foreclosure wrongful foreclosure claims predicated on void assignments of deeds of trust. But the debate over borrowers' ability to challenge assignments is far from over, as *Yvanova* raised more questions than it answered. One such question is how California's Homeowner Bill of Rights (HBOR) factors into the equation. That question has been partially answered in the case of *Lucioni v. Bank of America*.

The issue framed by the court in *Lucioni* was whether the HBOR allows a homeowner to seek injunctive relief based on one of its provisions, Civil Code section 2924(a)(6), which requires the entity initiating foreclosure to be either the beneficiary of the deed of trust, the original or substituted trustee, or an authorized agent. Mr. Lucioni had brought a cause of action for "Lack of Standing under Civil Code section 2924(a)(6)," contending that due to certain breaks in the chain of title it was impossible to determine who held the beneficial interest. Under that cause of action, he sought to enjoin the nonjudicial foreclosure.

The Court of Appeal agreed with the trial court in finding that no claim for injunctive relief could be based on an alleged violation of Section 2924(a)(6) because that was not included among the HBOR provisions for which the Legislature chose to grant a remedy.

Remedies for violation of HBOR are limited by statute to either a pre-foreclosure injunction or post-foreclosure damages

under section 2924.12(b). But the code expressly limits those remedies to material violations of certain enumerated HBOR provisions, and Section 2924(a)(6) is not included in that list. The Court of Appeal held that the Legislature's decision to

provide injunctive relief for other violations of HBOR but not for violation of Section 2924(a)(6) precluded that remedy. "Under the HBOR, then, a plaintiff may not seek to enjoin a foreclosure based on a claim that the foreclosing party lacked the necessary authority to foreclose." *Lucioni v. Bank of America*, 3 Cal.App.5th 150, 158.

The borrower tried to save his case by seeking leave to amend his cause of action to allege a violation of another HBOR provision, Civil Code section 2924.17, which he claimed

requires the foreclosing entity to affirmatively show it has the right to foreclose. The Court rejected this contention as well, finding that Section 2924.17 only imposes requirements on the mortgage servicer to review documentation before signing a declaration to substantiate the borrower's default and right to foreclose. The statute did not shift the burden to the servicer to affirmatively prove their authority to foreclose.

The Court was careful to note that a borrower still retains the right to bring a wrongful foreclosure claim after a completed foreclosure, and may obtain monetary damages or an order setting aside the sale if it is proven that an entity foreclosed without authority. But for pre-foreclosure challenges, HBOR's provisions will be read narrowly to authorize only the relief explicitly set forth by the Legislature, and only for the violations that the Legislature chose to provide remedies for. The *Lucioni* decision will provide a valuable precedent for

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filing, (which was evidently the basis over the years for the allegation of a violation of the automatic stay) and the subsequent dismissal brought the parties to the point they would have been at Dismissal- Bankruptcy Court Judge Meredith Jury was rightly concerned that there was a “wild deed” in having two foreclosure sales on the same Deed of Trust back in 2002, one of the Trustee’s Deeds Upon Sale was retroactively rescinded in 2003.

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trustees’ and servicers’ counsel encouraging judges to draw narrow interpretations of HBOR in other aspects as well.



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