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SB 900: Recent Opinions Provide Indications of How Courts May Be Leaning (Not All That Bad for Lenders and Trustees)

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Clearly, SB 900/A.B. 278 (effective 1.1.13) spells trouble for lenders, and gives borrowers expanded tools to challenge lender/servicer/trustee conduct in loan modification and foreclosure disputes. However, initial response (as gauged by some of the first court decisions issued) does not reflect a complete "swing of the pendulum" to borrower rights.

It appears that Courts are still willing to reject spurious or uncertain claims and will require that borrowers initially demonstrate more than just hardship and that they make a solid factual showing evidencing specific statutory violations. Old standbys such as alleging "show me the note" arguments are still looked at with skepticism, even under the new expanded law. It also appears that the question of retroactive application of the statutes to actions taken before the effective date of the statutes will be a primary "battle ground" for SB 900 claims raised early on. Courts appear to be reluctant to find that SB 900 parameters govern actions taken before the implementation of the statute.

> ***Recently enacted SB 900 must be taken seriously. However, preliminary indications are that Courts will also require that borrowers show more than just hardship and that they demonstrate a solid factual basis to bring SB 900 claims.***

It is still early in the process and there are no appellate decisions that govern. However, the following give some preliminary indication of what Courts looking at SB 900 claims are thinking. In essence, while borrowers have more tools, it appears that the Courts are going to be reluctant to further "open the floodgates" and use SB 900 to justify unsubstantiated claims. Also discussed below are some preliminary lessons learned from SB 900 cases and claims received by the author to date:

1. **Some of the First SB 900 Cases:**

- **Post SB 900 CA case Denying an Injunction for Alleged SB 900 "Show me the Note" Violations:** *Nardico v. J P Morgan Chase & Co., 2013 U.S. Dist. LEXIS 63194 (N.D. Cal. May 2, 2013).* Plaintiff generally alleged that the foreclosing lender never acquired an assignment of the loan from the originating lender and that Plaintiff's loan was part of a securitized loan pool that was established before the purchase of the lender's assets by the foreclosing lender. Plaintiff cited SB 900 provisions (Cal. Civ. Code §2924 (a)(6)), requiring that a foreclosing entity/servicer establish that it owns the note or is authorized by the current holder to foreclose, to support a request for issuance of an injunction to stop the foreclosure sale. The Court rejected "show me the note" claims (requirement that the lenders show possession of the original note) as a prerequisite to foreclose, citing pre SB 900 cases that previously rejected such claims. The Court upheld the right to foreclose on loans that have been "securitized" and assigned to a loan pool, and denied the request for an injunction.

Note: While the lender also argued that SB 900 should not be applied retroactively to the facts of

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this case, the Court did not specifically rule on the argument.

- **SB 900 Provisions not to be Applied Retroactively**: See *Guglielmelli v. Wells Fargo Bank, N.A., 2013 U.S. Dist. LEXIS 43063 (C.D. Cal. Mar. 26, 2013)* denying a request for injunction in part because of this fact; See *McGough v. Wells Fargo Bank, N.A., 2012 U.S. Dist. LEXIS 151737 (N.D. Cal. Oct. 22, 2012)* (dicta, in footnote 4).

- **Post SB 900 Case Imposing an Injunction for Alleged Dual Tracking:** *Singh v. Bank of Am., N.A., 2013 U.S. Dist. LEXIS 63127 (E.D. Cal. May 1, 2013).* Plaintiff alleged SB 900 violations pursuant to Cal. Civ. Code § 2923.6, asserting that the Lender recorded an NOTS while he had a complete loan modification application pending and did not respond to his loan modification request. The Court granted a TRO.

2. **Other Lessons Learned Since the Implementation of SB 900:**

- **Mortgage Servicers should control the Loss Mitigation process to Reduce Multiple Loan Modification Requests and to Enhance Lawsuit Defense.** [1]

- **Your Policies and Procedures will either hurt you or help you if you are sued.** Many small or private lenders are not subject to federal or state modification programs and may not be required to provide a wide range of foreclosure prevention alternatives ("FPA") or any FPA. [2] **Be careful** what you promise on your website or what you write into your policies, as you will be held to what you say.

- **Establishing Good Faith Reliance is Critical for Trustees.** There is limited immunity allowed to foreclosure trustees under certain circumstances. [3] Foreclosure trustees should ensure that they have evidence i.e. a checklist, with information from the servicer showing that the mortgage servicer/lender owns the note and has been assigned the deed of trust and is foreclosing in good faith, based on reliable information. A title search alone will likely not be enough to show good faith.

- **Borrower Counsel Will Often Confuse the Damage Provisions Applicable to SB 900 and will Wrongfully Assert Claims Against Trustees or will Assert Claims on Excluded Loans against Smaller Lenders.** [4] While foreclosure trustees may have independent liability under certain 900 provisions [5] trustees are being wrongfully included in claims only applicable to specific servicers on specific loans or on claims that they can assert should be the responsibility of the servicer only. Conversely, many servicers for smaller lenders are wrongfully asserted to have liability under provisions applicable only to larger lenders, or under loans which are exempted from coverage.

Conclusion: The bottom line is that recently enacted SB 900 must be taken very seriously. However, preliminary indications are that Courts will also require that borrowers show more than just hardship and that they demonstrate a solid factual basis to bring SB 900 claims. Initial reaction is that retroactive application of SB 900 claims will not happen and this will limit many "pipeline" claims and allow motions to dismiss or demurrers. Understanding SB 900 damage provisions is key to analyzing a case and removing frivolous or exempted claims and getting your client out of a lawsuit.

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1 See proposed Consumer Finance Protection Bureau ("CFPB") changes to Regulation Z, which include among other things the requirement that covered Servicers will not be allowed to require multiple applications for multiple modifications. They must offer a single application for all available options and a borrower who submits a complete and timely application must be considered for all options at once.

2 See Civ. Code §2920.5 (c), which defines an eligible borrower as "any natural person who is a mortgagor or trustor and who is potentially eligible for any federal, state or proprietary foreclosure prevention alterna-

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tive program **offered by**, or through, his or her mortgage servicer".

3 See Civ. Code § 2924(b).

4 **These following examples are not exhaustive. All claims must be fully analyzed for any and all defenses.** For example, see Code Section 2924.17. Damage claims raised for violations of this code section are raised in two ways: (1): Directly under the enabling provisions of Civil Code Section 2924.17 (c) **which does not provide a borrower private right of action, and is not applicable to Trustees**; or (2):By asserting a private right of action utilizing Civil Code §§ 2924.12(a) or (b), (which are only applicable to servicers for larger lenders, per Civ. Code §2924.12(j)), or Civil Code §§ 2924.19 (a) and (b) (which are only applicable to servicers for smaller lenders). In addition, there are limits on raising claims under both of these statutes. Assuming a loan is otherwise covered, Civil Code Section 2924.12 claims are only applicable to servicers for larger lenders and cannot be brought against smaller lenders (See Civ. Code §2924.12 (j)). Claims under Civ. Code § 2924.19, applicable to smaller lenders, only allows actions for violations of Civ. Code Section 2923.5, 2924.17 or 2924.18, which is much less expansive that what can be asserted against larger lenders under Civ. Code.§2924.12.

Further limitations on raising a private right of action for certain specified SB 900 violations on covered loans are contained in Civ. Code Section 2924.15, which specifically limits any claims based on alleged violations of Civ. Code Sections 2924(a)(5), 2923.5, 2923.55, 2923.55, 2923.6, 2923.7, 2924.9, 2924.10, 2924.11 and 2924.18, **to loans secured by owner-occupied first trust deed liens, only**. **Note:** The §2924.15 exclusions do not include Civ. Code §2924.17 (provisions requiring accurate foreclosure documents), so private actions can likely be brought for claimed violations, even on junior liens. The same is likely true for claims brought under Civ. Code §2924 (a) (6). **These examples are not exhaustive. All claims must be fully analyzed for any and all defenses.**

5 See e.g. Civ. Code §2924(a) (6) (which clearly governs trustee actions and allows limited immunity under certain conditions) or Civ. Code §2924.12 (which specifically names trustees, as well as servicers as responsible parties). While other provisions can be argued to impose liability on Trustees, liability for claims based on breach of other mortgagor servicer duties should be contested, as a trustee is specifically excluded from the definition of a "mortgage servicer" (See Civ. Code §2920.5).

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