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# 2019–2020 California Real Property Journal Editorial Board



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**Correction:** Issue 2 inadvertently excluded one of our article editors from the masthead: Coleen Gillespie with the Law Office of Coleen P. Gillespie, 3600 S Harbor Blvd #481, Oxnard, CA, (805) 988-9817, cg@cgillespielaw.net. Our deepest apologies to Coleen, who provided invaluable IP expertise!

# Message from the Editor-in-Chief

**Misti M. Schmidt**

Welcome to our last issue of 2019! In this issue, we are focusing 100% on real property, with articles regarding assignments of deeds of trust and borrowers' rights to attorney fees, a helpful overview of short-term rental regulations, and a timely discussion of San Francisco's new Community Opportunity to Purchase Act, which might have implications for other cities in California. We also re-printed a brief article from the Section's E-Bulletin since it addresses one of the crucial ethics issues that face us every day: Who is your client?

In addition to presenting these informative pieces, I'm pleased to introduce a new section in our *Journal* that will be dedicated to California Lawyers Association and Real Property Section business in each issue going forward. Flip to page 38 for a welcome message from our new Section co-chairs, as well as other announcements.

The *Journal* hosted two Editorial Board orientations this Fall, and we were pleased with the number of excellent candidates seeking to join the board. I'll announce our new board members in the next issue. If you are interested in getting involved with the Journal as an editor, please reach out to me at mschmidt@conservationpartners.com.

We also always welcome informative articles on real property topics. We currently are seeking articles for Issues 3 and 4 next year, with deadlines of May 15, 2020, and September 15, 2020, respectively. Issue 3 will be a joint issue published with the Environmental Law and Public Law sections, while Issue 4 will focus on cannabis law.

I hope you enjoy this issue. See you in a few months!

– Misti Schmidt

# MCLE Self-Study Article: Is the Popularity of Short-Term Rentals Sustainable, or Will Regulations Weaken Their Current Stronghold?

***Check the end of this article for information on how to access one MCLE self-study credit.***

**Whitney Hodges**

Whitney Hodges is a partner in Sheppard Mullin Richter & Hampton LLP's Real Estate, Land Use, and Environmental Law practice group. Her practice focuses on advising developers, investors, sellers, and public agencies in land use and environmental law. Whitney's practice includes obtaining federal, state, and local agency approvals, defending litigation, and securing community and political support for complex development projects, including renewable energy facilities, urban infill, master planned communities, and other mixed-use, retail, industrial, and commercial projects. She is based out of the firm's San Diego office.

## I. INTRODUCTION

Like many other sectors in the "sharing economy,"[1] short-term rentals of residential property[2] ("STRs") have become a ubiquitous part of the national economy. Often labeled as one of the biggest disrupters in the travel industry, STRs are particularly impactful on the United States tourist sector, with one estimate putting the size of the domestic vacation rental market at $100 billion.[3] The STR industry is young and, while not yet fully crystallized, flush with growing demand.[4] The number of consumers utilizing STR options has burgeoned exponentially since 2011,[5] with a reported seven in ten millennial business travelers preferring to stay in local host rentals over more traditional lodging options.[6]

The rapid evolution of the STR market, once a cottage industry, can be attributed in large part to new technology that is changing the industry and providing new and efficient means for consumers to access alternative accommodations. Online rental platforms such as Airbnb, Vacation Rentals by Owner ("VRBO"),[7] FlipKey, and hundreds of other rental websites significantly decrease the time it takes to find lodging and facilitate connections between hosts and travelers. They also enable both parties to leverage the power of peer-to-peer reviews.[8] These platforms allow consumers to find accommodations specific to their needs, and allow hosts to obtain assurances about the people requesting accommodation in their properties. Consequently, this new niche market has unwittingly ushered a tremendous number of new hosts and consumers into the hospitality industry.

The emergence of such online marketplaces has created a global boom in the STRs of personal residences. In the U.S., this phenomenon has spread from coast-to-coast.[9] Indeed, the number of available STR units has grown at a forty-five percent annual rate over the past five years, and there is no reason to believe that this growth will slow down in the foreseeable future.[10] As a result of the market's momentous popularity, consumers are flocking into previously undisturbed (and perhaps, undesirable from a traveler's perspective) residential neighborhoods for home-based, transient lodgings.[11]

While the staggering popularity of STRs may appear to be a clear path forward for vacation rentals, the future of STRs in California is far from certain. STRs are central to vigorous debates at local and state levels. STRs pose major issues for local governments and homeowners associations ("HOAs") because a greater influx of transient residents into traditionally residential areas has resulted in increased municipal and

homeowner demand for regulations and enforcement efforts.[12] Local governments may feel that they are losing their share of tax dollars by failing to effectively regulate this new industry.[13] HOAs are increasingly asked to respond to nuisance complaints and to request government enforcement of rental restrictions such as those found in a development's covenants, conditions, and restrictions ("CC&Rs").[14] Due to the headaches over these and other issues, homeowners, local governments, community groups, and certain state policymakers are waging wide-ranging and comprehensive campaigns with the goal of severely restricting STRs. Nonetheless, the market share of STRs in the travel sector continues to grow.[15] With the backing of local entrepreneurs, businesses, and online platforms like Airbnb and VRBO, it is unlikely that STRs will go down without a fight.

STR regulations are complex and constantly evolving. This article provides a broad overview of the considerations a real property owner may encounter when contemplating whether to establish an STR. The first section addresses the advantages and disadvantages of STRs for the local community. The second section examines limited state STR-related regulations, various local land use approaches, the legality of previously enacted STR-related land use controls, and other governmental agency responses. The third and last section discusses the ability to further regulate STRs in common interest developments ("CIDs") via CC&Rs and HOA enforcement actions. This article does not address every nuance associated with land use controls, regulations, and/or negotiating a lease with a third party for either long- or short-term rentals.

## II. ADVANTAGES AND DISADVANTAGES OF STRS FOR THE LOCAL COMMUNITY

Short-term renting may impact a community's economic and residential stability[16] and its security.[17] Whether a community has a legitimate concern about STRs often depends on the characteristics of the particular community and whether the STR units operating there do so respectfully and avoid negatively impacting the community. Given all of the competing interests, local governments bear the difficult charge of finding appropriate ways to regulate STRs so as to protect neighborhoods while preserving homeowners' property rights.

### A. Advantages of STRs

At their best, STRs provide a welcome alternative to the hotel industry with potentially cheaper rates and simpler booking processes for consumers. For some jurisdictions, STRs can boost a sagging tourism sector. For example, the price advantage of STRs to consumers can cause less-popular tourist destinations or areas that lack adequate hotel accommodations to become more attractive.[18] Local governments in locations with an established tourist industry also benefit from STRs.

Studies show that STRs can positively impact a local economy in several ways. First, they can provide a municipality with additional income through tax revenues.[19] Second, STR guests tend to spend money on local visitor-related amenities such as restaurants, bars, and museums, thus providing a large economic benefit to the community. For example, research conducted in the City of San Diego ("San Diego") in 2015 demonstrated that, during a one-year period, STR guests spent $86.4 million on visitor-related activities compared to money spent on the lodgings subject to transient occupancy taxes ("TOTs").[20] Third, a study on the effects of the sharing economy found a direct correlation between STRs and job creation in the tourism sector.[21] In San Diego alone, STRs support 3,109 jobs.[22] Moreover, hosting an STR space can help local residents who are hosts supplement their income. They in turn can further contribute to the local economy when they spend this revenue locally. The total economic impact in San Diego, including the visitor-related activities, has been estimated at $482 million.[23]

Lastly, the proliferation of STR units increases the supply of travel accommodations, making travel more affordable, benefiting consumers, and encouraging more travel.[24] STRs increase the supply of short-term travel accommodations, lower prices, and can be more cost-effective for families.[25] This price reduction is often attributable to not only the theory of supply and demand, but also the fact that STR platforms are not encumbered by hotel costs such as staffing, furnishings, property maintenance, and other business-related regulations.[26] STRs can thus pass those savings on to consumers and offer lower rates than those of traditional tourist accommodations.[27]

### B. Disadvantages of STRs

Many argue that STRs are detrimental to a community's character. Those who oppose STRs believe that, as rental properties become an increasingly attractive investment opportunity, a large number are being operated as de facto hotels that disrupt communities, consume potential affordable housing units and sites that could be used as permanent or semi-permanent residences instead, drive rent prices skyward, and leave government regulators with heartburn.[28] While STRs are considered a boon to consumers, the hotel industry claims that the STR business model offers unfair economic advantages.[29] The hotel industry also argues that local service jobs can be jeopardized due to unfair competition

from unregulated and untaxed STRs, and that STRs reduce demand for local bed and breakfast establishments, hotels, and motels.[30] In these ways, STRs are considered to be disruptive for the traditional lodging industry.[31]

STRs are mainly located in residential areas, so people who oppose STRs argue that tourists are renting spaces that otherwise might be used for long-term renters, upsetting a stable rental market and decreasing the availability of long-term housing.[32] This impact is greater in large cities with pre-existing affordable housing issues such as San Francisco and Los Angeles.[33] This instability could eventually contribute to an increase in rent and housing prices.[34] Many smaller jurisdictions in California, such as the City of Long Beach, are expressing concerns about the spread of STRs as well.[35]

Opponents of STRs argue that increased tourist traffic from short-term renters could slowly transform residential communities into "communities of transients" with decreased community involvement and engagement. Local residents worry that the "infestation" of STRs in their neighborhoods will change their character and transform the residents' quality of life.[36] Residents express concern that short-term renters may not always know let alone comply with local laws and regulations and could result in public safety risks, excess noise, trash, and parking problems for nearby residents.[37] The lack of proper regulation or limited enforcement of existing ordinances can also cause tension or hostility between short-term landlords and their neighbors.[38]

## III. GOVERNMENT LAND USE CONTROLS

### A. Limited State Regulations

In California, STRs are generally regulated by the local city or county. As discussed below,[39] the specific rules vary by jurisdiction. However, a few statewide regulations also relate to STR units.

The State of California imposes recordkeeping requirements for transient occupancies.[40] Such persons must also comply with all collection, payment, and recordkeeping requirements of local TOT ordinances if applicable to the occupancy.[41] The state also requires rental listing platforms such as Airbnb or VBRO to post a notice advising tenants who are listing a room or home to review their leases and insurance policies for restrictions on such activity.[42]

While land use controls have traditionally been left to the local governments, a bill is currently pending in the California State Legislature that would set strict limits on STRs in certain coastal neighborhoods.[43] Assembly Bill ("AB") 1731,[44] written by Assemblywoman Tasha Boerner Horvath, who represents northern beach cities in the city and county of San Diego, bars vacation rental platforms like Airbnb and VRBO from listing San Diego County-based STRs that are within both residential and state coastal zones on their sites for more than 30 days each year unless a full-time resident lives at the property.[45] The legislation, which is currently in committee, would dramatically curb rentals outside of commercial areas.[46] The bill's original intent was to curtail year-round rentals across California but after pushback, Assemblywoman Boerner Horvath amended it to focus solely on San Diego County including coastal areas within the city.[47] Despite the pushback, AB 1731 remains a test case for the rest of California and has deeply divided the local communities and state political machines impacted by it.[48]

### B. Local Land Use Controls

Local governments may regulate what they deem the appropriate use of land within their boundaries.[49] This authority stems from a local government's police power, its inherent power to provide for the peace, order, health, morals, welfare, and safety of its citizens.[50] Land use regulations are a manifestation of the local police powers conferred by Article XI, Section 7 of the California Constitution, and not the state's delegation of authority.[51] California Constitution Article XI, Section 7 provides that "a county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."[52] This police power is broad, elastic, and constantly expanding to keep pace with our changing society.[53]

Under the police power, local governments have enacted a wide variety of regulatory controls including a range of land use regulations particularly when new issues and controversies enter the real property space. Courts have upheld the following land use controls, among others: (1) building height limitations;[54] (2) setback requirements;[55] (3) zoning ordinances creating exclusive single-family residential districts;[56] (4) rent control;[57] (5) growth management measures;[58] (6) limits on off-site commercial billboards for aesthetic purposes;[59] and (7) prohibitions against "monotonous" development.[60]

Similarly, courts have upheld regulations related to STRs of residential property as proper exercises of the police power.[61] However, the surge in STRs is forcing local governments to decide how to strike a balance between protecting neighborhoods and allowing the alienability of property, or the right of an owner to separate him/herself from the property and deed or lease it to another person. Yet, as with many zoning regulations, those provisions related to or restricting

STRs are jurisdiction-specific, and vary from city to city, county to county.[62] The specific regulations run the gamut from severe; making most STRs illegal, fairly liberal,[63] or non-existent.[64] California's various STR regulations typically address the following matters:

- taxation;[65]
- minimum rental periods;[66]
- geographic limitations;[67]
- occupancy limits;[68]
- residency;[69]
- maximum number of total rental days;[70]
- property monitoring and management;[71]
- notice to neighboring property owners;[72] and
- licenses and permits, including caps on the number of STR-related licenses issued.[73]

Also entering the fray, the California Coastal Commission ("Coastal Commission" or "Commission") has taken an interest in local STR regulations when they have the potential to affect access to the coast.[74] The Coastal Commission repeatedly has expressed support for STRs over the years. It claims that the restriction of STRs serves to limit access to the beach and makes it harder for people with average or below-average incomes to vacation on the coast.[75] Therefore, after a coastal municipality has passed an STR-related ordinance, it must forward the ordinance to the Coastal Commission for a determination that the regulations comply with the California Coastal Act.[76] The Coastal Commission can, and has,[77] invalidated local government-approved STR regulations as too restrictive. It has found, for instance that the Coastal Commission can preempt an ordinance if it conflicts with Coastal Act policies, either because the ordinance amends the city's local coastal program and which must first be certified by the Commission, or because it constitutes a "development" under the Coastal Act that requires a Commission. The Commission can also invalidate an ordinance if the ordinance conflicts with the Coastal Act's enumerated goals of protecting coastal access and encouraging lower cost visitor and recreational opportunities.[78]

AB 1731, as discussed in Section III, aims to provide an exception to avoid the Coastal Commission's repeated demands that local governments accommodate STRs that can serve as lower-cost alternatives to hotels in beach communities.[79] As currently written, AB 1731 provides that properties listed in accordance with the state's "Lower Cost Accommodations Program" can be utilized as an STR year-round.[80]

Despite the controversy surrounding STR operations and regulations, restrictions on STRs, like those described herein, are haphazardly enforced.[81] Typically, local governments lack the resources to diligently pursue code enforcement actions against illegal STR operators.[82] Indeed, most often municipalities are unaware of illegal STR operations and enforcement efforts are usually undertaken, if at all, only when neighbors lodge nuisance complaints.[83]

### C. Determining Whether a Restriction Constitutes a Taking

It is well established that an excessively restrictive land use regulation may constitute a taking of property for which compensation must be paid under the California Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.[84] Determining whether a regulation constitutes a taking where there has been no permanent physical invasion and the regulation has not deprived the owner of all economically beneficial use of its property requires a balancing of the public and private interests by weighing the following three factors: (1) the economic impact of the regulation on the property owner; (2) the extent to which the regulation interferes with the property owner's distinct investment-backed expectations; and (3) the character of the governmental action (i.e., physical invasion versus economic interference).[85] This three-factor balancing test could possibly be applied to STR restrictions.

When reviewing an STR operator or owner's challenge to an STR restriction alleging that the regulation amounts to taking, a court is required to "compare the value that has been taken from the property with the value that remains in the property."[86] "[W]here an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety."[87] In *Penn Central Transportation Co. v. New York City*,[88] the United States Supreme Court observed:

> Zoning laws generally do not affect existing uses of real property, but 'taking' challenges have also been held to be without merit in a wide variety of situations when the challenged governmental actions prohibited a beneficial use to which individual parcels had previously been devoted and thus caused substantial individualized harm.

Therefore, as a practical matter, it may difficult to argue that an STR prohibition denies the owner of all economically

viable use of his land, particularly where longer-term rentals are still allowed.[89]

## IV. CIDS MAY ENFORCE STRICTER STR REGULATIONS, BUT SUCH REGULATIONS ARE STILL LIMITED

CIDs[90] are sophisticated combinations of privately and commonly held interests in a real estate development or neighborhood in which lots or units are individually owned. CIDs are governed by a recorded declaration of CC&Rs, bylaws, and often, owner/developer-imposed rules.[91] They have an established HOA that is charged with enforcing the CC&Rs and acting in a reasonable, fair, and nonarbitrary manner.[92] CC&Rs regulate certain property uses and activities that are distinct from zoning ordinances regulating land use.[93] CC&Rs must also be reasonable and nonarbitrary.[94] They are considered an equitable servitude on the land; characterized as follows:

> [A]n equitable servitude will be enforced unless it violates public policy; it bears no rational relationship to the protection, preservation, operation or purpose of the affected land; or it otherwise imposes burdens on the affected land that are so disproportionate to the restriction's beneficial effects that the restriction should not be enforced.[95]

CIDs, with their CC&Rs and HOA enforcement rights, inherently possess the framework necessary to regulate STRs above and beyond the local government's regulations.[96] CC&Rs may restrict individual owners' rights to lease their units. These restrictions may absolutely prohibit leasing,[97] partially restrict leasing,[98] or restrict tenants' rights.[99] Although many documents contain leasing restrictions,[100] few California cases interpret them as they relate to STRs. How far HOAs may go in regulating short-term rentals remains unsettled as illustrated by the following cases.

- In *Mission Shores Ass'n v. Pheil*,[101] the court upheld the validity of amendments to the development's declaration that: (i) added a requirement that any rental of a residence be for 30 days or more; and (ii) granted the association the right to evict a tenant for breach of the governing documents, and to recover from the owner-landlord the costs and attorney fees incurred in such an action.[102]

- In *Colony Hill v. Ghamaty*,[103] the application of a condominium association's "single-family residence" CC&R provision to prevent serial renting of rooms in an owner's home was upheld in the face of a constitutionality defense based on privacy rights.

- In *Watts v. Oak Shores Community Ass'n*,[104] the court upheld a board-adopted rule requiring a minimum seven-day rental period and imposing fees on owners using their property for such STRs. The court stated that "evidence and common sense" placed beyond debate the concept that short-term renters cost an HOA more than long-term renters or permanent residents.[105]

- In *Greenfield v. Mandalay Shores Community Ass'n*,[106] homeowners in a beach community in the coastal zone made a prima facie showing sufficient to warrant the issuance of a preliminary injunction that stayed the enforcement of an STR ban implemented by the CC&Rs and HOAs. The court granted the injunction because the STR ban violated the Coastal Act by causing a change in the intensity of use of or access to land in a coastal zone.[107]

It must also be noted that any leasing restriction that violates fair housing laws or is determined to be an unreasonable restraint on alienation will be void.[108]

In restricting and regulating STRs, HOAs rely on arguments that such action is necessary to prevent or mitigate the negative impact that can result from STRs. Most HOAs take the position that retaining the quality of the HOA's residences, preserving quiet enjoyment of property, and keeping costs down within the community is reasonable justification for enforcing regulations and restrictions on STRs.[109]

For CIDs without an express CC&R on STRs, HOAs may argue that STRs or similar activities violate the residential use required by the CC&Rs.[110] STRs may not per se violate the CC&Rs, but depending upon the features of a particular use, it may be a commercial venture, instead of a residential use. Such a determination may be based upon the frequency of rental activity, indicia of business, and government business tax or license requirements applicable to STRs in the jurisdiction.[111] To a certain extent, STR enterprises resemble traditional lodging establishments in that STR units may be subject to tax and licensing requirements; the properties are advertised online; and provide the same services, commodities, and amenities that would be found in a hotel. An HOA may use these facts to demonstrate that whenever a property is not being used as a permanent or long-term residence, its purpose is to conduct STR business, and is, therefore, a violation of a residential-use CC&R.[112]

## V. CONCLUSION

While STRs provide substantial benefits to their proprietors, local government coffers, and the platforms that host the rentals, STRs also cause problems related to abatement of nuisances, the housing market, and local communities. Local governments and CIDs have tried to regulate STRs to varying degrees, with both often stymied by roadblocks and dueling constituents. California, as a premier vacation destination, is sure to continue to grapple with the rapidly evolving legal landscape governing STRs. Interested real estate owners and investors should reevaluate and reposition their real estate investment strategies to legally capitalize on this burgeoning industry. Effective representation of these types of commercial clients requires an attorney to employ a similarly disciplined strategy—one that concentrates on continuously monitoring the shifting STR regulations that govern land use and real estate controls.



**Endnotes**

1 The sharing economy is an economic model defined as a peer-to-peer based activity of acquiring, providing, or sharing access to goods and services that is often facilitated by a community-based online platform. Derek Miller, *The Sharing Economy and How it is Changing Industries* (June 25, 2019), https://www.thebalancesmb.com/the-sharing-economy-and-how-it-changes-industries-4172234. Aside from short-term vacation rentals, examples of the sharing economy include crowdfunding (Kickstarter), ridesharing (Uber, Lyft), shared working spaces (WeWork), and online reselling/trading (eBay, Craigslist).

2 A "short-term rental" most commonly refers to a furnished rental property rented for fewer than thirty consecutive days. *See e.g.*, Carlsbad Mun. Code § 5.60.020; Santa Monica Mun. Code § 6.20.010(f).) Unlike a lease, which is a sort of "long-term rental," an STR does not involve the grant of an estate in the land being rented. Cai Roman, *Making a Business of "Residential Use": The Short-Term-Rental Dilemma in Common Interest Communities*, 68 Emory L.J. 801, 806 (2019). Rather, an STR is a license, which is "an agreement which merely entitles a party to use the land of another for a specific purpose, subject to the management and control retained by the owner." 49 Am. Jur. 2d *Landlord & Tenant* § 20; Rachael Ann Neal Harrington, *Vacation Rentals: Commercial Activity Butting Heads with CC&Rs*, 51 Cal. W.L. Rev. 187, 193-97 (2015). An STR can provide lodging for entire families while providing hotel amenities, including complimentary Wi-Fi, toiletries, bedding, towels, and the added benefits of a fully equipped kitchen, private dinning space and, sometimes, a private pool. Lori Weisberg, *Airbnb Spawns Vacation Rental Confusion*, The San Diego Union-Trib. (Mar. 8, 2015), http://www.utsandiego.com/news/2015/mar/08/airbnb-vacation-rental-growth-causing-confusion/. An STR is often used as an alternative to hotels, motels, and the like.

3 Nat'l Univ. Sys. Inst. of Policy Research, Short-Term Rentals in the City of San Diego: An Economic Impact Analysis (Oct. 2015), http://www.nusinstitute.org/assets/resources/pageResources/NUSIPR_Short_Term_Rentals.pdf; Dennis Schaal, *How the Vacation Rental Land Grab Stacks Up: HomeAway vs. Priceline vs. Airbnb*, Skift (April 4, 2015), http://skift.com/2015/04/07/how-the-vacation-rental-land-grab-stacks-up-homeaway-vs-priceline-vs-airbnb/.

4 Jeremiah Jensen, *In the Pipeline: Short Term Rentals are the Future of Commercial Real Estate*, Housing Wire (Aug. 8, 2018), https://www.housingwire.com/articles/46393-in-the-pipeline-short-term-rentals-are-the-future-of-commercial-real-estate; Carolyn Said, *After Tangle with City, HomeAway CEO Talks Vacation-Rental Growth*, SFGATE (Feb. 20, 2015), http:// www.sfgate.com/business/article/After-tangle-with-city-HomeAway-CEO-talks-6092937.php.

5 Johanna Jainchill, *Big Growth Expected in Vacation Rental Market*, Travel Wkly. (June 5, 2011), http://www.travelweekly.com/travel-news/hotel-news/big-growth-expected-in-vacation-rental-market.

6 Peter L. Allen, *How the Sharing Economy is Transforming the Short-Term Rental Industry*, Knowledge @ Wharton

(Feb. 14, 2019), https://knowledge.wharton.upenn.edu/article/short-term-rentals-the-transformation-in-real-estate-and-travel-set-to-check-in/.

7 VRBO was acquired by HomeAway, another vacation rental platform, in 2006.

8 Short-Term Rentals in the City of San Diego: An Economic Impact Analysis, *supra* note 3, at 2.

9 Host Compliance, LLC, *Home-Sharing and Short-Term Rentals Regulations FAQ*, https://hostcompliance.com/short-term-vacation-rental-faqs. Host Compliance, LLC is a San Francisco-based company that helps cities and counties enforce STR laws. The company has worked with about fifteen cities, including Vancouver, Pasadena, Los Angeles, and Truckee (a resort town near Lake Tahoe, California). The company compiles local STR listings and sends notices to hosts on behalf of the municipalities. It might tell the operator to register or pay taxes, or inform them of other applicable local rules. It has a hotline for neighbors to report issues, such as noise or parking, and then it gathers evidence to back up the claim for local governments to take action.

10 *Id.*

11 Nathan P. Bettenhausen, Esq., *There Goes the Neighborhood: Regulating the Growing Short Term Rental Industry*, Orange Cty. Law., vol. 57, at 16 (July 2015), http://www.fiorelaw.com/regulating-the-growing-short-term-rental-industry/.

12 *Id.*

13 *Id.*

14 *Making a Business of "Residential Uses": The Short-Term-Rental Dilemma in Common Interest Developments*, *supra* note 2, at 816.

15 *Home-Sharing and Short-Term Rentals Regulations FAQ*, *supra* note 9.

16 Charles Gottlieb, *Residential Short-Term Rentals: Should Local Governments Regulate The "Industry?*, 65 Plan. & Envtl. Law 4, at 5 (2013) (implying that there are consequences that come along with unstable renting).

17 *See id.* at 6 (noting that transients lack commitment, which creates unstable communities).

18 Host Compliance, *Six Ways Short-Term Vacation Rentals Are Impacting Communities*, https://hostcompliance.com/how-do-short-term-vacation-rentals-impact-communities; WLOS Staff, *City of Brevard Approves Short-term Rentals*, WLOS (Mar. 23, 2017), https://wlos.com/news/local/city-of-brevard-approves-short-term-rentals.

19 Adrian Rodriquez, *Mill Valley Continues Airbnb-style Host Registry*, The Marin Indep. J. (July 19, 2018), https://www.marinij.com/2017/03/08/mill-valley-continues-airbnb-style-host-registry/.

20 Short-Term Rentals In the City of San Diego: An Economic Impact Analysis, *supra* note 3, at 1.

21 *Six Ways Short-Term Vacation Rentals Are Impacting Communities*, *supra* note 18.

22 Short-Term Rentals In the City of San Diego: An Economic Impact Analysis, *supra* note 3, at 5.

23 *Id.*

24 Josh Bivens, *The Economic Costs and Benefits of Airbnb*, Econ. Pol'y Inst. (Mar. 26, 2019), https://www.epi.org/publication/the-economic-costs-and-benefits-of-airbnb-no-reason-for-local-policymakers-to-let-airbnb-bypass-tax-or-regulatory-obligations/.

25 *Id.*; Stephen Fisherman, *Pros and Cons of Airbnb, VRBO, and Other Short-Term Rentals*, https://www.nolo.com/legal-encyclopedia/pros-cons-airbnb-vrbo-other-short-term-rentals.html.

26 *Six Ways Short-Term Vacation Rentals Are Impacting Communities*, *supra* note 18.

27 *Id.*

28 *See Making a Business of "Residential Use:" The Short-Term-Rental Dilemma in Common Interest Communities*, *supra* note 2.

29 George Zervas, Davide Proserpio & John W. Byers, *The Rise of the Sharing Economy: Estimating the Impact of Airbnb on the Hotel Industry*, B.U. Sch. of Mgmt. Res. Paper No. 2013-2016, at 16 (Nov. 18, 2016), http://people.bu.edu/zg/publications/airbnb.pdf.

30 *Home-Sharing and Short-Term Rentals Regulations FAQ*, *supra* note 9.

31 *How the Vacation Rental Land Grab Stacks Up: HomeAway vs. Priceline vs. Airbnb*, *supra* note 3.

32 *Six Ways Short-Term Vacation Rentals Are Impacting Communities*, *supra* note 18.

33 *Id.*

34 In the City of Los Angeles, several tenants have been suing their landlords and Airbnb for evicting them from apartments. I-Chun Chen, *L.A. Apartment Tenants Sue Airbnb, Landlord for Their Eviction*, L.A. Biz (Jan. 10, 2017), https://www.bizjournals.com/losangeles/news/2017/01/10/l-a-apartment-tenants-sue-airbnb-landlord-for.html. A report on the relationship between short-term rentals and Los Angeles's affordable housing crisis has shown that the density of Airbnb listings overlaps with higher rental prices and lower rental vacancy. Dayne Lee, *How Airbnb Short-Term Rentals*

*Exacerbate Los Angeles's Affordable Housing Crisis: Analysis and Policy Recommendations*, 10 Harv. L. & Pol'y Rev., at 229 (2016).

35 Courtney Tompkins, *Should Long Beach Allow Airbnb and Other Short-term Rentals?*, Press Telegram (Mar. 24, 2017), https://www.presstelegram.com/2017/03/24/should-long-beach-allow-airbnb-and-other-short-term-rentals/.

36 Hailey Branston-Potts & Tracey Lien, *Protesters Storm Airbnb's San Francisco Headquarters a Day Before Vote on Regulations*, L.A. Times (Nov. 2, 2015), https://www.latimes.com/local/lanow/la-me-ln-airbnb-protest-20151102-story.html; *Ewing v. City of Carmel-By-The-Sea*, 234 Cal. App. 3d 1579 (1991) (Vacation rentals have adverse impacts on local communities, "including, but not limited to, increased levels of . . . vehicle traffic, parking demand, light and glare, and noise detrimental to surrounding residential uses and the general welfare of the City." Additionally, "[s]uch commercial use may increase demand for public services, including, but not limited to, police, fire, and medical emergency services, and neighborhood watch programs.").

37 Joel Grover, Matthew Glasser & Cole Sullivan, *Short-Term Rentals Turn Into Nightmares Next Door*, NBC4 LA (Mar. 1, 2017), https://www.nbclosangeles.com/news/local/I-Team-Investigation-Short-Term-Rentals-Property-Airbnb-415128373.html.

38 *Home-Sharing and Short-Term Rentals Regulations FAQ*, *supra* note 9.

39 Section III.B.

40 Cal. Civ. Code § 1864, which reads as follows:

> Any person or entity, including a person employed by a real estate broker, who, on behalf of another or others, solicits or arranges, or accepts reservations or money, or both, for transient occupancies described in paragraphs (1) and (2) of subdivision (b) of Section 1940, in a dwelling unit in a common interest development, as defined in Section 4100, in a dwelling unit in an apartment building or complex, or in a single-family home, shall do each of the following:
>
> (a) Prepare and maintain, in accordance with a written agreement with the owner, complete and accurate records and books of account, kept in accordance with generally accepted accounting principles, of all reservations made and money received and spent with respect to each dwelling unit. All money received shall be kept in a trust account maintained for the benefit of owners of the dwelling units.
>
> (b) Render, monthly, to each owner of the dwelling unit, or to that owner's designee, an accounting for each month in which there are any deposits or disbursements on behalf of that owner, however, in no event shall this accounting be rendered any less frequently than quarterly.
>
> (c) Make all records and books of account with respect to a dwelling unit available, upon reasonable advance notice, for inspection and copying by the dwelling unit's owner. The records shall be maintained for a period of at least three years.
>
> (d) Comply fully with all collection, payment, and recordkeeping requirements of a transient occupancy tax ordinance, if any, applicable to the occupancy.
>
> (e) In no event shall any activities described in this section subject the person or entity performing those activities in any manner to Part 1 (commencing with Section 10000) of Division 4 of the Business and Professions Code. However, a real estate licensee subject to this section may satisfy the requirements of this section by compliance with the Real Estate Law.

41 *Id.*

42 Cal. Bus. & Prof. Code § 22592.

43 Lisa Halverstadt & Sara Libby, *Sacramento Report: Bill Would Sharply Limit Short-Term Rentals in Beach Neighborhoods*, Voice of San Diego (Apr. 19, 2019), https://www.voiceofsandiego.org/topics/government/sacramento-report-bill-would-sharply-limit-short-term-rentals-in-beach-neighborhoods/.

44 https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB1731. This bill would add Business and Professions Code section 22596.

45 *Id.*

46 *Id.*

47 *Id.*

48 Danny Freeman, *Bill Placing Days-Per-Year Limit on STVR Properties Moving Through Sacramento*, NBC7 San Diego (June 19, 2019), https://www.nbcsandiego.com/news/local/Bill-Placing-Days-Per-Year-Limit-on-STVR-Properties-Moving-Through-Sacramento-511545452.html.

49 McQuillin, The Law of Municipal Corporations §§ 24.01-24.92a (3d ed. 1980); *City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.*, 56 Cal. 4th 729 (2013).

50 *Berman v. Parker*, 348 U.S. 26 (1954); *Euclid v. Ambler Realty*, 272 U.S. 365 (1926).

51 Cal. Const. art. XI, § 7; *Scrutton v. Cty. of Sacramento*, 275 Cal. App. 2d 412 (1969); *DeVita v. Cty. of Napa*, 9 Cal. 4th 763, 768 (1995).

52 Cal. Const. art. XI, § 7; *Griffin Dev. Co. v. City of Oxnard,* 39 Cal. 3d 256 (1985); *Santa Monica Pines, Ltd. v. Rent Control Bd.*, 35 Cal. 3d 858 (1984).

53 *Consolidated Rock Prods. Co. v. City of L.A.*, 57 Cal. 2d 515, 522 (1962); *Miller v. Bd. of Pub. Works*, 195 Cal. 477, 485 (1925).

54 *Welch v. Swasey*, 214 U.S. 91, 29 S. Ct. 567 (1909).

55 *Eubank v. City of Richmond*, 226 U.S. 137, 33 S. Ct. 76 (1912).

56 *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114 (1926); *Miller*, 195 Cal. 477.

57 *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129 (1976) (voiding the subject rent control law, but stating that such laws generally are within the police power); *Foster v. Britton*, 242 Cal. App. 4th 920 (2015).

58 *Constr. Indus. Ass'n v. City of Petaluma*, 522 F.2d 897 (9th Cir 1975).

59 *Metromedia, Inc. v. City of San Diego*, 26 Cal. 3d 848, 860 (1980), *rev'd on other grounds in Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S. Ct 2882 (1981).

60 *Novi v. City of Pacifica*, 169 Cal. App. 3d 678 (1985).

61 *Ewing v. City of Carmel-by-the-Sea*, 234 Cal. App. 3d 1579 (1991). Florida appears to be the only state to have enacted legislation limiting the authority of local governments to regulate or prohibit STRs. Gray Rohrer, *Florida House Targets Airbnb As It Moves to Preempt Local Rules on Home Rentals*, Orlando Sentinel (Mar. 26, 2019), https://www.orlandosentinel.com/politics/os-ne-airbnb-bill-preemption-20190326-story.html. It is conceivable, however, that the Florida law may become a model for other states. This would appear most likely to occur in those states where STRs comprise a meaningful segment of the tourist lodging industry.

62 *Estates at Desert Ridge Trails Homeowners' Ass'n v. Vazquez*, 300 P.3d 736, 747 (2013); Stephen Fisherman, Esq., *Legal Restrictions on Renting Your Home on Airbnb or Other Rental Services*, https://www.nolo.com/legal-encyclopedia/legal-restrictions-renting-your-home-airbnb-other-rental-services.html/.

63 Oceanside City Code, chapter 24 establishes inspections, occupancy limits, parking requirements, imposition of fees, increased code enforcement, and compliance with the "Good Neighbor Policy." However, it only requires a two-night minimum stay and does not include a cap on total rental days per year.

64 In July 2018, the City Council for the City of San Diego passed two ordinances related to STR regulations. The following month, a referenda petition, seeking to put the ordinances to the voters, was filed. The petition alleged that the ordinances "undermine private property rights" and negatively impact tourism. It also claimed that they "hurt local residents who rely on home sharing to stay in their communities." The petition needed 36,000 signatures to put the issue on the ballot, and received over 62,000. Polling at the time suggested that voters were in favor of allowing STRs to operate relatively freely. On October 22, 2018, the city council voted 8-1 to repeal both ordinances, leaving San Diego without direct STR regulations. Lori Weisberg, *San Diego Rescinds Tough Airbnb Regulations, Reopening Debate on How to Rein in Short-term Rentals*, San Diego Union Trib. (Oct. 22, 2018), https://www.sandiegouniontribune.com/business/tourism/sd-fi-airbnb-regulations-council-20181022-story.html; Ashley Rollins, *Palo Alto Profiting from Unauthorize Short-Term Rentals*, Peninsula Press (Oct. 30, 2018), http://peninsulapress.com/2018/10/30/palo-alto-profiting-from-unauthorized-short-term-rentals/.

65 Some local governments impose short-term rental occupancy taxes on STRs. For example, in the City of Berkeley, only primary residences are eligible for short-term rental stays of fourteen days or less. Hosts are required to register with the city and obtain a zoning certificate (includes application fee), collect a TOT, and pay an additional enforcement fee. Non-hosted rentals are capped at ninety days per year. Hosts also must notify adjacent property owners of short-term rental status and carry a minimum of $1,000,000 liability insurance. Additional dwelling units ("ADUs") constructed after April 1, 2017, or used as long-term rentals since April 1, 2007, are not eligible for short-term rentals. Neither below-market rent units nor any unit with a no-fault eviction in the last five years are eligible to qualify as STRs. Berkley City Code, ch. 23C.22, Short-Term Rentals.

66 Restrictive statutes are broad and prescribe length-of-stay terms anywhere from one to thirty days, with a maximum number of rental days annually. In the City of Calistoga, all STRs of less than thirty days are banned in residential zones. Press Release, City of Calistoga, Unlawful Vacation Rental*s* (Mar. 1, 2016), http://www.ci.calistoga.ca.us/home/showdocument?id=21807. In a recently settled case, an unlawful operator was fined $17,842, plus an additional $10,000 in suspended fees and $2,633 in reimbursement costs.

67 Zoning regulations that restrict STRs in residential areas have been upheld where the restrictions are found to be substantially related to land use impacts in the area. *Ewing v. City of Carmel-by-the-Sea*, 234 Cal. App. 3d 1579, 1589 n.37 (1991); *Homeaway.com, Inc. v. City of Santa Monica*, 918 F.3d 676 (9th Cir.) (municipal regulation of short-term rentals, including prohibiting booking transactions for residential properties not listed on the city's registry does not violate the Communications Decency Act; the First, Fourth, and Fourteenth Amendments of the U.S. Constitution; or the Stored Communications Act); *Young v. County of San Mateo*, 2005 WL 3454106 (N.D. Cal. 2005) (upholding validity of ordinance that prohibited hosting conferences, meetings, or social events at bed and breakfast establishments). Per San Luis Obispo Code section 23.08.165, an STR is not permitted within 200 linear feet of a different and separate STR. In the City of Santa Barbara, STRs are defined as "hotels" that can only operate in designated zones, and then only if all necessary approvals are obtained. Santa Barbara Mun. Code §§ 28.04.395, 28.21.005.

68 The City of Pacific Grove limits the density of STRs. Pacific Grove Mun. Code § 23.64.350. The City imposes serious fines for violations of the STR regulations—penalties equal 100% of the total revenue earned through illegal hosting, assessed beginning the day the illegal activity begins, and accruing until the activity ceases. Additionally, operators of illegal STRs are barred from obtaining another license for two years.

69 Some regulations require that the property be a primary residence for the operator to prevent investors who do not live on the property from renting out a unit or an entire property as an STR. In the City of Piedmont, the STR must be a primary residence. A permit to operate an STR is required, which triggers notification of adjacent neighbors. Permittees must maintain general liability insurance of at least $1,000,000.00. The minimum stay is two consecutive nights, but there is an annual cap of sixty rental nights. ADUs are not eligible to qualify as STRs. STRs are required to provide a smoke detector, carbon monoxide detector, and fire extinguisher. No events, parties, or gatherings are permitted. Violations are fined at $1,500 for the first offense and $5,000 for each subsequent offense. The city collects TOT. Piedmont City Code § 17.40.030. In the City of Los Angeles, hosts must register with the city. Hosts are limited to registering only one property with the city at a time, which must be their primary residence where they live at least six months out of the year. Rentals are limited to a 120-day annual cap, and rent-stabilized units may no longer be used for home-sharing, even if the host owns the unit. L.A. Mun. Code § 12.22.

70 In the City of Cloverdale, a residential unit used as an STR is limited to an annual 120-night cap, while individual rental periods cannot exceed thirty consecutive days. All property owners and occupants within 200 feet of the STR shall be provided with (a) the contact information of the property owner of the STR in the case of disturbance, and (b) notice prior to the residential unit being listed as an STR. Cloverdale Mun. Code § 18.09.265. The City of San Francisco enacted an ordinance legalizing STRs in the city. Before this, San Francisco banned residential rentals of less than thirty days in multi-unit buildings—a ban that effectively made most STRs illegal. The current law imposes a number of restrictions on STRs including: a cap of ninety total rental days per year; a requirement that the property owner live in the property at least 275 days per year; a requirement that the owner be on the premises while the unit is being rented; and a requirement that the rental unit must be the property owner's primary residence and not a secondary home. S.F. Admin. Code, ch. 41A, Residential Unit Conversation and Demolition.

71 The City of Palm Desert requires units that are rented for twenty-seven or fewer days to register as an STR. Hosts are not required to be on the premises of the rental while the visitor is staying, but they must provide a round-the-clock contact person who can respond to calls within thirty minutes. Permitting of new STRs in residential neighborhoods is prohibited and previously permitted STRs in certain residential zones will terminate effective December 31, 2019. Palm Desert, Cal., Muni. Code ch. 5.10, Short-Term Rentals.

City of Redwood STR operators must register with the city, get a business license, and collect TOT. Hosts must

provide on-site parking for guests and designate a local contact person who will respond to complaints while the host is absent. STRs are only allowed in homes that are primary residences, and rentals are limited to no more than 120 days per year when the host is not present. STR properties may not host special events, such as weddings or corporate retreats. Redwood Mun. Code, ch. 3.13, Short Term Rental Uses Incidental to Primary Uses.

72 City of Redwood, Redwood Mun. Code, ch. 3.13, Short Term Rental Uses Incidental to Primary Uses.

73 The operation of any business, which can include the rental of property, may trigger a license or permit requirement. In addition, a jurisdiction may also require an STR license or registration (with a fee) and attestation that the property meets health and safety requirements (*e.g.*, smoke and carbon monoxide detectors, fire extinguishers, etc.), code compliance, zoning laws, and minimum insurance requirements.

The City of South Lake Tahoe requires owners of vacation home rentals to apply for a Vacation Home Rental Permit and agree to abide by rules and regulations, including posting notices about noise, parking, trash pickup, number of guests, and identifying a local contact for guests or neighbors to reach. South Lake Tahoe City Code, ch. 3.50, Transient Lodging.

In the City of Napa, STRs of less than thirty-one days are prohibited without a vacation rental permit. Only forty-one permits for non-hosted STRs are available for the entire city. Under the applicable regulations, "Non-Hosted Accommodation" means a vacation rental business for which the owner (or authorized agent) is not required to reside at the vacation rental unit. Only sixty permits are available for hosted STRs in which the owner resides on-site and a maximum of two bedrooms can be rented out for these hosted rentals. All permits have been issued and there is currently a wait list for new applications, which the city expects will move *very* slowly as existing permits can be transferred when a legal STR is sold to a new owner. Napa Mun. Code § 17.52.515.

In the City of Santa Cruz, there is a permanent citywide cap of 250 STR permits available. To operate an STR, a permittee must obtain an STR permit and TOT certificate. The city will not issue new permits for units where the resident resides less than six months per year. This does not apply to "grandfathered" STR units. Only residents who reside for at least six months per year can apply for new STR permits. STR permits will not be issued for ADUs unless "grandfathered." Lastly, the permittee must enroll in the city's Rental Inspection Service and remit to the city TOT. Santa Cruz Mun. Code, ch. 24.12, pt. 18.

74 [V]acation rental regulation in the coastal zone must occur within the context of your local coastal program (LCP) and/or be authorized pursuant to a coastal development permit (CDP). The regulation of short-term/vacation rentals represents a change in the intensity of use and of access to the shoreline, and thus constitutes development to which the Coastal Act and LCPs must apply. We do not believe that regulation outside of that LCP/CDP context (e.g., outright vacation rental bans through other local processes) is legally enforceable in the coastal zone, and we strongly encourage your community to pursue vacation rental regulation through your LCP."
Letter from Steve Kinsey to Coastal Planning/ Community Development Directors re Short-Term/ Vacation Rentals in the California Coastal Zone (Dec. 6, 2016), https://documents.coastal.ca.gov/assets/la/Short_Term_Vacation_Rental_to_Coastal_Planning_&_Devt_Directors_120616.pdf.

75 Phil Diehl, *Coastal Commission Tells Del Mar to Expand Short-term Rentals*, San Diego Union Trib. (June 17, 2018), https://www.sandiegouniontribune.com/communities/north-county/sd-no-short-rentals-20180614-story.html.

76 Cal. Pub. Res. Code §§ 30000-30900.

77 Marisa Moret, *A Ban on Short-term Rentals Would Violate the California Coastal Act*, The Orange County Reg. (Dec. 14, 2017), https://www.ocregister.com/2017/12/13/a-ban-on-short-term-rentals-would-violate-the-california-coastal-act/; *Coastal Commission Tells Del Mar to Expand Short-term Rentals*, *supra* note 75; Keith Hamm, *Coastal Commission Rejects Limiting Short-Term Rentals*, Santa Barbara Indep. (Aug. 18, 2018), https://www.independent.com/2018/08/20/coastal-commission-rejects-limiting-short-term-rentals/.

78 Cal. Pub. Res. Code §§ 30213, 30222; Talia Edelman, *Cities Can Stem the Tide of Short-Term Coastal Rental Homes*, SCOCAblog (Apr. 16, 2019), http://scocablog.com/cities-can-stem-the-tide-of-short-term-coastal-rental-homes/.

79 *Sacramento Report: Bill Would Sharply Limit Short-Term Rentals in Beach Neighborhoods*, *supra* note 43.

80 *Id.*

81 Barbara Wood, *Atherton Will Consider Allowing Airbnb-type Short Term Rentals*, The Almanac (Mar. 2, 2017),

https://almanacnews.com/news//03/02/atherton-will-consider-allowing-airbnb-type-rentals.

82 *Legal Restrictions on Renting your Home on Airbnb or Other Rental Service*, *supra* note 62.

83 *Id.*

84 *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309 (1994); *Ehrlich v. City of Culver City*, 12 Cal. 4th 854 (1996). As it relates to alternative Constitutional-related allegations, in *Rosenblatt v. City of Santa Monica*, No. 17-55879 (2019), the Ninth Circuit recently approved the dismissal of a putative class action against the City of Santa Monica and Santa Monica City Council alleging that the city's STR ordinance violates the dormant commerce clause.

85 *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646 (1978).

86 *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497, 107 S. Ct. 1232, 1248 (1987).

87 *Andrus v. Allard*, 444 U.S. 51, 65-66, 100 S. Ct. 318, 327 (1979).

88 438 U.S. 104, 125-27, 98 S. Ct. 2646, 2659-61 (1978).

89 *Cope v. City of Cannon Beach*, 855 P.2d 1083 (1993).

90 As defined by Davis-Stirling Common Interest Development Act (Cal. Civ. Code §§ 4000-6150).

91 *Making a Business of "Residential Uses": The Short-Term-Rental Dilemma in Common Interest Developments*, *supra* note 2, at 816.

92 *Ironwood Owners Ass'n IX v. Solomon*, 178 Cal. App. 3d 766, 772 (1986).

93 *Vacation Rentals: Commercial Activity Butting Heads with CC&Rs*, *supra* note 2, at 216.

94 Cal. Civ. Code §§ 4350, 5975(a); *Nahrstedt v. Lakeside Village Condo. Ass'n*, 8 Cal. 4th 631 (1994).

95 *Lamden v. La Jolla Shores Clubdominium Homeowners Ass'n*, 21 Cal. 4th 249, 263 (1999).

96 *Making a Business of "Residential Uses": The Short-Term-Rental Dilemma in Common Interest Developments*, *supra* note 2, at 816.

97 *City of Oceanside v. McKenna*, 215 Cal. App. 3d 1420 (1989).

98 *Mission Shores Ass'n v. Pheil*, 166 Cal. App. 4th 789 (2008) (upheld amendment to declaration adding thirty-day minimum lease requirement and authorizing association to evict tenants that violate development's governing documents).

99 *Major v. Miraverde Homeowners Ass'n*, 7 Cal. App. 4th 618 (1992).

100 Effective January 1, 2012, a provision in a governing document that prohibits leasing or rental of a separate interest does not apply to those who owned the separate interest before the effective date of the leasing restrictions (unless the owner expressly consents to the prohibition). Cal. Civ. Code § 4740. Cal. Civil Code § 4740 addresses only "prohibitions" on leasing, not "restrictions" on leasing. To the extent leasing is not totally prohibited, it is unclear what rental restrictions a community might adopt and enforce retroactively. For example, limiting the total number of units rented at any given time is not a "prohibition" on leasing, nor is a requirement that an owner reside in the unit (or refrain from renting it for a specified period after acquisition). It cannot be said with certainty how restrictive a rental provision might be before a court would deem it a "prohibition." If the restriction takes the form of an owner-adopted CC&R amendment, the restriction should be entitled to the presumption of validity articulated in *Nahrstedt*. *See Nahrstedt v. Lakeside Village Condo. Ass'n*, 8 Cal. 4th 631 (1994). An owner must provide to the association verification of the acquisition date of the separate interest before rental of the separate interest. Cal. Civ. Code § 4740(d).

101 *Mission Shores Ass'n v. Pheil*, 166 Cal. App. 4th 789 (2008).

102 *Id.* at 795.

103 *Colony Hill v. Ghamaty*, 143 Cal. App. 4th 1156 (2006).

104 *Watts v. Oak Shores Community Ass'n*, 235 Cal. App. 4th 466 (2015).

105 *Id.* at 472.

106 *Greenfield v. Mandalay Shores Cmty. Ass'n*, 21 Cal. App. 5th 896 (2018).

107 Cal. Pub. Res. Code §§ 30600(a), 30106. The Coastal Act provides that "[a]ny person may maintain an action for declaratory and equitable relief to restrain any violation of this division.… On a prima facie showing of a violation of this division, preliminary equitable relief shall be issued to restrain any future violation of this division." *Id.* § 30803. In *Greenfield v. Mandalay Shores Community Ass'n,* the Greenfields had standing to pursue relief. The term "development" has been interpreted broadly. In this matter, the STR ban changed the intensity of use and access to single-family homes in the Oxnard Coastal Zone. STRs could not be regulated by a private actor when it affected the intensity of use or access to single-family homes in

a coastal zone. STR bans were a matter for the city and the Coastal Commission to address and decide whether a one-week rental created more neighborhood problems than a longer rental period. The HOA's STR ban affected 1,400 units across a wide section of beach properties that previously had been used as short-term rentals.

108 Cal. Civ. Code § 711.

109 Dana Palombo, *The Tale of Two Cities: The Regulatory Battle to Incorporate Short-Term Residential Rentals Into Modern Law,* 4 Am. U. Bus. L. Rev. 287 (2015).

110 *Making a Business of "Residential Uses:" The Short-Term-Rental Dilemma in Common Interest Developments*, *supra* note 2, at 820-21 n.2.

111 *Id.* at 821.

112 *Id.*

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REAL PROPERTY LAW

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# The Problem of the Assignment of Deed of Trust

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## I. INTRODUCTION

Mortgage loan servicers frequently record an assignment of deed of trust in the public records. The assignment is typically from the originating lender, who purports to grant, assign, and transfer all beneficial interest in the deed of trust to the designated assignee. Reading this text, one might assume that (1) the assignor held title to the mortgage loan as of the date of the assignment, (2) the assignment effected a transfer of ownership in the deed of trust and with it, the right to foreclose, and (3) the assignee was entitled to enforce the deed of trust upon the borrower's default by virtue of the assignment. Surprisingly, all three assumptions would be wrong.

Contrary to its terms, a bare assignment of the deed of trust does not operate to transfer or convey the beneficial interest in the deed of trust.[1] The beneficial interest in a deed of trust is "incident to" the promissory note it secures, and follows a transfer of the note without any further assignment or documentation.[2] No assignment of the deed of trust need be recorded—or even exist—for the originating lender to sell or transfer its interest in the mortgage debt, or for the transferee of the promissory note to foreclose in the event of a default.[3]

And yet, deed of trust assignments are frequently recorded, and often years after the underlying note was transferred. Their recordation causes widespread confusion among mortgage borrowers trying to grasp the meaning of documents recorded against their property, their attorneys, and even courts handling foreclosure-related litigation. This article examines the assignment of deed of trust, why it is recorded, and the myriad problems its recordation causes. Finally, it suggests an alternative recording device provided for in the California Commercial Code that accomplishes the same goals as recording an assignment but that foregoes the misleading assignment language that causes such misunderstanding.

## II. THE DEED OF TRUST'S ROLE IN MORTGAGE LENDING

A promissory note is a negotiable instrument that the lender may sell to a third party without notice to the borrower.[4] A deed of trust is a separate document encumbering real property that may be foreclosed and sold in the event of a default on the promissory note it secures. Under a deed of trust, the borrower, or "trustor," conveys nominal title to real property to an intermediary, the "trustee," who holds that title as security for repayment of the loan to the lender, or "beneficiary."[5] If the borrower/trustor defaults on the loan, the lender/beneficiary may demand that the trustee conduct a nonjudicial foreclosure sale. The trustee is not a true trustee as the word is commonly used elsewhere, and owes no fiduciary obligations; it merely acts as a common agent for the borrower and lender. As the California Court of Appeal memorably put it, "[j]ust as a panda is not a true bear, a trustee of a deed of trust is not a true trustee."[6]

The California Legislature has established a comprehensive set of legislative procedures governing nonjudicial foreclosures at Civil Code sections 2924 to 2924l. The Court of Appeal has explained:

The purposes of this comprehensive scheme are threefold: (1) to provide the creditor/beneficiary with a quick, inexpensive and efficient remedy against a defaulting debtor/trustor; (2) to protect the debtor/trustor for wrongful loss of

the property; and (3) to ensure that a properly conducted sale is final between the parties and conclusive as to a bona fide purchaser.[7]

The foreclosure process is commenced by the recording of a notice of default and election to sell by the beneficiary, trustee, or any of their authorized agents.[8] After the notice of default is recorded, the trustee must wait three calendar months before issuing a notice of sale that is published, posted, and mailed 20 days before the sale and recorded 14 days before the sale.[9] The trustee then sells the property at auction to the highest bidder. Once the trustee's sale is complete, the borrower has no further right of redemption. The purchaser takes title by a trustee's deed upon sale.[10] Due to the exhaustive nature of this scheme, California appellate courts have generally refused to read any additional requirements into the nonjudicial foreclosure statutes.[11]

## III. THE DEED OF TRUST "FOLLOWS" THE PROMISSORY NOTE WITHOUT SEPARATE ASSIGNMENT

Understanding the assignment of deed of trust instrument requires grasping the relationship between the deed of trust and the promissory note it secures. As the California Court of Appeal explained in *Domarad v. Fisher & Burke, Inc.* ("*Domarad*"),[12] "a deed of trust is a mere incident of the debt it secures" and "is inseparable from the debt and always abides with the debt, and it has no market or ascertainable value, apart from the obligation it secures." Even though the deed of trust is a separate document that is recorded in the public records, the rights and obligations set forth in the deed of trust are forever tied to the note.

For this reason, the beneficial interest in a deed of trust "follows" assignment or sale of the promissory note without a separate assignment. The U.S. Supreme Court summarized this longstanding common law principle in its seminal decision *Carpenter v. Longan*,[13] where it explained that the "transfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter." Inevitably, perhaps, given the California Legislature's enthusiasm for codifying the common law, the principle is codified as Civil Code section 2936, which states: "[t]he assignment of a debt secured by mortgage carries with it the security."

It follows that a bare assignment of deed of trust does not, in fact, assign or otherwise convey the beneficiary interest in the deed of trust. As the California Court of Appeal concluded in *Domarad*, the "deed of trust has no assignable quality independent of the debt, it may not be transferred apart from the debt, and an attempt to assign the deed of trust without a transfer of the debt is without effect."[14] So, the beneficial interest in a deed of trust is "assigned" or otherwise conveyed only when the promissory note it secures is transferred to a new person entitled to enforce the note.

Potentially, an exception exists where the assignment purports to convey the deed of trust *and* the promissory note it secures. The Court of Appeal has found that "[s]uch a form of assignment operates as an assignment of both the note and the deed of trust."[15] However, the reality of modern residential mortgage servicing is that the assignment is neither prepared nor recorded in the public records until the mortgage servicer is preparing to non-judicially foreclose following a default. This may be months or years after the originating lender has sold its interest in the loan. No assignment may be prepared at all if no delinquency occurs. The transfer of ownership in a residential mortgage loan is often through a bulk sale with hundreds or thousands of other loans, often only days after the loan was originated. So, an assignment purporting to assign the beneficial interest in a deed of trust and the promissory note it secures is almost invariably moot because the indebtedness had already been transferred.

For this reason, one cannot assume that the assignee even held the beneficial interest in the deed of trust (or the promissory note) on the date of the assignment. The mortgage loan servicer normally holds a power of attorney from the originating lender authorizing the servicer to execute an assignment from the originating lender. As noted, this could be years after the putative assignor sold its interest in the loan. Still, federal law requires timely notice to the borrower if a residential mortgage loan is transferred to a new servicer[16] or owner,[17] and timely notice of a transfer may conflict with the date of a recorded assignment, inevitably causing confusion.

## IV. A LENDER MAY PROVE IT IS THE BENEFICIARY ENTITLED TO ENFORCE THE DEED OF TRUST BY SHOWING IT IS A "PERSON ENTITLED TO ENFORCE" THE NOTE

In 2016, the California Supreme Court issued a decision in *Yvanova v. New Century Mortgage Corp.* ("*Yvanova*")[18] holding that a mortgage borrower has standing to sue for wrongful foreclosure on the ground that a completed non-judicial foreclosure sale was not conducted by the deed of trust beneficiary or its agent.[19] The court explained that "[o]nly the 'true owner' or 'beneficial holder' of a Deed of

Trust can bring to completion a nonjudicial foreclosure under California law."[20] For this reason, it is important for attorneys representing both lenders and borrowers (and courts, of course) to correctly identify the deed of trust beneficiary.

Too frequently, attorneys—even those representing lenders and servicers—try to rely upon a recorded assignment of deed of trust to establish ownership of the debt. They should not. The assignment of deed of trust does not, in fact, convey the beneficial interest in a deed of trust. Rather, attorneys representing lenders and loan servicers should identify the person who is entitled to enforce the underlying promissory note to satisfy the inquiry.

Identifying the person entitled to enforce the note requires reference to the California Commercial Code.[21] Article 3, which governs negotiable instruments, provides that the ability to enforce a promissory note is held by the "person entitled to enforce" the note.[22] But Article 3 does not necessarily equate the proper person to be paid with the person who owns the instrument.

At least two ways exist in which a person can acquire "person entitled to enforce" status.[23] Most commonly, the person is a "holder" of the note.[24] The concept of a "holder" is set out in detail in California Commercial Code section 1201(b)(21)(A), which provides that a person is a holder if the person possesses the note and either (1) the note has been made payable to the person who has it in his possession, or (2) the note is payable to the bearer of the note, i.e., endorsed to blank as opposed to an identified person or entity.[25] This determination requires physical examination not only of the face of the note but also of any endorsements, including whether any purported allonge was sufficiently affixed.[26] But the signatures on the note—including the endorsement(s)—are presumed authentic.[27] The great majority of notes secured by residential property in California are endorsed to blank (known as "bearer paper" as they are enforceable by their bearer).

An alternative, and less frequent, way to become a "person entitled to enforce" involves attaining the status of "nonholder in possession of the instrument who has the rights of a holder."[28] A person becomes a nonholder in possession if the note "is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the [note]," even if the note was not made payable to the recipient or to the note's bearer.[29] Put differently, "the possessor of the note must demonstrate both the fact of the delivery and the purpose of the delivery of the note to the transferee in order to qualify as the 'person entitled to enforce.'"[30] This is far more rare than showing "holder" status, but may occur where the promissory note was not endorsed before it was delivered, perhaps through oversight or error where a large number of notes are delivered together.

Some pre-*Yvanova* decisions hold that possession of the original promissory note is not required to initiate foreclosure proceedings.[31] These decisions look to the nonjudicial foreclosure statutory scheme set forth in Civil Code section 2924-2924l and hold no express requirement relating to possession of the note. Certainly, the Civil Code does not require that the person issuing a notice of default be in possession of the original note; rather, the foreclosure proceeding may be initiated by "the trustee, mortgagee, or beneficiary, *or any of their authorized agents*…." (emphasis supplied).[32] However, in light of the California Supreme Court's holding in *Yvanova* that only the "true owner" or "beneficial holder" of the deed of trust may foreclose, the lender's attorney should be prepared to show that the foreclosure proceedings were ultimately authorized by a "person entitled to enforce" the note.

## V. ASSIGNMENTS ARE NONETHELESS FREQUENTLY RECORDED IN THE PUBLIC RECORDS

It may seem surprising that assignments are nonetheless recorded in the public records by mortgage servicers, but recorded they are, and in the great majority of foreclosure proceedings. Why do mortgage servicers bother? At least one reason stems from longstanding confusion over the difference between a deed of trust and a mortgage. California Civil Code section 2932.5, whose predecessor statute was enacted in 1872, requires that the power of sale set forth in a *mortgage* (as opposed to a deed of trust) "may be exercised by the assignee if the assignment is duly acknowledged *and recorded*." (emphasis supplied.) There is little practical difference between mortgages and deeds of trust as they perform the same function, and the same rules are generally applied to deeds of trust that are applied to mortgages.[33] Nonetheless, in the 1908 case of *Stockwell v. Burnham* ("*Stockwell*")[34] the California Court of Appeal held that the Civil Code section 2932.5 applies only to mortgages, not deeds of trust. Unlike a mortgage where the mortgagee (lender) has the authority to exercise the power of sale, it is the trustee on a deed of trust who holds legal title to the property and may conduct the sale and transfer title.[35] In other words, "because a deed of trust does not convey a power of sale directly to the beneficiary-creditor, it is immaterial whether an assignment of a promissory note was properly acknowledged and recorded when a deed of trust is used to secure a debt."[36]

However, some borrowers have argued that *Stockwell* is outdated and poorly reasoned, and indeed, several federal district courts concluded that Civil Code section 2932.5 obligated lenders to record an assignment of deed of trust before foreclosure.[37] Many mortgage servicers continued recording assignments in an excess of caution. It was not until the California Court of Appeal expressly reaffirmed *Stockwell* in 2011 that the issue was finally laid to rest.[38]

There are other reasons as well why servicers continue to record deed of trust assignments. One practical reason is that a lender who takes title through a credit bid at a nonjudicial foreclosure sale does not pay transfer tax on the unpaid debt.[39] An assignment of a deed of trust in favor of the lender, who then takes title through a trustee's deed upon sale, evidences that the sale was to the beneficiary.

Assignments are also recorded to impart public notice as to the owner of the indebtedness in advance of the sale.[40] As the Court of Appeal has observed: "The purpose of the recording statutes is to give notice to prospective purchasers or mortgagees of land of all existing and outstanding estates, titles or interest, whether valid or invalid, that may affect their rights as bona fide purchasers."[41]

Also, the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac"), which purchase mortgage loans in the secondary market and guarantee third-party loans, require mortgage servicers to record assignments as part of the foreclosure process for most mortgage loans.[42] Many private-label investors also require servicers to record an assignment of deed of trust.

And another important reason for the continuing prevalence of recorded assignments is due to the Mortgage Electronic Registration System ("MERS"). MERS is a private corporation that administers a national registry of real estate debt interest transactions. Under the "MERS System," MERS is designated as the beneficiary of the deed of trust, acting as "nominee" for the lender, and granted the authority to exercise legal rights of the lender. Members of the MERS System otherwise retain the promissory notes and mortgage servicing rights.[43] MERS System rules require the servicer to record an assignment of deed of trust from MERS before the servicer may commence nonjudicial foreclosure proceedings.[44]

## VI. THE PROBLEMS CAUSED BY RECORDING DEED OF TRUST ASSIGNMENTS

It should come as no surprise that recording an assignment of deed of trust frequently causes confusion. After all, most or all of the representations made in a typical assignment are untrue. The assignee does not hold the beneficial interest in the deed of trust on the date of the assignment, and nor does the assignor "hereby convey" to the assignee anything at all, let alone the power of sale set forth in a deed of trust. The author of this article has tried numerous cases in California courts that arose from misunderstanding the assignment's true role in mortgage lending and foreclosure. What follows is a description of the most common misunderstandings. The common thread running through them is the misconception that an assignment of deed of trust has the effect of transferring the beneficial interest in a given deed of trust.

### A. The Note and Deed of Trust Cannot Become "Bifurcated"

Borrowers attempting to stop a foreclosure sale have argued that the note and deed of trust were "bifurcated" because the beneficial interest in the deed of trust was assigned to a person who was not the "person entitled to enforce" the promissory note. So, the theory goes, the lender has lost the security for its debt even if it may still enforce the promissory note. Troublingly, some courts have seemed to give the theory credence, but it does not appear any court has ultimately concluded that bifurcation occurred.[45]

The problem with this theory, of course, is that the beneficial interest in the deed of trust follows the note it secures without any further assignment. The beneficial interest in a deed of trust logically cannot separate from the note; whomever is entitled to enforce the note may also enforce the deed of trust to foreclose on the security. Hypothetically, if an originating lender were to negotiate the promissory note to a "person entitled to enforce" while simultaneously recording an assignment of the deed of trust to another, the former would be entitled to enforce both the note and security, and the latter would have nothing. "As between a holder of the debt instrument and an assignee of the deed of trust (whether or not the assignment is recorded), the holder of the note should prevail."[46]

### B. An Assignment Cannot Be Defective or Void

Borrowers have also theorized that a deed of trust is not enforceable because the assignment was executed in violation of a trust instrument governing the pool of loans in which the loan belongs. In one case, *Glaski v. Bank of America, N.A.* ("*Glaski*"),[47] the Fifth District of the Court of Appeal held that a borrower properly alleged wrongful foreclosure on the ground that the foreclosing party acted without authority

because the assignment by which it purportedly became beneficiary under the deed of trust was void. The foreclosing entity purportedly acted for the current beneficiary, the trustee of a securitized mortgage investment trust. The borrower alleged that the assignment of the note and deed of trust to the securitized trust was void because the assignment was made after the trust's closing date, in violation of the trust instrument.[48] An assignment of deed of trust purporting to assign all beneficial interest in the deed of trust to the trustee of the securitized trust was recorded in 2008, long after the 2005 trust closing date.[49] To the appellate court, this apparent discrepancy meant the borrower had plausibly alleged that the debt had been transferred into the securitized trust in violation of securitized trust rules.[50]

In a similar case, *Hacker v. Homeward Residential* 23 Cal. App. 5th 111 (2018),[51] the Second District held that an assignment was void where the originating lender transferred the debt pursuant to a securitization agreement, but then purported to assign the deed of trust to the foreclosing lender two years later.[52]

Since *Glaski* was decided, courts dwelt at great length on the question of whether a tardy assignment is "void" or merely "voidable." If the defect is void, the assignment never occurred and the putative beneficiary cannot enforce the deed of trust. If the defect is merely voidable, only the parties to the assignment may retract the assignment; the borrower lacks standing to challenge the assignment.[53] But the void/voidable inquiry entirely misses the point. An assignment of the beneficial interest in a deed of trust cannot be any more void or voidable than a newspaper article describing the transaction. The power to enforce the deed of trust flows with the underlying debt, not the assignment of deed of trust.

### C. An Assignment Recorded Out of Order Cannot Deprive the Lender of Standing to Foreclose

Another too-common fact pattern that leads attorneys and courts astray is where a recorded assignment purports to convey the beneficial interest in a deed of trust from an assignor who had already assigned the deed of trust elsewhere.

These facts led the Court of Appeal to hold that a mortgage borrower could state a plausible claim for relief because the foreclosing beneficiary purportedly assigned the deed of trust elsewhere, in *Sciarratta v. U.S. Bank National Ass'n*.[54] There, the originating lender purported to assign the deed of trust to Bank of America in November 2009, which acquired the property as the "foreclosing beneficiary" via a trustee's deed upon sale. But Bank of America had (probably erroneously) recorded an assignment of deed of trust to a third party several months before the sale.[55] The appellate court concluded that the third party—not Bank of America—was the proper beneficiary, so the borrower could challenge the sale.[56]

Once again, the appellate court entirely misunderstood the nature and effect of the recorded assignment. The borrower alleged no facts relating to Bank of America's status as holder of the promissory note entitled to foreclose, notwithstanding the assignment of the deed of trust.

## VII. THE UNIFORM COMMERCIAL CODE PROVIDES AN ALTERNATIVE NOTICE PROCEDURE

As explained in Section V, there are a number of reasons why mortgage servicers continue recording deed of trust assignments despite the problems they cause. However, the California Commercial Code provides a little-known alternative to the problematic assignment.

California Commercial Code section 9607(b) provides that the purchaser of a promissory note or the secured party to whom the note is hypothecated may record in the office where the deed of trust is recorded, a copy of the transfer agreement whereby the note was acquired, together with a sworn statement that a default has occurred.[57]

Recording the transfer agreement and sworn statement allows foreclosing lenders to provide public notice that they hold the beneficial interest in a deed of trust without the misleading language found in a typical recorded assignment that has caused such widespread confusion. The Commercial Code approach properly puts the focus on ownership of the underlying debt. At this point in time, mortgage loan servicers are not making regular use of the Commercial Code approach. They should consider it.

## VIII. CONCLUSION

The assignment of deed of trust is perhaps the most widely misunderstood instrument regularly recorded in the public records. While important reasons exist for recording assignments, they cause widespread and unnecessary confusion. Mortgage loan servicers who want or need to provide public notice of the foreclosing lender's identity should consider making use of the alternative approach found in Commercial Code section 9607(b).

**Endnotes**

1 *Domarad v. Fisher & Burke, Inc.,* 270 Cal. App. 2d 543, 553-54 (1969).
2 *Id.*
3 *Yvanova v. New Century Mortg. Corp.*, 62 Cal. 4th 919, 927 (2016).
4 *Id.*
5 *Orcilla v. Big Sur, Inc.*, 244 Cal. App. 4th 982, 995 (2016).
6 *Stephens, Partain & Cunningham v. Hollis*, 196 Cal. App. 3d 948, 955 (1987).
7 *Debrunner v. Deutsche Bank Nat'l Tr. Co.*, 204 Cal. App. 4th 433, 440 (2012).
8 Cal. Civ. Code § 2924(a)(1).
9 *Id.* §§ 2924b, 2924f.
10 *Id.* § 2924g; *Lona v. Citibank, N.A.*, 202 Cal. App. 4th 89, 102 (2011).
11 *Gomes v. Countrywide Home Loans, Inc.*, 192 Cal. App. 4th 1149, 1154 (2011). As used in this article, "lender" refers to the creditor who owns the debt secured by a deed of trust, and "borrower" refers to the debtor owing an obligation to the lender. A "mortgage servicer" has the contractual right to service the loan on behalf of the lender.
12 *Domarad v. Fisher & Burke, Inc.*, 270 Cal. App. 2d 543, 553 (1969)
13 *Carpenter v. Longan*, 83 U.S. 271, 275 (1872).
14 *Domarad*, 270 Cal. App. 2d at 553-54 (*citing Kelley v. Upshaw*, 39 Cal. 2d 179, 191-192 (1952)); *Adler v. Sargent*, 109 Cal. 42, 48 (1895); *Hyde v. Mangan*, 88 Cal. 319, 327 (1891); *Johnson v. Razy*, 181 Cal. 342, 344 (1919)).
15 *Domarad*, 270 Cal. App. 2d at 554 (interpreting form of assignment providing that beneficiary was assigning his right, title, and interest to the deed of trust "together with the Promissory Note therein mentioned and thereby secured").
16 12 C.F.R. § 1024.33(b)(1).
17 *Id.* § 1026.39.
18 *Yvanova v. New Century Mortg. Corp.* 62 Cal. 4th 919 (2016).
19 *Id.* at 927 (2016). Notably, however, the California Supreme Court declined to address whether a borrower has standing to file a *pre*-foreclosure action, thus leaving in place a line of court of appeal cases holding that a borrower lacks standing to "test" whether a foreclosing servicer is the "true" deed of trust beneficiary or its agent. *See, e.g., Debrunner v. Deutsche Bank Nat'l Tr. Co.*, 204 Cal. App. 4th 433, 440–442 (2012); *Gomes v. Countrywide Home Loans, Inc.*, 192 Cal. App. 4th 1149, 1154-57 (2011); *Jenkins v. JP Morgan Chase Bank, N.A.,* 216 Cal. App. 4th 497, 511 (2013) (disapproved on other grounds by *Yvanova*, 62 Cal. 4th at 934-35).
20 *Yvanova*, 62 Cal. 4th at 928.
21 The provisions of the California Uniform Commercial Code are, in large part, identical to those of the Uniform Commercial Code and versions adopted by jurisdictions around the country. *See Orix Fin. Servs., Inc. v. Kovacs*, 167 Cal. App. 4th 242, 243 (2008).
22 Cal. Comm. Code § 3301.
23 Another method is uncommon and does not require possession of the note. Under California Commercial Code section 3301(iii), a person may be a "person entitled to enforce" the note if, among other things, "the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process." *Id.* § 3309(a)(3).
24 *Id.* § 3301(i).
25 A note endorsed to blank might read "Pay to the order of _____."
26 *See Veal v. Am. Home Mortg. Servicing, Inc. (In re Veal)*, 450 B.R. 897, 911 (B.A.P. 9th Cir. 2010). An allonge (from French "allonger", "to draw out") is a slip of paper affixed to a negotiable instrument, as a bill of exchange, for the purpose of receiving additional endorsements for which there may not be sufficient space on the bill itself. *See* Cal. Comm. Code § 3204(a).
27 Cal. Comm. Code § 3308(a); 5 Hawkland, Miller & Harrell, Uniform Commercial Code Series § 3-308:2, at 550-51 (2018).
28 Cal. Comm. Code § 3301(ii).
29 *Id.* § 3203(a).
30 *In re Veal*, 450 B.R. at 912.
31 *See, e.g., Debrunner v. Deutsche Bank Nat'l Tr. Co.*, 204 Cal. App. 4th 443, 440 (2012).
32 Cal. Civ. Code § 2924(a)(1).
33 *Domarad v. Fisher & Burke, Inc.*, 270 Cal. App. 2d 543, 553 (1969).
34 *Stockwell v. Burnham* 7 Cal. App. 413 (1908).
35 *Id.* at 417.

36 *Jenkins v. JP Morgan Chase Bank, N.A.,* 216 Cal. App. 4th 497, 518 (2013) (disapproved on other grounds by *Yvanova v. New Century Mortg. Corp.* 62 Cal. 4th 919, 934-35 (2016)).

37 *Tamburri v. Suntrust Mortg., Inc.*, 2011 U.S. Dist. Lexis 72202 (N.D. Cal., July 6, 2011); *In re Cruz*, 457 B.R. 806 (Bankr. S.D. Cal. 2011).

38 *Calvo v. HSBC Bank USA, N.A.*, 199 Cal. App. 4th 118, 120 (2011); *Haynes v. EMC Mortg. Corp.*, 205 Cal. App. 4th 329 (2012).

39 Cal. Rev. & Tax. Code § 11926.

40 *Domarad v. Fisher & Burke, Inc.*, 270 Cal. App. 2d 543, 554 (1969).

41 *Id.*

42 The Fannie Mae Servicing Guide's relevant rule, Rule E-3.2-09: Conducting Foreclosure Proceedings (11/12/2014), is available at this website: https://www.fanniemae.com/content/guide/servicing/e/3.2/09.html. The Freddie Mac Single-Family Seller/Servicer Guide relevant rule, Rule 9301.12: Foreclosing in the Servicer's name (03/02/16), is available at this website: 9301.12: https://www.allregs.com/tpl/Main.aspx.

43 *Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal. App. 4th 256, 267 (2011) (disapproved on other grounds by *Yvanova v. New Century Mortg. Corp.*, 62 Cal. 4th 919 (2016)).

44 A primary purpose of MERS is for lenders to avoid recording numerous assignments in states that require a recorded assignment when the beneficial interest in a mortgage is transferred. *See* https://www.mersinc.org/products-services/mers-system/faq.

45 *See Orcilla v. Big Sur, Inc.*, 244 Cal. App. 4th 982, 1004 (2016).

46 5 Miller & Starr, Cal. Real Estate § 13:49 (4th ed. 2015).

47 *Glaski v. Bank of America, N.A.* 218 Cal. App. 4th 1079 (2013).

48 *Id.* at 1084.

49 *Id.* at 1087.

50 *Id.*

51 *Hacker v. Homeward Residential*, 23 Cal. App. 5th 111 (2018).

52 *Id.* at 121.

53 *See, e.g., Yvanova v. New Century Mortg. Corp.*, 62 Cal. 4th 919, 935-36 (2016); *Mendoza v. JP Morgan Chase Bank, N.A.*, 6 Cal. App. 5th 802, 812-13 (2016).

54 *Sciarratta v. U.S. Bank Nat'l Ass'n,* 247 Cal. App. 4th 552 (2016).

55 *Id.* at 558.

56 *Id.* at 564.

57 Cal. Comm. Code § 9607(b); U.C.C. § 9-607 (Am. Law Inst. & Unif. Law Comm'n 2010) official cmt. 8; *see* Miller & Starr, *supra* note 46, §13:49.

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# Coping with COPA

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## I. INTRODUCTION

On June 3, 2019, San Francisco adopted the Community Opportunity to Purchase Act ("COPA")[1] conferring upon "Qualified Nonprofits"[2] a first right to purchase certain residential real property in San Francisco. While such legislation is new to California, similar legislation has been enacted in other jurisdictions and we can learn from the experiences of those other jurisdictions.

For example, the City of Paris, France, has, for some time, had a shortage of affordable housing for lower- and middle-income families. Consequently, the City adopted a right of pre-emption law known as the "droit de preemption urbain" or "DPU." The DPU now applies throughout France.[3] Under the DPU, the mayor's office is allowed the first right to purchase many different types of property, whether vacant or not. Tenants also are allowed to purchase certain types of existing residential properties. Farmers are granted special rights in rural areas. As a practical matter, the mayor's office only purchases property where it is required for development purposes, which include public works or leisure facilities. The scope of the French pre-emption law, or DPU, is quite broad and its requirements are specific and diverse.[4]

Similar to Paris, the District of Columbia more than thirty years ago adopted the Tenant Opportunity to Purchase Act ("TOPA").[5] TOPA provides that before an owner may sell, demolish, or discontinue rental accommodations, the owner must give tenants an opportunity to purchase and a right of first refusal to match a third-party offer.[6] TOPA was designed to keep longtime renters from being forced out of gentrifying neighborhoods. As originally written, TOPA applied to renters of single-family homes, including condos and co-ops. TOPA was recently revised to exempt single-family dwellings to primarily address the fact that renters have become more savvy about the law and were assigning their rights to speculators for large sums of money and delaying closings.[7] However, tenant-occupied properties with two to four units, and buildings with five or more units, remain subject to TOPA.[8] With the assistance of the District of Columbia, tenant groups are not only able to purchase buildings as rental units, but they are also able to purchase buildings and convert the units into cooperatives or condominiums. The District of Columbia provides a variety of services including (i) financial assistance, such as seed money, earnest money deposits, and acquisition funding; (ii) technical assistance; and (iii) specialized organizational and development services, including structuring a tenants' association, preparing legal documents, and helping with loan applications.[9]

On September 3, 2019, the San Francisco Major's Office of Housing and Community Development (the "Mayor's Office") published COPA program rules on its website.[10] The program rules expressly provide that, notwithstanding the June 3, 2019, effective date of the legislation, (i) "Qualified Nonprofits" (as defined in COPA)[11] (see Section III below) may only exercise their rights under COPA commencing September 3, 2019; and

(ii) a seller that has executed a written and binding purchase and sale agreement for a building otherwise subject to COPA prior to September 3, 2019, will not be required to comply with COPA, unless the agreement is terminated or expires after September 3, 2019. A seller that has offered or listed a building for sale, but has not executed a purchase and sale agreement prior to September 3, 2019, must comply with the COPA right of first refusal provisions described therein.[12]

COPA confers upon certain Qualified Nonprofits a first right to purchase real property in San Francisco that (i) is improved with three or more residential rental units (whether or not the property also includes non-residential uses), and (ii) on which three or more residential units could be or are being built (all such lots or buildings will be referred to hereafter as a "multi-family residential building"). The first right to purchase consists of both a right of first offer as well as a right of first refusal. A multi-family residential building acquired by a Qualified Nonprofit under COPA must be maintained as rent-restricted affordable housing in perpetuity.[13]

It is not surprising that San Francisco and the District of Columbia, two of the nation's most politically progressive cities where tenants make up a very large percentage of the population, have adopted similar legislation to address the continuing affordable housing crisis. We can expect to see the enactment of similar laws throughout the country in cities and towns with a shortage of rental housing and high prices, particularly college towns. In fact, during the last several months, the City of Berkeley has held public hearings on the adoption of a similar law. In June 2019, the City Council was presented with a proposal by the City Manager to develop an ordinance modeled after the TOPA law in the District of Columbia.[14]

The impact of COPA on owners of multi-family residential buildings in San Francisco is monumental and fraught with practical questions and legal implications. The seller of a multi-family residential building in San Francisco will be subjected to transactional delays and related costs. Even with the program rules in place, the logistics of complying with the law are complex and easily misunderstood. Delays from five days to perhaps six months or more can be anticipated. This article attempts to explain the law and the logistics of complying with COPA.

## II. WHAT IS A "SALE" UNDER COPA?

COPA likely will affect a wide range of transactions in San Francisco. A sale is broadly defined and includes not only the transfer of a fee interest in the building for money or anything of economic value, but also certain transfers of interests in trusts, corporations, or other entities. There are exceptions to a sale, including, but not limited to (i) transfers made under a mortgage, deed of trust, or deed in lieu of foreclosure; (ii) transfers to heirs; and (iii) transfers among defined family members.[15] COPA is intended to be construed so as not to impair any purchase contract, option to purchase, or any right of first offer or right of first refusal in existence before its effective date.[16]

The San Francisco legislation contemplates that transfers akin to the transfer of a fee interest in a multi-family residential building will be enough to trigger COPA.[17] For example, if a trust owns an interest in a multi-family residential building, the transfer of a beneficial interest in the trust in exchange for money or any other thing of economic value, where the value of the beneficial interest in the trust is substantially equal to the value of the fee interest in the multi-family residential building, will trigger COPA.[18] To avoid sham transfers, COPA will also be triggered in the event that there is a transfer of a controlling interest in a corporation, partnership, or other entity where two conditions are met: (i) the transfer is substantially equal in value to the value of the fee interest of a multi-family residential building that is held by any kind of corporation, partnership, or other entity, and (ii) that interest is substantially equal in value to the total value of assets held by the entity.[19]

The program rules clarify that the sale of the building that has multiple owners will be considered a transfer of a single interest of the building if the transfer by each owner is made in connection with substantially the same transaction or set of transactions. Conversely, the sale of an individual property interest in a building, such as the sale of a unit by one owner in a tenancy in common (regardless of percentage ownership), will not be considered a building sale if such transfer and sale is not substantially connected with the transaction or set of transactions for sale of all property interests in the building.[20]

The program rules further clarify how to determine whether a building has three or more residential rental units and when a vacant lot falls within the purview of the law. For example, an unlawful residential unit (i.e., presumably meaning one that does not conform to legal requirements at the time it was built, including a unit built without required permits) will not count toward the minimum unit count of three or more residential rental units.[21] As to vacant lots, compliance with COPA is only required if (i) the San Francisco Planning Code and other San Francisco laws permit the construction of a three unit residential building "as of right" (meaning without issuance of a variance or conditional use permit or the like) and (ii) the zoning would

allow use of the lot as residential and the development of three or more residential units.[22]

## III. WHAT IS A "QUALIFIED NONPROFIT"?

The Mayor's Office has certified and listed on its website six nonprofit organizations that meet certain specified criteria, including demonstrating (i) a commitment to providing affordable housing for low and moderate-income residents and preventing the displacement of such residents, and (ii) the capacity (including the legal and financial capacity) to effectively acquire and manage residential real property at multiple locations in San Francisco.[23] A Qualified Nonprofit's certification will be valid for three years.[24] The Mayor's Office will solicit applications to become certified as a Qualified Nonprofit at least once each calendar year. Existing Qualified Nonprofits whose certification has expired will be allowed to apply for renewed certification.[25]

## IV. WHAT IS THE "RIGHT OF FIRST OFFER?"

COPA raises a number of questions that may well require legal analysis, including what constitutes an "offer of sale" or an "offer to purchase."[26] For example, it is clear that the solicitation of an offer triggers a right of first offer, but what about less formal expressions of a wish to sell a property, such as emails to friends or family or to a real estate agent?

Before a seller may offer a multi-family residential building for sale to any purchaser, other than a Qualified Nonprofit, or otherwise solicit any offer to purchase, such as placing the property on the Multiple Listing Service (MLS), the seller must notify each Qualified Nonprofit of its intent to sell and allow those nonprofits an opportunity to make an offer to purchase.[27] The notice is to be sent via email to all Qualified Nonprofits on the same day and, to the extent possible, at the same time. The notice must identify the number of rental units and the address and rental rate for each unit. Each Qualified Nonprofit then has five calendar days within which to notify the seller via email of its intent to further consider whether to make an offer to purchase. Upon receipt of any such notice of intent from a Qualified Nonprofit, the seller must disclose to each such Qualified Nonprofit the names of, and any available contact information for, any tenant in each rental unit. The Qualified Nonprofit then has twenty-five additional calendar days to make and submit to the seller an offer to purchase. The seller is free to accept or reject any offer submitted. If the seller rejects all offers, or if no Qualified Nonprofit makes an offer, the seller then can offer the multi-family residential building for sale to the public, subject to the right of first refusal described below.[28]

Some have questioned whether or not a seller would be in violation of COPA if it were to receive and accept an unsolicited offer to purchase before it has first offered the property for sale to all Qualified Nonprofits, even if such acceptance is clearly subject to the right of first refusal.[29] COPA, as well as the program rules promulgated thereunder, both clearly provide that, during the right of first refusal period discussed below, a seller may accept an offer to purchase subject to the contingency that no Qualified Nonprofit exercises its right of first refusal.[30] Neither, however, clarify whether an unsolicited offer to a seller who is not contemplating the sale of a multi-family residential building could be accepted subject to the right of first refusal process without first commencing the right of first offer process.

Property owners in San Francisco have long feared that tenant activists and their attorneys might someday put together a list of as many tenants as possible (and their contact information) with the idea to create a citywide tenant directory that can be used for various purposes, including to organize political campaigns. While Qualified Nonprofits are subject to confidentiality provisions, information disclosed under the right to purchase process nevertheless could be intentionally or inadvertently passed on to others, including parties that sell the information. As indicated herein, a Qualified Nonprofit need merely express its intent to submit an offer (as opposed to actually submitting an offer) to secure additional tenant-related information.

## V. WHAT IS THE "RIGHT OF FIRST REFUSAL?"

Before accepting any offer of purchase or offer of sale from a party other than a Qualified Nonprofit (unless such acceptance is expressly subject to the condition that no Qualified Nonprofit exercises its right of first refusal), the seller must offer to sell the multi-family residential building to (i) any Qualified Nonprofit that previously submitted an offer to purchase and (ii) any Qualified Nonprofit that was not previously given the right of first offer to purchase.[31] Qualified Nonprofits that were notified of the seller's original offer to sell but declined to express an intent to exercise its right of first offer will not enjoy the right of first refusal.[32] The right of first refusal offer must be submitted by the seller in writing, via email, on the same calendar day and, where possible, at the same time, to all Qualified Nonprofits. Such offer should be in the form of a copy of the third-party purchaser offer with the third-party purchaser information redacted.[33]

If a Qualified Nonprofit did, in fact, receive a right of first offer and made an offer to purchase that the seller rejected, any such Qualified Nonprofit has five calendar days after the

seller's submission of a right of first refusal offer of sale to notify the seller (and every other Qualified Nonprofit) of its decision to accept the offer of sale.[34] If a Qualified Nonprofit did not receive the right of first offer (regardless of the reason), any such Qualified Nonprofit has thirty calendar days after the seller's submission of an offer of sale to notify the seller (and every other Qualified Nonprofit) of its decision to accept the offer of sale. Notwithstanding the different time periods within which to respond, the first Qualified Nonprofit to submit its decision to accept the offer of sale to the seller and every other Qualified Nonprofit via email is then obliged to purchase the multi-family residential building. No other Qualified Nonprofit may thereafter accept the seller's offer. A seller or Qualified Nonprofit may authorize a third-party agent to act on its behalf as permitted by law.[35]

If no Qualified Nonprofit elects to proceed with the purchase or the applicable time period within which they are required to do so expires, the seller may proceed with the sale of the multi-family residential building consistent with the offer of purchase or offer of sale.[36] If the terms of the proposed sale, however, are materially different than those submitted to the Qualified Nonprofits in the right of first refusal notice, the materially different offer of purchase or offer of sale will be considered a new offer subject to the right of first refusal.[37] This is true whether or not the materially different terms occur in the normal course of due diligence and related negotiations customary in real estate sales transactions. The difficult problem and question presented here, as is generally true with rights of first refusal, is whether or not a change in terms results in a materially different offer. Whether there is a materially different offer will depend on the facts of each case. The only guidance provided by the program rules is that "material changes" will generally mean changes to a significant term of contract that a Qualified Nonprofit justifiably relied on to make a decision to not accept a seller's offer for a building.[38] Material changes may include, but not be limited to, changes to the parties to the contract, the financial terms, the property, or performance under the contract. We suggest that you engage an attorney experienced in this area of the law when changes occur so that there can be an accurate analysis (based on interpretations of California court decisions) as to whether or not a particular change is, in fact, material.

## VI. WHAT INCENTIVES EXIST FOR SELLERS UNDER COPA?

COPA expressly provides that the Mayor's Office will maintain and publicize the list of Qualified Nonprofits to facilitate voluntary sales to Qualified Nonprofits in a manner that avoids or minimizes the need for a broker, search costs, or other transaction costs.[39] In addition, those who sell to a Qualified Nonprofit under a right of first offer will not be subjected to increased incremental transfer taxes for property with a value equal to or greater than $5,000,000 (at least until June 30, 2024 pursuant to sunset legislation).[40] There is nothing in COPA that provides the same benefit for those who sell to a Qualified Nonprofit under a right of first refusal. Similarly, COPA requires that a Qualified Nonprofit that purchases a multi-family residential building under a right of first offer, work with the seller in good faith to facilitate a 1031 exchange.[41] There is no such requirement if a Qualified Nonprofit purchases under a right of first refusal.

## VII. WHAT HAPPENS IF YOU VIOLATE COPA?

Every seller of a multi-family residential building in San Francisco must, within fifteen days of the close of escrow, submit to the Mayor's Office a signed declaration under penalty of perjury affirming that the sale substantially complied with the requirements of COPA.[42] If a multi-family residential building is sold in violation of COPA, Qualified Nonprofits are permitted to bring a legal action against the seller. Potential remedies include damages, attorneys' fees, and, if the violation is knowing or willful, civil monetary penalties presumptively tied to the value of the property. These remedies are imposed only against the seller or a party that has willfully colluded with the seller to violate COPA.[43] This latter party clearly could include brokers and others listing multi-family residential buildings for sale in San Francisco as well as purchasers. Absent evidence of collusion, however, any remedy imposed under COPA will not affect any property interest of a purchaser of a multi-family residential building. That being said, it is quite possible that title companies will be unwilling to provide title insurance without evidence that the parties have complied with the requirements of COPA.

## VIII. WHAT IMPACT WILL COPA HAVE ON SALES?

Sellers of a multi-family residential building will be subjected to transactional delays ranging from days to potentially six months or more. It is difficult to project the length of a possible delay due to the variables involved. COPA itself allows a Qualified Nonprofit, whose offer to purchase has been accepted, a sixty-day period within which to conduct due diligence and secure financing.[44] The time period for closing thereafter is not specified. If a potential sale, however, is to a third party following the rejection of offers made by Qualified Nonprofits, the delays encountered include the respective notice periods required to comply with the COPA right-of-first-offer and right-of-first-refusal processes. Moreover, if there

is a material change in terms of the third-party offer, the COPA right of first refusal process must commence again.[45]

Sellers desiring to meet a 1031 exchange deadline or close a transaction within a certain period of time to facilitate, for example, a move to a new location (perhaps due to a job transfer) could be greatly impacted. Similarly, transactional delays could adversely affect those facing a deadline related to settling an estate or completing a court settlement.

## IX. HOW WILL COPA BE FUNDED?

At this time, very few nonprofits have sufficient money to be able to close many deals. However, there will be a $500 million to $600 million affordable housing bond on the ballot this November to provide low-income housing, and it appears that this bond will become the primary funding vehicle for the COPA program. In conversations the Mayor's Office staff has had with real estate industry leaders, the Mayor's Office has stated that a portion of that housing bond will be used for COPA acquisitions, and that the existing "Small Sites" acquisition fund also will be used for buildings up to a certain maximum number of units.

## X. WILL COPA BE RULED ILLEGAL?

The San Francisco Apartment Association and other industry groups are reviewing their options to have the courts look at the legality of the ordinance and potentially put it on hold.[46] As of the date of this article, however, no such lawsuits have been filed. In the meantime, the Mayor's Office is conducting outreach to property owners to help them understand and comply with COPA requirements. Although not pleased with the law itself for myriad reasons, the San Francisco Association of Realtors has created forms for its members to use that follow the procedures outlined in COPA in an attempt to avoid confusion and facilitate compliance on the part of brokers, agents, and property owners.

**Endnotes**

1 S.F., Cal., Admin. Code § 41B.

2 *Id.* § 41B.4(a).

3 Pre-emption rights in France are provided by the Law of 31st December 1975 and the Law of 6th July 1989.

4 More details can be found at https://www.french-property.com/reference/pre_emption_rights.htm.

5 D.C. Law 3-86, § 402, 27 D.C. Reg. 2975 (Sept. 10, 1980).

6 D.C. Code § 42-3404.02.

7 Gov't of the D. C., Dep't of Housing and Cmty. Dev., Summary of Act 22-339, The TOPA Single-Family Home Exemption Amendment Act of 2018, https://dhcd.dc.gov/sites/default/files/dc/sites/dhcd/service_content/attachments/TOPA%20Single-Family%20Home%20Exemption%20Amendment%20Act%20of%202018%20Summary.pdf (last accessed Nov. 11, 2019).

8 D.C. Code §§ 42-3404.10, 42-3404.11.

9 Gov't of the D. C., Dep't of Housing and Cmty. Dev., Tenant Purchase Assistance: Programs from the DC Department of Housing and Community Development, https://ota.dc.gov/sites/default/files/dc/sites/dhcd/publication/attachments/tenantpurchaseinterim01-15.pdf (last accessed Nov. 11, 2019).

10 Mayor's Office of Housing and Cmty. Dev., Community Opportunity to Purchase Act (COPA), https://sfmohcd.org/community-opportunity-purchase-act-copa (last accessed Nov. 11, 2019). San Francisco Administrative Code section 41B.11 authorized the Mayor's Office to interpret and implement COPA and promulgate any appropriate rules for implementation. Accordingly, the Mayor's Office adopted COPA program rules effective September 3, 2019 (COPA Program Rules). *See* https://sfmohcd.org/sites/default/files/Documents/MOH/COPA/COPA%20-%20Final%20%20Program%20Rules-09-03-2019.pdf (last accessed Nov. 11, 2019).

11 Pursuant to Ordinance No. 79-19, a "qualified nonprofit" is determined as follows:

To be a qualified nonprofit, an organization must meet the following criteria: (1) The organization is exempt from federal income tax under 26 USC §501(c)(3), (2) The organization has demonstrated a commitment to the provision of affordable housing for low- and moderate-income City residents, and to preventing the displacement of such residents, (3) The organization has demonstrated a commitment to community engagement as evidenced by relationships with neighborhood-based organizations or tenant counseling organizations, (4) The organization has demonstrated the capacity (including, but not limited to, the legal and financial capacity) to effectively acquire and manage residential real property at multiple locations in the City; and (5) The organization has, within the previous five years, acquired or partnered with another nonprofit housing development organization to acquire at least two residential buildings using funding provided by the Agency or has acquired or partnered with another nonprofit

organization to acquire at least two residential buildings under this Chapter 41B.

12 COPA Program Rules § III.B.

13 S.F., Cal., Admin. Code § 41B.8.

14 Proposal from Dee Williams-Ridley, City Manager, City of Berkeley (Jun. 11, 2019) (on file with the City of Berkeley Office of the City Manager).

15 S.F., Cal., Admin. Code § 41B.3(c).

16 *Id.* § 41B.5(c).

17 *Id.* § 41B.3(a)(1).

18 *Id.* § 41B.3(a)(2).

19 *Id.* § 41B.3(a)(3).

20 COPA Program Rules § I.B.1.

21 *Id.* § I.B.23.

22 *Id.* § I.B.3.

23 Mayor's Office of Housing and Cmty. Dev., Community Opportunity to Purchase Act: Qualified Nonprofit List, https://sfmohcd.org/sites/default/files/Documents/MOH/COPA/COPA%20-%20Qualifed%20Nonprofit%20List-09-03-2019.pdf (last accessed Nov. 11, 2019).

24 S.F., Cal., Admin. Code § 41B.4(a).

25 *Id.* § 41B.4(b).

26 *Id.* § 41.B.6.

27 *Id.* § 41B.6(b).

28 *Id.* § 41B.6(g).

29 *Id.* § 41B.7.

30 *Id.* § 41B.7(g); COPA Program Rules § IV.B.5.

31 S.F., Cal., Admin. Code § 41B.7(b).

32 COPA Program Rules § IV.B.

33 *Id.* § IV.B.1.

34 S.F., Cal., Admin. Code § 41B.7(c).

35 COPA Program Rules § I.B.4.

36 S.F., Cal., Admin. Code § 41B.7(f).

37 *Id.* § 41B.7(f); COPA Program Rules § IV.B.2.

38 COPA Program Rules § IV.B.2.

39 S.F., Cal., Admin. Code § 41B.9(a).

40 *Id.* § 41B.9(b).

41 *Id.* § 41B.9(c).

42 *Id.* § 41B.10(a).

43 *Id.* § 41B.10(d).

44 *Id.* § 41B.6(h).

45 *Id.* § 41B.7(f); COPA Program Rules § IV.B.2.

46 S. F. Apartment Ass'n, The NEWS, *COPA Enacted: What Property Owners Need to Know Once COPA Goes Into Effect on September 3, 2019*, https://www.sfaa.org/Public/Magazine/09_2019/The_News_Sept_2019.aspx (last accessed Nov. 11, 2019).

**Lien Times:**
The Lighter Side of Real Property Law


*By* Richard G. Witkin & Bella Roscigno, artist*

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# California Court of Appeals Expands a Borrower's Right to Attorneys' Fees Under the Homeowner Bill of Rights: *Hardie v. Nationstar* and *Bustos v. Wells Fargo*

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## I. INTRODUCTION

Although it has been in effect since January 1, 2013, California's Homeowner Bill of Rights ("HOBR") is still working its way through the trial and appellate courts, with parties searching for clarification on many of its vague and ambiguous provisions. One issue ripe for interpretation is the question: under what circumstance is the borrower entitled to attorneys' fees? Civil Code[1] sections 2924.12(h) and 2924.19(h) give the court the discretion to award reasonable attorneys' fees and costs to the "prevailing borrower," who is defined as a borrower who "obtained injunctive relief or was awarded damages."[2] There is no question that the court has the discretion to award borrowers who obtained a judgment for damages on their HOBR claims, their reasonable fees. Likewise, under the Court of Appeal's 2015 decision in *Monterossa v Superior Court*,[3] it is equally as clear that a borrower obtaining a preliminary injunction under HOBR is entitled to move for recovery of attorneys' fees for bringing an injunction, even if the borrower does not ultimately prevail on the merits of the lawsuit. However, until recently, servicers have often successfully argued that borrowers who obtain a temporary restraining order ("TRO") are not entitled to attorneys' fees just for obtaining the TRO, as a TRO is not within the scope of the term "injunctive relief."

## II. THE NEW DECISIONS

Two recently published decisions by the Court of Appeal, *Hardie v. Nationstar* and *Bustos v. Wells Fargo*,[4] have concluded that borrowers prevailing at a TRO hearing are eligible for attorneys' fees and costs under HOBR because a TRO should be considered a form of injunctive relief.[5] The decisions in *Hardie* and *Bustos* will undoubtedly increase the motivation for borrowers claiming violations of HOBR to seek TROs.

A TRO is an injunction in the sense that it enjoins a particular act pending a hearing on a preliminary injunction.[6] However, it is distinguishable from an injunction in the following ways:

1. A TRO may be issued *ex parte* and, sometimes, even without notice (*e.g.* where a foreclosure sale is just days or even hours away) as its purpose is to preserve the status quo.

2. In contrast to the *ex parte* TRO proceeding, a hearing on the preliminary injunction is a full evidentiary hearing giving all parties the opportunity to present arguments and evidence.[7]

3. A bond is not essential for a TRO, but is for a preliminary injunction that is not effective until the undertaking is filed.[8]

4. The TRO is transitory in nature and terminates automatically when a preliminary injunction is issued or denied.[9] When issued without notice, the TRO is only supposed to last for 15 days, though, for good cause, the court can set its expiration for up to 22 days from the date of issuance.[10]

The most troubling aspect of the TRO is the short notice required prior to the *ex parte* hearing. In California State courts, a borrower need only provide telephonic notice by 10:00 a.m.

the day before of an 8:30 a.m. TRO hearing and, as noted, in emergency situations, no notice need to be given at all. With fewer than 24-hours' notice required, most telephonic, email, or faxed TRO notices do not make it to the right personnel in time for counsel to be retained to appear at the hearing. Even if counsel is hired, he or she often does not have sufficient information to effectively oppose the TRO. Making matters worse, judges, faced with little time or information, "rubber stamp" TROs to stop foreclosure sales, believing that a short continuance until the preliminary injunction hearing will not cause the servicer significant harm.

## III. HOW CAN SERVICERS AVOID LIABILITY FOR ATTORNEYS' FEES AND COSTS UNDER THE *HARDIE* AND *BUSTOS* RULE?

The *Hardie* and *Bustos* decisions highlight the servicer's need for internal procedures to quickly identify when a TRO is being noticed and to immediately funnel it to the legal department or other appropriate person so that counsel can be hired. With the referral to outside counsel, we suggest including (1) the status of any current loss mitigation discussions, (2) if possible, copies of loss mitigation notes, applications, denials, and the like, (3) any known bankruptcy information, and (4) contact information for the person responsible for postponing the sale. With this information, outside counsel can then quickly determine whether the TRO is likely to be granted. In such a case counsel may recommend postponing the foreclosure sale. Postponing the sale will allow counsel to prepare an opposition and, when appropriate, argue that the TRO should be denied because there is no risk of "immediate" harm.

Most California lawsuits include, in addition to the typical HOBR claims, causes of action for negligent loan modification review, promissory estoppel, wrongful foreclosure, and the like. A TRO that is based on non-HOBR claims does not trigger the borrower's immediate right to attorneys' fees. With that in mind, if the court is inclined to grant the TRO, counsel may consider asking the court to clarify that the TRO is based on the non-HOBR claims. Judges often grant TROs thinking there is no harm to the lender. If the distinction is pointed out, some judges may still grant the TRO but *not* the HOBR claims to avoid triggering borrowers' rights to attorneys' fees. Along the same lines, if the servicer cannot hire counsel in time to oppose the TRO, counsel can later argue, in opposition to the preliminary injunction, that the TRO was granted based on the non-HOBR claims.

## IV. FINAL THOUGHTS AND A (SMALL) SILVER LINING

In recognition of the obvious negative implications of its ruling, the *Hardie* court did provide one important, positive constraint on potential abuses. Specifically, the court confirmed that an attorney fee award under HOBR is *not mandatory* just because injunctive relief was granted:

> Furthermore, the award of attorney's fees under section 2924.12 is discretionary. (§2924.12, subd. (h) [fees "may" be awarded].) By permitting, rather than requiring a court to award attorney's fees, section 2924.12 allows courts to avoid awards that would be inequitable or unconstitutional. The ex parte nature of the proceedings, the relative merits of the TRO application, and a party's ultimate ability to obtain statutory compliance through imposition of an injunction are relevant factors the court may consider in determining whether to award fees.[11]

Prior to the *Hardie* decision, many courts viewed an attorney fee award as mandatory under HOBR. At least now, servicers can cite to *Hardie* for reasons why, even if a TRO or preliminary injunction is granted, the court can still deny the borrower's request for attorneys' fees.

Despite this saving clause, the *Hardie* and *Bustos* decisions increase the likelihood that borrowers will seek TROs and, if they prevail, move for fees. Again, the best recourse for the other side is to immediately hire counsel to oppose the TRO and, if it is going to be granted, seek to clarify that the TRO is based on the non-HOBR claims. In addition, counsel may consider persuading the court to condition the TRO or preliminary injunction on the posting of a bond. That way, if the borrowers fail to timely post the bond, counsel can argue that the injunction never took effect and, therefore, the borrowers are not the prevailing party under sections 2924.12(h) or 2924.19(h).

Another option may be in cases where subsequent facts are developed to show that the TRO was improperly granted, such as when they are based on misrepresentations by the borrower that the short time frame for response did not allow the servicer or investor to present their arguments at the hearing, or where the TRO was issued without notice of the hearing. In such instances, it may be possible to move the court to dissolve the TRO or preliminary injunction. If all that fails, counsel may be able to argue that the court should exercise its discretion to deny all or a part of the borrower's fee request.

Both decisions in *Hardie* and *Bustos* discussed one final option—legislative action. While addressing the potential

unfairness in awarding attorneys' fees following an often-unopposed TRO, the courts indicated that they are bound by the language of the statute. While the differences between a TRO and a preliminary injunction may provide "sound policy reasons for prohibiting attorneys' fees on a TRO application, such determinations are reserved for the Legislature."[12] In other words, if you do not like the statute, take it up with the Legislature!

In conclusion, servicers and investors should make sure that their staff is trained on what constitutes *ex parte* notice in California and what to do when they receive such a notice. That is the first line of defense in seeking to avoid the risk of attorneys' fees and costs under HOBR.

**Endnotes**

1 All code sections cited herein are to the California Civil Code unless otherwise indicated.

2 Civil Code section 2924.12(h) applies to servicers who conduct more than 175 annual qualifying foreclosures a year. Section 2924.19(h) applies to those who conduct 175 or fewer annual qualifying foreclosures.

3 *Monterossa v. Superior Court*, 237 Cal. App. 4th 747 (2015).

4 *Hardie v. Nationstar Mortg. LLC*, 32 Cal. App. 5th 714 (2019); *Bustos v. Wells Fargo Bank, N.A.*, 2019 WL 4051751, at *1 (Cal. Ct. App. Aug. 28, 2019).

5 *Hardie*, 32 Cal. App. 5th 714; *Bustos*, 2019 WL 4051751, at *1.

6 *Chico Feminist Women's Health Ctr. v. Scully*, 208 Cal. App. 3d 230, 237 n.1 (1989).

7 Cal. Civ. Proc. Code § 527.

8 *Id.* § 529.

9 *Landmark Holding Grp. v. Superior Court*, 193 Cal. App. 3d 525, 529 (1987).

10 Cal. Civ. Proc. Code § 527(d).

11 *Hardie v. Nationstar Mortg. LLC,* 32 Cal. App. 5th 714, 718 (2019).

12 *Bustos v. Wells Fargo Bank, N.A.,* 2019 WL 4051751, at *14 (Cal. Ct. App. Aug. 28, 2019) (citing *Hardie,* 32 Cal. App. 5th at 724).

# The Importance of Knowing Who Is, and Who Is Not, Your Client

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Lawyers must be able to identify who is, and who is not, their client to comply with their professional obligations. Lawyers owe fiduciary duties to their clients,[1] including the duties of loyalty and confidentiality, which the California Supreme Court considers to be the most fundamental qualities of the attorney-client relationship.[2] These duties to the client are embodied in the California Rules of Professional Conduct (the "Rule(s)"), most notably in Rule 1.6 (Confidential Information of a Client) and Rule 1.7 (Conflict of Interest: Current Clients).

Rule 1.6, together with California Business and Professions Code section 6068(e)(1), obligates a lawyer "to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client,"[3] "unless the client gives informed consent."[4] To comply with this mandate, a lawyer must be able to identify his or her client to ensure whose confidences and secrets are to be protected, and to ensure that the proper person authorizes any disclosure of such information.[5]

Rule 1.7 provides,

> [A] lawyer shall not, without informed written consent from each client […], represent a client if the representation is directly adverse to another client in the same or a separate matter [or] if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person, or by the lawyer's own interests.[6]

To comply with Rule 1.7, and avoid impermissible conflicts of interest, lawyers must also be able to properly identify their clients.[7]

Similarly, the conflict of interest rule pertaining to former clients, Rule 1.9 (Duties to Former Clients), requires a lawyer to identify his or her former clients:

> "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed written consent."[8]

Other Rules also require a lawyer to be able to properly identify the client. For example: Rule 1.8.10 (Sexual Relations with Current Client) generally provides that "a lawyer shall not engage in sexual relations with a current client," subject to certain specified exceptions; Rule 1.4 (Communication with Clients) requires that a lawyer "keep the client reasonably informed about significant developments relating to the representation;" Rule 1.8.1 (Business Transactions with a Client) provides that "a lawyer shall not enter into a business transaction with a client" unless certain specified conditions are satisfied; and Rule 1.8.3 (Gifts from Client) generally provides that "a lawyer shall not […] solicit a client to make a substantial gift, including a testamentary gift, to the lawyer."[9]

Certain Rules also require a lawyer to be able to determine who is *not* a client of the lawyer. For example, Rule 1.8.6 (Compensation from One Other than Client) mandates that "a lawyer shall not […] accept compensation for representing

a client from one *other than the client,*" unless certain specified conditions are satisfied.[10] Rules 4.2 (Communication with a Represented Person) and 4.3 (Communicating with an Unrepresented Person) generally restrict a lawyer's communications with a *non-client*. Rule 7.3 (Solicitation of Clients) generally provides that "a lawyer shall not solicit professional employment" from a *non-client* unless certain specified conditions are satisfied.

So how does a lawyer properly identify current or past clients? In most instances, this is a relatively simple inquiry: the lawyer and client enter into a retention agreement that establishes an attorney-client relationship and identifies the client for a specific matter.[11] But in the absence of a retention agreement, it is not entirely clear whether an attorney-client relationship has been established. Moreover, even if an attorney-client relationship has been established, the lawyer may not be entirely clear who the client is.

California courts have held that an attorney-client relationship can be created only by contract.[12] However, the formation of an attorney-client relationship does not require an express contract in all instances. These relationships can be formed implicitly, as evidenced by the intent and conduct of the parties.[13] While the lawyer and the purported client may have their own subjective views as to whether or not an attorney-client relationship has been formed and with which client(s), courts generally will apply an objective test. Thus, despite the subjective view of the lawyer to the contrary, the reasonable perception of the purported client may determine that the client is, in fact, a client of the lawyer.[14]

The question of who is, and who is not, a client is further complicated when the lawyer is associated with a law firm, and when the client is an organization or an individual associated with an organization.

When a lawyer is associated with a law firm, a client of any lawyer in the law firm is generally considered, from a practical perspective, to be a client of all of the lawyers in the law firm, at least with respect to conflicts of interest. In accordance with Rule 1.10 (Imputation of Conflicts of Interest: General Rule): "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by rules 1.7 or 1.9," unless certain specified exceptions apply. The attorney-client relationship, and resulting potential conflict of interest, of one lawyer in the firm is imputed to all lawyers in the firm.

The imputation of an attorney-client relationship also applies to certain other prohibitions under the Rules. For example, the limitation on engaging in business transactions with a client[15] applies not just to the lawyer who has a direct attorney-client relationship with the client, but to all other lawyers in the same law firm.[16]

Imputation under Rule 1.8.11, which applies to certain conduct, does not, however, extend to the prohibition on sexual relations with a client "since the prohibition in [Rule 1.8.10] is personal and is not applied to associated lawyers."[17] But it is important to note that the term "client" has a unique meaning in the context of Rule 1.8.10 when the client is an organization. Solely for purposes of prohibited sexual relations under Rule 1.8.10, "a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters" is deemed to be a client of the lawyer-even if the lawyer has no attorney-client relationship with that person in his or her individual capacity.[18]

When a lawyer works with an organization as the client, the necessary analysis to determine the client's identity may be further complicated by such factors as the working relationship and the ownership and structure of the organization. When a lawyer is retained by an organization, Rule 1.13 (Organization as Client) mandates that the lawyer "conform his or her representation to the concept that the client is the organization itself, acting through its duly authorized […] constituents overseeing the particular engagement."[19] When dealing with such constituents, the lawyer must "explain the identity of the lawyer's client whenever the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituent(s) with whom the lawyer is dealing."[20] Interestingly, even when the lawyer has an attorney-client relationship with an organization, the lawyer may also have an attorney-client relationship with any one or more of the organization's constituents (subject to the Rules pertaining to conflicts of interest).[21]

As a result, when working with organizations, a lawyer should clearly delineate, both to himself or herself and to the various constituents, who is, and who is not the lawyer's client. This distinction may be particularly challenging in several common situations. For example, in a closely held organization, the owner(s) may be so closely identified with the organization itself that either the owner(s) or the lawyer, or both, may have difficulty distinguishing who is, and who is not, the client. This can be especially difficult if the lawyer works with the owner(s) of a to-be-formed business. Although the owner(s) and the lawyer may expect and agree that the organization will be the client of the lawyer, the identity of the client for the pre-formation work

(before the organization exists) may well be the owner(s) (because the formation work is being done for the benefit, and at the direction, of the owner(s)). Even with respect to established business organizations with multiple subsidiaries and affiliated entities, the determination of which entities are, and which are not, clients of the lawyer may be unclear.

The fiduciary duties owed by lawyers to their clients, as well as the protections afforded under the Rules to clients, require that lawyers at all times be able to clearly answer the question: *Who is, and who is not, my client?* Lawyers who use the guideposts in the Rules to make that distinction clear for themselves and their clients will reduce their risk of inadvertently running afoul of the Rules.

**Endnotes**

1 *See, e.g., Lee v. State Bar*, 2 Cal. 3d 927 (1970).

2 *See Flatt v. Sup.Ct. (Daniel)*, 9 Cal. 4th 275 (1994) ("One of the principal obligations which bind an attorney is that of fidelity") (internal quotes and citation omitted). *See also* Rules of Prof'l Conduct r. 1.7 cmt. [1] ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client."); Cal. State Bar Form Opn. 1984-83 ("Perhaps the most fundamental quality of the attorney-client relationship is the absolute and complete fidelity owed by the attorney to his or her client.").

3 Cal. Bus. & Prof. Code § 6068(e)(1) (italics added).

4 Rules of Prof'l Conduct r. 1.6(a) (italics added). *See also id*. at r. 1.8.2 (Use of Current Client's Information) ("A lawyer shall not use a *client*'s information protected by Business and Professions Code section 6068, subdivision (e)(1) to the disadvantage of the *client* unless the *client* gives informed consent") (italics added).

5 In addition, the existence of an attorney-client privilege pursuant to California Evidence Code section 954 depends upon the existence and identity of a client. The term "client" is defined in Evidence Code section 951 as "a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity."

6 Italics added. *See also* Rule 1.18 (Duties to Prospective Client), which extends, to the extent set forth therein, the protections of Rule 1.6 and Business & Professions Code section 6068(e)(1) to a "prospective client" (as defined).

7 *See* Model Rules of Prof'l Conduct r. 1.7 [Conflict of Interest: Current Clients] cmt. [2] (Am. Bar Ass'n) ("Resolution of a conflict of interest problem under this Rule requires the lawyer to […] clearly identify the client or clients.").

8 Italics added.

9 Italics added.

10 Italics added.

11 It is good practice for a retention agreement to be in writing. In fact, certain engagements must be evidenced in a writing. *See* Cal. Bus. & Prof. Code § 6146 (with respect to contingency fees) & § 6148 (where reasonably foreseeable attorney fees and expenses exceed $1,000 and the client is not a corporation).

12 *See, e.g., Koo v. Rubio's Restaurants, Inc*., 109 Cal. App. 4th 719 (2003).

13 *See, e.g., Lister v. State Bar*, 51 Cal. 3d 1117 (1990) ("No formal contract or arrangement or attorney fee is necessary to create the relationship of attorney and client.") (internal quotes and citation omitted); *Hecht v. Superior Court (Ferguson)*, 192 Cal. App. 3d 560 (1987) ("It is the intent and conduct of the parties which is critical to the formation of the attorney-client relationship."). *See also* Restatement (Third) The Law Governing Lawyers §14(1) ("A relationship of client and lawyer arises when […] a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either (a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services").

14 *See Responsible Citizens v. Superior Court (Askins)*, 16 Cal. App. 4th 1717 (1993) ("one of the most important facts involved in finding an attorney-client relationship is the expectation of the client based on how the situation appears to a reasonable person in the client's position") (internal quotes and citation omitted). *See also Sky Valley Ltd. P'ship v. ATX Sky Valley, Ltd.*, 150 F.R.D. 648 (N.D. Cal. 1993) ("the courts have focused on whether it would have been reasonable, taking into account all the relevant circumstances, for the person who attempted to invoke the joint client exception [to the attorney-client privilege] to have inferred that she was in fact a 'client' of the lawyer.").

15 Rules of Prof'l Conduct r. 1.8.1.

16 Rules of Professional Conduct rule 1.8.11 (Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9) requires that a prohibition under Rule 1.8.1 "that applies to any one of them shall apply to all of them."

17 Rules of Prof'l Conduct r. 1.8.11 cmt.

18 *Id.* at r. 1.8.10 cmt. [2].

19 *Id.* at r. 1.13(a).

20 *Id.* at r. 1.13(f); *see also Upjohn Co. v. United States,* 449 U.S. 383 (1981).

21 Rules of Prof'l Conduct r. 1.13(g).

## THE NEW ETHICS COMMITTEE OF THE CALIFORNIA LAWYERS ASSOCIATION

The California Lawyers Association has created a new Ethics Committee to help ensure CLA members stay up-to-date with their ethical obligations. This new advisory group will create educational content, comment on proposed rule changes, write advisory opinions on emerging ethical issues, and issue ethics alerts and reminders to CLA members.

# Message from the Co-Chairs

**Steven W. DeLateur and Tara Burd**

Dear Real Property Law Section Members:

Welcome to the 2019-2020 RPLS ExCom Year! As the incoming Co-Chairs, we are so excited for all the opportunities the California Lawyers Association (CLA) Real Property Law Section (RPLS) has to offer. This marks the beginning of the first full ExCom year that the sections will have the support of full-time staff from an organization that puts the sections and lawyer services first. Although the CLA is only a year and a half old, we are blessed with the benefits left to us by the State Bar: a 6,000-person section membership, statewide and nationwide leadership opportunities, and a direct line to the Legislature and California Supreme Court. For those interested in CLA-wide opportunities, government affairs, drafting legislation, or additional leadership opportunities, please let us know and we will connect you with the right person or committee. Also, be sure to read the monthly CLA Leadership emails for snapshots of what is happening.

Our section also has an amazing monthly e-bulletin that ExCom member John (J.R.) Richards rebuilt last year to be a content-rich summary of the RPLS's monthly activities. This is really important for our members because we are one of the most active sections and we need our members to know about all of the benefits and services we offer. We encourage you to regularly read the e-bulletin so that you can stay up-to-date on our section, and see how you may contribute.

As a reminder, here are some of the section offerings to our membership:

- Real Property Law Journal (scholarly articles, four issues per year)
- E-bulletin (summaries and snapshots, monthly)
- Webinars (with MCLE Credit)
- What's Up Webinars (information-based)
- Half-day Seminars
- Multi-day Spring Conference
- Lunch or happy hour in-person seminars
- Networking-only events
- Podcasts (in process)

We look forward to hearing from each of you regarding what you like about our section's activities and what you suggest we should be doing differently.

A very special "thank you" goes out to our outgoing Co-Chairs, Neil Kalin and Thomas Lombardi, for their seemingly boundless energy and commitment to our section. They supported all of our events in a way that

contributed greatly to the success of the ExCom and the section during the past year. We are so thankful that they are staying on as advisors so that we can continue to benefit from their commitment and experience.

Throughout the coming year, we look forward to meeting as many of you as possible at one or more of our fabulous events. With your participation and suggestions, we are confident that our section will achieve great results this year. Many thanks for your commitment to the Real Property Law Section.

Steven W. DeLateur, Co-Chair
Tara Burd, Co-Chair

# *In Memoriam:* Executive Committee Member Danny Wang

In mid-August 2019, the Real Property Law Section Executive Committee members received the unfathomable news that one of our newest members, Danny Wang, had unexpectedly passed away at the young age of 39. Our collective heart was broken. Danny Wang had joined the Real Property Law Section Executive Committee the previous fall, 2018. Like most new members, he was quiet and observant at first. He studied the nuances of the ExCom's decision-making process, learned how the members interacted, and finally, gathered information to help him decide where he likely would be most effective. Those who sat next to him at meetings, lunch, dinner, or special events, quickly learned that Danny was a delight to be around. By the half-way point of his first year, Danny had become actively engaged in the life of the ExCom. He gave his opinions at meetings, volunteered to participate in the Section's efforts to revitalize the Section's MCLE webinar and seminar replay program, contributed to the successful planning of the Section's signature REAL Symposium at Stanford, and was one of the few to actually volunteer to be the recording Secretary at the in-person ExCom meetings. Probably most important of all, in his short time on the ExCom, Danny was well-liked and respected by all the ExCom members. This was undoubtedly due, in no small part, to his ever-present smile and disarming personality. And it is this contribution of friendship that will be missed most of all. As soon as the news spread of his passing, there was an outpouring of disbelief and overwhelming grief. That will not soon pass, nor will his memory. Danny, thank you for making those around you feel your warmth, dedication, and commitment. You will be sorely missed.

# Section Calendar of Upcoming Events

### Leadership Retreat
January 16-18, 2020 *Sacramento*

### REAL Symposium
February 5, 2020 *Stanford*

### Spring Conference
April 23-26, 2020 *San Francisco*

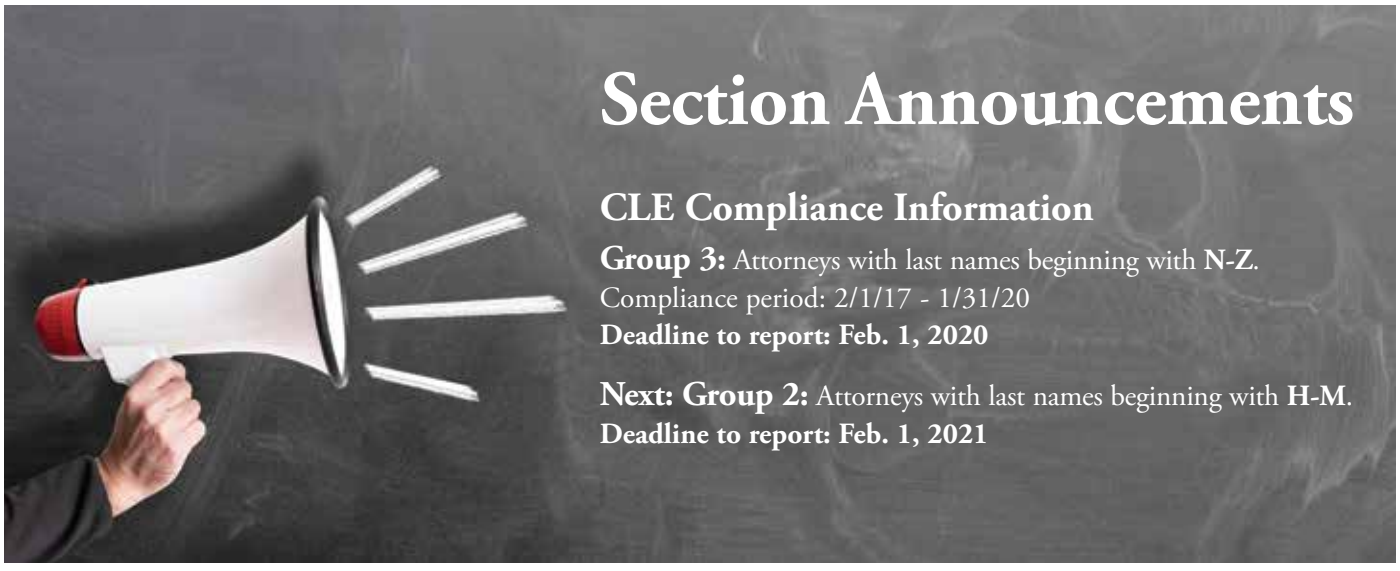
### Solo Summit
June 11-13, 2020 *Huntington Beach*

### CLA New Member Orientation
August 29, 2020 *Sacramento*

### Annual Meeting
September 24-26, 2020 *San Diego*

### Deadlines for RPLS Journal
Issue 2 article submission deadline February 15, 2020
Issue 3 article submission deadline May 15, 2020
Issue 4 article submission deadline September 15, 2020

### Deadline for RPLS E-Bulletin
The 10th of each month



# Section Announcements

## CLE Compliance Information

**Group 3:** Attorneys with last names beginning with **N-Z.**
Compliance period: 2/1/17 - 1/31/20
**Deadline to report: Feb. 1, 2020**

**Next: Group 2:** Attorneys with last names beginning with **H-M.**
**Deadline to report: Feb. 1, 2021**

**Thank you to our Journal Sponsor:**

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