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**Mortgage Banking Update  
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**CONCURRENT FORECLOSURE SALE &  
ATTEMPTED LOAN PAYOFF:  
CALIF. APP. CT. OFFERS PARTIAL RESOLUTION**

**In Reaching its Holding, Court Re-Acknowledges, Explains &  
Expands Significant Foreclosure, Loan Servicing and Payoff Law**

**Summary of Case**

A California Appellate Court published an extraordinary opinion on January 15, 2003 resolving a dispute between a purchaser of a property in foreclosure and the third party purchaser at the foreclosure sale. Both the private sale and foreclosure sale consummated virtually concurrently, as did an intended loan payoff in connection with the private sale.

The Court held in favor of the bidder at the foreclosure sale. However, the opinion's rationale is perhaps more important than its holding as it re-acknowledges, clarifies, and, in some instances, expands upon a number of basic legal principals favorable to the mortgage banking industry. The opinion also explains the interrelationship between the legal principals.

The case is *Nguyen v. Calhoun* (2003 DJDAR 599; 2003 WL 122630; — Cal.Rptr.2d —; Calif. App. Ct., 6<sup>th</sup> App. Dist.; Jan. 15, 2003). It can be viewed at <http://www.courtinfo.ca.gov/opinions/documents/H022134.PDF>.

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## **Facts**

On the same day that an existing lien holder foreclosed via a properly noticed trustee's sale, the owner/borrower closed a sale escrow to Plaintiff. Also on the day of the closing, the escrow agent sent by overnight courier an intended payoff check to the existing lien holder. The lien holder received it the following business day.

## **Issues**

The case involves competing claims of ownership to the subject property between the purchaser through escrow (Plaintiff) and the successful third party bidders at the foreclosure sale (Defendants).

## **Holding / Analysis**

The appellate court concluded that defendants, as successful bidders at the Trustee's Sale, were entitled to a quiet title judgment.

In reaching its conclusion the Court re-acknowledges, clarifies and expands upon a number of significant legal principals. They include:

### **Loan Servicing / Payoff Law**

- Generally, depositing a payment/payoff in the mail does not itself constitute payment. An exception to this rule exists where a creditor *directs* the debtor to mail payment, but providing payment envelopes, supplying a mailing address or even furnishing payment coupons with the notation "detach and mail with payment" is not considered to be such a direction.

- A borrower alleging that disputed payments were in fact made, or that a loan was paid off, has the burden of proof of payment.

### **Foreclosure Law**

- If a trustee's deed recites that all statutory notice requirements and procedures required by law for the conduct of the foreclosure have been satisfied, a *rebuttable presumption* arises that the sale has been conducted regularly and properly. This presumption is *conclusive* as to a bona fide purchaser.

- Although a foreclosure sale can be set aside where there is an irregularity in the sale coupled with inadequate price, the irregularity must arise from the statutory foreclosure proceeding itself. Likewise, a mistake which occurs outside ("dehors") the confines of the foreclosure proceedings does not provide a basis for invalidating the sale. The Court



characterized a misunderstanding between the creditor and debtor as to an oral agreement to postpone the foreclosure sale as dehors the foreclosure.

- Absent defects in the foreclosure proceeding itself, delivery of the trustee's deed to the successful bidder is merely a ministerial act. As such, a delay in delivery of the trustee's deed to the successful bidder until a time after the bidder learns of allegations of adverse claims or irregularities in the sale do not defeat the bidder's bona fide status.

### **Other Issues, Notes & Commentary**

The case also involved additional facts and issues, beyond the scope of this memorandum. They include an oral promise by the lien holder to conditionally postpone the trustee's sale.

Curiously, one issue not explored by the Court in its opinion is California Civil Code, section 2924c(e), which provides that a borrower only has until *five business days* prior to the date of a foreclosure sale to "cure" the default. After that point in time, the lender can refuse payment and proceed with foreclosure without liability. Perhaps the Court assumed this issue was moot in light of the lien holder's aforementioned oral promise to conditionally postpone the sale.

The case explores basic trust deed / mortgage financing law, loan servicing / payoff law, foreclosure law and real property ownership / recording act law. The case serves as a mini-primer on numerous mortgage banking principals which should, and no doubt will, be cited frequently by the mortgage banking bar.

### **Further Information and Assistance**

For further information and/or assistance, please feel free to contact any member of the Mortgage Banking Department at Wolfe & Wyman LLP, including:

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