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CHAPTER 14. The Demise of CC § 2924l: Joint and Several Liability, and the Right to Indemnification ("Tactical")

Introduction

This Chapter analyzes a less obvious practical change made by the HBR – the introduction of the doctrines of "joint and several liability" and "indemnification" into the mortgage default practice area. While these doctrines are well-known in the field of personal injury law, they did not exist in this practice area with any appreciable frequency prior to the HBR.

"Joint and several liability" makes any one of multiple losing defendants liable for the *full* amount of any legal liability to the winning plaintiff, regardless of any apportionment of fault (or any written indemnifications) that may exist among the losing defendants. Thus, "joint and several liability" lets the winning plaintiff choose which of the losing defendants to collect its damage award from, leaving those defendants to then sort out or apportion liability between themselves (using the legal doctrine of "indemnification"). While "indemnification" is normally a contractual concept, it also exists as a legal doctrine wherein liability can be apportioned by the court among defendants based on relative fault. In situations where a person is found liable based on the conduct of another, the legal doctrine of "indemnification" also allows the first party to seek to be made whole by the second party as a matter of law (and not necessarily as a matter of contract). The core idea to grasp is that under "joint and several liability", the injured party gets more "deep pockets" from which to pay the totality of its damage award (while each defendant remains individually liable for the total award), and the "deep pockets" then get to sort out that liability amongst themselves later pursuant to contractual terms or the legal doctrine of "indemnification".

To give these concepts a concrete application under the HBR, imagine a case in which:

- The borrower is granted an injunction staying a non-judicial foreclosure based on allegations the loan servicer improperly denied a loan modification and the foreclosure trustee "robosigned" the NOS.
- Legal fees payable to the borrower under the "Harris Rule" amount to $50,000, due primarily to extensive discovery regarding the policies and procedures of both the servicer and the foreclosure trustee.
- The court imposes joint and several liability under CC 2924.12(i) for the full $50,000 on both the foreclosure trustee and the loan servicer.
- The foreclosure trustee is found to have been wrongfully accused while the loan servicer is found to have violated the HBR.

So, the $50,000 question is: Who pays the legal fees? The loan servicer? The foreclosure trustee? Under the doctrine of "joint and several liability", the foreclosure trustee could be forced to pay the *entire* $50,000 – even though the servicer was actually the party in error. The foreclosure trustee could then seek recoupment of all or a percentage of that $50,000 from the loan servicer, using any enforceable contractual terms or under the doctrine of "indemnification". Of course, if the loan servicer has filed for bankruptcy or otherwise gone out of business, this entire loss is then effectively put on the foreclosure trustee.

Prior to the HBR, the foreclosure trustee had no serious practical liability, the mortgage servicer had little direct liability to the borrower (only indirect liability to the borrower), and the investor bore the primary liability (although still fairly rare). After the HBR, liability is effectively imposed per transaction – e.g. per loan modification request, per appeal of any denial, per NOD, per NOS, etc. – on all three parties: the investor, the loan servicer, and the foreclosure trustee.

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And, although technically an open question, it appears highly likely that this liability will be of the "joint and several" variety.

Focusing specifically on the foreclosure trustee, the provisions of CC § 2924l have long provided the foreclosure trustees a shield against liability for their actions in conducting the non-judicial foreclosure sale, allowing the foreclosure trustee to escape liability by filing a statement of non-monetary interest in any action for wrongful foreclosure. After the HBR, it is likely that the shield of CC § 2924l is significantly weakened, as explained below.

Parties Liable Under the HBR

The HBR creates a "crazy quilt" of liability for violation of its provisions. The below table summarizes these provisions.

CC §	Parties Liable	Joint & Several	Indemnification
2923.6(c)	"…mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent…"	Most likely	Most likely
2923.6(e)	"…mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent…"	Most likely	Most likely
2323.7	Mortgage servicer	No	No
2924(a)(6)	No direct party named; indirectly: investor, mortgage servicer, trustee	Most likely	Most likely
2924.9	Mortgage servicer	No	No
2924.10	Mortgage servicer	No	No
2924.11(a)	"…mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent…"	Most likely	Most likely
2924.11(b)	"…mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent…"	Most likely	Most likely
2924.11(c)	Mortgage servicer	No	No
2924.11(d)	"" A mortgagee, beneficiary or authorized agent…"	Most likely	Most likely
2924.11(e)	Mortgage servicer	No	No
2924.11(f)	Mortgage servicer	No	No
2924.17(a)	Party signing document	No	Most likely
2924.17(b)	Mortgage servicer	No	No
2924.17(c)	Mortgage servicer	No	No

When "Or" Really Means "And"

The reader will note that the sections which seem directly to impose the joint and several liability (CC § 2923.6(c), CC § 2923.6(e), CC § 2924.11(a), CC § 2924.11(b) and CC § 2924.11(d)) all use "or" as the conjunction listing the parties liable. Normally and without more, this would tend to indicate that each party is separately liable, and not jointly liable. Unfortunately, the "or" is not likely to provide much protection to any individual party as a practical matter – and the "or" is probably best viewed as equivalent to "and".

The intent of the HBR is, as explicitly stated in its purpose, to protect borrowers in default on their mortgages. All of the provisions which impose liability are likely to be interpreted consistent with that purpose, and interpreting any "or" as excluding any of the listed parties from liability frustrates the purpose of the HBR by forcing the borrower to go on a wild goose chase to locate a defendant – when the reality is that all the listed parties are probably operating as agents of each other. Courts are likely to be aware of that reality, and are not likely to be friendly to attempts among inter-related parties to escape or apportion relative liability prior to a determination on the merits.

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Taken to an extreme example, if the "or" was narrowly interpreted to mean separate liability, then all the parties that the HBR exposes to liability for recording the NOD could avoid that liability by simply having someone who is *not* a listed party (for example, a random pizza delivery person) perform the act. Obviously no court would countenance such a result – e.g. all parties escape liability, and the borrower has no remedy – merely because of the presence of an "or" in the statute.

The reading which the authors believe makes the most sense, in light of the clear purpose of the HBR and the practical realities, is that each of the listed entities violates the statute when an NOD or NOS is recorded, or the sale is held, in violation of the particular statute's terms. Read this way, if the foreclosure trustee signs the NOS, it does so under direction of the mortgage servicer which is an agent for the investor/beneficiary, and so on – which is a reasonable view, and one courts are likely to adopt. Under this interpretation, then, the use of the word "or" as the conjunctive does not relieve any of the listed entities from liability, but instead imposes it on all of them. Thus, when read in a reasonable and practical context, the conjunctive "or" most likely means "and" – and these provisions are very likely to be interpreted as imposing joint and several liability.

CC § 2924l and the HBR

Prior to the HBR, the trustee conducting the non-judicial foreclosure was protected from "legal leverage" and any real legal exposure. The cornerstone of that protection is CC § 2924l(a), which states in relevant part:

> "In the event that a trustee under a deed of trust is named in an action or proceeding in which that deed of trust is the subject, and in the event that the trustee maintains a reasonable belief that it has been named in the action or proceeding solely in its capacity as trustee, and not arising out of any wrongful acts or omissions on its part in the performance of its duties as trustee, then, at any time, the trustee may file a declaration of nonmonetary status."

By imposing direct liability on the trustee in CC § 2923.6(c), CC § 2923.6(e), CC § 2924.11(a), CC § 2924.11(b) and CC § 2924.11(d), the HBR, for all practical purposes, effectively "killed" CC § 2924l. In the future, a foreclosure trustee will never be sued for "proceeding solely in its capacity as trustee", but instead for "wrongful acts or omissions" tied to the performance of duties placed directly on it by the HBR. In fact, it would probably be malpractice for a borrower's attorney to fail to name the trustee as a defendant on any claim where the HBR places direct responsibility on the trustee, or to allow for the protections of CC § 2924l to go unchallenged if the trustee files a declaration of nonmonetary status on such claims.

"Standing", "Joint and Several Liability", and "Indemnification"

One of the more intriguing issues presented by the HBR is the interaction of the "joint and several liability" and "indemnification" doctrines with the new concept of "standing" set forth in CC § 2924(a)(6). CC § 2924(a)(6) simply prohibits the commencement of a foreclosure unless by the "holder of the beneficial interest", and as expressly authorized by that holder.

CC § 2924(a)(6), however, does not name the entities subject to its provisions. Thus, all parties to the non-judicial foreclosure process (the investor/beneficiary), the servicer, and the trustee will most likely all be named. There are two levels of analysis involving liability under CC § 2924(a)(6). The first level is the simple statutory analysis. The second level is unique to the foreclosure trustee: Does the trustee owe a duty to the borrower to require proof of "holder" status by the party starting the non-judicial foreclosure process? Put another way, can a foreclosure trustee be sued by a

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borrower for negligently commencing the foreclosure in violation of the "standing" proof requirement, which action will include emotional distress damages?

Statutory Liability

Liability under CC § 2924(a)(6) can occur at two different points in time: (a) prior to foreclosure deed recordation, and (b) after foreclosure deed recordation.

- *Actions Filed Prior to Deed Recordation.* For these actions, the primary concern should not be the potential for damages (because the HBR makes it clear that, prior to deed recordation, injunctive relief is the sole remedy), but instead should be the likely legal expense required to prove compliance when challenged in court. Defending this type of case is likely to cost a foreclosure trustee in the tens of thousands of dollars, even if they did properly follow the law. The core issue then becomes: Can the trustee force the servicer or the investor to pay for its legal fees via the legal doctrine of "indemnification" (assuming no such contractual arrangement exists)?

- *Actions Filed After Deed Recordation.* After deed recordation, money damages are available – but what kind and on what theory will depend on the claims being brought. Under CC § 2924(a)(6), the post-foreclosure claims can include: (a) those related to improper foreclosure due to lack of "standing", and (b) those related to improper eviction due to lack of "standing".

    - The concern in actions alleging a completed foreclosure violates the "standing" requirements will probably *not* remain focused on just the legal expense to defend against the claims being brought – because the borrower will most likely be seeking emotional distress and similar soft damages for the loss of the home, among other damages. Please remember, CC § 2924(a)(6) is not controlled by CC § 2924.12(b) (the private right of action provision), and thus is not bound by its limitation solely to economic damages. Even so, the authors believe it remains highly unlikely that "tort damages" will be allowed in these actions, absent unusual facts – but that does not mean borrowers' attorneys will not press for them, and force on the defendants the expense of an appropriate defense.

    - In actions alleging a pending or completed eviction violates the "standing" requirements, however, the primary concern probably remains focused on the legal expense to defend against those claims. In the authors' opinion, damage claims relating to commencing and/or completing an eviction will likely be shielded under the litigation privilege. In these instances, it is believed the borrower's sole remedy will be to seek an injunction against the eviction in an action filed to set aside the foreclosure sale for lack of "standing".

Negligent Commencement of Non-Judicial Foreclosure Process

There is the potential that the HBR creates a new cause of action for the negligent commencement of a non-judicial foreclosure process. Under this theory, CC § 2924(a)(6) imposes a duty on the trustee (and the loan servicer) to make certain that the entity commencing the non-judicial foreclosure process is, in fact, the "holder of the beneficial interest" (whatever that may mean) – and that duty runs to the borrower.

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There is a high probability that California appellate courts will find that such a duty exists. In dicta, the California Supreme Court in *Monterey S.P. Partnership v. W.L. Bangham* (1989) 49 Cal. 3d 454 said:

> "The deed of trust conveys "title" to the trustee "only so far as may be necessary to the execution of the trust." (cite omitted) Thus, as trustee, Western had only two **duties** with respect to the property….When, as actually occurred, Oak Knoll defaulted on its obligation, Western was required on proper request of the beneficiaries to exercise the power of sale…" (at 460). (emphasis added)

As part of its holding in the case of *I.E. Associates v. Safeco Title Ins.* (1985) 39 Cal.3d 281 the court, in refusing to imply a duty on a trustee to discover changed addresses of the borrower, stated:

> "In short, there is no authority for the proposition that a trustee under a deed of trust owes any **duties** with respect to exercise of a power of sale beyond those specified in the deed **and the statutes**." (at 288) (emphasis added)

A case which extensively discusses that trustee's duties are limited to those imposed by statute is also *Banc of American Leasing and Capital, LLC v. 3 Arch Trustee Services, Inc.* (2009) 180 Cal.App.4th 1090.

Thus, a strong argument exists that CC 2924(a)(6) creates a duty the trustee owes the borrower to exercise the power of sale only when so instructed by the "holder of the beneficial interest". A similarly strong argument exists that the duty is purely contractual, and hence no tort damages will be allowed. Although much surrounding this theory and argument is unknown at this point in time, what is known is that foreclosure trustees sued under this theory will be forced to expend legal fees to defend against it. The outcome of this argument, while believed to be strong by the authors, is expected to very much go case-by-case and judge-by-judge until published opinions begin to appear (and that may take 2-3 years). Assuming that a foreclosure trustee is so accused, and prevails after expending $50,000 in legal expense, can that trustee then claim indemnification for that $50,000 from the servicer, or the investor? The outcome of that indemnification argument will be very dependent on the facts of the case (and the terms of any contractual retention of the trustee).

The Demise of CC § 2924l and the Rise of Legal Conflicts of Interest

One major offshoot of the HBR's practical evisceration of the protections of CC § 2924l, and its likely imposition of "joint and several liability", is that law firms must now carefully review representation of related entities (such as the investor, servicer, and foreclosure trustee) based on legitimate conflicts of interest between the parties. In the past, this was never much of a concern for either the law firms or the clients who retained them (who many times would agree to joint representation to lower effective legal costs). Given the HBR's regime change (potentially making the related parties adverse to each other, and subject to claims for indemnification pursuant to joint and several liability), and given the hyper-charged regulatory environment most servicers now operate in, the conflicts issue should now very much be a concern for everyone.

For example, it is likely to be problematic for a single law firm to represent both the trustee and the servicer in any borrower suit alleging wrongful foreclosure due to a violation of the HBR. The parties are likely adverse given the statutory scheme employed by the HBR (including the trustee's likely inability to "get out" under CC § 2924l), and prudent risk management protocols for most servicers will probably mandate separate representation for the parties

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(depending on the facts). This can become problematic quickly if a law firm has *ever* represented the subject foreclosure trustee in its past, as the conflict generally endures indefinitely – absent a written waiver. In effect, the typical practice of the industry for years in response to borrower suits (e.g. to use joint representation of related parties) may in fact now result in serious hurdles for numerous law firms (and servicers, trustees, and investors) due to conflict concerns engendered by the HBR.