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CURRENTS

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Foreclosure Cases – More Challenges for Lenders **U.S. Bank v. Ibanez: Show us the Papers!**

By John C. Rogers & Cassell von Baeyer

Foreclosures continue to make news around the country. Developments can be of critical significance to readers whether they are property owners/borrowers or investors.

Business News reports that in 2010 there were about 1 million foreclosures nationwide. About 5 million borrowers are at least two months behind in their payments. This year the number of foreclo-

sure is expected to increase to 1.2 million. Nevada posted the highest foreclosure rate in 2010 for the fourth straight year! California is close behind. The situation is not expected to improve any time soon.

The focus of our discussion this issue is what documents must a lender have and prove before it can foreclose?

Once a note or debt is paid in full, the original note and the original deed of trust need to be surrendered

to the person paying the obligation in full. If the originals can’t be delivered, the lender cannot prove that it owns them and cannot guarantee that someone else who could claim ownership does not have them. It is therefore critical that a lender and its successors and assigns maintain possession and control of the originals of these instruments. This has become significantly more complicated in recent years when groups of mortgages or deeds of
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2011 Estate and Gift Tax Changes

By Vera Anne Struc

On December 17, 2010, after vigorous debate in the Senate and House of Representatives, President Obama signed a bill that reinstated the federal estate

tax and made significant changes to the federal gift, estate and generation-skipping tax laws. Some highlights are:

- The estate, gift and generation-skipping tax exemption in

2011 and 2012 is \$5 million.

- The maximum federal estate, gift and generation-skipping tax rate in 2011 and 2012 is 35%.

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Lawyers USA's Top Five Jury Verdicts of 2010

By: **Jamie L. Winter**

"The year's top verdict was awarded to a Las Vegas plaintiff who developed Hepatitis C just weeks after undergoing a routine colonoscopy"

Lawyers USA has once again released its list of the "Top Ten Jury Verdicts", this time for 2010. In compiling the list each year, Lawyers USA looks only at defended cases and verdicts awarded to an individual plaintiff, defined as a single person, family or small group of individuals injured in a single incident who had their claims tried in one case before the same jury. In other words, Lawyers USA does not include business vs. business lawsuits, class actions or consolidated cases and does not look at default verdicts or suits against incarcerated individuals.

"\$124.5 million verdict awarded by a Texas jury to seven passengers injured or killed while riding in a van"

The top award in 2010 was significantly higher than that in 2009, jumping from \$370 million in 2009 to \$505 million in 2010. The top five verdicts were as follows:

The year's top verdict was awarded to a Las Vegas plaintiff who developed Hepatitis C just weeks after undergoing a routine colonoscopy at an outpatient endoscopy center. Staff at the center administered anesthesia to the plaintiff from an oversized vial that had previously been used by an-

other patient. The plaintiff's attorney argued that the manufacturer of the oversized anesthesia vials and the vials' distributor should be punished for using "weapons of mass infection" which led to a 2008 Hepatitis C outbreak at the outpatient surgical centers. The jury agreed and awarded the Las Vegas plaintiff \$5.1 million in compensatory damages and \$500 million in punitive damages.

In second place this year was a \$208.8 million Los Angeles jury verdict awarded to a 68 year-old woman who developed mesothelioma after washing the clothes her husband wore home from his job which were determined to be laced with asbestos. The man regularly cut cement water pipes, containing asbestos and manufactured by CertainTeed Corporation, as part of his work for the L.A. Department of Water and Power. The jury awarded \$8.8 million in compensatory damages to be paid 70% and 30% by the manufacturer and the employer (respectively) and awarded \$200 million in punitive damages to be borne entirely by the manufacturer.

Number three in 2010 was a \$152 million verdict handed down by a Massachusetts jury in a wrongful death action brought by the son of a woman who had been given free cigarettes as a child by representatives of Lorillard, a tobacco company.

According to Lawyers USA, the fourth largest verdict was awarded to the family of a 22 year-old star New York Mets prospect who died when the Ford Explorer he was driving rolled-over, killing the star player. The trial, a retrial, resulted in a \$132.5 million award against Ford. The verdict was unusually high for a wrongful death case in large part because the Mets stipulated that it had projected that the player would be a star and earn a salary of more than \$100 million over his career.

In the fifth position was a \$124.5 million verdict awarded by a Texas jury to seven passengers injured or killed while riding in a van operating in a state where the passenger van company was not licensed. The suit was brought against the van company and the van's driver with the jury finding both liable.



Foreclosure Cases – More Challenges for Lenders.

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trust have been pooled and sold to investors, a process called “securitization.” When loans are securitized, who holds the original documents and who has authority to enforce the security instruments? [See end NOTE concerning MERS [Mortgage Electronic Registration System] and elec-

tronic registration of documents.]

A case decided in Massachusetts on January 7, 2011 has brought this issue to the forefront. Many commentators are claiming that this group of cases is a “game changer” for lenders – and not in a good way.

In *U.S. Bank National Association v Ibanez*,

NE2d, 2011 WL 2011 WL 38071 (Jan. 7, 2011), and its companion cases (collectively, “*Ibanez*”), the Massachusetts Supreme Judicial Court, essentially held that lenders must be able to prove they own a mortgage and have the right to foreclose before starting the sale process. In these cases, the
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“Many are claiming that this group of cases is a ‘game changer’ for lenders”

Mediation as a Cost Effective Alternative to Divorce Litigation

By Stacey F. Herhusky

In these difficult economic times, mediation is emerging as the procedure of choice for couples hoping to obtain closure of their divorce issues without engaging in the time consuming, emotional and costly litigation process. Inefficiencies in the court system have only been exacerbated by budget cuts which have resulted in program cuts, furlough days, early closures and cuts in court personnel. If it is possible to resolve your entire divorce without having to navigate the pitfalls of the court system, you should definitely consider mediation as an alternative. However, you should know that mediation is not for everyone and there are definitely several requirements which

will be discussed here to assure its success. If all of the ingredients for a successful mediation are not present, mediation can sometimes be as time consuming, frustrating and costly as litigation. The first, and most basic requirement for mediation, is that both parties want to mediate. Mediation requires two active voices in the room. The goal is to reach a meaningful agreement that reflects what each of you needs, in order to move forward in your life. If you are not both willing and voluntary participants, then there will not be two voices, and the result will likely be failed mediation or, at best, an unbalanced agreement which could be subject to enforceability issues in the future. Other requirements of a

successful mediation are as follows:

- **Both Parties Are Determined to Settle The Matter.** If both parties want to resolve everything in mediation, and keep coming back to the table to talk and to try, then they will likely be successful.
- **Both Parties Must Be Active Participants.** Both people need to contribute to the discussion. This means that you have to be able to use your best efforts to listen to the other side, even when you don't agree with what he/she is saying. It follows also that neither person should be cognitively or emotionally impaired (e.g., severe depression) in any way that
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“Mediation requires two active voices in the room.”



Mechanics Liens – Defective Pre-Lien Notices Get Fresh Legs

By Andrew N. Wolf

In these stressed economic times, mechanics lien rights are ever more important to contractors and subcontractors. This case concerns the rule of substantial compliance in regard to pre-lien notices given by subcontractors. In order to perfect a mechanics lien, a sub-contractor (i.e., someone not in direct contract with the owner) must give a special notice of its right to lien the property within a very short time period. The notice is designed to alert the owner and its construction lender that a particular person is doing work at the site and will have a mechanics lien claim if not paid. The notice is typically given to the owner,

the construction lender and the general contractor, and must match the format and delivery requirements described in NRS Chapter 108.

In December, 2010, the Nevada Supreme Court reiterated the substantial compliance doctrine by ruling that before a subcontractor can prevail in a lien action against the owner, the owner must have either pre-lien notice or actual knowledge of the subcontractor. *Hardy Companies, Inc. v. SNMARK, LLC*, 126 Nev. Adv. Op. No. 49 (12/16/2010). Although strict compliance with the mechanic's lien statutes is not required to perfect a lien, substantial compliance requires at least actual no-

tice to the owner of the subcontractor's existence. This case is an in-depth analysis of the substantial compliance doctrine and the kinds of notice and knowledge that an owner may receive that will satisfy the substantial compliance rule and, in effect, remedy a defective pre-lien notice.

Bottom Line: Subcontractors may have an argument to keep their mechanics liens alive even if their pre-lien notice was not given according to the rules; and owners may have a trickier time avoiding lien claims of subcontractors and material suppliers who can make a plausible case that the owners knew of their identity and work at the site.

"Subcontractors may have an argument to keep their mechanics liens alive even if their pre-lien notice was not given according to the rules."

Mediation as a Cost Effective Alternative to Divorce Litigation

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affects capacity to mediate. Neither person should lack capacity due to drug or alcohol abuse.

- **Both Parties Want To Settle the Case, and Move On.** The breakdown of a marriage is similar to a death and does cause both parties to engage in the grieving

process. This can involve transition through various stages such as denial, pain, anger, depression, reconstruction and eventually acceptance. It is often the case that divorcing couples are at different stages of the grieving process which can certainly complicate the ability of both parties to

have meaningful discussions about child custody, visitation, division of assets, support, etc. Mediation of these important and often very emotionally charged issues requires attention to the long-term, and the big picture. You must think about your ex and - on some level -

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"...you have to be able to use your best efforts to listen to the other side, even when you don't agree.."



Are you a professional in the real estate and/or lending industry?

If so, and you are interested in learning more about distressed real estate, bankruptcy and the tax consequences surrounding the current real estate market please consider joining Cassell von Baeyer on February 11, 2011, for a no cost lunch and learn presentation sponsored by Ticor Title of Nevada.

12:00-2:30 Presentation (11:30- 12:00 Lunch)

5650 Riggins Court, Reno (Reno/Sparks Association of Realtors)

Due to space limitations RSVPs required:

renosales@ticortitle.com or 775.324.7400 ext. 169

2011 Estate and Gift Tax Changes

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- Full-stepped up in basis for income tax purposes applies for persons who die in 2011 and 2012.
- For persons who died in 2010, the estate can elect to apply either the 2010 rules (no estate tax, but limited stepped up in basis for income tax purposes) or the 2011 rules (estate tax for estates larger than \$5 million, but with full stepped up in basis for income tax purposes for all estates).
- The unused estate tax exemption (but NOT

the exemption from the generation-skipping tax) for the first spouse to die is “portable” and may be carried over to the surviving spouse.

- The new rules are set to expire on December 31, 2012, with a return to the 2001 rules in 2013 (which will mean if Congress takes no further action: a return to the \$1 million general estate, federal and generation skipping tax exemption, with a 55% maximum estate tax rate).

Persons with estate plans that utilize formulas for funding trusts may wish to review their plans to

confirm that the new exemptions satisfy their estate planning intentions. Some families may be able to simplify their estate plans by relying on the portability of the estate tax exemption, particularly if the estate does not utilize generation skipping planning. Gifting opportunities in 2011 and 2012 may prove to be unique with the increased gift tax exemption to \$5 million, and the potential return to the \$1 million exemptions in 2013. Please let us know if you want us to review your estate plan in light of the new estate tax law.

“Obama signed a bill that reinstated the federal estate tax and made significant changes to the federal gift, estate and generation-skipping tax laws.”



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banks failed to prove they had received valid assignments prior to starting the sale process and could not quiet title against the prior owners. Thus, the Court found that the banks had no legal right to title to the property on which to base a quiet title action.

Massachusetts, like Nevada and California, has statutes governing the sale

process. Massachusetts statute permits only certain parties, including the “mortgagee or [its] successors or assigns,” to exercise the power of sale. Because the power of sale is so powerful – because it allows foreclosures with minimal judicial oversight – Massachusetts case law requires that provisions authorizing the power of sale must be strictly complied with. Fail-

ing to properly identify the person authorized to foreclose renders the notice of sale defective and the sale void. U.S. Bank held an assignment executed after the sale, so its lack of authorization to foreclose was clear. The bank argued that the various securitization documents such as an unsigned private placement memorandum (PPM), servicing (continued on page 7...)

“U.S. Bank held an assignment executed after the sale, so its lack of authorization to foreclose was clear.”

Mediation as a Cost Effective Alternative to Divorce Litigation

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hope to honor your past love for each other, the years of your lives that you spent together.

- **No Hidden Assets and Full Financial Disclosure.** It goes without saying that parties cannot make informed decisions if they do not have all of the information on which to base decisions. In mediation, you will not have the power of the court behind you to compel your spouse to produce credit card statements, bank statements, stock options, small business records, etc. Most couples who choose mediation feel confident that they know what each other

has, or can trust the other party to voluntarily produce information without engaging in formal discovery. Mediation would not be productive for someone who wants to 'make a deal' without revealing their cards.

- **No Patterns of Intimidation, Control or Domestic Violence.** Finally, it is important to note that, if you and your spouse have a history of violence between you, more traditional methods for negotiating your divorce might provide better if not safer results. It is difficult to speak freely and express what you want if you fear repercussions or do not feel that you can

contribute productively without inciting anger in the abusive spouse.

Whether you decide to mediate or litigate, it is also important that you retain an attorney to assist you during either process. Mediation is a way to conserve resources and funds, but it is still advisable to have an attorney reviewing your agreements to be sure your interests are being protected. Mediators represent the agreement or the goal or resolution and do not have the ability to represent the interests of the individual parties with conflicting interests. You want to make sure to have any agreements reached in mediation reviewed by your own counsel before signing.

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agreements and blank assignments granted ownership and authorization. The Court found these documents did not provide proof of ownership or assignment because they did not constitute present, valid assignments. Each bank failed in its burden of proof and each sale was invalidated.

It is uncertain how *Ibanez* will be applied elsewhere, but in Nevada and California the case suggests that proof of ownership of a Note and Deed of Trust could be essential to concluding a valid trustee's sale. Such proof is much easier where there is but one loan (note and deed of trust) being assigned, even if there are a few successive transfers. Where there are numerous assignments, or where there are pooled and securitized loans sold to investors, tracking original documents and all assignments becomes much more difficult. This writer believes that where a person or firm runs a large volume of foreclosure sales, it is much more likely that it will be hard for a seller to document proper ownership or produce necessary transfer documents to support its entitlement to conduct a valid sale.

It should also be noted that there are significant differences in the way mortgages operate in California and Nevada vs. Massachusetts, as well as differences in the specific language of our foreclosure statutes. The *Ibanez* case may find widespread support in its general proposition that banks must be able to provide documentation proving ownership of loans before they can maintain a foreclosure action. But, that general proposition may be applied differently or in limited ways on a state by state basis.

Many practical issues arise if a lender cannot properly prove ownership, including: Will an upside down borrower have the money or desire to challenge a defective foreclosure sale? Will a third party buyer be able to rely on title acquired at a potentially defective sale? And, will title insurers be willing to insure title from a foreclosing lender to such a buyer? These issues will have to be addressed in the future by courts and perhaps Congress. A number of commentators suggest that this problem is so large and complex that it will need legislative action to resolve. Stay tuned...

NOTE: The *Ibanez* cases were not MERS [Mortgage Electronic Registration System] cases. Discussion of MERS warrants an article of its own, but briefly, MERS was established, in part, to minimize recording of the many assignments that would follow the securitization process. Although there are a few cases that uphold the right of MERS to pursue foreclosures, there are numerous cases where MERS has not been able to produce documents to prove ownership. If assignment of notes and deeds of trust are not transferred and tracked together, and if the original documents cannot be found and all transfers proven, lenders have had their sales declared invalid. In one California federal bankruptcy case (*In re Walker*) a ruling was issued in May, 2010 that MERS could not have assigned the original note from the original lender because it was not the owner of the note. In a Nevada bankruptcy case (*In re Hawkins*), the court held that MERS did not produce sufficient evidence to prove that it was a "real party in interest" that could move to lift an automatic stay. Expect much more in the news about MERS!

"...there are significant differences in the way mortgages operate in California and Nevada vs. Massachusetts, as well as differences in the specific language of our foreclosure statutes."

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A Law Firm Committed to Excellence & Committed to You.

Incline law Group, LLP is a boutique law firm located on the North Shore of Lake Tahoe. The firm, founded in 1973 by John C. Rogers, has earned a reputation for professionalism, discretion, diligence and positive results.

In short, we are personally committed to excellence and to our clients' success. Our areas of practice include change of residency, creation and management of entities, contracts, real estate, asset protection, family law, commercial transactions, civil litigation and estate planning.

All of our attorneys are licensed in Nevada and California.



From left to right:

Stacey F. Herhusky, Jamie L. Winter, John C. Rogers, Vera Anne Struc,
Andrew N. Wolf and Cassell von Baeyer



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