

Mark S. Blackman, Gary S. Barr Successfully Represent Wells Fargo in Court of Appeals “Lien Priorities” Case

SAN FRANCISCO, CALIF. (October 29, 2009)--In an October 22 decision, the First District Court of Appeals laid out a methodology for determining lien priorities when inconsistent lien priorities exist in non-judicial foreclosure sales, *Wells Fargo Bank et. al. v. James Neilsen* (A122626, San Mateo County Superior Court No. CIV 465331).

In 2007, American Express Centurion Bank (AMEX) foreclosed on its deed of trust for a single-family residence owned by James Neilsen. The liens against Neilsen's property were recorded in chronological order and had balances at the time of the AMEX foreclosure as follows: AMEX (\$28,726), Wells Fargo Bank (WFB) (\$78,433) and PHH Mortgage Corporation (\$322,000). "When PHH made its loan, it obtained a subordination agreement from AMEX, but not from WFB," says Mark S. Blackman, principal in the Encino law firm of Alpert, Barr & Grant, who argued the case before the court on behalf of WFB.

WFB was unsure of its lien position because of the subordination agreement between AMEX and PHH. To protect its security interests, WFB provided the winning bid of \$400,000 at the property's foreclosure sale resulting in surplus funds of approximately \$367,000 (minus the AMEX lien and trustee costs). "Since PHH's lien was senior to AMEX's lien, but WFB's lien was senior to PHH, there was uncertainty about 1) lien priorities, 2) what liens WFB would take subject to the foreclosure sale and 3) who was entitled to any surplus funds," says Blackman.

Robert Curtis, the foreclosure trustee, was unsure how to distribute the surplus funds for which WFB, PHH and Neilsen all made claims. He filed an interpleader action in the San Mateo County Superior Court and deposited the funds with the court.

WFB and PHH asserted and the San Mateo Superior Court agreed that a case involving a sheriff's sale under the Enforcement of Judgments Act should be applied to non-judicial foreclosures conducted by foreclosure trustees. Neilsen disagreed; claiming AMEX's lien subordination placed PHH in first position ahead of AMEX and WFB and that he was thus entitled to all surplus funds after WFB received reimbursement of the advances it made to protect its security interest.

The Court of Appeal determined that where there are inconsistent liens, the liens should be paid under a theory of "partial subordination." Since AMEX had subordinated its lien to PHH, the Court of Appeal ruled that under this theory, PHH was entitled to a first in time lien, but only to the extent of AMEX's lien (\$28,726). WFB then was paid as it

was entitled under its lien in the sum of \$78,433. The remaining balance, up to the difference between PHH's original lien (\$322,000) minus the amount of the lien granted senior priority status (\$28,726), would be paid to PHH (\$293,274). If any money was left, it could be paid to Neilsen. Since there were not sufficient funds to pay PHH in full, Neilsen was not entitled to any of the "surplus funds."

"The court's decision clarifies foreclosure bidding and surplus fund issues for title companies, foreclosure trustees, third party bidders and beneficiaries," says Blackman. "It provides a means for each of these parties to determine what rights they have (or will obtain as the successful bidder) at the time of the public sale. The court's decision facilitates an orderly determination of all of the respective player's rights in foreclosure sales involving inconsistent liens, which should result in fewer legal disputes over surplus funds and title following these sales."

"The court's ruling is important to lenders who are presently faced with foreclosures of both their own liens and those of senior and junior lien holders," says Gary L. Barr, principal with Alpert, Barr & Grant who was also legal counsel for WFB. "Now, lenders will be able to make better decisions to protect their rights at foreclosure sales."

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For a copy of the Appellate Court ruling, go to
<http://www.courtinfo.ca.gov/opinions/documents/A122626.PDF>.

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