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Slow Justice: The Unfortunate Result of Case Law Lagging Statutory Changes in the Residential Foreclosure Arena

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Two recent decisions of the California Supreme Court, reported in this issue of the *Miller & Starr Real Estate Newsalert*, illustrate both the virtues and the limitations of incremental appellate jurisprudence in a fertile subject of litigation, the California nonjudicial foreclosure process and related one-action and antideficiency laws. In the first decision, *Coker v. JPMorgan Chase Bank, N.A.*,2 the Court held that a short sale agreement whereby the borrower of a purchase money residential loan acknowledged continuing liability was unenforceable as a purported waiver of Code of Civil Procedure Section 580b, and that the lender therefore could not recover the remaining unpaid amount of the debt after releasing its collateral from the deed of trust without a full payoff in order to accommodate the borrower's request to facilitate the sale. In so holding, the Court relied only on the long history of case law applying the California purchase money protections, and declined to address the impacts of at least two pieces of intervening legislation on short sales and on particular types of residential purchase money loans.

In the second decision, *Yvanova v. New Century Mortgage Corporation*,3 the Court found that a borrower had *standing* to assert that because an assignment of the note and deed of trust by the beneficiary was *void*, the nonjudicial sale of her property constituted a wrongful, i.e., tortious, foreclosure, but the Court declined to rule on whether the borrower could actually *plead* such a cause of action. The *Yvanova* Court also expressly did not apply another statute that became effective only a few weeks after the operative facts of the case arose that would have potentially given the borrower a cause of action based on failure of the foreclosing parties to establish their authority and right to foreclose under the circumstances.

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