

June 27, 2012



Honorable Nathan D. Mihara
Honorable Eugene M. Premo
Honorable Franklin D. Elia
California Court of Appeal
Sixth Appellate District
333 W. Santa Clara Street, Suite 1060
San Jose, CA 95113

RE: *Request for Partial Publication*
Skov v. U.S. Bank National Association,
Case No. H036483, Decision Filed June 8, 2012

Dear Justices of the Court of Appeal:

Pursuant to California Rules of Court Rule 8.1120, National Housing Law Project¹ and Public Counsel Law Center² write to respectfully request partial publication of Part D of this Court's opinion in *Skov v. U.S. Bank National Association*, Case No. H036483.

Civil Code § 2923.5 provides that a mortgagee, trustee, beneficiary, or authorized agent must contact the borrower to assess the borrower's financial situation and explore options to avoid foreclosure or satisfy due diligence requirements before recording a notice of default. In *Skov*, the appellant alleged that U.S. Bank failed to comply with Civil Code § 2923.5 when the bank recorded a notice of default without first contacting her to evaluate her finances and to discuss foreclosure avoidance options. Nevertheless, the trial court took judicial notice of U.S. Bank's declaration that it complied with section 2923.5 and dismissed the case.

This Court reversed. First, the Court held that the trial court erred to take judicial notice of U.S. Bank's declaration of compliance because "whether U.S. Bank complied with section 2923.5 is the type of fact that is reasonably subject to dispute, and thus, not a proper subject of

¹ The National Housing Law Project (NHLP) is a charitable nonprofit corporation established in 1968 whose mission is to use the law to advance housing justice for the poor by increasing and preserving the supply of decent, affordable housing; by improving existing housing conditions, including physical conditions and management practices; by expanding and enforcing tenants' and homeowners' rights; and by increasing housing opportunities for people protected by fair housing laws. Since the inception of the foreclosure crisis, NHLP has been at the forefront of protecting the rights of low-income tenants and homeowners in foreclosure situations.

² Established in 1970, Public Counsel is dedicated to advancing equal justice under law by delivering free legal and social services to indigent and underrepresented children, adults and families throughout Los Angeles County. The Consumer Law Project at Public Counsel deals primarily with legal issues related to mortgages and foreclosures. Since the collapse of the housing market in 2008, the Consumer Law Project has devoted most of its resources to assisting distressed homeowners facing foreclosure.

judicial notice.” Slip op. at 9. The Court then proceeded to rejected U.S. Bank’s contention that there is no private right of action for noncompliance with section 2923.5. In so holding, the Court held that the legislature intended to allow private enforcement of section 2923.5. Finally, the Court held that section 2923.5 is not preempted by the National Banking Act because as a foreclosure statute, section 2923.5 is covered by the savings clause in 12 C.F.R. § 34.4(b)(6).

This Court’s opinion merits publication because it satisfies the standards for publication set forth in California Rules of Court 8.1105. First, it provides an important and much-needed explanation of the interplay between judicial notice and the fact-specific inquiry that a trial court must engage in to determine compliance with Civil Code § 2923.5, and so warrants publication under Rule 8.1105(c)(3), (c)(4) and (c)(7) (explanation, new interpretation, reviewing development of common law rule).

The opinion also addresses a “conflict in the law.” Rule 8.1105(c)(5). As the Court observed (slip op. at 16 n. 9), at least one federal court has found that section 2923.5 is preempted by the National Banking Act. In contrast, another court upheld section 2923.5 against a NBA preemption challenge. *Tamburri v. Suntrust Mortg.* (N.D.Cal. June 21, 2012, No. C-11-2899 EMC) 2012 U.S. Dist. LEXIS 86360. *Skov* resolves this split in the case law by holding that “section 2923.5 is not preempted by federal law.”³ Slip op. at 17.

Finally, *Skov* “[i]nvolves a legal issue of continuing public interest.” Rule 8.1105(c)(6). As the foreclosure crisis continues unabated,⁴ section 2923.5 provides a crucial mechanism for California homeowners to avoid preventable foreclosures. However, as the many federal cases cited in footnote 9 of the opinion demonstrate, the statute has also generated substantial litigation in its wake. It is therefore of critical importance to have a precedential California appellate decision that provides guidance on these recurring issues to state trial courts, federal courts applying California law, and litigants.

We therefore request that the Court partially publish *Skov v. U.S. Bank National Association*, Case No. H036483.

³ A related split on whether section 2923.5 is preempted by HOLA was resolved by *Mabry v. Superior Court* (2010) 185 Cal.App.4th 208, which held section 2923.5 not to be preempted. *Mabry*, however, did not reach the issue of whether section 2923.5 is preempted by the National Banking Act.

⁴ California, where 1 in every 324 housing units received some kind of foreclosure filing in May 2012, is one of the hardest hit states. See California Real Estate Trends, <http://www.realtytrac.com/trendcenter/ca-trend.html>.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Kent Qian', written in a cursive style.

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PROOF OF SERVICE

Skov v. U.S. Bank National Association

Case No. H036483

I, Kent Qian, state:

I am over the age of eighteen and not a party to this action. My business address is 703 Market Street, Suite 2000, San Francisco, CA 94103. On the date set forth below, I served the foregoing document,

REQUEST FOR PARTIAL PUBLICATION

by placing one copy of the document in an envelope addressed to the persons listed below, sealed the envelope, and placing first-class postage on the envelope.

Service list:

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I declare under penalty of perjury under California law that the information above is true and correct.

Dated: June 27, 2012

By 
Kent Qian