RECENT DEVELOPMENTS IN LOAN MODIFICATION LAW

A property owner sometimes claims that an agreement was reached with his lender to modify a loan, and that the lender breached the loan modification agreement and proceeded with a foreclosure in breach of the agreement. The first obstacle faced by the homeowner is a rule known as the "statute of frauds," which generally bars the introduction of evidence of an oral agreement concerning a type of contract that must be in writing, rather than oral, such as an agreement to transfer an interest in real property.

The court of appeal in *Rossberg vs. Bank of America (2013) 219 CA 4th 1481* held that **a homeowner could not state a cause of action for fraud against the lender for failure to comply with an oral loan modification, where the lender moved forward in violation of the agreement and completed a foreclosure sale and then evicted the homeowner, because the loan modification was oral and not written.**

However, another loan modification dispute with different facts, also decided in 2013, arrived at a different result. In the case of *Chavez vs. Indymac Mortgage Services (2013) 219 CA 4th* 1052, Indymac recorded a notice of default and election to sell pursuant to its deed of trust. The homeowner requested a loan modification. The lender sent a loan modification agreement to the homeowner, which the homeowner signed and returned to the lender – but the lender did not sign. The lender moved forward and held a foreclosure sale and evicted the homeowner. The trial court dismissed the homeowner's complaint. **The court of appeals reversed the trial court and held that the homeowner could state allegations for breach of contract and "equitable estoppel" preventing Indymac from relying upon the defense of the statute of frauds. The court of appeals noted that the homeowner might be able to make an argument that there were sufficient facts to show that Indymac should equitably be prevented from relying upon the defense of the statute of frauds, because the homeowner might be able to show that he undertook an additional obligation, besides the obligation simply to pay principal and interest that he already owed, in that the alleged loan modification added the unpaid and deferred interest to the outstanding amount of principal, and under the loan modification agreement, interest would then accrue on unpaid interest. Under that theory, the homeowner could be considered to have agreed to take on an additional obligation. In other words, the homeowner gave additional consideration for the loan modification agreement, and such additional consideration could take the loan modification outside the defense of the statute of frauds.**

In *Bushell vs. JPMorgan Chase Bank (2013) 220 CA 4th* 915, a homeowner brought suit against a lender alleging that the homeowner had completed a trial loan modification program and that the lender had failed to offer the homeowner a permanent loan modification. The Home Affordable Modification Program (known as HAMP) required that the lender offer a permanent loan modification after the homeowner successfully completed a trial loan modification. Lenders that took part in the HAMP program received public tax dollars and, in return, where required to comply with the provisions of the law requiring that homeowners who successfully completed a trial period plan be offered a permanent loan modification. The court of appeals in *Bushell* held that the federal regulations concerning trial payment plans imposed upon the lender the obligation to offer the borrower a permanent loan modification.

The determination of whether a property owner might have an enforceable claim against a lender for breach of a promise to make a loan modification requires a careful examination of the facts of the particular case.