

**CALIFORNIA COURT OF APPEALS REINFORCES CIVIL CODE  
2932.5'S INAPPLICABILITY TO DEEDS OF TRUST AND UPHOLDS THE  
RULE THAT RECORDATION OF AN ASSIGNMENT OF THE  
BENEFICIAL INTEREST UNDER A DEED OF TRUST IS NOT A  
PREREQUISITE TO FORECLOSURE**

**By Robert W. Norman, Jr. & Carrie N. Heieck**

For over one hundred years, the State of California has not required an assignment of the beneficial interest under a deed of trust to be recorded prior to foreclosure.<sup>1</sup> However, until September 13, 2011, the only published California case concerning this issue was *Stockwell v. Barnum*<sup>2</sup> from 1908. The California Court of Appeal has now reinforced *Stockwell* with its published *Calvo v. HSBC Bank*<sup>3</sup> decision briefed and argued by Houser & Allison, APC. This decision is a win for the mortgage banking industry.

The *Calvo* decision reinforces the rule that California does not require recordation of an assignment of a deed of trust prior to foreclosure and that *Civil Code* § 2932.5 is inapplicable to deeds of trust. The ruling clarifies that the statute does not apply when the power of sale is conferred in a deed of trust rather than in a mortgage. This ruling will serve as recent precedent for California courts to strike down the thousands of foreclosure lawsuits that allege a foreclosure is invalid when done in the name of Mortgage Electronic Registration System, Inc. (“MERS”) without an assignment.

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<sup>1</sup> *Stockwell v. Barnum*, 7 Cal. App. 413 (1908).

<sup>2</sup> 7 Cal. App. 413 (1908)

<sup>3</sup> --- Cal.Rptr.3d ----, 2011 WL 4035791 (Cal.App. 2 Dist.).

**Deeds of Trust, as Opposed to Mortgages, Have Become The Modern Preferred  
Instruments to Secure Loans Against Real Property in California and Are Governed by  
California's Non-Judicial Foreclosure Statutes**

By way of background, the preferred instrument to secure loans against real property in California is a deed of trust, not a mortgage. Deeds of trust and mortgages are separate and distinct instruments. In a mortgage, the lender holds and transfers title upon sale. In a deed of trust, a third party trustee holds and transfers title upon sale. As a result of these differences, deeds of trust and mortgages each have their own separate and distinct statutory requirements for foreclosure.

In California, deeds of trust are foreclosed pursuant to the non-judicial foreclosure process set forth in *Civil Code* § 2924 et. seq. The California Legislature adopted *Civil Code* section 2924 et seq. to be the comprehensive framework governing non-judicial foreclosures designed “(1) to provide the creditor/beneficiary with a quick, inexpensive and efficient remedy against a defaulting debtor/trustor; (2) to protect the debtor/trustor from wrongful loss of the property; and (3) to ensure that a properly conducted sale is final between the parties and conclusive as to a bona fide purchaser.”<sup>4</sup> This statutory framework is meant to be exhaustive and, like California case law, does not require recordation of an assignment prior to foreclosure. Recording an assignment of the beneficial interest under the deed of trust is unnecessary because it is the trustee, not the lender, who holds title and transfers that title upon sale. Therefore, so long as a substitution of trustee, if applicable, is recorded prior to the trustee sale, the chain of title is preserved.

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<sup>4</sup> *Moeller v. Lien*, 25 Cal. App. 4<sup>th</sup> 822, 830 (1994).

The recent *Calvo* opinion confirms that *Civil Code* § 2932.5 is only applicable to mortgages, as it is outside the above-described non-judicial foreclosure statutory framework of § 2924 *et seq.* applicable to deeds of trust.

**A Conflict Between the Bankruptcy Court’s Interpretation and California State and District Courts’ Interpretation of § 2932.5 Created Confusion and Increased Litigation Prior to the *Calvo* Decision.**

In the recent flood of foreclosure lawsuits in California, borrowers have frequently asserted claims that an assignment of the deed of trust must be recorded prior to completing foreclosure proceedings. In the wake of these claims, the Federal District Courts in California agreed with *Stockwell* by upholding the rule that *Civil Code* § 2932.5 does not apply to deeds of trust.<sup>5</sup> However, one bankruptcy court agreed with the borrower’s argument that there was no distinction between mortgages and deeds of trust.

On April 12, 2011, the Federal Bankruptcy Court in *U.S. Bank N.A. v. Skelton (In re Salazar)*<sup>6</sup> held that *Civil Code* § 2932.5 is applicable to deeds of trust. This holding was repeated in the Bankruptcy Court’s follow-up *Doble v. Deutsche Bank*<sup>7</sup> decision. Suddenly, borrowers had some authority for their Section § 2932.5 claims. This created an issue for litigants.

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<sup>5</sup> *Chourp v. Ocwen Loan Serv., LLC*, 2011 WL 1559796, at \*4 (S.D. Cal. 2011); *Arreola v. Wells Fargo Home Mortg.*, 2011 WL 1205249, at \*4 (E.D. Cal. 2011); *Segura v. Green Tree Serv., LLC*, 2011 WL 2462856, at \*4 (E.D. Cal. 2011); *Estillore v. Countrywide Bank, FSB*, 2011 WL 348832, at \*15 (E.D. Cal. 2011); *Jacobs v. Bank of America, N.A.*, 2011 WL 250423, at 5 (N.D. Cal. 2011); *Park v. Wachovia Mortg, FSB*, 2011 WL 98408, at \*8-9 (S.D. Cal. 2011); *Washington v. Nat’l City Mort. Co.*, 2010 WL 5211506, at \*4 (N.D. Cal. 2010); *Selby v. Bank of America, Inc.*, 2010 WL 4347629, at \*3 (S.D. Cal. 2010); *Caballero v. Bank of America*, 2010 WL 4604031, at \*3 (N.D. Cal. 2010); *Roque v. Suntrust Mortg., Inc.*, 2010 WL 546896, at \*2-3 (N.D. Cal. 2010); *Parcray v. Shea Mortg., Inc.*, 2010 WL 1659369, at \*11 (E.D. Cal. 2010).

<sup>6</sup> 448 B.R. 814(Bankr. S.D.Cal. 2011).

<sup>7</sup> 2011 WL 1465559 (Bkrcty.S.D.Cal.).

## ***Calvo* Has Put to Rest Any Question as to Whether § 2932.5 is Applicable to Deeds of Trust**

On September 13, 2011, the California Court of Appeal issued its decision, *Calvo v. HSBC Bank*<sup>8</sup>, reinforcing the rule that California does not require recordation of an assignment of a deed of trust prior to foreclosure and that *Civil Code* § 2932.5 is inapplicable to deeds of trust. The Appellate Court upheld the law and reasoning in *Stockwell* distinguishing mortgages from deeds of trust. The Court further expanded upon the *Stockwell* decision by explaining MERS' statutory and contractual authority to initiate foreclosure on behalf of the investor, HSBC Bank, as Trustee.

To resolve the prior conflict between courts as to the interpretation of the statute, the California Appellate Court explained its disagreement with the Bankruptcy Court's decisions as stated in footnote 2 of the *Calvo* decision:

“We find the analysis in [*In re Salazar*] unpersuasive . . . Holdings of the federal courts are not binding or conclusive in California courts though they may be entitled to respect and careful consideration [citation omitted]. A federal bankruptcy court decision interpreting California law, however, is not due the same deference [citation omitted].”

Therefore, the California Appellate Court reasoned that the *Salazar* and *Doble* decisions have no legal force or effect as to their interpretation of § 2932.5.

In *Calvo*, the California Court of Appeal has clarified and reinforced the longstanding rule that *Civil Code* § 2932.5 is inapplicable to deeds of trust. The assignment of the beneficial interest in the deed of trust does not have to be recorded prior to foreclosure. Should you have any questions regarding this article or any related issues, please contact Houser & Allison, APC

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<sup>8</sup> --- Cal.Rptr.3d ----, 2011 WL 4035791 (Cal.App. 2 Dist.).

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