ARTICLE:
AFTER *TANIGUCHI:* THE FUTURE OF UPSET CLAUSES IN WORKOUT TRANSACTIONS

By Karl E. Geier[*]

The recent case of *Taniguchi v. Restoration Homes, LLC*,[1] on rehearing, held unenforceable a default clause in a loan modification agreement that purported to allow the lender to call due a deferred principal and interest balance if the borrower ever defaulted on the new, modified reduced payment schedule. The court found that this constituted an invalid waiver of the borrower's right of reinstatement under § 2924c of the Civil Code, and that the modification transaction was a "renewal" within the meaning of Civ. Code, § 2953, which directly prohibits a prospective waiver of certain statutory rights, including § 2924c, "at the time of or in connection with the making of or renewing of any loan secured by a deed of trust. . ."[2]

Although *Taniguchi* arose in the context of a single family residential loan transaction, the decision does not hinge on the application of any of the specialized one-to-four unit foreclosure protections contained in the Homeowner's Bill of Rights and other legislation that responded to the 2008 mortgage crisis. Rather, it involves the application of the right of reinstatement and the anti-waiver provisions of the Civil Code that apply regardless of the nature of the loan or the collateral, if it is secured by real property.

In particular, the case leaves no room for draconian "upset clauses" that purport to revert the loan to its original terms and allow a quick foreclosure if, after a negotiated modification, the borrower should subsequently default. Rather, as discussed in this article, *Taniguchi* requires that lenders negotiating with borrowers in default recognize that the renegotiated loan transaction necessarily results in a new reinstatement process based on the modified terms. This forces the lender either to press ahead with immediate foreclosure based upon the original circumstances of default, without agreeing to the modified terms, or else accept the fact that a new reinstatement notice and a new process for foreclosure based on the modified terms will be necessary if the borrower subsequently is unable or unwilling to perform the modified terms. Moreover, as discussed in this article, the *Taniguchi* case underscores the doubtful utility of

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virtually any purported waiver or work-around of the protections of California's one action and anti-deficiency laws in the context of any workout, forbearance, or modification transaction, and for that reason it likely will change the dynamics of many such negotiations.

The following article first outlines the factual circumstances of the *Taniguchi* decision and relevant portions of the court's decision. It then discusses the application of the core holding of *Taniguchi* (non-waivability of mortgagor protections under Civ. Code, § 2924 et seq. as well as of all one-action and possibly some anti-deficiency provisions under the terms of Civ. Code, § 2953) in connection with any material modification, extension, renewal, or longer-term forbearance of a real property secured debt. This includes limitations on the potential waiver of other legal protections and sanctions the lender might wish to impose on a borrower who has already demonstrated a willingness to default and even litigate or file bankruptcy in the context of an earlier foreclosure, including an executory deed-in-lieu of foreclosure agreement and other mechanisms for short-circuiting the standard three-month reinstatement period and 21-day sale period that begin anew in case of a subsequent default. This is so even if the modification is part of a negotiated settlement approved by a bankruptcy court in the context of automatic stay litigation. The article also offers some questions for future consideration, including the possible effect of *Taniguchi* in connection with guarantor workout negotiations where, as is often the case in commercial loan transactions, the borrowing entity's direct protections under the anti-deficiency, one action, and power of sale foreclosure statutes of the Civil Code and Code of Civil Procedure may be lawfully waived by a true surety in the context of an undertaking to guarantee the borrower's performance of the underlying financial obligations.

I. The Background Facts and Decision in *Taniguchi v. Restoration Homes, LLC*

The *Taniguchi* case arose from an all-to-familiar fact pattern associated with the 2008 mortgage loan crisis. In 2006, Mr. and Mrs. Taniguchi had obtained a $510,500 loan secured by their home and by early 2008 they were defaulting on the original loan. After nearly 18 months of negotiations, in September 2009 they entered into a "balloon loan modification agreement" that adjusted the principal amount, eliminated an adjustable interest rate rider, reduced the interest rate and monthly payments, and deferred until the maturity of the loan approximately $116,000 of indebtedness, including accrued and unpaid inter-

est and principal, fees, and foreclosure expenses. Under this modification, the loan would mature in ten years, at which point there would be a balloon payment of approximately $531,000, plus additional charges, and the loan would be paid in full. In exchange for this substantial lessening of their required debt service and deferral of various delinquent amounts as well as some principal payments, the Taniguchis agreed that in case of default, the entire modification transaction would be null and void at the lender's option and the lender would have the right to enforce the loan and associated agreements in accordance with their original terms. This would include the lender's right to accelerate the entire indebtedness by requiring immediate payment of the full amount of principal not yet paid and all interest owed, and to invoke the power of sale.

The Taniguchis subsequently did default on the modified loan, which eventually was assigned to Restoration Homes. Restoration Homes initiated default proceedings by recording a notice of default in 2013. At that point, Restoration Homes informed the Taniguchis that in order to reinstate the loan, they would have to pay the four most recently missed monthly payments and associated late charges under the modified loan terms (totaling $11,000) plus $4,500 in foreclosure fees and costs, plus all the sums that had previously been deferred under the modification agreement (a sum that was then over $120,000 in principal, interest, and charges). The Taniguchis then filed a series of three state court actions, all of which were consolidated (after a delay by a Chapter 13 bankruptcy petition filed by Charles Taniguchi). The consolidated lawsuit sought relief on the basis of breach of contract and breach of the covenant of good faith and fair dealing, violation of Civ. Code, § 2924c by demanding excessive amounts to reinstate, and unfair competition under Bus. & Prof. Code § 17200. The Taniguchis later dropped the breach of contract and bad faith claims. The trial court granted summary judgment to Restoration Homes on both of the remaining causes of action in 2016, approximately 8 years after the initial default. The Taniguchis then appealed the trial court's grant of summary judgment in the consolidated cases.

In April 2019, the Court of Appeal for the First Appellate District reversed the trial court decision, holding that the required payment of the full deferred amount to reinstate the loan after the Taniguchis missed four of the reduced monthly installment payments under the modified payment terms constituted an illegal demand of an unlawful amount to reinstate under § 2924c, that any agreement by the Taniguchis to this provision in the context of the modification agreement was an invalid waiver of § 2924c in violation of Civ. Code, § 2953

and other case law, and that a cause of action for unfair competition could be asserted based on the violation of § 2924c. Restoration Homes sought rehearing of the matter by the Court of Appeal, which was granted. On rehearing, the Court of Appeal in December 2019, again reversed the trial court's grant of summary judgment, vacating that judgment and remanding for further proceedings (presumably a trial). It may be assumed, although the Court of Appeal's opinion on rehearing does not discuss this, that continued injunctive relief against the attempted foreclosure will be granted while the other issues in the case are hashed out at the trial court level and beyond—long after the Taniguchis' balloon payment would otherwise have become due sometime in September 2019, the ten-year anniversary of the modification agreement.

II. The Court of Appeal's Analysis in *Taniguchi* Initially and on Rehearing

The Court of Appeal's initial opinion in *Taniguchi* was brief and unsurprising. The court recited the background of Civil Code § 2924c, subdivision (a)(1), which provides that when a mortgage is accelerated as a result of a borrower's default, the borrower can reinstate the loan by paying all amounts due "other than the portion of principal as would not then be due had no default occurred," and the requirement that the mortgage lender must inform the borrower of the correct amount to reinstate the loan in order to enforce this requirement.[3] Noting the longstanding public policy behind the right to reinstatement, the court quoted Civ. Code, § 2953 for the simple proposition that the right to reinstate a loan under § 2924c cannot be waived. Section 2953 provides:

> "Any express agreement made or entered into by a borrower at the time of or in connection with the making of or renewing of any loan secured by a deed of trust, mortgage or other instrument creating a lien on real property, whereby the borrower agrees to waive the rights, or privileges conferred upon the borrower by Sections 2924, 2924b, 2929c of the Civil Code or by Sections 580a or 726 of the Code of Civil Procedure, . . . shall be void and of no effect."[4]

Without specifically analyzing the question of whether the lender's option in the Taniguchi Modification Agreement was an invalid "waiver" of § 2924c, or whether the modification transaction was "a making of or renewing of" a loan secured by a deed of trust, the court went on to hold that § 2924c was violated when the lender exercised its option, under the terms of the modification, to enforce the original loan terms if the Taniguchis defaulted on the modified loan, and that the deferred amounts under the original loan could not properly be required to be paid as a condition of reinstatement after that default. The

Court of Appeal found directly that § 2924c "gives the Taniguchis the opportunity to cure their precipitating default (that is, the missed modified payments) by making up those missed payments and paying the associated late charges and fees, and in that way to avoid the consequences of the default on the defaulted modified loan."[5] The court rejected the argument that the modification agreement had merely defined the deferred amounts as part of what must be paid to reinstate the loan, rather than provide for impermissible accelerations of amounts not then due, noting that "[t]his is inconsistent with the modified loan agreement dated September 25, 2009, which states, 'lender will bring the loan due for the October 01, 2009 payment' "[6] . . . "Further," it said, "the modified loan agreement is explicit that the deferred amounts are deferred 'to the maturity date of the loan or the date the loan is paid in full, which ever comes first.' " Thus, the Taniguchis had a statutory right under § 2924c to simply cure the default by paying the four delinquent monthly payments and could not be required to pay the previously deferred amounts.[7] On this basis, the court also found that the Bus. & Prof. Code, § 17200 claim for unfair competition could be pursued by the Taniguchis.[8]

The Court of Appeal's initial opinion assumed, without directly stating, that the modification transaction was either an improper waiver of the § 2924c right of reinstatement or an unlawful burden on the right of reinstatement, but did not closely analyze the applicability of § 2953, which is the statute that renders § 2924c non-waivable. On rehearing, the briefing of the parties focused on that question. The Court of Appeal repeated its earlier analysis that the lender's demand for reinstatement violated Civ. Code, § 2924c,[9] but its new opinion focused more closely on the § 2953 issue, as well.[10] While no party would dispute the non-waivability of the statutory right of reinstatement under § 2924c at the inception of a loan, the question was whether a post-default waiver or modification of the right to reinstate was enforceable despite the restrictions of Civ. Code, § 2953 on such waivers in connection with a "renewal" of such a loan. The lender, Restoration Homes, and its amici argued that the modification transaction was neither the "making" of a loan nor the "renewing" of a loan within the meaning of § 2953, and therefore, by implication, the prohibition by § 2953 of various waivers of statutory rights was inapplicable to the modification transaction. This argument was based on *Salter v. Ulrich*, [11] in which the California Supreme Court had suggested "in often-cited dictum" that because § 2953 prohibits *contemporaneous* waivers of certain code sections (in that case, specifically Civ. Proc. Code, § 726), it *implicitly* permit-

ted such waivers after a loan is made.[12] *Salter v. Ulrich* suggested that a later waiver after the loan was already in default did not come within the prohibition of § 2953, although a later decision by the California Supreme Court, *DeBerard Properties Ltd. v. Lim*,[13] had drawn the *Salter v. Ulrich* dictum into question. In *DeBerard*, the court held that Civ. Proc. Code, § 580b (the purchase money anti-deficiency statute) could not be waived by contract, even in exchange for new consideration, after the original purchase money sale. Although *DeBerard* did not directly address § 2953, it strongly suggested that the anti-deficiency and one action limitations applicable to California real property secured loans are generally non-waivable even after the inception of the debt,[14] and in this respect constituted a criticism of the *Salter v. Ulrich* dictum.

The Court of Appeal in *Taniguchi* went on to discuss in detail the origins of the anti-waiver provisions of § 2953 and the sparse authority on the question of whether a significant modification of the original terms of the loan, as occurred here, was a "renewal" of a loan within the meaning of § 2953, and therefore not impliedly a context in which any of the statutory benefits listed in § 2953 could be waived, including § 2924c. The Court of Appeal found only one decision in which the California Supreme Court had specifically addressed the applicability of Civ. Code, § 2953 to a "subsequent agreement," which was *Morello v. Metzenbaum.*[15] Even though the Supreme Court in *Morello* had held § 2953 not to prevent a waiver of another provision, Civ. Code, § 2924, in an agreement that was executed three months after making of an unsecured loan, the *Taniguchi* court considered *Morello* not to control the current case, not only because it did not involve a waiver of § 2924c, but because *Morello* also relied on the now-questionable dictum of *Salter v. Ulrich.* Further, *Morello* was an effort by the lender to invoke to § 2953 under its peculiar facts, and did not involve a purported borrower waiver of section 2924 nor the application of 2953.

Having disposed of the one case that arguably supported the enforceability of a "subsequent agreement" waiving a statutory provision under § 2953, the Court of Appeal in *Taniguchi* went on to consider whether the modification agreement here was a "renewal," or something else, and identified at least two reasons why it was not "something else" but should be considered a "renewal." First, the Court of Appeal considered that the modification agreement in this case was not merely an "extension" or "alteration" of the terms under which the original loan was made, since this modification did involve "the deferral of ac-

crued and unpaid interest." The modification here could be regarded "as an extension or renewal because it amended and supplemented the Taniguchis' original obligation, changing the time and terms by which payments were due. And upon signing the modification, the Taniguchis were no longer in default."[16] Thus, the transaction was not merely an extension but more aptly considered a "renewal" because "although the original note continues to exist, its terms have been amended considerably by the modification."[17] The Court of Appeal also rejected outright the argument that a "modification" was not a "renewal" of an existing loan within the meaning of § 2953, on the basis that, according to the court, there was no indication that the term "loan modification" was in general use in 1941 when section 2943 was last amended.[18] Finally, it rejected an argument under another decision, *Secrest v. Security National Mortgage Loan Trust 2002-2*,[19] a statute of frauds case, which had concluded that a forbearance agreement that modified the note and deed of trust was subject to the statute of frauds and not enforceable because it was not executed by the lender.[20] In *Secrest*, the court had concluded that as a general matter a forbearance agreement does not "create, renew or extend" a deed of trust but that the forbearance agreement at issue did "modify" the deed of trust.[21] Restoration Homes and its amici suggested that *Secrest* drew a distinction between a modification or forbearance agreement and the renewal or making of a loan. But here, the *Taniguchi* court, relying on the positions and terminology used by the parties in the case before it, rather than on any implicit interpretation of the statute, simply noted that *Secrest* had not involved § 2953 and in any event none of the parties had contended that the modification agreement in this case was a mere "forbearance" rather than "something else." In short, said the court, the modification was "appropriately viewed as the making or renewal of a loan secured by a deed of trust. It is thus subject to the anti-waiver provisions of § 2953."[22] The Taniguchis accordingly had a right to reinstate the loan by paying the $11,000 of missed payments and associated late charges and fees, "and in that way to avoid the consequences of default on the modified loan."[23]

III. The Implications of *Taniguchi* for Workout Transactions Generally

The *Taniguchi* court's wrestling with the alternate definitions of "making," "extending," "renewing," or "forbearing" in the context of workout negotiations might be somewhat problematic as an exercise in the construction of statutory language or its legislative history, but the court's opinion leaves no doubt that the typical mortgage forbearance modification agreement, whether character-

ized as an extension agreement, a renewal, a modification, or a forbearance, will be deemed subject to the anti-waiver provisions of § 2953 if it includes one or more of the following:

(1) A deferral of delinquent principal and/or accrued interest to a later date.

(2) A provision acknowledging that the loan is no longer in default once the modification agreement is executed and initial consideration is given.

(3) A substantial recasting of the payment terms of an existing indebtedness to postpone the due date of ongoing principal and/or interest payments.

In such circumstances, any purported effort to enforce a provision allowing the lender retroactively to unwind the modification based on the subsequent default will be considered an impermissible attempt to exact a waiver of the right to reinstate under § 2924c in violation of § 2953.

Although not directly relevant and not mentioned by the Court of Appeal, the *Taniguchi* decision has a strong corollary in another context that has been the subject of recent appellate decisions, namely, the effort to unwind a settlement of disputed sums by reinstating the full amount due based on a later default in payment of modified terms. In *Red & White Distribution, LLC v. Osteroid Enterprises, LLC*,[24] the Court of Appeal considered a purported settlement of litigation over a disputed debt that compromised the amount due at $2.1 million but included a provision that if the obligor failed to pay the modified terms, then the entire original debt of $2.8 million, including the $700,000 portion "forgiven" as part of the settlement, would be due and payable, and judgment in that larger amount could be perfected. The court held that this retroactive effort to resurrect the original debt was in fact a penalty rather than a permissible or reasonable effort to liquidate "damages" in the event of nonperformance of the modified terms. According to the court, it was inherently unreasonable to magnify an obligation by some 25 percent after the creditor had already agreed to accept the reduced amount ($2.1 million) as a satisfaction in full of the debt.[25] The *Red & White Distribution* decision suggests that efforts by a creditor to create exorbitant or draconian remedies to force performance of a modified obligation are looked upon with disfavor by the courts even in the context of a settlement of a commercial dispute between two parties represented by counsel. This is all the more likely in the specific context of real estate-secured loans, where the strong policy against waiver of statutory protections is

engrained in the case law and clearly affects the interpretation of an anti-waiver statute such as Civ. Code, § 2953.

The *Taniguchi* decision does not directly address the application of the non-waiver statute (Civ. Code, § 2953) to other types of waivers besides the one it found embodied in the *Taniguchi* settlement, namely, the implicit waiver of the right of reinstatement (and to an accurate and legally permissible amount to reinstate) under Civ. Code, § 2924c. However, its conclusion that a substantial modification that effectively cures a prior default and allows continued performance by the borrower under revised terms constitutes a "renewal" within the meaning of § 2953 means that other types of workout transactions are potentially unenforceable by the lender as invalid "waivers." This may include transactions that attempt to circumvent or limit the applicability of the one action statute (Civ. Code, § 726, subd. (a)), the fair value limitations (Civ. Code, § 726, subd. (b), and Civ. Proc. Code, § 580a), the procedural and substantive provisions of Civ. Code, § 2924 (providing for the three-month reinstatement period, the extension of that period by the notice of sale, the serving of and recording of a notice of default and notice of sale, and the time frame for the sale), and the provisions of Civ. Code, § 2924b (prescribing who is entitled to a copy of notice of default, and the duty of the mortgagee or trustee to third parties regarding service of such notices of default), as well as all of the terms and conditions of § 2924c (regarding the curing of default and reinstatement rights and related procedures and notices). All of these provisions are subject to § 2953 and not waivable or capable of being modified in connection with the "making" or "renewal" of a loan secured by real property, under the express language of § 2953. Thus, if a "modification" in the context of a workout or otherwise is tantamount to a "renewal" under the interpretation given to § 2953 by the *Taniguchi* court, the result could be a number of other common provisions in workout-type modification transactions which will potentially be unenforceable under *Taniguchi*. These include the following:

(a) Any effort to keep a reinstatement period "closed" and allow for summary notice of sale and immediate sale without a new notice of default and opportunity to reinstate in the event of a subsequent post-modification default by the borrower;

(b) Any attempt to minimize notice periods or time frames required to reopen foreclosure processes on short notice if the modification agreement contains language implying or providing that past defaults are deemed

"cured," or implicitly providing the loan is no longer in default as long as periodic payments are made;

(c) Any provision for a "strict foreclosure" following an additional default, such as a pre-executed deed in lieu of foreclosure to short-circuit a future need to initiate or complete a foreclosure process (which likely is barred by Civ. Proc. Code, § 726,[26] and non-waivable not only under Civ. Code, § 2983 but also under Civ. Code, § 2889, which invalidates any waiver or restriction on the debtor's equity of redemption).[27]

To be clear, all of these types of workout provisions were of dubious validity prior to *Taniguchi*, and most practitioners would caution against relying on or implementing any of these provisions except in the context of an extremely short "forbearance" transaction intended to precipitate a refinance or payoff of the loan by a guarantor or other parties. Under *Taniguchi*, there is still room to argue that a true "forbearance" in the nature of a postponement of a noticed trustee's sale is not a "renewal," but *Taniguchi* will render it increasingly difficult to characterize a longer term postponement of foreclosure in return for periodic payments and other performances as a "forbearance" or anything other than a "renewal" in order to avoid the implications of § 2953. It can also be anticipated that title insurance companies will be even less willing than before to insure either a trustee's sale or an outright deed in lieu of foreclosure where any of these statutory rights are potentially affected.

In addition to the statutes specifically made non-waivable in connection with a "renewal" under § 2953, there is an issue whether other statutory protections not explicitly referenced in § 2953 can be waived in connection with a "renewal," as that term has now been broadly defined by *Taniguchi*. Specifically, the question is whether, in connection with a post-default modification, a mortgagor can effectively waive the seller carryback purchase money protections and third party purchase money financing provisions of Civ. Proc. Code, § 580b and the absolute bar against a deficiency judgment following a sale under the power of sale of a deed of trust pursuant to Civ. Proc. Code, § 580d. Section 2953 does not specifically mention these anti-deficiency provisions, but the omission probably is not material. In some cases, it already has been determined immaterial in connection with purported waivers or efforts to structure around these limitations upon the making of a loan or the initiation of a sale. For example, in *DeBerard Properties Limited v. Lim*, discussed above, the Supreme Court specifically found the omission of § 580b from the anti-

waiver provisions of § 2953 to be immaterial in the course of holding the purchase money protections under § 580b to be inherently non-waivable, even in a post-sale transaction for new consideration (which might be characterized as the "renewal" of a purchase money transaction under § 2953).[28] Also, in *Coker v. J.P. Morgan Chase Bank*,[29] a case involving a residential third party purchase money loan, the Supreme Court found a purported waiver of § 580b purchase money protections in conjunction with a "short sale" to be unenforceable, relying on *DeBerard Properties* for this conclusion.[30] Moreover, in the seminal decision, *Freedland v. Greco*,[31] the Supreme Court essentially held that § 580d's anti-deficiency bar is also not waivable at inception of the loan.[32] The latter decision did not arise in the context of a loan modification or workout transaction, but the strong inference is that a waiver of the statutory anti-deficiency bar would also be disallowed in connection with a modification transaction,[33] even though the provision of additional collateral, guaranties, or other consideration to the lender as part of such a workout would not violate the anti-deficiency bar.[34] Although these issues might be slightly different in connection with a "renewal" as distinguished from the origination or "making" of a loan, the Supreme Court in *Coker, Freedland*, and *DeBerard Properties* has shown little interest in differentiating the policy against waiver of these and other statutory protections depending on whether or not they are mentioned in § 2953. As a result, while not entirely resolved by the *Taniguchi* decision, the *Taniguchi* court's broad construction of the term "renewal" and the extension of the anti-waiver language of § 2953 to such broadly-construed notions of a "renewal" embodied in a modification as part of a typical post-default workout transaction could be persuasive as to these other statutory protections as well.

Another aspect of workout transactions that was not directly confronted in *Taniguchi* but has received attention in other recent cases and was attempted, however ineffectually, by the parties in *Taniguchi*, is the notion of obtaining approval by a bankruptcy judge of a modification or forbearance transaction in a plan of reorganization or as a settlement of automatic stay litigation. The argument is that a settlement agreement, sanctioned by a bankruptcy judge's order with the imprimatur of federal bankruptcy law, somehow insulates a transaction from attack as a violation of California state law debtor protection remedies embodied in the Civil Code and Code of Civil Procedure provisions referenced in § 2953. In *Taniguchi*, the lender tried to argue that an unpublished order in Mr. Taniguchi's Chapter 13 bankruptcy proceeding was either "persuasive authority" or "res judicata" on the application of § 2924c. Restoration Homes

had sought a ruling from the United States District Court on its claim that the unpublished bankruptcy court order was "without prejudice to the party's right to raise whatever claims and defenses they wish in the state court litigation" and claiming that this order somehow had res judicata effect against the Taniguchis' subsequent state law claims. This request was denied by the federal district court in an unpublished decision.[35] The same argument was then also rejected by the California Court of Appeal for the First District as "not supported by meaningful analysis or citation to authority" and deemed forfeited.[36]

Another division of the First District Court of Appeal has directly addressed a similar argument by a lender in connection with a confirmed Chapter 13 plan of reorganization in *Williams v. 21st Mortgage Corporation*,[37] decided just a few weeks after the decision on rehearing in *Taniguchi*. In *Williams v. 21st Mortgage Corporation*, as in *Taniguchi*, the question was whether § 2924c allowed a borrower to reinstate a loan by paying only the modified amounts due and not the amounts that were deferred as part of the confirmed Chapter 13 plan, or whether the confirmed plan somehow allowed the lender "to reach behind the default that precipitated the foreclosure to a *previous default* that was cured by an agreement for a new payment plan."[38] The lender attempted to argue that an order terminating the automatic stay based on the confirmed plan somehow obviated the need to comply with state law, including § 2924c, in connection with subsequent default proceedings after the borrower failed to perform the terms of the plan. This argument was rejected by the court in *Williams v. 21st Mortgage*, which stated:

> "Neither the order nor the approved stipulation recorded the modified amounts due under the confirmed plan. Nor did the order affect the procedures required by California law before a lender may foreclose on a mortgage; rather, it recited defendant could take 'any and *all* actions under its Note and Deed of Trust, *and applicable . . . law*,' to foreclose on the property (Italics added [by the court]). Thus, the issue before the bankruptcy court was whether the stay should be lifted as a result of plaintiff's failure to meet her obligations under bankruptcy law, not what obligations California law imposed on a defendant as it sought to foreclose on the property."[39]

The Court of Appeal thus rejected the suggestion that the bankruptcy court's order or the approved stipulation somehow removed the necessity for the lender to comply with Civ. Code, § 2924c (or any other provision of state law) when it resumed foreclosure proceedings. Instead, it held directly that § 2924c allowed the borrower to reinstate the loan based on the modified terms, and that the

lender could not require the borrower to also pay amounts previously in default as a condition of reinstatement. Accordingly, as in *Taniguchi*, the Court of Appeal in *Williams v. 21st Mortgage* upheld the claim that the lender, by requiring a greater payment to reinstate than allowed by § 2924c, not only violated § 2924c, but also the unfair competition law, Bus. & Prof. Code, § 17200, based on the violation of § 2924c.[40]

Although *Williams v. 21st Mortgage* only involved alleged violations of § 2924c and not the other statutes made non-waivable under Civ. Code, § 2953, the logic of the decision may extend to some of these other statutes if the effort is to enforce a bankruptcy court-approved plan of reorganization that includes some form of "strict foreclosure" or accelerated foreclosure process or to reimpose greater burdens after breach of the plan on the debtor's ability to protect their position than would otherwise be allowed under California law. As stated in *Williams v. 21st Mortgage Corporation*, a confirmed bankruptcy plan of reorganization may be "res judicata as to the payments currently due for prepetition arrears," but "[t]he extent of the arrears that must be tendered under § 2924c to avoid a [subsequent] foreclosure is a question of state law that was not before the bankruptcy court"—neither when it confirmed the plan, nor when it issued its order lifting the automatic stay to allow foreclosure after failure to cure subsequent defaults.[41]

One final area in which *Taniguchi* may have some relevance is in the context of negotiations with guarantors of real property secured debt as part of a workout transaction with the principal debtor. As a general rule, Civ. Code, § 2856 authorizes the waiver of defenses and protections that are otherwise available under sections 580a, 580b, 580d, and 726 of the Code of Civil Procedure, provided the contract with the guarantor contains language that expresses an intent to waive any or all of these rights and defenses.[42] (Such guarantor waivers are not permitted in connection with a purchase money loan on a one-to-four unit owner-occupied dwelling.)[43] The enforceability of a waiver by a surety or guarantor under § 2856 is not linked to the "making" or "renewal" of a loan, and a waiver contained in a guarantee of the secured obligation would generally be enforceable, provided the guarantee itself is enforceable, if sufficient language is included to invoke Civ. Code, § 2856. In the context of a substantial workout or modification of a loan with the borrower or principal obligor, however, absent the guarantor's express consent to the modification, the continued validity of waivers by the guarantor can be questioned. The

fundamental limitation of Civ. Code, § 2809 (the obligation of a surety must be neither larger in amount nor in other respects more burdensome than that of the principal) potentially could be raised as a defense by the guarantor to additional post-foreclosure liabilities that legally cannot also be asserted against the trustor/obligor. The explicit non-waivability of one action and anti-deficiency protections by the obligor in connection with a "renewal" under Civ. Code, § 2953 as interpreted in *Taniguchi* effectively limits the extent of the principal obligor's prospective liability. Even if a guarantor is not protected by these statutes, or has waived them at inception of the loan, it is less clear that such waivers also extend to a substantially modified underlying debt. Whether this creates an avenue for a guarantor to avoid liability under § 2809 without, at a minimum, renewed waivers by the guarantor in connection with the modification, is at least a question that bears consideration in the context of such negotiations, particularly if the effort is to impose greater liabilities on the guarantor than would otherwise exist on the part of the trustor as part of the modified loan.[44]

IV. Conclusion

The specific holding of *Taniguchi*, limiting the waiver of the right of reinstatement or the implicit forfeiture of a right to reinstate by performing the modified terms without a requirement also to cure pre-modification defaults, is the most significant aspect of the decision. By casting a substantial modification transaction in a post-default workout context as a "renewal" to which the anti-waiver provisions of Civ. Code, § 2983 directly apply, the *Taniguchi* decision removes one substantial inducement for a lender to agree to defer and postpone loan recoveries. It eliminates the "hammer" of an unwinding of the modification and immediate foreclosure that some lenders try to maintain in case of a subsequent default, and limits the terms that lenders may make available in such transactions going forward. The Court of Appeal, based on the record in the *Taniguchi* decision, found "no evidence" to support the argument, made by Restoration Homes and its amici, that lenders would be less likely to enter into serious workout transactions without the availability of the accelerated right to demand payment of past arrearages if a subsequent default occurred after the loan was modified:

> "Finally, Restoration Homes and Amici contend that applying § 2953 to post-default modifications of mortgages would likely have a chilling effect on the willingness of lenders and servicers to modify loans, or at least would mean that the modifications offered by lenders would be less favorable to borrowers. Restora-

> tion Homes further contends that '[l]enders who are willing to provide borrowers with one final opportunity to save their property want to incentivize the borrower not to default again, particularly those with larger arrearages at the time of the modification agreement. Lenders will be disinclined to do so, however, to the event [sic] that upon further default they cannot be [sic] readily collect the arrearages.' These contentions are not supported by any evidence, and we do not find them convincing. In any event, nothing in the record suggests that Restoration Homes would be disadvantaged by providing the Taniguchis the opportunity to reinstate their modified loan before taking steps to foreclose on the note and deed of trust."[45]

The Court's dismissal of these arguments in the context of the case before it is perhaps understandable. However, commentators and practitioners who actually practice in this area are likely to observe a different reality. Because the application of the anti-waiver provisions to "modifications" eliminates a tool that many workout specialists actually have attempted to implement in the past, it is more likely that lenders in the future will simply decide to go forward with foreclosure rather than negotiate long-term workouts that involve deferral of substantial amounts of principal and interest to a later date. As reflected by the tortured history of the *Taniguchi* litigation, a relatively simple effort by a lender to accomplish a modification and deferral of a loan that was in default less than two years into the 30-year term has resulted in what is now a 12-year waiting period for payment or foreclosure. While the actual reasons for the *Taniguchi* lender's original agreement to the modification in 2008 are unknown, lenders in similar circumstances would be well advised to reconsider their willingness to negotiate such transactions in the future. And borrowers who might have preferred a loan structure that gave them at least a chance to work things out over a longer period of time may face the more imminent likelihood of foreclosure and resistance by their creditors to extended workout transactions if these potential waivers and remedies cannot be offered to their lenders as an inducement to agree to a long-term modification and deferral of delinquent and/or future payments.

ENDNOTES:

[1] *Taniguchi v. Restoration Homes LLC*, 43 Cal. App. 5th 478, 256 Cal. Rptr. 3d 679 (1st Dist. 2019), review filed, (Jan. 16, 2020).

[2] 43 Cal. App. 5th at 481.

[3] *Taniguchi v. Restoration Homes, LLC*, 246 Cal. Rptr. 3d 706, 709 (Cal. App. 1st Dist. 2019), as modified, (May 2, 2019) and reh'g granted, opinion

not citeable, (May 22, 2019) and opinion vacated, 43 Cal. App. 5th 478, 256 Cal. Rptr. 3d 679 (1st Dist. 2019), review filed, (Jan. 16, 2020).

[4]Civ. Code, § 2953. The version of § 2953 quoted in *Taniguchi v. Restoration Homes, LLC*, 246 Cal. Rptr. 3d at 710, is different from the current version quoted here, but the differences are not material to the decision or the discussion in this article.

[5]*Taniguchi v. Restoration Homes, LLC*, *supra*, 246 Cal. Rptr. 3d at 710-711.

[6]*Id*. at 711.

[7]*Id*.

[8]*Id.* at 711, 712.

[9]*Taniguchi v. Restoration Homes, LLC, supra*, 43 Cal. App. 5th at 483–484.

[10]*Id.* at 484–491.

[11]*Salter v. Ulrich*, 22 Cal. 2d 263, 138 P.2d 7 (1943).

[12]*Id.* at 267.

[13]*DeBerard Properties, Ltd. v. Lim*, 20 Cal. 4th 659, 662, 85 Cal. Rptr. 2d 292, 976 P.2d 843 (1999).

[14]*Id.* at 662.

[15]*Morello v. Metzenbaum*, 25 Cal. 2d 494, 496-497, 154 P.2d 670 (1944).

[16]*Taniguchi v. Restoration Homes, LLC*, *supra*, 43 Cal. App. 5th at 488.

[17]43 Cal. App. 5th at 488.

[18]*Id.* at 489.

[19]*Secrest v. Security National Mortgage Loan Trust 2002-2*, 167 Cal. App. 4th 544, 553, 84 Cal. Rptr. 3d 275 (4th Dist. 2008).

[20]Civ. Code, §§ 1624, subd. (a)(3), 1698, subd. (a), 2922.

[21]*Secrest v. Security National Mortgage Loan Trust 2002-2, supra*, 167 Cal. App. 4th at 553.

[22]*Taniguchi v. Restoration Homes, LLC, supra*, 43 Cal. App. 5th at 490.

[23]*Id.* at 490.

[24]*Red & White Distribution, LLC v. Osteroid Enterprises, LLC*, 38 Cal. App. 5th 582, 251 Cal. Rptr. 3d 400 (2d Dist. 2019).

[25]*Id.* at 588.

[26]Under Civ. Code, § 726, a deed given to secure debt, which might include an agreement to convey the property to the lender, is, by definition, a mortgage (see *Hamud v. Hawthorne*, 52 Cal. 2d 78, 83-84, 338 P.2d 387 (1959); *McGuigan v. Millar*, 117 Cal. App. 739, 743, 750, 4 P.2d 607 (4th Dist. 1931), and if the original obligation continues, an agreement to deliver a deed in the future will be unenforceable as a "strict foreclosure" without judicial process, in violation of Civ. Proc. Code, § 726. See *Kaiser Industries Corp. v. Taylor*, 17 Cal.

App. 3d 346, 351-353, 94 Cal. Rptr. 773 (1st Dist. 1971).

[27]Civ. Code, § 2889 ("All contracts for the forfeiture of property subject to a lien, in satisfaction of the obligation secured thereby, and all contracts in restraint of the right of redemption from a lien, are void").

[28]See *DeBerard Properties LLC v. Lim, supra*, 20 Cal. 4th at 669-670.

[29]*Coker v. JPMorgan Chase Bank, N.A.*, 62 Cal. 4th 667, 197 Cal. Rptr. 3d 131, 364 P.3d 176 (2016).

[30]*Id.* at 680-687. See also *Powell v. Alber*, 250 Cal. App. 2d 485, 488, 58 Cal. Rptr. 657 (2d Dist. 1967).

[31]*Freedland v. Greco*, 45 Cal. 2d 462, 289 P.2d 463 (1955).

[32]*Id.* at 467.

[33]But cf. *Black Sky Capital, LLC v. Cobb*, 7 Cal. 5th 156, 163-164, 246 Cal. Rptr. 3d 583, 439 P.3d 1149 (2019), in which the Supreme Court held that a note secured by a junior deed of trust held by the same creditor who foreclosed nonjudicially under a senior deed of trust could be enforced as a "sold-out junior" note by a personal action against the borrower despite the § 580d anti-deficiency bar, at least in the absence of evidence "gamesmanship" to circumvent § 580d.

[34]For this latter point, see *Dreyfuss v. Union Bank of California*, 24 Cal. 4th 400, 409, 101 Cal. Rptr. 2d 29, 11 P.3d 383 (2000). See generally 5 Miller & Starr, California Real Estate 4th §§ 13:260, 14:12.

[35]*Restoration Homes, LLC v. Taniguchi*, 2015 WL 4734488 (N.D. Cal. 2015).

[36]*Taniguchi v. Restoration Homes, LLC, supra*, 43 Cal. App. 5th 478, 486, fn. 6.

[37]*Williams v. 21st Mortgage Corporation*, 2020 WL 359027 (Cal. App. 1st Dist. 2020).

[38]*Id.* at *4, emphasis by the court.

[39]*Id.* at *5, emphasis by the court.

[40]*Id.*

[41]*Id.* at *6.

[42]Civ. Code, § 2856, subds. (a)-(d).

[43]Civ. Code, § 2856, subd. (e).

[44]See 4 Miller & Starr, California Real Estate 4th, § 14:9, for discussion of surety defense waivers in conjunction with real property secured debt.

[45]*Taniguchi v. Restoration Homes, LLC, supra*, 43 Cal. App. 5th at 490.

