

FINANCE

In response to the influx of loan modification scams, Marietta Rodriguez of NeighborWorks America says knowledge is the homeowner's best defense. **PAGE 5**

ENVIRONMENT

Roderick Walston of Best Best & Krieger examines the Supreme Court's 5-4 split in *South Carolina v. North Carolina*, which was not the usual line up of justices. **PAGE 6**

CRIMINAL

Bethany Hengsbach of Sheppard Mullin identifies three lessons to be learned from the Department of Justice's recent clampdown on foreign bribery. **PAGE 7**

U.S. Supreme Court to Hear Case of Alleged Somali Torturer

San Francisco Nonprofit Will Argue Sovereign Immunity Doesn't Apply to Official

By Lawrence Hurley
Daily Journal Staff Writer

WASHINGTON — When the question of whether former officials of foreign countries can be sued in American courts for acts of torture goes before the U.S. Supreme Court next month, it will be a landmark moment for a nonprofit legal group in San Francisco.

Although the case comes out of Virginia, the legal brains behind the fight are from the Center for Justice and Accountability, based on Market Street. In its 12-year history, the group has never had a case reach the Supreme Court, a milestone that executive director Pamela Merchant has mixed feelings about.

Merchant's clients, five Somalis who accuse a former Somali prime minister of various human rights violations, won when the case was argued before the 4th U.S. Circuit Court of Appeals, traditionally considered the



S. TODD ROGERS / Daily Journal

Pamela Merchant, executive director of the Center for Justice and Accountability.

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PAMELA MERCHANT
CENTER FOR JUSTICE AND ACCOUNTABILITY

most conservative of the federal appellate courts, so she would have preferred the high court not to get involved at all.

“For an organization of our size it’s a little bit daunting,” she sighed in a recent telephone interview. “We didn’t think the Supreme Court would take the case.”

The defendant, Mohamed Ali Samantar, was the defense minister and later prime minister of Somalia during the 1980s when the country was led by dictator Mohamed Siad Barre. After the regime fell in 1991, Samantar ended up in Fairfax, Va.

Through the close-knit Somali community, some 1,500 of whom live in the San Francisco Bay Area, the family of one of the plaintiffs, Bashe Abdi Yousuf, heard Samantar

was in the United States and wondered if there was any way of holding him accountable for his alleged actions.

After hearing about the CJA, Yousuf's relatives contacted the group, which agreed to investigate further.

Founded solely to assist torture victims seeking justice, the CJA has just 12 staff members but has enjoyed considerable success. The group has filed claims in U.S. courts against human rights abusers from such countries as Bosnia, Chile, and El Salvador. It has won every case that has gone to trial, Merchant said. The group also represents human rights victims pursuing claims in Spanish courts for alleged violations that took place in Guatemala and El Salvador.

Seeking to broaden the Somalia case, the CJA's staff attorneys talked to others in the U.S.-based Somali community and visited Somalia itself, picking up four more plaintiffs along the way.

They include two United States citizens: Yousuf, who was detained, tortured, and kept in solitary confinement for six years, and Aziz Deria, who fled Somalia after his father and brother disappeared.

Of the other three plaintiffs, all of whom are Somali citizens, one survived a firing squad by hiding under

dead bodies, one had two family members executed and one, a woman, was repeatedly raped and held in solitary confinement for three years.

In 2004, the CJA, after seeking outside legal assistance from Cooley Godward Kronish, filed suit in the Eastern District of Virginia. The plaintiffs sought redress under the Torture Victim Protection Act, which creates a cause of action for torture committed in “any foreign nation,” and the Alien Tort Statute, which gives United States courts jurisdiction to hear certain international disputes. Samantar sought immunity, setting up the legal question now before the Supreme Court: whether a foreign state's immunity from lawsuits under the Foreign Sovereign Immunities Act extends to individuals acting in their official capacities. *Samantar v. Yousuf*, 08-1555. The Supreme Court has previously ruled on the scope of the FSIA but not on the question of whether it can apply to former government officials.

The district court found that Samantar had immunity under the FSIA, but the 4th Circuit disagreed. In the January 2009 opinion, a three-judge panel noted that the act is too vague, stating only that “a foreign state”

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Howrey's Cuts May Be Start Of New Round Of Layoffs

By Craig Anderson
Daily Journal Staff Writer

Washington, D.C.-based Howrey laid off 29 associates nationwide this week as part of a cost-cutting measure, including five in the Bay Area and an undisclosed number from its two Southern California offices.

The firm — which specializes in intellectual property, antitrust, and global litigation — has tried to postpone and avoid associate layoffs but concluded they were necessary, according to the firm's chairman, Robert Ruyak.

“The fact of the matter is that while demand from clients for our services remains stable, it does not, unfortunately, provide enough work for all of our attorneys and staff to be fully utilized,” Ruyak wrote in an email sent to firm employees.

The Howrey layoffs are a reminder that, while firms are increasingly optimistic that the worst is behind them as the economy begins to recover, the job outlook at big firms remains shaky at best.

“It means you are going to see a continuing round of layoffs through the first six months of this year,” said Peter Zeughauser, a Newport Beach-based consultant with the Zeughauser Group.

Howrey tried to avoid large-scale attorney layoffs last year even as other firms took more aggressive steps to limit costs.

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Prosecutors Nab Small Target In Mortgage Fraud

By Rebecca Beyer
Daily Journal Staff Writer

SAN FRANCISCO — Faced with the task of defending a homeowner accused of scamming banks out of \$6.5 million in mortgages, Jones Day partner Martha Boersch told a federal jury in closing arguments earlier this week that the lenders themselves were partially responsible for the fraud.

Boersch's argument didn't help her client. The jury found Judy Yeung guilty on all 12 counts Tuesday, and her case — the first Northern District federal trial stemming from a mortgage fraud task force U.S. Attorney Joseph P. Russoniello created in 2008 — is obviously a victory for the prosecutors. But its target — a single homeowner scamming the system — leaves some wondering if prosecutors here and elsewhere will have any success going after the banks themselves.

Boersch echoed a common criticism that prosecutors should do more to hold bank executives and investors accountable for some of the mortgage industry's practices, which helped push the nation into a deep recession. She called the banks “alleged victims” and told jurors lenders were “churning loans” by paying kickbacks to brokers and running only cursory checks on people's ability to repay. The more loans the banks issued, she said, the more money they made. Boersch declined to comment

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GUEST COLUMN

With consumer trust a top priority, business models that fail to ‘compete on privacy’ risk losing customers, write **Sean Morris** and **Suzanne Wilson** of Arnold & Porter.

As reported previously, the Federal Trade Commission gathered in the west last week on January 28 at Berkeley School of Law to hold the second of its day-long roundtable discussions entitled “Exploring Privacy.” The purpose of these roundtables is to present a forum in which the FTC can “explore the privacy challenges posed by the vast array of 21st century technology and business practices that collect and use consumer data.” The FTC is interested in “how best to protect consumer privacy while supporting beneficial uses of the informa-

This article continues “Wrestling With Consumer Privacy on the Internet,” which appeared January 19.

tion and technological innovation.”

The Internet provides a unique opportunity for businesses and consumers to exchange information. When a user goes “online,” she provides myriad data points. The type and amount of this data ranges from the particular Web pages visited and which links were followed by the user's computer, to more directly identifiable information such as the user's name, address, or even social security number. In the case of social networking sites, the information provided becomes even more intimate (marital status, political affiliations, etc.).

Providing such data helps consumers conduct business and interact with other users in a convenient manner, while at the same time permitting businesses

to better tailor their services for and communications with customers. Knowing that a consumer is interested in new flat panel televisions allows businesses to provide more information about that topic to the particular user, for example. While data collection thus has many benefits, consumers also need to recognize and understand what is being collected and how it is used, shared or retained for later use, so that they can make choices right for them regarding any restrictions on that data.

To explore these issues at the roundtable discussions, the FTC invited panelists representing different perspectives: business (such as Facebook and Google), consumer groups, academics, and govern-

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DAILY APPELLATE REPORT

CIVIL LAW

Administrative Agencies: Mother's full-time In-Home Supportive Services program funded care of disabled child does not constitute full-time employment for purposes of program. *Basden v. Wagner*, C.A. 3rd, DAR p. 1870

Employment Law: Arbitration agreement is valid in wrongful termination dispute despite limit placed on number of depositions employees could take. *Dotson v. Amgen Inc.*, C.A. 2nd/6, DAR p. 1875

Immigration: Waiver of deportability for fraud under Immigration and Naturalization Act is unavailable for

person who is inadmissible on additional grounds. *Corona-Mendez v. Holder*, U.S.C.A. 9th, DAR p. 1890

Maritime Law: Equitable vacatur of writ of maritime attachment is improper where plaintiff's presence in district was not materially significant. *ProShipLine Inc. v. Aspen Infrastructures Ltd.*, U.S.C.A. 9th, DAR p. 1883

CRIMINAL LAW

Criminal Law and Procedure: Burglar of apartment whose resident was temporarily relocated due to fire in another unit is properly convicted of first-degree burglary. *People v. Aguilar*, C.A. 4th/2, DAR p. 1880

Summaries and full texts appear in insert

BRIEFLY

In a controversy possibly destined for the U.S. Supreme Court, the 9th U.S. Circuit Court of Appeals Wednesday let stand a federal law criminalizing possession of body armor by a felon. The decision conflicts with seven other circuits that have held the law erroneously allows the federal government to intrude on a domain traditionally relegated to the states.

DIGITAL

The Daily Journal is available through the Web in a digital edition, identical to the paper edition. For more information, go to www.dailyjournal.com.

MORE NEWS

Home Boy

William Palmer, left, grew up in Bakersfield, and came home to practice law. Now he's a judge, with no need for formalities in court. **PAGE 2**

Pillsbury Sticks With Lockstep

Pillsbury Winthrop Shaw Pittman debated moving away from a lockstep-based associate compensation structure but decided not to, settling instead on more performance-based bonuses, according to a memo leaked online Wednesday. **PAGE 3**



ON THE MOVE

Products Liability Lawyer Back to Shook Hardy

Lucy Mason has returned to the San Francisco office of Shook, Hardy & Bacon — where she worked for 15 years — after a stint in-house with Altria Client Services Inc in Washington, D.C.. Mason's practice will focus on the defense of product liability claims. A former assistant U.S. attorney, Mason joins the firm as partner.

A complete list of the week's lateral moves appears every Monday in the Daily Journal and at www.dailyjournal.com.

Fighting Back Against Loan Modification Scams

Every 13 seconds in America, there is a new foreclosure filing. The national foreclosure rate now stands at an all-time high of 8.85 percent, with more than 4.5 million households currently at risk of foreclosure. In California, the foreclosure rate reached a staggering 11.7 percent in 2009, with Los Angeles reporting the highest number of homes in foreclosure in the nation.

There is little hope for relief on the horizon. Experts are predicting between 1.5 and 2 million new foreclosures in 2010 alone and an estimated total of 8.1 million by 2012. The Obama administration created the Home Affordable Modification Program (HAMP) with the good intentions to help homeowners modify their mortgages and payments-and ultimately stay in their homes. However, just 1 percent of those eligible have secured permanent modifications to date.



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Moreover, adjustable-rate mortgages and especially adjustable-rate interest-only loans are due to reset in the coming months. Areas with high-cost housing markets-including many of California's metropolitan and coastline cities-are expected to see more mortgages adjust, as people who purchased high-priced homes during the housing boom may have little choice but to default on substantially higher interest payments.

These facts and scenarios alone are troubling. Worse, they lead to another problem-getting bigger by the day-that puts homeowners in a far more challenging predicament. The tumultuous housing environment is fertile territory for loan modification scams, a fast-growing epidemic that demands immediate attention.

Every day, more homeowners are taken in by slick advertising and sales pitches from fraudulent loan modification or foreclosure "rescue" companies that guarantee to keep people in their homes. Many scam artists openly prey on people in difficult circumstances with unethical and sometimes unlawful tactics-stripping them of thousands of dollars and often their homes.

Zulma Navarette of Los Angeles knows this trend all too well. The 36-year-old Guatemalan native was scammed twice after receiving unsolic-

ited referrals to two supposedly reputable companies claiming they could help her with her mortgage. Soon after paying \$2,000 to a company that promised to lower her mortgage payments, Zulma's bank called to explain that her loan modification paperwork was incomplete and her payments would likely increase. The company attempting to scam Zulma told her she still had to pay for services rendered. Only when she threatened to call the police did she receive a refund.

Just two months later, Zulma was advised that she was eligible for a loan modification, without back payments, through a local lawyer's office. The lawyer even offered a 100 percent money-back guarantee. So Zulma paid \$3,495 and waited. As instructed, she stopped making payments to her bank. Her paperwork, the lawyer said, was in progress. But as more time went by, Zulma decided to call her bank, only to learn that no one from the lawyer's office had been in touch. She had fallen even farther behind in her payments and was at risk of losing her home.

Fortunately, Zulma found help she could trust through Los Angeles Neighborhood Housing Services, Inc. There are millions of other stories like Zulma's, but they don't always have a positive outcome.

In fact, California Attorney General Edmund G. Brown Jr.'s office reported receiving more than 2,500 complaints against loan modification consultants and fraudulent practices like these in 2009-a dramatic jump from 2008, when fewer than 200 complaints were filed.

As a response to the dramatic increase in fraudulent activity, Con-



The tumultuous housing environment is fertile territory for loan modification scams, a fast-growing epidemic that demands immediate attention.

‘Compete on Privacy,’ It Does the Business Good

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ment. This second roundtable focused on two particular questions: What role do privacy enhancing technologies play in addressing Internet-related privacy concerns; and what challenges do innovations in the digital environment pose for consumer privacy, and how can those challenges be addressed without stifling innovation or otherwise undermining benefits to consumers?

Noting that the gathering in Berkeley represented the FTC's coming to the "technology community," the day opened with introductory comments by FTC Commissioner Pamela Jones Harbour. She began with the interesting observation that consumer privacy presents an excellent opportunity for businesses. In her view, "good" businesses have the chance to distinguish themselves and compete for market share on the privacy issues.

This undoubtedly is true. Because their data and its use are important to them, consumers will tend to conduct business with those companies that they trust will treat the information in an appropriate, transparent, and beneficial manner. Market forces thus help create an environment that protects privacy at the level consumers want. Businesses that respond to the privacy demands of consumers can thrive, while those who fail to do so risk losing customers.

Accordingly, the marketplace, coupled with the dissemination of "best practice" guides and the additional backstop of general consumer protection laws that can be used to investigate and stop outlier bad actors (such as the Federal Trade Commission Act that precludes "unfair" and "deceptive" business practices), works as a force to protect consumer privacy at appropriate levels.

The roundtable participants representing the business perspective echoed this point. Referring to the importance of building and maintaining consumer trust, these representatives made it very clear that a significant part of their business model includes taking steps to make sure that they are responsive to the needs of consumer privacy demands. Driving the point home more directly, these representatives stated flat out that they "compete on privacy."

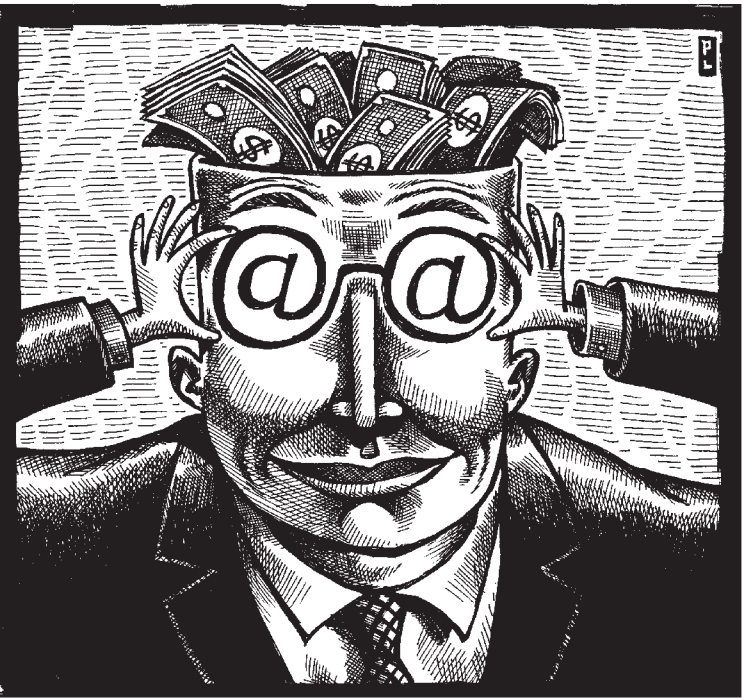
Participants representing the consumer perspective did not disagree with the importance the marketplace plays in addressing privacy issues.

In fact, the American Civil Liberties Union of Northern California, which participated in the roundtable discussions, has published a guide, available through its Web site and directed at businesses, entitled "*Privacy and Free Speech: It's Good For Business*." The guide provides tips and case studies that the ACLU hopes "will help [businesses] make smart, proactive decisions about privacy and free speech so you can protect your customers' rights while bolstering the bottom line."

Despite the agreement that market forces (along with generally applicable consumer protection laws and self-regulation) are important, the underlying debate in all the panel discussions centered on whether more needs to be done to expressly address unique e-commerce privacy issues. In addition to her comments regarding the opportunity privacy issues present for businesses to compete, Commissioner Harbour also noted in her opening remarks the concern that, particularly with rapidly expanding technology, it is difficult for consumers to "define their expectations." When consumers do not understand what is happening with their data or what their options are, it is harder for them to exert market pressures. David Vladeck, the FTC's Director of the Bureau of Consumer Protection, emphasized this point as well, expressing the worry that many consumers simply do not appreciate the privacy issues they face and that privacy protections for new technology may need to be more overtly prescribed; or, as

he colorfully put it, "baked in at the beginning, rather than half-baked" adjustments later.

Not surprisingly, the panelists at the Berkeley roundtable had differing views about whether more prescriptive privacy rules or regulations are in fact needed. While the roundtable was not the setting to resolve the issue, what is clear from the mere fact of the debate is that this is a question that will receive significant attention in the coming months. Moreover, members of Congress are reportedly in the process of drafting legislation that could place express restrictions on the use of consumer privacy information (beyond those already in place for particular segments, such as banking). This is an issue that bears watching, and undoubtedly more interesting insights will be provided during the next FTC privacy roundtable to be announced later this year, this time back in Washington.



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SUZANNE WILSON is a partner in Arnold & Porter's Los Angeles office. She represents Internet and technology companies, as well as consumer product companies and other businesses in commercial and intellectual property litigation.

gress asked NeighborWorks America to launch a national public education campaign that empowers homeowners to combat loan modification scams. The Loan Modification Scam Alert campaign officially kicked off at an event in Los Angeles in October 2009 with the support of Los Angeles Mayor Antonio Villaraigosa, NeighborWorks America Chief Operating Officer Eileen Fitzgerald and other community stakeholders.

Today, our campaign includes a network of national, state and local partners on the ground, as well as 235 community-based affiliates. We are alerting thousands of homeowners in communities that are at high risk for scam activity with messages by way of testimonials, marketing collateral, local PSAs, events and social media activity.

This campaign is based on the belief that knowledge is the best defense, which is why it equips homeowners with the tools they need to minimize their risk and stop scammers in their tracks. Our mission is threefold:

First, we alert homeowners to the existence of loan modification scams-urging them to know the facts to avoid becoming a victim.

Second, we help homeowners recognize the warning signs of a scam. Though scams vary, there are consistent red flags that anyone seeking loan modification help should look for: Homeowners should avoid any company or person asking for a fee in advance of providing a service; they should stay away from any business that guarantees it can stop a foreclosure or modify a loan; and they should never agree to stop paying their mortgage company and pay a "rescue" firm instead.

Finally, we are urging homeowners to fight back and become part of the solution by immediately reporting scammers and fraudulent activities to the authorities. They can easily report scams by calling 1-888-995-HOPE (4673) or visiting www.LoanScamAlert.org. The hotline and Web site also connect homeowners to free, loan modification guidance from a HUD-approved counseling agency.

Everyone has the power to help spread the word and prevent more unsuspecting homeowners from losing money and their homes to the criminal activity of scammers. I encourage all community groups and businesses to join NeighborWorks America in this fight.

Learn more at www.LoanScamAlert.org.