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November 13, 2019
The Westin Irving Convention Center
Dallas, TX 75039
www.alfn.org/fcintersect

CONTENTS OVERVIEW

SCHEDULE	Event Schedule & Sponsors	Pages 2-3
OPENING GENERAL SESSION	Foreclosure Hot Topics – 13 Things Keeping You Awake at Night	Page 4
BREAKOUT SESSION 1	Post-Foreclosure: The sale is not the end! Defending the foreclosure, and becoming a landlord.	Page 32
BREAKOUT SESSION 2	Regulatory Compliance: Compliance Hot Topics	Page 46
BREAKOUT SESSION 3	Operations: Playing the Game – Overcoming Challenges in Everyday Foreclosure Practice	Page 175
BREAKOUT SESSION 4	Complex Litigation: Real Property Impact During Disasters and Business Records Exception	Page 209
BREAKOUT SESSION 5	Title Issues: Deceased Borrowers, Missing Lien Assignments and Errors in Loan Documents	Page 240
BREAKOUT SESSION 6	Case Law & Legislation: The Top Ten Trends/Things To Watch in Foreclosure Litigation and Legislation	Page 281
CLOSING GENERAL SESSION	Still Working Together: Servicers and Attorneys	Page 308

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SCHEDULE:

8:00 AM-2:30 PM – Registration – Melody Ballroom Foyer

8:30-9:30 AM – Breakfast & Opening General Session – Melody 2-3
Foreclosure Hot Topics – 13 Things Keeping You Awake at Night

9:30-9:45 AM – Refreshment Break – Melody Ballroom Foyer

9:45-10:45 AM – Breakout Sessions

- **Breakout Session 1 – Post-Foreclosure Track - Melody 1**
  The sale is not the end! Defending the foreclosure, and becoming a landlord.

- **Breakout Session 2 – Regulatory Compliance Track - Melody 2-3**
  Compliance Hot Topics

10:45-11:00 AM – Refreshment Break – Melody Ballroom Foyer

11:00AM-12:00 PM – Breakout Sessions

- **Breakout Session 3 – Operations Track - Melody 1**
  Playing the Game – Overcoming Challenges in Everyday Foreclosure Practice

- **Breakout Session 4 – Complex Litigation Track - Melody 2-3**
  Real Property Impact During Disasters and Business Records Exception

12:00-12:15 PM Refreshment Break – Melody Ballroom Foyer

12:15-1:15 PM – Breakout Sessions

- **Breakout Session 5 – Title Issues Track - Melody 1**
  Deceased Borrowers, Missing Lien Assignments and Errors in Loan Documents

- **Breakout Session 6 – Case Law & Legislation Track - Melody 2-3**
  The Top Ten Trends/Things To Watch in Foreclosure Litigation and Legislation

1:15-2:15 PM – Networking Luncheon – Melody 2-3
Sponsored by Bonial & Associates, PC

2:15-3:15 PM – Closing General Session – Melody 2-3
Still Working Together: Servicers and Attorneys

3:15-4:15 PM – WILL Cocktail Hour Reception for All Attendees – Mesa Mezcal @ The Westin Irving Convention Center
Hosted by WILL and Sponsored by Heavner, Beyers, Mihlar, LLC and Schiller Knapp Lefkowitz, & Hertzel, LLP

We Thank our Sponsors

Please take a moment to visit with our sponsors during the breaks in our session schedule at 9:30-9:45am, 10:45-11:00am, 12:00-12:15pm or during the Networking Luncheon 1:15-2:15pm and Networking Reception 3:15-4:15pm.

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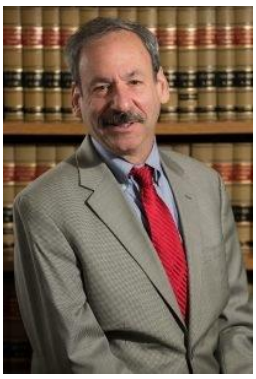
Opening Breakfast General Session: Foreclosure Hot Topics – 13 Things Keeping You Awake at Night
Melody 2-3
8:30-9:30 AM

We will answer these 13 questions during this session:

1. What can be done to solve Lost loan histories, lost notes, defunct prior servicers and UCC Section 3-309
2. How do you fix the missing assignment problem?
3. How do you remedy unreleased mortgages or unsatisfied mortgages?
4. What open issues remain after Obduskey that affect FDCPA claims?
5. What are the main issues with respect to HOA super priority?
6. What should be done to protect against QWRs?
7. What are the main issues experienced with Service of Process?
8. What are the main issues with respect to SCRA?
9. What property preservation can be accomplished during foreclosure process?
10. What issues are experienced as a result of a borrower's death?
11. What problems are associated with the redemptions?
12. What types of efforts are not permitted during the foreclosure process?
13. What factors play into establishing a proper foreclosure bid?

Speakers:

- Ron Deutsch, Esq., Attorney, Cohn, Goldberg & Deutsch, LLC Rdeutsch@cgd-Law.com – Moderator
- Paul Weingarden, Esq., Partner, Usset, Weingarden & Liebo, PLLP Paul@uwllaw.com
- Julie O'Hara, Director of Servicer Oversight, PRP Advisors johara@prpadvisors.com
- Doug Hick, Esq., Shareholder / Managing Attorney - Non-Judicial Foreclosure, SouthLaw, P.C. Doug.Hick@southlaw.com
- Chris Carman, Esq., Litigation & Compliance Counsel, BSI Financial Services Ccarman@bsifinancial.com



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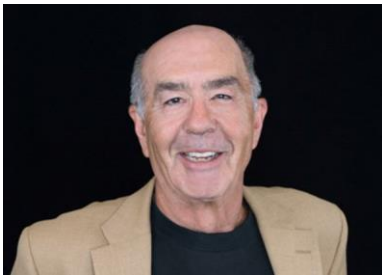
Holds a Bachelor of Arts degree, cum laude, from the University of Maryland (B.A. 1979), a law degree from the National Law Center, George Washington University, (J.D. 1982) and a Masters in Taxation Law also from The National Law Center, George Washington University (LL.M 1985). He is A-V rated with Martindale-Hubbell and maintains memberships with the Maryland and District of Columbia Bar Associations. He is also licensed to practice before the United States Tax Court and the United States District Courts for the District of Columbia and Maryland.

Mr. Deutsch obtained a nationally recognized reported decision in Island Financial v. Ballman, 607 A.2d 76 (1992) and has had dozens of articles published in industry publications. He is a former member of the Board of Directors of REOMAC, a former member of the Board of Directors of the USFN, the former Chair of the Real Property Section of the Maryland State Bar Association, and a lifetime fellow of the Maryland Bar Foundation. He is also a former Chair of the Foreclosure Committee of the Maryland Bar Association and served on Governor Martin O'Malley's Maryland Homeownership Preservation Task Force – Legal and Regulatory Reform Work Committee, which was established to rewrite Maryland's foreclosure law.

In addition to lecturing at the University of Maryland, Montgomery College, and the PDI Institute, Mr. Deutsch is a frequent speaker at industry events. He has also co-authored the District of Columbia chapter in the National Mortgage Servicer's Reference Directory 27th Ed and co-authored Maryland Foreclosure and Repossession, National Business Institute.



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Paul A. Weingarden is a founder and partner in the law firm of Usset, Weingarden & Liebo, PLLP, representing mortgage lenders and other creditors in the state of Minnesota since 1979. The firm provides statewide legal representation in a variety of subject matters including foreclosure, bankruptcy, eviction, litigation matters, regulatory enforcement and other creditor's rights issues.

A former prosecutor, Mr. Weingarden is responsible for supervising bankruptcy, foreclosure and litigation matters for the firm. He is AV rated, a certified real property specialist by the Minnesota State Bar Association, a member of the USFN and ALFN, serves as HUD foreclosure commissioner in Minnesota and is a frequent lecturer to mortgage company personnel, lawyers and other creditor interest groups.

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Julie O'Hara is the Director of Servicer Oversight for PRP Advisors. Ms. O'Hara's office is based in Winston Salem, NC. Her team manages over 22,000 active loans and two servicers, with a total of over 27,000 loans purchased to date. Ms. O'Hara spent 15 years working as lead paralegal handling civil litigation, specifically collection matters, and bankruptcy, both debtor and creditor work, for two firms in California, the Law Office of John A. Ham and the Law Office of Christopher G. Metzger. Followed by nearly 10 years at SN Servicing before joining the PRP Advisors team in 2015. Ms. O'Hara believes in volunteerism and participating in your community. She was a Girl Scout leader and Service Unit Manager for many years. Upon stepping back from Girl Scouting, Ms. O'Hara became very involved in the foster care community and is currently looking to create a program in her new North Carolina community, similar to what was available in her California community.

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Doug joined SouthLaw, P.C. (formerly South & Associates, P.C.) in March of 1998. He is a shareholder and managing attorney for the Non-Judicial Foreclosure Department in the corporate office in Overland Park, Kansas. He is currently licensed to practice in both state and federal courts in Missouri and Kansas. He obtained his Bachelor of Science in Business Administration, with an emphasis in Personnel Management, from the University of Missouri-Columbia in 1986. He obtained his law degree from the University of Missouri-Kansas City in 1993.

Doug has concentrated his practice of law representing secured creditors in the areas of real estate finance and mortgage foreclosure. He has spoken at various industry events over the years, participated in efforts to enact new legislation in the State of Missouri, and regularly participates in training events at various servicing locations. Prior to obtaining his law degree, Doug spent four years with a residential loan servicing company in Kansas City where he gained an in depth knowledge of loan servicing and acquisition.

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Christopher L. Carman is Litigation & Compliance Counsel for BSI Financial Services, a specialty sub-servicer, which has offices in Texas, Pennsylvania and California. He is responsible for oversight of litigation involving BSI, which involves not only contested default matters, but also defensive and complex litigation. He is admitted to practice law in the States of Texas and California, and is a graduate of the University of Texas for both Finance and Law.

Mr. Carman has been in the mortgage servicing industry for over twenty years, with most of that time spent as in-house counsel for a number of mortgage servicers. He also has experience working for default servicing law firms. Mr. Carman has spoken on a number of panels for the MBA, USFN, ALFN and CTA.

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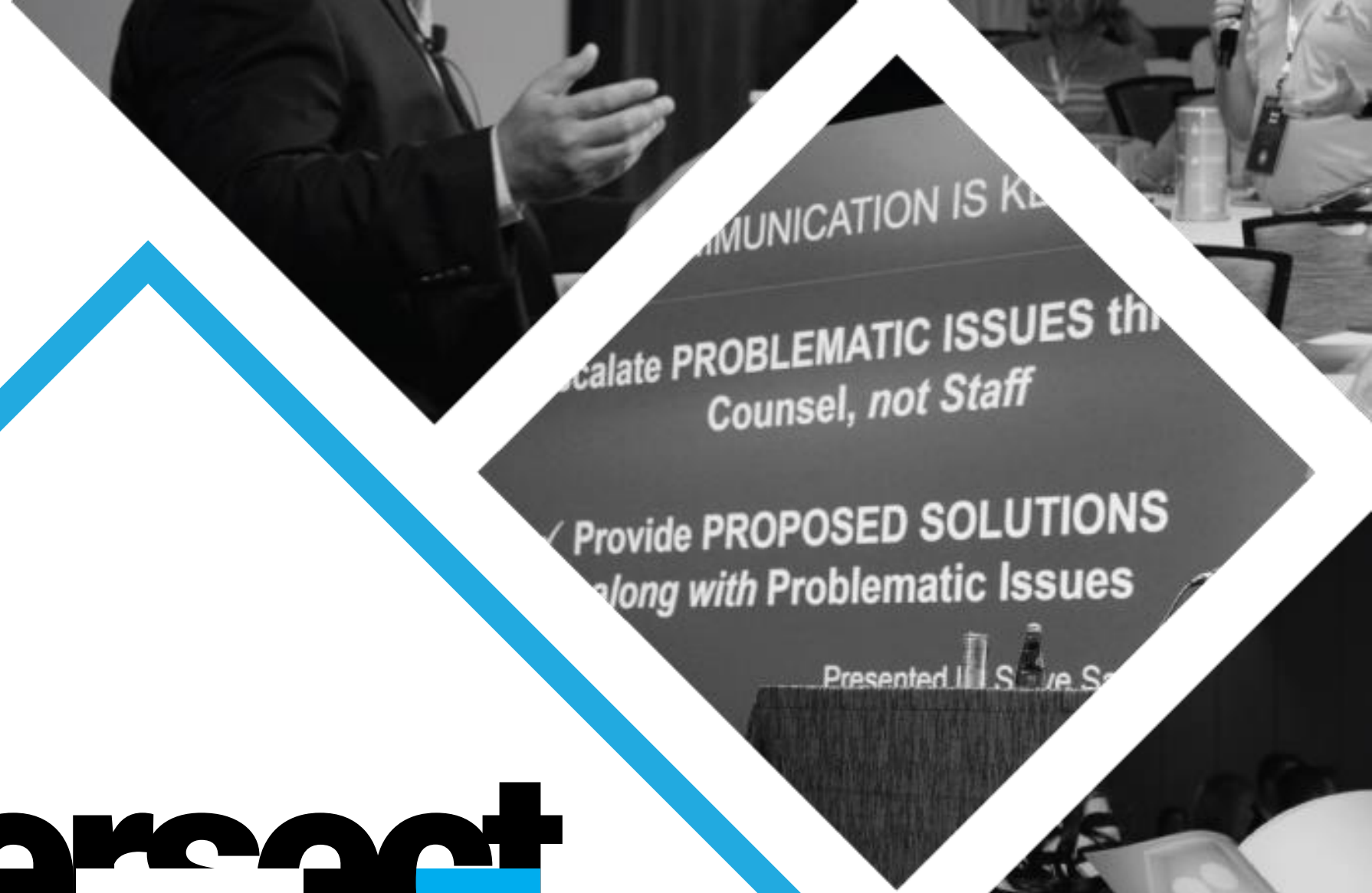

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FORECLOSURE HOT TOPICS

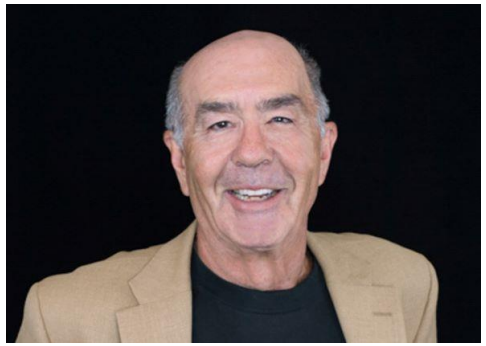
13 Things Keeping you Awake at Night

This session will focus on topics of concern in today's environment for both mortgage servicers and foreclosure counsel. Specifically they will focus on some of the recent challenges facing the industry.

These "hot topics" will be covered and discussed so they can be identified and acted upon.

INTERSECT | PRESENTERS

Speaker



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PAUL A. WEINGARDEN is a founder and partner in the law firm of Usset, Weingarden & Liebo, PLLP, representing mortgage lenders and other creditors in the state of Minnesota since 1979. The firm provides statewide legal representation in a variety of subject matters including foreclosure, bankruptcy, eviction, litigation matters, regulatory enforcement and other creditor's rights issues.

A former prosecutor, Mr. Weingarden is responsible for supervising bankruptcy, foreclosure and litigation matters for the firm. He is AV rated, a certified real property specialist by the Minnesota State Bar Association, a member of the USFN and ALFN, serves as HUD foreclosure commissioner in Minnesota and is a frequent lecturer to mortgage company personnel, lawyers and other creditor interest groups.

INTERSECT | PRESENTERS

Speaker

Ronald S. Deutsch
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Holds a Bachelor of Arts degree, cum laude, from the University of Maryland (B.A. 1979), a law degree from the National Law Center, George Washington University, (J.D. 1982) and a Masters in Taxation Law also from The National Law Center, George Washington University (LL.M 1985). He is A-V rated with Martindale-Hubbell and maintains memberships with the Maryland and District of Columbia Bar Associations. He is also licensed to practice before the United States Tax Court and the United States District Courts for the District of Columbia and Maryland.

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What can be done to solve Lost Loan Histories, Lost Notes, Defunct Prior Servicers and UCC Section 3-309?

- Lost Note Affidavits
- Waive Payments
- State Banking Commissions
- Recreate records based on all available information?
- Judicial enforcement

How to you fix the Missing Assignment Problem?

- Contact Parties
- State Banking Commissions - Officer
- Endorsement in Blank
- Judicial Action to compel assignment

How do you remedy unreleased mortgages or unsatisfied mortgages?

- Locate Closing Company – Notary licensing division
- Obtain New Release
- Statute of Limitations on unreleased mortgages and state presumptions
- Title Claim
- Cancelled Check/Release of Lien
- Judicial Action

What open issues remain after *Obduskey* that affect FDCPA claims?

- Judicial vs. Non-Judicial states
- Portion of Practice is debt collection/bifurcation

What are the main issues with respect to HOA Super Priority?

- Priority over First Trusts/mortgages subject to state limitations on amounts
- Right to foreclose/extinguishment
- Attorney Fees
- Special Assessments

What should be done to protect against QWRs?

- Limit Scope
- Send to Servicer with letter to sender
- Special fax number
- Adequate investigation and timely Response to avoid RESPA or FCRA suits

What are the main issues experienced with Service of Process?

- Age
- Residency, seasonal
- Vacancies
- Foreign borrowers
- Alternative addresses
- Gated communities
- Post Office boxes

What are the main issues with respect to SCRA?

- Manpower website errors
- Date loan was executed
- Judicial Appointment
- Active Duty vs. non-active duty
- Unknown spouse of borrower in military

SCRA
Servicemembers Civil Relief Act
CENTRALIZED VERIFICATION SERVICE

What Property Preservation can be accomplished during foreclosure process?

- Vacant
- Winterization
- Emergency Issues (Roofing, Flooding Issues)
- Code Enforcement or hazardous Condition property

What issues are experienced as a result of a borrower's death?

- Probate/Personal Representative
- Disclosure of Information to successors in Interest/who qualifies if no Last Will & Testament
- Heirs share and military service
- Heirs and tax liens

What problems are associated with redemptions?

- Additional amounts paid by client during redemption and affidavits
- False liens by junior liens
- Section 108(b) – if Bankruptcy Is filed or cure proposed to Redemption expiration/extension

What types of efforts are not permitted during the foreclosure process?

- Dual tracking; stopping versus postponing A property foreclosure bid.
- Private information disclosure
- Not redacting social security numbers found on document
- Failure to appoint a SPOC

What factors play into establishing a proper foreclosure bid?

- Right to Deficiency
- Surplus issues
- Existence of Transfer Taxes
- Priority and existence of IRS lien
- Bidding first and second lien together

End of slide content.

CONCLUSION – Q&A

All these topics are different and can be difficult to spot.

Jurisdictions can differ depending on state law.

Contact your counsel immediately with questions.

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SCRA
Servicemembers Civil Relief Act
CENTRALIZED VERIFICATION SERVICE

Breakout Session 1: Post-Foreclosure Track
Melody 1
9:45-10:45 AM

The sale is not the end! Defending the foreclosure, and becoming a landlord.

Our panel will discuss the two primary hurdles facing servicers and their counsel after the foreclosure sale: addressing challenges to the title to the property and the foreclosure itself, and the burden of becoming a landlord in an increasingly tenant friendly society.

Speakers:

- James McPherson, Esq., Managing Attorney, A LAW, jmcpherson@alaw.net – Moderator
- Sara Tussey, Esq., Senior Associate, Rosenberg & Associates, LLC Sara.Tussey@Rosenberg-Assoc.com
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James is the Managing Attorney for the Arkansas office of A|LAW. He has been involved in the mortgage industry since 2004 spending time both in both the law firm and mortgage servicing spaces where he has developed a broad understanding of the issues facing the mortgage industry. James has been active within ALFN for several years, previously co-chairing its JPEG group, and routinely having spoken at ALFN's annual ANSWERS conferences.

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Sara Tussey practices real estate law with a focus on litigation, title curative, loss mitigation, foreclosure and eviction. She joined Rosenberg & Associates, LLC in January, 2012 and is dedicated to providing quality representation and innovative solutions to meet clients' business objectives. She regularly serves as panelist at default industry events and authors articles for industry related publications. Sara is admitted to practice in Virginia, Maryland, New York, and the District of Columbia. She holds a Bachelor of Arts in English from the Pennsylvania State University and a Juris Doctor (cum laude) from the Pennsylvania State University Dickinson School of Law where she was Casenote Editor of the Penn State Law Review, Notarius of the John Reed Inn of Phi Delta Phi, and was elected to the Order of Barristers.

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Heather Rogers, is the managing partner of the firm and also manages the Default Operations Department. She also dedicates a portion of her practice to commercial and residential real estate, including buy/sell, lending, leasing and evictions. In addition, Ms. Rogers combines her MBA and law degree in the area of business law, counseling her clients on entity selection and formation, as well as the continued management and operation of those businesses as the companies grow.

Ms. Rogers is a past chair of the 4,877-member Real Property Law Section (RPLS) of the New York State Bar Association (NYSBA). Ms. Rogers is actively involved with the Executive Committee of the Real Property Law Section of the NYSBA and has served on the board as vice-chair and section secretary. In her role as vice-chair, Ms. Rogers organized and coordinated the industry and state bar association responses to the Office of Court Administration (OCA) affidavit that has affected the New York State foreclosure industry. Currently she is the Co-Chair of the Real Estate Finance Committee of the RPLS. She is also a Fellow of the American College of Mortgage Attorneys. Heather is also a licensed real estate broker.

Ms. Rogers is a frequent lecturer for the Monroe County Bar Association, New York State Bar Association, National Business Institute and Lorman on a wide range of real estate related topics, including residential real estate, mortgage foreclosure and workouts, landlord tenant matters and UCC updates and compliance. She also offers detailed training sessions to clients regarding the New York Judicial Foreclosure Process.

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Bryan D. Hughes practices in the areas of mortgage foreclosure, collections, and real estate law. He is a graduate of the University of Illinois at Urbana-Champaign (2006) and The John Marshall Law School (2009). He is licensed to practice law in the State of Illinois, in Federal Court in the Northern, Central, and Southern Districts of Illinois, the Northern and Southern Districts of Indiana, and the Northern District of Ohio. He is a member of the American Bar Association, the Illinois State Bar Association, the Chicago Bar Association, and the DuPage County Bar Association. He has been a speaker at various trade association and continuing legal education seminars on mortgage

foreclosure, property ordinance and tenant protection issues and has authored publications at both the state and national level.

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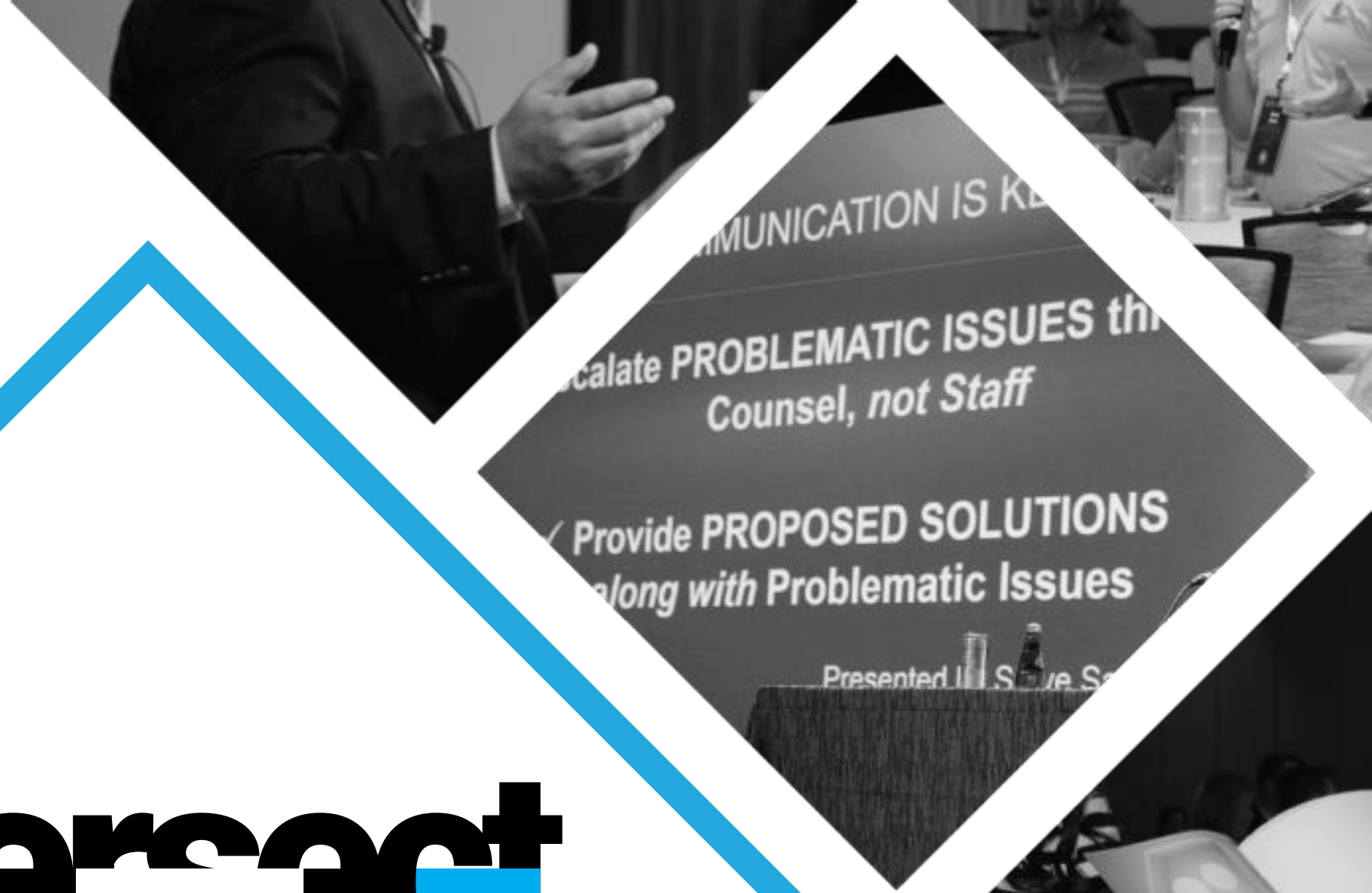

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BREAKOUT SESSION 1

Post-Foreclosure Issues

Melody 1

Time 9:45 – 10:45 AM

The sale is not the end!

Defending the foreclosure, and becoming a landlord

Two primary hurdles face servicers and their counsel after the foreclosure sale:

- Challenges to title and the foreclosure
- The burden of becoming a landlord in an increasingly tenant friendly society

INTERSECT | PRESENTERS

Moderator

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Speaker

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Speaker

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Managing Partner
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Post-Sale Challenges

Virginia – Non-judicial

- Va. Code § 55.1-324(3) requires a trustee to file an accounting with the commissioner of accounts within six months of the foreclosure sale
  - Borrowers can file exceptions to the accounting, which the commissioner will rule on; if there are no exceptions, the commissioner will file a report in the land records approving the audit
  - Any surplus funds will be distributed by the trustee prior to the accounting and the disbursements approved by the commissioner
- Borrowers who wish to challenge the validity of the foreclosure sale must either object to the accounting or file a separate civil lawsuit

Ramos v. Wells Fargo, 289 Va. 321 (2015) holds that a sale can only be rescinded if there is fraud, collusion, or a grossly inadequate sale price.

Parrish v. Fannie Mae, 292 Va. 44 (2016) added that a sale could also be rescinded if it was conducted in material breach of the deed of trust.

Crosby v. ALG Trustee, 296 VA. 561 (2018), the court held that there was collusion and a grossly inadequate sale price and rescinded a foreclosure sale

Post-Sale Challenges (cont.)

Maryland (Quasi-Judicial)

- Md. Rule 14-211 allows for a pre-sale challenge to the foreclosure
- If borrowers are unsuccessful in their Rule 14-211 motions, they have an absolute right of appeal to the Court of Special Appeals, which appeal often occurs or continues after the sale is completed
- Md. Rule 14-305 requires the filing of a Report of Sale and allows for exceptions to be filed, both within 30 days of the sale date
- Md. Rule 14-305 further requires ratification of the sale and referral of the file to a court appointed auditor, an audit must then be filed, to which the borrower may again file exceptions
- Surplus funds are distributed as directed by the court and junior lienholders or other parties wishing to receive surplus must file a motion to intervene in the foreclosure action

Manigan v. Burson, 160 Md. App. 114 (2004): final ratification of the foreclosure is *res judicata* as to the validity of a foreclosure sale, and validity cannot be collaterally attacked in a new proceeding.

Post-Sale Challenges (cont.)

District of Columbia (Judicial)

- The borrower can fully litigate the foreclosure through the course of the judicial proceeding leading up to judgment
- Appeals from the judgment generally occur or continue after sale
- Super. Ct. Civ. R. 308(b)(4) requires the filing of a Verified Report of Sale within 30 days of the sale date
- Super. Ct. Civ. R. 308(d) requires the filing of a proposed accounting and distribution of funds within 60 days of settlement, along with a motion to ratify the accounting using the court's form
    - Surplus funds are distributed to the borrower, unless a junior lienholder files a motion to intervene in the court action
- Borrowers can file a motion objecting to any of these post-sale stages

Post-Sale Challenges (cont.)

Other states

- Courts allowing challenges to the foreclosure in the eviction/UD case
- Challenges of the “strict compliance” to the foreclosure statutes

Being an unintended "landlord"

Post-Foreclosure Occupancy Issues: The Unintentional Landlord

- Pre-existing Tenants and the rights/equities involved
- Subsequent Owner as Landlord
  - Security deposits
  - Habitability issues
    * Is the bank coming to fix my furnace?
  - Local Ordinances (KCRO and Rent Control)
    * Owning but not controlling real property
- Homeowners Associations and Co-Ops
  - Assessments and who has to pay them
  - Tenants of the HOA. What rights do they have?

Being an unintended "landlord" (cont.)

Evictions

- Holdover vs. Non-Payment
- Borrower Occupied vs. other Tenant occupied
- New NY Law – Effective 6/11/2019
    - Notices Required
        * 10 day notice;
        * 90 day notice (PTFA)
    - Timing
        * Notice of Petition and Petition
            When returnable
            When it must be served
        * 72 hour notice is now 14 day notice
    - No right to collect attorneys' fees
    - Jurisdictions interpreting the law differently
- New CA statewide rent control ordinance effective January 1, 2020 (retroactive to 3/15/19)

Being an unintended "landlord" (cont.)

- Selling the property occupied
- Issues with lender/servicer being a landlord if under 2(b)(2) above the Tenant has a lease that has a term remaining longer than 90 days.
    - Property Manager
    - Notices - 30 day/60 day notice/90 day
    - Receipt requirements: data and timing

Third Party Closings – trials and tribulations getting to an actual closing

- Taxes and water
- Title issues
- Failure to close

Breakout Session 2: Regulatory Compliance Track
Melody 2
9:45-10:45 AM

This panel will discuss FHA Face to Face Litigation, FDCPA compliance for judicial foreclosure states and an in-depth interpretation of Obduskey, Demand/NOD Letter language compliance and the Expansion of Mortgage Servicer regulation in NJ.

Speakers:

- Andrew Houha, Esq., Senior Attorney, Johnson, Blumberg & Associates, LLC, andrew@johnsonblumberg.com – Moderator
- Oliver Ayon, Esq., Compliance Attorney, Stern & Eisenberg oayon@sterneisenberg.com
- Jennifer Fitzwater, Esq., Partner, Fitzwater Mercer, jfitzwater@fitzwatermercer.com

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Andrew manages the strategic operations of the firm. Since joining Johnson, Blumberg & Associates, LLC in 2008, he has served as the firm's bankruptcy managing attorney and its Wisconsin lead trial attorney, having handled hundreds of contested bankruptcy and foreclosure matters in his career. He has over twenty five years of bankruptcy and foreclosure experience, beginning his career as a debtor's attorney with a small consumer bankruptcy firm where he became fully versed in all aspects of real estate closing and eviction matters, both tenant and landlord side. From 1999 until 2007 he operated as a senior-level attorney for Fisher and Fisher, Attorneys at Law P.C. In that position, he was instrumental in building that majority of the processes, procedures and operations of the firm's bankruptcy practice. Andrew also acted as a lead facilitator and panelist at many industry conferences over the years, speaking on a wide range of bankruptcy and foreclosure topics. Andrew graduated from Illinois State University with a Bachelor of Science in Finance and received his Juris Doctorate from Illinois Institute of Technology, Chicago-Kent College of Law in 1993. Andrew is licensed to practice law in Illinois and Wisconsin. Andrew is also licensed to practice in all of the Federal Courts in Illinois, Indiana, and Wisconsin.

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Oliver is a graduate of Rutgers University – New Brunswick, where he graduated in 2006 with a degree in Political Science, Criminal Justice, and Sociology. Oliver later attended Rutgers University – Camden School of Law where he earned his J.D. in 2011 and was awarded the highest honors upon graduation in the Civil Practice Clinic for his work with providing legal services for the community on behalf of the Law School. In addition to regulatory compliance, his practice is focused on bankruptcy, litigation, and mortgage foreclosure. Oliver also teaches Continuing Education classes for the Real Estate Program in New Jersey wherein he provides insight and knowledge to realtors in the matters of REO, Short Sales and Mortgage Foreclosures.

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Ms. Fitzwater is a partner with Fitzwater Mercer, a majority women- owned law firm. Ms. Fitzwater joined the firm in 2000. She has over eighteen (18) years of experience in a wide array of areas, including extensive experience with creditors' rights, foreclosure, bankruptcy, commercial workouts, litigation and commercial and

retail collections. Ms. Fitzwater's focus on banking law is complemented by her prior experience in the retail banking industry in various management positions. She continues to use her experience in creditor's matters on behalf of her clients. Ms. Fitzwater has skillfully represented creditors in bankruptcy court litigation, state court foreclosures, and litigated title claims.

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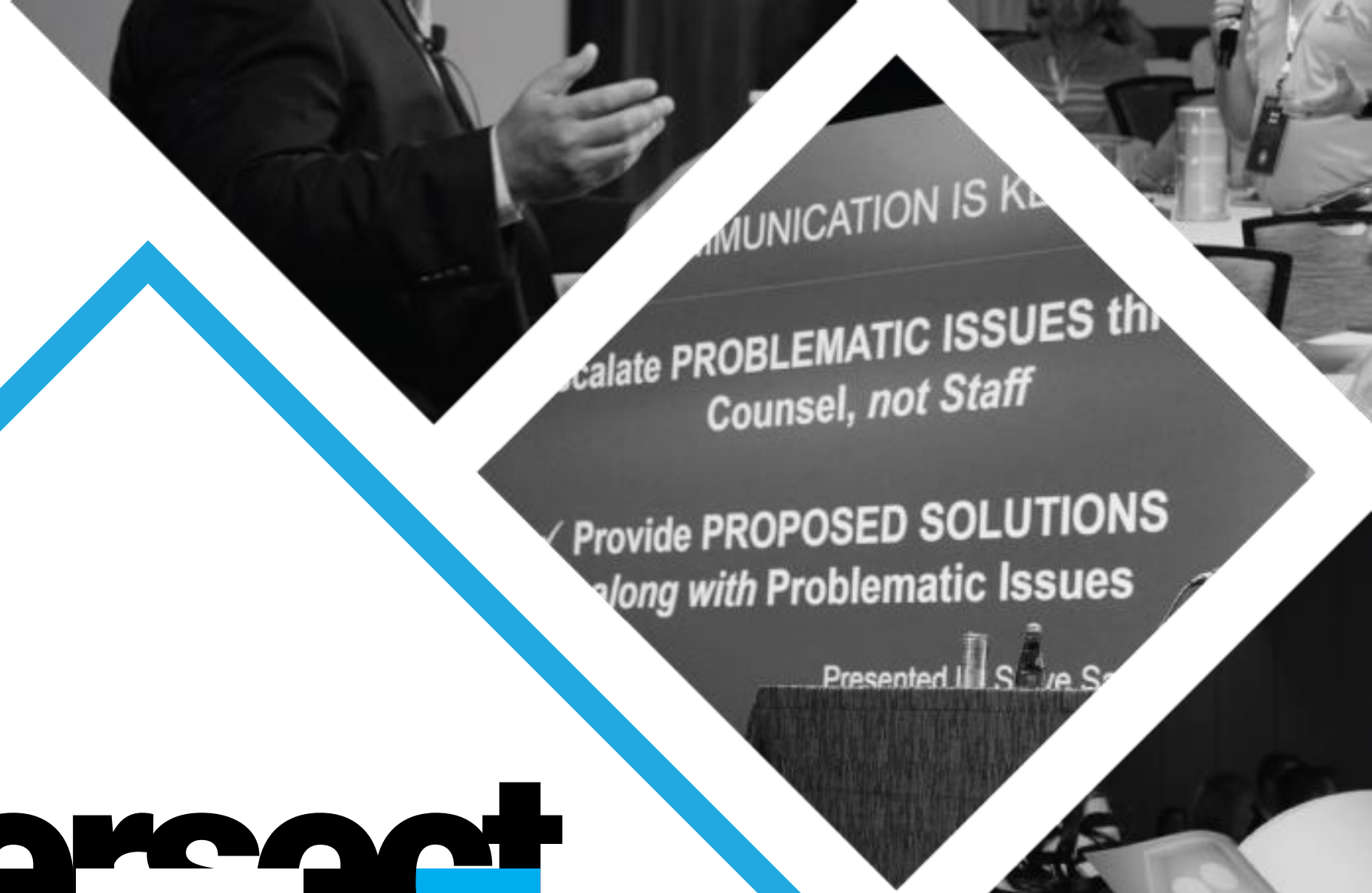

intersect

servicing + foreclosure

intersect

BREAKOUT SESSION 2

REGULATORY COMPLIANCE: Hot Topics

MELODY 2

Time 9:45 – 10:45

REGULATORY COMPLIANCE

Ensuring that your servicing processes, procedures and documentation comply with state and federal laws and regulations is essential to managing a default loan portfolio as a loan moves though the foreclosure process.

Today we will be covering four areas that demand accurate records to have a valid foreclosure:

- New Jersey Mortgage Servicer Regulation Expansion
- Demand/NOD Letter Compliance
- FDCPA Compliance in Judicial and Non-Judicial States
- FHA Face-to-Face Compliance

INTERSECT | PRESENTERS

Moderator

Andrew Houha
Senior Attorney
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Speaker

Oliver Ayon
Compliance Attorney
Stern & Eisenberg
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Speaker

Jennifer R. Fitzwater
Managing Partner
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NJ Mortgage Servicer Reg. Expansion

10 Significant Changes to New Jerse Foreclosure Process in 2019-20

- A664 – Mediation Expansion and Lender Subsidization Bill
- A4997 – Mortgage Servicer's Licensing Act
- A4999 – Property Preservation and Notice Bill
- A5001 – Statute of Limitations Bill
- A5002 – Common Interest Community Bill
- S3411 – NOI, Receivership and Reinstatement Bill
- S3413 – Vacant and Abandoned Property Bill
- S3416 – Licensed Lender Bill
- S3464 – Sheriff's Sale Bill
- New Jersey NOI Changes

NJ Mortgage Servicer Reg.

Code	Legislation	What you need to do to be compliant?	Effective Date
A5001	Statute of Limitations Bill	• Less "active" compliance measures required than with some of the other legislation • Be aware of the shift in legal landscape…closely monitor loans originated on / after 4/29/19 that go into default. Do not hesitate to refer / initiate foreclosure process following default	Effective Immediately
A5002	Common Interest Community Bill	• Does not impose new requirements on Servicers / Lenders • Anticipate Litigation – legislation appears to include Homeowner's Associations ("HOA") • Sets the stage for a showdown with HOAs	Effective Immediately
S3416	Licensed Lender Bill	• Need to determine if Plaintiff / Lender needs to be licensed or is exempt • We recommend including the exact statutory language in your NOIs ("Lender is either licensed…. or exempt….")	Effective Immediately
S3413	Vacant & Abandoned Property Bill	• Not significant to our operation as the "standard" process is more expeditious	May 29, 2019
A4997	Mortgage Servicer's Licensing Act	• Determine applicability / Review potential exemptions (exemptions exist for credit unions / federally insured banks) • "Servicer" is defined broadly – comports with common understanding • Get licensed!! (if necessary)	July 28, 2019 - Sunday 90th day following enactment

NJ Mortgage Servicer Reg.

Code	Legislation	What you need to do to be compliant?	Effective Date
A4999	Property Preservation & Notice Bill	• Designate a property manager / service agent located in the State of New Jersey. • Identify these individuals for us at referral • S&E will identify itself as the service agent absent a specific directive to the contrary	July 28, 2019 - Sunday
S3464	Sheriff Sale Bill	• Understand adjournments have become significantly more restrictive • Prepare to make applications for additional adjournments as soon as 2nd adjournment is used (DON'T WAIT!!!) • S&E will make fee requests for the motion as soon as the 2nd adjournment is used. Practically, it may not be possible to make such an application on the day of sale if both adjournments were previously used. This could result in an binary decision: proceed as scheduled or cancel the sale.	July 28, 2019 - Sunday
S3411	NOI, Receivership & Reinstatement Bill	• Include the necessary language in NOIs, track NOI expiration dates…re-send when necessary	August 1, 2019
A664	Mediation Expansion and Lender Subsidization Bill	• Dedicate personnel to track mediations and appear (telephonically) at same • Amend NOI to include notice of mediation availability	November 1, 2019 1st day of the 7th month following enactment
A5000	Residential Property – Foreclosure - Notice - Database	• Requires Department of Community Affairs to maintain database for covered properties – affordable housing... • Provide copy of NOI to clerk of municipality; municipal housing liaison, if there is one; and Community Affairs Department.	April 1, 2020

NJ Mortgage Servicer Reg. Expansion

NEW JERSEY NOI - 2A:50-56 AFTER THE NEW JERSEY 9 – THEN APRIL 2020…

The Original Elements

(b) Notice , in writing, sent via registered or certified mail, *return receipt requested*, to the last known address, and property address, if different. (c) Notice reasonably calculated to convey the following information:

1. Real estate subject to mortgage
2. Nature of default claimed
3. Right to cure under 2A:50-57
4. What is needed to cure the default by a certain date in #5 below
5. Date deadline to cure, which is at least 30 days out from notice date. Also, give name, address and number of person to tender payments to;
6. Notice that if obligation not cured, that debtor's interests in property may be terminated through proceeding in competent court.
7. If we take legal action, Debtor may still have right to cure but will responsible for fees and costs accrued, not to exceed allowable fees and costs.
8. If mortgagor is allowed to transfer interest in property then transferee may be able to cure default.
9. Debtor should get counsel and if cannot afford one then seek legal aid assistant. (List of bar associations)
10. Availability of financial assistance; List programs promulgated by commissioner for benefit of homeowners. (Affordable housing and NJHMFA info if aff. hous.)*
11. The name of the *lender* and telephone number of representative.

…

Notice not required if property was voluntarily surrendered…

New Items*

12. If lender takes steps to foreclose then there is mediation available. Notice to comply with new mediation program.
13. Debtor is entitled to a housing counselor at no cost to debtor
14. If 1-4 unit residential property and not maintained, then receivership may be sought.
15. Whether or not the *lender* is licensed or exempt under NJ residential mortgage licensing act.

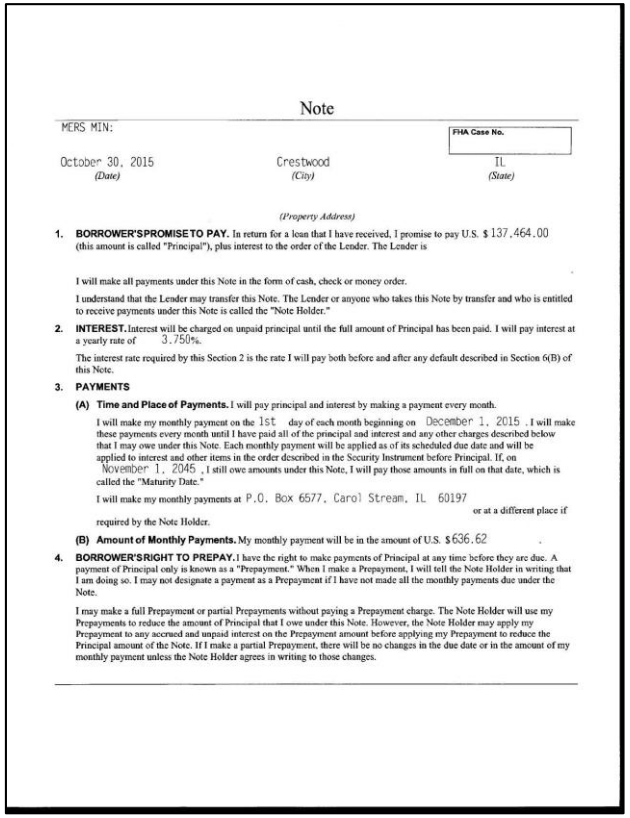
g. Action must be commenced within 180 days from date of notice (and after time under 5 expires…) After 180 new notice required.

Demand/NOD Letter Compliance

A CONTRACTUAL RELATIONSHIP – The note and mortgage are a written contract between the borrower and lender. In order to foreclose, a plaintiff must comply with the terms of the contract.

Obligations Under the Note

- Borrower promises
  - To pay on a monthly basis the repayment of the principal balance of the loan
  - Failure to pay in primary reason for a default under the note.
- Lender must provide notice of the default. Notice must:
  - Be in writing
  - State the amount of the overdue payment
  - The failure to pay the past due payment by a certain date may require immediate payment
  - Notice sent to the property address or notice address to all borrowers who signed the note



Note

MERS MIN:

FHA Case No.

October 30, 2015 (Date) Crestwood (City) IL (State)

(Property Address)

1. **BORROWER'S PROMISE TO PAY.** In return for a loan that I have received, I promise to pay U.S. $ 137,464.00 (this amount is called "Principal"), plus interest to the order of the Lender. The Lender is

I will make all payments under this Note in the form of cash, check or money order.

I understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder."

2. **INTEREST.** Interest will be charged on unpaid principal until the full amount of Principal has been paid. I will pay interest at a yearly rate of 3.750%.

The interest rate required by this Section 2 is the rate I will pay both before and after any default described in Section 6(B) of this Note.

3. **PAYMENTS**

(A) Time and Place of Payments. I will pay principal and interest by making a payment every month.

I will make my monthly payment on the 1st day of each month beginning on December 1, 2015 . I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied as of its scheduled due date and will be applied to interest and other items in the order described in the Security Instrument before Principal. If, on November 1, 2045 , I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

I will make my monthly payments at P.O. Box 6577, Carol Stream, IL 60197 or at a different place if required by the Note Holder.

(B) Amount of Monthly Payments. My monthly payment will be in the amount of U.S. $ 636.62 .

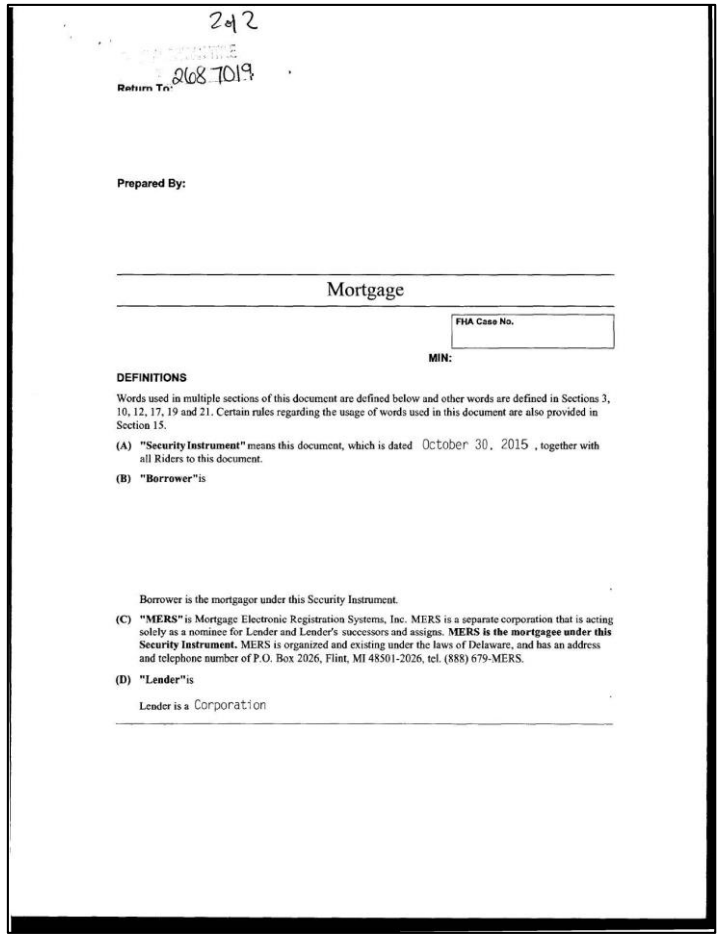
4. **BORROWER'S RIGHT TO PREPAY.** I have the right to make payments of Principal at any time before they are due. A payment of Principal only is known as a "Prepayment." When I make a Prepayment, I will tell the Note Holder in writing that I am doing so. I may not designate a payment as a Prepayment if I have not made all the monthly payments due under the Note.

I may make a full Prepayment or partial Prepayments without paying a Prepayment charge. The Note Holder will use my Prepayments to reduce the amount of Principal that I owe under this Note. However, the Note Holder may apply my Prepayment to any accrued and unpaid interest on the Prepayment amount before applying my Prepayment to reduce the Principal amount of the Note. If I make a partial Prepayment, there will be no changes in the due date or in the amount of my monthly payment unless the Note Holder agrees in writing to those changes.

Demand/NOD Letter Compliance

Obligations under the mortgage – Judicial state typical requirements

- Lender must provide notice of default prior to commencing a foreclosure, must be in writing and sent to the mortgagors at the designated notice address
- Language found in a mortgage in a judicial state – The notice shall specify
  - The default
  - The action required to cure the default
  - A date to cure the default (not less than 30 days)
  - That failure to cure the default on or before the date in the notice may result in acceleration, foreclosure by ***judicial proceeding*** and sale of the property
  - That the borrower has a right to reinstate after acceleration
  - That the borrower has the ***right to assert in a foreclosure proceeding*** the non-existence of a default or any other defense to acceleration or foreclosure



2 of 2

Return To: 268 7019

Prepared By:

Mortgage

FHA Case No.

MIN:

DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 10, 12, 17, 19 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 15.

(A) **"Security Instrument"** means this document, which is dated October 30, 2015, together with all Riders to this document.

(B) **"Borrower"** is

Borrower is the mortgagor under this Security Instrument.

(C) **"MERS"** is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. **MERS is the mortgagee under this Security Instrument.** MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS.

(D) **"Lender"** is

Lender is a Corporation

Demand/NOD Letter Compliance

Obligations under the mortgage – Non-Judicial state typical requirements

- Lender must provide notice of default prior to commencing a foreclosure, must be in writing and sent to the mortgagors at the designated notice address

- Language found in a mortgage in a non-judicial state – The notice shall specify
  - The default
  - The action required to cure the default
  - A date, not less than 30 days from the date of the notice to cure the default
  - That failure to cure the default on or before the date specified in the notice may result in acceleration of the amounts secured by the mortgage, ***and sale of the property***
  - That the borrower has a right to reinstate after acceleration
  - That the borrower has the ***right to bring a court action*** to assert the non-existence of a default or any other defense to acceleration or foreclosure

Demand/NOD Letter Compliance

A well documented process is the best defense when a borrower claims the demand letter has not been sent or does not have the necessary language –

- Mailing – Document processes and standard timing of when the letter is mailed.
  - Standard date of mailing
  - Saving image of letter sent
  - Training staff to understand and follow the process when the demand letter is being sent
  - Proper notes entered in your CMS to record events as they occur

- Language in Letter –
  - Tailor letter to ensure correct language is used for each state and/or mortgages
  - Recognize differences in language used for judicial foreclosures v. non-judicial foreclosures
  - Attempt to use the exact language found in the mortgage

Demand/NOD Letter Compliance

Court Opinions

Cathay Bank v. Accetturo, 2016 IL App (1st) 152783 – Failure to mail demand notice that contains the necessary language required by the mortgage will result in dismissal of the action for failing to comply with the condition precedent in the mortgage

Bank of N.Y. Mellon v. Johnson, 185 So. 3d 594 (Florida) – There must be substantial compliance with the conditions precedent in order to authorize performance with the mortgage and without evidence of some prejudice, the breach of a condition precedent does not constitute a defense to the contract.

U.S. Bank N.A. v. Gold, 2019 IL App (2d) 180451 – A technical defect will not warrant dismissal absent allegation claiming prejudice in the technical defect. The defendant availed himself to assert defenses to the foreclosure and as such, was not prejudiced when the demand notice stated the mortgagor had the right to bring an action rather than raise as a defense in a foreclosure action.

FDCPA Compliance

FHA and Compliance with FDCPA

- FHA Face to Face requirement and the FDCPA

- If a law firm is defined as a “debt collector” under the FDCPA, and has otherwise complied with the Act, has the law firm violated any provision of the FDCPA if the lender or servicer did not meet the pre-requisite requirements of the FHA provisions regarding a mortgage foreclosure?

FDCPA Compliance

What is a “debt” under the FDCPA?

- What is a “debt” under the Fair Debt Collection Practices Act (FDCPA)?

- 15 USC §1692a(5) The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

FDCPA Compliance

What is a “debt collector” under the FDCPA

- How is “debt collector” defined under the Fair Debt Collection Practices Act (FDCPA)?

- **15 U.S.C. §1692a(6)** The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another… For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include –

FDCPA Compliance

U.S. Supreme Court Decides *Obduskey*

- ***Obduskey v. McCarthy & Holthus*** , 139 U.S. 1029 (2019)

- Decided on March 20, 2019 it AFFIRMED the ruling of the U.S. Court of Appeals, Tenth Circuit holding in *Obduskey v. Wells Fargo*, 879 F. 3d 1216 (2018), that the "FDCPA does not apply to non-judicial foreclosure proceedings."

- More specifically, the Supreme Court of the United States held that "The debt-collector-related provisions of the FDCPA (with the exception of §1692(f)(6)) do not apply to those who, like McCarthy, are engaged in no more than security-interest enforcement."

FDCPA Compliance

How do we apply *Obduskey?*

- FOR THOUGHT: What does *Obduskey* do to *Heintz v. Jenkins*, 514 U.S. 291 (1995) which held that a lawyer who "regularly" *through litigation*, tries to collect consumer debts is a "debt collector" under the FDCPA?

- FOR THOUGHT: Are lower courts subsequently applying the new Obduskey standard? *Gagnon v. Hal P. Gazaway and Associations, LLC*, U.S. Dist. Ct., D. Alaska, decided 9-19-19 (unpublished opinion). *Gagnon* was a case of a non-judicial foreclosure under Alaska law. However, Alaska does not have the pre-requisites such as Colorado for its non-judicial foreclosures. Therefore, the court refused to apply *Obduskey* because Alaska's non-judicial foreclosure requirements

- FOR THOUGHT: Is an in rem judicial foreclosure law firm protected by *Obduskey*?

FHA Face-to-Face Compliance

ISSUE: More and more defendants are raising as a defense to foreclosure the failure to properly adhere to HUD regulations that require an attempt to conduct a face to face interview with the borrower before proceeding with foreclosure

24 CFR §203.604 requires:

- A face-to-face interview (or a reasonable attempt to arrange such an interview) with the borrower before three monthly payments are in default, or within 30 days after default in a repayment plan arranged other than during a personal interview and at least 30 days before commencing a foreclosure

- The mortgagee must also (i) Inform the mortgagor that HUD will make information regarding the status and payment history of the mortgagor's loan available to local credit bureaus and prospective creditors; (ii) Inform the mortgagor of other available assistance, if any; (iii) Inform the mortgagor of the names and addresses of HUD officials to whom further communications may be addressed

FHA Face-to-Face Compliance

No face-to-face meeting is required if

- The mortgagor does not reside in the mortgaged property
- The mortgaged property is not within 200 miles of the mortgagee, its servicer, or a branch office of either
- The mortgagor has clearly indicated that he will not cooperate in the interview
- A repayment plan consistent with the mortgagor's circumstances is entered into to bring the mortgagor's account current thus making a meeting unnecessary, and payments thereunder are current, or
- A reasonable effort to arrange a meeting is unsuccessful

Reasonable effort to arrange a face-to-face meeting requires a minimum:

- One letter sent to the mortgagor by certified mail showing that the letter has been dispatched, and
- One trip to see the mortgagor at the mortgaged property, unless the mortgaged property is more than 200 miles from the mortgagee, its servicer, or a branch office of either, or it is known that the mortgagor is not residing in the mortgaged property

FHA Face-to-Face Compliance

Documenting attempts to schedule a face-to-face interview

Letter sent by certified mail

- Copy of the letter
- Certified mail serial number
- Documentation of mailing having been accepted for mailing by the USPS
- Established process and procedures on how and when the letter is mailed
- Case notes in your CMS documenting the entire process

One physical trip to the property address

- Who performs the trip
- Report of attempt should include narrative and photo documentation
- Door hangers
- Case notes in your CMS documenting when attempt was made, by whom and results.

FHA Face-to-Face Compliance

Defending claim of non-compliance of the face-to-face regulation prior to foreclosing:

- The mortgagor does not reside in the mortgaged property
  - The case of the wandering borrower – “I moved back in”
- The mortgaged property is not within 200 miles of the mortgagee, its servicer, or a branch office of either
  - Test applies both to the mortgagee and servicer
  - Servicing Transfers will complicate determination of the 200-mile radius
- The mortgagor has clearly indicated that he will not cooperate in the interview
  - The case of the borrower who will not answer the door or phone but then claim no one attempted to contact him
- A repayment plan consistent with the mortgagor's circumstances is entered into to bring the mortgagor's account current thus making a meeting unnecessary, and payments thereunder are current
  - Failing to accurately document all phone calls with the borrower

FHA Face-to-Face Compliance

Cases of Note:

- ***PNC Bank, N.A. v. Wilson***, 2017 IL App (2d) 151189 – Failure to comply with face-to-face requirements excused after borrowers received Chapter 7 discharge and did not reaffirm the debt.
- ***U.S. Bank Trust, N.A. v. Hernandez***, 2017 IL App (2d) 160850 – Evidence provided by the servicer that a FedEx label was created does not evidence that the document was dispatched. BUT...
  - "We stress that we do not hold today that the use of a private carrier can never satisfy section 203.604(d). We do not reach that issue, because, as plaintiff concedes, proof of dispatch would be required in any case, and we determine here that plaintiff failed to establish as a matter of law that it dispatched the letter."
- ***Donahue v. Fannie Mae***, 2019 U.S. Dist. LEXIS 84460 – Summary judgment entered in favor of plaintiff after evidence submitted supported the finding of compliance with the face-to-face requirements. *Case provides an excellent analysis of the evidence submitted to demonstrate compliance with the face-to-face regulations*

FHA Face-to-Face Compliance

Does FHA face-to-face even apply after HUD insurance has been terminated?

Typical FHA mortgage provides under grounds for default:

- The right to declare a default is “limited by regulations issue by the Secretary in the case of payment default”
- “In many circumstances regulations issued by the Secretary will limit Lender’s rights, in the case of payment defaults, to require immediate payment in full and foreclose if not paid. This Security Instrument does not authorize acceleration or foreclosure if not permitted by regulations of the Secretary”
- BUT “Borrower agrees that if [this note and mortgage] are not determined to be eligible for insurance under the National Housing Act. . .Lender may, at its option require immediate payment in full of all sums secured by [the mortgage]. A written statement of any authorized agent of the Secretary dated [eight months after the date of the mortgage], declining to insure this [mortgage], shall be conclusive proof of such ineligibility.”

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 15. Commerce and Trade
Chapter 41. Consumer Credit Protection (Refs & Annos)
Subchapter V. Debt Collection Practices (Refs & Annos)

15 U.S.C.A. § 1692a

§ 1692a. Definitions

Effective: July 21, 2011

Currentness

As used in this subchapter--

(1) The term "Bureau" means the Bureau of Consumer Financial Protection.

(2) The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium.

(3) The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.

(4) The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.

(5) The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

(6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of

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interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include--

(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

(B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;

(C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;

(D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

(E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and

(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

(7) The term "location information" means a consumer's place of abode and his telephone number at such place, or his place of employment.

(8) The term "State" means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing.

CREDIT(S)

(Pub.L. 90-321, Title VIII, § 803, as added Pub.L. 95-109, Sept. 20, 1977, 91 Stat. 875; amended Pub.L. 99-361, July 9, 1986, 100 Stat. 768; Pub.L. 111-203, Title X, § 1089(2), July 21, 2010, 124 Stat. 2092.)

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Notes of Decisions (607)

15 U.S.C.A. § 1692a, 15 USCA § 1692a
Current through P.L. 116-65.

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KeyCite Red Flag - Severe Negative Treatment
Unconstitutional or PreemptedRecognized as Repealed by Implication Townsend v. Quantum3 Group, LLC, M.D.Fla., July 29, 2015

United States Code Annotated
Title 15. Commerce and Trade
Chapter 41. Consumer Credit Protection (Refs & Annos)
Subchapter V. Debt Collection Practices (Refs & Annos)

15 U.S.C.A. § 1692e

§ 1692e. False or misleading representations

Effective: September 30, 1996

Currentness

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.

(2) The false representation of--

(A) the character, amount, or legal status of any debt; or

(B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

(3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.

(4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

(6) The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to--

(A) lose any claim or defense to payment of the debt; or

(B) become subject to any practice prohibited by this subchapter.

(7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.

(8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.

(9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

(11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

(12) The false representation or implication that accounts have been turned over to innocent purchasers for value.

(13) The false representation or implication that documents are legal process.

(14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

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(15) The false representation or implication that documents are not legal process forms or do not require action by the consumer.

(16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 1681a(f) of this title.

CREDIT(S)

(Pub.L. 90-321, Title VIII, § 807, as added Pub.L. 95-109, Sept. 20, 1977, 91 Stat. 877; amended Pub.L. 104-208, Div. A, Title II, § 2305(a), Sept. 30, 1996, 110 Stat. 3009-425.)

Notes of Decisions (1064)

15 U.S.C.A. § 1692e, 15 USCA § 1692e
Current through P.L. 116-65.

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KeyCite Red Flag - Severe Negative Treatment
Unconstitutional or PreemptedRecognized as Repealed by Implication Townsend v. Quantum3 Group, LLC, M.D.Fla., July 29, 2015
KeyCite Yellow Flag - Negative TreatmentProposed Legislation

United States Code Annotated
Title 15. Commerce and Trade
Chapter 41. Consumer Credit Protection (Refs & Annos)
Subchapter V. Debt Collection Practices (Refs & Annos)

15 U.S.C.A. § 1692f

§ 1692f. Unfair practices

Currentness

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

(2) The acceptance by a debt collector from any person of a check or other payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than ten nor less than three business days prior to such deposit.

(3) The solicitation by a debt collector of any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution.

(4) Depositing or threatening to deposit any postdated check or other postdated payment instrument prior to the date on such check or instrument.

(5) Causing charges to be made to any person for communications by concealment of the true purpose of the communication. Such charges include, but are not limited to, collect telephone calls and telegram fees.

(6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if--

(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;

(B) there is no present intention to take possession of the property; or

(C) the property is exempt by law from such dispossession or disablement.

(7) Communicating with a consumer regarding a debt by post card.

(8) Using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business.

CREDIT(S)

(Pub.L. 90-321, Title VIII, § 808, as added Pub.L. 95-109, Sept. 20, 1977, 91 Stat. 879.)

Notes of Decisions (388)

15 U.S.C.A. § 1692f, 15 USCA § 1692f
Current through P.L. 116-65.

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Cathay Bank v. Accetturo

Appellate Court of Illinois, First District, Second Division

September 30, 2016, Decided

No. 1-15-2783

Reporter
2016 IL App (1st) 152783 *; 66 N.E.3d 467 **; 2016 Ill. App. LEXIS 680 ***; 408 Ill. Dec. 675 ****

CATHAY BANK, f/k/a NAB Bank, Plaintiff-Appellee, v. HELEN R. ACCETTURO; UNITED STATES OF AMERICA, DEPARTMENT OF TREASURY; UNKNOWN OWNERS; UNKNOWN TENANTS; and NONRECORD CLAIMANTS, Defendants (Helen R. Accetturo, Defendant-Appellant).

Prior History: [*1]** Appeal from the Circuit Court Of Cook County. No. 13 CH 21936. The Honorable Daniel Patrick Brennan, Judge Presiding.

Disposition: Reversed.

Counsel: For DEFENDANT-APPELLANT: Eryk Folmer, Chicago, Illinois, Of Counsel Eryk Folmer.

For PLAINTIFF-APPELLEE: Ashen Faulkner, Chicago, Illinois, Of Counsel: Alexander Wright.

Judges: JUSTICE NEVILLE delivered the judgment of the court, with opinion. Presiding Justice Hyman and Justice Pierce concurred in the judgment and opinion.

Opinion by: NEVILLE

Opinion

[**677] [**469]** JUSTICE NEVILLE delivered the judgment of the court, with opinion.

Presiding Justice Hyman and Justice Pierce concurred in the judgment and opinion.

OPINION

[*P1] On September 25, 2013, the plaintiff, Cathay Bank, formerly known as NAB Bank,[1] filed a ***mortgage foreclosure*** action against the defendants, Helen Accetturo; United States of America, Department of Treasury; unknown owners; unknown tenants; and nonrecord claimants, to obtain possession of the property located at 3624 South Paulina Street, Chicago, Illinois, because Accetturo failed to make payments on her note from December 1, 2011, to the present. On June 3, 2014, Accetturo filed an answer and affirmative defenses, which maintained that Cathay Bank failed to satisfy a contractual ***condition precedent*** by failing to submit a notice of acceleration prior to filing the ***foreclosure*** action. On March 5, 2015, the circuit court entered an order granting Cathay Bank's **[***2]** motion for summary judgment. On March 5, 2015, the circuit court also entered a judgment of ***foreclosure*** and sale against Accetturo. On April 3, 2015, Accetturo filed a motion to reconsider. On July 17, 2015, the circuit court entered an order denying the motion to reconsider. On August 27, 2015, the circuit court entered an order approving the report of sale and distribution, confirmed the sale, entered an order of possession, and entered a personal deficiency judgment in the amount of $11,964.86 against Accetturo. The deed was subsequently conveyed to the purchaser on September 9, 2015.[2] On **[**470]** **[****678]** September 25, 2015, Accetturo filed her notice of appeal.

[*P2] We find that a notice provision with an acceleration clause in a ***mortgage*** is a ***condition precedent*** and prescribes servicing requirements that **[***3]** a lender must comply with in order for the lender to have a right to file an action to recover possession of a secured property. *Kingdomware Techs., Inc. v. United States, 579 U.S. , , 136 S. Ct. 1969,*

[1] Cathay Bank informed Accetturo in a March 19, 2012 and in an August 6, 2013 letter that NAB Bank was now known as Cathay Bank.

[2] We take judicial notice of the fact that a deed was conveyed to the purchaser and reported by the Cook County recorder of deeds on September 9, 2015. *Swieton v. Landoch, 106 Ill. App. 3d 292, 299, 435 N.E.2d 1153, 62 Ill. Dec. 181 (1982)* (courts may take judicial notice of a deed filed with the recorder of deeds as such a document is a public record); see also ***Wells Fargo Bank, N.A. v. Simpson, 2015 IL App (1st) 142925, ¶4 n.1, 394 Ill. Dec. 333, 36 N.E.3d 266***.

1978, 195 L. Ed. 2d 334 (2016); *People v. Pomykala, 203 Ill. 2d 198, 205-06, 784 N.E.2d 784, 271 Ill. Dec. 230 (2003)*. We also find that Cathay Bank failed to comply with the ***condition precedent*** in paragraph 21 of the ***mortgage*** and that Cathay Bank's failure to give Accetturo the notice required by paragraph 21 divested the lender of its right to file this ***foreclosure*** action. Because we find that Cathay Bank had no right to file this ***foreclosure*** action, we hold that the circuit court erroneously granted Cathay Bank's motion for summary judgment and abused its discretion when it entered the August 27, 2015, order approving the report of sale and distribution. Accordingly, because Cathay Bank had no right to file this ***foreclosure*** action, we reverse the circuit court's March 5, 2015, order granting Cathay Bank's motion for summary judgment and vacate all subsequent orders because Cathay Bank must comply with the notice of acceleration clause in paragraph 21 of the ***mortgage*** before filing a ***foreclosure*** action.

[*P3] BACKGROUND

[*P4] On January 17, 2003, Accetturo executed a note and ***mortgage*** in the amount of $141,000 naming "NAB BANK, IT'S [*sic*] SUCCESSORS AND/OR ASSIGNS," now Cathay Bank, **[***4]** as the lender. The ***mortgage*** contained a "Transfer of the Property or a Beneficial Interest in Borrower" provision in paragraph 17 which provided:

> "If all or any part of the Property or any interest in it is sold or transferred (or if a beneficial interest in Borrower is sold or transferred and Borrower is not a natural person) without Lender's prior written consent, Lender may, at its option, require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if exercise is prohibited by federal law as of the date of this Security Instrument.
>
> If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is delivered or mailed within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower."

[*P5] The ***mortgage*** also contained an "Acceleration; Remedies" clause in paragraph 21 which provided:

> "Lender shall give notice to Borrower **[***5]** prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under paragraph 17 unless applicable law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is **[**471]** **[****679]** given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, ***foreclosure*** by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the ***foreclosure*** proceeding the non-existence of a default or any other defense of Borrower to acceleration and ***foreclosure***. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding. Lender shall be entitled to collect all expenses incurred in pursuing **[***6]** the remedies provided in this paragraph 21, including, but not limited to, reasonable attorneys' fees and costs of title evidence."

[*P6] Cathay Bank sent several letters to Accetturo:

i. On November 22, 2011, Cathay Bank mailed a letter informing Accetturo that her loan with Cathay Bank was "seriously delinquent," that "$8,4205.29" [*sic*] was past due, and that Accetturo should call Cathay Bank to resolve the matter;

ii. On January 24, 2012, Cathay Bank mailed a second letter to Accetturo stating that the loan was "seriously delinquent," stating that amount past due on the loan was $8700.83, and urging Accetturo to call Cathay Bank to resolve the matter;

iii. On March 13, 2012, Cathay Bank mailed a third letter, informing Accetturo that the loan was "seriously delinquent," and stating that the amount past due on the loan was $12,183.48, which included the actual loan payments plus late fees, and an estimate of collection fees and costs. This notice also urged Accetturo to call Cathay Bank to resolve the matter;

iv. On March 19, 2012, Cathay Bank mailed a fourth letter to Accetturo entitled "Notice of Intent to

Foreclose." This letter informed Accetturo that "Events of Default *** as defined **[***7]** in the Loan Documents, have occurred and are continuing as a result of [Accetturo's] failure to pay to make [*sic*] required monthly payments to [Cathay Bank] that were due on the 1st of the month for the months of December 2011 through March 2012. In addition, the next payment due of April, 2012." The letter further stated "[u]nless Cathay Bank is in receipt of a cashiers [*sic*] check or certified funds for the full amount of the balance due [$11,912.99] on or before April 10, 2012, Cathay Bank may exercise its rights and remedies as provided for in the Guaranty and other related loan documents;" and

v. On August 6, 2013, Cathay Bank mailed a fifth letter to Accetturo, through counsel, entitled "Notice of Default and Acceleration." This letter informed Accetturo that "pursuant to paragraph 21 and 17 of the ***Mortgage***, the Loan is now accelerated and the entire loan is due." Accetturo was instructed to pay $78,193.65 no later than September 6, 2013. In the event the loan amount was not paid by the deadline, the notice informed Accetturo that Cathay Bank "may pursue all its rights and remedies to enforce **[**472]** **[****680]** the loan documents, including ***foreclosure*** without additional notice or demand."

[*P7] On September **[***8]** 25, 2013, Cathay Bank filed a ***mortgage foreclosure*** action against the defendants, involving the property located at 3624 South Paulina Street, Chicago, Illinois, because Accetturo failed to make payments on her note and ***mortgage*** from December 1, 2011, to the present. On October 2, 2013, "unknown occupants" were served personally through "abode service" by leaving a copy of the summons and complaint with Zayra Garcia, a member of the household, at 3624 S. Paulina Street, Chicago, Illinois. On October 3, 2013, Accetturo was personally served with summons and a copy of the complaint at 2543 S. Lowe Avenue #1, Chicago, Illinois. On October 7, 2013, the United States of America, Department of Treasury was served with corporate service on Joann Contreras, a receptionist, at 219 S. Dearborn Street, Chicago, Illinois.

[*P8] On September 25, 2013, Cathay Bank filed an affidavit of service by publication on the defendants, unknown owners, unknown tenants, and nonrecord claimants. *735 ILCS 5/2-206* (West 2012); *735 ILCS 5/15-1502(c)* (West 2012). The notice was published in the Chicago Daily Law Bulletin on September 30, 2013; October 7, 2013; and October 14, 2013. On November 13, 2013, United States Attorney Zachary Fardon filed an appearance **[***9]** for the United States of America, Department of Treasury, and filed an answer to the complaint.

[*P9] On February 13, 2014, Cathay Bank filed a motion for entry of an order of default against Accetturo and unknown owners, unknown tenants, and nonrecord claimants; requested summary judgment against the United States of America, Department of Treasury; and requested a judgment of ***foreclosure*** and sale against the defendants. Cathay Bank also filed the loss mitigation affidavit of its employee, Janie Yang, on February 13, 2014.

[*P10] On May 8, 2014, the circuit court entered an order giving Accetturo until June 5, 2014, to file an appearance or to answer or otherwise plead to the complaint. That same day, Accetturo's attorney, Thomas L. Burdelik, filed an appearance on her behalf. On June 3, 2014, Accetturo filed a verified answer and an affirmative defense. In her affirmative defense, Accetturo alleged that Cathay Bank failed to satisfy a contractual ***condition precedent*** by failing to submit a notice of acceleration prior to filing the ***foreclosure*** action. Specifically, in paragraphs 6 through 9 of her affirmative defense, Accetturo alleged the following:

"6. NAB Bank [Cathay Bank], its successors or **[***10]** assigns and plaintiff failed to provide ACCETTURO any notice that a failure to cure the alleged defaults may result in '***foreclosure*** by judicial proceeding and sale of the Property.'

7. NAB Bank [Cathay Bank] and plaintiff have failed to meet a ***condition precedent*** of the ***mortgage*** when it failed to mail or deliver an adequate notice of acceleration to ACCETTURO as required by Section 21 of the alleged ***mortgage***.

8. ACCETTURO was denied a good faith opportunity, pursuant to the alleged ***mortgage*** and the obligations of BAC to avoid acceleration and ***foreclosure***.

9. The failure to provide a proper acceleration notice prior to filing this ***foreclosure*** action would require dismissal of this action." On July 16, 2014, Cathay Bank filed its response to Accetturo's affirmative defense denying the allegations.

[*P11] **[****681]** **[**473]** On September 22, 2014, Cathay Bank filed a motion for entry of an order of

default against unknown owners, unknown tenants, and nonrecord claimants; for summary judgment against Accetturo and the United States of America, Department of Treasury; and for a judgment of ***foreclosure*** and sale against the defendants. In its motion, Cathay Bank maintained that (i) defendants unknown owners, unknown tenants and **[***11]** nonrecord claimants are in default pursuant to *section 5/15-1502(c)(2)* of the Illinois ***Mortgage Foreclosure*** Law (*735 ILCS 5/15-1502(c)(2)* (West 2012)) and a judgment of ***foreclosure*** should be entered against them; (ii) Accetturo is in default on the note and ***mortgage*** and has failed to establish that she made payment from December 1, 2011, to the present, thereby failing to raise an issue of fact that would prevent summary judgment; and (iii) Accetturo's affirmative defense is void and does not raise a fact issue that would prevent summary judgment as Cathay Bank has provided evidence to establish that all proper notices were mailed to Accetturo.

[*P12] On January 8, 2015, the circuit court entered an order allowing Accetturo's previous counsel, the Burdelik Law Group, to withdraw its appearance and granted the Law Office of Mark A. Laws leave to file its appearance on behalf of Accetturo, *instanter*. That same day, Mark Laws filed an appearance on behalf of Accetturo. On January 8, 2015, Accetturo filed a motion to dismiss pursuant to *section 2-619*. *735 ILCS 5/2-619* (West 2012). In her motion to dismiss, Accetturo maintained that Cathay Bank's failure to comply with *section 15-1503(b)* of the *Illinois* ***Mortgage Foreclosure*** *Law* (*735 ILCS 5/15-1503(b)* (West 2012) and issue a copy of the notice of ***foreclosure*** **[***12]** to the alderman for the 11th ward or file an affidavit of compliance with this rule within 10 days of filing the complaint, should result in dismissal of the complaint without prejudice.

[*P13] On February 5, 2015, Accetturo filed a response to Cathay Bank's motion for summary judgment. In this response, Accetturo maintained that (i) Cathay Bank's failure to comply with *section 15-1503(b)* of the Illinois ***Mortgage Foreclosure*** Law (*735 ILCS 5/15-1503(b)* (West 2012) and issue a copy of the notice of ***foreclosure*** to the alderman for the 11th ward or file an affidavit of compliance with this rule within 10 days of filing the complaint, precludes summary judgment and (ii) Cathay Bank failed to properly follow the notice guidelines provided in paragraph 21 of the ***mortgage***.

[*P14] On February 19, 2015, Cathay Bank filed its reply and maintained that (i) Accetturo's answer to the complaint failed to raise an issue of fact, specifically it failed to offer proof that payment was made on the note after December 1, 2011; (ii) *section 15-1503* of the Illinois ***Mortgage Foreclosure*** Law (*735 ILCS 5/15-1503* (West 2012)) does not apply because the real property at issue in this case is not "residential real estate" as defined in the statute; (iii) Accetturo cannot raise a new affirmative **[***13]** defense in her response brief that was not pled in her answer and her *section 15-1503* defense was not pled in her answer; and (iv) Accetturo admits to receiving several notices from Cathay Bank which is contrary to her position in her answer and fails to raise a fact issue to prevent summary judgment.

[*P15] On March 5, 2015, the circuit court entered an order denying Accetturo's *section 2-619* motion to dismiss pursuant to *section 15-1503(b)* of the Illinois ***Mortgage Foreclosure*** Law. *735 ILCS 5/15-1503(b)* (West 2012). In its order, the court found that "at the time of the filing of the complaint, the property was not residential real estate as defined in *735 ILCS 5/15-1219* **[****682]** **[**474]** [of the Illinois ***Mortgage Foreclosure*** Law] since the property was not [Accetturo's] principal residence."

[*P16] However, on March 5, 2015, the circuit court granted Cathay Bank's motion for default against unknown owners, unknown tenants, and nonrecord claimants and granted Cathay Bank's motion for summary judgment against Accetturo and the United States of America, Department of Treasury. The circuit court also entered a judgment of ***foreclosure*** and sale against the defendants on March 5, 2015, and found that the notices provided to Accetturo satisfied the ***mortgage*** requirements. The record does not contain a transcript **[***14]** or a bystander's report of the March 5, 2015, proceedings.

[*P17] On April 3, 2015, Accetturo filed a motion to reconsider the circuit court's March 5, 2015, order that granted Cathay Bank's motion for summary judgment. In her motion to reconsider, Accetturo argued that Cathay Bank failed to comply with the notice requirements of paragraph 21 of the ***mortgage***, and as a result, it was improper for the circuit court to grant summary judgment. On June 30, 2015, Cathay Bank filed a response to Accetturo's motion to reconsider. In its response, Cathay Bank argued that (i) Accetturo's motion to reconsider is improper because she did not make any claim as to changes in the law or newly discovered evidence, (ii) Accetturo's notice argument was waived by not making the argument in her answer to the complaint, (iii) the notice argument is not a proper

affirmative defense, and (iv) notice was proper under the ***mortgage***. On July 8, 2015, Accetturo filed her reply in support of her motion to reconsider. In her reply, Accetturo argued that (i) her notice arguments are proper and valid, (ii) lack of adequate notice barred Cathay Bank from bringing suit, and (iii) the notice was improper under the ***mortgage***. **[***15]**

[*P18] On April 27, 2015, the Judicial Sales Corporation, the selling officer, filed a proof of mailing notice of sale to Accetturo's attorney; to the United States of America, Department of Treasury; and to unknown owners, unknown tenants, and nonrecord claimants. A public notice of sale was published in the Cook County Chronicle on April 29, 2015; May 6, 2015; and May 13, 2015. A public notice of sale was also published in the Chicago Sun-Times on April 29, 2015; May 6, 2015; and May 13, 2015. On June 8, 2015, the property was sold at public auction for $90,000 and the report of sale and distribution, the receipt of sale, and the certificate of sale were filed on June 17, 2015. On June 17, 2015, Cathay Bank filed a motion for order approving the report of sale and distribution and for entry of an order of possession.

[*P19] On July 17, 2015, the circuit court entered an order denying Accetturo's motion to reconsider "for the reasons stated on the record." The circuit court also found that Accetturo's notice argument was not a proper affirmative defense and that Cathay Bank's letters complied with the notice requirements under the ***mortgage***. In reaching this conclusion, the circuit court found that **[***16]** there were procedural deficiencies with the notice argument and further found:

> "It could have been brought—I know a motion to dismiss was brought regarding the notice to the alderman, et cetera. It could have been made part of that or it could have been brought otherwise.
>
> So I don't think it's a valid affirmative defense. But even putting—notwithstanding that, I should say, to me, I indicated last time, I believe that the—the letters—that the multiple letters—particularly the last one—were sufficient to comply with the provision of the ***mortgage***.
>
> **[**475]** **[****683]** I think unquestionably it specifically complied with really the critical portions of that paragraph [paragraph 21].
> ***
> So your motion to reconsider is denied."

[*P20] On August 7, 2015, Accetturo filed her response to Cathay Bank's motion for order approving the report of sale and distribution and for entry of an order of possession. In her response, Accetturo argued that (i) the sale violated *section 15-1508* of the Illinois ***Mortgage Foreclosure*** Law (*735 ILCS 5/15-1508(b)* (West 2012)) because the below-market sale price was unconscionable and (ii) Cathay Bank failed to properly follow the notice guidelines provided in paragraph 21 of the ***mortgage***, and therefore, confirming the sale would **[***17]** violate *sections 15-1508(b)(iii)* and *(iv)* of the Illinois ***Mortgage Foreclosure*** Law. *735 ILCS 5/15-1508(b)(iii)*, *(iv)* (West 2012).

[*P21] On August 20, 2015, Cathay Bank filed a reply in support of its motion for an order approving the report of sale and distribution and for entry of an order of possession. In its reply, Cathay Bank maintained that (i) when a judicial sale is conducted in accordance with Illinois law, the sale price is the most accurate measure of the property's value and Accetturo has failed to establish that the terms of the sale were unconscionable and (ii) Accetturo's notice argument has been previously ruled upon and rejected and is outside of the scope of *section 15-1508* of the Illinois ***Mortgage Foreclosure*** Law. *735 ILCS 5/15-1508* (West 2012).

[*P22] On August 27, 2015, the circuit court entered an order approving the report of sale and distribution, confirmed the sale, entered an order of possession, and entered an order finding a personal deficiency in the amount of $11,964.86 against Accetturo. In reaching this conclusion, the court reasoned:

> "The standard is shocking the conscience of a court of equity, and we all understand—it's well-established that you're not going to get the best price and, you know, importantly obviously insufficiency of the price alone is—is **[***18]** not a basis to disturb a judicial sale again unless it shocks the conscience of a court of equity.
> Here again we have—well, the only thing we have is the Zillow report, and again I think beyond it being potentially a questionable foundation for it, it was even—the accuracy of it again I don't think it's something that, based on the number that it was, it wasn't that dramatic and with the lack of accuracy of a Zillow report I think commonly known. I don't think that's sufficient for me to set an evidentiary hearing, that alone, or to conduct any discovery at this point.
> So the motion to approve the sale is granted. Your approving the sale is entered—
> ***
> —for deficiency."

[*P23] On September 25, 2015, Accetturo filed a timely notice of appeal seeking review of the March 5, 2015, order.

[*P24] ANALYSIS

[*P25] Standard of Review

[*P26] We find that Accetturo's notice of appeal requests that this court reverse the order granting summary judgment and the final order approving the report of sale and distribution. The standard of review for an order granting a motion for summary judgment is *de novo* (*Williams v. Manchester, 228 Ill. 2d 404, 417, 888 N.E.2d 1, 320 Ill. Dec. 784 (2008)*), and the standard of review for an order approving a sale and distribution is an abuse of discretion. **[****684]** **[**476]** *Household Bank, FSB v. Lewis, 229 Ill. 2d 173, 178, 890 N.E.2d 934, 322 Ill. Dec. 15 (2008)*. Finally, we must **[***19]** also interpret a provision in the ***mortgage***, and the interpretation of a contract involves a question of law which we review *de novo*. *Phoenix Insurance Co. v. Rosen, 242 Ill. 2d 48, 54, 949 N.E.2d 639, 350 Ill. Dec. 847 (2011)*; *Carr v. Gateway, Inc., 241 Ill. 2d 15, 20, 944 N.E.2d 327, 348 Ill. Dec. 374 (2011)*.

[*P27] Order Granting Summary Judgment

[*P28] Accetturo argues that the circuit court erred when it granted Cathay Bank's motion for summary judgment because Cathay Bank failed to comply with paragraph 21 of the ***mortgage***, a ***condition precedent***, requiring Cathay Bank to give Accetturo notice, with specific information, prior to accelerating the ***mortgage***. Accetturo argues that Cathay Bank's first four letters make no mention of acceleration and the fifth letter informed Accetturo that ***mortgage foreclosure*** was forthcoming and that her note was accelerated, after acceleration had already taken place.

[*P29] In response, Cathay Bank maintains that it was entitled to summary judgment because Accetturo failed to establish her compliance with the note and ***mortgage***, her notice argument changed throughout the course of the litigation, and her notice argument was not a valid affirmative defense.

[*P30] We note that Accetturo continuously raised her notice argument in pleadings during the litigation. In paragraphs 6 through 9 of her affirmative defense, Accetturo alleged the following:

> **[***20]** "6. NAB Bank [Cathay Bank], its successors or assigns and plaintiff failed to provide ACCETTURO any notice that a failure to cure the alleged defaults may result in '***foreclosure*** by judicial proceeding and sale of the Property.'
>
> 7. NAB Bank [Cathay Bank] and plaintiff have failed to meet a ***condition precedent*** of the ***mortgage*** when it failed to mail or deliver an adequate notice of acceleration to ACCETTURO as required by Section 21 of the alleged ***mortgage***.
>
> 8. ACCETTURO was denied a good faith opportunity, pursuant to the alleged ***mortgage*** and the obligations of BAC to avoid acceleration and ***foreclosure***.
>
> 9. The failure to provide a proper acceleration notice prior to filing this ***foreclosure*** action would require dismissal of this action."

After reviewing the pleadings, we did not find that Accetturo changed her defense throughout the course of this case, nor do we find that Accetturo forfeited this issue. *CitiMortgage, Inc. v. Hoeft, 2015 IL App (1st) 150459, ¶ 9, 395 Ill. Dec. 773, 39 N.E.3d 240*.

[*P31] We note that Illinois law permits a creditor to elect to sue on the note or foreclose on the ***mortgage*** or both. *Abdul-Karim v. First Federal Savings & Loan Ass'n of Champaign, 101 Ill. 2d 400, 407, 462 N.E.2d 488, 78 Ill. Dec. 369 (1984)*. Accetturo maintains that summary judgment was improper because Cathay Bank failed, prior to accelerating the note, to comply with a ***condition precedent*** when it did not send a notice of acceleration **[***21]** to Accetturo as prescribed by paragraph 21 of the ***mortgage***.

[*P32] A "***condition precedent***" is an act that must be performed or an event that must occur before a contract becomes effective or before one party to an existing contract is obligated to perform. *Downs v. Rosenthal Collins Group, L.L.C., 2011 IL App (1st) 090970, ¶21, 963 N.E.2d 282, 357 Ill. Dec. 329*; *McCormick 101, LLC v. State Bank of Countryside, No. 14 C 8539, 2015 U.S. Dist. LEXIS 158383, 2015 WL 7450760, at *3 (N.D. Ill. 2015)*. **[****685]** **[**477]** When a contract contains an express ***condition precedent***, strict compliance with such a ***condition*** is required (*Midwest Builder Distributing, Inc. v. Lord & Essex, Inc., 383 Ill. App. 3d 645, 668, 891 N.E.2d 1, 322 Ill. Dec. 371 (2007)*), and the contract does not become enforceable or effective

until the contract is performed or the contingency occurs. *Midwest Builder Distributing, Inc., 383 Ill. App. 3d at 668*. The failure to perform a ***condition precedent*** may be construed as a breach of contract. *Jones v. Seiwert, 164 Ill. App. 3d 954, 958-59, 518 N.E.2d 394, 115 Ill. Dec. 869 (1987)*; *Hardin, Rodriguez & Boivin Anesthesiologists, Ltd. v. Paradigm Insurance Co., 962 F.2d 628, 633 (1992)*. Finally, courts will enforce express ***conditions precedent*** regardless of the potential for harsh results for the noncomplying party. *Midwest Builder Distributing, Inc., 383 Ill. App. 3d at 668*.

[*P33] A notice of acceleration is a ***condition precedent*** to ***foreclosure*** under Illinois ***Mortgage Foreclosure*** Law. *CitiMortgage, Inc. v. Bukowski, 2015 IL App (1st) 140780, ¶ 16, 389 Ill. Dec. 405, 26 N.E.3d 495* ("If CitiMortgage had not sent an acceleration notice, it would not be entitled to foreclose," therefore not satisfying "a ***condition precedent*** to its right to bring suit.").

[*P34] We must determine (i) whether paragraph 21 of the ***mortgage*** contained a notice of acceleration; (ii) if so, whether Cathay Bank complied with the ***condition precedent*** in paragraph 21 of the ***mortgage*** by giving notice **[***22]** to Accetturo prior to acceleration of the note; and (iii) whether Cathay Bank had a right to file an action of ***foreclosure*** predicated on Accetturo's ***mortgage***.

[*P35] Because paragraph 21 of the ***mortgage*** has been invoked as an affirmative defense to Cathay Bank's ***mortgage foreclosure*** action, we must consider the language in paragraph 21, and specifically how courts have construed the words "shall" and "may" in contracts. The United States Supreme Court has held that "[w]hen a statute distinguishes between 'may' and 'shall,' it is generally clear that 'shall' imposes a mandatory duty." *Kingdomware Techs., Inc. v. United States, 579 U.S. , , 136 S. Ct. 1969, 1977 (2016)*. The Illinois Supreme Court has also held that, the word "shall," in contracts and statutes, has a mandatory connotation unless otherwise stated. *Pomykala, 203 Ill. 2d at 205-06*.

[*P36] Paragraph 21 of the ***mortgage*** repeatedly uses the words "shall," and "may" and required Cathay Bank, the lender, to give Accetturo, the borrower, the following notice:

> "Lender *shall* give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under paragraph 17 unless applicable law provides otherwise). The notice *shall* specify: (a) the default; (b) the action required to **[***23]** cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, ***foreclosure*** by judicial proceeding and sale of the Property. The notice *shall* further inform Borrower of the right to reinstate after acceleration and the right to assert in the ***foreclosure*** proceeding the non-existence of a default or any other defense of Borrower to acceleration and ***foreclosure***. If the default is not cured on or before the date specified in the notice, **[**478]** **[****686]** Lender at its option *may* require immediate payment in full of all sums secured by this Security Instrument without further demand and *may* foreclose this Security Instrument by judicial proceeding. Lender *shall* be entitled to collect all expenses incurred in pursuing the remedies provided in this paragraph 21, including, but not limited to, reasonable attorneys' fees and costs of title evidence." (Emphasis added.)

[*P37] Because the ***mortgage*** contained an acceleration clause that provided "[Cathay Bank] shall give notice to [Accetturo] **[***24]** prior to acceleration," we find that paragraph 21 is a contractual ***condition precedent*** and that Cathay Bank had a mandatory duty to send a notice of acceleration to Accetturo prior to accelerating the ***mortgage***. *Kingdomware, 579 U.S. at , 136 S. Ct. at 1978*; *Pomykala, 203 Ill. 2d at 205-06*; *In re Marriage of Ackerley, 333 Ill. App. 3d 382, 398, 775 N.E.2d 1045, 266 Ill. Dec. 973 (2002)*. Our interpretation is based on the maxim that contract language should be construed most strongly against the maker, Cathay Bank, because the bank chose the words in the ***mortgage***. *Scheduling Corp. of America v. Massello, 119 Ill. App. 3d 355, 361, 456 N.E.2d 298, 74 Ill. Dec. 796 (1983)*; *Farmers & Mechanics Bank v. Davies, 97 Ill. App. 3d 195, 201, 422 N.E.2d 864, 52 Ill. Dec. 655 (1981)* (the ***mortgage*** should be construed against the maker, here, the Bank).

[*P38] In its March 5, 2015, order granting Cathay Bank's motion for summary judgment, the circuit court struck Accetturo's affirmative defenses and found that the "notices provided to Defendant Accetturo satisfied the ***mortgage*** requirements." A reviewing court cannot reverse a finding of fact of the circuit court unless its

finding is against the manifest weight of the evidence. *Corral v. Mervis Industries, Inc., 217 Ill. 2d 144, 154, 839 N.E.2d 524, 298 Ill. Dec. 201 (2005)*.

[*P39] The record reveals that Cathay Bank sent five letters to Accetturo. While we note that the first three letters (November 22, 2011; January 24, 2012; and March 13, 2012) contained the words "seriously delinquent" instead of "default," they were sufficient to put Accetturo on notice that there was a problem. However, the first three letters failed to incorporate **[***25]** the specific information required by paragraph 21: (i) information about what must be done to cure the default, (ii) date on which to cure the default, (iii) information stating that failure to cure the default may result in acceleration of the sums secured by the Security Instrument ***foreclosure*** by judicial proceeding and sale of the Property, and (iv) information about Accetturo's right to reinstate or assert defenses to the acceleration and ***foreclosure***.

[*P40] The fourth letter dated March 19, 2012, does not satisfy the requirements of paragraph 21 in that it fails (i) to mention acceleration, (ii) to provide Accetturo 30 days to cure the default, (iii) to specifically state that the failure to cure the default may result in acceleration of the sums secured by the Security Instrument ***foreclosure*** by judicial proceeding and sale of the Property, and (iv) to inform Accetturo of her right to reinstate or assert defenses to the acceleration and ***foreclosure***.

[*P41] The fifth letter that was sent on August 6, 2013, was a "notice of default and acceleration" and was the first letter that mentioned "acceleration." However, this notice was sent informing Accetturo that the note was already accelerated; **[***26]** it was not a notice prior to acceleration as mandated by paragraph 21 of the ***mortgage***.

[*P42] **[****687]** **[**479]** Here, we find the letters that Cathay Bank sent to Accetturo were not sent prior to acceleration. Moreover, most of the information that Cathay Bank was mandated by paragraph 21 to provide was missing from the five letters. Compare *CitiMortgage, Inc. v. Hoeft, 2015 IL App (1st) 150459, ¶ 11* (the notice provided all of the information except the specific dollar amount to cure the default). Finally, while we note that a technical defect in the notice sent to a mortgagor will not automatically warrant a dismissal of a ***foreclosure*** action (*Bank of Am., N.A. v. Luca, 2013 IL App (3d) 120601, ¶ 15, 999 N.E.2d 361, 376 Ill. Dec. 478)*, we find that Cathay Bank's failure to strictly comply with paragraph 21, by providing Accetturo with specific information prior to accelerating the note, was more than a technical defect. Accordingly, we find that the circuit court's finding that Cathay Bank's letters complied with the ***condition precedent*** contained in the ***mortgage*** was against the manifest weight of the evidence. *Corral, 217 Ill. 2d at 154*.

[*P43] Cathay Bank argues that Accetturo's notice argument fails and cites *CitiMortgage, Inc. v. Bukowski, 2015 IL App (1st) 140780, ¶ 16* as support for its position. The *Bukowski* court found that the circuit court properly struck the defendants' affirmative defenses. The court points out that we review the dismissal **[***27]** of affirmative defenses *de novo*. *Bukowski, 2015 IL App (1st) 140780, ¶ 15*. The *Bukowski* court also found that the defendants' affirmative defenses asserting that the bank failed to send notice attacks the bank's ability to maintain the action, but does not raise a new matter that defeats the claim. *Bukowski, 2015 IL App (1st) 140780, ¶ 16*. Finally, the *Bukowski* court found that if CitiMortgage had not *sent* an acceleration notice, it would not be entitled to foreclose. *Bukowski, 2015 IL App (1st) 140780, ¶ 16*.

[*P44] We find that Cathay Bank's reliance on *Bukowski* is misplaced. Compare *Bankers Life Co. v. Denton, 120 Ill. App. 3d 576, 579, 458 N.E.2d 203, 76 Ill. Dec. 64 (1983)*. In *Denton*, a case where this court was reviewing a bank's failure to comply with a ***mortgage***'s servicing regulations, the court stated:

> "It is evident from the language of the servicing regulations that the mortgagee must comply with these provisions prior to the commencement of a ***foreclosure*** proceeding. Therefore, *** we believe that the failure to comply with these servicing regulations which are mandatory and have the force and effect of law can be raised in a ***foreclosure*** proceeding as an affirmative defense." *Denton, 120 Ill. App. 3d at 579*.

[*P45] We also find that *section 8.1 of the Restatement of Property* makes it clear that the mortgagee is bound by language in a ***mortgage*** that requires additional notice:

> "(a) An acceleration provision is a term in a ***mortgage***, or in the obligation it secures, that **[***28]** empowers the mortgagee upon default by the mortgagor to declare the full ***mortgage*** obligation immediately due and payable. An

> acceleration becomes effective on the date specified in a written notice by the mortgagee to the mortgagor delivered after default." *Restatement (Third) of Property (**Mortgages**) § 8.1* (1997).

Comment b of section 8.1 provides:

> "However, language in the ***mortgage*** documents that requires additional notice to that required by *Subsection (a)* is enforceable." *Restatement (Third) of Property (**Mortgages**) § 8.1 cmt. b*, **[****688]** **[**480]** at 559 (1997).

Paragraph 21 of the ***mortgage*** prescribes additional notice requirements. Therefore, we find the specific requirements enumerated in paragraph 21 of Cathay Bank's ***mortgage*** are enforceable. *Restatement (Third) of Property (**Mortgages**) § 8.1* (1997).

[*P46] In this case, we find (i) that paragraph 21 prescribed Cathay Bank's servicing requirements for the ***mortgage***; (ii) that Accetturo's affirmative defenses contained facts asserting Cathay Bank's letters failed to comply with the servicing requirements by providing the information required by paragraph 21 of the ***mortgage***; (iii) that by failing to comply with the servicing requirements in paragraph 21 of the ***mortgage***, Cathay Bank was estopped from proceeding with the ***foreclosure*** action (*735 ILCS 5/2-613* (West 2012)); and (iv) that Accetturo's affirmative defenses raised new matter—whether Cathay Bank had complied **[***29]** with the ***condition precedent*** or the serving requirements in paragraph 21 of the ***mortgage*** prior to filing the ***foreclosure*** action—and, therefore, were properly raised in this ***foreclosure*** action. *Denton, 120 Ill. App. 3d at 579*. Accordingly, following *Denton*, we hold that the circuit court erred by striking Accetturo's affirmative defenses.

[*P47] Here, unlike *Bukowski*, Accetturo does not maintain that she did not *receive* notice. Instead, she maintains that Cathay Bank sent notice but failed to provide the information required by paragraph 21 of the ***mortgage***. Therefore, Accetturo contends that Cathay Bank's failure to comply with paragraph 21 of the ***mortgage*** divested Cathay Bank of its right to file this ***foreclosure*** action. We agree with Accetturo.

[*P48] In *Abdul-Karim v. First Federal Savings & Loan Ass'n of Champaign, 101 Ill. 2d 400, 407, 462 N.E.2d 488, 78 Ill. Dec. 369 (1984)*, our supreme court held that a ***mortgage*** is a contract and that the provision in the ***mortgage*** for acceleration extends only to the right to foreclose the ***mortgage***:

> "'It has been held by the courts of several States that a provision in a ***mortgage*** for an acceleration of maturity extends only to the right to foreclose the ***mortgage*** and subject the property pledged to the payment or reduction of the debt, and that the ***mortgage*** and note are separate contracts. The ***mortgage*** is applicable **[***30]** to the right to apply the security to the discharge of the debt and the note to the liability of the maker for the payment of that indebtedness.'" *Abdul-Karim, 101 Ill. 2d at 407* (quoting *Conerty v. Richtsteig, 379 Ill. 360, 366-67, 41 N.E.2d 476 (1942)*).

[*P49] In this case, we find that paragraph 21 of the ***mortgage*** (i) is a notice provision with an acceleration clause, (ii) contains specific notice information that the lender has a mandatory duty to provide to the borrower, (iii) imposes a mandatory duty on the lender to provide notice to the borrower prior to acceleration, and (iv) is a ***condition precedent*** which must be complied with for a lender to have a right to file a ***foreclosure*** action. *Kingdomware, 579 U.S. at , 136 S. Ct. at 1978*; *Pomykala, 203 Ill. 2d at 205-06*; see also *Midwest Builder Distributing, Inc., 383 Ill. App. 3d at 668*.

[*P50] We hold that Cathay Bank's failure, prior to acceleration, to provide Accetturo with a notice containing the specific information mandated by paragraph 21 divested the lender of its right to file this ***foreclosure*** action.

[*P51] Finally, because we find that Cathay Bank did not provide Accetturo with **[**481]** **[****689]** the notice mandated by paragraph 21 of the ***mortgage***, we hold that (i) Cathay Bank had no right to file this ***foreclosure*** action, (ii) that Cathay Bank was not entitled to a judgment as a matter of law, and (iii) that the circuit court erroneously entered the order granting Cathay Bank's motion **[***31]** for summary judgment.

[*P52] Order Approving Report of Sale and Distribution

[*P53] Next, we must determine whether the circuit court erred when it entered an order approving the report of sale and distribution. We have already held that the circuit court erred when it entered the order granting Cathay Bank's motion for summary judgment. We find that the order approving the report of sale and distribution relates back to the summary judgment order, which was a step in the procedural progression leading to the final order approving the sale.

[*P54] *Section 15-1508* of the Illinois ***Mortgage***

Foreclosure Law (*735 ILCS 5/15-1508* (West 2012)) has been construed as conferring on the circuit courts broad discretion in approving or disapproving judicial sales, and consequently, a court's decision will not be reversed unless there has been an abuse of discretion. *Household Bank, FSB, 229 Ill. 2d at 178*. Because we find that Cathay Bank did not provide the notice mandated by paragraph 21 of the ***mortgage***, Cathay Bank had no right to file the ***foreclosure*** action against Accetturo. Because Cathay Bank had no right to file the ***foreclosure*** action, the circuit court erred (i) when it granted the motion for summary judgment and (ii) when it permitted the summary judgment order to form the basis **[***32]** for the order approving the sale and distribution. When a bank fails to comply with its servicing requirements and does not give notice to the borrower mandated by a provision in its ***mortgage***, and the circuit court ignores the banks' failure to comply with the ***mortgage***'s servicing requirements, the circuit court abuses its discretion. Therefore, we reverse the circuit court's order approving the report of sale and distribution.

[*P55] Finally, because Cathay Bank did not comply with paragraph 21 of the ***mortgage***, the circuit court's summary judgment order is reversed and all related orders, including the final order approving the report of sale and distribution, are vacated.

[*P56] CONCLUSION

[*P57] Cathay Bank failed to give notice to Accetturo with the specific information required by paragraph 21 of the ***mortgage*** prior to accelerating the note. Therefore, we reverse the circuit court's order granting summary judgment and vacate all other orders.

[*P58] Reversed.

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Bank of N.Y. Mellon v. Johnson

Court of Appeal of Florida, Fifth District

January 29, 2016, Opinion Filed

Case No. 5D14-3626

Reporter
185 So. 3d 594 *; 2016 Fla. App. LEXIS 1157 **; 41 Fla. L. Weekly D 287

THE BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK AS TRUSTEE FOR THE CERTIFICATE HOLDERS CWALT, INC. ALTERNATIVE LOAN TRUST 2006-OA17, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-OA17, Appellant, v. DONNA D. JOHNSON, Appellee.

Subsequent History: Review denied by *Johnson v. Bank of N.Y. Mellon, 2016 Fla. LEXIS 1870 (Fla., Aug. 23, 2016)*

Prior History: **[**1]** Appeal from the Circuit Court for Brevard County, Charles M. Holcomb, Judge.

Counsel: Allison Morat and Ronnie J. Bitman, of Pearson Bitman LLP, Maitland, for Appellant.

Beau Bowin, of Bowin Law Group, West Melbourne, for Appellee.

Judges: WALLIS, J. SAWAYA and EDWARDS, JJ., concur.

Opinion by: WALLIS

Opinion

[*595] WALLIS, J.

Appellant, the Bank of New York Mellon F/K/A the Bank of New York as Trustee for the Certificateholders CWALT, Inc. Alternative Loan Trust 2006-OA17, Mortgage Pass-Through Certificates, Series 2006-OA17 (the "Trust") appeals the trial court's entry of involuntary dismissal in a foreclosure action brought against Donna D. Johnson ("Appellee"). Finding that the trial court erred by determining the Trust failed to comply with the mortgage's pre-foreclosure notice requirements and by excluding various documents obtained from the prior loan servicer, we reverse the entry of involuntary dismissal and remand for a new trial.

On July 24, 2006, Appellee executed a promissory note and accompanying mortgage for $187,000. Appellee defaulted on the mortgage by failing to make payment due August 1, 2009, and all subsequent payments. On May 24, 2010, the Trust filed a complaint to foreclose, and the case proceeded to a non-jury **[**2]** trial on September 12, 2014.

At trial, Christine Coffron, an employee of Select Portfolio Servicing ("SPS"), the loan servicer, testified for the Trust. Coffron explained that SPS does not actually originate any loans, "so every loan it services is brought on through the acquisition process. There's the Loan Acquisition Department and the Onboarding Department that both work together when we service a loan." Regarding the process used to verify the accuracy of the loans obtained from prior servicers, Coffron stated:

> [W]hen information is transferred over from the prior servicer as a data file, that data file goes through an algorithm to determine the amounts due in owing from origination to the actual date of transfer to verify information as complete and accurate. If there's something missing, there is that period of time which a prior servicer and the new servicer can work out discrepancies.
>
> It's also during that time that the actual hardcopy documents are transferred **[*596]** which are reviewed by an actual individual within the Onboarding Department. Any information that is not verified through our quality control check system . . . [is] not boarded into the SPS system.
>
> . . . .
>
> It basically goes through **[**3]** their quality control check system, and that consists of about a 650 point check system that each loan clears. If there is any discrepancy, it is noted within the system. If the discrepancy can't be cleared, it won't be boarded. That's generally how it works.

SPS then offered into evidence various records that it

obtained from the prior servicer, Bank of America ("BOA"), including a foreclosure referral document and the loan payment history. Despite Coffron's testimony, the trial court sustained Appellee's hearsay objections, finding that Coffron failed to establish a proper foundation for the records' admissibility under the business records exception to the hearsay rule. *See* § 90.803(6), Fla. Stat. (2014). The trial court explained that the business records exception "was based upon a party's own records, not someone else's records." Moreover, the trial court determined that, because Coffron did not work in the boarding department, she lacked the requisite knowledge concerning the boarding process.

Although the trial court excluded the aforementioned records, it admitted a notice of intent to accelerate ("default letter") sent by BOA on November 9, 2009. The default letter provides, in relevant part:

> You **[**4]** may, if required by law or your loan documents, have the right to cure the default after the acceleration of the mortgage payments and prior to the foreclosure sale of your property if all amounts past due are paid within the time permitted by law. However, BAC Home Loans Servicing, LP and the Noteholder shall be entitled to collect all fees and costs incurred by BAC Home Loans Servicing, LP and the Noteholder in pursuing any of their remedies, including but not limited to reasonable attorney's fees, to full extent permitted by law. *Further, you may have the right to bring a court action to assert the non-existence of a default or any other defense you may have to acceleration and foreclosure*.

(emphasis added).

After SPS rested, Appellee moved for an involuntary dismissal, arguing the default letter failed to comply with paragraph 22 of the mortgage. Paragraph 22 provides, in pertinent part, that the default letter shall specify:

> (a) the default, (b) the action required to cure the default, (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured, and (d) that failure to cure the default on or before the date specified in the **[**5]** notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non existence of a default or any other defense of Borrower to acceleration and foreclosure.

Appellee argued that, because the default letter stated the borrower would have to file an action to stop foreclosure, rather than raising any defenses in the Trust's foreclosure case, it did not properly inform Appellee of her rights with respect to foreclosure. The trial court agreed and granted an involuntary dismissal.

[*597] We first address the Trust's argument that the trial court erred by determining the default letter failed to comply with paragraph 22's pre-foreclosure notice requirements. "A lender cannot foreclose until it has complied with the terms of the mortgage." Martins v. PNC Bank, Nat'l Ass'n, 170 So. 3d 932, 936 (Fla. 5th DCA 2015) (citing DiSalvo v. SunTrust Mortg., Inc., 115 So. 3d 438, 439 (Fla. 2d DCA 2013)). "The notice requirements set forth in paragraph 22 of the defendants' mortgage are conditions precedent to the filing of a foreclosure action against the borrower." Bank of N.Y. Mellon v. Nunez, 180 So. 3d 160, 40 Fla. L. Weekly D2486, D2487 (Fla. 3d DCA Nov. 4, 2015) (citing *Konsulian v. Busey Bank, N.A., 61 So. 3d 1283, 1285 (Fla. 2d DCA 2011))*.

"Courts require there **[**6]** to be at least substantial compliance with conditions precedent in order to authorize performance of a contract." Allstate Floridian Ins. Co. v. Farmer, 104 So. 3d 1242, 1246 (Fla. 5th DCA 2012) (citing Seaside Cmty. Dev. Corp. v. Edwards, 573 So. 2d 142, 145 (Fla. 1st DCA 1991)). Moreover, "[a]bsent some prejudice, the breach of a condition precedent does not constitute a defense to the enforcement of an otherwise valid contract." Gorel v. Bank of N.Y. Mellon, 165 So. 3d 44, 47 (Fla. 5th DCA 2015) (citing Farmer, 104 So. 3d at 1248-49). "[W]hen the content of a lender's notice letter is nearly equivalent to or varies in only immaterial respects from what the mortgage requires, the letter substantially complies, and a minor variation from the terms of paragraph twenty-two should not preclude a foreclosure action." Green Tree Servicing, LLC v. Milam, 177 So. 3d 7, 14-15 (Fla. 2d DCA 2015), *reh'g denied* (Oct. 13, 2015).

Here, the default letter sent by BOA substantially complies with paragraph 22 and caused no prejudice to Appellee. Appellee does not contend that the default letter completely omits one or more of the required elements. *See, e.g.,* Samaroo v. Wells Fargo Bank, 137 So. 3d 1127, 1129 (Fla. 5th DCA 2014) (finding no substantial compliance with paragraph 22 where the default letter did not "inform the [borrowers] of their right to reinstate after acceleration"). Rather, Appellee argues

the default letter in this case would lead to confusion, whereby a borrower "would not appear in the foreclosure case, thinking instead that he had to file his own lawsuit to assert his defenses." **[**7]** However, no confusion occurred here; Appellee retained counsel and vigorously defended the foreclosure proceedings, ultimately obtaining an involuntary dismissal. *See Milam, 177 So. 3d at 19* ("[Paragraph 22] is not a technical trap designed to forestall a lender from prosecuting an otherwise proper foreclosure action because a borrower, after the fact, decides that the letter might have been better worded."). Insofar as the default letter varies from paragraph 22's requirements, any variation caused no actual prejudice to Appellee. Therefore, we find that the default letter substantially complies with paragraph 22.

We next address the Trust's argument that the trial court erred by excluding various records obtained from BOA. "A trial court has wide discretion in determining the admissibility of evidence, and, absent an abuse of discretion, the trial court's ruling on evidentiary matters will not be overturned." *LaMarr v. Lang, 796 So. 2d 1208, 1209 (Fla. 5th DCA 2001)* (citing *Dale v. Ford Motor Co., 409 So. 2d 232, 234 (Fla. 1st DCA 1982)*). However, "that discretion is limited by the rules of evidence." *Michael v. State, 884 So. 2d 83, 84 (Fla. 2d DCA 2004)* (citations omitted).

The business records exception to the hearsay rule allows a party to offer such records into evidence after eliciting testimony from "a person with knowledge, **[*598]** if kept in the course of a regularly conducted **[**8]** business activity and if it was the regular practice of that business activity to make such . . . record . . . unless the sources of information or other circumstances show a lack of trustworthiness." *§ 90.803(6)(a), Fla. Stat.* "As a general rule, 'the authenticating witness need not be the person who actually prepared the business records.'" *Nationstar Mortg., LLC v. Berdecia, 169 So. 3d 209, 213 (Fla. 5th DCA 2015)* (quoting *Cayea v. CitiMortgage, Inc., 138 So. 3d 1214, 1217 (Fla. 4th DCA 2014)*). "In a perfect world, the foreclosure plaintiff would call an employee of the previous note owner to testify as to the documents. However, this is neither practical nor necessary in every situation . . . ." *Id. at 213* (citations omitted). "Mere reliance on these records by a successor business, however, is insufficient to establish admissibility." *Channell v. Deutsche Bank Nat'l Trust Co., 173 So. 3d 1017, 1019-20 (Fla. 2d DCA 2015)* (citation omitted).

In *Bank of New York v. Calloway, 157 So. 3d 1064 (Fla. 4th DCA 2015)*, the Fourth District Court clarified the standard for admitting records obtained from a prior loan servicer. The court explained that "[w]here a business takes custody of another business's records and integrates them with its own records, the acquired records are treated as having been 'made' by the successor business, such that both records constitute the successor business's singular 'business record.'" *Id. at 1071* (citing *United States v. Adefehinti, 510 F.3d 319, 326, 379 U.S. App. D.C. 91 (D.C. Cir. 2007)*). Relying on *Calloway*, we held that a current servicer can establish a proper foundation for admission **[**9]** of a prior servicer's records "so long as all the requirements of the business records exception are satisfied, the witness can testify that the successor business relies upon those records, and the circumstances indicate the records are trustworthy." *Berdecia, 169 So. 3d at 216* (citing *Le v. U.S. Bank, 165 So. 3d 776 (Fla. 5th DCA 2015)*; *Calloway, 157 So. 3d at 1074*)).

Based on the foregoing, we hold that the trial court abused its discretion by excluding business records obtained from the prior servicer. The trial court's assertion that a business cannot offer business records of a prior servicer does not conform with *Calloway* and its progeny. In addition, the trial court incorrectly determined that only a boarding department employee could testify regarding the boarding process. *See Berdecia, 169 So. 3d at 216* ("Although [the witness] did not personally participate in the 'boarding' process to ensure the accuracy of the records acquired from [prior servicer] . . . she demonstrated a sufficient familiarity with the 'boarding' process to testify about it."). Coffron testified at length regarding the procedures SPS used to verify the accuracy of the records it obtained from BOA. Coffron further testified that SPS kept the records in its regular course of business, by persons with knowledge, and that it was the regular **[**10]** practice of SPS to make and keep those records. Coffron's testimony established a sufficient foundation for the records' admissibility under *section 90.803(6)(a)*. Therefore, we reverse the entry of involuntary dismissal and remand for a new trial.

REVERSED and REMANDED for further proceedings consistent with this opinion.

SAWAYA and EDWARDS, JJ., concur.

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Bank of N.Y. Mellon v. Johnson

Court of Appeal of Florida, Fifth District

January 29, 2016, Opinion Filed

Case No. 5D14-3626

Reporter
185 So. 3d 594 *; 2016 Fla. App. LEXIS 1157 **; 41 Fla. L. Weekly D 287

THE BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK AS TRUSTEE FOR THE CERTIFICATE HOLDERS CWALT, INC. ALTERNATIVE LOAN TRUST 2006-OA17, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-OA17, Appellant, v. DONNA D. JOHNSON, Appellee.

Subsequent History: Review denied by *Johnson v. Bank of N.Y. Mellon, 2016 Fla. LEXIS 1870 (Fla., Aug. 23, 2016)*

Prior History: **[**1]** Appeal from the Circuit Court for Brevard County, Charles M. Holcomb, Judge.

Counsel: Allison Morat and Ronnie J. Bitman, of Pearson Bitman LLP, Maitland, for Appellant.

Beau Bowin, of Bowin Law Group, West Melbourne, for Appellee.

Judges: WALLIS, J. SAWAYA and EDWARDS, JJ., concur.

Opinion by: WALLIS

Opinion

[*595] WALLIS, J.

Appellant, the Bank of New York Mellon F/K/A the Bank of New York as Trustee for the Certificateholders CWALT, Inc. Alternative Loan Trust 2006-OA17, Mortgage Pass-Through Certificates, Series 2006-OA17 (the "Trust") appeals the trial court's entry of involuntary dismissal in a foreclosure action brought against Donna D. Johnson ("Appellee"). Finding that the trial court erred by determining the Trust failed to comply with the mortgage's pre-foreclosure notice requirements and by excluding various documents obtained from the prior loan servicer, we reverse the entry of involuntary dismissal and remand for a new trial.

On July 24, 2006, Appellee executed a promissory note and accompanying mortgage for $187,000. Appellee defaulted on the mortgage by failing to make payment due August 1, 2009, and all subsequent payments. On May 24, 2010, the Trust filed a complaint to foreclose, and the case proceeded to a non-jury **[**2]** trial on September 12, 2014.

At trial, Christine Coffron, an employee of Select Portfolio Servicing ("SPS"), the loan servicer, testified for the Trust. Coffron explained that SPS does not actually originate any loans, "so every loan it services is brought on through the acquisition process. There's the Loan Acquisition Department and the Onboarding Department that both work together when we service a loan." Regarding the process used to verify the accuracy of the loans obtained from prior servicers, Coffron stated:

> [W]hen information is transferred over from the prior servicer as a data file, that data file goes through an algorithm to determine the amounts due in owing from origination to the actual date of transfer to verify information as complete and accurate. If there's something missing, there is that period of time which a prior servicer and the new servicer can work out discrepancies.
>
> It's also during that time that the actual hardcopy documents are transferred **[*596]** which are reviewed by an actual individual within the Onboarding Department. Any information that is not verified through our quality control check system . . . [is] not boarded into the SPS system.
>
> . . . .
>
> It basically goes through **[**3]** their quality control check system, and that consists of about a 650 point check system that each loan clears. If there is any discrepancy, it is noted within the system. If the discrepancy can't be cleared, it won't be boarded. That's generally how it works.

SPS then offered into evidence various records that it

obtained from the prior servicer, Bank of America ("BOA"), including a foreclosure referral document and the loan payment history. Despite Coffron's testimony, the trial court sustained Appellee's hearsay objections, finding that Coffron failed to establish a proper foundation for the records' admissibility under the business records exception to the hearsay rule. *See* § 90.803(6), Fla. Stat. (2014). The trial court explained that the business records exception "was based upon a party's own records, not someone else's records." Moreover, the trial court determined that, because Coffron did not work in the boarding department, she lacked the requisite knowledge concerning the boarding process.

Although the trial court excluded the aforementioned records, it admitted a notice of intent to accelerate ("default letter") sent by BOA on November 9, 2009. The default letter provides, in relevant part:

> You **[**4]** may, if required by law or your loan documents, have the right to cure the default after the acceleration of the mortgage payments and prior to the foreclosure sale of your property if all amounts past due are paid within the time permitted by law. However, BAC Home Loans Servicing, LP and the Noteholder shall be entitled to collect all fees and costs incurred by BAC Home Loans Servicing, LP and the Noteholder in pursuing any of their remedies, including but not limited to reasonable attorney's fees, to full extent permitted by law. *Further, you may have the right to bring a court action to assert the non-existence of a default or any other defense you may have to acceleration and foreclosure*.

(emphasis added).

After SPS rested, Appellee moved for an involuntary dismissal, arguing the default letter failed to comply with paragraph 22 of the mortgage. Paragraph 22 provides, in pertinent part, that the default letter shall specify:

> (a) the default, (b) the action required to cure the default, (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured, and (d) that failure to cure the default on or before the date specified in the **[**5]** notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non existence of a default or any other defense of Borrower to acceleration and foreclosure.

Appellee argued that, because the default letter stated the borrower would have to file an action to stop foreclosure, rather than raising any defenses in the Trust's foreclosure case, it did not properly inform Appellee of her rights with respect to foreclosure. The trial court agreed and granted an involuntary dismissal.

[*597] We first address the Trust's argument that the trial court erred by determining the default letter failed to comply with paragraph 22's pre-foreclosure notice requirements. "A lender cannot foreclose until it has complied with the terms of the mortgage." *Martins v. PNC Bank, Nat'l Ass'n, 170 So. 3d 932, 936 (Fla. 5th DCA 2015)* (citing *DiSalvo v. SunTrust Mortg., Inc., 115 So. 3d 438, 439 (Fla. 2d DCA 2013)*). "The notice requirements set forth in paragraph 22 of the defendants' mortgage are conditions precedent to the filing of a foreclosure action against the borrower." *Bank of N.Y. Mellon v. Nunez, 180 So. 3d 160, 40 Fla. L. Weekly D2486, D2487 (Fla. 3d DCA Nov. 4, 2015)* (citing *Konsulian v. Busey Bank, N.A., 61 So. 3d 1283, 1285 (Fla. 2d DCA 2011)*).

"Courts require there **[**6]** to be at least substantial compliance with conditions precedent in order to authorize performance of a contract." *Allstate Floridian Ins. Co. v. Farmer, 104 So. 3d 1242, 1246 (Fla. 5th DCA 2012)* (citing *Seaside Cmty. Dev. Corp. v. Edwards, 573 So. 2d 142, 145 (Fla. 1st DCA 1991)*). Moreover, "[a]bsent some prejudice, the breach of a condition precedent does not constitute a defense to the enforcement of an otherwise valid contract." *Gorel v. Bank of N.Y. Mellon, 165 So. 3d 44, 47 (Fla. 5th DCA 2015)* (citing *Farmer, 104 So. 3d at 1248-49*). "[W]hen the content of a lender's notice letter is nearly equivalent to or varies in only immaterial respects from what the mortgage requires, the letter substantially complies, and a minor variation from the terms of paragraph twenty-two should not preclude a foreclosure action." *Green Tree Servicing, LLC v. Milam, 177 So. 3d 7, 14-15 (Fla. 2d DCA 2015)*, *reh'g denied* (Oct. 13, 2015).

Here, the default letter sent by BOA substantially complies with paragraph 22 and caused no prejudice to Appellee. Appellee does not contend that the default letter completely omits one or more of the required elements. *See, e.g., Samaroo v. Wells Fargo Bank, 137 So. 3d 1127, 1129 (Fla. 5th DCA 2014)* (finding no substantial compliance with paragraph 22 where the default letter did not "inform the [borrowers] of their right to reinstate after acceleration"). Rather, Appellee argues

the default letter in this case would lead to confusion, whereby a borrower "would not appear in the foreclosure case, thinking instead that he had to file his own lawsuit to assert his defenses." **[**7]** However, no confusion occurred here; Appellee retained counsel and vigorously defended the foreclosure proceedings, ultimately obtaining an involuntary dismissal. *See* Milam, 177 So. 3d at 19 ("[Paragraph 22] is not a technical trap designed to forestall a lender from prosecuting an otherwise proper foreclosure action because a borrower, after the fact, decides that the letter might have been better worded."). Insofar as the default letter varies from paragraph 22's requirements, any variation caused no actual prejudice to Appellee. Therefore, we find that the default letter substantially complies with paragraph 22.

We next address the Trust's argument that the trial court erred by excluding various records obtained from BOA. "A trial court has wide discretion in determining the admissibility of evidence, and, absent an abuse of discretion, the trial court's ruling on evidentiary matters will not be overturned." LaMarr v. Lang, 796 So. 2d 1208, 1209 (Fla. 5th DCA 2001) (citing *Dale v. Ford Motor Co., 409 So. 2d 232, 234 (Fla. 1st DCA 1982))*. However, "that discretion is limited by the rules of evidence." Michael v. State, 884 So. 2d 83, 84 (Fla. 2d DCA 2004) (citations omitted).

The business records exception to the hearsay rule allows a party to offer such records into evidence after eliciting testimony from "a person with knowledge, **[*598]** if kept in the course of a regularly conducted **[**8]** business activity and if it was the regular practice of that business activity to make such . . . record . . . unless the sources of information or other circumstances show a lack of trustworthiness." § 90.803(6)(a), Fla. Stat. "As a general rule, 'the authenticating witness need not be the person who actually prepared the business records.'" Nationstar Mortg., LLC v. Berdecia, 169 So. 3d 209, 213 (Fla. 5th DCA 2015) (quoting Cayea v. CitiMortgage, Inc., 138 So. 3d 1214, 1217 (Fla. 4th DCA 2014)). "In a perfect world, the foreclosure plaintiff would call an employee of the previous note owner to testify as to the documents. However, this is neither practical nor necessary in every situation . . . ." Id. at 213 (citations omitted). "Mere reliance on these records by a successor business, however, is insufficient to establish admissibility." Channell v. Deutsche Bank Nat'l Trust Co., 173 So. 3d 1017, 1019-20 (Fla. 2d DCA 2015) (citation omitted).

In Bank of New York v. Calloway, 157 So. 3d 1064 (Fla. 4th DCA 2015), the Fourth District Court clarified the standard for admitting records obtained from a prior loan servicer. The court explained that "[w]here a business takes custody of another business's records and integrates them with its own records, the acquired records are treated as having been 'made' by the successor business, such that both records constitute the successor business's singular 'business record.'" Id. at 1071 (citing United States v. Adefehinti, 510 F.3d 319, 326, 379 U.S. App. D.C. 91 (D.C. Cir. 2007)). Relying on Calloway, we held that a current servicer can establish a proper foundation for admission **[**9]** of a prior servicer's records "so long as all the requirements of the business records exception are satisfied, the witness can testify that the successor business relies upon those records, and the circumstances indicate the records are trustworthy." Berdecia, 169 So. 3d at 216 (citing Le v. U.S. Bank, 165 So. 3d 776 (Fla. 5th DCA 2015); Calloway, 157 So. 3d at 1074)).

Based on the foregoing, we hold that the trial court abused its discretion by excluding business records obtained from the prior servicer. The trial court's assertion that a business cannot offer business records of a prior servicer does not conform with Calloway and its progeny. In addition, the trial court incorrectly determined that only a boarding department employee could testify regarding the boarding process. *See* Berdecia, 169 So. 3d at 216 ("Although [the witness] did not personally participate in the 'boarding' process to ensure the accuracy of the records acquired from [prior servicer] . . . she demonstrated a sufficient familiarity with the 'boarding' process to testify about it."). Coffron testified at length regarding the procedures SPS used to verify the accuracy of the records it obtained from BOA. Coffron further testified that SPS kept the records in its regular course of business, by persons with knowledge, and that it was the regular **[**10]** practice of SPS to make and keep those records. Coffron's testimony established a sufficient foundation for the records' admissibility under section 90.803(6)(a). Therefore, we reverse the entry of involuntary dismissal and remand for a new trial.

REVERSED and REMANDED for further proceedings consistent with this opinion.

SAWAYA and EDWARDS, JJ., concur.

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U.S. Bank N.A. v. Gold

Appellate Court of Illinois, Second District

September 23, 2019, Opinion Filed

No. 2-18-0451

Reporter
2019 IL App (2d) 180451 *; 2019 Ill. App. LEXIS 781 **

U.S. BANK N.A., as Trustee Relating to Chase Funding LLC Mortgage Backed Certificates Series 2006-2, Plaintiff-Appellee, v. WILLIAM GOLD, a/k/a William S. Gold; JULIE GOLD, a/k/a Julie L. Gold; MR. DAVID'S CARPET SERVICE, LTD.; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; COUNTRYWIDE HOME LOANS, INC.; LINCOLN PARK SAVINGS BANK; THE UNITED STATES OF AMERICA; and UNKNOWN OWNERS AND NONRECORD CLAIMANTS, Defendants, (William Gold, a/k/a William S. Gold, Defendant-Appellant).

Prior History: **[**1]** Appeal from the Circuit Court of Lake County. No. 09-CH-4751. Honorable Michael B. Betar and Margaret A. Marcouiller, Judges, Presiding.

U.S. Bank N.A. v. Gold, 2019 IL App (2d) 180451-U, 2019 Ill. App. Unpub. LEXIS 1568 (Aug. 23, 2019)

Disposition: Affirmed.

Counsel: For Appellant: Carla Sherieves, of CMS Law, LLC, of Chicago, for appellant.

For Appellee: Adam A. Price, of Codilis & Associates, P.C., of Burr Ridge, for appellee.

Judges: JUSTICE McLAREN delivered the judgment of the court, with opinion. Justices Zenoff and Hudson concurred in the judgment and opinion.

Opinion by: McLAREN

Opinion

JUSTICE McLAREN delivered the judgment of the court, with opinion.

Justices Zenoff and Hudson concurred in the judgment and opinion.

OPINION

[*P1] Defendant William Gold appeals from the order of the Lake County circuit court granting summary judgment and a judgment of foreclosure to plaintiff, U.S. Bank N.A., as trustee relating to Chase Funding LLC Mortgage Backed Certificates Series 2006-2, and the order approving the report of sale and distribution. Defendant contends that his counteraffidavit opposing summary judgment was timely filed and that it properly challenged the sufficiency of plaintiff's notice of default. No argument is raised with respect to the approval of the sale and distribution. For the reasons that follow, we affirm.

[*P2] I. BACKGROUND **[**2]**

[*P3] In 2006, defendants William and Julie Gold secured repayment of a promissory note in the amount of $1,500,000 by executing a mortgage on property in Highland Park, Illinois. Beginning in 2009, defendants defaulted on their monthly payments. In October 2009, plaintiff filed a complaint to foreclose on defendants' mortgage. Defendants answered the complaint, denying plaintiff's allegations.

[*P4] In 2017, plaintiff moved for summary judgment and a judgment of foreclosure and sale. Hearing on the motions was set for September 6, 2017. That morning, defendant William Gold filed a counteraffidavit, in which he alleged, *inter alia*, that plaintiff's "notice of acceleration/notice of default" did not comply with the notice requirement stated in the mortgage. Specifically, defendant alleged that paragraph 22 of the mortgage required that he be informed "of the right to *assert in the foreclosure proceeding* the non-existence of a default or any other defense of Borrower to acceleration and foreclosure," whereas the notice he received stated "you have the right *** *to bring a court action to assert* the nonexistence of a default or any other defense you may have to the acceleration and *sale*." (Emphases **[**3]** added.) Defendant did not present this point in his response to plaintiff's summary judgment motion or

raise it as an affirmative defense.

[*P5] The trial court ordered additional briefing relative to defendant's counteraffidavit. Plaintiff requested that the court strike the counteraffidavit as untimely and noncompliant with *Illinois Supreme Court Rule 191(a)* (eff. Jan. 4, 2013). On October 25, 2017, the court struck defendant's counteraffidavit and granted plaintiff's motion for summary judgment and a judgment of foreclosure. On May 4, 2018, the court entered an order approving the report of sale and distribution and a personal deficiency judgment against defendant in the amount of $1,342,622.19. Defendant filed a motion for leave to file a late notice of appeal on June 11, 2018, which this court granted on June 25. The notice of appeal was filed on June 27, 2018.

[*P6] II. ANALYSIS

[*P7] Defendant requests that this court reverse the order granting summary judgment and the final order approving the report of sale and distribution. We review *de novo* an order granting a motion for summary judgment. *Williams v. Manchester, 228 Ill. 2d 404, 417, 888 N.E.2d 1, 320 Ill. Dec. 784 (2008)*. We review for an abuse of discretion an order approving a sale and distribution. *Household Bank, FSB v. Lewis, 229 Ill. 2d 173, 178-79, 890 N.E.2d 934, 322 Ill. Dec. 15 (2008)*. To the extent we also interpret a provision in the **[**4]** mortgage, the interpretation of a contract involves a question of law, which we review *de novo*. *Phoenix Insurance Co. v. Rosen, 242 Ill. 2d 48, 54, 949 N.E.2d 639, 350 Ill. Dec. 847 (2011)*.

[*P8] Defendant's only argument on appeal is that the trial court erred in striking his counteraffidavit in opposition to summary judgment as "untimely and conclusory." Defendant argues that the affidavit was timely filed and that it "challenged the sufficiency of plaintiff's notice of default." We agree with defendant that an affidavit may be timely filed at the time of the hearing. See *735 ILCS 5/2-1005(c)* (West 2018) ("[t]he opposite party may prior to or at the time of the hearing on the motion file counteraffidavits"). However, we also determine that the affidavit did not comply with *Rule 191(a)*, as it contained a legal conclusion upon which defendant's entire claim was based. Thus, it was not truly an affidavit but a pleading attempting to raise an affirmative matter. As such, it was untimely and properly stricken.

[*P9] *Rule 191(a)* provides, *inter alia*, that an affidavit in opposition to a motion for summary judgment "shall set forth with particularity the facts upon which the *** counterclaim *** is based *** [and] shall not consist of conclusions but of facts admissible in evidence." *Ill. S. Ct. R. 191(a)* (eff. Jan. 4, 2013). Defendant avowed in his **[**5]** affidavit that he did not receive a notice of default that complied with the mortgage terms stated in paragraph 22. He explained that the notice stated "you have the right to *** bring a court action to assert the nonexistence of a default or any other defense you may have to the acceleration and sale," whereas paragraph 22 requires the notice to inform the borrower "of the right to assert in the foreclosure proceeding the nonexistence of a default or any other defense of borrower to acceleration and foreclosure."

[*P10] The evidentiary facts pled in defendant's affidavit do not raise a question for the fact finder so as to preclude summary judgment. See *Robidoux v. Oliphant, 201 Ill. 2d 324, 335, 775 N.E.2d 987, 266 Ill. Dec. 915 (2002)* ("[t]he purpose of summary judgment is not to try a question of fact, but to determine if one exists"); *Harrell v. Summers, 32 Ill. App. 2d 358, 361, 178 N.E.2d 133 (1961)* (the primary purpose of affidavits in summary judgment proceedings is to inform the court whether there is any fact issue worthy of trial). Rather, defendant's facts are recited to imply a legal conclusion that the notice is insufficient under the terms of the mortgage contract. Because the interpretation of a mortgage contract is a question of law for the court (***Cathay Bank v. Accetturo, 2016 IL App (1st) 152783, ¶ 26, 408 Ill. Dec. 675, 66 N.E.3d 467)***, defendant's affidavit was correctly disregarded, as it did not comply **[**6]** with the requirement of *Rule 191(a)* that the affidavit not contain conclusions.

[*P11] Moreover, by electing to present his averments only in an ersatz pleading in the form of a conclusory counteraffidavit, defendant forfeited his arguments that the notice he received was defective. Assuming *arguendo* that the arguments were not forfeited, we find them to be without merit. Defendant argues that plaintiff was not entitled to summary judgment because it improperly accelerated the mortgage. A notice of acceleration has been deemed a condition precedent to foreclosure under Illinois mortgage foreclosure law. ***Id. ¶ 33***. However, "a technical defect in the notice sent to a mortgagor will not automatically warrant a dismissal of a foreclosure action." ***Id. ¶ 42*** (citing *Bank of America, N.A. v. Luca, 2013 IL App (3d) 120601, ¶ 15, 999 N.E.2d 361, 376 Ill. Dec. 478)*. Moreover, where the mortgagor does not allege any prejudice resulting from a technical defect in the notice, dismissal to permit new

notice would be "futile." *Aurora Loan Services, LLC v. Pajor, 2012 IL App (2d) 110899, ¶ 27, 973 N.E.2d 437, 362 Ill. Dec. 337*; accord *Luca, 2013 IL App (3d) 120601, ¶ 17*; see also *Bank of New York Mellon v. Johnson, 185 So. 3d 594 (Fla. Dist. Ct. App. 2016)* (nonprecedential but on-point case holding that notice advising mortgagor that she "'may have the right to bring a court action to assert'" defenses, but not informing her that she could bring defenses in the foreclosure action, substantially complied with the mortgage **[**7]** terms where the variation caused no actual prejudice to the mortgagor (emphasis omitted)).

[*P12] In support of his contention that plaintiff improperly accelerated the mortgage, defendant relies solely on the distinction drawn in his affidavit between bringing a court action to assert the nonexistence of a default or other defense and asserting the same in the foreclosure proceeding. Defendant argues that the statement in the notice of default is "misleading" because the "right to assert a defense within a pending lawsuit is different from the right to file a new action to assert those defenses." Defendant, however, did not allege that he was prejudiced by the default notice, nor does he now argue that he was prejudiced.

[*P13] Moreover, the record belies any claim that defendant had no knowledge of his "right to assert in the foreclosure proceeding the nonexistence of a default or any other defense *** to acceleration and foreclosure." Prior to retaining counsel, defendant attempted to cure the default: in his first answer to the foreclosure complaint, filed in November 2009, defendant stated: "I feel very confident that an agreement can be obtained as I am in constant contact with *** the loss **[**8]** mitigation dept. *** We are having a good dialogue and I believe we are close to working out a repayment plan." Subsequently, defendant and his wife, through their attorneys, contested plaintiff's original and amended foreclosure complaints, pled affirmative defenses, issued interrogatories, and otherwise vigorously participated in eight years of foreclosure litigation. In other words, defendant timely availed himself of the ability to assert defenses in the foreclosure proceeding.

[*P14] Under the circumstances presented, where prejudice is neither alleged nor argued and defendant fully availed himself of the ability to assert defenses in the foreclosure proceeding, the notice defect cited in the affidavit is rendered a technicality, and reversal of the trial court's order based upon prejudicial error in striking the affidavit is not warranted.

[*P15] Defendant filed no response in the trial court to plaintiff's motion for an order approving the sale and distribution and makes no argument on appeal that the order was improperly entered. Accordingly, we affirm.

[*P16] III. CONCLUSION

[*P17] For the reasons stated, we affirm the circuit court of Lake County orders striking defendant's counteraffidavit and approving **[**9]** the report of sale and distribution.

[*P18] Affirmed.

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879 F.3d 1216
United States Court of Appeals, Tenth Circuit.

Dennis OBDUSKEY, Plaintiff-Appellant,
v.
WELLS FARGO; Wells Fargo Bank; Wells Fargo & Co; Wells Fargo Bank NA; Wells Fargo Home Mortgage; McCarthy and Holthus LLP, Defendants-Appellees.

No. 16-1330
|
Filed January 19, 2018

Synopsis

Background: Mortgagor brought action against mortgage loan servicer, to whom mortgage debt was assigned, and law firm that represented servicer, alleging, inter alia, violation of the Fair Debt Collection Practices Act (FDCPA), defamation under Colorado law, and extreme and outrageous conduct under Colorado law. The United States District Court for the District of Colorado, No. 1:15-CV-01734-RBJ, R. Brooke Jackson, J., 2016 WL 4091174, granted servicer's motion to dismiss for failure to state a claim. Mortgagor appealed.

Holdings: The Court of Appeals, Kelly, Circuit Judge, held that:

[1] servicer, to whom debt was assigned, was not a debt collector within the meaning of the FDCPA;

[2] law firm was not a debt collector within the meaning of the FDCPA; and

[3] as a matter of first impression, entities engaged in non-judicial foreclosure in Colorado are not debt collectors under the FDCPA.

Affirmed.

West Headnotes (12)

[1] **Federal Courts**
Dismissal or nonsuit in general

Court of Appeals reviews the grant of a motion to dismiss de novo.

[2] **Finance, Banking, and Credit**
Creditors and lenders; assignees and loan servicers

Mortgage loan servicer, to whom mortgage debt was assigned, was not a debt collector within the meaning of the Fair Debt Collection Practices Act (FDCPA); mortgagor was not in default when servicer began servicing loan or when servicer became assignee of debt. Consumer Credit Protection Act § 802, 15 U.S.C.A. § 1692(a)(6)(F).

6 Cases that cite this headnote

[3] **Finance, Banking, and Credit**
Attorneys and law firms; legal services

Law firm that hired mortgage loan servicer that was also assignee of mortgage debt, which sought to conduct non-judicial foreclosure proceeding under Colorado law, was not a debt collector within the meaning of the Fair Debt Collection Practices Act (FDCPA); firm sought to enforce security interest against real property, rather than to collect money from mortgagor, as a separate action would have been required in order to permit entry of a deficiency judgment against mortgagor, and there was no indication firm demanded payment or used foreclosure as a threat to elicit payment from mortgagor. Consumer Credit Protection Act § 803, 15 U.S.C.A. § 1692a(5).

6 Cases that cite this headnote

[4] **Statutes**

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Intent

It is a court's primary task in interpreting statutes to determine congressional intent, using traditional tools of statutory construction.

[5] **Statutes**
Language
Statutes
Absence of Ambiguity; Application of Clear or Unambiguous Statute or Language

A court's first task when interpreting a statute is always to examine the language of the statute, and when that language is clear, the court ordinarily ends its analysis.

[6] **Statutes**
Purpose and intent; determination thereof
Statutes
Plain, literal, or clear meaning; ambiguity

If the language of a statute leaves a court attempting to interpret the statute uncertain, the court turns to the legislative history and policy of the statute to deduce Congress's intent.

[7] **Finance, Banking, and Credit**
Debt collectors and debt collection in general

Entities engaged in non-judicial foreclosure actions in Colorado are not debt collectors under the Fair Debt Collection Practices Act (FDCPA). Consumer Credit Protection Act § 803, 15 U.S.C.A. § 1692a(5).

14 Cases that cite this headnote

[8] **Mortgages and Deeds of Trust**
Right to Deficiency and Grounds Therefor

A non-judicial foreclosure differs from a judicial foreclosure in that the sale does not preserve to the trustee the right to collect any deficiency in the loan amount personally against the mortgagor.

6 Cases that cite this headnote

[9] **Finance, Banking, and Credit**
Persons and Transactions Subject to or Protected by Regulation

While judicial mortgage foreclosures may be covered under the Fair Debt Collection Practices Act (FDCPA) because of the underlying deficiency judgment, a non-judicial foreclosure proceeding is not covered because it only allows the trustee to obtain proceeds from the sale of the foreclosed property, and no more. Consumer Credit Protection Act § 803, 15 U.S.C.A. § 1692a(5).

7 Cases that cite this headnote

[10] **Mortgages and Deeds of Trust**
Federal preemption
States
State police power
States
Banking and financial or credit transactions

In areas of traditional state regulation, a federal statute has not supplanted state law unless Congress has made such an intention clear and manifest, and mortgage foreclosure is an essential state interest.

[11] **Libel and Slander**
Injury from Defamation

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Mortgagor failed to sufficiently allege any specific monetary loss from allegedly defamatory statements, as required to support his defamation claim under Colorado law against mortgage loan servicer and law firm that represented it.

[12] **Damages**
Debt collection practices

Mortgagor failed to sufficiently allege any conduct by mortgage loan servicer or law firm that represented it that was so outrageous in character and extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized society, as required to state an extreme and outrageous conduct claim against servicer or firm under Colorado law.

***1218 Appeal from the United States District Court for the District of Colorado, (D.C. No. 1:15-CV-01734-RBJ)**

Attorneys and Law Firms

Steven L. Hill of Riggs, Abney, Neal, Turpen, Orbison & Lewis, Denver, Colorado, for Plaintiff-Appellant.

Jessica E. Yates of Snell & Wilmer, L.L.P., Denver, Colorado, for Defendants-Appellees Wells Fargo, Wells Fargo Bank, Wells Fargo & Co., Wells Fargo Bank, N.A., Wells Fargo Home Mortgage.

Holly R. Shilliday of McCarthy & Holthus, L.L.P., Centennial, Colorado, for Defendants-Appellees McCarthy & Holthus, L.L.P.

Before MORITZ, KELLY, and MURPHY, Circuit Judges.

Opinion

KELLY, Circuit Judge.

Plaintiff-Appellant Dennis Obduskey appeals from the district court's order granting Defendants-Appellees Wells Fargo and McCarthy and Holthus, LLP's motions to dismiss numerous claims, including whether either party was liable as a "debt collector" under the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692–1692p. Obduskey v. Fargo, No. 15-CV-01734-RBJ, 2016 WL 4091174 (D. Colo. July 19, 2016). Having jurisdiction under 28 U.S.C. § 1291, we affirm.

Background

In 2007, Mr. Obduskey obtained a $329,940 loan from Magnus Financial Corporation to buy a home. The loan was secured by his property and was serviced by Wells Fargo. Aplee. Supp. App. 107. Mr. Obduskey eventually defaulted on the loan in 2009. Id. at 109. Several foreclosure proceedings were initiated over the following six years, none of which were completed. Mr. Obduskey's loan remains in default.

In 2014, Wells Fargo hired McCarthy and Holthus, LLP (McCarthy), a law firm, to pursue a non-judicial foreclosure on Mr. Obduskey's home. McCarthy initially sent Mr. Obduskey an undated letter stating that McCarthy "MAY BE CONSIDERED A DEBT COLLECTOR ATTEMPTING TO COLLECT A DEBT." Id. at 127. The letter explained that McCarthy was "instructed to commence foreclosure against" Mr. Obduskey's home. Id. It referenced the amount owed and noted the current creditor as Wells Fargo. Id. Mr. Obduskey apparently responded to the letter disputing the debt, id. at 124; however, instead of replying to his letter, McCarthy initiated a foreclosure action in May of 2015.[1] Mr. Obduskey then filed this action claiming (1) a violation of the Fair Debt Collection Practices Act; (2) a violation of the Colorado Consumer Protection Act; (3) ***1219** defamation; (4) extreme and outrageous conduct—emotional distress; and (5) commencement of an unlawful collections action. Aplee. Supp. App. at 21–27.

Wells Fargo and McCarthy filed motions to dismiss, which the district court granted on all claims. Obduskey, 2016 WL 4091174, at *8. Regarding the FDCPA claim, the district court held that Wells Fargo was not liable because it began servicing the loan prior to default. Id. at

*3. It also held that McCarthy was not a "debt collector" because "foreclosure proceedings are not a collection of a debt," but it noted that "not all courts have agreed" on whether foreclosure proceedings are covered under the FDCPA. Id. To settle this confusion, we asked both parties to provide supplemental briefing on the issue. We now hold that the FDCPA does not apply to non-judicial foreclosure proceedings in Colorado.

Discussion

[1]We review the grant of a motion to dismiss de novo. Khalik v. United Air Lines, 671 F.3d 1188, 1190 (10th Cir. 2012). We begin with the FDCPA claim against Wells Fargo and McCarthy.

I. Fair Debt Collection Practices Act

The Fair Debt Collection Practices Act was enacted, in part, to "eliminate abusive debt collection practices by debt collectors." 15 U.S.C. § 1692(e) (2012). It prohibits "abusive, deceptive, and unfair debt collection practices," such as late-night phone calls or falsely representing to a consumer the amount of debt owed. Id. §§ 1692(a), 1692c, 1692e. To prevail under the FDCPA, a plaintiff must prove that the defendant is a "debt collector" who is trying to collect a "debt" from the plaintiff in violation of some provision of the FDCPA. A "debt collector" is defined as "any person ... who regularly collects or attempts to collect, directly or indirectly, debts owed or due ... another. Id. § 1692a(6). "Debt" is further defined as "any obligation ... to pay money." Id. § 1692a(5).

On appeal, Mr. Obduskey claims numerous violations of the FDCPA, including that Wells Fargo and McCarthy violated § 1692g by failing to "respond to a properly delivered notice requesting debt validation."[2] Aplt. Br. at 18–21.

A. Wells Fargo Is Not a Debt Collector

[2]The district court held that Wells Fargo was not a debt collector because "Mr. Obduskey was not in default when ... Wells Fargo began servicing the loan or when it became the assignee of the debt." Obduskey, 2016 WL 4091174, at *3. We agree. The FDCPA excludes "any person collecting or attempting to collect any debt ... which was not in default at the time it was obtained by such person." 15 U.S.C. § 1692(a)(6)(F). Furthermore, the Senate Report notes that "the committee does not intend the definition [of debt collector] to cover ... mortgage service companies and others who service outstanding debts for others, so long as the debts were not in default when taken for servicing." S. Rep. No. 95-382, at 3–4 (1977). While Mr. Obduskey does allege that Wells Fargo sent him confusing information concerning whether Wells Fargo was the servicer of the loan or whether it actually owned the loan, Mr. Obduskey admits that Wells Fargo began servicing the loan before he went into default and that it continued to do so after he defaulted. See Aplee. Supp. App. ***1220** at 12, ¶ 5, at 14, ¶ 14. Therefore, Wells Fargo is not a "debt collector" under the FDCPA. See Perry v. Stewart Title Co., 756 F.2d 1197, 1208 (5th Cir. 1985).

B. McCarthy Is Not a Debt Collector

[3]McCarthy argues that we should affirm the district court's dismissal because Mr. Obduskey has failed to adequately allege a claim against it under the FDCPA. While Mr. Obduskey's complaint is far from perfect, we find that he has sufficiently pled that McCarthy failed to verify Mr. Obduskey's debt after it was disputed, in violation of § 1692g. See Aplee. Supp. App. at 16, ¶¶ 21–23. McCarthy also claimed for the first time in oral argument that Mr. Obduskey had waived the FDCPA claim against it by failing to raise it in the opening brief. We disagree. Mr. Obduskey specifically argues in his opening brief that McCarthy "violated the FDCPA by ignoring [a] valid written request related to verification of the debt and continued to collect." Aplt. Br. at 18. Regardless, we hold that McCarthy is not a debt collector for purposes of the FDCPA.

1. The FDCPA Does Not Cover Non-Judicial Foreclosure Proceedings

Whether the FDCPA applies to non-judicial foreclosure proceedings has divided the circuits. The Ninth Circuit,

along with numerous district courts, has held that non-judicial foreclosure proceedings are not covered under the FDCPA. Vien-Phuong Thi Ho v. ReconTrust Co., 858 F.3d 568 (9th Cir. 2016) (Ho). The Fourth, Fifth, and Sixth Circuits, as well as the Colorado Supreme Court, have held that they are covered. Wilson v. Draper & Goldberg, P.L.L.C., 443 F.3d 373 (4th Cir. 2006); Kaltenbach v. Richards, 464 F.3d 524 (5th Cir. 2006); Glazer v. Chase Home Fin. LLC, 704 F.3d 453 (6th Cir. 2013); Shapiro & Meinhold v. Zartman, 823 P.2d 120 (Colo. 1992) (en banc). The Tenth Circuit has been presented with this issue twice but has declined to address it because of pleading deficiencies in the complaint. See Burnett v. Mortg. Elec. Registration Sys., Inc., 706 F.3d 1231, 1239 (10th Cir. 2013); Maynard v. Cannon, 401 Fed.Appx. 389, 395 (10th Cir. 2010). While there arguably may be some deficiencies in Mr. Obduskey's complaint, to provide clarity in this circuit, we address this issue.[3] Compare Huckfeldt v. BAC Home Loans Servicing, LP, 2011 WL 4502036, at *5 (D. Colo. Sept. 29, 2011) (finding that Colorado non-judicial foreclosure proceeding falls under the FDCPA), with Schwitzer v. Wells Fargo Bank, N.A., 2013 WL 607832, at *5 (D. Colo. Feb. 19, 2013) ("[T]he vast majority of courts, especially in this District, have found that foreclosure activities are outside the scope of the FDCPA.").

a. Plain Language of the Statute

[4] [5] [6]"[I]t is our primary task in interpreting statutes to determine congressional intent, using traditional tools of statutory construction." Coffey v. Freeport McMoran Copper & Gold, 581 F.3d 1240, 1245 (10th Cir. 2009) (quoting Russell v. United States, 551 F.3d 1174, 1178 (10th Cir. 2008)). Our first task is always to ***1221** examine the language of the statute. Woods v. Standard Ins. Co., 771 F.3d 1257, 1265 (10th Cir. 2014). When that language is clear, we ordinarily end our analysis. Id. If, however, the language leaves us uncertain, we turn to the legislative history and policy of the statute to deduce Congress's intent. Id.

[7]McCarthy argues that the plain language of the FDCPA dictates that it is not a "debt collector." Relying principally on the Ninth Circuit's decision in Vien-Phuong Thi Ho v. ReconTrust Co., 858 F.3d 568 (9th Cir. 2016), it argues that because debt is synonymous with "money," the FDCPA "imposes liability only when an entity is attempting to collect" money. 858 F.3d at 571. Because enforcing a security interest is not an attempt to collect money from the debtor, and the consumer has no "obligation ... to pay money," non-judicial foreclosure is not covered under the FDCPA. Id. at 572 (quoting 15 U.S.C. § 1692a(5)). We have previously seemed to endorse such a view, see Burnett, 706 F.3d at 1239, and now endorse it fully. Entities engaged in non-judicial foreclosure actions in Colorado are not debt collectors under the FDCPA.[4]

Mr. Obduskey relies upon the Sixth Circuit's decision in Glazer v. Chase Home Fin. LLC, 704 F.3d 453 (6th Cir. 2013), in support of his contrary position. That court held that a non-judicial mortgage foreclosure was covered under the FDCPA because the "ultimate purpose of a foreclosure action is the payment of money," and "every mortgage foreclosure, judicial or otherwise, is undertaken for the very purpose of obtaining payment on the underlying debt, either by persuasion (i.e., forcing a settlement) or compulsion (i.e., obtaining a judgment of foreclosure, selling the home at auction, and applying the proceeds from the sale to pay down the outstanding debt)." 704 F.3d at 461, 463.

[8]We disagree. There is an obvious and critical difference between judicial and non-judicial foreclosures—"[a] non-judicial foreclosure differs from a judicial foreclosure in that the sale does not preserve to the trustee the right to collect any deficiency in the loan amount personally against the mortgagor." Burnett, 706 F.3d at 1239 (emphasis added) (quoting Maynard, 401 Fed.Appx. at 391–92). Colorado follows this general rule and allows a creditor to collect a deficiency only after the non-judicial foreclosure sale and through a separate action. See Colo. Rev. Stat. § 38-38-106(6) (2017); Bank of Am. v. Kosovich, 878 P.2d 65, 66 (Colo. App. 1994).

[9]While judicial mortgage foreclosures may be covered under the FDCPA because of the underlying deficiency judgment, see Maynard, 401 Fed.Appx. at 394, a non-judicial foreclosure proceeding is not covered because it only allows "the trustee to obtain proceeds from the sale of the ***1222** foreclosed property, and no more." Burnett, 706 F.3d at 1239 (quoting Maynard, 401 Fed.Appx. at 391–92). Had McCarthy attempted to induce Mr. Obduskey to pay money by threatening foreclosure, the FDCPA might apply. See Burnett, 706 F.3d at 1239 ("[T]he initiation of foreclosure proceedings may be intended to pressure the debtor to pay her debt."); Rousseau v. Bank of N.Y., 2009 WL 3162153, at *9 (D. Colo. Sept. 29, 2009); see also Ho, 858 F.3d at 573 ("If entities that enforce security interests engage in activities that constitute debt collection, they are debt collectors.").

Glazer and other courts have also relied on §

1692i—"Legal actions by debt collectors"—as evidence that Congress intended the FDCPA to apply to mortgage foreclosures. See 704 F.3d at 462. Section 1692i is a venue provision. It requires "[a]ny debt collector who brings any legal action on a debt against any consumer ... to enforce an interest in real property securing the consumer's obligation" to file in the judicial district where the property is located. 15 U.S.C. § 1692i(a)(1). The Glazer court noted that while this section

> does not speak in terms of debt collection, it applies only to "debt collectors" as defined in the first sentence of the definition, id. § 1692a(6), which does speak in terms of debt collection. This suggests that filing any type of mortgage foreclosure action, even one not seeking a money judgment on the unpaid debt, is debt collection under the Act.

704 F.3d at 462 (footnote omitted). We again disagree. Section 1692i by its very terms applies only to those who are originally debt collectors under § 1692a(6)—which McCarthy is not. It furthermore covers only "action[s] to enforce an interest in real property." 15 U.S.C. § 1692i(a)(1) (emphasis added). "Action" is generally understood to imply a "judicial proceeding," Action, Black's Law Dictionary (10th ed. 2014), and a non-judicial proceeding plainly does not fall under this definition.

b. Policy Considerations

While we find that the plain language of the statute dictates our decision, policy considerations further support it. If the FDCPA applied to non-judicial foreclosure proceedings in Colorado, it would conflict with Colorado mortgage foreclosure law. McCarthy suggests two such conflicts:

> [1.] C.R.C.P. 120(a) requires foreclosing entities to provide notice of the foreclosure to any party that may have acquired an interest in the property, which is inconsistent with the FDCPA's prohibition on communicating with third parties about the debt. See 15 U.S.C. § 1692c(b).
>
> [2.] [T]he FDCPA mandates that a debt collector must cease all direct communications with the borrower when the collector knows the borrower is represented by an attorney, see 15 U.S.C. § 1692c(a)(2), but C.R.C.P. 120(b) requires the foreclosing entity to post notice relating to the non-judicial foreclosure on the door of the subject property and mail it directly to the mortgagor regardless of representation.

Aplee. Supp. Reply Br. at 7–8. McCarthy sums it up as follows: "If the FDCPA applies to these communications, then a foreclosing entity could not initiate non-judicial foreclosure in Colorado without violating federal law." Id. at 8.

[10]We start with the assumptions that (1) "[i]n areas of traditional state regulation ... a federal statute has not supplanted state law unless Congress has made such an intention 'clear and manifest,' " ***1223** Bates v. Dow Agrosciences LLC, 544 U.S. 431, 449, 125 S.Ct. 1788, 161 L.Ed.2d 687 (2005) (quoting N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995)), and (2) that mortgage foreclosure is "an essential state interest," BFP v. Resolution Tr. Corp., 511 U.S. 531, 544, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994). Our reading of the plain language is bolstered by the fact that we find no "clear and manifest" intention on the part of Congress to supplant state non-judicial foreclosure law.[5] Indeed, many of the conflicts noted above are designed to protect the consumer, see Plymouth Capital Co. v. Dist. Court of Elbert County, 955 P.2d 1014, 1015 (Colo. 1998) ("Through creation of a public trustee's office, the General Assembly sought to ensure the protection of debtors while maintaining a speedy, efficient procedure for creditors."), and preempting them under the FDCPA would seem to both undermine their purpose as well as the purpose of the FDCPA. See 15 U.S.C. § 1692 (stating the purpose of the FDCPA is "to promote consistent State action to protect consumers against debt collection abuses").

Some courts (reaching a contrary conclusion) have expressed concern that if the FDCPA does not apply to non-judicial foreclosure proceedings, it would immunize debt secured by real property where foreclosure was used to collect the debt. See Wilson, 443 F.3d at 376; Piper v. Portnoff Law Assocs., Ltd., 396 F.3d 227, 236 (3d Cir. 2005).

This proves too much. First, our holding is limited to non-judicial foreclosure proceedings and does not include judicial foreclosure actions. Second, our holding is also

limited to the facts of the case. Whether or not more aggressive collection efforts leveraging the threat of foreclosure into the payment of money constitute "debt collection" is left for another day. See Maynard, 401 Fed.Appx. at 395; Gburek v. Litton Loan Servicing LP, 614 F.3d 380, 385 (7th Cir. 2010) ("[T]he absence of a demand for payment is just one of several factors that come into play in the commonsense inquiry of whether a communication from a debt collector is made in connection with the collection of any debt."). In this case, however, the answer is clear—McCarthy did not demand payment nor use foreclosure as a threat to elicit payment. It sent only one letter notifying Mr. Obduskey that it was hired to commence foreclosure proceedings. Mr. Obduskey is, of course, free to contest this foreclosure in a Rule 120 proceeding, see C.R.C.P. 120(d); however, we hold that McCarthy's mere act of enforcing a security interest through a non-judicial foreclosure proceeding does not fall under the FDCPA.

II. Remaining Claims

[11] [12]Mr. Obduskey's remaining claims warrant summary treatment. As noted by the district court, Mr. Obduskey failed to "allege any specific monetary loss" from the alleged defamatory statements. Obduskey, 2016 WL 4091174, at *5. As such, Mr. Obduskey's defamation claim must fail. See Lind v. O'Reilly, 636 P.2d 1319, 1320 (Colo. App. 1981). Concerning the extreme and outrageous conduct claim, Mr. Obduskey has not alleged any act on the part of Wells Fargo or McCarthy that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community." Hewitt v. Pitkin Cty. Bank & Tr. Co., 931 P.2d 456, 459 (Colo. App. 1995).

***1224** Mr. Obduskey's limitations claim is also without merit. He claims that the mortgage foreclosure proceeding took place seven years after the note was accelerated and is barred by a six-year limitations period. But the applicable limitations period for foreclosure proceedings in Colorado is 15 years. Colo. Rev. Stat. § 38-39-205. Finally, because Mr. Obduskey's claim that Colorado's Rule 120 hearing is unconstitutional (because it does not provide a full and fair hearing and has no right of appeal) was not adequately pled in his complaint, he cannot raise it here.

AFFIRMED.

All Citations

879 F.3d 1216

Footnotes

1 McCarthy apparently responded to the letter on August 4, 2015, almost one year after Mr. Obduskey's initial letter. Aplt. Reply Br. to Aplee. Jt. Supp. Br. Ex. 3.

2 Mr. Obduskey also claims violations of §§ 1692c (communicating with third party), 1692d (harassment), 1692e (false or misleading representations), and 1692f (unfair practices). Aplt. Br. at 21.

3 This confusion is also apparent in the Colorado Rule 120 Committee Comment: "There was considerable debate concerning whether the Federal 'Fair Debt Collection Practices Act' is applicable to a C.R.C.P. 120 proceeding. Rather than attempting to mandate compliance with that federal statute by specific rule provision, the Committee recommends that a person acting as a debt collector in a matter covered by the provisions of the Federal 'Fair Debt Collection Practices Act' be aware of the potential applicability of the Act and comply with it, notwithstanding any provision of this Rule." C.R.C.P. 120, Committee Comment to 1989 Amendment.

4 A casual reading of the definition of debt collector may lead some to conclude that those who enforce security interests are only covered under § 1692(f) of the act and nowhere else. See 15 U.S.C. § 1692(a)(6) ("For the purpose of section 1692f(6) of this title, such term also includes any person who[se] ... business the principal purpose of which is the enforcement of security interests."). Upon closer examination, however, § 1692f(6) prohibits "dispossession or disablement of property" when the security enforcer has no "present right to possession of the property," or when the enforcer has no "present intention to take possession of the property." A non-judicial foreclosure proceeding does not fit this bill—Wells Fargo has no present right to possession of the property nor could they take possession of the property. It is the public trustee who holds the deed of trust and sells the property. See Colo. Rev. Stat. §§ 38-38-101, -105. Therefore, because non-judicial foreclosure actions do not fall within this section, they also do not fall under this sub-definition in 1692a(6).

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5 For example, the word “foreclosure” is not mentioned once in either the statute or the legislative history.

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KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Gagnon v. Hal P. Gazaway and Associates, LLC, D.Alaska, September 19, 2019

139 S.Ct. 1029
Supreme Court of the United States.

Dennis OBDUSKEY, Petitioner
v.
MCCARTHY & HOLTHUS LLP

No. 17-1307
|
Argued January 7, 2019
|
Decided March 20, 2019

Synopsis

Background: Mortgagor brought action against mortgage loan servicer, to whom mortgage debt was assigned, and law firm that represented servicer, alleging, inter alia, violation of the Fair Debt Collection Practices Act (FDCPA), defamation under Colorado law, and extreme and outrageous conduct under Colorado law. The United States District Court for the District of Colorado, No. 1:15-CV-01734-RBJ, R. Brooke Jackson, J., 2016 WL 4091174, granted defendants' motions to dismiss for failure to state a claim. Mortgagor appealed. The Tenth Circuit Court of Appeals, Paul J. Kelly Jr., Circuit Judge, 879 F.3d 1216, affirmed. Certiorari was granted.

[Holding:] The Supreme Court, Justice Breyer, held that a business such as the law firm that is engaged in no more than the kind of security-interest enforcement at issue here, that is, nonjudicial foreclosure proceedings, is not a "debt collector" subject to the main coverage of the FDCPA, abrogating *Kaymark v. Bank of America, N.A.*, 783 F.3d 168; *Glazer v. Chase Home Finance LLC*, 704 F.3d 453; and *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373.

Affirmed.

Justice Sotomayor filed a concurring opinion.

West Headnotes (16)

[1] **Mortgages and Deeds of Trust**
Nature and Requisites

"Mortgage" is a security interest in real property designed to protect the creditor's investment. Restatement (Third) of Property: Mortgages § 1.1.

[2] **Mortgages and Deeds of Trust**
Default in payment in general

If homeowner defaults on required mortgage payments, the mortgage entitles the creditor to pursue "foreclosure," which is the process in which property securing a mortgage is sold to pay off the loan balance due.

1 Cases that cite this headnote

[3] **Mortgages and Deeds of Trust**
Foreclosure by action in general

"Judicial foreclosure" is a legal action initiated by a creditor in which a court supervises sale of the property and distribution of the proceeds.

1 Cases that cite this headnote

[4] **Mortgages and Deeds of Trust**
Right to Deficiency and Grounds Therefor

In the event that a foreclosure sale does not yield the full amount due, creditor pursuing a judicial foreclosure may sometimes obtain a "deficiency judgment," that is, a judgment against the homeowner for the unpaid balance of a debt.

1 Cases that cite this headnote

[5] **Mortgages and Deeds of Trust**
Foreclosure by exercise of power of sale

Under a "nonjudicial foreclosure," notice to the parties and sale of the property securing the mortgage occur outside court supervision.

2 Cases that cite this headnote

[6] **Mortgages and Deeds of Trust**
Actions and Proceedings

Under Colorado's form of nonjudicial foreclosure, if a house sells for less than what is owed on the loan, the creditor cannot hold the homeowner liable for the balance due unless it files a separate action in court and obtains a deficiency judgment. Colo. Rev. Stat. Ann. § 38-38-106(6).

[7] **Finance, Banking, and Credit**
Harassment and abuse

Under the Fair Debt Collection Practices Act (FDCPA), debt collectors may not use or threaten violence, or make repetitive annoying phone calls. Consumer Credit Protection Act § 806, 15 U.S.C.A. § 1692d.

13 Cases that cite this headnote

[8] **Finance, Banking, and Credit**
Particular communications, representations, notices, and responses
Finance, Banking, and Credit
Collecting unauthorized amounts

Under the Fair Debt Collection Practices Act (FDCPA), debt collectors cannot make false, deceptive, or misleading representations in connection with a debt, like misstating a debt's character, amount, or legal status. Consumer Credit Protection Act § 807, 15 U.S.C.A. § 1692e.

5 Cases that cite this headnote

[9] **Finance, Banking, and Credit**
Disputed debts; validation notices and responses thereto

Under the Fair Debt Collection Practices Act (FDCPA), if a consumer disputes the amount of a debt, a debt collector must cease collection until it obtains verification of the debt and mails a copy to the consumer. Consumer Credit Protection Act § 809, 15 U.S.C.A. § 1692g(b).

6 Cases that cite this headnote

[10] **Finance, Banking, and Credit**
Persons and Transactions Subject to or Protected by Regulation
Finance, Banking, and Credit
Debt collectors and debt collection in general

A business that is engaged in no more than the kind of security-interest enforcement involved in nonjudicial foreclosure proceedings is not a "debt collector" subject to the main coverage of the Fair Debt Collection Practices Act (FDCPA) but, instead, pursuant to the Act's limited-purpose definition of the term, is only subject to the subsection of the statute prohibiting debt collectors from taking or threatening to take any nonjudicial action to effect dispossession or disablement of property under certain enumerated conditions; abrogating *Kaymark v. Bank of America, N.A.*, 783 F.3d 168; *Glazer v. Chase Home Finance LLC*, 704 F.3d 453; and *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373. Consumer Credit Protection Act §§ 803, 808, 15 U.S.C.A. §§ 1692a(6), 1692f(6).

24 Cases that cite this headnote

[11] **Finance, Banking, and Credit**
Debt collectors and debt collection in general

Fair Debt Collection Practices Act's (FDCPA) primary definition of "debt collector," as any person "in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or asserted to be owed or due another," does not require that payment on a debt come "from a debtor." Consumer Credit Protection Act § 803, 15 U.S.C.A. § 1692a(6).

18 Cases that cite this headnote

[12] **Finance, Banking, and Credit**
Debt collectors and debt collection in general

Fair Debt Collection Practices Act's (FDCPA) primary definition of "debt collector," as any person "in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or asserted to be owed or due another," sweeps in both direct and indirect debt collection. Consumer Credit Protection Act § 803, 15 U.S.C.A. § 1692a(6).

21 Cases that cite this headnote

[13] **Statutes**
Giving effect to entire statute and its parts; harmony and superfluousness

Courts generally presume that statutes do not contain surplusage.

3 Cases that cite this headnote

[14] **Finance, Banking, and Credit**
Communications with third parties

Fair Debt Collection Practices Act (FDCPA) broadly limits debt collectors from communicating with third parties in connection with the collection of any debt. Consumer Credit Protection Act § 805, 15 U.S.C.A. § 1692c(b).

12 Cases that cite this headnote

[15] **Finance, Banking, and Credit**
Persons and Transactions Subject to or Protected by Regulation

Enforcing a security interest does not grant an actor blanket immunity from the Fair Debt Collection Practices Act (FDCPA), even though security-interest enforcers are not subject to the main coverage of the Act but, rather, are only subject to the subsection of the statute prohibiting debt collectors from taking or threatening to take any nonjudicial action to effect dispossession or disablement of property under certain enumerated conditions. Consumer Credit Protection Act §§ 803, 808, 15 U.S.C.A. §§ 1692a(6), 1692f(6).

6 Cases that cite this headnote

[16] **Statutes**
Construction as written

Supreme Court must enforce the statute that Congress enacted.

1 Cases that cite this headnote

Syllabus[*]

Law firm McCarthy & Holthus LLP was hired to carry

out a nonjudicial foreclosure on a Colorado home owned by petitioner Dennis Obduskey. McCarthy sent Obduskey correspondence related to the foreclosure. Obduskey responded with a letter invoking a federal Fair Debt Collection Practices Act (FDCPA or Act) provision, 15 U.S.C. § 1692g(b), which provides that if a consumer disputes the amount of a debt, a "debt collector" must "cease collection" until it "obtains verification of the debt" and mails a copy to the debtor. Instead, McCarthy initiated a nonjudicial foreclosure action. Obduskey sued, alleging that McCarthy failed to comply with the FDCPA's verification procedure. The District Court dismissed on the ground that McCarthy was not a "debt collector" within the meaning of the FDCPA, and the Tenth Circuit affirmed.

Held: A business engaged in no more than nonjudicial foreclosure proceedings is not a "debt collector" under the FDCPA, except for the limited purpose of § 1692f(6). Pp. —— – ——.

(a) The FDCPA regulates " 'debt collector[s].' " § 1692a(6). Relevant here, the definition of debt collector has two parts. The Act first sets out the primary definition of the term "debt collector": a " 'debt collector,' " it says, is "any person ... in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts." *Ibid.* The Act then sets forth the limited-purpose definition, which states that "[f]or the purpose of section 1692f(6) ... [the] term [debt collector] also includes any person ... in any business the principal purpose of which is the enforcement of security interests." It is undisputed that McCarthy is, by virtue of its role enforcing security interests, at least subject to the specific prohibitions contained in § 1692f(6). But only if McCarthy falls within the primary definition's scope do the Act's other provisions, including those at issue here, apply. Pp. —— – ——.

(b) Three considerations lead to the conclusion that McCarthy is not subject to the Act's main coverage. *First*, and most decisive, is the text of the Act itself. The limited purpose definition says that "[*f*]*or the purpose of section 1692f(6)*" a debt collector "*also* includes" a business, like McCarthy, "the principal purpose of which is the enforcement of security interests." § 1692a(6) (emphasis added). This phrase, particularly the word "also," strongly suggests that security-interest enforcers do not fall within the scope of the primary definition. If they did, the limited purpose definition would be superfluous. By contrast, under a reading that gives effect to every word of the limited-purpose definition, the FDCPA's debt-collector-related prohibitions (with the exception of § 1692f(6)) do not apply to those who, like McCarthy, are engaged in no more than security-interest enforcement. *Second*, Congress may well have chosen to treat security-interest enforcement differently from ordinary debt collection in order to avoid conflicts with state nonjudicial foreclosure schemes. *Third*, this Court's reading is supported by legislative history, which suggests that the Act's present language was the product of a compromise between competing versions of the bill, one which would have totally excluded security-interest enforcement from the Act, and another which would have treated it like ordinary debt collection. Pp. —— – ——.

(c) Obduskey's counterarguments are unconvincing. *First*, he suggests that the limited-purpose definition is not superfluous because it was meant to cover "repo men"—a category of security-interest enforcers who he says would not otherwise fall within the primary definition of "debt collector." The limited-purpose definition, however, speaks broadly of "the enforcement of security interests," § 1692a(6), not "the enforcement of security interests *in personal property*." *Second*, Obduskey claims that the Act's venue provision, § 1692i(a), which covers legal actions brought by "debt collectors" to enforce interests in real property, only makes sense if those who enforce security interests in real property are debt collectors subject to all prohibitions and requirements that come with that designation. The venue provision, however, does nothing to alter the definition of a debt collector. *Third*, Obduskey argues that McCarthy engaged in *more* than security-interest enforcement by sending notices that any ordinary homeowner would understand as an attempt to collect a debt. Here, however, the notices sent by McCarthy were antecedent steps required under state law to enforce a security interest, and the Act's (partial) exclusion of "the enforcement of security interests" must also exclude the legal means required to do so. *Finally*, Obduskey fears that this Court's decision will permit creditors and their agents to engage in a host of abusive practices forbidden by the Act. But the Court must enforce the statute that Congress enacted, and Congress is free expand the FDCPA's reach if it wishes. Pp. —— – ——.

879 F.3d 1216, affirmed.

BREYER, J., delivered the opinion for a unanimous Court. SOTOMAYOR, J., filed a concurring opinion.

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Opinion

Justice BREYER delivered the opinion of the Court.

The Fair Debt Collection Practices Act regulates " 'debt collector[s].' " 15 U.S.C. § 1692a(6); see 91 Stat. 874, 15 U.S.C. § 1692 *et seq.* A " 'debt collector,' " the Act says, is "any person ... in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts." § 1692a(6). This definition, however, goes on to say that "[f]or the purpose of section 1692f(6)" (a separate provision of the Act), "[the] term [debt collector] also includes any person ... in any business the principal purpose of which is the enforcement of security interests." *Ibid.*

The question before us concerns this last sentence. Does it mean that one principally involved in "the enforcement of security interests" is *not* a debt collector (except "[f]or the purpose of section 1692f(6)")? If so, numerous other provisions of the Act do not apply. Or does it simply reinforce the fact that those principally involved in the enforcement of security interests are subject to § 1692f(6) in addition to the Act's other provisions?

In our view, the last sentence does (with its § 1692f(6) exception) place those whose "principal purpose ... is the enforcement of security interests" outside the scope of the primary "debt collector" definition, § 1692a(6), where the business is engaged in no more than the kind of security-interest enforcement at issue here—nonjudicial foreclosure proceedings.

I

A

[1] [2]When a person buys a home, he or she usually borrows money from a lending institution, such as a bank. The resulting debt is backed up by a "mortgage"—a security interest in the property designed to protect the creditor's investment. Restatement (Third) of Property: Mortgages § 1.1 (1996) (Restatement). (In some States, this security interest is known as a "deed of trust," though for present purposes the difference is immaterial. See generally *ibid.*) The loan likely requires the homeowner to make monthly payments. And if the homeowner defaults, the mortgage entitles the creditor to pursue ***1034** foreclosure, which is "the process in which property securing a mortgage is sold to pay off the loan balance due." 2 B. Dunaway, Law of Distressed Real Estate § 15:1 (2018) (Dunaway).

[3] [4]Every State provides some form of *judicial* foreclosure: a legal action initiated by a creditor in which a court supervises sale of the property and distribution of the proceeds. *Id.*, § 16:1. These procedures offer various protections for homeowners, such as the right to notice and to protest the amount a creditor says is owed. *Id.*, §§ 16:17, 16:20; Restatement § 8.2. And in the event that the foreclosure sale does not yield the full amount due, a creditor pursuing a judicial foreclosure may sometimes obtain a deficiency judgment, that is, a judgment against the homeowner for the unpaid balance of a debt. National Consumer Law Center (NCLC), Foreclosures and Mortgage Servicing §§ 12.3.1–2 (5th ed. 2014).

[5]About half the States also provide for what is known as *nonjudicial* foreclosure, where notice to the parties and sale of the property occur outside court supervision. 2 Dunaway § 17:1. Under Colorado's form of nonjudicial foreclosure, at issue here, a creditor (or more likely its agent) must first mail the homeowner certain preliminary information, including the telephone number for the Colorado foreclosure hotline. Colo. Rev. Stat. § 38–38–102.5(2) (2018). Thirty days later, the creditor may file a "notice of election and demand" with a state official called a "public trustee." § 38–38–101. The public trustee records this notice and mails a copy, alongside other materials, to the homeowner. §§ 38–38–102, 38–38–103. These materials give the homeowner information about the balance of the loan, the homeowner's right to cure the default, and the time and place of the foreclosure sale. §§ 38–38–101(4), 38–38–103. Assuming the debtor does not cure the default or declare bankruptcy, the creditor may then seek an order from a state court authorizing the sale. Colo. Rule Civ. Proc. 120 (2018); see Colo. Rev. Stat. § 38–38–105. (Given this measure of court involvement, Colorado's "nonjudicial" foreclosure process is

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something of a hybrid, though no party claims these features transform Colorado's nonjudicial scheme into a judicial one.) In court, the homeowner may contest the creditor's right to sell the property, and a hearing will be held to determine whether the sale should go forward. Colo. Rules Civ. Proc. 120(c), (d).

[6]If the court gives its approval, the public trustee may then sell the property at a public auction, though a homeowner may avoid a sale altogether by curing the default up until noon on the day before. Colo. Rev. Stat. §§ 38–38–110, 38–38–104(VI)(b). If the sale goes forward and the house sells for more than the amount owed, any profits go first to lienholders and then to the homeowner. § 38–38–111. If the house sells for less than what is owed, the creditor cannot hold the homeowner liable for the balance due unless it files a separate action in court and obtains a deficiency judgment. See § 38–38–106(6); *Bank of America v. Kosovich*, 878 P.2d 65, 66 (Colo. App. 1994). Other States likewise prevent creditors from obtaining deficiency judgments in nonjudicial foreclosure proceedings. Restatement § 8.2. And in some States, pursuing nonjudicial foreclosure bars or curtails a creditor's ability to obtain a deficiency judgment altogether. NCLC, Foreclosures and Mortgage Servicing § 12.3.2.

B

In 2007, petitioner Dennis Obduskey bought a home in Colorado with a $ 329,940 loan secured by the property. About two years later, Obduskey defaulted.

***1035** In 2014, Wells Fargo Bank, N. A., hired a law firm, McCarthy & Holthus LLP, the respondent here, to act as its agent in carrying out a nonjudicial foreclosure. According to the complaint, McCarthy first mailed Obduskey a letter that said it had been "instructed to commence foreclosure" against the property, disclosed the amount outstanding on the loan, and identified the creditor, Wells Fargo. App. 37–38; see *id.*, at 23. The letter purported to provide notice "[p]ursuant to, and in compliance with," both the Fair Debt Collection Practices Act (FDCPA) and Colorado law. *Id.*, at 37. (The parties seem not to dispute that this and other correspondence from McCarthy was required under state law. Because that is a question of Colorado law not briefed by the parties before us nor passed on by the courts below, we proceed along the same assumption.) Obduskey responded with a letter invoking § 1692g(b) of the FDCPA, which provides that if a consumer disputes the amount of a debt, a "debt collector" must "cease collection" until it "obtains verification of the debt" and mails a copy to the debtor.

Yet, Obduskey alleges, McCarthy neither ceased collecting on the debt nor provided verification. App. 22–23. Instead, the firm initiated a nonjudicial foreclosure action by filing a notice of election and demand with the county public trustee. *Ibid.*; see *id.*, at 39–41. The notice stated the amount due and advised that the public trustee would "sell [the] property for the purpose of paying the indebtedness." *Id.*, at 40.

Obduskey then filed a lawsuit in federal court alleging that the firm had violated the FDCPA by, among other things, failing to comply with the verification procedure. *Id.*, at 29. The District Court dismissed the suit on the ground that the law firm was not a "debt collector" within the meaning of the Act, so the relevant Act requirements did not apply. *Obduskey v. Wells Fargo*, 2016 WL 4091174, *3 (D. Colo., July 19, 2016).

On appeal, the Court of Appeals for the Tenth Circuit affirmed the dismissal, concluding that the "mere act of enforcing a security interest through a non-judicial foreclosure proceeding does not fall under" the Act. *Obduskey v. Wells Fargo*, 879 F.3d 1216, 1223 (2018).

Obduskey then petitioned for certiorari. In light of different views among the Circuits about application of the FDCPA to nonjudicial foreclosure proceedings, we granted the petition. Compare *ibid.* and *Vien-Phuong Thi Ho v. ReconTrust Co., NA*, 858 F.3d 568, 573 (C.A.9 2016) (holding that an entity whose only role is the enforcement of security interests is not a debt collector under the Act), with *Kaymark v. Bank of America, N. A.*, 783 F.3d 168, 179 (C.A.3 2015) (holding that such an entity is a debt collector for the purpose of all the Act's requirements), *Glazer v. Chase Home Fin. LLC*, 704 F.3d 453, 461 (C.A.6 2013) (same), and *Wilson v. Draper & Goldberg, P. L. L. C.*, 443 F.3d 373, 376 (C.A.4 2006) (same).

II

A

The FDCPA's definitional section, 15 U.S.C. § 1692a, defines a "debt" as:

> "*any obligation* or alleged obligation of a consumer *to pay money* arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes." § 1692a(5) (emphasis added).

The Act then sets out the definition of the term "debt collector." § 1692a(6). The first sentence of the relevant paragraph, which we shall call the primary definition, says that the term "debt collector":

> ***1036** "means any person ... in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or asserted to be owed or due another." *Ibid.*

The third sentence, however, provides what we shall call the limited-purpose definition:

> "For the purpose of section 1692f(6) [the] term [debt collector] also includes any person ... in any business the principal purpose of which is the enforcement of security interests." *Ibid.*

The subsection to which the limited-purpose definition refers, § 1692f(6), prohibits a "debt collector" from:

> "Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if—
>
> "(A) there is no present right to possession of the property ... ;
>
> "(B) there is no present intention to take possession of the property; or
>
> "(C) the property is exempt by law from such dispossession or disablement."

[7] [8] [9]The rest of the Act imposes myriad other requirements on debt collectors. For example, debt collectors may not use or threaten violence, or make repetitive annoying phone calls. § 1692d. Nor can debt collectors make false, deceptive, or misleading representations in connection with a debt, like misstating a debt's "character, amount, or legal status." § 1692e. And, as we have mentioned, if a consumer disputes the amount of a debt, a debt collector must "cease collection" until it "obtains verification of the debt" and mails a copy to the debtor. § 1692g(b).

No one here disputes that McCarthy is, by virtue of its role enforcing security interests, at least subject to the specific prohibitions contained in § 1692f(6). The question is whether *other* provisions of the Act apply. And they do if, but only if, McCarthy falls within the scope of the Act's primary definition of "debt collector."

B

[10]Three considerations lead us to conclude that McCarthy is not subject to the main coverage of the Act.

First, and most decisive, is the text of the Act itself. As a preliminary matter, we concede that if the FDCPA contained *only* the primary definition, a business engaged in nonjudicial foreclosure proceedings would qualify as a debt collector for all purposes. We have explained that a home loan is an obligation to pay money, and the purpose of a mortgage is to secure that obligation. See *supra*, at ——. Foreclosure, in turn, is "the process in which property securing a mortgage is sold to pay off the loan balance due." 2 Dunaway § 15:1. In other words, foreclosure is a means of collecting a debt. And a business pursuing nonjudicial foreclosures would, under the capacious language of the Act's primary definition, be one that "regularly collects or attempts to collect, directly or indirectly, debts." § 1692a(6).

[11] [12]It is true that, as McCarthy points out, nonjudicial foreclosure does not seek "a payment of money *from the debtor*" but rather from sale of the property itself. Brief for Respondent 17 (emphasis added). But nothing in the primary definition requires that payment on a debt come "from a debtor." The statute speaks simply of the "collection of any debts ... owed or due." § 1692a(6). Moreover, the provision sweeps in both "direc[t]" and "indirec[t]" debt collection. *Ibid.* So, even if nonjudicial foreclosure were not a *direct* attempt to collect a debt, because it aims to collect on a consumer's obligation by way of enforcing ***1037** a security interest, it would be an *indirect* attempt to collect a debt.

The Act does not, however, contain only the primary definition. And the limited-purpose definition poses a serious, indeed an insurmountable, obstacle to subjecting McCarthy to the main coverage of the Act. It says that "*[f]or the purpose of section 1692f(6)*" a debt collector "*also* includes" a business, like McCarthy, "the principal

purpose of which is the enforcement of security interests." § 1692a(6) (emphasis added). This phrase, particularly the word "also," strongly suggests that one who does no more than enforce security interests does *not* fall within the scope of the general definition. Otherwise why add this sentence at all?

[13]It is logically, but not practically, possible that Congress simply wanted to emphasize that the definition of "debt collector" includes those engaged in the enforcement of security interests. But why then would Congress have used the word "also"? And if security-interest enforcers are covered by the primary definition, why would Congress have needed to say anything special about § 1692f(6)? After all, § 1692f(6), just like all the provisions applicable to debt collectors, would have already applied to those who enforce security interests. The reference to § 1692f(6) would on this view be superfluous, and we "generally presum[e] that statutes do not contain surplusage." *Arlington Central School Dist. Bd. of Ed.* v. *Murphy*, 548 U.S. 291, 299, n. 1, 126 S.Ct. 2455, 165 L.Ed.2d 526 (2006). By contrast, giving effect to every word of the limited-purpose definition narrows the primary definition, so that the debt-collector-related prohibitions of the FDCPA (with the exception of § 1692f(6)) do *not* apply to those who, like McCarthy, are engaged in no more than security-interest enforcement.

[14]*Second*, we think Congress may well have chosen to treat security-interest enforcement differently from ordinary debt collection in order to avoid conflicts with state nonjudicial foreclosure schemes. As Colorado's law makes clear, *supra*, at ——— – ———, state nonjudicial foreclosure laws provide various protections designed to prevent sharp collection practices and to protect homeowners, see 2 Dunaway § 17:1. And some features of these laws are in tension with aspects of the Act. For example, the FDCPA broadly limits debt collectors from communicating with third parties "in connection with the collection of any debt." § 1692c(b). If this rule were applied to nonjudicial foreclosure proceedings, then advertising a foreclosure sale—an essential element of such schemes—might run afoul of the FDCPA. Given that a core purpose of publicizing a sale is to attract bidders, ensure that the sale price is fair, and thereby protect the borrower from further liability, the result would hardly benefit debtors. See 2 Dunaway § 17:4. To be sure, it may be possible to resolve these conflicts without great harm to either the Act or state foreclosure schemes. See *Heintz* v. *Jenkins*, 514 U.S. 291, 296–297, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995) (observing that the FDCPA's protections may contain certain "implici[t] exception[s]"). But it is also possible, in light of the language it employed, that Congress wanted to avoid the risk of such conflicts altogether.

Third, for those of us who use legislative history to help interpret statutes, the history of the FDCPA supports our reading. When drafting the bill, Congress considered a version that would have subjected security-interest enforcers to the full coverage of the Act. That version defined a debt collector as "any person who engages in any business the principal purpose of which is the collection of any debt *or enforcement of security interests*." S. 918, ***1038** 95th Cong., 1st Sess., § 803(f) (1977) (emphasis added). A different version of the bill, however, would have totally excluded from the Act's coverage "any person who enforces or attempts to enforce a security interest in real or personal property." S. 1130, 95th Cong., 1st Sess., § 802(8)(E) (1977). Given these conflicting proposals, the Act's present language has all the earmarks of a compromise: The prohibitions contained in § 1692f(6) will cover security-interest enforcers, while the other "debt collector" provisions of the Act will not.

These considerations convince us that, but for § 1692f(6), those who engage in only nonjudicial foreclosure proceedings are not debt collectors within the meaning of the Act.

III

Obduskey makes several arguments to the contrary. But, on balance, we do not find them determinative.

First, Obduskey acknowledges that unless the limited-purpose definition is superfluous, it must make some kind of security-interest enforcer a "debt collector" who would not otherwise fall within the primary definition. Reply Brief 11–13. But, according to Obduskey, "repo men"—those who seize automobiles and other personal property in response to nonpayment—fit the bill. See Black's Law Dictionary 1493 (10th ed. 2014) (explaining that "repo" is short for "repossession," which means "retaking property; esp., a seller's retaking of goods sold on credit when the buyer has failed to pay for them"). This is so, he says, because repossession often entails only "limited communication" with the debtor, as when the repo man sneaks up and "tows a car in the middle of the night." Brief for Petitioner 25–26, and n. 13. And because, according to Obduskey, the language of § 1692f(6), which forbids "[t]aking or threatening to take

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any nonjudicial action to effect *dispossession or disablement* of property," applies more naturally to the seizure of personal property than to nonjudicial foreclosure. (Emphasis added.)

But we do not see why that is so. The limited-purpose provision speaks broadly of "the enforcement of security interests," § 1692a(6), not "the enforcement of security interests *in personal property*"; if Congress meant to cover only the repo man, it could have said so. Moreover, Obduskey's theory fails to save the limited-purpose definition from superfluity. As we have just discussed, *supra*, at ——— – ———, if the Act contained only the primary definition, enforcement of a security interest would at least be an indirect collection of a debt. The same may well be true of repo activity, a form of security-interest enforcement, as the point of repossessing property that secures a debt is to collect some or all of the value of the defaulted debt. And while Obduskey argues that the language of § 1692f(6) fits more comfortably with repossession of personal property than nonjudicial foreclosure, we think it at least plausible that "threatening" to foreclose on a consumer's home without having legal entitlement to do so is the kind of "nonjudicial action" without "present right to possession" prohibited by that section. § 1692f(6)(A). (We need not, however, here decide precisely what conduct runs afoul of § 1692f(6).)

We are also unmoved by Obduskey's argument that repossession would not fall under the primary definition because it generally involves only limited communication with the debtor. For one thing, while some of the FDCPA's substantive protections apply where there has been a "communicat[ion]" with a consumer, see, *e.g.*, § 1692c, the primary definition of debt collector turns on the "collection of ... debts," without express reference to communication, § 1692a(6). For another, while ***1039** Obduskey imagines a silent repo man striking in the dead of night, state law often requires communication with a debtor during the repossession process, such as notifying a consumer of a sale. NCLC, Repossessions § 10.4 (9th ed. 2017).

Second, Obduskey points to the Act's venue provision, 15 U.S.C. § 1692i(a), which states that "[a]ny *debt collector* who brings any legal action on a debt against any consumer shall ... in the case of an action to enforce an interest in real property securing the consumer's obligation, bring such action only in a judicial district" where the "property is located." (Emphasis added.) This provision, he says, makes clear that a person who *judicially* enforces a real-property-related security interest is a debt collector; hence, a person who *nonjudicially* enforces such an interest must also be a debt collector. Indeed, he adds, this subsection "only makes sense" if those who enforce security interests in real property are debt collectors subject to all prohibitions and requirements that come with that designation. Brief for Petitioner 21.

This argument, however, makes too much of too little. To begin with, the venue section has no direct application in this case, for here we consider *nonjudicial* foreclosure. And whether those who judicially enforce mortgages fall within the scope of the primary definition is a question we can leave for another day. See 879 F.3d at 1221–1222 (noting that the availability of a deficiency judgment is a potentially relevant distinction between judicial and nonjudicial foreclosures).

More to the point, the venue provision does nothing to alter the definition of a debt collector. Rather, it applies whenever a "debt collector" brings a "legal action ... to enforce an interest in real property." § 1692i(a)(1). In other words, the provision anticipates that a debt collector can bring a judicial action respecting real property, but it nowhere says that an entity is a debt collector *because* it brings such an action. Obduskey suggests that under our interpretation this provision will capture a null set. We think not. A business that qualifies as a debt collector based on *other* activities (say, because it "regularly collects or attempts to collect" unsecured credit card debts, § 1692a(6)) would have to comply with the venue provision if it also filed "an action to enforce an interest in real property," § 1692i(a)(1). Here, however, the only basis alleged for concluding that McCarthy is a debt collector under the Act is its role in nonjudicial foreclosure proceedings.

[15]*Third*, Obduskey argues that even if "simply enforcing a security interest" falls outside the primary definition, McCarthy engaged in *more* than security-interest enforcement by sending notices that any ordinary homeowner would understand as an attempt to collect a debt backed up by the threat of foreclosure. Brief for Petitioner 15–16; see Reply Brief 13. We do not doubt the gravity of a letter informing a homeowner that she may lose her home unless she pays her outstanding debts. But here we assume that the notices sent by McCarthy were antecedent steps required under state law to enforce a security interest. See *supra*, at ———. Indeed, every nonjudicial foreclosure scheme of which we are aware involves notices to the homeowner. See 2 Dunaway § 17:4 (describing state procedures concerning notice of sale). And because he who wills the ends must will the necessary means, we think the Act's (partial) exclusion of "the enforcement of security interests" must also exclude

the legal means required to do so. This is not to suggest that pursuing nonjudicial foreclosure is a license to engage in abusive debt collection practices like repetitive nighttime phone calls; enforcing a security interest does not ***1040** grant an actor blanket immunity from the Act. But given that we here confront only steps required by state law, we need not consider what *other* conduct (related to, but not required for, enforcement of a security interest) might transform a security-interest enforcer into a debt collector subject to the main coverage of the Act.

[16]*Finally*, Obduskey fears that our decision will open a loophole, permitting creditors and their agents to engage in a host of abusive practices forbidden by the Act. States, however, can and do guard against such practices, for example, by requiring notices, review by state officials such as the public trustee, and limited court supervision. See *supra*, at —— – ——, ——. Congress may think these state protections adequate, or it may choose to expand the reach of the FDCPA. Regardless, for the reasons we have given, we believe that the statute exempts entities engaged in no more than the "enforcement of security interests" from the lion's share of its prohibitions. And we must enforce the statute that Congress enacted.

For these reasons, the judgment of the Court of Appeals is

Affirmed.

Justice SOTOMAYOR, concurring.

I join the Court's opinion, which makes a coherent whole of a thorny section of statutory text. I write separately to make two observations: First, this is a close case, and today's opinion does not prevent Congress from clarifying this statute if we have gotten it wrong. Second, as the Court makes clear, "enforcing a security interest does not grant an actor blanket immunity from the" mandates of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 *et seq.* See *ante*, at —— – ——.

This case turns on two sentences that, put together, read in relevant part:

> "[1] The term 'debt collector' means any person ... in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts .... [2] For the purpose of section 1692f(6) of this title, such term also includes any person ... in any business the principal purpose of which is the enforcement of security interests." § 1692a(6).

As the Court recognizes, if the first sentence were the only text before us, nonjudicial foreclosure plainly would qualify as debt collection—after all, foreclosure itself "is a means of collecting a debt," *ante*, at ——, whether "directly or indirectly," § 1692a(6). That may be because a house can be sold—thus satisfying the debt with the proceeds—but it may also be because the initiation of a foreclosure itself sends a clear message: "[P]ay up or lose your house." Brief for Petitioner 17; see *Alaska Trustee, LLC v. Ambridge*, 372 P.3d 207, 217–218 (Alaska 2016); *Glazer v. Chase Home Finance LLC*, 704 F.3d 453, 461 (C.A.6 2013).

The problem for Obduskey's reading, as the Court explains, is the second sentence, which then becomes superfluous if all security-interest enforcement is already covered by sentence one. See *ante*, at —— – ——. To be clear, there is a reasonable argument that the second sentence covers security-interest enforcers who are not already covered by the first sentence: Under this argument, those additional security-interest enforcers are "people who engage in the business of repossessing property, whose business does not primarily involve communicating with debtors in an effort to secure payment of debts," *Piper v. Portnoff Law Assoc., Ltd.*, 396 F.3d 227, 236 (C.A.3 2005); see also *Alaska Trustee*, 372 P.3d at 219–220; *Glazer*, 704 F.3d at 463–464, such as "the repo man [who] sneaks ***1041** up and 'tows a car in the middle of the night,' " *ante*, at ——. But, as the Court explains, that reading does not resolve the surplusage problem, because even such repossession agencies engage in a means of collecting debts "indirectly"—which means that they are similarly situated to entities pursuing nonjudicial foreclosures after all. See *ante*, at —— – ——.

All the same, this is too close a case for me to feel certain that Congress recognized that this complex statute would be interpreted the way that the Court does today. While States do regulate nonjudicial foreclosures, see *ante*, at ——, the extent and method of those protections can vary widely, and the FDCPA was enacted not only "to eliminate abusive debt collection practices" but also "to promote consistent State action to protect consumers against debt collection abuses," § 1692(e); see also § 1692n (pre-empting inconsistent state laws while exempting state consumer protections that are "greater than the protection provided by [the FDCPA]"). Today's opinion leaves Congress free to make clear that the FDCPA fully encompasses entities pursuing nonjudicial foreclosures and regulates security-interest enforcers like

repossession agencies in only the more limited way addressed in § 1692f(6). That too would be consistent with the FDCPA's broad, consumer-protective purposes. See § 1692(e).

Separately, I note that the Court's opinion recognizes that the question before us involves "no more than the kind of security interest enforcement at issue here," *ante*, at ——, which means an entity that takes "only steps required by state law," *ante*, at ——. The Court rightly notes, therefore, that nothing in today's opinion is "to suggest that pursuing nonjudicial foreclosure is a license to engage in abusive debt collection practices like repetitive nighttime phone calls; enforcing a security interest does not grant an actor blanket immunity from the Act." *Ante*, at —— – ——. Indeed, in addition to the unnecessary and abusive practices that the Court notes, I would see as a different case one in which the defendant went around frightening homeowners with the threat of foreclosure without showing any meaningful intention of ever actually following through. There would be a question, in such a case, whether such an entity was in fact a "business the principal purpose of which is the enforcement of security interests," see § 1692a(6), or whether it was simply using that label as a stalking horse for something else.

Because the Court rightly cabins its holding to the kinds of good-faith actions presented here and because we are bound to apply Congress' statutes as best we can understand them, I concur in the Court's opinion.

All Citations

139 S.Ct. 1029, 203 L.Ed.2d 390, 19 Cal. Daily Op. Serv. 2461, 2019 Daily Journal D.A.R. 2246, 27 Fla. L. Weekly Fed. S 724

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

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2019 WL 4539926
Only the Westlaw citation is currently available.
United States District Court, D. Alaska.

Rebecca GAGNON, Plaintiff,
v.
HAL P. GAZAWAY AND ASSOCIATES, LLC, Defendant.

3:19-cv-178 JWS
|
Signed 09/19/2019

Attorneys and Law Firms

Goriune Dudukgian, James J. Davis, Jr., Northern Justice Project, Anchorage, AK, for Plaintiff.

Hal P. Gazaway, Anchorage, AK, for Defendant.

ORDER AND OPINION

[Re: Motion at docket 9]

JOHN W. SEDWICK, SENIOR JUDGE

I. MOTION PRESENTED

***1** At docket 9, defendant Hal P. Gazaway and Associates, LLC ("Defendant") moves to dismiss the complaint filed by plaintiff Rebecca Gagnon ("Plaintiff"). In the alternative, Defendant asks the court to stay this case pending resolution of a state court case which is set for trial on July 13, 2020. While Plaintiff does not mention it in his motion, the request to dismiss the complaint is clearly brought pursuant to Fed. R. Civ. P. 12(b)(6). Plaintiff responds at docket 10, and Defendant replies at docket 13. Oral argument has not been requested and would not assist the court.

II. BACKGROUND

Defendant sent a letter dated September 26, 2017, to Plaintiff ("the Letter"). The Letter advised Plaintiff that she had failed to pay Defendant's client Alpine Village Condominium Association the sum of $371.99 due on the first of each month commencing on October 1, 2013. Prominently displayed in a box above the salutation, the Letter proclaimed, "The purpose of this letter is to collect a debt." The Letter went on to state that as of October 1, 2017, Plaintiff would need to pay $3,155.32, consisting of monthly dues and special assessments of $2,545.32 plus late charges of $360 and attorneys' fees of $250, to cure her default. The Letter further advised that if the payment were not made in 30 days, a foreclosure proceeding would be commenced and that once a foreclosure was commenced, the amount to be paid would increase to a higher amount as specified in the Letter.[1]

Plaintiff brings her complaint pursuant to the Fair Debt Collection Practices Act[2] ("FDCPA"). Her complaint sets forth two claims for relief. In Count 1 she alleges that Defendant violated 15 U.S.C. § 1692g(a), which would entitle Plaintiff to recover damages pursuant to 15 U.S.C. § 1692k(a).[3] Count II alleges Defendant violated 15 U.S.C. § 1692e, which would also entitle Plaintiff to recover damages pursuant to 15 U.S.C. § 1692k(a).

III. STANDARD OF REVIEW

Rule 12(b)(6) tests the legal sufficiency of a plaintiff's claims. In reviewing such a motion, "[a]ll allegations of material fact in the complaint are taken as true and construed in the light most favorable to the nonmoving party."[4] To be assumed true, the allegations, "may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively."[5] Dismissal for failure to state a claim can be based on either "the lack of a cognizable legal theory or the absence of sufficient facts alleged under a

cognizable legal theory."[6] "Conclusory allegations of law ... are insufficient to defeat a motion to dismiss."[7]

To avoid dismissal, a plaintiff must plead facts sufficient to " 'state a claim to relief that is plausible on its face.' "[8] "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[9] "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully."[10] "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.' "[11] "In sum, for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief."[12]

IV. DISCUSSION

***2** Plaintiff alleges that Defendant regularly engages in the collection of consumer debt.[13] Under the Rule 12(b)(6) standard, the court must accept this allegation of material fact as true. Plaintiff also alleges that the Letter's purpose is to collect a debt. That material fact cannot be disputed, because the Letter specifically states that such is its purpose.

In Count I, Plaintiff contends 15 U.S.C. § 1692g(a) required Defendant to give her a debt validation notice within five days from the date of Defendant's first communication with her. In Count I, Plaintiff also contends that 15 U.S.C. § 1692g(a)(3) required Defendant to inform her that she had thirty days from the receipt of the debt validation notice to request Defendant to provide her with proof of the debt's validity. Plaintiff alleges that Defendant did not comply with either requirement. In Count II, Plaintiff contends that Defendant violated 15 U.S.C. § 1692e, because the Letter made a false representation about the character, amount or legal status of the debt it sought to collect.

To support dismissal of Plaintiff's claims, Defendant relies on its interpretation of the recent Supreme Court decision in *Obduskey v. McCarthy & Holthus LLP*.[14] Defendant argues that because it was attempting to complete a non-judicial foreclosure, it is not a debt collector under *Obduskey* and so cannot violate the FDCPA. This argument does not withstand scrutiny.

In *Obduskey*, the Court considered an action brought against a law firm engaged to bring a non-judicial foreclosure on Obduskey's home in Colorado. Colorado, like Alaska, has statutes which authorize non-judicial foreclosures. Obduskey argued that the law firm was a debt collector within the meaning of the FDCPA and that the law firm had violated the statute. The Court examined the FDCPA in detail and concluded that the law firm was not a debt collector for purposes of the FDCPA except that the law firm was subject to § 1692f(6).

In *Obduskey*, the law firm sent a letter to the debtor prior to commencing the non-judicial foreclosure. The Court's analysis proceeded on the basis that the letter was required by Colorado statutes governing non-judicial foreclosures. Alaska's statutory scheme governing non-judicial foreclosures is different. It requires the entity seeking foreclosure to record a detailed notice in the appropriate recording district and then to mail a copy of the detailed notice to specified persons including the debtor.[15] There is nothing in the Alaska statutory scheme which mentions, much less requires, a letter to be sent to the debtor. The *Obduskey* opinion makes clear that the requirement of state law was central to its holding that the letter at issue there did not subject the law firm to the full range of FDCPA. Justice Sotomayor's concurring opinion gives further emphasis to the significance of the fact that the letter was required by state law.[16]

Given the carefully cabined discussion in *Obduskey*, this court concludes that the Letter does not escape scrutiny under FDCPA. Defendant has not cited any post-*Obduskey* case which supports its position. However, other district court decisions made subsequent to *Obduskey* set out conclusions like the one this court has reached.[17]

***3** Defendant's alternate request is to stay this action pending resolution of Alaska Superior Court case *Gagnon v. Hal P. Gazaway and Associates, LLC* ("State Case").[18] Defendant says the State Case involves the same parties and involves the same condominium which is the subject of the foreclosure. Plaintiff says the issues in the State Case "are whether Alaska state law allows for the non-judicial foreclosure of common expense liens, and whether a debt collector violates [state statutes] by falsely threatening 'the non-judicial foreclosure of a common expense lien....' "[19] In its reply Defendant does not dispute Plaintiff's characterization of the issues, but contends that Plaintiff could have pled the claims before this court in the State Case, so she is forum shopping. The claims pled in this court are federal law claims. The claims pled in the

State Case are state law claims. Plaintiff could have pled all her claims in state court, but that does not mean that she was required to do so. Choosing to pursue federal law claims in federal court and separate state law claims in state court does not constitute forum shopping.

V. CONCLUSION

For the reasons set out above, the motion at docket 9 is DENIED.

All Citations

Slip Copy, 2019 WL 4539926

Footnotes

1 Doc. 1-1.

2 15 U.S.C. §§ 1692, *et seq.*

3 Doc. 1 at pp. 4-5.

4 *Vignolo v. Miller*, 120 F.3d 1075, 1077 (9th Cir. 1997).

5 *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

6 *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

7 *Lee v. City of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001).

8 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

9 *Id.*

10 *Id.* (citing *Twombly*, 550 U.S. at 556).

11 *Id.* (quoting *Twombly*, 550 U.S. at 557).

12 *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009); *see also Starr*, 652 F.3d at 1216.

13 Doc. 1 at ¶ 5.

14 139 S.Ct. 1029 (2019).

15 AS 34.20.070 (b), (c).

16 139 S.Ct. at 1040-41.

17 *Cooke v. Carrington Mortg. Servs.*, No. TDC-18-0205, 2019 WL 3241128 (D. Md. July 18, 2019); *Sevela v. Kozeny & McCubbin, L.C.*,

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No. 8:18-cv-390, 2019 WL 2066924 (D. Neb. May 2, 2019).

18 Case No. 3AN-18-07802 CI (Alaska Super. Ct. Mar. 20, 2019).

19 Doc. 10 at pp. 6-7.

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PNC Bank, N.A. v. Wilson

Appellate Court of Illinois, Second District

March 2, 2017, Opinion Filed

No. 2-15-1189

Reporter
2017 IL App (2d) 151189 *; 74 N.E.3d 100 **; 2017 Ill. App. LEXIS 109 ***; 411 Ill. Dec. 791 ****

PNC BANK, NATIONAL ASSOCIATION, Plaintiff-Appellee, v. JEREMY T. WILSON and MICHELLE M. WILSON, Defendants (Jeremy T. Wilson, Defendant-Appellant).

Subsequent History: Appeal denied by *PNC Bank v. Wilson, 2017 Ill. LEXIS 815 (Ill., Sept. 27, 2017)*

Prior History: **[***1]** Appeal from the Circuit Court of Du Page County. No. 12-CH-5282. Honorable Robert G. Gibson, Judge, Presiding.

Disposition: Affirmed.

Counsel: For Appellant: Eryk Folmer, Law Office of Eryk Folmer, Chicago.

For Appellee: Jennifer E. Frick, James M. Crowley, Crowley & Lamb, P.C., Chicago.

Judges: JUSTICE McLAREN delivered the judgment of the court, with opinion. Justices Jorgensen and Schostok concurred in the judgment and opinion.

Opinion by: McLAREN

Opinion

[**793]** **[**102]** JUSTICE McLAREN delivered the judgment of the court, with opinion.

Justices Jorgensen and Schostok concurred in the judgment and opinion.

OPINION

[*P1] Defendant Jeremy T. Wilson appeals from summary judgment rendered against him and in favor of plaintiff, PNC Bank, National Association, in a foreclosure action upon a mortgage loan between the parties. The mortgage is insured by the Federal Housing Administration (FHA), a division of the United States Department of Housing and Urban Development (HUD). Jeremy contends that the trial court erred by rendering summary judgment in PNC Bank's favor, because PNC Bank did not comply with federal regulations prior to instituting its foreclosure action. Jeremy argues that the evidence in the record demonstrates the existence of a genuine issue of material fact with respect to his defense that PNC Bank failed to comply with HUD regulations, specifically, ***title 24, section 203.604, of the Code of Federal Regulations*** (***24 C.F.R. § 203.604 (2014)***), which requires **[***2]** a lender, before bringing a foreclosure action against a defaulting borrower, either to have a face-to-face meeting with the borrower or make "a reasonable effort" to arrange a face-to-face meeting. For the following reasons, we affirm.

[*P2] I. BACKGROUND

[*P3] In June 2003, Jeremy and his wife, Michelle M. Wilson, gave a promissory note to National City Mortgage Company in the amount of $224,467, secured by a mortgage lien on the Wilsons' real property in Du Page County. Subsequently, PNC Bank succeeded to the interest of National City Mortgage Company. The federally insured mortgage loan that is the subject of this cause of action is subject to HUD regulations.

[*P4] **[****794]** **[**103]** The Wilsons failed to make their monthly payment due on the loan for August 2010. In October 2010, PNC Bank sent the Wilsons a letter establishing the terms of a three-month special forbearance plan. The Wilsons complied with the special forbearance plan, and PNC Bank offered the Wilsons a loan modification to bring their loan current. The parties executed the loan modification agreement on February 10, 2011. On February 28, 2011, the Wilsons filed for Chapter 7 bankruptcy protection in the United States Bankruptcy Court, and they did **[***3]** not reaffirm their mortgage. The bankruptcy court discharged the Wilsons' debt to PNC Bank in May 2011.

[*P5] On October 31, 2012, PNC Bank filed a complaint against the Wilsons for foreclosure, alleging

that the Wilsons defaulted on the loan "by failing to pay the monthly installment due May 1, 2012[,] and thereafter." PNC Bank alleged that both Jeremy and Michelle were the mortgagors of the subject property. PNC Bank attached a copy of the mortgage to the complaint.

[*P6] On September 28, 2013, Jeremy, alone, filed an answer.

[*P7] On November 18, 2014, the Wilsons moved for summary judgment. In their motion, the Wilsons contended that PNC Bank violated HUD regulations because (1) before PNC Bank filed its foreclosure complaint neither Jeremy nor Michelle "received any written information from [PNC Bank] regarding *** counseling programs *** offered by [HUD] [or] any written information from [PNC Bank] regarding a request to have a face to face interview," and (2) no efforts were "made to arrange such a meeting." The affidavits of Jeremy and Michelle were attached to their motion.

[*P8] In response, PNC Bank filed a cross-motion for summary judgment, arguing that there was no dispute that it sent a certified **[***4]** letter to the Wilsons and that a PNC Bank agent made a trip to the Wilsons' property and met with Michelle. PNC Bank attached the affidavit of Brian Arthur, PNC Bank's vice president for mortgage services-default, wherein Arthur stated the following. He was familiar with PNC Bank's business, its mode of operation, and the manner in which its records were prepared. Arthur reviewed loan files and was familiar with PNC Bank's corporate history and its records, including the Wilsons' loan file. Arthur stated that PNC Bank sent the Wilsons "a letter by certified mail dated February 2, 2012, stating that PNC, through its agent [J.M. Adjustment Services (JMA)], would schedule a face-to-face meeting at their home to discuss solutions to bring their loan current. A true and correct copy of the February 2, 2012 letter is attached." The attached letter is a computer-generated copy of a letter dated February 2, 2012, addressed to Jeremy at the mortgaged property. In the upper-right corner, the letter provides, in the same font as the entire letter, "Certified Mail/Return Receipt Requested."

[*P9] PNC Bank also attached the affidavit of Ryan Kojadulian, an employee of JMA, wherein Kojadulian stated the **[***5]** following. Kojadulian reviewed the business records regarding the attempt by one of JMA's agents to arrange a face-to-face meeting with the Wilsons at the mortgaged property. These business records include a "Field Visit Result Summary Sheet" that was saved to JMA's computer, indicating that on February 12, 2012, an attempt was made to have a face-to-face meeting with the Wilsons, and the agent made contact with Michelle and gave her a letter in a blank, sealed, confidential envelope "with the customer's name on it." Further, a copy of that letter was saved to JMA's computer. "[T]rue and correct" copies **[****795]** **[**104]** of the "Field Visit Result Summary Sheet" and the letter were attached to Kojadulian's affidavit. The "Field Visit Result Summary Sheet" contains the Wilsons' names, the mortgaged address, PNC Bank's name, and a number of checked boxes indicating that the agent "Spoke with Customer" and that the "Address [was] Verified by Customer." Under "Additional Comments," it states the following:

> "A visit was made by the agent on 2-12. The agent made contact with the customer, Michelle, at the time of the visit. The agent left the blank sealed confidential envelope with the customer's name on it containing **[***6]** the letter to the customer and she declined to use the agent's cell phone to contact the lender right then. *** Michelle advised that she would be sure to contact the lender."

The letter is on PNC Bank's letterhead, is dated February 12, 2012, and is addressed to Jeremy and Michelle at the mortgaged property. The letter states as follows:

> "Please contact PNC Mortgage at 1-(800) *** between the hours listed below. Please call PNC Mortgage during the hours listed below:

Go to table1

> It is important for you to respond to this letter immediately.
>
> Sincerely,
>
> PNC Mortgage."

[*P10] On June 2, 2015, Jeremy, alone, filed a reply in support of his motion for summary judgment and response in opposition to PNC Bank's cross-motion for summary judgment.

[*P11] On July 21, 2015, the trial court granted summary judgment in favor of PNC Bank and denied the Wilsons' motion. On October 27, 2015, the property was sold at a judicial sale to PNC Bank. On November 10, 2015, the trial court granted PNC Bank's motion for an order approving the sale of the property. Jeremy filed his notice of appeal on December 7, 2015.

[*P12] After oral argument, this court ordered additional briefing regarding the **[***7]** effect of the Wilsons' discharge in bankruptcy without reaffirming the PNC Bank loan debt.

[*P13] II. ANALYSIS

[*P14] Jeremy argues that PNC Bank did not comply with federal regulations, namely, title 24, ***sections 203.604(b)*** and ***(d)***, of the Code of Federal Regulations (***24 C.F.R. § 203.604(b)***, ***(d) (2014)***), prior to instituting its foreclosure action.

[*P15] As our statement of facts indicates, this case was decided in the context of cross-motions for summary judgment. When parties file cross-motions for summary judgment, they agree that only a question of law is involved and invite the court to decide the issues based on the record. *Pielet v. Pielet, 2012 IL 112064, ¶ 28, 978 N.E.2d 1000, 365 Ill. Dec. 497*. However, the filing of cross-motions for summary judgment does not establish that there is no issue of material fact, nor does it obligate a court to render summary judgment. *Id.*

[*P16] Summary judgment motions are governed by *section 2-1005* of the Code of Civil Procedure (Code) (*735 ILCS 5/2-1005* (West 2014)). Pursuant to *section 2-1005* of the Code, summary judgment should be granted only where the pleadings, depositions, admissions, and affidavits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and that the moving party is clearly entitled to judgment as a matter of law. *735 ILCS 5/2-1005(c)* **[****796]** **[**105]** (West 2014). **[***8]** "Summary judgment is a drastic measure and should only be granted if the movant's right to judgment is clear and free from doubt." *Seymour v. Collins, 2015 IL 118432, ¶ 42, 39 N.E.3d 961, 396 Ill. Dec. 135*. Where a reasonable person could draw divergent inferences from undisputed facts, summary judgment should be denied. *Pielet, 2012 IL 112064, ¶ 53*. On a motion for summary judgment, the trial court must construe the record strictly against the movant and liberally in favor of the nonmoving party. *Seymour, 2015 IL 118432, ¶ 42*.

[*P17] Where an order granting summary judgment is before us on appeal, our review is *de novo*. *Home Insurance Co. v. Cincinnati Insurance Co., 213 Ill. 2d 307, 315, 821 N.E.2d 269, 290 Ill. Dec. 218 (2004)*. *De novo* review is also appropriate to the extent that this case turns on construction of HUD regulations and thus presents a question of law. See *Better Government Ass'n v. Zaruba, 2014 IL App (2d) 140071, ¶ 20, 21 N.E.3d 516, 386 Ill. Dec. 753*.

[*P18] Initially, we note that it is undisputed here that the failure to comply with HUD's mortgage services requirements contained in its regulations is a defense to a mortgage foreclosure action. See *Bankers Life Co. v. Denton, 120 Ill. App. 3d 576, 579, 458 N.E.2d 203, 76 Ill. Dec. 64 (1983)*. The legislative purpose of the National Housing Act (Act) (*12 U.S.C. § 1701t (2012)*) is to assist in providing a decent home and a suitable living environment for every American family. The primary beneficiaries of the Act and its implementing regulations are those receiving assistance through the Act's various housing programs, including HUD-insured mortgages. *Denton, 120 Ill. App. 3d at 579*. Because these **[***9]** government-insured-mortgage programs recognize that mortgagors will often have difficulty making full and timely payments, HUD promulgated very specific regulations outlining the mortgage servicing responsibilities of mortgagees. *Federal National Mortgage Ass'n v. Moore, 609 F. Supp. 194, 196 (N.D. Ill. 1985)*. Thus, *title 24, section 203.500, of the Code of Federal Regulations*, entitled "Mortgage servicing generally," states:

> "It is the intent of [HUD] that no mortgagee shall commence foreclosure or acquire title to a property until the requirements of this subpart have been followed." *24 C.F.R. § 203.500 (2014)*.

[*P19] One of these requirements provides that the mortgagee must have a face-to-face interview with the mortgagor, or make a reasonable effort to arrange such a meeting, before three full monthly installments are unpaid. ***24 C.F.R. § 203.604(b) (2014)***. A reasonable effort is defined as sending a minimum of one certified letter to the mortgagor and making at least one trip to see the mortgagor at the mortgaged property. ***24 C.F.R. § 203.604(d) (2014)***. ***Section 203.604*** provides, in part:

> "(b) The mortgagee must have a face-to-face interview with the mortgagor, *or* make a reasonable effort to arrange such a meeting, before three full monthly installments due on the mortgage are unpaid. ***
> * * *
>
> (d) A reasonable effort to arrange a face-to-face meeting with the mortgagor shall consist **[***10]** at a minimum of one letter sent to the mortgagor *certified by the Postal Service* as having been

> dispatched. Such a reasonable effort to arrange a face-to-face meeting *shall also include at least one trip to see the mortgagor* at the mortgaged property ***." (Emphases added.) ***24 C.F.R. § 203.604 (2014)***.

[*P20] **[****797]** **[**106]** The parties agree that PNC Bank did not have a face-to-face meeting with the Wilsons and that, therefore, PNC Bank was required to make a reasonable effort to arrange such a meeting. Jeremy argues that PNC Bank did not make a reasonable effort to arrange a face-to-face meeting as required by ***section 203.604(d)***, because there is no "proper evidence" of a letter being certified by "the Postal Service."

[*P21] In their affidavits, Jeremy and Michelle stated that they never received a letter from PNC Bank attempting to arrange a face-to-face meeting. In response, PNC Bank relied on exhibits attached to their cross-motion for summary judgment, consisting of (1) the affidavit of Arthur, stating that he was familiar with the business records and practices of PNC Bank regarding letters requesting face-to-face meetings with customers who are in default and that PNC Bank sent a certified letter to the Wilsons stating that "PNC, through **[***11]** its agent [JMA], would schedule a face-to-face meeting at their home to discuss solutions to bring their loan current," and (2) a purported computer-generated copy of PNC Bank's letter, dated February 2, 2012, marked "Certified Mail/Return Receipt Requested," offering the Wilsons a face-to-face meeting "to discuss ways to cure your delinquency." Jeremy replies that PNC Bank failed to establish that the purported letter was "certified by the Postal Service as having been dispatched," as expressly required by ***section 203.604(d)***, because (1) PNC Bank presented nothing from the "Postal Service," and (2) Arthur's affidavit is inadequate given that he had no personal knowledge of the purported letter having been sent or certified by the postal service as having been sent.

[*P22] In order to determine whether summary judgment was proper in this case, we must interpret the phrase "shall consist at the minimum of one letter sent to the mortgagor *certified by the Postal Service as having been dispatched*." (Emphasis added.) ***24 C.F.R. § 203.604(d) (2014)***. We interpret a regulation in the same manner that we would interpret a statute. *Better Government Ass'n, 2014 IL App (2d) 140071, ¶ 20*. Our primary goal is to give effect to the drafter's intent, and the best indicator of that intent is the **[***12]** language of the regulation, given its plain and ordinary meaning. *Id.*

[*P23] Here, the plain and ordinary meaning of ***section 203.604(d)*** requires proof from the United States Postal Service that the letter was sent. See *RBS Citizens, NA v. Sharp, 2015-Ohio-5438, at ¶ 20, 47 N.E.3d 170* (holding that "the 'minimum' effort necessary to comply with C.F.R. ***§ 203.604(d)*** requires that the letter be sent to the mortgagor by certified mail"). In addition, we take judicial notice that the United States Postal Service (USPS) provides proof of mailing in the form of a "certificate" for the cost of $1.30.[1]

[*P24] Although the regulation requires proof from the postal service that **[****798]** **[**107]** the letter was "certified as having been dispatched," and PNC Bank failed to provide this proof, we determine that its failure to do so did not bar it from foreclosing on the subject property under the facts of this case. Where a mortgagor alleges only a technical defect in notice and fails to allege any resulting prejudice, vacating the foreclosure to permit new notice would be futile. See *Aurora Loan Services, LLC v. Pajor, 2012 IL App (2d) 110899, ¶ 27, 973 N.E.2d 437, 362 Ill. Dec. 337*. PNC Bank **[***13]** failed to proffer any proof from the USPS of the dispatch of the letter in question pursuant to the federal regulation at issue; however, we affirm the trial court's judgment for the following reasons. See *Burton v. Airborne Express, Inc., 367 Ill. App. 3d 1026, 1033, 857 N.E.2d 707, 306 Ill. Dec. 308 (2006)* ("this court may affirm the circuit court's dismissal for any reason

---

[1] "Certificate of Mailing

Have evidence that you [sent] the item when you say you did. This official record shows the date your mail was presented to USPS for mailing.

Notes

- Only available at your Post Office.
- Available only at the time of mailing.
- Don't lose your certificate. The Postal Service® does not keep a copy.
- Use Form 3817 or Form 3877 only.

Cost

$1.30 (Form 3817)." United States Postal Service, *https://www.usps.com/ship/insurance-extra-services.htm*? (last visited Jan. 31, 2017).

appearing in the record").

[*P25] The record reflects that the Wilsons' debts were discharged in bankruptcy in May 2011. Eight months later, PNC Bank allegedly sent the letter required by federal regulations for a face-to-face meeting. However, the requirement of a face-to-face meeting contemplates that there is a contract between the parties that could be remediated or ameliorated. Because the Wilsons did not reaffirm the debt, there was no contract to remediate or ameliorate. Sending the letter seeking a face-to-face meeting would be meaningless and futile. Futile acts are usually excused, especially when the equities lie in that direction. A proceeding to foreclose a mortgage is a proceeding in equity. *Federal National Mortgage Ass'n v. Bryant, 62 Ill. App. 3d 25, 27, 378 N.E.2d 333, 18 Ill. Dec. 869 (1978)*. Under long-standing equitable principles, a party seeking to invoke the aid of a court of equity must do equity. *Id.*

[*P26] The Wilsons' discharge in bankruptcy without reaffirmation means that they are no longer bound by **[***14]** the mortgage contract between the parties and should not be allowed to enjoy any benefits of the mortgage contract that their own volitional act has nullified. The defenses raised by Jeremy are based upon PNC Bank's failure to complete an exercise in futility. To send notice in order to remediate or ameliorate a mortgage contract when the contract has been nullified by the act of the debtor is futile and meaningless. Moreover, if we permitted Jeremy's argument to prevail, we would be allowing a regulation designed as a shield to be used as a sword. The law does not require futile acts as prerequisites to the filing of legal proceedings. "[A] demand is not necessary where the circumstances indicate its futility. [Citations.] In order to excuse the requirement of a demand for the surrender of property, the evidence must show the demand would have been unavailing." *First Illini Bank v. Wittek Industries, Inc., 261 Ill. App. 3d 969, 970-71, 634 N.E.2d 762, 199 Ill. Dec. 709 (1994)*. In addition, "where it appears that a demand would have been of no avail, then none is required, for the law never requires the doing of a useless thing." *Carroll v. Curry, 392 Ill. App. 3d 511, 515, 912 N.E.2d 272, 332 Ill. Dec. 86 (2009)*. Further, the alleged failure did not prejudice Jeremy's ability to ameliorate a mortgage contract that he nullified by his voluntary act of discharge in bankruptcy without **[***15]** reaffirmation. Thus, although the regulation at issue requires proof of mailing, in this particular case this defense is unavailing as the discharge without reaffirmation would have rendered PNC Bank's efforts futile. There is neither purpose nor policy that would countenance a determination of prejudicial error.

[*P27] Jeremy presents an additional basis for reversal. Jeremy argues that **[****799]** **[**108]** summary judgment in PNC Bank's favor was improper because a genuine issue of material fact exists regarding whether PNC Bank complied with the timeframe requirements contained in ***title 24, section 203.604(b)***, of the Code of Federal Regulations. This section provides in relevant part:

> "[H]ave a face-to-face interview with the mortgagor, *or* make a reasonable effort to arrange such a meeting, before three full monthly installments due on the mortgage are unpaid. If default occurs in a repayment plan arranged other than during a personal interview, the mortgagee must have a face-to-face meeting with the mortgagor, or make a reasonable attempt to arrange such a meeting within 30 days after such default and at least 30 days before foreclosure is commenced ***." (Emphasis added.) ***24 C.F.R. § 203.604(b) (2014)***.

Jeremy argues that there is a genuine issue of **[***16]** material fact regarding whether PNC Bank complied with this section, because several potential default dates can be gleaned from the record.

[*P28] PNC Bank responds that Jeremy forfeited this argument because he failed to present it to the trial court in his motion for summary judgment and related briefing. Jeremy counters that he raised the issue of timeliness in his motion for summary judgment.

[*P29] An alleged error is not preserved for review if the trial court fails to rule upon it. *McCullough v. Gallaher & Speck, 254 Ill. App. 3d 941, 946, 627 N.E.2d 202, 194 Ill. Dec. 86 (1993)*. The record reveals that the Wilsons raised the issue of timeliness in their motion for summary judgment. However, Jeremy failed to raise this argument during the hearing on the parties' motions, and the trial court made no ruling on this issue. Accordingly, Jeremy has forfeited the issue. See *King v. Paul J. Krez Co., 323 Ill. App. 3d 532, 534, 752 N.E.2d 605, 256 Ill. Dec. 725 (2001)* (finding one of the defendant's bases for summary judgment was forfeited based upon the rule that "[a]n alleged error is not preserved for review if the trial court fails to rule upon it").

[*P30] III. CONCLUSION

[*P31] For the reasons stated, we affirm the judgment of the circuit court of Du Page County.

[*P32] Affirmed.

Table1 (*Return to related document text***)**

Monday - Friday	8:00AM - 9:00PM (EST)
Saturday	8:00AM - 2:00PM (EST)

Table1 (*Return to related document text***)**

End of Document

U.S. Bank Trust N.A. v. Hernandez

Appellate Court of Illinois, Second District

October 12, 2017, Opinion Filed

No. 2-16-0850

Reporter

2017 IL App (2d) 160850 *; 88 N.E.3d 1056 **; 2017 Ill. App. LEXIS 651 ***; 417 Ill. Dec. 638 ****

U.S. BANK TRUST NATIONAL ASSOCIATION, as Owner Trustee for Queen's Park Oval Asset Holding Trust, Plaintiff-Appellee, v. JOSE HERNANDEZ and MARIA HERNANDEZ, Defendants-Appellants.

Prior History: **[***1]** Appeal from the Circuit Court of Lake County. No. 14-CH-3. Honorable Luis A. Berrones, Judge, Presiding.

Disposition: Vacated and remanded.

Counsel: Daniel S. Khwaja, of Chicago, for appellants.

Louis J. Manetti, Jr., of Codilis & Associates, P.C., of Burr Ridge, for appellee.

Judges: JUSTICE BIRKETT delivered the judgment of the court, with opinion. Presiding Justice Hudson concurred in the judgment and opinion. Justice Schostok specially concurred, with opinion.

Opinion by: BIRKETT

Opinion

[1057]** **[****639]** JUSTICE BIRKETT delivered the judgment of the court, with opinion.

Presiding Justice Hudson concurred in the judgment and opinion.

Justice Schostok specially concurred, with opinion.

OPINION

[*P1] Defendants, Jose Hernandez and Maria Hernandez, appeal the summary judgment entered in favor of plaintiff, U.S. Bank Trust National Association, on its complaint to foreclose a mortgage. Defendants argue that material questions of fact exist on two issues: (1) whether plaintiff lacked standing to foreclose on the mortgage and (2) whether plaintiff complied with a federal regulation, specifically *Title 24, section 203.604, of the Code of Federal Regulations* (Code) (*24 C.F.R. § 203.604 (2014)*), prior to initiating the foreclosure proceeding. We hold that plaintiff's standing was established as a matter of law but that material questions of fact remain on whether plaintiff complied with *section 203.604*. Therefore, we vacate the summary **[****640]** **[**1058]** judgment and remand for further proceedings. **[***2]**

[*P2] I. BACKGROUND

[*P3] On January 2, 2014, plaintiff filed its complaint to foreclose a mortgage on property owned by defendants. Plaintiff identified the original mortgagee as "Mortgage Electronic Registration Systems, Inc. as Nominee for Franklin American Mortgage Company." Plaintiff attached a copy of the subject mortgage, dated June 9, 2008. In support of its claim to be the current mortgagee, plaintiff attached a copy of a note, also dated June 9, 2008 (the Note). The Note bore two indorsements. The first was an indorsement from Franklin American Mortgage Company to Countrywide Bank, FSB (Countrywide). The second was a blank indorsement from Countrywide, signed by its senior vice-president, Laurie Meder. Neither indorsement was dated.

[*P4] After the trial court struck without prejudice defendants' initial affirmative defenses, defendants refiled their answer and affirmative defenses. Their first affirmative defense was that plaintiff lacked standing because the indorsements on the Note were inadequate to show that plaintiff held the debt when it filed its complaint. Their second defense was that plaintiff failed to comply with *section 203.604*, which required plaintiff to have, or reasonably attempt to have, **[***3]** a face-to-face meeting with defendants before seeking foreclosure. *Id.*

[*P5] In February 2016, plaintiff moved for summary judgment, attaching several documents that bear on the issues in this appeal. First, plaintiff attached several

affidavits from Kacy Prather, who identified herself as a foreclosure supervisor with Roundpoint Mortgage Servicing Corporation (Roundpoint). The affidavits were all dated in 2015. According to Prather, Roundpoint was "currently servic[ing] [defendants'] loan on behalf of Plaintiff" and had "acquired the servicing rights for [the] loan on 09/16/13 from Bank of America N.A." Prather averred that, in April 2012, plaintiff's agents "visited the subject property" in an attempt to have a face-to-face meeting with defendants. Prather also attached a copy of an April 2012 letter addressed to defendants at the subject property. The sender was Titanium Solutions (Titanium), identifying itself as the mortgage servicer for Bank of America, N.A. The letter advised defendants that a representative from Titanium would attempt to visit defendants regarding their loan. Prather attached what she claimed was "a copy of the FedEx Label for the package in which the letter was sent." The **[***4]** label, which was computer-generated, showed a "ship date" of April 20, 2012, included a tracking number, and bore the instruction, "LEAVE AT ADDRESS. DON'T RETURN."

[*P6] In addition to Prather's affidavits, plaintiff attached copies of two assignments of the subject mortgage. The first was an August 15, 2013, assignment from "Bank of America N.A., successor by merger to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing, LP" to the Secretary of Housing and Urban Development (HUD). The assignment specified that it included "the Note or Notes *** described" in the subject mortgage. The second assignment was a January 16, 2014, assignment from HUD to plaintiff. This assignment did not reference any underlying debt.

[*P7] Defendants filed a response, contending that the August 2013 assignment to HUD raised an issue of material fact whether plaintiff owned the debt on January 2, 2014, when it filed its complaint. Defendants also claimed that the January 16, 2014, assignment was immaterial to **[****641]** **[**1059]** whether plaintiff owned the debt at an earlier date.

[*P8] Defendants further asserted that a triable question of fact existed as to plaintiff's compliance with ***section 203.604(d)*** because, according to Prather, plaintiff's **[***5]** April 2012 letter was sent by Federal Express when ***section 203.604(d)*** expressly provides that the letter offering a face-to-face meeting should be sent through the United States Postal Service. See ***24 C.F.R. § 203.604(d) (2014)*** ("A reasonable effort to arrange a face-to-face meeting with the mortgagor shall consist at a minimum of one letter sent to the mortgagor certified by the Postal Service as having been dispatched."). Defendants attached an affidavit from defendant Maria Hernandez (Maria), who asserted in relevant part:

> "10. I have never received a certified letter by mail from Plaintiff, U.S. Bank Trust National Association, the purported previous note holder, Bank of America, N.A.; one of their servicers, or affiliates, for notice of available counseling, or been offered a face-to-face meeting at either the Plaintiff's or the previous lender's local banks, or other H.U.D. related servicing office."

[*P9] The trial court granted summary judgment for plaintiff and entered a judgment of foreclosure and sale. Defendants filed a motion to reconsider, to which they attached a document from the Federal Deposit Insurance Corporation indicating that Countrywide was inactive as of April 27, 2009, having merged on that date into **[***6]** Bank of America. Defendants concluded that the blank indorsement by Countrywide could have been executed no later than April 2009 and was, accordingly, "mooted" by the later August 2013 assignment from Bank of America to HUD. The trial court denied the motion to reconsider.

[*P10] Subsequently, plaintiff purchased the subject property at a judicial sale and moved the court to approve the sale. Defendants filed an objection. They attached documentation showing that the August 2013 assignment of the subject mortgage from Bank of America to HUD was recorded on January 23, 2014, several days after plaintiff instituted this foreclosure proceeding. The trial court rejected defendants' arguments and entered an order confirming the sale.

[*P11] Defendants filed this timely appeal.

[*P12] II. ANALYSIS

[*P13] A. General Principles

[*P14] Defendants claim that the trial court erred by entering summary judgment in favor of plaintiff. Summary judgment is appropriate where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *735 ILCS 5/2-1005(c)* (West 2014). Thus, the purpose of summary **[***7]** judgment is not to try a question of fact but rather to

determine whether a genuine issue of material fact exists. *Adams v. Northern Illinois Gas Co., 211 Ill. 2d 32, 42-43, 809 N.E.2d 1248, 284 Ill. Dec. 302 (2004)*. In determining whether such a question exists, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent. *Id. at 43*. "A triable issue precluding summary judgment exists where the material facts are disputed, or where, the material facts being undisputed, reasonable persons might draw different inferences from the undisputed facts." *Id.* Summary judgment is appropriate only where the right of the movant is clear and free from doubt. *Id.* Our review of a summary-judgment ruling is *de novo. Id.*

[1060]** **[****642]** **[*P15]** B. Standing

[*P16] Defendants claim that a material question of fact exists as to whether plaintiff had standing to foreclose on the mortgage. We disagree.

[*P17] "The doctrine of standing is designed to preclude persons who have no interest in a controversy from bringing suit." *Raintree Homes, Inc. v. Village of Long Grove, 209 Ill. 2d 248, 262, 807 N.E.2d 439, 282 Ill. Dec. 815 (2004)*. A party's standing must be determined as of the time the suit is brought. *Deutsche Bank National Trust Co. v. Gilbert, 2012 IL App (2d) 120164, ¶ 15, 982 N.E.2d 815, 367 Ill. Dec. 665*. Lack of standing is an affirmative defense that the defendant must plead and prove. *Lebron v. Gottlieb Memorial Hospital, 237 Ill. 2d 217, 252, 930 N.E.2d 895, 341 Ill. Dec. 381 (2010)*.

[*P18] Plaintiff's claim of authority to foreclose on the subject mortgage was based on **[***8]** its possession of the Note with its blank indorsement. A note indorsed in blank is payable to the bearer. See *810 ILCS 5/3-205(b)* (West 2014) ("When indorsed in blank, an instrument becomes payable to the bearer and may be negotiated by transfer of possession alone until specially indorsed."). A transfer of a note constitutes an assignment of the mortgage securing the debt, and thus the bearer of the note is deemed the mortgagee, authorized to bring foreclosure proceedings. *US Bank, National Ass'n v. Avdic, 2014 IL App (1st) 121759, ¶ 35, 381 Ill. Dec. 254, 10 N.E.3d 339*; *Federal National Mortgage Ass'n v. Kuipers, 314 Ill. App. 3d 631, 635, 732 N.E.2d 723, 247 Ill. Dec. 668 (2000)*; see *735 ILCS 5/15-1208* (West 2014) (defining "mortgagee" as "(i) the holder of an indebtedness or obligee of a non-monetary obligation secured by a mortgage or any person designated or authorized to act on behalf of such holder and (ii) any person claiming through a mortgagee as successor"). Plaintiff's possession of the Note, indorsed in blank, was sufficient to establish standing absent a contrary showing. See *Bank of New York Mellon v. Rogers, 2016 IL App (2d) 150712, ¶ 30, 407 Ill. Dec. 365, 63 N.E.3d 289* ("In a foreclosure action, attaching the note to the complaint is *prima facie* evidence that the plaintiff owns the note."); *Lipscomb v. Sisters of St. Francis Health Services, Inc., 343 Ill. App. 3d 1036, 1041, 799 N.E.2d 293, 278 Ill. Dec. 575 (2003)* (a *prima facie* case is sufficient to establish a point in the absence of contrary evidence (citing *Lehman v. Stephens, 148 Ill. App. 3d 538, 551, 499 N.E.2d 103, 101 Ill. Dec. 736 (1986)))*.

[*P19] Defendants suggest that plaintiff's attachment of a mere copy of the Note was inadequate to create a *prima facie* ***[***9]*** case. They cite no authority here, which is no surprise since well-established law holds to the contrary. See *Bayview Loan Servicing, LLC v. Cornejo, 2015 IL App (3d) 140412, ¶ 12, 395 Ill. Dec. 601, 39 N.E.3d 68* ("The attachment of a copy of the note to a foreclosure complaint is *prima facie* evidence that the plaintiff owns the note."); *Parkway Bank & Trust Co. v. Korzen, 2013 IL App (1st) 130380, ¶ 26, 377 Ill. Dec. 771, 2 N.E.3d 1052* ("For over 25 years, the [Illinois Mortgage] Foreclosure Law [(*735 ILCS 5/15-1101 et seq.* (West 2010))] has been interpreted as not requiring plaintiffs' production of the original note, nor any specific documentation demonstrating that it owns the note or the right to foreclose on the mortgage, other than the copy of the mortgage and note attached to the complaint." (Emphasis omitted.)); *First Federal Savings & Loan Ass'n of Chicago v. Chicago Title & Trust Co., 155 Ill. App. 3d 664, 665-67, 508 N.E.2d 287, 108 Ill. Dec. 126 (1987)*.

[*P20] Defendants also claim that plaintiff's own documentary support for summary judgment undercut its showing of **[****643]** **[**1061]** standing. Defendants point specifically to the August 15, 2013, assignment of the subject mortgage from Bank of America to HUD. According to defendants, this assignment raises a triable question of fact whether the subject mortgage was held by HUD when plaintiff filed this action several months later in January 2014. Defendants suggest that the recording of the August 2013 assignment on January 23, 2014, after the complaint was filed, makes it even more likely that HUD, not plaintiff, **[***10]** owned the debt when the suit was brought. As for the January 16, 2014, assignment of the subject mortgage from HUD to plaintiff, defendants

claim that it is "inconsequential" to whether plaintiff possessed the subject debt when it filed its complaint several days before. Defendants also assert that the January 2014 assignment could not have transferred the subject debt in any case, since it did not reference that debt.

[*P21] Plaintiff counters defendants' position on the August 2013 assignment by pointing to Prather's statement in her 2015 affidavits that Roundpoint had "acquired the servicing rights for [defendants'] loan on 09/16/13 from Bank of America N.A." Plaintiff asks us to construe this remark as meaning that plaintiff "had an interest in the loan before it filed [its action]." The difficulty is that Prather did not specify for which entity Roundpoint began servicing the loan in September 2013. Her affidavits simply do not indicate when, prior to May 19, 2015 (the date of her earliest affidavit), plaintiff obtained the Note.

[*P22] Irrespective of Prather's affidavits, however, plaintiff's standing was established as a matter of law. Defendants dismiss the blank indorsement on the Note **[***11]** as a "snapshot in time of a much earlier date, one that preceded the assignment of the [N]ote to [HUD]." Defendants fail to appreciate the force of the blank indorsement. The presumption of ownership conferred by the indorsement meant that plaintiff could sue on the Note without setting forth its history. Defendants, rather, had the burden of providing as much of that history as necessary to demonstrate that "the transfer [of the Note] did not occur before the complaint was filed." *Cornejo, 2015 IL App (3d) 140412, ¶ 13*. Defendants "could have, through depositions or interrogatories, definitively shown when plaintiff obtained an interest in the mortgage." *Rosestone Investments, LLC v. Garner, 2013 IL App (1st) 123422, ¶ 25, 377 Ill. Dec. 616, 2 N.E.3d 532*. Like the defendant in *Rosestone*, defendants did not make this effort below. Instead, they pointed, and continue to point on appeal, simply to another "snapshot in time," the August 15, 2013, assignment. Assuming *arguendo* that the August 15, 2013, assignment conveyed the subject debt to HUD, it simply did not rebut the possibility that plaintiff became the owner of that debt sometime between August 15, 2013, and January 2, 2014 (the date that plaintiff filed its complaint), whether from HUD or another entity in the chain of ownership. Even the recording of the August 2013 **[***12]** assignment as late as January 23, 2014, did not rebut plaintiff's ownership of the debt on January 2.

[*P23] As for the January 16, 2014, assignment from HUD to plaintiff, we agree with plaintiff that it is plausibly explained as a memorialization of a prior transfer of the Note to plaintiff. See *id.* ("Even when a written assignment exists, it may be a mere memorialization of an earlier transfer of interest.").

[*P24] Defendants cite *Title 24, section 203.351*, of the Code (*24 C.F.R. § 203.351 (2014)*), which prescribes what must be contained in an application for federal mortgage insurance when a mortgage is assigned to HUD. Defendants' reason for **[****644] [**1062]** citing it is obscure; they appear to suggest that the provision explains why the subject mortgage was assigned to HUD. Our concern is not why the August 2013 assignment was made but whether it raises an issue of material fact regarding standing. As explained, the assignment did not rebut plaintiff's *prima facie* case that it owned the debt on January 2, 2014, as evidenced by its possession of the Note indorsed in blank.

[*P25] For these reasons, we hold that defendants failed to rebut plaintiff's *prima facie* case of standing. As plaintiff established as a matter of law that it had standing, **[***13]** summary judgment on that issue was proper.

[*P26] C. Compliance With ***Section 203.604***

[*P27] Defendants' second contention on appeal is that summary judgment was inappropriate on the issue of plaintiff's compliance with ***section 203.604*** of the Code.

[*P28] As defendants' mortgage was insured by HUD, it was subject to specific servicing requirements. See *24 C.F.R. § 203.500 (2014)*; *Federal National Mortgage Ass'n v. Moore, 609 F. Supp. 194, 196 (N.D. Ill. 1985)*. The failure to comply with HUD's servicing requirements is a defense to a mortgage-foreclosure action. *PNC Bank, National Ass'n v. Wilson, 2017 IL App (2d) 151189, ¶ 18, 411 Ill. Dec. 791, 74 N.E.3d 100*.

[*P29] ***Section 203.604(b)*** requires that "[t]he mortgagee must have a face-to-face interview with the mortgagor, or make a reasonable effort to arrange such a meeting, before three full monthly installments due on the mortgage are unpaid." ***24 C.F.R. § 203.604(b) (2014)***. "A reasonable effort to arrange a face-to-face meeting with the mortgagor" has two elements. ***24 C.F.R. § 203.604(d) (2014)***. First, it "shall consist at a minimum of one letter sent to the mortgagor certified by the Postal Service as having been dispatched." *Id.* Second, it "shall also include at least one trip to see the

mortgagor at the mortgaged property." *Id.* A mortgagor may not institute foreclosure proceedings before complying with ***section 203.604***. See *24 C.F.R. § 203.500 (2014)*.

[*P30] We note initially that, in the midst of their argument on the "attempt-by-letter" requirement, defendants make the passing **[***14]** remark that "no visit to the property was ever conducted." Prather claimed otherwise in her affidavit. As defendants do not acknowledge her statement or cite any other part of the record to support their point, we reject it as forfeited. See *Ill. S. Ct. R. 341(h)(7)* (eff. Jan. 1, 2016) (failure to provide supporting record citations results in forfeiture of a point).

[*P31] The gravamen of defendants' challenge is that plaintiff failed to satisfy the requirement that it attempt by letter to arrange a face-to-face meeting. According to defendants, plaintiff's use of Federal Express, as evidenced by a shipping label that plaintiff produced from the carrier, was inadequate because ***section 203.604(d)*** specifies that the letter must be sent by the United States Postal Service. Plaintiff cites *Rourk v. Bank of America National Ass'n, No. 4:12-CV-42 (CDL), 2013 U.S. Dist. LEXIS 147373, 2013 WL 5595964, *5 (M.D. Ga. Oct. 11, 2013)*, where the foreclosure plaintiff sent the letter "via Federal Express with delivery confirmation." The trial court held that, while this delivery method did not "strictly comply with the certified mail requirement, it [did] substantially comply with the requirement that the letter be certified as having been dispatched." *Id.*

[*P32] We do not decide whether the use of a private carrier can constitute **[***15]** substantial compliance with the "attempt-by-letter" requirement of ***section 203.604(d)***, for even if we construed the section in **[****645] [**1063]** plaintiff's favor, we would hold that plaintiff failed to comply with its requirements. Plaintiff concedes that even substantial compliance with ***section 203.604(d)*** would entail proof from the carrier that the letter was "dispatched" (***24 C.F.R. § 203.604(d) (2014)***), or sent. See *Wilson, 2017 IL App (2d) 151189, ¶ 23* ("[T]he plain and ordinary meaning of ***section 203.604(d)*** requires proof from the United States Postal Service that the letter was sent."). Here a material question of fact remains on whether plaintiff's letter offering a face-to-face meeting was dispatched. Plaintiff claims that the "unique tracking identifier" on the Federal Express label is "proof that the letter was sent." We disagree. The label is not indubitable proof of dispatch. We take judicial notice of the procedures for shipping packages with Federal Express. See *id.* (taking judicial notice of the Postal Service's shipping options). The label submitted by plaintiff was computer-generated. Federal Express's website permits a user to generate labels for shipment. The user selects the ship date, and a tracking number is assigned. See FedEx Ship Manager® Software User Guide 25-28, *http://images.fedex.com/us/software/pdf/FSM_UserGuide_v3000.pdf* (last visited Sept. **[***16]** 14, 2017) (user manual describing process of creating a label); *Shipping Services and Online Shipping Tools*, FedEx, *https://www.fedex.com/us/shipping* (last visited Sept. 14, 2017) (video describing process of creating a label); *Tracking Your Shipping Business*, FedEx, *http://www.fedex.com/us/smallbusiness/articles/trackingshippingbusiness.html* (last visited Sept. 14, 2017) ("A tracking number is a numeric code assigned to every package in the shipping system; it uniquely identifies each package as it moves through the shipping channels. It is assigned when transport is arranged - the tracking number appears on the shipper's forms if you use paper-based method, or is assigned automatically if you arrange for shipment online."). The user might or might not actually ship the item after generating the label. *FAQs for FedEx Ship Manager Software*, FedEx, *http://www.fedex.com/us/ship-manager/software/resources/faq.html* (last visited Sept. 14, 2017) (noting that a shipping label can be generated up to 10 days in advance of shipment). In short, a shipping label—complete with shipping date and tracking number—can be generated independently of actual shipment. See *Geathers v. Bank of Am., N.A., No. 1:14-cv-00850-WSD-AJB, 2015 U.S. Dist. LEXIS 113777, 2015 WL 5089347, *7 (S.D. Ga. July 6, 2015)* (Federal Express shipping label, with "no tracking information or other documentation showing that the package was actually dispatched or delivered," **[***17]** did not satisfy the letter requirement of ***section 203.604(b)***). Notably, Federal Express offers proof of delivery (*Fed Ex Tracking*, FedEx, *https://www.fedex.com/apps/fedextrack/?action=spod&cntry_code=cv* (last visited Sept. 14, 2017)), which the plaintiff in *Rourk* submitted. Plaintiff offered no such proof here. A movant's entitlement to summary judgment must be free and clear from doubt. *Adams, 211 Ill. 2d at 43*. The shipping label does not demonstrate conclusively that plaintiff sent defendants a letter offering a face-to-face meeting.

[*P33] We stress that we do not hold today that the use of a private carrier can never satisfy ***section 203.604(d)***. We do not reach that issue, because, as plaintiff concedes, proof of dispatch would be required in

any case, and we determine here that plaintiff failed to establish as a matter of law that it dispatched the letter.

[*P34] Plaintiff alternatively argues lack of prejudice. First, as plaintiff reads Maria's affidavit, she asserted only that defendants received no letter from the *Postal Service* **[****646] [**1064]** offering a face-to-face meeting, not that they received no such letter at all. We disagree. Maria did specifically deny that defendants received a letter by certified mail from the Postal Service, but at the end of the same sentence she also generally denied being "offered a face-to-face **[***18]** meeting at either the Plaintiff's or the previous lender's local banks, or other H.U.D. related servicing office." Construing Maria's affidavit in the light most favorable to defendants, as we must, we read her as denying that she received any letter offering defendants a face-to-face meeting.

[*P35] Second, plaintiff asserts that defendants' history of delinquency on their mortgage payments suggests that they could not have avoided foreclosure even if offered a face-to-face meeting. Plaintiff's only authority for this contention is *Wilson*, where this court held that the offer of a face-to-face meeting pursuant to ***section 203.604*** would have been futile because the debt was discharged in bankruptcy, and hence "there was no contract to remediate or ameliorate." *Wilson, 2017 IL App (2d) 151189, ¶ 25*. In so holding, this court articulated the general principle that "[w]here a mortgagor alleges only a technical defect in notice and fails to allege any resulting prejudice, vacating the foreclosure to permit new notice would be futile." *Id. ¶ 24*. The case from which *Wilson* derived this proposition, *Aurora Loan Services, LLC v. Pajor, 2012 IL App (2d) 110899, ¶ 27, 973 N.E.2d 437, 362 Ill. Dec. 337*, interpreted an Illinois statute on notice in foreclosure proceedings (*735 ILCS 5/15-1502.5* (West 2010)).

[*P36] *Wilson* grafted the no-prejudice principle, a creature of Illinois state **[***19]** law (as far as *Pajor* indicates), onto a federal regulation. In the absence of direction from the federal courts, to which plaintiff does not refer us, we decline to extend the principle to a situation so unlike that of *Wilson* and to hold that noncompliance with ***section 203.604*** may be excused in cases of inevitable foreclosure (however that may be determined). Accordingly, we reject plaintiff's contention.

[*P37] We conclude that summary judgment was improper because plaintiff did not establish as a matter of law that it complied with ***section 203.604(d)***.

[*P38] III. CONCLUSION

[*P39] For the foregoing reasons, we vacate the summary judgment and judgment of foreclosure and sale, and we remand this case for further proceedings.

[*P40] Vacated and remanded.

Concur by: SCHOSTOK

Concur

[*P41] JUSTICE SCHOSTOK, specially concurring.

[*P42] I write separately due to concerns over judicial economy that are created by situations such as present in this case. The plaintiff relies on *Rourk* for the proposition that the use of Federal Express was sufficient to comply with the requirements of ***section 203.604(d)*** of the Code. However, *Rourk* suggested that Federal Express was a substitute for the USPS only upon proof of receipt. *Rourk, 2013 U.S. Dist. LEXIS 147373, 2013 WL 5595964, at *5*. Here, the plaintiff provided neither proof of dispatch nor proof of receipt. The **[***20]** present situation, and the needlessly extended proceedings on remand, could clearly have been avoided had the plaintiff simply provided an affidavit stating that the letter required by ***section 203.604(d)*** had been sent or some other proof of dispatch. Because the plaintiff failed to do **[****647] [**1065]** so, we are required to remand for further proceedings.

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U.S. Bank Trust N.A. v. Hernandez

Appellate Court of Illinois, Second District

October 12, 2017, Opinion Filed

No. 2-16-0850

Reporter
2017 IL App (2d) 160850 *; 88 N.E.3d 1056 **; 2017 Ill. App. LEXIS 651 ***; 417 Ill. Dec. 638 ****

U.S. BANK TRUST NATIONAL ASSOCIATION, as Owner Trustee for Queen's Park Oval Asset Holding Trust, Plaintiff-Appellee, v. JOSE HERNANDEZ and MARIA HERNANDEZ, Defendants-Appellants.

Prior History: **[***1]** Appeal from the Circuit Court of Lake County. No. 14-CH-3. Honorable Luis A. Berrones, Judge, Presiding.

Disposition: Vacated and remanded.

Counsel: Daniel S. Khwaja, of Chicago, for appellants.

Louis J. Manetti, Jr., of Codilis & Associates, P.C., of Burr Ridge, for appellee.

Judges: JUSTICE BIRKETT delivered the judgment of the court, with opinion. Presiding Justice Hudson concurred in the judgment and opinion. Justice Schostok specially concurred, with opinion.

Opinion by: BIRKETT

Opinion

[1057]** **[****639]** JUSTICE BIRKETT delivered the judgment of the court, with opinion.

Presiding Justice Hudson concurred in the judgment and opinion.

Justice Schostok specially concurred, with opinion.

OPINION

[*P1] Defendants, Jose Hernandez and Maria Hernandez, appeal the summary judgment entered in favor of plaintiff, U.S. Bank Trust National Association, on its complaint to foreclose a mortgage. Defendants argue that material questions of fact exist on two issues: (1) whether plaintiff lacked standing to foreclose on the mortgage and (2) whether plaintiff complied with a federal regulation, specifically *Title 24, section 203.604, of the Code of Federal Regulations* (Code) (*24 C.F.R. § 203.604 (2014)*), prior to initiating the foreclosure proceeding. We hold that plaintiff's standing was established as a matter of law but that material questions of fact remain on whether plaintiff complied with *section 203.604*. Therefore, we vacate the summary **[****640]** **[**1058]** judgment and remand for further proceedings. **[***2]**

[*P2] I. BACKGROUND

[*P3] On January 2, 2014, plaintiff filed its complaint to foreclose a mortgage on property owned by defendants. Plaintiff identified the original mortgagee as "Mortgage Electronic Registration Systems, Inc. as Nominee for Franklin American Mortgage Company." Plaintiff attached a copy of the subject mortgage, dated June 9, 2008. In support of its claim to be the current mortgagee, plaintiff attached a copy of a note, also dated June 9, 2008 (the Note). The Note bore two indorsements. The first was an indorsement from Franklin American Mortgage Company to Countrywide Bank, FSB (Countrywide). The second was a blank indorsement from Countrywide, signed by its senior vice-president, Laurie Meder. Neither indorsement was dated.

[*P4] After the trial court struck without prejudice defendants' initial affirmative defenses, defendants refiled their answer and affirmative defenses. Their first affirmative defense was that plaintiff lacked standing because the indorsements on the Note were inadequate to show that plaintiff held the debt when it filed its complaint. Their second defense was that plaintiff failed to comply with *section 203.604*, which required plaintiff to have, or reasonably attempt to have, **[***3]** a face-to-face meeting with defendants before seeking foreclosure. *Id.*

[*P5] In February 2016, plaintiff moved for summary judgment, attaching several documents that bear on the issues in this appeal. First, plaintiff attached several

affidavits from Kacy Prather, who identified herself as a foreclosure supervisor with Roundpoint Mortgage Servicing Corporation (Roundpoint). The affidavits were all dated in 2015. According to Prather, Roundpoint was "currently servic[ing] [defendants'] loan on behalf of Plaintiff" and had "acquired the servicing rights for [the] loan on 09/16/13 from Bank of America N.A." Prather averred that, in April 2012, plaintiff's agents "visited the subject property" in an attempt to have a face-to-face meeting with defendants. Prather also attached a copy of an April 2012 letter addressed to defendants at the subject property. The sender was Titanium Solutions (Titanium), identifying itself as the mortgage servicer for Bank of America, N.A. The letter advised defendants that a representative from Titanium would attempt to visit defendants regarding their loan. Prather attached what she claimed was "a copy of the FedEx Label for the package in which the letter was sent." The **[***4]** label, which was computer-generated, showed a "ship date" of April 20, 2012, included a tracking number, and bore the instruction, "LEAVE AT ADDRESS. DON'T RETURN."

[*P6] In addition to Prather's affidavits, plaintiff attached copies of two assignments of the subject mortgage. The first was an August 15, 2013, assignment from "Bank of America N.A., successor by merger to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing, LP" to the Secretary of Housing and Urban Development (HUD). The assignment specified that it included "the Note or Notes *** described" in the subject mortgage. The second assignment was a January 16, 2014, assignment from HUD to plaintiff. This assignment did not reference any underlying debt.

[*P7] Defendants filed a response, contending that the August 2013 assignment to HUD raised an issue of material fact whether plaintiff owned the debt on January 2, 2014, when it filed its complaint. Defendants also claimed that the January 16, 2014, assignment was immaterial to **[****641]** **[**1059]** whether plaintiff owned the debt at an earlier date.

[*P8] Defendants further asserted that a triable question of fact existed as to plaintiff's compliance with ***section 203.604(d)*** because, according to Prather, plaintiff's **[***5]** April 2012 letter was sent by Federal Express when ***section 203.604(d)*** expressly provides that the letter offering a face-to-face meeting should be sent through the United States Postal Service. See ***24 C.F.R. § 203.604(d) (2014)*** ("A reasonable effort to arrange a face-to-face meeting with the mortgagor shall consist at a minimum of one letter sent to the mortgagor certified by the Postal Service as having been dispatched."). Defendants attached an affidavit from defendant Maria Hernandez (Maria), who asserted in relevant part:

> "10. I have never received a certified letter by mail from Plaintiff, U.S. Bank Trust National Association, the purported previous note holder, Bank of America, N.A.; one of their servicers, or affiliates, for notice of available counseling, or been offered a face-to-face meeting at either the Plaintiff's or the previous lender's local banks, or other H.U.D. related servicing office."

[*P9] The trial court granted summary judgment for plaintiff and entered a judgment of foreclosure and sale. Defendants filed a motion to reconsider, to which they attached a document from the Federal Deposit Insurance Corporation indicating that Countrywide was inactive as of April 27, 2009, having merged on that date into **[***6]** Bank of America. Defendants concluded that the blank indorsement by Countrywide could have been executed no later than April 2009 and was, accordingly, "mooted" by the later August 2013 assignment from Bank of America to HUD. The trial court denied the motion to reconsider.

[*P10] Subsequently, plaintiff purchased the subject property at a judicial sale and moved the court to approve the sale. Defendants filed an objection. They attached documentation showing that the August 2013 assignment of the subject mortgage from Bank of America to HUD was recorded on January 23, 2014, several days after plaintiff instituted this foreclosure proceeding. The trial court rejected defendants' arguments and entered an order confirming the sale.

[*P11] Defendants filed this timely appeal.

[*P12] II. ANALYSIS

[*P13] A. General Principles

[*P14] Defendants claim that the trial court erred by entering summary judgment in favor of plaintiff. Summary judgment is appropriate where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *735 ILCS 5/2-1005(c)* (West 2014). Thus, the purpose of summary **[***7]** judgment is not to try a question of fact but rather to

determine whether a genuine issue of material fact exists. *Adams v. Northern Illinois Gas Co., 211 Ill. 2d 32, 42-43, 809 N.E.2d 1248, 284 Ill. Dec. 302 (2004)*. In determining whether such a question exists, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent. *Id. at 43*. "A triable issue precluding summary judgment exists where the material facts are disputed, or where, the material facts being undisputed, reasonable persons might draw different inferences from the undisputed facts." *Id.* Summary judgment is appropriate only where the right of the movant is clear and free from doubt. *Id.* Our review of a summary-judgment ruling is *de novo. Id.*

[1060]** **[****642]** **[*P15]** B. Standing

[*P16] Defendants claim that a material question of fact exists as to whether plaintiff had standing to foreclose on the mortgage. We disagree.

[*P17] "The doctrine of standing is designed to preclude persons who have no interest in a controversy from bringing suit." *Raintree Homes, Inc. v. Village of Long Grove, 209 Ill. 2d 248, 262, 807 N.E.2d 439, 282 Ill. Dec. 815 (2004)*. A party's standing must be determined as of the time the suit is brought. *Deutsche Bank National Trust Co. v. Gilbert, 2012 IL App (2d) 120164, ¶ 15, 982 N.E.2d 815, 367 Ill. Dec. 665*. Lack of standing is an affirmative defense that the defendant must plead and prove. *Lebron v. Gottlieb Memorial Hospital, 237 Ill. 2d 217, 252, 930 N.E.2d 895, 341 Ill. Dec. 381 (2010)*.

[*P18] Plaintiff's claim of authority to foreclose on the subject mortgage was based on **[***8]** its possession of the Note with its blank indorsement. A note indorsed in blank is payable to the bearer. See *810 ILCS 5/3-205(b)* (West 2014) ("When indorsed in blank, an instrument becomes payable to the bearer and may be negotiated by transfer of possession alone until specially indorsed."). A transfer of a note constitutes an assignment of the mortgage securing the debt, and thus the bearer of the note is deemed the mortgagee, authorized to bring foreclosure proceedings. *US Bank, National Ass'n v. Avdic, 2014 IL App (1st) 121759, ¶ 35, 381 Ill. Dec. 254, 10 N.E.3d 339*; *Federal National Mortgage Ass'n v. Kuipers, 314 Ill. App. 3d 631, 635, 732 N.E.2d 723, 247 Ill. Dec. 668 (2000)*; see *735 ILCS 5/15-1208* (West 2014) (defining "mortgagee" as "(i) the holder of an indebtedness or obligee of a non-monetary obligation secured by a mortgage or any person designated or authorized to act on behalf of such holder and (ii) any person claiming through a mortgagee as successor"). Plaintiff's possession of the Note, indorsed in blank, was sufficient to establish standing absent a contrary showing. See *Bank of New York Mellon v. Rogers, 2016 IL App (2d) 150712, ¶ 30, 407 Ill. Dec. 365, 63 N.E.3d 289* ("In a foreclosure action, attaching the note to the complaint is *prima facie* evidence that the plaintiff owns the note."); *Lipscomb v. Sisters of St. Francis Health Services, Inc., 343 Ill. App. 3d 1036, 1041, 799 N.E.2d 293, 278 Ill. Dec. 575 (2003)* (a *prima facie* case is sufficient to establish a point in the absence of contrary evidence (citing *Lehman v. Stephens, 148 Ill. App. 3d 538, 551, 499 N.E.2d 103, 101 Ill. Dec. 736 (1986)))*.

[*P19] Defendants suggest that plaintiff's attachment of a mere copy of the Note was inadequate to create a *prima facie* ***[***9]*** case. They cite no authority here, which is no surprise since well-established law holds to the contrary. See *Bayview Loan Servicing, LLC v. Cornejo, 2015 IL App (3d) 140412, ¶ 12, 395 Ill. Dec. 601, 39 N.E.3d 68* ("The attachment of a copy of the note to a foreclosure complaint is *prima facie* evidence that the plaintiff owns the note."); *Parkway Bank & Trust Co. v. Korzen, 2013 IL App (1st) 130380, ¶ 26, 377 Ill. Dec. 771, 2 N.E.3d 1052* ("For over 25 years, the [Illinois Mortgage] Foreclosure Law [(*735 ILCS 5/15-1101 et seq.* (West 2010))] has been interpreted as not requiring plaintiffs' production of the original note, nor any specific documentation demonstrating that it owns the note or the right to foreclose on the mortgage, other than the copy of the mortgage and note attached to the complaint." (Emphasis omitted.)); *First Federal Savings & Loan Ass'n of Chicago v. Chicago Title & Trust Co., 155 Ill. App. 3d 664, 665-67, 508 N.E.2d 287, 108 Ill. Dec. 126 (1987)*.

[*P20] Defendants also claim that plaintiff's own documentary support for summary judgment undercut its showing of **[****643]** **[**1061]** standing. Defendants point specifically to the August 15, 2013, assignment of the subject mortgage from Bank of America to HUD. According to defendants, this assignment raises a triable question of fact whether the subject mortgage was held by HUD when plaintiff filed this action several months later in January 2014. Defendants suggest that the recording of the August 2013 assignment on January 23, 2014, after the complaint was filed, makes it even more likely that HUD, not plaintiff, **[***10]** owned the debt when the suit was brought. As for the January 16, 2014, assignment of the subject mortgage from HUD to plaintiff, defendants

claim that it is "inconsequential" to whether plaintiff possessed the subject debt when it filed its complaint several days before. Defendants also assert that the January 2014 assignment could not have transferred the subject debt in any case, since it did not reference that debt.

[*P21] Plaintiff counters defendants' position on the August 2013 assignment by pointing to Prather's statement in her 2015 affidavits that Roundpoint had "acquired the servicing rights for [defendants'] loan on 09/16/13 from Bank of America N.A." Plaintiff asks us to construe this remark as meaning that plaintiff "had an interest in the loan before it filed [its action]." The difficulty is that Prather did not specify for which entity Roundpoint began servicing the loan in September 2013. Her affidavits simply do not indicate when, prior to May 19, 2015 (the date of her earliest affidavit), plaintiff obtained the Note.

[*P22] Irrespective of Prather's affidavits, however, plaintiff's standing was established as a matter of law. Defendants dismiss the blank indorsement on the Note **[***11]** as a "snapshot in time of a much earlier date, one that preceded the assignment of the [N]ote to [HUD]." Defendants fail to appreciate the force of the blank indorsement. The presumption of ownership conferred by the indorsement meant that plaintiff could sue on the Note without setting forth its history. Defendants, rather, had the burden of providing as much of that history as necessary to demonstrate that "the transfer [of the Note] did not occur before the complaint was filed." *Cornejo, 2015 IL App (3d) 140412, ¶ 13*. Defendants "could have, through depositions or interrogatories, definitively shown when plaintiff obtained an interest in the mortgage." *Rosestone Investments, LLC v. Garner, 2013 IL App (1st) 123422, ¶ 25, 377 Ill. Dec. 616, 2 N.E.3d 532*. Like the defendant in *Rosestone*, defendants did not make this effort below. Instead, they pointed, and continue to point on appeal, simply to another "snapshot in time," the August 15, 2013, assignment. Assuming *arguendo* that the August 15, 2013, assignment conveyed the subject debt to HUD, it simply did not rebut the possibility that plaintiff became the owner of that debt sometime between August 15, 2013, and January 2, 2014 (the date that plaintiff filed its complaint), whether from HUD or another entity in the chain of ownership. Even the recording of the August 2013 **[***12]** assignment as late as January 23, 2014, did not rebut plaintiff's ownership of the debt on January 2.

[*P23] As for the January 16, 2014, assignment from HUD to plaintiff, we agree with plaintiff that it is plausibly explained as a memorialization of a prior transfer of the Note to plaintiff. See *id.* ("Even when a written assignment exists, it may be a mere memorialization of an earlier transfer of interest.").

[*P24] Defendants cite *Title 24, section 203.351*, of the Code (*24 C.F.R. § 203.351 (2014)*), which prescribes what must be contained in an application for federal mortgage insurance when a mortgage is assigned to HUD. Defendants' reason for **[****644] [**1062]** citing it is obscure; they appear to suggest that the provision explains why the subject mortgage was assigned to HUD. Our concern is not why the August 2013 assignment was made but whether it raises an issue of material fact regarding standing. As explained, the assignment did not rebut plaintiff's *prima facie* case that it owned the debt on January 2, 2014, as evidenced by its possession of the Note indorsed in blank.

[*P25] For these reasons, we hold that defendants failed to rebut plaintiff's *prima facie* case of standing. As plaintiff established as a matter of law that it had standing, **[***13]** summary judgment on that issue was proper.

[*P26] C. Compliance With ***Section 203.604***

[*P27] Defendants' second contention on appeal is that summary judgment was inappropriate on the issue of plaintiff's compliance with ***section 203.604*** of the Code.

[*P28] As defendants' mortgage was insured by HUD, it was subject to specific servicing requirements. See *24 C.F.R. § 203.500 (2014)*; *Federal National Mortgage Ass'n v. Moore, 609 F. Supp. 194, 196 (N.D. Ill. 1985)*. The failure to comply with HUD's servicing requirements is a defense to a mortgage-foreclosure action. *PNC Bank, National Ass'n v. Wilson, 2017 IL App (2d) 151189, ¶ 18, 411 Ill. Dec. 791, 74 N.E.3d 100*.

[*P29] ***Section 203.604(b)*** requires that "[t]he mortgagee must have a face-to-face interview with the mortgagor, or make a reasonable effort to arrange such a meeting, before three full monthly installments due on the mortgage are unpaid." ***24 C.F.R. § 203.604(b) (2014)***. "A reasonable effort to arrange a face-to-face meeting with the mortgagor" has two elements. ***24 C.F.R. § 203.604(d) (2014)***. First, it "shall consist at a minimum of one letter sent to the mortgagor certified by the Postal Service as having been dispatched." *Id.* Second, it "shall also include at least one trip to see the

mortgagor at the mortgaged property." *Id.* A mortgagor may not institute foreclosure proceedings before complying with ***section 203.604***. See *24 C.F.R. § 203.500 (2014)*.

[*P30] We note initially that, in the midst of their argument on the "attempt-by-letter" requirement, defendants make the passing **[***14]** remark that "no visit to the property was ever conducted." Prather claimed otherwise in her affidavit. As defendants do not acknowledge her statement or cite any other part of the record to support their point, we reject it as forfeited. See *Ill. S. Ct. R. 341(h)(7)* (eff. Jan. 1, 2016) (failure to provide supporting record citations results in forfeiture of a point).

[*P31] The gravamen of defendants' challenge is that plaintiff failed to satisfy the requirement that it attempt by letter to arrange a face-to-face meeting. According to defendants, plaintiff's use of Federal Express, as evidenced by a shipping label that plaintiff produced from the carrier, was inadequate because ***section 203.604(d)*** specifies that the letter must be sent by the United States Postal Service. Plaintiff cites *Rourk v. Bank of America National Ass'n, No. 4:12-CV-42 (CDL), 2013 U.S. Dist. LEXIS 147373, 2013 WL 5595964, *5 (M.D. Ga. Oct. 11, 2013)*, where the foreclosure plaintiff sent the letter "via Federal Express with delivery confirmation." The trial court held that, while this delivery method did not "strictly comply with the certified mail requirement, it [did] substantially comply with the requirement that the letter be certified as having been dispatched." *Id.*

[*P32] We do not decide whether the use of a private carrier can constitute **[***15]** substantial compliance with the "attempt-by-letter" requirement of ***section 203.604(d)***, for even if we construed the section in **[****645]** **[**1063]** plaintiff's favor, we would hold that plaintiff failed to comply with its requirements. Plaintiff concedes that even substantial compliance with ***section 203.604(d)*** would entail proof from the carrier that the letter was "dispatched" (***24 C.F.R. § 203.604(d) (2014)***), or sent. See *Wilson, 2017 IL App (2d) 151189, ¶ 23* ("[T]he plain and ordinary meaning of ***section 203.604(d)*** requires proof from the United States Postal Service that the letter was sent."). Here a material question of fact remains on whether plaintiff's letter offering a face-to-face meeting was dispatched. Plaintiff claims that the "unique tracking identifier" on the Federal Express label is "proof that the letter was sent." We disagree. The label is not indubitable proof of dispatch. We take judicial notice of the procedures for shipping packages with Federal Express. See *id.* (taking judicial notice of the Postal Service's shipping options). The label submitted by plaintiff was computer-generated. Federal Express's website permits a user to generate labels for shipment. The user selects the ship date, and a tracking number is assigned. See FedEx Ship Manager® Software User Guide 25-28, *http://images.fedex.com/us/software/pdf/FSM_UserGuide_v3000.pdf* (last visited Sept. **[***16]** 14, 2017) (user manual describing process of creating a label); *Shipping Services and Online Shipping Tools*, FedEx, *https://www.fedex.com/us/shipping* (last visited Sept. 14, 2017) (video describing process of creating a label); *Tracking Your Shipping Business*, FedEx, *http://www.fedex.com/us/smallbusiness/articles/trackingshippingbusiness.html* (last visited Sept. 14, 2017) ("A tracking number is a numeric code assigned to every package in the shipping system; it uniquely identifies each package as it moves through the shipping channels. It is assigned when transport is arranged - the tracking number appears on the shipper's forms if you use paper-based method, or is assigned automatically if you arrange for shipment online."). The user might or might not actually ship the item after generating the label. *FAQs for FedEx Ship Manager Software*, FedEx, *http://www.fedex.com/us/ship-manager/software/resources/faq.html* (last visited Sept. 14, 2017) (noting that a shipping label can be generated up to 10 days in advance of shipment). In short, a shipping label—complete with shipping date and tracking number—can be generated independently of actual shipment. See *Geathers v. Bank of Am., N.A., No. 1:14-cv-00850-WSD-AJB, 2015 U.S. Dist. LEXIS 113777, 2015 WL 5089347, *7 (S.D. Ga. July 6, 2015)* (Federal Express shipping label, with "no tracking information or other documentation showing that the package was actually dispatched or delivered," **[***17]** did not satisfy the letter requirement of ***section 203.604(b)***). Notably, Federal Express offers proof of delivery (*Fed Ex Tracking*, FedEx, *https://www.fedex.com/apps/fedextrack/?action=spod&cntry_code=cv* (last visited Sept. 14, 2017)), which the plaintiff in *Rourk* submitted. Plaintiff offered no such proof here. A movant's entitlement to summary judgment must be free and clear from doubt. *Adams, 211 Ill. 2d at 43*. The shipping label does not demonstrate conclusively that plaintiff sent defendants a letter offering a face-to-face meeting.

[*P33] We stress that we do not hold today that the use of a private carrier can never satisfy ***section 203.604(d)***. We do not reach that issue, because, as plaintiff concedes, proof of dispatch would be required in

any case, and we determine here that plaintiff failed to establish as a matter of law that it dispatched the letter.

[*P34] Plaintiff alternatively argues lack of prejudice. First, as plaintiff reads Maria's affidavit, she asserted only that defendants received no letter from the *Postal Service* **[****646] [**1064]** offering a face-to-face meeting, not that they received no such letter at all. We disagree. Maria did specifically deny that defendants received a letter by certified mail from the Postal Service, but at the end of the same sentence she also generally denied being "offered a face-to-face **[***18]** meeting at either the Plaintiff's or the previous lender's local banks, or other H.U.D. related servicing office." Construing Maria's affidavit in the light most favorable to defendants, as we must, we read her as denying that she received any letter offering defendants a face-to-face meeting.

[*P35] Second, plaintiff asserts that defendants' history of delinquency on their mortgage payments suggests that they could not have avoided foreclosure even if offered a face-to-face meeting. Plaintiff's only authority for this contention is *Wilson*, where this court held that the offer of a face-to-face meeting pursuant to ***section 203.604*** would have been futile because the debt was discharged in bankruptcy, and hence "there was no contract to remediate or ameliorate." *Wilson, 2017 IL App (2d) 151189, ¶ 25*. In so holding, this court articulated the general principle that "[w]here a mortgagor alleges only a technical defect in notice and fails to allege any resulting prejudice, vacating the foreclosure to permit new notice would be futile." *Id. ¶ 24*. The case from which *Wilson* derived this proposition, *Aurora Loan Services, LLC v. Pajor, 2012 IL App (2d) 110899, ¶ 27, 973 N.E.2d 437, 362 Ill. Dec. 337*, interpreted an Illinois statute on notice in foreclosure proceedings (*735 ILCS 5/15-1502.5* (West 2010)).

[*P36] *Wilson* grafted the no-prejudice principle, a creature of Illinois state **[***19]** law (as far as *Pajor* indicates), onto a federal regulation. In the absence of direction from the federal courts, to which plaintiff does not refer us, we decline to extend the principle to a situation so unlike that of *Wilson* and to hold that noncompliance with ***section 203.604*** may be excused in cases of inevitable foreclosure (however that may be determined). Accordingly, we reject plaintiff's contention.

[*P37] We conclude that summary judgment was improper because plaintiff did not establish as a matter of law that it complied with ***section 203.604(d)***.

[*P38] III. CONCLUSION

[*P39] For the foregoing reasons, we vacate the summary judgment and judgment of foreclosure and sale, and we remand this case for further proceedings.

[*P40] Vacated and remanded.

Concur by: SCHOSTOK

Concur

[*P41] JUSTICE SCHOSTOK, specially concurring.

[*P42] I write separately due to concerns over judicial economy that are created by situations such as present in this case. The plaintiff relies on *Rourk* for the proposition that the use of Federal Express was sufficient to comply with the requirements of ***section 203.604(d)*** of the Code. However, *Rourk* suggested that Federal Express was a substitute for the USPS only upon proof of receipt. *Rourk, 2013 U.S. Dist. LEXIS 147373, 2013 WL 5595964, at *5*. Here, the plaintiff provided neither proof of dispatch nor proof of receipt. The **[***20]** present situation, and the needlessly extended proceedings on remand, could clearly have been avoided had the plaintiff simply provided an affidavit stating that the letter required by ***section 203.604(d)*** had been sent or some other proof of dispatch. Because the plaintiff failed to do **[****647] [**1065]** so, we are required to remand for further proceedings.

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Donahue v. Fannie Mae

United States District Court for the District of Massachusetts

May 20, 2019, Decided; May 20, 2019, Filed

Case No: 17-cv-10635-DJC

Reporter
2019 U.S. Dist. LEXIS 84460 *; 2019 WL 2176939

JOSEPHINE B. DONAHUE, Plaintiff, v. FEDERAL NATIONAL MORTGAGE ASSOCIATION AND OCWEN LOAN SERVICING, LLC, Defendants.

Counsel: **[*1]** For Josephine B. Donahue, on behalf of herself and all others so similarly situated, Plaintiff: Todd S. Dion, LEAD ATTORNEY, Law Office of Todd S. Dion, Quincy, MA.

For Ocwen Loan Servicing, LLC, Defendant: Maura K. McKelvey, Vanessa V. Pisano, LEAD ATTORNEYS, Hinshaw & Culbertson LLP, Boston, MA.

Judges: Denise J. Casper, United States District Judge.

Opinion by: Denise J. Casper

Opinion

MEMORANDUM AND ORDER

CASPER, J.

I. Introduction

Plaintiff Josephine Donahue ("Donahue") has filed this lawsuit against Defendants Federal National Mortgage Association and Ocwen Loan Servicing, LLC ("Ocwen") (collectively, "Defendants") alleging violations of *Mass. Gen. L. c. 183, § 32* and Mass. Gen. L. 183, *§ 4* (Count I), breach of the duty of good faith and reasonable diligence (Count II) and breach of contract and the covenant of good faith and fair dealing (Count III). D. 1-1. Ocwen has moved for summary judgment. D. 37. For the reasons stated below, the Court ALLOWS the motion.

II. Standard of Review

The Court grants summary judgment where there is no genuine dispute as to any material fact and the undisputed facts demonstrate that the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(a)*. "A fact is material if it carries with it the potential to affect **[*2]** the outcome of the suit under the applicable law." *Santiago—Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 52 (1st Cir. 2000)* (quoting *Sánchez v. Alvarado, 101 F.3d 223, 227 (1st Cir. 1996))*. The movant "bears the burden of demonstrating the absence of a genuine issue of material fact." *Carmona v. Toledo, 215 F.3d 124, 132 (1st Cir. 2000)*; see *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. If the movant meets its burden, the non-moving party may not rest on the allegations or denials in her pleadings, *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*, but "must, with respect to each issue on which she would bear the burden of proof at trial, demonstrate that a trier of fact could reasonably resolve that issue in her favor," *Borges ex rel. S.M.B.W. v. Serrano—Isern, 605 F.3d 1, 5 (1st Cir. 2010)*. "As a general rule, that requires the production of evidence that is 'significant[ly] probative.'" Id. (quoting *Anderson, 477 U.S. at 249*) (alteration in original). The Court "view[s] the record in the light most favorable to the nonmovant, drawing reasonable inferences in his favor." *Noonan v. Staples, Inc., 556 F.3d 20, 25 (1st Cir. 2009)*.

III. Factual Background

The following facts are undisputed unless indicated otherwise. On or about June 22, 2010, Donahue executed a mortgage (the "Mortgage") in the amount of $484,330.00 to Reliant Mortgage Company, LLC ("Reliant") relating to real property located in Scituate, Massachusetts (the "Property"). D. 39 ¶ 1; D. 39-1; D. 45 at 1. Ocwen began servicing the Mortgage in February 2013. D. 39-6 ¶ 8. On June 10, 2014, the Mortgage **[*3]** was assigned from Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for Reliant, to Ocwen. D. 39 ¶ 2; D. 39-3; D. 45 at 2.

In or around April 2014, Donahue made a verbal

request for mortgage assistance from Ocwen, which Ocwen acknowledged in a letter dated April 28, 2014. D. 39-8; D. 45 at 4. The letter explained that Ocwen required a complete copy of an attached "Financial Analysis Package" by June 29, 2014 from Donahue to process her request. D. 39-8 at 2; see D. 39-2 at 6. The parties dispute whether Donahue submitted the required financial information. Compare D. 39 ¶ 11, with D. 45 at 4-5.

Donahue first defaulted on her loan payments under the Mortgage in or around September 2014. D. 39 at 3 n.1; D. 45 at 3; D. 47 ¶ 16; D. 47-3. Between September 2014 and January 2015, Defendants did not send any correspondence to Donahue about the opportunity for a face-to-face meeting. D. 47 ¶ 16; D. 39-6 ¶ 20 (referring to October 28, 2015 face-to-face letter as Ocwen's "First" HUD Face-to-Face Letter). Ocwen did, however, send Donahue a 150-day notice of a right to cure the mortgage default on November 14, 2014. D. 39 ¶ 12; D. 47-3; see D. 47 ¶ 16. As of the time of the November **[*4]** 14th letter, Donahue had failed to make her monthly loan payments for September, October or November 2014. D. 47-3 at 2. Before 150 days had passed, in January 2015, Donahue made the outstanding payments on the Mortgage, D. 47 ¶ 16, and Ocwen reinstated the loan, D. 39 at 3 n.1; D. 45 at 3.

In March 2015, Donahue again defaulted on the Mortgage. D. 39 ¶ 7; D. 47 ¶ 17. In April 2015, Donahue entered into a "Temporary Repayment Agreement" with Ocwen. D. 39 ¶ 14; D. 39-10; D. 45 at 6. It is undisputed that Donahue failed to make any payments under the Agreement. D. 39 ¶ 15; D. 45 at 6. On May 28, 2015, Ocwen sent Donahue a pre-foreclosure referral letter, reflecting the balance owed on the Mortgage and encouraging Donahue to "call [Ocwen] immediately to discuss possible alternatives to foreclosure" if she could not make her account current. D. 39-5 at 3; D. 39-6 ¶ 17. In or about July 2015, Donahue made another verbal request for mortgage assistance, as acknowledged by Ocwen in a letter dated July 15, 2015. D. 39-11; D. 39-6 ¶ 18. Ocwen informed her that she still had not submitted a complete mortgage assistance package and set a deadline of August 13, 2015 for receipt of that package. **[*5]** D. 39-11 at 2.

According to Ocwen, Ocwen first offered a face-to-face meeting with Donahue in a letter dated October 28, 2015. D. 39 ¶ 20, see D. 39-12. Katherine Ortwerth ("Ortwerth"), a Senior Loan Analyst at Ocwen, refers to the letter as "Ocwen's First HUD Face-to-Face Letter" and attests that it was sent to Donahue. D. 39-6 ¶ 20; 12/6/18 hearing transcript (counsel for Ocwen acknowledging that this letter was not sent by certified mail). Donahue claims that the letter was never sent because she did not receive it and the purported United States Postal Service ("USPS") tracking number on the letter reflects origin and receipt destinations in California. D. 45 at 7-8; D. 47 ¶ 13; D. 48-1.

In or about November 2015, Donahue submitted a request for modification of her delinquent loan. D. 39 ¶ 21; D. 45 at 8. By letter dated December 4, 2015, Ocwen acknowledged Donahue's request and solicited additional documentation from Donahue, including a copy of her most recent retirement, social security and death benefit income. D. 39 ¶ 22; D. 39-14; D. 45 at 8. On December 23, 2015, Ocwen sent Donahue a list of missing documents needed to review her request for modification. D. 39 ¶ 23; D. 39-15; **[*6]** D. 45 at 8.

On January 28, 2016, Ocwen ordered "Doorknocks" for Donahue. D. 53-1 at 7. On or about February 2, 2016, Ocwen asserts that it had a door hanger left at the Property, advising Donahue of her right to "a face-to-face interview with a representative from the mortgage on the underlying loan agreement." D. 39-16 at 3. Ocwen has filed a photo of a door hanger on a door knob that is printed on letterhead from a company called Safeguard Properties. Id. at 2. The header above the photo identifies the address as that of the Property and lists a "Completed Date" of February 2, 2016. Id. Ortwerth from Ocwen attests that it is the regular practice of Ocwen to have Ocwen's vendor visit properties and leave a door hanger with information about a face-to-face meeting once a request is made for a property visit pursuant to ***24 C.F.R. § 203.604***. D. 53-1 ¶ 11. Ortwerth further attests that this practice was followed in February 2016 and that, based on her review of Donahue's file, nothing indicates that the usual procedure was not followed in this case. Id.

On February 4, 2016, Ocwen requested a face-to-face letter be sent to Donahue, as reflected in Donahue's account file. D. 53-1 at 7. On February 5, 2016, Ocwen asserts **[*7]** that it sent a letter informing Donahue of her right to a face-to-face meeting. D. 39 ¶ 27; D. 39-6 ¶ 26; D. 39-17. An entry dated February 8, 2016 in Donahue's account file reflects the same mailing date. D. 53-1 ¶ 6; D. 53-1 at 8. The February 8, 2016 entry also lists a USPS tracking number that corresponds to the one at the top of the letter. D. 53-1 ¶ 6; D. 53-1 at 8.

Donahue contends that Ocwen never sent the February 5, 2016 letter, because she never received it and

because the tracking number—identical to the one offered for the October 28 letter—indicates origin and receipt destinations in California in March 2016. D. 45 at 10-11; D. 47 ¶ 13; D. 48-1. Donahue attests that she never received any correspondence or notice from Ocwen advising her of the option of a face-to-face meeting. D. 47 ¶ 13. She also attests that no Ocwen agent ever made a trip to the Property, id., despite the Property being within 200 miles of an Ocwen branch office, id. ¶ 10.

Donahue remained in default. D. 39 at 3 n.1; D. 44 at 9. In or around June 2016, approximately one month before the scheduled foreclosure sale, Donahue submitted another request for mortgage assistance. D. 39 ¶ 29; D. 45 at 11. On **[*8]** June 30, 2016, Ocwen acknowledged receipt of Donahue's request and indicated that she had until July 14, 2016 to provide all supporting documents listed in the letter. D. 39 ¶ 31; D. 39-19; D. 45 at 11. The parties dispute whether Donahue submitted the documents. Compare D. 39 ¶ 32, with D. 45 at 11-12. Ocwen representatives spoke with Donahue or her authorized representatives on at least twenty occasions to discuss Donahue's mortgage and available loss mitigation options before holding a foreclose sale. D. 53-1 ¶ 13.

By letter dated June 17, 2016, the law firm representing Ocwen informed Donahue that the foreclosure sale had been scheduled for July 21, 2016. D. 39-20; D. 45 at 12. Ocwen conducted an appraisal prior to the foreclosure sale that indicated the fair market value of the Property was $500,000. D. 39-21 at 4; D. 45 at 12-13. Donahue attests that the Property is worth more than Ocwen's assessment, based on tax assessments from the Town of Scituate. D. 47 ¶ 19. On July 21, 2016, Ocwen foreclosed on the Property and was the highest bidder at the foreclosure auction. D. 39-22; D. 45 at 13.

IV. Procedural History

Donahue instituted this action in Plymouth Superior Court on February **[*9]** 27, 2017. D. 1-1. Defendants removed the case to this Court. D. 1. Ocwen has now moved for summary judgment. D. 37. The Court heard the parties on the pending motion and took the matter under advisement. D. 55.

V. Discussion

A. *Mass. Gen. L. c. 183, § 32* and *Mass. Gen. L. c. 183, § 4* (Count I)

Donahue asserts that the foreclosure of the Property was unlawful under *Mass. Gen. L. c. 183, § 32* and Mass. Gen. L. 183, *§ 4*[1] because Defendants lacked a Power of Attorney ("POA") from Ginnie Mae. D. 1-1 ¶ 76. *Mass. Gen. L. c. 183, § 32* provides that "[t]he law relative to the acknowledgement and recording of deeds shall apply to letters of attorney for the conveyance of real property." *Mass. Gen. L. c. 183, § 4* states, in relevant part, that "[a] conveyance . . . shall not be valid as against any person, except the grantor or lessor, his heirs and devisees and persons having actual notice of it, unless it . . . is recorded in the registry of deeds for the county or district in which the land to which it relates lies." Ocwen argues that Donahue's claims under these statutes fail because there is no private right of action under either statute and because Ocwen had the authority to foreclose on the Mortgage. D. 38 at 20-22.

Even assuming there is a private right of action under the statutes, which Ocwen contests, the record does **[*10]** not reflect that Ocwen executed a conveyance of the Property on behalf of another entity, such that Ocwen required a POA from Ginnie Mae or any other entity to foreclose. The undisputed evidence shows that the Mortgage was originally executed between Donahue and Reliant, with MERS serving as nominee for Reliant, and that MERS assigned the mortgage to Ocwen on or about June 10, 2014. D. 39 ¶¶ 1-2; D. 39-1; D. 45 at 1-2. Under *Mass. Gen. L. c. 183, § 21*, "[t]he 'statutory power of sale' can be exercised by 'the mortgagee or his executors, administrators, successors or assigns.'" *U.S. Bank Nat'l Ass'n v. Ibanez, 458 Mass. 637, 647, 941 N.E.2d 40 (2011)* (quoting *Mass. Gen. L. c. 183, § 21*). Because MERS was named as nominee in the Mortgage, and there was nothing in the Mortgage prohibiting MERS from assigning the Mortgage, it had the authority to assign the Mortgage to Ocwen without a POA. See *Francis v. CitiMortgage, Inc., No. 11-11091-GAO, 2012 U.S. Dist. LEXIS 42233, 2012 WL 1038813, at *1 (D. Mass. Mar. 28, 2012)* (stating that "if a mortgage names MERS as mortgagee and as nominee for the lender or its assigns, MERS has the authority to assign the mortgage to

[1] The Court understands Donahue to have intended to cite to Mass. Gen. L. 183, *§ 4*, which relates to recordings in the registry of deeds and whose language is quoted in Donahue's complaint, D. 1-1 ¶ 72, rather than Mass. Gen. L. 184, *§ 4* which was cited in the header of Count I.

another entity"); *Shea v. Fed. Nat'l. Mortg. Ass'n, 87 Mass. App. Ct. 901, 903, 31 N.E.3d 1122 (2015)* (holding that "despite [the note holder's] right . . . to demand and obtain an assignment of the mortgage in order to enforce its security interest and collect the debt, MERS (as mortgagee) retain[s] the right **[*11]** to assign the mortgage unilaterally absent any restriction in the mortgage document"). The Court, therefore, holds that Ocwen is entitled to summary judgment on Count I.

B. Breach of the Duty of Good Faith and Reasonable Diligence (Count II)

Donahue also alleges a breach of the duty of good faith and reasonable diligence based on Defendants' failure to comply with ***24 C.F.R. § 203.604(b)***. D. 1-1 ¶ 95. Under Massachusetts law, "a mortgagee in exercising a power of sale in a mortgage must act in good faith and must use reasonable diligence to protect the interests of the mortgagor." *Mackenzie v. Flagstar Bank, FSB, 738 F.3d 486, 492-93 (1st Cir. 2013)* (citation and internal quotation mark omitted). Although Donahue bases this claim on the lack of a face-to-face meeting, "the mortgagee's duty of good faith and reasonable diligence is focused on its conduct of the foreclosure sale." *Figueroa v. Fed. Nat'l. Mortg. Ass'n, Civ. A. No. 12-11290-RWZ, 2013 U.S. Dist. LEXIS 70960, 2013 WL 2244348, at *3 (D. Mass. May 20, 2013)* (citing *Seppala & Aho Constr. Co. v. Petersen, 373 Mass. 316, 326, 367 N.E.2d 613 (1977)*); see *Sandler v. Silk, 292 Mass. 493, 496, 198 N.E. 749 (1935)* (noting that "[i]t has become settled by repeated and unvarying decisions that a mortgagee in executing a power of sale contained in a mortgage is bound to exercise good faith and put forth reasonable diligence"). Donahue's claim regarding the lack of a face-to-face meeting one year before the foreclosure sale, therefore, does **[*12]** not give rise to the claim that she alleges in Count II for a breach of the duty of good faith and reasonable diligence.

Specifically, Donahue does not address Ocwen's conduct at the foreclosure sale under Count II of the complaint or connect it to the duty of good faith and reasonable diligence in her pleading. In her opposition to summary judgment, however, Donahue asserts that Ocwen's conduct at the sale caused her damages because Ocwen paid less than market value for the Property at the foreclosure sale. D. 44 at 20-21. To the extent Donahue is indirectly invoking the price Ocwen paid for the Property as a breach of the duty of good faith and reasonable diligence, this claim, too, must fail. When the mortgagee "is both seller and buyer, [its] position is one of great delicacy. Yet, when [it] has done [its] full duty to the mortgagor in [its] conduct of the sale under the power [of sale], and the bidding begins, in [its] capacity as bidder a mortgagee may buy as cheaply as [it] can, and owes no duty to bid the full value of the property as that value may subsequently be determined by a judge or jury." *W. Roxbury Co-op v. Bowser, 324 Mass. 489, 492-93, 87 N.E.2d 113 (1949)* (citation and internal quotation mark omitted). Here, the sale of a property at **[*13]** an allegedly "inadequate" price does not, without more, "show bad faith or lack of diligence." *Id. at 493*. The Court, therefore, grants summary judgment to Ocwen on Count II.

C. Breach of Contract and the Covenant of Good Faith and Fair Dealing (Count III)

1. Breach of Contract

Donahue alleges the Defendants breached the contract between the parties by failing to comply with Paragraph 9(d) of the Mortgage. Paragraph 9(d) provides that "[i]n many circumstances regulations issued by the [HUD] Secretary will limit Lender's rights, in the case of payment defaults, to require immediate payment in full and foreclose if not paid. This Security Instrument does not authorize acceleration or foreclosure if not permitted by regulations of the Secretary." D. 39-1 ¶ 9(d). The parties agree that the HUD regulations applicable to the Mortgage include ***24 C.F.R. § 203.604(b)***, which states: "[t]he mortgagee must have a face-to-face interview with the mortgagor, or make a reasonable effort to arrange such a meeting, before three full monthly installments due on the mortgage are unpaid." ***24 C.F.R. § 203.604(b)***. A "reasonable effort" requires, at minimum, "one letter sent to the mortgagor certified by the Postal Service as having been dispatched" and "one trip **[*14]** to see the mortgagor at the mortgaged property, unless the mortgaged property is more than 200 miles from the mortgagee . . . ." ***24 C.F.R. § 203.604(d)***. Ocwen argues that it is entitled to summary judgment on this claim because it complied with this requirement by sending letters to Donahue about a face-to-face meeting, in addition to leaving a door hanger with similar information left at the Property, and Donahue suffered no damages because of the lack of a face-to-face meeting.

To prevail on a breach of contract claim, Donahue must prove "that a valid, binding contract existed, the defendant breached the terms of the contract, and [she]

sustained damages as a result of the breach." *Bean v. Bank of N.Y. Mellon, Civ. A. No. 12-10930-JCB, 2012 U.S. Dist. LEXIS 132447, 2012 WL 4103913, at *9 (D. Mass. Sept. 18, 2012)* (alteration in original) (quoting *Brooks v. AIG Sunamerica Life Assur. Co., 480 F.3d 579, 586 (1st Cir. 2017)* (internal quotation marks omitted)). It is undisputed that the Mortgage here constitutes a valid, binding contract between the parties. Accordingly, the issues before the Court are whether Defendants breached its terms and whether Donahue suffered damages as a result.

As a preliminary matter, the Court notes that Donahue defaulted on the Mortgage twice—once in 2014 and once in 2015. The parties appear not dispute that Ocwen did not make any **[*15]** effort to conduct a face-to-face meeting within three months of the 2014 default, as required by ***24 C.F.R. § 203.604(b)***. This failure to comply with the statute in 2014, however, cannot sustain Donahue's claim for breach of contract because she suffered no damages as a result. Even without a face-to-face meeting, Donahue was able to bring her account current at that time and Ocwen reinstated the loan. D. 39 at 3 n.1; D. 45 at 3. The Court's analysis, therefore, turns on the 2015 default.

a) "Reasonable Effort" to Arrange a Face-to-Face Meeting

The Court first considers whether Ocwen made a "reasonable effort" to arrange a face-to-face meeting, as required by ***24 C.F.R. § 203.604(b)***, through the letters it sent to Donahue and the door hanger it had dispatched to the Property. As to the letters, federal courts have held that mortgagees may prove compliance with ***§ 203.604(b)*** by relying on "proof of a business system of preparing and mailing letters, and compliance with such a custom in the particular instance," along with a copy of the business letter coded with internal identification numbers, names and descriptions. *Underwood v. Wells Fargo Home Mortg., Inc., No. 16-10226, 2016 U.S. Dist. LEXIS 74343, 2016 WL 3182022, at *3 (E.D. Mich. June 8, 2016)* (quoting *Simpson v. Jefferson Standard Life Ins. Co., 465 F.2d 1320, 1324 (6th Cir. 1972)*). Similarly, sworn testimony describing the ordinary practice of utilizing certified mail when sending the face-to-face **[*16]** meeting letters and "indicating that a certified letter was, in fact, sent" can suffice to support summary judgment in favor of the mortgagee. *Campbell v. Wells Fargo Bank, N.A., Civ. A. No. 1:14-cv-03341-TWT-JFK, 2016 U.S. Dist. LEXIS 150814, 2016 WL 6496458, at *8 (N.D. Ga. Oct. 6, 2016)*, adopted, *No. 1:14-CV-3341-TWT, 2016 U.S. Dist. LEXIS 150812, 2016 WL 6462070 (N.D. Ga. Nov. 1, 2016)*.

Here, the record reflects that Ocwen sent at least the February 2016 letter by providing a copy of the letter, a USPS tracking number, two Ortwerth affidavits validating that the letter was sent in accordance with Ocwen's regular practices and a corroborating entry from Donahue's file with Ocwen. (An earlier October 2015 letter was also sent, but apparently not by certified mail as Ocwen acknowledged at the motion hearing). Moreover, the Court finds Donahue's lack of receipt to be immaterial. See *Dan-Harry v. PNC Bank, N.A., C.A. No. 17-136WES, 2018 U.S. Dist. LEXIS 178423, 2018 WL 5044235, at *5 (D.R.I. Oct. 17, 2018)* (observing that "[a] mortgagor's denial of having received the letter does not give rise to a factual dispute regarding the mortgagee's compliance with the requirement to send it"). The Court concludes that even just the February letter satisfied Ocwen's burden to send "at least one" face-to-face letter to Donahue. ***24 C.F.R. § 203.604(b)***.

The Court also agrees with Ocwen that, given the circumstances, its failure to submit proof of dispatch **[*17]** from USPS does not bar summary judgment in its favor. See *RBS Citizens NA v. Sharp, 7th Dist. Mahoning No. 17 MA 0059, 2018-Ohio-2480, ¶ 4* (granting summary judgment to mortgagee who submitted copy of face-to-face letter with "evidence that said letter was sent via certified mail" and evidence that a representative was sent to mortgagor's home to attempt to arrange a meeting). Donahue argues the opposite, relying mainly upon *PNC Bank, N.A. v. Wilson, 2017 IL App (2d) 151189, 411 Ill. Dec. 791, 74 N.E.3d 100 (Ill. App. Ct. 2017)*. In Wilson, the court observed that the plain language of ***§ 203.604(d)*** "requires proof from the United States Postal Service that the letter was sent." *Id. at 106*. There, the lender's failure to include proof from USPS was "only a technical defect in notice" and did not bar the lender from foreclosing where the borrower could not show any resulting prejudice. *Id. at 106-07*. The other cases Donahue cites all differ in material respects from this case and do not mandate that the lender must provide proof of dispatch from USPS. See *PNC Mortg. v. Krynicki, 2017-Ohio-808, 85 N.E.3d 1024, ¶¶ 19, 25 (7th Dist.)* (reversing summary judgment for lender where lender sent only one, non-certified letter to borrower that did not mention a face-to-face meeting, and lender filed conclusory, unsupported affidavit); *U.S. Bank Trust N.A. v. Lopez, 2018 IL App (2d) 160967, 424 Ill. Dec. 140, 107 N.E.3d 859, 866-67 (Ill. App. Ct. 2018)* (concluding that letter sent via FedEx, rather than USPS, without corresponding notation **[*18]** of dispatch was

insufficient to support summary judgment for lender); *U.S. Bank Trust N.A. v. Hernandez, 2017 IL App (2d) 160850, 417 Ill. Dec. 638, 88 N.E.3d 1056, 1062-63 (Ill. App. Ct. 2017)* (holding that user-generated FedEx label was insufficient proof of dispatch for compliance with ***§ 203.604(d)***).

The Court also rules that Donahue's attorney's declaration that the tracking number corresponded to mail in California is unavailing because "the unexplained document from the USPS website proves nothing." *Dan-Harry, 2018 U.S. Dist. LEXIS 178423, 2018 WL 5044235, at *5*. Donahue's attorney attests only that "[o]n or about July 10, 2017, [he] searched the USPS Tracking Results" for the tracking number on Donahue's letter. D. 48 ¶ 4. The declaration does not describe USPS tracking procedures for letters mailed several years ago or what the results mean. The Court agrees with the reasoning in *Dan-Harry* that "[w]ithout some cognizable evidence to authenticate the [USPS tracking] document . . . this document does not amount to admissible evidence permitting the inference that [the lender's] certified letter was not sent." *Dan-Harry, 2018 U.S. Dist. LEXIS 178423, 2018 WL 5044235, at *5*.

As to the in-person visit to the Property, Donahue argues that even if Ocwen dispatched the door hanger to the Property (which she contests), the visit would be inadequate because it was executed by a vendor of Ocwen that lacked the authority to conduct a face-to-face **[*19]** interview. D. 44 at 12. Donahue relies on Freedom Mortg. Corp. v. Newsome, in which the mortgagee did not send a timely letter nor make a timely, in-person trip to arrange a face-to-face meeting. Freedom Mortg. Corp. v. Newsome, Mass. Housing Ct., No. 12-SP-2461, slip op. at ¶¶ 20-21 (Sept. 1, 2017).[2] The court held that a subsequent visit to the property by an agent who was not authorized to conduct a face-to-face meeting with the mortgagor was insufficient cure the prior deficiency under ***24 C.F.R. § 203.604(b)***. Id. at ¶¶ 21, 28. The Court, however, agrees with the court's conclusion in Dan-Harry that "Freedom Mortgage does not stand for the proposition that compliance with the timely trip requirement of ***§ 203.604(d)*** requires that the representative who makes the trip must be prepared to conduct the face-to-face meeting on the spot. And if Freedom Mortgage somehow may fairly be read as supporting such a proposition, that holding would be error as it ignores the clear language of ***§ 203.604(d)***, which states that the trip is 'to arrange' the meeting, not to conduct it in the moment." *Dan-Harry, 2018 U.S. Dist. LEXIS 178423, 2018 WL 5044235, at *5*. In sum, the Court concludes that Ocwen submitted unrebutted evidence that it sent at least one face-to-face letter to Donahue and conducted at least **[*20]** one in-person visit to the Property to attempt to arrange a meeting as required by ***§ 203.604***.

The undisputed evidence, however, shows that Ocwen did not strictly comply with ***24 C.F.R. § 203.604(b)***, because by Ocwen's own account, it both mailed the February 2016 face-to-face letter and visited the Property almost one year after Donahue went into default. As discussed above, ***§ 203.604(b)*** requires that a lender make a "reasonable effort" to arrange a face-to-face meeting "before three full monthly installments due on the mortgage are unpaid." ***24 C.F.R. § 203.604(b)***. Accordingly, the Court must consider whether strict compliance with the timeline established in ***§ 203.604(b)*** is required.

Generally, "the mortgagee, to effect a valid foreclosure sale, must strictly comply not only with the terms of the actual power of sale in the mortgage, but also with any conditions precedent to the exercise of the power that the mortgage might contain." *Pinti v. Emigrant Mortg. Co., Inc., 472 Mass. 226, 233-34, 33 N.E.3d 1213 (2015)*. Donahue, however, has not identified a case that holds that a reasonable effort toward conducting a face-to-face meeting is condition precedent that requires strict compliance. Several courts have explicitly determined that strict compliance with the three-month window is not required. See, e.g., *Grimaldi v. U.S. Bank Nat'l Ass'n, Civ. A. No. 16-519 WES, 2018 U.S. Dist. LEXIS 70927, 2018 WL 1997277, at *3 (D.R.I. Apr. 27, 2018)* **[*21]** (holding that visiting property of defaulted borrower five years after default and leaving a letter because borrower was not home satisfied requirement of making a reasonable effort at arranging face-to-face meeting); *US Bank Natl. Assn. v. McMullin, 55 Misc. 3d 1053, 47 N.Y.S.3d 882, 889 (N.Y. Sup. Ct. 2017)* (reasoning that ***§ 203.604(b)*** should not be construed to command an impossibility where lender missed the deadline and could, therefore, never achieve "strict compliance"); *PNC Mortg. v. Garland, 7th Dist. Mahoning No. 12 MA 222, 2014-Ohio-1173, ¶ 30 (7th Dist. Ohio Mar. 20, 2014)* (describing the "specific time deadlines" set out in HUD regulations as "aspirational").

The Court also rejects Donahue's contention that *Wells Fargo Bank, N.A. v. Cook, 87 Mass. App. Ct. 382, 31 N.E.3d 1125 (2015)*, mandates strict compliance with ***§ 203.604(b)***. In Cook, the Massachusetts Appeals Court

[2] A copy of the opinion has been filed at D. 48-2.

reversed the trial court's grant of summary judgment for the lender because there were disputed material facts as to whether a face-to-face meeting with the borrowers satisfied the substantive requirements of ***24 C.F.R. § 203.604(b)***. *Id. at 388*. The untimely meeting took place at a mass event at Gillette Stadium with a Wells Fargo representative who "was unable [to] propose or accept any forbearance or modification options, or arrange a payment plan." Id. (alteration in original). There was also no evidence **[*22]** demonstrating that "personalized consideration" of the borrowers took place. *Id. at 388-89*. The holding in Cook, however, does not compel the conclusion that ***§ 203.604(b)*** bars summary judgment to Donahue here. On the contrary, Cook specifies that "the regulations obviously do not state or require that the deadline specified in the regulations, once missed, could never again be met, thereby forever precluding the lender from accelerating the loan or exercising its right of foreclosure." *Id. at 387 n.10*. And finally, as noted in Dan-Harry, "to the extent that Cook has been considered by other courts (albeit not in the context of evaluating the sufficiency of a trip to the mortgaged property), its holding has been limited to its unique facts." *Dan-Harry, 2018 U.S. Dist. LEXIS 70927, 2018 WL 5044235, at *6* (citing cases).

b) Damages

Even if Donahue could show a breach of contract based on Ocwen's failure to comply strictly with ***§ 203.604(b)***, Count III would still fail because Donahue has not met her burden of establishing disputed material facts showing that this alleged breach by Defendants resulted in damages. Donahue asserts that if she had been given a chance to meet with an Ocwen representative in person within the first three months of default, she "would have been given instructions on what to do or an **[*23]** agreement could have been met and [her] mortgage would be in good standing right now." D. 47 ¶ 18. The undisputed evidence, however, belies Donahue's claim. After Donahue first defaulted in 2014, she was able to bring her account current and have the loan reinstated in January 2015. Two months later, however, she defaulted again. It is undisputed that despite reaching a "Temporary Repayment Agreement" with Ocwen in April 2015, Donahue failed to make a single payment under the Agreement and cure her 2015 default. Although Donahue submitted evidence that she could have liquidated her retirement savings in the amount of $36,194.60 (as of March 2015), she could have done so under the 2015 Agreement and did not so then or at any subsequent point. Furthermore, Ortwerth attests that Ocwen spoke to Donahue or her authorized representatives twenty times before holding a foreclosure sale, and Donahue has not articulated how these conversations would have differed from a face-to-face meeting. Accordingly, the Court concludes that the lack of an in-person meeting with Ocwen did not cause Donahue damages necessary to prevail on a breach of contract claim.

*2. Breach of Implied Covenant of Good Faith **[*24]** and Fair Dealing*

Donahue also alleges under Count III that Defendants' failure to comply with paragraph 9(d) of the Mortgage constitutes a violation of the implied covenant of good faith and fair dealing. Ocwen argues it is entitled to summary judgment on this claim because it is derivative of the breach of contract claim and the covenant creates no rights independent of the contract. D. 38 at 17-19.

The covenant of good faith and fair dealing is implied in every contract in Massachusetts. *Anthony's Pier Four, Inc. v. HBC Assocs., 411 Mass. 451, 471, 583 N.E.2d 806 (1991)* (citation omitted). It requires that "neither party [] do anything that will have the effect of destroying or injuring the right of the other party to the fruits of the contract." *T.W. Nickerson, Inc. v. Fleet Nat'l Bank, 456 Mass. 562, 570, 924 N.E.2d 696 (2010)* (quoting *Anthony's Pier Four, Inc., 411 Mass. at 471*). To prevail on such a claim, a plaintiff must show that the defendant "acted with . . . dishonest purpose or [with the] conscious wrongdoing necessary for a finding of bad faith or unfair dealing." *Schultz v. R.I. Hosp. Trust Nat'l Bank, N.A., 94 F.3d 721, 730 (1st Cir. 1996)*. "[T]he purpose of the covenant is to guarantee that the parties remain faithful to the intended and agreed expectations of the parties in their performance." *Uno Rests., Inc. v. Boston Kenmore Realty Corp., 441 Mass. 376, 385, 805 N.E.2d 957 (2004)*.

The Court concludes that there is no evidence of Ocwen having a "dishonest purpose" or having acted with "conscious wrongdoing" that could sustain a claim **[*25]** of a breach of the duty of good faith and fair dealing. Rather, the evidence shows that Ocwen reinstated Donahue's loan when she made her account current in January 2015, entered into a Temporary Repayment Plan with Donahue in April 2015, communicated with Donahue twenty times about her options for loan modifications before conducting a foreclosure sale and provided various opportunities for Donahue to undergo loan modification (including immediately prior to the foreclosure sale). To the extent Donahue indirectly

claims that Ocwen's assessments of her paperwork being incomplete were not made in good faith, the claims are not supported by the record. Donahue cites to no other examples of how Defendants breached the duty of good faith and fair dealing, apart from by allegedly breaching the Mortgage. See D. 44 at 25-28. Because of having articulated no other basis for this claim and the Court having concluded that Defendants did not breach the mortgage contract as discussed above, Donahue's derivative claim for breach of the implied covenant also fails. See *Kolbe v. BAC Home Loans Servicing, LP, 738 F.3d 432, 453-54 (1st Cir. 2013)* (holding that an allegation of a breach of the duty of good faith and fair dealing that was "wholly dependent on the premise that **[*26]** the [defendant] breached the contract" necessarily failed with the failure of the breach of contract claim). The Court, therefore, grants summary judgment to Ocwen on Count III.

VI. Conclusion

For the foregoing reasons, the Court ALLOWS Ocwen's motion for summary judgment, D. 37.

So Ordered.

/s/ Denise J. Casper

United States District Judge

End of Document

Stern&Eisenberg
ATTORNEYS AT LAW

Significant Changes to
New Jersey Foreclosure Process

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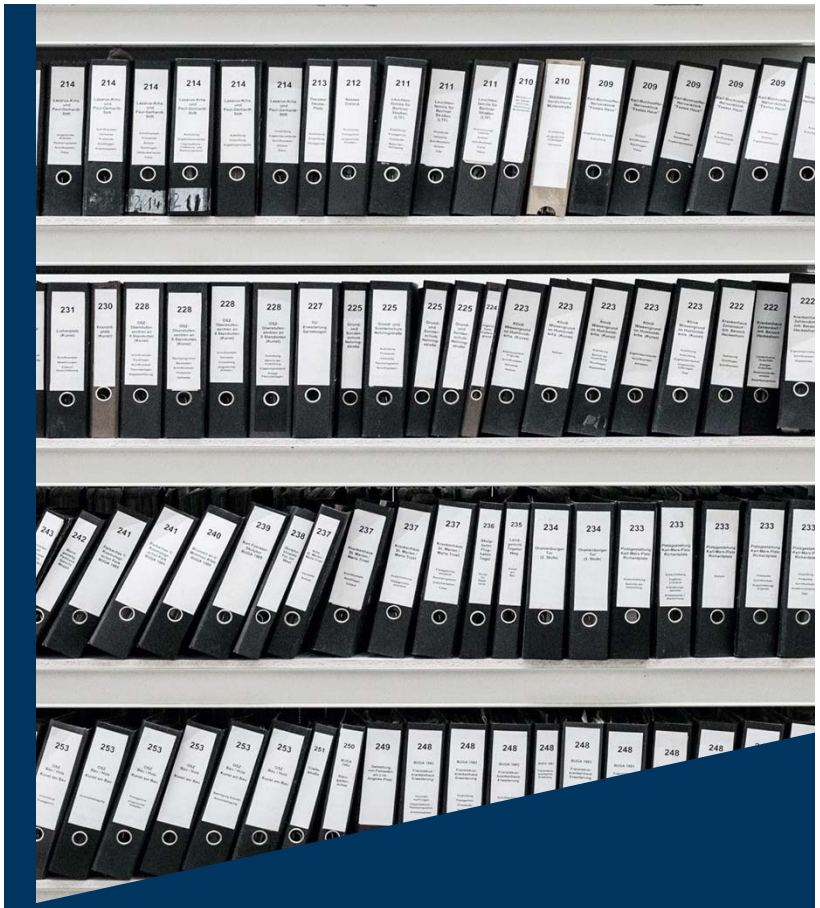
ALERT

9 Significant Changes - 2019

New Jersey Foreclosure Process

(Plus one more effective April 1, 2020)



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AGENDA

9 Significant Changes to New Jersey Foreclosure Process

1. A664 – Mediation Expansion and Lender Subsidization Bill
2. A4997 – Mortgage Servicer's Licensing Act
3. A4999 – Property Preservation and Notice Bill
4. A5001 – Statute of Limitations Bill
5. A5002 – Common Interest Community Bill
6. S3411 – NOI, Receivership and Reinstatement Bill
7. S3413 – Vacant and Abandoned Property Bill
8. S3416 – Licensed Lender Bill
9. S3464 – Sheriff's Sale Bill

A. The NOI...looking to 2020...

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1 A664 – Mediation Expansion and Lender Subsidization Bill

Effective 1st day of the 7th month following enactment (November 1, 2019)

- Expands mediation eligibility to include multi-family homes
- Expands mediation eligibility to include homes where the borrower's immediate family resides
- Requires that notice of mediation availability be included in the pre-foreclosure Notice of Intent to Foreclose
- Requires that notice of mediation availability again be provided at service (in English and Spanish).

1

A664 – Mediation Expansion and Lender Subsidization Bill

Effective 1st day of the 7th month following enactment (November 1, 2019) CONT.

- Requires that a person with settlement authority be available to appear on behalf of the lender or servicer telephonically or in person
- Provides for a civil penalty of up to $1,000 for failure to appear
- Increases the filing fee of a foreclosure complaint $155. These funds are to be used to fund the mediation program

2 A4997 – Mortgage Servicer's Licensing Act

Effective 90th day following enactment (July 28, 2019)

"Mortgage Servicer" is defined as any person who on behalf of the holder of a residential mortgage loan, receives payments of principal and interest in connection with a residential mortgage loan, records the payments on the person's books and records and performs the other administrative functions as may be necessary to properly carry out the mortgage holder's obligations....including the receipt of funds from the mortgagor to be held in escrow for payment of taxes and insurance and the distribution of funds to the taxing authority and insurance company.

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2 A4997 – Mortgage Servicer's Licensing Act

Effective 90th day following enactment (July 28, 2019) CONT.

Who is exempt? Banks / credit unions (and their subsidiaries) that are federally insured; Anyone licensed as a New Jersey Residential Mortgage Lender (provided they meet the bonding and insurance coverage requirements of the Mortgage Servicer's Licensing Act")

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2 A4997 – Mortgage Servicer's Licensing Act

Effective 90th day following enactment (July 28, 2019) CONT.

- Requires mortgage loan servicers to obtain a license from the Commissioner of Banking and Insurance
- Sets forth broad range of criteria for licensing qualification
- Requires annual reporting and renewals
- Initial application fee is $1k, annual renewal fee is $3k. Fees are non-refundable
- Requires the posting of a Surety and Fidelity Bonds
- Imposes broad record keeping and reporting responsibilities
- Permits the Commissioner to bar any person who knowingly violates the act from servicing or brokering activities. Imposes civil and criminal liability for such violations

3

A4999 – Property Preservation and Notice Bill

Effective 90th day following enactment (July 28, 2019)

Requires the filing of creditor contact information with the summons / complaint and Lis Pendens. Contact information for a representative for property maintenance purposes and who is authorized to accept service on behalf of the creditor must be provided. Both of these representatives must be located in the State of New Jersey

In addition to filing this information with the summons / complaint and lis pendens, it must also be sent to the municipal clerk and the Mayor of the town.

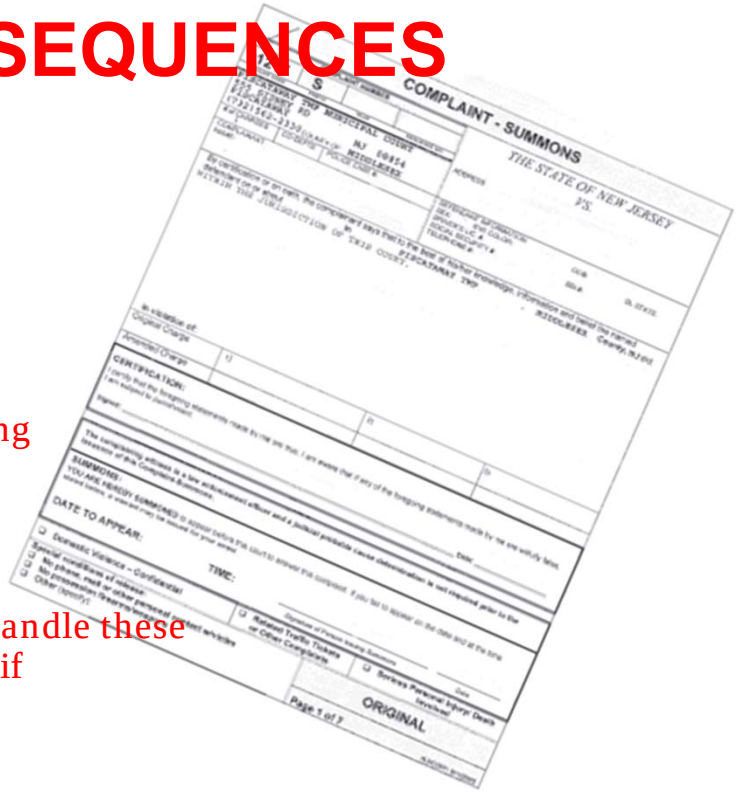
Any subsequent changes to the above contact information must be disclosed within 10 days of same.

NOTE: It is imperative that the requisite information be provided to us at the time of referral, as we will not be able to file the complaint without same.**

REAL WORLD CONSEQUENCES

Local Townships and Municipalities do not hesitate to issue a Summons to force you to appear at a code violations hearing and explain why the property was not registered.

Fines are issued but you can usually negotiate them downward with prompt attention to the issue, including prompt registration of a property.


COMPLAINT - SUMMONS
THE STATE OF NEW JERSEY
VS.
CERTIFICATION:
SUMMONS:
DATE TO APPEAR:
TIME:
ORIGINAL
Page 1 of 7

NOTE: Make sure you have the appropriate procedures to handle these issues and remember, we, as counsel, are a phone call away if necessary.

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4 A5001 – Statute of Limitations Bill

Effective Immediately

Revises Statute of Limitations for Residential Mortgages

Applicable to residential mortgages executed on or after effective date (4/29/19)

Reduces statute of limitations for initiating foreclosure due to non payment from 20 to 6 years

4

Statute of Limitations

The prior law clearly defined…
over some confusion…

Prior to this change, there was a lot of litigation surrounding the meaning of the statute of limitations.

The now reversed *In Re Washington* case (Judge Michael Kaplan, U.S. Bankruptcy Judge, DNJ) found that the act of acceleration essentially triggered the maturity of a mortgage; when the foreclosure was ultimately dismissed more than 6 years after it started, the lender was now beyond the statute of limitations, resulting in the 'repugnant' result of a "free house" due to the statute of limitations. The case was reversed…the 6 year statute ran from the original maturity, not an acceleration date. From default, the statute was 20 years…

The legislature decided that 20 years was too long, so they changed it for new loans...

5

A5002 – Common Interest Community Bill

Effective Immediately

Allows condo associations to include late fees, fines, expenses and attorneys fees in an association lien

Continues to provide 6 month limited priority to condo liens; exempts association liens from 60 month expiration period if they are renewed annually

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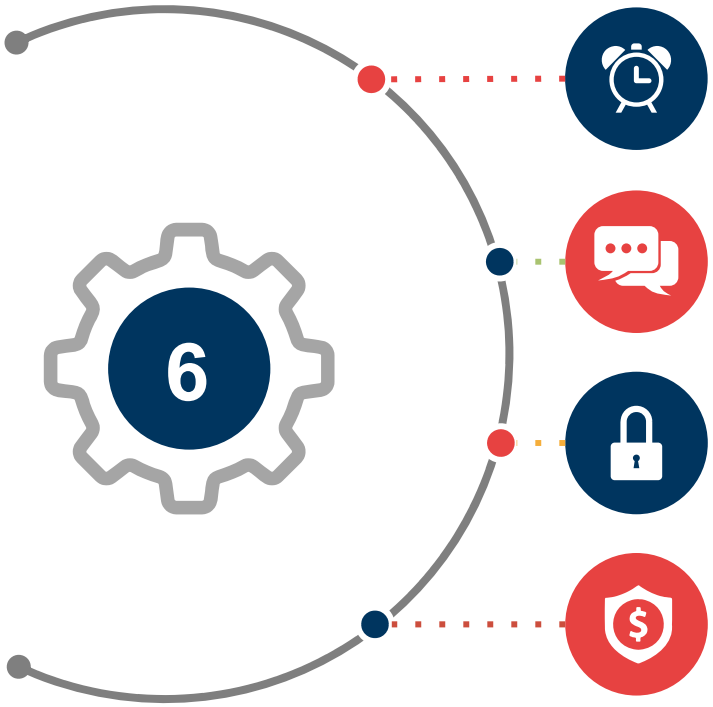


S3411 – NOI, Receivership and Reinstatement Bill

Effective 1st Day of 4th Month Following Enactment (August 1, 2019)

Requires NOI to be sent within 180 days of filing foreclosure complaint – must be re-sent if 1st legal not filed within 180 days

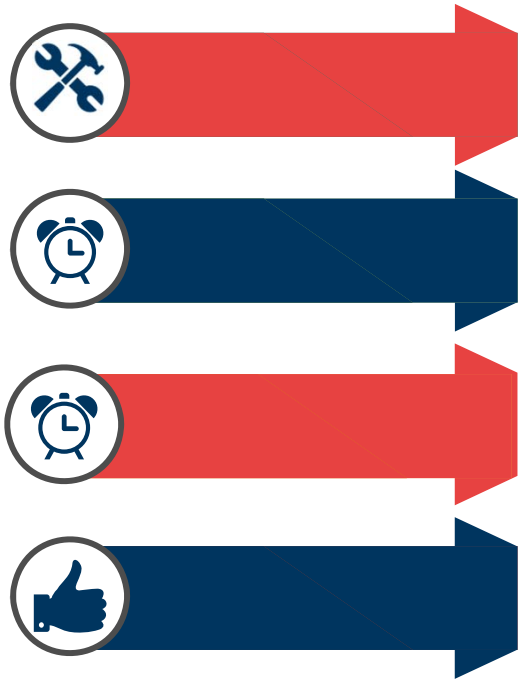
Requires additional language to be included in NOI: (1) Notice of Mediation availability; and, (2); that a receiver shall be appointed if the mortgage is secured by a multifamily property which meets the eligibility criteria of the Multifamily Housing Preservation and Receivership Act

Limits reinstatements of an action dismissed without prejudice for lack of prosecution to 3. Fee to reinstate is 2x the amount of the filing of a foreclosure complaint.

No portion of a reinstatement fee may be passed on to a debtor

7 S3413 - Vacant and Abandoned Property Bill

Effective 30th day following enactment (May 29, 2019)



Makes certain changes to vacant and abandoned property procedure

Increases sheriff's time to sell the property following an order that it is vacant and abandoned from 60 to 90 days

Special Master application may be made if the sheriff cannot hold the sale within 90 days

Does not have a practical impact our practice because the vacant / abandoned procedure is less efficient than the "standard" foreclosure process. These changes make it even less efficient than it already is and therefore even less desirable.

8

S3416
Licensed Lender Bill
Effective Immediately

- Requires NOI to include language stating that the Lender is either licensed in accordance with the New Jersey Mortgage Lending Act or exempt from same
- **"Residential Mortgage Lender"** is defined under the Residential Mortgage Lending Act as a non-exempt person who for compensation or gain, or in the expectation of compensation or gain, either directly or indirectly takes a residential mortgage loan application, or offers, negotiates originates or acquires residential mortgage loans in the primary market for others.

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8

S3416
Licensed Lender Bill
Effective Immediately - CONT

“Primary Market”

Is defined as the market wherein residential mortgage loans are originated between a residential mortgage lender and a borrower, whether or not through a residential mortgage broker or other conduit, and shall not include the sale or acquisition of a residential mortgage loan after the mortgage loan is closed.

S3416 - Licensed Lender Bill

Effective Immediately. CONT

8

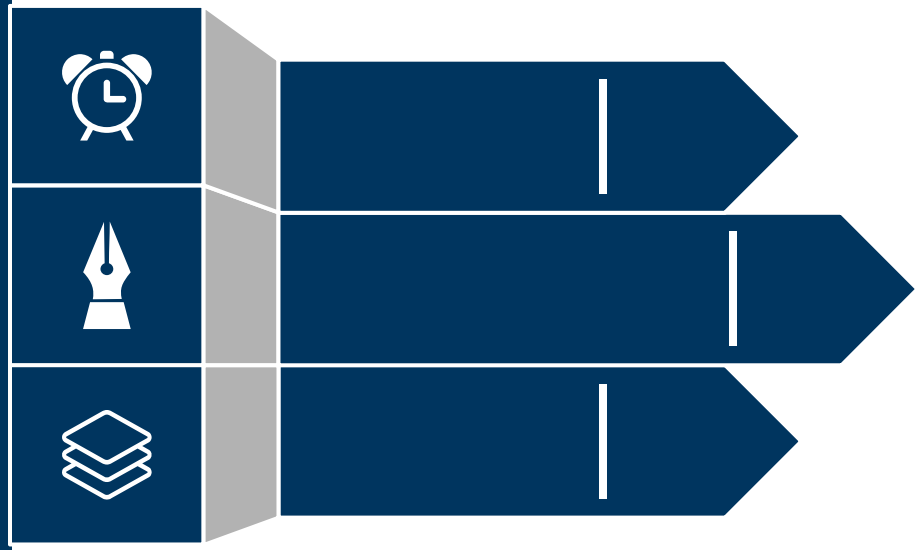
"Lender"

Is defined under the Fair Foreclosure Act as a person / entity "which makes or holds a residential mortgage and any person, corporation or other entity to which such residential mortgage is assigned."

Since the change is being made to the Notice of Intent to Foreclose, which is required pursuant to the Fair Foreclosure Act, the relevant entity to consider for licensure or exemption purposes is the foreclosure Plaintiff. This reading comports U.S. Bank v. Guillaume 209 N.J. 449 (2012) wherein the New Jersey Supreme Court clearly held that the Fair Foreclosure Act requires contact information for the Lender (rather than the servicer) to be provided.

9 S3464 - Sheriff's Sale Bill

Effective 90 days after enactment (July 28, 2019)



Requires sheriff to conduct sale within 150 days of receiving Writ of Execution (permits special master application if sheriff is not able to do so)

Requires Plaintiff's counsel to prepare deed for sheriff.

Limits sheriff's sale adjournments to 5 (debtor and lender may each use 2 unilaterally, and a 5th may be used if both parties agree). Practically, this will limit Plaintiff's adjournments to 2 in most cases. After the 2 adjournment threshold is met, a motion for additional adjournments must be filed.

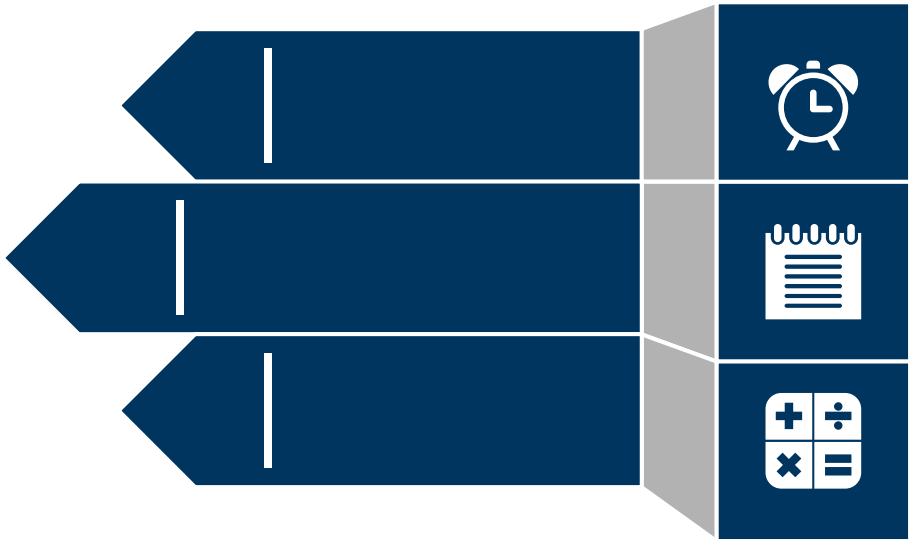
9 S3464 - Sheriff's Sale Bill

Effective 90 days after enactment (July 28, 2019) CONT.

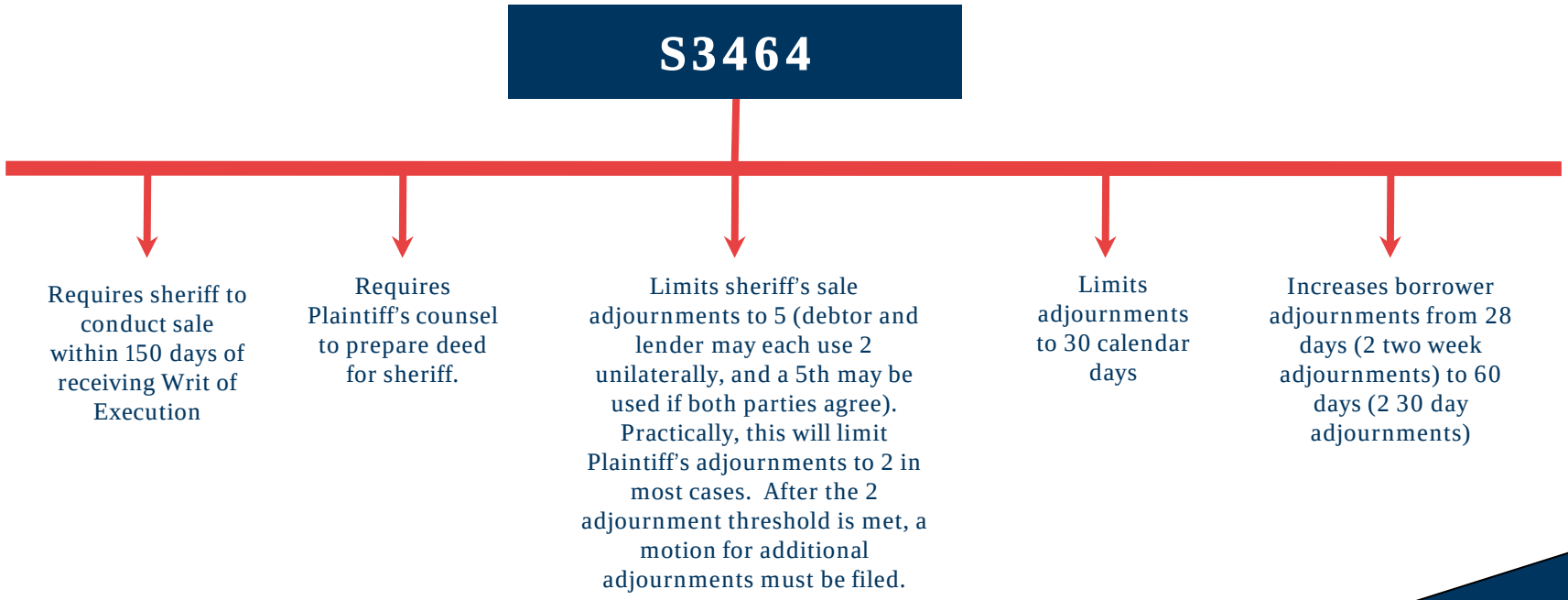
Limits adjournments to 30 calendar days

Increases borrower adjournments from 28 days (2 two week adjournments) to 60 days (2 30 day adjournments)

This is going to significantly impact S&E's processes. Best practice is to make a motion for additional adjournments as soon as the 2nd adjournment is utilized. If we do not we risk having to *cancel* the sale if another adjournment becomes necessary. Cancellation would result in delay and duplication of sheriff's costs.



Sheriff Sale Bill



*Simple View of the Process Changes

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A NEW JERSEY NOI - 2A:50-56

AFTER THE NEW JERSEY 9 – THEN APRIL 2020…

The Original Elements

(b) Notice , in writing, sent via registered or certified mail, *return receipt requested*, to the last known address, and property address, if different. (c) Notice reasonably calculated to convey the following information:

1. Real estate subject to mortgage
2. Nature of default claimed
3. Right to cure under 2A:50-57
4. What is needed to cure the default by a certain date in #5 below
5. Date deadline to cure, which is at least 30 days out from notice date. Also, give name, address and number of person to tender payments to;
6. Notice that if obligation not cured, that debtor's interests in property may be terminated through proceeding in competent court.
7. If we take legal action, Debtor may still have right to cure but will responsible for fees and costs accrued, not to exceed allowable fees and costs.
8. If mortgagor is allowed to transfer interest in property then transferee may be able to cure default.
9. Debtor should get counsel and if cannot afford one then seek legal aid assistant. (List of bar associations)
10. Availability of financial assistance; List programs promulgated by commissioner for benefit of homeowners. (Affordable housing and NJHMFA info if aff. hous.)*
11. The name of the *lender* and telephone number of representative.

…

Notice not required if property was voluntarily surrendered…

New Items*

12. If lender takes steps to foreclose then there is mediation available. Notice to comply with new mediation program.
13. Debtor is entitled to a housing counselor at no cost to debtor
14. If 1-4 unit residential property and not maintained, then receivership may be sought.
15. Whether or not the *lender* is licensed or exempt under NJ residential mortgage licensing act.

g. Action must be commenced within 180 days from date of notice (and after time under 5 expires…) After 180 new notice required.

April 2020 – affordable housing identification and disclosure to…
Municipal Clerk; municipal housing liaison, if appted; and Commissioner of Community Affairs…

Code	Legislation	What you need to do to be compliant?	Effective Date
A5001	Statute of Limitations Bill	• Less "active" compliance measures required than with some of the other legislation • Be aware of the shift in legal landscape…closely monitor loans originated on / after 4/29/19 that go into default. Do not hesitate to refer / initiate foreclosure process following default	Effective Immediately
A5002	Common Interest Community Bill	• Does not impose new requirements on Servicers / Lenders • Anticipate Litigation – legislation appears to include Homeowner's Associations ("HOA") • Sets the stage for a showdown with HOAs	Effective Immediately
S3416	Licensed Lender Bill	• Need to determine if Plaintiff / Lender needs to be licensed or is exempt • We recommend including the exact statutory language in your NOIs ("Lender is either licensed…. or exempt….")	Effective Immediately
S3413	Vacant & Abandoned Property Bill	• Not significant to our operation as the "standard" process is more expeditious	May 29, 2019
A4997	Mortgage Servicer's Licensing Act	• Determine applicability / Review potential exemptions (exemptions exist for credit unions / federally insured banks) • "Servicer" is defined broadly – comports with common understanding • Get licensed!! (if necessary)	July 28, 2019 - Sunday 90th day following enactment

Code	Legislation	What you need to do to be compliant?	Effective Date
A4999	Property Preservation & Notice Bill	• Designate a property manager / service agent located in the State of New Jersey. • Identify these individuals for us at referral • S&E will identify itself as the service agent absent a specific directive to the contrary	July 28, 2019 - Sunday
S3464	Sheriff Sale Bill	• Understand adjournments have become significantly more restrictive • Prepare to make applications for additional adjournments as soon as 2nd adjournment is used (DON'T WAIT!!!) • S&E will make fee requests for the motion as soon as the 2nd adjournment is used. Practically, it may not be possible to make such an application on the day of sale if both adjournments were previously used. This could result in an binary decision: proceed as scheduled or cancel the sale.	July 28, 2019 - Sunday
S3411	NOI, Receivership & Reinstatement Bill	• Include the necessary language in NOIs, track NOI expiration dates…re-send when necessary	August 1, 2019
A664	Mediation Expansion and Lender Subsidization Bill	• Dedicate personnel to track mediations and appear (telephonically) at same • Amend NOI to include notice of mediation availability	November 1, 2019 1st day of the 7th month following enactment
A5000	Residential Property – Foreclosure - Notice - Database	• Requires Department of Community Affairs to maintain database for covered properties – affordable housing... • Provide copy of NOI to clerk of municipality; municipal housing liaison, if there is one; and Community Affairs Department.	April 1, 2020

Q&A

With your session presenter and other Stern & Eisenberg team members present. Contact SEValue@SternEisenberg.com for additional questions and for future trainings online and in person.

States of Service

(no objection letters – default creditor rights)

New York
New Jersey
Pennsylvania
Delaware
West Virginia

Ask for additional services offered beyond our default creditor rights practice

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Breakout Session 3: Operational Track
Melody 1
11:00 AM – 12:00 PM

Operations – Playing the Game.

What is it like on the inside of a foreclosure practice? What challenges do your attorneys face every day as they move default files through the process? How do we make it happen? In this session we will discuss (1) process organization and challenges, (2) automation (3) the atmosphere of innovation, and (4) HR Challenges.

Speakers:

- Heidi Carey, Esq., Managing Partner, Riley Pope & Laney, LLC HCAREY@RPLFIRM.COM – Moderator
- Michelle Garcia Gilbert, Esq., Managing Partner, Gilbert Garcia Group, P.A. mgilbert@gilbertgrouplaw.com
- Melissa Bekisz, Esq., Managing Attorney, David A. Gallo & Associates LLP mbekisz@msgrb.com
- Jeremy Wilkins, Esq., Partner, Brock and Scott, PLLC Jeremy.Wilkins@Brockandscott.Com

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Heidi B. Carey of Riley Pope & Laney is an attorney in Columbia, SC. She represents mortgage banking creditors and manages the day-to-day operations of the firm's default servicing practice. Ms. Carey joined Riley Pope and Laney in 2008 and became a member of the firm in 2010.

Ms. Carey graduated magna cum laude from the Honors College of the University of South Carolina with a Bachelor of Arts in Music, a minor in Business, and a Performance Certificate from the School of Music in Cello. Upon graduation, she attended the University of South Carolina School of Law where she was Articles Editor of the South Carolina Environmental Law Journal. She began her law practice representing clients in business litigation and commercial real estate matters.

In 1998 she became in-house counsel to Fleet Mortgage Group, Inc. and Washington Mutual Bank managing mortgage banking litigation nationwide, and advising corporate clients on a wide range of mortgage servicing issues relating to customer service, tax payments, hazard insurance, foreclosures, collections, loss mitigation, mortgage insurance, and bankruptcy. While at Fleet Mortgage, she was also a member of the Fleet Mortgage Corp. Privacy Task Force for implementation of practices and procedures to comply with the newly enacted Gramm-Leach-Bliley Financial Privacy Act.

Since 2001, Ms. Carey has practiced residential foreclosure and bankruptcy law and supervised and managed both paralegals and attorneys. Ms. Carey is a member of the South Carolina Bar and the Richland County Bar Associations and admitted to practice before all South Carolina state courts and the United States District Court for the District of South Carolina. Ms. Carey is AV rated by Martindale Hubbell, is a speaker at default servicing events, and has been recognized as part of the Legal Elite of the Midlands for foreclosure by the Greater Columbia Business Monthly magazine.
Ms. Carey continues her musical career as a tenured cello section member of the South Carolina Philharmonic, and also serves at Eastminster Presbyterian Church. Ms. Carey, her husband Ken, and their two children reside in Columbia, South Carolina.

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Ms. Gilbert has been admitted to the following practices and courts: Florida Bar, 1986; Middle District of Florida; 1988, Northern District of Florida; 2005, Southern District of Florida, 2006; U.S. Supreme Court, 2000; U.S. Court of Appeals, Eleventh Circuit, 2003. She matriculated at the University of South Florida (B.A., 1982, cum laude), and the University of Notre Dame (J.D., 1985). She is a member of the following groups: Greater Tampa Association of Realtors; Bay Area Real Estate Council, Inc., Board of Directors; Florida Bar and Hillsborough County Bar Association, Real Property, Probate and Trust Law Section; American Legal and Financial Network; Legal League 100 (Vice

Chairperson, 2016-18; Advisory Council Member, 2014-19); REOMAC; Attorney Agent, Attorney's Title Insurance Fund/ Old Republic and Westcor Title agent.
Ms. Gilbert handles a wide variety of operational and legal matters for the firm, including default and non-default cases, jury and non-jury trials, motion practice, and appellate oral argument, throughout the state of Florida.

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Melissa E. Bekisz is the managing attorney in the law firm of David A. Gallo & Associates LLP. She handles the day-to-day operations of the office and continually updates processes to exceed client and court compliance requirements. Before returning to David A. Gallo and Associates LLP in 2018, she worked at PricewaterhouseCoopers where she focused on regulatory compliance projects and assessments for large banks and national insurance companies. She graduated St. John's Law in 2013, and currently sits as the Village Justice of Stewart Manor, New York. Melissa enjoys volunteering in the Mentor Program at her alma mater Manhattan College and at Career Night at her alma mater Kellenberg Memorial High School.

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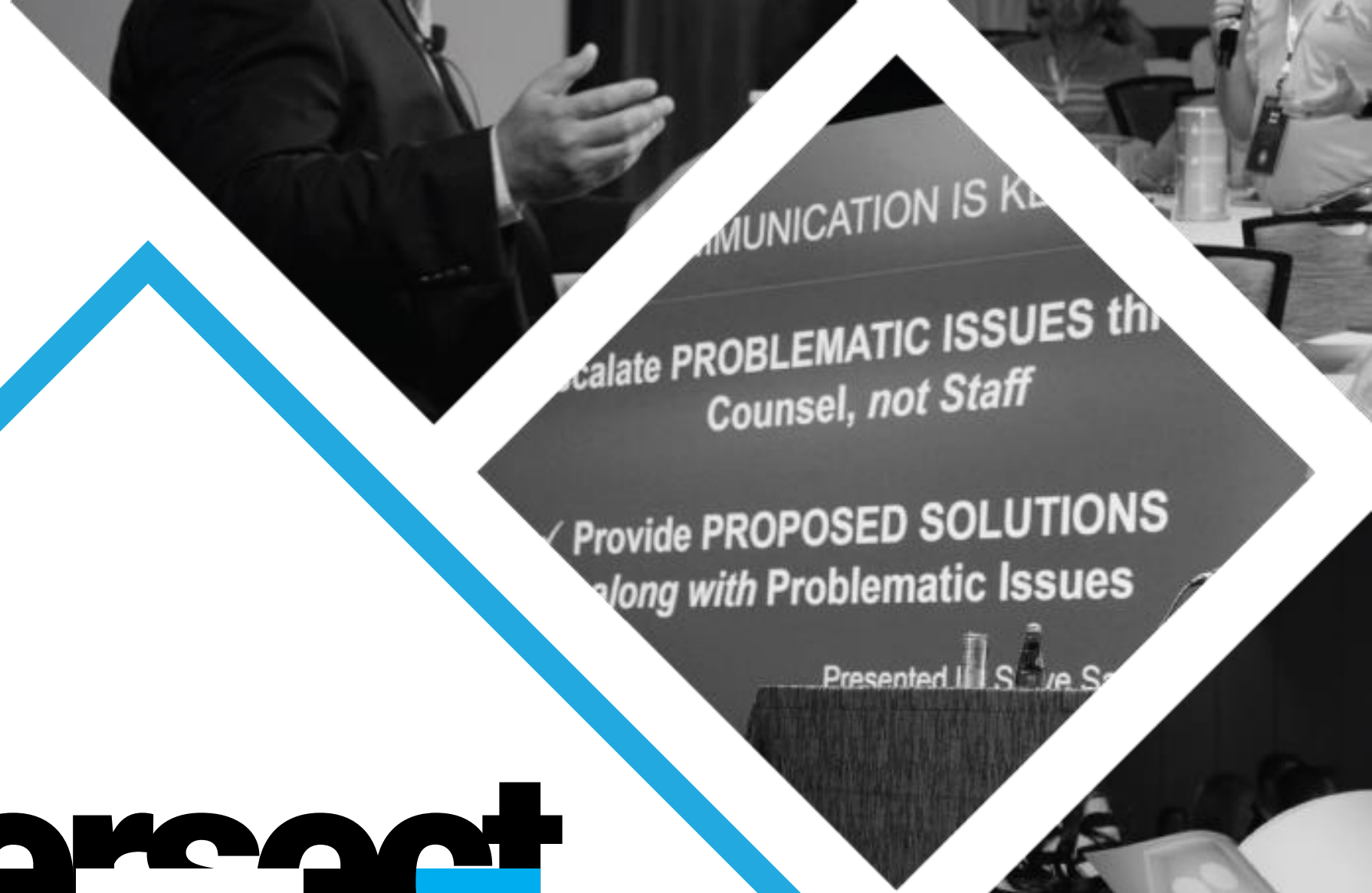
Jeremy is a Partner with the North Carolina Foreclosure Division of Brock & Scott, PLLC. Jeremy is responsible for the general foreclosure legal operations for the North Carolina Foreclosure Division. With over 15 years of experience, specifically in the Mortgage Default Industry, Jeremy oversees exposure to day to day operations of the North Carolina foreclosure process at Brock & Scott, PLLC, including overseeing all Power of Sale foreclosures in the North Carolina before the clerk of court, judicial foreclosures in Superior Court, title resolution (including title related litigation) and general mortgage finance litigation. Jeremy practices in both State and Federal Court. Jeremy is licensed to practice law in North Carolina (2004), Georgia (2009) and Virginia (2016). Jeremy is also licensed to practice in the United States District Courts for the Eastern and Western Divisions of North Carolina.

Jeremy received his Juris Doctor from Nova Southeastern University at Fort Lauderdale, Florida in 2003 and his Bachelor of Arts in History from The University of Virginia in 2000 where he was also a member of the wrestling team.

ALFN AMERICAN LEGAL & FINANCIAL NETWORK



intersect

servicing + foreclosure

intersect

BREAKOUT SESSION 3
OPERATIONS

MELODY 1

Time 11:00 – 12:00

OPERATIONS - PLAYING THE GAME

What is it like on the inside of a foreclosure practice? What challenges do your attorneys face every day as they move default files through the process? How do we make it happen?

In the next hour we will discuss:

- Process organization and challenges
- Automation
- Atmosphere of Innovation
- HR Challenges

INTERSECT | PRESENTERS

Moderator

Heidi B. Carey
Managing Partner
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Speaker

Melissa Bekisz
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Speaker

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Speaker

Jeremy B. Wilkins
Partner
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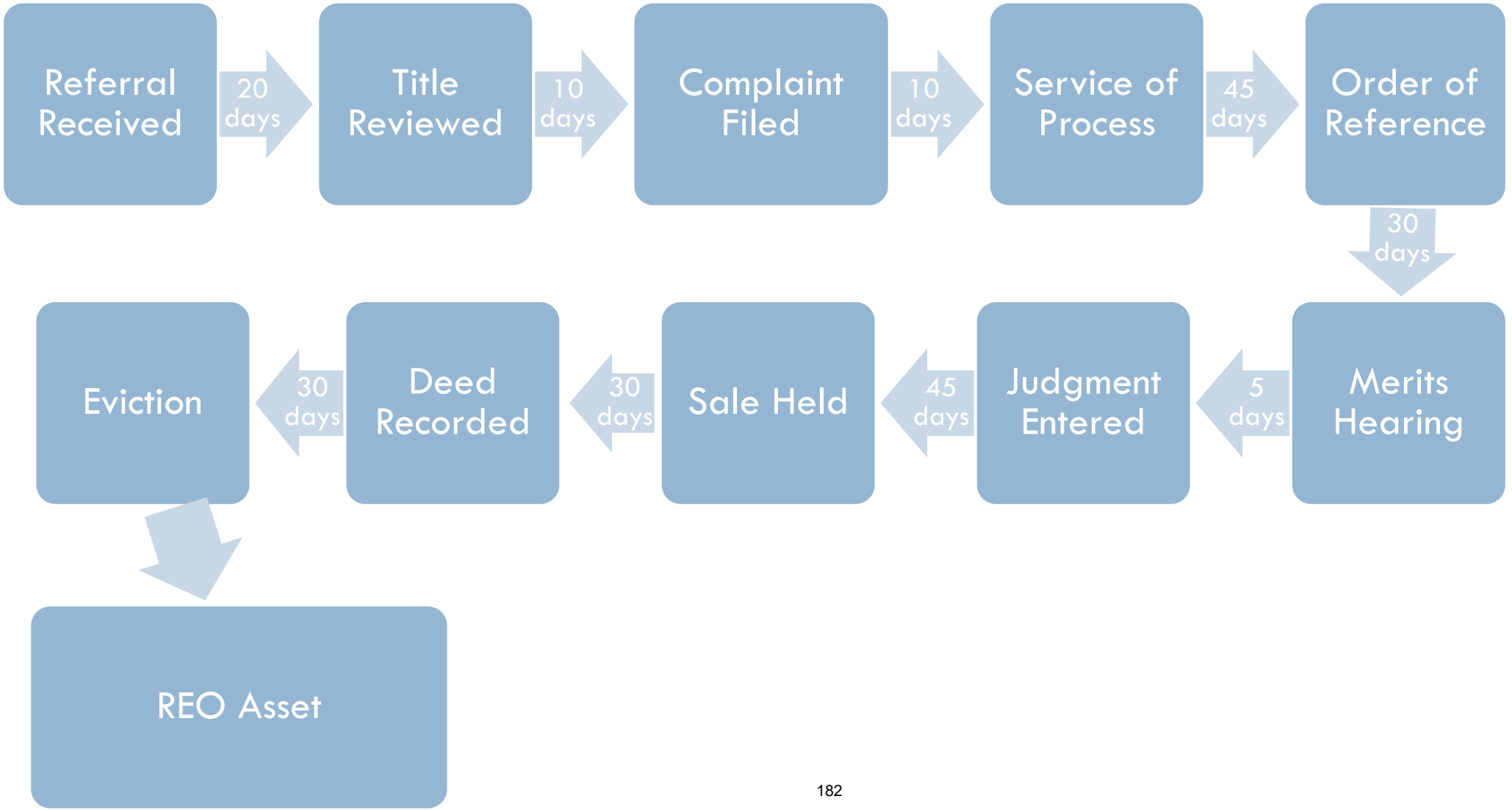
PROCESS


Referral Received
20 days
Title Reviewed
10 days
Complaint Filed
10 days
Service of Process
45 days
Order of Reference
30 days
Merits Hearing
5 days
Judgment Entered
45 days
Sale Held
30 days
Deed Recorded
30 days
Eviction
REO Asset

PROCESS – ORGANIZATION

- Basic process – involuntary transfer of title from one party to another party
- How do we get from Referral to Deed?
- Paralegal heavy practice
  - Technology, automation, organization and consistency
- Assembly line vs. Single point of contact
- Multi-state practice benefits and challenges

PROCESS CHALLENGES – FORM VS. SUBSTANCE

- Foreclosure is a fairly simply process, but many times the process gets in the way of the action.
- Workloads, Comtags and DDFs - trying to make something black/white that is gray
- Audit and compliance – what used to take 150 days now takes 270 days
- Are we all playing by the same rules? Different attorneys have different opinions

PROCESS CHALLENGES – COMMUNICATIONS

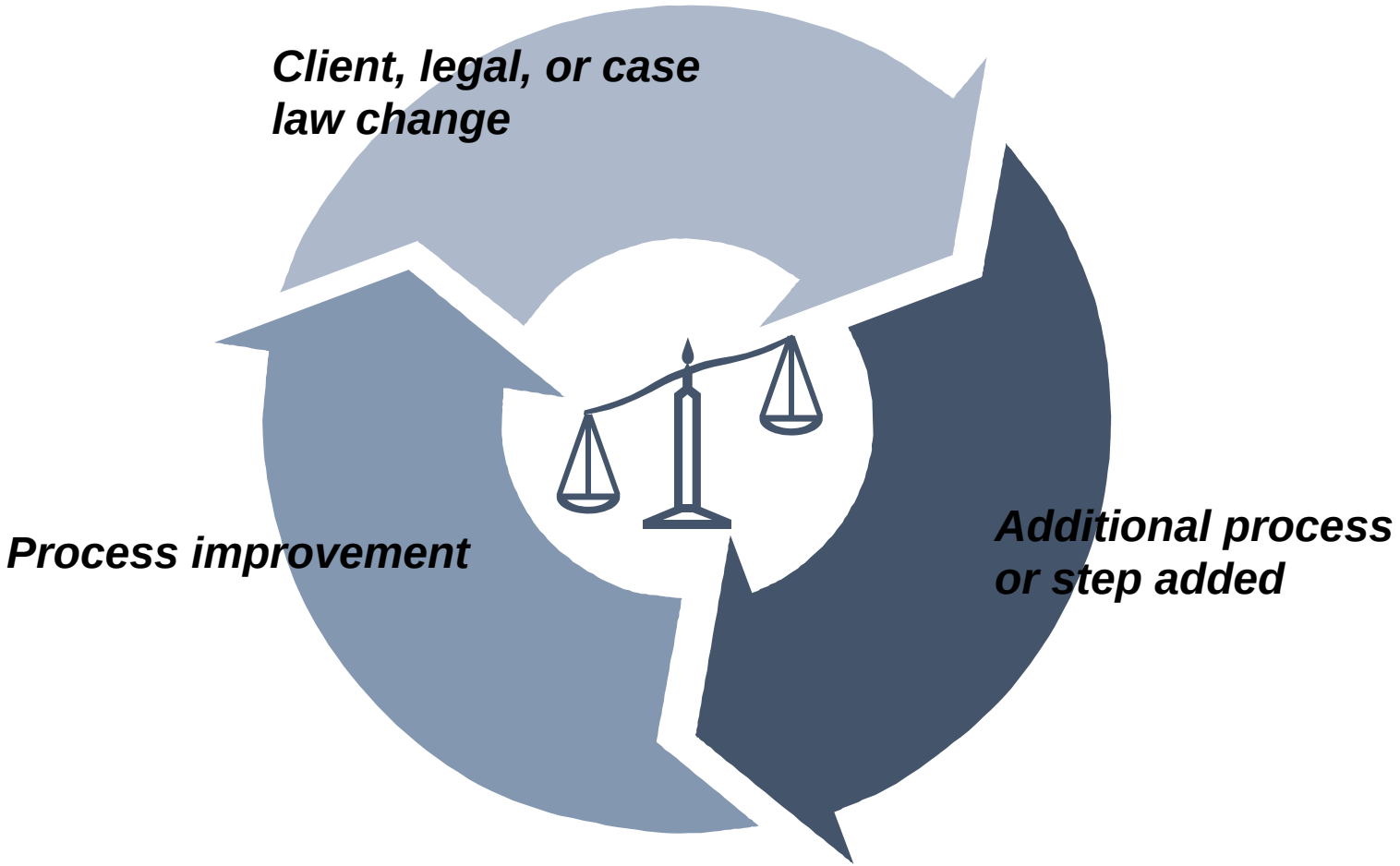
- Giving advice through a website
  - Do attorneys use the client websites?
  - How do we supervise paralegals?
- Some clients do not provide clear expectations or communications. How do we get around this?

PROCESS CHALLENGES

- Service transfers
- Attorney transfers
- File handoffs between paralegals
- Courthouse staff

PROCESS CHALLENGES

INDUSTRY CHALLENGE



TECH PROCESS ADVANTAGES

- Saves time and reduces opportunities for user error
- Updates client system automatically – faster and more effective communication
- Hold staff accountable
- Immediate updates available to everyone in the firm
- Removes reliance on institutional knowledge
- Removes one-man risk
- Paperless filings are the future!

HOW TO USE TECH TO GET A FRESH PERSPECTIVE

- Review “steps” and process to see where something is done multiple times. Stepping back to take a fresh look at how a process is done can delineate that something is being repeated unnecessarily.
- In New York, for example: A “verified pleading” may be utilized as an affidavit whenever the latter is required.

Best practice is to provide a client verified, rather than an attorney verified complaint:

Allows the firm to file for default judgment without requesting an additional affidavit.

Reduces the timeline, alleviates work for the document execution team, and firmly establishes standing at the commencement of the litigation.

CUTTING CORNERS

Boilerplate Documents:

Boilerplate documents can be used where necessary.

Creating templates and merge sequences cuts down cost and time.

Dangerous game – on one hand, they work! On the other hand, these may not account for the relevant facts in a specific case.

Boilerplate Affidavits for MSJ's:

US Bank Nat'l Association v. Hunte, 2019 NY Slip Op 07311: "….Here, the plaintiff failed to meet its prima facie burden of establishing that it had standing. The affidavits of Andrea Kruse, vice president of loan documentation for Wells Fargo Bank, N.A. (hereinafter Wells Fargo), the plaintiff's servicer, failed to lay the proper foundation under the business records exception to the hearsay rule to support her assertion that the note was transferred to the plaintiff's custodian prior to commencement of the action and remained in the possession of the plaintiff's custodian at the time of commencement. While, in attempting to rely upon the documentary evidence that was annexed to the motion, Kruse averred in her first affidavit that she reviewed the books and records regularly created, maintained, and kept by Wells Fargo, and in her second affidavit that she reviewed the books and records regularly created, maintained, and kept by the plaintiff, she did not attest that she was personally familiar with the plaintiff's or Wells Fargo's record-keeping practices and procedures, or that the plaintiff's records were incorporated into Wells Fargo's own records or routinely relied upon in its business…."

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Like what does the future law practice look?

- open letter from 12 General Counsel

  - more diversity
  - better training- technology training, paid internships
  - less debt

https://www.futurelawpractice.org/open-letter

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- process mapping
- optimization
- contract drafting and automation
- coding
- privacy
- cybersecurity
- data analytics
- visualization

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Real-world scenarios:
reduced budgeting or change management, based upon feedback from CEOs, CFOs, GCs or managing partners of leading organizations

Legal operations vs. Traditional law firm operations:
various metrics (financial perspective, customer perspective, internal perspective, learning and growth perspective) vs. financial metrics only

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Harvard Business School Balanced Scorecard, 1992

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Calculating Legal Operations value

- Improving processes and clarifying metrics: core business responsibilities
- Longer-term mindset, upfront effort yields benefits over later years
- 20x-30x increased profit returns annually

American Law Firms in Transition: Trends, Threats, and Strategies (2019), Randall Kiser

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- **Legal Ops Checklist**
  - Leadership is invested
  - Pro-active communication with clients about expectations and experiences
  - At least one expert in legal ops- accountable for defining and driving change
  - Visual dashboard with metrics, ability to use data driven analytics
  - Principals can analyze and plan independently
  - Cradle to grave workflow processes

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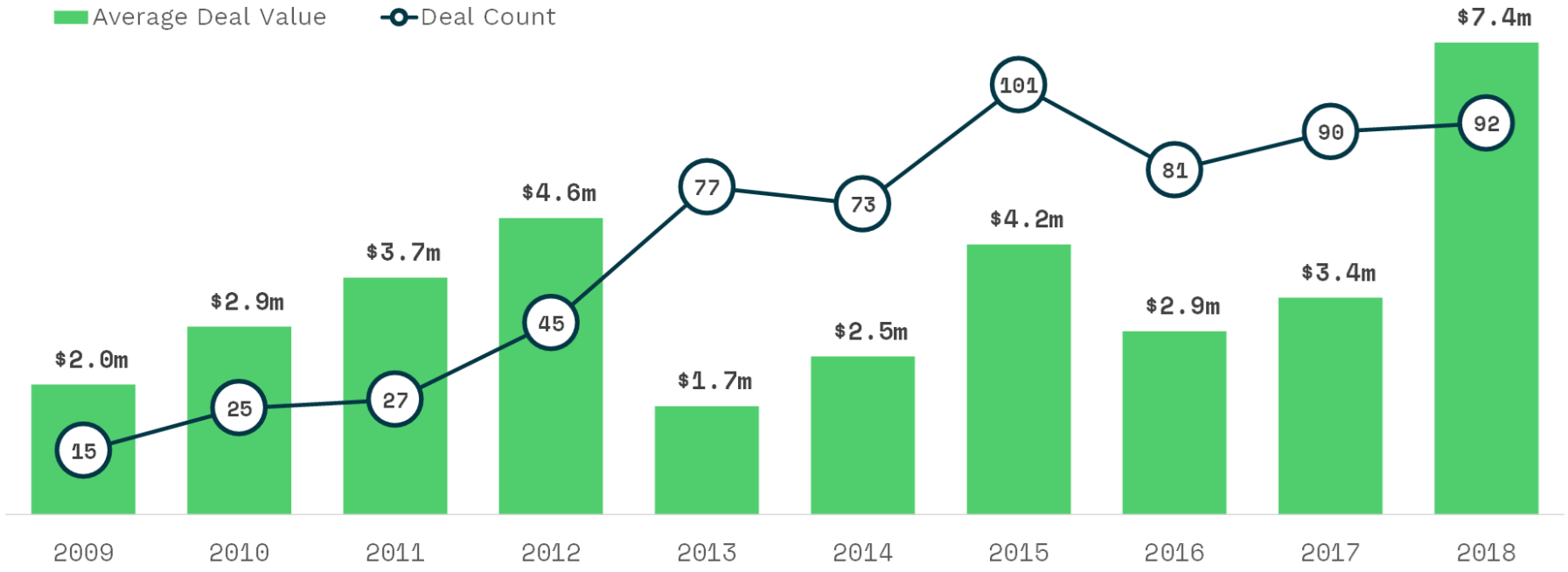
A NEW WAVE & FASTER PACE OF LEGAL STARTUP ACTIVITY

2012 marks a turning point for investment in legal startups (inclusive of tech + services).

DEAL FLOW ON 10-YEAR UPTICK; AVERAGE DEAL SIZE FLUCTUATES IN WAVES



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Data source: Crunchbase

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OVER $1BN OF INVESTMENT MADE IN 2018...

The larger deals in 2018 continue a (bull) run of **growth financing**

SELECTED DEALS

01.29.18 LOGIKCULL $25m SERIES B — eDiscovery	1.30.18 CS DISCO $20m SERIES D — eDiscovery	5.18.18 FISCALNOTE $22m SERIES D — RegTech	
6.11.18 EIGEN TECH $18m SERIES A — Contracts	6.17.18 TESSIAN $13m SERIES A — RegTech	6.20.18 SEAL $30m GROWTH CAPITAL — Contracts	8.2.18 ICERTIS $50m SERIES D — Contracts
6.28.18 EVERLAW $25m SERIES B — eDiscovery	9.5.18 KIRA $50m SERIES A — DealTech	9.10.18 ATRIUM LTS $65m SERIES B — ALSP+tech	10.18.18 CARTA $80m SERIES D — DealTech

'17	Carta	$42.0m	SERIES C
	Leverton	$12.5m	SERIES A
	CaseText	$12.0m	SERIES B
	Atrium	$10.5m	SERIES A
	Shoobx	$10.0m	SERIES A
	Luminance	$10.0m	SERIES A
	SimpleLegal	$10.0m	SERIES A
	ROSS	$8.7m	SERIES A
	Immuta	$8.0m	SERIES A
	Ironclad	$8.0m	SERIES A
	LawGeex	$7.0m	SERIES A
'16	Checkr	$40.0m	SERIES B
	CS Disco	$18.6m	SERIES C
	AirHelp	$12.0m	SERIES A
	Logikcull	$10.0m	SERIES A
	FiscalNote	$10.0m	SERIES C
	EverLaw	$8.1m	SERIES A
'15	kCura	$125.0m	GROWTH
	Carta	$17.0m	SERIES B
	Zapproved	$15.0m	SERIES C
	FiscalNote	$10.0m	SERIES B
	UpCounsel	$10.0m	SERIES A
	Seal	$9.0m	GROWTH

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Most legal tech companies 15 years old or more: long timelines…

COMPANY	Founded
Mitratech	1987
iManage	1995
Intralinks	1996
Integreon	1998
DTI	1998
Fastcase	1999
NetDocuments	1999
Axiom	2000
InTapp	2000
kCura	2001
Consilio	2002
Pangea3	2005
Elevate	2011

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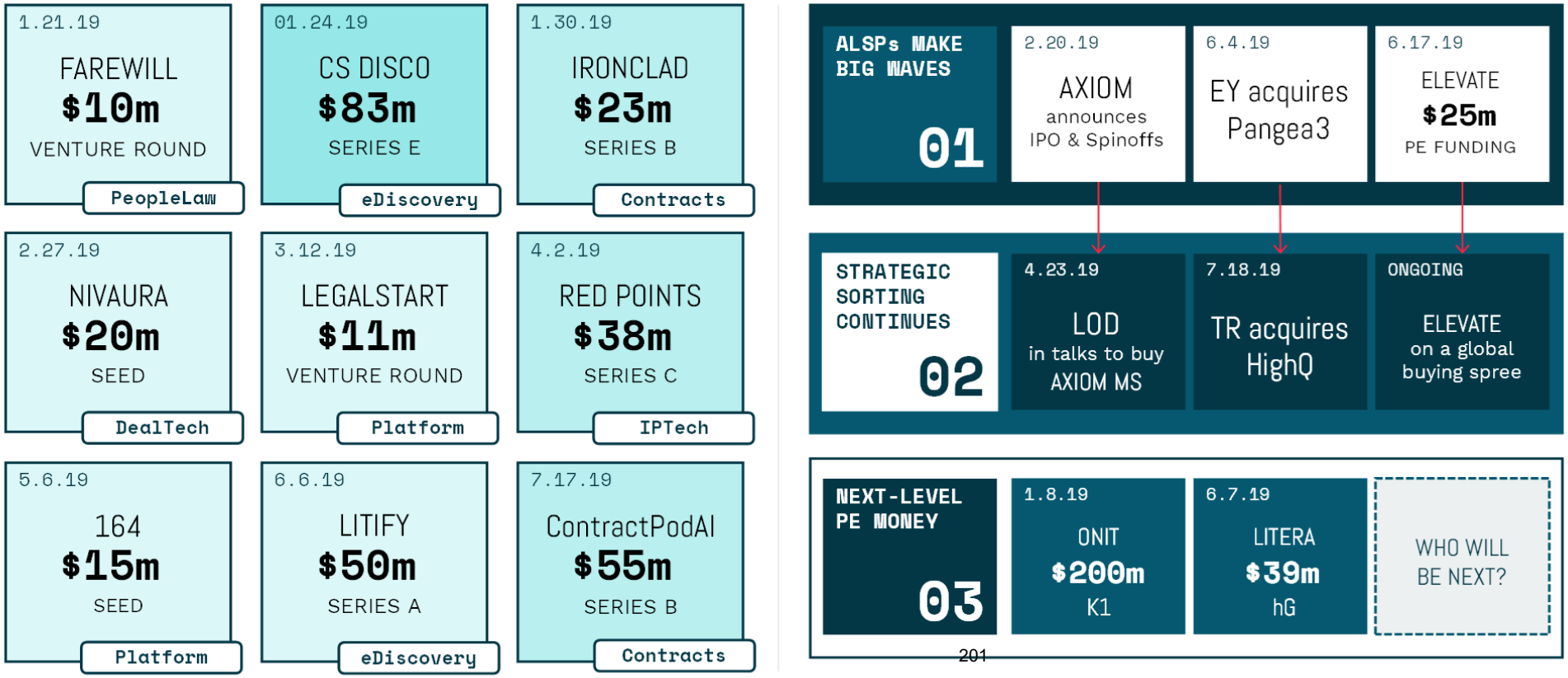
2019: MARQUEE DEALS OF VARIOUS FLAVORS

The capital keeps flowing for startups, while ALSPs, strategics, and PE funders keep moving the chess pieces



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Soft Skills for lawyers

- Collaboration among attorneys and practice groups
- Sound decision making in client matters and firm operations
- Readiness to change perceptions and behavior
- Civility in relating to colleagues and subordinates
- Diversity and inclusion in practice groups, teams, and leadership roles.
  American Law Firms in Transition: Trends, Threats, and Strategies (2019), Randall Kiser

Personnel and Human Resources Challenges for Attorneys

Managing Non-Legal Staff

- Rule: Law Firm First!
  - Starting point-
    - Applicable Rules of Professional Conduct (See ABA Model Rule 5.3)
      - Nonlawyer employed or retained by or associated with a lawyer
        - Partner / Lawyer / Lawyer with direct supervisory authority – ***Comparable Managerial Authority*** in a law firm
- Shall make ***REASONABLE EFFORTS*** that the law firm has measures in place that provide ***REASONABLE ASSURANCE*** that the person's conduct is compatible with the professional obligations of the lawyer.
- ***A lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct – IF***
  - Lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved
  - Lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Personnel and Human Resources Challenges for Attorneys

Find the Balance – Attorneys should be Leaders, they must set the tone and build trust

Communication

- Regularly and effectively
- Attend Daily Huddles that discuss inventory movement (what's moving? what's stuck?) → Help Educate through participation.
- As an attorney, speak the operational language, as well

Personnel and Human Resources Challenges for Attorneys

Find the Balance – Attorneys should be Leaders, they must set the tone and build trust

- Build a Viable Organization Chart – "Living Org Chart" – Important for Day to Day Escalation / Efficiencies
  - Partners / Attorney → Managers → front line staff
  - Ensure visibility of the organization chart internally
  - Lean on HR to ensure discipline measures are uniform and consistent

Personnel and Human Resources Challenges for Attorneys

Find the Balance – Attorneys should be Leaders, they must set the tone and build trust

- Approachability
  - Open door policy for issue solving
  - For work related problem solving
  - Everyone has a purpose and a function, treat them accordingly
  - Be careful here, give the attorney / client relationship an opportunity to attach, and it will

Personnel and Human Resources Challenges for Attorneys

Maintain successful teams with sustainability through the ups and downs

- Starts at the interview process with prospective hires Ask yourself, did this hire match the culture?
- Run lean to stay lean, even if there is uptick in volume.
  - Cross training
  - Leverage Technology Resources for Efficiency
  - Keep experienced performers around and happy
  - Find alternative ways to motivate, keep employees happy
    - Quality of life environment
    - Work from home day
    - Office lunches
    - Awards – give recognition to those performing well
      - No win too big, no win too small to recognize

Personnel and Human Resources Challenges for Attorneys

Attorney Managers v. Non-Attorney Operational Managers

- See Rule 5.3 of the ABA Model Rules of Professional Conduct

- Meet regularly – ***Rhythm***
  - Daily Huddles for inventory movement
  - Weekly meetings, longer in duration to solve larger problems or discuss trends that need remediation
    - Scorecard reviews
    - Data / Timeline integrity
    - Case Management System usage
- Communicate – ***Teamwork***
  - Direct
  - Do not operate out of assumptions
- Set mutual goals – **Win Together**
  - Hold each other accountable
  - Build trust
- Continual education for Non Attorney Staff – **Invest!**
- HR as a resource (neutral party) – **Consistency**
  - Helps keep a dividing line between attorneys / non-attorneys, when needed
  - Promotes consistency

Breakout Session 4: Complex Litigation Track
Melody 2
11:00 AM – 12:00 PM

This session will begin with a discussion of what constitutes non-routine litigation and will identify red flags you need to be on the lookout for in complex litigation (i.e., fraud, accounting, disaster relief, bankruptcy, trade secret and policy ad reputational cases). Next we will review the Business Records Exception to the hearsay rule and provide guidance on ensuring that crucial business records are properly introduced into evidence in court proceedings. Finally, we will discuss tips and strategies for successfully preparing for and defending corporate representative depositions.

Speakers:

- John Steele, Esq., Partner, Steele LLP jsteele@steelellp.com – Moderator
- Adam Gross, Esq., Partner, Gross Polowy agross@grosspolowy.com
- Linda Finley, Esq., Shareholder, Baker Donelson lfinley@bakerdonelson.com
- Yusuf Haidermota, Esq., Senior Litigation Attorney, Kass Shuler, P.A. Yhaidermota@kasslaw.com

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John is a trial attorney with nearly 25 years' experience litigating in state and federal courts. He also has substantial experience arbitrating cases before FINRA, the American Arbitration Association, ADR Services, and JAMS. His expertise includes: commercial litigation, mortgage, banking and securities litigation, employment and trade secret matters, and real property disputes. John represents mortgage servicers and banks, institutional investors, Fortune 500 companies, and corporate officers and directors through trial in a wide variety of business disputes.

John was formerly a partner at law firms in Los Angeles and Orange County and was previously associated with Latham & Watkins LLP. He is licensed to practice in California.

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Adam Gross is Partner at the New York & New Jersey law firm of Gross Polowy, LLC. Mr. Gross has over 27 years' of legal expertise, and specializes in the nuances of New York law relating to all aspects of mortgage foreclosure, statute of limitation, title curative related matters, and the business conduct rules for servicing mortgage loans in New York. Mr. Gross is uniquely known for his thought leadership and pragmatic approach to his areas of specialization.

Gross Polowy, LLC represents a varied client base from all sectors involved in residential mortgage servicing and lending, including banks, servicers, GSEs, privately held trusts, and private investment groups.

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Linda Finley represents and defends mortgage lending and servicing clients in litigation concerning residential mortgage transactions, including lending liability, state and federal regulatory compliance and real estate title issues. Partnering with Baker Donelson's industry-leading Knowledge Management Team, Ms. Finley led the Firm's creation of a tailored, web-based tool that allows for the strategic management and reporting of significant portfolios of borrower litigation. She is the former chair of the Firm's Consumer Financial Litigation and Compliance Group.

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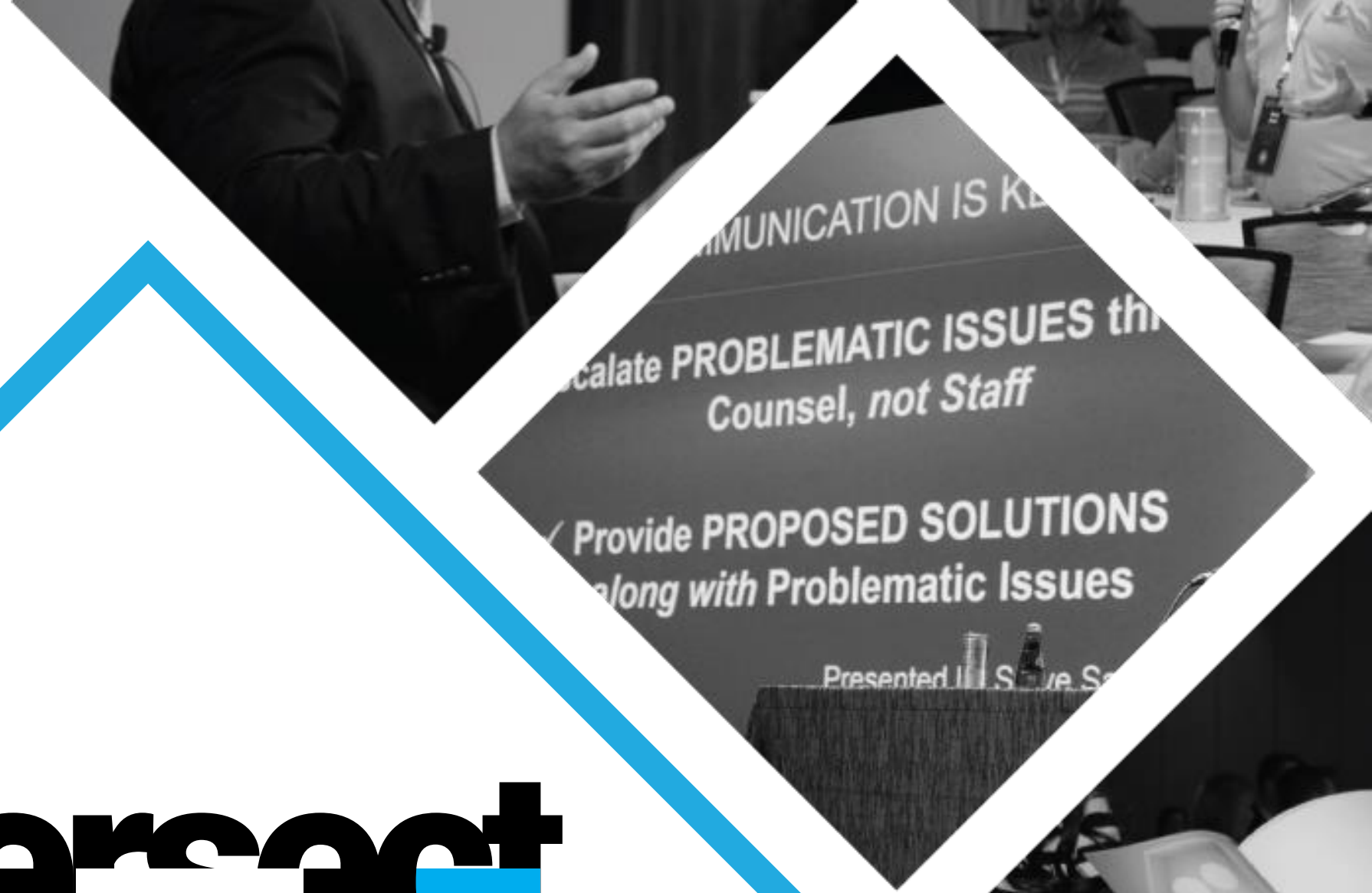
Yusuf Haidermota is a Shareholder at Kass Shuler, P.A. where he is a member of the Firm’s Litigation Group focusing his practice on Commercial, Real Estate, Creditors’ Rights Litigation. Yusuf is an experienced litigator and his practice extends in both state and federal courts. Yusuf has successfully prosecuted and defended lawsuits involving creditor’s rights, breach of contract, foreclosures, commercial collections and other business issues. Yusuf also handles the firm’s Fair Debt Litigation. He is a frequent speaker on the Florida Consumer Collection Practices Act, the Fair Debt Collection Practices Act and Telephone Consumer Protection Act.

ALFN AMERICAN LEGAL & FINANCIAL NETWORK



intersect

servicing + foreclosure

intersect

BREAKOUT SESSION 4

Complex Litigation

Melody 2

11:00AM – 12:00PM

COMPLEX COMMERCIAL LITIGATION

This session will begin with a discussion of what constitutes non-routine litigation and will identify red flags you need to be on the lookout for in complex litigation, *i.e.,* fraud, accounting, disaster relief, bankruptcy, trade secret and policy ad reputational cases).

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INTERSECT | PRESENTERS

Moderator

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WHAT IS COMPLEX LITIGATION?

COMPLEX LITIGATION IS:

- The category of cases requiring more intensive judicial management.
- Complexity may be determined by multiple parties, multiple attorneys, geographically dispersed plaintiffs and defendants, numerous expert witnesses, complex subject matter, complicated testimony concerning causation, procedural complexity, complex substantive law, extensive discovery, choice of law, requisites of a class-certification order, complex damage determinations, diversity and res judicata implications for plaintiffs not within the proposed class.
- Mass torts and class actions are example of two types of well-known complex actions.

COMPLEX VS. NON-ROUTINE LITIGATION

THE REALITY IS THAT WHAT WE MOST OFTEN REFER TO AS COMPLEX LITIGATION IN OUR INDUSTRY IS REALLY "NON-ROUTINE" LITIGATION

What is Routine?

- Foreclosure (Judicial and non-judicial)
- Chapter 7 & 13 Bankruptcy (in most cases)
- Eviction issues
- Run of the Mill Regulatory Defenses

WHAT MAKES SOMETHING NON-ROUTINE?

- "Bet the Company" Cases (Large Exposure)
- Class Actions
- Issues affecting the entire company (Policy Cases)
- Issue Affecting the Exposure to the Industry: *Obduskey vs. McCarthy, et al.*, *Bartram v. U.S. Bank* (FL)
- Complex Appeals: See *Obduskey*! See *Bartram*!
- Multi-District Cases or Cases requiring special procedural guidelines or court monitoring
- Chapter 11 Bankruptcy; Adversary Matters in Bankruptcy Court
- Trade Secrets

SHOULD MY FIRM KEEP THE CASE?

"There is no shame in telling your client that the matter is inappropriate for your firm and that they are better served to escalate the matter pursuant to client guidelines."

-- CEO of Dallas-Based Servicer at Recent Conference

- **Ethical Obligations**. **ABA RULE 1.7(b)(1)** Conflicts of Interest. "A lawyer may represent a client if the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.
- Your client will appreciate your thorough analysis of the issues and how the client will best be served.
- Your partners will appreciate it.
- The conversation with your client does not show a lack of skill but shows that you are focusing on CLIENTS' BEST INTERESTS.

SHOULD MY FIRM KEEP THE CASE?

WE ARE TALKING ABOUT THE OBVIOUS…

- Class Action Suits
- Trade Secrets
- Multi-district Suits

SHOULD MY FIRM KEEP THE CASE?

PROBLEMS GENERALLY ARISE IN THE CASES THAT ARE NOT SO OBVIOUS

- Regulatory/Statutory Cases
- REO
- Accounting Issues
- Counterclaims in Judicial Foreclosures
- Bankruptcy Sanctions, Ch. 11, Ch. 12, Adversary Actions
- Federal Property Forfeiture Cases

COMPLEX LITIGATION…OR IS IT?

OTHER PROBLEMS

- **Your firm is named as a party along with the client**
  - Decision of the client, of course
  - Get permission in writing from the client
  - Not always a problem, particularly in matters where a quick MTD is appropriate
  - Ethical Rule Consideration

- **You are in the middle of the case and an issue arises**
  - Of course, notify your client
  - Particularly important if you discover firm error

COMPLEX LITIGATION…OR IS IT?

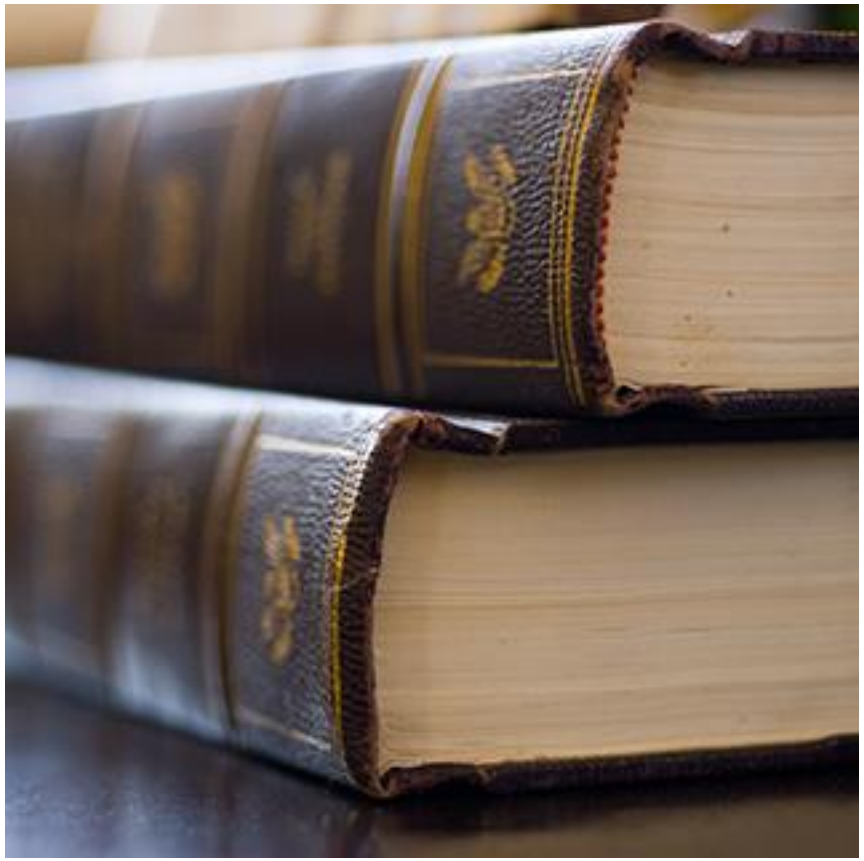
SERVICERS, DON'T BE TOO HASTY….

- Not every counterclaim is non-routine
- Not every Chapter 11 case is complicated
- And we all know that just because you call it a class action it might not be…
- Key is knowing your Default Law Firm

SHOULD MY FIRM KEEP THE CASE?

BEWARE OF PROCEDURAL ISSUES…

- Depositions
- Discovery
- Court Rules and Jurisdiction
- Constitutionality, Res Judicata, Diversity and the like



SHOULD MY FIRM KEEP THE CASE?

THE BOTTOM LINE

- **LAW FIRMS:** Your duty is to inform the client about the case and be honest about your strengths and weaknesses.
- **SERVICERS:** Appreciate these firms that put clients' interests first.
- **LAW FIRMS & SERVICERS:** Use the opportunity to enhance your relationship

CORPORATE REPRESENTATIVE DEPOSITIONS

FEDERAL RULE 30. DEPOSITIONS BY ORAL EXAMINATION

Notice or Subpoena Directed to an Organization. In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

DEPOSITION NOTICE

1. The notice must describe with reasonable particularity the matters on which examination is requested.

a. This allows the servicers to designate the corporate representative that can testify about information known or reasonably available to the organization.

b. The notice should never request a person with the most knowledge. A person with the most knowledge is NOT a valid designation for a corporate representative.

c. The corporate representative is answering questions on behalf of the company, not on an individual capacity.

d. A request for testimony regarding the allegation of the complaint is not specific enough.

e. Motion for Protective Order. File sooner rather than later.

DEPOSITION NOTICE

2. The Notice may also include a subpoena duces tecum to produce documents at the deposition.

a. This request must comply with Rule 34 Request for Production. Most states have a similar rule.

b. You have 30 days to respond to the duces tecum in writing.

c. Objection(s) must be made in writing.

d. If a duces tecum deposition is set within 30 days without your consent, you can file a motion for protective order.

CORPORATE REPRESENTATIVE

DESIGNATION

1. The party being deposed has the duty to designate an appropriate representative to testify on behalf of the organization.

   a. The duty is fulfilled by finding the right person to testify on the matters described in the notice.

   b. The organization can designate as many people as necessary to answer the questions.

   c. The party seeking the deposition cannot designate the corporate representative.

   d. Federal Rules do not require the party being deposed to identify the name of the representative prior to the deposition.

CORPORATE REPRESENTATIVE

PREPARATION

2. It is important to prepare for the deposition as if you are preparing for trial.

   a. The corporate representative is speaking on behalf of the organization.

   b. The corporate representative must educate himself or herself about the topics, review the documents and meet with counsel to thoroughly prepare for the deposition.

   c. The corporate representative will need all of the knowledge necessary to answer the questions.

   d. The organization must prepare the designee to the extent matters are reasonably available, whether from documents, past employees or other sources.

   e. Goal is to get right notice, with particularity, and to prepare the person accordingly.

CORPORATE REPRESENTATIVE

PREPARATION

f. The deponent should never be in a position to answer the question with "I don't know." If the deposition is properly notice, the designee should know what is going to be asked.

g. If the deponent cannot answer questions regarding the designated subject matter, the corporation has failed to comply with the rule and may be subject to sanctions.

h. Inconsistent positions may be used for impeachment – deposition witness vs. trial witness.

i. A witness should not be surprised or caught off-guard in a deposition. Should have intimate knowledge of the topics designated in the notice.

j. The corporate representative will only testify on designated topics based on known or reasonably available information designated in the notice.

k. Only answer the question asked.

OBJECTION... HEARSAY!

- Broadly defined, **"hearsay"** is testimony or documents quoting people who are not present in court. Hearsay evidence is generally inadmissible for lack of a firsthand witness.
- **Hearsay** is an out-of-court statement that is offered in court as evidence to prove the truth of the matter asserted. At its core, the rule against using hearsay evidence is to prevent secondhand statements from being used as evidence at trial given their potential unreliability.
- The **Hearsay Rule** prohibits most statements made outside a courtroom from being used as evidence in court. These out-of-court statements do not have to be spoken words, they can also be documents.

FEDERAL RULES OF EVIDENCE RULE 803(6) BUSINESS RECORDS EXCEPTION

Some business records are not excluded by the rule against hearsay, regardless of whether the author of the document is available as a witness.

***Records of a Regularly Conducted Activity*.** A record of an act, event, condition, opinion, or diagnosis is admissible as evidence if:

- The record was made at or near the time by — or from information transmitted by — someone with knowledge;
- The record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
- Taking the record was a regular practice of that activity;
- All these conditions are shown by the testimony of the custodian or another qualified witness; and
- The opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

FEDERAL RULES OF EVIDENCE RULE 803(6) BUSINESS RECORDS EXCEPTION

- The business records exception is based on presumption of accuracy, which is accorded because information is part of regular conducted activity, kept by those trained in habits of precision, and customarily checked for correctness.
- The general trustworthiness and accuracy demanded in the conduct of business and keeping of such records favors a policy of their admission into evidence.
- The reason underlying business records exception fails, however, if any of the participants in the record keeping is outside pattern of regular business activity.

FEDERAL RULES OF EVIDENCE RULE 803(6) BUSINESS RECORDS EXCEPTION

- Typically, the business records exception, including electronic records, requires only that a qualified witness testify that the document was kept in the regular course of a business activity and that the making of such record was the regular practice of that activity.
- To be **“qualified,”** the witness need not have personal knowledge of the actual creation of the documents
- Using an “automated process” to compile the records in question does not render the documents inadmissible; only regular use in reliance on the records' accuracy is required.

FEDERAL RULES OF EVIDENCE RULE 803(6) BUSINESS RECORDS EXCEPTION

- A business record may include data stored electronically and later printed out for presentation in court, so long as the original computer data compilation was prepared pursuant to a business duty in accordance with regular business practice.

- If employees regularly retrieve data from the entity's computer system and rely on such information for commercial purposes, they bear sufficient indicia of trustworthiness.

PRIOR SERVICER RECORDS

A subsequent servicer can testify to the prior servicer's records.

- But a witness must have intimate knowledge of the new servicer's loan boarding processes.
- The business records exception to the hearsay rule does NOT require that the records were prepared by the business which has custody of them or the witness testifying. The party seeking to introduce the business records does not have to present the testimony of the party who made or kept the original record.

PRIOR SERVICER RECORDS

To the extent business records were created by prior servicers of a loan, a subsequent loan servicer can testify about the records of a prior servicer when:

(i) The witness is familiar with the books and records kept and maintained by the new servicer;

(ii) The prior servicer's business records were integrated into new servicer's business records; and

(iii) The records are kept and relied upon as a regular business practice and in the ordinary course of business conducted by the new servicer.

PRIOR SERVICER RECORDS

After a loan sale or the transfer of mortgage servicing can testimony from the new servicer demonstrate knowledge that:

- The prior servicer had regular business practices for creating and maintaining records that were sufficiently accepted by the new servicer to allow reliance on the records by the new servicer;
- The prior servicer used regular business practices to transmit the business records to the new servicer;
- The new servicer, by manual or electronic processes, integrated the prior servicer's records into its own records and maintained them through regular business processes;
- The record at issue was, in fact, among the new servicer's own records; and
- The new servicer relied on the prior servicer's records in its day-to-day operations.

#ExceptionOVERRULED

Breakout Session 5: Title Issues Track
Melody 1
12:15-1:15 PM

Do you have deceased borrowers? Do you have missing lien assignments? Do you have errors in your loan documents?

Join us for an interactive discussion where you get to play title attorney and help us spot these and other title defects and determine what curative actions to take. See how title issues differ from state to state and from nonjudicial to judicial jurisdictions. Also, see how sometimes fixing the title issue without title company assistance is the best option.

Speakers:

- Kelly Gring, Esq., Attorney, Tromberg Law Group, PA Kgring@tromberglawgroup.com – Moderator
- Jaclyn Clemmer, Esq., Partner, Schiller, Knapp, Lefkowitz & Hertzel LLP jclemmer@schillerknapp.com
- Brady Lighthall, Esq., Managing Shareholder, Weltman, Weinberg, & Reis Co., LPA blighthall@weltman.com
- Michael Schroeder, Esq., Attorney, Law Office Of Michael J. Schroeder mike@lawmjs.com

Kelly Gring, Esq.
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Kelly Gring is a Virginia attorney, based in the City of Richmond, Virginia. Ms. Gring graduated from The Pennsylvania State University in 2005, then earned her law degree from the University of Richmond's T.C. William's School of Law, where she graduated a semester early, in December of 2007. Ms. Gring sat for the bar in February of 2008, and has been practicing in the field of creditor's rights since March 19, 2008.

Ms. Gring is licensed to practice in the Supreme Court of Virginia, the Eastern and Western Districts of Virginia, as well as the Eastern and Western District Bankruptcy Courts of Virginia, and became licensed to practice law in the state of Georgia in 2016.

She is a seasoned litigator, and has appeared in most of the 133 state courts, the Eastern District of Virginia, and both the Eastern and Western District of Virginia Bankruptcy Courts with regularity.

As well as handling routine default-related matters for her clients, Kelly has worked to become proficient in litigating to cure title defects clouding her clients' security interests. Ms. Gring was the founding member of the American Legal and Financial Network's Junior Executives and Professional's (JPEG) group, and was a Picture the Future winner for the JPEG group. Ms. Gring served on the ALFN's board of directors from 2013-2019. She has spoken on many panels at ALFN events and other CLEs, on topics including nonjudicial foreclosure in Virginia, title curative measures, moving into management, and how to bridge the age gap between baby boomers and younger generations.

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Ms. Clemmer is a Partner who specializes in judicial foreclosure and title clearance in the states of New York and New Jersey. Ms. Clemmer graduated from Albany Law School in 2012 and immediately began working at the firm. In 2019 she became a partner and currently oversees the firm's New Jersey Foreclosure Department.

Brady Lighthall, Esq.
Managing Shareholder
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Originally joining the firm more than 15 years ago as a law clerk, Brady transitioned into the real estate practice group as an attorney shortly after completing his juris doctorate. He was promoted to a shareholder in 2015, and now leads the real estate practice area, overseeing overall performance and client satisfaction. He also serves on the firm's marketing committee.

Brady provides real estate default services to national, regional, and community banks, credit unions, mortgage servicers, and individual investors. When his clients' in-house efforts to cure loan defaults have failed, they look to him for recovery assistance, be it loss mitigation alternatives, resolution of title issues, or the protection of their interests in defensive litigation.

Some of the biggest obstacles his clients face today involve compliance with federal and state regulations, loss mitigation initiatives, legal proceeding delays, and managing and minimizing legal expenses. Brady approaches each matter conscientiously, considering unique solutions to resolve their challenges. Initiatives such as the home ownership preservation program have assisted many of his clients in avoiding foreclosure and curing loan defaults.

Born and raised in North Ogden, Utah, Brady is married with seven children (five daughters and two sons). He spends his time away from the office with his family, and serving as a local leader in The Church of Jesus Christ of Latter-day Saints.

He is passionate about anything related to history (religious, world, American, etc.), and he enjoys most forms of music, particularly religious, classical, country, and jazz. He finds relaxation in various forms of exercise and sports, as well as yard work and gardening.

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Michael J. Schroeder, the Principal of the Law Office, received his Bachelor of Arts Degree from Drake University in 1979 and his Juris Doctorate Degree from Drake Law School in 1983. While at Drake, Mr. Schroeder was a member of the Drake Law Review and served as Case Notes Editor of the Law Review. His case note, Lien Avoidance in Bankruptcy, was published at 31 Drake Law Review 240 (1981).

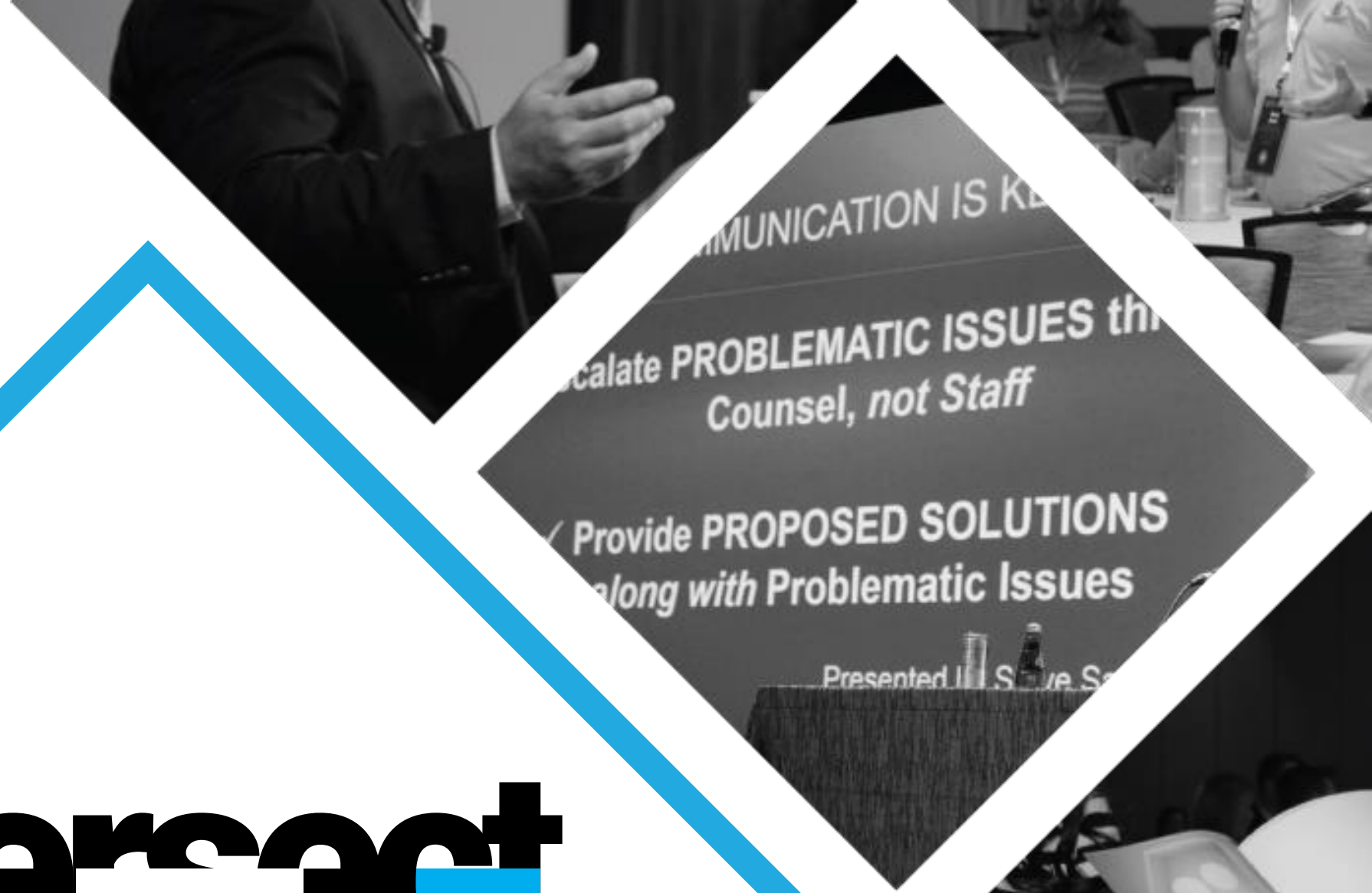
Mr. Schroeder was admitted to practice to the State Bar of Iowa in 1983 and to the State Bar of Texas in 1987. He has also been admitted to practice before the United States District Courts for the Northern and Southern Districts of Iowa, the United States District Courts for the Northern, Eastern, Southern, and Western Districts of Texas, the United States Court of Appeals for the Fifth Circuit, and the United States Supreme Court.

Mr. Schroeder's memberships include the Iowa State Bar Association, the State Bar of Texas, the Dallas Bar Association, the Federal Bar Association, the American Legal & Financial Network, the National Association of Chapter 13 Trustees, the American Land Title Association, the Texas Association of Business, and the Texas Land Title Association. He is a lifetime member of the American Legal & Financial Network.

Mr. Schroeder successfully represented the mortgage lender in Nobelman v. American Savings Bank, 113 S. Ct. 2106 (1993); and Munoz v. James B. Nutter & Co., No. 10-3039-hcm, 2011 WL 710501 (Bankr. W.D. Tex. 2-22-11). Mr. Schroeder is AV Peer Review Rated in The Bar Register of Preeminent Lawyers (Preeminent, Distinguished Martindale-Hubble 2019). The firm is under legal services contracts with the GSEs.

Mr. Schroeder has also lectured on various bankruptcy, foreclosure, and title issues to several mortgage lending groups, including the Mortgage Bankers Association, the Texas Mortgage Bankers Association, the American Legal & Financial Network, and the State Bar of Texas. He is an active member of several legal and mortgage finance related trade groups including the MBA, TMBA, DBA, FWMBA, ALFN, NACTT, FBA, ABI, TLTA, ALTA, and UTA. Mr. Schroeder may also be contacted via LinkedIn.

ALFN AMERICAN LEGAL & FINANCIAL NETWORK



intersect

servicing + foreclosure

intersect

BREAKOUT SESSION 5

Title Issues

Time 12:15 – 1:15

TITLE WORKSHOP

Do you have deceased borrowers? Do you have missing assignments? Do you have errors in your loan documents? Join us for an interactive discussion where you get to play title attorney and help us spot these and other title defects, then determine what curative actions to take. See how title issues differ from state to state and from nonjudicial to judicial jurisdictions. Also, see how sometimes fixing the title issue without title company assistance may be the best option.

INTERSECT | PRESENTERS

Moderator

Kelly Gring
Managing Attorney
Tromberg Law Group
kgring@tromberglawgroup.com

Speaker

Jaclyn Clemmer
Attorney
Schiller, Knapp, Lefkowitz & Hertzel
JClemmer@schillerknapp.com

Speaker

Mike Schroeder
Principal
Michael J. Schroeder, P. C.
mike@lawmjs.com

Speaker

Brady Lighthall
Managing Partner
Weltman, Weinberg & Reis Co.
blighthall@weltman.com

COMMON DEFECTS

PRIOR MORTGAGES

- Prior Mortgages attach to property
  - Title Claims
    - Include HUD-1 and any other supportive documentation in origination file
  - Requests for discharge/payoff statement to prior holder
  - GSE Investors do not accept Letters of Indemnity (marketable title required)
    - Additional Cause of Action/Count in complaint (Judicial jurisdiction)
    - Order from court extinguishing lien (record order in land records)
  - Quiet Title Action
  - What if your DOT is not recorded or recorded in the wrong county?

COMMON DEFECTS

JUDGMENTS

- Prior Judgments may attach to the property (depending on specifics)
  - Title Claim
    - Possible issues with “similar name” judgment results
  - Jurisdictions Rules
    - Does judgment need to be docket in county where property is located?
    - Lifespan of judgment
  - Judgment Inquiry Letters to lienholder
    - Prior owner vs. Current owner
  - GSE Investor Issues (marketable title)

COMMON DEFECTS

LIENS

FEDERAL LIENS:

- Must be named in action (cannot complete strict foreclosure on USA)

- Must specifically reference the possible interest USA holds within Complaint (Judicial)

- IRS Liens vs. USA judgments
  - Right of Redemption
  - Possible “similar name” issues (judgments)

IRS may remove title litigation to federal court, which can have different precedent.

COMMON DEFECTS

LIENS

OTHER LIENS:

- COA/HOA liens
  - Naming the Association in the Complaint
  - “Super Lien” Priority in some jurisdictions

- Municipal Liens (Tax Liens)
  - Hold priority over mortgage lien
  - Tax Sale Certificate vs. Tax Foreclosure
  - A completed tax foreclosure will extinguish the mortgage lien from property.

COMMON DEFECTS

MISSING INTEREST / TRUSTOR NAME / TRUSTEE

What are you to do when a party does not sign the Deed of Trust?

What if their name is simply missing from the first page?

What if a party is missing on a vesting deed?

- Virginia case law reversed

Is it fatal if the trustee's name is missing from the document?

COMMON DEFECTS

Legal Description Errors

What truly needs fixed?
- vs. called out in advertisement or complaint

Availability of Scrivener's Error Affidavit?
- VA Code change effective October 1, 2019, seems to indicate personal service no longer required.

FHA requirement that error be perpetuated. Any luck in reaching out to HUD?

COMMON DEFECTS

MISSING ASSIGNMENTS

- Title professionals want a clear, traceable chain of ownership of the lien
- Foreclosure professionals want to avoid title issues
- Cause: sloppy loan originations, lax assignment practices, inattentive title professionals
- Self-help: Contact prior lender, closing title agent
  - Prior lender still in business?
  - Closing title agent still in business?
  - Title underwriter assistance?

Self-help: Texas Law

Tex. Bus. & Comm. Code §26.02

Loan Agreement means the Note signed by the Maker and the Deed of Trust signed by the Grantor

Perkins v. Sterne, 23 Tex. 561 (1859)

Carpenter v. Longan, 83 US 271 (1873)

The security of the Deed of Trust follows the ownership of the Note

Tex. R. Civ. Pro. 166a(f) Affidavit

"Custody, control, or physical possession" of original wet ink Note Maker of Note received loan proceeds at closing Maker of Note acknowledged Note by making payments Record, foreclose – receive title insurance.

COMMON DEFECTS

DECEASED BORROWERS:

- Texas Probate

Tex. Estates Code Chapter 205: Small Estate Affidavit

- Quick - affidavit filed, court order entered

Tex. Estates Code Chapter 202: Heirship Proceeding

- Evidentiary hearing required - order establishes heirs

Tex. Estates Code Chapter 257: Muniment of Title

- Quick - application with will filed; court order entered

Tex. Estates Code Chapter 401: Independent Proceeding

- Issuance of Letters of Administration required
- Mortgage Creditor: Claim - Wait 6 months - Foreclose

Tex. Estates Code Chapter 301: Dependent Proceeding

- Issuance of Letters of Administration required
- Complete administration - long, drawn out
- Mortgage Creditor: Claim - Allowance - Allowance
- Wait 6 months; Application to Foreclose; Hearing; Order

Tex. Estates Code Chapter 1001: Guardianship

- Guardian may have full or limited authority
- Mortgage Creditor: Claim - Allowance - Allowance
- Wait 6 months; Application to Foreclose; Hearing; Order

24 CFR §201.42: HUD Requirements

- Lender shall timely file a claim in a probate proceeding

- Texas No Probate

Tex. Estates Code §203.002: Heirship Affidavit Form

- Nonjudicial method of establishing heirs

Title Underwriter Opinion

- Permit foreclosure under certain facts

OTHER CONSIDERATIONS

MOBILE HOMES

Documentation

- HUD Requirements
  - 24 CFR §266 - Conveyance of Marketable Title
  - 60 days to clear title defects
  - If defects are not timely cured - reconveyance

- Mobile Homes - HUD
  - Title documentation must be correct
  - Taxing authority must tax as one

- Texas Mobile Home Documentation
  - Tex. Occupations Code Chapter 1201: TDHCA regulation
  - Application for Statement of Ownership and Location
  - Ownership Affidavit of Fact
  - Affidavit of Fact for Real Property (closing error; 60 day notice sent)
  - SOL issued by TDHCA: record - send copy to county tax office, TDHCA
  - Loan policy of insurance (MTP) T-31 Endorsement

- Texas Mobile Home Documentation Missing
  - Self-help: Contact closing title agent
  - Self-help: Review TDHCA online records
  - Self-help: Prepare, submit lender application
  - If all else fails ... submit a title claim

OTHER CONSIDERATIONS

AFFORDABLE HOUSING RESTRICTIONS

- Deed Restrictions that establish rules and income requirements for who can purchase the property
  - Agreement Controls

- Additional pleading requirements and notice requirements may exist

- Potential Sale issues (public auction and REO)

- Conveyance issues (HUD/VA)

TITLE CLAIMS

VIEW OF POTENTIAL CLAIM FILER

If all self-help options fail, submit a title claim to the title insurer

- *Tex. Insurance Code Title 11*
- Review loan policy of insurance (MTP), including definitions
- Insure that claimed defect is insured
- Check for Schedule B exceptions
- Determine if the error is by the lender or title agent
- Articulate claim; Provide backup

If you submit a title claim to the title insurer ...

- TDI: “ACKNOWLEDGMENT AND INVESTIGATION OF CLAIM: The insurer shall, within 15 days after a Notice of Claim, (1) acknowledge the Claim, (2) commence investigation of the Claim and (3) request necessary information that is allowed to be requested by the policy. The Insurer may request additional necessary information during the progress of the investigation.”
- Title insurer opportunity to correct
- Follow up regularly
- Be persistent
- Watch for repetitive requests for documentation
- Watch for “bait & switch” – Omaha - Jacksonville
- Watch for “curative action”
- Watch for claims “denial” letters
- Demand litigation updates ... send your attorney to hearings

TITLE CLAIMS

FROM TITLE COUNSEL

What can you do to ensure the quickest resolution?

- Return representation / authorization letters promptly
- Assist title counsel with getting necessary documents from insured
- Be willing to foreclose judicially, or use warrant in detinue action for real mobile homes.
- Offer creative solutions to the clients
  - Pub early
  - Be willing to litigate yourself – especially if the cloud is post-policy, and you know filing a claim is a waste of your client's time.

FNF, in particular, Omaha is "clearance", Jacksonville is "claims".

OTHER CONSIDERATIONS

POST-FORECLOSURE SALE TITLE ISSUES

- What happens when your foreclosure title report:
  - Misses liens or parties; or
  - Contains incorrect information such as a legal description error.

    - Indemnification of title insurer
    - Strict foreclosure
    - Set aside sale
    - Lien resolution

TYPES OF TITLE PRODUCTS

WHAT ARE THEY AND WHAT ARE THEY GOOD FOR?

- Insurable v. Non-insurable
- Non-insurable title products
  - Title Abstract
  - Current owner/limited lien search

- Insurable title products
  - Title Commitment/Title Update
  - Preliminary Judicial Report/Final Judicial Report
  - Trustee Sale Guarantee
  - Title Policy

INTERACTIVE EXERCISE

Everyone should have a faux title report and corresponding mortgage and assignment document.

It's your turn to play title attorney! Point out the defects, and give us your suggestions on how to cure. Remember, some of these clouds may or may not prevent foreclosure depending on jurisdiction!

We look forward to answering any questions you may have, and as always, our advice is to communicate with your counsel. If a title matter is ruining your day, feel free to call any of us. We love to try to find creative solutions that make your lives easier!

Thanks for your time and attention today!

After Recording Return To:

Land Records
City of Columbia
Inst. # 0000017543

[Space Above This Line For Recording Data]

DEED OF TRUST

DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

(A) "Security Instrument" means this document, which is dated September 9, 2000, together with all Riders to this document.
(B) "Borrower" is Sharon L. Norman. Borrower is the trustor under this Security Instrument.
(C) "Lender" is Perris Home Lending Group. Lender is a financial institution organized and existing under the laws of East Carotucky. Lender's address is 4 Nobler Road, Cheyene, East Carotucky 33398. Lender is the beneficiary under this Security Instrument.
(D) "Trustee" is Cannondale Trustee Group, LLC.
(E) "Note" means the promissory note signed by Borrower and dated September 9, 2000. The Note states that Borrower owes Lender Dollars (U.S. $147,000.00) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than September 1, 2030.
(F) "Property" means the property that is described below under the heading "Transfer of Rights in the Property."
(G) "Loan" means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.
(H) "Riders" means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower [check box as applicable]:

☐ Adjustable Rate Rider	☐ Condominium Rider	☐ Second Home Rider
☐ Balloon Rider	☐ Planned Unit Development Rider	☐ Other(s) [specify]
☐ 1-4 Family Rider	☐ Biweekly Payment Rider	

(I) "Applicable Law" means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.

(J) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.

(K) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(L) "Escrow Items" means those items that are described in Section 3.

(M) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.

(N) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on, the Loan.

(O) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.

(P) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. §2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.

(Q) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

TRANSFER OF RIGHTS IN THE PROPERTY

This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower irrevocably

grants and conveys to Trustee, in trust, with power of sale, the following described property located in the City of East Carotucky:
[Type of Recording Jurisdiction] [Name of Recording Jurisdiction]

Legal Description:

All that certain tract or parcel of land situate in the development of Columbius Heights being more particularly described as Lot 984 Block 323007, shown in a plat of redevelopment created by Bob West, which said Plat is recorded in Plat Book 12, page 77.

IT BEING the same property conveyed to Sally Mead and Robert Mead by deed dated OCtober 3, 1997, and commonly known as 30 E. Rand Boulevard, Columbius, East Carotucky 33399.

which currently has the address of 30 East Rand Boulevard
[Street]
Columbius, EC 33399 ("Property Address"):
[City] [Zip Code]

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property."

BORROWER COVENANTS that Borrower is lawfully seised of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

1. Payment of Principal, Interest, Escrow Items, Prepayment Charges, and Late Charges. Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note. Borrower shall also pay funds for Escrow Items pursuant to Section 3. Payments due under the Note and this Security Instrument shall be made in U.S. currency. However, if any check or other instrument received by Lender as payment under the Note or this Security Instrument is returned to Lender unpaid, Lender may require that any or all subsequent payments due under the Note and this Security Instrument be made in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is

drawn upon an institution whose deposits are insured by a federal agency, instrumentality, or entity; or (d) Electronic Funds Transfer.

Payments are deemed received by Lender when received at the location designated in the Note or at such other location as may be designated by Lender in accordance with the notice provisions in Section 15. Lender may return any payment or partial payment if the payment or partial payments are insufficient to bring the Loan current. Lender may accept any payment or partial payment insufficient to bring the Loan current, without waiver of any rights hereunder or prejudice to its rights to refuse such payment or partial payments in the future, but Lender is not obligated to apply such payments at the time such payments are accepted. If each Periodic Payment is applied as of its scheduled due date, then Lender need not pay interest on unapplied funds. Lender may hold such unapplied funds until Borrower makes payment to bring the Loan current. If Borrower does not do so within a reasonable period of time, Lender shall either apply such funds or return them to Borrower. If not applied earlier, such funds will be applied to the outstanding principal balance under the Note immediately prior to foreclosure. No offset or claim which Borrower might have now or in the future against Lender shall relieve Borrower from making payments due under the Note and this Security Instrument or performing the covenants and agreements secured by this Security Instrument.

2. Application of Payments or Proceeds. Except as otherwise described in this Section 2, all payments accepted and applied by Lender shall be applied in the following order of priority: (a) interest due under the Note; (b) principal due under the Note; (c) amounts due under Section 3. Such payments shall be applied to each Periodic Payment in the order in which it became due. Any remaining amounts shall be applied first to late charges, second to any other amounts due under this Security Instrument, and then to reduce the principal balance of the Note.

If Lender receives a payment from Borrower for a delinquent Periodic Payment which includes a sufficient amount to pay any late charge due, the payment may be applied to the delinquent payment and the late charge. If more than one Periodic Payment is outstanding, Lender may apply any payment received from Borrower to the repayment of the Periodic Payments if, and to the extent that, each payment can be paid in full. To the extent that any excess exists after the payment is applied to the full payment of one or more Periodic Payments, such excess may be applied to any late charges due. Voluntary prepayments shall be applied first to any prepayment charges and then as described in the Note.

Any application of payments, insurance proceeds, or Miscellaneous Proceeds to principal due under the Note shall not extend or postpone the due date, or change the amount, of the Periodic Payments.

3. Funds for Escrow Items. Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the "Funds") to provide for payment of amounts due for: (a) taxes and assessments and other items which can attain priority over this Security Instrument as a lien or encumbrance on the Property; (b) leasehold payments or ground rents on the Property, if any; (c) premiums for any and all insurance required by Lender under Section 5; and (d) Mortgage Insurance premiums, if any, or any sums payable by Borrower to Lender in lieu of the payment of Mortgage Insurance premiums in accordance with the provisions of Section 10. These items are called "Escrow Items." At origination or at any time during the term of the Loan, Lender may require that Community Association Dues, Fees, and Assessments, if any,

SLN
WPN

be escrowed by Borrower, and such dues, fees and assessments shall be an Escrow Item. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this Section. Borrower shall pay Lender the Funds for Escrow Items unless Lender waives Borrower's obligation to pay the Funds for any or all Escrow Items. Lender may waive Borrower's obligation to pay to Lender Funds for any or all Escrow Items at any time. Any such waiver may only be in writing. In the event of such waiver, Borrower shall pay directly, when and where payable, the amounts due for any Escrow Items for which payment of Funds has been waived by Lender and, if Lender requires, shall furnish to Lender receipts evidencing such payment within such time period as Lender may require. Borrower's obligation to make such payments and to provide receipts shall for all purposes be deemed to be a covenant and agreement contained in this Security Instrument, as the phrase "covenant and agreement" is used in Section 9. If Borrower is obligated to pay Escrow Items directly, pursuant to a waiver, and Borrower fails to pay the amount due for an Escrow Item, Lender may exercise its rights under Section 9 and pay such amount and Borrower shall then be obligated under Section 9 to repay to Lender any such amount. Lender may revoke the waiver as to any or all Escrow Items at any time by a notice given in accordance with Section 15 and, upon such revocation, Borrower shall pay to Lender all Funds, and in such amounts, that are then required under this Section 3.

Lender may, at any time, collect and hold Funds in an amount (a) sufficient to permit Lender to apply the Funds at the time specified under RESPA, and (b) not to exceed the maximum amount a lender can require under RESPA. Lender shall estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with Applicable Law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is an institution whose deposits are so insured) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items no later than the time specified under RESPA. Lender shall not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and Applicable Law permits Lender to make such a charge. Unless an agreement is made in writing or Applicable Law requires interest to be paid on the Funds, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender can agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds as required by RESPA.

If there is a surplus of Funds held in escrow, as defined under RESPA, Lender shall account to Borrower for the excess funds in accordance with RESPA. If there is a shortage of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the shortage in accordance with RESPA, but in no more than 12 monthly payments. If there is a deficiency of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the deficiency in accordance with RESPA, but in no more than 12 monthly payments.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender.

4. Charges; Liens. Borrower shall pay all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over this Security Instrument, leasehold payments or ground rents on the Property, if any, and Community Association Dues, Fees, and Assessments, if any. To the extent that these items are Escrow Items, Borrower shall pay them in the manner provided in Section 3.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth above in this Section 4.

Lender may require Borrower to pay a one-time charge for a real estate tax verification and/or reporting service used by Lender in connection with this Loan.

5. Property Insurance. Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Loan. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be exercised unreasonably. Lender may require Borrower to pay, in connection with this Loan, either: (a) a one-time charge for flood zone determination, certification and tracking services; or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time remappings or similar changes occur which reasonably might affect such determination or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by Borrower.

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts disbursed by Lender under this Section 5 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgage clause, and shall name Lender as mortgagee and/or as an additional loss payee. Lender shall have the right to hold the policies and renewal certificates. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. If Borrower obtains any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the Property, such policy shall include a standard mortgage clause and shall name Lender as mortgagee and/or as an additional loss payee.

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.

If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 22 or otherwise, Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Note or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the Property or to pay amounts unpaid under the Note or this Security Instrument, whether or not then due.

6. Occupancy. Borrower shall occupy, establish, and use the Property as Borrower's principal residence within 60 days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control.

7. Preservation, Maintenance and Protection of the Property; Inspections. Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate or commit waste

on the Property. Whether or not Borrower is residing in the Property, Borrower shall maintain the Property in order to prevent the Property from deteriorating or decreasing in value due to its condition. Unless it is determined pursuant to Section 5 that repair or restoration is not economically feasible, Borrower shall promptly repair the Property if damaged to avoid further deterioration or damage. If insurance or condemnation proceeds are paid in connection with damage to, or the taking of, the Property, Borrower shall be responsible for repairing or restoring the Property only if Lender has released proceeds for such purposes. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. If the insurance or condemnation proceeds are not sufficient to repair or restore the Property, Borrower is not relieved of Borrower's obligation for the completion of such repair or restoration.

Lender or its agent may make reasonable entries upon and inspections of the Property. If it has reasonable cause, Lender may inspect the interior of the improvements on the Property. Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause.

8. Borrower's Loan Application. Borrower shall be in default if, during the Loan application process, Borrower or any persons or entities acting at the direction of Borrower or with Borrower's knowledge or consent gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Loan. Material representations include, but are not limited to, representations concerning Borrower's occupancy of the Property as Borrower's principal residence.

9. Protection of Lender's Interest in the Property and Rights Under this Security Instrument. If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9.

Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

10. Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan, Borrower shall pay the premiums required to maintain the Mortgage Insurance in effect. If, for any reason, the Mortgage Insurance coverage required by Lender ceases to be available from the mortgage insurer that previously provided such insurance and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to obtain coverage substantially equivalent to the Mortgage Insurance previously in effect, at a cost substantially equivalent to the cost to Borrower of the Mortgage Insurance previously in effect, from an alternate mortgage insurer selected by Lender. If substantially equivalent Mortgage Insurance coverage is not available, Borrower shall continue to pay to Lender the amount of the separately designated payments that were due when the insurance coverage ceased to be in effect. Lender will accept, use and retain these payments as a non-refundable loss reserve in lieu of Mortgage Insurance. Such loss reserve shall be non-refundable, notwithstanding the fact that the Loan is ultimately paid in full, and Lender shall not be required to pay Borrower any interest or earnings on such loss reserve. Lender can no longer require loss reserve payments if Mortgage Insurance coverage (in the amount and for the period that Lender requires) provided by an insurer selected by Lender again becomes available, is obtained, and Lender requires separately designated payments toward the premiums for Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to maintain Mortgage Insurance in effect, or to provide a non-refundable loss reserve, until Lender's requirement for Mortgage Insurance ends in accordance with any written agreement between Borrower and Lender providing for such termination or until termination is required by Applicable Law. Nothing in this Section 10 affects Borrower's obligation to pay interest at the rate provided in the Note.

Mortgage Insurance reimburses Lender (or any entity that purchases the Note) for certain losses it may incur if Borrower does not repay the Loan as agreed. Borrower is not a party to the Mortgage Insurance.

Mortgage insurers evaluate their total risk on all such insurance in force from time to time, and may enter into agreements with other parties that share or modify their risk, or reduce losses. These agreements are on terms and conditions that are satisfactory to the mortgage insurer and the other party (or parties) to these agreements. These agreements may require the mortgage insurer to make payments using any source of funds that the mortgage insurer may have available (which may include funds obtained from Mortgage Insurance premiums).

As a result of these agreements, Lender, any purchaser of the Note, another insurer, any reinsurer, any other entity, or any affiliate of any of the foregoing, may receive (directly or indirectly) amounts that derive from (or might be characterized as) a portion of Borrower's payments for Mortgage Insurance, in exchange for sharing or modifying the mortgage insurer's risk, or reducing losses. If such agreement provides that an affiliate of Lender takes a share of the insurer's risk in exchange for a share of the premiums paid to the insurer, the arrangement is often termed "captive reinsurance." Further:

(a) Any such agreements will not affect the amounts that Borrower has agreed to pay for Mortgage Insurance, or any other terms of the Loan. Such agreements will not increase the amount Borrower will owe for Mortgage Insurance, and they will not entitle Borrower to any refund.

(b) Any such agreements will not affect the rights Borrower has – if any – with respect to the Mortgage Insurance under the Homeowners Protection Act of 1998 or any other law. These rights may include the right to receive certain disclosures, to request and obtain cancellation of the Mortgage Insurance, to have the Mortgage Insurance terminated automatically, and/or to receive a refund of any Mortgage Insurance premiums that were unearned at the time of such cancellation or termination.

11. Assignment of Miscellaneous Proceeds; Forfeiture. All Miscellaneous Proceeds are hereby assigned to and shall be paid to Lender.

If the Property is damaged, such Miscellaneous Proceeds shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such Miscellaneous Proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may pay for the repairs and restoration in a single disbursement or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such Miscellaneous Proceeds, Lender shall not be required to pay Borrower any interest or earnings on such Miscellaneous Proceeds. If the restoration or repair is not economically feasible or Lender's security would be lessened, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such Miscellaneous Proceeds shall be applied in the order provided for in Section 2.

In the event of a total taking, destruction, or loss in value of the Property, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the sums secured by this Security Instrument shall be reduced by the amount of the Miscellaneous Proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the partial taking, destruction, or loss in value divided by (b) the fair market value of the Property immediately before the partial taking, destruction, or loss in value. Any balance shall be paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is less than the amount of the sums secured immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument whether or not the sums are then due.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the Opposing Party (as defined in the next sentence) offers to make an award to settle a claim for

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damages, Borrower fails to respond to Lender within 30 days after the date the notice is given, Lender is authorized to collect and apply the Miscellaneous Proceeds either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether or not then due. "Opposing Party" means the third party that owes Borrower Miscellaneous Proceeds or the party against whom Borrower has a right of action in regard to Miscellaneous Proceeds.

Borrower shall be in default if any action or proceeding, whether civil or criminal, is begun that, in Lender's judgment, could result in forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. Borrower can cure such a default and, if acceleration has occurred, reinstate as provided in Section 19, by causing the action or proceeding to be dismissed with a ruling that, in Lender's judgment, precludes forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. The proceeds of any award or claim for damages that are attributable to the impairment of Lender's interest in the Property are hereby assigned and shall be paid to Lender.

All Miscellaneous Proceeds that are not applied to restoration or repair of the Property shall be applied in the order provided for in Section 2.

12. Borrower Not Released; Forbearance By Lender Not a Waiver. Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to Borrower or any Successor in Interest of Borrower shall not operate to release the liability of Borrower or any Successors in Interest of Borrower. Lender shall not be required to commence proceedings against any Successor in Interest of Borrower or to refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or any Successors in Interest of Borrower. Any forbearance by Lender in exercising any right or remedy including, without limitation, Lender's acceptance of payments from third persons, entities or Successors in Interest of Borrower or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy.

13. Joint and Several Liability; Co-signers; Successors and Assigns Bound. Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. However, any Borrower who co-signs this Security Instrument but does not execute the Note (a "co-signer"): (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without the co-signer's consent.

Subject to the provisions of Section 18, any Successor in Interest of Borrower who assumes Borrower's obligations under this Security Instrument in writing, and is approved by Lender, shall obtain all of Borrower's rights and benefits under this Security Instrument. Borrower shall not be released from Borrower's obligations and liability under this Security Instrument unless Lender agrees to such release in writing. The covenants and agreements of this Security Instrument shall bind (except as provided in Section 20) and benefit the successors and assigns of Lender.

14. Loan Charges. Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees. In regard to any other fees, the absence of express authority in this Security

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Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee. Lender may not charge fees that are expressly prohibited by this Security Instrument or by Applicable Law.

If the Loan is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the Loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge (whether or not a prepayment charge is provided for under the Note). Borrower's acceptance of any such refund made by direct payment to Borrower will constitute a waiver of any right of action Borrower might have arising out of such overcharge.

15. Notices. All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall promptly notify Lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time. Any notice to Lender shall be given by delivering it or by mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower. Any notice in connection with this Security Instrument shall not be deemed to have been given to Lender until actually received by Lender. If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.

16. Governing Law; Severability; Rules of Construction. This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.

As used in this Security Instrument: (a) words of the masculine gender shall mean and include corresponding neuter words or words of the feminine gender; (b) words in the singular shall mean and include the plural and vice versa; and (c) the word "may" gives sole discretion without any obligation to take any action.

17. Borrower's Copy. Borrower shall be given one copy of the Note and of this Security Instrument.

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18. Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

19. Borrower's Right to Reinstate After Acceleration. If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 18.

20. Sale of Note; Change of Loan Servicer; Notice of Grievance. The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA requires in connection with a notice of

transfer of servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action. If Applicable Law provides a time period which must elapse before certain action can be taken, that time period will be deemed to be reasonable for purposes of this paragraph. The notice of acceleration and opportunity to cure given to Borrower pursuant to Section 22 and the notice of acceleration given to Borrower pursuant to Section 18 shall be deemed to satisfy the notice and opportunity to take corrective action provisions of this Section 20.

21. Hazardous Substances. As used in this Section 21: (a) "Hazardous Substances" are those substances defined as toxic or hazardous substances, pollutants, or wastes by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials; (b) "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection; (c) "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law; and (d) an "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environmental Cleanup.

Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances, or threaten to release any Hazardous Substances, on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property (a) that is in violation of any Environmental Law, (b) which creates an Environmental Condition, or (c) which, due to the presence, use, or release of a Hazardous Substance, creates a condition that adversely affects the value of the Property. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property (including, but not limited to, hazardous substances in consumer products).

Borrower shall promptly give Lender written notice of (a) any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge, (b) any Environmental Condition, including but not limited to, any spilling, leaking, discharge, release or threat of release of any Hazardous Substance, and (c) any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of the Property. If Borrower learns, or is notified by any governmental or regulatory authority, or any private party, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law. Nothing herein shall create any obligation on Lender for an Environmental Cleanup.

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NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and sale. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale, assent to decree, and/or any other remedies permitted by Applicable Law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

If Lender invokes the power of sale, Lender shall mail or cause Trustee to mail a notice of sale to Borrower in the manner prescribed by Applicable Law. Trustee shall give notice of sale by public advertisement and by such other means as required by Applicable Law. Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder at the time and place and under the terms designated in the notice of sale in one or more parcels and in any order Trustee determines. Trustee may postpone sale of all or any parcel of the Property by public announcement at the time and place of any previously scheduled sale and by notice to any other persons as required by Applicable Law. Lender or its designee may purchase the Property at any sale.

Trustee shall deliver to the purchaser Trustee's deed conveying the Property without any covenant or warranty, expressed or implied. The recitals in the Trustee's deed shall be prima facie evidence of the truth of the statements made therein. Trustee shall apply the proceeds of the sale in the following order: (a) to all expenses of the sale, including, but not limited to, Trustee's fees of 5 % of the gross sale price and reasonable attorneys' fees; (b) to all sums secured by this Security Instrument; and (c) any excess to the person or persons legally entitled to it.

Borrower, in accordance with Title 14, Chapter 200 of the Maryland Rules of Procedure, does hereby declare and assent to the passage of a decree to sell the Property in one or more parcels by the equity court having jurisdiction for the sale of the Property, and consents to the granting to any trustee appointed by the assent to decree of all the rights, powers and remedies granted to the Trustee in this Security Instrument together with any and all rights, powers and remedies granted by the decree. Neither the assent to decree nor the power of sale granted in this Section 22 shall be exhausted in the event the proceeding is dismissed before the payment in full of all sums secured by this Security Instrument.

23. Release. Upon payment of all sums secured by this Security Instrument, Lender or Trustee, shall release this Security Instrument and mark the Note "paid" and return the Note to Borrower. Borrower shall pay any recordation costs. Lender may charge Borrower a fee for

releasing this Security Instrument, but only if the fee is paid to a third party for services rendered and the charging of the fee is permitted under Applicable Law.

24. Substitute Trustee. Lender, at its option, may from time to time remove Trustee and appoint a successor trustee to any Trustee appointed hereunder by an instrument recorded in the city or county in which this Security Instrument is recorded. Without conveyance of the Property, the successor trustee shall succeed to all the title, power and duties conferred upon Trustee herein and by Applicable Law.

25. Possession of the Property. Borrower shall have possession of the Property until Lender has given Borrower notice of default pursuant to Section 22 of this Security Instrument.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by Borrower and recorded with it.

Witnesses:

Notarized _____ Sharon L. Norman (Seal)
- Borrower

Notarized _____ William P. Norman (Seal)
- Borrower

_____ **[Space Below This Line for Acknowledgment]** _____

ASSIGNMENT AND CERTIFICATE OF TRANSFER

Place of Record: City of Columbius

Date of Deed of Trust: September 9, 2000

Recorded in: City of East Carotucky

Name(s) of Grantor(s): William P. Norman and Sharon L. Norman

Name(s) of Trustee(s): Cannondale Trustee Group, LLC

Original Payee: Perris Home Lending Group

Original Amount Secured: $147,000.00

Property Address: 50 East Rand Boulevard, Columbius, East Carotucky 33399

Property Description:

All that certain tract or parcel of land situate in the development of Columbius Heights, being more particularly described as Lot 984 Block 323007, shown in a plat of redevelopment created by Bob West, which said Plat is recorded in Plat Book 12, page 77.

I/We, the holder(s) of the Note secured by the above-mentioned Deed of Trust, do hereby certify that the Note and Deed of Trust have been assigned, transferred or endorsed or are hereby assigned to Credit Five Bank, whose mailing address is 1701 Flagship Way, Cheyene, East Carotucky 33397.

Given under my/our hand(s) this 5th day of October, 2014.

By: _____
Name: Margaret Smalling
Title: AVP of Credit Five Bank

STATE OF EC
CITY/COUNTY OF Columbius, to-wit:

I, the undersigned, a Notary Public in and for the jurisdiction aforesaid, do hereby certify that Margaret Smalling AVP of Credit Five whose name as such is signed to the foregoing instrument, has acknowledged the same before me.

Given under my hand this 5th day of October, 2014.

_____
Notary Public

Commission expires: 12/15/19

SEAL

FORECLOSURE REPORT **Effective date: 10/21/19**

Borrower(s): Sharon L. Norman and William P. Norman

Address: 50 East Rand Boulevard, Columbius, East Carotucky 33399

VESTING INFORMATION:

Deed dated 8/14/89 conveying from Wendy Carr and Alvin Carr to Ronald C. Merrick and Gayle R. Merrick, as joint tenants with rights of survivorship.

Power of Attorney granting Ronald C. Merrick POA for Gayle R. Merrick, recorded 4/29/92

Deed dated 10/3/97, conveying from Ronald C. Merrick and Gayle R. Merrick to Ronald C. Merrick, endorsed by Ronald C. Merrick as POA for Gayle R. Merrick, and in his individual capacity

Deed dated 4/8/98, conveying from Ronald C. Merick to Surry Meade and Robert Meade, husband and wife, as tenants by the entirety.

Deed dated 9/9/00 conveying from Surry Meade to Sharon L. Norman and William P. Norman, husband and wife as tenants by the entirety.

LEGAL DESCRIPTION:

All that certain tract or parcel of land situate in the development of Columbius Heights, being more particularly described as Lot 984, Block 323077, shown in a plat of redevelopment created by Bob West, which said Plat is recorded in Plat Book 2, page 77.

IT BEING the same property conveyed to Sally Mead and Robert Mead by deed dated October 3, 1997, and commonly known as 30 E. Rand Street, Columbius, EC 33399.

HOA/COA Association information:

HOA Name: Columbius Heights Racquet Club

Mobile Home Information: none found

Probate information: List of heirs filed for William P. Norman, dated 6/16/14.

Heirs: Sharon L. Norman, William P. Norman, Jr., Christine Davis

PURCHASE MONEY DEED OF TRUST:

Borrower(s): Sharon L. Norman and William P. Norman

Lender: Perris Home Lending Group

Trustee: Cannondale Trustee Group, LLC.

Dated: 9/9/00 Recorded: 3/1/01

CREDIT LINE DEED OF TRUST:

Borrower(s): Sharon L. Norman and William P. Norman

Lender: Hughes Bank of Columbius

Trustee: N/A

Dated: 5/30/12 Recorded: 6/1/12

Judgments/Other Liens:

Judgment against Ronald C. Merrick, dated and recorded 5/9/75

Judgment against Ronald C. Merrick, dated and recorded 4/24/98

Judgment against Sharon L. Norman, dated and recorded 10/13/99

Judgment against Sharon L. Norman and William P. Norman, dated and recorded 4/14/02

Judgment against Christine Davis, dated 7/8/11

IRS lien for $3,400.00 against Sharon L. Norman and William P. Norman, dated and recorded 4/14/02

HOA lien for &7,090.00 against Sharon L. Norman and William P. Norman, dated and recorded 5/17/12

Property taxes due for 7/1/18.

Breakout Session 6: Case Law & Legislation Track
Melody 2
12:15-1:15 PM

This session will discuss the Top Ten Trends/Things to Watch in Foreclosure Litigation and Legislation:

1. Statutes of Limitation on Loan Documents – When has a loan been accelerated? Case law from several states
2. Attorney's fees to the prevailing party – TRO (CA) and Standing (FL)
3. Demand letters
4. FL legislation (SB 220)
5. CFPB updates
6. The constitutionality of the CFPB
7. Federal legislation -House Finance Committee bills – can we flesh these out a bit?
8. Local legislation - Vacant Property Registration
9. Payoffs and reinstatements prior to sale
10. The boarding process for loan transfers

Speakers:

- Deanne Stodden, Esq., Partner, Messner Reeves LLP dstodden@messner.com – Moderator
- Casper Rankin, Esq., Partner, Aldridge | Pite, LLP crankin@aldridgepite.com
- Sally Garrison, Esq., Managing Member, The Mortgage Law Firm, PLLC sally.garrison@mtglawfirm.com
- Steven Hurley, Esq., Supervising Attorney – Florida, Padgett Law Group Steven.Hurley@Padgettlawgroup.com

Deanne Stodden, Esq.
Partner
Messner Reeves LLP
1430 Wynkoop Street, Suite 300
Denver, CO 80202
Phone: 303-605-1579
dstodden@messner.com

Deanne is a partner with Messner Reeves, LLP. Deanne's practice encompasses all areas of real estate law, business law, banking law, foreclosure law and creditor's rights law including bankruptcy. The majority of her legal career has focused on the

representation of large and small financial institutions and other creditors in residential and commercial foreclosures, loan workouts, deficiency actions, bankruptcy, title claims and related litigation.

In addition to her work, Deanne is active in the legal community and is a frequent author and speaker on a variety of real estate law and foreclosure topics. Deanne is currently a member of the Colorado Bar Association Ethics Committee and is the liaison to the Colorado Bar Association Real Estate Section Council. Deanne is the Managing Editor of the Colorado Bar Association CLE Colorado Real Estate Practice books and coordinates and teaches what is considered to be Colorado's preeminent course in real estate practice to new real estate attorneys and paralegals. Deanne is on the Board of Directors for Colorado Canine Rescue and she is on the Board of Directors for ALFN.

Deanne graduated from the University of Denver Sturm College of Law in 2001 and earned two bachelor's degrees from the University of Colorado, Boulder.

Casper Rankin, Esq.
Partner
Aldridge | Pite, LLP
4375 Jutland Dr.
San Diego, CA 92117
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Casper J. Rankin is the managing partner of Aldridge Pite LLP's west coast judicial and non-judicial foreclosure practice groups. Casper is also a California licensed real estate broker. He has over a decade of experience in foreclosure, mortgage finance and lending related litigation, surplus funds, and bankruptcy. Casper is licensed to practice law in Arizona, California, Idaho, Oregon, Washington, and Alaska.

Sally Garrison, Esq.
Managing Member
The Mortgage Law Firm, PLLC

421 NW 13th Street, Suite 300
Oklahoma City, OK 73103
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sally.garrison@mtglawfirm.com

Sally E. Garrison received a B.A. in Economics, Environmental Science, and Political Science, from Claremont McKenna College in 1995. She received her J.D. from the University of Oklahoma, College of Law, in 2000. During her studies at the University of Oklahoma (OU), she also attended the Oxford Summer Program at Queen's College, focusing on the European Union and Intellectual Property. Before beginning her work in real estate litigation, Sally taught as an adjunct professor at the University of Oklahoma, College of Law, in the areas of Intellectual Property, Copyright, Contracts, and Law in Cyberspace. She assisted in the research and editing of Copyright in a Global Information Economy, ISBN 0-7355-2430-0; Toward an International Fair Use Doctrine, Columbia Journal of Transnational Law, 2000, Volume 39, No. 1; and Givers, Takers and Other Kinds of Users: A Fair Use Doctrine for Cyberspace, Florida Law Review, January 2001, Volume 53, No. 1. From 2001 to 2008, Sally worked as in-house counsel for OU, representing various departments and organizations including Student Affairs, OU Police Department, Sam Nobel Museum, Alumni Affairs, Development, Housing and Food Services, and the University Outreach, among numerous others. She is currently the managing member of The Mortgage Law Firm, PLLC, in Oklahoma, and is licensed in Oklahoma, Texas, and Arizona. Her work includes motion practice, non-jury and jury trial work, and appellate practice. She is also the Firm's Client Relations and Marketing Liaison, working closing with clients to ensure excellent service and communication. In addition to firm work, she has consulted with local law firms to provide system efficiency and managerial advice. She is a graduate of the Stagen Leadership Academy Integral Leadership Program, and was awarded Black Belt recognition for her work in communication, influence, and motivation. She serves on the board of directors for the USFN and for Savannah's Station Therapeutic Riding Program, an organization providing horse riding therapy for children with special needs (savannahstation.org).

Steven Hurley, Esq.
Padgett Law Group
6267 Old Water Oak Rd., Ste. 203
Tallahassee, FL 32312
Phone: 850-422-2520, Ext. 7092
Steven.Hurley@Padgettlawgroup.com

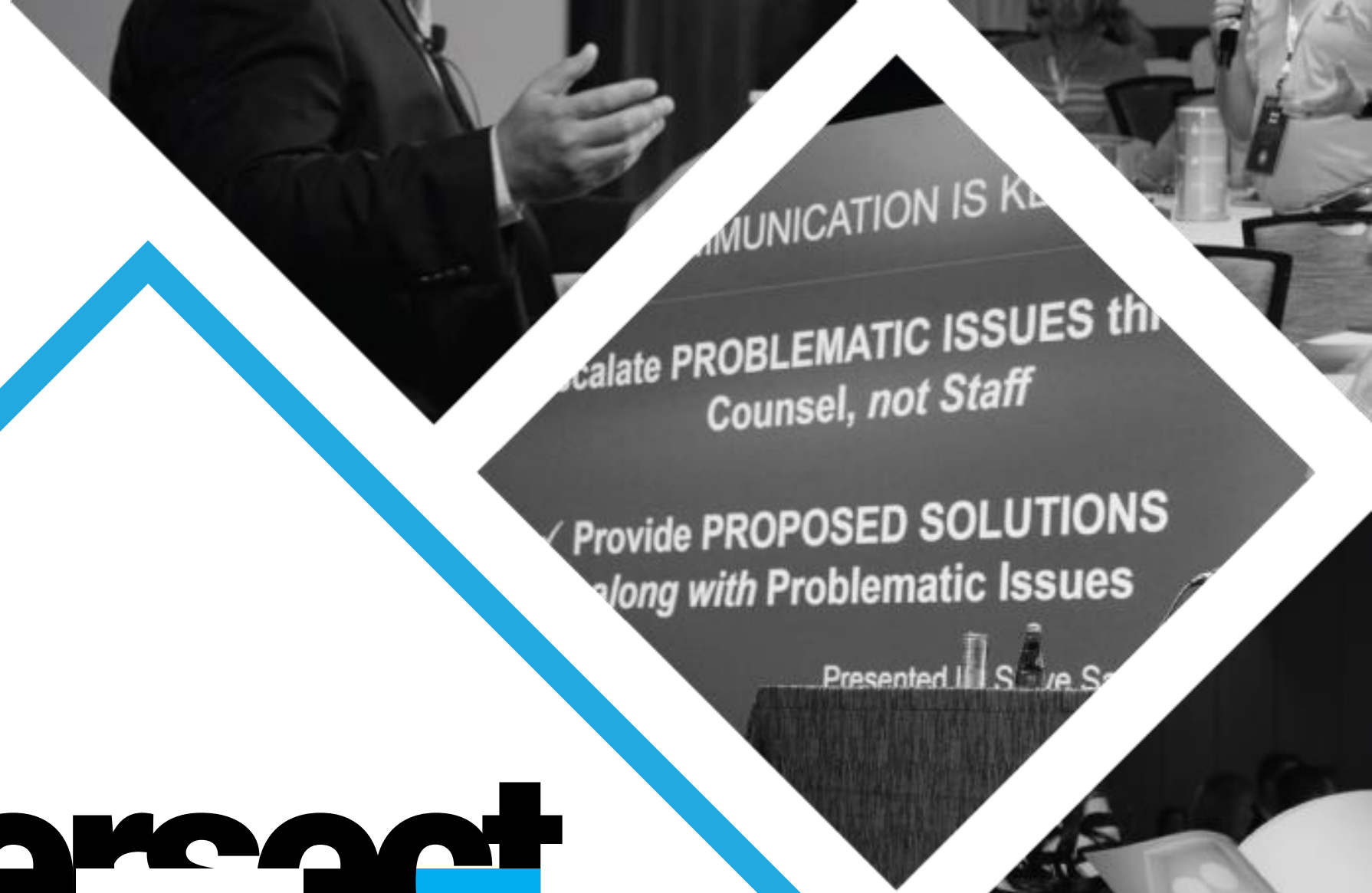
Steven Hurley is the Supervising Attorney of Florida for the Padgett Law Group. His practice focuses on foreclosure and commercial litigation with a concentration in the areas of real estate and creditors' rights. Mr. Hurley handles bank and lender

representations, including loan servicing and default-related legal services ranging from loss mitigation to foreclosure, evictions, and litigation. Steven recently served as a contributing attorney on a Supreme Court Amicus Brief on behalf of PLG. Prior to joining the Padgett Law Group, he was an associate attorney with a national law firm specializing in default legal services.

Mr. Hurley received his Juris Doctor from Nova Southeastern University, Shepard Broad Law Center, Fort Lauderdale, Florida, and Bachelor of Arts and Sciences from Florida State University, graduating with a major in political science. He is licensed to practice law in Florida; he is a member of The Florida Bar and is also admitted in the U.S. District Court for the Southern District of Florida. He is a member of the Real Property, Probate, and Trust Law section of the Florida Bar.

He is a proud supporter of the Big Brothers Big Sisters Program, and was a recipient of the Big Brother of the Year in Broward County, Florida.

ALFN AMERICAN LEGAL & FINANCIAL NETWORK



intersect

servicing + foreclosure

TOP 10 TRENDS IN FORECLOSURE LITIGATION AND LEGISLATION

intersect

BREAKOUT SESSION 6
CASE LAW & LEGISLATION

Melody 2-3

Time 12:15-1:15

INTERSECT | PRESENTERS

Moderator

Deanne R. Stodden
Partner
Messner Reeves, LLP
dstodden@Messner.com

Speaker

Casper J. Rankin
Partner
Aldridge Pite, LLP
crankin@aldridgepite.com

Speaker

Sally Garrison
Managing Member
The Mortgage Law Firm
Sally.garrison@mtglawfirm.com

Speaker

Steven G. Hurley
Supervising Attorney - Florida
Padgett Law Group
Steven.hurley@padgettlawgroup.com


THINGS THAT SOUND COOL
WHEN SAID BY SNOOP DOGG
8. "LET

TOP 10 TRENDS IN FORECLOSURE LITIGATION AND LEGISLATION

10. STATUTES OF LIMITATION ON LOAN DOCUMENTS (aka "SOL") AND ACCELERATION

TOP 10 TRENDS IN FORECLOSURE LITIGATION AND LEGISLATION

10. STATUTES OF LIMITATION ON LOAN DOCUMENTS

9. ATTORNEYS' FEES TO THE PREVAILING PARTY (aka "Fees to the PP")

TOP 10 TRENDS IN FORECLOSURE LITIGATION AND LEGISLATION

10. STATUTES OF LIMITATION ON LOAN DOCUMENTS AND ACCELERATION

9. ATTORNEYS' FEES TO THE PREVAILING PARTY

8. DEMAND LETTERS (aka "Demands")

TOP 10 TRENDS IN FORECLOSURE LITIGATION AND LEGISLATION

10. STATUTES OF LIMITATION ON LOAN DOCUMENTS AND ACCELERATION

9. ATTORNEYS' FEES TO THE PREVAILING PARTY

8. DEMAND LETTERS

7. FLORIDA LEGISLATION (aka SB 220)

TOP 10 TRENDS IN FORECLOSURE LITIGATION AND LEGISLATION

10. STATUTES OF LIMITATION ON LOAN DOCUMENTS AND ACCELERATION

9. ATTORNEYS' FEES TO THE PREVAILING PARTY

8. DEMAND LETTERS

7. FLORIDA LEGISLATION

6. CFPB UPDATES

TOP 10 TRENDS IN FORECLOSURE LITIGATION AND LEGISLATION

10. STATUTES OF LIMITATION ON LOAN DOCUMENTS AND ACCELERATION

9. ATTORNEYS' FEES TO THE PREVAILING PARTY

8. DEMAND LETTERS

7. FLORIDA LEGISLATION

6. CFPB UPDATES

5. THE CONSTITUTIONALITY OF THE CFPB – SEILA LAW

TOP 10 TRENDS IN FORECLOSURE LITIGATION AND LEGISLATION

10. STATUTES OF LIMITATION ON LOAN DOCUMENTS AND ACCELERATION
9. ATTORNEYS' FEES TO THE PREVAILING PARTY
8. DEMAND LETTERS
7. FLORIDA LEGISLATION
6. CFPB UPDATES
5. THE CONSTITUTIONALITY OF THE CFPB – SEILA LAW
4. HOUSE FINANCE COMMITTEE BILLS

TOP 10 TRENDS IN FORECLOSURE LITIGATION AND LEGISLATION

10. STATUTES OF LIMITATION ON LOAN DOCUMENTS AND ACCELERATION
9. ATTORNEYS' FEES TO THE PREVAILING PARTY
8. DEMAND LETTERS
7. FLORIDA LEGISLATION
6. CFPB UPDATES
5. THE CONSTITUTIONALITY OF THE CFPB – SEILA LAW
4. HOUSE FINANCE COMMITTEE BILLS
3. VACANT (OR NOT) PROPERTY REGISTRATION

TOP 10 TRENDS IN FORECLOSURE LITIGATION AND LEGISLATION

10. STATUTES OF LIMITATION ON LOAN DOCUMENTS AND ACCELERATION
9. ATTORNEYS' FEES TO THE PREVAILING PARTY
8. DEMAND LETTERS
7. FLORIDA LEGISLATION
6. CFPB UPDATES
5. THE CONSTITUTIONALITY OF THE CFPB – SEILA LAW
4. HOUSE FINANCE COMMITTEE BILLS
3. VACANT (OR NOT) PROPERTY REGISTRATION
2. PAYOFFS AND REINSTATEMENTS PRIOR TO SALE

TOP 10 TRENDS IN FORECLOSURE LITIGATION AND LEGISLATION

10. STATUTES OF LIMITATION ON LOAN DOCUMENTS AND ACCELERATION
9. ATTORNEYS' FEES TO THE PREVAILING PARTY
8. DEMAND LETTERS
7. FLORIDA LEGISLATION
6. CFPB UPDATES
5. THE CONSTITUTIONALITY OF THE CFPB – SEILA LAW
4. HOUSE FINANCE COMMITTEE BILLS
3. VACANT (OR NOT) PROPERTY REGISTRATION
2. PAYOFFS AND REINSTATEMENTS PRIOR TO SALE
1. THE BOARDING PROCESS FOR LOAN TRANSFERS (aka "Boarding")

CONCLUSION – Q&A

The Top 10 Reasons We Are Glad You Attended

10. We like you.
9. It was fun.
8. It was better than standing outside in the hotel lobby.
7. Candy.
6. Snoop Dogg.
5. Information = Power.
4. We can all sound cool when we say “Based upon *Seila*…”
3. We can all impress friends, co-workers and cocktail party guests with our knowledge of the Trends.
2. “SOL” comes in handy in lots of situations. (“The SOL on this conversation has expired.”)
1. Friends!

19-7 SEILA LAW LLC V. CONSUMER FINANCIAL PROTECTION BUREAU

DECISION BELOW: 923 F.3d 680

LOWER COURT CASE NUMBER: 17-56324

QUESTION PRESENTED:

Whether the vesting of substantial executive authority in the Consumer Financial Protection Bureau, an independent agency led by a single director, violates the separation of powers.

IN ADDITION TO THE QUESTION PRESENTED BY THE PETITION, THE PARTIES ARE DIRECTED TO BRIEF AND ARGUE THE FOLLOWING QUESTION: IF THE CONSUMER FINANCIAL PROTECTION BUREAU IS FOUND UNCONSTITUTIONAL ON THE BASIS OF THE SEPARATION OF POWERS, CAN 12 U.S.C. §5491(c)(3) BE SEVERED FROM THE DODD-FRANK ACT?

PAUL D. CLEMENT, ESQUIRE, OF WASHINGTON, D. C., IS INVITED TO BRIEF AND ARGUE THIS CASE, AS AMICUS CURIAE, IN SUPPORT OF THE JUDGMENT BELOW ON THE QUESTION PRESENTED BY THE PETITION.

CERT. GRANTED 10/18/2019

SB 220 — Bankruptcy Matters in Foreclosure Proceedings

by Senators Passidomo and Mayfield

This summary is provided for information only and does not represent the opinion of any Senator, Senate Officer, or Senate Office.

Prepared by: Banking and Insurance Committee (BI)

The bill allows a lienholder in a foreclosure proceeding to use documents filed in a defendant's bankruptcy case as admissions against the defendant. A mortgage foreclosure is a legal action by a lender against a debtor to force the sale of real property that secures a defaulted-upon loan. The proceeds of the sale are used to repay the debt. Often, a debtor subject to foreclosure will file for bankruptcy as a means of obtaining an automatic stay of the foreclosure action and a discharge of the mortgage debt.

In bankruptcy, a debtor must file a statement under penalty of perjury stating his or her intent to retain, redeem, or surrender any property securing a debt. The debtor is supposed to act on that decision as a condition of obtaining a discharge of his or her debts. In some cases, debtors have stated an intention to surrender real property in bankruptcy proceedings, but later have actively contested the completion of a foreclosure proceeding regarding the property in state court.

The bill allows for documents filed under a penalty of perjury in a bankruptcy case to be filed in a mortgage foreclosure proceeding as admissions against the debtor/mortgagor. The bill also creates a rebuttable presumption that a defendant has waived any defense to a foreclosure action if the lienholder submits documents filed in the defendant's bankruptcy case which:

- Evidence intention to surrender to the lienholder the property that is the subject of the foreclosure;
- Have not been withdrawn by the defendant; and
- Show that a final order that discharges the defendant's debts or confirms the defendant's repayment plan that provides for surrender of the property.

A defendant can still raise a defense based upon the lienholder's action or inaction subsequent to the filing of the document which evidenced the defendant's intent to surrender the property.

The bill also requires a court in foreclosure proceeding, upon the request of a lienholder, to take judicial notice of any order entered in a bankruptcy case.

If approved by the Governor, these provisions take effect October 1, 2018.

Vote: Senate 35-0; House 111-0

KeyCite Yellow Flag - Negative Treatment
Certiorari Granted by Seila Law LLC v. Consumer Protection Bureau, U.S., October 18, 2019

923 F.3d 680
United States Court of Appeals, Ninth Circuit.

CONSUMER FINANCIAL PROTECTION BUREAU, Petitioner-Appellee,
v.
SEILA LAW LLC, Respondent-Appellant.

No. 17-56324
|
Argued and Submitted January 8, 2019 Pasadena, California
|
Filed May 6, 2019

Synopsis
Background: Consumer Financial Protection Bureau (CFPB) filed petition to enforce civil investigative demand (CID) that it issued as part of its investigation into whether law firm violated the Telemarketing Sales Rule in the course of providing debt-relief services to its clients. The United States District Court for the Central District of California, Josephine L. Staton, J., 2017 WL 6536586, granted petition and ordered firm to comply with the CID, subject to one uncontested modification. Firm appealed.

Holdings: The Court of Appeals, Watford, Circuit Judge, held that:

[1] structure of the CFPB, which is headed by a single director who can be removed by the President only for cause, is constitutionally permissible;

[2] the CID did not violate the Consumer Financial Protection Act's practice-of-law exclusion; and

[3] the CID did not violate the provision of the Act requiring CIDs to state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation.

Affirmed.

Procedural Posture(s): On Appeal; Other.

West Headnotes (8)

[1] **Finance, Banking, and Credit**
Jurisdiction and authority

Consumer Financial Protection Act confers upon the Consumer Financial Protection Bureau (CFPB) a broad array of powers to implement and enforce federal consumer financial laws. 12 U.S.C.A. §§ 5481-5603.

[2] **Finance, Banking, and Credit**
Jurisdiction and authority

Powers of the Consumer Financial Protection Bureau (CFPB) include, among other things, the authority to promulgate rules, conduct investigations, adjudicate administrative enforcement proceedings, and file civil actions in federal court. 12 U.S.C.A. §§ 5512, 5562, 5563, 5564.

[3] **Finance, Banking, and Credit**
Officers and employees
Public Employment
Multiple decisionmakers; confirmation or other approval

Consumer Financial Protection Bureau (CFPB) is led by a single director appointed by the President with the advice and consent of the Senate. 12 U.S.C.A. § 5491(b).

1 Cases that cite this headnote

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[4] **Finance, Banking, and Credit**
Officers and employees
Public Employment
Cause in general

Director of the Consumer Financial Protection Bureau (CFPB) may be removed by the President only "for cause." 12 U.S.C.A. § 5491(c)(3).

1 Cases that cite this headnote

[5] **Constitutional Law**
Public employment
Finance, Banking, and Credit
Officers and employees
Public Employment
Cause in general

Structure of the Consumer Financial Protection Bureau (CFPB), which is headed by single director who exercises substantial executive power and may be removed by the President only for cause, is constitutionally permissible, notwithstanding separation-of-powers challenge; CFPB exercises quasi-legislative and quasi-judicial powers, it was permissible for Congress, in creating CFPB, to seek to ensure that agency discharges those responsibilities independently of the President's will, particularly in light of CFPB's role as financial regulator, which has historically been viewed as calling for a measure of independence from Executive Branch control, and for-cause removal restriction protecting director does not impede the President's ability to ensure that the laws are faithfully executed. U.S. Const. art. 3, § 1 et seq.; 12 U.S.C.A. §§ 5481-5603.

[6] **Courts**
Supreme Court decisions

Though the Supreme Court is free to revisit Supreme Court precedent, the Court of Appeals is not.

[7] **Finance, Banking, and Credit**
Investigations and examinations

Civil investigative demand (CID) issued by the Consumer Financial Protection Bureau (CFPB) as part of investigation into whether law firm violated the Telemarketing Sales Rule in the course of providing debt-relief services to its clients did not violate the Consumer Financial Protection Act's practice-of-law exclusion; exception to the practice-of-law exclusion applied to the CFPB's enforcement of the Telemarketing Sales Rule, a consumer law that does not exempt attorneys from its coverage even when they are engaged in providing legal services. 12 U.S.C.A. §§ 5517(e)(1), 5517(e)(3); 15 U.S.C.A. § 6102; 16 C.F.R. § 310.1 et seq.

[8] **Finance, Banking, and Credit**
Investigations and examinations

Civil investigative demand (CID) issued by the Consumer Financial Protection Bureau (CFPB) as part of investigation into whether law firm violated the Telemarketing Sales Rule in the course of providing debt-relief services to its clients sufficiently put firm on notice of nature of conduct investigated where agency identified the allegedly illegal conduct under investigation as "whether debt relief providers, lead generators, or other unnamed persons are engaging in unlawful acts or practices in the advertising, marketing, or sale of debt relief services or products, including but not limited to debt negotiation, debt elimination, debt settlement, and credit counseling," and then specified the sections of the Consumer Financial Protection Act applicable to the alleged violations. 12 U.S.C.A. §§ 5481, 5531, 5536, 5562(c)(2); 16 C.F.R. § 310.1 et seq.

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Attorneys and Law Firms

***681** Anthony Bisconti (argued) and Thomas H. Bienert Jr., Bienert Miller & Katzman PLC, San Clemente, California, for Respondent-Appellant.

Kevin E. Friedl (argued) and Christopher J. Deal, Attorneys; Steven Y. Bressler, Assistant General Counsel; John R. Coleman, Deputy General Counsel; Mary McLeod, General Counsel; Consumer Financial Protection Bureau, Washington, D.C.; for Petitioner-Appellee.

Appeal from the United States District Court for the Central District of California, Josephine L. Staton, District Judge, Presiding, D.C. No. 8:17-cv-01081-JLS-JEM

Before: Susan P. Graber and Paul J. Watford, Circuit Judges, and Jack Zouhary,* District Judge.

OPINION

WATFORD, Circuit Judge:

***682** The Consumer Financial Protection Bureau (CFPB) is investigating Seila Law LLC, a law firm that provides a wide range of legal services to its clients, including debt-relief services. The CFPB is seeking to determine whether Seila Law violated the Telemarketing Sales Rule, 16 C.F.R. pt. 310, in the course of providing debt-relief services to consumers. As part of its investigation, the CFPB issued a civil investigative demand (CID) to Seila Law that requires the firm to respond to seven interrogatories and four requests for documents. *See* 12 U.S.C. § 5562(c)(1). After Seila Law refused to comply with the CID, the CFPB filed a petition in the district court to enforce compliance. *See* § 5562(e)(1). The district court granted the petition and ordered Seila Law to comply with the CID, subject to one modification that the CFPB does not contest. Seila Law challenges the district court's order on two grounds, both of which we reject.

I

Seila Law's main argument is that the CFPB is unconstitutionally structured, thereby rendering the CID (and everything else the agency has done) unlawful. Specifically, Seila Law argues that the CFPB's structure violates the Constitution's separation of powers because the agency is headed by a single Director who exercises substantial executive power but can be removed by the President only for cause. The arguments for and against that view have been thoroughly canvassed in the majority, concurring, and dissenting opinions in *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (en banc). We see no need to re-plow the same ground here. After providing a summary of the CFPB's structure, we explain in brief why we agree with the conclusion reached by the *PHH Corp.* majority.

[1] [2]Congress created the CFPB in 2010 when it enacted the Consumer Financial Protection Act, 12 U.S.C. §§ 5481–5603. The Act confers upon the CFPB a broad array of powers to implement and enforce federal consumer financial laws, with the overarching goals of "ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive." 12 U.S.C. § 5511(a). The agency's powers include, among other things, the authority to promulgate rules (§ 5512), conduct investigations (§ 5562), adjudicate administrative enforcement proceedings (§ 5563), and file civil actions in federal court (§ 5564). Congress classified the CFPB as "an Executive agency" and chose to house it within the Federal Reserve System. § 5491(a).

[3] [4]The CFPB is led by a single Director appointed by the President with the advice and consent of the Senate. § 5491(b). The Director serves for a term of five years that may be extended until a successor has been appointed and confirmed. § 5491(c)(1)–(2). The Director may be removed by the President only for "inefficiency, neglect of duty, or malfeasance in office." § 5491(c)(3). A provision of this sort is commonly referred to as a "for cause" restriction on the President's removal authority.

***683** [5]Seila Law contends that an agency with the CFPB's broad law-enforcement powers may not be

headed by a single Director removable by the President only for cause. That argument is not without force. The Director exercises substantial executive power similar to the power exercised by heads of Executive Branch departments, at least some of whom, it has long been assumed, must be removable by the President at will. The Supreme Court's separation-of-powers decisions, in particular *Humphrey's Executor v. United States*, 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611 (1935), and *Morrison v. Olson*, 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988), nonetheless lead us to conclude that the CFPB's structure is constitutionally permissible.

In *Humphrey's Executor*, the Court rejected a separation-of-powers challenge to the structure of the Federal Trade Commission (FTC), an agency similar in character to the CFPB. The petitioner in that case argued that the FTC's structure violates Article II of the Constitution because the agency's five Commissioners, although appointed by the President with the advice and consent of the Senate, may be removed by the President only for cause. The Court rejected that argument, relying heavily on its determination that the agency exercised mostly quasi-legislative and quasi-judicial powers, rather than purely executive powers. 295 U.S. at 628, 631–32, 55 S.Ct. 869. The Court reasoned that it was permissible for Congress to decide, "in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control." *Id.* at 629, 55 S.Ct. 869. The for-cause removal restriction at issue there, the Court concluded, was a permissible means of ensuring that the FTC's Commissioners would "maintain an attitude of independence" from the President's control. *Id.*

This reasoning, it seems to us, applies equally to the CFPB, whose Director is subject to the same for-cause removal restriction at issue in *Humphrey's Executor*. Like the FTC, the CFPB exercises quasi-legislative and quasi-judicial powers, and Congress could therefore seek to ensure that the agency discharges those responsibilities independently of the President's will. In addition, as the *PHH Corp.* majority noted, the CFPB acts in part as a financial regulator, a role that has historically been viewed as calling for a measure of independence from Executive Branch control. 881 F.3d at 91–92.

To be sure, there are differences between the CFPB and the FTC as it existed when *Humphrey's Executor* was decided in 1935. The Court's subsequent decision in *Morrison v. Olson*, however, precludes us from relying on those differences as a basis for distinguishing *Humphrey's Executor*.

The most prominent difference between the two agencies is that, while both exercise quasi-legislative and quasi-judicial powers, the CFPB possesses substantially more executive power than the FTC did back in 1935. But Congress has since conferred executive functions of similar scope upon the FTC, and the Court in *Morrison* suggested that this change in the mix of agency powers has not undermined the constitutionality of the FTC. *See Morrison*, 487 U.S. at 692 n.31, 108 S.Ct. 2597. Indeed, in *Morrison* the Court upheld the constitutionality of a for-cause removal restriction for an official exercising one of the most significant forms of executive authority: the power to investigate and prosecute criminal wrongdoing. And more recently, in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 130 S.Ct. 3138, 177 L.Ed.2d 706 (2010), the Court left undisturbed a ***684** for-cause removal restriction for Commissioners of the Securities and Exchange Commission, who are charged with overseeing a board that exercises "significant executive power." *Id.* at 514, 130 S.Ct. 3138.

The other notable difference between the two agencies is that the CFPB is headed by a single Director whereas the FTC is headed by five Commissioners. Some have found this structural difference dispositive for separation-of-powers purposes. *See PHH Corp.*, 881 F.3d at 165–66 (Kavanaugh, J., dissenting). But as the *PHH Corp.* majority noted, *see id.* at 98–99, the Supreme Court's decision in *Humphrey's Executor* did not appear to turn on the fact that the FTC was headed by five Commissioners rather than a single individual. The Court made no mention of the agency's multi-member leadership structure when analyzing the constitutional validity of the for-cause removal restriction at issue. *See Humphrey's Executor*, 295 U.S. at 626–31, 55 S.Ct. 869. And the Court's subsequent decision in *Morrison* seems to preclude drawing a constitutional distinction between multi-member and single-individual leadership structures, since the Court in that case upheld a for-cause removal restriction for a prosecutorial entity headed by a single independent counsel. 487 U.S. at 696–97, 108 S.Ct. 2597; *see PHH Corp.*, 881 F.3d at 113 (Tatel, J., concurring). As the *PHH Corp.* majority noted, if an agency's leadership is protected by a for-cause removal restriction, the President can arguably exert more effective control over the agency if it is headed by a

single individual rather than a multi-member body. *See* 881 F.3d at 97–98.

[6]In short, we view *Humphrey's Executor* and *Morrison* as controlling here. Those cases indicate that the for-cause removal restriction protecting the CFPB's Director does not "impede the President's ability to perform his constitutional duty" to ensure that the laws are faithfully executed. *Morrison*, 487 U.S. at 691, 108 S.Ct. 2597. The Supreme Court is of course free to revisit those precedents, but we are not.

II

Seila Law next argues that the CFPB lacked statutory authority to issue the CID. It asserts two separate grounds in support of this argument.

[7]First, **Seila** Law contends that the CID violates the Consumer Financial Protection Act's practice-of-law exclusion. That exclusion provides, with important exceptions, that the CFPB "may not exercise any supervisory or enforcement authority with respect to an activity engaged in by an attorney as part of the practice of law under the laws of a State in which the attorney is licensed to practice law." 12 U.S.C. § 5517(e)(1). **Seila** Law argues that the CID is invalid because it requests information related to **Seila** Law's activities in providing legal services to its clients. Specifically, the CID seeks information relevant to determining whether **Seila** Law has violated the Telemarketing Sales Rule "in the advertising, marketing, or sale of debt relief services or products, including but not limited to debt negotiation, debt elimination, debt settlement, and credit counseling."

The district court correctly held that one of the exceptions to § 5517(e)(1)'s practice-of-law exclusion applies here. Section 5517(e)(3) states: "Paragraph (1) shall not be construed so as to limit the authority of the Bureau with respect to any attorney, to the extent that such attorney is otherwise subject to any of the enumerated consumer laws or the authorities transferred under subtitle F or H." Subtitle H empowers the CFPB to enforce the Telemarketing Sales Rule, 16 C.F.R. pt. 310, a ***685** consumer law that does not exempt attorneys from its coverage even when they are engaged in providing legal services. *See* 15 U.S.C. § 6102; Telemarketing Sales Rule, 75 Fed. Reg. 48,458-01, 48,467-69 (Aug. 10, 2010). The CFPB thus has the authority to investigate whether **Seila** Law is violating the Telemarketing Sales Rule, without regard to the general practice-of-law exclusion stated in § 5517(e)(1).

[8]Second, **Seila** Law contends that the CID violates 12 U.S.C. § 5562(c)(2), which provides that "[e]ach civil investigative demand shall state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation." The CID at issue here fully complies with this provision. It identifies the allegedly illegal conduct under investigation as follows: "whether debt relief providers, lead generators, or other unnamed persons are engaging in unlawful acts or practices in the advertising, marketing, or sale of debt relief services or products, including but not limited to debt negotiation, debt elimination, debt settlement, and credit counseling." The CID also identifies the provision of law applicable to the alleged violation as "Sections 1031 and 1036 of the Consumer Financial Protection Act of 2010, 12 U.S.C. §§ 5531, 5536; 12 U.S.C. § 5481 et seq., the Telemarketing Sales Rule, 16 C.F.R. § 310.1 et seq., or any other Federal consumer financial law." That information suffices to put **Seila** Law on notice of the nature of the conduct the CFPB is investigating, and it is not so general as to raise vagueness or overbreadth concerns. *See* *United States v. Morton Salt Co.*, 338 U.S. 632, 652, 70 S.Ct. 357, 94 L.Ed. 401 (1950).

AFFIRMED.

All Citations

923 F.3d 680, 19 Cal. Daily Op. Serv. 4144, 2019 Daily Journal D.A.R. 3832

Footnotes

* The Honorable Jack Zouhary, United States District Judge for the Northern District of Ohio, sitting by designation.

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Closing General Session: Still Working Together
Melody 2-3
2:15 – 3:15 PM

The session will go through the common issues that continue to arise between servicers and attorneys and deliver solutions to ensure that both sides of the spectrum are getting what they need to ensure top performance and results. Some of the areas that be covered include but are not limited to: Scorecards, chronologies, document execution and return, witness preparation, collateral files, audits, file transfers, consolidation, special projects as well as training.

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Randall S. Miller, Randy as he is called by his friends, graduated from Michigan State University in 1987 with a B.S. in Political Science/Pre-Law. He earned his J.D. at the Detroit College of Law in 1992. After spending over a decade as a trial attorney, Randy

started his law firm, Randall S. Miller & Associates in 2002. The firm is now in the States of Colorado, Illinois, Michigan, Minnesota, Wisconsin and Wyoming. Randy is also the CEO of U.S. Default Management, a back office solutions provider, helping save servicers millions of dollars per year. His current focus is on their new Universal Attorney Audit Platform, which benefits servicers and attorneys alike. Schweitzer Title Agency, LTD is another of Randy's companies, providing national title solutions, as well as handling closing/escrow matters. He formerly sat on both the Executive Board and Executive Committee of the Association of Trial Lawyers of America, and headed its PAC Task Force. He also served on the Executive Board of the Michigan Association for Justice. As a member of the State Bar of Michigan Representative Assembly, an elected position that he held until being term limited out, he chaired its Drafting Committee where he had the ability to redraft Michigan's' attorney ethics standards

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Glen Rubin is the Managing Member of the law firm Rubin Lublin, LLC located in suburban Atlanta. The firm was founded in 2009 and currently employs 31 attorneys and has a total of 135 employees. The firm's practice is concentrated in the area of real estate law, representing several prominent lending institutions and title companies.

Mr. Rubin completed his undergraduate studies at Emory University and received his law degree from Hofstra University School of Law in 1989. He began his career in New York practicing commercial bankruptcy law and later transitioned to Georgia in 1992 where he built, and continues to manage, a successful regional mortgage default practice for his clientele in Georgia, Tennessee, Alabama and Mississippi. Mr. Rubin himself is admitted to practice law in Georgia, Tennessee, Mississippi and New York.

Mr. Rubin is AV rated by Martindale Hubbell, the highest ranking possible and voted on by his peers attesting to his professional excellence. Additionally, he has achieved national prominence as a frequent lecturer, author and speaker in his area of practice. In addition to his professional responsibilities and involvement, Rubin is currently a member of the Board of Directors for the Habitat for Humanity -Gwinnett County.

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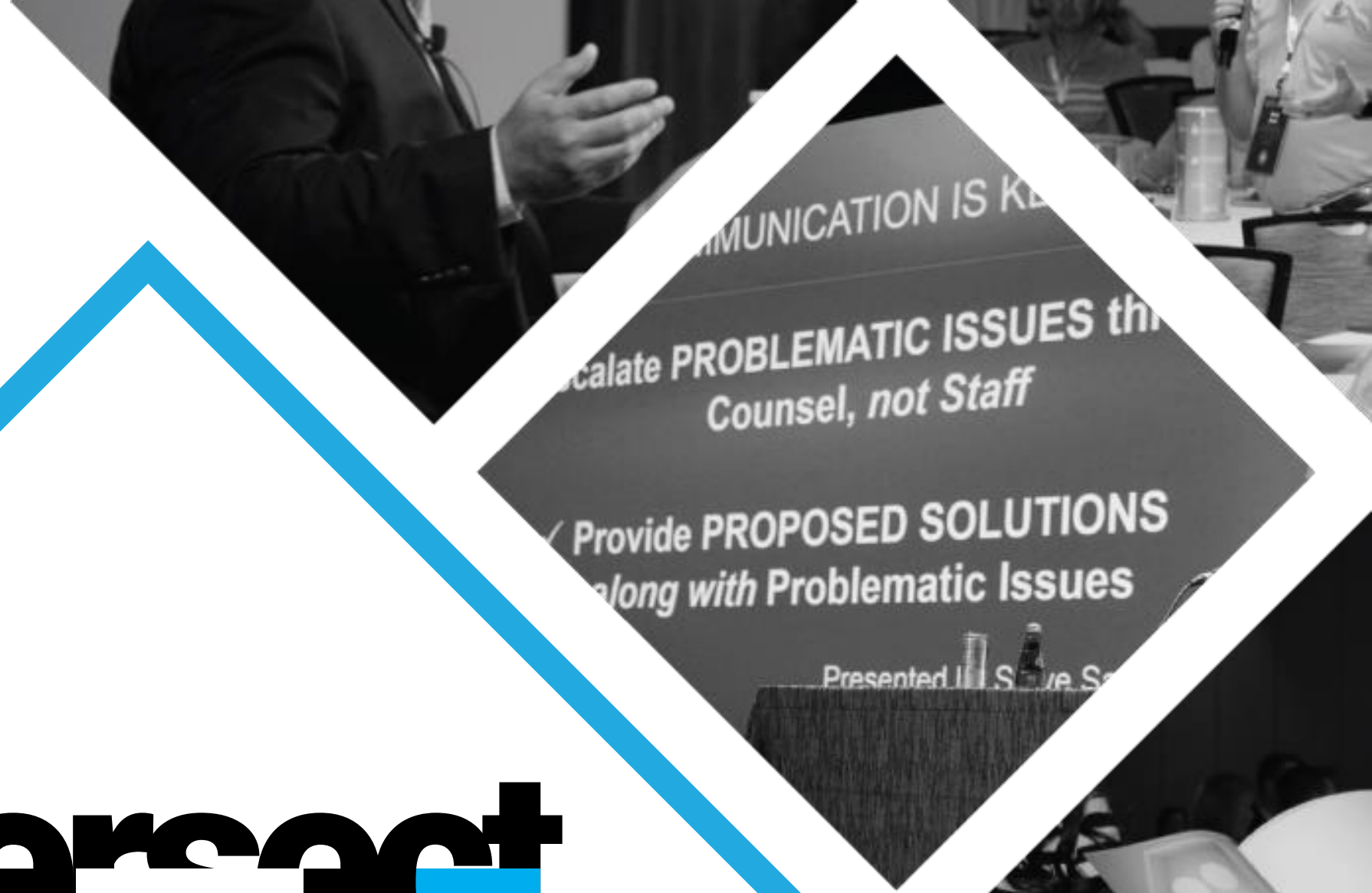

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CLOSING GENERAL SESSION

MELODY 2-3

Time 2:15 – 3:15

Still Working Together: Servicers and Attorneys

The session will go through the common issues that continue to arise between servicers and attorneys and deliver solutions to ensure that both sides of the spectrum are getting what they need to ensure top performance and results. Some of the areas that be covered include but are not limited to: Scorecards, chronologies, document execution and return, witness preparation, collateral files, audits, file transfers, consolidation, special projects as well as training.

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