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educating America's mortgage
servicing industry.*

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ALFN WEBINAR

Hindsight is 2020 - A Year in Review, Top Issues of the Past Year

*Friday, July 31, 2020
1:00 - 2:15 PM Central Time*

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Contact information for today's presenters

PRACTITIONERS. EXPERTS. ALFN WEBINAR PRESENTERS.

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REPRESENTING, DEFENDING AND EDUCATING
AMERICA'S MORTGAGE SERVICING INDUSTRY.

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Loss Mitigation in a Time of Pandemic

PAST

- **Loss Mitigation Prior to COVID-19**
 - Traditional Options
 - HAMP

PRESENT

- **Loss Mitigation under CARES Act**
 - Forbearance
 - Mitigated Defaults

FUTURE

- **A Brave New World of Loss Mitigation**
 - Loan Modifications
 - New and Improved Options



Litigation: When Holds Are Warranted

Impact of COVID-19 on court operations

- Unprecedented pandemic brought court closures
- Unprecedented pandemic highlighted technological advances
- March and April, 2020 - state executive orders and judicial administrative orders exacting partial or complete closures and cancellation or postponement of court proceedings
- All efforts directed at stopping the spread
- Court hearing by remote access



State by State Closures and Reopenings

National Center for State Courts

- <https://www.ncsc.org/newsroom/public-health-emergency>

“Since the onset of the pandemic, courts throughout the country have determined to stay open to deliver justice without faltering, no matter the adjustments and sacrifices demanded, but also to protect staff ... and the public from the risks of disease. We are learning new technology and practices together.”

**Texas Chief Justice Nathan Hecht
President of the Conference of Chief Justices
Chair of NCSC Board of Directors
Co-chair of the national Pandemic Rapid Response Team**



Pandemic Impact on Court Proceedings

- **United States' covid-19 stimulus package funds federal judges use of teleconferencing**
- **U.S. Supreme Court conducted hearings by telephone for the first time in May, 2020**
- **India's Supreme Court began hearing all cases on an app called Vidyo on March 23rd, 2020**
- **Spain held its first internet trial in May, 2020**
- **Britain's Supreme Court changed its rules to require all evidence to be submitted digitally**



Continuing Use of Remote Hearings

- **Pros**

- Legal reformers advocate for use of technology
- Cheaper and more accessible
- Easier to attend, i.e., for journalists, infinite number
- Reduce spread of virus
- Research found does not affect verdicts in non-jury cases

- **Cons**

- Technology at scale is untested
- Slow internet speeds, bad hardware and confusing software
- Threatens access to court by nefarious use of technology- change passwords



Litigation: When Holds Are Warranted

- As term of art, litigation hold refers to evidence preservation as part of records management and document retention policy and procedure
- ***Green v. Blitz U.S.A., Inc.*** (E.D. Tex. 2011), the court sanctioned defendant in products liability case when it learned, more than two years after the case had closed, that the defendant declined to issue a litigation hold and destroyed potentially relevant documents



Litigation: When Holds Are Warranted

- ***In re 3M Combat Arms Earplug Products Liability Litigation***, Case No. 3:19-MD-2885, 2020 U.S. Dist. LEXIS 48461 (N.D. Fla. Mar. 20, 2020), the court found that litigation holds are “textbook work product” – because “[u]nlike normal business activities . . . litigation hold notices are prepared because of the prospect of litigation.” *Id.* at 23. The court also adopted the majority view in assessing whether the adversary could overcome that work product protection – understandably explaining that “[t]he prevailing view is that litigation hold notices are discoverable only if there is a preliminary showing of spoliation.” *Id.* at 22.



Litigation: When Holds Are Warranted-*Conclusion*

- Pandemic presented opportunity to legal community to adapt to remote hearings
- While courts initially shut down except for essential matters, they started opening up using virtual hearings
- Based on continuing spread of virus, litigation holds will continue to occur as court systems adapt to more robust virtual hearings
- Check state or <https://www.ncsc.org>
- Review records management and document retention policy and procedure



Polling Question

To what degree has your state allowed previously litigated cases (cases contested prior to the pandemic) to continue:

- Not at all
- It depends, if judge allows virtual hearings, we can , but varies by judge
- My state is setting zoom hearings and nonjury trials, so we are set to continue virtually
- We are back at the courthouse



Litigation Trends

What trends have we seen nationwide in litigation in the past year?

- The usual suspects:
 - Standing
 - Original Note/Holder Status
 - Chain of Title/Assignment Validity
 - Loss Mitigation Procedures
 - Conditions Precedent- Contractual & Statutory
 - Proper Notice/Acceleration



Litigation Trends

What trends have we seen nationwide in litigation in the past year?

- Some old and some new:
 - State Consumer Protection Violations
 - FDCPA, FCRA, TILA, CFPB
 - Use of Subpoenas, Deposition Notices
 - Third Party Claims against current and prior servicers
 - Objections to admission of business records (current & prior servicers)



Litigation Trends

Evidentiary Challenges: Business Records

- *US Bank Trust, N.A. v. Jones*, 925 F.3d 534 (1st Cir. 2019)
 - Held: Even without testimony of a custodian or qualified witness, prior servicer records can be admitted under business record exception to hearsay if integrated into the records of the offering entity.
 - Actual Reliance
 - Accuracy
 - Reliability
 - Trustworthiness



Litigation Trends

The Progeny of US Bank Trust v. Jones

- Distinguished by: *Citibank, N.A. v. Caito*, 2019 U.S. Dist. LEXIS 219473 (December 18, 2019)
- Cited by:
 - *United States v. Gordon*, 2019 U.S. Dist. LEXIS 154713 (September 11, 2019)
 - *Jenzack v. Stoneridge Assocs., LLC*, 334 Conn. 374 (January 14, 2020)



Litigation Trends

Recent Victory in Admission of Business Records:

- *Jackson v. Household Fin. Corp. III*, 2020 Fla. LEXIS 1137 (July 2, 2020)
 - 25-year employee and officer was qualified witness
 - Additional foundational testimony was not needed because witness laid proper predicate for admission under business record exception to hearsay
- Amicus Brief filed by ALFN



Polling Question

Which do you think will generate more litigation:

- Failure to grant CARES forbearance when requested
- Grant of CARES forbearance when none requested
- Both equal



NEW YORK MORTGAGE FORECLOSURE ACTIONS STANDING TO SUE: NEW LIFE TO AN OLD DEFENSE

I. STANDING:

When action commenced, Plaintiff is either:

- Holder of the underlying note;
- Assignee of the note under written assignment instrument; or
- Servicing Agent for holder or assignee of note



NEW YORK MORTGAGE FORECLOSURE ACTIONS STANDING TO SUE: NEW LIFE TO AN OLD DEFENSE

II. OBJECTION TO STANDING:

A. Before December 23, 2019:

- Waived unless raised in:
 - Answer to the Complaint; or
 - Pre-Answer Motion to Dismiss



NEW YORK MORTGAGE FORECLOSURE ACTIONS STANDING TO SUE: NEW LIFE TO AN OLD DEFENSE

II. OBJECTION TO STANDING:

B. On and After December 23, 2019:

- Not Waived if not asserted in answer or pre-answer motion to dismiss;
- May be asserted by an appearing party at any time before the foreclosure sale; and
- May be asserted by a defaulting party at any time before or after the foreclosure sale.



NEW YORK MORTGAGE FORECLOSURE ACTIONS STANDING TO SUE: NEW LIFE TO AN OLD DEFENSE

III. RPAPL 1302-a PROBLEMS:

A. DELAY resulting from:

- Motions to Amend Answer (by movant whose answer does not include standing defense)
- Motions to Renew (by movant who lost standing argument on account of waiver)
- Motions to stay sale (by movant who defaulted and now asserts lack of standing)



NEW YORK MORTGAGE FORECLOSURE ACTIONS STANDING TO SUE: NEW LIFE TO AN OLD DEFENSE

III. RPAPL 1302-a PROBLEMS:

B. CLOUD ON TITLE resulting from:

- REO Title Insurance Coverage Exclusion
- “Policy will except rights of the defendants in foreclosure action, _____ v. _____, Supreme Court of _____, Index number _____, pursuant to RPAPL Section 1302-a”



NEW YORK MORTGAGE FORECLOSURE ACTIONS STANDING TO SUE: NEW LIFE TO AN OLD DEFENSE

IV. BEST PRACTICES

A. Increase Due Diligence in Pleadings & Motion Practice:

- Proof of Standing should be obvious and apparent from the filed pleadings and papers in the foreclosure action.
- Affidavit of Merit should be supported with properly authenticated business records which establish the elements of standing. Conclusory assertions of standing should be avoided.



NEW YORK MORTGAGE FORECLOSURE ACTIONS STANDING TO SUE: NEW LIFE TO AN OLD DEFENSE

IV. BEST PRACTICES

A. Increase Due Diligence in Pleadings & Motion Practice:

- Consider giving defaulted parties notice of motions for Order of Reference and Final Judgment
- Include a specific determination of plaintiff's standing in the Order of Reference and Final Judgment if permitted by the court



NEW YORK MORTGAGE FORECLOSURE ACTIONS STANDING TO SUE: NEW LIFE TO AN OLD DEFENSE

IV. BEST PRACTICES

B. Anticipate & Prepare for REO Sale Title Objection

- Consider executing additional standing affidavit during foreclosure action to be delivered to REO Department following completion of foreclosure.

QUERY: Should the affidavit come from the servicer or the attorney?



THEY CAN'T DO THAT, CAN THEY?



CHALLENGES TO STATE GOVERNMENT-IMPOSED MORATORIA ON EVICTIONS AND FORECLOSURES

*PRESENTED BY JAMES V. NOONAN
NOONAN & LIEBERMAN, LTD.*



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Overview

- Background.
- Are the Moratoria Allowed Under the State Law?
- Venue: Federal or State Court?
- Constitutional Law Theories.



Background

Background

Eviction Moratoria

The federal eviction moratoria under the CARES Act expired on July 24, 2020.

However, on June 17, 2020, Fannie Mae and Freddie Mac extended their “single-family moratorium on foreclosures and evictions until at least August 31, 2020.”

Since the Pandemic began, 38 states have enacted laws or imposed moratoria preventing landlords from either the serving of notice or eviction, the commencement of an eviction action, or the enforcement of an order of eviction against a non-paying tenant.



Background

Foreclosure Moratoria

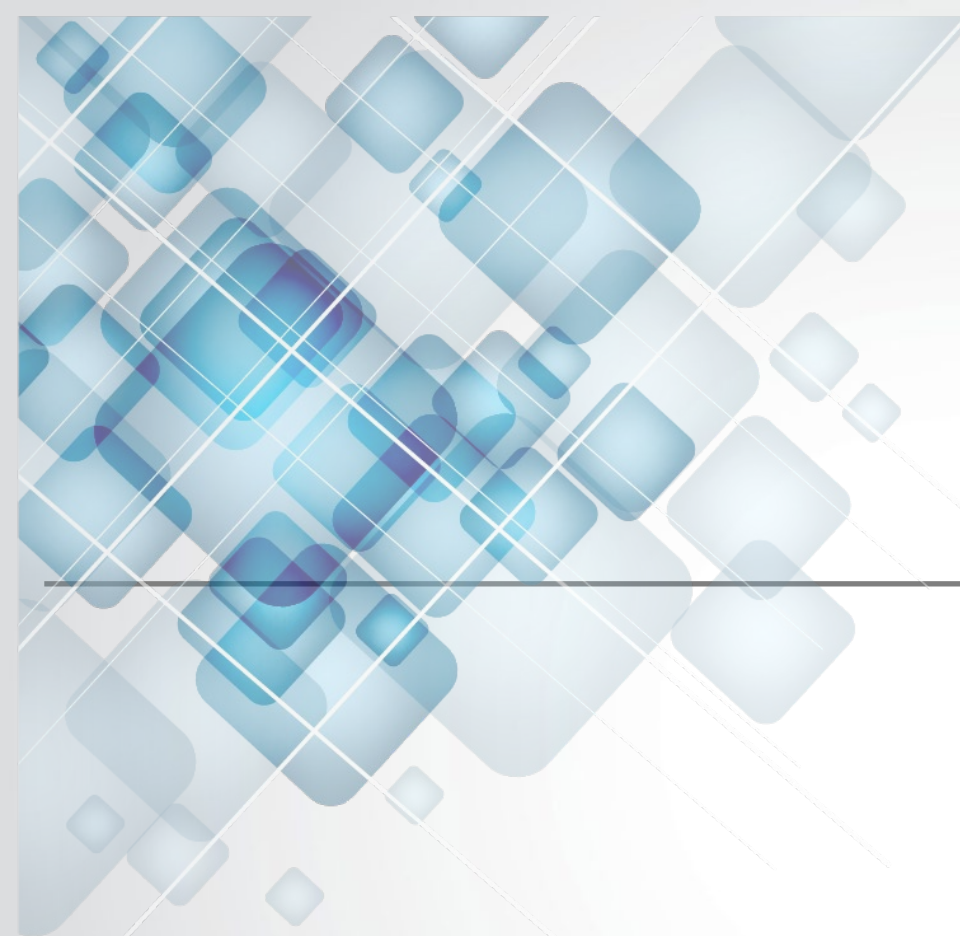
The Department of Housing and Urban Development (HUD)'s Federal Housing Administration (FHA), the Department of Veterans Affairs (VA), and the Department of Agriculture (USDA)'s Rural Development Department, and two federal enterprises who purchase and securitize mortgages, Fannie Mae and Freddie Mac (collectively "Agencies"), extended their moratoriums on foreclosures of federally backed mortgage loans through August 31, 2020.

Since the pandemic began, 31 states, through executive actions or court orders, have imposed foreclosure moratoria or mandated forbearances on defaulted loans.

Many of these may have expired or been modified. A challenge on the enforceability or constitutionality of the laws may therefore be moot.

<https://www.nclc.org/issues/foreclosures-and-mortgages/covid-19-state-foreclosure-moratoriums-and-stays.html>





Are the Moratoria Allowed Under the State Law?

Are the Moratoria Allowed Under the State Law?

Who made the law? The Governor, the Legislature, or the Courts?

Was it imposed by executive order, legislative act, or court order?

Most, if not all, of the state moratoria associated with COVID-19 are edicts from the Governor or judicial administrative orders.

Case law: *Block v. Hirsh*, 256 U.S. 135 (1921); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934); *Federal Land Bank of Wichita v. Bott*, 240 Kan. 624 (1987); *Federal Land Bank of Omaha v. Arnold*, 426 N.W.2d 153 (Iowa 1988); *Federal Land Bank of Wichita v. Story*, 1988 OK 52.





Venue: Federal or State Court?

Venue: Federal or State Court?

The answer largely depends on the claims advanced. If any part of the suit challenges the action of the state, the Eleventh Amendment of the U.S. Constitution shields them from state law claims where they assert sovereign immunity. U.S. Const. amend. XI. The only exception is that a federal court may intervene when a state official may be said to act *ultra vires*, meaning that he or she acts without any authority whatever.

Case Law: *Cassell v. Snyders*, 2020 WL 2112374 (N.D. Ill. May 3, 2020); *Elmsford Apartment Assocs., LLC v. Cuomo*, 2020 WL 3498456 (S.D.N.Y. June 29, 2020); *Sixth Street Business Partners, v. Abbott*, 2020 WL 4274589 (W.D. Tex. July 24, 2020); *Didier v. Inslee*, 2020 WL 4277345 (W.D. Wash. July 24, 2020).





Constitutional Law Theories

Constitutional Law Theories

Most, if not all, of the litigation challenging state responses to the Pandemic involves constitutional issues.

The Supreme Court has recognized that “a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.” *Jacobson v. Commonwealth of Mass.*, 197 U.S. 11 (1905). During an epidemic, the traditional tiers of constitutional scrutiny do not apply. Under those narrow circumstances, courts only overturn rules that lack a “real or substantial relation to [public health]” or that amount to “plain, palpable invasion[s] of rights.” *Jacobson*, 197 U.S. at 31.



Constitutional Law Theories

While much state constitutional jurisprudence is in lockstep with federal constitutional jurisprudence, many state constitutions differ substantially from the U.S. Constitution

Case Law: *Ney v. Yellow Cab Co.*, 2 Ill. 2d 74, 84, 117 N.E.2d 74 (1954); *Brown v City of Michigan City*, 462 F.3d 720 (7th Cir. 2006); *Armster v. U.S. Dist. Court for the Cent. Dist. of California*, 792 F.2d 1423 (9th Cir. 1986).



Constitutional Law Theories

Separation of Powers

Each branch has separate powers, and generally each branch is not allowed to exercise the powers of the other branches. The Legislative Branch exercises congressional power, the Executive Branch exercises executive power, and the Judicial Branch exercises judicial review.

Case Law: *East N.Y. Savings Bank v. Hahn*, 326 U.S. 230 (1945); *Gregory Real Estate v. Miles M. Keegan*, CV 2020-007629 (Maricopa County, July 22, 2020); *Oakland State Bank v. Bolin*, 141 Kan. 126, (1935); *Lingo Lumber Co. v. Hayes*, 64 S.W.2d 835 (Tex. Civ. App. 1933); *Levy Plumbing Co. v. Standard Sanitary Mfg. Co.*, 68 S.W.2d 273 (Tex. Civ. App. 1933).



Constitutional Law Theories

Equal Protection Clause

Article 14 of the U.S. Constitution provides that “No state shall ... deny to any person within its jurisdiction the equal protection of the laws.” This provision, known as the Equal Protection Clause requires that the government treat similarly situated individuals in a similar fashion, unless the government can demonstrate an appropriate reason to treat them differently.

Case Law: *ACA Int'l v. Healey*, 2020 WL 2198366, at *3 (D. Mass. May 6, 2020); *Federal Land Bank of Wichita v. Bott*, 240 Kan. 624 (1987); *Federal Land Bank of Omaha v. Arnold*, 426 N.W.2d 153 (Iowa 1988); *Federal Land Bank of Wichita v. Story*, 1988 OK 52.



Constitutional Law Theories

Contract Clause

Article I, section 10 of the U.S. Constitution provides that “No state shall ... pass any ... law impairing the obligation of contracts.”

Case Law: *Block v. Hirsh*, 256 U.S. 135 (1921); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934); *Elmsford Apartment Assocs., LLC v. Cuomo*, WL 3498456 (S.D.N.Y. June 29, 2020); *Chicago Bd. of Realtors, Inc. v. City of Chicago*, 819 F.2d 732, 735–37 (7th Cir. 1987); *Federal Land Bank of Wichita v. Bott*, 240 Kan. 624 (1987); *Federal Land Bank of Omaha v. Arnold*, 426 N.W.2d 153 (Iowa 1988); *Federal Land Bank of Wichita v. Story*, 1988 OK 52.



Constitutional Law Theories

Right to Petition the Government

The right to petition for a redress of grievances in the form of judicial relief is protected by the First Amendment.

Case Law: *Christopher v. Harbury*, 536 U.S. 403 (2002); *Elmsford Apartment Assocs., LLC v. Cuomo*, WL 3498456 (S.D.N.Y. June 29, 2020); *ACA International v. Healey*, 2020 WL 2198366 (D. Mass. May 6, 2020).



Constitutional Law Theories

Right to Trial by Jury

The Seventh Amendment of the U.S. Constitution provides that “[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.”

Case Law: *Block v. Hirsh*, 256 U.S. 135 (1921); *Armster v. U.S. Dist. Court for Cent. Dist. of California*, 806 F.2d 1347 (9th Cir. 1986); *First Nat. Bank of Olathe v. Clark*, 226 Kan. 619, 622, 602 P.2d 1299, 1302 (1979); *Vermont Supreme Court Admin. Directive No. 17 v. Vermont Supreme Court*, 154 Vt. 392, 579 A.2d 1036 (1990); *Odden v. O'Keefe*, 450 N.W.2d 707 (N.D. 1990).



Constitutional Law Theories

Takings Clause

The Takings Clause of the Fifth Amendment provides that no “private property shall be taken for public use, without just compensation.” U.S. Const. Amend. V. The clause applies to the states through the Fourteenth Amendment.

Case Law: *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Elmsford Apartment Assocs., LLC v. Cuomo*, WL 3498456 (S.D.N.Y. June 29, 2020).



Constitutional Law Theories

Due Process Clause

The Fourteenth Amendment of the U.S. Constitution's "procedural due process" clause concerns the procedures that the government must follow before it deprives an individual of life, liberty, or property. Due process requires, at a minimum: (1) notice; (2) an opportunity to be heard; and (3) an impartial tribunal.

Case Law: Chicago Bd. of Realtors, Inc. v. City of Chicago, 819 F.2d 732 (7th Cir. 1987); *Elmsford Apartment Assocs., LLC v. Cuomo*, WL 3498456 (S.D.N.Y. June 29, 2020).



Polling Question

If your state was one of the 38 states that imposed statewide foreclosure and eviction moratoria in March of this year, is the ban still in place?

- Yes
- No



THEY CAN'T DO THAT, CAN THEY?



CHALLENGES TO STATE GOVERNMENT-IMPOSED MORATORIA ON EVICTIONS AND FORECLOSURES

*PRESENTED BY JAMES V. NOONAN
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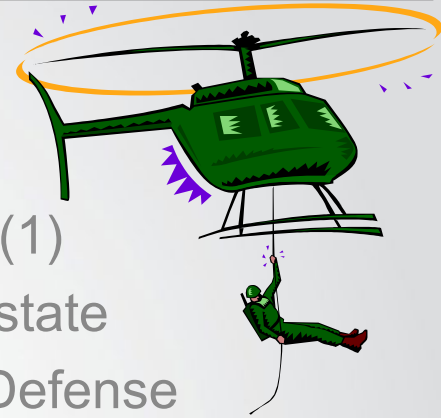
Servicemembers Civil Relief Act



Servicemembers Civil Relief Act of 2003 (“SCRA”) - Public Law 109-189 (50 USC App. 501-596), which amended the Soldier’s and Sailor’ Civil Relief Act of 1940 (“SSCRA”)

Persons Protected

- Members of the Army, Navy, Air Force, Marine Corps, and Coast Guard on active duty under 10 U.S.C. 101(d)(1)
- Members of the National Guard who are under a call to state active duty authorized by the President or Secretary of Defense for a period of more than 30 consecutive days under section 502(f) of Title 32, United States Code, for purposes of responding to a national emergency declared by the President and supported by Federal Funds.
- The commissioned corps of the National Oceanic and Atmospheric Administration and the Public Health Service
- Citizens of the US serving with forces of an allied nation in the prosecution of a war or military action
- Dependents of servicemembers and persons secondarily liable who are also covered in some cases

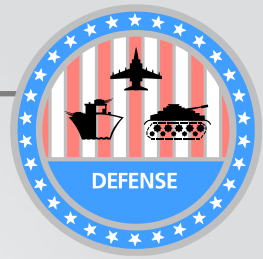


Period of Protection

- Generally for the period of military service and shortly thereafter
- The Economic Growth, Regulatory Relief, and Consumer Protection Act ([S. 2155](#)), however, which President Trump signed on May 24, 2018, eliminates the sunset date and makes the one-year period during which a servicemember is protected from foreclosure after military service permanent. Effective date: May 24, 2018
- For reservists and guardsmen ordered to report for military service and inductees, protection begins on the date that the servicemember is ordered to report.



Operational Reserve Forces



- Since the end of the Cold War National Guard and reserve forces have been transformed from a strategic to an operational force because of the demands of U.S. Military involvement in Somalia, Bosnia, Kosovo and-most significantly-Afghanistan and Iraq.
- Over 800,000 reservists have been mobilized since September 11, 2001. Half of all Army reserve component soldiers are combat veterans. One fifth of all casualties in Afghanistan and Iraq are reserve component soldiers.
- The Department of Defense has embraced a “Total Force Objective.” War planning is done with an eye towards National Guard and Reserve contribution at all levels.
- The National Guard and Army Reserve force combined is larger than the Active Army. The National Guard’s Title 10 mission is focused on “combat arms” with the majority of the Guard force composed of infantry, combat engineers and aviation elements.
- The National Guard also fills the role of “Homeland Security” under Title 32. Only National Guardsmen can operate legally in the United States to enforce civilian laws. The examples we have seen in Louisiana include Hurricanes, Katrina, Ike, Gustav and Isaac as well as the Deep Water Horizon Oil Spill and Operation River Guardian. If Guardsmen are mobilized under Article 502(f) of Title 32 for more than 30 days in response to a national emergency declared by the President, the SCRA applies. The SCRA applied for Katrina but not Isaac.



Identifying a Servicemember

- The Department of Defense maintains a web-site that allows anyone to access, free of charge, to determine if a person is a soldier and their duty status. The site identifies the start date of orders to service and the end date.

www.dmdc.osd.mil



- The site requires the name and social security number of the person whose service data you are seeking.
- If the information on an individual is readily available, I recommend running them through the database and printing out the document which verifies that they are not on active duty.



COVID-19 SCRA Eligibility



- Since March of 2020 the Army and Air National Guard has deployed 45,000 to 55,000 soldiers in response to Covid-19.
- The vast majority of soldiers have been mobilized pursuant to Title 32 (502)f.
- The majority of mobilization orders exceed 30 days.

Example of Eligible Orders

Request for Military Status

Page 1 of 2

Department of Defense Manpower Data Center

Apr-12-2011 13:37:06



Military Status Report
Pursuant to the Service Members Civil Relief Act

< Last Name	First/Middle	Begin Date	Active Duty Status	Active Duty End Date	Service Agency
		Nov-13-2010	Yes	NA	Army

Upon searching the information data banks of the Department of Defense Manpower Data Center, based on the information that you provided, the above is the current status of the individual as to all branches of the Uniformed Services (Army, Navy, Marine Corps, Air Force, NOAA, Public Health, and Coast Guard).

Mary M. Snavely-Dixon

Mary M. Snavely-Dixon, Director
Department of Defense - Manpower Data Center
1600 Wilson Blvd., Suite 400
Arlington, VA 22209-2593

The Defense Manpower Data Center (DMDC) is an organization of the Department of Defense that maintains the Defense Enrollment and Eligibility Reporting System (DEERS) database which is the official source of data on eligibility for military medical care and other eligibility systems.

The DoD strongly supports the enforcement of the Service Members Civil Relief Act (50 USC App. §§ 501 et seq, as amended) (SCRA) (formerly known as the Soldiers' and Sailors' Civil Relief Act of 1940). DMDC has issued hundreds of thousands of "does not possess any information indicating that the individual is currently on active duty" responses, and has experienced a small error rate. In the event the individual referenced above, or any family member, friend, or representative asserts in any manner that the individual is on active duty, or is otherwise entitled to the protections of the SCRA, you are strongly encouraged to obtain further verification of the person's status by contacting that person's Service via the "defenselink.mil" URL http://www.defenselink.mil/fac/pis/PC09SI_DR.html. If you have evidence the person is on active duty and you fail to obtain this additional Service verification, punitive provisions of the SCRA may be invoked against you. See 50 USC App. §521(c).

If you obtain additional information about the person (e.g., an SSN, improved accuracy of DOB, a middle name), you can submit your request again at this Web site and we will provide a new certificate for that query.

This response reflects **active duty status** including date the individual was last on active duty, if it was within the preceding 367 days. For historical information, please contact the Service SCRA points-of-contact.

More Information on "Active Duty Status"

Active duty status as reported in this certificate is defined in accordance with 10 USC § 101(d)(1) for a period of more than 30 consecutive days. In the case of a member of the National Guard, includes service under a call to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days under 32 USC § 502(f) for purposes of responding to a national emergency declared by the President and supported

<https://www.dmdc.osd.mil/appj/scra/popreport.do>

4/12/2011

Request for Military Status

Page 2 of 2

by Federal funds. All Active Guard Reserve (AGR) members must be assigned against an authorized mobilization position in the unit they support. This includes Navy TARs, Marine Corps ARs and Coast Guard RPAs. Active Duty status also applies to a Uniformed Service member who is an active duty commissioned officer of the U.S. Public Health Service or the National Oceanic and Atmospheric Administration (NOAA Commissioned Corps) for a period of more than 30 consecutive days.

Coverage Under the SCRA is Broader in Some Cases

Coverage under the SCRA is broader in some cases and includes some categories of persons on active duty for purposes of the SCRA who would not be reported as on Active Duty under this certificate.

Many times orders are amended to extend the period of active duty, which would extend SCRA protections. Persons seeking to rely on this website certification should check to make sure the orders on which SCRA protections are based have not been amended to extend the inclusive dates of service. Furthermore, some protections of the SCRA may extend to persons who have received orders to report for active duty or to be inducted, but who have not actually begun active duty or actually reported for induction. The Last Date on Active Duty entry is important because a number of protections of SCRA extend beyond the last dates of active duty.

Those who would rely on this certificate are urged to seek qualified legal counsel to ensure that all rights guaranteed to Service members under the SCRA are protected.

WARNING: This certificate was provided based on a name and SSN provided by the requester. Providing an erroneous name or SSN will cause an erroneous certificate to be provided.
Report ID:SVN0T61A8

<https://www.dmdc.osd.mil/appj/scra/popreport.do>

4/12/2011

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Example of Eligible Orders

3/22/2011 10:52:47 AM From:
Mar 22 11 09:01a

To:

Page: 4

p. 4

DEPARTMENTS OF THE ARMY AND THE AIR FORCE
JOINT FORCE HEADQUARTERS - LOUISIANA
OFFICE OF THE ADJUTANT GENERAL
CAMP BEAUREGARD, PINEVILLE, LA 71360

ORDERS 264-070

21 September 2010

Following order is amended as indicated.

So much of: Orders 156093 this Hq dtd 05 June 2010

Pertaining to:

ADSW for
(TQ3T0-34A) 3102 MCDONALD AVE

HSC 527 ENGR BN
RUSTON LA 71270

As reads: 2nd Amendment

Period (TDY): 03 June 2010 - 28 September 2010

How changed: 1st Amended to Read: (3rd Amendment)

Period (TDY): 03 June 2010 - 28 October 2010

Auth: Title 32 USC 502 (F)

APC DJMS_RC: 18GE33 PM/TDC; PS0 K33 DEEPWATER HORIZON OIL SPILL

Format: 700 *

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CW5, AG, LAARNG
CHIEF, SUPPORT SERVICES DIVISION

Example of Eligible Orders

3/22/2011 10:52:47 AM From:
Mar 22 11 09:03a

To:

Page: 10

p. 10

DEPARTMENTS OF THE ARMY AND THE AIR FORCE
JOINT FORCE HEADQUARTERS - LOUISIANA
OFFICE OF THE ADJUTANT GENERAL
CAMP BEAUREGARD, PINEVILLE, LA 71360

ORDERS 338-214

04 December 2010

Following order is amended as indicated.

So much of: Orders 320015 this Hq dtd 16 November 2010

Pertaining to:

ADSW for
(TQ3T0-34A) 3102 MCDONALD AVE

SSG HSC 527 ENGR BN
RUSTON LA 71270

As reads: Period (TDY): 13 November 2010 - 31 December 2010

How changed: Amended to Read: (1st Amendment)

Period (TDY): 13 November 2010 - 31 March 2011

Auth: Title 10, USC 12301(d) - NGB Directed Tours

APC DJMS RC: C2E511 PM/TDC: 1H0 511 NGB Directed Tours

Format: 700 *

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Example of Eligible Orders

Mar 22 11 09:03a

P.11

DEPARTMENTS OF THE ARMY AND THE AIR FORCE
JOINT FORCE HEADQUARTERS - LOUISIANA
OFFICE OF THE ADJUTANT GENERAL
CAMP BEAUREGARD, PINEVILLE, LA 71360

ORDERS 320-015

16 November 2010

(TQ3T0-34A) 3102 MCDONALD AVE

3 HSC 527 ENGR BN
RUSTON LA

71270

You are ordered to Active Duty for Operational Support - Reserve Component (ADOS-RC) for the period shown plus allowable travel time. Upon completion of the period of ADOS-RC unless sooner released or extended by proper authority, you will return to the place where you entered ADOS-RC and be released from such duty.

Period (TDY) : 13 November 2010 - 31 December 2010

Report to: Camp Beauregard, Pineville, LA w/further tvl to Haiti

Reporting time/date: 0700 / 13 Nov 10

Purpose: TF Bon Voison Duration Staff

Additional instructions:

- (a) Traveler does not have a Government Travel Card and must use the Centrally Billed Account to purchase transportation tickets.
- (b) Soldier must not be within six months of MRD or ETS on the report date of this tour, or have 17 years of Active Federal Service. Government meals & quarters will be utilized if available.
- (c) ADOS-RC SMS must annotate at the top of their leave request with "ADOS-RC" for finance processing. Rental car is not authorized. Do not access into the strength of the Active Army.
- (d) All soldiers reporting for ADSW in Federal Status (Title 10, USC), are subject to UCMJ Jurisdiction. (AR 135-200, paragraph 1-16).
- (e) Soldier must have a negative HIV test within two years before report date IAW 135-200. Soldier must have panoramic X-ray with CPSF acceptance statement annotated on their SF 603 before start of ADOS-RC tour.
- (f) Soldiers must have a current physical IAW AR 40-501, Chap 3 review. As long as the ARNG soldier's last physical exam is within validity of AR 40-501, Ch 8-14, and frequency of AR 40-501, Ch 8-19, this req can be met by a current physical and AMC reviewed (within 60 days) by ST Surg or designee. Soldiers age 40 and over must have cardiovascular screening IAW AR 40-501. Med condition w/3 or 4 in PULHES must be retained by MMRB prior to entry.
- (g) Involuntary release from active duty for exceeding height/weight standards when inprocessing for ADOS: All soldiers will be checked for AR 600-9 standards (height/weight) upon reporting for ADOS tours. A soldier who reports over weight will be immediately released from duty and returned to his/her home state. "IN ADDITION, A MESSAGE WILL BE SENT TO SM'S CDR, THROUGH CMD CHANNELS, CITING REASONS FOR TERMINATION OF TOUR."
- (h) Soldier must understand that his/her Active Duty Operational Support - Reserve Component Short tour does not constitute entry into the Title 10 AGR Long Program. SM must further understand that he or she may not be retained on active duty after tour end date, but will return to home of record on or about that date.

Example of Eligible Orders

3/22/2011 10:52:47 AM From:
Mar 22 11 09:04a Wendell Betts

To: 3185124071

Page: 12
p. 12

ORDERS 320-015 HQ LA NG, OTAG, 16 November 2010

Additional instructions (cont):

- (i) You are not authorized movement of your dependents and household goods at Government expense.
- (j) Soldier must understand that he or she will not be retained on active duty to complete 20 years of Active Federal Service for retirement purposes, if 18 or more years of Active Federal Service are completed while serving on this tour.
- (k) Orders issued by NGLA-JOP.
- (l) FY11 Funding availability is contingent on Congress enacting appropriation or authorizing operations under a continuing resolution.

FOR ARMY USE

Auth: Title 10, USC 12301(d) - NGB Directed Tours Confirms verbal orders of the Adjutant General, LA, 08 November 2010

HOR: 107 WINDRIDGE DR WEST MONROE LA71291

APC DJMS-RC: C2E511 TDC 511 NGB Directed Tours

APC STANFINS Pay: N11X APC STANFINS Travel: N11X

Acct clas:

Enl pay/alw: 2112060 18-1016 P1N31.2000-1198/1199/1210/1250 S16104 1H0 TQ3T0

Enl tvl/pd: 2112060 18-1016 P1N31.2000-21T2 S16104 1H0 TQ3T0

SRN: BET0352320015* JON/CCC: N11X37/37N11X Cost Estimate: \$ 8,434

PEBD: 991215

Federal WE: M02

State tax code: LA

Marital status / Number of dependents: M02

Type of incentive pay: NONE

Type of special pay: NONE

Sety cl: SECRET

Format: 282

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CHIEF, SUPPORT SERVICES DIVISION

Additional Missions for the National Guard during COVID-19



US Navy & US Navy Reserve Respond to COVID-19



Year in Review – *Some* Top Bankruptcy Issues

- 3002.1 Litigation – How should Servicers prepare and handle PPFNs and the litigation related to 3002.1(c)?
- Credit Reporting for BK Loans.



3002.1(c) History and Requirements

3002.1 Notices of Post-Petition Mortgage Fees and Charges (PPFNs)

- **Section (c) amended and effective 12/2011:**
 - **The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice itemizing all fees, expenses, or charges (1) that were incurred in connection with the claim after the bankruptcy case was filed, and (2) that the holder asserts are recoverable against the debtor or against the debtor's principal residence. The notice shall be served within 180 days after the date on which the fees, expenses, or charges are incurred. Fed. R. Bankr. P. 3002.1.**
 - Advisory committee guidance states the reasoning behind section c as assisting trustees and debtors in completing the final cure. Stating timely notice of these changes will permit the debtor or trustee to challenge the validity of any such charges, if necessary, and to adjust postpetition mortgage payments to cover any properly claimed adjustment. Compliance with the notice provision of the rule should also eliminate any concern on the part of the holder of the claim that informing a debtor of a change in post petition payment obligations might violate the automatic stay.
 - **Debtors have been challenging servicers on alleged violations of section c by filing Adv. Proceedings and seeking section 362 stay violations, damages and fees.**



3002.1(c) Notes of Decisions

- A number of cases were decided in 2019 relating to 3002.1(c) and courts naturally see the conduct differently in different jurisdictions.
- In *Re Gravel*, *In Re Bealulieu*, and *In Re Kinsely*, 2019 WL 2710197 (D. Vt. June 27, 2019). In the consolidated cases, the servicer for all three cases was hit with \$300,000 in sanctions due to failure to file PPFNs on all three cases. The amount of the fees were less than \$500 in all three cases, yet the court determined that the conduct was so egregious to merit the sanctions.
 - How could this conduct rise to this level of sanctions? It is hard to justify, but the primary issue the court had seemed to be that the fees were assessed following a final cure, and were demanded on a mortgage statement (actually, 25 statements on each loan).
 - Possibly, the court reasoned that the servicer failed to notify the debtor or trustee of the outstanding fees, presumably preventing the debtors from truly receiving a “fresh start”.
- Other courts have been much more lenient on 3002.1 violations, assessing “actual costs” in some cases, and minor statutory damages of \$1,000 in others.
- Further, multiple jurisdictions have determined that the filing of a PPFN is a “collection activity”, so statutory damages under consumer credit codes are likely to be seen.



3002.1(c) How Should Servicers Handle?

- Obviously, PPFNs should be filed for all post-petition fees incurred.
 - Best practice, be liberal with PPFN filings and fee waivers if the cost does not justify the cost of filing the PPFN.
 - How should PPFNs be handled if the fee was assessed and paid by the debtor within the 180 day period? What if the fee does not result in a fee on the notice of final cure?
 - Should file PPFNs whether paid or not. I have seen debtor's counsel argue that application of a payment from a debtor is a stay violation and that the money applied to the late fee is property of the estate. Therefore, the late fee should be assessed and notice should be filed before applying payment to the fee.
- Most issues are seen following a request for information where the pay history is produced and analyzed by creative debtor's counsel.
 - If faced with a challenge to PPFN practices waivers of the alleged fees and payment of modest attorney fees can often resolve the case.



Other Litigation Trends Involving Bankruptcy

- **FCRA litigation about reporting on bankrupt loans.**
- **I have noticed an uptick in credit reporting suits being filed following discharge and following a NOE and RFI from debtor's counsel.**
 - The claims typically follow a credit dispute, which creates additional damages for both the creditor and the servicer if the alleged reporting error was not properly investigated.
- **What should be reported?**
 - CDIA and CRRG dictate what should be reporting and it changes frequently.
 - Most reporting issues relate to the balance on the loan. Guidance recently changed to require reporting of the outstanding loan balance v. the pre-petition arrearage balance. This is likely due to the claims where servicers were reporting \$0 for a balance if the loan was current pre-petition.
- **How should litigation be handled?**
 - Most cases settle with relative ease, so engage in early settlement negotiations. Often times the creditor will be reporting accurately and the bureaus may have been reporting incorrect information.



Polling Questions

1. When does a creditor have to file a PPFN?

1. Never
2. 30 days after incurring the fee
3. 60 days after incurring the fee
4. 180 days after incurring the fee

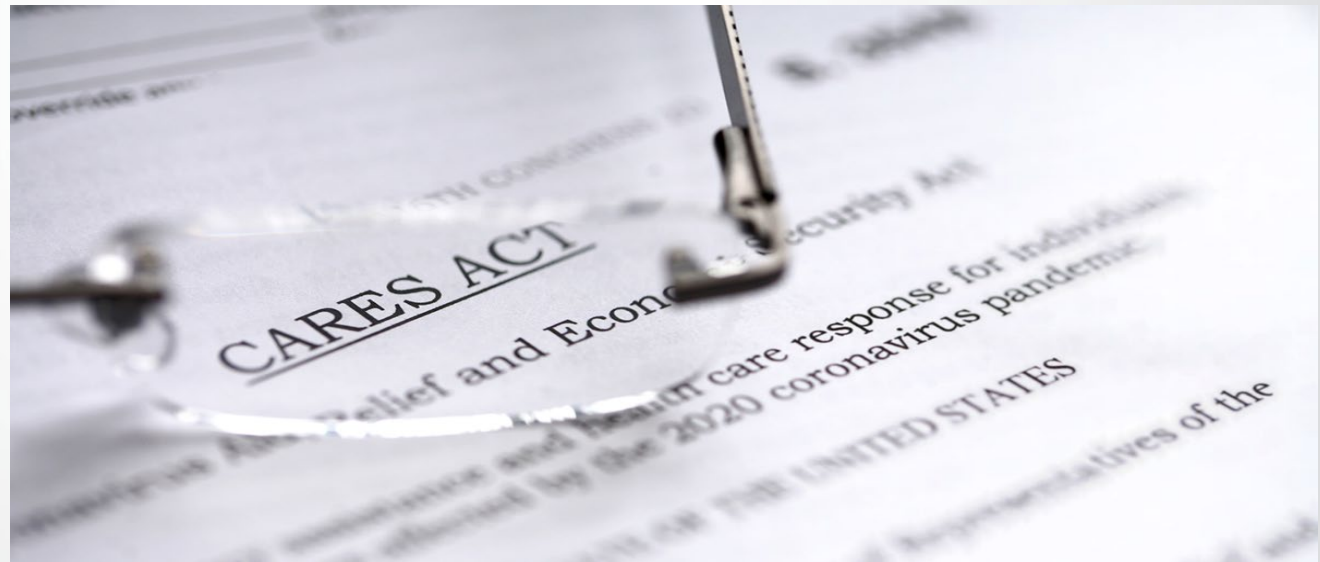
2. What fees require a PPFN filing?

1. Late fees
2. Attorney fees
3. Inspection fees
4. All of the above



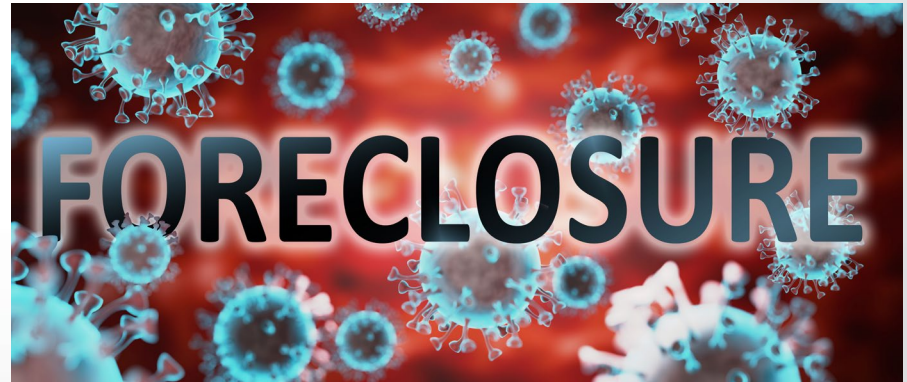
Impact of COVID/Moratoria on Servicers

- Staffing
 - Remote – Work From Home
 - Reallocated Staff
 - Current Structural Challenges
- Varying Client Directives
- State-Specific Moratoria



Impact of COVID/Moratoria on Servicers

- Holds Management
- Forbearances
- Future State/Firm Readiness and Viability
 - Projected Referral Volume
 - Surveys
 - Layoffs/Furloughs
 - Lines of Credit
 - PPP Loans



COVID-19 and Law Firm Survival



Characteristics of Main Street Business Loan Types

Loan Term:	5 years		
Principal Payments:	Principal deferred for two years. Years 3-5: 15%, 15%, 70%		
Interest Payments:	Deferred for one year		
Interest Rate:	Adjustable rate of LIBOR (1 or 3 mo.) plus 300 basis points.		
Lender Participation Rate:	5%		
Fed Participation Rate:	95%		
Prepayment Allowed:	Yes, without penalty		
Business Size Limits:	15,000 employees or fewer, or 2019 revenues of \$5 billion or less		
Fees:	Origination and transaction fees may apply		
	<u>New Loan Facility</u>	<u>Priority Loan Facility</u>	<u>Expanded Loan Facility</u>
Loan Size	\$250,000 to \$35 million	\$250 000 to \$50 million	\$10 million to \$300 million
Maximum Combined Debt to Adjusted 2019 EBITDA	4 times	6 times	6 times



Polling Question

Select the CARES act or other relief programs you have used, plan to use or utilize to sustain your business operations during COVID-19:

- Paycheck Protection Program "PPP" Loan
- Economic Injury Disaster Loans (EIDL)
- Employee Retention Payroll Tax Credit &/or Tax Deferment
- State Shared Work Unemployment Compensation Programs
- Main Street Lending Program



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