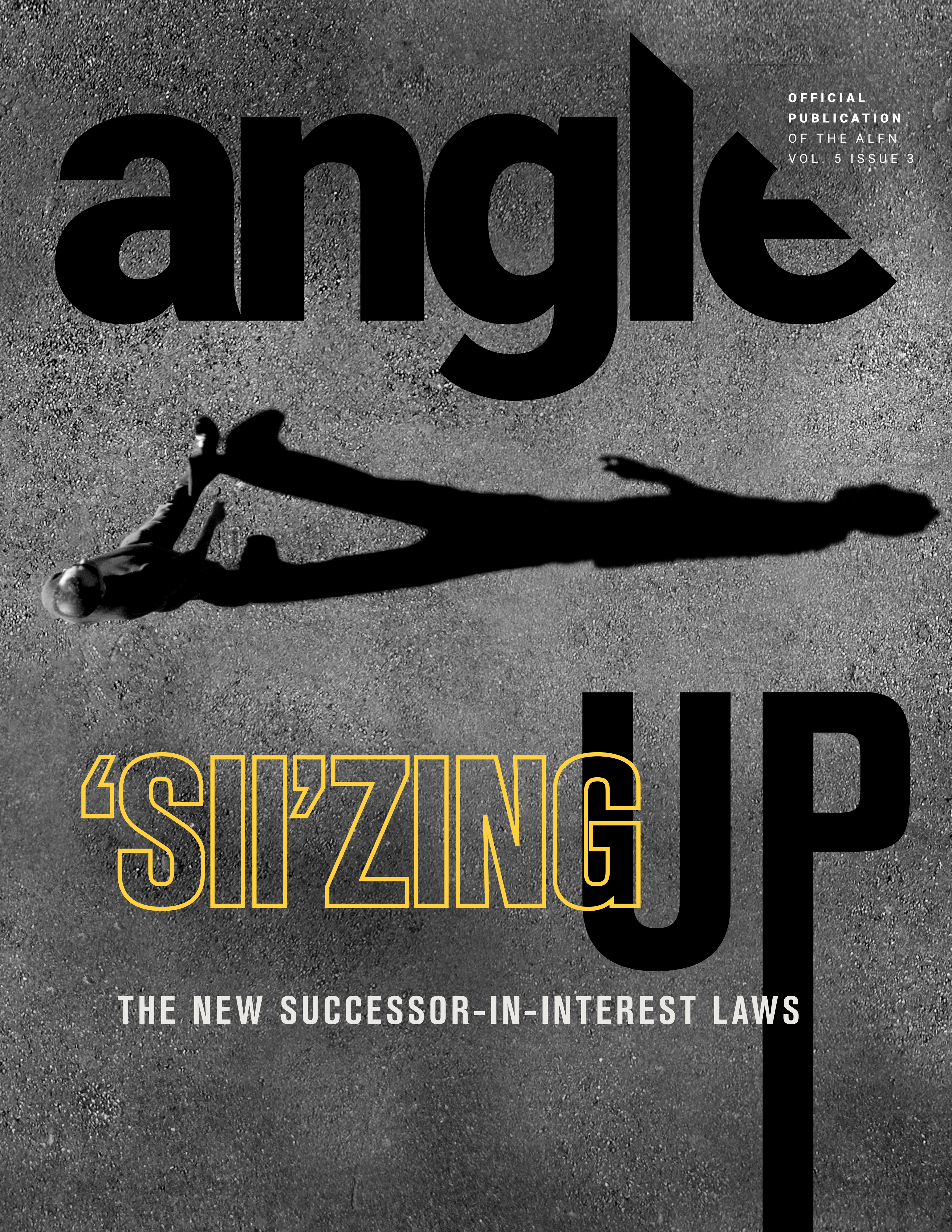
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OFFICIAL PUBLICATION OF THE ALFN
VOL. 5 ISSUE 3
'SII'ZING UP
THE NEW SUCCESSOR-IN-INTEREST LAWS

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Letter from the Editor

THE ALFN IS EXCITED to be hosting ANSWERS, our 16th Annual Conference, this month in beautiful Santa Barbara, CA. With more attendees than ever before, and an increased level of support from our mortgage servicing clients, we are pleased to bring you an event with enhanced opportunities for networking and quality education. We have increased our educational content this year with a total of 19 sessions, which include several hours of potential CLE (with ethics) for attorneys. The line-up of industry experts we have in store for you will be one you don't want to miss, including GSE's, industry leading attorneys and service providers, mortgage servicing executives, bankruptcy trustees and more. ANSWERS will deliver the tools, knowledge and connections you require to best represent your companies and further your careers.

ANSWERS has always tackled the tough issues in mortgage servicing, dealing with the complexities and ever changing world of regulatory compliance. This issue of the ANGLE has several regulatory compliance topics that will provide our readers with the knowledge they need to remain compliant and stay on top of the changes in our industry's legal and regulatory landscape. Many of the educational sessions at ANSWERS will address the issues presented in this publication, so take notes and bring your questions as we attempt to provide the ANSWERS.

We start this issue off with the new Successor-in-Interest (SII) regulations that went into effect on April 19, 2018, to help shed some light on the gray areas when dealing with potential successors. We then transition to another very important regulatory development dealing with HUD Face-to-Face Compliance, with insights as to the timing and other complexities that are involved. Another key feature article in this issue points out the potential uses of Artificial Intelligence (AI) in default mortgage servicing. Automating processes can have a positive impact on a servicer or law firm's bottom-line, which may drastically reduce processing errors. Bankruptcy is up next with an article that addresses the question, "Is the Bankruptcy Court stayed from entering a discharge order in a Chapter 7 case upon the debtor filing notice of appeal?" Our final feature article focuses on the Protecting Tenants at Foreclosure Act (PTFA), which the President recently revived on May 24, 2018.

State level issues often have far-reaching impacts, and the State Snapshots in this issue of our ANGLE are no exception. We dive deeper into some of the latest legal complexities in Illinois, Connecticut, South Carolina and Minnesota. Learn about the Illinois Appellate Courts rule on post-foreclosure payment of condominium assessments; Connecticut mediation and alias tax warrants; South Carolina changes to loss mitigation/mortgage modification procedures; and finally handling of RESPA QWR's in Minnesota.

Don't miss an opportunity to get involved with the ALFN and seek out ways to reap the benefits of your membership and volunteering. Join us as we continue representing, defending and educating America's mortgage servicing industry. a

MATT BARTEL
President & CEO
American Legal & Financial Network (ALFN)

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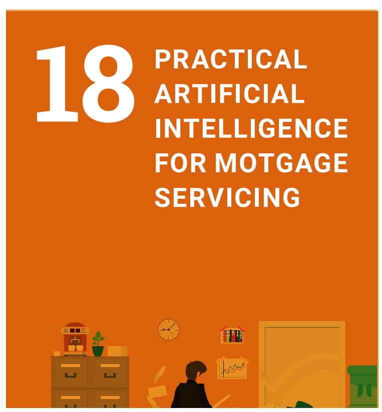

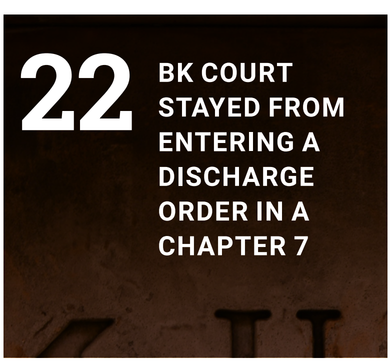

ANSWERS

STATE SNAPSHOT

answers 2018

ABOUT

ANSWERS remains the key event for ALFN members and the Association's servicing partners to meet, network, grow their business, and deepen their relationships. Attendees can expect the same great networking with clients, potential clients, and industry peers through our on-site networking receptions and late night mixers, off-site group networking activities, and additional industry-leading educational offerings.

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SCHEDULE AT A GLANCE

SUNDAY, JULY 22

3:00 – 4:00PM Concurrent Member Meetings

- Attorney-Trustee — Santa Ynez Salon (closed session for Attorney-Trustee Members only)
- Associate - The Rotunda (closed session for Associate Members only)
- Servicer - Ballroom C (closed session for Servicers only)

4:15 – 5:30PM Opening Super Session — Ballroom AB

5:30 – 6:30PM New Member and First Time Attendee Welcome Reception — Ocean Terrace (only for first time ANSWERS attendees & new members)

6:30 – 8:30PM Welcome Reception & Dinner Bacara Pools

MONDAY, JULY 23

6:30 – 7:30AM Yoga — The Bluff, Ocean View Lawn

8:30 – 9:30AM Breakfast Session Trial Jeopardy — Ballroom AB

9:30 – 10:30AM Breakout Sessions (three concurrent choices)

- Breakout Session 1 — Ballroom A
- Breakout Session 2 — Ballroom C
- Breakout Session 3 — Santa Ynez Salon

10:30 – 11:00AM Refreshment Break

11:00AM – 12:00PM Breakout Sessions (three concurrent choices)

- Breakout Session 4 — Ballroom A
- Breakout Session 5 — Ballroom C
- Breakout Session 6 — Santa Ynez Salon

12:00 – 1:00PM JPEG Luncheon & Picture the Future Awards — Ballroom AB

1:00 – 6:00PM Group Networking Activities

6:30 – 8:30PM Reception & Lobster Boil Dinner — Arrival Courtyard

8:30 – 11:00PM JPEG After Hours Networking Reception — Rotunda Room & Terrace

TUESDAY, JULY 24

6:30 – 7:30AM Yoga — The Bluff, Ocean View Lawn

8:30 – 9:30AM Networking Breakfast — Ballroom Terrace & Lawn

9:30 – 10:30AM Breakout Sessions (three concurrent choices)

- Breakout Session 1 — Ballroom A
- Breakout Session 2 — Ballroom C
- Breakout Session 3 — Santa Ynez Salon

10:30 – 11:00AM Refreshment Break

11:00AM – 12:00PM Breakout Sessions (three concurrent choices)

- Breakout Session 4 — Ballroom A
- Breakout Session 5 — Ballroom C
- Breakout Session 6 — Santa Ynez Salon

12:00 – 1:00PM WILL Luncheon — Ballroom AB

1:00 – 2:15PM General Session Ballroom AB

2:15 – 2:30PM Refreshment Break

2:30 – 3:45PM Servicer Super Session — Ballroom AB

3:45 – 5:30PM Afternoon Break

5:30 – 6:30PM Assure Rewards Reception (closed reception for servicers and members of the Assure Rewards program only)

6:30 – 8:30PM Closing Reception & Dinner — Ocean Lawn

WEDNESDAY, JULY 25

6:30 – 7:30AM Yoga - The Bluff, Ocean View Lawn

8:30 – 9:30AM Breakfast with Fannie Mae — Ballroom AB

9:30 – 11:00AM Client-Counsel Roundtable Sessions: Servicing + Legal

11:00AM Conference Concludes

BY ANDREW J. BOYLAN, ESQ.,
PARTNER, RISK MANAGEMENT AND COMPLIANCE
MCCARTHY HOLTHUS, LLP
ABOYLAN@MCCARTHYHOLTHUS.COM

'SII'ZING UP

THE NEW SUCCESSOR-IN-INTEREST LAWS

When it comes time to implement a new law or regulation, it's crucial to know the "ins and outs" to avoid any potential compliance gaps. But in an industry like ours, where "black letter law" is all too often replaced with "gray areas of law," it becomes increasingly important to also know and understand the regulatory, legislative, or other relevant history behind the new legal requirement. This is certainly the case with the newly implemented Successor-in-Interest (SII) regulations that went into effect on April 19, 2018. [i]

BACKGROUND

Mortgage servicers having to deal with deceased borrowers and their successors-in-interest is certainly not a new concept. But over the past five years, we've seen a notable uptick in investor, regulatory, and state law requirements governing how servicers and their agents are to be handling these situations. Historically, there was a strong reluctance in communicating with potential successors due to privacy concerns and potential FDCPA violations. As a result, we began to see more and more legal battles and media stories highlighting the struggles that non-borrowing individuals were having when attempting to speak with the deceased borrower's mortgage servicer regarding the property.

Five years ago, both Fannie Mae and Freddie Mac issued formal guidance for servicers handling their loans as to how they should be identifying, communicating with, and assisting potential successors-in-interest. According to Fannie Mae, the "policies and procedures must allow the new owner to continue making mortgage payments and pursue an assumption of the mortgage loan as well as a foreclosure prevention alternative, if applicable."[ii] Freddie Mac similarly recognized, "There may be cases where the non-Borrower applicant is not eligible to assume the Mortgage … However, the non-Borrower applicant may be able to assume the Mortgage if the assumption is accompanied by a loan modification … In these situations, … the Servicer must evaluate the non-Borrower applicant as if [they] were a Borrower."[iii]

Later in 2013, the CFPB issued a Bulletin[iv] highlighting some of the relevant provisions in the then-pending Mortgage Servicing Rules, which would later go into effect on January 10, 2014. The Bulletin focused on the requirement that servicers have policies and procedures reasonably designed to ensure that, upon notification of the death of a borrower, the servicer promptly identifies and facilitates communication with an SII. Although several best practices were provided by the Bureau for servicers to consider adopting, the regulatory requirements were held to the adoption of reasonable policies and procedures.

This all changed when the CFPB issued its amended Final Rule on August 4, 2016, which included specific servicing requirements for potential and confirmed SII. These new regulations, as we know them today, were approved with a delayed implementation date of April 19, 2018.

WHO IS CONSIDERED AN SII UNDER TODAY'S LAW?

The answer to this question still depends upon many factors, starting with your jurisdiction. As with all of the CFPB's Mortgage Servicing Rules, the updated SII regulations create a new floor for qualifying mortgage servicers and their service providers. To the extent states or investors choose to enact more stringent laws or guidelines that do not directly conflict with the federal regulations or otherwise provide for relevant exceptions, then they must be followed. As stated by the CFPB, "An applicable servicing requirement is not in conflict with the Mortgage Servicing Rules solely because it imposes additional requirements."[v]

[i] 12 CFR 1024; 12 CFR 1026.

[ii] Fannie Mae, Lender Letter LL-2013-04 (Feb. 27, 2013).

[iii] Freddie Mac, Bulletin Number 2013-3 (Feb. 15, 2013).

[iv] http://files.consumerfinance.gov/f/201310_cfpb_mortgage-servicing_bulletin.pdf

On the west coast, the States of California (as of 1/1/17) and Washington (as of 6/7/18) have already taken action to implement additional state-law protections for both potential and confirmed SII. As a result, we have differing laws governing the applicability, definitions, exemptions, rights, duties, outreach requirements, hold requirements, guidance on assumptions and foreclosure prevention alternatives, violations, and safe harbors. For a full compare/contrast chart as between CFPB, CA, and WA, please reach out to the article's author.

CALIFORNIA[vii]	WASHINGTON[viii]
Must meet all of the following requirements:	Must meet all of the following requirements:
Natural person;	Someone claiming to be successor to the borrower's or grantor's property rights;
Not a party to the loan;	Not a party to the loan;
Provides documentation of death of borrower;	Provides written notice identifying the property address and name of the borrower;
Provides documentation of ownership interest in the property;	Provides documentation of death of borrower (unless servicer already has it); and,
Either the spouse, domestic partner, joint tenant, parent, grandparent, adult child, adult grandchild, or adult sibling of deceased borrower;	Provides documentation of claimant's ownership interest in the property.
Occupied property as principal residence within last 6 continuous months prior to borrower's death; and	
Currently resides in the property.	

SII DEFINED

Under the Mortgage Servicing Rules, "Successors in interest are certain persons who inherit or otherwise receive an ownership interest in property, from a spouse, parent, or other relative, or upon the death of a joint tenant, when there is an outstanding mortgage loan on the property. Successors in interest can include persons who acquire their interest in the property upon death of a borrower or in a divorce, as well as transfers from a spouse or from a parent to a child."[vi] Notably, under the CFPB regulations, you can have an SII even where the borrower is still living. Compare that with the relevant definitions under California and Washington law, both of which require the borrower(s) to be deceased:

DEALING WITH POTENTIAL SUCCESSORS

The Mortgage Servicing Rules require that servicers maintain policies and procedures that are reasonably designed so that they are able to:

- Promptly facilitate communication with any potential successors in interest regarding the property upon receiving notice of the death of a borrower or of any transfer of the property securing a mortgage loan;

- Promptly determine what documents the servicer reasonably requires to confirm the person's identity and ownership interest in the property, and promptly provide a description of those documents to the person and how the person may submit a written request for a description of the documents required for confirmation (including the appropriate address); and

[v] CFPB Small Entity Compliance Guide. Pg. 34.; 12 CFR 1024.31.

[vi] CFPB Small Entity Compliance Guide. Pg. 34.; 12 CFR 1024.31.

[vii] CCC 2920.7(a) and (i)(4).

[viii] RCW 61.24.030(11).

CALIFORNIA[xi]	WASHINGTON[xii]
Before NOD is recorded: Send claimant written requests to be received within specified timeframes for documentation of death of borrower and ownership interest of claimant.	Before NOD is issued: If aware borrower is deceased, send mailings to spouse, child or parent of deceased borrower, to any owner of record, and to heirs and devisees of borrower. Engage in due diligence to identify any such persons if you do not have contact information.
At any time: If claimant sends in documentation to satisfaction of servicer showing death of borrower and ownership interest of claimant, send loan information to claimant (who is deemed an SII at this point) within 10 days and allow to apply to assume loan subject to a foreclosure prevention alternative, if requested.	Before NOS is recorded: • Send claimant written requests to be received within specified timeframes for documentation of death of borrower and ownership interest of claimant. • If claimant timely responds with documentation of ownership interest, send loan information to claimant (who is now deemed an SII) within 20 days, and also send information on applying for loan assumption and modification. • Record declaration with NOS if no spouse, child or parent identified during pre-NOD due diligence.
	NOS mailing: Send to any SII or, if none established, to any spouse, child or parent that was identified in the pre-NOD due diligence. If no spouse, child or parent identified, mail to heirs/devisees of borrower and publish once a week for 3 consecutive weeks.

- Upon the receipt of such documents, promptly make a confirmation determination and notify the person that the servicer has: Confirmed the person's status; Determined that additional documents are required (and what those documents are); or Determined that the person is not a successor in interest.[ix]

So what does "promptly" mean? Unfortunately, this section does not provide us with a relevant definition. However, according to the Official Interpretations, "Generally, whether an action is prompt will depend on the facts and circumstances of the potential successor in interest's request. Notification that a potential successor in interest has been confirmed is not prompt if it unreasonably interferes with a successor in interest's ability to apply for loss mitigation options according to the procedures provided in § 1024.41."[x]

This is one area where there will be significant differences between state and federal law. In the default context, the primary method of foreclosure in both California and Washington is non-judicial. Therefore, both states have passed statutes providing potential successors (known as "claimants") with additional protections during the non-judicial foreclosure process. Here is a quick overview:

[ix] 12 CFR 1024.38(b)(i)(vi).

[x] Official Comment 38(b)(1)(vi)-5).

[xi] CCC 2920.7(a); CCC 2920.7(b)–(d).

[xii] RCW 61.24.030(10)-(11).

[xiii] Escrow accounts, payments, and account balances (§§ 1024.17 and 1024.34); Mortgage servicing transfers and mortgage transfers (§§ 1024.33; 1026.39); Error resolution (§ 1024.35); Information requests (§ 1024.36); Force-placed insurance (§ 1024.37); Early intervention (§ 1024.39); Loss mitigation (§ 1024.41); Post-consummation events (§ 1026.20); Payoff statements (§ 1026.36(c)); and Periodic statements (§ 1026.41).

DEALING WITH CONFIRMED SUCCESSORS

Once you confirm someone as an SII, he/she is treated as a borrower/consumer under most portions of the federal Mortgage Servicing Rules. This means they may be entitled to several notices[xii]. However, there are several notable exceptions, including if the servicer has sent the optional acknowledgment form and the SII has not signed and returned it[xiv] or if the servicer is already sending the notice to another borrower/consumer[xv]. Additionally, the regulations allow the servicer to omit certain personal information about the borrower's location, contact, and/or finances (other than the terms, status, and payment history of the loan) when sending the notice to a confirmed successor.[xvi]

In California and Washington, once someone is deemed an SII *under state law*, they are entitled to additional rights, including:

The CFPB provides additional caution when sending notices to an SII that has not assumed the loan, "One option is to adjust the language in the notices to replace terminology that might suggest liability ... A second option is to add an affirmative disclosure that clarifies a confirmed successor in interest has no personal liability and has not assumed the mortgage loan obligation under state law."[xix] Care should also be taken to review state law notices for this same issue. To avoid potential confusion or allegations of deception, servicers should work closely with their local counsel to review forms and letters that may be sent to potential and/or confirmed SII that have not yet legally agreed to assume the loan.

LOOKING AHEAD

Seeing as the SII portions of the Mortgage Servicing Rules just recently went into effect, there will not likely be changes to those sections anytime soon. However, undoubtedly more states will follow California and Washington by enacting their own state-specific SII laws. It's imperative that mortgage servicers work closely with their local counsel to actively monitor legislative sessions and track legal updates on this topic to stay apprised of new laws on the horizon and remain in compliance with all relevant SII laws.

CALIFORNIA[xvii]	WASHINGTON[xviii]
Receive loan information;	Receive loan information;
Apply to assume loan subject to offered FPAs (eligibility according to investor requirements and guidelines);	Receive application materials and information, or a description of the process, necessary to request a loan assumption and modification; and
Certain HBOR protections (no pre-NOD outreach);	Receive NOS mailing.
Nonjudicial foreclosure notices; and	
Ability to bring action for violations.	

ASSUMPTION ISSUES

Under the federal Mortgage Servicing Rules and both California and Washington law, a potential successor cannot be required to assume the loan. However, a Servicer is able to condition a foreclosure prevention alternative upon a confirmed SII agreeing to assume the loan.

[xiv] 12 CFR 1024.32(c).
[xv] 12 CFR 1024.32(c)(1).
[xvi] 12 CFR 1024.35(e)(5).
[xvii] CCC 2920.7(c)–(e).
[xviii] RCW 61.24.030.
[xix] CFPB Small Entity Compliance Guide. Pg. 45.

NEW WRINKLES

FOR HUD FACE-TO-FACE COMPLIANCE

BY DANIELLE PATTERSON, ESQ. AND MEREDITH PITTS, ESQ.
HEAVNER, BEYERS & MIHLAR, P.C.
DPATTERSON@HSBATTYS.COM AND MEREDITHPITTS@HSBATTYS.COM

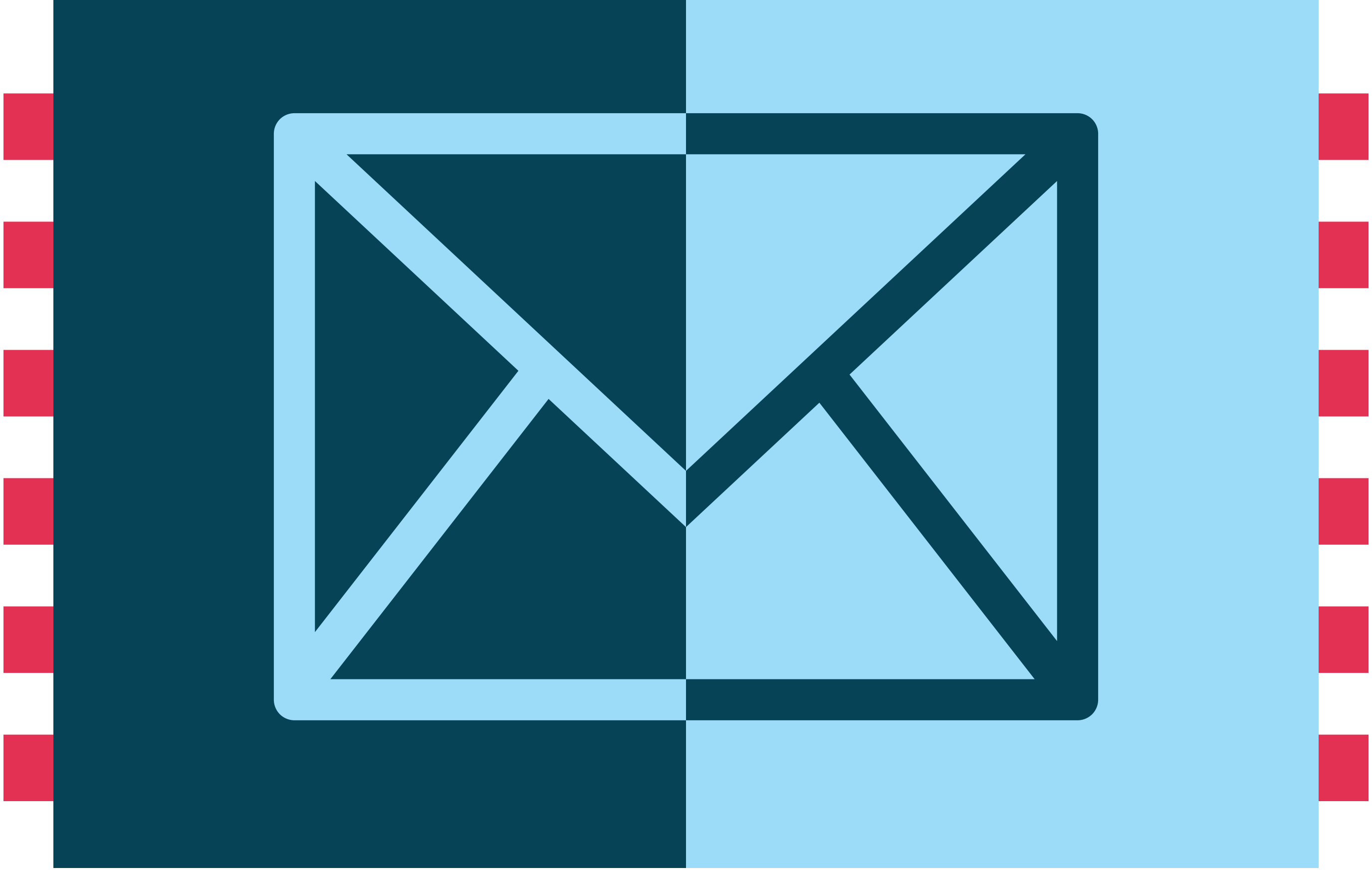
THERE HAVE been continuing developments relating to HUD Face-to-Face Compliance, and new wrinkles continue to emerge. As has been well documented, HUD Regulations require a mortgagee, before the mortgagor is three monthly installments in arrears on the mortgage, to have a face-to-face interview with the mortgagor. The Regulations provide for several exceptions to completing the face-to-face interview, namely: 1) The mortgagor does not reside in the mortgaged property; 2) The property is not within 200 miles of the mortgagee, its servicer, or a branch office of either; 3) The mortgagor has clearly indicated he will not cooperate in an interview; 4) A repayment plan is entered into, and payments under the plan are current; and 5) A reasonable effort to arrange the face-to-face interview is unsuccessful. 12 C.F.R. §203.604.

The Regulations provide that the reasonable effort requirement is satisfied if the mortgagee sends at least one letter **certified by the Postal Service as having been dispatched** and makes at least one visit to see the mortgagor at the mortgaged property.

In the last few years, courts in Illinois have additionally considered the effect of a bankruptcy filing as it relates to these requirements. Specifically, courts in these states have considered whether a Chapter 7 Bankruptcy discharge granted to the mortgagor in cases where the mortgagor did not reaffirm the debt, bar the mortgagor from asserting a violation of these Regulations as a defense to foreclosure. In PNC Bank, National Association v. Wilson, the Illinois Appellate Court for the Second District held that HUD regulations requiring a face-to-face interview contemplate that there is a contract between the parties, and where the mortgagor files bankruptcy but does not reaffirm the debt, there is no longer a contract to remediate or ameliorate. As such, requiring compliance with HUD regulations, when the contract has been nullified by the mortgagor, is futile and meaningless. Ultimately, courts that have considered the issue have held that under these circumstances, a face-to-face interview is not required, and the failure to conduct a face-to-face interview does not act as a bar to foreclosure.

Additionally, in the last year, borrowers have started to focus on some of the more hyper-technical aspects of the regulations in asserting defenses to foreclosure actions. Specifically, in Illinois, borrowers have begun to complain about the manner in which the "reasonable effort" letter was sent in an attempt to assert non-compliance with the Regulations. In U.S. Bank Trust National Association v. Jose Hernandez, the Illinois Appellate Court for the Second District held there was an issue of material fact as to whether the letter was dispatched when the only proof provided was a tracking number from a Federal Express label. Specifically, the Court opined that a tracking number can be generated and canceled by Federal Express and therefore a mere tracking number is not "indubitable proof of dispatch." While the Court said it was taking no position as to whether correspondence sent by a third-party carrier is an acceptable substitute for the Postal Service, in a special concurrence, Justice Schostok suggested that a third-party carrier is an acceptable substitute only when there is proof of delivery.

Subsequently, in another Illinois case, U.S. Bank Trust National Association v. Mario Lopez, the Defendant again raised the issue concerning the manner in which the letter was sent. In response, in addition to the shipping label of the third party carrier, the Plaintiff also produced an Affidavit, which set forth the letter had been dispatched and attached a 55 page screenprint demonstrating same. However, in determining whether the letter sufficiently complied with the Regulations, the Court held "various notations on the screenprint do not explicitly identify the dispatch." The Court also found the Affidavit was insufficient to demonstrate the letter had been properly sent. In reaching its holding, the Court ac-



knowledged that proof of delivery is not required by the regulations, but emphasized the letter must be certified as "having been dispatched." As in Hernandez, the Lopez Court stopped short of finding whether compliance with 24 C.F.R §203.604 could be accomplished by using a third-party carrier instead of the Postal Service. Ultimately, the Court determined the Plaintiff did not prove a letter had been mailed in compliance with HUD regulations, and the case was remanded.

Finally, another developing wrinkle relates to the timing of the face-to-face interview. In Bank of America, N.A. v. John Edwards, the Ohio Appellate Court discussed whether the requirement that the meeting occur before three monthly installments are unpaid required strict compliance. Specifically, the Court considered the effect of not sending the letter or completing the face-to-face interview within three months of the date of the default and whether a mortgagee can then ever comply with the Regulations. In Edwards, the Court entertained the argument that the timing requirement may not require strict compliance, but stopped short of specifically so ruling because the mortgagee had not demonstrated that it had ever made a reasonable effort.

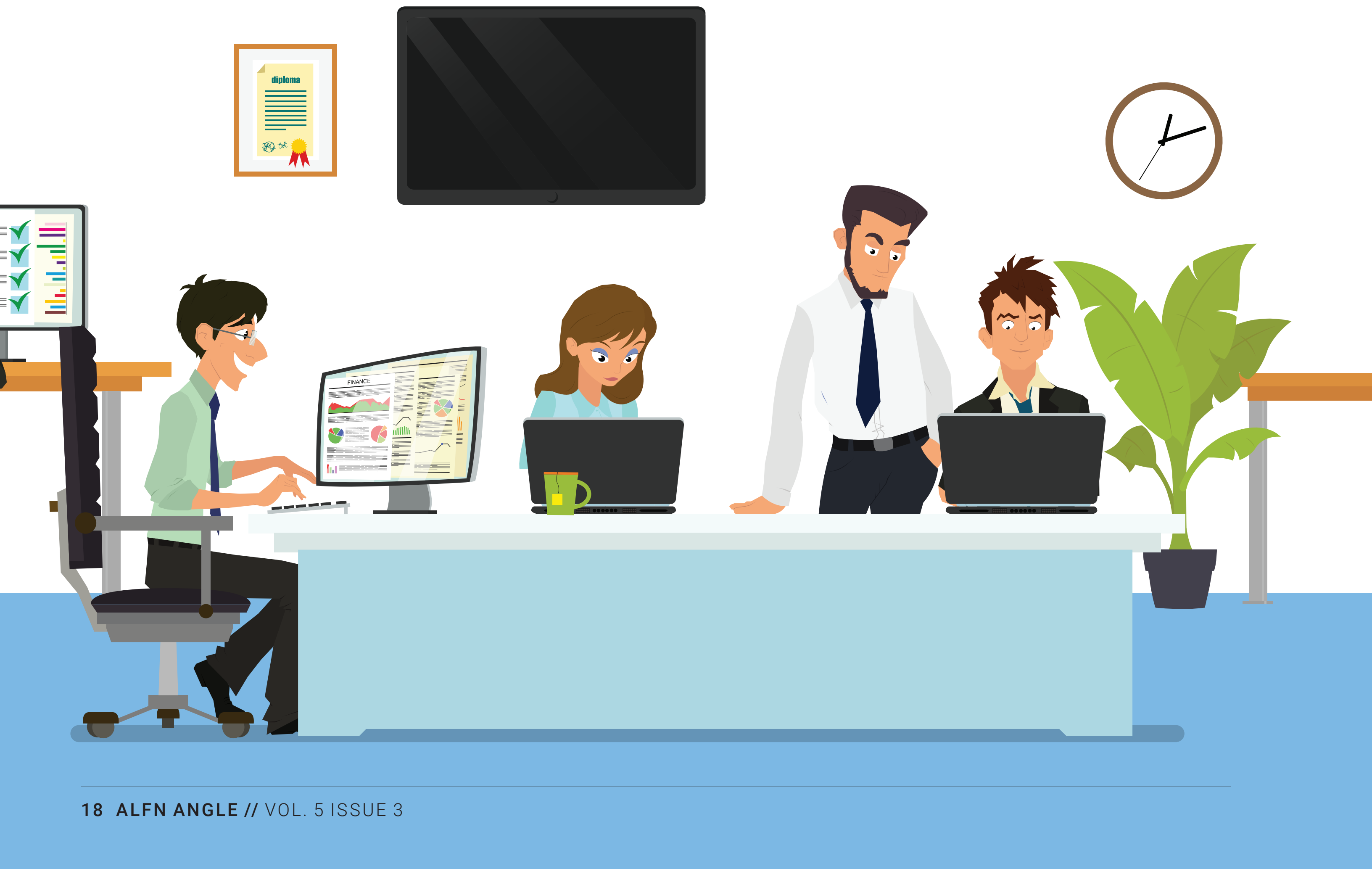
While there is no clear guidance relative to these latest wrinkles, the current trend as it relates to the manner of sending the letters is clear- it is best practice to send the reasonable effort letter via certified mail by the Postal Service with proof that the letter has been dispatched. Additionally, proof of the certified mailing should be obtained and retained in the mortgagee's records. However, if HUD face-to-face correspondence is sent via a third-party carrier, delivery confirmation **must** be obtained prior to filing first legal action.

As to the timing requirements, care should be taken to ensure the letter is sent within three months of the default and that a face-to-face interview is also attempted during this time. Although it is not entirely clear how the courts will rule if the letter is sent and/or the interview is attempted outside of this three month window, it is clear the face-to-face analysis and attempts should begin as promptly as possible.

PNC Bank, Nat'l Ass'n v. Wilson, 2017 IL App (2d) 151189, ¶ 25
Bank of America, N.A. v. John Edwards, 93 N.E.3d 2012 (2017)
U.S. Bank Trust National Association v. Jose Hernandez, 2017 IL App (2d) 160850
U.S. Bank Trust National Association v. Mario Lopez, 2017 IL App (2d) 160967

PRACTICAL ARTIFICIAL INTELLIGENCE FOR MORTGAGE SERVICING

BY JAMIE STEWART
OPERATIONS MANAGER, JANEWAY LAW FIRM, P.C.
JAMIESTEWART@JANEWAYLAW.COM



How advantageous is it for a company to use artificial intelligence (AI)? The jury is still out on AI as a whole. On the one hand, there are countless installations of artificial intelligence, machine learning (ML) and other advanced automation technologies disrupting industries across the globe. For example, the mortgage originations space is experiencing a race toward digitization, dabbling in AI-driven lending platforms to improve the overall customer experience and increase sales. Also, the first artificially intelligent "attorney" robot, ROSS, was brought on by a firm to support its bankruptcy practice. On the other hand, the most notorious visions for AI have not yet come to fruition. Concepts such as fully autonomous vehicles, and blockchains replacing banks in all banking transactions, remain futuristic.

This article explores three prevalent processes performed throughout default mortgage servicing and discusses how AI techniques can automate these processes. These AI techniques can presently be implemented to improve a servicer's or a firm's financial performance while substantially reducing processing errors.

PERILS OF THE FEE PRORATION LABYRINTH

One paramount yet overlooked opportunity for AI entails ascertaining the amount of fees and costs incurred for purposes of invoicing, quoting, preparing judgment figures, and bidding.

Consider attorney fee prorations as a specific example. This fee's framework is based on several intricate attributes. State, investor and loan type are utilized to determine the flat attorney fee. Either the investor or servicer defines the billing milestones and accompanying proration percentages. Additionally, the referral date range may influence fee proration due to agency fee changes over time. Across the U.S., these attributes can combine to form potentially more than 1.2 million proration scenarios around which attorney foreclosure fees, alone, are structured. Using elaborate matrices to manually apprehend fee prorations is a breeding ground for human errors. As an alternative to manual processing, some firms and servicers may have attempted to program every fee proration scenario, using business rules, to determine prorations in an automated manner. Unfortunately, programming business rules can be tedious, costly, and programmatically labor-intensive for some systems due to the sheer number of scenarios, insufficient documentation detailing fee scenarios, and/or lackluster system infrastructure.

Correctly identifying fee prorations is imperative. Overcalculating a fee leads to potential legal and reputational risks while undercalculating a fee can result in financial detriment to a firm. Moreover, these risks compound each time a fee proration must be ascertained, which can occur frequently throughout the life of a default.

Fortunately, AI can serve up a constructive solution to handle fee proration intricacies. A supervised machine learning algorithm, which is a subsect of AI based on statistics and analytics, can be rendered to detect the patterns used to conceive fee prorations from past billing data. The algorithm can accomplish this feat without being explicitly programmed with the menagerie of proration logic and criteria. From billing data, the attributes that influence fee proration, as well as the actual fee proration invoiced, are fed as inputs into the software model. The algorithm then harnesses majority and/or probability calculations to glean how investor, loan type, servicer, etc. are used to formulate a fee proration. The model is also given feedback on whether its fee proration predictions on unseen data are correct or incorrect. With each predicted fee proration, the ML model also produces a probability score indicating how confident it is in the prediction's accuracy. This probability score can assist companies in creating strong controls and ensuring an appropriate level of manual review is performed.

Opportunities abound for AI in the billing and quoting ecosystem. Not only can supervised machine learning be applied to correctly identify fee proration; similar supervised machine learning models can be built to determine costs and additional fees, apprehend the appropriate line item specific backup documentation needed for invoicing, and discover each servicer's billing line item codes so that additional automation opportunities may be pursued.

WHAT IF EVERY ELECTRONIC DOCUMENT COULD CATEGORIZE AND SAVE ITSELF, AUTOMATICALLY?

No, documents are not self-aware. However, a powerful amalgam of technologies allows electronic documents to be automatically categorized and routed to the appropriate destinations. To get an intuition for how valuable this software can be in default servicing, first, grab a cup of coffee. Then, watch a person scan documents, locate the electronic documents, possibly separate and rotate the specific electronic document desired, name the electronic document, and finally save and/or move the electronic document to its destination such as a network drive folder or case management system. This scan-to-save process may not be time consuming for a single document. However, contemplate how many documents go through this process and the number of opportunities for making mistakes, and it becomes easy to understand where the value lies in automating this process.

There are multiple ingredients that comprise this automation. The primary ingredient is Optical Character Recognition (OCR) technology, which makes document text recognizable. OCR is commonly used software that allows a scanned document or PDF document to be converted into a *searchable* document. The culmination of OCR, ML, and AI can recognize if a given document is a loan modification or a note. Categorizing documents in this manner is formally known as classification in the document management domain. Classification works by recognizing key image and text characteristics of a document, similar to how a person naturally classifies a document. If document quality is subpar, the software can flag the document to be reviewed and classified manually. As documents are processed using AI over time, the software becomes increasingly precise at classifying documents.

AUTOMATING DATA ENTRY VIA "SMART" DATA EXTRACTION

Once a software program becomes proficient at classifying documents, the real AI brilliance can commence. Sophisticated software can automatically locate desired data elements in documents and websites, copy these data elements, then enter the data into their appropriate fields within the system of record.

Antiquated technology of decades past only copied data based on zoning (that is, a data field like a grantor name could only be pulled from multiple deeds of trust if the signature line was in the exact, same spot in every deed of trust). Today, data extraction methods are significantly more forgiving. To get a better intuition for how this extraction method works, consider how a loan number is taken from a document or website and entered into a system of record. A law firm processor may manually pull up a referral document, review the document to locate the loan number, then manually type the loan number directly into the firm's case management system.

This data entry process can be automated by setting guidelines for the extraction tool. The tool is configured to search for an item that is roughly 10 consecutive numerical digits and that is often located immediately to the right of, or beneath, text that resembles the word "Loan Number" or "Loan #" in a referral document. Then, by feeding the model referral document examples that have loan number identified, and by allowing a person to provide feedback to the software as to whether its attempt at identifying a loan number is correct or incorrect, the software evolves to become highly accurate at identifying the loan number and inputting it correctly into a system of record.

The software also includes a tool for manually validating each field. The validation works by first presenting the list of the data fields that were completed via data entry automation. As a person tabs through each data element, the document from which the data was copied immediately and automatically pops up, scrolls to, and highlights, the section of the document from which that data field was taken. This streamlined process allows each field to be validated promptly, but thoroughly, via side-by-side comparison. If the software is unable to locate i.e. the note interest rate within the promissory note, or if the legibility of the note interest rate is compromised, then the data entry process is not carried out. In this case, a person is prompted to enter the data manually during the validation step. In routine processing landscapes, these document classification and data extraction programs significantly reduce errors while automating at least two thirds of processing, according to vendors and multitudinous case studies.

CONCLUSION

Though these emerging technologies have already become popular in mortgage originators and other regulated financial services' companies around the world, these revolutionary, time-saving facilities driven by AI are seldom exploited in default servicing. Within industries that are apprehensive about adopting new technologies, a realistic path to espousal involves initially implementing proofs of concept and making strides on specific, valuable uses of the software. The applications discussed herein could be used in parallel with manual processing, or for purposes of auditing, until a satisfactory confidence level in the technology is achieved.

Ultimately, these AI capabilities can reduce processing costs, improve quality, and help an entity to become markedly more scalable. In some ways, each of these tools may even be considered superior to, and less expensive than in the long term, traditional technologies like integration and business rules management. a

IS THE BK COURT STAYED FROM ENTERING A DISCHARGE ORDER IN A CHAPTER 7 CASE UPON THE DEBTOR FILING A NOTICE OF APPEAL?

BY SHIRLEY PALUMBO, ESQ.
BANKRUPTCY SR. COUNSEL, GREENSPOON MARDER LLP
SHIRLEY.PALUMBO@GMLAW.COM

An appeal of an order granting relief from stay to allow the bank to enforce a final judgment of foreclosure can have a profound impact on a bankruptcy case and the secured creditor's right to foreclose on the collateral property. The appeal can hinder and prolong the delay, sometimes for an additional year. A question currently being asked to the 11th Circuit Court of Appeal is whether the granting or denial of a motion for relief from stay enjoins the bankruptcy court from entering a discharge order in the bankruptcy case. As it turns out, the answer is not as easy as it sounds.

In this particular case the debtor filed for chapter 7 bankruptcy protection after the Final Judgment of Foreclosure had been entered. The Trustee in the chapter 7 case had already entered her Report of No Distribution when the bank was granted relief from the automatic stay, and the bank sought permission to proceed with a foreclosure sale. The debtor objected and challenged the servicer's status as a holder of the mortgage and as the real party in interest. After a hearing, the bankruptcy court authorized the bank to proceed with the foreclosure sale, thereby granting relief from the automatic stay. The debtor filed a timely notice of appeal. On the same day that the debtor filed his notice of appeal, the discharge order was entered. In the appeal to the district court, the servicer filed its motion to dismiss as moot as the protection under 11 U.S.C. 362 no longer existed. Just like the order granting relief from stay, the discharge order also terminated the stay. Either way, the debtor did not have the protection of the automatic stay.

The District Court considered the servicer's motion to dismiss and the debtor's response and, subsequently, entered an order dismissing the appeal as moot. The debtor has now appealed to the 11th Circuit.

The debtor generally argued that Bankruptcy Rule 4001(3) should have stayed the order granting relief for 14 days and that the Notice of Appeal also stayed the bankruptcy proceedings.

There are three main premises here to consider: 1) Without an order stating otherwise, pursuant to 11 U.S.C. § 362(c)(2)(C), the stay continues to run until discharge is entered, whether it is granted or denied. Under this rule, it is fair to state that the appeal would be moot because either way the stay was lifted. 2) Pursuant to Bankruptcy Rule 4001(3) the order granting relief cannot be enforced for a period of 14 days after the entry of the order. That is, a servicer has a 14 day stay from commencing or continuing the foreclosure action. But does this rule extend the injunction from enforcement of the MFR order if an appeal is filed? 3) A Notice of Appeal strips the bankruptcy court of jurisdiction, but until what extent?

BANKRUPTCY RULE 4001(3)

The stay under Rule 4001(3) acts as an injunction, or bar, against any attempts by the creditor that brought the motion to collect the debt or enforce the lien. The rule explicitly stays the movant for 14 days after the entry of the order from enforcing the order. Some judges in certain districts will not waive the 14 days unless there is a showing of "cause", which is what happened in this case. The MFR order entered did not waive the 14 day stay, and, accordingly, there was a stay when the Notice of Appeal was filed.

However, this argument easily fails as the relief order is specific to that secured creditor that seeks relief from the stay. The rule does not stop an ongoing bankruptcy case. The rule does not stay a bankruptcy judge, a bankruptcy clerk or the bankruptcy process.

Further, the rule was designed to allow a party to request a stay pending appeal. So that, if the debtor fails to file a motion to stay proceedings pending appeal[i], all proceedings will continue. Even if the debtor would have filed a motion to stay, it would have stayed the secured creditor's enforcement of its in rem rights in the foreclosure proceedings, i.e., it would have stayed the sale of the collateral in a foreclosure action. But a motion to stay pending appeal would have not stayed the debtor's bankruptcy case, unless specifically ordered otherwise.

In addition, Title 28 U.S.C. § 158(d)(2)(D) states that an appeal of a final order from a bankruptcy judge, as provided under 28 U.S.C. 158(d), "*does not stay any proceeding of the bankruptcy court, the district court, or the bankruptcy appellate panel* from which the appeal is taken, unless the respective bankruptcy court, district court, or bankruptcy appellate panel, or the court of appeals in which the appeal is pending, issues a stay of such proceeding pending the appeal." [emphasis added]. Accordingly, the Notice of Appeal did not stay the Bankruptcy Court from entering the discharge order.

THE COURT'S LIMITED JURISDICTION PENDING APPEAL

The Supreme Court has stated that the filing of a notice of appeal strips a lower court of "its control over those aspects of the case involved in the appeal[ii]. Thus, under this doctrine, the debtor's timely notice of appeal divested the bankruptcy court of jurisdiction to proceed with the discharge order.

We believe that a Bankruptcy Court does have jurisdiction to enter a discharge order pending an appeal granting a motion for relief from stay. We believe this current issue on appeal will be decided in favor of the bank.

The debtor cited to *In re Padilla* 222 F.3d 1184, 1190 (9th Cir.2000) to specifically refer to our issue, that the bankruptcy court was without jurisdiction to enter the discharge order. In that case, the appellate court was reviewing a motion to dismiss that had been granted when the discharge order was entered. The appellate court held that the discharge order should not have been entered while the motion to dismiss was being appealed, thereby removing the bankruptcy court of jurisdiction. The debtor's argument is that, as in *Padilla*, if an appeal of the Motion for Relief from Stay is timely filed, the entry of a discharge order in the bankruptcy case while the appeal is pending would exceed the bankruptcy court's jurisdiction, and, accordingly should have not been entered.

Albeit the holding in *Padilla* being right on point, a review of the case indicated that, in dicta, the court stated that this doctrine is not absolute. Other cases also show that this doctrine comes with qualifications. The filing of a notice of appeal does remove the bankruptcy court of jurisdiction to enter orders *that would affect or modify any issue or matter on appeal*[iii]. Nonetheless, an appeal from an order does not deprive bankruptcy court of jurisdiction over all aspects of the case[iv]. The court retains jurisdiction when (1) the matter is not related to the issues involved in the appeal; (2) the order appealed is not appealable or is clearly frivolous; and (3) the court's action would aid in the appeal[v].. As such, the bankruptcy court retains jurisdiction to implement or enforce the order. "[A]cts undertaken to enforce the judgment … [are] permissible" but "acts which expand upon or alter it … [are] prohibited."[vi]

Thus, arguably, in the case currently on appeal, the entry of the order of discharge did not affect or modify the appeal of the order granting relief from stay as the lien rights of the secured creditor were no altered or affected by the discharge order. The bank retained its right to foreclose on the property whether by the order granting relief or by the discharge order. The order of discharge releases the debtor of his personal obligation over his debts. One is not related to the other. One did not alter or modify the other. Thus, the Bankruptcy Court should have jurisdiction to enter the order of discharge despite the Notice of Appeal on the Motion for Relief from Stay.

Further, *Padilla* is clearly distinguishable as it did not involve a Motion for Relief from Stay. Rather, *Padilla* involved a dismissal order by the trustee for substantial abuse, where the debtor would not have been entitled to discharge the personal obligations. This was Vis-a Vis a discharge order that would release the debtor from the personal obligations. Clearly, in that case, the order of discharge affected the decision previously rendered under the order of dismissal. That case, the main concern was "to discharge or not to discharge".

We believe that a Bankruptcy Court does have jurisdiction to enter a discharge order pending an appeal granting a motion for relief from stay. We believe this current issue on appeal will be decided in favor of the bank. Not so in other circumstances, like the denial of a discharge in an adversary complaint under 11 U.S.C. § 727 or the dismissal of the case where the discharge of all the debts will not be granted. It remains to be seen. a

[i] Rule 4001(3), 1999 Committee Advisory Notes (rule has not change since then).

[ii] Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 58 (1982).

[iii] In re Bialac, 694 F.2d 625 (9th Cir. 1982); In re Health Care Prods., 169 B.R. 753, 755 (M.D. Fla. 1994) ("Filing a Notice of Appeal from an appealable order divests the lower court of jurisdiction over issues related to the appeal."); In re Health Care Products, 169 B.R. 753 (M.D. Fla. 1994) (bankruptcy court lacked jurisdiction to strike affidavit following grant of summary judgment on turnover complaint and opponent's filing of notice of appeal).

[iv] In re Strawberry Square Assocs., 152 B.R. 699 (Bankr. E.D.N.Y. 1993).

[v] In re Bryant, 175 B.R. 9, 11-12 (W.D. Va. 1994).

[vi] Citing to: In re Prudential Lines, Inc., 170 B.R. 222, 243-44 (S.D.N.Y. 1994); accord NCRB v. Cincinnati Bronze, Inc., 829 F.2d 585 (6th Cir. 1987) (the bankruptcy court may enforce or implement (as opposed to alter) a judgment despite the filing of an appeal).

BACK TO THE FUTURE

PROTECTING TENANTS AT FORECLOSURE ACT REACTIVATED

BY MICHELLE GARCIA GILBERT, ESQ.
GILBERT GARCIA GROUP, P.A.
MGILBERT@GILBERTGROUPLAW.COM

On May 24, 2018, President Trump signed into law a restoration of the Protecting Tenants at Foreclosure Act (PTFA). See, generally, https://www.congress.gov/bill/115th-congress/senate-bill/2155/text#toc-id-BAA1BB9325204D0DABC5AB386F3C27B7.

The effective date of the repeal of the sunset of the PTFA is June 24, 2018, so forms and processes need to be implemented, or re-implemented, soon. You may recall that the PTFA requires that a bona fide tenant can be evicted only after the expiration of the 90 day period succeeding the date of receipt of the notice.

The PTFA was enacted on May 20, 2009, was initially extended to December 31, 2012, and expired on December 31, 2014. President Trump revived it on May 24, 2018.

The PTFA attempted to address the plight of tenants caught unaware by landlords with pending foreclosure actions.

The Act allows a tenant to remain in possession of a property until the later of their lease termination or 90 days, provided they provide a bona fide lease, proof of fair market payments, and have no relation to the former borrower.

Servicers resorted to offering cash-for-keys (CFK) payments to these tenants, in an effort to move property to sale, rather than wait for expiration of a lease. CFK avoided placing servicers in role of a landlord with commiserate liability.

MORE DETAILS

The Act applies to any federally-related mortgage loan or any residential real property foreclosed after May 20, 2009, and applies to parties purchasing property at foreclosure sale, and their assignees and successors in interest. The purchaser is required to deliver a 90 day notice to vacate to any bona fide tenant.

Tenants under a bona fide lease entered into before the notice of foreclosure (defined as prior to the transfer of title after the foreclosure sale) may occupy premises until end of lease term or after a 90 day notice to vacate, whichever is longer. If the real property transfers by a deed in lieu of foreclosure, after a foreclosure action has begun, the PTFA still applies.

A purchaser who will occupy the unit as a primary residence may terminate a lease with a remaining term that is longer than 90 days, upon delivering a 90 day notice.

A bona fide tenant without a lease, or with lease terminable at will is entitled to 90 day notice.

A lease or tenancy is "bona fide" only if:

1. The mortgagor or a child, spouse, or parent of the mortgagor under the contract is not the tenant;
2. The lease or tenancy was the product of an arm's-length transaction; and
3. The lease or tenancy requires the receipt of rent that is not substantially less than fair market rent or the rent is reduced or subsidized due to a federal, state, or local subsidy.

STATE LAWS

Some states adopted their own versions of the PTFA. For example, Florida statute §83.561 requires that bona fide tenants be given a 30 day notice to vacate, after which eviction can proceed regardless of an existing arms length lease.

As in the past, it will be questioned whether federal law can pre-empt state law, which may depend upon the specific state law and the incentive to test protracted eviction processes. Generally, the PTFA would not preempt state law that provides greater protections for the tenants. Conversely, the PTFA may preempt state law that is less protective of tenants. *See Mik v. Fed. Home Loan Mortg. Corp.*, 743 F.3d 149, 164 (6th Cir. 2014).

Firms likely will bring back the notice to vacate letter they used before the sunset in 2014, which requests that occupants remit certain information within 10 days that will allow a determination of whether the act applies. If the PTFA applies, a certified letter should be sent to prove that the letter was received by the occupants. If there is no response to the certified letter within 30 days, firms can apply for a writ of possession. Responses, leases, proof of payment, etc. will be reviewed to determine whether an existing lease has to be honored.

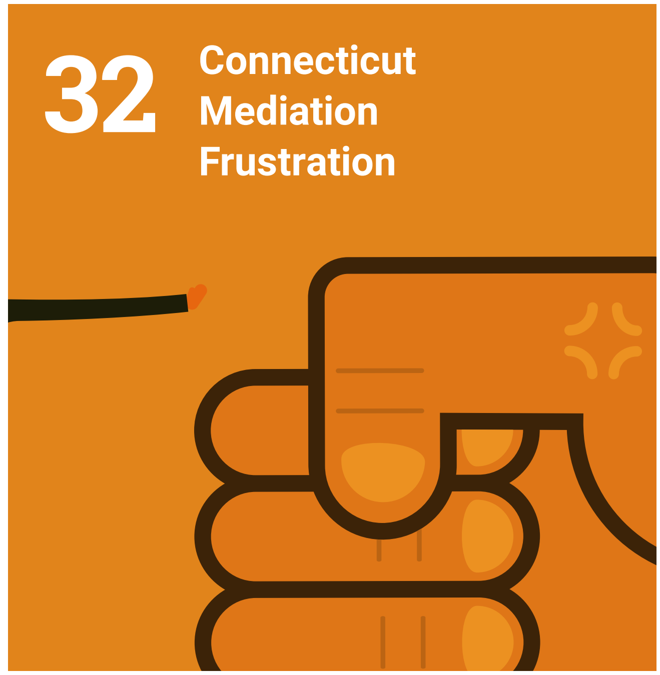
BACK TO BEING LANDLORDS

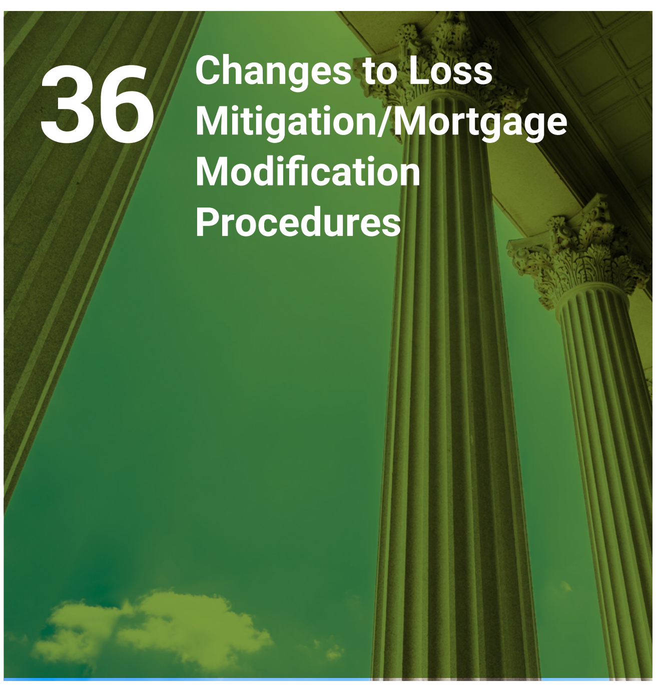
With REO property, the investor/servicer/bank is now the landlord and/or owner of the property, and has the option to collect rent pursuant to the existing lease, to offset losses. If the tenant fails to pay rent, the default options under the lease can be exercised.

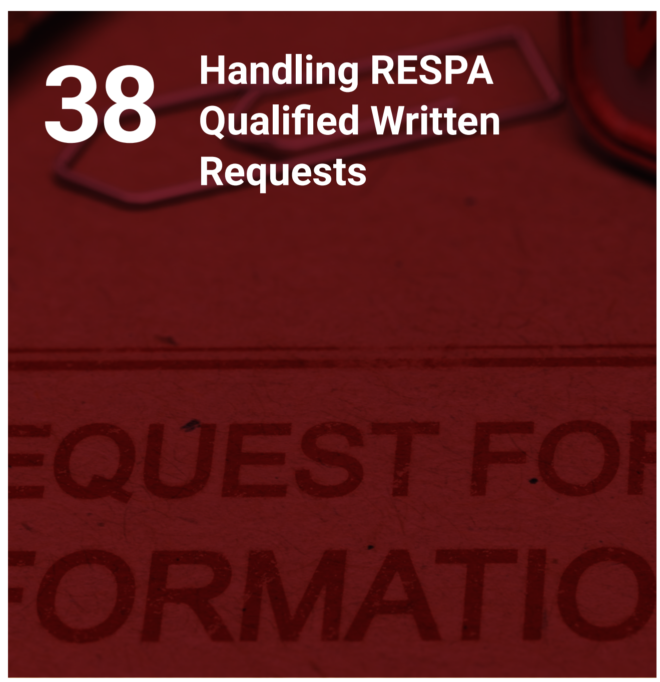
Being a landlord and owner implies liability for the premises and for code violations, so cash for keys offers may resolve these issues for both sides.

As always, please consult with your attorneys for effective solutions!

STATE SNAPSHOT







STATE SNAPSHOT

Illinois Appellate Courts Rule on Post-Foreclosure Payment of Condominium Assessments

BY MIKE TIMOTHY, ESQ.,
Assistant General Counsel, LOGS Network | mtimothy@logs.com

Illinois appellate courts have revisited the issue of the mechanism and timeliness of a foreclosing mortgagee's attempts to extinguish condominium liens for assessments accruing pre-foreclosure. The First District's opinion in Quadrangle House Condominium Association v. U.S. Bank, N.A., 2018 IL App (1st) 171717 issued April 20, 2018 contradicts its decision issued a year earlier under nearly identical facts, and confuses the procedure for foreclosing lenders who seek to properly confirm the extinguishment of a condominium lien post-foreclosure in conformity with the Illinois Condominium Act.

The foreclosing lender in Quadrangle completed its foreclosure by proceeding to sale on November 13, 2015. The bank thereafter tendered a check to the association for its share of common expenses (those arising post foreclosure) on September 13, 2016, 10 months following the conclusion of the sale.

On appeal, the association argued that Section 9 (g)(3) of the Illinois Condominium Act operated as a strict time limitation on the timing of assessment tender, confirming the extinguishment of the associations' pre-foreclosure lien for assessments. The First District, Sixth Division rejected this interpretation and held that tender, whenever effectuated, confirms extinguishment.

The applicable portion of the Illinois Condominium Act provides as follows:

(1) If any unit owner shall fail or refuse to make any payment of the common expenses or the amount of any unpaid fine when due, the amount thereof ….shall constitute a lien on the interest of the unit owner in the property…"

(3) The purchaser of a condominium unit at a judicial foreclosure sale…shall have the duty to pay the unit's proportionate share of the common expenses for the unit assessed from and after the first day of the month after the date of the judicial foreclosure sale… Such payment confirms the extinguishment of any lien created pursuant to paragraph (1) ….of this subsection (g) by virtue of the failure or refusal of a prior unit owner to make payment of common expenses".

This panel additionally rejected the condominium associations' position that 9 (g)(3) required "prompt" payment to confirm extinguishment. The court, analyzing a prior Illinois Supreme Court case, *1010 Lake Shore Drive Association v. Deutsche Bank National Trust Co.,* 2015 IL 118372, found no limiting language in the statute mandating "prompt" payment, and, following up on a finding in *1010 Lake Shore Drive,* found no ambiguity in the statute. The *Quadrangle* panel interpreted the Supreme Court holding as requiring only that payment be made at some point in the future to "confirm" the extinguishment of the condominium lien and rejected the argument that "prompt" payment meant tender to the condominium association no later than the month following the foreclosure sale.

This holding is all the more compelling to the practitioner in light of prior jurisprudence ruling on this issue. By way of background, the Illinois Supreme Court ruled that a failure to tender any payment to the condominium association would prevent extinguishment of the condominium lien. *1010 Lake Shore Association v. Deutsche Bank National Trust Co.,* 2015 IL 118372. Subsequently, this same First Appellate District panel hearing *Quadrangle* ruled that tender by the foreclosing lender 8 months after the foreclosure sale was sufficient to extinguish the condominium lien. *5510 Sheridan Road Condo Associ-*

ation v. U.S. Bank, 2017 IL App (1st) 160279. "We hold, based on a plain reading or section 9 (g) (3), that the phrase 'from and after the first day of the month after the date of the judicial foreclosure sale' does not create a timing deadline with which purchasers must comply to avail themselves of the statutes' extinguishment provision. Instead, that phrase simply demarcates the precise moment in time when the foreclosure-purchaser becomes liable for *postsale* common expenses". *5510 Sheridan Road Condo Association, 2017 Il App (1st) 160279, 306.*

Five months later, a different panel of this same appellate district came to an opposite conclusion. The second division of the First Appellate District ruled that tender 7 months after the foreclosure sale was insufficient as a matter of law to confirm the extinguishment of the associations' lien and remanded the case to the trial court to make a finding. *Country Club Estates Condominium Association v. Bayview Loan Servicing, LLC,* 2017 IL App (1st) 162459. ",,,(W)e hold that in order to extinguish an association's lien for pre-foreclosure-sale assessments, a foreclosure buyer must make 'prompt' payment of current assessments. (T)he question of whether a particular payment is 'prompt' is fact-based, taking the particular circumstances and the equities of the situation into account". The *Bayview* court continued its analysis by holding that tender within the first month following the foreclosure sale was rebuttably presumed to be prompt, but that such circumstances as a delay in approving the foreclosure sale could be a circumstance to consider in determining if a tender after this time period was "prompt".

Given the turbulent and confusing status of the law on this issue, especially within the Illinois First Appellate District, foreclosure counsel would be wise to advise its clients to obtain a statement from the condominium association as close to the sale date as possible and to be prepared to tender the lender's share within the first month following the sale or certainly no later than the first full month following its confirmation.

CONNECTICUT MEDIATION FRUSTRATION

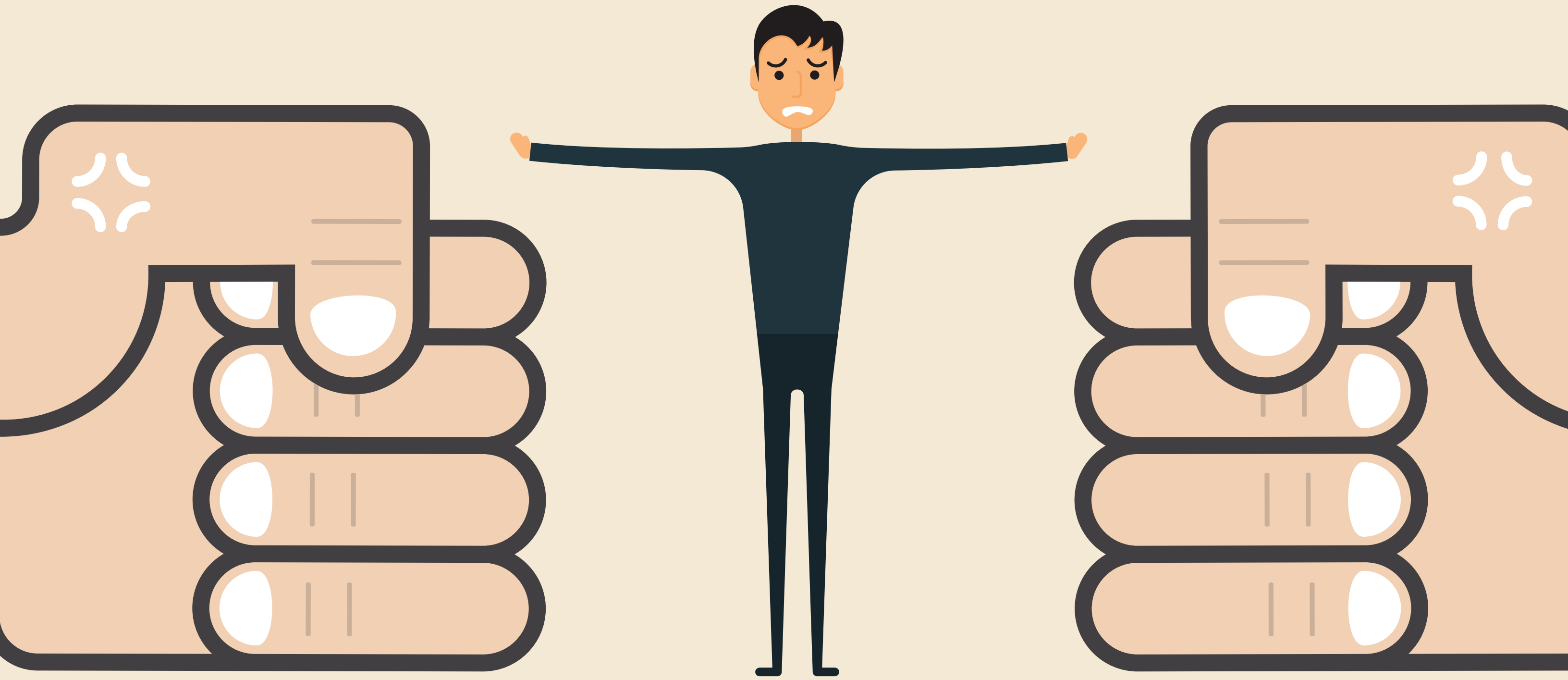
BY MARISA M. ENGEL, ESQ.,
Milford Law, LLC | marisa@milfordlegal.com

NOTHING DERAILS a foreclosure timeline quite like a referral to the Foreclosure Mediation Program in Connecticut. Mediation-related inquiries generally top the list of concerns from mortgage servicing clients of all sizes in Connecticut. Mediation related headaches are not unique to any one servicer, lender or law firm, but the way each court interprets the governing statute is unique to each judicial district within the State. Overcoming the difficulties associated with differing interpretations requires a hands-on approach to mediations in Connecticut.

The Foreclosure Mediation Program has evolved over the last decade to fit the needs of the growing foreclosure crisis in Connecticut. While it's future is currently uncertain, the current inception of the program involves a period of pre-mediation designed to allow the borrower an opportunity to meet independently with a court-appointed mediator to discuss the completion of the relevant financial documents needed to apply for loss mitigation options. Upon successful completion of pre-mediation, which is open to the interpretation of the mediator, the loan is assigned into the regular mediation program, which both borrower and servicer's counsel are required to attend.

Mediation lasts for up to eight months from the return date of the foreclosure action. This "mediation period" is accompanied by a litigation stay that dictates an instant - and significant - delay in the foreclosure process. What seems like a simple directive is further complicated by the availability, upon request, of additional time in the program for a myriad of reasons: ongoing negotiations, document review, a change in loss mitigation strategy, etc. The current inception of the statute includes modifications, sales, short sales, deeds in lieu of foreclosure and reinstatement as acceptable reasons for mediation. Exhaustion of all available loss mitigation options is generally required in each district before a judge will ultimately end the mediation period. Modifications are universally the first step in a loss mitigation review. In a post-HAMP world where there are fewer types of modifications being offered, the inclusion of sales and short sales as reasons to remain in mediation has proven to significantly extend the average time a file spends in mediation - even in cases where modification was never an option - since judges will frequently allow extensions for what they deem reasonable marketing time. Judicial discretion and the fact that foreclosures are handled in a court of equity often combine to lead to the inclusion of cases that do not fit the statute or to extensions of the mediation period for reasons that are not specifically referenced in the statute.

In theory, pre-mediation should serve to ameliorate the potential delays of the mediation process by ensuring that available options are discussed up front and the relevant loss mitigation applications are submitted for review in a timely manner. In practice, this is rarely the case. Loss mitigation applications are often incomplete, out of date, or rife with errors. The resulting document update requests can often tack on a significant amount of extra time in mediation. Poor communication is almost always the culprit behind these types of delays. Efficient handling of mediation files requires excellent communication on every file in real time. Firms need to know when a review has uncovered a need for an additional, updated, or missing document as soon as that discovery has been



In theory, pre-mediation should serve to ameliorate the potential delays of the mediation process by ensuring that available options are discussed up front and the relevant loss mitigation applications are submitted for review in a timely manner.

made so that they can communicate the request to the borrower as quickly as possible before the rest of the application becomes stale. By extension, firms need to have a strict protocol in place for monitoring document reviews and notifying borrowers of any document requests. Further, it may prove extremely beneficial to have some sort of protocol for weeding out cases that will not require a full document submission. For example, if an investor is only offering the kind of streamlined modifications that are not income-based and, therefore, do not require an application and supporting documents, the firm should be notified so that they can be sure the case does not get unduly delayed by requests for unnecessary documentation. This notification should also extend to the borrower's single point of contact with the servicer, who should be giving out the same information when they communicate with borrowers directly to alleviate extension of the mediation period due to communication errors.

Short of dedicated loan specialists for a small State who may not make up a large percentage of a servicer's portfolio, communication and the active exchange of information and problem-solving strategies is the only way to bring any kind of efficiency to the mediation process in Connecticut.

CONNECTICUT ALIAS TAX WARRANTS

BY ADAM LEWIS, ESQ. AND CLAUDIA SKLAR, ESQ.
O'CONNELL ATTMORE & MORRIS, LLC | ALEWIS@OAMLAW.COM AND CSKLAR@OAMLAW.COM

Unpaid taxes and blight liens are always a concern for a mortgagee. Because these liens generally have absolute priority over mortgages in Connecticut, mortgagees often pay off these liens to protect first lien position. However, some mortgagees elect to take title to the property subject to these outstanding priority liens. In Connecticut, this strategy is becoming increasingly perilous. A growing number of municipalities are foregoing their right to foreclose on properties for unpaid taxes and/or blight liens and, instead, are looking to the bank accounts of mortgagees, who took title to a property after foreclosure, to cure any unpaid municipal liens.

UNPAID TAXES

In Connecticut, like many, if not all, states, unpaid real estate taxes, including blight liens, or water or sanitation charges, result in a lien on real property. Upon a party's failure to pay any tax, or water or sanitation charges within thirty days of the due date, a tax collector may provide the party with written demand for payment. C.G.S. § 12-155(a). Following demand and a party's failure to pay, the tax collector may attempt to recover on its lien. *See* C.G.S. § 12-155(b). Traditionally, municipal tax collectors have elected to attempt to cure any delinquent taxes through either a sale of tax liens in bulk to a third party or a tax foreclosure pursuant to C.G.S. § 12-157. In both of these scenarios, a first mortgage holder usually elected to i) cure any tax delinquencies through payment in full, ii) take title to the property by redeeming on an appointed law day, or iii) take title as high bidder at the foreclosure sale. Recently, municipal tax collectors are diverging from this traditional course of practice when a bank takes title to a property after a mortgage foreclosure. In these cases, municipal tax collectors employ alias tax warrants to grab money from a mortgagee's account with a financial institution.

ALIAS TAX WARRANTS

An alias tax warrant is a creature of statute. Connecticut General Statues § 12-162 allows tax collectors to issue alias tax warrants when a person, which includes corporations and limited liability companies, fails to make payment of real estate taxes. An alias tax warrant may be served on a financial institution of any taxpayer similar to the levying of an execution. Also like an execution, the service of the alias tax warrant results in immediate withdrawal of the funds sufficient to cover the warrant amount and associated fees. Should the amount withdrawn exceed the amount of the warrant and associated fees, any surplus funds will be returned to the person.

CHALLENGING AN ALIAS TAX WARRANT

Should a lender discover that its money was seized through an alias tax warrant, a mortgagee can dispute the alias tax warrant in different ways. First, a mortgagee can challenge an alias tax warrant though an attack on a municipality's statutory compliance. In our experience, some municipalities, anxious to invade the deep pockets of a mortgagee, will execute an alias tax warrant before proper notice is effectuated. Or, the municipality will have an employee, lacking statutory authority, execute the alias tax warrant. In either case, an alias tax warrant is improper and any money seized should return to the lender. Another challenge to an alias tax warrant rests on the Hous-

ing and Economic Recovery Act ("HERA"). 12 U.S.C. § 4501, *et seq.* Under HERA, Fannie Mae and Freddie Mac are protected from levy, attachment, or garnishment from municipalities. It follows that money in the account of a mortgagee that services a federally insured loan, and which is reimbursed by Fannie Mae or Freddie Mac for expenses incurred in connection with the relevant loan, should be considered property of Fannie Mae or Freddie Mac. It follows that, pursuant to HERA, the money in the account is exempt from execution and an alias tax warrant.

It is important to review title and contact any local taxing authorities to determine what, if any, priority liens will encumber the property upon title vesting in the foreclosing entity.

CONCLUSION

Foreclosing entities that take title to a property after foreclosure must be cognizant of this issue before taking title. It is important to review title and contact any local taxing authorities to determine what, if any, priority liens will encumber the property upon title vesting in the foreclosing entity. While a lender may still take title to the property while these liens remain unpaid, this strategy comes with an increasing risk of an alias tax warrant. Should the mortgagee suffer loss due to an alias tax warrant, the alias tax warrant must be analyzed for statutory compliance and/or HERA to determine how, if at all, any money seized can be recovered.

CHANGES TO LOSS MITIGATION/ MORTGAGE MODIFICATION PROCEDURES

BY: LOUISE JOHNSON, ESQ., RONALD SCOTT, ESQ. AND REGINALD CORLEY, ESQ.
SCOTT & CORLEY, P.A.
CEASIEJ@SCOTTANDCORLEY.COM, RONS@SCOTTANDCORLEY.COM AND REGGIEC@SCOTTANDCORLEY.COM

South Carolina's senior Bankruptcy Judge, the Honorable John E. Waites, has amended his Chamber Guidelines with respect to Loss Mitigation/Mortgage Modification ("LM/MM") requirements and procedures effective **July 1, 2018** ("Amended Guidelines").

Below please find a summary of the procedural and substantive changes with respect to Loss Mitigation/ Mortgage Modification through the DMM Portal as set forth in the Amended Guidelines:

1

Shortly after the commencement of any Chapter 13 case assigned to Judge Waites, the Court now will enter an Order Regarding Procedures for Loss Mitigation/Mortgage Modification ("Order Regarding LM/ MM"). There is no deadline to serve this initial, early Order Regarding LM/MM.

2

The LM/MM program will remain a mediator-based LM/MM program, **but the appointment of a mediator is no longer automatic and/or mandatory in every LM/MM case**. The appointment of a mediator now will be triggered only by the request of one of the parties who may need additional time to obtain/send necessary documents. **This should reduce costs.**

3

In the event Debtor files an initial Plan that proposes to treat the Mortgage Creditor with LM/MM (and without adequate protection payments), a new, 21-day deadline from the date of the Plan filing is imposed on Debtor and/or Debtor's counsel which requires Debtor to file a Notice and Motion for LM/MM.

4

The Amended Guidelines increase the amount of time after the entry of the LM/MM Order for Debtor to submit his/her Prepared Loss Mitigation Package from seven (7) days to twenty-eight (28) days. **The Court will also set a status hearing ("Status Hearing") approximately 35 days after the entry of the LM/MM Order to ensure the package has been submitted by Debtor and received by Creditor. Personal attendance at the Status Hearing is required of Creditor's counsel and Creditor's representative; however, attendance at the Status Hearing could be excused by the Court upon Creditor's counsel's filing of the following items at least two (2) days prior to the Status Hearing: (a) correspondence indicating that the LM/MM package has been submitted by Debtor and received by Creditor; and (b) a calendar removal request.**

5

The Amended Guidelines also set a 21-day deadline after the submission of the Prepared Package for the creditor to complete an initial review of the Debtor's entire Prepared Package and to designate any additional requirements in a single entry in the DMM

Creditor's counsel shall also file a certification indicating that his/her client has completed these requirements.

Portal. Creditor's counsel shall also file a certification indicating that his/her client has completed these requirements.

6

Thereafter, the parties shall have 28 days to provide and review any additional documentation that is required, so that the LM/MM application may be submitted to an underwriter or other approving official.

Prior to the expiration of this deadline, the parties may have a telephonic conference for clear communication on the necessary requirements.

If the parties do not meet this deadline, they shall report it to the Court and the Court will designate a mediator for the case.

7

In all other circumstances, if a party determines that a mediator would assist the process, said party may request a mediator, and the Court will appoint a mediator; however, counsel for the requesting party must hold his or her client's share of the mediator's fee before requesting the mediation.

8

Upon the appointment of the mediator, the mediator schedules the session in his or her discretion. The mediation should be held within 60 days of the appointment, but the deadline is designed to be flexible depending on the circumstances and need at the time.

9

The mediator's fee has been increased. Mediator is to be paid $100 up-front for an administrative fee, and then paid $250 per hour for the mediation sessions. The full mediator's fee of $350 is required to be paid prior to the session and split equally between Debtor and Creditor. If the fees are not paid, the mediator may cancel the mediation session and shall report the failure to pay to the Court.

10

(The deadline to conclude the LM/MM review has been extended from 90 days to 120 days with further opportunities for an extension.

11

Creditors shall now post receipt of each trial payment in the Portal and the Debtors are to upload the executed LM/MM agreements into the portal.

12

The Portal is to remain open until the final modification is posted.

13

Any denial of LM/MM must be detailed and state specific and enumerated reasons.

14

Requests for LM/MM in the portal should be made within 45 days of an order granting relief to the Mortgage Creditor, or such request by the Debtor may be denied.

15

A second request for LM/MM during the case will require a demonstration of a change of circumstances if the mortgage creditor objects to the request.

16

The non-standard South Carolina Chapter 13 Form Plan language has been modified to take into account the ability to amend the plan upon a denial of LM/MM (in cases where the Debtor is making adequate protection payments to the mortgage creditor).

HANDLING RESPA QUALIFIED WRITTEN REQUESTS

8TH CIRCUIT REVERSES DAMAGES AWARD FOR VIOLATION

BY PAUL WEINGARDEN, ESQ. AND BRIAN LIEBO, ESQ.,
USSET WEINGARDEN & LIEBO, PLLP | PAUL@UWLLAW.COM & BRIAN@UWLLAW.COM

In a recent case decided by the 8th Circuit Court of Appeal, a borrower sued his mortgage servicer claiming servicing violations on his Minnesota loan under RESPA. Ultimately, the district court's damages award to the borrower was reversed and remanded for further proceedings in the district court. The appellate court found "no harm, no foul."

The facts of the case are fairly straightforward. Borrower Wirtz made a series of QWR demands to his current loan servicer arising from an alleged misapplication of funds for their servicer-transferred loan after the servicer claimed he was delinquent on his loan. Through one QWR, the borrower demanded a payment history from "origination to present." The current servicer may have received only a partial loan history from the prior servicer at the time of the service transfer. When their current servicer responded in a fashion deemed objectionable, Wirtz sued for damages under RESPA and the piggyback provisions of the Minnesota Mortgage Originator and Servicer Licensing Act which also proscribes lenders from violating federal laws regulating mortgage loan.

The trial court found the responses to Wirtz were improper, concluding that the servicer did not conduct an adequate investigation into the QWRs submitted by Wirtz. The trial court held (and later the appellate court also agreed) that the servicer violated RESPA when it did not "obtain, review, or provide the full payment history as Wirtz requested." The district court awarded the borrower damages in amount less than $5,000, plus attorneys' fees in excess of $45,000.

> An important lesson from this case is for servicers to adequately investigate and respond to borrowers' qualified written requests. If a borrower submits a QWR that includes a demand for a complete loan history or a loan history covering certain dates, then the servicer should provide the matching loan history to satisfy RESPA requirements.

The servicer appealed to the 8th Circuit Court of Appeals. There, the appellate judges carefully analyzed the wording of the statutes in question, and disagreed with the rationale for the ultimate damages award by the trial court, noting that Wirtz had no actual damages to trigger the penalties in the statute. The court held that proof of actual damages is an essential element of a claim under RESPA, and that Wirtz had suffered no actual damages to trigger the statutory provisions. In coming to this conclusion, the Court stated the following:

"We agree with Specialized that Wirtz failed to prove actual damages, because Specialized's failure to comply with RESPA did not cause Wirtz's alleged harm. When a loan servicer fails to comply with § 2605(e), the borrower is entitled to 'any actual damages to the borrower as a result of the failure.'.. Congress's use of the phrase 'as a result of' dictates there must be a causal link between the alleged violation and the damages."

Once disposing of the actual damage issue, the Court then vacated the award for statutory damages on the basis that without actual damages, the trigger to impose additional statutory damages failed as a matter of law. The appellate court reversed and remanded to the district Court to enter judgment for Specialized on the RESPA claim. The Court, however, did mention the possibility for a further examination under the corresponding Minnesota statute, which remains unknown as of this writing.

An important lesson from this case is for servicers to adequately investigate and respond to borrowers' qualified written requests. If a borrower submits a QWR that includes a demand for a complete loan history or a loan history covering certain dates, then the servicer should provide the matching loan history to satisfy RESPA requirements.

Hopefully, the result of this case will deter all but the most determined borrowers from litigation if they suffer no actual damages under RESPA. The prospect of a substantial attorney's fees award in favor of a borrower remains an issue whenever litigating RESPA matters, so extreme caution is always prudent for servicers around this topic. However, it is comforting to see the reversal of a large damages award when there is no actual loss caused to a borrower.

Kelley Kronenberg
ATTORNEYS AT LAW

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