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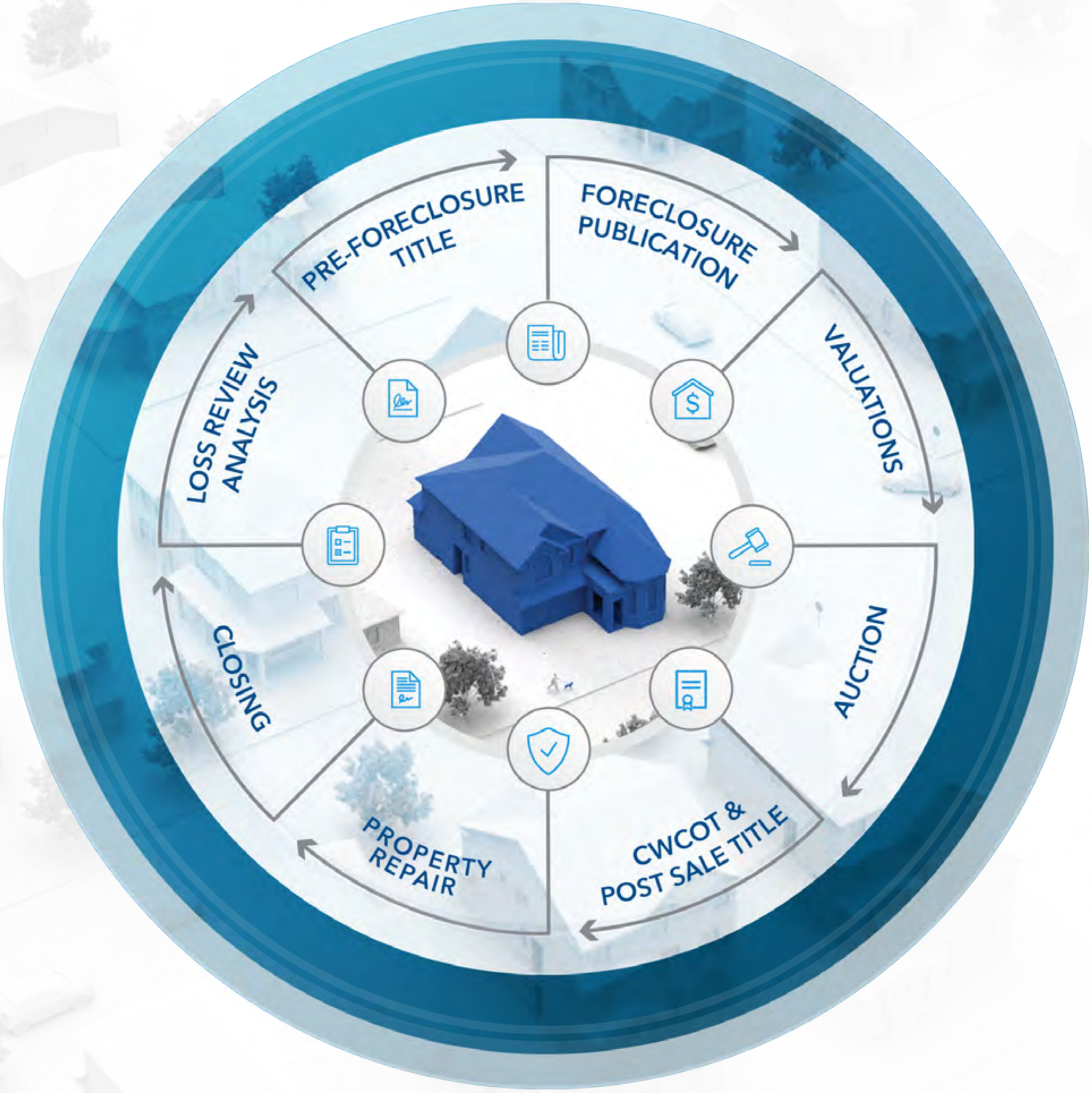
OFFICIAL PUBLICATION
OF THE ALFN
VOL. 6 ISSUE 3

JPEG's Guide to the Perfect Selfie



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GAME OF FIRMS
STRIKING A BALANCE

Letter from the ALFN Board Chair

THE FINANCIAL SERVICES INDUSTRY encompasses a wealth of opportunities and unique challenges. ALFN provides law firms, vendors, servicers, and investors a community to grow, learn, and develop allies. Similar to the popular, *Game of Thrones*, the members of our industry often compete for position, title, and rank in the financial services kingdom. One of the goals of ALFN, the Board and, Chair of the Board, is to ensure there are no wars; everyone is served and that the industry members flourish.

The Board is often faced with the challenge of meeting the needs of its many diverse members. There are very large firms, medium-sized firms, small firms, vendors, servicers, investors and GSEs. Each of these fiefdoms has specific goals they wish to achieve through membership or participation in ALFN. Thus, when working on policies and agendas for the different events or opportunities, we strive to listen and learn in order to meet our member's expectations.

The large firm. This is a firm generally made up over 100 employees and covers several states. Its budget is large and it wishes to obtain a dominant presence. The objective is to allow this type of firm to represent its size and ability, but to not allow overshadowing. This firm often requests time at events to take clients offsite and to throw large and often expensive events. The conflict for ALFN is that all attendees pay to travel long distances at great expense to participate and these "private" events take potential opportunities away from their reach.

The medium firm. This firm may only cover one or two states and is more limited in branding as compared to the large firms. It has a modest budget, is able to gain the attention of clients, but does not have the influence or ability to host larger events unless they join forces with similarly-sized firms. This size firm appreciates onsite events but also looks for larger sponsorship opportunities or methods for ALFN to gain attention such as speaking engagements.

The small firm. This firm often has 10 or fewer employees and a modest reach but, as members of our industry, they too seek opportunities through ALFN and its events. These firms need and rely on ALFN to provide not only education but to assist in making introductions to clients they may not have had the chance to meet without the larger reach of the organization. This firm does not want to see private events hosted by larger firms that whisk away the clients during ALFN scheduled events.

The vendor. For this group, putting on events and reaching the attention of firms and servicers is extremely valuable. It is a chance to meet prospects and maintain relationships. Like all firms, budgets and needs vary for vendors, and the competition for attention is great. These vendors appreciate that firms are seeking the attention of clients and look to ALFN to provide the same opportunities to promote their services and interests.

The client. This is truly a challenging group. This group enjoys the opportunity to learn about the issues facing the industry, meet with its firms and receive education and training. However, it can be daunting to be placed in a situation where individuals are being courted by a barrage of firms and vendors. This group often requests a limit to access or restrictions on attendance and participation. The challenge presented is many of these individuals attend on a scholarship paid for by ALFN and draw the attention of the members as well as drive attendance.

While facing this complex arena of competing interests, how does the Board together with the executive team solve these challenges to provide an excellent experience for its members and attendees? The answer is to compromise and to always put the betterment of the group as a whole first. The kingdom must survive together to succeed. Events are costly and do take the time of its attendees and members, thus the primary focus is to make the experience as valuable and fulfilled as possible. The focus of ALFN is not solely to provide an opportunity for firms to put on their own events, but for ALFN to provide the entertainment and education through dues and attendance fees. Thus, while downtime is needed during events, it is critical that we meet the needs of the firms that budget for the events and cannot afford to have a night or a large amount of time with little or no activity. On the other hand, the opportunity for larger firms to be seen is critical to its agenda for attendance. Thus, larger and more specialized sponsorships for the events are available where a larger firm can display the scale of the organization for attention and recognition.

Servicers, GSE's and investors want to attend and enjoy the events as well, and often ask for the opportunity to not be bombarded. To deal with this need, ALFN focuses on relaxed atmospheres in remote and scenic locations. This provides the opportunity to engage during smaller, more intimate events, where real conversations can occur and the ability to create meaningful relationships.

These considerations take time and dedication by ALFN. Constructive feedback from members is what makes it a success. It allows the Board to debate and evaluate the needs of the members so that the different parties involved come together and support ALFN as the association they wish to commit to for their education and connections.

As Chair of the Board, I appreciate this challenge and encourage more members to share their ideas and thoughts to ensure the success and survival of the *Realm*.

ANDREA TROMBERG, ESQ.
Board Chair
American Legal & Financial Network (ALFN)

Letter from the Editor

I AM PLEASED to present you with this special ANSWERS issue of the ALFN ANGLE. ANSWERS, ALFN's 17th Annual Conference, is being held this month in beautiful Lake Tahoe with over 300 industry professionals who are preparing for another memorable week of impactful networking and cutting-edge education. With 12 educational sessions, and several hours of potential CLE available, there will be no shortage of issues to discuss and ANSWERS to explore. The line-up of industry experts we will showcase include GSE's, ALFN attorneys and service providers, mortgage servicing executives, bankruptcy trustees and more. Also, don't miss an ALFN ANSWERS first with a special keynote speaker who will address the challenges of cybersecurity. Ben Hammersley is the Editor-at-Large for WIRED UK magazine and the host of the Netflix and BBC series, "Cybercrimes." As an international reporter, author and adventure seeker, Ben explores the effects of the internet and the digital network on the world's business, political and social atmospheres.

Our cover feature of this month's ANGLE is presented by the leadership of the ALFN's Junior Professionals & Executives Group (JPEG), and breaks down some of the key pieces of advice that each of them have gained throughout their personal career growth and time spent in JPEG as young professionals. We then transition to an important topic in Bankruptcy dealing with "in rem" relief and the co-debtor stay, and the need for creditors to be cautious when proceeding with a foreclosure or collection action if a co-debtor stay exists. Our next key feature article addresses the home equity foreclosure process in Texas, and while any home equity loan may be foreclosed by judicial foreclosure, the Texas Supreme Court has provided rules for an expedited foreclosure proceeding as an alternative. We then proceed to our next featured topic and cover the ins and outs of servicing subsequent purchased non-mortgagor loans. Having established protocols in place and a clear understanding of the rights of a subsequent purchaser is crucial to avoiding unnecessary litigation and delays during the servicing of these loans. Up next is an article that reviews two cases from the Sixth and Seventh Circuits and how each addressed situations involving debt collectors who failed to advise debtors that disputing delinquent obligations, in writing, would trigger additional protections under the Fair Debt Collection Practices Act. Our final feature article provides insight on the Minnesota Safe at Home program, and the critical importance that lenders and servicers have procedures in place to identify Safe at Home participants, conceal and protect the participants' location information system-wide, and ensure all future mailings are sent to the proper Safe at Home address.

This issue of the ANGLE concludes with several important state level snapshots. These include a Supreme Court case in California that provides some clarity on the application of the anti-deficiency statute where a creditor holds two deeds of trust on the same property; Michigan Court of Appeals guidance regarding when a mortgage debt is not paid in full, then the funds beyond a mortgagee's bid are not surplus proceeds; New Jersey's foreclosure law updates that include required changes to the Notice of Intent to Foreclosure; and the need in Pennsylvania to file updated Act 6/91 notices before each new foreclosure filing.

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 financial services industry. a

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

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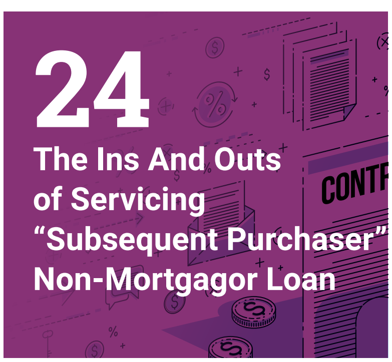

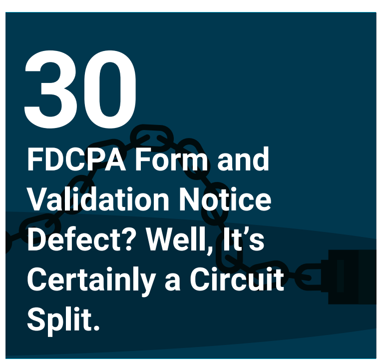

MEMBER BRIEFS

STATE SNAPSHOT

MEMBER BRIEFS

ALFN EVENTS
SAVE THE DATES

2019

JUL. 21-24
ALFN ANSWERS
17th Annual Conference
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Resort, Spa & Casino
Incline Village, NV
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NOV. 13
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Westin Irving Convention Center
Irving, TX
* Registration Opens August 2019

2020

MAY 5-6
5TH ANNUAL WILLPOWER SUMMIT
The Ritz-Carlton Dallas
* Registration Opens February 2020

JULY 19-22
ALFN ANSWERS 2020
Hyatt Regency Coconut Point Resort
Bonita Springs, FL

2021

JULY 18-21
ALFN ANSWERS 2021
Hyatt Regency Tamaya Resort
Santa Ana Pueblo, NM

Want more industry intel?

Check the complete industry calendar for ALFN and other events online at alfn.org for even more details and registration info.

IS YOUR CONTACT INFO UPDATED?

Is your online directory listing optimized? Do you know who has access to your ALFN.org account? Well, log in at ALFN.org to edit your member listing to make sure your information is current. You should also send us a complete list of your company employees and we will add them to our database to make sure everyone receives our updates and reminders. We often send emails on important opportunities for our members, so we don't want you to miss out on all the ways you can get involved.
Contact us at *info@alfn.org* to be included.

EVENT & ANNUAL SPONSORSHIP PACKAGES FOR 2019

Contact Susan Rosen at srosen@alfn.org to design a package that is right for you to sponsor single or multiple events throughout 2019.

VOLUNTEER OPPORTUNITIES 2019

ALFN offers members an opportunity to serve on small, issue or practice specific groups. Take the opportunity to have direct involvement in developing and leading the activities of the ALFN. Volunteering is one of the most important activities you can do to take full advantage of your membership value. For descriptions of each group, their focus, activities and other details, visit Member Groups at ALFN.org.

ALFN WEBINARS

The ALFN hosts webinars that are complimentary for members and servicers. Contact us at info@alfn.org to learn more about hosting a webinar and the benefits of doing so, or to sign up to attend our future webinar events. Our webinar offerings include:

PRACTICE BUILDING SERIES

Presentations on operational and business issues facing our members.

HOT TOPIC LEGAL UPDATES

Industry hot topics and litigation updates.

STATE SPOTLIGHT

Focusing on those state specific issues.

MEMBERS ONLY

Presenting the products/services you offer as a member of ALFN, and how they might benefit our Attorney-Trustee and/or Associate Members.

SPEAKER APPLICATIONS FOR 2019 EVENTS

If you want to be considered for a panelist position as a speaker or moderator in 2019 at one of our events, please find our events tab on alfn.org and fill out the speaker form listed there. Each year many members submit their interest to speak at ALFN events, and we are looking for the best educators and presenters out there to get involved. To be considered, everyone in your company that wants to speak on a panel in 2019 must complete a speaker form.

JPEG's Guide
TO THE
Perfect Selfie

BY ALFN'S 2019 JPEG LEADERSHIP TEAM

At a very early age we are taught to define ourselves by selecting our future careers. Preschool is dedicated to learning about and even dressing up as community helpers. In those years we are often directed to imagine what we want to be when we grow up. Grade school is a time for aptitude tests, career days and shadowing our parents at work. Then, before we graduate, we should draw on all of our life experience to that point and be prepared to choose the perfect career. The career that feels like play and not like work. For a few those choices are right and will unfold just as we planned. For some, career choices are shaped by college or other life experiences that ignite a true passion or purpose in our lives. For others, we stumble around in the dark, step on a few Legos, and try not to slip on a roller skate, until we can find the light switch. But once we turn on the light, it is smooth sailing right?

Should our careers really be defined at a time when our lives are consumed by cloudy judgment, questionable choices, and selfies? A time when we are devoted to the countless articles and online tutorials to help us capture the perfect snapshot of our unblemished youth, while we mostly ignore the resources that could help us shape our future careers. Even if we chose the right career, how do we develop and grow into a more senior position? As we emerge as junior professionals and executives, our judgment is hopefully less cloudy, and our choices are hopefully less questionable, but as Millennials, we still love our selfies. Annually, JPEG invites our industry to Picture the Future and take notice of some of the rising talent in our industry. In addition, this year we thought it was time for a little self-reflection on personal career growth. Drawing on the inspiration from our youth, JPEG introduces The Guide to the Perfect Selfie.

Plotting and navigating a career path is a very difficult undertaking, but your JPEG leadership team is here to help. We have broken down some of the key pieces of advice we have learned over the years mastering the art of the perfect selfie and mashed it up with some advice we have learned through our personal career growth and time in JPEG. We hope this unique blend of everything Millennial will inspire you as you self-reflect and determine the best way to move forward in your own career.

Pay Attention to Your Light and Avoid Shadows

The first rule of selfie-ing is to focus on the light. Being aware of the light around you and avoiding any shadows can greatly enhance your selfie. The right light can push shadows away and avoid any dark, blurry or unintended looks that shadows can cause. The same is true in your career. Surround yourself with positive uplifting voices and avoid any negative voices that can cast a shadow on your day or worse your career path.

> "John Muir once said, "The sun shines not on us but in us." In my experience, I have found value in surrounding myself with positivity. To do this, I have cultivated relationships with peers and mentors that I can trust to guide me to the "light" when I'm faced with challenges or seeking direction. It's easy to succumb to negativity and find yourself in the dark, but consciously focusing on immersing yourself in positivity helps to navigate difficult situations while staying focused on your success and betterment—both personally and professionally. Having people that are "lights" in your life is a great way to ensure that you also shine. Once I found my light, I was able to teach others to avoid dark shadows. JPEG has introduced me to many guiding "lights" that help me enhance my selfie to pursue my career goals."
>
> —Julius Drayton, Vendor Management & Oversight at Shellpoint Mortgage Servicing and JPEG Servicer Liaison

Play to Your Angles

When it comes to selfies we have all learned to keep your chin down and the camera up. Some of the best selfies come with the aid of the selfie stick, because the upward angle makes everyone look slender and elegant. As you develop your career you should similarly find ways to highlight your strengths or find opportunities to play to your angles. If you find an angle that works for you, that is your selfie stick, and should be used frequently.

> "I often struggled feeling like I couldn't keep up with everything until I was offered some incredible career advice: Focus on building my strengths, rather than focusing on my weaknesses. This allowed me to hone in on what I was inherently good at and provided me the confidence to build on what I may not feel as comfortable with. My natural strengths always led me towards people, so I use that ability to build relationships with others who can assist me in my weaker "spots". In turn, I try to assist people with their innate weaknesses and build a trusting relationship."
>
> —Lauren Einhorn, Partner at Kelly Kronenberg and JPEG Chair

Use the Right Filters

The filter is the shortcut to the perfect selfie. Filters make an otherwise lengthy preparation instantaneous and make the impossible suddenly possible. Suddenly, the outlandish dream of being a unicorn with a rainbow and sparkles over your head can be realized. The right mentor, book, course, or the perfectly timed piece of advice can be the equivalent of the selfie filter. They can lessen preparation time and make a goal that seemed unattainable, suddenly possible. The right filter can prepare you for the opportunity when it presents itself.

> "I once griped that getting career advice always seemed to be about being in the right place at the right time, and how was one ever supposed to plan a career around that? In response, my managing partner (always a fixer) urged me to join ALFN and JPEG noting that you not only need the luck to be in the right place at the right time, but you needed to be prepared when that time came. JPEG helps you know your peers in the industry and connect with them, attending events gives you insight to global issues that help you build your expertise, and taking part in leadership opportunities gives you experience you can apply to other facets of your career."
>
> —Caitlin Donnelly, Managing Attorney at KML Law Group and JPEG Secretary

Limit Editing and Embrace Your Natural Self
(trust your instincts or be true to yourself)

Enhancing a selfie through editing or filters is common and is a useful tool when used properly. Over-editing a selfie can lead to an unnatural looking selfie that no longer resembles your true self. Selfie time is definitely the time to strike a pose, but be aware not to oversell it. We have all seen the websites dedicated to the "duck-face" look. When navigating your career it is similarly important to stay true to yourself. No one knows your talents and strengths more than you. If there is a glaringly obvious weakness that could use correction, by all means take time to focus on building up that area. But be careful not to over-correct or change your personality just to address one weakness. Also, make sure you take the time to strike a pose. Let your personality shine through. If you are guarded or hiding a part of your personality from others, it prevents them from getting to know the real you.

> "Early in my career I heard a lot of bad advice. "You have to be mean to manage people." "If you are nice you can't be an effective attorney, because others will always be able to take advantage of you." Several mentors along the way have guided me in the other direction. They have encouraged me to lead through example, and not fear, and to be nice, but firm, when working with adverse parties or situations. They have also taught me that the more of myself I share with others the easier it is to get to know them and in turn the more of themselves they will share with you. Many of these mentors have come through my time in JPEG and actively working in committees with the ALFN. These experiences have allowed me to develop my career identity while helping to move my career forward."
>
> —J.P. Sellers, Senior Attorney at Mackie Wolf Zientz & Mann, P.C. and JPEG Vice-Chair

Be Aware and Avoid Photo-Bombers

The perfect selfie can happen in a really interesting background or in a very simple background. Regardless of where you are, you must always be aware of your background to avoid ending up in a clickbait article of failed selfies. And of course, you must avoid the photo-bombers. They will attempt to leap in at the last second and steal your selfie glory. To advance your career you must master the art of self-promotion, but to do so requires awareness. You have to be aware of your audience, environment, and your opportunity. Overlooking any of these could lead to an embarrassing moment, in which you are labeled a braggart, or could lead to a missed opportunity. Waiting for someone else to take notice and praise your efforts could leave you waiting or open you up to a photo-bomber sharing or taking your spotlight.

> "As a natural introvert, putting myself at the forefront of most situations, including paving the path of my career, did not come easily. I relied heavily on my talents speaking for themselves and my amazing mentor pushing me forward. One day, early in my practice, my mentor spoke with me about the importance of marketing myself. She encouraged me to put my ideas and talents in front of clients and management with boldness, assertively moving my career and our firm forward. I took her counsel to heart and began offering to take on challenging projects that played to my strengths. This small but intentional step forward lead to our clients, my peers, and firm management trusting my abilities, advancing my career upward. When it came time to networking myself and the firm, as a member of ALFN, I decided to join JPEG. I am so thankful for the opportunities JPEG has provided. The benefits of networking with other young professionals who understand the struggles and are equally as eager to build up the future of our industry is boundless!"
>
> —Danielle Patterson, Attorney Manager at Heavner, Beyers & Mihlar, LLC and JPEG Social Media and Membership Chair

Do you need some more advice or just want an opportunity to get to know other junior professionals and executives working in the mortgage servicing industry? Please consider joining JPEG. We are a diverse group of young professionals who collaborate on quarterly calls, meet up at industry events and above all work together to forge a path for Millennials in the mortgage servicing industry. We may even shatter some glass ceilings along the way. If you are interested join through ALFN.org or reach out to any of the JPEG leadership or members. Make sure you join us for the JPEG Picture the Future Breakfast and 6th Annual JPEG Awards on Monday July 22nd at ALFN ANSWERS.

IN REM RELIEF AND THE CO-DEBTOR STAY

BY ANJALI KHOSLA,
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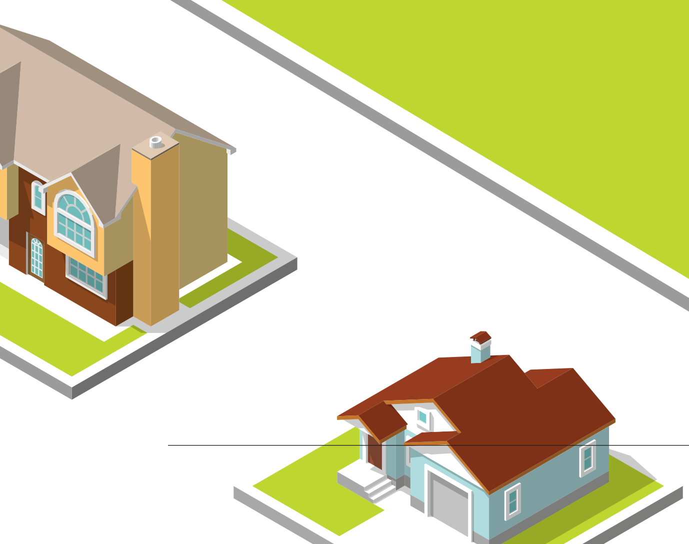

WHEN FACED with a serial or repeat bankruptcy filer, mortgage creditors have been forced to be aggressive and seek extreme forms of redress with the Courts. Several years ago, creditors scored a major victory with codification of what was commonly referred to as "in rem" relief.

The concept of "in rem" relief was developed by judges and creditors around the country to combat abuses of the bankruptcy system to prevent foreclosure sales from occurring. An "in rem" order essentially gave a creditor relief as to the property prospectively, no matter who filed bankruptcy and claimed an interest in the property. This helped to thwart various schemes where borrowers, who themselves became ineligible to file bankruptcy, would have another interested holder in the property file bankruptcy for the express purpose of thwarting a scheduled foreclosure sale. Often there were situations where co-borrowers would "tag team" filings to keep the mortgage holder at bay. There were even situations where borrowers would deed away interests in the property to unrelated parties, for the sole purpose of filing a bankruptcy and staying a pending foreclosure sale. "In rem" orders helped to curb that practice, but many judges around the country refused to issue them as they did not believe the bankruptcy code authorized this extreme form of relief. Finally, Congress spoke in 2005 and, in doing so, legalized the concept of "in rem" relief.

A relief order under 11 U.S.C. § 362(d)(4) (the "in rem" provision of the Bankruptcy Code) can help stop the leap frogging of case filings as well as bankruptcies filed by new owners who were simply transferred the property in an attempt to stop a foreclosure sale. However, "in rem" relief under section 362(d)(4) does not apply against a co-debtor stay in future Chapter 13 cases, and consequently will not stop the co-debtor stay under 11 U.S.C. §1301 from triggering in a future chapter 13 filing. Thus, an "in rem" order that is obtained in a Chapter 13 filing, may not be enough to allow the foreclosure proceedings to resume. The mortgage creditor may also need to obtain prospective relief from the co-debtor stay to resume and conclude foreclosure efforts.

The automatic stay of section 362 and the co-debtor stay of section 1301 operate as separate stays which are independent of each other and one has no effect on the other.,[1, 2] Neither section of the code references the other and nothing in section 362 indicates that relief from or termination of the automatic stay under section 362 means relief or termination as to the stay under section 1301. The stay under section 1301 is even more protective than that automatic stay under section 362. The co-debtor stay takes effect in any chapter 13 case that is filed for a loan that is classified as a consumer debt if another person is liable on the debt or secured such debt and did not file as a joint debtor. The bankruptcy code supports the reasoning that a mortgage lien is a consumer debt, and thus, the co-debtor stay takes effect and can stop a foreclosure sale. See 11 U.S.C. § 101(8) ("The term 'consumer debt' means debt incurred by an individual primarily for a personal, family, or household purpose.").[3] Of note, if you are practicing in a state where a foreclosure action is considered a fully in rem action and only the property is named in the proceeding, then a co-debtor stay would not apply and an order pursuant to 11 U.S.C. §362(d)(4) would allow a foreclosure to proceed without a bankruptcy filing stopping the sale (so long as no motion under 11 U.S.C. §362(b)(20) has been filed and granted). A truly in rem proceeding is extremely narrow in scope. It is typically limited to a tax sale or a quiet title action. Most foreclosure proceedings across the nation would not qualify as a truly in rem proceeding where only the property is the named defendant as most foreclosure sales would name the borrowers.[4] Attorney's should check their state laws to determine if a foreclosure proceeding is considered fully in rem in nature.

In contrast, unlike the co-debtor stay, Congress placed limits on the automatic stay by including section 362(c). The automatic stay will automatically terminate after the 30th day if a case is filed within one year of the dismissal of a prior case and if a motion to extend the stay is not filed and granted by a party in interest. 11 U.S.C. § 362(c)(3). Further, the automatic stay does not go into effect at all if the case is the third filing within a one year period where the two prior cases have been dismissed. 11. U.S.C. § 362(c)(4). No such limitation exists for the co-debtor stay. Since there is no limitation to the co-debtor stay, Creditors could find themselves in a situation where there is no automatic stay as to the debtor under section 362, but then find themselves forced to stop or rescind a sale due to a co-debtor stay.[5]

The distinction between the debtor and co-debtor stay is extremely pertinent when reviewing a case for an in rem motion for relief. In rem relief granted under section 362(d)(4) applies to any automatic stay that could go into effect as to the subject property filed by any person, regardless of whether they were a party in the bankruptcy case where in rem relief was sought and granted. However, the in rem relief is limited to the stay under section 362. The relevant sections state:

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section…

> (4) with respect to a stay of an act against real property under subsection (a), by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved either—
>
> > (A) transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or (B) multiple bankruptcy filings affecting such real property. (Emphasis added)[6]

As a way to mitigate due process concerns to any co-owner or future owner in regard to an order granting in rem relief under section 362(d)(4), section 11 U.S.C. § 362(b)(20) further allows a future debtor to "move for relief from such order based upon changed circumstances or for other good cause shown, after notice and a hearing." Since the two stays of section 362 and section 1301 are independent of each other and relief under section 362(d)(4) clearly limits any prospective relief to a stay under section 362 only, an in rem order granting relief pursuant to section 362(d)(4) that does not also grant prospective relief under section 1301 will not stop a foreclosure sale where a co-debtor is a named party to the foreclosure if a chapter 13 bankruptcy is filed and a co-debtor stay exists.

In order to obtain the necessary relief to proceed with a foreclosure sale, one option would be to file a motion for relief pursuant to section 362(d)(4) as well as a request for prospective co-debtor relief. While section 1301 does not explicitly state a Court can grant such relief, when faced with an abusive filer, Courts may grant such a request using the general powers of the court under 11 U.S.C. § 105 in conjunction with section 362(d)(4) and section 1301 much like they did prior to the 2005 change to the rules. If you are in a jurisdiction where a Court would not go so far as to grant prospective co-debtor relief and would only grant in rem relief under section 362(d)(4), a motion for nunc pro tunc co-debtor relief could be filed in the new bankruptcy case in which a co-debtor stay was triggered. Until such time that the Courts or Congress clarifies that relief granted under 11 U.S.C. § 362(d)(4) also applies as to any co-debtor stay that could be triggered under 11 U.S.C. § 1301, creditors should be careful when proceeding with a foreclosure or collection action if a co-debtor stay exists. a

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[1] See In re Whitlock-Young 571 B.R. 795, 805 (Bankr. N.D. Il. 2017)("…it is clear that Congress also intended the protections under section 1301 and section 362 to exist independent of one another.")

[2] See also In re Lemma 393 B.R. 299, 304 (Bankr. E.D.N.Y. 2008) ("Just as the termination of the stay in section 362(a) will not terminate the co-debtor stay imposed by section 1301, so too does the Court find that the new thirty-day automatic termination of the stay applicable to Debtors pursuant to section 362(c)(3)(A) does not terminate the co-debtor stay imposed by section 1301").

[3] In Re King 362 B.R. 226 (Bankr. D.Md. 2007) ("A debt securing debtor's principal residence qualifies as a consumer debt"); In re Morris 385 B.R. 823 (E.D. Va. 2008) (same); In Re Bryant 47 B.R. 21 (Bankr. W.D. N.C. 1984) (same)

[4] See in re Ebadi 448 B.R. 308 (Bankr. E.D.N.Y. 2011) (holding that a foreclosure proceeding was not truly in rem but a combined in rem and in personam action against the debtor since debtor was named in the foreclosure proceeding)

[5] See Whitlock-Young 571 B.R. 795 (holding that the automatic stay did not go into effect as it was the Debtor's third bankruptcy within a one year period where the two prior cases has been dismissed, but that the co-debtor stay under section 1301 was in effect and foreclosure sale was voided due to the violation of the co-debtor stay).

[6] In Re Greenstein 576 B.R. 139, 148 (Bankr. C.D. Cal. 2017) (Stating that an in rem order "exempts the subject real property from the protection of the automatic stay in any subsequent bankruptcy case") (emphasis added).

THE HOME EQUITY FORECLOSURE PROCESS IN TEXAS

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BACKGROUND

HOME EQUITY LOANS ARE A FORM OF A MORTGAGE THAT ENABLES A HOMEOWNER TO CONVERT THE EQUITY IN THEIR HOME TO CASH BY BORROWING MONEY SECURED BY A LIEN ON THEIR HOMESTEAD. UNTIL VERY RECENTLY IN ITS HISTORY, TEXAS RESTRICTIONS AGAINST THE FORCED SALE OF A HOMESTEAD FOR ANY REASON OTHER THAN IN SATISFACTION OF UNPAID PROPERTY TAXES OR A PURCHASE MONEY MORTGAGE PREVENTED HOMEOWNERS FROM BORROWING AGAINST THE EQUITY IN THEIR PROPERTY. THIS REMAINED LARGELY THE CASE FROM THE INCEPTION OF THE REPUBLIC OF TEXAS IN 1839 TO 1845 WHEN TEXAS JOINED THE UNITED STATES AND ENSHRINED THE HOMESTEAD EXEMPTION IN THE FIRST TEXAS CONSTITUTION.

The Texas Constitution was amended in 1876 to allow homeowners to borrow against their homestead to make improvements to their home. In 1986 the federal Tax Reform Act phased out the tax deductibility of interest paid on other, non-mortgage consumer loans, making home equity loans a more attractive borrowing opportunity. Nonetheless, Home Equity Loans for any purpose other than home improvements remained prohibited until 1997 when the Texas Constitution was amended to permit homeowners to obtain closed-end home equity loans.

In 2003, the Texas Constitution was amended yet again to permit homeowners to obtain open-end home equity loans, otherwise known as Home Equity Lines of Credit (or HELOCs, in the industry parlance.) Nevertheless, strict requirements must be met for a Texas home equity loan to be valid and enforceable; the loan must be created with the consent of each homeowner and homeowner's spouse, the principle of the loan cannot exceed eighty percent (80%) of the fair market value of the home, and the loan must be non-recourse, in addition to other numerous specific requirements related to the origination of the loan. Any loan that does not strictly comply with these requirements, or for which any violation is not cured by the lender within sixty days of discovery, is invalid and the lender forfeits all principal and interest of the loan.

Furthermore, home equity loans may only be foreclosed upon the authority of a court order. This differs dramatically from the standard nonjudicial sale process in Texas, by which a lender may foreclose its lien against a homestead in a public auction via the power of sale granted to a trustee under the deed of trust. When a foreclosure order is required, typically to correct a defect in title or origination or to adjudicate the rights of various lienholders, the lender has the option to pursue a judicial foreclosure, a foreclosure that is carried out via a sheriff's sale of the property. A judicial foreclosure, however, is a lawsuit, with all of the attendant requirements of a lawsuit; a petition that states a claim for relief and a remedy, notice to all defendants (any party with an interest in the subject property), a time period in which defendants are permitted to answer, and discovery (where appropriate) once that answer is filed.

THE PRINCIPLE OF THE
LOAN CANNOT EXCEED
EIGHTY PERCENT
OF THE
FAIR MARKET VALUE

NOTICE REQUIREMENTS ARE GREATLY RELAXED IN THE EXPEDITED FORECLOSURE PROCESS.

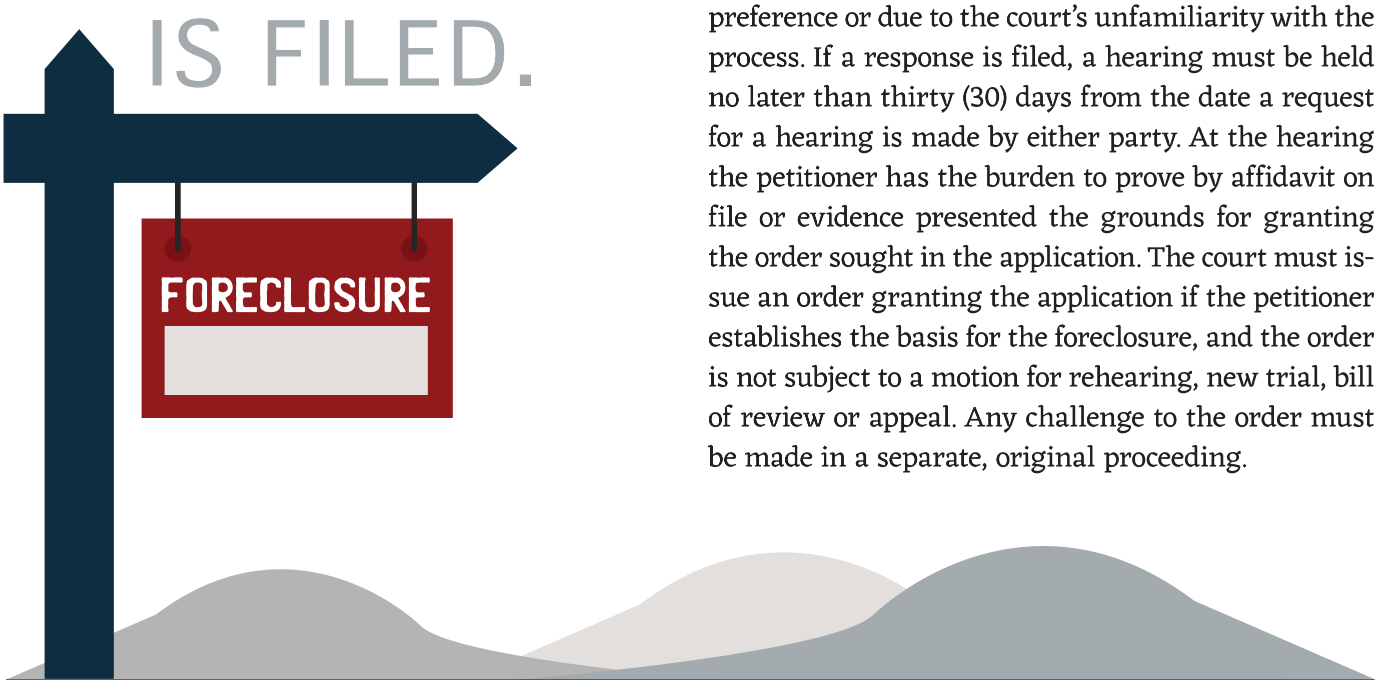
FORECLOSURE PROCESS – EXPEDITED

While any home equity loan may be foreclosed by judicial foreclosure, the Texas Supreme Court, as called for by the Texas Constitution, has promulgated rules for an expedited foreclosure proceeding as an alternative. These are set forth in Texas Rule of Civil Procedure 735, which describes the liens to which the expedited foreclosure applies, and Texas Rule of Civil Procedure 736, which sets forth the procedure by which the expedited foreclosure order may be obtained.

First, the lender (now "petitioner") must file an application for an expedited order in the county where all or part of the real property sought to be foreclosed on is located, or in a probate court with jurisdiction over proceedings involving the property. The application must identify the petitioner, the respondent (any person obligated to pay the loan, as well as any mortgagor) and the property, both by its commonly known street address and legal description. It must state the type of lien being foreclosed, the authority of the party seeking foreclosure and, as of a date not more than sixty days prior to the date the application is filed, the number of payments past due, the amount required to cure the default, and the amount required to pay off the loan. It must also state that the requisite notices to cure have been sent to each person who is entitled to such notice, that the opportunity to cure has expired, and that before the application was filed, any other action required under applicable law and the loan agreement was performed. The application must be accompanied by an affidavit of material facts, signed by the petitioner or its loan servicer, describing the basis of foreclosure. The affidavit must in turn be accompanied by true and correct copies of the note, the deed of trust, any assignments of lien, and each notice required to be mailed to any person entitled to notice, with proof of mailing.

Helpfully, the Texas Supreme Court has promulgated forms for both the application and the affidavit, thus eliminating any guess work on the part of the petitioner (and its counsel) on precisely which facts must be stated or which documents must be included with the application. Notice requirements are greatly relaxed in the expedited foreclosure process. Personal service upon the respondents is not required. Rather, citations are issued by the clerk of the court, and served by the clerk of the court by both first class and certified mail. Upon mailing the clerk will complete a return of service indicating that the date of service is the date and time the citation was placed in the mail. At this point service is complete.

THE COURT **MUST GRANT** THE APPLICATION BY DEFAULT ORDER **NO LATER THAN THIRTY DAYS** AFTER A MOTION IS FILED.



The citation must state that any response to the petitioner's application is due the first Monday after the expiration of thirty-eight (38) days from the date of service. The response may be in the form of a general denial, but the respondent is limited in the scope and number of defenses that may be affirmatively plead. The respondent may plead that they did not sign the loan agreement, that they are not obligated for payment on the loan, that the number of past due payments, reinstatement or payoff amounts are incorrect, why any document attached to the application is not a true and correct copy of the original, or provide proof that payment on the loan has been made. The response may not state any independent claim for relief, and, per the Rule, the court is required to strike without a hearing and dismiss any counterclaim, cross claim, third party claim, intervention or cause of action filed by any person.

The Rule states that a hearing must not be held by the court unless a response is filed. If no response is filed the petitioner may file a motion to obtain a default order, and the court must grant the application by default order no later than thirty (30) days after a motion is filed. The Rule also states that the petitioner need not appear in court to obtain a default order, though it is not uncommon for some courts to routinely hold hearings on default motions in expedited foreclosure actions, whether out of the judge's preference or due to the court's unfamiliarity with the process. If a response is filed, a hearing must be held no later than thirty (30) days from the date a request for a hearing is made by either party. At the hearing the petitioner has the burden to prove by affidavit on file or evidence presented the grounds for granting the order sought in the application. The court must issue an order granting the application if the petitioner establishes the basis for the foreclosure, and the order is not subject to a motion for rehearing, new trial, bill of review or appeal. Any challenge to the order must be made in a separate, original proceeding.

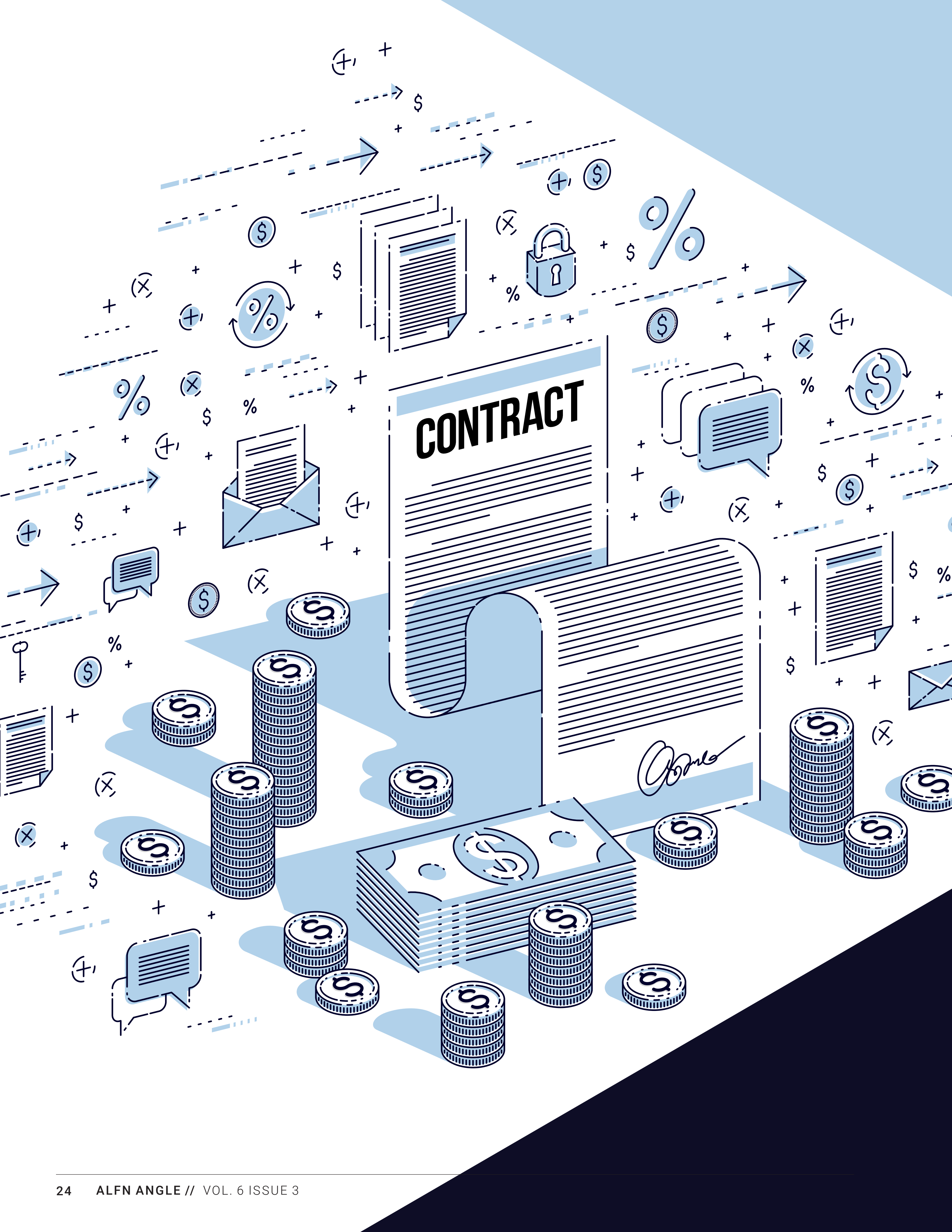
STAYS AND INDEPENDENT LITIGATION IN THE EXPEDITED FORECLOSURE PROCESS

An expedited foreclosure proceeding is automatically stayed if the respondent files a separate, original proceeding. Furthermore, the respondent may stay any foreclosure sale authorized by a previously entered order if the independent suit is filed prior to 5:00 p.m. on the Monday before the scheduled foreclosure sale. If an order was previously entered the respondent must, within ten days of filing of the suit, file a motion and proposed order with the court to vacate the order obtained by the petitioner. As an independent lawsuit is the only means outside of bankruptcy by which a respondent can challenge the expedited foreclosure process, filing of such suits is not uncommon. In such instances where the respondent's claims are meritless dismissal is ultimately the result, after which the petitioner may elect to file another application seeking an expedited foreclosure order. It is not uncommon though for a respondent to file suit again, seeking to buy time even when another dismissal is the inevitable result. For this reason, petitioners will sometimes counterclaim for foreclosure in the respondent's proceeding. Though the result is a sheriff's sale only after discovery is completed, the proper motions are filed, and judgment is granted, counterclaiming in the respondent's suit can prevent a litigious borrower from delaying the process further in another expedited foreclosure proceeding.

PETITIONERS WILL SOMETIMES COUNTERCLAIM FOR FORECLOSURE IN THE RESPONDENT'S PROCEEDING.

CONCLUSION

As has hopefully become clear in the course of this article, the expedited foreclosure process represents an effort to strike a balance between policies that reflect a desire to protect the homestead rights of Texas borrowers while also allowing these same borrowers the freedom to take advantage of the equity in their homes that they have earned. Court oversight of the foreclosure process helps to ensure that the petitioner has both the standing and the right to foreclose on the homesteaded property and, furthermore, offers the home equity borrower additional time to take advantage of opportunities that may exist to prevent foreclosure. While the expedited foreclosure process is lengthier and more open to contest than the standard nonjudicial foreclosure process, astute counsel can nevertheless guide lenders to satisfactory outcomes without unwarranted expense and delay.


CONTRACT

THE INS AND OUTS OF SERVICING "SUBSEQUENT PURCHASER" NON-MORTGAGOR LOANS

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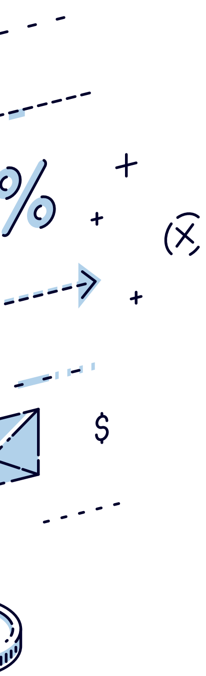

Acknowledging there are exceptions to every stereotype, in the case of subsequent purchasers who take title to mortgaged property without assuming the mortgage their interests are typically averse to those of the mortgagee. Having established protocols in place and a clear understanding of the rights of a subsequent purchaser is crucial to avoiding unnecessary litigation and delays during the servicing of these loans. Although a subsequent purchaser owns and possesses the property just like a mortgagor, the relationship and communications between a servicer and subsequent purchaser should be limited in furtherance of protecting the privacy rights of the mortgagor and ensuring the mortgage and note terms are upheld.

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A servicer is required to communicate and work with a subsequent purchaser; however, unless a subsequent purchaser assumes the mortgage and debt, he is not a party to the mortgage contract and has no rights under those documents. Due to this fact, a subsequent purchaser should not be given information about the borrower or the loan such as financial, contact or loan information (excepting payoff information). In addition to these limited rights, a subsequent purchaser who takes title to property which is subject to a recorded mortgage is considered an indispensable party to an action seeking to foreclose that mortgage. *Green Emerald Homes, LLC v. 21st Mortgage Corp.*, 2D17-2192, 2019 WL 2398015 (Fla. 2d DCA June 7, 2019). In *Green Emerald* the Second DCA recently clarified that a subsequent purchaser named in a foreclosure action can fully defend against said action with few limitations. The Court provided a detailed analysis of the substantive law behind its reasoning.

In *Green Emerald* the mortgagee, 21st Mortgage Corporation ("the Bank"), filed a foreclosure action wherein it named *Green Emerald* as a defendant and identified it as the "owner…in possession of the property subject to its mortgage." *Green Emerald*, at *1. Green Emerald filed an answer and affirmative defenses challenging most of the complaint allegations and admitting only that it was the property owner and in possession of the property. Id. The matter proceeded to a non-jury trial where the Bank at the outset argued that Green Emerald lacked "standing" to "contest practically anything" as a non-mortgagor owner of the property. Id. During the trial the Bank introduced evidence through one witness, Whit Reed, "a 'legal team leader' for 21st Mortgage who worked with loans in default." Id., at *2. The Bank proffered the original note and mortgage, default letter and payment history into evidence through Mr. Reed. Id. Mr. Reed also testified as to the amounts due as reflected in the proposed judgment which included an increase in principal of $77,270 which was not supported by the trial evidence. Id. Mr. Reed explained away the added principal as "likely the result of a modification agreed to by Ms. Reid and a prior loan servicer." Id. Mr. Reed also testified there must be a written modification agreement reflecting the principal increase but stated he did not have a copy of it. Id. The Bank did not offer any further testimony or evidence on the subject.

After the Bank rested Green Emerald moved for an involuntary dismissal asserting the Bank could not prove the amount due without a copy of the modification agreement. Id. The Bank argued Green Emerald as a non-party to the mortgage or note lack standing to challenge the amounts due. Id., at *2. The trial court denied Green Emerald's request for an involuntary dismissal and entered a judgment of foreclosure but reduced the judgment amount by $77,270 due to the lack of evidence to support the increased principal amount. Id. Green Emerald appealed the judgment to the Second DCA. On appeal the Bank and Green Emerald maintained the same arguments raised at trial.

The Second DCA found the Bank failed to satisfy its burden of proof on the amounts due and reversed the foreclosure judgment and remanded the case with directions to enter a voluntary dismissal. The Court reasoned that the amount due under the note was "an element of the foreclosure cause of action" and explained that "[t]he notion that a party named as a defendant in a civil action has no standing to require that the plaintiff prove the elements of its cause of action" was a novel one for which it could find no legal support. The Court elaborated: "Requiring a named defendant to have standing to hold the plaintiff to its proof is quite out of line with the conventional understanding of standing that prevails in civil litigation." Id., at *2.

A servicer is required to communicate and work with a subsequent purchaser; however, unless a subsequent purchaser assumes the mortgage and debt, he is not a party to the mortgage contract and has no rights under those documents.

The Court explained that Green Emerald was named as a defendant in the foreclosure action because it was an indispensable party. In response to the Bank's argument that only parties to the note and mortgage could challenge the amounts due the Court retorted: "If only the party to the note and mortgage is relevant, and the titleholder is nothing more than a set piece with no right to defend of any substance, there is no point in making the final resolution of a mortgage foreclosure action contingent on the titleholder being joined to the litigation" as an indispensable party. Id., at *4. The Court continued that as an indispensable party, Green Emerald was entitled to its due process right to notice and an opportunity to be heard, the latter of which it described as more than being "present and [allowed] to speak." The Court elaborated that the opportunity to be heard included "the right to meaningfully introduce evidence, cross-examine witnesses, and be heard on questions of law." Id., at *3 (citations omitted).

The Court did clarify that there were some limitations to the "types of issues and defenses" a subsequent purchaser could raise in a foreclosure action. Id., at *4. For example, they are "estopped from disputing the validity of [a previously recorded] mortgage." Id., at *4 (citations omitted). Additionally, "a subsequent purchaser who is not a party to the mortgage contract generally cannot assert rights under the contract that belong to the parties." The Court rejected the Bank's characterization of these limitations as being related to the "standing" of a defendant explaining instead that:

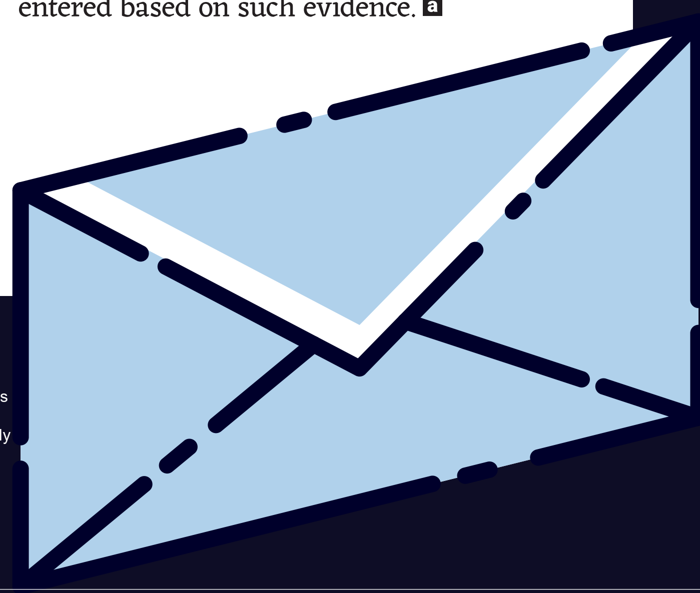
> [W]e should recognize these rules for what they are: limitations on the rights of particular parties in the foreclosure process imposed by substantive law. Their scope is confined to the limited subject areas they cover—disputes as to the validity of mortgages and the rights of nonparties to enforce contract provisions. On their face, they do not represent a determination that a subsequent purchaser lacks standing to contest practically anything a plaintiff might assert in a foreclosure case or that a subsequent purchaser must tie each and every matter it asserts by way of defense to some interest that gives it standing to assert that specific matter.

Id., at *5. The Court concluded that requiring the mortgagee to prove the amounts due "does not implicate either the validity of the mortgage or an effort to enforce provisions in a mortgage contract to which Green Emerald is not a party." Id., at *6. Going forward, it is likely these two limitations will be used to determine if a non-mortgagor can raise a specific defense.

Notably, the Court also alluded in a footnote that a subsequent purchaser may also have the right to challenge the bank's compliance with the notice provision of the mortgage (typically paragraph 22 of the mortgage). The Court explained: "Because compliance with paragraph twenty-two is a condition precedent to a foreclosure suit… there might be an argument that the failure to comply with paragraph twenty-two may be asserted by a named defendant to the suit that is not a party to the mortgage." Id., at *5. The current common law precedent on this issue is that a subsequent purchaser cannot raise failure of conditions precedent as a defense since such a requirement stems from the mortgage to which the subsequent purchaser is not a party. *LaFaille v. Nationstar Mortg., LLC,* 197 So. 3d 1246, 1247 (Fla. 3d DCA 2016); *Clay County Land Tr. No. 08-04-25-0078-014-27, Orange Park Tr. Services, LLC v. JPMorgan Chase Bank, Nat. Ass'n*, 152 So. 3d 83, 84 (Fla. 1st DCA 2014). However, the Second DCA's recent commentary in Green Emerald on the subject may stimulate additional litigation on the issue.

The Court also distinguished between a subsequent purchaser named as a party, and a subsequent purchaser who was not named but sought to intervene. The Court identified the latter as a "purchaser pendente lite" who "acquired the mortgaged property after the foreclosure complaint and lis pendens were filed, not before." *Green Emerald*, at *6 (emphasis provided). The Court explained that "purchasers pendente lite – pending litigation…have no right to insert themselves into the pending litigation to which they were not previously a party." The Court noted the reason for this "is that allowing intervention invites the unnecessary protraction of litigation by a nonparty who knew full well at the time it took title that the property was in foreclosure." Id., at *7.

Although the Court's holding in Green Emerald appears to extend the rights of a subsequent purchaser, the required proofs are no more than has always been required in a foreclosure proceeding. Proffering competent substantial evidence of amounts due, especially the principal amount due is foreclosure 101, to use the Court's words. Although this holding may promote additional litigation and delay caused by additional defenses which must be rebutted by a subsequent purchaser, the bank possesses all the required proofs to do so. Evidence of comprehensive records which demonstrate the contract between the parties, any modifications, the default, the notice of default, failure to cure, and finally, the amounts due should be proffered in every foreclosure case to ensure the legitimacy and finality of any judgments that are entered based on such evidence.



[i] A subsequent purchaser is entitled to payoff information within fourteen days of a written request pursuant to § 701.04, Fla. Stat.

[ii] Typically, both the note and mortgage contain fee provisions which allow the bank to recover the fees and costs associated with a foreclosure necessitated by the borrower's default. Although this entitlement is one of the "rights under the contract" the Bank is still entitled to collect these fees even when the subsequent purchaser (who presumably did not assume the mortgage) holds title since the fees are awarded against the property and not against the subsequent purchaser personally.

A HARM? A FOUL?

A F.D.C.P.A FORM AND VALIDATION NOTICE DEFECT?

WELL, IT'S CERTAINLY A CIRCUIT SPLIT.

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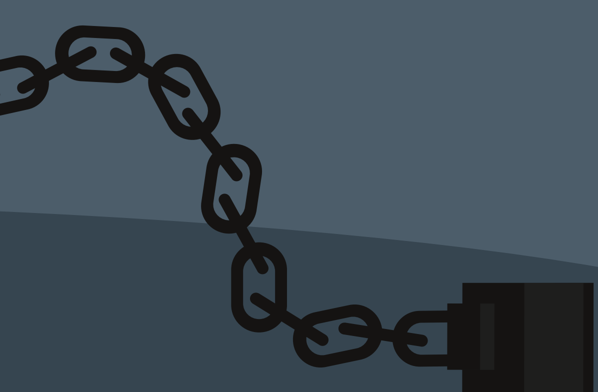
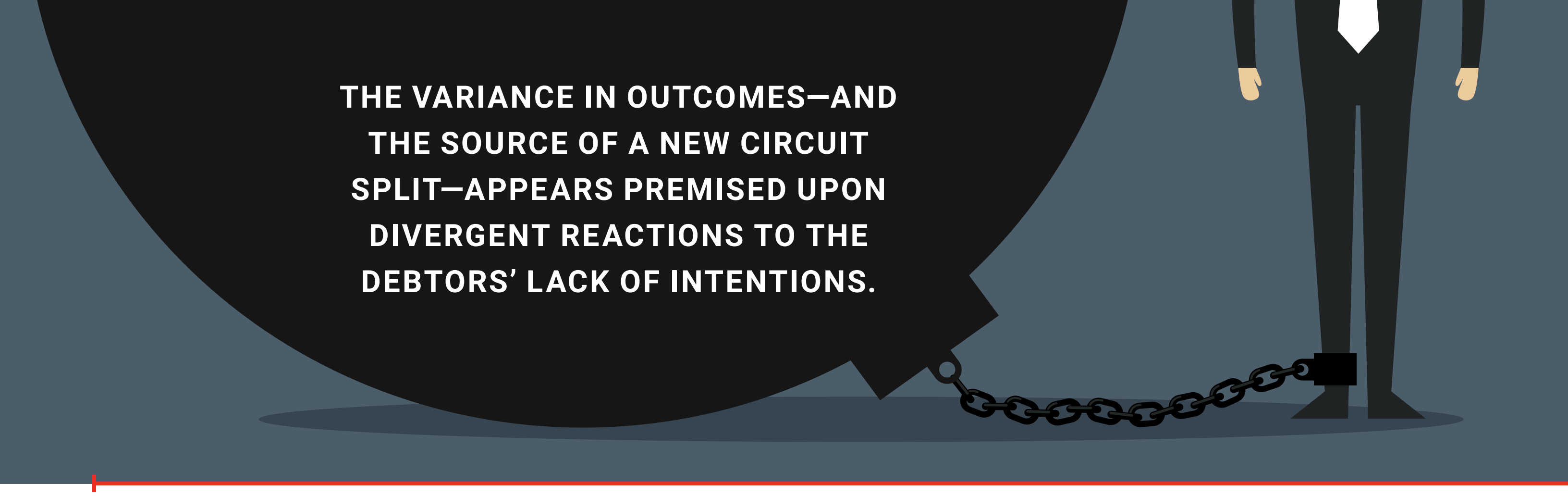


With the Seventh Circuit handing down Casillas v. Madison Avenue Associates, No. 17-3162 (7th Cir. June 4, 2019)[1] early this summer, a rift has erupted between it and the Sixth Circuit. Macy v. GC Services Limited Partnership, 897 F.3d 747 (6th Cir. 2018) and Casillas each addressed situations involving debt collectors who failed to advise debtors that disputing delinquent obligations, in writing,[2] would trigger additional protections under the Fair Debt Collection Practices Act (the "F.D.C.P.A" or "Act").[3] In reaching their respective conclusions, both Casillas and the earlier decided Macy focused on the interplay between Article III standing, the 2016 U.S. Supreme Court decision of Spokeo, Inc. v. Robins, 136 S.Ct. 1540 (2016), and the F.D.C.P.A. Briefly summarized, the Spokeo decision is a reminder that Article III of the U.S. Constitution requires "concrete" injuries – i.e., injuries that "actually exist."[4] Injuries of this caliber are needed to maintain federal jurisdiction "even in the context of a statutory violation."[5] "For that reason… a bare procedural violation, divorced from any concrete harm" cannot satisfy the injury-in-fact threshold established in Article III.[6] Ultimately, the Sixth Circuit concluded the debt collector's omission under the Act created an actionable, concrete injury to the Macy plaintiff. The Seventh Circuit found the opposite, adopting a mantra of "no harm, no foul."[7]



Crucial to the Sixth Circuit holding that the Macy debtors had standing was its interpretation of Spokeo; namely, that the decision divides statutory violations "as falling into two broad categories…."[8] The first is "where the violation of a procedural right granted by statute is sufficient in and of itself to constitute concrete injury in fact because Congress conferred the procedural right to protect a plaintiff's concrete interest and the procedural violation presents a material risk of real harm to that concrete interest…."[9] The second is "a 'bare' procedural violation" which compels a plaintiff to "allege 'additional harm beyond the one Congress has identified.'"[10] Notably, this aspect of Sixth Circuit's analysis appears to have been strongly influenced by the Second Circuit's 2016 decision Strubel v. Comenity Bank,[11] as well as the Ninth Circuit's post-remand findings within Spokeo.[12]

In order to assess the gravity of the F.D.C.P.A infraction at issue, and—in turn—establish the degree of harm plaintiffs needed to allege, the Sixth Circuit explored the history and purpose of the Act. And paramount to said statute are the goals "'to protect consumers from a host of unfair, harassing, and deceptive debt collection practices'… to 'eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.'"[13] With this in mind, the Sixth Circuit ruled the debt collector's failure to tell borrowers certain disputes under 15 U.S.C. § 1692g must be lodged in writing placed plaintiffs "at a materially greater risk of falling victim to 'abusive debt collection practices.'…" and causing an "unintentional waiver of [the] FDCPA's debt-validation rights, including suspension of collection of disputed debts…."[14]

Yet surely—as the Macy debt collector posited—the fact that the challenged omission "never materialized into actual harm" is relevant?[15] After all, the plaintiffs never argued the debt collector's letters "led them to waive any right(s) under the FDCPA, or caused them any confusion or inconvenience… [and Plaintiffs never bothered to] allege they wished to dispute their debt or that they wished to request… the name and address of the original creditor."[16] But, according to the Sixth Circuit, that's not the point. The mere chance the debtors could have lost their core protections under the Act—like those in § 1692g(a)(4) and (a)(5)—amounted to true harm.[17] Hence, the court concluded Article III standing was shown by alleging the debt collector's violations "created a material risk of harm to the interests recognized by Congress in enacting the FDCPA."[18] The Macy plaintiffs were therefore free to proceed with the prosecution of their suit at the district court level.

Roughly ten months later, facing the same F.D.C.P.A violation, the Seventh Circuit reached an entirely dif

[1] The decision can also be found at 2019 WL 2353211.

[2] The Sixth Circuit quoted the relevant, offending portion of the debt collector's correspondence, which stated:
[I]f you do dispute all or any portion of this debt within 30 days of receiving this letter, we will obtain verification of the debt from our client and send it to you. Or, if within 30 days of receiving this letter you request the name and address of the original creditor, we will provide it to you in the event it differs from our client, Synchrony Bank.
Macy, 897 F.3d at 751.

[3] For illustration purposes, a timely written dispute compels a debt collector to cease all collection efforts until the debt is verified in accordance with 15 U.S.C. § 1692g; a telephonic dispute may not.

[4] *Spokeo*, 136 S.Ct. at 1548.

[5] *Id*. at 1549.

[6] See *id.*

[7] *Casillas*, No. 17-3162 at page 1.

[8] *Macy*, 897 F.3d at 756.

[9] *Id.*

[10] *Id.* (citing and quoting *Spokeo*, 136 S.Ct. at 1549).

[11] *See* 842 F.3d 181, 189–90 (2d. Cir. 2016) ("[W]e understand *Spokeo*, and the cases cited therein, to instruct that an alleged procedural violation can by itself manifest concrete injury where Congress conferred the procedural right to protect a plaintiff's concrete interests and where the procedural violation presents a 'risk of real harm' to that concrete interest.").

[12] *See* 867 F.3d 1108, 1113 (9th Cir. 2017) (determining that, for standing purposes, the *Spokeo*

ferent conclusion in Casillas.[19] Like the Sixth Circuit, the Seventh agreed the purpose of the F.D.C.P.A was to curb "the use of abusive, deceptive, and unfair debt collection practices…."[20] Both appellate courts also acknowledged that full compliance with § 1692g helps "reduce the risk that debtors will inadvertently lose the protections given to" them.[21] Furthermore, the litigants in both actions were similarly situated; the Seventh Circuit even specifically mentioning that its plaintiff—just like the plaintiffs in Macy—never alleged "that they tried or had any intention of trying to contact the debt collector to verify the debt."[22]

The variance in outcomes—and the source of a new circuit split—appears premised upon divergent reactions to the debtors' lack of intentions. The Casillas court began by reiterating that Article III standing has limitations and requires injury-in-fact; it specifically "grants federal courts the power to redress harms that defendants cause plaintiffs, not a freewheeling power to hold defendants accountable for legal infractions."[23] Here, the plaintiff "was not at any risk of losing her statutory rights because there was no prospect that she would have tried to exercise them."[24] Basically, she "had no more use for the [omitted] notice than she would have had for directions accompanying a product that she had no plans to assemble."[25] And since the debt collector's omission of prescribed information never put the debtor "in harms way, it was nothing more than a 'bare procedural violation.'"[26] In the end, it was immaterial that the debt collector's infraction "risked harming someone – it must have risked harm to the plaintiffs."[27] That, per the Seventh Circuit, is the concrete injury standard set by Spokeo. "[S]uccinctly stated: no harm, no foul."[28] Or, perhaps phrased alternatively - if you knowingly don't use a right, be prepared to lose the right.

Lastly, the debtor in Casillas was unsuccessful in her efforts to create standing through arguing she had suffered a concrete "informational injury."[29] Specifically, the plaintiff contended that, because the debt collector did not provide her the information required by §1692g(a)(4) and (5), "being deprived of information was itself the injury."[30] The Seventh Circuit disagreed with the borrower's assessments and distinguished her cited case law, stating that most decisions for this topic related to "the denial of information subject to public disclosure…" or the Fair Housing Act.[31] The district court's decision to dismiss the debtor's complaint and its ruling denying leave to amend were both upheld and affirmed.

CONCLUSIONS

Casillas and Macy highlight the importance of assessing whether violations—or purported violations—of the Fair Debt Collection Practices Act can amount to an injury which is actual, real, and concrete enough to confer standing. To that effect, these cases illustrate the importance of understanding the nuances of law in the locations where one operates, especially so if engaging in multi-state, multijurisdictional business or practice. After all, as we have seen, an F.D.C.P.A violation in Indiana can have a very different outcome than the same violation happening in Kentucky. These cases also show the importance of checking—and re-checking—any forms utilized to communicate with debtors to ensure they are up-to-date and properly convey all information required under the F.D.C.P.A, or—of course—any other statute applicable to the situation.

decision found courts confronting claims premised upon procedural violations must "ask: (1) whether the statutory provisions at issue were established to protect [a litigant's] concrete interests (as opposed to purely procedural rights), and if so, (2) whether the specific procedural violations alleged in this case actually harm, or present a material risk of harm to, such interests.").

13 *Macy*, 897 F.3d at 756 (citations and quotations omitted).

14 *Id.* at 758 (citations and quotations omitted).

15 *Id.* at 759.

16 *Id.* at 759 n.10.

17 *See id.* at 759.

18 *Id.* at 761.

19 The *Casillas* debt collector experienced a stroke of good luck here. With approval of a class settlement pending, the Seventh Circuit decided *Groshek v. Time Warner Cable, Inc.*, 865 F.3d 884 (7th Cir. 2017), holding therein that a plaintiff cannot satisfy the injury-in-fact element of standing discussed in *Spokeo* by merely alleging a defendant has violated a disclosure provision of a consumer-protection law. After interpreting *Groshek* and *Spokeo*, the district court believed it was required to dismiss the borrower's complaint.

20 *Casillas*, No. 17-3162 at page 6.

21 *Id.*

22 *Id.* at page 11.

23 *Id.* at page 2.

24 *Id.* at page 6.

25 *Id.*

26 *Id.* (citing *Spokeo*, 136 S.Ct. at 1549).

27 *Id.* at page 10.

28 *Id.* at page 1.

29 *Id.* at page 8.

30 *Id.* at page 13.

31 *See generally id.* at pages 13–16.

TRAP FOR THE UNWARY

IT'S A CRIME FOR MORTGAGE LENDERS AND SERVICERS TO NOT KEEP CERTIFIED BORROWERS "SAFE AT HOME."

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Although relatively small in number, there are ever-increasing participants in programs across the country that protect the identities of certain borrowers. Unwary mortgage lenders and servicers can find themselves in trouble if they run afoul of the related laws, including being subject to criminal penalties in certain states. Approximately 39 states across the U.S. have programs similar to Minnesota's "Safe at Home" project. These legislative plans can provide home address confidentiality for people who fear for their safety. Participants are typically survivors of domestic violence, sexual assault, or stalking. In Minnesota alone, there are over 3,000 program participants, and the program is administered by the Office of the Minnesota Secretary of State. The Minnesota Safe at Home program is governed by Minnesota Statutes Chapter 5B and Minnesota Rules Chapter 8290.

When someone enrolls in Safe at Home, the State assigns a post office box address that the participant uses as a legal address for all purposes. Since all Safe at Home participants share the same assigned post office box, the participants are differentiated by a designated "lot number" that is unique to each of them. This lot number is not to be confused with those "lot numbers" typically contained in real property legal descriptions. The participant does not pick up their mail from that post office box. Instead, Safe at Home staff forward the first-class mail to the participant's real residential address.

The State certifies participants for the Safe at Home program in renewable terms of four years. Participants can lose the certification by changing their legal identity without advance notice, or by using false information in conjunction with the certification. Also, certification can be lost if the mail forwarded by the Safe at Home office is returned as "undeliverable." This latter issue is often relevant in mortgage default situations where a borrower abandons the home.

IMPACT OF THE SAFE AT HOME PROGRAM ON MORTGAGE LENDERS AND SERVICERS:

A participant must disclose the address of the home to mortgage loan originators. The participant will provide the lender with a Safe at Home program form, which will require the lender to conceal the mortgage record and will prohibit the sharing of their location information without signed consent from the participant. The lender must also only use the participant's assigned post office box address for mailed correspondence. For loans other than a home loan, such as vehicle loans or unsecured personal loans, a Safe at Home participant cannot be required to disclose their home address.

It is the responsibility of participating borrowers to affirmatively notify their lenders and servicers of their Safe at Home program participation, and provide their assigned Safe at Home post office box address. If a lender or servicer wishes to contact the Safe at Home office to verify a borrower's program participation, they must provide the potential participant's name and lot number, or name and date of birth. Thereafter, if a lender or servicer must disclose the name and address of the borrower participant to sell or service-transfer the loan, the lender must obtain the prior written consent of the participant and provide the name and contact information of the transferee to the participant, so that the participant may give the transferee the Safe at Home program notice.

Safe at Home participants cannot, however, protect their information in property records retroactively. This means that if an individual purchases a property and obtains a mortgage without the required Safe at Home program procedures, the Safe at Home program will not apply. The Safe at Home office will not provide the required forms to individuals trying to enter the program after purchasing a home or when trying to refinance a mortgage that was not part of the program.

Once properly notified, the mortgage servicer or lender must accept a participant's Safe at Home address as the person's actual address of residence, school address, and as their address of employment. When mailing to a Safe at Home participant, the sender must always include the participant's name and lot number.

In Minnesota alone, there are over 3,000 program participants, and the program is administered by the Office of the Minnesota Secretary of State.

A Safe at Home participant cannot be required to disclose his or her home address for financial account records. Thus, financial institutions must not require a participant to disclose his or her home address in order to be Customer Identification Program (CIP) compliant. For CIP compliance, instead of the participant's home or business address, the financial institution is required to use a non-public, designated street address by the Office of the Minnesota Secretary of State, which can be obtained by calling (651) 201-1399.

If a mortgage servicer must serve a participant with legal process, the Office of the Minnesota Secretary of State acts as the agent for service of process for all program participants. In order for the Safe at Home office to accept service of process on behalf of a participant, the service documents must also include the participant's name and lot number. This aspect presents an interesting issue for conducting non-judicial foreclosures in Minnesota. The non-judicial foreclosure statute in Minnesota requires that all "occupants" of the property be properly served with the foreclosure notices, in contrast to just all "borrowers." Thus, service on the Secretary of State alone may be insufficient. Also, the foreclosure notices that are published and served would need to be limited as well to protect the Safe at Home borrower. Accordingly, it may be wise in such cases to proceed by judicial foreclosure, or carefully consider how the non-judicial foreclosure statutes can be complied with while also meeting the Safe at Home requirements.

Similarly, if a mortgage servicer or REO entity pursues an eviction action following foreclosure proceedings, they will want to ensure Safe at Home borrower or tenant occupants are protected from having their locations disclosed during the pendency of such an action. In various jurisdictions, it may be best to identify the case defendants as "John Doe and Mary Roe," where acceptable to the courts, to maintain the required protections for program participants.

As a practice pointer, it is critical that lenders and servicers have procedures in place to immediately identify Safe at Home participants, conceal and protect the participants' location information system-wide, and ensure all future mailings are sent to the proper Safe at Home address.

As a reminder, the Safe at Home participant is required to give private companies a special notice they obtain from the Safe at Home office. Receipt of the notice prohibits the private companies from sharing the participant's name and location information with anyone unless the participant provides a prior written consent for a specific disclosure purpose. A violation of any of the provisions of the notice constitutes a misdemeanor punishable by imprisonment with a maximum time of 90 days, a fine up to $1,000, or both.

As a practice pointer, it is critical that lenders and servicers have procedures in place to immediately identify Safe at Home participants, conceal and protect the participants' location information system-wide, and ensure all future mailings are sent to the proper Safe at Home address. According to the program administrator, a mortgage servicer is prohibited from even disclosing a participating borrower's protected information to the servicer's own agents and contractors.

To comply with this legislation, a mortgage servicer should not share both the name and physical address of a program participant together to any third parties, absent written consent. For example, if a mortgage servicer wants a property inspection performed, the mortgage servicer should direct its vendor to inspect the physical address, without providing the name of the protected borrower to the agent conducting the inspection, unless written consent was provided by the Safe at Home participant expressly permitting the specific disclosure.

Finally, lenders and servicers will also want to coordinate with experienced, local counsel to help ensure full compliance with these types of laws through all aspects of servicing the mortgage loan.

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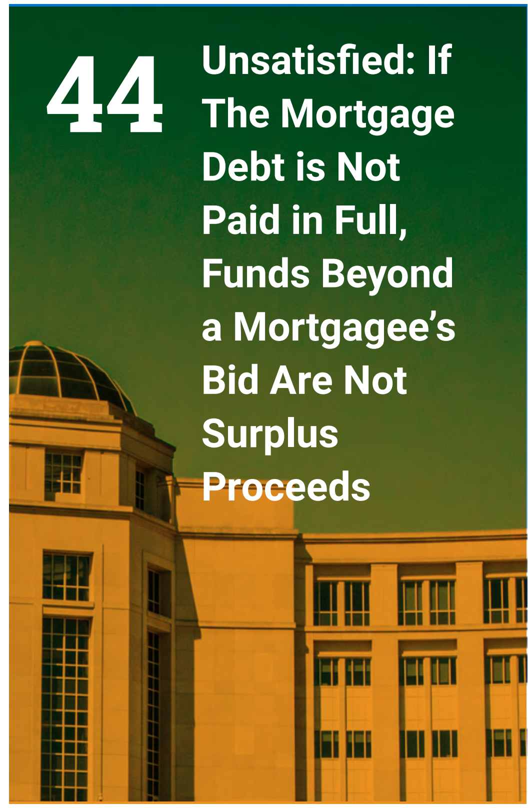

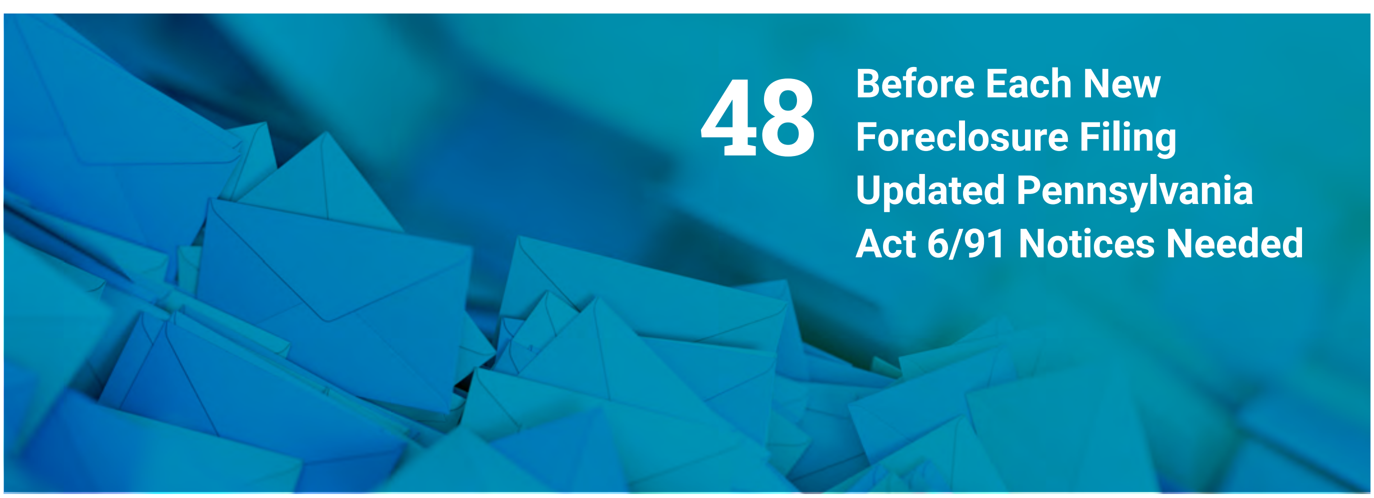

Simon says "Don't Collect a Deficiency" but the CA Supreme Court Declines to Play that Game

BY ANDREW BOYLAN
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California's anti-deficiency statute[1] prohibits creditors from collecting a deficiency judgment for the difference between the amount of indebtedness and the fair market value of the property following a nonjudicial foreclosure, regardless of whether the property sold for less than the amount of the outstanding debt. In *Black Sky Capital, LLC v. Cobb*[2] , the Supreme Court of California provided some clarity on the application of the anti-deficiency statute where a creditor holds two deeds of trust on the same property.

The leading case on this topic has been *Simon v. Superior Court* [3], which held "where a creditor makes two successive loans secured by separate deeds of trust on the same real property and forecloses under its senior deed of trust's power of sale, thereby eliminating the security for its junior deed of trust, Section 580d [California's anti-deficiency statute] … bars recovery of any 'deficiency' balance due on the obligation the junior deed of trust secured." As a result, a creditor that forecloses on its senior deed of trust is barred from any recovery for the amount owing under the junior deed of trust. Over the past twenty years, several cases have followed the reasoning provided in *Simon*. One such case was *Black Sky Capital, LLC v. Cobb*[4] where the trial court concluded that the monetary judgement was barred by Section 580d.

However, the Court of Appeal and Supreme Court of California weren't interested in playing "*Simon* Says" and instead determined that although the lienholder was the same for both liens, "[a]ny debt owed on the junior note in this case has no relationship to the debt owed on the senior note."[5] The Supreme Court noted that Section 580d was only intended to prevent a deficiency judgment on the deed of trust securing the note that was foreclosed, not under other deeds of trust, and that the language of the statute makes that clear. In this case, the Court ultimately ruled that the anti-deficiency analysis should only apply to the senior deed of trust.

Although this case brings some clarity to the issue, it should not be relied upon without a review of the specific facts of each case.

It's apparent that the facts supported the Supreme Court's ultimate decision to depart from the long line of cases following *Simon*. The Court noted that "in *Simon*, the junior and senior loans were issued just four days apart, and the deeds of trust securing the loans were recorded on the same date."[6] But in this case, the loans were issued more than two years apart and there was no "evidence of gamesmanship" or "loan splitting." Due to this clear delineation, the loans were treated separately, and since a nonjudicial foreclosure was not completed on the junior deed of trust, the statute does not bar a deficiency judgment with respect to the note it secured.

Although this case brings some clarity to the issue, it should not be relied upon without a review of the specific facts of each case. The Court spent time reflecting that it has "consistently looked to the purposes of the statute and to the substance rather than the form of loan transactions in deciding the… applicability [of antideficiency statutes]."[7] Although this case was distinguishable from *Simon*, the opinion cautions against potential "gamesmanship scenarios" or where there is clear evidence of intentional loan splitting. Therefore, when a creditor holds both deeds of trust, a case-by-case analysis should be done to determine whether it is appropriate to sue for judgment on the note secured by the junior deed of trust after completion of a nonjudicial foreclosure on the senior. ■

[1] Code of Civil Procedure Section 580d

[2] Black Sky Capital, LLC v. Cobb (2019) 7 Cal.5th 156.

[3] Simon v. Superior Court (1992) 4 Cal.App.4th 63, 66.

[4] Black Sky Capital, LLC v. Cobb (2019) 7 Cal.5th 156.

[5] Black Sky, at p.897

[6] Simon, supra, 4 Cal.App.4th at p. 66.

[7] Coker v. JPMorgan Chase Bank, NA (2016) 62 Cal.4th 6678, 676.

Unsatisfied: If The Mortgage Debt is Not Paid in Full, Funds Beyond a Mortgagee's Bid Are Not Surplus Proceeds

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The Michigan Court of Appeals, once again, addressed the rights of a foreclosing mortgagee to foreclosure sale proceeds. In re Claim for Surplus Funds, BAERE Co. v Specialized Loan Servicing, LLC, Case No. 344016, the foreclosing party, Specialized Loan Servicing, LLC. ("SLS") brought a mortgage loan to foreclosure and submitted a bid in the amount of $20,300.00, which represented only a portion of the $51,915.75 total debt. On the date of sale, a third party successfully purchased the property for $51,915.75. The Kent County Sheriff turned $20,300.00 over to SLS, however, the Sheriff held onto the remaining funds.

Prior to the foreclosure sale, BAERE Co. purchased the subject property from the mortgagor. Following the foreclosure both BAERE and SLS filed claims for the funds held by the sheriff. SLS claimed the funds as the mortgage remained unsatisfied. BAERE claimed the funds as the successor to the mortgagee under MCL 600.3252. Given the fact that two parties claimed the same funds, the issue was left for the court to "make an order in the premises directing the disposition of the surplus moneys or payment thereof in accordance with the rights of the claimant or claimants or persons interested," MCL 600.3252.

BAERE made two arguments that ultimately became the subject of appeal. First, it argued that, because SLS received $20,300.00 as proceeds from the sale, and a foreclosure satisfies the underlying mortgage, SLS was not entitled to the remaining funds. Second, BAERE argued that because SLS provided a specified bid in an amount less than the total debt, it was acquiescing to satisfaction of the debt in an amount less than the total debt. The Kent County Circuit Court found in favor of SLS and BAERE appealed. While this issue has been with the Michigan Court of Appeals, this represents the first published opinion directly on the topic.

The primary questions were whether the mortgage was satisfied upon receipt of its bid amount and whether there was a surplus. MCL 600.3252 includes the phrase "after satisfying the mortgage on which the real estate was sold." The Court of Appeals noted:

The terms "satisfy" and "surplus" are not defined in the statute. As a result, we will consult the dictionary to determine the common and ordinary meanings of the words. See Krohn v Home-Owners Ins Co, 490 Mich 145, 156; 802 NW2d 281 (2011). The word "satisfy" is defined, in relevant part, as "to carry out the terms of (as a contract); DISCHARGE," and "to meet a financial obligation to." Merriam-Webster's Collegiate Dictionary (11th ed). Merriam-Webster's collegiate Dictionary (11th ed) defines "surplus," in pertinent part, as "the amount that remains when use or need is satisfied."

The Court of Appeals held that satisfaction of the mortgage, as used in MCL 600.3252, necessarily means satisfaction of the debt, unless the total amount due under the mortgage is paid. In the matter before the Court, the total debt was not paid, therefore, the mortgage was not satisfied. Specifically, the Court held

> it is unambiguous that 'satisfying the mortgage' refers to paying off the entirety of the debt secured by the mortgage. In other words, satisfying a mortgage and extinguishing the mortgage are not synonymous. It is therefore beyond dispute that respondent's mortgage was not 'satisfied,' and no surplus funds existed for petitioner to seek.

BAERE alternatively argued that submission of a bid amount less than the total debt is an express agreement to accept less than the debt amount as satisfaction, thus any additional amount would constitute a surplus. The Court of Appeals held that a bid sheet is not a contract or a binding admission establishing the debt ("We are aware of no law requiring mortgagees to bid the full amount owed during a foreclosure sale, and we decline to create any such law.")

The Court of Appeals held that satisfaction of the mortgage, as used in MCL 600.3252, necessarily means satisfaction of the debt, unless the total amount due under the mortgage is paid. In the matter before the Court, the total debt was not paid, therefore, the mortgage was not satisfied.

It is, of course, possible that one of the parties will appeal this decision, and that the Michigan Supreme Court will agree to hear the matter, however, this appears to be an unlikely outcome. Assuming the Michigan Court of Appeals decision remains in place, it is expected that counties across Michigan will modify their procedures in order to comply with BAERE. Until such a time that procedures fully complying with BAERE are implemented, each case should be reviewed on an individual basis for a determination as to whether the foreclosing entity is entitled to additional funds from the sheriff's sale proceeds.

New Jersey Legal Updates

BY KRISTINA G. MURTHA, ESQ., KML LAW GROUP
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New Jersey foreclosure law underwent sweeping changes recently, when NJ's Governor signed nine bills into law on 4-29-19 and NJ's Supreme Court adopted a series of rule amendments to foreclosure rules on 4-30-19. Two of the bills were effective immediately, including one requiring changes to the Notice of Intention to Foreclose ("NOI"), the statutorily required pre-foreclosure notice. (Bad news for any lender or servicer that sent NOIs out that day.) There are seven other effective dates for the new legislation, starting with 5-29-19 and ending with 2025, the year in which the newly revised six-year statute of limitations will impact the first foreclosure cases.

While lenders and servicers work to operationalize the newly enacted and newly effective provisions, they must simultaneously prepare for the coming waves of changes. A very brief statement of the changes to come is below. The laws are referenced by the bill number under which they were enacted; in some instances, there are multiple bills amending one act, as is the case with changes to the NOI.

These Court Rule changes have some provisions that will assist in streamlining foreclosure actions, specifically the provisions that allow service of process on junior lien creditors by mail and remove the expiration time of 90 days for the Certification of Proof of Amount Due in the motion for final judgment.

1. A664 - Codifies the Judiciary's Foreclosure Mediation Program; dedicates monies from increased foreclosure filing fees and fines; requires changes to NOI form to include notice to borrowers.
2. S3411 - Requires receivership appointment application for certain properties in foreclosure; requires NOI to be sent no more than 180 days prior to commencing foreclosure; limits reinstatement of foreclosure actions following dismissal for lack of prosecution.
3. S3413 - Makes certain changes to the summary action foreclosure process, used for vacant & abandoned properties.
4. S3416 - Clarifies that the "New Jersey Residential Mortgage Lending Act" applies to certain out-of-state persons involved in residential mortgage lending in the State. Requires changes to the NOI form to specify that the lender is either licensed in accordance with the NJ Residential Mortgage Lending Act or is exempt from licensure under the act.
5. S3464 - Revises certain procedures for sheriff's sales, most significantly limiting the previously unlimited number of postponements the plaintiff may have to two postponements of 30 days each, increasing the borrower's two postponements to 30 days each, and allowing one more postponement of 30 days if the lender and borrower agree.
6. A4997 - "Mortgage Servicers Licensing Act" requires servicers to obtain a license.
7. A4999 - Requires filing of certain creditor contact information with the foreclosure complaint and Lis Pendens, increases the information required to be in the municipality letter and requires updated letters if

the information changes.

8. A5001 – Reduced the statute of limitations for residential mortgage foreclosures. For mortgages made after 4-29-19, the statute bars actions after the earliest of: (1) six years from the maturity; (2) thirty-six years from recording; or (3) six years [formerly 20 years] from default.

9. A5002 - Permits certain planned real estate developments to file certain liens; concerns limited priority of certain liens.

Not to be outdone by the Legislature, on 4-30-19 the New Jersey Courts announced a set of changes to the NJ Rules of Court that specifically relate to foreclosure, all effective 5-1-19. These Court Rule changes have some provisions that will assist in streamlining foreclosure actions, specifically the provisions that allow service of process on junior lien creditors by mail and remove the expiration time of 90 days for the Certification of Proof of Amount Due in the motion for final judgment. The changes also implement the statutory mediation requirement, increase penalties for non-compliance, increase the complaint filing fee from $250 to $405 to pay for the mediation program and limit the number of times a case can be reinstated following a dismissal for lack of prosecution.

There is no precedent for the breadth of the changes and, with most of these new laws becoming effective at dates through the end of the year, there will be no relief from the waves of change until well into 2020. This is surely the time to be in close contact with your local counsel, who will be your best resource for answers and guidance.

Before Each New Foreclosure Filing Updated Pennsylvania Act 6/91 Notices Needed

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In October 2014, the Superior Court, an intermediate appellate court in Pennsylvania, decided that a residential mortgagee must deliver an Act 6 pre-foreclosure notice before filing a second foreclosure action based on the same default as a prior foreclosure action, even when the mortgagee had delivered the notice before the first foreclosure action. The Court held that the legislature intended for the word “any” in 403(a) of Act 6 of 1974 to mean “each” and “every,” thus requiring that a lender send a notice to a debtor before each and every foreclosure action.

The Court’s rationale was that mailing a new notice is necessary before filing the second action to bring sections 404(a) and 403(c)(4) of Act 6 into play. They require, among other things, a reinstatement amount breakdown. If the mortgagee does not send a second notice, the reinstatement breakdown would serve no purpose because the debtor would not be made aware of the amount of money needed to cure the default. The Superior Court also suggested that Act 91 of 1983 would likely require a new notice as well, given that Act 91 was amended in 2008 both to require an itemization of the amount past due and to create a combined Act 6/91 pre-foreclosure notice.

In early 2019, the state Supreme Court decided a separate case under a similar fact pattern. The Supreme Court mostly followed the prior Superior Court decision in holding that a lender may not recycle a stale pre-foreclosure notice issued in connection with

a prior foreclosure complaint but must instead provide the borrower with a new, updated Act 6 notice before each foreclosure action.

The Court determined that a lender must inform the borrower of the payment required to cure the default in a clear and conspicuous manner. If the stale notice is used, the statutory period allowable to make payment becomes meaningless. Further, the Court held that a required new notice must include the lender's current contact information and the address to send payment.

Notwithstanding the comment in the intermediate appellate opinion discussed above about Act 91 notices, neither court directly addressed Act 91 notices as part of its decision, but rather, as direction. That Act contains specific language that if a notice is sent and the borrower does not apply for assistance or is denied, a new notice is not required.

However, it makes little sense to distinguish between the two notices as a future court is likely to hold that, despite the language of Act 91, it is still within the spirit of the Act to send a new notice before each foreclosure action. Further, the only cases where Act 91 would apply and Act 6 would not apply are non-FHA loans secured by borrowers' personal residences where the original principal amount exceeds the Act 6 base amount of $256,025 for 2019 or the applicable year in which the mortgage originated. There may be a small number of FHA loans that exceed the base amount and therefore may not require that any notice be sent under Pennsylvania law.

Regardless, given the tight window for finding exceptions, best practices would recommend that mortgagees send both a new Act 6 and Act 91 notice, separate or combined, before each new foreclosure action is filed.

That Act contains specific language that if a notice is sent and the borrower does not apply for assistance or is denied, a new notice is not required.

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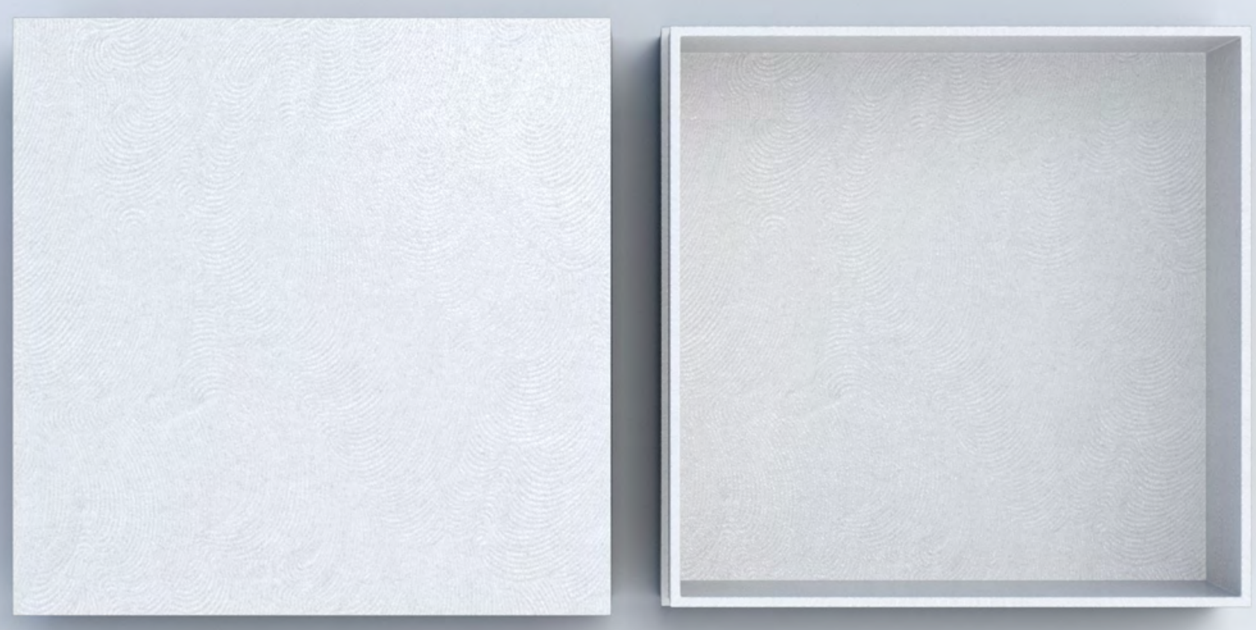

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