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OFFICIAL PUBLICATION OF THE ALFN
VOL. 7 ISSUE 2

PREDICTING THE FALLOUT FROM COVID-19

Letter from the ALFN Board Chair

Need A Little Help From Our Friends? Turn to ALFN

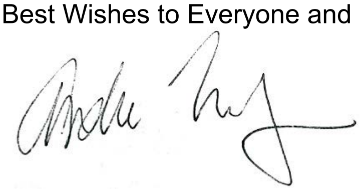
TOP OF MIND IS COVID-19 and the tremendous impact and toll it is taking on our lives personally and professionally. Several members have become ill or know someone who contracted the Coronavirus. First and foremost, the ALFN board wants to be there for its members to provide support and guidance. The most pressing and urgent question for all of us is how long will our industry be impacted and how do we hold onto our businesses and jobs with foreclosures being delayed or halted.

Several of the articles and webinars focus on federal programs, how servicers and GSEs are dealing with this crisis, but very few are discussing the hundreds of law firms and vendors that support this industry. These are also the members of ALFN. Several states have put a complete hold on all fore-closures regardless of occupancy status or nature of the residential loan. This has put law firms in a difficult position requiring layoffs, reduction in salaries and reduced hours. How long this will last and when business will resume as normal is unknown, and what will “normal” even look like?

ALFN members should take this time to review the list of members and reach out to one another for support and ideas. Although many of us are competitors, this is the time to come together and support each other on how to preserve our industry, law firms, vendors and clients. There are many programs available and it can be difficult to navigate given our unique industry. For example, a pizza place knows that in maybe 60 days, they can increase the amount of pizza they can sell or reopen their stores. Fore-closure is a different beast. Taking a person’s home during this time, and the foreseeable future, will not be looked upon favorably and this may continue to be the case for an extended period of time. This is especially true in light of the push for six months to one-year forbearance offerings. Meanwhile law firms and vendors have expenses and payroll that must be met to survive.

This is a critical time to plan and strategize as to how each of us will survive and sustain during this crisis. For some it will be taking out loans, downsizing, diversifying or simply waiting it out. What are your needs? Reach out to myself, the board and Matt Bartel our CEO with your issues and questions. How can ALFN be there for you? What are the educational needs you have? Financial questions? Now more than ever the ALFN needs to be a valuable tool for its members. Together we will pull through this and become an even stronger network. We are all in this together and we should all have a vested inter-est in seeing all of us come out healthy and financially strong.

Best Wishes to Everyone and Stay Healthy.



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

Letter from the Editor

OUR MEMBERS and the financial services industry continue to experience the effects of COVID-19. Rest assured that the leadership of ALFN remains front and center to continue advocating for the best interests of our members on a daily basis. As many of our members are dealing with the operational issues that have been created from moratoriums, court closures, and stay at home orders among others, we want you to know that ALFN will continue to remain a vital leadership resource to have your voices heard and in providing you with the premier educational offerings you have come to expect from ALFN. You will be pleased to know that we have increased our online educational offerings in light of cancelled events, all at no additional cost to you, which will also allow for additional CLE opportunities through our expanded online educational offerings. We also continue to communicate and collaborate with industry leaders and other associations, so that the needs of our members remain top of mind with the individuals who are making the decisions that ultimately impact our law firms and member businesses.

This ANGLE publication brings you the latest up-to-date information on the important issues that may have far reaching impacts in our industry. With this resource in hand, you can rest assured that ALFN continues to strive for excellence in education and providing our members the information they require to make informed business decisions during a time of uncertainty and change.

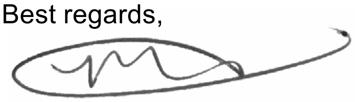
The cover feature of this issue brings us a prediction of the fallout from COVID-19. The future is still uncertain on what the exact fallout will be in terms of the impact on default servicing. We are undoubt-edly experiencing another paradigm shift in this industry, and we will band together and persevere just as we did after the last great recession.

Our first feature submission brings us a review of the attestation requirements in Georgia, with important information on what you need to know to remain compliant. We then transition to another feature article submission to review the co-debtor stay loophole in chapter 13 bankruptcy cases. Our final feature article looks at the COVID-19 Stimulus and provides an overview of the CARES Act and its impact on mortgage loans.

Don't miss our State Snapshot contributions to wrap up this ANGLE issue, where we will address some important state specific updates in Florida, Illinois, Minnesota, New Jersey, New York and Oregon.

Please reach out to myself or any of the ALFN leadership about what the ALFN can do to assist you, or to discuss ways to get more involved. Be safe and healthy out there!

Best regards,



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

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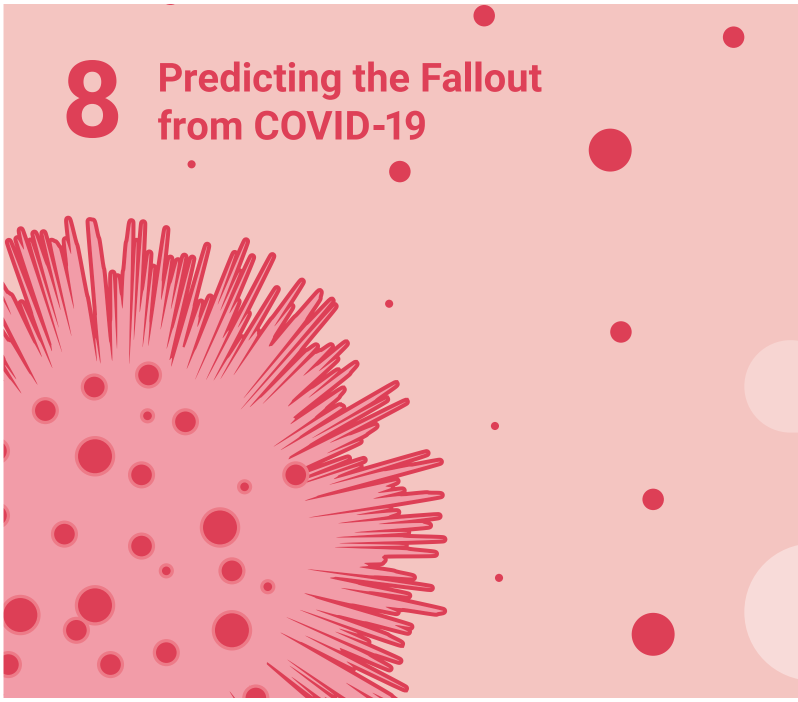
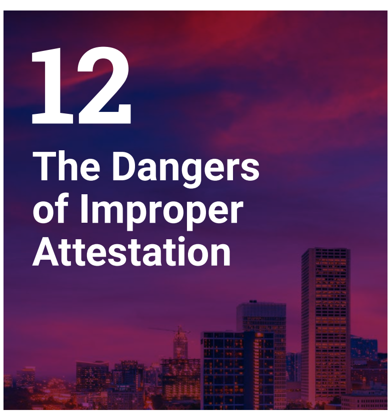
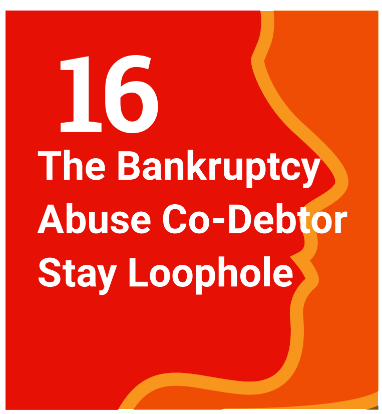






MEMBER BRIEFS

STATE SNAPSHOT

MEMBER BRIEFS

ALFN EVENTS
SAVE THE DATES

2020

NOVEMBER 18
FORECLOSURE INTERSECT
Marriott Dallas Las Colinas
Irving, TX

2021

MARCH 4
BANKRUPTCY INTERSECT
Marriott Dallas Las Colinas
Irving, TX

APRIL 29-30
5th ANNUAL
WILLPOWER SUMMIT
The Ritz-Carlton Dalla
Dallas, TX

JULY 18-21
ALFN ANSWERS
18th Annual Conference
Hyatt Regency Tamaya Resort
Santa Ana Pueblo, NM

NOVEMBER 18
FORECLOSURE INTERSECT
Marriott Dallas Las Colinas
Irving, TX

2022

JULY 17-20
ALFN ANSWERS
19th Annal Conference
Park Hyatt Beaver Creek Resort
Beaver Creek, CO

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 2020

Contact Susan Rosen at srosen@alfn.org to design a package that is right for you to sponsor single or multiple events throughout 2020.

VOLUNTEER OPPORTUNITIES 2020

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.

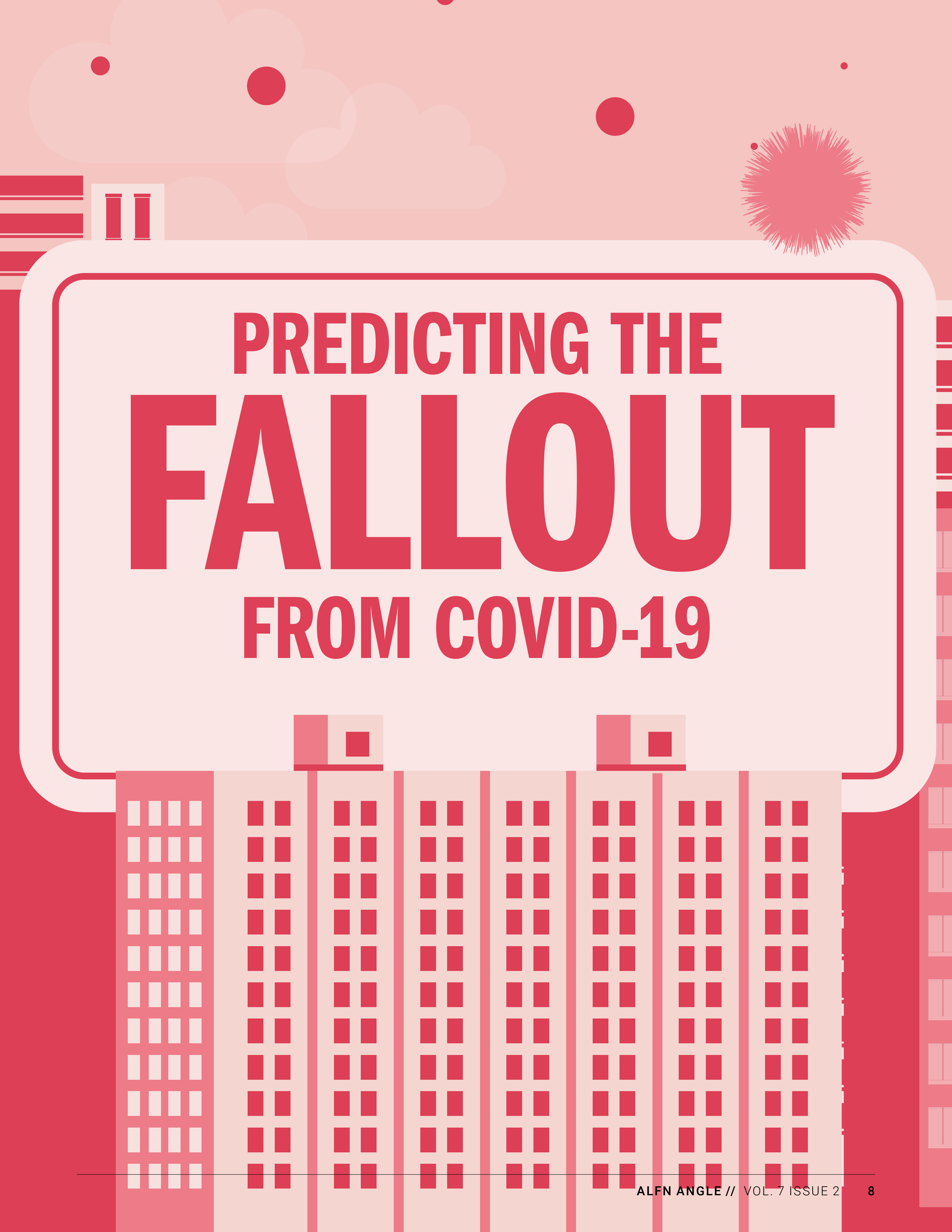
MEMBERS ONLY

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 2020 EVENTS

If you want to be considered for a panelist position as a speaker or moderator in 2020 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 2020 must complete a speaker form.

PREDICTING THE FALLOUT FROM COVID-19



BY ROBERT LIEBER, JR., ESQ., ASSOCIATE ATTORNEY
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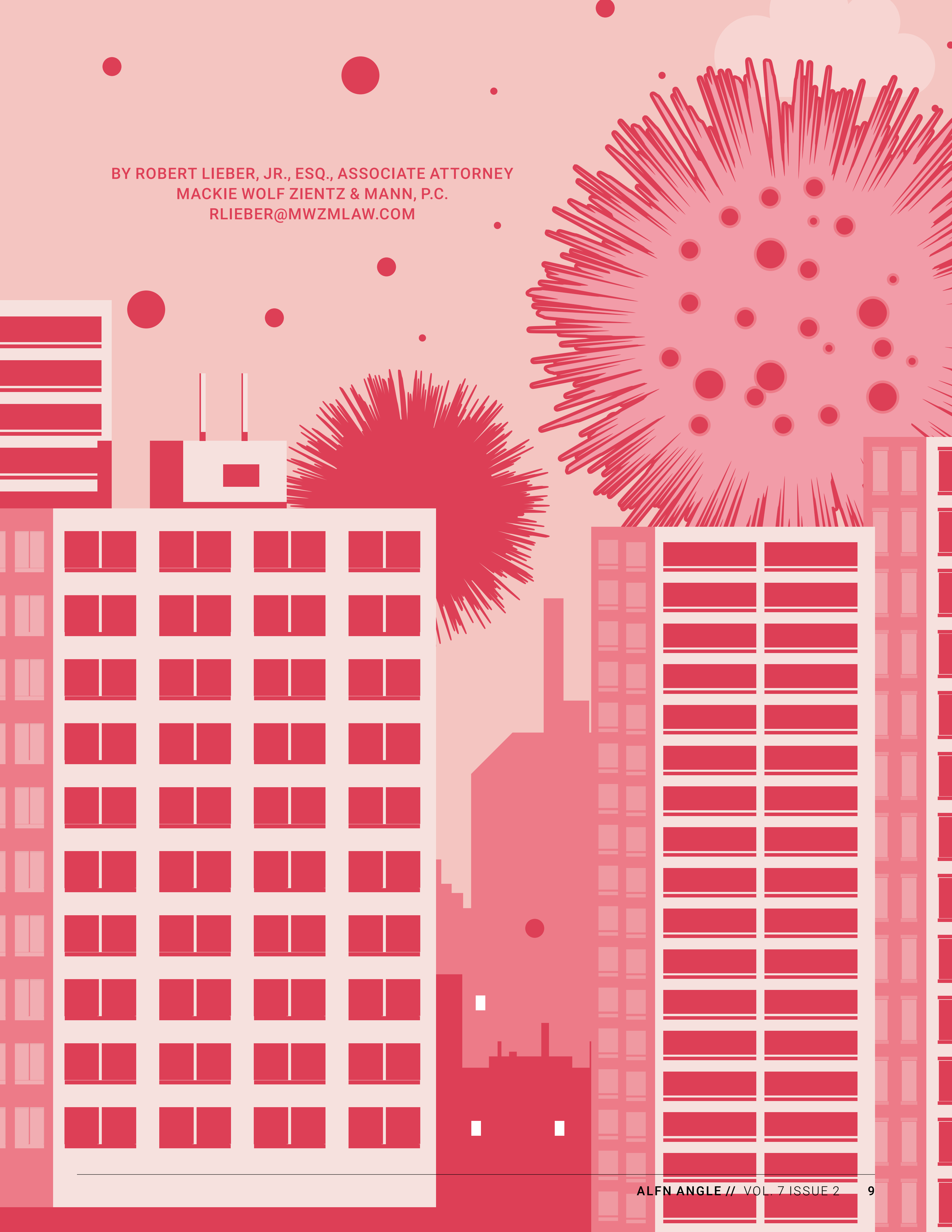

THE MORTGAGE INDUSTRY was negatively impacted by the moratorium enacted by HUD as a result of the COVID-19 pandemic, but the full effect of the pandemic will not be immediately known. Instinctively, we will look toward the Great Recession (2007-2009) for guidance. Is the country ripe for another spike in foreclosures similar to the Great Recession? What are the important indicators?

First, what precipitates a foreclosure? A foreclosure typically requires both negative equity and a cash-flow problem that makes the monthly mortgage payment unaffordable to the borrower. "Cash-flow problems without widespread negative equity do not cause foreclosure waves."[1] During the Great Recession, more than 15 million mortgages had negative home equity (or "underwater"). In theory, even if a household is subject to an income shock, such as a layoff or reduced cash-flow, positive equity in their home will make it easier for them to avoid default.[2] Since 1970, academics have understood that higher loan-to-value (LTV) ratios increased the likelihood of delinquency and foreclosure.[3] According to CoreLogic, in March of this year there were only 1.9 million underwater properties.[4] Thus, one of the main ingredients for a foreclosure bonanza would appear to be missing.

Although 15 million borrowers had negative equity during the Great Recession, only about 5% of mortgages were in default at any point in the crisis.[5] Developing research has refined the model used to predict foreclosures. The newest model, called the double-trigger model, includes both negative equity and adverse life events (such as unemployment) as factors.

Recent research suggests that the role of unemployment has been overlooked; however, the ability to assess this factor has been hampered by a dearth of relevant information. "Measuring a borrower's ability to pay fundamentally requires detailed, household-level data on borrowers' economic attributes, including their income, their employment status, and their balance sheet, as well as their mortgage characteristics and payment status."[6] In other words, there is a mix of information that researchers require in order to fully understand why a borrower defaults.

As of February 2020, the unemployment rate stood at 3.5%.[7] This number will surely rise as the pandemic continues to inflict economic devastation. Federal Reserve Bank of

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[1]Foote, Christopher L.; Gerardi, Kristopher; Willen, Paul S. (2008): Negative equity and foreclosure: Theory and evidence, Public Policy Discussion Papers, No. 08-3, Federal Reserve Bank of Boston, Boston, MA http://hdl.handle.net/10419/59247

[2]Bernstein, Asaf, Negative Home Equity and Labor Supply (December 5, 2019): https://ssrn.com/abstract=2700781 or http://dx.doi.org/10.2139/ssrn.2700781

[3]Herzog, John N.; Earley, James S. (1970): The Major Determinants of Differential Mortgage Quality https://www.nber.org/chapters/c3295.pdf

[4]http://www.mortgagenewsdaily.com/03122020_core_logic_equity_report.asp

[5]Foote, Christopher L. and Willen, Paul S., Mortgage-Default Research and the Recent Foreclosure Crisis (November 2018): Annual Review of Financial Economics, Vol. 10, pp. 59-100, 2018. https://ssrn.com/abstract=3280811 or http://dx.doi.org/10.1146/annurev-financial-110217-022541

[6]Kristopher Gerardi, Kyle F. Herkenhoff, Lee E. Ohanian, Paul S. Willen, Can't Pay or Won't Pay? Unemployment, Negative Equity, and Strategic Default, The Review of Financial Studies, Volume 31, Issue 3, March 2018, Pages 1098–1131, https://doi.org/10.1093/rfs/hhx115

[7]https://www.bls.gov/news.release/pdf/empsit.pdf

St. Louis President James Bullard has stated that the unemployment rate could soar to 30%.[8]

Severe unemployment has the potential to increase the number of "can't pay" borrowers, those that have positive equity but insufficient cash-flow to make their monthly payments. Some researchers have posited that long-term unemployment is a more significant trigger than negative equity.[9] Nearly 96% of low equity borrowers with the ability to pay remain current.[10] Further, 80% of households that need to cut their spending to make their mortgage payments remain current on their payments. This is why lenders have a low incentive to negotiate preemptive mortgage modifications with even very high-risk borrowers - most of these borrowers continue to pay. This further shows that the unemployment rate may be the best indicator of whether a foreclosure wave is on the horizon.

There is an important caveat, researchers have not yet determined why certain borrowers who have high negative equity continue to pay their mortgage. In this instance, it is theoretically in the borrower's best interest to "strategically default." One theory is that the transaction cost is too high. A transaction cost can range from social stigma to fear of a deficiency judgment. States allowing lenders to enter deficiency judgments against defaulting borrowers experience lower defaults, especially on higher-priced homes.[11]

Empirical and theoretical research indicates that a rise in unemployment, despite the lack of underwater properties, will lead to an increase in foreclosures. However, the increase may not be as drastic as that seen during the Great Recession because borrowers will be able to use their equity to avoid foreclosure. As a result, servicers should be prepared to see increased loss-mitigation applications. Only time will tell.

[8] https://thehill.com/policy/finance/economy/488924-st-louis-fed-president-says-us-unemployment-rate-could-hit-30-percent

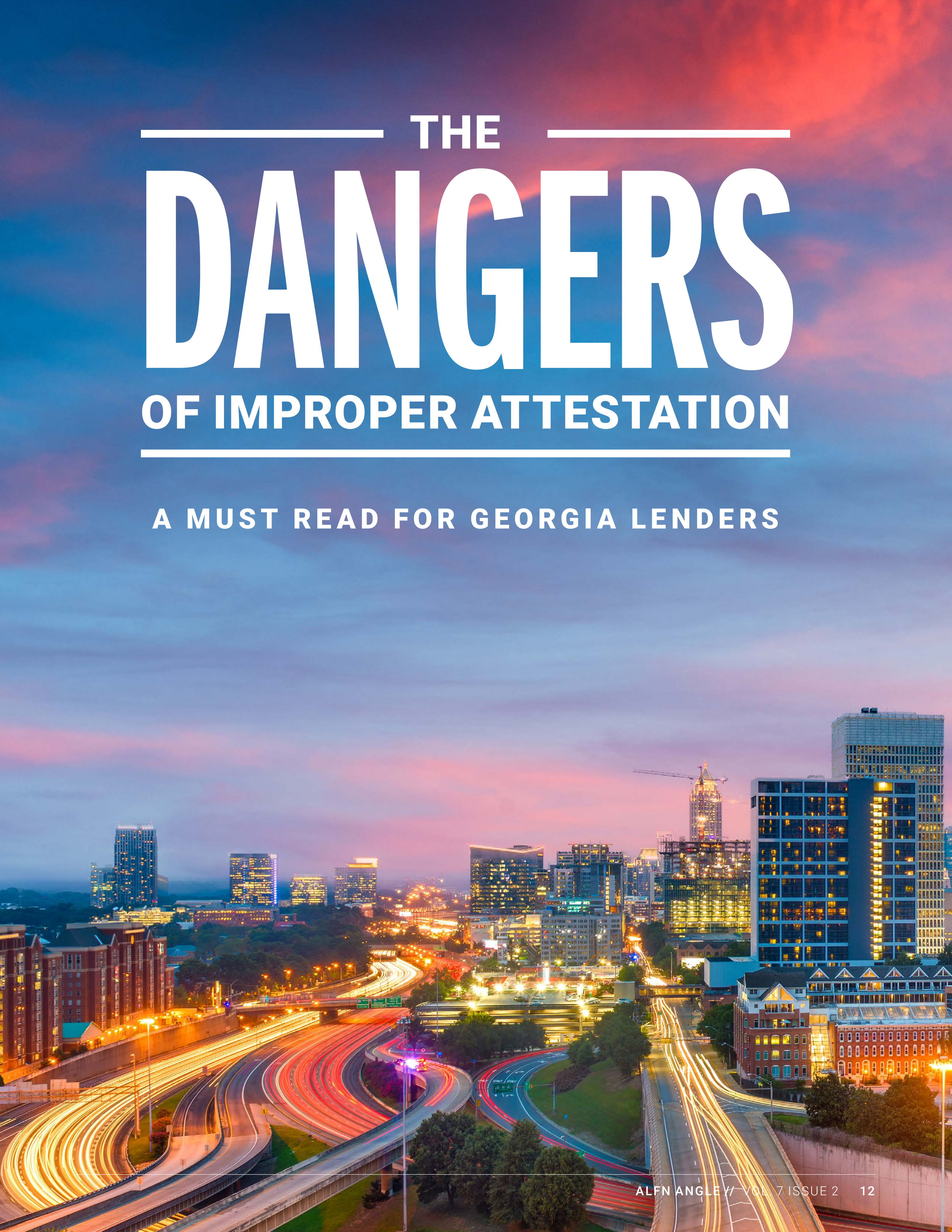
[9] Gerardi, Kristopher S. and Herkenhoff, Kyle and Ohanian, Lee E. and Willen, Paul S., Unemployment, Negative Equity, and Strategic Default (July 12, 2013). Available at SSRN: https://ssrn.com/abstract=2293152 or http://dx.doi.org/10.2139/ssrn.2293152

[10] The Review of Financial Studies, Volume 31, Issue 3, March 2018, Pages 1098–1131, https://doi.org/10.1093/rfs/hhx115

[11] Ghent, Andra C. and Kudlyak, Marianna, Recourse and Residential Mortgage Default: Evidence from U.S. States (February 25, 2011). Federal Reserve Bank of Richmond Working Paper No. 09-10R. Available at SSRN: https://ssrn.com/abstract=1432437 or http://dx.doi.org/10.2139/ssrn.1432437

THE DANGERS OF IMPROPER ATTESTATION

A MUST READ FOR GEORGIA LENDERS



BY JENNIFER MCCALL, ESQ., SUPERVISING ATTORNEY - GEORGIA
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CALLING ALL MORTGAGE lenders seeking to loan money in the state of Georgia! Are you compliant with Georgia's attestation requirements? Are you aware that failure to meet these requirements may put your security interest at risk? Surely you must be familiar with Georgia's quirk regarding notary acknowledgments. Read on!

A bit of background first. Georgia is a title theory state, meaning title of property is held by the mortgage lender until the underlying loan is paid off in full. A security deed, or deed to secure debt, is the document that secures such title. This security deed usually contains a provision called the "power of sale" clause, which allows for a non-judicial foreclosure, the primary method of foreclosure in the state of Georgia. The power of sale clause contains language that states upon a debtor's default, the lender is allowed to sell the property in or-

der to satisfy the underlying loan. This selling of the property occurs via an auction, which is held on the first Tuesday of each month, between the hours of 10am and 4pm, at the courthouse in which the property is located. The lender is required to publish a notice of sale in the designated legal publication for that specific county, for four consecutive weeks prior to the foreclosure auction. The lender is also required to send a demand letter to the debtor(s), demanding payment of all past due amounts, prior to initiating the foreclosure action. Comparatively, Georgia's foreclosure process is fairly quick. The average time period to complete an uncontested, non-judicial foreclosure is sixty to ninety days. This time period, of course, can be delayed if the debtor chooses to contest the action or files for bankruptcy.

Sounds easy, doesn't it? A lender will need to: 1) confirm the security deed contains the power of sale clause necessary to proceed with a non-judicial foreclosure, 2) send out the required demand letters, and 3) properly publish the legal notice of sale. No wonder this process should only take two to three months! Wait, what's this? You, as the lender, issued a security deed for a Georgia property that contains "notary acknowledgment" language? All the other requirements are met, why would certain notary language prevent a non-judicial foreclosure from moving forward? This is where Georgia is unusual. All lenders that choose to conduct business in the state must be proficient in Georgia's quirks regarding deed attestation.

On July 1, 2015, a new Georgia bill went into effect that settled the way documents must be signed in order to be admitted for recording in Georgia. Under this new bill, warranty deeds, quitclaim deeds, security deeds, and assignments must be: a) signed by the maker, b) attested by an officer as provided in Code Section 44-2-15 (a notary), and c) attested by one other witness. In other words, both a notary and an unofficial witness must be present at the signing of such documents. So, can the person serving as the notary simply acknowledge the grantor's signature? The answer is no. Despite the misconception, "acknowledgment" and "attestation" are not one and the same. What may be a properly acknowledged deed in one state may mean a complete violation of statute in Georgia. Failure to recognize the distinction between the two may result in a lender's security deed not being properly recorded and indexed in the county deed records. In extreme cases, the security deed may even be declared void altogether.

A notary acknowledges execution of a deed by confirming the authenticity of the grantor's signature ("I acknowledge the grantor signed the security deed. I see the grantor's signature on the deed and was provided a copy of the grantor's driver's license.") A notary attests to execution of a deed by actually being present and witnessing the signing ("The grantor signed the security deed in front of me."). Georgia does not accept a general notary acknowledgment unless certain key words are present – "signed, sealed and delivered in front of me", "signed in my presence", "signed before me", etc.

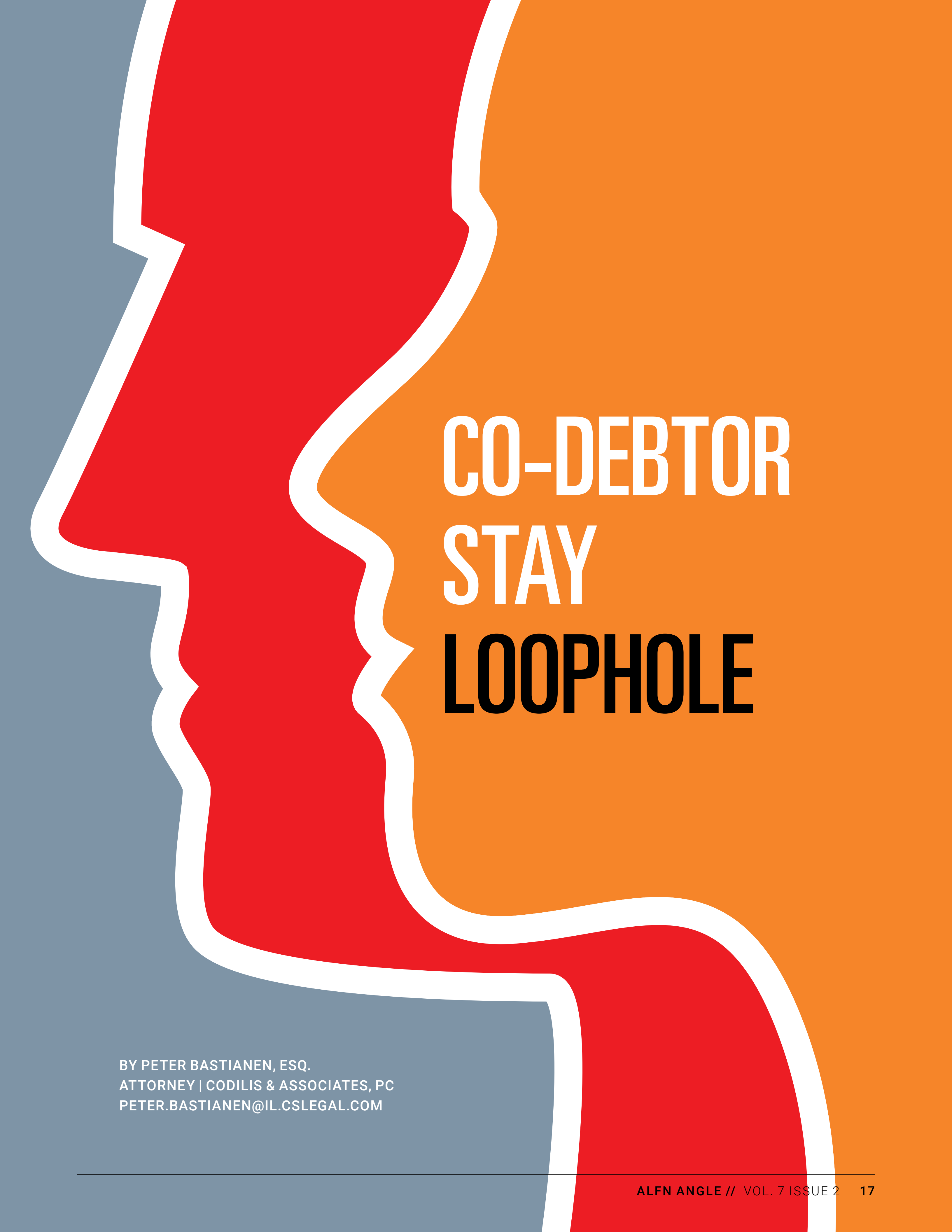
This requirement has had a significant impact on how security deeds executed out of state are accepted. California is perhaps the most notable. One type of notarial act in the state of California is where the notary acknowledges that the document was signed by the grantor. In this type of acknowledgment, there is no language stating the notary public actually was present and witnessed the signing. Again, if the acknowledgment language fails to contain key words such as "signed in my presence" or "appeared before me", this document may not be accepted for recording in Georgia. Other states may require only a notary acknowledgment, without a second witness. In this situation, the deed fails to meet Georgia's standards twofold: missing the required witness signature and missing a proper notary attestation. Such execution inconsistencies across the states lead to many rejected deeds here in Georgia. To avoid this rejection and delay in deed recording, Georgia counsel should be used in reviewing all such security deeds prior to being submitted to the real estate records.

So, you ask, what exactly would happen if my Georgia security deed contains a California acknowledgment? Danger! Danger! If a security deed recording is delayed due to improper attestation, a lender may lose its priority over the secured property. The lender may believe to have a first priority lien on a property, but if their security deed is not properly attested and therefore not properly recorded, a subsequent lienholder that met the Georgia attestation requirements and correctly recorded a security deed, may actually jump ahead in priority. In other words, the first lender may be subject to the second lender's lien, not an ideal position for any lender.

GEORGIA IS A TITLE THEORY STATE, MEANING TITLE OF PROPERTY IS HELD BY THE MORTGAGE LENDER UNTIL THE UNDERLYING LOAN IS PAID OFF IN FULL. A SECURITY DEED, OR DEED TO SECURE DEBT, IS THE DOCUMENT THAT SECURES SUCH TITLE.

Bankruptcy may also be an issue. In the infamous, for lenders at least, *Wells Fargo Bank. N.A. v. Gordon* case, the bankruptcy trustee sought to avoid a lender's secured interest in the property due to improper attestation. The Supreme Court of Georgia ruled that a security deed lacking the required witness signature was deemed to be unrecordable under Georgia law and therefore did not give proper notice to a hypothetical bona fide purchaser, i.e. a bankruptcy trustee, on inquiry notice of the deed. The ramifications of this are huge – a mortgage lender may lose its status as a secured creditor solely due to a missing witness or a notary acknowledgment. As a lender, do not take this risk. It is imperative to have local Georgia counsel review all real estate documents prior to recording, especially any executed outside of the state.

THE BANKRUPTCY ABUSE



CO-DEBTOR STAY LOOPHOLE

BY PETER BASTIANEN, ESQ.
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W**HEN A BANKRUPTCY** case is filed, a stay goes into effect automatically that prohibits creditors from engaging in almost any type of formal or informal collection activity.[1] In chapter 13 cases, a codebtor stay also goes into effect if the debtor cosigned a note or mortgage with another individual (frequently a friend or relative) who is not in bankruptcy.[2] For example, if a brother and sister buy a house together and both sign the note or mortgage, but then only the brother files a chapter 13 bankruptcy, the codebtor stay goes into effect as to the sister even though she did not file bankruptcy. The purpose of the codebtor stay is to prevent creditors from exerting indirect pressure on the debtor by pursuing collection actions against the non-filing codebtor.[3] A creditor who seeks relief from the automatic stay must also obtain relief from the codebtor stay in order to proceed with foreclosure or other non-bankruptcy remedies.[4]

Many chapter 13 cases are filed to stop foreclosure and attempt to bring the loan current via a chapter 13 plan to repay the pre-petition default and maintain monthly post-petition payments.[5] If the payments are made, the loan will be brought current at the end of the bankruptcy and the foreclosure can be dismissed. If the payments are not made, the mortgage lender can obtain relief from the automatic stay and codebtor stay, if applicable, and resume with foreclosure or other non-bankruptcy remedies.

Sometimes, individuals who lack either the good faith ability or intent to successfully reorganize file multiple chapter 13 bankruptcies to delay a foreclosure. These cases follow a familiar pattern. A bankruptcy case is filed shortly before a scheduled judgment hearing or foreclosure sale. Few or no payments are made in the bankruptcy. The creditor obtains relief from the automatic stay and codebtor stay, if applicable. The foreclosure resumes. Then, another bankruptcy case is filed, and so on.

In 2005, Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") which amended the Bankruptcy Code.[6] Among other things, Congress added §§362(c)(3) and (4) in an attempt to protect creditors from serial filing bankruptcy abuse. These provisions place limitations on the automatic stay in serially filed bankruptcy cases. With certain exceptions inapplicable here, the automatic stay in a case filed within a year of the dismissal of a prior case only remains in effect for 30 days, and the automatic stay in a case filed within a year of the dismissal of two prior cases does not go into effect at all.[7]

The debtor can file a motion to extend the automatic stay in a 30-day stay case or to impose the automatic stay in a no-stay case, but must clear several hurdles in order for such a motion to be granted.[8] First, there are time limits that must be met.[9] A motion to extend must be filed and the hearing must be completed within 30 days from

[1] 11 U.S.C. §362(a). All subsequent statutory citations shall be to the Bankruptcy Code 11 U.S.C. §101 et. al.
[2] §1301(a). The codebtor stay applies only to "consumer debt" defined in §101(8) as "debt incurred by an individual primarily for a personal, family, or household purpose." The majority view is that "consumer debt" includes home mortgages. See e.g. In re: Kelly 841 F.2d 908, 913 (9th Cir. 1988).
[3] H.R. Rep. No. 95-595, at 121 (1977) reprinted in 1978 U.S.C.C.A.N. 5787, 6081.
[4] §§ 362(d) and 1301(c).
[5] See §§1322(b)(2) and 1322(b)(5).
[6] Pub. L. 109-8, 119 Stat. 23, enacted April 20, 2005.
[7] §§362(c)(3)(A) and 362(c)(4)(A)(i).
[8] §§362(c)(3)(B) and 362(c)(4)(B).

With certain exceptions inapplicable here, the automatic stay in a case filed within a year of the dismissal of a prior case only remains in effect for 30 days, and the automatic stay in a case filed within a year of the dismissal of two prior cases does not go into effect at all.

the date the case is filed.[10] A motion to impose must also be filed within 30 days from the date the case is filed, although the hearing does not need to be completed within 30 days.[11] Second, there is a presumption that the new bankruptcy case has been filed in bad faith, and the burden is on the debtor to show by clear and convincing evidence that it has been filed in good faith.[12] The debtor must show that the prior case was not dismissed for failure to file required documents, make court ordered adequate protection payments, perform the terms of a confirmed plan, or that there has been a substantial change in the debtor's personal or financial affairs indicating that the new case will result in a confirmed plan that will be fully performed.[13]

The problem with §§362(c)(3) and (4) is that they specifically refer to the automatic stay under §362(a), and make no mention of the codebtor stay under §1301(a).[14] Therefore, even in serially filed cases where the automatic stay would only go into effect for 30 days due to one prior dismissal within a year, or would not go into effect at all due to two or more dismissals within a year, the codebtor stay still goes into effect in a chapter 13 case when the debtor cosigned a loan with another individual who is not in bankruptcy.[15] In these cases, it is not necessary for debtors to seek to extend or impose the automatic stay, and clear the related hurdles imposed by §§362(c)(3) and (4), because creditors will be stayed by the codebtor stay anyway. This is the bankruptcy abuse codebtor stay loophole.

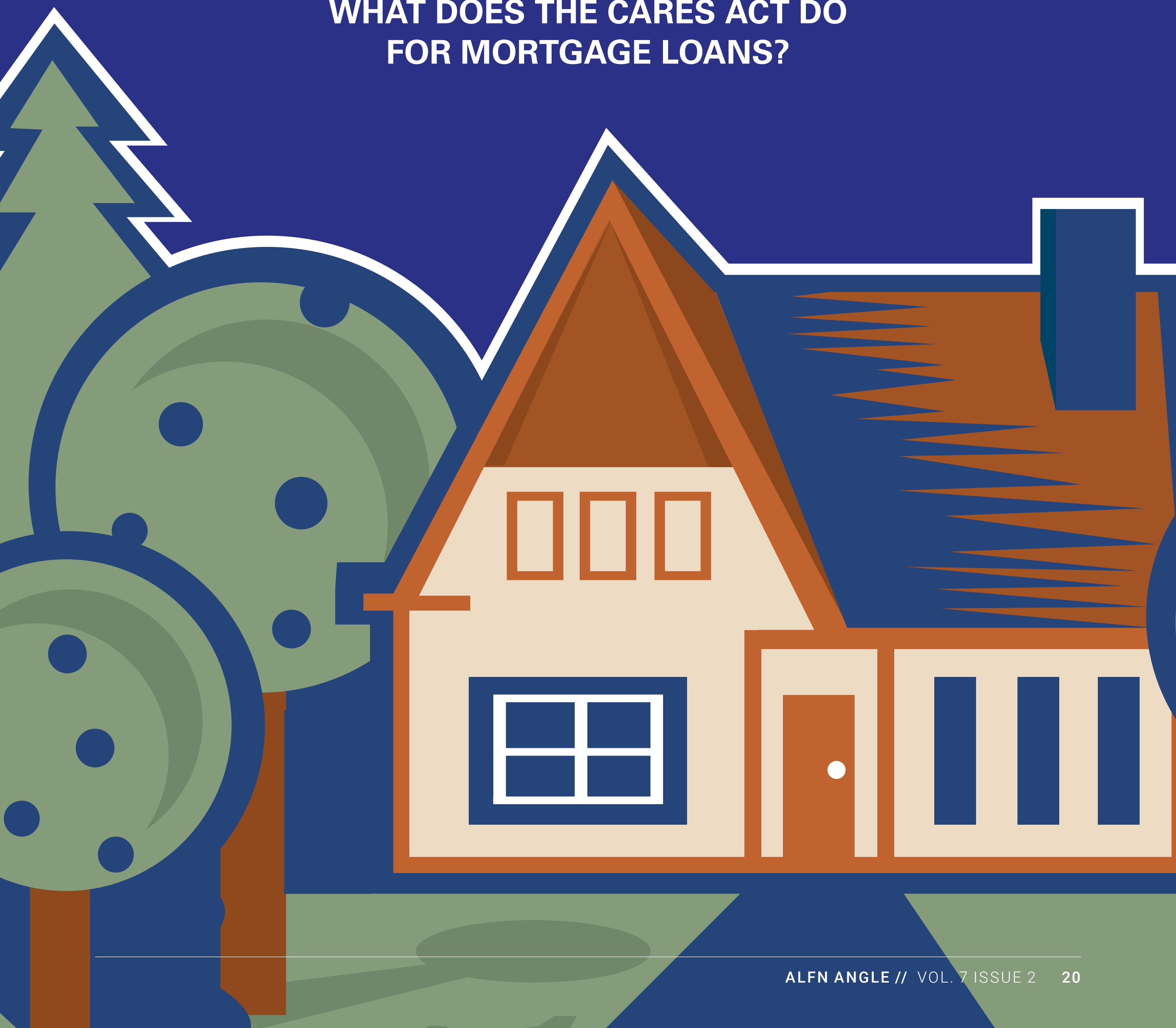
Of course, creditors remain free to file motions for relief from the automatic stay and co-debtor stay under §§362(d) and 1301(c) when grounds for relief exist. However, those motions would no longer be necessary if the loophole were closed. In order to close the loophole, Congress would simply need to amend §§362(c)(3) and (4) to refer to the codebtor stay of §1301(a) in addition to the automatic stay of §362(a).[16] Until that is done, BAPCPA's intent to curb serial filing bankruptcy abuse will remain ineffective in all chapter 13 cases where the codebtor stay applies. a

[9] Id.
[10] §362(c)(3)(B).
[11] §362(c)(4)(B).
[12] §§362(c)(3)(C) and 362(c)(4)(D). §§362(c)(3)(C) and 362(c)(4)(D).[13] Id. at §§362(c)(3)(C)(i) and 362(c)(4)(D)(i).
[14] §362(c)(3)(a) and (c)4(A)(i) refer only to "the stay under subsection (a) . . . "
[15] *In re Lemma*, 393 B.R. 299 (Bankr. E.D.N.Y. 2008); In re King: 362 B.R. 226 (Bankr. D. Md. 2007); *In re Whitlock-Young* (Bankr. N.D.Ill. 2017).
[16] §362(c)(3)(a) and (c)4(A)(i) could be amended to provide "the stay under subsection (a) [*and codebtor stay under section 1301(a)*] . . . "

COVID-19

STIMULUS

WHAT DOES THE CARES ACT DO FOR MORTGAGE LOANS?



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Included in the CARES Act signed by President Trump on March 27, 2020 is mortgage relief. What does the Act actually provide?

APPLIES TO FEDERALLY-BACKED LOANS

The CARES Act applies only to “Federally backed mortgage loan[s]” secured by “residential real property (including individual units of condominiums and cooperatives) designed principally for the occupancy of from 1-to 4-families”. Federally backed mortgage loans are those loans owned by Fannie Mae, Freddie Mac and the Department of Agriculture, and those that are insured or guaranteed by the FHA, the VA, and the Department of Agriculture.

FORBEARANCE RELIEF

Borrowers protected by the Act are eligible for forbearance relief. During the “covered period”, mortgage borrowers, regardless of delinquency status, may request a forbearance by submitting a request to their servicer and affirming that they are experiencing a financial hardship, either directly or indirectly, as a result of the COVID-19 emergency. Borrowers may receive two separate forbearance period, each 180 days long.

> **The CARES Act applies only to “Federally backed mortgage loan[s]” secured by “residential real property (including individual units of condominiums and cooperatives) designed principally for the occupancy of from 1-to 4-families.”**

Servicers are obligated to provide the forbearance without requesting any documentation other than the borrower’s attestation of a financial hardship caused by the COVID-19 emergency. During the forbearance period, servicers may not charge any fees, penalties or interest beyond the amounts that would have been due had the borrower made his or her payments on time and in full.

The "covered period" is not expressly defined in the section of the CARES Act governing residential mortgage loans; however, in the provisions addressing multi-family mortgage loans, it is stated to end on the earlier date of either December 31, 2020, or the date when the President formally terminates the national emergency he declared on March 13, 2020.

"Financial hardship" has no definition anywhere in the Act. At this juncture, it is unclear what that standard may be and what discretion a servicer may have in deciding whether a borrower is truly suffering a financial hardship due to the COVID-19 emergency that affects his or her ability to make their mortgage payment.

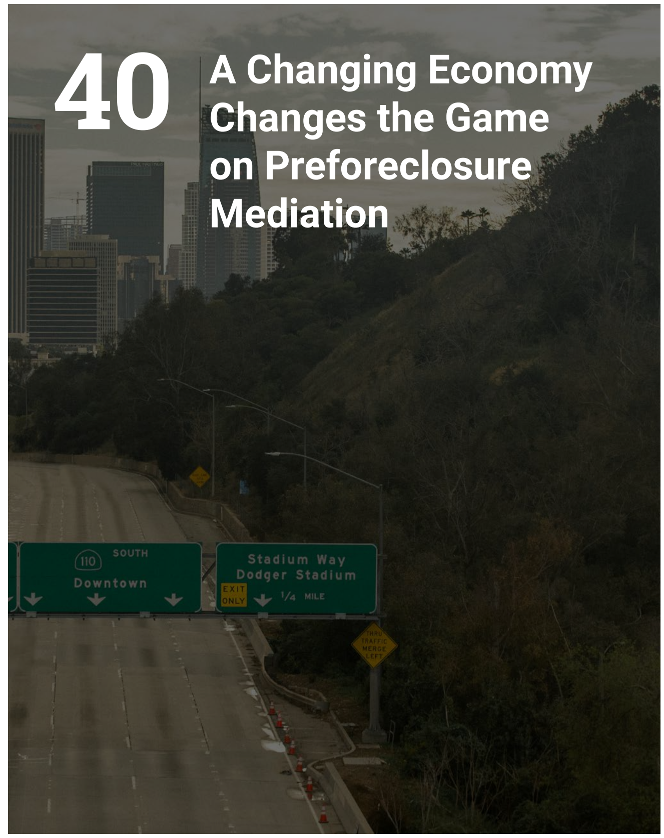
FORECLOSURE MORATORIUM

Except with respect to a vacant or abandoned property, a servicer of a Federally backed mortgage loan may not initiate any judicial or non-judicial foreclosure process, move for a foreclosure judgment or order of sale, or execute a foreclosure-related eviction or foreclosure sale until after May 19, 2020

EVICTION MORATORIUM

The CARES Act does not affect REO evictions. For properties encumbered by a Federally backed mortgage loan, the Act bars mortgagees from filing, for reason of a payment default, any legal action to seek possession of a residential dwelling until July 27, 2020 and must then provide a 30-day notice to vacate. However, as REO properties, generally, no longer have mortgage liens on them, and as a payment default is not the reason for the eviction filing, the Act is not applicable. a

STATE SNAPSHOT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Pay Direct v. Surrender

Chapter 13 Plan Treatment Options in Florida in the Aftermath of In re Failla and In re Dukes

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For years, many Chapter 13 Debtors in Florida who choose not to pay their home mortgage loan obligations inside their plan have been able to rely on myriad creative plan treatment options with minimal legal repercussions, aside from facing potential in rem action.[1] A Debtor could choose to treat the lender outside, pay direct or simply surrender the property without any meaningful consequences. However, two notable Eleventh Circuit decisions have changed the potential long-term outcome of these choices: In re Failla, 838 F.3d 1170, 1178 (11th Cir. 2016) and In re Dukes, 909 F.3d 1306 (11th Cir. 2018).

The Court in Failla held that a debtor that intends to surrender a property must perform that intent. This means foregoing affirmative foreclosure defenses in any ongoing foreclosure action. Although In re Failla took place in the context of a Chapter 7 Bankruptcy, Florida Courts have extended the holding to Chapter

[1] In the Southern and Northern Districts of Florida, Secured Creditors not treated inside the plan will receive stay relief is effective upon plan confirmation. Conversely, in the Middle District of Florida this in rem stay relief is effective with the filing of the plan per administrative order.

For secured creditors, these decisions certainly limit a default borrower's ability to enjoy a free or extended stay in the home without long-term consequences via either a forfeiture of foreclosure defenses or the possibility of a deficiency judgment.

13 cases were the Debtor's plan specifically stated an intent to surrender the subject property. See, In re Lapeyre, 544 B.R. 719 (Bankr. S.D. Fla. 2016) and In re Franklin, No. 11–20340–RBR (Bankr. S.D. Fla. 2016).

Moreover, the Florida legislature went a step further. On February 20, 2018 the Florida Senate passed HB 220, which enacted Fla. Stat. § 702.12. This statute creates a rebuttable presumption in favor of a lender that a discharged borrower has waived any available foreclosure defenses when the property was surrendered in a bankruptcy document. The caveat here is that pursuant to subsection 3 of the statute, the law does not preclude the borrower from raising affirmative defenses that are based on the lender's conduct after the borrower declared an intention to surrender.

Conversely, the Court in Dukes ruled that mortgage debt is not "provided for" within the meaning of 11 U.S.C.S. § 1328(a) when the plan pays direct or outside and therefore, the debt is not discharged. Based on this, a lender would be able to seek a deficiency judgment against a Debtor who did not treat the debt inside his or her chapter 13 plan.

Given these rulings, what are the implications of plan treatment decisions for chapter 13 Florida Debtors who have defaulted on their loan obligations? Debtors will need to make an educated choice between facing a potential deficiency judgment versus giving up the ability to contest a foreclosure action. Of course, the choice between foregoing affirmative foreclosure defenses or forgoing a discharge may be avoided altogether if the Debtor is able to treat the lender inside the plan. However, this is not always a feasible option depending on the outstanding arrears for the subject loan. Based on this, the decision to treat a lender outside, whether direct or not at all, versus choosing to surrender will need to be a strategic one. The selection will depend on several factors, among them: the likelihood of a deficiency, whether there is an ongoing foreclosure proceeding and if so, whether the borrower believes it has viable defenses available.

For secured creditors, these decisions certainly limit a default borrower's ability to enjoy a free or extended stay in the home without long-term consequences via either a forfeiture of foreclosure defenses or the possibility of a deficiency judgment. However, these consequences are far from irrevocable. With regards to a Debtor's decision to surrender, subsection 3 of Fla. Stat. § 702.12 means that a subsequent dismissal of the foreclosure action, loan modification agreement or arguably even the lender's agreement to review a borrower for a modification could negate the intent to surrender. This is consistent with distinctions made by some Florida Courts following Failla. See, for example, *In re Kurzban*, 2017 WL 3141915 (Bankr. S.D. Fla 2017) (denying the Creditor's Motion to Compel Surrender and distinguishing *Failla* by finding that a decision to surrender is not binding in subsequent foreclosure actions. The Court also found it noteworthy that the parties were actively engaged in loss mitigation discussions after discharge and the creditor dismissed the initial foreclosure.).

With regards to a Debtor's decision to treat the loan directly, outside, or not at all, it is worth noting that the Dukes Court did not rule on whether the lender's failure to file a Proof of Claim would then result in a discharge. Accordingly, Secured Creditor's failure to file a claim could potentially jeopardize the lender's ability to seek a deficiency claim for loans treated outside the plan.

Accordingly, although at first glance these decisions appear to burden Debtors exclusively, such an assumption may limit a secured creditors' post-relief remedies. Secured lenders will need to strike the perfect balance between lack of action such as failure to file a claim, or active engagement such as loss-mitigation solicitation and review post-judgment.

STATE SNAPSHOT | FLORIDA

Curing Defaults in Chapter 13 – Florida Bankruptcy Court Rules Mortgage Controls Over Foreclosure Judgment When Curing Arrears Pursuant to §1322(b)

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A CHAPTER 13 bankruptcy allows a defaulted homeowner the unique benefit of saving a primary residence in order to avoid foreclosure. Section 1322(b)(5) of the Bankruptcy Code – often termed the "cure and maintain" provision – empowers a debtor to propose specific Chapter 13 plan treatment without the consent, and over the objection of, creditors. Section 1322(b)(5) operates as an exception to the anti-modification protection of subsection (b)(2), and thus permits a debtor to cure any default, notwithstanding that the creditor holds a contrary right that would prevent such a forced cure outside of bankruptcy. In re Harris, 2012 WL 1410264 (Bankr. C.D. Ill Apr. 23, 2012). As a tradeoff for this benefit, all terms and provisions from the original note or contract (the "underlying loan documents") are reinstated when a debtor elects to cure pursuant to §1322(b)(5) of the Bankruptcy Code.

While a relatively straightforward concept, foreclosure judgments – at times – greatly confuse the issue. For example, in the state of Florida, the underlying loan documents merge into the final judgment. As a result, debtors have made the argument that any fees, costs, or other charges not included in the foreclosure judgment should be waived because the underlying loan documents no longer exist. Consequently, such fees, costs, and charges have been objected to, if identified in a creditor's proof of claim.

In the Southern District of Florida, a Bankruptcy Court recently overruled a debtor's objection to a creditor's proof of claim stating that the debtor improperly relied on the financial terms of a consent foreclosure judgment, rather than the underlying mortgage. The debtor's objection presented a dichotomy between a statutory right (pursuant to the Bankruptcy Code) and a contractual right (pursuant to the mortgage). The creditor argued that the Bankruptcy Code provides guidance on how such rights harmonize – the Court must look to the mortgage as the underlying agreement. The cure and maintain provision of §1322(b)(5) allows debtors that do not have the financial wherewithal to satisfy the amount of their mortgage obligation within the life of the Chapter 13 plan, the opportunity to save their real property. In re Rogel, 425 B.R. 231, 234-235 (Bankr. W.D. Pa. 2010).

Prior to the debtor filing for bankruptcy, the debtor entered into a mortgage contract with the creditor; wherein both the debtor and creditor agreed to be bound by a collection of terms and conditions. A foreclosure judgment memorializes both the debtor's default on his/her obligation to the creditor, and the creditor's right to obtain marketable title. A debtor's reliance on the amounts contained in the foreclosure judgment is premised on the position that the note and mortgage no longer exist; as they have merged into the final judgment. The Florida Bankruptcy Court ruled that as a tradeoff for the ability to employ the cure and maintain provision under §1322(b)(5), all of the provisions of a note or contract

In the Southern District of Florida, a Bankruptcy Court recently overruled a debtor's objection to a creditor's proof of claim stating that the debtor improperly relied on the financial terms of a consent foreclosure judgment, rather than the underlying mortgage.

remain in full force and effect, and the proper reference to either "curing" or "modifying," respectively, speaks to the underlying mortgage and does not refer to the foreclosure judgment. In re Rowe, 239 B.R. 44, 46 (Bankr. D.N.J. 1999).

The Bankruptcy Code forces a creditor to file a proof of claim displaying the amounts owed under its agreement with the debtor. See §501. A creditor's proof of claim is an unbiased, non-negotiated snapshot of the exact amount owed (pursuant to the original contract) in order to reinstate the mortgage. Section 1322 of the Bankruptcy Code is a right that a Chapter 13 debtor is entitled by law (and over the objection of the creditor) to reinstate a mortgage *inside* bankruptcy that has been extinguished outside of bankruptcy. Stated differently, a cure returns the parties to the status quo ante by paying all the arrearages on the debt and reinstating the debt's original terms. When a debtor elects to cure and reinstate his/her mortgage pursuant to §1322(b)(5), the debtor becomes liable for interest and all other charges which accrue under the terms of the mortgage, just as if no judgment were ever taken. In re Willet, 196 B.R. 732 (Bankr. W.D. Pa 1996).

Minnesota Appellate Court Doubles Down on Strict Compliance

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In navigating the rocky shores of nonjudicial foreclosures, the recent decision in *Larsen v. Wells Fargo Bank*, No. A19-0952, 2020 WL 1129880 (Minn. App. 2020), has just made life a bit more difficult for practitioners—the Minnesota Court of Appeals vacated a foreclosure sale after finding that the lender gave the mortgagor too much time to redeem.

Ever since the landmark decisions of *Jackson v. MERS*, 770 N.W.2d 487 (Minn. 2009) and *Ruiz v. 1st Fid. Loan Servicing*, 829 N.W.2d 53 (Minn. 2013), the Minnesota Supreme Court has held that lenders and practitioners of Minnesota foreclosures must strictly comply with the requirements of the non-judicial foreclosure process or risk avoidance of a sale. In the case of minor irregularities, based on precedent, many hoped that mortgagors might have to show a modicum of prejudice before courts reach the drastic conclusion to avoid an otherwise proper sale. Sadly, in Larsen, a recent unpublished opinion, the Minnesota court of appeals reversed a trial court and ruled that where the foreclosing lender published a redemption period double that to which the mortgagor was legally entitled, despite no prejudice to the mortgagor, the nonjudicial sale was void.

The facts in the case are fairly straightforward. Following a default on the borrower's loan, WF commenced a nonjudicial foreclosure proceeding. After the title search revealed a junior mortgage in favor of the United States, Wells Fargo's counsel drafted and published a foreclosure sale notice advertising a 12-month redemption period, six months longer than the period the mortgagor was otherwise entitled to Minnesota statutes. In our state, most properties are entitled to a 6-month redemption, with 12 months being reserved for agricultural properties, much older mortgages, and those loans with steep equity.

Wells Fargo's counsel took this action relying on 28 U.S.C. § 2410(c), which provides for a one-year redemption period for the United States from a foreclosure sale in judicial proceedings and felt the longer period was required to avoid redemption issues caused by giving 6 months to the mortgagor. The county sheriff ultimately sold the property to Wells Fargo at a nonjudicial sheriff's sale subject to the 12-month redemption period. The mortgagor sued, alleging the sale was in-valid because they received a longer redemption period than allowed by statute, i.e., Wells Fargo gave the bor-rower an additional 6 months to possibly redeem from the sale and to stay in their home before the foreclosure purchaser could commence an eviction proceeding. The trial court determined that Wells Fargo's actions were valid and dismissed the case. The mortgagor ap-pealed.

In reversing the trial court decision, the appellate court decided that 11 U.S.C. § 2410 did not mandate a change from 6 to 12 months for either the notice or the sale. The court noted that the statutory provision establishing the 6-month redemption period in Minnesota statutes 580.23 and required in the publication under Minnesota statutes 580.04(a)(6) applied to the *mortgagor*'s rights, not to those of *junior lienholders*.

Decisions like Larsen serve as a reminder that **lenders and their counsel will be subject to ever more scrutiny** and the phrase "Get it Right" will be with us for the foreseeable future. Lenders and Minnesota attorneys are advised to follow the strict compliance standard of Minnesota Statute 580 on each foreclosure or risk a void sale.

The court followed with a review of the strict compliance standard in *Jackson v. MERS* and *Ruiz v. 1st Fid. Loan Servicing* governing nonjudicial mortgage foreclosures and explained that although the mortgagor received a longer period of time to remain in the home and perhaps redeem, Minnesota law mandates strict compliance with the applicable foreclosure statutes. The court ultimately held the foreclosure sale was void because Wells Fargo gave the mortgagor too much time to redeem, noting that the mechanics of redemption by junior liens after 6 months was known to any redeeming creditors or could be fixed by legislative amendment if truly needed.

As an aside, the authors and their firm have always foreclosed nonjudicially using the 6-month redemption period despite the existence of a junior mortgage in favor of the United States, and the United States has not objected or asserted a right to a one-year redemption period. Although not explicit-ly stated in 11 U.S.C. § 2410, the text of that statute clearly implies that the 12-month redemption period applies to foreclosures by judicial action, but a judicial action is not required. Where the United States has a junior mortgage and the lender commences a judicial foreclosure, the lender may name the United States as a defendant, and the United States is entitled to a 12-month redemption. But the choice of forum is permissive, and where a lender forecloses un-der state nonjudicial foreclosure statutes, the United States is not guaranteed the 12-month redemption period. Instead, state law applies. See *U.S. vs. Brosnan*, 363 U.S. 237 (1960).

Finally, in Larsen, the court did not find persuasive Wells Fargo's argument that the sale was val-id because the mortgagor was not prejudiced by the longer redemption, despite cases holding otherwise, e.g., *Wells Fargo v. Terres*, 2008 WL 3287817 (Minn. App 2008) (amending sheriff's certificate where no prejudice to mortgagor); *Young v. Penn Mutual Life*, 265 N.W. 278 (Minn. 1936)(overstated amount due by $116.55 not prejudicial to mortgagor and sale was valid). Decisions like Larsen serve as a reminder that lenders and their counsel will be subject to ever more scrutiny, and the phrase "Get it Right" will be with us for the foreseeable future. Lenders and Minnesota attorneys are advised to follow the strict compliance standard of Minnesota Statute 580 on each foreclosure or risk a void sale.

STATE SNAPSHOT | ILLINOIS

Illinois Case Law Update

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Procedural or Substantive, that is the Question posed in THE BANK OF NEW YORK MELLON, f/k/a the Bank of New York, as Trustee for the Certificate Holders of CWALT, Inc., Alternative Loan Trust 2005-47cb, Mortgage Pass-Through Certificates, Series 2005-47CB, Plaintiff-Appellant v. GEORGE J. SPEREKAS II; THE BANK OF NEW YORK, as Trustee for the Benefit of the Certificate Holders of the CWHEQ Inc., Homer Equity Loan Asset-Backed Certificates, Series 2006-S1; RANDOLPH PLACE RESIDENCES CONDOMINIUM ASSOCIATION; CHICAGO PATROLMEN'S FEDERAL CREDIT UNION; UNKNOWN OWNERS AND NONRECORD CLAIMANTS, Defendants-Appellees.

The issue on appeal was a narrow one dealing with notices that need to be sent to the local Alderman in the City of Chicago. The Alderman wanted to have notice of what properties in his/her Ward were being foreclosed upon so as to be able to "protect" the neighborhood. As a result, once a case is filed a notice had to be sent to the local Alderman. In this case, the notice was sent to the wrong room number and the borrower claimed that this necessitated that the case be dismissed. This is one of many small "defenses" raised by the local defense bar and this particular attorney.

The law was changed during the pendency of this appeal to provide that the foreclosure case would be stayed until proper notice is given to the Alderman. This change was supported by the local mortgage foreclosure bar. The Appellate Court made quick work of case and determined that this was a procedural change and as a result of the procedural nature of the change in the law and the fact that the Plaintiff produced the correct evidence of the notice, the case could proceed and ruled against the defendant.

This case illustrates the length to which defense counsel, and this one in particular, will go to litigate a foreclosure matter to drag out the proceedings as long as possible to give his client more time in the property.

Appeal Outlines Need for De-Acceleration Notice and Proof of Mailing

BY DEBORAH GALLO, DIRECTOR OF OPERATIONS
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IN 1081 STANLEY AVE., LLC . Bank of New York Mellon Trust Company, N.A. , Supreme Court, Appellate Division, Second Department, New York, January 29, 2020, 2020WL 465549; 2020 NY Slip Op. 00559, the Appellate Court reversed, and the plaintiff's motion for summary judgment on the complaint was granted and defendant's cross-motion for summary judgment dismissing the complaint was denied. https://law.justia.com/cases/new-york/appellate-division-second-department/2020/2017-06386.html.

The instant action was commenced pursuant to RPAPL 1501(4) to cancel and discharge a mortgage in the sum of $551,200.00. In March 2009, Bank of New York Trust Company, NA commenced an action against Batista to foreclose the mortgage. (Mortgage was thereafter further assigned). By order dated November 14, 2013, the Supreme Court dismissed the 2009 action as abandoned under CPLR 3215(c).

> A lender may revoke its election to accelerate the mortgage, but it must do so by an affirmative act of revocation occurring during the six-year statute of limitations period.

The Plaintiff herein, acquired the premises pursuant to a deed dated June 22, 2015, and commenced an action against Bank of New York Trust pursuant to RPAPL article 15 to cancel and discharge the mortgage. In the complaint it was alleged that any interest of the defendant was barred by the statute of limitations. Defendant filed an answer alleging, among other items, that the acceleration of the debt was revoked prior to expiration of the statute of limitations and that Batista had acknowledged the debt, thereby restarting the statute of limitations. The plaintiff moved for summary judgment on the complaint, and the defendant cross-moved for summary judgment dismissing the complaint. The Supreme Court denied the plaintiff's motion and granted the defendant's cross motion. The plaintiff then appealed.

A lender may revoke its election to accelerate the mortgage, but it must do so by an affirmative act of revocation occurring during the six-year statute of limitations period. The defendant submitted the affidavit of Mark Syphus, a Document Control Officer of Select Portfolio Servicing, Inc., the defendant's attorney-in-fact and loan servicer, to which was annexed a letter addressed to Batista, dated December 29, 2014, stating that the acceleration of the mortgage debt was "hereby rescinded." However, the defendant failed to show that the letter dated December 29, 2014, constituted an affirmative act revoking the acceleration, since the defendant submitted no evidence that the letter was sent to Batista.

Additionally, defendant failed to show that certain authorizations signed by Batista constituted acknowledgments sufficient to revive the statute of limitations. The authorizations were attempts to negotiate loan modifications and not unqualified acknowledgments of the debt sufficient to reset the running of the statute of limitations.

THIS is another lesson in the necessity of HAVING documentary evidence of mailing IN ORDER for a de-acceleration letter to have the intended effect.

New Jersey Senate Assembly Bill 5001 Revises Statute of Limitations

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THE NEW JERSEY legislature passed Senate Assembly Bill 5001 in April 2019, which revised the statute of limitations on all residential mortgages executed on or after the effective date. Kindly allow the remainder to serve as a substantive summarization of the revised statute of limitations.

At the outset, **all mortgages executed before April 29, 2019, are not affected by the revised statute of limitations**. Accordingly, mortgages executed before April 29, 2019, shall be subject to the statute of limitations as it existed before the statute was revised, which is the earlier of: (a) six (6) years from maturity; (b) thirty-six (36) years from the date the mortgage was recorded; or (c) twenty (20) years from the date of default.[1]

The relevant revised statute of limitations for residential mortgages executed after April 29, 2019, is codified in *N.J.S.A.* 2A:50-56.1, as follows:

"An action to foreclose a residential mortgage shall not be commenced following the earliest of:

a. Six years from the date fixed for the making of the last payment or the maturity date set forth in the mortgage or the note, bond, or other obligation secured by the mortgage, whether the date is itself set forth or may be calculated from information contained in the mortgage or note, bond, or other obligation, except that if the date fixed for the making of the last payment or the maturity date has been extended by a written instrument, the action to foreclose shall not be commenced after six years from the extended date under the terms of the written instrument;

b. Thirty-six years from the date of recording of the mortgage, or, if the mortgage is not recorded, 36 years from the date of execution, so long as the mortgage itself does not provide for a period of repayment in excess of 30 years; or

c. Six years from the date on which the debtor defaulted, which default has not been cured, as to any of the obligations or covenants contained in the mortgage or in the note, bond, or other obligation secured by the mortgage, except that if the date to perform any of the obligations or covenants has been extended by a written instrument or payment on account has been made, the action to foreclose shall not be commenced after six years from the date on which the default or payment on account thereof occurred under the terms of the written instrument."

Here, the significant change is the reduction from twenty (20) to six (6) years in subsection (c). Based upon the shortening of the time to commence an action, a foreclosing plaintiff must be cognizant of both timely commencing an action and fully prosecuting a foreclosure action within one year of commencement. *See N.J. R.* 4:64-8(a) (maintaining that a foreclosure matter that has been pending for more than twelve (12) months may be considered "aged" and ripe for the issuance of a Superior Clerk's Order advising that the action may be dismissed within thirty (30) days of the

[1] New Jersey is distinct in that acceleration does not impact a statute of limitations analysis for residential foreclosures. See *JPMorgan Chase Bank, National Association v. Zarour*, 2019 WL 46202346 (N.J. App. Div. Sept. 24, 2019) and *Deutsche Bank National Trust Company v. Hochmeyer*, 2013 WL 2435371 (N.J. App. Div. June 6, 2013).

Based upon the shortening of the time to commence an action, a foreclosing plaintiff must be cognizant of both timely commencing an action and fully prosecuting a foreclosure action within one year of commencement.

issuance of the order, unless an answer, motion for default, motion for final judgment, or a motion fixing the time, place, and amount of redemption is filed).

Further, as the New Jersey legislature, enacted a restriction on the amount of restorations (i.e. reinstatements) permitted under Senate Assembly Bill 3411 and codified in *N.J.S.A.* 2A:50-56., as well as a non-recoverable fee associated with restoring a formerly dismissed foreclosure, there are potential statute of limitations issues that could arise where a prior action was timely commenced but dismissed without prejudice, and a foreclosing plaintiff has exhausted the number of reinstatements available. See *N.J.S.A.* 2A:50-56.3 (stating that a foreclosing plaintiff is limited to three reinstatements for any action dismissed without prejudice, and the cost to restore a foreclosure is twice the amount of the filing fee for a complaint). Separate and distinct from the non-recoverable "reinstatement fee" of roughly $810.00 is the application fee, which varies based upon the length of the dismissal.

In sum, foreclosing plaintiffs can expect to see a wide range of litigation on residential foreclosures involving both the revised statute of limitations, the new restoration limitations created by the legislature, and more generally, the other amendments made to the Fair Foreclosure.

Per Appellate Division, a Discharge in Bankruptcy Does Not Automatically Accelerate the Debt & the Terms of the Mortgage Survive Bankruptcy

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WE ARE PLEASED TO SHARE a recent decision, on an issue of first impression, of a case handled by Friedman Vartolo, LLP entitled *Wilmington Sav. Fund Socy., FSB v. Fernandez,* et al. Supreme Court Ct., Appellate Decision, Fourth Department 11/15/19, 2019 WL 6042376, 2019 NY Slip Op 08290. The borrower argued that a "bankruptcy operates as the acceleration of the principal amount of all claims against the debtor" (House Report at 353, U.S. Code Cong. & Ad. News at 6309; *In Re Schweitzer,* 19 B.R. 860, 867-868 [Bankr. E.D.N.Y. 1982]; see also *In Re Oakwood Homes Corp.*, 449 F.3d 588 [3d Cir. 2006]; *In Re Amr Corp.*, 485 B.R. 279 [Bankr. S.D.N.Y. 2013] and that six-years after discharge in bankruptcy, Plaintiff's loan was barred by the statute of limitations. The Court found that the bankruptcy did not automatically accelerate the debt, Plaintiff's complaint was not time-barred because separate causes of action accrue for each installment payment that was not made, and the Court properly denied defendant's motion to dismiss the complaint.

On August 17, 2007, defendant executed a note in the amount of $94,400 plus interest, payable in successive monthly installments with the final payment to be made on January 4, 2031. Defendant secured payment of the note with a mortgage encumbering certain real property. On December 8, 2009, defendant filed a petition for chapter 7 bankruptcy in Bankruptcy Court. Defendant received a discharge in bankruptcy on March 15, 2010, and obtained a final bankruptcy decree on April 1, 2010. On May 26, 2017, plaintiff, the successor to the lender, sent defendant notice that he was in default and that defendant had 90 days to cure the default. After receiving no payment during the following 90 days, plaintiff accelerated the remaining balance due under the note and, on November 1, 2017, plaintiff commenced an action seeking to foreclose on the mortgage. In his answer, defendant raised the statute of limitations as an affirmative defense.

itations began to run from the date each unpaid installment became due unless plaintiff accelerated the debt, and that plaintiff's action was therefore timely because the debt had not been accelerated prior to 2017. Thus, on re-argument, the court reversed its prior determination, denied defendant's motion to dismiss the complaint, reinstated the complaint, and denied defendant's cross motion to quiet title.

The mortgage provided plaintiff the option to accelerate the debt under certain circumstances but did not state that the debt would be automatically accelerated if defendant obtained a discharge in bankruptcy. The appellate division rejected defendant's contention that the discharge in bankruptcy automatically accelerated the debt. The Court found, that Chapter 7 discharge removes the "mode of enforcement" against the debtor in personam, but the obligation otherwise remains intact and does not impact an action in rem (*Johnson,* 501 US at 84).

The Court found that the bankruptcy did not automatically accelerate the debt, Plaintiff's complaint was not time-barred because separate causes of action accrue for each installment payment that was not made, and the Court properly denied defendant's motion to dismiss the complaint.

Defendant moved to dismiss the complaint pursuant to CPLR 213 (4) and 3211 (a) (5). Supreme Court initially granted defendant's motion, reasoning that defendant's March 15, 2010 discharge in bankruptcy triggered the six-year statute of limitations (see CPLR 213 [4]), and that plaintiff failed to commence its foreclosure action within that period. Plaintiff then moved for leave to reargue, and defendant cross-moved to quiet title. The court granted plaintiff's motion for leave to reargue, and ultimately held that defendant's discharge in bankruptcy did not extinguish plaintiff's right to commence an in rem foreclosure proceeding against defendant, that the statute of lim-

The Court had not previously addressed the specific impact a discharge in bankruptcy has on the ability to commence a foreclosure proceeding over six years after a discharge in bankruptcy. The application of the above rules regarding the survival of in rem actions suggests that, absent terms in the mortgage to the contrary, a discharge in bankruptcy does not automatically accelerate the debt and that the terms of the mortgage survive bankruptcy. Because the terms of the mortgage survive, causes of action would thus continue to accrue with respect to each installment payment as the payments become due, although a note holder would only be able to commence an action in rem.

New NY Law Adds a New Layer of Requirements on Reverse Mortgages to Take Effect March 5, 2020

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ON DECEMBER 6, 2019, New York Governor Andrew Cuomo signed into law a bill, Assembly Bill 5626 (AB 5626), which, among other things, regulates reverse mortgages issued under FHA's HECM program. AB 5626 also appears to require lenders offering reverse mortgages in New York to obtain approval from the Superintendent of the New York Department of Financial Services (Superintendent) in order to make HECMs in New York. The bill went into effect on March 5, 2020.

AB 5626 provides that an authorized lender, or any other party or entity, is prohibited from engaging in any unfair or deceptive practices in connection with the marketing or offering of reverse mortgage loans and must not: (i) use the words "government insured" or other similar language representing that reverse mortgage loans are insured, supported, and sponsored by any governmental entity in any commercial, mailing, advertisement or writing relating thereto; (ii) use the words "public service announcement" in any commercial, mailing, advertisement or writing relating thereto; or (iii) represent that any such loan is other than a commercial product.

Lenders must include certain consumer protection information, the content, and form of which must be specified by the Superintendent, with any solicitation for reverse mortgage products mailed to a physical address in New York. Lenders must also provide each actual/potential applicant with the telephone number and website address provided by HUD for HECM counseling. Both the lender and the borrower must be represented by an attorney at closing, and each such party must have at least one attorney present to conduct the closing.

AB 5626 provides various servicing-related requirements and restrictions. Lenders must inform and provide notice to a borrower, by telephone and first-class mail, when his or her line of credit or life

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expectancy set aside is depleted to 10% or less of its value. Such notice must inform the borrower of their obligations relating to the property. In addition, reverse mortgage lenders are prohibited from making an advance payment for any obligation arising from the borrower's property. Additionally, in the event a borrower defaults upon the payment of insurance premiums or real property taxes, the lender may only pay those premiums and/or taxes that are in arrears.

The bill also states that in the event a lender seeks to foreclose on a reverse mortgage loan on the basis that the property is no longer the primary residence of or occupied by the borrower, if during the verification of the borrower's primary residence and/or occupancy no responses are received in response to mailings relating thereto, such lender must cause a telephone call to be made to the borrower, or if the borrower is unreachable by telephone, to a (designated) third-party contact. In addition to making such call, prior to the commencement of a foreclosure proceeding, an in-person visit must also be made to the borrower. Note that the lender may not charge a fee for any such visit and inspection. The lender must wait at least 30 days following the in-person visit, in addition to any additional time or notice requirements specified by any other provision of law, before initiating a foreclosure action on the basis that the property is no longer the primary residence of the borrower. If the borrower contacts the lender and provides proof of residence or occupancy after such visit, but before the commencement of the foreclosure action, the lender is barred from initiating such foreclosure action.

The bill also provides that compliance with its requirements is a condition precedent to commencing a foreclosure action, and failure to comply is a complete defense to such action. Additionally, any person injured by any violation of the bill's requirements or any violation of the rules and regulations of HUD relating to the HECM program may bring an action to recover treble damages, plus the prevailing plaintiff's reasonable attorneys' fees.

A Changing Economy Changes the Game on Preforeclosure Mediation

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THE LAST 13 YEARS have witnessed a changing economic landscape and evolution of pre-foreclosure mediations. From 2007-2009, the United States experienced the Great Recession, which resulted in the loss of millions of jobs, high unemployment, and the bursting of the housing bubble. December of 2008 marked the largest drop in home prices in recent history and within two years, the delinquency rates on home loans increased, dramatically, with the FNMA and Freddie Mac serious delinquency rates peaking in February 2010.[1]

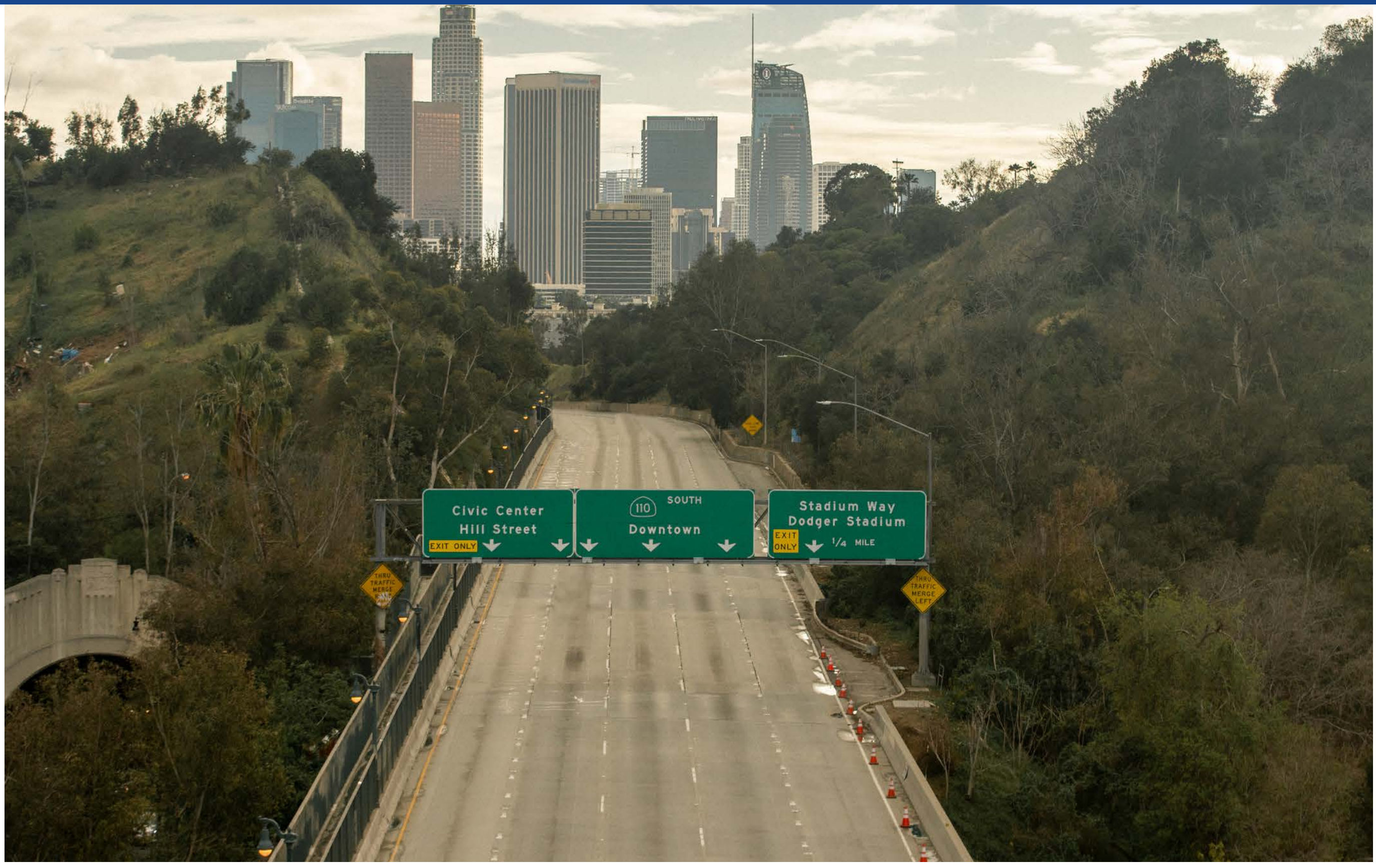
As home prices bottomed out in 2011, the common myth that home prices will always increase proved false, and borrowers found themselves underwater and unable to sell their home in order to avoid foreclosure. Unable to sell, increasing numbers of borrowers attempted to modify their loans, a process that was profoundly frustrating to many borrowers due to communication issues, lack of documentation and a lack of understanding regarding document expiration. In response, states across the country established pre-foreclosure mediation programs, in an attempt to facilitate communication between borrowers and loan servicers/beneficiaries, and enable loss mitigation applications and review.

In June 2012, the Oregon Foreclosure Avoidance Program was established. While the program initially applied only to nonjudicial trustee sales, in August 2013, the Program was expanded to apply to judicial foreclosures as well. Initially, meetings in the Program focused on increasing communication between the borrowers and loan servicers. The Program includes a document Portal which allows for documents to be submitted, tracked, and retrieved by borrowers and servicers. The Portal has helped reduce frustrations on the part of both servicers and borrowers, providing tracking of documents, consistent and improved communication regarding loss mitigation applications, and increased access to beneficiary provided documents such as payoffs and reinstatement amounts. The Program's requirement for a representative from the servicer to call in also created a direct line of communication with the servicers which many borrowers had previously not been able to establish.

Starting in 2012, through the National Mortgage Settlement, as well as other agreements between servicers and the CFPB, and at the suggestion of the major GSEs, the major loan servicers established a single point of contact ("SPOC") for troubled mortgages. This requirement has now been codified.[2] This SPOC serves as a dedicated individual who is designed to be familiar with the loan, and to facilitate smooth communication and make transmission of documents easier. This SPOC eventually evolved to be a direct point of contact at the servicers, similar to the contact provided by the Oregon Foreclosure Avoidance Program.

During the initial years, given the high number of

[1] https://www.calculatedriskblog.com/2013/12/fannie-mae-mortgage-serious-delinquency.html
[2] 12 CFR Part 1024.40 (Regulation X)



While the recent financial outlook for our country has been good, with lower unemployment, and lower default rates, the new pandemic and its economic effects are just beginning to be seen.

underwater homes, many of the meetings revolved around modifications, and tracked the modification application and review process. Approximately eight years later, however, the economic picture has dramatically changed. Nationally, as of March 2020, the number of underwater homes was the lowest since the Great Recession. Home prices have in general rebounded from their Great Recession lows, in most markets. This increase in home prices, and corresponding increase in borrowers gaining equity in their homes, has changed the nature of the discussions occurring in the mediation programs. Discussions that used to be focused on loan modification review have, over time, shifted into borrower education regarding sale options. Many borrowers participating in the Oregon Foreclosure Avoidance Program are unaware of exactly how much is due on their loans, and the extent of the growth in value of their homes, including the possibility of sales where borrowers can walk away with (sometimes) significant equity.

While the recent financial outlook for our country has been good, with lower unemployment, and lower default rates, the new pandemic and its economic effects are just beginning to be seen. Depending on the duration and intensity of the pandemic, and the type of national response, the result may be increased default rates. As of the middle of March 2020, pending foreclosure avoidance meetings have been postponed in Oregon, and the large governmental backed entities have put into place various foreclosure moratoriums. Where once the Oregon Foreclosure Avoidance Program provided relief, in the form of a direct communication channel, it evolved into an avenue of education regarding options available to homeowners. Now, with the negative economic effects coming from COVID-19, we may see further evolution in ways we cannot yet predict.

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