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OFFICIAL PUBLICATION OF THE ALFN
VOL. 7 ISSUE 4

A DIFFERENT STORM

WHAT DOES THE PAST TELL US ABOUT OUR FUTURE?

ALFN AMERICAN LEGAL & FINANCIAL NETWORK

ALFN.ORG

WE ARE HERE FOR YOU

#100%MemberRetention

As we are all dealing with the impact of COVID-19, ALFN is offering some enhanced membership benefits and incentives that will provide direct ROI for your continued membership support. It is our goal to maintain 100% member retention, and 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 the ALFN. Here are some of the ways we would like to thank you for your continued support:

- **15% Dues Discount for 2021 Membership Renewal:** Members that pay their 2020 membership renewal dues in full by Dec. 31, 2020, will receive a 15% discount on your 2021 membership renewal dues.
- **Payment Assistance:** Installment plans, credit card payments and payment deferrals are available for 2020 membership dues, and for any ads and sponsorship purchases made in 2020. No additional fees charged for these alternative payment methods.
- **2021 Membership Dues:** Installment plans and credit card payments accepted for all members, with no additional fees. No increase in 2021 membership renewal dues.
- **Former Members Re-Joining:** Any member that had a cancelled membership and wants to re-join the ALFN in 2021 will not be charged any re-joining or initiation fees.
- **Enhanced Online Educational Offerings:** Additional webinars and online content offered at no additional cost to our members.
- **ASSURE Rewards Program:** Members that had achieved ASSURE Rewards status after ANSWERS 2019 will remain in the program through and including ANSWERS 2021.
- **ANSWERS & INTERSECT Online Presentations:** The 9 educational sessions from ANSWERS are available to view on-demand at gotostage.com/channel/alfnwebinars. We are pleased to bring you our Foreclosure Intersect event online, in the form of 7 webinar sessions throughout December. We are offering all of our online webinar sessions free of charge to our members.
- **CLE Credit:** No less than 16 of our online presentations in 2020 will include CLE credit opportunities. CLE credit is available at a special discounted rate for all ANSWERS and Foreclosure Intersect webinars at $100/state. That means you can get 7 hours of CLE for our Foreclosure Intersect webinars for only $100 (one state).
- **Discounted Ad Purchases:** Discounts will be provided for all ads and upgrades purchased for the remainder of 2020 in the Legalist, WILLed and ANGLE publications.
- **New Webinar Sponsorship Opportunities:** Newly designed sponsorships are available at a lower cost to provide continued branding and marketing opportunities for our members.

ALFN has a vested interest in seeing all of our members pull through these challenging times with good health and financial strength. Please reach out to us and let us know how we can continue to help.

WE ARE HERE FOR YOU!

Letter from the ALFN Board Chair

Stay Strong and Carry On

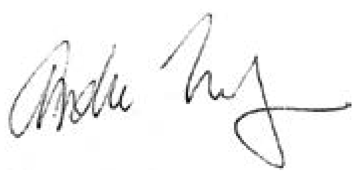
WHEN WILL THIS BE OVER? Have you heard anything? How can we go on with no work? This basically sums up how our industry feels, as well as the rest of the world. We cannot escape the topic of COVID-19 as it affects us personally and has impacted the financial world in ways we don't yet comprehend. The default industry is part of the epicenter of the issues this country faces as millions of Americans are out of work or underemployed, and the moratoriums to protect those homeowners appear endless. Firms and vendors in the industry struggle to keep their doors open while the holds remain in place with no end in sight. While some states have loosened moratoriums and some private lenders have resumed them in different forms, most of the work that maintains this industry is at an effective standstill.

ALFN has continued to lobby for the interests of our industry by expressing the growing complexity of compliance and continued importance of our work within the mortgage industry. Our members have taken years to put together processes and train attorneys and staff to provide not only excellent service, but to provide the necessary compliance demanded and expected by our clients. Although there has been no relief, we continue to ensure that ALFN's voice and position is heard.

Another struggle is isolation. Our members are feeling disconnected. No Zoom meetings, webinars or calls can truly replace the in-person meetings we have enjoyed and look forward to returning to again, hopefully in the not-too-distant future. That being said, your ALFN board is working on new initiatives that will allow our members the ability to continue collaborating together and offering quality education The ALFN board believes now more than ever that its membership needs one another, and we are ready and available to help.

Please know that you have an incredible association behind you to support and guide you during this difficult time. Reach out, call or email and let us be there for you.

Thank you and stay well,



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

Letter from the Editor

ALFN IS HERE for you during these difficult times, and we stand side-by-side with our members to make sure your voices are heard and to continue bringing you the opportunities to get involved and be part of something that's larger than the sum of its parts. ALFN has been, and always will be, about collaboration and community. A forum where we can all come together and work through common issues such as those that we are facing from COVID-19 and the impact of industry moratoriums. We will continue to provide new and creative membership benefits and incentives that result in direct ROI for your ongoing support. It is tough out there right now and default revenues for our members are nearly non-existent. Knowing this, we have developed several new ways to help our members as we move into 2021. It is our goal to maintain 100% member retention and remain your go-to trade association in the financial services industry.

This issue of the ALFN ANGLE brings you the latest up-to-date information on the important issues that may have far-reaching impacts in our industry, including many that surround COVID-19 and industry moratoriums. You can rest assured that ALFN continues to strive for excellence in education and providing our members the information you need to be successful and persevere during this time of uncertainty and change.

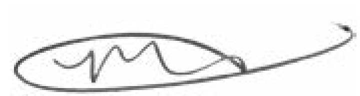
The cover feature of this issue focuses on the correlation that unemployment has on foreclosures. The authors point out the historical data correlations between the two, and provide a prediction for foreclosure volumes into 2021.

Our feature articles section begins with a review of landlord contract rights in light of the recent moratoriums on evictions. It is a careful balance protecting the rights of landlords, while understanding the health risks associated with COVID-19 and keeping people in their homes during a time when many can longer pay their rent. Next up we take a deeper look into the new litigation issues that will be created from the impact of COVID-19. It will be critical to understand all of the litigation risks related to the CARES Act, and be prepared by knowing what types of cases will be filed and what you should do to mitigate any litigation risks. As we continue, our next submission looks at the use of electronic records and electronic signatures. These electronic communications are becoming the new normal, now more than ever due to COVID-19. It is imperative to understand all applicable laws and procedures involved to remain in compliance, such as those related to the Uniform Electronic Transactions Act (UETA). Next up is an article that touches on some creative settlement solutions for evictions in light of the recent moratoriums. With a wave of evictions that are sure to come in the near future, it is important that we all work together to navigate the post-moratorium environment. Moving on to our next feature article, we are presented with a Florida Supreme Court decision that clarifies the requirements for admission of business records under the hearsay exception. The decision will streamline the introduction of business records into evidence at trial and eliminates the need for collateral testimony. As we continue with our feature submissions, we learn how the moratoriums may affect mortgage servicers and investors. One thing is certain in this time of uncertainty, and that is the severe impact that COVID-19 will continue to have on the economy and mortgage market. As we move on, our next article focuses on the Ohio legislature as they revisit the abolition of dower. Ohio could remain one of only three states that recognizes the archaic doctrine of dower. Our ANGLE features continue with a focus on process servers, and the importance that screening plays when selecting process servers. It is vital that candidates be properly vetted to verify they have the right skills and so they are AMP'D (Answered, Met, Prepared and Detailed). Following this is a submission that provides some great tools that can be used in managing remote employees. It is important to trust your employees that are working from home, and these tools are a few that can be used in monitoring the work of your remote staff. Moving on, we take a look at Robotic Process Automation (RPA) and 4 ways that it can help law firms in the post-COVID era. RPA can help minimize human error, improve efficiency and turn-around time, and as you deal with process compliance. Up next, we review two perspectives on how servicing organizations will react in the post-COVID industry environment by investing in new technologies. The first perspective being that of the manger and their vision on transforming servicing to achieve scalability, and the second from the developers perspective to execute on that vision and produce robotic systems that deliver the needed efficiencies. Finally, we wrap up our feature article submissions with a look at the power and limitations of reformation actions in Tennessee, and using them when mistakes are found in a deed of trust to retroactively make the necessary corrections.

Take a look at some of the State Snapshot contributions to wrap up this ANGLE issue, which will address some important state specific updates in Connecticut, Florida, New York, Ohio and Tennessee.

Please reach out if there is anything that the ALFN can assist you with during these trying times. Stay safe and healthy out there, and keep a positive mindset in knowing that the difficulties we are facing from COVID-19 will too eventually pass. I look forward to seeing everyone in-person again soon.

Best regards,



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

CONTENTS

MEMBER BRIEFS

ALFN EVENTS
SAVE THE DATES

2021

MARCH 4
BANKRUPTCY INTERSECT
Marriott Dallas Las Colinas
Irving, TX

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

JULY 18-21
ALFN ANSWERS
18th Annual Conference
Hyatt Regency Coconut Point Resort
Bonita Springs, FL

NOVEMBER 18
FORECLOSURE INTERSECT
Marriott Dallas Las Colinas
Irving, TX

2022

JULY 17-20
ALFN ANSWERS
19th Annal Conference
Hyatt Regency Tamaya Resort
Santa Ana Pueblo, NM

2023

JULY 16-19
ALFN ANSWERS
20th Annual 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.

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

VOLUNTEER OPPORTUNITIES

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.

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

WEBINARS ON-DEMAND

View Previously Recorded ALFN Webinars On-Demand at:
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SPEAKER APPLICATIONS FOR ALFN EVENTS

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

A DIFFERENT STORM

WHAT DOES THE PAST TELL US ABOUT OUR FUTURE?

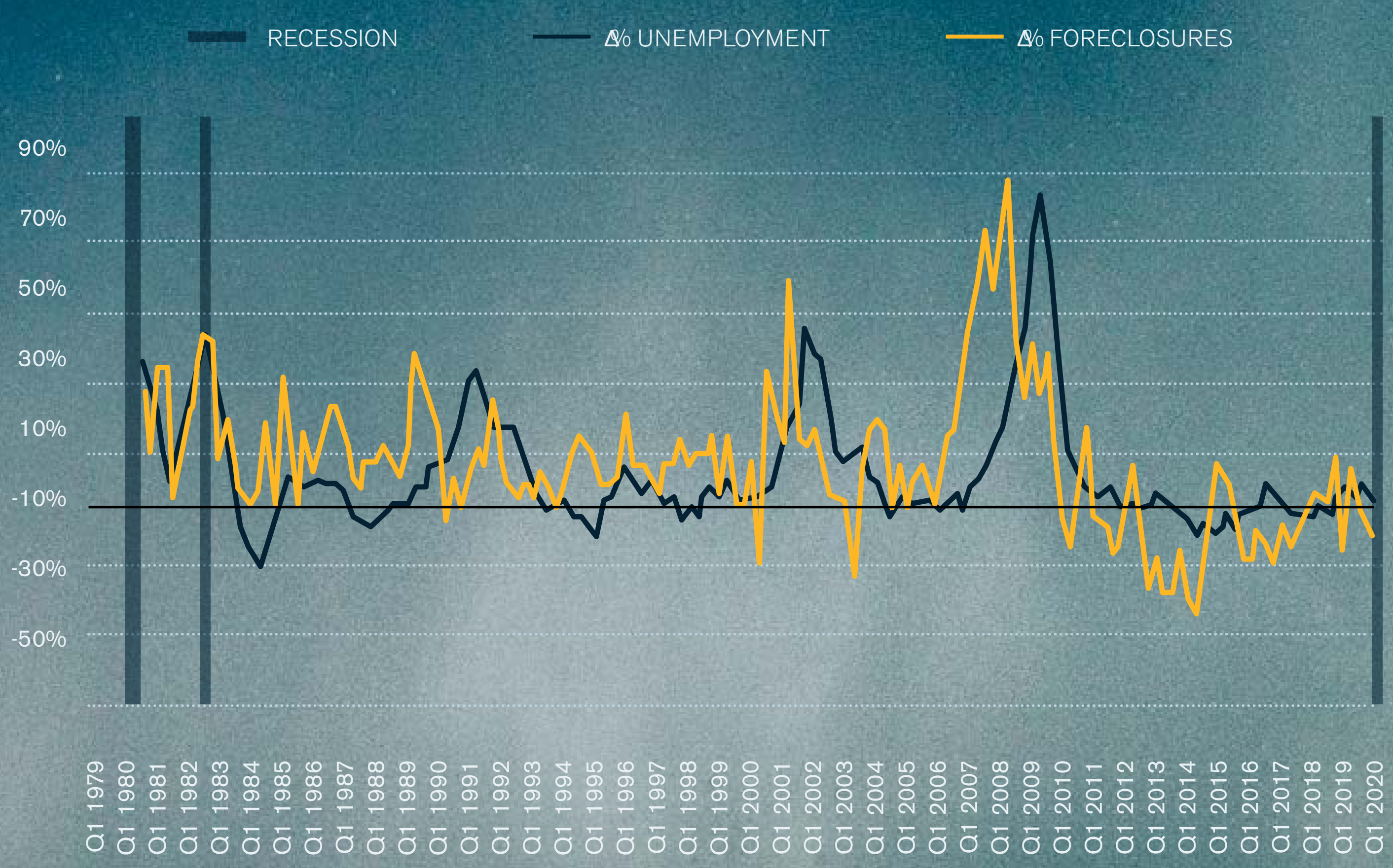
BY BRIAN A. POTESTIVO, ESQ., PRESIDENT & MANAGING ATTORNEY
POTESTIVO & ASSOCIATES, P.C., BPOTESTIVO@POTESTIVOLAW.COM
AND LEON LABRECQUE, ESQ., CHIEF GROWTH OFFICER
SEQUOIA FINANCIAL GROUP, LLABRECQUE@SEQUOIA-FINANCIAL.COM

THE COVID-19

crisis has upended the U.S. economy, creating the biggest drop in gross domestic product (GDP) in decades. Commensurate with the drop in GDP is a corresponding rise in unemployment that is unlike any prior increases in unemployment. Unemployment is a significant factor in foreclosures, as is evidenced by prior studies by the Federal Reserve Bank of Cleveland.

In their 2010 study, the Cleveland Fed found that during the global financial crisis, states that had large increases in their unemployment rates also exhibited higher foreclosure rates. Expanding the scope of their analysis, we looked at this relationship going back to 1980. This figure can be seen below in the following chart, which shows the quarter-on-quarter change for foreclosure starts versus the unemployment rate (shaded areas are recessions).

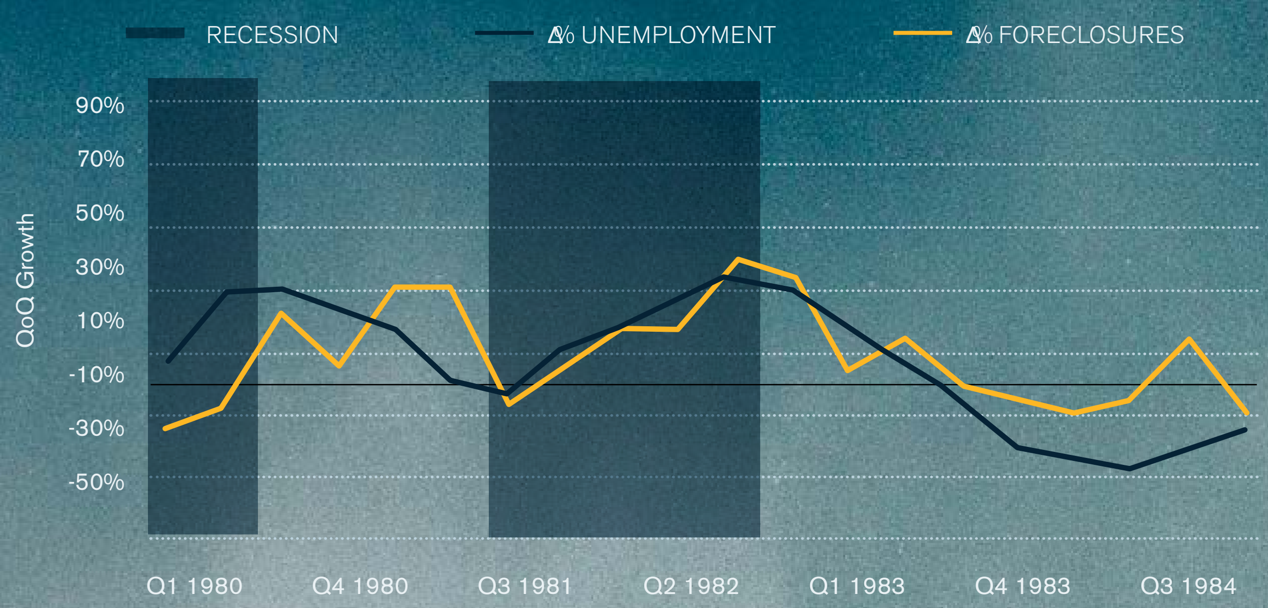
HISTORICAL UNEMPLOYMENT AND FORECLOSURE GROWTH



Taking this data further, there appears to be one major takeaway – in recessionary periods, unemployment and foreclosures track each other closely. However, the time lag between these two variables appears to be contingent on the recessionary period.

In the early 1980s recession, we saw foreclosures and unemployment went hand-in-hand.

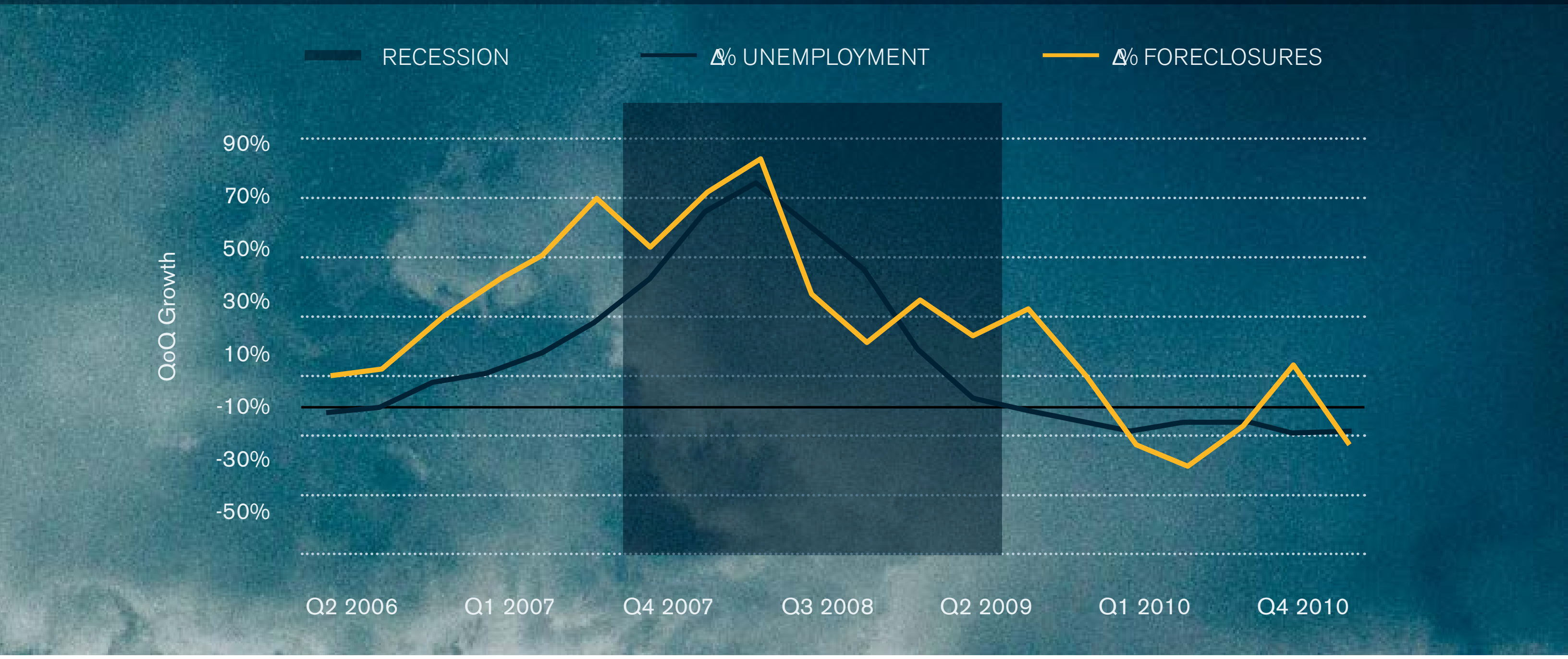
UNEMPLOYMENT AND FORECLOSURE GROWTH | 1980s RECESSION



Conversely, with the recessions of 2000 and 2008-09, we see that an increase in foreclosures preceded changes in unemployment.

UNEMPLOYMENT AND FORECLOSURE GROWTH | INTERNET BUBBLE

UNEMPLOYMENT AND FORECLOSURE GROWTH | GLOBAL FINANCIAL CRISIS



In 2008-09, the unemployment rate lagged the foreclosure rate, likely because the recession was precipitated by the mortgage crisis.

But what does this all mean for the current situation we are facing? The COVID-19 pandemic has brought about economic challenges that we have not seen in a century. Rather than a traditional recession, where foreclosures have preceded or tracked unemployment, we have seen unemployment skyrocket while foreclosures have fallen. This is primarily due to the foreclosure moratorium, which extends as of the publication of this article.

WHY 2020 IS DIFFERENT

For a number of reasons, the recession of 2020 will likely be significantly different than past recessions. First, and perhaps most notably, there is a moratorium on foreclosures as a result of Congressional stimulus packages and federal agency declarations. According to recent statistics, foreclosures are down 84% year over year, as the moratoriums have substantially halted most foreclosures. The Department of Housing and Urban Development (HUD) extended the moratorium on certain Federal Housing Administration (FHA) mortgages (approximately 8.3 million units) until December 31, 2020. The Federal Housing Finance Agency (FHFA) has done the same for certain Fannie Mae and Freddie Mac mortgages.

The second reason the recession of 2020 will likely be different is due to the substantial unemployment stimulus made available by the CARES Act. The stimulus, in the form of federal unemployment supplements of an additional $600 per week from March 23, 2020 through July 31, 2020, provided significant financial support to individuals and families. Additionally, there are currently replacement supplemental unemployment insurance programs in place; although, none seem to attain the level of the original additional $600 per week.

Future stimulus programs will likely be less than the Pandemic Unemployment Assistance provided by the CARES Act. Another thing that is becoming clear is that employment composition and levels will not return to their pre-COVID-19 levels in the immediate future. Many jobs, particularly those in the hospitality and service sectors are likely to be permanently eliminated. Post-stimulus, there will probably be a new 'nominal' unemployment rate that will stabilize as people return to jobs that exist.

For 2020-21, the likelihood of a surge in foreclosures post-moratorium is substantial due to the build-up of loan delinquencies during the moratorium period. Assuming prospective defaults are even at early levels, this suggests a 15,000 per month 'build.' This is simply taking the early 2020 rate and applying it to the current number of months in the moratorium. Quite likely the 'build' is substantially more than 15,000 per month. The Cleveland Federal Reserve predicts that we will have a nominal unemployment rate of 6-7.5% post-COVID-19. This suggests that there would be a new foreclosure rate that is 60-90% higher than it is currently, suggesting a rate of 32,000 to 38,000 foreclosures per month. This provides a possible 'lag' of 120,000-135,000 foreclosures if we apply the pre-COVID-19 rate, or a substantially higher lag of 300,000-400,000 if the unemployment/foreclosure correlation bears true.

In any event, lenders and servicers should be preparing for the inevitable onslaught of foreclosure filings. Unless Congress permanently passes legislation on foreclosures and the accompanying issues of property rights, the level of foreclosures will continue to mount and the filings will be substantial.

FORECLOSURE STARTS VS. UNEMPLOYMENT

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CURRENT LANDLORDS RIGHTS

COVID-19 EVICTION MORATORIA AND THE IMPACT ON LANDLORDS' CONTRACT CLAUSE RIGHTS

BY SONIA J. BUCK, ESQ., ASSOCIATE ATTORNEY,
BROCK & SCOTT, PLLC | SONIA.BUCK@BROCKANDSCOTT.COM

IN RESPONSE TO COVID-19, on March 18, 2020, the Federal Housing Finance Authority ("FHFA") instituted a moratorium pertaining to eviction proceedings from properties subject to GSE-backed sponsored loans.[1] The moratorium has been extended several times, with the latest extension running through December 31, 2020 – more than nine months following the initial moratorium. Further, several state governors have taken their own initiatives to prevent evictions from moving forward, issuing executive orders broadening the scope of eviction moratoria to apply to all landlords.

This article discusses the moratoria and its impact on landlord contract rights, in light of the Contract Clause of the United States Constitution, and the balancing of those rights against the public health risks associated with COVID-19 and the importance of keeping people in their homes during a time when many can no longer afford their rent.

Several state governors have already faced challenges to their eviction moratoria. In New York, three residential landlord plaintiffs challenged Governor Andrew Cuomo's Executive Order 202.28, "Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency," issued May 7, 2020 (the "Executive Order"). In *Elmsford Apartment Associates v. Cuomo*, the plaintiffs filed a lawsuit against Governor Cuomo in an effort to enjoin the enforcement of the Executive Order.[2] Part of the Executive Order "temporarily prohibits landlords from initiating eviction proceedings against tenants who are facing financial hardship due to the pandemic."[3] The plaintiffs argued that the eviction moratorium imposed by the Executive Order violated their constitutional rights under (among other clauses) the Contract Clause.[4]

In its Order on cross motions for summary judgment, the United States District Court, Southern District of New York (the "Court") disagreed with the landlords and ruled in favor of Governor Cuomo. The Court analyzed the Contract Clause, acknowledging its plain language: "[n]o state shall ... pass any... Law impairing the Obligation of Contracts."[5] Although the language is "facially absolute… courts must accommodate the Contract Clause with the inherent police power of the state to safeguard the vital interests of its people."[6] The Contract Clause "does not trump the police power of a state to protect the general welfare of its citizens."[7]

The plaintiffs in *Elmsford* argued that the eviction moratorium impacts their contractual rights under their leases to enforce payment of rent using the available summary eviction process. Following United States Supreme Court and Second Circuit precedent, the Court applied a three-part test to balance the Governor's policing powers in the face of the public health and economic threat, against the landlords' rights to evict in order to enforce rental payment and protect their own income.

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[1] A GSE-backed loan is guaranteed loan through a Government Sponsored Enterprise, such as FNMA, FreddieMac, VA, or FHA. The moratorium applies to foreclosures as well as evictions.

2 2020 WL 3498456 *1 (June 29, 2020) (federal citation not yet available).

3 *Id.*

4 The landlords claimed other constitutional rights violations, including rights under the Takings Clause (Eminent Domain), the Due Process Clause, and the Petition Clause. The Court found no merit in any of these claims.

5 Constitution, Art. 1, § 10, Clause 1.

6 *Elmsford,* 2020 WL 3498456 *12 (quoting *Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 240 (1978)*).

7 *Id. (quoting Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 367 (2d Cir. 2006)).

THE THREE-PART TEST THE COURT FOLLOWED FIRST LOOKED AT:

1
whether the contractual impairment is substantial.

2
If the answer to that question is "yes," the Court moves on to: whether or not the law, notwithstanding the contractual impairment, serves a legitimate public purpose.

3
If so, the Court moves onto: whether the means chosen to accomplish this purpose are reasonable and necessary.

The three-part test the Court followed first looked at: 1. whether the contractual impairment is substantial. If the answer to that question is "yes," the Court moves on to: 2. whether or not the law, notwithstanding the contractual impairment, serves a legitimate public purpose; if so, the Court moves onto: 3. whether the means chosen to accomplish this purpose are reasonable and necessary.[8]

The Court did not move beyond the first question. The Court found that the eviction moratorium aspect of the Executive Order does not substantially impair landlords' contract rights. The Court's rationale was grounded in the specific facts of the case, as opposed to questions of law and legal precedent. One important fact was the apparent lack of an express provision in the leases for the landlords to bring eviction proceedings to enforce rights.[9] The plaintiffs argued that the "default clauses in each agreement allow the landlords to seek relief under state law," the Court stated that the default provisions do "not settle whether the right is express or implied." From that principle, the Court assumed the rights to eviction were implied in this case.

The Court also looked at the origin of the landlords' rights to the eviction process. The Court found those rights to be creatures of New York statute as opposed to contractual rights.[10] Under the leases, the landlords enjoyed only implied rights of eviction, not the streamlined, statutory process the courts provide. Further, the Court stated that the Executive Order did not deprive landlords of any rights; it "merely postpones the date on which landlords may commence summary proceedings against their tenants."[11] Because no impairment was found, the court looked no further at the other factors in the Contract Clause analysis.

The plaintiffs have appealed to the Second Circuit. The Second Circuit will need to reconsider question one: whether there is substantial impairment of contract rights. Without a finding of substantial impairment, the Second Circuit may decline to reach the questions of whether or not the Executive Order sweeps too far in its effort to serve a legitimate public interest, and whether such efforts are reasonable and necessary to accomplish that purpose. To properly accomplish the required three-part test, however, the Second Circuit must explore whether there might be an executive order that better balances the rights of landlords with the Governor's interest in protecting public housing and health during a pandemic. Guidance is needed as these cases continue to be filed and make their way through the trial and appellate courts.

Presented with a distinct set of facts, a court may differ from *Elmsford*. For example, some moratoria may restrict a landlord's ability to enforce late fee provisions in a lease, a right that is based in contract as opposed to statute. Additionally, individual, private landlords may face more immediate and apparent impairment of contract rights. A private landlord may be just as vulnerable as many of her tenants facing income insecurity and the risk of homelessness. The courts so far, however, have not been sympathetic to landlords claiming they, too, face economic uncertainty and housing instability.

In *HAPCO v. Philadelphia*, the United States District Court, Eastern District of Pennsylvania, recently denied injunctive relief to a group of landlords who claimed that they themselves would face foreclosure if they could not collect rent.[12] The group of plaintiffs, nearly 1,900 members, claimed that their evidence of substantial impairment stemmed from "[t]he obvious result of not having the rental payments to meet those expenses is foreclosure and tax delinquency."[13] The court did not agree.[14] The group failed "to establish a foundation for which the Court could infer that the nearly 1,900 HAPCO members are all in the same situation. After all, the financial situation of HAPCO's members assuredly varies and … many landlords are protected from foreclosure by different

8 *See Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 368 (2d Cir. 2006).
9 *Id. at* *14.
10 *Id.* at *15.
11 *Id.*
12 2020 WL 5095496 (August 28 2020).
13 *Id.* at *16.
14 *Id.* at *18.

government programs."[15] In short, HAPCO's claim of impairment by potential foreclosure was too speculative to justify injunctive relief.

Another problem with a landlord's ability to show substantial impairment is court opinion that the moratoria should have been expected, and that the situation is only temporary. In *Auracle v. Lamont*, the United States District Court for the District of Connecticut, in denying a preliminary injunction, found it relevant that the plaintiffs chose to do business in a "heavily regulated industry."[16] The Connecticut court therefore ruled there could not be substantial impairment, because the regulations were not "wholly unexpected" government legislation.[17] Quoting *Elmsford*, the court reasoned that, "[f]or those who do business in a heavily regulated industry, 'the expected costs of foreseeable future regulation are already presumed to be priced into the contracts formed under the prior regulation.'"[18] The court further agreed with the New York Court that there is no impairment because the eviction moratorium does "not eliminate plaintiffs' contractual remedies for evicting nonpaying tenants; plaintiffs instead have to wait before they may issue notices to quit or initiate summary proceedings."[19]

There are several other cases pending across the country, in which eviction moratoria are being challenged under the Contract Clause and other constitutional grounds.[20] Decisions have not been made on the merits of most of these pending cases, although preliminary injunctive relief has been largely denied to landlords.[21] In so doing, courts have signaled that these plaintiffs will be unlikely to prevail on the merits of constitutional claims.[22] It is unclear how many of the plaintiffs who have failed to obtain preliminary injunctions will continue to litigate the merits of their cases, or how many of these cases will reach appellate courts.[23]

It will be interesting to see how appellate courts will address these landlord challenges to eviction moratoria. The rulings are likely to be fact-specific. The case law so far shows that the initial obstacle for landlords is the need to prove substantial impairment in a cognizable manner that is neither speculative nor short-term. The landlords will also be on stronger Contract Clause ground if their leases have express provisions for eviction upon payment default. ■

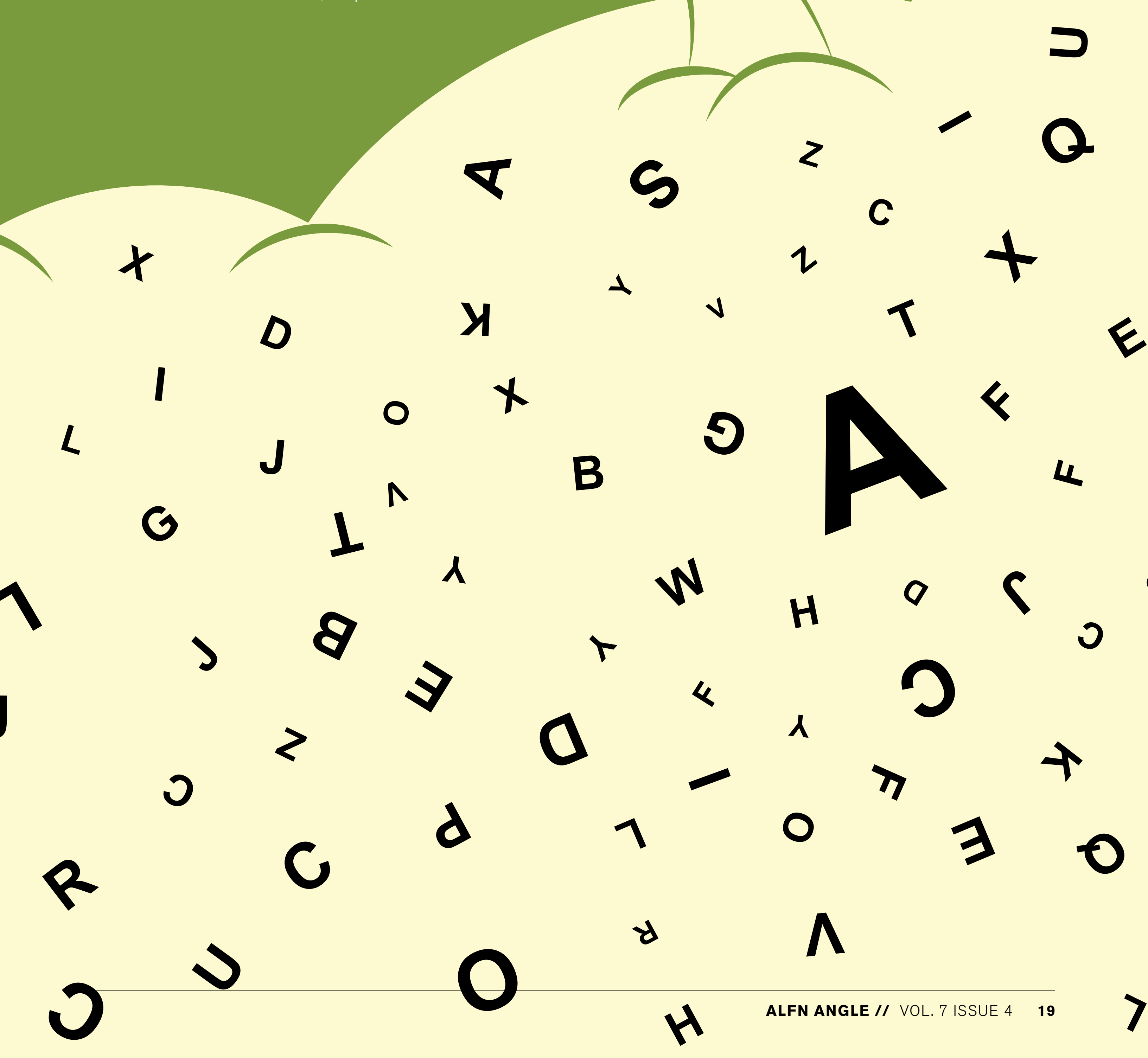
The case law so far shows that the initial obstacle for landlords is the need to prove substantial impairment in a cognizable manner that is neither speculative nor short-term.

15 *Id.* at *16.
16 2020 WL 4558682 at *17 (August 7, 2020) (federal citation not yet available).
17 *Id.* at *17.
18 *Id.*
19 *Id.*
20 *See, e.g., Matorin v. Sullivan*, Massachusetts Supreme Judicial Court, SJ-2020-442 (challenging Massachusetts Executive Office of Housing and Economic Development's regulations under an Act Providing for a Moratorium on Evictions and Foreclosures during the COVID-19 Emergency); *Apartment Ass'n of Greater L.A. v. City of L.A.,* No. 2:20-cv-05193 (U.S. District Court, Central District of California (Los Angeles)) (alleging that the Los Angeles eviction moratorium and rent freeze ordinance violates landlords' rights under the contract clause and robs them of their bargained-for contractual relationship with their tenants).
21 *See, e.g., JL Props. Grp. B LLC v. Pritzker*, No. 20CH601 (Ill. Cir. Ct. Ch. Div. Will Cty.) (an Illinois District Court denied a request to enjoin the Governor of Illinois from extending the state-wide eviction moratorium).
22 The procedural posture in *Elmsford* was slightly different, in that the plaintiffs had converted their preliminary injunctive relief request into a permanent request via a motion for summary judgment, to which Governor Cuomo cross motioned for summary judgment and won on the merits.
23 Providing an additional level of analysis for the courts is the fact that, on September 4, 2020, the United States Center for Disease Control released a notice regarding its recommendation to temporary halt all evictions. Whether the CDC notice is enforceable or not, the notice certainly bolsters any argument by a State that the public threat warrants the moratoria, notwithstanding constitutional rights of landlords.

THE
FIRST WAVE

COVID-19 CONCERNS: LITIGATION IS ON THE RISE

BY JANE BOND, ESQ., MANAGING PARTNER-FLORIDA LITIGATION
MCCALLA RAYMER LEIBERT PIERCE, LLC | JANE.BOND@MCCALLA.COM



For the residential servicing industry, what litigation can we expect from the COVID-19 pandemic?

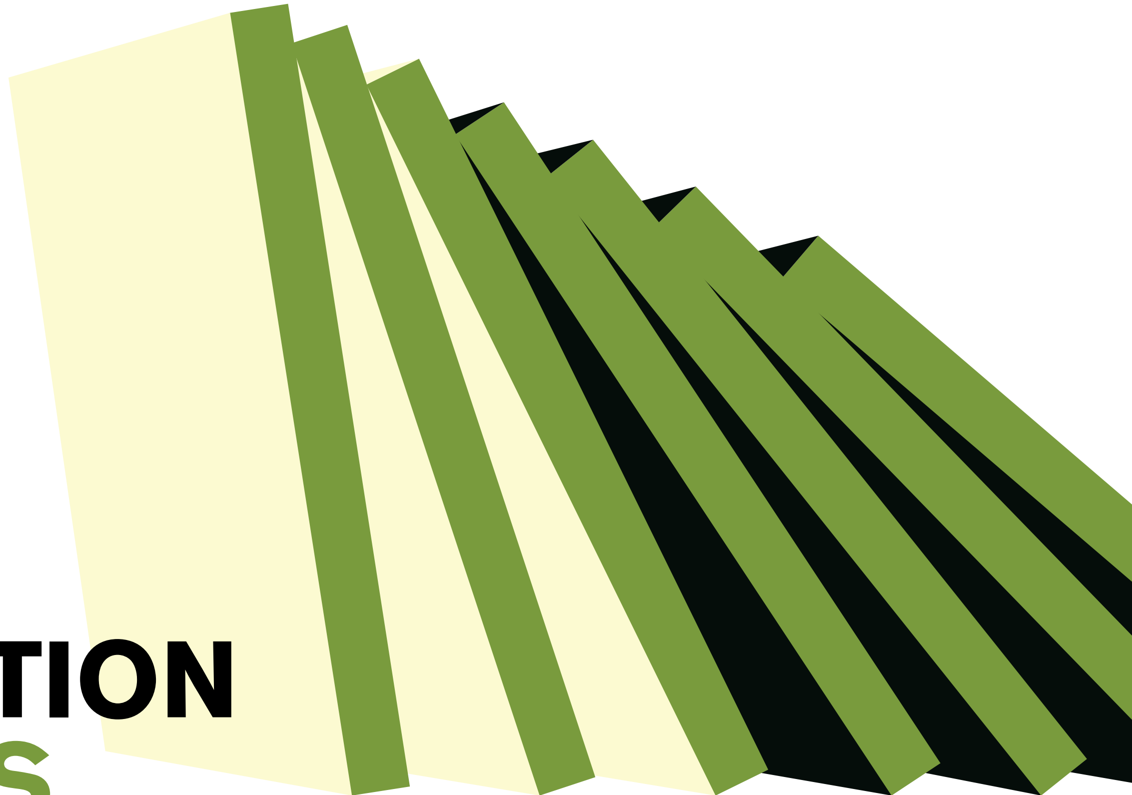
CFPB HIGHEST COMPLAINTS ON RECORD

Let's start with the issues being raised by consumers with the Consumer Financial Protection Bureau (CFPB). The CFPB reports, after the COVID-19 National Emergency was declared in March 2020, receiving the highest complaint volume since the Bureau began in 2010. The complaints peaked in April and May of 2020 at over 40,000 complaints each month. The very high monthly complaint volume has remained approximately the same throughout 2020. This is in comparison to 2019 where the average monthly complaints received by the CFPB were approximately 29,000. The five states with the highest CFPB complaint volume are Florida, California, Texas, New York, and Georgia.

The most frequent complaint documented by the CFPB in 2020 from consumers is regarding credit reporting. Consumers are identifying incorrect information on their credit report as the primary issue. Debt Collection and Mortgage issues followed as consumers said they are struggling to pay their mortgage payments.

Common concerns raised by consumers to the CFPB include: (a) being unable to reach their creditors' customer service representatives; (b) continued debt collection during the pandemic; (c) that pursuing alternative payment options would result in negative credit reporting; and (d) having to make large, lump-sum payments to creditors at the completion of a forbearance period. Specifically, consumers reported to the CFPB that some mortgage servicers are providing information that conflicts with guidance regarding lump sum payments. Consumers who reported having a federally backed mortgage described receiving information from their servicers that after the expiration of the forbearance period, a lump sum payment would be due on the mortgage loan account. Some consumers reported their servicer told them options other than a lump sum repayment were not available.

The historic increase in the number of complaints to the CFPB, as well as the types of issues raised, highlights the challenges faced by consumers and creditors due to the continuing effects of the pandemic. The consumer complaints with the CFPB lead the way for the types of litigation issues



NEW LITIGATION ISSUES

arising across the country.

NO PRIVATE CAUSE OF ACTION UNDER THE CARES ACT

Courts have already found there is no private right of action under the CARES Act, see *Profiles, Inc. v. Bank of America Corp.*, 2020 WL 1849710 (D. Md., Apr. 13, 2020). A business filed a class action against the bank after being denied PPP loans under the CARES Act. The Court found there was no "express" right of action under the CARES Act and no "implied" right of action could be inferred. This ruling should be applied the same way by the courts in residential servicing cases seeking relief under the CARES Act, as it is clear; there is no private right of action under the CARES Act. There are motions to dismiss currently pending across the U.S. seeking dismissal of CARES Act claims. It is very likely claims will be made under the CARES Act in residential mortgage cases in the future as the CARES Act has sections covering foreclosure moratoria, credit reporting and forbearances. It will take time for the state courts to rule on these matters and consumer lawyers will take advantage of the opportunity.

FAIR CREDIT REPORTING

Without a private right of action under the CARES Act, borrowers are finding ways to sidestep the prohibition by alleging other causes of action such as violations under the Fair Credit Reporting Act. Cases have already been filed alleging that loan servicers and credit reporting agencies inaccurately reported information regarding loans covered under the CARES Act and FCRA. In New Jersey, New York and California cases have been filed alleging FCRA violations include: *Hafez v. Equifax Information Services, LLC*, No. 20-cv-09019 (D.N.J. July 16, 2020); *Grauman v. Equifax Information Services, LLC*, No. 20-cv-03152 (E.D.N.Y. July 15, 2020), *Stoff v. Wells Fargo*, No. 37-2020-00020808 (Cal.

Without a private right of action under the CARES Act, borrowers are finding ways to sidestep the prohibition by alleging other causes of action such as violations under the Fair Credit Reporting Act.

Sup. Ct., San Diego, filed Jun. 18, 2020). These cases remain pending, alerting us to the type of claims being made and what we can expect in the future.

Under the CARES Act and by some state specific law, the credit reporting agencies and the mortgage servicers are to report the credit as current for borrowers in forbearance. In the pending cases, borrowers are alleging the Credit Reporting Agencies and/or the Mortgage Servicers did not report the credit accurately by placing a comment code indicating the loan was in " forbearance" or using the comment code for "natural disaster relief" thereby negatively affecting the borrowers credit or incurring other damages. Mortgage Servicers can mitigate their exposure by reviewing how credit is being reported to ensure compliance with the CARES Act and any other specific state laws to deter these types of cases.

FORBEARANCE AGREEMENTS

There are pending cases alleging violations including: fraud, breach of contract, gross negligence and violations of RICO, TILA, for mortgage servicers placing Borrowers into forbearance without their consent. These cases are worth reviewing and include: *Urista v. Wells Fargo & Co.*, No. 20-cv-01689 (S.D. Cal. Aug. 29, 2020); *Delpapa v. Wells Fargo Bank, N.A.*, No. 20-cv-06009 (N.D. Cal. Aug. 26, 2020); Green v. Wells Fargo & Co., No. 20-cv-05296 (N.D. Cal. July 31, 2020); *Forsburg v. Wells Fargo & Co.*, No. 20-cv-00046 (W.D. Va. July 23, 2020). The complaints specifically allege that the mortgage servicers were placing the loans into forbearance without the borrower's consent for their own financial gain. Once in a forbearance, the servicers would then place the borrowers into a post-forbearance modification; allowing the mortgage servicer to receive incentive funds from the investors for each modification. The outcome of these cases will be important as to what defenses are being considered viable as borrowers make future claims.

In Fisher v. Dovenmuehle Mortgage, Inc., No. 20-01222 (E.D. Cal., filed June 17, 2020), the borrower brought claims the mortgage servicer failed to comply with the CARES Act violating CA Consumer Legal Remedies Act and Unfair Competition Law by restricting the forbearance period on a federal backed loan to 90 days instead of 180 days required by the CARES Act. This case remains pending in CA.

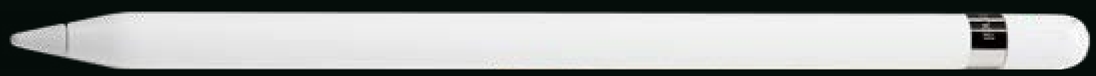
In New Jersey, a case was filed under the Fair Debt Collection Practices Act after the Borrower entered into a forbearance agreement with the mortgage servicer. The forbearance agreement included language that the foreclosure case would be placed on "hold." During the pendency of the forbearance, the foreclosure moved forward to judgment in violation of the forbearance agreement. The case was settled by vacating the judgment and dismissing the foreclosure case along with a nominal settlement.

As the forbearances come to an end and the modifications begin, expect to see more claims under RESPA and Regulation X for loan modification errors; such as, the borrower alleging they sent a complete modification package, only to be denied indicating an incomplete package.

BEST PRACTICES

When working with Borrowers communicate often and be clear with the information given. It may be reasonable to have certain information available on a website or send written communication along with the telephone contact. Have documented processes and procedures, especially with the forbearance agreements and the post-forbearance options. Keep good records of forbearance agreements, loss mitigation offers and loan modifications or deferments. Make sure there is enough staff to take the calls from borrowers and keep track of wait times. Keep the staff up to date on new policies and procedures due to the CARES Act, Federal, and State Regulations as it seems to change daily. Have quality control and document the type of errors and re-training procedures.

There will be a substantial increase in residential mortgage litigation due to the COVID-19 pandemic; be prepared by knowing the types of cases that are being filed, have the proper documentation to reduce or mitigate the risk, and be ready to work with your counsel to resolve the case.



Communication is Key

USING ELECTRONIC SIGNATURES AND ELECTRONIC RECORDS

BY ALEX WEINBERG, ESQ., ATTORNEY
WELTMAN WEINBERG & REIS CO., LPA | ALEXWEINBERG@WELTMAN.COM

TECHNOLOGY is changing the way that we, as a society, interact with one another. Electronic communications, transactions, and dealings are becoming the new "norm." With that in mind, it is important to make sure that if individuals and/or businesses choose to conduct dealings in this manner, all parties understand and follow the proper procedures and laws that are in place to regulate these types of transactions. It will help to shield one's self from liability for non-compliance. Two key parts of communicating and doing business electronically are electronic records and electronic signatures.

The Uniform Electronic Transactions Act, (UETA) defines an electronic signature as an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.[1] A signature that is secured through blockchain technology is considered to be in an electronic form and to be an electronic signature.[2]

A "transaction" means an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs.[3] The first safeguard to ensure that a party cannot dispute the use of electronic signatures or records used in a transaction is to confirm the parties agree to transact business in this manner. The UETA only applies to transactions between parties that have agreed to conduct transactions by electronic means.[4] Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties conduct.[5]

An actual written agreement between the parties, signed prior to the start of conducting business electronically, is an extremely safe way to protect businesses from a claim that electronic signatures and records are unenforceable, invalid, or insufficient. However, it is important for all parties involved to know that a record or signature may not be denied legal effect or enforceability solely because it is in electronic form[6], that a contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation[7], that if a law requires a record to be in writing, an electronic record satisfies the law[8], and that if a law requires a signature, an electronic signature satisfies the law.[9]

BP Metals, LLC v. Glass, 2018-Ohio-3527, is a good example of the effect of the UETA in a foreclosure case. This is a Third District, Ohio, Court of Appeals case, addressing electronic transactions. The defendant in that case converted a note into electronic form and retained the hard copy that contained his original signature. This assignment of error revolved around whether there was an issue of genuine fact as to whether the parties agreed to conduct the transaction by electronic means and create a binding contract with the meaning of Ohio Revised Code 1306 ("the UETA"). The trial court originally granted the defendant summary judgment, stating that there were no issues remaining.

The defendant asserted that he was entitled to judgment as a matter of law

1 See Ohio Revised Code 1306.01(H)
2 See Ohio Revised Code 1306.01(H)
3 See Ohio Revised Code 1306.01(P)
4 See Ohio Revised Code 1306.04(B)
5 See Ohio Revised Code 1306.04(B)
6 See Ohio Revised Code 1306.06(A)
7 See Ohio Revised Code 1306.06(B)
8 See Ohio Revised Code 1306.06(C)
9 See Ohio Revised Code 1306.06(D)

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because the plaintiff did not have possession of the note depicting his "original" signature.[10] The defendant sent a copy of the executed note via email and was believed not to have forwarded the original. The defendant signed his version that was in his possession.[11]

A document converted to digital form and remitted by email is an electronic record.[12] The effect of an electronic record or signature attributed to a person…shall be determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including the parties' agreement, if any.[13] In a proceeding, evidence of a record or signature may not be excluded solely because it is

10 See BP Metals, LLC v. Glass, 2018-Ohio-3527
11 Id.
12 Id. at P19
13 Id.

in electronic form.[14]

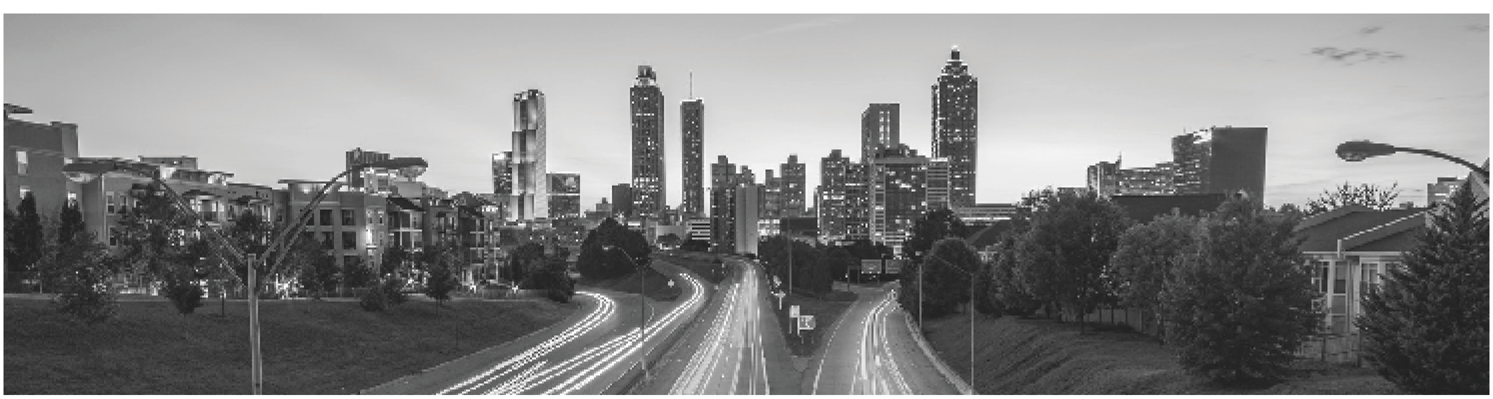
Based on the application of the UETA, the Court of Appeals reversed and remanded the trial court's decision, stating that there is a genuine issue of material fact as to whether the parties agreed to conduct business electronically, creating a binding contract under the meanings defined in Ohio Revised Code 1306.[15] This case is a great example to show that before businesses and individuals conduct business, agreeing upon, in writing, the appropriate and acceptable methods (i.e. are electronic records, signatures, and communications agreed upon) can help avoid future problems.

Wolfe v. J.C. Penny Corp,. 2018-Ohio-3881, a Tenth District, Ohio, Court of Appeals Case, emphasizes the use of electronic signatures, and their binding effect. The defendant applied her electronic signature, by checking a box, at the end of an arbitration agreement that was administered via a kiosk.[16] The defendant submitted into evidence an affidavit stating she never knowingly electronically signed the agreement and that the agreement was never presented to her.[17] The plaintiff, through their own affidavit, alleged that the defendant was presented the agreement via the employee kiosk, and willingly signed the agreement after reading it, by clicking the box in said kiosk.[18]

In this case, the affidavits, which were executed correctly, authenticated the statements and facts presented by both the plaintiff and the defendant and were properly admitted into evidence.[19] The Court of Appeals reviewed the evidence, and determined that the defendant was presented the agreement through the kiosk, and was bound to the agreement when she applied her electronic signature by clicking the box acknowledging so.[20] While this is not a foreclosure case, it does highlight the enforceability of electronic signatures, even when that is simply "checking a box."

Overall, electronic records and signatures should be embraced (especially during this COVID-19 pandemic, which limits personal interaction), as it is supposed to make our lives easier, in business or otherwise. Knowing and understanding the laws and procedures that govern this area can go a long way in saving time and money further down the road. If you choose to conduct business electronically, make sure you are in compliance with the UETA.

14 Id.
15 Id.
16 See Wolfe v. J.C. Penny Corp., 2018-Ohio-3881
17 Id. at P15
18 Id. at P16
19 Id. at P14
20 Id. at P19



EVICTIONS IN THE COVID-19 ERA

CREATIVE SETTLEMENT SOLUTIONS FOR EVICTIONS IN THE COVID-19 ERA

BY ANNALISE HAYES DELUCA, ESQ., PARTNER FLORIDA
MCMICHAEL TAYLOR GRAY, LLC | ADELUCA@MTGLAW.COM

STATE-SPECIFIC EVICTION moratoriums have been the norm for the better part of this year with differing levels of restrictions and a complete lack of uniformity. However, that recently changed in early September with the release of the Center for Disease Control's Order temporarily halting residential evictions throughout the country. The purpose of the Order was to prevent the further spread of COVID-19. It is the most far-reaching moratorium on residential evictions to date, as it also includes properties that did not fall under the government-sponsored enterprise moratoriums already in place and properties located in states with less restrictive moratoriums.

While it is important to note that organizations such as the New Civil Liberties Alliance (NCLA) and the National Apartment Association (NAA) have filed suit against the Center for Disease Control challenging the legality of the Order, the Court may take weeks or months to reach a decision. Likewise, landlords are filing suit against Governors in states like New York and California for imposing severely restrictive moratoriums in violation of state law. Decisions in those cases will likely vary widely and contribute further to the uncertainty of the environment in which we find ourselves. With both legal and public policy considerations to take into account, there is no telling when a resolution will be reached.

For now, the focus should shift from litigating on behalf of our clients to working with our clients and their tenants to resolve the matter in a mutually beneficial manner.

With over 100 million renters in the United States and a current national unemployment rate of 8.4%, the moratoriums affect a large portion of our population. However, it is equally important to consider that landlords are also adversely affected by COVID-19. Many landlords are from low-to-moderate income households looking to make an investment through purchasing and leasing rental properties. Without the stream of rental income, they face foreclosure and loss of their properties. Even the large corporations are suffering due to the previously unheard-of number of non-paying tenants. It is unsustainable for landlords big and small. The negative economic impact caused by COVID-19 is felt by landlords and tenants alike. With both sides in a seemingly no-win situation, how do we move forward? It is time to get creative with settlement solutions.

Before the pandemic began, filing suit was often the quickest and most efficient way to remove a non-paying tenant. Now, with the numerous restrictions and harsh penalties for violations of said restrictions, eviction actions are not always a viable option. Instead, landlords should review the facts of each case with counsel to determine how to proceed and potentially settle the matter outside of Court. As lawyers we may not be used to suggesting ways to stay out of the courtroom, but unprecedented times call for unprecedented measures. For now, the focus should shift from litigating on behalf of our clients to working with our clients and their tenants to resolve the matter in a mutually beneficial manner.

There are a multitude of reasons tenants are refusing or unable to pay rent. Perhaps the tenant was adversely affected by the pandemic. They may no longer be able to afford the rent and may be amenable to moving, but they simply cannot come up with the deposit to rent a new place. In that case, providing "cash for keys" to contribute to the tenant's deposit or moving expenses may be the way to go. When speaking to tenants, one of the top concerns they have is how they will come up with first, last, and deposit in order to move. Many tenants realize that they can no

longer afford the rent, but they feel as if they have no alternatives. By providing "cash for keys" to cover or contribute to the deposit, landlords benefit by getting the tenant to vacate without further legal action, and the tenant benefits by having access to funds they would otherwise not have. Both parties are left in a better position.

Alternatively, landlords may have a tenant who owes a substantial amount of back rent, but they would like to remain at the property. Many tenants are not in a position to come up with several months rent all at once. It is just one of the many ways in which the moratoriums fail to address major issues. None of the moratoriums relieve the tenants from the obligation to make the payments, but rather, they just keep putting off the payments until it becomes an insurmountable sum. Forgiving all or some of the back rent, prorating the back rent over the remainder of the lease term, or providing discounts on rent are all ways to work with the existing tenant to achieve a desirable outcome for all involved. For example, let's say a landlord has a tenant who is six months behind on rent with six months left on the lease. The landlord could offer to forgive the six months of rent entirely in order to have the tenant resume normal payments, the landlord could prorate the first six months of unpaid rent over the remaining six months, or the landlord could agree to a discount on rent if the tenant makes the next three payments on time. At this point, recovering even a portion of the back rent owed or keeping a tenant who is willing and able to resume making payments in the property can be considered a win for landlords.

It is also important to consider the quality of tenant when reviewing these options. Did the tenant fail to make any payments before the pandemic? Were they regularly late on rent? Are they otherwise responsible and good tenants? How long have the tenants resided in the property? There is no guarantee that removing one tenant won't result in the same scenario playing out with the next. This way, the property remains occupied, the landlord gets paid moving forward, and the tenant does not have to look for another place to live, starting the cycle all over again.

With all of the confusion and ambiguity surrounding evictions, it is more important than ever for attorneys and their clients to think outside the box and examine all the possible options to resolve a case. With a looming wave of evictions surely to come, getting ahead of it will put all parties in a better position to navigate the post-moratorium environment.

the Hearsay Exception Requirements

Florida Supreme Court Clarifies Requirements for Admission of Business Records Under Hearsay Exception

BY ROY DIAZ, ESQ., MANAGING SHAREHOLDER
DIAZ ANSELMO LINDBERG, P.A. | RDIAZ@DALLEGAL.COM

Earlier

THIS MONTH the Florida Supreme Court weighed in on an evidentiary issue involving the admissibility of a bank's business records under an exception to the hearsay rule.[1] *Jackson v. Household Fin. Corp. III,* No. SC18-357, 2020 WL 3580036 (Fla. July 2, 2020). The Florida Supreme Court accepted jurisdiction to resolve a certified conflict between the Fourth DCA and the Second DCA[2] regarding what testimony a qualified witness must proffer in order to lay the foundation for admission of business records, initially identified as hearsay, in a foreclosure matter.

In *Jackson*, a 25-year employee of HSBC[3] laid the foundation for admission of HSBC's business records when he responded in the affirmative to each of the following questions: (1) "Do you have access to the records maintained by HSBC with respect to the [subject] mortgage…and…[a]re you familiar with the business practices of HSBC?" (2) Is it the regular business practice of HSBC to keep records and record transactions? (3) Do the persons who prepare the records have personal knowledge of the events they are recording? (4) Are the records made at the time the event occurred? (5) "Did HSBC prepare and maintain these records with respect to the subject loan?"[4] These questions closely followed the requirements laid out in § 90.803(6)(a), Fla. Stat. for determining if evidence otherwise classified as hearsay under § 90.802 could be admitted as an exception to that rule. After laying the above foundation, HSBC moved for the admission of its records (the note, mortgage and payment history) into evidence.

After HSBC's evidentiary proffer, the borrower ("Jackson") raised a hearsay objection arguing HSBC's witness failed to testify as to *how* he gained his personal knowledge of HSBC's business records and practices thereby failing to lay the necessary predicate for admission of the records.[5] The lower court found the testimony sufficient, overruled Jackson's hearsay objection and moved the documents into evidence. After[6] the court admitted the documents Jackson's counsel questioned the witness about "the basis for his knowledge" but failed to "press the witness for further details" after he demonstrated "a working knowledge of HSBC's relevant record-keeping practices and system."[7] Ultimately, the lower court found HSBC's evidence sufficient and entered judgment in Household's favor.[8] On appeal, the Second DCA affirmed and the borrower appealed the affirmance to the Florida Supreme Court.

Comparatively, in *Maslak*, Wells Fargo proffered very similar testimony and evidence which the trial court found sufficient to support entry of judgment[9] but which the Fourth DCA found insufficient on appeal of that judgment.[10] There again the bank's witness testified as "to each element required by the business records exception," but the borrower argued that the witness simply 'regurgitated the magic words [required by the statute],' but was unfamiliar with, and had no knowledge of, how the records were created and kept."[11] The Fourth DCA agreed with the

[1] The hearsay rule is codified at § 90.802, Fla. Stat.

[2] The Fourth DCA case was *Maslak v. Wells Fargo Bank, N.A.*, 190 So. 3d 656, 660 (Fla. 4th DC 2016), *disapproved of by Jackson v. Household Fin. Corp. III*, No. SC18-357, 2020 WL 3580036 (Fla. July 2, 2020).

[3] Household Finance Corp. III ("Household") originated the Jackson's loan; however, before originating the subject mortgage, HSBC Holdings ("HSBC" or "the Bank") purchased Household and it became "a wholly-owned subsidiary of HSBC." *Jackson*, at *1.

[4] *Jackson*, at *2-3.

[5] *Jackson*, at *2, *4.

[6] Notably, on review the Supreme Court pointed out this line of questioning was untimely as the documents had already been admitted into evidence. *Jackson*, at *4. The Court did not elaborate on this issue, but questions pertaining to a witness' knowledge or competency to testify about a particular matter should be raised on voir dire prior to a ruling on an opponent's evidentiary proffer. "Voir dire" is "a preliminary examination to determine the competency of a witness or juror." "voir dire." Merriam-Webster.com. Merriam-Webster, 2020. Web. 13 July 2020.

[7] *Jackson*, at *4.

[8] *Jackson*, at *4.

[9] In *Maslak*, there were actually three separate foreclosure cases and three separate judgments, but the cases were consolidated for purposes of trial. *Maslak*, at 658. For ease of reference "judgment" is used here and refers to all three judgments.

Maslak, at 658.

[10] *Maslak*, at 658.

[11] *Maslak*, at 658-9.

This decision will streamline the introduction of business records into evidence at trial and eliminate the need for burdensome collateral testimony that unnecessarily complicates and prolongs foreclosure trials and detracts from the true issues in the case.

borrower and explained that the omission of "specific details of the bank's 'procedures for inputting payment information into their systems and how the payment history was produced'" rendered the witness' testimony insufficient to lay a proper foundation for admission of the bank's business records.[12] The Fourth DCA reversed the bank's judgments finding the bank's payment history constituted inadmissible hearsay and the bank's evidence was therefore insufficient to support entry of judgment. The Florida Supreme Court agreed with the Second DCA that the decision in *Maslak* conflicted with the Second DCA's decision in *Jackson* and accepted jurisdiction to resolve the conflict.

On review the Florida Supreme Court rejected the Fourth DCA's conclusion in *Maslak* that additional foundational testimony was required to authenticate business records under § 90.803(6)(a) finding "the plain words of the statute" did not require it.[13] The Court explained that "requiring factual specificity as to how the records were compiled, maintained, or utilized" was not necessary for establishing a prima facie case pointing out the "litigant is free to contest the genuineness [or lack of trustworthiness] of the documents as business records…if he or she has a basis to do so."[14] The Court reasoned that "a minimal testimonial foundation" was "desirable in terms of fairness and the efficient administration of justice."[15] The Court elaborated that it would be "odd if a party could not make [the] required showing with straightforward testimony that each of the criteria [of § 90.803(6)(a)] is met."[16]

Further, noting the purpose of the hearsay rule was to prevent fraud, the Court concluded there was "no reason to prolong a trial…with irrelevant details" to prove a "collateral matter… that is almost always self-evident and true" pointing out "that every commercial lender will necessarily have a 'regular practice' of making a record of payments and will necessarily keep that record 'in the ordinary course of business.'"[17] Lastly, the Court reasoned additional testimony was not warranted "in this case, as in most…" where the debtor did "not even dispute the accuracy of the payment history…" but argued for reversal "on the theory that her lender should have been required to prove additional collateral facts before it could introduce records to establish material facts that she [did] not contest."[18] The Court affirmed[19] the Second DCA's decision in *Jackson* and disapproved the Fourth's reversal of the foreclosure judgments in *Maslak*.

The Florida Supreme Court's decision in *Jackson* settles a long disputed evidentiary issue with regard to the application of the hearsay exception to the admissibility of a bank's business records. This decision will streamline the introduction of business records into evidence at trial and eliminate the need for burdensome collateral testimony that unnecessarily complicates and prolongs foreclosure trials and detracts from the true issues in the case.

[12] *Jackson*, at *5 (quoting Maslak, at 659).
[13] *Jackson*, at *5.
[14] *Jackson*, at *5, *7.
[15] *Jackson*, at *5
[16] *Jackson*, at *6.
[17] Jackson, at *6-7.
[18] Jackson, at *7.
[19] Justice J. Polston wrote a lengthy dissent which comprised nearly half the written opinion. Jackson, at *6-12. Since it lacks precedential value the arguments raised in his dissent are outside the scope of this article. Justice Polston disagreed with the majority's reasoning and ruling explaining that "general statements parroting the statutory elements of the business records exception without any identified basis of how the records were generated, what they were used for, or how they were maintained" transformed Florida's business records exception into nothing more than a "magic-words test." Jackson, at*7.

UNDER STRAIN

HOW WILL MORATORIUMS AFFECT MORTGAGE SERVICERS AND INVESTORS?

BY KERI P. EBECK, ESQ., PARTNER, KEBECK@BERNSTEINLAW.COM AND
KEILA ESTEVEZ, ESQ., ASSOCIATE, KESTEVEZ@BERNSTEINLAW.COM
BERNSTEIN-BURKLEY

BAILOUT.

This is a term that people have become intimately familiar with over the last decade, from airlines to auto companies to Fannie Mae and Freddie Mac in 2008. At the beginning of 2020, no one could have anticipated that the U.S. economy would be discussing potential bailouts again. However, in March 2020, the world shut down due to the global outbreak of "Coronavirus" or "Covid-19". At that time, the U.S. and state governments had little to no choice but to issue "Shutdown" or "Shelter-In-Place" orders requiring closures, allowing only businesses to remain operational during the shutdown. Nonessential businesses were left with whether to decide to completely close their doors or resort to nontraditional work settings. During the shutdown, only nonessential businesses that were equipped to function remotely remained operational. This started the avalanche of unemployment and the economic downturn of 2020. With unemployment at record highs, people were not able to make their monthly obligations on mortgages, rent, vehicles, etc. In order to provide relief to those affected (either directly or indirectly), local, state and the U.S. government began issuing moratoriums on foreclosure and eviction proceedings.

Initially, on March 18, 2020, the Federal Housing Finance Agency (FHFA) directed Fannie Mae and Freddie Mac to suspend evictions and foreclosures for any single-family mortgages, due to the national emergency, for a period of at least sixty days.[1] As conditions worsened, the FHFA issued additional extensions to this suspension.[2] While some state and local moratoriums have been lifted and foreclosure proceedings may be commenced or continued, the FHFA extended its moratorium, that was set to expire on August 31, 2020, to December 31, 2020, for any single-family mortgages that are federally

1 https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Suspends-Foreclosures-and-Evictions-for-Enterprise-Backed-Mortgages.aspx March 18,2020
2 https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Extends-Foreclosure-and-Eviction-Moratorium.aspx May 14,2020; https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Extends-Foreclosure-and-Eviction-Moratorium-6172020.aspx June 17,2020

The current state of affairs and ongoing impact of Covid-19 in the economy have left many people asking, "Is 2020 a repeat of 2008?" The short answer is hopefully no.

backed, including Fannie Mae, Freddie Mac, Ginnie Mae, FHA, HUD, and VA.[3] As of 2018, Fannie Mae and Freddie Mac accounted for an upward of 46% of all mortgage loans originated.[4] While this appears to provide short-term relief to borrowers, what will the overall long-term effects be to borrowers, mortgage servicers and investors?

The American public and its government have no interest in hearing or listening to the potential bailout of mortgage servicers, especially after 2008. The Subprime Mortgage Crisis led the U.S. economy into the Great Recession and a housing crisis. The sudden increase of availability of subprime mortgage loans to less than creditworthy individuals led to a rapid increase in the housing market price. When those subprime loans went into default, houses were underwater and could not be sold, resulting in foreclosures being commenced at a rapid pace. The effects of 2008 led to many people losing their homes to foreclosure, tighter and stricter lender and consumer laws, investment banks and investors who bought and sold these mortgage-backed securities going bankrupt, and bailouts. [5] "The financial crisis of 2008 was caused by homeowners defaulting on their mortgages in mass thanks to risky loan products that were destined to fail. The bonds those mortgages were bundled into collapsed in value as a result, and it brought the entire financial system down with it." [6]

The current state of affairs and ongoing impact of Covid-19 in the economy has left many people asking, "Is 2020 a repeat of 2008?" The short answer is hopefully no. Facts are vastly different, laws are different, and corporations have learned. However, a significant concern arises from lack of payment on mortgages, whether resulting from borrowers' default or in a forbearance; there is a ripple effect that most are not aware of. Mortgage servicers are companies that run the day-to-day activities of a mortgage loan. It is not the mortgagee, who owns the mortgage, or the investor that undertakes these responsibilities. The mortgage servicers collect monthly payments from the borrowers and make those payments to the investors of mortgage bonds. But what happens when the mortgage payments stop being paid? The mortgage servicers still have contractual obligations to pay the investors of those mortgage payments, regardless of whether or not the borrower has paid. Therefore, when a loan is in default or in forbearance, the mortgage servicers are still required to make those payments from their own reserve of cash.[7] As part of the relief provided by the U.S. government, Congress enacted the CARES Act[8] on March 27, 2020, which provided for forbearance of mortgage payments to borrowers. As of September 21, 2020, 6.93% of mortgage loans were in forbearance.[9] In contrast, during the first three months of Covid-19,

3 www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Extends-Foreclosure-and-REO-Eviction-Moratoriums.aspx, August 27, 2020
4 www.marketwatch.com/story/some-homeownwers-and-renters-will-get-a-break-from-the-coronavirus-financial-fallout-2020-03-18, March 21, 2020
5 www.thestreet.com/personal-finance/mortgages/subprime-mortgage-crisis-13704400 September 7, 2018
6 www.curbed.com/2020/3/27/21197434/mortgage-coronavirus-forebearance/crisis-coronavirus-servicers April 8,2020
7 Id.
8 The Coronavirus Aid, Relief, and Economic Security Act, 116 Enacted H.R. 748, 134 Stat. 281
9 www.mba.org/2020-press-releases/september/share-of-mortgage-loans-in-forbearance-declines-to-693 September 21, 2020

8% (5.14 million) of homeowners missed or deferred at least one mortgage payment.[10] During the second quarter, the 90-plus delinquency rate was at a 10-year high, which hasn't been seen since 2010.[11] With the increase in delinquency and loans in forbearance, how are mortgage servicers surviving? Under normal circumstances, mortgage servicers have capital reserves in order to cover borrower defaults and make the required payments to the investors.[12] As of May 2020, 6% of borrowers with Fannie Mae- or Freddie Mac-backed loans postponed making mortgage payments. That equates to the mortgage servicers servicing those loans to advance approximately $500 million each month to bond investors. If the number of forbearance loans more than doubles to 15%, that number the mortgage servicers are required to advance will increase to $1.2 billion. This creates a colossal cash flow and liquidity issue for mortgage servicers.[13] The four biggest lenders—J.P. Morgan Chase & Co., Bank of America, Wells Fargo & Co, and CitiGroup—have actually set aside $33 billion in anticipation of losses from mortgage loans.[14] What about the other mortgage servicers that don't have the liquidity or cash to prepare? If mortgage servicers fail or go bankrupt, there is no one to service the borrowers' loans (i.e., the day-to-day activities: collect payments, pay taxes or pay homeowners' insurance). If there are no mortgage servicers to pay investors, mortgage bonds would collapse and the entire mortgage infrastructure would suffer, result-

10 Id.
11 www.mba.org/2020-press-releases/august/mortgage-delinquencies-spike-in-the-second-quarter-of-2020 August 17,2020
12 www.mccarter.com/insights/residential-mortgage-servicing-industry-may-feel-brunt-of-foreclosure-moratorium-new-forbearance-rights/ April 2, 2020
13 www.bloomburglaw.com "Mortgage Services in Good Shape in Avoid Bailout May 19, 2020
14 www.bloomburglaw.com "Four Megabanks' 33 Billion Loan Loss Warning Sets off Confusion" July 27, 2020

If mortgage servicers fail or go bankrupt, there is no one to service the borrowers' loans (i.e., the day-to-day activities: collect payments, pay taxes or pay homeowners' insurance). If there are no mortgage servicers to pay investors, mortgage bonds would collapse and the entire mortgage infrastructure would suffer resulting in investors, once again, holding on to worthless mortgage bonds.

ing in investors, once again, holding on to worthless mortgage bonds.[15] It is imperative that mortgage servicers be able to continue to operate, but as indicated above, no one wants to bail out mortgage servicers. This is simply a cash problem, which could be easily fixed. Congress is aware of the pending and looming issue, but is hesitant to take any action. The House of Representatives drafted a relief bill for the Federal Reserve to extend a line of credit to mortgage servicers to abet the cash problem and therefore avoid any potential 11th-hour bailout. This was met with resistance and did not make it into the final proposed bill.[16] Should Congress not choose to provide some relief to servicers, this will eventually affect investors, impacting mortgage bonds and creating issues we saw in 2008. In April 2020, U.S. Treasury Secretary Steven Mnuchin said that he had no plans to create a Federal Reserve rescue facility for the mortgage industry.[17] Perhaps views will change the longer Covid-19 continues to affect unemployment and borrowers' abilities to make mortgage payments.

The long-term effects of Covid-19 on the mortgage industry remain unknown. It is still undetermined how long before the U.S. sees a mass distribution of a vaccine, how long before unemployment rebounds, and what if any further government assistance remains available. What is known is that government moratoriums cannot continue, as there will be severe consequences for all parties involved. Borrowers are receiving a short-term reprieve, but come January 2021, mortgage companies and servicers will have no choice but to begin foreclosure proceedings, and by that point, mortgages will be in default for six (6) months or more, making it close to impossible to cure other than with a loan modification. Borrowers' inability to cure the default may lead many to seek relief under the bankruptcy code in order to avoid foreclosure and eviction actions. Additionally, credit availability is tightening due to risk and uncertainty surrounding the effects. According to the Mortgage Bankers Association (MBA), mortgage credit fell to its lowest since March 2014. [18] These are long-term problems for borrowers and future borrowers. Mortgage servicers can only hold on for so long without a regular stream of payments from borrowers to pay investors or without government assistance before servicers will default on investor payments. This is an overall trickle-down effect. Default or forbearance leads to mortgage-servicing issues and cash flow problems that could lead to defaulted payments to investors which would affect the mortgage bond market. In the midst of these very uncertain times, one thing remains clear: The impact of Covid-19 on the U.S. economy and the mortgage market will be long-lasting, absent of prompt federal action. a

15 www.curbed.com/2020/3/27/21197434/mortgage-coronavirus-forebearance/crisis-coronavirus-servicers April 8,2020
16 Id.
17 www.bloomburglaw.com "Mortgage Services in Good Shape in Avoid Bailout May 19, 2020
18 www.mba.org/2020-press-releases/september/mortgage-credit-avaiability-decreased-in-august September 10, 2020

WILL THEY, OR WON'T THEY?

THE OHIO LEGISLATURE REVISITS THE ABOLITION OF DOWER

BY ELLEN L. FORNASH, ESQ., ATTORNEY
PADGETT LAW GROUP | ELLEN.FORNASH@PADGETTLAWGROUP.COM

IN 2017, THE OHIO HOUSE OF REPRESENTATIVES introduced House Bill 407, which proposed the abolition of dower. After passing in the House with a generous 87:1 vote, the Bill died before the Senate Judiciary Committee a year after its introduction. One of only three states left to recognize dower, this was not the first time Ohio considered abandoning the archaic doctrine, and it would not be the last. Revitalized in April of 2019, House Bill 209 was introduced, thereby once again seeking to bring the debate on dower to the floor. Succinctly, House Bill 209 seeks to abolish the estate of dower but sets forth that the abolition is not retroactive and will therefore not affect any dower interest that vested prior to the effective date of the Bill.

Section 2103.02 of the Ohio Revised Code governs dower and grants the inchoate right of a spouse to claim a life estate in one-third of the real property owned by the titled spouse during the marriage for his or her support. Now gender-neutral, dower, also called curtesy, was originally intended to protect women who lacked rights and property interests in the event they became widowed. Practical application of the statute allows a surviving spouse to receive one-third of real property and of rents or profits from the deceased spouse's real estate for the rest of the surviving spouse's life. Dower rights are only extinguished by death, divorce, or release of dower upon the transfer of real property. Because of dower, a titleholder cannot sell or encumber his real property without the signature of his non-titled spouse on the deed or mortgage.

Proponents of abolition include title companies and real estate attorneys whose practices often include resolution of title insurance claims, quiet title litigation and clouded title interests caused by dower problems that result in the inability to provide the clear and marketable required for the conveyance of the property or hinder a property owner's ability to acquire a mortgage. Dower-related title defects are not automatically cured until the passage of fifty years. Often, a simple clerical error, such as omitting or not clearly setting forth a grantor's marital status on a deed, can result in the arduous task of attempting to locate former titleholders or their unknown spouses (who may not even exist) from several years to several decades in the past. In the alternative, such scrivener's errors can require litigation to extinguish potential interests of spouses long ago.

Charles A. Brigham, III, President of the Ohio Land Title Association, supported both House Bill 407 and House Bill 209, and notes that not only does dower *not* protect against the fraudulent or erroneous disposition, conveyance, or transfer of marital assets other real property, but the doctrine is also is circumvented by property conveyances to trusts and LLC's. Moreover, not only can a title owner simply add his spouse's name to the deed voluntarily to grant a one-half title interest, Brigham notes that there are supplemental state protections offered to protect a non-titled spouse's property interests. These include monetary awards in the Domestic Relations Courts for fraudulent dispositive of assets (O.R.C. §3105.171), the Uniform Fraudulent Transfer Act, or the Elective Share Statute (O.R.C. §2106.01). *See February 2, 2020 testimony in support of House Bill 209 of Monica Russell, Residential Real Property Law Specialist*. Proponents of the bill also suggest replacing dower with an augmented estate doctrine, as used in Virginia. *See May 28, 2019 testimony in support of House Bill 209 of Stephen C. Gregory*. The doctrine of the augmented estate provides a non-titled spouse with an interest in the monetary value of the real property (rather than in the actual property itself). This allows the title holder to transfer property without the consent or signature of his spouse, thereby resolving common title defects while still providing the untitled spouse with monetary assurance.

But opponents of the bill claim that this solution is no solution at all. Paul Pfeifer, Executive Director of the Ohio Judicial Conference notes "the most common concern is that by eliminating dower there would not be enough protection in Ohio law for situations involving an unscrupulous spouse who sells real estate or other mar-

The doctrine of the augmented estate provides a non-titled spouse with an interest in the monetary value of the real property (rather than in the actual property itself). This allows the title holder to transfer property without the consent or signature of his spouse, thereby resolving common title defects while still providing the untitled spouse with monetary assurance.

ital property without informing the non-titled spouse." *See May 28, 2019 testimony as interested party in House Bill 209 of Paul Pfeifer.* In such scenarios, a judge may be able to award a monetary remedy, but these funds can be misappropriated or spent by the titleholder quickly, and as for the marital home, "When it's gone, it's gone." *Id.* The Legal Aid Society of Southwest Ohio agrees, and argues that while supplemental protections come too late, "[d]ower acts before the sale occurs, and hopefully stops it from happening." *See February 12, 2020 testimony in opposition of House Bill 209 of Brian Davidson, Legal Aid Society of Southwest Ohio, LLC.* For this reason, all testifying opponents of House Bill 209 want to see the abolition of dower only in conjunction with the adoption of a requirement that spouses consent to the sale of real marital property. In fact, each of the opponents who has provided testimony before the legislature is agreeable to the demise of dower, but not until additional modernized and suitable protections are in place to protect a non-titled spouse from financial misconduct.

ACTION OHIO Coalition For Battered Women agrees. Dower often bestows a protection where no other exists in cases of domestic violence and abusive relationships. Ms. Carlson-Reihm calls out proponents of the Bill for being motivated by profit and turning a blind eye to "the plight of non-titled spouses and dependents[.]" *See May 28, 2019 testimony in opposition of House Bill 209 of Phyllis L Carlson-Riehm on behalf of ACTION OHIO Coalition For Battered Women.* Because abused spouses are often non-titleholders, despite the fact that the abused spouse may generate income that contributed to the purchase or maintenance of the family home, "the abolition of dower would allow a titled spouse, without the knowledge or consent of the non-titled spouse, to transfer or mortgage the primary residence of the spouses and their dependents." *Id.* However, the abusive relationship argument provides ammunition for both sides of the aisle. As one sponsor of the Bill points out, with dower in existence, an abusive partner could also refuse to relinquish his dower or to sign a deed or mortgage in an effort to control and manipulate an abused spouse and prevent that spouse from selling or financing property to which she is the sole titleholder.

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Opponents of the Bill are willing to put the doctrine of dower to bed but only if the parties reach a compromise to replace the outdated mechanism with reasonable protections for non-titled spouses. While opponents want a dual signature requirement and/or consent of a non-titled spouse for the transfer of property, such a requirement carries with it all of the trials and tribulations related to title defects as does dower. Dower is touted as a protection on those who have no other safety net for their marital homes yet disdained by real estate professionals as lacking substantive value, steeped in innumerable hours of remedial efforts and burdened with excessive expense heaped upon homeowners. 2017's House Bill passed overwhelmingly in the House before dying on the table in the Senate. House Bill 209 was referred to the Senate Judiciary Committee on November 13, 2019, and remains there. Without a meeting of the minds, House Bill 209 could likely see the same fate, and Ohio could remain, along with Kentucky and Arkansas, one of the last of a dying breed to recognize the archaic doctrine of dower. a

You've Been Served

ARE YOUR PROCESS SERVERS AMP'D?

BY KEITH J. MCMASTER
FOUNDER AND CO-OWNER,
FIREFLY LEGAL, INC.
KEITH.MCMASTER@FIREFLY.PRO

AN OUT-OF-DATE, monster-sized gold Cadillac pulls up to a house in the opening credits of the movie *Pineapple Express*. Dale Denton, a stoner played by Seth Rogen, gets out of the car, flicks his joint to the street, and opens the trunk. It is filled to the brim with outfits, glasses, and various disguises. He grabs a shirt, vest, and baseball cap labeled "Global Saviors" and puts on the outfit in the back seat of his car. He walks up to the door and rings the doorbell, where the homeowner answers.

"Hi there! Are you Sandra Danby?" he asks. "Yeah…" responds the confused woman. "I'm Garth from Global Saviors and uh…" "What is this?"

"I'm just joking. You failed to show up for your divorce proceedings like four times under court order. And… you've been served."

The scene continues with Dale parading through an office into an executive's suite dressed as a fax machine repairman. Upon serving legal documents to the executive he states, "You've been served by the best, my friend." As he exits, he snatches a plate of snacks from the breakfast bar and heads to his third stop. There he barges into a surgery looking for a doctor. He snidely says, "You've been served," while tossing the papers in the doctor's direction.

If law firms or process serving agencies are not careful, somebody like Dale could be exactly who is hired. It takes a high level of professionalism and integrity to deliver not only the documents, but also the importance of their information.

Too often, serving agencies hire process server candidates without fully checking if they are a good fit for their company and clients. Candidates have to be screened and interviewed as well as possess the right skills. Across the nation, servers need to be AMP'D: Answered, Met, Prepared and Detailed.

Preliminary questions *answered* by a potential candidate and assessed by the agency will qualify or eliminate the applicant. Ensuring their licensing and insurance requirements are active is just the beginning. Once the applicant has fulfilled the proper specifications, industry experience must be evaluated. Accomplished process servers should be involved with professional associations and stay knowledgeable of legislative changes. Experience is also shown through the number of papers served during their time in the field.

A person's character can only be discerned after an agency representative has *met* the candidate. While an in-person meeting is always preferred, sometimes a carefully outlined phone conversation will suffice. With the evolution of videoconferencing, a hybrid version of in-person and electronic meetings will become more commonplace. Thought-provoking questions with real-life scenarios can determine an individual's abilities and behavior. While technology is helpful, there is no substitute for trust in the process server. Every serving attempt is unique. It takes an empathetic, understanding, and considerate person to sincerely convey sensitive information to an individual. Only applicants with the right conduct and qualities are ready to move to the next step.

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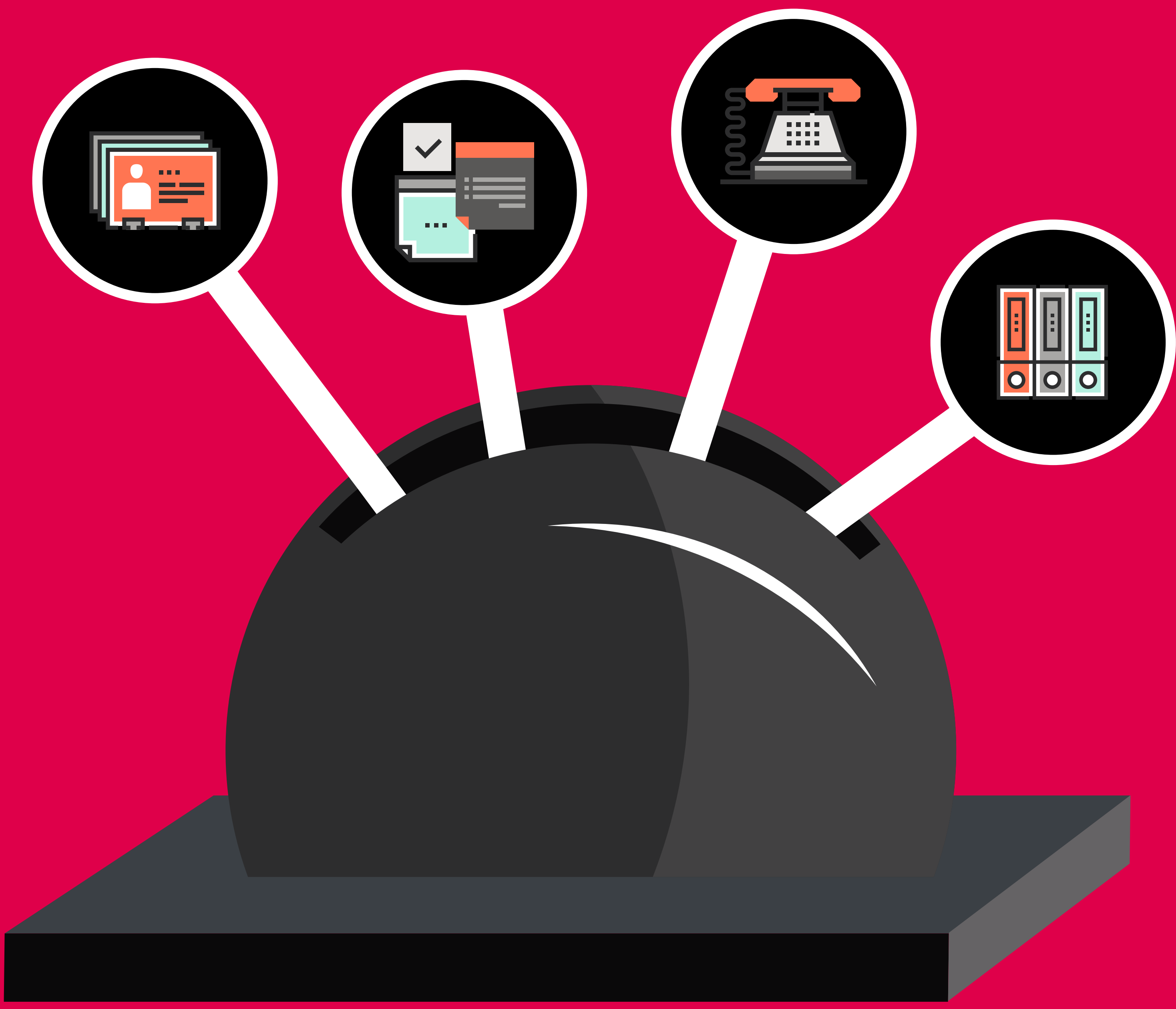
Servers have to be *prepared* to meet client's needs. After completing background checks, the exceptional agencies go further and provide training platforms for their servers. State and federal law require certain courses, while others give an extra layer of preparedness and protection for the servers. Courses such as Process Server Awareness, Driver Safety, and Sexual Harassment impart the basics. For certain cases, a server needs to be informed of Privacy and Information Security, the Fair Debt Collection Practices Act, the Gramm-Leach-Bliley Act, and rules about notaries.

Detailed events of service is where technology assists but human interaction is indispensable. Case management programs exist to route stops, track GPS, send updates and produce affidavits. However, technology cannot take the place of empathy and integrity when speaking with a defendant face to face. Process serving agencies and their clients must know that the individuals put on each doorstep are trusted to treat every defendant with the utmost care, diplomacy, and professionalism.

Unfortunately, too many agencies do not properly vet their servers. This leads to improper service and actions that can be detrimental to clients. Following this simple yet detailed process leads to fewer complaints, effective service, and happy clients. Servers should have composure and be AMP'D up when handling cases. In short, don't hire Dale Denton.

MANAGING REMOTE EMPLOYEES



BY JEREMY LIPFORD, DIRECTOR OF NEW ENGLAND OPERATIONS,
KORDE & ASSOCIATES | JSLIPFORD@KORDEASSOCIATES.COM

MANAGING REMOTE EMPLOYEES may seem challenging, but if the pandemic has taught us anything, we've learned that much of what we do can be accomplished outside the confines of the office. At my law firm we have employees located in a dozen states across three time zones. There are many advantages to this model. For example, when severe winter weather cripples New England, our employees in the South can keep things moving. Our Hawaii employee continues to work long after the firm has closed for the day on the East coast.

I've frequently been asked by peers in the industry, "how do you manage remote staff?" or "do you trust them to work at home?" Obviously, many firms in the industry had to take a leap of faith during the pandemic. However, there are some tools available to assist with managing remote staff that are equally as applicable to onsite staff.

How many times has an employee told you, "I can't get my work done because I get so many emails" or "I'm working in Loansphere all day" or "I couldn't get to XYZ because my phone wouldn't stop ringing"? Perhaps an employee enjoys using words like "always" and "never." As we know, using these adverbs of frequency are often exaggerations. How can we validate the employee's claims?

First, let me disclose that I am not a believer in micromanaging. These are simply tools that may allay some of your concerns surrounding the oversight of remote employees. One of my management catchphrases is, "Reports don't lie. People do." Of course, a report doesn't capture every action taken by the employee or every variable of a loan being worked, but reports are an invaluable tool for understanding the daily activities of our teams.

EMAIL REPORTS

I receive an automated report on the first of every month from our IT team showing the total number of received, read, and sent emails from the previous month for all the staff. I sort the report by total number of emails received and then share it with the entire office. Amazingly, no one has complained about the number of emails received since I began sharing with the office. Once they saw my 5000+ emails a month to their 500-1000 a month, there wasn't much to say.

LOANSPHERE PRODUCTION REPORTS

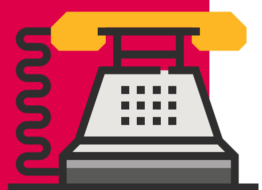
Our firm subscribes to Black Knight's "A50 Attorney Reports" which among other things has a production report that shows the following data by user:

Events Completed, Processes Created, Processes Closed, Issues Created, Holds Created, Reprojections, Intercoms Read, and more.

With many mortgage servicers on the Loansphere platform, this report is an eye opener and can validate or invalidate an employee's statement concerning time spent in Loansphere.

INTERNET & VPN USAGE REPORTS

Each month I receive internet and VPN usage reports from our IT team. These reports will show me which non-work related websites are being visited and for how long by each employee. The report only shows me the "top" 10 employees, and thereby, there is always something on the report. Most often, the alleged non-work related websites are indeed for work, but on occasion you'll find an employee who is really invested in online shopping during work hours. The VPN reports will show when a remote user has logged on and off each day. Not to say that the employee couldn't logon and then take a nap, but there are other reports to identify inactivity if needed.



PHONE REPORTS

Depending on your phone system, you may be able to run reports showing the total number of incoming, outgoing, and transferred calls along with the duration of these calls. Once an employee claimed she was receiving numerous calls throughout the day from clients. I was able to pull the phone report and validate her claims. I was then able to work with the phone administrator to update the main greeting's options and addressed the employee's issue.

CASE MANAGEMENT PRODUCTION REPORTS

No doubt your firm has production reporting to show how many "widgets" were completed within a specified timeframe. Do you have timings associated with these widgets? For example, I once worked with someone we'll call "Nancy." Nancy was a full-time employee at the peak of the mortgage crisis, responsible for the production of final title policies post-sale and had no other ancillary tasks. In reviewing the production reports, I noticed she was averaging 12 final title policies per week. I called Nancy into my office to have a friendly conversation. I asked her how long it took on average to prepare a policy from start to finish. She answered, "about 30 minutes." I then showed her the production report and we did the math together which of course revealed 6 hours of production within a 40-hour work week. She was shocked and immediately she retracted her estimated timing and doubled it to an hour which still only equated to 12 hours a week. Nancy ended up resigning later that same day, which was not my intent, but it was an instance of my catchphrase about reports being on point. Without reviewing the production numbers, Nancy would continue to stretch out her day and get paid for 40 hours of work. Fast forward to today's environment and you will find that sophisticated, proactive firms will have tools in place to know in advance how much work is to be completed each day along with the associated timings.

Again, these tools are not meant to micro-manage or to go on a witch hunt looking to catch someone in the act, but rather the reports can shed light on both the challenges our staff face as well as reassure you of their production and performance. Although my catchphrase may come across as callous, blindly trusting staff is not always an option especially if you have no prior history of their work ethic whether at the office or at home. Hopefully embracing these tools will give you peace of mind as we continue to navigate these challenging times.

DIGITAL EFFICIENCY

4 WAYS ROBOTIC PROCESS AUTOMATION (RPA) CAN HELP LAW FIRMS IN THE POST COVID ERA

BY ANIL SHARMA, CTO | ANIL.SHARMA@MSIDUS.COM AND
JAI AGARWAL, SENIOR SOLUTION CONSULTANT | JAI.AGARWAL@MIND-INFOTECH.COM
MSID US, INC.

THE LEGAL INDUSTRY is changing fast by adopting technology for processing information, and COVID has accelerated this trend. Most hearings are now virtual, and this trend may continue even beyond COVID. Technology has penetrated into the core daily operations of the legal industry now and benefits are being realized by early adopters. The default industry is no different. As a result, we have more data, awareness and education about digital technologies in the legal industry. This digital acceleration has improved the efficiency of most of the major stakeholders involved in providing services for default industry. So what exactly does it mean to be digital? The world is getting more digital with each passing day and technology is becoming exponentially more important to simplify life. We are producing 2.5 quintillion bytes of data each day. We have produced 90% of the data that exists in the world today just in the last two years, and this pace is accelerating each day. The legal industry has also been going digital over the last few years and has adopted technologies like electronic signatures, contract management, document management and work flow systems.

Artificial intelligence, big data and analytics related solutions are becoming more mainstream as the industry moves towards mature, integrated solutions to leverage technology for information processing. One particular area of importance is robotic process automation (RPA).

What is RPA - RPA may include manipulating data, passing data to and from different applications, triggering responses, or executing transactions. RPA uses a combination of user interface interaction and descriptor technologies. Organizations achieving scale in RPA implementation have moved beyond the experimentation stage and into transformation. RPA has proved a technology that qualifies for a tag of here and now. Industries have recognized the potential and scale of impact and are adopting approaches and techniques associated with large-scale change programs

Common benefits of using RPA are as follows:

1. Better accuracy of output by reduction in human error and reduction in rework and near perfection compliance,
2. Improvement in customer experiences as there is more time available to focus on customer with bots doing repetitive activities
3. Data integrity and compliance to process as bots don't miss / forget a step, don't leak data and use encryption techniques,
4. Possibility to move higher on the digital ladder to artificial intelligence due to reliable data supply chain

***Robotic process automation** (RPA)* is a productivity tool that allows a user to configure one or more scripts (which some vendors refer to as "bots") to activate specific keystrokes in an automated fashion. The result is that the bots can be used to mimic or emulate selected tasks (transaction steps) within an overall business or IT process. The scripts can overlay on one or more software applications.

Source: Gartner

Robotic process automation (RPA) software revenue grew 63.1% in 2018 to $846 million, making it the fastest-growing segment of the global enterprise software market, according to Gartner, Inc. Gartner expects RPA software revenue to reach $1.3 billion in 2019.

The default industry is always looking for reliable methods to improve productivity as servicers have moved to a fixed cost in place hourly billings. RPA is a maturing technology that offers multiple use cases to the industry.

RPA bots can be usually deployed to scan information available on digital sources. This is a common practice for all due diligence activities. A bot is multiple times efficient in this case and can save hours by performing this job in few minutes. Once programmed properly, a bot does not make mistakes. In cases where diligence is required, this could save a firm from expensive lawsuits.

RPA offers direct as well as indirect cost benefits to user organizations. RPA bots are also used for regular filing related activities like filing of information or transfer of data from source to destination. Some examples are e-filing, tracking and updating status, milestones, billing, and also processing of incoming files and assigning of the case-load.

RPA bots can be helpful during all stages of a foreclosure including pre-foreclosure, foreclosure, bankruptcy, and loss mitigation. Most firms use some kind of case management system with limited automation. There is still a lot of manual work to collect data, input data, generate documents and file. We are not proposing removing any reviews or attorney steps but rather automate the clerical aspects of the matter.

Here are some examples of RPA automation:

1. *Data collection* – Scanning for information through structured documents (digital data sets) as well as unstructured data (scanned copies) and extracting information and inputting into case management systems
2. *Data processing* – Speedily pull required information from data sets and prioritizing in the order of relevance for legal assistants. Use cases include the analysis of collected data as per classification rules and presentment to attorneys for further action to assemble a crisp, actionable, objective package for each case.
3. *Milestone updates* – RPA bots can review your case management systems and login to servicer platforms like Black Knight and update information there if automated integration is not available.
4. Automate the collection of attachments for billing and collections, eliminating a large number of labor hours spent.

RPA as a technology is positively impacting law firms and help them improve performance. Following are few benefits offered by RPA technology for uses organizations:

1. *Minimizing human error* – RPA helps organization control and eliminate human error since bots don't get fatigued and are guided by logical program written based on years of experience of law firms.
2. *Improving efficiency* – All bots operate at the same efficiency hence RPA offers standard process time and better process capability by removing all human dependent biases of efficiency. Usage of technology also helps to free bandwidth of skilled resources and offers redeployment opportunities hence further amplifying output and efficiencies of law firms. Hours freed by using RPA for highly skilled legal assistants can be used for doing some really important and complex information processing work by legal assistants.
3. *Improving turn-around time* – A higher output with the same team and help of RPA technology offers lesser turn-around time for information processing. This improvement can also be converted into better customer satisfaction or higher sales revenues or some other business outcomes as per management strategy.
4. *Process compliance* – Bots are more obedient and follows set process and guidelines without fail. This helps in improving process compliance especially for a critical service line of law.

The legal industry employs highly talented and precious manpower. It becomes very important to utilize their time and bandwidth carefully, in order to optimize value generation potential. It should be the top priority for the firm's management to identify all non-value adding, routine activities performed by its staff and eliminate or automate such activities.

RPA also helps legal assistants to get rid of monotonous and burdensome activities. RPA helps legal teams to perform work smartly by making these teams even smarter and enhances job satisfaction. a

Sources –
Future trends for legal services, Global research study, June 2016
Glossary, Gartner, 2019

A NEW VISION

PREPARING FOR THE NEXT DEFAULT CYCLE

BY
EMILY CHAVARRIAGA, DEFAULT OPERATIONS MANAGER
EMILYCHAVARRIAGA@COMMUNITYLOANSERVICING.COM
KATRINA WARD, ENTERPRISE OPTIMIZATION ANALYST
KATRINAWARD@COMMUNITYLOANSERVICING.COM AND
JOHN DUNNERY, VICE PRESIDENT, GOVERNMENT LOAN SERVICING
JOHNDUNNERY@COMMUNITYLOANSERVICING.COM
COMMUNITY LOAN SERVICING, LLC

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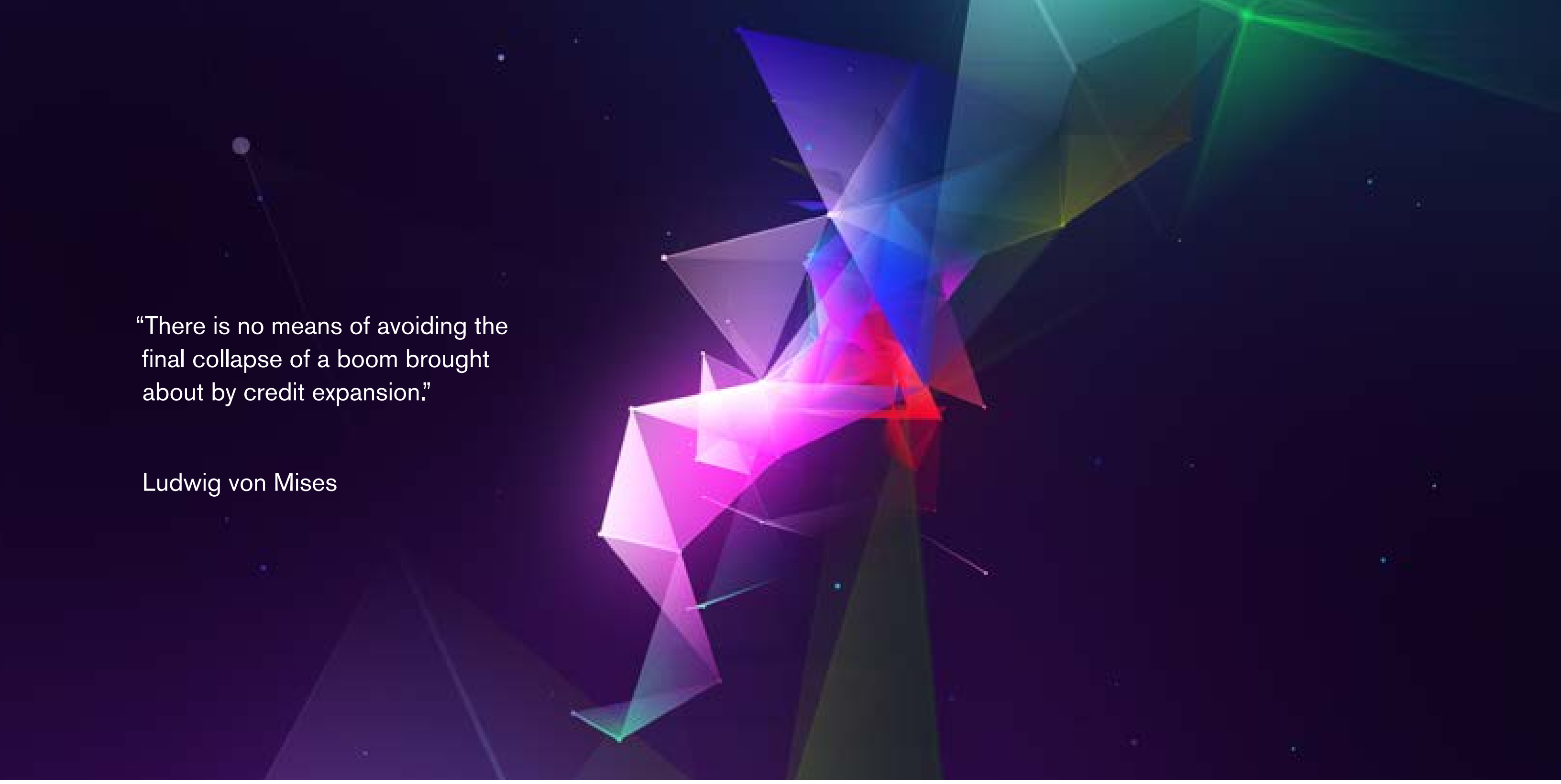
AS ANYONE WITH some tenure in mortgage servicing will tell you, the business cycle is a harsh reality. The business cycle is inevitable and as the quotes above foretell, we are building a high crest from which to come crashing down. Prior to the COVID economic shutdown, the origination market was strong with refinance and purchase activity spurred by engineered low rates. As economic conditions improved for most consumer sectors, non-performing loan counts decreased to record levels. Servicing organizations got smaller with the bigger players using acquisition and consolidation to grow their servicing portfolios. Related industry service providers experienced diminishing work flows resulting in a lack of growth and investment, consolidation and exit from our industry. The COVID response has exacerbated the decline. Indefinite foreclosure and eviction moratoria, although the right thing to do to help impacted consumers, coupled with forbearance and deferral, will result in additional financial stress for our service provider partners. This will leave our servicing industry in a weaker position when, and it is when, the cycle changes and the wave crashes.

How will servicing organizations react? Will they scale using the traditional massive hire model with its additional cost and training investment? After a decade of trimming headcount and reduction in staff investment, will the needed talent be there to hire? Or have new approaches based on financial technology incorporating automated, robotic systems and AI machine learning been developed that allow for scale without adding staff? The organizations that have invested in these new technologies are likely to emerge as the servicing leaders once the business cycle changes.

This article presents a view of this different approach from two perspectives: the manager's vision of how to transform servicing to achieve efficient scalability and the developer's journey to execute on that vision to produce robotic systems that deliver the needed efficiencies. Do what they say mirror what is going on inside your organization?

"Once the business cycle starts, it keeps on going. The best time to fight the housing cycle with tight monetary policy is when the wave is starting to rise, not when it is cresting. The worst time to stimulate the economy with loose monetary policy is when the wave is starting to rise. That is going to make the crest all the higher, and the crash all the more catastrophic."

Edward E. Leamer, Housing Is the Business Cycle



THE VISION

How do you define yourself as a manager? I see myself as an obstacle remover and a facilitator. I spend my days analyzing the “buzz” (what they say and the emotional undercurrent) from my team, looking at their day to day struggles, monitoring trends to anticipate roadblocks. While I am doing all of that, I constantly think to myself, “how do we do it better?”

From a managerial perspective the most important aspect of creating Robotic Process Automation (RPA) is shadowing your employee yourself and understanding what each step looks like. It is my opinion that you will not maximize the technology’s potential if you do not spend the upfront time understanding what each upstream and downstream process looks like; how do we receive the data, who or what is handing it off, what are the trends, both positive and negative, what works, and what doesn’t? The goal was to replace hundreds of manual hours of loan invoice review and reconciliation at loan boarding with an infinitely scalable, accurate and traceable automated process. The BOT Handoff project was born out of the desire to not only function more efficiently but to accomplish it in a way we never had before. This involved visioning the process in a completely radical form. The first layer of automation would look at how we receive documents and process initiation. The intent here was to eliminate the manual “pick up” and to robotically “kick off” the action. The second layer would examine how we receive the file and the steps that are taken to prepare it for ingestion. This part of the process would use two systems condensing two added benefits: 1) automating what I call the “software road maps” and 2) leveraging machine learning to “decision” the variety of inconsistent formats we receive from prior servicers. The unique innovation involved automating a two-BOT workflow directed at replacing the manual data extraction and entry. This was an operation we had examined before but at the time didn’t have the right tools available to increase scale and efficiency. The vision was to leverage Optical Character Recognition (OCR) and introduce Machine Learning (ML) for the first time in a default servicing tool. The result would be a parallel BOT simulating a work flow to manage a continuous “BOT pick-up” pushing data files through the review and reconciliation functions before handing it back to the “processing BOT” for final clearance.

After months of combing over various scenarios we were ready to engage the Enterprise Optimization Team (EOT) to discuss the vision of revamping the way we perform invoice reconciliation at boarding.

> "[W]e expect to maintain an accommodative stance of monetary policy until these outcomes … are achieved. With regard to interest rates, we now indicate that we expect it will be appropriate to maintain the current zero to one quarter percent target range for the federal funds rate … for some time."
>
> Jerome Powell, Fed Chair, 09.16.2020

THE DEVELOPMENT

The robotic process automation engaged in this project utilizes a combination of technology based on metaphorical robotic engineered software, and artificial machine intelligence. Development of the automation infrastructure generated a scalable process pipeline, and implemented a cost effective solution design from start to production. This automation also enhances process speed, and reinforces quality and accuracy through leveraging tailored algorithms and statistical models with image recognition abilities and API integration across enterprise applications. Successful development of our hyper-automation strategies, create a launching pad to optimizing interoperability with prior servicers by augmenting human capabilities.

In terms of scalability, we've been able to functionalize RPA (or robotic engineered systems) with managing increased load, breadth of access, and scope of usage to execute complex tasks more broadly on a constant basis. Virtualization technology has been beneficial with expanding capacity and agility in transforming standard workload management to be more scalable. From an operational perspective, we are implementing decisive but flexible rules-based governance objectives that are essential for scaling robotics. This helps us to achieve high velocity change and capitalize on increased performance speed a digital workforce requires. Unlike traditional technologies, we've adopted proven agile principles with significant strategic advantages that enable our RPA efforts to reach and exceed expectations.

Machine learning configurations have been essential for making our automation digitally intelligent. Our automation is strategically designed to leverage a combination of robotic process programming and artificial intelligence, which analyzes structured and unstructured information to process and effectively use data for making smart decisions based on historical learning. Our development strategies create a next level platform for machine learning algorithms to quickly process mass inflows of various types of loan documents. This also optimizes our exponential processing growth in a virtual production environment.

Development of our hyper-automation and machine learning solutions for managing prior servicer invoices has set us apart in the digital workspace and how we do business. This automation utilizes a range of tools that accelerate the prior servicer invoice ingestion process beyond the confines of standard processing. This hyper-automation project also offers the unique benefits of bringing visibility to previously inaccessible data, innovating complex processes to rapidly create value to the business, and leveraging digital intelligence to identify new opportunities. In addition, the technological advancement and flexibility incorporated into RPA, it provides businesses with the opportunity to have true digital agility and move past manual human limitations that impact time and effort required in business process transformations.

CONCLUSION

"Otherworldly" is barely sufficient to describe what financial technology is bringing to the servicing industry. Gone are the days when we thought merging system data with our letters or adding another feature to the IVR were game-changing vision. To be ready for the next cycle with the challenges left by the last one, bold managers will need to team with next-generation developers to create something new beyond the old hiring cycle.

TENNESSEE REFORMATION

BY ROBERT T. LIEBER JR., ESQ., ASSOCIATE ATTORNEY,
MACKIE WOLF ZIENTZ & MANN, P.C. | RLIEBER@MWZMLAW.COM

MISTAKES HAPPEN. Fortunately, the law can be flexible and enables errors to be remedied. When mistakes are found in a deed of trust in Tennessee a reformation action may be one way to retroactively correct the instrument. However, there are limits. Below are three case examples that illustrate both the power and limitations of reformation actions in Tennessee.

First, what is "reformation?" It is an equitable doctrine through which a court may correct a mistake in a writing (such as a deed of trust, other security instrument or legal document) so that it fully and accurately reflects the original agreement between the parties. The mistake in the document must have been mutual or a unilateral mistake coupled with a fraud committed by the other party. The party requesting reformation must show the judge that the intent of the parties is both clear and the same. Again, the objective is to correct the document so that it reflects the original intent of the parties. It is not a means to alter it to current needs or wants.

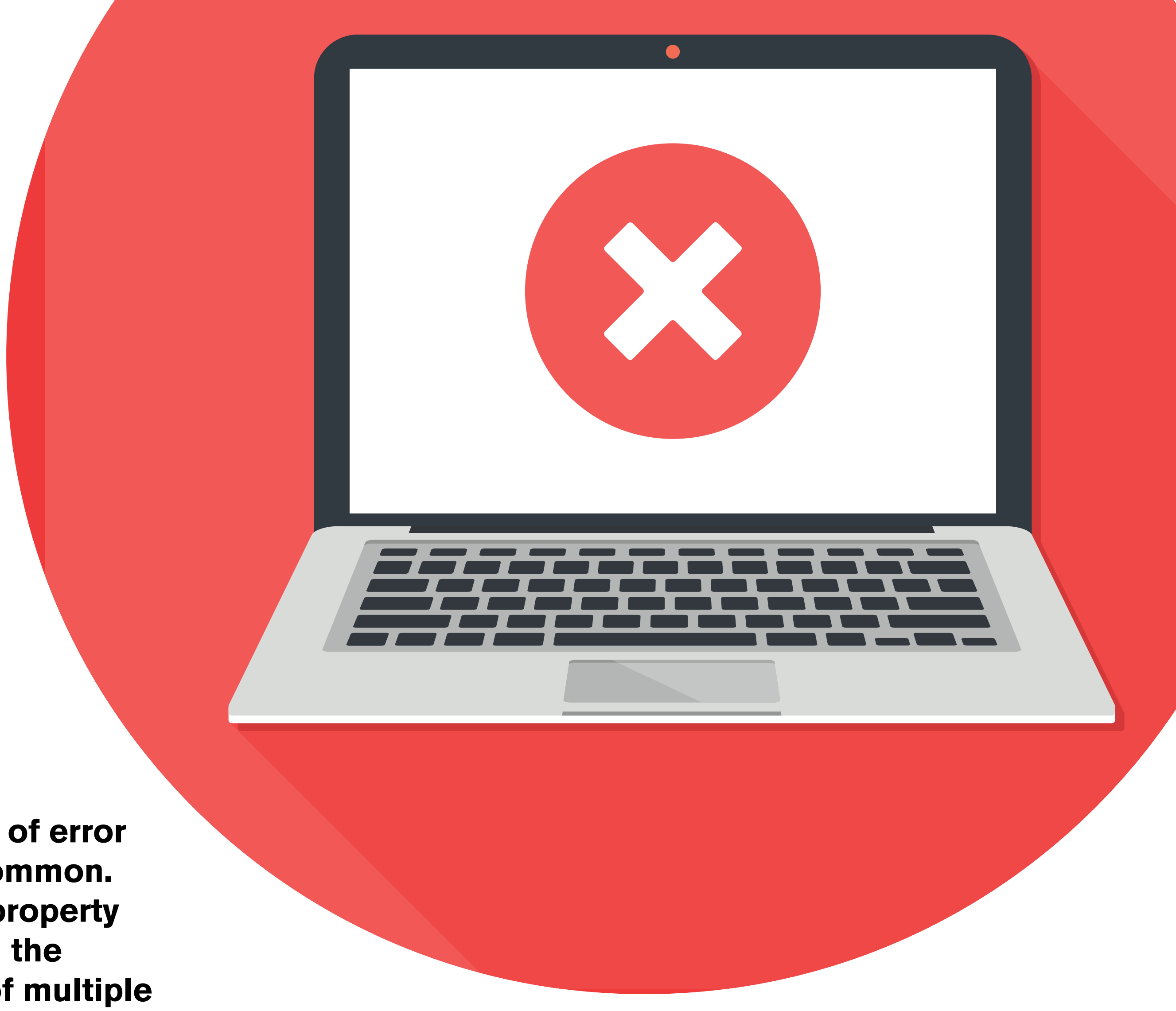
It must also be emphasized that the party seeking reformation must prove its entitlement with clear and convincing evidence. This is a standard beyond the normal preponderance of the evidence standard that is typically used in civil cases.

U.S. Bank v. Ingram, a 2019 case, is a textbook example of a common reformation action – where the legal description of the property is incorrect. In *Ingram*, the borrower owned a 2-acre parcel and an adjacent .7-acre parcel. The borrower refinanced his existing loan on the 2-acre parcel; however, the legal description of the refinance deed of trust contained the legal description of the .7-acre. U.S. Bank filed a complaint to correct the legal description.

The court granted U.S. Bank's motion for summary judgment in large part due to the strength of its evidence. U.S. Bank submitted the borrower's refinance application that listed the 2-acre parcel as collateral. Further, there was proof submitted that showed the refinance was for the loan that encumbered the 2-acre parcel. The court noted that the failure to find a drafting error does not prevent reformation.

This type of error is very common. When a property has been the subject of multiple transactions, it increases the likeliness that a legal description is either incorrect or for an entirely different property. The ***Ingram*** case also shows the importance of providing as much documentary evidence as possible in order to persuade the judge. The application and closing documents can be useful tools in proving the parties' intent.

In the second case, *Trent v. Mountain Commerce Bank*, the plaintiffs attempted to reform a deed in order to add a grantor. Adren S. Greene and Pamela W. Greene owned a property in Morristown, Tennessee. In 2010, Adren S. Greene executed a quitclaim deed transferring his ownership interest of the property to Real Estate Holdings of East Tennessee, L.P. ("Real Estate Holdings"), of which both Adren and Pamela



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were partners. In 2012, Mount Commerce Bank and First Community Bank, N.A. both obtained separate judgments against the Greenes. After the banks recorded their judgments, Real Estate Holdings executed a deed conveying the property to the plaintiffs, Scott Trent and Ted Trent. In 2019, the Trents asked the court to reform the 2010 deed to include Pamela as a grantor.

At trial, Pamela testified that it was always her intent to transfer the property to Real Estate Holdings in 2010. The appellate court, however, held that it did not have the power to retroactively add her to the deed. The court's reasoning was straightforward – reformation is only available to the parties. Because the deed only named Adren and Real Estate Holdings the court concluded that Pamela was not a party. If she was not a party then her intent (even if it was to convey the property) did not affect the status of the deed.

The case was appealed to the Tennessee Supreme Court, which upheld the lower court's decision. The Supreme Court's reasoning differed from the appellate court because it focused on the negative effect it would have on other lienholders. The court was unwilling to correct a mistake that the Trents could have avoided with reasonable diligence.

The *Trent* case shows that reformation may not be available in order to add a borrower after execution. It also highlights the importance of evaluating the impact reformation will have on other lienholders. The court's determination

Therefore, the lack of the check on the recorded copy would appear to be another scrivener's error. The end result was that the deed of trust is unenforceable – the bank lost its security.

may have changed if the reformation would not have shifted the lien priority. There is also a question whether the outcome would have been different had the deed included Pamela as a grantor in the body and signature lines, but she merely failed to sign.

The last case serves as stern warning to lenders and closing agents. In *Tennessee State Bank v. Mashek*, the court held that reformation was not available when the bank materially altered the deed of trust. There were a number of inconsistencies between the originally recorded deed of trust and the recorded copy: 1) the deed of trust stated that it was executed to secure the obligations of Breaking Bread, Inc., a company that had nothing to do with the transaction (likely a "copy and paste" error); 2) the notary acknowledgment stated that the document was executed in Tennessee when it was actually executed in Minnesota; 3) the Notice of Right of Rescission was altered to change the date of the notice from December 22, 2003 to December 15, 2003, including the borrowers' forged initials; and 4) the box that indicates the deed of trust was an "Open Ended Mortgage as defined by Chapter 137, 1987 Public Acts of Tennessee" was checked on the original document executed by the borrowers but the check was absent on the recorded copy.

On appeal, the court found that reformation of the first two inconsistencies was valid. The court noted that they were "mistakes in expression" or in other words simple drafting errors. This specific holding comports with the result in *Ingram* above - a drafting error will not prevent reformation.

Unfortunately for the bank in *Mashek*, there were more serious errors. As to the change in the rescission notice, the appellate court recognized that the borrowers "had a reasonable expectation that neither the Bank nor its agent(s) would place their [the borrowers'] initials on a document in supposed authorization of a change that they did not authorize." Although the court found that it was not a forgery, it did hold that the bank's conduct in placing the borrower's initials on the document after the closing constituted gross negligence. There was no evidence that the borrowers had agreed to the terms associated with their initials; this went beyond a drafting error.

The fourth inconsistency was also resolved in favor of the borrowers. The appellate court noted that the Tennessee Code requires a notice on the face of the document when it is for an open-end mortgage. The court concluded that the bank made a "material, unilateral mistake when it omitted the open-end mortgage indication from the Recorded Deed of Trust." This result is puzzling because the evidence showed that the parties agreed that the loan was to be an open-end mortgage and the original executed deed of trust contained the appropriate check. Therefore, the lack of the check on the recorded copy would appear to be another scrivener's error. The end result was that the deed of trust is unenforceable – the bank lost its security.

The *Mashek* case is hopefully a lesson well-learned. As all three cases show, mistakes will happen, and the law can help to rectify some of them, but a reformation action is not always a panacea.

STATE SNAPSHOT

Signed, Sealed, Postage Prepaid

BY VICTORIA FORCELLA, ESQ., ASSOCIATE ATTORNEY,
MCCALLA RAYMER LEIBERT PIERCE, LLC | VICTORIA.FORCELLA@MCCALLA.COM

IN THE WORLD OF CONNECTICUT mortgage foreclosures, compliance with *Connecticut General Statutes* §§8-265ee et seq., otherwise known as the EMAP statute, has been a "hot topic" over the last five years. While plaintiffs in foreclosure actions had long been required to attest to compliance with the statute prior to the entry of judgment, a decision on a motion to dismiss in *People's Bank v. Wright*, although not biding precedent, forever changed the role the EMAP statute would play in foreclosures when it deemed compliance with the statute went to subject matter jurisdiction and that proof of delivery of the notice, commonly referred to as an EMAP Notice, was required in order to establish compliance. The Connecticut Appellate Court weighed in on the issue in 2018 with the decision in *Aurora Loan Services, LLC v. Condron*. The *Condron* court, in deviation from the decision in *Wright*, held that the EMAP statute did not require proof of delivery of the notice to mortgagors and that evidence of mailing alone was sufficient to meet the plaintiff's burden of establishing compliance with the statute.

What constitutes proof of mailing under the statute was further explored in the recent decision in the matter of *FST-CV14-6021030-S Wells Fargo Bank, NA v. Yorfino*. The trial court (Tierney, JTR) weighed in the on the issue and held that a plaintiff and/or its agent may rely on the existence of a bulk mailing contract with the United States Postal Service to satisfy the requirement that notice under the EMAP statute must be sent out by registered, or certified mail, <u>postage prepaid</u>. The *Yorfino* court, having been presented with a copy of the EMAP notice, a mailing log from the servicer which sent the EMAP notice, and a return receipt containing information regarding the servicer's G-10 bulk mailing permit, it found "it is illogical that the United States Postal Service would accept mail into its system, and then process that mail throughout the entire delivery service, assign a tracking number, code in the tracking number, prepare a delivery receipt as set forth on the first page of [the return receipt entered into evidence], and obtain the signature of some unknown individual thereby completing the mail process, all of which was done without any payment being made to the United States Postal Service."

> **Foreclosing plaintiffs may do well to include reference to their G-10 bulk mailing permit in their mailing records for EMAP notices.**

The *Yorfino* court cut through one of the remaining arguments available to defense counsel following the *Condron* decision. The issue of whether inclusion of an EMAP notice on a mailing log without supporting proof of payment established that it had been mailed by registered, or certified mail, postage prepaid had been a lingering issue raised by defense counsel in claiming that plaintiffs had failed to comply with *Connecticut General Statutes* §§8-265ee et seq. While not binding, the decision in *Yorfino* effectively shuts down that argument as illogical. With the *Yorfino* decision now available to refute claims a plaintiff failed to satisfy the postage prepaid requirement under the EMAP statute, foreclosing plaintiffs may do well to include reference to their G-10 bulk mailing permit in their mailing records for EMAP notices.

[1] 2015 Conn. Super Lexis 694
[2] 181 Conn. App. 248 (2018)

Easy Come, Easy go?

An Important Change to the Bankruptcy Court for the Middle District of Florida's Administrative Order Prescribing Procedures for Chapter 13 Cases

BY PATRICK HRUBY, ESQ., ASSOCIATE ATTORNEY BANKRUPTCY,
BROCK & SCOTT, PLLC | PATRICK.HRUBY@BROCKANDSCOTT.COM

MOTIONS FOR RELIEF from stay are an everyday occurrence in bankruptcy courts. While those motions are generally not complicated, they are time consuming and often cause lenders to incur fees and costs that they cannot recover from the borrower.

The United States Bankruptcy Court for the Middle District of Florida reduces those burdens by streamlining the relief from stay process in certain chapter 13 cases. The Court has entered a series of Administrative Orders Prescribing Procedures for Chapter 13 cases that provided *in rem* relief from stay against the property and *in rem* and in *personam* relief against any codebtor, upon filing of the plan,

> If the plan provides for (a) the surrender of collateral to the secured creditor or lessor, (b) for payments to be made by debtor directly to the secured creditor or lessor, (c) that debtor does not intend to make payments to the creditor, or (d) fails to provide for the claim of the secured creditor or lessor.

As a result, in many cases, a secured creditor may have relief from stay as of the petition date or shortly after.

Previously, if the debtor amended or modified the plan to provide for the claim of the secured creditor, the debtor was required to file a motion to reimpose the stay. Recently, that changed.

Pursuant to Administrative Order FLMB-2020-7 entered on July 9, 2020, titled Administrative Order Prescribing Procedures for Chapter 13 Cases Filed On or After August 1, 2020, if the debtor amends or modifies the plan to provide for the claim of the secured creditor, the stay is reimposed automatically as to that creditor, provided that the debtor served the amended or modified plan on the affected secured creditor. However, that does not apply if the secured creditor has already concluded its repossession or foreclosure remedies under state law.

Understandably, this change is a cause for concern for secured creditors and the attorneys that represent them. This change requires extra diligence when reviewing amended or modified plans to determine whether any changes caused the automatic stay to be automatically reimposed, and extra diligence communicating those changes between law firms and creditors and the necessary departments within each. If a secured creditor fails to update its records to note the reimposition of the automatic stay, it may later find itself subject to sanctions if it takes certain actions in violation of the automatic stay.

It remains to be seen how many chapter 13 cases this will effect. It is not common for a debtor who indicates a surrender of the property or does not treat the property in the plan to later attempt to bring property back into the plan. On the other hand, if a debtor pays the claim direct, it is often because he or she is current at the time of filing. The more likely scenario where this would apply is If the debtor were to fall behind on the direct post-petition payments. In that case, the debtor could bring the property back into the plan to attempt to cure the arrearages and reimpose the automatic stay.

Like with any new rule or change, there will be an adjustment period. However, moving forward, attorneys and secured creditors need to take a closer look at amended or modified plans in Florida's Middle District.

The New York Split on whether Default Letters are deemed Acceleration of the Loan Continues…

BY DEBORAH GALLO, DIRECTOR OF OPERATIONS
FRIEDMAN VARTOLO, LLP | DGALLO@FRIEDMANVARTOLO.COM

WILL THE NEW YORK Court of Appeals eventually weigh in on the issue of whether a loan is accelerated based upon the very specific language on the demand letter? The changing law is complicated by the fact that New York has four Appellate Divisions, each with jurisdiction over different counties. This causes splits in the law, and the same facts can lead to opposite legal results for property owners within the same state. The statute of limitations does not begin to run on the entire mortgage debt unless and until there has been an acceleration of the mortgage debt. [See, e.g., *Nationstar Mortgage, LLC v. Weisblum*, 143 A.D.3d 866 (2d Dept. 2016).]

The mortgage debt may be accelerated by a notice sent to borrower by the creditor or creditor's loan servicer; however, the notice to the borrower must "clearly and unequivocally" establish the creditor's intent to accelerate the mortgage debt upon the expiration of the cure period listed in the notice.

In the First Department (Bronx and Manhattan), a default notice that says the servicer "will accelerate" absent cure serves to automatically accelerate the debt upon expiration of the letter [*Deutsche Bank Natl. Trust Co. v. Royal Blue Realty Holdings, Inc.*, 148 A.D.3d 529 (1st Dept. 2017)]. This results in the six-year clock starting to run earlier than most expected. However, the Second Department (which includes Brooklyn, Queens, Staten Island, Long Island, and more) recently held that "will accelerate" language in a default notice is not "clear and unequivocal" notice of acceleration, "as future intentions may always be changed in the interim" [*Milone v. US Bank Natl. Assn.*, 164 A.D.3d. 145 (2d. Dept. 2018)]. In U.S. Bank N.A. v. Gordon, 176 A.D.3d 1006 (2d Dept. 2019), the New York Appellate Division, Second Department, held that a notice of default stating that if the loan was not made current, the lender "will automatically accelerate [the] loan," was "merely an expression of future intent" and therefore did not accelerate the borrowers' debt. As such, the Second Department again held that the notice of default did not trigger the statute of limitations. Accordingly, the effect of "will accelerate" language depends on which county the property is located in.

Now, the Third Department (28 Counties covering the Capitol Region and Northern NY) has entered the mix. U.S. Bank National Association v. Creative Encounters LLC, Supreme Court, Appellate Division, Third Department, New York.May 14, 2020, 183 A.D.3d 1086124 N.Y.S.3d 922020 N.Y. Slip Op. 02844. The issue on appeal was whether the voluntary discontinuance, together with letters and notices from Nationstar Mortgage, LLC and its successor in interest, constituted affirmative acts that revoked the election to accelerate the debt. In this case, After the second action was discontinued, plaintiff's representative sent two letters to Tufano. The first letter, dated November 3, 2016, provided the 90–day notice required under RPAPL 1304 and demanded payment of $87,009.49 by November 30, 2016 to cure the default. The second letter, dated January 5, 2017 and captioned "Notice of Intent to Foreclose," advised that Tufano had 30 days to cure a default dating back to May 1, 2011 in the amount of $89,518.61. The Court found that these letters did not indicate a clear and unambiguous return to an installment payment plan, and did not actually evidence *any* real intent to de-accelerate the loan. Thus, in effect, "plaintiff simply put defendant[s] on notice of its obligation to cure a ... default and then promptly embarked on the notices required to initiate a [third] foreclosure action" (*Wells Fargo Bank, N.A. v. Portu,* 179 A.D.3d 1204, 1207, 116 N.Y.S.3d 761 [2020]).

Statute of limitations law in New York is forever evolving and remains an area of confusion and risk that can lead to total lien loss if navigated incorrectly. Lenders and servicers should continue to beware of this risk and work closely with their New York counsel at the loan level to understand the fact specific circumstances, the county of the property, and exposure with any given matter. ■

Ohio Amends its Rules of Civil Procedure

BY PETER MEHLER, ESQ., ATTORNEY,
REIMER LAW | PMEHLER@REIMERLAW.COM

AFTER A LENGTHY period of public comment and multiple revisions, The Ohio Supreme Court adopted several amendments to the Ohio Rules of Civil Procedure. The amended rules went into effect on July 1, 2020, and two of the amendments, Service and Discovery, are relevant to the default servicing industry.

The first amendment to the Ohio Civil Rules Civil Procedure is Rule 4 (D) which states in relevant part, "For any civil action filed in a Court of Common Pleas, the plaintiff may request that the defendant waive service of a summons pursuant to the provisions of Civ R. 4.7." This parallels the Federal Rules of Civil Procedure and brings Ohio more in line with the many other State's that have adopted a similar manner of service.

The rule takes a carrot and stick approach by encouraging cooperation among the parties and granting defendants that agree to the waiver, approximately 60 days to reply to the complaint, as opposed to the standard 28 days after being served. Conversely, if the defendant fails to agree to the waiver, the Court can shift the costs of perfecting service from the plaintiff to the defendant. This would include attorney fees incurred by the plaintiff in requesting a hearing before the Court to have the defendant explain why they would not agree to the waiver.

Prior to the rule amendments, plaintiff would file its complaint and perfect service on all the parties. Under the amended rule, the plaintiff now must file its complaint, then send a copy of the filed complaint along with a request for service waiver to the various defendants. Each defendant then has 28 days to send back to the plaintiff the service waiver which the plaintiff can then send to the Court. The defendant returning the waiver would then get a total of 60 days from the time the waiver was mailed out to them to file a response to the complaint.

If the defendant who receives the waiver request does not return the waiver within 28 days, the plaintiff must then request and perfect service on the defendants failing to return the waiver. Once served, the defendant would then get the standard 28 days within which to file an answer. The rule further allows the plaintiff to request a hearing before the Court wherein the argument can be made that the defendant failed to cooperate by returning the waiver. Therefore, the costs of service and the hearing can be shifted to the defendant.

The second amendment relevant to the default servicing industry involves how discovery is conducted under Civil Rule 26. This amendment now makes the Ohio rule nearly identical to the Federal rule.

The amended rule requires the automatic exchange of initial disclosure documents which, under the old rule, would have been something the defendant would need to request via a formal written response. Moreover, the amended rule requires the parties hold a separate conference before the Court will conduct a scheduling conference. Difficulties and substantial delays are anticipated in this new discovery process, especially when a party is not represented by counsel.

Until the moratoria are lifted and volumes return to pre-pandemic levels, the jury is still out on the actual impact the Civil Rule Amendments will have on the default servicing industry. The diminished referral volumes will, however, give us a sense of what to expect in the not too distant future.

Tennessee Supreme Court Affirms Appeals Court Holding on Deed Reformation

BY JERRY BRIDENBAUGH, ESQ., ASSOCIATE ATTORNEY,
MACKIE WOLF ZIENTZ & MANN, PC | JBRIDENBAUGH@MWZMLAW.COM

THE TENNESSEE SUPREME COURT, by unanimous decision, has upheld a Tennessee Court of Appeals finding that a deed may not be retroactively reformed by a court when doing so would harm creditors with valid recorded liens on the property and benefit other parties who bought the property with notice of the liens.

The Court, hearing the case of Scott Trent et. al. v. Mountain Commerce Bank et.al. (Tenn. App., 2019) was presented with the issue of whether a Quitclaim Deed should be reformed when such reformation would benefit parties with constructive notice of a title defect and harm the rights of creditors with recorded judgment liens.

In March 2010, Adren and Pamela Greene were facing foreclosure on certain real estate development loans. In order to protect other real estate assets that were not encumbered by the development loans, they conveyed the properties by Quitclaim Deed to limited partnerships in which they had an interest. Their attorney drafted six Quitclaim Deeds conveying ten parcels of property.

In one of the deeds conveying property to Real Estate Holdings of East Tennessee, L.P. ("Real Estate Holdings"), Mrs. Greene was inadvertently left off the deed and only Mr. Greene was named as Grantor. He signed the deed which was recorded on March 18, 2010. The Greene's held title to this property as tenants by the entirety. As such, only Mr. Greene's interest in the property was conveyed to Real Estate Holdings. Mrs. Greene retained her interest even though, as later claimed, it was not her intent to do so.

The Greenes defaulted on their loans resulting in foreclosure by Mountain Commerce Bank and People's Community Bank. Both banks sued for deficiency and later entered agreed judgments with the Greenes. Mountain Commerce recorded their judgment on October 22, 2013 and People's Community recorded on March 28, 2013.

In August 2016, Scott and Ted Trent purchased the subject property from Real Estate Holdings. Sometime in 2017, the Trents learned of Mrs. Greene's retained ownership interest in their property. As a result of this discovery, they also learned of the Banks recorded judgment liens against the property. In an attempt to correct the error, Mr. and Mrs. Greene executed a corrective Quitclaim Deed in March 2017, with the explanation that Mrs. Greene had intended to convey her interest to Real Estate Holdings in the original deed.

> **It is well settled Tennessee case law that mutual mistake "is a mistake common to all the parties to the written contract or the instrument or in other words it is a mistake of all the parties laboring under the same misconception." *Collier v. Walls*, 369 S.W.2d 747, 760 (Tenn. Ct. App. 1962).**

The Trents petitioned the Hamblen County Chancery Court for a declaratory judgement, centered on mutual mistake of the parties, to affirm that the corrective deed reformed the original and fully vested title to Real Estate Holdings as of the

STATE SNAPSHOT | TENNESSEE

date of the original deed. If granted, the reformation would extinguish the Banks judgment liens.

It is well settled Tennessee case law that mutual mistake "is a mistake common to all the parties to the written contract or the instrument or, in other words, it is a mistake of all the parties laboring under the same misconception." Collier v. Walls, 369 S.W.2d 747, 760 (Tenn. Ct. App. 1962).

The trial court declined the reformation holding that since Mrs. Greene had not been a party to the original deed, there had been no mutual mistake. The Appeals Court affirmed, stating that Mr. Greene and Real Estate Holdings, as parties to the original deed, had intended for Mr. Greene to convey his interest and there had been no mutual mistake between the parties to the agreement. Namely, Mr. Greene and Real Estate Holdings.

The Supreme Court, under a different reasoning, affirmed the Appeals Court ruling. The Court, citing Restatement (First) of Contracts §504 (June 2020 Update), said that reformation, as an equitable remedy, required consideration of the equities of all parties and that, "a court should not reform a contract when doing so would unfairly affect the rights of innocent third parties."

The Supreme Court affirmed, holding that the Petitioners (Scott and Ted Trent) were not entitled to reformation as it would be detrimental to the Banks interest by extinguishing their liens and benefit the Petitioners who, by virtue of the prior recorded deeds and judgment liens, had constructive notice of Mrs. Greene's interest in the property and also of the Banks liens.

You can read the opinion of the Court by going to https://www.tncourts.gov/, search on Trent v. Commerce Bank, and click on the Scott Trent Et Al. v. Mountain Commerce Bank Et Al. link.

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