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OFFICIAL PUBLICATION
OF THE ALFN
VOL. 8 ISSUE 3

FINDING NEW ROUTES

NAVIGATING TODAY'S DEFAULT SERVICING & COMPLIANCE

ALFN AMERICAN LEGAL & FINANCIAL NETWORK

ALFN.ORG

WE ARE HERE FOR YOU

#100%MemberRetention

As we are all continuing to deal 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 paid their 2020 membership renewal dues in full by Dec. 31, 2020, received a 15% discount on your 2021 membership renewal dues.
- **Payment Assistance:** Installment plans, credit card payments and payment deferrals are available for 2021 membership dues, and for any ads and sponsorship purchases made in 2021. No additional fees charged for these alternative payment methods.
- **2021 Membership Dues:** There was no increase in 2021 membership renewal dues over the 2020 dues amounts.
- **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. View all past online session recordings and materials free of charge at https://www.gotostage.com/channel/alfnwebinars.
- **ANSWERS 2021 Online Presentations:** Since we will not host ANSWERS in-person this year, we will be offering the educational sessions we had planned in an online format. We are offering these 9 sessions free of charge to our members.
- **CLE Credit:** No less than 16 of our online presentations in 2021 will include CLE credit opportunities. CLE credit will be offered at a special discounted rate.
- **Discounted Ad Purchases:** Discounts will be provided for all ads and upgrades purchased for the remainder of 2021 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.
- **ASSURE Rewards Program:** Members that had achieved ASSURE Rewards status after ANSWERS 2019 will remain in the program through and including ANSWERS 2022.

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

Walk Before You Run

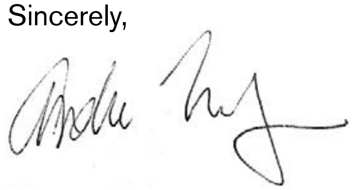
THE DAY HAS ARRIVED, the holds are beginning to lift, staff is ready to go and you breath a sigh of relief. But, not so fast. A lot has changed during this past year and a half, and it continues to evolve. New regulations, laws and policies have changed the method in which we may proceed in many jurisdictions. The CFPB has also enacted several regulations which will cause firms and the clients they serve to learn once again to walk before they run.

Throughout this publication you will read about new rules and challenges our industry faces in order to service files. The ALFN board has also received inquiries for education and advice on navigating this new landscape. In addition to implementing new procedures, we will continue to see files coming on and off holds to ensure borrowers receive the exhaustive list of options to save their home or property before the foreclosure auction is final. These actions often come at a financial cost to the firms including loss mitigation efforts, implementation of new forms, rules, and procedures, assisting clients with compliance and maintenance of files that are sitting with the courts without action for months at a time.

ALFN has been exploring options and educating the industry on these new issues. Some of our members also participated in a meeting with the GSE's to discuss these changes, which was truly valuable to all parties involved. The board also held its first in-person board meeting since February 2020, where we spent two days discussing the future of the industry and our organization. Yet, there is a lot of work ahead. We are relieved to see our files begin moving while recognizing the need to pause and fully educate ourselves on the new rules and precautions put in place to protect borrowers affected by COVID and to ensure we are implementing the new CFPB rules within our companies.

As Chair of the ALFN board, I can assure everyone we are making this a priority along with supporting our members with top education and assistance with the many challenges we continue to face. Do not hesitate to reach out with your questions and ideas. Let us be there for you.

Sincerely,



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

Letter from the Editor

REGULATORY COMPLIANCE in the default mortgage servicing industry is always a hot topic within the ALFN's hopper of educational offerings. As default files begin to move again, we will all be dealing with the various compliance issues that have come out of the COVID-19 pandemic. The ALFN continues to be at the forefront to bring you the latest guidance and education to navigate the complex regulatory environment we are experiencing.

The ALFN ANGLE will continue providing you the latest information to stay current on the changing post-COVID regulatory environment, and the many other default servicing issues that are critical to have in your knowledge base. With this publication in hand, you can rest-assured that the ALFN continues to strive for excellence in education and providing our members the information they require to succeed during a time of uncertainty and change.

The cover feature of this issue deals with a recent decision in the United Stated Court of Appeals for the First Circuit in *Montilla v. Fannie Mae*, et al. This case reviewed the authority of Fannie Mae & FHFA to conduct non-judicial foreclosure sales. In conclusion, the GSE's are permitted to continue exercising the statutory power of sale incorporated in the standard Fannie Mae and Freddie Mac mortgage contracts.

Our first feature article submission brings us to an important Eight Circuit ruling in *Heinz vs. Carrington Mortgage Services, LLC* that concluded the Mini-Miranda does not automatically trigger FDCPA protections. Your communication might not be an attempt to collect a debt that is subject to the FDCPA after all. We then transition to our next feature article with a case in the United States Court of Appeals for the Eleventh Circuit, where the court clarified and effectively expanded provisions of the FDCPA in *Hunstein v. Preferred Collection & Mgmt. Services, Inc.*

Don't miss our State Snapshot contributions to conclude this ANGLE issue, where we address some important state specific updates in Arizona, Illinois, Maryland and New York.

Please reach out to myself or any of the ALFN's leadership about ways in which we continue serving you, and opportunities where you can volunteer and be an active advocate for the betterment of our industry. Please be safe, stay healthy, and I look forward to seeing everyone back in-person again soon!

Best regards,

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

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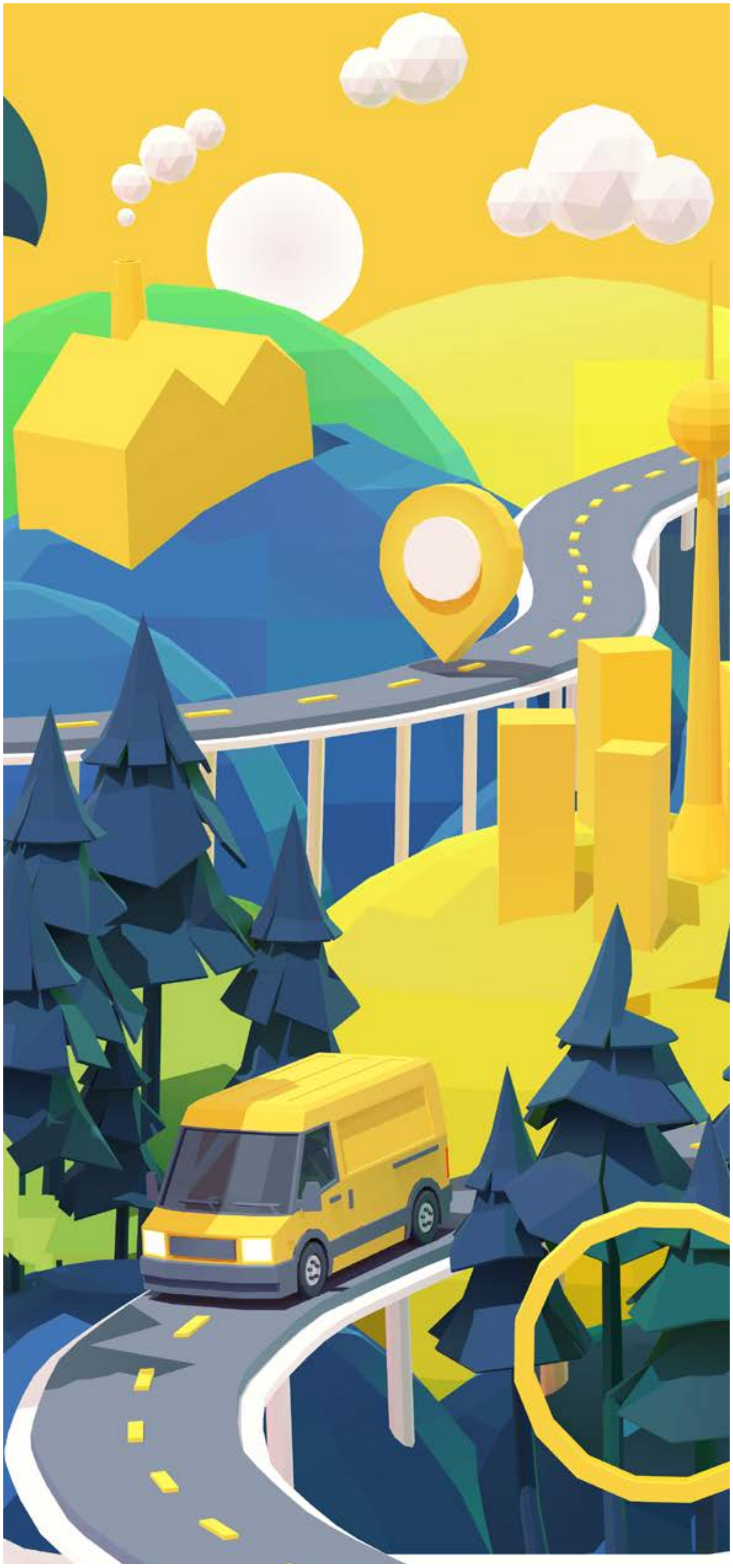

MEMBER BRIEFS

ALFN EVENTS
SAVE THE DATES

2021

JULY 27-AUGUST 24
ALFN ANSWERS
19th Annual Conference
Online Educational Event
9 Webinar Sessions
Starting July 27

NOVEMBER 18
FORECLOSURE INTERSECT
Marriott Dallas Las Colinas
Irving, TX

2022

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

2023

JULY 16-19
ALFN ANSWERS
21th Annual Conference
Park Hyatt Beaver Creek Resort
Beaver Creek, CO

2024

JULY 14-17
ALFN ANSWERS
22nd Annual Conference
Hyatt Regency Coconut Point Resort
Bonita Springs, FL

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.

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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

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HOT TOPIC LEGAL UPDATES

Industry hot topics and litigation updates.

STATE SPOTLIGHT

Focusing on those state specific issues.

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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.

STATUS QUO

FANNIE MAE AND FREDDIE MAC ARE NOT GOVERNMENT ACTORS DURING FORECLOSURE PROCESS

BY JOSEPH A. CAMILLO, JR., ESQ.
JOSEPH.CAMILLO@BROCKANDSCOTT.COM
& MICHAEL R. HAGOPIAN, ESQ.
MICHAEL.HAGOPIAN@BROCKANDSCOTT.COM
BROCK & SCOTT PLLC

MONTILLA V. FEDERAL NATIONAL MORTGAGE ASSOCIATION, ET AL.'S

NO. 20-1673 (JUNE 8, 2021)

THE UNITED STATES Court of Appeals for the First Circuit (the "First Circuit") issued a recent decision in the case of, *Montilla v. Fannie Mae*, et al., 2021 WL 2326955 (1st Cir. 2021)("*Montilla II*"), which reviewed the authority of Federal National Mortgage Association ("Fannie Mae") and the Federal Housing Finance Agency ("FHFA") to conduct nonjudicial foreclosure sales. This decision resolved a split in decisions that emanated in the United States District Court for the District of Rhode Island (the "District Court").

FACTS AND TRAVEL

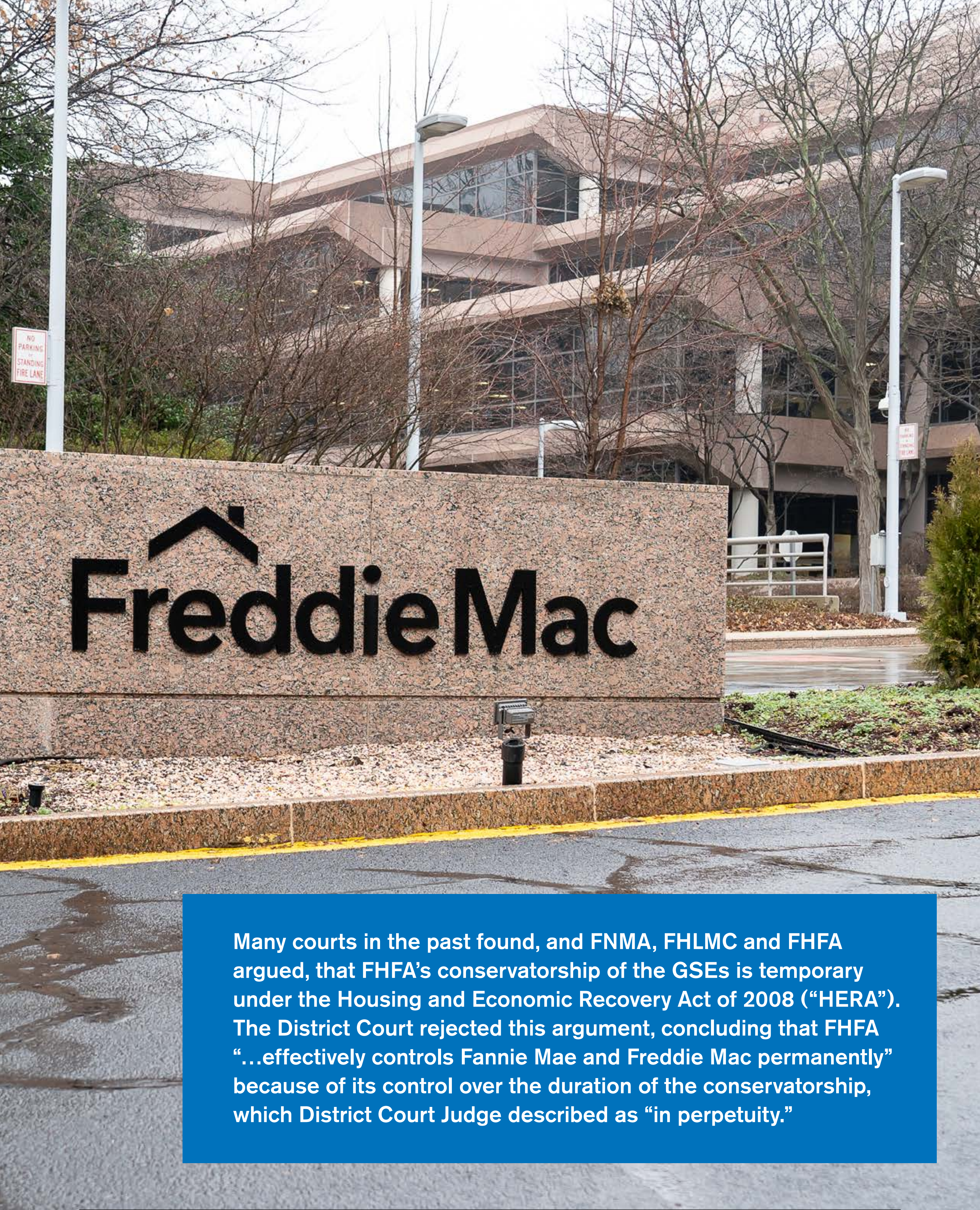
1. Sisti and Boss

IN 2017, JUDITH SISTI filed an action in the District Court, seeking to invalidate a nonjudicial foreclosure conducted by Nationstar Mortgage, as servicer for Federal Home Loan Mortgage Corporation ("Freddie Mac"). *Sisti v. Federal Housing Finance Agency*, et al., CA No 17-005 (DRI). That same year, Cynthia Boss filed a similar claim seeking to invalidate a nonjudicial foreclosure conducted by Fannie Mae. *Boss v. Federal Housing Finance Agency*, et al., CA No 17-042 (DRI). In both cases, FHFA, as the conservator of Fannie Mae and Freddie Mac, was also named as a party. In both cases, the Plaintiffs were facing post-foreclosure eviction actions in state court. The civil actions were filed in District Court to challenge the foreclosures. The basis for their claims was that FHFA, Fannie Mae and Freddie Mac were government entities and as such, the Plaintiffs were deprived of due process when the nonjudicial foreclosures were conducted.

FHFA, Fannie Mae and Freddie Mac moved for judgment on the pleadings. The District Court consolidated both cases for the purpose of the Defendants' motion for judgment on the pleadings since both cases presented the same legal issues. The District Court Judge acknowledged that "[n]umerous district courts, as well as the Sixth and D.C. Circuit Courts, have concluded that the Defendants are not government actors for purposes of constitutional claims". *Sisti v. Federal Housing Finance Agency,* 324 F.Supp.3d 273, 277 DRI 2018). Notwithstanding, the Court held that Plaintiffs could prove that Fannie Mae and Freddie Mac are government actors for purposes of constitutional claims and Defendants' motions for judgment on the pleadings were denied.

The basis of the District Court's ruling in denying the motion for judgment on the pleadings, was the District Court's application of the three-part test to determine whether an entity is a government actor, as outlined in *Lebron v. National Railroad Passenger Corp.,* 513 U.S. 374 (1995) which asked: 1) whether the government created the entity by special law; 2) whether the entity furthers governmental objectives; and 3) whether the government retains for itself "permanent authority" to appoint a majority of the directors of that entity. The third prong of this test was in dispute among the parties, i.e., whether the government retained permanent authority to appoint a majority of the directors of that entity. Many courts in the past found, and FNMA, FHLMC and FHFA argued, that FHFA's conservatorship of the GSEs[1] is temporary under the Housing and Economic Recovery Act of 2008 ("HERA"). The District Court rejected this argument, concluding that FHFA "…effectively controls Fannie Mae and Freddie Mac permanently" because of its control

1 GSE represents Government Sponsored Entities, meaning Fannie Mae and Freddie Mac.



Many courts in the past found, and FNMA, FHLMC and FHFA argued, that FHFA's conservatorship of the GSEs is temporary under the Housing and Economic Recovery Act of 2008 ("HERA"). The District Court rejected this argument, concluding that FHFA "…effectively controls Fannie Mae and Freddie Mac permanently" because of its control over the duration of the conservatorship, which District Court Judge described as "in perpetuity."

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In September of 2020, the parties entered into an agreement for judgment in favor of Plaintiffs, reserving the rights of the Defendants to file an appeal. Defendants filed an appeal of the denial of its motion for judgment on the pleadings to the First Circuit.

2. Montilla

IN 2018, Neris Montilla and Michael Kyriakakis filed an action in the District Court, also seeking to invalidate nonjudicial foreclosures conducted by Fannie Mae of their respective properties. *Montilla, et al. v. Federal National Mortgage Association*, et al., CA No 18-632 (DRI) ("*Montilla I*"). The claims filed in this matter were substantially similar to the claims in *Sisti* and *Boss*. The District Court Judge assigned to *Montilla I* was not involved in the *Sisti* or *Boss* decision. Fannie Mae moved to dismiss the Plaintiff's Complaint. The District Court Judge found the *Sisti* analysis to be "well reasoned and sensible"; however, the District Court followed the majority of the federal district and circuit decisions and held that Fannie Mae is not a government actor. The District Judge carefully reviewed the factors in *Lebron, supra*. The distinction between *Montilla I* and *Sisti* is that the Judge in *Montilla I* determined that FHFA did not control Fannie Mae or Freddie Mac permanently, and that the conservatorship was temporary in nature.

Even though FHFA is a government agency, as conservator, it assumes Fannie Mae's private status. *Id.* at *4. A conservatorship by its very nature is temporary and not an exercise of permanent control. Therefore, FHFA was not intended to exercise permanent control over the GSEs and the third prong of *Lebron* was not met. The District Court Judge reviewed the purpose of the conservatorship, which was to restore Fannie Mae to a financially stable condition. This is considered to be an inherently temporary purpose. *Id.* at *3. In essence, the conservatorship converted FHFA to a private company rather than converting Fannie Mae to a government entity.

Much like a Federal Deposit Insurance Corporation's ("FDIC") receivership of a failed private financial institution, FHFA steps into the shoes of Fannie Mae and "sheds its government character and [becomes]a private party". *Id. (citing Meridian Invs., Inc. v Fed. Home Loan Mortg. Corp.,* 855 F.3d 579(4th Cir 2017)). FHFA's authority to conduct a nonjudicial foreclosure is derived from Fannie Mae's contractual authority as a private corporation. The exercise of that authority flowed from Fannie Mae to FHFA. Fannie Mae's motion to dismiss was granted. Plaintiffs appealed the decision of the Court to the First Circuit.

3. The Appeal

THE JUDGMENTS IN *Sisti*, *Boss* and *Montilla I* were appealed to the First Circuit. They were consolidated for oral argument. The First Circuit issued a full decision on the appeal of *Montilla I* on June 8, 2021, which addressed the decisions in all three related cases. Upon review of the District Court decisions in *Sisti*, *Boss* and *Montilla I,* the First Circuit specifically disagreed with the holding in *Sisti,* and held that FHFA is not a government actor because it stepped into the shoes of the GSEs.

The First Circuit began by reviewing HERA, which empowered the director of FHFA to appoint that agency as conservator or receiver for Fannie Mae and Freddie Mac. 12 U.S.C. § 4511. The purpose of the conservatorship or receivership was to reorganize, rehabilitate or wind up the affairs of the GSEs. *Montilla II* at *1. The First Circuit then examined whether FHFA, as conservator, was a government actor. The First Circuit held that it was not a government actor even though it was a government agency. In its role as conservator of the GSEs, FHFA was not acting on behalf of the government because it stepped into the shoes of the GSEs, which are private entities. Id. at *3. When FHFA became the conservator of the GSEs, it acquired all the rights, titles, powers and privileges of those entities, including the rights of all shareholders, officers and directors. *Id*. Of those rights, the most relevant is the right to conduct a nonjudicial foreclosure pursuant to its mortgage contracts.

The conservatorship operates much like the succession clause in the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA"). The language in HERA is substantially similar to the succession clause in FIRREA. The First Circuit echoed the holding in *Montilla I* and confirmed that a government entity that acts as a receiver steps into the shoes of a private institution and assumes that entity's rights.

Next, the First Circuit examined whether Fannie Mae and Freddie Mac were themselves government actors subject to Constitutional Due Process claims. This time, the First Circuit examined *Lebron* and came to the same conclusion that the District Court found in *Montilla I*. In *Lebron*, the United States Supreme Court held that Amtrak was a government entity. The *Lebron* Court rejected the argument that Amtrak's charter prevented it from being considered a governmental entity. *Lebron*, 513 US at page 392. The *Lebron* Court held that Congress cannot pre-determine the status of an entity it creates, but rather the practical reality of federal control and supervision determines that status. See *Department of Transportation v. Association of American Railroads*, 575 US 43, 55 (2015). In *Sisti*, the District Court Judge held that there was a practical reality that FHFA effectively controlled Fannie Mae and Freddie Mac because it held all of the powers of the GSEs. That argument was rejected in *Montilla II*. The First Circuit determined that Congress did not disclaim the governmental status of the GSEs when it enacted HERA. It follows that this legislation confirms that the conservatorship, by its very nature, had a temporary purpose.

Applying the three-prong test in *Lebron*, the First Circuit held that FHFA's conservatorship over the GSEs was not permanent, since it was an "inherently temporary purpose." *Id.* at *5 (citing *Herron v. Fed. Nat'l Mortg. Ass'n*, 861 F.3d 160, 169(4th Cir. 2017)). Despite the fact that the conservatorship had been in place for thirteen years, such control continued to be temporary, and did not reach a level of permanency.

CONCLUSION

FANNIE MAE AND FREDDIE MAC have been considered by the majority of Federal Courts to be private companies, separate and distinct from federal agencies. The fact that they were placed under conservatorship by a governmental agency did not alter that status. Rather, FHFA, which is a governmental agency, operated as a private entity when it stepped into the shoes of the GSEs. This holding permits the GSEs to continue to exercise the statutory power of sale incorporated in the standard Fannie Mae/Freddie Mac mortgage contracts.

FAILED ATTEMPT

EIGHTH CIRCUIT RULES MINI-MIRANDA DOES NOT AUTOMATICALLY TRIGGER FDCPA PROTECTIONS

BY CRAIG M. BARBEE, ESQ., PARTNER
LIEBO, WEINGARDEN, DOBIE & BARBEE, PLLP
CRAIG@MINNESOTAMORTGAGELAW.COM

L **IKE POLICE OFFICERS** warning a criminal suspect before interrogation, debt collectors also have to read you your rights. In the servicing and debt collection industry, we know this Mini-Miranda all too well: *This is a communication from a debt collector attempting to collect a debt. Any information obtained will be used for that purpose.* It's on our letters, our emails, our voicemail greetings, and all other communications with debtors. And for good reason: because a debt collector could be sued and fined for $1,000 under the Fair Debt Collection Practices Act (FDCPA) for each communication that fails to include this language. This begs the question: are servicers and foreclosure firms making an admission with this boilerplate language that specific communications are attempts to collect a debt that are subject to the FDCPA?

In *Heinz v. Carrington Mortgage Services, LLC*, the United States Court of Appeals for the Eighth Circuit reviewed this issue and, upholding the District Court's grant of summary judgment for the mortgage servicer against the Plaintiff, responded in the negative. You can almost hear the collective sighs of relief from foreclosure and debt collection attorneys across the country (or maybe that was just my partner down the hall).

The Plaintiff in the *Heinz* case asserted claims against a mortgage servicer under the FDCPA in connection with communications regarding loss mitigation assistance. Plaintiff's Complaint alleged that specific communications by the servicer violated the FDCPA because they were false, deceptive, misleading, and unfair or unconscionable and violated 15 U.S.C. Sec. 1692e and 1692f. The dispositive issue on appeal was "whether the challenged communications and conduct were made in connection with the collection of the debt[.]" The Court of Appeals examined each of the communications in question under the "animating purpose test," which looks at the substance of each communication and asks if it was to "induce payment by the debtor" (citing *McIvor v. Credit Control Servs., Inc.*, 773 F.3d 909, 914 (8th Cir. 2014). While this is a question of fact for the jury, summary judgment may be granted where "a reasonable jury could not find that an animating purpose of the statements was to induce payment" (citing *Goodson v. Bank of Am., N.A.*, 600 Fed. Appx. 422, 431 (6th Cir. 2015). In applying the animating purpose test, the Eighth Circuit found that none of the servicer's communications, which included a notification of a loss mitigation denial, a phone call between servicer representatives and the Minnesota Attorney General's Office, and a post-foreclosure sale letter, were attempts to collect a debt. The Court declined to accept Plaintiff's arguments that *any* communications about foreclosure or an underlying debt are "*always* intended to facilitate collection."

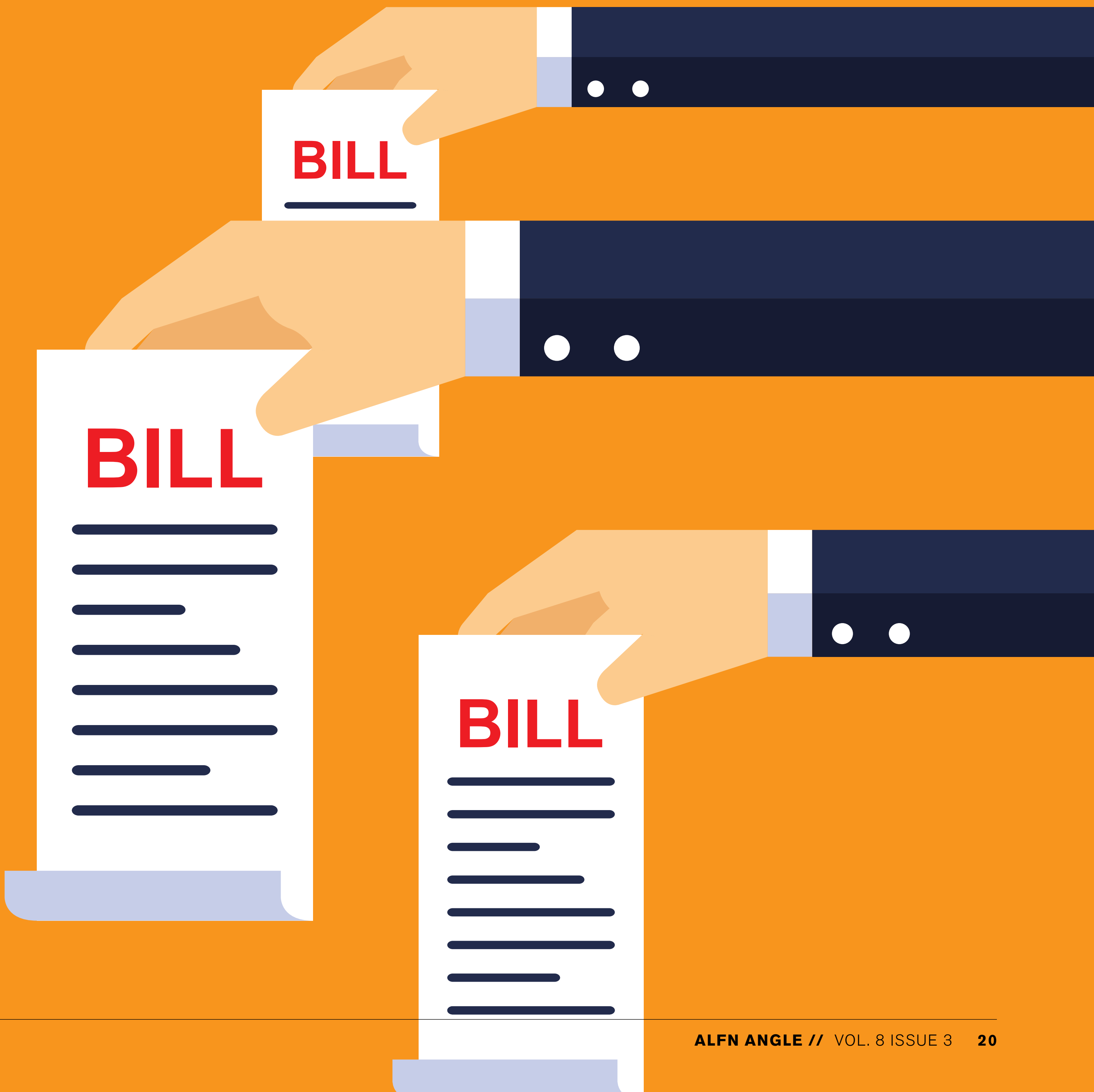
But then the Court gets to the industry's badge of shame: the "Mini-Miranda." The Eighth Circuit found the boilerplate in the Defendant's communications to the debtor "more troublesome." The Court's opinion states, "[at] first glance, it may seem implausible that a communication labeled by the sender as 'for the purpose of collecting a debt' would, in fact, not be sent 'in connection with the collection of a debt.'" Read that again. The Court almost goes down the path of accepting the Mini-Miranda as an admission of debt collection activity. This would have put servicers and foreclosure firms in a frightening position.

Thankfully, there is always a "but." And in *Heinz*, there is a big one. Citing decisions from the Sixth and Seventh Circuits in addition to the *McIvor* case, the Court does a surprising one-eighty: "But these types of boilerplate mini Miranda disclosures . . . 'do not automatically trigger the protections of the FDCPA[.]" Then the Court goes back to the animating purpose test in evaluating whether the servicer's communications were attempts to collect a debt, and reaffirms that the communications in question did not try to induce payment. The opinion might have said instead to use the old "duck test." Ignore any signs that say "I am a duck," and see if it quacks, swims, and has feathers.

The Court summarizes its holding in *Heinz* on the Mini-Miranda as follows: "We thus conclude that a routine disclosure statement that is at odds with the remainder of the letter does not turn the communication into something that it is not-in this case, a communication made in connection with the collection of a debt for the purposes of the FDCPA." So remember *Heinz* the next time you read someone their rights like a cop from a TV show and tell them you are attempting to collect a debt. Despite your warning, your communication might not be an attempt to collect a debt that is subject to the FDCPA after all.

EXPANDED PROVISIONS

FEDERAL APPELLATE COURT EXPANDS FDCPA PROTECTIONS



BY: ADAM DIAZ, ESQ. PARTNER
DIAZ ANSELMO & ASSOCIATES, P.A.
ADIAZ@DALLEGAL.COM

LAST MONTH THE U.S. COURT of Appeals for the Eleventh Circuit clarified and effectively expanded provisions of the Fair Debt Collection Practices Act ("FDCPA") in ***Hunstein v. Preferred Collection & Mgmt. Services, Inc.***, 19-14434, 2021 WL 1556069 (11th Cir. Apr. 21, 2021). In *Hunstein*, the debtor (Hunstein) incurred debt due to medical treatment his son received at Johns Hopkins All Children's Hospital. Johns Hopkins assigned Hunstein's debt to Preferred Collection & Management Services ("Preferred") for collection. Preferred hired a commercial mail vendor ("Compumail") to send out a dunning letter and, to facilitate that, Preferred sent Compumail information about Hunstein's collections account including: "(1) his status as a debtor, (2) the exact balance of his debt, (3) the entity to which he owed the debt, (4) that the debt concerned his son's medical treatment, and (5) his son's name."

As a result of the dunning letter, Hunstein filed a complaint in federal court alleging Preferred violated § 1692c(b) (titled "Communication with third parties") of the FDCPA, which reads:

> Except as provided in section 1692b of this title, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a post judgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

15 U.S.C. § 1692c(b). The district court dismissed Hunstein's complaint concluding Preferred's communications with Compumail did not "qualify as a communication 'in connection with the collection of a[ny] debt.'" Hunstein appealed that dismissal to the Eleventh Circuit.

The Court's first consideration on appeal was whether it had subject matter jurisdiction pursuant to Article III of the U.S. Constitution. The Court's Article III standing analysis centered around whether Hunstein suffered an "injury in fact" based on Preferred's violation of § 1692c(b). The Court explained "that in determining whether a statutory violation confers Article III standing, we should consider 'history and the judgment of Congress.'" As to history, the Court stated if the § 1692c(b) claim "has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts," then such violation would constitute an "injury in fact" under the Article III analysis.

The Court surmised that "invasions of personal privacy" through the "public disclosure of private facts" have long formed the basis for tort claims. The Court then looked to the FDCPA's own statu-

The Court invited Congress to comment or amend §1692c(b) if it thought the Court misread the statute. The Court reversed the lower court's dismissal and remanded the matter for further proceedings.

tory findings which it noted "explicitly identif[ied] 'invasions of individual privacy' as one of the harms against which the statute is directed." The Court concluded claims brought under § 1692c(b) bore a close relationship to invasion of privacy tort claims, so history favored Article III standing. The Court then surmised that the "judgment of Congress" also weighed in favor of standing since Congress identified invasion of privacy as a harm against which the statute was directed. The Court concluded Hunstein had standing to sue Preferred.

The Court then narrowed the issue on appeal to "whether Preferred's communication with Compumail was 'in connection with the collection of any debt,' such that it violates § 1692c(b)." Looking to the plain meaning of the phrase "in connection with," the Court concluded that Preferred's communication with Compumail "concerned," was related to and was in "reference to" the collection of Hunstein's debt. The Court rejected Preferred's three rebuttal arguments. First, Preferred argued that there must be "a demand for payment" in the communication in order for the communication to be considered made "in connection with the collection of any debt." The Court disagreed, explaining that such a requirement would render the exceptions under § 1692c(b) "superfluous." The Court elaborated that four of the six excepted parties – the debtor's attorney, a consumer reporting agency, the creditor, and the creditor's attorney – "would never include a demand for payment." Since every word and provision in a statute is to be given effect, the Court concluded a demand for payment was not a requirement for a communication to be considered made "in connection with the collection of any debt."

The Court also refused to adopt the "multi-factoring balancing test" urged by Preferred. Under that test, the Court would consider a list of seven factors and, based on those factors, determine whether the communication was made "in connection with the collection of any debt." In rejecting this approach, the Court again explained the phrase "in connection with the collection of any debt" had a "discernible ordinary meaning that obviates the need for resort to extratextual factors" which "all too often…obscure more than they illuminate." Lastly, the Court acknowledged its holding "runs the risk of upsetting the status quo in the debt-collection industry" but still rejected Preferred's "industry practice argument." The Court explained it was obliged to "interpret the law as written, whether or not…the resulting consequences are particularly sensible or desirable." The Court invited Congress to comment or amend § 1692c(b) if it thought the Court misread the statute. The Court reversed the lower court's dismissal and remanded the matter for further proceedings.

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"Homestead" property

A Step-By-Step Guide to Enforcement of Money Judgments Against a Judgment Debtor's "Homestead" Property/Residence Under Arizona's New Laws to Become Effective on December 31, 2021

LARRY O. FOLKS, ESQ.,
FOLKS HESS PLLC | FOLKS@FOLKSHESS.COM

Introduction

LEGISLATION TO PROTECT "HOMESTEAD" PROPERTY – historically the family farm and now personal residences – from loss to judgment creditors is traceable in the United States to a statute enacted in Texas in 1839.[1] Legislatures across the United States have enacted such laws for the primary purpose of serving the public interest to allow Judgment Debtors to avoid a complete loss of the value of their "homestead" property to judgment creditors through forced judgment execution sales.

1 *"Preserving the Family Farm in an Urban Age," 34-SEP Ariz. Att'y 18 (Kathi Mann Sandweiss and Roger L. Cohen) citing Act of January 26, 1839, Laws of Republic of Texas, 3d Cong., 1st Sess. 113.*

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In Arizona, the "homestead" exemption and related judgment lien and judgment enforcement laws have evolved over time. As an example, in 1977, the dollar amount of the "homestead" exemption was increased from $15,000 to $20,000, and it has steadily been increased over time through ongoing statutory amendments.[2]

More changes to these laws are on the immediate horizon.

Arizona HB 2617. Specifically, on May 19, 2021, Governor Ducey signed into law Arizona House Bill 2617 ("HB 2617"), which shall implement wide-sweeping changes to the Arizona judgment lien, judgment execution and "homestead" exemption statutes effective on January 1, 2022.[3]

HB 2617 will specifically implement significant amendments to Arizona's:

- judgment lien statute located at A.R.S. § 33-964 (the "Judgment Lien Statute");
- judgment execution statute located at A.R.S. § 12-1551 (the "Judgment Execution Statute"); and
- "homestead" exemption statutes located at A.R.S. §§ 33-1101 and 33-1103 (collectively, the "Homestead Exemption Statutes").[4]

The most significant of these amendments for judgment creditors shall be:

- the imposition of a judgment lien upon "homestead" property upon the recordation of a money judgment in the county where the real property is located; and
- an increase of the "homestead" exemption amount allowed for Judgment Debtors from $150,000 to $250,000.

This article is a step-by-step practical guide to help judgment creditors to understand the coming changes to this area of the law to be implemented by HB 2617 and evaluate enforcement of a money judgment against a "homestead" property on or after January 1, 2022, pursuant to the revised Judgment Lien Statute, Judgment Execution Statute and Homestead Exemption Statutes.

Step 1

Confirm that the Judgment Has Not Expired

In 2018, the Arizona Judgment Execution Statute was amended to extend the validity of civil money judgments from five years to ten.[5]

HB 2617 confirmed the validity of money judgments for ten years that:

- were entered on or after August 3, 2013; or
- were entered on or before August 2, 2013, and that were renewed on or before August 2, 2018.[6]

If a civil money judgment has expired, it is no longer enforceable. As a result, the first step to enforcement of a money judgment against "homestead" property is for the judgment creditor to review the court docket and/or face of the judgment to determine the date of entry and/or renewal of the judgment, if applicable. That will allow the judgment creditor to make the decision concerning whether, or not, the judgment in hand remains enforceable.

Step 2

Determine Whether the Real Property at Issue Qualifies for the Homestead Exemption and the Amount of the Exemption that Applies

HB 2617 includes revisions to the Homestead Exemption Statute located at A.R.S. § 33-1101(A) which provide that any person eighteen (18) years of age who resides in Arizona and is married or single may hold a "homestead" exemption for the following types of real property (hereinafter, a "Homestead Property"):

- the person's interest in real property in one compact body on which exists a dwelling house in which the person resides;
- the person's interest in one condominium or cooperative in which the person resides;

2 *Id.*
3 Section 5 of Chapter 368, House Bill 2617, Fifty-fifth Legislature, State of Arizona (2021).
4 *Id.*
5 A.R.S.§ 12-1551(A).
6 *See, A.R.S. § 12-1551(D) as revised by Chapter 368, House Bill 2617, Fifty-fifth Legislature, State of Arizona (2021).*

- a mobile home in which the person resides; or
- a mobile home in which the person resides plus the land on which that mobile home is located.[7]

For the most part, the analysis is very straight-forward to determine whether the real property subject to collection is a Homestead Property. The main exception to be aware of as a judgment creditor is to determine whether the property is a rental property that the Judgment Debtor cannot claim as a Homestead Property.

HB 2617 shall also implement the major change to the Homestead Exemption Statute of increasing the dollar amount of the exemption from $150,000 to $250,000.[8]

Step 3

Determine Whether the Judgment Is a Lien Upon the Homestead Property

For many years, the Arizona Judgment Lien Statute has included:

- the general rule that a recorded money judgment creates a statutory judgment lien on all real property then owned by a Judgment Debtor, or acquired by the Judgment Debtor in the future, in the county where the judgment is recorded; and
- the exception to the general rule that a recorded money judgment is *not a lien* upon real property that qualifies under the definition of a Homestead Property, which is typically the Judgment Debtor's personal residence, whether it be a single-family home, condominium or mobile home.[9]

Under the current statute effective through December 31, 2021, even though the judgment creditor does not have a lien on the Homestead Property, the judgment creditor is given the legal remedy to force a Sheriff's execution sale of the Homestead Property, if there is equity in the property above all consensual liens on the property and the $150,000 homestead exemption available to the Judgment Debtor.[10]

HB 2617 repeals the exception to the general rule by revising the Arizona Judgment Lien Statute.[11] As a result, as of January 1, 2022, *all civil money judgments recorded with a county recorder shall become a lien upon:*

- all real property, including Homestead Property, owned by the subject Judgment Debtor in that county on the date that the judgment is recorded; and
- all real property that may be acquired by the subject Judgment Debtor in that county in the future.[12]

The practical requirements for a judgment creditor to obtain a valid recorded judgment lien have not been changed by HB 2617 and will continue to be that:

- a certified copy of the judgment will need to be obtained for recordation; and
- a judgment information sheet must be recorded with the judgment.[13]

The Judgment Lien Statute also includes certain transitional rules in new A.R.S. § 33-964(G)[14] concerning when a judgment lien is imposed by the new statutes. The transitional rules are:

1. If a sale, transfer or refinance of the Judgment Debtor's Homestead Property is completed prior to January 1, 2022, then the judgment creditor does not have a judgment lien upon the Homestead Property.[15]
2. If the Judgment Debtor receives a bankruptcy discharge prior to January 1, 2022, then the judgment

7 *See, A.R.S. § 33-1101 as revised by Chapter 368, House Bill 2617, Fifty-fifth Legislature, State of Arizona (2021). Judgment creditors should also be advised that the homestead exemption amount is the same for an individual or a married couple.*

8 A.R.S. § 33-1101(A) as revised.

9 *See, the Judgment Lien Statute located A.R.S. § 33-964 (A) and (B) and the definition of "homestead" property located at A.R.S. § 33-1101(A) and Pacific Western Bank v. Castleton, 434 P.3d 1187,1189-1190, 246 Ariz. 108, 110-111 (AZ App. 2018)(which includes a comprehensive analysis of a judgment creditor's rights with respect to collecting upon a recorded money judgment against a debtor's homestead property under Arizona law prior to the enactment of House Bill 2617).*

10 *Pacific Western Bank v. Castleton, 434 P.3d 1187, 1190, 246 Ariz. 108, 111 (AZ App. 2018).*

11 *See, A.R.S. § 33-964(A) as revised by House Bill 2617.*

12 *Id.*

13 *See, A.R.S. § 33-961(judgment recording requirements) and A.R.S. § 33-967(D)(which provides that the priority of a recorded judgment is established on the date that the judgment is recorded with the required judgment information sheet attached). These practical requirements have not been changed by House Bill 2617.*

14 See, A.R.S. § 33-964(G) as revised by House Bill 2617

15 *Id.*

If the creditor does not exercise the option to accelerate an installment contract debt and/or to determine the date of "accrual" of a cause of action upon a matured/defaulted monthly installment payment, the Statute of Limitations applies to each matured/defaulted Note installment payment separately as it becomes due under the Note amortization schedule, and does not begin to run on any installment until it is due.

creditor does not have a judgment lien upon the Homestead Property.

3. If the Judgment Debtor has filed for bankruptcy protection prior to January 1, 2022, and ultimately receives a discharge, then the judgment creditor does not have a judgment lien upon the Homestead Property.
4. For any sale, transfer or refinance that is completed on or after January 1, 2022, judgments that are recorded before January 1, 2022, and that are still valid attach to the homestead property, are enforceable, and create judgment liens pursuant to the priority rules listed in the statute.

Step 4

Determine What Collection Rights the Judgment Creditor Has Under the Circumstances as a Result of Its Judgment Lien Upon the Homestead Property

Judgment creditors must evaluate their collection rights granted by the new statutes under the particular circumstances of their case. Several recurring scenarios faced by creditors when collecting upon money judgments secured by real property are specifically addressed by HB 2617 and discussed below.

"CASH OUT" REFINANCE TRANSACTION BY THE JUDGMENT DEBTOR CONCERNING A HOMESTEAD PROPERTY SECURED BY A JUDGMENT LIEN

HB 2617 grants judgment creditors a new collection right when a Judgment Debtor refinances a mortgage loan on a Homestead Property and there are "cash out" proceeds available from the refinance transaction.

In particular, A.R.S. § 33-964(C) has been added to the Judgment Lien Statute *to provide that the judgment creditor's judgment lien balance must be paid in full from the refinance "cash out" proceeds before the Judgment Debtor or any other person receives any of the proceeds.*[16] The new text of A.R.S. § 33-964(C) is as follows:

> C. If the Judgment Debtor receives cash proceeds from refinancing the homestead property that is subject to a judgment lien, the judgment creditor must be paid in full from those proceeds before the Judgment Debtor or other person receives any proceeds, except that monies used to pay direct costs associated with the refinance or to satisfy liens with priority over a judgment lien on a homestead property do not constitute cash proceeds. In subsequent refinance transactions on the homestead property that is subject to a judgment lien, the judgment lien is subordinated by operation of law to the new lender's interest in the homestead property. A notice of subordination may be recorded by any person who is a party to that refinance.[17]

HB 2617 makes a conforming change to the Homestead Exemption Statute, located at A.R.S. § 33-1101(C), to provide that "the homestead exemption does not at-

16 *See, A.R.S. § 33-964(C) added by House Bill 2617.*
17 *Id.*

tach to the person's interest in identifiable cash proceeds from refinancing the homestead property[18]

HB 2617 also added the following new subsection A.R.S. § 33-1101(D), which gives the parties' guidance concerning how to determine whether there is equity in a Homestead Property for the purpose of complying with several provisions of the Judgment Lien Statute, Judgment Execution Statutes, and Homestead Exemption Statutes as revised. The new section provides as follows:

> D. For the purposes of determining the amount of equity in a homestead property that is sold or for determining whether the property owner is receiving cash back from refinancing the homestead property, the parties may rely on the valuation of the property in the final closing document disclosure that is used for that transaction[19]

The effect of the above revisions to the Judgment Lien Statute and Homestead Exemption Statute is to grant judgment creditors a very significant new substantive collection legal right to enforce their judgment lien by executing upon the "cash out" refinance proceeds that did not exist prior to enactment of HB 2617.

Stated alternatively, the newly amended statutes will close the loophole that existed to allow Judgment Debtors to strip the equity out of their Homestead Properties and not pay the refinance "cash out" proceeds to judgment creditors, because the proceeds by definition under current law are not encumbered by a lien in favor of the judgment creditors.

VOLUNTARY SALE OF HOMESTEAD PROPERTY SUBJECT TO A JUDGMENT LIEN BY THE JUDGMENT DEBTOR

HB 2617 has added to the Judgment Lien Statute a new section, A.R.S. § 33-964(B). This new section grants a judgment creditor rights with respect to payment of its judgment lien balance upon a Judgment Debtor's voluntary sale of a Homestead Property as follows:20

> B. On the sale of homestead property that is subject to a judgment lien, the judgment creditor shall be paid from the proceeds of the sale after the homestead exemption amount is paid to the Judgment Debtor as prescribed in section 33-1101 and after payment of any liens on the property that have priority over the judgment lien[.][21]

This change is a codification of the judgment creditor's substantive right to payment under existing lien priority and Homestead Exemption Statutes now that the judgment creditor's recorded judgment is recognized as a statutory judgment lien upon the Homestead Property.

The primary effect of this new law will be to expand judgment creditors' rights to sale proceeds without having to take other enforcement steps that were previously necessary as a result of the judgment creditor not having an actual lien upon the sale proceeds.

New A.R.S. § 33-964(B) also grants title companies the right to record a partial release of the judgment creditor's judgment under certain circumstances. If the title company makes a determination that the payment to the Judgment Debtor from the proceeds of the sale of the Homestead Property shall total less than 80% of the amount of the $250,000 homestead exemption (i.e., less than $200,000), then the title company may record the partial release of the judgment *without prior notice to the judgment creditor.*

Alternatively, if the title company determines that the sales proceeds to be paid to the Judgment Debtor will exceed the $200,000 threshold, then the judgment creditor's lien upon the Homestead Property will be extinguished if:

- the title company mails a notice (including certain specific information listed in the statute) to the judgment creditor by certified mail, return receipt, which informs the judgment creditor of the title company's position that its judgment lien will be extinguished by the sale transaction; and

18 *See, A.R.S. § 33-1101(C) added by House Bill 2617.*
19 *See, A.R.S. § 33-1101(D) added by House Bill 2617.*
20 *See, A.R.S. § 33-964(B) added by House Bill 2617.*
21 *d.*

- the judgment creditor fails to object within the required 20-day statutory notice and objection period.[22]

If the judgment creditor sends the title company an objection, prior to expiration of the 20-day statutory objection time period, which provides that the judgment creditor has good cause for its judgment lien not to be extinguished by the sale transaction, then the title company may not record the partial release of the judgment lien.[23]

If a court subsequently determines that the judgment creditor did not have good cause to object, then the prevailing party is entitled to a court order extinguishing the judgment lien on the Homestead Property and an award of actual damages, court costs and attorneys' fees and costs.[24]

If a title company records a notice of a partial release of judgment lien wrongfully, then the title company is liable to any party for the actual damages, including attorney's fees and costs, that are caused by wrongfully recording the release.[25]

INVOLUNTARY SHERIFF'S EXECUTION SALE OF THE HOMESTEAD PROPERTY FORCED BY THE JUDGMENT CREDITOR

HB 2617 has been revised *to expressly authorize a judgment creditor to force an involuntary Sheriff's execution sale of a Homestead Property* (with equity in it that exceeds the homestead exemption amount) encumbered by its judgment lien by amending A.R.S. § 33-1103(A) to provide as follows:[26]

> A. Real property that is subject to the homestead exemption provided for in section 33-1101, subsection A is exempt from involuntary sale under a judgment or lien, *except in connection with:*
>
> …..
>
> 4. *A recorded civil judgment* or other nonconsensual lien that is not otherwise prescribed in this subsection *if the debtor's equity in the real property exceeds the homestead exemption* under section 33-1101 (*emphasis added*).

The example of the Maricopa County Sheriff's forced execution sale requirements discussed below is useful to understand the requirements and collection rights of a judgment creditor to pursue this collection remedy.[27]

Judgment creditor (the "Judgment Creditor") obtains a money judgment (the "Judgment") against an individual judgment debtor (the "Judgment Debtor"). The Judgment is recorded with the Maricopa County Recorder ("County Recorder") while Judgment Debtor owns a residence located in Maricopa County that is the Judgment Debtor's Homestead Property.[28]

Judgment Creditor obtains a Writ of General Execution from the Clerk of the Superior Court to direct the Sheriff of Maricopa County, Arizona ("Sheriff"), to schedule a Sheriff's execution sale of the Homestead Property. This is a straight-forward application process; it does not require a hearing, and the Writ of General Execution is summarily issued by the Clerk of the Superior Court. The Writ of General Execution is delivered to the Civil Enforcement Division of the Sheriff's Department along with an initial $200 fee deposit. The Sheriff will schedule an execution sale of the Homestead Property to enforce the Judgment only if all of the legal requirements discussed below are satisfied ("Sheriff's Execution Sale").

The Sheriff's Execution Sale of the Judgment Debtor's Homestead Property will be scheduled by the Sheriff after:

- it is determined that the legal requirements of A.R.S. §§ 33-1103(A) and 33-1105(A) are met, which is that the value of the Homestead Property exceeds the total of any senior liens upon the property plus the $250,000 statutory homestead exemption amount

22 *Id.*
23 *Id.*
24 *Id.*
25 *Id.*
26 *See, A.R.S. § 33-1103(A) as revised by House Bill 2617.*
27 Maricopa County is *Arizona's most populous county. The procedures of the Sheriffs of other counties differ in small respects, but the process is generally the same in all Arizona counties.*
28 The requirements for real property to qualify as a Judgment Debtor's "homestead" property and for the $250,000 homestead exemption to apply are set forth at A.R.S. § 33-1101 *et seq. as revised by House Bill 2617.*

due to the Judgment Debtor pursuant to revised A.R.S. § 33-1101(A) (the "Homestead Exemption Amount");

- the Sheriff makes demand upon the Judgment Debtor to pay the Judgment, and the Judgment Debtor fails to pay the Judgment balance; and
- the Sheriff determines that the Judgment balance cannot be collected by selling the Judgment Debtor's personal property.

The Sheriff initially enforces the Writ of General Execution by recording it with the Maricopa County Recorder as the act of levying upon the property. In addition, the Sheriff must publish the Notice of Sale for three weeks prior to the date of sale and post the Notice of Sale at three designated public places at least 15 days prior to the date of the Sheriff's Execution Sale. The Sheriff will mail a copy of the Notice of Sale to the Judgment Creditor well in advance of the Sheriff's Execution Sale date.

Once the Sheriff's execution sale of the Homestead Property is scheduled, Judgment Creditor will have to comply with the Sheriff's bidding requirements to prepare for and participate in the Sheriff's execution sale of the Homestead Property. The statutes relevant to and specific bidding requirements of the Sheriff are discussed below.

The Arizona statute, which includes the conditions that must be complied with before the Sheriff will even schedule a Sheriff's Execution Sale of a Homestead Property, is set forth in full below.[29]

33-1105. SALE BY JUDGMENT CREDITOR OF PROPERTY SUBJECT TO HOMESTEAD EXEMPTION.

A judgment creditor other than a mortgagee or beneficiary under a trust deed may elect to sell by judicial sale as specified in title **12** the property in which the Judgment Debtor has a homestead under section 33-1101, subsection A, provided that the Judgment Debtor's interest in the property shall exceed the sum of the Judgment Debtor's homestead plus the amount of any consensual liens on the property having priority to the judgment. A bid shall not be accepted by the officer in charge of a sale under this section which does not exceed the amount of the Judgment Debtor's homestead plus the amount of any consensual liens on the property having a priority to the judgment plus the costs of the sale allowable under title **12**. After receipt of a sufficient bid, the officer shall sell the property. From the proceeds, the officer shall first pay the amount of the homestead to the Judgment Debtor plus the amount of any consensual liens on the property having a priority to the judgment and then pay the costs of the sale. The remaining proceeds shall be applied in accordance with the provisions of section 12-1562, subsection A.

The Sheriff's interpretation and implementation of A.R.S. § 33-1105 to schedule a Sheriff's Execution Sale of a Homestead Property and accept a Judgment Creditor's bid are set forth below:

- In advance of the Sheriff's Execution Sale date, the Judgment Creditor must provide the Sheriff with the dollar amount of unpaid real property taxes upon the Homestead Property to be paid to the Maricopa County Treasurer upon completion of the sale, good through two weeks and one day after the scheduled date of the Sheriff's Execution Sale ("Senior Real Property Tax Lien Amount").
- In advance of the Sheriff's Execution Sale date, the Judgment Creditor must provide the Sheriff with payoff amounts of all Deeds of Trust and other liens of record senior upon the Homestead Property that are senior to the money Judgment being enforced good through two weeks and one day after the scheduled date of the Sheriff's Execution Sale (the "Senior Lien Payoff Amount").
- The Judgment Creditor is required by the Sheriff to bid $1.00 over the total amount of the Senior Real Property Tax Lien Amount + the Senior Lien Payoff Amount + the $250,000 Homestead Exemption

29 A.R.S. § 33-1105.

Amount as its opening credit bid at the Sheriff's Execution Sale.[30]

The Judgment Creditor must have a representative physically present at the Sheriff's office to attend the Sheriff's Execution Sale, which is a public auction. The representative must fully understand the bidding process and make the Judgment Creditor's opening credit bid and any additional higher bids during the auction sale.

At the beginning of the public auction Sheriff's Execution Sale, the Sheriff will announce the total judgment principal amount, interest accrued upon the judgment amount until the date of sale, and the Sheriff's sale commission and other hard costs. This is known as the Judgment, Interest and Costs ("JIC") announced amount for informational purposes.

For a Homestead Property execution sale, the actual bidding begins at $1.00 over the total amount of the Senior Real Property Tax Lien Amount + the Senior Lien Payoff Amount + the $250,000 Homestead Exemption Amount as the Judgment Creditor's opening credit bid at the Sheriff's Execution Sale.

If the Judgment Creditor is the successful bidder for the Homestead Property, the Judgment Creditor is responsible for paying the $250,000 Homestead Exemption Amount, the prior unpaid real property taxes, the prior consensual liens, and the Sheriff's costs of sale *in cash* within five days after the date of the Sheriff's Execution Sale.

Any additional amount over the foregoing sums generated by the bidding process would go toward satisfying the Judgment. (When the homestead exemption does not apply, the Judgment Creditor is responsible for paying only the Sheriff's fees for the sale of the property.)

Should the property be more valuable than the homestead exemption, prior consensual liens, Judgment amount, and Sheriff's costs of sale, any bid over that amount is sent to the Clerk of the Superior Court as excess proceeds. (If the Judgment Creditor was the high bidder, the Judgment Creditor would be responsible dollar-for-dollar for any amount over the satisfaction of the Judgment, homestead exemption, prior consensual liens, and Sheriff's fees).

CONCLUSION

Effective as of January 1, 2022, judgment creditors should be prepared to comply with the sweeping new changes that HB 2617 imposes on the current judgment enforcement process in Arizona. Failure to understand these changes and implement policies to address them may result in the judgment creditor's rights being prejudiced.

In addition, the changes to Arizona law imposed by HB 2617 will have multiple bankruptcy law implications that will certainly be litigated once the laws become effective.

Several major bankruptcy law implications will include, without limitation, that:

- judgment creditors will be secured creditors on the petition date and have the rights of a secured creditor in bankruptcy proceedings;
- unless set aside by the Bankruptcy Court, judgment liens should now pass through the bankruptcy and remain enforceable post-discharge *in rem* against the Homestead Property through a forced Sheriff's execution sale or otherwise; and
- bankruptcy debtors will likely pursue avoidance actions when the circumstances apply pursuant to Bankruptcy Code Section 522(f)[31] (to avoid the judgment lien as impairing the debtor's homestead exemption) or Bankruptcy Code Section 506(d) and various Bankruptcy Rules to attempt to strip the judgment lien from the Homestead Property. a

30 If the Sheriff's Execution Sale is of real property that is not a homestead property, then the Judgment Creditor does not have to pay cash to pay off the senior liens on the property and is only responsible for paying the Sheriff's fees to schedule and conduct the sale. Also, under this circumstance, the Sheriff's procedure is to have the Judgment Creditor bid $1.00 as its opening bid. The Judgment Creditor and other bidders must do their due diligence to understand what liens will have to be paid off if they are the successful bidder and plan their bidding strategy accordingly. In addition, the Sheriff's hard costs and sale commission must be verified with the Sheriff and taken into account by any bidder at a Sheriff's Execution Sale.

31 The United States Bankruptcy Code is located at 11 U.S.C. § 101 *et seq.*

STATE SNAPSHOT | ILLINOIS

Illinois Court Rules Chicago Post-Foreclosure Eviction Protection Ordinance Unconstitutional

BY: BLAKE A. STRAUTINS, ESQ., MANAGING PARTNER - BSTRAUTINS@KLUEVERLAWGROUP.COM,
DANIEL J. MAY, ESQ., SENIOR ASSOCIATE - DMAY@KLUEVERLAWGROUP.COM &
POOJA DOSI, ESQ., ASSOCIATE - PDOSI@KLUEVERLAWGROUP.COM - KLUEVER LAW GROUP, LLC

REO DEPARTMENTS and other industry participants preparing for the resumption of residential foreclosure sales in Illinois[1] may have one less compliance headache to deal with after an Illinois appellate court ruled that a controversial Chicago ordinance–Chicago's Protecting Tenants in Foreclosed Rental Properties ordinance, commonly known as the Keep Chicago Renting Ordinance ("KCRO") [2] –is unconstitutional.[3]

THE DECISION

On April 30, 2021, the First District Appellate Court held that the KCRO is unconstitutional because the Illinois Rent Control Preemption Act ("RCPA")[4] preempts it. Long detested by servicers and REO investors because of its stringent requirements and the draconian consequences of non-compliance, the most notorious provision of the KCRO obligates a foreclosing owner to pay a relocation fee in the amount of $10,600.00 to tenants, unless the owner offers an option to renew or extend the current written or oral lease at an annual rent that does not exceed 102% of the current annual

1 Foreclosure sales of residential properties in Illinois are stayed through July 31, 2021. See 735 ILCS 5/15-1513.
2 Chicago Municipal Code § 5-14-010, et seq.
3 *Rivera v. Bank of New York Mellon*, 2021 IL App (1st) 192188.
4 50 ILCS 825/1, *et seq.*

The REO industry should postpone any celebrations—at least temporarily—because the tenant filed a petition for rehearing that is still pending consideration by the Appellate Court. The petition alternatively asks that the appellate court certify the preemption question for consideration by the Illinois Supreme Court, so it seems that the fight over this issue is far from over.

rent.[5] And, a tenant who does not receive the notice required under the ordinance and an offer of relocation assistance or lease renewal may sue the new owner for statutory damages in the amount of $21,200.00, plus attorney fees and costs.[6] Not only are the requirements of KCRO burdensome, costly, and vague, but the potential risks associated with non-compliance are punishing.

Faced with precisely such a claim, a foreclosing owner challenged the constitutionality of the KCRO on the grounds that the ordinance regulates and controls the amount of rent a landlord may charge for residential property in contravention of the RCPA.[7] The trial court agreed but held that the offending provision could be severed from the ordinance while leaving the remainder of the KCRO intact, awarding the tenant $21,200.00 in statutory damages and $98,420.00 in attorney's fees.[8] In its review of the trial court's decision, the appellate court agreed that the RCPA expressly preempts the rent limitation imposed under the KCRO. The appellate court then examined whether that provision could be severed from the ordinance without destroying the underlying objective "to preserve, protect, maintain and improve rental property and prevent occupied buildings from becoming vacant after foreclosures."[9] Ultimately, the court answered that question in the negative, finding that if the KCRO's rent control provision were removed, then owners of foreclosed properties could simply circumvent the purpose of the KCRO by offering tenants a lease with prohibitively high rent.[10] The appellate court found that Chicago would not have enacted the KCRO without including the offending provision, making the provision inseverable from the KCRO and rendering the entire ordinance unconstitutional.

WHAT IT MEANS

The REO industry should postpone any celebrations—at least temporarily—because the tenant filed a petition for rehearing that is still pending consideration by the Appellate Court. The petition alternatively asks that the appellate court certify the preemption question for consideration by the Illinois Supreme Court, so it seems that the fight over this issue is far from over. Investors and their agents are strongly encouraged to continue following the KCRO's rigid requirements until such a determination is made. But as Illinois prepares to open its doors to foreclosure sales, an important decision looms in the First District Appellate Court—and possibly the Illinois Supreme Court—and the potential impact of this case may be far-reaching when dealing with tenants of foreclosed residential properties in Chicago. Given the current widespread practice of newly foreclosed property owners opting to pay the relocation assistance rather than being saddled with a forced tenancy relationship, the prospect of no longer adding $10,600.00 to the carrying costs of REO properties in Chicago makes this litigation one worth following!

5 Chicago Municipal Code § 5-14-050.
6 *Id.*
7 *Rivera*, 2021 IL App (1st) 192188 at ¶ 12.
8 *Id.* at ¶¶ 10; 17.
9 *Id.* at ¶¶ 26-29.
10 *Id.* at ¶ 29.

New Case Discusses Liability by Foreclosure Purchasers for Toxic Torts

BY MAURICE W. O'BRIEN, ESQ.
ROSENBERG & ASSOCIATES, LLC
MAURICE.OBRIEN@ROSENBERG-ASSOC.COM

IN MAY, THE MARYLAND COURT of Appeals held that a foreclosing lender could be found liable for damages related to lead-paint poisoning, starting from the date of the foreclosure sale, even though it was acting solely as trustee. In *Hector v. Bank of N.Y. Mellon*, the plaintiff filed a complaint against the Bank of New York Mellon ("BNYM") in its individual capacity for negligence committed while they served as trustee of a pool of securitized loans. The case was first heard by the Circuit Court, before eventually being appealed to the Court of Special Appeals and then finding its way to the Maryland Court of Appeals.

The Hectors sued BNYM after their daughters suffered severe and permanent brain damage due to their exposure to lead in the property. BNYM was the trustee for a residential mortgage-backed securitization trust ("Trust") that owned the property after it purchased the property at the foreclosure sale. The plaintiffs, who were holdover tenants that originally rented the property from the borrower, continued to occupy the property for a few months after the foreclosure sale. Plaintiffs brought the suit against BNYM in its individual capacity, as opposed to its fiduciary, or trustee, capacity. The Court of Appeals agreed with the Court of Special Appeals that a trustee may be "individually liable for a tort committed in the course of trust admin-

This ruling is significant because it makes clear that a foreclosing lender can be liable for torts, including strict liability torts, even in cases where the people occupying the property are holdover tenants and where the lender has never entered the property.

istration if the trustee is personally at fault." *Hector v. Bank of N.Y. Mellon*, 2021 Md. Lexis 222, 5-6 (2021).

This ruling makes clear that a trustee is not shielded from liability solely because the property is owned by a corporation or other entity. The Court clarified that an officer or agent "may be liable . . . for torts he or she personally commits, or which he or she inspires or participates in, even though performed in the name of an artificial body." *Id.* at 44. The Court explained that being a trustee for a trust series does not remove the trustee's liability because, during the passage of the Trust Act, it was the General Assembly's intent to allow plaintiffs to recover from trustees in their individual capacity when the trustee is personally at fault for a tort. This is especially important in this case because, by the time the complaint was filed, the Trust was no longer in existence. Therefore, Plaintiffs sought damages from BNYM as the trustee. The Court held that, because the trustee was in violation of a code intended to protect a specific class of persons which included the plaintiff, BNYM's violation constituted a strict liability tort for which it could be held responsible.

The Court then made a determination regarding when BNYM, as trustee, became the owner of the property. BNYM argued that damages should not be accrued until the date the Court ratified the foreclosure sale because the purchaser of a foreclosed property is not entitled to possession of the property until after ratification. However, the Court explained that there are instances where the purchaser may be permitted to take possession of the property prior to the ratification. One of those instances occurred in this case, as the deed of trust provided that the borrower "shall have possession of the Property until Lender has given Borrower notice of the default." *Id.* at 64. Due to this clause in the deed of trust, the Court determined that BNYM became the owner of the property as of the date of the foreclosure sale.

The Court's determination of ownership was based on their finding that although BNYM was not a hands-on owner of the property and do not appear to have ever entered the property, they were an "owner" as described by the Housing Code. The Housing Code defines an "owner" as "any person, firm, corporation, guardian, conservator, receiver, trustee, executor, or other judicial officer who . . . owns, or controls the whole or any part of the . . . title." *Id.* at 44. The Court ruled that a trier of fact could find that BNYM "controlled" the property because they had the "ability to change or affect the title to the property." *Id.* Previous Court cases have listed examples of "control" to include the running of the day-to-day affairs of the entity in the time between the entity's acquiring and selling of the property at issue, executing deeds, and signing complaints to remove occupants from the property.

This ruling is significant because it makes clear that a foreclosing lender can be liable for torts, including strict liability torts, even in cases where the people occupying the property are holdover tenants and where the lender has never entered the property. Further, acting solely as a trustee does not shield them from liability. The Court clarified that an officer or agent "may be liable . . . for torts he or she personally commits, or which he or she inspires or participates in, even though performed in the name of an artificial body." *Id.* Going forward, servicers should be aware of this potential liability and discuss with their vendors how to mitigate any possible damages.

Recent Case Asks Court to Invalidate Hardship Declaration Stay

BY DEBORAH M. GALLO, ESQ.
COMPLIANCE ATTORNEY, FRIEDMAN VARTOLO, LLP
DGALLO@FRIEDMANVARTOLO.COM

IN A RECENT CASE, Southern Acquisition Company LLC v. TNT, LLC, Supreme Court, New York, Ulster County, 2021 WL 1307854, 2021 NY Slip Op. 21084 (4/6/2021), the mortgagee filed a motion to invalidate and find the small business' filing of a COVID 19 pandemic related hardship declaration lacking in merit and to allow proceeding to foreclosure sale. The Court found that the mortgage enjoyed a rebuttable presumption of financial hardship due to the COVID 19 pandemic, even though the matter entered foreclosure and Judgment was granted prior to the pandemic.

In this commercial foreclosure action, the plaintiff filed the motion to invalidate the hardship declaration and to proceed to foreclosure sale. Defendants did not submit opposition by the return date and thus plaintiff filed a proposed order granting the motion to the Court. The Court first indicated that not all unopposed motions or granted and further that COVID 19 impacted the global economy in many ways, particularly in New York, which took the brunt of same in the first wave hitting the United States. Thus, the Court and Legislators quickly implemented legislation to avoid evictions and foreclosures for small businesses and residential foreclosures.

In any action to foreclosure a mortgage in which a Judgment of sale has been issued prior to the effective date of the Act, like in this case, "the Court shall stay the execution of the Judgment at least until the Court has held a status conference with the parties" (Act, Part B, Subpart A, § 8). However, where "the mortgagor provides a hardship declaration ... prior to the execution of the Judgment, the execution shall be stayed until at least May 1, 2021" (*id.*) "A hardship declaration shall create a rebuttable presumption that the mortgagor is suffering financial hardship, in any judicial or administrative proceeding that may be brought, for the purposes of establishing a defense under an executive order of the governor or any other local or state law, order, or regulation restricting actions to foreclose a mortgage against a mortgagor suffering from a financial hardship *during* ... the COVID-19 pandemic" (Act, Part B, Subpart A, § 10 [emphasis added]).

The Court went on to outline the long history of the action which was initially commence in April 2014. Had the Judgment of foreclosure and sale signed August 19, 2015, followed by six cancelled foreclosure sales. Given the timing, it was clear that the matter entered and proceeded to Judgment well prior to the COVID pandemic. The Court found that the plaintiff had not provided evidence to rebut the presumption, but merely stated their position in a self- serving and conclusory manner. Thus, Plaintiff's motion was denied, and the hardship declaration stay continued.

The Court found that the plaintiff had not provided evidence to rebut the presumption, but merely stated their position in a self-serving and conclusory manner. Thus, Plaintiff's motion was denied, and the hardship declaration stay continued.

For Whom the [S.O.]"L." Tolls

BY DAVID P. CASE, ESQ.
PARTNER, FEIN SUCH & CRANE, L.L.P.
CASED@FEINSUCHCRANE.COM

THE READER OF THIS ARTICLE may be expecting a State-snapshot article on the New York Court of Appeals decision in *Freedom Mortgage Corp. v. Engel*, 2021 N.Y. Slip Op. 01090 (2021). The *Engel* case confirmed, among other things, that: 1) a letter that states the loan shall be accelerated if the default is not cured within thirty days is not an acceleration, and 2) the voluntary discontinuance of a foreclosure action revokes the acceleration of the mortgage. The reader's foreclosure counsel should have already advised it of this decision. Also, there is a serious legislative push in Albany to legislatively overturn *Engel* as well as legislatively impose unique restrictions and limitations that would apply only to mortgage foreclosures, but not to the enforcement of other installment contracts[1].

But, this is not an *Engel* article, as those are plenty[2]! Instead, we are going to delve into whether or not Governor Cuomo's exercise of emergency powers tolled the Statute of Limitations[3] (hereinafter "SOL") or merely suspended them. In short, the Appellate Division, Second Department, recently held[4] that the Governor's action was a toll, not merely a suspension.

Before we walk down the path of recent history that got us here, it is important for the reader to understand the difference between a "suspension" of the SOL or a "tolling" of the statute of limitations. "A toll suspends the running of the applicable period of limitation for a finite period… [whereas] a suspension does not exclude its effective duration from the calculation of the relevant time period." *Brash*, 2021 N.Y. Slip. Op. 03436 at *2. We can boil the difference down to the following more accessible hypothetical:

Lender has a mortgage in New York where the SOL would expire on August 4, 2020. Governor Cuomo put the state on "pause" on March 7, 2020, through the use of executive action and power given to him by the State Legislature[5]. The Governor then allows the action affecting the SOL to expire on November 3, 2020. If the Governor's executive action merely suspends the SOL, then the mortgage becomes time-barred on November 4, 2020. However, if the SOL is tolled, then one adds the time period from March 7 to August 4 (150 days) to November 4, 2020—in other words, the

In short, the Appellate Division, Second Department, recently held that the Governor's action was a toll, not merely a suspension.

1 *See, e.g.*, State Senator Sanders' Bill S.B.5473C, introduced in the State Senate and Assembly person Weinstein's A.B.7737A in the State Assembly—both introduced in the 2020-2021 Legislative Session.

2 *See*, *e.g.*, "The Doctrine of Nullification Also Justifies the Result in the Mortgage Acceleration Cases.", March 23, 2021, https://twentyeagle.com/the-doctrine-of-nullification-also-justifies-the-result-in-the-mortgage-acceleration-cases/

3 The Statute of Limitations time-bars and prevents a litigant from bringing a claim that the state considers too stale or too old. If a litigant's case becomes time barred, they are sure out of luck and their case can be dismissed permanently.

4 *Brash v. Richards*, 2021 N.Y. Slip Op. 03436 (June 2, 2021).

5 See N.Y. Executive Law §29-a, entitled "Suspension of Other Laws".

mortgage would not be time barred until May 1, 2021.

The many Executive Orders issued by Gov. Cuomo (a trained lawyer and duly admitted Attorney to practice law in the State of New York, by the way) used both words, "suspend" and "toll" in the same executive orders. For heavily litigated or distressed loans undergoing a restart, the difference between suspension or tolling the SOL could mean millions of dollars of loss for any given lender.

The controversy of whether the executive action was a suspension or a toll gained momentum when a trial-level Judge in New York wrote an article[6] for the New York Law Journal and argued that the Governor did not have the authority to toll the SOL and he merely suspended it.

The Appellate Division held that the Governor had the power to, not only suspend, but also to modify the laws through the emergency powers given to him by the Legislature. "Since the tolling of a time limitation contained in a statute constitutes a modification of the requirements of such statute within the meaning of Executive Law §29-a(2)(d), these [executive orders] continued to toll [the time limitations]." *Brash* at *7. a

6 See, "Executive Orders: A Suspension, Not a Toll of the SOL", By Hon. Thomas F. Whelan, New York Law Journal, Oct. 6, 2020

NY Appellate Division Outlines Standard for Lost Note Affidavit

BY DEBORAH M. GALLO, ESQ.
COMPLIANCE ATTORNEY, FRIEDMAN VARTOLO, LLP | DGALLO@FRIEDMANVARTOLO.COM

IN WELLS FARGO BANK, NA. v. Zolotnitsky, Supreme Court, Appellate Division, Second Department, New York, 6/2/2021, 2021 WL 2214014, 2021 NY Slip Op 03482, a mortgage brought an action seeking foreclosure of a residential mortgage and to reform the mortgage to correct the description. Mortgagor asserted varied affirmative defenses, including lack of standing. The mortgagee then assigned the mortgage. The Appellate Division held that the assignee failed to establish ownership of the promissory note and failed to establish that reformation of the mortgage to the correct legal description was warranted based on mutual mistake.

By assignment of mortgage dated October 9, 2015, Wells Fargo assigned the mortgage to Wilmington Savings Fund Society, FSB. In November 2016, Wilmington, successor in interest to Wells Fargo, moved for summary judgment on the complaint and asserted against defendant, to strike answer, reform mortgage, amend caption and correct legal description. A lost note affidavit was included alleging that the note had been "inadvertently lost, misplaced, or destroyed." Defendant moved to renew her opposition to the summary judgment, and plaintiff Wilmington moved to confirm oath and report and judgment. The Court entered the Judgment of foreclosure and sale and defendant appealed.

UCC 3-804 provides a method of recovery for instruments that are lost, destroyed, or stolen, and plaintiff is required to submit "due proof of ownership, the facts that prevent production of the note, and its terms. (*Deutsche Bank Natl. Trust Co. v. Anderson*, 161 A.D.3d 1043, 1044, 79 N.Y.S.3d 42, quoting UCC 3–804). Based upon same, the Court found that the affidavit "failed to establish when the note was acquired and failed to provide sufficient facts as to when the search for the note occupied, who conducted the search, and how or when it was lost.

Further, the Court the standard to correct the legal description of the premises. A party seeking reformation of a contract by reason of mistake must establish, with clear and convincing evidence, that the contract was executed under mutual mistake or a unilateral mistake induced by the other party's fraudulent misrepresentation" (*Yu Han Young v. Chiu*, 49 A.D.3d 535, 536, 853 N.Y.S.2d 575; see Chimart Assoc. v. Paul, 66 N.Y.2d 570, 573, 498 N.Y.S.2d 344, 489 N.E.2d 231; Gunther v. Vilceus, 142 A.D.3d 639, 640, 36 N.Y.S.3d 723.

Based upon the above, the Appellate Division held that the assignee failed to establish ownership of the promissory note and failed to establish that reformation of the mortgage to the correct legal description was warranted based on mutual mistake. Servicers should review transfer files for the content of the lost note affidavit. Historically, we have seen most lost note affidavits that do not have the level of detail needed to be successful with the Court.

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The New York Legislators Propose Bills That Will Overturn Engel Decision

BY DEBORAH M. GALLO, ESQ.

COMPLIANCE ATTORNEY, FRIEDMAN VARTOLO, LLP | DGALLO@FRIEDMANVARTOLO.COM

THE LEGISLATURE IN NEW YORK is clearly frustrated with the recent decision of the Court of Appeals in Freedom Mtge. Corp. v Engel, NY3d, 2021 NY Slip Op 01090 (2021). The Engel decision resolved a split between the First and Second Departments regarding whether a default letter clearly and unequivocally affirmatively accelerates a mortgage debt and provides much needed clarity on what conduct sufficiently accelerates a mortgage debt and revokes acceleration. Specifically, the Court found:

1. a default letter stating that the lender "will" accelerate the debt referred to a future event and therefore did not accelerate the debt;
2. the voluntary discontinuance of a foreclosure action (whether by motion or stipulation) within six years of acceleration, alone, revokes acceleration as a matter of law, unless the noteholder expressly states otherwise;
3. the reason for a noteholder's revocation is irrelevant, thereby expressly rejecting the concept that a noteholder's revocation of acceleration cannot be "pretextual" to merely avoid the expiration of the statute of limitations; and
4. a verified foreclosure complaint that accelerates the mortgage debt must clearly and accurately refer to the loan documents and debt at issue.

As a result of this decision, the Assembly and Senate of New York have both proposed legislation that would clarify and overturn the Engel decision. Assembly Bill 7737 is pending before the New York State Assembly. The Bill is the latest in a series of proposed legislation designed to limit a mortgagee plaintiff's ability to foreclose on debt that might otherwise be time barred.

Assembly Bill 7737 amends RPAPL 1301 to now state "If an action to collect any part of the mortgage debt is adjudicated to be barred by the applicable statute of limitations, any other action seeking to recover any part of the same mortgage debt shall also be barred by the statute of limitations." If passed, the Bill would prevent suits to recover on the note if the statute of limitations had expired on a mortgage foreclosure action and vice versa.

A7737 would also create an amended savings statute, which applies only to mortgage foreclosure matters, the new "CPLR 205-a." Under the new statute, foreclosure plaintiffs will only get the benefit of the savings statute **once** and dismissals for failure to enter default within a year under CPLR 3215(c), for failure to appear, for failure to submit an order, and for failure to comply with an order of the Court are now added to the list of dismissals explicitly exempt from protection under CPLR 205-a. Most recently another Assembly Bill 7922 has been proposed and mirrors the proposed Senate bill.

While some of these restrictions are certainly unwelcome, this Bill is preferable to its Senate counterpart, S5473B. While both bills include the above referenced changes, under the Assembly proposal, voluntary discontinuances **can** serve as a de-acceleration of the debt provided that the discontinuance is made within six years of the acceleration and provided that the discontinuance includes text which advises of the de-acceleration and explicitly notes that the defendant may resume making installment payments. By contrast, S5473B if enacted would limit the ability of a voluntary discontinuance to extend the statute of limitations to circumstances where the defendant explicitly consents to such extension.

While these bills have not exited committee or been approved by the legislature, we are highlighting them, even at this early stage, as their passage would fundamentally change foreclosure practice in New York. While it appears that some form of legislation will eventually pass that addresses and clarifies how the statute of limitations will be applied going forward, in its present form, A7737, while certainly not ideal, represents a preferable solution to its Senate counterpart. We will continue to monitor and advise on the status of this legislation.