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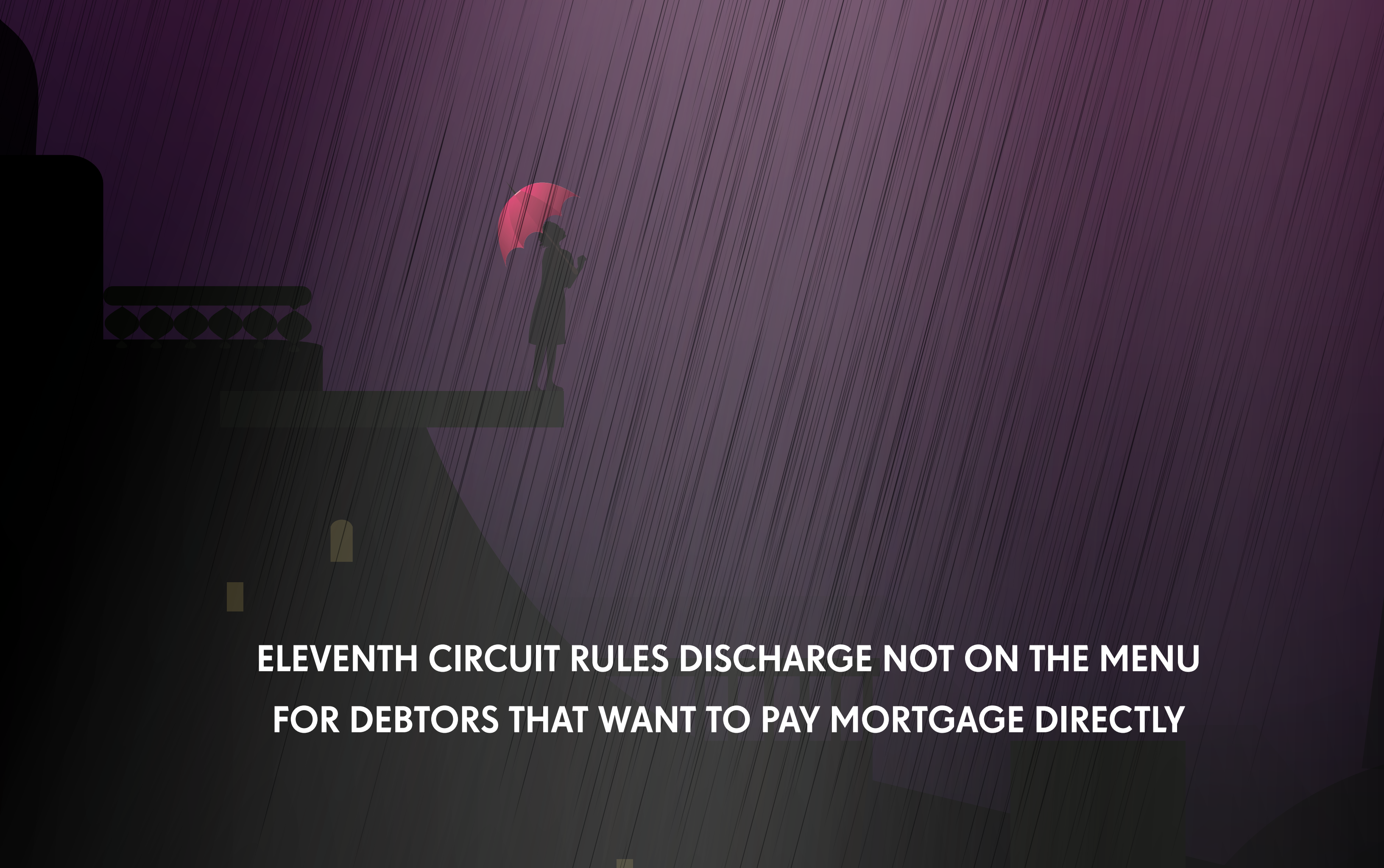
VOL. 6 ISSUE 1

WOULD YOU LIKE A DISCHARGE WITH THAT PLAN?



ELEVENTH CIRCUIT RULES DISCHARGE NOT ON THE MENU FOR DEBTORS THAT WANT TO PAY MORTGAGE DIRECTLY

Letter from the Editor

I AM PLEASED to bring you the first edition of the ALFN Angle for 2019. Not unlike our other publications, the ALFN Angle brings you the latest up to date information on legal issues that may have far reaching impacts in our industry. With this resource in hand, you can rest assured that ALFN continues to strive for excellence in education and providing our members the information they require to make informed business decisions.

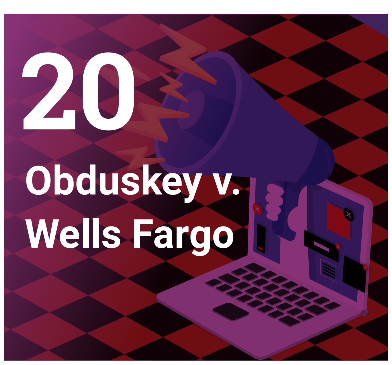
The cover feature of this issue brings an important bankruptcy update from the 11th Circuit Court of Appeals decision in Dukes v. Suncoast Credit Union. We will review new guidance that the Eleventh Circuit provided for mortgage creditors being paid through chapter 13 bankruptcy cases. We then shift to look at addressing the FDCPA and recent information on when a principal business purpose amounts to debt collection under the FDCPA. Our additional feature articles will provide insight on the CFPB's final rule adopting changes to Regulation P, and a review of the Obduskey v Wells Fargo case with the US Supreme Court agreeing to address the issue of whether a non-judicial foreclosure process and the act of conducting a trustee's sale qualify as "debt collection" under the FDCPA. We then conclude our features section with an update regarding the PTFA. Don't miss our State Snapshot contributions to wrap up this ANGLE issue, where we will address some important state specific updates in California, Ohio, Illinois and Maine.

Other than our publications, our educational programming is another of the many ways we seek to bring value to your membership commitment. This year we will continue to expand on our two Intersect training events in Dallas, TX, with Bankruptcy Intersect on March 26 at the Omni Mandalay Hotel and Foreclosure Intersect on November 13 at the new Westin Irving Convention Center. We are also thrilled to bring you our WILLPOWER Summit being held at the Ritz-Carlton Dallas on April 30-May 1. Finally, you won't want to miss our 17th Annual ANSWERS Conference, July 21-24 at the Hyatt Regency Lake Tahoe Resort. Finally, don't forget about our online educational offerings, which will feature several hot topic webinars throughout 2019.

I would like to thank each of you for your support and confidence in the ALFN throughout the past 17 years, and we look forward to adding continued membership value through our industry-leading programs and education that you have come to expect from the ALFN. Please take the time to reach out to us on how you would like to get more involved this year.

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

CONTENTS



MEMBER BRIEFS

STATE SNAPSHOT

MEMBER BRIEFS

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SAVE THE DATES

2019

MAR. 26
BANKRUPTCY INTERSECT

The Omni Mandalay
Irving, TX
* Registration Opens December 2018

APR. 30-MAY 1
WILLPOWER

The Ritz-Carlton Dallas
Dallas, TX
* Registration Opens February 2019

JUL. 21-24
ALFN ANSWERS

17th Annual Conference
Hyatt Regency Lake Tahoe
Resort, Spa & Casino
Incline Village, NV
* Registration Opens March 2019

NOV. 13
FORECLOSURE INTERSECT

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Irving, TX
November 13, 2019
* Registration Opens August 2019

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WOULD YOU LIKE A DISCHARGE WITH THAT PLAN?

ELEVENTH CIRCUIT RULES DISCHARGE NOT ON THE MENU FOR DEBTORS THAT WANT TO PAY MORTGAGE DIRECTLY

BY NEIL JONAS, ESQ., ASSOCIATE ATTORNEY
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On December 6, 2018, the Eleventh Circuit Court of Appeals decided the case of Dukes v. Suncoast Credit Union, a bankruptcy appeal from the Middle District of Florida. The Eleventh Circuit provided new guidance for mortgage creditors being paid through chapter 13 bankruptcy cases. Specifically, the Dukes case holds that although a discharge in Chapter 13 provides for a discharge of "all debts provided for by the plan," a plan that states that a mortgage loan will be paid outside the plan, does not "provide for" that mortgage claim and therefore, does not result in a discharge of the mortgage at the end of the chapter 13 case.

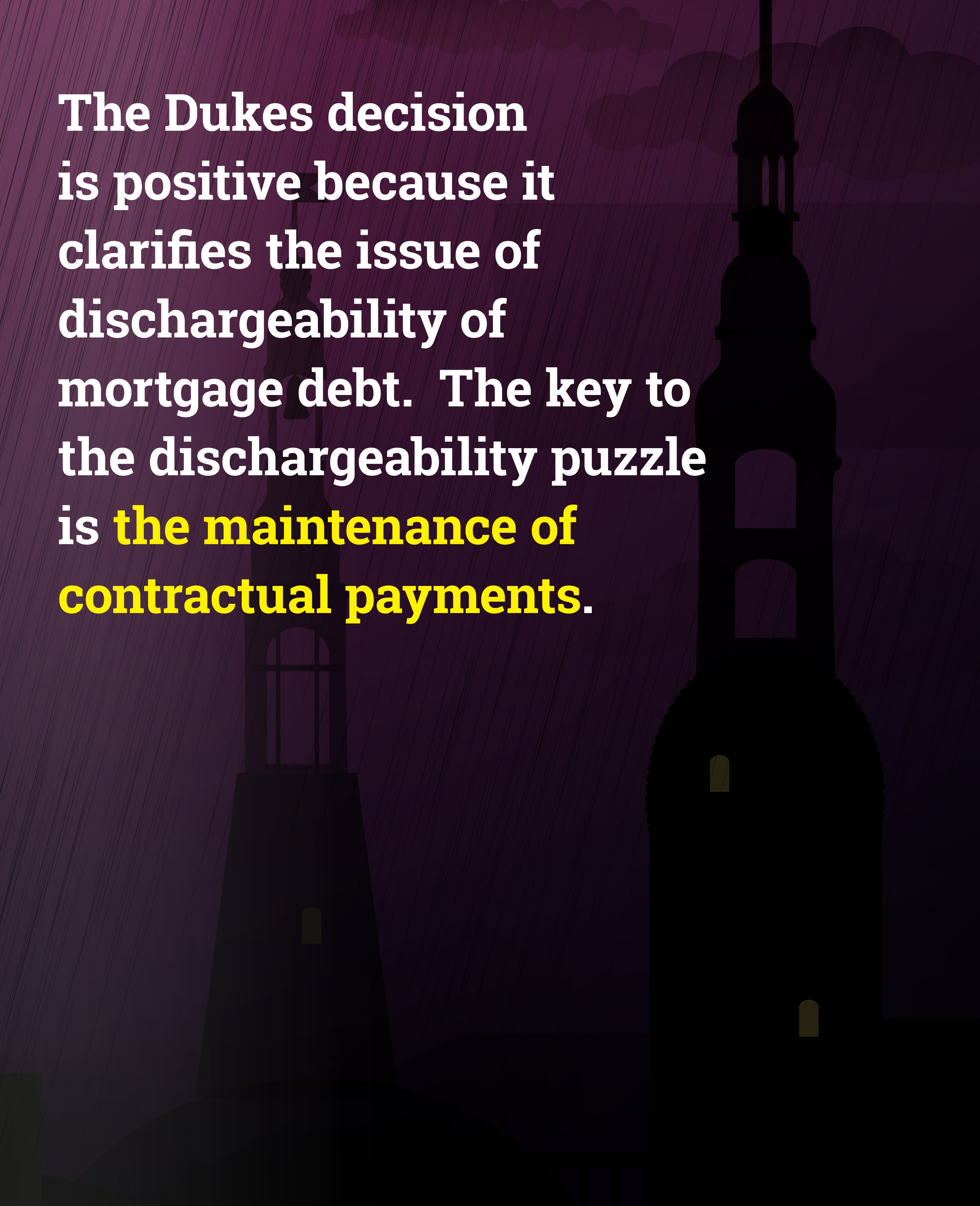
One of the goals of bankruptcy is to ensure debtors a "fresh start." See Moses v. CashCall, Inc., 781 F.3d 63 (4th Cir. 2015). Chapter 13 of the Bankruptcy Code is an option for individual consumer debtors with regular income. 11 U.S.C. § 109(g). Chapter 13 debtors are given the opportunity to adjust their debts through the filing of a plan which provides debtors many options in reorganizing their debts. See 11 U.S.C. §§ 1321-1322. Upon completion of the plan, the Bankruptcy Code provides that generally, "…the court shall grant the debtor a discharge of all debts provided for by the plan." 11 U.S.C. § 1328(a). This relief is, of course, subject to certain conditions, exceptions, and limitations. The clear language of § 1328(a) sets forth one such limitation, which is that the debt be "provided for by the plan." The Eleventh Circuit thoroughly chews this linguistic nugget in the Dukes case.

Upon filing Chapter 13 Bankruptcy in 2009, Dukes had two mortgage loans with Suncoast Schools Federal Credit Union. At the time of filing, she was current on payments on both mortgages. The Debtor's Chapter 13 Plan listed both Suncoast mortgage loans with the treatment as "paid directly to the Creditor." The Plan confirmed without any objections. About a year into the case, the Debtor stopped making payments to Suncoast. The Debtor did make all her Chapter 13 plan payments and she received a discharge in March 2012 and her case subsequently closed. After the entry of the discharge, Suncoast foreclosed on the delinquent second mortgage and also sought a personal judgment against the debtor for the balance due on the first mortgage. Thereafter, Suncoast moved to reopen the Debtor's bankruptcy case to seek a determination that the Debtor's personal liability on the first mortgage had NOT been discharged. Both the bankruptcy court and the district court, on appeal, found that the Debtor's personal liability on the mortgage loan was not discharged.

In analyzing the issue, the Eleventh Circuit states that the Debtor intended to and had the right to pay the mortgage loans directly to Suncoast. The Court specifically reviewed the discharge language of 11 U.S.C. § 1328(a) which provides that a Chapter 13 discharge discharges "all debts provided for by the plan." The Debtor argued that the first mortgage was discharged because the plan provided for it by stating that it would be paid outside the plan. The Eleventh Circuit disagreed with this argument finding that the debtor "chose not to handle the Credit Union's Debt through her bankruptcy." The court relied upon the case of <u>Rake v. Wade</u>, 508 U.S. 464 (1993), which interpreted the same phrase in the context of § 1325(a)(5). In <u>Rake v. Wade</u>, the Supreme Court defined "provided for" as meaning "'to make a provision for' or to 'stipulate to' something in a plan." Rake also distinguished between claims for "underlying debt and arrearages" holding that arrearages to be cured under a chapter 13 plan are "provided for" because they are to be paid off within the life of the plan pursuant to certain repayment schedules. The Eleventh Circuit extracts from Rake that the high court "suggests that claims wholly governed by the original loan instruments—rather than the terms of the bankruptcy plan—are not 'provided for by the plan' in the sense Chapter 13 contemplates." Through this reasoning, claims that are provided to be paid directly to the creditor are not "provided for" by the plan.

The Eleventh Circuit also examined its interpretation of "provided for" in the context of the Chapter 13 process as a whole. The Court noted that a Chapter 13 plan cannot unilaterally deprive secured creditors of their rights and that to modify a secured creditor's claim, a plan must either (1) be accepted by the creditor, (2) provide that the secured creditor will receive the full value of the secured claim and that the creditor retain its security interest; or (3) surrender the collateral. The Court also cited § 1322(b)(2) which prohibits a plan from modifying "the rights of holders of . . . a claim secured only by a security interest in real property that is the debtor's principal residence." A debtor may use a plan to cure an arrearage on a home loan without violating this provision. § 1322(b)(5). Such a plan treatment requires the debtor to maintain the ongoing contractual payments on the mortgage loan in addition to paying an amount necessary to cure the arrearage. At the conclusion of

The Eleventh Circuit extracts from Rake that the high court "suggests that claims wholly governed by the original loan instruments—rather than the terms of the bankruptcy plan—are not 'provided for by the plan' in the sense Chapter 13 contemplates."



The Dukes decision is positive because it clarifies the issue of dischargeability of mortgage debt. The key to the dischargeability puzzle is the maintenance of contractual payments.

such a plan, the loan would be contractually current, and the debtor would revert to paying only the ongoing contractual payments. The Code explicitly excepts long term debts cured through the plan from discharge. § 1328(a)(1).

The Court found that discharging long term mortgage debt would constitute an impermissible modification of a mortgage creditor's rights. As noted above, the Code clearly prohibits a plan from modifying "the rights of holders of . . . a claim secured only by a security interest in real property that is the debtor's principal residence." In so holding, the Court rejected the Debtor's argument that the Credit Union's failure to object to confirmation constituted consent to a discharge. In reviewing this argument, the Court points out that nothing in the plan referenced any discharge of the debt, shortening of the maturity date of the loan or other modification of the plan. The Court further held that the Debtor must "pay the price if there is any ambiguity" in her plan's terms. In other words, if the Debtor construed the plan to discharge this debt, the plan should have said as much.

The Court similarly rejected the Debtor's argument that discharge of a debt was not a modification of the creditor's rights. Removal of the right to pursue the balance owed in personam is a modification of the Creditor's rights, because it was a right provided for under the original loan terms that the creditor would no longer be able to enforce.

The Dukes decision is positive because it clarifies the issue of dischargeability of mortgage debt. The key to the dischargeability puzzle is the maintenance of contractual payments. In a cure scenario, the debtor is still obliged to pay the ongoing contractual payments on long term debts. Similarly, in the pay direct scenario, the terms of the contract govern the ongoing contractual payment amounts. In either scenario, the ongoing payments are governed by the terms of the contract, not by the plan. Thus, the Courts reading of "provided for" as excluding mortgage loans paid directly harmonizes with the exception to discharge under § 1328(a)(1).

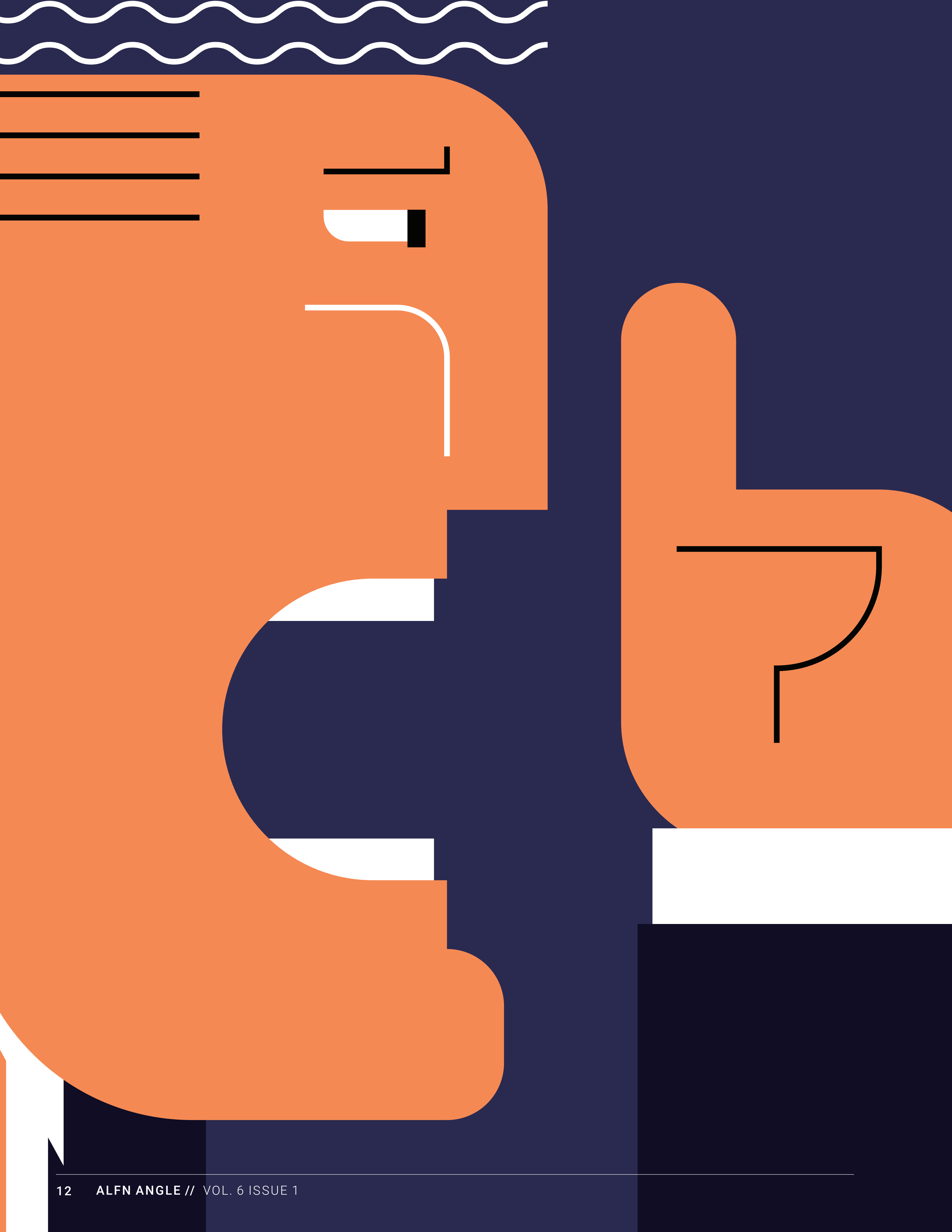
The most obvious takeaway from the Dukes opinion is that it preserves the rights of mortgage creditors to enforce the terms of the promissory note against a debtor after discharge. In this way, the ruling ensures creditors the benefit of their original bargain struck in the mortgage loan process. The ruling may come as a shock to bankruptcy debtors who think that completing chapter 13 absolved them of certain mortgage debts. However, the debtor's expectation of a discharge may have been misplaced. As the Eleventh Circuit noted, it is paradoxical to expect a plan that essentially states nothing about a debtor's mortgage payment to discharge that mortgage upon completion. The Court analogized this expectation as essentially wanting something (i.e., the discharge) for nothing (i.e., no change in treatment under the plan).

The Dukes decision also articulates good language for creditors dealing with ambiguous plan terms. First, Dukes clearly states that plan language should be construed against the Debtor as draftsman. The Court cites Fawcett v. United States (In re Fawcett), 758 F.2d 588, 591 (11th Cir. 1985), stating: "[I]t is the debtor's duty to put the creditor on notice by specifically detailing [the plan's treatment of a creditor's claim]. Failing this, the debtor as draftsman of the plan has to pay the price if there is any ambiguity about the meaning of the terms of the plan."

In addition, Dukes indicates that ambiguous plan language should be harmonized, as much as possible, with the core principals of 1322:

> the most obvious conclusion regarding the Credit Union's mortgage is that it was left unaltered by Debtor's bankruptcy. Because the plan did not propose any modification—likely because Debtor could not do so under § 1322(b)(2) 2)—or stipulate to any terms about the Credit Union's mortgage, the mortgage must, by default, have remained governed by the original loan instruments, and thus was not "provided for" by the plan.

In other words, when a plan is silent about a term, a mortgage creditor may reasonably conclude that their claim is not being modified because modification is not permitted. Creditors should not take this to mean that ambiguous plan terms should not be addressed prior to confirmation. Rather, this language is backup in the event that a creditor ends up in litigation even though it reasonably relied upon the antimodification clause to protect its rights.



The Two Ways

When Does a Principal Business Purpose Amount to Debt Collection Under The FDCPA?

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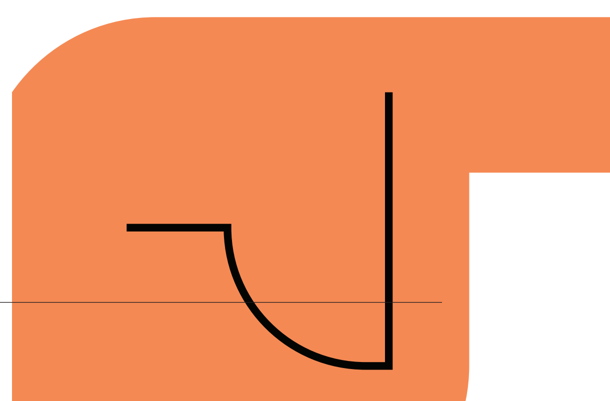
THE FAIR DEBT Collection Practices Act prohibits debt collectors from engaging in abusive debt collection practices. To be liable under the Act, however, the defendant must be a debt collector. And there are two ways that a defendant can qualify as a debt collector under the Act — the defendant's "principal [business] purpose" is debt collection or the defendant regularly attempts to collect debts "owed or due another." 15 U.S.C. § 1692.

Last summer, the Supreme Court examined what it means to regularly collect a debt "owed or due another," holding that defendants who seek to collect debts that they own (even if the debt is in default when purchased) are not subject to liability under the Act. See *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718 (2017). The Court declined to discuss when a defendant's principal business purpose amounts to debt collection making it subject to the Act.

That issue, however, recently confronted the Third Circuit, which had to decide how to apply the "principal purpose" definition of debt collector – the first federal court of appeals to do so since the Supreme Court's ruling last summer in Henson.

The Third Circuit addressed the issue in *Tepper v. Amos Fin.*, LLC, 898 F.3d 364, 368 (3d Cir. 2018). There, the plaintiffs (the Teppers) received a home equity loan from NOVA Bank. The FDIC closed NOVA Bank, took over as receiver, and sold the Teppers' defaulted loan to Amos Financial. After purchasing the Teppers' loan, Amos attempted to collect the debt and ultimately foreclosed. The Teppers then sued, claiming that Amos violated the Act by attempting to collect more than they owed and making false representations about the foreclosure sale, among other things. Amos, relying on the Supreme Court's decision in Henson, argued that it was not a debt collector because it owned the Teppers' loan.



The district court rejected the argument, holding that even though Amos was collecting a debt it owned, Amos was still a debt collector because its "principal [business] purpose" was debt collection. Amos admitted to the district court that it was "[n]ot a financial institution or lender, [and] its sole business [wa]s purchasing debts entered into by third parties and attempting to collect them." Id. at 369. After a one-day bench trial, the district court found that Amos had violated the Act and awarded the Teppers statutory damages and attorneys' fees.

Amos appealed, arguing again that, under the Supreme Court's decision in *Henson*, it was not a debt collector subject to the Act because it owned the Teppers' loan. The Third Circuit rejected Amos's argument, reasoning that because Amos's sole business was collecting debts that it had purchased, it was a debt collector. And, said the Third Circuit, "[a]sking if Amos is a debt collector is thus akin to asking if Popeye is a sailor. He's no cowboy." Id. at 370-71.

According to the Third Circuit, "an entity whose principal purpose of business is the collection of any debts is a debt collector regardless whether the entity owns the debts it collects." *Id.* (emphasis added). In other words, simply owning the debt will not protect a defendant from liability under the Act if the defendant's principal business purpose is debt collection.

So, if a plaintiff can sufficiently plead in her complaint that a defendant's principal business purpose is debt collection, whether that is actually so is a fact question that will need to be fleshed out in discovery. See, *e.g., Hordge v. First Nat'l Collection Bureau, Inc.*, No. 4:15-CV-1695, 2018 WL 3741979, at *5 (S.D. Tex. Aug. 7, 2018) (holding that whether the defendant's principal purpose is debt collection is a "disputed fact question" notwithstanding that the defendant argued that its business was "holding debts, not collecting debts"); Yarid v. Ocwen Loan Serv., LLC, No. 3:17-CV-484, 2018 WL 3631883, at *5 (E.D. Va. July 31, 2018) ("[D]eciding whether an entity qualifies as a debt collector involves a fact-intensive process.").

As a result, consumer plaintiffs are likely to seize on the Third Circuit's reasoning in Tepper to avoid a summary disposal of their cases when the defendant owns the subject debt. And courts will likely soon be faced with having to decide exactly when some debt collection by a defendant is enough to qualify as a defendant's principal purpose. Indeed, the Third Circuit already has before it a case raising this very issue where the plaintiff argued at oral argument that the defendant's principal business purpose is debt collection because at least 50 percent of its business involves debt collection. *See Barbato v. Greystone Alliance, LLC*, 2017 WL 5496047, No. 3:13-2748 (M.D. Penn. Nov. 16, 2017) (holding that the defendant is a debt collector under the "principal purpose" definition because it purchased charged-off receivables and 90 – 95 percent of its accounts were such receivables).

> ***Consumer plaintiffs are likely to seize on the Third Circuit's reasoning in Tepper to avoid a summary disposal of their cases when the defendant owns the subject debt. And courts will likely soon be faced with having to decide exactly when some debt collection by a defendant is enough to qualify as a defendant's principal purpose compliance with the law. Failing to be in compliance CAN BE COSTLY.***

PRIVACY REQUIREMENTS **UNLOCKED**

CFPB'S NEW FINAL RULE COULD HAVE BIG IMPACT ON FINANCIAL INSTITUTIONS

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The Consumer Financial Protection Bureau (CFPB) has issued its final rule adopting changes to Regulation P, which governs the requirements for financial institutions to issue privacy notices to its customers. The final rule implements new timing requirements for sending annual privacy notices pertaining to financial institutions who no longer qualify for the exception and eliminates the "alternative delivery" option for annual privacy notices. The most significant impact of the final rule is the creation of an exception which permits financial institutions to avoid sending annual privacy notices to its customers under certain circumstances.

The final rule will have the biggest impact on financial institutions who only share non-public personal information with non-affiliated third parties and do not have an obligation to provide an opt-out. However, with recent amendments to the Gramm Leach Bliley Act (GLBA) and Regulation P regarding privacy notices, all financial institutions should evaluate their current privacy policies and procedures. The final rule became effective on September 17, 2018.

CREATION OF ANNUAL PRIVACY NOTICE EXCEPTION

The changes to Regulation P are intended to align the rule with amendments made by Congress to the Gramm Leach Bliley Act (GLBA) in 2015. Under Regulation P, financial institutions are required to send a privacy notice to all customers every 12 months without exception. This includes information such as whether the financial institution shares consumer information with nonaffiliated third parties, how the financial institution protects nonpublic personal information obtained from customers, and whether the customer has the right to opt out of the sharing of that information.

The final rule now creates an exception to this rule and exempts financial institutions from this requirement if it satisfies two conditions: (1) the financial institution only shares nonpublic personal information with nonaffiliated third parties where there is no obligation to offer an opt-out and (2) the financial institution must not have changed its “policies and procedures with regard to disclosing nonpublic personal information” from the policies and procedures outlined in the most recent privacy notice sent to the consumer. Under the GLBA, there is no requirement to provide an opt-out notice to customers where personal information is shared with (a) service providers performing functions on the company's behalf; (b) non-affiliated third parties who perform joint marketing on your behalf; or (c) if the disclosure is necessary to "effect, administer, or enforce a transaction." This exception only applies to annual privacy notices and does not impact current requirements regarding initial privacy notices or amended privacy notices.

AMENDMENT TO TIMING REQUIREMENTS

In addition to creating the annual privacy notice exception, the final rule also adopted new timing requirements for issuing annual privacy notices in the event that a financial institution has made changes to its privacy policies and procedures and no longer qualifies for the exception. The timing requirements are rather nuanced but essentially require a financial institution to issue an annual privacy notice either: (1) before implementing the changes in the policy or practice which trigger the obligation to send a revised privacy notice or (2) within 100 days after adopting a policy or practice that eliminates the financial institution's notice exception but the changes did not trigger the obligation to send a revised privacy notice.

REMOVAL OF "ALTERNATIVE DELIVERY" METHOD

Finally, as part of its changes to Regulation P, the CFPB eliminated the "alternative delivery" method for annual privacy notices. Under the "alternative delivery" method, financial institutions were permitted to satisfy the annual privacy notice requirement in certain circumstances by posting a copy of the annual notice on its website. However, the CFPB rationalized that many of the requirements permitting a financial institution to use the "alternative delivery" method were the same as the requirements for a financial institution to qualify for the new annual privacy notice exception and, therefore, the method was now irrelevant.

As regulators continue to amend privacy notice requirements, it is imperative that financial institutions monitor their privacy practices to remain in compliance.

The final rule will have the biggest impact on financial institutions who only share non-public personal information with non-affiliated third parties and do not have an obligation to provide an opt-out.

OBDUSKEY v. WELLS FARGO

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Recently, in *Obduskey v. Wells Fargo*, the U.S. Supreme Court agreed to address the issue of whether the non-judicial foreclosure process and the act of conducting a trustee's sale qualify as "debt collection" under the Fair Debt Collection Practices Act ("FDCPA" or the "Act"). With the oral argument set for January 7, 2019, everyone involved anxiously awaits the Court's ruling, since the finding that the non-judicial foreclosure process – consisting of the issuance, recording, posting, and mailing of foreclosure notices and the conducting of trustee's sale – amounts to debt collection may have a drastic impact on the mortgage industry, as well as on the State law.

Before addressing the potential impact of an adverse decision on the industry, we should understand the facts of the case, discuss why the Supreme Court agreed to review the Tenth Circuit's decision, and analyze the likelihood of the adverse ruling by the Supreme Court.

Background. In *Oduskey,* having defaulted on his mortgage loan obligation, the borrower sued his loan servicer, Wells Fargo Bank, N.A., and the law firm of McCarthy and Holthus, LLP ("McCarthy") – who was retained by Wells Fargo to conduct the non-judicial foreclosure process – for, among other things, violation of the FDCPA. *Obduskey v. Wells Fargo*, 879 F.3d 1216, 1218-19 (10th Cir.) As relevant herein, the Tenth Circuit found that McCarthy did not violate the FDCPA because the Act did not apply to non-judicial foreclosures. Id. at 1222-23. The Supreme Court granted Obduskey's Petition for writ of certiorari (138 S.Ct. 2710) in order to finally address the issue, which has thus far split the circuits, resulting in two different legal interpretations of the issue. Compare *Vien-Phuong Thi Ho v. ReconTrust Co., NA,* 858 F.3d 568 (9th Cir., 2017) ("Ho") [finding that non-judicial foreclosure proceedings are not covered under the FDCPA] with Wilson v. Draper & Goldberg, P.L.L.C., 443 F.3d 373 (4th Cir. 2006); Kaltenbach v. Richards, 464 F.3d 524 (5th Cir. 2006); *Glazer v. Chase* Home *Fin. LLC*, 704 F.3d 453 (6th Cir. 2013) [finding that the process is covered by the Act].

Language of the FDCPA supports finding that non-judicial foreclosure does not constitute debt collection. Analyzing the purpose of the FDCPA and the Act's pertinent language suggests that the Supreme Court should uphold the Tenth Circuit's decision.

The Act was enacted in 1977 to eliminate abusive debt collection practices by unscrupulous debt collectors while, at the same time, protecting ethical debt collectors from unnecessary restrictions. Senate Report No. 95-382, p.p. *1-2 (Aug. 2, 1977) ("Report"); 15 U.S.C. § 1692(a) and (e).[1] The Act prohibits "'abusive, deceptive, and unfair debt collection practices,' such as late-night phone calls or falsely representing to a consumer the amount of debt owed." Obduskey, 879 F.3d 1216, 1219 (10th Cir.) [citing 15 U.S.C. §§ 1692(a), 1692c, and 1692e]. The Congress found the legislation was necessary because the existing laws and procedures were inadequate to protect individual consumers from the above-referenced practices. 15 U.S.C. § 1692(b) and (c); Report, p.p. 2-3. These concerns do not apply to non-judicial foreclosure proceedings, as the process does not involve the type of abusive debt collection practices that the Congress sought to curtail. Unlike the above-articulated collection practices, non-judicial foreclosure notices are merely informational in nature, do not demand payment from the consumer borrowers, and are not the type of harassing or abusive communication the FDCPA was designed to protect against. Indeed, they "were designed to protect the debtor." Ho, at 574 [emphasis in original]. While the issuance of non-judicial foreclosure notices may, of course, induce the defaulted consumer borrower to either cure the deficiency or even pay off the loan completely, that possibility, in and of itself, does not transform a regular non-judicial foreclosure process into "debt collection": "[t]he prospect of having property repossessed may, of course, be an inducement to pay off a debt. But that inducement exists by virtue of the lien, regardless of whether foreclosure proceedings actually commence. The fear of having your car impounded may induce you to pay off a stack of accumulated parking tickets, but that doesn't make the guy with the tow truck a debt collector." *Ho*, at 572.

In addition, the Congress's reservations concerning inadequacy of the state-specific laws are unfounded.[2] Indeed, a study of foreclosure trends per-

[1] The Act was enacted Congress reasoned that the legislation was necessary because the abusive debt collection practices – such as "[d]isruptive dinnertime calls, downright deceit, and more", including "obscene or profane language, threats of violence, ... misrepresentation of a consumer's legal rights, disclosing a consumer's personal affairs to friends, neighbors, or an employer, obtaining information about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process..." – all contributed to "personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." Henson v. Santander Consumer USA Inc., 137 S.Ct. 1718, 1720, 198 L.Ed.2d (2017); Senate Report No. 95-382, supra, p.2; 15 U.S.C. § 1692(a).

formed by RealtyTrac specified that out of the top 5 states[3] with the highest foreclosure rates, the top 4 were either judicial or quasi-judicial foreclosure states, which finding is supported by a study from Bankrate (finding that 9 out of top 10 states for foreclosures were judicial foreclosure states),[4] and Experian (finding that 7 out of 10 states with lowest foreclosure rate are non-judicial foreclosure states).[5]

On its face, the Act does not apply to non-judicial foreclosures. The Act applies only to "debt collectors" who "collect" "debt." *Obduskey*, at 1219. To come within the provisions of the FDCPA, all three prongs must be satisfied. The non-judicial foreclosure activity does not fall squarely within these definitions. First and foremost, the issue of whether mortgage indebtedness falls squarely within the Act's definition of "debt" is not a foregone conclusion. For instance, in Section 1692a(6)(F), Congress excluded from the definition of "debt collector" persons who are foreclosing (whether judicially or non-judicially) on mortgage debt that was not in default when they obtained it, whether it be for purposes of servicing the loan or its collection. *Henson v. Santander Consumer USA Inc.*, 137 S.Ct. 1718, 1723-24 (2017) 1723-24. As a result, a non-judicial foreclosure of a previously performing loan would not fall within the purview of the Act. Moreover, in limiting Section 1692i's venue provision to judicial foreclosures only (*Obduskey*, at 1222 – recognizing that the term "action" applies to a judicial proceeding), Congress – while being well aware of the fact that more than half of the states have laws governing non-judicial foreclosures – appears to have made a conscious decision to exempt or otherwise exclude the non-judicial foreclosure process from the Act's provisions.

Second, non-judicial foreclosure activities do not qualify as "debt collection." While the Act did not define the term "debt collection", case law interpreted it to mean the "activity undertaken for the general purpose of inducing payment." *McLaughlin v. Phelan Hallinan & Schmieg, LLP*, 756 F.3d 240, 245 (3d Cir. 2014). There is a caveat to this definition, however. When reviewing Section 1692a(5)'s definition of "debt", it stands out that Congress has elected to limit it to an "obligation … of a consumer to pay

Analyzing the purpose of the FDCPA and the Act's pertinent language suggests that the Supreme Court should uphold the Tenth Circuit's decision

2 See, e.g., Yvanova v. New Century Mortg. Corp., 62 Cal.4th 919, 926-27, 365 P.3d 845 (2016) [explaining that "[t]he nonjudicial foreclosure system is designed to provide the lender-beneficiary with an inexpensive and efficient remedy against a defaulting borrower, while protecting the borrower from wrongful loss of the property"]; U.S. Bank Nat. Ass'n v. Castro, 131 Haw. 28, 39, 313 P.3d 717 (2013) [explaining that "the nonjudicial foreclosure process should protect the debtor from a wrongful loss of property"].

3 https://www.realtytrac.com/statsandtrends/foreclosuretrends/ (accessed on Dec. 3, 2018).

4 https://www.bankrate.com/finance/real-estate/top-10-states-for-foreclosure-1.aspx#slide=1., Claes Bell, CFA (Oct. 23, 2017).

5 https://www.experian.com/blogs/ask-experian/do-you-live-in-one-of-the-10-states-with-the-lowest-foreclosure-rates-in-the-us/, Brian O'Connell (May 14, 2018).

If the Supreme Court agrees with Mr. Obduskey, finding that the non-judicial foreclosure process falls within the provisions of the Act, that ruling will have drastic effect on State laws and the mortgage industry. Such ruling would interfere with State foreclosure laws, requiring States to re-write their foreclosure statutes.

money", which limitation is significant. Based on this limitation, in order for the activity to fall within the definition of "debt collection", it must be aimed or directed at collecting money from the consumer and not from any other person. *Ho*, at 572 ["debt collection" necessarily involves collection of money from the consumer, as "debt" is "synonymous with 'money'." Id. at 571]; *Molina* v. F.D.I.C., 870 F.Supp.2d 123, 133 (D.D.C. 2012), aff'd in part sub nom. *Molina v. Ocwen Loan Servicing,* 545 F.App'x 1 (D.C. Cir. 2013) [holding that the plaintiff failed to state a claim for violation of FDCPA where he failed to allege that the defendant attempted to collect money from him].

The non-judicial foreclosure activity does not involve collection of money from the consumer. The Ninth Circuit, which is the first Circuit that has thus far recognized that the "debt collection" is limited to activity designed to induce payment from the consumer (and construed this limitation in the context of a non-judicial foreclosure), explained that, while different courts have come to different conclusions regarding the purpose of a non-judicial foreclosure sale,[6] the undeniable effect of the non-judicial foreclosure sale is collection of money from the purchaser of the property and not from the delinquent consumer/borrower. *Ho*, at 572. In *Obduskey*, the Tenth Circuit agreed with the Ninth Circuit's reasoning, explaining that, unlike judicial foreclosure, which permits recovery of deficiency judgments from the defaulted borrowers, non-judicial foreclosure activity does not provide for recovery of such deficiency. *Obduskey*, at 1221-22 ["non-judicial foreclosure proceeding … only allows 'the trustee to obtain proceeds from the sale of the foreclosed property, and no more.'"]; see also, Ho, at 571 [under California law, non-judicial foreclosure sale extinguishes the entire debt and the borrower is not subjected to a deficiency judgment].

Third and finally, the provisions of 15 U.S.C. § 1692f(6) do not in any way alter the conclusion reached in *Ho* and *Obduskey*. While the Circuits disagree as to whether the non-judicial foreclosure process and the entities involved in it are subject to the provisions of Section 1692(f)(6),[7] that divergence does not affect the determination of the underlying issue of whether non-judicial fore-

[6] See, Ho, at 572 [citing to Burnett v. Mortg. Elec. Registration Sys., Inc., 706 F.3d 1231, 1239 (10th Cir. 2013) and Alaska Tr., LLC v. Ambridge, 372 P.3d 207, 228 (Alaska 2016) (Winfree, J., dissenting) for the proposition that non-judicial foreclosure does not involve collection of money but merely sale or real estate and Glazer v. Chase Home Fin. LLC, 704 F.3d 453, 463 (6th Cir. 2013) for the proposition that "the ultimate purpose of foreclosure is the payment of money."]

[7] See, e.g., Obduskey, at 1221, fn. 4 [holding that non-judicial foreclosure actions do not fall within the provisions of Section 1692f(6)]; and Ho, at 572-73 [finding that a foreclosure trustee falls under the definition of "debt collector" under the provisions of Section 1692f(6).]

closure activities amount to "debt collection." Even if the provisions of Section 1692f(6) were applicable to the non-judicial foreclosure process, they would only impose limits on the activities prohibited thereunder, *i.e.*, commencing or threatening the non-judicial foreclosure "to effect dispossession... of property if - (A) there is no present right to possession of the property claimed as collateral through an enforceable security interest; (B) there is no present intention to take possession of the property; or (C) the property is exempt by law from such dispossession or disablement." *Ho*, at 573; 15 U.S.C. § 1692f(6). They have no impact on the general classification of the non-judicial foreclosure activity as "debt collection."

The potential impact of an adverse ruling on the mortgage industry and State laws. If the Supreme Court agrees with Mr. Obduskey, finding that the non-judicial foreclosure process falls within the provisions of the Act, that ruling will have drastic effect on State laws and the mortgage industry. Such ruling would interfere with State foreclosure laws, requiring States to re-write their foreclosure statutes.

For example, 15 U.S.C. § 1692g, requires that the initial communication between a debt collector and a consumer (or subsequent communication made within five days thereafter) include notice of the consumer's right to request the debt collector to obtain validation of the debt. The form Notice of Default currently prescribed by California *Civil Code* § 2924c, as well as the additional "Summary of Key Information" now required by California Civil Code § 2923.3, both refer the consumer directly to the trust deed beneficiary or loan servicer. The Notice of Default forms, which must be mailed to the consumer at the inception of the foreclosure, and which would constitute the initial communication to the consumer, could be attacked in many respects as "overshadowing" the verification notice, which is a violation of FDCPA section 1692g.

15 U.S.C. § 1692g also requires that if the consumer contacts the debt collector, requesting verification of the debt, all collection activities must cease until such verification is provided. However, during the thirty day period following the recording of the Notice of Default, trustees are required under California Civil Code § 2924b(b)(1) and 2924b(c)(1) to make two separate mailings. The first mailing must occur within ten business days to the trustor and to all parties having previously recorded requests for copies of that document. The second mailing must occur within a month following recordation of the Notice of Default, and is required to be sent to the successor in interest to the trustor and to the beneficiaries of junior trust deeds among other parties. Should a notice of dispute be received during that initial thirty day period, the trustee would be prevented from complying with the foreclosure statute's requirements. The validity of the foreclosure would thus be called into question, requiring the entire process to be started anew, including the purchase of a new title report (called the "trustee's sale guaranty") and new recording and mailing expenses, with no guidance as to who would be responsible to pay these expenses.

15 U.S.C. § 1692c(b) generally prohibits a debt collector from communicating with third parties concerning the subject debt. Yet, the trustee is required by California statute to record notices in the public records, mail them to junior lienholders and others, and finally to post them on the property and publish them in the newspaper. These third party communications are vital to advertise the foreclosure, in part for the benefit of the consumer, as well as to provide a warning, consistent with the requirements of due process, to those whose junior liens would be extinguished by the foreclosure. All of these communications would become illegal if the FDCPA were applied to non-judicial foreclosures in California.[8] a

[8] States other than California have much more stringent foreclosure statutes, which would also run afoul of the FDCPA. For instance, Washington's RCW 61.24.163 set up a foreclosure mediation program for defaulted borrowers, following a referral by a housing counselor or an attorney. Similarly, Oregon's ORS 86.726 requires the parties to a non-judicial foreclosure to participate in a resolution conference.

REVIEW BEFORE EVICTION

THE PTFA – BACK FROM THE DEAD, WITH SOME FAMILIAR ISSUES

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WITH THE RETURN OF THE PTFA, or Protecting Tenants at Foreclosure Act, mortgage servicers and law firms who are looking to take possession of foreclosed properties are experiencing a return of some familiar issues tied to interpreting the PTFA that were not ever definitively addressed in the past. While the PTFA was basically in effect for around 6 years, some of the issues with the interpretation of the statute were never adequately addressed by courts in many jurisdictions as not many cases were ever fully litigated. The return of the PTFA protections for bona fide tenants means the return of some of these unresolved issues. Some awareness may help mortgage servicers and their law firms plan for and at least have a blueprint to interpret and litigate some of the potential pitfalls dealing with eviction actions by looking at a few areas of the PTFA that could be possible traps.

The PTFA was initially introduced in 2009 as part of the Helping Families Save Their Home Act of 2009. The idea was to protect tenants with valid leases from being evicted after a foreclosure of properties owned by landlords, when often times the tenants had no notice or knowledge that the properties were being foreclosed. Compare that to the situation of a former owner, who receives notice of the foreclosure based on either notice requirements set forth in the mortgage, or through notice requirements in state statutes. The requirement of notice gives the former owner both time and opportunity to either make arrangements to vacate the property, or at the least plan ahead and present a defense to either the foreclosure or the eviction actions. The additional protections granted by the PTFA allow additional time and notice to unsuspecting tenants so that they are not quickly locked out of a property where they are current on rent and occupying the property under a valid lease.

The PTFA initially was set to sunset in 2012, but through various extensions, the law lasted until December 31, 2014. A few states adopted their own version of the PTFA and kept those tenant rights alive, but many states did not. After the initial sunset date of January 1, 2015, many tenants were once again at the mercy of state eviction laws, which often offered little notice or time to those who were, for a brief period, partially protected from being thrown out of their home on short notice. On May 24, 2018, the PTFA was resurrected and also made permanent law. The return of the protections means that once again tenants are granted federal protection in specific cases of post-foreclosure evictions.

The specifics of the PTFA remain unchanged from the enacted version of 2009. *Bona fide* tenants under the PTFA are allowed either a 90-day notice to vacate, or allowed to stay in the property until the end of their valid lease period, whichever is longer. In the case of a month-to-month lease, the 90 day notice applies. To qualify as a "*bona fide*" tenant under the PTFA:

1. The tenant cannot be the mortgagor, or the child, spouse, or parent of the mortgagor (the language of the Act is specific, and does not extend to those considered immediate family members).

2. The valid lease must be the result of an "arms-length transaction." (an arms-length transaction requires the two parties that enter into the agreement act independently of each other, and do not have a relationship with each other).

3. The tenant must be paying rent which is not substantially less than the fair market value for the property (this requirement involves an evaluation of the rent amount with comparable properties).

While the requirements are the same as the PTFA passed in 2009, many states have not addressed the specifics of these requirements, and therefore there are still some areas that mortgage servicers and law firms must pay close attention to before proceeding with any eviction action. By looking at some of the older decisions that courts have made regarding the initial PTFA, we can start discussions on how to again prepare to proceed with evictions with the return of the resurrected law.

One area that has received discussion has been the requirement that to be a valid lease, the lease must have been signed as a result of an "arms-length transaction." As there is not a definitive definition of an "arms-length transaction" included in the PTFA, a review of the language and specifics of a lease are required in order to decide if the tenant should be afforded PTFA protections. One court found that tenant was not a *bona fide* tenant based on their lease, when the tenant had entered into a new 16 month lease (changed from a month-to-month lease) immediately after the landlord discovered that a foreclosure action had started. On appeal, the court of court affirmed the lower court's finding that the terms of the lease and the timing of the new lease violated the "arm's-length transaction" requirement of the PTFA due to the fact that the new deal was so different and lengthy compared to the original terms.[1] Another case that was affirmed on appeal found that leases with excessive terms (a three-year lease and a five-year lease) violated the arm's length transaction requirement of the PTFA, and therefore the tenants were not protected under the PTFA.[2]

Another legal issue pertaining to the PTFA that has not been adequately addressed by most jurisdictions is a determination of who has the burden of proof for PTFA applicability. Some courts have found that the burden of proof is on the successor in interest to show that the tenant is not a *bona fide* tenant, often stating that there is nothing in the language of the PTFA that places that burden on the tenant, and that placing the burden on the successor in interest is not unduly burdensome.[3] At least one court implied that while the burden may be on the successor in interest to show that the tenant is not *bona fide* if the tenant failed to answer the eviction lawsuit or appear in court, they may have waived their PTFA protections.[4] Other courts have found the opposite; that failing to respond to a request for a lease does not waive the PTFA protections.[5]

Still other cases have found that since the PTFA is considered to be a protection for tenants, the burden of proof is on the tenant to show that they are *bona fide* tenants and therefore they should be protected by the PTFA.[6] Many states have not specifically addressed this issue, so successors in interest and the law firms representing them should not only review the specifics of each case, but they should be prepared to carry the burden of proof when arguing the case at trial.

While this list of issues is a good starting point for areas to review before proceeding with an eviction, mortgage servicers and law firms must not only use due diligence in examining the specifics of each case, but they must look to cases in their jurisdiction to get a better idea of how to proceed. The good news is that the PTFA has almost uniformly been interpreted as a shield to protect tenants, and not a sword. The PTFA is not seen as a private action for tenants to use to attack mortgage servicers or banks for incorrectly proceeding with the eviction. Regardless, knowing the areas that can become pitfalls in the eviction arena can help avoid expensive and timely headaches as we again deal with the resurrected PTFA, which is here to stay. a

[1] See Federal Nat. Mortg. Ass'n v. Sears. 2011 WL 6292220 (Ariz. Ct. App. Div. 1 2011)(Unreported Opinion).

[2] U.S Bank Nat. Ass'n v. Gagliardi, 2010 WL 3385328 (Ariz. Ct. App. Div. 2 2010)(Unreported Opinion).

[3] Bank of America, N.A. v. Owens, 28 Misc. 3d 328, 903 N.Y.S.2d 667 (City Ct. 2010).

[4] Harper v. JP Morgan Chase Bank Nat. Ass'n., 305 Ga. App 536, 699 S.E.2d 854, 65 A.L.R. Fed. 2d 713 (2010).

[5] E.g. Bank of America, N.A. v. Owens, 28 Misc. 3d 328.

[6] See Federal Nat. Mortg. Ass'n v. Hammond, 2011 WL 2516498 (C.D. Cal. 2011)(Unreported Opinion).

STATE SNAPSHOT


30

First Circuit Court of Appeals Holds that Automatic Stay Terminates as to Debtor and Estate After 30-Days in Second Filings

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ONE OF THE GOALS of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), was to discourage debtors from filing multiple, frivolous bankruptcy cases. Historically, under the provisions of 11 U.S.C. § 362(c) as amended by BAPCPA, if a debtor had a prior bankruptcy case dismissed (other than a Section 707(b) dismissal) within one-year of the filing of the current petition, the automatic stay as to the debtor was to terminate thirty (30) days from the date of filing of the new case. In this situation, the automatic stay terminates without the need for a creditor to move either for relief or for a confirmatory order that the stay has terminated. The debtor, however, is afforded an opportunity to avoid termination of such stay after thirty (30) days by motion demonstrating that the current filing was made in good faith.

However, in situations where a debtor has had one bankruptcy case dismissed in the year prior to filing the new petition, courts have looked at the plain language of § 362(c)(3) and have held that the automatic stay terminates after thirty (30) days as to the *debtor* only, and not as to the *bankruptcy estate*. As a result, in such situations, a creditor has still historically been required to file a motion for relief from the automatic stay to proceed with a foreclosure action as to a debtor's property or any other collection activity against property of the estate. See In re Jumpp, 356 B.R. 789 (1st Cir. B.A.P. 2006); see also In re Witkowski, 523 B.R. 291 (B.A.P. 1st Cir. 2014); In re Rinard, 451 B.R. 12 (Bkrtcy.C.D. Cal. 2011); In re Holcomb, 380 B.R. 813 (10th Cir. B.A.P. 2008).

In the past few years, however, several courts have begun declining to follow *Jumpp* and its progeny, finding that 11 U.S.C. § 362(c)(3)(A) terminates the stay in its entirety as to all interests of the debtor, *including* property of the estate. See St. Anne's Credit Union v. Ackell, 490 B.R. 141 (D.Mass. 2013). This drastic change in judicial mindset—which to date has remained divided—culminated in the decision of December 12, 2018 of United States Court of Appeals for the First Circuit in the case of Leland S. Smith, Jr. v. State of Maine Bureau of Revenue Services (Case No. 18-1573).

An appeal from the United States District Court for the District of Maine,[1] the Court held that § 362(c)(3)(A) terminates the entire stay thirty (30) days after the filing of a second petition—provided that procedure for extending the stay by a debtor (and/or a creditor and/or interested party) has not been successfully invoked (e.g. a debtor has failed to file a motion to extend). Rejecting the contention that the plain language of § 362(c)(3)(A) ("with

[1] See Smith v. Me. Bureau of Revenue Servs., 590 B.R. 1 (D. Me. 2018), affirming In re Smith, 573 B.R. 298 (Bankr. D. Me. 2017.)

STATE SNAPSHOT

Given the recency of this decision, it has yet to be seen how title insurers will react to foreclosure actions that proceed during active second (or current) filings where a debtor has not sought to extend the thirty-day stay and/or a creditor does not have an order granting it relief from the automatic stay outside of/after the thirty-day stay.

respect to the debtor") unambiguously limits the breadth of the stay implicated, the Court—while emphasizing that its decision was a close one—instead relied upon a cumulative review of the provision's text, its statutory context, and Congress's intent in enacting BAPCPA, § 362(c)(3)(A) in particular, to curb serial bankruptcy filings. Instead, the Court found the phrase "with respect to the debtor" as being superfluous, holding that when reviewed in its totality, § 362(c)(3)(A) operates to terminate creditor actions against a debtor, a debtor's property, and property of the bankruptcy estate—after thirty days for a second-time filer.

While the Smith decision is ultimately a positive one for creditors in particular, there are still several considerations to be made. First and foremost—creditors must be diligent in reviewing both prior and current filings for an implication or non-implication of § 362(c)(3)(A) and whether or not a debtor has filed a motion to extend the thirty-day stay that includes clear and convincing evidence that adequately rebuts the presumption that the second (or current) filing was made in bad faith. Remember, § 362(c)(3)(A) is only triggered if a debtor had a prior bankruptcy case dismissed within one (1) year of the filing of the current petition.

Given the recency of this decision, it has yet to be seen how title insurers will react to foreclosure actions that proceed during active second (or current) filings where a debtor has not sought to extend the thirty-day stay and/or a creditor does not have an order granting it relief from the automatic stay outside of/after the thirty-day stay. Note that § 362(c)(3) and (4) do not require a creditor to confirm that the automatic stay has either terminated after thirty (30) days or was not imposed at all (e.g. in the event of more egregious serial filings). However, if a creditor is concerned about a potential claim that its collection action violated the stay, a creditor may consider requesting a comfort order out of an abundance of caution (but at a cost and resulting in potential delay in foreclosure-related proceedings). Furthermore, in instances involving an especially egregious serial filer, a creditor may still remain eligible to seek in rem relief against a property if that creditor is able to show that the filing of the new bankruptcy petition was a part of a scheme to delay, hinder, and defraud the creditor under 11 U.S.C. § 362(d)(4).

Lastly, it is important to note that this decision does not affect the "co-debtor stay" of 11 U.S.C. § 1301, which prevents creditors from collecting a consumer debt against someone who is liable, along with the debtor, in a nonbusiness capacity (such as a spouse or other family member who co-signed a mortgage and note with the debtor). In instances involving both a so-called Smith debtor and a non-filing co-debtor, a creditor would arguably still need to seek separate relief from the co-debtor stay in order to be entitled to proceed with enforcing its non-bankruptcy rights to a particular collateral.

STATE SNAPSHOT

Illinois' Single Refiling Rule Strikes Again New Illinois Supreme Court Case Affirms Limits On Refiled Cases

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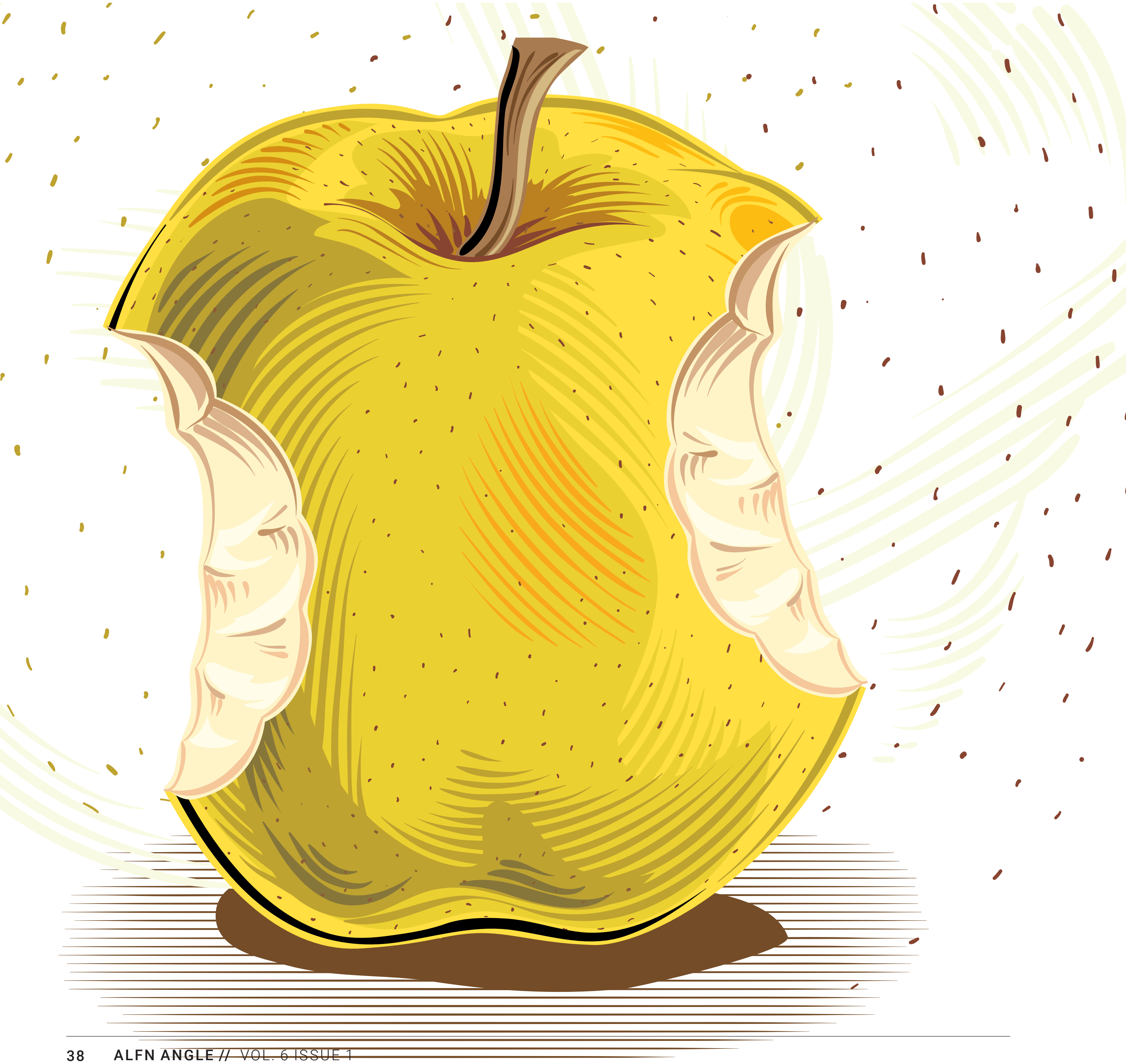

AS REGULAR READERS of our newsletters know, Illinois law allows for only one refiling of a lawsuit if the plaintiff voluntarily dismisses its case. In practice, this means the plaintiff gets two bites at the apple, but no more. In a unanimous opinion today in the case of First Midwest Bank v. Cobo, the Illinois Supreme Court ruled that foreclosure plaintiffs cannot avoid the application of this rule by spinning one of its suits as a different kind of apple.

In this case, the plaintiff brought a 2011 foreclosure action alleging that the mortgagors had defaulted by failing to make the monthly payments due under the note secured by the mortgage as of July, 2011. The Illinois Mortgage Foreclosure law permits creditors to seek a personal deficiency if a deficiency exists after the property is sold at the foreclosure sale, and the foreclosure complaint requested that a deficiency judgment be awarded if sought after the foreclosure sale. The plaintiff voluntarily dismissed this foreclosure case and filed a new action less than two weeks later. This second action did not seek to foreclose the mortgage, but rather only sought a judgment for breach of the borrower's promise to repay the money owed under the note. This case, too, was eventually voluntarily dismissed by the plaintiff. The plaintiff then filed a third action, which like the first but unlike the second, sought foreclosure of the mortgage and a deficiency judgment. Ultimately, the trial court found that the case could proceed, but the Illinois Appellate Court overruled that decision and ordered that the case be dismissed as a barred refiling. At the lender's request, the Illinois Supreme Court agreed to hear the case.

Unfortunately for the lender, the Supreme Court sided with the defendants. Technically speaking, Illinois follows a transactional test to determine whether a lawsuit is the same or nearly the same as a prior suit. If each case arises from the same group of facts, they are considered to be the same case even if each case seeks a different kind of judgment. In this instance, the basis of each case was the defendants' alleged July, 2011, failure to make payments due under the note.

Notably relevant to lenders, the Supreme Court stated that if a case is voluntarily dismissed by the plaintiff because the parties entered into a loan modification while a foreclosure case was pending, the single refiling rule would not apply because the modification changes the operative facts of any later suit (i.e. the date of default). Though not explicitly stated by the court, it seems the same reasoning should apply to reinstatements as well. However, whether a lender could avoid the application of the rule by voluntarily advancing the due date absent a modification or a reinstatement remains an open question, but that seeming loophole might be too small a needle to thread.

Notably relevant to lenders, the Supreme Court stated that if a case is voluntarily dismissed by the plaintiff because the parties entered into a loan modification while a foreclosure case was pending, the single refiling rule would not apply because the modification changes the operative facts of any later suit (i.e. the date of default).

In most foreclosure circumstances, the single refiling rule will not apply. However, if a case was previously filed twice without a change of circumstances such as application of payments, modification, or reinstatement, lenders must be aware that the single refiling rule might bar any future case. It is therefore important that you consult with your attorneys regarding the application of this rule prior to voluntarily dismissing any foreclosure lawsuit that you intend to later refile.

Ohio Legal Updates

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THE STATE OF OHIO has been busy this past holiday season, passing three different bills, all signed by Governor John Kasich on December 19, 2018, scheduled to take effect 91 days after filing with the Secretary of State.

House Bill 489, entitled in short as a bill to "address financial institution regulation and consumer protection," was initially aimed at undoing some of the effects the Dodd-Frank had smaller banks and credit unions while still protecting consumers. The motivation behind the Ohio Financial Institutions Reform Act was to regulate banks only in a manner that would not affect the institutions soundness and security. The Bill permits analytics to be conducted on publicly available information regarding state banks, credit unions and entities registered and licensed in Ohio. However, if an institution meets certain requirements, said institution would be subjected to less frequent regulatory checks of no more than once every twenty-four months. Failure to comply, however, exposes an institution to civil liability.

House Bill 489 adds a definition of "mortgage servicer" to Ohio Revised Code Section 1322, "Mortgage Brokers, Loan Officers." A mortgage servicer is, "an entity that, for itself or on behalf of the holder of a mortgage loan, holds the servicing rights, records mortgage payments on its books, or performs other functions to carry out the mortgage holder's obligations or rights under the mortgage agreement, including, when applicable, the receipt of funds from the mortgagor to be held in escrow for payment of real estate taxes and insurance premiums and the distribution of such funds to the taxing authority and insurance company." R.C.1322.01(AA). Revised Code Section 1322.07, entitled "Mortgage Broker certification of registration" is revised to include mortgage servicers in its requirement to obtain certification of registration from the superintendent of financial institutions for the principal office and every branch office, and further requires each registrant to maintain an office location for transaction as a mortgage servicer in the State of Ohio. Finally, Revised Code Section 1349.72, governing Consumer Protection, is added and requires a person before attempting to collect a debt secured by residential real property to send written notice via US mail to the residential address of the debtor if the debt is (1) a *second* mortgage or *junior* lien on the debtor's residential real property and (2) the debt is in default. Written notice must be in 12-point font and must include:

1. the name and contact information of the person collecting the debt;
2. the amount of the debt;
3. a statement that the debtor has a right to an attorney;
4. a statement that the debtor may qualify for relief under Chapter 7 or 13; and
5. a statement that a debtor may be able to protect his residence from foreclosure through the Chapter 13 process.
6. if requested in writing by the debtor, the "owner" of the debt shall provide a copy of the note and loan history to the debtor.

Failure to comply authorizes civil liability, but also provides a bona fide error defense. The notice requirements set forth by this House Bill are strikingly similar to those imposed upon debt collectors under the Fair Debt Collection Act, but extend these requirements to "persons" rather than debt collectors and pertain only to junior mortgages.

The next Bill to affect the lending industry is **House Bill 480**, which establishes requirements for multi-parcel auctions, which are not currently addressed in the Ohio Revised Code, and gives the Ohio Department of Agriculture the power to regulate the auctions. House Bill 480 amends Ohio Revised Code sections 2329 (Execution against real property) and 4707 (Auctioneers). The Bill defines a multi-parcel auction as one involving real or personal property in which multiple parcels or lots are offered for sale in whole or part. The Bill further establishes advertising requirements placed upon auctioneers, including the mandate that all advertisements short of road signs must state that the auction will be offered in various amalgamations, whether individual parcels, combinations or all parcels as a whole. The Bill goes on to clarify that online auctions are to be held for 7 *calendar days* (previously simply seven days), excluding the day the auction opens for bidding.

Finally, **Senate Bill 263**, titled in short, the "Enact Notary Public Modernization Act," increases requirements for commission of a notary and enacts requirements for notarization of electronic documents. Notably, to obtain a notary commission, one will now have to submit to a criminal records check completed within the preceding six months (R.C. 147.022). Already commissioned attorneys will be exempt from this requirement. Although the new requirement is not retroactive, notaries seeking to renew their commission will have to comply. The bulk of the Bill is dedicated to online notarizations. The Bill permits a commissioned notary to apply to perform online notarizations via live video, electronic signatures and electronic notary seals. Online Notary Commissions expire after five years – including those issued to attorneys. Those seeking online commission must participate in an educational course; non-attorney applicants must also pass a test. Bill 263 passes oversight of the appointment and revocation of notary commissions from the Court of Common Pleas to the Secretary of State. Finally, in short, the Bill deems an online notarized document to be an "original document." While these changes do not have any effect on our current notary procedures, current non-attorney notaries in Ohio will have additional hoops through which to jump upon renewal of their current licenses.

Finally, closing with a case law update, the Supreme Court of Ohio sided with lenders when it issued its opinion in *Bank of N.Y. Mellon v. Rhiel* on December 20, 2018, when it held that:

1. "In response to certified questions by the bankruptcy appellate panel, it was determined that the failure to identify a signatory by name in the body of a mortgage agreement did not render the agreement unenforceable as a matter of law against that signatory;" and

2."It was possible for a person who was not identified in the body of a mortgage, but who signed and initialed the mortgage, to be a mortgagor of his or her interest." *Bank of N.Y. Mellon v. Rhiel*, 2018-Ohio-5087, 2018 Ohio LEXIS 3007.

Both Marcy and Vodrick Perry initialed and signed a mortgage, however, the definition of "borrower" within the mortgage only included Vodrick's name. The bankruptcy trustee determined that the mortgage did not encumber Marcy's interest in the real property. The bankruptcy court disagreed, and allowed extrinsic evidence to make its determination that Marcy intended to encumber her interest. The Bankruptcy Appellate Panel for the United States Sixth Circuit Court of Appeals asked the Ohio Supreme Court to clarify, after noting the conflicting decisions of prior bankruptcy cases and controlling decisions issued by Ohio courts of appeals. The Ohio Supreme Court held that signing a mortgage may be enough to bind the signatory despite not being named in the body of the mortgage itself.

STATE SNAPSHOT

Lenders and Servicers Face Increased Risk With California's New Affordable Housing

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ALTHOUGH ENACTED just over one year ago, the impact of California Senate Bill 2 – commonly referred to as the Building Homes and Jobs Act ("SB 2" or the "Act"), has not yet been felt by lenders and loan servicers. But, as the revenue from the Act comes pouring in at a higher than expected rate, [1] lenders and servicers will start to see more affordable housing construction throughout California, which in turn will mean more loans on affordable housing units to originate and service.

The Act was designed to address California's affordable housing dilemma[2] by bringing in an estimated annual revenue of $250 million through an increase in the recording fees for the recording of documents in real estate transactions. The funds would be dedicated to developing affordable, low-income housing in California.

It seems that this revenue goal has been achieved, as California's 2018-19 budget allotted $5 billion to addressing the affordable housing and homelessness is-

[1]See, Toni G. Atkins, "Building homes and jobs" <https://sandiegodowntownnews.com/building-homes-and-jobs/>; see also, <http://www.hcd.ca.gov/policy-research/housing-package/cahp-faq.shtml#sb2>;

[2]Senate Bill 2 Planning Grant Program Year 1 Guidelines < http://www.hcd.ca.gov/policy-research/docs/sb2-plng-grant-draft-guidelines.pdf> According to the CA Treasurer's Office, CA needs approximately 1.5 million additional affordable housing units. <https://www.treasurer.ca.gov/ctcac/factsheet.pdf>

[3]The 2018-19 budget is located as <http://www.ebudget.ca.gov/FullBudgetSummary.pdf>

sues, $255 million of which came from the SB 2 fund.[3] Accordingly, in the near future Californians will likely be provided with new, affordable, low-income housing units for purchase. While this is great news for Californians and local governments (which will obtain additional funding from State and Federal government), it is important to understand the potential impact of an influx of low-income housing units will have on lenders and servicers who fund and service loans secured by low-income housing units.

California generates new "affordable" of "low-income" housing units through either new construction or rehabilitation/reclassification of the existing housing units. These new units are then offered for sale through various housing programs administered by local (city) governments and are eventually sold to qualified individuals at below-market-rate prices. Because of this, these units are subject to various value and/or use restrictions, which restrictions are enforceable over a period of time (generally, between 30 and 45 years), are binding on lenders as well as the borrowers, and are senior to any mortgage liens. Generally, these restrictions limit the use of property to a principal residence use only, constrain the borrower's right to refinance or sell the property, and provide the locality where the property is located with a "right of first refusal" and other rights in the event of the borrower's default, a catastrophic event, or condemnation of the property. Failure to comply with these restrictions subjects the lenders, servicers, and foreclosure trustees to potential liability from not only the borrower, but also the locality, exposing the industry to damages not generally foreseeable in regular residential mortgage transactions.[4]

With the volume of loans on low-income projects likely to increase in the near future, lenders and servicers should understand the risks associated with these loans and limit their potential exposure and liability through a thorough investigation process.

As part of their due diligence in connection with purchase loan transactions, in addition to obtaining a title report/guarantee, the lender should specifically review and understand the restriction agreement recorded against the property. Note – Wright, Finlay & Zak has seen many instances where the title company excepted from coverage the low-income housing restrictions, leaving the lender and subsequent investors and servicers subject to the often onerous restrictions without any knowledge of their existence and/or understanding of the consequences of failure to comply with them. The lender should study the restriction agreement in detail to ensure that the loan transaction does not violate its terms. The lender should also ensure that the restriction agreement is included in the collateral file, provided to the loan servicer and the system noted for future use, i.e., at the time of foreclosure.

In addition, since the localities that offer affordable housing units for sale ensure that they have certain rights in the event of the borrower's default, restriction agreements and requests for notice of default (recorded by the city or agency) should be reviewed and studied before the commencement of (and also during) the foreclosure process to ensure that these rights are not violated.5

While this additional due diligence is recommended in purchase loan transactions, it is even more important in refinance transactions. The restriction agreements placed on low-income housing units often prohibit or significantly constrain refinance loans. Accordingly, it is imperative for the potential lender to study the restriction agreement and ensure that the refinance loan is permitted in the first place, or whether additional steps are required to satisfy the restriction agreement – such as, for instance, obtaining pre-approval of the refinance from the city.

Finally, in the event of a lawsuit involving a low-income housing unit, the lender, servicer, and/or trustee should consult attorneys who are experienced in litigating the low-income housing matters to fully understand its potential liability and exposure. a

Disclaimer: The above information is intended for information purposes alone and is not intended as legal advice.

[4] As a general matter, the lender can be held responsible for all damages caused by the violation to the city, including the damages resulting from the use of property as a low-income housing unit, potential loss of federal and state funding, cost of a potential replacement property, etc.

[5] While the trustee should itself obtain the request for notice, given the potential liability to the lender/servicer resulting from a failure to provide notice, it is a better business practice for the servicer to provide that document to the trustee.

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The firm is experienced in the areas of foreclosure, creditor litigation, the Fair Debt Collection Practices Act, title curative issues, and general housing-related issues such as foreclosure liens, redemption, homeowner association matters, mobile home curative, and compliance issues.

Andrea Tromberg, the firm's owner, purchased the firm which she had served as managing partner since 2011. This ownership change and subsequent renaming of the firm to Tromberg Law Group made Tromberg Law Group one of the largest woman-owned creditor firms in Florida that also serves Puerto Rico. Andrea Tromberg serves as the first elected Chairwoman on the Board of Directors for the American Legal and Financial Network (ALFN) and has served on numerous committees and is a current member of the leadership committee for Women in Legal Leadership (WILL).

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