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OF THE AFLN
VOL. 4 ISSUE 4

THE BEST DEFENSE IS A GOOD OFFENSE IN LITIGATION

P. 6

Letter from the Editor

The ALFN has had a great year thanks to your support, and we continue to be the leading force in representing, defending and educating America's mortgage servicing industry. 2018 will be no different, and we plan to continue bringing you new and exciting opportunities that provide the tools, knowledge and connections you need to best represent your individual companies and to further your careers.

2017 was full of firsts for us, including our two new events, Foreclosure Intersect and Bankruptcy Intersect. With these two new training events we were able to have a more focused approach by going much deeper on the issues independently for foreclosure and bankruptcy. We also celebrated our 15th Annual Conference – ANSWERS, including more servicer attendance than ever before, and new educational and networking opportunities for attendees. Included in this was our new state-by-state roundtables with members and servicers, additional group networking activities, and our new Member Service Award where we recognized 19 members for their continued support of ALFN since our inception. We also recognized 13 young professionals with the Picture the Future award, and are pleased to congratulate these individuals on being standout young leaders in our industry. Our annual event schedule also included Advocacy Day and WILLPOWER which were both well attended, and provided us the opportunity to continue advocating with members of Congress, and empowering our women leaders. Finally, we held 3 onsite training events for mortgage servicers, and we continue to value these opportunities to showcase our members with targeted educational opportunities.

These are just a few of the great benefits you can participate in with the ALFN, so take time to review our member briefs section of the ANGLE, reach out to us on how you would like to get involved, and make sure you get plugged in for 2018. Unlike other larger associations where you can get lost in the crowd, with the ALFN we continue to create those experiences where you will always have a place to stand out and reap the benefits of your membership.

As we conclude the year with our final ANGLE publication of 2017, we start this issue with our cover article on the doctrine of Judicial Estoppel and its effectiveness as a defense for servicers. We then move on to our other feature articles and take a closer look at the new Federal Bankruptcy Rules taking effect Dec. 1, and review a Ninth Circuit ruling on Judicial Estoppel.

Law firms, don't miss our feature article on important KPI's and implementing metrics in your firms. We then continue with our State Snapshot updates including a recent Illinois decision with guidance on when a judicial foreclosure sale purchaser should start making assessment payments to extinguish a condo association's lien for prior unpaid assessments. We provide new updates in Georgia on providing pay-off information to third-party purchasers and protecting your security interest, and review of a Massachusetts decision on foreclosure by statutory power of sale. Concluding our State Snapshots is an update in Nevada on mandatory mediation, and a deeper look at additional case law in Georgia and Connecticut that benefits a lender facing casualty losses.

I would like to thank each and every one of you for your support and confidence this year and we look forward to living up to your expectations and earning your continued support in 2018. a

"Unlike other larger associations where you can get lost in the crowd, with the ALFN we continue to create those experiences where you will always have a place to stand out and reap the benefits of your membership."

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

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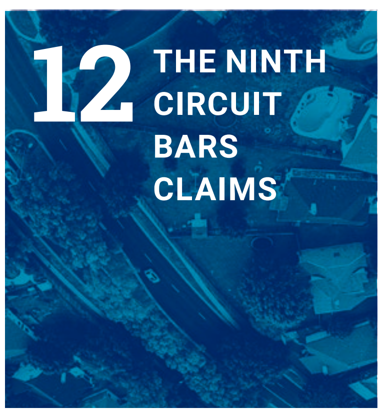

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STATE SNAPSHOT

ALFN EVENTS
SAVE THE DATES

2017

NOV. 14
FC INTERSECT
The Highland Dallas
Dallas, TX

2018

FEB. 5
BK INTERSECT
Dallas, TX

JUL. 22-25
ANSWERS – ALFN's 16th Annual Conference
The Ritz-Carlton Bacara, Santa Barbara

FALL
FC INTERSECT
Dallas, TX

TBD
WILLPOWER SUMMIT
Dallas, TX

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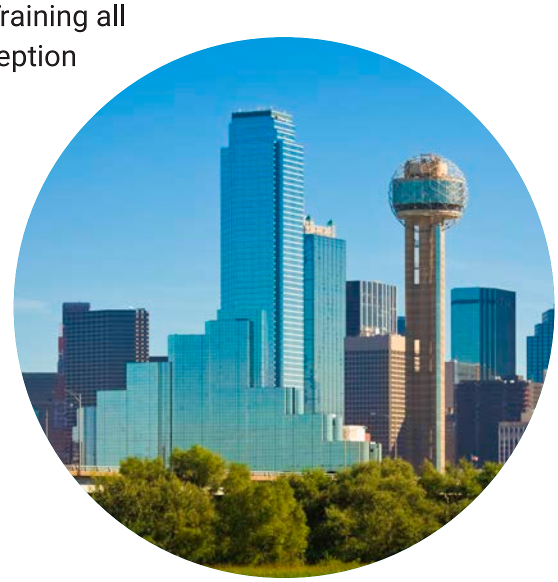
FC INTERSECT IN DALLAS
NOVEMBER 14TH

In February, we introduced our re-branded regional training for bankruptcy - BK INTERSECT in Dallas. This fall we will complete the picture with our new FC INTERSECT, a deep dive into the issues and topics our default servicing members are asking for. We will host the event at The Highland Dallas Hotel on Tuesday, November 14th. Luncheon features our Marketing and Business Development Group discussing – Better Business through Networking. You won't want to miss our opening super session where we'll tackle the big issues and solutions following Hurricane Harvey, Irma and Maria, with speakers from ALFN law firms in the affected areas, Servicers, Fannie Mae, Hazard Claims and Property Preservation Providers. Training all day concludes with a reception hosted by our Women in Legal Leadership Group for all attendees. Please reach out to Liz Potter at lpotter@alfn.org for more information on FC Intersect.



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Women in Legal Leadership (WILL) – Q3 Group Call and Special Guest Speaker, Nora Bergman.
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2018 EVENTS

YEP, WE HAVE BIG PLANS FOR YOU!

BK INTERSECT – Deep dive regional bankruptcy training for bankruptcy teams will be on February 5th in Dallas.

ANSWERS – Our 16th Annual signature conference will be held July 22-25th at the beautiful Bacara Resort & Spa in Santa Barbara, CA.

WILLPOWER SUMMIT – We are exploring potential options for the WILLPOWER Summit in 2018, stay tuned for more details.

FC INTERSECT – Wrap up the year with a one-day, in-depth training focused on the intersection of mortgage servicing and the ever-changing foreclosure process. Fall 2018 in Dallas.

THE BEST DEFENSE IS A GOOD OFFENSE IN LITIGATION

A LOOK AT HOW THE DOCTRINE OF JUDICIAL ESTOPPEL HAS EVOLVED INTO AN EFFECTIVE COUNTER-ATTACK FOR SERVICERS

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While default rates across the country have significantly decreased, there remains a deluge of litigation brought against servicers. Contested foreclosures initiated by borrowers are often colorful, and take on a variety of forms depending on the jurisdiction. Borrowers' efforts to stop foreclosure or delay proceedings indefinitely may include filing a counter-claim in a judicial proceeding or filing separate action alleging wrongful foreclosure and requesting injunctive relief. These claims often follow trends specific to the jurisdiction, and include alleged statutory violations, standing or document issues, or some other type of servicer misconduct or omission.

Many of these lawsuits lack merit, and are brought primarily to delay proceedings. In many of these cases, the borrowers are significantly in default on their loan, and there may even be an element of bad faith, particularly in cases where the relief requested is not commensurate with the actual violation. For example, a defect in the origination documents should not excuse a failure to make mortgage payments. However, many judges are reluctant to dispose of borrowers' claims, frivolous or not, too quickly. The end result is increased costs to servicers and delayed foreclosures.

While the mortgage industry has been forced to ride the wave of anti-creditor sentiment, many pragmatic judges have caught on quickly to situations where borrowers have tried to take advantage of technical irregularities notwithstanding admissions that they borrowed money. The doctrine of Judicial Estoppel is becoming a growing area of protection for servicers with many courts adopting a hard line approach in any case where it appears a party is playing 'fast and loose with the courts.' This article will briefly explore the evolution of Judicial Estoppel, look at some favorable case law applying the doctrine, and offer some practical ways for servicers to utilize this defense effectively.

WHAT IS JUDICIAL ESTOPPEL?

Simply, Judicial Estoppel is a judge made rule designed to protect the integrity of the judicial system by prohibiting parties from taking inconsistent posi-tions in court. The court in *New Hampshire v. Maine*, U.S. 742 749 (2001), set the standard by reinforcing that a party that assumes a certain position in a pri-or legal proceeding may not take a contrary position simply because his interests have changed. The court looked at three general factors:

1. A party's later position must be clearly inconsistent with its earlier position.
2. Courts will inquire about whether the party has succeeded in persuading a court to accept that party's earlier position so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled.
3. Does the party seeking to assert an inconsistent position derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped? Id.

In practical terms, Judicial Estoppel is often a valuable defense for servicers in cases where a borrower contests foreclosure after filing bankruptcy. Bankruptcy schedules must be acknowledged under oath, and Borrowers typically give sworn testimony at the designated 341 meeting set by the bankruptcy Trustee. Failure by a Borrower to disclose any claims of wrongful foreclosure while the bankruptcy is pending often provides a defense for a servicer if such claims existed while the bankruptcy was pending, and are brought up at a later date.

RECENT DECISIONS APPLYING JUDICIAL ESTOPPEL

One common denominator for judges applying Judi-cial Estoppel is a common sense approach taken in these cases aimed at fairness. In *Knigge v. Sun Trust Mortgage, Inc.* (In re Knigge), 479 B.R. 500 (8th Cir. 2012), the 8th Circuit upheld the court's ruling grant-ing summary judgment to Sun Trust Mortgage, and rejected borrowers' claims that the lender lacked standing to bring the lawsuit. The court was deeply troubled by "gotcha" litigation--where borrowers play along with a lender in the early part of a bankruptcy when it suits their purpose, but then try to invalidate a lender's security interest when it becomes prob-lematic or burdensome. In this case, borrowers had previously acknowledged the validity of the lender's secured claim when they entered into two separate consent orders, agreeing in both cases to cure arrear-age owed to the lender. These prior actions estopped borrowers from bringing later claims to invalidate Sun Trust's lien. As the court aptly stated, Judicial Estoppel is designed to prevent a party from playing 'fast and loose with the courts.'

The 10th circuit took a similar stance by ruling in favor of a lender sued for violations of the Fair Debt Collection Practices Act. In B*arker v. Asset Accep-tance, LLC*, 874 F. Supp.2d 1062 (D. Kan. 2012), the court granted lender's motion for summary judg-ment relying on Judicial Estoppel in its determina-tion. The factor that weighed most heavily on the court was borrower's failure to disclose the lawsuit in his bankruptcy schedule, or otherwise indicate the lawsuit existed until after the Motion for Sum-mary Judgment was filed. The court rejected borrower's attempts to reopen the bankruptcy to dis-close the claim after the Motion for Summary Judg-ment was filed.

More recently, the 11th Circuit Court of Appeals ruled in *Failla v. CitiBank, N.A.*, 838 F.3d 1170 (11th Cir. 2016), that borrowers who file a statement of intention to surrender property in bankruptcy are estopped from later contesting a foreclosure action. The Failla court went even further by holding that bankruptcy courts have broad power and authority to sanction viola-tions for misconduct and dishonesty. A bankruptcy court can order borrowers who surrender property to drop their opposition to foreclosure in state court. If the facts are egregious enough, the bankruptcy court can sanction borrowers who lie about their intent to surrender the property.

Similarly, another Florida court denounced borrow-ers' assertion of affirmative defenses and prosecution of a foreclosure counterclaim as inconsistent with the

Chapter 13 Plan providing "surrender" of the property, and a violation of the Confirmation Order. See *In re Lapeyre*, 544 B.R. 719 (D. Florida 2016). The Lapeyre court reaffirmed that bankruptcy courts may lack jurisdiction to tell state courts what to do, but a court can exercise its jurisdiction by telling parties what they can and cannot do in a non-bankruptcy forum. Simply stated, these courts did not permit borrowers to take inconsistent positions to the detriment of the lender.

The 9th Circuit appears to take a more narrow approach in applying the doctrine. Specifically, In A*h Quin v County of Kauai Dept. of Transportation*, 733 F.3d 267 (9th Cir. 2013), the court held that if a debtor seeks to reopen the bankruptcy proceeding, the court must examine the subjective intent at the time debtor completed the bankruptcy schedules to determine whether Judicial Estoppel applies. Failure to disclose a lawsuit in a bankruptcy schedule due to "mistake" or "inadvertence" might be excusable in the 9th circuit if the borrower can show that the omission was an accident or inadvertent.

PRACTICAL SUGGESTIONS FOR SERVICERS

Litigation often involves trying to gain an upper hand over your opponent, but Judicial Estoppel reminds us that borrowers cannot have their cake and eat it too. Courts are generally wary to reward inconsistency and have little tolerance for parties changing positions to gain an unfair advantage. Here are a few suggestions for servicers in a position to utilize Judicial Estoppel as a defense.

First, remember that a prior bankruptcy may preclude borrowers from bringing claims contesting the foreclosure at a later date. Under 11 U.S.C § 521(1) of the Bankruptcy Code, a debtor is required to file a "schedule of assets and liabilities…..and a statement of the debtor's financial affairs." In simple terms, this means that borrowers filing bankruptcy have a duty to file under oath a complete an accurate schedule of assets with the court. Failure to do so could have significant consequences including denial of discharge under 11 U.S.C. 727 or loss of any interest in the concealed asset.

Therefore, servicer's counsel should take great care in reviewing prior bankruptcy proceedings in situations where borrowers have brought subsequent litigation contesting the foreclosure. Lenders have a strong argument that any claims of wrongful foreclosure that exist at the time of the bankruptcy must be disclosed by borrowers on their bankruptcy schedules. Failure to disclose these claims could invoke the doctrine of Judicial Estoppel and prohibit borrowers from filing a lawsuit at a later date.

Servicers should also be mindful of the importance of the debtor examination required under 11 U.S. Code §341. The purpose of the creditor meeting is to allow the trustee to verify the accuracy of the bankruptcy petition and schedules. From an evidentiary standpoint, valuable information may be gleaned from borrowers' testimony at the creditors meeting. The trustee may ask questions about the loan and security instrument, and confirm whether the loan is delinquent.

Borrowers' failure to disclose concerns or claims concerning the mortgage at the creditors meeting such as perfection issues or the servicer's standing to file a lawsuit may judicially estop borrowers from raising these issues at a later date. Moreover, depending on the jurisdiction, transcripts are often easily obtainable for years after a bankruptcy filing. Reviewing prior pleadings, consent orders, and transcripts may estop borrowers from bringing later claims contesting foreclosures and are effective methods that aid in resolution of contested matters more quickly.

Litigation often involves trying to gain an upper hand over your opponent, but Judicial Estoppel reminds us that borrowers cannot have their cake and eat it too.

NEW FEDERAL BANKRUPTCY RULES TAKING EFFECT 12/1/2017

An Eye Towards the Future

BY JASON A. WEBER, ESQ., SIROTE & PERMUTT, PC
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FINALLY, after several years of debate, major changes have been approved that will have a profound impact on consumer bankruptcy cases. On April 27, 2017, the Supreme Court of the United States, through Chief Justice Roberts, submitted amendments to the Federal Rules of Bankruptcy Procedure to Congress. The amendments set forth extensive changes pertaining to forms and the filing of claims. The proposed changes will take effect December 1, 2017 and will significantly change how creditors should approach consumer bankruptcy cases (Chapters 7, 12, and 13) and will require crucial adjustments to conform to the shortened timelines for creditors to take action, particularly in Chapter 13 cases. The most noteworthy changes are discussed below.

RULE 2002

NOTICE TO CREDITORS

The amendments to this Rule now require that creditors are to be provided at least 21 days' notice of the time fixed for filing an objection to confirmation of a Chapter 13 plan and be provided at least 28 days' notice of the confirmation hearing in a Chapter 13 case. Neither of these notice provisions existed prior to the rule change, and each provides creditors with advance notice for the date of the scheduled confirmation hearing and the deadline for filing an objection.

RULE 3002

FILING OF PROOFS OF CLAIM

The amendments to this Rule may have the biggest impact on creditors, largely due to the shortened deadlines for filing claims and the requirement that all creditors — including secured creditors — must file proofs of claim within 70 days of the filing date of a Chapter 7, 12, or 13 case (or within 70 days of the date of conversion to a Chapter 12 or 13) in order for the claim to be deemed allowed. The new Rule does add a provision that allows a creditor the opportunity for an extension of time of up to 60 days to file a proof of claim (POC) upon motion and order if the creditor can establish that it did not have a reasonable time to file a POC because the debtor failed to timely file the list of creditors and addresses, or because the notice was mailed to the creditor at a foreign address. Additionally, the Rule does clarify that a lien securing a claim is not void should the creditor fail to file a proof of claim.

Moreover, the new Rule adds a *two-stage deadline* for filing proofs of claim secured by a security interest in the debtor's **principal residence**. These claims must be filed with the Official Form 410, the Attachment (Official Form 410A), and an escrow account statement no later than **70 days** of the petition filing date (or conversion date). Also, in order to be timely, all other loan documents evidencing the claim [e.g., the note (allonge), mortgage, assignment of mortgage] must be filed as supplements to the POC within **120 days** of the filing date (or conversion date). For such a claim to be timely, *both* of these deadlines must be met.

The new 70/120-day time period is significantly shortened compared to the pre-12/1/2017 rules that permit a claim to be timely if it is filed within 90 days after the Section 341 meeting of creditors date, which, in practice, permits claims to be filed within an approximate 120 to 140 day time period from the petition filing date or conversion date.

RULE 3007

OBJECTION TO CLAIMS

This Rule requires at least 30 days' notice to creditors of an objection to claim. The objection may be filed on "negative notice" and provides for service via first-class mail to the name and address most recently designated on the creditors' original or amended POC, or in accordance with Rule 7004 for federally insured depository institutions. This is significant because it clarifies that Rule 7004 no longer applies to the service of most claim objections with the exception of insured depository institutions. Instead, service can be accomplished by first-class mail, meaning creditors must be cognizant of the name and address listed on their proofs of claim and may no longer rely on raising Rule 7004 as a defense to a claim objection.

RULE 3012

DETERMINING THE AMOUNT OF SECURED CLAIMS

This Rule sets forth numerous ways for the court to determine the amount of secured claims, including by motion, claim objection, or Chapter 12 or 13 plan. Most importantly, the new Rule, in combination with amended Rule 3015 (see below), provides that any determination made in a plan formed under Rule 3012 regarding the amount of a secured claim is binding on the holder of the claim *even if the holder files a contrary proof of claim, and regardless of whether an objection to the claim has been filed.* This is a significant change to the prior rules, particularly for creditors in Florida and similarly situated districts, which (effective 12/1/2017) will require creditors to file objections to confirmation of Chapter 12 and Chapter 13 plans, or be bound by the plan terms upon confirmation.

RULE 3015

FILING OF PLAN, EFFECT OF CONFIRMATION OF PLAN — MODEL CHAPTER 13 PLAN

This Rule requires the use of an Official Form Model Chapter 13 Plan unless a Local Form is adopted and is in compliance with Rule 3015.1. For example, the Southern District of Florida has recently announced that it will "opt out" and adopt a Local Form and has solicited public comment prior to its implementation in December. It would not be a surprise to see many districts across the country announce similar opt-out plans enabling them to marry the content and notice provisions required under the Model Plan with the local customs and language incorporated into the Local Form. The Model Chapter 13 Plan is intended to streamline the plan review process for creditors. The new Rule also requires an objection to plan confirmation to be filed at least seven days before the confirmation hearing. As noted above, the proposed changes further provide that a determination of value or "valuation" of a secured claim done through the plan will become effective and binding upon confirmation despite the absence of a claim objection or a contrary proof of claim.

CLOSING COMMENTS

Once again, these Rules will become effective December 1, 2017 and apply to all Chapter 7, 12, and 13 cases filed after that date, as well as all pending cases "insofar as just and practicable" — meaning they will likely apply to almost all consumer bankruptcy cases. Accordingly, it is important that creditors take immediate measures to ensure compliance under these Rules. Although the shortened deadlines and increased attention to plan treatment might be burdensome in some respects, the above rule changes may well provide some assistance to creditors by establishing predictable proof of claim deadlines, consistent plan content, and clear notice and objection deadlines across all districts — which should enable creditors to more efficiently process consumer bankruptcy cases. a

THE NINTH CIRCUIT BARS CLAIMS DUE TO THE BORROWER'S FAILURE TO AMEND INCLUDE THE CLAIMS IN THEIR BANKRUPTCY SCHEDULES

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ON AUGUST 29, 2017, the 9th Circuit provided foreclosing parties some well-needed protection from borrower lawsuits. M*eyer v. Northwest Trustee Services,* No. 15-35560, 2017 U.S. App. LEXIS 16551 (9th Cir. 2017).[1] While the *Meyer* decision is unpublished and involved a foreclosure trustee, the rationale behind the ruling should apply to future litigation against trustees, servicers and investors in the 9th Circuit of the Federal Courts, which includes Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington.

In its decision, the Ninth Circuit declined to review the borrower's claims but instead determined that the borrowers were barred from bringing the claims against Northwest Trustee Services, Inc. ("NWTS") under the doctrine of judicial estoppel. The ruling sends the message to borrowers that, as soon as they learn of a potential claim during their bankruptcy, they must amend their schedules or disclosure statements to include the claim as an asset. If they don't, their subsequent claims could be barred by the doctrine of judicial estoppel.

Judicial estoppel prevents a party from claiming one set of circumstances and then later claiming a different inconsistent set to their advantage. Any potential claim a debtor has is an asset of the bankruptcy estate because if they prevail on those claims, the monies they receive could go toward paying their creditors. By failing to include a potential claim, debtors mislead the court and their creditors. Their failure to disclose the claim during the bankruptcy prevents them from bringing the claim at a later date when it is most advantageous to the debtor.

FACTUAL HISTORY

In late 2005, Peter J. Meyer and Sharee L. Meyer ("Meyers") executed a promissory note and deed of trust. The loan was later transferred into a securitized trust. US Bank was appointed the trustee of the trust and Wells Fargo Bank, N.A. ("Wells Fargo") was the authorized servicer and custodian. Sometime in 2008, the Meyers defaulted on the loan.

In 2010, NWTS received a referral to foreclose along with the required beneficiary declaration, executed by Wells Fargo as attorney in fact for the beneficiary. The referral also included the loss mitigation declaration, signed by the same person but as an employee of America's Servicing Company ("ASC").[2] NWTS issued a notice of default ("NOD") relying on the information in the referral and the executed declarations. NWTS performed no additional inquiries into the authority of the person signing the declarations or the information contained in the referral. The NOD included language that NWTS was acting as an agent for the beneficiary. The NOD also listed the address for ASC as the address for the owner of the note and for the servicer. The phone numbers provided for the owner of the note and the servicer were numbers for Wells Fargo.

Believing the arrears listed in the NOD were incorrect, the Meyers contacted the numbers listed on the NOD. The Meyers assert that they were confused when the calls led to Wells Fargo (as opposed to ASC), an entity they had not dealt with before.[3] In August 2010, NWTS recorded the Notice of Trustee's Sale ("NOTS"). The day before the scheduled foreclosure sale, the Meyers filed for Chapter 13 Bankruptcy.

In December 2010, an attorney for the Meyers sent a Qualified Written Response ("QWR") that as US District Court Judge Martinez noted "raised no concerns about the identification of the Note owner." ASC responded to the QWR providing the the contact information for US Bank, the trustee of the trust.

[1] The decision is not precedent "except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion." Ninth Circuit rule 36-3.

[2] ASC is a division of Wells Fargo.

[3] All payments had been going to ASC as the servicer under the loan.

During the bankruptcy, the Meyers and US Bank stipulated to an order of relief from the stay on June 1, 2011. The loan was removed from the Meyers plan and the plan was confirmed. In May of 2012, NWTS recorded a new NOTS.

ADVERSARY PROCEEDING

With another sale date looming, in July 2012, the Meyers filed an adversary complaint in the bankruptcy court. By October 2013, only NWTS remained as a defendant in the action and a three day bench trial commenced. The claims against NWTS were for violations of the Deed of Trust Act ("DTA"), the Washington State Consumer Protection Act ("CPA"), and the Fair Debt Collection Practices Act ("FDCPA"). During trial, NWTS asserted that the Meyers are barred from bringing these claims under the doctrine of judicial estoppel because they failed to include the claims as assets in their bankruptcy schedules. Judge Overstreet issued a memorandum decision finding for the Meyers on the DTA and CPA claims, denying relief under the FDCPA and ignoring any argument regarding judicial estoppel.

At the time of Judge Overstreet's decision, it was not clear as to whether or not a claim for a violation of the DTA survives if a foreclosure was not completed. Judge Overstreet decided that a cause of action under the DTA was permitted under the current case law. [4] Judge Overstreet held that due to NWTS's inclusion of language in the NOD asserting that it was acting as the agent for the beneficiary; NWTS not independently verifying the parties executing the declarations had authority to execute and the beneficiary was the actual owner of the note; and by failing to include the contact information for the owner of the note in the NOD, NWTS breached their duty to the Meyers under the DTA.[5]

According to Judge Overstreet, NWTS's failure to strictly comply with the DTA was an unfair and deceptive act giving rise to a CPA claim.[6] Putting the final nail in the coffin, Judge Overstreet determined that but for NWTS's faulty NOD, the Meyers would not have been forced to act. The chain started with the Meyers being required to hire an attorney to send the QWR, continued with the filing of the bankruptcy, extended to the cost of moving and paying for a rental, and also included lost wages for the time spent in mediations and hearings.

NWTS APPEAL TO THE UNITED STATES DISTRICT COURT, WESTERN DIVISION

On April 10, 2015, U.S. District Court Judge Martinez reversed Judge Overstreet's decision. Between Judge Overstreet's decision and Judge Martinez's reversal, the case law concerning the DTA changed considerably. In that time, it was established that there was no independent action under the DTA without a completed foreclosure sale but that a violation of the DTA could still be actionable under the CPA.[7] Additionally, it was determined that a trustee's reliance on the beneficiary declarations in initiating a non-judicial foreclosure was not a violation under the DTA so long as there was no evidence conflicting the information in the declarations.[8] Finally, there was no affirmative duty for a trustee to investigate if the beneficiary is the holder of the note.[9]

During the appeal, NWTS again argued that judicial estoppel barred the Meyers from bringing their claims against NWTS. The Court denied this argument relying on the fact that at the time the Meyers filed for bankruptcy, the law underlying the claims did not exist.[10] Therefore, to bar the claims would not be fair to the Meyers due to the constant shifting of DTA law. The court based their decision on what the

[4] *Walker v. Quality Loan Serv. Corp. of Wash.,* 176 Wn. App. 294, 308 P.3d 716 (2013); and *Bavand v. OneWest Bank, FSB,* 176 Wn. App. 475, 309 P.3d 636 (2013).

[5] The Court relied on *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013).

[6] Without a violation of a statute that specifically asserts that violation of that statute is a violation of the CPA, a party must prove: 1) an unfair or deceptive act or practice; 2) the act or practice occurred in trade or commerce; 3) the act or practice impacts the public interest; 4) the act or practice caused injury to the plaintiff in his business or property; and 5) the injury is causally liked to the unfair or deceptive act.

[7] *Frias v. Asset Foreclosure Servs., Inc.,* 181 Wn.2d 412, 334 P.3d 529 (2014).

[8] *Trujillo v. Nw. Tr. Servs., Inc.,* 181 Wn. App. 484, 326 P.3d 768 (2014) (Reliance on the declarations is not a violation absent conflicting evidence.).

[9] *Bavand v. Onewest Bank, FSB,* 587 F. App'x 392 (9th Cir. 2014).

Meyers knew at the time of filing their bankrupt-cy in 2010 and did not address any requirement for the Meyers to amend their schedules once the claims were known in 2012.

Instead, the District Court reversed Judge Over-street's decisions specifically as to each of the claims. The DTA claim was reversed based on *Frias* estab-lishing there is no individual claim for a violation under the DTA. The CPA claim failed because the Meyers failed to establish all elements required for a CPA claim. Most importantly, in light of the decision in *Trujillo,* the court determined that NWTS did not violate the DTA by relying on the beneficiary decla-rations. Finally, the District Court determined that the injury and damages either could not be proven to stem from NWTS's actions or simply were not recov-erable under a CPA claim.[11]

Continuing the trend of ever changing DTA law, on August 20, 2015, the Washington State Supreme Court reversed *Trujillo* in a decision referred to as *Trujillo II*. In *Trujillo II,*[12] the Supreme Court deter-mined that the declaration of the noteholder was am-biguous because it stated that the beneficiary is the "actual holder of the promissory note or other obliga-tion." (emphasis added). A trustee's reliance on an am-biguous declaration is a violation of the trustee's duty to the borrower and therefore a violation of the DTA. As a violation of the DTA, reliance on the declaration gives rise to a CPA claim. The beneficiary declaration used by NWTS to commence the Meyers' foreclosure also included this ambiguous language and could be deemed a violation of the DTA. NWTS would have to prove that they relied on additional information confirming the beneficiary was the owner of the note prior to the initiation of the foreclosure.

Though the Meyers brought forward ten issues for the appellate court to review, including the change in *Trujillo II*, **the Ninth Circuit's majority mem-orandum decision is based solely on the issue of**

Once served with a complaint, the servicer, investor, trustee or their counsel, should first review a borrower's bankruptcy status and history. If, while they were in active bankruptcy, the borrower was aware of the facts giving rise to their claims, their action should be dismissed.

judicial estoppel. The Ninth Circuit finally agreed that the Meyers were barred from bringing claims against NWTS because they failed to amend their schedules after obtaining enough facts evidencing their potential claims against NWTS. Upon the filing of the adversary proceeding, the Meyers should have also amended their schedules in order to apprise the bankruptcy court and their creditors of the claims.

Although the decision involved a foreclosing trustee, the same rationale would apply to servicers, investors or any creditor in a bankruptcy. Once served with a complaint, a servicer, investor, trustee or their counsel, should first review a borrower's bankruptcy status and history. If, while they were in active bankruptcy, the borrower was aware of the facts giving rise to their claims, their action should be dismissed.

Ideally, the 9th Circuit would have published this decision so that it could be used as precedent on future matters. Nonetheless, the cases cited in the decision and its rationale can be used to protect foreclosing parties within the 9th Circuit.

[10] *Bain v. Metro. Mortg. Grp., Inc.,* 175 Wn.2d 83, 285 P.3d 34 (2012); *Klem* (2013); *Walker* (2013); and *Bavand* (2013).

[11] As trustee, NWTS asserting they were acting as agent to the owner of the note in the NOD was not prejudicial because they were authorized to issue the NOD by statute and the Meyers failed to show prejudice or harm due to the language. NWTS's inclusion of ASC's address and Wells Fargo's numbers on the NOD was merely a technical error and the Meyers failed to prove how the practice is likely to deceive the public or how they were deceived or prejudiced by it.

[12] *Trujillo v. Nw. Tr. Servs., Inc.,* 183 Wn.2d 820, 355 P.3d 1100 (2015).

HOW DO YOU MEASURE UP?

IMPLEMENTING METRICS & KPI'S IN YOUR FIRM

BY ERICA FUJIMOTO, DIRECTOR OF DEFAULT SERVICES, AFFINITY CONSULTING GROUP
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LAW FIRMS are typically run 2 different ways: firms who try to analyze data and understand their business based on reports, and those who eyeball their circumstances and hope for the best. One might think that as a result, the former have a good handle on their firm, whereas the latter are just guessing. In actuality, neither is a completely accurate assessment.

Of course guessing is never the best way to go about running any business. However, many firms who do not operate or make their business decisions from data analysis have still been able to achieve some level of success because the owners and/or managers are very hands on and have a good idea of what is being done in the firm. Conversely, simply running reports without really understanding the story the data is telling, and in many cases not looking at the right data points, can be even worse. Think of it like a map – if you don't know where you want to go, you really can't have a predictable way to get there. And, you would never want to use a map that takes you to California when you really want to go to New York.

Ultimately metrics can help a firm gauge the market, improve internal performance, promote staff accountability, open lines of communication, increase profitability, and facilitate future planning.

DECIDE WHAT TO MEASURE AND ANALYZE

Key Performance Indicators (KPIs) are quantifiable measurements specific to the firm and its business that reflect strategy, goals, and success factors of the organization. They are essentially the measurements a firm utilizes to perform internal analysis and make improvements, and can be critical to identifying issues in the firm.

It is important to note, as previously mentioned, that the KPIs are a reflection of the firm's strategy. In order to determine how to measure the firm's strategy, an analysis of the current state is usually needed. That discussion of how the firm is currently operating, what is and is not working well, and a plan of action for desired improvements will usually lead a firm right to the target indicators for measurement.

Firms who are not currently taking advantage of the data that is tracked in their case management systems, time billing and accounting systems, document storage systems, etc., might be encouraged to find that these systems generally have some level of built in mechanism for extracting data, and if the tool provided with the software is not sufficient, there are often third party solutions that can help. In either case, there is no better time than now to start mapping out the desired KPIs.

KPIs change over time as the firm evolves and its strategies change, so for firms who are already utilizing metrics, it is important that evaluations be performed annually on the data you are analyzing to confirm they are still measuring the right items, that the reports are still pulling the correct information, and whether there is other data that might be needed.

There is a difference between metrics and KPIs. KPIs reflect your business strategy and goals, whereas some metrics are simply measurements used to analyze the current state and derive trends over time. Which a particular measurement is depends on the

FINANCIAL METRICS

METRIC	DESCRIPTION	HOW IT CAN BE PUT TO USE
Realization	The difference between the chargeable per hour rate and the rate paid by a client after write-offs. It enables a firm to know how much money is needed to sustain business.	Analysis of Realization rates that are low could be indicative of too many write offs, an efficiency problem, billing not being done timely, etc.
Aged Accounts Receivable	Invoiced fees and costs that have yet not been paid to the firm.	Reviewing overdue amounts can reveal issues with the collection process, or potentially even with the billing process itself.
Utilization	Billable hours divided by total hours expressed as a percentage.	Establishing a utilization policy and creating a foundation to measure it consistently can help uncover scheduling problems, whether people are working enough, whether there is a motivation issue, whether people are billing all of the time they actually worked, and whether they are managing non-billable hours productively.
Hourly Billed Charges	The amount of hourly fees billed by timekeepers over a specific period of time.	Setting a daily or weekly billing target, and using the measurements to determine whether the process is broken, there are not enough files or too many files per timekeeper, whether bonuses are needed, etc.
Client Advanced Costs	The amounts that are paid out of pocket by the firm and reimbursed later by the clients.	When amounts are not being paid in full by clients, it may be a result of untimely or incorrect billing, whether outside vendors' rates are too high, etc.

BUSINESS DEVELOPMENT METRICS

METRIC	DESCRIPTION	HOW IT CAN BE PUT TO USE
Networking Activity Tracking and Growth Rate	Tracking sales and marketing dollars spending (including data on location, people, event, time spent, dollars spent, etc.) and measuring it against the growth rate in terms of clients, net business, and profit margins.	This can help to determine whether marketing dollars are being well spent, and which activities are worth attending or have resulted in new clients.
New Matters Per Client and Cost of Doing Business	Measuring referrals received by client, and the non-billable cost of doing business with those clients.	Knowing not only how many referrals are received from each client, but also the non-billable costs, such as compliance and specific requirements that cost the firm in staff time, can assist with knowing which type of clients yield the most profitable business for your firm and when a particular client is costing more than they are profiting the firm.

PRODUCTION & EFFICIENCY METRICS

METRIC	DESCRIPTION	HOW IT CAN BE PUT TO USE
Stage/Timeline Tracking and Task Management	The amount of time files take from one part of the process to the next, together with measurements of how many tasks users are handling and whether they are being handled timely.	Both firm controllable delays in timelines and disparate task management among employees who have comparable workloads can be indicative of training, process, coverage, unclear expectations, and a whole slew of other issues, while delays that are outside of the control of the firm can help to pinpoint areas that should be addressed with clients, vendors, etc.
Client Response Timelines	Measurements of how long staff take to respond to client inquiries	While these measurements may be largely compiled manually, clients rely on timely responses, and delays can be the result of the items listed directly above.
Database Maintenance	Ensuring that information or fields that should be updated in the case management/billing systems is being updated/maintained in a timely fashion.	When users have been required to update internal systems with data at a particular point in the process, and that information is found to be missing, it can also be the result of the items listed above.

strategy it is aligned with, so for simplicity the examples provided are listed as metrics. There are standard metrics that most law firms should be running, and then there are metrics that may be unique to a specific firm or industry. Below are some examples of metrics that might be used in a default law firm.

CREATION, AUTOMATION, AND CONTINUOUS IMPROVEMENT

Once the desired KPIs and metrics have been established, the next step is to create the reports to output the information and to automate them if possible. In some cases, there may need to be manually tracked information, but it is best to minimize or avoid this whenever possible. Instead, creating methods of storing this information, if it is not already tracked, is optimal, and will ensure that additional burden is not placed on staff. Automating the delivery so that they are sent to the appropriate attorneys, managers, or staff at the proper intervals will enhance the process and improve likelihood that the reports are reviewed at regularly.

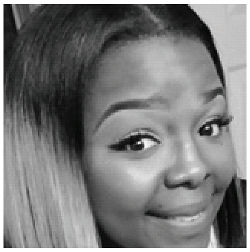
The metrics broken down above are examples that might be helpful for a default services law firm, but since each firm's strategies and internal makeup differ, there is no exact science to the correct KPIs for any firm, and running KPIs are not a guarantee of success. Ultimately, the goal with these metrics is to improve the quality, process, and financial wellbeing at the firm, so it is important that the implementation of data analysis include regular reviews with a specific focus on potential issues and opportunities for improvements. And once those improvements have been made, continuing to better understand the data or adjusting the metrics that are needed for the firm ensures that the process is circular, and increases the chances of success at the firm!

KPI'S ARE A REFLECTION OF THE FIRM'S STRATEGY. IN ORDER TO DETERMINE HOW TO MEASURE THE FIRM'S STRATEGY, AN ANALYSIS OF THE CURRENT STATE IS USUALLY NEEDED.

CONGRATULATIONS!

TO ALL OUR YOUNG PROFESSIONALS WHO RECEIVED THE ALFN'S 2017 PICTURE THE FUTURE AWARD.


STEVE SACKS
PNC Bank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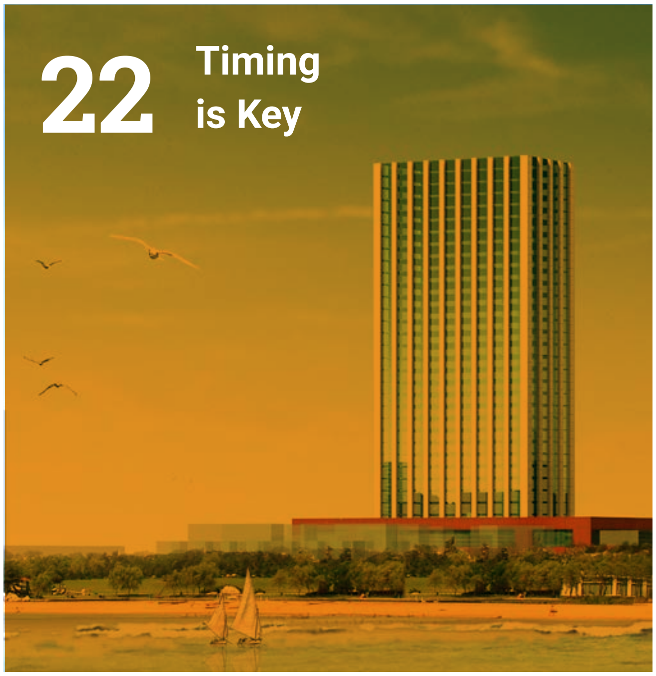
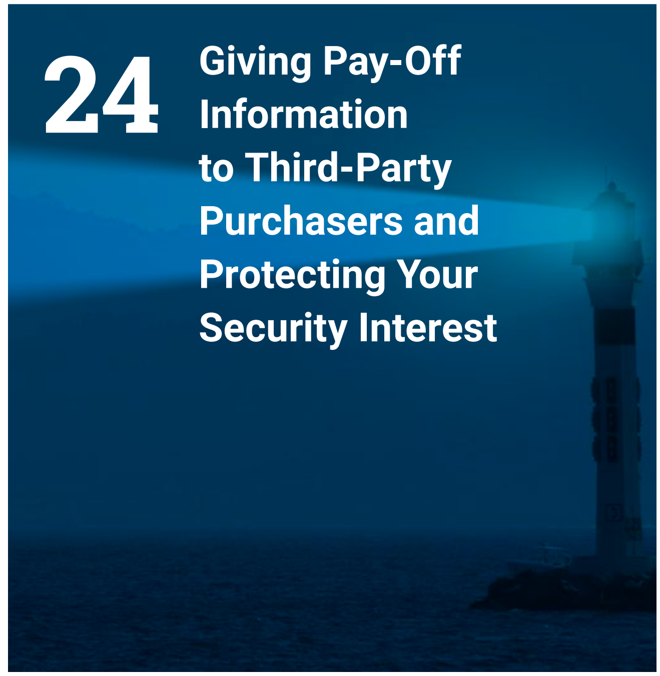
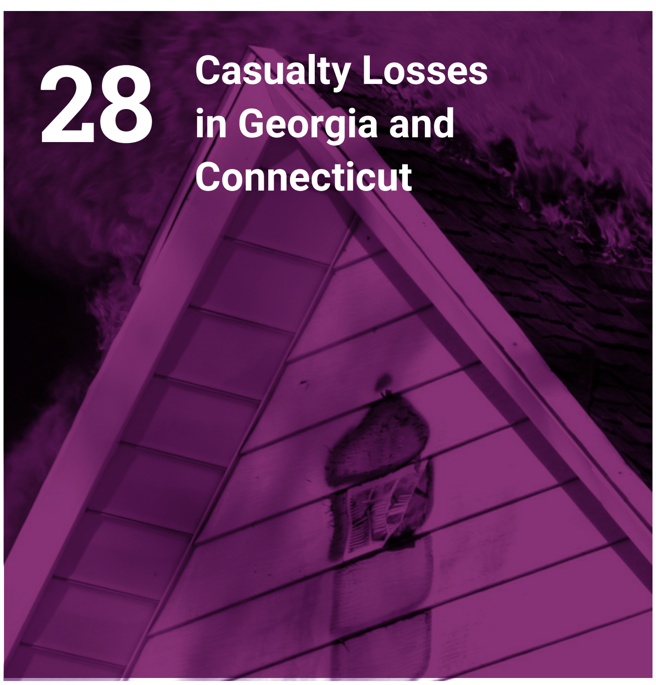
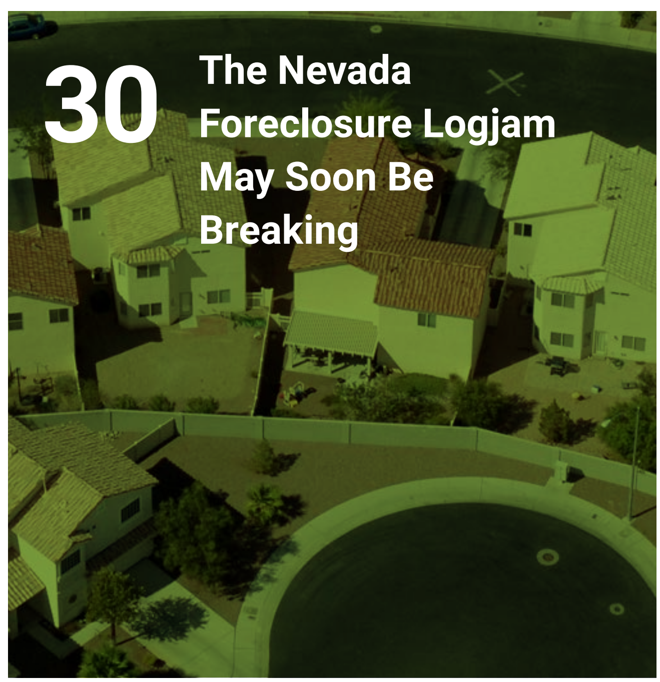
STATE SNAPSHOT









TIMING IS KEY

"Prompt" Payment Needed to Exinguish Pre-Foreclosure Sale Condo Assessments

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A RECENT ILLINOIS appellate court decision provides necessary guidance in determining when a judicial foreclosure sale purchaser should start making assessment payments to extinguish a condominium association's lien for prior unpaid assessments. While there is no strict deadline for when foreclosure sale buyers must start making condominium assessment payments, best practices dictate that to avoid being on the hook for any outstanding pre-sale assessments, such purchasers should begin making monthly assessment payments beginning the first month after the judicial sale.

When a condominium owner fails to pay his assessment fees, the other owners bear the burden of paying the delinquent owner's portion, which typically occurs when an owner's unit is in foreclosure. To help combat this issue, the Illinois Legislature enacted Section 9(g)(3) of the Condominium Property Act (765 ILCS 605/9 (the "Condo Act")), which provides:

> The purchaser of a condominium unit at a judicial foreclosure sale . . . shall have the duty to pay the unit's proportionate share of the common expenses for the unit assessed from and after the first day of the month after the date of the judicial foreclosure sale . . . . Such payment confirms the extinguishment of any lien created pursuant to paragraph (1) or (2) of this subsection (g) by virtue of the failure or refusal of a prior unit owner to make payment of common expenses, where the judicial foreclosure sale has been confirmed by order of the court.

The Illinois Appellate Court for the First District clarified Section 9(g)(3) in *Country Club Estates Con-dominium Association v. Bayview Loan Servicing,* 2017 IL App (1st) 162459, holding that the purchaser of a condominium at a judicial foreclosure sale must make "prompt" payment of post-sale assessments.

Bayview purchased a condominium unit at a judi-cial foreclosure sale, at which time the unit had accu-mulated unpaid monthly assessments. Bayview ini-tially refused to pay any past or present assessments, but seven months later, Bayview ultimately paid the assessments accruing *after* the foreclosure sale. The Association refused the partial payment because it did not include payment of pre-sale assessments.

The Association argued that under the Illinois Supreme Court's interpretation of Section 9(g)(3) of the Condo Act in *1010 Lake Shore Association v. Deutsche Bank National Trust Co.*, 2015 IL 118372, a foreclosure buyer is required to make "prompt" payment of post-sale assessments to extinguish an association's lien for prior unpaid assessments, and Bayview's seven-month delay was not prompt as a matter of law. The trial court disagreed, however, ruling that Bayview's ultimate tender of post-sale assessments extinguished the Association's lien for pre-sale assessments. The Association appealed.

The appellate court noted that because the text of

Section 9(g)(3) does not contain any time limit for confirming the extinguishment of an association's lien, it needed to look beyond the statute's language. With no legislative history to review for Section 9(g)(3), the court looked to other legislative debate regarding the difficulties faced by condominium associations when a unit owner fails to pay his or her share of the common expenses. The appellate court also discussed the Illinois Supreme Court's decision in *1010 Lake Shore*, which acknowledged an implicit time requirement in the second sentence of (9)(g)(3), "insofar as that section gives foreclosure buyers an 'incentive for prompt payment'. . . . [U]nder the plain language of section 9(g)(3), the payment of post-foreclosure sale assessments formally approves and makes certain the cancellation of the condominium association's lien."

The appellate court reversed the trial court's ruling that Bayview's payment of post-sale assessments seven months later was prompt, resulting in Bayview being on the hook for both pre- and post-sale assessments. Although the appellate court recognized that under the Condo Act, foreclosure buyers become responsible for paying assessments "from and after the first day of the month after the date of the judicial foreclosure sale," it did not go as far as placing a rigid deadline for the payment. In certain cases there may be extenuating circumstances that would excuse a failure to tender the required assessments commencing the month after purchase, such as unreasonable refusal of payment by a condominium association or delay in confirming the sale through the judicial process.

Purchasers of condominiums at judicial sales should take the above circumstances into account when determining when to make such a payment. But in the absence of any extenuating circumstances, it is recommended that a purchaser begin making payment of post-sale assessments beginning with the first full month after the sale to ensure they meet the Condo Act's "prompt" standard. a

GIVING PAY-OFF INFORMATION TO THIRD-PARTY PURCHASERS AND PROTECTING YOUR SECURITY INTEREST

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GEORGIA'S COURT OF APPEALS recently reiterated that "'[t]he refusal of a creditor to accept a proper tender in payment of a debt does not extinguish the debt, but the creditor loses the collateral benefits under the deed given to secure the debt.'" *100 Lakeside Trail Trust v. Bank of America, N.A.*¸ No. A17A1735, 2017 WL 3932246 (Ga. App. Sept. 8, 2017); *citing Ward v. McGuire*, 213 Ga. 563, 565, 100 S.E.2d 276 (1957). In order to properly tender, a person needs to know what the pay-off amount is. With the privacy concerns that arise under federal laws like the Gramm-Leach-Bliley Act, how does a lender or servicer protect its security while simultaneously protecting its borrower's privacy rights? Both Georgia law and the Consumer Financial Protection Bureau provide guidance on this issue.

By Georgia statute, the borrower, or a person who buys the property from the borrower subject to the borrower's security deed, is entitled to know the pay-off balance upon request. *See* O.C.G.A. § 44-14-64(h).

The question that remains is whether the third-party purchaser of a second priority security deed that has been foreclosed is entitled to the loan pay-off information. Stated differently, can a lender lose its security in a first priority security deed if it refuses to provide pay-off information to a third-party purchaser of a second priority security deed? Based on an analysis of Georgia law and federal regulations, the answer is unequivocally, yes.

In Georgia, when a person gives a first security deed he or she conveys legal title to the lender and retains the right of possession and an equitable right of redemption. As a result, all that is left to convey to the holder of a second security deed is the right of possession and the equitable right of redemption. Under Georgia law, the foreclosure of a second security deed transfers these rights from the grantor (the borrower) to the third-party purchaser. *See Chason v. O'Neal*, 158 Ga. 725, 124 S.E. 519 (1924); *accord* Georgia Real Estate Finance and Foreclosure Law §10:2. As a result, the third-party purchaser has the right of possession and the equitable right of redemption. This third-party purchaser is not considered a stranger in title. In fact, according to the laws of subrogation, the third-party purchaser has a right to pay the debt on the property in which it has an interest. *See* Harris' Law of Subrogation, 10.

In this situation, Georgia's foreclosure statutory scheme further supports the argument that this loan information must be provided. Under Georgia law, the foreclosing lender must send the "debtor" notice of the foreclosure. *See* O.C.G.A. §44-14-162.2. In Georgia, the grantor on the security deed, or the current owner of the property is considered the "debtor" for the purposes of the foreclosure statutes. *See Roylston v. Bank of America, N.A.*, 290 Ga. App. 556, 660 S.E.2d

412 (2008); *Wright v. Barnett Mortg. Co.*, 226 Ga. App. 94, 485 S.E.2d 583 (1997); O.C.G.A. § 44-14-162.1; *Pindar's Georgia Real Estate Law and Procedure with Forms* § 21:81. There are times where a lender will give a loan to one person and secure it with property owned by two or more persons. If that occurs, and all of the owners, which are not the borrower, sign the security deed, then the non-obligated titleholders are entitled to that information. The same is true if the original borrower has sold or transferred the property, subject to the first position security deed. *See* O.C.G.A. § 44-14-64(h).

Furthermore, O.C.G.A. § 44-14-162.2 requires the foreclosure notice that is sent to the debtor to "include the name, address, and telephone number of the individual or entity who shall have the full authority to negotiate, amend, and modify all terms of the mortgage with the debtor . . . ." Thus, Georgia law clearly contemplates that the holder of security deed negotiate and deal with the owner of the property, even if that owner became the owner by purchasing the property at the foreclosure sale of a subordinate security deed. This is further evidenced by the fact that Georgia's Courts allow this "debtor" to sue the first position security deed holder for wrongful foreclosure if it does not send the required notice to the "debtor." *See Roylston v. Bank of America, N.A.*, 290 Ga. App. 556, 660 S.E.2d 412 (2008).

All of this is important, because, as recent reiterated in the *100 Lakeside Trail Trust* case, it has been long standing Georgia law that the refusal of a creditor to accept a tender can cause the creditor to lose the collateral benefits under the deed given to secure the debt. *See Thurman v. Lee*, 181 Ga. 408, 182 S.E. 609 (1935). Additionally, at section 21:66, *Pindar's Georgia Real Estate Law and Procedure with Forms*, states that in Georgia, "the grantee must provide a loan payoff on demand by the grantor or his successor."

However, Georgia Courts have taken this a step further in *Coffee Enterprises Realty & Dev. Co., Inc. v. Holmes*, 233 Ga. 937, 213 S.E.2d 882 (1975). In this case, the plaintiff purchased the property subject to a security deed. The Plaintiff sued the holder of the security deed because it refused to provide a payoff and failed to accept payments tendered to pay the arrearage to stop the foreclosure. *Id.* The Georgia Supreme Court held "[t]he refusal of [the lender] to accept any payment or to provide [the plaintiff] with the correct 'pay-off' of such loan is in reality no different than a grantee absenting himself so that a tender cannot be made." *Id.* at p. 940. Stated differently, under Georgia law if a successor owner attempts to make a payment and the lender refuses, the lender can lose its entire security in the property.

If federal privacy concerns remain, it is recommended that one look to the Consumer Financial Protection Bureau's Final Rule published on October 19, 2016, at 81 F.R. 72160 and titled "Amendments to the 2013 Mortgage Rules Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z)", and which is effective in part on October 19, 2017, for guidance on what information can be provided. The following sections of which are informative:

> *Gramm-Leach-Bliley Act and privacy concerns*. In the proposal, the Bureau indicated that it believed that applying Regulation X's subpart C to confirmed successors in interest does not present privacy concerns. The proposal explained that the Bureau believed that a confirmed successor in interest's ownership interest in the property securing the mortgage loan is sufficient to justify enabling the successor in interest to receive information about the mortgage loan. However, because some people representing themselves as successors in interest may not actually have an ownership interest in the property, the Bureau recognized that requiring servicers to apply the communication, disclosure, and loss mitigation requirements from Regulations X and Z to successors in interest before servicers have confirmed the successor in interest's identity and ownership interest in the property might present privacy and other concerns. The Bureau solicited comment on whether any information that could

be provided to successors in interest under §§1024.35 and 1024.36 presents privacy concerns and whether servicers should be permitted to withhold any information from successors in interest out of such privacy concerns . . . . *See* 81 F.R. 72179.

The Bureau concludes that complying with the final rule does not cause servicers to violate the GLBA or its implementing regulations but recognizes the potential privacy and related concerns raised by commenters and has made adjustments in the final rule to address these concerns. Disclosing information to successors in interest as required under the final rule will not cause a servicer to violate the GLBA or Regulation P because the GLBA and Regulation P permit financial institutions to disclose information to comply with a Federal law or regulation. *See* 81 F.R. 72180.

The Bureau continues to believe that a confirmed successor in interest's ownership interest in the property securing the mortgage loan is sufficient to warrant that person's access to information about the mortgage loan. The Bureau also believes it is important for confirmed successors in interest to be able to obtain information about the terms, status, and payment history of the mortgage loan. Id.

Because a mistaken or erroneous denial of a pay-off request could result in the loss of security for a loan, lenders and loan servicers must exercise prudence when responding to pay-off requests for Georgia loans which were submitted by non-borrowers in order to ensure that they are protecting the collateral that secures the loan.

Massachusetts Decision Extends Application of *Pinti*

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ON MAY 11, 2017 the Supreme Judicial Court of Massachusetts issued a decision in *Federal National Mortgage Association v. Marroquin,* 477 Mass. 82 (Mass. May 11, 2017) relating to cases that were effected by holding of *Pinti v. Emigrant Mortgage,* 472 Mass. 226, 227, 232, 33 N.E.3d 1213 (2015). To summarize, *Pinti* held that a foreclosure by statutory power of sale pursuant to M. G. L. c. 183, § 21, and G. L. c. 244, §§ 11-17C, is invalid unless the notice of default strictly complies with paragraph 22 of the standard mortgage, (which informs the mortgagor of, among other things, the action required to cure the default, and the right of the mortgagor to bring a court action to challenge the existence of a default or to present any defense to acceleration and foreclosure.) The *Pinti* Court applied this rule to the parties, but otherwise gave the ruling prospective effect only.

The *Marroquin* case now extends the holding of the *Pinti* rule to cases pending in where the *Pinti* issue was timely and fairly raised on or before the Court issued its decision in *Pinti.* The Court reasoned that "In such cases, the homeowner-mortgagors are similarly situated to the plaintiffs in *Pinti,* because they presented the same arguments in the trial court that the *Pinti* plaintiffs presented to this court on appeal. All that distinguishes the homeowners in *Pinti* from the homeowners in this case is the pace of the litigation." *Marroquin supra at 8*.

Thus, cases pending in the trial court or on appeal where the *Pinti* issue was timely asserted on or before July 17, 2015 will receive the benefit of the rule.

The impact to servicers will be that titles once deemed valid post-*Pinti* will now be subject to challenge under the rule and most likely uninsurable pursuant to title standards. Servicers should review their default notices carefully to en-sure that they comply verbatim with the mortgage terms for all non-judicial and judicial foreclosures as well as for any bank-owned properties.

STATE SNAPSHOT

CASUALTY LOSSES IN GEORGIA AND CONNECTICUT

How Can the Borrower Help?

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When a lender suffers a casualty loss, a servicer needs to act with dispatch to meet the time deadlines in an insurance policy to commence a suit, or risk denial of any benefits. Connecticut standard form fire insurance policies in require a suit to be commenced within 18 months of the loss. CGS 38a-307.

Suppose that, for whatever reason, the servicer fails to commence suit within that timeframe. What recourse does the servicer have? If the homeowner filed a timely suit against the insurer for that same loss, the lender, as a loss payee under the policy, can intervene in that suit, which satisfies the suit limitation provi-sion. In Austin-Caseras v. Safeco Insurance Company, 310 Conn. App. 640 (2013), a secured lender suffered a fire loss to the mortgaged property, but failed to commence suit within the 18 month suit limitation provision in the policy. The homeowner did com-mence suit within the 18 month limitation provision. The lender filed a motion to intervene in the home-owner's suit against the insurer, utilizing a Georgia[1] decision which held that a lender can intervene in a timely suit by the homeowner due to an ambiguity in the policy. In the Safeco case the trial court denied the lender's motion to intervene, on the basis that it was time barred. The Connecticut Supreme Court, in a unanimous decision, reversed the trial court, hold-ing that it had failed to consider whether the inter-vention related back to the timely suit filed by the homeowner. Furthermore, the Safeco court held that as a matter of law, the motion to intervene related back to the timely suit by the homeowner.

This case law provides a benefit to lenders facing casualty losses. When a homeowner reports a loss to a servicer, information related to the status of the claim is typically provided, but may not address whether suit has been commenced by the homeowner. Obtaining this information can prove the differ-ence between a denial of a material loss by the in-surer and the ability to recover under the insurance policy. This case law may also be a benefit to lenders when homeowners have advanced class action litiga-tion against insurers for various reasons.

Also noteworthy is the basic concept that lenders are "innocent insureds", such that conduct of the owner is typically not imputed to the lender, and should not form the basis of the denial of a claim by the lender. Jurisdictions which have tackled the ques-tion of whether a mortgagee may recover against an insurer when a residency or vacancy exclusion was raised as a policy defense have answered the question[2] in the affirmative, except for Wisconsin. Residency and occupancy requirements of an insurance policy involve acts of the homeowner. Courts have held that a mortgagee may recover under an insurance policy even if the borrower-owner did not reside there as required by the policy. Wells Fargo Bank, NA v. Null, 304 Mich. App. 508 (2014).

In Null, there was a fire loss at a residential prop-erty insured by a homeowner's policy with a "union" mortgage clause listing the mortgagee as a payee. At the time of the fire loss, the borrower-owner was incarcerated and had not lived at the property for several years. The mortgagee made a claim for the fire loss, which was denied because the borrower did not reside at the property as required by the policy. The Court of Appeals of Michigan reversed the en-

try of summary judgment for the insurer, holding that "it was the insured's act of ceasing to reside in the residence that negated the insured's coverage. We hold that…circumstance does not negate coverage for Wells Fargo, as mortgagee, under the standard mort-gage clause." In ruling for the mortgagee, the Null Court stated that "the lender's role in the process of obtaining insurance is essentially non-existent. That process occurs solely between the insured and the in-surer; the mortgagee is merely along for the ride."

The holding of Null that a mortgagee may recov-er under an insurance policy with a standard or union clause notwithstanding the owner's failure to comply with a residency requirement has been adopted in other states: Home Savings of Ameri-ca, FSB v. Continental Ins. Co., 87 Cal. App. 4th 835 (2001) (California); Old Second National Bank v. In-diana Insurance Company, 2015 Ill. App. Lexis 185 (Indiana); Murray v. North Country Insurance Co., 277 A.D. 2d 847, (New York); First American Sav-ings F.A. v. Newark Insurance Co., 1990 U.S. Dist. Lexis 10833 (ED PA.); SWE Homes, LP v. Wellington Insurance Co., 436 S.W. 3d 86 (2014). All of these cases adhere to the reasoning that the act of a bor-rower under such policies cannot impair coverage to the innocent mortgagee. a

[1] Georgia Mutual Ins. Co. v. Glennville Bank & Trust, Co., 229 Ga. App. 402 (1997). The Georgia opinion held that the policy language was susceptible to two meanings because it did not state that the mortgagee's claim was barred unless the mortgagee filed suit within the limitation period. The policy was silent on the pivotal issue of whether a mortgagee was required to bring a separate, second action even if the action of the insured was timely filed and pending.

[2] Waterstone Bank SSB v. American Family Mutual Insurance Company, 2013 WI App. 60. This case was distinguished by the Court in Null, as fol-lows: "We find Waterstone Bank to be distinguishable, because it involved a business-owner's policy under which "noncoverage existed by virtue of the vacancy provision and not by any breach or violation by the property owner,…rather than, as here, a homeowner's policy under which the insured was denied coverage because the insured had failed to abide by the residency requirement of the policy…thus, unlike this case, Waterstone Bank did not involve the sort of act or neglect on the part of the insured from which the standard mortgage clause was designed to protect the mortgagee."

THE NEVADA FORECLOSURE LOGJAM MAY SOON BE BREAKING

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RESIDENTIAL FORECLOSURES in Nevada came to a halt June 12, 2017, when SB490 was signed by Governor Sandoval. The bill permanently established a mediation program for residential properties and included a number of procedural changes that created an immediate halt on the foreclosure process.

Perhaps most significant to the new changes is the implementation of Home Means Nevada, Inc. ("HMN") as the entity that will administer the program in conjunction with the district courts. HMN is a non□profit organization established by the Director of the Department of Business and Industry pursuant to NRS 23.520(4) and was originally established in 2013 from the national mortgage settlement proceeds to assist under□water mortgages for Nevadans.

In June 2017, HMN did not have a Program Administrator for the mediation program, a staff, an office, an email address or a phone number and as a result, foreclosures in Nevada became stagnant. Yet, under the new legislation, HMN is responsible for providing Trustee's with a mandatory Mediation Form that must be mailed with all Notices of Default ("NOD") detailing the new mediation alternatives. In addition, HMN is responsible for issuing the Certificates of Foreclosure that are required prior to scheduling a foreclosure sale.

In the intervening 90 days since the passage of SB490, HMN hired an Operations Manager, Michelle Crumby, and on September 19, 2017, HMN moved into its office located at 3300 W Sahara Avenue, Suite 480, Las Vegas, Nevada 89102.

It is our understanding that HMN's website (NOT the portal) should be operational by the end of

September 2017, if not sooner. The website will have all of the documents and forms that

lenders/trustees will need to resume recording NODs in Nevada.

It is our understanding that HMN will start processing and issuing Certificate requests by the end of October 2017. A form will need to be submitted for each property separately by the Trustee requesting the issuance of the Certificate.

There is a concern over the effect NRS 107.550(2)—[the tolling provisions related to NODs and NOSs under NV HOBR] will have on NODs that have been lingering during the delay created by HMN. The concern stems from whether this 100 day period for HMN to become operational will be considered a "tolling" event. Although it has been impossible for lenders/servicers/beneficiaries to request a Certificate of Foreclosure in order to proceed with scheduling a sale and thereby avoid a lapse in setting a sale or going to sale, it is unclear how the courts may interpret the statute. We are seeking clarification and will continue to provide information as it becomes available.

With HMN becoming operational, lenders and trustees will begin navigating the new rules and procedures. For example, in order to elect mediation, a homeowner must file a petition in the district court where the property is located. The trustees are required to file an Answer to the homeowner's Petition. If there are issues related to eligibility to participate in the program, limitations of

the foreclosure alternatives or other circumstances related to a loan, it would be prudent to know the information as early in the process as possible. Under the previous mediation program, the district court's involvement in the mediation process was limited to a post-mediation review. With the new rules, the district court is involved throughout the mediation process and the actual risk of sanctions for noncompliance will increase.

A particular area of concern is a new document requirement, which mandates that beneficiaries

produce "any document created in connection with a loan modification," (FMR 12(1)(a)) but the rules do not specify what documents satisfy the requirement. If a loan modification (temporary or permanent) was previously offered or accepted to a property owner, we recommend producing the documents under the new rules.

At the conclusion of the mediation, the parties have ten (10) days to submit a "request for appropriate relief." Under the previous rules, the parties had thirty (30) days to consider their options after receiving the mediator's statement. The new rules do not require the district court to hold a hearing. The district court can enter its order without a hearing, and the only remedy available to the parties is to proceed with a more costly appellate process to the Nevada Court of Appeals.

Consult with your local counsel as you prepare to navigate through the potential pitfalls that will almost certainly arise due to the complexity of these new rules.

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