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OFFICIAL PUBLICATION OF THE ALFN
VOL. 8 ISSUE 2

Legislative and Regulatory Issues


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82
DID RECENT EVENTS THROW YOUR BUSINESS A CURVE?
NBS IS STILL ON THE FIELD AND READY TO HELP!

ALFN AMERICAN LEGAL & FINANCIAL NETWORK

ALFN.ORG

WE ARE HERE FOR YOU

#100%MemberRetention

As we are all continuing to deal with the impact of COVID-19, ALFN is offering some enhanced membership benefits and incentives that will provide direct ROI for your continued membership support. It is our goal to maintain 100% member retention, and continue to remain a vital leadership resource to have your voices heard and in providing you with the premier educational offerings you have come to expect from the ALFN. Here are some of the ways we would like to thank you for your continued support:

- **15% Dues Discount for 2021 Membership Renewal:** Members that paid their 2020 membership renewal dues in full by Dec. 31, 2020, received a 15% discount on your 2021 membership renewal dues.
- **Payment Assistance:** Installment plans, credit card payments and payment deferrals are available for 2021 membership dues, and for any ads and sponsorship purchases made in 2021. No additional fees charged for these alternative payment methods.
- **2021 Membership Dues:** There was no increase in 2021 membership renewal dues over the 2020 dues amounts.
- **Former Members Re-Joining:** Any member that had a cancelled membership and wants to re-join the ALFN in 2021 will not be charged any re-joining or initiation fees.
- **Enhanced Online Educational Offerings:** Additional webinars and online content offered at no additional cost to our members. View all past online session recordings and materials free of charge at https://www.gotostage.com/channel/alfnwebinars.
- **ANSWERS 2021 Online Presentations:** Since we will not host ANSWERS in-person this year, we will be offering the educational sessions we had planned in an online format. We are offering these 9 sessions free of charge to our members.
- **CLE Credit:** No less than 16 of our online presentations in 2021 will include CLE credit opportunities. CLE credit will be offered at a special discounted rate.
- **Discounted Ad Purchases:** Discounts will be provided for all ads and upgrades purchased for the remainder of 2021 in the Legalist, WILLed and ANGLE publications.
- **New Webinar Sponsorship Opportunities:** Newly designed sponsorships are available at a lower cost to provide continued branding and marketing opportunities for our members.
- **ASSURE Rewards Program:** Members that had achieved ASSURE Rewards status after ANSWERS 2019 will remain in the program through and including ANSWERS 2022.

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

WE ARE HERE FOR YOU!

Letter from the ALFN Board Chair

The Good, The Bad, The Ugly and ALFN

I HOPE THIS article finds you in good health. After a year of the unimaginable which included a once in a lifetime pandemic, a complete stop in work, and struggles to keep our industry afloat, we see a flickering light at the end of the tunnel. Faced with even more new regulations, incredible court opinions and everchanging restrictions. It appears that our industry will ramp up again towards the end of June 2021 while additional extensions to 2022 are being considered by the CFPB.

With 2021 barely out of our rear-view mirror, we now have new proposed restrictions on evictions by the CFPB to look forward to. In addition, we will continue to face new compliance requirements and an empowered CFPB that is flexing its muscles once again. That should get all of our attention.

Recently, we saw many rulings from courts that present challenges, like the Hunstein case, making us question who else will be considered a 3rd party. New Statutes of limitation issues. Government agencies determining when and how the default market should handle matters and when it may resume. The CFPB regulating lawyers through the proposed eviction notices, and stepping in after the CARES Act expires to punitive new regulations and sweeping holds on files.

It is a lot to take in. But, this is where ALFN steps in. We have been working hard getting ahead of these issues making the arguments for how we can get properly and ethically handle these difficult issues. Currently, the board is working on a response to proposals for another sweeping moratorium to 2022. Our industry knows all too well that treating all matters the same is not the answer and will have long term negative effects on the economy, housing market and the financial industry.

We are also working on new programs and offerings for our members to allow for more engagement and help where it is needed. I am so proud of our board and members for their resiliency and ability to make it through this most difficult of times. Please stay engaged as we get through this together.

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

Letter from the Editor

THIS ALFN ANGLE issue contains the latest up-to-date information on many important Legislative & Regulatory issues, including those associated with COVID-19, Statute of Limitations, Bankruptcy, Lien Priority, CDC Moratorium Issues and more. Our industry landscape will continue to change and evolve as we are starting to come out of the COVID-19 pandemic. The far-reaching impact that this pandemic has had will continue to be seen for some time. Rest-assured, the ALFN will continue to be an industry leader in education, member advocacy and providing our members with the information you need to be successful and persevere.

We start this issue with our cover feature, which addresses the new Consolidated Appropriations Act of 2021. This new Statute will need to be monitored carefully to remain in compliance with the new proof of claim deadlines and requirements, and proper documentation and filing of any forbearance claims.

Our feature articles section starts off with a review of the CDC's authority to issue a moratorium on evictions. We can expect more litigation testing the authority of the CDC as it relates to matters such as these, and something that should be carefully monitored. Next up we take a look at how the New York Court of Appeals clarified Statute of Limitations in mortgage foreclosures. This case made clear the three major issues regarding acceleration, de-acceleration and how the Statute of Limitations should be applied. We then move on to take a deeper look into a recent Oregon Supreme Court opinion affirming a condominium association's ability to gain priority over a first position mortgage or deed of trust. This case demonstrates the importance of consulting with your local counsel when in receipt of a 90-day notice from a homeowner or condominium association.

This ANGLE issue also contains several important State Snapshot contributions, which addresses state specific updates in Arizona, California, Maryland, Ohio, Pennsylvania and Texas.

Let us know what ALFN can do to help, and how you would like to get involved. WE ARE HERE FOR YOU!

Best regards,

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

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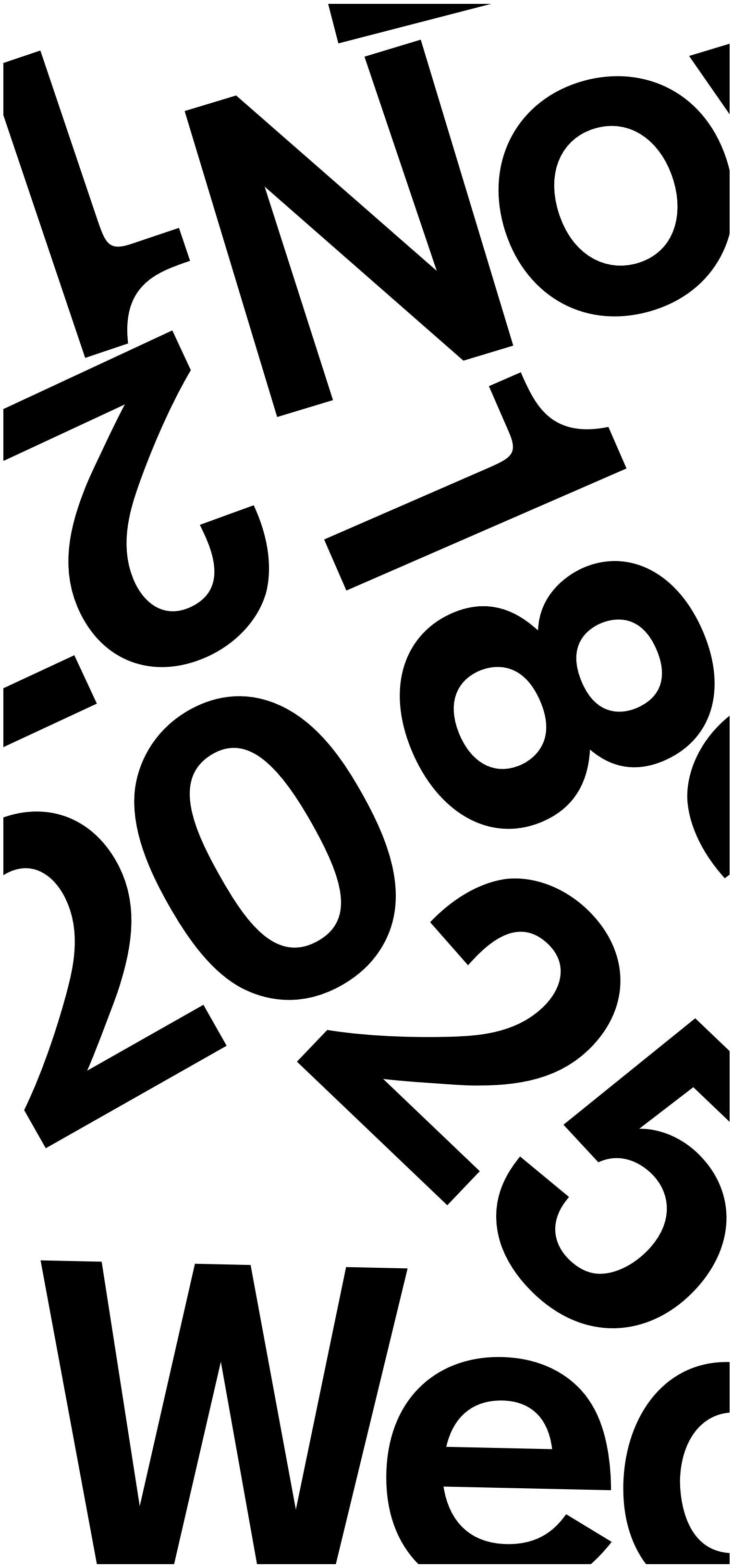

MEMBER BRIEFS

ALFN EVENTS

SAVE THE DATES

2021

JULY 27-AUGUST 24

ALFN ANSWERS

Online Educational Event

9 Webinar Sessions

Starting July 27

NOVEMBER 18

FORECLOSURE INTERSECT

Marriott Dallas Las Colinas

Irving, TX

2022

JULY 17-20

ALFN ANSWERS

19th Annal Conference

Hyatt Regency Tamaya Resort

Santa Ana Pueblo, NM

2023

JULY 16-19

ALFN ANSWERS

20th Annual Conference

Park Hyatt Beaver Creek Resort

Beaver Creek, CO

Want more industry intel?

Check the complete industry calendar for ALFN and other events online at alfn.org for even more details and registration info.

IS YOUR CONTACT INFO UPDATED?

Is your online directory listing optimized? Do you know who has access to your ALFN.org account? Well, log in at ALFN.org to edit your member listing to make sure your information is current. You should also send us a complete list of your company employees and we will add them to our database to make sure everyone receives our updates and reminders. We often send emails on important opportunities for our members, so we don't want you to miss out on all the ways you can get involved.

Contact us at *info@alfn.org* to be included.

EVENT & ANNUAL SPONSORSHIP PACKAGES

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

VOLUNTEER OPPORTUNITIES

ALFN offers members an opportunity to serve on small, issue or practice specific groups. Take the opportunity to have direct involvement in developing and leading the activities of the ALFN. Volunteering is one of the most important activities you can do to take full advantage of your membership value. For descriptions of each group, their focus, activities and other details, visit Member Groups at ALFN.org.

ALFN WEBINARS

The ALFN hosts webinars that are complimentary for members and servicers. Contact us at info@alfn.org to learn more about hosting a webinar and the benefits of doing so, or to sign up to attend our future webinar events. Our webinar offerings include:

PRACTICE BUILDING SERIES

Presentations on operational and business issues facing our members.

HOT TOPIC LEGAL UPDATES

Industry hot topics and litigation updates.

STATE SPOTLIGHT

Focusing on those state specific issues.

MEMBERS ONLY

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

WEBINARS ON-DEMAND

View Previously Recorded ALFN Webinars On-Demand at:
wwww.gotostage.com/channel/alfnwebinars

SPEAKER APPLICATIONS FOR ALFN EVENTS

If you want to be considered for a panelist position as a speaker or moderator at one of our events, please find our events tab on alfn.org and fill out the speaker form listed there. Each year many members submit their interest to speak at ALFN events, and we are looking for the best educators and presenters out there to get involved. To be considered, everyone in your company that wants to speak on a panel must complete a speaker form.

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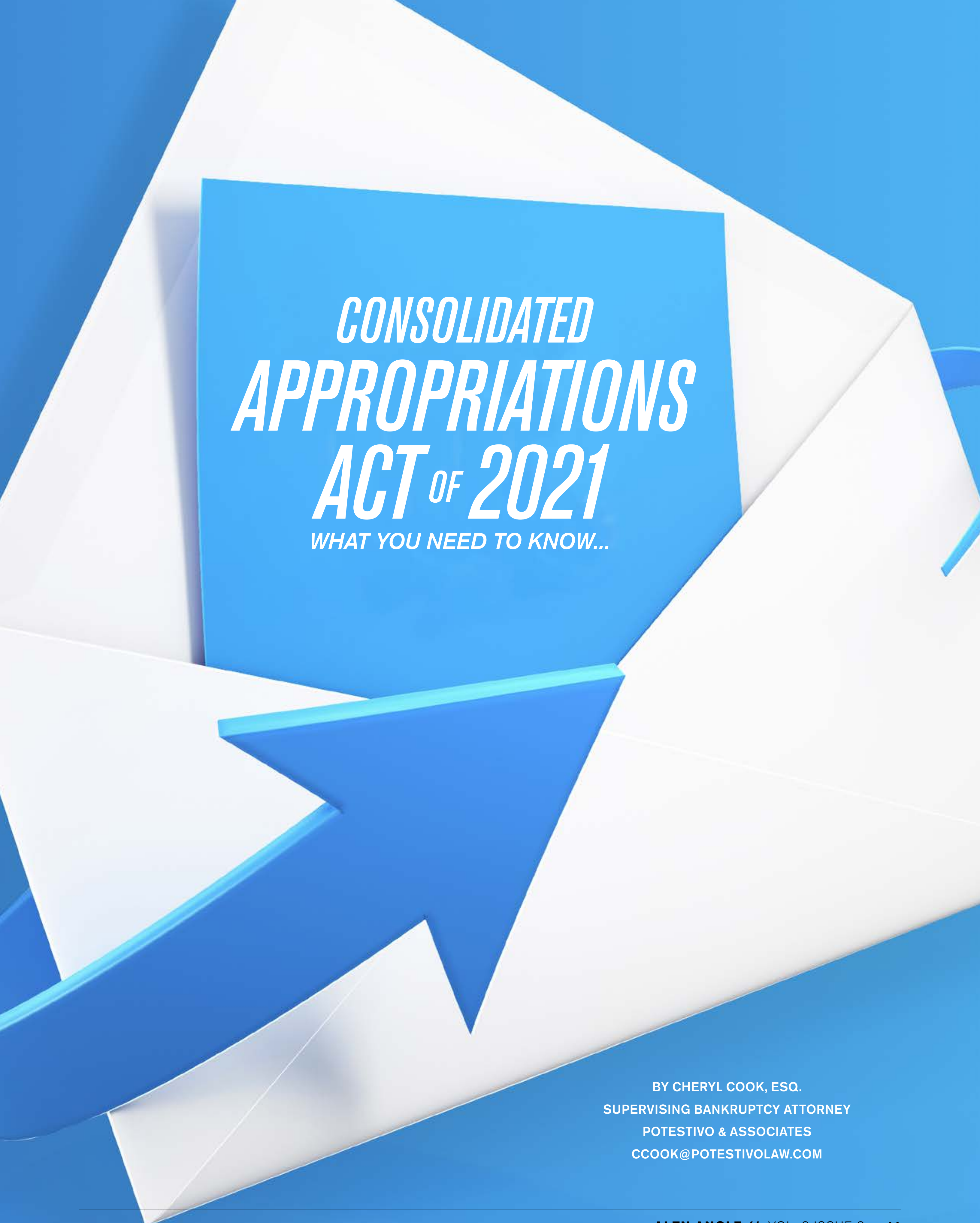
CONSOLIDATED APPROPRIATIONS ACT OF 2021

WHAT YOU NEED TO KNOW...



BY CHERYL COOK, ESQ.
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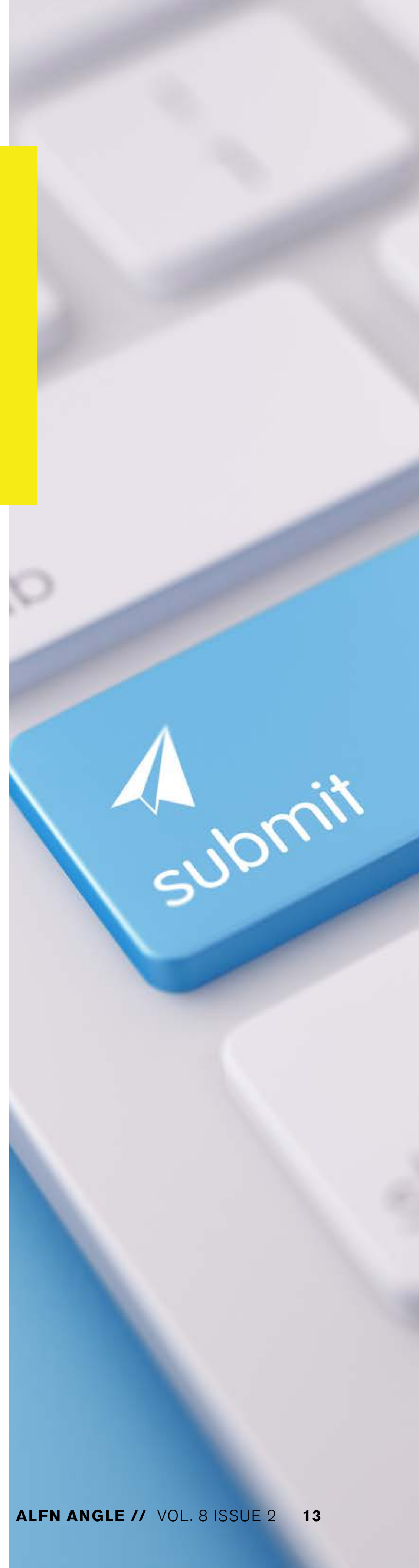
AS MANY OF YOU ALREADY KNOW, under the CARES Act of 2020, borrowers can request forbearance of their payments on FNMA/FHMLC-backed mortgages for up to two 180-day periods if they were experiencing financial hardship caused by the COVID-19 emergency. Forbearances are mandated (not discretionary, so long as the hardship element is satisfied for eligible loans), and "[n]o additional interest, fees, or penalties are allowed beyond the amounts scheduled or calculated as if the borrower made all contractual payments on time and in full under the terms of the mortgage contract."[1]

Once the forbearance period ends, the payments have to be addressed – are the payments due in a lump sum, does the borrower have to pay "make-up" payments over a period of time to catch up, or are the payments deferred to the end of the loan? If the parties agree on how those payments are treated, how is that agreement documented?

Some borrowers may obtain forbearance on their mortgages outside of a bankruptcy court, but their economic hardship circumstances continue to the point where they seek relief under the bankruptcy code before the forbearance period ends. Others may be in the middle of a confirmed chapter 13 bankruptcy plan but require forbearance during the plan period. Depending on their financial circumstances at the beginning of their case, they may have started their case with a current mortgage and continued to make payments directly to their mortgage lender/servicer. Or, they may have started their bankruptcy case to avoid foreclosure due to mortgage defaults.

In a chapter 13 bankruptcy, where the debtors are required to make payments pursuant to the terms of a chapter 13 plan, forbearance poses additional administrative problems. Debtors who obtain a forbearance on their mortgage payments while in bank-

The CAA amended Section 501 of Title 11 of the U.S. Bankruptcy Code[3] to provide that if the parties enter into a forbearance of the debtor's obligation to the mortgagee and there is an agreement to cure those mortgage payments, the mortgage creditor (and ONLY the mortgage creditor) must file a supplemental proof of claim for a CARES forbearance claim.



ruptcy but make their payments through the Trustee may not get the benefit of the forbearance without a plan modification. Debtors with a chapter 13 plan provided for direct payment of their mortgage payments to the creditor may need to forbear those payments during a period of financial hardship to avoid plan default and dismissal of their bankruptcy case.

Congress enacted the Consolidated Appropriations Act of 2021 ("CAA"), specifically Title X, to resolve these and other questions arising from the continued impact the COVID-19 pandemic has on our economy. These changes are in effect until December 31, 2021 (unless extended).

The CAA requires creditors to file a supplemental proof of claim in the debtor's bankruptcy case when a mortgage is provided for by a plan under 11 U.S.C. § 1322(b)(5)[2], and the creditor did not receive mortgage payments during a forbearance period of a loan granted forbearance under 15 U.S.C. §§ 9056, 9057. The form that will be used for this supplement can be found at form_4100s_0221_0.pdf (uscourts.gov). Note: although the Bankruptcy Code requires proofs of claim to be filed no later than 70 days after the petition is filed (with any supplemental documentation filed no later than 120 days after the petition date), the forbearance supplemental claim may be filed even if the initial claims bar date passed.

1 cfpb_csbs_industry-forbearance-guide_2020-06.pdf (consumerfinance.gov)

2 § 1322(b)(5) provides, "Subject to subsections (a) and (c) of this section, the plan may…notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due."

The CAA amended Section 501 of Title 11 of the U.S. Bankruptcy Code[3] to provide that if the parties enter into a forbearance of the debtor's obligation to the mortgagee and there is an agreement to cure those mortgage payments, the mortgage creditor (and ONLY the mortgage creditor) must file a supplemental proof of claim for a CARES forbearance claim. The supplemental proof of claim must include the terms of the modification or deferral, a copy of the modification or deferral if in writing[4], and a description of the payments to be deferred to the date on which the mortgage loan matures.

Under newly amended section 502(b)(9)[5], the time for filing a CARES forbearance claim is 120 days after expiration of the forbearance period of a loan granted forbearance under section 4022 or 4023 of the CARES Act (15 U.S.C. 9056, 9057).

Section 1329 of title 11 is amended to provide that when a creditor files a CARES Act supplemental claim, the debtor may file a request for plan modification to provide for it. If the debtor does not, the Court, the Trustee, or any interested party (including the creditor) may file a motion to request modification of the plan. The deadline for filing the modification is 30 days after the supplemental claim is filed.

How does forbearance impact the debtor's discharge?

Generally, at the end of the chapter 13 plan period, the Trustee files a notice of final cure relative to a mortgage secured by the debtor's principal residence. This notice gives the mortgage creditor a limited period to tell the Court whether the mortgage is current or not, and if not, what remains to be paid, before the Court enters the discharge. If the creditor fails to timely respond, the case is discharged, and the mortgage is deemed current whether it was or not.[6]

Under the new Statute, the debtor may still obtain a discharge even if he has defaulted on his mortgage payments, if he is no more than 3 months behind, unless there is a forbearance agreement or loan modification agreement. Notice and a hearing are required.

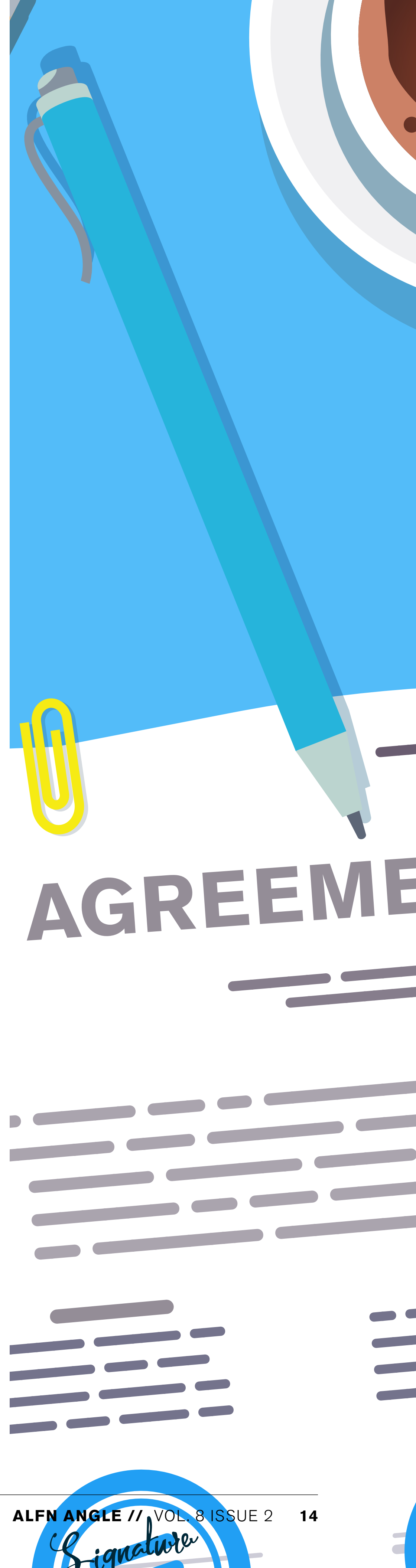
This new Statute will require careful monitoring at the servicer and attorney levels. On the servicer's side, account monitoring will require deadlines to be set for compliance with the new proof of claim deadlines and requirements. On the attorney's side, case management will require careful monitoring and follow-up to make sure that any forbearance claim is properly documented and timely filed. a

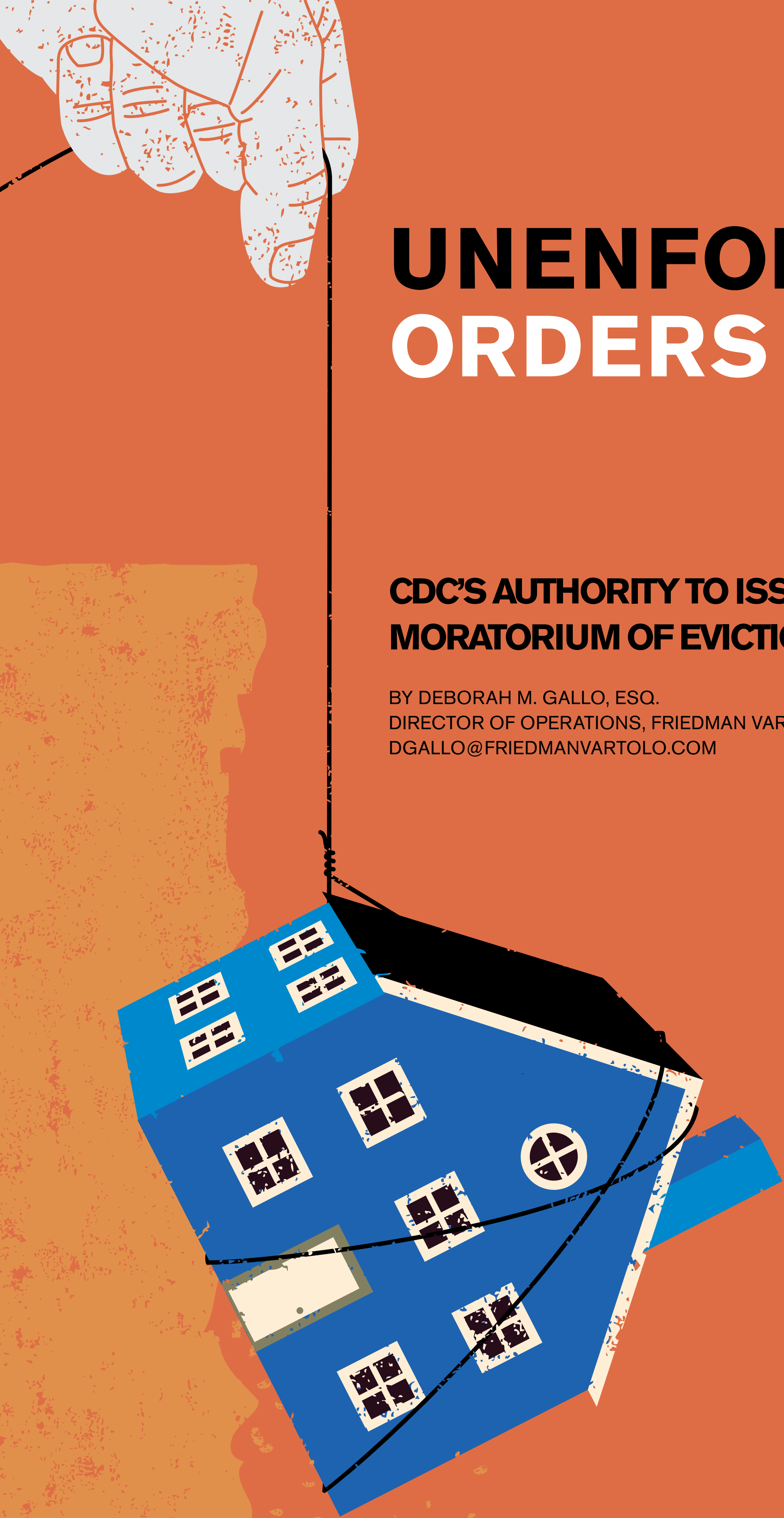
3 11 U.S.C. § 501(f).

4 In most states, modification of a mortgage loan must be in writing to satisfy the applicable Statute of fraud

5 11 U.S.C. § 502(b)(9).

6 See 11 U.S.C. § 1328; Fed. R. Bankr. P. 3002.1(f) - (i).





UNENFORCEABLE ORDERS

CDC'S AUTHORITY TO ISSUE A MORATORIUM OF EVICTIONS

BY DEBORAH M. GALLO, ESQ.
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ON SEPTEMBER 4, 2020, the Center for Disease Control (CDC) Director Michelle P. Walensky, M.D. M.P.H. issued an Order temporarily halting evictions in the United States in an effort to mitigate the effect of COVID 19 and its spread. The Order was set to expired December 31, 2020 subject to extension, modification, or rescission. On January 29, 2021, the CDC Director made the decision to extend the Order to March 31, 2021 and now further to June 30, 2021. The CDC cites multiple data points reflecting that if evictions proceed, there will be increased homelessness and expansion of the severe risk of disease. As all are aware, there has been a strong direction to stay home to avoid the risk of COVID 19 and all variants.

CDC QUALIFICATIONS FOR HARDSHIP INCLUDE INCOME AND HARDSHIP AS FOLLOWS:

INCOME: In 2020 or 2021, I earned (or expect to earn) less than $99,000 as an individual or less than $198,000 as a joint tax return filer. Or not required to report any income to the IRS in 2020.

HARDSHIP: Substantial household income reduction. Laid off from work. Hours or wages cut. Extraordinary out of pocket medical expenses (greater than 7.4% of adjusted gross income.

There are exceptions to the Order – if a tenant is engaging in criminal activity, endangering the lives of other tenants, damaging the property, violations of building or health code, or breaking other contractual agreements. To be clear, those diagnosed with COVID 19, or exposed to COVID, and taking reasonable precautions to avoid the spread cannot be evicted.

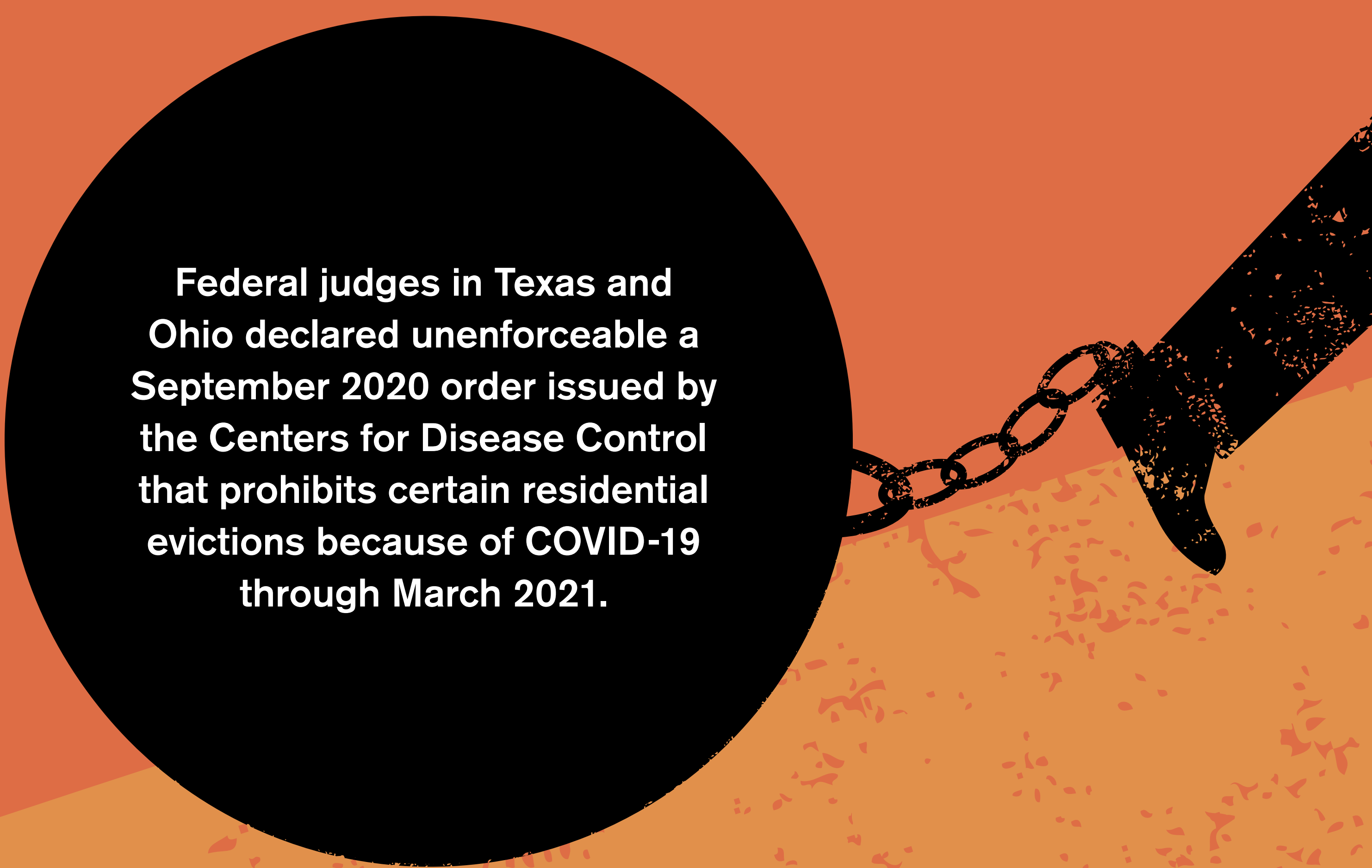
Those in violation of this Order, may be fined no more than $100,000 or jailed for a year, or both if the violation does not result in death, and more if it does. The Department of Justice is given the authority to initiate criminal proceedings.

Federal judges in Texas and Ohio declared a September 2020 Order issued by the Centers for Disease Control that prohibits certain residential evictions because of COVID-19 through March 2021 unenforceable. The U.S. District Court for the Eastern District of Texas found that while there may have been a public health benefit, the residential eviction moratorium was not economic in nature, was too attenuated from interstate commerce and was an unprecedented exercise of federal government authority in an area well within the scope of the states' traditional police power. The U.S. District Court for the Northern District of Ohio found that the CDC's Order exceeded the agency's statutory authority to make and enforce regulations to stop the spread of communicable diseases between states because that authority was limited to actions to address infected animals, objects or properties. *Terkel v. Centers for Disease Control and Prevention*, No. 6:20-cv-00564 (E.D. Tex. Feb. 25, 2021) and *Skyworks, Ltd. v. Centers for Disease Control and Prevention*, No. 5:20-cv-2407 (N.D. Ohio Mar. 10, 2021).

Likewise, five landlords filed suit in the U.S. District Court for the Eastern District of New York on February 24, 2021, requesting that the court bar enforcement of Part A of the New York COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020. The state law, in part, provides a stay based upon an application of hardship that could extend eviction cases until at least May 1, 2021. *Chrysafis, et al. v. James*, Case No. 2:21-cv-00998. However, on April 14, 2021, the Attorney General's Motion to dismiss was granted, case dismissed for lack of subject matter jurisdiction, and plaintiff's preliminary injunction denied. The Attorney General was found not to be a proper party to the action (they were not the entity to enforce the NY Eviction moratorium.)

On March 4, 2021, an organization purporting to represent the interests of more than 4,200 building owners, managers and landlords in Pittsburg and other surrounding locales, filed suit in the Court of Common Pleas for Allegheny County, Pennsylvania, challenging the validity of a recently passed municipal moratorium on evictions during the pandemic. The plaintiff argues that the ordinance forces landlords to stay in or renew contracts in violation of the state constitution and the U.S. Constitution, and that the ordinance is an improper extension of the federal moratorium from the CDC. The plaintiff seeks a declaration that the ordinance is illegal and unconstitutional, and an injunction barring its enforcement or implementation.

State by State, we can expect continued litigation testing the authority of the CDC to issue a moratorium on eviction. Moratorium after moratorium gets extended by the Government, so, there is not yet an end in sight at this time. Even if a landlord organization is successful against the CDC, they must work through their State's Eviction moratoriums. We continue to monitor the litigation and trends. a



Federal judges in Texas and Ohio declared unenforceable a September 2020 order issued by the Centers for Disease Control that prohibits certain residential evictions because of COVID-19 through March 2021.

CLEAR ANSWERS

NEW YORK COURT OF APPEALS CLARIFIES STATUTE OF LIMITATIONS IN MORTGAGE FORECLOSURES IN LANDMARK CASE

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F**OR OVER A CENTURY**, in New York foreclosure law, the application of the Statute of Limitations has led to vast confusion in the mortgage industry, the bar, and between the Appellate Departments themselves. This confusion has led to contradictory decisions in the various Supreme Courts and on appeal, and unclear information to mortgage servicers as to the requirements regarding what constitutes an acceleration, when a mortgage loan is accelerated, and how and when an acceleration is revoked and the loan de-accelerated. On February 18, 2021, the Court of Appeals has finally clarified three major issues regarding acceleration, de-acceleration, and how the Statute of Limitations should be applied.

CPLR § 213(4) establishes a six (6) year Statute of Limitations on "an action upon a bond or note, the payment of which is secured by a mortgage upon real property, or upon a bond or note and mortgage so secured, or upon a mortgage of real property, or any interest therein." The language in the Statute is vague, and has led to disagreement between the courts regarding what triggers the Statute of Limitations, and the definitions and triggers of acceleration and deceleration.

On February 18, 2021, the Court of Appeals released its Slip Opinion in the matter of *Freedom Mortgage Corp. v. Engle*, 2021 NY Slip Op 01090 (2021), which clarified multiple issues regarding the Statute of Limitations in mortgage foreclosure matters from four cases appealed from the Appellate Division (multiple departments). The Court held that an acceleration is triggered upon commencement of the suit and not on the acceleration warning, even if language such as "will accelerate" is included; that dismissal of a foreclosure action for a deficiency in the foreclosure does not trigger the acceleration; and that a voluntary dismissal by a mortgagee in a foreclosure suit constitutes an affirmative act of revocation of the acceleration.

New York has generally stated that the Statute of Limitations is triggered by acceleration or maturity, and that de-acceleration can be accomplished by revocation of the acceleration. The rule regarding acceleration was established in *Albertina Realty Co. v. Rosbro Realty Corp.* (258 NY 472 [1932]), stating that the noteholder must effect an "unequivocal overt act" to accelerate the mortgage loan. First, the Court in Freedom Mortgage Corp. decided in one of the cases at issue, *Wells Fargo v. Ferrato*, a prior foreclosure in which the case was dismissed due to a deficiency in the mortgage complaint did not constitute a valid acceleration. In the prior foreclosure action, Plaintiff failed to include a loan modification agreement in its complaint, and was dismissed on Defendant's Motion to Dismiss. In the current action, Defendant moved

to dismiss that the action was barred by the Statute of Limitations, stating that the prior foreclosure action triggered acceleration, which was not de-accelerated. The Supreme Court granted said motion, which was affirmed by the Appellate Division. The Court of Appeals, however, held that "where the deficiencies in the complaints were not merely technical or de *minimus* and rendered it unclear what debt was being accelerated—the commencement of these actions did not validly accelerate the modified loan." Therefore, when a foreclosure action is dismissed due to a deficiency in the complaint, there is no valid acceleration, and the Statute of Limitations is not triggered.

Prior to the decision *Freedom Mortgage Corp.*, there was dispute as to whether the acceleration warning could constitute an "unequivocal overt act," specifically if the warning stated that the mortgagee "will accelerate" the debt, or similar language. The First Department has previously held that a letter stating that the noteholder "will" accelerate upon borrower's failure to cure the default constituted clear and unequivocal notice of acceleration, effective the date of the expiration of the cure period (*Deutsche Bank Natl. Trust Co. v. Royal Blue Realty Holdings, Inc.*, 148 AD3d 529 [1st Dept. 2017]). In contrast, the Second Department previously held that this language did not accelerate debt, and that "merely an expression of future intent that fell short of an actual acceleration" (*Milone v. U.S. Bank N.A.*, 164 AD3d 145 [2d Dept. 2018]). In the second case analyzed by the Court, *Vargas v. Deutsche Bank National Trust Company*, the Court settled this dispute. The Court of Appeals in this case sided with the Second Department, stating that "Noteholders should be free to accurately inform borrowers of their default, the steps required to cure and the practical consequences if the borrower fails to act, without running the risk of being deemed to have taken the drastic step of accelerating the loan." Therefore, the Court concluded that an acceleration warning, even if it includes affirmative language such as "will accelerate," is not an "unequivocal overt act" to accelerate, and does not trigger the Statute of Limitations.

The Court held that an acceleration is triggered upon commencement of the suit and not on the acceleration warning, even if language such as "will accelerate" is included; that dismissal of a foreclosure action for a deficiency in the foreclosure does not trigger the acceleration; and that a voluntary dismissal by a mortgagee in a foreclosure suit constitutes an affirmative act of revocation of the acceleration.

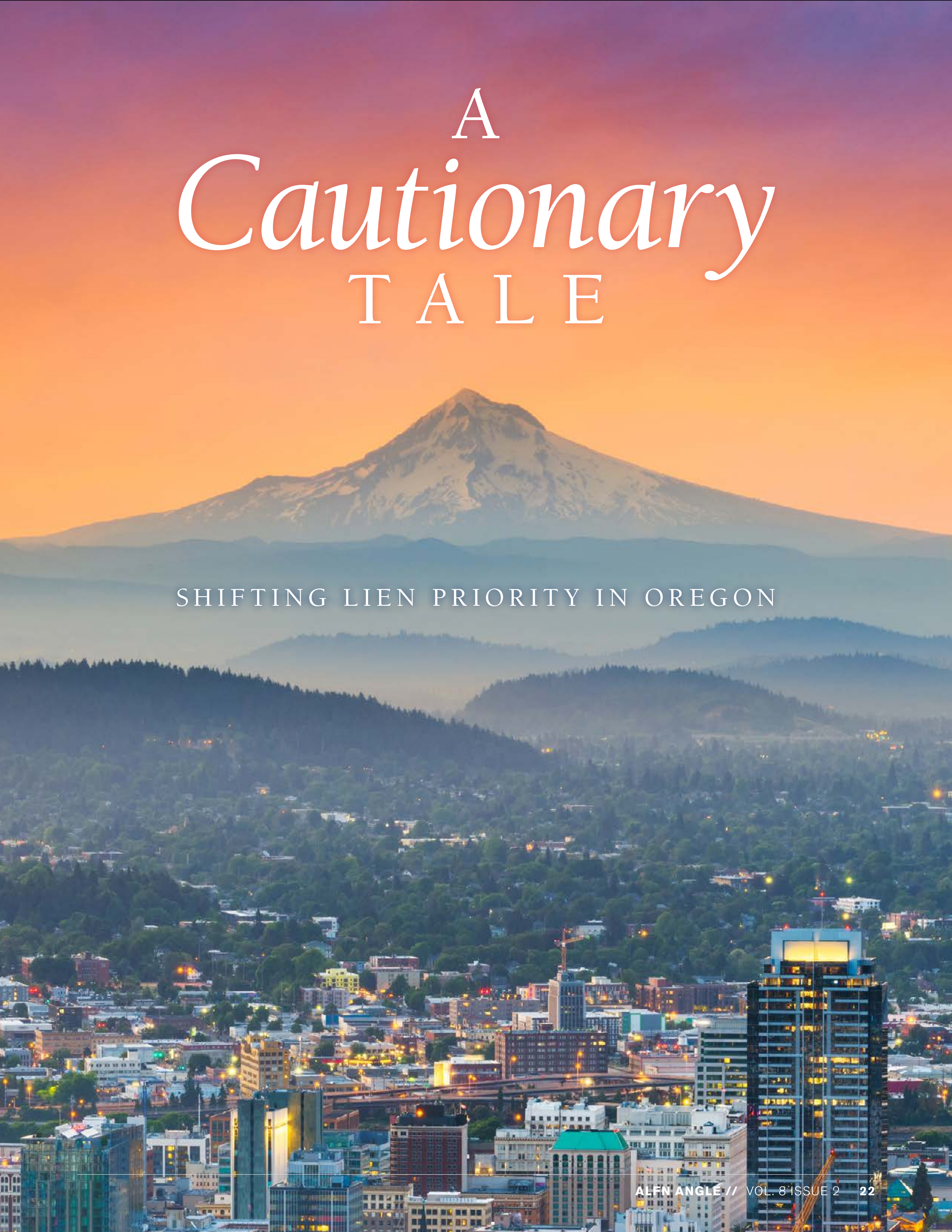
Finally, in the last two cases analyzed, *Freedom Mortgage Corporation v. Engel and Ditech Financial, LLC v. Naidu*, the Court clearly defined what constitutes a de-acceleration, holding that a voluntary dismissal of a foreclosure action constitutes a clear and unequivocal act of revocation of the acceleration. In a previous matter, the Third Department in *CitiMortgage v. Ramirez*, 59 Misc. 3d 1212[a][3d Dept. 2018] established a five-prong test regarding deceleration: 1) Revocation must be evidenced by an affirmative act; 2) The affirmative act must be clear and unequivocal ; 3) The affirmative act must give actual notice to the borrower that acceleration has been revoked; 4) The affirmative action must occur before the expiration of the six (6) year Statute of Limitations period; and (5) The borrower must not have changed his position in reliance on the acceleration. Prior to the *Freedom Mortgage Corporation* decision, mortgagees would send a letter of de-acceleration to borrowers, which satisfied the requirements of the test. In *Freedom Mortgage Corporation*, the Court of Appeals held that the mere voluntary discontinuance of a foreclosure action constituted the revocation. The Court acknowledged that once the case is dismissed, the mortgagee can collect on a monthly basis again, and that if the exact time in which the de-acceleration occurs is not definite, that it would lead to inadvertent defaults. Finally, the Court also acknowledged that mortgages are typically long contracts, and multiple foreclosure actions on a single mortgage are common due to the length of the contract, and that financial positions often change during the course of said contract.

In its rulings in *Freedom Mortgage Corporation*, the Court has clarified the Statute of Limitations for mortgage foreclosure actions. Essentially, an acceleration occurs when there is a valid complaint filed (the unequivocal overt action), and is decelerated once the voluntary discontinuance is granted. This case makes it clear that an acceleration warning does not trigger the Statute of Limitations, and no further notice is needed to be sent to inform the borrower that a mortgage loan is decelerated other than the discontinuance of an action.

In a year marred by federal and state moratoria due to the COVID-19 pandemic, the ruling in *Freedom Mortgage Corporation* is welcome good news. The Court made a commonsense decision, in which sending an acceleration warning, or a prior foreclosure will not lead to enforcement of mortgage loans being barred by the Statute of Limitations. Additionally, mortgage servicers will no longer need to send out de-acceleration letters to borrowers, or research whether a prior holder or servicer sent one to enforce a mortgage loan. These decisions by the Court send a clear message as to how the Statute of Limitations should be applied in an area that should not be as unsettled as it had been.

A *Cautionary* TALE

SHIFTING LIEN PRIORITY IN OREGON



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The Oregon Supreme Court

recently issued an opinion affirming a condominium association's ability to gain priority over a first position mortgage or deed of trust. In *Bank of New York Mellon Trust Company v. Sulejmanagic*, the Oregon Supreme Court considered whether a condominium association had gained priority over a lender's first position deed of trust lien when the lender failed to reinstate its judicial foreclosure case after the condominium association issued a 90-day notice pursuant to ORS 100.450(7). *Bank of N.Y. Mellon Trust Co., N.A. v. Sulejmanagic*, 367 Ore. 537 (2021). Oregon law generally provides that first mortgage or deed of trust liens have priority over unpaid assessment liens recorded against a condominium unit. ORS 100.450(1)(a). However, under certain circumstances, an unpaid assessment lien may gain priority over a first position mortgage or deed of trust lien. ORS 100.450(7)(c). Section 7(c) of ORS 100.450 provides in part that when a mortgage or deed of trust is in default, if the association provides the lienholder with formal notice of the unpaid assessments and the lienholder fails to initiate judicial action to foreclose the mortgage or deed of trust 1 within 90 days, the association's lien gains priority over the first mortgage or deed of trust lien.

On July 30, 2013, Bank of New York Mellon Trust Company (the "bank") initiated a judicial foreclosure action in Clackamas County Circuit Court after the borrower defaulted on his mortgage. *Bank of N.Y. Mellon Trust Co., N.A. v. Sulejmanagic*, 367 Ore. 537 (2021). At the time of filing, the bank held the first position deed of trust lien on the condominium unit. 367 Ore. at 540. Approximately 6 months after filing, the bank amended its complaint to add Tanglewood Hills Condominium Association ("Tanglewood") as a defendant to the lawsuit due to an unpaid assessment lien recorded by Tanglewood just 5 days prior to the filing of the foreclosure. *Id.* at 541. Shortly thereafter, the trial court dismissed Tanglewood from the case without prejudice based on the bank's failure to timely prosecute its case as required by UTCR 7.020. *Id.* The limited judgment of dismissal was entered on May 26, 2014. *Id.* Around October 1, 2014, Tanglewood issued a 90-day notice to the bank after the borrower failed to pay additional condominium assessments, thereby triggering the requirement that the bank "initiate" a foreclosure on or before January 1, 2015, or face losing priority of its lien. *Id.* During that time period, the bank neither moved to reinstate its judicial foreclosure action nor filed a new one. *Id.* Ultimately, the bank sought reinstatement of its case, which the trial court granted on June 12, 2015. *Id.* Tanglewood answered the complaint, asserting it now had priority over the bank's lien as a result of the bank's failure to take any action during the 90 day notice period. *Id.* In response, the bank argued that the Statute only requires the lender to "initiate" a foreclosure action and because it had already done so, albeit prior to the notice being issued, the bank maintained priority. *Id.* at 542. The trial court agreed with the bank and entered a judgment of foreclosure. *Id.* Tanglewood appealed to the Oregon Court of Appeals, which affirmed the lower court's ruling. Id. On appeal, the Oregon Supreme Court disagreed with the lower Courts and held the bank failed to properly "initiate" a foreclosure action within the statutorily prescribed timeframe. Id. at 557.

1 The Statute also contemplates a request for issuance of a trustee's notice of sale under the trust deed or acceptance of a deed in lieu of foreclosure.

The Supreme Court began its opinion with a historical discussion of the often competing interests among condominium associations and first lienholders. Id. at 543-545. From the Court's perspective, condominium associations have an interest in preserving the shared common spaces of the condominiums and achieve that by collecting assessments from the unit owners. Id. at 543. To the extent a unit owner fails to pay their individual assessment, the condominium association is forced to increase assessments on the other unit owners to ensure the necessary upkeep and maintenance of the common spaces. Id. On the other hand, first lienholders have an interest in preserving their collateral from impairment and laws that jeopardize their lien priority may decrease the value of their security. Id. at 543-544. Ultimately this could harm the overall value of condominiums because when faced with the possibility of losing their lien priority, financial institutions will in turn make it more difficult to finance the construction or purchase of a condominium. Id. Additionally, in the opinion of the Court, the first lienholder will oftentimes delay foreclosure on a condominium if the economy is poor because the property will most likely revert back at the foreclosure sale, meaning the lienholder will be on the hook for future assessments until the time in which the condominium unit can be sold. Id. at 544. The decision to strategically foreclose by the first lienholder places an undue burden on the other condominium association unit owners by forcing them to absorb the unpaid assessments until the market improves. Id. With these competing interests in mind, the Oregon legislature reached a compromise with the passage of ORS 100.450(7). Id. at 545.

Next, the Supreme Court looked at the plain text of ORS 100.450(7) to determine what actions were required by the lienholder "prior to the expiration of 90 days following the notice." Id. at 548. Unable to glean meaning from the text alone, the Court turned to public policy reasons for implementation of the notice provision. Id. The Court determined that the

This case should serve as a cautionary tale to both lenders and servicers of the importance in consulting with local counsel upon receiving a 90-day notice from a homeowner or condominium association in Oregon. This is especially true when the loan is in default.

purpose of the notice provision "was to prompt an inactive first lienholder to start a foreclosure proceeding". Id. at 553. To be sure, the Court went on to state that "[t]he notice was intended to cause the first lienholder to take action to put the property into the hands of someone who would begin paying condominium assessments". Id. The Court then discussed how the 90-day notice impacts a particular set of actions. Id. at 554. Clearly the notice would have no impact on an already active foreclosure. Id. at 555. However, the Court was careful to draw a distinction between an active foreclosure and a foreclosure that was once active but dismissed before issuance of the notice. Id. For purposes of ORS 100.450(7)(c), the Court concluded that "a foreclosure action that has been filed and dismissed is functionally identical to a foreclosure action that has never been filed." Id. at 556. In that instance, the notice would have an impact by prompting the lienholder to act by either reinstating the dismissed case or filing a new foreclosure action before the 90 day elapses. Id.

Applying the law to the facts, the Supreme Court initially found that Tanglewood met its statutory obligation by properly issuing the notice. Id. at 555. The burden then shifted to the bank to take action because under the Court's rationale, there was no active foreclosure at the time the notice was issued. Id. at 556. As the bank failed to take any action within the 90 days, Tanglewood gained priority over the bank's first position lien by operation of ORS 100.450(7). Id. The Court rejected the bank's argument that the subsequent reinstatement of the case effectively revived the case during the notice period. Id. It also disagreed with the bank's assertion that reinstatement "undid" Tanglewood's statutory award of priority, simply stating that the bank failed to provide any legal authority to support its position. Id.

This case should serve as a cautionary tale to both lenders and servicers of the importance of consulting with local counsel upon receiving a 90-day notice from a homeowner or condominium association in Oregon. This is especially true when the loan is in default.

STATE SNAPSHOT

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The Arizona Statute of Limitations Applicable to Collection Lawsuits and Non-Judicial Trustee's Foreclosure Sales of Real Property

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THE GREAT RECESSION caused a dire decline in both the Arizona real estate market and the financial position of many borrowers and guarantors. One effect was that, for years, many lenders elected not to pursue collection of eligible defaulted loans through:

- collection lawsuits based upon credit card agreements and promissory notes ("Collection Lawsuits"); and
- non-judicial trustee's foreclosure sales of real property based upon mortgage loan promissory notes and deeds of trust ("Foreclosure Sales").

As time has passed since the Great Recession, both the Arizona real estate market and the financial position of many previously distressed borrowers and guarantors have improved significantly. That has resulted in lenders making the decision to pursue Collection Lawsuits and Foreclosure Sales based upon loans that have been in payment default or fully matured for years.

Covid-19 is now causing even further delay of lenders exercising their collection rights and remedies concerning many defaulted loans, due to a new recession in Arizona and moratoriums imposed by the federal government against lenders conducting certain Foreclosure Sales.

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Regardless of the reason for the lender's delay in collecting upon a dormant defaulted loan, borrowers and guarantors are quick to assert the affirmative defense of the Arizona Statute of Limitations as a bar against the lender pursuing the long-delayed Collection Lawsuit or Foreclosure Sale.

Regardless of the reason for the lender's delay in collecting upon a dormant defaulted loan, borrowers and guarantors are quick to assert the affirmative defense of the Arizona Statute of Limitations as a bar against the lender pursuing the long-delayed Collection Lawsuit or Foreclosure Sale. Although many of the Collection Lawsuits and Foreclosure Sales are, in fact, now time-barred by the Arizona Statute of Limitations, the analysis to determine whether, or not, the Statute of Limitations applies is complex.

To assist in making a decision concerning whether, or not, a Collection Lawsuit or Foreclosure Sale is barred by the Statute of Limitations, we have prepared the following list of frequently asked questions ("FAQs") that are often received by our firm. Our responses to the FAQs:

- are limited to an analysis of current Arizona law,
- do not take into account arguments that may be made with respect to tolling of the Statute of Limitations as a result of the federal Covid-19 moratoriums, or for other reasons, and
- are not intended to be a substitute for independent legal research and analysis when making the ultimate decision to pursue collection of a given defaulted loan.

FREQUENTLY ASKED QUESTIONS

1

What is the Arizona Statute of Limitations that applies to collecting upon a defaulted promissory note or credit card agreement?

Short answer: Six years.

The Arizona Statute of Limitations applicable to a lender's breach of contract cause of action based upon a defaulted promissory note or a credit card agreement is six years. A.R.S. § 12-548 sets forth said applicable six-year Statute of Limitations as follows:

12-548. Contract in writing for debt; six-year limitation; choice of law.

A. An action for debt shall be commenced and prosecuted *within six years after the cause of action accrues, and not afterward,* if the indebtedness is evidenced by or founded on either of the following:

1. A contract in writing that is executed in this state.
2. A credit card as defined in section 13-2101, paragraph 3, subdivision (a).

(Emphasis added)

2

Does the same six-year Statute of Limitations apply to a non-judicial trustee's Foreclosure Sale of real property?

Short answer: Yes.

In February 2018, the Arizona Court of Appeals held that the six-year Limitations period of A.R.S. § 12-548(A)(1) applies equally to bar a lawsuit to collect upon an unsecured promissory note and conducting a non-judicial Foreclosure Sale. *Andra R. Miller Designs LLC v. US Bank*, 244 Ariz. 265, 269, 418 P.3d 1038, 1042 (AZ Ct. App. 2018), *review denied* (July 3, 2018).

3

Can a lender collect upon a promissory note that matured six or more years ago?

Short answer: No.

The Statute of Limitations applies to each matured/defaulted note installment payment separately as it becomes due under the note amortization schedule, and it does not begin to run on any installment until it is due. *Andra R. Miller Designs LLC v. US Bank NA,* 244 Ariz. 265, 270, 418 P.3d 1038, 1043 (App. 2018) review denied (July 3, 2018). See also, *Ancala Holdings L.L.C. v. Price*, 220 Fed. App. 569, 572 (9th Cir. 2007) (a cause of action "accrues" each time a party fails to perform as required by the contract) and *Ortiz v. Trinity Fin. Servs. LLC*, 98 F.Supp. 3d 1037, 1042 (D. Ariz. 2015) *(each time the debtor fails to make a payment when it becomes due, a separate breach occurs and a cause of action "accrues," starting the clock).*

Because the maturity date of a promissory note is the last scheduled installment payment of the debt instrument, the cause of action for that final installment payment "accrues" on the loan maturity date. As a result, a lender cannot sue upon the promissory note six years or more after the scheduled maturity date.

EXAMPLE: Loan Maturity Date: 1/1/2015. Current Date: 1/2/2021. A Collection Lawsuit or Foreclosure Sale is barred, as more than six years have passed since the loan maturity date.

4

When does a cause of action "accrue" upon a defaulted credit card agreement loan for the purpose of calculating the six-year Statute of limitation?

Short answer: On the date of the first uncured missed payment upon the credit card loan.

The Arizona Supreme Court, in Mertola v. Santos, 244 Ariz. 488, 489, 796 Ariz. Adv. Rep. 16, 422 P.3d 1028, 1029 (2018) held that whether, or not, a credit card lender exercises an optional acceleration clause in a defaulted credit card agreement, the cause of action to collect the entire credit card balance due "accrues" as of the date of the first uncured missed payment.

EXAMPLE: Last Payment On Credit Card: 1/1/2015. Current Date: 1/2/2021. Collection Lawsuit based upon the credit card agreement is barred.

5

Are there different rules to determine when a cause of action "accrues" for the purpose of application of the six-year Statute of Limitations concerning a suit on an installment promissory note versus a credit card agreement?

Short answer: Yes. They are discussed below.

6

Application of the six-year Statute of Limitations to accelerated loans:

When does a cause of action "accrue" upon a defaulted unmatured installment promissory note for the purpose of calculating the six-year Statute of limitation if the lender has taken an affirmative act to accelerate the loan?

Short answer: The cause of action "accrues" on the date that the lender takes an affirmative act to exercise the option to accelerate the debt.

When a creditor has the power to accelerate an installment contract debt, the six-year Statute of Limitations begins to run on the date that the creditor takes an affirmative act to exercise the option to accelerate the debt. *Mertola v. Santos,* 244 Ariz. 488, 491, 796 Ariz. Adv. Rep. 16, 422 P.3d 1028, 1031 (2018) citing *Navy Federal Credit Union v. Jones*, 187 Ariz. 493, 495, 930 P.2d 1007, 1009 (AZ App. 1996) ("[I]f the acceleration clause in a debt payable in installments is optional, a cause of action as to future non-delinquent installments does not "accrue" until the creditor chooses to take advantage of the clause and accelerate the balance"). In addition, the creditor must undertake some affirmative act to make clear to the debtor that the debt has been accelerated. *Id.* See also, *Baseline Financial Services v. Madison,* 229 Ariz. 543, 544, 78 P.3d 321, 322 (AZ App. 2012) ('when an installment contract contains an optional acceleration clause, an action as to future installments does not "accrue" until the holder exercises the option to accelerate").

EXAMPLE: Loan Date: 1/1/10. Loan Maturity Date: 1/1/40. Loan Acceleration Date: 1/1/21. A Collection Lawsuit or Foreclosure Sale may be initiated within six years after the acceleration date – until 1/1/27.

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

7

Application of the six-year Statute of Limitations to loans that have not been accelerated: When does a cause of action "accrue" upon a defaulted un-matured installment promissory note for the purpose of calculating the six-year Statute of limitation if the lender has not taken an affirmative act to accelerate the loan?

Short answer: The Statute of Limitations applies to each matured/defaulted Note installment payment separately as it becomes due under the Note amortization schedule, and does not begin to run on any installment until it is due.

If the creditor does not exercise the option to accelerate an installment contract debt and/or to determine the date of "accrual" of a cause of action upon a matured/defaulted monthly installment payment, the Statute of Limitations applies to each matured/defaulted Note installment payment separately as it becomes due under the Note amortization schedule, and does not begin to run on any installment until it is due. *Andra R. Miller Designs LLC v. US Bank NA,* 244 Ariz. 265, 270, 418 P.3d 1038, 1043 (App. 2018) *review denied* (July 3, 2018). See also, *Ancala Holdings L.L.C. v.* Price, 220 Fed. App. 569, 572 (9th Cir. 2007) (a cause of action "accrues" each time a party fails to perform as required by the contract) and *Ortiz v. Trinity Fin. Servs. LLC*, 98 F.Supp. 3d 1037, 1042 (D. Ariz. 2015) (each time the debtor fails to make a payment when it becomes due, a separate breach occurs and a cause of action "accrues," starting the clock).

The rules discussed above concerning determining the date of "accrual" of a cause of action based upon a defaulted mortgage loan installment promissory note have been applied consistently by the Arizona Court of Appeals and the United States District Court for the District Of Arizona in the following line of cases: Andra R. *Miller Designs LLC v. US Bank NA,* 244 Ariz. 265, 418 P.3d 1038 (AZ App. 2018) *review denied* (July 3, 2018). *Baseline Financial Services v. Madison,* 229 Ariz. 543, 278 P.3d 321 (AZ App. 2012); *Navy Federal Credit Union v. Jones,* 187 Ariz. 493, 930 P.2d 1007 (AZ App. 1996); *Hummel v. Rushmore Loan Management LLC,* 2018 WL 3744858 (D. AZ 2018); and *Ortiz v. Trinity Financial Services LLC*, 98 F.Supp.3d 1037 (D. AZ. 2015). Furthermore, as was fully discussed above, the Arizona Supreme Court, in *Mertola, LLC v. Santos,* 244 Ariz. 488, 490, 796 Ariz. Adv. Rep. 16, 422 P.3d 1028, 1030 (2018) distinguished installment debt from credit card debt in the context of selecting the correct rules to determine when a cause of action "accrues" to calculate the six-year Statute of limitation.

In February 2021, the Arizona Court of Appeals held that the same rules concerning determining the date of "accrual" of a cause of action also apply to a home equity line of credit loan with a defined maturity date. *Webster Bank NA v. Mutka,* 2021 WL 476056 (AZ App. 2021).

EXAMPLE #1: Loan Maturity Date: 1/1/21. Last Payment: 1/1/15. Current Date: 1/2/21. Both a Collection Lawsuit and a Foreclosure Sale are barred.

EXAMPLE #2: Loan Date: 1/1/10. Loan Maturity Date: 1/1/40. Loan is not accelerated. Last Payment Made: 1/1/15. Current Date: 1/2/21. The Limitations period bars a suit on any payments due under the loan on 1/1/15 or earlier. The lender may, however, still commence a Collection Lawsuit or Foreclosure Sale based upon the installment payments due from 2/1/15 going forward.

8

Do the same rules apply to determine when a cause of action "accrues" to pursue a non-judicial Foreclosure Sale of real property as apply to a matured or unmatured installment promissory note?

Short answer: Yes.

See, *Andra R. Miller Designs LLC v. US Bank*, 244 Ariz. 265, 269, 418 P.3d 1038, 1042 (AZ Ct. App. 2018), *review denied* (July 3, 2018).

9

What qualifies as an affirmative act to accelerate an unmatured installment promissory note?

Short answer: Typically, sending a Notice of Acceleration or Demand Letter or recording a Notice of Trustee's Sale that makes clear to the borrower that the lender has accelerated the loan. In addition, filing a judicial foreclosure complaint is an affirmative act of acceleration of a loan.

On January 14, 2021, the Arizona Court of Appeals held "that absent an express statement of acceleration in the notice of trustee's sale, or other evidence of an intent to accelerate, recording a notice of trustee's sale, by itself, does not accelerate a debt." *Bridges v. Nationstar Mortgage, L.L.C.*, 2021 WL 126562 (AZ App. 2021). See also, *Baseline Financial Services v. Madison*, 229 Ariz. 543, 545, 275 P.3d 321, 323 (AZ App. 2012) (even if a contract permits acceleration of a loan without notice, the lender must perform an unequivocal act demonstrating it has exercised the loan acceleration clause); and *Andra Miller Designs LLC v.* US Bank NA, 244 Ariz. 265, 270, 418 P.3d 1038, 1043 (AZ App. 2018), review denied (July 3, 2018) ("to exercise its option to accelerate a debt, the creditor must undertake some affirmative act to make clear to the debtor it has acceleration the obligation").

10

Does recordation of a Notice of Trustee's Sale by itself serve as an act to accelerate an unmatured installment promissory note?

Short answer: No. The simple act of recording a Notice of Trustee's Sale, by itself, is not an affirmative act to accelerate the loan. The loan must be accelerated in writing by a separate notice of acceleration or by including language in the Notice of Trustee's Sale that the loan has been accelerated.

On January 14, 2021, the Arizona Court of Appeals held "that absent an express statement of acceleration in the notice of trustee's sale, or other evidence of an intent to accelerate, recording a notice of trustee's sale, by itself, does not accelerate a debt." *Bridges v. Nationstar Mortgage, L.L.C.*, 2021 WL 126562 (AZ App. 2021).

11

Can a lender de-accelerate a loan for the purpose of application of the Statute of Limitations?

Short answer: Yes. The lender can de-accelerate a loan by stating in writing that acceleration of the debt is withdrawn or revoked.

See, *Andra Miller Designs LLC v. US Bank NA*, 244 Ariz. 265, 271, 418 P.3d 1038, 1044 (AZ App. 2018), *review denied* (July 3, 2018).

12

Does the act of a lender internally "charging off" a loan have any implication concerning whether, or not, an installment loan evidenced by a promissory note has been accelerated for the purpose of calculating the Statute of Limitations?

Short answer: No. "Charging-off" a loan is an internal bank accounting measure. It is not an affirmative act to exercise the optional acceleration clause of a loan.

See, *Baseline Financial Services v. Madison*, 229 Ariz. 543, 545, 275 P.3d 321, 323 (AZ App. 2012) (charge-off of a loan is an accounting procedure within the bank and not an affirmative exercise of the optional acceleration clause).

13

What is the Statute of Limitations applicable to a defaulted contract for sale such as a retail installment contract for the sale of a motor vehicle?

Short answer: Four years.

A.R.S. §47-2725(A) of the Arizona Uniform Commercial Code ("UCC") imposes a four-year Statute of Limitations for suits based upon a defaulted contract for sale which typically concerns a retail installment contract for the sale of a motor vehicle. Baseline Financial Services v. Madison, 229 Ariz. 543, 544, 275 P.3d 321, 322 (AZ App. 2012).

Additionally, a lender's repossession of a motor vehicle is an affirmative act sufficient to exercise the optional acceleration clause of a retail installment sales contract concerning the sale of a motor vehicle. Id. at 546 and 324 citing *Wheel Estate Corp. v. Webb,* 139 Ariz. 506, 508, 679 P.2d 529, 531 (AZ App. 1983).

14

What is the Statute of Limitations that applies to a mortgage deficiency lawsuit following a lender's non-judicial trustee's foreclosure sale of real property?

Short answer: 90 days.

A.R.S. §33-814(A) and (D) require that a creditor commence an action to recover a mortgage deficiency within ninety (90) days after the date of the non-judicial trustee's foreclosure sale of the subject real property. Failure to file a deficiency lawsuit within the 90-day period results in the proceeds of sale, regardless of amount, being deemed to be full satisfaction of the obligation and no right to recover a deficiency in any action shall exist. Furthermore, this Statute of limitation is a Statute of repose, meaning that it is an absolute bar date against filing a mortgage deficiency lawsuit after the 90-day post-foreclosure sale period expires. *In re Wright*, 486 B.R. 491, 502 (Bankr. AZ 2012) citing *Resolution Trust Corporation v. Olson*, 768 F. Supp. 283 (D. Ariz. 1991).

District Court Issues Tidal Wave Order Siding with Servicer on Alleged Lost Payment Claim

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AN ACTION CONCERNING an alleged lost payment and investigation concerning the same, remains before the United States District Court, Northern District of California. However, a recent ruling by Magistrate Judge Laurel Beeler granting the motion to dismiss by Defendants Citigroup, Citibank, CitiMortgage, and CitiGroup Global Markets (collectively, "Citi") indicates rough seas ahead for Plaintiffs, Michael Ng Chie, Hellen Lee Chie, and Xi S. Zhu (collectively, "Plaintiff stay are an everyday occurrence in bankruptcy courts. While those motions are generally not complicated, they are time consuming and often cause lenders to incur fees and costs that they cannot recover from the borrower.[1]

Plaintiffs allege that Citi engaged in egregious behavior, wrongfully maintaining possession of $40,000 of Plaintiffs' money. Plaintiffs are an adult son ("Mr. Chie") and his parents. Mr. Chie's parents have a home equity line of credit with Citi. In 2018, Mr. Chie wrote a $40,000 check to be applied to his parents' line of credit. Citi initially rejected the check, but later cashed it. Shortly thereafter, and believing the first check had been rejected, Mr. Chie wrote another $40,000 check to Citi to be applied to the line of credit. This check was also alleged to have been cashed, meaning that Citi received $80,000 from Plaintiffs. Plaintiffs allege that while no money was returned, only $40,000 was credited to the line of credit. Citi represented that $40,000 had been returned to Plaintiffs' USAA Federal Savings Bank, and the other $40,000 had been applied to the appropriate line of credit. USAA Federal Savings Bank conducted an investigation and determined that Citi had retained both $40,000 checks. Similarly, after a request for investigation by Plaintiffs, the Board of Governors of the Federal Reserve sent a letter stating that Citi had retained both $40,000 checks.

After voluntarily dismissing claims alleging violation of the Fair Debt Collection Practices Act and Rosenthal Act, Plaintiffs were left with claims for: (1) Declaratory Relief, (2) Negligence, (3) Conversion, (4) Common Count for Money Had and Received, (5) Breach of Contract, (6) Financial Elder Abuse, and (7) Violation of California's Unfair Competition Law ("UCL"). Citi moved to dismiss all remaining causes of action for, among other reasons, failure to state a claim, claims predicated on dismissed actions, and, in their reply, failure to pursue contractual remedies. It is worth noting that Plaintiffs did not seriously challenge the motion to dismiss for each of these causes of action, indicating that they planned to amend even before the Court's ruling. Accordingly, the Court did not weigh in heavily on many of Plaintiffs' claims. Nonetheless, all of Plaintiffs' remaining claims were dismissed without prejudice, leaving Plaintiffs the opportunity to amend within 21 days after the upcoming April 14, 2021 case management conference.

If Plaintiffs' allegations are presumed true on a motion to dismiss, and supported by both the Board of Governors of the Federal Reserve and USAA Federal Savings Bank, why did the Court dismiss each of the Plaintiffs' causes of action? Using the appropriate legal mechanism matters. While the Northern District of California is generally viewed as a favorable forum for consumers in financial services litigation, the Court took a strict approach in interpreting the elements for each of Plaintiffs' claims.

[1] *See Chie v. Citigroup, Inc.* (N.D. Cal., Feb. 18, 2021, No. 20-CV-07611-LB) 2021 WL 633868.

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Because the alleged conduct is squarely within Citi's role as a conventional lender, Plaintiffs have not plausibly pled a duty of care sufficient to support a cause of action for negligence. For any negligence claim to survive another motion to dismiss, Plaintiffs will need to plausibly plead a duty of care that is not limited to that of a conventional lender.

Conversion can occur when an entity takes a person's property and fails to return it. The mechanism seems appropriate given Plaintiffs' basic contentions: Citi took $80,000 and only credited them with $40,000. However, the issue when asserting a claim for conversion against a bank arises because by tendering money to the bank, intending that it be credited to the person's loan, the person has given up the possessory interest in the money. Without a possessory interest in the money, a claim for conversion will fail. Plaintiffs' claim for Common Count for Money Had and Received fails on the same possessory prong. Plaintiffs ceded their possessory interest in the money when the Plaintiff son wrote checks to Citi. Per the Court's ruling, these are not the appropriate causes of action with which Plaintiffs should seek justice. Amending the Complaint is unlikely to fix what appears to be an insurmountable issue of law.

Plaintiffs' claim for negligence ran afoul of the traditional duty of care owed by a bank as a lender of money. Lenders generally do not owe borrowers a duty of care unless their involvement in a transaction goes beyond their conventional role as a mere lender of money. Therefore, a claim alleging only that a lender breached its duty of care in fulfilling its role as a conventional lender will fail. However, as litigators have seen time and again[2], courts still regularly allow negligence claims against lenders where, for example, allegations exist of a botched loan modification review in violation of the California Homeowner Bill of Rights. In this action, the Court takes a more strict approach and adopts Citi's argument to apply the traditional "no duty" rule. Based on Plaintiffs' allegations, the Court could not find that Citi acted in a capacity beyond that of a conventional lender. Rather the allegations are that Citi breached its duty to plaintiffs to account for and credit or refund funds that were sent to Citi. Because the alleged conduct is squarely within Citi's role as a conventional lender, Plaintiffs have not plausibly pled a duty of care sufficient to support a cause of action for negligence. For any negligence claim to survive another motion to dismiss, Plaintiffs will need to plausibly plead a duty of care that is not limited to that of a conventional lender.

Whether "fair" or "unfair," Plaintiffs appear to have an uphill battle amending their pleading to defeat a future motion to dismiss. Not all causes of action or legal theories are equally equipped to deal with what may essentially boil down to a contractual dispute between two parties. While the Court has encouraged further investigation and a resolution of the dispute between the parties in light of its ruling, Plaintiffs will need to drastically change the underlying legal mechanism if they intend to proceed with the action. While the underlying harm alleged by Plaintiffs is recognized by the Court, the vessel for their claims as advanced in the Complaint was found to be unseaworthy. The Court's analysis of the conversion, common counts, and negligence claims, in the context of an alleged lost payment, provides lenders or servicers with a compass to successfully navigate through similar litigation. a

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[2] *See Alvarez v. BAC Home Loans Servicing, L.P.* (2014) 228 Cal.App.4th 941, 945.

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United States District Court for the District of Maryland Allows Counties' FHA Claims to Proceed

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THE UNITED STATES DISTRICT COURT for the District of Maryland has recently issued a ruling allowing two counties' claims under the Fair Housing Act (the "FHA") to go forward against Wells Fargo, et al., finding that proximate causation, to be established using a regression analysis, has been sufficiently pled.

On May 1, 2017, the Supreme Court issued its decision on *Bank of America Corp. v. City of Miami*, Case No. 15-1111, May 1, 2017, finding that a city qualifies as an "aggrieved person" able to bring suit under the FHA, but remanded so that the lower federal courts could "define, in the first instance, the contours of proximate cause under the FHA and decide how that standard applies to the City's claims for lost property-tax revenue and increased municipal expenses."

In November of 2018, following that decision, Montgomery and Prince George's Counties in Maryland brought actions in federal court against Bank of America, Wells Fargo, and other related entities alleging predatory and discriminatory residential mortgage lending, servicing, and foreclosure practices in violation of the FHA.

As part of those actions, the Counties claimed five general categories of injuries resulting from the alleged violations of the FHA: (1) increased foreclosure processing costs, (2) increased cost of municipal services (i.e., municipal expenditure), (3) economic injuries to the Counties' tax base, (4) lost municipal income, and (5) various non-economic injuries.

In August of 2019, the United States District Court for the District of Maryland issued a decision on Wells Fargo's motion to dismiss the original complaint. See *Prince George's Cty. v. Wells Fargo & Co.,* 397 F. Supp. 3d 752 (D. Md. 2019). The Court held that the Counties had sufficiently pleaded their claims regarding foreclosure processing costs and dismissed the non-economic claims (for money damages). However, the Court deferred decision on the Counties' other claims and granted them the opportunity to amend their complaint. The remaining claims at issue included the economic injury to the Counties' tax base, increased municipal expenditures, and lost municipal income.

The Counties argued in their amended complaint that foreclosures reduce the value of surrounding properties, and consequently shrink their property tax bases. The Counties claimed that they will be able to demonstrate through use of a regression analysis (a process for calculating the relationships between a dependent variable, often called the "outcome variable," and one or more independent variables) the actual amount of their tax-base-related damages resulting from Wells Fargo's alleged discriminatory practices, as opposed to other factors.

This type of analysis involves, among other things, computing tax appraisal values based on sales price estimates, examining the impact of foreclosure sales prices on tax appraisal values, and determining both the extent to which foreclosures cause nearby properties to lose value and the rate at which properties in higher minority areas with higher concentrations of foreclosures lose value.

The Counties further alleged that increased foreclosures, and Wells Fargo's failure to secure and care for abandoned and vacant properties, has resulted in additional municipal expenditures (from their respective building code enforcement, police departments, and fire departments). The Counties claim that they will be able to use a regression analysis similar to that described above to calculate the Counties' increased expenditures and isolate the extent to which that increase was caused by Wells Fargo.

Finally, the Counties alleged they lost revenue due to unpaid franchise taxes and utility service costs from the homes that sat vacant over significant periods of time.

Similar actions have been brought in recent years in other districts, notably in *City of Miami v. Wells Fargo & Co.,* 923 F.3d 1260 (11th Cir. 2019) and *City of Oakland v. Wells Fargo & Co.,* 972 F.3d 1112 (9th Cir. 2020). The Eleventh and Ninth Circuits, respectively, permitted the claims of injuries to tax bases to go forward based on regression analysis argument, but rejected the increased municipal expenditure claims of the plaintiffs.

Here, in its opinion granting in part and denying in part Wells Fargo's motion to dismiss the Counties' amended complaint, the United States District Court for the District of Maryland permitted both the tax base injury and increased municipal services claims to proceed, finding that "the Counties here plead [the increased municipal services claim] with more specificity than the plaintiffs in [City of Miami and City of Oakland]," and that the Counties had "plausibly alleged that the use of regression analysis will allow them to sufficiently demonstrate proximate cause." See Prince George's Cty., Md. v. Wells Fargo & Co., 2021 U.S. Dist. LEXIS 29851, 2021 WL 633380 (D. Md. February 17, 2021).

The District Court rejected the lost franchise tax and utility-related damages claim, calling it "as a bridge too far," and finding that these claims were "too removed from the alleged discriminatory lending in the chain of causation." *Id.*

It remains to be seen whether the Counties will ultimately be able to prove the alleged violations of the FHA by Wells Fargo, *et al.* or effectively identify and accurately calculate the resulting damages using the regression analysis techniques described in their amended complaint. However, despite the District Court's rejection of the lost municipal income claim, this decision marks an expansion of the federal courts' willingness to entertain damages under the FHA proximate cause standard in cases brought by counties/municipalities.

More Clarity for Loan Servicers in Ohio

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ON MARCH 16, 2021, Governor Mike DeWine signed into law Ohio S.B. 13 and H.B. 251, which lowers the Statute of Limitations on all written contracts, including mortgages, from eight years to six years. The bill will take effect 90 days from the date the Governor signed it. The change represented several years of back and forth negotiations, which began with the bill lowering the Statute of Limitations on written contracts to three years. The final bill had the support of many creditors' rights organizations.

The recently passed legislation will finally bring some consistency to the previously disparate treatment that Ohio courts gave to notes and mortgages. Prior to the passage of the new law, Ohio courts applied two separate Statutes of Limitations to notes and mortgages. Notes were governed by Ohio's version of the UCC, and courts applied a six year Statute of Limitations. ORC §1303.16 (UCC 3-118) However, when it came to the enforcement of mortgages, courts applied ORC §2305.06, which gave a more generous eight year enforcement period.

Part of the reason for the application of two distinct Statutes came as a result of the Ohio Supreme Court's decision in Deutsche Bank Nat'l Trust Co. v. Holden, 147 Ohio St.3d 85 (2016), wherein the Court held that the action to collect on a note is a separate and distinct action from collecting on a mortgage. Furthermore, the Court did not provide an analysis as to the applicability of the two distinct Statutes which governed the time limit within which creditors had to bring a cause of action. This created confusion among the Appellate Courts and even the bankruptcy courts within the state.

Hopefully, servicers will find the Ohio legislative environment less plagued by confusion and uncertainty with the passage of the new law. It is important to remember that the Statute of Limitations begins to run when the cause of action accrues, not when the default occurs. Always consult with your attorney to ensure compliance with applicable laws.

Pennsylvania Appeal Decision in Mae v. Janczak

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IN MAE V. JANCZAK, SUPERIOR COURT OF PENNSYLVANIA, January 21, 2021, 245 A3rd 1134, the Superior Court, No. 3175 EDA 2019, held that the plain language of the Federal National Mortgage Association Charter empowers the corporation commonly known as Fannie Mae to sue only in its corporate name, which is the Federal National Mortgage Association.

Christopher Janczak appealed from the order, entered in the Court of Common Pleas of Chester County, granting summary judgment in favor of appellee Fannie Mae on its action in ejectment. Same was reversed by the Superior Court. Two issues were brought to the Superior Court – 1. Whether the court below had subject matter jurisdiction over Fannie Mae's lawsuit because it used its fictitious name in this ejectment action while failing to comply with the Act and 2. Whether the Fictitious Name Act is preempted by the Federal National Mortgage Association Charter, a federal law, to give it standing to sue notwithstanding the Act. The Fictitious Name Act provides that "[n]o entity which has failed to register a fictitious name as required by this chapter shall be permitted to maintain any action in any tribunal of this Commonwealth until such entity shall have complied with the provisions" of the Act. 54

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The Court found, that under the plain language of the FNMA Charter, Fannie Mae is only empowered to "sue and be sued, and to complain and to defend" in its corporate name. 12 U.S.C. § 1723a(a).

Pa.C.S.A. § 331(a). The purposes of the Act are: (1) to protect persons giving credit in reliance on the fictitious name; and (2) to definitely establish the identities of those owning the business for the information of those who have dealings with the entity. *Lamb v. Condon*, [ ] 276 Pa. 544, 120 A. 546 ([Pa.] 1923); *Ross v. McMillan,* [ ] 172 Pa.Super. 298, 93 A.2d 874, 875 ([Pa. Super.] 1953).

Janczak argued that Fannie Mae "had no right to file a lawsuit in the name of 'Fannie Mae' without complying with the [Act, as the Act] provides that an entity which has failed to re[gister] its fictitious name shall not be permitted to maintain any action" in the courts of this Commonwealth. Janczak further asserts that the Act is not preempted by the Federal Charter of the Federal National Mortgage Association ("FNMA Charter") because the Act "in no way conflicts with federal law concerning [Fannie Mae's] Federal Charter or its legal corporate name[,] which is the Federal National Mortgage Association." Essentially, it claims that Fannie Mae could not sue in their colloquial name.

The Court found, that under the plain language of the FNMA Charter, Fannie Mae is only empowered to "sue and be sued, and to complain and to defend" in its corporate name. 12 U.S.C. § 1723a(a). Although the corporation regularly conducts business under the name "Fannie Mae," the name of the corporate entity is plainly and unambiguously stated as "Federal National Mortgage Association" throughout the empowering legislation. 12 U.S.C. § 1716b. Thus the Court concluded that the trial Court erred in granting summary judgment in "Fannie Mae".

An interesting case, in which the appellant took a different route in order to seek their redress.

STATE SNAPSHOT | TEXAS

"Minimum Price" and the Secured Creditor: The Most Explosive Provision of the Texas Estates Code

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COMMENTATORS HAVE labeled the Texas Estates Code a "minefield" for creditors, owing in part to its diverse and detailed claims provisions and lack of coherent organization. The mechanisms for enforcing claims in Texas probate proceedings differ between dependent and independent administrations, and between secured and unsecured claimants. A creditor who fails to submit a claim in the specified timeframe, form, or manner may find the claim rejected, even absent any action by the administrator. And the creditor who does not timely file suit to establish a rejected claim will find that claim barred by the Code's 90-day Statute of Limitations. With one misstep negotiating the Code, the creditor's claim may be obliterated.

With knowledge, experience, and diligence, the secured creditor can navigate the minefield and arrive unscathed at the end of the dependent administration claims process – the hearing on the application to foreclose. Tex. Estates Code § 355.158. Yet at this hearing the creditor may stumble upon a provision that could potentially annihilate all rights to enforce the secured lien:

"Based on the evidence presented at the hearing, the court may set a minimum price for the property to be sold by foreclosure that does not exceed the fair market value of the property. If the court sets a minimum price, the property may not be sold at the foreclosure sale for a lower price." Tex. Estates Code § 355.159(b).

Before the creditor can file an application to foreclose, the creditor must present the claim, the personal representative must allow the claim, and the court must approve the claim. Tex. Estates Code § 355.155. And the Code gives the personal representative of the estate at least six months to sell the property or otherwise address the debt. Tex. Estates Code § 355.155. Therefore, the creditor typically files an application to foreclose because the property at issue cannot be sold at fair market value on the open market. Under such circumstances, the probate court that mandates a minimum foreclosure sale price equal to the fair market value of the property fundamentally obliterates the creditor's right to enforce the security instrument.

The previous version of the above-quoted provision specified that the minimum price would be fixed "[i]n the discretion of the court." Tex. Probate Code § 306(i)(C)(2). Removing the language of discretion did not change the result. The ability to fix a minimum foreclosure sale price up to the fair market value remains at the court's discretion, which makes an adverse ruling under this provision difficult to appeal. That difficulty may explain the lack of case law developing the provision.

Where a dependent administration is pending, the Estates Code already eliminates the secured creditor's right to enforce a lien with a non-judicial foreclosure under the usual mechanism set forth in Texas Property Code section 51.002. The secured creditor must follow the Code's claims process. If the probate court exercises its discretion to fix a minimum price equal to the value of the property, the court effectively eliminates the secured creditor's right to enforce the lien under the terms of the security instrument as well.

Moreover, because the probate court has exclusive jurisdiction over property falling under a dependent

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Advocacy groups for secured creditors can find plentiful material in the Texas Estates Code that may be reformed for an increase in equity and efficiency. The best place to start is by advocating for the revocation of section 355.159(b).

administration, the creditor can go nowhere else for relief. Tex. Estates Code § 31. Federal courts will dismiss actions concerning such property under the "probate exception," and the probate court can pull into its own docket any action regarding estate property pending in other state courts. Tex. Estates Code § 34.001.

The Texas legislature seems to have recognized the radical power section 355.159(b) gives the probate court to render secured liens unenforceable and attempted to address it with a subsequent provision. Section 355.160 provides that the creditor may return with a subsequent application to foreclose when the property does not sell for the minimum price set by the probate court. However, a subsequent application to foreclose merely brings the secured creditor back to the discretion of the probate court to set a minimum price under section 355.159(b).

Advocacy groups for secured creditors can find plentiful material in the Texas Estates Code that may be reformed for an increase in equity and efficiency. The best place to start is by advocating for the revocation of section 355.159(b). ■