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OFFICIAL PUBLICATION OF THE ALFN
VOL. 5 ISSUE 1

NEW BANKRUPTCY RULES EFFECTIVE DECEMBER 1, 2017

P. 6

Letter from the Editor

As we begin a new year, we reflect on our many accomplishments and look forward to bringing more new and exciting opportunities to our members that provide the tools, knowledge, and connections you need to best represent your individual companies and to further your careers.

Our educational programming is one of the many ways we seek to bring value to your membership commitment. We know that budgets are tight, so we want every ALFN event to be the best it can be with a focus on high-quality education, and impactful networking opportunities with your industry peers. This year we will continue to expand on our two Intersect training events in Dallas, TX, with Bankruptcy Intersect on Feb. 5 at the Westin Galleria Dallas and Foreclosure Intersect this Fall. We plan to make our onsite training programs even more robust, to continue providing these training opportunities to servicers where we are able to offer a beneficial experience to the members that attend. Something else we are very excited to bring you this year is our WILLPOWER Summit, which for the first time ever is a standalone event, April 23-24 at the Ritz-Carlton Dallas. And for the pinnacle flagship ALFN event, you won't want to miss our 16th Annual ANSWERS Conference, July 22-25 at the beautiful Ritz-Carlton Bacara in Santa Barbara, CA, as you will be very pleased to see what we have planned for you. As for our online education, we will be increasing the number of webinars we host this year, allowing for more opportunities to showcase our members through this great educational and marketing tool. We will also be launching a new e-learning platform, which will contain a myriad of on-demand education, tutorials and archived webinars that will be a 24/7 resource for the industry-leading education you have come to expect from ALFN.

I am pleased to present you with this first ANGLE issue of the year, where we open with a focus on Bankruptcy and a review of the many changes to the Federal Rules of Bankruptcy Procedure that took effect on Dec. 1, 2017. We then shift to look at two amicus briefs that ALFN recently sponsored and the impact we had on the appeals for *Linza v. PHH Mortgage* and *Davidson v. Seterus, Inc.*, our additional feature articles will provide insight on the best practices in addressing code enforcement concerns after natural disasters, dual-tracking prohibitions, and new HMDA disclosure guidance. We then move on to cover a scenario where bad faith filers could hijack a bankruptcy case that pre-dates an in rem order. Finally, we wrap up our feature articles with a contribution on the Statute of Limitations, and how servicers can increase their chances of successfully defending an SOL claim.

In our State Snapshot section, you will be interested in reading about a recent ruling from the Illinois Appellate Court for the Second District, which ruled that failure of an originating mortgage lender to comply with the Illinois Mortgage Licensing Act does not void the mortgage lien as a matter of law on mandatory mediation. In addition, we look at the Indiana Court of Appeals, who for the first time in a published opinion in the state, held that a borrower has no standing to challenge allegedly invalid assignments.

I would like to thank each and every one of you for your support and confidence this year and we look forward to increasing membership value and earning your continued support in 2018. Please take the time to reach out to us on how you would like to get more involved this year.

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

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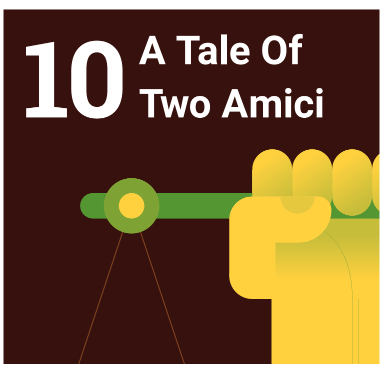
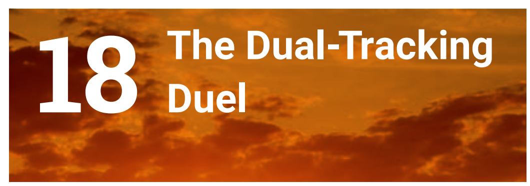
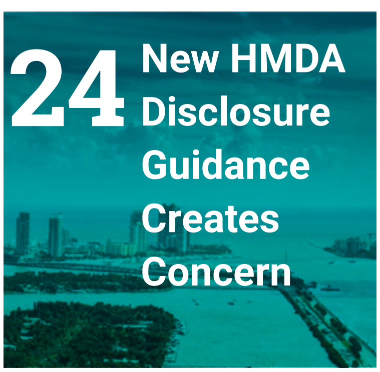






MEMBER BRIEFS

STATE SNAPSHOT

ALFN EVENTS
SAVE THE DATES

2018

FEB. 5
BANKRUPTCY INTERSECT
The Westin Galleria Dallas
Dallas, TX

APR. 23-24
WILLPOWER SUMMIT
The Ritz-Carlton Dallas
Dallas, TX

JUL. 22-25
ANSWERS
ALFN'S 16TH ANNUAL CONFERENCE
The Ritz-Carlton Bacara, Santa Barbara

FALL '18
FORECLOSURE INTERSECT
Dallas, TX

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!

BK INTERSECT IN DALLAS
FEBRUARY 5

The financial services industry faces many new challenges, and as you work towards solving various complexities in the loans you are servicing, you need training that is deep and up to the minute. We have that for you at INTERSECT: Servicing + Bankruptcy, February 5 at The Westin Galleria Dallas. Your team and team management will benefit from this training on various timely bankruptcy and default servicing issues. Our attorneys, servicer guest speakers and other subject matter experts will provide a deeper level of training and focus on today's latest bankruptcy hot topics. This day long training concludes with a reception hosted by the ALFN Bankruptcy Practice Group. Please reach out to Susan Rosen at srosen@alfn.org for more information on BK Intersect.

REGISTER, SPONSOR OR LEARN MORE AT
ALFN.ORG/BKINTERSECT

SOMETHING NEW AT ALFN.ORG

Get plugged into our award-winning young professionals network JPEG, Women in Legal Leadership (WILL), Bankruptcy, Marketing and several other groups!

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. To expand your coverage in as many practice groups as possible, we recommend you assign specific individuals in your company based on their interests and expertise to our various practice groups. For descriptions of each group, their focus, activities and other details, visit Member Groups at **ALFN.org**.

ARE YOU A GREAT SPEAKER & EDUCATOR? THEN WE WANT YOU.

If you want to be considered for a panelist position as a speaker or moderator in 2018 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 in 2018 must complete a speaker form.

WHAT WE HAVE IN STORE FOR YOU!

ALFN can now process your purchases online through our e-store. You can register for our events, purchase sponsorships, even renew your membership, all online at ALFN.org. Please reach out to Ashleigh Bouselli abouselli@alfn.org if you need assistance with your member ID and password for login purposes.

ARE YOU ON THE LIST?

Does everyone with your company receive ALFN emails? If not, 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. If you have a multi-state or Enterprise membership in the ALFN, don't forget to include all employees from your additional states of membership as well. Contact us at info@alfn.org to be included.

2018 EVENTS

ANNUAL SPONSORSHIPS FOR 2018 NOW AVAILABLE – Contact Susan Rosen at srosen@alfn.org to design a package that is right for you.

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.

Webinar Types

Practice Building Series – Presentations on operational and business issues facing our members.

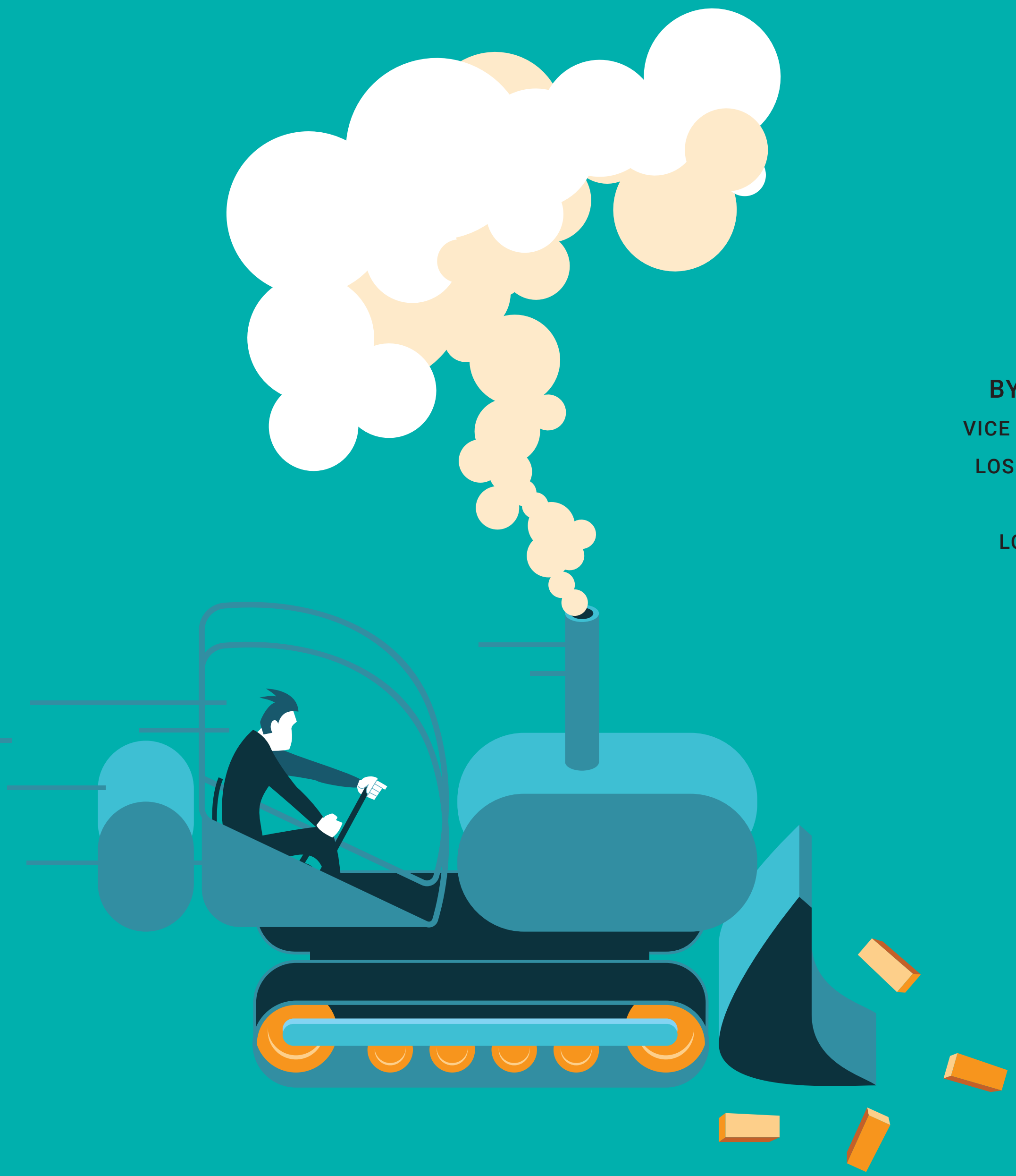
Hot Topic Legal Updates – Industry hot topics and litigation updates.

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.

On-Demand – We are working on a new platform to host our webinar archive, to be made available in 2018. Webinar archives will be accessible on-demand 24/7, and will include presentation materials and a video/audio recording where available.

NEW BANKRUPTCY RULES EFFECTIVE DECEMBER 1, 2017



BY LEANN E. COVEY, ESQ.
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Major changes to the Federal Rules of Bankruptcy Procedure took effect on December 1, 2017. The most important changes are as follows: 1) Required use of a model Chapter 13 Plan (Official Form 113), 2) Established deadlines related to plan confirmation 3) Express identification of mechanisms to determine the amount of secured and priority claims, 4) Explicit requirements that a secured creditor file a proof of claim, and 5) New proof of claim bar filing date.

THE NATIONAL PLAN

Official form 113 is now the national standard and should be replacing most other local plans now in existence. The national plan is cover under Rule 3015. The goal of the national plan was to set forth a streamlined plan that is broad based enough to use across all districts.

The national plan will now allow surrender with relief upon confirmation of the plan in Chapter 13 bankruptcy and relief the co-debtor stay. This change is a boon to creditors as they are now no longer required to expend fees to seek relief from stay in a surrender situation. Another rule that is beneficial to creditors is Rule 3015(c), which provides that nonstandard provisions are effective only if included in the appropriate designated section of the national plan. There will be no more ambiguous treatment in any part of the plan that could be confusing to creditors because it must be clearly listed in the nonstandard provisions section.

Rule 3015 and Rule 3015.1 should streamline the plan review process for creditors, who now will be able to more easily locate the debtor's proposed treatment of their claims and any nonstandard provisions within the plan. The key word is "should" as many districts have opted for their own plan instead of using the national plan. Rule 3015.1 allows districts to adopt their own form, subject to restrictions that ensure the district's retention of the key content of the official form. The Judicial Conference has been considering a national Chapter 13 plan since 2011, but did not originally propose an opt-out mechanism. However, after much debate and comment, it appeared in the final rule. The reason is that many districts simply prefer to have their own forms and fought hard for this option. It should streamline the process for each district, due to the fact the district will either use the national plan or a plan agreed upon for the entire district. The upside is that Rule 3015 and 3015.1 will prevent districts from having no form plan at all or each city division within a district having a local form. Therefore, there is more uniformity with the new rules overall even though the national plan is not mandatory.

Financial institutions should not rely solely on the national plan for employee training purposes due to the likely continued prevalence of local plans. Financial institutions should also be aware that many local forms will look like the national plan in format, but may have a few key distinctions that are in small print throughout the document that could affect the creditor to their detriment.

Rule 3012 expressly sets forth various mechanisms by which courts may determine the amounts of secured claims, namely a motion, claim objection, or through the Chapter 13 plan. Courts may now determine the amount of priority claims by motion (after a claim is filed) or claim objection. Rule 3015(g) provides that any determination made in the plan made under Rule 3012 about the amount of a secured claim is binding on the holder of the claim, even if the holder files a contrary proof of claim or the debtor schedules that claim, and regardless of whether an objection to the claim has been filed. Creditors must carefully review the debtor's plan to determine whether an objection is necessary to any possible dispute that may arise regarding the valuation of a property. Creditors can no longer rely on the fact that a motion or adversary proceeding will be filed regarding lien stripping in certain districts, because it may already be stripped upon confirmation of the plan.

Objections to any negative treatment must be filed prior to objection deadline set forth by the court. Rule 2002 was amended to 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 proposed rule change and each change provides creditors with advance notice for the date of the scheduled confirmation hearing and the deadline for filing an objection. Due to the fact that creditors are bound to the terms of a confirmed plan, regardless of whether or not they enter an appearance into a Chapter 13 proceeding, it is imperative that financial institutions ensure there is a system in place to thoroughly review the Chapter 13 plan.

PROOF OF CLAIM

Rule 3002(a) indicates that secured creditors must now file a proof of claim. This had not been the case prior to the new rule as a secured creditor was not required to file a claim. The rule does clarify that a lien that is a secured is not void should the creditor fail to file a proof of claim. However, the rule does not indicate what will occur if a secured creditor fails to file a claim.

Rule 3002(c) changes the POC deadline to 70 days after the date of filing for holders of a claim that is secured by a security interest in the debtor's principal residence. This is much sooner than the current deadline of 90 days after the first date set for the meeting of creditors. The attachments to the POC must be filed 120 days after the filing date. This was a compromise by the various parties involved in a bankruptcy proceeding because Chapter 13 Trustees and Debtors want the figures, but the note, mortgage, and assignments can be filed later while the Creditor gathers this information. Chapter 13 Trustees and Debtors' counsel need this information to determine if the case is feasible as filed due to the fact the primary residence is generally the largest creditor in a proceeding. These new rules tighten the proof of claim deadline for creditors, but also should provide more certainty with respect to the bar date. The old rule had a deadline tied to the first date set for the meeting of creditors, which may vary by district.

Rule 3002 (c)(6) allows only two exceptions to complying with the new proof of claim bar date. On a motion filed by a creditor before or after the filing deadline, the court may extend the deadline by not more than 60 days if the court finds insufficient notice because the debtor failed to timely file the list of creditors' names and addresses required by Rule 1007(a), or notice was mailed to the creditor at a foreign address. Please note, there is no rule to give more time to a Creditor if they need it. Creditors would have to prove that they did not get service for the specific reasons stated above. A motion to extend the time because the Creditor simply needs additional time to compile the figures will likely be denied in most districts.

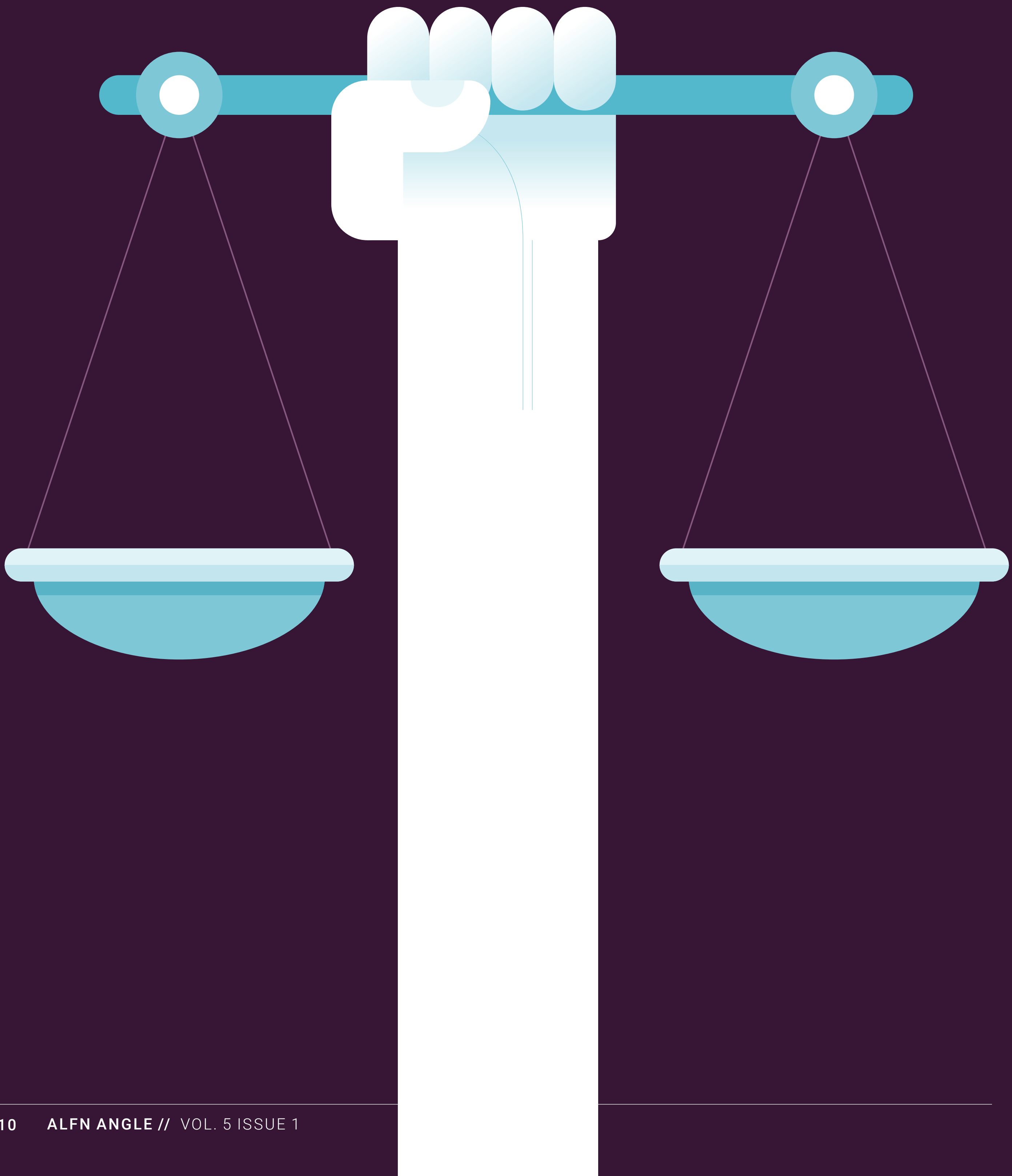
Rule 3007(a)(2) states a claim objection and notice must be served by first-class mail to the person designated on the creditor's proof of claim. Objections to claims of an insured depository institution must also be served as provided by Rule 7004(h), which is certified mail addressed to a designated officer of the institution. This rule change is important because creditors finally have control over where a debtor mails a claim objection.

Financial institutions should not rely solely on the national plan for employee training purposes due to the likely continued prevalence of local plans.

Rule 3007(a) no longer requires a hearing on every claim objection. The removal of the requirement of a hearing means that local rules will control whether a creditor must file a response and request a hearing if a debtor files a claim objection. Rule 3007 now permits courts to require a claimant to timely request a hearing or file a response in order to obtain a hearing. The Committee Notes, however, make clear that the court will still need to determine if the claim is valid even if the claimant does not file a response or request a hearing.

Overall, it appears the new rules regarding proofs of claim should make it easier for plans to confirm and start payments to the creditor more quickly. The struggle will continue to be with getting the necessary documents filed by mortgage creditors in a timely manner.

A TALE OF **TWO** AMICI



AMONG THE BENEFITS your ALFN membership provides are educational opportunities to help you understand and comply with the applicable laws and regulations and lobbying efforts to attempt to address the existing and potential impact of those laws and regulations on the industry. Another benefit with which you might be less familiar is the ALFN's sponsorship of amicus briefs in appropriate State and Federal appellate cases that raise issues of concern to lenders, loans servicers and trustees. Below are two recent examples where the ALFN, through Wright, Finlay & Zak, LLP, sponsored amicus efforts on behalf of its members.

1. *LINZA*:

One significant recent example was presented by the case of *Linza v. PHH Mortgage.* In *Linza*, a jury in Yuba County, California awarded a borrower $16MM in damages over the loan servicer's (PHH's) alleged failure to properly implement a loan modification. As part of the judgment, the jury slapped PHH with $15.7MM in punitive damages. PHH promptly filed a Motion for a Judgment Notwithstanding the Verdict and Motion for a New Trial. The trial court refused to order a new trial, but reduced the award from $16MM to roughly $158k. The court then awarded Linza's attorneys, $178k in fees and costs. Both sides appealed the decisions.

On appeal, Linza raised two particularly troubling arguments from a servicer, lender or trustee's point of view: (1) that a breach of contract (the loan modification agreement in this instance) can give rise to tort claims and (2) that an agent can be held liable for interference with its principal's contract with the borrower.

The ALFN (along with the UTA and the CMA) filed an amicus brief supporting the decision in favor of PHH, particularly focusing on these two issues. More specifically, the Amicus Brief discussed the industry's interest in the decision, as well as the potential adverse impact on the lending and loan servicing if an agent (a servicer or trustee) could be held liable for interfering with the beneficiary/lender's loan contract, or if an ordinary

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breach of contract claim were allowed to give rise to tort liability.

In October of this year, the California Court of Appeals issued a unanimous win for the mortgage industry! The Court upheld the Judgment Notwithstanding the Verdict and reversed the denial of the Motion for New Trial, ordering a new trial on the question of contractual damages only. The court also vacated the attorney fee award in favor of Linza's counsel – the United Law Center. The Court of Appeals agreed that: (1) PHH (the loan servicer and prior owner of the loan) was clearly a party to the loan modification and, thus, could not have interfered with its own contract; (2) as held in *Nymark v. Heart Fed. Sav. & Loan Assn.*, (1991) 231 Cal.App.3d 1089, 1095-96, PHH did not owe Linza a negligence duty of care because there was a contractual relationship between them and PHH was acting in the conventional role of lender/servicer (the Court noted that the only consumer loan decisions that had held that a negligence duty could exist notwithstanding the *Nymark* "rule" had all involved the loan modification application process—and even there the courts were even split on when and whether there was a duty); and (3) tort damages did not arise from an ordinary breach of contract and there was no such thing as negligent breach of a contract. There will be a new trial but it will be limited to the issue of proper <u>contract</u> damages. In sum, it was a significant victory for PHH, the ALFN, the other amicus parties, as well as the entire industry.

Although it is possible that Linza could seek review by the California Supreme Court, it is unlikely it would be accepted.

2. *DAVIDSON*

The ALFN also recently sponsored an amicus effort in *Davidson v. Seterus*, Inc., which involved a series of communications the loan servicer allegedly made to the borrower concerning his monthly mortgage payments. The borrower claimed that the calls violated the Rosenthal Act because the calls were made even though he had timely paid and even though (if he had not) he was still within the "grace" period before he would be considered to be in default. The borrower also claimed that the calls improperly threatened consequences if he did not pay. The Superior Court rejected the borrower's claims, finding that the Rosenthal Act did not apply to mortgage loans at all. The borrower appealed.

On appeal, the borrower argued that the scope of the Rosenthal Act was broader than that of the Federal Fair Debt Collection Practices Act and did not exclude creditors or their servicers, nor could it be properly read to exclude mortgage loans. The borrower attempted to distinguish the cases which had declined to apply the Rosenthal Act to mortgage loans by pointing out that most of them involved <u>foreclosure</u> activity whereas he was protesting the servicer's <u>collection</u> activity when there was no pending foreclosure. He also argued that the inclusion of the "mini-Miranda" warning on the servicer's correspondence (in compliance with the requirements of the Federal Act) was a concession by the borrower that it was a debt collector. Most disturbingly, the borrower argued that the parent of the loan servicer was also liable for the servicer's alleged violations (though borrower tried to disguise this by claiming it was the parent entity's own acts that were at issue, albeit no specific acts by the parent were ever identified).

The ALFN's amicus brief (joined by ALFN and CMA) addressed three of the key issues affecting the servicing industry at large:

1. Whether the inclusion of the required "mini-Miranda" warning in a party's communications constituted an admission that the party was a debt collector for purposes of the Rosenthal Act [although there are a few cases in other parts of the country that disagree, the cases in this Circuit tend to hold it does not];

2. Whether the Rosenthal Act applies to servicers of mortgage loans in the regular course of their servicing those loans [an issue on which the cases are mixed]; and

3. Whether the parent entity of a loan servicer can be held liable for violations of the Rosenthal Act

IN SUM, IT WAS A **SIGNIFICANT VICTORY** FOR PHH, THE ALFN, THE OTHER AMICUS PARTIES, AS WELL AS THE **ENTIRE INDUSTRY**.

(and, consequently, of Business & Professions Code § 17200) attributed to the loan servicer absent the parent's direct involvement in committing those violations [but for the borrower's attempts to muddy the waters by arguing that he alleged (unidentified) acts by the parent itself, this should be a clear-cut issue].

The *Davidson* appeal has been fully briefed and will be set for oral argument in January, 2018.

Although it is certainly true that the respondents in both these cases mounted strong defenses of the correctness of the lower court's decisions in their favor, and have the most direct interest in seeing those decisions affirmed, having the support of an amicus on appeal can provide the respondents (and the industries in which they do business) with several often crucial benefits, among which are the following:

1. Unlike the parties on an appeal, the amicus is not limited to the record presented to the lower court but can bring in relevant articles, expert opinions, industry practices, similar cases and/or statutes from other jurisdictions, studies and surveys that were not previously introduced in the case or which could not have been for some reason;

2. The filing by an amicus helps focus the Court on the potential broader impact of its decision and the public policy implications, showing how it might affect persons and entities other than the parties to the appeal;

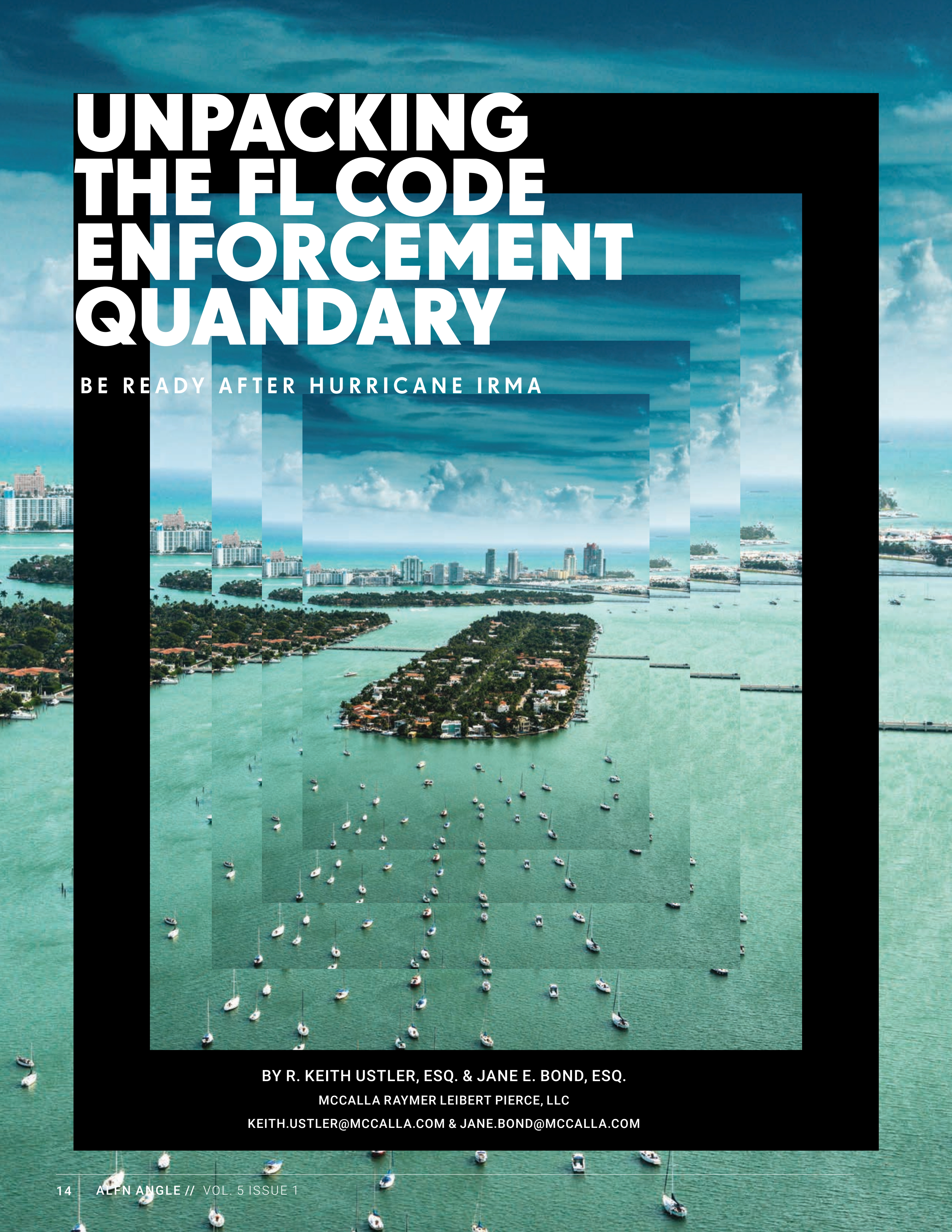
3. The amicus typically brings a special depth and breadth of knowledge or expertise as to the issues before the Court that can help tilt the balance in favor of one side or the other;

4. An amicus brief filed in support of a respondent can address and rebut issues and authorities that might have first been raised in the appellant's reply brief (the respondent is not allowed a sur-reply); however, the appellant still gets the last word as an appellant is entitled to file a response to an amicus brief; and

5. In the event that the party whom the amicus seeks to support muffed an issue that might be important on the appeal, the amicus brief can seek to repair the damage (albeit an amicus, at least one in support of an appellant, cannot raise any issues not already properly asserted in that party's brief).

As recognized by the Ninth Circuit in *Miller-Wohl Co., Inc. v. Commissioner of Labor & Indus.*, (9th Cir. 1982) 694 F.2d 203, 204: "the classic role of amicus curiae [is fulfilled] by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration."

The pending *Davidson* appeal and the *Linza* decision thus highlight the importance and value of vigorous amicus efforts by the industry. If you have an appeal that you believe could affect the ALFN or its members, please contact the ALFN at info@alfn.org, or let our office know at rfinlay@wrightlegal.net or jfink@wrightlegal.net.



UNPACKING THE FL CODE ENFORCEMENT QUANDARY

BE READY AFTER HURRICANE IRMA

BY R. KEITH USTLER, ESQ. & JANE E. BOND, ESQ.

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WHILE I WAS WATCHING Local News shortly after Hurricane Irma moved past South Florida, prior to every commercial break the channel played a tease concerning whether the City of Miami was able to place code violations on residential property the day after a storm wreaked havoc on the area. The answer, of course, is "yes" but the indignation from the citizens of Miami was evident. You see, when dealing with code violations there is one universal truth: the government, much like a casino, always wins. In fact, a colleague of mine has coined the phrase "guilty until paid innocent" which although facetious carries with it a fair amount of truth. Another piece of the puzzle is that mortgage servicers are presumed to have deep pockets and many times do not receive and review the code enforcement notices until the fees start accruing. These two facts make them targets for code enforcement matters and allow local governments the chance to beautify properties and collect large fines through alleged bullying. While this is sadly sometimes the case, if one understands the process and learns how to work within these biased systems, a savvy, attentive, and well represented client can avoid unnecessary expenses and delays.

THE RULES

Florida's code enforcement is authorized and controlled by statute. The enforcement procedure may be found in Fl. Stat. §162.06. The procedures vary a bit depending on the size of the municipality. A rough outline of the life of a code violation, and some of the pitfalls and intricacies of the process while harrowing, are doable.

In Florida, many local governments have housing and/or building codes which are intended to promote, protect, and improve the health, safety, and welfare of citizens. These codes are enforced by a small army of officers, inspectors, and commissioners via fines and other non-criminal penalties. These individuals receive calls from angry or nosey neighbors regarding a messy property or note violations on routine neighborhood inspections and the process begins.

GIVE NOTICE

Upon the discovery of a violation, a code inspector must notify the owner of the non-compliant property of the issue and provide the owner a reasonable time to correct the violation. Many municipalities will also notify interested parties such as mortgage holders on the property of the violations as well. This notification, oftentimes titled a Notice of Violation, typically comes through the mail (although it may be posted to the property, published in a newspaper, or hand-delivered) and the timeframe to bring the property into compliance is usually about 15 to 30 days. This might seem reasonable but in practice the days tend to pass in the blink of an eye. To further complicate matters, some municipalities will cite the sections of their code which were violated or use "legalese" rather than providing a specific or colloquial description of the problem. These complications tend to make solving the problem a bit more difficult for the average Joe.

COMPLY QUICKLY

If the Notice is timely received a call can be made to the inspector who issued the citation and an explanation of the actual issue, and extension of time to bring the property into compliance, may be obtained. This extra time can then be used to hire a contractor to remedy the issues before it is necessary to appear at a hearing in front of the code commissioners and nip the problem in the bud. For these reasons it is imperative to have a system in place to identify code enforcement concerns quickly and have a network of individuals who can rectify small concerns before they become big ones. Handling code concerns expeditiously can save hundreds in attorney's fees and possibly thousands in fines not to mention time holding the asset in REO. It is the business decision of the servicer based on many factors as to whether the servicer may want to address the code violation or whether the compliance is left to the owner of the

> When addressing code enforcement concerns as they arise; awareness, quickness of action, and diligence are paramount.

property. If the mortgagee wants to rectify the violation, a court order may be advisable to protect the collateral pursuant to the mortgage provisions.

CODE HEARING

If the property is not brought into compliance within the stated timeframe (typically this happens because the Notice is not processed timely), the code officer will notify the code enforcement board and a Notice of Hearing will be generated and served on the property owner in the same manner as a Notice of Violation. The hearing will often take place at a City Hall or regional courthouse in a large docket sounding. Once again, if the Notice of Hearing is received timely, negotiations or repairs can be made prior to the hearing and the problem can be resolved before things get out of hand. Furthermore, even if repairs or negotiations cannot be completed prior to the hearing, an extension of time to bring the property into compliance may be sought from the board at the appearance. A first, and possibly second, extension is routinely granted as long as some effort is being made to resolve the issue and a representative of the property owner appears at the hearing. A word of caution, while these hearings seem informal they are serious endeavors which are purposefully designed to ensure the most basic of due process concerns are met. Don't be fooled by the amount of lay people in jeans, the utilitarian style of the hearing room, or the friendly demeanor of the hearing board, these are real court proceeding with real consequences and should be treated as such. Additionally, many municipalities will only allow the property owner, or its attorney, to speak at the hearing and defend the code enforcement action. This means that unless the bank has title to the property, their attorney, although one may be present at the hearing, is not allowed to make objections or arguments and sometimes isn't even allowed to request an extension on the owner's behalf. This restriction makes receipt of any notices and negotiation prior to a hearing all the more important. If the municipality provides or hires services to rectify the issue, the services provided will not be foreclosed and must be paid. It is prudent for the servicer to have counsel present if the violation may be a significant dollar amount as the servicer may want to take action to protect the collateral for the loan.

CODE ENFORCEMENT LIEN

If an extension is not granted, and if the city can meet its burden in proving a continuing violation (whether by a preponderance of the evidence or by confession of the property owner on the record), a final order with findings of fact and conclusions of law will be issued. If the municipality prevails it is entitled to recover all costs incurred in prosecuting the case and those costs may be included in a lien against the property. This means the harder a property owner fights and the more effort the city has to exert to prove its case the more lien will be. Subsequent to issuance of the final order, if the property is still non-compliant, a Claim of Lien will be recorded against the property. Many liens carry an escalating fine per day (some as high as $500.00 per violation per day) for as long as the condition persists. While these liens may be extinguished in a mortgage foreclosure action, many municipalities will continue to accrue fines against the property despite the lien being stripped. It's also important to note that the municipality could foreclose its lien and take title to the property. This is rare because the foreclosure may not impact a superior interest. Most of the time municipalities would rather recover money and force the property into compliance rather than become a landlord.

SETTLEMENT OF THE LIEN

Once a lien is recorded, even if it has been foreclosed in a mortgage foreclosure action, a municipality will demand the property be brought into compliance and will almost always require some sort of payment. Unless the property can be sold with a hold harmless agreement at REO (See, Fl.Stat.§162.06(5) for mandates regarding the transfer of ownership while the property is subject to enforcement proceedings), the amounts due are usually negotiated prior to a sale. The first step in mitigating the fines is bringing the property into compliance which, depending on the property could be costly. After that, an offer requesting an adjustment of the amounts due can be made. Depending on the municipality a hearing could be required or the amount could be reduced over the phone with the County Attorney. The best case scenario is that the government will reduce their demand to the costs which it incurred in prosecuting the case but a more likely outcome is a reduction of the amounts due by 60-80%.

APPEAL

The Florida Statutes do provide a mechanism for appeal of a final administrative order in the event one disagrees with the decision made by the code enforcement board. The appeal must be brought within 30 days of the *execution* of the order being appealed and is made to the Circuit Court in the County. The review on appeal is not *de novo* (which basically means of the whole case) but rather is limited to a review of the record created before the enforcement board. See, Fl.Stat. §162.11. This review is composed of three parts: (1) whether procedural due process was accorded; (2) whether the essential requirements of the law have been observed; and (3) whether the agency's findings and judgment are supported by competent, substantial evidence. *Lee County v. Sunbelt Equities, II, Ltd. P'ship*, 619 So. 2d 996, 1003 (Fla. 2d DCA, 1993). The final prong essentially boils down to whether the record contains the necessary quantum of evidence. *Id*. The appellate court may not reweigh the evidence or substitute its judgment for that of the agency. *Id*. Procedural due process requires fair notice and a real opportunity to be heard at a meaningful time and in a meaningful manner. *Massey v. Charlotte County*, 842 So.2d 142, 146 (Fla. 2d DCA, 2003). Whether the essential requirements of the law have been observed means whether the agency "applied the correct law". *Haines City Community Development v. Heggs*, 658 So.2d 523, 530 (Fla. 1995). The final prong, whether the judgment is supported by competent, substantial evidence, or more specifically, whether the burden of proof was met, will vary depending on the municipality. Typically however the burden will be for the code enforcement division to show that a violation existed by a "preponderance of the evidence". This fancy term of art is defined as "the greater weight of the evidence" or evidence that "more likely than not" tends to prove a certain thing. See, *Gross v. Lyons* 763 So.2d 276 (Fla, 2002). Unfortunately, due to the nature of code enforcement proceedings and the standard of review on appeal, successful appeals are rare. For all the foregoing reasons, appeals of this nature should be a last resort even if an excellent record of the underlying proceedings is preserved.

REPEAT OFFENDERS BEWARE

The speed of code proceedings and the amount of a fine per day are greatly increased for repeat violations. A repeat violation is defined as a violation of a provision of a code by a person who has been previously found, or has admitted, to have violated the same provision within 5 years. Fl.Stat.§162.04(5). If a repeat violation is discovered, the violator is *not* entitled to a reasonable time to correct the violation and the inspector, upon notifying the violator of the repeat violation, shall notify the board and request a hearing. Fl.Stat.§162.06(3). Even if the repeat violation is remedied prior to the hearing the hearing may still go forward and the board may still require the payment of reasonable enforcement fees and costs. The increased liability of being a repeat violator (especially since the violation does not have to be on the same property each time) adds extra incentive to cure code problems prior to a hearing on the violation in order to avoided being found to have committed a violation.

After Hurricane Irma and the billions of dollars in damage, code violations will be plentiful in FL. When addressing code enforcement concerns as they arise; awareness, quickness of action, and diligence are paramount. If a servicer discovers a violation it is the best practice to remedy it as quickly as possible and reach out to counsel for advice in order to mitigate the amount of money due and the determine the options available. a

THE DUAL-TRACKING DUEL

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WHETHER DUAL-TRACKING is permissible has been the subject of several important recent developments.

As background, the recent foreclosure crisis was the worst the United States has ever experienced, both in duration and in depth. At times, the foreclosure rate was more than triple the rate experienced at the height of the Great Depression. According to RealtyTrac, a real estate information company and an online marketplace for foreclosed and defaulted properties in the United States, more than 7.2 million consumers lost their homes between 2007 and 2014. Of these 7.2 million consumers, 5.4 million consumers lost their homes through a foreclosure sale, while 1.8 million consumers participated in a short sale program. Although the economic crisis began in September of 2007, the effects of this crisis are being experienced even today. The resulting losses have had a significant negative impact upon investors, borrowers and communities.

As a result of this crisis and actions by various parties, Congress implemented several protections for consumer borrowers. These protections include the creation of the Consumer Financial Protection Bureau ("CFPB"), the Home Affordable Modification Program ("HAMP") and amendments to the Real Estate Settlement Procedures Act ("RESPA").

Borrowers have increasingly utilized the various defenses created by these protections when attempting to retain their homes. One such protection raised in litigation is the prohibition of dual-tracking. The United States District Court for the District of Maryland recently dealt with this issue in an unreported case, Sherry L. Wisheit v. Rosenberg & Associates, LLC Civil No. JKB-17-0823.

In Weisheit, the Plaintiff executed a mortgage in 2007, which mortgage became delinquent in 2009. The servicer assumed responsibility for the servicing of the loan in 2012. Foreclosure proceedings began on April 26, 2016. Then, almost five (5) months later, but more than thirty-seven (37) days prior to a scheduled foreclosure sale, the Plaintiff submitted a "complete" loan modification application to the servicer under HAMP.

Pursuant to RESPA and its implementing regulations, if a borrower submits a complete loss mitigation application by a certain, specified date prior to a scheduled foreclosure sale, a loan servicer must evaluate that application before moving for foreclosure judgment or order of sale, or conducting a foreclosure sale. 12 C.F.R. § 1024.41(g). If a borrower submits a loss mitigation application to a servicer forty-five (45) days or more prior to a foreclosure sale, then that servicer is required to promptly review the application to determine if the application is complete. 12 C.F.R. § 1024.41 (b) (2) (i) (A). Within 5 business days after receiving a loss mitigation application, a servicer must notify a borrower in writing "that the servicer acknowledges receipt of the loss mitigation application, and that the servicer has determined that the loss mitigation application is either complete or incomplete." 12 C.F.R. § 1024.41 (b) (2) (i) (B). If the loss mitigation application is incomplete, the notice shall state the additional documents and information that the borrower must submit to complete the

Borrowers have increasingly utilized the various defenses created by these protections when attempting to retain their homes.

application. *Id*. Provided that a complete loss mitigation application is submitted to a servicer more than thirty-seven (37) days prior to any scheduled foreclosure sale, then a foreclosure servicer may not move for foreclosure judgment or order of sale, or conduct a foreclosure sale. If the servicer does so, then that servicer is engaging in a prohibited practice known as dual-tracking.

In Weisheit, after a failed attempt at mediation, the servicer denied the Plaintiff's loss mitigation application by letter. The stated reason for the denial was that the resulting modified payment was outside the required range of 10-55% of the Plaintiff's monthly gross income. The servicer concluded that, based on the financial information provided, the Plaintiff did not meet the debt to income ratio requirement established for a HAMP Tier 1 loan modification option.

Under RESPA and its regulations, a borrower is entitled to appeal the denial of a loan modification application. 12 C.F.R. §1024.41(h). In Weisheit, the Plaintiff timely appealed the servicer's denial of the Plaintiff's loss mitigation application on November 29, 2016. In the appeal, the Plaintiff alleged that the servicer did not calculate the debt to income ratio correctly, and that the Plaintiff's financial information established that she qualified for a loan modification. On December 29, 2016, the servicer sent a letter to the Plaintiff in response to her appeal (the "Response Letter"). In the Response Letter, the servicer did not dispute the Plaintiff's calculations. Instead, the servicer asserted that an investor restriction prevented it from extending the term of the loan. However, in the Response Letter, the servicer did not name the investor, and did not describe the specific nature of the alleged investor restriction. Furthermore, the servicer indicated in the Response Letter that "we have enclosed all supporting documentation used to complete the review of your account," but no documentation was enclosed with the Response Letter. The Plaintiff responded to the servicer on January 12, 2017, and advised the servicer that she would appeal the denial set forth in the Response Letter once she had received the supporting documentation from the servicer. The Plaintiff also notified the foreclosure firm that she intended to appeal the denial decision, so that the foreclosure firm would not improperly proceed with the foreclosure sale during the appeal process. However, on March 9, 2017, the Plaintiff's home was rescheduled for sale. On February 22, 2017, the Plaintiff received a communication from the servicer that the reference to supporting documentation in the Response Letter had been an inadvertent error, and, thus, the servicer would not be providing the Plaintiff with any such documentation. On February 28, 2017, without receiving any supporting documentation, the Plaintiff submitted a further appeal to the servicer. In this appeal, the Plaintiff asserted that the servicer violated RESPA because a foreclosure sale had been scheduled while the Plaintiff was still engaged in loss mitigation. The servicer did not respond to the Plaintiff's appeal. As a result, the Plaintiff filed an Emergency Motion to stay the sale, which Motion was granted by the Circuit Court on March 8, 2017.

The Plaintiff then brought an action against the servicer and the foreclosure firm (collectively, the "Defendants") in the United States District Court for the District of Maryland. In her lawsuit, the Plaintiff alleged that the servicer violated RESPA, and that both Defendants violated the federal Fair Debt Collection Practices Act ("FDCPA"). The Defendants moved to dismiss the Plaintiff's complaint. However, the Defendants' Motions to Dismiss were both denied by the Court. The reasons for these denials are discussed below.

The Court noted that RESPA is a consumer protection statute, designed to protect mortgagors from "certain abusive practices in the real estate mortgage industry." RESPA is implemented by CFPB regulations, which are collectively known as Regulation X. See 12 C.F.R. § 1024.1, *et seq*. The Court stated that dual-tracking is the practice of moving towards foreclosure while the loss mitigation process is ongoing, and further indicated that such action is prohibited. The Court further noted that the loss mitigation process begins when a borrower submits a complete loss mitigation application, and ends when the servicer denies that application on appeal (or, the loss mitigation process ends after the servicer's first denial if the borrower fails to timely appeal that denial decision). A denial of a loan modification application must state the "specific reason or reasons for the servicer's determination." According to the CFPB's official interpretation, if the denial is due to a restriction by the investor – that is, if the modification cannot be made by the servicer because the owner of the mortgage would not allow some condition necessary for the modification, then the explanation for the denial "must identify the owner or assignee of the mortgage loan and the requirement that is the basis of the denial." Simply stating that the denial is based on an investor requirement, without additional identifying information or explaining the restriction, is

What is clear is that dual-tracking prohibitions must be strictly followed. Lenders would be well served to either review or have their local counsel review their procedures as to whether they are in strict compliance with the law. Failing to be in compliance can be costly.

insufficient. Therefore, the Court found that the denial contained in the servicer's Response Letter was insufficient because the servicer did not name the investor, and did not describe the specific nature of the alleged investor restriction. According to the Court, an insufficient denial such as the denial letter issued by the servicer in this case did not end the loss mitigation process. As a result, since the loss mitigation process was not ended, the servicer and the foreclosure firm were prohibited from moving towards a foreclosure sale. By moving towards a sale under these circumstances, the servicer and the foreclosure firm essentially created a situation whereby the servicer was simultaneously pursuing loss mitigation and a sale of the property.

The Court also held that the Plaintiff's letter, dated February 28, 2017, could be found to be a Qualified Written Request ("QWR") under RESPA. This letter included the borrower's name as well as a statement of the reasons for why the borrower believed that the servicer was in error and/or the specific information that the borrower sought. The servicer's failure to respond to that letter plausibly falls within the requirements of QWR protections under Regulation X.

Next, the Court noted that Congress enacted the FDCPA after being confronted with "abundant evidence of the use of abusive, deceptive and unfair debt collection practices…." 15 U.S.C. § 1692. Debt collectors are prohibited under §§ 1692e and 1692f of the FDCPA from utilizing any false representations or unfair practices, including threatening to take any action to proceed with foreclosure if the debt collector has no right to take possession of the property at issue. The Plaintiff asserted that scheduling a foreclosure sale and issuing a notice of sale when no right to proceed with the foreclosure action existed constituted a false representation and also constituted an unfair practice to collect a debt under §§ 1692e and 1692f of the FDCPA. Guided by the legal standard established by the Fourth Circuit, the Court found that such a representation is material, and that such a representation would affect "a least sophisticated consumer's decisionmaking" with regard to a debt. Goodrow v. Friedman & MacFadyen, P.A. Civil Action No. 3:11cv20, 2013 WL 38948442.

In summary, the Court ruled that the Plaintiff alleged sufficient facts to state a claim for relief against the servicer for violations of RESPA's prohibition of dual-tracking and for violations of the FDCPA. Similarly, the Court held that the Plaintiff alleged sufficient facts to support a claim that the foreclosure firm violated the FDCPA. By ruling in this manner, the Court dismissed the servicer's and the foreclosure firm's Motions to Dismiss, and permitted the Plaintiff's lawsuit to continue.

What is clear is that dual-tracking prohibitions must be strictly followed. Lenders would be well served to either review or have their local counsel review their procedures as to whether they are in strict compliance with the law. Failing to be in compliance can be costly.

NEW HMDA DISCLOSURE GUIDANCE CREATES CONCERN IN WAKE OF RECENT DATA BREACHES

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THERE IS NEW policy guidance from the CFPB concerning the data required to be collected, reported, and disclosed by financial institutions to the public under the Home Mortgage Disclosure Act (HMDA). The guidance is intended to supplement the sweeping changes made by the CFPB to HMDA in 2015 when it expanded the amount of loan-level information required to be disclosed by financial institutions to include new data points such as borrower age, credit score, property value, unique loan identifier information, along with other information. The proposed guidance and rule went into effect on January 1, 2018.

HMDA is the regulation governing financial institutions to report and publicly disclose information about mortgages and mortgage lending activities. The CFPB states that the purpose of HMDA is "to determine whether financial institutions are serving the housing needs of their communities … and [assist] in identifying possible discriminatory lending patterns and enforcing discrimination statutes." With the new rule set to take effect in under three months, recent data breaches have created concerns that expanding the amount of information being disclosed under HMDA could be combined with other information to discover the identity of applicants and/or borrowers.

As part of the new rule, financial institutions will disclose HMDA data directly to the CFPB, who will be in charge of disclosing the information to the public. At the time the 2015 changes were announced, the CFPB did not identify which loan-level data would or would not be disclosed to the public. However, under the recently proposed guidance, the following data would be excluded:

- Universal loan identifiers
- The date the application was received
- The date of action taken by the financial institution on the loan or application
- The address of the property securing the loan
- The identifier assigned by the NMLS
- The credit score(s) relied upon in making a credit decision; and
- The result generated by the automated underwriting system used to evaluate the application

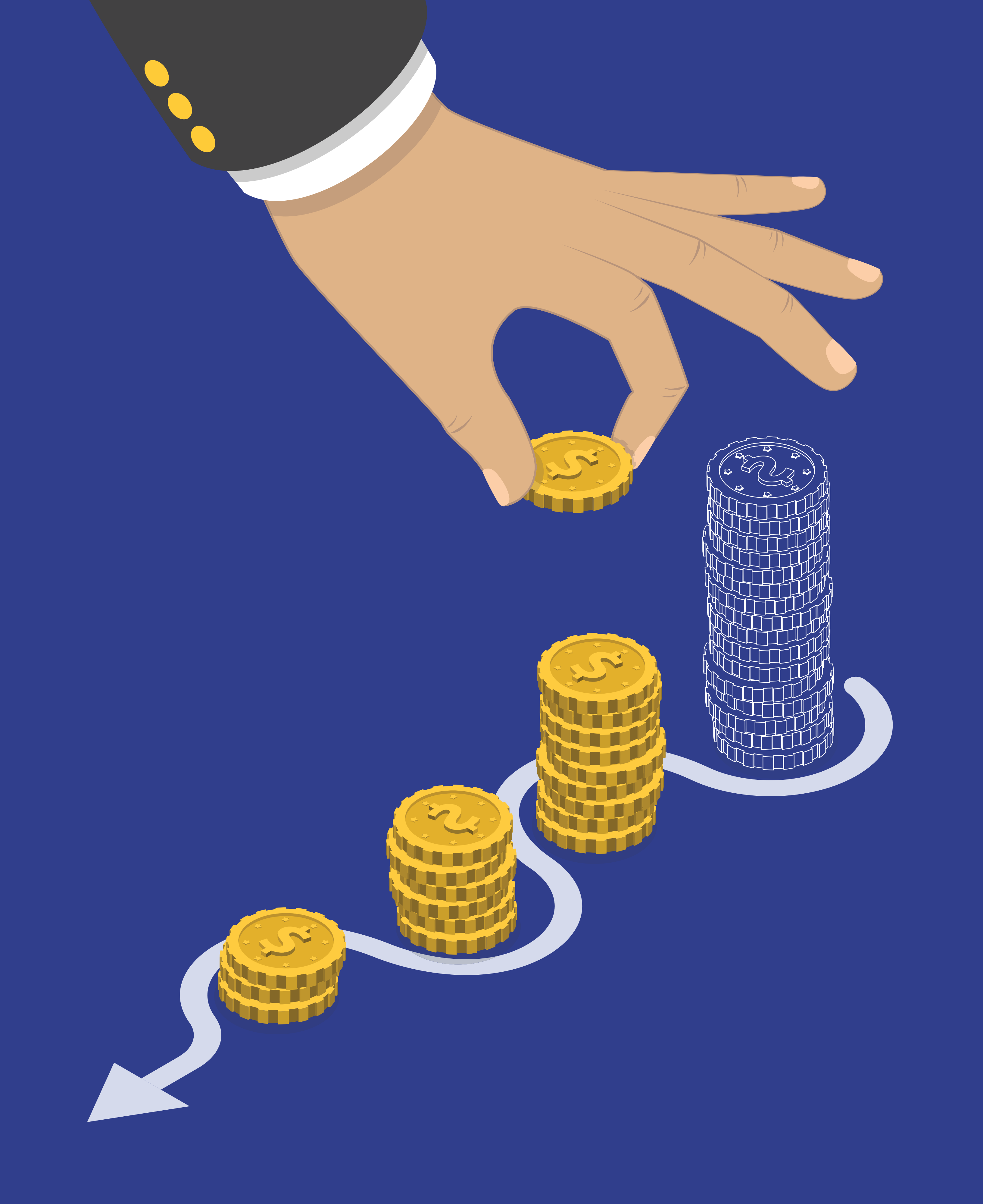
The guidance also proposes to exclude free form text fields which may identify the borrower or applicant's race or ethnicity, the name and version of the credit scoring model used to generate credit scores, and the principal reason the financial institution denied the application.

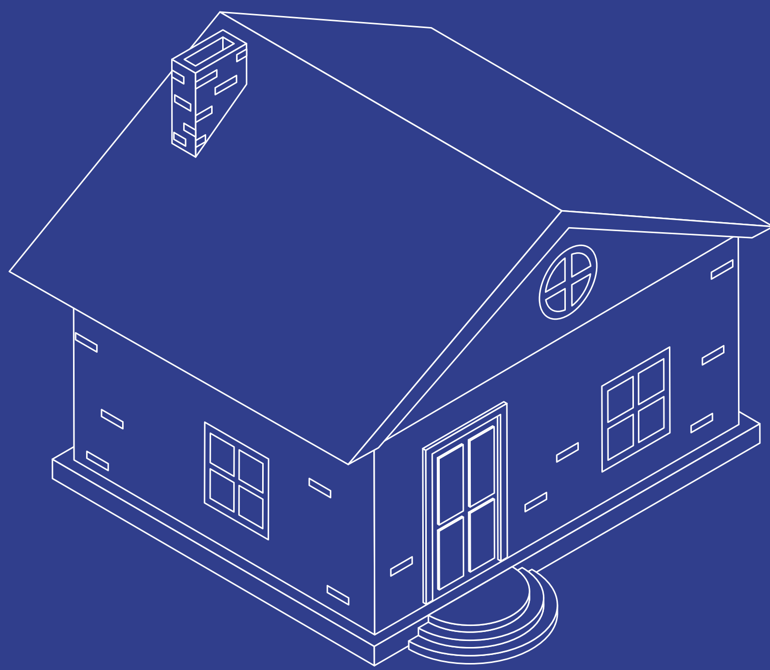
In addition to excluding certain information, the CFPB also proposes to modify certain loan-level data in order to reduce the precision in publicly disclosed data, which could lead to privacy breaches. These modifications include:

- Disclosing the midpoint for the $10,000 interval for the reported loan value (rather than the nearest $1,000)
- Indicating whether the reported value exceeds the loan limits for Freddie Mac and Fannie Mae
- Compartmentalizing the age of an applicant or borrower into specified age ranges (i.e., 25 to 34, 35 to 44, etc.)
- Disclose whether the reported age of the applicant is 62 years of age or older
- New categories for disclosing the applicant's or borrower's debt-to-income ratio

On the heels of the Equifax data breach and continued cybersecurity threats, the CFPB's guidance is a clear attempt to alleviate concerns regarding identity theft and information security. However, significant privacy concerns persist that the increase in the amount of data that is being disclosed for the first time will make it easier to discover the identity of applicants and borrowers. Furthermore, as the CFPB will become the sole purveyor of sensitive HMDA data prior to public disclosure, there are heightened concerns about the strength of the CFPB's own information security systems, which have been previously criticized by the Office of Inspector General.

As the effective date of the new HMDA disclosure rule draws near, financial institutions subject to the rule should be familiar with the new data points to be included in the disclosures to the CFPB. A comprehensive review of the institution's data privacy program is also recommended to understand the data being received from applicants or borrowers, how that data is collected, how it is stored, and how the required information is collated before being disclosed to the CFPB. At the very least, the CFPB's guidance provides insight as to what information the CFPB believes is sensitive if disclosed and could be a focal point during any examination. As privacy issues continue to be at the forefront of concerns by both regulators and the public, it is imperative for financial institutions to place an increased focus on its internal data privacy controls in order to eliminate potential threats and manage risk in the marketplace.





NEW APPROACH TO **BAD FAITH "HIJACKED"** BANKRUPTCY CASES:

RETROACTIVE IN REM BANKRUPTCY RELIEF ORDERS

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In 2005, Congress recognized the need for reform for the Bankruptcy Code and enacted The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). Under BAPCPA, Congress set forth the circumstances under which a "bad faith" bankruptcy filer could obtain the benefits of the automatic stay. Congress, however, did not contemplate a scenario in which bad faith actors would "hijack" a bankruptcy case that pre-dates an in rem order.

CURRENT LAW

Pursuant to 11 U.S.C. § 362(d)(4) the bankruptcy courts are granted authority to enter "in rem" orders terminating, annulling, modifying or conditioning the automatic stay to enable action by the lender against real property. If the "in rem" order is entered and recorded, the order is binding in any bankruptcy case that would affect the real property filed within two (2) years *after* the in rem order is entered. However, the in rem order is not applicable to bankruptcy filings that *pre-date* the date of the entered order.

ISSUE

In California, bad faith filings, which include repeat filers and real property transfers, are a frustration for lenders. A process known as "bankruptcy hijacking" exists, where deeds are produced purportedly transferring an interest in property to a person who is in an active bankruptcy. This is done in an attempt to take advantage of the automatic stay in the pending bankruptcy case since the automatic stay protects all assets of the debtor, including the transferred property. Many of these situations involve fraudulent deeds, and at times the person who filed the bankruptcy is unaware of the deed and the borrower's attempt to use the legitimate bankruptcy to stall foreclosure on a property.

Typically, once the lender files a motion for relief and an "in rem" order is entered and recorded, the ongoing delay for the lender related to a bankruptcy filing ends.

However, what if the bankruptcy filing and related fraudulent deed impacting the subject real property *pre-dates* the date of the previously obtained "in rem" relief order? Technically, the automatic stay is in effect as to the bankruptcy case filed *before* the in rem order and the lender is again stuck obtaining relief before taking any action against the property. This trend is increasing and the lenders are left with no option but to continuously re-enter the bankruptcy court to obtain new relief orders.

PAST APPROACH: CONTINUOUSLY FILING MOTIONS FOR RELIEF

Rather than proceed with foreclosure, and risk a potential stay violation or title concerns, the lender is forced to file a new motion for relief. Since this approach is foreseeable by the borrower, this may result in the borrower (or other interested party) entering into a never ending scheme, leaving the lender without options and yet again stalled from proceeding with foreclosure.

Due to the fact that such a scheme could potentially continue forever, the typical motion for relief with prospective relief from stay, or even with annulment of the existing automatic stay does not offer a guaranteed successful outcome for the lender.

NEW APPROACH: FILE AN ADVERSARY PROCEEDING

When confronted with evidence of such a bankruptcy hijacking scheme, this problem is overcome by utilizing an adversary proceeding action to obtain a *retroactive* relief order. An adversary proceeding is a lawsuit filed within the bankruptcy case.

In the subject case, the lender obtained and recorded an in rem relief order. Prior to the scheduled foreclosure sale, the lender was provided notice of a grant deed transferring the property into an existing bankruptcy filing that pre-dated the in rem order. Rather than filing a new motion for relief, the lender filed an adversary proceeding requesting extraordinary relief.

The bankruptcy court has authority under 11 U.S.C. §105(a) to *prevent an abuse of process*, and that such authority allows the court to grant retroactive relief from the automatic stay. Additionally, any due process concerns are addressed by mailing notice of the proceeding to all known interested parties, and publishing notice to notify all unknown interested parties.

OUTCOME

Pursuant to 11 U.S.C. §105(a), the requested relief was <u>granted</u> under 11 U.S.C. §362(d)(4) and binding on all (1) past, (2) present and (3) future bankruptcy cases in reference to the real property. This order gives the lender blanket relief to proceed with foreclosure action even if new evidence of a deed and bankruptcy filing purports to create an interest in a new debtor, regardless when the bankruptcy was actually filed.

The Court, in the adversary proceeding, granted a motion for summary judgment holding that extraordinary equitable relief is appropriate. The transfer of the subject property to the debtor indicated that the transferor intended to hinder, delay or defraud the secured lender by use of the automatic stay in an existing bankruptcy case. The pattern of multiple unauthorized transfers of the subject property, without lender's consent, also indicated intent to hinder, delay or defraud the secured lender. The Court found the facts of the case sufficient to grant the requested extraordinary equitable relief in order to prevent an abuse of the bankruptcy process. The Court also agreed that there is no point in having the lender seek relief from stay in each and every bankruptcy case in order to enforce its rights in the face of a clear scheme to hinder, delay and defraud the lender.

In light of this result, the lender has the option of obtaining a larger extraordinary relief order to defeat extreme bankruptcy hijacking schemes and avoid unnecessary delays in the foreclosure process. ■

> **Technically, the automatic stay is in effect as to the bankruptcy case filed *before* the in rem order and the lender is again stuck obtaining relief before taking any action against the property.**

[1] Prior to the action mentioned, a request for retroactive relief, as to all past, pending and future bankruptcy filings was requested in a motion for relief. The request was denied due to potential due process concerns. The ruling recognized that it is possible that some innocent person would be harmed by such an order without the opportunity to be heard.

WFZ LEGAL UPDATE

STATUTE OF LIMITATIONS ISSUES

IN THE PACIFIC NORTHWEST AND SOUTHWEST

(Avoiding the SOL Bar Through Waiver of Acceleration and Tolling)

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CHALLENGES TO MORTGAGE lenders and servicers ("Servicers") right to foreclose based on the expiration of the statute of limitations ("SOL") are rapidly increasing in the Pacific Northwest and Southwest regions. Consumer attorneys are now representing Borrowers in a winner-take-all bid to avoid repayment of their home loan and simultaneously prevent Servicers from ever foreclosing and recovering the principal owed. However, two strategies for defeating these claims are now gaining acceptance - waiver of acceleration and tolling due to bankruptcy.

As a brief reminder, a SOL is the outward time limit of when a Servicer can enforce its Deed of Trust following a particular default. For example, if the SOL is six (6) years, the Servicer must complete its foreclosure within 6 years. If the Servicer fails to foreclose within 6 years, it is arguably prevented from ever foreclosing on its lien, effectively giving the property to the borrower or owner free and clear of the Deed of Trust. A notice from theServicer declaring the loan to be in default and that all sums are immediately due generally commences the SOL (*i.e.* acceleration).

WAIVER OF ACCELERATION

Borrowers and their attorneys tend to focus on a long-ago acceleration of the Loan and the lack of any authority (contractual or otherwise) for a Servicer to unilaterally waive, cancel or decelerate the same. Often, the Servicer's records will not reflect an express deceleration but, instead, the commencement or cancellation of foreclosure activities and mailing the requisite notice of default and intent to accelerate. Both of these activities are key to demonstrating that any prior acceleration was waived by *implication*.

Courts in Arizona substitute the term "waiver" of acceleration with "revocation," but the concept is the same. "[R]evocation of acceleration may occur when a lender commits an affirmative act to revoke acceleration."[1] The requisite "affirmative act" would be any act "that places the borrower on actual or constructive notice of the revocation."[2] In practice, Servicers often send a "Notice of Default and <u>Intent to Accelerate</u>" ("Notice of Intent") when seeking to commence foreclosure. Providing this notice to Borrowers is typically required by the subject security instrument. The Notice of Intent also implies that any prior acceleration has been revoked for two reasons:

First, the Notice of Intent typically informs the Borrowers that the loan is in default and that they may bring it current by paying less than the entire loan balance. If the prior acceleration was still in effect, the demand would have been for the full amount owing, not a lesser amount.[3] Second, the Notice of Intent often states that Borrowers' failure to make payment may/will result in the acceleration of all sums due under the loan. A loan that is already in an accelerated status cannot be accelerated again without first canceling the prior acceleration.

Finally, recording cancellations of foreclosure sales is further indication that any prior acceleration was impliedly waived.

[1] *Steinberger v. IndyMac Mortgage Services*, CV-15-450-PHX-ROS (D. Ariz., Jan. 12, 2017).

[2] *Id.*

Servicers can increase their chances of successfully defending an SOL claim (under the above-discussed principles) by reviewing their loan files, extracting any Notices of Intent sent after the alleged acceleration date, and making a timeline of any bankruptcy filings affecting the loan.

TOLLING DUE TO BANKRUPTCY

Tolling under the United States Bankruptcy Code provides little relief to Servicers in the Ninth Circuit. Courts in this Circuit conclude that 11 U.S.C. § 108(c)(1) does not create a dayfor-day tolling provision, independent of state law, where the SOL does not expire during the bankruptcy.[4] Instead, where the SOL does expire during the bankruptcy, 11 U.S.C. § 108(c)(2) provides a 30 day extension of the SOL, which is nearly always insufficient. However, state law interpretation of a bankruptcy's tolling effect on the SOL may apply.[5]

The Arizona Supreme Court, for example, concluded in *In re Smith*, 101 P.3d 637 (2004), that although ministerial actions, with the primary purpose of putting parties on notice (such as affidavits renewing a judgment), were not subject to a bankruptcy stay and, therefore, were not tolled during a bankruptcy action, the automatic bankruptcy stay did stay actions that "create, perfect or enforce liens or judgments."[6] Applying this reasoning in the context of foreclosure, the United States District Court, for the District of Arizona held that because the lender's foreclosure was prohibited by the automatic bankruptcy stay, the SOL for completing the same was tolled (day-for-day) from the filing of the borrowers' bankruptcy until the automatic stay was lifted.[7]

TIPS FOR INCREASING THE CHANCE OF A SUCCESSFUL DEFENSE

Servicers can increase their chances of successfully defending an SOL claim (under the above-discussed principles) by reviewing their loan files, extracting any Notices of Intent sent after the alleged acceleration date, and making a timeline of any bankruptcy filings affecting the loan. Because a Borrowers' SOL challenge is an all-or-nothing gamble, pre-litigation resolution of these types of claims is unlikely. However, having this information readily available for review will allow Servicers or their counsel to determine if this defense strategy should be pursued.

Of course, none of this should be relied upon as legal advice. Before addressing any SOL issues in Arizona, Oregon, Washington, Utah or any other state, Servicers should consult with their in-house legal counsel or hire outside counsel.

[3] See, e.g., *Navy Fed. Credit Union v. Jones*, 930 P.2d 1007, 1009 (Ariz. Ct. App. 1996) (exercising acceleration clause means lender is "demanding full payment of the note before all installments became due").

[4] *In re Spirtos*, 221 F.3d 1079 (9th Cir. 2000); see also *Aslanidis v. U.S. Lines, Inc.*, 7 F.3d 1067 (2d Cir. 1993).

[5] *Pettibone Corp. v. Easley*, 935 F.2d 120, 121 (7th Cir. 1991) ("Federal law assured the plaintiffs 30 days in which to pick up the baton; if states want to give plaintiffs additional time, that is their business. Some states do -- e.g., Illinois, which tolls its statute of limitations during the entire bankruptcy proceeding, Ill. Rev. Stat. ch. 110 para. 13-216.")

[6] *Smith*, 101 P.3d at 639.

[7] *Mlynarczyk v. Wilmington Sav. Fund Soc'y FSB*, No. CV-15-08235-PCT-SPL, 2016 U.S. Dist.LEXIS 87462, at *16 (D. Ariz. Apr. 29, 2016).

STATE SNAPSHOT

STATE SNAPSHOT

Illinois Appellate Court Rules Failure to Comply with IL Mortgage Licensing Act Does Not Void Mortgage

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IN A DRAMATIC reversal of prior opinion, the Illinois Appellate Court for the Second District has ruled that failure of an originating mortgage lender to comply with the Illinois Mortgage Licensing Act does not void the mortgage lien as a matter of law. This opinion means practitioners can relax without fear of an inability to foreclose in the event of noncompliance with the Mortgage Licensing Act. First Mortgage Company v. Daniel Dina, et al., 2017 IL App (2nd) 170043 (2nd Dist. 2017). (Dina II). A short review of the case's prior history is helpful to appreciate the impact of this ruling.

DINA I

In Dina I, (First Mortgage Co. v. Dina, 2014 IL App (2d) 130567), this identical panel ruled that a violation of the Act (205 ILCS 635/1-3(a) by the originating lender operated to void the mortgage lien as a matter of public policy. This was a matter of first impression for an Illinois court, and sent practitioners scrambling to perform additional due diligence before initiating suit to foreclose. In reaching its conclusion, this panel made a finding that one of the purposes of the Act was to protect consumers. Having reached that conclusion, the court looked to a line of Illinois cases holding that Illinois courts will not aid a plaintiff who bases his cause of action on an illegal act. See Chatham Foot Specialists P.C. v. Health Care Service Corp., 216 IL 2d 366 (2005).

At some point following issuance of this opinion, the Illinois legislature amends the Mortgage licensing statute. Illinois General Assembly Public Act 99-113, effective July 23, 2015, amends the Act in such a fashion as to prevent a voiding of a mortgage lien in the event of a failure to comply with the Act. The amendatory language reads in part as follows:

(e.) Any person, partnership, association, corporation or other entity who violates any provision of this Section commits a business offense and shall be fined an amount not to exceed $25,000.00. A mortgage loan brokered, funded, originated, serviced, or purchased by a party who is not licensed under this section shall not be held to be invalid solely on the basis of a violation of this section. The changes made to this Section by the Amendatory Act of the 99th General Assembly [P.A.95-113] are declarative of existing law.

The plaintiff in Dina had returned to the trial court in an attempt to re-enter judgment while the 99th General Assembly was in session. Following passage of the Amendatory Act, the trial court reentered judgment of foreclosure and sale and the matter proceeded to Judicial Sale. The mortgagor brought the second Dina appeal (Dina II) thereafter.

DINA II

The borrower in Dina II made a number of arguments in an attempt to avoid the implications of the Act, as amended by P.A. 99-113. The borrower's arguments are summarized as follows:

a. The holding in Dina I creates "law of the case", barring First Mortgage from asserting the Act is inapplicable to plaintiff;

b. The amendment 99-113 is constitutionally defective because it was applied retroactively;

c. The General Assembly's attempt to get around Dina I is a violation of the Special Powers clause of the Illinois constitution;

d. The originating lender is subject to the Act despite only making this one loan in Illinois;

e. The amendment violates the "Special Legislation Clause" of the Illinois Constitution (Art IV, Section 13).

The panel in Dina II, while agreeing that the Act, as amended, did apply to plaintiff, disposed of all Appellant's arguments, ruling the mortgage was not void despite a demonstrated failure to comply.

With respect to the constitutionally-defective argument, the panel ruled that the insertion of the language "are declarative of existing law" disposed of the retroactivity argument. The violation of Special Powers argument was rejected by recognizing prior case law precedent holding that a subsequent legislation on point has the same effect as if the Illinois Supreme Court had reversed. With respect to the Special Legislation argument, the panel ruled that unless a suspect class or fundamental right was affected, the legislature had the authority to enact special legislation so long as there was a rational basis for doing so.

Practitioners and clients are still required to pay attention to mortgage licensing requirements; penalties can be significant in the event of noncompliance. However, they need no longer fear a voiding of the mortgage lien in the event of a failure to comply.

INDIANA CASE LAW UPDATE

DUTY V. CIT GROUP/CONSUMER FINANCE, INC.

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ON NOVEMBER 8, 2017, The Indiana Court of Appeals, for the first time in a published opinion in the state, held that a borrower has no standing to challenge allegedly invalid assignments. The opinion in *Duty v. CIT Group/Consumer Finance, Inc.*, 2017 WL 5163283, should be a powerful tool to short-circuit some of the most common challenges that debtors raise in defending foreclosure actions.

In the case, the foreclosing lender obtained a foreclosure judgment in 2009, which was delayed for a substantial period of time due to a bankruptcy by the debtor, Bryant Duty. After bankruptcy, Duty filed a motion for relief from judgment under trial rule 60(B), alleging that CIT Group did not have the right to enforce the loan documents at the time the foreclosure action was filed in 2009. He argued that he alleged break in the "chain of assignments" entitled him to relief from the foreclosure decree.

As a result of these arguments, the issue of whether a debtor has standing to challenge assignments and transfers between lending institutions was placed directly at issue. The Court of Appeals noted that there were no other published decisions in Indiana addressing the issue, and that it was a matter of first impression, but that in other jurisdictions "courts have routinely found that a debtor may not challenge an assignment between an assignor and assignee."

The court referenced decisions from other states and federal courts holding squarely that the debtor does not have standing, specifically *Ifert v. Miller*, 138 B.R. 159, 166 n.13 (E.D. Pa. 1992), which held:

> [The underlying contract] is between [Debtor] and [Assignor]. [Assignor's] assignment contract is between [Assignor] and [Assignee]. The two contracts are completely separate from one another. As a result of the assignment of the contract, [Debtor's] rights and duties under the [underlying] contract remain the same: the only change is to whom those duties are owed…[Debtor] was not a party to [the assignment], nor has a cognizable interest in it. <u>Therefore, [Debtor] has no right to step into [Assignor's] shoes to raise its contract rights against [Assignee]. [Debtor] has no more right than a complete stranger to raise the [Assignor's] rights under the assignment contract.</u>

The Court of Appeals found this line of reasoning to be persuasive, and squarely held that "a debtor does not have standing to challenge an allegedly invalid assignment of the right to collect the debt." Although it appears that only assignments of mortgage were directly at issue in the case, the court's language (using the broader phrase "Loan Documents" instead of just "Mortgage") and reasoning would apply equally to challenges to endorsements of the note, which are often more difficult to defend. Most endorsements on a note do not contain time and date stamps, or any specific representations or warranties regarding the authority of the person making the endorsement. Although legal answers to the questions raised by such defenses are found in the Uniform Commercial Code, it can be difficult to support such arguments with any facts to establish a "chain of custody" or ownership, as prior holders of the note may be out of business or have poor documentation.

Under the *Duty* case, a borrower's affirmative defenses regarding whether the plaintiff is the proper party to enforce the note and mortgage could arguably be stricken, or addressed by citation to the *Duty* case as part of a Motion for Summary Judgment. Counterclaims that raise the issue could be the subject of a motion to dismiss for failure to state a claim upon which relief can be granted. Whether it becomes the silver bullet for such challenges in Indiana remains to be seen, and will be determined as additional case law develops, but it is an important step in the right direction in defining the borrower's role in the transfer of loan documents between financial institutions.

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