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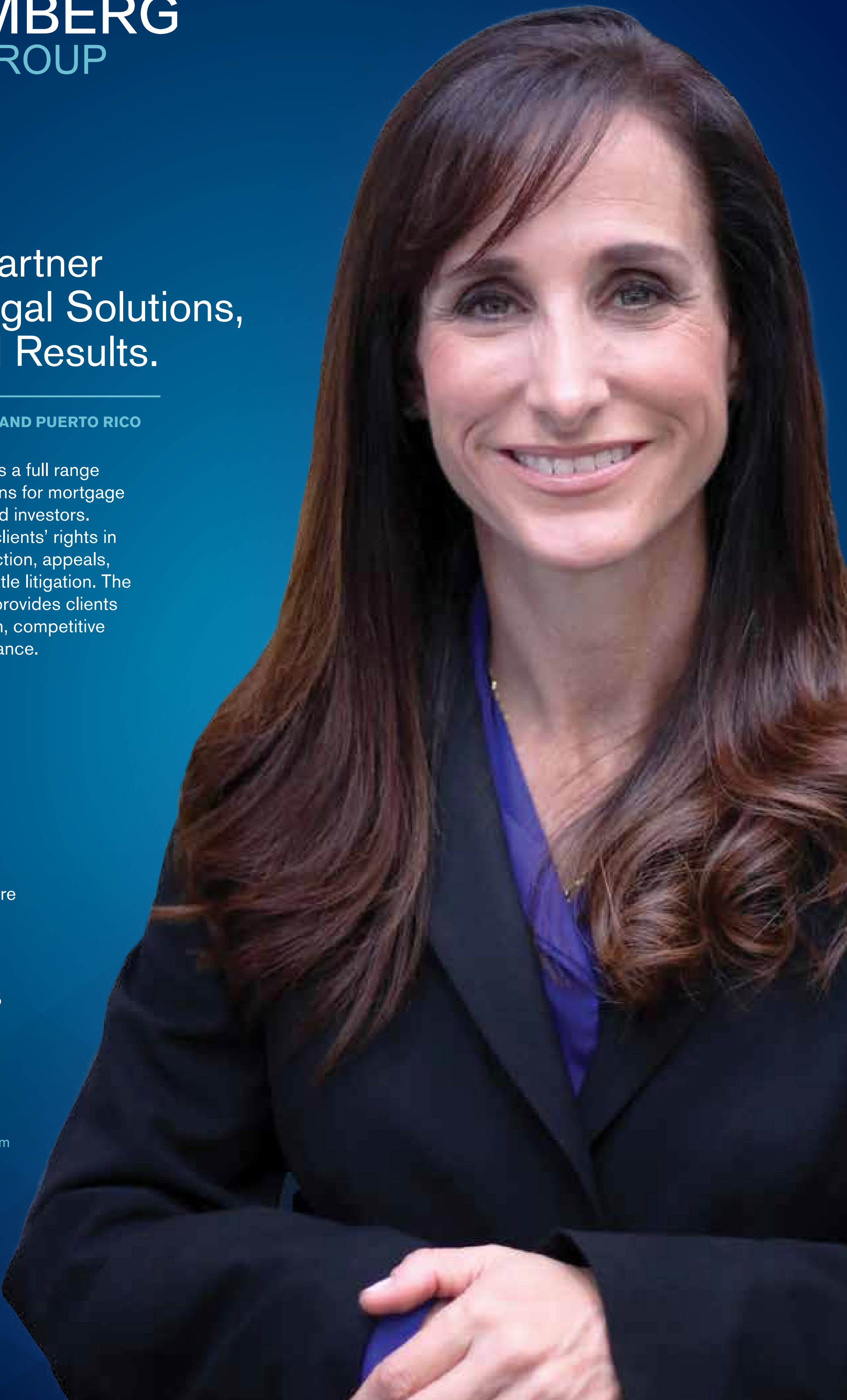
OFFICIAL PUBLICATION OF THE ALFN
VOL. 7 ISSUE 1

Coming IN 2020

THE SMALL BUSINESS REORGANIZATION ACT OF 2019



Letter from the ALFN Board Chair

2020 VISION

AS WE START THE YEAR 2020, I know that most people have made one or more personal goals or resolutions. For most of us, this is a yearly tradition. However, this year is symbolic for 20/20 vision, a term commonly used to identify clarity, sharpness of vision or "perfect" vision. Thus, I feel compelled to look at this year as an opportunity to perfect some of my goals. That is not an easy task on a personal or business level. One of the tools that I have, as do all of you, is ALFN. How can ALFN help us reach our respective goals, perfect something in our lives, provide clarity and a 20/20 vision for this new year?

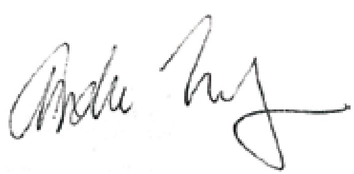
First, ALFN's board has worked tirelessly to meet the needs and requests of its members. Members have many wants and needs. We want to learn how to get more clients, how to improve our businesses, how to meet and befriend industry leaders, how to stay compliant and, of course, how to make money and remain profitable with reduced files. In response, the board is working diligently to improve our vision for 2020 by providing better content, higher quality attendance at events and equal opportunities for our members to thrive in this environment.

Second, the board has worked with the executive team to provide everyone with the tools, finances and information we all need to succeed in 2020. The talent on this team is second to none, but we welcome and need the input of ALFN's members to perfect their 20/20 vision for ALFN and its members. This includes better software, improved technology and resources. The board is helping to make that happen.

Third, and truly important, is stability. In this very difficult market, where after going through the highest volumes, increases in compliance requirements and a wide range of other issues, we all now find ourselves in the lowest default market in history. While this is considered good for the overall economy, it certainly does not support the firms and our clients. Likewise, it also affects ALFN. The board takes this very seriously and is working to make sure the association is providing guidance and tools to its members. Our vision is to be a support system for our membership and a place to go to for education, resources and inspiration in good times and bad.

So, other than the promise to lose weight, be kinder, exercise more or the other usual goals, what is your business goal? What do you need from ALFN to succeed? Let's continue to work together to make this year better than ever with a focus on our 20/20 vision.

Happy New Year,



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

Letter from the Editor

AS WE EMBARK on a new year and set our sights on the 2020 vision that we have in store for the ALFN, we realize that perfect vision isn't possible without the unwavering support of members like you. Our achievements and growth these past 18 years couldn't have been possible without you, and we value the opportunities to continue earning your membership each and every year. Your investment in an association like the ALFN results in a much greater return when you get involved, so take the time to volunteer and get active in 2020 with all the activities that your membership affords you.

One primary focus continues to be in bringing you the highest level of legal education possible. The ANGLE publication is just one of the many ways in which we seek to do this by updating our members on the most important legal updates that impact your business operations and careers. I am pleased to bring you this first edition of the ALFN ANGLE for 2020, where we begin by focusing on the Small Business Reorganization Act of 2019 "SBRA". The SBRA created a new Subchapter V under Chapter 11 of the United States Bankruptcy Code, and will provide small business owners a more cost-effective and streamlined option for reorganization than a traditional Chapter 11. We will highlight some of the key requirements, benefits and differences of the SBRA from current Chapter 11 cases.

Our feature articles section begins with the deceleration of a New York mortgage and the best practices to avoid the effect of the expiration of the statute of limitations. Then up next is an article where we look back to the U.S. Supreme court case of Obduskey vs. McCarthy Holthus LLP, and to help clarify whether nonjudicial foreclosure proceedings are deemed to be debt collection under Nevada state law. Our focus then shifts to a very interesting feature article that at least at the outset may have you asking yourself "what does this have to do with real estate and property rights?" The article starts by describing a murder in Oklahoma that took place on Indian land, and then leads us to the incredible impact it has on land ownership and mortgage interests. Finally, we conclude our feature articles with some suggestions on reaching a mutual goal of a confirmed Chapter 13 plan, and how all stakeholders involved can help to achieve that goal during a Chapter 13 Bankruptcy.

We conclude this issue of the ANGLE with our State Snapshot contributions, where we address some important state specific updates in Illinois New Jersey, New York, Tennessee, New Mexico & Minnesota.

Your ALFN membership in 2020 will be full of many new and exciting opportunities that give you the platform to showcase your products and services, grow your network of colleagues and clients, advocate to ensure your voices are heard, and deliver the highest value in legal education. We will continue working tirelessly to deliver tangible value for your membership in the ALFN in 2020 and for many more years to come.

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

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ALFN EVENTS

SAVE THE DATES

2020

FEBRUARY 12

BANKRUPTCY INTERSECT
Marriott Dallas Las Colinas
Irving, TX

MAY 5-6

5TH ANNUAL WILLPOWER SUMMIT
The Ritz-Carlton
Dallas, TX

JULY 19-22

ALFN ANSWERS
18th Annual Conference
Hyatt Regency Coconut Point Resort
Bonita Springs, FL

NOVEMBER 18

FORECLOSURE INTERSECT
Marriott Dallas Las Colinas
Irving, TX

2021

JULY 18-21
ALFN ANSWERS
19th Annual Conference
Hyatt Regency Tamaya Resort
Santa Ana Pueblo, NM

2022

JULY 17-20
ALFN ANSWERS
20th Annal 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 FOR 2020

Contact Susan Rosen at srosen@alfn.org to design a package that is right for you to sponsor single or multiple events throughout 2020.

VOLUNTEER OPPORTUNITIES 2020

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.

SPEAKER APPLICATIONS FOR 2020 EVENTS

If you want to be considered for a panelist position as a speaker or moderator in 2020 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 2020 must complete a speaker form.

Coming IN 2020

THE SMALL BUSINESS REORGANIZATION ACT OF 2019

WHAT YOU NEED TO KNOW AND EXPECT

BY PATRICK A. HRUBY, ESQ.
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On April 23, 2019, President Trump signed the Small Business Reorganization Act of 2019 ("SBRA") into law, which will go into effect on February 22, 2020. The SBRA creates a new Subchapter V under Chapter 11 of the United States Bankruptcy Code. The SBRA will provide small business owners with a more cost-effective and streamlined option for reorganization than a traditional Chapter 11 bankruptcy. This article highlights the SBRA's key requirements, benefits, and differences from current Chapter 11 cases.

A debtor may opt for relief under the SBRA if the z is a "person [or company] engaged in commercial or business activities ... that has aggregate noncontingent liquidated secured and unsecured debts ... in an amount not more than $2,725,625[1]." The only business activity that does not qualify is a small business debtor operating a single-asset real estate property.

Unlike a standard Chapter 11 case, a case under the SBRA is overseen by a "standing trustee," like a case under Chapter 13. The SBRA trustee has several duties, including: accounting for all property received; reviewing proofs of claims and objecting to improper claims; reviewing the debtor's financial condition and business operations; facilitating the development of a consensual plan of reorganization; ensuring the debtor makes timely payments under the confirmed plan; attending the status conference and certain other hearings; objecting to the debtor's discharge, if warranted; and producing a final report for the bankruptcy court. Also, unlike a typical Chapter 11 case, an unsecured creditors' committee is not appointed in an SBRA case, unless the bankruptcy court appoints one for cause.

Missing from the list of the trustee's duties is the duty to operate the debtor's business. The debtor's management will continue to operate the business, effectively acting as a debtor-in-possession. However, upon request of a party in interest, and after notice and a hearing, the court shall order that the debtor shall be removed from operating its business for cause, including fraud, dishonesty, incompetence, or for failure to perform the debtor's obligations under the confirmed plan.

The streamlined nature of the SBRA makes it ideal for debtors that qualify. Within 7 days of filing the SBRA case, the debtor is required to file its most recent balance sheet, statement of operations, cash-flow statement, and Federal income tax return; or, a statement made under perjury that those documents have not been prepared, and no Federal income tax return has been filed. The court must hold a status conference within 60 days after the order for relief under the SBRA, in order to "further the expeditious and economical resolution of [the] case...". The court may extend that 60-day window, but only if "the need for extension is attributable to circumstances for which the debtor should not justly be held accountable." Fourteen days prior to the status conference the debtor is required to file with the court and serve "a report that details the efforts the debtor has undertaken and will undertake to attain a consensual plan of reorganization."

Under the SBRA, only the debtor is permitted to file a plan of reorganization and must do so within 90 days, subject to exten-

[1] Federal Register, Vol. 84, No. 29, available at https://bankruptcy.cooley.com/wp-content/uploads/sites/245/2019/02/Fed-Reg-Dollar-Amount-Adjustments-2019.pdf (last accessed December 12, 2019).

A debtor may opt for relief under the SBRA if the debtor is a "person [or company] engaged in commercial or business activities … that has aggregate noncontingent liquidated secured and unsecured debts… in an amount not more than $2,725,625.

sion using the same test for extension as the status conference. Currently, under 11 U.S.C. § 1121, a debtor has 120 days to file a plan, although lenders and creditor's counsel often see chapter 11 cases move too slow because of the generous extensions allowed under that section. Additionally, the SBRA removes the requirement that a debtor file a separate disclosure statement, although the court may order the debtor to file a disclosure statement for cause.

The debtor's plan under the SBRA must include a brief history of the business operations of the debtor, a liquidation analysis, and projections with respect to the debtor's ability to make payments under the proposed plan of reorganization. The plan must also provide for the submission of all or such portion of future income of the debtor to the supervision and control of the trustee to the extent necessary for the execution of the plan. The plan may also allow the

One new feature of the SBRA of particular importance to this audience is that the SBRA allows a debtor to modify the rights of a secured creditor whose claim is secured only by a security interest in real property that is the debtor's principal residence.

owners of the debtor to retain their stake in the reorganized debtor, provided that the plan meets the confirmation requirements described below.

One new feature of the SBRA of particular importance to this audience is that the SBRA allows a debtor to modify the rights of a secured creditor whose claim is secured only by a security interest in real property that is the debtor's principal residence. This is possible only if the new value received in connection with the granting of the security interest was not used primarily to acquire the property and was instead used primarily in connection with the small business of the debtor. This allows a debtor under the SBRA to modify the terms of junior mortgages or home equity lines of credit that were obtained for business purposes. Such modifications could include potential principal reductions, rate reductions, or extending the maturity date. This issue may arise frequently with lending programs that require junior mortgages on a principal's residence as extra collateral for the business loan.

In order to confirm a plan under the SBRA, a debtor still must meet all the requirements necessary to confirm a Chapter 11 plan under 11 U.S.C § 1129(a), except for paragraph (15) of that section, which pertains to individual debtors. A court may still confirm a plan under the SBRA if it fails to meet paragraphs (8) (requiring that each class of claims or interests has accepted the plan; or such class is not impaired under the plan) and (10) (requiring at least one class of impaired claims to accept the plan) of section 1129(a). However, for that to occur, the plan must not discriminate unfairly, and the plan must be fair and equitable with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

To comply with the "fair and equitable" requirement of the SBRA, a plan must meet the requirements of 11 U.S.C. § 1129(b)(2)(A) with respect to secured claims. That section is the cramdown provision of Chapter 11. Further, to be "fair and equitable" as relates to unsecured classes of claims, the plan must provide that all of the projected disposable income of the debtor to be received in the 3-year to 5-year plan will be applied to make payments under the plan; or the debtor will allow the trustee to liquidate or otherwise some or all of the debtor's property, provided that the value of the property to be distributed under the plan in the 3-year to 5-year plan is not less than the debtor's projected disposable income. For the purposes of the SBRA, "projected disposable income" means income received by the debtor that is not for the support of the debtor or a dependent of the debtor, a domestic support obligation that first becomes payable post petition, or for the payment or expenditures necessary for the continuation, preservation, or operation of the business of the debtor." Also, the new "fair and equitable" requirements eliminate the "absolute priority rule" for cases filed under the SBRA.

A debtor under the SBRA is eligible to obtain a discharge, like the discharge under 11 U.S.C. § 1141(d), which occurs once the debtor completes all payments required under the confirmed plan of reorganization.

With the SBRA taking effect next month, it remains to be seen the scope of the impact the new law will have. The SBRA clearly is a very useful tool for small business debtors that have been effectively priced out of the current Chapter 11 landscape. It may open doors to a whole potential subset of small business debtors that never considered reorganization as a feasible prospect. Either way, the SBRA is likely going to lead to an increase in Chapter 11 filings.

But for secured creditors, this is not necessarily bad news. The oversight of the standing trustee, the confirmation requirements, and the reward of having debts discharged in as little as 3 years all suggest that creditors may be more likely to be paid in a case under the SBRA by a struggling small business debtor than they would outside of that bankruptcy case. Additionally, the streamlined nature of a case under the SBRA will result in cost savings to lenders compared to involvement in a traditional Chapter 11 case.

There are outstanding questions that can only be answered in time such as how will bankruptcy courts interpret certain provisions of the SBRA? Will bankruptcy courts use Chapter 12 and/or Chapter 13 cases as precedent for similar provisions introduced in the SBRA, or will bankruptcy courts still rely on Chapter 11 precedent? Of course, those questions, and the ones that have not been thought up yet will be answered and the solutions worked out, as is usually the case with new bankruptcy legislation.

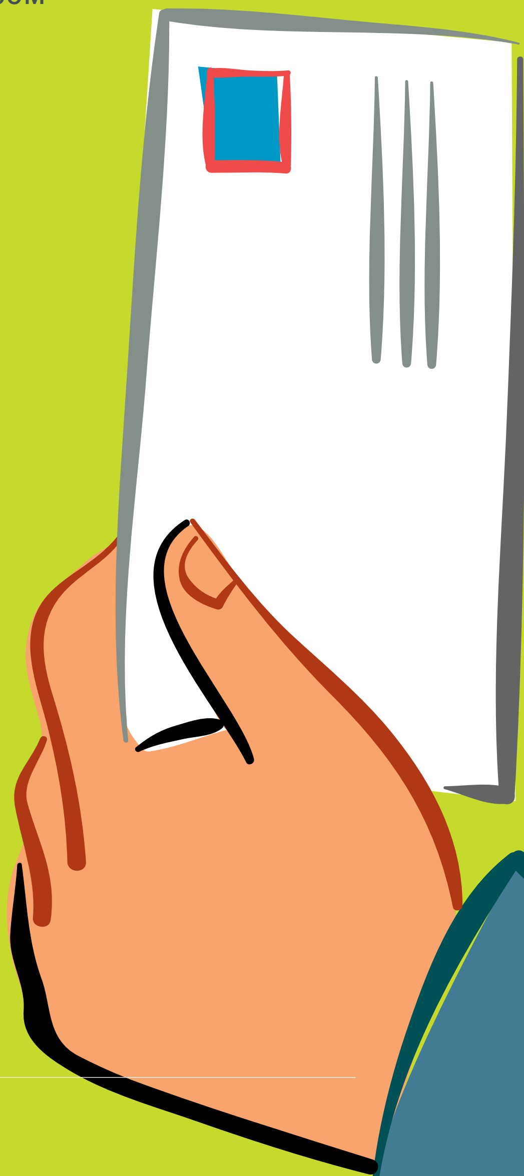
As we move into 2020, the SBRA appears a very welcome addition to the U.S. Bankruptcy Code for small business debtors, and one that will benefit secured and unsecured creditors as well, while allowing parties to save on fees and expenses.

DECELERATION OF A NEW YORK MORTGAGE

Evolution of the Requirements to Revoke Acceleration and Best Practices to Avoid the Onerous Effect of the Expiration of the Statute of Limitations

BY STEPHEN J. VARGAS, ESQ., SUPERVISING ATTORNEY
GROSS POLOWY, LLC | SVARGAS@GROSSPOLOWY.COM

A mortgage note holder's right to accelerate the maturity of the debt is agreed upon by the lender and borrower in the mortgage. However, how and when a note holder can exercise the option to accelerate is the subject of litigation in the New York State Court of Appeals.[1] Barring a change in decisional law, the four intermediate appellate courts hold the commencement of a foreclosure proceeding by the filing of a complaint in which the plaintiff declares the entire mortgage debt due and owing constitutes a valid acceleration.[2] The First Department is the lone appellate court that ruled a mortgage is accelerated when the cure period in the contractual notice of default expires, which occurs prior to the commencement of a foreclosure action.[3] When a mortgage loan is accelerated, the six-year statute of limitations begins to run on the total debt. [4]



[1] Bank of N.Y. v. Dieudonne, 171 A.D. 3d 34 (2d Dept. 2019)

[2] Nationstar Mortgage LLC v. Islam, 158 A.D. 3d 553 (1st Dept. 2018); Kashipour v. Wilmington Savings Fund Society, FSB, 144 A.D. 3d 985 (2d Dept. 2016); Lavin v. Elmakiss, 302 A.D. 3d 638 (3d Dept. 2003); U.S. Bank N.A. v. Balderston, 163 A.D. 3d 1482 (4th Dept. 2018)

[3] Deutsche Bank National Trust Co. v. Royal Blue Holdings, 148 A.D. 3d 529 (1st Dept. 2017)

[4] EMC Mortgage Corp. v. Patella, 279 A.D. 2d 604 (2d Dept. 2001)

MEBANE IS DEVOID OF EXPLICIT GUIDANCE ON HOW THE HOLDER CAN REVOKE A DEMAND FOR IMMEDIATE PAYMENT OF THE TOTAL DEBT, AND REVOCATION OF THE ACCELERATION VIA THE VOLUNTARY DISCONTINUANCE OF A FORECLOSURE ACTION WITHIN SIX YEARS FROM ITS COMMENCEMENT WAS DISCUSSED IN DICTA.

Unlike the contractual authority to accelerate the debt, the mortgage loan documents are silent as to the note holder's ability to revoke or otherwise nullify its election to demand payment in full. Once accelerated, the notion of decelerating the maturity of a New York mortgage is a creature of Appellate Court case law[5] emanating from the Second Department's seminal Federal National Mortgage Association v. Mebane [6], in which the court alluded to the inherent ability of the holder of a contractual option to rescind acceleration. Although the court opined the note holder possessed the right to revoke acceleration within the limitations period provided, the borrower did not change his position in reliance thereon[7], Mebane is devoid of explicit guidance on how the holder can revoke a demand for immediate payment of the total debt, and revocation of the acceleration via the voluntary discontinuance of a foreclosure action within six years from its commencement was discussed in dicta.

From 1994 to 2018, the Appellate Courts did not address how a note holder can rescind an acceleration, which resulted in inconsistent application of Mebane across the trial courts. Some Judges reasoned that the voluntary discontinuance of a foreclosure action was effective to revoke acceleration because when an action is discontinued, all proceedings are annulled and every pleading, order, or judgment is nullified as if it had never been.[8] Other Judges held the mailing of a letter to the borrower in which the note holder or its loan servicer notified the borrower of the holder's election to withdraw the demand for immediate payment in full was sufficient to revoke acceleration.[9] Some courts imposed the additional requirement that the letter provide actual, clear, and unequivocal notice to the borrower of the lender's election to revoke acceleration, but they failed to articulate how to satisfy this standard. [10]

In 2018, the First Department in HSBC Bank USA N.A. v. Kirschenbaum[11] and Second Department in Freedom Mortgage Corporation v. Engel[12] rejected the theory the voluntary discontinuance of a foreclosure action within six years from its inception, in itself, was an affirmative act of revocation where the discontinuance documents were silent on the issue of revocation and did not otherwise demand the bor-

[5] Wells Fargo Bank N.A. v. Machell, 55 Misc. 3d 1214(A) (Sup. Ct., Ulster Cty., 2018)

[6] Federal National Mortgage Association v. Mebane, 208 A.D. 2d 892 (2d Dept. 1994)

[7] Mebane at 894

[8] Wilmington Savings Fund Society, FSB v. Brophy, 2017 N.Y. Misc. LEXIS 3225 (Sup. Ct., Suffolk Cty. 2017)

[9] Greco v. Bank of America N.A., 2017 U.S. Dist. LEXIS 62933 (E.D.N.Y. 2017)

[10] Bank of New York Mellon v. Slavin, 54 Misc. 3d 311 (Sup. Ct., Rensselaer Cty., 2016)

[11] HSBC Bank USA N.A. v. Kirschenbaum, 159 A.D. 3d 506 (1st Dept. 2018)

[12] Freedom Mortgage Corporation v. Engel, 163 A.D. 3d 631 (2d Dept. 2018)

rower resume making monthly mortgage payments. However, neither decision instructed a note holder how it could exercise its ability to decelerate the mortgage after an acceleration, though it could be inferred from Engel a notice that was not silent on revocation and demanded the borrower resume making installment payments would suffice in the Second Department.

On August 15, 2018, the Second Department issued Milone v. U.S. Bank[13], which provided guidance on how to revoke the election to accelerate. First, the requirements the note holder give notice to the borrower within the limitations period and the borrower not detrimentally rely on the acceleration remained in effect. Second, the deceleration notice must be "clear and unambiguous" to be valid and enforceable.[14] Third, the notice to be given by an entity with standing to enforce the note and mortgage.[15]

The fourth requirement set out by the Milone court limited the ability to decelerate to circumstances in which a lender is not revoking acceleration as a pretext to avoid the running of the statute of limitations.[16] A notice containing a clear and unequivocal demand that the borrower meet her prospective monthly payment obligations constitutes a deceleration in fact and cannot be viewed as pretextual.[17] In the absence of such ex-

[13] Milone v. U.S. Bank, 164 A.D. 3d 145 (2d Dept. 2018)

[14] Milone at 153

[15] Milone at 155

[16] Milone at 154

[17] Milone at 154

press demand, a holder can satisfy the Milone standard if a deceleration notice that does not contain a demand for prospective mortgage payments is accompanied by copies of monthly invoices transmitted to the borrower for installment payments or supported by other forms of evidence demonstrating the lender was truly seeking to decelerate and not attempting to achieve another purpose under the guise of deceleration.[18]

If a holder or servicer mails written notice to the borrower in accordance with the notice requirements in the mortgage—typically, by first class mail to the borrower's notice address—that it revokes its election to accelerate, withdraws its prior demand for immediate payment in full, re-institutes the loan as an installment loan, and demands the borrower resume making prospective monthly payments including but not limited to the earliest missed installment within the limitations period, then the deceleration should be enforceable, the statute of limitations would cease to run on the accelerated debt, the loan would return to installment payment status,

[18] Milone at 154

IN ENGEL, THE COURT OF APPEALS HAS THE OPPORTUNITY TO OPINE ON HOW A NOTE HOLDER CAN REVOKE A PRIOR ELECTION TO ACCELERATE TO ESTABLISH A STATEWIDE STANDARD THAT CAN BE UNIFORMLY APPLIED BY THE APPELLATE AND TRIAL COURTS.

and payments that came due within the period could be recovered.[19]

At a minimum, the notice must be sent within six years from when the earliest foreclosure complaint was filed, though the note holder is afforded additional time to revoke the acceleration if the statute of limitations was tolled by, inter alia, the automatic stay imposed by 11 U.S.C. §362(a) of the United States Bankruptcy Code.[20] As a best practice and in an abundance of caution, the notice should be mailed to the borrower within six years from when the cure period set forth in the initial notice of default elapsed.

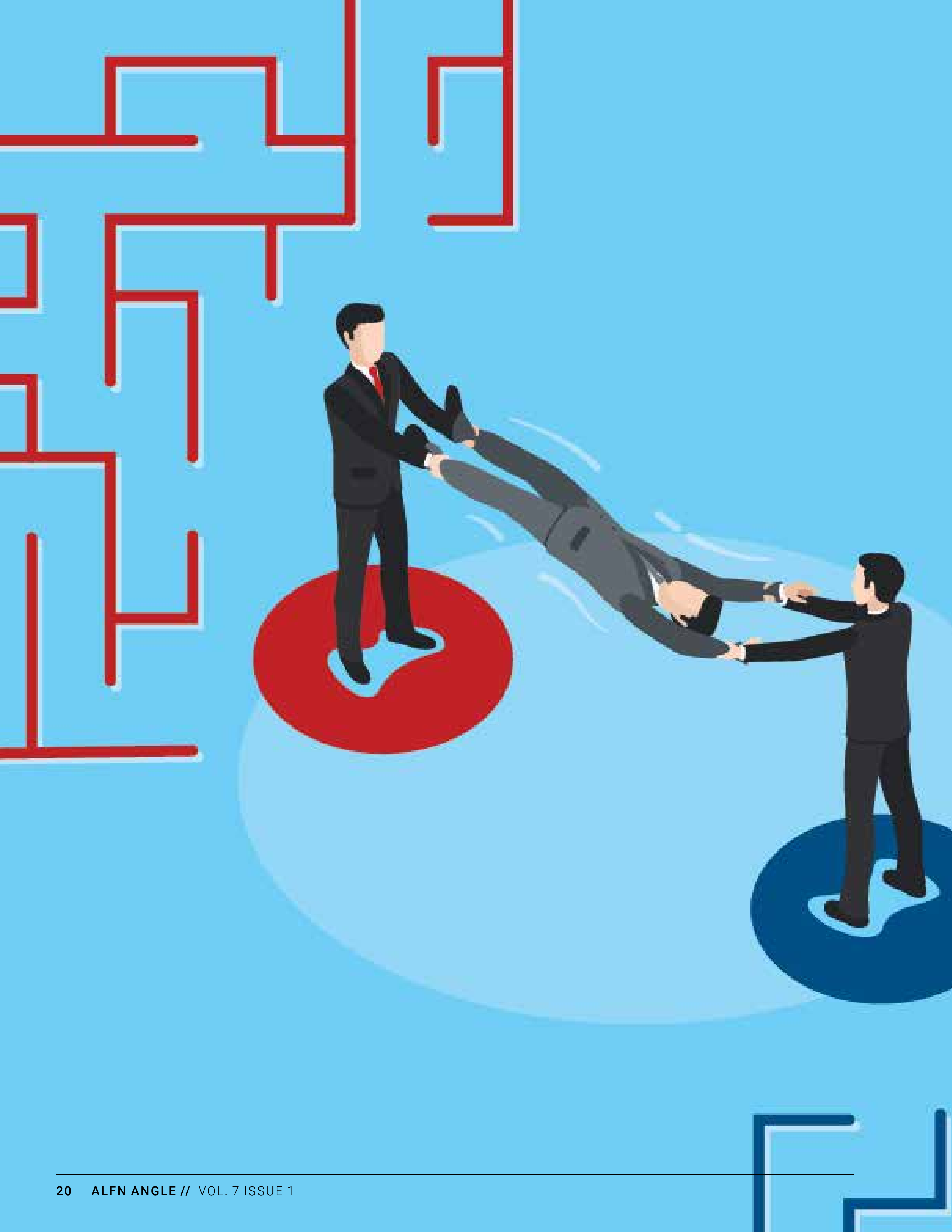
The Second Department's mortgage foreclosure decisional law is influential and this intermediate appellate court pioneered the deceleration concept in New York State, but the other three intermediate appellate departments have not relied on or rejected Milone since it was decided. Although New York State trial courts are bound by Milone under the stare decisis doctrine, Milone is merely persuasive authority to the other appellate departments. As noted in Milone, the First Department—which consists of Bronx and New York counties—disagreed with the Second Department on how a lender can exercise the option to accelerate and it is conceivable the First Department will not adopt the Second Department's deceleration analysis. The Third and Fourth Departments often align with the perspective of the Second Department but the appellate precedent on statute of limitations and acceleration from those Departments is scant.

In June 2019, the Court of Appeals granted Freedom Mortgage Corporation permission to appeal to the highest appellate court—the Court of Appeals —on the issue of whether a voluntary discontinuance is effective to nullify a prior acceleration.[21] In Engel, the Court of Appeals has the opportunity to opine on how a note holder can revoke a prior election to accelerate to establish a statewide standard that can be uniformly applied by the appellate and trial courts. Absent Court of Appeals precedent, mortgagees, servicers, and consumer finance practitioners should abide by the Milone standard when decelerating a mortgage debt to avoid the onerous effect of the running of the statute of limitations period.

[19] EMC Mortgage Corp. v. Suarez, 49 A.D. 3d 592, 593 (2d Dept. 2008)

[20] Lubonty v. U.S. Bank N.A., 2019 N.Y. LEXIS 3250 (2019)

[21] Freedom Mortgage Corp. v. Engel, 33 N.Y. 3d 1039 (2019)



FORECLOSURE TRUSTEE DEBT COLLECTION LICENSING

TO BE OR NOT TO BE?

LAST YEAR, IN OBDUSKEY V. MCCARTHY & HOLTHUS, LLP[1], THE U.S. SUPREME COURT HELD THAT "BUT FOR [THE LIMITED PURPOSE DEFINITION UNDER] 1692F(6), THOSE WHO ENGAGE IN ONLY NONJUDICIAL FORECLOSURE PROCEEDINGS ARE NOT DEBT COLLECTORS WITHIN THE MEANING OF THE ACT." OUR NATION'S HIGHEST COURT ANSWERED THE QUESTION AS TO WHETHER FORECLOSURE TRUSTEES WERE DEBT COLLECTORS UNDER THE FDCPA, BUT LEFT OPEN CERTAIN QUESTIONS UNDER STATE LAW, INCLUDING WHETHER ACTING AS A FORECLOSURE TRUSTEE REQUIRES LICENSING AS A COLLECTION AGENCY. IN NEVADA, THIS QUESTION HAS BEEN ANSWERED.

BY KRISTIN A. SCHULER-HINTZ, ESQ.,
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IN BENKO V. QUALITY LOAN SERVICE,[2] THE NEVADA SUPREME COURT EXAMINED THE QUESTION OF WHETHER THE BROAD DEFINITION OF A COLLECTION AGENCY IN NRS 649.020 INCLUDED FORECLOSURE TRUSTEES. THE NEVADA SUPREME COURT HARMONIZED THE BROAD STROKES IN NRS 649 WITH THE SPECIFIC REQUIREMENTS AND DUTIES OF NRS 107 AND HELD THAT THE COMPREHENSIVE STATUTORY SCHEME IN NRS 107 TRUMPED THE MORE GENERALIZED APPLICATION OF NRS 649 TO PREVENT TWO DISTINCT AND CONFLICTING SCHEMES FROM ATTEMPTING TO REGULATE THE NON-JUDICIAL FORECLOSURE PROCESS.

In litigation dating back to 2010, Quality Loan Service Corp. ("the Trustee") obtained a ruling from the State District Court against the Nevada Financial Institutions Divisions[3] holding that NRS 649 did not govern the activities of a foreclosure trustee acting under NRS 107.

The Benko case initially commenced in October 2011, as a purported state court class action (despite the results of the prior litigation with the FID) alleging that foreclosure trustees were required to hold collection agency licenses under what was perceived to be a broad definition of "collection agency" under NRS 649. The case was removed to federal court in February 2012, and was initially dismissed on the Trustee's motion. The dismissal order was appealed to the Ninth Circuit Court of Appeals, and in October 2015, was remanded by the Ninth Circuit on the District Court's denial of the Plaintiff's Motion to Remand to State Court under the Class Action Fairness Act. After substantial motion work in state court, the Trustee's Motion to Dismiss the Third Amended Complaint was granted in June 2017. The appeal followed.

Prior to the ruling in Obduskey, the state court dismissed the action ruling that foreclosure trustees were not debt collectors; are subject to NRS 107 and do not need to be licensed as collection agencies. The court found NRS 107 empowers deed of trust trustees to contract and perform duties to accomplish non-judicial foreclosures. Further, the court found that NRS 649 intended to exclude deed of trust trustees from its licensing requirements.[4]

After oral argument on September 5, 2019, the en banc Nevada Supreme Court held that the comprehensive framework and specific scheme of NRS 107 indicated the intent of the legislature to exempt deed of trust trustees from the NRS 649 licensing requirement. The undivided Supreme Court found that NRS 107 was specific and trumped the generalized application of NRS 649.

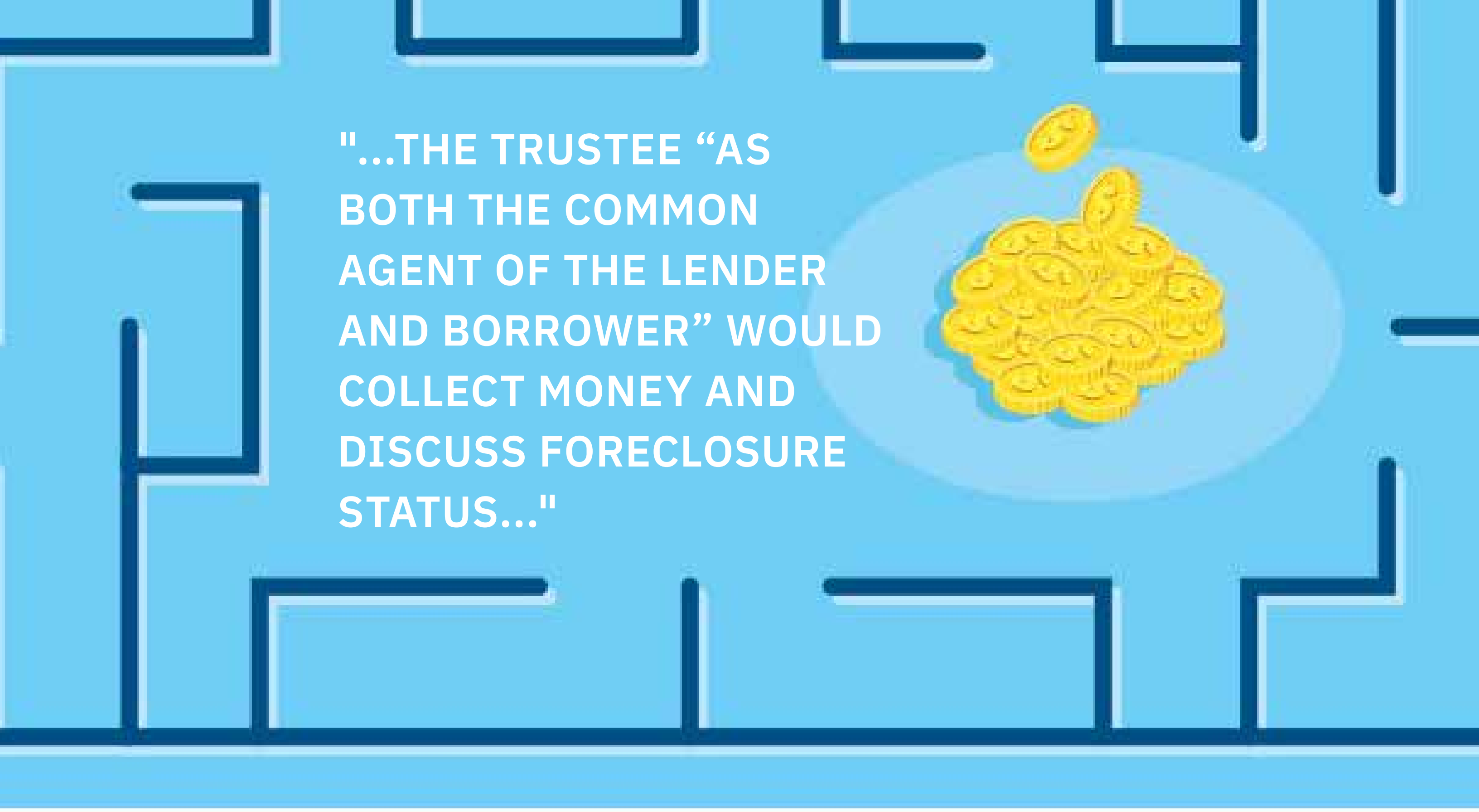
The Nevada Supreme Court further held that the conflicting provisions of NRS 649 and NRS 107 supported their conclusion that NRS 649 was not intended to apply to foreclosure trustees. For example,

[1]Obduskey v. McCarthy & Holthus, LLP (2019) ___U.S.___ [139 S.Ct. 1029, 203 L.Ed.2d 390]

[2]Benko v. Quality Loan Service Corp. (135 Nev.Adv.Op. 64; Dec. 26, 2019)

[3]Quality Loan Service Corp. vs. Dept. of Bus. & Ind., Fin. Inst. Div. (A-12-657580-J, Jan. 1, 2013)

[4]The District court further found that enforcing a security interest was not doing business in Nevada so licensing was not required; however, the Supreme Court did not reach a decision on this issue.



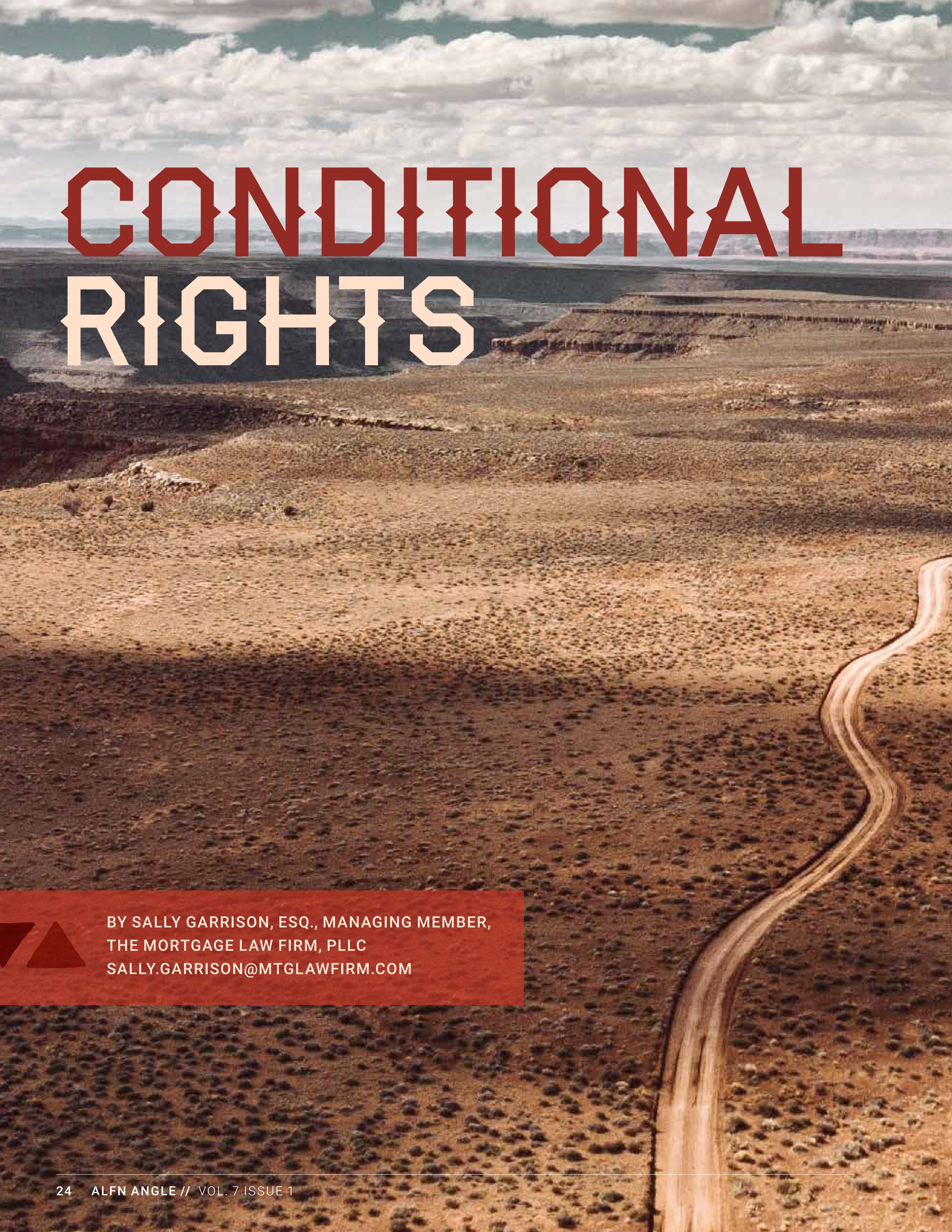
non-judicial foreclosure requires the trustee to notify the borrower of foreclosure prevention alternative resources and to post, publish, and mail debt information, thereby revealing information about the debtor, which conflicts with NRS 649.[5]

Further, and of long standing, NRS 649 specifically speaks to the requirement of a community manager who performs "any act associated with the foreclosure of a lien" to be licensed as a collection agency. From that, the Nevada Supreme Court inferred the legislative knowledge of how to include foreclosure activity as a collection agency if they so intended. Additionally, in further support of its holding, the Nevada Supreme Court noted the legislative amendments in 2011, and its comprehensive list of licenses that could serve as foreclosure trustees. A collection agency is one of the options, but by no means the only one.

Once the Nevada Supreme Court determined that a foreclosure trustee performing the actions under NRS 107 was not required to be licensed as a collection agency, the Court looked to the allegations of the Third Amended Complaint to determine if they showed activity outside of the ambient of NRS 107. The undivided Nevada Supreme Court held that NRS 107 contemplates that the trustee "as both the common agent of the lender and borrower" would collect money and discuss foreclosure status and related arrangements and, as such, the activity does not amount to claim collection. The Court further held that the collection of funds from the sale and its application was contemplated by NRS 107. Finally, while there were allegations that the foreclosure notices themselves were debt collection, the Nevada Supreme Court held that NRS 107.080 explicitly empowers a trustee to create the necessary notices to initiate and complete the foreclosure process.

NRS 649 regarding collection agency licensure paints with a broad brush. By contrast, NRS 107 has a much finer point. In light of this decision, it is important to review the tasks and activities of foreclosure trustees to ensure they remain within the finer points of NRS 107.

[5]In light of Obduskey, the Nevada Supreme Court held that the broad definition of collection agency found in NRS Chpt 649 (which is broader than the FDCPA) would encompass foreclosure trustee activities.



CONDITIONAL RIGHTS

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ON AUGUST 28, 1999, PATRICK MURPHY MURDERED GEORGE JACOBS,

AND BECAUSE OF THAT, MILLIONS OF ACRES OF LAND MAY BE RESTORED TO NATIVE AMERICAN TRIBES' GOVERNANCE.

MURPHY WAS LIVING with Patsy Jacobs, George Jacobs' ex-wife and mother of Mr. Jacobs' child. Murphy and Patsy Jacobs had an argument about Jacobs. Murphy left his home saying he was "going to get" Jacobs.

Jacobs had spent the day drinking with his cousin, Mark Sumka. Around 9:30pm, Sumka was driving to a bar in Henryetta, OK, with Jacobs passed out in the back of the car. Murphy was driving on the same road in the opposite direction. Billy Long and Kevin King, accompanied Murphy. Both cars stopped after passing each other. There was an exchange between Sumka and Murphy, with Murphy demanding that Sumka turn off his car. Sumka refused and drove away, with Murphy's car in pursuit. Murphy's car forced Sumka's car off the road at a place that is rural and heavily wooded. Long, King, and Murphy began beating Jacobs and Sumka. Sumka ran from the scene.

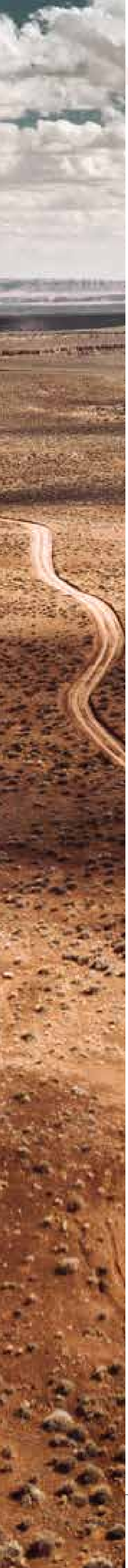
Approximately five minutes later, Sumka returned to see Murphy throw a folding knife into the woods. He also saw Jacobs laying in a ditch. Murphy and his companions threatened Sumka's life, along with that of his family. King issued a final blow to Sumka's jaw. Then Murphy, King, and Long forced Sumka into their car, leaving Sumka's dying cousin, Jacobs, in the ditch behind them. During that car ride, Murphy and his friends informed Sumka that they had cut Jacobs' throat and cut off his genitals.

A passerby found Jacobs—in the ditch with a bloody face, slashes across his abdomen, his throat cut, and his genitals cut from his body. It took at least twelve (12) minutes for Jacobs to die, maybe longer.

Murphy returned home. Confessed to Patsy Jacobs. He was then arrested. Oklahoma state courts tried Murphy for murder in the first degree and found him guilty. In 2000, Murphy was sentenced to death.

What does that have to do with real estate and property rights? Well, more than you might expect. Murphy is, and Jacobs was before his death, a member of the Muscogee (Creek) Nation. Additionally, Jacobs was killed on land that was part of the Muscogee (Creek) reservation as it was established in 1866, but which had since been devised away… and that is the crux of the issue.

"…DIMINISHMENT OF INDIAN LAND WITHOUT SUBSTANTIAL AND COMPELLING EVIDENCE ESTABLISHING CONGRESSIONAL INTENT TO DIMINISH INDIAN LAND IS INEFFECTIVE."



ESTABLISHMENT OF RESERVATION

In 1866, the US Congress established reservation boundaries for the Muscogee (Creek), Cherokee, Chickasaw, Choctaw, and Seminole Nations (often referred to collectively as the "Five Civilized Tribes"). The Muscogee (Creek) Nation's reservation, as established in 1866, lays claim to three (3) million acres in Eastern Oklahoma, including most of the city of Tulsa. The total land claimed by all five reservations established in 1866 is 19 million acres—almost the entire Eastern half of Oklahoma.

JURISDICTION OVER CRIMES

In 1885, the Major Crimes Act, 18 U.S.C. § 1153, was implemented. This Act establishes that serious crimes committed in Indian country and any native person charged with such crimes on Indian land fall under the exclusive jurisdiction of the federal government. However, if that same crime were committed outside Indian land, the state would have jurisdiction. Consequently, if the land where Murphy killed Jacobs is part of the Muscogee (Creek) Nation's reservation, he cannot be tried and executed by the state of Oklahoma; he must be tried by federal authorities.

ALLOTMENT OF RESERVATION LAND

Allotment, the practice of selling off parcels of Indian land to individuals, breaking up the communal management and nature of the reservations, and eventually devising away the "surplus land" to non-native people, was strongly resisted by the Five Civilized Tribes in Oklahoma. Even so, the allotment initiative eventually ate away at their reservation land.

- The Dawes Act of 1887 (also known as the General Allotment Act) aimed to break up the communal reservation land into lots held by individual tribal members, and then devising "surplus land" to non-natives. Section 8 of this Act specifically exempted the Five Civilized Tribes.

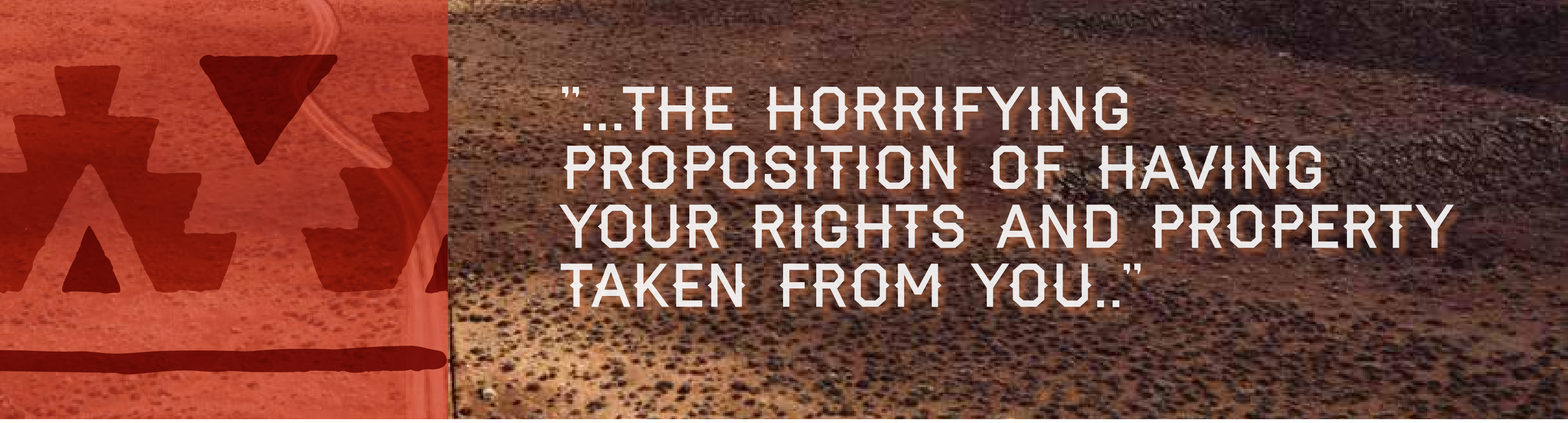
- The land run of 1889 created a heightened demand to redistribute the tribes' land to non-native settlers.

- In 1893, President Grover Cleveland appointed the Dawes Commission (also known as the Commission to the Five Civilized Tribes). This Commission was authorized to negotiate allotment with the Five Civilized Tribes. So, while allotment for other tribes was done by Congressional mandate, the Commission's allotment efforts were not. As a part of this effort, the Dawes Commission took census rolls of the tribes to determine who would be eligible for land allotment. Many resisted being counted due to fears about retribution or mistreatment. Additionally, the rolls limited the membership to bloodlines, which did not encompass the tribes' approach to membership. Therefore, the establishment of rolls diminished the number of tribal members eligible for allotment.

- An agreement with the Muscogee (Creek) was reached in September of 1897, and it was ratified by Congress under the Curtis Act of 1898. It is clear that the government enabled the practice of allotment. However, it is significant that Muscogee (Creek) allotment was achieved by way of negotiation—not by Congressional mandate. Further, it is significant that the policy was implemented inconsistently between tribes. This supports the notion that the intent was limited to preferring allotment, and did not extend to a general policy of disestablishment of reservations and tribal governance.

SOLEM V. BARTLETT, 465 U.S. 463, 104 S.CT. 1161 (1984)

Solem v. Bartlett, establishes that diminishment of Indian land without substantial and compelling evidence establishing Congressional intent to diminish Indian land is ineffective. In Solem, The Cheyenne River Act of 1908 authorized the Secretary of the Interior to sell and dispose of part of the Cheyenne River Sioux Reservation for homesteading purposes. John Bartlett, an enrolled member of the Cheyenne River Sioux Tribe, was convicted of attempted rape. After pleading guilty in South Dakota state court, he filed a pro se petition for writ of habeas corpus, alleging that the crime actually occurred on Cheyenne



River Sioux Reservation land. He argued that removal of the land in question from the reservation under the authority of the Cheyenne River Act was ineffective and the land remained Indian land.

The Court in Solem sets forth the analysis: "The first and governing principle is that only Congress can divest a reservation of its land and diminish its boundaries. Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise" Id. at 470 (emphasis added). "Diminishment, moreover, will not be lightly inferred. Our analysis of surplus land acts requires that Congress clearly evince an "intent to change boundaries" before diminishment will be found." Id. "There are, of course, limits to how far we will go to decipher Congress's intention in any particular surplus land act. When both an act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, we are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening." Id. at 472 (emphasis added).

Of note, the Court did not find Congressional intent in Solem. "Undisputedly, the references to the opened areas as being in 'the public domain' and the unopened areas as comprising 'the reservation thus diminished' support petitioner's view that the Cheyenne River Act diminished the reservation. These isolated phrases, however, are hardly dispositive. And, when balanced against the Cheyenne River Act's stated and limited goal of opening up reservation lands for sale to non-Indian settlers, these two phrases cannot carry the burden of establishing an express congressional purpose to diminish. Cf. Mattz v. Arnett, 412 U.S., at 497-499, 93 S.Ct., at 2254-2255. The Act of May 29, 1908, read as a whole, does not present an explicit expression of congressional intent to diminish the Cheyenne River Sioux Reservation." Id. at 475-6 (footnotes omitted).

SHARP V. MURPHY (UNITED STATES SUPREME COURT CASE NO. 17-1107)

The initial question before the US Supreme Court was whether the 1866 territorial boundaries of the Muscogee (Creek) Nation within the former Indian Territory of eastern Oklahoma constitute an "Indian reservation" today under 18 U.S.C. §1151(a). The Court has posed two (2) additional questions: (1) whether any statute grants the State of Oklahoma jurisdiction over the prosecution of crimes committed by Indians in the area within the 1866 territorial boundaries of the Creek Nation, irrespective of the area's reservation status; and (2) whether there are circumstances in which land qualifies as an Indian reservation but nonetheless does not meet the definition of Indian Country as set forth in 18 U.S.C. §1151(a).

It is clear from the supplemental questions that they would prefer to avoid deciding this issue and perhaps resolve this issue by finding that Oklahoma retains jurisdiction regardless of land status. Additional indication of this reluctance is the delay in scheduling the second round of oral argument. The first round of oral argument was heard on November 27, 2018. The second round of oral argument was available to be calendared as of June 27, 2019, but has not received a date for hearing and the current schedule reaches into January.

HOW DOES THIS IMPACT LAND OWNERSHIP AND MORTGAGE INTERESTS?

Should the land be deemed Indian country, what were thought to be valid mortgages originated on fee simple land would become unenforceable mortgages on Indian land absent intervention by the federal government to ratify those mortgages retroactively. If this were to happen, the consequences for both the mortgage industry and the title insurance industry are obvious. The roots of this problem lie in 25 U.S.C. §5135, the federal statute that sets forth the process that must be followed to establish an enforceable mortgage on Indian land.

a. The individual Indian owners of any land which either is held by the United States in trust for them or is subject to a restriction against alienation imposed by the United States are authorized, subject to approval by the Secretary of the Interior, to execute a mortgage or deed of trust to such land. Such land shall be subject to foreclosure or sale pursuant to the terms of such mortgage or deed of trust in accordance with the laws of the tribe which has jurisdiction over such land or, in the case where no tribal foreclosure law exists, in accordance with the laws of the State or Territory in which the land is located. For the purpose of any foreclosure or sale proceeding the Indian owners shall be regarded as vested with an unrestricted fee simple title to the land, the United States shall not be a necessary party to the proceeding, and any conveyance of the land pursuant to the proceeding shall divest the United States of title to the land. All mortgages and deeds of trust to such land heretofore approved by the Secretary of the Interior are ratified and confirmed.
b. In the event such land is acquired by an Indian or an Indian tribe, such land shall not be removed from trust or restricted status except upon application to the Secretary under existing law.

25 U.S.C.A. § 5135.

Consequently, a lender may lend on land that is part of Indian country, and with the approval of the Secretary of the Interior1, may foreclose on such property in accordance with the laws of the respective tribe. If the tribe has no foreclosure sale provisions, the lender may proceed in accordance with the forum state's laws. However, without that approval, the land is not subject to a sales process that removes the land from tribal management.

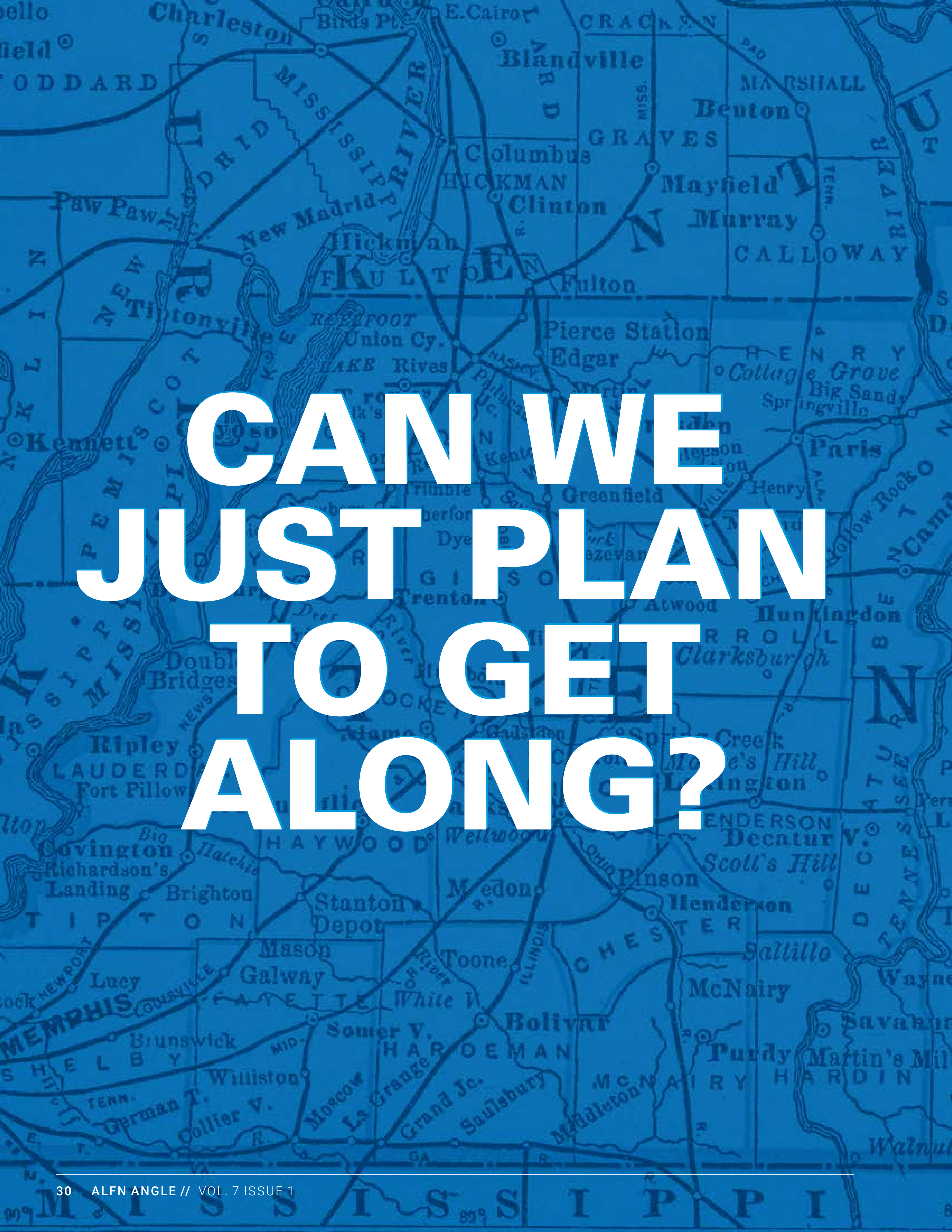
This begs the question, can the Bureau of Indian Affairs retroactively approve mortgages? The Bureau of Indian Affairs has promulgated rules governing how an application for land patent in fee is reviewed and approved and the process to approve mortgage lending. 25 CFR §152.1, et seq. Nothing therein expressly confers the authority to approve such transfers retroactively. However, the Department of the Interior has determined that it does have the authority to approve such transactions retroactively.

Generally speaking, retroactive approval should be "fair in all respects." George Big Knife, 13 L.D. 511 (1891). Such approvals might relate to deaths of grantees prior to obtaining approval. However, retroactive approval has been denied where there was "clear evidence of overreaching or fraud in the procurement of the conveyance." Wishkeno, et al. v. Deputy Asst. Sec. Indian Affairs, 11 IBIA 21, 80 I.D. 291 (1982), citing Kendall v. Ewert, 259 U.S. 139 (1922). It is unclear what the analysis would be for this type of scenario. Additionally, the process requires that the application may be made by "(a)ny Indian 21 years of age or over…." 25 CFR §152.4.

If Murphy is successful in his argument, and assuming an appropriate application can be made, the Department of the Interior could be tasked with deciding either to (1) affirm thousands of mortgages, unilaterally divesting the tribes of the same reservation land that had previously been ceded away from them under objectionable circumstances; or (2) declining to approve such patents in fee to property that once secured mortgage loans.

The murder of Jacobs may have far-reaching implications, not the least of which is making us personally consider the horrifying proposition of having your rights and property taken from you unilaterally—a horrifying proposition that the tribes have faced all too often. a

[1]This is handled through the Bureau of Indian Affairs, an agency within the U.S. Department of the Interior.



CAN WE JUST PLAN TO GET ALONG?

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Plan (noun)
\ 'plan \
Definition of plan
1 : a drawing or diagram drawn on a plane: such as
a : a top or horizontal view of an object
b : a large-scale map of a small area
2a : a method for achieving an end
b : an often customary method of doing something : PROCEDURE
c : a detailed formulation of a program of action
d : GOAL, AIM
3 : an orderly arrangement of parts of an overall design or objective
4 : a detailed program (as for payment or the provision of some service)

BANKRUPTCY (NOUN)

A definition and word that nobody wants in their lives, but sometimes life comes at you faster than you expect, things happen that were not planned for, and all of a sudden you are trying to find the best option to get back on your feet. Most likely, an individual will be choosing between filing a Chapter 7 and Chapter 13 bankruptcy. The easiest way to differentiate between the two is that Chapter 7 is for those looking to liquidate their debts while Chapter 13 is for those looking to reorganize them. In this article we will be mostly focusing on Chapter 13 and the Chapter 13 Bankruptcy Plan process in the Western, Middle and Eastern Districts of Tennessee.

Just over two years ago on December 1, 2017 the Federal Rule of Bankruptcy Procedure adopted an Official Form Chapter 13 Plan. Districts do have the ability to opt out of using the form Chapter 13 Plan; however, both the Middle and Eastern District have developed plans substantially similar to the National Plan. Other changes that came with the adoption of a National Plan was a shorter time period to get a proof of claim filed (70 days) and the ability to utilize cram down and lien avoidance through the Chapter 13 Plan rather than having to file separate motions. The FRBP also does clarify that a secured creditor's lien is not void merely because a creditor fails to file a timely proof of claim. These key changes to the FRBP have made it even more important to review each and every plan carefully and to maintain an open line of communication between both Creditors' and Debtors' counsel. At the end of the day, both the Trustees and Debtors' counsel want the Creditors to file their timely proof of claim with supporting

Districts do have the ability to opt out of using the form Chapter 13 Plan; however, both the Middle and Eastern District have developed plans substantially similar to the National Plan.

documents so that they can get figures and keep the bankruptcy moving towards a confirmed plan. Sometimes, given the new time constraints, that just is not feasible, whether it is due to a servicing transfer or something else. One option, which has been explored in the Western District of Tennessee, is to get approximate figures to the Trustees and Debtors' counsel, including the arrears, the monthly ongoing payment amount, the month to begin payments and the Creditors name and contact information. However, one concern this option raises is the lack of documentation within the case itself on the Court's docket.

Having personally practiced in Florida, Pennsylvania, New Jersey and Tennessee, I have stood in front of many Federal Judges and worked closely with their staff. I have shared time in the courtroom, on the phone, and at conferences working with and learning from the Trustees and their staff and spent many hours communicating with Debtors' counsel. I mention all of these people because this is the group of people who all need to work together no matter what state or district so

This is suggesting that given the shorter time constraints to get a claim filed, that perhaps we all focus more on getting the figures in everyone's hands as soon as possible and then offering the ability through a supplemental/amended claim to provide these collateral documents if they are not immediately available.

that we all can reach the mutual goal of a confirmed Chapter 13 Plan. Relationships are the key to a successful practice whether you are representing Debtors or Creditors and it is crucial that all parties communicate and develop a consistent working relationship for the sake of all our clients.

"PLG Attorneys pride themselves on their ability to facilitate progress. It is important for Debtors, Debtor's Counsel, and Trustees to see PLG Attorneys as collaborators of resolution. This strong sense of communal partnership paired with a solutions-oriented approach, is a huge value add to clients."—Keena Newmark, Esq., PLG Managing Attorney for Bankruptcy

In each of the three Tennessee districts, timely filed proof of claim figures control over the plan's figures; however, each district does have different deadlines for getting a written objection to confirmation filed. The problem that we all are trying to minimize in each district is the numerous continuances of confirmation hearings in order to get an agreed order or something similar on the docket reflecting the figures to be used in the Plan. All of this together oftentimes creates competing priorities and timelines and may lead to a bottleneck not only in the Court room but with the

daily workflow. Besides adhering to the Court deadlines for filing a plan, proof of claim, objections to plan, etc., we all can work together and communicate so that these plans are not sitting there waiting to be confirmed while Creditors are scrambling to try and provide a lost note affidavit or an assignment of mortgage to get their proof of claim filed.

This author in no way is suggesting that the requirements for what needs to be attached to a proof of claim be changed as we all know certain collateral documents are needed to have a valid proof of claim. This is suggesting that given the shorter time constraints to get a claim filed, that perhaps we all focus more on getting the figures in everyone's hands as soon as possible and then offering the ability through a supplemental/amended claim to provide these collateral documents if they are not immediately available.

There always are going to be cases where Debtors' are seeking to cram down a mortgage or avoid a lien that will end up outside of this box, but overall the great majority of what takes up most of our time as practitioners and what congests the Court calendars are these very issues. If we all can agree to just PLAN to get along and communicate, I know that we all can do a better job of accomplishing our mutual goals of a confirmed Chapter 13 Plan.

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STATE SNAPSHOT

The Devil of Demand Letter Details

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GIVEN THE BUSINESS reality that many servicers manage loans across multiple states, the desire to create one-size-fits all mortgage notices may be strong. However, at least when it comes to Illinois demand letters, generalization may produce more problems than solve.

As industry professionals are well-aware, most mortgages require a defaulting borrower notice, which may answer to a variety of names—with "demand letter", "notice of acceleration" and "acceleration notice" being the predominant favorites. Regardless of the moniker, these notices tend to serve a synonymous purpose: to notify the borrower of the default, provide an opportunity to cure, and advise of next steps. However, mortgages may have differing idiosyncrasies requiring adherence.

In Deutsche Bank Nat'l Trust Co. v. Roongseang, 2019 IL App (1st) 180948, the 1st District Appellate Court focused on language prevalent in many loans regarding how notices must be sent. The particular clause at issue states that: "Any notice to Borrower…shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means."

Therefore, the mailing of a notice under this clause presents only two possible options; it can be sent by "first class mail," or it can be sent by "other means." These options, however, have vastly different repercussions—although mailing by first class mail is effective immediately, mailing by other means is only effective "when actually delivered." In legal terms, first class mail has a presumption of delivery, whereas "other means" does not.

The question before the Court was whether certified mail should be categorized as first class mail, with its accompanying presumption of delivery, or rather via "other means," where actual delivery must be proven.

In Roongseang, the servicer mailed its notice via certified mail, but was unable to acquire a return receipt. The Court held that the demand letter failed to conform to the mortgage.

> "Given the distinction between the methods of delivery for first class and certified mail, we find that where plaintiff chose to send the acceleration notice via certified mail, it was sent by 'other means' and proof of actual delivery of the notice is required to establish compliance with the notice provisions of the mortgage." Id. at *P35.

Under this new ruling, servicers should avoid sending notices via certified mail only if first class is all that's required--but one caveat to consider is that some mortgages require certified mailing. Those mortgages will necessitate careful review to determine if proof of delivery is in fact needed.

However, mailing method isn't the only particularity to be wary of. Some mortgages require a 30-day opportunity to cure, whereas others require far longer time periods. Further, directing that a cure be made by certified funds, absent specific mortgage language permitting same (which does not exist in the standard Fannie Mae/Freddie Mac mortgage form), is veritably asking for trouble. The devil is most definitely in the details.

Additional litigation has focused on the exact wording employed in demand letters, with Illinois courts much more frequently requiring an exact match to the related mortgage.

In Ass'n Asset Mgmt. v. Cruz, 2019 IL App (1st)

182678, several letters were sent to the defaulting mortgagor, but Illinois' 1st District Appellate Court found that none met the requirements of the governing mortgage. Specifically, the letters failed to state the overdue amount and provide a grace period to pay that amount prior to acceleration--instead, the letters referenced an already accelerated balance. Id. at ¶39. The Court held that the right to cure must come before the actual acceleration, and that the letter's reference to an already accelerated balance belied that right.

Under this new ruling, servicers should avoid sending notices via certified mail only if first class is all that's required--but one caveat to consider is that some mortgages require certified mailing.

Correspondingly, in Cathay Bank v. Accetturo, 2016 Il App (1st) 152783, five notices were actually sent to the defaulting mortgagor, but none were found to meet all of the requirements of the mortgage, except possibly the last, which was dismissed because it referenced an already accelerated balance. In the eyes of the Court, if the note had already been accelerated, the letter couldn't be a notice "prior to acceleration," as dictated by the mortgage. Id. ¶41.

Therefore, to attempt to avoid litigation problems, Illinois demand letters should ensure compliance with the loan's delivery requirements, avoid referencing an accelerated balance prior to the expiration of any required cure period, and include verbatim phrases as specified in their mortgage counterparts. To attempt to avoid the costly delays that can flow from nonconforming notices, customization is therefore key.

STATE SNAPSHOT

Unintended Consequences of Recent Legislation Regarding New Jersey Sheriff's Sales

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ON APRIL 29, 2019 New Jersey Governor Phil Murphy signed several laws intended to impact foreclosures in the State of New Jersey. The laws were recommended in a September 2018 report by the Special Committee on Residential foreclosures. The stated goal of these laws was to "assist homeowners facing the prospect of foreclosure and pave the way for community revival by addressing blight."

One of these laws, Senate Bill No. 3464, was intended to amend P.L.1995 c.244 (C.2A:50-64) and N.J.S.2A:17-36, by changing the procedures for how foreclosure sales are held and altering the adjournment of sale process with the hopes of bringing uniformity to the process throughout the state.

The amendment provided that as of August 1, 2019 a Sheriff must conduct a foreclosure sale within 150 days, instead of within 120 days, of the Sheriff's receipt of a Writ of Execution. Subsection 3(b) of the legislation does allow for the foreclosing plaintiff to apply for an order appointing a Special Master where it becomes apparent that the Sheriff cannot comply with the imposed time limitations. However, the appointment of a Special Master comes along with its own hurdles, as it is not a commonly utilized method of proceeding to sale. To date, the Sheriffs seem to be in compliance with the 150 days deadline.

The amendment further states that a Sheriff or other officer conducting a foreclosure sale may make up to five (5) adjournments—no more than two (2) adjournments may be made solely at the request of the lender, two (2) at the request of the debtor, and one (1) additional adjournment may be granted if both the lender and debtor agree to the adjournment. Under this amendment, each adjournment can be no more than thirty (30) calendar days in length, and any additional requests for time beyond what is delineated in this legislation will be subject to the court's review and approval, even where both parties agree.

The unintended effect of this law is to force a foreclosing lender to choose between reviewing for loss mitigation or having to cancel the sale. Plaintiffs no longer have the unfettered ability to adjourn a sale as needed in order to complete a loss mitigation review.

The most problematic section of the amendment was set forth under Paragraph (6) which also took affect August 1, 2019 and mandates that the Sheriff's office use a Deed prepared by the Plaintiff's attorney. The form of the Deed was provided within the body of the actual amendment. The amendment also states that the Deed must be delivered to the Sheriff within ten (10) days of the sale. An additional complication is where the property is sold to a third-party at Sheriff's sale. Under the amendment, Plaintiff's counsel would be required to perform this task even in instances where the purchaser ultimately defaults on completing their bid, an all too unfortunate common practice.

Prior to the enactment of this law, the preparation of the Deed was a function traditionally handled by

The amendment provided that as of August 1, 2019 a Sheriff must conduct a foreclosure sale within 150 days, instead of within 120 days, of the Sheriff's receipt of a Writ of Execution.

the Sheriff. In the weeks that followed the effective date of this law, each of New Jersey's twenty-one (21) counties began promulgating their own procedures based on their interpretations of this law. Some counties advised firms to utilize the form of Deed as set forth in the law, while others provided county-specific Deeds created by their internal counsel and a handful of counties advised that they will continue to prepare the Deeds, despite the edict within the new law. As you can see, these differing approaches left local counsel needing to decide how to best protect their clients, while navigating the differing approaches set forth by the various the Sheriff offices, an entity that our office relies on to effectively conduct the foreclosure sales. The only current County where we see a delay with receiving executed deeds is Bergen County.

We are fortunate that the core of our Sales Department has been working together and along with the various Sheriffs for roughly a decade and their knowledge base along with the rapport they have built over the years has made the transition due to these changes as pain free as possible.

Fein, Such, Kahn & Shepard, P.C. is here to assist our clients in navigating the ever-changing terrain imposed by the Courts and legislators in the state of New Jersey and Pennsylvania.

No Joke: As a Limited Liability Company Don't Take Title to Real Property in New York

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NORMALLY, when Your Author offers a submission to the ANGLE, they try to interject a humorous title or subtitle. The issue Your Author writes on today is so vexatious to lenders and servicers, organized as limited liability companies, it is humorless.

Effective September 13, 2019, the New York State Legislature passed a law, which was Senate Bill 1730, that requires certain documentation, to be filed with the deed on a one- to four-family dwelling, and the State Tax forms:

> "which identifies the names and business addresses of all members, managers, and any other authorized persons, if any, of such limited liability company and the names and business addresses or, if none, the business addresses of all shareholders, directors, officers, members, managers and partners of any limited liability company or other business entity that are to be the members, managers or authorized persons, if any, of such limited liability company… If any such member, manager or authorized person of the limited liability company is itself a limited liability company or other business entity, the names and addresses of the shareholders, directors, officers, members, managers and partners of the limited liability company or other business entity shall also be disclosed until full disclosure of ultimate ownership by natural persons is achieved." Laws 2019, Ch. 297 (emphasis added).

In sum and substance, if an LLC takes or gives title to certain real property, there must be documentation submitted along with the Deed (or else the deed should be rejected by the Clerk) that lists the names and business addresses all of the owners, officers, and authorized agents—including the owners, officers, and authorized agents if an owner/member of the LLC is itself an LLC.

This issue is particularly troublesome, as Your Author discovered when the ultimate owner of the LLC is a publically-traded company. One might think the County Clerk would accept a statement showing that the ultimate owner is a publically traded company (especially when one of that publically traded company's investors is the New York State Pension Fund—the owners of which are the 19.5 million people of the State of New York).

However, when the problem was presented to a County Clerk who refused to accept a deed into the LLC (who was the foreclosing plaintiff and purchaser of the property at foreclosure sale) and the New York State Department of Taxation and Finance, the official response was:

"Based on the facts presented in your email, the tax law requires that a document which identifies the names and addresses of the individual owners of the LLC (until ultimate ownership by natural persons is disclosed) be attached to Form TP-584. So in this case, this would include the shareholders of the publicly traded corporation. If any member of the LLC is itself an LLC or other business entity, the names and addresses of the shareholders, directors, officers,

members, managers and/or partners of that LLC or other business entity must also be provided until ultimate ownership by natural persons is disclosed. The tax department doesn't have the authority to tell the County Clerks to require less." (emphasis added).

Allow your author to highlight and emphasize the problem: under the law in the situation that occurred above, Your Author's client would have had to provide a list of every natural person—all 19.4 million of them—who was an owner of one of its investors: the New York State Pension Fund. The list did not stop there; compliance means listing all of the natural people who are owners of the investment banks, mutual funds, and any other entity that invests in the Russell 2000 index of funds (the parent LLC is part of that composite). It is not beyond the realm of possibility that a compliant list would have included nearly every American and a fair percentage of other North Americans, Europeans, South Americans, Australians, Africans, and Asians who invest in companies who invested in Your Author's client's publically traded parent company.

If your servicing shop takes title as an LLC on foreclosures in New York, you must either be prepared to list all of the natural persons who are the ultimate owners, managers, and authorized agents of the LLC and the LLC's members/owners who are business entities, or you should seriously consider creating a holding corporation into which you can direct title to vest.

This issue will also vex the LLC taking a deed-in-lieu of foreclosure. a

STATE SNAPSHOT

New NY law adds a new layer of requirements on Reverse Mortgages to take effect March 5, 2020

BY DEBORAH GALLO, DIRECTOR OF OPERATIONS
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ON DECEMBER 6, 2019, New York Governor Andrew Cuomo signed into law a bill, Assembly Bill 5626 (AB 5626), which, among other things, regulates reverse mortgages issued under FHA's HECM program. AB 5626 also appears to require lenders offering reverse mortgages in New York to obtain approval from the Superintendent of the New York Department of Financial Services (Superintendent) in order to make HECMs in New York. The bill will take effect on March 5, 2020.

AB 5626 provides that an authorized lender, or any other party or entity, is prohibited from engaging in any unfair or deceptive practices in connection with the marketing or offering of reverse mortgage loans and must not: (i) use the words "government insured" or other similar language representing that reverse mortgage loans are insured, supported, and sponsored by any governmental entity in any commercial, mailing, advertisement or writing relating thereto; (ii) use the words "public service announcement" in any commercial, mailing, advertisement or writing relating thereto; or (iii) represent that any such loan is other than a commercial product.

Lenders must include certain consumer protection information, the content and form of which must be specified by the Superintendent, with any solicitation for reverse mortgage products mailed to a physical address in New York. Lenders must also provide each actual/potential applicant with the telephone number and website address provided by HUD for HECM counseling. Both the lender and the borrower must be represented by an attorney at closing, and each such party must have at least one attorney present to conduct the closing.

AB 5626 provides various servicing-related requirements and restrictions. Lenders must inform and provide notice to a borrower, by telephone and first-class mail, when his or her line of credit or life expectancy set aside is depleted to 10% or less of its value. Such notice must inform the borrower of their obligations relating to the property. In addition, reverse mortgage lenders are prohibited from making an advance payment for any obligation arising from the borrower's property. Additionally, in the event a borrower defaults upon the payment of insurance premiums or real property taxes, the lender may only pay those premiums and/or taxes which are in arrears.

The bill also states that in the event a lender seeks to foreclose on a reverse mortgage loan on the basis that the property is no longer the primary residence of or occupied by the borrower, if during the verification of the borrower's primary residence and/or occupancy no responses are received in response to mailings relating thereto, such lender must cause a telephone call to be made to the borrower, or if the borrower is unreachable by telephone, to a (designated) third-party contact. In addition to making such call, prior to the commencement of a foreclosure proceeding, an in-person visit must also be made to the borrower. Note that the lender may not charge a fee for any such visit and inspection. The lender must wait at least 30 days following the in-person visit, in addition to any additional time or notice requirements specified by any other provision of law, before initiating a foreclosure action on the basis that the property is no longer the primary residence of the borrower. If the borrower contacts the lender and provides proof of residence or occupancy after such visit, but before the commencement of the foreclosure action, the lender is barred from initiating such foreclosure action.

Lenders must include certain consumer protection information, the content and form of which must be specified by the Superintendent, with any solicitation for reverse mortgage products mailed to a physical address in New York.

The bill also provides that compliance with its requirements is a condition precedent to commencing a foreclosure action, and failure to comply is a complete defense to such action. Additionally, any person injured by any violation of the bill's requirements or any violation of the rules and regulations of HUD relating to the HECM program may bring an action to recover treble damages, plus the prevailing plaintiff's reasonable attorneys' fees.

Per New York Appellate Division, A Discharge in Bankruptcy Does Not Automatically Accelerate The Debt & The Terms Of The Mortgage Survive Bankruptcy

BY DEBORAH GALLO, DIRECTOR OF OPERATIONS
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We are pleased to share a recent decision, on an issue of first impression, of a case handled by Friedman Vartolo, LLP entitled Wilmington Sav. Fund Socy., FSB v. Fernandez, et al. Supreme Court Ct., Appellate Decision, Fourth Department 11/15/19, 2019 WL 6042376, 2019 NY Slip Op 08290. The borrower argued that a "bankruptcy operates as the acceleration of the principal amount of all claims against the debtor" (House Report at 353, U.S.Code Cong. & Ad.News at 6309; In Re Schweitzer, 19 B.R. 860, 867-868 [Bankr. E.D.N.Y. 1982]; see also In Re Oakwood Homes Corp., 449 F.3d 588 [3d Cir. 2006]; In Re Amr Corp., 485 B.R. 279 [Bankr. S.D.N.Y. 2013] and that six-years after discharge in bankruptcy, Plaintiff's loan was barred by the statute of limitations. The Court found that the bankruptcy did not automatically accelerate the debt, Plaintiff's complaint was not time-barred because separate cause of action accrue for each installment payment that was not made, and the Court properly denied defendant's motion to dismiss the complaint.

On August 17, 2007, defendant executed a note in the amount of $94,400 plus interest, payable in successive monthly installments with the final payment to be made on January 4, 2031. Defendant secured payment of the note with a mortgage encumbering certain real property. On December 8, 2009, defendant filed a petition for chapter 7 bankruptcy in Bankruptcy Court. Defendant received a discharge in bankruptcy on March 15, 2010, and obtained a final bankruptcy decree on April 1, 2010. On May 26, 2017, plaintiff, the successor to the lender, sent defendant notice that he was in default and that defendant had 90 days to cure the default. After receiving no payment during the following 90 days, plaintiff accelerated the remaining balance due under the ~~note and,~~ on November 1, 2017, plaintiff commenced an action seeking to foreclose on the mortgage. In his answer, defendant raised the statute of limitations as an affirmative defense.

Defendant moved to dismiss the complaint pursuant to CPLR 213 (4) and 3211 (a) (5). Supreme Court initially granted defendant's motion, reasoning that defendant's March 15, 2010 discharge in bankruptcy triggered the six-year statute of limitations (see CPLR 213 [4]), and that plaintiff failed to commence its foreclosure action within that period. Plaintiff then moved for leave to reargue, and defendant cross-moved to quiet title. The court granted plaintiff's motion for leave to reargue, and ultimately held that defendant's discharge in bankruptcy did not extinguish plaintiff's right to commence an in rem foreclosure proceeding against defendant, that the statute of limitations began to run from the date each unpaid installment became due unless plaintiff accelerated the debt, and that plaintiff's action was therefore timely because the debt had not been accelerated prior to 2017. Thus, on re-argument, the court reversed its prior determination, denied defendant's motion to dismiss the complaint, reinstated the complaint, and denied defendant's cross

The Court found that the bankruptcy did not automatically accelerate the debt, Plaintiff's complaint was not time-barred because separate cause of action accrue for each installment payment that was not made, and the Court properly denied defendant's motion to dismiss the complaint.

motion to quiet title.

The mortgage provided plaintiff the option to accelerate the debt under certain circumstances but did not state that the debt would be automatically accelerated if defendant obtained a discharge in bankruptcy. The appellate division rejected defendant's contention that the discharge in bankruptcy automatically accelerated the debt. The Court found, that Chapter 7 discharge removes the "mode of enforcement" against the debtor in personam, but the obligation otherwise remains intact and does not impact an action in rem (Johnson, 501 US at 84).

The Court had not previously addressed the specific impact a discharge in bankruptcy has on the ability to commence a foreclosure proceeding over six years after a discharge in bankruptcy, the application of the above rules regarding the survival of in rem actions suggests that, absent terms in the mortgage to the contrary, a discharge in bankruptcy does not automatically accelerate the debt and that the terms of the mortgage survive bankruptcy. Because the terms of the mortgage survive, causes of action would thus continue to accrue with respect to each installment payment as the payments become due, although a note holder would only be able to commence an action in rem.

How to Lose a Lien in 10 Days in Tennessee

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In most states, the beneficiary or mortgagee of a deed of trust is entitled to priority over any subsequent mechanic's or materialmen's liens if the deed of trust is recorded prior to the initiation of construction.[1] Tennessee, however, has provided contractors with an opportunity to wipe out the mortgagee's priority lien after a deed of trust has been recorded—and, all it takes is ten days.

Tennessee courts have generally held that "a deed of trust, properly recorded, has priority over a mechanic's or materialman's lien." An exception to this rule is found in Tennessee Code Section 66-11-108. This provision allows a contractor to prioritize a construction lien by serving the first-in-time-and-right mortgagee with notice before construction is initiated via certified or registered mail. The mortgagee then must respond by a written objection by certified or regular mail within ten days after receipt, or the mortgagee's consent shall be implied. In other words, the mortgagee loses its priority lien status in ten days if an objection is not returned to construction lienholder.

The mechanic's lien statute is strictly interpreted and the provisions of the statute are compulsory. Thus, in order for a contractor to actually obtain lien priority it must strictly obey the statute and fully comply with the statute's requirements. To comply with Section 108 a contractor must do the following: (1) send written notice of the construction contract to the mortgagee; (2) by certified or registered mail; (3) prior to commencement of work or furnishing of material; and (4) the notice must contain a name and address to send objection.

There is scant case law on this potential pitfall, but the cases that address this section indicate that if a contractor were to provide the requisite notice as outlined above, then its lien would be superior if the mortgagee failed to object. Fortunately, there is no evidence that suggests contractors or their attorneys are routinely sending notices under Section 108. Perhaps they are infinitely optimistic about the mortgagor's ability to pay. However, if this trend were to reverse, for instance in an economic recession, contractors may need more assurance that the mortgagor can pay for their services. An influx of Section 108 notices would likely require a change in the mortgage servicing industry.

> **From the servicing side, the most demanding aspect of Section 108 is that an objection to the notice is required within ten days of receipt. This short deadline requires an immediate written objection.**

From the servicing side, the most demanding aspect of Section 108 is that an objection to the notice is

[1] Obviously this general rule does not apply in every state. In addition, states such as Arkansas and Rhode Island amongst others, have similar statutory pitfalls like the one addressed here.

required within ten days of receipt. This short deadline requires an immediate written objection. Would a servicer be able to respond that quickly? Perhaps a more relevant question is whether a servicer would be able to identify a Section 108 notice and be cognizant of the need to respond. Because a failure to respond would result in the mortgagee losing its first lien position, the stakes and potential litigation costs are high.

Mortgage servicers should also be aware of the reporting requirements implicated by a Section 108 Notice. For example, under Fannie Mae's most recent servicing guidelines, a Section 108 notice would be an action that challenges the priority of a Fannie Mae mortgage loan and would thus be considered "non-routine" litigation.

The dearth of case law on Section 108 demonstrates the infrequency of its use by contractors. Nevertheless, an increase in Section 108 notices has the potential to quickly and drastically affect a mortgagee's deed of trust lien priority, and potential to change how loans are serviced in Tennessee.

Keep Your Receipts: Illinois Appellate Court Finds That Paragraph 22 Notice Sent Certified Mail Is Not Presumed To Be Given Upon Mailing

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FANNIE MAE/FREDDIE MAC uniform mortgages are so ubiquitous that many in the servicing industry have certain provisions committed to memory. For example, paragraph 22 requires that notice be sent to the borrower prior to acceleration and enumerates the content of such notice (the "Notice of Acceleration"). In defense to foreclosure, borrowers often cite to paragraph 22 and claim no such Notice of Acceleration was given.

In response, to this defense, a foreclosing plaintiff will often provide an affidavit attaching the Notice of Acceleration and attesting that the Notice of Acceleration was mailed in accordance with its usual and customary business practices. The affidavit relies on Paragraph 15 of the uniform mortgage which states that any notice given to the borrower in connection with the mortgage is "deemed to be given to the Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means."

The production of the signed return receipt showing actual delivery of the Notice of Acceleration should be sufficient to prove compliance with paragraph 22, if the Notice was sent via certified mail.

Typically, the filing of the mailing affidavit successfully rebuts the defense that the notice was not given and allows the foreclosing Plaintiff to prevail on summary judgment. However, a recent decision in the Illinois Appellate Court has given new life to this defense.

In Deutsche Bank v. Roongseang 2019 IL App (1st) 180948 (opinion filed December 2, 2019), Illinois' First District Appellate Court held that where a Notice of Acceleration is sent via certified mail, there is no presumption of delivery. The appellate court scrutinized the language of paragraph 15 and found that notices sent via first class mail are deemed to be given upon mailing. However, where a notice is mailed via certified mail it is considered to be "by other means" as provided for in paragraph 15. Accordingly, proof of actual delivery was required in order to establish that a paragraph 22 Notice of Acceleration was given. In Roongseang, the trial court's entry of judgment was reversed and it was remanded because the plaintiff failed to produce the return receipt from the certified mailing which gave rise to an issue of fact as to whether the Notice of Acceleration was actually given, i.e. whether notice was actually received by the borrowers.

The opinion in Roongseang also narrowed or undercut recent Illinois case law that had a chilling effect on the ability to raise a successful defense based on the failure to give the paragraph 22 Notice of Acceleration. In Bank of New York Mellon v. Wojcik, 2019 IL App (1st) 180845, the Appellate Court found that a Notice of Acceleration defense in a foreclosure action was forfeited where there was a general denial that all required notices were duly and properly sent. Wojcik, at ¶21 (stating that "courts have repeatedly recognized that a mere general denial of the performance of the conditions precedent of a contract in a party's responsive pleading, without allegations of specific facts, results in forfeiture of the issue of the performance of the conditions precedent of a contract"). In Roongseang, the court narrowed the application of Wojik by finding the allegation that the notice was not sent is sufficient to plead a notice of acceleration defense. Roongseang also undercut the holding in CitiMortgage, Inc. v. Bukowski, 2015 IL App (1st) 140780 which held that the failure to perform the condition precedent of sending notice pursuant to the mortgage is not an affirmative defense. However, in Roongseang, the Notice of Acceleration defense was raised as an affirmative defense and allowed to proceed as such. The opinion also quickly rejected any argument about substantial compliance or harmless error without much analysis or acknowledging a recent opinion, U.S. Bank N.A. v. Gold, 2019 IL App (2d) 180451 in the adjoining Second District of Illinois which held that where a notice of acceleration is technically defective under the terms of the mortgage, it will not provide a defense to foreclosure where there is no prejudice suffered by the defendant.

The issue in Roongseang was an issue of first impression in Illinois which could lead to additional challenges invoking the paragraph 22 notice of acceleration defense. The production of the signed return receipt showing actual delivery of the Notice of Acceleration should be sufficient to prove compliance with paragraph 22, if the Notice was sent via certified mail. The additional evidentiary requirements in contested litigation and burden of record keeping may outweigh any benefits of certified mailing. If notice is sent certified or by other means, be sure to keep your receipts.

STATE SNAPSHOT

NM Court of Appeal Rules on Statutes of Limitation for Notes and Mortgages

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TWO RECENT NEW MEXICO Court of Appeals cases are set to change the landscape for filing foreclosure actions, specifically where the initial default on the note occurred outside the statute of limitation. Both cases hold that a note and mortgage constitute an installment contract, and consequently the statute of limitation runs from the date of each individual missed payment. LSF9 Master Participation Trust v. Moreno, No. A-1-CA-36879 (Ct. App. December 18, 2019) citing LSF9 Master Participation Trust v. Sanchez, 2019-NMCA-055, 450 P.2d 413. The effect of these decisions is to potentially allow lenders to foreclose a debt even where the initial default falls beyond six years from the date the complaint is filed.

In Moreno, the initial payment default occurred on November 1, 2009, and the complaint for foreclosure was filed on December 11, 2015. The District Court ruled that the six-year statute of limitation began to run on November 1, 2009, and expired on November 1, 2015. The District Court's position was that the complaint was filed one month and eleven days too late, and was therefore dismissed. The Court of Appeals disagreed, finding that the statute of limitation runs from the date of each individual missed payment. Therefore, although the bank was not allowed to recover payments due more than six years from the filing date, the bank was entitled to recover payments due within the six-year window. Similarly, in Sanchez, the Court concluded that the statute of limitation began to run with respect to each installment when due.

In Moreno, the Court of Appeals rejected the bank's argument that the District Court abused its discretion by allowing the homeowner to amend his answer to assert the statute of limitation as a defense. However, the Court of Appeals adopted the argument that the lender was entitled to thirty days of tolling given the mandatory demand letter period. In New Mexico, the demand letter is a requirement not only under the security instrument, but also under the New Mexico Home Loan Protection Act (HLPA NMSA 1978 Section 58-21A-6(A)). The notice of default in this case was sent on April 29, 2010, and provided an additional thirty day tolling period during which no action could be filed.

Some questions remain as to the application of Sanchez and Moreno when applied to defaults that occur beyond the statute of limitation. Mortgage lending institutions should be aware of prior fore-

Mortgage lending institutions should be aware of prior foreclosure cases that resulted in dismissals with prejudice, or that were based on lack of prosecution.

closure cases that resulted in dismissals with prejudice, or that were based on lack of prosecution. The industry should also ensure that when rolling a due date forward to comply with the six-year timeframe, that they are reviewing and taking necessary action with respect to any uncollectible amounts due, including: attorney fees, late fees, and even taxes and escrow. All cases should be individually reviewed for prior accelerations and if needed a deceleration analysis should be completed prior to filing the complaint.

These favorable rulings should be beneficial by further clarifying industry practices and policies in an increasingly complex judicial foreclosure state. They will protect lenders during the thirty-day default notice period, and in cases that are filed close to the expiration of the statute of limitation. The judicial recognition of the installment contract theory is a boon for the mortgage lending industry in New Mexico, by limiting the loss exposure to debts outside of the six-year limitation period, rather than the entire balance in similar circumstances.

FDCPA Prohibitions Inapplicable to Loss Mitigation Communications Per Minnesota Federal District Court

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After executing a note and mortgage in 2008 encumbering his Minnesota residence, the plaintiff borrower ("Borrower") in Heinz v. Carrington Mortgage Services, LLC, No. 18-cv-1919 (D. Minn. 2019) ultimately experienced a series of defaults and failed loss mitigation plans. Non-judicial foreclosure proceedings were initiated in 2016 and a sheriff's sale set for August 1, 2017.

In July 2017, the loan was service transferred to the defendant ("Servicer") and Servicer postponed the sale twice to permit Borrower to pursue a new loss mitigation application. After a series of communications between the parties relating to the application and required documentation shortcomings, the sheriff's sale ultimately occurred on November 14, 2017. Two days after the sheriff's sale, Servicer terminated its loss mitigation review in a written communication to Borrower.

After expiration of the redemption period and sale of the property to a third party, Borrower brought an action alleging violations of the FDCPA asserting that Servicer engaged in false, deceptive communications relating to requirements of the loan modification application and errors in handling his application, all of which caused him the loss of his home and emotional damages. Both parties brought summary judgment motions on the issue of FDCPA liability based on these communications between Servicer and Borrower.

In making their arguments to the Court, both parties argued for broad applications of their respective interpretations of the FDCPA. Borrower asserted that any communications regarding loss mitigation constituted "debt collection" for the underlying debt, in light of the underlying foreclosure process and triggering the application of FDCPA prohibitions. While admitting being a debt collector under the FDCPA (in contrast to the law firm in the Obduskey case), Servicer urged the court to follow a string of cases holding communications concerning enforcement of a security instrument were not "debt collection" under the FDCPA and to find the statute inapplicable.

The court first noted that review of loss mitigation communications under the FDCPA was a case of first impression in the 8th Circuit. On the merits, the court rejected both parties' broad positions, noting that courts in Minnesota have adopted an "animating purpose test" in reviewing communications between a Borrower and Servicer debt collector, and held, in pertinent part:

"As articulated in McIvor v. Credit Control Servs., Inc., 773 F.3d 909, 914 (8th Cir. 2014), the court may adopt an "animating purpose" test to interpret the communication for collection of debt. As set forth in Gray v. Four Oak Court Ass'n, Inc., 580 F. Supp. 2d 883 (D. Minn. 2008), in interpreting the term 'debt collector' in the FDCPA, the court may distinguish between 'the collection of any debts' and 'the enforcement of security interests' and may find activities incidental to enforcement of a security interest as not constituting 'debt collection' under the FDCPA."

The court then applied this animating purpose test to each of the communications in dispute, finding all of them to fall outside the scope of the FDCPA. The court noted specifically that the only subjects of

discussion related to the loss mitigation application itself with no communication regarding the debt in question, terms of any possible payment plans, or the foreclosure process.

In rejecting the Borrower's FDCPA claims, although noting that the resolution of the case may seem unfair, the court determined the "animating purpose" of the communications and conduct could not be appropriately described as seeking to collect the underlying debt. The court therefore determined that the lien-foreclosure activities did not constitute debt collection under the FDCPA.

It should be noted this case may yet be appealed and is just one District Court judge's opinion in the 8th Circuit, but it does give a bit of comfort for mortgage servicers defending against FDCPA violation claims regarding loss mitigation communications within the 8th Circuit.

As a practice pointer, mortgage servicers should ensure all loss mitigation communications relate to the loss mitigation application and review process as much as possible to fall within this exception, avoiding actual debt collection measures or demands for payment in any form. If the communications stray to the underlying debt rather than loss mitigation or lien enforcement, the FDCPA may apply.

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