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OFFICIAL PUBLICATION
OF THE ALFN
VOL. 5 ISSUE 2

BLOCKCHAIN TECHNOLOGY FUTURE OF MORTGAGE SERVICING

SERVICELINK AUCTION — *A BETTER WAY TO AUCTION*

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Letter from the Editor

Spring is finally here, and we are realizing some remarkable growth at the ALFN. Membership support is as high as ever, and I am excited to see so many members taking advantage of the benefits we offer. If you haven't yet explored everything ALFN has to offer, then I encourage you to reach out to us and get plugged in. In this association the old adage "you reap what you sow" is absolutely accurate.

We just concluded our 3rd Annual WILLPOWER Summit, and I want to thank our Women in Legal Leadership (WILL) and especially the WILL Leadership Team for helping us make this year's summit the largest and most successful one yet. We are pleased to see the impact this event continues to make in empowering our women leaders.

Next up on the schedule, ANSWERS, ALFN's 16th Annual Conference. We are hard at work preparing for another top-notch event this July 22-25 at the beautiful Ritz-Carlton Bacara Resort in Santa Barbara, CA. We have added more educational sessions this year, and additional networking time with attendees is included, along with a group reception and dinner each evening of the conference. You can't afford to miss this year's event, so register now as our room block is filling fast.

As we dive deeper into this issue of the ALFN ANGLE, we explore blockchain technology, and it's growing interest and future use in the mortgage servicing industry. We also look at the Property Assessed Clean Energy (PACE) programs, and how the global financial community is taking a stance on green financing as an important emerging development strategy. Some of our other feature articles include a new law in New York where harassed tenants can receive compensatory damages and legal fees, and another New York update on motion templates being used in foreclosure actions. We wrap up our feature articles with California's new recording fees and the practical applications for lenders and loan servicers.

Some of the state snapshots on legal issues from around the country include: Georgia's use of harvesting trees to pay off your loan; Maryland Bankruptcy Court ruling that says state law does not preclude unlicensed debt collectors from filing a proof of claim; The Sixth Circuit's application of Spokeo to dismiss FDCPA claims for lack of cognizable injury; New York blockchain legislation; Virginia and the Circuit Court following a partial subordination rule in interpreting subordination agreements; Illinois and the Appellate Court offering guidance on the diligence requirement for service by publication, and changes to the Illinois Condo Act and Community Association Act.

I look forward to seeing each of you at ANSWERS this July. Please reach out to let me know what the ALFN can do to assist you, or to discuss ways to get more involved. a

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

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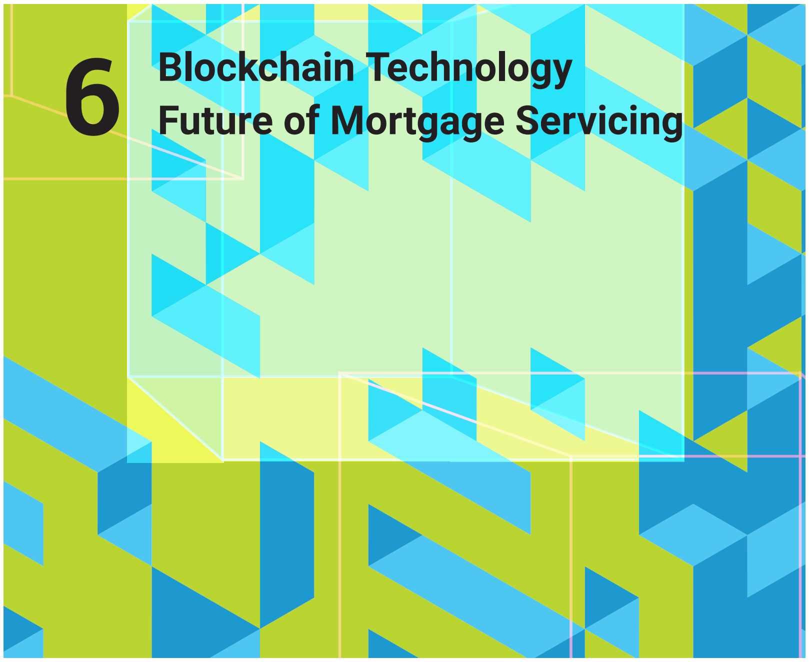

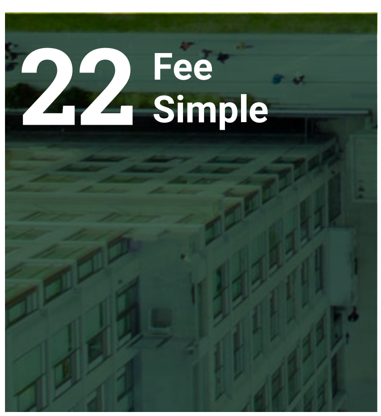

MEMBER BRIEFS

STATE SNAPSHOT

MEMBER BRIEFS

ALFN ANSWERS
JULY 22-25

Now in its 16th year, ANSWERS is a mortgage servicing and regulatory compliance event that leads the industry in educational content and networking opportunities. ANSWERS brings together over 300 attendees from mortgage servicers, government-sponsored enterprises, national banking institutions as well as the ALFN's leading network of attorneys, trustees, and industry service providers. Attendees can expect the same great networking with clients, potential clients, and industry peers through our expanded on-site networking receptions and dinners (including a group dinner every evening of the conference), off-site group networking activities, and our industry-leading educational offerings. ANSWERS 2018 will be the industry event that you simply can't afford to miss.

REGISTER, SPONSOR OR LEARN MORE AT
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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!

GET INVOLVED AND REAP THE BENEFITS

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

ALFN offers members an opportunity to serve on small, issue or practice-specific groups. Take the opportunity to have direct involvement in developing and leading the activities of the ALFN. Volunteering is one of the most important activities you can do to take full advantage of your membership value. To expand your coverage in as many practice groups as possible, we recommend you assign specific individuals in your company based on their interests and expertise to our various practice groups. For descriptions of each group, their focus, activities and other details, visit Member Groups at **ALFN.org**.

ALFN EVENTS : SAVE THE DATES

JUL. 22-25

ANSWERS

ALFN's 16th Annual Conference
The Ritz-Carlton Bacara,
Santa Barbara, CA

NOV. 14

FC INTERSECT

Omni Mandalay
at Las Colinas
Dallas, TX

ARE YOU A GREAT SPEAKER AND EDUCATOR?

THEN WE WANT YOU.

If you want to be considered for a panelist position as a speaker or moderator in 2018 at one of our events, please find our events tab on alfn.org and fill out the speaker form listed there. Each year many members submit their interest to speak at ALFN events, and we are looking for the best educators and presenters out there to get involved. To be considered, everyone in your company that wants to speak on a panel in 2018 must complete a speaker form. We are now accepting speaker forms for the Foreclosure Intersect on November 14 in Dallas, TX. Forms for that event are due by August 20.

WHAT WE HAVE IN STORE FOR YOU!

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

ARE YOU ON THE LIST?

Does everyone with your company receive ALFN emails? If not, send us a complete list of your company employees and we will add them to our database to make sure everyone receives our updates and reminders. We often send emails on important opportunities for our members, so we don't want you to miss out on all the ways you can get involved. If you have a multi-state or Enterprise membership in the ALFN, don't forget to include all employees from your additional states of membership as well. Contact us at info@alfn.org to be included.

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Contact Susan Rosen at srosen@alfn.org to design a package that is right for you to sponsor single or multiple events throughout the remainder of 2018

ALFN WEBINARS

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

WEBINAR TYPES

Practice Building Series

Presentations on operational and business issues facing our members.

Hot Topic Legal Updates

Industry hot topics and litigation updates.

State Spotlight

Focusing on those state specific issues.

Members Only

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

On-Demand

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

BLOCKCHAIN TECHNOLOGY
FUTURE OF MORTGAGE SERVICING

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IN THE WAKE of the newfound surge in interest regarding decentralized currency, it's only natural that the mortgage serving industry's foray into this space through blockchain-based applications has garnered some renewed interest. Although fundamentally different from the current cryptocurrency "fad," the concept of applying blockchain technology to the mortgage servicing industry has the potential to profoundly alter the manner in which mortgage lender transactions, and subsequent transfers of interest, are memorialized.

As any attorney or servicer that's dealt with a lost promissory note knows, paper still rules the day in default servicing litigation, as financial institutions still rely heavily on paper processes for their lending practices. In fact, it's quite incredible to think that in an era well past the advent of the digital age, so many documents involved in the lending process – mortgage notes, leasing contracts, etc. – have substantial cash value tied to them that could be severely impacted if physically lost, or even if the authoritative digital copy is misplaced.

Similarly, the vast majority of real estate registry records are paper based, and highly centralized as well. The net effect of these practices results in a consortium of a financial, legal, governmental, and real estate intermediaries which serve to lengthen the mortgage lending processes, delay transfers of title, increase associated fees, and complicate a lender's already burdensome task of demonstrating regulatory compliance. Blockchain technology seeks to tackle these challenges head on by removing the proverbial "red tape".

For as much buzz as it generates, however, blockchain technology spawns just as much confusion. Essentially, blockchain-based applications allow authorized users to record and track transactions in a decentralized database in real time. Unlike Bitcoin or other crypto-currency blockchain networks that are centralized and public, the blockchain networks contemplated here are owned privately by the institution using the technology (whether developed by a third party like "R3" or a company's in-house IT Department) and user-authorized. This "distributed ledger technology" is the platform by which the mortgage industry would implement the peer-to-peer transactions and blockchain ledgers. Once implemented by a major financial institution, other institutions would invariably join in on the specific ledger and pool resources to utilize the same technology, as it would behoove each company to utilize the same ledgers to facilitate the transactions or "blocks" between them.

Most importantly, these real time "blocks" are visible to anyone with permission on the network, and cannot be altered in any way once entered to the ledger system. Blockchain technology digitizes entire business transactions, and the resulting title transfers, in a tamper-proof format. Each permissioned user would have the same access to the timeline of transactions or events.

In theory, a borrower could access the blockchain-based platform to create a unique profile with all applicable loan application information and the originating lender would then access the same platform to review and approve the loan. This would be followed by the title agent and the applicable governmental recording entity's memorialization of the transfer of title in the platform. As time passes, any subsequent securitization or transfers of the beneficial interest on the loan would also be tracked and codified within the digitized ledger. In the real estate context, real property would develop its own digital history reflecting ownership history and much more. Essentially, the entire history of a mortgage loan, and potentially the underlying asset, would be completely verifiable in a digital format (at least in theory).

If applied as initially conceptualized, banks and lenders under constantly increasing regulatory compliance pressure could quickly and easily demonstrate how the entire loan history has unfolded. This would be a revolutionary response to the growing problems with CFPB compliance or "Qualified Written Requests" under *12 CFR 1024 (Regulation X)*. Better still, thanks to the tamper-proof nature of blockchain, regulatory compliance reporting would reap the added benefit of this presumed inherent reliability. Accordingly, blockchain technology has the potential to support a lender or bank's position in an audit, increase transparency, strengthen compliance, and bolster consumer confidence.

While blockchain- based systems have the potential to rattle the entire industry, there are still some very practical challenges to its success and implementation. Enough, some say, to stop it from every taking shape in a truly decentralized format as originally envisioned. For instance, who would determine whether a user was authorized? Would such a gatekeeper function diminish the decentralized nature of the platform? Further, although the very real concern for paper forgeries of documents would be alleviated, it would be replaced with much more complex data privacy, consumer protection, and data security concerns, including but not limited to, adherence to each jurisdiction's data privacy laws.

Additionally, for blockchain-based platforms to enjoy the indicia of trustworthiness that would establish its value to the industry, a legal and regulatory framework would be indispensable. No such framework currently exists. Accordingly, "paper" duplicates would still be required, at least in most U.S. jurisdictions, to enforce and litigate disputes based on digital contracts until legislation is created to apply the technology to current laws and regulations, particularly the Uniform Commercial Code. Furthermore, even though blockchain's immutable character could theoretically ease the burden of increased regulatory compliance, the potential anonymity of the parties involved could lead to new compliance challenges related to counter-terrorism financing regulation and tax implications.

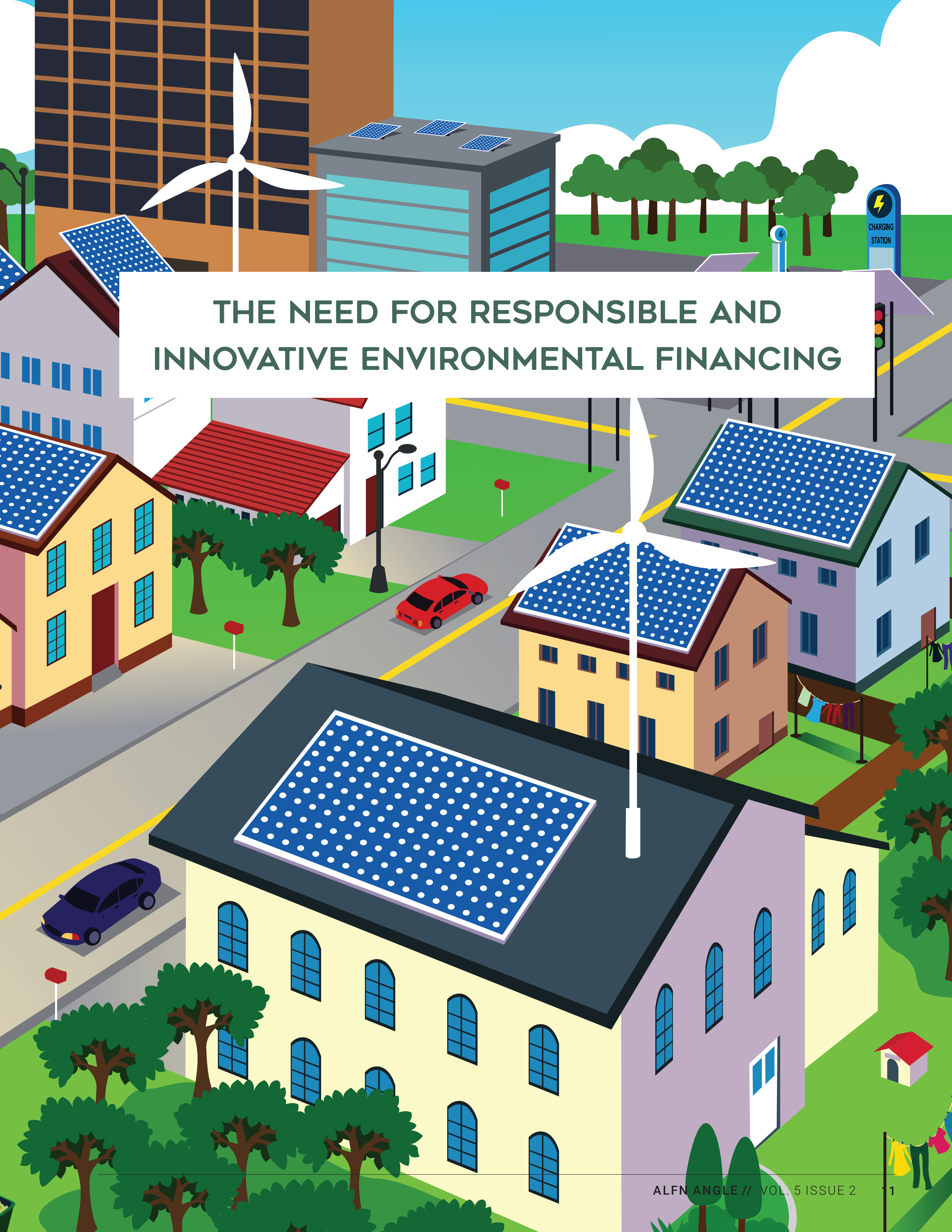
ESSENTIALLY, BLOCKCHAIN-BASED APPLICATIONS ALLOW AUTHORIZED USERS TO RECORD AND TRACK TRANSACTIONS IN A DECENTRALIZED DATABASE IN REAL TIME.

Notwithstanding, if these hurdles are overcome and drawbacks can be minimized, the use of blockchain technology has the potential to establish a more efficient mortgage market by exponentially increasing the speed and decreasing the lag time in the lending process. And if there's one constant that remains, it's that "time is money". The aggregate time and effort saved by blockchain, coupled with decreased resources to adhere with compliance and audit matters, could translate to huge financial savings in the mortgage industry.

If nothing else, the conversation regarding blockchain technology has one guaranteed result - industry leaders are rethinking and challenging some fundamentals of the financial services industry. Blockchain has taken the once humdrum back-office technology upgrades and increased their relevancy. To that extent, blockchain technology will assuredly impact the mortgage industry in a positive way by spurring decision makers to take a hard look at current the mortgage transaction process, and explore new technologies to increase efficiency, transparency, and compliance. a

FIGHTING FOR THE GREEN

THE NEED FOR RESPONSIBLE AND INNOVATIVE ENVIRONMENTAL FINANCING



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Over the past few years, climate change and renewable energy have been heavily focused on across multiple platforms. Scientists, politicians, and media pundits devote entire conferences, papers, speeches, and news cycles to these topics on a regular basis.

Even the mortgage industry has thrown its hat into the ring. Property Assessed Clean Energy (PACE) programs provide financing to owners seeking to make enhancements to their properties that increase energy efficiency. Because PACE loans are repaid as a tax assessment that is charged annually for up to 20 years, PACE financing is an excellent way to increase a building's energy efficiency at a low and manageable cost for the owner. In the event of the sale of a property with outstanding PACE financing, the obligation may continue with the property, and the new homeowner will be responsible for the payments on the outstanding PACE amount. After the program received support from President Obama's administration, PACE-enabling legislation was adopted by 33 states and the District of Columbia, although currently residential PACE programs are only offered in California, Florida, and Missouri[1].

Yet, even with these great strides, the various mortgage industry entities are taking a step away from the PACE programs. In December of last year, the Department of Housing and Urban Development (HUD) has announced that they will stop insuring mortgages on homes that also carry PACE liens, after it insured such loans for over a year[2]. Fannie Mae and Freddie Mac have ceased purchasing mortgage loans secured by a property with an outstanding PACE loan, originating on or after July 6, 2010, with first lien priority[3]. The VA is currently the only agency which insured loans with PACE liens upon lenders meeting certain requirements; however, the circular with PACE requirements expires July 1, 2018[4].

The position of the U.S. government agencies on this matter seems to be in direct conflict with the intentions and goals of the international community in regard to environmental protection. Last year, the Financial Stability board, an influential international body that monitors and makes recommendations about the global financial system, launched the first international task force on climate-related financial disclosures. This task force will consider multiple avenues of risk associated with climate change, as well as what constitutes effective financial disclosures across industries5. The Bank of England (BoE) is also researching climate change, and the EU recently proposed integrating environmental risks into the mandates of the European Space Agency (ESA) as part of its action plan on sustainable and green finance.

The global financial community is taking a stance that green financing is an important emerging development strategy. According to the Climate Bonds Initiative, an international, investor-focused not-for-profit organization, the world financial industry issued $157 billion in green bonds in 2017 and forecasted $250 billion in green bonds to be issued in 20186. The

[1] http://pacenation.us/

[2] https://www.hud.gov/sites/dfiles/OCHCO/documents/17-18ml.pdf

[3] https://www.fanniemae.com/content/guide/selling/b5/3.4/01.html; http://www.freddiemac.com/singlefamily/guide/bulletins/pdf/iltr050510.pdf; https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Statement-on-Certain-Energy-Retrofit-Loan-Programs.aspx

[4] https://www.benefits.va.gov/HOMELOANS/documents/circulars/26_16_18.pdf

[5] https://www.fsb-tcfd.org/about/

[6] https://www.climatebonds.net/files/reports/cbi-green-bonds-highlights-2017.pdf

mortgage industry's decision not to support the PACE financing would seem to give the opposite message.

So why, then, are the mortgage industry entities making this change?

Although the PACE programs show a concerted effort toward green financing, they introduced an increased risk both to the consumers and the industry itself. The loans are often provided by private companies, and they are not regulated in any uniform manner. There is also a distinct lack of due diligence that would protect the consumer and their best interests. PACE financing does not follow the traditional underwriting process, which means that there is no evaluation of the borrower's credit standing.

Additionally, borrowers have reported a distinct lack of PACE knowledge. They are often assured that their outstanding PACE loan obligation will run with the property; however, PACE loans can present property resale issues that result in the borrower having to pay off the PACE loan prior to closing. Borrowers also face aggressive marketing tactics, along with misleading product information and significantly higher interest rates than other financing options[7].

In a 2014 report, Moody highlighted the risks associated with PACE financing for commercial mortgage-backed securities. The report indicated that PACE loans may materially increase the risk profile of the property because of the loan priority to the initial mortgage. PACE loans are added to the property tax polls, and therefore take a senior lien position to the mortgage[8].

These are all valid risks that are necessary for the industry to address. It may very well be that the PACE programs are not the best initiative for the mortgage industry to address green financing concerns. If that is the case, though, regulators must focus on innovation so that they can provide more guidelines and regulations to promote renewable energy sources, low carbon buildings, clean transport, sustainable land use, and sustainable water and waste management. We need a uniform financial product that can provide sustainable and attractive incentives for both consumers and lenders to make more environmentally responsible choices in the way that we build and in the way that we consume resources.

> The position of the U.S. government agencies on this matter seems to be in direct conflict with the intentions and goals of the international community in regard to environmental protection.

Environmental concerns are not myths, and they are not going away. They need to be carefully considered by all industries, and the initiatives rolled out must be thoroughly evaluated to ensure that the individuals participating in them are protected, and that they are truly effective in promoting a greener environment. The PACE programs brought the mortgage industry onto the playing field; we now need to keep the ball rolling by evaluating what worked, integrating the lessons that we learned, and forging ahead with carefully crafted ideas and action plans that will work toward the greater good.

7 https://www.mba.org/issues/residential-issues/property-assessed-clean-energy-(pace)-lending

8 https://www.moodys.com/research/Moodys-CMBS-loan-documents-need-to-explicitly-address-PACE-clean--PR_309970

NEW NYC LAW:
HARASSED TENANTS CAN **RECEIVE COMPENSATORY** DAMAGES AND LEGAL FEES

BY: ROSEMARIE A. KLIE, SENIOR ASSOCIATE
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A new law became effective Nov. 28, enabling tenants or lawful occupants of multi-unit dwellings in the five boroughs of New York to obtain monetary compensation of $1,000 or compensatory damages plus legal fees if they can prove in housing court that they were harassed by their landlords. This law was signed by Mayor Bill De Blasio as part of a package of bills that expands the NYC Tenant Harassment Law, also known as the Tenant Protection Act.

The original Tenant Harassment Laws were signed by former Mayor Michael R. Bloomberg in March 2008. These laws allowed New York tenants or lawful occupants for the first time to file claims alleging harassment by their landlords in the NYC housing courts. Previously the housing courts did not have the jurisdiction to adjudicate harassment claims. The laws apply to all tenants and lawful occupants of multi-unit dwellings, except owners of cooperative or condominium apartments. (See, NYC Administrative Code sections 27-2005(d) and 27-2004(n).)

Harassment as defined in paragraph 48 of Section 27-2004 of the New York City Administrative Code, is "any act or omission by or on behalf of an owner that (i) causes or is intended to cause the occupants to vacate or waive their rights in relation to such occupancy, and (ii) includes one or more of the following acts or omissions…". Some of the acts/omissions cited in the law include bringing frivolous court actions, failing to provide essential services, failing to cure housing violations, removing occupants' possessions, repeatedly contacting or visiting the occupant on weekends, holidays, or before 9 a.m. or after 5 p.m. on weekdays.

Harassment also consists of "contacting any person lawfully entitled to occupancy of such dwelling unit, or any relative of such person, to offer money or other valuable consideration to induce such person to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy for 180 days after the owner has been notified, in writing, that such person does not wish to receive any such offers…." (See NYC Administrative Code section 27-2004 (48)f-1.) This provision warrants extreme caution on the part of mortgage servicers and their property managers with respect to "buy-out" or "cash-for-keys" negotiations.

The complete list of harassing acts/omissions are set forth in paragraph 48 subdivisions a-g. The penalties to be imposed on the landlord after a finding of harassment are set forth in Sections 27-2115 and 27-2121 of the NYC Administrative Code.

Landlord groups throughout the city came out strongly against this legislation and filed an action known as *Prometheus Realty Corp v. the City of New York,* alleging that the law violated the New York State

THE NEW CIVIL PENALTIES THAT WENT INTO EFFECT DEC. 28 INCREASED THE PENALTIES TO $2,000 TO $10,000 FOR THE FIRST OFFENSE AND $4,000 TO $10,000 FOR THE SECOND OFFENSE.

and U.S. constitutions and unlawfully expanded the jurisdiction of housing court judges. The Hon. Eileen Rakower of the NYC Supreme Court denied the plaintiff's motion for summary judgment and granted the city's motion to dismiss. The decision was appealed, but was upheld in the Appellate Division, First Department. The appellate court held that the law did not impermissibly expand the jurisdiction of the NYC Housing Court and did not violate landlords' substantive due process rights. *(See 80 AD 3d 206(11/16/10)*.

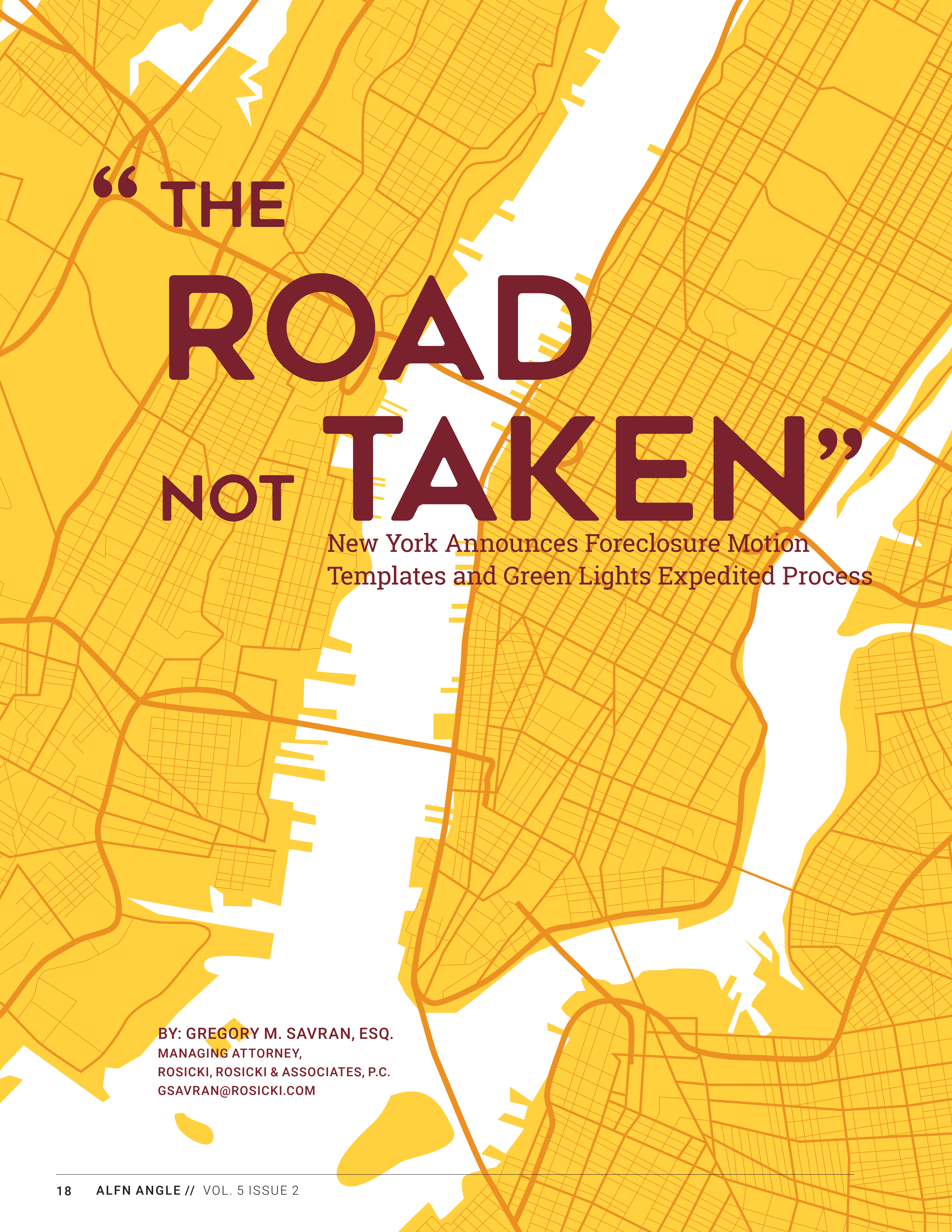
Interest in the subject was renewed, and on Aug. 30, De Blasio signed a collection of new tenant harassment laws. The most significant law codified in Section 27-2115(o) of the NYC Administrative Code gave lawful occupants or groups of lawful occupants who can prove harassment by their landlords the ability to obtain compensatory damages *or* $1,000 *plus* reasonable attorneys' fees and costs. In addition, the new law gave the courts the discretion to impose additional punitive damages on landlords. This is the law that took effect Nov. 28.

Previously, the penalty for tenant harassment was a civil fine payable to the city and a temporary restraining order barring the landlord from engaging in the harassing conduct. The current law provides additional penalties, permitting the court to award monetary compensation to the harassed party plus legal fees *and* opens the door to the possible imposition of punitive damages. The penalties to be imposed on the landlord after a finding of harassment are set forth in Sections 27-2115 and 27-2121 of the NYC Administrative Code.

The new laws have also increased the civil penalties for tenant harassment. In the original 2008 legislation, the court could impose a civil penalty of not less than $1,000 and not more than $5,000. The civil penalty was increased in 2014, allowing the courts to impose civil penalties of not less than $1,000 and not more than $10,000 for a first offense and not less than $2,000 and not more than $10,000 for a second offense within five years. The new civil penalties that went into effect Dec. 28 increased the penalties to $2,000 to $10,000 for the first offense and $4,000 to $10,000 for the second offense.

Additionally, the new law permits a finding of harassment to be posted, similar to a violation, on the city's Housing Preservation and Development (HPD) website. This essentially creates a digital record of all harassment findings against landlords. This is particularly relevant as the new laws allow the courts to consider harassment committed by landlords against other lawful occupants of the building.

De Blasio also signed into law another measure, which also took effect Dec. 28, creating a rebuttable presumption that the harassing acts or omissions of the landlord were done with the intent to force occupants to vacate their apartments or surrender or waive their rights in relation to their occupancies. Tenants are no longer required to prove that their landlords acted with this intent. The tenant merely needs to prove that the harassment took place. *(See, Section 27-2004 (48) of the NYC Administrative Code.)* I expect this law to be subject to a court challenge on due process grounds. a



"The Road Not Taken"

New York Announces Foreclosure Motion Templates and Green Lights Expedited Process

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ON NOVEMBER 28, 2017, New York's Office of Court Administration signed Administrative Order 356/17, promulgating for use certain motion templates in foreclosure actions. Our firm worked with members of both the plaintiff and defendant's bar in drafting these proposed templates, which endeavor to bring uniformity to foreclosure law in New York State when no answer is filed.

The Order approves three motion templates: 1) an order of reference; 2) a judgment of foreclosure and sale; and 3) a combined motion, which combines the relief of the first two motions into one application. The relief in this third motion has always been available to plaintiff firms, but historically has not been the practice with the courts. By providing a formal combined motion template for use, AO 356/17 green lights this expedited process.

RPAPL § 1321 SUPPORTS EXPEDITED PROCESS

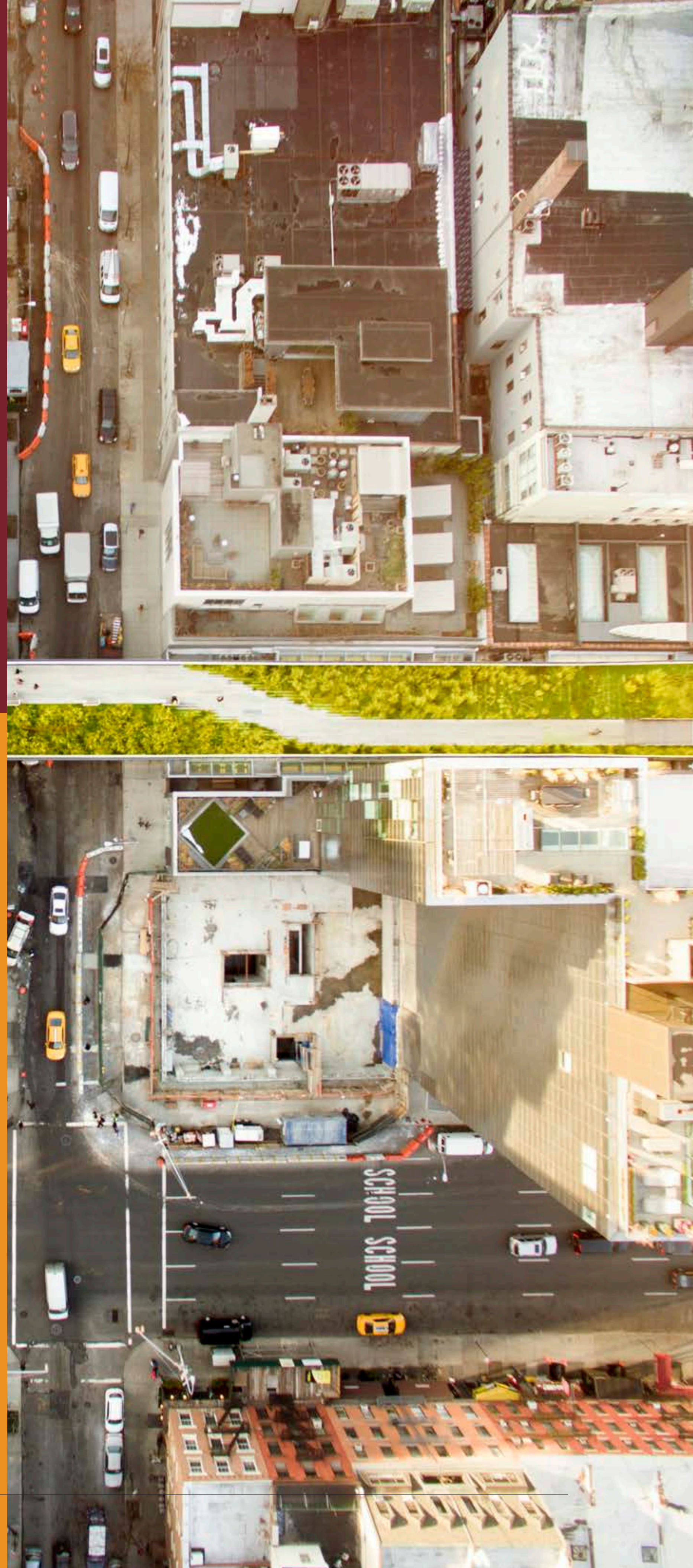
Traditionally, in New York foreclosure actions when there is no answer filed by the defendant, the plaintiff makes two motions in order to auction the property at a foreclosure sale. 1) An order of reference, which requests that a referee is appointed to determine the amounts due and owing, and
2) a judgment of foreclosure and sale to confirm the referee's report. Although this two-motion process has been the historical practice in New York, Real Property Actions and Proceedings Law does not require that a referee be appointed to compute the amounts due and owing. RPAPL § 1321 provides: *"If the defendant fails to answer within the time allowed or the right of the plaintiff is admitted by the answer, upon motion of the plaintiff, the court shall ascertain and determine the amount due, or direct a referee to compute the amount due to the plaintiff..."*

From the plain language of RPAPL § 1321, the court has the option to determine the amounts owed based on proofs provided by the plaintiff, "or" direct a referee to compute these amounts. Though the practice has been to appoint a referee for this purpose, such reference is not required under the RPAPL. With a combined motion, there is no need for a referee's report and the action is accelerated by requiring only one motion in place of two. This provides an expedited road to a foreclosure auction for non-litigated cases and may help clear up court dockets still inundated with foreclosure actions and zombie properties.

COMPARISON TO RPAPL § 1309

Real Property Actions and Proceedings Law § 1309 is entitled *"Expedited application for judgment of foreclosure and sale for vacant and abandoned property."* This law became effective on December 20, 2016 in an effort to tackle the "zombie" property dilemma in New York State. This law provides plaintiffs with an expedited avenue toward foreclosure similar to the combined motion template under RPAPL§ 1321 in the instance where the property is both vacant and abandoned. The law requires the plaintiff to provide proof that the property is both vacant and abandoned, which requires multiple inspections of the property within a specified time-period.
In addition to the requirement that the property be deemed vacant and abandoned, RPAPL § 1309(5)(a) does not allow a judgment of foreclosure and sale to be entered *"if the mortgagor or any other defendant has filed an answer, appearance, other written objection that is not withdrawn, or has otherwise demonstrated an intention to contest the*

THIS PROVIDES AN EXPEDITED ROAD TO A FORECLOSURE AUCTION FOR NON-LITIGATED CASES AND MAY HELP CLEAR UP COURT DOCKETS STILL INUNDATED WITH FORECLOSURE ACTIONS AND ZOMBIE PROPERTIES.



foreclosure action." In that regard, RPAPL § 1309, like RPAPL § 1321, pertains to non-litigated actions. However § 1309 goes a step further to include other levels of challenge or participation in the action beyond filing an answer.

Comparing RPAPL §§ 1309 and 1321 side to side, these two options provide the Plaintiff with the same relief by combining two steps into one. However, RPAPL § 1309 is more restrictive than § 1321. RPAPL § 1309 focuses on occupancy and maintenance, but also requires that there is not even a hint of litigation in the action. RPAPL § 1321, however, is centered only on whether the action is formally litigated as a result of an answer being filed. While RPAPL § 1309 provides an avenue to expedite vacant properties, this same relief can apply to zombie properties under RPAPL § 1321.

To give RPAPL § 1309 its due, this statute made sense when enacted. While RPAPL § 1321 provides expedited relief, this statute was not being widely used in this manner. RPAPL § 1309 is a step taken by the legislature to address zombie properties that devalue neighborhoods and brought an expedited process to the forefront of New York foreclosure law. To that extent, this legislation is to be commended.

EXISTING PRECEDENT FOR EXPEDITED PROCESS UNDER RPAPL § 1321

Prior to AO 356/17 there existed precedent from various counties to proceed in an expedited manner under RPAPL § 1321. Nassau and Queens Counties already have foreclosure trial/inquest parts that allow the plaintiff to go straight to judgment if no answer is filed. Just prior to the signing of AO 356/17, Suffolk County enacted Administrative Order 125-17, which creates an expedited part based on RPAPL § 1321 combined motion practice. Besides certain counties designing expedited parts, plaintiff attorneys have made combined motions under § 1321 throughout the State prior to AO 356/17. Success of these motions have been based on the preference of different districts, counties, and judges who have either accepted this process or opted for the traditional New York approach.

CPLR § 3408 NEW LAWS CREATE EQUITABLE ARGUMENT FOR EXPEDITED PROCESS

In addition to the enactment of RPAPL § 1309, in December 2016, CPLR § 3408 was amended. Specifically, CPLR § 3408(m) allows a defendant that appears at a settlement conference the right to file an answer within thirty days of the initial conference if the defendant failed to do so pursuant to CPLR § 320. This bold exception to CPLR § 320 is afforded to defendants only in foreclosure law as a matter of right. Additionally, CPLR § 3408(l) requires the court to explain to defendants their right to file an answer and provide the defendant with a "Consumer Bill of Rights" at the conference. These new laws mark an extraordinary effort to protect and educate defendants regarding their rights to file an answer. If after this second bite of the apple, a defendant still has not filed an answer, there is an equitable argument to encourage plaintiffs to proceed in an expedited manner.

CONCLUSION

Plaintiffs in foreclosure actions can take three roads when no answer is filed. 1) The traditional two-motion route; 2) in the instance the property is vacant and abandoned, the plaintiff may proceed under RPAPL § 1309; and 3) a combined motion under RPAPL § 1321. The passing of RPAPL § 1309 into law pioneered a break from the traditional practice of requiring two separate motions to go to auction. However, there is no circumstance under the RPAPL where the plaintiff has the ability to pursue a 1309 motion, while not also having the ability to pursue a 1321 combined motion.

AO 356/17 trumpets mainstream use of the combined motion under RPAPL § 1321 for all non-litigated actions, regardless of occupancy status. Notably, no uniform motion template was announced for its § 1309 counterpart. Considering restrictions placed under § 1309, it is no surprise that plaintiffs will look toward § 1321 as a less taxing and more inclusive statute. To provide an analogy, if these two statutes were roads, then Route 1309 would be a new road with some roadblocks, while Route 1321 existed all along and goes to the same exact location with less obstacles. Route 1321 is historically a road "less traveled by", but a road that should be considered.

FEE SIMPLE

UNDERSTANDING CALIFORNIA'S NEW RECORDING FEES

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THE RULE

On September 29, 2017, Governor Jerry Brown signed Senate Bill 2, the Building Homes and Jobs Act (the "Act"), authored by Senator Toni Atkins (D-San Diego). The Act creates a new source of funding for affordable homes by charging a $75 fee for recording certain types of real estate documents. It is estimated that the new fee will generate $250 million each year. The Act, which became effective immediately, is part of a comprehensive package of legislation that aims to address California's housing dilemma by imposing a new duty on counties to send quarterly revenues from this fee, after deduction of administrative costs, to the State Controller for deposit in the Building Homes and Jobs Fund, created within the State Treasury.[1]

The Act adds California Government Code section 27388.1, requiring a $75 fee per document to be paid, commencing January 1, 2018, at the time of the recording "of every real estate instrument, paper, or notice required or permitted by law to be recorded..., per each single transaction per parcel of real property." The fee is capped at $225 for transactions involving the recording of multiple documents. Section 27388.1(a)(1) defines "real estate instrument, paper, or notice" to mean "a document relating to real property, including but not limited to, the following: deed, grant deed, trustee's deed, deed of trust, reconveyance, quit claim deed, fictitious deed of trust, assignment of deed of trust, request for notice of default, abstract of judgment, subordination agreement, declaration of homestead, abandonment of homestead, notice of default, release or discharge, easement, notice of trustee sale, notice of completion, UCC financing statement, mechanic's lien, maps, and covenants, conditions, and restrictions."[2] The statute does not limit the definition to a finite list; other real property related documents not specifically listed in the code section also remain subject to the fee, unless an exception applies.

EXCEPTIONS

Section 21388.1(a)(2) provides for certain exceptions to the $75 fee, including transactions involving a transfer/sale of real property that is subject to the imposition of a documentary transfer tax, as defined by California Revenue and Taxation Code section 11911. Transactions covered by the documentary transfer tax under Revenue & Taxation Code section 11911 involve a purchase and sale or change of ownership when the consideration or value of the interest or property conveyed exceeds $100.[3] This exception would apply to transfers of real property by court order, or pursuant to an eminent domain judgment, for example, since Revenue & Taxation Code section 11911 is not limited to voluntary vs. involuntary sales.[4] Additionally, easements that may potentially endure for a substantial period of time, such as perpetual easements and easements for life, are also subject to the provisions of the Documentary Transfer Tax Act, and thus also should be subject to an exception from the new fee.[5] Section 2 of the Bill further describes the intention of the exception as follows: "In order to promote housing and homeownership opportunities, the recording fee imposed by this act shall not be applied to any recording made in connection with a sale of real property. Purchasing a home is likely the largest purchase made by Californians, and it is

[1] Legislative Counsel's Digest, SB 2, Atkins. Building Homes and Jobs Act; See newly added Cal. Health & Saf. Code § 50470.
[2] Cal. Gov. Code §12388.1(a)(1).
[3] California Revenue & Taxation Code §11911(a).
[4] People ex rel. Department of Public Works v. County of Santa Clara (Cal. App. 1st Dist. 1969), 275 Cal. App. 2d 372, 79 Cal. Rptr. 787, 1969 Cal. App. LEXIS 1927.
[5] 62 Ops. Cal. Atty. Gen. 87.

the intent of this act to not increase transaction costs associated with these transfers."

Section 21388.1(a)(2) also provides an exemption from the new fee in connection with a transfer of property to a grantee who will occupy the dwelling as a principal residence, even if the documentary transfer tax is not imposed on the transfer. Thus, documents recorded as part of a refinance loan on an owner occupied property, including, for example, transfer deeds, i.e., in and out of a trust, are exempt. However, in the same type of refinance transaction regarding a non-owner occupied property, the fee would be imposed as to both the deed transferring the ownership interest out of the trust and the deed transferring it back into the trust.

As a practical matter, county recorders do not take it upon themselves to determine whether a document is subject to the fee or the exception. Title companies have confirmed with the county recorders that any exception for payment of the fee on an individual document must be set forth on the face of the document or in a cover sheet when the document is presented for recording. A few select counties require inclusion of a declaration under penalty of perjury that an exception applies.

INTERPRETING THE $225 FEE CAP

For purposes of the $225 fee cap, documents included in a single transaction are those presented together and related to the same parties and property.[6] The Legislature's imposition of the cap "*per each single transaction per parcel of real property*" suggests that the $225 fee limit is not intended to be for the life of a loan, but rather is a cap for all documents submitted simultaneously in one transaction. Multiple documents that relate to a sale or transfer transaction of real property received from one party may include multiple "SB2" transactions. If not otherwise exempt, the fee would be $75 for each recorded document, up to the cap of $225. Trailing documents that come in days or weeks after the other documents in a transaction would not be included in the calculation of the $225 cap and would require payment of the $75 fee if not otherwise exempt. Thus, for example, a transfer or assignment of a loan after origination (other than a simultaneous assignment of the loan upon origination), commencement of foreclosure proceedings, or reconveyance of the loan would be considered separate transactions for purposes of the statute, even though they may relate to the same parties to the loan.[7]

PRACTICAL APPLICATIONS FOR LENDERS AND LOAN SERVICERS

From a practical standpoint, lenders and loan servicers should now begin to include in their payoff demand statements an additional $150 in recording fees for the recording of a Substitution of Trustee and Full Reconveyance ($75.00 for each "title" on the document), necessary for the release of the loan following a full payoff. Additional examples of a multiple title document include a Substitution of Trustee and Notice of Default, Deed of Trust with Assignment of Rents (also $150), and an Assignment of Deed of Trust, Substitution of Trustee and Notice of Default combination ($225). Title companies and county recorders have advised that such multi-purpose documents will be assessed the new fee for each title.

With respect to the disclosure of fee estimates on a new loan, it is advisable to obtain an estimate from the title company handling the closing, so that the loan estimate is as close as possible to the actual fees to be incurred. While there is currently some uncertainty about the disclosure of good faith fee estimates for transactions and how many documents will need to be recorded in each transaction, once the Act is put into practice and closing agents gain experience, the fee estimates will become easier. In the meantime, it appears that the preferred method is to disclose the transaction maximum of $225[8], as a refund can be given through an amended settlement statement in the event actual recording fees are lower. Otherwise, if the lender under-discloses and the difference exceeds applicable tolerances, the lender would be responsible for payment of the tolerance cure on every such transaction.[9] These amounts could certainly add up over the course of many transactions!

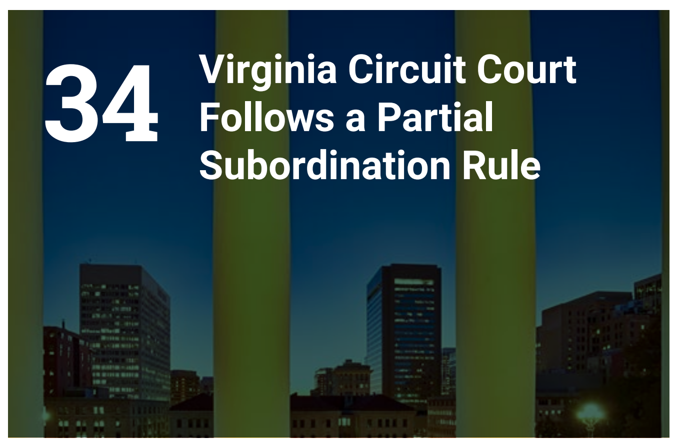
[6] California Mortgage Bankers Association SB2 Compliance Webinar, January 25, 2018, Lisa Tyler, Fidelity National Financial, Inc., who has worked with all 58 County Recorders' Offices regarding implementation of the Bill.

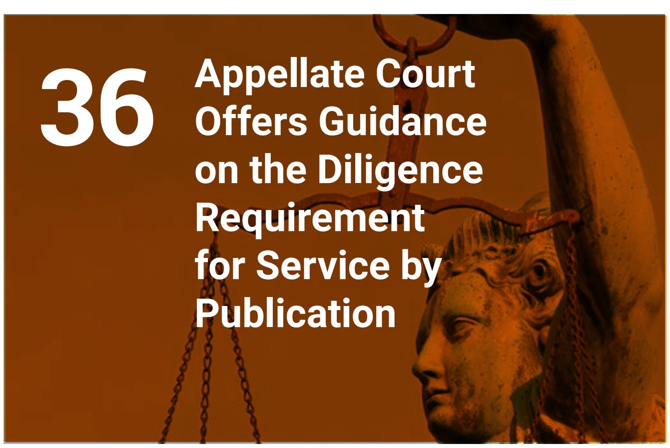
[7] California Mortgage Bankers Association SB2 Compliance Webinar, January 25, 2018, Lisa Tyler, Fidelity National Financial, Inc., who has worked with all 58 County Recorders' Offices regarding implementation of the Bill.

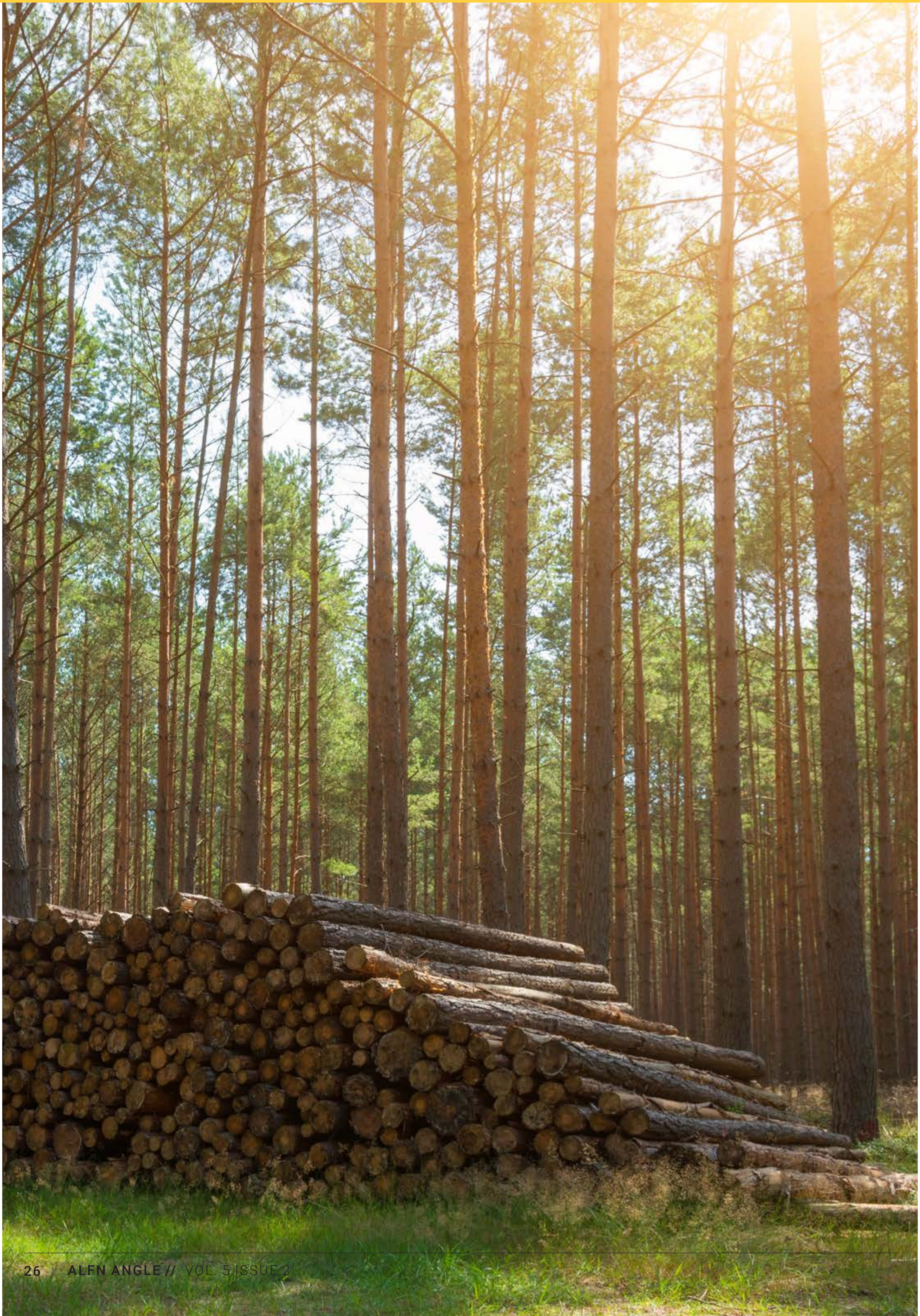
[8] The disclosed finance charge is considered accurate if it is not understated by more than $100, but overstatements are not violations. 12 C.F.R §1026.18(d).

[9] 12 C.F.R. §1026.19(f)(2)(v)

STATE SNAPSHOT







How Harvesting Trees Can Pay Off Your Loan in Georgia

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IN GEORGIA there are 24.4 million acres of timberland available for commercial use. This is more than any other state in the nation. Forest-related industries have a $32.2 billion impact on the state's economy and provide over 133,000 jobs to Georgians. Each year, Georgia harvests more timber and exports more pulp and paper products, wood fuel, and wood pellets than any other state. All the while, Georgia grows 41% more timber each year than it harvests.

Perhaps the most important fact about Georgia's timberlands is that over 90% are privately-owned, with the remaining 10% are used for national, state, and local government lands, forests, and parks. The majority of these privately owned lands are owned by individuals. With the value of timber being such an important part of Georgia's economy, one must ask, how are the lenders protected?

In 1939 Georgia's legislature enacted the predecessor to today's O.C.G.A. § 51-12-51. This code section states that if there is a properly recorded security deed, and a person or entity "buys, sells, cuts, removes, holds, disposes of, changes the form of, or otherwise converts to the use of himself, itself, or any other trees" on the secured land, that person is liable to the holder of the security deed for the value of the trees. If the trees are sold or purchased without the lender's permission, the lender is entitled to recover up to the unpaid portion of the debt, plus reasonable attorney's fees. The one caveat is that the borrower can use the trees for personal use, like "firewood or other necessary uses in and around his farm." *Id.*

The effect of this can best be shown through an example. A borrower obtains a loan and pledges his property as security for the loan to the lender via a security deed which is properly recorded. Then, without the lender's written permission, the borrower sells the existing trees to a third party, and the trees are subsequently harvested. If the borrower has not paid off his loan, the lender can sue the borrower, the harvester (if different from the purchaser of the trees), or the purchaser of the trees. The lender can recover the full value of the trees, up to the unpaid balance on the loan, plus reasonable attorney's fees. *See Martin v. Fairburn Banking Co.*, 218 Ga. App. 803, 463 S.E.2d 507 (1995).

Perhaps the most important fact about Georgia's timberlands is that over 90% are privately owned, with the remaining 10% are used for national, state, and local government lands, forests, and parks.

If a borrower who permits the timber on the secured land to be harvested without obtaining the lenders permission, Georgia law allows the lender to protect its investment and recover the value of that timber, even if it has been sold.

Maryland Bankruptcy Court Rules that State Law does not preclude Unlicensed Debt Collectors from filing a Proof of Claim.

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IN ITS MARCH 8, 2018 Opinion, in the case of adversary matter of *Chorba v. Quantum3 Group LLC, et al.* the United States Bankruptcy Court for the District of Maryland, Baltimore Division determined that an unlicensed debt collector's Proof of Claim may be filed, based upon their right to payment of a purchased debt. That claim however, l is subject to the claims allowance process.

The Plaintiff, and Debtor in the case, Jacqueline Chorba, filed for protection under chapter 13 of the Bankruptcy Code on March 1, 2017, at which time she also filed her chapter 13 plan. In June of 2017, the Defendant, Quantum3 Group, LLC, timely filed two proofs of claim. With no objection being filed, the plan was confirmed on October 17, 2017.

On October 9, 2017, Plaintiff filed a two-count Complaint against the Defendant, which was amended shortly after to include a third Count. The three Counts: 1) Allege that the Defendant violated the Maryland Consumer Debt Collection Practices Act by filing a Proof of Claim because the Defendants are unlicensed debt collectors under the Maryland Collection Agency Licensing Act ("MCALA"); 2) Allege that the conduct alleged in Count I, is a *per se* violation of the Maryland Consumer Protection Act; and 3) Assert an objection to, and disallowance of the Defendant's Proofs of Claim.

The Defendant then filed a Motion to Dismiss the Amended Complaint on the basis of *Res Judicata* and Preemption, to which, the Plaintiff filed a response. The hearing on the Motion to Dismiss was held on January 17, 2018. The Court's Opinion was then entered on March 8, 2018, in which the Court relied heavily on the Supreme Court's reasoning in *Midland*

Funding, LLC v Johnson, 137 S.Ct. 1407, 1412 (2017), to ultimately dismiss Count I and II of Plaintiff's Amended Complaint, stating Unlicensed Debt Collectors may file proofs of claims, based upon their right to payment of a purchased debt, but that the claim is still subject to the claims allowance process. Count III of the Amended Complaint was not dismissed, as the Court did not believe the Objection to Claim was barred by *Res Judicata* or Preemption.

This Opinion raises just one of many issues that unlicensed debt collectors are facing in the State of Maryland. Although the Proof of Claim may be filed, it will most likely not withstand the claims allowance process, as the Debt Collector is not licensed and must be under MCALA. The Opinion however leaves open another major potential issue; whether or not an unlicensed debt collector can file a Motion for Relief from the Automatic Stay without violating MCALA. In a Chapter 7 Motion for Relief, it could be argued that the Motion is not an attempt to collect a debt, but, rather, is merely an attempt to lift the stay so that the creditor may enforce its rights to the extent they exist in State Court. However, it could conversely be argued that filing a Motion for Relief from the Automatic Stay, in a Chapter 13 (or Chapter 11), is an attempt to collect a debt and subject to MACALA. Unlike a Chapter 7, in Chapters 13 and 11, there is a reorganization of the Debtor's assets and liabilities, and in most cases there is a payment plan filed with the Court.

The issue of licensing under MCALA has also recently placed a "hold" on many foreclosures within the State of Maryland, pending the Court of Appeals of Maryland's decision in the combined cases of *Blackstone v. Sharma*, Sept. 2015 No. 1524 and *Shanahan v. Marvastian*, Sept. 2015, 1525. The June 6, 2017 opinion of the Court of Special Appeals of Maryland ("COSA", the intermediate appellate court in Maryland), in the combined cases, caused great concern with unlicensed debt collectors, as the COSA upheld the dismissal of two foreclosure cases initiated by unlicensed Delaware Statutory Trusts. The COSA concluded that, because these Trusts were not licensed collection agencies MCALA, and that they purchased the loans while in default, any judgment entered as a result of the foreclosure actions would be void. That decision was subsequently appealed, and on November 30, 2017, the Maryland Court of Appeals heard oral argument in the matter. The opinion of the Court of Appeals of Maryland is anticipated shortly day, leaving many unlicensed debt collectors holding tight, with fingers crossed.

STATE SNAPSHOT

The Sixth Circuit Applies Spokeo to Dismiss FDCPA Claims for Lack of Cognizable Injury

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On February 16, 2018, the United States Court of Appeals for the Sixth Circuit vacated summary judgment and dismissed claims under the Fair Debt Collection Practices Act against an Ohio attorney and his firm in *Hagy v. Demers & Adams*, 2018 U.S. App. LEXIS 3710, 2018 FED App. 0032P (6th Cir.). Drawing on the Supreme Court's holding in Spokeo, Inc. v. Robins, the Sixth Circuit Court of Appeals found that the debtors failed to show that the violation caused any harm, and therefore failed to establish standing under U.S. Const. Art. III.[1]

The underlying facts of the dispute are quite plain and begin in 2002, when the Hagys obtained a note and mortgage on a mobile home and property upon which it rested.[2] Eight years later, the Hagys defaulted on their loan, and foreclosure proceedings were commenced.[3] Settlement was achieved, and thereafter, on June 30, 2010, the lender's counsel, Demers & Adams, sent the Hagys' attorney a letter advising that no deficiency judgment would be pursued.[4] The Hagys filed suit.[5] In addition to claims against their lender for telephonic collection attempts on a waived debt, the Hagys also filed claims against Demers & Adams, alleging that the June 30th letter failed to disclose that it was from a debt collector, in violation of 15 U.S.C. 1692e(11).[6] On the FDCPA claims, the Hagys were awarded statutory damages, costs, and over $74,000.00 in attorney's fees.[7] Demers & Adams appealed.

Among other errors, Demers & Adams argued that the district court lacked jurisdiction due to the Hagys lack of standing.[8] In consideration of this argument, the Sixth Circuit Court of Appeals noted that any dispute set forth before a federal court, under U.S. Const. Art. III, must, at a minimum, contain a particular injury, caused by Demers & Adams, to be remedied by the Court.[9] The Court found that no such burden was met.[10] The Court agreed that Demers had a duty under the FDCPA to include a required disclosure in its correspondence, and that the duty was breached; however, the Court held that Congress lacked the authority to create an injury on behalf of a claimant.[11] The Court noted that no harm or injury was caused by the letter from Demers; in fact, the letter served to give the Hagys peace of mind. Leaning on *Spokeo*, the Court agreed that "a bare procedural violation" does not equate to actual harm or injury.[12] Further, in

[1] Hagy v. Demers & Adams, 2018 U.S. App. LEXIS 3710, 2018 FED App. 0032P (6th Cir.), citing Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 194 L. Ed. 2d 635, 2016 U.S. LEXIS 3046, 84 U.S.L.W. 4263, 100 Empl. Prac. Dec. (CCH) P45,556, 26 Fla. L. Weekly Fed. S 128.
[2] Hagy v. Demers & Adams, 2018 U.S. App. LEXIS 3710, 2018 FED App. 0032P (6th Cir.), [*2].
[3] Id., [*2].
[4] Id.
[5] Id., [*3].
[6] Id.
[7] Id., [*5].

its finding of summary judgment, the district Court had relied on *Church v. Accretive Health, Inc.* for its holding that a bare violation sufficed to create an injury. *Church* has since been rejected by the Sixth Circuit Court of Appeals.[13] Because no cognizable injury existed or was even alleged, the FDCPA claims were dismissed for lack of standing.

While the holding in *Hagy* appears to extend further protection to debt collectors in the Sixth Circuit, it should be noted that the underlying facts in *Hagy* are somewhat ridiculously favorable to the debt collector. The Court makes mention throughout its Opinion that the very letter upon which the lawsuit was based served to help the debtors - not to hurt them. Moreover, the debtors admitted the letter did just that. Such a perfect set of facts are few and far between. Since *Spokeo* was first reported over a year ago, the case has been interpreted and applied numerous times. Interpretations of *Spokeo* in the context of the FDCPA have resulted in findings of the existence of standing despite a lack of tangible injury in the majority of cases.[14] Without a similarly favorable fact pattern, despite *Hagy*, this debtor-friendly trend may continue.

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[8] Id.

[9] Id., [*6]; citing, Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d 351, 1992 U.S. LEXIS 3543, 60 U.S.L.W. 4495, 92 Cal. Daily Op. Service 4985, 92 Daily Journal DAR 7876, 92 Daily Journal DAR 8967, 22 ELR 20913, 34 ERC (BNA) 1785, 6 Fla. L. Weekly Fed. S 374.

[10] Id.

[11] Id., [*7].

[12] Id., [*9]; citing, Spokeo, 136 S. Ct. at 1550.

[13] Id., citing, Lyshe v. Levy, 854 F.3d 855, 2017 U.S. App. LEXIS 6855, 2017 FED App. 0088P (6th Cir.), 2017 WL 1404182, declining to follow Church v. Accretive Health, Inc., 654 Fed. Appx. 990, 2016 U.S. App. LEXIS 12414

[14] Ezra Church, Brian Ercole, Christina Vitale, Warren Rissier, Ken Kliebard, The Meaning of Spokeo, 365 Days and 430 Decisions Later, Law360, New York, Mary 15, 2017.

THE BEST EVIDENCE

New York Blockchain Legislation and Its Prospective Effect on Verifying Documents in a Mortgage Transaction

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LEGISLATION TO DEFINE and regulate blockchain technology is in its infancy. New York Assemblyman, Clyde Vanel (of Queens), is a leading voice on advancing the understanding and implementation of blockchain technology regulations in New York State. He has proposed a bill regarding how blockchain technology can be utilized in government record keeping, elections and business.[1]

Fundamentally, blockchain can be defined as a distributed ledger-"a list of transactions that is shared among a number of computers, rather than being stored on a central server."[2]

On November 27, 2017, Vanel introduced Bill number 8780. The bill defines blockchain technology as follows: "'Blockchain technology'" shall mean distributed ledger technology that uses a distributed, decentralized, shared and replicated ledger, which may be public or private, permissioned or permissionless, or driven by tokenized crypto economics or tokenless. The data on the ledger is protected with cryptography, is immutable and auditable and provides an uncensored truth."[3]

In New York residential foreclosure actions the plaintiff must prove standing. [4] The plaintiff must have ownership of the mortgage and hold the note prior to commencing the action. Verifying the note and mortgage is paramount and has been complicated by many issues not limited to pooling and servicing agreements, securitization of mortgages, and human error.

Blockchain can be utilized to verify transactions.[5] The implementation of Bill 8780 could mitigate the risk of filing and proving a foreclosure action by allowing the electronic ledger provided by blockchain technology to verify the mortgage and note prior to commencing suit.

An obstacle for this potential usage is that blockchain obtained signatures are not currently recognized under the New York Electronic Signatures and Records Act (ESRA) as a valid means of obtaining a legally enforceable signature. However, proposed section 310 of Bill 8780 could provide the gateway

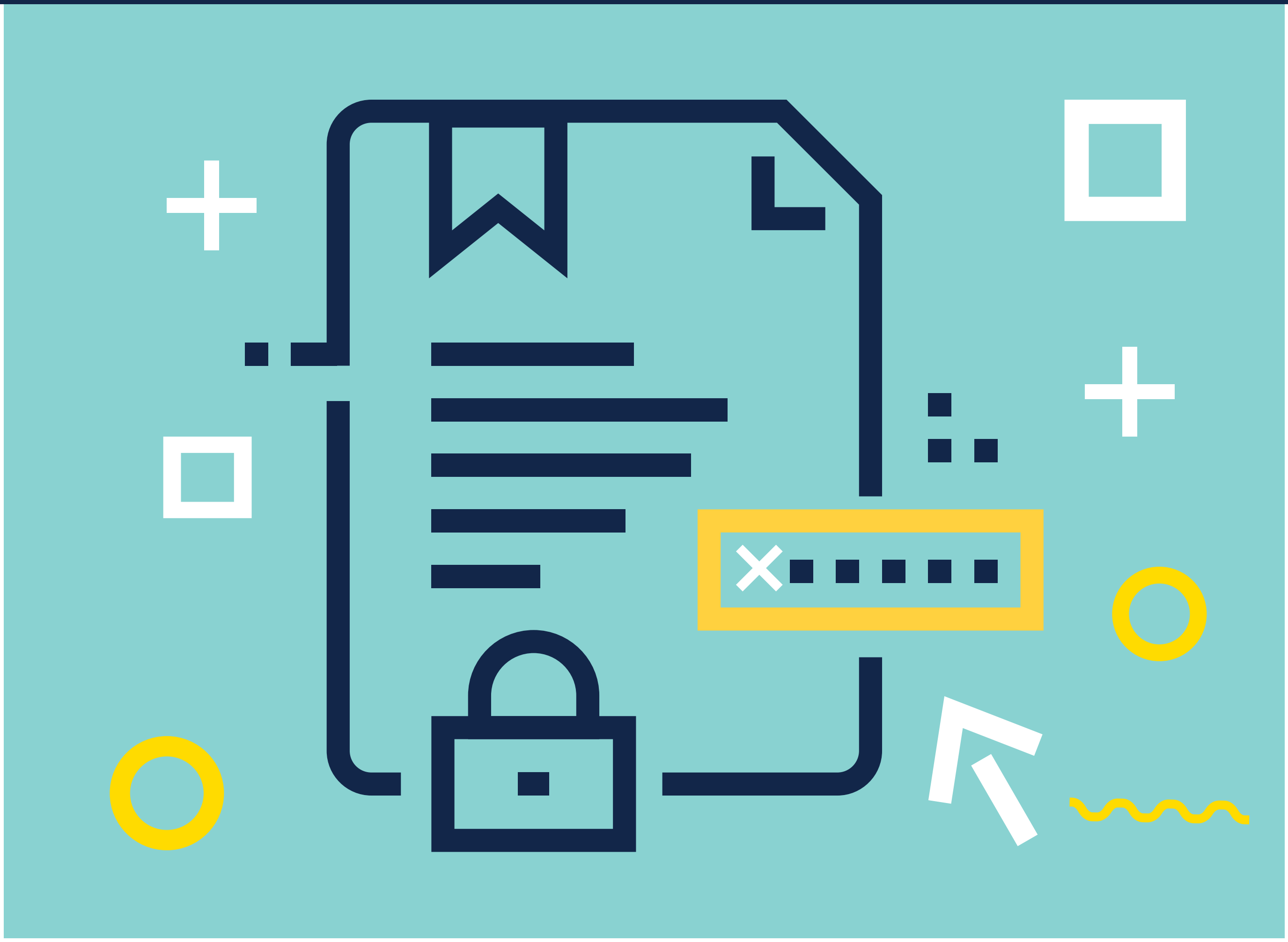
[1] Elizabeth Zima, Four Blockchain Bills Introduced in New York State Assembly, http://www.govtech.com/Four-Blockchain-Bills-Introduced-in-New-York-State- Assembly.html (December 15, 2017).

[2] Anthony Lewis, A Gentle Introduction to Blockchain Technology https://perma.cc/H3AX-XJXX (Archived October 28, 2017).

[3] Assem. Bill Reg. Sess. 8780 (NY 2018).

[4] Aurora Loan Servs., LLC v Taylor 2015 NY Slip Op 04872 Decided on June 11, 2015 Court of Appeals.

[5] James Condos, Blockchain Technology: Opportunities and Risks, https://perma.cc/9TKH-V4KN (last visited March 10, 2018) Summarizing, "A valid blockchain is a reliable way of confirming the party submitting a record to the blockchain, the time and date of its submission, and the contents of the record at the time of submission.'



for allowing blockchain technology to be recognized as a lawful form of electronic signature. The proposed bill states: "A signature that is secured through blockchain technology is considered to be in an electronic form and to be an electronic signature."[6] Other states, such as California and Florida have also introduced bills that would recognize blockchain obtained electronic signatures. In California, Assembly Bill 2685, proposes an expansion of the definition of an electronic signature under the current Uniform Electronic Transactions Act.[7] The definition would be inclusive of electronic signatures obtained through blockchain.[8] Legislation like this and the bills introduced by Clyde Vanel could help pave the way for utilizing blockchain in real estate and all types of transactions.

The utilization of electronic signatures obtained by blockchain would change the way real estate transactions are verified in New York State. Given the definition of blockchain under the proposed legislation, determining the initial ownership and validity of signatures on the note and mortgage, could be substantiated by blockchain data which is inherently "immutable" and averse to the inherent fraud risks that have plagued the industry, such as straw buyers and robo-signatures. Each mortgage transaction could be on its own ledger, having proprietary security measures driven by the originator of the loan. New York's impending legislation may soon enable lenders and consumers to tap into the blockchain breakthrough and change the way they do business.

[6] Assem. Bill Reg. Sess. 8780, Sec. 310 (NY 2018).

[7] Riley T. Svikhart ,Blockchain's Big Hurdle, https://www.stanfordlawreview.org/online/blockchains-big-hurdle/ (November 2017) See for potential federal preemption issues related to The Uniform Electronic Transactions Act (UETA) and ESIGN.

[8] Annaliese Milano, California Bill Would Legally Recognize Blockchain Data https://www.coindesk.com/california-lawmaker-files-bill-legally-recognize-blockchain-data/ (February 20, 2018).

In Case of First Impression, Virginia Circuit Court Follows a Partial Subordination Rule in Interpreting Subordination Agreements

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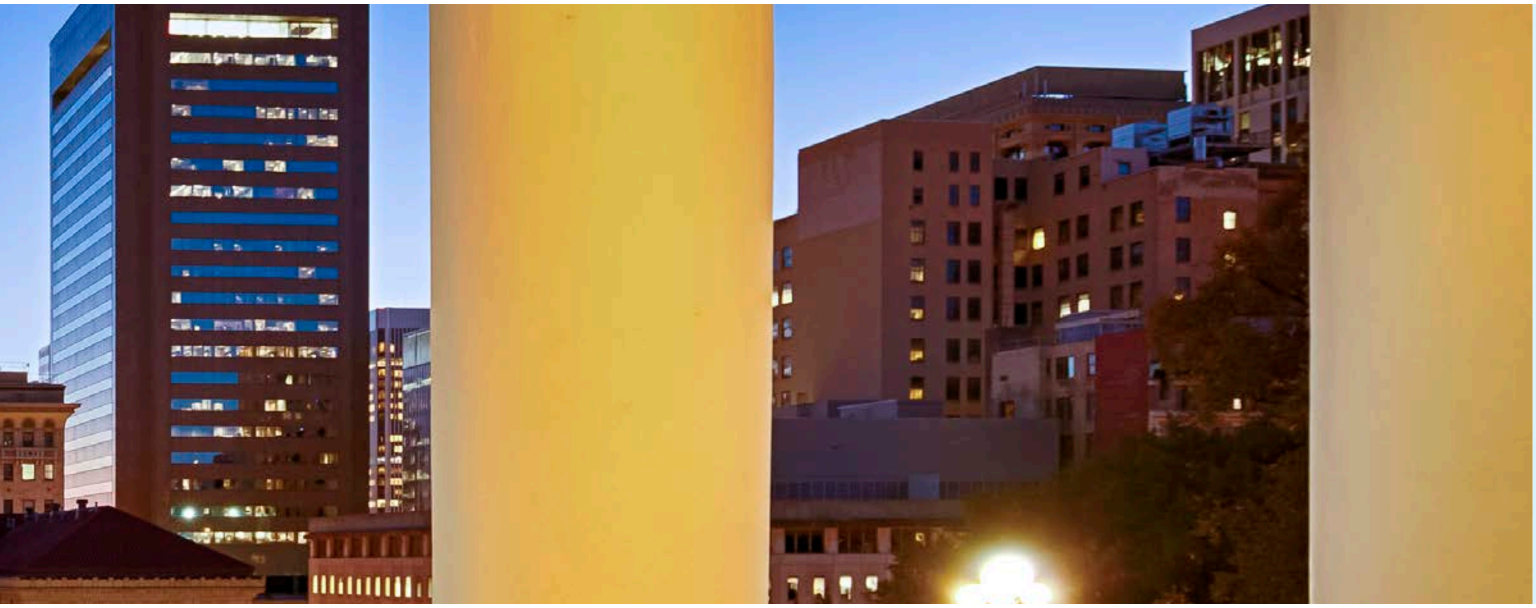
In Atlantic Trustee Services v. Cortez, 2018 Va. Cir. LEXIS 26, Fairfax County Court Case No. CL- 2017-8414, the Fairfax County Circuit Court decided a case of first impression regarding whether Virginia follows a rule of partial subordination or complete subordination when interpreting subordination agreements. Partial subordination allows for one lien to subordinate its position to one other lien, without giving up priority over third-party liens and is favored in a majority of states. Whereas complete subordination results in a complete reduction of lien priority.

In *Cortez*, the borrowers first obtained a loan from SunTrust in the amount of $220,000 ("STDOT"). Less than a month later, they obtained a loan from Wachovia (now Wells Fargo) in the amount of $415,000 ("WF1"). While the STDOT was executed first, WF1 was recorded in the land records first, and, due to Virginia's first in time, first in right lien priority, WF1 was secured in first position. A year later, the borrowers obtained a third loan, also from Wachovia, in the amount of $252,007.33 ("WF2"). Wells Fargo subsequently executed a subordination agreement stating that WF1 was subordinate to WF2. The subordination agreement made no mention of SunTrust.

Ultimately, the plaintiff trustee foreclosed the STDOT and sold the property to a third-party purchaser, with the sale resulting in surplus funds. Following the sale, Wells Fargo asserted a first priority lien position based on a partial subordination argument. The third-party purchaser urged the Court to apply a complete subordination rule holding that the Wells Fargo liens were extinguished.

The Court considered whether the intent of the parties was clear on the face of the subordination agreement. The Court found that the agreement explicitly described the two Wells Fargo liens and the subordination of WF1 to WF2, without reference to



any other liens. The Court did not find any intent in the agreement to subordinate either lien to the STDOT, and explained that reading such intent into the contract would violate Virginia case law which does not allow courts to read language into an agreement which would change its meaning. The Court, therefore, determined that Virginia law is "in harmony with the majority view" of other states and followed the partial subordination rule.

The Court also discussed the effect of the subordination agreement on the lien priority. The Court explained that the partial subordination resulted in a circuity of lien priority between the three liens, based on two specific factors. First, under the terms of the subordination agreement, WF1 only subordinated $250,000 to WF2. However, WF1 secured a total amount of $415,000 in first position against the property. Therefore, WF1 retained first priority of $165,000. Second, only an amount equal to the total of WF1 could be in first position above the STDOT. Since WF1 had subordinated part of its lien position to WF2, a total of $415,000 secured by both WF1 and WF2 would be senior to the STDOT, with the remaining amounts being in a junior position. Therefore, the court determined that the lien priority before foreclosure of the STDOT was as follows: (1) WF1 $165,000; (2) WF2 $250,000; (3) STDOT; (4) WF1 $250,000; (5) WF2 remaining amount of $2,007.22.

The Court further explained that the surplus proceeds from the foreclosure sale of the STDOT should be paid out to the fourth position WF1 lien. However, since the surplus amount was less than the amount owed in fourth position and since the fourth position lien was actually recorded prior to the STDOT, the Court held that the fourth position lien was not extinguished and remained secured against the real property. Therefore, instead of a foreclosure sale resulting in free and clear marketable title, liens in the amount of $463,352.06 remained secured against the property.

This case is currently being appealed to the Virginia Supreme Court, which may decide to take a different approach. However, the lessons from this case are still important. Servicers should always consult local counsel when drafting subordination agreements to ensure that the document is clear regarding the intended lien priority. Also, lien priority matters, so you should always be very careful when reviewing subordination agreements and releases in title to be sure that your lien is properly in first position before foreclosure. A mistake of lien priority could end up costing almost half a million dollars. a

STATE SNAPSHOT

Illinois update:

Appellate Court Offers Guidance on the Diligence Requirement for Service by Publication

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NEIGHBORHOOD LENDING SERVS. V. GRIFFIN, 2018 IL APP (1ST) 162855

The First District Appellate Court of Illinois, in a published opinion decided March 15, 2018, found that service of process via publication pursuant to 735 ILCS 5/2-206(a) was proper and upheld the Trial Court's order denying Defendant's Motion to Quash Service. The process server made one attempt to serve Defendant, at the only address found for Defendant, where he was told by Defendant's spouse that Defendant did not live at the property. Thereafter, Plaintiff served Defendant via publication pursuant to Illinois law. 735 ILCS 5/2-206.

Defendant argued Plaintiff failed to exercise due inquiry into his whereabouts and therefore, did not comply with Section 2-206. Contrary to Defendant's contentions, Plaintiff submitted the requisite affidavits establishing the inquiry into Defendant's whereabouts. Of note, the Appellate Court found with respect to statutory prerequisites: "Our courts have determined that these statutory prerequisites [of due inquiry and due diligence] are not intended as *pro forma* or useless phrases requiring mere perfunctory performance but, on the contrary, require an honest and well-directed effort to ascertain the whereabouts of a defendant by inquiry as full as circumstances permit." *Neighborhood Lending Servs. v. Griffin*, 2018 IL App (1st) 162855, P20, 2018 Ill. App. LEXIS 127, *12. The Appellate Court found that because Defendant could not be located at any other address other than the property in which service was attempted and the process server was told by Defendant's spouse that he did not live there and refused to provide additional information, the trial court did not err in permitting service by publication. Additionally, there was no showing as to any requirement for a process server to repeatedly engage in knowingly meaningless visits before serving via an alternate method of service.

As Counsel for Plaintiff at both the Trial and Appellate level, McCalla Raymer Leibert Pierce, LLC is pleased to report on this matter. As service via publication is a frequently challenged area in Illinois with respect to defendants seeking to quash service, this case presents additional stability for parties serving via publication, especially when spouses seemingly go out of their way to conceal the whereabouts of the party you are trying to serve. With timelines in Illinois always a challenge, it is imperative to efficiently prosecute cases in compliance with statutory requirements, yet recognize instances such as the case described herein, to minimize delays. ▣

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Changes to Illinois Condo Act and Community Association Act Shift Burden to Mortgagees for Opposing Objectionable Association Amendments

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MANY CONDOMINIUM and community association declarations require a certain percentage of unit owners and mortgagees consent to amendments of the governing condominium documents before the amendment is deemed valid and enforceable. Because of this requirement, associations routinely send out written notices seeking mortgagees' consent to such amendments. These notices, however, are routinely ignored or disregarded by most mortgagees based on the belief that a response is not required. In some cases, mortgagees receive no notice at all because a functional address is not of record. But as of January 1, 2018, two recent amendments have drastically altered this paradigm.

Section 27 of the Illinois Condominium Property Act and its counterpart, Section 1-20(e) of the Common Interest Community Association Act, now make it easier for associations to pass amendments without the *actual consent* of the required percentage of mortgagees. Both statutes now hold that if an association is required to obtain the approval or consent of a mortgagee before amending a declaration, a mortgagee is deemed to have given consent to the amendment *unless* the mortgagee delivers an objection to the association's request within 60 days of its mailing.

The potential impact of these amendments is far-reaching. Associations will now have a far easier time inserting amendments that may materially prejudice mortgagees. Such amendments could include imposing restrictions in the following areas: leasing; the sale of an entire building; allowing pets; enforcement of rules and fines; insurance obligations; and owner maintenance requirements.

Imposing leasing restrictions, for example, could shrink the pool of potential buyers interested in purchasing property from a lender following a foreclosure. Associations in Illinois routinely impose restrictions that seek to either outright ban leases (often with a hardship exception) or drastically limit the number of units in a building that may be leased. Because many REO buyers are investors seeking to purchase properties for their rental income value, granting an easier path to such amendments will undoubtedly have an impact on the size of the pool of potential buyers and their appetites for such investments. Foreclosing lenders may then be forced to solely market to owner-occupant buyers.

In light of these statutory amendments, it is recommended that mortgagees for properties in Illinois governed by condominium or community associations take the following steps:

- timely escalate and review an association's request to approve or consent to amendments;
- evaluate the request to consider whether the amendments might negatively impact the mortgagee's current (or future) rights or interests in the property; and
- where it is deemed prudent, prepare and submit a "no vote" or written objection to the association within 60 days of the date the association mailed the request.

Now that the burden has shifted to mortgagees, the importance of exercising vigilance in the face of these amendments is more important than ever.