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OFFICIAL PUBLICATION
OF THE ALFN
VOL. 5 ISSUE 4

STANDING ISSUES IN THE WAY DISTANT FUTURE?

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Letter from the Editor

AS 2018 IS COMING TO AN END, I would like to thank each of you for helping us achieve many great successes throughout the past year. ALFN continues to be the leader in representing, defending and educating America's mortgage servicing industry. 2019 will be no different, and we plan to continue bringing you new and exciting opportunities that provide the tools, knowledge, and connections you need to best represent your individual companies and to further your careers.

We are just coming off our largest conference in ALFN history with our 16th Annual Conference — ANSWERS, that included more servicer attendance than ever before, and nearly 400 total attendees. We are already getting ready for next year's event lineup and looking forward to showcasing the best education and networking value available in the industry. Your membership with an association like ALFN brings a higher level of ROI when you get involved, so take time to review our member briefs section of the ANGLE, reach out to us on how you would like to get involved and make sure you get plugged in for 2019.

As we conclude the year with our final ANGLE publication of 2018, we start this issue with our cover article on the use of eNote's and Standing issues. This is something to keep an eye on as several court cases have upheld the use of electronic notes in foreclosure. We then move on to our other feature articles and take a closer look at the chances of survival for the CFPB Consumer Complaint Database; Bifurcation of 910 Claims; Remedies available in Ohio to a note holder when a borrow defaults, and how those remedies may be affected by the borrowers death; Review of case law and legislation in Florida dealing with Surrender; and finally the 9th Circuits controlling decision concerning HERA.

We then transition to some important state-specific legal updates with our State Snapshot's, including a recent Maryland decision that debt purchasers are not required to obtain a collection agency license to foreclosure. We provide new updates in New York regarding the legal effect of voluntary discontinuing a foreclosure action on the acceleration of a mortgage. We look at the ALFN's efforts in the Amicus Briefs filed in two very important cases in Illinois. Finally, we conclude with a recent FDCPA victory in Minnesota. The 8th Circuit agreed with the 9th Circuit that the FDCPA does not prevent a debt collector from responding to a debtor's post-cease letter inquiry regarding a debt.

Don't miss an opportunity to get involved with the ALFN and seek out ways to reap the benefits of your membership and volunteering. Contact me or any of the other ALFN staff members or our board of directors and learn how you can get more involved in 2019.

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

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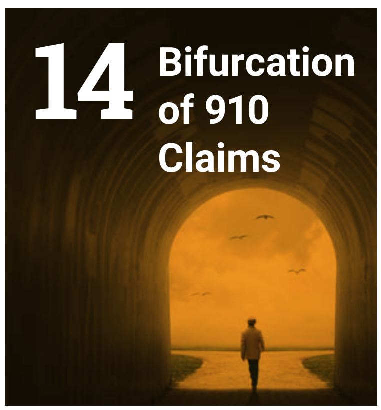

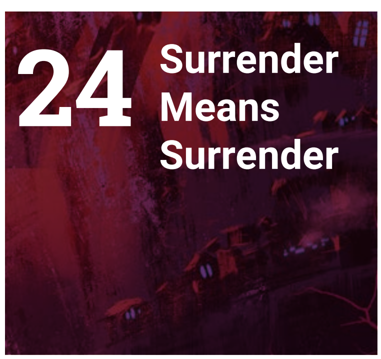

MEMBER BRIEFS

STATE SNAPSHOT

MEMBER BRIEFS

ALFN EVENTS

SAVE THE DATES

2019

MAR. 26

BANKRUPTCY INTERSECT

The Omni Mandalay
Irving, TX
* Registration Opens December 2018

APR. 30-MAY 1

WILLPOWER

The Ritz-Carlton Dallas
Dallas, TX
* Registration Opens January 2019

JUL. 21-24

ALFN ANSWERS

17th Annual Conference
Hyatt Regency Lake Tahoe
Resort, Spa & Casino
Incline Village, NV
* Registration Opens March 2019

NOV. 13

FORECLOSURE INTERSECT

Westin Irving Convention Center
Irving, TX
November 13, 2019
* Registration Opens August 2019

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 2019

Contact Susan Rosen at srosen@alfn.org to design a package that is right for you to sponsor single or multiple events throughout 2019.

VOLUNTEER OPPORTUNITIES 2019

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 2019 EVENTS

If you want to be considered for a panelist position as a speaker or moderator in 2019 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 2019 must complete a speaker form. We are now accepting speaker forms for all 2019 events.

STANDING ISSUES IN THE WAY DISTANT FUTURE?

BY MICHELLE GARCIA GILBERT, ESQ.
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THE WITNESS holds the original note, in the presence of the judge presiding over the trial, the borrower's attorney and the bank's attorney, and testifies under oath that the note should be introduced into evidence as a negotiable instrument, as part of proving a mortgage foreclosure case.

THE NOTE, some few paper pages of a legal document signed with an ink pen by the borrower at some time in the past, represents the difference between a successful and unsuccessful foreclosure depending upon whether the judge allows the note into evidence, in the face of vociferous argument by borrower's counsel. Then if the note is admitted into evidence, it becomes the basis of argument that it does not convey standing to the bank to proceed to judgment.

Now imagine a world without paper notes but instead with a digital note stored on the equivalent of an Apple wallet on a cell phone or tablet.

In fact, the National Conference of Commissioners on Uniform State Laws (NCCUSL) drafted the Uniform Electronic Transactions Act (UETA) in 1999; forty seven (47) states plus the District of Columbia have adopted the UETA. The states of Washington, Illinois, New York, and the Commonwealth of Puerto Rico have yet to pass the law. The U.S. Congress passed the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §7001, et seq. ("ESIGN") in 2000. Both laws authorize the use of electronic documents as being on par with paper documents with "wet" signatures.

Both UETA and ESIGN require that electronic documents accurately reflect information in contracts and agreements, be accessible to the parties, and be capable of reproduction by electronic transmission or physical printing.

Dovetailing into the permitted use of electronic documents, the NCCUSL drafted the 2010 Revised Uniform Law on Notarial Acts (RULONA) which authorizes electronic notarization by using a certificate with the notary's title, jurisdiction and expiration date of the notary commission, combined with signing and dating the notarization at the same time. The law also provides templates for implementation of the law. Approximately eleven (11) states have enacted RULONA, with a handful considering enactment. Also, there has been almost universal acceptance of electronic recording of documents, based upon the Uniform Real Property Electronic Recording Act.

Now to the Way Distant Future: ESIGN and UETA discuss transferable records which are electronic records that would be notes under Article 3 of the Uniform Commercial Code. To be a transferable record, the borrower must agree that the document is a transferable record and relates to a loan secured by real property.

The loan originates electronically, meaning the borrower signs electronically, using electronic notarization, and the borrower, or also called the issuer under the uniform laws, acknowledges that the electronic note is transferable. The mortgage is electronically recorded, and the note is stored in an electronic vault by the lender, who then becomes the holder of the note, also known as the controller. The electronic vault could be modeled after or could use the MERS registry or the GSE enote vault formed in April, 2018. See, https://www.fanniemae.com/content/technology_requirements/enote-specifications.pdf, http://www.freddiemac.com/singlefamily/pdf/eMortgage_Guide.pdf.

Freddie and Fannie purchase the majority of resi-

THE ENOTE DELIVERY PROCESS

The eNote is electronically signed by the borrower through use of an electronic closing system ("eClosing System).

The eClosing System secures the electronically signed documents by applying a tamper-evident seal to the entire transferable record (eNote).

The eNote must be registered on the MERS® eRegistry within one business day.

dential loans, after the loans are originated in conformity with their guidelines, so they agreed to be early adopters and implementers of the electronic loan origination.

Generally, standing to file a foreclosure action means the party either the holder of the note or a non-holder in possession of the note who has the rights of a holder, and the note is endorsed in blank prior to the filing of the first legal action. So how does the bank foreclose using an electronic note? An electronic note, a transferable record under ESIGN and UETA, is recognized as a note under Article 3 of the UCC, because an electronic note would be a negotiable promissory note if the note were in paper form.

Standing to enforce an electronic note means showing the method for acquiring and conveying a transferrable record, as well as showing who has control over the transferable record.

A system for housing electronic notes must meet the following requirements:

(1) only a single unique, identifiable ad unalterable copy of the transferable record can exist;

(2) the authoritative copy must identify the person asserting control as the person to which the transferable record was issued or, the person to which the transferable record was most recently transferred; and

(3) the authoritative copy must be communicated to and maintained by the person asserting control or its designated custodian.

If these requisites are established, and in the absence of an agreement to the contrary, the person or entity identified is deemed to have control of the transferable record and thereby becomes the "holder" for purposes of the UCC. Likewise, the "issuer," or the borrower, of the transferable record, or signer of the electronic promissory note, credentials their electronic execution of the note and mortgage, which has been upheld in courts of law as being valid, unless the borrower can present evidence that the signature was forged.

Because the e-note is in electronic form, there is no requirement for physical delivery, possession, or indorsement of a hard copy of the e-note to enforce or exercise any rights under the UETA and the UCC.

Several court cases have upheld the use of electronic notes in foreclosure cases, and the key seems to be the use of a reliable system to comply with the requirements of UETA.

Because the e-note is in electronic form, there is no requirement for physical delivery, possession, or indorsement of a hard copy of the e-note to enforce or exercise any rights under the UETA and the UCC.

The lender transmits the eNote to the applicable GSE eNote Vault using the MERS® eDelivery software application.

The lender submits a request to the MERS® eRegistry to transfer control on the eNote from the lender to the applicable GSE.

The GSE eNote Vault validates that the tamper-evident seal value on each eNote delivered by lender and matches the tamper-evident seal blue stored in the MERS® eRegistry and, if the values match, accepts the eNote delivery.

Will the CFPB Consumer Complaint Database Survive?

STAKEHOLDERS WEIGH IN

BY KRISTINE L. ROBERTS, ESQ.
SHAREHOLDER AND CHAIR OF FINANCIAL SERVICES LITIGATION & COMPLIANCE GROUP AT BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, PC
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THE CFPB'S acting director Mick Mulvaney made headlines a few months ago when he told the audience at an American Bankers Association meeting that he does not believe Dodd-Frank mandates making the database of consumer complaints publicly available. The CFPB does not have to run a "Yelp for financial services" sponsored by the federal government, Mulvaney argued.

The Dodd-Frank Wall Street Reform and Consumer Protection Act created the Bureau and required it to establish a database to collect and monitor complaints regarding consumer financial products and services. While Dodd-Frank does not specifically state that the complaints must be made public, former CFPB director Richard Cordray took the position that the database should be publicly available. Since 2011, more than one million complaints have been submitted.

When a customer complains to the CFPB, the Bureau sends the complaint to the financial institution in question for a response. If there is no response within 15 days, the CFPB publishes the complaint as-is. If there is a timely response, the CFPB publishes both the complaint and the response. According to the Bureau, 97 percent of complaints receive timely responses.

In April, the Bureau initiated a public comment period, requesting input on potential changes to the consumer complaint and inquiry handling processes. Among the questions asked were whether and what data should remain public and how the Bureau can meet its "objective of reducing unwarranted regulatory burden on companies." The comment period closed on July 16.

Not surprisingly, the comments submitted reflect diverse views. For example, the State Attorneys General of New York and 14 other states endorsed continued public access to the database, praising the database as representing an "admirable commitment to transparency that benefits all Americans." In contrast, the American Bankers Association criticized the fact that the database has "introduced unreliable, misleading, and potentially false information into the market," noting that Dodd-Frank did not authorize publishing individual complaints. The Credit Union National Association (CUNA) urged the CFPB to revisit how its intake system works, asking the CFPB to consider reforms such as taking steps to verify complaint information for accuracy prior to disclosure.

Advocates for the Bureau's consumer complaint database have long argued that it is a helpful resource for consumers and that its public nature is essential to encourage banks to respond quickly and resolve customer complaints. Critics have charged that

So long as the database still exists in its current form, it **is a good practice** for any financial institution to periodically review the complaints and corresponding aggregated data attributed to them.

the database includes unverified complaints, mistakes, and duplicative information.

Proponents for the public database are preparing for its possible removal from public view. A former attorney general of Ohio, Marc Dann, has downloaded and currently displays a copy of the entire CFPB database on his law firm's website. He has threatened to sue the Bureau if it shuts off public access to the complaint database.

The Bureau's inspector general has recently also raised questions about whether the consumer complaint database has sufficient identity and access management controls. On June 27, 2018, the inspector general released the results of its testing of security controls for the Mosaic system, which houses the consumer complaint database. The inspector general found that "the Bureau can strengthen controls in the area of identity and access management to ensure that the security control environment for Mosaic remains effective." The Bureau did not dispute that finding, noting it is already taking steps to strengthen security controls. The full report of the test results is not publicly available.

All of these questions come at a time when the Bureau's leadership is in flux. Kathy Kraninger, a program associate at the Office of Management and Budget, was nominated on June 20 to serve as the next director of the Bureau. If she is confirmed, Kraninger is expected to continue director Mulvaney's scaling back of the CFPB's enforcement and regulatory efforts, particularly given her ties to Mulvaney. In the meantime, acting deputy director Leandra English, who had filed a lawsuit challenging Mulvaney's appointment, resigned on July 9. That same day, Mulvaney appointed Brian Johnson, one of his senior advisors, to take on the second leadership role at the Bureau.

So long as the database still exists in its current form, it is a good practice for any financial institution to periodically review the complaints and corresponding aggregated data attributed to them. Doing so can be a cost-effective way to monitor for any trends in complaints for any product area, service, or geographic region. If you have any questions about the database or responding to a specific consumer complaint, please contact a member of Baker Donelson's Financial Services Litigation and Compliance Team.


BIFURCATION
OF
910 CLAIMS

BY KINNERA BHOOPAL, ESQ.
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RIOR TO THE enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), debtors could bifurcate a secured creditor's claim to the value of the collateral and treat the remainder as a general unsecured claim. In re Bethoney, 384 B.R. 24 (Bankr. D. Mass. 2008). In the pre BAPCPA era, the Code did not impose restrictions on the bifurcation of claims secured by an interest in a motor vehicle regardless of when the debt originated or the nature of the collateral's use. However, after BAPCPA, Congress modified 11 U.S.C.

Section 1325 to implement limitations on when a secured creditor's claim could be bifurcated, or "crammed down" as the process is colloquially known. 11 U.S.C. Section 1325(a)(9) was amended to include an unnumbered paragraph referred to as the "hanging paragraph", which states:

> For purposes of paragraph (5), section 506 shall not apply to a claim described in that paragraph if the creditor has a purchase money security interest securing the debt that is the subject of the claims, the debt was incurred within the 910-day preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle (as defined in section 30102 of title 49) acquired for the personal use of the debtor, or if collateral for that debt consists of any other thing of value, if the debt was incurred during the 1-year period preceding that filing."

By enacting this provision, Congress sought to prohibit the cram down of a vehicle that the debtor obtained within 2 and one-half years, or 910 days, of filing bankruptcy when it was acquired for the personal use of the debtor. While the 910 days acquisition restriction is fairly clear, the clause "for the personal use of the debtor" has generated a significant amount of litigation. The term "personal" is not defined in this section nor anywhere else in the Bankruptcy Code thereby leaving it open to interpretation.

The most straight forward interpretation of the term "personal" is exclaimed in *In re Grimme*, 371 B.R. 814 (Bankr. S.D. Ohio 2007). The *Grimme* Court found that personal use simply meant non-business use. In this case, the debtor purchased a vehicle in the 910 days period before filing bankruptcy but was unable to legally drive. Therefore, her son used the vehicle to drive the debtor to her appointments. Debtor argued that since she was not personally driving the vehicle that it should be eligible for a cram down. However, the Court found that she enjoyed the personal use of the vehicle as a passenger thereby satisfying the personal prong of the hanging paragraph. Regardless of who was driving the car, the car was not being used for business purposes and thus the anti-modification provision prevailed.

Other courts have focused more on the parameters of who constitutes a debtor rather than the nature of the vehicle's use when examining the clause "personal use of the debtor." The Court in *General Motors Acceptance Corp. v. Chaney (In re Chaney)*, opted to use the dictionary definition of the word "personal," which they cited as "particular person-debtor." *General Motors Acceptance Corp. v. Chaney (In re Chaney)*, No. 06-50775, 2007 Bankr. LEXIS 4747, at *8 (Bankr. S.D. Ga. Feb. 7, 2007). In this case, the Debtor purchased a vehicle for his non-debtor spouse to use. Instead of focusing on how the car was used in terms of its personal or business nature, this Court's decision turned on the "use of the debtor" portion of the hanging paragraph. The Court stated that in order to give meaning to every word of the statute, the vehicle must have been purchased for the debtor's use. Since the vehicle was bought for someone other than the debtor, the Court held that the "of the debtor" requirement was not satisfied. Moreover, they reasoned that if Congress intended to extend the scope of the anti-modification provision to include family or household use, then Congress would have done so, especially because it has incorporated the terms "family or household" into other sections of the Code. For example, Congress conjoined "personal" with "family or household" in Sections 101(8), 507(a)(7) and 722. Since "family or household" were omitted from the hanging paragraph the Court declined to extend the anti-modification protection to the debtor's family and held that the creditor's claim could be bifurcated. Other courts have adopted this "user focused approach" to conclude that a vehicle purchased for someone other than the debtor does not equate to "personal use of the debtor," thereby rendering such a vehicle eligible for a cram down. In re Ford, No. 07-28188-svk, 2008 Bankr. LEXIS 1381 (Bankr. E.D. Wis. Apr. 29, 2008). See also *In re Lewis*, 347 B.R. 769 (Bankr. D. Kan. 2006); In re *Adaway*, 367 B.R. 571 (Bankr. E.D. Tex. 2007).

Invariably there is also a divergent line of cases where Courts have interpreted the phrase "use of the debtor" to include the debtor's family and household. The rationale in these cases is that some types of property transcend the boundaries of mere personal or family use such as vehicles, which often have mixed uses. In *In re Bolze*, the debtor bought a car for the use of his common-law wife and their children. No. 06-40036, 2006 Bankr. LEXIS 2027 (Bankr. D. Kan. Aug. 31, 2006). However, unlike the *In re Chaney* holding cited above, the Bolze Court disagreed with the Debtor's argument that his family's use removes the vehicle from the ambit of the anti-modification provision. The *Bolze* Court stated that even though the hanging paragraph does not explicitly include a debtor's family or household, it also does not state that the vehicle must be "only" or "exclusively" used by the debtor. No. 06-40036, 2006 Bankr. LEXIS 2027 (Bankr. D. Kan. Aug. 31, 2006). Additionally, personal use is not mutually exclusive of family use therefore, "personal use" would include accomplishing tasks for the family or household. The Court further explained that the purpose of the post BAPCPA hanging paragraph was to provide more protection to secured creditors. *In re Bolze* No. 06-40036, 2006 Bankr. LEXIS 2027 (Bankr. D. Kan. Aug. 31, 2006). Therefore, a broader interpretation of "use of the debtor" aligns with the Congressional paradigm in enacting this provision rather than allowing debtors to circumvent this intention by allowing someone else to use their vehicle. This interpretation is particularly salient when considered within the context of the overall goal of the Bankruptcy Abuse Prevention and Consumer Protection Act 2005 amendments, which was to discourage bankruptcy abuse. *In re Vagi*, 351 B.R. 881 (Bankr. N.D. Ohio 2006). Consequently, the claim secured by a vehicle that the debtor purchased for non-business reasons for his family or household could not be crammed down. See also *In re Phillips*, 362 B.R. 284 (Bankr. E.D. Va. 2007) and In re *Bethoney*, 384 B.R. 24 (Bankr. D. Mass. 2008).Despite the disparate rulings in the aforementioned cases, the central tenet is that the determination of whether a 910 vehicle was acquired for personal use and whether such use is attributable to the debtor, is a fact intensive inquiry. The cited holdings may be distinguishable based on the particularities of any given situation. Some variants include whether the non-debtor who uses the vehicle resides with the debtor or not, whether the debtor has another vehicle in addition to the family vehicle, and whether the non-debtor is a co-borrower or not. The lack of a bright line rule is evident in these cases and the issue of whether a 910 claim may be bifurcated into secured and unsecured portions is subject to a case by case determination.

Invariably there is also a divergent line of cases where Courts have interpreted the phrase "use of the debtor" to include the debtor's family and household. The rationale in these cases is that some types of property transcend the boundaries of mere personal or family use such as vehicles, which often have mixed uses.

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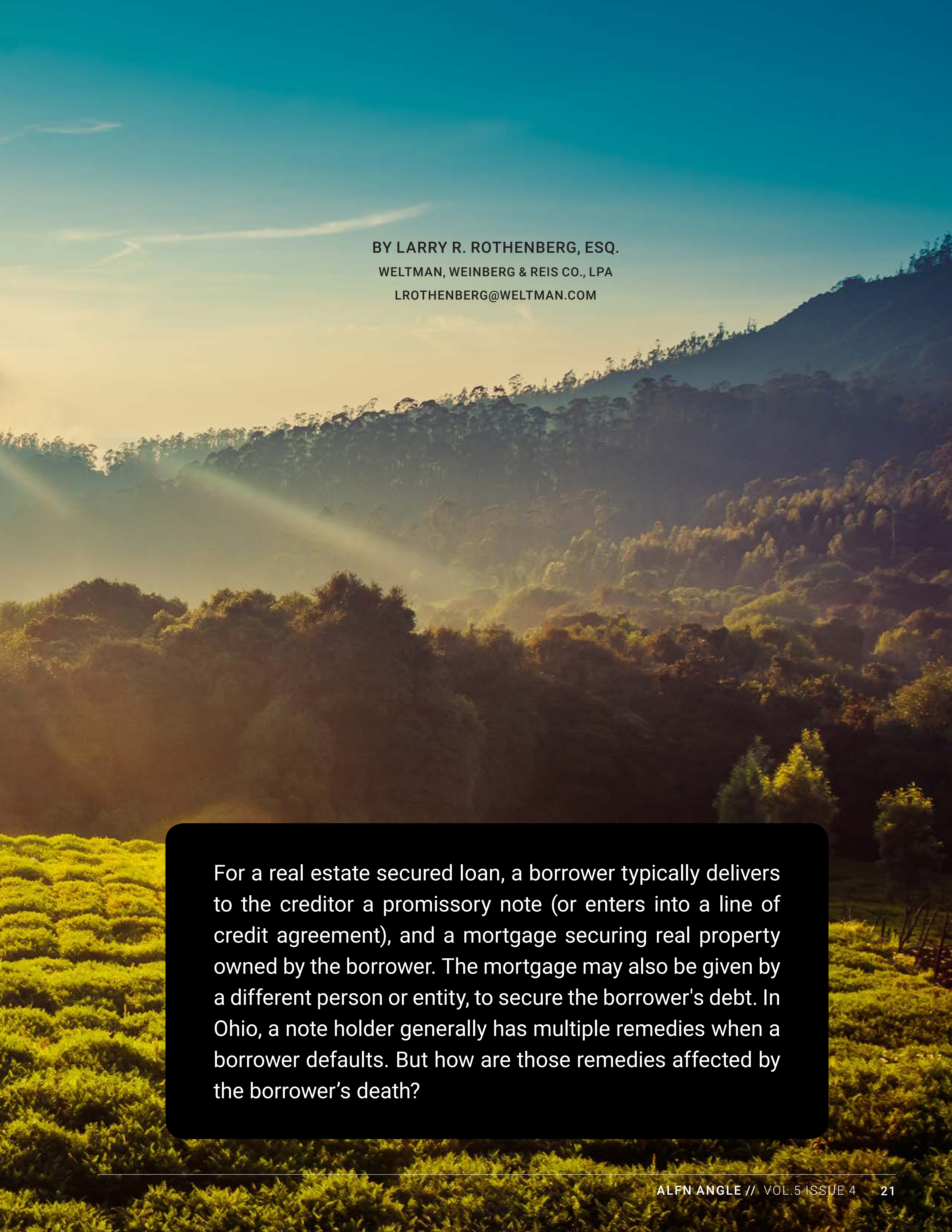
LIFE AFTER DEATH IN OHIO

NOTE HOLDERS' REMEDIES AFTER A BORROWER'S DEATH



BY LARRY R. ROTHENBERG, ESQ.
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For a real estate secured loan, a borrower typically delivers to the creditor a promissory note (or enters into a line of credit agreement), and a mortgage securing real property owned by the borrower. The mortgage may also be given by a different person or entity, to secure the borrower's debt. In Ohio, a note holder generally has multiple remedies when a borrower defaults. But how are those remedies affected by the borrower's death?

THE MONEY JUDGMENT

Although after a borrower's default, the mortgaged property may be the most natural source for recovery, it is not the only source. The note holder also generally is entitled to a money judgment against the defaulting borrower on the underlying debt. In addition to foreclosing on the mortgage, the note holder may execute on the money judgment to seek recovery from the borrower's other assets.

In *Deutsche Bank Natl. Trust Co. v. Holden*, 2016-Ohio-4603, the Ohio Supreme Court reiterated Ohio's long-recognized holding that an action at law on a promissory note to collect a mortgage debt is separate and distinct from an action in equity to enforce the mortgage lien on the property. See also *Gevedon v. Hotopp*, 2005-Ohio-4597 (2nd Dist.). Hence, the note holder may seek a money judgment either as a separate claim in a foreclosure action, or in a separate action commenced before or after the foreclosure. The money judgment entitles the note holder to pursue the borrower's other assets even before the foreclosure sale. For example, with a money judgment, the note holder may garnish wages, attach bank accounts, levy on personal property, file a judgment lien to secure other real property owned by the borrower, etc., while waiting for the foreclosure sale to be scheduled. Not only do these actions effectively enhance the note holder's likelihood of a full recovery of the debt, they also incentivize the borrower to propose an acceptable settlement.

ORC § 2329.08 permits the collection of foreclosure deficiency judgments, limited by the following. If the entry of the money judgment preceded the entry of the order confirming the foreclosure sale, and the property was a dwelling or dwellings for not more than two families, the deficiency is unenforceable after two years from the date of the order confirming the sale.

Although many borrowers may be uncollectible post-foreclosure, in some cases the default may not have been due to the borrower being insolvent, but rather due to domestic problems, abandonment of the property, or other reasons unrelated to an inability to pay. In certain situations, the deficiency judgment may be substantially or even fully collectible. Hence, the holders should not automatically resign themselves to writing off their foreclosure deficiencies.

THE CLAIM AGAINST THE DECEASED BORROWER'S ESTATE

A valid money judgment cannot be obtained against a deceased borrower. However, upon the borrower's death, the borrower's assets become assets of his or her estate. Under ORC §2117.06, the creditor may make a claim against the decedent's estate within six months after the date of death, and may then be entitled to recover from the estate's assets. If the creditor fails to make its claim against the decedent's estate before the six-month period expires, the creditor will be barred from recovering from the estate's assets. Hence, creditors must be vigilant in promptly presenting their claims against borrowers' estates.

Even where no decedent's estate has been filed, the creditor may have a remedy. The creditor can force the opening of an estate to enable the creditor to present a claim before the six-month period expires and to recover from the estate's assets. Creditors' counsel should evaluate whether it would be cost-effective to do so, based on the known assets of the estate.

THE FORECLOSURE

The note holder's right to foreclose on a recorded mortgage remains intact after the borrower's death, as Ohio's Tenth District Court of Appeals recently illustrated in *Deutsche Bank Natl. Trust Co. v. Vigue*, 2017-Ohio-7037 (10th Dist.). In that case, the borrower's next of kin continued making the mortgage payments after the borrower died so that the loan was not in default until three years after the borrower's death. The next of kin, citing Ohio's statute requiring creditors to present a claim against a decedent's estate within six months after the borrower's death, argued that the creditor's failure to present a timely claim not only barred the creditor from enforcing the note, it also barred the creditor from foreclosing on the mortgage. The next of kin argued that if the debt is unenforceable, the mortgage securing the debt is unenforceable.

However, the court, citing ORC §2117.10, made clear that a lienholder with a recorded mortgage is

If the borrower dies before the foreclosure is filed or before the court enters the foreclosure judgment (assuming the borrower died while being the titled owner of the real property), the borrower's heirs, if any, must be joined as defendants in the action, served with summons, and given an opportunity to contest the case.

not barred from foreclosure, even if it failed to present a claim against the decedent's estate within six months. The court reiterated that the foreclosure on the mortgage is an action against the property and is a separate cause of action from the claim against the borrower on the note. Based on this reasoning, the court allowed the foreclosure to proceed.

If the borrower dies before the foreclosure is filed or before the court enters the foreclosure judgment (assuming the borrower died while being the titled owner of the real property), the borrower's heirs, if any, must be joined as defendants in the action, served with summons, and given an opportunity to contest the case.

LAND SALE ACTIONS UNDER ORC CHAPTER 2127

If a mortgage holder is served with a summons in an Ohio land sale action under ORC Chapter 2127, the mortgage holder must file an answer to protect its interest in the real property, just as in any Ohio third-party foreclosure action. If the mortgage holder is served with a summons and fails to file an answer, the mortgage will be released upon the court's entry of the order confirming the sale, and the mortgage holder will not be entitled to any proceeds of the sale.

If the loan secured by the mortgage is in default, in addition to filing an answer to protect its interest, the mortgage holder may file a counterclaim to affirmatively seek an order for foreclosure. Many times, the estate's fiduciary is unable to find a buyer for an amount sufficient to pay off the mortgage and other liens, resulting in a significant passage of time and risk of deterioration of the property. By filing and pursuing a counterclaim, counsel for the mortgage holder can usually push the case to a sale without delay.

TAKEAWAYS FOR NOTE HOLDERS

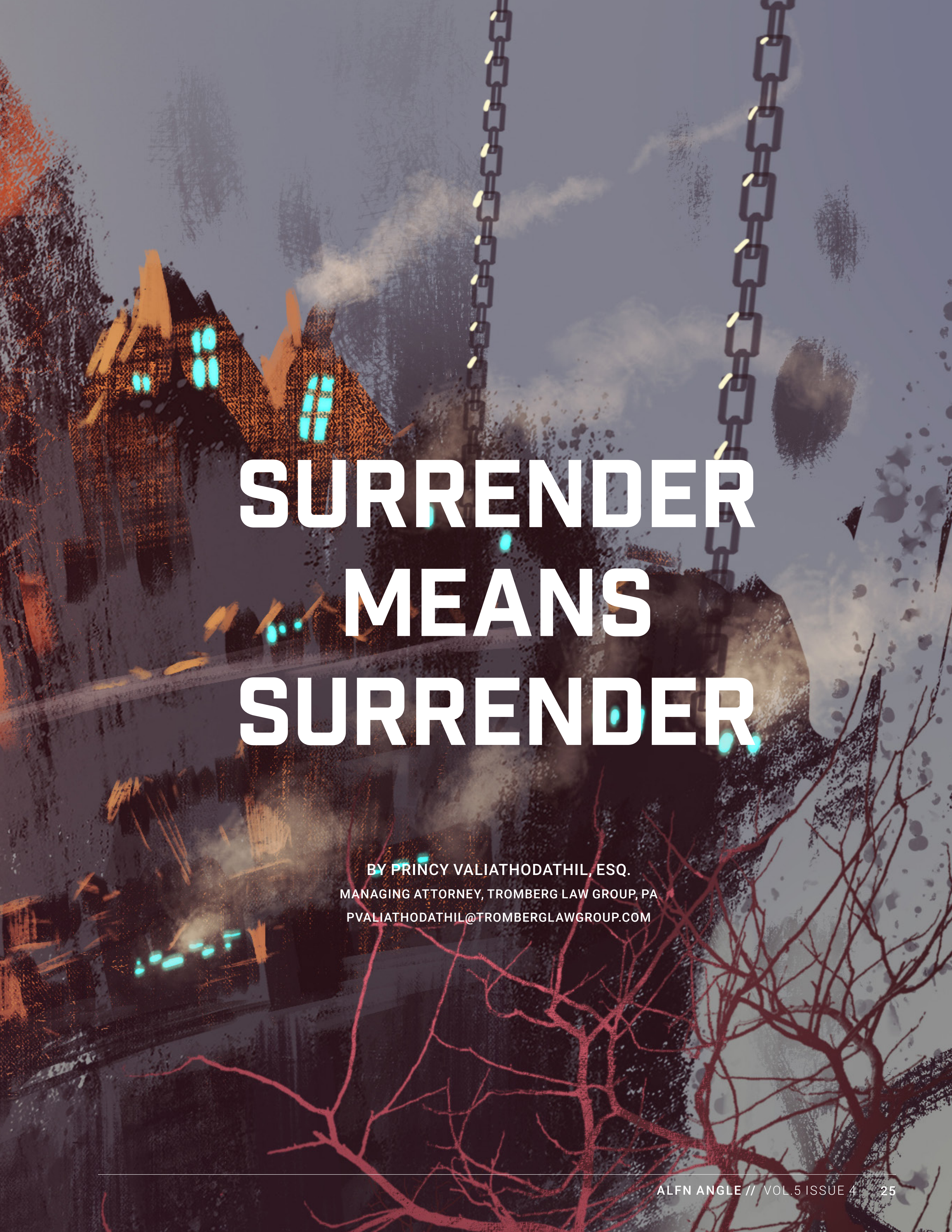
- After the borrower's default, obtain a money judgment either in a separate action or as a claim in the foreclosure action (unless the borrower filed for bankruptcy or is already deceased), and if the borrower may have other assets, have your foreclosure attorney pursue collection of the debt (assuming they offer this service).

- Deliver a claim to the deceased borrower's estate within the allowable timeframe.

- If no estate has been filed, investigate whether the deceased borrower had other assets, and have your attorney force the opening of an estate if warranted and cost-effective.

- Be aware that the right to foreclose on a mortgage in default is not affected by the borrower's death.

- If the mortgage holder is served with a summons in a third-party foreclosure action or in a land sale action, promptly file an answer to protect the mortgage, and determine whether to file a counterclaim or crossclaim to affirmatively seek an order of foreclosure.



SURRENDER MEANS SURRENDER

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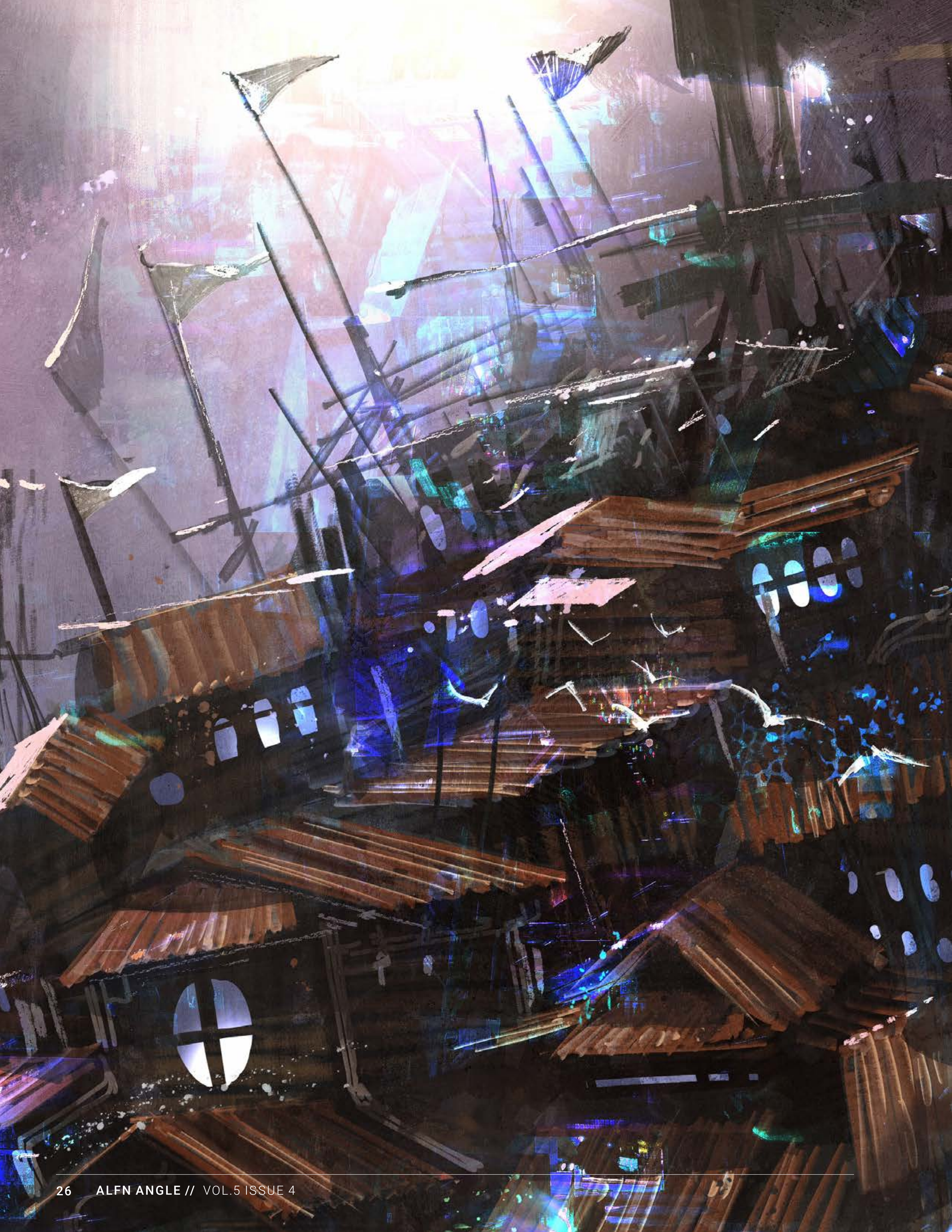


THE LAW RELATING to foreclosures in Florida continues to evolve resulting in changes impacting the definition of acceleration, the elements of standing, calculation of statute of limitations, and the ability to award attorney fees. The creditor's side fights to advance the cause of lenders, making it more reasonable and possible to foreclose against a relentless defense. These battles cause conflicting results in the various district. As a result, the Florida has enacted legislation with the hope of settling one of these issues - bankruptcy surrender.

The impact of a debtor's bankruptcy filing in a foreclosure proceeding lent itself to the same arduous battle, until now, as reprieve is on the horizon.

In order to be victorious on the frontline, creditors must be equipped with the proper armor of knowledge and the backing of sound law and statute, specifically, Florida Statute 702.12, which is effective as of October 1, 2018.

INTERSECT BETWEEN FORECLOSURE & BANKRUPTCY

Both foreclosure and bankruptcy proceedings are governed by equitable principles. Equity urges the courts to render a decision that is predicated on an unequivocal statement of fairness. This crusade for fairness has shifted the burden to the lender who continues to fight the same fight in both foreclosure and bankruptcy. The bankruptcy stay has been a great tool employed to stop a judicial foreclosure in its tracks. Often these stays are imposed on the eve of trial or prior to the entry of judgment, or even minutes before a foreclosure sale. This delay and disruption have forced creditors' attorneys to take a closer look at the bankruptcies to determine this apparent contradiction: properties could be surrendered in bankruptcy but defended in the foreclosure case. The conflicting position taken by the debtor in the foreclosure and bankruptcy have allowed debtors to take advantage of the due process proceedings of foreclosure, after reaping the full benefit and protections of the bankruptcy process.

Under 11 U.S. Code, § 521(a)(2)(A) of the Bankruptcy Code, a Chapter 7 debtor is required to file a Statement of Intentions within thirty days of filing the bankruptcy petition or, on or before the first meeting of creditors. The Statement of Intentions must indicate whether the debtor intends to reaffirm, redeem, or surrender the property, which may be the subject of a pending foreclosure action. Once an option is elected, the debtor is required to perform and carry out that intention. Chapter 11, 12, or 13, contain similar provisions requiring the debtor to state their intentions regarding the property. In Florida, borrowers have the additional option of forcing their lenders into mortgage modification mediation by court order. Under the Mortgage Modification Mediation Procedures, if mediation is unsuccessful, then the borrower must amend the plan to either pay the creditor pursuant to their filed Proof of Claim or they must surrender the property.

In the case of *In re Failla*, 838 F.3d 1170, 1177 (11th Cir. 2016), the Court applied the Black's Law Dictionary definition of surrender, "[t]he giving up of a right or claim."; *see also Surrender, Webster's New International Dictionary* 2539 ("To give up completely; to resign; relinquish; as, to surrender a right, privilege, or advantage."). If debtor has elected to surrender, it means they are waiving a white flag of surrender. The problem

with that white flag was, who was it directed to and who were they surrendering to? In recent litigation, the contentious debate cocooned under the guise of fairness and equity is that the white flag of surrender was to the bankruptcy trustee and no one else. This belief conveniently allows the debtor to surrender the property in bankruptcy and in a parallel course, continue to challenge and litigate the foreclosure action. This conflicting set of events sets forth this paradox of surrender, which perpetuates itself in a longwinded battle both in federal and state court.

In *Failla*, the borrowers/debtors, David and Donna Failla ("Faillas") defaulted on a loan, and the note holder initiated a foreclosure action. Subsequent to the filing of the foreclosure, the Faillas filed a bankruptcy petition in 2011, wherein under §521(a)(2)(A), they filed a Statement of Intention surrendering the collateral secured by the mortgage. The property was abandoned by the trustee and as they continued to reside in the home, the Faillas continued to challenge and contest the foreclosure action. In response to this, the noteholder filed a motion to compel surrender in the bankruptcy court. The premise of the argument predicated on the characterization of "surrender" and that the Faillas contesting the foreclosure action was in direct contravention with the position elected in

the bankruptcy court. The Court held in pertinent parts, that 1) debtors who intend to surrender the property must perform that intent by surrendering the property both to the trustee and to the creditor (i.e. the white flag of surrender is not selective in nature) 2) when the debtor surrenders, they have to abandon and withdraw any opposition to a state court foreclosure proceeding; and 3) a bankruptcy judge has the inherent power to command the debtor to withdraw the defenses or any other counterclaims that may have been filed in the pending state court foreclosure action. In re *Failla*, 838 F.3d 1170 (11th Cir. 2016)

In a case parallel to the facts of *In re Failla*, in the Middle District of Florida, *In re Seguinot*, the court granted creditor's Motion to Reopen and Compel Surrender, because the debtor surrendered the property, but continued to assert and raise several affirmative defenses in the foreclosure action. *In re Seguinot*, 6:10-BK-05336-KSJ, 2018 WL 3533345, at *1 (Bankr. M.D. Fla. Mar. 9, 2018). The court went on to state, "[o]pposing foreclosure entirely contradicts the Debtors' stated intention. They are seeking an impermissible "head start," not the fresh start they are entitled to receive. Id., at *3.

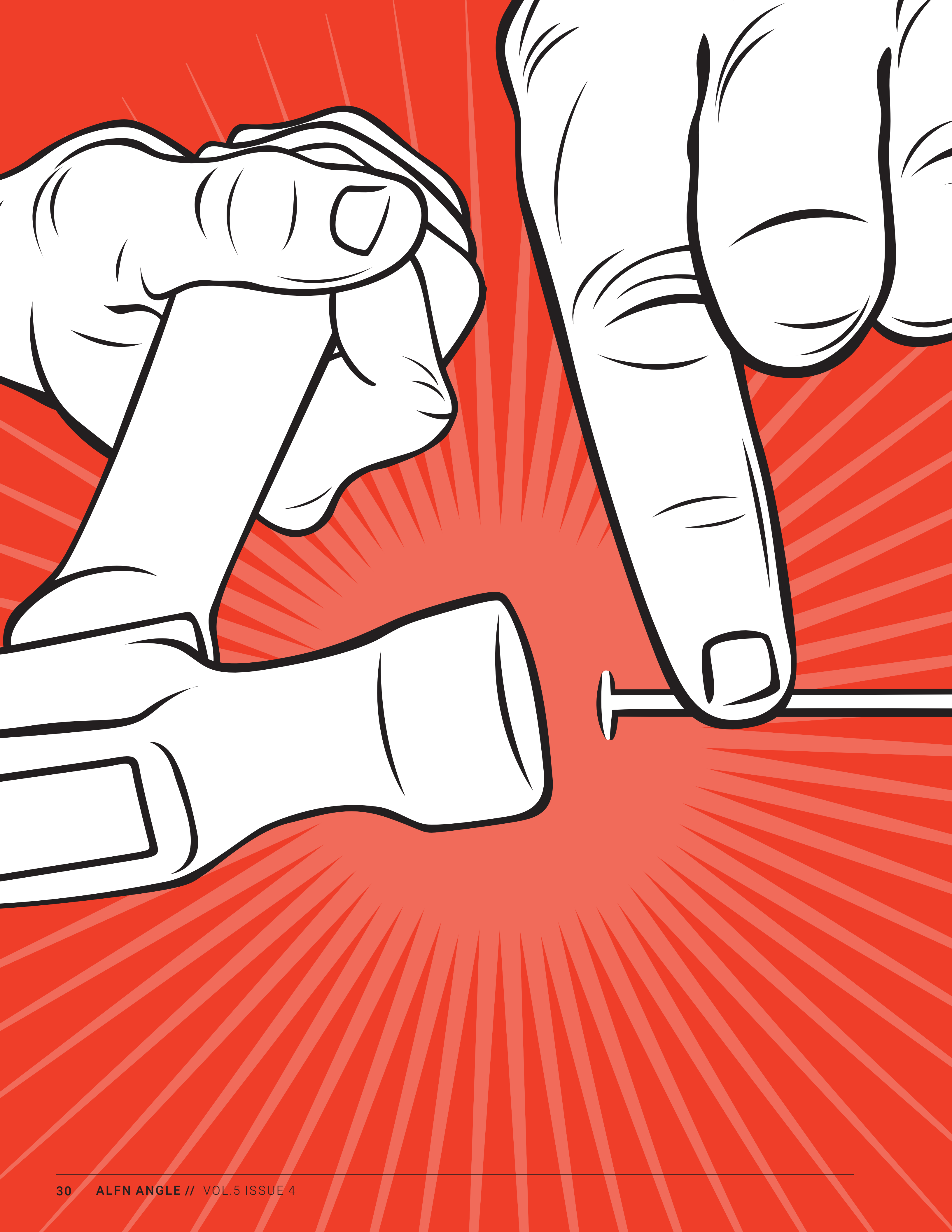
In both of these cases and many others that are found in various jurisdictions, the creditor not only has to take an affirmative action to obtain relief from stay, but thereafter, file subsequent motions to impede the debtor from contesting the foreclosure action. The effect of these rulings is delay and expense to the creditor until the bankruptcy court issues a ruling compelling the debtor from taking action that is overtly inconsistent with surrender.

FLORIDA LEGISLATURE

In response to this ongoing issue, state legislators in Florida enacted § 702.12, Fla. Stat. Ann., permitting lienholders in a foreclosure action to file with the court any document that the defendant has filed under penalty of perjury in the defendant's bankruptcy case, which may be used as an admission in the foreclosure action. Under Fla. Stat. § 702.12(1)(b), there is a rebuttable presumption that the defendant has waived any defense to the foreclosure if the document evidences: 1) defendant's intent to surrender; 2) the intent has not been withdrawn; and 3) that a final order has been entered in the defendant's bankruptcy case which discharged the debt or confirms the defendant's repayment plan which provides for the surrender of the property. This section does not preclude the defendant from raising a defense grounded on the lienholder's action or inaction, subsequent to the filing of the document filed in the bankruptcy case, which evidenced the defendant's intention to surrender the mortgaged property to the lienholder. This statue will allow the court to take judicial notice upon request by the lienholder. This statute applies to foreclosure actions that have been filed on or after October 1, 2018.

WHAT THIS MEANS FOR THE LENDER

This statute will have an immense impact on creditor's foreclosure actions, as it will prevent unnecessary delay and mitigate, or in some cases, completely obliviate the defendant's ability to contest the foreclosure, when provisions of §702.12 have been met. This statue gives the court the ability to take judicial notice of the debtor's white flag of surrender, so that the case is not muddied with unwarranted litigation and all parties are in alignment with their elected option. As Judge William Pryor echoed in his opinion, "in Bankruptcy, as in life, a person does not get to have his cake and eat it too." In re Failla, 838 F.3d 1170, 1178.



ANOTHER NAIL IN THE COFFIN

THE NINTH CIRCUIT HAMMERS AWAY AT THE ATTACKS ON HERA IN HOA SUPER-PRIORITY CASES

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IN AUGUST 2017, we saw the first controlling decision published by the Ninth Circuit Court of Appeals concerning the application of the Housing and Economic Recovery Act of 2008 ("HERA") in the context of a Nevada homeowners' association non-judicial foreclosure sale. Berezovsky v. Moniz, 869 F.3d 923 (9th Cir. 2017). Under HERA's asset protection clause, 12 U.S.C. §4617(j)(3), affectionately referred to as the "Federal Foreclosure Bar," no property of FHFA shall be subject to foreclosure without the consent of FHFA.

The Ninth Circuit held that the Federal Foreclosure Bar is not limited to tax liens and does not require FHFA to actively resist a foreclosure to ensure it does not impliedly consent. Addressing also whether the Federal Foreclosure Bar preempts the State Foreclosure Statute (NRS 116.3116 et seq.), the Ninth Circuit held that HERA implicitly demonstrates a clear intent to preempt Nevada's super-priority lien law. Lastly, the Ninth Circuit analyzed Freddie Mac's ownership interest under Nevada law, concluding that Nevada recognizes that a note owner - such as Freddie Mac or Fannie Mae - remains a secured creditor with a property interest even if the recorded deed of trust names only the owner's nominee or servicer. Most importantly, the Ninth Circuit found that Freddie Mac's database printouts and excerpts of its Single-Family Seller/Servicing Guide, along with a declaration from Freddie Mac's employee explaining that the records show when Freddie Mac owned the loan, were sufficient to prove Freddie Mac's interest. As a result of the Ninth Circuit's reliance on limited evidence to prove the GSE's ownership interest, we have had success in similarly limiting and streamlining discovery in HERA-based actions in Federal Court.

But the story does not stop there. Out of *Berezovsky* came several creative, although misguided, attacks to the Federal Foreclosure Bar, notably including: the "Securitization" and "Due Process" arguments. Under the Securitization argument, numerous HOA buyers argued that FHFA did not "succeed to" mortgages "held in trust" because Congress omitted the phrase "shall succeed to" from the general exceptions set forth in subsection §4617(b)(19)(B), titled "Mortgages held in trust."[1] Under the Due Process argument, HOA buyers argued that FHFA deprived the buyer of its constitutionally-protected interest in real property it purchased at an HOA foreclosure sale by affirmatively determining not to consent to the HOA foreclosure sale; an ironic position in light of buyers' earlier argument that an "opt-in" notice requirement satisfied lenders' right to due process.

Almost a year later, in its second controlling decision published in June 2018, the Ninth Circuit has now disapproved both attacks on the Federal Foreclosure Bar, expressing that both the Securitization and Due Process arguments lack any merit. *Federal Home Loan Mortgage Corporation v. SFR Investments Pool 1, LLC*, 893 F.3d 1136 (9th Cir. 2018).

In rejecting the Securitization argument, the Ninth Circuit concluded that the HOA buyers'[2] interpretation of the text of HERA would be an absurd reading of HERA, focusing on the intent behind enacting HERA in 2008 and the goal of protecting the GSEs' property as their mortgage portfolios constituted nearly half of the United States mortgage market. The Ninth Circuit also noted the importance of providing additional safeguards to loans backing mortgage-backed securities "to combat further systemic breakdown in the American housing market." In rejecting the Due Process argument, the Ninth Circuit concluded that the State Foreclosure Statute does not function to provide HOA buyers with a constitutionally-protected interest in purchasing free and clear title to real property. Even if there was a theoretical deprivation

1 HERA mandates that FHFA shall "succeed to" the GSEs' assets. 12 U.S.C. §4617(b)(2)(A)(i). Subsection §4617(b)(2) is titled "General Powers." Compare with subsection §4617(b)(19), titled "General Exceptions."

of due process under the Federal Foreclosure Bar, it would actually implicate the seller - the foreclosing HOA - not the buyer.

The Nevada Supreme Court, on the other hand, appears to be shy in publishing any opinions on the Federal Foreclosure Bar, presumably while it waited to see where the Ninth Circuit falls on the same issues. However, in a recent stream of unpublished opinions, the Nevada Supreme Court appears to be peeking out favorably upon *Berezovsky* and its progeny.

In March 2018, the Nevada Supreme Court held that the Federal Foreclosure Bar preempts the State Foreclosure Statute, finding that State Foreclosure Statute is in direct conflict with Congress' clear and manifest goal to protect Fannie Mae's property interest while under FHFA's conservatorship and, thus, the Federal Foreclosure Bar implicitly preempts the State Foreclosure Statute. *Saticoy Bay LLC Series 9641 Christine View v. Federal National Mortgage Association*, 134 Nev. Adv. Op. 36, 417 P.3d 363 (2018).[2] In this decision, the Nevada Supreme Court also agreed with the Ninth Circuit that FHFA does not implicitly consent to foreclosure - the Federal Foreclosure Bar does not require FHFA to actively resist foreclosure - citing favorably to the Ninth Circuit's *Berezovsky* opinion.

Almost a year later, in its second controlling decision published in June 2018, the Ninth Circuit has now DISAPPROVED BOTH ATTACKS on the Federal Foreclosure Bar, expressing that both the Securitization and Due Process arguments lack any merit.

In June 2018, the Nevada Supreme Court held that a loan owner - Fannie Mae - can maintain a secured property interest while its loan servicer - Bank of America and, subsequently, Nationstar - appears as the recorded beneficiary of the deed of trust.[3] *Nationstar Mortgage, LLC v. Guberland LLC* - Series 3, 420 P.3d 556, 2018 WL 3025919 (2018) (unpub.). The Nevada Supreme Court cited, with approval, to its decision in *Christine View*, as well as the Ninth Circuit's *Berezovsky* opinion.

Most recently, on July 10, 2018, the Nevada Supreme Court rejected the Securitization and Due Process challenges to the Federal Foreclosure Bar, concluding: first, that Due Process argument failed because the action complained of is Congress's enactment of the Federal Foreclosure Bar but the HOA buyer did not have a property interest at that time, and the legislative process provided all the process that was due; and, second, assuming the loan was securitized at the time of the HOA foreclosure sale, it remained the property of Fannie Mae while under FHFA's conservatorship because Fannie Mae is the trustee, and therefore the legal owner, of the pool of loans it securitizes. *A&I LLC Series 3 v. Federal National Mortgage Association et al.*, --- P.3d ---, 2018 WL 3387787 (2018) (Unpub.). Tellingly, the Nevada Supreme Court again looked to the Federal Courts for guidance citing to both District Court and Ninth Circuit decisions.[4]

Although it appears that these particular attacks are dead, the HOA buyers will not go quietly. Instead, we expect they will attempt to raise new attacks or, at least, whittle down the protections afforded by these cases. Nevertheless, the mortgage industry can enjoy a well needed win for now! a

[2] Although originally unpublished, this opinion was reissued as a published opinion in May 2018.

[3] Relying on its earlier opinion in *In re Montierth*, 131 Nev. 543, 547, 354 P.3d 648, 650-651 (2015) (the note remains secured "if there is either a principal-agent relationship between the note holder and the mortgage holder, or the mortgage holder 'otherwise has authority to foreclose in the [note holder]'s behalf.").

[4] Both the June 2018 *Guberland* and July 2018 *A&I LLC* decisions remain unpublished. Nationstar and FHFA moved to have the *Guberland* decision reissued as a published opinion; however, Guberland LLC has also moved for rehearing.

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Andrea Tromberg, the firm's owner, purchased the firm which she had served as managing partner since 2011. This ownership change and subsequent renaming of the firm to Tromberg Law Group made Tromberg Law Group one of the largest woman-owned creditor firms in Florida that also serves Puerto Rico. Andrea Tromberg serves as the first elected Chairwoman on the Board of Directors for the American Legal and Financial Network (ALFN) and has served on numerous committees and is a current member of the leadership committee for Women in Legal Leadership (WILL).

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STATE SNAPSHOT

STATE SNAPSHOT

MARYLAND DEBT PURCHASERS ARE NOT REQUIRED TO OBTAIN COLLECTION AGENCY LICENSE TO FORECLOSE

By Ronald S. Deutsch, Esq. | RDeutsch@cgd-law.com & Richard Solomon, Esq.
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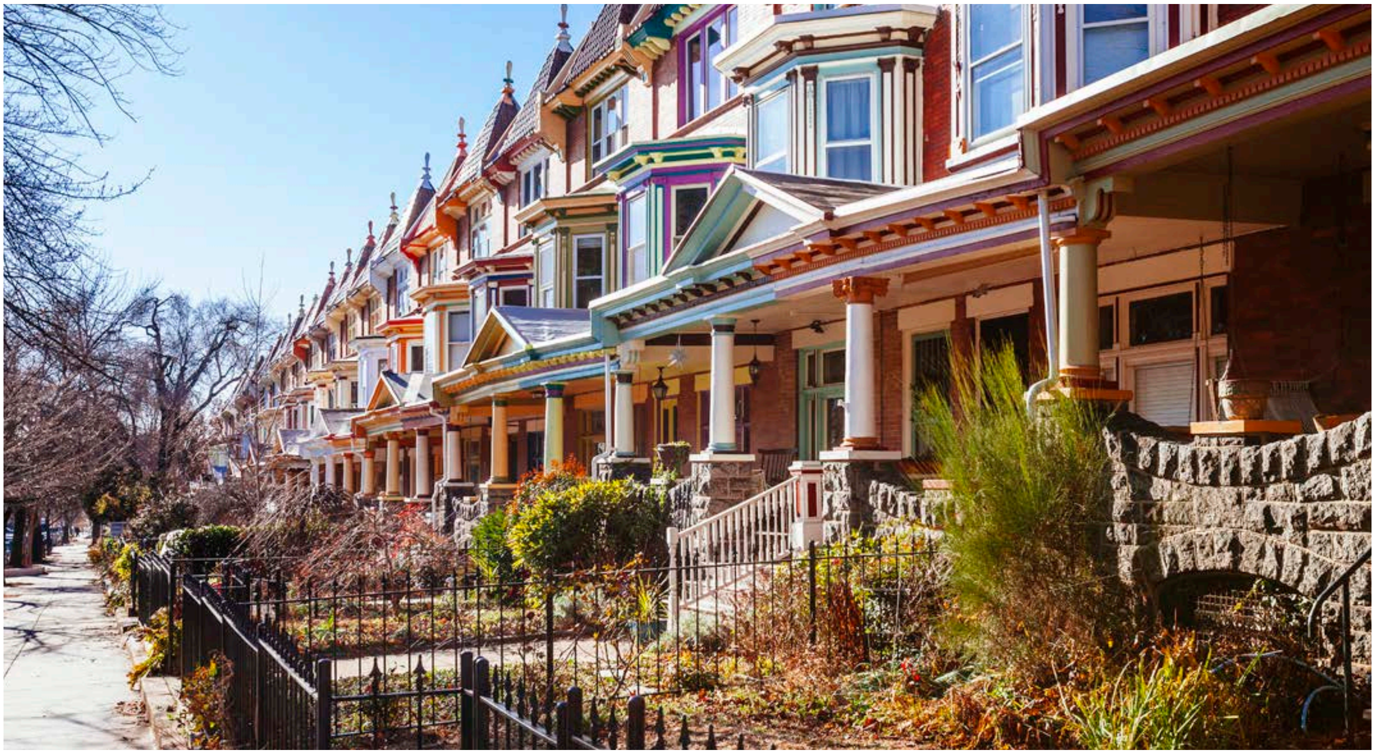

THE COURT OF APPEALS of Maryland on August 2, 2018, issued its long-anticipated ruling in Blackstone v. Sharma, et al., a consolidated appeal involving several Maryland foreclosures. The favorable opinion, although lengthy, can be summarized succinctly as holding that a foreign statutory trust, which merely served as a vehicle to own a mortgage loan that was acquired in default, is not required to obtain a collection agency license prior to foreclosing through its appointed trustees. This decision came as a large relief for many note purchasers and servicers, especially since the language of the opinion is broad and holds that the prior amendment to the Maryland collection agency licensing law does not expand the scope of the act to the "mortgage industry."

As background, on June 6, 2017, the Court of Special Appeals of Maryland ("COSA") decided the combined cases of Blackstone v. Sharma, Sept. 2015, 1524, and Shanahan v. Marvastian, Sept. 2015, 1525 (hereinafter "Sharma"). This consolidated opinion upheld the dismissal of two foreclosure actions initiated on behalf of a Delaware Statutory Trust named the "Ventures Trust" (the "Trust"), due to the Trust not being licensed as a collection agency pursuant to the Maryland Collection Agency Licensing Act, Md. Ann. Code, Bus. Reg. § 7-101, et. seq. ("MCALA"). The COSA determined that the trust fell within MCALA's definition of "collection agency" and held that any foreclosure judgment obtained was void, as a result of the Trust's failure to obtain a license.

The Court of Appeals however, upon examining the plain language of the statute, held that the statute was ambiguous and noted several incongruities between mortgage industry actors and the common understanding of "collection agency." The court stated: "On the one hand, this Court cannot ignore the term 'collection agency' is commonly understood as those entities with a business model of sending letters to debtors, making collection calls, and filing collection suits for consumer debt." The Court then moved on to an exhaustive examination of the legislative history and concluded that the Maryland General Assembly did not intend to significantly enlarge the scope of MCALA to entities outside of the collection industry. Instead, the target of the law were actors in the "collection industry" who employed a loophole in MCALA's licensing requirement by purchasing delinquent consumer debt for "goods and services" pursuant to a purchase contract that "may closely resemble the terms of a collection agency agreement…". Moreover, the Court specifically found that the Department of Labor Licensing and Regulation did not request, and the General Assembly did not intend, to expand the scope of MCALA licensing requirements into new industries or beyond the collection agency industries that collect consumer claims.

As to statutory trusts, the Court noted that securitization requires special purpose vehicles, such as trusts, to serve as a repository for mortgage backed securities. The Court wrote, "Both this Court and the ("Governor's 2007) Task Force, created specifically to review the Maryland foreclosure laws and suggest changes (which a member of this firm served on), recognized that a separate trustee would serve to manage the loans in the mortgage backed securities while a loan servicer would collect payments from the borrowers." MCALA was not contemplated by the Task Force and this further demonstrated that MCALA was not applicable to the foreclosure industry.

The Court in its conclusion, stated "Similarly when the General Assembly enacted the Statutory Trust Act in 2010, the legislature specifically decided that the statutory trusts were not doing business in Maryland when foreclosing on deeds of trust, recognizing that the previous Maryland mortgage foreclosure law reform would dictate the requirements for the in rem proceeding. As such, the legislative history surrounding MCALA, the Maryland mortgage foreclosure law, and the Statutory Trust Act all confirm the mortgage industry did not fall under the scope of MCALA." It then held, that "the General Assembly did not intend for statutory trusts to obtain a collection license under MCALA before its substitute trustees file a foreclosure action in circuit court." It further stated "we conclude that foreign statutory trusts are outside of the scope of the collection agency industry regulated and licensed under MCALA." In so holding, it found that the courts below erred in dismissing the foreclosure cases that were subject to the appeal.

The Sharma decision also coordinates with the reasoning of Dorrian v. LVNV Funding, in which the Massachusetts Supreme Judicial Court held, earlier this year, that passive debt buyers are not required to obtain a Massachusetts license when "all aspects of the debt collection process are contracted out to and conducted by" a licensed third party collection agency and the investment entity does not collect debts owed "to another."

Although the dissenting opinion believes the holding is narrower in scope, it is the opinion of this office that the issues of whether MCALA applies to foreclosure actions and whether unlicensed non-exempt investors can act through a licensed servicer, have now been conclusively established.

INDUSTRY IMPACT: WHAT IT MEANS FOR SERVICING

Entities that purchase defaulted mortgage loans do not need to acquire a collections license in Maryland before foreclosing. The Sharma appellate decision has clarified that this licensing requirement does not apply and foreclosure actions that have been held up pending the appellate outcome may now move forward.

Tom-ay-to, Tom-ah-to: in New York You Might Have to Call the Whole Thing (the Mortgage) Off!

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UNLIKE THE GERSHWIN SONG, the legal effect of voluntary discontinuing a foreclosure action on the acceleration of a mortgage is not merely how to pronounce the word referring to the red fruit. The theory the Court adopts may result either in having an enforceable mortgage or discarding the mortgage like a rotten tomato.

New York has a 6-year Statute of Limitations on mortgage foreclosure actions. The 6-year Statute of Limitations runs from each individual loan installment that the borrower defaulted in paying until such time as the entire amount of the debt is called due and owing (acceleration). A lender may accelerate the mortgage through a clear, overt, and unequivocal act in demanding the entire amount due. Such an act includes calling the entire amount of the debt due in a Complaint commencing a foreclosure proceeding.

Some mortgage foreclosure actions in New York have been pending for years (for many reasons including bankruptcy, Court delay, multiple and/or lengthy loss mitigation holds, service transfers, servicer delay due to adaptations to changes in New York law and regulatory demands, etc.). Sometimes an aged foreclosure needs to be restarted for one of multiple reasons well known to those steeped in New York foreclosures.

What happens to the acceleration when a mortgage foreclosure action, pending for years, is voluntarily discontinued? The fruit of two legal theories grew off the same vine: nullification (tomayto) and revocation (tomahto). Whether one said, “tom-ay-to” or “tom-ah-to”, one would expect that (s)he could commence a new foreclosure action without serious threat of the Statute of Limitations.

Under the revocation theory, by voluntarily discontinuing the action, the foreclosing lender also revokes its prior acceleration. By revoking the acceleration, the loan reverts back to an installment loan where the Statute of Limitations applies only to individual installments. While some installments might be time-barred, the entire mortgage does not need to be thrown away like a rotten tomato. The time-barred payments act as a spot of mold to be excised from the fruit.

Under the nullification theory, the voluntary discontinuance nullifies all acts that occurred within the action—including the acceleration via the commencement of the foreclosure. With the acceleration-via-commencement nullified, the loan reverts back to an installment loan by operation of law and the servicer need only excise the moldy time-barred installments.

In a recent Appellate Division case [Freedom Mortgage Corp. v. Engel, 163 A.D.3d 631 (2d Dept. 2018)] the Second Department threw out the whole tom-ah-to. The facts in a nutshell: a foreclosure action was commenced on July 16, 2008; that action was voluntarily discontinued on January 23, 2013; and a second foreclosure action was commenced on February 19, 2015. The Court held that the mortgage was time-barred since the prior foreclosure action accelerated the loan more than six years prior to the second action and

Noticeably absent from the Court's determination was any discussion about whether the voluntary discontinuance acted to nullify, as a matter of law, the acceleration that occurred through commencement of the prior action.

that the prior voluntary discontinuance did not revoke the acceleration:

> "Contrary to the Supreme Court's determination, the plaintiff's execution of the [stipulation of discontinuance] did not, in itself, constitute an affirmative act to revoke its election to acceleration, since, inter alia, the stipulation was silent on the issue of revocation of the election to accelerate, and did not otherwise indicate that the plaintiff would accept installment payments from the defendant." Id. at 633.

Noticeably absent from the Court's determination was any discussion about whether the voluntary discontinuance acted to nullify, as a matter of law, the acceleration that occurred through commencement of the prior action. Generally, "[b]y the [voluntary] discontinuance of an action… what has been done therein is also annulled, so that the action is as if it had never been." Brown v. Cleveland Trust Co., 233 N.Y. 399 (N.Y. 1922). Indeed, "[w]hen an action is discontinued, it is as if it had never been; everything done in the action is annulled…" Newman v. Newman, 245 A.D.2d 353 (2d Dept. 1997) (emphasis added).

Either the nullification argument was not preserved for Appeal, was not argued on Appeal, or the Appellate Division ignored the argument. The Appellate Division ordered that the borrower's motion for summary judgment be granted, on the basis that the enforcement of the mortgage was time-barred. The Court found the fruit to be rotten and discarded the whole tomato.

ALFN AMICUS BRIEF EFFORTS IN ILLINOIS

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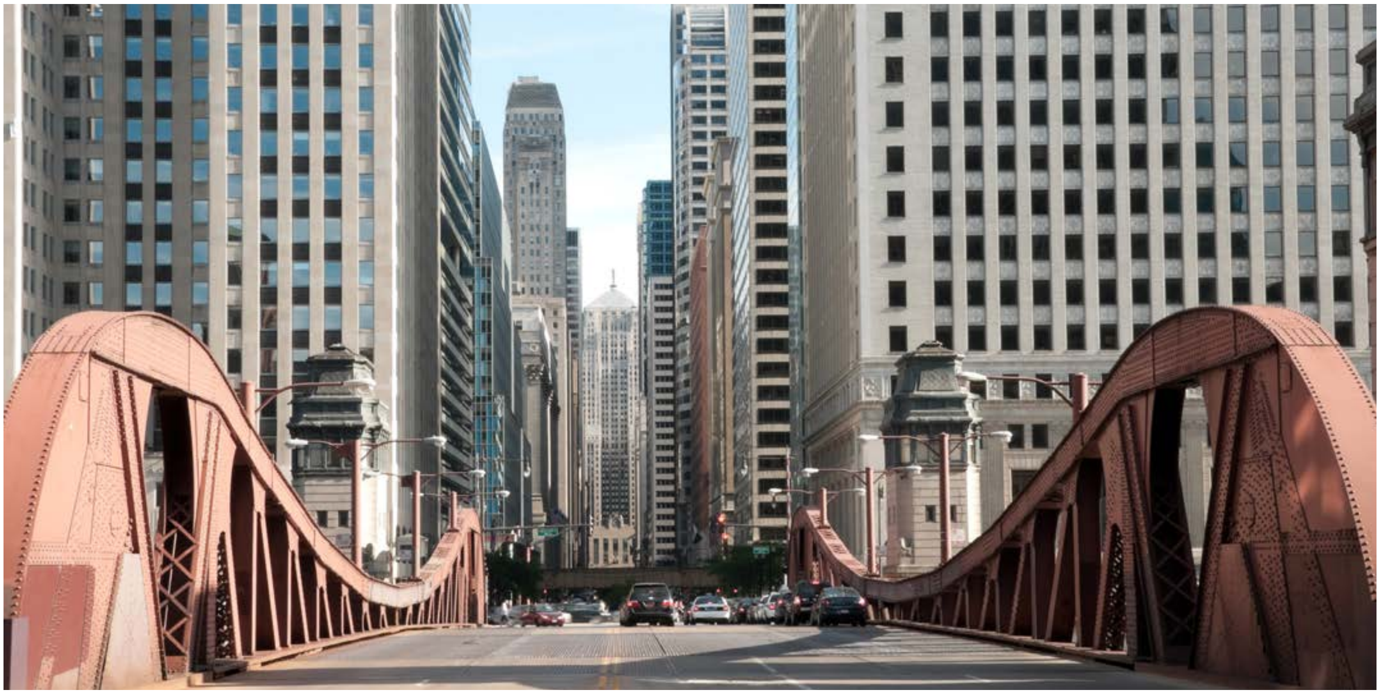

The ALFN was recently granted leave to file amici briefs in two very important cases in Illinois. The first, First Midwest Bank v. Cobo, 123038, is before the Illinois Supreme Court. At issue in Cobo is the application of a state procedural rule which prohibits a plaintiff from refiling an action if it had been dismissed more than once. Because mortgage foreclosure litigation often results in the voluntary dismissal of a suit, because of a loan modification, bankruptcy, or reinstatement, the "single refiling rule" has been frequently — and successfully invoked — to bar a subsequent foreclosure filing. The ALFN urges the Supreme Court in Cobo to re-examine its holding in a 1991 decision which effectively created the single refiling rule. It is also asking the Court to clarify how the single refiling rule operates in suits where there the payment default is under an instrument requiring monthly or regular payments. Similar to the arguments raised in the Florida statute of limitations cases, the ALFN argues that because each missed payment constitutes a distinct default, a subsequent suit based on a different default is a different action for purposes of the rule. Oral argument is scheduled for September 18, 2018.

The other case, Santiago v Deutsche Bank, 1-17-3170 is before the First District Illinois Appellate Court. It concerns the City of Chicago's rental ordinance, the Keep Chicago Renting Ordinance (KCRO) which requires purchasers of foreclosed properties the choice either to offer existing tenants a lease renewal at essentially the same terms or to pay them each $10,600. The main issues are whether an Illinois statute, the Illinois Rent Control Preemption Act, preempts the KCRO and whether it is unconstitutionally vague. A decision is expected later in both cases this year.

ALFN member, Noonan & Lieberman, authored the briefs on behalf of the organization.

FDCPA WIN FOR COMPANY SUBJECT TO "NO CONTACT" DEMAND BY SCHEMING DEBTOR

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PROFESSIONAL PLAINTIFF CRAIG SCHEFFLER is a former debt collector who now sues other debt collectors under various FDCPA claims, including a law firm who crossed paths with Scheffler while collecting a judgment docketed against him. *Scheffler v. Gurstel Chargo, PA* (8th Cir., decided August 27, 2018.). Scheffler apparently sent the law firm a "cease further communications letter" under the FDCPA. Thereafter, the law firm served a garnishment summons upon Scheffler's bank in an attempt to collect the judgment and sent Scheffler a copy of the summons with a statement advising him to contact a collections representative with any questions.

In response, Scheffler called a law firm representative, and when the conversation turned to the underlying debt, Scheffler asked "OK, so what am I gonna do about that?" When the law firm's rep suggested a settlement, Scheffler warned that he had sent the law firm a cease communications letter and that the firm violated the letter's directive. Scheffler then sued the law firm, alleging various violations of the FDCPA, including provision 15 U.S.C § 1692c(c), entitled "Ceasing communication." After dismissal of his claims at the Federal District Court level, this appeal followed.

The "Ceasing communication" provision of the FDCPA reads in part: "If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt . . . ." However, the FDCPA expressly exempts certain communications, including those made "to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor." *Id.* at § 1692c(c)(2).

In reviewing Scheffler's claims, the Court first disposed of the garnishment summons issue by noting that prior precedent held that sending a garnishment notice following a cease of communications demand is not a violation. See, *Scheffler v. Messerli & Kramer P.A.*, 791 F.3d 847, 848 (8th Cir. 2015). Further, the appellate court concurred that the law firm's inclusion of an invitation for the consumer to call with questions was not in itself a violation, nor was the language deceptive to an unsophisticated consumer since it was clear, concise, accurate, and fell within the ceasing communication exception of the FDCPA.

Scheffler claimed there should be liability under the FDCPA's "unsophisticated consumer standard" and that the law firm's communication was deceptive. The Court described the "unsophisticated consumer" standard of the FDCPA as "designed to protect consumers of below average sophistication or intelligence without having the standard tied to 'the very last rung of the sophistication ladder.'" *Id.* The

As a practice pointer, this case suggests that within the 8th Circuit, if a debtor actually initiates the call, the creditor should be free to answer questions about the debt even when there has been a cease and desist letter, so long as there is no pressure or threatening language during the call to collect the debt.

Court further reasoned that "[t]his standard protects the uninformed or naive consumer, yet also contains an objective element of reasonableness to protect debt collectors from liability for peculiar interpretations of collection letters."

Perhaps the best news for the default industry involves the Court's review of the FDCPA claims surrounding the phone call between Scheffler and the law firm. The 8th Circuit agreed with the Ninth Circuit that the FDCPA does not prevent a debt collector from responding to a debtor's post-cease letter inquiry regarding a debt. See, *Clark v. Capital Credit and Collection Servs., Inc.* 460 F.3d 1162 (9th Cir. 2006) at 1170. "Indeed, to hold that a debt collector may not respond to a debtor's telephone call regarding his or her debt would, in many cases, 'force honest debt collectors seeking a peaceful resolution of the debt to file suit in order to resolve the debt—something that is clearly at odds with the language and purpose of the FDCPA.'" Id. (quoting *Lewis v. ACB Business Servs.*, 135 F.3d 389, 399 (6th Cir. 1998)).

The Scheffler appellate court agreed with the lower court's finding that Scheffler's call to the law firm to discuss his debt was "an unsubtle and ultimately unsuccessful attempt to provoke [the law firm] into committing an FDCPA violation."

The appellate court further noted that "even if [the law firm's] communication can be construed as an effort to collect on the debt in violation of the cease letter, it occurred after Scheffler called and asked a question about the underlying debt. An unsophisticated consumer would know that by behaving like Scheffler, he was waiving his rights under § 1692c(c) so as to allow the debt collector to answer his question. We hold Scheffler voluntarily and knowingly waived his cease letter for purposes of allowing [the law firm] to answer his question, and therefore [the law firm] did not violate Scheffler's rights under § 1692c(c) by briefly discussing a possible resolution of the debt during the phone call." The 8th Circuit then affirmed the dismissal of all claims.

As a practice pointer, this case suggests that within the 8th Circuit, if a debtor actually initiates the call, the creditor should be free to answer questions about the debt even when there has been a cease and desist letter, so long as there is no pressure or threatening language during the call to collect the debt. Such calls should be closely monitored for FDCPA compliance and recorded, but it is a formidable step in the right direction to deny FDCPA claims when it is the debtor who actively seeks out communication with the creditor.