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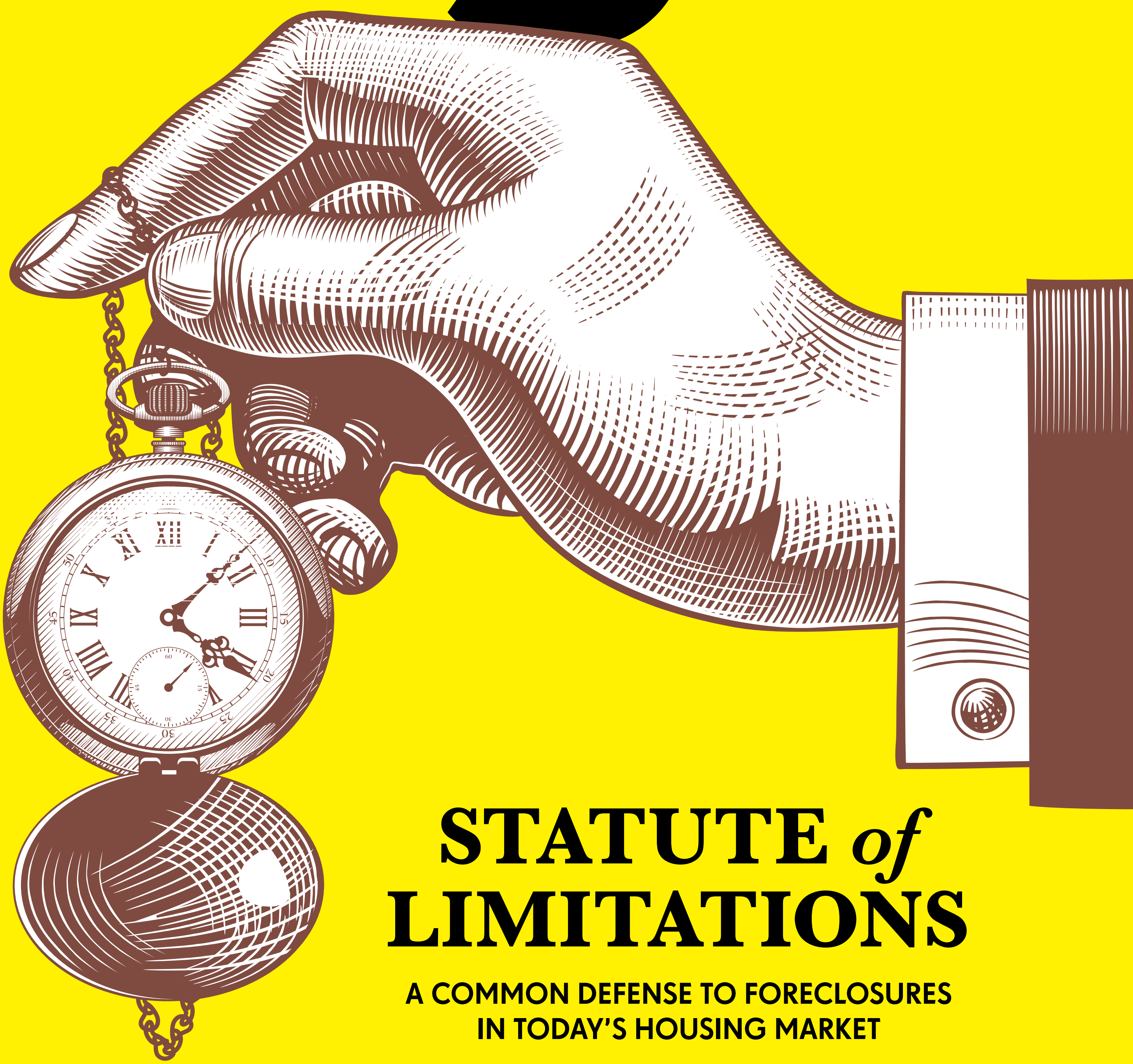

STATUTE *of* LIMITATIONS

A COMMON DEFENSE TO FORECLOSURES IN TODAY'S HOUSING MARKET

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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 Virginia and 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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Letter from the Editor

AS WE CONCLUDE 2019, I would like to thank each of you for helping us make this past year a huge success. Our achievements and growth couldn't have been possible without your support, and we value the opportunities to continue earning your membership in 2020. We look forward to bringing you many new and exciting opportunities that give you the platform to showcase your products and services, grow your network of colleagues and clients, advocate to ensure your voices are heard, and deliver the highest value in legal education.

Your membership with an association like ALFN brings a higher level of ROI when you get involved, so take the time to review our member briefs section of the ANGLE to see where you can get involved with our educational events and other activities that your membership affords you.

As we wrap up the year with our final ANGLE publication of 2019, we start this issue with our cover article on Statute of Limitations and its use as a common defense to foreclosures in today's housing market. We then move on to take a closer look at the City of Chicago, and the Seventh Circuit Court of Appeals reaffirmation of a creditors requirement to return impounded vehicles upon a Bankruptcy filing. Next up we analyze the liability risks for lenders and foreclosure plaintiffs under New York state environmental contamination laws. It is critical that a foreclosing plaintiff know the extent of contamination with a plan in place for remediation and disposition of property prior to commencing any foreclosure action. Moving on to our next feature, our focus is on the rise of solar energy equipment use by homeowners and the legal and practical issues that result from the financing of such equipment. Foreclosure attorneys should be prepared to analyze these issues upon discovery of solar equipment financing on a property. Lastly, we showcase a topic on building the leadership of tomorrow, and reviewing some of the most important values of leadership.

Don't miss our state snapshot section, where we have several state specific legal updates in Florida, Maine, Nevada, New York, Connecticut, Maryland, Pennsylvania, Ohio, California and Kentucky.

I encourage each of you to use the coming new year as an opportunity to get more involved with the ALFN and continue increasing your membership ROI. Please contact me or any of the other ALFN staff or members of the board and learn how you can get more involved in 2020.

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

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Dallas, TX

MAY 5-6
5TH ANNUAL WILLPOWER SUMMIT
The Ritz-Carlton
Dallas, TX
* Registration Opens February 2020

JULY 19-22
ALFN ANSWERS
18th Annual Conference
Hyatt Regency Coconut Point Resort
Bonita Springs, FL

NOVEMBER 18
Foreclosure Intersect
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Dallas, TX

2021

JULY 18-21
ALFN ANSWERS 2021
Hyatt Regency Tamaya Resort
Santa Ana Pueblo, NM

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.

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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 2020.

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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.

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

PRACTICE BUILDING SERIES

Presentations on operational and business issues facing our members.

HOT TOPIC LEGAL UPDATES

Industry hot topics and litigation updates.

STATE SPOTLIGHT

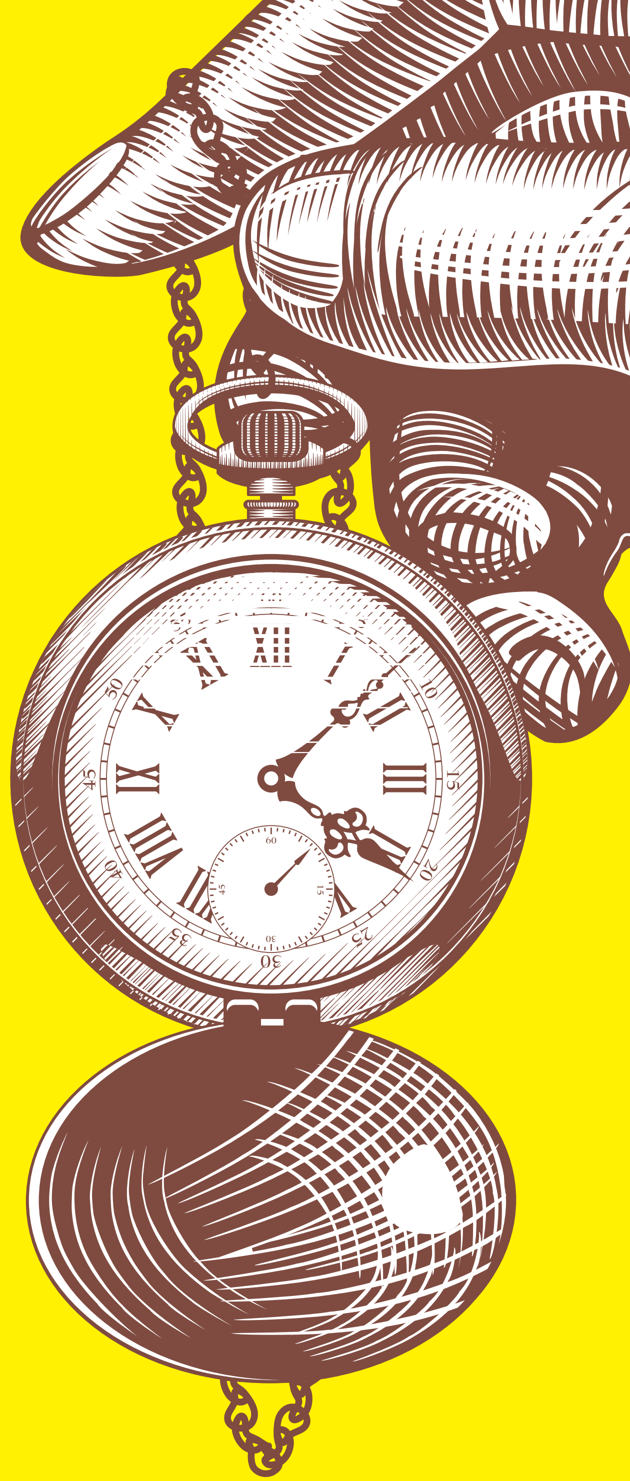
Focusing on those state specific issues.

MEMBERS ONLY

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

SPEAKER APPLICATIONS FOR 2020 EVENTS

If you want to be considered for a panelist position as a speaker or moderator in 2020 at one of our events, please find our events tab on alfn.org and fill out the speaker form listed there. Each year many members submit their interest to speak at ALFN events, and we are looking for the best educators and presenters out there to get involved. To be considered, everyone in your company that wants to speak on a panel in 2020 must complete a speaker form.



STATUTE *of* LIMITATIONS

A COMMON DEFENSE TO FORECLOSURES IN TODAY'S HOUSING MARKET

BY ALISON BERRY, ESQ.
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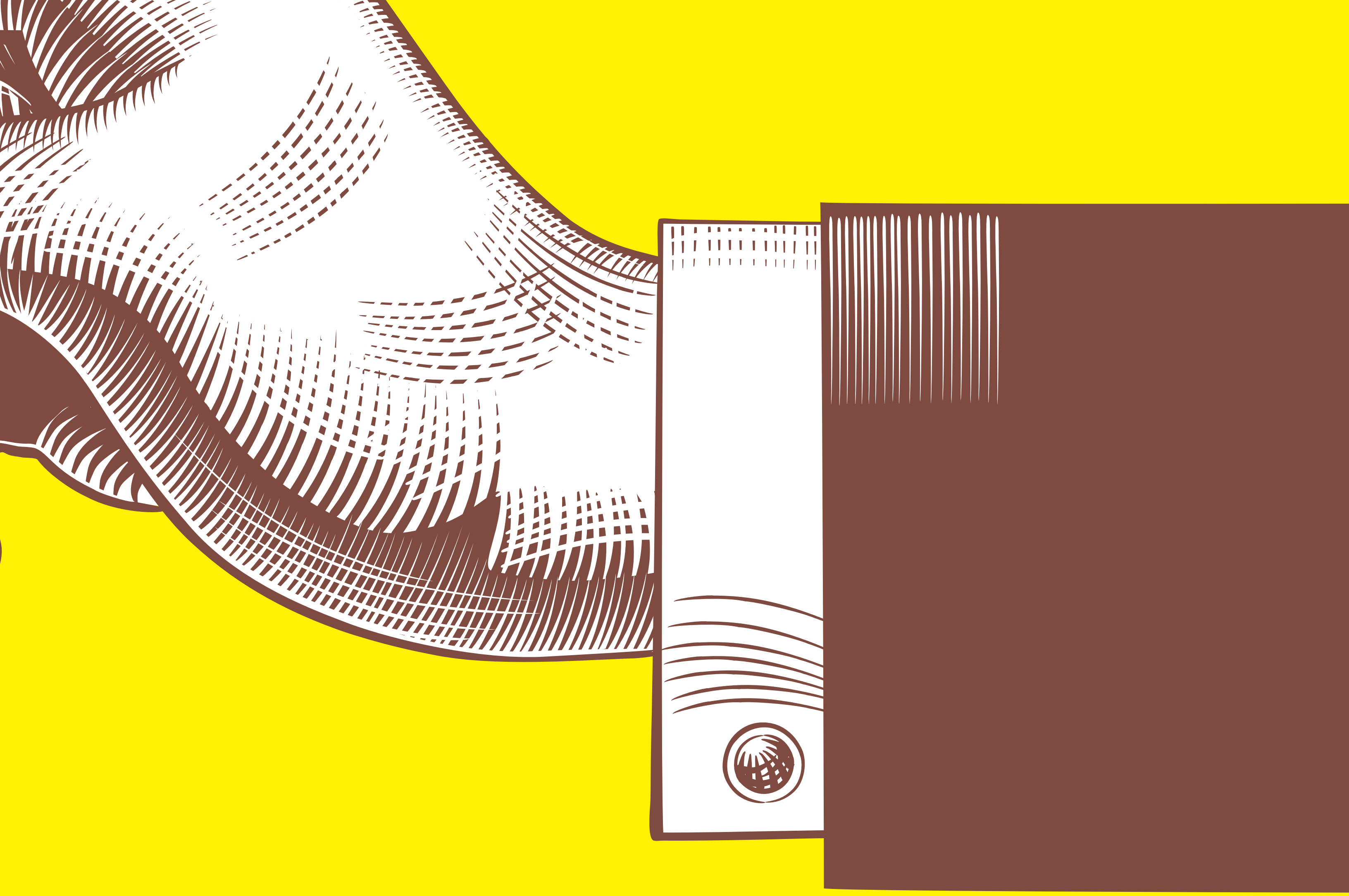

HOMES ACROSS THE COUNTRY have seen an increase in property values, and lenders are paying attention. Debts which seemed unrecoverable a few years ago, are getting a second look. In today's housing market, many lenders are electing to foreclose previously valueless second lien mortgages due to the recovery of the market and the attendant increased equity in homes. Imagine a homeowners' surprise when they become current on their first mortgage as the result of a loan modification and thereafter, receive a notice of default/acceleration on a long-forgotten second mortgage. Many times, the second loan has not been paid in years, but that does not necessarily mean that a lender cannot foreclose the property or otherwise seek enforcement of the obligation. However, enforcement of debts under these circumstances often leads borrowers to raise a statute of limitations defense.

ADDITIONALLY, statute of limitation arguments frequently arise when a foreclosure action has been initiated and withdrawn many times. Common situations involve a borrower applying for loss mitigation, the foreclosure action being placed on hold, and then ultimately withdrawn due to a sale deadline or Court order. How do you respond to a borrower who alleges the statute of limitations has expired and the lender's lien is extinguished?

With the housing crisis of 2007-2008 in the rearview mirror, many lenders are instituting collection actions to recoup amounts due under second mortgage notes. A common scenario involves a homeowner with a first and second mortgage. The first mortgage is foreclosed, extinguishing the second mortgage lien, and the homeowner assumes the second mortgage debt is no longer owed. Lenders are successfully obtaining monetary judgments for the unpaid second mortgage. While the second mortgage is no longer a lien against the property, the homeowner still owes the debt in many circumstances.

The applicable statute of limitations has become a common defense by borrowers in defending a foreclosure action or collection case. For example, consider a homeowner who hasn't made payments on the second mortgage for over six years. A lender determines that there is sufficient equity in the real property to justify foreclosure and proceeds with an enforcement action. The homeowner claims that the right to foreclose and/or collect the debt has been extinguished by the running of the statute of limitations. Is the homeowner correct? That answer depends on various circumstances, acceleration, accrual of the cause of action, what constitutes deacceleration or abandonment of acceleration, and the particular jurisdiction. Below is a discussion of a few of the jurisdictions addressing the issue.

FLORIDA'S POSITION ON STATUTE OF LIMITATIONS:

In Bartram v. U.S. Bank, N.A. 211 So. 3d 1009, 1011 (Fl. 2016), the Supreme Court of Florida determined that Florida's five-year statute of limitations did not continue to accrue when a foreclosure action was involuntarily dismissed. In January 2006, the borrower stopped making payments on a $650,000.00 mortgage, which contained an optional acceleration clause. The lender filed a complaint to foreclose in May 2006. Five years later, on May 5, 2011, the foreclosure was involuntarily dismissed upon the lender's failure to appear at a case management conference. The borrower filed a motion to cancel the note and release the lien on the mortgage asserting the statute of limitations had expired. The Florida Supreme Court held that the dismissal revoked the acceleration. The Court found if there was a subsequent default and the statute of limitations had not run on that particular default, the lender could proceed with another foreclosure action.

Following the rationale of the Bartram decision, the 11th Circuit affirmed the district Court's dismissal of a borrower's declaratory judgment case seeking to extinguish the promissory note and mortgage due to the running of the statute of limitations. Gomez v. Household Fin. Corp., 688 Fed Appx. 680 (11th Cir. 2017). The borrower defaulted on the mortgage loan on November 1, 2007. The lender started foreclosure proceedings on April 2, 2008 and obtained a judgment. Before the foreclosure sale process began, the lender moved to vacate its judgment because the borrower reinstated the loan. The borrower filed his complaint alleging that the five-year statute of limitations had expired, and the note and mortgage were unenforceable. The borrower argued that the five-year statute of limitations begins running on the initial default date, or at the latest the date when the lender accelerated the loan. The 11th Circuit relying upon the Bartram decision held that each future installment payment created a new and independent right to accelerate payment on the note in a subsequent foreclosure action causing a new limitations period to begin to run from the date of each new default. Further, the Court held that the voluntarily dismissed foreclosure action deacceler-

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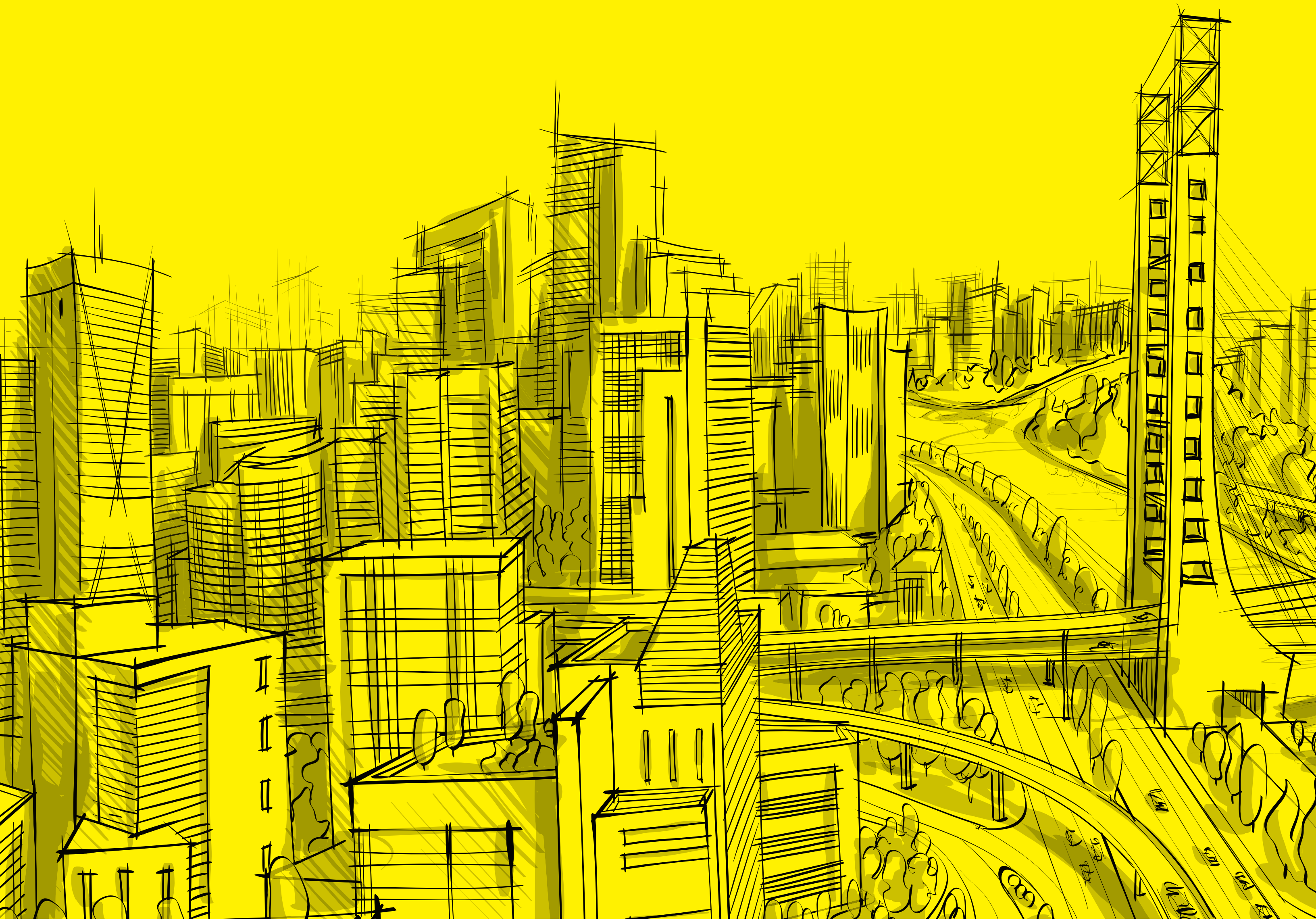
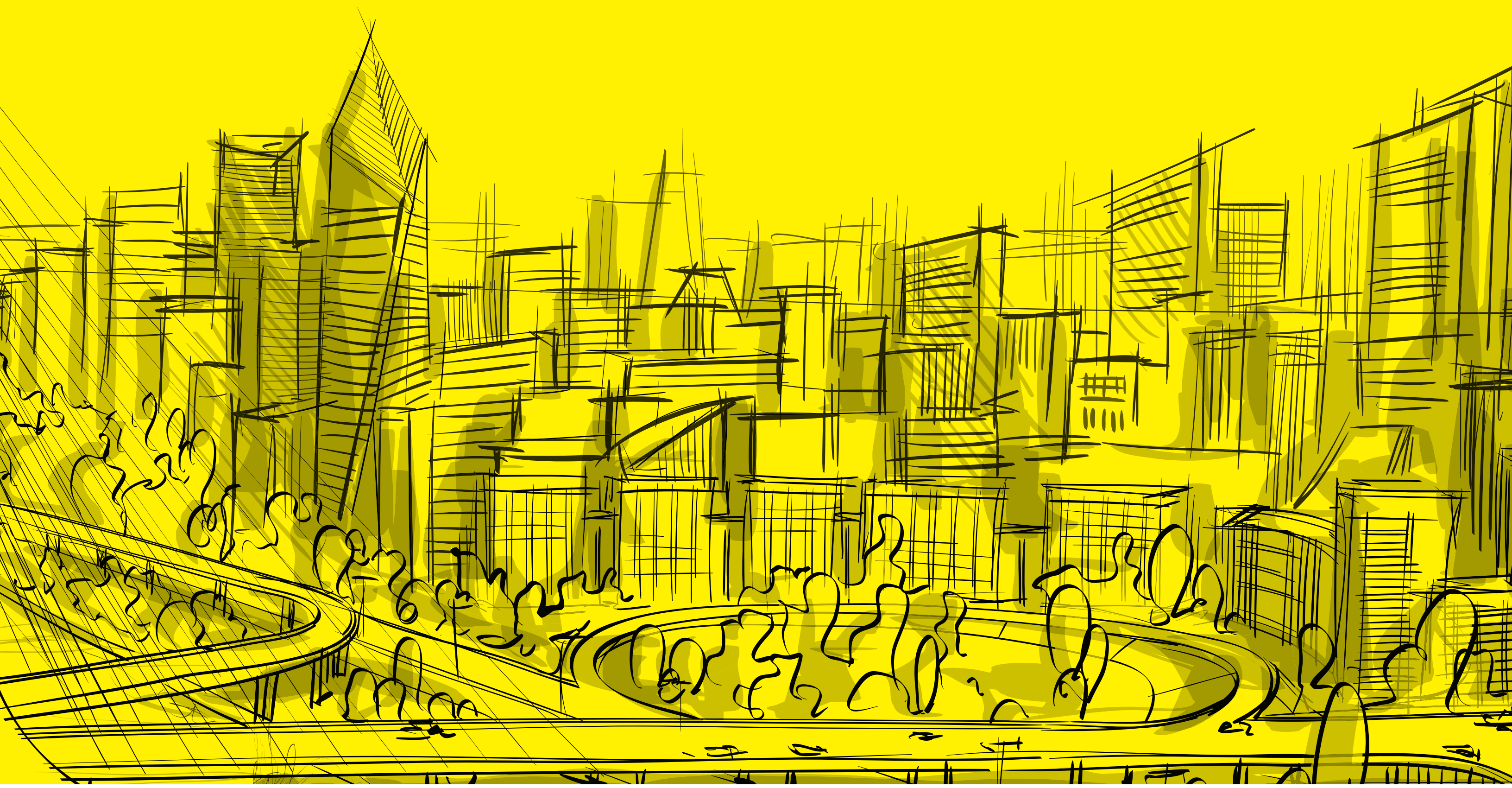


ated future payment obligations, restoring the "installment nature" of the note.

NEW YORK'S INTERPRETATION

Another recent statute of limitations case involved a New York borrower arguing that the 6-year statute of limitations expired on his $1,495,000.00 mortgage because the loan was due for the July 1, 2007 payment and the foreclosure was commenced on September 17, 2014. Nationstar Mortg., LLC v. MacPherson, 56 Misc. 3d 339 (N.Y. 2017). The Court stated that with respect to mortgages payable in installments, separate causes of action accrue for each installment that is not paid and the statute of limitations begins to run on the date each installment becomes due. But once a mortgage debt is accelerated, the entire amount is due, and the statute of limitations begins to run on the entire debt. The acceleration notice

Always determine the limitations period for a mortgage foreclosure action in your particular jurisdiction and the date the action accrues, consider the language of the note and mortgage, and how a prior dismissal and/or acceleration impacts the running of the statute of limitations.



to the borrower must be "clear and unequivocal." The New York Supreme Court reviewed the decisive mortgage acceleration case of Albertina Realty Co. v. Rosbro Realty Corp., (258 NY 472, 180 NE 176 (1932)), which held that because the mortgage provisions contained a strict statutory acceleration clause, the lender elected to exercise its right to accelerate and had no legal obligation to accept the borrower's tender of the past due payments after the foreclosure was filed. Since Albertina, many cases have relied upon the proposition that the filing of a prior foreclosure starts the running of the statute of limitations. However, the MacPherson case was different because of the language contained in the mortgage. Various provisions in the mortgage allowed the borrower to cure the default until the judgment is entered. The court held that the judgment triggers the acceleration of the entire judgment debt and that the foreclosure action was not time-barred by the statute of limitations. It is important to note that the court stated the lender's recovery was limited to only the unpaid installments, which accrued from September 17, 2008, the six years immediately preceding the foreclosure action.

RECENT COLORADO CASE LAW ON DECELERATING THE DEBT

In Colorado, an action on a promissory note must be commenced within 6 years of the date the cause of action accrues. C.R.S. §13-80-103.5. A mortgage lien is extinguished at the same time that the right to commence a suit to enforce payment of the underlying obligation is barred by the statute of limitations. C.R.S. §38-39-207. With respect to installment loans, the statute of limitations runs separately for each individual installment, which is similar to other states, including Florida. Colorado case law has held that a cause of action on a note accrues at the time of acceleration. A lender can accelerate the debt with an optional acceleration provision by performing a clear, unequivocal act evidencing its intention to take advantage of the accelerating provision. Hassler v. Account Brokers of Larimer County, Inc., 274 P.3d 547, 553 (Colo. 2012). Recently, a Colorado Court of Appeals decision held that the lender's withdrawal of the foreclosure action operated as an abandonment of acceleration of the debt, which restored the note's original maturity date and reset the statute of limitations period for a new foreclosure or other enforcement action. Bank of N.Y. Mellon v. Peterson, 2018 COA 174. Additionally, a recent U.S. District Court for the District of Colorado weighed in and determined that the date of acceleration, not the loan default date, triggered the six-year statute of limitation, and the withdrawal of a foreclosure action showed abandonment of the lender's prior acceleration. Paggen v. Bank of Am., N.A. 2018 U.S. Dist. LEXIS 145364.

A NOTEWORTHY CASE OUT OF MAINE CONCERNING RES JUDICATA

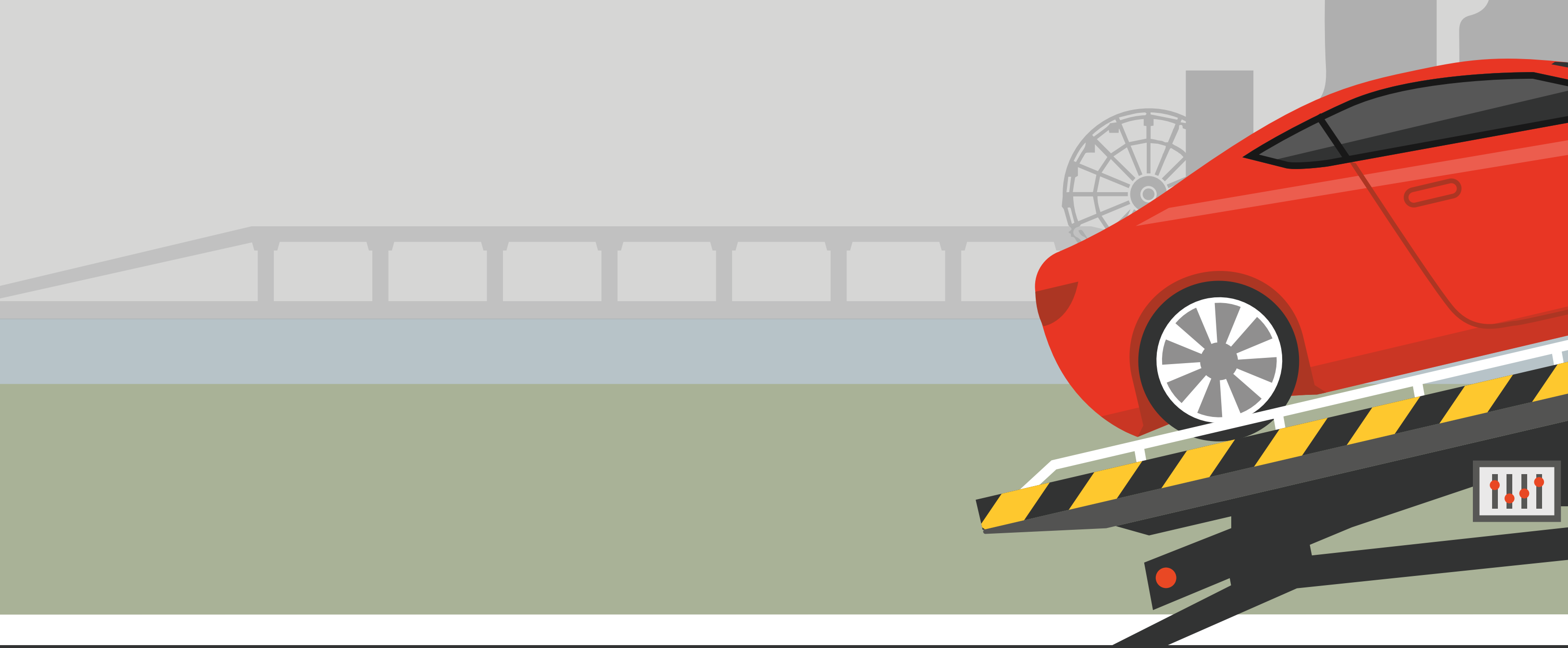
In 2017, the Supreme Court of Maine affirmed a lower court's ruling that the borrowers' mortgage was unenforceable due to a previously dismissed foreclosure action. Fannie Mae v. Deschaine, 2017 ME 190. In 2012, Fannie Mae filed a complaint for residential foreclosure due to a payment default. The foreclosure was dismissed with prejudice due to the parties' failure to comply with the court's pretrial order. The following year, Fannie Mae filed a second complaint for foreclosure involving the same property, same note, and mortgage, and same borrowers. The Supreme Court of Maine affirmed the lower court's determination that Fannie Mae's second foreclosure was barred as a matter of law because of res judicata. Fannie Mae attempted to argue that the borrowers would receive a windfall if the court did not allow the second foreclosure action to be prosecuted. The court dispensed with the argument by holding that the lenders would be the ones to receive a windfall if they could file successive foreclosure actions indefinitely until they eventually win.

REMINDERS

Always determine the limitations period for a mortgage foreclosure action in your particular jurisdiction and the date the action accrues, consider the language of the note and mortgage, and how a prior dismissal and/or acceleration impacts the running of the statute of limitations. If you are seeking money damages on a second lien that was previously foreclosed, consider asking the lender to advance the due date within the applicable statute of limitations to completely dispense of a statute of limitations argument. In pursuing money damages, do not forget to determine whether the personal obligation of the borrower has been discharged in a bankruptcy proceeding. Also, consider whether your jurisdiction may require an affirmative act to deaccelerate a previously accelerated debt.

CITY OF CHICAGO LOSES APPEAL:

REQUIRED TO RETURN IMPOUNDED VEHICLES UPON BANKRUPTCY FILING



BY KINNERA BHOOPAL, ESQ.
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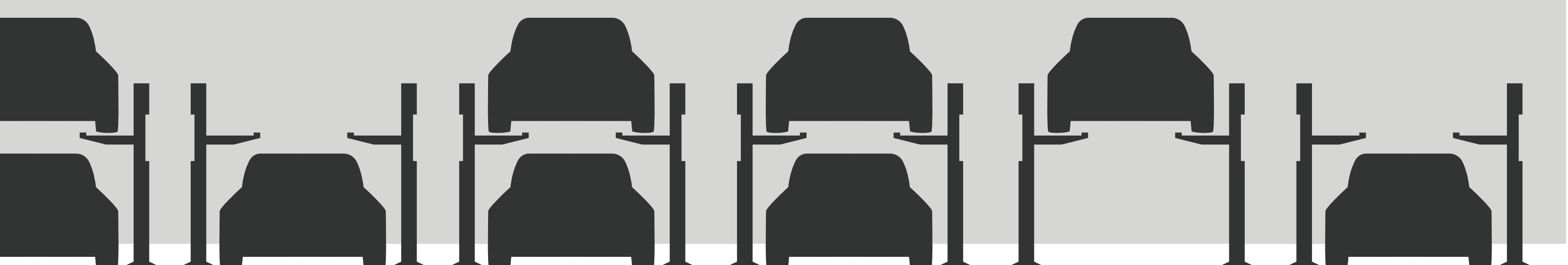
Thompson v GMAC, LLC is well established Seventh Circuit law from 2009, which holds creditors must return repossessed vehicles when the debtor files bankruptcy. 566 F.3d 699 (7th Cir. 2009). However, in a consolidated appeal, the City of Chicago ("the City") not only sought to rattle the Thompson ruling but sought to completely overturn it after four Northern District of Illinois Bankruptcy Judges imposed sanctions on the City for failing to return impounded vehicles. The Seventh Circuit Court of Appeals denied the City's appeal thereby reaffirming its decision in Thompson and issued the In re Fulton opinion on June 19, 2019. 926 F.3d 916 (7th Cir. 2019).

Section 9-100-120(b) of the Chicago Municipal Code provides that the City may impound vehicles that have two to three final determinations of liability (depending on the timeframe of the violations) for parking, standing, compliance, or automated traffic law/speed enforcement system violations. In 2016, the City amended the Municipal Code to state "any vehicle impounded by the City or its designee shall be subject to a possessory lien in favor of the City in the amount required to obtain release of the vehicle." The City invoked this provision to justify retaining vehicles that had been impounded prior to the owner's bankruptcy filing until the debtor either paid the outstanding charges or obtained a court order for turnover. The Bankruptcy Judges in the Northern District of Illinois cited Thompson as the prevailing authority and sanctioned the City for violating the automatic stay.

The facts of Thompson are nearly identical, except a creditor repossessed a vehicle after the obligor defaulted on payments. 566 F.3d. 699. The obligor filed bankruptcy, but the creditor refused to return the vehicle. The Thompson Court began its analysis with 11 U.S.C §362(a)(3), which states a bankruptcy petition operates as a stay of "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." The issue turned on what constituted an "act or exercise of control." The creditor argued that passively holding the vehicle did not rise to the level of "exercising control." The Court disagreed stating, "holding onto an asset, refusing to return it, and otherwise prohibiting a debtor's beneficial use of an asset all fit within the definition, as well as within the common sense meaning of the word." 566 F. 3d at 702.

After determining that 11 U.S.C §362(a)(3) did impose a stay and the creditor had to return the vehicle, the next issue was when. The creditor argued it was the debtor's responsibility to bring a motion for turnover of the vehicle. The Thompson Court disagreed, citing 11 U.S.C. §363(e), which provides "on request of an entity that has an interest in property used, sold, or leased…by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest." The Thompson Court explained that under §363(e), the creditor has the burden of requesting adequate protections for its interest in the property. Therefore, the Court reasoned that this provision would be meaningless if creditors could simply retain possession of the vehicle because then there would be no reason to seek adequate protection. 566 F. 3d at 704.

On appeal, the City asked the Seventh Circuit Court of Appeals to overrule Thompson for three reasons: 1) property impounded prior to bankruptcy filing is not property of the bankruptcy estate because the debtor did not have a possessory interest at that time, 2) the automatic stay precludes creditors from taking any action thus it is the debtor's duty to proactively move for turnover of the vehicle, and 3) passive retention of a vehicle does not constitute an act to exercise control under 11 U.S.C §362(a)(3). The Court noted that these issues had already been raised and rejected in Thompson and found no reason to overrule the decision. Additionally, the U.S. Supreme Court stated in United States v. Whiting Pools, "filing of a petition will generally transform a debtor's equitable interest into a bankruptcy estate's possessory right in the vehicle. United States v. Whiting Pools, 462 U.S. 198 (1983) at 205. Therefore, the City is not absolved of liability just because the debtor was not physically in possession of the vehicle when he filed bankruptcy. Moreover, the City's position defies the central tenet of bankruptcy of affording debtors a fresh start, which requires the use of their assets, especially vehicles which may be paramount to getting to work in order to fund their reorganization plan. Fulton, 926 F.3d 916.



Alternatively, the City claimed that it was exempt from the automatic stay pursuant to the exception delineated in 11 U.S.C. §362(b)(3), which excepts from the stay "any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b). The City reasoned that since they obtained a possessory lien under the Municipal Code, they must retain the vehicle until the debt is paid to maintain perfection of their lien. However, the Court rejected this argument for two reasons. First, they said there are other ways for the City to maintain perfection of their lien such as filing a notice with the Secretary of State or the Recorder of Deeds. Second, the City's possessory lien is not eradicated by involuntarily relinquishing the vehicle in accordance with bankruptcy law. Futon 926 F.3d 916 see also In re Borden, 361 B.R. 489, 495 (B.A.P. 8th Cir. 2007). Therefore, since the City does not lose its perfected lien, this exception does not apply.

> **"...DESPITE THE INHERENT RISK OF LOSS OR DESTRUCTION INCUMBENT IN VEHICLES, CREDITORS AND POSSESSORY LIEN HOLDERS MUST COMPLY WITH THE AUTOMATIC STAY AND IMMEDIATELY RETURN THE COLLATERAL TO THE DEBTOR UPON FILING BANKRUPTCY."**

The City also tried to invoke the stay exception of 11 U.S.C. §362(b)(4), which involves "the commencement or continuation of an action or proceeding by a governmental unit…to enforce such governmental unit's…policy and regulatory power, including the enforcement of a judgment other than a money judgement." The City claimed it was impounding vehicles to enforce traffic regulations, which is an exercise of its police powers in the interest of public safety. The Fulton Court stated that parking tickets and minor moving violations do not constitute police power regulations but even if they did, they cannot be enforced if they are money judgments that require payments. Fulton, 926 F.3d at 931. The debtors alleged that the City's actions were based more in generating revenue rather than concern for public safety. The Court employed the pecuniary test and the public policy test to determine whether the City's actions were within the ambit of the §362(b)(4) exception or not. "If the focus of the police power is directed at the debtor's financial obligations rather than health and safety concerns, the automatic stay is applicable." In re Ellis, 66 B.R. 821, 825 (N.D.Ill. 1986) (quoting In re Sampson, 17 B.R. 528,530 (Bankr. D. Conn. 1982). Given that the City was impounding vehicles regardless of the nature of the violations, a nexus to public safety was tenuous at best. For example, two to three violations for failure to display a City sticker or other non-moving violations would be grounds for impoundment. Moreover, the City was imposing monetary penalties on the owner of the vehicle not the offending driver thereby widening the chasm between public safety and pecuniary interests. Furthermore, the City was conditioning release of the vehicles upon payment of the fines. Consequently, the Court concluded that the City did not satisfy either of the tests and thus was not excepted from the stay.

In rendering the Fulton opinion, the Seventh Circuit Court of Appeals reaffirmed its position that despite the inherent risk of loss or destruction incumbent in vehicles, creditors and possessory lien holders must comply with the automatic stay and immediately return the collateral to the debtor upon filing bankruptcy. The sanctity of the automatic stay is highlighted in the Seventh Circuit's decision, which aligns with the majority opinion held by the Second, Eighth, and Ninth Circuits. a

ENVIRONMENTAL CHALLENGES

LIABILITY RISKS FOR LENDERS AND FORECLOSING PLAINTIFFS UNDER NEW YORK STATE ENVIRONMENTAL CONTAMINATION LAWS

BY RICHARD N. FRANCO ESQ.
DAVIDSON FINK | RFRANCO@DAVIDSONFINK.COM

AT FIRST BLUSH, one might think that environmental contamination on a mortgaged property would not create risk for lenders or mortgage holders who had no involvement with the contamination. However, a recent case in the Fourth Department seeks to challenge that assumption and assign risk to a foreclosing plaintiff. Under New York State Navigation § 181 (1): "[a]ny person who has discharged petroleum shall be strictly liable, without regard to fault, for all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained…". Critically, §181(4)(b) protects lenders from being held liable under the Navigation Law where:

> (i) such lender, without participating in the management of such site, holds indicia of ownership primarily to protect the lender's security interest in the site, or (ii) such lender did not participate in the management of such site prior to foreclosure, and such lender:

Lenders or mortgage holders must be careful to not take any actions which would cause them to be disqualified as a "lender" within the meaning of New York State Law. For purposes of Navigation Law claims, a lender is defined by NY ECL § 27-1323 as: "[a]ny person, including a successor or assignee of such person makes a bona fide extension of credit to or takes or acquires a security interest from a non-affiliated person." However, any lender who is actively involved in the management of the premises can be held strictly liable under Navigation Law §181. Bank of N.Y. v. Bram Mfg. Corp., 8 Misc.3d 1017 (A) (Sup. Ct. Rockland Cty. 2005), citing In re DuFrayne 194 B.R. 354, 360 (Bankr. E.D. Pa. 1996).

FORECLOSURE ON CONTAMINATED PROPERTIES, A CASE STUDY

There is little New York case law directly on point as it pertains to lender liability under the Navigation Law. On September 12, 2019, the Fourth Department Appellate Division heard the case of Mason v. Caruana, (2016-7972, Monroe Cty. Sup. Ct.), in which I argued on behalf of Ann Mason, the foreclosing plaintiff. The appeal was taken from an Order denying Defendant's Motion for Summary Judgment on his Navigation Law §181 counter-claims against the plaintiff.

In 2002, Fred Mason entered into a purchase and sale contract with Defendant Eric Caruana, and Caruana executed a note and mortgage in favor of Mr. Mason. At the time, both parties were aware of the contamination on the property. In addition to the purchase and sale contract, the parties entered into a "Completion Agreement", whereby Fred Mason agreed to remediate the property and that his responsibility would "terminate at such time as the NYSDEC determines that no further continuation of action as set forth in the Corrective Action Plan is necessary".

In 2002, Fred Mason assigned his interest in the note and mortgage to his wife, plaintiff Ann Mason. Fred Mason died shortly thereafter. On April 24, 2007, the New York State Department of Environmental Conservation wrote a letter to Fred Mason's attorney informing him that the State had determined no further remedial action was necessary, as contemplated in the Completion Agreement between the plaintiff and the defendant. Caruana rented the property to a tenant who ran and continues to run a motorcycle repair shop on the property.

In December 2015, Caruana defaulted in payment.

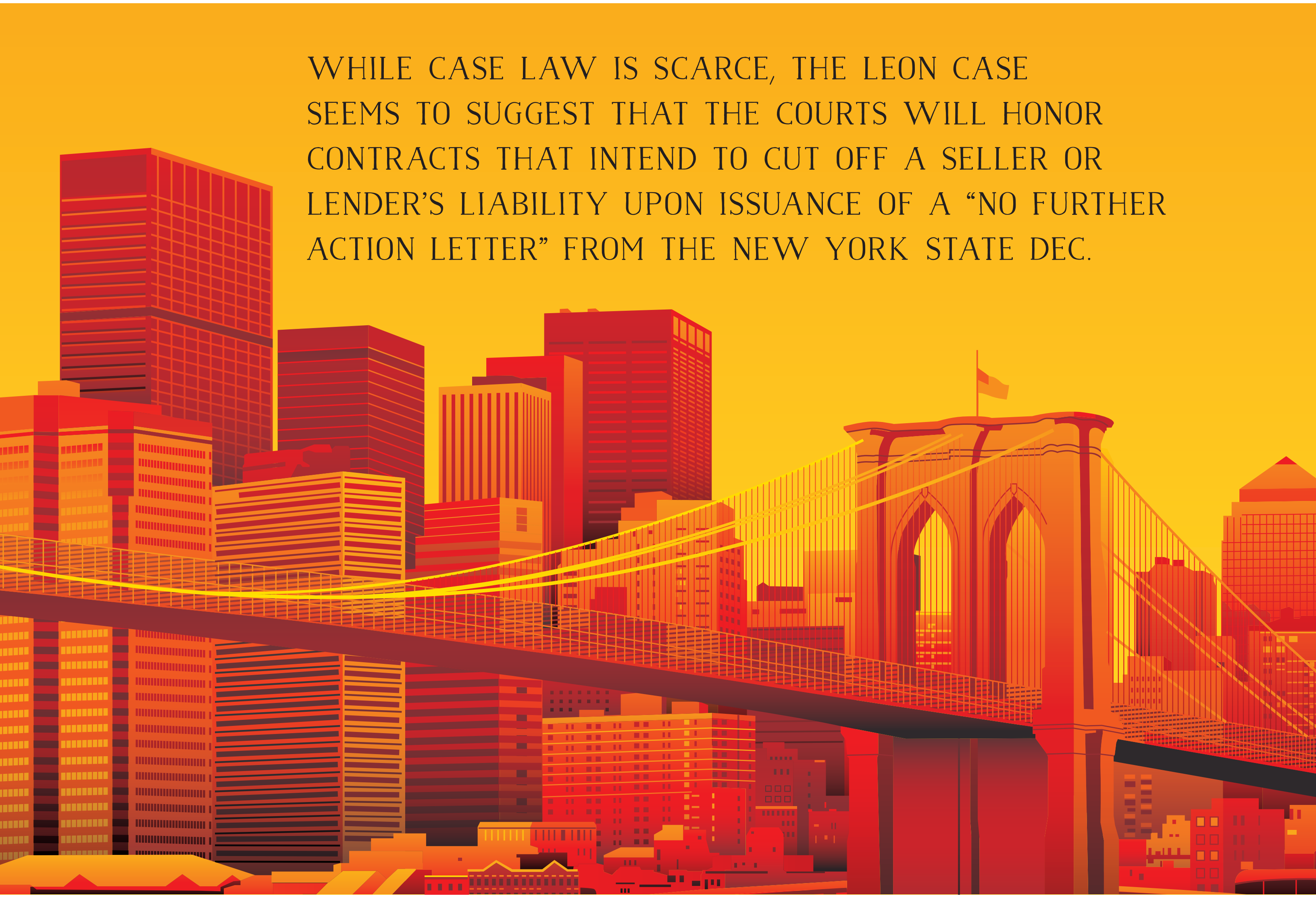
UNDER NEW YORK STATE NAVIGATION § 181 (1): “[A]NY PERSON WHO HAS DISCHARGED PETROLEUM SHALL BE STRICTLY LIABLE, WITHOUT REGARD TO FAULT, FOR ALL CLEANUP AND REMOVAL COSTS AND ALL DIRECT AND INDIRECT DAMAGES, NO MATTER BY WHOM SUSTAINED...”

As a result, Plaintiff Ann Mason sued Caruana in Monroe County Supreme Court on July 15, 2016. Despite the aforementioned agreement between Fred Mason and Caruana, Caruana answered the complaint by counter-suing Ann Mason under Navigation Law §181, alleging strictly liability to Caruana for pollution he alleged still existed on the property. Caruana further argued that his counter-claims should be a set-off to Plaintiff’s foreclosure cause of action, and that he was no longer obligated to pay the mortgage. Caruana argued that Ann Mason was not a lender as defined by the statute, and further argued that the Completion Agreement was not intended to limit future liability, in spite of its plain language to the contrary.

In regards to the lender exception, Caruana contended that the lender exception cannot be invoked against a private party. This is a profound misunderstanding of how liability flows under the Navigation Law. The State has jurisdiction over environmental pollution. See Navigation Law §181(1). Thus, any owner can be forced by the State to clean-up such contamination, regardless of fault. A party that has not discharged on the property may sue a predecessor in interest for indemnification for such cleanup under the Navigation Law. Caruana is clearly misapplying the statute in arguing that a heightened liability exists between private parties. Such interpretation is not supported by any case law.

Caruana further argued that because Ann Mason was assigned the mortgage from a party Caruana alleges to be liable under the Navigation Law, so too is Ann Mason. Mason argues that she is protected by the lender exception in both state and federal law. Critically, Ann Mason asserts that even if the lender exception does not apply, Caruana has no right to bring any claims against Fred or Ann Mason based upon the Completion Agreement between the parties,

WHILE CASE LAW IS SCARCE, THE LEON CASE SEEMS TO SUGGEST THAT THE COURTS WILL HONOR CONTRACTS THAT INTEND TO CUT OFF A SELLER OR LENDER'S LIABILITY UPON ISSUANCE OF A "NO FURTHER ACTION LETTER" FROM THE NEW YORK STATE DEC.



wherein Caruana agreed that Fred Mason's responsibilities to remediate the property would be terminated upon the State's issuing a "no further action required" letter.

While there is no appellate authority directly on point, in Leon Holdings, LLC v. Northville Indus. Corp., 134 A.D.3d 910 (2nd Dept. 2015), a tenant who owned a gas station entered into a remediation agreement with NYSDEC. Prior to remediation, the tenant assigned its lease to a third party, and was required under the assignment agreement to remediate existing pollution on the premises according to Department of Environmental Conservation's ("DEC") standards, just as the parties agreed to in the case athand. Id. at 911. Similarly, just like Fred Mason, the tenant/defendant Northville remediated the pollution on the property and received a letter from the DEC confirming that no further action was required to remediate the property, exactly as was the case with Fred Mason in the case at bar. Id. Thereafter, the lease in Leon was sold to the plaintiff. More than three years after the "no further action" letter was received by defendant Northville, plaintiff Leon was sued by various municipalities alleging groundwater contamination caused by the pollution on the premises. Leon settled those suits and sought to recover damages from defendant Id. The Court emphatically endorsed the power and significance of the "no further action required" letter from the state:

> "[T]o the extent that Leon sought to recover purported remediation costs in connection with the 1992 petroleum spill, the defendant conclusively demonstrated a defense to those claims, through documentary evidence in the form of its contract

> with CP. In particular, the defendant demonstrated that, having received a 'no further action letter' from the DEC which was never challenged either administratively or in a CPLR article 78 proceeding, it performed its remediation obligations under that contract, and pursuant to Navigation Law §181".

Based on the holding in Leon that the "no further action required" letter from the state was a complete defense to the Navigation Law claims, the Fourth Department should hold that the Completion Agreement between the parties is a complete defense to the Navigation Law claims by Caruana.

As to the "non-affiliated" language in (ECL) §27-1323, Caruana argued that because Fred Mason was "affiliated with the property", Ann Mason did not receive the mortgage from a "non-affiliated" party, as required by ECL §27-1323. While the Appellate Courts have not defined the term in this context, Plaintiff argued that Defendant's definition of "non-affiliated" is simply wrong. In the securities context, 17 CFR §230.405 defines an affiliate as:

> "[a]n affiliate of, or person affiliated with, a specified person, is a person that directly or indirectly, through one or more intermediaries, controls or is controlled by, or is under common control with, the specified person".

Caruana's definition of "non-affiliated" is not supported by any case law. Interestingly, counsel for Caruana did not argue that as the wife of Fred Mason, Ann Mason was affiliated with Fred Mason and should not be considered a lender. This would have been the stronger argument. Surprisingly, the Court made no mention of the marital relationship between the parties at oral argument.

LESSONS FOR LENDERS FROM MASON V. CARUANA

This case is a cautionary tale for lenders. A lender taking security in contaminated property must be wary of the line between lender and owner/operator/discharger. While case law is scarce, the Leon case seems to suggest that the Courts will honor contracts that intend to cut off a seller or lender's liability upon issuance of a "no further action letter" from the New York State DEC. In Mason, the contractual agreement between the parties is a strong and likely dispositive argument in favor of the plaintiff, without even needing to reach the lender exception. Such express agreements should be made by lenders and sellers of properties with a history of contamination to protect the lender or seller's interest.

WHAT HAPPENS WHEN THE FORECLOSURE ENDS?

In recognition of the problem created for mortgage holders who foreclose on contaminated property and take title to the property, Navigation Law §181 (4)(b)(2), which exempts lenders who, *inter alia*, "foreclose[] on such site" and, subsequently sells, re-leases (in the case of a lease finance transaction), or liquidates such site, maintains business activities, winds up operations, or takes any other measure to preserve , protect or prepare such site for sale or disposition". The statute goes on to require the foreclosing lender to take such action "at the earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements."

While the above provision creates somewhat of a shelter for foreclosing parties, the practicality of actually selling or otherwise disposing of the property is significantly more difficult. Where possible, a lender should allow private parties to remediate the property to the satisfaction of the state. Theoretically, a lender could take title and immediately begin to restore the site, even seeking indemnification under the statute from prior owners/dischargers. However, the vague provisions of the statute, which require the mortgage holder to act as early as possible, must be strictly adhered to, as any undue delay or failure to remediate properly could lead to a property that is both unsellable, as well as financial liability for the note holder.

As such, a foreclosing plaintiff must know the extent of the contamination on the property, and must have a clear plan for remediation and disposition of the property prior to commencing any foreclosure action and certainly prior to any foreclosure auction.

THE SOLAR FORECLOSURE FIXATION

WITH THE TORRID PACE OF SOLAR ENERGY EQUIPMENT INSTALLATIONS, IT HAS BECOME MORE COMMON TO EXPERIENCE LEGAL AND PRACTICAL ISSUES RESULTING FROM THE FINANCING OF SUCH EQUIPMENT. SUCH INSTALLATIONS AND FINANCING HAVE INCREASED NEARLY 500% IN THE LAST SEVERAL YEARS, WITH HOMEOWNERS TAKING ADVANTAGE OF FALLING PRICES AND TAX CREDITS. AN AVERAGE HOMEOWNER, IT HAS BEEN ESTIMATED, WILL RECOUP THE COSTS OF THEIR SYSTEM IN APPROXIMATELY SEVEN YEARS.

BY RONALD S. DEUTSCH, ESQ.
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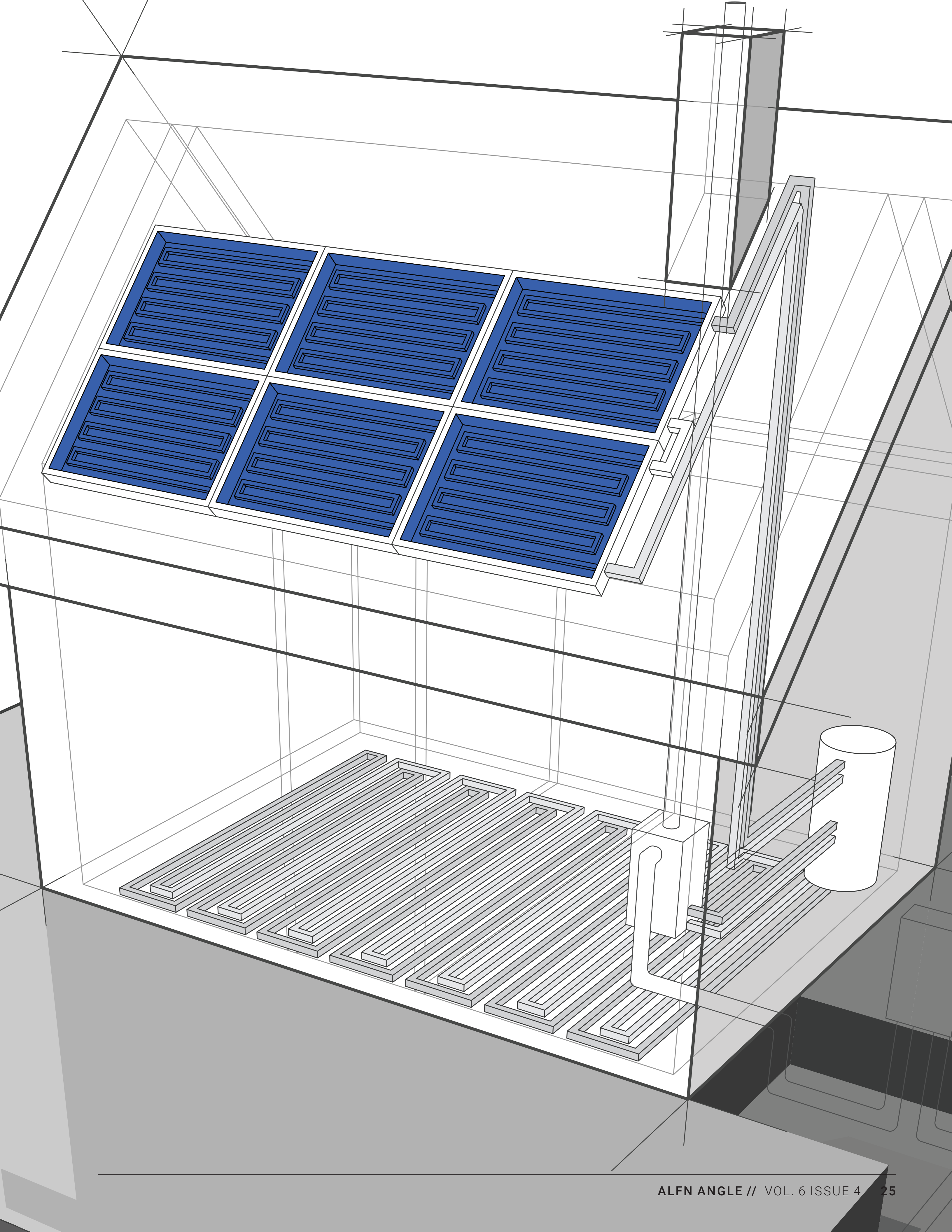


Foreclosure attorneys must analyze several legal issues when discovering solar equipment financing on a property. Paramount in the analysis is whether a solar panel is a fixture or whether it is separate property or a chattel. Priority is another critical issue that must be reviewed.

It is a blackletter law, that when a bank foreclosures on a property it takes the land, the building and all permanent fixtures attached. Fixtures are improvements or items of separate property that are attached to a building, making them part of the building. Fixtures are defined in Article 9 of the Uniform Commercial Code "UCC" to include "goods that have become so related to a particular property that an interest in them arises under real property law." State law must also be reviewed to determine whether a particular "good" is a fixture. Although not uniform, most states have adopted the critical factors established by the Ohio Supreme Court in Teaff v. Hewitt when analyzing whether a good is a fixture or a chattel. These factors are: (1) whether the good is attached to the real property, (2) whether the good has been adapted for the use of the real property, and (3) whether the parties intended a good to be permanently attached.

Hornbook fame, Professors White and Summers, proposed a half-inch formula stating that "anything which could be moved more than a half inch by one blow with a hammer weighing not more than five pounds and swung by a man weighing not more than 250 pounds would not be a fixture". Many examples of property found not be a fixture include such extremes as twenty ton machines anchored in with screws. On the other hand, a mobile home was a fixture, where the intent of the parties demonstrated such an intent.

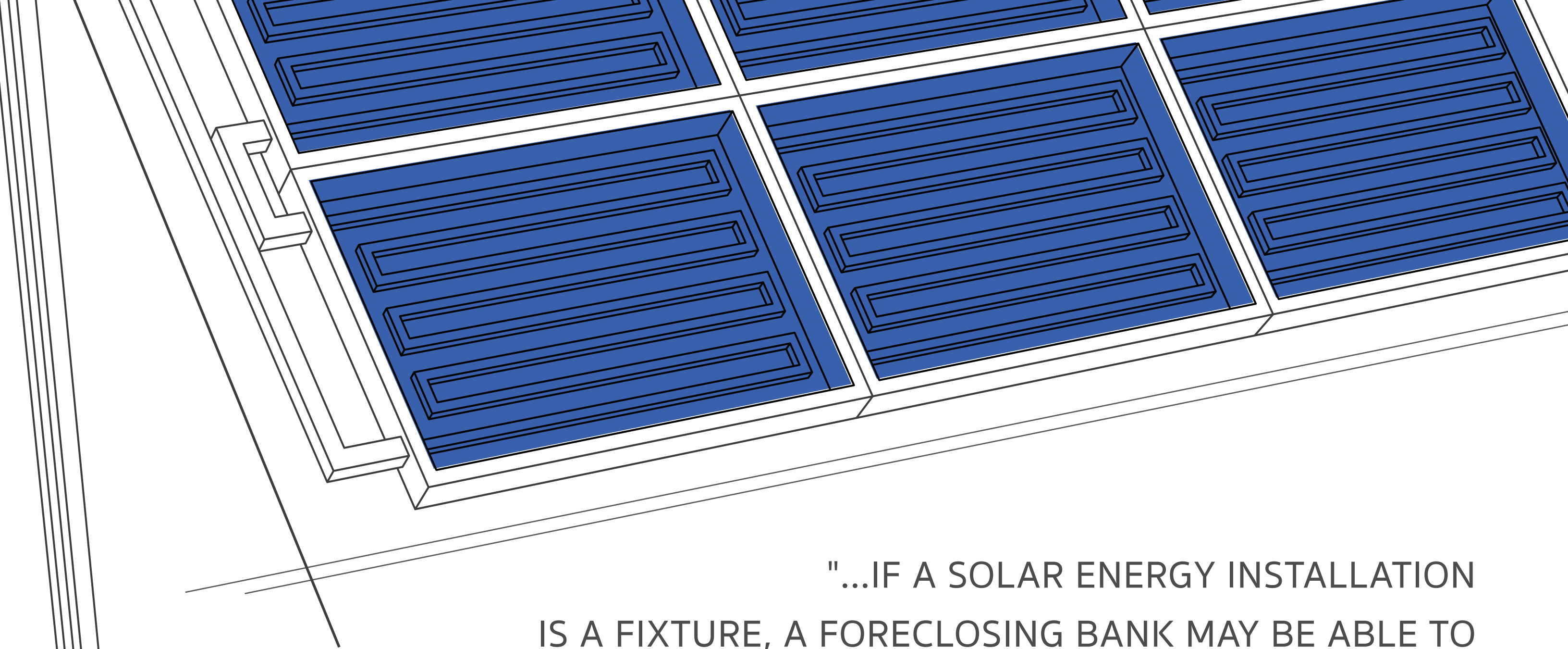
With respect to solar panels, attachment can occur through means such as nails, screws, bolts, adhesives, moldings, tiles and other fastening. Even if not physically attached, panels can have constructive attachment, when it permanently rests upon the building and it is necessary for use of the building.

In analyzing whether a solar panel has been adapted for use for the real property, a court generally reviews several factors. These include, whether the solar panel is an integral and indispensable part of the property; whether it would damage the structure if it was severed; and whether the solar panels are highly customized in fabrication and installation to meet the specific criteria of the property where it is installed. The more generic and less customized, the more likely the solar panel would be found to be separate property or a chattel.

Intent is also a critical factor. That is, do the parties intend a solar panel to remain separate or mere personal property or instead intend the panel to become a fixture? The clearest way to demonstrate intent is where a lender and the property owner document their intent through the execution of an agreement in writing. Intent, however, can be overridden when a court finds that a solar panel cannot be removed without substantially damaging the structure or whether it has become essential to property to which it is attached.

Lenders generally perfect their security interest in chattels by filing a financing statement with the applicable Secretary of State or such other office where it would normally file a financing statement covering personal property. Alternatively, a fixture filing may be filed in the local office where it would normally record a mortgage to encumber the real estate property. Fixture filings contain the same contents as a personal property filing, but includes additionally, (a) a specification that the collateral includes fixtures, (b) indicates that it is to be recorded in the real property records, (c) provides a description of the related real property and, (d) provides the name of the record owner if the debtor does not have an interest of record. Most jurisdictions also permit the recordation of a mortgage which fits the requirements of a fixture filing. Each of these steps results in a lender having a perfected security interest in the fixtures. That said, personal property and fixture filings may lapse after five years unless renewed. Mortgages offer the advantage of having a greater initial life.

In any event, if a solar energy installation is a fixture, a foreclosing bank may be able to reap the benefit of any property value accretion upon completing its foreclosure action. Lenders who finance solar energy installations that remain chattels are also protected, as they can repossess such items through a replevin action filed in the county courts.



"...IF A SOLAR ENERGY INSTALLATION IS A FIXTURE, A FORECLOSING BANK MAY BE ABLE TO REAP THE BENEFIT OF ANY PROPERTY VALUE ACCRETION UPON COMPLETING ITS FORECLOSURE ACTION."

Priority of solar panel financing must additionally be reviewed closely. With the advent of government approved Property Assessed Clean Energy (PACE) loans, enacted in more than 30 states and the District of Columbia, mortgage lending priority rules, have been upended. No longer is the axiom that first to file is first in right controlling.

PACE financing as defined by Wikipedia, is a means of financing energy efficiency upgrades, disaster resiliency improvements, water conservation measures, or renewable energy installations of residential, commercial and industrial property owners. PACE enables property owners to defer the upfront costs that are most common barrier to energy efficiency installations and thereby facilitate increased installations.

PACE loans are paid by an additional special assessment on the property's tax assessment over an agreed number of years while energy costs are simultaneously lowered, providing the borrower with a net financial benefit. Because the solar panels are attached to the property, the consumer can sell the property leaving the debt to be paid through the tax assessment on subsequent owners. Critical to parties handling actions involving a default in a typical mortgage is how the solar panel security interest affects their action and potential claims of priority. The analysis involves reviewing whether the asset is a fixture or not, and also whether the loan product is a PACE loan. A major problem associated with PACE loans is that it takes priority over other lien-holders and those lien-holders may not have been notified or given an opportunity to object.

Another issue arising from solar panel financing is the differing treatment of government and GSE loans at origination and or resale. Fannie Mae and Freddie Mac have refused to purchase or underwrite loans for properties with existing PACE based tax-assessments. However, the Veterans Benefits Administration (VA) in mid- 2016, announced guidelines on managing the financing of properties with PACE obligations. The Federal Housing Administration (FHA) on the other hand will not allow a property encumbered with a PACE obligation to be eligible for its financing programs, unless the lien remains subordinate to the insured mortgage. The ineligibility of a property for a new FHA loan may impact the resale of a home that has been encumbered with PACE loan by prospective Sellers.

There are a myriad of paths that must be analyzed when determining the rights of a foreclosing party or determining the advisability of financing solar energy installations. The analysis can be complex but is necessary to determine the various practical implications as well as the rights of any secured party.

BUILDING THE LEADERSHIP OF TOMORROW

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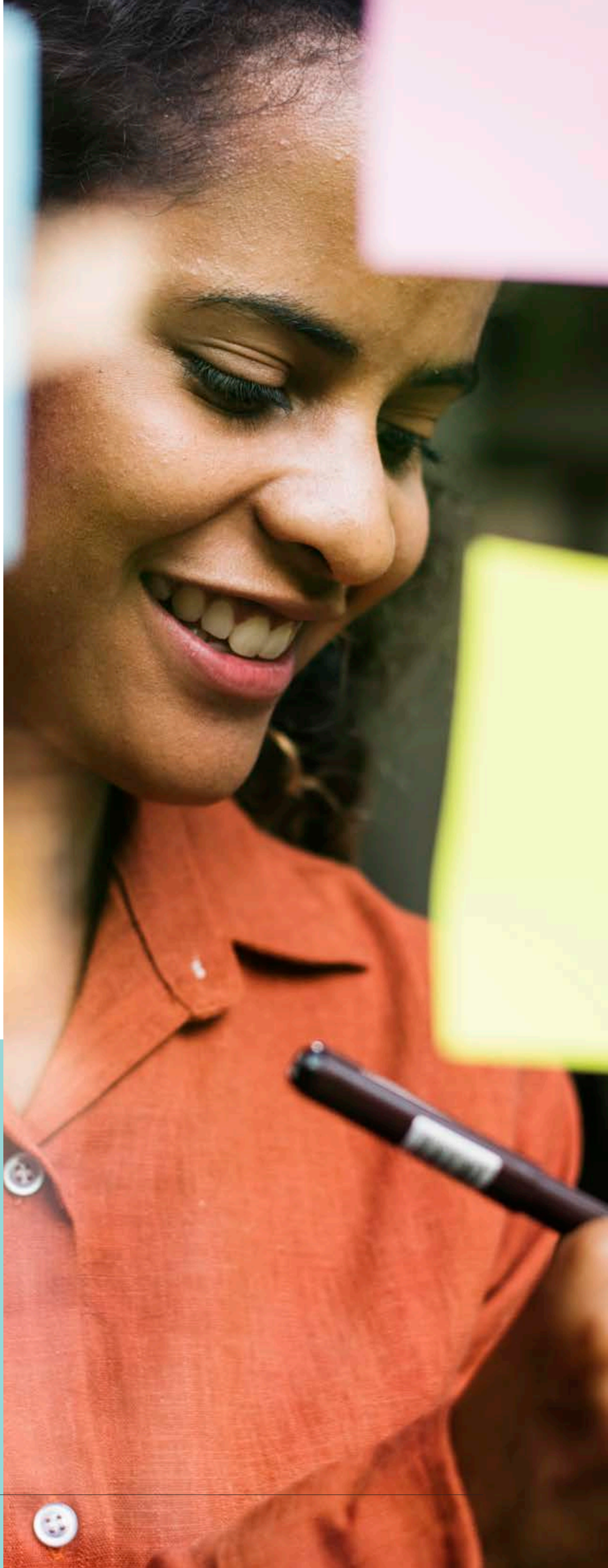
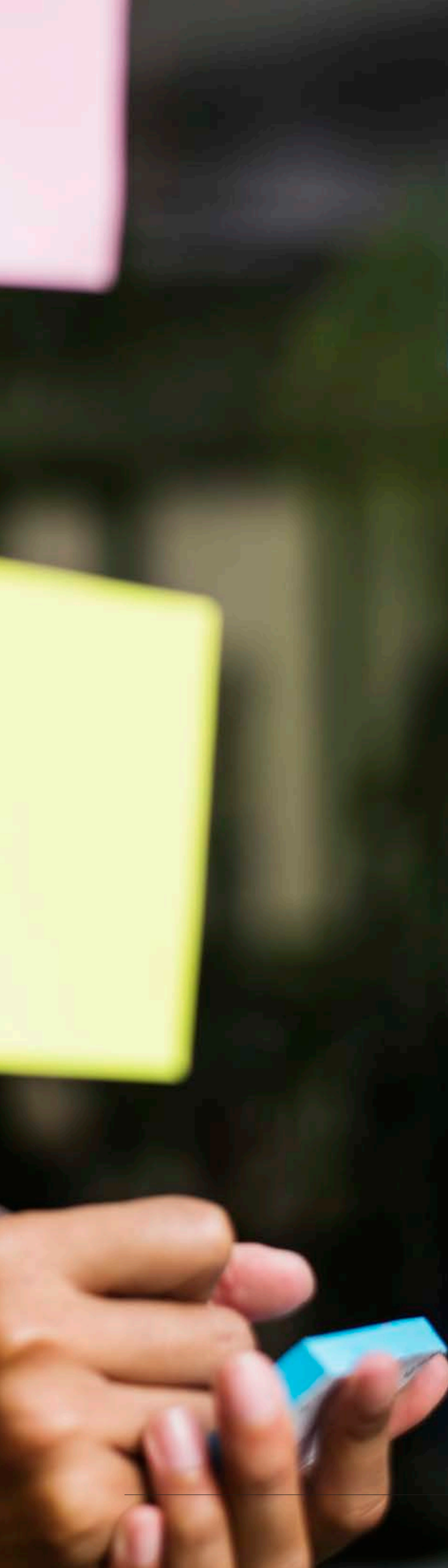
One would be hard pressed, regardless of political affiliation, to deny that we are living in turbulent times in which the foundations of leadership are being questioned from every direction. Not that that is a bad thing, we should always be inspecting our foundations and ensuring that they are stable enough to meet the demands of our current growth.

After being out of the "industry" for several years, I recently attended my first ALFN conference in some time. Although, I encountered a few familiar faces, it immediately caught my attention that a generation of leaders has recently retired from our industry. Many of those individuals served as mentors and examples of a high standard of leadership that led the servicing industry through periods of extreme growth and turbulent crisis during the 80's, 90's and early 2000's.





Those individuals who are leaders in our industry will affect the outcome of and literally be affecting the lives of thousands of individuals, from frontline representatives to law firm teams.

Although feeling a touch of sentimentality, I felt comforted and truly excited to see that the ALFN was giving out the JPEG Picture the Future leadership awards to the new and upcoming leaders in our industry. One of the first (if not the only) time I've seen a public recognition that growing our leadership base is important and crucial to the success of our industry.

As we begin to build a new generation of leaders to take us through the coming years, what should we as senior leaders be instilling on those that are ready to rise to the occasion? Warren Bennis, who authored 30 books on leadership before his passing, stated that "Leading means deeply affecting others. A leader is not simply someone who experiences the personal exhilaration of being in charge. A leader is someone whose actions have the most profound consequences on other people's lives, for better or for worse and sometimes for ever and ever."

Those individuals who are leaders in our industry will affect the outcome of and literally be affecting the lives of thousands of individuals, from frontline representatives to law firm teams. Though what makes a great leader can and does fill scores of books. Hopefully, we can agree that the following are the minimum key tenants and core values of leadership that must be shared with and instilled into the minds of our future and leaders.

Integrity – A value that is paramount and from which all others flow. When our news is continually filled with repeated stories of our high profile leaders lying and skirting the law, one would be hard pressed to deny that these stories have a potential effect of influencing young leaders to think that this form of behavior is an acceptable leadership practice.

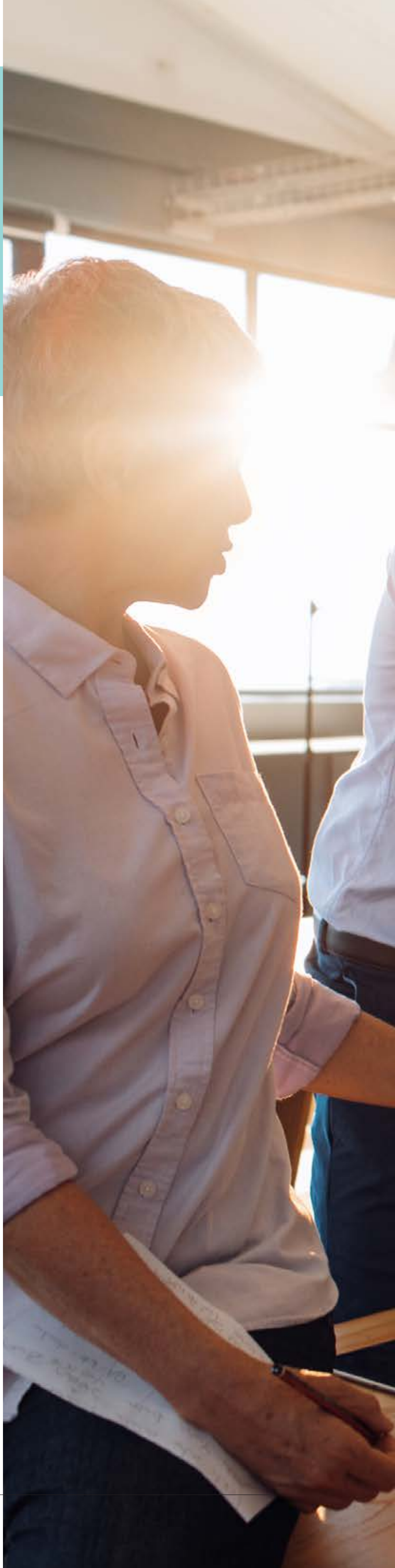
In and industry ripe with regulations and guidelines that must be followed verbatim, it is important that senior leadership ensure that they are setting the example that only the truth is acceptable. This begins by "walking your talk." If you cannot deliver on your words, then don't speak them.

When Washington Mutual acquired Great Western Bank, Kerry Killinger, then their CEO came to Northridge, California to address the banks teams. He stated that the name of the bank would never change and that he would honor our slogan of "We'll always be there!" By the end of the following month the name was changed to Washington Mutual. In itself not a big deal, but it took several years for the teams to trust anything that was coming from corporate and the ill will was felt for some time.

Often, when companies, divisions or departments are going through monumental change, leaders have a tendency to want to say things that will ease the tension, rather than dealing with the truth. This often has a negative affect when the truth finally arrives.

Further, leaders have to ensure that they are willing to hear the truth from their subordinates. Too often, leaders become enraged when hearing bad news. This always results in the leader eventually becoming the last to know when things take a bad turn. Leaders must be open to honesty and able to accept it without allowing it to affect their emotions. Whether that honesty come in the form of a personal critique or in letting you know about a costly error, champion and commend integrity at all costs, regardless of how it makes you feel.

Know thyself – These famous words that were inscribed on the walls of the courtyard of the ancient Greek Temple of Apollo at Delphi, are as relevant today. Leaders must be aware of what their strengths and weakness. Often leaders become deluded that



Leaders must be open to honesty and able to accept it without allowing it to affect their emotions.

they are the only one that knows how to do things. They may have team meetings where they listen to the suggestions of others, but only it's only out of courtesy to the team. Often feeling ignored, teams leave the meetings disillusioned with their place in the company. With their heads down, they quietly return their departments with less enthusiasm, animosity, spreading their melancholy throughout their team.

A great leader relies on their team to shore up their weaknesses and build up the strength of their abilities. There's an old saying that states that "A" leaders hire "A+" team members and "B" leaders hire "C's and D's." We must help our future leaders to understand the true value of a strong team and encourage them to continually evaluate themselves to determine which attributes they lack, so they can hire those who can compensate for them.

It's important that leaders continue to study leadership as well. Encourage the upcoming leaders to read books on leadership, provide them articles on leadership subjects. Help them to know themselves as often as possible.

See the big picture – Again, quoting Warren Bennis, "the manager has his eye on the bottom line; the leader has his eye on the horizon." Often young leaders become so bogged down on trying to manage the day to day activities of their departments, losing sight as to where they're trying to go. It's important that senior leaders set aside time to explain and provide a vision of the divisional or company goals are and how each leader fits into that vision.

Hopefully, once that precedent is set, the vision will continue to be spread to the frontline. Great companies obtain greatness when the entire company moves together as a single unit to obtain their goals. When asked, "How do you know when you're succeeding?" frontline team members often answer that their supervisor or manager does not get mad at them.

Leaders must ensure that the frontline understands in clear terms what will be considered success and how it will be measured. Everyone should have a crystal clear picture of what they need to do in order to succeed both as an individual and as a team. Above all, make sure to acknowledge when success is achieved as often as when it is not achieved.

Be open to and promote change – Just because things are going well today, does not mean they will tomorrow. Good leaders review their processes on a regular basis to ensure they are still optimized for how the business is running today. Too often processes or workflows are not evaluated until a major crisis occurs. A

A great leader relies on their team to shore up their weaknesses and build up the strength of their abilities.

common response to evaluating what caused a crisis is "that's how we've always done it." Great leaders are continually educating themselves on the current trends within their industry to ensure that they are moving in the right direction.

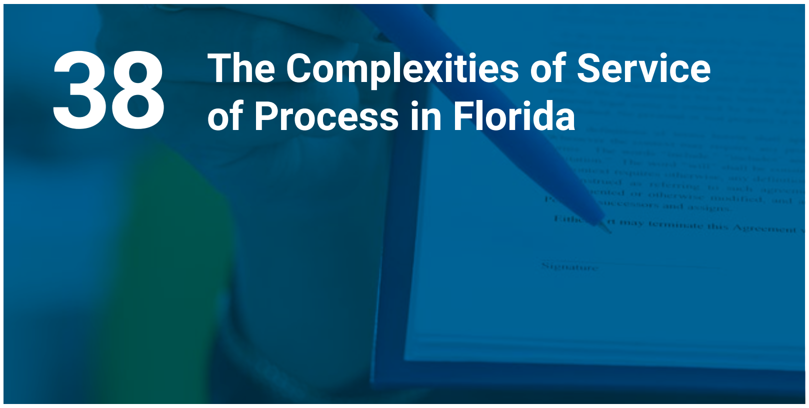
Leaders need to listen to the frontline, taking note of what issues or challenges they're facing, that's often where change needs to happen first. MWA, manage by walking around. If you're a leader who confines themselves to their office, it's guaranteed that you're missing what's really going on in your department.

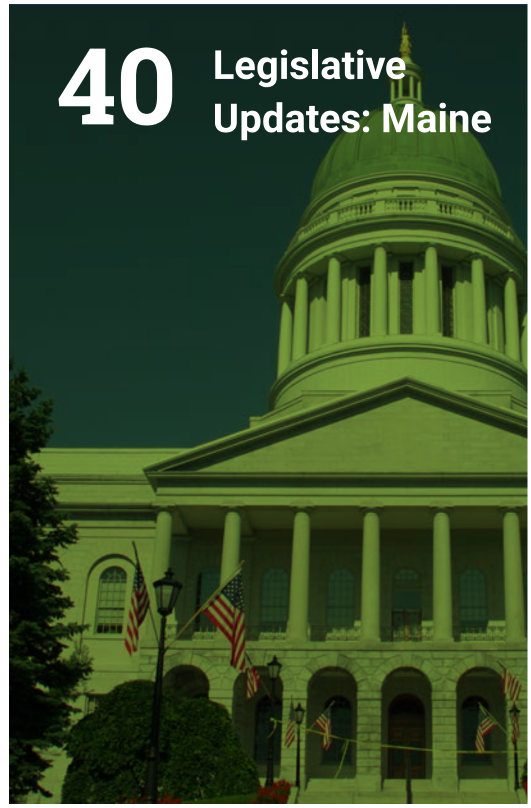
Get out on the floor on a regular basis; hear what the associates are challenged by. Hold "blue sky" meetings without supervisors. Ask two questions only, what do you like about working here and what are your greatest challenges. Don't say anything, don't offer your opinion (I know it's hard), just write down the answers. You'll find plenty of reason to make changes.

Use your best judgement – Again, to quote Warren Bennis, "The manager does things right; the leader does the right thing." There are times when a leader needs to make quick decisions that may not always be clearly defined by protocol. Great leaders always do what's right. If you act from integrity and follow an ethical high ground, you will undoubtedly make the right decision. By the way, Use Your Best Judgement is often referred to as Rule number 1. Rule number 2 is See Rule Number 1.

Obviously, all the values of leadership cannot be covered in an article. Hopefully, this will give you a foundation to begin the discussion with your leaders of tomorrow. They say no one is born a leader, leadership is something you learn. It's up to the leaders of today to help teach the leaders of tomorrow. Take the time to meet with your leaders regularly, just to discuss leadership as an art form. All the stats in the world will mean nothing, unless you have great leaders to help make them even better. a

STATE SNAPSHOT





The Complexities of Service of Process in Florida

BY MIKE WEAVER
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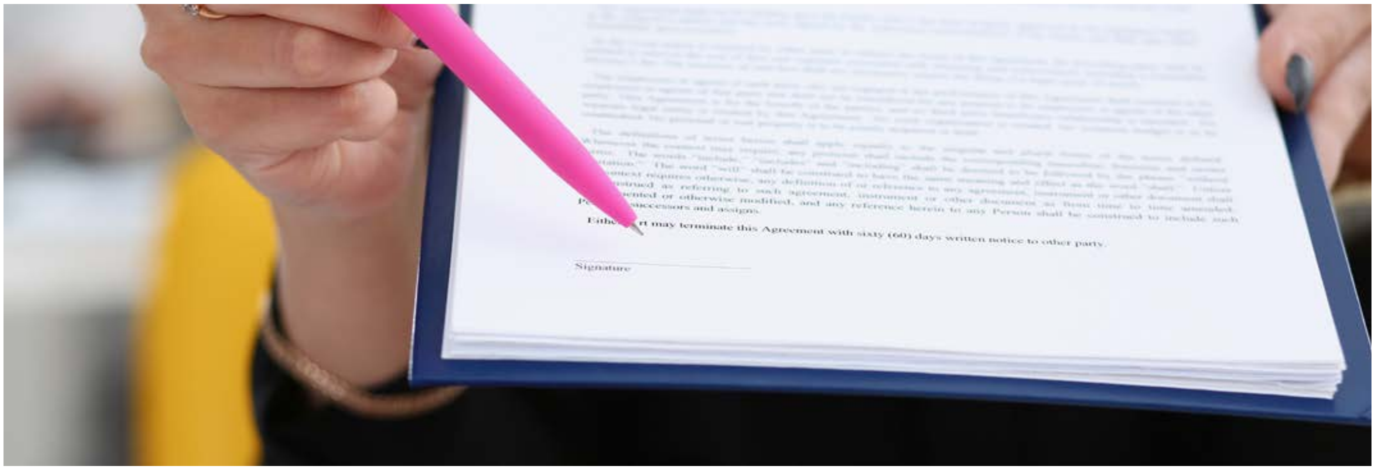

Service of Process is a critical component of your default practice. In my experience many firms take Service of Process for granted. Service of Process in Florida can be especially complex as there are 67 counties and 20 judicial circuits. Each county or jurisdiction manages their own Special Process Server or Certified Process program each with their own peculiarities.

Additionally, each serve is different, and the circumstances require through knowledge in each jurisdiction. If your firm utilizes a Legal Service firm, like 360 Legal, that is a member of the National Association of Professional Process Servers (NAPPS) or the Florida Association of Professional Process Servers (FAPPS), you are covered. Membership in these organizations ensures that your Service of Process vendor maintains their certification and is up to date current regulations and rules of civil procedure required to handle your most complex cases.

During the 2019 legislative session, FAPPS proposed and successfully lobbied for several changes to Florida Title VI, Chapter 48 in House Bill 91. FAPPS legislative focus is strengthening Chapter 48 to make it more difficult to quash service of process on your cases. This year there were 8 changes adopted and signed into law by Governor DeSantis. One key area of change was to the Substitute Service provision. As of June 7, 2019, a spouse does not have to request service if they are a party to a case. A Process Server can now sub-serve the spouse anywhere, not only in the county where they reside. While this might seem like a small modification, this change directly impacts service completion dates and timelines. Previously, a spouse had to explicitly request service. This change prevents serving one spouse while the other spouse begins avoiding service, thus forcing the firm to serve the remaining spouse by publication. FAAPS also successfully lobbied for the adoption of electronic signatures on Returns of Service. Previously, only Sheriffs were authorized to utilize electronic signatures. FAPPS was a key champion in changing the requirements for Process Servers to place their identification number on the first page of the service package in Florida jurisdictions where numbers are not assigned. This change prevents opposing counsel from quashing service in instances where identification numbers may not be assigned like Motion and order counties or out of State Process Servers. a

Legislative Updates: Maine

BY JAMES M. GARNET, ESQ.
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THE MAINE LEGISLATURE recently passed 3 bills that will have an impact on the residential foreclosure process. These 3 bills will take effect on September 19, 2019. Below is a synopsis of the bills.

AN ACT TO ENSURE THAT DEFENDANTS IN FORECLOSURE PROCEEDINGS RECEIVE PROPER NOTIFICATION – H.P. 671 – L.D. 907

This bill amends 14 M.R.S.A. § 6111 to require that the notice of right cure letter be sent by both certified and first-class mail. Previously, § 6111 provided mortgagees with the option of sending the notice via either certified or first-class mail.

The cure period remains 35 days from the date the notice is given to the mortgagors but the time by which the notice is considered given has been amended. For notices sent via certified mail, the notice is considered given on the date the mortgagor signs the return receipt or, if the notice is undeliverable, the date the post office last attempts delivery. For notices sent via first-class mail, the notice is considered given on the 7th calendar day after mailing. A post office department certificate of mailing is required for all notices sent via first-class mail.

The date the notice is considered to be given is the sooner of the two dates. In most cases, this will mean that the notice will expire 42 calendar days after mailing.

AN ACT TO AMEND THE LAWS GOVERNING FORECLOSURE TO ENSURE TIMELY COMPLETION - H.P. 1020 – L.D. 1405

This bill amends 14 M.R.S.A. § 6323 and 14 M.R.S.A. § 6324 to impose additional time limits and constraints on the mortgagee post-judgment to ensure that foreclosure sales are timely completed.

Going forward, foreclosure sales may only be adjourned once for a period of up to 60 days. Previously, mortgagees could adjourn foreclosure sales for periods of 7 days indefinitely without court approval. This bill amends § 6323 to only allow one adjournment for a period of up to 60 days. If a further adjournment is needed, the mortgagee may file a motion with the court prior to the deadline for sale and if the court finds that good cause has been shown, it may grant further extensions of the mortgagee's time to sell as it considers appropriate.

This bill also places constraints on what actions a mortgagee may take following the expiration of the post-judgment redemption period. Previously, mortgagees had the option of proceeding to sale, allowing the mortgagor to redeem or waiving the foreclosure. This bill amends when a judgment of foreclosure can be waived. A waiver of foreclosure may only be filed in conjunction with a reinstatement and with the written consent of the mortgagors.

Finally, this bill imposes a time limit on when a report of sale must be filed. The report of sale must be filed with the court within the earlier of 90 days after the sale or 45 days after the mortgagee's delivery of the deed to the purchaser. If additional time is needed to file the report, the mortgagee may file a motion with the court prior to the deadline and if the court finds that good cause has been shown, it may grant additional time as it considers appropriate. In the event that the report of sale is not timely filed, the foreclosure remains valid but the mortgagee has no

right to seek a deficiency judgment, should one exist. Previously, there was no time limit by when a report of sale had to be filed.

AN ACT TO REQUIRE RESIDENTIAL MORTGAGE LOAN SERVICERS TO ACT IN GOOD FAITH IN DEALINGS WITH HOMEOWNERS – S.P. 415 – L.D. 1327

This bill requires servicers of residential mortgage loans to act in good faith when dealing with homeowners or obligors. The bill amends the foreclosure mediation program to allow the courts to directly sanction a mortgage servicer when the servicer's conduct evidences a failure to mediate in good faith. The bill requires an order of sanctions to identify the name of the mortgage servicer so that, when a servicer is found to have failed to act in good faith, the court may take into account previous misconduct in fashioning a sanction sufficient to deter continuation of the misconduct in the same case or in future cases.

Good faith is defined as "honesty in fact and the observance of reasonable commercial standards of fair dealing."

If the court finds that a servicer has violated its duty of good faith, the court may dismiss the foreclosure, stay the foreclosure on appropriate terms and conditions or impose sanctions that the court finds to be appropriate until the violation is cured. The bill also creates a separate cause of action for homeowners or obligors against a servicer for the violation of the duty of good faith. Remedies provided for by this bill include any actual damages incurred by the homeowner or obligor, payment of attorney's fees and statutory damages of up to $15,000 when a pattern or practice of the servicer's violations of the duty of good faith have been shown.

The Ten Year Rule

BY ALLISON SCHMIDT, ESQ.
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IN THE YEARS following the real estate market crash, few states other than Nevada have presented more challenges to foreclosing lenders and trustees. Beginning with the passage of SB321 – the Nevada Homeowner's Bill of Rights - in 2009, and the subsequent enactment of numerous other State and Federal laws designed to slow the tidal wave of foreclosures faced in Nevada, both lenders and trustees were required to navigate a difficult landscape in order to complete foreclosures in the state.

Later, in 2014, the industry was dealt another blow when the Nevada Supreme Court issued its opinion in SFR Investments Pool 1 v. U.S. Bank, 130 Nev. 742, 334 P.3d 408 (2014), which held that homeowners associations' "super-priority" assessment liens extinguished first deeds of trust when the assessment liens were foreclosed. The SFR ruling rocked the mortgage industry, running contrary to years of servicer practices, in which it was widely believed that an assessment lien could not extinguish a first deed of trust. Following the ruling, millions of dollars of loans secured by thousands of homes in Nevada were thrust into litigation, forcing beneficiaries to fight to maintain the validity of their deeds of trust. Even today, more than five years after the decision was issued, thousands of these "HOA foreclosure cases" continue to wind their way through Nevada courts, creating pervasive title uncertainty.

Against this backdrop, another potential pitfall for lenders and trustees has evaded the attention of the industry: Nev. Rev. Stat. 106.240, often referred to as Nevada's ten-year rule. The ten- year rule has existed on Nevada's books, largely unnoticed, for more than a century:

NRS 106.240 Extinguishment of lien created by mortgage or deed of trust upon real property. The lien heretofore or hereafter created of any mortgage or deed of trust upon any real property, appearing of record, and not otherwise satisfied and discharged of record, shall at the expiration of 10 years after the debt secured by the mortgage or deed of trust according to the terms thereof or any recorded written extension thereof become wholly due, terminate, and it shall be conclusively presumed that the debt has been regularly satisfied and the lien discharged.

Putting the statute into simpler terms, once a loan matures or is accelerated, foreclosure must be completed within ten years, or both the security and the underlying debt itself are extinguished. Understanding this requirement is now more important than ever, when borrower defaults approaching and exceeding ten years becomes more commonplace as a result of anti-foreclosure laws and widespread title litigation in Nevada.

As is often the case in Nevada, there is very little case law to offer clues on how the ten-year rule will work in practice. The sole Nevada Supreme Court case analyzing the effect of the statute states that the ten-year rule "creates a conclusive presumption that a lien on real property is extinguished ten years after the debt becomes due." Pro-Max Corp. v. Feenstra, 117 Nev. 90, 16 P.3d 1074 (2001), opinion reinstated on reh'g (Jan. 31, 2001). The ProMax decision further confirmed that the ten-year rule will work to extinguish a lien and debt even if it results in an inequitable windfall to a borrower.

Another unpublished decision in Nevada strongly suggests that the mere act of cancelling a foreclosure by dismissing a judicial foreclosure complaint or rescinding a notice of default is not enough to stop the clock running on the ten-year rule. Once a loan has been accelerated, the Nevada Supreme Court requires specific and definite actions to be taken to effectively de-accelerate the loan. Failure to correctly de-accelerate a loan that has been in default for years puts the loan at risk of total loss.

There are numerous ways in which the clock on Nevada's ten-year rule may be triggered: a borrower's bankruptcy, mailing an acceleration letter, or recording a notice of default are some of the more common events that start the clock running. It is a far more difficult task to stop the clock from running. The penalty for running afoul of Nevada's ten-year rule is a harsh one – the lender loses its security and the underlying debt is rendered uncollectable by any means. With homeowner attorneys in Nevada actively searching public records for cases to cash in on the ten-year rule, it is imperative for lenders, servicers, and foreclosure trustees to speak with their attorneys, educate themselves on the law, and to have the ability to identify at-risk loans. Any loan in which default occurred more than nine years ago should be reviewed by a knowledgeable attorney. By completing a relatively brief review of the account, an attorney can assist in properly de-accelerating at-risk loans – an act that will protect the lender's rights, and save trustees the trouble and expense of being included in wrongful foreclosure litigation.

STATE SNAPSHOT

The Finality of Non-Judicial Sales: Co-Ops vs. Real Property

BY ALEXANDRA HEANEY, ESQ.
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NEW YORK STATE remains one of approximately fifteen states[1] where interest in a cooperative ("Co-Op") housing unit can be purchased. Rather than obtaining a deed and having an ownership in real property, the purchaser/debtor is provided with shares in the Co-Op Corporation and a proprietary lease (which is also known, collectively, as the collateral). The Lender (also known as the secured party) is not provided with a mortgage. Instead, the Lender receives a security agreement, the Co-Op shares, and an assignment of the proprietary lease to secure the loan.

Upon default in the purchaser's obligations under the security agreement, and after proper notice[2], the Lender will commence a non-judicial foreclosure in order to dispose of the collateral. The non-judicial sale of the collateral is governed by Article 9 of the NYS Uniform Commercial Code ("UCC"). The UCC states that "every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable." NY CLS UCC § 9-610. Once the sale occurs and the collateral transfers, the remedies afforded to the debtor, as outlined further below, are limited due to the language and intent of the UCC.

In *Atlas MF Mezzanine Borrower, LLC v Macquarie Texas Loan Holder LLC*, 174 AD3d 150 [1st Dept 2019], the New York State Appellate Division, First Department examined what remedies exist when a non-judicial sale is commercially unreasonable.

Atlas, in an effort to finance the purchase of apartment properties, obtained a loan from Macquarie in the amount of $71 million dollars in December, 2013. With Atlas being unable to repay the loan, Macquarie demanded payment and sold the collateral in 2017. Atlas, along with three other bidders, attended the sale. Macquarie ultimately rejected Atlas' bids and transferred the collateral to an entity who demonstrated an ability to close. Atlas thereafter initiated suit "seeking a declaration that the auction was conducted in a commercially unreasonable fashion, and that the sale can and should be unwound." (*Id.* at 157).

Atlas' argument is premised on "UCC 9-617 and principles of equity as a basis for its claim that the Court has the power to recognize [its] rights in the property and to order the sale unwound and the [collateral] returned." (*Id.* at 159). Specifically, Atlas' argues that because UCC 9-617 states that the collateral is transferred "subject to the debtor's rights in the collateral …[Atlas] retains…entitlement to the collateral, which in turn means that a court may set aside the sale." (*Id.* at 159-160). The Court did not agree. Instead the Court found that "UCC 9-617 does not deal with remedies for wrongdoing [and] it would be a stretch to interpret the language as providing a court with the authority to unwind a concluded UCC sale." (*Id.* at 161).

The Court's rationale is further supported by the plain language of UCC 9-625, which states – "a person is liable for damages in the amount of any loss caused by a failure to comply with [Article 9]."

The Court's rationale is further supported by the plain language of UCC 9-625, which states – "a person is liable for damages in the amount of any loss caused by a failure to comply with [Article 9]." A debtor "may not, after dissolution and conclusion of the sale, unwind the sale…because this remedy is not provided for in the UCC" (*Id.* at 162-163). In the context of a judicial sale where real property is foreclosed, the Civil Practice Law and Rules ("CPLR") allow for a "sale [to be] set aside …if a substantial right of a party was prejudiced by the defect (See CPLR 2003). Unlike the remedy provided for in the CPLR, and the recent First Department decision, a debtor's lone remedy is to seek an award for damages in a commercially unreasonable non-judicial sale; the interest in the Co-Op cannot be regained.

While the Appellate Court clearly articulates the finality of a non-judicial sale and removes any doubt regarding a borrower's inability to re-claim the collateral, this decision provides little protection for Lenders and Law Firms alike whose only remedy will be to defend itself in what could amount to be costly litigation. In the end, a commercially unreasonable foreclosure sale leaves a Lender exposed to the payment of damages long after the sale occurred and the collateral transferred. a

[1] National Association of Housing Cooperatives

[2] "[A Lender] whose collateral consists of a residential cooperative interest…who proposes to dispose of such collateral after a default…shall send to the debtor, not less than ninety days prior to the date of the disposition…notice [as provided for under the UCC]." NY CLS UCC § 9-611

STATE SNAPSHOT

Appraiser Not Liable to a Lender For Crumbling Foundation in Connecticut

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In Renewal Capital, LLC v. Joshua Martin, et al., Superior Court, Judicial District of Hartford at Hartford, Docket No. HHD-CV18-6088271-S, the lender, RCN Capital Funding, LLC ("RCN"), brought an action claiming the appraiser of certain property was negligent in failing to discover, detect, and disclose in his appraisal report the actual presence of pyrrhotite which causes crumbling foundation in homes, and therefore the foundation of the property appraised was defective requiring to be replaced. In the complaint, RCN alleges that if such defect was provided in the appraisal, it would not have made the loan to Renewal (which had withdrawn from the case). RCN also alleged that First American Staff Appraisals, LLC was vicariously liable for the negligence of its appraiser. The defendants filed a motion for summary judgment which was granted by the court, entering judgment in favor of the defendants upon a Memorandum of Decision (8/16/19).

There were several grounds plead by the defendants which served as the basis for the summary judgment. The defendants argued that Connecticut General Statutes §36a-755(b) applied and as a result of a lack of privity between RCN and the defendants, the defendants could not be held liable to the plaintiff for the appraisal. That statute provides that an appraiser is not liable to a third party unless there is an intentional misrepresentation in the appraisal. The plaintiff did not plead intentional misrepresentation in its complaint. Though the appraiser was retained under contract with another entity, not the plaintiff, to conduct the appraisal, to which the defendants claimed RCN therefore lacked privity, the court nonetheless held that the parties had a "functional relationship", with the plaintiff identified as the "intended user" of the appraisal to evaluate whether it would make the loan. Therefore, the statute did not provide protection to the defendants against liability to the plaintiff. It should be noted that during the argument before the court, the Judge inquired that if he ruled in favor of one party or the other under that statute that would be dispositive of the summary judgment, in other words if he ruled in favor of RCN [court misidentifies as "RNC"], then the motion would be denied). RCN's counsel agreed, however defendants' counsel responded that though the application of the statute is dispositive as to RCN, the defendants have submitted additional and further basis, as alternatives, for granting the summary judgment, one of them being the language contained in the appraisal; hence, even if the court ruled the statute inapplicable, alternative grounds for summary judgment were presented.

The court found that the appraisal contained limiting language as to the appraiser with regard the duties and responsibilities of the appraiser. RCN attempted to attack the appraisal language as exculpatory language for the appraiser to escape their own negligence which is disfavored by the courts. The court however found the appraisal language to rather be limiting the scope of the appraiser's duties and responsibilities and insulates the appraiser from liability for failing to detect problems that would be discernable only with additional engineering or testing. (The appraisal report used was a Fannie Mae / Freddie Mac Uniform Residential Appraisal Report which included as standard language, the limiting language.) To support their position, the defendants submitted two affidavits, from its expert (a certified residential real estate appraiser) and the actual appraiser of the property. The appraiser testified in his affidavit that at no time was it communicated to him by anyone, or brought to his attention, that there was a concern with the foundation. The appraiser further provided that he was not qualified to conduct testing to discern the existence of crumbling foundation as he, as an appraiser, lacked the skill, training, knowledge and qualifications of a licensed home inspector or professional structural engineer to conduct the testing required to determine the existence of crumbling foundation. The expert provided in her affidavit that the duty of discerning crumbling foundation belongs to a qualified licensed home inspector or a professional structural engineer and is not the responsibility of an appraiser under USPAP ("Uniform Standards of Professional Appraisal Practice"). The court found the plaintiff failed to proffer any admissible evidence to rebut defendants' contention that based on the language in the appraisal limiting the scope of responsibilities and liabilities, the defendants did not have a duty, or the ability, to discover the foundation was defective, hence there was no genuine issue of material fact that the defendants were responsible for determining that the foundation of the property was defective and would need to be replaced. In noting the plaintiff failed to submit any "admissible" evidence in support of its counter position, the court pointed out that portions of the transcript attached by the plaintiff in support of its opposition were not certified.

The court further held that the plaintiff attempted to introduce a new theory of liability in its opposition to the motion for summary judgment, asserting "geographical incompetence" in an attempt to circumvent the legal effect of the limiting conditions in the appraisal. That theory was not plead in the complaint and the court found that it was too late to make such a count and distinguished it from the negligence count. RCN alleged in their complaint that the defendants negligently failed to discover, detect, and disclose the actual presence of pyrrhotite and therefore the foundation was entirely defective. However, the plaintiff failed to allege a geographical competence theory in its complaint based on the claim that the defendants should have known, based on publicly available information, that there was a risk [or potential risk] or generalized risk, that pyrrhotite was present. The Judge notes in a footnote (#8 to its Decision) that RCN abandoned its actual alleged claim of negligence as plead in its complaint. The court held that at this stage of the case it would be fundamentally unfair and prejudicial for RCN to interject a new theory for the first time in opposition to a motion for summary judgment.

The court however found the appraisal language to rather be limiting the scope of the appraiser's duties and responsibilities and insulates the appraiser from liability for failing to detect problems that would be discernable only with additional engineering or testing.

The court also noted that the defendants raised several evidentiary issues as to the information submitted by the plaintiff in favor of its objection to the motion for summary judgment, including as to Plaintiff's expert report. The court found the articles in the report which served as the basis for, and incorporated into, the report were unsubstantiated and inadmissible hearsay. The Judge noted other grounds were plead as to the plaintiff's expert report (i.e. the report was not prepared by plaintiff's expert but rather by a research assistant), but the court stated it did not need to address them it was granting judgment in favor of the defendants on other grounds. This is the first known case in Connecticut in which a lender attempted hold an appraiser liable as a result of having made a loan on a property with a crumbling foundation.

STATE SNAPSHOT

Maryland Extends Statute of Limitations for Civil Actions Against Mortgage Servicers

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EARLIER THIS YEAR, the Maryland legislature passed House Bill 425 in order to extend the statute of limitations for filing a civil action by a homeowner if a mortgage servicer engaged in unfair, abusive, or deceptive trade practices. As concerns mount of an increase in defaults on first-lien mortgages and deeds of trust, the Maryland House of Delegates used the 2019 session to begin re-evaluating legislation enacted during and after the Great Recession to protect homeownership. The legislature considered that the stresses of the foreclosure process could make it difficult for homeowners to pursue legitimate claims. Therefore, the legislature attempted to clarify and broaden the time-period a homeowner has to sue their mortgage servicer for misconduct. The new addition to Title 5, Subtitle 1 of the Courts and Judicial Proceedings article of the Annotated Code of Maryland takes effect October 1, 2019, and extends the statute of limitations for a civil action alleging impropriety on the part of mortgage servicers.

The new law will extend the statute of limitations from three years to five years for a civil action against a mortgage servicer for damages caused by "unfair, abusive, or deceptive trade practices" when the cause of action arose on or after October 1, 2019. A homeowner filing suit with such allegations must do so within the earlier of: five years after the foreclosure sale of the residential property; or three years after the mortgage servicer discloses its unfair, abusive, or deceptive trade practices to the homeowner. Md. Courts & Judicial Proceedings § 5-121. This change modifies the general Maryland statute of limitations from three years from the cause of action to essentially run the entirety of the life of the loan, plus five years after foreclosure sale, to better clarify that the statute of limitations are connected with the alleged misconduct, and not origination date of the loan. Compare with Md. Courts & Judicial Proceedings § 5-101 (establishing a general statute of limitations of three years from a cause of action).

It is vital to note the breadth of Maryland's definition of "unfair, abusive, or deceptive trade practices." Unfair, abusive, or deceptive trade practices include, but are not limited to: statements or representations of any kind which are capable of deceiving or misleading a borrower, as well as any violation of consumer protection laws, e.g., the Maryland Consumer Debt Collection Act and the federal Service members Civil Relief Act. See *generally*, Md. Commercial Law § 13-301. This change to the statute of limitations will affect the risk of litigation for parties throughout the Maryland mortgage and foreclosure industry. Maryland law considers a "mortgage servicer" to be any entity which engages in any part of servicing or payment collections for personal, family, or household loans secured by a mortgage, deed of trust, or other equivalent consensual security interest on a residential property. *See generally*, Md. Financial Institutions § 11-121.

Additionally, while the five-year window after foreclosure sale appears relatively straightforward in application, the three-year period after a "disclosure" could be an area ripe for litigation going forward. Although the new law attempts to clarify when the

The new law will extend the statute of limitations from three years to five years for a civil action against a mortgage servicer for damages caused by "unfair, abusive, or deceptive trade practices" when the cause of action arose on or after October 1, 2019.

clock starts for allegations of unfair, abusive, or deceptive practices during the life of the loan, the term "disclosure" is not defined in the statute or the relevant article of the Maryland Code. While the new standard would almost certainly apply in a scenario in which a mortgage servicer is required, e.g. a legal settlement, to formally inform consumers of their rights following improper conduct on the part of the mortgage servicer, it is unclear what constitutes disclosure in other possible situations. For example, does the window of opportunity for a homeowner to sue begin with the actual action of committing, and thereby "disclosing," an unlawful practice against a homeowner? When does the Court consider tolling to have started if in October 2022 a homeowner reads an article on prohibited conduct for Maryland mortgage servicers and the homeowner realizes such conduct happened to them in October 2019? As of now, it is unclear.

The new statute of limitations extends the risk of liability for participants in the Maryland mortgage industry—it is imperative to have early and proactive communication with legal counsel regarding best practices to avoid conduct which might be perceived as constituting an unfair, abusive, or deceptive trade practice under Maryland law. Local counsel will be especially important throughout the mortgage foreclosure process. a

Redemand Not Necessary Even After Bank Accepts Partial Payments

BY ADAM DIAZ, ESQ.
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THE FOURTH DCA reversed a judgment entered in favor of two mortgagors in a Broward County foreclosure action brought by Bank of New York Mellon ("the Bank") finding the lower court erred when it concluded the bank failed to satisfy conditions precedent. *Bank of New York Mellon, etc. v. Withum*, 204 So. 3d 136 (Fla. 4th DCA 2016). In *Withum*, the mortgagors defaulted on their loan and the Bank sent them a demand letter in compliance with paragraph 22 of their mortgage. After receiving the demand letter, the borrowers sent in three partial payments, but not enough to cure the default. The Bank initiated foreclosure proceedings and the matter proceeded to a bench trial.

The trial court entered judgment in favor of the borrowers finding the bank failed to satisfy the requirements of paragraph 22 of the mortgage because it failed to redemand after accepting the borrowers' three partial payments. The Bank appealed the judgment. The Fourth DCA noted contract construction was a "pure question of law" and surmised the lower court misinterpreted paragraph 22 of the mortgage. The DCA cited several provisions of the mortgage which clearly provided that if a default was not cured "on or before the date specified in the [demand] notice" the lender could accelerate "without further demand" and may foreclose by filing a lawsuit.

The DCA also pointed out that each time the Bank accepted the borrowers' partial payments it sent notice to the borrowers which indicated the Bank was not waiving any of its rights under the note and mortgage, including the right to foreclose, by accepting partial payments. The Court noted the language in the partial payment notices was consistent with the mortgage language which also provided the Bank could accept partial payments "insufficient to bring the Loan current, without waiver of any rights…"

The DCA disagreed with the lower court's conclusion that the three notices following the partial payments were "confusing" and taken together "did not adequately inform Borrowers of the necessary steps to cure." The DCA explained that the purpose of a demand notice is to inform the borrower of what must be done "to bring the loan out of default." The Court elaborated that such a notice "need only substantially comply with a mortgage's condition precedent." The Court added that the "initial breach letter expressly informed Borrowers that if they sent less than the full amount due, Bank could keep the payment, apply it to the outstanding debt, and still proceed to foreclosure." This notice was sufficient.

The Court concluded there was no dispute that the borrowers remained in constant default since receiving the initial demand letter and that the partial payment notices "could not retroactively alter the sufficiency" of the initial demand notice. The DCA remanded the matter to the trial court to reverse judgment for the borrowers and directed the lower court to enter a judgment of foreclosure for the Bank. The key take-away from this decision is the importance of the language in the demand letter, mortgage and any communications sent to the borrowers. A foreclosure is an action based in contract and the court is required to enforce the terms of the parties' agreement — as written. As long as consistent, clear language is used in the contract and communications with the borrower, the parties' respective rights will be protected and enforced.

IN A HURRY? CLICK HERE FOR THE KEY POINTS:

1. The Fourth DCA reversed a judgment entered in favor of two mortgagors in a Broward County foreclosure action brought by Bank of New York Mellon ("the Bank") finding the lower court erred when it concluded the bank failed to satisfy conditions precedent. Bank of New York Mellon, etc. v. *Withum*, 204 So. 3d 136 (Fla. 4th DCA 2016). In *Withum*, after a bench trial the lower court found the Bank's acceptance of three partial payments after sending the initial demand notice necessitated redemand before the Bank could file its foreclosure complaint.

2. The DCA disagreed and explained that the purpose of a demand notice was to inform the borrower of what must be done "to bring the loan out of default." The Court elaborated that such a notice "need only substantially comply with a mortgage's condition precedent. The Court explained that the Bank's "initial breach letter expressly informed Borrowers that if they sent less than the full amount due, Bank could keep the payment, apply it to the outstanding debt, and still proceed to foreclosure." This notice was adequate to inform the borrowers of their rights.

3. The Court elaborated there was no dispute the borrowers remained in constant default since receiving the initial demand letter and that the partial payments the borrowers made did not cure the default. The Court concluded the notices "could not retroactively alter the sufficiency" of the demand notice. The DCA remanded the matter with directions to enter a judgment of foreclosure for the Bank. The key take-away from this decision is the importance of the language in the demand letter, mortgage and any communications sent to the borrowers. A foreclosure is an action based in contract and the court is required to enforce the terms of the parties' agreement - as written. As long as consistent, clear language is used in the contract and communications with the borrower, the parties' respective rights will be protected and enforced.

To pay or not to pay: is the Pennsylvania government bilking you in its collection of inheritance taxes?

BY M. TROY FREEDMAN, ESQ.
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I. BACKGROUND

"In mythological lore, the Greek hero Achilles thought himself to be invincible, impervious to the swords and arrows of his enemies. So too, is the mindset of the Pennsylvania Department of Revenue ("Revenue") . . .[.]" In re Berger, 18-20778 (Bankr. W.D. of Pa.).

Last year, the Pennsylvania foreclosure process for deceased mortgagors changed. Specifically, the Pennsylvania Department of Revenue ("DoR") issued correspondence dated 5-1-18 asserting that inheritance taxes are never divested via judicial sales. Prior to that date, notice of sheriff's sale was provided to DoR, as a lienholder, which permitted title insurers to insure REO properties. Circulation of that letter last May caused a ripple effect in the underwriting industry and added steps to foreclosures.

II. THE APPLICATION PROCESS

One means to address the inheritance tax involves submission of an Application for Mortgage Foreclosure Inheritance Tax Release of Lien or form REV-1839 ("Application"). This process actually contains multiple steps; it is not as simple as filing a form and waiting for DoR's response. In fact, as discussed infra, DoR's response must be analyzed carefully due to a phenomenon this author labels "the 15% game."

First, applicants must confirm whether a probate proceeding has been filed, as that proceeding is assigned an estate or file number that DoR cross-references. If no such proceeding has been filed, then an Affidavit of Death must be filed with the county's Register of Wills for the purpose of obtaining this estate or file number. Second, to complete the Real Estate Value and Mortgage Balance fields on Section IV of the Application, a BPO or appraisal from at or around the time of the mortgagor's death as well as a date-of-death ("DOD") payoff or mortgage statement are required, as those documents must also be submitted along with the Application. Valuations from the exact DOD are unlikely so property valuations within a few years before or after the mortgagor's death appear sufficient. DoR altered the Application instructions between October and November 2018 to accept either an applicant's property valuation or the current fair market value predicated upon county assessment data. Lenders and servicers should be able to produce DOD mortgage statements or generate retroactive DOD payoffs. Third, the Application, filed Affidavit of Death (if needed), property valuation, and mortgage statement or payoff must be e- mailed to DoR (the Application instructions contain the e-mail address).

It will take DoR several weeks to several months (time-frames have been inconsistent) to respond to an Application with a Notice of Appraisement ("Notice"). The Notice identifies the property value, the mortgage debt, the applicable tax rate, and the amount of the tax (the tax is calculated on the equity in the collateral).

III. THE "15% GAME"

In evaluating the Notices and tracking DoR's actions, the following chronic and frequent discrepancies in the Notices have been observed: (1) DoR's unilateral increase of property values; (2) DoR's unilateral decrease, or complete elimination, of mortgage balances; and (3) application of the highest tax rate of 15% when a lower statutorily prescribed rate of 4.5% or 12% should have applied because the deceased mortgagor had surviving heirs. There is no explanation for these discrepancies on the Notices themselves. It was initially believed that the higher property values on the Notices were the result of DoR's reliance on assessment values, one of DoR's prescribed means of valuing collateral. However, matching these adjusted figures with, or reverse engineering them to, actual county assessment values has proven elusive. After having escalated the foregoing discrepancies within DoR, DoR dismissively attributed these discrepancies to untrained/rogue rank-and-file examiners. It therefore appears that DoR is artificially manufacturing and/or increasing the inheritance tax liability on financial institutions presumed to have deep pockets ("the 15% game").

When discrepancies like the foregoing are discovered, the Notice may be appealed to another divi-

Pennsylvania Department of Revenue ("DoR") issued correspondence dated 5-1-18 asserting that inheritance taxes are never divested via judicial sales. Prior to that date, notice of sheriff's sale was provided to DoR, as a lienholder, which permitted title insurers to insure REO properties.

sion of DoR (meaning the appeal is not evaluated by an independent third-party arbiter), adding several months and further non-recoverable expenses to resolution of the issue in addition to potentially delaying your REO sale. In some cases, the tax liability may be minimal, making it cost-ineffective to exercise your appellate rights. If the Notice is not appealed (or not appealed timely), it becomes a final administrative adjudication, which is binding on the applicant. After payment of the tax is made, DOR will, after yet several more weeks, provide a Release.

The "15% Game" can be costly and can delay your REO sale.

IV. THE PETITION PROCESS: AN ALTERNATIVE ROUTE TO DIVESTING TAX LIABILITY

Many lenders and servicers were advised that the sole means to address the inheritance tax was capitulation to the foregoing Application procedure. This advice was incomplete as there has always been another creative option: filing a petition labeled a Petition for Supplementary Relief in Aid of Execution and/or to Confirm Divestiture of Lien ("Petition"). The Petition seeks a Court Order declaring, *inter alia*, the inheritance tax lien divested, and is supported by the following arguments:

A. Administrative agencies like DoR may not regulate by issuing letters and must instead observe statutorily prescribed rule-making requirements consisting of several stages or steps.

B. Inheritance tax liens are not preserved from a sheriff's sale of real property.

C. Mortgage foreclosure actions and Sheriff's Deeds conveying real property are not statutorily recognized transfers that invoke the imposition of an inheritance tax.

D. By not observing statutes governing rule-making, DoR has violated the due process rights of lenders and other purchasers of real property at sheriff's sale.

Courts have been receptive to this Petition, even granting some on an emergency basis due to impending REO transactions.

A variation of this Petition has recently been created for use in foreclosures involving government-insured or GSE-backed mortgages as those foreclosures necessitate conveyance of the collateral to HUD, V.A., or a GSE, if the foreclosing entity purchases the collateral at sheriff's sale. This variation of the Petition is supported by the constitutional argument that the grantee of the collateral, an agency or instrumentality (in the case of a GSE) of the U.S. government, cannot be taxed by Pennsylvania pursuant to long-standing federal law providing for immunity of the U.S. government from state taxation. See McCulloch v. Maryland, 17 U.S. 316, 4 Wheat. 316, 4 L. Ed. 579 (1819)(it was unconstitutional for the State of Maryland to impose a tax on a bank created and operated by the U.S. government). FNMA's Legal Department is to be contacted for authorization before any constitutional/federal argument is asserted in a filing.

V. CONCLUSION

The Pennsylvania inheritance tax issue has multiple layers and nuances. It is critical that your default counsel is not only skilled in these minutiae, but willing to pursue innovative alternatives to protect your interests and otherwise minimize or obviate your tax liability.

Ohio Recording Fees to Increase Statewide, Effective October 17, 2019

BY LARRY ROTHENBERG, ESQ.
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Ohio's 2602-page budget bill recently signed by the Governor, includes an increase in fees to be charged by Ohio's County Recorders, effective October 17, 2019, for recording real estate documents, including deeds, mortgages, releases of mortgages, assignments of mortgages, easements, land installment contracts, and other documents.

The current recording fee of $28 for the first two pages and $8 for each additional page, will increase to $34 for the first two pages, with no increase in the $8 fee for each additional page.

Supporters advocated for the increase to provide additional funding for the Ohio Housing Trust Fund. Originally established in 1991, the Ohio Housing Trust Fund is a flexible state funding source that is intended to provide affordable housing opportunities, expand housing services, and improve housing conditions for low-income Ohioans and families. The Fund supports a wide range of housing activities including housing development, emergency home repair, handicapped accessibility modifications, and services related to housing and homelessness. In addition, Ohio Housing Trust Fund dollars may be used for predevelopment costs, rental assistance, housing counseling, rehabilitation, and new construction.

Ohio Housing Trust Fund dollars are allocated based on recommendations by a 7-member advisory committee representing various sectors of the housing and lending industry and local governments.

Half of all recording fees collected are required to be submitted to the state to the credit of the Ohio Housing Trust Fund. ▪

RECORDING FEE INCREASE

THE FIRST TWO PAGES CURRENT RECORDING FEE IS

$28

THIS WILL INCREASE TO

$34

THE $8 FEE FOR EACH ADDITIONAL PAGE WILL REMAIN THE SAME.

STATE SNAPSHOT

Changes to the Military and Veterans Code with California AB 3212

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On January 1, 2019, California AB 3212 changed the state's existing Military and Veterans Code. Existing state law provided that any sale, foreclosure, or property seizure for non-payment was invalid if made during or within one year of military service if the obligation secured by the mortgage or trust deed originated before the person's military service and is still owned by the service member. This was in line with federal protections afforded under the SCRA.

AB 3212 expands the class of protected service members. It eliminates the requirement that the obligation originated before the person's period of military service for purposes of state law and applies to any obligations secured by a mortgage or trust deed upon real or personal property owned by a qualifying service member. This is a substantial change that provides protections to many qualifying service members who may not be statutorily protected from foreclosure under the current federal law because their obligation originated after their military service began.

Section 408(c) specifically states: "No sale, foreclosure, or seizure of property for nonpayment of any sum due under any obligation as provided in subdivision (a), or for any other breach of the terms thereof, whether under a power of sale, under a judgment entered upon warrant of attorney to confess judgment contained therein, or otherwise, shall be valid if made during the period of military service or within one year thereafter, except pursuant to an agreement between the parties made after the nonpayment or breach, unless upon an order previously granted by the court and a return thereto made and approved by the court."

The code fails to define the word "foreclosure". The 9th Circuit in Brewster v. Sun Trust Mortg., Inc. 742 F.3d 876 (2014) defined this term when interpreting the SCRA, which has the same language as Section 408. In Brewster, the original servicer initiated a non-judicial foreclosure proceeding against the borrower pursuant to California law by recording a notice of default. After this, the servicer determined that the borrower was a reservist mobilized to active duty and rescinded the notice of default. The fees and costs incurred as a result of the non-judicial foreclosure, however, remained on the borrower's account. The loan was then servicer transferred. Although the new servicer did not commence foreclosure activities against the borrower, it left the foreclosure fees incurred

by the first servicer in place. As a result, when the second servicer initiated collection activities, it also sought to collect foreclosure-related fees arising from the rescinded foreclosure. During the period of the second servicer's collection efforts, the borrower remained in military service.

The borrower filed suit against both servicers, alleging violation of Section 533(c) of the SCRA. The federal district court dismissed the claims against the subsequent servicer for failure to state a legally cognizable claim. The district court premised its decision on the theory that a party does not violate Section 533 unless it forecloses without permission from the court, and in this case, the subsequent servicer did not "foreclose" on the borrower. The district court acknowledged that the fees assessed against the borrower from the first servicer likely were improper but stated "there is no cause of action for violating the spirit of the SCRA." The court held that Section 533 forbids foreclosing on the home of a servicemember under certain circumstances but because the subsequent servicer did not actually foreclose on the borrower, it was not liable under Section 533. The borrower appealed.

On appeal before the Ninth Circuit, the subsequent servicer argued that the SCRA applied only to the foreclosure that was terminated before the servicer assumed the servicing rights of the bor-

AB 3212 expands the class of protected service members. It eliminates the requirement that the obligation originated before the person's period of military service for purposes of state law and applies to any obligations secured by a mortgage or trust deed upon real or personal property owned by a qualifying service member.

rower's mortgage. In other words, the servicer's position was that no SCRA violation existed because a foreclosure action (a) did not exist when it assumed servicing obligations, and (b) was never commenced because the second servicer never pursued a sale, foreclosure, or seizure.

The circuit court rejected the second servicer's argument, reasoning that the plain language of the statute suggests that "foreclosure" covers more than just the formal foreclosure proceeding. The court also relied upon the California statutes governing the non-judicial foreclosure process, observing that (a) initiation of a non-judicial foreclosure and assessment of fees constitutes "foreclosure" because it is one of several steps in the foreclosure process, and (b) the statute includes numerous requirements for imposing fees related to basis, timing, and reasonableness. Relying upon the statutory procedure and taking into account the broad construction given to the statutory language of the SCRA to effectuate the legislative purpose of the statute, the court held that the attempted collection of fees related to a recorded notice of default on a California property constitutes a violation of § 533 of the SCRA regardless of whether the notice had been rescinded.

Here, there is a strong argument that issuing the standard breach letter in California could be viewed as "foreclosure" activity under Section 408 as (1) it the first step required in the foreclosure process and (2) it asserts that if payment is not made by a specific date that the servicer may accelerate the loan commence foreclosure proceedings. To be compliant, servicers should not be issuing a breach letter when a protected member defaults. Rather, the recommended approach is to issue a notice of non-payment, informing the borrower that their account is delinquent, and to reach out to their servicer to discuss their options.

Connecticut Supreme Court Recognizes That Loss Mitigation May Provide a Basis for Defense or Counterclaim in Foreclosure

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U.S. BANK NATIONAL ASSOCIATION, Trustee v. Blowers, 332 Conn. 656; 2019 Conn. LEXIS 213 (August 13, 2019). The Connecticut Supreme Court released a decision on August 13, 2019, which recognizes that loss mitigation conduct may provide a basis for a defense or counterclaim in a foreclosure. The Connecticut Supreme Court reversed an earlier Appellate Court ruling in that case, which had affirmed the trial court's order striking the defenses and counterclaims. In U.S. Bank National Association, as Trustee v. Blowers, 2019 Conn. LEXIS 213, the Connecticut Supreme Court found that special defenses and counterclaims could be based upon alleged wrongful conduct of a Servicer during loss mitigation attempts which substantially increased the borrower's overall indebtedness, caused the borrower to incur costs that impeded the borrower from curing the default and that such allegations were directly and inseparably connected to the enforcement of the note and mortgage.

The Courts in Connecticut previously held that defenses to a foreclosure could only include conduct which went to the making, validity and enforcement of the note and mortgage. The Appellate Court previously ruled that the allegations raised in this matter did not satisfy the enforcement portion of the making, validity and enforcement test because there was no final modification agreement reached. The Connecticut Supreme Court rejected that finding and determined that such an application created a more stringent test than required for special defense and counterclaims raised in nonforeclosure actions.

It is important to note that the borrower's allegations recited in this decision which included alleged pre-foreclosure and post-foreclosure wrongful conduct of the Servicer were deemed true based upon the procedural standard which is used in motions to strike. The decision which was reversed was a procedural motion that was not based upon the merits of any trial court findings.

Connecticut's mandatory mediation program contains a provision which states that participation in mediation does not waive the rights of any party. CGS 49-31l. The allegations in this case involved events before and during the mediation program. Although counsel for the lender argued in the Supreme Court that the legislature sought to occupy the remedies for mediation misconduct by way of sanctions only, that issue was not briefed and was deemed abandoned. There is Connecticut appellate authority that evidence related to mediation is inadmissible at trial. Christiana Trust v. Lewis, 184 Conn. App. 659 (2018).

The Blowers opinion rejected the public policy argument that this decision would deter Servicers from engaging in modification negotiations with borrowers and stated that "our decision serves as a deterrent to wrongful conduct only."

Lenders and Servicers should be mindful of this decision and consider revising or striking allegations of mediation misconduct in accordance with the statutory framework of Connecticut's mediation program

STATE SNAPSHOT

Kentucky court of appeals rejects lender's attempt to attach manufactured home

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ON AUGUST 23, the Kentucky Court of Appeals struck another blow against lenders seeking to enforce a lien against a manufactured home. In Clancy v. Green Tree Servicing, LLC, the Court of Appeals held that a lender could not assert an "equitable lien" in a manufactured home.

Manufactured homes have been a headache to lenders since the Court of Appeals decided *Hiers* v. Bank One more than two decades ago. In *Hiers*, the Court of Appeals ruled that, contrary to long-standing practice, a manufactured home remained personal property even when affixed to real estate, and the only way to perfect a lien on a home was to have the lien notated on the manufactured home's certificate of title.

The legislature soon responded, setting out a procedure by statute allowing an owner to surrender a certificate of title to the county clerk, and thus "convert" the manufactured home to real estate. However, this fix did not resolve the issue for the many manufactured homes that had already been permanently affixed to the real estate and were being treated as real estate by the owners. Lenders have found it difficult and sometimes impossible to obtain orders for sale on defaulted loans for manufactured homes from trial courts, which rely on *Hiers* to deny lenders' attempts to foreclose.

The decision in Clancy makes obtaining such an order even more difficult. In Clancy, the prior owners had failed to transfer the certificate of title to the Clancys when they bought the property. Thus, the manufactured home remained unconverted and personal property, with a certificate of title in a different name than that of the owners/mortgagors. When the Clancys defaulted on their mortgage loan, Green Tree Servicing initiated foreclosure proceedings, naming both the Clancys, as the mortgagors, and the prior owners, for their interest in the manufactured home. The prior owners disclaimed any interest in the manufactured home and surrendered the certificate of title to the court.

Green Tree moved for summary judgment, acknowledging that it had not notated a lien on the certificate of title, nor had the manufactured home been converted to real estate in conformity with statute, but that it was entitled to an "equitable lien" on the home. The Court of Appeals rejected this argument, holding that equitable relief cannot be had in circumstances where there is means to obtain legal relief. The court reasoned that a party cannot make an equitable claim to avoid the results of its own negligence in failing to perfect a lien on the manufactured home.

The court reasoned that a party cannot make an equitable claim to avoid the results of its own negligence in failing to perfect a lien on the manufactured home.

This ruling is clearly detrimental to lenders, but may not be as large of a blow that it appears at first glance. To begin, the opinion makes no mention of the lender asserting an unperfected security interest in the manufactured home. People often forget that the decision in *Hiers* dealt with a priority dispute between two lenders. There was no decision in *Hiers* on the validity of the lien as between the parties to the transaction.

Under the Uniform Commercial Code as adopted by the state of Kentucky, a security agreement is effective as between the parties. An argument not made in Clancy, but that appears would be effective, is that the Mortgage Agreement is a security agreement and can be enforced between the parties, even if unperfected. Most mortgages are signed by the borrower, are given for value, and explicitly set out that the mortgaged property includes any improvements on the real estate. A lender's case is even stronger if the mortgage makes specific mention of the manufactured home, either by a rider or a description of the home in the legal description. When the dispute is not between a lender and lienholder with a perfected security interest, but instead between the lender and the borrower, the "security agreement" of the mortgage should be controlling as between the parties, and the lender's recognized by the court.

Further, a judgment holder has the right to sell any property, real or personal, of the judgment debtor. A holder of a mortgage is not limited to the real property described in the mortgage, but can request any other property of the judgment debtor to be sold to satisfy its judgment. There is obviously a caveat in cases where the home is sold or the debtor files bankruptcy, but this would be a minority of cases.

The Court of Appeals continues to restrict lenders' ability to collect on liens secured by manufactured homes, but lenders can take action to protect their interests. First, a lender should require that a manufactured home be converted to real estate in the county offices as a prerequisite to closing. Further, for additional security, the lender should make sure that the manufactured home is explicitly identified in the mortgage as being part of the transaction. By following these recommendations, lenders can reduce any risk of loss.

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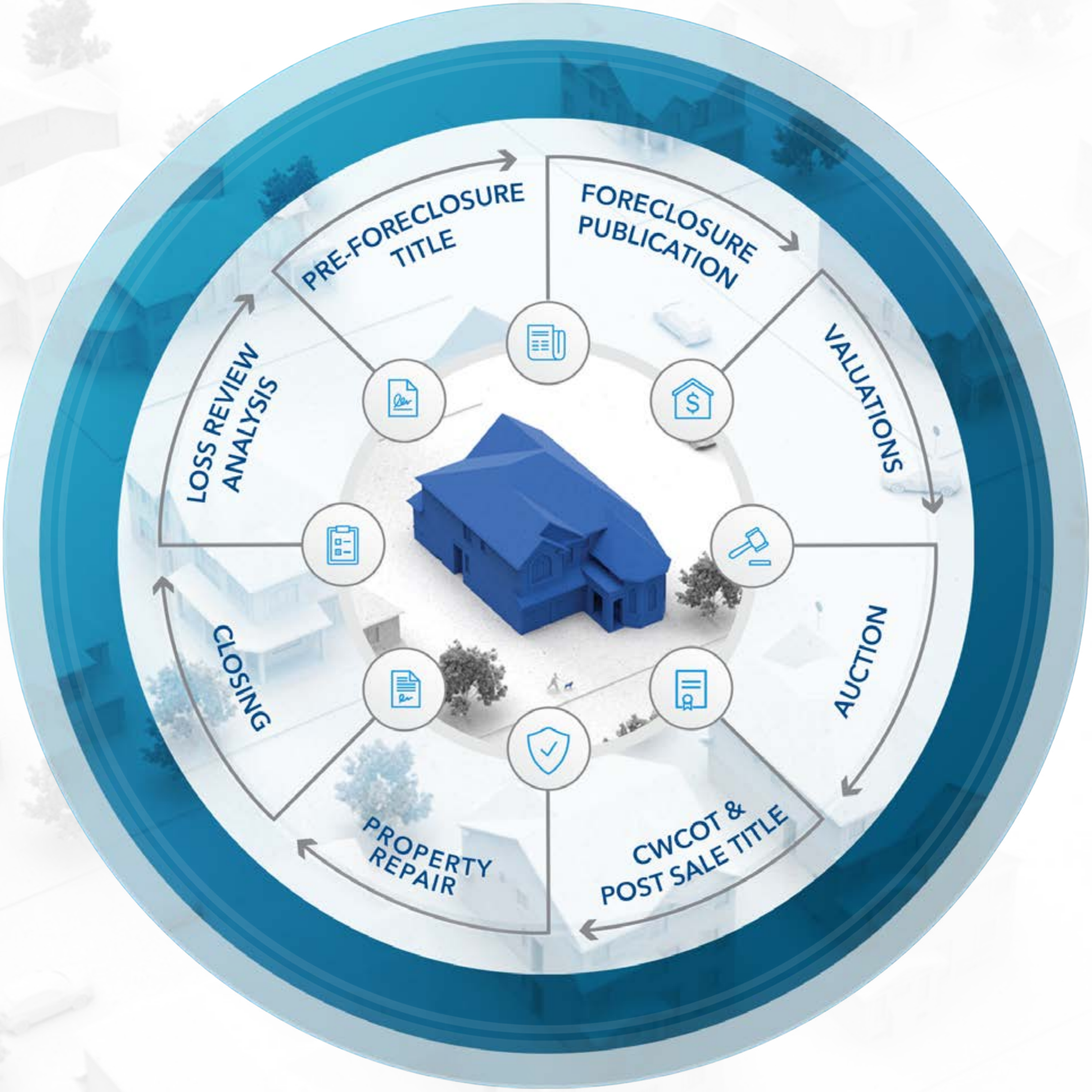

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