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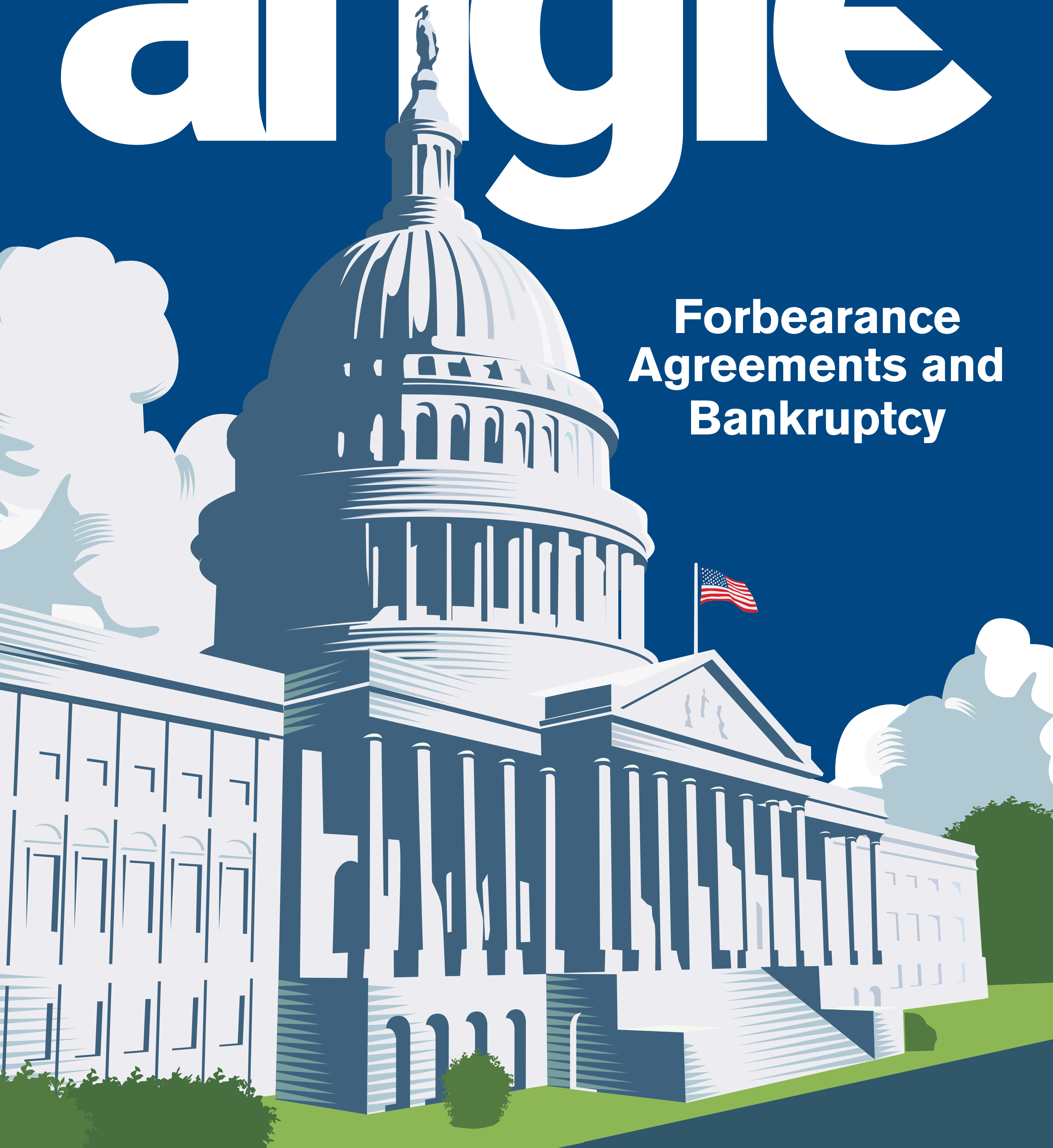

Forbearance Agreements and Bankruptcy

ALFN AMERICAN LEGAL & FINANCIAL NETWORK

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WE ARE HERE FOR YOU

#100%MemberRetention

As we are all continuing to deal with the impact of COVID-19, ALFN is offering some enhanced membership benefits and incentives that will provide direct ROI for your continued membership support. It is our goal to maintain 100% member retention, and continue to remain a vital leadership resource to have your voices heard and in providing you with the premier educational offerings you have come to expect from the ALFN. Here are some of the ways we would like to thank you for your continued support:

- **15% Dues Discount for 2021 Membership Renewal:** Members that paid their 2020 membership renewal dues in full by Dec. 31, 2020, received a 15% discount on your 2021 membership renewal dues.
- **Payment Assistance:** Installment plans, credit card payments and payment deferrals are available for 2021 membership dues, and for any ads and sponsorship purchases made in 2021. No additional fees charged for these alternative payment methods.
- **2021 Membership Dues:** There was no increase in 2021 membership renewal dues over the 2020 dues amounts.
- **Former Members Re-Joining:** Any member that had a cancelled membership and wants to re-join the ALFN in 2021 will not be charged any re-joining or initiation fees.
- **Enhanced Online Educational Offerings:** Additional webinars and online content offered at no additional cost to our members.
- **Bankruptcy INTERSECT Online Presentations:** The educational sessions we had planned for BK Intersect will now be hosted in an online webinar format. We are offering these 7 sessions free of charge to our members.
- **CLE Credit:** No less than 10 of our online presentations in 2021 will include CLE credit opportunities. CLE credit is also available at a special discounted rate for all 7 BK Intersect webinar sessions.
- **Discounted Ad Purchases:** Discounts will be provided for all ads and upgrades purchased for the remainder of 2021 in the Legalist, WILLed and ANGLE publications.
- **New Webinar Sponsorship Opportunities:** Newly designed sponsorships are available at a lower cost to provide continued branding and marketing opportunities for our members.
- **ASSURE Rewards Program:** Members that had achieved ASSURE Rewards status after ANSWERS 2019 will remain in the program through and including ANSWERS 2021.

ALFN has a vested interest in seeing all of our members pull through these challenging times with good health and financial strength. Please reach out to us and let us know how we can continue to help.

WE ARE HERE FOR YOU!

Letter from the ALFN Board Chair

Planning for the Next "Chapter"

AS I TALK TO PEOPLE IN THE INDUSTRY, there is a sense that we are still deep in the pandemic, but that we are starting to see the light. The light for us is not only the end of the pandemic, but the coming out of the worst downturn of business in our industry. Firms have been living off a limited source of files from private clients or vacant properties, undergone a substantial reduction of staff, and many have survived due to the PPP and other government programs.

While we exit this dark time, the misfortune of others will mean increased business for the default industry. This will be especially true for bankruptcy practitioners. The bankruptcy practice area for ALFN has held several successful conferences, and this ANGLE is a perfect way to memorialize the knowledge, experience and lessons from experts in the field.

Borrowers have been afforded numerous opportunities to handle the negative financial effects of the pandemic through loan modifications and forbearances but, in the end, there will still be thousands of homeowners who did not take the help, the help was simply not enough, or they decided to use this as an opportunity to simply avoid payments. It is critical that the ALFN members and affiliates prepare for the new rules, case law, arguments and strategies that will be used in the months and years to come by opposing counsels. It is time to be creative, work together and approach these new times with new solutions.

Properly and swiftly handling the bankruptcy allows clients the ability to either enter into loss mitigation or obtain relief. This requires creditor's counsels to understand that the debtors are looking for any and all opportunities to save their home or property. Bankruptcy is often used for delay, rather than an honest effort to reorganize. We need to be looking at the bankruptcy schedules and proposed plans earlier with a critical eye and come down hard on serial filers, as well as those who simply show a lack of ability to cure the arrearage and succeed in bankruptcy. Further, filing a proof of claim earlier in the process may also be to our client's advantage as it puts the burden back on the debtor to either cure the correct arrearage amount or possibly surrender the subject property. Likewise, a comparison of the schedules filed with the correct arrearage may reveal issues concerning feasibility that may or may not yet have been ripe for court review. These are not new concepts, but ones we need to consider given the potential volume and abuses that may come during these desperate times.

ALFN's goal is to bring all of its members the tools needed to survive and succeed. As board chair, I have impressed upon the board that we need to make a priority the education of our members and insist on new and creative presentations. These have been difficult times but ALFN remains a strong voice for our industry.

Wishing you all continued health and luck as we work together during these most difficult times.

Sincerely,

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

Letter from the Editor

WE WANT TO THANK YOU for your continued support of the ALFN during one of the most difficult years we have experienced as an industry. Although we are starting to see the light at the end of the tunnel, 2021 will no doubt bring about a year of added challenges and post COVID-19 issues. ALFN will be remain front and center to provide the quality education you'll need to address these issues head on, and we will continue being a positive change agent as we deal with the "new normal".

This ALFN ANGLE issue brings you the latest up-to-date information on the important issues that may have far-reaching impacts in our industry, including many that surround COVID-19, Statute of Limitations, Bankruptcy and more. You can rest assured that ALFN continues to strive for excellence in education and providing our members the information you need to be successful and persevere during this time of uncertainty and change.

The cover feature of this issue focuses on forbearance agreements and bankruptcy, and the important information you will need to have to properly manage your bankruptcy files for any debtor's that may be in a CARES Act forbearance agreement.

Our feature articles section begins with a piece about farming through a Pandemic, and the possible increase in Chapter 12 bankruptcy filings. Chapter 12 can be used as a tool to bring relief during an economic downturn, but at the same time it can also mean the end for many farms. Next up we take a look at how a Ninth Circuit decision has re-opened the door to debtor's post-bankruptcy litigation for FDCPA violations. This case further demonstrates how important accurate record keeping is and the protocols you should have in place for verifying a debt before communicating with debtors. We then move on to take a deeper look into how COVID-19 has impacted timelines. There are several reasons why cases have been delayed, and this article focuses on delays that are created from budget issues with the Clerk's Offices in the state of Florida. As we continue, our next submission looks at the improper use of non-standard language in a Chapter 13 Bankruptcy. Our author provides information from a few cases that shed some light on how the Bankruptcy courts have handled this. Our last feature article touches on the difficulties surrounding the ever-changing VA document submission requirements. It is important to understand these challenges and remain focused on acquiring any additional documentation that is requested and required in FTP's.

Don't miss our State Snapshot contributions that conclude this ANGLE issue, which will address some important state specific updates in Florida, Illinois, Maryland, Minnesota, New York, Ohio, Washington and Washington DC.

Let us know what ALFN can assist you with during 2021, and how you would like to get involved.

WE ARE HERE FOR YOU!

Best regards,

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

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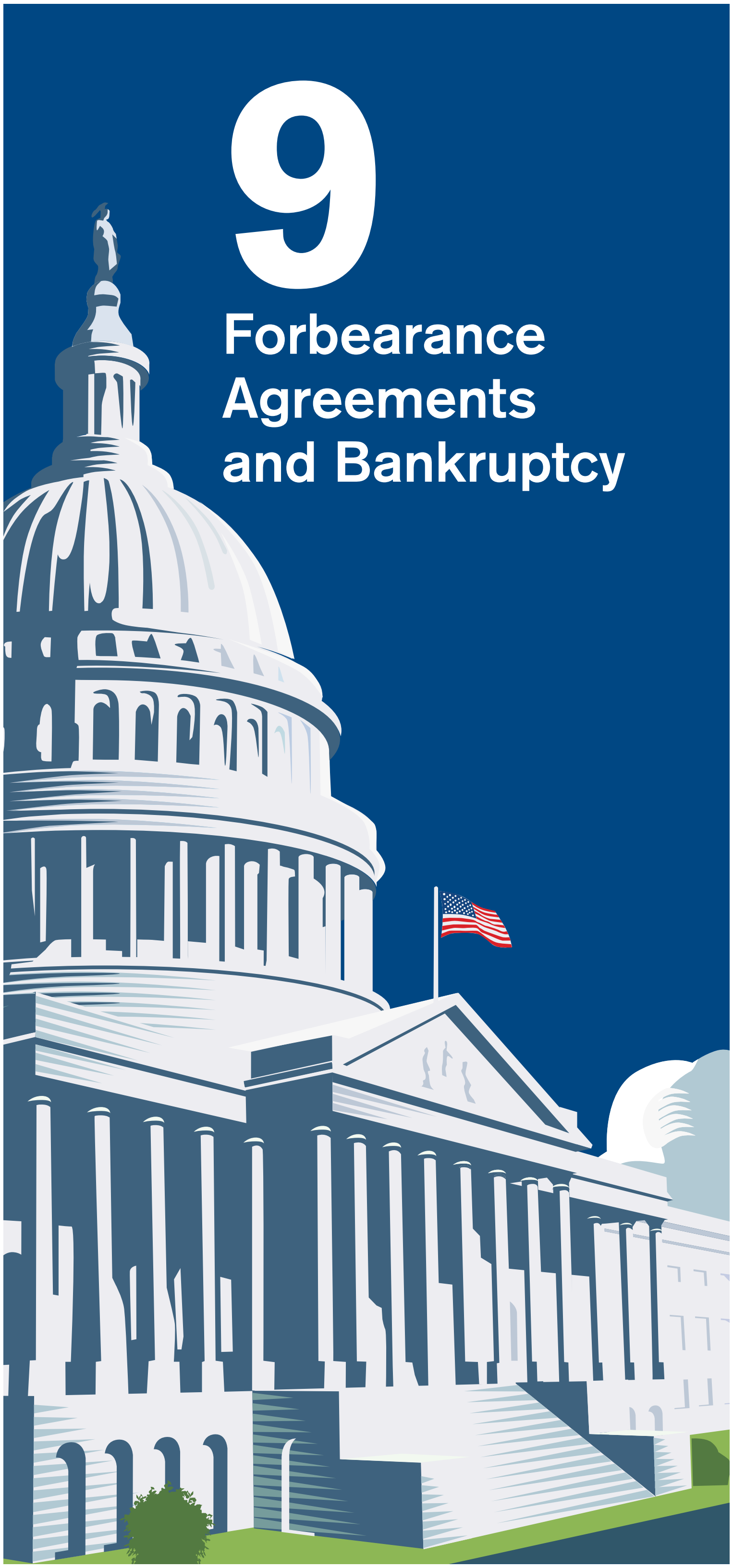


MEMBER BRIEFS

ALFN EVENTS

SAVE THE DATES

2021

MARCH 16-APRIL 9
BANKRUPTCY INTERSECT
Webinar Program
7 Online Webinar Sessions
Registration Opens March 1

JULY 19
ALFN ANSWERS
Webinar Program
9 Webinar Sessions
Starting July 19

NOVEMBER 18
FORECLOSURE INTERSECT
Marriott Dallas Las Colinas
Irving, TX

2022

JULY 17-20
ALFN ANSWERS
19th Annal Conference
Hyatt Regency Tamaya Resort
Santa Ana Pueblo, NM

2023

JULY 16-19
ALFN ANSWERS
20th Annual Conference
Park Hyatt Beaver Creek Resort
Beaver Creek, CO

Want more industry intel?

Check the complete industry calendar for ALFN and other events online at alfn.org for even more details and registration info.

IS YOUR CONTACT INFO UPDATED?

Is your online directory listing optimized? Do you know who has access to your ALFN.org account? Well, log in at ALFN.org to edit your member listing to make sure your information is current. You should also send us a complete list of your company employees and we will add them to our database to make sure everyone receives our updates and reminders. We often send emails on important opportunities for our members, so we don't want you to miss out on all the ways you can get involved.

Contact us at *info@alfn.org* to be included.

EVENT & ANNUAL SPONSORSHIP PACKAGES

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

VOLUNTEER OPPORTUNITIES

ALFN offers members an opportunity to serve on small, issue or practice specific groups. Take the opportunity to have direct involvement in developing and leading the activities of the ALFN. Volunteering is one of the most important activities you can do to take full advantage of your membership value. For descriptions of each group, their focus, activities and other details, visit Member Groups at ALFN.org.

ALFN WEBINARS

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

PRACTICE BUILDING SERIES

Presentations on operational and business issues facing our members.

HOT TOPIC LEGAL UPDATES

Industry hot topics and litigation updates.

STATE SPOTLIGHT

Focusing on those state specific issues.

MEMBERS ONLY

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

WEBINARS ON-DEMAND

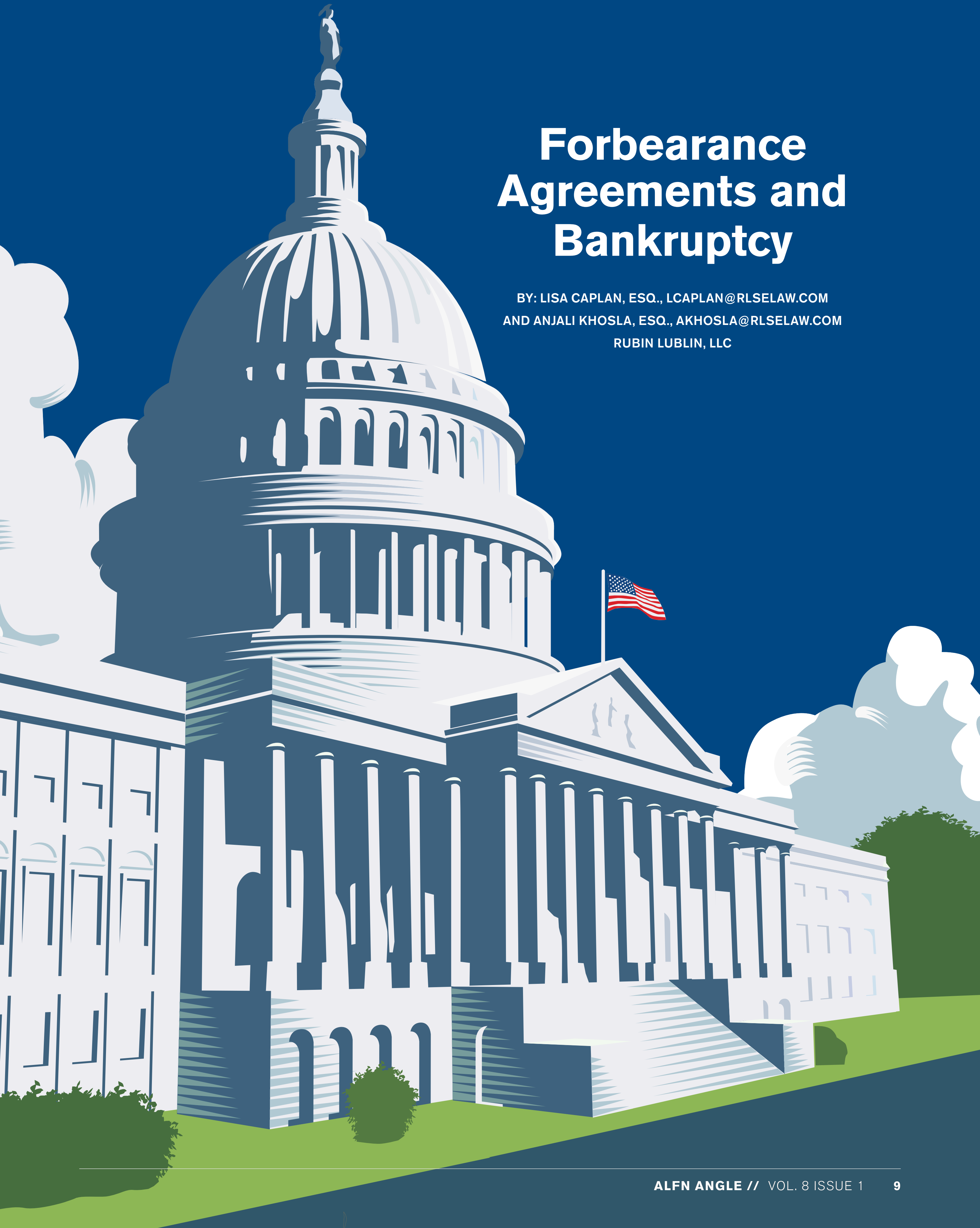
View Previously Recorded ALFN Webinars On-Demand at:
wwww.gotostage.com/channel/alfnwebinars

SPEAKER APPLICATIONS FOR ALFN EVENTS

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

Forbearance Agreements and Bankruptcy

BY: LISA CAPLAN, ESQ., LCAPLAN@RLSELAW.COM
AND ANJALI KHOSLA, ESQ., AKHOSLA@RLSELAW.COM
RUBIN LUBLIN, LLC



TO HELP borrowers most in need during these difficult times, federally backed mortgage loans were tasked by Congress to provide forbearance agreements to borrowers who have been impacted by COVID-19. This direction came from the CARES Act. There have also been many non-federally backed mortgage lenders who stepped up and voluntarily offered similar forbearance options. A forbearance is an agreement between the borrower and the lender that allows the borrower to pause making mortgage payments for a period of time. Pursuant to the CAREs Act, these payments can be paused for up to one year for federally backed mortgage loans. Once that period has expired, the payments that have been missed are due. Most lenders are working with borrowers to craft repayment strategies. Repayment options could include, but are not limited to, a repayment plan over time, a loan modification, or even repayment of all the missed payments in full immediately, but only if this is the repayment method chosen by the borrower. Forbearance is vastly different than a deferral, which would essentially place the missed payments at the back of the loan such that these amounts would not be due until the loan is either paid in full or reaches maturity.

When entering into a CARES Act forbearance agreement, the lender should take steps to ensure the borrower truly wants to enter into a forbearance agreement. Forbearance is not something borrowers necessarily fully understand. Many may contact their lender or servicer to obtain more information as to what a forbearance is, how it works or just to discover what types of assistance might be available if they are struggling financially. Lenders must take precautions to ensure borrowers are not automatically placed into a forbearance agreement simply because they contacted their lender or servicer to obtain more information about a forbearance. If the borrower is in bankruptcy, additional steps must be taken once a forbearance agreement is entered in to.

If the borrower is in bankruptcy at the time a forbearance agreement is entered into, lenders should reach out to their local counsel to discover whether it is appropriate, in the given jurisdiction, to file a Notice of Forbearance Agreement with the Court. This notice is filed to ensure that the trustees and even Debtor attorneys are aware of the Agreement. There are some Judges who are concerned that Lenders are placing Debtors into forbearance agreements without the Debtor's knowledge/consent and are therefore setting these notices for hearing to confirm the Debtor's intent. If Lenders are unable to confirm the Debtor's intent and thus withdraw the notice, the Court may still require a hearing to determine what is happening with the account. Also, if an extension of the forbearance agreement is entered into, a notice should be filed with Court disclosing the extension as well.

While a loan is under a forbearance agreement during a bankruptcy, lenders must take extra precaution to avoid engaging in attempts to obtain relief from the automatic stay. Motions for Relief filed while a Debtor is under a forbearance agreement are not well taken by the Debtor attorney, trustee, or

Non-federally backed mortgage loans that opted to allow the Debtor to forbear payments during bankruptcy are, as previously mentioned, ineligible to file a CARES forbearance claim.

Court. If a Motion for Relief was filed prior to the entry of such an agreement, the Motion should likely be withdrawn. This is especially true if the account is a federally back mortgage loan as the Consolidated Appropriations Act, 2021 has now been signed into law. This very new law appears to allow a federally backed mortgage loan to file a CARES forbearance claim which will list the missed/forborne payments. Of note, only a federally backed mortgage loan may file a forbearance claim. More on how this might impact non-federally backed mortgage loans later. Said forbearance claim will be a supplemental claim for the amount not received by the creditor during the forbearance period of a loan granted forbearance under the CARES Act. This supplemental claim will be considered timely filed if it is filed within 120 days after the expiration of the forbearance period of a loan granted forbearance under the CARES Act. The Debtor should then file a request for modification of their plan to provide for payment of the forbearance claim. If the Debtor does not make this modification request with 30 days after the date on which the creditor files the forbearance claim, the trustee, United States Trustee, bankruptcy administrative, or other party in interest may request the modification. Based on this new law, it seems the Debtor might receive a Discharge of their dischargeable debts prior to their curing a mortgage arrearage caused by a forbearance. Because the Appropriations Consolidation Act is so very new, we expect there to be much discussion and likely litigation surrounding these provisions which should serve to clarify interpretations.

Non-federally backed mortgage loans that opted to allow the Debtor to forbear payments during bankruptcy are, as previously mentioned, ineligible to file a CARES forbearance claim. Thus, if the Debtor is not proactive in taking steps to set in place a strategy to cure the forborne payments once the forbearance period expires, a Motion for Relief becomes the appropriate next step. These Motions for Relief should not be filed unless and until the forbearance period has fully expired and there is no option to extend the forbearance period further. Though relief from the stay may not be the goal of the Motion for Relief filings, it should serve as a stepping board to bring about discussion as to a plan to cure the accrued post arrearage. To be clear, though a non-federally backed mortgage loan is not eligible to file a CARES forbearance claim, this does not preclude them filing an Amended Proof of Claim or Supplemental Proof of Claim for the post arrearage should the Motion for Relief result in an Agreed/Consent Order whereby all parties agree on this method to cure the accrued arrearage.

We are in very new territory these days with an ever-changing legal landscape that is open to a variety of interpretations. Your local counsel is your best source of information when it comes to the expectations of the Debtor bar, Trustees, and Judges as we all work through the latest and greatest Congress has to offer.

FARMING *Through A* PANDEMIC

WILL CHAPTER 12 BE GROWING?

BY: KERI EBECK, ESQ., PARTNER
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FARMING is a family-run staple in the United States. Every year, farmers struggle and family farms decrease due to various factors. The farming community certainly did not anticipate having to deal with a worldwide raging pandemic that would affect their agriculture. Farmers can predict certain downturns or issues that may arise, certain potential seasonal weather conditions, but none of them could have predicted Covid-19. While normally, farmers are worried about growing crops and cattle herds, now they're worried about the economy and the growing number of Chapter 12 bankruptcy filings.

Before Covid-19, Chapter 12 bankruptcies hit an eight-year high in 2019. [1] Historically, this was below the high numbers seen in the 1980s, but Chapter 12 filings for a 12-month period ending March 2020 increased 23% compared to the prior 12-month period. [2] Some experts would assert that this increase was due to the 2019 Family Farmer Relief Act, which increased the debt ceiling of filing to $10 million. [3] This same data has shown that family farm bankruptcies have generally increased every year for the past five (5) years. [4] Filings are steadily increasing and now—insert the Coronavirus. While most expected a significant rise in filings this year, the filings have actually decreased due to the systemic governmental relief to farmers through the Coronavirus Aid, Relief and Economic Security Act (CARES). When it comes to relief to farmers, the CARES Act included direct payments to agricultural producers through the Coronavirus Food Assistance Program (CFAP), Paycheck Protection Program loans, and temporary forbearance. As much, in April 2020, the government enacted the Coronavirus Food Assistance Program, which directed $16 billion in relief to farmers via the USDA, which allowed farmers to avoid immediate default on loans and to survive through low commodity prices and consumer consumption.

2020 has taken a toll in many ways on farming. The Midwest, Northwest, and Southeast were the hardest hit regions. [5] According to University of Illinois De-

1 www.statista.com/chart/20779/chapter-12-bankruptices-filed-in-the-us
2 www.fb.org/market-intel/covid-19-will-likely-push-farm-bankruptices-higher
3 Id.
4 www.reuters.com/article/us-usa-famers-bankruptcy
5 www.dtnpf.com/agriculture/web/ag/news/farm-life/article/2020/08/05

While normally, farmers are worried about growing crops and cattle herds, now they're worried about the economy and the growing number of Chapter 12 bankruptcy filings.

partment of Agricultural and Consumer Economic analysis, farmers could expect to lose about $30 an acre on corn in 2020 and $75 per acre in 2021. [6] Additionally, the same analysis conducted showed those farmers were expected to make $19 an acre on soybeans and expected to make $50 an acre loss in 2021. [7] This is just a small portion of farming; the livestock and milk struggles represent a much larger portion. "The livestock industry accounts for more than 50% of total farm revenues in the United States and cattle and hogs make up almost half of all livestock revenues." [8] The livestock industry was hit hard during Covid-19, due to meatpacking shutdowns and decreased consumer consumption. Milk prices have taken a hit due to lack of use and large milk distributors filing their own Chapter 11 bankruptcies. This toll cannot be sustained for a long period of time. Farmers are being propped up by government assistance that has run its course. According to statistics, 40% of farmers applied for government assistance like PPP loans, and 60% haven't received any funds because they didn't know how to apply, when to apply, or even that they could apply. [9] As of August 2020, $6.8 billion in CFAP payments have been delivered to farmers.[10] Many farmers again did not apply for aid or assistance or did not know that assistance was even available. It is clear that unless the new Biden administration provides further governmental relief and easier access to farmers, more Chapter 12 filings will be inevitable.

But filing for Chapter 12 is not the end of a farming

6 Id.
7 Id.
8 Id.
9 www.fastcompany.com/90510325/one-third-of-small-independant-farms-could-go-bankrupt-in-2020-due-to-covid-19
10 www.michiganfarmnews.com/mixed-news-on-chapter-12-farm-bankruptcies-amid-covid-19-pandemic

According to University of Illinois Department of Agricultural and Consumer Economic analysis, farmers could expect to lose about $30 an acre on corn in 2020 and $75 per acre in 2021.[6]

business. The Bankruptcy Code provides that only a family farmer or family fisherman with "regular annual income" may file a petition for relief under Chapter 12. Chapter 12 is slightly different than Chapter 13 in relation to how a creditor should handle it. A creditors' attorney in Chapter 12 is still required to provide a proof of claim, review of the Chapter 12 plan for secured creditor treatment, and cramdowns (whether through a plan or adversary). One aspect that is different is that a creditor should review any motions to use cash collateral filed by the debtor. This may consist of using collateral that the creditor is secured by, and it is important to review these motions, to make sure adequate protection is being provided as well as replacement liens if necessary. Chapter 12 cases in most jurisdictions tend to move swiftly. In the Western District of Pennsylvania, there is a Chapter 12 model plan, orders, and procedure to assure that Chapter 12 filings are handled efficiently. According to the Association of Chapter 12 Trustees, the Chapter 12 completion rate is 60%, which is significantly higher than a Chapter 11 or Chapter 13. [11] A successful Chapter 12 may not even include plan completion but instead a scenario and platform for the farmer and his creditors to work out a successful reorganization and outcome. This would not be included in the plan completion numbers.

While a Chapter 12 filing could be a helpful tool during this rare economic downturn and worldwide pandemic, it could also be the end to a traditional family farm, passed down from generation to generation. Therefore, it is imperative during this time that the new administration address these concerns and issues that surround farms and their struggles, and immediately provide assistance and relief to avoid further farms from suffering. ◼

11 Id.

While a Chapter 12 filing could be a helpful tool during this rare economic downturn and worldwide pandemic, it could also be the end to a traditional family farm, passed down from generation to generation.

POST BANKRUPTCY
DOORWAY

FEDERAL COURT DISTINGUISHES WALLS & RE-OPENS DOOR TO DEBTOR'S POST BANKRUPTCY LITIGATION FOR FDCPA VIOLATIONS

BY: NISHA B. PARIKH, ESQ., MANAGING ATTORNEY, BANKRUPTCY
DIAZ ANSELMO LINDBERG, P.A. | NPARIKH@DALLEGAL.COM

IN NOVEMBER 2020 the United States Court of Appeals for the Ninth Circuit reversed a creditor's summary judgment finding the debtor's ("Manikan") FDCPA claims against debt collector Peters & Freedman, L.L.P. ("P&F") were not barred even though the debt was discharged in bankruptcy prior to Manikan's lawsuit against P&F. *Manikan v. Peters & Freedman, L.L.P.* In 2012 Pacific Ridge Neighborhood Homeowners' Association ("HOA") hired P&F to initiate nonjudicial foreclosure proceedings against Manikan for his failure to pay his monthly HOA fees.[i] Thereafter, Manikan filed for Chapter 13 bankruptcy protection and named the HOA as a secured creditor. Manikan's Chapter 13 bankruptcy plan required monthly payments to the HOA to cure the default for past due HOA fees and to keep current with monthly HOA fees as they became due. The bankruptcy court confirmed Manikan's plan and he made payments to the HOA as required under the plan.

In 2014 the HOA advised the bankruptcy trustee "that the HOA debt was 'paid in full.'" The trustee "issued a notice stating the HOA's claim was 'deemed as fully paid'" and the trustee confirmed same again when it filed a "Notice of Final Cure Payment and Completion of Payments Under the Plan" over a year and a half later. Sometime thereafter, based on inaccurate or incomplete records, P&F hired a process server to re-serve Manikan with the same notice of default from the 2012 foreclosure. "The process server entered Manikan's backyard without permission by breaking a closed gate" and startled Manikan and his family by banging on the windows of Manikan's house. The police were called and after the police arrived "the process server identified himself and served Manikan with the 2012 default notice."

Manikan contacted P&F and explained he had paid off the HOA debt in full, but P&F "responded that its records still showed an unpaid balance." Eventually, P&F determined Manikan was correct. The debt had been paid in full, and at the time P&F hired the process server Manikan's account was current. Based on P&F's attempt to collect a debt that was not owed, Manikan initiated a lawsuit against P&F alleging violations of the Fair Debt Collection Practices Act ("FDCPA"). Specifically, Manikan argued under 15 U.S.C. § 1692(e) and (f) that "P&F attempted to collect a debt that was already paid" and under § 1692

(d) service of the default notice constituted conduct that was harassing, oppressive or abusive.

Manikan moved for partial summary judgment on his FDCPA claims, arguing there was no dispute P&F attempted to collect a debt that was no longer owed… so P&F's violation of the FDCPA was established as a matter of law. In opposition to Manikan's summary judgment motion P&F "cross-moved arguing that Manikan's FDCPA claims" were barred under the Ninth Circuit's 2002 holding in Walls v. Wells Fargo Bank, 276 F.3d 502 (9th Cir. 2002). In *Walls*, the Ninth Circuit concluded that a debtor did not have a "private right of action" based on violations of a bankruptcy discharge order under 11 U.S.C § 524[ii] or under the FDCPA because the bankruptcy code already provided a remedy and if another remedy was needed it was "for Congress to decide." The Court elaborated "the proper remedy for violating the discharge order [under § 524] is a contempt proceeding pursuant to 11 U.S.C. §105(a)."

The Ninth Circuit reasoned that "[i]mplying a private remedy" from § 524 "could put enforcement of the discharge injunction in the hands of a court that did not issue it…which is inconsistent with the present scheme that leaves enforcement to the bankruptcy judge whose discharge order gave rise to the injunction." Likewise, the Court explained allowing a claim under the FDCPA "would allow through the back door what [the debtor] cannot accomplish through the front door — a private right of action. This would circumvent the remedial scheme of the Code…" The district court, relying on *Walls*, granted summary judgment for P&F "concluding that Manikan's FDCPA claims were precluded 'because they are premised upon violations of the bankruptcy post-discharge injunction.'" Manikan appealed that judgment to the Ninth Circuit.

The Ninth Circuit reversed distinguishing *Walls* on the basis that Manikan was not seeking a remedy for P&F's violation of the bankruptcy discharge order, but rather because P&F "tried to collect a debt that [Manikan] fully paid nearly two years before his debts were discharged in bankruptcy." The Court explained even if Manikan's debt was never discharged under his Chapter 13 bankruptcy plan, he still could have asserted "P&F acted unlawfully" when it attempted "to collect a debt [Manikan] fully satisfied." The Court concluded "Manikan's FDCPA claims [were] therefore premised on a wholly independent theory of relief" unrelated to the discharge order and therefore not barred under § 524 and prior precedent (*Walls*). The Court remanded the matter for further proceedings.

This case demonstrates the importance of proper record keeping throughout the debt collection process and the need for established protocols for verifying a debt prior to involving the debtor. Hiring a law firm with these platforms and protocols in place can avoid costly mistakes like those made in *Manikan*.

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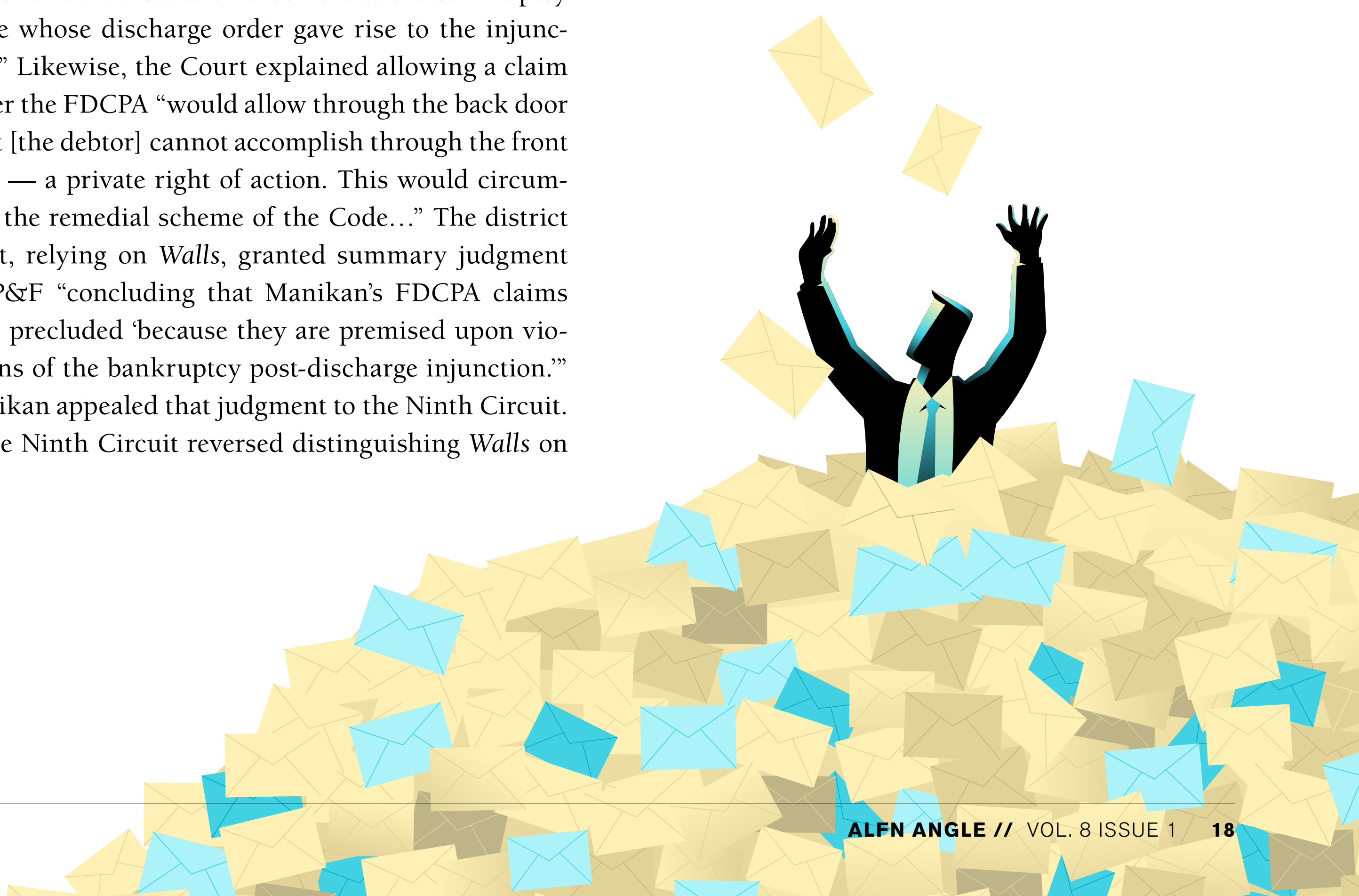
i *Manikan*, at *1. All references, citations and quotes to *Manikan* that follow are to the same cite unless indicated otherwise.

ii The pertinent provision of the bankruptcy code is codified at 11 U.S.C. § 524. Section 524 imposes an injunction against creditors from collecting a debt that had previously been discharged in bankruptcy proceedings. *Walls*, 276 F.3d at 504.



CASES DELAYED

HOW COVID-19 IS IMPACTING OUR TIMELINES

BY: ANNALISE HAYES DELUCA, ESQ., PARTNER FLORIDA
MCMICHAEL TAYLOR GRAY, LLC | ADELUCA@MTGLAW.COM

AT THE BEGINNING OF THE PANDEMIC the reasons as to why cases were delayed were fairly obvious: court closures, staffing issues, new restrictions, and moratoriums that needed to be implemented and assessed, just to name a few. Now that we're beginning a new year, still in the thick of the pandemic, what is causing the delay now? Many courts are open again, if not to the general public, then at least to staff. We've also had time to adjust to the restrictions and moratoriums and how to proceed within their limitations. With many expiring or set to expire, shouldn't we be seeing delays improve? Not necessarily.

One cause for delay that is perhaps less apparent, is the budget issues faced by Clerk's Offices throughout the State of Florida. The financial implications of the pandemic have not only been felt by the borrowers, tenants, servicers, and lenders, but also the local governments. With fewer people on the road, less traffic citations have been issued than normal. The revenue from traffic citations helps fund court operations. Without that money and without the collection of other fees and court costs, the Clerk's Offices cannot fully staff their offices or handle the backlog of cases. Foreclosure filing fees are also a large source of revenue for the Courts. Following a statewide moratorium on foreclosures, it is difficult, if not impossible, to make up the revenue. In some Counties, budget cuts have led to the loss of millions of dollars. Without that money, the counties cannot afford to maintain staffing levels that can keep up with the current case level, let alone any substantial increase in cases.

Another cause for delay will be the deluge of filings once the current restrictions and moratoriums are lifted. The defaults on mortgages and the nonpayment of rent haven't dropped off, they have merely been put off. Each time the moratoriums and holds are extended, the case load continues to pile up. When the moratoriums expire, and the holds are removed, the rush to get the cases into action will cause a massive backlog for the Clerks' Offices. It takes time to process filings, and even with moratoriums and restrictions in place and fewer new cases as a result, the Clerks are still behind. Depending on the County, it currently may take a week for a new filing to be accepted and another week or two for the summonses to be issued. That is weeks from the time the complaint is filed before it can even really begin. If the Clerks cannot keep up with the volume of cases at this time, it is an almost certainty that they will be unable to do so as the number of filings grow.

However, it is not only Clerks that are experiencing a backlog, but also Judges. Despite the convenience of the Zoom format, many Judges simply do not have the time on their calendars to hear all the pending cases. In some instances, lawyers who are following up on the status of their cases, and assistants who are attempting to schedule hearings, are finding that the only available dates are a month or two out. Trials are also being set four to five months out after having been delayed or bumped to the next Trial docket. Judges, Judicial Assistants, and attorneys are all trying to make up for the hearings that were postponed at the beginning of the pandemic, but the sheer number is overwhelming. These delays make it harder to clear out cases at a normal pace, meaning the Judges are left with larger case loads as new cases keep coming in. Everyone is struggling to adjust and catch up, but there just aren't enough resources or time.

What about delays in the cases that are pending or may have already been concluded, but have otherwise been stayed due to COVID-19? In Miami-Dade County alone, there are nearly 2,000 Writs of Possession waiting to be served by the Miami-Dade Police Department. The Police Department is not currently moving forward with lockouts on evictions filed after March 13, 2020. To put that in perspective, over 4,500 evictions were filed in Miami-Dade County in just the last three months of 2020. Between Broward and Miami-Dade Counties, there are over 7000 pending eviction cases combined. Those numbers will only continue to increase. Add to that the volume of cases waiting to be filed once the CDC eviction moratorium expires and the limited resources of the police departments, and you will see a massive delay in the return of possession of property to the landlords.

Although the causes may have changed, the fact remains the same- delays are going to be a new normal, at least for the foreseeable future. Whether it is a pending case, a case waiting to be filed, or a case that is subject to a moratorium, this coming year will prove to be more of a waiting game. Limited staffing and financial resources for our Clerks, limited time for our Judges, and backlogs for all mean more of the hurry up and wait we have come to expect from this pandemic. The only things to do in these unprecedented times are to adjust our expectations, anticipate the delays, and plan accordingly to deliver the same level of service, albeit at a slower pace.

BANKRUPTCY IS BROAD

BUT NOT THAT BROAD

An Improper Use of Non-Standard Language in Chapter 13

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CHAPTER 13 bankruptcy is uniquely designed to allow a defaulted homeowner the benefit of saving a primary residence in order to avoid foreclosure. Section 1322(b)(5) of the Bankruptcy Code — often termed the "cure and maintain" provision — empowers a debtor to propose specific Chapter 13 plan treatment without the consent, and over the objection of, a secured creditor. A number of jurisdictions have also expanded plan options for Chapter 13 debtors to include mediation programs in order to streamline a transparent loan modification review. To boot, the automatic stay imposed by §362 of the Bankruptcy Code prevents creditors from exercising any collection activity against the debtor while that debtor explores the various avenues for reorganization. In short, Chapter 13 offers debtors — with the protection and comfort of the automatic stay — a number of opportunities to save real property that are unavailable outside of bankruptcy.

Notwithstanding the broad scope of both the automatic stay and the Chapter 13 process, a debtor cannot create or include language in a Chapter 13 plan to cure the creditor's claim *through* the plan; or treat the creditor's claim *direct* by either paying the creditor its contractual payment or surrendering the collateral securing the debt. Pursuant to the Local Plan Form, the option to either pay the claim directly or surrender would result in the lifting of the automatic stay upon confirmation of the Chapter 13 plan.

Prior to the debtor's Chapter 13 filing, the creditor obtained a final judgment of foreclosure against the debtor, and the debtor filed an appeal of that judgment. Subsequently, the debtor filed his bankruptcy petition. Instead of selecting an appropriate plan treatment — consistent with the Local Plan Form — the debtor included language (in the "Non-standard Provisions" section) explaining that the debtor is appealing the adverse final judgment ruling and will modify the plan at some point in the future pending the result of the appeal. Bankruptcy Rule 3015(c) permits the inclusion of non-standard provisions in a chapter 13 plan and defines a "non-standard provision" as one that is "not otherwise included in the Official or Local Form or deviating from it." In re Mank, No. 19-04199-5-SWH, 2020 WL 1228671, at 2 (Bankr. E.D.N.C. Mar. 3,

In short, Chapter 13 offers debtors — with the protection and comfort of the automatic stay — a number of opportunities to save real property that are unavailable outside of bankruptcy.

2020). The NDFL Local Plan Form *does* have a section for non-standard language, however, the Court determined that the debtor's non-standard language was an attempt to circumvent the provisions of the Local Plan Form by seeking to capture the protection of the automatic stay (post-confirmation) without providing any treatment whatsoever to the secured creditor.

expand that debtor's protection under the Bankruptcy Code. Faced with such a situation, a bankruptcy court in the Northern District of Florida (NDFL) recently sustained a creditor's objection to confirmation, ruling that a debtor's non-standard language cannot capture the protection of the automatic stay without providing any plan treatment to the creditor *through* the plan. Like most jurisdictions in the country, the NDFL requires that its debtors utilize a model Chapter 13 Plan (the Local Plan Form) for a debtor's reorganization proposal. The creditor's claim was associated with a first lien on the debtor's primary residence; and as such, the Local Plan Form required that the debtor

Bankruptcy courts have consistently stricken language that serves no useful bankruptcy purpose. (*See* In re Madera, 445 B.R. 509 (Bankr. D.S.C. 2011) (Explaining that Nonconforming provisions in debtors' proposed Chapter 13 plan, that either provided for rejection only of arbitration provisions in debtors'

contracts in manner not permitted under the Bankruptcy Code, or that merely cluttered form plan with added provisions serving no useful purpose, rendered the plan unconfirmable, as not "compl[ying] with the provisions of this chapter" and, specifically, with provision authorizing plan to include only "appropriate provision[s] not inconsistent with this title." 11 U.S.C.A. §§1322(b)(11), 1325(a)(1)). Likewise, bankruptcy courts have also stricken impermissible and inconsistent language with a Court's local plan form. (*See* In re Russel, 458 B.R. 731(Bankr. E.D. Va. 2010) (Explaining that provisions added by debtor to a model plan "fell squarely within the category of additions that are emphatically not peculiar to this debtor and his financial circumstances, but rather seek to substitute counsel's version of an appropriate uniform plan for the one adopted by the court).

Notwithstanding whether or not the debtor's appeal had merit, the debtor's proposed language was an improper use of the non-standard language provision of a plan; and did not coincide with the intent, purpose and spirit of a Chapter 13 case.

The NDFL Court determined that the debtor's non-standard language cannot capture the protection of the automatic stay without providing any plan treatment to the Creditor *through* the plan. The Court ultimately disagreed with the debtor's assertion that the plan language properly "provided for" the creditor's claim; and ruled that the inclusion of language referencing the debtor's state rights relating to an appeal of a foreclosure judgment is not appropriate when such language is included to serve the intent of "providing" treatment through a Chapter 13 plan. Notwithstanding whether or not the debtor's appeal had merit, the debtor's proposed language was an improper use of the non-standard language provision of a plan; and did not coincide with the intent, purpose and spirit of a Chapter 13 case.

EXPECT THE UNEXPECTED

POST-SHERIFF'S SALE CONVEYANCES TO THE V.A.

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IN 2019, VRM MORTGAGE SERVICES ("VRM"), a vendor of the U.S. Department of Veterans Affairs (V.A.) rejected a post-sheriff's sale conveyance of a Pennsylvania property on the following ground: "Please provide a copy of the Affidavit of Non-Military Status (for SCRA purposes) and Printout of Defense Manpower Database Center information on the Veteran borrower." Because the borrower had died prior to commencement of foreclosure, that individual would logically not have been subject to military service during the pendency of foreclosure. Another anomaly regarding VRM from 2019 is a returned email from title-va@vrmco.com stating that a final title package ("FTP"; plural, "FTPs") submission "was deleted without being read … [.]"

Also in 2019, this author sought clarification on the contents of FTPs from the V.A. through a Freedom of Information Act (FOIA) request seeking, *inter alia*:

> All materials, manuals, guidelines, instructions, standard operating procedures, best practices, handbooks, guides, directives, legal opinions, research, processes, process charts, flow charts, memoranda, correspondence, and documents of any nature (digital and hard copies)
>
> - relating to the processing, handling, and review of final title packages for conveyances to The Secretary of Veterans Affairs pursuant to 38 C.F.R. §36.4323;
> - relating to Circular 26-16-14 ["Title Requirements for Conveyance of Real Property"] and Exhibit "A" thereto including in particular the requirement of "Affidavit of Non-Military Status"; and
> - clarifying, explaining, and/or supplementing any of the requirements set forth in Exhibit "A" to Circular 26-16-14.

Though the FOIA request stated, in bold and italicized print, to "[k]indly deem this matter to be a priority," the V.A. did not tender a response within the twenty-day timeframe mandated by 5 U.S.C. §552(a)(6)(A)(i). Despite voicemails left for the V.A.'s regional counsel, the V.A. has not responded to such FOIA request and it appears that further follow up attempts will only be futile.

Last year, VRM rejected an FTP on the basis that it wanted a copy of an instrument recorded well before the Deed into the Veteran borrower that had no relevance to, or legal effect on, the Veteran borrower.

No reasonably experienced individual or seasoned attorney could ever foresee that the V.A. would (a) insist on a military search from a decedent; (b) delete

email submissions without reading them; (c) ignore its obligations under federal law to respond to FOIA requests; and (d) reject an FTP because it decided arbitrarily that it additionally wants a copy of a random instrument. So, what can you do in these instances?

• MILITARY SEARCH OF A DECEDENT •

It is recommended that FTPs contain either a SCRA search of the deceased veteran (which will obviously be negative for active military service) or, alternatively, the deceased veteran's death certificate together with any/all probate records — the latter of which are neither required by, nor referenced in, Circular 26-16-14 or Exhibit "A" thereto.

• DELETION OF EMAIL •

While VRM's failure and/or refusal to read emails is indeed aggravating, sending a barrage of emails to VRM, even one or more per day, making sure to select the "Request a Delivery Receipt" and "Request a Read Receipt" features (located in the "Options" tab of Microsoft Outlook™) is recommended in order to get someone's attention and establish a paper trail in case future legal action becomes necessary.

• FAILURE TO RESPOND TO FOIA REQUEST •

"The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." John Doe Agency v. John Doe Corp., 493 U.S. 146, 152 (1989); Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978). FOIA espouses government transparency or "full agency disclosure." Dep't of the Air Force, et al. v. Rose, et al., 425 U.S. 352, 361 (1976) citing S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965).

When challenging decisions of federal agencies, administrative remedies must ordinarily be exhausted including making use of an agency's appellate process before seeking judicial review. 33 CHARLES ALAN WRIGHT & CHARLES H. KOCH, JR., FEDERAL PRACTICE AND PROCEDURE: JUDICIAL REVIEW OF ADMINISTRATIVE ACTION § 8398, Westlaw (database updated Apr. 2018). This principle applies to FOIA requests. U.S. DEP'T OF JUSTICE, GUIDE TO THE FREEDOM OF INFORMATION ACT: PROCEDURAL REQUIREMENTS 32–36, 71–74 (2013), https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/procedural-requirements.pdf. An exception exists for an agency's outright failure to respond to an FOIA request. In such instance, the aggrieved party ("complainant") may circumvent the administrative process and immediately initiate legal action in a U.S. District Court in either the federal district of the requestor's domicile or the District of Columbia to "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. §552(a)(6)(B).

In the above scenario in which the V.A. is unequivocally shirking its federal statutory obligations, legal action against the V.A. may be cost-prohibitive from a business perspective given the legal fees and court costs involved. On the other hand, taking no action "enables" the V.A. to continue this evasive conduct, and is tantamount to rewarding bad behavior. Thus, such legal action may be advisable under the right set of circumstances to send a signal to the V.A. that it is not "above the law."

REQUESTS FOR RANDOM RECORDED INSTRUMENTS

Unfortunately, there is no way to guard against such requests, which will delay final approval of FTPs. The pre-emptive move of attaching all recorded instruments in the chain of title for some period of time to FTPs may actually invite rejection of FTPs as the additional documents are not expressly required by Circular 26-16-14 or Exhibit "A" thereto. Therefore, those who submit FTPs are stuck in a perpetual Catch-22. The only sound advice for this scenario is to resubmit the FTP with the additional requested documents well in advance of the deadline provided and then send a barrage (as mentioned *supra*) of follow up emails to VRM to confirm acceptance and approval of the FTP.

Because the V.A. moves the goalposts by unilaterally altering document submission requirements on a whim, conveying properties to the V.A. will not always be a seamless, problem-free process. FTPs that are fully compliant with Circular 26-16-14 and Exhibit "A" thereto can still be rejected for one or more arbitrary reasons. It is important to avoid the natural inclination to become frustrated with bureaucracy and instead focus on acquiring the additional documents for the resubmission. As of 1-20-21, based on trial and error, the following appear to be required in FTPs for judicial states, notwithstanding internet resources to the contrary:

- ✓ Recorded Deed into borrower(s)
- ✓ Note
- ✓ Recorded Mortgage
- ✓ Lender's Title Policy
- ✓ Recorded Assignment(s) of Mortgage
- ✓ NOI(s)
- ✓ Time-stamped foreclosure Complaint
- ✓ Time-stamped Praecipe(s) for Substitution of Parties
- ✓ Proof of service of sheriff's sale notice on lienholders
- ✓ Affidavit/Verification of Non-Military Service and SCRA search(es) annexed to judgment
- ✓ Evidence of title curative
- ✓ Recorded Sheriff's Deed
- ✓ Recorded Deed into V.A.
- ✓ Recorded Power of Attorney if Deed into V.A. is signed by an attorney-in-fact as well as evidence that the signatory is so authorized
- ✓ Memorandum of Repurchase Rights, if such instrument appears on title
- ✓ Evidence of mobile home curative
- ✓ Final title policy
- ✓ Evidence of resolution of inheritance tax

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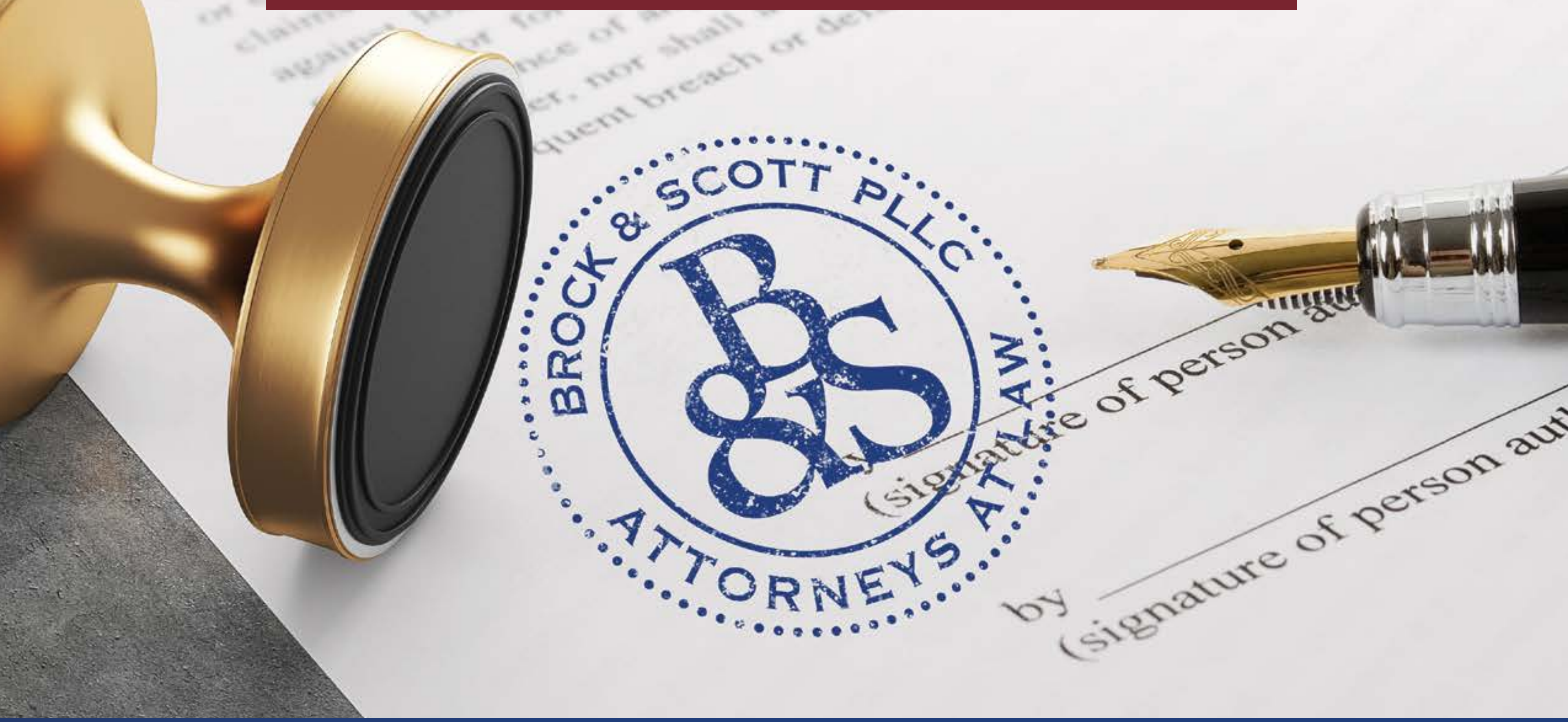

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COVID-19 Moratorium Lingers

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ON OCTOBER 9, 2020, the District of Columbia officially codified a local moratorium regarding the institution and maintenance of residential foreclosure actions. It is important to note that, even though the applicable District of Columbia law was not codified until October 9, 2020, the moratorium was effective as of the first date of the declaration of a public health emergency in the District of Columbia. The Mayor of the District of Columbia first declared a public health *emergency on March 11, 2020*; and, thus, the foreclosure moratorium was effective as of that date. See Mayor's Order 2020-045.

DC Code § 42-815.05 (a) provides that "during a period of time for which the Mayor has declared a public health emergency …, *and for 60 days thereafter,* no residential foreclosure … [m]ay be initiated or conducted …; or … [s]ale may be conducted …." (emphasis added). Therefore, firms are precluded from instituting or proceeding with residential foreclosure actions in the District of Columbia, regardless of whether the loans are federally backed or not. However, there is an exception made for non-owner-occupied properties. DC Code § 42-815.05 (b) provides that the moratorium "shall not apply to a residential property at which neither a record owner nor a person with an interest in the property as heir or beneficiary of a record owner, if deceased, has resided for at least 275 total days during the previous 12 months, as of the first day of the public health emergency." As long as there is evidence establishing that someone other than the record owner of the property or an heir of the record owner currently occupies the subject property, then a foreclosure action may proceed.

Recently, on December 18, 2020, the Mayor of the District of Columbia once again extended the public health emergency (which was set to expire on December 31, 2020) to March 31, 2021. See Mayor's Order 2020-127, ¶ V. As a result, the District of Columbia's foreclosure moratorium is currently set to lift on May 30, 2021, pursuant to DC Code § 42-815.05 (a). However, the public health emergency and the moratorium could certainly be extended yet again by the Mayor.

Florida County Court Judge Finds Eviction Stay Constituted an Unconstitutional Taking

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IN SEPTEMBER 2020, the Centers for Disease Control and Prevention (CDC) and the Department of Health and Human Services (HHS) issued an agency order ("the Agency Order" or "Order") temporarily banning residential evictions in the United States to slow the spread of COVID-19.[1] Under the Order, Courts are required to stay a residential eviction if the tenant files an affidavit attesting to the following:[2]

(I) the tenant tried to obtain government assistance for rent or housing;
(II) the tenant did not earn more than $99,000 annually ($198,000 jointly);
(III) the tenant is unable to pay his full rent or mortgage payment due to a "substantial loss of household income";
(IV) the tenant is using best efforts to make timely partial payments;
(V) the tenant would likely become homeless if evicted;
(VI) the tenant understands he is still obliged to pay back rent or mortgage payments;
(VII) the tenant understands the moratorium ends December 31, 2020.

The CDC provided a form affidavit ("CDC Affidavit") to facilitate tenant compliance with this requirement.[3]

This agency-imposed moratorium took effect on September 4, 2020 and remains in effect at least through December 31, 2020.[4] Pursuant to the moratorium, Spicliff, Inc. ("Spicliff"), a landlord in Pensacola, Florida, was prohibited from evicting its tenant, Steven Cowley, despite Cowley's blatant disregard of the judicial eviction proceedings. *Spicliff, Inc. v. Cowley*, Escambia County, Florida Case No. 2020-CC-03778. In *Cowley*, Spicliff sent the required statutory notice advising Cowley he needed to pay his rent or move out of Spicliff's rental property by September 21, 2020.[5] Cowley did nothing, so Spicliff filed an eviction case on October 8, 2020. Spicliff served Cowley with the eviction complaint, which clearly advised Cowley he "may be evicted without…further notice" if he did not file a written answer by October 18th. Again, Cowley did nothing, and the clerk entered a default against Cowley. Thereafter, the Court entered a final judgment of eviction. Pursuant to the final judgment, a writ of possession later issued, and the Escambia County Sheriff's Office advised Cowley on October 23rd that he had 24 hours to vacate the premises.

After receiving the 24-hour notice, Cowley signed the CDC Affidavit, had it notarized, and then emailed it to the Court. Upon receipt of the affidavit, the Court stayed the eviction as required by the Agency Order. Thereafter, Spicliff moved to lift the stay arguing the Agency imposed stay was an unconstitutional deprivation of "property without due process of law and just compensation." Spicliff elaborated that the Agency Order was "confusing, vague and unenforceable." The county court judge agreed.

Judge Patricia A. Kinsey issued a written order on November 24, 2020 wherein she lifted the CDC stay, finding it constituted a government taking "without just compensation" and that such activity was prohibit-

1 The Agency Order bans evictions based on non-payment of rent or mortgage payments but does not ban evictions based on other legal grounds, e.g., if the tenant engages in criminal activity on the leased/mortgaged premises, or threatens the health or safety of other residents, or damages the property, etc. http://files.alfn.org/angle_pdf/FAQpageCDCmoratoria.pdf at page 4.
2 http://files.alfn.org/angle_pdf/CDCorder.pdf
3 The Agency Order defines such a tenant as a "covered person" and includes additional details as to each of the enumerated requirements. See the Agency Order at page 55293 for a complete definition of "covered person." http://files.alfn.org/angle_pdf/CDCorder.pdf
4 http://files.alfn.org/angle_pdf/CDCaffidavit.pdf
5 See page 1, ¶1 of HHS/CDC's Frequently Asked Questions. http://files.alfn.org/angle_pdf/FAQpageCDCmoratoria.pdf at page 1.

ed by the Fifth Amendment[6] of the United States Constitution. Judge Kinsey, comparing the moratorium on evictions to the forced housing of British soldiers under the Quartering Act of 1774, explained that *"neither the federal nor state governments have the authority to force private citizens to 'house' persons in their private property without just compensation or due process of law."*

The Court found the "simple two-page form [affidavit]…already completed by the government" and unverified by the CDC to be insufficient "process" to protect Spicliff's rights to its property. Without a hearing wherein the landlord is given an opportunity to contest the content of the affidavit and without just compensation for the taking, the Agency moratorium constitutes an unconstitutional taking even if it is only temporary in nature. Judge Kinsey went on to explain that due to state-imposed moratoriums which preceded the Agency Order "…many landlords have been forced to house tenants without due process or just compensation for over a year or more." The Court elaborated that "with spikes in COVID-19 cases nationwide, it is not unreasonable to foresee an extension on the CDC Agency restriction on evictions beyond January 1, 2021."

Focusing on the facts before her, Judge Kinsey explained that by December 31, 2020, when the moratorium is scheduled to end, Cowley "will be more than $7,000.00 in arrears…[on his rent payments]." The Court concluded it was "inconceivable" tenants like Cowley would be able to resume paying monthly rent while also repaying large amounts of past due rent. As a result, the Court explained that landlords were at risk of "losing their properties permanently through foreclosure unless they are able to continue paying their mortgages while they are forced to house tenants without due process or just compensation."

The Court surmised that the effect of the Agency Order "rises to a level of a regulatory deprivation of substantial economic benefits deserving of protection under the Fifth Amendment of the United States Constitution and Article X of the Florida Constitution." On this basis the Court granted Spicliff's motion to lift the Agency imposed stay noting the government's unconstitutional taking could be "easily avoided" by having the CDC verify the veracity of the form affidavit and once verified, "provide just compensation (the rent) directly to the landlord." Cowley appealed the order lifting the stay to the First Circuit Court. That appeal and a timely rehearing motion currently remain pending before both courts.

Judge Kinsey's order is well-written and well-reasoned; however, as it originated from an Escambia County court it carries no precedential value for other courts. Stay tuned for developments in the appeal. If it makes it beyond the First Circuit to the First District Court of Appeal, and possibly to the Florida Supreme Court, it could have enormous impact. This issue is sure to become a prominent and reoccurring one given the recent rise in COVID-19 cases and the likely extension of the eviction moratorium given the current state of affairs. a

6 All subsequent references or quotes to this case are to the same citation. Spicliff, Inc. v. Cowley, Escambia County, Florida Case No. 2020-CC-03778.
7 "The Fourteenth Amendment applies [the Fifth Amendment]…to the states." Spicliff, Inc., at 2.

STATE SNAPSHOT | ILLINOIS

Adler v. Bayview Loan Servicing and 735 ILCS 5/15-1509(c)

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A RECENT ILLINOIS appellate decision has confirmed that a provision of the state's mortgage foreclosure statute operates to bar any claim against the mortgagee or its servicer, including any misdeeds the mortgagee may have committed during the foreclosure. The rule works like *res judicata*, but it covers more than just the same causes of action, but any claim a party to the foreclosure may have against any other party.

The defendants in *Adler v. Bayview Loan Servicing*, 2020 IL App (2d) 191019 (Dec. 29, 2020), obtained a judgment of foreclosure and order approving the judicial sale of the plaintiffs' home in a prior foreclosure. A year and a half later, the plaintiffs filed suit against the mortgagee and servicer under RESPA and the Illinois Consumer Fraud Act alleging misconduct arising out of the foreclosure proceeding; specifically, the defendants' failure to acknowledge receipt of a Qualified Written Request and Request for Information under RESPA in the context of plaintiffs' request for a loan modification.

Defendants moved to dismiss arguing, among other things, that the claims were barred under *res judicata* and under section 15-1509(c) of the Illinois Mortgage Foreclosure Law ("IMFL"). Section 15-1509(c) provides in relevant part:

> Claims Barred. Any vesting of title . . . by deed pursuant to subsection (b) of Section 15-1509, unless otherwise specified in the judgment of foreclosure, shall be an entire bar of (i) all claims of parties to the foreclosure … Any person seeking relief from any judgment or order entered in the foreclosure in accordance with subsection (g) of Section 2-1301 of the Code of Civil Procedure may claim only an interest in the proceeds of sale.

735 ILCS 5/15-1509(c). The trial court agreed and dismissed the complaint. The Appellate Court affirmed without reaching the *res judicata* issue.

On appeal, the Plaintiffs argued that section 15-1509(c) does not apply to claims for money damages as are available for violations of RESPA or the Fraud act. The last sentence of this section, they contended, indicates the bar only applies to claims seeking relief from a foreclosure judgment or an order confirming a judicial sale.

The court rejected that reading. Considering the Foreclosure Act as a whole, it found the legislature intended section 15-1509(c) to preclude all claims of parties to the foreclosure related to the mortgage or the subject property, except for claims for an interest in the proceeds of a judicial sale.

Adler reinforces the fact that section 15-1509(c) is often the best way to dispose of claims brought after the foreclosure. *Res judicata* requires the defendant to prove an identity of the causes of action, which it does not have to prove under section 15-1509(c). For example, an appellate court found that *res judicata* did not bar a claim against the mortgagee who refused to allow the removal of equipment from the premises. It concluded that the claims asserted in mortgagee's foreclosure action were not the "same cause of action"

In sum, if a mortgagor brings a claim against the mortgagee or its servicer after the deed has been transferred via a foreclosure sale, section 15-1509(c) is a better tool to dispose of that claim than *res judicata*.

for *res judicata* purposes as a conversion and replevin claim arising out of mortgagee's alleged refusal to allow the guarantor to take possession of the equipment. *Bhutani v. Barrington Bank & Tr. Co.*, 2015 IL App (2d) 140972, 42 N.E.3d 377. The result may have been different had the defendant in that case moved to dismiss under section 15-1509(c).

Adler is the latest of several recent decisions addressing the scope of section 15-1509(c)'s bar; and these decisions together affirm that the reach of the bar is long. In *Taylor v. Bayview*, 2019 IL App (1st) 172652, for example, the appellate court affirmed the dismissal of a complaint for wrongful foreclosure, even where the plaintiffs had alleged that the mortgagee committed fraud on the court. In *BMO Harris Bank Nat'l Ass'n v. LaRosa*, 2017 IL App (1st) 161159, the appellate court denied a post-judgment motion to vacate a deficiency judgment under rule 2-1401 (similar to Fed. R. Civ. Pro. 60 motion) based on 15-1509(c)'s bar. The bar even extends to claims that the homeowners were defrauded by the lender at the loan origination. *American Advisors Grp. v. Cockrell,* 2020 IL App (1st) 190623. It is not only the mortgagor who will be barred from bringing a claim after the foreclosure. And a recent bankruptcy court decision held that it also bars any claim by a junior mortgagee may have against the mortgagor on the note. *See, In re Dancel,* No. 18 BK 01399 (Bankr. N.D. Ill. Feb. 5, 2019).

In sum, if a mortgagor brings a claim against the mortgagee or its servicer after the deed has been transferred via a foreclosure sale, section 15-1509(c) is a better tool to dispose of that claim than *res judicata*.

Governor of Maryland Issues Order Further Extending Moratorium on New Notices of Intent to Foreclose

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ON DECEMBER 17, 2020, the Governor of Maryland issued an Executive Order amending and restating his previous Orders concerning the registration of new Notices of Intent to Foreclose. This Amended Order extends the existing Moratorium on the initiation of new foreclosures by suspending the Notice of Intent to Foreclose registry until January 31, 2021. The Order further grants the Commissioner of Financial Regulation the authority to extend the Moratorium, with the caveat that the extension can not last for more than thirty days after the state of emergency ends. At this time, the Commissioner of Financial Regulation has indicated that it will resume accepting Notices of Intent to Foreclose on February 1, 2021. However, the Commissioner may extend the suspension of the operations of the Notice of Intent to Foreclose Electronic System beyond that date in accordance with the Order.

This new Order also modifies the requirements of the previous Order relating to Non-Federal mortgage loans. Specifically, it now explicitly requires an offer of forbearance to be sent to the borrower at least 30 days before a Notice of Intent to Foreclose is sent (consistent with the federal requirement, and consistent with prior guidance issued in this regard), and now limits the time within which the borrower may request a forbearance, to 90 days from the date of the notice of such right to request forbearance. Additionally, regardless of whether the loan is federally-backed or not federally-backed, the Servicer or Secured Party must certify through an electronic certification that the Servicer has complied with the forbearance offer requirements outlined in the Order.

Please take note, while the Amended Order is worded in a way that suggests that the Moratorium is on new foreclosures, the actual Moratorium is only as to new Notices of Intent to Foreclose and accordingly, to the extent that a loan has a valid Notice of Intent to Foreclose sent prior to the Governor's April 3, 2020 order, such foreclosure may still be filed (assuming otherwise permissible under any federal moratorium).

Maryland Court of Special Appeals Holds There is No Statute of Limitations on Foreclosures

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ON DECEMBER 16, 2020, the Maryland Court of Special Appeals filed an opinion holding that no statute of limitations directly applies to Maryland mortgage foreclosures, affirming the 1947 ruling of *Cunningham v. Davidoff* (188 Md. 437 (1947)). This ruling is important because it puts to rest arguments that borrowers have consistently made when filing a motion to stay or dismiss a foreclosure sale. Since the revision of Section 5-102 of the Courts and Judicial Proceedings Article in 2014, borrowers have made the argument that their foreclosure should be dismissed because there is a statute of limitations of either three years or twelve years on foreclosures due to the deed of trust being executed under seal. The Court's new ruling in *Wanda Daughtry, et al. v. Jeffrey Nadel, et al.*, (2020 Md. App. LEXIS 1180) eliminates this argument and clarifies for borrowers, lenders, and the lenders' attorneys that no such limitation exists.

> Since the *Daughtry* opinion was released, the Court has released at least one unreported opinion in which they have already relied on the same reasoning to dismiss other foreclosure challenges, and it is expected that they will continue to rely on Daughtry to dismiss further claims of this kind.

Maryland law generally recognizes a three-year statute of limitations on all actions, unless a specific provision of the Code provides a different time period. In 2014, the General Assembly of Maryland revised Section 5-102, which concerns the statute of limitations for certain specialties, by adding to its exceptions a deed of trust, mortgage, or promissory note secured by owner-occupied residential property. While it seems likely that the law intended to restrict deficiency judgments, many borrowers began to assert that, since the law specifically excluded deeds of trust from Section 5-102, it must logically follow that foreclosure would fall under the general three-year limitation as well.

The prevailing case law on the subject had been the 1947 *Cunningham* opinion, which was decided well before the revision to Section 5-102. The Court of Special Appeals has now found it necessary to resolve whether Section 5-102 altered Maryland law concerning limitations on foreclosure.

In *Daughtry*, Appellants Wanda and Nathaniel *Daughtry* argued that *Cunningham* was no longer good law following the revisions to Section 5-102 and that the three-year statute of limitations now applies to mortgage foreclosures. The Daughtry's reasoned that the substitute trustees were barred by the statute of limitations because they brought their foreclosure action more than three years after the default occurred.

The Court of Special Appeals, however, agreed with the opposing argument that "there has never been a statute of limitations applicable to mortgage foreclosures in Maryland and that [Section 5-102] did not create one." The Court's rationale was that neither Section 5-101 nor 5-102 state a limitation applicable to foreclosure and that "[i]f the General Assembly had intended to impose a statute of limitations on mortgage foreclosure actions for the first time—and, in doing so, to overrule a six-decade-old Court of Appeals precedent that was directly on point—we would expect it to do so explicitly."

The Court examined legislative history related to the original adoption of the three-year blanket limitation, as well as the revisions to the twelve-year limit on specialties, and found no evidence that the General Assembly ever intended to impose any limitation on the equitable action of foreclosure. The Court further evaluated the statutory construction and plain language of the relevant statutes but was unable to find any language that imposes a limitation. Therefore, the Court determined that no such limitation applies and the foreclosure could proceed.

It is important to note that, while there is no statute of limitations on a foreclosure based on the default date, there still must be a valid instrument upon which to base foreclosure. Under Maryland Real Property § 7-106(c), an unreleased mortgage or deed of trust is presumed to have been satisfied twelve years after maturity or after the last payment date. If the last payment date or maturity date cannot be ascertained, the mortgage or deed of trust is presumed to be satisfied forty years after the recordation of the instrument. According to *Cunningham*, this presumption can be rebutted, and if so, "there is no legal obstacle to the foreclosure . . .," such as a statute of limitations or laches because of an old or stale mortgage.

Since the *Daughtry* opinion was released, the Court has released at least one unreported opinion in which they have already relied on the same reasoning to dismiss other foreclosure challenges, and it is expected that they will continue to rely on *Daughtry* to dismiss further claims of this kind. Therefore, we would expect that this particular argument against foreclosure will begin to become less common while borrowers generate their claims against foreclosure. a

Abandoned Property or Looking to Give Borrowers More Loss Mitigation Options?

Check out Minnesota's Alternative 5-Week Redemption Period Statutes

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1. FIVE WEEK REDEMPTION PERIOD FOR ABANDONED PROPERTIES

It's that time of year, yet again — Wintertime in Minnesota. Twenty below zero with another six-month period of time when pipes can freeze and burst, causing damage to the property. Your local property preservation team has just called you (hopefully long-distance for your sake), suggesting one of your mortgaged properties is vacant.

So now what's a Lender to do? You're in luck. Under Minnesota Statutes § 582.031, if a mortgaged property is vacant, the mortgage holder can take the necessary steps to protect its security without becoming what is termed a "mortgagee in possession." These powers include the authority to enter the property without a court order, secure the property, winterize the property, inspect the premises, and take all other reasonable actions to prevent trespass, waste, and damage to the premises. The cost of such actions may be added to the principal balance of mortgage, or added to the redemption price if incurred after the foreclosure sale, and an affidavit of those posts-sale costs is timely provided to the sheriff's office.

Keep in mind, however, that this statute also provides that, upon request, the servicer must deliver a key (rather than simply access) to the borrower or any person lawfully claiming through the borrower, which may include the owner, agent, tenant, or in the case of death, the heirs or personal representatives. These requests should be promptly honored, and we suggest your property preservation team be available to respond to such requests on short notice.

So now that you have secured and winterized the property, what's next? Minnesota law specifically contains a provision to shorten the foreclosure's redemption period to just five (5) weeks (down from the standard 6-month redemption period or even the 12-month redemption period applicable to certain properties), thereby cutting delay costs considerably. These properties must be both vacant and abandoned, rather than just vacant. For example, if the vacant property is listed for sale, then the property is almost certainly not abandoned.

The mechanics of this process are found in Minnesota States § 582.032 which dovetails nicely with the securing powers available to lenders in § 582.031 for vacant properties. In most cases, a mortgage servicer changing the locks and terminating a utility begins proof of abandonment. Once secured, an affidavit by the servicer asserting no person with a right of possession to the property has requested a key within 10 days of securing constitutes a *prima facie* establishment of abandonment. Procedurally, there is an abbreviated court action required to request a judicial determination of abandonment and reduction in the redemption period to 5 weeks. If there is no opposing appearance at the hearing following proper service, such absence constitutes conclusive evidence of abandonment, and the Order will issue.

This redemption shortening process is only applicable to properties that are 10 acres or less, improved with a residential dwelling of four or less units, is not a model home or dwelling under construction, and not used in agricultural production. Also, keep in mind that while an encumbering federal income tax lien may not prevent the shortening of the redemption period for the borrower, it may preclude reducing the redemption period for the federal interests under 120 days.

2.FIVE WEEK REDEMPTION PERIOD FOR BORROWER-INITIATED POSTPONEMENTS

In contrast, there is another 5-week redemption period at play in Minnesota, which is Minnesota Statutes § 580.07, Subd. 2. While this statute does not actual-

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In Minnesota, a qualifying borrower has the right to apply for loss mitigation up to 7 business days before the original sheriff's sale date or the new sale date resulting from the borrower's postponement, whichever is later, to activate related dual-tracking protections.

ly shorten the timing of the overall foreclosure process (and instead actually adds one week to the overall process), it can be a formidable tool for borrowers working with servicers to extend the time before the foreclosure sale occurs to have more loss mitigation options available.

In short, the borrower can unilaterally use a specific affidavit to delay the sheriff's sale date by 5 months (for a 6-month redemption period foreclosure) or 11 months (for a 12-month period foreclosure). The borrower's affidavit must be recorded and served on both the sheriff and foreclosing party's counsel at least 15 days before the scheduled foreclosure sale. In exchange, the borrower's redemption period is automatically reduced to just five (5) weeks. This right to postpone unilaterally by the borrower can only be exercised once, regardless whether the borrower reinstates the mortgage before the postponed foreclosure sale. If the initial foreclosure is ultimately stopped by the mortgage servicer, rather than by the borrower reinstating or filing bankruptcy, it is common practice in Minnesota to accept the borrower's subsequent postponement election. Otherwise, mortgage servicers could simply stop and restart foreclosures as soon as a borrower's postponement affidavit is received to avoid the statute's intended effects.

This postponement process has the particular advantage of preserving available loss mitigation options for the lender and borrower. Since the pre-sale foreclosure period is extended with this postponement procedure, the borrower and lender have more extensive loss mitigation tools available. The borrower can still modify the mortgage, work out a forbearance, repayment plan, or utilize any other loss mitigation options available. Once the sheriff's sale occurs though, the available loss mitigation options are typically just a short sale or short redemption.

The primary concern a lender may have is that the extension of the pre-sale foreclosure period also gives the borrower more time to file for bankruptcy relief enabling an endless loop of postponements and bankruptcy filings. That assumption is somewhat correct, since bankruptcy filings after borrower postponements are a common practice. However, the drafters of § 580.07 wisely anticipated this, and added a provision that if a borrower obtains a bankruptcy stay after electing postponement of the sheriff's sale under the statute, then when the stay is no longer applicable, the 5-week redemption period remains applicable to the foreclosure process.

Also, keep in mind that a borrower-initiated postponement extends the time for dual-tracking protections for the borrower. In Minnesota, a qualifying borrower has the right to apply for loss mitigation up to 7 business days before the original sheriff's sale date or the new sale date resulting from the borrower's postponement, whichever is later, to activate related dual-tracking protections.

As practice tips for mortgage servicers, these Minnesota statutes involving 5-week redemption periods can be effective tools for avoiding potential losses or delay costs. The first statutes mentioned (Sections 582. 031 and 582.032) are powerful tools for protecting abandoned properties and vastly shortening the redemption periods surrounding qualifying properties.

On the other hand, the latter statute mentioned (Section 580.07, Subd. 2) is a great tool for borrowers and mortgage servicers looking for more time to work with a wider variety of loss mitigation options available before the sheriff's sale than the more limited options after the sheriff's sale occurs. This benefit of having greater flexibility in loss mitigation options comes at the relatively small price of having the overall foreclosure process extended by just one week. a

Lessons from the Crucible

Added Peril on Allonges in New York

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NEW YORK STATE does not follow the Uniform Commercial Code as recognized by nearly all other jurisdictions in the Union. The New York State Uniform Commercial Code (a misnomer) is largely what the U.C.C. was back in 1964. At issue today is the allonge. Before we discuss the pitfalls of the use of the allonge in New York, we should all start at the same place of understanding.

A Promissory Note is a contract where one person or entity promises to pay another person or entity a certain amount of money with certain terms. In the context of our industry, the Promissory Note is the contract where the homebuyer promises to repay his/her bank for the money they are borrowing to finance the property.

When a loan is sold from one lender to another, the

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Under New York law, an allonge is only valid and appropriate where there is no room on the negotiable instrument for the indorsement. The allonge must be permanently affixed to the original Note.

Promissory Note must be negotiated from the seller (the old lender) of the loan to the buyer (the new lender). The Note is negotiated when the Note is endorsed (signed over) and delivered to the purchaser of the loan. The indorsement is normally somewhere on the Promissory Note itself.

When the indorsement is on a separate page and attached to the Note, then that indorsement is on an allonge. This is where New York's peculiarities lead to lender's peril.

Under New York law, an allonge is only valid and appropriate where there is no room on the negotiable instrument for the indorsement. The allonge must be permanently affixed to the original Note. The Court's do not define what is meant by "permanent" other than confirming that a paper clip will not do.

Earlier this year, the Appellate Division reversed summary judgment for the lender because there was insufficient proof that the allonge was permanently affixed to the Note at the time the Complaint was filed. *See, U.S. Bank, N.A. v. Moulton*, 179 A.D.3d 734 (2d Dept. 2020).

In an October 2020 trial-level opinion, a court dismissed Plaintiff's Complaint holding that a foreclosing Plaintiff could not prove that the allonge was permanently affixed to the Note fourteen years ago when the Complaint was filed in 2006. The Court noted that there were several staple holes in the Note and the allonge, but the Plaintiff's witness could not testify that the allonge was permanently affixed to the Note in 2006. The witness

> "testified that he did not know when the allonge was affixed to the note, did not know when any original staples were removed, did not know if the allonge was affixed to the note as the time both documents where transferred to the custody of Home Eq, and did not know if they were affixed at the time the action was filed…" *Deutsche Bank National Trust Company v. Burke,* 2020 N.Y. Slip Op. 51255(U) (Sup. Ct. Suffolk Co. 2020).

It appears that the Plaintiff and servicer never changed throughout the foreclosure. Plaintiff's original Counsel went out of business, and substituted Counsel did not exist in New York when the action was commenced.

As problematic of an issue the allonge caused for the *Burke* lender, the difficulty of the problem increases in the secondary mortgage market where lenders and investors buy mortgaged loans that are already in default and foreclosure. If your company bought a mortgage where a pending foreclosure was commenced years ago, do you have an affiant who can testify as to the affixation of the allonge to the Note at the time of the filing of the foreclosure action? Does the seller of the Note have a witness who can testify that the Note was reviewed to confirm or maintained, so the allonge was permanently affixed to the Note? If not, you may find that you just lost years of timeline. All was not lost for the lender in *Burke*; the Court held that, by failing to prove affixation, the Plaintiff failed to prove standing and, therefore, the loan was not properly accelerated. The lender's mortgage survives for another try at foreclosure.

The best practice takeaway to be learned from the crucible of someone else's case is: when selling or purchasing notes on mortgaged loans, make sure that the Note is endorsed on the instrument (not through allonge). The situations in the *Moulton* and *Burke* cases would have been avoided—as well as years of time-costly litigation—if only the Note was indorsed-in-blank on the face of the instrument.

COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 and Administrative Orders

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ON DECEMBER 28, 2020, Governor Cuomo signed into law the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 (L. 2020, c. 381; "Act"). The Act provides immediate relief to respondents and defendants in residential eviction proceedings and foreclosure actions in New York State, including, among other things:

1. Staying pending residential eviction proceedings ("Proceedings") and residential real property mortgage foreclosure actions ("Actions") for sixty days.
2. Staying Proceedings and Actions filed within thirty days of December 28, 2020 for sixty days.
3. Publishing form "Hardship Declarations" to be used by tenant-respondents in eviction matters and defendant-mortgagors in residential foreclosure actions in reporting financial hardship during or due to the COVID-19 pandemic.
4. Staying Proceedings and Actions until at least May 1, 2021 in Proceedings and Actions where a tenant-respondent or defendant-mortgagor submits a completed Hardship Declaration.

Several elements of the enacted legislation left many questions unanswered and/or unclear. Therefore, administrative orders were issued in line with the legislation and to provide the Courts' expectations. Administrative order AO 340/2020 addresses eviction proceedings, and Administrative order AO 341/20 addresses foreclosure actions. Additionally, forms of Hardship Declarations for both have been created.

As to AO/340 -Residential eviction proceeding pending on December 28, 2020, including eviction proceedings filed on or before March 7, 2020, and any residential eviction proceeding commenced on or before January 27, 2021, are stayed for 60 days. However, the Court may hear cases where other tenants' rights are being infringed or creating safety issues. There is a bar on the issues of default judgments. Where a warrant of eviction has been issued, but not executed upon, there is a stay pending a status conference. Where there was a prior judgment for objectionable or nuisance behavior, the Court will be required to hold a hearing. Finally, the Petitioner must serve the hardship declaration in English or the tenant's primary language.

As to AO 341- Act immediately stays pending residential foreclosure actions for sixty days, and provides that, where a mortgagor/owner submits to the foreclosing party or the Court a declaration attesting to hardship arising from or during the COVID-19 pandemic, proceedings will be further stayed (or commencement tolled) until May 1, 2021.

The Act does not cover vacant and abandoned property that was first listed on the statewide vacant and abandoned electronic property registry before March 7, 2020. A hardship declaration, in blank format, must be provided to the Defendant (6 most common languages). The Courts are still working on how to achieve the goal economically. Where no hardship declaration is returned, the matter may proceed after 60 days (or proceed with status conference). If the Hardship declaration is returned to the plaintiff, the matter is stayed to at least May 1, 2021.

In pending actions, where a judgment was issued before December 28, 2020, the matter is stayed until the Court holds a status conference with the parties. If Defendant submits a Hardship Declaration to the plaintiff, the Court, etc. the action will be stayed until at least May 1, 2021. A prior COVID 19

STATE SNAPSHOT | NEW YORK

The Act does not cover vacant and abandoned property that was first listed on the statewide vacant and abandoned electronic property registry before March 7, 2020. A hardship declaration, in blank format, must be provided to the Defendant (6 most common languages).

Assessment Conference does NOT satisfy the new conference requirement.

The Court cannot accept a new residential foreclosure proceeding filing unless it is accompanied by both an affidavit of service of the Hardship Declaration and an Affidavit from the foreclosing party that no Hardship Declaration has been received from the owner/mortgagor. At the earliest opportunity following a new file, the Court must seek confirmation, on the record, or in writing, that the owner/mortgagor received the blank Declaration and has not submitted a completed Declaration to plaintiff (or agent). Where procedures were followed, the matter may proceed. If not followed, then the Court must stay proceedings for no less than 10 business days to give the owner/mortgagor an opportunity to submit the Declaration.

As New York continues to work through the challenges of the pandemic, the Legislators and Court officials work toward extending protections to homeowners, borrowers, and tenants who have had a significant loss of income. However, many others view the extension with a Hardship Declaration, without proof of economic hardship, as likely to result in further economic decline for the state and those doing business in New York.

Recent Decision Clarifies RPAPL 1302-a

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RPAPL 1302-a WAS ENACTED ON DECEMBER 23, 2019, AND BECAME EFFECTIVE ON THAT DATE. IT PROVIDES AS FOLLOWS:

> "Notwithstanding the provisions of [CPLR3211(e)], any objection or defense based on the plaintiff's lack of standing in a foreclosure proceeding related to a home loan, as defined in [RPAPL 1304(6)(a)], shall not be waived if a defendant fails to raise the objection or defense in a responsive pleading or pre-answer motion to dismiss. A defendant may not raise an objection or defense of lack of standing following a foreclosure sale, however, unless the judgment of foreclosure and sale was issued upon defendant's default" (RPAPL 1302-a)."

This provision applies only to residential mortgage foreclosures and provides that failure to raise a standing defense in a pleading does not constitute waiver pursuant to CPLR 3211(e). The law was implemented to have cases regarding standing be resolved on the merits and not a technicality.

A recent decision GMAC Mortgage, LLC v. Coombs, AD 2nd, 2017-08030 issued November 25, 2020, sheds light on the Court's interpretation of the law. The Court found that the statute does not impact CPLR 3018 (b), "where, as here, standing is not an essential element of the cause of action, under CPLR 3018(b) a defendant must affirmatively plead lack of standing as an affirmative defense in the answer in order to properly raise the issue in its responsive pleading".

- The defense of standing is exempt from waiver provisions of CPLR 3211 (e), but it does not excuse defendant from raising the issue before it may be considered by the Court.
- The Court was not vested with the authority to raise standing on its own initiative, as the legislature did not go that far in its change to the law.

This provision applies only to residential mortgage foreclosures and provides that failure to raise a standing defense in a pleading does not constitute waiver pursuant to CPLR 3211(e). The law was implemented to have cases regarding standing be resolved on the merits and not a technicality

As applied to the case, the Court found that defendant's answer be deemed amended to include lack of standing in the opposition to plaintiff's motion for summary judgment, as plaintiff had the duty of establishing standing in order to be entitled to summary judgment. Here, this was brought up in the opposition, therefore, plaintiff in the reply provided that they had physical possession of the note and mortgage prior to commencement. While the defendant did make allegations regarding the validity of the assignment, the Court found that it was of no relevance as standing based on the note.

Therefore, the Court agreed with the Supreme Court's determination to grant leave to reargue, and upon re-argument, grant plaintiff's motion for summary judgment.

Evolution of the Statutes of Limitations on Ohio Foreclosure Law

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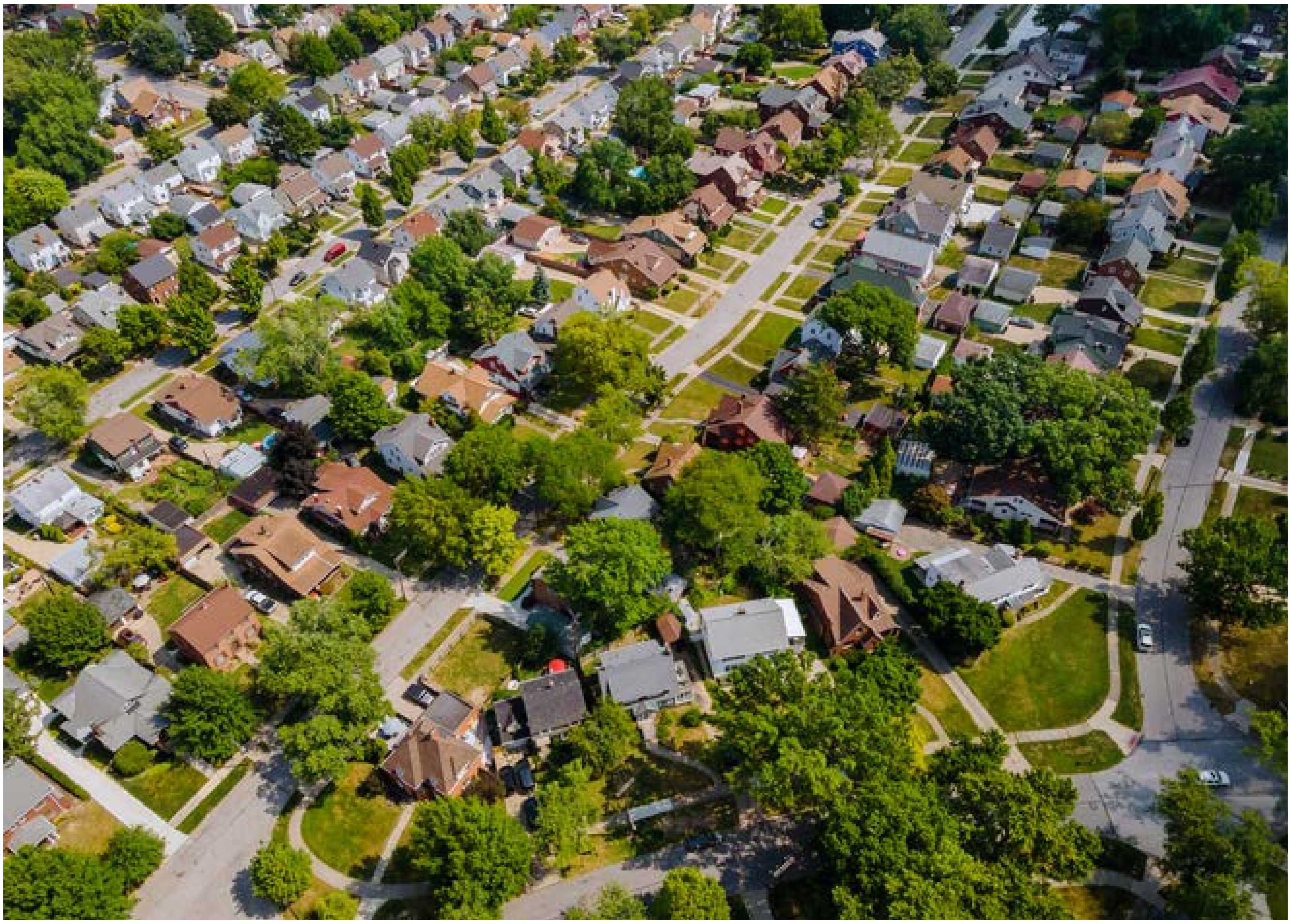
WHEN COMMONLY asked how long one has to pursue an action for default on a promissory note and mortgage, the simple answer is, "It's not that simple." The Ohio Revised Code, state and federal case law, and the Ohio State Legislature have altered and continue to alter just how, and for how long, an action on a note or mortgage can be pursued. While the action necessary to trigger the running of the statute of limitations varies between a promissory note and mortgage, and while R.C. 2305.04 still permits an action for ejectment and recovery of title to or possession of real property to be brought within twenty-one years, the time frame for bringing a foreclosure action continues to narrow.

It is well-settled that an action to collect on a note is distinct from one to foreclose a mortgage and permits foreclosure of a mortgage even when a note has become time-barred. *Deutsche Bank Nat'l Trust Co. v. Holden,* 147 Ohio St.3d 85, 2016-Ohio-4603, 60 N.E.3d 1243 (Ohio 2016); *Bank of New York Mellon v. Walker,* 2017-Ohio-535, 78 N.E.3d 930 (Ohio Ct. App. 8th Dist. 2017). Despite this, in 2017 and 2018, after considering state court precedent on the issue, the Northern and Southern Districts of Ohio ruled that enforcement of both a note *and foreclosure of a mortgage* could be time-barred by a six-year statute of limitations. *In re Fisher,* Case No. 17-40457, 2018 Bankr. LEXIS 1275 (Bankr. N.D. Ohio Apr. 27, 2018); *Baker v. Nationstar Mortgage LLC,* 2018 U.S. Dist. LEXIS 121686, 2018 WL 3496383 (Ohio S.D. July 20, 2018). While not binding on state court foreclosure actions, these federal decisions nevertheless foretold of a potential impact on mortgage lenders and servicers and warned of a strategy by which borrowers might avail themselves and their homes of the encumbrances of their mortgages by extinguishing mortgage liens that have not been pursued within the six-year confines on promissory notes of R.C. 1303.16(A).

While lenders and servicers who have been time-barred from collection on a promissory note have had a more generous time frame in which to pursue foreclosure of the mortgage, this window of availability has continued to evolve and narrow over time.

Yet when faced last month with this issue, the Seventh District Court of Appeals stayed true to prevailing case law and Holden when considering an appeal of summary judgment granting a counterclaim to foreclose a mortgage on the appellant's home. *Rutana Vs. Koulianos,* 2020 WL 7642864, 2020 -Ohio- 6848 (¶1). First reminding us that the Ohio Supreme Court has "long recognized that an action for a personal judgment on a promissory note and an action to enforce mortgage covenants are 'separate and distinct' remedies," the Seventh District continued, "[t]he bar of the note or other instrument secured by mortgage does



not necessarily bar an action on the mortgage." *Id*, at ¶39-40, citing *Holden* at ¶25. The Court determined that the counterclaim for foreclosure could be taken regardless of whether collection of the underlying debt was time-barred and applied the eight-year statute of limitation per R.C. 2305.06. *Id.*

While lenders and servicers who have been time-barred from collection on a promissory note have had a more generous time frame in which to pursue foreclosure of the mortgage, this window of availability has continued to evolve and narrow over time. While R.C. 2305.06 originally set forth a lengthy 15-year statute of limitations on enforcement of a contract, the statute was amended in 2012 to reduce the limitation to eight years. R.C. 2305.06, *as amended 129th General Assembly File No.135, SB 224, §1, eff. 9/28/2012.* Currently, the Ohio State Legislature is seeking to reduce the statute of limitations set forth in R.C. 2305.06 again, this time to mirror six-year confines of R.C. 1303.16. Pending House Bill 251, passed by the House of Representatives on November 19, 2019, and as amended and passed by the Senate on December 9, 2020, provides that "an action upon a specialty or an agreement, contract, or promise in writing shall be brought within six years after the cause of action accrued." *OH HB251 | 2019-2020 | 133rd General Assembly.* (2020, December 09). *LegiScan.*

In what may be another blow to the rights of the mortgagee, what was previously well-settled law has been reinterpreted in the federal court system and is now before the Ohio State Legislature for amendment, tentatively unsettling the mortgage industry and years of settled practice in Ohio. Lenders and loan servicers would be well-advised to pursue any claims on both the note and mortgage within six years.

BEWARE! The Washington State Statute of Limitations Pitfall

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WASHINGTON has a pitfall that can be very costly, and many in the industry are not aware. The statute of limitations on a written installment contract (mortgage, Deed of Trust) is six years. Wash.Rev.Code §4.16.040. For installment notes, the statute of limitations runs against each installment from the time it becomes due. Every missed payment by the borrower starts its own six-year statute of limitations. *Herzog v. Herzog*, 23 Wash.2d 382, 387-88 (1945); *United States v. Dos Cabezas Corp.,* 995 F.2d 1486, 1490 (9th Cir. 1993). More specifically, the statute of limitations does not begin to run until the payment becomes due. *Dos Caezaz* Corp. at 1490. The last payment owed commences the final six-year period to enforce a deed of trust securing a loan. This situation occurs when the final payment becomes due, such as when the note matures or a lender unequivocally accelerates the note's maturation. *4518 S. 256th, LLC v. Karen L. Gibbon, P.S.*, 195 Wn. App. 423, 434–35, 382 P.3d 1 (2016), *review denied sub nom. 4518 S. 256th, LLC v. Gibbon,* 187 Wash.2d 1003, 386 P.3d 1084 (2017); *see also Westar Funding, Inc. v. Sorrels*, 157 Wn. App. 777, 784, 239 P.3d 1109 (2010).

("Where there has been no explicit acceleration of the note, the statute of limitations does not run on the entire amount due and non-judicial foreclosure can be begun within six years of any particular installment default and the amount due can be the then principal amount owing."). Because Allen did not pay the monthly installment amount due on June 1, 2010 or thereafter, the statute of limitations for each missed payment accrued and the six-year statute of limitations began to run on the date the payment was due.

Cedar W. Owners Ass'n v. Nationstar Mortg., LLC, 434 P.3d 554, 560 (Wash. Ct. App.), review denied, 193 Wash. 2d 1016, 441 P.3d 1200 (2019).

If a debt is accelerated, the debt is due immediately, and the statute of limitations runs from the date of acceleration. The Washington Supreme Court has held "that even if the provision in an installment note provides for the automatic acceleration of the due date upon default, *mere default alone will not accelerate the note.*" A.A.C. Corp. v. Reed, 73 Wash.2d 612, 615 (1968). "Some *affirmative action is required; some action by which the holder of the note makes known to the payors that he intends to declare the whole debt due." Glassmaker v. Ricard*, 23 Wn. App. 35, 37-38 (1979) quoting *Weinberg v. Naher,* 51 Wash. 591, 594 (1909); *4518 S. 256th, LLC v. Karen L. Gibbon,* PS, 195 Wn. App. 423, 436 (2016), *review denied,* 187 Wash.2d 1003 (2017) (emphasis added).

In addition to the statute of limitations beginning to run at the foregoing times, it begins to run in relation to events related to Bankruptcy cases. The statute of limitations accrues with the last payment due immediately prior to a debtor's discharge from Bankruptcy. *Edmundson v. Bank of America,* 378 P.3d 272, 278 (Wash. Ct. App. 2016). The Court reasoned that no further payments were due on the loan in light of the debtor no longer being personally liable. Edmundson at 278.

When the statute of limitations bars a foreclosure, a borrower may initiate an action to quiet title against the lender. *Pifer v. Bank of Am., N.A.*, No. 2:18-CV-606-RSL, 2019 WL 1231735, at *3 (W.D. Wash. Mar. 15, 2019). In the circumstance where the statute of limitations has not run, the borrower must show that the obligations under the terms of the note and deed of trust have been satisfied. *Ibid.*

While these cases are not new, on September 22, 2020, the 9th Circuit held that the law in Washington is: the statute of limitations is triggered by a debtor's Chapter 7 discharge. *In re Nazario Hernandez, et al v. Franklin Credit Mgmt. Corp,* et al, 19-35719 (9th Cir. 2020). Fortunately, the opinion was not certified to be published. Unfortunately, servicers must be very vigilant in proceeding to foreclosure and staying on that path. Bankruptcy and the state's required mediation program toll the statute of limitations. However, once a borrower has received a discharge, the clock starts ticking and must be watched very carefully to avoid the pitfall of the statute running due to a bankruptcy discharge resulting in the borrower avoiding the lien thru a quiet title action.

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