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OFFICIAL
PUBLICATION
OF THE ALFN
VOL. 7 ISSUE 3



**10 PROJECTS
TO WORK ON RIGHT NOW**

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#100%MemberRetention



As we are all dealing 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 pay their 2020 membership renewal dues in full by Dec. 31, 2020, will receive a 15% discount on your 2021 membership renewal dues.
- ◆ **Payment Assistance:** Installment plans, credit card payments and payment deferrals are available for 2020 membership dues, and for any ads and sponsorship purchases made in 2020. No additional fees charged for these alternative payment methods.
- ◆ **2021 Membership Dues:** Installment plans and credit card payments accepted for all members, with no additional fees. No increase in 2021 membership renewal dues.
- ◆ **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.
- ◆ **ANSWERS Online Presentations:** The educational sessions we had planned for ANSWERS will now be hosted in an online learning format. We are offering these 9 sessions free of charge to our members.
- ◆ **CLE Credit:** No less than 10 of our online presentations in 2020 will include CLE credit opportunities (\$75/state). CLE credit is available at a special discounted rate for all 9 ANSWERS webinars.
- ◆ **Discounted Ad Purchases:** Discounts will be provided for all ads and upgrades purchased for the remainder of 2020 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.

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Letter from the ALFN Board Chair



Making the Difficult and Unpopular Argument

I F YOU ARE READING THIS, good for you! This means you are still engaged and pushing through this pandemic and searching for ideas and value through ALFN. As the board chair, one of my goals has been to ensure ALFN is an influential voice to the leaders of the housing market. At the onset of the pandemic, FHA and FHFA were quick to ensure all foreclosures and evictions came to a screeching halt. This was then followed by the larger servicers, then smaller, taking a cautious approach to avoid foreclosing on a home during this crisis. This initially made sense, seemed fair and was the right thing to do. However, the approach was immediate and truthfully appeared to be a panic move, which resulted in an overreaching effect stopping some matters that really could or should have proceeded. Some of that was later handled by carving out exceptions for vacant properties, however, the complete ban on filings effectively stopped all actions or potential future actions completely. After five months, the moratoriums are set to expire.

Herein lies the opportunity. How do we make the most unpopular and difficult argument as to why we should be permitted to proceed? Nobody wants to hear about failing law firms, industry vendors losing staff and on the brink of closing or about how difficult it will be to continue holding on if this continues through next year. So, we know that cannot be our position. However, there are real and viable arguments as to why we need to work on bringing back the foreclosure process, and for the industry to assist firms during this time.

First, many of us experienced what happens when files sit on extended holds. It results in overburdened courts, has negative effects on the housing market's recovery and puts borrowers even further behind and often beyond hope. Second, firms bear the unreasonable burden of holding files without adequate compensation, while having to properly maintain staff in order to meet court deadlines, compliance and ensure files properly resume after collecting dust for months. It is a true recipe for disaster.

Our leaders need to understand that this is not our first time dealing with these issues, as we have had FEMA holds due to natural disasters, a housing crisis and the robo-signing fiasco to learn from. It is critical for the industry to listen to the lessons of the past. ALFN must make the difficult and unpopular argument for our industry to have the ability to receive compensation for all of the matters we have on hold, allow files to move forward, offer help to borrowers truly affected by the pandemic, and to allow the default market, which is part of the circle of life of the housing industry, to begin to heal and move forward.

Each of us plays a crucial role in the survival of housing. Without enforcement, there is reduced value to the mortgages and notes borrowers execute and, in turn, little reason for institutions to continue to lend. There is a way to be sensitive and help borrowers truly in need while preserving the residential lending market. We just need to be a part of the conversation and make the arguments so that leaders have better tools and understand how, why and when to proceed. Our letter campaigns and meetings with leaders have made some progress, but with the deadlines slowly approaching, our voice needs to be heard now more than ever.

Be a part of this conversation and reach out to me or any board member. ALFN is here for all its members during this difficult time.

Thank you and stay well,

A handwritten signature in black ink, appearing to read 'Andrea Tromberg'.

ANDREA TROMBERG, ESQ.

Board Chair

American Legal & Financial Network (ALFN)

Letter from the Editor



AS WE ALL CONTINUE dealing with the challenges created from COVID-19, ALFN is offering some enhanced membership benefits and incentives that will provide direct ROI for your continued 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.

This ANGLE publication brings you the latest up-to-date information on the important issues that may have far reaching impacts in our industry, including those surrounding COVID-19. With this resource in hand, you can rest assured that ALFN continues to strive for excellence in education and providing our members the information they require to make informed business decisions during a time of uncertainty and change.

The cover feature of this issue provides us a list of potential projects and process improvements that you might consider undertaking while files are on hold during the moratoriums. These might include documentation, disaster planning and technology updates to name a few. Now is the time to get your operational efficiencies in tune, before files begin moving again.

Our first feature article submission brings us a review of process serving in a socially distant environment. The civil process industry is using some interesting techniques to keep everyone safe during COVID-19, and to continue maintaining their high level of professional service. We then transition to another feature article submission to review changes that the CARES Act has on the FCRA. Understanding these changes and implementing the right compliance processes now will go a long way in preventing FCRA related litigation in the future. Our next feature article looks at the use of newspapers to continue providing public notice of foreclosure sales. There are many other more effective means of providing this public notice, and the author explores many of those for us. Next up is an article that touches on what practitioners might consider doing in the Bankruptcy process during moratoriums, which may help make the financial impacts less severe on both creditors and debtors. Finally, we wrap up our feature submissions with a Bankruptcy decision that provides insight to creditors on when the relief from stay order is appealable.

Don't miss our State Snapshot contributions to wrap up this ANGLE issue, where we will address some important state specific updates in Connecticut, Massachusetts, Maryland, New Jersey and New York.

Please reach out to myself or any of the ALFN leadership about what the ALFN can do to assist you, or to discuss ways to get more involved. Be safe and stay healthy out there!

Best regards,



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

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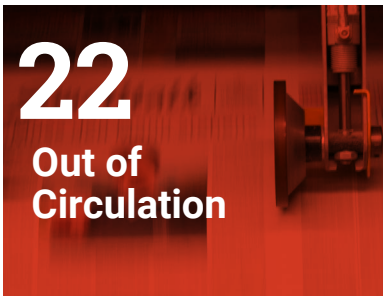
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MEMBER BRIEFS

ALFN EVENTS

SAVE THE DATES

2021

MARCH 4

BANKRUPTCY INTERSECT

Marriott Dallas Las Colinas
Irving, TX

APRIL 29-30

5th ANNUAL

WILLPOWER SUMMIT

The Ritz-Carlton Dallas
Dallas, TX

JULY 18-21

ALFN ANSWERS

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

NOVEMBER 18

FORECLOSURE INTERSECT

Marriott Dallas Las Colinas
Irving, TX

2022

JULY 17-20

ALFN ANSWERS

19th Annual 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:
www.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.

10 PROJECTS TO WORK ON RIGHT NOW



BY ERICA FUJIMOTO, DIRECTOR OF DEFAULT SERVICES
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WITH EVERYTHING GOING ON, your firm might be focused primarily on trying to figure out how to stay afloat. For most, that must be your number one priority. It is thus inspiring to see some firms, even in the thick of this turmoil, taking the time to work on projects and make improvements that they might not otherwise have time to manage. Even the smallest of projects can make a significant impact on your firm's efficiency and quality, with the potential for an extremely impactful return on investment once we begin to return to volumes post COVID.

Taking on new projects now might mean that if you are the owner, you put in more hours than usual. If you are a manager or employee, and one or more of these projects is in your wheelhouse, it might keep you busy while you are slower than normal. It could mean putting together a small team of people to take a project on as a group. No matter which group you fall into, consider these or other plans that might be good for your firm.

1



TIME FOR CLEANUP

Most of us don't love housekeeping. You can count me at the top of that list, but I find that when my house is clean, I have a lot less stress. The same goes for a clean firm. This includes cleaning up every area you can. You might consider starting with cleaning up Accounts Receivable and writing off outdated billing items that can get in the way of effective collections. You can take also set aside time to review and update all files. Ensure that all active files are properly documented and updated. Close out old files, and review on hold files to determine if they are still on the right holds. Get client system task lists completely up to date, and make sure that clients have been updated on every file. And finally, what about all that paper laying around? Do you really need it? Consider scanning and shredding wherever possible. Be sure to outline a new process so the paper does not start piling up again.

2



DOCUMENTATION

Your firm might already have standard operating procedure manuals, checklists to help ensure quality, and training guides. If you do, that's great. Now might be the perfect time to update them. If you don't already have this documentation, consider making it a project. Think about every area, and don't forget to include non-legal processes such as HR, IT, and accounting. You may be surprised to learn how much of what is being done is simply done a certain way, not because it is more efficient or facilitates that process, but rather because it has always been done that way, even if it no longer makes sense to continue doing so. While you are putting together this documentation, be critical of the processes and make improvements where you can.

3

DISASTER PLANNING

It isn't too early to start creating your new disaster plans and ensuring they include a pandemic response for technology and people. Do it while it is fresh in your mind because you will forget. It is like having a toothache. It hurts so bad when it is happening and once it is fixed you can't remember just how painful it was. That's the pandemic. Once we are back to normal, we will look back and tell stories, but we won't remember the actual details. Start keeping a list of everything you had to do to mobilize and add that to the plan.



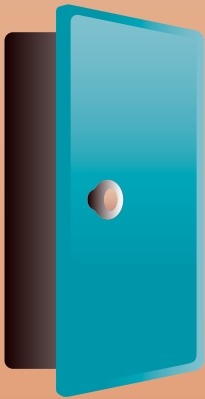
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DEFINE YOUR NEW NORMAL

Start making decisions about your new normal. Affinity did a free webinar series focused on helping firms make sure that when you come out of this, you learn from it and decide what you want your firm to look like. For example, you might now be interested in the benefits of transitioning to a more virtual company, such as improved flexibility for your people, increased efficiency, and lower rate of sickness. Before today, you might have thought it impossible, but most, if not all of you, managed to do it in record time. At the end, you might just be relieved to have everyone back together, but if you are interested in making the virtual office change, or any change to a what is "normal" for your firm, now is the time to start thinking about what that would look like and how you would implement it.



5



ONBOARDING AND EMPLOYEE ENGAGEMENT

Your single-most important resource is your people. There are estimates that strong onboarding increases new hire retention by as much as 65-85% and improves productivity by over 70%. Fingers crossed, we will all be hiring again here soon, and some of us might be bringing on a lot of new people. Building out a fully comprehensive onboarding plan that is completely mapped out will give your firm a real benefit you can offer to your people. Similarly, keeping your employees challenged and engaged long-term is key to retention. According to Work Institute's 2019 study, 22.2% of employees cited career development as their reason for leaving¹. LinkedIn estimates that 94% of employees would stay at a company longer if it invested in their learning and development². Formal employee engagement programs with ongoing training and platforms such as Engagedly can help your firm keep employees who otherwise might leave.

6



TECHNOLOGY EVALUATION

Start evaluating technology changes you might want or need to make. A technology audit helps firms compile a "list" of all internal and external hardware. This includes everything from servers and printers to computers and desktop scanners. It documents licensing, maintenance costs, update tracking/depreciation/replacement costs, warranties, etc. If your firm is still operating with paper files, phasing out physical files, and converting to electronic files to the extent possible can help facilitate easy access and simultaneous work. You might consider a document management system such as NetDocuments to help accomplish this. Once you know what you have, then you can start to decide what technology needs to be updated and when. You may also find that it is time for your firm to start a project to move to the cloud, which will involve a lot of research and planning. Companies like ProCirrur offer customizable solutions that can help your firm determine the best option.

¹ "2019 Retention Report." Work Institute, 2019, workinstitute.com/retentionreport2019.

² "2019 Workplace Learning Report." LinkedIn Learning, 2019, <https://learning.linkedin.com/content/dam/me/business/en-us/amp/learning-solutions/images/workplace-learning-report-2019/pdf/workplace-learning-report-2019.pdf>

7



MAILROOM AUTOMATION

The first time I heard this term, I wondered what exactly it meant. Would people no longer be required to work in a mailroom? How would envelopes get opened? Would it save money? Almost anything is possible. There are systems where very little needs to be done at the firm to cause mail to be sent. One mailroom solution for sending mail is to outsourcing through a company such as iMailTracking, who can not only send the mail, but can also receive and process returned mail and returned certified mail certificates so you don't have to. A solution that is like magic for receiving mail makes it possible for batches of mail to be scanned it all in at one time. A computer program takes the mail that was received, identifies it, creates a log of every piece of mail, and if integrated with your document management or case management system, automatically saves the documents to the "files." This is all with very little user intervention.

8

PROCESS IMPROVEMENT

A lot of my clients bring me in to do process audits. During these audits, we look at every legal process. We review the case management solutions, including workflow, file opening/closing procedures, and mergeable document templates. You can perform your own internal process audit. I recommend starting small. Select an area that you know is struggling. Include processors from that area and case management system administrators in the discussion. Be critical. Ask questions such as why are we doing it this way, do we have to, and what could we or the system be doing better. Focus on improvements that will help you gain value without losing quality. This might lead to building out your case management system to facilitate the process more. Remember to evaluate all changes once they are in place to ensure that the improvement helped, and re-adjust as needed.



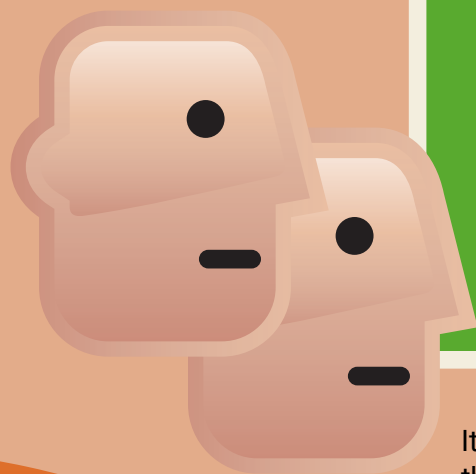
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AUTOMATION AND INTEGRATIONS

Consider integrations with systems such as LoanSphere, VendorScape, and Tempo, Fannie Mae DMRS, and Freddie Mac's Quandis ADR. Also think about integrating with vendors who can take over work that you may not want to or need to do internally. NetDirector facilitates integrations with many case management systems. You can also integrate with vendors directly in some cases. Examples of vendor integrations you may want to consider are Auction.com, Provest, and MyMotionCalendar. In addition to integrations, you can also investigate areas where your processes can be automated using your software platforms. For example, automatically sending emails to vendors who don't have integrations, scheduling reports to send to your managers and partners regularly, and setting up documents to merge automatically. Setting up these automations and integrations can really help your firm save time and money.

10



"WHAT WE LEARNED" DOCUMENT

Create a list of everything you learned from COVID. Include what you learned from a people perspective, from a technology perspective, etc. Maybe you found out your people were more resilient than you thought. You may have discovered that most, if not all, of your processes could or couldn't be effectively handled remotely. Maybe you were dismayed that your hardware or software needs were deficient. Maybe you thrilled that your attorneys were able to enter their own time or edit pleadings rather than marking them up for paralegals. Take the document and analyze it, make changes, and ensure you aren't caught in the lurch again. I have a lot of clients who are almost paralyzed by their inability to make seemingly big decisions. This time, you had to make them, whether you liked it or not. Next time rip off the band-aid. Don't wait for a pandemic to clean up your house!

It might not seem like this is the right time to be taking on new projects, especially those that might cause your firm to incur unanticipated costs. For some, it might not be, but for others, it might be the perfect time. Either way, now is the time to get your ducks in a row so you are ready to pull the trigger when the time comes. Don't miss out on this opportunity to get projects done that you might otherwise delay in a busy default environment—knock on wood—like the one we are all anticipating at the end of this tunnel. **a**



PROCESS SERVING IN A SOCIALLY DISTANT WORLD

BY: KEITH J. MCMASTER, CO-FOUNDER AND OWNER,
FIREFLY LEGAL | KEITH.MCMMASTER@FIREFLY.PRO

DUE PROCESS dates back to the year 1215 in the Magna Carta. The Magna Carta represented the “Great Charter of Freedoms.” One freedom implemented in 1354 by King Edward III was the “due process of law” and is also contained in the Fifth and Fourteenth Amendment of the United States Constitution. It guarantees that no United States citizen shall “be deprived of life, liberty, or property, without due process of law.”



Since then, a majority of this is achieved through in-person service of process. It is proven to be the most effective and commonly used method when establishing jurisdiction over a defendant. But how does service happen under the many health protections and social distancing guidelines issued by the CDC?

Companies and workers that serve civil process were predominantly classified as essential services, which allowed them to continue functioning. Professional servers nationwide tuned in to many state and federal press conferences daily to keep up to date with the latest health and safety recommendations. Members of the industry gathered together to discuss best practices through webinars, Zoom conferences, and

social media groups. Unfortunately, in the states and counties where serving was not categorized as an essential service, some firms closed permanently.

Attorneys, law firms, and their clients can be assured that the civil process industry is working hard to follow CDC guidelines. Companies and individuals vigorously clean and disinfect their work surfaces. Larger companies transitioned to working remotely when possible. Most importantly, if a server has any of the symptoms of COVID-19, they stay home. In many regions of the country, cloth face masks are a daily part of public life and are worn while serving. Process servers use gloves and hand sanitizer and practice sanitation between stops.

Regions vary, and so does contact with other in-

Attorneys, law firms, and their clients can be assured that the civil process industry is working hard to follow CDC guidelines.





dividuals. Using a face mask and gloves with sanitation procedures is enough in some jurisdictions. However, in others, social distancing may be required. There are slight differences in methods of social distancing when handing a person their legal papers. The United States Postal Service created coronavirus recommendations for certified mail and mail requiring signatures. The process serving industry has adopted many of these standards with slight adjustments. These include: avoiding doorbells, knocking on untouched areas of the door, and maintaining social distancing while requesting a litigant and explaining the documents. Another way is the server asks the notified person to back away from the doorway. After the explanation, he or she then places the court documents by the entrance before backing away and watching the notified party retrieve them. This ensures visual evidence of the documents' acceptance, which could be noted in the affidavit or proof of service.

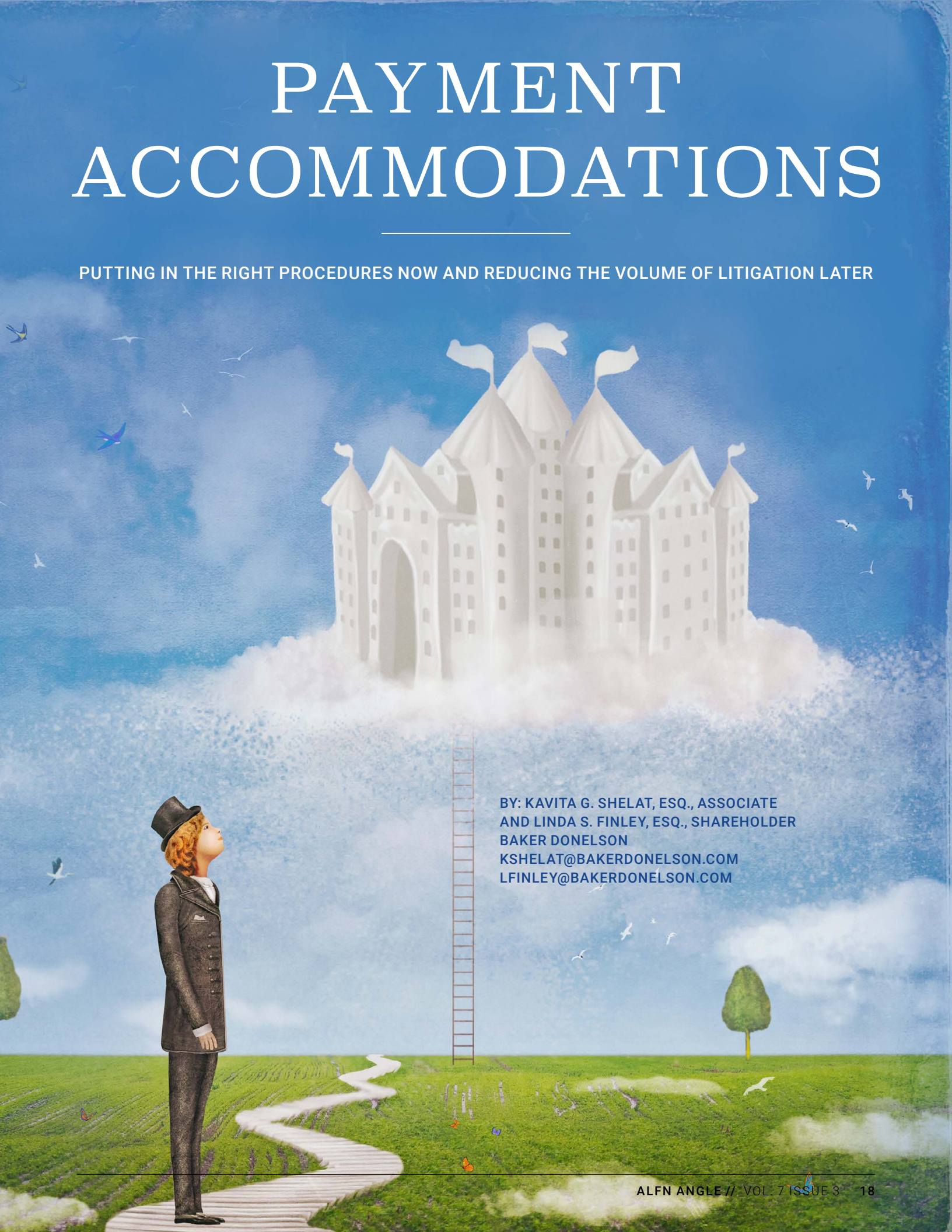
The more advanced firms enacted further assurances that the serve was completed. GPS and pho-

to-taking affirm the server was at the correct address at the specified date and time. In states where allowed, some companies have even filmed each individual serve for added confirmation. The signed affidavit or proof of service, along with these supplementary measures can promise that a defendant was informed properly.

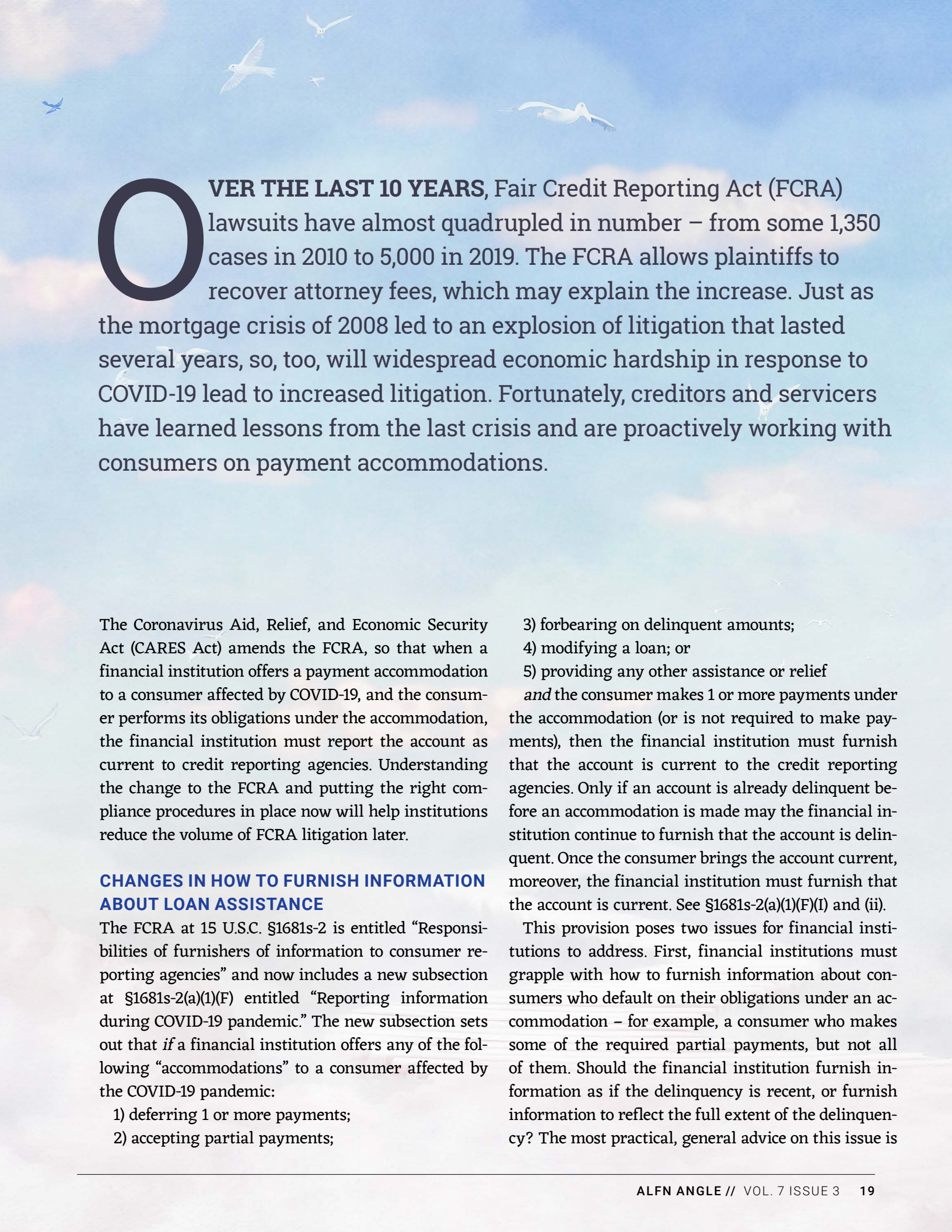
Exceptional times call for exceptional measures, but that does not detract from an individual's guaranteed rights. The professional industry of process servers is doing its best to make sure Constitutional rights are upheld to the highest standards. As the courts reopen, talk to your vendors. Although each may use different techniques, defendants' rights are not being infringed. Most businesses implemented COVID-19 procedures and they should openly discuss them. Verify they are upholding the CDC's guidelines and the USPS's modified guidelines and ask what other supplementary evidence their company is using. It is imperative, even in a socially distant world, that the Constitution prevails. **a**

PAYMENT ACCOMMODATIONS

PUTTING IN THE RIGHT PROCEDURES NOW AND REDUCING THE VOLUME OF LITIGATION LATER



BY: KAVITA G. SHELAT, ESQ., ASSOCIATE
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OVER THE LAST 10 YEARS, Fair Credit Reporting Act (FCRA) lawsuits have almost quadrupled in number – from some 1,350 cases in 2010 to 5,000 in 2019. The FCRA allows plaintiffs to recover attorney fees, which may explain the increase. Just as the mortgage crisis of 2008 led to an explosion of litigation that lasted several years, so, too, will widespread economic hardship in response to COVID-19 lead to increased litigation. Fortunately, creditors and servicers have learned lessons from the last crisis and are proactively working with consumers on payment accommodations.

The Coronavirus Aid, Relief, and Economic Security Act (CARES Act) amends the FCRA, so that when a financial institution offers a payment accommodation to a consumer affected by COVID-19, and the consumer performs its obligations under the accommodation, the financial institution must report the account as current to credit reporting agencies. Understanding the change to the FCRA and putting the right compliance procedures in place now will help institutions reduce the volume of FCRA litigation later.

CHANGES IN HOW TO FURNISH INFORMATION ABOUT LOAN ASSISTANCE

The FCRA at 15 U.S.C. §1681s-2 is entitled “Responsibilities of furnishers of information to consumer reporting agencies” and now includes a new subsection at §1681s-2(a)(1)(F) entitled “Reporting information during COVID-19 pandemic.” The new subsection sets out that *if* a financial institution offers any of the following “accommodations” to a consumer affected by the COVID-19 pandemic:

- 1) deferring 1 or more payments;
- 2) accepting partial payments;

- 3) forbearing on delinquent amounts;
- 4) modifying a loan; or
- 5) providing any other assistance or relief

and the consumer makes 1 or more payments under the accommodation (or is not required to make payments), then the financial institution must furnish that the account is current to the credit reporting agencies. Only if an account is already delinquent before an accommodation is made may the financial institution continue to furnish that the account is delinquent. Once the consumer brings the account current, moreover, the financial institution must furnish that the account is current. See §1681s-2(a)(1)(F)(I) and (ii).

This provision poses two issues for financial institutions to address. First, financial institutions must grapple with how to furnish information about consumers who default on their obligations under an accommodation – for example, a consumer who makes some of the required partial payments, but not all of them. Should the financial institution furnish information as if the delinquency is recent, or furnish information to reflect the full extent of the delinquency? The most practical, general advice on this issue is



The most practical, general advice on this issue is to 1) implement consistent procedures for all consumers with this fact-pattern; and 2) communicate with consumers on the front end about how the accommodation (and any default under the accommodation) will be furnished to credit reporting agencies.

to 1) implement consistent procedures for all consumers with this fact-pattern; and 2) communicate with consumers on the front end about how the accommodation (and any default under the accommodation) will be furnished to credit reporting agencies.

Second, financial institutions must develop parallel tracking systems for loan delinquency levels for purposes of regulatory review – one tracking system that comports with the changes to the FCRA, and one tracking system that captures the true level of delinquency in a loan portfolio.

SOME GOOD NEWS ON LIABILITY AND FEDERAL REGULATORY REASSURANCE

First piece of good news – remember that the FCRA does not provide consumers with a private right of action to bring

claims related to the initial accuracy of information furnished to credit reporting agencies. See 15 U.S.C. § 1681s-2(c)(1). Instead, a consumer must first dispute the accuracy of any information that appears on their credit report through the credit reporting agency. The reporting agency, in turn, will give the financial institution the opportunity to investigate and correct any errors. If a financial institution fails to conduct a reasonable investigation into a consumer's dispute, then the financial institution could be subject to FCRA liability. See 15 U.S.C. § 1681s-2(c)(1).

Second piece of good news—the CFPB has made clear that it wants financial institutions to work with affected consumers and provided regulatory relief and reassurance in three areas. In its April 1st policy statement, the CFPB stated that it does not intend to cite in examinations or take enforcement actions against those



The bad news is that although the CFPB's April 1st policy statement provided that the Bureau would step back from enforcing certain requirements of the FCRA as amended by the CARES Act, several state Attorneys General are not so forgiving.

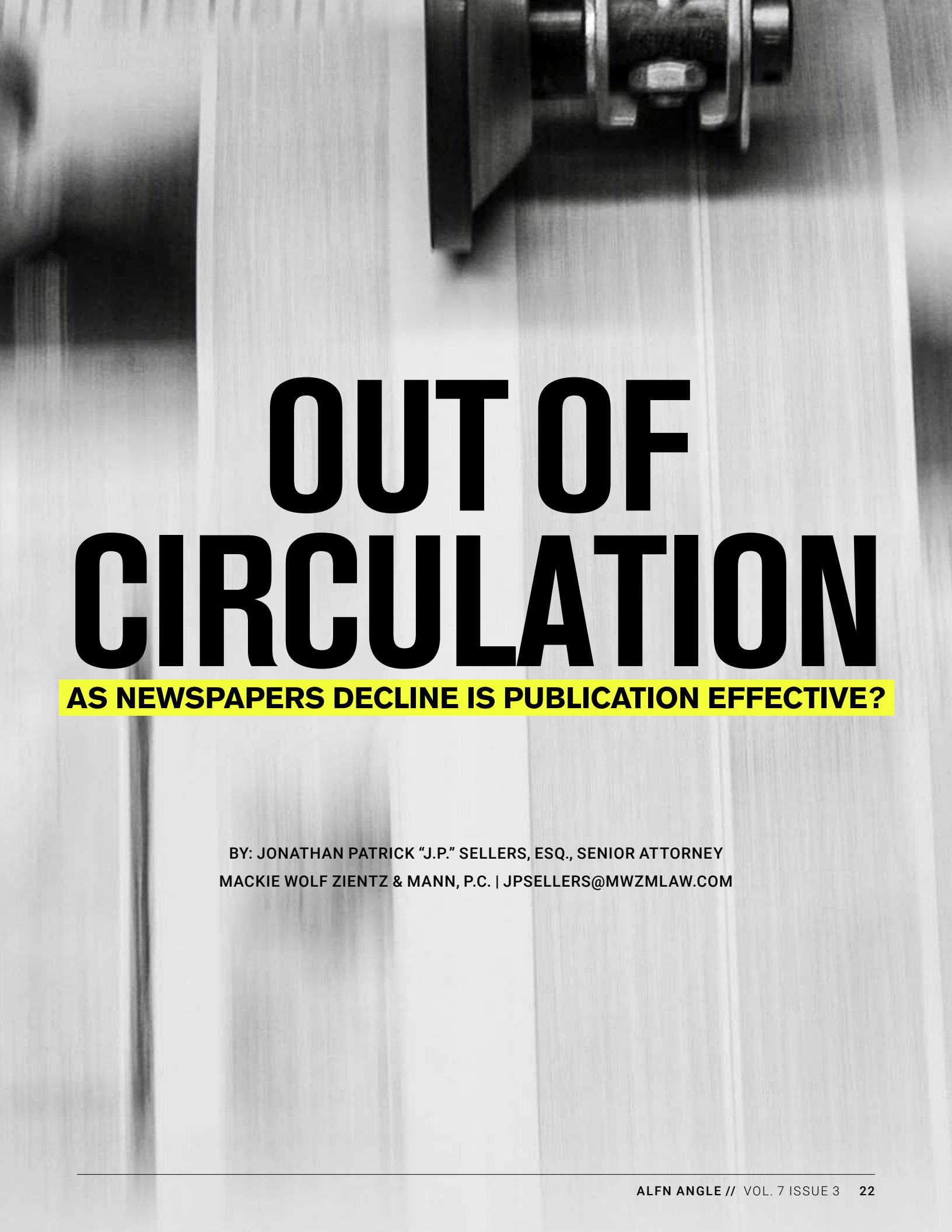
financial institutions that provide accommodations to consumers but furnish information to credit reporting agencies that an account is not current. The CFPB also recognized that financial institutions would be serving increased consumer need while operating under physical distancing conditions, and therefore, the CFPB does not intend to cite in an examination or bring an enforcement action against a financial institution making good faith efforts to investigate consumer disputes as quickly as possible, even if the dispute investigations take longer than the timeframes set out in the FCRA statute. Finally, the CFPB anticipates that financial institutions may see an increase in frivolous consumer disputes about credit reporting and encourages financial institutions to take advantage of existing statutory provisions that eliminate the obligation to investigate disputes that are reasonably determined to be frivolous or irrelevant.

SOME BAD NEWS ON STATE ENFORCEMENT AND PRIVATE LITIGATION

The bad news is that although the CFPB's April 1st policy statement provided that the Bureau would step back

from enforcing certain requirements of the FCRA as amended by the CARES Act, several state Attorneys General are not so forgiving. On April 13th, in response to the CFPB's April 1st guidance, AGs from 21 states and D.C. directed a letter to the CFPB requesting that it withdraw its April 1st guidance insofar as the guidance limited the CFPB's action. To strengthen their position, on April 28th those AGs directed a letter to the major credit reporting agencies stating that they expected compliance with the new FCRA provisions and that compliance of the provisions would be actively monitored and enforced.

While state-level scrutiny of compliance will vary across states, one constant is that FCRA private litigation will increase in every state. In fact, even if financial institutions implement effective procedures for approving and implementing accommodations, and even if financial institutions communicate the terms and consequences to their consumers, private litigation will increase for two reasons. First, mistakes will happen. Second, some consumers use litigation out of desperation—to buy time or to get further assistance. ■



OUT OF CIRCULATION

AS NEWSPAPERS DECLINE IS PUBLICATION EFFECTIVE?

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THE NEWSPAPER brings to mind a simpler time. A time when adolescents could earn spending money by delivering newspapers on their bikes. Parents would leisurely consume the news over breakfast while their kids played outside. Print was a media made to promote community and local events that were deemed unimportant in the fast paced world of television. As the world sped up, gratification became instant, and two parents in the workforce became the norm, the newspaper fell out of favor as America's news source.

Today's fast-paced and often arduous society doesn't wait for the leisurely delivery of news. Over the last two decades newspaper subscriptions have steadily dropped. Smaller newspapers have merged with larger regional publications and produced a more regionally focused product. In that time, the internet, with its instantaneous delivery method, has replaced the newspaper as the preferred media to receive print news. Similarly, the rise of social media has provided that same fast-paced media for delivering community news and events. Many newspapers have

The purpose of public notice is to relay important information to the general public. Public notice is intended to display information in a place where the public is likely to take notice of it. This notice must be accessible to the public so they can be made aware of the information and use it to make well-informed decisions.

Prior to newspapers, public notices were posted in a public area available to the entire community. As many could not read the notice, the town or community would employ a town crier. The crier would wear



lost significant income from advertising that has moved to their digital replacement. As such, many newspapers are relying on income from advertising public notices to supplement the lost revenue. But as the newspaper has been replaced as America's print news source, is it still the most effective way to get public notices to the masses?

eye-catching uniforms and would loudly announce himself to the town prior to reading and posting the public notice. As communities grew and reading became more prominent in society, public notices migrated to newspapers. At that time, newspapers were the perfect media for public notices as they were widely available and easily circulated throughout the



MOST POPULAR NEWS SOURCES IN UNITED STATES IN 2018

16%

PRINT NEWSPAPERS

20%

SOCIAL MEDIA

33%

NEWS WEBSITES

Source: Pew Research Center

community. Once an advantage for the newspaper, circulation has now become its detriment.

One of the current barriers to fulfilling the purpose of public notice through a newspaper is the lack of circulation. If an individual does not receive a newspaper they are not privy to the public notice contained within. According to the Pew Research Center from 1964 through 1992 there were roughly 60 million newspaper subscribers. Subscriptions peaked in 1983 with 63.3 million subscribers, which represent-

ed 28 percent of the population. In 2018, there were only 28.5 million newspaper subscribers. That figure represents only eight percent of the population. In comparison, one-third of U.S. citizens were newspaper subscribers in 1964.

In 2018, The Pew Research Center determined that Social Media surpassed print newspapers as a news source amongst its poll responders for the first time in the United States. Their research showed that only 16 percent of Americans rely on print newspapers as

a news source, while 20 percent rely on social media, and 33 percent rely on news websites. While television and print newspapers were in decline as a news source amongst their responders, social media and news websites both received gains. From 2016 to 2018, print newspapers declined from 20 percent, to 16 percent while social media increased from 18 percent to 20 percent and news websites increased from 28 percent to 33 percent in that two-year span.

The move toward digital news consumption and decline in print newspapers is further magnified by looking at the generational breakdown of preferred news sources. Of those interviewed by the Pew Research Center in 2018, 36 percent of 18 to 29 year olds reported social media as a news source, with 27 percent for

will not see the public notice posted in a newspaper. Even amongst those over age 65, only a minority will see the notice, although that percentage is closer to the traditional numbers that were likely to see a public notice in a newspaper in the 1960s.

Newspaper publication is a favored means of notification amongst statutes that govern foreclosure processes throughout the United States. The theory is that in the event an individual is not aware their property is at risk of foreclosure that they, or someone they know, will notice the publication of the foreclosure notice of their home in their local newspaper and they will become aware. The barrier to public notice discussed above is even more concerning when compared to the foreclosure rates amongst the vari-



news websites and only two percent for print newspapers. Amongst 30 to 49 year olds surveyed forty two percent reported news websites as a news source, with 22 percent for social media and only eight percent for print newspapers. Responders aged 50 to 64 reported their news sources as 28 percent news websites, with 14 percent social media and 18 percent print newspapers. Those responders that were aged 65 and older reported their preferred news sources as 39 percent print newspapers, with 28 percent news websites and only eight percent social media. Based on these statistics, the vast majority of individuals under aged 65

ous age groups. A 2016 study by the Urban Institute broke down the foreclosure rates by age group from 2003 to 2015.¹ While the Pew Research Center reported only eight percent of those age 30 to 49 years old used the newspaper as a news source, these individuals made up almost 40 percent of all foreclosures nationally from 2003 to 2015. Those aged 50 to 64 made up almost 30 percent of the national foreclosures, while only 18 percent reported using newspapers. While the largest group that used newspapers was the 65 plus age group at 39 percent, only a little over nine percent of that population was subject to

¹ Li, W. and Goodman, L. (2016). Comparing Credit Profiles of American Renters and Owners. Washington, DC: Urban Institute.



WHILE NEWSPAPERS STILL SERVE A PURPOSE FOR THE LOCAL COMMUNITY AND WILL ALWAYS BE A SOURCE OF NOSTALGIA, THEY ARE CURRENTLY INEFFECTIVE AT NOTIFYING THE INDIVIDUAL HOMEOWNER OR THE PUBLIC ABOUT A FORECLOSURE SALE.

foreclosure from 2003 to 2015. These statistics show that the individuals affected by foreclosure the most are the least likely to see the foreclosure notice in the newspaper. Also, as the individuals in the lower age groups continue to age, the percentages of those using newspapers as a news source are likely going to continue to decline.

Concerns of the effectiveness of public notice via newspaper are growing nationally. In 2017, 26 states introduced legislation to eliminate some form of public notice via a newspaper. In 2019, two states, Missouri and Indiana, introduced legislation to remove foreclosure notices from newspapers. Indiana's House Bill 1212 of 2019 aimed to remove foreclosure notices from the newspaper in favor of a municipal website, such as the Sheriff or County website. The bill passed the House, but did not make it through the Senate before it was defeated. In Missouri, House Bill 686

of 2019 aimed to move publication to the internet and specifically disallowed internet publication via a newspaper website. Missouri's Senate Bill 250 of 2019 similarly aimed to move publication of notices from the print newspaper to the internet. Both bills were defeated. As newspapers continue to decline as a source of news, one has to wonder how long these types of bills will continue to suffer defeat.

While social media and internet websites are outpacing the print newspaper as a news source amongst Americans, they are probably not the media of the future for public notice. Social media does focus on mostly local events and updates, but misses several of the features needed for effective public notice. First, public notice must be archived in a manner that is easy to search. Social media is not. Second, public notice must be verifiable as accurate. At this point, social media is rife with opinion and

easily manipulated and influenced by outside sources. News websites provide their readers a regional or national perspective and are not localized enough to target the audience intended for public notice.

The answer for public notice used in foreclosures may be as easy as eliminating newspaper publication. Each state provides many avenues of notice for their foreclosure processes. Most require the notice be sent to the homeowner at their last known address by first-class or certified mail, sometimes both. Most

have crowds attend their sales and do not see an abnormal amount of challenges to their foreclosure processes for lack of notice. If Texas can teach us anything it is that... the foreclosure process can proceed without newspaper publication.

In addition to the lack of circulation, newspaper publication is an expensive process that can be a deterrent to a homeowner's attempt to reinstate their loan. Often the publication process can account for almost one third or more of the foreclo-



states require that the notice be posted in a public place, such as the County Courthouse. Many states also require that the notice be posted on the internet, though not on a news website. These other opportunities for notice of the foreclosure sale are much more effective and targeted than publication in a print newspaper and are therefore more likely to catch the attention of the homeowner.

To determine the effectiveness of a foreclosure process without the newspaper publication component, we need only look to our second most populous state, Texas, for the answer. Texas has many of the notice components described above such as mailing of the notice to the homeowner, filing the notice with the County Clerk and posting the notice at the County Courthouse. Texas does not require newspaper publication as part of the foreclosure process. Even though they do not have publication, they still

sure costs. When a borrower is already struggling financially, adding additional cost is not beneficial to either party. Another concern is the stigma with publicly announcing the foreclosure in the newspaper. A common complaint heard throughout the other 49 states is from a homeowner whose inability to make their mortgage payment becomes the source of gossip once someone in their town sees the notice in the newspaper.

While newspapers still serve a purpose for the local community and will always be a source of nostalgia, they are currently ineffective at notifying the individual homeowner or the public about a foreclosure sale. The cost to the homeowner through expense and stigma are far higher than the benefit of newspaper publication. It is time to follow Texas' lead and eliminate the publication of foreclosure notices in the print newspaper. ■



DOING MORE IN A MORATORIUM

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With the arrival of COVID-19 on American shores in early 2020, an unprecedented quarantine and economic shutdown have confined us to our homes. Each and every one of us have had our lives changed recently, with some more affected than most, but in the end, our home is our safe place and while we want it to stay that way, the longer shutdowns last and the greater the social and economic impact of the public health crisis, the greater the risks posed to those safe places. Sometimes we need to seek protections afforded to us from the Bankruptcy Code to do so, and now is no different.

As I brainstormed ideas for this article on the Sunday before my son's first birthday, I tried to think of what we all can do as professionals in this practice to help. Everything seems different in our communities, our jobs, our personal lives, our finances, and our futures. Things are different for those who still have the financial ability to make their mortgage and Chapter 13 plan payments, and things are different for those who unfortunately cannot. Over the coming years, even the most financially responsible people may seek help and guidance through the bankruptcy process, whether it is trying to reorganize through a Chapter 13 or liquidate through a Chapter 7. It is our job and responsibility to help. What can we all do as professionals in this practice to make things easier and beneficial to all our clients? What can we all do to accomplish our mutual goals of a confirmed bankruptcy plan? What can we all do to make sure that an already confirmed plan is successful with these unprecedented financial challenges? Moratoriums legislated by the CARES Act expired as of May 17,

2020. However, Fannie Mae, Freddie Mac, FHA, and VA have each issued additional directives extending the moratoriums until August 31, 2020, excluding vacant and abandoned properties. As these moratoriums are set to expire, the effects of this will soon start making its way into the Bankruptcy world, and we must all be prepared for the next steps.

WHAT CAN WE ALL DO TO DO MORE IN A MORATORIUM?

We must all work together to make the financial impacts less severe on each of our clients, both Debtors and Creditors. We also must acknowledge the adjustments that the Trustees, the Court, and their staff have had to make to their local rules and procedures to accommodate these times and we must learn these rules and procedures and be efficient with them. Some Debtors and their counsel have made applications to the Court to modify plans or suspend payments. Some Creditors and their counsel have had been forced to make major changes during these unpredictable times. Here at Padgett Law Group, we have made it our priority to focus on continuity.

How should we handle it when a Debtor requests a 3-month forbearance right now? What do we do in three, six, or nine months when this forbearance comes to an end? Should we, as Creditor's counsel, be objecting to Motions to Suspend or Forgive Payments when a Debtor has four prior unsuccessful bankruptcies in the last two years? Should Debtor's counsel even be filing a Motion on that Debtor's behalf? How does the CARES Act affect our clients' interests? These are all questions we in our practice are constantly asking ourselves these days, and the best solution is more communication with our clients, counsel, and the Trustees. For ex-

MITIGATION (NOUN)

[mit-i-gey-shuh n]

the act of mitigating, or lessening the force or intensity of something unpleasant, as wrath, pain, grief, or extreme circumstances;

the act of making a condition or consequence less severe;

the process of becoming milder, gentler, or less severe;

a mitigating circumstance, event, or consequence.



We must all
work **TOGETHER**
to make the
financial impacts
LESS SEVERE
on each of our
clients, both
Debtors and
Creditors.

ample, the recently adopted CARES Act allows Chapter 13 Debtors who have already confirmed a plan to modify the plan based on a material financial hardship caused by the pandemic, including extending their payments for seven years after their initial plan payment was due. If we as Creditor's counsel see a Motion to Suspend Plan Payments three months while extending the plan in a conduit district, it is better practice to communicate with Debtor's counsel and the Trustee prior to just blindly objecting.

At PLG, we are filing Notices of Forbearance with the Court for some clients, for others Agreed Responses to Motions to Suspend Payments, and yet with others with an extensive history, we are objecting to these motions. Another option has been filing Notice of Payments Changes pursuant to Rule 3002.1 based on a forbearance to reflect \$0.00 owed during the forbearance period. There are no set rules or procedures on how to handle these requests from Debtors while also being in full compliance with the Bankruptcy Code. Much of what we do falls in line with local Court and Trustee preferences and procedures while also using the Code as guid-

ance, and it is extremely important that we all keep our hand on the pulse to make sure we continue to do the same.

As Creditor's counsel we evaluate each case that comes in, balance that with our client directives and determine the best option in each specific district with each specific Trustee. It is Debtor's counsel's responsibility to evaluate their clients and determine if they are a good candidate to request such relief from the Court and not take advantage of this unprecedented situation. We then rely on the Trustees to balance out these plans and these requests to see if each Debtor warrants such relief from the Court or if they are abusing the system and taking one too many bites of the apple. In the end it is our job and responsibility as a team to be proactive and facilitate and answer to these questions well before it gets in front of the Court. The Court's time is valuable, especially in these unique times, and we as professionals must be extraordinary and continue to communicate with each other and with our clients, so we are realizing the most efficient use of that time. Together we must all take a few extra steps to do more in this moratorium. **a**



14 Days to Act

DENIAL OF RELIEF FROM STAY IS FINAL
AND APPEALABLE WITHIN 14 DAYS

BY: SHIRLEY PALUMBO, ESQ., LL.M. BANKRUPTCY SR. COUNSEL
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FILING

a petition for bankruptcy automatically operates as a stay of all collection and litigation against the debtor and most acts against the debtor's property.¹ The stay is one of the most extraordinary features of the Bankruptcy Code.² The scope of the prohibition against the initiation or continuation "of a judicial, administrative, or other action or proceeding against the debtor" on a pre-petition claim is extremely broad.³ The stay may be terminated by order of the bankruptcy court pursuant 11 U.S.C. § 362(d). On January 14, 2020 the Supreme Court held that the bankruptcy court's denial of relief from stay is a final, appealable order.⁴

The background of *Ritzen Group, Inc. v. Jackson Masonry, LLC*, involved a state court breach of contract litigation. Ritzen had filed a lawsuit for breach of contract in state court against Jackson Masonry, LLC. Prior to the state court trial, Jackson Masonry, LLC filed for bankruptcy relief, thereby triggering the automatic stay. Upon Ritzen filing a motion for relief from stay, the bankruptcy court denied it with prejudice. Consequently, Ritzen did not have the right to renew the request for relief in the same case. Ritzen proceeded to file a proof of claim, which Jackson Masonry, LLC, as Debtor, objected to and, ultimately, Ritzen's claim was disallowed. After three hundred and sixteen days (316) from the date of that the order denying relief from stay had been entered⁵ and after having his claim disallowed, Ritzen appealed the order of the United States Bankruptcy Court for the Middle District of Tennessee. The



District Court dismissed the appeal as untimely. On further appeal, the Court of Appeals for the Sixth Circuit affirmed. Due to a split in the circuit courts, certiorari was granted.

Justice Ginsburg, writing for a unanimous United States Supreme Court, held that a bankruptcy court's order unreservedly denying relief from the automatic stay is a final, immediately appealable order.⁶ The court stated that the order constitutes a discrete dispute within the bankruptcy that creates a basis for a final appealable ruling.⁷ Thus, resolving a split amongst circuits on the procedural issue of whether such orders are immediately appealable.

A final order is one that "ends the litigation and leaves nothing for the court to do but execute the judgment."⁸ An interlocutory order, on the other hand, decides some intervening matter that requires some other action to enable the court to adjudicate the cause on the merits.⁹ Hence, an appellate court has no authority to consider interlocutory orders without

¹ 11 U.S.C. § 362(a)(1) (2019).

² *In re Soares*, 107 F.3d 975 (1st Cir. 1997).

³ See *Balaber-Strauss v. Reichard* (*In re Tampa Chain Co.*), 835 F.2d 54, 55 (2d Cir. 1987); *Ellison v. Nw. Eng'g Co.*, 707 F.2d 1310, 1311 (11th Cir. 1983); *Grabek v. Worldwide Specialty Merch., Inc.*, 611 So. 2d 590, 591 (Fla. 4th DCA 1993) (Farmer, J., concurring).

⁴ *Ritzen Group, Inc. v. Jackson Masonry, LLC*, No. 18-938, --- U.S. ---, 140 S.Ct. 582, 205 L.Ed.2d 419, 2020 WL 201023 (U.S. Jan. 14, 2020).

⁵ Brief of Appellee, *Jackson Masonry, LLC*, 2018 WL 2394062 (6th Cir. 2018).

⁶ *Jackson Masonry, LLC* 140 S.Ct. at 582.

⁷ *Jackson Masonry, LLC*, 140 S.Ct. at 586.

⁸ *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978); *In re IBI Sec. Serv., Inc.*, 174 B.R. 664, 668 (E.D.N.Y. 1994).

⁹ *Thomas v. Grigsby*, 556 B.R. 714, 718 (D. Md. 2016) (citing to *In re Rood*, 426 B.R. 538, 546 (D. Md. 2010).



Overall, the decision provides certainty to creditors as to when the relief from stay order is appealable. Certainly, any appeal of the order will have to be filed within 14 days, pursuant to Rule 8002 of the Federal Rules of Bankruptcy Procedure.

first the appellant filing for leave of court,¹⁰ whereas an appeal of a final order may be taken simply by filing a notice of appeal with the bankruptcy clerk within 14 days of the entry of the order.¹¹ A bankruptcy petition may encompass various controversies in one case, and, accordingly, orders become final when the orders “definitively dispose of discrete disputes within the overarching bankruptcy case.”¹² In other words, once the controversy is decided it is “final.”¹³ In essence, the court found that a motion for relief from the automatic stay is a distinct procedural component within the bankruptcy case, which, upon adjudication is final, and therefore immediately appealable.

The Supreme Court rejected Ritzen’s argument that the order could, in certain circumstances, be deemed non-final such that the creditor could wait to get a ruling on the allowance of its claim before it seeks appellate review of the stay relief issue reasoning that (a) Congress made orders in bankruptcy cases immediately appealable under 28 U.S.C. § 158(a) of the United States Code if they finally dispose of discrete disputes within the larger bankruptcy case, clearly denoting that the statutory language of 158(a) provides for appeals from final deci-

sions in bankruptcy “proceedings” as distinguished from bankruptcy “cases.” (b) Postponing an appeal would delay appellate review of fully adjudicated disputes which, in addition would increase cost to the debtor or the estate that is contesting the claim. (c) The court beheld its prior opinion in *In Bullard v. Blue*.¹⁴ In *Bullard*, the Supreme Court had to determine whether an order denying confirmation of a chapter 13 plan was a final order for purposes of appeal. In that case, the court held that an order denying confirmation of a Chapter 13 plan is not final because the plan could be amended, thus denial of confirmation of the plan did not conclude the confirmation process.

Overall, the decision provides certainty to creditors as to when the relief from stay order is appealable. Certainly, any appeal of the order will have to be filed within 14 days, pursuant to Rule 8002 of the Federal Rules of Bankruptcy Procedure.

Nevertheless, the decision does not meet the realities of a bankruptcy case in that a determination that the order is final might prevent a creditor from seeking relief from stay at a later time in the bankruptcy proceedings, even where newly discovered

¹⁰ 28 U.S.C. § 158(a)(3) (2019); See also, *Ocwen Loan Servicing v. Marino* (In re *Marino*), 949 F. 3d 483, 489 (9th Cir. 2020).

¹¹ Fed. R. Bankr. P. 8001(b) (2019).

¹² *Ritzen Group, Inc. v. Jackson Masonry, LLC*, No. 18-938, --- U.S. ---, 140 S.Ct. 582, 205 L.Ed.2d 419, 2020 WL 201023 (U.S. Jan. 14, 2020) (citing to *Bullard v. Blue Hills Bank*, 575 U.S. 496, 501, 135 S.Ct. 1686, 191 L.Ed.2d 621 (2015)).

¹³ 28 U.S.C.A. § 158(a) and Fed. R. Civ. P. 8002(a)(1) (2019).

¹⁴ *Bullard v. Blue Hills Bank*, 575 U.S. 496, 135 S. Ct. 1686, 1692-93, 191 L.Ed.2d 621 (2015).



As it stands, best practice will require treatment of the order denying relief as final and consequently will require an appeal to be filed promptly. Missing the deadline would be hugely detrimental.

evidence or additional circumstances may justify a grant of relief.¹⁵ A motion for relief from stay is usually filed to continue or commence collection or court proceedings on claim, to which claim's validity is not being questioned or disputed. These motions usually seek to terminate or modify the stay on validly perfected collaterals or leases, insurance licenses for lack of adequate protection or delinquency, which, a debtor may cure either under a modified plan or directly with the creditor without affecting any further their relationship or the case. In practice, a change of circumstance usually permits another motion for relief from stay to be filed. Numerous opportunities to maintain a business relationship are provided to a debtor and a creditor by denying a motion for relief from stay without prejudice, especially where the debtor falls behind in post-petition payments, like in the case of a mortgagor and a mortgagee. The dynamics of the case allow for the stay to be granted with conditions or denied depending on the challenges presented at the moment of the proceedings. The bankruptcy court may be inclined to support "cause" for granting relief at a later time upon new or re-occurring circumstances where a collateral is being placed at risk.

As it stands, best practice will require treatment of the order denying relief as final and consequently will require an appeal to be filed promptly. Missing the deadline would be hugely detrimental. As Judge

Ginsburg put it, there is "no second bite".¹⁶

In *Ritzen*, Justice Ginsburg stated the decision is final when it unconditionally resolves the dispute.¹⁷ As such, the parties should get a clear determination from the bankruptcy court as to the finality of the decision when subsequent conditions denying a motion for relief from stay must be met. In addition, where the parties wish the matter to be heard again or renewed, the parties should request that the order be entered without prejudice to its rights to bring the matter back before the bankruptcy court. Moreover, local rules may be amended to proposed that denial of an order for relief from stay filed by secured creditors with validly perfected interests are to be entered without prejudice unless clearly stated otherwise. Similarly, a finding of adequate protection should clarify if it will impact a future request for relief from stay for "cause" or other. If a party is not certain whether the order represents a final or interlocutory order, it seems best to appeal and safeguard the rights of the appellant by filing both the notice to appeal and a motion for leave to appeal before the 14 day deadline. Also, the parties that entertain agreed or consent orders or stipulations to the relief motion should be cautious to add language whether they consider the agreement sought as final or not. Lastly, consider that meeting the deadline [to appeal] is not good enough and beating the deadline is the expectation.¹⁸ ■

¹⁵ In re: Wright , 186 B.R. 394, 396 (Bankr.D.Md.1995). See also, In re Chesapeake Contractors, Inc., 413 B.R. 254 (Bankr. D. Md. 2008) (holding that assignee would not be permitted to retry a final judgment on relief from stay adding evidence not provided at prior trial.)

¹⁶ Jackson Masonry, LLC , 140 S.Ct. at 591.

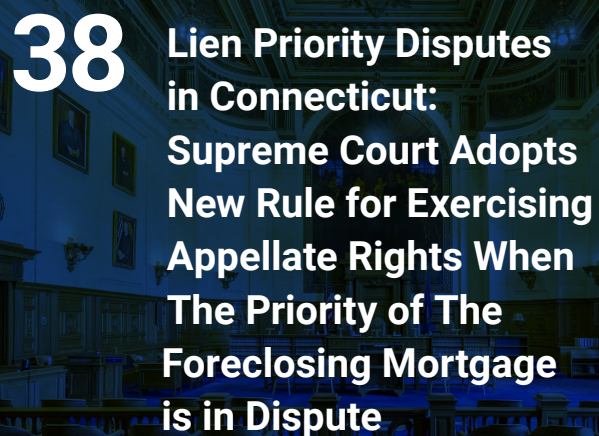
¹⁷ See note 7.

¹⁸ Dhirubhai Ambani

STATE SNAPSHOT



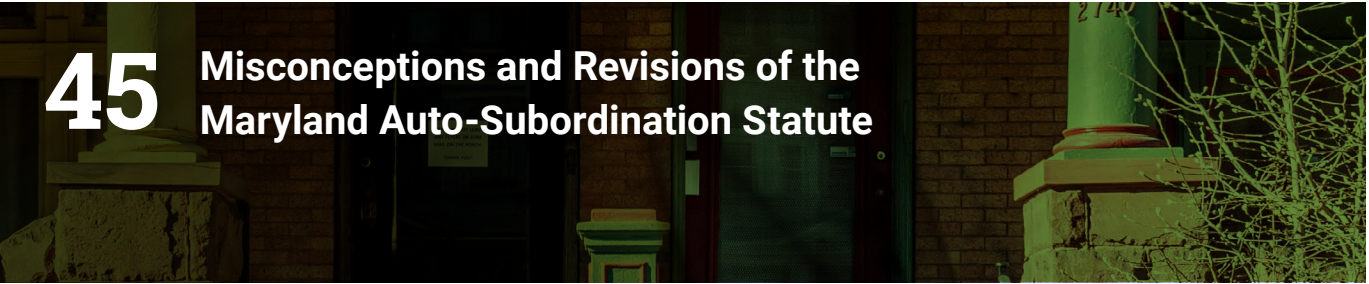
36 Connecticut Appellate Court Holds Defective EMAP Notice Strips Court of Subject Matter Jurisdiction



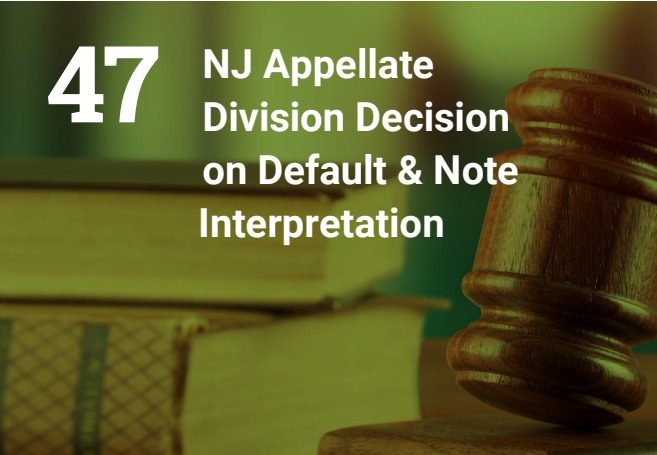
38 Lien Priority Disputes in Connecticut: Supreme Court Adopts New Rule for Exercising Appellate Rights When The Priority of The Foreclosing Mortgage is in Dispute



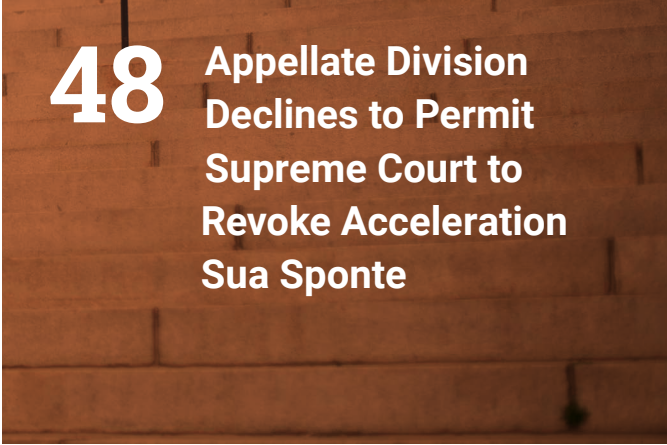
41 Mortgagor in Possession Required to Pay Use and Occupancy Pending Appeal



45 Misconceptions and Revisions of the Maryland Auto-Subordination Statute



47 NJ Appellate Division Decision on Default & Note Interpretation



48 Appellate Division Declines to Permit Supreme Court to Revoke Acceleration Sua Sponte



Connecticut Appellate Court Holds Defective EMAP Notice Strips Court of Subject Matter Jurisdiction



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On March 24, 2020, the Connecticut Appellate Court held that the pre-foreclosure statutory notice requirement under the Emergency Mortgage Assistance Program (“EMAP”) implicates subject matter jurisdiction, and vacated a foreclosure judgment with instructions to dismiss the case. In the decision, MTGLO Investors, LP v. Hammons, 196 Conn. App. 636 (2020), the Appellate Court held that an EMAP notice is required to be sent by the actual mortgagee of record at the time a foreclosure is commenced, and that a prior notice issued by another owner of the loan is improper. In Hammons, the foreclosing lender relied upon an EMAP notice sent in a prior foreclosure action by the servicer for a different mortgagee and owner of the loan. The trial court entered a Judgment of strict foreclosure after an Affidavit of Compliance with EMAP was filed, which included the notice from the prior action¹. The borrower, who was self-represented, filed an appeal, challenging the validity of the EMAP notice, and argued that it implicated subject matter jurisdiction.

¹ The prior action was dismissed for inactivity under the dormancy program.



Indeed, a Connecticut mortgage foreclosure is a common law cause of action, and has remained a common law cause of action since before 1825. Swift v. Edison, 5 Conn. 532 (1825). Strict foreclosure is a common law process. Society for Savings v. Chestnut Estates, Inc., 176 Conn. 563, 568 (1979). Unfortunately, this argument was not made by lender's counsel in the Appellate Court. Therefore, the Appellate Court concluded that the EMAP notice provision implicates subject matter jurisdiction, and reversed the trial court, with instructions to dismiss the action. The Appellate Court also held that the only party who can satisfy the EMAP pre-foreclosure notice requirement is the actual mortgagee as recorded on the land records, or its agent. Specifically, the Appellate Court held that the phrase "such mortgagee" under EMAP means the mortgagee who is filing a foreclosure, as opposed to a notice previously sent by an earlier servicer or owner of the loan. The statutory regime contains a definitions section, which defines mortgagee as "the original lender under a mortgage, or its agents, successors or assigns" under CGS Section 8-265cc.

The limited authority that EMAP implicates subject matter jurisdiction is based on trial court decisions which applied an incorrect analysis. The Superior Court cases which have concluded that EMAP notice requirements implicate subject matter jurisdiction exclusively rely upon an analysis of statutory causes of action, such as a summary process, and its statutory notice to quit requirement. People's United Bank v. Wright, No. FSTCV106004126S, 2015 Conn. Super. LEXIS 694 (Conn. Super. Ct. Mar. 30, 2015). Because a Connecticut foreclosure is a creature of the common law, strict interpretation of statutory causes of action is not applicable. Moreover, it is a maxim of statutory construction that when the legislature is modifying or changing common law rights, it must state explicitly that it intends to abrogate common law rights. DaimlerChrysler Serv. v. Comm'r Revenue Services, 274 Conn. 196, 216 (2005). There is nothing

in the legislative history of the 2009 amendments to EMAP to demonstrate that the legislature intended to abrogate the common law right of foreclosure. The amendments did not expand or limit the ability to file a mortgage foreclosure, nor did the 2009 amendments address limitations on subject matter jurisdiction. An in-depth review of other Connecticut pre-foreclosure statutory notices, such as mediation and protection from foreclosure, have not been interpreted as implicating subject matter jurisdiction. Rather, those statutory foreclosure notices have been interpreted to require compliance- prior to the entry of a foreclosure judgment- notwithstanding use of the term "shall" with regard to the notice being provided at the time of commencement of the action. The remedy for a defective notice under those provisions is to stay the foreclosure until the notice is issued. The EMAP statutes have the same built in provision under § 8-265dd(b).

Fortunately, the time to file a Petition for Certification remains in the Hammons case due to Covid-19. In the interim, Lenders with Connecticut mortgage loans can consider an EMAP checklist after the Hammons decision as follows:

1. Was the EMAP notice sent by the mortgagee of record or its agent before the foreclosure was filed?
2. If not, can a substitution of the Plaintiff align the facts of your case with Hammons?
3. If not, is there a basis for a forbearance plan or other loss mitigation to negotiate a resolution of the case and obtain a release from the consumer, to eliminate the risk that a consumer fee claim, which could be filed after the dismissal of the suit?

A lender faced with the dismissal of a foreclosure is likely to face a consumer fee claim under Connecticut's fee shifting statute, CGS 42-150bb. Accordingly, Connecticut loans in loss mitigation review should be scrubbed for compliance with EMAP after Hammons. ■



Lien Priority Disputes in Connecticut

Supreme Court Adopts New Rule for Exercising Appellate Rights When The Priority of The Foreclosing Mortgage is in Dispute

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THE CONNECTICUT SUPREME COURT¹, in a matter of first impression, has held that when the priority of a foreclosing plaintiff's mortgage is in dispute, there is an immediate right to appeal from the entry of a judgment of foreclosure by sale. Historically, the right of appeal arose after the sale had occurred during the Supplemental Judgment stage of the case. Lenders with mortgages subject to a lien priority dispute now have the ability, prior to an auction of the property, to have their lien position litigated and affirmed on appeal in instances in which the foreclosing plaintiff's mortgage is in dispute.

In *Saunders*, the subject condominium was encumbered by a \$565,000 mortgage executed in 2008 by KDFBS, LLC. However, the designation of the sole member of the company was omitted in the grantor clause of the mortgage, and the town clerk indexed the deed under the sole member's personal name rather than that of the limited liability company. In 2009, KDFBS, LLC, took out a second mortgage for \$110,000 on the unit. The 2009 mortgage became delinquent, and that lender sought to foreclose its mortgage, and named the 2008 mortgagee as a defendant. A second count sought a declaratory judgment that the 2008 mortgage was subordinate to the 2009 mortgage based on the indexing error. After a trial, the Superior Court entered a Judgment of foreclosure by sale, and held that the 2008 mortgage was subordinate to the 2009 mortgage. The owner of the \$565,000 mortgage then filed an appeal, which was dismissed by the Appellate Court for lack of a final judgment. A Petition for Certification was granted by the Connecticut Supreme Court, which reviewed whether the Appellate Court's dismissal of the initial appeal was proper.

The Connecticut Supreme Court reversed the Appellate Court, and found that a final judgment had been entered by the trial court, clarifying the law on when a party may appeal a determination of lien priority. The Supreme Court noted that historically, lien priority disputes among junior creditors (those other than the foreclosing mortgagee), are typically addressed in a foreclosure by sale at the supplemental judgment stage under CGS 49-27. In wading through the appellate waters in this area, the Supreme Court quoted extensively from *Connecticut Foreclosures*, Caron and Milne, regarding the timing to exercise appellate rights in lien priority disputes. In adopting a new rule on when to exercise appellate rights when the priority of a foreclosing mortgage is in dispute, the Connecticut Supreme Court stated as follows:

Finally, to the extent that practical and pragmatic considerations may be taken into account to bolster our final judgment determination, they weigh strongly in favor of permitting an appeal before the sale has been ratified. As the authors of the foreclosure treatise observe, the ability to

¹ *Saunders v. KDFBS*, 2020 Conn. Lexis 124



Saunders provides practical assistance to lenders with mortgages subject to a lien priority dispute. Should a lender find that the priority of its mortgage is in dispute, it has the option of foreclosing that mortgage and litigating its priority, prior to any auction.

calculate an appropriate bid on the property is impaired by the uncertainty of whether the foreclosing plaintiff or a defendant encumbrancer has first priority. See D. Caron & G. Milne, *supra*, § 9-2:2.1, p. 542. This concern has been cited by another jurisdiction as a compelling reason “for requiring an appeal to be perfected in a foreclosure action from a judgment entry decreeing sale and determining the mortgage to be the first and

best lien upon the land.” *Queen City Savings & Loan Co. v. Foley*, 170 Ohio St. 383, 388, 165 N.E.2d 633 (1960).

Saunders provides practical assistance to lenders with mortgages subject to a lien priority dispute. Should a lender find that the priority of its mortgage is in dispute, it has the option of foreclosing that mortgage and litigating its priority, prior to any auction. **■**

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Mortgagor in Possession Required to Pay Use and Occupancy Pending Appeal

Bank of New York Mellon v. Alton King, Jr.

SJC-12859 (June 17, 2020)

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THE MASSACHUSETTS SUPREME JUDICIAL COURT (“SJC”) issued a recent decision in the case of, Bank of New York Mellon v. King, et al, (“King”) which involved a post mortgage foreclosure eviction in the Commonwealth of Massachusetts.

FACTS AND TRAVEL

The defendant in the King case defaulted on a mortgage loan in 2015. The mortgage loan was secured by the defendant’s home in Massachusetts. The default was not cured, and as a result, the lender foreclosed the mortgage in 2018. The lender was the high bidder at the foreclosure sale and became the record owner of the property. A post foreclosure summary process action was filed in the Housing Court seeking possession of the property. The defendant was the former mortgagor, who answered the complaint and filed a counterclaim alleging that the foreclosure sale was void for failure to strictly comply with the foreclosure process.

A Judge of the Housing Court determined as a matter of law that the lender had a superior right of possession and entered judgment for possession in favor of the lender. Defendant appealed and filed a motion to waive the appeal bond based on indigency. The lender objected to the waiver and filed a motion to set a bond and use and occupancy payments pending appeal.

In support of the lender’s claim for a bond and use and occupancy, it provided an affidavit from a licensed real estate broker attesting to the fair market rental value of \$5,000 per month for the property. The opinion was based on both an interior and ex-

terior inspection of the property. The property was a 7,500 square foot single-family residence with five bedrooms, one and a half baths, an indoor basketball court, a three-car garage, and an in-law apartment.

After hearing, the trial judge determined that the defendant was indigent, had a non-frivolous defense, and was entitled to a waiver of the bond. However, the trial judge ordered the defendant to make monthly use and occupancy payments of \$4,000 as a condition of the appeal.

Defendant appealed the decision of the issuance of the use and occupancy order to a single justice of the Appeals Court. The single justice concluded that the imposition of periodic payments pending appeal was an error of law since the bond was waived. The single justice was persuaded by the opinion of another single justice in the unrelated case of *BONY v. Dundon*¹. The Plaintiff appealed the decision of the single justice to a full panel. The SJC, sua sponte, removed the case to the SJC.

STATUTORY SCHEME

As a condition of an appeal from a summary process judgment for possession, a party filing the appeal shall give a bond in an amount set by the Court pend-

¹ The legal issues raised in *Dundon* are substantially similar to those before the *King* Court. The Single Justice decision in *Dundon* was appealed to a full panel of the Appeals Court. Oral argument was heard on May 13, 2020 and is pending decision.



ing disposition of the appeal. G.L. c 239 Section 5(e). In 1969, the Legislature amended G.L. c 239 Section 5 to permit an indigent defendant to seek a waiver of posting a bond pending appeal of a summary process action. Kargman v. Dustin, 5 Mass.App.Ct 101, 110 (1977). The statute was further amended two years later, which permitted a judge, after granting a waiver of the bond, to require an occupant to pay rent as it became due as a condition of possession of the premises pending appeal. Id. Thus, the statutory scheme is to require both a bond and periodic payments as a condition of a summary judgment appeal.

Notwithstanding, the Legislature's intent was not to automatically relieve an occupant from payment of rent after the date of the waiver. The Housing Court is by statute the proper venue for summary process actions and would be authorized by both G.L. c 239 Section 5 and Section 6 to issue orders relating to payment of use and occupancy as rent. Prior to the decision in King reviewed several issues related to post foreclosure evictions in the matter of Adjarvey v. Central Div. of the Housing Court Dep't, 481 Mass. 830, 858 (2019). At that time the SJC was very clear that "even if the appeal bond is waived, a court may order the tenant to make 'use and occupancy' payments" as rent pending appeal. Id.

The decision in King is consistent with the controlling bond statutes. Specifically, "[t]he court **shall require** any person for whom the bond or security provided for in subsection (c) has been waived to **pay**

in installments as the same becomes due, pending appeal, all or any portion of **any rent** which shall become due **after the date of the waiver.**" G.L. c 239 5(e) (emphasis added). Thus, the Legislature intended for there to be both the payment of a bond and periodic payments.

While Section 5 assumes a traditional landlord tenant relationship, G.L. c 239 Section 6 is tailored to post foreclosure ownership of property where the parties may not be in privity of a rental contract. See U.S. Bank Trust, N.A. v. Minnehan, 95 Mass.App.Ct 1123 *1 (2019), 2019 WL 3763958(citing Adjarvey at 858). In addition to the payment of a bond, an occupant in possession of a foreclosed property is obligated to pay "a reasonable amount **as rent**" until the plaintiff obtains possession. G.L. c 239 Section 6.

Section 6 does not contain a provision for waiver of a bond, rather it relies on the procedure set forth in Section 5(e). However, the Single Justice, in following Dundon, selectively chose to apply only portions of Section 5(e) as it applied to the waiver of the bond. While recognizing the Court's ability to waive the bond, the Single Justice ignored the provision that states that "the court shall require any person for whom the bond or security provided for in subsection (c) has been waived to pay in installments as the same becomes due, pending appeal, all or any portion of any rent which shall become due after the date of the waiver". G.L. c 239 Section 5(e). The King Court held that Sections 5 and 6 are interconnected and must



The bond and periodic payments of rent were intended to be separate and distinct considerations for the Court to consider. The waiver of one due to indigency is not a waiver of the other.

be read as a whole statutory scheme. King at page 10.

Section 5 controls post foreclosure summary process actions except as otherwise provided for in G.L. c 239 Section 6. Minnehan at *2. The provisions of Section 6 do not cause the procedures of Section 5 to be inapplicable to appeal bonds in eviction matters. Id. See Novastar Mortgage, Inc. v. Saffran, 83 Mass.App.Ct 1119 (2013), 2013 WL 1131271 (Appeals Court rejected argument that an order for periodic payments in favor of a foreclosing entity during the pendency of an appeal was improper). In reading the statutes together, there is no question that the Legislature intended there to be separate security of a bond and periodic payment of rent as a condition of an appeal of a summary process appeal. Kargman v. Dustin, 5 Mass.App.Ct 101, 110 (1977); See Eaton v. Federal Nat. Mortg. Ass'n, 462 Mass. 569, 583 (2012) (statutes that relate to the same subject matter should be construed as harmonious to avoid an absurd result). The statutory scheme related to payment of a bond pending appeal is thus dependent upon a full and fair reading of both G.L. c 239 Section 5 and G.L. c 239 Section 6. Home Savings Bank of America v. Camillo, 45 Mass. App.Ct 910, 911 (1998).

The Legislature's designation of reasonable amount as rent read in conjunction with Section 5(e) results in only one interpretation of the statutory scheme. The bond and periodic payments of rent were intended to be separate and distinct considerations for the Court to consider. The waiver of one due to indigency is not a waiver of the other. Adjarkey at 859. King at page 14.

FAIR USE AND OCCUPANCY

The fair use for occupancy of a property is the equivalent of rent when the intent is to prevent an occupant from use of property without compensation to the owner. King at 13-14. Unlike rent, use and occu-

pancy is intended to compensate the property owner for the use of the property without creating a landlord tenant relationship. Davis v. Comerford, 483 Mass. 164, 169-170 (2019). The calculation of use and occupancy is not arbitrary but based on fair market rental value of the property. Id. As demonstrated in the Davis case, use and occupancy and rent go to the very essence of payment for use of property.

The basis for the Single Justice's decision in declining to uphold the use and occupancy order was that there was no landlord tenant relationship between lender and the defendant. The rationale for that decision is that there was no obligation for the defendant to pay "rent" and therefore the Housing Court was without authority to enter such an order for use and occupancy. This specific question was considered by the King Court. In doing so, the Court considered whether the Legislature intended "rent" to be interpreted beyond the classic landlord-tenant relationship. King at page 15.

In a close reading of the statute, the Legislature chose to include the term "as rent" rather than "rent" in Section 5. The terms rent and use and occupancy are synonymous and have been used interchangeably to describe the payment for use of another's property. King at page 21-22; Ghoti Estates, Inc. v. Freda's Capri Restaurant, Inc., 332 Mass. 17, 26 (1954); Novastar Mortgage, Inc. v. Saffran, 83 Mass.App.Ct 1119 (2013) 2013 WL 1131271; Adjarkey v. Central Div. of the Housing Court Dep't, 481 Mass. 830, 858 (2019); See G.L. c 186 Section 3. The clear and unambiguous language of a statute is conclusive as to legislative intent and should be given their plain meaning. City of Worcester v. College Hill Properties, LLC, 465 Mass. 134, 138-139 (2013).

The fact that there is no traditional landlord tenant relationship between the lender and the former



mortgagor (a tenant at sufferance) is irrelevant. Fair market rental value is a fair equivalent of rent for the purposes of Section 6. Minnehan at *2. This interpretation of the statute is consistent with the purpose of Legislative intent. It is not employed to deny an otherwise meritorious appeal but is intended to discourage frivolous appeals and provide financial security to the property owner. Id.; King at page 18.

The use of terms such as “landlord” and “tenant” have come to be synonymous with a property owner and occupant. “[T]hese terms do not fully capture all of the individuals who initiate and defend against summary process evictions.” Adjartey at Note 7. Such terms include purchasers of property after a mortgage has been foreclosed and holder overs following a sale (such as a foreclosure sale). Id.

In King, the Single Justice ignored Section 6 by holding that there was no tenancy relationship between the parties in finding that defendants do not owe rent. This completely ignores the intent of the Legislature that there shall be payment to the plaintiff . . . “of a reasonable amount **as rent** of the land from the day when the mortgage was foreclosed until possession of land is obtained by the plaintiff”. G.L. c 239 Section 6 (emphasis added). However, the SJC determined that the use of “as by the Legislature was to respect the technical difference between tenancy at sufferance and tenancy at will. King at page 19.

The King Court made it clear that it is irrelevant whether the parties to a summary process action are in privity of contract. The payment of “rent,” or its equivalent, during the pendency of an appeal serves the dual role of discouraging frivolous appeals and providing a degree of financial protection during protracted litigation². Minnehan, at *2.

CALCULATING THE PERIODIC PAYMENT

Having determined that use and occupancy is equivalent to “rent,” the King Court considered the reasonableness of such periodic payments. The Court determined that there must be a fair balancing of both

parties’ interest in setting periodic payments. Such factors may include (1) fair rental value of the property; (2) merits of the defense; (3) monthly mortgage payment; (4) number of months mortgage is delinquent; (5) amount of real estate taxes; (6) expected duration of the litigation; and (7) respective financial condition of the parties. The Court was mindful of the financial hardship to all parties during an appeal. However, “a defendant who remains in possession after foreclosure is not entitled to remain on the property for nothing, even if he or she is indigent and even if he or she has a nonfrivolous defense.” King at page 25. Recognizing the hardship on the indigent, the Court also noted that “the duty to care for the poor and the needy is on the state and not on the landlord”. Id. (quoting Jones v. Aciz, 109 RI 612, 632 (1972)).

An occupant holding over after a foreclosure sale is not entitled to live in the property free of any payment, even if that person is indigent. King at page 25. Thus, fairness dictates that after a judgment issues in summary process action, there should be a payment of rent or use and occupancy pending an appeal. Id.

The SJC held that the use and occupancy payment ordered in King was based on the fair market rental value and was less than the principal and interest payment required by the defendant’s mortgage. The defendant was in default of the mortgage payment for 21 months prior to the date that the notice to cure was issued. The Court also considered the large tax bill, which was \$29,040 per year, and the fact that the defendant was “clearly hopelessly over his head” with respect to the finances associated with the property. The decision of the trial court was proper and there was a fair balancing of interests in setting the periodic monthly payments.

CONCLUSION

The decision helps to level the playing field when mortgagors appeal eviction decisions and seek to avoid posting a bond or paying fair use for occupation of the property pending what is normally a lengthy appeal. ■

² In the case of a post foreclosure eviction, a foreclosing entity has substantial costs associated with the property such as payment of taxes, insurance, and property preservation.



Misconceptions and Revisions of the Maryland Auto-Subordination Statute

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ONE OF THE LEGISLATIVE changes in Maryland that became effective on June 1, 2020 is a revision to the law that allows for the automatic subordination of junior liens, which can be found in Md. Code Real Property §7-112. This change will have an effect on the refinance of mortgages and deeds of trust.

Maryland first enacted this automatic subordination code section in October 2013, which allows a mortgage or deed of trust that refinances a first mortgage or deed of trust to maintain its priority of other junior liens, provided certain requirements are met. This statute essentially allows lenders to forego seeking permission from that of a junior lienholder so that a refinanced mortgage or deed of trust could remain in a priority position in the land records for title purposes. Prior to this statute, a lender refinancing a first mortgage or deed of trust with a junior lienholder would have to either seek permission from the junior lienholder and have a subordination agreement signed or pay off the junior lienholder to achieve the desired goal of being in first position for the purposes of the land records and title.

While on the surface, the ramifications of this rule would seem to have a wide impact on the lending industry, in reality, the narrowness of the statute somewhat limits that impact. In order for a lender to take advantage of the auto-subordination provisions, the loan that is being refinanced must be secured by a first deed of trust or mortgage which encumbers residential property. Under the statute residential property is defined as real property that is improved by four or fewer single-family dwelling units that are designed principally and intended for human habitation Md. Code Real Property §7-112(a)(5).

Once these first hurdles are cleared, a lender will

find further obstacles involving the interest rate and amount of principal of a new refinanced loan that further limit the usefulness of this statute. First, the interest rate of a new loan must be a lower rate of interest than the interest rate provided for in the first deed of trust or mortgage being refinanced. Secondly, the principal amount of a new loan cannot exceed the unpaid outstanding balance of the first mortgage or deed of trust plus an additional amount of \$5,000.00, which is meant to cover any costs for closing and escrow fees.

Even though a refinance loan may meet the requirements outlined above so that a junior lien will be automatically subordinated, there are additional exceptions which will disqualify a refinance loan from gaining the benefit of the automatic subordination provisions. If the principal amount secured by the junior lien exceeds \$150,000 then the automatic subordination provisions do not apply, and the refinance lender would need to seek the permission of the junior lienholder or payoff the junior lienholder to preserve the desired priority title position.

The way Md. Code Real Property §7-112(a)(3) defines a junior lien further limits the situations in which these provisions are useful. For purposes of this code section, a junior lien is defined as a mortgage, deed of trust, or other security instrument that is subordinate in priority to a first mortgage or deed of trust. The statute further specifically excludes judgment



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liens or liens filed under the Maryland Contract Lien Act as junior liens.

Therefore, property that has judgment liens or Maryland Contract Lien Act liens attached would likely not be able to gain the benefit of automatic subordination of a junior mortgage as a refinance would lose its title position to the judgment liens. Further, a common scenario where a refinance would simply pay off the judgment lien would also not be able to utilize the automatic subordination provisions, as a refinance loan amount would then likely exceed the requirement that the loan amount cannot be greater than the unpaid outstanding balance of the first mortgage or deed of trust plus an additional amount of \$5,000.00.

On June 1, 2020 the newest change to this code section became effective. This change added another exception to automatic subordination in that if the junior lien is securing a loan having a 0% interest rate

and the loan is made by a state or local government agency then the automatic subordination statute will not apply.

This change was requested by the Maryland Department of Housing and Community Development. The assistance the Department provides to homebuyers is in the form of small down payment loans that are typically secured by a junior deed of trust under their Downpayment and Settlement Expense Loan Program. The Department had asked for the change because they were unable to require repayment of the junior liens at the time of a refinance of a first mortgage or deed of trust if these loans were automatically subordinated to a refinance that met all the other requirements of the statute. Although this change does not have a significant impact on how this statute operates, it further erodes the limited usefulness of the automatic subordination provisions. ■



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NJ Appellate Division Decision on Default & Note Interpretation

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WE ARE EXCITED to share a recent decision of a case handled by Friedman Vartolo, LLP. In *US Bank Trust, National Association, as trustee for Bluewater Investment Trust 2018-1 v. Robert A. Bard, et al.* Superior Court of New Jersey, Appellate Division, 04/28/2020, 2020 WL 2036643, Friedman Vartolo LLP successfully defended the appeal of a summary judgment award to the foreclosing lender. New Jersey's Appellate Division rejected Defendant-borrower Robert A. Bard's arguments, including that the subject mortgage loan did not require Defendants to make monthly loan payments.

This appeal follows the foreclosure of a 2008 mortgage loan granted to Defendants Robert and Eleanor Bard in the amount of \$634,000. The loan was modified in 2014, and the modification agreement was recorded in 2015. Defendants defaulted on their loan payments in September 2017.

In December 2018, Plaintiff moved for summary judgment and to strike Defendants' answer. In their opposition to the summary judgment motion/cross-motion to dismiss the complaint, Defendants alleged, most notably, that they never defaulted under the terms of the subject promissory note because their modified loan allegedly provided them the option to forego monthly installment payments in favor of a lump sum payment at the loan's maturity in 2054.

In granting summary judgment, the trial court ruled that Plaintiff established its *prima facie* right to foreclose by showing, among other things, that Defendants borrowed the sums alleged and defaulted in their repayment of the loan. "The Defendant has acknowledged failure to pay, although he has asserted that he believed in his interpretation of the note that he could just wait and pay it all at the maturity date. The [c]ourt is satisfied in reading the note that is not an option...the note generally provides for monthly payments and provides for a default upon

failing to make the monthly [payment]. [T]he note [clearly] contemplated that monthly payments would be made." *US Bank Trust, Nat'l Assoc., as Trustee for Bluewater Investment Trust 2018-1 v. Robert A. Bard, et al.*, No. A-4371-18T4, 2020 WL 2036643, at *1-2 (N.J. Super. Ct. App. Div. Apr. 28, 2020).

On appeal, Defendant argued that the trial court erred in granting summary judgment because there existed a material dispute of fact as to whether Defendants defaulted. The Appellate Division affirmed the trial court's decision, rejecting Defendant's argument that no payment was due until 2054. "As the trial judge noted, the plain language of the note and the modification agreement provided no support for Defendants' theory, clearly required regular monthly payments, and set a fifteen-day deadline before Defendants were considered in default. Defendants' unsupported theory did not create a material dispute in fact thwarting the entry of summary judgment." *Id.* at *2-3.

The Appellate Division also rejected Defendants' arguments concerning Plaintiff's proof of compliance with the notice requirements of TILA and New Jersey's Fair Foreclosure Act. The court ruled that these arguments were either improperly before the court, to the extent they were not raised to the trial court, or unsupported by the record of the case. ■



Appellate Division Declines to Permit Supreme Court to Revoke Acceleration Sua Sponte

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IN **CITIMORTGAGE, INC.** etc. v. Salko, 179 A.D. 3rd 1009, 2020 WL 465495, 2020 N.Y. Slip Op. 00566, following dismissal of the first complaint for lack of jurisdiction for improper service, mortgagee's successor brought a foreclosure action against mortgages, and the mortgage counterclaims against mortgagee for alleging violations of the FDCPA. In the Appellate Divisions review, they held that denial of the cross motion that conditioned discontinuance of the foreclosure on tolling mortgage interest, late fees and expenses from the alleged default, or payment of attorney's fees, was warranted. However, the trial court's sua sponte order removing the previous acceleration of the mortgage debt and directing the mortgage remain as an installment contract was not warranted. <https://law.justia.com/cases/new-york/appellate-division-second-department/2020/2018-02512.html>.

In March 2005, **Salko** executed a note in the principal amount of \$937,500 in favor of ABN AMRO Mortgage Group, Inc. On May 20, 2011, CitiMortgage, Inc. as successor by merger to ABN AMRO, commenced an action against the **Salkos**, among others, to foreclose the mortgage. The Defendant served an answer and, thereafter, moved to dismiss the complaint insofar as asserted against him for lack of personal jurisdiction due to improper service. In an order dated April 18, 2012, the Supreme Court granted the Defendant's motion, which was unopposed, and dismissed the complaint insofar as asserted against him.

In June 2014, the Plaintiff commenced this action to foreclose the mortgage against the Defendant only, with the intention of consolidating this action with the 2011 action against the remaining Defendants.

The **Salkos** interposed an answer with affirmative defenses and a counterclaim alleging, inter alia, violations of the FDCPA. In March 2017, the Plaintiff moved to discontinue this action without prejudice and to dismiss or sever the **Salkos'** counterclaim, asserting that it had determined that it could not prove its compliance with RPAPL 1304. The Defendant cross-moved to condition the discontinuance of the action

on the payment of counsel fees to him, the tolling of all mortgage interest, late fees, and expenses from the date of the alleged default on the mortgage loan, and the severance and continuation of the counterclaim.

"In an action of an equitable nature, the recovery of interest is within the court's discretion. The exercise of that discretion will be governed by the particular facts in each case, including any wrongful conduct by either party" (*Prompt Mtge. Providers of N. Am., LLC v. Zarour*, 155 A.D.3d 912, 915, 64 N.Y.S.3d 106 [internal quotation marks omitted]; see CPLR 5001[a]; *BAC Home Loans Servicing, L.P. v. Jackson*, 159 A.D.3d 861, 862, 74 N.Y.S.3d 59; *Citicorp Trust Bank, FSB v. Vidaurre*, 155 A.D.3d 934, 934-935, 65 N.Y.S.3d 237; *U.S. Bank N.A. v. Williams*, 121 A.D.3d 1098, 1102, 995 N.Y.S.2d 172; *Dayan v. York*, 51 A.D.3d 964, 965, 859 N.Y.S.2d 673).

Here, the Appellate Court found the equities supported denying those branches of the motion for tolling of interest, late fees, expenses, legal fees etc. (which was requested) However, they found the Supreme Court's sua sponte, revocation of the acceleration and mortgage remaining as an installment contract exceeds the discretion of the Court and modified the Orders accordingly. **■**



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