LEGAL LEAGUE 100 QUARTERLY

SPRING 2018 — **COMMITTED TO THE INDUSTRY, INTEGRITY, AND BEST PRACTICES**

National

ESCROW IN BANKRUPTCY—IS IT TIME FOR A RULE CHANGE?

By: Anjali Khosla, Rubin Lublin, LLC

If you have ever dealt with a home mortgage in bankruptcy, whether on the creditor or debtor side, you have probably been frustrated by an escrow account. Escrow in bankruptcy can be extremely difficult to understand/calculate, and the current bankruptcy rules do not help the situation. Particularly, what do we do with escrow accounts if the loan, at the time of filing, is current? Federal Bankruptcy Rule 3001(c)(2)(C) requires an escrow statement prepared "as of the date the petition was filed" without consideration of the status of the loan. Since borrowers file bankruptcy throughout the year without regard to the renewal dates of their escrow accounts, the running of a mid-year analysis wreaks havoc on loans that are current at the time of filing and can increase costs for both debtors and creditors.

The new Proof of Claim form that requires the 410A attachment and loan histories, forces escrow advance deficiencies and projected escrow shortages to be calculated and listed separately. More often than not, if a debtor is current on their mortgage payments at the time of filing, they do not consider the possibility of a projected escrow shortage when listing treatment of the home mortgage in their chapter 13 plan. Running an escrow analysis in the middle of the year often results in a projected escrow shortage due either to recent disbursements and/or impending disbursements. This projected escrow shortage then results in an objection to the debtor's plan because no arrears were listed to be disbursed by the trustee. Objection fees are typically assessed back to the debtor as the creditor's interests were not adequately protected in the proposed plan. Placing the projected shortage in the plan increases trustee fees for the disbursement of arrears and some trustees do not allow debtors to make ongoing payments directly when there are pre-petition arrears of any sort. In order to avoid objection and increased fees for all, creditor and

"Escrow" continued on page 6

National

HOA LIENS: HOW "SUPER" IS SUPER PRIORITY?

By Jessica Skoglund Mazariego, Gilbert Garcia Group, P.A.

Because of their "super" status, Homeowners Association liens are a particular form of confusion and frustration for mortgage servicers and their attorneys. The content covers legal and process issues that affect a servicer's ability to assert their position in a property and any other relevant subtopics.

Super-priority is more or less the circumvention of the traditional legal concept of "first in time, first in right," meaning first to notice, file, or record is first in right or that an association's lien has higher priority over previously recorded liens. Currently, 21 states require the foreclosing lender to pay between six months and 12 months, or some variation of periodic assessments to the association at some point during the lender's foreclosure process.[i]

Depending on the state, the beneficiary of the super-priority liens are either condominiums or homeowners associations, or both. As of November 2017, four out of the top five states with the highest foreclosure rate have super-priority HOA statutes.[ii]

In Florida, associations must be named in the foreclosure process as a subordinate lienholder and interested party[iii] and the foreclosing lender cannot assign the bid to a third-party before the sale[iv] in order to qualify for the allowable statutory "safe harbor" provisions.[v] The 2008 Florida statutes were amended to allow an

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States: Colorado

10TH CIRCUIT SHEDS LIGHT ON WHETHER FDCPA APPLIES TO NON-JUDICIAL FORECLOSURES IN COLORADO

By Monica Kadrmas, Barrett Frappier & Weisserman

A Tenth Circuit decision has ruled that the Federal Fair Debt Collection Practices Act (FDCPA) does not apply to non-judicial foreclosures in Colorado. *Obduskey v. Wells Fargo,* 879 F.3d 1216 (10th Cir., 2018). In 2007, Plaintiff, Dennis Obduskey (Obduskey) obtained a loan originated by Magnus Financial Corporation secured by his real property. Obduskey defaulted on this loan in 2009. Several uncompleted foreclosure actions were initiated over the course of six years and again in 2014, then servicer Wells Fargo (Wells Fargo), retained counsel, McCarthy Holthus, LLP (McCarthy), to initiate a nonjudicial foreclosure.

Once retained, McCarthy sent Obduskey a letter containing language indicating that McCarthy, "may be considered a debt collector attempting to collect a debt," and included the amount owed, the current creditor, and advising Obduskey that they had been, "instructed to commence a foreclosure." Obduskey responded to said letter disputing the debt, but it was alleged McCarthy initiated foreclosure proceedings without replying to Obduskey's response. Obduskey filed a civil action in the United States District Court for the District of Colorado. Amongst other claims, Obduskey alleged violation of the FDCPA. The District Court dismissed all claims and Obduskey appealed to the United States Court of Appeals for the Tenth Circuit.

The relevant legal questions on appeal were whether the district court was correct in dismissing Obduskey's claims, specifically here, whether Wells Fargo and McCarthy were "debt collectors" for purposes of the FDCPA, and whether the FDCPA applied to nonjudicial foreclosure proceedings. The court affirmed the district

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I AM POSITIVE THAT THE SECOND HAND ON A CLOCK ALWAYS MOVES AT THE SAME PACE …

Positive and yet there is a little part of me that feels like the hand is moving faster and faster. By the time this hits publication, I will have concluded my two-year term as the Chair of our Advisory Board. First, it has been an honor and privilege serving on behalf of our fantastic membership. During these turbulent and challenging times for both our industry and our membership, we as a Board have worked to point the bow of our ship progressively forward.

Over the last two years, we have increased our membership by eight firms and our state representation by four states. We have streamlined and created efficiencies within our subcommittee structure, developed a recurring webinar program, and built a stronger bridge to our sibling association, the National Mortgage Servicing Association. In addition, we have organized and attended some amazing Summits, all while supporting our membership during difficult times. For all of this, I want to thank our entire Advisory Board made up of Vice Chair Michelle Gilbert and members Caren Castle, Adam Codilis, Roy Diaz, Erin Laurito, David Maroske, Rich Nielson, and Tony Van Ness.

I would also like to thank the team at the Five Star Institute (FSI) for all of their support and effort in helping the League grow while sustaining its principal core values. In FSI President and CEO Ed Delgado, we have a champion for our entire industry, and I am truly grateful for his counsel, support, and friendship.

In the '80s and early '90s, while I was in middle and high school, members of our industry were dealing with the fallout of the Savings and Loan Crisis. At the time, I didn't understand it and only years later did I realize the impact it had on the financial services industry. By the end of 1995, as a result of the crisis, there were 747 failed institutions.

Young associates joining our firms today were 16 years old at the beginning of the mortgage crisis. In the coming years, as that epic period in our industry moves further and further into the rearview mirror, we need to continue to teach, discuss, and share the history of that time with the next generation of attorneys, servicers, and industry vendors.

Over time, pendulums have a history of shifting; corners that were rigid begin to smooth out. Some movement, like the reduction of over-regulation, is good for the industry. The softening of excessive compliance, oversight, and audits can make for a more efficient operation. But if the pendulum shifts too far, if the corner becomes fully rounded, we run the risk of repeating the past.

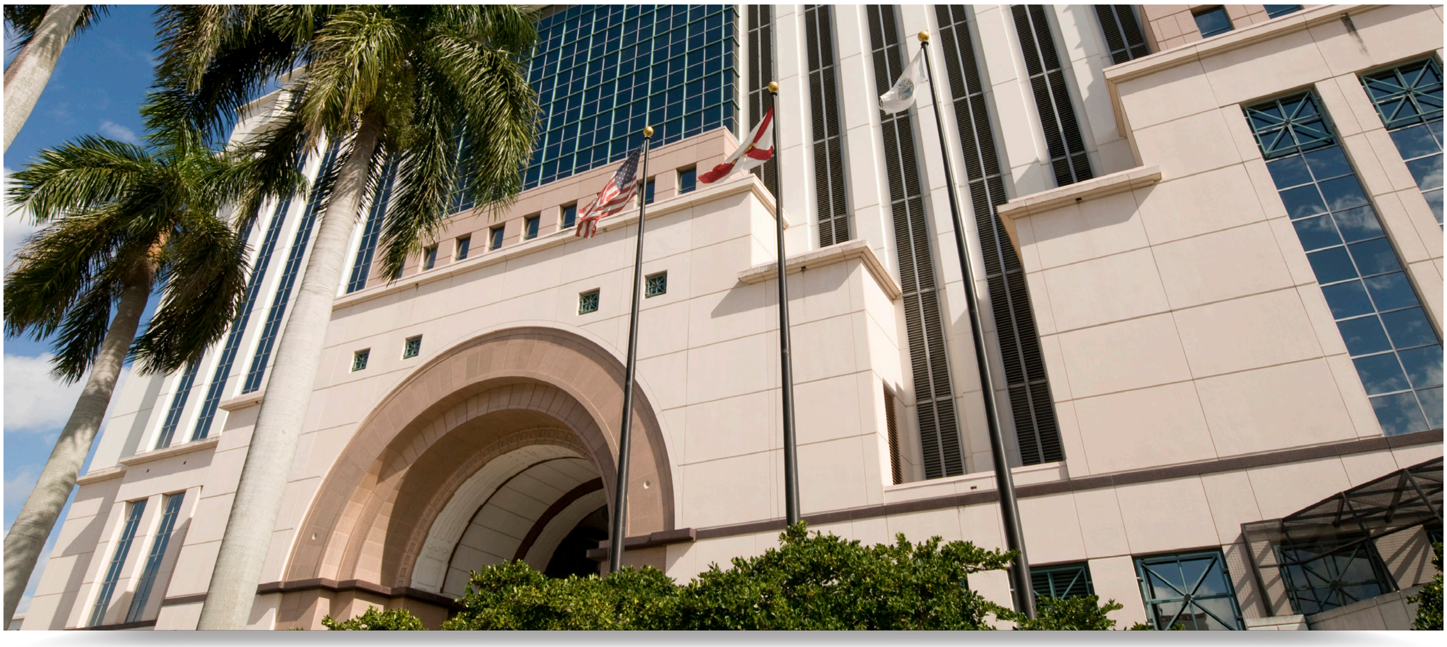
This is where we come in. Within our forum, the Legal League must continue to lead by example. We must provide the most relevant content in an environment of collaboration that will allow servicers and attorneys to ensure the great work we did in the last decade continues for decades to come. To that end, there are so many ways to get you or members of your firm or servicing operation involved. I promise, however much you give, you will get back in spades.

Thank you to our membership for making this happen. I truly look forward to working with all of you for many years to come.

NEIL R. SHERMAN, Schneiderman & Sherman, P.C.

Chairman, Legal League 100

Neil R. Sherman is Managing Attorney of Schneiderman & Sherman, P.C. He joined the firm in 2002 focusing his practice in the areas real estate law, and specifically bankruptcy, foreclosure, and eviction processes. Sherman currently oversees all aspects of the firm's operations including, but not limited to, the firm's foreclosure, bankruptcy, eviction, REO, title, and litigation departments. Sherman is a licensed title agent and regularly speaks on legal issues affecting the lending community. He can be reached by phone at 248.415.0530 or by email, nsherman@sspclegal.com.



States: Florida

SUBSTITUTED PLAINTIFF ACQUIRED STANDING WHEN THE ORIGINAL BLANKLY ENDORSED NOTE IS SURRENDERED

By Roy Diaz, SHD Legal Group

In a recent holding, the Fourth DCA affirmed a final judgment of foreclosure and clarified its position on standing as it pertained to a substituted party plaintiff. *Spicer v. Ocwen Loan Servicing, LLC*.[i] In Spicer, there was no dispute that the original plaintiff had standing because it possessed the original note, endorsed in blank, and attached a copy of the endorsed note to its complaint. However, an issue arose as to standing later in the case when the original plaintiff filed the original note with the clerk of court prior to moving to substitute the new party plaintiff, Ocwen. Although the original blankly endorsed note was in the court file and surrendered to the court at trial, the borrowers argued Ocwen failed to present sufficient evidence to establish it was a holder or a non-holder in possession at the time of judgment.

The lower court disagreed, finding Ocwen's evidence of standing to be sufficient:

"[The original plaintiff's] motion to substitute Ocwen as the party plaintiff specifically referenced the Note. Since the Note was bearer paper… Ocwen proved it had possession of the endorsed in blank original note at the time of trial, by virtue of it being in the court file of the case of which it was the party plaintiff."

The Second DCA reached the opposite conclusion in *Geweye v. Ventures Trust* 2013-I-H-R, [ii] finding that a substituted plaintiff "could not establish that it was the holder or non-holder in possession for purposes of standing" since the original plaintiff filed the original, blankly endorsed note with the clerk before moving to substitute the new plaintiff. This court reached a similar conclusion in *Creadon v. U.S. Bank,*[iii]stating: "Creadon's original note had been filed in the registry of the court years before U.S. Bank appeared in the suit. Therefore, U.S. Bank simply could not have been holding the note or been a non-holder in possession with standing to foreclose the mortgage."

On appeal to the Fourth DCA, the borrowers, relying on Geweye, again argued that Ocwen never "held" the note because the clerk of court, rather than Ocwen, had physical possession of the bearer instrument.

Ultimately, the Fourth DCA in Spicer distinguished Geweye on its facts and affirmed the lower Court's entry of judgment for the bank. The court noted:

"It is not entirely clear as to which basis the [Geweye] court's ultimate holding was founded upon…However, we believe the court's opinions[iv], viewed in their entirety, indicate the results were based upon specific facts distinct from those facts here."

The Court then surmised that in Gewye, "the court relied upon the fact that the original plaintiff's motion to substitute asserted only the mortgage had been assigned, as opposed to the note and mortgage."[v] The court explained:

"Here, the original plaintiff did specifically reference the note in the motion to substitute party plaintiff …"[vi] The court then concluded:

"The transferred standing a substituted plaintiff acquires from the original plaintiff, coupled with the presentation of the original note indorsed in blank, provides the substituted plaintiff standing to foreclose the mortgage."

In its holding the Fourth DCA acknowledged the fact the original note was in the physical possession of the clerk of courts and never physically held by the substituted plaintiff before being surrendered at trial. Ostensibly, in so holding, the court found the possession issue to be immaterial for purposes of determining standing.

This holding is helpful in clarifying the court's position regarding some of the nuances which arise when a substituted plaintiff enters a pending foreclosure and proceeds to judgment. It is important to note this decision is of persuasive value, but not precedential value, to the other four District Courts of Appeal. It will be interesting to see how the other district courts, especially the Second district, address similar standing issues in the future.

***Roy Diaz** is the shareholder of SHD Legal Group P.A. in Ft. Lauderdale, Florida. Diaz has been a member of the Florida Bar since 1988. He has concentrated his practice in the areas of real estate, litigation and bankruptcy. He has represented lenders, servicers of both conventional and GSE loans, private investors and real estate developers throughout his career with an emphasis on the mortgage servicing industry for over 20 years.*

[i] No. 4D16-2335, 2018 Fla. App. LEXIS 317 (Fla. 4th DCA Jan. 10, 2018)
[ii] The Court also based its holding on the fact that the substituted plaintiff failed to produce any evidence that the original plaintiff transferred the note to the substituted plaintiff, noting that the assignment attached to the motion to substitute party plaintiff only referenced a transfer of the mortgage. Geweye v. Ventures Trust 2013-I-H-R, 189 So. 3d 231, 233 (Fla. 2d DCA 2016).
[iii] Creadon v. U.S. Bank N.A., 166 So. 3d 952, 954 (Fla. 2d DCA 2015).
[iv] The Court in Spicer also distinguished the facts of Houk v. PennyMac Corp., 210 So. 3d 726 (Fla. 2d DCA 2017) finding the bank "failed to present any summary judgment evidence to show it had standing to enforce the lost note which had been specially indorsed to a different lender."
[v] Spicer, 2018 Fla. App. LEXIS 317, at *8-9.
[vi] Spicer, 2018 Fla. App. LEXIS 317, at *9.

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court's ruling.

Not a Debt Collector for Purposes of the FDCPA

The FDCPA at 15 U.S.C. § 1692(a)(6)(F) excludes from the definition of debt collector "any person collecting or attempting to collect any debt … which was not in default at the time it was obtained by such person." Because the loan was not yet in default at the time Wells Fargo became the servicer or became the assignee of the debt, Wells Fargo is not a debt collector under the FDCPA. Although the court found McCarthy failed to respond to a verification of debt request pursuant to 15 U.S.C. § 1692(g), they held McCarthy was not a debt collector for purposes of the FDCPA.

The FDCPA Does Not Apply to Nonjudicial Foreclosures

Plain Language of the Statute

The FDCPA defines "debt" as "obligation of a consumer to pay money" (15 U.S.C. § 1692a(5)). The Court held that the plain language of the statute imposes liability only on entities attempting to collect money. McCarthy argued that because a nonjudicial foreclosure in not an attempt to collect money nor is the consumer under any obligation to pay money, FDCPA doesn't apply. The Tenth Circuit agreed.

Policy Considerations

While the Court's interpretation of the plain language of the statue is controlling, it also noted that its holding is supported by several policy considerations. First, interpreting the FDCPA to apply to nonjudicial foreclosure proceedings conflicts with Colorado foreclosure law such that it would be impossible for foreclosing parties to properly notice interested parties in accordance with C.R.C.P. 120 without violating the FDCPA's prohibition on communication with 3rd parties under 15 U.S.C. §1692c (a)(2). Additionally, Colorado foreclosure law requires the foreclosing party to post notices of the proceedings at the subject property, whereas the FDCPA requires a debt collector to cease communicating with a borrower once the collector knows the borrower is represented by an attorney. Absent a clear manifestation of Congress' intent to supersede state law, the Court here declined to interpret the FDCPA such that it supplants Colorado's foreclosure law.

Importantly, the Court noted that the holding is limited to the facts of this case and nonjudicial foreclosures. Obduskey, 879 F.3d at 1223. Liability may be imposed in cases of judicial foreclosure because of the underlying deficiency judgment, or in cases where foreclosure proceedings are used to threaten or pressure consumers to pay on a debt, neither of which are the facts in this case.

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States: Minnesota

MINNESOTA SUPREME COURT UPHOLDS STRICT STATUTE OF LIMITATION ON FORECLOSURE CHALLENGES ALLEGING STATE LAW DUAL TRACKING VIOLATIONS

By Lawrence Zielke and Kalli Ostlie, Shapiro & Zielke, LLP

In 2013 during the foreclosure crisis, the Minnesota Legislature adopted Minnesota Statutes Section 582.043 which requires mortgage servicers to notify mortgagors of loss mitigation options before referring the delinquent loan for foreclosure.[1] The statute also prohibits "dual tracking," which is the practice of moving forward with a foreclosure while simultaneously processing a loss mitigation application.[2] The statute has been troublesome to mortgage servicers because it is more broad than the federal anti-dual tracking requirements, including, but not limited to, allowing unlimited applications, and further allowing applications to be filed up to seven (7) days prior to foreclosure sale.[3]

A mortgagor has a private cause of action to enjoin or set aside a foreclosure sale based on a violation of the statute, which may result in an award of attorney fees.[4] In order to pursue a cause of action against a servicer, however, the mortgagor must record a Notice of Lis Pendens with the appropriate County Property Recorder or Registrar prior to the expiration of the mortgagor's redemption period.[5] A lis pendens is a notice filed in the public property records for a county to warn all persons that the title to certain property is in litigation, and that they are in danger of being bound by an adverse judgment.[6]

In the case of Litterer vs. Rushmore,[7] the mortgagors filed suit to set aside a foreclosure sale just days before the redemption was set to expire, alleging dual tracking violations, but failed to timely record a lis pendens required by Minn. Stat. §582.043, subd. 7(b). The case was removed to the Minnesota Federal District Court by the defendants. The federal district court granted summary judgment to Rushmore and U.S. Bank.[8] The Litterers appealed to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit certified the following question to the Minnesota Supreme Court:

"May the lis pendens deadline contained in Minn. Stat. § 582.043,Subd.7(b) be extended upon a showing of excusable neglect pursuant to Minn. R. Civ. P. 6.02?" [9]

The Minnesota Supreme Court accepted the certified question on March 24, 2017, to review whether the lis pendens requirement was a "substantive" or "procedural" requirement.

The question became one of "constitutional separation of powers." The Minnesota Constitution establishes three distinct branches: legislative, executive, and judicial. One branch cannot exercise powers belonging to either of the others unless authorized by the constitution. Whether a legal requirement is a matter of substantive or procedural law is a question of law that the court considers de novo."[10] Courts cannot use rules of civil procedure to create substantive law.

In analyzing whether the legal requirement was procedural or substantive, the court held that the requirement to record a lis pendens before the redemption period expired, was clear, unambiguous substantive law, and that "excusable neglect" under the Rules of Civil Procedure could not alter the deadline. A mortgagor's failure to record a lis pendens prior to the end of the redemption period is fatal to the ability to assert a claim under §582.043, and creates a "conclusive presumption" that the mortgage servicer complied with the statutory requirements.[11]

While the court opined that this may cause a "harsh result" in some circumstances for mortgagors, it is restrained by the Minnesota Constitution's Separation of Powers doctrine. This is a significant decision because the dual tracking statute has greatly increased foreclosure challenges. The hard and fast statute of limitations provides mortgage servicers certainty that once the redemption expires, any challenges under this state law are behind them. It also provides the REO marketing of foreclosed properties a better chance of clean and marketable title knowing that a dual tracking challenge cannot be brought post redemption. This case could have settled, but by taking on a three-year journey through the state and federal courts, the defendants did a service to the industry by obtaining a bright line to the time-period for dual tracking challenges.

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i. Minn. Stat. § 582.043, subd. 5 (2016)
ii. Minn. Stat. § 582.043, subd. 6
iii. Minn. Stat. § 582.043, subd. 6(c)
iv. Minn. Stat. § 582.043, subd. 7(a)
v. Minn. Stat. § 582.043, subd. 7(b)
vi. Black's Law Dictionary (10th ed. 2014)
vii. Full Case Name is: Thomas J. Litterer and Mary L. Litterer vs. Rushmore Loan Management Services, LLC as Servicing Agent for U.S. Bank National Association as Legal Title Trust for Truman 2012 SC Title Trust and U.S. Bank National Association as Legal Title Trust for Truman 2012 SC Title Trust, 2018 Minn. LEXIS 3, Case No. A17-0472 (Minn., Jan. 10, 2018).
viii. Litterer v. Rushmore Loan Mgmt. Servs., LLC, 2016 U.S. Dist. LEXIS 72746, Civ. No. 15-1638 (PAM/HB) (D. Minn. Jun. 2, 2016).
ix. Rule 6.02 of the Minnesota Rules of Civil Procedure provides that "[w]hen by statute, by these rules, by a notice given thereunder, or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion, ... upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect[.]" Minn. R. Civ. P. 6.02.
x. State v. Johnson, 514 N.W.2d 551, 553 (Minn. 1994).
xi. Minn. Stat. § 582.043, subd. 7(b)

States: Ohio

OHIO SUPREME COURT TO ADDRESS THE HUD REGULATION QUAGMIRE IN FORECLOSURE ACTIONS

By Brian Jackson, Laurito & Laurito, LLC

HUD regulations provide procedures that mortgagee must follow when a borrower defaults on an FHA insured mortgage loan. These provisions place limitations on the mortgagee's to accelerate the note and file a foreclosure. Applying these regulations in the context of a judicial foreclosure has been a difficult challenge for Ohio courts in the last five years as evidenced by the split of authority between the appellate districts.

On October 11, 2017, however, the Ohio Supreme Court agreed to hear Wells Fargo Bank's discretionary appeal of decision from the Tenth District Court of Appeals which effectively bars Wells Fargo from ever foreclosing its mortgage due to its failure to comply with the HUD face-to-face requirements within the timeline established by the regulation. By accepting jurisdiction of the appeal, the Ohio Supreme Court determined that this case presents questions of great general interest.

Ohio courts have interpreted certain HUD regulations as HUD's clear intent to require mortgagees to comply with the notice, face-to-face meeting and loss mitigation evaluation requirements prior to commencing foreclosure. However, there is a split of authority amongst the Ohio appellate districts as to whether compliance with the HUD servicing regulations are conditions precedent or affirmative defenses to foreclosure. This distinction is important because each carries with it a different burden for pleading and summary judgment practice. Thus, the factual allegations of a foreclosure complaint as well as the procedural and evidentiary requirements to obtain judgment vary depending on whether the appellate district considers compliance with HUD regulations to be a condition precedent or an affirmative defense to foreclosure.

If compliance is deemed a condition precedent as the majority of appellate districts hold, the mortgagee must generally allege in its complaint that it has complied with all conditions precedent. The borrower then has a reciprocal burden to allege with specificity and particularity how the mortgagee failed to comply. If the borrower's answer states with specificity which HUD regulations the mortgagee failed to comply with, the mortgagee then bears the burden of establishing in a summary judgment motion the absence of a genuine issue of material fact on the issue of whether it complied with the specific HUD regulations.

Alternatively, if compliance is deemed as an affirmative defense, the mortgagee has no pleading burden in its complaint. However, the borrower must generally allege non-compliance as an affirmative defense in the answer. On summary judgment, the mortgagee has no burden to discuss compliance with the HUD regulations in its motion, whereas the borrower bears the burden of proving his defense via a brief in opposition to summary judgment.

Regardless of which approach applies, non-compliance does not always prohibit foreclosure despite the seemingly mandatory language used in the regulations. Some appellate districts have attempted to balance the equities involved when a strict interpretation of the regulations would lead to harsh results incompatible with HUD's regulatory scheme. For example, a Franklin County Common Pleas Court recently granted judgment in favor of the mortgagee despite finding that HUD's face-to-face requirements were not met. In that case, the borrower filed a Chapter 7 bankruptcy petition after the foreclosure complaint was filed but failed to reaffirm the debt. After balancing the equities, the trial court held that the borrower's failure to reaffirm should end his ability to enjoy the benefits of the mortgage contract his own volitional act has nullified.

Undoubtedly, the courts' heightened scrutiny surrounding HUD regulatory compliance over the last five years has resulted in higher litigation costs for all parties, burdensome evidentiary requirements, and splits of authority between the appellate districts. Hopefully the Ohio Supreme Court's opinion in Burd will provide the guidance necessary to remedy the current quagmire involving foreclosures of FHA insured mortgages.

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Wells Fargo Bank v. Burd, 10th Dist. Franklin App. No. 15AP-1044, 2016-Ohio-7706.
See, PNC Mortg. v. Garland, 7th Dist. Mahoning No. 12 MA 222, 2014-Ohio-1173, ¶ 27.
Id. ¶ 23.
Id.; Ohio Civ. R. 9(C).
Garland, ¶ 24.
Id.
See, e.g., Garland, ¶¶ 25-30.
U.S. Bank, N.A. v. Richard L. Frederick, III, Franklin C.P. No. 15 CV 3920 (November 30, 2017).
U.S. Bank, N.A. v. Richard L. Frederick, III, Franklin C.P. No. 15 CV 3920 (November 30, 2017), p. 8; citing PNC Bank, N.A. v. Wilson (App. Ct. Ill., 2nd Dist.), 2017 IL App (2d) 151189, p. 26.

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AICPA SOC

"Super Priority" continued from page 1

association's lien to "relate back to the date on which the original declaration of the community was recorded"[vi] reserving a caveat for pre-2008 mortgages.[vii]

Nevada has recently disrupted the lending industry with a shocking decision in *SFR Investments Pool 1 v. U.S. Bank.*[viii] In this 2014 decision, the court clarified the differences between "true lien priority" and "payment priority" and held that associations hold a "true lien priority," which can unequivocally extinguish a first mortgage upon following the proper foreclosure procedures. [ix]

In Washington, a COA's lien maintains a limited priority over a mortgage, subject to a relatively recent statute.[x] That limited priority mandates the lender to pay six months of assessments to the COA prior to the foreclosure sale date.[xi]

OTHER JURISDICTIONS:

While not a designated "super" priority state, Arkansas recognized that a first mortgage does not entirely extinguish an association's interest in delinquent assessments.[xii

The District of Columbia[xiii] and Rhode Island[xiv] held that a first mortgage is subordinate to an association lien and the association could extinguish the first mortgagee's interest.

On the more extreme end of the "super" priority spectrum, Massachusetts allows for multiple successive liens (every six months), all of which can be contemporaneously enforced.[xv]

Vermont extends its super priority status to assessments that have accrued during the first mortgagee's foreclosure action plus the prior six months of assessments.[xvi]

In order to preserve the first mortgagee's lien enforcement rights, some options include: (i) paying off the association's lien, (ii) keeping the borrower's account current with the association, (iii) redeeming the property in the association's foreclosure, (iv) reviewing potential lien priority issues at the loan origination stage, (v) including language in mortgages requiring escrow of association assessments to ensure timely payment, (vi) timely participation in association lien enforcement actions, (vii) referring lien priority determination files to their foreclosing attorneys in each jurisdiction, (viii) requiring an assignment or proxy designation of borrower-owner association voting rights, (ix) requiring assessment invoices, billing statements, and periodic notices be sent to the lender to ensure timely payment or, at least, to allow the lender to monitor the status of an account, and (x) revising the terms of a mortgage to include non-payment of super-priority eligible associations' assessments be considered a default under the terms of the mortgage.

Overall, lenders and associations must jointly navigate the same laws. While super priority may not be the fairest or the easiest resolution to the problems legislatures face in protecting all interests in real estate properties, it is certainly one solution. In order to properly and effectively navigate these complex laws, lenders should consult with their relevant jurisdiction's attorney for a case-specific strategy on (i) how best to enforce the terms of the mortgage in case of a default and (ii) how best to preserve its lien in the case of an association foreclosure.

***Jessica Skoglund Mazariego** has focused her educational career on business and international law. Specifically, she has earned an International Baccalaureate Degree and International Law Concentration. Her professional career has focused on business transactions, complex title resolution, creditor foreclosures, real estate closings, title insurance, and compliance law, including legal, regulatory, licensure, and corporate operational compliance.*

[i] Priority Lien for Collecting Delinquent Assessments. https://www.caionline.org/Advocacy/StateAdvocacy/PriorityIssues/PriorityLien/Pages/default.aspx (Alabama, Alaska, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, Oregon, Pennsylvania, Puerto Rico, Rhode Island, Vermont, Washington, West Virginia)

[ii] U.S. Real Estate Trends & Market Info: Foreclosure Trends. http://www.realtytrac.com/statsandtrends/foreclosuretrends (Alabama 1/2286, Alaska 1/4259, Colorado 1/4170, Connecticut 1/1391, Delaware 1/875, District of Columbia 1/1876, Florida 1/2361, Hawaii 1/3626, Illinois 1/1196, Maryland 1/981, Massachusetts 1/1862, Minnesota 1/3772, Missouri 1/2226, Nevada 1/1407, New Hampshire 1/3894, New Jersey 1/734, Oregon 1/3135, Pennsylvania 1/1723, Puerto Rico (unknown), Rhode Island 1/2324, Vermont 1/7176, Washington 1/5206, West Virginia 1/9372)

[iii] Fla. Stat. 720.3085(2)(c)(2)

[iv] Bay Holdings, Inc. v. 2000 Island Boulevard Condominium Association, 895 So.2d 1197 (Fla. 3d Dist. App. 2005) (holding that a title holder by virtue of a Certificate of Title whom was an assignee of a foreclosure final judgment did not qualify as a first mortgagee, successor, or assignee under Fla. Stat. 718.116(1) and therefore did not qualify for the safe harbor protections.)

[v] Under this statute, the foreclosing lender only has to pay the super-priority portion of the HOA's lien to a certain degree - the lessor of (i) the past 12 months of regular assessments or (ii) 1 percent of the original mortgage debt. This statute is still triggered if a deed in lieu of foreclosure is utilized as an alternative to a traditional judicial foreclosure.

[vi] Fla. Stat. 720.3085(1) (2008-2017)

[vii] Id.

[viii] SFR Investments Pool 1 v. U.S. Bank, 334 P.3d 408 (Nev. 2014); Prior to this decision, Nevada's prior version of the controlling statute was found to have violated the Fourteenth Amendment's Due Process Clause. See Bourne Valley Court Trust v. Wells Fargo Bank, 832 F.3d 1154 (9th Cir. 2016)

[ix] NRS 116.3116(2); This was later adopted by the Uniform Common Interest Ownership Act (UCIOA) (2014) §3-116 cmt. 2

[x] The Washington Condominium Act of 1989 governs the rights of condominium associations, including the lien priority over lender's mortgages. While it is effective only for condominiums created after July 1, 1990. A COA lien is considered superior to a mortgage, unless the mortgage is recorded before the declarations of the condominium or before the assessments become delinquent.

[xi] Only periodic assessments for the annual COA's budget for common expenses are specifically granted the limited super priority over mortgages, while capital improvement assessments and attorney fees and costs from collection efforts are examples of the limitations to the COA lien's super priority status. See Summerhill Village Homeowners Association v. Roughley, 289 P.3d 645 (Wash. Ct. App. 2012)

[xii] First State Bank v. Metro.District Condos Property Owner's Association, Inc., 432 S.W. 3d 1 (Ark. 2014)

[xiii] Chase Plaza Condo. Ass'n, Inc. v. JP Morgan Chase Bank, N.A. 98 A.3d 166 (D.C. 2014)

[xiv] Twenty Eleven, LLC v. Botelho, 127 A.3d 897 (R.I. 2015)

[xv] Drummer Boy Homes Association, Inc. v. Britton, 47 N.E. 3d 400 (Mass. 2016)

[xvi] Bank of America, N.A. v. Morganbesser, 2013 WL 9792479 (Vt. 2013)

States: Virginia

Significant New Hurdle for Virginia Evictions

By Scott Gardner, Rosenberg & Assoc. LLC

Historically in unlawful detainer actions filed in general district courts in Virginia, a Trustee's Deed was sufficient evidence of the right to possession of the property, and any challenge to the validity of such a deed would have to be argued in a separate action by the former property owner in the circuit court. Any defense that the owner's title was defective was dismissed by the court, which lacked subject matter jurisdiction to hear matters of title. Accordingly, foreclosure purchasers had a clear path to obtaining a writ of possession.

However, the Supreme Court of Virginia's decision in *Parrish v. Fed. Nat'l Mortgage Ass'n,* 787 S.E.2d 116, 120 (Va. 2016) creates a significant new hurdle to evicting a defaulting homeowner. In Parrish, Federal National Mortgage Association (Fannie Mae) purchased the Parrishes' property at a foreclosure sale. The Parrishes claimed that the foreclosure was defective, alleging that the lender violated 12 C.F.R. § 1024.41(g) by proceeding to foreclose where a complete loss mitigation package had been timely provided prior to sale. The district court granted possession to Fannie Mae, which was ultimately appealed to the Virginia Supreme Court. The Supreme Court, in a five-two decision, dismissed the case without prejudice, determining that if a legitimate question is raised about the validity of a foreclosure, a general district court is divested of jurisdiction over the case because it does not have the power to decide questions of title. Oddly, this decision creates a situation where the district court's jurisdiction is dependent upon the defense argument raised at trial. The Supreme Court emphasized that "[t]he question of title raised by the homeowner's allegations must be legitimate ... [and] must be sufficient to survive a demurrer had the homeowner filed a complaint in circuit court seeking such relief." Parrish, Op 7(citing Warwick 56 Va. at 542.) "[a] general allegation that the trustee breached the deed of trust is not sufficient. The homeowner's allegations must (1) identify with specificity the precise requirements in the deed of trust that he or she asserts constitute conditions precedent to foreclosure, (2) allege facts indicating that the trustee failed to substantially comply with them so that the power to foreclose did not accrue, and (3) allege that the foreclosure purchaser knew or should have known of the defect." Parrish, fn. 5.

The impact of Parrish is still uncertain. It appears adequate title defenses to eviction may include fraud, collusion, grossly inadequate sale prices, or a material breach of the deed of trust, which may include incorporated regulations. Courts following Parrish have recently dismissed eviction cases for failing to timely provide a payoff to borrower and violating HUD regulations. Additionally, requiring the purchaser to file actions in circuit court may extend the period of time to obtain possession and certainly increase legal costs. As a result, purchasers at foreclosures may prioritize unoccupied properties, effectively reducing the numbers of potential buyers and prices at sales.

***Scott Gardner** is an attorney with Rosenberg & Assoc. LLC, practicing in the areas of foreclosure, eviction and bankruptcy. Gardner holds a B.S. degree in Finance from Virginia Tech and a J.D. from the T.C. Williams School of Law at the University of Richmond. He is a member of the Virginia State Bar and is admitted to practice in all state courts and the U.S. Bankruptcy Court for Western District of Virginia.*

"Escrow" continued from page 1

debtor attorneys must often work out agreements separate from the plan to fund the projected escrow shortage directly by the debtor via ongoing mortgage payments.

Both creditor and debtor attorneys would likely agree that a rule change could benefit all parties in this scenario. A carve out of rule 3001(c)(2)(C), which states that an escrow statement at the time of the bankruptcy filing is not required if the loan is contractually current, would prevent these unnaturally occurring projected shortages that result from the midyear running of an escrow analysis. Instead of running a new escrow analysis, creditors would simply provide the last escrow statement run prior to the bankruptcy filing when filing their proof of claim. This avoids unnecessary objections and the time involved in negotiating workarounds by attorneys and provides the debtor with consistency since their mortgage payment would remain unchanged post filing.

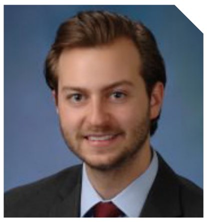
Other scenarios might also benefit by this proposed carve out. If the loan is current as to payments and the only arrears are due to pre-petition fees that have been incurred on the account, it would seem a new escrow analysis should not be run. Also, if the loan is current as to payments but there is a naturally occurring escrow advance deficiency because taxes and/or insurance were paid prior to or near the date of the bankruptcy filing, the loan should still be considered contractually current and the lender should not be required to run a new escrow analysis.

This carve out would obviously not apply to loans that are not contractually current in payments even if the loan is only pre-petition delinquent for one loan payment. In the case of a loan that is not current as to payments, the loan would not be considered contractually current and a new escrow analysis would be run just as rule 3001(c)(2)(C) currently requires.

The current model which directs the running of an escrow analysis at the time of the filing would do well to be updated in light of the new POC form and its requirements. A carve out of the current rules that does not require an escrow analysis to be run at the time of filing if the loan is current as to payments would benefit parties on both sides. Debtors who are current on payments at the time of filing their bankruptcy would be able to confidently list $0 arrears in their plans without having to consider the possibility of incurring costly objections and lenders would be able to continue servicing these accounts without need for unnecessary midyear manipulation of the escrow. The overall benefits to all parties showcase how a small change to the current rules could greatly impact the outcome of many.

***Anjali Khosla** is a fourth year bankruptcy attorney at Rubin Lublin, LLC. She received a B.B.A in Business Management from the University of Georgia and graduated from Georgia State University College of Law in 2014. She lives in Atlanta with her husband Gopal.*

MOVERS & SHAKERS

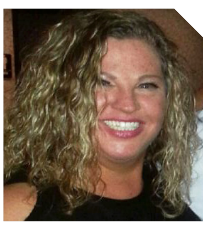


POTESTIVO & ASSOCIATES ANNOUNCES PROMOTION OF ALEXANDER POTESTIVO

Potestivo & Associates, P.C., announced that **Alexander Potestivo** has been promoted to Associate Attorney. He will serve and represent the firm in the Chicago office assisting with matters related to creditors' rights litigation and foreclosure. Potestivo graduated with his B.A. in Political Theory and Constitutional Democracy from the James Madison College at Michigan State University, and then went on to obtain his J.D. at Loyola University Chicago School of Law. Prior to graduating from law school, he served as a judicial intern for the U.S. District Court, Eastern District of Michigan where he drafted bench memorandums, assisted in writing judicial opinions, and examined case law and legal issues.

STERN & EISENBERG EXPANDS TEAM

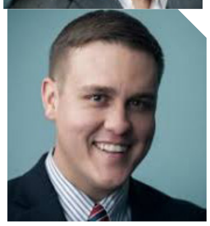
Stern & Eisenberg, a law firm servicing 10 states and the District of Columbia with a team of over 50 attorneys and 200 staff, announced the hiring of **Elizabeth Potter** in the role of Business Development Director and the promotion of Angela Wilson to the role of Client Relations Manager. Potter and Wilson will serve critical functions in the firm's expanded Value Department, headed by Chief Value Officer Kathy Brady. Potter, who recently served as SVP of Business Development and Member Relations for the American Legal & Financial Network, a national, legal-based trade association in the mortgage default industry, will spearhead the firm's business development across all practices, business lines, and regions stretching from New York to Georgia.



QUINTAIROS, PRIETO, WOOD & BOYER HIRES NEW DIRECTOR

Quintairos, Prieto, Wood & Boyer, P.A. (QPWB), the largest minority and women-owned law firm in the U.S., announced that **Dawn Berry** will join the firm's Business, Financial Services & Real Estate Division as Portfolio Performance & Oversight Director. Within this role, Berry will work hand in hand with loan servicers and mortgage loan investors to ensure that the investors' loans are being handled in an efficient manner and that the investors' goals and objectives are implemented and met.

Mike Barker, Managing Partner of QPWB's Business, Financial Services & Real Estate Division stated that "having Dawn join the QPWB team was in accordance with the firm's mandate to provide the highest level of legal representation to its clients and to show the firm's commitment to bringing value to its clients." Berry comes to QPWB with over 20 years' experience in the mortgage servicing field. Most recently, Berry worked at a national mortgage loan servicer and was responsible for the management of special servicing for multiple loan pools with various private mortgage investment funds.



NEW ATTORNEYS AT ROSENBERG & ASSOCIATES

Attorneys **Megan Hirt** and **Nathan B. Greyard** recently joined the law firm as associate attorneys in the firm's Vienna, Virginia office. Hirt holds Bachelor of Arts Degrees in Anthropology and in History from the University of Maryland, College Park and a Juris Doctorate from the University of Baltimore Law School. She practices real estate law with a focus on foreclosure and creditors' rights. Hirt is admitted to practice in the jurisdictions of Maryland, Virginia and the District of Columbia. She is a member of the Maryland State Bar, Virginia State Bar and District of Columbia Bar.

Greyard holds a Bachelor of Arts from James Madison University and a Juris Doctor from the University of Richmond School of Law (cum laude). While in law school, Greyard was the Articles Editor for the Richmond Journal of Global Law and Business. Greyard practices real estate law, focusing on foreclosure, bankruptcy, litigation, and evictions. He is a member of the Virginia State Bar, and is admitted to all the state courts of Virginia and the U.S. Bankruptcy Courts for the Eastern and Western Districts of Virginia. Greyard is a member of the Northern Virginia Bankruptcy Bar Association.

The Legal League 100 was honored to be a sponsor for the Motown Throwdown, the industry's coolest party, which was hosted in Grapevine, Texas in February.

Legal League member Randy Miller of Randall S. Miller & Associates, P.C. took in the festivities along with more than 500 other attendees.

Jan Duke, COO at Legal League Associate Member Firm Solutions, enjoyed mixing and mingling with party attendees.

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