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*National*

# Foreclosure Judgments and Bankruptcy

*By: Peter Bastianen, Attorney, Codilis & Associates, P.C.*

In a judicial foreclosure, a complaint is filed and served, a foreclosure judgment entered, the property is sold, an order approving/confirming the sale entered, and finally, a deed is issued transferring ownership of the property to the successful bidder. Many bankruptcy cases are filed after the foreclosure judgment has been entered but before the sale is held in order to stop the sale. In some of these cases, borrowers file pleadings attacking the mortgage. Several legal doctrines exist that bar these attacks. These doctrines are known as collateral estoppel, res judicata, Rooker Feldman, comity, federalism and full faith and credit. They are rooted in two principles–the promotion of judicial economy by precluding duplicative litigation, and respect for state sovereignty.

The following example can be used to illustrate these doctrines. Creditor files foreclosure in state court alleging a loan is due for the January 1, 2018 installment onward. Borrower asserts an affirmative defense that creditor lacks standing. The lack of standing issue is litigated and resolved in the creditor's favor. The foreclosure court enters a judgment of foreclosure. The day before the foreclosure sale, the borrower files bankruptcy. Creditor files a proof of claim alleging the loan is due for the January 1, 2018 installment onward. Borrower objects to the claim on two bases. First, that creditor lacks standing. Second, that the default date alleged in the claim is incorrect.

The doctrine of collateral estoppel (also known as claim preclusion) bars the re-litigation of the same issue that was previously litigated

*"Judgments" continued on page 7*

*National*

# New Buyer Condo Liens' Requirements & Limitations

*By: Lauren Riddick, Codilis & Associates, P.C.*

A recent opinion from the 1st Appellate District Court, V&T Investment Corporation v. West Columbia Place Condominium Association, 2018 IL App (1st) 170436, addressed an infrequently discussed distinction between the types of liens available to a condominium association. The V&T Court was primarily focused on discussing the ramifications of a foreclosure sale purchaser's partial condominium assessment payment made approximately four months after the foreclosure sale, yet less than two months after confirmation, but it was the Court's discussion of a nuance of 9(g)(4) liens that may well represent a stark change from standard practice for many governing condominium boards.

In order to properly understand the Court's ruling, an understanding of the different possible condominium liens may be helpful. The Illinois Condominium Law Act provides for at least three potential liens. The first type, commonly referred to as a "9(g)(1) lien" (so named after the authorizing section of the act,) encompasses the assessments, charges and attorney's fees accruing from the time of purchase forward—i.e., those amounts owed

*"Liens" continued on page 7*

*National*

# More Bankruptcy Rule Changes Are Coming in December 2018

*By: Mark A. Baker, Alabama and Tennessee, McMichael Taylor Gray, LLC*

By now, servicers and their counsel have adapted to the most recent changes to the Rules of Bankruptcy Procedure that came into effect December 1, 2017. These changes included the use of a uniform Model chapter 13 plan (or the opt-out plans of local jurisdictions); the requirement of secured creditors to file proofs of claim in all Chapter 7, 12, and 13 cases, and the time frame in which to do so; the process for objections to confirmation of Chapter 13 plans; and the multiple mechanisms now available to the debtor to compel the court to determine the amount of a secured claim.

On the heels of these Rules amendments, the U.S. Supreme Court has approved an additional set of Bankruptcy Rules amendments that will take effect December 1, 2018. Many of the proposed changes address the bankruptcy appeals process but let us look at two key changes to Rule 3002.1 under the proposed amendments, which address "Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence."

Under the current Rule 3002.1(b) [Notice of Payment Changes], the holder of the claim shall file and serve a notice of any change in the payment amount, including a change that results from an interest rate or escrow account adjustment, no later than 21 days before a payment in the new amount is due. The current Rule is silent, though, regarding the timing issues created by Home Equity Line of Credits (HELOCs), as well as the process to challenge the payment change notice.

Proposed new Rule 3002.1(b) is recaptioned "Notice of Payment Changes; Objection," and provides two new subparts. Subpart (b)(1)

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LEGAL LEAGUE 100
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## Letter From the Legal League 100 Advisory Council Chairman

The September Legal League Summit is upon us, and it looks like this summit will be a premier industry event. We are going to hear from an impressive group of industry leaders from all sectors, including servicers, GSEs, the Secretary of HUD, LL100 members, and associate members, all covering pointed and current industry topics. Cap that off with the opportunity to see a former First Lady and a multiple Grammy and Billboard Award-winning musical artist, and I think you will agree—a "premier" industry event.

As LL100 members, we all continue to adjust to industry expectations in an unprecedented environment. Years after the mortgage crisis, we co-exist in a market that has been impacted by post-crisis trends. Major cities are registering record increases in single-family rentals. The millennial approach to homeownership has been more hesitant and is impacted by student loans. As a result, homebuyer demand statistics have fluctuated.

The industry is reacting to these new realities and making appropriate shifts. Last month, industry leaders were invited to attend a webinar focused on strategies to lend to millennials, who are currently the largest and most active group of homebuyers in the market. The webinar was presented by *MReport* and Ellie Mae and included subject-matter experts from Bank of America, Flagstar Bank, Caliber Home Loans, Ellie Mae, and Fannie Mae. Coming together to map out the future of lending and the mortgage industry is one of the positive signs of movement.

*DS News* has recently reported encouraging total cumulative first mortgage loan balances. As of March 2018, first mortgage loan balances of $8.83 trillion were reported. Compare this to 2008, when the industry reported a record high cumulative balance of $9.04 trillion. The industry is on track to eclipse the 2008 numbers. A large percentage of the current mortgage balance originated under increased regulatory requirements. Additionally, many of those loans utilized technology that has made the lending process accessible through a smartphone. This is a different product, and we must position ourselves to represent the servicing industry managing this inventory of loans.

Understanding industry and client needs are critically important, and having the opportunity to hear from industry leaders provides perspective and insight to LL100 members. Five Star has lined up speakers and Labs that will be tremendously informative and pertinent. Examples include "A View of the Year Ahead" and "Servicing Innovation" panels, both of which will be part of the Servicing and Compliance Lab. The Foreclosure Lab includes topics related to managing the impact of appeals, HOA and condominium issues, and charge-off policies. These are all topics that have evolved significantly over the past decade.

I am excited about the future and proud to be part of an organization that strives to bring value to each of its members as we continue to provide the industry the best representation possible.

*I look forward to seeing you at the Summit.*

## Roy Diaz, SHD Legal Group P.A.

Roy 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 22 years. Diaz is admitted to Federal Court practice in the United States District Court for the Southern, Middle, and Northern Districts of Florida.

# Call us the Bureau…there is a new cop in town…

*By: Michelle Garcia Gilbert, Gilbert Garcia Group, P.A.*

The first director of the Bureuau of Consumer Financial Protection (BCFP, or simply the Bureau), Richard Cordray, who was appointed by President Barack Obama in 2012, resigned late November of 2017. Cordray announced as democrat candidate for Ohio governor in December 2017. His resignation resulted in his naming his chief of staff, Leandra English, as the acting director. However, President Donald Trump appointed Mick Mulvaney, Director of the Office of Management and Budget, as interim director to replace Leandra English under the Federal Vacancies Reform Act, which allows the president to appoint an interim replacement for an appointed officer of an executive agency without Senate confirmation.

Senator Elizabeth Warren, an architect of the BCFP, said that the deputy director assumes the acting director role. Leandra English sued for the position, ultimately lost the lawsuit, appealed, but has resigned and dropped the appeal as of July 6, 2018.

President Trump nominated Kathy Kraninger, a senior official at the Office of Management and Budget, on June 18, 2018 as the bureau director, and her nomination was sent to the full Senate after a 13-12 Senate Banking Committee vote. Kraninger's boss, Mulvaney, voted to eliminate the BCFP while in the U.S. House for South Carolina.

Mick Mulvaney seems to be a breath of fresh air for those pushed around by the BCFP. On January 23, 2018, Mulvaney emailed all of his BCFP staff. The email primarily was about a change of focus of the bureau. Previously, Mulvaney argued, the BCFP "pushed the envelope" aggressively, but Mulvaney has no intention of "shutting" down the bureaus, recognizing he must follow the law. Cordray had stated, "We wanted to send a message: There's a new cop on the beat … Pushing the envelope is a loaded phrase, but that's absolutely what we did."

Because of this envelope pushing, quantifiable and unavoidable damage has been done to businesses and to consumers, who are employed by many businesses employed by companies under the BCFP's ambit. Rather than regulation by enforcement, Mulvaney will use formal rulemaking and education will help prevent consumer abuse. Per Mulvaney, "…we work for the people. And that means everyone…If a company closes its doors under the weight of a multi-year Civil Investigative Demand, you and I still have jobs at the BCFP. But what about the workers who are laid off as a result?"

The new Strategic Plan for 2018, drafted by Mulvaney, is committed to the Bureau's statutory responsibilities, but shows no interest in using the bureau as a cudgel to enforce "unwritten" regulations- unless directed by Congress. The two strategic goals of the bureau come directly from Sections 1011 and 1013 of the Dodd-Frank Act- "to regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws" and "to educate and empower consumers to make better informed financial decisions."

There are also five strategic objectives to achieve those goals—educating consumers, protecting consumers from UDAAP and from discrimination, reduce unwarranted regulatory burdens, enforce federal consumer financial law consistency, and facilitate access and innovation in markets through transparency and efficiency. It should be noted that Cordray's Strategic Plan was 40 pages long, while Mulvaney's is a much more limited 15 pages.

In April 2018, Mulvaney also sent a Semi-Annual Report to Congress for the period of April 1, 2017 to September 30, 2017, in which he noted that the bureau (Mulvaney renamed the BCFP, the "Bureau of Consumer Financial Protection," or simply the bureau, to mirror historical terminology,

https://nationalmortgageprofessional.com/news/67459/more-changes-coming-BCFP) is too powerful, with little oversight.

The director serves in three roles, contrary to our system of checks and balances: as legislature writing rules, as executive officer with limited oversight, and as judiciary presiding over bureau's decisions. In his Semi-Annual Report, Mulvaney recommended four changes to the Dodd-Frank Act which founded the bureau:

- Fund through Congressional appropriations, under Section 1017 of Dodd-Frank, currently funded by transfers each year of combined earning of Federal Reserve System; for 2018, budget approximately $663 million ($631.7 million for 2016, and $646.2 million for 2017)
- Require legislative approval of major Bureau rules
- Ensure Director answers to President
- Create independent Inspector General for the Bureau

Mulvaney also listed the Bureau's Spring 2018 rulemaking agenda, with immediate focus on Business Lending Data (Regulation B); The Expedited Funds Availability Act (Regulation CC); Debt Collection Rule; Home Mortgage Disclosure Regulation (Regulation C); Payday, Vehicle Title and Certain High-Cost Installment Loans; Gramm-Leach-Bliley Act (GLBA) (Regulation P); Amendment Relating to Disclosure of Records and Information; and Amendments to the Federal Mortgage Disclosure Requirements under the Truth in Lending Act (Regulation Z).

The Bureau identified long-term rulemaking action and identified now inactive rules. See, Semi-Annual Report, above. So, what does all this mean for enforcement of the Dodd-Frank Act under the "new cop"? State Attorney Generals, who have collaborated closely with the bureau since its founding, plan to shoulder much more responsibility under the Trump administration. At the winter meeting of the National Association of Attorneys General on February 28, 2018, Mulvaney emphasized that the Bureau will focus much more on persecuting illegal acts rather than making new laws or policy- a very notable change compared to Cordray's rule.

State AGs have already begun shifting in reaction to Mulvaney's new policies- state enforcement of the consumer protection laws has tripled over the past year, Pennsylvania and Washington have set up consumer financial protection units, and California, Oregon, Illinois, Iowa, Massachusetts, and North Carolina are likely to increase their resources dedicated to enforcement of these laws.

Between November 21, 2017, when a settlement with Citibank was announced, and July 13, 2018, no enforcement actions have been filed, and 4 enforcement actions were settled, with significant reductions in penalties, or with restitution award only. Cordray issued an average of 2-4 enforcement actions each month

As of July 16, 2018, the Bureau confirmed they are investigating possible violations of consumer protection laws. So, look for more state enforcement of consumer protection laws, and for more bureau cooperation with lenders, servicers, creditors, and businesses. In fact, Mulvaney announced the end of May 2018 that the bureau is working with Commodity Futures Trading Commission, to develop a FinTech sandbox. The CFTC, a swaps and derivatives regulator, has launched one of the most robust sandboxes at the federal level. The Dodd-Frank Act allows the BCFP to foster innovation, though rarely has the bureau done so. A sandbox allows startups to test products with feedback from regulators. The United Kingdom's Financial Conduct Authority (FCA) announced earlier this year plans for a global testing bed for new financial technology applications. Arizona started a regulatory sandbox in March 2018, and Illinois announced plans to set one up.

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*"More" continued from page 1*

[Notice] essentially restates the current Rule, but also recognizes the unique timing issues presented by equity lines of credit. Subpart (b)(1) provides that "[i]f the claim arises from a home-equity line of credit, this requirement [to give notice no later than 21 days prior to the change date] may be modified by court order." Courts may specify alternative requirements for providing notice of changes in HELOC payment amounts by local rules or orders in individual cases. In the absence of a local rule or standing order, an investor or servicer holding a claim secured by a home-equity line should consider filing the appropriate motion at the outset of the case to shorten the notice time for HELOC payment changes.

Subpart (b)(2) [Objection] clarifies the process for objecting to a notice of payment change, by permitting "a party in interest" (which would also include the chapter 13 trustee, as well as the U.S. Trustee or Bankruptcy Administrator), to file a motion to determine whether the payment change is required to maintain payments in accordance with § 1322(b)(5) of the Code.

Generally, the Bankruptcy Code does not allow the debtor to modify the rights of the holder of a claim secured only by a lien in the debtor's principal residence. However, Code § 1322(b)(5) provides the debtor a limited ability to modify these rights, by allowing the debtor to cure a pre-petition default on such a long-term debt within a "reasonable period of time" while maintaining the regular contractual payments during the case.

Thus, under proposed Rule 3002.1(b)(2), any objection to the payment change must go to the question of whether the change is required in order for the successful chapter 13 debtor to emerge from the case with a fully reinstated loan. Clearly, changes in interest rate or escrow balances affecting the debtor's monthly payment obligation are legitimate and permissible reasons for payment change notices.

New Rule 3002.1(b)(2) does not set a deadline for filing this motion objecting to payment change but provides that if no motion is filed by the day before the new payment amount is due, the change goes into effect, unless the court orders otherwise. However, if there is a later motion and a determination that the payment change was not required to maintain payments under § 1322(b)(5), appropriate adjustments must be made to reflect any overpayments. If a motion is made prior to the day the change is to go in effect, leading to a suspension of the payment change, a determination that the payment change was valid will require the debtor to cure the resulting default to comply with § 1322(b)(5).

The take-aways: for legitimate changes that will affect the debtor's ability to comply with Code § 1322(b)(5), file notices of payment changes promptly, at least 21 days prior to the payment change date for non-HELOCs, and for HELOCs, in the absence of a local rule or standing order, consider filing an appropriate motion to facilitate the change notice in light of the short-fuse that often accompanies the change.

*A lawyer for over 30 years, Mark A. Baker's extensive legal background representing large corporate entities and artists both established and emerging, as well as his work as a gigging musician, make him equally comfortable navigating the halls of Corporate America and the mustiest of music halls. Licensed to practice law in all the federal and state courts of Georgia, Tennessee, North Carolina and Alabama, as well as the Fourth Circuit Court of Appeals, Baker is an alumnus of the University of Alabama (B.A.) and Cumberland School of Law (J.D.), and served two years as judicial law clerk to a federal judge. In addition to representing artists, Baker has represented many of the country's largest financial institutions, most recently as a partner at Johnson & Freedman, LLC, a mid-size firm serving clients in Atlanta, Georgia. In 2016, he married a professor of art at Florida State University and moved to Tallahassee, where he continues to represent clients nationwide (in matters of federal law, such as trademark and copyright) within his principal practice areas.*

*National*

# Former 'Foreclosure Capital' Experiments With Anti-Poverty Measure

Only a few years back, in 2012, the city of Stockton, California, was the "foreclosure capital" of the nation, with one in every 135 homes in foreclosure. The city was hit hard by the 2008 financial crisis, becoming the second-largest U.S. city to file for bankruptcy protection. Stockton left its bankruptcy in the rearview in February 2015, and now the city is trying out something potentially revolutionary—attempting to help its struggling residents escape the grip of poverty and housing insecurity with an experiment in Universal Basic Income (UBI).

The notion of a Universal Basic Income is nothing new, but it's gained popularity among tech giants such as Elon Musk and Mark Zuckerberg. Proponents of UBI posit that providing a guaranteed monthly income could help pull people out of poverty, provide stability during hard financial times, and even mitigate the impact of increasing automation as it renders more jobs or career fields obsolete.

Stockton isn't looking to solve all those problems right out the gate. They're starting small—as reported by CNN, the city's UBI program will give 100 local residents $500 a month for 18 months. For residents who qualify, there are no work requirements or any other "strings" attached.

During a CNNMoney interview earlier this year, Facebook co-founder Chris Hughes said, "It is such a fundamental idea behind America that if you work hard, you can get ahead—and you certainly don't live in poverty. But that isn't true today, and it hasn't been true in the country for decades. I believe that unless we make significant changes today, the income inequality in our country will continue to grow and call into question the very nature of our social contract."

Even having moved beyond bankruptcy, Stockton is still a strong candidate for a trial run at UBI. One in four of the city's residents currently live in poverty. The city's median income is a little over $49k, well below the national median of $57,617. The project is expected to launch in 2019.

While $500 a month might not seem like much in the grand scheme of things, its consistent, guaranteed nature could be quite a comfort for families struggling to make ends meet. As CNN describes it, "The goal is to create an income floor no one will fall beneath."

Some 16.1 million U.S. households currently live in poverty. Moreover, according to the United Way's ALICE Project, another 34.7 million families fit under the category that gave ALICE its name. It stands for "Asset Limited, Income Constrained, Employed." Members of this group are technically above the Federal Poverty Line but are unable to meet the basic needs of housing, food, healthcare, childcare, and transportation. Households that fall below the "ALICE Threshold" account for 43 percent of American households, and ALICE persists across all regions of the nation and among all ages, races, and ethnicities.

More than two-thirds of U.S. jobs pay less than $20 per hour, according to ALICE Project data, and "the dominance of low-paying jobs shows no signs of slowing down." More than 30 percent of households in each state fall below the ALICE-defined "basic survival budget." Moreover, "One of the most difficult conditions that most ALICE households face is the high cost of housing," according to the ALICE Project.

The ALICE Project identified a "mismatch between the number of households with income below the ALICE Threshold and the number of housing units that they can afford in a given county." While markets generally adapt to what consumers are able and willing to pay, the United Way said, "there are many constraints on the housing market that prevent it from adjusting quickly."

*States: Connecticut*

# CT case of Aurora Loan Service v. Condron

*By: Robert J. Wichowski, Bendett & McHugh, PC*

In Aurora Loan Services, LLC v. Condron, 181 Conn. App 248, 186 A.3d 708 (2018), the Connecticut Appellate Court established that only strict compliance with the notice requirement of the note and mortgage will be acceptable to show that a foreclosing plaintiff has met its contractual requirement of sending notice, as a condition prerequisite to instituting a foreclosure action. Despite Connecticut's general eccentricities in the foreclosure process, the courts have traditionally been receptive to the doctrine of substantial compliance as it relates to the sending of contractually required notices, such as those contained in the Note and Mortgage. Historically, when a notice of intent to accelerate, or a notice of default was required to be given under the terms of the note and mortgage, a foreclosing plaintiff was able to provide a United States Postal Service record that the piece of mail was sent certified with return receipt requested. Based on that evidence, courts have found that a foreclosing plaintiff's notice requirement was met, regardless of whether the mail was delivered. With the Appellate Court's ruling in Condron, however, this is no longer the case.

The Plaintiff, at the trial court level, prevailed in establishing they had the right to foreclose and that the conditions precedent to instituting the action had been met. After judgment, the Defendant appealed on the grounds that Plaintiff failed to send the notice of default as specified by the mortgage and that the trial court improperly determined that the contractual condition precedent to the commencement of the action was met because the notice was not sent by first class mail, and; since it was sent by certified mail, delivery of the notice was not proven. In this case, the loan documents, specifically paragraph 22 of the Mortgage, required that, "[The] lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant of agreement in [the mortgage]." The Appellate Court read that in conjunction with paragraph 15, which states, in relevant part, "[a]ll notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when delivered to Borrower's notice address if sent by other means."

In its opinion, the Appellate Court held, inter alia, that since Plaintiff was unable to prove that the letter was delivered, and that Plaintiff did not send via First Class Mail, the sending of the notice was not in compliance with the terms of the note and mortgage. Plaintiff did argue that it substantially complied with the note and the mortgage by sending the notice certified and in doing so, argued that certified mail was an additional service that one can obtain for letters that are send via first class mail. The Appellate Court was not persuaded. It opined that by sending the notice via certified mail and by not proving delivery, that Plaintiff was creating additional barriers against actual notice, which is what the note and mortgage call for. Certified mail requires that an individual either be home when the mail is delivered or make a special trip to the post office to retrieve same whereas first class mail is simply deposited in the recipient's mail box for them to retrieve at their leisure. These additional barriers make actual delivery less likely and therefore do not comply with the terms of the note and mortgage. Were the notice to have been sent by first class mail and were plaintiff to have testified to such a mailing at trial, Plaintiff would have been entitled to a presumption of actual delivery of the notice and therefore, of compliance with the notice provision of the mortgage. However since Plaintiff could not prove actual delivery or that the notice was sent via first class mail, the Appellate Court held that Plaintiff failed to meet a condition precedent to the institution of its foreclosure and remanded the case back to the trial court with direction to enter judgment in favor of Defendants.

This is a significant case because it puts any pending foreclosure action in which a notice of default or notice of intent to accelerate was sent only by certified mail and where such notice was not actually delivered in jeopardy. Mortgage loan servicers may have a considerable population of loans that are exposed in such a manner. For any cases that are pending that meet this criterion, it is likely that, if challenged, judgment will enter in favor of defendants and if counsel fees are sought, it is likely that said fees will be awarded. Further, this case does not impair, alter or negate the requirement that the statutory Notification of Availability of the Emergency Mortgage Assistance Program (EMAP) be sent by certified mail, return receipt requested. Accordingly, it is a best practice in Connecticut that the Notice of Default and the EMAP notification are sent via both First-Class Mail and Certified Mail, Return Receipts Requested.

*Robert Wichowski joined Bendett & McHugh, P.C. in 2010. He is a Partner at the firm and the Managing Attorney of the firm's Connecticut Litigation Department, representing lenders in contested foreclosures and defensive litigation. Wichowski speaks at local, regional, and national seminars and roundtables across the country in addition to conducting individual on-site training for clients. He has also authored many default-servicing related articles and co-authored several publications.*


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between two fully represented parties in a prior action. In the above example, the borrower's objection to the bankruptcy proof of claim based on lack of standing is barred by the doctrine of collateral estoppel.

The doctrine of res judicata is broader. It bars a losing party from raising any issues involving the same transaction (i.e. a mortgage loan) that could have been raised in the prior action. In the above example, the objection to claim based on an incorrect default date is barred by res judicata because even though that defense was not raised in foreclosure court, it involved the same transaction and it could have been raised.

The Rooker-Feldman doctrine bars federal courts, except the U.S. Supreme Court, from issuing an order that would require a state court order to be overturned. The doctrine prohibits federal courts from adjudicating issues that amount to an appeal of a state court decision by the party that lost in state court. The losing party's recourse is to appeal the state court judgment to the state court of appeals, not file a bankruptcy case or other federal case and raise the same issues again. In the above example, both the lack of standing and incorrect default date defenses are barred by Rooker-Feldman because any order sustaining those objections would directly contravene the state court foreclosure judgment.

Finally, both defenses raised in the above example may be barred by the doctrines of comity, federalism, and full faith and credit. These doctrines all stand for the proposition that the federal government should respect the sovereignty of the states, including judgments rendered by state courts.

But there is a catch. There is some question regarding whether the above doctrines apply to a foreclosure judgment. This is because, in some jurisdictions, the order approving/confirming the foreclosure sale is considered to be the only "final" order in a foreclosure case. The earlier foreclosure judgment order is considered "interlocutory." A final order is defined as an order that disposes of the rights of the parties with respect to the entire controversy, or some definite and separate portion thereof. An interlocutory order is defined as an order that is not a judgment on the merits. In addition, whether a state court order is "final" can turn on whether the order is immediately appealable. In some states, certain specific language must be included in a state court order to render it final and immediately appealable. Case law on these issues varies by jurisdiction. Generally, however, the more an issue is litigated in state court, the more likely it will be that the bankruptcy court will apply one or more of the doctrines to bar the borrower from re-litigating the issue in bankruptcy.

A lender who has obtained a foreclosure judgment in state court may be able to use that judgment in bankruptcy to avoid or limit costly and duplicative litigation. Contact your local counsel to see whether the doctrines of collateral estoppel, res judicata, Rooker-Feldman, comity, federalism or full faith and credit can be asserted in your favor in a bankruptcy case.

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*"Liens" continued from page 1*

for common expenses as a current owner of a condominium unit.

The second type, known as a "9(g)(3) lien," encompasses all of the amounts which accrued and remain unpaid up until a foreclosure sale—i.e., the remaining unpaid amounts owed by the prior owner for common condominium expenses, including any attorney's fees accrued by the association during that timeframe. This type of lien is typically at the forefront of condominium assessment litigation as of late, as the Condo Act's wording regarding how a foreclosure sale purchaser must confirm the extinguishment of this lien has become a matter of much debate.

In understanding this area of law, it's important to note that one owner's 9(g)(1) lien may become the next owner's 9(g)(3) lien, making condominium liens often look like changing chameleons, as old owners part and new owners takeover. Moreover, an owner may owe more than one type of lien at the same time, as they will owe assessments and charges going forward on their own 9(g)(1) lien but may simultaneously owe amounts unpaid by a prior owner as a 9(g)(3) lien.

The third type of lien, known as a "9(g)(4) lien," isn't frequently litigated and is even less frequently discussed. This lien permits a condominium association to collect six months of common unpaid expenses from a non-mortgagee purchaser—i.e., six months of unpaid debt now owed by a new buyer. The wording of the statute, however, requires a new buyer to pay "the six months immediately preceding institution of an action to enforce the collection of assessments." In practice, many condominium associations have historically added up six months of unpaid debt stemming from the prior owner and added it to their paid assessment letters or ledgers as an amount now owed by a new buyer, without ever actually filing an action against the prior owner to attempt collection.

However, in its analysis of this lien, the V&T Court pointed out two issues of importance. First, the Court emphasized that the wording of the statute only requires a purchaser "to pay a prior owner's unpaid assessments that accrued during the six months preceding an action to collect assessments." In the case at hand, the association had indeed filed a prior action to collect, but the Court emphasized that the association was therefore only entitled to collect the six months of assessments which immediately preceded that action. The Court further held that since the association had collected rent that offset these amounts since that timeframe, the amounts were no longer unpaid, so nothing was currently owed. The fact that the Court required the actual filing of an action to collect, as well as limited the collectible amount to only the six months of unpaid debt immediately preceding that action, lies in direct contrast to the standard practice of many condominium associations.

Secondly, the Court emphasized that the wording of 9(g)(4) does not refer to attorney's fees. In fact, the wording of the statute only specifies the collection of "common expenses." The Court, therefore, held that they could "find no reason as to why attorney fees were included in the demand letter" and that the new buyer should consequently be reimbursed for any amounts paid in attorney fees. This similarly is at odds with the normal operating procedure for many condominium associations.

Therefore, per the V&T Court, in order for an association to legally collect any amounts against a new buyer under 9(g)(4), the association not only has to file an action to collect those amounts but is limited to the six months of unpaid common expenses only, not attorney's fees, which accrued immediately prior to that action.

*Lauren Riddick handles contested foreclosure matters as a member of the Codilis & Associates, P.C.'s Contested Litigation Unit and also assists with title matters. She joined the firm in August 2013. Prior to joining the firm, she was an Adjunct Professor of Law with several colleges and a Securities Attorney for a large broker-dealer in Florida. Riddick is a member of the Illinois and Florida Bar Associations. She received her Juris Doctor in 2001 from the University of Florida Levin College of Law, and her Bachelor of Science in 1998 from the University of Florida.*

*States: Nevada*

# Foreclosure Mediation In Nevada, Past, Present and Future

*By: Kristin Schuler-Hintz, McCarthy & Holthus*

In 2009, the Nevada Legislature passed Assembly Bill 149, which was the first in a series of bills in the Nevada bi-annual legislature which impacted the processing of non-judicially, and then judicial foreclosure in the State of Nevada by mandating mediation prior to foreclosure in the State of Nevada. Prior to the passage of AB 149, foreclosure in Nevada was a streamlined process that took approximately 111 days from the recording of a Notice of Default to the sale being conducted.

AB 149 was passed in an effort to address the rising number of foreclosures in one of the hardest hit States during the peak in the financial crises. After the passage of AB 149, the foreclosure process was extended and the average time frame for the completion of a foreclosure was extended to about a year. The original foreclosure mediation program (known as the FMP) was not prepared the volume of Notices of Default it received and the number of processes that needed to be originated in order to track the Notice of Default, Request (or not) for Mediation and issuances of Certificates, and what to do in the event of rescission of a Notice of Default. The FMP was one of the very mediation programs tied solely to a non-judicial process and system and had little to no infrastructure at its inception.

In 2011 and 2013 various other legislature was passed as part of the process to bring judicial foreclosure under the aegis of the FMP and to make the process mandatory when the eligible borrower/homeowner paid the necessary fees and submitted the required paperwork.

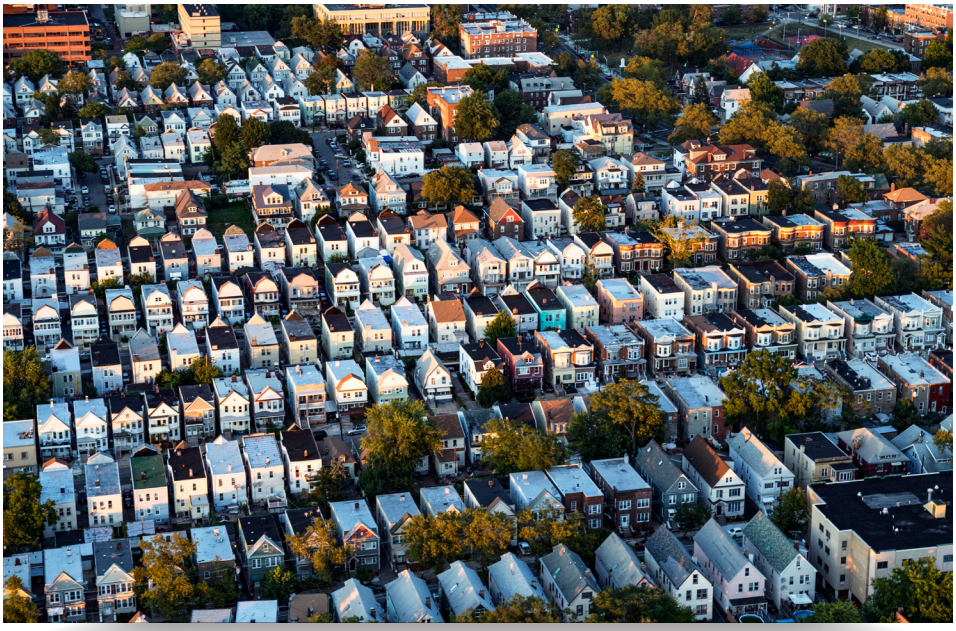
Today, opinions are mixed on the success foreclosure mediation and whether foreclosure mediation continues to be necessary. Proponents of the system point to the number of resolutions reached at mediation, along with the number of lender/beneficiary's deficiencies to rally support for the program and demonstrate its obvious need. Opponents of the system point to the lackluster number of enrollments, increased home values and employment, improved internal systems for early default resolution, along with State (Nevada Homeowners Bill of Rights) and Federal (FDCPA, Bankruptcy mediation) programs and laws to show that the need for the Nevada foreclosure mediation program is over.

Foreclosure mediation statistics from a 2013 legislative exhibit stated that since the passage of the legislation in 2009 at the peak of the crisis an average of 25 percent of eligible homeowners elected to participate in mediation. Rising costs and decreasing enrollment resulted in a 2015 legislative change designed to sunset the program as of June 30, 2017.

On June 12, 2017, Gov. Brian Sandoval signed SB490 bringing back foreclosure mediation as part of the Court alternative dispute resolution program and mandating the development of a portal to streamline the process of mediation. Since that time, the Supreme Court appointed mediators, put out a call for new mediators, and updated the Rules to comply with the legislative changes. The Courts in Nevada updated forms and systems to address the filing of Petitions for Foreclosure Mediation and Answers and pay the required mediator fees and costs and issue orders after mediation directed to guide Home Means Nevada. The new Foreclosure Mediation program under Home Means Nevada, created new forms to request and issue certificates of mediation completed or not required and opened up the new HLP portal to start streamlining the mediation process for the Courts, homeowners, beneficiaries, and trustees. While the program got off to a slow start (to be anticipated as the bill was effective upon passage and signage) it has made great strides moving forward.

What is ahead for foreclosure mediation in Nevada? The HLP portal will streamline the process making mediation and foreclosure more efficient. Unemployment in Nevada is down from 11.8 percent in 2009 to 4.6 percent in August 2018. Home values in Nevada have continued to rise from the rescission low (a median home value of $118,000 in early 2012) to a current median home value of $295,000. The increased ability to sell real property and recoup equity when a personal financial crisis hits rather than face foreclosure has decreased default notices. The short sale process for those homes that may still be underwater has improved further decreasing the Notices of Breach being recorded in Nevada. Improved internal process have resulted in earlier intervention when default occurs. Accordingly, fewer and fewer people are facing foreclosure and the choice for mediation. It is likely the question of the need for foreclosure mediation will be back on the table in a future legislative session.

*Kristin Schuler-Hintz is the Managing Partner for the Nevada office of McCarthy & Holthus. Schuler-Hintz, graduated from the University of Nevada Las Vegas, with a bachelor's in Psychology and obtained her law degree from the University of San Diego School of Law in 1999. While at USD, she received the CALI Award for Excellence in Conflict of Laws. Schuler-Hintz is admitted to practice law before all the courts in the states of California and Nevada.*



*States: New Jersey*

# New Jersey Appellate Division Case Confirms Lender's Standing to Foreclose

*By: Mario A. Serra and Ashleigh Levy Marin, Esq., Fein, Such, Kahn, & Shepard*

The sale of a loan the day prior to filing a foreclosure complaint does not automatically negate a plaintiff's standing to foreclose a mortgage. The appellate division held that a lender that no longer owns the note and mortgage but has retained physical possession of the note has standing to foreclose in an opinion affirming the trial court's decision in an appeal handled by the Creditors' Rights Litigation Department at Fein, Such, Kahn & Shepard, P.C in LSF8 Master Participation Trust v. Simon Zarour.

On August 10, 2007, defendant, Simon Zarour, executed a promissory note in the amount of one million dollars in favor of Washington Mutual Bank, F.A. "WAMU". The loan was secured by a mortgage of even date on a property located in Paramus, New Jersey. Defendant purchased this property as an investment property and leased the home. Defendant defaulted on the loan payments in August 2008. In 2008, WAMU went into receivership with the Federal Deposit Insurance Company (FDIC) acting as the receiver. WAMU's assets, including all loans, were then purchased by J.P. Morgan Chase, National Association "Chase Bank" in September 2008.

A foreclosure action was filed in the name of J.P. Morgan Chase, National Association on March 28, 2014. As part of the complaint verification process, Chase Bank confirmed that it was in possession of the original note. On March 27, 2014, the day prior to the filing of the complaint, Chase Bank sold the note and mortgage to LSF8 Master Participation Trust. The note was physically delivered to LSF8 Master Participation Trust on April 30, 2014. The mortgage was formally assigned from the FDIC to J.P. Morgan Chase, National Association by assignment dated May 13, 2014. The mortgage was further assigned by assignment of mortgage from J.P. Morgan Chase, National Association to U.S. Bank Trust, N.A. as Trustee for LSF8 Master Participation Trust on May 13, 2014. The mortgage was again assigned on August 5, 2014, to LSF8 Master Participation Trust.

Defendant filed an answer to the foreclosure complaint, challenging plaintiff's standing to foreclose. The court then entered an order striking defendant's answer, specifically finding that plaintiff had standing to foreclose. Final judgment was entered against defendant on September 28, 2016. Three months later, defendant filed a motion to vacate final judgment, contending that the judgment should be voided pursuant to subsections (c) and (f) of Rule 4:50-1 because Chase Bank fraudulently represented that it was the holder of the note and mortgage when filing the complaint. The trial court denied defendant's motion to vacate and his subsequent motion for reconsideration. The appeal followed.

Defendant specifically appealed the February 3, 2017 order denying his motion to vacate the final judgment and the April 28, 2017 order denying his motion for reconsideration. In affirming the trial court's decision, the appellate division noted that defendant's claim that Chase Bank misrepresented that it was the holder of the Note and Mortgage was really an argument about standing.

The appellate division held that under these circumstances, Chase Bank did indeed have standing to foreclose when it filed the complaint as the holder of the note. At the time the Complaint was filed, Chase Bank was in physical possession of the note. The note was not physically delivered to LSF8 Master Participation Trust until April 30, 2014, after the complaint was filed. The Court found that the record did not disclose any fraud or misrepresentation because Chase Bank did its due diligence prior to filing the complaint. On March 13, 2014, Chase was the owner of the note and mortgage. Defendant did not dispute that Chase Bank purchased the loan from the FDIC in 2008. The fact that the note and mortgage were sold the day before the complaint was filed does not amount to fraud. A later assignment of mortgage from the FDIC into Chase Bank in 2014 does not show fraud or misrepresentation.

The Court also considered the commercial reality of the situation noting that the defendant defaulted on this million-dollar loan in 2008 and has failed to make any payments since the default. Defendant also failed to dispute that LSF8 Master Participation Trust was the current holder of the note and mortgage. "Thus, the equitable considerations presented in this matter supported entry of the final judgment in favor of the plaintiff."

*Mr. Serra is the managing shareholder of the Creditors' Rights Practice Group for the states of New Jersey and New York. He has over 20 years of experience in representing lenders, servicers and individual investors in protecting their interests in the areas of foreclosure, bankruptcy, litigation and loss mitigation. Mr. Serra is a member of the New Jersey and New York State Bar Associations and the American Bankruptcy Institute. He is a frequent lecturer on bankruptcy including a lecturer for the New Jersey Institute for Continuing Legal Education (NJ ICLE). He is also a member of the Mortgage Bankers Association (MBA), Legal League 100 (LL100) and Default Attorney Group (DAG).*

*Ms. Marin works primarily in the Secured Creditors' Rights Litigation Group for the state of New Jersey. She focuses her practice on representing financial institutions in various matters that include foreclosure and title disputes. Upon graduation from law school, Ms. Marin clerked for the Honorable Glenn Berman, JSC, Superior Court of New Jersey Chancery Division, General Equity Part, Middlesex.*

*States: Maryland*

# Debt Collection, Licensing and In Rem Foreclosure Maryland Sets the Stage for Obduskey

*By: Kristine D. Brown, Managing Partner, Shapiro & Brown, LLP*

In June of 2017, the Maryland Court of Special Appeals took the mortgage industry down a winding path of uncertainty with its rulings in Blackstone v. Sharma, September 2015, 1524, and Shanahan v. Marvastian, September 2015, 1525. With these decisions, the Court upheld the dismissal of two foreclosure actions initiated on behalf of a foreign statutory trust and found that any foreclosure judgment obtained was void, as a result of the trust's failure to obtain a license as a collection agency pursuant to the Maryland Collection Agency Licensing Act, Md. Ann. Code, Bus. Reg. § 7-101, et. seq. (MCALA). The application of this licensing requirement to the mortgage industry threw the state for a curve like it had not seen in years and could not be ignored.

The Court determined in Sharma that the subject foreign trust fell within MCALA's definition of a "collection agency," and parsed the definition into five elements: "[a] a person who [b] engages directly or indirectly in the business of . . . collecting a [c] consumer claim the [d] person owns, [e] if the claim [*15] was in default when the person acquired it." BR § 7-101(c)(1)(ii). The trust argued that foreclosure did not constitute being "engage[d] in the business of collecting" a consumer claim. Op. at 14-15. But the Court was not persuaded and went so far as to say that foreclosure of deeds of trusts and mortgages is debt collection and therefore, MCALA applies. The Court also declined to accept the arguments that a "trust company" exemption applied and instead defined the trust to be more of a debt purchaser attempting to collect a debt through the foreclosure process.

As a practical matter, this decision caused a partial moratorium in Maryland. Although this negative ruling from the Court of Special Appeals was completely inconsistent with long-standing Maryland decisional law and failed to address several considerations, it left mortgage lenders in limbo. Even Circuit Court judges were incited to ask our firm's seasoned litigator if he was going to, "help clean this mess up?" This was a ruling that was at odds with long-standing cases, such as Anderson v. Burson 424 Md 232 (2011) which provided that a mortgage servicer in possession of the note is entitled to enforce the note. In Anderson, our firm successfully argued that the trustee of a trust containing securitized assets and the appointed substitute trustee were able to foreclose as non-holders in possession. The legal existence of the trust was immaterial.

Fortunately, Maryland's highest court, the Court of Appeals, granted certiorari and long-serving retired Judge Harrel joined the panel of judges to hear the case. At oral argument, the Court focused on whether the trust was doing business as defined in MCALA, and what harm, if any, would result in requiring the license. Without an appreciation for the impact to thousands of loans on hold, and the potential impact to marketing post-foreclosure properties, Maryland foreclosure law, and legislative history seemed to fall by the wayside, and the outlook seemed uncertain.

After many months of great anticipation, the Court of Appeals issued its sixty-five-page opinion on August 2, 2018, finding that foreign statutory trusts are not regulated under MCALA and even implying that "collection agency" does not include the mortgage industry. This substantial win for the mortgage industry in Maryland's highest court defined MCALA as an ambiguous statute and focused on a review of the legislative history and an analysis of the statute's relationship to other legislation in order to clarify the General Assembly's intent. When comparing MCALA with the almost contemporaneous Maryland mortgage foreclosure law reform, the Court concluded that the General Assembly, "consciously separated the consumer debt collection agency industry under MCALA from the mortgage industry."

Leaving us on a high note, the Court noted the U.S. Supreme Court's recent grant of certiorari in Obduskey v. McCarthy & Holthus LLP regarding the nature of non-judicial foreclosure actions and the applicability of the FDCPA. And, even though the Maryland Court of Appeals declined to extend to this issue, they recognized the implications of that decision for foreclosure actions and characterized Maryland's quasi-judicial foreclosure process as an in rem proceeding. This should set the stage for us to claim the benefit of a positive ruling by the Supreme Court of the United States in the state of Maryland.

*Kristine D. Brown is the Managing Partner of the law firm of Shapiro & Brown, LLP. She received the degree of Juris Doctor from Duquesne University in 1999, is licensed in the state of Maryland and has been practicing law for 18 years. Brown grew up in Montgomery County, Maryland and joined the firm 17 years ago as an Associate. She became a Managing Attorney in 2010, focusing on Compliance and Auditing and has been the Managing Partner for the past six years. Brown has significant experience within the default industry as an attorney and businesswoman, and she considers compliance and advocacy for the firm's clients to be her highest priorities.*

*States: New Jersey*

# New Jersey Appellate Division Case Confirming 20-Year Statute of Limitation on Foreclosure Actions

*By: Mario A. Serra, Jr. and Ashleigh Levy Marin, Esq., Fein, Such, Kahn, & Shepard, P.C.*

The appellate division recently upheld the 20-year statute of limitations in an appeal handled by the Creditors' Rights Litigation Department at Fein, Such, Kahn & Shepard, P.C. in Deutsche Bank National Association v. Michael Hochmeyer. The appellate division was tasked with determining which subsection of N.J.S.A. 2A:50-56.1 was applicable within the context of a restarted foreclosure action.

In May 2006, the defendant, Michael Hochmeyer, executed a promissory note in the amount of $540,000 in favor of Decision One Mortgage Company. The promissory note states, "If, on June 1, 2036, [defendant] still owe[s] amounts under this [n]ote, [defendant] will pay those amounts in full on that date, which is called the 'Maturity Date.'" Defendant defaulted on his loan in December 2006. A foreclosure complaint was subsequently filed by plaintiff's predecessor in interest in August 2007 and contained language accelerating the amount due pursuant to the terms of the promissory note. In August 2013, plaintiff voluntarily dismissed the 2007 foreclosure action without prejudice.

In March 2016, plaintiff initiated a second foreclosure action against the defendant. The defendant, through counsel, filed a contesting answer. Plaintiff then moved for summary judgment and defendant cross-moved to dismiss the complaint. The trial court ruled in favor of plaintiff granting summary judgment and denying defendant's cross-motion to dismiss. Plaintiff then submitted an application for final judgment. Defendant filed objections to the final judgment, which were overruled by the court. A final judgment of foreclosure was later entered in favor of the plaintiff in the amount of $1,202,880.86.

Defendant appealed the trial court's order granting summary judgment and the subsequent final judgment of foreclosure, raising two issues on appeal: first, that the trial court incorrectly applied the 20-year statute of limitations, and second, that the court should toll the amount due to plaintiff as a result of the delays in the foreclosure process.

First addressing the statute of limitations argument, Defendant asserted that the six-year statute of limitations, set forth in N.J.S.A. 2A:50-56.1(a), was triggered in 2007 when the respondent-plaintiff filed a prior foreclosure action against the defendant-appellant, which included language accelerating the amount due. Plaintiff countered, arguing that both the plain language of the statute and the legislative history clearly indicate that the twenty-year statute of limitations, N.J.S.A. 2A:50-56.1(c), was intended to be applicable to defaulted mortgage loans. Plaintiff further argued that accelerating the amount due did not change the maturity date as clearly set forth in the loan documents.

The Court ruled that: "[D]ismissal of plaintiff's March 2016 complaint would provide an inequitable result because the defendant would receive a windfall at plaintiff's expense. Accordingly, we affirm the trial court's decision to apply the 20-year statute of limitations from the date of default as the Legislature intended."

Defendant then argued, for the first time at the appellate level, that plaintiff should be barred from collecting the full amount of interest and advances due on the loan as a result of the delays in prosecuting the foreclosure action. The appellate division also rejected this argument, noting that defendant failed to challenge plaintiff's calculations of the amount due at the time of final judgment with any specificity as required by Rule 4:64-1(d)(3). The appellate division further explained: "defendant's argument again ignores the fact that plaintiff paid all of the carrying costs on the property, including taxes and insurance, while the defendant lived there payment-free. Equity dictates the court grant the plaintiff a judgment for its reasonable expenditures."

At the time this case was briefed, the appellate division had not yet issued a written opinion interpreting the statute and whether the six-year or twenty-year statute would be applicable in a case where the foreclosure action was restarted. An adverse ruling could have had catastrophic consequences to the foreclosure process in New Jersey, especially with the aged foreclosure actions which were restarted more than six years after the initial default. Fortunately, the appellate division agreed with the lender's interpretation of the statute of limitations.

*Mario A. Serra Jr., is the managing shareholder of the Creditors' Rights Practice Group for the states of New Jersey and New York. He has over 20 years' experience in representing lenders, servicers, and individual investors in protecting their interests in the areas of foreclosure, bankruptcy, litigation, and loss mitigation. Serra is a member of the New Jersey and New York State Bar Associations and the American Bankruptcy Institute. He is a frequent lecturer on bankruptcy including a lecturer for the New Jersey Institute for Continuing Legal Education (NJ ICLE). He is also a member of the Mortgage Bankers Association, Legal League 100, and Default Attorney Group.*

*Ashleigh Levy works primarily in the Secured Creditors' Rights Litigation Group for the state of New Jersey. She focuses her practice on representing financial institutions in various matters that include foreclosure and title disputes. Upon graduation from law school, Ms. Marin clerked for the Honorable Glenn Berman, JSC, Superior Court of New Jersey Chancery Division, General Equity Part, Middlesex.*

*States: Texas*

# LIENHOLDERS BEWARE OF LIEN-STRIPPING PRACTICE

*By: Philip Danaher, Mackie Wolf Zientz & Mann, P.C.*

Texas has seen a disturbing increase in real estate speculators investing in residential properties still subject to first lien mortgages filing baseless lawsuits and obtaining a default judgment against a mortgagee rendering its lien void. The method of service in these lawsuits often results in the mortgagee receiving no notice of the lawsuit until well after the default judgment is entered. An opinion from the Northern District of Texas purports to condone one such method of service, which should signal lenders to make sure their filings with the Texas Secretary of State are in proper order.

Texas law provides for a very specific method of service on foreign financial intuitions acting as trustees for a trust containing a pool of securitized mortgage loans. To summarize the requirements, foreign financial intuitions acting in such a capacity (often referred to as "foreign fiduciaries") are required by law to irrevocably appoint the Texas Secretary of State its agent for process and then file a certificate of designation specifying where and to whom notice of a lawsuit should be forwarded. As its agent for service of process, service is deemed to be effective when the Secretary of State is served, not when the foreign fiduciary receives notice. As one may suspect, this method of service could lend itself to abuse by unscrupulous plaintiffs seeking to take advantage of out-of-state lenders that expect service of process to be effective when on their registered agents or legal departments that may not manage receipt of their mail as carefully as the law may expect.

In Moss v. US Bank, the plaintiff, a borrower severely in default on his mortgage, filed a lawsuit against US Bank, his mortgagee, in its capacity as a trustee of a securitized trust. Moss proceeded to serve US Bank through the Texas Secretary of State with notice to be forwarded to an individual and address that US Bank had substantially informed the public that it no longer used. The record showed that the Texas Secretary of State had mailed the notice to the address, but it was returned undeliverable. Moss moved for and was awarded a default judgment against US Bank invalidating its lien interest. US Bank never received notice of the lawsuit before the default judgment was entered.

Later, US Bank was made aware of the default judgment when a recorded copy was discovered in a title search conducted by its foreclosure counsel. US Bank removed the action to the Northern District of Texas and argued that removal was timely and proper because Moss had not served US Bank since it had requested notice to be forwarded to an individual and address that it had notified the Secretary of State it was no longer using. Moss sought a remand arguing that US Bank was properly served because it failed to comply with Texas law's requirements for changing the "designee" to whom the Texas Secretary of State shall forward all notices. More specifically, Moss argued that because US Bank's notice to the Texas Secretary of State referenced a change to their "registered agent" rather than a change to the "designee" to whom notice should be forwarded, they had failed to change the person and address for notice effectively.

The court agreed with Moss and found that service was valid despite US Bank's filings with the Texas Secretary of State substantively providing notice that it had changed to whom and were notice should be forwarded. In doing so, the court adopted Moss' form over substance argument that US Bank's notices to Texas Secretary of State referring the change of their "registered agent" was ineffective to change the designee to whom service is to be forwarded. The court reasoned that Texas law provided for a method in which a foreign fiduciary could change such a designee, by filing an amended certificate of designation, and US Bank's failure to comply with those requirements rendered its notice of the change invalid. The case was remanded to the state court from which it was removed.

The Moss case provides a clear warning to financial institutions acting as trustees of securitized trusts in Texas that their information on record with the Texas Secretary of State needs to contain updated information and be in strict compliance with Texas law. Further, lenders should take a closer look at the address and person they have designated to receive notice under Texas law to ensure that receipt of said notice will result in actual notice to the lender's legal department. Anything less and a lender could find itself in losing its security interest with no recourse.

*Philip Danaher joined Mackie Wolf Zientz & Mann in April of 2013 as a member of the Litigation Section of the firm. Philip has a background in the mortgage industry including both servicing and origination. He currently represents creditors in matters regarding mortgage-lending litigation and other related matters. Danaher attended the University of Dallas as an undergraduate, where he earned a B.A. in Politics. He earned his Juris Doctor from Tulane Law School and was admitted to the State Bar of Texas in 2011. Danaher is a member of the State Bar of Texas and the St. Thomas More Society.*

# APPEALS COURT FINDS FHFA STRUCTURE UNCONSTITUTIONAL

FHFAThe Fifth Circuit U.S. Court of Appeals recently concluded that the leadership structure of the Federal Housing Finance Agency (FHFA) was unconstitutional.

The three-member panel of judges led by Chief Judge Carl Stewart was hearing a case filed by three shareholders of the government-sponsored enterprises (GSEs) Fannie Mae and Freddie Mac against the FHFA, its Director as well as the Treasury and its Secretary.

The shareholders contended that the Treasury and the FHFA exceeded their statutory authority under the Housing and Economic Recovery Act (HERA) of 2008 and challenged an agreement between the FHFA as conservator to Fannie and Freddie and the Treasury Department.

Under the agreement in question, the shareholders claimed that the Treasury provided billions of taxpayer dollars in capital. In exchange, the GSEs were required to pay the Treasury quarterly dividends equal to their entire net worth in an exchange known as the "net worth sweep." The shareholders were unhappy with the bailout out terms of this agreement and filed a suit arguing that the agreement rendered their shares valueless.

They also contended that the agreement was arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) ("APA"), while claiming that the FHFA was unconstitutionally structured because it was headed by a single Director, "removable only for cause, does not depend on congressional appropriations, and evades meaningful judicial review."

After the hearing, the three-member bench dismissed the shareholders' statutory claims and granted summary judgment in favor of the FHFA and Treasury on the constitutional claim. "Because we find that the FHFA acted within its statutory authority by adopting the net worth sweep, we hold that the Shareholders' APA claims are barred by § 4617(f)," the judges ruled. "But we also find that the FHFA is unconstitutionally structured and violates the separation of powers. Accordingly, we affirm in part and reverse in part."

A recent ruling by a New York Judge had also upheld a previous ruling that said the Bureau of Financial Protection (BCFP) was unconstitutional for the same reason.

# MOVERS & SHAKERS

## A360INC AND NATIONAL CREDITORS BAR ASSOCIATION ANNOUNCE NATIONAL PARTNERSHIP

a360inc, a Dallas, Texas-based technology and outsourcing solutions company, and National Creditors Bar Association (NCBA) have announced a national partnership designed to provide access to compliance training programs for the bar association's more than 500 law firms and their staffs, as well as NCBA's in-house counsel members. The online portal, hosted by a360inc and available to NCBA members, currently offers 10 compliance courses specific to the practice of creditors' rights law. The initial course offerings include compliance training covering topics such as the Americans with Disabilities Act and the Servicemembers Civil Relief Act. Each course includes several modules and which must be completed in order by the user, to complete and successfully finish a course. Additional courses will be introduced periodically. "Compliance is critical in today's environment, and at a360inc we're focused on helping firms transform their businesses into efficient, compliant, and operationally sound enterprises." said Scott Brinkley, CEO, a360inc.

## RICHARD M. SQUIRE & ASSOCIATES HIRES NEW ATTORNEY

Richard M. Squire & Associates, a mortgage default law firm licensed and practicing in Pennsylvania and New Jersey, has announced the continued expansion of its Attorney roster with the addition of Rutgers University School of Law graduate, Pierre Simonvil. Pierre will be responsible for foreclosure and bankruptcy litigation in Pennsylvania and New Jersey. "We are extremely excited to have Pierre on the team," said Richard Squire, Founder & President. "Pierre's experience in both New Jersey and Pennsylvania truly complements the firm's client-focused approach and furthers our commitment to providing the high quality of service to which our clients are accustomed to."

## STERN & EISENBERG EXPANDS TO NEW STATES

Stern & Eisenberg has announced the firm's expansion into Tennessee and Alabama. With this expansion, Stern & Eisenberg now operates in twelve states and the District of Columbia. The firm's other states of service are New York, New Jersey, Pennsylvania, Delaware, West Virginia, Maryland, Virginia, North Carolina, South Carolina, and Georgia. Stern & Eisenberg maintains GSE-compliant, brick-and-mortar operations in each of its twelve states of service and has large, regional processing hubs in Baltimore, Maryland and Warrington, Pennsylvania where the firm is headquartered. As part of the expansion, the firm has announced that Zachary H. Champion, Esq. has joined Stern & Eisenberg's Alabama office. In the firm's new Nashville, Tennessee office, Stern & Eisenberg has announced Carolee Berasi, Esq. has joined the firm's Tennessee team.

A FIRM FOUNDATION FOR THE FUTURE.

## ALAW ANNOUNCES MERGER WITH FELTY AND LEMBRIGHT

ALAW, a creditors' rights law firm which provides default, litigation, collection, title, and closing services to the mortgage banking industry, has announced its merger with Cleveland, Ohio based creditors' rights law firm Felty and Lembright Co., L.P.A. Current Felty and Lembright Partners Kriss Felty, Mark Lembright, and Antonio Scarlato, will remain as partners of the combined entity, which will serve clients as Albertelli Law Partners of Ohio, LLC. This acquisition further expands ALAW's growing default services footprint, which will now include Alabama, Arkansas, Florida, Georgia, North Carolina, Ohio, South Carolina, Tennessee, Texas, and the U.S. Virgin Islands. "We are thrilled to welcome Felty and Lembright to the ALAW family," said Jim Albertelli, Founding Partner at ALAW. "They have built a tremendous practice and have a tremendous industry reputation based on the highest standards of excellence and integrity."

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