LEGAL LEAGUE 100 QUARTERLY

WINTER 2018 COMMITTED TO THE INDUSTRY, INTEGRITY, AND BEST PRACTICES

National

Bankruptcy Court Dismisses Chapter 13 Case Based on Debtor's Prior Surrender of Property in Chapter Seven Case

By: Roy Diaz, SHD Legal Group P.A.

The Bankruptcy Court for the Middle District of Florida dismissed a Chapter 13 bankruptcy proceeding brought by a debtor (Johnson) in an effort to "repay his mortgage debt." In *Johnson*, the debtor and his wife defaulted on their mortgage and Charles Schwab Bank ("Schwab") initiated foreclosure proceedings. Thereafter, the Johnsons petitioned for bankruptcy protection under Chapter Seven. In their "Statement of Intention" filed in the Chapter Seven case, the Johnsons stated their intention to surrender their mortgaged property, a home in Jacksonville Beach, Florida, (the Property) in the bankruptcy proceedings. The Johnsons received a discharge of their debts in December 2013.

Contrary to their stated intention to surrender the property, the Johnsons "vigorously fought Schwab's foreclosure case for several years." While the foreclosure litigation was pending, the Eleventh Circuit Court of Appeals issued its decision in *Failla v. Citibank, N.A.* where the court clarified that "a debtor who surrenders property in a Chapter Seven bankruptcy case must relinquish all legal interest in the property to both the trustee and the creditor." Pursuant to the holding of *Failla,* the Johnsons entered into an agreed order at the foreclosure trial which explicitly precluded "them from defending the foreclosure case or taking any other

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National

The Rocky Road to Fee Recovery

A Court of Appeals has limited the lender's right to recover attorney's fees after successfully defending against borrower lawsuits challenging a foreclosure. That means a victory in court could still prove costly.

By T. Robert Finlay, Esq., Wright Finlay & Zak

Recovering attorney's fees can be a controversial aspect of any legal proceeding. When it involves navigating the terrain of foreclosures, the process can become even more complicated. A pair of recent decisions from the California Court of Appeals has provided clarification when it comes to whether and how servicers can recover their attorneys' fees after successfully defending challenges to their Deed of Trust (DOT)—and unfortunately, the news is potentially troubling.

In both *Hart v. Clear Recon Corp and Nationstar and Chacker v. JPMorgan Chase Bank,* separate panels of the Second Appellate District held that the provisions in the standard form Deed of Trust relied on by the prevailing lender only allowed the holder to add fees and costs incurred in defending the litigation to the loan

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National

Federal Law: Foreclosure Upon the Death of a Borrower

By Bret Chaness, Rubin Lublin, Peachtree Corners, GA

One of the most frequently litigated issues surrounding reverse mortgages is whether a mortgagee can foreclose following the death of the borrower when their non-borrower spouse still resides at the property. The argument hinges on 12 U.S.C. § 1715z-20(j), which provides that "the Secretary of HUD may not ensure a home equity conversion mortgage . . . unless such mortgage provides that the homeowner's obligation to satisfy the loan obligation is deferred until the homeowner's death. The section proceeds to define "homeowner" to include "the spouse of a homeowner."

In many reverse mortgage transactions, only one spouse is designated as the borrower. This occurs for a variety of reasons, including that the non-borrower spouse is ineligible for a reverse mortgage (which requires borrowers to be at least 62 years old). Under § 1715z-20(j), HUD may not insure reverse mortgages that allow for foreclosure upon only the death of the borrower (and not the non-borrower spouse). In reality, however, reverse mortgages were being issued and insured despite not providing any protection for the non-borrowing surviving spouse. Thus, when the borrower predeceases their spouse, the surviving non-borrower spouse is faced with foreclosure.

This was the situation recently presented to the Eleventh Circuit in *Estate of Jones v. Live Well Financial, Inc.* F.3d, No. 17-14677, 2018 WL 4211452 (11th Cir. Sept. 5, 2018). In *Jones,* the Estate of Caldwell Jones and Mr. Jones' widow Vanessa brought suit to enjoin the foreclosure of a reverse mortgage following the death of Mr. Jones. The Plaintiffs "argued

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WINTER 2018

LETTER FROM THE LEGAL LEAGUE 100 ADVISORY COUNCIL CHAIRPERSON

I was optimistic going into the September Legal League Summit and was very happy with the quality and substance of the event. This was my first Summit as the Advisory Board Chair, and I can describe it in one word …"whirlwind."

I think everyone who attended would agree that Marion McDougall's Keynote Address was fantastic. She has the unique ability to deliver substantive and informative industry information, with warmth and humor that is so refreshing. As she accepted her Lifetime Achievement Award, she recalled industry focus of the past few years and left us with a challenge:

"I challenge us all to continue to think outside the box, and view our industry from the perspective of our customers not only from a compliance perspective."

Her comments were spot-on and consistent with the sessions that followed, which provided the opportunity to hear from the industries' brightest on topics beyond compliance: improvement to loss mitigation, improved title process, litigation and bankruptcy developments, and creative management of regulation and our practices, she then closed with an industry super-session on building better partnerships.

The Summit was capped off with the Five Star Labs. Included was the Foreclosure Lab, which featured Karen Mastro of Rushmore Management Services as Lab Director. This lab comprised informative panels together with an update from Mark McArdle of the Bureau of Consumer Financial Protection.

The industry has made great strides and has seen tremendous improvement in the area of compliance. We must now look ahead and, as McDougall suggests, we need to "think outside the box."

September delinquency registered the most substantial single-month rise since 2008. The 2018 hurricane season will have a year-end impact on delinquencies. As delinquency shifts upward, we need to assure we are working together to provide the best possible value to our clients and to assist them in bringing the best possible service to their customers. This is the time to revisit practice policies, technology, data management, and effective communication. There continues to be opportunities for improvement in an ever-changing marketplace.

I look forward to the continued support of the LL100 membership and the opportunity to provide our industry with top-notch representation as an organization.

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.

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balance. The provisions did not, however, allow for a separately recoverable fee award against the borrower. In other words, if the property does not have sufficient equity to cover these amounts, the holder is out of luck. Even worse, if the defendant assigned away its interest in the DOT before judgment, it is completely out of luck as it would not even have the potential for recovering its fees through the foreclosure sale. As the court, quoting the late Justice Scalia in another context, stated in *Chacker,* the assignor "must take the bitter with the sweet."

The Bitter and the Sweet

The facts and ruling of both cases are relatively similar. In *Chacker,* the borrower sued Chase to stop the foreclosure sale. Chase's Demurrer was sustained without leave to amend, and the trial court entered a judgment of dismissal. Chase's attorneys then moved for attorney's fees under the standard language of paragraphs 9 and 14 of the DOT, which was granted by the trial court. The Court of Appeal reversed, vacating the judgment for fees and ordering that Chase's attorney's fees could only be added to the loan balance, not collected directly from the borrower.

The published portion of the appeal did not focus on Chase's right to recover fees or the amount of the fees. Instead, the decision focused on whether paragraphs 9 and 14 of the DOT limit Chase to adding the fees to the amount owed under the DOT, or whether these provisions supported a separate judgment against the borrower, independent of its repayment obligations under the note and the DOT. Paragraph nine of the relevant DOT provided that the lender may pay reasonable attorney's fees to protect its interest in the property or DOT. However, the plain language of the DOT specifies that "any amounts disbursed by lender under this Section Nine shall become additional debt of the borrower secured by this DOT." The court held that the plain language of paragraph nine did not provide for a separate award of attorney's fees. Likewise, paragraph 14 of the DOT states that the lender may "charge" the borrower fees for services performed in connection with borrower's default, for the purpose of protecting lender's interest in the property or DOT, including attorney's fees. However, again, the plain language of this paragraph provides that the attorney's fees are to be added or "charged" to the loan balance. As a result, paragraph 14 did not permit a freestanding contractual attorney fee award. Paragraph nine and 14 of Chase's DOT reflect the standard language used by most institutional, residential lenders.

Adding insult to injury, and leading to its quote from Justice Scalia, the court rejected Chase's point that the adding of the fees to the loan balance did nothing to assist Chase in recovering the fees it had incurred because it no longer had any interest in the loan, as the rights had been assigned to another financial institution and therefore would not be paid out of any subsequent foreclosure. The court observed that Chase could have protected itself against that result by including language in the assignment "to account for how attorney fees may be recovered when a borrower defaults."

In *Hart,* two plaintiffs (mother and son) sued Nationstar for wrongful foreclosure. Neither plaintiff was the borrower under the DOT, and the sole borrower was not a party to the action. Nationstar obtained summary judgment on the basis that the plaintiffs were not borrowers, and therefore had no rights under the DOT, and had no right to sue to stop the foreclosure. Nationstar's attorneys sought its attorney's fees as a prevailing party under the DOT. Unlike in *Chacker,* Nationstar relied exclusively on the attorney fee language in paragraph nine of the DOT. Like Chase's DOT, paragraph nine of Nationstar's DOT provided that, if there is a legal proceeding that might significantly affect the lender's interest in the property or security, the lender may do and pay for whatever is reasonable to protect the lender's interest, including paying attorney's fees to defend itself in a lawsuit. The provision then provides that "any amounts disbursed by Lender under this Section Nine shall become additional debt of Borrower secured by this Security Instrument." Trial Court granted Nationstar's attorney's fees motion, holding that paragraph nine of the DOT was an attorney's fees provision. The Court of Appeals reversed, however, holding that paragraph nine did not permit an award of attorneys' fees against the plaintiffs.

On appeal, Nationstar argued that it was entitled to a fee award under paragraphs 9, 14, and 22 of the DOT, as well as the note. The Court of Appeals refused to consider on appeal whether paragraphs 14 or 22 of the DOT or the note itself, justified an award because Nationstar had failed to raise these arguments at the trial court level. Instead, the court focused exclusively on what was before it—paragraph nine. Like in *Chacker,* the court concluded that the plain language of paragraph nine does not provide for an award of attorney's fees. Rather, it is "a provision that attorney's fees, like any other expenses the lender may incur to protect its interest, will be added to the secured debt." The court did, however, note that the result may have been different had Nationstar moved originally under paragraph 22. Likewise, and as discussed more below, we believe the result could be different if the lender had moved for fees under the language in the note.

Speedbumps Along the Way

What do these decisions mean for a lender or servicer who successfully defends a challenge to the foreclosure or DOT brought by the borrower or a related party? While the *Hart* and *Chacker* decisions are disheartening on their face, there are options for getting around their holdings. In addition, the decisions raise several interesting issues for a lender or loan servicer to consider, including:

Review your DOT: While most institutional lenders use DOTs with similar language to the ones at issue in these two cases, the language in conventional, private party, and some older DOTs vary. At the onset of your case, we suggest looking at your specific DOT to determine whether it has language that varies from the language in the Chase and Nationstar DOTs.

Move for fees under Paragraph 22 of the note: Although rejected as not timely raised, Nationstar raised an excellent argument on appeal, i.e., that the language in the acceleration paragraph 22, provided for attorney's fees but did not restrict the recovery of those fees to adding the fees to the amounts owed under the note and DOT. Likewise, many notes contain language providing for attorney's fees to the prevailing lender. If the note involved in your litigation contains favorable attorney fee language, use that as the basis or your fee motion.

Post-foreclosure fees: While not directly addressed in either of the court's rulings, without another ground for a fee judgment, lenders are presumably barred from recovering fees post-foreclosure. If the lender's only recourse is to add the fees to the amount owed under the note and DOT and the foreclosure sale has already occurred, there is no loan to add the fees to.

Recovering fees post-transfer: As Chase found out the hard way, while you may be entitled to add fees to the note and DOT, that process is complicated if the loan has been sold or service transferred before resolving the litigation. Logistically, how can the prior lender add fees to a note they no longer own or service and, even if they could, how would one collect them? It can be done, but it will require lots of calls to the new lender or servicer.

Can a servicer recover fees under the DOT?: California law is mixed on whether a servicer can recover fees under the DOT. Fortunately, most decisions and courts side with the servicer. While the *Hart* and *Chacker* decisions focused on the successor to the lender's right to recover fees, the rulings will apply similarly to a servicer. Indeed, implicit under *Chacker* was its acceptance that Chase, even as a non-party, was entitled, as an agent of the owner, to be paid its fees—it just was limited to doing so by adding them to the loan balance. Likewise, the servicer will have the same challenges collecting fees if the servicing of the loan has already transferred

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to a new servicer.

Can the foreclosure trustee recover its litigation defense fees?: Whether a foreclosing trustee named in borrower litigation can recover its litigation defenses fees and costs is a complicated question. Regardless of the recent decisions discussed above, most standard-form DOTs do not contain language specifically allowing the trustee to obtain a fee award or add them directly to the loan. It will generally require nonstandard language specifically providing that the trustee can recover fees. (Note: the court did confirm fees for the trustee in the Chacker case; however, it appears to have done so without much thought and perhaps was an oversight.)

Can the borrower still recover fees?: Unfortunately, yes. While it might seem inequitable, the reciprocal language of Civil Code section 1717 still gives the prevailing borrower the ability to recover a fee award, even if the prevailing lender or servicer is limited to adding the fees to the loan.

Do you need to move for fees or can you add them directly to your DOT?: Even before these decisions, servicers, and lenders often asked our firm if they could simply add the attorney's fees and costs directly to the loan like they do with advances for taxes, inspection fees, bankruptcy fees, non-judicial foreclosure fees, etc. The answer was almost uniformly—no. Although the DOT language cited above appears to provide that the attorney's fees in defensive litigation with the borrower can be added directly to the loan, Civil Code section 1717 provides that only the prevailing party is entitled to fees (and the fees must be reasonable). Therefore, until the lender wins and is awarded "reasonable" fees, the lender cannot simply add them directly to the loan. However, the *Hart* and *Chacker* decisions appear to bring into question the traditional approach. Both decisions repeatedly point to the language in the DOT that the fees can be added directly to the loan. In fact, the court in *Hart* vacated the fee award completely, holding that Nationstar was essentially free to apply the fees directly to the loan. "Paragraph nine is, instead, a provision that attorney's fees, like any other expenses the lender may incur to protect its interest, will be added to the secured debt." However, there are other issues at play, and we strongly recommend consulting with our office or another attorney before adding any litigation-related fees directly to your DOT.

Updating the attorney fee language in your DOT: While it might be difficult for institutional lenders, private and conventional lenders can revise the language in their DOTs to clearly state that the lender is entitled to add the fees to the loan or, at its sole discretion, obtain an attorney fee award. Again, please consult your attorney before revising the provisions in your DOT.

Why do I even care if the borrower is already in default?: In most instances where the borrower sues its lender, the loan is in default. If the borrower cannot afford to make his or her mortgage payments, he or she often cannot reimburse a lender for its litigation fees and costs. For the last decade or so, it did not make much sense for a lender to incur the expense of moving for fees. Now, however, with property values in California at or above all-time peaks, many litigious borrowers have equity in their homes. If they chose to sue and are unsuccessful, the prevailing lender may want to consider trying to recover its defense costs from the equity in the property. In addition, with borrowers who are serial litigants, the threat of having to pay fees when they lose might help dissuade them.

As you can see, while the court's recent decisions seem clear-cut, they raise a plethora of issues for a lender, servicer, and trustee to consider when moving for fees. We recommend analyzing your DOT at the outset of any litigation to determine whether you can ultimately recover your attorney's fees should you ultimately prevail. Even if you never end up filing the fee motion, knowing your options is useful when negotiating with the other side or during mediation.

T. Robert Finlay is one of the three founding partners of Wright, Finlay & Zak. Since 1994, Finlay has focused his legal career on consumer credit, business and real estate litigation and has extensive experience with trials, mediations, arbitrations and appeals. Finlay is at the forefront of the mortgage banking industry, handling all aspects of the ever-changing default servicing and mortgage banking litigation arena, including compliance issues for servicers, lenders, investors, title companies and foreclosure trustees.

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action to delay the foreclosure of the Property."

The state court entered an In Rem Final Judgment against the Johnsons and scheduled a foreclosure sale for March 7, 2018. The day before the sale, Thomas Johnson petitioned for bankruptcy protection under Chapter 13, indicating he hoped "to keep his home and to modify the mortgages." The Bank moved to dismiss the bankruptcy petition, "arguing the debtor filed his case in bad faith and lost the right to retain his home when he surrendered the property in his Chapter Seven case and then again when he agreed a second time to surrender the property under the agreed order in the foreclosure proceedings."

On appeal, the Middle District framed the issue as: "Whether Failla's strictures prevent a debtor, who surrendered property in a Chapter Seven bankruptcy case and obtained a discharge, from filing a Chapter 13 bankruptcy case the day before a scheduled foreclosure sale in a desperate attempt to keep the 'surrendered' property." The court discussed its prior holding (based on similar facts) wherein it concluded that a debtor forfeits his "right to change his mind" regarding property surrendered in a bankruptcy proceeding because opposition to foreclosure proceedings after a promise to surrender property "contradicted the debtor's Chapter 13 plan and the court's confirmation order."

Applying that reasoning to the facts of Johnson's Chapter 13 proceedings, the Middle District concluded that Johnson was "attempting to enjoy indefinite possession of the property while simultaneously hindering and prolonging the state court process." The court noted Johnson's decision to wait until the day before the foreclosure sale to file his Chapter 13 case demonstrated his true intention was a delay, not a modification of the Schwab mortgages, especially since "he could have modified the loan without filing a new bankruptcy case." The Court surmised Johnson's actions in this regard abused the provisions and purpose of the Bankruptcy Code and that he did not file his Chapter 13 petition in good faith. Despite finding Johnson filed his Chapter 13 petition in bad faith, the court declined to award sanctions, concluding that the bankruptcy filing did not rise "to the level of frivolity" nor was it "filed to harass Schwab." The court did enjoin the Johnsons from filing for bankruptcy relief for a period of 180 days.

This case further solidifies the minimal rights of a debtor once he voluntarily agrees to surrender mortgaged property in a bankruptcy proceeding. The court properly determined that, once receiving the benefit of his bargain via discharge or reorganization of his debts, a debtor should not be allowed to "change in his mind" in direct contravention of his stated intention and the bankruptcy court's orders.

The Johnsons obtained a first and second mortgage with Schwab on the property.

States: Illinois

Illinois Appellate Court Reaffirms State Right to Control Foreclosures

By Blake A. Strautins and Michael R. Schumann, Kluever & Platt

A recent Illinois appellate court decision emphasizes Illinois courts' ability to control their mortgage foreclosure dockets and deter frivolous pleadings and motions by foreclosure defendants. In *Wells Fargo Bank v. Roundtree,* 2018 IL App (1st) 172912 (Nov. 7, 2018), the First District reaffirmed past rulings, holding that the clock to file a motion to quash service starts ticking when a party participates in a hearing or files an appearance—regardless of whether this occurs before or after the entry of a default judgment.

Under Section 5/15-1505.6(a) of the Illinois Mortgage Foreclosure Law (IMFL), a defendant has 60 days from their initial appearance or participation in a hearing to file a motion to quash service. After 60 days, a defendant is barred from attacking service, which was the appellate court's holding in a past decisions. See, e.g., *GreenPoint Mortgage Funding v. Poniewozik,* 2014 IL App (1st) 132864; U.S. *Bank Tr., N.A. v. Colston,* 2015 IL App (5th) 140100, appeal denied, 39 N.E.3d 1012 (Ill.); *Wells Fargo Bank, N.A. v. Sanders,* 2015 IL App (1st) 141272. However, in none of these cases had a foreclosure defendant sought to quash service after an entry of default judgment.

In Roundtree's case, the the plaintiff filed a motion to approve the sale of the foreclosed property. At the hearing on the motion, an attorney appeared for the defendant and was granted time to respond; the attorney filed an appearance for the defendant a few days later. Alas, neither the defendant nor her counsel filed a response to the motion or appeared at the final hearing, and the court entered an order approving the sale of the property. Nearly 322 days after the defendant first appeared, she filed a petition to vacate judgment and motion to quash service. The plaintiff moved to dismiss the defendant's petition, and the trial court agreed with the plaintiff in holding that the petition and motion were untimely under §15-1505.6(a) of the IMFL because they were filed more than 60 days after her initial appearance.

The defendant appealed, contending she did not waive any jurisdictional challenge to the foreclosure because the default judgment was entered before she appeared—in essence, her position was that any waiver would stem from the date of the appearance going forward, but not retroactive to the default judgment. The defendant further argued that the timing of her appearance was irrelevant because void judgments can be attacked at any time. The plaintiff, on the other hand, argued that the defendant was precluded from raising a challenge to the trial court's personal jurisdiction more than 60 days after the defendant's initial appearance—regardless of whether judgment had been entered.

As Illinois courts have held, once an appearance is made, the clock starts running—a foreclosure defendant only has 60 days to move to quash service. The failure to adhere to this strict deadline results in a waiver of any objection to service. As the court notes, the reason for this strict requirement stems from the Illinois legislature's "concern over unreasonable delays in [foreclosure cases] and the desire to limit the ability to file motions to quash service," which are the bases for many such delays. The *Roundtree* court explained that the defendant had a right to prospectively challenge the court's jurisdiction by attacking the method of service on her, but that any such inquiry was irrelevant because "[she] failed to follow the very statutory procedure that would allow" the court to review the propriety of service." Quoting the Illinois Supreme Court's holding in *BAC Home Loans Servicing v. Pieczonka,* 2015 IL App (1st) 133128, the Roundtree court explained that when a "defendant's motion to quash service of process [is] untimely, we need not address the merits of his arguments regarding the propriety of . . . service."

While Illinois courts have addressed §5/15-1505.6(a) several times in the last few years, *Roundtree* is the first to hold that the strict timeline to move to quash service applies regardless of whether a defendant appears before or after the entry of a default judgment. It also reaffirms that a defendant cannot sit idly by, monitor a case, and wait until the eleventh hour to file a motion challenging service of process. Too many times in Illinois, foreclosure defendants will wait until the last possible moment to participate in litigation and seek judicial relief. The *Roundtree* decision highlights one of the often-overlooked procedural tools available in Illinois for mortgage loan servicers and their counsel to fight improper delay tactics by foreclosure defendants.

Blake A. Strautins is a partner at Kluever & Platt, LLC, with substantial expertise in mortgage foreclosure litigation and financial services litigation defense, with an emphasis on FDCPA, TCPA, TILA, and ICFA claims. He also handles all manner of commercial real estate-related litigation.

Michael R. Schumann is an associate with Kluever & Platt, LLC and has been with the firm for over five years. He specializes in residential default and lender services, as well as contested foreclosure, mediation, and commercial litigation.

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that 12 U.S.C. § 1715z-20(j) prohibited Live Well from foreclosing while Vanessa lived in the home because even though she was not a 'Borrower' under the terms of the mortgage contract, she was nonetheless a 'homeowner' protected by the statute." The district court disagreed, and the Eleventh Circuit affirmed. In its decision, the Eleventh Circuit held that the statute "applied only to HUD and spoke only to what the Secretary can and cannot do . . . ." Even if HUD should not have insured the reverse mortgage, "the mortgage contract here created and embodies an independent legal relationship between Live Well and Caldwell." Because the security deed (mortgage) clearly allowed the mortgagee to foreclose upon the death of Mr. Jones, there was no basis to enjoin the foreclosure sale, and the case was dismissed.

Jones was a case of first impression in the Eleventh Circuit but follows the uniform conclusion reached by courts around the country, including the Fifth Circuit and several district courts. See *Jones,* 2018 WL 4211452, at *4 n.4 (collecting cases).

***Bret J Chaness** is a Partner and a member of the Litigation Department. His primary practice areas include real estate litigation, mortgage servicing and foreclosure litigation, and bankruptcy litigation. He represents clients in a wide variety of complex civil litigation and bankruptcy matters involving contract disputes, real estate and quiet title actions, and lien priority actions. Chaness has been clerking at the firm since his second year of law school and, while a law student, he won the Exemplary Real Property Law Student Award from the State Bar of Georgia and was a member of the Emory Moot Court Society, competing in the Jessup International Law Moot Court Competition.*

States: Texas

How to Break the Impasse of a Stalled Probate Proceeding

By Daniel G. Van Slyke, Mackie, Wolf, Zientz, and Mann, PC

In Texas, many probate proceedings stall when applicants seeking letters of administration fail to prosecute their applications. Such stalled probate proceedings may remain open indefinitely without the appointment of personal representatives to administer the estates.

The prosecution of probate proceedings may stall for many reasons. Some applicants file probate proceedings specifically to avoid foreclosure, with no intention of prosecuting those proceedings. Some probate proceedings stall because of will contests or disputes among heirs as to who should serve as the estates' personal representatives. Other probates stall because the applicants did not understand the complexities or expenses of prosecuting the proceedings before opening them.

After the probate court appoints a personal representative of an estate, the owner of the delinquent mortgage signed by the deceased borrower has clear avenues of relief. In a dependent administration, the mortgagee must present an authenticated secured claim to the dependent administrator, as set forth in the Texas Estates Code. In an independent administration, the mortgagee may proceed with foreclosure directly against the executor or independent administrator.

However, mortgagees rightly pause in the space between the opening of a probate proceeding and the appointment of a personal representative. In its 1956 *Pearce v. Stokes* decision, the Supreme Court of Texas held that a subsequently-appointed administrator might cancel any sale made within four years of the administrator's death.

Yet the mortgagee need not stand by for four years or more while a probate proceeding stagnates. The mortgagee may choose from at least six strategies to push the probate along or remove it as an obstacle to foreclosure.

First, the mortgagee can help the applicant achieve appointment of a personal representative of the estate. The mortgagee benefits when a personal representative is appointed because such appointment provides the mortgagee with a person capable of binding the deceased borrower's estate. Helping the applicant achieve an appointment may entail, for example, coaching an applicant's attorney who is unfamiliar with the probate process or appearing in the probate proceeding to show the Court that the estate is losing equity while the probate proceeding stalls.

Second, the mortgagee may file a counter-application for letters of dependent administration, as *Pearce v. Stokes* recommended. Such a strategy may prove expensive and should be pursued only when careful analysis suggests it is expedient or necessary.

Third, the mortgagee may file an application for a receiver to sell real property. This strategy works best where the property retains sufficient value and equity to pay the mortgagee's claim, the sales commission, and the receiver's fees.

Fourth, four years or more after the borrower's death, the mortgagee may file a motion to dismiss the probate proceeding. To this end, the mortgagee's attorney should become familiar with the particular requirements of applications under the Texas Estates Code. For example, an application to probate a will as a muniment of title must meet several statutory elements. An attorney who can spot problems with the application can effectively achieve dismissal of the proceeding.

Fifth, the mortgagee should consider setting a status conference. In instances where the applicant does not intend to prosecute the application, the mortgagee could move the proceeding simply by bringing it to the court's attention. Pursuant to a status conference, the probate court may, for example, set the case for dismissal or appoint a third-party administrator. The Texas legislature has granted probate courts considerable discretion to take action on their own initiative.

Sixth, the mortgagee may take advantage of the probate court's jurisdiction to initiate an action for foreclosure. The applicant subjected property of the estate to the probate court's jurisdiction by opening the proceeding, even if the probate court is a county court that typically would not have jurisdiction over a foreclosure action. When an applicant opens probate for a deceased borrower, the mortgagee may file an ancillary action in the probate court against the borrower's heirs or devisees.

How does the mortgagee choose a strategy for breaking the impasse of a stalled probate? The choice depends upon factors such as the preferences of the particular probate judge, the extent of the estate's assets, the equity in the property at stake, the number of potential heirs or devisees, and the attitude of the heirs or devisees toward one another and the deceased borrower. The mortgagee should consult an attorney experienced in probate law to weigh these factors.

***Daniel G. Van Slyke, Ph.D., J.D.** earned his law degree magna cum laude from Texas A&M University School of Law in Fort Worth. As an Associate Attorney in the litigation department of Mackie, Wolf, Zientz and Mann, P.C., Dr. Van Slyke specializes in actions involving deceased borrowers, especially those in probate proceedings. Prior to law school, Dr. Van Slyke contributed to higher education as a well-published scholar, professor, and administrator in higher education. Dr. Van Slyke is admitted to the State Bar of Texas, the Missouri State Bar, and the United States District Courts for the Northern and Eastern Districts of Texas.*

States: Rhode Island

Springing Statutory Revival Creates Headaches in Rhode Island

By Erika Hoover, Esq and Julie Moran, Esq., Orlans PC

The enactment of a statute and its subsequent repeal is a common occurrence in the governmental world; even the expiration of a sunset provision in a temporary statute or regulation is not unheard of. On July 1, 2018, these occurrences unexpectedly came together in Rhode Island with frustrating effect. Whether due to inadvertence, oversight or legislative intent, Rhode Island RIGL 34-27-3.1, first enacted in 2009 and repealed in 2014, which required the mailing of a notice of availability of foreclosure credit counseling to all mortgagors at least 45 days prior to initiation of a non-judicial foreclosure (the 3.1 Notice), sprang back into effect as a result of the expiration of a sunset provision applicable to its repeal. Once the RI Department of Business Regulation (DBR) discovered what had happened, it reacted by issuing emergency Bulletin 2018-2 on July 27, 2018, effectively republishing Appendix A of Regulation 5 which sets forth the mandatory form of 3.1 Notice. The 3.1 Notice must be mailed to the property address and if different, to the address provided in writing to the mortgagee by the mortgagor. The statute applies to consumer mortgages regardless of occupancy status; the current mortgage holder of record must be referenced in the 3.1 Notice. The alternative to sending the 3.1 Notice is to foreclose judicially, which is not a preferable alternative given the risks inherent in proceeding judicially as well as what can be a lengthy and prolonged process in the state.

Although the 3.1 Notice is quite straightforward, its revival has had the short-term effect of voiding any foreclosure for which the statutorily required notice of sale was mailed on or after July 1 where the 3.1 Notice was not sent. The long-term effect is to complicate the foreclosure process further. This is caused primarily by the fact that in 2013, the legislature passed RIGL 34-27-3.2 which requires the sending of a pre-foreclosure mediation notice and completion of a mediation process under a number of circumstances (3.2 Notice). This subsection of the statute sets forth a much more complex, detailed and lengthy process with specific time requirements and limits in comparison to the process under subsection 3.1. On their face, the two-state statutory notice requirements may not seem to be in conflict. They use different forms; they are sent at different times during the non-judicial foreclosure process, they are intended to help homeowners avoid foreclosure and stay in their homes. However, in practice, these separate notices, with different definitions, interpretations, forms and timing for notice, create compliance confusion in the industry.

To help mitigate against legal challenges, it is recommended that mortgage servicers send the 3.1 Notice by certified mail in addition to first class mail required by the statute and mail the 3.2 Notice followed by the 3.1 Notice to avoid confusion. Additionally, the mortgagee will need to execute an Affidavit of Compliance with RIGL 34-27-3.1 and record it with the foreclosure deed. Unfortunately, the execution of this affidavit is not conclusive evidence of compliance with RIGL 34-27-3.1. Because of this, the title insurance companies consider the 3.1 Notice as stale if more than six months have passed since mailing and the foreclosure has not proceeded. In those cases, the mortgagee will need to execute a so-called gap affidavit outlining the reasons for the delay, attesting to the lack of reinstatement, bankruptcy filing, etc. The industry is hoping that the legislature will address this revival of RIGL. 34.27-3.1 when they reconvene for the next legislative session.

With more than 11 years' experience in title and default, Erika Hoover manages the foreclosure practice for Orlans PC in Massachusetts, Rhode Island, and New Hampshire. She serves as a subject matter expert for those jurisdictions, providing advice on escalated files and leads nine attorneys serving clients in the Northeast jurisdictions. She monitors key performance indicators for the foreclosure practice and participates in firm workgroups to improve efficiency, develop attorney judgment and reduce aged inventory. Hoover is licensed to practice in Massachusetts and Rhode Island where she is admitted to the Rhode Island Federal District Court and is a member of the respective state bar associations.

***Julie Taylor Moran** is a member of the Orlans PC Executive Committee and the Strategy Committee. In these roles, Moran helps create and implement growth strategies for the firm. She focuses considerable time on developing new service solutions for clients in collections, auto bankruptcy and timeshare foreclosures. On escalated files, she educates attorneys on how to effectively balance risks to better serve client needs. She is co-chair of the Massachusetts Home Ownership Advisory Committee, member of the Compliance Committee of the Massachusetts Mortgage Bankers' Association and the Board of Directors of the Massachusetts Real Estate Bar Association, and a frequent speaker and author.*

States: Florida

Florida Supreme Court Clarifies Deadline on Foreclosure Surplus Funds

By Radhika Ojha, Five Star Institute

The Florida Supreme Court in Glenville recently clarified when the 60-day deadline for surplus claims from a judicial foreclosure sale begins to run, ruling that the 60-day period begins upon the clerk's issuance of the certificate of disbursement and not upon the public auction of the property.

The ruling pertained to the case of *Bank of New York Mellon v. Glenville* and overturned the previous ruling of the Second and Third Districts, which held that the 60-days period runs from the actual foreclosure sale date.

At the center of the dispute was the question of whether the subordinate lienholder had filed its claim to the surplus amount on time and as per the provisions of Chapter 45 of the Florida Statutes governing judicial sales. Specifically, both parties argued over whether the 60-day period began upon the public auction of the property, the clerk's issuance of the certificate of title, or some other event.

"By concluding that 60 days after the sale means 60 days after the court issues the certificate of disbursements and not the date of the actual sale, the court confirmed the actual triggering event to the calculation of time for a filing of a claim for surplus," said Robyn Katz, Managing Partner, Florida Foreclosures at McCalla Raymer Leibert Pierce. "Junior lien holders should monitor the court's docket and clerk's filing of the certificate of disbursement so as to determine the time bar for the claim to surplus. If the time deadline is not met, the junior lien holders will be cut off from their surplus claims."

This ruling is binding on all counties and circuits in Florida and resolves any pending question about the triggering event to calculate the 60 days to claim a surplus.

Katz told *DS News* that this ruling also resolved a statutory interpretation dispute between the Second and Fourth Districts in Florida regarding when the 60 days following the sale period begins.

Prior to this ruling, the districts differed in their interpretation of the statute. According to Kelley A. Chida, Associate, Business, Financial Services, and Real Estate at Quintairos, Prieto, Wood & Boyer, while the Fourth District Court's interpretation was that the 60-day period ran from the date of the filing of the certificate of title, the Second and Third Districts held that the 60-day period ran from the actual foreclosure sale date.

Cases on foreclosure surpluses have gained ground recently thanks to the rise in property values. According to Anthony R. Smith, Attorney at Law at Sirote & Permutt PC, this opinion resolves the statutory ambiguity and the conflicting appellate court opinions by clarifying that the time to file a claim for those surpluses does not begin to run until after the clerk certifies that a surplus actually exists. "While this decision gives our clients more time within which to act, they still need to be vigilant in monitoring cases where they are junior lienholder and decide as soon as possible whether they wish to seek any resulting surplus funds," he said.

"The recent Supreme Court Ruling in *Bank of New York Mellon v. Glenville* is helpful to all parties involved in the foreclosure case—both plaintiff and surplus claimants—in that it clarifies when the 60-day deadline for surplus claims begins to run under section 45.031, F.S.," Chida said. "The court reasoned that the triggering date for the 60-day claims period is when the Certificate of Disbursements is issued, which is not always the same day as when the Certificate of Title is issued."

Radhika Ojha, *Online Editor at the Five Star Institute, is a graduate of the University of Pune, India, where she received her B.A. in Commerce with a concentration in Accounting and Marketing and an M.A. in Mass Communication. Upon completion of her master's degree, Ojha worked at a national English daily publication in India* (The Indian Express) *where she was a staff writer in the cultural and arts features section. Ojha also worked as Principal Correspondent at HT Media Ltd and at Honeywell as an executive in corporate communications. She and her husband currently reside in Dallas, Texas. She can be reached at Radhika.Ojha@TheFiveStar.com.*


CARE

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Mark your Calendars for a Year of Epic Industry Events.

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MORTGAGE SERVICING INDUSTRY CELEBRATION

ORLANDO, FLORIDA

Come together with hundreds of your fellow mortgage professionals at this one-of-a-kind networking reception, where you will enjoy cocktails, live music, and premier business opportunities.

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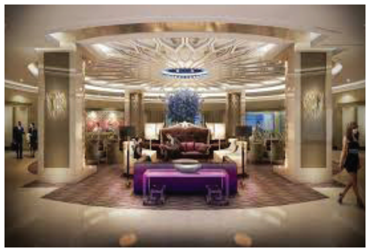
SINGLEFAMILYRENTALSUMMIT.COM

Featuring informative sessions led by the market's top experts, the 2019 Single-Family Rental Summit will discuss the technologies, strategies, and intel you need to craft an effective investment plan for today's SFR landscape.



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MEMPHIS, TENNESSEE
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Join us for the 2019 Five Star Fintech Summit, where attendees will have the opportunity to discuss the latest trends and innovations in financial technology with leading subject-matter experts in the technology and mortgage industries.

APRIL 3-4, 2019

LEGAL LEAGUE 100 SPRING SERVICER SUMMIT

THE ADOLPHUS HOTEL | DALLAS, TEXAS
LEGALLEAGUE100.COM

Open to all Legal League 100 members, associate members, and mortgage servicing professionals, the semi-annual Servicer Summit is where the nation's elite financial services law firms discuss emerging issues in default servicing with leading mortgage servicing executives.

APRIL 23, 2019

FIVE STAR GOVERNMENT FORUM

NEWSEUM | WASHINGTON, D.C.
FIVESTARGOVERNMENTFORUM.COM

Leaders from mortgage servicing and the federal government will participate in an open dialogue surrounding the mortgage industry's most pressing issues and challenges.

APRIL 23, 2019

NATIONAL MORTGAGE SERVICING ASSOCIATION MEMBER RECEPTION

OSTERIA BIBIANA | WASHINGTON, D.C.
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Executives from the nation's leading mortgage servicing organizations will come together for a evening of networking and entertainment at the National Mortgage Servicing Association Member Reception.

**Open only to NMSA members.*

APRIL 24, 2019

NATIONAL MORTGAGE SERVICING ASSOCIATION ANNUAL MEMBER MEETING

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The National Mortgage Servicing Association Spring Summit brings top-level executives and leaders together for the purpose of effecting progress and change on key challenges facing the mortgage industry.

SEPTEMBER 23-25, 2019

THE 16TH ANNUAL FIVE STAR CONFERENCE

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The most significant event in mortgage servicing returns in 2019 for inspiring keynotes, industry-leading academic labs, and unparalleled business opportunities.

Navigating Sale Costs in Kentucky

By David Boyce, Reimer Law Co.

Courts and practitioners in Kentucky are still adjusting to a 2016 Supreme Court order that had been intended to create a more uniform process for judicial foreclosure sales in Kentucky. Understandably, it takes time to adapt to designated procedural and rule changes fully. But in this case, it's the areas the order did not address that have become the most difficult to combat.

Order 2015-25, issued by the Supreme Court of Kentucky, amended the Rules of Administrative Procedure Part IV to address such issues as statewide terms of sale for foreclosure actions, qualification of appraisers of property, how and when sales are advertised and the description of the property to be advertised. However, the Order failed to establish how and when payments for the costs associated with conducting the sale should be made. As a result, an increasing number of Kentucky jurisdictions are making their own rules, and many are now requiring costs be advanced prior to the sale to prevent delays.

Kentucky is a judicial foreclosure state. Plaintiffs must file a complaint in circuit court and move the court for a judgment and order directing that the property be sold. Kentucky law allows for a Master Commissioner to be appointed for each county within a judicial circuit. The Master Commissioner serves at the pleasure of the court and, among other things, reviews requests for judgments and orders of sale coordinates judicial sales and oversees post-sale procedures. (KRS 31A.010 and KY Civil Rule 53). Part of the judicial sale process requires that a notice of the upcoming sale be posted and published in newspaper advertisements. In addition, the property to be sold must be appraised by two disinterested appraisers, with an appraisal made in writing and filed with the court. These tasks and others carry with them associated costs that must be paid at some point by the Master Commissioner with either proceeds generated from the sale or funds submitted by the party that moved to set the sale.

Order 2015-25's omissions have left decisions on the manner and timing of payments to each of Kentucky's 120 counties to make for itself. Historically, payment of costs associated with a sale was settled after the Master Commissioner filed his or her report of sale and provided a sale statement of costs. Because this occurs after the judicial sale, it can cause inherent delays to confirmation of sale, distribution of sale proceeds and the issuance of a deed as the funds are processed and payments are made to newspapers, appraisers and other necessary parties.

To combat these potential delays, several counties have recently entered local orders or adopted new policies requiring funds to cover certain sale costs be advanced at earlier stages of the case. Some counties now require sale deposits be made when a party files a motion seeking judgment and an order of sale. Others will schedule a sale but will cancel the sale at the moving party's expense if the deposit is not paid prior to the scheduled sale date.

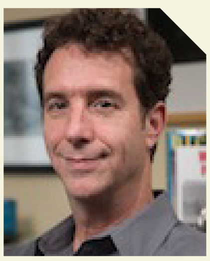
Counties have also begun setting their own standards for the amount of the required sale deposit. Some deposits have been set as flat amounts, ranging from several hundred to several thousand dollars per parcel. Others have been based on a percentage of the maximum intended sale bid amount or the estimated amount to be raised. Some counties simply require payment of the actual amount for advertising or appraisals in advance.

Requiring sale deposits to pay some of these costs prior to sale is an excellent start toward eliminating post-sale delay. The differing rules and procedures for each county in Kentucky and their treatment of foreclosure sale costs is a challenge that will need to be navigated for the time being. However, this challenge can be overcome with a uniform statewide approach to how and when these costs are paid.

David Boyce joined Reimer Law Co. in 2007. He is a Managing Attorney with the firm's Kentucky operations representing lenders and servicers in foreclosure, bankruptcy, litigation, eviction, collection, and other real estate matters. Boyce has been a member of the Kentucky bar since 2003 and is admitted to practice in the Kentucky and West Virginia courts.

Movers & Shakers

McMichael Taylor Gray Appoints Managing Attorney



Atlanta, Georgia headquartered McMichael Taylor Gray has announced the appointment of **Mark Baker** as the firm's Managing Attorney to oversee its Alabama and Tennessee operations.

In his new role, Baker will be responsible for overseeing the firm's bankruptcy practice and all legal matters related to the Tennessee and Alabama region.

Baker joins McMichael Taylor Gray with 30 years' experience in mortgage banking and creditor's rights. Prior to joining the firm, he was the owner of Mark A. Baker Law, LLC, based out of Tallahassee, Florida. Prior to that, he was the Managing Partner at Johnson & Freedman. He also served as the Judicial law clerk to a U.S. Bankruptcy Judge [L. Chandler Watson, Jr. (deceased], Northern District of Alabama.

Fein Such Announces Michael Hanusek as Principal

Fein, Such, Kahn & Shepard, P.C. & Fein Such & Crane, LLP (Fein Such) are pleased to announce that **Michael Hanusek** has been promoted to firm principal. Michael has been with Fein Such for almost 15 years and has acted as supervising attorney of our firm's Creditors' Rights Residential Litigation Department for the last six of those years. He is an accomplished attorney with more than 37 years of experience in the legal, banking, and financial services industries. Hanusek will continue to oversee the Creditors' Rights Residential Litigation Group and work closely with our clients to handle, resolve and litigate cases in an efficient and effective manner.

"We feel that this is an exciting opportunity for Mike and our entire firm as we continue to expand our operations and services to our clients in all of our states," the firm said in a statement.

A360inc Expands CourtXpress to Illinois

CourtXpress, an e-filing service of a360inc, announced that it has expanded its e-filing service to include the state of Illinois. Since its launch in 2012, CourtXpress has conducted over 1.2 million filings. "Ensuring that our technology solutions address the needs of our law firm and mortgage industry clients is a core objective for a360inc. And the convergence of these solutions into one technology platform ecosystem enables our clients to leverage one vendor relationship to achieve a variety of operational benefits. The expansion of CourtXpress into the Illinois market is part of our strategic expansion in the e-filling arena," said a360inc CEO Scott Brinkley.

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1349 EMPIRE CENTRAL DRIVE,
SUITE 900
DALLAS, TEXAS 75247
214.525.6700