LEGAL LEAGUE 100
QUARTERLY

FALL 2019 COMMITTED TO THE INDUSTRY, INTEGRITY, AND BEST PRACTICES

National

HELOCS AND HECMS: NON-NEGOTIABLE NOTES?

By: Jane E. Bond, McCalla Raymer Leibert Pierce, LLC

Due to the increase in property values, there are more originations of Home Equity Lines of Credit (HELOCs) and Home Equity Conversion Mortgage/Reverse Mortgages (HECMs) resulting in more foreclosures of these loans. In the process of foreclosing, standing has become an issue as Appellate Courts in several states are finding HELOCs and HECMs are secured by non-negotiable notes. Attorneys and servicers need to be aware of this case law to determine the proper way to foreclose these mortgages.

BACKGROUND

In a judicial foreclosure action, the lender must have standing to foreclose a mortgage. Many states allow standing to be plead generally, if the complaint indicates the plaintiff has the right to enforce the note. The lender usually forecloses by pleading standing generally and attaching a blank endorsed note along with the mortgage. In some states the law has changed, requiring standing to be plead with specificity. If a state requires the plaintiff to specifically allege either holder or non-holder status, choosing the correct status to enforce the note is vital to your case. Choosing the incorrect status may lead to a dismissal of the case; as, in some states, lack of standing at the inception of the case cannot be cured after the complaint is filed.

WHO CAN ENFORCE A NOTE?

The person entitled to enforce the note

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National

THE FUTURE OF PRIOR SERVICER RECORDS

By: Matthew Ciccio, McMichael Taylor Gray, LLC

The admissibility of prior servicer records is one of the tallest hurdles for servicers to overcome in judicial foreclosures. When a servicer must introduce and admit these records to prove their prima facie case, a savvy defense counsel is always ready to challenge the reliability of these purported records. This leads to the potential for defendants to conduct written discovery, depositions, voir dire, and cross-examination typically aimed at attempting to discredit the trustworthiness of the records. Without proper preparation, these litigation techniques can often lead to confusion or inaccuracies amongst the present servicer's representatives. This can then lead to the potential for an involuntary dismissal of the servicer's foreclosure action and even the dreaded prevailing party attorney's fees being awarded to the borrower.

Although preparation is key, often what and how much to prepare is unclear. That is because the ultimate question of how much and what specific knowledge a representative must possess to reflect trustworthiness of the records remains unresolved. There is no clear standard. It is likely, however, that rudimentary knowledge of the servicer using standard industry practices when boarding prior servicer loans is insufficient to overcome an experienced defense counsel who can raise issues of trustworthiness. To ensure admissibility of prior servicer records in a non-jury trial setting, the servicer's corporate representative should be prepared to be knowledgeable enough to go beyond

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National

NO HARM, NO FOUL: PLEADING STANDING IN FDCPA CASES

By: Michael Sadic, Potestivo & Associates P.C.

Prospective plaintiffs who may have a cause of action under the Fair Debt Collection Practices Act (FDCPA)[1] face a heightened standard to plead standing to sue in federal court. Under federal law, standing is a jurisdictional issue, which is governed by the U.S. Constitution.[2] Under article III of the Constitution, the power of federal court to adjudicate actions brought before it, is limited to actual "cases" and "controversies." To satisfy the cases and controversy requirement thus invoking federal court's jurisdiction, plaintiff must have suffered an injury in fact, that is fairly traceable to the challenged conduct of the defendant, and that is likely to be redressed by a favorable judicial decision.[3]

The injury-in-fact requirement, which has been described as the "first and foremost"[4] element of standing, has been the subject of controversy recently, causing a split among two federal circuit courts involving cases brought under FDCPA. In *Spokeo v. Robins,*[5] the U.S. Supreme Court succinctly stated that, to satisfy the "injury-in-fact" requirement, plaintiff must show not only it personally suffered a particularized injury but also that the injury is concrete. The court went on to recognize the inherent power vested in Congress to elevate certain intangible harms, which may be difficult to prove or measure, to the status of legally cognizable injuries.[6] However, the Court cautioned, just because Congress provides plaintiff with statutory authority to sue, it does not mean plaintiff automatically satisfies the "injury-in-fact" requirement.[7] This may lead to a scenario where plaintiff is able to establish a clear procedural statutory violation (plaintiff fails to provide the correct address of the debt holder; or the name of the current debt holder if different from the original debt holder), but still lack standing under article III, if it fails to show a concrete injury resulting

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FALL 2019

FROM THE CHAIR

The Advisory Board has worked diligently with the Legal League 100 team to put together a meaningful Fall Servicer Summit. As the industry continues to operate in a record low volume environment, the focus on rules and regulations, compliance, best practice, and communication remain critical to the entire industry. With that in mind, it was important to the Advisory Board to assure that the Summit presents opportunities to hear from an impressive talent pool on those topics.

Regulatory rules, federal law and state law continue to change, impacting processes and policies for both servicers and law firms. We have the opportunity to review and discuss the latest changes on both a national and state level and brainstorm how to best implement and communicate those changes. This will include bankruptcy changes, focus on the Fair Debt Collection Practices Act, and updated litigation trends. This will also be a great opportunity to discuss the proposed Regulation F Debt Collection Practices amendments that have been proposed by the Consumer Financial Protection Bureau.

Legal League 100 members continue to adjust to current market conditions by streamlining process and ensuring efficiency. Applying this focus to compliance policies is not only critical to law firms who need to meet compliance expectations in a cost-effective manner but provides servicers the ability to verify compliance standards are being met with positive audit outcomes.

The Super Session will review strategies for promoting effective communication. I am truly impressed with the top-notch panel that agreed to join us for the Super Session. The panel includes Associate General Counsel from Fay Servicing LLC, Compliance Counsel from BSI Financial Services, Foreclosure Manager from LendingHome, and the VP of Vendor Management from PennyMac who, together, will discuss communicating across multiple departments within servicer organizations, escalation of non-routine issues, and inconsistent practices among servicers. This level of involvement demonstrates the industry's sincere support for Legal League 100 and its membership.

The Advisory Board is committed to supporting the Legal League 100 membership to ensure we bring the servicing industry the best possible assistance and continue to embrace Legal League 100's standard as a premier organization.

Sincerely,

Roy Diaz
SHD Legal Group, P.A.
Chairman, Legal League 100 Advisory Council

ROY DIAZ, SHD LEGAL GROUP P.A.

Roy Diaz has been a member of the Florida Bar since 1988, concentrating his practice in the areas of real estate, litigation, and bankruptcy. For more than 20 years, he has represented lenders, servicers of both conventional and GSE loans, private investors, and real estate developers, with an emphasis on the mortgage servicing industry.

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perUCC § 3-301 is: [1]) the holder of a negotiable instrument, [2]) a non-holder in possession with the rights of a holder, or 3) a person not in possession who is entitled to enforce the instrument.

To enforce the note as a holder, there must be a negotiable instrument. A negotiable Instrument is an unconditional promise to pay a fixed amount of money. If a note is negotiable, it can be transferred by a blank endorsement or a specific endorsement. If a note is non-negotiable, it cannot be transferred by possession or endorsement alone to another party. A non-negotiable note needs an assignment or other evidence of the intent to transfer such as a purchase and sale agreement.

New Issue Arising

A new legal theory is trending contending lenders do not have standing as a holder for HELOCs and reverse mortgage loans, since the notes are not for a fixed sum of money rendering them non-negotiable instruments.

Typically, with a HELOC loan, there is a line of credit and the borrower can withdraw funds up to the maximum amount, as needed. Most HELOCs contain the following or similar language, "borrower promises to pay to the order of the lender the principal sum of (maximum credit limit), or so much thereof as may be disbursed to, or for the benefit of, the borrower." In *Third Fed. Sav. & Loan Assn of Cleveland v. Koulouvaris,* 247 So. 3d 652, (Fla. 2d DCA 2018); the Court of Appeals found, "The HELOC note failed to require the payment of a fixed amount of money, making it a nonnegotiable instrument." Another Florida case found the same, saying, "the original credit agreement executed by borrowers was a nonnegotiable instrument because it was not for a fixed sum of money …" *Chuchian v. Situs Invs., LLC,* 219 So. 3d 992, (Fla. 5th DCA 2017). The same reasoning was used in Nebraska and Indiana finding HELOCs are non-negotiable instruments.

As with the HELOCs, a New York appellate court similarly found reverse mortgages are a loan securing the repayment of a home equity line of credit and held "several provisions of the Cash Account Agreement (reverse mortgage document), read in context of the agreement as a whole, provides compelling evidence that, it is not, and was never intended to be, a negotiable instrument. The Cash Account Agreement does not constitute a negotiable instrument within the meaning of UCC 3-104. Therefore, the plaintiff cannot establish its standing merely by demonstrating that it was in possession of the original Cash Account Agreement, endorsed in blank, at the time the instant action was commenced." *One West Bank v. FMCDH Realty, Inc.,* 165 A.D. 3d 128, (NY. 2d Dep't 2018).

When a court finds the note to be non-negotiable and holder status was plead, the case may be dismissed, or further evidence may be required to show the transfer of the note.

Remedy

The remedy is to plead as a "non-holder" and to file the assignment(s) of the note, evidence of ownership, or evidence indicating purchase and sale of note and mortgage to prove the intent to transfer the loan to the transferee. A non-negotiable instrument cannot be transferred by a blank endorsement or specific endorsement. Attorneys and servicers will need to be careful to ensure all "holder" language is taken out of complaints, affidavits and any other pleadings. Also, a non-negotiable instrument is not self-authenticating under the rules of evidence. If contested, testimony will be needed to prove the authenticity and intent to transfer the loan.

Jane Bond, Managing Partner, McCalla Raymer Leibert Pierce, LLC

Jane Bond has 30 years' litigation experience, with 24 years specifically devoted to business and real estate litigation involving the mortgage lending and servicing industries. Handling both commercial and residential litigation for clients throughout Florida, Bond extends her expertise to teaching at training seminars, conferences, and continuing legal education courses on commercial and residential real estate property law and related topics.

1 *Heritage Bank v. Bruha, 812 N.W.2d 260* (Neb. 2012) revolving line of credit not a negotiable instrument
2 *Yin v. Society Bank Indiana, 665 N.E.2d 58* (Ind. App. 1996) line of credit not negotiable

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such a basic understanding by having the ability to provide insight and detail of the servicer's loan boarding practices, if questioned. This knowledge is in addition to the representative's ability to affirmatively answer the requisite questions to admit business records as set forth in *Fed. R. Evid.* § 803(6), which the majority of states pattern their evidence code after.

In this ever-evolving area of business records in foreclosure law, Florida has been at the forefront in terms of defense counsel litigiousness and development of case law. The first landmark case to specifically address the issue, by Florida's Fourth District Court of Appeal, was *Bank of New York v. Calloway,* 157 So.3d 1064 (Fla. 4th DCA 2015). In *Calloway,* the Fourth District provided some clarity as to what is necessary for a proponent to admit records of a prior servicer. In addition to laying the foundation required pursuant to Fla. Stat. §803(6), the bank's witness in *Calloway* testified that the prior servicer records were reviewed for accuracy before the servicer scanned them and inputted the payment information into its records system. Despite not having worked for the prior servicer or any knowledge of their record-keeping, by her knowledge of the current servicer's process of boarding loans, including checks and balances in place, the bank was able to withstand a hearsay objection.

As insightful as *Calloway* is, questions remain. How much knowledge must the representative have of the present servicer's verification process if challenged? Is the burden on the proponent to establish reliability beyond the four questions found in the evidence code for the business records exception to apply? Or does the burden rest with the party opposing admission of the prior servicer records? These questions hope to be answered by the Florida Supreme Court in their pending review of *Jackson v. Household Fin. Corp.* III, 236 So.3d 1170 (Fla. 2d DCA 2019), review granted, 2018 WL 3323451 (Fla. July 6, 2018).

In *Jackson,* Florida's Second District Court of Appeal held that the Florida Evidence Code does not require a proponent of evidence to do more than satisfy the "four prongs" of Fla. Stat. §803(6) for business records to be admitted into evidence. It was specifically held that once the prongs are satisfied, the burden shifts to the opponent to prove the records untrustworthy. In holding this way, the Second District certified conflict with *Maslak V. Wells Fargo Bank, N.A.,* 190 So.3d 656 (Fla. 4th DCA 2016). Unlike *Jackson,* the Fourth District in *Maslak* held that the business records were inadmissible despite the proponent testifying affirmatively to the four elements found in § 90.803(6), Fla. Stat. According to the Fourth District, the witness in *Maslak* failed to testify in detail about the servicer's boarding process notwithstanding her ability to affirmatively answer the "four prongs" required in the evidence code. On July 6, 2018, the Florida Supreme Court accepted the case exercising its conflict jurisdiction.

Briefing in *Jackson* concluded on November 5, 2018 and included an Amicus Curiae Answer Brief in support of the bank. Florida's highest court heard oral argument on March 7, 2019. Servicers and their counsel should continue to monitor this case as an opinion issued by the court is expected within the next few months. Not only does the opinion have the potential to clarify Florida's rule on business records but it could set the tone for the same in other judicial states.

Matthew A. Ciccio, Managing Litigation Attorney, McMichael Taylor Gray, LLC

Matthew Ciccio's focus is on general and complex litigation, judicial foreclosure, commercial foreclosure, appellate work, title curative and insurance claims, landlord-tenant litigation, consumer financial services and creditor defense including FDCPA defense. The depth of Ciccio's knowledge and experience allows him to provide big-picture advice to banks, credit unions, investors, and mortgage servicers, helping clients control costs, avoid expensive disputes whenever possible and efficiently resolving issues when they arise.

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from an alleged violation. To make matters more complicated, the court opined that, in some circumstances, a violation of procedural requirement under a statute may constitute an injury-in-fact.[8]

Whether a procedural violation of FDCPA is in itself sufficient to satisfy an injury-in-fact, or if plaintiff must also show a concrete injury caused by such violation, has caused the sixth and the seventh Circuit Courts of Appeals to come to differing conclusions. In *Cassilas v. Madison Ave. Assoc., Inc.*[9], the plaintiff alleged the defendant violated FDCPA by failing to inform him that—if he wanted to contest the validity of the debt or obtain the name of the original creditor, he would have to do so in writing. The Seventh Circuit following Spokeo, ruled that a bare procedural violation, i.e., not informing the plaintiff of the writing requirement, without a show of a concrete injury from the violation, is insufficient to satisfy the injury-in-fact element of standing under the Constitution.

In a factually indistinguishable case, *Macy v. GC Services Limited Partnership,*[10] the Sixth Circuit held that the defendant's failure to inform the plaintiff of the in—writing requirement was sufficient to establish an injury-in-fact. The *Macy* court reasoned "Without the information about the in-writing requirement, Plaintiffs were placed at a materially greater risk of falling victim to 'abusive debt collection practices,'"[11] from which the act protects the consumers.

The split among the circuits exposes a differing interpretation of *Spokeo* in regard to what constitutes a concrete injury for purposes of standing under Article III. The Seventh Circuit comes on the side that, although Congress authorized plaintiffs to sue for abusive debt collection practices—an FDCPA violation of a provision which serves to inform plaintiff of how to protect its rights under the law, is procedural in nature and insufficient in itself to satisfy the concrete injury requirement; the Sixth Circuit stands for the proposition that, Congress chose to elevate the intangible harms caused to consumers from abusive debt collection practices—thus a violation of a provision informing a plaintiff how to protect its rights under the law—leads to the risk of placing the plaintiff in a position where the substantive rights guaranteed by the law would be endangered.

The heightened pleading standard of Article III standing in the Seventh Circuit may lead prospective plaintiffs to instead sue in state courts. There are a few reasons why suing in state court may be prudent. First, by a way of example, Illinois courts are not required to follow federal law on issue of justiciability and standing.[12] Second, as previously said, the issue of standing under federal law is a matter of jurisdiction; whereas, under Illinois law and many other state-jurisdictions, standing is an affirmative defense which the defendant has the burden to meet.[13] Also, in Illinois, if a plaintiff alleges a statutory violation, no additional requirements are needed for standing.[14]

Finally, since there's a circuit-split on the issue of standing under FDCPA, which is relevant to pleading standing under other consumer protections laws,[15] it is likely the Supreme Court will take up this issue again and clarify its ruling in *Spokeo.*

Michael Sadic, Associate Attorney, Potestivo & Associates, P.C.

Michael Sadic began his career with Potestivo & Associates, P.C., in August 2015. Sadic is located at the firm's Chicago office as an Associate Attorney, primarily serving the foreclosure and litigation departments. Sadic has held multiple positions in the legal field. Most recently, he served as an attorney for the City of Chicago Department of Law.

1 U.S.C. § 1692 et seq.
2 Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992); U.S. Const. art. III, § 2.
3 Lujan, at 560-61.
4 Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 103 (1998).
5 136 S. Ct. 1540, 1547-48 (2016).
6 136 S. Ct. at 1549.
7 Id. at 1549.
8 Id. at 1549.
9 No. 17-3162 (7th Cir. June 4, 2019).
10 897 F.3d 747, 751 (6th Cir. 2018)
11 897 F.3d at 758.
12 Greer v. Illinois Housing Development Authority, 122 Ill. 2d 462, 491 (1988).
13 People v. $1,124,905 U.S. Currency & One 1988 Chevrolet Astro Van, 177 Ill. 2d 314, 328-30 (1997).
14 Glisson v. City of Marion, 188 Ill. 2d 211, 222 (1999).
15 See, Meyers v. Nicolet Restauran of De Pere, LLC, 843 F.3d 724, 727 (7th Cir. 2016); Collier v. SP Plus Corp., 889 F.3d 894 (7th Cir. 2018).

States: Michigan

FORECLOSURE RECOVERY STRATEGIES FOR JUNIOR MORTGAGEES IN MICHIGAN

By: Erica Nichols, and Stephanie Jollands, Schneiderman & Sherman, P.C.

Michigan's real estate market was hard hit in the Great Recession, with home values in some areas cut in half. Many homes fell "underwater," with the debt owed being greater than the home's value. Senior mortgagees could at least recover some of the debt through foreclosure. Junior mortgagees, however, had limited options for recovery. If the senior lien foreclosed, there was little chance there would be surplus proceeds generated from the sheriff's sale. Junior mortgagees often decided to simply walk away from the property.

Fortunately, values have rebounded almost entirely in most areas of Michigan. Servicers must once again consider their options for recovery when there is a default on a HELOC or other junior mortgage loans.

A primary factor in deciding how to proceed is whether the senior mortgage is already in default, with foreclosure imminent, or already in process. Often, the junior mortgagee receives a courtesy notice of the senior's foreclosure. However, it is critical to note that Michigan law does not require actual notice to other junior mortgagees. Thus, if the foreclosure status is unknown, local counsel can often assist using its state-wide contacts.

If the senior mortgagee is in foreclosure, a junior mortgagee has the option of bidding at the senior's foreclosure sale. If it is the highest bidder, the junior mortgagee receives title to the property without conducting its own foreclosure. Further, should the junior bid more than the senior's total debt, the junior could make a claim for the surplus and apply it to its loan balance. The drawbacks to this approach include the upfront cost of physically attending the sale and the requirement that the full amount of the bid must be paid at the time of sale. Furthermore, the junior's agent may appear at the sale only to find out that the sale was adjourned only moments before. Even if the junior mortgagee is the successful bidder, it must still wait for the redemption period, which is typically six months, to expire before title fully vests. In the end, the junior could still end up having to foreclose its own mortgage after waiting months and expending a great deal of energy and resources.

Another option for the junior lien holder is to wait for the senior to proceed with its foreclosure sale and redeem after that sale. Junior mortgagees have the same right to redeem as borrowers do following a sale. To redeem, the junior must pay the successful purchaser from the senior's sale the amount that was bid at sale, plus interest and any advances made for property taxes, insurance or association fees. A redemption does not transfer the sheriff's deed interest to the party redeeming. Instead, the junior can add the redemption payment to its own debt, and then commence its own foreclosure. This strategy has the advantage of forcing the borrower to effectively pay an amount equal to both debts all at once in order to avoid losing the property.

With this approach, the junior mortgagee must be aware that the senior mortgagee may shorten the redemption period to 30 days if the property is abandoned. This statutory "shortening" process does not require direct notice to other lienholders. The burden is on the junior mortgagee to be aware of conditions at the property and seek information from the senior mortgagee. Again, local counsel can often assist in obtaining this information.

Sometimes there may be a default on the junior mortgage while the senior mortgage remains current. The junior mortgagee may decide to initiate its own foreclosure, especially if there is ample equity in the property. The junior's foreclosure will have the benefit of forcing the borrower to reinstate in order to save the property. If a borrower takes no action and the junior's foreclosure proceeds, the junior should keep two factors in mind. First, a total debt bid by the junior will eliminate its ability to claim any surplus funds from any future senior foreclosure. Secondly, once the junior holds foreclosure sale, it is best to wait for the senior to hold its own foreclosure so that the junior can redeem the senior foreclosure. The reason is that Michigan law allows a junior mortgagee to enlarge its redemption amount for only certain types of post-sale advances, one of them being "amounts necessary to redeem senior liens from foreclosure." The law is silent as to payoffs to senior liens generally.

Fortunately, due to the current housing values in Michigan, junior mortgagees have foreclosure-related options for recovering some, if not all the debt. A plan should be developed based on the particular circumstances of the file. The keys for the junior mortgagee are to have an accurate estimate of the property's value and knowledge of the senior's status.

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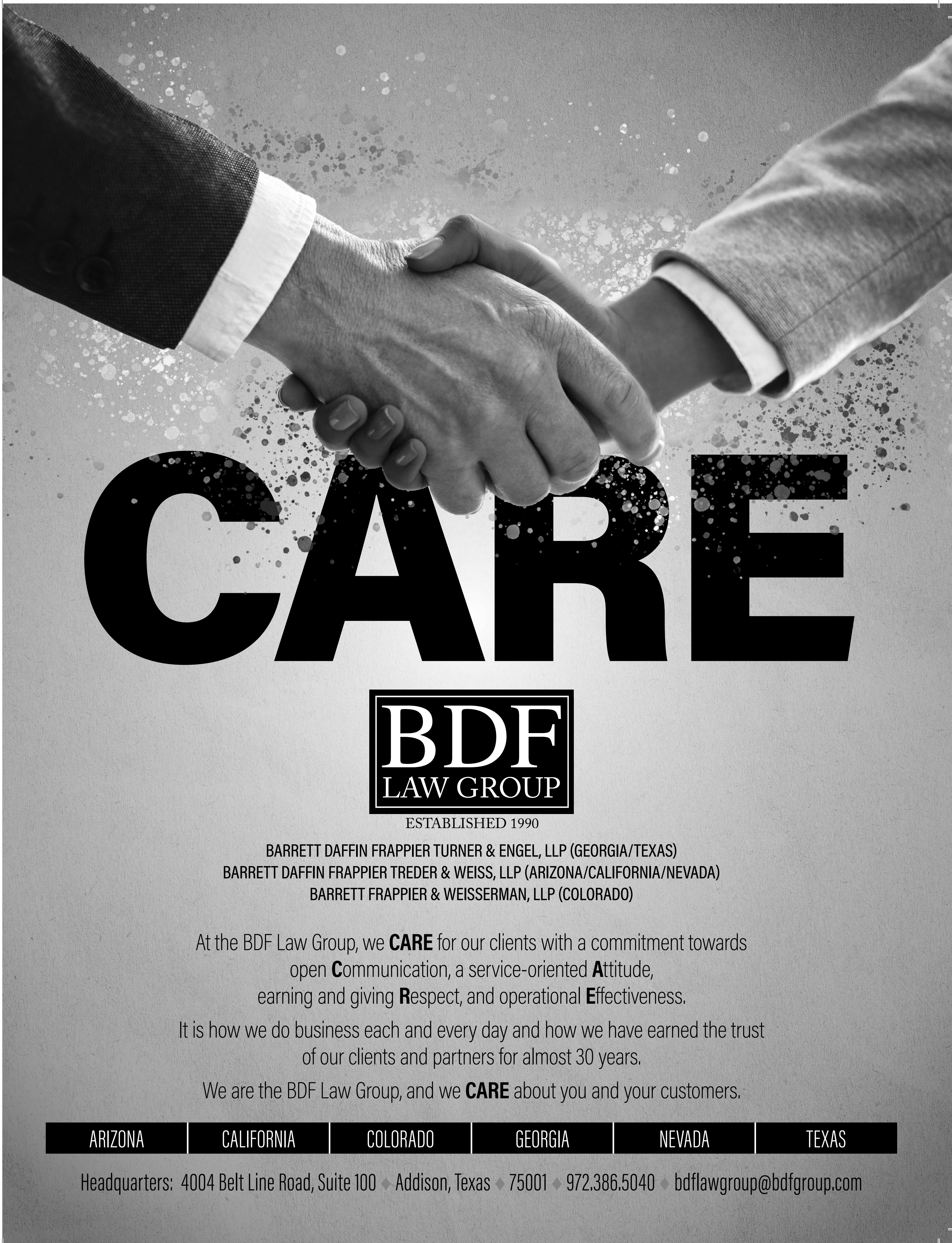
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States: New York

Industry Loses MacPherson SOL Argument in New York

By: Richard P. Haber, McCalla Raymer Leibert Pierce, LLC

Since the financial crisis, servicers and their counsel have struggled with statute of limitations (SOL) challenges in New York. Longer timelines, frequently dismissed cases, and ever-toughening standards to prove even uncontested cases have created a toxic mix that can lead to total lien loss.

In the spring of 2017, the industry got some relief when Justice Thomas F. Whelan issued his opinion in *Nationstar Mortgage, LLC v. MacPherson,* 56 Misc. 3d 339 (Supreme Court, Suffolk County, April 3, 2017). In *MacPherson,* the court held that the terms of the mortgage contract govern acceleration, and when the mortgage is drawn on the Freddie/Fannie Uniform instrument, acceleration could not actually be accomplished until a final judgment of foreclosure is entered. This is because under paragraph 19 of the Freddie/Fannie uniform instrument, the borrower retains the right to reinstate the loan until judgment is entered. The court held that "the lender bargained away its right to demand payment in full simply upon a default in an installment payment or the commencement of an action and has afforded the borrower greater protections than that set forth in the statutory form of an acceleration clause under Real Property Law § 258 or under the holding [of prior controlling New York law regarding acceleration]."

The court reasoned that the loan could not be deemed accelerated so long as the right to reinstate exists and that "the mortgage remains, in essence, an installment contract until a judgment is entered." In other words, the loan could not be deemed accelerated until the right to reinstate was extinguished. "Under the express wording of the mortgage document, plaintiff has no right to reject the borrower's payment of arrears in order to reinstate the mortgage, until a judgment is entered." As a result, "plaintiff does not have a legal right to require payment in full with the simple filing of a foreclosure action."

Because the vast majority of old dismissed foreclosure cases involve Freddie/Fannie uniform mortgage instruments, with dismissals that occurred pre—judgment, many potential SOL problems could be solved by the *MacPherson* argument. But the utility of the case was short-lived—less than two years—because on March 13, 2019, the Appellate Division, Second Department abrogated the decision in its opinion in Bank of *New York Mellon v. Dieudonne,* 171 A.D.3d 34 (NY App. Div. Second Dept., March 13, 2019).

In *Dieudonne,* the court determined that the lender's right to accelerate is independent of the borrower's right to reinstate. The court held that "[c]ontrary to the plaintiff's contention, the reinstatement provision in paragraph 19 of the mortgage did not prevent it from validly accelerating the mortgage debt." Even though "[t]hat provision effectively gives the borrower the contractual option to de-accelerate the mortgage when certain conditions are met" the lapsing of that right is not a condition precedent to acceleration. Rather, the conditions required for acceleration are all set forth in paragraph 22 of the mortgage and the "reinstatement provision in paragraph 19 of the mortgage was not referenced in, or included among, those conditions listed in paragraph 22." The court further observed that the reinstatement provision in paragraph 19 does not include any language indicating that it serves as a condition precedent to the plaintiff's right to accelerate the outstanding debt, but instead, "the language of paragraph 19 indicates that the plaintiff's right to accelerate the entire debt may be exercised before the defendant's rights under the reinstatement provision in paragraph 19 are exercised or extinguished."

As a result, the court concluded that acceleration occurs with the filing of the earlier foreclosure complaint irrespective of the borrower's right to reinstate until the entry of judgment. In reaching this conclusion, the court specifically referenced *MacPherson*, along with four post-*MacPherson* decisions that followed its logic and stated: "[t]o the extent that decisional law interpreting the same contractual language holds otherwise, it should not be followed." As a result, the MacPherson argument (that acceleration does not occur until the entry of judgment) is an arrow that has been lost from the industry's SOL quiver–at least for now.

On June 4, 2019, Bank of America (the servicer of the *Dieudonne* loan) filed a motion in New York's Appellate Division, Second Department, seeking re—argument in the Dieudonne case and/or leave to appeal the matter to the Court of Appeals (New York's highest court). As of the time this article was submitted, the Second Department had not yet ruled on the motion, but the prevailing thought is that the Second Department will deny the motion for re-argument but grant leave to appeal to the Court of Appeals. This would mark the most significant SOL case to be decided by the Court of Appeals in many years, and multiple industry groups have already expressed interest in potentially participating as amici curiae. Stay tuned for continuing developments in this case and New York's SOL generally.

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Rich Haber is Managing Partner of McCalla Raymer Leibert Pierce, LLC's mortgage servicing litigation practice in New York and New Jersey. Haber has over 20 years' experience handling mortgage foreclosures, bankruptcy actions, evictions, and related litigation. Haber has litigated thousands of contested foreclosures and title-related matters, and he regularly defends mortgage servicers from claims brought under state consumer fraud laws and federal statutes including FDCPA, TILA, RESPA, FCRA, and TCPA.

TO PAY OR NOT TO PAY: IS THE PENNSYLVANIA GOVERNMENT BILKING YOU IN ITS COLLECTION OF INHERITANCE TAXES?

By: M. Troy Freedman, Richard M. Squire & Associates, LLC

I. BACKGROUND "In mythological lore, the Greek hero Achilles thought himself to be invincible, impervious to the swords and arrows of his enemies. So too, is the mindset of the Pennsylvania Department of Revenue (Revenue) . . .[.]" In re *Berger*, 18-20778 (Bankr. W.D. of Pa.).

Last year, the Pennsylvania foreclosure process for deceased mortgagors changed. Specifically, the Pennsylvania Department of Revenue (DoR) issued correspondence dated May 1, 2018, asserting that inheritance taxes are never divested via judicial sales. Prior to that date, notice of sheriff's sale was provided to DoR, as a lienholder, which permitted title insurers to insure REO properties. Circulation of that letter last May caused a ripple effect in the underwriting industry and added steps to foreclosures.

II. THE APPLICATION PROCESS One means to address the inheritance tax involves submission of an Application for Mortgage Foreclosure Inheritance Tax Release of Lien or form REV-1839 (Application). This process actually contains multiple steps; it is not as simple as filing a form and waiting for DoR's response. In fact, as discussed infra, DoR's response must be analyzed carefully due to a phenomenon this author labels "the 15% game."

First, applicants must confirm whether a probate proceeding has been filed, as that proceeding is assigned an estate or file number that DoR cross-references. If no such proceeding has been filed, then an Affidavit of Death must be filed with the county's Register of Wills for the purpose of obtaining this estate or file number. Second, to complete the Real Estate Value and Mortgage Balance fields on Section IV of the Application, a BPO or appraisal from at or around the time of the mortgagor's death as well as a date-of-death (DoD) payoff or mortgage statement are required, as those documents must also be submitted along with the Application. Valuations from the exact DoD are unlikely so property valuations within a few years before or after the mortgagor's death appear sufficient. DoR altered the application instructions between October and November 2018 to accept either an applicant's property valuation or the current fair market value predicated upon county assessment data. Lenders and servicers should be able to produce DoD mortgage statements or generate retroactive DoD payoffs. Third, the application, filed Affidavit of Death (if needed), property valuation, and mortgage statement or payoff must be e-mailed to DoR (the application instructions contain the email address).

It will take DoR several weeks to several months (timeframes have been inconsistent) to respond to an Application with a Notice of Appraisement (Notice). The Notice identifies the property value, the mortgage debt, the applicable tax rate, and the amount of the tax (the tax is calculated on the equity in the collateral).

III. THE "15% GAME" In evaluating the Notices and tracking DoR's actions, the following chronic and frequent discrepancies in the Notices have been observed: (1) DoR's unilateral increase of property values; (2) DoR's unilateral decrease, or complete elimination, of mortgage balances; and (3) application of the highest tax rate of 15% when a lower statutorily prescribed rate of 4.5% or 12% should have applied because the deceased mortgagor had surviving heirs. There is no explanation for these discrepancies on the Notices themselves. It was initially believed that the higher property values on the Notices were the result of DoR's reliance on assessment values, one of DoR's prescribed means of valuing collateral. However, matching these adjusted figures with, or reverse engineering them to, actual county assessment values has proven elusive. After having escalated the foregoing discrepancies within DoR, DoR dismissively attributed these discrepancies to untrained/rogue rank-and-file examiners. It therefore appears that DoR is artificially manufacturing and/or increasing the inheritance tax liability on financial institutions presumed to have deep pockets (the 15% game).

When discrepancies like the foregoing are discovered, the Notice may be appealed to another division of DoR (meaning the appeal is not evaluated by an independent third-party arbiter), adding several months and further non-recoverable expenses to resolution of the issue in addition to potentially delaying your REO sale. In some cases, the tax liability may be minimal, making it cost-ineffective to exercise your appellate rights. If the Notice is not appealed (or not appealed timely), it becomes a final administrative adjudication, which is binding on the applicant. After payment of the tax is made, DOR will, after yet several more weeks, provide a release.

IV. THE PETITION PROCESS: AN ALTERNATIVE ROUTE TO DIVESTING TAX LIABILITY Many lenders and servicers were advised that the sole means to address the inheritance tax was capitulation to the foregoing application procedure. This advice was incomplete as there has always been another creative option: filing a petition labeled a Petition for Supplementary Relief in Aid of Execution and/or to Confirm Divestiture of Lien (Petition). The petition seeks a Court Order declaring, inter alia, the inheritance tax lien divested, and is supported by the following arguments:

A. Administrative agencies like DoR may not regulate by issuing letters and must instead observe statutorily prescribed rule-making requirements consisting of several stages or steps.
B. Inheritance tax liens are not preserved from a sheriff's sale of real property.
C. Mortgage foreclosure actions and Sheriff's Deeds conveying real property are not statutorily recognized transfers that invoke the imposition of an inheritance tax.
D. By not observing statutes governing rulemaking, DoR has violated the due process rights of lenders and other purchasers of real property at sheriff's sale.

Courts have been receptive to this petition, even granting some on an emergency basis due to impending REO transactions.

A variation of this petition has recently been created for use in foreclosures involving government-insured or GSE-backed mortgages as those foreclosures necessitate conveyance of the collateral to HUD, V.A., or a GSE, if the foreclosing entity purchases the collateral at sheriff's sale. This variation of the petition is supported by the constitutional argument that the grantee of the collateral, an agency or instrumentality (in the case of a GSE) of the U.S. government, cannot be taxed by Pennsylvania pursuant to long-standing federal law providing for immunity of the U.S. government from state taxation. See *McCulloch v. Maryland,* 17 U.S. 316, 4 Wheat. 316, 4 L. Ed. 579 (1819) (it was unconstitutional for the State of Maryland to impose a tax on a bank created and operated by the U.S. government).

Fannie Mae's Legal Department is to be contacted for authorization before any constitutional/federal argument is asserted in a filing.

V. CONCLUSION The Pennsylvania inheritance tax issue has multiple layers and nuances. It is critical that your default counsel is not only skilled in these minutiae, but willing to pursue innovative alternatives to protect your interests and otherwise minimize or obviate your tax liability.

M. Troy Freedman, Managing Foreclosure Attorney, Richard M. Squire & Associates, LLC

M. Troy Freedman, graduated from Dickinson College in 1996 with a B.A. in Political Science, where he was the senior class president; and from Widener University School of Law in 1999, where he was a member of the Moe Levine Trial Advocacy Honor Society. Freedman has served as a contributing legal advisor for the Employer's Practical Legal Guide *(published by the National Institute of Business Management) and as an arbitrator for the Montgomery County Court of Common Pleas, Currently, Freedman focuses on all aspects of creditors' rights and complex real estate matters, consistently looking for new, creative, and more cost-effective solutions to legal issues.*

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The 2019 Legal League 100 Fall Servicer Summit

Tuesday, September 24
8:00 a.m.–1:30 p.m.
Dallas, Texas
Hyatt Regency

Legal professionals working within the default servicing space cannot afford to miss the 2019 Legal League 100 Fall Servicer Summit, happening this September 24 in Dallas, Texas.

Attendance at this event will allow you to share knowledge and gain insights from representatives of companies such as **Fannie Mae, Wells Fargo, PennyMac, Flagstar,** and **Roundpoint Mortgage Servicing.**

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MOVERS & SHAKERS

MCMICHAEL TAYLOR GRAY, LLC, HIRES J. PAMELA PRICE AS SOUTH CAROLINA, MANAGING ATTORNEY

McMichael Taylor Gray, LLC, has hired **J. Pamela Price** as Managing Attorney of South Carolina. Price brings with her nearly 30 years' experience representing creditors, mortgage bankers, investors, banks, and credit unions with her legal expertise. She has practiced in the area of real estate transactions, including purchases, refinances, equity lines, construction loans, and foreclosures since 1990. Additionally, she has written title insurance, as an agent, for several major title companies, including Chicago Title, Investors Title, Old Republic National Title Insurance Company, and others. She has been a member of the South Carolina Bar Publications Committee since 1990. Price is also versed in wills, trusts, and estates. In her spare time, Price is the Music Director of Shady Grove United Methodist Church. She also enjoys teaching and writing, as she was the co-author of the *South Carolina Foreclosure Law Manual* and the *Lawyer's Tool Kit*. January Taylor, Managing Partner, said "We're very excited to have Pamela on board. Her depth of experience, knowledge and management capabilities will complement our team of seasoned executives."

LAURITO & LAURITO, PLLC, TRANSITIONS INTO PADGETT LAW GROUP

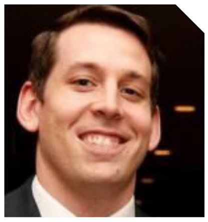
Padgett Law Group (PLG) announced that Ohio-based default services law firm Laurito & Laurito, PLLC, transitioned into the PLG family. Effective June 1, Laurito & Laurito became PLG's Ohio operation. As part of the transition, PLG will maintain the physical office location in Dayton, Ohio. The firm also operates in Florida, where PLG originated in 1993; Georgia; Tennessee; Arkansas; and Texas. Additionally, the firm offers a robust national bankruptcy practice. "Nearly 20 years ago, I joined a business my father had built on integrity, reliability, and quality. For 41 years, we have prided ourselves on our reputation and industry focus. The opportunity to become part of the PLG family perfectly continues those values while providing our clients with what is right for their businesses. I could not be more proud and excited for the firm to be part of PLG's growth and expansion," said Erin M. Laurito, Managing Partner of Laurito & Laurito. "Our growth strategy has always included a mix of organic expansion and deals with other firms who share our values, operate with a people-first mentality, and offer synergies across our client and service footprints. Erin, her father, and their entire team exemplify those values, and we're excited to welcome them into PLG," said Robyn Padgett, Chief Development Officer for PLG. Timothy D. Padgett, CEO and Managing Partner, added, "Ohio presents a unique opportunity for PLG and our clients as we look to create better synergies, lower costs, and improve our efficiencies firm-wide as we grow our capabilities to maintain our boutique focus with a larger footprint."

VIC DRAPER STEPS DOWN AS PROVEST CRO

After more than 12 years service, ProVest CRO **Victor Draper** has announced he will be stepping down. Draper has spent more than 35 years in the mortgage default industry and says he will continue to support the sector in retirement. In a statement, Draper said, "After more than 35 years in the mortgage default industry, I am excited to see what the next chapter in life may hold. I am looking forward to spending quality time with my wife, Deanna, my four children, and my granddaughter."

Draper credits one of his most significant accomplishments as "putting together a team of people with different thoughts and ideas and watching them collaborate, respect, and learn from their differences and accomplish great things." Prior to his time at ProVest, Draper operated Universal Default Services (UDS), a New York-based process-service and skip-tracing firm that was acquired by ProVest in January 2007. Before that, he led the default services department at Countrywide Financial Corporation. According to Draper, his time at ProVest strongly benefited from the lessons he learned earlier in his career, working in Default Servicing. "Understanding the entire life cycle of a mortgage default allowed me to zone in and focus on a specific and critical process within that cycle," Draper said. "Every day a loan is in default creates a greater risk and increases potential loss. I knew that performing the service of process and skip-tracing with the utmost speed and quality would be paramount to minimizing that risk and loss."

BRADLEY J. OSBORNE JOINS HLADIK, ONORATO & FEDERMAN, LLP, AS SENIOR ASSOCIATE



Hladik, Onorato & Federman, LLP has announced that **Bradley J. Osborne,** Esq. has joined the firm as a Senior Associate. The firm notes that Osborne has experience in all phases of default litigation and has handled all aspects of foreclosure, eviction, bankruptcy, and collection litigation before the United States District Courts and state courts of Pennsylvania and New Jersey. Osborne received his B.S. from S.U.N.Y. College at Brockport and his J.D., cum laude, from Western Michigan University Cooley Law School.

In addition to managing certain key components of the firm's New Jersey and Pennsylvania default cases, Osborne will be part of the firm's expanding capabilities in complex UDAAP and FDCPA defense litigation practice for lenders, servicers, and investors. "We are excited to welcome Brad to the HOF family and look forward to his participation in our continued commitment to providing clients with the highest quality legal representation," said partner Tom Federman. Partner Stephen M. Hladik echoed that sentiment, noting, "Brad's outstanding litigation and trial skills are a tremendous asset that will enhance the depth of our firm's capabilities in complex matters."

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