LEGAL LEAGUE 100

QUARTERLY

SPRING 2020 COMMITTED TO THE INDUSTRY, INTEGRITY, AND BEST PRACTICES

National

Understanding HUD's New Requirement

New cases bringing to the light the department's new "face-to-face" provision.

By Charles Gufford

The newest and first-blush review of 24 C.F.R 203.604, otherwise known as the "HUD Face-to-Face Provision," was issued by the Fourth District Court of Appeals of Florida on March 25, 2020.

The case, known as *Bank of America, N.A. v. Jones*, LEXIS 3942 (Fla. 4th DCA 2020), was like a majority of foreclosure cases involving the default of a borrower and the requirement of a lender to follow certain pre-foreclosure conditions prior to the institution of a foreclosure action.

The court specifically reviewed 24 C.F.R 203.604(b) under the auspices of whether Bank of America, N.A. (BoA), proved it complied with conducting a face-to-face interview with the borrower, Mark Jones.

The evidence on review revealed that after the default, but prior to the filed foreclosure action, the borrower, through his counsel, sent a cease and desist letter to BoA demanding the bank cease all communications with the borrower.

The correspondence further stated any contact by BoA would violate the Fair Debt Collection Practices Act (FDCPA) and expose the bank to statutory damages including attorney fees.

Upon receipt of the cease-and-desist letter, the bankupdated its internal system to not contact the borrower. Based upon the cease-and-desist demand, the bank did not perform

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National

Who Cares About SOL Issues Anymore?

Staying up-to-date individual state requirements will be beneficial in the long run.

By Andrew Boylan, Brandon Hakari, and Holly R. Shilliday

As the mortgage default industry continues to deal with the lasting effects of the COVID-19 pandemic, many of our pre-existing worries and troubles have fallen by the wayside. However, statute of limitations (SOL) issues are as important as they ever have been, if not more.

The Great Recession

Let's quickly rewind to the last major subprime mortgage default crisis. For entirely different reasons, we saw the real estate market collapse and mortgage defaults skyrocket. The aftermath of that brought sweeping changes to the mortgage industry, along with new programs designed to provide homeowners in need with different types of financial assistance. It wasn't long before acronyms like HAMP, HARP, TARP, MHA, and CFPB became part of daily conversations. The industry saw unprecedented levels of holds being placed on files where borrowers had requested assistance under these federal programs to either avoid further default or stop pending foreclosure actions. However, one acronym that was missing from our daily vocabulary back then—or at least temporarily forgotten—was SOL.

For the most part, the post-crisis holds were connected to borrower-initiated foreclosure prevention alternatives, where they acknowledged in writing that they were in default, that they were ex-

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National

Typographical Errors in HUD Conveyances: Tempest in a Teapot or Actual Issue?

How a one-digit difference can make all the difference when submitting a Final Title Package.

By Troy Freedman

Last year, the U.S. Department of Housing and Urban Development (HUD) rejected a post-sheriff's sale conveyance of a Pennsylvania property because "1 1/2 story brick," instead of "2 1/2 story brick," appeared in one of the legal descriptions to one of the deeds in a final title package (FTP).

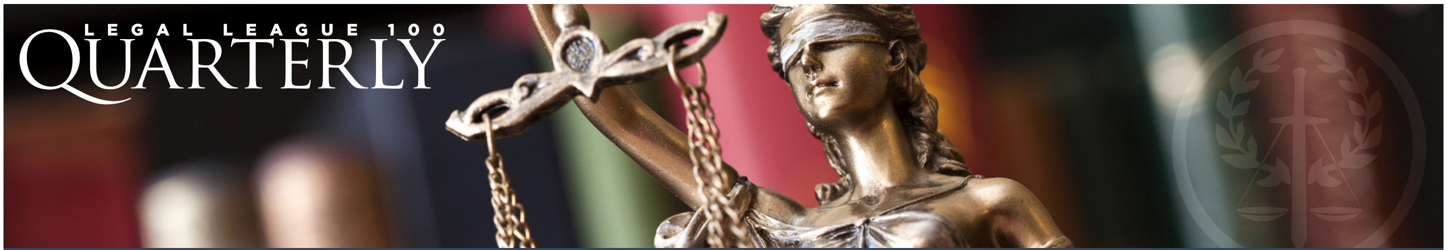
The various legal descriptions of the recorded instruments comprising the FTP were consistent. However, a single-digit difference was the basis for HUD's rejection of an FTP. Such action is incongruous with Pennsylvania law and possibly that of other jurisdictions.

In Chapter 2, page 2-14, of the FHA (Federal Housing Administration) Single Family Insurance Claims Handbook Rev-1 (4330.4), HUD defines good and marketable title as "clear of all encumbrances [and] no outstanding prior liens, including any past due and unpaid ground rents, general taxes or special assessments."

Similarly, Pennsylvania courts define "marketable" title as "free from liens and encumbrances and which a reasonable purchaser... would in the exercise of that prudence which businessmen ordinarily bring to bear upon such transactions, be willing to accept and ought to accept." *Barter v. Palmerton Area School District* 399 Pa. Super. 16, 581 A.2d 652, 654 (1990).

Title is unmarketable if it would expose "the

"Errors" continued on Page 10



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FROM THE CHAIR

As I am preparing this letter I am in awe of how different these last three months have been for us. As this time challenges us I am inspired how we have come together, and continue to come together as an industry.

This years spring summit was virtual and the Legal League 100 team put together an impressive Summit schedule that included Q&A with BSI Financial Services' President and CEO Gagan Sharma, a keynote address from the Lead Economist of the Federal Reserve Bank of St. Louis regarding the pandemic, a COVID-19 servicer panel, and topical sessions with servicers and Legal League 100 members that apply to the current environment. We hope you were able to join us and found the summit informative.

We continue to work with the U.S. Department of Housing and Urban Development (HUD) towards the fee align-ment initiative. In furtherance of that, the Legal League 100 aligned with ALFN and USFN to present a joint letter and memorandum in support of the alignment initiative and moratorium challenges. On April 17, 2020, USFN President Marty Stone; Andrea Tromberg, Board Chair, ALFN; and I had a call with HUD Deputy Assistant Joe Gormley and Paul Olin, Special Assistant and Program Analyst, HUD, regarding current issues. They were engaged and open to our concerns. They requested some follow-up data regarding moratoria impact on timelines and revenue. They also requested information on vacant and abandoned property data. I am committed to remaining engaged, and we will continue to work diligently to provide HUD with substantive information supporting the fee alignment initiative.

We continue to face challenges associated with COVID-19. For our part, we will continue to work for our members and strive to bring value.

I hope every one of you remains safe and healthy.

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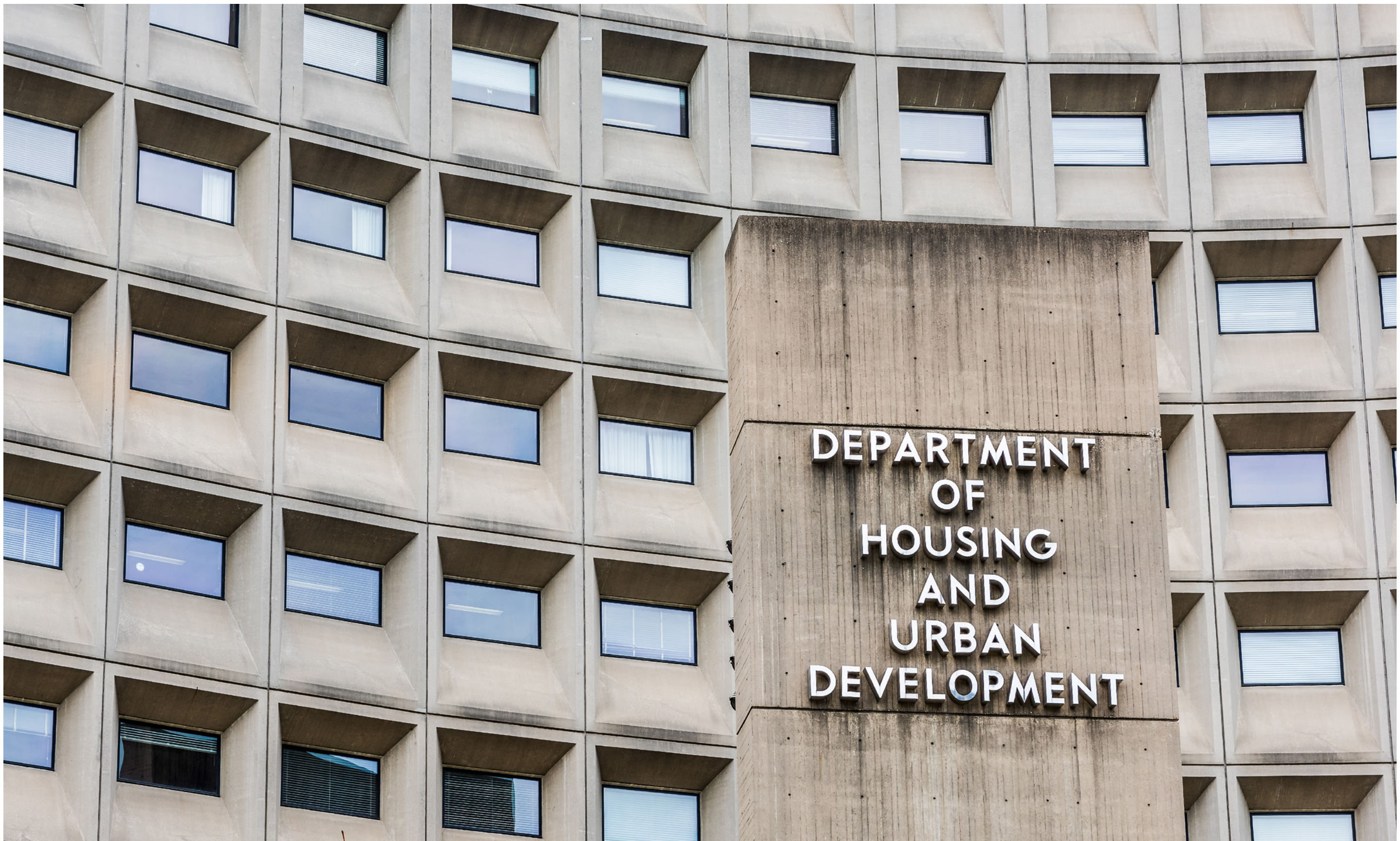
Roy Diaz has been a member of the Florida Bar since 1988, concentrating his practice in the areas of real estate, litigation, and bankruptcy. For more than 20 years, he has represented lenders, servicers of both conventional and GSE loans, private investors, and real estate developers, with an emphasis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



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the face-to-face interview as required by 24 C.F.R 203.604(b). As a result, the circuit court held the bank failed to prove compliance with Department of Housing and Urban Development (HUD) regulations with respect to the face-to-face meeting and granted the borrower's motion for an involuntary dismissal.

24 C.F.R 203.604(b) provides a "mortgagee must have a face-to-face interview with the mortgagor or make a reasonable effort to arrange such a meeting, before three full monthly installments due on the mortgage are unpaid." However, a face-to-face meeting is not required if the lender can demonstrate one of five specific exceptions to the above-mentioned rule. These exceptions include: (1) the mortgagor does not reside in the mortgaged property; (2) the mortgaged property is not within 200 miles of the mortgagee, its servicer, or a branch office of either; (3) the mortgagor has clearly indicated that he or she will not cooperate in the interview; (4) a repayment plan is entered into bringing the loan current and payments thereunder are current; or (5) a reasonable effort to arrange a meeting is unsuccessful. 24 C.F.R. § 203.604(c) (2019).

On appeal, the bank argued the borrower's cease-and-desist letter was a clear expression he would not cooperate with the bank to conduct a face-to-face meeting, and thus, it constituted an exception to conducting a face-to-face meeting as otherwise required by 24 C.F.R. § 203.604(c)(3).

The Appellate Court took guidance from *JP Morgan Chase Bank, N.A. v. Moore*, 2015 IL App (1st) 142971-U, 2015 WL 4640421 (Ill. App. Ct. Aug. 4, 2015), where the borrowers in that case were informed of their default via correspondence and were provided information to set up a face-to-face meeting. In response, the borrowers filed a federal lawsuit and a complaint with HUD against the lender. The Illinois Appellate Court ruled the borrowers' actions were inconsistent with an intent to cooperate in a face-to-face interview.

The Fourth District Court of Appeals ruled similarly that the borrower's demand of not wishing to communicate with the bank, coupled with the threat of a lawsuit if communications ensued, was sufficient evidence to conclude the borrower would not cooperate in a face-to-face meeting and, thus, placed the bank in an untenable situation, which would render its compliance with 24 C.F.R § 203.604 meaningless. Although the Appellate Court ruled in favor of Bank of America and overturned the Circuit Court's dismissal, the court provided a caveat to its ruling and cited *Derouin v. Universal Am. Mortgage Co.*, 254 So. 3d 595 (Fla. 2d DCA 2018), which held that merely informing a lender of a borrower's intention to communicate directly with counsel does not necessarily constitute a clear indication of a borrower's unwillingness to engage in face-to-face activities under 24 C.F.R § 203.604.

This is encouraging case law from the state of Florida and seems to indicate a willingness by the Florida Appellate Courts to interpret the HUD guidelines under a less stringent standard other than strict compliance and, thus, show they are willing to review the facts of each case individually to determine whether a lender has complied with its duty to perform pre-foreclosure conditions.

This case law should not be construed to mean a lender can cease all pre-foreclosure activities before the institution of a foreclosure if a borrower appears to be uncooperative. If anything, the actions of a borrower or the lack of cooperation from a borrower must be so clear as to allow a reviewing court to conclude that a face-to-face interview would not have changed the borrower's position curing any alleged default under the loan.

Charles Gufford *is a partner with McCalla Raymer Leibert Pierce, LLC's Florida Litigation & Trial Practice Group. Gufford's practice focuses on real property law, including mortgage and lien foreclosure, association law, and appellate practice. He has extensive experience in the trial arena representing major lending institutions, having conducted hundreds of non-jury trials. Gufford currently manages a trial group whose specific focus is to take civil matters to non-jury trial as means of expeditiously obtaining civil judgments. Gufford has also conducted numerous jury trials in Florida's criminal and civil courts.*

"Who Cares" continued from Page 1

periencing a financial hardship, and that they were requesting assistance. Although the legal concepts of tolling and resetting a SOL differ state-by-state, in many jurisdictions, the loss mitigation scenario described above would either stop or potentially even reset the SOL clock. As we came to see, however, not all post-crisis loss mitigation activity was toll able. As a result, the industry saw SOL issues arise in certain jurisdictions.

COVID-19 and the CARES Act

Currently, we have seen federal, state, and local governments enact a multitude of moratoriums and relief programs attempt to provide much needed assistance to homeowners and renters. At the national level, H.R. 748, the Coronavirus Aid, Relief, and Economic Security Act(CARES Act) was passed and signed into law by President Donald Trump.

The sizeable relief package included foreclosure and eviction moratoriums and a consumer right to request forbearance for qualifying federally backed mortgage loans. Many private investors have either followed suit or provided similar protections for their portfolios of defaulted loans.

As the industry continues to navigate these unchartered waters, it will be important to consider and track the underlying reason(s) behind any holds that are placed as a result of the COVID-19 pandemic. There are many different scenarios that are triggering holds, but not all of them will be toll able. Mortgage servicers and investors should work closely with local counsel to track any loans that are approaching SOL deadlines. If a loan is placed on hold unilaterally by the servicer or investor and there is no applicable moratorium or documented loss mitigation request, there could be enforcement issues down the line. This is especially true in jurisdictions where a loan may have already been accelerated.

Statute of Limitation Updates

While reviewing loans for potential SOL issues, especially in light of COVID-19 and the related holds, it's important to stay updated on jurisdictional case law. The following recent cases out of Colorado and Texas discuss the topic of decelerating loans, something that we could see more of if foreclosure actions end up being cancelled or rescinded as a result of the pandemic.

Colorado

The Colorado Supreme Court granted certiorari to consider whether a servicer may abandon the acceleration of a loan, thereby reinstating the original maturity date for purposes of applying the SOL to Colorado non-judicial foreclosures [*Parker v. Bank of New York Mellon*, et al, 2019 SC 84 (Colo. 2019)]. In *Parker*, the defendants contested the validity of a completed foreclosure sale and the holder's right to possession, saying the six-year statute of limitation expired prior to the foreclosure sale. The servicer initiated a foreclosure in 2008. Thereafter, the owner executed an option to purchase and power of attorney in favor of his father. Both the borrower and his father were in possession of the property. The 2008 foreclosure was withdrawn after the servicer approved the borrower's request for a loan modification. The borrower made the first payment, but after that no further payments on the loan were made.

In 2010, the servicer sent a new acceleration warning letter, giving the borrower a new opportunity to cure. The servicer-initiated foreclosure approximately five years later in 2015. The district court authorized the foreclosure sale. The borrower and his father asserted counterclaims in the resulting unlawful detainer case, stating they had superior title to the property due to expiration of the SOL prior to completion of the foreclosure.

The trial court disagreed dismissing the counterclaims and the Court of Appeals affirmed [*Bank of N.Y. Mellon v. Peterson*, 2018 COA 174 (Colo. App. 2018)]. Following *Boren v. U.S. Bank Nat's Ass'n*, 807 F.3d 99, 104 (5th Cir. 2015) and other federal court decisions, the Court of Appeals ruled the withdrawal of the 2008 foreclosure and subsequent communication to the borrower was an abandonment of the prior acceleration. In reaching its conclusion, the Court of Appeals referenced *Goodwin v. Dist. Court*, 7798 P.2d 837, 843-44 (Colo. 1989) wherein the Colorado Supreme Court recognized the doctrine of waiver applies to accelerations.

Even though the maturity date of a note may be reinstated by waiving an acceleration of the loan, the SOL may nonetheless limit a servicer's ability to recover past due installments that are more than six years from the last payment date. See *Castle Rock v. Team Transit*, 2012 Colo. App. 125 (Oct. 3, 2012), which held that the SOL begins to run separately as to each past-due installment on the due date of that installment.

Texas

Another recent ruling dealing with the same issue came from the 162nd Judicial District Court of Dallas County, where the court set the ground to receive further appellate guidance on what actions constitute abandonment of acceleration as a matter of law. Texas law is clear that a servicer or lender can abandon a prior acceleration of maturity through its conduct, thereby stopping the SOL from running.

One way to abandon acceleration that certain courts have recognized is sending a demand letter (or monthly payment statement), which articulates that the servicer will accept some amount less than a full payoff.

In *Florey v. U.S. Bank Nat'l Assn, et al, Dallas Co.* No. DC-19-05797 (162nd Dist. Ct., Feb. 27, 2020), the issue was whether enforcement of a loan, which was accelerated in 2013, was barred by Texas' four-year SOL, or if the servicer's actions abandoned acceleration prior to the SOL expiration.

Between 2014 and 2017, nearly 60 statements and notices were mailed to the borrowers that indicated a willingness to accept the past-due amount, informed the borrowers of the due date for the next payment, and that the failure to cure the default "may result in fees, possibly even foreclosure and the loss of your home"—all actions inconsistent with an accelerated loan.

The borrower argued that because the statements did not state "will result in fees…" combined with the fact that statements in late 2017 resumed using language indicating that the loan was accelerated (while providing the reinstatement amount at the same time) showed that acceleration was not abandoned. However, ultimately the court granted summary judgment establishing as a matter of law that the actions taken by the servicer constituted abandonment of acceleration. The case has since been appealed to the Fifth Court of Appeals of Texas.

Statute of Limitation Analyses

To avoid potential legal, regulatory, and reputational issues, mortgage servicers and investors should have state-specific portfolio reporting in place to track delinquencies and continue to work closely with local counsel to stay apprised of jurisdictional impacts. This is especially true as new programs and processes are rolled out to deal with the lasting impacts that COVID-19 will have on the mortgage default industry.

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Holly R. Shilliday joined the firm in 2014 as the Managing Attorney for the Colorado office of McCarthy & Holthus, LLP, and is now a Partner of the firm. She received a B.A. from the University of Denver and earned a J.D. from Pepperdine University School of Law. She clerked for the Honorable Samuel L. Bufford, a bankruptcy judge in the Central District of California. Shilliday is a frequent lecturer and author of articles on creditors' rights issues.

Brandon Hakari joined McCarthy & Holthus, LLP in the firm's Portland, Oregon, office in 2012. In 2018, he moved to the firm's Plano, Texas, office where he practices as the office's Senior Litigation Associate. He received his Bachelor of Arts in Chemistry from Texas A&M University in 2008 and his Juris Doctorate from Michigan State University in 2011. While in law school, he worked as a clinician at Michigan State University's Housing Law Clinic and served as a judicial extern for the Honorable Stacey Jernigan of the United States Bankruptcy Court, Northern District of Texas.

Arkansas

Foreclosure Act Could Limit Bids on Sales

The Arkansas Statutory Foreclosure Act established a minimum-bid requirement, hoping to limit competition by bidders at foreclosure sales.

By Mitch Berry

The Arkansas Statutory Foreclosure Act establishes a minimum-bid requirement, which has the effect of limiting competition by bidders at non-judicial foreclosure sales in Arkansas. The Act states: "No bid shall be accepted that is less than two-thirds (2/3) of the entire indebtedness due at the date of sale." Ark. Code Ann. §18-50-107(b)(3). Arkansas law also provides a judicial foreclosure path, for which there is no minimum-bid requirement.

Presumably, when this law was passed in 1987, the Arkansas legislature was concerned that statutory foreclosure sales would not draw significant bidding competition so that foreclosing creditors could purchase the property at the sale for a low amount, thus preserving their right to a large deficiency judgment in addition to obtaining ownership of the property.

If this was the legislature's concern, it was surely overkill, since the Act further limits the debtor's liability for a deficiency judgment at Ark. Code Ann. §18-50-112(b), which states a formula for determining the recoverable deficiency amount. Additionally, since 1987, non-judicial foreclosures have become the norm in the state rather than the exception as concerns about due process and insurable title have been eliminated. As those initial concerns have disappeared, statutory foreclosure sales have become fertile ground for third-party purchases of real estate.

Pursuant to Ark. Code Ann. §18-50-112(b), a money judgment after a non-judicial foreclosure is limited to the lesser of the amount by which the indebtedness due at the date of sale exceeds the fair market value of the property, or the amount by which the indebtedness due at the date of sale exceeds the sale amount.

The foreclosing creditor has 12 months following the foreclosure sale to sue for the deficiency, and the foreclosing credit bears the burden of proving the amount of the debt, the sale price, and the fair market value of the property.

Consider the scenario of an "underwater" home, where the indebtedness due on the date of the sale equals $100,000 and the fair market value of the property being sold is $40,000. In the absence of the act's minimum-bid requirement, and in a competitive market, the bidding at the foreclosure sale might begin at $30,000 and rise incrementally to a final winning bid of $50,000 to a third-party buyer. Pursuant to the Statutory Foreclosure Act, the foreclosing creditor would be limited to a deficiency judgment of $50,000, that being the difference between the amount of the indebtedness due and the sale price.

In the end, the foreclosing creditor would have received $50,000 in sale proceeds and could pursue a $50,000 money judgment against the debtor, which would make the creditor whole, assuming that the judgment is collectable. While it is likely a practical matter that the judgment is uncollectable, the creditor still gets the full benefit of the bargain that it made with the debtor when the loan was made.

When the minimum-bid requirement is applied, however, the foreclosing creditor would be forced to enter an opening bid of $66,666 at the non-judicial sale. In that case, competitive bidding would not occur, and the foreclosing creditor would be forced to take ownership of the property at an artificially inflated price. The foreclosing creditor pays, in the form of a set-off against the debt, $66,666 for a property that has a fair market value of only $40,000 to $50,0000.

The act would further limit the deficiency judgment amount of $33,333, as opposed to the $50,000 that might be obtainable in the competitive-bidding scenario discussed in the preceding paragraph. The foreclosing creditor then incurs the expenses and costs of owning and maintaining the property and reselling it on the traditional real estate market. The creditor has no chance of making itself whole in this case. In the best-case but unlikely scenario, the creditor sells the property at REO for $50,000 and obtains a money judgment against the debtor for $33,333 that is subsequently collected, leaving it with a loss of $16,666.

Once real estate commissions and the costs of owning and maintaining the property in REO are considered, the loss to the creditor would be much greater. Again, this is the best-case scenario. The more likely occurrence is that $33,333 deficiency is uncollectable, and the property sells at REO for a discounted price of $35,000, leaving the creditor with a loss of $65,000 even before REO costs and commissions are included.

Whereas a competitive sale with no minimum-bid requirement gives the creditor the chance of making itself whole, the minimum-bid requirement deprives the creditor of the full benefit of the bargain that it made with the debtor when the loan was made. In today's environment where statutory sales are the norm, this improperly burdens creditors.

Mitch Berry is an attorney with Padgett Law Group, serving the firm as Supervising Attorney of Arkansas. His practice is primarily focused on bankruptcy, foreclosure, real estate, and commercial litigation. Having practiced law since 2001, Berry has extensive litigation experience. He prides himself on his client communication, file management, and aggressive yet practical approach. In managing the firm's Arkansas practice, he has managed single-quarter influxes of significant file counts, and regularly educates clients on localized issues such as eviction and mobile home.

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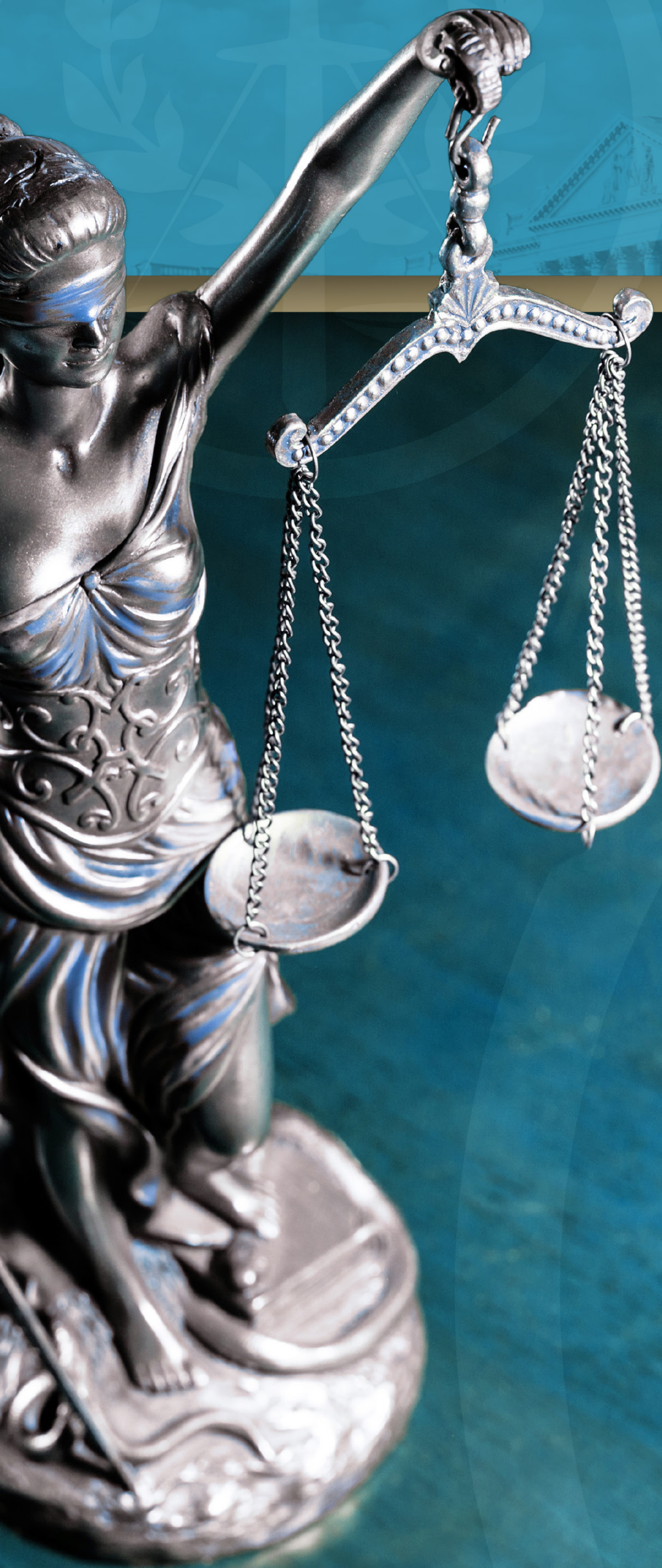

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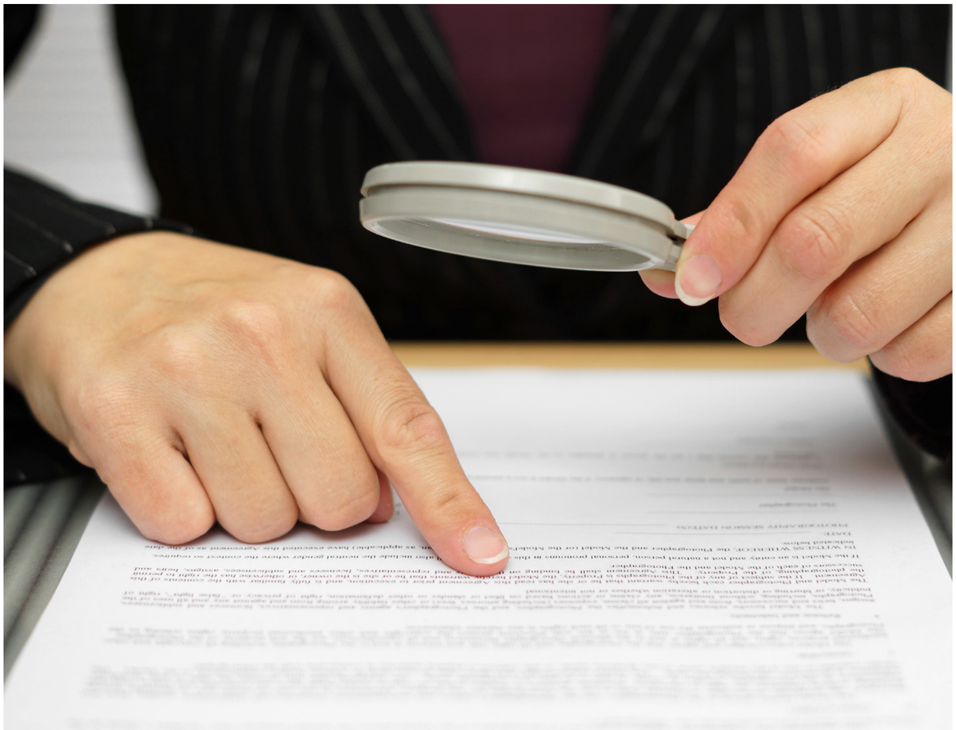

"Errors" continued from Page 1

party holding it to litigation." *Sivayne v. Lyon*, 67 Pa. 436 (1871); see also *Moyer v. De Vincentis Constr. Co.*, 107 Pa. Super. 588, 164 A. 111, 112 (1933) ("one is not compelled to purchase under an agreement for sale of real estate…where the title is in such condition that the purchaser will be exposed to litigation").

The *Barter* case suggests that a marketability analysis is limited to liens and encumbrances, exclusive of the content of instruments in the chain of title. Even if the instruments' content were included in such analysis, minor scrivener's errors do not adversely affect marketability. The applicable inquiry, dating back more than one century, is not whether an instruments' content is devoid of any mistakes whatsoever or perfectly consistent with other instruments in the chain of title, it is whether an instrument is "sufficiently definite to identify the parcel [.]" *Snow v. Corsica Constr. Co.*, 329 A.2d 887, 891, 549 Pa. 528, 536 (1974)(a mere typographical error does not invalidate agreement of sale for real estate) citing *Merwarth v. Townsend*, 455 Pa. 475, 317 A.2d 725 (1974) and *Yinger v. Springer*, 452 Pa. 66, 305 A.2d 19 (1973); *Albert v. Schenley Auto Sales, Inc.*, 375 Pa. 512, 515 (1953) citing *O'Connell v. Cease*, 267 Pa. 288, 293, 110 A. 266, 267 (1920)("real estate may be described by reference to a plan, a plot, a lot number, or a prior conveyance, or by name, such as 'Hotel Duquesne property'"); *Haupt v. Unger*, 222 Pa. 439, 71 A. 843 (1909) (real property at issue was described sufficiently as "all of the properties of E.J. Unger, deceased, in Croyle Township, together with the Heise and Bertenet additions, including buildings and schoolhouse, and all of the other buildings located on the lands, with the appurtenances thereto, including the coal and minerals of every description").

Accordingly, a single-digit difference, a non-prejudicial typographical error, in the number of stories to a structure on a property would not create any enforceability issues with the instrument in Pennsylvania. In such an instance, an appeal via the Yardi online platform resolved the matter, though not without additional expense and delay.

Because the FHA Single Family Insurance Claims Handbook Rev-1 (4330.4) lacks specific guidance or instructions on scrivener's errors, compliance can be a moving target. A proactive and methodical approach is recommended. For future conveyances to HUD, such approach means complete synchronicity among all legal descriptions in all instruments comprising the FTP including consistency among all the following, however insignificant or inconsequential they may seem:

- Metes and bounds descriptions.
- Parcel identification, block/lot, or similar numbers.
- References to prior instruments and subdivision plans, as well as their recording information.
- Placement of commas, semi-colons, hyphens, parentheses, brackets, and dashes; and
- The manner in which towns are identified (e.g. municipality, city, town, borough, village, hamlet).

The legal descriptions to the deed into the mortgagor(s) and to the mortgage should be reviewed carefully at the time of or shortly after a foreclosure referral involving an FHA-insured mortgage. If any discrepancies—even innocuous ones—are found, curative action may be advisable to ensure a smooth, rejection-free conveyance to HUD after a sheriff's sale.

The most expeditious and least costly means of resolution involves re-recording instruments with a recital setting forth the reason(s) for re-recording signed and notarized by default counsel.

However, some county ROD offices may not accept such re-recording attempts and, instead, require that original parties to those instruments re-execute them with a new notarization.

Convincing borrowers to re-execute mortgages after foreclosure has been initiated or even after just a pre-foreclosure notice has been sent is highly unlikely, if not impossible, so one of the following may be appropriate:

1. Including one or more additional counts for title curative in the foreclosure complaint.
2. Filing a motion or petition during the foreclosure seeking a court order either authorizing the county recorder of deeds to accept an instrument for re-recording or reforming such instrument; or
3. Initiating a separate action to quiet title—perhaps the most costly and lengthiest tactic.

Finally, ensure that the grantee on the deed into HUD is the following: Secretary of HUD, his/her successors and assigns. Any variation of this name, however slight, may result in a rejection of the FTP. Even if the pronoun "her" were excluded, which makes complete sense as the current Secretary is a male, HUD might reject the FTP.

In sum, benign legal description discrepancies or omissions should not be dismissed or ignored during the foreclosure of an FHA-insured mortgage. Curing the same is actually a critical and unavoidable step to obviate rejections of FTPs by HUD after sheriff's sale.

***M. Troy Freedman** graduated from Dickinson College in 1996 with a B.A. in Political Science,and from Widener University School of Law in 1999. He 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, presiding over cases involving non-payment of credit cards, non-payment of wages, construction disputes, and personal injuries. Freedman has represented consumers as well as business entities including commercial landlords, residential landlords, mortgage companies and lending institutions, mortgage servicers, and real estate matters.*

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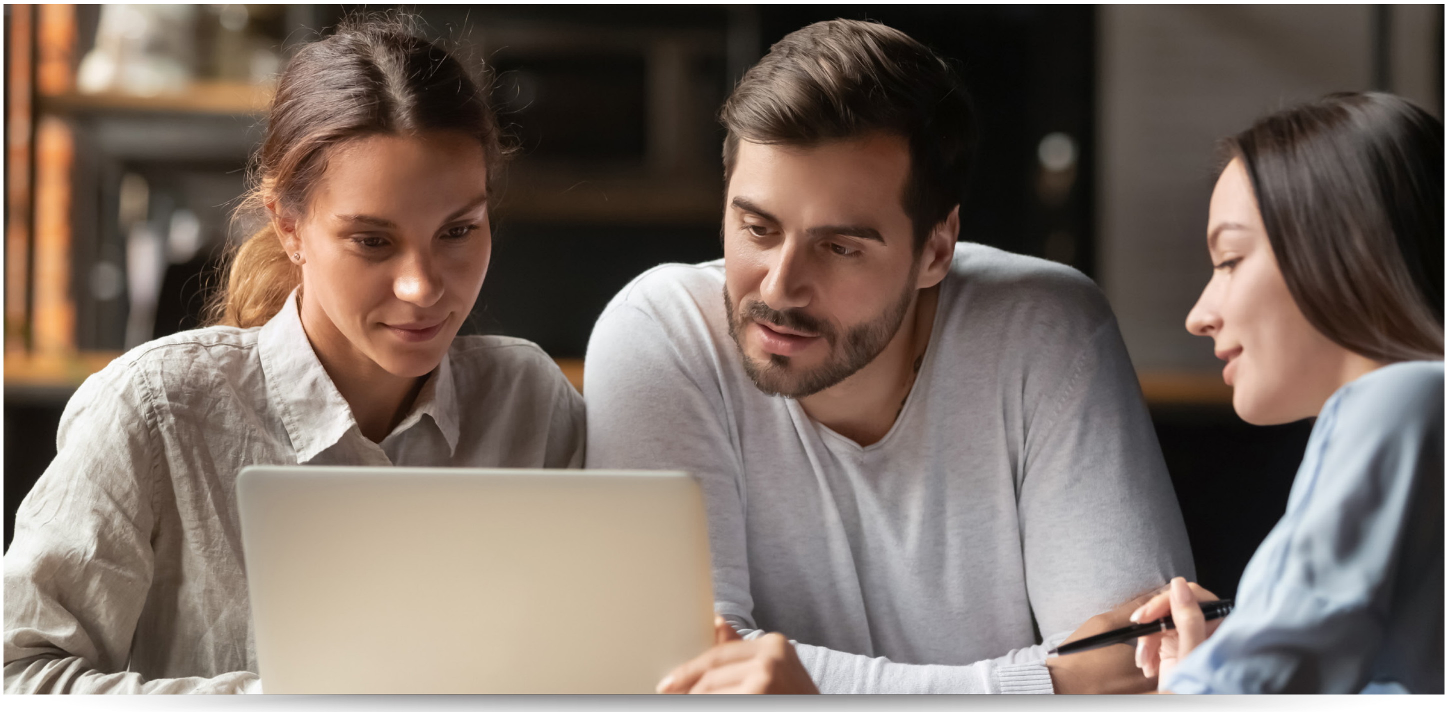

Florida

Borrower-Waived Pre-Foreclosure-Right to Face-to-Face Meeting

Loans backed by the FHA require that a mortgagee have a meeting, or that the bank make a 'reasonable effort' to arrange such an event.

By Adam Diaz

In 2019, Bank of America (BoA) appealed the involuntary dismissal of its foreclosure action. The lower court dismissed BoA's action because it found the bank failed to conduct a face-to-face meeting with the borrowers prior to foreclosing, as required by 24 C.F.R. § 203.604.

Section 203.604 applies to Federal Housing Administration (FHA) backed loans and requires a mortgagee "have a face-to-face interview with the mortgagor or make a reasonable effort to arrange such a meeting before three full monthly installments due on the mortgage are unpaid."

Below and on appeal, BoA argued it was not required to conduct the face-to-face meeting because, after defaulting on the note and mortgage, the borrowers demanded: "the Bank cease all communication" with them. The borrowers also threatened to sue the bank if it contacted them. As a result, "the Bank updated its system not to contact the borrowers and did not proceed with the face-to-face interview."

As the basis for not conducting the face-to-face meeting, the bank relied upon § 203.604(c), which includes a list of reasons under which a face-to-face meeting will not be required. Those exceptions are:

1. The mortgagor does not reside in the mortgaged property.
2. The mortgaged property is not within 200 miles of the mortgagee, its servicer, or a branch office of either.
3. The mortgagor has clearly indicated that he will not cooperate in the interview.
4. A repayment plan consistent with the mortgagor's circumstances is entered into to bring the mortgagor's account current, thus making a meeting unnecessary, and payments thereunder are current, or.
5. A reasonable effort to arrange a meeting is unsuccessful.

BoA argued the borrowers' cease and desist letter "…was a clear expression that…[they] would not cooperate with the Bank to conduct a face to face meeting…" and therefore such a meeting was not required under subsection (c)(3) of the rule.

The Fourth DCA agreed concluding "the borrowers' cease and desist letter [could] 'only be interpreted as indicia of an unwillingness to commit to such a meeting.'" The court noted this was a novel issue and relied upon the Illinois Appellate court's decision in *JPMorgan Chase Bank, N.A. v. Moore* in its analysis.

The court found the bank's interpretation of the borrower's letter was reasonable and that, based on the borrower's letter, engaging the borrowers in conversation about the face-to-meeting was likely to result in a lawsuit against the bank.

The court explained any other interpretation of the language in the cease and desist letter would put the bank in "an untenable situation and would render the regulatory exception meaningless."

The court reversed the involuntary dismissal and remanded the matter to the trial court for further proceedings. This decision provides helpful guidance for application of one of the more subjective exceptions to the requirements of § 203.604, and we anticipate this decision will reduce litigation on the issue. The effect of COVID-19 on the banks' pre-foreclosure requirements, including the face-to-face interview, is still to be determined.

Adam Diaz is the Litigation Partner at Diaz Anselmo Lindberg, P.A. in Fort Lauderdale, Florida. He is AV Rated by Martindale-Hubbell, which is the highest peer rating for Ethical Standards and Legal Ability. Diaz has concentrated his practice in the areas of mortgage foreclosure and real estate, bankruptcy, consumer protection actions, and commercial litigation. He is admitted in all Federal Courts in Florida as well as the United States Court of Appeals for the Eleventh Circuit.

Accelerating the Judgement of Mortgage Debt

New York's highest appellate court denied a motion regarding foreclosure actions.

By Adam Gross, Stephen Vargas

It is now clear that commencing a foreclosure and not entry of judgment accelerates mortgage debt. On February 18, 2020, New York's highest appellate court, the Court of Appeals, denied the motion for permission to appeal the *Bank of N.Y. v. Dieudonne's* decision, which held acceleration of a New York mortgage occurs by filing a foreclosure action, not the Judgment of Foreclosure.

Based on the denial, the "MacPherson/reinstatement clause argument" is dead and can no longer be relied on.

However, there is another case before the Court of Appeals regarding how a mortgage loan is accelerated, which should be decided this year. In *Vargas v. Deutsche Bank National Trust Company*, the Court of Appeals will decide whether a pre-foreclosure letter that contains the prescriptive language that the debt "will be accelerated" and "foreclosure proceedings will be initiated" if the default is not cured within the cure period constitutes a clear and unequivocal intent to accelerate the loan balance and begins running the six-year statute of limitations on the entire mortgage debt.

Another issue before the Court of Appeals is whether a plaintiff's voluntary dismissal of a foreclosure is an affirmative act to revoke the acceleration that occurred when the foreclosure was commenced. There are two pending cases, *Freedom Mortgage Corp. v. Engel and Ditech Financial LLC v. Naidu,* where the Court of Appeals will determine if a stipulation to voluntarily discontinue a foreclosure action entered within the six-year limitations period after acceleration is a revocation of the acceleration.

To add to the lack of clarity, what is required in a deceleration letter is also not settled law.

In *Milone v. U.S. Bank N.A.*, the Second Dept. Appellate Court (where half of the population in New York resides) acknowledged acceleration can be revoked and stop the statute of limitations from running by a deceleration letter mailed within the six-year limitations period. However, the *Milone* Court went on to state that a deceleration letter would be invalid to revoke the acceleration if it does not contain the proper notification or is sent shortly before the statute of limitations expires. The court did not clarify the exact language required in a deceleration letter or provide the time period for sending the letter, and there is no other appellate law that gives guidance regarding the content and timing of a deceleration letter. In stating what would be proper notification, the court set out three factors:

1. Letter contains express demand for monthly payments on the note
2. Letter is accompanied by monthly invoices for regular installment payments
3. Other evidence that lender truly intended to de-accelerate the loan

The *Milone* court went on to state that a "bare" and conclusory de-acceleration letter, without a demand for monthly payments, copies of invoices, or other evidence, may raise legitimate questions about whether or not the letter was sent as a mere pretext to avoid the statute of limitations and would not be a valid de-acceleration letter.

I recommend that a de-acceleration letter specifically notify the borrower the acceleration is revoked, the loan is payable by its original terms as a monthly installment contract, demand the borrower resume making monthly payments, and set out the due date, the monthly payment amount, and the amount needed to reinstate.

On February 26, 2020, in *Nationstar Mortgage LLC v. Dorsin*, the Second Dept. Appellate Court rejected the plaintiff's argument that the borrower's execution of a HAMP trial plan was an acknowledgment of the debt that revoked acceleration and dismissed the foreclosure for an expired statute of limitations.

The court reasoned that the borrower "merely agreed to make three trial payments so as to receive a permanent modification offer and any intention to repay the debt was conditioned on the parties reaching a permanent modification agreement, which did not occur."

The Appellate Court found the HAMP trial plan did not revoke acceleration because it was not a sufficient acknowledgment of the debt and an unconditional promise to repay. The Second Dept. also found the three timely trial period plan payments were not an absolute and unqualified acknowledgement of the debt by the borrower from which a promise to pay the remainder could be inferred because the trial payments were made for the purpose of a loan modification rather than payment of the loan at current terms.

The Second Dept. noted that its decision is inconsistent with the Third Dept.'s decision in *Wells Fargo Bank N.A. v. Grover,* in which the court found HAMP trial plan payments "constituted an unqualified acknowledgement of the debt that more was due and from which a promise could be inferred to pay the balance."

By creating such an obvious split in appellate department case law, the Second Dept. set up the issue to be appealed to the Court of Appeals. Unless that happens, the law on whether HAMP trial plan payments revokes acceleration differs depending on where in the state the issue is litigated.

Commencing a foreclosure action on a loan that was accelerated over six years ago, if the acceleration was not revoked within the six-year limitations period, the statute of limitations was not tolled by bankruptcy or death of an owner, or re-set by the borrower acknowledging the debt or making voluntary payments is a violation of the FDCPA and New York law.

A foreclosure filed after the statute of limitations expired is a violation of the Fair Debt Collection Practices Act because it is an attempt to recover an unenforceable debt under state law and the named plaintiff, servicer, and law firm could be sued for the FDCPA violation. Additionally, under New York law, plaintiffs in a foreclosure action must file a certificate of merit in which the plaintiff's attorney certifies that they reviewed the facts of the case with a representative of the plaintiff and there is a reasonable basis to commence the action. If the statute of limitations has expired, then there is no reasonable basis to commence the foreclosure.

Adam Gross is the Founding Partner at the New York & New Jersey based law firm of Gross Polowy, LLC. Gross is a critical source of thought leadership, for which Gross Polowy has become known. He has over 27 years' of legal expertise in the nuances of New York real property laws, and his practice focuses on mortgage default litigation and appeals, legal compliance, creditors' rights, home retention, foreclosure, litigation, title curative, and related real estate matters.

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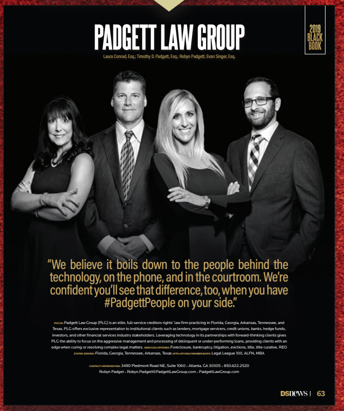

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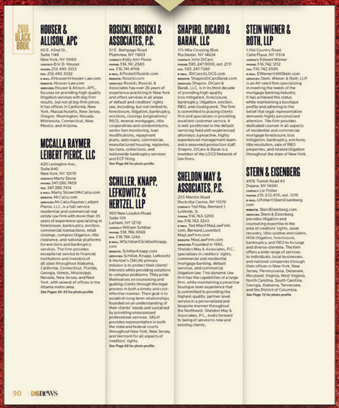

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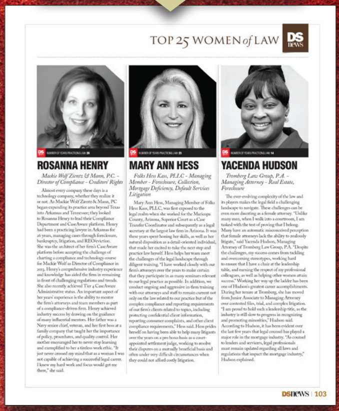

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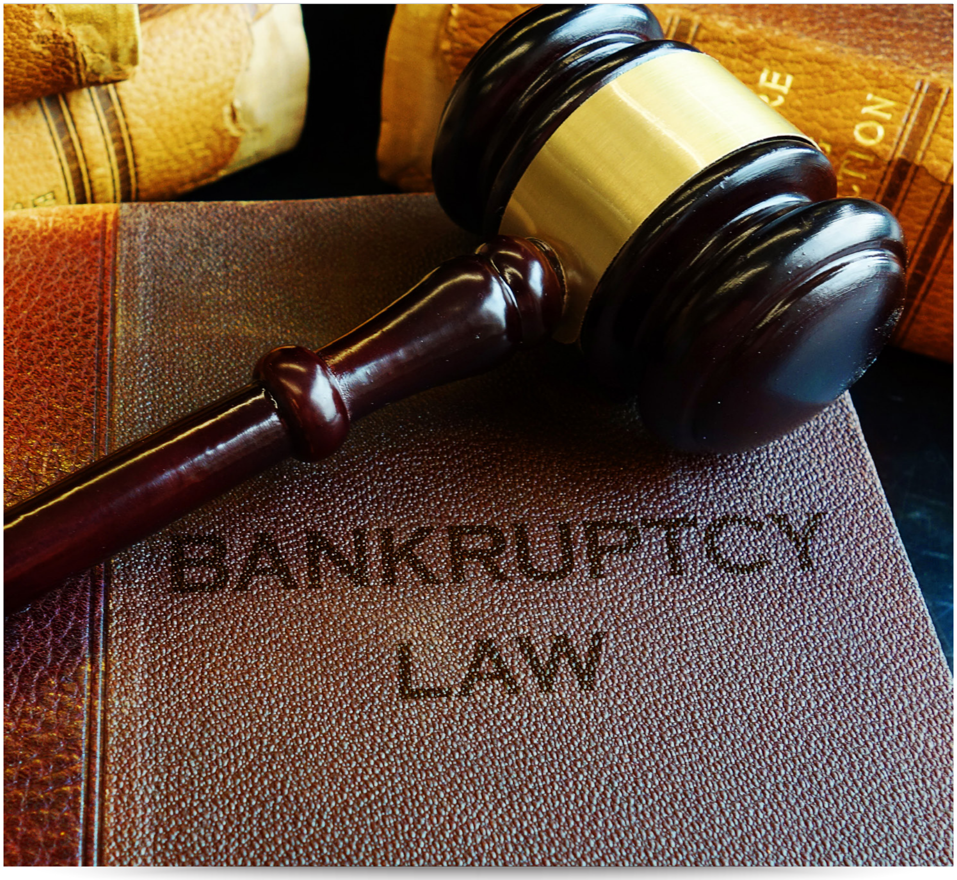
Tying Bankruptcy and Foreclosure Together

The purpose of declaring Chapter 7 bankruptcy is to clear debt from debtors. How does that relate to foreclosures?

By Lauren Riddick



In Illinois, the bankruptcy and foreclosure arenas may have become more closely aligned. Specifically, pursuant to a new case, a debtor's statements in a Chapter 7 bankruptcy petition might have a long-lasting effect, even outside of a bankruptcy.

The purpose of a Chapter 7 bankruptcy is to clear (or, in bankruptcy vernacular, to "discharge") debts from an overburdened debtor's shoulders. A Chapter 7 begins with a debtor filing a standardized document known as a "petition" in their presiding bankruptcy court to detail their income and expenses. Part of this petition is a "Statement of Intent," which is a declaration of how the debtor intends to handle secured debt (i.e., debt tied to a particular piece of property, such as a mortgage loan.) It requires the selection of one of three standardized options: namely, whether the debtor intends to "redeem the property" (i.e., pay the creditor back), "reaffirm the debt" (remain responsible for the debt), or "surrender the property."

Although surrendering the property implies an intent to relinquish, in practice—at least in Illinois—this selection has historically had no true ascertainable meaning. In other words, many (if not most) Illinois jurisdictions have permitted mortgagors to select "surrender" in their bankruptcy petition, receive a debt discharge, and then proceed to fight the lender's subsequent foreclosure tooth-and-nail.

A recent case, however, may change that. In the *Bank of New York Mellon v. Rodriguez*, 2020 Il App (2d) 190143, the Second District Court of Appeals held that debtors were bound by their stated intent. In *Rodriguez*, the debtors sought to void a foreclosure judgment due to improper service six years after declaring an intent to surrender and receiving a bankruptcy discharge—and after a foreclosure had not only been completed, but the property had changed hands twice over. The court was distinctly not receptive to the debtors' arguments.

The Second District agreed with the trial court that the defendants' position in bankruptcy and the benefit of the discharge effectively served to preclude their pursuit of relief from judgment in the foreclosure." Id. at 17. Further stating that, "indeed, it is abhorrent to our sense of equity that, six years after the bankruptcy, defendants claimed injury and sought to recover a property in which they no longer held any legal or equitable interest." Id. at ¶22. The court also took note of a case from the 11th Circuit, which stated that "otherwise, debtors could obtain a discharge in bankruptcy based, in part, on their sworn statement to surrender and "enjoy possession of the collateral indefinitely while hindering and prolonging the state court process."' Id. at ¶19.

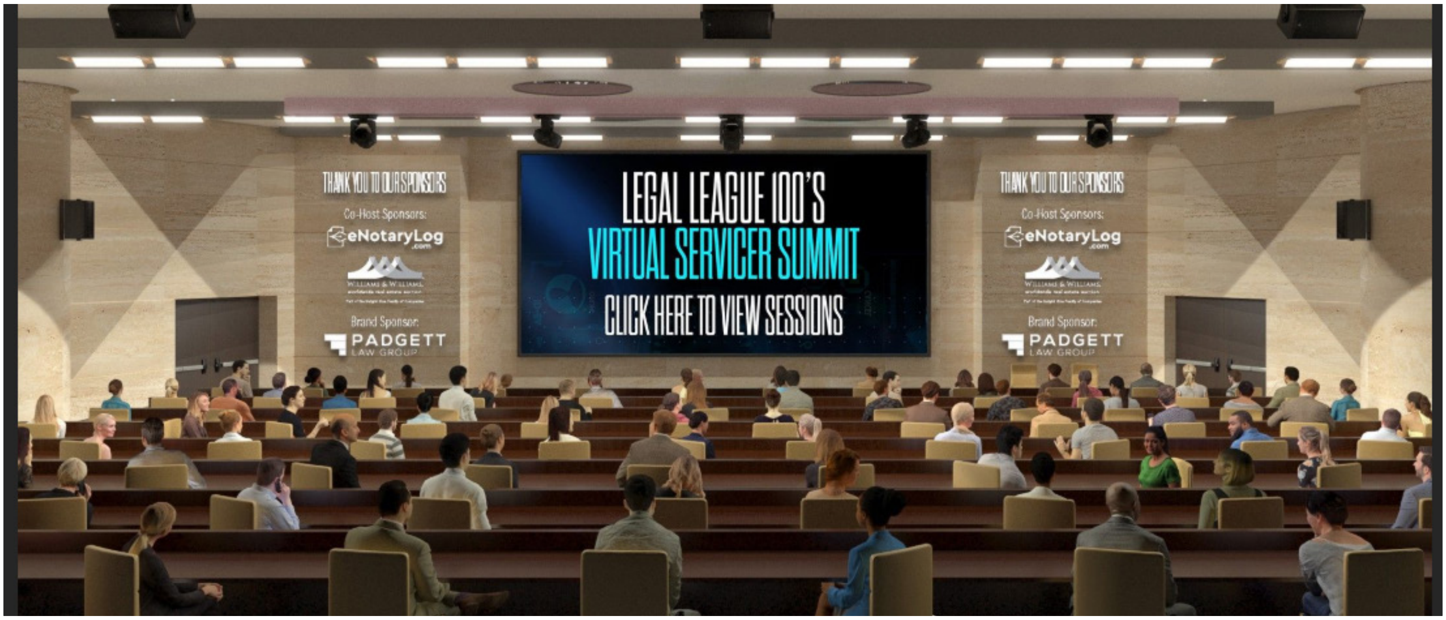
However, before foreclosing lenders overly rejoice and begin ordering copies of filed Chapter 7 petitions ad nauseam, there is a caveat. The court appeared to wish to limit this holding by emphasizing that the case had "unique circumstances" because the "defendants filed for bankruptcy, having apparently already physically abandoned the property …" and that "they declared an intent to surrender the property" and "did in fact surrender the property without reaffirming or redeeming it." Id. at ¶24. Oddly then, the court seemed to separate the "intent to surrender" from a "surrender," which may call into question whether surrendering in a bankruptcy petition, absent physical property abandonment, is enough to preclude a debtor from seeking foreclosure relief—despite the court's apparent approval of case law from other jurisdictions not requiring physical vacatur.

Also, the court went on to note that, "defendants did not take any other action, in the foreclosure case or otherwise, until six years had passed and two subsequent purchases of the property were completed," without explaining how this passage of time affected their analysis, or if it even did. Id.

Therefore, at least in Illinois, although the bankruptcy and foreclosure arenas are now more closely aligned, questions certainly remain as to whether a debtor's word alone truly is their bond.

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

Legal League 100 Virtual Servicer Summit



Legal League 100 members and servicer leaders converged digitally to unpack the latest critical regulatory changes, COVID-19 updates, and proactive strategies at the 2020 Spring Legal League 100 Virtual Summit.

"The Legal League team has done a tremendous job putting this Summit together," said Roy Diaz, Managing Shareholder, Diaz Anselmo Lindberg, P.A. in his opening remarks. "This has been a tremendous challenge, as you can imagine, and they've done an excellent job bringing everybody together and I'm really excited about the prospect of doing our summit on time and virtually."

Participating panelists included Christopher L. Carman, Litigation and Compliance Counsel, BSI Financial Services; Candace Russell, VP Post-Sale, Carrington Mortgage; Ryan Bourgeois, General Counsel—Partner, BDF Law Group; and John A. Dunnery, VP, Government Loan Servicing, Bayview Loan Servicing, LLC and more.

In a Q&A with Stephen Hladik, Partner, Hladik, Onorato & Federman, LLP; and Gagan Sharma, President and CEO, BSI Financial Services, Inc discussed forbearance issues and how servicers can prepare.

"As we think about what the post-forbearance scenario looks like, ramping up and preparing for that becomes important," said Sharma. "We know that there are going to be a significant number of borrowers who are going to need that help and assistance. Trying to do as much as we can ahead of time is going to be important"

Also, William R. Emmons, Lead Economist, Federal Reserve Bank of St. Louis, provided the afternoon keynote, discussing the state of the economy and what it will take to end the COVID-19 crisis.

"Very few of the economic sectors will be spared in this recession," Emmons notes. "In fact, some, I think, will be devastated."

Emmons notes that the U.S. is still "miles away" from herd immunity, meaning the economy may be closed again. Despite the Fed's best efforts, he notes, real estate markets are still being hit.