LEGAL LEAGUE 100
QUARTERLY
FALL 2020 COMMITTED TO THE INDUSTRY, INTEGRITY, AND BEST PRACTICES

National

Process Serving in a Socially Distant World

By: Keith J. McMaster

Due process dates back to the year 1215 and the Magna Carta, which represented the "Great Charter of Freedoms." One freedom implemented in 1354 by King Edward III was the "due process of law," which is also contained in the Fifth and Fourteenth Amendment of the U.S. Constitution. It guarantees that no U.S. citizen shall "be deprived of life, liberty, or property, without due process of law."

Since then, a majority of this is achieved through in-person service of process. This has proven to be the most effective and commonly used method when establishing jurisdiction over a defendant. But how does service happen under the many health protections and social distancing guidelines issued by the Centers for Disease Control (CDC)?

The COVID Effect

Companies and workers that serve civil process were predominantly classified as essential services, which allowed them to continue functioning when the pandemic first hit. Professional servers nationwide tuned into many state and federal press conferences daily to keep up to date with the latest health and safety recommendations. Members of the industry gathered to discuss best practices through webinars, Zoom conferences, and social media groups. Unfortunately, in the states and counties where serving was not categorized as an essential service, some firms closed permanently.

Attorneys, law firms, and their clients can be assured that the civil process industry is working

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National

Constitutional Challenges Affecting Loan Servicers and Note Holders

By: Stephen Vargas

In the wake of the economic crisis arising from the COVID-19 pandemic, approximately 4.2 million residential mortgages were in payment forbearance and 40 million people were receiving unemployment insurance. To provide a respite to consumers who experienced hardship, state governors and legislators took action to protect consumers from foreclosure by requiring servicers to offer forbearance on the ground of financial or health hardship, and imposed foreclosure moratoriums.

First, more than 30 governors used their disaster emergency executive powers to suspend judicial and non-judicial foreclosures to ensure homeowners would not lose their homes during the pandemic. Next, legislators crafted bills to forestall foreclosure by extending moratoriums on the commencement and continuation of foreclosure proceedings, requiring loan servicers to offer homeowners lengthy forbearance, deferring arrears to the end of the loan term, and prohibiting servicers from negative credit reporting.

These efforts will relieve a financial burden on millions of homeowners but create liquidity concerns for servicers that must continue principal and interest advances to investors and

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National

Virtual Hearings—The New Normal

By: Danielle Spradley

As the country and world try to figure out how to navigate and continue forward in the mist of the COVID-19 health pandemic, most jurisdictions have resorted to transitioning courtroom appearances to be conducted virtually through via Zoom. Attendance at hearings via Zoom has become the new normal, with no certain date in sight as to when judges will resume in-person court appearances. As we continue down this new path, we need to be professional, prepared and patient.

Professionalism

Attendance at a Zoom hearing should be approached and conducted in the same manner as if preparing for a hearing in the physical presence of a judge. While Zoom allows you to appear without video, many judges want to see who is appearing before them requiring video appearances, therefore, your physical appearance matters. Everyone appearing for a Zoom hearing should dress the part. Put on court proper clothing, a dress shirt, tie, blazer; whatever you would have worn to court six months ago.

Your background needs to be businesslike and presentable. Whether working from your office or remotely from your home, be mindful of what others can see behind you. Make sure your background does not become a distraction. If you are forced to conduct hearings in your bedroom, get out of the bed, put on clothes, and make sure the area behind you is clean. Be cognizant of the lighting so the judge and others can see the attorney or witness appearing. Also, virtual backgrounds are a good alternative, but make sure they are appropriate. Do not select a background orbiting the earth, in a jungle, or on

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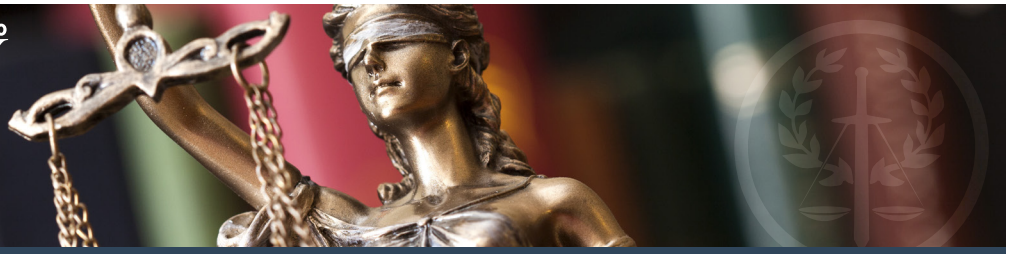

FALL 2020

FROM THE CHAIR

As I sat down to prepare this letter, I was struck by how different our world is right now. Tasks that were once routine are now filled with apprehension and careful calculation as we need to make countless adjustments to our lives and businesses.

While COVID-19 has thrust many challenges upon us, it has also tested our resolve. We continue to adjust to the "new normal", while "normal" continues to stay one step ahead. We are becoming accustomed to things like remote staffing, Microsoft Teams and Zoom meetings, e-notarization, and remote court proceedings. We adjust to the possibility that remote judicial proceedings will become a permanent part of our practice post COVID-19. Flexibility is key as we adjust to business planning on weekly intervals, as opposed to quarterly or annually.

The Legal League 100 has been equally fluid. This year the Five Star Conference, which encompasses the Legal League 100 Fall Servicer Summit, went virtual. I enjoyed networking with you virtually as well as watching sessions like, "The Servicer Perspective" with PennyMac's Jennifer Gordan and PHH's Patrick Cox.

In the "Coming Together to Better the Industry" session I sat down with Legal League's Vice Chair Stephen Hladik of Hladik Onorato and Federman. We discussed the initiatives that Legal League put in place this year, as well as how foreclosure moratoriums are affecting our industry.

The two-day virtual conference was well attended and proved to be a true "five star" experience. That said, I look forward to seeing you all in person in 2021. As we continue to find our way through these challenging times, the Legal League 100 will continue to drive advocacy for our industry and firms.

Sincerely,

Roy Diaz
Diaz Anselmo Lindberg, P.A.
Chairman, Legal League 100 Advisory Council

ROY DIAZ, DIAZ ANSELMO LINDBERG, P.A.

Roy Diaz is the shareholder of Diaz, Anselmo Lindberg, P.A. in Fort Lauderdale, Florida. Diaz has been a member of the Florida Bar since 1988, concentrating his practice in the areas of real estate, litigation, and bankruptcy. For over 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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hard to follow CDC guidelines. Companies and individuals vigorously clean and disinfect their work surfaces. Larger companies transitioned to working remotely when possible. Most importantly, if a server has any of the symptoms of COVID-19, they stayed home. In many regions of the country, cloth face masks are a daily part of public life and are worn while serving. Process servers use gloves and hand sanitizer and practice sanitation between stops.

Regions vary and so does contact with other individuals. Using a face mask and gloves with sanitation procedures is enough in some jurisdictions. However, in others social distancing may be required. There are slight differences in methods of social distancing when handing a person their legal papers. The United States Postal Service created coronavirus recommendations for certified mail and mail requiring signatures.

The process serving industry has adopted many of these standards with slight adjustments. These include avoiding doorbells, knocking on untouched areas of the door, and maintaining social distancing while requesting a litigant and explaining the documents. Another way is the server asks the notified person to back away from the doorway. After the explanation, he or she then places the court documents by the entrance before backing away and watching the notified party retrieve them. This ensures visual evidence of the documents' acceptance, which could be noted in the affidavit or proof of service.

The Tech Component

The more advanced firms enacted further assurances that the serve was completed. GPS and photo-taking affirm the server was at the correct address at the specified date and time. Where state regulations allowed, some companies even film each individual serve for added confirmation. The signed affidavit or proof of service along with these supplementary measures can promise that a defendant was informed properly.

Exceptional times call for exceptional measures, but that does not detract from an individual's guaranteed rights. The professional industry of process servers is doing its best to make sure Constitutional rights are upheld to the highest standards. As the courts reopen, talk to your vendors. Although each may use different techniques, defendants' rights are not being infringed. Most businesses implemented COVID-19 procedures and they should openly discuss them.

Verify they are upholding the CDC's guidelines and the USPS's modified guidelines and ask what other supplemental evidence their company is using. It is imperative, even in a socially distant world, that the Constitution prevails.

Keith McMaster *is the energetic, fearless leader and founder of Firefly Legal. As a successful and recognized national player in the civil process industry, Firefly celebrates its 25th anniversary in 2021. McMaster has achieved various accomplishments such as the USFN Associate Member of the Year and ALFN Junior Professionals Executive Group. In his spare time, he enjoys being a father, coaching high school football, and helping with major events for the National Football League and USA Football.*

"Challenges" continued from Page 1

advance real estate taxes and hazard insurance to protect the security interest in the property. The aggressive consumer protections run counter to the payment provisions in the note and mortgage. The interference with the terms of the loan agreement creates a question whether such orders and laws violate Article I, Section 10 of the United States Constitution, which provides no State shall enter into any Law impairing the Obligation of Contracts (the "Contract Clause").

As a general matter, the Constitution does not permit upsetting settled expectations in contractual obligations[1]. The threshold inquiry is whether the state law operated as a substantial impairment of the contractual relationship[2]. If such impairment is found, the State must have a significant and legitimate public purpose behind the regulation. If such purpose is identified, the adjustment of the contracting parties' rights must be based upon reasonable conditions and of a character appropriate to the purpose justifying the legislation's adoption.[3]

In Home Building & Loan Association v. Blaisdell[4], the Supreme Court upheld a state foreclosure moratorium passed during an emergency that extended the redemption period and barred a deficiency judgment action until the redemption period elapsed because the state retained authority to enact laws to safeguard the vital interests of its people. The Blaisdell Court found five factors significant in determining whether the law violated the Contract Clause: (1) the state legislature had declared in the Act itself that an emergency need for the protection of homeowners existed; (2) the state law was enacted to protect a basic societal interest, not a favored group; (3) the relief was appropriately tailored to the emergency it was designed to meet; (4) the imposed conditions were reasonable; (5) the legislation was limited to the duration of the emergency.

In COVID-19-related executive and legislative action, protecting homeowners from foreclosure and eviction during the worst national health emergency in 100 years[5] warranted government intervention during the emergency because the virus transmitted at a rapid rate. However, impairment of the terms of the mortgage contract could be susceptible to Constitutional challenge if the interference exceeded the duration of the emergency, or if the relief was overly broad or imposed an unreasonable financial burden on mortgagees. For example, the New York law that requires servicers to grant mortgagors experiencing financial hardship up to a 360-day payment forbearance and defer amounts that accrued during the forbearance period[6] appears unauthorized because the period will far exceed the duration of the emergency and the mortgagor is granted a unilateral right to extend the loan term or create a balloon payment. By contrast, California's proposed fifteen-day foreclosure moratorium that begins when the COVID-19 emergency period expired[7] would withstand any challenge due to its duration.

Creditors have begun challenging the constitutionality of executive and legislative actions that shield consumers from lawsuits and liability. As the COVID-19 pandemic subsides and legislatures pass further consumer protection legislation, Constitutional challenges will become more common. Servicers and note holders will face historic delinquency rates, deteriorating loan portfolio performance, and increasing and potentially unsustainable escrow disbursements and should scrutinize legislation that adversely impacts the ability to commence and complete foreclosure and eviction proceedings to determine whether a constitutional challenge is warranted in an effort to avoid timeline delays and financial injury.

Stephen J. Vargas, Esq. *is a supervising attorney at Gross Polowy, LLC, a New York law firm that specializes in consumer finance litigation on behalf of mortgage lenders and servicers. During his Gross Polowy career, Vargas briefed more than 120 New York State and 2nd Circuit appeals and litigated several hundred mortgage foreclosures in the United States District Courts of New York. Vargas graduated from Columbia University in 2005 and Brooklyn Law School in 2008.*

1 Sveen v. Melin, 138 S. Ct. 1815 (2018); Fletcher v. Peck, 10 U.S. 87 (1810); Bronson v. Kinzie, 42 U.S. 311 (1843)

2 Allied Structural Steel Co. v. Spannaus, 438 U. S. 234, 244 (1978)

3 Energy Reserves Group v. Kansas P. & L. Co., 459 U.S. 400 (1983)

4 Home Building & Loan Association v. Blaisdell, 290 U.S. 398 (1934)

5 https://www.cdc.gov/coronavirus/2019-ncov/index.html

6 https://www.nysenate.gov/legislation/laws/BNK/9-X; Wells Fargo Bank, N.A. v. Meyers, 108 A.D. 3d 9, 22 (N.Y. App. Div. 2d Dept. 2013)

7 https://legiscan.com/CA/bill/AB828/2019

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Op-Ed

Forged Through Fire

By: Jaime Kosofsky

At the start of 2019, I looked at my wife and kids and said good riddance to the year. The previous six months had been challenging for my firm as we embarked on an overhaul that we hoped would make us stronger.

What we didn't understand then—nor did most of the nation—was that the road ahead would have unprecedented speedbumps, and the systems we put in place would soon be put to the ultimate test.

A Four-Point Plan

When we looked to the future of the firm, we identified these steps as key to the overhaul of our people, processes, and technology.

Step 1: Changing IT Infrastructure In 2018 we made the decision to sell our interest in the IT hosting company that provided the firm with IT support for the previous 10 years. That meant switching from on premises hosting of the firm's system to cloud hosing.

Step 2: Changing Firm Structure This required that we bring in professionals from outside of the firm to transform the company into an entity which may be easier to grow, sell, or merge.

Step 3: Adjusting Firm Culture We hired a consultant who assisted us in resetting our mission, vision, and core values.

Step 4: Making a Company-wide Shift We met with the entirety of the staff to introduce the above changes. We started walking the walk and talking the talk, and by April of 2019, we started gaining traction. The culture was improving, we had identified some of our weak links, and began making some very scary decisions including letting go of some team members who were neither "on the right bus" or in the "right seats."

Perhaps the most important constant throughout this process was our unrelenting conviction to our compliance system and adherence to our policies and procedures. We adopted the ALTA (American Land and Title Association) Best Practices in 2013 and maintained our SOC2 Type 2 ratings for the same period.

By the summer, interest rates were dropping, relationships developed during the start of the conference season were coming to fruition, our new hosted IT environment was humming along nicely, and we started seeing an improvement in morale and in the culture of the firm. Life was about to get much easier.

Or so we thought.

Unexpected Turns

On midnight of July 5, 2019, my cell phone rang, and it was my partner, Kelly Brady. In her typical calm tone, she let me know that our building was on fire and I had to get there as soon as possible. Thus, began the 12 longest months in my career, and the history of our company.

As I drove to the office at break-neck speeds, I was thinking about bankruptcy, managing data breaches, and how we were going to open for business the next morning.

As I pulled up to the office, I was met by police who wouldn't let me get any closer to the building. Then, the important calls began—to our CFO, insurance company, and new IT provider who assured us that our data was intact.

As the myself and other members of the firm's executive team stood on the curb and watched the blaze, we pulled out our business continuity and disaster recovery plans to start formulating our next moves.

In the wee hours of the morning, when the fire was finally out, the arson investigation began. We got bombarded with questions probing into recent terminations, upset clients, and the health of the firm's finances.

When we got into the building our work area was filled with soot, fumes, and water. As we entered the server room, everything was gone. Hardware was melted, cables were destroyed—the serve was in shambles.

Although we were in the process of transferring to a cloud structure—this move wasn't complete and our email system, original data, and telephone system was still housed on the premises.

Despite it all, we were able to execute our continuity and disaster recovery plans and throughout the early hours we got on the phone to our COO, staff, and clients. Despite all odds, by 9:00 a.m. we were partially up and able to start conducting business.

It's Not Over Yet

While this story is deeply personal, the lessons it imparts are universal. Our firm's business continuity plan, disaster plan, and collective experience allowed us to recover 100% of all documents, data, and checks. Within 24 hours of the fire the firm secured an alternative site in our business park. Within 72 hours we had performed our first closing in that space.

After an extremely busy summer we were able to move into our shiny new office in the Ballantyne Area of Charlotte. It was an exciting time and to commemorate it we planned a grand opening in February 2020. Day of a storm moved through, spawning several tornadoes, closing the city, and all but killing our celebration. We chalked it up to dumb luck and moved on.

But "luck" wasn't through yet. Almost four weeks later to the day, Gov. Roy Cooper issued a stay a home order due to COVID-19, I can remember watching the news conference, shaking my head, and simply saying, "Really?" We immediately contacted our partners and clients and started to disburse our team to their home offices.

For the first time I was thankful for the fire. We had new laptops, our system was fully functional on the cloud, and it was matter of just sending staff home with docking stations and monitors. By this time, we had plenty of practice of working remote, which most of our staff is still doing.

It has been over a year since the day of the fire, or as I call it, the day that showed me what our team was made of. The takeaway for other firms is not to wait until disaster strikes, but to lay the foundation now that will allow you to weather any storm.

Jaime Kosofsky *is a founding partner of Brady & Kosofsky, PA, a Law Firm that focuses on real estate transactions in North Carolina and South Carolina. Kosofsky focuses on the laws and regulations in the title and settlement industry and how to create efficient, compliant workflows to effectuate them. Kosofsky holds a BS in History and a BS in Political Science from Indiana University in Bloomington Indiana; and a Law Degree from Western Michigan Thomas Cooley School of Law, in Lansing Michigan.*

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"Virtual Hearings" continued from Page 1

a beach. Many appropriate virtual backgrounds are available online, such as courtrooms or bookcases. These comments may sound elementary, but judges are reporting these concerns. "It is remarkable how many attorneys appear inappropriately on camera," said Judge Dennis Bailey of Broward County, Florida in a letter posted to the Weston Bar Association website. "We've seen many lawyers in casual shirts and blouses, with no concern for ill-grooming, in bedrooms with the master bed in the background, etc. One male lawyer appeared shirtless and one female attorney appeared still in bed, still under the covers. And putting on a beach cover-up will not cover up you're poolside in a bathing suit. So, please, if you don't mind, let's treat court hearings as court hearings, whether Zooming or not."

The noise in the background also matters, make sure outside noise is limited. Remember to remain on mute until the hearing begins, as noise from the outside should not become a distraction while the hearing or trial is taking place. Give others near your remote office space notice when a virtual court appearance is scheduled so they will limit their noise and activity.

There are virtual hearings with testimony on YouTube, review these before a virtual appearance. The insight gained by watching someone else will help immensely in understanding the process and procedure.

Preparation

As evidentiary hearings including trials are being conducted via Zoom, it can create somewhat of a challenge as to how we prepare and present evidence during a hearing. Many courts are requiring the parties mail in all documents to be relied upon at the hearing at least a week prior to the hearing.

Review the pleadings and determine what evidence will be needed to present your case. Also, determine the order in which the evidence needs to be presented. Create a roadmap or table of content to ensure everything needed for your hearing is provided to the judge, opposing counsel and any witnesses timely. Prepare your case well in advance of the hearing since there is no walking into court with evidence for the judge to review. Failure to prepare may result in the hearing being reset, or the case being dismissed.

Prepare your witness for the hearing. The witness should be provided with all evidence which will be presented to the judge. This will allow the witness to review the evidence and be prepared to testify prior to the virtual hearing. A preparation call or even a practice Zoom session can be done to go over the evidence and to practice screen sharing, which will be needed for testimony. Run through the presentation of evidence and practice sharing the screen to make sure any technical issues are resolved ahead of time. Presenting evidence via Zoom is new to most of us, and "new" can be stressful, so get comfortable with the process ahead of time. If more than one monitor is available, use one screen to display anything to be shared, and the other screen to see the parties in the courtroom. Preparation for a Zoom hearing should entail the same preparation taken for an in-person appearance before a Judge.

Patience

Lastly, remember, technology is not perfect. There may be issues with your equipment or the equipment of others, so be patient.

While we try to get our arms around our new courtrooms, always conduct yourself with professionalism, invest time in your preparation to perform with the same level of advocacy as in-person appearances before the court, and be patient with the process and others. Zoom hearings may be here to stay, so all of us need to get comfortable.

Danielle Spradley *is a Managing Attorney in the Fort Lauderdale office for McCalla Raymer Leibert Pierce. For the last 13 years, she has practiced as a civil litigation attorney handling disputed residential and commercial foreclosure actions along with the related issues.*

States: Florida

COVID-19 and Florida Courts: Charting a New Path Forward

By: Allison Morat and Teris McGovern

Unprecedented. It is a word heard all too frequently lately. Yet, there is no better word to describe COVID-19. Like the rest of the world, the financial services industry and the courts are looking for a new path forward. But what is the best plan when the waters are uncharted? Should directives come from the government and court system? Or should individuals and businesses set their own guidelines depending on the circumstances? The opinions are far ranging.

At the state level, the Florida governor has taken a more tailored and measured approach. After all, Florida is a large and diverse state, from less populous areas like Franklin County to the crowded shores of Miami Beach. However—while the governor has not mandated lockdown measures for the entire state, he issued a statewide executive order in April that suspended and tolled any statute providing for a mortgage foreclosure cause of action, as well as any statute providing for an eviction cause of action under Florida law solely as it relates to non-payment of rent by residential tenants due to the COVID-19 emergency (EO 20-94). The moratorium was originally set to last 45 days but was extended several times through subsequent orders.

The governor's original executive foreclosure order presented a conundrum for the courts. The directive of the order was arguably vague. What does it mean to suspend any statute providing for a mortgage foreclosure cause of action? Did the governor intend to suspend foreclosures and sales on private loans that have been in default and foreclosure for years (in some cases, a decade)? Local courts interpreted the language differently. The solution for several circuits came in the form of more specific administrative orders. In the Ninth Judicial Circuit (Orange and Osceola Counties), for example, the Chief Judge directed the clerks of court to suspend all actions related to mortgage foreclosure causes of action and cancel all pending mortgage foreclosure sales. (AO No. 2020-11-04). Likewise, in the Twelfth Judicial Circuit (Desoto, Manatee, and Sarasota Counties), the Chief Judge issued an order that allowed the filing of new cases but prohibited the issuance of summons and notices of action; prevented the execution of default judgments and writs of possession; and, suspended foreclosure sales and the issuance of certificates of title. (AO No. 2020-11.1).

However, with the rest of the state re-opening, and the real estate market open for business, foreclosure and eviction moratoriums cannot and should not last forever. In late July 2020, the waters began to subside a bit. On July 29th, the Florida governor issued a new executive order that provides limited relief to single-family mortgagors and residential tenants on a case-by-case basis. (EO 20-180). More specifically, the governor suspended and tolled any statute providing for final action at the conclusion of a mortgage foreclosure proceeding under Florida law solely when the proceeding arises from non-payment of mortgage by a single-family mortgagor adversely affected by the COVID-19 emergency. Further, the order defines what it means to be adversely affected by the COVID-19 emergency.

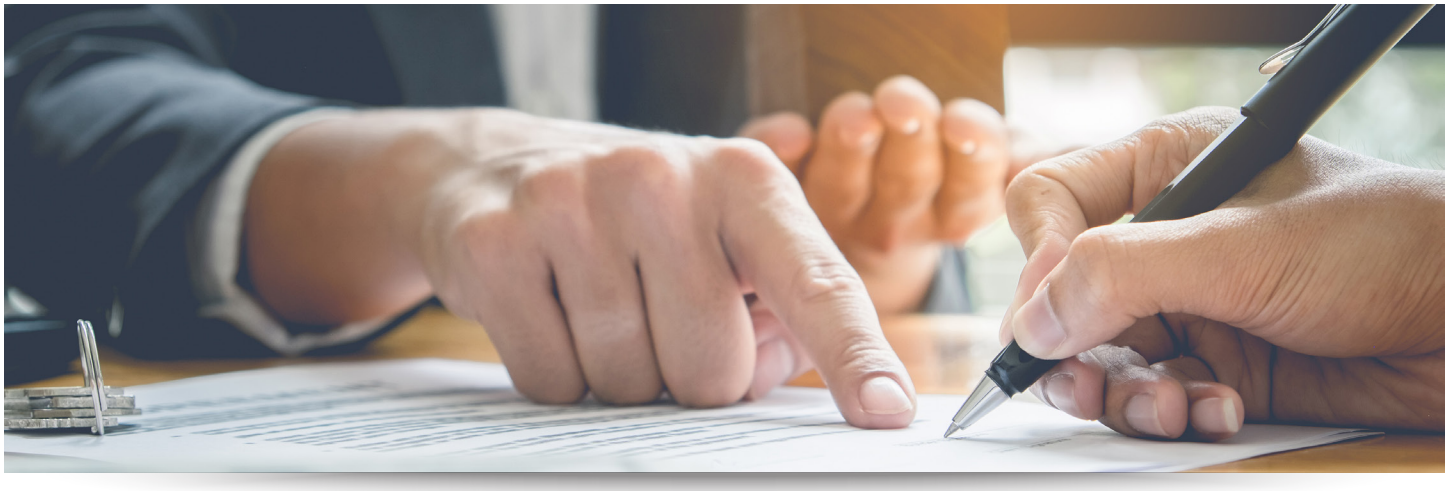
In response to the new executive order, the Florida courts are again beginning to implement administrative orders at the local level. For example, on August 3rd, the Chief Judge for the Eighth Judicial Circuit issued an administrative order that orders the presiding judge to determine the applicability of the Florida governor's new executive order on a case-by-case basis. (AO 11.36).

Florida's new case-by-case approach is a pragmatic alternative to sweeping moratoriums. Another possible alternative to broad moratoriums may come in the form of government aid. In Florida, the governor allocated $120 million for disbursement to local governments to aid qualifying homeowners and tenants with their rent or mortgage payments, or emergency repairs. And, back on March 27th President Donald J. Trump signed the CARES Act into law, which provided, in part, federal aid of $600 per week to individuals impacted in various ways by the Coronavirus, and expanded unemployment benefits to individuals not previously included. In addition, the Federal Government authorized a stimulus payment to qualifying Americans to provide alternative financial assistance.

Whatever the solution, recovery could be a long road. But, like most dark clouds, there are silver linings. Mortgage interest rates are low. Florida's housing market is still bustling. And, with Florida's new law allowing notaries to perform online notarizations, real estate deals may close efficiently and in a safe environment. It appears, then, that all is not lost. The waters are no longer completely uncharted. Like the courts, the financial services industry can—and will—successfully navigate these unprecedented times through strong leadership, innovation, and pragmatism.

Allison Morat *is a partner at Bitman O'Brien & Morat, PLLC. Her practices areas include consumer finance litigation, commercial litigation, and appellate law. She is experienced in representing financial institutions in residential mortgage foreclosures from inception through appeal. Morat has handled over 100 appeals spanning all five Florida District Courts of Appeal, as well as the Florida Supreme Court, and presented oral argument before the Second, Third, and Fifth Districts.*

Teris McGovern *is an associate at Bitman O'Brien & Morat, PLLC. She handles various matters, including complex commercial litigation, consumer finance litigation, deceptive and unfair trade practice claims, landlord-tenant, and eviction matters, as well as appeals. Prior to becoming a lawyer, McGovern worked in the legal department of a local bank where she was heavily involved in the foreclosure of residential mortgages.*



States: Florida

Examining the Impact of *Mace v. M&T Bank*

By: Roy Diaz

In March of this year, the Florida Second DCA issued a detailed 20-page opinion on what seemed to be a very simple foreclosure case dealing with the issue of conditions precedent. *Mace v. M&T Bank*, No. 2D16-3381, 2020 WL 1444996 (Fla. 2d DCA Mar. 25, 2020). In *Mace*, Kenneth and Janice Mace ("the Borrowers") failed to pay their mortgage so M&T Bank ("the Bank") initiated foreclosure proceedings against them. The matter proceeded to a non-jury trial where the Bank presented documentary evidence and testimony from its assistant vice present and operations manager. The dispositive issue in the case and the sole issue addressed by the Second DCA in its written opinion pertained to ***the sufficiency of the Bank's evidence that it satisfied conditions precedent and whether a case should be remanded for new trial or for dismissal.***

At trial, in support of its complaint allegation that it satisfied conditions precedent, the Bank presented the default letter and the certified mail card, both of which were addressed to the Maces. However, the mail card was not dated or signed, and the return address on the card was for a third-party default firm. The Court noted: "There were no markings or other indications on the document suggesting that it was filled out for purposes of mailing the default letters … or that it had in fact been mailed to the Maces." The Bank's witness, Shelly Andreas, testified that she was "personally involved" in sending the letter; however, the Court noted her personal involvement "consisted of (1) conversations with default firm about the default letter and (2) records she had reviewed that … reflected that the letter had been sent…" The Bank did not introduce the referenced records into evidence nor did it present evidence that it followed a "routine or ordinary practice" in sending out the default letter in the Maces case. The Maces raised hearsay objections to Andreas' testimony, but the lower court overruled them allowing Andreas to testify that the default notice was sent to the Maces.

At the end of trial, the lower court entered judgment for the Bank. The Maces appealed arguing the Bank's evidence that it satisfied conditions precedent was legally insufficient because "it came from a witness without personal knowledge and was inadmissible hearsay."

The Second DCA agreed with the Maces on that point and reversed the judgment noting the existence of the default notice standing alone was insufficient to demonstrate the letter was actually mailed and Andreas' testimony regarding mailing was inadmissible hearsay because it was not based on personal knowledge or a routine procedure that Andreas personally knew was followed. Simple enough; however, the complexities of this case begin at the end when the DCA *remanded the matter for dismissal* as opposed to new trial. Sixteen pages of the 20-page opinion pertained to the DCA's decision to dismiss the matter rather than remand for a new trial and more than half of that was Judge Black's well-reasoned dissent.

The majority explained its decision to dismiss M&T's foreclosure was founded on the "interest of finality and fairness" and the Courts "…'longstanding aversion to remanding' a case for retrial when a party fails to prove its case in the first trial …" The Court noted the "default assumption against a retrial applied" because there were "no exceptional circumstances" which warranted giving M&T a "second bite at the apple." The Court noted Andreas clearly lacked personal knowledge regarding the mailing of the default notice and there was no evidence that a routine practice for mailing the letters existed and was followed. Lastly, the Court concluded "we see nothing in our record to suggest that had the trial court [properly] excluded…[Ms. Andreas' testimony regarding mailing of the default notice] … the Bank would have been prepared to present other admissible evidence of mailing …"

Although Judge Black agreed with the majority's conclusion that Andreas' testimony constituted inadmissible hearsay, he concluded that the Maces failed to present that specific evidentiary issue on appeal. Instead, the Maces argued their motion for involuntary dismissal should have been granted because the sufficiency of the evidence "was predicated upon inadmissible evidence." Judge Black elaborated that the Maces did "not seek reversal premised on the trial court's rulings as to the admissibility of Andreas's testimony, the paragraph 22 notice, or the return receipt. As such, the Maces have waived an argument based on the validity of the trial court's ruling on the admission of evidence."

Based on this finding, Judge Black surmised that the majority failed to conduct the correct analysis on appeal and the case should have been remanded for a new trial. Notably, Judge Black did identify an "inter- and intra-district conflict" regarding the issue and requested that the following question be certified to the Florida Supreme Court: "Can the reviewing court disregard erroneously admitted evidence in reviewing the argument that insufficient evidence supporting a claim was presented below?"

Roy Diaz *is the shareholder of Diaz, Anselmo Lindberg, P.A. in Fort Lauderdale, Florida. Diaz has been a member of the Florida Bar since 1988, concentrating his practice in the areas of real estate, litigation, and bankruptcy. For over 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.*

LEGAL LEAGUE 100 FALL VIRTUAL SUMMIT

Compliance, defaults, and the government and service sector perspectives were the topics of discussion at the Five Star Legal League 100 Fall Summit.

The Summit kicked off with representatives from the Legal League 100's Advisory Council discussing how it advocates for the membership in its discussions, priorities and actions. Roy Diaz, Managing Shareholder, Diaz Anselmo Lindberg, P.A. & Chairperson, LL100; and Stephen Hladik, Partner, Hladik, Onorato & Federman, LLP discussed these items, as well as the impact foreclosure moratoriums have had on law firms. They also talked about fee parity within the industry.

Following the Advisory Council's discussion, industry economic experts provided insights on how unemployment is expected to impact foreclosure levels and how forbearance rates is expected impact bankruptcy filings, as well as other factors affecting the default market.

"The economy is in a pretty bad place," said Tendayi Kapfidze, Chief Economist, LendingTree. "During the financial crisis, the economy shrunk 4.8%. We had a decline in the second quarter [of 2020] of up to 30%. That is not going to persist, but even if we get all but 9% of that back, that is going to be an economy that's about 10% smaller than it was at the beginning of the year. The question is how long will it last, and what changes are going to occur in the economy as a result of it."

"We are in a once-in-a-lifetime event," said Lawrence Yun, Chief Economist and SVP of Research, NAR (National Association of Realtors). "We may actually be in a new economy, with a large percentage of people able to work from home in the future years. Without a doubt, we plunged into a recession, with more than 50 million people applying for unemployment insurance at some point. That's more than one third of the labor force."

But there is job creation occurring in some sectors, while there are job losses in others, Yun added. And the housing sector is enjoying a bounce, even as unemployment remains high.

"We expect very strong activity in autumn and winter of this year," Yun said.

A session on compliance and government outlook examined how the government is handling moratoriums, timelines, and updates to compliance rules, as well as what the future will look like once moratoriums expire.

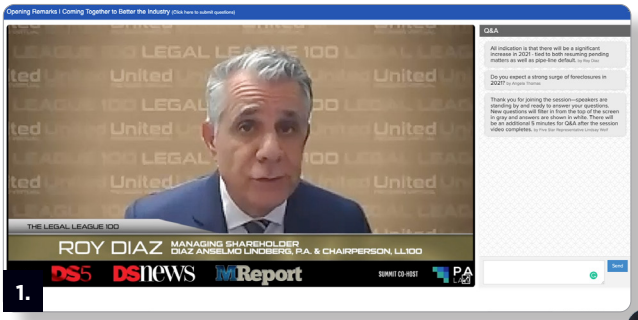
The government decisions on moratoriums, foreclosures and forbearances will sharply impact servicers' businesses, as the last panel of the day discussed.

"We are seeing a lot of activity from our borrowers," said Patrick Cox, SVP Operations, PHH Mortgage Corporation. "While we had a tremendous increase in the requests for forbearance in March and April, but we have since seen a decrease in activity in new borrowers reaching out to us. We do anticipate a lot of those borrowers who are currently on forbearance extending.

"One surprising thing we found is that a lot of the borrowers who asked for forbearance in the March/April time frame actually continued to pay. We expect that behavior to continue."

Bankruptcies have fallen to half of what they were in March, Cox added.

With the changes in borrower's finances, and the foreclosure/forbearance/moratorium rules, PennyMac Loan Services is re-evaluating its financial review methodology, said Jennifer Gordon, VP Vendor Management. "We're also taking a look at our attorney network, which I think is a very solid network. We're taking a look to make sure we have appropriate backups in place in every space."



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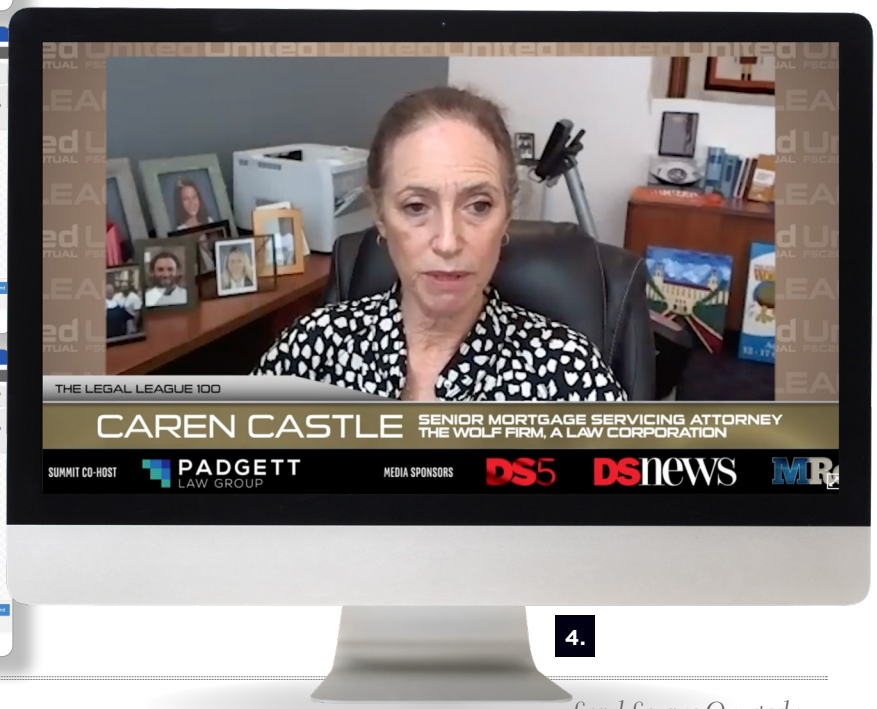

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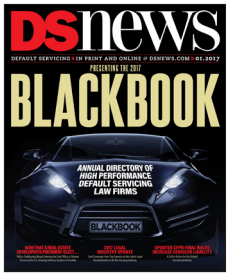
1. Roy Diaz, Managing Shareholder, Diaz Anselmo Lindberg, P.A. and Legal League 100 Chair **2.** Stephen M. Hladik, Partner, Hladik, Onorato & Federman, LLP and Legal League 100 Vice Chair **3.** Patrick Cox, SVP Operations, PHH Mortgage **4.** Caren Castle, Senior Mortgage Servicing Attorney, The Wolf Firm, A Law Corporation

DSnews | THE LEADING FIRMS. THE ULTIMATE RESOURCE. THE 2021 BLACK BOOK.

BLACKBOOK2021

Showcasing the financial servicing sector's most-watched law firms from across the country, the *DS News* Black Book is the lending and servicing executive's go-to resource for all their legal-searching needs, replete with detailed photo profiles and user-friendly text listings organized by state.



THE LEADING FIRMS | THE ULTIMATE RESOURCE | THE 2021 BLACK BOOK

EXPOSURE

- Mailed to thousands of lenders, servicers, GSEs, and vendor managers
- Featured at the Spring 2021 Legal League 100 Servicer Summit
- Featured at the 2021 Five Star Conference and Expo
- Year-long shelf life
- Distributed at the National Mortgage Servicing Conference & Expo
- Distributed at the 2021 Five Star Government Forum
- Provided to National Mortgage Servicing Association members at their annual meeting

PHOTO PROFILE SPECIFICATIONS

Please contact your *DS News* representative with your availability for a one-hour photo shoot by **November 13.** Photos come courtesy of *DS News*. Materials deadline: **November 23**.

RATES

Text listing–$350

Includes contact information and lists your services in the directory section of the 2021 *DS News* Black Book edition and on DSNewsBlackBook.com.

One-Page Photo Profile–$3,240

(Maximum six individuals)

- One-page photo profile in the Black Book
- One-page photo profile on DSNewsBlackBook.com
- Text listing in directory section of the Black Book
- Text listing on DSNewsBlackBook.com

TWO-PAGE PHOTO PROFILE–$5,640

(Maximum 12 individuals)

- Two-page photo spread in the 2021 *DS News* Black Book edition
- Two-page photo spread on DSNewsBlackBook.com
- Text listing in directory section of the Black Book
- Text listing on DSNewsBlackBook.com

DS News' Top 25 Women of Law

Black Book is proud to present the third annual Top 25 Women of Law. An exclusive guide-within-a-guide, this first-of-its-kind section will feature a select group of women attorneys who epitomize excellence in the mortgage legal services space. Have a woman in your firm who fits perfectly? Contact us right away to ensure she gets the kudos she deserves. **Rates: 1/3-page photo profile–$1,530**

For more information, please contact Lindsay Wolf at 214.525.6786 or Lindsay.Wolf@TheFiveStar.com.

Movers & Shakers

BERNSTEIN-BURKLEY, P.C. PARTNERS NAMED TO THE BEST LAWYERS IN AMERICA©






Six Bernstein-Burkley, P.C. team members were named to the 2021 The Best Lawyers in America list: Co-managing partner **Robert S. Bernstein** for Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law, Litigation – Bankruptcy; Co-managing partner **Kirk B. Burkley** for Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law, Commercial Litigation, and Real Estate Law; Partner **Kit F. Pettit** for Real Estate Law; Partner **Harry W. Greenfield** for Banking and Finance Law, Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law, and Litigation – Bankruptcy; Partner **Jeffrey C. Toole** for Banking and Finance Law, Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law, Commercial Transactions/UCC Law, and Litigation – Bankruptcy; and Partner **Keri P. Ebeck** for Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law.

MRLP WELCOMES WENDY LEE

Wendy Lee, the newest addition to the management team at McCalla Raymer Leibert Pierce (MRLP) will assume the role of Managing Partner of the firm's Oregon and Washington Foreclosure and Litigation Practice. "Lee has been a friend of the firm for many years and we have always experienced a close relationship and common mindset in responding to the industry's changes. We feel that Wendy is a perfect match for the MRLP family," Marty Stone, Managing Partner and CEO of MRLP, said.

ORLANS ATTORNEYS NAMED #NEXTPOWER-HOUSEAWARD WINNERS

The Founder & Executive Chair of Orlans, **Linda Orlans** was named a winner of the inaugural #NEXT-PowerhouseAward, honoring the most influential women in the mortgage industry. Julie Moran, Senior Executive Counsel of Orlans, was also the recipient of a #NEXTPowerhouseAward. The winners are celebrated for being technologically innovative, sharing new ideas, and pushing the limits to keep their companies and the industry moving forward.

SERVICELINK WELCOMES YVETTE GILMORE

ServiceLink is strengthening its leadership team to expand its innovative products and services by appointing **Yvette Gilmore** as its SVP of Servicing Product Strategy. In this role, Gilmore will be responsible for developing ServiceLink's products and services that support strategic servicer client initiatives She will also support ServiceLink's EXOS One Marketplace, the only AI-powered asset decisioning tool of its kind, that uses predictive modeling to determine the optimal disposition strategy for properties in default.

THE WOLF FIRM'S CASTLE FINALIST FOR MREPORT'S COMMUNITY LEADER AWARD

The Wolf Firm's Senior Mortgage Servicing Attorney, **Caren Castle**, was recognized as a Community Leader Award Finalist in MReport's September Women in Housing Issue. Castle has over 25 years' marketing experience boasts an outstanding record of cultivating and managing relationships. Having entered the mortgage industry over 35 years ago, Castle has often found herself as the only female attorney in many meetings, boardrooms, and conferences. Rather than slowing her down, this has only spurred her to be the change in the industry that she wishes to see.

LEADERSHIP. ADVOCACY. EDUCATION.

The Legal League 100 is a leading force for industry standards, market research, and policy change. In a time of industry transition, the Legal League 100 stands committed to supporting the mortgage servicing industry through education, communication, relationship development, and advisory services.

For more information regarding joining the Legal League 100, please contact Lindsay Wolf at 214.525.6786 or Lindsay.Wolf@TheFiveStar.com

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