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

National

What is a Reasonable Effort?

By: Jamie Juster-Caballero, McCalla Raymer Leibert Pierce

The defense of failure to comply with HUD regulations requiring a face-to-face meeting prior to the filing of a foreclosure action is on the rise. Defense attorneys have been successful in challenging a lender's compliance with the regulation due to a lack of case law on the issue.

So how can a lender overcome these defenses? Besides actually having the face-to-face meeting with the borrower there are five exceptions. A face-to-face meeting is not required if:

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. This article focuses on the last exception, the reasonable effort exception, and how Lenders may be able to overcome a defense of non-compliance.

24 CFR § 203.604(d) sets out the requirements for a reasonable effort. "A reasonable effort … shall consist at a minimum of one letter sent to the mortgagor certified by the Postal Service as having been dispatched. Such reasonable effort … shall also include at least one trip to see the mortgagor at the mortgaged property… ." This seems straightforward enough. However, litigation arises over what sending a letter "certified by the Postal Service as having been dispatched" entails and what suffices

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National

Case Law Development in Subchapter V

By: Craig Rule, Orlans & Associates

On February 19, 2020, the provisions of the Small Business Reorganization Act of 2019 became effective, thereby creating a new Subchapter V under Chapter 11 of the Bankruptcy Code. This Subchapter permits small businesses to avail themselves of the capability to reorganize, but without many of the costs and delays associated with regular Chapter 11 cases.

Initially, Subchapter V had a debt limit (both secured and unsecured) of $2,725.625, but the CARES Act modified this limit, increasing the debt threshold to $7,500,000 (until March 27, 2021 unless further extended by Congress).

When compared to large Chapter 11 cases, the procedural benefits to debtors of Subchapter V include that only a debtor may propose a plan of reorganization, there is no need to file a disclosure statement, and a debtor is not required to allow creditors to vote on acceptance of the plan. Substantively, Subchapter V, unlike Chapter 13 cases or other Chapter 11 cases, permits a debtor to "cram down" debts secured by a debtor's principal residence to the value of the property, an option not afforded by a Chapter 13 or a regular Chapter 11 bankruptcy case, if the loan was not used to purchase the property and the property was primarily used in connection with the debtor's small business. See 11 U.S.C. § 1190(3).

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States: California

California 2020 Legislative Update – What Passed, Failed, and Emerged

By: Ed Treder, BDF

The COVID-19 pandemic and resulting government emergency actions produced a fraught legislative session in 2020 as California lawmakers scrambled to enact protections for tenants, homeowners, and small landlords at risk of foreclosure and eviction. Most of the bills failed, including a proposed statewide foreclosure moratorium, while others were approved and signed into law. Near the end of the legislative session, a compromise bill emerged (AB 3088) that provides eviction and foreclosure relief to tenants, homeowners, and small landlords. Two other bills (SB 1079 and SB 1148) were passed that impact the nonjudicial foreclosure process.

Federal Response

At the federal level, Congress enacted the CARES Act (H.R. 748) in March 2020, which prohibited servicers of federally backed mortgage loans from pursuing evictions for not less than 60-days beginning March 18, 2020. The FHFA suspended evictions on properties securing GSE loans, and HUD/VA issued similar guidance as to FHA and VA loans. These moratoria are now scheduled to expire on December 31, 2020.

After Congress failed to pass new legislation to extend those protections, President Trump issued an executive order directing federal agencies to minimize residential tenant evictions during the ongoing pandemic. On September 1, 2020, the Centers for Disease Control (CDC) ordered a nationwide halt to residential tenant evictions for non-payment of rent effective September 4, 2020 through December 31, 2020. The CDC order does not forgive or cancel any rent obligation, or the accrual and collection of late charges, fees, or other penalties. To be eligible, a tenant must provide a written declaration, under penalty of perjury, attesting to financial hardship and income limits.

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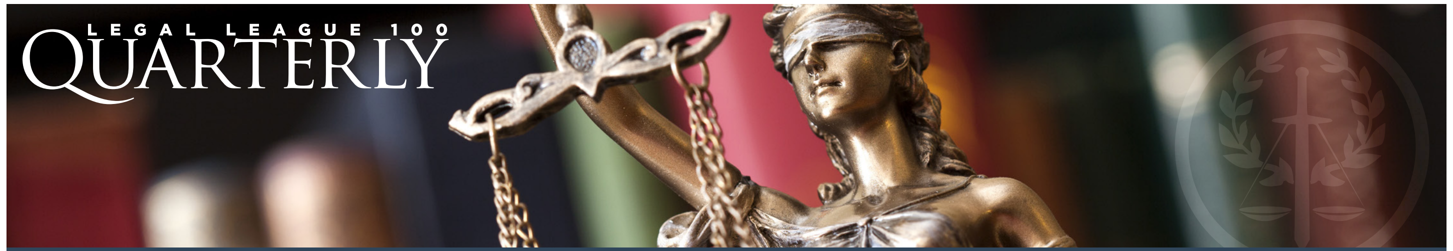

FROM THE CHAIR

It is hard to believe that we are in the fourth quarter of 2020. I looked back at the Chairman's Letter for the first quarter, which preceded the moratoriums triggered by COVID-19, and none of us had any idea how the rest of the year was about to change. What a difference a year makes!

As of this time, we know that the moratoriums have been extended through January 2021. With the current COVID-19 numbers being so high and a new administration prepares to assume leadership, it seems likely that another extension of the moratorium is probable. The good news is the success rate of the COVID-19 vaccine, which could have a significant and positive impact on the country by summer. Meanwhile, we will continue to coexist in Zoom and Teams' remote world that have become part of our day-to-day.

Notwithstanding the challenges, we had a productive year. The Legal League 100 Spring and Fall Summits were both virtual, well attended, and successful. We aligned with USFN and ALFN to present a joint letter and memorandum in support of the fee alignment initiative and moratorium challenges. We had several conferences with HUD and the GSEs regarding the various issues. FHA's proposed servicing guide includes a recommendation to align fees with Fannie Mae, which is consistent with the efforts Legal League 100 has been supporting. Overall, we were able to accomplish some very positive goals.

2020 also brought change to Five Star Global. Lindsay Wolf, the director of Legal League 100, has taken an opportunity with a mortgage company so with that Rachel Williams and Todd Storch will continue to manage the Legal League 100 going forward. Steve Hladik and I enjoyed a very positive meeting with Todd and Rachel, who are committed to seeing Legal League 100 continue to succeed and play an important role in the mortgage default space. We all look forward to working with Rachel and Todd in the future. Rachel can be reached at Rachel.Williams@TheFiveStar.com.

I hope everyone has a wonderful holiday season and a happy new year! I look forward to what's to come in 2021 and to working with all of you to make 2021 a productive and positive year.

Best regards,

Roy Diaz
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Chairman, Legal League 100 Advisory Council

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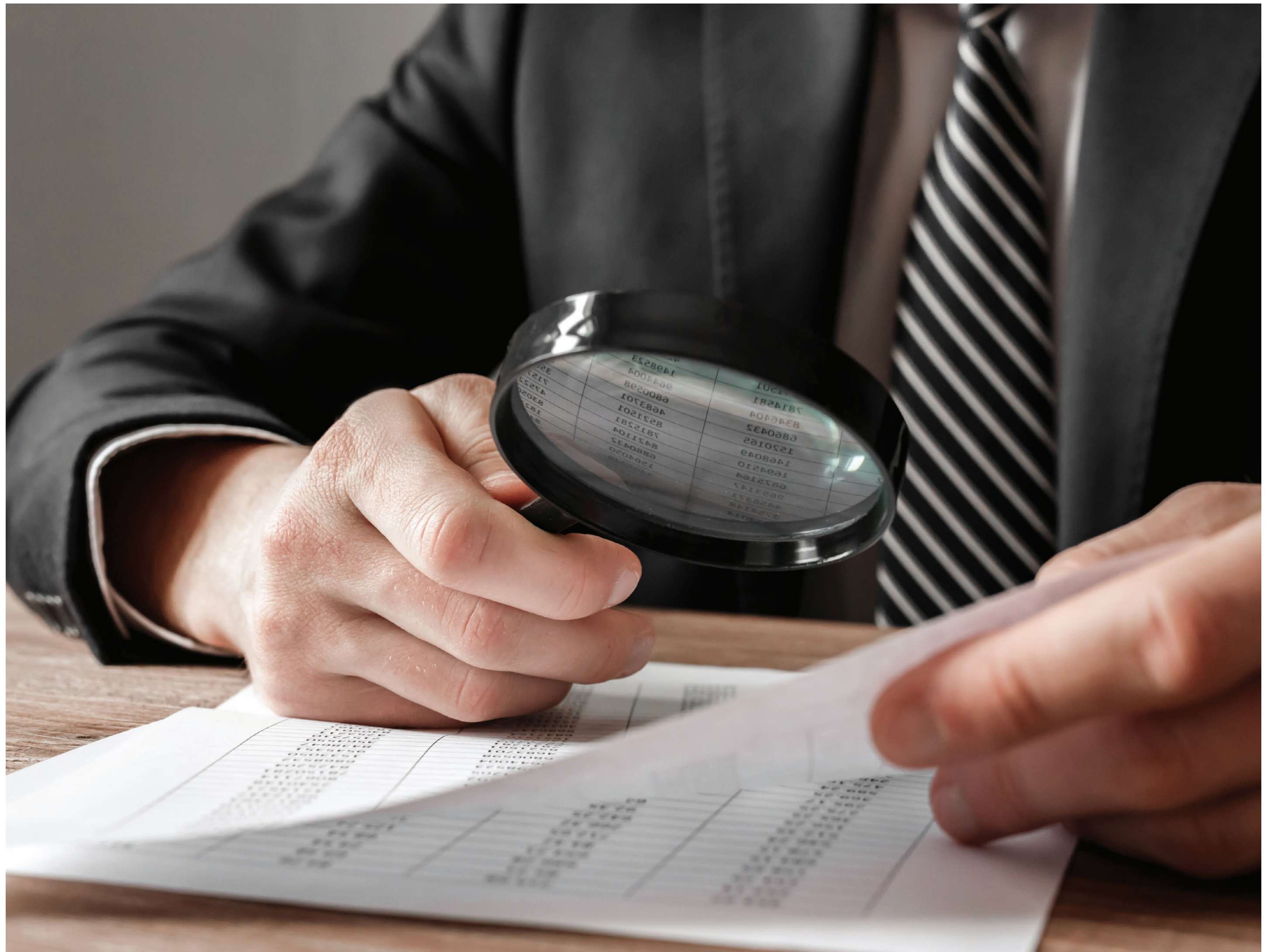

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as "at least one trip to see the mortgagor at the mortgaged property."

Many argue that the regulation requires the face-to-face letter to be sent only via certified mail. Yet, the regulation states that the letter be "certified by the Postal Service as having been dispatched." The HUD Handbook clarifies the provision stating that the face-to-face letter must be sent to the Borrower "via Certificate of Mailing or Certified Mail." One Florida Court looked at the language used in the regulation and stated, "…to certify a letter has been dispatched generally means to confirm or attest to the prompt or speedy sending off of something." *Lakeview Loan Servicing, LLC v. Walcott-Barr*, 2020 WL 6053302 (Fla. 4th DCA 2020). Noting the above, how does the lender prove compliance?

Rhode Island courts have held the regulations do not limit the type of proof needed to prove compliance. *See Dan-Harry v. PNC Bank, N.A.*, 2019 WL 1253481 (D.R.I. Mar. 18, 2019). Courts in Illinois have looked at prejudice to the borrower to determine whether the lender sufficiently proved mailing. *See PNC Bank, N.A. v. Wilson*, 74 N.E. 3d 100 (Ill. App. Ct. 2017). In the State of Florida, it will always be easier to prove compliance if the face-to-face letter is sent via certified mail with the green card retained to prove compliance. However, this method may be cost prohibitive. The HUD Handbook does allow a certificate of mailing which should be sufficient proof of compliance. From an evidentiary standpoint in Florida, the use of a certificate of mailing may require the mailing vendor to provide an affidavit and/or testimony regarding the procedures used. A witness from the lender could testify, however, the requisite knowledge they would need is a topic for another article. Regardless, any defense that the face-to-face letter must be sent via certified mail and only certified mail should not prevail.

What does one trip to see the mortgagor at the mortgaged property look like? Simply put, the lender must make a trip to the mortgaged property to try to arrange a face-to-face meeting. The HUD Handbook allows the use of third-party vendors to establish contact and schedule the meeting. This may be challenged, but the HUD Handbook is clear. What is not clear is what happens if the vendor is unable to complete the door knock due to some obstacle preventing access to the property. This facet of the argument of non-compliance is still a gray area with little to no direction from the courts. However, more courts are finding that compliance with the regulations should fall under a substantial compliance standard.

Overcoming a defense of non-compliance with the face-to-face requirement when a reasonable effort is made requires the lender to prove that the face-to-face letter was mailed, preferably by certified mail but at least via a certificate of mailing, and that a door knock was attempted within three months of default. Both need to be proven and what constitutes proof depends upon the jurisdiction. Being able to competently explain to the court what the regulation requires and provide adequate proof of compliance will offset the defense attorney's feeble attempts to trick the court and ensure that the Lender is successful in the litigation.

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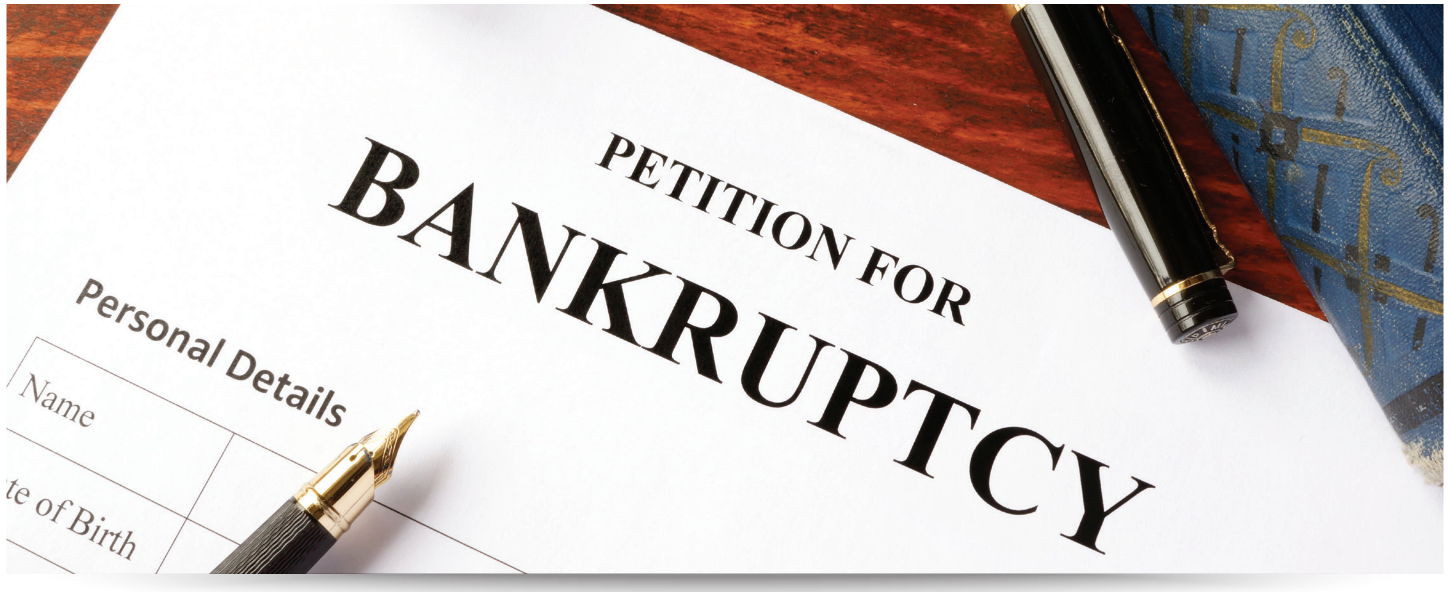

“Development in Subchapter V” continued from Page 1

Given its youth, it is not surprising that the greatest number of reported decisions interpreting Subchapter V have discussed the eligibility threshold for a debtor to proceed under the Subchapter. A common question before these bankruptcy courts is whether an election to Subchapter V can be made if the bankruptcy case was pending prior to the February 19, 2020, effective date. A majority of the decisions have allowed the election for cases already pending prior to that date. See *In re Bello*, 613 B.R. 894 (Bankr. ED MI March 27, 2020); *In re Body Transit, Inc.*, 613 B.R. 400 (Bankr. ED PA March 24, 2020); *In re Twin Pines, LLC*, 2020 Bankr. LEXIS 1217 (Bankr. D NM April 30, 2020); and *In re Moore Props. of Person Cty.*, LLC, 2020 Bankr. LEXIS 550 (Bankr. MD NC February 28, 2020).

On the other hand, at least two bankruptcy courts have ruled to the contrary. In *In re Seven Stars on the Hudson Corp.*, 2020 Bankr. LEXIS 2106 (Bankr. SD FL August 7, 2020), the bankruptcy court dismissed the case of a debtor who had filed before the effective date of Subchapter V. The court determined that, even if the debtor was eligible under Subchapter V, he had not complied with 11 U.S.C. § 1188(a), which requires a status conference within 60 days of the original bankruptcy filing date, and 11 U.S.C. § 1189(b), which mandates the filing of a plan of reorganization within 90 days of that same date. Similarly, the bankruptcy court in *In re Double H Transportation LLC*, Case number 19-31830 (Bankr. WD TX March 5, 2020), struck the debtor's election to Subchapter V and found that there was nothing in the Small Business Reorganization Act of 2019 to give Subchapter V a retroactive effect, that the late election meant that the debtor could not comply with the status conference and plan filing deadlines, and that the election itself was defective because the debtor failed to file financial documents required by 11 U.S.C. §§ 1116(1) and 1187(a). However, in *In re Trepetin*, 2020 Bankr. LEXIS 1770 (Bankr. D MD July 7, 2020), the bankruptcy court allowed an extension of deadlines to hold a status conference and file a plan because the debtor did not manipulate the timing of the filing of the bankruptcy case and no creditor asserted unfair prejudice from the delay. See also *In re Bonert*, 2020 Bankr. LEXIS 1783 (Bankr. CD CA June 3, 2020). Examining another threshold eligibility question, a bankruptcy court in the Eastern District of Louisiana permitted a debtor to proceed under Subchapter V although the debtor was not presently engaged in commercial activities. See *In re Blanchard*, 2020 Bankr. LEXIS 1909 (Bankr. ED LA, July 16, 2020).

Of particular concern to secured mortgage creditors should be the decision of the Bankruptcy Court for the Eastern District of New York in *In re Ventura*, in which the court, when approving the election to Subchapter V of a bankruptcy case pending prior to February 19, 2020, reached into the substantive rights of parties under the Subchapter to find that the individual debtor could potentially “cram down” a residence that the debtor also used as a bed and breakfast. *In re Ventura*, 615 B.R. 1 (Bankr. ED NY April 10, 2020) (On appeal. Direct appeal to 2nd Circuit denied, September 17, 2020). The *Ventura* court reasoned that, although the original petition was filed before the effective date of Subchapter V, allowing cram down under 11 U.S.C. § 1190(3) would not prejudice any vested rights of the mortgagee as there had been no bankruptcy plan confirmed and the nature of the property as a business property was evident upon the original bankruptcy filing date. *Id.* at 15-18. The court also found that the debtor was not judicially estopped from asserting that her mortgage debt arose from commercial or business activities because this characterization was not at odds with her pre-election disclosures in her petition and schedules. *Id.* at 20-23. Finally, the court made a preliminary determination that the cramdown provisions of 11 U.S.C. § 1190(3) could apply to her mortgage, although the mortgage was a purchase money mortgage used to acquire a property in which the debtor resided, because the primary purpose of the property was to be a bed and breakfast business, although the court reserved final determination for an evidentiary hearing during which it would employ a five-factor test to decide whether the mortgage could be modified. *Id.* at 23-25. The five factors are:

1. Were the mortgage proceeds used primarily to further the debtor's business interests?
2. Is the property an integral part of the debtor's business?
3. The degree to which the specific property is necessary to run the business;
4. Do customers need to enter the property to utilize the business?
5. Does the business utilize employees and other businesses in the area to run its operations? *Id.* at 25.

In conclusion, based on the case law discussed above, bankruptcy courts appear to be applying a liberal reading of the provisions of Subchapter V in a manner that favors debtors seeking protection under its provisions.

Craig Rule is the Managing Bankruptcy Attorney for Orlans PC. Rule's prowess in navigating lenders through Chapter 7 and Chapter 13 bankruptcy is unmatched. Rule is regarded as a thought leader on bankruptcy matters and has authored several articles published nationally and a contributing author of the Institute of Continuing Legal Education's “Handling Consumer and Small Business Bankruptcies in Michigan.” Rule is admitted to practice in Michigan, Massachusetts, New Hampshire, and the District of Columbia. He has appeared in the bankruptcy courts in each of those jurisdictions representing creditors on a wide variety of matters. He serves as a member of the American Bankruptcy Institute.

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There are substantial monetary sanctions for any landlord violation of the CDC order.

- **California Response (AB 3088):** California tenants financially impacted by the Coronavirus pandemic cannot be evicted for missed rent payments through January 31, 2021. For rent due March 1, 2020 to August 31, 2020 (“protected time period”), tenants need only self-attest to a COVID-related financial distress. For rent due September 1, 2020 to January 31, 2021 (“transition time period”), they must also pay 25% of the total rent on or before January 31, 2021. The bill does not forgive any rent but restricts the landlord's remedies to a small claims action for money damages, which cannot be filed until on or after March 1, 2021. Tenants may still be evicted for other just cause such as nuisance, denial of access, criminal activity, or other material default.

To qualify for these eviction protections, the tenant must provide the landlord with a signed declaration under penalty of perjury, self-attesting to one or more of the following:

- Loss of income caused by COVID-19 pandemic
- Increased out of pocket expenses related to performing essential work
- Increased expenses directly related to pandemic health impact
- Caring for child, elderly, disabled, or sick family member
- Other reduced income or increased expenses from COVID

A tenant whose income is below 130% of area median income is not required to provide any additional proof of financial distress.

Landlords were required to give tenants who missed rent payments during the protected time period a state-prescribed written notice of their rights by September 30, 2020. The law also increases the three-day notice requirement for all rent defaults during the protected and transition time periods to 15 days, nullifies earlier-served three-day notices, and requires landlords to serve an unsigned declaration of financial distress with each 15-day notice.

The legislation also increases financial penalties ($1,000 to $2,500) for self-help lockouts despite a tenant's financial distress declaration. These provisions sunset on February 2, 2021.

Finally, AB 3088 places limits on COVID-related eviction moratoria enacted by cities and counties. Local moratorium ordinances which end before January 31, 2021 can remain in effect but cannot be extended or renewed with an effective date before February 1, 2021. Repayment of back rent must start by March 1, 2021 and end by March 1, 2022, which preempts local ordinances that start repayment periods after March 1, 2021 or tie them to the end of the emergency.

<u>AB 3088 Small Landlord and Homeowner Protections</u>

Small landlords unable to collect rent from tenants with a COVID-related financial distress are themselves at risk of foreclosure if they default on their mortgage payments. To alleviate that risk, AB 3088 places additional burdens on servicers whose loans are secured by certain rental properties. Existing borrower protections under California's Homeowner Bill of Rights now extend to “small landlords.” Small landlords are quantified as one or more individuals who own no more than three residential properties. These properties must contain no more than four dwelling units, occupied by a tenant under an arms-length lease entered before, and in effect on, March 4, 2020. Protect small landlords must be unable to pay rent due to a reduction in income resulting from COVID-19. Mortgage servicers must expand their pre-foreclosure contact and due-diligence procedures and their single point of contact and dual tracking policies to include such properties. These protections also impact the Notice of Default compliance declaration, but sunset on January 1, 2023, when the law's scope reverts to “owner-occupied” properties only.

In addition, AB 3088 adds provisions to the Civil Code (secs. 3273.01 to 3273.16) relating to forbearance and post-forbearance loss mitigation requests by homeowners and “small landlords” impacted by a COVID-related financial hardship. Mortgage servicers must respond by written notice to a forbearance request made between September 1, 2020 and April 1, 2021 (the “effective time period”) by borrowers who were current on payments as of February 1, 2020. If the mortgage servicer denies a forbearance request for a curable defect (e.g., incomplete application, missing information), then the denial notice must specifically identify the curable defect and provide the borrower with 21 days to cure the defect. The mortgage servicer must also respond to any revised request received during the 21-day timeframe not later than five business days after receipt. Small servicers must attach a copy of the denial notice to their NOD compliance declaration, and state whether forbearance was or was not subsequently provided. These requirements do not apply to a mortgage servicer of a federally backed mortgage who complies with forbearance provisions of the CARES Act or to mortgage servicer of a non-federally backed mortgage that provides forbearance consistent with the requirements of the CARES Act on federally backed mortgages.

Mortgage servicers must comply with applicable federal agency guidance regarding post-forbearance loss mitigation options. As with forbearance requests, there are safe harbor exemptions for mortgage servicers who comply with the CARES Act on federally backed mortgages and with consistent post-forbearance loss mitigation options on non-federally backed mortgages. Mortgage servicers must offer a post-forbearance loss mitigation option that is consistent with their contractual or other authority and must communicate with borrowers about forbearance and post-forbearance loss mitigation options in their preferred language.

Lastly, AB 3088 creates a private right of action for borrowers harmed by a material violation of these forbearance and post-forbearance requirements to sue for injunctive relief or damages. A court may award attorney's fees and costs to a borrower who obtains injunctive relief against a

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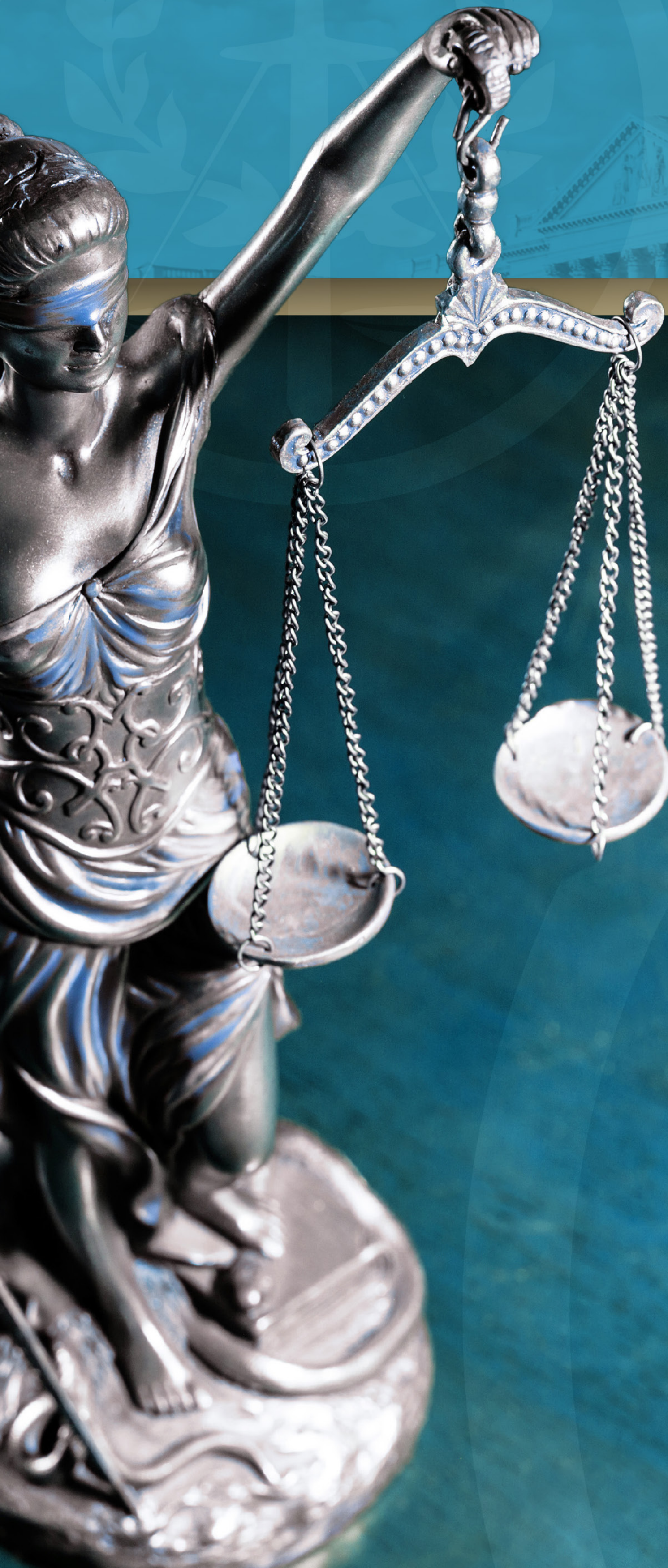

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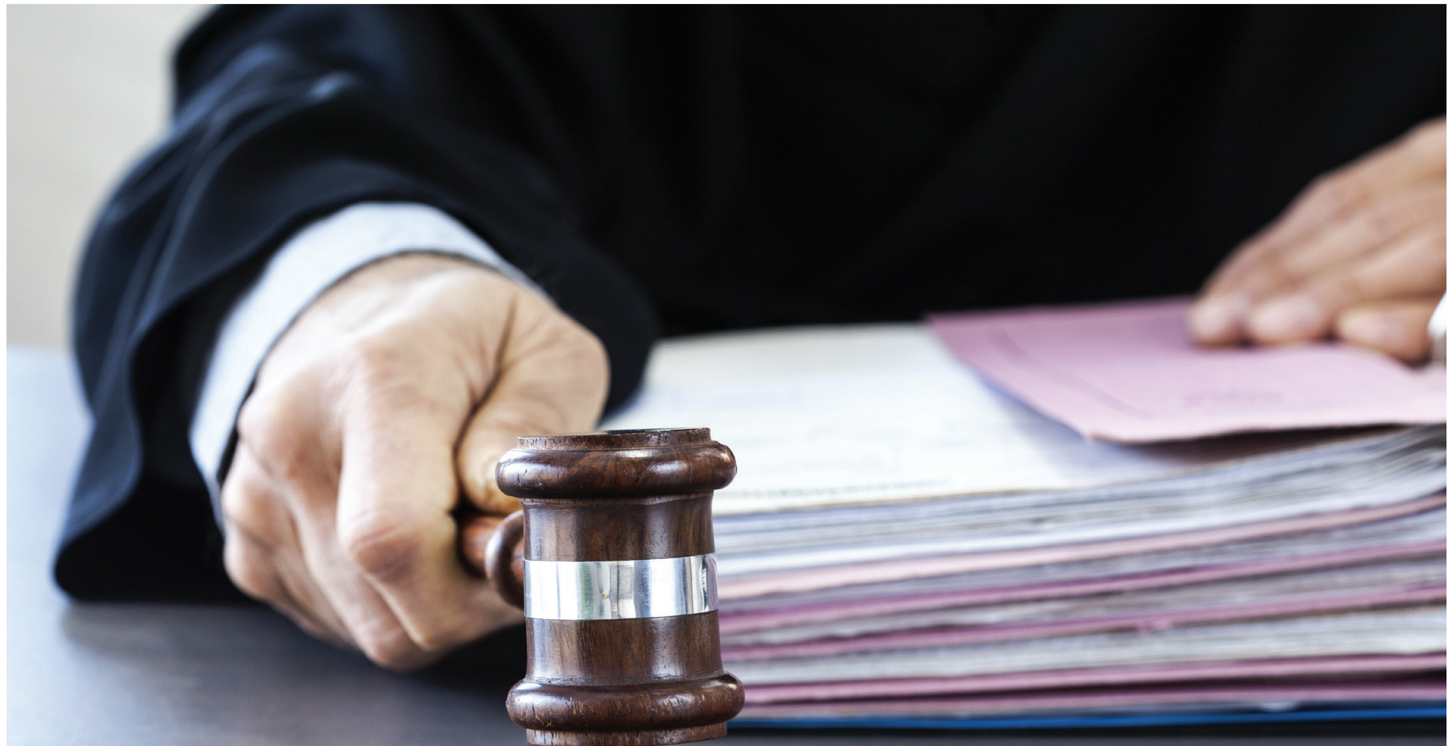


"California" continued from Page 7

sale, including a temporary restraining order, or any other relief.

SB 1079 Post-Sale Overbidding; Civil Fines on Vacant Properties

This legislation targets three perceived problems caused by the last foreclosure crisis:

1. A significant decline in homeownership, and a resulting rise in renter-occupied housing units owned by private investment firms and corporate landlords;

2. An increase in vacant residential properties that decrease the available housing stock, and depress property values, and

3. An increase in unmaintained properties, causing community blight, and driving adjacent property values down further still.

The legislative solution creates an elaborate post-sale overbidding process giving eligible parties, (i.e., tenant buyers, prospective owner-occupants, non-profit affordable housing providers, community land trusts, limited-equity housing cooperatives, and public entities) up to 45 days to match or exceed the last and highest bid at public auction. An eligible party may submit a bid or serve a non-binding written notice of intent to bid by certified mail or overnight delivery within 15 days of the sale date and must consummate the transaction within the 45-day timeframe by tendering the bid by cashier's check or other certified funds and an affidavit that the bidder is an eligible party. The bill extends the timeframe to record a Trustee's Deed Upon Sale and retroactively perfect title up to 48 days after the sale. Trustees will now be required to navigate a complex post-sale procedure that will likely discourage competitive bidding, extend foreclosure timeframes, delay the finality of sales, and invite legal challenges by interested parties, all with no additional compensation. The legislation is scheduled to sunset after five years (January 1, 2026).

SB 1079 also mandates a new "Notice to Tenant" disclosure in the Notice of Trustee's Sale to inform eligible tenant buyers that they can purchase the property by matching the last and highest bid at public auction and what steps they must follow to exercise this right.

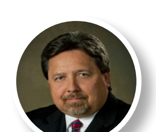
Finally, the bill increases the maximum civil fines for failure to maintain vacant residential properties purchased or acquired at foreclosure sale to $2,000 per day for the first 30 days and up to $5,000 per day thereafter. The bill requires governmental entities to give written notice of alleged violations, including a detailed description of property conditions, and of its intent to assess civil fines unless the owner begins corrective action not less than 14 days after the date of the written notice. The 14-day time period may be extended up to 10 days to clarify the corrective action required, but work must be completed within 16 business days thereafter to avoid civil fines.

SB 1148 Publication Charges; DNMS Filing Fees

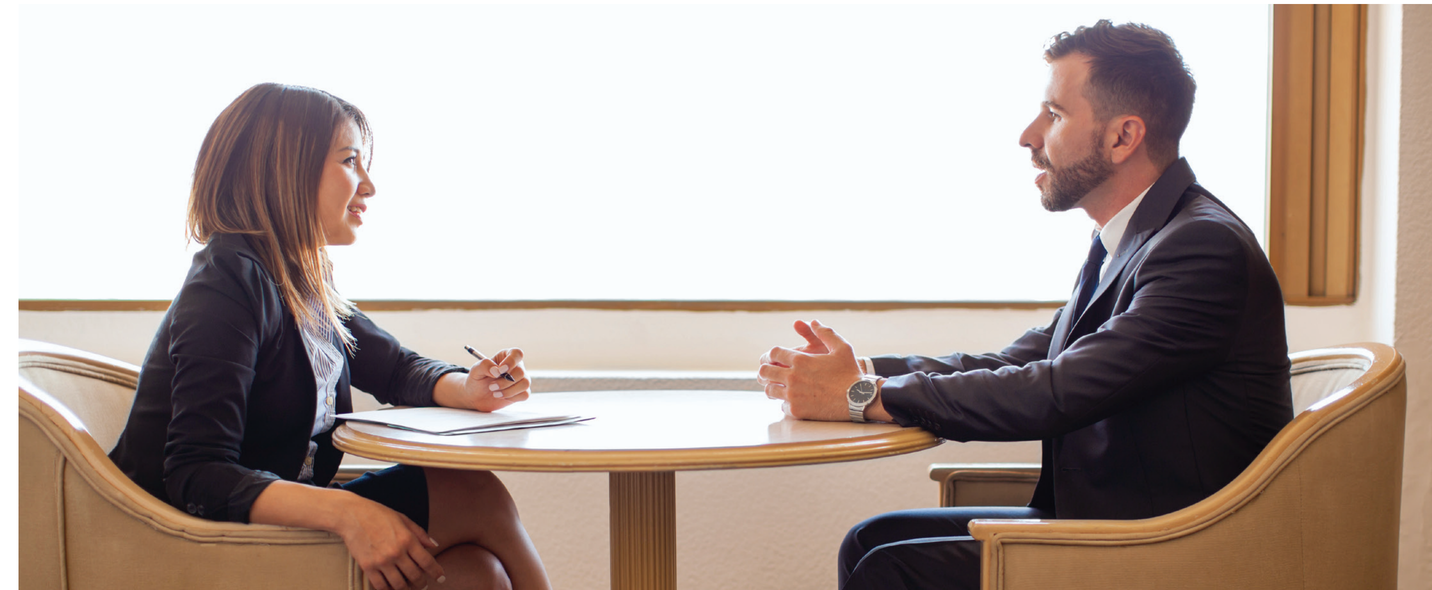
This legislation aims to lower newspaper publication charges in cities where there was no real price competition among newspapers of general circulation by expanding the geographic area in which trustees may publish Notices of Trustee's Sale. The United Trustee's Association sponsored the bill in response to price-gouging by newspapers with effective monopoly advertising charges in some cities, which drove up the cost for lenders, trustees, and homeowners.

SB 1148 also eliminates first appearance filing fees for trustees sued as nominal defendants in litigation between borrowers and lenders. State law allows the trustee to file a declaration of non-monetary status to avoid the burden and expense of actively participating in the litigation, but many jurisdictions currently charge the trustee a non-recoverable filing fee of $435.

Servicers will need to consult with both local counsel and property preservation vendors to ensure compliance with the new laws. It is important that servicers have policies and procedures in place to address these changes now while foreclosure volumes are low, as it will be difficult to implement once moratoriums end and volumes increase.



Edward A. Treder is managing partner of Barrett Daffin Frappier Treder & Weiss, LLP with offices in California, Nevada, and Arizona. Treder practices law at the trial and appellate levels in all California state and federal courts with an AV Preeminent Peer-Review Rating for Legal Ability and General Ethical Standards and 36 years' experience handling default servicing legal matters, including foreclosures, civil litigation, bankruptcy matters, evictions, title curative actions, surplus funds, receivership cases, legislative affairs, and administrative hearings.



States: Florida

Florida DCA Reverses Foreclosure Dismissal

By: Roy Diaz, Diaz Anselmo Lidberg

Earlier this month the Fourth DCA of Florida reversed a circuit court's dismissal of Lakeview Loan Servicing, LLC's ("Lakeview" or "the Bank") foreclosure complaint. *Lakeview Loan Servicing v. Walcott-Barr*[i]. The DCA found the Bank presented sufficient evidence to show it complied with pertinent HUD regulations, specifically § 203.604(d), so dismissal based on failure to satisfy conditions precedent was inappropriate.

The court's opinion (and the concurring opinion written by Judge Gross) includ ed considerable discussion of the Court's recent *PennyMac* decision wherein the Court distinguished HUD requirements from other statutory conditions precedent. (citing and quoting *PennyMac Loan Services LLC v. Ustarez*) In *PennyMac*, the Court explained if the note or mortgage incorporated HUD regulations then "the lender 'contractually agreed to self-impose the HUD regulation on itself before… foreclosing…,'" but the Court distinguished that obligation from a condition precedent. Judge Gross vehemently disagreed with this characterization noting it was a distinction without a difference, but his concurring opinion elaborating on the issue is outside the scope of this article.

In *Walcott-Barr*, the borrowers' loan documents incorporated references to HUD thereby making compliance with HUD regulations a "contractual pre-condition to foreclosure." In response to Lakeview's foreclosure complaint, the borrowers ("Walcotts" or "Borrowers") asserted as an affirmative defense that the Bank failed to comply with the face-to-face meeting requirement of § 203.604(d). Under that section, the mortgagor was required to conduct a face-to-face interview with the borrowers within three months of default or "make a reasonable effort" to do so. To be considered "reasonable," according to HUD, Lakeview had to send at least one certified letter to the borrower requesting a meeting and take at least one trip to the mortgaged property."

At trial, the Bank presented testimonial evidence that it mailed out a letter via certified mail requesting a face-to-face meeting with the borrowers. The witness confirmed the letter was addressed to the borrowers at the property address and the witness provided the "USPS certified mail tracking number." The Bank introduced a copy of the letter into evidence but not the "return receipt" card. The trial court found Lakeview "presented sufficient circumstantial evidence that a representative tried to personally meet the Borrowers;" however, it also found "the omission of a return receipt from the USPS [was] fatal" to the Bank's case. The court entered judgment for the Borrowers and dismissed the case. Lakeview appealed that order.

On appeal, the Fourth DCA disagreed with the lower court's conclusion that the absence of the return receipt card rendered Lakeview's evidence deficient. The Court analyzed the plain language of the statute which stated in pertinent part that "the reasonable effort [to conduct a face-to-face meeting] 'shall consist … of one letter sent to the mortgagor certified by the Postal Service as having been dispatched.'" The Court expounded that the term "certify" meant to "…attest to as being true …" and the word "dispatch" meant "… the act of sending off …"

Based on the plain language of the statute, the Court concluded Lakeview's witness testimony (1) identifying the letter requesting a face-to-face meeting, (2) confirming the letter was sent to the Borrowers' at the property address via USPS certified mail, and (3) providing the tracking number "was sufficient to establish [the Bank made] a 'reasonable' effort' under 24 C.F.R. § 203.604(d)." The Court elaborated that compliance with the face-to-face meeting was not limited to "introduction of the USPS green card." The Court also looked to an analogous Illinois case where that court found the bank's failure to produce the "USPS proof" of mailing "did not bar foreclosure because it was a 'technical defect' that did not prejudice the borrower.

The Court reversed the order of dismissal and remanded the matter for further proceedings consistent with its findings.

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.

States: Illinois

Illinois' Single Refiling Rule–New Twist

By: Lauren Riddick, Codilis & Associates

Illinois' single refiling rule just received another twist to its already long chain of legal interpretations. The rule, at its heart, permits only one refiling of a claim, even if a party's actual time to file suit hasn't yet run out. In other words, if a plaintiff voluntarily dismisses their action, they are only permitted to bring that same cause of action one more time. Much more complex, however, is what constitutes the "same cause of action" in this context, especially when dealing with defaulted loans.

A contractual "cause of action," or lawsuit, must be centered around a default or a "wrong"—a missed obligation or a failure to meet some duty that damages another. As servicers and lenders are well-aware, mortgage loans typically require ongoing monthly payments. So, if a loan contract is entered into in January, but payment stops in February, then the loan has been defaulted and the lender can file a foreclosure complaint alleging the February default.

Notwithstanding, assuming payment isn't ever made, that missed February installment certainly isn't the only missed contractual payment, as each month after February is still owed up until maturity. Therefore, each month following February could be viewed as a separate "default"—with February simply being the earliest that occurred. Moreover, loans usually include numerous promises from the borrower regarding the property itself—such as the promise to pay property taxes and insurance—which potentially constitute additional separate "defaults."

Historically though, these distinctions have largely been ignored, with courts treating a mortgage loan default as seemingly a one-time issue. The fact that lenders typically must accelerate principal and interest payments into one lump sum owed upon default merely complicates matters further—as it can be argued that the accelerated balance is being sought, not the individual missed month, with later filed complaints seeking that same accelerated balance.

Recently, however, in *Wilmington Sav. Fund Soc'y v. Barrera*, 2020 IL App (2d) 190883, the Second District Appellate Court provided an important holding and an encouraging analysis.

The lender had filed three earlier complaints, each based on missed payments and each dismissed prior to judgment, before filing its fourth complaint alleging only the failure to pay property taxes and insurance. The lender began by conceding that the acceleration of principal and interest prevented a separate foreclosure every time a mortgagor missed a monthly payment but argued that the taxes sought fell after the dismissal of the third complaint, and therefore couldn't have been part of any of the prior actions.

Contrastingly, the mortgagors argued that all the complaints "arose from a single group of operative facts" and were therefore barred by the single refiling rule—as the Court paraphrased, "that dismissals of two suits on a note 'use up' that note under the single refiling rule." *Id.* at P12 and P30.

The Court, however, starkly disagreed, finding that the failure to pay later accruing taxes and insurance constituted "new defaults" that were not barred by the single refiling rule, and stating that "no equivalent of acceleration of a note exists for tax and mortgage payments." *Id.* at P14. Therefore, the lender could collect for those tax amounts falling after the last complaint dismissal, as well as those amounts falling during the interim of earlier cases (i.e., postdating one and predating another.)

Notably though, the Court went on to state that Illinois' current case law did not hold that "if a lender were to sue on a note twice, both times seeking only the arrearage, [that] further suits on the note were barred," without detailing exactly what that meant. *Id.* at P30. Interestingly, what was not before the Court, and therefore not specifically answered, was whether the acceleration of principal and interest payments would, in fact, prevent a future payment related default.

For the time being, it appears that lenders can at least seek a portion of the amounts owed—future accruing taxes and insurance—if two prior complaints happen to be unsuccessful, and that suits for additional amounts owed might be able to proceed, if correctly drafted.

Lauren Riddick specializes in contested foreclosures, condominium disputes, and title matters. Riddick joined the firm in August 2013. Prior to joining the firm, she was an Adjunct Professor of Law with several colleges and served as the Compliance 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.

Member Highlights

A360 Acquires Express Notary Services

a360inc, a portfolio company of Knox Capital and a technology and outsourcing solutions provider to the legal and financial services industries, announced the acquisition of Express Notary Services (ENS), a national notary and signing services provider based out of Irvine, California. Founded in 2003, Express Notary Services provides national notarization and signing services and is one of the larger independent service providers to the real estate and legal marketplaces. ENS's advanced CloseClear signing technology platform allows clients to fulfill their signing needs directly through the platform in a self-service model or through a variety of full-service options including vendor management, training, placement, document quality control, and a multitude of reporting capabilities.

BDF Law Group Announces Organizational Promotions

Ryan Bourgeois is expanding his role to include Compliance Officer. Having been with the firm since 2006 and a Partner since 2014, Bourgeois is a frequent contributor and speaker on industry issues, currently serving on the Legal League 100 Advisory Council. Jaymie Frappier is being promoted to serve as the firm's Communications Director. Since joining the firm in 2017, Frappier has steadily expanded her role within the Compliance department and is well-versed in all aspects of firm operations as she assumes her new role as Communications Director. Jorge Rios-Jimenez is expanding his role to include management of Foreclosure Operations across all firm states. Rios-Jimenez joined the firm in 2014 as part of CA Foreclosure Operations. His expertise and leadership position the firm's foreclosure operations for growth in the future. Robert D. Forster, II, Managing Partner of the BDF Law Group, said, "I'm excited to announce these management promotions. The strategic review of the organizational structure and natural promotion of such highly qualified team members is a distinct pleasure as we continue to position ourselves to handle the regulatory and legal issues faced by the firm and industry as a whole."

Linda Orlans Selected to Serve on State's Attorney Discipline Board

The founder of Orlans PC in Troy, Michigan, Linda Orlans, has been selected by the Michigan Supreme Court to serve on the state's Attorney Discipline Board (ADB). She is one of six lawyers appointed for a three-year term. The board is responsible for reviewing allegations of misconduct of lawyers. "It is a great honor to serve as a member of the ADB. I look forward to working with the esteemed members of the Board to assure the standards of our profession are maintained at the highest ethical level," said Orlans, who founded the multi-state law firm focused on real estate law. She also has founded or acquired numerous companies in the legal, real estate, and title industries.

Independence Title Announces Promotion

Jennifer Hunter has been promoted to Escrow Officer at Independence Title's Bee Caves office. She has been working with Independence Title and the Phyllis Anderson Team for about seven years and has been performing back-up and courtesy closings for more than a year. She says, "Coming to Independence Title was the best career move I've ever made. I love it, this is my destination career!"