LEGAL LEAGUE 100
QUARTERLY
SPRING 2021 COMMITTED TO THE INDUSTRY, INTEGRITY, AND BEST PRACTICES

States: Illinois

The "All Claims" Bar is an All Claims Bar

By: Lauren Riddick, Codilis & Associates, P.C.

Upon foreclosure completion, an Illinois statute entitled "Transfer of Title and Title Acquired," bars "all claims" from the parties involved, except for claims by parties who were improperly brought into the action. 735 ILCS 5/15-1509(c). Specifically, only parties with faulty notice are permitted to dispute judgments entered against them within certain timeframes, but even then, such claims are only permitted to seek sale proceeds. In other words, foreclosure sales are intended to be safe-guarded to prevent purchaser worries regarding deeds later unraveling.

In a recent case, *Adler v. Bayview Loan Servicing, LLC*, 2020 IL App (2d) 191019 (12/29/2020), the reach of this "all claims" bar was directly challenged. Post-foreclosure, the suing former mortgagors sought money damages pursuant to two consumer protection statutes—the Real Estate Settlement Procedures Act (RESPA) and the Consumer Fraud and Deceptive Business Practices Act (Fraud Act). Their argument was that since an attack was not being made on the foreclosure judgment or sale, and instead monetary relief was being sought pursuant to two separate consumer protection statutes, the "all claims" statutory bar was inapplicable.

However, the 2nd District Court of Appeals was not persuaded. The court held that the Illinois legislature intended to prohibit "all claims of parties to the foreclosure related to the mortgage or the subject property," other than those claims falling into the noted exception (emphasis added). Id. at *P25. All claims meant all claims.

The court did reference that only properly

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Member Profile

Innovative Solutions

We sat down with Leisha Delgado to discuss how servicers are preparing for the expected surge in default activity once foreclosure moratoria expire. Delgado is Founder and CEO of Hello Solutions—a Legal League 100 Associate Member company.

LL100: Hello Solutions works to connect law firms with servicers and investors—what advice would you impart to attorneys who want to make their firm stand out from the competition?

Delgado: That's a great question, and something that many businesses—including attorney firms—have a hard time answering, since a lot of the services they provide seem similar to what their competitors offer. When we look at potential members for the Hello Solutions Network, we look for certain attributes that we think help distinguish our firms from the competition. This includes documented performance that exceeds Fannie Mae's published timelines by at least 50%; unquestioned expertise in the state where they practice, and strong relationships with the state's regulators, courts and legal associations; a culture of integrity and client centricity; and managing partners who are involved in the day-to-day business.

LL100: How should servicer and law firms prepare for the likely surge in default activity that

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State: Nevada

Are Mortgage Lenders Destined to Lose in Nevada?

By: Rosemarie Hebner & Eric Houser, Houser LLP

Court decisions in Nevada may have a national impact on the rights of mortgagors inside and out of the court.

Nevada's Homeowner's Associations (HOAs) have won again in their battle with mortgage lenders challenging Nevada's super-priority lien law, this time in the United States Court of Appeals Ninth Circuit.

What's the Superpriority Statute?

First enacted in 1991, Nevada's HOA lien priority statute, formally known as NRS 116.3116 and acrimoniously referred to as the "superpriority statute," is intended to provide HOAs with what was considered much needed muscle as a means of collecting delinquent assessments from offending homeowners. NRS 116.3116(1) bestows upon an HOA a statutory lien against a property for unpaid HOA assessments and further provides for a portion of these assessments to be superior to a senior mortgage. Simply put, aside from a few exceptions, if the HOA assessments go unpaid, an HOA has the authority to proceed with foreclosure of its lien, even if the HOA lien itself is subordinate in value to the mortgage or lender's lien.

The assessments that HOAs levy are typically the hard costs incurred by the HOAs to provide requisite services to the homeowners within the private community, such as property taxes for the common areas as well as costs of maintaining the amenities held in common by owners of property within the development. When a homeowner abandons property or neglects to pay the HOA assessments as obligated, the HOAs are left at risk.

In 2009, the Nevada Legislature amended the HOA superpriority statue by increasing the amount given priority over a senior mortgage to nine months of delinquent assessments. However, properties encumbered by Fannie Mae or Freddie Mac backed mortgages remain limited to six months of

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LEGAL LEAGUE 100
QUARTERLY

SPRING 2021

FROM THE CHAIR

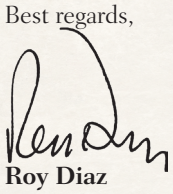
As we ease into 2021, we are all looking forward to getting COVID-19 under control as vaccines are distributed. The League will monitor closely what changes we can expect from a new administration and remain optimistic that the "new normal" will shift to the industry opening face-to-face engagement with clients and colleagues.

Unfortunately, however, the year began with the sad news of the loss of a dear friend and colleague Ed Kirn, of Powers Kirn, LLC, who passed away on January 4, 2021. This sudden and unexpected loss has hit us hard. We continue to remember and pray for Ed, his wife Sarah, and their two sons.

We also start the year with renewed focus to partner within the industry. The League is continuing to work with USFN and ALFN to deliver a post-moratorium joint letter and memorandum to FHFA and the GSEs highlighting post moratorium concerns. As the new administration settles in, we will work diligently to engage the government leadership and offer assistance with the challenges that our industry will face as moratoriums lift. My thanks to Legal League 100 Board Members Caren Castle, Ryan Bourgeois, Neil Sherman, and Tony Van Ness for their continued contribution to this effort.

We are looking forward to the 2021 Summit. The Spring Servicer Summit is scheduled for May 19, 2021 and will be a virtual event. The theme will be focused on best practices in a new environment. The Fall Summit will be part of the Five Star Conference and is scheduled for September 19-21, 2021. I hope everyone continues to stay safe and healthy. I look forward to having the opportunity to see each other in 2021.

Best regards,



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

ROY DIAZ, DIAZ ANSELMO & ASSOCIATES, P.A.

Roy Diaz is the shareholder of Diaz, Anselmo & Associates, 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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Hello Solutions offers Legal League 100 Members an opportunity to connect with Servicers and Investors who need legal services in the areas of default servicing and foreclosures.

Hello Solutions is a minority and woman-owned small business dedicated to providing marketing and business development services to attorney firms in the default servicing industry.

The company's mission is to connect mortgage servicers and investors with a network of highly qualified default law firms they can count on to provide tangible and reliable results. Passionate about integrity, operational excellence and customer-centricity, Hello Solutions only represents law firms that share and demonstrate these same values.

The Legal League 100 has partnered with Hello Solutions to provide a unique opportunity for its members, who can opt in to the Hello Solutions network at no cost, and have the opportunity to work with prospective clients in markets not currently covered by a Hello Solutions client. *Find out more by calling 727-403-5900, or emailing hello@hellosolutions.com.*

Leisha Delgado
Founder & CEO
Hello Solutions

For more information contact: 727.403.5900 | hello@hellosolutions.com

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entered judgments were protected (i.e. with proper subject matter and personal jurisdiction) before going on to note that statutory provisions already existed for "addressing 'injustice' issues that might arise in the course of foreclosure proceedings." That is, since the claims were "related to the mortgage or subject property," and since the former mortgagors failed to properly raise these issues during the course of the foreclosure, their claims were now prohibited by the "all claims" statutory bar, irrespective of whether any attack was being launched against the foreclosure itself.

This case will greatly limit actions by mortgagors post-foreclosure.

***Lauren Riddick**, specializes in contested foreclosures, condominium disputes, and title matters. She joined Codilis & Associates, P.C. 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.*

"Innovative Solutions" continued from Page 1

we'll see once the forbearance program and foreclosure moratoria have expired?

Delgado: There's definitely a backlog of foreclosure activity building up, and the longer the government foreclosure and eviction moratoria and mortgage forbearance programs are extended, the bigger the surge of activity we're going to see when the programs expire.

The servicers we work with are focusing on three areas right now to make sure they can handle the millions of borrowers they're going to be working with in the coming months: they're building out technology solutions that will allow borrowers to at least begin communications online, automating some of the borrower outreach, and streamlining previously manual paperwork processes; they're hiring or re-deploying their existing staff and cross-training them to make sure they understand what foreclosure prevention and loss mitigation options are available and appropriate; and they're taking inventory of their service providers—including their attorney firm partners—to make sure that they're up to date on all the changes happening to state foreclosure laws, and that they have the capacity to handle increased workloads when the floodgates inevitably open. In some cases, the servicers are putting back-up firms in place to handle overflow volume.

LL100: How can these industry parties navigate staying compliant with multi-state and federal regulations?

Delgado: Staying up to date with the frequent changes to federal, state, and even local foreclosure and eviction laws and regulations is one of the biggest challenges the industry faces right now. It seems like something changes almost every week—sometimes reversing the last set of changes from the week before. There are also differences between what's allowed in foreclosing on government-backed loans vs. loans held in private portfolios.

Unfortunately, this situation isn't likely to get much better until the pandemic is under control, and the various entities involved—regulators, government entities, noteholders, etc.—decide that it's safe to go back to business as usual. Many of the larger companies in the mortgage industry have entire departments dedicated to compliance; others rely on partners like their attorney firms for help.

We're blessed to be working with a growing number of attorney firms who are regarded as foreclosure experts in their respective states, who keep up with all the changes as they happen. We share that information across the Hello Solutions Network, so that all the members can benefit from having this information, and the servicers and investors we work with can be confident that their partners will help keep them compliant. For anyone looking for this kind of information, we also post updates from across the country on our website at HelloSolutions.com/covid-19.

LL100: How can law firms structure their operations to weather market fluctuations?

Delgado: These are certainly difficult times for law firms that specialize in default servicing. ATTOM just released a report noting that overall foreclosure activity in 2020 was the lowest they've ever recorded, and the Biden Administration has recommended extending the foreclosure and eviction moratorium through the end of September. The firms we work with are well-positioned to get through this cycle because of how they operated prior to the pandemic. Many of the firms had already cross-trained employees who typically focus on default servicing so they can work on other matters as foreclosure volume fluctuates. A number of firms work in a variety of other practice areas like residential and commercial real estate, mortgage originations, and other types of default servicing, such as automotive loans, and that diversity helps them manage their way through periods when mortgage default activity is slow.

It's very important for law firms to do whatever they can to retain enough staff to handle the workload that will inevitably—eventually—come their way. And it's important for them to maintain some market presence, so they're top-of-mind for servicers and investors when they need overflow help or consider replacing their incumbent firms.

LL100: What has been a rewarding aspect of your role at Hello Solutions?

Delgado: I've had a chance to see the very best side of people. Shortly after I started Hello Solutions, I was diagnosed with cancer. I was upfront with my member firms about my situation and gave them the option of canceling our contracts—but not one of them did, and every one of them was incredibly supportive and understanding, which I believe helped me immensely in my recovery. We've built relationships that go beyond the traditional client/service provider model. There's nothing more gratifying than having my clients tell me what a difference I've made in their business, and that they consider me a critical part of their team. They trust me to be as committed as they are to help their firms survive and grow. And that trust has even led to our member firms helping each other by referring business and sharing best practices. I've been lucky to find some of the best attorneys in the industry who also happen to be some of the best people I've ever met.

Membership Note: Hello Solutions has entered into an exclusive, strategic relationship with Five Star Global and the Legal League 100 membership. Hello Solutions offers opportunities to connect Legal League 100 member firms to mortgage servicers and investors across the country who are looking for legal services in the areas of default servicing and foreclosures.

Legal League 100 members will have the first option to work with these prospective clients in areas not already covered by a Hello Solutions client, and there is no charge for opting into the Hello Solutions network.

To learn more, visit LegalLeague100.com/hello.

"Nevada" continued from Page 1

assessments. Until 2013 and 2015, the statute did not expressly require notice be given to the lender of the foreclosure nor expressly provide any right for the lender to obtain lien payoff.

Surrounding Controversy

In 2014, the Nevada Supreme Court, in what remains a controversial decision, affirmed the legislative intent of NRS 116.3116 and pointedly endorsed the dominion of the superpriority statue, holding that the foreclosure of an HOA's super-priority lien could lawfully extinguish a senior mortgage under the mandate of NRS 116.3116. SFR Investments Pool 1 v. U.S. Bank, 334 P.3d 408, 410 (Nev. 2014). SFR unequivocally decided:

1. an HOA has a true super-priority lien, not just a payment priority; and
2. the property foreclosure, whether judicial or nonjudicial, extinguishes a first deed of trust.

Dissatisfied with the mortgagee's argument, the Nevada Supreme Court concluded that the lender could have either:

1. Paid-off the full lien to avert its loss of security and request the HOA reimburse the amount exceeding the super-priority lien or
2. paid the HOA assessments through an escrow account to avoid disbursing its own funds.

In the wake of SFR and the derivative law of the case, Nevada witnessed a surge of quiet title actions aimed to ensure title was acquired free and clear of the senior mortgage. In response, the Federal Housing Finance Agency (FHFA) categorically withheld consent for all HOA lien foreclosures, contravening the Nevada Supreme Court's ruling in SFR.

The FHFA contemporaneously filed a surfeit of federal district court complaints and counterclaims asserting HERA. As a result, Congress granted FHFA certain privileges and exemptions including a "property protection" exemption. Under this exemption, when acting as conservator, no property of FHFA is subject to levy, foreclosure, or sale without the consent of FHFA and no involuntary lien(s) may attach to any FHFA property. 12 U.S.C. 4617 (j)(3). This congressional gesture offered the FHFA bona fide protection from the superiority statute but left lenders vulnerable and fully exposed.

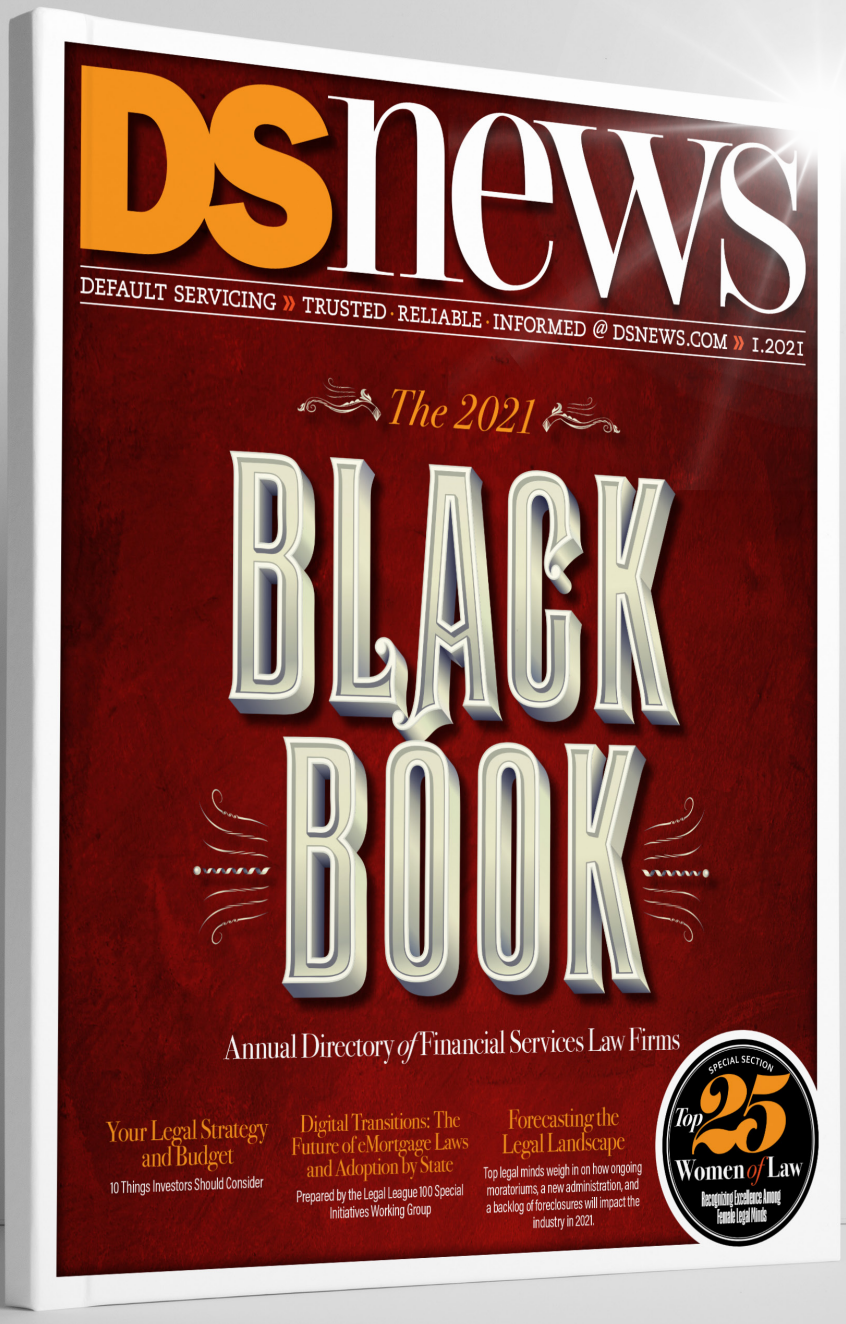
The Superpriority Statute Today

Six years after SFR bequeathed upon the Nevada HOAs a true super-priority lien with the capacity to extinguish a first deed of trust, lenders continue to challenge the constitutionality of the Nevada superpriority statute. In late fall 2020, in what may resonate beyond Nevada state lines, the United States Court of Appeals for the Ninth Circuit was asked to consider the federal constitutional question of whether the HOA superpriority "scheme" (as donned by the Court) either effectuates an uncompensated taking of property in violation of the Fifth Amendment or alternatively violates the Due Process Clause of the Fourteenth Amendment. The Ninth Circuit handily affirmed the district court's dismissal of the quiet title action commenced by first lien holder Wells Fargo Bank, N.A. against the purchaser of real property at a foreclosure sale. Effectively representing all lenders in opposition of NRS 116.3116, Wells Fargo sought a declaration that the foreclosure sale was invalid and that the bank's deed of trust continued as a valid encumbrance against the real property located in Las Vegas, alleging brazenly on appeal that the superpriority statute and authorized HOA foreclosure violated the lender's constitutional rights.

Factual Background and Procedural History

In 2008, homeowners purchased a home within the Copper Creek HOA in Las Vegas and were subject to the covenants, conditions and restrictions, including an obligation to pay dues

"Nevada" continued on Page 10

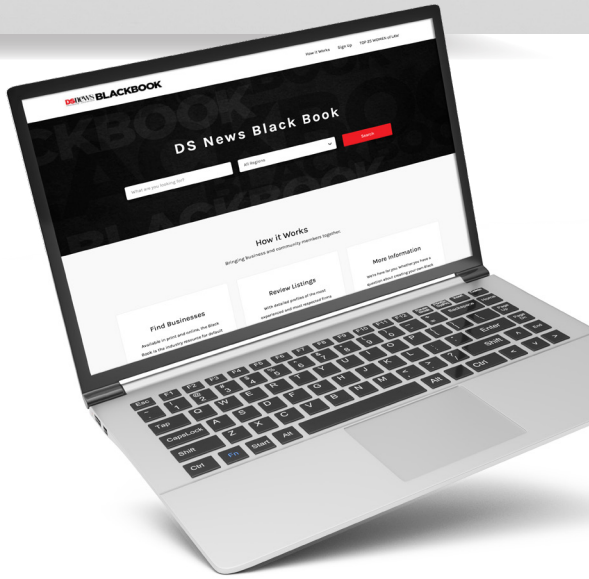


The 2021 Black Book

The Leading Firms. The Ultimate Resource.

Bringing business and community members together for more than a decade, the Black Book Directory helps lenders, servicers, and vendor managers find qualified legal professionals from respected firms in the default servicing industry that manage bankruptcy, foreclosure proceedings, loss mitigation, financial services, and more.

Available both in print and online, the Black Book Directory is the most comprehensive and detailed source of legal firms serving the default servicing industry and financial services law firms. It includes user-friendly detailed photo profiles organized by state.



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and other assessments to the HOA. The homeowners financed the purchase with a loan from Wells Fargo and to secure the loan, recorded a deed of trust in favor of Wells Fargo. In 2011, the homeowners defaulted on the loan and concurrently fell behind on their HOA dues, resulting in a lien for the delinquent assessments. Thereafter, the HOA foreclosed on the property to satisfy its lien and in 2013, the Mahogany Meadows Avenue Trust (Mahogany Meadows) purchased the property at public auction thereby extinguishing Wells Fargo's deed of trust. Notably, Mahogany Meadows purchased the property for $5,332.00, an amount substantially less than the value of the property estimated at $200,000.00.

Following the foreclosure, Wells Fargo initiated a quiet title action seeking a declaration that the foreclosure sale was invalid and that the lender's deed of trust survives as a valid encumbrance against the real property on the grounds that NRS 116.3116 violates the Takings Clause and the Due Process Clause of the U.S. Constitution. The district court dismissed Wells Fargo's complaint for failure to state a claim relying heavily on the Supreme Court of Nevada's decision in the 2017 action, Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortgage, a Division of Wells Fargo Bank, N.A., 388 P.3d 970, 975 (Nev. 2017) where the court concluded an HOA acting pursuant to NRS 116.3116 cannot be deemed a state actor nor did the Nevada Legislature deprive the lender of its constitutional rights by enacting the superpriority statute.

Thereafter, Wells Fargo unsuccessfully moved for reconsideration, arguing for the first time that because the borrower was an active-duty member of the Army Reserve, the HOA foreclosure sale was a flagrant violation of the Servicemembers Civil Relief Act, 50 U.S.C. §3953. The district court denied Wells Fargo's motion because Wells Fargo was unable to explain why it did not reveal or know of its borrower's status earlier.

5th Amendment/Takings Claim

The Takings Clause of the Fifth Amendment, made applicable to the states under the Fourteenth Amendment to the United States Constitution, provides private property shall not be taken for public use without just compensation. In determining whether a regulation, or in this instance, a statute, constitutes a compensable "taking," courts consider three factors:

1. The economic impact on the property owner,
2. the interference with investment backed expectations, and
3. the character of the government action.

Intended to bolster the HOAs enforcement authority, the superpriority statute facially appears to illicitly and unjustly strip lenders of their prerogative as first lien holders without compensation.

Certainly, that is the argument zealously advanced by Wells Fargo in Wells Fargo v. Mahogany Meadows Ave. Trust (2020). However, the Ninth Circuit decidedly disagreed. While the Supreme Court has long recognized that liens such as Wells Fargo's deed of trust constitute property under the Takings Clause, the Ninth Circuit concluded that one of the requisite prongs of eminent domain is simply not satisfied as there is a profound absence of government action.

Pursuant to Nevada law, later fortified by the court's ruling in SFR, we now understand that HOAs in the Battle State enjoy a superpriority lien on association properties for unpaid assessments that has the capacity to extinguish a first deed of trust held by a mortgage lender. The appellate panel, agreeing with both the Nevada Supreme Court in Saticoy Bay, and its predecessor district court ruling in SFR, held that Wells Fargo did not suffer an uncompensated physical nor regulatory taking under the Takings Clause of the U.S. Constitution.

Interestingly the Court notes the potential for a philosophical conundrum in its analysis of the purported taking of Wells Fargo's lien, which is an intangible interest. Nonetheless, Wells Fargo, under the physical or regulatory analysis, is plagued with the onus of identifying what action actually constitutes the egregious taking.

Nevada witnessed a surge of quiet title actions aimed to ensure title was acquired free and clear of the senior mortgage. In response, the Federal Housing Finance Agency (FHFA) categorically withheld consent for all HOA lien foreclosures, contravening the Nevada Supreme Court's ruling in SFR.

First, importantly rejecting Wells Fargo's claim that the foreclosure proceeding initiated by the HOA, Mahogany Meadows Ave. Trust, amounted to a taking, the Ninth Circuit noted that the HOA's foreclosure proceeding was not, nor could it liberally be construed as, a taking under any circumstance because the Takings Clause governs the conduct of the government exclusively and not that of a private actor. Here, the Copper Creek HOA, which conducted the foreclosure, is a private entity not an arm of the State of Nevada and not beholden to nor subject to the parameters of the Takings Clause. As such, the HOA's foreclosure could not identify as a taking and therefore Wells Fargo's claim of foul play was moot.

Secondly, the Ninth Circuit rejected Wells Fargo's contention that the legislative enactment of NRS 116.3116 itself embodied a taking because:

1. Although the HOA's action was authorized by Nevada law, that authorization and resultant foreclosure sale by a private actor does not metamorphose into government action, and
2. the enactment of the superpriority statute predated origination of Wells Fargo's lien on the property, meaning Wells Fargo could not demonstrate that it had suffered an uncompensated taking as defined by the Takings Clause.

The Court relied on Saticoy Bay where the Nevada Supreme Court held that the extinguishment of a subordinate deed of trust through an HOA's nonjudicial foreclosure did not materialize as a violation of the Takings Clause. Moreover, the conspicuous factual timeline here challenged Wells Fargo's position that it should maintain its lien unimpaired by a purported subordinate HOA lien. The timeline of events revealed the following:

NRS 116.3116 was enacted in 1991;

The HOA's covenants, condition and restrictions, which created the obligation to pay dues, were recorded in 2003; and

Both events occurred before 2008 Wells Fargo acquired its lien.

In a nutshell, the interest Wells Fargo asserted, that being its right to maintain its lien unimpaired by the HOA lien, was in fact not even part of its title from the onset. Furthermore, though Wells Fargo argued that this interpretation yields a harsh result by allowing a small HOA lien to wipe out the value of a much larger deed of trust, the Court reminded that property-tax liens are likewise often lesser than mortgage liens but nonetheless, routinely abate the lender's often substantial interest, and do so judiciously.

Fourteenth Amendment—Due Process Claim

The Due Process Clause of the Fourteenth Amendment requires the government to provide notice reasonably calculated to apprise all interested parties of the pendency of the action and to afford said parties of the opportunity to object to the same. Wells Fargo relied on the Due Process Clause in its appeal to challenge the constitutionality of the HOA foreclosure, specifically pointing to what the lender characterized as deficient notice.

Nevada law requires that upon foreclosure, HOAs provide all junior interest holders the following:

1. Notice of default and election to sell the property to satisfy the lien;
2. Notice of the amount of assessments and sums owed; and
3. Notice of time and place of foreclosure sale.

See NRS 116.31162(b) and 31635(1).

Well Fargo argued, while conceding receipt of actual notice, that the notice provided by the HOA was not reasonable because it did not articulate that the HOA was foreclosing to satisfy the superpriority portion of the lien, state how large the superpriority lien portion was, or warn that Wells Fargo's lien was in jeopardy.

In its analysis, the Court first cautioned that the foreclosure sale itself was not a state or government action necessarily subject to the Due Process Clause. Notwithstanding this fact, the Ninth Circuit nonetheless rebuffed the lender's remonstration finding that Wells Fargo received precisely the notice prescribed by Nevada Law and therefore, constitutionally adequate notice of the foreclosure sale. Further, the Court held that simply by conceding receipt of notice of the foreclosure sale Wells Fargo's due process rights were not violated.

A Hail Mary Pass

Anticipating the uphill battle of its Takings and Due Process claims, in what can best be characterized as a hail mary pass in further support of its appeal, Wells Fargo posited that the HOA foreclosure was unlawful under the Servicemembers Civil Relief Act and that the district court therefore abused its discretion in dismissing its complaint pursuant to Federal Rule of Civil Procedure 59(e). Though the Ninth Circuit did not contemplate Wells Fargo's rationale in detail, but rather politely admonished Wells Fargo for failing to raise the argument based upon evidence that was theoretically available earlier, it did not altogether dismiss this belated play, suggesting this would have been the lender's most persuasive tactic to challenge the HOA foreclosure and perhaps vacate the foreclosure sale and regain its position as a first priority lien.

The Take-Aways/Lessons Learned

1. Be proactive: Wells Fargo could have satisfied the HOA lien to avert loss of its security interest.
2. Brainstorm all possible defenses: Carefully evaluate potential defenses, like the Servicemembers Civil Relief Act, and do so early on. This translates to investigating your borrowers and closely examining the history of the loan.
3. Don't cry wolf: Pay attention to chronology. Create a timeline to determine whether the lender's lien predates the HOA recording before claiming foul-play.

The National Impact

Homeowners and lenders beware, 20 states, including the District of Columbia, have assessment priority statutes akin to NRS 116.3116, which are not random, but are based in whole or in part on the Uniform Common Interest Ownership Act. This list includes Alabama, Alaska, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and West Virginia. While each state's threshold for designating HOA liens as true priority liens that hold a higher priority in a foreclosure than a first lien mortgage varies among this list, the message to borrowers and lenders in Nevada and D.C. rings clear—if an HOA properly conducts a foreclosure sale of its super lien, and the mortgagee does not act to redeem its interest by satisfying the HOA assessment, then the mortgagee's interests can potentially be extinguished despite even the most valiant attempts.

Rosemarie C. Hebner *is an Associate in the New York office with a compelling background in New York litigation. She graduated with honors from Villanova University with dual B.A. degrees in Literature and Philosophy and additionally received her Master's in Education from Fairleigh Dickinson University. Hebner obtained her Juris Doctorate from the Elisabeth Haub School of Law at Pace University, earning an advanced certificate in Environmental Law. As part of the Houser team, Hebner represents corporations, financial institutions and other institutional clients.*

Eric Houser *received his Juris Doctorate degree in 1987 from the University of San Diego School of Law. Houser is the Managing Partner at Houser LLP, with offices in 11 states. Houser has successfully tried cases from Hawaii to Connecticut (and lots of places in between).*

Member Highlights

Diaz Anselmo & Associates, P.A. Announces Staff Changes

Diaz Anselmo & Associates, P.A. announced that Richard Cohn is expanding his role to Managing Attorney for Multistate Default and will work in tandem with the Firm's Operations Director in the multistate default practice. Cohn has been practicing creditor rights for over 24 years. Additionally, Chris Iaria is being promoted to serve as the Managing Attorney for Midwest Litigation and will work with the firm's Litigation Partner on Midwest contested and litigation issues. Iaria has been with the Firm for eight years and has been practicing for 10 years. He has the focus and experience that will assure the best possible client representation. Bryan Hughes is expanding his role to include being the Managing Attorney of Midwest Default. He will be the Midwest arm of the default team, working closely with Cohn. He joined the firm in 2012 and has been intimately involved in all court operations as well as leading the evictions practice. Nisha Parikh is expanding her role to include being the Managing Attorney of Bankruptcy and will have management oversight of the Firm's Multistate bankruptcy practice. Nisha has been with the firm for seven years and has been practicing for over 11 years. Michael Anselmo is expanding his role in the firm to being Managing Attorney of Real Estate. Anselmo will be overseeing all aspects of the real estate practice in all states within the firm. He has been a member of the firm for eight years and has been working with Tom Anselmo in managing the real estate practice.

Firefly Legal Celebrates 25th Anniversary

In January Firefly Legal marked its 25th anniversary. Since taking flight in 1996, Firefly has opened offices and expanded its footprint to help clients across the nation. It has developed innovative technological solutions to optimize maximum results for its clients. Procedural changes have been implemented within clients' offices and also the courts. Its staff members have served on industry boards and committees while being recognized with numerous awards. "Throughout all the years, one thing has always remained steadfast: our great clients. Our focus has always been to be a true partner to them and constantly improve their business and lives in every way possible. We continue to tenaciously pursue greatness for our clients well into the future. I want to thank all the people who have helped Firefly reach this tremendous milestone." Keith McMaster Co-Founder and CEO. Firefly Legal is family-owned and was started by fatherson duo Ken and Keith McMaster.

Potestivo & Associates Adds Melissa Z. Prantzalos

Potestivo & Associates P.C., a top tier creditors' rights law firm, announced the hiring of Melissa Z. Prantzalos as Supervising Litigation attorney in the Rochester, Michigan, office of the firm. A native Michigander, Prantzalos brings tangible expertise in real estate and title law litigation. With over 13 years' experience representing loan servicers, banks, and other financial institutions, Prantzalos will be a strong addition to the litigation team at Potestivo & Associates. Prantzalos is licensed in the state of Michigan and admitted to practice in the U.S. District Court for the Eastern and Western Districts of Michigan. Managing Partner Brian Potestivo commented, "We are excited to bring Melissa onboard. Her depth and litigation experience in the default servicing industry adds considerable strength to our team. As always Potestivo & Associates is dedicated to diversity hiring and promotion. Although it has been a difficult year for business in both Michigan and Illinois, we are committed to the further development of our firm and continue to enhance technology and roll out new initiatives with a growth mindset for 2021."

Linda Orlans Accepts Invite to Harvard Advanced Leadership Team

Linda Orlans, Orlans PC, Executive Chair, has accepted an invitation to join Harvard University's 2021 Advanced Leadership Initiative. She will have the privilege of working on society's most pressing challenges with some of the most passionate and talented people in the world. As a Fellow, Orlans plans on turning what she has learned over her lifetime into meaningful change for others. She is passionate about making civil justice more accessible and affordable for all people. It is estimated that 80% of people who go to court do so without a lawyer. Better known as a Justice Gap, Orlans looks forward to joining the thought leaders at Harvard and her other ALI cohorts to make the legal system better for all people. A champion of Detroit, Orlans has served in leadership roles with the Detroit Institute of Arts, Michigan Opera Theatre, Junior Achievement, The Heat and Warmth Fund, and Beyond Basics. She is a trustee, past board chair, and alumna of the year at Michigan State College of Law, trustee for Michigan's State Building Authority, and a member of the Michigan Supreme Court's Attorney Discipline Board.

Stern & Eisenberg Welcomes Arsenio Rodriguez

Stern & Eisenberg, a leading, regional, full-service law firm, announced changes to its New York Management team. Stern & Eisenberg noted that **Arsenio Rodriguez** has joined the S&E team as the New York Managing Attorney. Rodriguez is a seasoned, bilingual litigator who brings his experience and superior skills in negotiations, mediation, and trial practice to the firm. S&E described Rodriguez as enthusiastic about client interactions, oral advocacy, motions, and discovery. Rodriguez started his law career at the Queens County District Attorney's Office, where he tried multiple cases to verdict and negotiated hundreds of plea deals with members of the defense bar in New York. Rodriguez continued to develop his passion for all aspects of litigation representing companies and individuals. Rodriguez brings a commitment to law and a dynamic approach to partnerships with his clients and team members. He is an alumnus of George Washington University Law School and he graduated from Lehigh University with a BS in Finance and Marketing.

In Memoriam – Edward William Kirn, III

Edward William Kirn, III, of Moorestown, New Jersey, passed away suddenly on January 4, 2021 at the age of 54. Kirn was born in Pittsburgh, Pennsylvania and relocated to Moorestown to start his career and family. He went to Penn Hills High School and graduated from Allegheny College with a Bachelor of Science degree. Later he went on to study law and obtain his Juris Doctorate from Ohio Northern University, where he met his wife. Kirn was a partner in Powers Kirn, LLC, and practiced mortgage banking law in New Jersey and Pennsylvania for more than 26 years. He managed the litigation department and client relations. He regularly served on many panels and was a featured speaker at many industry conferences. He leaves behind his wife, Sarah (nee Powers) and two sons, Andrew and Edward "Teddy," his parents, Edward W. Kirn, Jr. and Joanne (nee Bizzack), his sister Christine Heffner (Randy), and many other aunts, uncles, cousins, nieces, nephews and other family who loved him dearly.

Command Paper

Digital Transitions: The Future of eMortgage Laws and Adoption by State

PAPER FORWARD: This command paper was developed by LL100's Special Initiatives Working Group (SIWG). The SIWG works tirelessly to be a leading force for industry standards, education, and market research. In advancement of this mission, the SIWG is providing this important guide on e-Notes and e-Mortgages to further educate attorneys, lenders, servicers, and other industry professionals as the industry rapidly moves into a more electronic document world. Our industry has historically facilitated the origination and enforcement of mortgages and notes via paper and a wet signature. More rarely have our industry seen on the enforcement side via electronic, or paperless, mortgages and notes. However, the Congress and most states passed laws almost 20 years ago that legitimize the use of electronic loan documents in commerce. The SIWG's goal is that the following guide will assist the industry as we swiftly move into a more electronic document world during these times.

The Legal League would like to recognize the following members of the Special Initiatives Working Group for their contribution to this project.

Ryan Bourgeois | Michelle Gilbert

Marissa Yaker | Seth Greenhill

History of the eMortgage

Our industry facilitates the origination and enforcement of mortgages and notes—the paper variety. Electronic, or paperless, mortgages and notes are more rarely seen on the enforcement side.

Fannie Mae defines an eMortgage as "a loan for which the promissory note and possibly other documents (such as the security instrument and loan application) are created and stored electronically rather than by traditional paper documentation that has a pen and ink signature. Because some recording jurisdictions will not yet accept electronic documents for recordation, eMortgages may consist of a paper security instrument and an electronic note (e-Note)."[1]

In 2000, the U.S. Congress passed the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §7001, et seq. (ESIGN), which allows electronic signatures on contracts and retention of electronic records as long as those records are accessible to the parties and can be accurately reproduced by electronic transmission or by printing on paper.

Introduced in 1999, the model Uniform Electronic Transactions Act (UETA) established the legal equivalence of electronic records and signatures with paper records and physical signatures in order to facilitate electronic commerce. Only two states, Illinois and New York, haven't adopted UETA in some form.[2]

ESIGN and UETA closely resemble each other: their objective is to legitimize the use of electronic records in commerce throughout the United States.

Fannie Mae and Freddie Mac, who collectively own almost half of the American residential mortgage market (or a combined $5.5 trillion), worked at the direction of their conservator, FHFA, to look at barriers to electronic mortgages and notes. The GSEs formed the Uniform Mortgage Data Program (UMDP), which published the eMortgage Foreclosure Educational Aid on March 30, 2017.[3]

[1] https://singlefamily.fanniemae.com/media/4601/display

[2] https://www.uniformlaws.org/committees/community-home?CommunityKey=2c04b76c-2b7d-4399-977e-d5876ba7e034

[3] http://www.freddiemac.com/singlefamily/sell/pdf/eMortgage_Foreclose_Educational_Aid.pdf

Key Terms Relating to eMortgages and eNotes

- *Transferrable record:* An electronic record that would be a note under Article 3 of the Uniform Commercial Code (UCC) if it were in writing. Borrower must agree it is transferable record related to a loan secured by real property. See, ESIGN 15 U.S.C. §7021; UETA §16.
- *Control or controller:* Person having control, in the MERS® e-Registry (e-Registry evidencing transfer of interests in e-Notes), controller, of a transferable record is the equivalent of a "holder," as described in UCC, with same rights and defenses as a holder; a person has control of a transferable record if the system employed for evidencing the transfer of interests in the transferable record reliably establishes that person as the person to which the transferable record was issued or transferred. (ESIGN 15 U.S.C. §7021 (b); UETA §16b).
- *Authoritative Copy:* ESIGN and UETA requires that a single, unique, identifiable, and generally unalterable copy of the transferrable record be maintained. For example, while there can be many copies of each e-Note, there can be only one authoritative copy of the e-Note, and only the Controller of the authoritative copy can enforce it.
- *Location:* MERS® e-Registry tracks the "location" of every e-Note, using the name of the Controller or its designee, that stores the e-Note in an e-Note Vault, like a document custodian storing an original paper note.[4]

Process Flow of e-Note Delivery

- e-Note electronically signed by the borrower through use of an electronic closing system.
- e-Closing system secures electronically signed documents by applying a tamper-evident seal to the entire transferable record (e-Note).
- e-Note must be registered on MERS® e-Registry within one business day.
- Lender transmits e-Note to e-Note Vault.
- Lender submits a request to the MERS® e-Registry to transfer control of the e-Note from the lender to the GSE, if applicable.

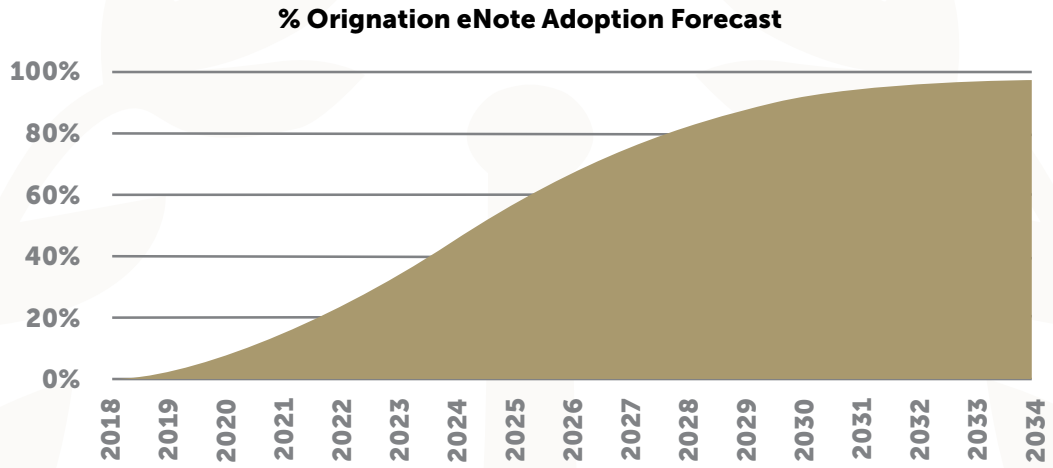
Note: e-Mortgages would be recorded in county or local records to create the lien on the real property.

History and Background of Understanding e-Notes

In February 2020, the 11 Federal Home Loan Banks, chartered by the U.S. Congress in 1932 to promote homeownership, created Electronic Promissory Notes (e-Notes) Model Collateral Acceptance Requirements and Guidelines, which established guidelines for its members (6,900 banks, credit unions, insurance companies, community development financial institutions) for accepting e-Notes as collateral.

Use of e-Notes and e-Mortgages skyrocketed in the first quarter of 2019 with the origination of 19,000 e-Notes, compared to 17,000 e-Notes in 2017. A writer for Iron Mountain used a differential equation to predict adoption of e-Notes. His model predicted a 98% adoption rate for originations in 15 years, or the year 2034.

[4] https://www.mersinc.org/products-services/mers-esuite/mers-enote-solutions



Source: Iron Mountain

Understanding e-Notes

The legal framework for e-Notes was created by the Uniform Electronic Transactions Act in 1999 and the passage of the Electronic Signature in Global and National Commerce Act in 2000. The acts ensure that e-Notes and other electronic documents are accepted and encourages the growth of electronic commerce. The Uniform Electronic Transactions Act has been adopted by all states except New York and Illinois, however both have adopted similar statues. Many servicers were initially reluctant to originate e-Notes, and Ginnie Mae did not initially authorize the purchase of e-Notes. The financial crisis likely hampered the adoption of e-Notes, as mortgage companies had to focus their attention on other matters.

Another factor in the adoption of e-Notes originations is the consumer appetite to electronically close the mortgage. For most borrowers, their home mortgage is the largest financial transaction they will ever be a party to. As a result, some may be hesitant to electronically close such a large obligation. Instead, the borrower may feel more comfortable meeting face to face with the closing agent. Younger and more technologically savvy millennials are more comfortable with the digital process and are likely to increase originations. Also, with the COVID-19 pandemic and stay-at-home orders, many states relaxed rules regarding electronic notarization and lenders and borrowers increased their use of e-closings since they were unable to attend physical closings.

Fannie Mae & Freddie's e-Note Guidelines

In 2005, Fannie Mae and Freddie Mac began purchasing e-Notes and set forth detailed guides for the purchase and servicing of e-Notes. Per the guides, an originator must obtain separate approval from Fannie Mae to originate e-Notes. The guides set forth all the technical specifications required for approval. Once approved to originate e-Notes, the seller may originate any product as an e-Note except for the following:

- Mortgages secured by mortgaged premises located in Puerto Rico
- Texas Equity Section 50(a)(6) mortgages
- New York Consolidation, Extension, and Modification Agreement (NYCEMA) mortgages (Note: An e-Mortgage may be refinanced into NYCEMA using the NYCEMA process provided in Section 1402.17.)
- Mortgages for which the borrower is a trust of any type.[5]

[5] Freddie Mac Single-Family Seller/Servicer Guide Sec. 1402.7

There are separate guidelines for to be approved as an e-Note servicer. Being approved to originate and sell e-Notes does not qualify the servicer to service an e-Note. If the servicer wishes to be authorized to service e-Notes, they should contact Fannie Mae and Freddie Mac for approval. The minimum requirements to service e-Notes for FHLMC are as follows:

- Be a member in good standing of MERSCORP Holdings, Inc.
- Be an approved member and user of the MERS® System, MERS Delivery, and MERS e-Registry
- Have an approved e-Note Vault System (Note: See Section 1402.5 for e-Note Vault System requirements. If the e-Note Vault System was not previously reviewed by Freddie Mac, the e-Note Vault System must go through a review and approval process, similar to the process described in Section 1402.3, as applicable.)

The e-Note Vault System must have the ability to:

- Maintain a copy of the Authoritative Copy of the e-Note and its Tamper Evidence Seal for the life of the e-Mortgage plus seven years
- Identify and track all e-Mortgages that the seller/servicer services for Freddie Mac
- Record all status changes and required actions that occur during the life of the e-Mortgage in the MERS® e-Registry
- Accept an offer of change of control from Freddie Mac, in the event of a foreclosure or other Freddie Mac Default Legal Matters with respect to an e-Mortgage, as applicable
- Create an offer of change of control to Freddie Mac, in the event of termination of a foreclosure or other Freddie Mac Default Legal Matters with respect to an e-Mortgage, as applicable
- Confirm that the MERS e-Registry accurately always reflects the controller and location
- Accept a transfer of the Authoritative Copy of the e-Note from Freddie Mac's e-Note Vault System using MERS e-Delivery, in the event of an e-Mortgage repurchase by the seller/servicer
- Securely store electronic copies of Mortgage File Documents (Note: A seller/servicer can store all Electronic Mortgage File Documents in its e-Note Vault System if the e-Note Vault System allows such storage. If the e-Note Vault System does not permit storage of Electronic Mortgage File Documents other than the e-Note, the seller/servicer must have a secure e-Storage System for storing such documents. (See Section 1402.8(c)(iv) for e-Storage System requirements.)
- Have written e-Mortgage Servicing policies and procedures in place
- Meet any other e-Mortgage requirements imposed by Freddie Mac[6]

In addition, if the loan is modified, the servicer should modify the loan in electronic format. Servicers should also be aware that while most state laws allow for the conversion of an e-Note to a paper Note, this should not be done without the GSE's approval.[7]

[6] *Id.* at Sec. 1402.9

[7] *Id.* at Sec. 1402.10

HUD & Ginnie Mae e-Note Guidelines

In 2018, as the impacts from the financial crisis began to subside and more servicers began to announce the creation of e-Note origination platforms, Ginnie Mae announced it would create guidelines to begin accepting digital collateral beginning in 2020.

In October of 2019, Ginnie Mae released its Digital Collateral Guide and requested input by December 2019.[8] The guide outlines a pilot program for servicers and originators to be approved to originate and service e-Notes. In addition to similar technical and process requirements to that of the GSEs, the Ginnie Mae program requires that applicants have demonstrated experience in serving e-Notes.

While Ginnie Mae does not generally issue any specific forms or language for loan documents, it does list certain elements and sample language for e-Notes. While the GSEs allow for loan modifications of e-Notes to be completed in electronic format also, Ginnie Mae requires the modification to be completed in paper format with wet-ink signatures.

Handling of e-Notes and e-Mortgages in Default

While law firms rarely see e-Notes and e-Mortgages, with their increasing popularity there are a few important items that need to be considered when foreclosing.

Starting from the beginning as a threshold question, what are an e-Mortgage and e-Note? "An e-Mortgage is a mortgage for which the promissory note and possibly other documents are created and stored electronically rather than by using traditional paper documentation that has a pen and ink signature."[9] The legal basis for proceeding under e-Mortgages stems from the Electronic Signatures in Global and National Commerce Act (E-Sign), and most states have adopted laws based on the Uniform Electronic Transactions Act (UETA).[10] While an e-Note is defined as the electronic equivalent of a promissory note, it is a transferable record.[11] This leads to the next legal questions:

- Are they legally enforceable?
- From where is the authority derived?

The legality of e-Notes and e-Mortgages was established in 2000 with the enactment of the federal Electronic Signatures in Global and National Commerce Act (ESIGN) and the Uniform Electronic Transactions Act aka eCommerce laws.[12] These eCommerce laws provide that a transferable record created in conformity with their requirements is the functional equivalent of a paper negotiable promissory note/mortgage and is just enforceable against the borrower as its written counterpart.[13]

So, what makes them "just as enforceable?" For an e-Note to qualify as a transferable record at the time of issuance, an e-Note must be electronically created, presented to the borrower, and executed entirely on information processing systems.[14]

[8] *Id*. at Sec. 1402.10

[9] Enabled by Lenders, Embraced by Borrowers, Enforced by the Courts: What you Need to Know about Enotes, by Margo H.K. Tank and R. David Whitaker, May 1, 2018

[10] FannieMae, eMortgage Delivery, Frequently Asked Questions, March 2007

[11] FannieMae, eMortgage Delivery, Frequently Asked Questions, March 2007

[12] Enabled by Lenders, Embraced by Borrowers, Enforced by the Courts: What you Need to Know about Enotes, by Margo H.K. Tank and R. David Whitaker, May 1, 2018

[13] Enabled by Lenders, Embraced by Borrowers, Enforced by the Courts: What you Need to Know about Enotes, by Margo H.K. Tank and R. David Whitaker, May 1, 2018

[14] Enabled by Lenders, Embraced by Borrowers, Enforced by the Courts: What you Need to Know about Enotes, by Margo H.K. Tank and R. David Whitaker, May 1, 2018

Further, it must otherwise qualify as a negotiable promissory note under Article 3, if it were in writing; the borrower must expressly agree that the instrument is a Transferable Record; and must be signed and must reliably establish the identity of the person entitled to "control" the e-Note (Controller).[15] To ensure the authenticity, the tamper-evident seal is a kind of "digital thumbprint" of the e-Note, which is stored on the MERS e-Registry and can be verified at any point in the loan's life by the various business partners who may hold the e-Note at different times. [16] Additionally, the eCommerce laws provide a safe harbor for satisfying the rules establishing Control (safe harbor), which lay out the following conditions to ensure same. They are:

- A single authoritative copy of the record exists that is unique identifiable, unalterable;
- The authoritative copy identifies the person asserting control as either the person to whom the Transferable Record was issued or the person to whom the Transferable Record was most recently transferred;
- The authoritative copy is communicated to and maintained by the person asserting control or his designated custodian;
- Copies or revisions that add or change an identified assignee of the authoritative copy can be made only with the consent of the person asserting control;
- Each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and
- Any revision of the authoritative copy is readily identifiable as an authorized or unauthorized revision.

Leading to the discussion of MersCorp Holdings, Inc (MERSCORP) services, MERSCORP developed the MERS e-Registry in cooperation with several mortgage industry stakeholders. The MERS e-Registry does not store the actual e-Note, but instead only stores and tracks identifying information about it, including the e-Note's digital footprint, the name of the Controller, and the location of the note. The authoritative copies of the e-notes themselves are stored in an e-Vault. It records all transactions on the MERS e-Registry record. [17]

Common Issues in Handling e-Notes and e-Mortgages

Now that we have addressed a brief of overview of what they are, the legality of same, and where to find to find them, let us get into the common issues that we see in the default industry. To start with, we understand the benefits to utilizing e-Notes and e-Mortgages, as it eliminates the need for paper, increases capital efficiencies (achieving quicker warehouse turn times, increasing liquidity for investors), eliminates lost notes, improves audit trials, increases process efficiencies and automation, reduces security needs. [18]

Now come the possible issues with proceeding on them as it relates to foreclosure:

- *Different Terminology:* Key terms when dealing with e-Mortgage and e-Notes include:

[15] Enabled by Lenders, Embraced by Borrowers, Enforced by the Courts: What you Need to Know about Enotes, by Margo H.K. Tank and R. David Whitaker, May 1, 2018

[16] eMortgage Frequently Asked Questions, MBA Technology: Where are you the Road to E-Mortgages, MBA Residential Technology Committee, eMortgage Adoption Task Force, March 9, 2007

[17] MERS, Mortgage Innovation: eNotes and the MERs eRegistry, www.mersinc.org/mers-eregistry

[18] Mortgage Innovation: eNotes and the MERS eRegistry, www.mersinc.org/mers-eregistry

- *Transferable Record:* "An electronic record that would be a Note under Article 3 of the Uniform Commercial Code (UCC) if it were in writing. To be a transferable record, the issuer (borrower) must have agreed the document is transferable record and the document must relate to a loan secured by real property."[19]
- *Control, aka as the Controller:* This means that a "person has a control of a transferable record if the system employed for evidencing the transfer of interests in the transferable record reliably establishes that person as the person to which the transferable record was issued or transferred." (ESIGN 15 U.S.C. 7021(b); UETA 16b).
- *Authoritative Copy:* "a system satisfies the conditions of ESIGN and UETA if it maintains records in a manner such than an "authoritative copy" of the transferable record exists." It must be a single, unique, identifiable, and generally unalterable copy.[20]
- *Location:* The MERS e-Registry tracks the location of every e-Note.

- *Proving Standing:*
  - This includes getting the MERS transaction history into record and guiding the court through the chain of transfers. Also, important to note here: pursuant to MERS Rule Number 8, any member as of September 1, 2011, that initiates a foreclosure or files a legal proceeding in MERS' name could be sanctioned by MERSCORP Holdings pursuant to Rule 7.
  - Additionally, when reviewing Assignment of Mortgages from MERS, one will notice that the "language indicating that the note is being assigned to MERS is prohibited in Assignments out of MERS."
  - Confirming whether one can plead "holder" varies on jurisdiction.
- *Proving "control" of the e-Note:*
    - This is where the authoritative copy comes in and can sometimes be supplemented by the "summary information sheet" describing the bank as the "Controller" of e-Note and proving possession.
- *Proving and providing the transferable record, and to whom the e-Note/e-Mortgage has been transferred*
- *Knowing Your State Law:* Whether the applicable jurisdiction allows for same/how it differs from the ESIGN Act and UETA and knowing the requirements.

Items to consider from a bankruptcy perspective for when handling same:

- Original Documents: In bankruptcy proceedings, there is no requirement for the creditor to produce the original documents in order to evidence standing. In the event the creditor files a Motion for Relief from the Automatic Stay, the creditor must prove standing by showing is has the legal right to bring about the proceeding.
- To do this, there must be a note endorsed to the "Action in the Name of" (AITNO) or blank as well as the chain of assignment of mortgages. In addition, if state law requires perfection of the mortgage or deed of trust, a recorded copy must be attached. More importantly, compared to judicial foreclosure proceedings in most states, there is no need to produce the originals in bankruptcy court.

[19] Uniform Mortgage Data Program, eMortgage Foreclosure Educational Aid, Document Version, 1.0, 3/30/17, page

[20] Uniform Mortgage Data Program, eMortgage Foreclosure Educational Aid, Document Version, 1.0, 3/30/17

- Challenging State Court Rulings: As is sometimes the case, a borrower who lost in state court (i.e., had a foreclosure judgment entered) attempts to challenge the state court's decision to issue the judgment by arguing the creditor lacked standing and or that the borrower never signed the note and mortgage. Similarly, the borrower may also argue that the creditor failed to produce the "original" note. This may be more common with e-notes and mortgages due to the electronic signatures and lack of any "original."

    - Fortunately, the Rooker-Feldman doctrine prevents this. This doctrine bars lower courts from undertaking appellate review of state court decisions. *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 462, 103 S. Ct. 1303, 1304, 75 L. Ed. 2d 206 (1983); see also *Rooker v. Fid. Tr. Co.*, 263 U.S. 413, 414, 44 S. Ct. 149, 149, 68 L. Ed. 362 (1923).

    - The following requirements must be met for the Rooker-Feldman doctrine to apply: (1) the federal plaintiff lost in state court; (2) the plaintiff complains of injuries caused by the state-court judgments; (3) those judgments were rendered before the federal suit was filed; and (4) the plaintiff is inviting the district court to review and reject the state-court judgments. *Exxon Mobil v. Saudi Basic Industries Corporation*, 544 U.S. 280, 284, 125 S. Ct. 1517, 1521-22, 161 L.ed.2d 454 (2005). If applicable, the federal court lacks subject-matter jurisdiction over the federal plaintiff's claims and the claims must be dismissed.

    - This means that a borrower who files bankruptcy after the entry of the entry of a foreclosure judgment but prior to a sale (as is most commonly the case) will not be able to re-litigate any issues raised in the state court regarding the e-note and mortgage. In other words, the bankruptcy court does not act as an appellate court for state court decisions.

In this new world we live in, it is important to take a moment and research the applicable laws/cases in your jurisdiction on how best to handle same.

The Legal Technicalities—Admission of e-Note Records as Evidence at Trial

While the use of the e-Note has exploded in the first quarter of 2020, unfortunately, the same cannot be said for the use of e-Notes at trial, which continue to be problematic throughout the litigation process. It is important to recognize the differences between the admissibility of a "wet-ink" Note and an e-Note, as a failure to properly admit the electronic records into evidence will prove a fatal flaw to the Plaintiff's case.

Most courts throughout the nation are plodding in their adoption and reliance upon technology and electronic records. The most conventional judges are insistent upon seeing, touching, and verifying the "wet-ink" Note, to prove the existence of the financial obligation and the plaintiff's standing to commence the subject foreclosure action. Reliance upon electronic records, including the e-Note and the proof of transfer and ownership, is a clear departure from the standards imposed by the courts for countless years. However, relevant case law and state-specific statutes clearly allow for the admission of such exhibits into evidence, and the reliance upon such exhibits to prove a plaintiff's entitlement to judgment.

To prove the existence of the loan and standing in a case involving an e-Note, the plaintiff must produce and admit the e-Note and the MERS registry records at the time of trial. These documents should also be exchanged, if requested, during the discovery process to avoid the possibility of evidentiary preclusion at the time of trial. All such documents should be admitted as business records at the time of trial despite the possibility/likelihood that such "transferable records" were not created by the current plaintiff nor the current loan servicer.

Transferable records are governed by 15 U.S.C.S. 7021, which defines a transferable record as an electronic record that:

- would be a note under Article 3 of the Uniform Commercial Code if the electronic record were in writing;
- the issuer of the electronic record expressly has agreed is a transferable record; and
- relates to a loan secured by real property.

It further states that a transferable record may be executed using an electronic signature.

Subsection (b) of 15 U.S.C.S. 7021 states that "a person has control of a transferable record if a system employed for evidencing the transfer of interests in the transferable record reliably establishes that person as the person to which the transferable record was issued or transferred." The federal statute further states, within subsection (c), that, "if requested by a person against which enforcement is sought, the person seeking to enforce the transferable record shall provide reasonable proof that the person is in control of the transferable record. Proof may include access to the authoritative copy of the transferable record and related business records sufficient to review the terms of the transferable record and to establish the identity of the person having control of the transferable record."

The difficulty begins with the admission of the "related business records" to prove the control of the transferable record at the time of the commencement of the subject foreclosure action.

In New York, business records are governed by CPLR 4518(a), which defines such a record as "any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter." The statute further enumerates the admissibility requirements of electronic records by stating that, "an electronic record, used or stored as such a memorandum or record, shall be admissible in a tangible exhibit that is a true and accurate representation of such electronic record. The court may consider the method or manner by which the electronic record was stored, maintained, or retrieved in determining whether the exhibit is a true and accurate representation of such electronic record."

While the path to admissibility is clearly enumerated, there are obstacles along the way. For example, what if the loan servicer and/or the plaintiff did not create these records because they were not involved in the origination of the loan nor the transfer process through the MERS registry? If a prior entity was involved, the current servicer will not have the requisite knowledge as to how the record was created, stored, or maintained before the loan was transferred to the current plaintiff and/or servicer. This lack of knowledge is a hurdle to proving the plaintiff's standing and to the plaintiff's entitlement to judgment.

Recently, the Second Department of New York's Appellate Division held that a loan servicer could testify to the records that were created by a different entity provided that the servicer proved that the records were incorporated into its system(s) of records and relied upon in the daily servicing of the subject loan. In *Bank of N.Y. Mellon v. Gordon*, 171 A.D.3d 197 (2nd Dept. 2019), the court specifically held that "such records may be admitted into evidence if the recipient can establish personal knowledge of the maker's business practices and procedures or establish that the records provided by the maker were incorporated into the recipient's own records and routinely relied upon by the recipient in its own business." This holding is supported by New York's Court of Appeals in *People v. Cratsley*, 86 N.Y.2d 81 (1995), as well as the other Appellate Divisions in previous decisions.

While the initial benefit of these decisions was to allow new servicers to testify to the records that were created by prior servicers, they also serve as an outline as to how to properly admit e-Notes and the MERS registry without requiring a witness and/or affidavit from MERS. Upon receipt of the servicing rights, the loan servicer should upload a copy of the e-Note and the MERS registry to its own systems. These documents should be reviewed to ensure the existence of the obligation, as well as the plaintiff's standing. This review serves as the plaintiff's/servicer's reliance on the incorporated records for the daily servicing of the loan. The witness will be asked to discuss his/her knowledge and training on the servicer's systems of record to build the proper foundation to admit the records into evidence. Once the foundation is laid, the witness will have to discuss the onboarding process that is undertaken when the records are received, and the ensuing review process, including the incorporation of the records into the servicer's systems, and the servicer's reliance on the records in the subsequent servicing of the loan. It is important that the witness testify that corrections would be sought if any errors or omissions are discovered during the onboarding process. This testimony creates an indicium of reliability of the records and contributes to the admissibility of the records.

These statutes and cases apply only to New York State. If your state does not allow the incorporation/reliance testimony, the plaintiff will have to produce a witness who has personal knowledge of the MERS' registry and how entries are made and maintained within the registry. Otherwise, the records will be deemed as inadmissible hearsay.

As technology, statutes, and case law continuously change, it is incumbent upon the default servicing industry to remain vigilant as to such changes. The increased knowledge and ability to use technology to the industry's advantage will inevitably result in shorter timelines, fewer undue delays, and a greater rate of success in the litigation process.

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