THE LEGAL LEAGUE
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From the Chair

Welcome to this Edition of the Legal League Quarterly, and best wishes for a great Summer 2023! As we move into summertime, already halfway through the year, we at the Legal League want to thank you for all your involvement so far this year, and we are excited at the outlook for our planned events throughout the rest of the year.

For 2023, the League has been busy at work!

Under the leadership of Jane Bond, the League's Webinar Committee has been providing timely and informative seminars, with cutting-edge topics and top speakers. These presentations provide excellent educational content to all member firms and the mortgage industry. The League's Strategic Initiatives Working Group (SIWG), under the direction of Chair Brooke Sanchez, remains active, putting out multiple whitepapers and sponsoring webinars, covering important issues related to HAF and FDCPA, among others. Our newly created Publications Committee is also underway, and the committee will be assisting in making our Legal League Quarterly the premier legal-issues publication in the mortgage industry.

Our Events Committee has been busy, having just completed our highly successful Spring Summit, and planning is underway to put together another outstanding Servicer Summit at the Five Star Conference in September. Our Spring Summit included outstanding panels on a wide variety of topics, including foreclosure, bankruptcy, and the market outlook. The morning was highlighted by a Keynote Address from Stanley Middleman of Freedom Mortgage. Our lunchtime fireside chat featured Erica Johnson-Seck from Mr. Cooper, who provided significant insight into current issues in the servicing industry. We truly thank all our speakers and guests who helped make this well-attended Spring Summit so successful.

Members of the League also participated in providing Certification Course training to servicing industry members during the Spring Summit, and we appreciate how the number of attendees continues to grow. We look forward to developing further and more in-depth training materials for more advanced certifications.

As our members know, we are at an interesting time in the mortgage industry. Unemployment remains at historically low levels, while inflation has remained a consistent force, depleting consumers' discretionary income. Interest rates have been increasing, further eroding consumers' spending power. In some areas of the country, we see home prices starting to decrease. Despite such inflationary pressures and higher rates for borrowing, foreclosure volumes have remained below historical levels. It will be interesting to see how these economic trends play out in the second half of 2023.

For the remainder of the year, and beyond, the League will be prepared to assist its members, provide keen analysis to its servicing partners, and stay ahead of the ever-increasing regulatory burdens for servicers and law firms. We at the Legal League want you to know that we are here to help you in any way. It is our goal to provide the highest level of membership benefit to our firms and our mortgage industry partners.

The League endeavors to involve all members in educational opportunities, written feature articles such as in this publication, speaking opportunities, advocacy, and social networking events. As always, we appreciate your input on how the League can continue to provide its members with the best value. We want to hear from you, and we look forward to your involvement with the League. Please feel free to reach out to me via email or phone, as I welcome your input and suggestions. Enjoy the summer, and we will see you in September at the Five Star Conference.

STEPHEN HLADIK
Hladik, Onorato & Federman, LLP
Legal League 100 Chair

Are "Zombie" Mortgages Real? Colorado Supreme Court Rejects Court of Appeals Holding that Statute of Limitations Starts Just Before Discharge in Chapter 7 Case

By **Holly R. Shilliday**

I enjoy watching the television show *Zombie House Flipping*. The show follows a team of friends as they locate and purchase a rundown, dilapidated house in Florida. The friends face many challenges and surprises (*e.g.*, alligators in the backyard pool) as they transform a "zombie" house into a beautiful home that is sold for a generous profit. As a real estate foreclosure attorney, I didn't realize I would be facing "zombie" mortgages in my legal practice. The Consumer Financial Protection Bureau (CFPB) recently issued guidance on what the CFPB called "illegal collection tactics on zombie mortgages." The CFPB promised to crack down on debt collectors trying to enforce time-barred debts, including debts arising from dormant second mortgages. Yet, as many of us know who practice in this field, it can be difficult to identify an actual "zombie" mortgage. From a distance, what appears to be a "zombie" mortgage may actually be a legally enforceable lien. In a closely watched statute of limitations case, the Colorado Supreme Court had occasion to examine an alleged "zombie" mortgage in *U.S. Bank Nat'l Ass'n v. Silvernagel*, 21SC386 (April 24, 2023)

In a 7-0 ruling, the Colorado Supreme Court ruled in favor of the lender and held that a bankruptcy discharge does not accelerate payment on a mortgage nor the remaining payments thereunder. In doing so, the court reversed the Colorado Court of Appeals and reaffirmed its prior holding in *Hassler v. Account Brokers of Larimer County, Inc.*, 2012 CO 24, ¶24, 274 P.3d 547,553 (Colo. 2012). Under *Hassler*,

"Zombie" continued on page 7

The Ironclad Anti-Modification Provision (§ 1322(b)(2)) Prevails Over the Finality of a Confirmed Plan Says the 11th Circuit—An Analysis of *Bozeman*

By **Jeffrey S. Fraser**

The phrase *res judicata* is a popular Latin term that is often used as a "mic drop" argument ender, asserted to quell a litigant's attempt to unwind a judicially settled issue. However, simply alleging *res judicata* does not always ensure success—especially when faced with a powerful competing statute. In a substantial victory for mortgage creditors, the Eleventh Circuit Court of Appeals—in the case of *In re Bozeman*, 2023 U.S. App. LEXIS 545 (11th Cir., Jan. 10, 2023)—delivered a decisive opinion highlighting (and reinforcing) the "ironclad, do not touch" anti-modification provisions set forth in §1322(b)(2) of the Bankruptcy Code. In *Bozeman*, the appellate court was confronted with a scenario where the finality/res-judicata effect of a confirmed plan was in direct conflict with a mortgage lender's rights under §1322(b)(2). After the mortgage creditor filed an "arrearage only" proof of claim indicating that the debtor was $6,817.42 delinquent to the creditor (the claim did not provide for the total amount due on the claim), the *Bozeman* debtor proposed a plan to pay that mortgage creditor **in full** through a Chapter 13 plan. The debtor's plan was confirmed with the "pay all" treatment. As articulated in the court's opinion, the ultimate (and unambiguous) intent of the debtor was to pay the mortgage creditor an amount that would result in the satisfaction of the mortgage lien at the conclusion of the bankruptcy.

At the end of the case, the Chapter 13 trustee issued the notice of plan completion, indicating that the debtor had successfully paid the $6,817.42 provided for in the plan; and according to the trustee, the creditor's *entire* mortgage debt was therefore paid in full. The creditor objected to the notice, claiming the debtor had not made any ongoing contractual payments on the mortgage during the course of the bankruptcy. Coinciding with the trustee's notice, the debtor sought to have the mortgage creditor's lien dissolved, noting that the bankruptcy court had confirmed the debtor's plan without objection, and that §1327 of the Bankruptcy Code (the "finality" provision) rendered the confirmed plan final, and, as a result, the creditor's lien must be satisfied. The bankruptcy court agreed, holding that the mortgage creditor's lien should be dissolved, and the district court affirmed. The mortgage creditor appealed to the Eleventh Circuit.

The appellate court framed the issue as a battle of Bankruptcy Code provisions—*anti-modification* (§1322(b)(2)) versus *finality* (§1327). Siding with antimodification, the appellate court explained that §1322(b)(2) protects the rights of mortgage creditors that hold a security interest in real property that is the debtor's primary residence *even if* such creditors do not object to a plan that seemingly violates such rights. Relying on prior precedent (*Nobelman*, *Bateman*, and *Dukes*), the appellate court reiterated and reinforced the Bankruptcy Code's special treatment afforded mortgage lenders and reasoned that even though the debtor's plan had been confirmed, the antimodification provision still prohibits modification of the mortgagee's rights. *Nobleman* and the Bankruptcy Code instruct that the critical inquiry for the antimodification provision involves the "*rights* of the holders." In releasing the mortgage creditor's lien, the bankruptcy court dramatically altered the *rights* of the secured creditor. In addressing the debtor's argument that the creditor got what it bargained for (as the creditor's claim "asked" for $6,817.42, and that is the amount the creditor received), the court indicated that precedent is clear that a creditor's lien cannot be released until that creditor received the full benefit of its bargain pursuant to its rights under its mortgage. Furthermore, the creditor is not even required to file a claim at all, as it will always be able to look to the underlying collateral to satisfy its lien. *Bateman* at 827. The *Bozeman* debtor attempted to satisfy the full scope of her obligation by paying only the arrearage and ignoring the remaining balance owed to the creditor.

The court then addressed the Supreme Court case of *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010). The debtor asserted that, according to Espinosa, the rationale in *Bateman* had been displaced to the extent that when a creditor has notice of a plan that proposes to modify its rights, and that creditor fails to object, the confirmed plan is enforceable and binding on that creditor. In disagreeing with the debtor's position, the appellate court concluded that *Espinosa* has no bearing on the release of a lien after a confirmed plan erroneously modifies a homestead mortgagee's rights; and further, *Espinosa* does not abrogate *Bateman*. The appellate court explained that *Bateman* (and *Bozeman*) emerged in a significantly different procedural posture than *Espinosa*, particularly concerning the timing (and mechanism) of the creditor's act to preserve its claim. In *Espinosa*, the U.S. Supreme Court limited the scope of its ruling to challenges to a confirmed plan under Federal Rule of Civil Procedure 60(b)(4). Although the mortgage creditor in Bozeman did not object to the plan's confirmation, it *did* object to the release of its lien prior to the debtor's discharge. By contrast, the creditor in *Espinosa* sought to undue and void a discharge order after 10 years by way of a Rule 60(b)(4) motion. *Bateman* and *Bozeman* do not arise out of a Rule 60(b)(4) motion.

Finally, the appellate court specifically addressed §1327(a) (the "finality provision"), which provides that the terms of a confirmed plan bind the debtor and each creditor, and confirmation has a preclusive effect, foreclosing re-litigation of any issue determined by the confirmation order. The court went as far as to scrutinize the mortgage creditor for failing to engage in the bankruptcy process (by failing to file an objection, failing to amend its claim, or otherwise highlighting the plan's inadequacy). However, notwithstanding the creditor's inaction, the Bankruptcy Code still affords special protections to homestead mortgage holders' rights, and a creditor's lien shall survive the bankruptcy unimpaired. Thus, while §1327 confirms that is too late to alter a plan, it is *not* too late for a creditor to invoke the Bankruptcy Code's special protection for homestead mortgages. So, does *Bozeman* give mortgage creditors a blanket pass? No, it does not. Section 1327 is still operable, and confirmed plans still have binding effects. Neither *Bozeman* nor *Bateman* renders the provision entirely superfluous. Creditors are bound by the plan to the extent that such creditors are prevented from moving forward because of the automatic stay, and a defect (or illegality) in a confirmed plan will not always be grounds for dismissal. In short, the creditor must still comply with the plan during the bankruptcy proceeding. However, upon completion of a case, if a secured creditor's claim falls within the parameters of §1322(b)(2), that creditor's lien will survive and is protected by the iron-clad power of the anti-modification provision.

Jeffrey S. Fraser is the Partner of Albertelli Law's national Bankruptcy department. In this role, Fraser works closely with each state's managing attorneys as it relates to training, legal strategy, and all facets of the firm's bankruptcy practice. Fraser is an active participant in the Southern District of Florida's bankruptcy bar and was the 2019/2020 Chair of the Local Rule Committee and an inaugural member of the district's Lawyer Advisory Committee (LAC), serving as the committee's Chair in 2020 and 2021. He was also born in Jamaica and is a past President of the Jamaican-American Bar Association. Fraser has achieved the highest rating in both legal and ethical ability by Martindale-Hubbell and prides himself on practicing with humility, integrity, and appreciation.

Demystifying the Illinois Mediation Process

By **Marc Wagman**

In Illinois, foreclosure mediation programs have been in effect since the 2008 foreclosure crisis. Mediation in those counties offering the program is available once a mortgage foreclosure complaint is filed against the homeowner. In most circumstances, mediation is automatic once the foreclosure complaint is filed, and the case will be set for mediation once the borrower is served with the summons. Usually, the first mediation will take place within the first 60 days of the foreclosure complaint being filed. Any mediation notices are attached to the foreclosure complaint and are served at the same time and in the same manner as the service of the summons and the complaint. While the foreclosure action is in mediation, there is an automatic court stay as to any foreclosure litigation.

The vast majority of mediations today continue to be held via Zoom, and some of the counties now have the option of appearing either via Zoom or in-person (a hybrid approach). The mediation program is paid for by an additional filing fee that helps fund the program, or from grant funds. The court-appointed mediators are normally Illinois attorneys who have practiced a significant amount of real estate litigation or are retired judges who have no interest in the outcome of the litigation or mediation. The foreclosure court oversees the program, its implementation, its success rates, and the program's participants. The goal of mediation is for both the borrower and the lender an opportunity to resolve the delinquent loan through a mutually beneficial arrangement.

Foreclosure mediation is where the neutral, court-appointed meditator facilitates a discussion to assist the lender and borrower in reaching a meaningful solution to resolve the loan's underlying delinquency. Mediation allows for varying options to resolve the underlying debt such as loan modification, repayment plans, forbearance agreements, a short sale, a deed-in-lieu of foreclosure, or other alternatives. Most importantly, it allows the borrower and the lender's representative the opportunity to resolve the delinquent loan in a beneficial arrangement for both parties.

Normally, upon the first scheduled mediation, the mediator will inquire as to the borrower's intent with regard to the property, refer the borrower to a HUD-approved housing counselor or approved partner, and have the borrower fill out a loss mitigation application provided by the lender within a certain amount of time. In some counties, the borrower will meet with the HUD counselors on the same day as the mediation.

From there, the court-approved agency will verify the borrower's eligibility, help them fill out a loss mitigation application, and discuss any options or programs available to that specific borrower. The mediation is also confidential and exempt from discovery requests or as evidence in the underlying action.

In addition, the borrower will normally be advised of the Illinois Homeowner's Assistance Fund, which gives qualifying homeowners up to $60,000 for a COVID-related hardship. This grant has been available from November 1, 2022, to a TBA date. The Illinois Homeowner's Assistance Fund will pay the lender any past-due amounts and cure the mortgage arrears. The grant of any funds from the program does not have to be repaid by the borrower in most circumstances.

If the borrower expresses interest in retaining the property and any of the available options, the mediation will be continued on another scheduled date to allow the borrower the time to explore those options. Once the parties reach an agreement with regard to resolving the delinquent loan, the mediator submits a report to the program's coordinator. On the continued mediation date, the borrower will be asked whether they submitted a loss mitigation packet and any progression with resolution of the delinquent loan. The mediator will also prepare a written agreement that outlines the terms of any agreement if one is made. Both parties must then sign the agreement and file it with the court overseeing the foreclosure proceedings. If the borrower fails to appear or is uninterested in the options, the mediator will terminate the mediation and send a final report to the court, the coordinator of the program, the lender's attorney, and the borrower.

Mediation offers a more personalized approach to resolving mortgage debt and can be faster and less expensive than foreclosure litigation. Mediation programs in Illinois provide the opportunity for both parties to negotiate resolutions for both parties' mutual interests and benefits. Working with a neutral mediator opens the opportunity for various alternative solutions for the debt to be resolved for both parties. In my experience, the mediation process offers lenders a cost-effective way to resolve the loan without further litigation. The process isn't perfect, but it does work as intended in most circumstances.

Marc Wagman *joined Potestivo & Associates, PC in October 2018 and is based in the Chicago office. He serves as the Supervising Attorney for the firm's Illinois Bankruptcy Department. Prior to joining the firm, Wagman worked at various law firms in the Chicago area, including owning a private practice where his focus was on creditors' rights and consumer financial issues. Wagman brings over 14 years of bankruptcy experience in creditor and debtor representation, adversary lawsuits, examinations, and a plethora of motions and evidentiary hearings. Wagman graduated from Indiana University with a Bachelor of Arts in Political Science. He earned his Juris Doctor degree from the John Marshall Law School. Wagman is a member of the Northern District of Illinois Trial Bar and belongs to the American Bar Association, Illinois Bar Association, and DuPage County Bar Association.*

Legal League Assembles With Servicers for Spring Summit

By Kyle G. Horst

The Legal League Spring Servicer Summit was held in early May at the Westin Dallas Stonebriar Golf Resort & Spa for members of the Legal League. Highlights of the two-day event included a servicer certification class, networking opportunities, and a number of speakers and panel discussions featuring the top minds in the industry.

Kicking off the event was Legal League Chair Stephen Hladik of Hladik, Onorato & Federman, LLP who welcomed everyone and gave a quick rundown of the day. Hladik was followed by the opening keynote speech by Stanley Middleman of Freedom Mortgage.

The first panel of the day, "Attorney Oversight and Compliance—Current and Future Issues in Law Firm Compliance" featured speakers Legal League Advisory Council Member Ryan Bourgeois of BDF Law Group, Michael Merritt of BOK Financial, Melissa Black of PennyMac Loan Services, Mark Atencio of Lyons McCloskey, and Legal League Vice Chair Tony Vas Ness of Van Ness Law Firm. The speakers discussed the future of on-site audits, IT, and information security issues facing firms and the industry, as well as the management of firms' third-party vendors.

Following a short networking break, the next panel, "A Kaleidoscope of Foreclosure Perspectives" featured insights into the challenges and solutions of today's foreclosure environment, including loss mitigation, foreclosure delays, and e-notes/e-mortgages. Speakers on the panel included Legal League Advisory Council Member Caren Castle of IDEA Law Group, Roy Diaz of Diaz Anselmo & Associates, Elizabeth DeSilva of McCalla Raymer Leibert Pierce, Deloise Browne Milner from Freddie Mac, and Toniqua Green of Mr. Cooper Group.

After lunch, a fireside chat was held, as Hladik moderated an open discussion with Tony Van Ness and Erica Johnson-Seck of Mr. Cooper.

The chat was followed by the panel, "Costly Servicer Pitfalls in the Bankruptcy Arena," featuring speakers Legal League Special Initiative Working Group Chair Brooke E. Sanchez of McPhail Sanchez, Graham Arceneaux of Graham, Arceneaux & Allen LLC, Alicia Byrd of Flagstar Bank, Michael Daniels of Mr. Cooper, Traci Luckhaupt of PHH Mortgage, and Brian McGarry of Fannie Mae. This panel focused on the lengthy list of rules and recent litigation surrounding rule (3002.1).

The final panel of the day was titled "Market Update: Inflation, Recession, or What?" and featured Legal League Advisory Council Member Jane Bond of McCalla Raymer Leibert Pierce LLC, Daren Blomquist of Auction.com, Legal League Advisory Council Member Neil Sherman of Schneiderman & Sherman PC, Nolan Turner of Carrington Holding Company, Rick Sharga of CJ Patrick Company, and Dean Meyer of Freddie Mac. The panel discussed the current state of the market as Q2 winds down, and heard expert predictions on whether foreclosures will rise, if loss mitigation will provide meaningful options, and whether third-party sales will continue to remain near record highs.

The day concluded with brief closing remarks from Hladik, who recapped the day's events and shared what's next to come for the Legal League. Attendees were then invited to attend Globe Life Field to watch the Texas Rangers battle the Arizona Diamondbacks from a VIP suite.

Alicia Byrd, Bankruptcy Operations Manager at Flagstar Bank, was a first-time attendee and had this to say about why she chose to attend this year: "Legal League appealed to me because I like to hear both my peers' perspective and the legal perspective. I enjoyed what [the different panels] brought: what our servicers are seeing, but tempered by what attorneys can cope with."

Mike Aiken, SVP and Associate General Counsel of Fay Financial, LLC, was a past Summit attendee but had missed the past few years.

"The face-to-face [aspect] is important for me because I'm counsel, so I deal with a lot of these attorneys directly," noted Aiken. "Being able to see them again … and to talk about what's going on, what they're seeing, what we're seeing … it's not the same doing it over the phone or Zoom."

Merritt, who serves as SVP of Mortgage Default Servicing for BOK Financial, served as a panelist during the "Attorney Oversight and Compliance—Current and Future Issues in Law Firm Compliance" discussion, had this to say about the Summit: "The thing I like about Legal League is being able to hear the firms' perspectives. A lot of these conferences are so focused on the servicer perspective, and our firms, they are one of the most critical vendors and partners that we have, so hearing their pain points is eye-opening because a lot of times it's simple fixes that you can make on our side to make their job easier. Just hearing and having that interaction is always a great part of this Summit."

__Kyle G. Horst__ is a reporter for DS News and MReport. A graduate of the University of Texas at Tyler, he has worked for a number of daily, weekly, and monthly publications in South Dakota and Texas. With more than 10 years of experience in community journalism, he has won a number of state, national, and international awards for his writing and photography including best newspaper design by the Associated Press Managing Editors Group and the international iPhone photographer of the year by the iPhone Photography Awards. He most recently worked as editor of Community Impact Newspaper covering a number of Dallas-Ft. Worth communities on a hyperlocal level. Contact Kyle G. at kyle.horst@thefivestar.com.

1. Jane Bond, Managing Partner, FL Litigation, McCalla Raymer Leibert Pierce, LLC, and Dean Meyer, Director, Loss Mitigation, Single-Family Servicing Operations Management, Freddie Mac
2. Roy A. Diaz, Shareholder, Diaz Anselmo & Associates, P.A., onstage with Toniqua Green, VP, Corporate Social Responsibility, Mr. Cooper
3. Brooke E. Sanchez, Partner, Managing Bankruptcy Attorney, Kent McPhail & Associates, LLC, and Graham Arceneaux, Managing Attorney, Graham, Arceneaux & Allen
4. Brooke Sanchez; Graham Arceneaux of Graham, Arceneaux, & Allen LLC; Alicia Byrd, Bankruptcy Operations Manager, Flagstar Bank; Michael Daniels, Senior Principal, Bankruptcy, Mr. Cooper; Traci Luckhaupt, VP of Default Servicing, PHH/Ocwen; Brian McGarry, Manager, Single-Family Portfolio Servicing, Fannie Mae
5. Neil Sherman; Jane Bond; Dean Meyer; Rick Sharga, Founder & CEO, CJ Patrick Company; Nolan Turner, Managing Director, Carrington Holding Company, LLC
6. The 2023 Legal League Advisory Council (left to right): J. Anthony Van Ness, Founder, Managing Partner, Van Ness Law Firm; Stephen M. Hladik, Partner, Hladik, Onorato & Federman, LLP; Ryan Bourgeois, General Counsel/Compliance Officer, Partner, BDF Law Group; Caren Castle, Senior Mortgage Servicing Attorney, IDEA Law Group PLLC; Jane Bond of McCalla Raymer Leibert Pierce, LLC; Roy Diaz; Kent McPhail, Managing Partner, McPhail Sanchez, LLC; David Demers, Managing Partner, Cooke Demers, LLC; Neil Sherman, Esq., President, Managing Partner Default Operations, Schneiderman & Sherman P.C.
7. Stanley Middleman, CEO, Freedom Mortgage, onstage with Stephen Hladik
8. Erica Johnson-Seck, SVP, Default Services, Mr. Cooper
9. Elizabeth M. DeSilva, General Counsel, McCalla Raymer Leibert Pierce, LLC, and Roy Diaz

Post-Forbearance Workout Performance Suffered in April

By **Eric C. Peck**

The Mortgage Bankers Association's (MBA) monthly Loan Monitoring Survey found that the total number of loans now in forbearance decreased by four basis points from 0.55% of servicers' portfolio volume in the prior month to 0.51% as of April 30, 2023.

According to the MBA's estimate, 255,000 homeowners remain in forbearance plans, and mortgage servicers have provided forbearance options to approximately 7.8 million borrowers since April 2020.

In April 2023, the share of Fannie Mae and Freddie Mac (GSE) loans in forbearance decreased two basis points from 0.26% to 0.24%. Ginnie Mae loans in forbearance decreased seven basis points from 1.18% to 1.11%, and the forbearance share for portfolio loans and private-label securities (PLS) decreased seven basis points from 0.68% to 0.61%.

"While the number of loans in forbearance continues to dwindle, there was some deterioration in the performance of post-forbearance workouts," said Marina B. Walsh, CMB, MBA's VP of Industry Analysis. "About three out of four borrowers are remaining current on their post-forbearance workouts, but this is down from the average of four out of five borrowers that was relatively consistent in 2022 and into 2023."

By stage, 34.4% of total loans in forbearance were in the initial forbearance plan stage, while 53.2% were in a forbearance extension. The remaining 12.4% were forbearance re-entries, including re-entries with extensions.

Total loans serviced that were current (not delinquent or in foreclosure) as a percent of servicing portfolio volume (#) decreased to 95.89% in April 2023 from 96.35% in March 2023 (on a non-seasonally adjusted basis).

"Overall servicing portfolios remain healthy, and some of the worsening monthly performance can be attributed to seasonal factors such as tax refunds that pushed up the March results and then normalized in April," said Walsh. "MBA's forecast calls for an economic slowdown and an increase in unemployment later this year and into 2024, which will impact loan performance."

Of the cumulative forbearance exits for the period from June 1, 2020, through April 30, 2023, at the time of forbearance exit:

- 29.6% resulted in a loan deferral/partial claim.
- 18.0% represented borrowers who continued to make their monthly payments during their forbearance period.
- 17.7% represented borrowers who did not make all of their monthly payments and exited forbearance without a loss mitigation plan in place yet.
- 16.1% resulted in a loan modification or trial loan modification.
- 10.9% resulted in reinstatements, in which past-due amounts are paid back when exiting forbearance.
- 6.5% resulted in loans paid off through either a refinance or by selling the home.
- The remaining 1.2% resulted in repayment plans, short sales, deeds-in-lieu, or other reasons.

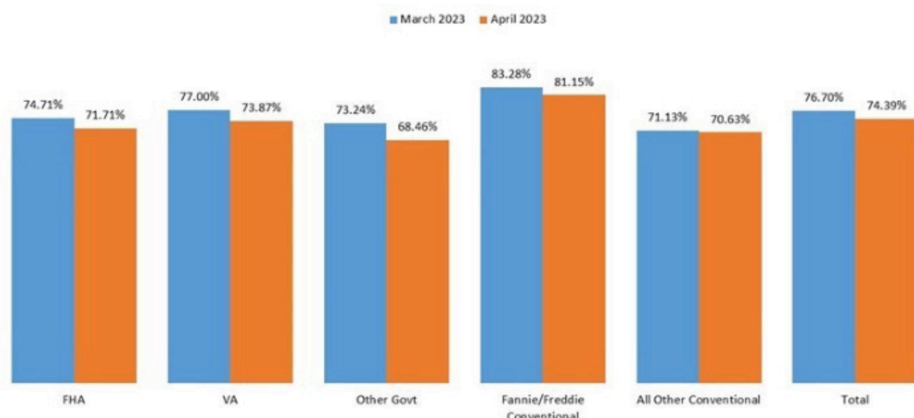
Total completed loan workouts from 2020 and onward (repayment plans, loan deferrals/partial claims, loan modifications) that were current as a percent of total completed workouts decreased to 74.39% in April from 76.70% the previous month. Nationwide, the five states reporting the highest share of current loans as a percent of servicing portfolio include Washington, Colorado, Idaho, Oregon, and California. The five states reporting the lowest share of current loans as a percent of servicing portfolio include Louisiana, Mississippi, New York, Indiana, and Alabama.

The Bureau of Labor Statistics (BLS) reports that total nonfarm payroll employment rose by 253,000 in April, and the unemployment rate changed little at 3.4%. Employment continued to trend up in professional and business services, healthcare, leisure and hospitality, and social assistance. Both the unemployment rate, at 3.4%, and the number of unemployed persons, at 5.7 million, changed little in April, as the unemployment rate has ranged from 3.4% to 3.7% since March 2022. Among the major worker groups, the unemployment rates for adult men (3.3%), adult women (3.1%), teenagers (9.2%), Whites (3.1%), Blacks (4.7%), Asians (2.8%), and Hispanics (4.4%) showed little or no change in April.

"A strong job market will boost earnings and household spending capacity, which is good for the housing market and broader economy," added Realtor.com Chief Economist Danielle Hale. "However, a too-strong market means the Fed has to tighten further, dampening that good news and running a higher risk of over-tightening. Today's report falls a bit above expectation and may undermine some of the early-week confidence that a pause in rate hikes is ahead. Fortunately, we have nearly another 6 weeks to go before the next Fed meeting in which we'll see several more readings on the economy, inflation, and the job market. For home shoppers, this could mean somewhat higher mortgage rates ahead. But perhaps more importantly for home buyers and sellers, the labor market continues to support income-earning and consumer confidence, two necessary ingredients for home sales to occur."

"A strong job market will boost earnings and household spending capacity, which is good for the housing market and broader economy."

—**Danielle Hale,** Chief Economist, Realtor.com



"Zombie" continued from page 1

a lender must perform a "clear, unequivocal affirmative act" to accelerate payment of an unmatured security agreement.

The borrower in *Silvernagel* took out a loan secured by a deed of trust on property he owned with his husband. The maturity date on the loan was October 1, 2036. The spouse was also a grantor under the deed of trust. The borrower filed a Chapter 7 bankruptcy petition, received a discharge in 2012, and made no further payments on the loan. The couple filed a declaratory action against the lender in 2019 after receiving a notice of intent to foreclose. Among other allegations, the Plaintiffs alleged the lender was attempting to collect a discharged debt, the lender did not have standing to foreclose, and the lender was prohibited from foreclosing the property based upon laches or expiration of the statute of limitations. The lender filed a motion to dismiss, which was granted by the trial court.

Relying on a case from Washington entitled *Edmunson v. Bank of Am.*, 378 P.3rd 272, 276 (Wash. Ct. App. 2016) and an unpublished federal district court case called *Jarvis v. Federal National Mortgage Ass'n*, 2017 U.S. Distr. LEXIS 62102, 201W.D. Wash. Apr. 24, 2017), the Court of Appeals held the discharge of the borrower's liability on the loan meant there were no longer any forthcoming installments to be paid by the borrower. Consequently, the appellate court reasoned that a discharge in Chapter 7 advanced the maturity date of the loan to just prior to the discharge. *Silvernagel v. U.S. Bank National Association*, 2021 Colo. App. LEXIS 1441 (Colo. App. Oct. 21, 2021)

The Colorado Supreme Court, following a *de novo* review, reversed the Court of Appeals and affirmed the trial court's dismissal of the borrower's claim. First, the court observed that the out-of-state case law relied upon by the Court of Appeals has since been repudiated by a Washington appellate court. See *Copper Creek (Marysville) Homeowners Ass'n v. Kurtz*, 508 P.3d 179, 191 (Wash. Ct. App. 2022) (Chapter 7 discharge does not accelerate the debt under Washington law). In addition, the borrower cannot unilaterally accelerate the due date through bankruptcy as that would rewrite a provision of the contract and is unsupported by Colorado law. The court explained that a discharge removes one method of enforcing a claim which is an *in personam* action against the borrower but preserves an *in rem* action against the property.

The court confirmed the statute of limitation on individual payments or the accelerated debt in Colorado is six years. C.R.S. § 13-80-103.5(1)(a). The court examined the allegations in the complaint and the contract terms and concluded the lender took no steps to accelerate repayment of the debt. Accordingly, with a maturity date of 2036, the statute of limitations had not been triggered. Although the deed of trust looked like a "zombie" mortgage, the court ruled it was not.

As seen in *Silvernagel*, whether a debt is time-barred is governed by state law. The analysis to determine if a lien is a "zombie" mortgage can be fact-intensive and complex. In addition to examining the express terms of the loan documents, the servicer will need to explore the loan history to see if the borrower made any voluntary payments or acknowledged the debt (usually in writing) to restart the statute of limitations. If there was a prior foreclosure or acceleration, then the servicer should look for evidence the loan was de-accelerated. In addition, there may be a number of tolling events such as loss mitigation, bankruptcy, litigation, or forbearance during a worldwide pandemic. If in doubt, a lender should seek guidance from counsel to assist in the analysis.

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LEGAL LEAGUE

“Junk Beauty is in the Eye of the Beholder”: An Overview of the CFPB’s Supervisory Highlights Junk Fees Special Edition

By **Robert D. Forster, II**

In line with the White House’s crackdown on “junk fees”, the CFPB (Bureau) issued a Supervisory Highlights titled “Junk Fees Special Edition” in March 2023. The results of this report were obtained directly by the Bureau through its examination of several industries within the financial sector from July 1, 2022, to February 1, 2023, including mortgage servicing. Several issues were discovered, and those institutions found to be in violation were addressed by the Bureau. It is worth noting the institutions under investigation remained anonymous throughout the report to avoid singling out any specific servicer.

What Are “Junk Fees” in Mortgage Servicing?

Examiners from the Bureau focused on any type of charge passed onto the borrower that arguably could or should have been billed internally to the servicer: late fees, property inspections, private mortgage insurance (PMI) premiums, and fees incurred after implementation of the CARES Act (CARES) that were justifiable under the terms of the mortgage but should have been waived under CARES. Not only did the Bureau take issue with these fees, but more so with how, why, and when they were charged and passed on to consumers.

How the “Junk” Was Handled

The first issue covered was late fees—specifically, the amount of the assessment. The mortgage servicers were charging late fees in accordance with the maximum allowable under requisite state law, not necessarily pursuant to the terms of the mortgage. Consequently, this approach, at times, resulted in fees being charged to consumers that exceeded those called for under the loan agreement. Thus, the Bureau concluded consumers could not reasonably avoid this because they have no control over how late fees are calculated, had no reason to anticipate them being imposed, and held this was a violation of Regulation Z. In response to these findings, servicers waived or refunded the specific accounts.

Another issue of grave concern was property inspections. It is a common industry standard for investors to require servicers to perform property inspections on severely delinquent accounts. Generally, servicers retain third-party property preservation companies to perform this task on their behalf. Examiners discovered some instances in which the property inspector was unable to locate a subject property for whatever reason. Nonetheless, property inspectors were repeatedly retained to revisit the same properties at the bad address that previously had been unable to be located, with the cost being passed onto the consumer. Accordingly, the Bureau concluded this charge for property inspections on bad addresses caused substantial injury to consumers and the fees were waived or refunded, along with a revision of internal policy by the servicer.

PMI premiums received scrutiny as well. Not only was it discovered that monthly periodic statements included PMI premiums that consumers did not owe, but also some servicers were not automatically canceling PMI when the principal balance of the mortgage reached 78%, in violation of the Homeowners Protection Act and UDAAP. Refunds were issued and additional safeguards were implemented to ensure this did not continue to occur.

Another issue noticed in periodic monthly statements had to do with late fees and charges sent during the last month of a consumer forbearance plan. The Bureau determined that servicers would list a $0.00 late fee for a subsequent payment when a late fee was assessed if the payment was not made timely. This was rendered deceptive and servicers updated their periodic statements to remedy this along with waiving or refunding unlawful charges.

The last major finding revolved around fees passed onto consumers that should have been waived under CARES. The Bureau concluded that servicers failed to waive certain late charges, fees, and penalties accrued outside of periods of forbearance, where required by HUD, upon a consumer entering a permanent COVID loss mitigation option.

Best Practices to Avoid the “Junkyard”

All violations cited by the Bureau covered in “Junk Fees Special Edition” involved fees or charges the supervised mortgage servicer could lawfully charge under the terms of the mortgage based upon certain circumstances. However, it was how or when the charges and fees were assessed that resulted in them being unlawful. Whether or not they are actually “junk” is debatable, but it is unquestioned the Bureau has emphasized an attention to detail and justification for each charge assessed to a loan.

This scrutiny of “junk fees” is unlikely to ebb anytime soon, and, if anything, litigation and regulatory risk will increase for mortgage servicers, investors, and attorneys alike. In light of the current climate, mortgage servicers and their counsel should review all internal processes that involve any type of fee to ensure it is both justified and in compliance with the terms of the contract, state, and federal law.

Robert D. Forster, II, *is the Managing Partner/CEO of the BDF Law Group and is based in the Addison, Texas, location. The BDF Law Group provides a range of legal services to creditors on defaulted commercial and residential mortgage loans and is comprised of the following firms: Barrett Daffin Frappier Turner & Engel, LLP, (Texas & Georgia); Barrett Daffin Frappier Treder & Weiss, LLP (California, Nevada & Arizona); and Barrett Frappier & Weisserman, LLP (Colorado). He is licensed to practice law with the State Bars of Texas, Arizona, and Georgia, all United States District Courts in Texas and Arkansas, and the United States Supreme Court.*

INDUSTRY NEWS

One in 80 U.S. Homes Reported Vacant in Q2

By **Eric C. Peck**

ATTOM's Q2 2023 Vacant Property and Zombie Foreclosure Report has found that 1.3 million (1,285,633) residential properties in the U.S. remain vacant—a total that represents 1.3%, or one in 79 homes, across the nation.

In order to determine the number of zombie foreclosures nationwide, ATTOM analyzes publicly recorded real estate data—including foreclosure, equity, and owner-occupancy status—matched against monthly updated vacancy data.

The Q2 2023 Vacant Property and Zombie Foreclosure Report reveals that 311,508 residential properties in the U.S. were in the process of foreclosure in Q2 2023, up 4.3% from Q1 2023, and up 20.2% from Q2 2022.

Among those pre-foreclosure properties, 8,752 sit vacant as zombie foreclosures (pre-foreclosure properties abandoned by owners) in Q2 2023. That figure is up 7.5% from the prior quarter, and up 15.6% from a year ago. The count of zombie properties has grown in each of the last five quarters, dating back to early 2022. However, the number of zombie foreclosures remains historically low, with little impact on the nation's total stock of 101.3 million residential properties.

"Zombie foreclosures keep inching up as lenders pursue more delinquent homeowners in courts around the country. All indications are that the number of zombie properties will keep going up slowly, given that foreclosures are up," said Rob Barber, CEO of ATTOM. "But abandoned properties are still nothing more than a dot on the radar screen among the majority of neighborhoods. We are still a long way from the fallout after the Great Recession of the late 2000s when this was a very real issue in many areas around the U.S."

Among the 8,752 residential properties facing possible foreclosure that have been vacated by their owners nationwide in Q2 2023, that total is up from 8,141 in Q1 2023, and from 7,569 in Q2 2022. The number of zombie properties has grown quarterly in 29 states, and annually in 36.

While most neighborhoods around the U.S. have little or no zombie foreclosures, the biggest increases from Q1 2023 to Q2 2023 in states with at least 50 zombie properties were found in:

- Texas (zombie properties up 47%, from 114 to 168)
- Ohio (zombie properties up 26%, from 846 to 1,070)
- Oklahoma (zombie properties up 22%, from 142 to 173)
- Georgia (zombie properties up 22%, from 78 to 95)
- Iowa (zombie properties up 21%, from 227 to 274)

The only quarterly decreases among states with at least 50 zombie foreclosures were found in:

- Michigan (zombie properties down 20%, from 74 to 59)
- South Carolina (zombie properties down 2%, from 154 to 151)
- Pennsylvania (zombie properties down 1%, from 404 to 401)
- New York (zombie properties down less than 1%, from 2,006 to 2,000).

The Empire State of New York continues to have the highest ratio of zombie homes to all residential properties at one in every 2,140 homes; followed by Ohio at one in 3,615 homes; Iowa at one in 4,480 homes; Illinois at one in 4,687 homes; and Florida at one in 5,926 homes.

ATTOM reports that the vacancy rate for residential properties in the U.S. has remained the same in Q2 2023 after dropping in the prior three quarters—currently at 1.27% (one in 79 properties), the same as in Q1 2023, but still down from 1.31% recorded in Q2 of last year (one in 76).

States reporting the largest annual drops in the overall vacancy rate are: Tennessee (down from 1.55% of all homes in Q2 of 2022 to 1.02% in Q2 of 2023)

- Michigan (down from 2.14% to 1.88%)
- Georgia (down from 1.61% to 1.39%)
- Minnesota (down from 0.95% to 0.73%)
- New Jersey (down from 0.53% to 0.36%)

Among the 166 metropolitan statistical areas in the U.S. with at least 100,000 residential properties and at least 100 properties facing possible foreclosure in Q2 2023, the highest zombie foreclosure rates were found in:

- Wichita, Kansas, where 13.1% of properties in the foreclosure process were vacant
- Cedar Rapids, Iowa, where 11.3% of properties in the foreclosure process were vacant
- Peoria, Illinois, where 9.7% of properties in the foreclosure process were vacant
- Toledo, Ohio, where 8.8% of properties in the foreclosure process were vacant
- Youngstown, Ohio, where 7.4% of properties in the foreclosure process were vacant

The highest zombie-foreclosure rates in major metro areas with at least 500,000 residential properties and at least 100 homes facing foreclosure in Q2 2023 were found in:

- Cleveland, Ohio, where 7.1% of homes in the foreclosure process were vacant
- Indianapolis, Indiana, where 6.5% of homes in the foreclosure process were vacant
- Louis, Missouri, where 5.8% of homes in the foreclosure process were vacant
- Baltimore, Maryland, where 5.7% of homes in the foreclosure process were vacant
- Pittsburgh, Pennsylvania, where 5.4% of homes in the foreclosure process were vacant

Among the 23.6 million investor-owned homes throughout the U.S. in Q2 2023, approximately 843,000 are vacant, or 3.6%. The highest levels of vacant investor-owned homes were found in:

- Indiana, where 6.9% were vacant
- Alabama, where 6.1% were vacant
- Oklahoma, where 6% were vacant
- Ohio, where 5.9% were vacant
- Illinois, where 5.8% were vacant

Among the roughly 14,900 foreclosed, bank-owned homes in the U.S. during Q2 2023, 14.5% were vacant. In states with at least 50 bank-owned homes, the largest vacancy rates were found in:

- Iowa, where 27.8% were vacant
- Ohio, where 24.8% were vacant
- New Mexico, where 22.9% were vacant
- Indiana, where 22.8% were vacant
- New York, where 20.8 were vacant

The highest zombie-foreclosure rates in U.S. counties with at least 500 properties in the foreclosure process during Q2 2023 were found in:

- Peoria County, Illinois, where 11.7% were zombie foreclosures
- Broome County (Binghamton), New York, where 11.6% were zombie foreclosures
- Baltimore County, Maryland, where 11.2% were zombie foreclosures
- Lake County, Illinois (outside Chicago), where 9.9% were zombie foreclosures
- Marion County (Indianapolis), Indiana, where 8.5% were zombie foreclosures

Among ZIP codes with at least 1,000 residential properties, 44 of the 50 with the largest portions of overall homes in zombie status were found in New York, Ohio, and Illinois, as well as seven in Cleveland, Ohio. The biggest ratios were found in the following zip codes:

- 10993 in Rockland County (West Haverstraw), New York (one in 191 homes)
- 44112 in Cleveland, Ohio (one in 213)
- 13754 in Broome County (Deposit), New York (one in 239)
- 44108 in Cleveland, Ohio (one in 255)
- 73554 in Greer County (Mangum), Oklahoma (one in 259)

***Eric C. Peck** has 20-plus years' experience covering the mortgage industry, he most recently served as Editor-in-Chief for The Mortgage Press and National Mortgage Professional Magazine. Peck graduated from the New York Institute of Technology where he received his B.A. in Communication Arts/Media. After graduating, he began his professional career with Videography Magazine before landing in the mortgage space. Peck has edited three published books and has served as Copy Editor for Entrepreneur.com.*

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