THE LEGAL LEAGUE
QUARTERLY

COMMITTED TO THE INDUSTRY, INTEGRITY, AND BEST PRACTICES | Q3 2023

From the Chair

As we look forward to convening the Legal League Fall Summit at the Five Star Conference this September, let us highlight how the League has been busy at work in 2023.

We are coming off a highly successful Spring Summit in May. The Spring event had excellent attendance, top speakers, and high-quality content. We look to continue setting the bar high for our future summits, promoting excellent educational forums, cutting-edge topics, and insightful speakers. The mortgage servicing industry is ever-changing, and we look to provide our members and industry partners with timely topics.

In addition to the Spring Summit, the Strategic Initiatives Working Group (SIWG) has authored and provided significant certification courses for the mortgage servicing industry. Each certification session has continued to grow in the number of participants, and now we are growing in scope as well, offering higher-level topics and courses. SIWG also continues to publish white papers on important topics, including an overview of the HAF Program. We thank SIWG Chair Brooke Sanchez and the SIWG committee members for all their hard work and dedication.

Under the leadership of Jane Bond, the Webinar Committee continues to provide excellent educational content to all member firms and the mortgage industry throughout the year. The Webinar Committee has already laid out a schedule of topics and speakers going into 2024 that will be outstanding.

We also extend a major "thank you" to our Publications Committee, under Chair Michael Woods, who has worked so hard to put together this journal for you. The Publications Committee strives to make this the best journal for the mortgage servicing industry, and Committee Members Robert Forster, Jeffrey Fraser, and Matthew Podmenik have been prolific in authoring and editing articles for this edition. We invite all members to get involved and contribute articles to future editions.

On the Advisory Council level, we are pleased to welcome two new members to the Council, Kent McPhail and David Demers. These industry veterans not only bring years' worth of mortgage servicing experience to the Council but also share fresh and innovative ideas to keep the League growing. The Advisory Council also continually surveys potential regulatory activity from federal and state agencies and stands ready to guide the League and the mortgage industry in advocating for our constituents. The Advisory Council also closely monitors important pending legal cases around the country, and the League recently joined in an amicus brief on an issue concerning statutes of limitation in Florida. Thank you to our members Michelle Gilbert and Jane Bond for their efforts on this initiative.

As we look back on the first nine months of 2023, we continue to see interesting economic times. Interest rates have continued to rise, sparking questions about housing affordability. Inflation, while subsiding, is a continuing source of concern. Despite those concerns, unemployment and mortgage defaults remain at historic lows. As we embark on the fourth quarter of 2023, looking into the crystal ball, will unemployment begin to tick upward? Will there be a soft landing for the economy? What will happen with real estate values? We at the Legal League want you to know that we are here to help our members and industry partners in any way. It is always our continuing goal to provide the highest level of membership benefit to our firms and our mortgage industry constituents. We endeavor to provide timely information to the industry and to assist members in education, training, and methods to enable staff to efficiently handle and process any coming workloads. Enhancing technology and maintaining the highest level of cybersecurity measures are paramount, and the League stands ready to assist members in education on these topics.

We look forward to seeing everyone at the Five Star conference! Another big "thank you" goes out to the Events Committee, under the leadership of Ryan Bourgeois, which has once again put together a fantastic Fall Summit. As always, we truly appreciate your input on how the League can continue to best provide its members with value. Please feel free to reach out to me via email or phone, as I welcome your input and suggestions, and, once again, our sincerest thank you for your participation this year!

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

Legal League Files as an Amicus Curiae in an Important Florida Case

By **Jane E. Bond, Esq., Legal League Advisory Board Member**

The newly established Florida Sixth District Court of Appeal decided a case of interest on June 16, 2023, *Gregory Maki v. NCP Bayou 2, 2023*, 48 Fla. L. Weekly D 1223 (Fla. 6th DCA, 2023). The decision, although it is based upon a unique set of facts, has the potential to cause ripples and uncertainty in the mortgage foreclosure community. As a result of this potential impact, Legal League joined with the ALFN to file an Amicus Brief in support of rehearing in the *Maki* case. The motion for Amicus Curiae remains pending for LL and the ALFN, as of the writing of this article. Jane Bond filed the Motion for Amicus Curiae on behalf of the Legal League in this important statute of limitations case.

By way of background, the panel decision in *Maki* (in its simplest form since the case is very fact-intensive) barred a second mortgagee from foreclosing its mortgage after it had obtained a money judgment on the note secured by the mortgage due to the expiration of the statute of limitations. The Court reasoned that since the loan was accelerated more than five years before the filing of the claim for foreclosure, and the note was no longer an installment contract due to its merger into the money judgment, the claim was barred.

After the filing of the panel decision, but before it became final, NCP petitioned for rehearing. The argument on rehearing is that the panel may have not realized the full scope of the law at issue and did not contemplate that the money judgment on the note was still secured by the mortgage. NCP also highlighted in the record that its foreclosure claim was pled based on non-payment of the note and the money judgment.

NCP's argument mainly stems from a quote from 37 Am. Jur., Mortgages §523 (1941) within *Klondike, Inc. v. Blair*, 211 So. 2d 41 (Fla. 4th DCA, 1968). NCP asserts the language quoted by the Fourth District Court of Appeals in *Klondike* is incomplete and that the restatement, if reviewed in totality, resolves the issue before

"Florida" continued on page 7

Strict Liability Strikes Again: CFPB Advisory Opinion Affirms FDCPA Liability for Collection Actions on Time-Barred Debts

By **Melissa Robbins Coutts**

The CFPB issued an Advisory Opinion effective May 1, 2023, that should be on the radar of foreclosure attorneys everywhere. In the Advisory Opinion, the CFPB provides its interpretation of provisions within the Fair Debt Collection Practices Act (FDCPA) and its implementing Regulation F for the collection of time-barred debts. Regulation F specifies that a "debt collector must not bring or threaten to bring a legal action against a consumer to collect a time-barred debt," and further defines a "time-barred debt" as "a debt for which the applicable statute of limitations has expired." A generous reading of the regulation on its face could support an argument that a debt collector does not violate the FDCPA unless and until a court has adjudicated the debt to be time-barred under state law and the debt collector thereafter tries to collect it. But the CFPB's Advisory Opinion unequivocally eliminates that argument. There is now no question that because Regulation F prohibits any attempt to collect a time-barred debt, a foreclosure attorney can be held strictly liable for violating the FDCPA if it files or threatens to file a foreclosure action (either judicial or nonjudicial) past the statute of limitations. This is true "even if the debt collector neither knew nor should have known that the debt was time barred."

As the CFPB's Opinion recognizes, statutes of limitation have long existed under state law as affirmative defenses that must be raised by the consumer, or else, they are waived. But under the CFPB's interpretation of Regulation F, the practical benefit of recognizing statutes of limitation as affirmative defenses is gone; the debt collector has committed an FDCPA violation at the moment it files suit or issues a nonjudicial foreclosure notice, regardless of whether the consumer raises a statute of limitations defense or not.

The problem with Regulation F's black-and-white approach to time-barred debts, of course, is that the applicability of statutes of limitations often occupies gray areas. Certainly, there are clear-cut cases when a debt collector can see that a debt is time-barred and cannot be enforced. However, there are countless other cases where a time bar is not so clear, especially in states where this area of law is still in flux. For example, courts in numerous states continue to struggle to define what types of actions will constitute acceleration of a loan balance and thus start the running of the limitations period for enforcing the debt.[1]

Foreclosure attorneys must proceed with extreme caution before taking any action on a time-barred debt, as the attorney can be held strictly liable for violating the FDCPA and Regulation F regardless of the consumer's failure to raise the statute of limitations as an affirmative defense.

Moreover, numerous potential avenues to reset or toll the limitations period may apply to any given loan, including acknowledgments of the debt, bankruptcy, litigation, loss mitigation, or forbearance. Not all methods of tolling have been recognized in all jurisdictions. A debt collector is thus left with a substantial degree of risk in all but the most clear-cut cases.

A debt collector accused of violating the FDCPA by pursuing collection of a time-barred debt has only one potential avenue to escape liability: the "bona fide error" defense. Under this defense, a debt collector cannot be held liable under the FDCPA if it "shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1692k(c). Although the Supreme Court has foreclosed the use of that defense to protect the debt collector from a mistaken interpretation of the FDCPA's requirements,[2] some circuit courts have recognized that the bona fide error defense may still provide cover for a debt collector who makes "a mistake about the time-barred status of a debt under state law."[3] For example, in some states there may be a conflict regarding which of two alternate limitations periods applies in a given case. In circuits recognizing the availability of the bona fide error defense for mistakes of state law, the foreclosure attorney may have the means to escape FDCPA liability where it has a good faith argument as to why the debt was not time-barred. But this application of the bona fide error defense is far from universal.[4]

In light of the CFPB's Advisory Opinion, foreclosure attorneys must proceed with extreme caution before taking any action on a time-barred debt, as the attorney can be held strictly liable for violating the FDCPA and Regulation F regardless of the consumer's failure to raise the statute of limitations as an affirmative defense.

Melissa Robbins Coutts *is a Partner in the firm's San Diego office and is the Managing Attorney of the Civil Litigation and Evictions Departments. After obtaining a B.A. in English and a B.S. in Criminal Justice from Northern Arizona University in 2003, Coutts graduated Cum Laude from California Western School of Law in 2006. Before joining the firm, she clerked for the Hon. Ruben B. Brooks of the U.S. District Court for the Southern District of California. Coutts is admitted to practice in all state and federal courts in California and Arizona and the Ninth Circuit Court of Appeals. Coutts has received an AV Preeminent® rating from Martindale Hubbell, ranking her at the highest level of professional excellence for legal knowledge, communication skills and ethical standards.*

1 See, *e.g. Copper Creek (Marysville) Homeowners Ass'n v. Kurtz*, 508 P.3d 179, 191 (Wash. Ct. App. 2022) (rejecting case decisions from 2016 and 2018 to conclude that Chapter 7 bankruptcy discharge does not accelerate loan balance); *Bridges v. Nationstar Mortgage LLC*, 515 P.3d 1270, 1274 (Ariz. 2022) (disapproving 2018 case decision to hold that recording notice of trustee's sale does not accelerate loan balance).
2. See *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 577 (2010).
3. *Kaiser v. Cascade Capitalf, LLC*, 989 F.3d 1127, 1137 (9th Cir. 2021).
4. See, *e.g., Thompson v. Midland Funding, LLC*, 375 F.Supp.3d 774, 784-787 (E.D. Ky. 2019) (discussing 6th Circuit cases and concluding the bona fide error defense does not apply to filing of time-barred suit due to mistaken belief regarding conflicting state-law statutes of limitations).

Rising Tides, Rising Premiums, Rising Defaults: Climate Change's Toll on the Mortgage Industry

By **Robert D. Forster, II**

Droughts and wildfires. Floods, tornadoes, and hurricanes. The exacerbation of losses stemming from natural disasters has provoked a discernable phenomenon whereby an increasing number of household insurance giants have opted to withdraw from providing or renewing homeowner insurance policies in many states, including California, Florida, and Louisiana. The numbers simply don't lie: in California, there have been eight disaster events since 2020 that have caused between $20 billion and $50 billion in damage. In Florida, over a dozen storms or hurricanes since 2020 have caused between $100 billion and $200 billion in damage. On a per-capita basis, Louisiana is the single most impacted state by costly natural disasters since 1980.[1] So, why does this matter and how is it relevant to the mortgage industry?

Skyrocketing Insurance Premiums—If You're Lucky Enough to Get Coverage

The immediate threat placed upon insurance companies forced an unprecedented response: failure by major insurers to accept homeowner insurance applications and removal from the market in its entirety by others. And not just small insurance companies, but industry behemoths like State Farm, Farmers, and Allstate. It is worth noting that State Farm was the top homeowner insurance company in California and abruptly ceased accepting new applications in 2022. "The factors driving State Farm's decision are beyond our control, including climate change, reinsurance costs affecting the entire industry, and global inflation," California Department of Insurance spokesperson Michael Said after the State Farm announcement.[2]

The average homeowner insurance premium in Florida is now an astounding $6,000 annually, up 200% from 2019.[3] To add insult to injury, rising construction and labor costs have intensified the issue, as replacement costs to damaged property surged 55% between 2019 and 2022. According to the Reilly Center for Media & Public Affairs, 17% of Louisiana residents reported their homeowner insurance provider canceled their policy in 2022 alone.[4] As a result, state-backed insurance companies are being forced to step up and are gaining popularity amongst those who have been dropped. In Florida, Citizens Property Insurance has grown from 750,000 to 1.5 million insureds in just one year.

Impact on Housing Prices

While it comes as no surprise that natural disasters alter property values, not all properties are impacted the same. Middle- and low-income households tend to occupy the riskiest properties in communities for a couple of reasons: (1) land values in lower-lying or less desirable areas tend to be cheaper, and (2) recovery and construction of these homes tend to take longer and further suppress property values for a lengthier duration. On the other hand, homeowners with higher-valued homes are more likely to purchase additional insurance policies, such as flood insurance, which results in a swifter recovery. In essence, for households with adequate insurance, housing prices rebound relatively well, but the same cannot be said for homes in middle- and low-income neighborhoods.

Additionally, it is commonplace for the value of surrounding communities to jump, as the displaced residents need a place to live and generally remain within the local area due to family, jobs, and schools, which increases demand in those areas. After the deadly fire in Northern California that killed 85 people in late 2018, home sales in Paradise, California, plummeted 40-50%, while neighboring counties, Butte and Sonoma, saw three percent and six percent increases, respectively.

Increased Default Rates

The culmination of increased insurance premiums and decreased property values, paired with the highest interest rates seen in over 20 years, is surely going to result in an increased rate of defaults, if history serves as any indicator. The ramifications of natural disasters reach far beyond the physical damage they inflict on individual homes. They also damage commercial buildings that supply jobs to local residents, who are abruptly deprived of any income.

Several researchers, including Carolyn Kousky, AVP – Environment & Policy, Environment Defense Fund, have studied the effects of Hurricane Harvey (2017) and Hurricane Ida (2021), highlighting the link between property damage and mortgage delinquency in 2020 and 2021, respectively. In 2020, Kousky and Co. found that "loans on moderately to severely damaged homes were more likely to become 90 days delinquent after Harvey." 2021's study by Moody's Analytics expanded on this, revealing that regions "more exposed to storm risk are expected to suffer more than other regions when a hurricane hits."[5]

Furthermore, from a mortgage servicer perspective, loss mitigation becomes increasingly difficult, if not impossible, for borrowers in regions impacted by natural disasters. Even if repair of the property is feasible, modifying or recasting a loan with a higher insurance premium at a higher interest rate is unlikely to result in a more affordable or lower payment that allows the homeowner to retain the home. Plus, if damaged, the property has potentially decreased in value, eliminating the possibility of selling the property while also lowering the loan-to-value ratio.

The undeniable and escalating impacts of climate change are ushering in a new era of challenges for the mortgage industry. As rising sea levels, severe weather events, and shifting climate patterns become more frequent, originators, servicers, insurers, and homeowners are being forced to navigate unchartered territory. Failure by the industry to proactively work with government officials and the private sector to address innovative solutions will further exacerbate the problem, placing a greater burden on all parties involved. By acknowledging the reality of climate change and enacting strategic measures to address the problems head-on, the industry can play a vital role in building a more sustainable and secure future for both the housing market and our planet.

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.*

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2. *Los Angeles Times*: Putril, Corrine. "State Farm is no longer accepting property insurance applications in California" May 27, 2023. https://www.latimes.com/california/story/2023-05-27/state-farm-is-no-longer-accepting-property-insurance-applications-in-california.
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4. Henderson, Michael. "Homeowners Face Insurance Challenges." 2023 Louisiana Survey, a project of the Reilly Center for Media & Public Affairs (2023).
5. "Impact of Natural Disasters on the US Mortgage Industry." Imsdatawise, November 30, 2022, https://imsdatawise.com/impact-of-natural-disasters-on-the-us-mortgage-industry

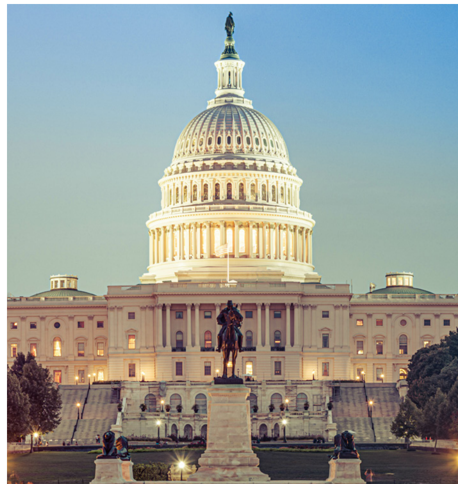
Some Federal Protections Are Stronger Than Others: Sovereign Immunity, Criminal Restitution, and the Automatic Stay

By **Jeffrey S. Fraser**

Tribal sovereignty, in short, is the authority of federally recognized Indian tribes to govern themselves. Abrogation by Congress of sovereign immunity "cannot be implied," but must be "unequivocally expressed" in "explicit legislation." *In re Whitaker*, 474 B.R. 687, 691 (B.A.P. 8th Cir. 2012). In the case of *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 143 S. Ct. 1689 (2023) (*Coughlin*), the Supreme Court of the United States (SCOTUS) was presented with the issue of whether the Bankruptcy Code's express abrogation of governmental units extends to federally recognized Indian tribes. While acknowledging that abrogation of tribal sovereign immunity is a high hurdle, SCOTUS found that the Bankruptcy Code—and its automatic stay protection under §362—clears such hurdles.

Shortly before filing bankruptcy, the *Coughlin* debtor borrowed a short-term, high-interest loan from a lending company owned by a federally recognized Indian tribe. Post-bankruptcy, the tribal company continued collection efforts on its debt, triggering a petition by the debtor to the bankruptcy court to enforce the automatic stay against the tribal company. The bankruptcy court—siding with the tribal company—found that the court lacked subject-matter jurisdiction because the Bankruptcy Code did not clearly express Congress's intent to abrogate tribal sovereign immunity. After the First Circuit Court of Appeals reversed the bankruptcy court, SCOTUS granted certiorari. The central question before the court was whether the abrogation provision of §106(a) of the Bankruptcy Code and the definition of a "governmental unit" in §101(27) of the Bankruptcy Code (taken together) unambiguously abrogates the sovereign immunity of federally recognized tribes.

SCOTUS described §101(27)'s definition of a "governmental unit," as "comprehensive from the beginning to end" and "concludes with a broad catchall phrase, sweeping in 'other *foreign* or *domestic* governments.'" SCOTUS found that the pairing of "foreign" and "domestic" exhibited an unmistakable intent (as a catchall) of the statute to cover all possible governmental units. The court then described that federally recognized tribes exercised unique governmental functions (for example, the power to make their own substantive law in internal matters and enforce such law in their own forums). As a result, tribes are indisputably governments that fall within the scope of §106(a). Unpersuaded by the tribal company's



assertion that neither §101(27) nor §106(a) mention Indian tribes by name (and had Congress wanted to abrogate tribal sovereign immunity, it would have referenced Indian tribes specifically, instead of perceived inclusion in a catchall phrase), SCOTUS determined that Congress did not have to include a specific reference in order to make clear that tribes (as governmental units) are covered by the abrogation provision. The only requirement was for Congress to speak "unequivocally" and, according to SCOTUS, §101(27) and §106(a), when read together, exhibits Congress's unequivocal intent for the Bankruptcy Code to abrogate tribal immunity.

Conversely in the case of *Turner v. United States*, No. 1:22-CV-937, 2023 WL 4053585, at *1 (M.D.N.C. June 16, 2023)—coincidentally decided one day after the Supreme Court's *Coughlin* case, the United States District Court for the Middle District of North Carolina approached a different (but somewhat analogous) scenario. In *Turner*—similar to *Coughlin*—a debtor was confronted with a creditor engaging in collection activity during the course of an active bankruptcy, under the premise that the Bankruptcy Code did not apply to its particular debt. In *Turner*, an individual (the future debtor) pleaded guilty to conspiracy for operating a chop shop, eight years before filing for bankruptcy. As a part of the criminal judgment, the future debtor was sentenced to pay restitution in the amount of $336,614.26 (the "Restitution Debt"). When the debtor filed for bankruptcy in February 2022, he included the Restitution Debt in his summary of assets and liabilities. In June 2022 (four months after the bankruptcy filing), the United States moved for an order of garnishment in the criminal case in aid of recovery of the Restitution Debt. Subsequently, the United States moved for a protective order from the bankruptcy court requesting an adjudication from the court that the automatic stay does not apply to the enforcement and collection of the Restitution Debt. After the bankruptcy court held that the automatic stay does not apply, the debtor timely appealed to the district court.

The issue on appeal was framed as follows: does the automatic stay provided under §362(a) bar enforcement of a criminal judgment through the collection of restitution provided by the Mandatory Victims Restitution Act (the "MVRA"). 18 U.S.C.A. § 3613 (West). The district court focused on the specificity of Congress's mandate contained in MVRA, which allowed for seizure of all property or rights to property "notwithstanding any other federal law." This clear mandate displays that Congress intended for the MVRA to supersede the Bankruptcy Code, including the automatic stay. Furthermore, the district court was not persuaded by the debtor's argument that the debtor's earnings are property of the estate, not property of the debtor. The court concluded that the distinction between the debtor's property and the bankruptcy estate does not impact the statutory analysis of the MVRA. While the authorities relied upon are different in *Coughlin* and *Turner*, both creditors proceeded with a perceived protected status, each feeling their respective status superseded the federal bankruptcy court protection. As *Turner* and *Coughlin* display, clear, unambiguous, and unequivocal language of a federal law is imperative when using such law as authority against the Bankruptcy Code.

Jeffrey S. Fraser *is the Partner over 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 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.*

ALAW

ALAW is excited to continue growing in new jurisdictions and with new talent. This summer, we merged with Milstead & Associates: a creditors' rights firm based in New Jersey and Pennsylvania. With over 20 years of industry experience, Michael Milstead and his team have joined the ALAW family, with Michael leading as our newest Partner.

We have also welcomed a new Partner in our Texas office, Kirk Schwartz. Kirk brings almost three decades of experience in the mortgage and creditors' rights industry to our firm, bolstering our already strong presence in Texas.

In our Arizona office, ALAW has welcomed Carrie Thompson Jones as Managing Attorney and Carson Emmons as Senior Counsel.

We are excited for the future as we continue to grow our footprint and cultivate an excellent team of seasoned professionals.

Gilbert Garcia Group

Gilbert Garcia Group, P.A. has proudly served all of Florida since 1991. A testament to their dedication and commitment to meeting the growing legal needs of the diverse Florida community, the firm expanded its practice areas in early 2023 to include immigration law. The recent addition of associate attorney Symone Neil-Robinson to the firm's civil team has further enriched their expertise, enhancing their capacity to provide top-tier legal counsel.

The firm remains committed to serving on numerous boards and committees and supporting its community by donating to and volunteering with various non-profit organizations. This impressive track record, along with owner and Managing Partner Michelle Garcia Gilbert's leadership and unwavering commitment to serving her parish, local education systems, health organizations, and veterans service organizations, have earned her recognition as a finalist for the 2023 Women in Housing Award. Gilbert Garcia Group is grateful and proud to be part of the mortgage servicing industry and Five Star community.

Van Ness Law Firm

The firm had an excellent win this year in *Bank of N.Y. Mellon v. Kardok*, 2023 Fla. App. LEXIS 4113 (Fla. 4th DCA June 21, 2023) (pending rehearing).

This foreclosure involves a lost note with no endorsements, a confusing modification agreement that identifies the servicer as the lender, and a MERs assignment. The bank's standing to foreclose was heavily contested, and while it was extremely problematic—we felt comfortable relying upon established case law on MERs assignments of note and mortgage. After lengthy contested trial and closing arguments, the court found that the confusing modification agreement created too "big a gap" to "find by a preponderance of the evidence" that the bank had standing in the foreclosure action. The court ruled in favor of the borrower, and the bank was looking at a six-figured award of attorney's fees to the borrower. We felt confident that the court misapplied the law and appealed the ruling to the Fourth District Court of Appeals (the "Fourth DCA"). The matter was fully briefed, and after a lengthy wait, the Fourth DCA issued an Opinion reversing the final judgment in favor of the borrower. In so doing, the Fourth DCA held that the bank satisfied its burden to prove its standing and that "circumstantial evidence supporting an inference about the status of a third entity was not competent substantial evidence to rebut by a preponderance of evidence that the bank lacked standing to foreclose the mortgage." While the matter is still on rehearing, we are happy with the opinion and feel vindicated by the result.

Legal Updates: Illinois Amends Foreclosure Notice, Foreclosure File, and Notary Provisions

By Michael Woods

The state of Illinois provided several legal updates in 2023, impacting how firms operate on a procedural and professional basis.

Updates to Foreclosure Notice and Court Files

On June 9, 2023, the Mortgage Foreclosure Article of the Code of Civil Procedure was amended as a result of the enrollment of 2023 Illinois Senate Bill No. 201, creating Public Act 103-0061. This amendment made a change to 735 ILCS 5/15-1503 (Notice of foreclosure) and added a new section: Sec. 15-1515 (COVID-19 emergency sealing of court file).

Section 15-1503, subsection (b) had previously required a copy of the notice of foreclosure to be mailed first class to the municipality where the mortgaged real estate was located. If the real estate was located in a city with a population of more than 2,000,000, the foreclosing party was also required to send a copy of the notice of foreclosure to the alderperson for the ward in which the real estate was located and to file an affidavit attesting to the fact it was sent. With the passage of this Act, these requirements were eliminated from this section.

Section 15-1515 provides an opportunity for the court to seal a file (upon motion of the mortgagor) of any foreclosure action filed during the COVID-19 emergency and economic recovery period, provided the action was not subject to the moratoria enacted by the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Federal Housing Administration, or the Department of Veterans Affairs. Additionally, a residential eviction filed during the COVID-19 emergency and economic recovery period and pending on the effective date of the Act shall also be sealed by court order. This new section applies to any action to foreclose a mortgage relating to residential real estate, and real estate improved with a dwelling structure containing dwelling units for six or fewer families living independently of each other in which the mortgagor is a natural person landlord renting the dwelling units, even if the mortgagor does not occupy any of the dwelling units as the mortgagor's personal residence.

Notary Updates

In addition to the changes mentioned above, a number of revisions to the Illinois notary laws became effective on June 5, 2023 (as a result of Public Act 102-0160 and the Illinois Secretary of State's subsequent adoption of the administrative rules).

Notary Commission Appointment and Reappointment

A notary's journey in Illinois will largely depend on how they plan to notarize documents. The state of Illinois now has three options for notarizations: traditional (in-person), remote, and electronic. The traditional notarization is what most people are familiar with. A signor brings a physical document, presents valid identification, may state an oath, signs the document in front of the notary, and the notary signs the document.

As a result of the COVID-19 pandemic, other notarial options gained popularity. Remote notarization in Illinois is similar to the traditional method—where physical documents are signed with a wet-ink signature. Rather than being in the physical presence of one another, however, the remote notary and signer use special audio-video technology to communicate, view the document, and have the signor sign the document—all in real-time.

Electronic notarizations differ from the above two methods and require particular skills and specialization. Because of this, a separate application, commission, and larger bond are required to perform electronic notarizations. An electronic notarization can occur both when the notary and signer are in different physical locations, but it can also occur when there is an in-person meeting. What makes the act

an electronic notarization is the signing of the document through the use of an electronic signature and seal.

Regardless of whether a notary chooses a traditional or electronic commission, they will encounter the upcoming change of mandatory education and testing. Beginning January 1, 2024, all notary applicants will be required to take a three-hour study course that includes a 50-question, multiple-choice, and true/false exam. A score of at least 85% is required to pass.

The Addition of Remote and Electronic Notarizations

While some similarities and differences were mentioned above as they relate to traditional notarizations, the permanent addition and approval of remote and electronic notarizations requires particular technical compliance. Any remote or electronic notarization requires a statement that the notarial certificate was done in a remote/electronic manner, and the use of A/V technology or software requires the increased notary bond purchase.

Audio-video technology must provide a clear, live feed between the notary and signer, and the electronic notary process calls for multi-factor authentication for signer identification. Such authentication involves the presentation of a government-issued photo ID with signature, ID credential analysis, and a "dynamic knowledge-based authentication" consisting of a five-question test about the signer pulled from public and private resources (life, address, credit history, etc.). While these multi-factor authentication protocols are not required for remote notarizations, they are strongly recommended. Remote and electronic notarizations must be recorded in Illinois, with appropriate disclosures to all parties. Stored recordings must comply with NPI security requirements.

With over 130 pages of rules, it is recommended to review the changes and updates to the Illinois Notary Process.

The Journal Requirement

There is also a requirement for Illinois notaries to create and maintain a journal of notarial acts. The journal can be either paper or electronic. It is the property of the notary and should be kept secure at all times. Every journal must include the name and signature of the notary, notary commission number and expiration date, the notary's public address, the meaning of any abbreviated words used in the journal, and a statement that "upon the death or adjudication of incompetency of the notary public, the notary public's personal representative or guardian or any other person knowingly in possession of the journal must deliver or mail it to the Secretary of State."

Additionally, each notarial act logged in the journal must contain the following elements: the name of the signer and any witnesses, the title or description of the document, the notarization date, method of notarization, the fee charged (if any), and the location of notary and signer. Because of law firm/client confidentiality requirements, a notary employed by a law firm is not required to keep a journal of notarizations performed during the notary's employment with the firm, as long as the firm maintains a copy of the documents notarized.

Other Odds and Ends

With over 130 pages of rules, it is recommended to review the changes and updates to the Illinois Notary Process. The Illinois General Assembly's Joint Commission on the Administrative Rules (JCAR) has made them available on its website. That said, there are a few other updates worth mentioning. Any Notarial Certificate must now be secured to the document—read stapled. The use of tape, paper clips, or binder clips is not permitted. Signatures of the notary must include a legible, recognizable handwritten signature that can be attributed to the notary public performing the notarial act by anyone examining or authenticating the signature. If the notary's preferred signature is not legible and recognizable, they must legibly print their name immediately adjacent to their signature.

Firms should review these updates and be aware of any impacts the rules may have on their organizations, notary employees, and compliance efforts.

__Michael Woods__ joined Potestivo & Associates, P.C. in 2006. He is the firm's EVP and is located in the Rochester, Michigan office. He oversees the day-to-day operations of the firm and works to promote efficiency across all firm departments and processes. Prior to his current position, Woods previously served the firm in the capacity of the Supervising Attorney of the Foreclosure and Loss Mitigation Departments and later as an Assistant VP – Managing Attorney. Woods graduated from Central Michigan University with a Bachelor of Science in Political Science, and a concentration in Public Administration. He earned his Juris Doctor degree from the University of Miami School of Law.

"Florida" continued from page 1

the panel in *Maki*. The full language of the quoted section is as follows:

> Except as affected by statute in a few states, and subject to the conflict of authority as respects the effect of an execution or an attachment upon the mortgaged property by the judgment creditor, or a sale thereunder, the cases are uniform in holding that until the mortgage debt is actually satisfied, the recovery of a judgment on the obligation secured by a mortgage, without the foreclosure of the mortgage, although merging the debt in the judgment, has no effect upon the mortgage or its lien, does not merge it, and does not preclude its foreclosure in a subsequent suit instituted for that purpose, or the exercise of the power of sale contained in the mortgage or deed of trust – the conclusion often reached in such cases being that the debt is not destroyed by the merger and that the mortgage secures the debt in its new form as merged in the judgment. 37 Am. Jur., Mortgages § 523 (1941)

The final portion of this quotation—**"the debt is not destroyed by the merger and that the mortgage secures the debt in its new form as merged in the judgment"**—was omitted for unknown reasons in *Klondike* and is the operative language, which, according to NCP, would potentially resolve the issue before the panel in *Maki*. Please stay tuned for further developments in this interesting and impactful case.

__Jane Bond__ is the Managing Partner of the Firm's Florida Litigation Group. She has over 30 years' litigation experience, with 27 years specifically devoted to business and real estate litigation involving the mortgage lending and servicing industries. Her experience leads to frequently speaking at training seminars, conferences, and continuing legal education courses on real property issues. Bond continues to share her knowledge by authoring several articles regarding real estate litigation and related topics.

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Oversight in Post-Foreclosure Sale Bid Process Under California Civil Code §2924m(c): Triggering Automatic Stay Violations?

By **Jennifer Wong, Esq.**

Navigating California's foreclosure scheme has been further complicated by the enactment of Cal. Civ. Code §2924m (2020). Effective January 1, 2021, the addition of this statute has left unintended consequences and triggered automatic stay violations in bankruptcy court.

Before January 1, 2021, when bankruptcies were filed in an attempt to stop a California non-judicial foreclosure, the sale validity was easily determined. A foreclosure sale was deemed final and perfected as of 8:00 a.m. on the actual date of the sale as long as the Trustee's Deed was recorded within 15 days of the sale, even if the 15 days was during the pendency of an active bankruptcy. This concept is known as relation back and prevented stay violations claims from bankruptcy filings post-sale. See Cal. Civ. Code §2924h(c); *In re Bebensee-Wong*, 248 B.R. 820, 823 (B.A.P. 9th Cir. 2000). Many other California bankruptcy courts have ruled similarly, and this concept was relatively undisputed.

However, California muddled the foreclosure process by enacting Cal. Civ. Code §2924m. §2924m(c) established holding periods following a foreclosure sale under various scenarios to allow the submission of additional bids, which convoluted when a sale is determined to be "final" and whether relation back under §2924h(c) was applicable. This posed a troubling question of whether a bankruptcy filed during this holding period would create an automatic stay that could potentially affect the sale. It left the bankruptcy court to ascertain when a sale was deemed final and whether a stay violation occurred.

In an *unpublished* ruling (*In re Shannon Hager*, 22-12056, May 25, 2023) out of the bankruptcy court in the Eastern District of California, the Court addressed this exact issue and held under the plain language of the statute, the sale in this instance was not deemed final until the expiration of the required holding period and relation back under §2924h(c) was not applicable. Under these findings, the Court concluded the sale was finalized post-petition in violation of the stay and was deemed void as a matter of law. In *Hager*, a foreclosure sale was held on November 7, 2022, wherein McGilvray (a third-party investor) purchased the property. McGilvray was not a prospective owner-occupant and thus under §2924m(c), a 15-day window opened to allow bids to be submitted. This window can be further extended to 45 days if bids or notices of intent to bids are submitted during this 15-day window. Depending on which party submits a bid, the statutes branch out to various scenarios on when the sale is deemed final and whether relation back under §2924h(c) applies. In *Hager*, notices of intent to bid were submitted triggering the extension to 45 days, but ultimately, no actual bids were submitted. Thus, on December 22, 2022, (45th day) at 5:00 p.m., the sale was deemed final and McGilvray remained the only eligible bidder to take title to the property. Cal. Civ. Code §2924m(c)(4)(A). Unfortunately for McGilvray, during this 45-day window, the prior owner (*Hager*) filed for bankruptcy. *Hager* argued the recordation of the deed and the sale itself violated the stay, which went into effect on December 1, 2022, when the bankruptcy was filed.

The foundational issue here lies with the applicability of §2924h(c), which provides the relation back protections that determine finality and perfection of the sale. Under the new amendments, §2924h(c) is only specifically referenced under §2924m(c)(3) for bids won by "eligible tenant buyers" but otherwise not referenced in the other subsections, including (c)(2) and (c)(4) for bids won by "eligible bidders." Thus, the Court in *Hager* was left to conclude the relation back protections of §2924h(c) only intended to apply to bids won by "eligible tenant buyers" but did not apply to an "eligible bidder," the category which McGilvray fell under. *Hager* at 15, 16. If the relation back did not apply, the sale became final on December 22, 2022, when the automatic stay was in full force and effect. *Hager* at 20. Even the Court admitted this approach was a "radical departure" from prior precedent. *Hager* at p. 15. But is this what the legislators intended, or was it a mere oversight? This would only serve to protect bids made by eligible tenant bidders, which is probably less than 1% of successful bidders. It would significantly prejudice qualifying eligible bidders (which is most common) to purchase properties at foreclosure sales.

Lastly, McGilvray pleaded for annulment of the stay. Relying on the extensive factors laid out in *Fjeldsted*, the Court determined most of the factors weighed against annulment. *In re Fjeldsted*, 293 B.R. 12 24-25 (B.A.P. 9th Cir. 2003). But the real concern and focus here is not annulment but the amendments to the foreclosure statutes that will likely result in a slew of complications and additional liabilities associated with stay violations. While this unpublished ruling is one of the first bankruptcy courts to analyze the new statutes, this "loophole" has been recognized by the industry and its practitioners as a legislative oversight. The legislative intent suggests the failure to recognize all eligible bidders is an unintentional omission. Paragraph (2) of subdivision (c) in §2924m references both "eligible tenant buyer" and "eligible bidder." Logic would presume that both categories of buyers would receive the same relation back protections mentioned in §2924h(c) when a sale is subject to the 45-day overbid window as they would under the 15-day window. Action has been taken and a proposed bill (AB 1043), which is currently pending, will remedy this issue and provide the same relation-back protections to all bidders. Otherwise, this practice will undoubtedly encourage bankruptcy filings post-sale to draw out what is already a long foreclosure process in California.

Jennifer Wong *is an attorney at McCarthy & Holthus, LLP in San Diego, California. Wong has 10 years of experience as a lawyer since graduating from California Western School of Law with a N/A in 1998. This attorney also has a Bachelor of Arts from University of California, Santa Barbara.*

INDUSTRY NEWS

Despite Low Q2 Mortgage Delinquencies, Signs of 'Consumer Credit Stress' Remain

By **Eric C. Peck**

According to the Mortgage Bankers Association's (MBA) National Delinquency Survey covering the second quarter of 2023, the delinquency rate for mortgage loans on one- to four-unit residential properties decreased to a seasonally adjusted rate of 3.37% of all loans outstanding.

The delinquency rate was down 19 basis points from Q1 2023, and down 27 basis points year-over-year. The percentage of loans on which foreclosure actions were started in Q2 fell by three basis points to 0.13%.

"The seasonally adjusted mortgage delinquency rate fell to its lowest level since MBA's survey began in 1979, reaching 3.37% in the second quarter of 2023," said Marina Walsh, CMB, MBA's VP of Industry Analysis. "Buoyed by a resilient job market, homeowners are continuing to make their mortgage payments."

Compared to Q1, the seasonally adjusted mortgage delinquency rate decreased for all loans outstanding. By stage, the 30-day delinquency rate decreased two basis points to 1.75%, the 60-day delinquency rate remained unchanged at 0.55%, and the 90-day delinquency bucket decreased 17 basis points to 1.07%.

By loan type, the total delinquency rate for conventional loans decreased 15 basis points to 2.29% over the previous quarter to the lowest level in the history of the survey dating back to 2004. The FHA delinquency rate decreased 32 basis points to 8.95%, and the VA delinquency rate decreased by 28 basis points to 3.70% over the previous quarter to the lowest level since Q4 of 2019.

On a year-over-year basis, total mortgage delinquencies decreased for all loans outstanding. The delinquency rate decreased by 35 basis points for conventional loans, increased 10 basis points for FHA loans and decreased 52 basis points for VA loans from the previous year.

The delinquency rate includes loans that are at least one payment past due but does not include loans in the process of foreclosure. The percentage of loans in the foreclosure process at the end of Q2 was 0.53%, down four basis points from Q1 of 2023, and six basis points lower than one year ago.

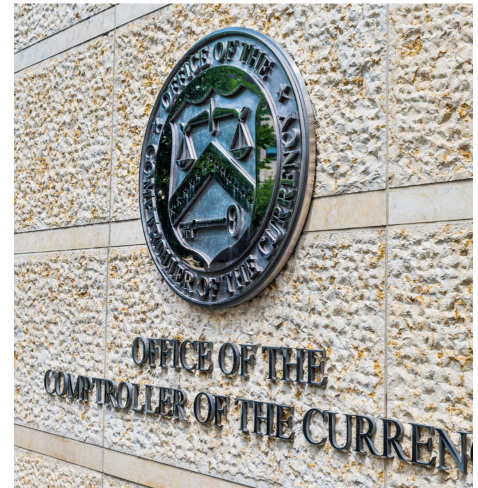
The non-seasonally adjusted seriously delinquent rate, the percentage of loans that are 90 days or more past due or in the process of foreclosure, was 1.61%, the lowest level since Q2 of 2000. It decreased by 12 basis points from the last quarter and fell by 51 basis points from last year. The seriously delinquent rate decreased 10 basis points for conventional loans, decreased 30 basis points for FHA loans, and decreased 11 basis points for VA loans from the previous quarter. Compared to a year ago, the seriously delinquent rate decreased by 44 basis points for conventional loans, decreased 93 basis points for FHA loans, and decreased 68 basis points for VA loans.

"Despite low delinquency rates, there are early signs of possible consumer credit stress," added Walsh. "Delinquencies are rising for other forms of credit, such as credit cards and car loans. In addition, FHA delinquencies rose 10 basis points compared to year ago levels. On a non-seasonally adjusted basis, FHA delinquencies rose 13 basis points year-over-year, and 71 basis points from the first quarter of 2023. As the economy slows and labor market cools, homeowners with FHA loans are likely to feel the distress first."

The five states reporting the largest quarterly increases in their overall non-seasonally adjusted delinquency rate were: Indiana (37 basis points)

Michigan (35 basis points)
Ohio (35 basis points)
Pennsylvania (32 basis points)
Texas (31 basis points)

***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.*



INDUSTRY NEWS

Banking Regulators Seek Comment on Rules to Strengthen Capital Requirements

By **Eric C. Peck**

The Office of the Comptroller of the Currency (OCC), U.S. Department of the Treasury, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation (FDIC) have jointly requested comment on a proposal to increase the strength and resilience of the U.S. banking system. The proposal set forth would modify large bank capital requirements to better reflect underlying risks and increase the consistency of how banks measure their risks.

The changes would implement the final components of the Basel III agreement, also known as the Basel III endgame. Additionally, following the banking turmoil in March 2023, the proposal seeks to further strengthen the banking system by applying a broader set of capital requirements to more large banks. The proposal would generally apply to banks with $100 billion or more in total assets. Community banks would not be impacted by this proposal.

The joint agency proposal aims to improve the strength and resilience of the banking system by modifying large bank capital requirements to: Better reflect underlying risks; and

Increase the transparency and consistency of the regulatory capital framework.

These goals would be accomplished by revising the capital framework for banks with total assets of $100 billion or more in four main areas: Credit risk, which arises from the risk that an obligor fails to perform on an obligation;

Market risk, which results from changes in the value of trading positions;

Operational risk, which is the risk of losses resulting from inadequate or failed internal processes, people, and systems, or from external events; and

Credit valuation adjustment risk, which

results from the risk of losses on certain derivative contracts.

Trade groups, including the Mortgage Bankers Association (MBA), expressed their opposition to the measure.

"Without significant revisions, this proposal will increase borrowing costs and reduce credit availability for the very consumers and borrowers this administration ostensibly seeks to assist," said Robert D. Broeksmit, CMB, President and CEO of the MBA. "The large increases in capital standards will likely stunt macroeconomic growth and reduce banks' participation as single-family and commercial/multifamily lenders, servicers, and providers of warehouse lines and mortgage servicing rights financing."

We're not talking about the big eight banks. ... We're talking about a $30 or $40 billion bank, or a $100 billion bank, not being able to compete for a middle market loan because a bank or a supplier in Europe ... is getting a lower cost of capital."

Brian Moynihan, CEO Bank of America

The proposal includes transition provisions to give banks sufficient time to adapt to the changes while minimizing any potential adverse impact. During the comment period, the agencies will collect data to further refine their estimate of the proposal's impact. Under the proposal, large banks would begin transitioning to the new framework on July 1, 2025, with full compliance starting July 1, 2028.

In an interview with Fox Business, Bank of America CEO Brian Moynihan said the process needs to assure "the playing field is level," saying the rules should be implemented carefully "so to not make the U.S. less competitive."

Moynihan added, "We're not talking about the big eight banks. ... We're talking about a $30 or $40 billion bank, or a $100 billion bank, not being able to compete for a middle market loan because a bank or a supplier in Europe ... is getting a lower cost of capital."

In terms of the proposed rule's impact on the nation's already hamstrung housing market, Broeksmit said, "Given ongoing affordable housing challenges, regulators should be taking steps that encourage banks to better support real estate finance markets. These proposed changes do precisely the opposite during a time of near record-low single-family delinquencies and pristine underwriting. This proposal also undermines several current policy objectives, from closing the racial homeownership gap to promoting competition over consolidation."

INDUSTRY NEWS

CFPB Uncovers Unfair and Deceptive Practices Across Consumer Financial Products

By **Eric C. Peck**

The Consumer Financial Protection Bureau (CFPB) has released a new Supervisory Highlights report which found unfair, deceptive, and abusive acts or practices across many consumer financial products. The latest edition of the Supervisory Highlights report covers findings from CFPB supervisory examinations completed from July 2022 to March 2023.

"Today's report furthers our efforts to highlight conduct that violates federal law, including the prohibition on abusive practices in consumer financial services," said CFPB Director Rohit Chopra. "The CFPB is also inspecting more financial data brokers engaged in consumer reporting, as well as nonbank entities using authorities that previously went unused."

In its report, the Bureau assessed the mortgage origination operations of several supervised institutions for compliance with applicable Federal consumer financial laws, including Regulation Z. Examiners determined that the institutions used a compensation plan that allowed a loan originator who originated both brokered-out and in-house loans to receive a different level of compensation for the brokered-out loans versus in-house loans. By compensating differently for loan product types that were not offered in-house, the entities violated Regulation Z by basing compensation on the terms of a transaction. In response to these findings, the entities have since revised their loan originator compensation plans to comply with Regulation Z.

Examiners also identified Unfair, Deceptive, or Abusive Acts or Practices (UDAAPs) and regulatory violations at mortgage servicers, including violations during the loss mitigation and servicing transfer processes, as well as payment posting violations.

CFPB examiners found that mortgage servicers engaged in an unfair act or practice when they delayed processing borrower requests to enroll in loss mitigation options, including COVID-19 pandemic-related forbearance extensions, based on incomplete applications. These delays varied in length, including delays of up to six months. Borrowers were substantially injured because they suffered one or more of the following harms: prolonged delinquency, late fees, default notices, and lost time and resources addressing servicer delays. Borrowers also experienced negative credit reporting because of the servicers' delays, resulting in a risk of damage to their credit that may have materialized into financial injury. Borrowers could not reasonably avoid injury because servicers controlled the processing of applications, and borrowers reasonably expected servicers to enroll them in the options they applied for. And the injury to consumers was not outweighed by benefits to consumers or competition.

Under the Consumer Financial Protection Act, the CFPB has the authority to supervise large banks, thrifts, and credit unions with assets in excess of $10 billion and their affiliates, as well as certain nonbanks, including mortgage companies, private student lenders, and payday lenders. The CFPB's supervisory authority also covers consumer reporting, student loan servicing, debt collection, auto finance, international money transfer, and other nonbank entities that pose risks to consumers.

Among the other findings, the CFPB observed a significant shift in the auto lending market recently. Car prices rose sharply during the recent pandemic, leading to larger loan amounts, higher monthly payments, and consequently, a higher rate of loan delinquencies. CFPB examiners found that consumers were misled in marketing materials by auto lenders about the quality of car they were eligible for under the terms of an auto loan offer. The pictured cars were often significantly larger, more expensive, and newer than the advertised loan offers were good for.

CFPB examiners also found unfair and abusive acts employed by payday lenders in their collection practices. Lenders would put language in loan agreements that prohibited consumers from revoking their consent for the lender to call, text, or e-mail the consumers about collection on the outstanding balance.

Lenders also made false collection threats that would often purport their authority to garnish wages of borrowers, when no such authority exists. In some cases, the lender would actually make an unauthorized wage deduction by sending demand notices to consumers' employers that incorrectly conveyed that the employer was required to remit to the lenders from the consumer's wages the full amount of the consumer's loan balance.

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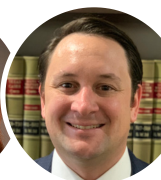

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