CONSIDERATIONS FOR THE LENDER HOLDING MULTIPLE MORTGAGE LIENS ON A SINGLE PROPERTY

By: Luke Wiley – Anselmo Lindberg Oliver LLC

When we talk about foreclosure, we usually speak in the context of a single action on a single mortgage. The picture is often more complicated. The most common ways that a lender obtains two lien positions on the same property is through financing a buyer’s down payment (the old “80/20” loans) and through the origination of home equity lines of credits subsequent to a purchase money mortgage. However, when loans are traded on the secondary market, a single investor or servicer can become the holder of two lien positions through trade. It is not uncommon for two mortgages to be taken out at two completely different points in time, sometimes by multiple lenders, and then eventually end up in the hands of a single owner or servicer.

When such loans fall into a status of default and foreclosure becomes necessary, an issue arises as to how to manage these lien positions to best avoid loss.

IS YOUR STATE AN ANTI-DEFICIENCY STATE?
When dealing with multiple liens on a single property, a chief issue is whether and to what extent state law allows for deficiency judgments. Some states have anti-deficiency statutes, which is to say that personal deficiency judgments are prohibited or limited in some way. While a state like Illinois allows for a deficiency judgment by either a junior or senior mortgagee (735 Ill. Comp. Stat. 5/15-1508), other states use a variety of different approaches. This can greatly affect the options available to a foreclosing lender to avoid losses.

It is not uncommon for states to limit the right to a deficiency judgment based upon the type of property the borrower owned. A foreclosure judgment may only allow for judgment in the amount of the outstanding balance of the lien, with no consideration of any additional liens that may be held.

When dealing with multiple liens on a single property, a chief issue is whether and to what extent state law allows for deficiency judgments.

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JUDICIAL FORECLOSURE STATES SHOULD UPDATE UCC WITH 2002 AMENDMENTS

By: Matthew J. Richardson – Manley Deas Kochalski, LLC

A host of judicial foreclosure states, including Ohio, Pennsylvania, Illinois, and New Jersey, have obstacles in place that deny servicers and investors the right to enforce lost promissory notes. Because legislatures in those states have not adopted the 2002 amendments to Section 3-309 of the Uniform Commercial Code (UCC), existing statutes that help determine how lenders may enforce lost notes are inflexible. At best, they delay enforcement, and at worst, they deny enforcement altogether.

Section 3-309 of the Uniform Commercial Code (UCC) contains the standard most widely applied to permit servicers and investors to enforce lost notes in judicial foreclosure actions. Under the 2002 amendments—the most current for enforcing lost notes—a party may enforce a lost note if it was entitled to enforce the note when it was lost. Significantly, however, a transferee party may also enforce the note if the transferee “directly or indirectly acquired ownership” of the obligation from a party that was entitled to enforce the note when it was lost.

Additional prerequisites apply, such as requiring the servicer or investor to prove the note’s terms and supply other information supporting the party’s right to enforce it. The current version strikes a balance between establishing a reasonable burden for a servicer or investor to enforce a lost note and making it possible for their transferees to enforce them.

This newer version of UCC 3-309 was drafted to legislatively “override” a federal district court’s holding in Dennis Joslin Co., L.L.C. v. Robinson Broadcasting Corp., 977 F. Supp. 491 (D.D.C. 1997) and the similar holdings of other courts (UCC 3-309, comment 2 (2002)).

“Judicial” continued on page 13

CLARIFYING BANKRUPTCY CLAIMS DURING DIVORCE PROCEEDINGS—THE TENTH CIRCUIT WEIGHS IN

By: Caitlin Stayduhar – Martin Leigh PC

In December 2015, the Tenth Circuit Court of Appeals held that under certain circumstances, a bankruptcy creditor has standing to litigate the validity of a domestic support obligation claim in the underlying state court divorce proceeding.

The case, In re Lavenhar, arose out of a state court judgment entered against Jeffrey Lavenhar in favor of First American Title Insurance Company. While the First American litigation was pending, Jeffrey and his wife, Laurie Lavenhar, entered into a separation agreement that required Jeffrey to pay spousal support to Laurie and provided for certain real property transfers. Jeffrey subsequently filed a Chapter 7 bankruptcy, listing the domestic support obligation to Laurie among the schedules to his bankruptcy petition. Laurie then filed a priority unsecured claim for domestic support obligations in the amount of $347,400. Asserting that the domestic support obligation was obtained via fraud, First American filed a motion to lift the automatic stay and sought permission to litigate its complaint in intervention in the Lavenhars’ state court divorce proceeding. Laurie objected to a deficiency judgment based upon the type of property the borrower owned.

Laurie and provided for certain real property transfers. Jeffrey subsequently filed a Chapter 7 bankruptcy, listing the domestic support obligation to Laurie among the schedules to his bankruptcy petition. Laurie then filed a priority unsecured claim for domestic support obligations in the amount of $347,400. Asserting that the domestic support obligation was obtained via fraud, First American filed a motion to lift the automatic stay and sought permission to litigate its complaint in intervention in the Lavenhars’ state court divorce proceeding. Laurie objected

“Clarifying” continued on page 18
Legal League Members and Supporters.

As we start 2016—with foreclosure crisis firmly in the past and the market in full-scale recovery mode—I couldn’t help but reflect on one of the most intriguing players that entered the world of mortgage default as a result of the crisis. I am referring to the so-called opportunistic “foreclosure rescue” entities that sprang into existence all over the country as the crisis was heating up and now have all but vanished. I wonder what ever happened to those scam artists we all read about several years back. Were they brought to justice and made to pay for their wrongdoings like so many other parties involved in the foreclosure crisis were?

While there are scores of certified, legitimate debt relief and counselling agencies that still exist for the benefit of consumers in need, the fact remains that many of the entities that sprung up in the early 2000s were “scammers” that capitalized on borrower’s misfortunes for their own substantial profit. Unfortunately for my profession, many of the “scammer” entities were set up and run by attorneys. They operated under the guise of providing valuable legal assistance to borrowers who were facing imminent foreclosure. While many vigorously defended or negotiated foreclosure alternatives for their clients, many others pocketed huge upfront fees from borrowers and failed to represent their interests. Worse yet, many concocted elaborate schemes to strip their own clientele of the title and equity in their homes.

When their misdeeds came to light, there were numerous efforts by state attorneys general and various federal agencies, including the Consumer Financial Protection Bureau (CFPB), to bring these “scammers” to justice. CFPB Director Richard Cordray said, “We are taking on schemes that prey on consumers who are struggling to pay their mortgages or facing foreclosure. These companies pocketed illegal fees—taking millions of hard-earned dollars from distressed consumers, and then left those consumers worse off than they began. These practices are not only illegal, they are reprehensible.”

I thought it would be worthwhile to take a look at what the CFPB and others have done about these reprehensible entities. What I found was pretty astounding. Other than shutting some of the more high profile offenders down, and filing a handful of dead-end lawsuits, very few of these “scammers” were ever brought to justice. Just as disturbing is that very little, if anything was ever recovered from the “scammers” through forfeitures or penalties. The reasons why are numerous. From the sheer numbers of these agencies that were operating fraudulently, to the lack of trained prosecutors and effective laws, all but the most high profile “scammers” were able to evade the justice system and liability.

While some of the lawsuits and prosecutions are ongoing, fewer and fewer new cases are being pursued. Major awards against those that have been successfully prosecuted have proven to be almost impossible to collect since the entities and the individuals who operated them usually have little or no assets available to seize. As a result, authorities are only able to satisfy a small fraction of the awards they obtain from a successfully prosecuted case. Still, the overwhelming majority of the “scammers” have moved on with their ill-gotten gains, having never been made to answer to anyone. Sadly, the CFPB appears to have moved on as well. In 2016, foreclosure rescue entities don’t seem to be as big priority to them either, now that the foreclosure crisis has subsided.

In the end, it all seems pretty unfair when compared to how the lenders, servicers, and their counsel were made to pay for their alleged transgressions during the foreclosure crisis. While nothing can be done to fix the transgressions of the past, I call on our membership to make 2016 a year of above-board business, collaboration, and strength.

Chairman–Legal League 100

Glen Rubin, Rubin Lublin, LLC

Glen Rubin, an AV-rated attorney, is the managing partner at Rubin Lublin, LLC, located in suburban Atlanta. He did his undergraduate studies at Emory University and received his law degree from Hofstra University School of Law. Rubin has practiced law since 1989, primarily in the creditors’ rights arena. He began his career in New York practicing commercial bankruptcy law and later transitioned to Georgia, where he built and continues to manage a successful regional mortgage default practice for his clientele in Georgia, Tennessee, Mississippi, and Alabama. In addition to his professional responsibilities, Rubin is active with various civic organizations such as Habitat for Humanity. He can be reached at 770.246.3301 or by email at grubin@rubinlublin.com.

Q1 2016
FILING A PROOF OF CLAIM ON TIME-BARRED DEBT

By: Amy Kiser – Gilbert Garcia Group, P.A.

There are several theories that are important to our legal system. One theory is the statute of limitations. Statute of limitations laws set the maximum time after an event in which a legal proceeding may be filed. The time periods vary from state to state and claim to claim.

With regards to the collection of debt, if a debt collector attempts to collect a debt when the statute of limitations has expired, that debt collector’s practices may be found to be misleading, deceptive, and false. See Crawford v. LVNV Funding, LLC, 758 F.3d 1254 (11th Cir. 2014). As such, those actions may violate the Fair Debt Collection Practices Act (FDCPA). The FDCPA imposes restrictions on false, deceptive, and unfair debt-collection practices. If a creditor is found to have violated the FDCPA, the creditor is liable for actual damages, statutory damages, and reasonable attorneys’ fees and costs. However, the expiration of the statute of limitations does not eliminate the underlying debt it just limits enforcement of the debt.

Another theory is found in bankruptcy. Through the bankruptcy process, a person may eliminate and reduce their debts by distributing their assets in a pro-rata share to their creditors. In order to participate in the distribution of the bankruptcy estate assets, the creditor must file a proof of claim. The proof of claim details the debt and provides a notice of the debt. If no objections are made to the proof of claim, the claim is automatically allowable and is entitled to distribution. At the conclusion of the bankruptcy, the court issues a discharge and all debts included in the bankruptcy are eliminated.

The above two theories can collide when a creditor files a proof of claim on a debt for which the statute of limitation has run. Should that claim be an allowed claim and receive a distribution of the bankruptcy estate? Or should the creditor be found in violation of the FDCPA for employing misleading and deceptive practices?

In 2014, the Eleventh Circuit held that it is a violation of the FDCPA to file a proof of claim to collect a debt that was unenforceable because the statute of limitations has expired (Crawford, 758 F.3d 1254). In Crawford, a third-party creditor purchased a debt from a furniture store company. Id. Under the applicable statute of limitations, the debt became unenforceable in October 2004. Id. The Debtor filed a voluntary petition under Chapter 13 of the Bankruptcy Code on February 2, 2008. Id. A proof of claim was filed for the subject debt and the Trustee disbursed payments to the Creditor. Id. In May 2012, the Debtor commenced an adversary proceeding alleging that the creditor filed a proof of claim for a time-barred debt in violation of the FDCPA. Id. The bankruptcy court dismissed the adversary proceeding and the district court affirmed. Id. The district court found that filing a proof of claim is not an attempt to collect a debt but, rather a request to participate in the distribution of the bankruptcy estate. Id.

However, on appeal, the Eleventh Circuit reversed holding that it is a violation of the FDCPA to file a claim on a time-barred debt. Id. The court reasoned that based on the least sophisticated consumer standard, which is standard used in Eleventh Circuit FDCPA cases, the subject claim creates a misleading impression that the creditor can enforce the debt. Id. Additionally, a time-barred claim reduces funds available to other creditors and wastes judicial resources. Id. As a result, it is unfair, misleading, and deceptive to file claims for time-barred debt and to receive payments from the trustee on time-barred debts. Id.

The holding in Crawford created a split in the circuit courts as to whether filing a proof of claim on a time-barred debt is a violation of the FDCPA. A majority of the courts have refused to follow the Crawford rational. Recent opinions differentiate between a lawsuit brought to collect on the time-barred debt and filing a claim on a time-barred debt. See Martin v. Quantum3 Grp. (In re Martin), 2015 Bankr. LEXIS 3450 (Bankr. N.D. Miss. Oct. 9, 2015) (finding that it is not a violation of the FDCPA as the running of the statute of limitation is an affirmative defense and not part of the affirmative claim); Perkins v. LVNV Funding, LLC, 533 B.R. 242 at 261 (Bankr. W.D. Mi. July 8, 2015). Other courts have found that the debtors do not need protection under the FDCPA from abusive collection methods as the Bankruptcy Code provides the Debtor protection and regulation. See Martin v. Quantum3 Grp. at 9. Other courts have gone so far as to state that stale claims may be encouraged under the Bankruptcy Code and the claim filing process. See Torres v. Calvary SPV I, LLC, 530 B.R. 268, at 272-74 (Bankr. E.D. Pa. 2015).

The circuit courts are also split on whether the Bankruptcy Code precludes the FDCPA when the two intersect. The Second Circuit has held that the Bankruptcy Code precludes the FDCPA in the context of a bankruptcy. See Simmons v. Roundup Funding, LLC, 622 F.3d 93 (2d Cir. 2010), finding that there is no need to protect debtors when they are already protected by the Bankruptcy Code. The Eighth Circuit has also held that filing an accurate proof of claim on a time-barred debt does not violate the FDCPA. See Gatewood v. CP Medical, LLC, No. 15-6008 (B.A.P. 8th Cir. July 10, 2015), finding that the Bankruptcy Code provides the only relief available to a debtor in these cases. While the Third and Seventh Circuits have held that to the extent the Bankruptcy Code and the FDCPA can be reconciled neither precludes the other. See Randolph v. IMBS, Inc., 368 F.3d 726, 728 (7th Cir. 2004), finding that the Bankruptcy Code and FDCPA overlapped and can be complied with simultaneously; and Simon v. FIA Card Services, N.A., 732 F.3d 259, 274 (3d Cir. 2013), finding that the Bankruptcy Code does not repeal the FDCPA. Although the court in Crawford declined to address whether the Bankruptcy Code precludes the FDCPA, this issue is currently on appeal with the Eleventh Circuit in Johnson v. Midland Funding, LLC (Case No. 15-11240).

On April 20, 2015, the Supreme Court denied the Defendants’ petition for certiorari in Crawford. As such, the circuit court split regarding time-barred claims will not be resolved any time soon. Also, there will most likely be an increase in litigation surrounding this issue as the scope of Crawford is tested. Furthermore, with the circuit courts split over whether the Bankruptcy Code precludes the FDCPA, litigation will likely continue over this issue also. However, for now, it is important to remember if the Bankruptcy Code precludes the FDCPA, this issue is currently on appeal with the Eleventh Circuit in Johnson v. Midland Funding, LLC (Case No. 15-11240).

Amy Kiser is a bankruptcy attorney with Gilbert Garcia Group, P.A., in Tampa, Florida. She graduated from Stetson University College of Law in 2007.
A Tangled Web: The New Bankruptcy Proof of Claim Form

By: Lisa F. Caplan with assistance from Victoria Buggett and Anjali Khosla – Rubin Lublin, LLC

By now, almost everyone in our industry has, at least to some extent, felt the impact of the most recent change that went into effect on December 1, 2015 concerning the official form for mortgage proofs of claim in bankruptcy cases. In particular, we are already beginning to see issues arising regarding the new required Proof of Claim form.

The first interesting and seemingly problematic change is the omission of the property address field. While the address can easily be gleaned by reviewing the attached loan documents, some of our clients are having a hard time parting with this field and have thus made requests to our firm to add the address into the form even though it has no assigned field. We recommend avoiding the urge to change the format of the form to add the address field because any information entered into a pleading creates not only an increased risk of incurring a typographical error, but also more scrutiny by the bankruptcy trustees and debtors counsel. Since the property address is not required information in the new form, it is better left out.

The next items of confusion are contained within the Mortgage Proof of Claim Attachment. First, in Part 1: Mortgage and Case Information, there is a field entitled “Fixed accrual/daily simple interest/other.” According to Proof of Claim Attachment instructions, this field is where the creditor describes the method used to calculate interest on the debt. We have seen this field completed with information describing whether the Note is fixed or variable. However, the fixed versus variable interest rate issue is already addressed in the Proof of Claim form itself at Part 1 Section 9. As such, the information inputted into this field should indicate how the interest is accruing/calculated, such as daily, quarterly, annually, etc., and not how the interest rate has been determined.

Another confusing aspect of the Mortgage Proof of Claim/Attachment relates to two fields entitled “Escrow deficiency for funds advanced” which appear in both the Part 2: Total Debt Calculation and the Part 3: Arrearage as of Date of the Petition sections. The total for these fields should match column O of the loan history. If the Debtor’s escrow account showed a negative balance at filing, this field will show the same amount in both sections. However, per the Official Instructions, if the Debtor had a positive escrow balance at filing, the positive amount should be included with and entered into the “Less total funds on hand” field of the Total Debt Calculation and a $0 should be entered in the corresponding field of the Arrearage section. We are already fielding requests to ignore the Official Instructions and enter a negative figure to represent the positive balance in the “Escrow deficiency for funds advanced” field of the Total Debt section, but we strongly advise against this approach.

A portion of the new form subject to varying interpretations is the Part 5: Loan Payment History from the First Date of Default. The term “First Date of Default” in and of itself is unclear. Some servicers are starting the history with the date of the first missed payment. This method is fine so long as there are neither unreimbursed fees nor any unreimbursed escrow advances accrued prior to the date of the first missed payment that will be listed in and collected as part of the arrearage. In other words, the Loan History should not begin with an amount already appearing as due in columns “O” or “P” unless the first line of the history is illustrating the date on which that amount was incurred or the columns “zero” out at some point in the loan history prior to the bankruptcy filing. In light of this, the creditor might weigh the benefit of attempting to collect a very old fee/corporate advance against the time and labor involved in creating a history that will go back far enough to support the incurrence of said fee.

We have also seen issues with the method used to calculate escrow shortages. Each of our clients seems to take a slightly different approach. The instructions are as follows: “The projected escrow shortage is the amount the claimant asserts should exist in the escrow account as of the petition date, less the amount actually held.” Thus, the escrow shortage amount should be based on and appear in the figures contained in the escrow analysis run using the date of the filing of the case and that will be filed with the Proof of Claim.

While the new Proof of Claim form certainly adds a level of detail regarding the status of the loan not found in prior versions, the form astonishingly still does not address at least one piece of crucial information the creditor might need to disclose. For example, there are several districts where the Debtor might, via their Chapter 13 Plan, request the creditor add one or more post petition payments to the Proof of Claim. As this is certainly not an uncommon occurrence, we had hoped the new form might address the issue. However, as it stands, creditors are still forced to create an addendum to the form to address these additional payments. These are only a few of the issues coming to light with the advent of the new Proof of Claim form. Stay tuned for more excitement as the Debtor’s bar, Trustees, and others begin reviewing filed claims and coming up with questions and interpretations of their own.

Lisa F. Caplan, Bankruptcy Partner with Rubin Lublin, LLC, is admitted to practice before the Northern, Southern, and Middle Districts of Georgia; Superior Court of Georgia; Supreme Court of Tennessee; and the Middle, Eastern, and Western Districts of Tennessee. Caplan earned her Juris Doctor from the University of Georgia Law School (2004), and received a Bachelor of Science, magna cum laude, from Georgia State University (2000).
**DEMAND IN MOTION QUALIFIES AS WRITTEN DEMAND UNDER ALABAMA’S REDEMPTION STATUTE**

*By: Andy Saag – Sirote & Permutt PC*

The Alabama Court of Civil Appeals recently held that a failure to timely respond to a demand for lawful charges after a tax sale acts as a waiver of those charges. It also held that a request for a statement of lawful charges included in a court motion served on the other party is sufficient under the statute.

Under Alabama Code Section 40-10-122(d), a response to a demand for lawful charges after a tax sale must be furnished within 10 days from the receipt of such demand. The proposed redemptioner in this case requested that the tax sale purchaser deliver a statement of lawful charges in a motion filed with the court on December 21, 2012. The motion was properly served on the purchaser. The purchaser failed to deliver a statement of lawful charges within 10 days of receipt of the demand as is required by the statute. In a hearing to determine whether the purchaser had been properly reimbursed for the lawful charges identified in the redemption statement, the court determined the purchaser had waived any recovery of lawful charges, including improvements and insurance premiums, due to the failure to timely respond to the demand. The purchaser filed two separate post-judgment motions that were denied.

On appeal, the purchaser argued the demand was not delivered in compliance with Alabama Code Section 40-10-122(d); however, the Court of Civil Appeals affirmed the probate court’s decision finding that the first demand satisfied the statute’s requirement for a written demand. The Court further held that because the purchaser failed to timely respond to the first demand for a statement of lawful charges, the purchaser forfeited its right to payment for the improvements. The Court noted that the statute did not require the demand be mailed or otherwise transmitted in any certain manner. The Court implied that, indeed, any form of written communication—including email—would likely qualify as a written demand under the statute. This holding could be advantageous to mortgagees whose interest is threatened by tax sales as any form of notice when demanding a statement of lawful charges will likely qualify as a valid demand.

Andy Saag of Sirote & Permutt, PC, represents national mortgage lenders, servicers, and investors in the areas of mortgage banking law, real estate litigation, consumer finance, regulatory compliance, title litigation, and title insurance law. He frequently speaks at educational seminars for mortgage banking attorneys and business managers across the country, and he conducts seminars and training sessions at client offices throughout the U.S.

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**LOST NOTE: OH WHERE OR WHERE DID MY NOTE GO?**

*By: Jennifer Lima-Smith – Gilbert Garcia Group P.A.*

Let's say you've recently been assigned a file. Procedurally, the case is poised between a summary judgment and setting the case for trial. You're sifting through the documentary evidence and... there's no note! Reporter Stephen Gandel studied this issue in an article in TIME magazine titled, “The Foreclosure Foul-Up: Tracking Those ‘Lost’ Mortgages.” As Gandel said, “the promissory note that proves a bank owns a borrower mortgage is now gone. Vanished.” However, the question remains...now what? What should an attorney do in a judicial action to prove standing to pursue a foreclosure case?

In Florida, cases will be dismissed when the plaintiff cannot establish entitlement to enforce a note under the Uniform Commercial Code (UCC), a specific statute, or common law. See Riggs v. Aurora Loan Serv., LLC, 36 3d 932, 933 (Fla. Dist. App. 2010). The right must exist prior to the filing the action.

Article 3 of the UCC determines the right of a purchaser to enforce a mortgage note. Section 3-309 permits enforcement if the person “(A) was entitled to enforce the instrument when loss of possession occurred; or (B) has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred.”

In Florida, “[T]he plaintiff must either present the original promissory note or give a satisfactory explanation for its failure to do so.” State Street Bank and Trust Co. v. Lord, 851 So. 2d 790, 791 (Fla. 4th DCA 2003). See National Loan Investors, L.P. v. Joymar Associates, 767 So. 2d 549, 551 (Fla. 3d DCA 2000). “Satisfactory explanation” to enforce a lost note must be included in an affidavit filed with the complaint. The Florida legislature requires specific elements to enforce a lost note ( Fla. Stat. 702.015). The use of affidavits is also common with lost notes.

Where a party who lost the note had standing to enforce its terms, pursuant to Fla. Stat. §673.3091, then this constructive possession of the note can be assigned to another to enforce the note’s terms. Deaker v. Menendez, 830 So. 2d 124, 128 (Fla. 3d DCA 2002). (If Mendelson’s attorney or his daughter had actual custody of the original 1995 note and Mendelson had the power to exercise control over it, then Mendelson had constructive possession of the note when it was lost.”) (Emphasis added). Deaker, at 129. Constructive possession does not require “actual manual possession” of the property for it to be delivered. Bush v. Belenke, 381 So. 2d 315, 316 (Fla. 3d DCA 1980). Even after a note is lost by a party, the right to enforce the note is still transferable. Deaker, 830 So. 124 2d at 129. The party seeking to enforce the note needs to be able to identify “...who possessed the note when it was lost.” State Street Bank and Trust Co. v. Lord, 851 So. 2d 790, 792 (Fla. 4th DCA 2003).

Specifically, Fla. Stat. §702.015(5) requires that, “[A]n affidavit executed under penalty of perjury must be attached to the complaint and sets forth the required elements. The affidavit must:

(a) Detail a clear chain of all endorsements, transfers, or assignments of the promissory note that is the subject of the action.

(b) Set forth facts showing plaintiff is entitled to enforce a lost, destroyed, or stolen instrument pursuant to s. 673.3091. Adequate protection as required under s. 673.3091(2) shall be provided before the entry of judgment.

(c) Include as exhibits to the affidavit such copies of the note and allowances to the note, audit reports showing receipt of the original note, or other evidence of the acquisition, ownership, and possession of the note as may be available to the plaintiff.”

Best practice includes consulting with your counsel, researching, and evaluating the documentary evidence.

Jennifer Lima-Smith is experienced in the areas of civil litigation, administrative law; contracts and procurement, senior executive management representation, public and confidential records, child abuse and neglect, adult abuse and neglect, and employee/client relations. She is currently focusing on managing real estate litigation with Gilbert Garcia Group P.A.
The ongoing tug of war between mortgagee purchasers at Illinois foreclosure sales and condominium associations continues. A recent Illinois Supreme Court ruling has created new law and gives associations the right to seek payment of all of the prior owner's unpaid assessments if the purchaser of the condominium unit following a foreclosure sale does not pay assessments from the first day of the month following the foreclosure sale. Purchasers are encouraged to pay assessments timely or run the risk of being liable for all past due assessments.

In a surprising and significant ruling, the Illinois Supreme Court affirmed the Appellate Court's decision in 1010 Lake Shore v. Deutsche Bank National Trust Company, as Trustee for Loan Tr 2004-1, Asset-Backed Certificates, Series 2004-1, 2015 IL 118372, holding that the lien for unpaid assessments is not fully extinguished following a judicial foreclosure sale until the purchaser at that sale makes a payment for current assessments the month following the sale.

The Appellate Court in 1010 Lake Shore concluded that unless a purchaser at a foreclosure sale makes an assessment payment the month following the foreclosure sale, the lien of all past due assessments survives and can be collected by the condominium association against the bidder. The key to the Supreme Court's ruling is the conclusion that when the bidder at the foreclosure sale makes the assessment payment the month following the sale it “confirms the extinguishment” of the lien created when the prior owner failed to pay the assessments. The only guidance provided by Supreme Court states: “additionally, the Act allows an encumbrancer ‘from time to time [to] request in writing a written statement setting forth the unpaid common expenses with respect to the unit covered by his encumbrance.’ 765 ILCS 605/9(j) (West 2008).”

One solution for servicers is to request, after judgment but prior to sale, “a written statement” setting forth the unpaid assessments with respect to the unit being foreclosed and to carefully document all activities taken to obtain that information. This way the amount of the assessment will be known and the payment can be promptly made after the sale to avoid the possibility of being liable for all past due assessments. In the event that an association is not cooperative and refuses to provide that information, you will have an opportunity to seek relief from the court either by letter, subpoena, or motion to bar collection of past due assessments.

To avoid being liable for all pre-sale assessments that were unpaid by a prior owner, servicers, and lenders are urged to pay post-sale assessment payments in Illinois as soon as possible beginning the first day of the month following the date of the foreclosure sale. It seems quite simple, but it has proven to be much more challenging for the industry.

Kentucky Considers Adding Non-Judicial Foreclosure Option

By: David E. Johnson – Lerner, Sampson & Rothfuss

During its 2015 regular session, the Kentucky General Assembly introduced House Bill 470 to add non-judicial foreclosure as an option in Kentucky. Although the bill was subsequently withdrawn, it is expected to be reintroduced in 2016 and represents a marked departure from this state's historical approach to mortgage enforcement. Kentucky long ago abolished the practice of “strict foreclosure” and requires a judicial process to foreclose a mortgage lien while protecting the homeowner’s equitable right of redemption.

The proposed new regime would add a non-judicial foreclosure option by recrafting new mortgage originations as deeds of trust with a power of sale. This would not affect already existing mortgages, and it would not eliminate current judicial foreclosure procedures. Rather, upon a default under a deed of trust, the beneficiary would have the option to pursue either judicial or non-judicial recourse against the borrower. If it chooses the non-judicial option the borrower can still demand that the judicial process be used instead, and other parties objecting to the non-judicial process can file suit to enjoin a trustee’s sale under certain conditions. Thus, the two systems are not mutually exclusive and appear likely to overlap.

Interestingly, unlike existing judicial foreclosure statutes, the proposed law would provide for no right of redemption when a property is sold non-judicially by a trustee.

This bill enjoys significant support from the Kentucky Bankers Association, whose members seek to reduce the expenses of foreclosure and to expedite the lien enforcement process. The streamlined notice procedures outlined in the new bill would enable a beneficiary to get to a sale date faster, while preserving the parties’ right to resort to the courts if necessary to protect their interests. Certain other aspects of the process, such as distribution of surplus proceeds, appear to be reserved specifically for the courts, although there are some unanswered questions in the draft bill about exactly how this would work. In other words, there is some degree of hybridization contemplated between the new and old systems. The ability to pursue loss mitigation would remain, but the shorter timelines can be expected to put more onus on the borrower to pursue a resolution sooner before the abbreviated non-judicial process can run its course.

For firms practicing foreclosure law in Kentucky, the proposed legislation can be expected to require substantial changes in existing procedures, forms, policies, and training of both attorneys and support staff. The notice requirements and procedural steps to complete a non-judicial foreclosure will be very exacting and create ample pitfalls for the unwary. Also, the non-judicial method will require a mechanism to coordinate with the judicial side of a practice when a party to an otherwise non-judicial case invokes the jurisdiction of the courts. After enactment of the final version of the bill, firms should have a window of opportunity to make the necessary adjustments before seeing the first defaults under the newly minted deeds of trust.

David E. Johnson is an attorney with Lerner, Sampson & Rothfuss.
Maryland Court of Special Appeals Adopts New Rule Related to Equitable Subrogation

By: Sara Tussey – Rosenberg & Associates, LLC

In Nutter v. Black, 2015 Md. Ap. LEXIS 129 (Md. Ct. Spec. App. 2015), the Maryland Court of Special Appeals ruled that a mortgagor holding a void deed of trust was not entitled to equitable subrogation, even though the mortgagor had paid off a prior purchase money deed of trust, because the mortgagor was an “officious payor.”

The case concerns a borrower, Edwina Black, whom the Baltimore City Circuit Court had previously deemed incompetent to manage her own financial affairs. Black owned a home in Baltimore County, which had been purchased for her by her appointed guardian, David Moore. In 2009, unbeknownst to Moore, Black entered into a reverse mortgage loan transaction with James B. Nutter & Company. As part of the transaction, Nutter satisfied a prior deed of trust and paid a lump sum to Black. When Moore discovered the transaction, he notified Nutter of Black’s disability. Nutter asked Moore to either ratify the loan or to disaffirm it and return the proceeds. He did neither. Instead, he asserted that the loan was void and there was no duty to return the proceeds.

Nutter filed suit requesting that the court ratify the reverse mortgage, grant a judgment based on unjust enrichment, or grant a lien based on equitable subrogation. In response, Moore asserted that the deed of trust was void. The Baltimore County Circuit Court considered cross summary judgment motions and decided in favor of Moore and entered a declaratory judgment nullifying the deed of trust. Nutter appealed.

The Court reasoned that a person with a disability holds no legal title to property and cannot grant a deed of trust, therefore, the deed of trust was void.

Accordingly, the Court voided the deed of trust and quieted title in favor of Moore. Unfortunately, Nutter’s Motion for Summary Judgment did not properly preserve the unjust enrichment argument for appeal and the Court did not consider it. However, the Court noted that “officious payors” are also ineligible for restitution.

This case is still pending appeal to the Maryland Court of Appeals, so the story may not be over. However, any attorneys requesting equitable subrogation in Maryland should be prepared to argue that their client is not an “officious payor.”

Sara Tussey is an associate attorney with Rosenberg & Associates, LLC, at the firm’s Vienna, Virginia office. Tussey holds a Bachelor of Arts from the Pennsylvania State University and a Juris Doctor from the Pennsylvania State University Dickinson School of Law. She is admitted to practice in Virginia, New York, Maryland, and the District of Columbia. She practices in the firm’s foreclosure, eviction, and litigation practice areas. For more information visit, Rosenberg-Assoc.com.
MASSACHUSETTS LAW CREATES LIMITATION PERIOD ON SOME FORECLOSURE CHALLENGES AS CONSUMER GROUPS FIGHT BACK

By: Julie Moran – Orlans Moran, PLLC

Massachusetts Republican Gov. Charlie Baker recently signed bill S2015, entitled “An Act Clearing Titles to Foreclosed Properties” (the “Law”). The residential mortgage default bar and the title insurance companies welcomed the move; in 2014 then Gov. Deval Patrick had refused to sign an almost identical bill passed by the Legislature.

The Law, which is effective December 31, 2015, amends M.G.L. Ch. 244, §15 to limit the time within which to bring certain foreclosure challenges to three years running from the date of recording of the Affidavit of Sale (“Affidavit”). Additionally, Affidavits recorded before the effective date of the Law become conclusive as to the validity of the foreclosure on the later of one year from the effective date of the Law or three years from the date of recording of the Affidavit.

The Law protects third party purchasers by cutting off foreclosure challenges after three years unless: (i) a party entitled to notice of the foreclosure sale files a complaint or asserts a claim as a defense or counterclaim in a legal action within the three years and records the complaint in the Registry of Deeds (“Registry”) or (ii) a party entitled to notice and also occupying the home as her principal residence, records a copy of the complaint or other pleading at the Registry within the later of: (a) three years from the recording of the Affidavit or (b) 60 days from the date of the challenge. The latter exception basically allows the borrower occupying her home to challenge the foreclosure sale without regard to the three-year limitation.

The Law also expands the jurisdiction of the Housing Court, the court commonly used to bring eviction actions, to hear these defenses and counterclaims. If a final judgment rendered in one of these cases ultimately deems the foreclosure invalid, the foreclosure is void.

Although the scope of the Law is somewhat limited, the expectation is it will bring more certainty to the title underwriting process on foreclosed properties. However, as this article was going to press, consumer advocates filed a referendum petition under Article 48 of the Massachusetts Constitution with the Attorney General seeking to place suspension of the Law on the election ballot. The process requires obtaining more than 40,000 signatures of registered voters. Further, Article 48 prohibits this process for any law, which as it does in this case, relates to “the powers . . .of courts.” Several of the groups who advocated for passage of the Law have provided feedback in this regard to government officials.

Julie Moran, Esq., is a principal with Orlans Moran, PLLC. She can be reached at jmoran@orlansmoran.com.

MOON LAKE CONDOMINIUM ASSOCIATION V RBS CITIZENS BANK, ET AL.

By: Bree Anne Stopera – Trot Law, P.C.

Where a mortgage foreclosure sale results in full payment to the foreclosing entity, and there are surplus funds resulting from an overbid, subsequent lienholders may be entitled to some, or all, of those funds. In Michigan, as in most states, the distribution process for excess funds is memorialized by statute. When the real estate market is strong, as it is now trending nationwide, we see a rise in competitive bidding at sheriff’s sales; and by extension, we see an increase in surplus funds. It is therefore more imperative than ever that subsequent lienholders keep a watchful eye on foreclosure sales to determine whether a surplus claim is appropriate.

A recent case from the Michigan Court of Appeals, Moon Lake Condominium Association v RBS Citizens Bank, et al., unpublished, entered November 12, 2015 (Docket No. 323576), reviewed two key areas in which Michigan’s statute is virtually silent: claim timeliness and notice requirements. For a subsequent lienholder in Michigan, this opinion is instructive. Yet, the elementary lesson is the same for junior lienholders across the country—act promptly and adhere to the statutory process for submission of a claim.

In Moon Lake, RBS Citizens Bank (“Citizens”) held a second mortgage on property that had gone to sheriff’s sale and resulted in an overbid by a third-party. Roughly two weeks after the sale, Citizens submitted a verified claim to the County Sheriff’s Department for the excess funds. Upon receipt of the verified claim, the Sheriff’s Department transferred the surplus funds to the circuit court. Citizens moved the court for disbursement approximately one month after the foreclosure, noting it was the only party to make any claim to the overage. The trial court summarily confirmed the same, and ordered the funds released in full to Citizens.

Prior to the underlying sheriff’s sale, Moon Lake Condominium Association (the “Association”) had recorded a Lien for Non-Payment of Condominium Assessments against the foreclosed property. Arguing that release of the surplus funds to Citizens was improper, the Association filed a collateral complaint, attacking the circuit court’s order disbursing the funds to Citizens. The Association suggested that MCL § 600.3252, Michigan’s surplus statute, required Citizens to provide notice of its surplus claim to other possible interested parties. The collateral action was ultimately transferred and consolidated with Citizens’ surplus case. However, the court declined to disturb the prior order releasing the funds to Citizens, indicating that the Association had actual notice of the sheriff’s sale, and simply failed to file a timely surplus claim.

Properly viewed, the filing of the collateral claim did not appear to be a factor in the trial court’s ruling, finding that Michigan’s surplus statute does not contain the requirements of a formal cause of action. In fact, Michigan’s surplus statute fails to reference a time constraint for either submission of a claim, or for disposition of the surplus funds; notwithstanding, the court opined that a reasonable time is implied. And, while the Association could have easily determined whether the sheriff’s sale resulted in excess funds, and proceeded with filing a claim soon thereafter, it inexplicably failed to do so. Instead, the Association waited roughly 10 weeks after the date of the sheriff’s sale, and six weeks after Citizens moved for disposition of the funds, to file its complaint. On that basis, the court found the Association’s claim untimely.

The Association’s dilatory conduct wasn’t saved by its argument that Citizens was obligated to provide it with notice of its surplus claim. Relying on the plain language of Michigan’s surplus statute, the Courts of Appeals determined that it did not require Citizens to provide notice of its claim to other possible lienholders. The Moon Lake court opined: “The statute clearly requires the claimant to give notice to the sheriff and to apply to the court and wait for the determination of the validity of its claim . . . [t]here are no other notice requirements specified.”

Moon Lake serves as a judicious reminder that in law, simplicity rules. In order to preserve an interest in surplus claims, timeliness, and adherence to the statutory process are paramount. In a time when the property market is in an upswing, junior lienholders should take note.

Bree Anne Stopera serves as an attorney in the litigation department of Trot Law, P.C., a Farmington Hills, Michigan-based real estate finance law firm. Stopera can be reached at bstopera@trottlaw.com.
Ohio's Proposed Fast-track Foreclosure Legislation

By: Larry R. Rothenberg – Weltman, Weinberg & Reis Co., LPA

On November 17, 2015, the Ohio House passed Ohio’s proposed foreclosure fast-track legislation (H.B. 134), and the bill now moves to the Ohio Senate for consideration. The primary objective of the bill is to allow a mortgagee to bring an expedited foreclosure action against vacant and abandoned residential property. The bill would also modify some procedures that generally apply to foreclosure sales of Ohio properties.

Ohio is a judicial foreclosure state, in which the Ohio Rules of Civil Procedure generally govern the proceedings until the judgment has been entered. The Rules allow for the foreclosure plaintiff to file a motion for default judgment only after 28 days following service of the summons on a non-answering defendant. Most courts either schedule a hearing a few weeks after the motion is filed, or rule on the motion without a hearing, usually after holding the motion for a period of time to allow any party to file an objection.

The bill would permit a mortgagee who files a foreclosure action on a residential property to file a motion with the court to proceed in an expedited manner on the basis that the property is vacant and abandoned. In the motion, the mortgagee must establish: (1) that it is the party entitled to enforce the debt instrument; (2) that there has been a monetary default; and (3) that no defendant has filed an answer setting forth a defense which, if proven, would preclude the court from granting the motion. If the mortgagee files such a motion, the bill would require the court to decide the motion within 21 days after the motion is filed, or within 21 days after the last answer date of any defendant, whichever is later. However, the bill does not suggest any remedy if the court fails to decide the motion within the specified time frame.

In order to grant the motion, the court must find by clear and convincing evidence that at least three of the following factors are true:
1. Utility services have been disconnected.
2. Windows or entrances are boarded up or broken off, or multiple windowpanes are broken.
3. Doors are smashed through, broken off, unhinged, or continually unlocked.
4. Trash or hazardous substances or materials have accumulated on the property.
5. Furnishings, window treatments, or personal items are absent from the structure.
6. The property is the object of vandalism, loitering, or criminal conduct, or there has been physical destruction or deterioration of the property.
7. A mortgagor has made a written statement expressing the intention of all mortgagors to abandon the property.
8. An inspection showed that no owner or tenant appears to be residing in the property.
9. Government employees have provided written statements indicating that the structure is vacant and abandoned.
10. The property is sealed because, immediately prior to being sealed, it was considered by an appropriate official to be open, vacant, or vandalized.
11. Other reasonable indicia of abandonment exist.

The bill would require that if the court decides that the property is vacant and abandoned, and that the mortgagee that filed the motion is entitled to judgment for foreclosure, the court must enter a final judgment and order the property to be sold, and the property must be offered for sale or not later than 75 days after the clerk of courts issues the order of sale. The bill does not impose a time frame for the clerk of courts to issue an order of sale. Some clerks of courts are backlogged, so there may still be a delay at this stage. Some sheriffs are also backlogged in scheduling sales, and the bill does not suggest a remedy if a sheriff fails to schedule the sale within the specified time frame.

Some other features of the bill include:

- An express provision imposing criminal liability on an owner who knowingly causes physical harm to the property after having been served with the summons in the residential mortgage loan foreclosure action. (While this is not limited to fast-track foreclosure cases, it is limited to residential properties. There is no apparent explanation for this limitation.)
- Establishment of a uniform requirement for a deposit equal to 5 percent of the appraised value, with a minimum deposit of $5,000 and a maximum of $10,000, to be paid by the successful bidder, including the judgment creditor, on the day of the sale. The failure to make a timely deposit would invalidate the sale.
- All notices and advertisements for the sale of residential property located in a municipal corporation in connection with a mortgage foreclosure case must include a provision for a second sale if there are no bidders at the first sale. The second sale is to be scheduled within 72 days after the first sale, and will have no minimum bid requirement. The successful bidder at the second sale must pay to the sheriff, in addition to the amount of the bid, a deposit in an amount determined by the Sheriff, not less than $5,000 and not more than $10,000. The Sheriff is to use the deposit to pay the costs of the sale. After doing so, the Sheriff must refund any excess to the purchaser (the bill does not state how the costs of the sale will be paid if the Sheriff underestimated the amount required for the deposit, or if the costs are more than $10,000).
- If there are no bidders at the second sale, additional sales may be scheduled with no minimum bid requirement. If there is a bidder at the second or a subsequent sale, the judgment creditor and the first lienholder each will have the right to redeem the property within 14 days after the sale by paying the purchase price, and thereby become the purchaser.
- In one provision, the bill states that in all foreclosures, the purchaser will be responsible for the payment of real estate taxes, assessments, penalties, and interest that attach as of the day following the date of the sale, including taxes and assessments levied for the year in which the sale occurred, apportioned pro rata after the date of the sale.
- In all foreclosures, the officer making the sale must record the deed within 14 days after confirmation of the sale and payment of the balance due. If the officer fails to record the deed within the specified time frame, the purchaser may file a motion to have a certified copy of the order of confirmation of sale filed with the county recorder to effectuate the transfer of title. In this provision, the bill states that the purchaser becomes responsible for real estate taxes beginning on the date of confirmation of the sale (this seems to be in conflict with the provision referred to in the bullet point above, which states that the purchaser’s responsibility for taxes accrues as of the day following the date of the sale, rather than as of the date of confirmation of the sale).
- The clerk of courts will be prohibited from restricting, prohibiting, or otherwise modifying the rights of the parties to seek service of the summons as allowed by the Rules of Civil Procedure (some clerks of courts, for example, previously imposed requirements preventing simultaneous attempts to perfect service of the summons through alternative methods, or required service by the county sheriff despite a plaintiff’s desire to use a private process server).
- Larry Rothenberg is a shareholder with Weltman, Weinberg & Reis Co., LPA, which provides representation throughout Ohio, Kentucky, Indiana, Pennsylvania, Michigan, and Illinois, in foreclosures, bankruptcies, evictions, and related litigation as well as collection services nationwide.
Default Judgment May Require More Than Default Language

By: Jordan David – Hladik, Onorato & Federman, LLP

Default Judgment is a powerful tool widely used by plaintiffs to streamline litigation and conserve judicial resources. In Pennsylvania, the rules regarding Default Judgments appear in Pa.R.C.P. 237.1-237.6, which state the requirements to obtain judgment by default. Note in particular Rules 237.1 and 237.5, which explain the Notice of a Praecipe for Default Judgment and the form of that Notice, respectively.

Under Rule 237.1, a Notice must be sent at least 10 days before filing a Praecipe for Default Judgment. This Notice is commonly referred to as a “10-Day Notice.” See Pa.R.C.P. 237.1. In addition, while Rule 237.5 provides form language for the Notice, the Rule itself only requires that the language of a 10-Day Notice “substantially” conform to the language provided in the rule. Pa.R.C.P. 237.5.

The question, then, is what language is sufficient to satisfy the Rule. An answer to this question was recently suggested by the Pennsylvania Superior Court in AmeriChoice Fed. Credit Union v. Ross, 2015 Pa. Super. LEXIS 803 (Pa. Super. Ct. 2015).

The facts of AmeriChoice were as follows: on May 9, 2012, AmeriChoice Federal Credit Union (“AmeriChoice” or “plaintiff”) filed a complaint in mortgage foreclosure against the defendants. Id. at *1. On June 20, 2012, the defendants filed preliminary objections to the complaint, pro se, to which AmeriChoice filed its own preliminary objections. Id. By Order entered on May 1, 2013, the plaintiff’s preliminary objections were sustained, the defendants’ preliminary objections were overruled, and the defendants were ordered to file an answer to the complaint within 20 days.

Id. at *2. After defendants’ attempts to have the case removed to federal court, AmeriChoice sent the defendants a 10-Day Notice enclosing copies of the Order requiring the defendants to file an answer to the complaint as well as a copy of the federal court’s order dismissing the attempt to remove the action to federal court. Id. at *2-3. On June 4, 2013, upon praecipe for entry of default judgment filed by the plaintiff, the prothonotary entered a judgment against the defendants. Id. at *3.

The defendants filed, inter alia, a petition to strike the default judgment, arguing that the 10-Day Notice sent by AmeriChoice failed to comply with Pa.R.C.P. 237.5. Id. at *5. The trial court entered an Order denying that petition on April 16, 2015, which was timely appealed. Id.

The Superior Court distilled the appellate issues down to one: “Whether the form and content of AmeriChoice’s [eighty-six]-word [[Notice is non-compliant pursuant to Pa.R.C.P. 237.1 and Pa.R.C.P. 237.5.]] Id. at *9 (quotation marks and internal citations omitted).


The 10-Day Notice at issue in Oswald stated, in pertinent part, “You are in default because you have failed to take action required of you in this case.” Id. (quoting 80 A.3d at 796). The Superior Court in Oswald found the language to be deficient and, in reaching that holding, adopted the reasoning of the Commonwealth Court in David J. Lane Advertising.

In David J. Lane Advertising, the Commonwealth Court had noted that the Pennsylvania Supreme Court amended the notice requirement in a 1994 amendment that substituted more specific language. 33 A.3d at 678-680 (internal citations omitted; emphasis in original). The more specific language included a defendant’s failure “to enter a written appearance personally or by attorney and file in writing with the court . . . defenses or objections to the claims set forth against [the defendant].” Id. The Commonwealth Court in David J. Lane Advertising specifically stated that: by “adopting the [1994] revision to the form, then, the Pennsylvania Supreme Court determined that before entering judgment by default . . . it was important to notify a defendant specifically what it failed to do (i.e., why it was in default) by tracking the language in the earlier-issued notice to defend.” Id.

The Superior Court in AmeriChoice found that the language of the 10-Day Notice sent by the plaintiff was identical to the nonspecific language of the Notice in Oswald. The Superior Court also found that the two court orders the plaintiff had enclosed with its 10-Day Notice did not cure the defect because the Notice did not specifically reference the enclosed orders. Id. at *15.

The Superior Court’s holding in AmeriChoice will teach the cautious practitioner a number of lessons. First, make sure that your form 10-Day Notice tracks the language provided in Pa.R.C.P. 237.5. In the majority of foreclosure actions, there will be no filings by the defendant, and the Rule 237.5 form language will be sufficient. But in cases where the defendant has filed preliminary objections, the Rule 237.5 form language will likely be confusing because the defendant would have already asserted the “defenses or objections” referenced in the form language. See Pa.R.C.P. 237.5. In those cases, the language should be tailored to specifically explain why the defendant is in default.

Second, the Superior Court noted that because there had been numerous filings at the trial court level by pro se defendants, specificity was “all the more necessary.” Id. at *15. Although it is unclear precisely what impact those facts had on the Court’s holding, the cautious practitioner should specify in his 10-Day Notice why the defendant is in default, regardless of the number of filings or whether the defendant is represented.

Jordan David is a real estate and bankruptcy attorney with Hladik, Onorato & Federman, LLP. He received his Juris Doctorate from Widener University School of Law and a bachelor’s in philosophy and history form the University of Pittsburgh.
LENDERS: BEWARE MODIFYING A LOAN IN SOUTH CAROLINA WITHOUT A LICENSED ATTORNEY

By: John S. Kay — Hutchens Law Firm

The unprecedented increase in foreclosures after the 2008 financial crisis led to a massive response from lenders to assist borrowers in trying to save their homes. The most common form of aid provided to borrowers since that time has been the use of a loan modification. A large number of loan modifications have been entered into between lenders and borrowers in states across the country and South Carolina is no exception.

But what if those loan modifications with borrowers living in the state of South Carolina were void and unenforceable? This was the possibility being faced by lenders when the South Carolina Supreme Court issued its opinion in the case of Crawford v. Central Mortgage Company, 404 S.C. 39, 744 S.E.2d 538, (2013). The Crawford case involved two foreclosure actions that were consolidated for review by the Court. In its decision, the Court held that modifying a loan without the participation of an attorney does not constitute the unauthorized practice of law, or “UPL” in South Carolina. So, how then does UPL play into the issue of whether a loan modification is unenforceable?

To understand the importance of the Crawford opinion, we need a quick review of the South Carolina history of cases on the unauthorized practice of law. In a line of cases dating back to 1987, the South Carolina Supreme Court has determined the practice of law in connection with a residential real estate closing includes:

- Searching the Title and Reviewing the Results
- Preparing the Loan Documents
- Conducting the Loan Closing
- Recording the Title Deed and Mortgage
- Disbursing the Closing Proceeds

With this framework in place, the Court issued its landmark opinion in the case of Matrix Financial Services Corp. v. Frazer, 394 S.C. 134, 714 S.E.2d 532, 534 (2011) holding that performing a residential loan closing on South Carolina property without the supervision of a licensed South Carolina attorney constitutes the unauthorized practice of law, and, more importantly, may prevent a mortgage holder from foreclosing on the mortgage in the future. This ruling was made prospective from the date of the filing of the opinion on August 8, 2011. This is why the issue of UPL in South Carolina is so vitally important to lenders conducting business in the state.

With this landscape before us, what would happen if the Matrix decision were to be applied to the thousands of loan modifications created in South Carolina since the recession of 2008, most, if not all, of which were not supervised by an attorney and completed in-house by most lenders? In the Crawford cases, the borrowers were facing foreclosures filed after they had defaulted on the terms of their loan modifications. The borrowers claimed that as the loan modifications were not supervised by an attorney, the lender should not be allowed to enforce the obligations created by the loan modifications pursuant to the Court’s previous holding in Matrix.

Fortunately for lenders, the Court disagreed with the borrowers’ contentions and held that the lender’s modification of an existing loan without the participation of a licensed South Carolina attorney did not constitute the unauthorized practice of law. The S.C. Supreme Court has previously found conducting a refinance of a residential real estate mortgage without the supervision of a licensed attorney to constitute the unauthorized practice of law. It could be easy to see why many in the legal community thought that the Court would extend its reasoning to the loan modification arena as well. However, the Court distinguished the facts in some of its previous decisions from those in the Crawford case and found that the same public policy that requires attorney supervision for real estate loan closings and mortgage refinancing does not apply to loan modifications.

While it is clear that loan modifications do not have to be supervised by a licensed attorney in South Carolina, lenders need to be mindful of the unauthorized practice of law decisions in the state when determining processes for completing loan modifications. As the legal requirements are developed through case decisions rather than through legislation, lenders need to keep informed on a regular basis with local counsel to stay abreast of any changes in the landscape.

John S. Kay is the managing attorney for the South Carolina office of the Hutchens Law Firm. Kay focuses his practice in the areas of mortgage default servicing, real estate, and Bankruptcy and throughout the year is a frequent speaker at continuing legal education seminars on issues related to these areas. Kay was admitted to the Unauthorized Practice of Law Bar in 2006 and has practiced law in South Carolina since 1986 and has 30 years experience in representing mortgage lenders and servicers. Kay is a member of the Mortgage Bankers Association of the Carolinas and has served on its Loan Administration Committee and Education Committee.
real estate that the mortgage encumbers. Arizona law, for example, provides an anti-deficiency statute that applies only to purchase-money mortgages used to purchase a single one-or-two-family property of 2.5 acres or less (Ariz. Rev. Stat. Ann. Section 33-729). This is obviously aimed at consumers.

However, notwithstanding the fact that the foregoing Arizona statute appears aimed at consumer relief, it does not apply to second mortgages. This is of interest as it calls into question the applicability of the “merger of rights” doctrine, in which two mortgages held by the same lender are consolidated into one interest by operation of law. However, in Wells Fargo Bank, N.A. v. Riggio, No. 1CA-CV-12-0430 (Ariz. Ct. App. June 4, 2013), the Arizona Court of Appeals held that the merger-of-rights doctrine did not merge the lender’s first and second lien into a single unitary interest upon the foreclosure of the first lien. Further, the case held that Arizona law permits a lender holding two liens against the same property to foreclose on the senior lien, and then sue on the second loan outside of Arizona’s anti-deficiency statutory scheme.

Another jurisdiction is California. California has codified a doctrine referred to as “security first.” Cal. Civ. Proc. Code Section 726(a) (West 1976 & Supp. 2009). “Security first” is simply a legal requirement that a lender foreclose on a security interest, rather than sue only on the underlying note. Thus, a lender holding multiple liens on a California residence does not have the option to foreclose one mortgage but sue on the note secured by another. Instead, the lender will always be required to file a foreclosure and seek to recover via its security.

In Mississippi, a nonjudicial foreclosure state, the lender may obtain a deficiency judgment but it must file a separate legal action to do so. The foreclosing lender in Mississippi has one year following a foreclosure sale to file such a lawsuit against the borrower (Miss. Code Ann. Sections 11-5-111, 15-1-23).

Idaho, a nonjudicial foreclosure state, also allows for a deficiency with limitations. There, the amount recovered in the form of a deficiency judgment is limited to the difference between the outstanding debt and the fair market value of the property. Idaho Code Ann. Section 45-1512. Similar limitations on deficiency judgments can be found in judicial foreclosure states as well, such as in the State of Wisconsin (Wis. Stat. § 846.101).

Clearly, there exists a great deal of variation among the states with respect to foreclosure deficiencies. This presents quite a challenge to lenders and servicers. Since liens arise at different times and then trade on the secondary market thereafter, it is virtually impossible to be prepared, in advance, for the best possible outcome in every circumstance involving defaults where there are multiple mortgage liens.

**In Almost Every Circumstance, It Is Helpful to Have an Idea of Value**

The various pieces of the puzzle with a property encumbered by multiple mortgage liens can look confusing: the possibility of a deficiency judgment, action-single actions, the relative balances due on the underlying debts. It is virtually always easier to put the pieces together in a sensible way if you have some idea of the property value. There are various levels of property valuation, from a full appraisal down to a Zillow search. A cost-effective option in the recent past has been the broker’s price opinion (BPO).

Once the lender has a rough valuation of its secured interest, it must evaluate the multiple mortgage liens it holds on the property and how they are structured. Perhaps, only one of the mortgages is in default and the other is current. In many situations, one loan being in default makes the other loan in default, automatically. Yet, this is not always the case and will depend on the structuring of the loans when they were originated.

In Illinois, for example, the long-standing practice has been for the foreclosing lender to name as defendants all subordinate secured interests, even if the Plaintiff holds one or more of the subordinate interests. That way, the subordinate interests are extinguished in a single action. Yet, where there is substantial value, the same lender would be more likely to bring suit in multiple counts for each of its lien positions. This enables the lender to obtain judgment on each of its mortgage liens and then credit bid the total amount at sale, thus capturing and recovering the maximum value in the property.

However, this only makes sense if the lender has ascertained that there is sufficient equity in the property to justify this strategy.

This raises an obvious issue in that it means the Plaintiff in the case would be suing itself, along with the borrowers and other lien holders. One might wonder how that could be. This is, at present, becoming more of an issue in Illinois. In Bank of Illinois v. Bank of Illinois, 13 Ill.App.3d 711 (5th Dist. 1973), the foreclosing lender, Bank of Illinois, held title to the subject property as trustee of a land trust. It then, subsequently, lent money to the beneficiaries of that very land trust, placing a mortgage on the property. The trial court found that the Bank of Illinois could not sue itself and dismissed the case. The Appellate Court later found that such a ruling would be “fundamentally unfair” to bar the suit where the Bank acted with full knowledge and assent of the beneficiaries and directors of the land trust. Id. at 713. Thus, in Illinois, the foreclosing lender will want to prove up its secondary mortgage interest in case of a surplus following the judicial sale. This holding, however, has been called into question in recent trial court rulings of late.

In any event, the foregoing illustrates that a sensible decision depends upon having a reasonable idea of the market value of the property.

A final circumstance worth examination is when a third party’s secured interest finds its way in between multiple liens held by a foreclosing lender. In such a situation, filing a two-count complaint to foreclose on both of the mortgage liens, or allowing the two to be merged into one may strategically make sense. It is fairly well-established that the law permits this strategy. See, e.g., Swedbank, AB v. Hale Avenue Borrower, LLC, 89 A.D.3d 922, 932. But again, the property value is highly relevant. Determining whether such a strategy makes sense depends upon the property value exceeding the foreclosing lender’s senior-most lien.

Every state is different. Every case is different. In the context of a foreclosure in which the lender occupies multiple secured positions, attention to the foregoing issues can help illuminate the best possible way forward.

Luke Wiley is an associate at Anselmo Lindberg Oliver LLC, focusing on the firm’s default practice. He has prior experience in bankruptcy law and is licensed to practice in Illinois. While lacking in the personality department, Wiley has been voted in the “Top 10 Most Attractive Attorneys” in Cook County by People magazine for the past two years.

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**Judicial** continued from page 1

The district court in Joslin had applied the then-current 1990 UCC standard governing how lost notes may be enforced. That standard says that only the party that lost the note could enforce it, which denies enforcement to a subsequent transferee. As a result, a party could not enforce the note if it “directly or indirectly acquired ownership” of the obligation from another that was entitled to enforce the note when it was lost. Still, while the lost note standard detailed in the 2002 amendments to UCC 3-309 in response to the Joslin ruling was more flexible, a number of judicial foreclosure states, including Ohio, have not enacted the amendments. In a recent appellate case from that state, Fannie Mae v. Hicks, 8th Dist. 102079, 2015-Ohio-1955, 35 N.E.3d 37 (Ohio Ct. App. 2015), a bank that had lost the relevant promissory note transferred the right to enforce the mortgage loan obligation to the foreclosure plaintiff.

Under Ohio law based on the 1990 version of UCC 3-309, only the transferring bank could enforce the note—the plaintiff transferee bank could not. As a result, the plaintiff sought to proceed in rem in the trial court to foreclose the mortgage without attempting to secure a judgment on the note. While the trial court agreed with the plaintiff and granted its summary judgment motion, the appellate court reversed, deciding that unless the plaintiff could enforce the note under the UCC, it could not foreclose the mortgage. At the same time, the appellate court was wary of providing a windfall to the borrower. It reasoned instead that the note and mortgage could be transferred back to the original transferring bank that had lost the note, which could then enforce the note and mortgage against the borrower.

However, transferring notes and mortgages back to servicers and investors that lost the relevant promissory notes is often not a viable option, particularly in situations where institutions have gone out of business.

It would be better for these states to enact the 2002 UCC amendments to permit transferee servicers and investors to enforce lost notes in foreclosure proceedings without such maneuvering. To that end, the Ohio State Bar is proposing such legislation to Ohio’s General Assembly this year.

Judicial foreclosure states that have not done so already should follow the lead of states that have enacted the 2002 UCC amendments or risk delays in resolving borrower defaults on any lost promissory notes in mortgage loan portfolios.

Matthew J. Richardson is Director of Litigation at Manley Dees Kochalski, LLC. Formally, he served as editor in chief of the Ohio State Law Journal and earned a doctorate in English from Ohio State.
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in her new role with the firm. Processes and procedures are in place to ensure that law firm perspectives are taken into account when developing new strategies.

Joyce Kindsvogel will apply her experience from both servicing and default operations for the firm in Michigan, has been admitted to the Michigan Bar.

Hladik, Onorato & Pearlstine, headquartered North Wales, Pennsylvania, has announced a merger with Federman & Associates in an effort to expand its practice in the Pennsylvania and New Jersey markets.

The merged firm will be known as Hladik, Onorato & Federman, LLP, and will be known under the trade name of HOF Law Group. The principals for HOF Law Group are Stephen M. Hladik, David C. Onorato, and Thomas M. Federman. HOF will operate offices in the Philadelphia area, Marlton, New Jersey, and Phoenix, Arizona.

Hutchens Law Firm has announced several honors that have been awarded to the firm’s attorneys recently.

Hilton T. Hutchens, Jr., a partner in the firm’s Fayetteville, North Carolina, office, has been elected to the Business North Carolina magazine’s Legal Elite.

In addition, Hutchens Law Firm and its attorneys ranked in the 2016 Edition of U.S. News World Report and Best Lawyers “Best Law Firms.” Attorneys recognized were Managing Partner H. Terry Hutchens (Banking and Finance Law), Partner William L. Senter (Workers’ Compensation Law), Associate Attorney Maggie Senter Bennington (Workers’ Compensation Law). Overall, the firm ranked as Metropolitan Tier 1, Raleigh—Workers’ Compensation Law—Claimants.

Lastly, the firm announced that John F. Renger III has joined the Charlotte office. Renger has been practicing law since 1998 and is a graduate of the University of North Carolina at Chapel Hill.

Hunoval Law Firm has announced the addition of Phil Marquez as Director of Default Client Relations and Bryan Haskins as Managing Closing Attorney.

Marquez has worked in the mortgage banking industry since 1998, when not on active military duty. His experience in the industry includes working for several national and large regional firms in client relations, development, and marketing.

Haskins obtained his Juris Doctor degree from Florida Coastal School of Law and his Bachelor of Arts from the University of South Carolina. He later received a Masters of Law in Law and Government with a specialization in law, politics, and legislation from American University Washington College of Law.
Rosenberg & Associates, LLC, has announced the hiring of Jordan Kozik as a new attorney. Kozik’s practices are in real estate law with a focus on foreclosures, evictions, and bankruptcy. A member of the Virginia State Bar, Kozik is also admitted to practice in all of the Virginia State Courts and the U.S. Bankruptcy Courts for the Eastern and Western Districts of Virginia.

Detroit-based default servicing law firm Schneiderman & Sherman, PC, has announced that Jared Anderson joined the firm in the position of Director of Client Relations. Anderson will be responsible for client relations, business development, industry relations, and the firm’s marketing efforts. Anderson’s experience includes work in bankruptcy, foreclosure, eviction, and REO spaces.

SouthLaw, P.C., a law firm that focuses on the protection of creditors’ rights in Missouri, Kansas, Nebraska, and Iowa, moved its corporate headquarters on February 1, 2016. The firm’s current P.O. Box will remain unchanged for billing purposes, which is P.O. Box 800076, Kansas City, Missouri 64180-0076. In addition, the phone and fax numbers will also remain the same, 913.663.7600 and 913.663.7899, respectively. The new office address is 13160 Foster, Suite 100, Overland Park, Kansas 66213.

ROSENBERG & ASSOCIATES HIRES NEW ATTORNEY

LES ZIEVE CHANGES NAME TO ZIEVE, BRODNAX AND STEELE, LLP

SCHNEIDERMAN & SHERMAN ADDS DIRECTOR OF CLIENT RELATIONS

MARTIN LEIGH PC MOVES ST. LOUIS OFFICE TO NEW LOCATION

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to First American's request, arguing that only the Chapter 7 Trustee had standing to pursue such a claim. The bankruptcy court granted First American's motion, entering a narrowly tailored order lifting the stay only in part and limiting the litigation of First American's complaint in intervention to the single issue of the validity of Laurie's domestic support obligation claim. Laurie appealed, asserting that the bankruptcy court erred in lifting the automatic stay because First American lacked standing to litigate its complaint in intervention in the divorce proceeding.

The Tenth Circuit disagreed, holding that the bankruptcy court did not err in partially lifting the automatic stay. In reaching this conclusion, the Court first noted that First American was undoubtedly a "party in interest" for purposes of the Bankruptcy Code. Reiterating that a "party in interest" can object to a proof of claim and that anyone whose interests are directly affected by a bankruptcy proceeding is generally understood to be a "party in interest", the Court found First American clearly had such an interest in the validity of the domestic support obligation. In light of this finding, the Court determined that the only real issue was whether allowing First American to litigate its complaint in intervention in state court intruded upon the Trustee's right to exclusively control all aspects of the bankruptcy estate. Laurie asserted that it did, arguing that the validity of the real property transfer in the divorce decree was inseparable from the validity of the domestic support obligation contained in the same document. Because the bankruptcy court had previously held that only the Trustee could challenge the validity of the real property transfer, Laurie argued that likewise only the Trustee could challenge the domestic support obligation. The Court rejected this argument, noting that the order lifting the stay specifically limited the complaint in intervention to the issue of whether the divorce decree had been obtained by fraud. The Court also found that the property transfer and domestic support obligation were not inseparable because the validity of the property transfer did not turn exclusively on the validity of the divorce decree. Finally, the Court noted that lifting the automatic stay and allowing First American to litigate the validity of the divorce decree would benefit all creditors equally, not just First American. A ruling in favor of First American in the complaint in intervention would eliminate Laurie's claim, resulting in a significantly larger recovery for all creditors. Because the interests of First American and the bankruptcy estate were perfectly aligned in this situation, the Court determined that there was no danger of intruding upon the Trustee's exclusive powers.

This decision provides guidance as to when a judgment creditor will be permitted to object to a proof of claim for domestic support by directly attacking the domestic support claim in the underlying state divorce proceeding. In situations where the divorcing parties may have used the divorce decree to prevent creditors from reaching marital assets or to give one spouse a priority domestic support entitlement over the claims of other creditors, the creditor and Trustee share an interest in uncovering such fraud. As reflected by the Tenth Circuit's focus on the limitations incorporated in the order lifting the stay, any such order must be narrowly drawn in order to avoid infringing upon the Trustee's rights to exclusive control over all assets of the bankruptcy estate.

Caitlin Stayduhar is an attorney with Martin Leigh PC, practicing out of the Firm's St. Louis office. If you have any questions regarding this article or another litigation matter, please contact her by email at cl@martinleigh.com or by phone at 636.534.7600. For more information about Martin Leigh PC please visit MartinLeigh.com.

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**A CORPORATION MAY BE A PROTECTED “PERSON” UNDER THE FDCPA**

*By: Graham H. Kidner – Hutchens Law Firm*

On July 23, 2015, the 6th Circuit Court of Appeals, in a case from Tennessee, held that the definition of a protected “person” under FDCPA’s enforcement provision, 15 U.S.C. § 1692k, includes a corporation. The District Court had dismissed an action brought by a corporation, alleging the misrepresentation in foreclosure proceedings that the foreclosure trustee was properly appointed was a violation of 15 U.S.C. § 1692k...”

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On July 23, 2015, the 6th Circuit Court of Appeals, in a case from Tennessee, held that the definition of a protected “person” under FDCPA’s enforcement provision, 15 U.S.C. § 1692k, includes a corporation. The District Court had dismissed an action brought by a corporation, alleging the misrepresentation in foreclosure proceedings that the foreclosure trustee was properly appointed was a violation of 15 U.S.C. § 1692k, on the ground that only an individual person had standing to bring such an action. Relying on the definition of “person” in the Dictionary Act, the Circuit Court reversed, observing that some sections of the FDCPA are expressly applicable only to individual persons, while other sections do not contain such limitation. The FDCPA’s enforcement provision, 15 U.S.C. § 1692k, states that “any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person [.]” 15 U.S.C. § 1692k (a) (emphasis added). The sole issue before us is whether Anarion is a “person” under this provision and the Act generally. The presumptive answer to that question is yes. The federal Dictionary Act provides that, “[i]n determining the meaning of any Act of Congress,” the word “person” includes artificial entities—like Anarion—unless "the context indicates otherwise." 15 U.S.C. § 1. Here there is plenty of relevant context, since “person” appears 24 times in the FDCPA. In some places, the term refers exclusively to artificial entities. – Anarion Investments LLC v. Carrington Mortgage Services, LLC, 2015 WL 4503588 (6th Cir. July 23, 2015).

The dissenting opinion strongly argued that "the context [of the FDCPA clearly and repeatedly] indicated otherwise." The FDCPA contains several references to Congress’ intent to protect individuals from harassment and unfair collection practices, and that consumer, not business, debt, is the sole focus of the statute. The dissent warns of the precedential effect of the ruling, opening up litigation in favor of corporate plaintiffs.

The precedential effect may be somewhat limited because of the rather unusual facts; specifically, the plaintiff was the assignee of the lessee of the secured property, whose attorney was the original lessee and owner of the corporate plaintiff. The Court has, nevertheless, opened the door to a new category of plaintiff arguably not contemplated by the purpose of the statute.

Graham H. Kidner is General Counsel at Hutchens Law Firm and is involved in client relations and development activities, firm compliance, and mortgage default and civil litigation. Kidner has an extensive background in mortgage loan servicing, foreclosure management, real property management and disposition, and civil litigation.
1. The team at Kahane & Associates, P.A., pictured following their 2015 Thanksgiving Charity Drive on behalf of Feeding South Florida. Pictured front center: Anita Peters, Operations Manager, and Robert S. Kahane, President and Managing Shareholder.

2. During the Thanksgiving holiday, team members from Gilbert Garcia Group, P.A. collected more than 1,000 items of food for the Yes! of America United organization. Pictured left to right: Becki Forsell, President of Yes!, Tyler Koch, Kerry Barbon, Chris Green, Tyler Green.


4. The team at Davidson Fink, LLP after the firm was named to Rochester, New York’s Top 100 list of fastest growing, privately owned companies.

5. Managing foreclosure attorney with Illinois’ Codilis & Associates, P.C., Robb Rappe, provided training to the Citi team in Dallas close to the holidays. Members of Citi’s legal team received a course on recent Illinois case law and legislation.

6. The team at Potestivo & Associates, P.C., outside of their new office in Downtown Rochester Hills. This location is the firm’s second in Rochester Hills. The firm also has offices in Grand Rapids, Michigan, and in Chicago, Illinois.
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