McGlinchey Stafford

McGlinchey Stafford is pleased to bring you the Manufactured Housing Law Update, prepared by the firm's nationally-recognized consumer financial services team. For decades, McGlinchey Stafford has been a leader in the manufactured housing and mortgage lending industries, representing clients in the areas of federal and state law compliance, preemption analysis and advice, nationwide document preparation, licensing support, due diligence, federal and state examination and enforcement action defense, individual and class action litigation defense, and white collar criminal defense.

WELCOME!

As 2015 wound to a close, most legislators were busy kissing babies in their home districts rather than voting on new legislation impacting manufactured housing (or anything else). Never fear! Courts made up for the lack of legislation. A Florida court emphasized that it is the Note, not the security instrument that matters. A federal court in Florida held that you could collect on a time barred debt, so long as you don't threaten to sue. Super-priority liens still reign supreme, according to courts in Florida and Rhode Island. Think that you can get an enhancement in the amount of your claim for delivery and set up costs in a Chapter 13 in Texas? Think again!

There were also a few notable regulation amendments. Georgia amended provisions related to the taxation of mobile homes. And the long-awaited servicer rules were issued in Nevada.

Happy New Year!

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ARBITRATION

CASE LAW

Class Action Waiver – Unconscionability

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CASE NAME: *DirecTV Inc. v. Imburgia*
DATE: *12/14/2015*
CITATION: *U.S. Supreme Court, No. 14-462. 2015 WL 8546242*

DIRECTV, Inc. entered into a service agreement with its customers. Section 9 of that contract provided that "any Claim either of us asserts will be resolved only by binding arbitration." It then set forth a waiver of class arbitration, but added that if the "law of your state" makes the waiver of class arbitration unenforceable, then the entire arbitration provision "is unenforceable." Section 10 of the contract states that §9, the arbitration provision, "shall be governed by the Federal Arbitration Act."

This case began as a putative class action in state court claiming that DIRECTV, by imposing hefty early-termination fees, violated California consumer-protective legislation, including the Consumers Legal Remedies Act (CLRA).

At the time litigation was commenced, California law held that class-action waivers in consumer contracts were invalid. Nearly three years into the litigation, AT&T Mobility LLC v. Concepcion, 563 U. S. 333, 352 (2011) held that the FAA preempts state rules that render class-arbitration bans unenforceable. DIRECTV then moved to halt the pending lawsuit and compel arbitration. The state trial court denied that request, and DIRECTV appealed.

The California Court of Appeal thought that the critical legal question concerned the meaning of the contractual phrase "law of your state," and held that, despite the U.S. Supreme Court's holding in Concepcion, "the law of California would find the class action waiver unenforceable."

The Court of Appeal consequently affirmed the trial court's denial of DIRECTV's motion to enforce the arbitration provision. The California Supreme Court denied discretionary review, but the U.S. Supreme Court granted a writ of certiorari.

The Court's decision noted that the "Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." The Federal Arbitration Act is a law of the United States, and Concepcion is an authoritative interpretation of that Act. Consequently, the judges of every State must follow it.

The Court recognized that when DIRECTV drafted the contract, the parties likely believed that the words "law of your state" then made class-arbitration waivers unenforceable. But Concepcion subsequently held that such a rule was invalid.

Court found that, absent any indication in the contract that the "law of your state" was meant to refer to invalid state law, it presumably takes its ordinary meaning: valid state law.

Thus, the Court of Appeal's interpretation was pre-empted by the Federal Arbitration Act and the California Court of Appeal must enforce the arbitration agreement.

Reversed and remanded.

COMMUNITIES

CASE LAW

Eviction – Shareholder

CASE NAME: *Kenosia Commons, Inc. v. DaCosta*
DATE: *12/15/2015*
CITATION: *Appellate Court of Connecticut. --- A.3d --. 2015 WL 8132814*

The plaintiff is a mixed-use mobile home or manufactured housing community. It is the only manufactured housing community cooperative in the state. Although the plaintiff does not own the mobile manufactured home occupied by the defendant, it owns the land beneath it.

Cynthia DaCosta moved onto lot 10 after purchasing a home. She received and signed a lease for lot 10 and paid $2,500 for twelve shares in the co-op.

As of May 1, 2014, the defendant was delinquent in paying rent for lot 10 in the amount of $2,297.78.

The plaintiff caused a notice to quit to be served on the defendant. The complaint alleged that the defendant failed to tender the total arrearage due within the time stated in the notice to quit. In its prayer for relief, the plaintiff sought a judgment of possession.

At trial, the plaintiff's counsel presented the plaintiff's certificate of incorporation, bylaws, and rules and regulations. Counsel argued, pursuant to article 13, that the homeowner loses the right to own shares under certain circumstances, including eviction.

The trial court found that DaCosta, by virtue of her ownership shares in the plaintiff, was equal part owner and tenant and therefore fell outside of the strict statutory guidelines for a summary process action. The court reviewed the plaintiff's bylaws and found no language that would reduce the tenant/owner's status to that of tenant only, which would then allow her to be the proper target of a summary process action. The motion for judgment of possession was denied. The plaintiff appealed.

The appeals court found that Chapter 412 of the General Statutes, entitled "Mobile Manufactured Homes and Mobile Manufactured Home Parks. Park Owners and Residents," provides that an owner is a person who owns, operates or maintains a mobile manufactured home park. Section 21–64(9) defines person as a corporation, among other things. Section 21–64(9) does not define owner as a shareholder of a corporation. For this reason, the Court concluded that the defendant was subject to summary process for failing to pay rent.

Further, General Statutes § 47a–24 provides: "As used in this chapter, (1) 'lessee or occupant' includes a member or shareholder of a cooperative housing corporation who occupies a dwelling unit in such corporation's premises pursuant to an agreement of occupancy, whether or not it is designated as a lease or rental agreement, which agreement provides that, for breach by a member or shareholder of any provision of such agreement, the corporation shall have the legal remedies available to a landlord for breach by a tenant of a provision of a lease or rental agreement; and (2) 'owner or lessor' includes any such cooperative housing corporation." Pursuant to § 47a–24, DaCosta, a shareholder in the plaintiff cooperative housing corporation, was subject to summary process as a lessee of the plaintiff.

The Court therefore concluded, as a matter of law, that the plaintiff was entitled to possession of lot 10 if the defendant failed to pay rent in accordance with the parties' oral lease agreement. The trial court, however, failed to make factual findings on the basis of the evidence presented as to whether the defendant failed to comply with the terms of the subject lease. The matter, therefore, must be remanded to the trial court for further proceedings.

The judgment was reversed and the case remanded.

PROPOSED RULE
Georgia
Ownership - Taxes

This proposed rule would amend Ga. Comp. R. & Regs. 560-11-9-.03, Return of Mobile Homes, to provide that, on or before April 1 (formerly, May 1) of each year, or at the time of the first sale or transfer before April 1 (formerly, May 1), every owner of a mobile home shall return such mobile home for taxation and pay the taxes due on the mobile home in the county where the mobile home is situated on January 1.

The rule would also amend Ga. Comp. R. & Regs. 560-11-9-.04 Issuance of Permits; Display of Decals, to provide that any person acquiring a mobile home after January 1 of each year shall obtain from the tax commissioner a mobile home location permit by April 1 (formerly, May 1) or within 45 days of acquisition, whichever occurs later, upon satisfactory evidence that all outstanding taxes due on the mobile home, including delinquent taxes, interest and penalties, if any, have been paid.

Also, each year every owner of a mobile home situated in the state on January 1 which is not subject to taxation under Article 10 of Chapter 5 of Title 48 of the Official Code of Georgia Annotated, by virtue of its qualifying the owner for a homestead exemption or if acquired from a dealer after January 1, shall nevertheless obtain a mobile home decal from the tax commissioner by April 1 (formerly, May 1), or within 45 days of acquisition, whichever occurs later. The decal shall be designed, attached and displayed as provided in this Regulation.

The amendments also include Ga. Comp. R. & Regs. 560-11-9-.09, Appeals, providing that After an appeal has been filed, the county's board of tax assessors shall notify the county's tax commissioner within 10 days of said appeal. A temporary tax bill, like those in O.C.G.A. § 48-5-311 (E)(6)(d)(iii)(I), shall be issued for every mobile home which is on appeal. A mobile home owner shall pay their temporary tax bill by April 1 (formerly, May 1), if the appeal is not yet resolved, or upon receipt, if temporary tax bill is issued after April 1 (formerly, May 1). Upon payment of temporary tax bill, the county's tax commissioner shall issue a mobile home location permit. Nothing in this Regulation shall prevent the county's tax commissioner from assessing penalties and interest against a mobile home owner who receives a temporary tax bill after April 1 (formerly, May 1) because said owner failed to return their mobile home by April 1 (formerly, May 1).

Ga. Comp. R. & Regs. 560-11-9-.11, Penalties, will be amended to provide that every owner of a mobile home located in a county on January 1 and subject to these regulations, in addition to the ad valorem tax due on the mobile home, if applicable, and the penalty, if applicable, for failure to make the return or pay the tax by April 1 (formerly, May 1) of each year, shall be guilty of a misdemeanor if they fail to secure, attach and display on a mobile home the decal that is required by Regulation 560-11-9-.04. Upon conviction thereof, the owner shall be punished by a fine of not less than $100.00 nor more than $300.00 (formerly, not less than $25.00 nor more than $200.00), except that upon receipt of proof of purchase of a decal prior to the date of the issuance of a summons, the fine shall be $50.00 provided, however that in the event such person owns more than one mobile home in an individual mobile home park, the maximum fine under this paragraph for such person with respect to such mobile home park shall not exceed $1,000.00. (Formerly, the rule provided that the fine where a decal was purchased prior to the issuance of the summons was $25, with no provision re: ownership of more than one mobile home in a mobile home park.)

EMERGENCY RULE

Louisiana

Plumbing systems

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Effective 1/1/2016. Expires 4/30/2016.

This rule amends La. Admin. Code Tile 17:I of the Department of Public Safety/State Uniform Construction Code Council, to provide for maintenance and installation of plumbing systems.

The rule adds La. Admin. Code tit. 17, § 1601 et seq., Travel Trailer and Mobile/Manufactured Home Parks to apply specifically to all new travel trailer and mobile/manufactured home parks, and to additions to existing parks, and are to provide minimum standards for sanitation and plumbing installation within these parks, for the accommodations, use and parking of travel trailers and/or mobile/manufactured homes.

The rule provides that travel trailers or mobile/manufactured homes shall not be parked in any park unless there are provided plumbing and sanitation facilities installed and maintained in conformity with the code. Every travel trailer and mobile/manufactured home shall provide a gastight and watertight connection for sewage disposal which shall be connected to an underground sewage collection system discharging into a community sewerage system, a commercial treatment facility, or an individual sewerage system which has been approved by the state health officer.

PROPOSED RULE

Oregon

Inspections

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This proposed rule would amend Or. Admin. R. 918-098, -281, -695, to provide that the following may conduct plan review and inspection of manufactured dwelling parks:

A Commercial Mechanical Inspector certificate holder;

A Residential Mechanical Inspector certificate holder;

Structural inspectors;

Mechanical inspectors;

Plumbing inspectors;

Electrical inspectors;

Persons certified as a one-and-two family dwelling plans examiners.

DEFAULT SERVICING

CASE LAW

Assignment – Priority

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CASE NAME: *HSBC Bank USA, N.A. v. Perez*
DATE: *05/06/2015*
CITATION: *District Court of Appeal of Florida, Fourth District. 165 So.3d 696. 2015 WL 2078683*

On April 17, 2006, Rolando Perez obtained a loan and mortgage from Federal Guaranty Mortgage Company. The mortgage was recorded the following month. At closing, the Borrower executed two nearly identical promissory notes in FGMC's favor, both for the same amount and both secured by the same mortgage. The execution of two promissory notes was part of a larger fraudulent scheme that included other loans.

On June 30, 2006, appellant HSBC Bank USA, N.A. closed on a pooling and servicing agreement ("PSA") and took possession of one of the Borrower's "original" promissory notes. The note was specially endorsed from FGMC to American Home Mortgage Corp. and from American Home Mortgage Corp. to HSBC.

After HSBC's purchase, LaSalle Bank entered into a separate PSA, and took possession of the Borrower's second "original" promissory note on August 8, 2006. The note obtained by LaSalle also contained special endorsements completing the chain of ownership.

The Borrower defaulted and both banks commenced separate foreclosure lawsuits. HSBC recorded a mortgage assignment on April 24, 2009. LaSalle obtained an assignment of mortgage on June 5, 2009, which stated that the assignment was effective as of January 2, 2009; it recorded this assignment on August 12, 2009.

At the behest of a third mortgagee, the foreclosure cases were consolidated. Nevertheless, HSBC obtained a judgment of foreclosure and sold the property to Juan Guerra and Esperanza Medina.

The banks entered into an agreed order vacating the final judgment, sale, and issuance of certificate of title. The Purchasers sought a declaratory judgment establishing whether HSBC or LaSalle (succeeded by U.S. Bank) was the owner and holder of the Note and Mortgage.

The trial court entered a final declaratory judgment in U.S. Bank's favor after applying Fla. Stat. § 701.02—Florida's recording statute for mortgage assignments. Finding that section "appl[ies] to all subsequent assignments of the original mortgagee," the trial court found it determinative that before HSBC recorded its mortgage assignment, "U.S. Bank obtained its assignment of the same mortgage …, thereby obtaining its equitable interest in the mortgage." HSBC appealed.

The appeals court found that Article 9 of Florida's Uniform Commercial Code governing secured transactions is contained in Chapter 679, Florida Statutes. Generally, Chapter 679 does not apply to the creation of a real property mortgage. However, if, as occurred in this case, the note in a mortgage transaction is sold or assigned, Chapter 679 applies to the security interest created in favor of the purchaser or assignee of the note. Because of the application of § 679.1091(2), HSBC's possession of the note gave it "an attached security interest in the mortgage lien that secure[d] the note."

This is consistent with the notion that the promissory note, not the mortgage, is the operative instrument in a mortgage loan transaction.

Under Fla. Stat. § 679.2031(1), a security interest attaches to collateral "when it becomes enforceable against the debtor with respect to the collateral." An assignment of a promissory note becomes enforceable against the assignor and debtor with respect to the collateral when (a) value has been given, (b) the assignor has rights in the collateral or the power to transfer rights in the collateral to a secured party, and (c) the assignor has either "authenticated a security agreement that provides a description of the collateral" or the assignee has taken possession of the note. As applied to the third requirement, the promissory note itself is the "collateral," and the written assignment constitutes the "security agreement." Here, HSBC's security interest attached, at the latest, when it took possession of its note.

Chapter 679 distinguishes "attachment" of a security interest from its "perfection." It is perfection that affords maximum secured creditor protection against third parties. One method of perfecting a security interest in a promissory note is by taking possession of the original promissory note.

Both the timing and the method of obtaining perfection are key to establishing priority. Pursuant to Fla. Stat. § 679.322(1)(a), "[c]onflicting perfected security interests ... rank according to priority in time of filing or perfection." Fla. Stat. § 679.330(4), dictates that "a purchaser of an instrument has priority over a security interest in the instrument perfected by a method other than possession if the purchaser gives value and takes possession of the instrument in good faith and without knowledge that the purchase violates the rights of the secured party."

The Court found that, by taking possession of the promissory note before LaSalle, HSBC was the first to perfect its interest in a note connected to the underlying mortgage.

The Court rejected LaSalle Bank's argument that § 701.02 compelled a result in its favor, finding the statute has no application to successive assignees. Section 701.02 was designed to confront issues pertaining to real property and requires recording to make an assignment of a mortgage "good or effectual" against "creditors or subsequent purchasers"; however, the statute omits any reference to "subsequent assignees." In a statute dealing with assignments, had the Legislature intended to treat subsequent assignees the same as "creditors or subsequent purchasers," it would have said so.

Further, in 2005, the Legislature added § 701.02(4) to eliminate any "ambiguity as to whether assignments of security interests in mortgages must be recorded to be secured" by "clarify[ing] that the [UCC] governs whether an assignment of a security interest in a mortgage has perfected or attached to the mortgage."

In addition, the inapplicability of § 702.01 to determine priority between competing mortgage assignments is supported by Uniform Commercial Code Comment 7 to § 679.1091. Comment 7 provides that it follows from § 679.1091(2) that an attempt to obtain or perfect a security interest in a secured obligation by complying with non-Article 9 law, as by an assignment of record of a real-property mortgage, would be ineffective.

Because § 702.01 does not apply as between HSBC and LaSalle, HSBC's earlier perfection of its security interest in a note arising from the Perez–FGMC transaction established its priority over LaSalle. The Court therefore reversed the final judgment and remanded to the circuit court for the entry of a final judgment in favor of HSBC.

CASE LAW

Bankruptcy – Rescission

CASE NAME: *In re Sheedy*
DATE: *09/01/2015*
CITATION: *United States Court of Appeals, First Circuit. 801 F.3d 12*

In 2004, Sheedy refinanced her property and executed a promissory note and mortgage in favor of Washington Mutual Bank.

The Note provided for an adjustable interest rate. The initial monthly payment under the Note was $4,109.56, but the terms of the Note were amended in an addendum so that Sheedy would only pay interest during the first five years. This resulted in Sheedy only having to pay $2,446.87 monthly for the first five years.

In 2008, JPMorgan Chase National Association acquired certain WAMU assets from the FDIC, including an assignment of the Mortgage. Chase assigned the Mortgage to Deutsche Bank, as Trustee for WAMU Mortgage Pass–Through Certificates Series 2004–AR4. Chase continued servicing the loan.

In 2009, the monthly payment jumped to $4,055.05—an amount slightly less than the number provided by the terms of the Note. Sheedy fell into default.

Sheedy retained MFI–Miami—a mortgage fraud investigation firm—to analyze her loan documents. MFI–Miami provided her with a report that stated that the Truth in Lending statement differed from the terms of the Note because Sheedy had been told by WAMU that the first payment due after the adjustment would in fact be higher than what the Note itself reflected, and even higher than what she was actually required to pay when the adjustment occurred. Also, the Truth in Lending statement did not disclose that the payments for the first five years would only include interest and no principal would amortize.

After Deutsche Bank commenced foreclosure proceedings, Sheedy filed Chapter 13.

As part of her plan, Sheedy alleged that the Mortgage was rescindable under TILA, and that the Secured Creditors violated Massachusetts General Laws Chapter 93A, §§ 1–11, as well as "general principles of equity under Massachusetts law." The plan also proposed that, after rescission, the principal owed under the Mortgage be treated as an unsecured claim.

Deutsche Bank filed a proof of claim preserving its status as a secured creditor and objecting to the confirmation of the plan. Sheedy filed an adversary proceeding to have the bankruptcy court resolve her lender liability claims, adding that Deutsche Bank and Chase were also liable for fraud, deceit, and misrepresentation on the basis that WAMU provided her with inaccurate or false information concerning the terms of the Note and the Mortgage. Sheedy also objected to the Secured Claim and challenged Deutsche Bank's standing as her creditor. The Secured Creditors denied the allegations and filed a motion for summary judgment.

The bankruptcy court granted summary judgment in favor of the Secured Creditors. Sheedy challenged this decision before the district court, which affirmed. This appeal followed.

The appeals court concluded that Sheedy's TILA claim was time-barred since Sheedy first brought this claim within the bankruptcy case in 2010. The statute of limitations for claims for rescission under TILA varies depending on the circumstances, but is—at most—three years after the extension of credit. In addition, because Congress clearly intended that any TILA action brought outside of the three-year statute of limitations be time-barred, there was no independent ground to raise the right as a defense in recoupment.

The Court also found that, in order to pursue a claim under Chapter 93A, which protects consumers from "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce...," an injured consumer must provide at least thirty days' notice before filing a claim. Furthermore, actions arising under Chapter 93A "shall be commenced only within four years next after the cause of action accrues."

Sheedy acknowledged that she knew at the time of the 2004 Transaction that her husband did not receive the required disclosures she now claims he should have received. Moreover, she should have known immediately upon receiving the loan documents that different amounts were listed by WAMU in the Truth in Lending statement and the Note itself. Therefore, any claim under Chapter 93A was time-barred because Sheedy's four-year limitations period began when she entered into the loan in 2004.

The Court also concluded that rescission in recoupment is not allowed under the Massachusetts Consumer Credit Cost Disclosure Act, nor is it allowed pursuant to Massachusetts common law. Consequently, Sheedy could not assert a claim for rescission in recoupment under Chapter 93A.

The Court noted that, while it may be a violation of federal and state laws and regulations in some circumstances, Sheedy did not explain how telling a borrower that she will be responsible for a higher amount than what is actually demanded of her fraudulently induces such a borrower into entering a loan that she would not have otherwise executed. In any event, Sheedy's argument was misleading because the amount actually paid by her during the initial sixty-month period was based on the addendum to the Note and not on what the Note itself provided.

Further, absent more detailed evidence, it is not obvious that a payment amount provided in the disclosure is deceptive when the interest rate is variable—by its own terms the payment amount will be the result of applying the interest formula at a future time.

Sheedy also failed to show she relied on WAMU's representation as true and acted upon it to her detriment. She first recognized that the details disclosed by WAMU were contradictory and that "any reasonable person would be confused by this discrepancy[,]" yet she claimed that she still relied on the higher payment amounts represented by WAMU and acted upon them to her detriment. Sheedy did not argue that this resulted in any specific harm. Instead, she simply asked that the Court find quite irrationally that she was harmed by the alleged fraud based on the fact that she was later required to make lower payments.

Nor did Sheedy establish how her reliance on "confusing" and "contradictory" disclosures was reasonable under the circumstances, especially in light of the facts that she had been in the real estate industry and had a real estate broker license since the early 1980s.

Finally, the Court found that Sheedy could not question Deutsche Bank's status as her creditor unless she challenged the mortgage assignment as invalid, ineffective, or void, rather than as an assignment that is only voidable. Yet a valid challenge for violations of the terms of a Pooling and Service Agreement would result in the assignment being voidable and not void.

Affirmed.

CASE LAW
Foreclosure – RESPA

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CASE NAME: *Pineda v. Nationstar Mortgage, LLC*
DATE: *09/29/2015*
CITATION: *United States District Court, N.D. Texas, Dallas Division. Slip Copy. 2015 WL 6438154*

Plaintiff executed a note and a deed of trust to secure the Note. The mortgage was assigned to Aurora Loan Services, LLC. Nationstar Mortgage, LLC was the servicer. Plaintiff's monthly payments were initially $1,026.00, but after transfer to Aurora, were increased to $1,222.26.. Plaintiff paid the higher payments, but on three occasions requested that the amount be corrected. Plaintiff was told that the discrepancy would be investigated, but he never heard anything further. Plaintiff tendered payment in the amount of $1,131.75. Defendants purportedly accepted this payment, but did not apply it to Plaintiff's account. The next month, Plaintiff was informed that Defendants would not accept his payment. Plaintiff contacted Nationstar and was assured it would work with him to modify his loan.

On October 31, 2014, Plaintiff received notice of acceleration and notice of the sale of the Property. Plaintiff averred that he never received a notice of default and intent to accelerate, and was never given the opportunity to cure his default prior to acceleration. Plaintiff stated that Nationstar told him it could reduce his monthly payments if Plaintiff produced a number of documents. Plaintiff asserted that he complied with this process but the Property was listed for sale, and Nationstar did not return Plaintiff's calls about the listing. Nationstar foreclosed and subsequently filed a petition for forcible detainer against Plaintiff.

Plaintiff brought claims alleging that RESPA proscribed Defendants from foreclosing on the Property because he submitted a complete loss mitigation application during the pre-foreclosure review period. Plaintiff asserted that Defendants breached the Deed of Trust by not applying his partial payment to his account and by failing to send him a notice of default and intent to accelerate. As to the Texas Debt Collection Act (TDCA), Plaintiff averred that Defendants made false representations about modifying his loan, misrepresented the character and extent of his debt by requiring different payment amounts after acceleration, misrepresented the character and extent of his debt by changing his monthly payment amount, and threatened to foreclose despite being prohibited from doing so by RESPA. Plaintiff alleged that his partial payment was a periodic payment that should have been credited to his account under TILA. Plaintiff claimed that Defendants were thus unjustly enriched and requested injunctive relief and money damages.

The Court found that, while it is the servicer, not the borrower, who determines whether a loss mitigation application is complete, Defendants failed to state exactly what Nationstar required for a complete application or otherwise give the Court any basis to conclude that Plaintiff's allegation was incorrect. Defendants' argument that Plaintiff failed to state a claim for RESPA violations failed.

The Court also found that Plaintiff stated a claim under Section 392.304(a)(19) of the TCDA as he alleged that Defendants obtained his information for loan modification and told him they would work with him but instead foreclosed on his home without notice.

But the Deed of Trust, by its own terms, rendered Plaintiff's claims under 392.304(a)(8) meritless. First, the Deed of Trust allows for the borrower to reinstate the loan after acceleration by tendering in a "lump sum all amounts required" to bring the account current. The Deed of Trust also allows for the monthly payment to change according to taxes and insurance that may vary. Thus, it could not be said that Defendants misrepresented either the amount due after the Note was accelerated or the amount due each month by changing his monthly payment.

Further, because Defendants' threat to foreclose was based on a contractual right, it was explicitly exempted from Section 392.301(a)(8)'s prohibition on threats and coercion.

Plaintiff admitted that he tendered payment for an amount less than his monthly loan payment. Accordingly, he was unable to sustain a cause of action for breach of contract because he could not show he tendered performance thereunder.

In addition, Plaintiff stated that he only "tendered payment for $1,131.75 to Defendants" when the monthly payments were $1,222.26. Thus, this payment did not meet the definition of a periodic payment in Section 1026.36(c)(1)(i) of TILA.

But there was no basis for the Court to conclude that Defendants complied with TILA's requirement to apply partial payments as periodic payments as sufficient funds allow. Thus, the Court found Plaintiff had sufficiently stated a claim under this section of the TILA under Section 1026.36(c)(1)(ii).

The Court also found that because the Deed of Trust governs the relationship between the parties here and the disputed conduct, there can be no recovery for unjust enrichment, and Plaintiff's claim failed as a matter of law.

The Court further found that, in a quiet title action, the plaintiff must recover on the strength of his own title, not on the weakness of the defendant's title. Plaintiff's only basis for the strength of his title here was the conclusory statement that he was the owner and the Property was his homestead. Thus, Plaintiff's quiet title claim was premised on the lawfulness of Defendants' foreclosure of the Property, which was insufficient to state a claim.

Because the Court concluded that some of Plaintiff's claims should survive Defendants' motion, it was recommended that Plaintiff's claims for injunctive and declaratory relief survive as well.

In addition, at this early stage of the case, the Court could not conclude that as a matter of law Plaintiff was not entitled to an accounting. According, Defendant's motion for dismissal for failure to state a claim failed.

The Court recommended that Defendants' Motions to Dismiss, be granted in part, denied in part.

CASE LAW

Bankruptcy – FDCPA

CASE NAME: *In re Martel*
DATE: *10/13/2015*
CITATION: *United States Bankruptcy Court, D. Maine. 539 B.R. 192. 2015 WL 5984890*

In the April 2015 McGlinchey Stafford Manufactured Housing Law Update, we reported that the United States Supreme Court had declined to review *Crawford v. LVNV Funding, LLC*, United States Court of Appeals, Eleventh Circuit. 758 F.3d 1254. 2014 WL 336122659, decided July 10, 2014, which was in the McGlinchey Stafford July 2014 Update, thus leaving intact the Eleventh Circuit's decision extending Fair Debt Collection Practices Act protections to a debtor and exposing debt collectors to liability within bankruptcies over their actions.

The Maine Bankruptcy Court found that the Martels had to allege facts that the defendants engaged in acts prohibited under the FDCPA. In this case, those alleged acts were the filing of proofs of claim for time-barred debts. Section 1692e(7) of the FDCPA prohibits creditors from employing "false, deceptive or misleading representations or means in connection with the collection of [ ] alleged debts and falsely representing the character, amount or legal status of the debt". The Court found that filing a proof of claim in a bankruptcy case, even a proof of claim for a time-barred debt, does not violate the Code.

The Court noted that, prior to Crawford, the consensus was clear: "Federal Courts have consistently ruled that filing a proof of claim in bankruptcy court (even one that is somehow invalid) cannot constitute the sort of abusive debt collection practice proscribed by the FDCPA, and that such a filing therefore cannot serve as the basis for an FDCPA action." *Claudio v. LVNV*, 463 B.R. at 193 (Bankr.D.Mass. 2012)(collecting authorities).

The Court referred to a recent observation by 8th Circuit Bankruptcy Appellate Panel: "The FDCPA does not prohibit all debt collection practices. Instead, it simply prohibits false, misleading, deceptive, unfair, or unconscionable debt collection practices. Filing in a bankruptcy case an accurate proof of claim containing all the required information, including the timing of the debt, standing alone, is not a prohibited debt collection practice." *In re Gatewood*, 533 B.R. 905, 910 (B.A.P. 8th Cir. 2015). Nor, according to the Court, is such a claim harassing or abusive or unfair within the meaning of §§ 1692d10 or f11 of the FDCPA. See, e.g.,*LaGrone v. LVNV Funding, LLC*, 525 B.R. 419, 426 (Bankr.N.D.Ill. 2015) (analyzing the subsections of the FDCPA in relation to the requirements for proofs of claim under the Code and included in the March 2015 McGlinchey Stafford Manufactured Housing Law Update).

The parties agreed that defendants' proofs of claim clearly stated all relevant dates of activity on the underlying accounts, including the debt amounts and the last transaction date. From a review of the proofs, the Martels (or, more specifically, their attorney) identified that the debts would be time-barred in state court proceedings. Exercising their rights under the Code and the Rules, the Martels contacted the defendants to raise their dispute and the claims, which would have been subject to disallowance in the normal course of the bankruptcy proceedings, were withdrawn. The Court found that the fact that the debts were subject to the affirmative defense of the statute of limitation did not make filing the proofs of claim violative of the FDCPA, the Maine FDCPA, or the Code. Statutes of limitation do not extinguish debts, but bar actions to collect once raised.

Although the Court found that the Bankruptcy Code and the FDCPA are not irreconcilable and creditors are under the obligation to follow both, the defendants met their burden of showing that the Martels had not stated a claim upon which relief can be granted.

Dismissed.

CASE LAW

TILA – Rescission

CASE NAME: *Deutsche Bank National Trust Company v. Gardner*
DATE: *10/14/2015*
CITATION: *Superior Court of Pennsylvania. 125 A.3d 1221. 2015 WL 6162448*

In June 2003, Gardner signed a mortgage on his home and borrowed $140,000 from Ameriquest. In January 2005, Gardner and Ameriquest refinanced, adding $45,400 to the loan. A second mortgage was signed. At closing Ameriquest gave Gardner a federal H–8 Form to advise Gardner of his rescission rights.

In October 2007, Gardner applied to rescind the refinance agreement and stopped repaying the loan because he had not been given correct disclosure of his rescission rights. Gardner's action to enforce his rescission rights for the refinance loan was transferred and consolidated with an ongoing TILA class action against Ameriquest. When this class action settled, Gardner waived his direct TILA claims against Ameriquest and kept the right to defend himself against mortgage foreclosure. Gardner also preserved his right to assert an affirmative defense based on inadequate notice.

On January 12, 2008, Deutsche Bank, trustee for Ameriquest, filed this mortgage foreclosure action against Gardner. This case was in limbo for five years until the federal class action settled.

The trial court found that Ameriquest did not comply with the TILA requirements, and therefore, Gardner's affirmative defense was valid and prevented foreclosure and Gardner was entitled to rescind his refinance loan, but only up to the $45,400 which was added during the refinance, and Gardner's home remained mortgaged to Deutsche Bank under terms of the first mortgage. Deutsche Bank appealed.

The Court noted that, although it is not necessary that any particular form is used, the Board of Governors of the Federal Reserve System created the H–8, a model form for general usage by lenders to satisfy the notice provision of TILA. However, because rescission rights in 'refinancing' situations differ from those applicable in new-loan situations, the Board promulgated a model rescission form H–9 for partially exempt 'refinancings.'

Here, the lender provided the H–8, rather than the H–9. The Court found that one could read the H–8 notice as indicating that the borrower could rescind the whole new security interest, covering both old and new money. Under this interpretation, because a refinance borrower may want to rescind the new-money portion of the loan but may not have the funds readily accessible to pay back the old loan immediately, the unclear H–8 notice could dissuade him or her from exercising his or her right to rescind. Because the disclosures were inadequate, the trial court correctly held that Gardner had three years to exercise his rescission rights.

However, the Court also found that the trial court erred in permitting Gardner to rescind the refinance agreement without tendering back the $45,400 that he received when the loan closed. Third Circuit courts have held repeatedly that a debtor's inability to tender the funds delivered by the lender rendered inappropriate termination of the lender's security interest in effectuating rescission.

Absent from the trial court's order was any provision for Gardner's tender of the new money portion of the rescinded loan. Instead, the trial court provided that Deutsche Bank may file an in personam action against Gardner to recover the $45,400.

The Court held that, with this absence of any proof of an intent by Deutsche Bank or any of its predecessors to deceive or cheat Gardner, the trial court abused its discretion in ordering the termination of Deutsche Bank's security interest obtained in the refinance transaction, without also requiring Gardner to fulfill his tender obligation.

Accordingly, the trial court's judgment was vacated and the case remanded. Specifically, the trial court upon remand must calculate the amount of Gardner's tender obligation and order Gardner to satisfy that tender obligation either by paying that amount to Deutsche Bank in a lump sum or by satisfying it over time. The trial court also must determine whether termination of Deutsche Bank's 2005 security interest prior to Gardner's full tender is equitable under the circumstances of this case.

CASE LAW

TILA – Rescission

CASE NAME: *John Korman v. SRMOF II 2011-1 Trust*
DATE: *10/15/2015*
CITATION: *United States District Court, S.D. Florida. Slip Copy. 2015 WL 6121382*

Plaintiff closed on a loan to refinance the mortgage on his home. Plaintiff's lender for the refinance was Lehman Brothers Bank FSB, which was not a party to this lawsuit. Plaintiff claims that sometime thereafter he reviewed the closing documents, and discovered that they contained "elements of fraud" as well as a TILA violation, so Plaintiff "rescinded the [m]ortgage" on April 1, 2008, by mailing the lender a notice of rescission. According to Plaintiff, when the lender failed to respond or contest the rescission, the promissory note was automatically "discharged" and Plaintiff's "obligation to make monthly mortgage payments" was "terminated." Plaintiff stated that the "void mortgage and the void note" were then unlawfully assigned numerous times. Ultimately, Plaintiff's property was foreclosed upon on February 15, 2014, and subsequently purchased by Defendants.

Plaintiff brought suit in state court to quiet title to the property. Because Plaintiff's complaint also referenced TILA, Defendants removed the lawsuit to federal court. Defendants moved to dismiss the Complaint for failure to state a cause of action under Rule 12(b)(6) and based on the TILA statute of limitations. According to Defendants, "[n]o notice of rescission is alleged in the Complaint, nor is any notice of rescission attached as an exhibit to the Complaint ...nothing in the exhibit[s] contains the words "rescind" or "rescission," and nothing in the exhibit meets the requirements under TILA ..." Defendants further claimed that "no allegation is made that Plaintiff ever offered or tendered a return of the property or money for which reason no enforcement of any TILA violation is available.

The Court first found that removal was proper based on diversity jurisdiction.

The Court further found that Plaintiff's interpretation of the TILA statute was fatally flawed. Contrary to Plaintiff's theory of automatic rescission, courts have held that the exercise of the right to rescind is distinct from full rescission which contemplates a full unwinding of the transaction and a return to the status quo prior to the transaction.

Here, the lender did not acknowledge Plaintiff's right to rescind, nor had Plaintiff's attempted rescission been enforced by a court of law. Thus, despite Plaintiff's conclusory allegations, he did not allege facts demonstrating that title to the subject property was properly vested in him.

Plaintiff's Complaint for a declaratory judgment to quiet title based on an allegedly wrongful foreclosure is premature until the underlying rescission issue has been decided by the Court. Plaintiff's failure to establish the proper foundation was fatal and therefore, the Court recommended that Defendants' Motion to Dismiss the Complaint be granted and Plaintiff's Motion for Remand be denied.

CASE LAW

FDCPA – Time-barred debt

CASE NAME: *Elrich v. Convergent Outsourcing, Inc.*
DATE: *10/28/2015*
CITATION: *United States District Court, S.D. Florida. Slip Copy. 2015 WL 6470453*

Ehrich alleged that Convergent violated the FDCPA in sending him a letter "regarding an alleged debt that was several years old." Ehrich claimed the letter "failed to indicate that the debt was too old to be enforced in court (statute of limitations expired) but nevertheless made an offer to 'settle' the debt on a discounted basis[.]" "Based on the FDCPA's 'least sophisticated consumer' standard," Ehrich argued, "the foregoing could be construed to be a threat to sue if an agreement is not reached and is therefore misleading" in violation of the FDCPA. Ehrich did not allege the debt was not owed or was otherwise illegitimate.

The Court found that a debt collector is not required to advise a consumer of any potential defenses to a legal action. That includes advising a consumer of the time-barred status of a particular debt.

Nor did Convergent threaten legal action in any way, even from the point of view of the least sophisticated consumer. The letter contained no indication or threat that Convergent would be seeking to enforce the debt in court. No lawsuit was mentioned or threatened—either explicitly or implicitly. Because Convergent did not initiate or threaten legal action in connection with its debt collection efforts, it was entitled to seek voluntary repayment of the time-barred debt. Accordingly, the Court found that Ehrich failed to state a claim under the FDCPA.

The Court also rejected Ehrich's argument that Convergent's settlement offer could be construed as a threat to sue, finding that a debt collector's offer to settle a debt does not in and of itself constitute a threat to bring legal action

Here, the letter states, in part, that the current creditor of the debt was "willing to settle [the] account for 50% of [the] total balance due." The letter contained no threat of any future action, litigation or otherwise. It lacked language the least sophisticated consumer could reasonably construe as a threat, such as negative consequences in the event of non-payment. In short, Convergent's use of the word "settle," without more, could not be taken as a threat, even by the least sophisticated consumer. For that reason, Ehrich's claim must be dismissed for failure to state a claim upon which relief could be granted.

Further, given the fatal flaws in Ehrich's case, permitting him to amend the Complaint at this juncture would be futile.

The case was dismissed with prejudice.

CASE LAW

Notification filing – Debt collector

CASE NAME: *Capital One Bank (USA), N.A. v. Taylor*
DATE: *11/25/2015*
CITATION: *Court of Appeals of Iowa. Slip Copy. 2015 WL 7567398*

Taylor applied for and was issued a revolving credit account with Capital One. Capital One mailed Taylor a notice of right to cure default and subsequently filed a civil action against Taylor seeking payment for the credit card debt. Attached to Capital One's petition were a credit card agreement, a billing statement, a charge-off statement, a facsimile report detailing the state of the account, and a right-to-cure notice. Taylor filed an answer, including numerous affirmative defenses and an unfair debt collection counterclaim. The counterclaim alleged Capital One violated the Iowa Debt Collection Practices Act (IDCPA), , when it filed suit attempting to collect debt from Taylor without first registering as a debt collector with the Iowa Attorney General pursuant to Iowa Consumer Credit Code (ICCC) (requiring notification and designation of a registered agent for service of process).

Capital One filed a motion for summary judgment regarding Taylor's counterclaim. Taylor filed a resistance to Capital One's motion, attaching an affidavit by his attorney, which did not dispute any of the facts Capital One had put forth and instead alleged that Taylor was prejudiced by Capital One's failure to file notification for purposes of service of process. The district court held that Capital One "is exempt from the registration and notification requirements of § 537.6202 as it is authorized to engage in business under [c]hapter 524." See Iowa Code § 537.6201.

The district court additionally found that even if Capital One was not exempt, "a violation of that section does not give rise to Defendant's cause of action as it is not included in the list of violations set forth in § 537.5201 of the Code giving a consumer a cause of action to recover damages." Taylor appealed.

The appeals court did not reach the issues of exemption and preemption because it found that a failure to file a notification pursuant to section 537.6202 was not a violation of the ICCC that allowed a defendant in a debt collection action to pursue a counterclaim for unfair debt collection practices under the IDCPA. Accordingly, the district court did not err in denying Taylor's motion for summary judgment on his unfair debt collection counterclaim.

The Court also found that Capital One offered sufficient evidence to prove the elements of an account stated theory of recovery by providing an account agreement with Taylor; a final charge-off statement addressed to Taylor; and a competent affidavit that stated Capital One sent regular monthly account statements to Taylor, a charge-off statement that is the sum total of the monthly account statements, and that Taylor never objected to any of the monthly statements.

Finally, the Court found that there were no delinquency or deferral fees on Taylor's account that were required to be itemized and concluded Capital One sent a proper right-to-cure notice and the district court correctly granted Capital One's motion for summary judgment on the underlying credit card debt.

Affirmed.

CASE LAW
Class action – Defendant's offer of judgment

CASE NAME: *Franco v. Allied Interstate LLC*
DATE: *11/30/2015*
CITATION: *United States District Court, S.D. New York. Slip Copy. 2015 WL 7758534*

Franco brought suit against defendant Allied Interstate, LLC, alleging that defendant violated the FDCPA when it used false, deceptive, and misleading practices in its attempts to collect alleged debts from plaintiffs and other consumers in Massachusetts. Specifically, plaintiff alleged that defendant's written communications warned debtors that they may be subject to wage garnishment of 15% of their pay. Plaintiff claimed that defendant disseminated this communication in violation of §§ 1692e and 1692f of the FDCPA because the law only allows wage garnishment up to 15% of disposable income.

The FDCPA's statutory damages provision permits individual plaintiffs to recover "any actual damages sustained" as a result of defendant's violation of the statute and "such additional damages as the court may allow, but not exceeding $1,000." The FDCPA also permits recovery for "the costs of the action, together with a reasonable attorney's fee determined by the court." Id. Plaintiff alleged only statutory damages in his complaint and sought no actual damages.

Defendant offered judgment to plaintiff pursuant to Federal Rule of Civil Procedure 68 in the amount of $1,501.00 plus reasonable attorney's fees and costs to be determined by the Court. The offer did not include any reservation of rights or avoidance of a finding of liability. Plaintiff did not accept that offer of judgment, and the offer expired. Plaintiff moved for class certification. defendant moved to dismiss the action for lack of subject matter jurisdiction arguing that because plaintiff offered judgment in complete satisfaction of statutory damages he could have recovered if he were to prevail on his claims, the action was rendered moot.

The Court granted defendant's motion to dismiss. The Second Circuit vacated the dismissal on the grounds that plaintiff's "individual claim was not mooted by the Rule 68 offer," which itself "did not result in the entry of any judgment against the defendant," and remanded the case for further proceedings pursuant to its holding in *Tanasi v. New Alliance Bank*, 786 F.3d 195 (2d. Cir. 2015) (as amended May 21, 2015).

On defendant's renewed motion, plaintiff advanced two arguments in opposition. First, that the Proposed Judgment did not provide complete relief because: (1) it did not provide relief to the class, (2) it did not allow the Court to award the statutory attorney's fees or costs that that plaintiff sought in his Complaint, and (3) it postponed plaintiff's rights by giving defendant thirty days to after entry of judgment to make payment; and second, that in any event the class claims should survive.

The Court found that defendant's offer was a complete satisfaction of the relief plaintiff sought in his Complaint and the entry of judgment against defendant therefore "provide[s] complete relief" to Franco.

The Court also found that, as a prevailing party under the FDCPA, a plaintiff who receives a settlement offer for the maximum statutory amount (albeit not under Rule 68) is presumptively entitled to an award of reasonable attorney's fees. As long as the Rule 68 offer did not implicitly or explicitly provide that the judgment not include costs, a timely offer is valid. Finally, and alone dispositive, was defendant's own concession that the Court may enter such an award.

Further, post-judgment interest from the date of entry of judgment is mandatory regardless of whether it is specifically enumerated in the Proposed Judgment.

Finally, the Court let stand its ruling that when the claims of the named plaintiffs become moot prior to class certification, the entire action becomes moot.

Defendant's motion to enter judgment granted.

Note: On January 20, 2016, the United State Supreme Court held that a consumer's complaint was not rendered moot by unaccepted offer of judgment.

We will report on *Campbell-Ewald Co. v. Gomez*, Supreme Court of the United States. --- S.Ct. ----. 2016 WL 228345 in the next McGlinchey Stafford Manufactured Housing Law Update.

CASE LAW
Bankruptcy – Homestead exemption

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CASE NAME: *In re Fix*
DATE: *11/30/2015*
CITATION: *United States Bankruptcy Court, D. Montana. Slip Copy. 2015 WL 7755353*

Timothy Fix bought property located at 21335 Old Highway 93, Florence, Montana [the MT property] on March 11, 2005. Timothy, his wife Beverly, and their child moved on to the MT property as their residence and, on March 7, 2008, recorded a Declaration of Homestead on the MT property.

In the winter of 2014–15, Timothy drove to Arizona for employment. Beverly and their child remained behind on the MT property.

On February 25, 2015 and March 5, 2015, the Fixes signed a Purchase and Sale Agreement for the MT property with the Fontaines. On February 26, 2015, the Fontaines wired $40,000 to Beverly Fix's bank account for the down payment due under the Purchase and Sale Agreement; Between March 13–15, 2015, the Fixes negotiated and signed a Buy–Sell Agreement to purchase residential real property located in Lake Havasu, Arizona [the AZ property] from the Hailers, using $30,000 of the $40,000 received from the Fontaines to make the down payment.

The Fixes filed Chapter 13 on March 30, 2015.

The deed from Hailers to Fixes was dated March 27, 2015; notarized on March 30, 2015 and recorded on April 1, 2015.

The sale of the MT Property to the Fontaines has not yet closed, although the Court entered an Order on October 6, 2015 approving the sale. The Fixes still keep animals and personal property on the MT Property, pending closing of that sale to the Fontaines. Beverly testified that she and Timothy will move back to the MT property if the sale to the Fontaines does not go through.

The MT Property is encumbered by a first mortgage in the amount of $169,182. The MT property has a value of $335,000. Even before deducting second and third mortgages against the MT property totaling approximately $38,000, there is less than $250,000 of equity in the MT property.

The Estate of Kent Olson has a judgment lien on the MT property for $48,184.38. William & Garnet Kinney have judgment liens on the MT property for $10,419.11. Collection Bureau Services holds three separate judgment liens on the MT property totaling approximately $5,000. Debtors filed motions to avoid these judgment liens on the grounds that the liens impair Debtors' homestead exemption.

The Olson Estate filed an objection on the grounds that the Debtors contracted to sell their homestead and to purchase real property in Arizona prepetition and because Timothy had been employed in Arizona for four months. The Kinneys filed their objection on the same grounds and contended that Debtors abandoned their Montana homestead prepetition and that an automatic homestead exemption attached to Debtors' Arizona property by state statute.

The Court found that a claimant is entitled to temporarily vacate a homestead premises for such things as employment, as Timothy did, and still claim a homestead exemption.

Further, Timothy's departure for employment in Arizona did not affect Beverly's homestead exemption. Mont. Code Ann. § 70–32–10 allows the homestead to be selected from the property of either spouse.

The Court also found that § 70–32–216 provides that if property that could have been claimed as a homestead has been sold, the owner is entitled for 18 months to exemption of the proceeds that are traceable and Beverly's testimony that all their exemptions claimed under Montana homestead statutes are traceable to the proceeds of the sale of the MT property was uncontroverted. The 18–month period of § 70–32–216(1) has not expired. Debtors' total claimed exemption under the homestead statutes does not exceed the $250,000 limitation of Mont. Code Ann. § 70–32–103. Neither Kinney nor the Olson Estate filed an objection to Debtors' claim of homestead exemption.

The Olson Estate and Kinney argued that Arizona statutes govern the Debtors' allowance of exemptions. However, the 730–day domicile period required under § 522(b)(3)(A) was not shown. Timothy drove Beverly's motorhome to Arizona in the winter of 2014–15, which at most was 180 days. Section 522(b)(3)(A) thus prohibited Debtors from claiming exemptions under

Arizona law even if they wished to because they did not meet the 730–day domicile requirement in Arizona.

Nor did the Court agree with the Olson Estate that the Fixes acquired legal ownership of the Arizona property on March 30, 2015, thereby triggering Arizona homestead statutes. The down payment made by the Fixes to Hailers was placed in escrow and the closing took place on April 1, 2015, after the date Fixes filed their Chapter 13 petition. A debtor's entitlement to claimed exemptions generally is determined as of the date the bankruptcy petition is filed.

The Court concluded that the Debtors were entitled to their claims of homestead exemption in 21335 Old Highway 93 in Florence, Montana, and traceable proceeds therefrom, in an amount not to exceed $250,000 in value and that that the judicial liens of CBS, Kinney and the Olson Estate, which together total $63,603.49, were avoidable in their entire amount under § 522(f)(1)(A).

CASE LAW
Bankruptcy – Homeowners' Association lien

CASE NAME: *U.S. Bank National Association v. Grant*
DATE: *12/02/2015*
CITATION: *District Court of Appeal of Florida, Fourth District. --- So.3d ----. 2015 WL 7752864*

U.S. Bank National Association filed a foreclosure complaint based on a mortgage and note dated March 14, 2007. The mortgagor's homeowner's association, Pipers Landing Association, Inc., answered the complaint and denied that its lien interest in the property was inferior to the Bank's. The Bank's mortgage was recorded prior to the Association's delinquency lien against the homeowners and after the recording of the Declaration of Covenants and Restrictions for Pipers Landing.

The Circuit Court concluded that the association's lien had priority. The mortgagee appealed.

Following *Holly Lake Ass'n v. Federal National Mortgage Ass'n*, 660 So.2d 266 (Fla.1995), the Court found that in order for a claim of lien recorded pursuant to a declaration of covenants to have priority over an intervening recorded mortgage, the declaration must contain specific language indicating that the lien relates back to the date of the filing of the declaration or that it otherwise takes priority over intervening mortgages.

Here, the Declaration did not contain the language required by Holly Lake to give the Association's lien priority over that of the Bank.

Reversed and remanded.

CASE LAW
Bankruptcy – Fraudulent transfer

CASE NAME: *In re Village Concepts, Inc.*
DATE: *12/04/2015*
CITATION: *United States Bankruptcy Appellate Panel of the Ninth Circuit. Slip Copy. 2015 WL 8030974*

Debtor was in the business of selling new and used manufactured homes and managing mobile home parks. Mark Weiner is Debtor's president and Nancy Weiner is Debtor's secretary. The Kopp Family Revocable Living Trust is Debtor's sole shareholder, and the Weiners are the sole trustees and beneficiaries of the Trust.

In March 2009, Park Village was formed. Its sole shareholder is the Trust. Mark is the President and Chief Financial Officer of Park Village.

On June 8, 2009, attorney Steven H. Haney sent a demand letter advising that his firm represented owners of manufactured homes that had been purchased from Debtor and that the homes were defectively constructed. Haney made a settlement demand for $1,250,000 which remained open until June 30, 2009. Debtor did not respond to the demand letter.

On June 30, 2009, Debtor transferred its interest in the Mobile Home Parks to Park Village in return for 100% of the stock in Park Village. As part of the same transaction, Debtor transferred its stock in Park Village to its sole shareholder, the Trust.

On August 10, 2009, Haney filed a state court lawsuit against Debtor. This case was consolidated with a prior action filed by another purchaser.

On June 5, 2012, a trial commenced.

On June 8, 2012, almost three years after the transfers and while the state court construction defect litigation was pending, Debtor filed a chapter 11 petition. The construction defect litigation plaintiffs alleged that there was strong circumstantial evidence that Mark had caused Debtor to make fraudulent transfers of its property to its sole shareholder, an affiliate entity also controlled by Mark, after he learned of their claims. About two months later, the case was converted to chapter 7.

Trustee filed an adversary complaint alleging that Debtor's transfer of 100% of its interest in the Mobile Home Parks to Park Village in return for 100% of Park Village stock was fraudulent. Trustee also alleged that the issuance of new shares comprising 100% of the outstanding and issued stock in Park Village which were transferred to the Weiners in their capacities as trustees of the Trust was also fraudulent. Trustee maintained that these transfers were made with actual intent to hinder, delay, or defraud a creditor. Trustee also maintained that the transfers were constructively fraudulent because they were made without receiving reasonably equivalent value in exchange and that Debtor was insolvent at the time the transfers were made. Finally, Trustee sought turnover of the transferred property.

The bankruptcy court found that Debtor was solvent both before and after the transfer. The court also implicitly found that Debtor received value in exchange for the transfer.

The bankruptcy court acknowledged that the transaction was between insiders and that they retained control of the assets both before and after the transfers. But the court stated that it was not convinced that Debtor's knowledge of the construction defect litigation showed actual fraud as to the transfer. The court opined that these types of suits were part of doing business. Finally, the bankruptcy court said that it believed Mark's testimony that the transfer was made to accomplish a tax spinoff.

Trustee appealed.

According to the Bankruptcy Appellate Panel, under Cal. Civil Code § 3439.05, a transfer is constructively fraudulent if the debtor made the transfer without receiving reasonably equivalent value in exchange and the debtor was insolvent at that time or rendered insolvent as a result of the transfer. Trustee must prove both reasonably equivalent value and insolvency by a preponderance of evidence. There are two alternative tests to establish a debtor's insolvency—the balance sheet test and the cash flow test. The bankruptcy court found that Trustee had not proved insolvency under either. The evidence showed that Debtor had no contingent liabilities as of June 30, 2009, or if it did, they were indefinite, speculative, and not material.

In addition, even assuming such contingent liabilities existed, Trustee provided no evidence that attempted to quantify the amount of Debtor's likely liability on the construction defect claims. Therefore, the bankruptcy court had no evidence from Trustee showing that the construction defect litigation would have rendered Debtor insolvent.

To make out a successful fraudulent transfer claim under Cal. Civil Code § 3439.05, Trustee had shown not only that Debtor was insolvent at the time of the transfer, but also that it failed to receive "a reasonably equivalent value in exchange for the transfer." The Trustee having failed to prove insolvency, a necessary element for a constructive fraudulent transfer, it was unnecessary for the Court to reach this issue.

Further, after the transfer, there were assets remaining: "All the inventory items which consisted of mobile homes and RV's and equipment, a lot of construction equipment, and substantial notes receivable." This testimony was not rebutted by Trustee at trial. Moreover, the balance sheet identified many assets which were not transferred representing more than half of the total book value of the assets. Finally, the Court found that many of the typical elements associated with an actual fraudulent transfer were not present in this case. The bankruptcy court considered Mark's explanation for the transfer as a tax spinoff credible. This was sufficient, in the bankruptcy court's mind, to rebut the circumstantial inference of actual intent arising from the few badges of fraud that were present. Accordingly, the bankruptcy court's factual finding that Debtor had not made the transfer with actual fraudulent intent was not clearly erroneous.

Affirmed.

CASE LAW
Foreclosure – Super-priority lien

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CASE NAME: *Twenty Eleven, LLC v. Botelho*
DATE: *12/04/2015*
CITATION: *Supreme Court of Rhode Island. --- A.3d --. 2015 WL 7873599*

Michael J. Botelho purchased a condominium unit. On the same day, he executed a promissory note in favor of First Franklin Financial Corp. in the amount of $114,400, secured by a first mortgage. Botelho became delinquent on his condominium assessment fees and the condominium association sold the property at a lien foreclosure sale, conveying title to the property in exchange for payment in the amount of $21,000 to plaintiff on August 25, 2011.

Botelho had also fallen behind on his first-mortgage, which had been assigned to defendant PNC Bank. Plaintiff was notified that the property was to be sold at a mortgage foreclosure sale and instituted this action seeking to quiet title to the property in its name. Defendant filed a motion to dismiss plaintiff's complaint.

The hearing justice found that defendant's mortgage survived the association's lien foreclosure sale and that plaintiff took the property subject to its mortgage. Plaintiff appealed.

The appeals court found that the Rhode Island Condominium Act, G.L.1956 chapter 36.1 of title 34, effectively splits condominium-assessment liens into two liens of differing priority: (1) a lien for six months of assessments that is higher in priority than the first mortgage or first deed of trust; and (2) a lien for any additional unpaid assessments that is lower in priority than the first mortgage or first deed of trust.

The Court noted that the Act does not expressly address what happens when, as in this case, a condominium association forecloses solely on its super-priority lien and the proceeds of the sale are not sufficient to pay off a first mortgage or first deed of trust, but found that a general principle of foreclosure law potentially provides an answer: liens with lower priority are extinguished if a valid foreclosure sale yields proceeds insufficient to satisfy a higher-priority lien. Because the Legislature did not explicitly depart from these general principles, the Court found it meant to adhere to them, and, therefore, when a super-priority lien established by § 34–36.1–3.16(b)(1)(ii) is foreclosed on, a first mortgage is extinguished.

The Court identified several practical solutions for first mortgagees to avoid extinguishment of their security interest by foreclosure on a super-priority lien. First, as a practical matter, secured lenders will most likely pay the 6 months' assessments demanded by the association rather than having the association foreclose on the unit.

This payment can then be added on to the principal balance of the mortgage. Another option is to require payment of assessments into an escrow account, much as with insurance premiums or taxes. Whether or not lenders choose to employ these safeguards, the bottom line is that statutory principles of priority, not the monetary value of the respective liens, control.

Further, if the super-priority of the association's lien just established a payment priority, the reference to a first security holder paying off the super-priority lien to stave off foreclosure would make no sense.

The Court also noted that, in 2008, the act was amended to include a right of redemption in favor of the holder of the first mortgage. The fact that the statutory scheme was amended to include a right of redemption was indicative of the Legislature's intent that foreclosure of a super-priority lien extinguishes a first mortgage: one cannot redeem what it has not lost.

Here, defendant did not redeem and, as such, relinquished its last chance to save its security interest in the property.

Although the Court was "mindful of the implications of our holding today and the draconian nature of its effects," it nonetheless, reversed and remanded.

CASE LAW
Repossession – Third party liability

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CASE NAME: *Nelson v. BMW Financial Services NA, LLC*
DATE: *12/08/2015*
CITATION: *United States District Court, D. Minnesota. Slip Copy. 2015 WL 8328073*

Defendant BMW Financial Services NA, LLC extended a loan to Nelson to finance the purchase of a 2011 Chrysler 200. Subsequently, BMW hired All Wheels to repossess the vehicle. All Wheels repossessed of the car from Nelson's driveway over her objections.

Nelson initiated this action against BMW and All Wheels, asserting three claims: (1) Count I for violation of the FDCPA; (2) Count II for wrongful repossession under Minn. Stat. § 336.9–609; and (3) Count III for conversion.

The parties agreed that only All Wheels' argument directed to Count II remained at issue.

Nelson claimed that All Wheels violated Minn. Stat. § 336.9–609 when it wrongfully repossessed her car because BMW previously accepted multiple partial and late payments, contending that All Wheels was required to notify her that strict compliance with the payment terms was required before effectuating repossession. All Wheels countered that it cannot be held liable under § 336.9–609 because that provision only mandates a standard of conduct for secured parties, not independent contractors operating on a secured party's behalf.

The Court found that several Courts in the district have required those performing repossession on behalf of secured parties to comply with the standards set forth in § 336.9–609. This Court agreed. Finding Minn. Stat. § 336.9–609 applicable to an independent contractor's actions is appropriate because self-help repossession is a harsh remedy, and strict application of the law is necessary to prevent abuse and to discourage illegal conduct. Accordingly, Nelson may assert a cause of action under Minn. Stat. § 336.9–609 against All Wheels for wrongful repossession as an unsecured party.

However, the Court also found that Nelson was not entitled to the damages she sought under Minn. Stat. § 336.9–625(c)(2), which provides recovery for noncompliance in the amount of the finance charge plus ten percent.

The Court noted that the UCC comment to this section states that "[a] person who has delegated the duties of a secured party but who remains obligated to perform them is liable under this subsection." Uniform Commercial Code, Former § 9–503, cmt. 3. As such, the comment evinces an intent to hold the secured party liable, even in situations when the secured party contracted with a third party to perform the act of repossession.

Moreover, the finance charge itself is originally paid to the secured party. Finding an unsecured contractor liable under § 336.9–625(c)(2) could lead to a nonsensical result. That is, even a plaintiff without actual damages could recover from the independent contractor repossession agent the finance charge plus 10 percent, when this amount was never paid to the contractor in the first instance. Accordingly, § 336.9–625(c)(2) does not provide for the finance damages Nelson sought from All Wheels. This conclusion, however, does not foreclose the possibility that an independent contractor may be liable for other damages (such as actual damages) under the section.

To the extent All Wheels sought to dismiss Count II in its entirety, the motion was denied; but, to the extent All Wheels sought to preclude damages under § 336.9–625(c)(2) for the finance charge plus 10 percent, the motion was granted.

CASE LAW

Bankruptcy – Replacement value

CASE NAME:	*In re Prewitt*
DATE:	*12/08/2015*
CITATION:	*United States Bankruptcy Court, E.D. Texas, Tyler Division. Slip Copy. 2015 WL 8306422*

The Lender is the current owner and holder of the promissory note obligation owed by the Debtor and holds a properly-perfected purchase money security interest in the Collateral, a 2001 Palm Harbor "Country Place" 18' x 76' three-bedroom, two-bath, single-wide manufactured home. In part to address an arrearage with the Lender, the Debtor filed a Chapter 13.

The Chapter 13 plan was confirmed, with a final valuation assessment regarding the manufactured home reserved for future determination. The Lender filed a motion seeking to establish a valuation in an amount of "at least $24,104." The Debtor filed an objection.

The Lender offered appraisal testimony of two witnesses in support of its valuation, both utilizing a NADA-developed format known as the National Appraisal System ("NAS"), but neither of which was based upon comparable sales.

In addition to that asserted value of the used home and its value-adjusted optional equipment, one of the appraisers included an additional assessment of $3,904 for "delivery and setup of a replacement home" which the Lender claimed was necessary to complete the determination of replacement value of a manufactured home.

The Debtor's expert rejected any use of NADA sales information in reaching his opinion, and, instead, engaged in an analysis of comparable sales. The Court found, however, that the dissimilarity of the units selected by the Debtor's expert for his comparable sales analysis and his unilateral rejection of NADA sales information by which the subjective effect of his particular sales choices might have been moderated lessened the reliability of the conclusions offered.

The Court found that the Bankruptcy Abuse Prevention and Consumer Protection Act brought a new statutory subsection – § 506(a)(2)17 – which expressly mandated the use of replacement value as the valuation methodology and established a definition of replacement value for "property acquired for personal, family, or household purposes," as "the price a retail merchant would charge for property."

Although the Court noted that the Bankruptcy Code does not impose a specific method for calculating the retail value of an item of personal property, the Court found that, assuming that it is used in its entirety by a knowledgeable and diligent appraiser, the NAS process to evaluate the retail price of a manufactured home unit is consistent with, and conducive to, the determination of the retail merchant value required.

The Court rejected the Lender's assertion that that value may be enhanced by an additional assessment for "delivery and setup costs." The Court found that the point of the whole valuation process is to ascertain the value of a particular asset in its current condition, and not to re-create all aspects of a hypothetical sales transaction with all of its ancillary activities.

Since the Debtor's manufactured home was being retained and not actually being replaced, the Lender's asserted costs for delivery and setup, utility connection, and porch attachment were completely illusory and artificial. They reflected services that this debtor would not actually receive and costs that the Lender would not actually incur. They were, in fact, costs for which the debtor already paid and which would not, in reality, be repeated.

Accordingly, the Lender's request that the replacement value of the Debtor's manufactured home be supplemented by hypothetical delivery and setup costs was denied and the replacement value of the manufactured home was determined to be $18,500.

CASE LAW

Repossession – "Commercially reasonable"

CASE NAME:	*Harley-Davidson Credit Corp. v. Galvin*
DATE:	*12/08/2015*
CITATION:	*United States Court of Appeals, First Circuit. 807 F.3d 407. 2015 WL 8121856*

Eaglemark Savings Bank loaned RASair $250,000 for the purchase of a Cessna 421C Aircraft, in exchange for an "Aircraft Secured Promissory Note" and an "Aircraft Security Agreement." Mark Galvin, a pilot and the owner of RASair, personally guaranteed payment of the loan. The Loan Documents were assigned to Harley–Davidson.

RASair defaulted. Harley–Davidson arranged for Specialty Aircraft Services, Inc. to help with the sale and repossessed the Aircraft and moved it into Specialty's custody. While in Specialty's possession, the Aircraft was vandalized.

Harley–Davidson executed a purchase agreement for the plane with an individual buyer for $155,000. The Aircraft was sold in an "as is" condition, and the buyer waived any warranty with respect to the plane's "airworthiness." Harley–Davidson calculated the outstanding debt, deducted the costs of repairs, and sent Galvin a letter requesting $108,681.50. Galvin did not pay.

Harley–Davidson filed a breach of contract action against Galvin and RASair to collect the deficiency.

The district court entered default judgment against RASair. Harley–Davidson moved for summary judgment against Galvin. Galvin opposed the motion on the grounds that Harley–Davidson failed to comply with the Loan Documents and a provision of the Nevada Commercial Code, requiring disposition of collateral after a debtor's default to be "commercially reasonable."

Under Nevada commercial law, which follows the Uniform Commercial Code, one method of demonstrating that a disposition was "commercially reasonable" is to show that it was conducted "in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition."

The district court granted partial summary judgment for Harley–Davidson, finding that "selling repossessed collateral through a dealer, if such sale is 'fairly conducted, is recognized as commercially reasonable,'" Galvin appealed.

The appeals court found that the district court prematurely shifted the burden of proof onto Galvin. Under Nevada law, a creditor may demonstrate that a sale through a dealer was "commercially reasonable" by showing that the sale was conducted “in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.” The district court and Harley–Davidson suggested that using a dealer alone met this requirement. The Court found, however, that use of a dealer must also be “fairly conducted.”

The Court found that there was a genuine dispute of material fact as to whether Specialty's handling of the sale after the vandalism fell below the standard of reasonable commercial practices among such dealers.

Galvin contended the Aircraft's missing avionics would likely have turned away buyers. Replacement of the avionics was specifically written into that agreement, which also strongly indicated that having the avionics was important, as the buyer insisted upon their replacement as a condition of the sale.

Although Harley–Davidson argued the plane was in poor condition and damaged when delivered to Specialty, it did not dispute Galvin's testimony that the plane was nonetheless airworthy before the vandalism. The purchase agreement, however, stated that the plane is being sold “as is” and expressly disclaimed its “airworthiness.” Given the facts on the record, there was a genuine dispute of material fact regarding whether the vandalism's effect on the plane's airworthiness may have affected the price obtained. This conclusion was not altered by damage that already existed at the time of repossession. Simply put, a fact-finder could reasonably conclude that an airworthy craft would attract more interest and a higher price than would a non-airworthy craft that had been vandalized, even if the seller promised to repair the known damage.

Reversed and remanded.

CASE LAW

TILA – Retroactivity

CASE NAME: *Talaie v. Wells Fargo Bank, NA*
DATE: *12/14/2015*
CITATION: *United States Court of Appeals, Ninth Circuit. 808 F.3d 410. 2015 WL 8606014*

Plaintiffs brought a putative class action against Wells Fargo Bank and U.S. Bank, alleging various federal and state law claims arising out of the modification of the deed of trust for the Talaies' home. One of Plaintiffs' claims was that Defendants did not comply with 5 U.S.C. § 1641(g), a 2009 amendment to TILA. Wells Fargo transferred Plaintiffs' deed of trust to U.S. Bank in 2006, three years before Congress enacted § 1641(g). The reporting requirement of § 1641(g) would apply to this loan transfer only if § 1641(g) had retroactive effect.

Section 1641(g) requires that “not later than 30 days after the date on which a mortgage loan is sold or otherwise transferred or assigned to a third party, the creditor that is the new owner or assignee of the debt shall notify the borrower in writing of such transfer.” If the new creditor does not comply with this duty, the borrower may sue the creditor to recover actual damages, a statutory penalty of up to $4,000 in individual claims or up to $1 million in a class action, plus costs and attorney's fees.

The United States District Court granted the lender's motion to dismiss on the ground that the notice requirement did not apply retroactively, and the borrowers appealed.

The Court noted that the Supreme Court has held that the presumption against retroactive legislation is “deeply rooted in our jurisprudence,” and can only be overcome where Congress expresses a clear and unambiguous intent to do so. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994).

The Court also found there was no clear indication that Congress intended for it to apply to loans that had been transferred before its enactment. The statute requires notice within 30 days of loan transfer and authorizes damages and penalties for failure to comply. If the statute were given retroactive effect, this 30–day reporting period would have already lapsed for all loan transfers that occurred more than a month before enactment, and it would have been impossible for those creditors to comply with the reporting requirement. It is unlikely that Congress would have broadly subjected creditors to civil liability and statutory penalties without at least giving them a way to comply with § 1641(g) for loan transfers that predated its enactment. The Court concluded that Congress did not make any such intention clear or unambiguous.

Further, Congress has demonstrated that it knows how to specify the effective date of statutory provisions. First, another provision of TILA, 15 U.S.C. § 1641(f), states that "[t]his subsection shall apply to all consumer credit transactions in existence or consummated on or after September 30, 1995." Second, Public Law 111–22, which implemented § 1641(g), provided a "retroactive effective date" for a different component of the same bill. Section 105, which addressed the distribution of funds under the Neighborhood Stabilization Program, includes a "retroactive effective date" stating that the amendment "shall take effect as if enacted on the date of enactment of the Foreclosure Prevention Act of 2008.

Affirmed.

CASE LAW
Foreclosure – "As is"

☹

CASE NAME: *Fricano v. Bank of America NA*
DATE: *12/23/2015*
CITATION: *Court of Appeals of Wisconsin. Slip Copy. 2015 WL 9309194*

Bank of America acquired property in foreclosure. The Bank's real estate agent, James Morgan, advised the Bank that the property had suffered severe water damage. After the Bank approved mold remediation. Morgan informed the Bank that the mold remediation "was not a complete job." The Bank approved repair work, but Morgan informed the Bank that the repair work was unsatisfactory.

The property was listed for sale and Fricano's second bid was accepted. Attached to that e-mail for Fricano to sign were a Real Estate Purchase Addendum and a Water Damage, Toxic Mold Environmental Disclosure, Release and Indemnification Agreement which contained an "as is" clause, along with a number of disclaimers or exculpatory clauses. In addition, the Bank represented that it acquired the property by foreclosure and consequently it had "little or no direct knowledge about the condition of the [p]roperty."

Shortly after the closing, Fricano discovered mold throughout the house. The house was stripped down to the studs, the mold and water damage was remediated, and the interior of the house was reconstructed.

Fricano sued, alleging the Bank misrepresented that it had "little or no direct knowledge regarding the condition of the [p]roperty." The jury awarded her $50,000 in compensatory damages.

The Bank moved for judgment notwithstanding the verdict. The trial court denied the Bank's motion and the Bank appealed.

The Court found no support for the Bank's argument that the "as is" provision, disclaimers, and waivers in the parties' contract relieved it from liability for its deceptive statement that it had little to no knowledge of the condition of the property. When a seller makes an affirmative representation about some aspect of the property, the buyer is entitled to rely upon that statement and expect full and fair disclosure of all material facts relating to that aspect of the property.

There was nothing in the "as is" provisions that informed the buyer that she was not entitled to rely on the representation in the sale contract itself, a representation that induced agreement to precisely those exculpatory provisions.

The Court also found that there was no contract between the parties when the Bank misrepresented its knowledge of the condition of the property. After Fricano increased her offer, the Bank sent Fricano an e-mail indicating that it had "accepted" the counteroffer, but, because the Addendum and the Agreement contained a variation of terms of the agreement, that acceptance was, in fact, a rejection and a counteroffer. Accordingly, the Court rejected the Bank's contention that, as a matter of law, its misrepresentation was not made to "the public."

The Court further found that the Bank's contention that its misrepresentation could not have materially induced Fricano into buying the property because her offer had already been accepted was without merit. As discussed, the Bank's acceptance of Fricano's counteroffer was, in fact, a rejection of that counteroffer and a new offer, since it sought to alter the terms of Fricano's counteroffer by requiring her to sign the Addendum and the Agreement.

In addition, the Court found that the substance of the misrepresentation could have materially induced Fricano into purchasing the property. Fricano testified that she agreed to sign the Addendum and the Agreement because the property had been in foreclosure and, as such, she thought the Bank could not tell her anything about the property, as it represented. Thus, there was more than sufficient credible evidence to believe that had the Bank not misrepresented its knowledge of the condition of the property, Fricano would not have gone forward and that Fricano's belief of the Bank's misrepresentation that it had no knowledge regarding the condition of the property did not render her reliance unreasonable as a matter of law. Fricano had no reason to doubt that the Bank lacked knowledge of the condition of the property because banks that acquire properties through foreclosure are not living there, unlike the ordinary person selling his or her home. Nor did the fact that Fricano had two inspectors examine her home render her reliance unreasonable as a matter of law. The jury could have credited the testimony Fricano presented that, after having one person inspect the property and consulting with another, coupled with the Bank's representation that it lacked knowledge of the condition of the property, she thought the mold growth was limited to portions of the basement. The Bank's misrepresentation did not have to be the sole motivation for Fricano's decision to purchase the property. She could have relied on both her own investigation and the Bank's misrepresentation.

Affirmed.

CASE LAW

FDCPA – Foreclosure as counterclaim

CASE NAME:	*Bauman v. Bank of America, N.A.*
DATE:	*12/23/2015*
CITATION:	*United States Court of Appeals, Sixth Circuit. --- F.3d ----. 2015 WL 9310136*

We note that the attorneys representing Bank of America in this case included Amanda L. Holzhauer and James W. Sandy of McGlinchey Stafford.

Brian and Cynthia Bauman purchased property and, to finance the purchase, obtained a loan and executed a note, later sold to Hudson City Savings Bank, secured by a mortgage that listed MERS as nominee. Bank of America's predecessor, BAC, became the servicer of the loan.

BAC brought a foreclosure action against the Baumans in state court. At the time of the foreclosure action, BAC falsely represented that it was in possession of the note and, therefore, that it had standing to file the lawsuit. The court denied BAC's motion for summary judgment and BAC voluntarily dismissed the case.

Based on BAC's false representation that it was the holder of the note and its alleged misrepresentation concerning the availability of a loan modification, the Baumans filed a complaint alleging violations of the FDCPA.

The district court found that Hudson and Bank of America acquired their interests in the debt prior to the Baumans' default and, therefore, neither were debt collectors under the FDCPA. Accordingly, the court granted Defendants' motion for summary judgment.

Although Defendants prevailed in the FDCPA action, they did not bring a foreclosure action as a counterclaim. Consequently, the Baumans filed a new complaint requesting a declaration barring Defendants from bringing a future foreclosure action and to quiet title. The district court granted Defendants' motion to dismiss. The court dismissed the Baumans' quiet title claim because it was "entirely dependent on their claim for declaratory relief." The Baumans appealed, pointing to Rule 13(a) of the Federal Rules of Civil Procedure which provides:

A pleading must state as a counterclaim any claim that—at the time of its service—the pleader has against an opposing party if the claim: (A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and (B) does not require adding another party over whom the court cannot acquire jurisdiction.

The Court found that the Baumans' FDCPA claim raised different issues of law from those that a foreclosure action would present. A foreclosure action alleges that the borrower has defaulted on a private loan contract governed by state law. An FDCPA action, on the other hand, requires interpretation of federal statutory law and regulations designed to "eliminate abusive debt collection practices by debt collectors."

Second, while there may be some overlap, the issues of fact presented by the FDCPA claims and a foreclosure action were not "largely the same." The district court's FDCPA ruling turned on one key factual issue: whether Defendants acquired their interest in the property before the Baumans defaulted. In a foreclosure action, whether the Defendants obtained their interest in the debt prior to the Baumans' default would be irrelevant.

Further, a foreclosure action requires a lender to prove that the debtor is in default and to prove the amount that the debtor owes. An FDCPA claim, however, does not focus on the validity of the debt, but instead on the use of unfair methods to collect it.

Third, barring FDCPA defendants who fail to bring foreclosure actions as a counterclaim from later bringing the actions in state court could systematically usurp these state law debt claims from adjudication by the state courts. Such a rule would also require lenders to initiate foreclosure proceedings as a counterclaim when they otherwise may not have done so, frustrating the purposes of the FDCPA by creating for debtors a disincentive to sue.

Affirmed.

CASE LAW
Bankruptcy – FDCPA

CASE NAME: *Garfield v. Ocwen Loan Servicing, LLC*
DATE: *01/04/2016*
CITATION: *United States Court of Appeals, Second Circuit. --- F.3d ----. 2016 WL 2663161*

This case is an appeal from *Garfield v Ocwen Loan Servicing, LLC*, United States District Court, W.D. New York. --- B.R. ----. 2015 WL 307009, which was in the February 2015 McGlinchey Stafford Manufactured Housing Law Update. In that case, the court dismissed a lawsuit filed by Donna Garfield accusing Ocwen of illegally demanding payment of thousands of dollars in mortgage debt she did not owe after the discharge of her debt in bankruptcy. The lower court held that there was no need to protect debtors who are already under the protection of the bankruptcy court, and no need to supplement the remedies afforded by bankruptcy itself, that there is not an independent cause of action under the FDCPA for the violation of a bankruptcy stay, and that such claims are precluded by the Bankruptcy Code.

Garfield obtained a mortgage from Ocwen's predecessor-in-interest and became personally obligated on a mortgage loan. Garfield failed to make payments and filed a Chapter 13.

Under her bankruptcy plan, Garfield paid the arrears on her mortgage loan and obtained a discharge of her entire personal obligation for the mortgage loan. However, Garfield agreed to pay $938 per month to prevent foreclosure of the mortgaged property.

Garfield conceded that she made only one monthly payment after her bankruptcy discharge. Ocwen demanded payment that reflected both Garfield's conceded arrears for post-bankruptcy monthly payments and the mortgage loan arrears that had been discharged. Ocwen also reported to Equifax that Garfield owed the discharged amount.

Garfield filed an FDCPA complaint against Ocwen, which was, as noted above, dismissed. She appealed.

The appeals court concluded that the Bankruptcy Code does not broadly repeal the FDCPA for purposes of FDCPA claims based on conduct that would constitute alleged violations of the discharge injunction. No irreconcilable conflict exists between the post-discharge remedies of the Bankruptcy Code and the FDCPA. There is no reason to assume that Congress did not expect these two statutory schemes to coexist in the post-discharge context.

Post discharge, the former debtor no longer has the protection of the bankruptcy court. The Court noted that the Bankruptcy Code provision concerning the discharge injunction does not explicitly create a cause of action for its violation, whereas the automatic stay provision provides such a remedy.

Garfield alleged that Ocwen sent her a bill for her monthly payment as well as her arrears for post-discharge monthly payments missed. She claimed that Ocwen violated the mini-Miranda warning requirement of subsection 1692e(11) “during conversations with [her],” and that it violated subsection 1692g(a)(3) by failing to send a 30–day right-to-dispute notice within five days of the initial communication. These alleged violations do not conflict with any provisions of the Bankruptcy Code.

Ocwen challenged several of Garfield's other FDCPA claims under subsections 1692e, 1692e(2), 1692e(5), 1692e(8), 1692e(10), 1692f, and 1692f(1), all of which regulate collection of a debt, contending that these provisions conflict with the Bankruptcy Code because, by regulating how to collect a debt, they imply that it can collect the discharged debt, an action that the discharge injunction prohibits. But Ocwen could avoid violating both the cited provisions and the Bankruptcy Code simply by not attempting to collect the discharged debt. And once Ocwen tried to collect the discharged debt, it risked violation of both the cited provisions and the Bankruptcy Code. Either way, there was no conflict.

Reversed and remanded with instruction to reinstate Garfield's FDCPA claims against Ocwen.

ADOPTED RULE
Nevada
Mortgage servicer licensing

☹

Effective 1/1/2016, adopts or amends Nev. Admin. Code 645F; 645F.005, .015, .040, .105, .200, .205, .210, .215, .230, .250, .260, .270, .275, .315, .320, .325, .400, .410, .415, .435, .440, .445, .455, .480 - .920 nonseq.

The regulations require that any person engaging in the business of a mortgage servicer in the State must be licensed. The regulations provide for a supplemental license for licensed mortgage professionals engaging in mortgage servicing activities. The regulations prescribe the procedures for applying for a license as a mortgage servicer and the conditions under which a license as a mortgage servicer will be granted to an applicant.

The regulations set forth requirements for the principal office and qualified employee of a mortgage servicer. A natural person may not be designated to serve as a qualified employee unless such person:

(a) Has at least 2 years of verifiable experience in the business of servicing mortgage loans within the immediately preceding 5 years.

(b) Is designated by the licensee to act on behalf of the licensee and to supervise and control the conduct of the business of the licensee at only one location.

(c) Will be employed and present at the location.

(d) Has submitted to and successfully passed a background investigation.

(e) Has been approved by the Commissioner to act as the qualified employee for the licensee at the location.

The regulations establish reporting and recordkeeping requirements and minimum net worth requirements of at least $100,000 for a mortgage servicer. The regulations prescribe surety bond requirements, also of at least $100,000, and the procedure for filing a claim against a bond.

Pursuant to the regulations, "Dwelling" means a structure that contains one to four residential units, whether or not that structure is attached to real property. The term includes, without limitation, an individual condominium unit, cooperative unit, mobile home and trailer, if it is used as a residence.

"Mortgage loan" includes, without limitation:

(a) Any loan that is secured by a mortgage, deed of trust or other consensual security interest on a dwelling located in the State or real property located in the State upon which is constructed or intended to be constructed a dwelling; or

(b) Any loan made or arranged by a mortgage broker under chapter 645B of NRS that is secured by a mortgage, deed of trust or other consensual security interest on commercial property located in the State that is funded by one or more private investors.

An supervision fee will be assessed for annual mortgage loan servicing volume of at least $1,500,000.

A mortgage servicer must file with the Commissioner a complete and current schedule of the ranges of costs and fees the mortgage servicer charges a borrower for its servicing-related activities with its application and renewal and with any of its supplemental filings.

At the time a mortgage servicer accepts assignment of servicing rights for a mortgage loan, the mortgage servicer shall disclose to the borrower:

(1) Any notice required by federal law or regulation.

(2) A schedule of the ranges and categories of its costs and fees for its servicing-related activities, which must comply with state and federal law and which must not exceed those reported to the Commissioner.

COMPLIANCE BULLETIN 2015-07
CFPB
In-Person Collection of Consumer Debt

In response to recent practices observed during supervisory examinations and enforcement investigations, the CFPB issued this compliance bulletin to provide guidance to creditors, debt buyers, and third-party collectors about compliance with sections 1031 and 1036 of the Dodd Frank Act and the FDCPA when collecting debt from consumers.

First-party and third-party debt collectors may run a heightened risk of committing unfair acts or practices in violation of the Dodd-Frank Act when they conduct in-person debt collection visits, including to a consumer's workplace or home. Depending on the facts and circumstances, in-person collections may cause or may be likely to cause substantial injury to consumers. For example, in-person collection visits may result in third parties, such as consumers' co-workers, supervisors, customers, roommates, landlords, or neighbors learning that the consumers have debts in collection. As with other types of collection, in-person visits may also be likely to cause substantial injury to a consumer if, based on the facts and circumstances, a likely or actual consequence of the visits is to harass the consumer.

In addition, third-party debt collectors and others subject to the FDCPA who engage in in-person collection visits may violate a variety of FDCPA provisions.

First, section 805(a)(l) and (3) of the FDCPA makes it illegal for third-party debt collectors and others subject to that Act to communicate with a consumer in connection with the collection of any debt "at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer" or "at the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication."

Second, subject to certain exceptions, section 805(b) of the FDCPA prohibits third-party debt collectors and others subject to that Act from communicating with any person other than the consumer in connection with the collection of any debt.

Depending on the facts and circumstances, in-person collection visits may result in collectors communicating with others about the debt in violation of section 805(b).

Finally, sections 806 and 808 of the FDCPA prohibit, respectively, a debt collector from engaging in any conduct the natural consequence of which is to harass, oppress, or abuse any person, and from using unfair or unconscionable means to collect or attempt to collect any debt. In-person collection visits may pose a heightened risk that collectors will violate these provisions.

If the CFPB determines that a company has engaged in acts or practices that violate the Dodd-Frank Act, the FDCPA, or other Federal consumer financial law, it will take appropriate supervisory or enforcement actions to address the violations and seek all appropriate corrective measures, including remediation of harm to consumers and assessment of civil money penalties.

INSTALLATION

CASE LAW

City ordinance – Wind zones

CASE NAME: *City of Anahuac v. Morris*
DATE: *12/17/2015*
CITATION: *Court of Appeals of Texas, Houston (14th Dist.). --- S.W.3d ----. 2015 WL 9249830*

The City of Anahuac adopted an ordinance that regulated the placement of both mobile homes and manufactured homes. The ordinance provided that it is unlawful to locate or relocate any mobile home or manufactured home that does not meet Zone 3 or better specifications within the city limits. The reference pertains to the “Zone III” construction standards established by the federal government and adopted by the state for regulation of manufactured homes, setting the minimum requirements for manufactured homes situated in areas classified as being in Wind Zone III.

Morris transported a manufactured home into the City and placed it on his property without a permit, in violation of the ordinance. The City requested that he cease all efforts to install the home. The City determined that there were unspecified deficiencies in Morris’s permit application which Morris was unable to cure. Accordingly, the City did not issue a permit.

Morris sought a declaration that the ordinance was preempted by the state law that implemented the federal act. Morris argued that the City could not demand that his manufactured home meet Zone III standards because the City was situated in Chambers County, which is designated under state law as being in Wind Zone II. Morris also argued that even if the City could demand stricter standards, his manufactured home fell within the scope of a grandfather clause.

The trial court ruled in favor of Morris and rendered a declaratory judgment that stated: "It is therefore ordered and declared that the language 'Zone 3 or better specifications' of [the ordinance] is invalid, illegal, and unconstitutional." The City appealed.

The City argued Morris did not establish standing because there was no evidence of the wind zone rating or age of Morris's manufactured home. The Court found, however, that Morris testified that his manufactured home was constructed in 1996. He also testified that the City denied his permit application because his manufactured home violated the ordinance.

Further, the City's refusal to issue a permit resulted in a particular injury to Morris. Without the permit, Morris could not complete the installation of his manufactured home.

The Court also found that Tex. Occ. Code § 1201.256(a) establishes which counties in Texas are designated as being in Wind Zone II. The regulations in subsections (b) and (c) are divided according to the age of the manufactured home at issue. If the manufactured home was constructed on or after September 1, 1997, then it must meet the minimum standards of Wind Zone II to be installed in a Wind Zone II county. If, however, the manufactured home was constructed before September 1, 1997, then it can be installed in a Wind Zone II county "without restriction."

The Court found the City's ordinance was inconsistent with Section 1201.256(c), which effectively functions as a grandfather clause. The City cannot prohibit the installation of all manufactured homes that fail to meet a certain construction standard when the legislature has already determined that manufactured homes of a certain age, such as Morris's, may be installed in Chambers County without regard to their construction standard.

Even if the ordinance were adopted to protect the aesthetics and property values of the community, the City's use of its police powers cannot supplant or take supremacy over a contrary act of the state legislature.

The Court found the trial court's declaratory judgment overbroad, however. Morris did not argue that his manufactured home was constructed on or after September 1, 1997, and built according to Wind Zone II standards, which would implicate Section 1201.256(b). The issue in this case was whether the ordinance conflicts with Section 1201.256(c). Therefore, the Court modified the trial court's judgment to state that the City's ordinance is preempted and unenforceable as to a manufactured home constructed before September 1, 1997.

Affirmed as modified.

LENDING

PROPOSED RULE
Georgia
Disclosures

This proposed rule would amend Ga. Comp. R. & Regs. 80-11-1-.01, Disclosure Requirements.

The proposed amendment clarifies that the provisions of this rule only apply to entities that are licensed, registered, or required to be licensed or registered under the Georgia Residential Mortgage Act as it was never the intent of the Department to expand the scope of the rule beyond those entities. The proposed revision also clarifies that disclosures required by federal law instead of the specific disclosures set forth in 12 CFR §§ 1026.19, 1026.37, and 1026.38 shall be provided to applicants for a home equity line of credit, a residential mortgage loan not secured by real property, such as a mobile home, or a residential mortgage loan related to a reverse mortgage as it was never the intent of the Department to require any disclosures other than those disclosures required by federal law. Finally, the proposed revision makes a number of other changes to increase the clarity of the rule.

ADOPTED RULE
Vermont
Privacy

Effective 12/28/2015, adopts Regulation B-2015-02, Privacy of Consumer Financial and Health Information. Replaces Regulation B-2001-01.

This regulation governs the treatment of nonpublic personal information about consumers by financial institutions. The regulation:

(1) Requires a financial institution to provide notice to individuals about its privacy policies and practices;

(2) Describes the conditions under which a financial institution may disclose nonpublic personal information about consumers to nonaffiliated third parties;

(3) Requires financial institutions to obtain consumer consent prior to disclosing that information, subject to the exceptions in Sections 14, 15, 16 and 17 of this regulation and 8 V.S.A. § 10204 and subject to the federal Fair Credit Reporting Act and Vermont Fair Credit Reporting Act; and,

(4) Provides an exemption from the provisions of 8 V.S.A. §§ 10201 et seq. for information about business customers.

The regulation applies to: (1) nonpublic personal information about individuals who obtain financial products or services primarily for personal, family, or household purposes from the institutions listed below; and (2) all nonpublic personal health information.

The regulation applies to any entity the business of which is engaging in activities that are financial in nature or incidental to such financial activities as described in section 4(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)) including:

(1) financial institutions within the meaning of 8 V.S.A. § 10202 (5);

(2) any person required to be licensed or registered with the commissioner under Parts 2, 5, or 6 of title 8 V.S.A.;

(3) lenders, mortgage brokers, sales finance companies, and mortgage loan originators subject to chapter 73 of title 8 V.S.A.;

(4) independent trust companies subject to chapter 77 of title 8 V.S.A.;

(5) money services providers under chapter 79 of title 8 V.S.A.;

(6) debt adjusters under chapter 83 of title 8 V.S.A.;

(7) loan servicers under chapter 85 of title 8 V.S.A.;

(8) branches and agencies of foreign banks; and,

(9) any subsidiaries of such entities; provided, however, that this regulation does not apply to any subsidiary that is subject to a privacy law or rule implementing Title 15 U.S.C. § 6801 et seq. and is not a financial institution within the meaning of 8 V.S.A. § 10202 (5).

DIRECTOR'S LETTER
CFPB
TRID compliance

Letter from Richard Cordray, Director of the CFPB, to David Stevens, President and CEO of the Mortgage

Bankers Association regarding TRID compliance, dated 12/29/2015.

The Director advised that the Bureau and other regulators have made clear that their initial examination for compliance with the rule will be focused on whether companies have made good faith efforts to come into compliance and will be corrective and diagnostic, rather than punitive.

Cordray points out that the FHFA, GSEs and the FHA, in order to ensure that implementation of the rule will not disrupt the secondary market, will not conduct routine post-purchase loan file reviews for technical compliance and do not intend to exercise contractual remedies, including repurchase, for non-compliance with TRID where a lender is making good faith efforts to comply.

The letter also points out the TRID provides for the issuance of a corrected closing disclosure, even after closing, to be used, for example, to correct non-numerical clerical errors or a c component of curing any violations of the monetary tolerance limits. Liability for statutory and class action damages would be assessed with reference to the final closing disclosure issued, not to the loan estimate.

In addition, the provisions in TILA for the correction of errors continue to apply to TRID.

Further TRID does not change the fundamental principles of liability under TILA or RESPA.

BULLETIN 2015-21
Freddie Mac
Mortgages Secured by Manufactured Homes

Effective for Mortgages with Settlement Dates on or after January 4, 2016.

Delivery fee rate:

Freddie Mac is reducing the delivery fee rate for all eligible Mortgages secured by Manufactured Homes from 100 basis points to 50 basis points.

Mortgage insurance:

Freddie Mac is reducing the required minimum mortgage insurance coverage level for Mortgages secured by Manufactured Homes to be the standard mortgage insurance coverage. For mortgage insurance coverage requirements for Home Possible Mortgages secured by Manufactured Homes see Section 27.1. In addition, Freddie Mac is removing the table in Section H33.3 reflecting mortgage insurance coverage levels for Mortgages secured by Manufactured Homes and consolidating it with the general mortgage insurance coverage level information in Section 27.1.

Guide impacts: Sections 27.1 and H33.3.

SALES

CASE LAW
Inspection – Liability

CASE NAME: *Barto v. Boardman Home Inspection*
DATE: *12/14/2015*
CITATION: *Court of Appeals of Ohio, Eleventh District, Trumbull County. Slip Copy. 2015 WL 8618876*

The Bartos retained Boardman Home Inspection, Inc. to perform a home inspection on a manufactured home they wanted to purchase. The parties signed a contract entitled, “Pre–Inspection Agreement,” which outlined the areas of the home that would be inspected; set forth the fee for the inspection; and included a limitation-of-liability clause.

By its terms, the contract limited the liability of Boardman, “its agents and employees” to the amount of the fee paid by the Bartos for the home inspection and inspection report, which was $350. Thus, the Bartos' damages were capped by contract at $350.

David Shevel, the sole shareholder, owner, and employee of Boardman, performed the home inspection. Based on his visual inspection, the pitch or slope of the roof was about four inches per foot and asphalt shingles on the roof were appropriate because such shingles are effective to divert rain water from a roof if the pitch of the roof is at least two inches per foot. He said that if the pitch of a roof is less than two inches per foot, some other roofing material should be used. The only evidence presented by the Bartos disputing Mr. Shevel's testimony was Mrs. Barto's testimony that her roofing contractor told her the pitch of the roof was 1.5 inches per foot. Contrary to the Bartos' argument, Mr. Shevel did not testify he failed to check the pitch of the roof or that he was required to measure the slope of the roof using a tool designed for such purpose. Mr. Shevel testified he determined the pitch of the roof by a visual inspection based on his years of experience and that industry standards do not require him to measure the exact pitch of a roof. Sometime after the Bartos purchased the home, the roof leaked, causing damage.

The Bartos filed suit against Boardman and Mr. Shevel personally, alleging that Defendants negligently failed to disclose that the roof of the home was defective because the roofing material was improper. They also alleged the limitation-of-liability clause, which limited the recovery of any damages to the cost of the home inspection and report, violated the Ohio Consumer Sales Practices Act.

The trial court found that that the parties' contract did not violate the Consumer Sales Practices Act. However, the court found that a genuine issue of material fact existed regarding whether Boardman was liable in negligence based on Mr. Shevel's inspection, but that, pursuant to the parties' contract, the limit of Boardman's liability was $350. With respect to the Bartos' negligence claim against Mr. Shevel personally, the court granted Defendants' motion for summary judgment, finding that Mr. Shevel, as agent for Boardman, could not be held liable for the debts of his principal.

The Bartos appealed, asserting for their sole assignment of error that the trial court erred in finding that a limitation of damages provision in a consumer transaction did not violate the Ohio Consumer Sales Practices Act.

The Court found that the contract was not procedurally unconscionable because: (1) the limitation-of-liability clause was set off in the agreement as a separate paragraph; (2) Mrs. Barto said that before she signed the contract, Mr. Shevel reviewed and explained it; (3) Although the agreement stated in large font and in all capital letters at the beginning of the contract, "PRE–INSPECTION AGREEMENT (PLEASE READ CAREFULLY)," Mrs. Barto said she just "skimmed over" the agreement and did not "fully" read it; (4) Mrs. Barto said that Mr. Shevel did not try to rush her through reading the agreement; (5) she said he did not prevent her from asking questions about it; (6) she said that Mr. Shevel did not refuse to answer any questions she had about it; and (7) there was no evidence the Bartos were deprived of an opportunity to negotiate more favorable terms.

Affirmed.

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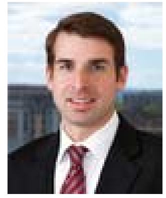

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