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!

Punxsutawney Phil's verdict is in… Spring is coming! In the meantime, most regulators and legislatures were dormant. A notable exception—Wisconsin. They are used to cold, and therefore had no problem enacting two important bills relevant to the manufactured housing industry. HUD also issued a bulletin relating to manufactured housing.

Once again, the *Update* contains multiple cases where lenders were tripped up by trying to collect on a debt discharged by bankruptcy. You better not include estimated fees as part of reinstatement figures either, if you collect in the Eleventh Circuit, unless you want to be liable under the FDCPA. Don't try to add attorney's fees to an account if you incurred those fees defending a credit reporting case, unless, of course, you enjoy paying the borrower a quarter of a million dollars, give or take.

Two other decisions are worth particular note. A Pennsylvania court weighed in on the ongoing "rent-a-charter" issue, with a twist: its case deals with a "rent-a-tribe" issue. Finally, in a surprising reversal of the decisions of most lower courts in California, the California Supreme Court opened wide the door for borrowers to challenge a lender's standing to foreclose.

Read on!

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CASE LAW

Suit waiver – Unconscionability

CASE NAME: *Dvorak v. AW Development, LLC*
DATE: *01/13/2016*
CITATION: *Superior Court of New Jersey, Appellate Division, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION. Not Reported in A.3d. 2016 WL 595844*

Plaintiffs entered into a contract to purchase a manufactured home from defendant. The contract included a clause providing for non-binding arbitration of any claim.

Plaintiffs sued for fraudulent inducement, breach of contract, tortious interference, and consumer fraud.

Defendant filed its answer and counterclaim, "without waiving any contractual provisions, including the arbitration clause." Defendant asserted plaintiffs' complaint was "barred due to an applicable arbitration clause ...." Defendant also filed a motion to dismiss, based on the arbitration clause. The trial court granted defendant's motion.

In plaintiffs' motion for reconsideration they also argued that defendant waived arbitration by participating in the litigation instead of seeking arbitration at the outset. The court denied the motion and noted that defendant raised arbitration as an affirmative defense in its answer. Plaintiffs appealed.

The Court found that the arbitration provision did not clearly and unambiguously require plaintiffs to arbitrate their claims before filing a lawsuit.

Further, although the contract is one of adhesion did not render it per se unenforceable, it was apparent that defendant had greater bargaining power, given plaintiffs' position. Plaintiffs needed a new home to replace one significantly damaged by the storm; they were in a "seller's market."

Also, defendant reserved for itself the right to cure any default, while denying plaintiffs a comparable right. Plaintiffs may not seek any consequential damages, yet defendant's right to do so is unfettered. The Court noted that defendant sought consequential damages in its counterclaim. These facts reflected the economic pressure on plaintiffs to accept the contract on defendant's terms.

Most important in the unconscionability analysis was the one-sided nature of the arbitration provision. Defendant reserved for itself the power to seek injunctive and emergent relief, while plaintiffs may not seek such relief "under any circumstances."

The Court concluded the arbitration provision did not clearly waive plaintiffs' right to bring suit, and in any event was unconscionable. Reversed and remanded.

COMMUNITIES

CASE LAW

Failure to maintain – Damages

CASE NAME: *Clark v. Leisure Woods Estates, Inc.*
DATE: *02/23/2016*
CITATION: *Appeals Court of Massachusetts, Franklin. --- N.E.3d ----. 2015 WL 10323033*

Seven residents of Leisure Woods Estates, a manufactured housing community, alleged that Leisure Woods Estates, Inc. failed to properly maintain and repair the common spaces, roads, and home sites. The trial court entered judgment in favor of plaintiffs, finding a breach of the implied warranty of habitability with respect to the condition of the roads, interference with the plaintiffs' quiet enjoyment of the common walking trails, and separate and distinct breaches of the covenant of quiet enjoyment with respect to the conditions of the seven individual home sites. The judge awarded two

separate awards of three months' rent to each household under Mass. Gen. Laws ch. 186, § 14, for the breaches of the covenant of quiet enjoyment, and a twenty percent rent abatement, trebled under G.L. ch. 93A and the Attorney General's regulations promulgated thereunder, for the breach of the warranty of habitability.

The appeals court found that only one triple rent award is available in a single proceeding under § 14, no matter how many ways the landlord interferes with the tenant's quiet enjoyment. Accordingly, the Court vacated one of each plaintiff household's two triple rent awards.

The Court also affirmed the ch. 93A award of treble damages, finding that the defendant's conduct violated ch. 93A under the Attorney General's Manufactured Housing Regulations, 940 Code Mass. Regs. § 10.00 et seq., which specifically provide that "[a]n operator shall maintain and keep in good repair all community roadways that are part of the common areas and facilities, including but not limited to ensuring that roadways are reasonably free of debris and potholes. An operator shall provide necessary snow plowing for all community roadways. "

As the failure to comply with the regulations amounts to an unfair or deceptive act or practice in violation of ch. 93A, and the judge found the defendant's violations to be willful and knowing, the judge did not err or abuse his discretion in awarding treble damages.

With respect to each of the seven plaintiff households, one award of three months' rent under § 14 was vacated. The judgment was affirmed in all other respects.

LEGISLATION

Wisconsin

Nonconforming use

2015 WI A 523. Enacted 3/1/2016. Effective 3/3/2016.

This bill adds Wis. Stat. § 59.69 (10) to provide that a licensed manufactured home community that is a legal nonconforming use continues to be a legal nonconforming use notwithstanding the occurrence of any of the following activities within the community:

1. Repair or replacement of homes.

2. Repair or replacement of infrastructure.

The bill amends Wis. Stat. § 62.23 (7) to provide that restrictions that are applicable to damaged or destroyed nonconforming structures and that are contained in an ordinance enacted under this subsection may not prohibit the restoration or replacement of a nonconforming structure if the structure will be restored to , or replaced at, the size, subject to subd. 2., location, and use that it had immediately before the damage or destruction occurred, or impose any limits on the costs of the repair, reconstruction, or improvement if specified conditions apply (adding references to "replacement").

LEGISLATION

Wisconsin

Rentals – Municipal fees

2015 WI A 568. Enacted 2/29/2016. Effective 3/2/2016.

This bill adds Wis. Stat. § 66.0104 **(2)** (e) to provide that no city, village, town, or county may enact an ordinance that does any of the following:

1. Requires that a rental property or rental unit be inspected except upon a complaint by any person, as part of a program of regularly scheduled inspections conducted in compliance with s. 66.0119, as applicable, or as required under state or federal law.

2. Charges a fee for conducting an inspection of a residential rental property unless all of the following are satisfied:

a. The amount of the fee is uniform for residential rental inspections.

b. The fee is charged at the time that the inspection is actually performed.

3. Charges a fee for a subsequent reinspection of a residential rental property that is more than twice the fee charged for an initial reinspection.

4. Except as provided in this subdivision, requires that a rental property or rental unit be certified, registered, or licensed. A city, village, town, or county may require that a rental unit be registered if the registration consists only of providing the name of the owner and an authorized contact person and an address and telephone number at which the contact person may be contacted.

The bill adds Wis. Stat. § 66.0104 **(2)** (f) to provide that no city, village, town, or county may impose an occupancy or transfer of tenancy fee on a rental unit.

Wis. Stat. § 66.0104 **(2)** (g) is added to provide that, except as provided in subds. 2 and 3, no city, village, town, or county may enact an ordinance that requires a residential rental property owner to register or obtain a certification or license related to owning or managing the residential rental property.

The above does not apply to an ordinance that applies uniformly to all residential rental property owners, including owners of owner-occupied rental property.

Nor does it prohibit a city, village, town, or county from requiring that a landlord be registered if the registration consists only of providing the name of the landlord and an authorized contact person and an address and telephone number at which the contact person may be contacted.

The bill adds Wis. Stat. § 66.0104 **(3)** (c) to provide that if a city, village, town, or county has in effect on the effective date of this paragraph an ordinance that is inconsistent with sub. (2) (e), (f), or (g), the ordinance does not apply and may not be enforced.

The bill also adds Wis. Stat. § 704.055, Disposition of personalty left by trespasser, to provide that in this section, "trespasser" means a person who is not a tenant and who enters or remains in residential rental property without the consent of the landlord or another person lawfully on the property.

If a trespasser is removed or otherwise removes from residential rental property and leaves personal property, the landlord shall hold the personal property for 7 days from the date on which the landlord discovers the personal property. After that time, the landlord may presume that the trespasser has abandoned the personal property and may dispose of the personal property in any manner that the landlord, in the landlord's sole discretion, determines is appropriate but shall promptly return the personal property to the trespasser if the landlord receives a request for its return before the landlord disposes of it.

If the landlord disposes of the abandoned personal property by private or public sale, the landlord may send the proceeds of the sale minus any costs of sale and, if the landlord has first stored the personal property, minus any storage charges to the department of administration for deposit in the appropriation under § 20.505 (7) (h).

The landlord's power to dispose as provided by this section applies to any personal property left on the landlord's property by the trespasser, whether owned by the trespasser or by others. The power to dispose under this section applies notwithstanding any rights of others existing under any claim of ownership or security interest. The trespasser, other owner, or any secured party has the right to redeem the personal property at any time before the landlord has disposed of it or entered into a contract for its disposition by payment of any expenses that the landlord has incurred with respect to the disposition of the personal property.

Wis. Stat. § 704.17 (1) (b) has been added to provide that the landlord gives the tenant a notice that requires the

tenant to either remedy the default or vacate the premises no later than a date at least 5 days after the giving of the notice, and the tenant fails to comply with the notice. A tenant is considered to be complying with the notice if promptly upon receipt of the notice the tenant takes reasonable steps to remedy the default and proceeds with reasonable diligence, or if damages are adequate protection for the landlord and the tenant makes a bona fide and reasonable offer to pay the landlord all damages for the tenant's breach. If, within one year from receiving a notice under this subdivision, the tenant again commits waste or breaches the same or any other covenant or condition of the tenant's rental agreement, other than for payment of rent, the tenant's tenancy is terminated if the landlord gives the tenant notice to vacate on or before a date at least 14 days after the giving of the notice.

New Wis. Stat. § 704.17 provides that a landlord may, upon notice to the tenant, terminate the tenancy of a tenant, without giving the tenant an opportunity to remedy the default, if the tenant, a member of the tenant's household, or a guest or other invitee of the tenant or of a member of the tenant's household engages in any criminal activity that threatens the health or safety of, or right to peaceful enjoyment of the premises by, other tenants; engages in any criminal activity that threatens the health or safety of, or right to peaceful enjoyment of their residences by, persons residing in the immediate vicinity of the premises; engages in any criminal activity that threatens the health or safety of the landlord or an agent or employee of the landlord; or engages in any drug-related criminal activity on or near the premises. The notice shall require the tenant to vacate on or before a date at least 5 days after the giving of the notice. The notice shall state the basis for its issuance; include a description of the criminal activity or drug-related criminal activity, the date on which the activity took place, and the identity or description of the individuals engaging in the activity; advise the tenant that he or she may seek the assistance of legal counsel, a volunteer legal clinic, or a tenant resource center; and state that the tenant has the right to contest the allegations in the notice before a court commissioner or judge if an eviction action is filed. If the tenant contests the termination of tenancy, the tenancy may not be terminated without proof by the landlord by the greater preponderance of the credible evidence of the allegation in the notice.

To terminate a tenancy under this subsection, it is not necessary that the individual committing the criminal activity or drug-related criminal activity has been arrested for or convicted of the criminal activity or drug-related criminal activity.

The above does not apply to a tenant who is the victim of the criminal activity.

The bill amends Wis. Stat. § 706.22 (2) (a) to provide that no local governmental unit may by ordinance, resolution, or any other means do any of the following:

Restrict the ability of a person to purchase or take title to real property by requiring the person or an agent of the person to take certain actions with respect to the property or pay a related fee, to show compliance with taking certain actions with respect to the property, or to pay a fee for failing to take certain actions with respect to the property, at any of the following times:

a. Before the person may complete the purchase of or take title to the property.

b. At the time of completing the purchase of or taking title to the property.

c. Within a certain period of time after completing the purchase of or taking title to the property.

Nor may a governmental unit restrict the ability of a purchaser of or transferee of title to residential real property to take occupancy of the property by requiring the purchaser or transferee or an agent of the purchaser or transferee to take certain actions with respect to the property or pay a related fee, to show compliance with

taking certain actions with respect to the property, or to pay a fee for failing to take certain actions with respect to the property, at any of the following times:

a. Before the purchaser or transferee may take occupancy of the property.

b. At the time of taking occupancy of the property.

c. Within a certain period of time after taking occupancy of the property.

Finally, the bill amends Wis. Stat. § 943.14 (2) to provide that whoever intentionally enters or remains in the dwelling of another without the consent of some person lawfully upon the premises or, if no person is lawfully upon the premises, without the consent of the owner of the property that includes the dwelling, under circumstances tending to create or provoke a breach of the peace, is guilty of a Class A misdemeanor.

DEFAULT SERVICING

CASE LAW

FDCPA – Estimated fees

CASE NAME: *Prescott v. Seterus, Inc.*
DATE: *12/03/2015*
CITATION: *United States Court of Appeals, Eleventh Circuit. --- Fed.Appx. ----. 2015 WL 7769235*

Prescott asked Seterus to reinstate his mortgage. Seterus sent Prescott a letter showing the amount he needed to pay to be reinstated, including $15 in "estimated" property inspection fees and "estimated" attorney's fees, both marked "estimated" and listed in a separate section of the letter. Prescott paid the full reinstatement balance and Seterus refunded the estimated legal fees but did not refund the estimated property inspection fees because those fees were incurred before reinstatement.

Prescott filed suit, asserting Seterus violated the FDCPA. The district court granted summary judgment for Seterus on all of Prescott's claims. He appealed.

The appeals court found that Seterus violated § 1692f because Prescott was not expressly obligated under the security agreement to pay for estimated attorney's fees. Because the "least sophisticated consumer" would not have understood that the security agreement "expressly authorized" Seterus to charge estimated fees for legal services not yet rendered, the Court reversed the district court's grant of summary judgment on Prescott's § 1692f(1) claim.

The Court also found that Seterus violated § 1692e(2), which prohibits the false representation of any "compensation which may be lawfully received by any debt collector for the collection of a debt," when it demanded that Prescott pay estimated attorney's fees before it would reinstate his loan. That was true even if Seterus believed it was entitled to those fees.

The Court rejected Seterus's bona fide error defense, finding that the Supreme Court has held that the FDCPA's bona fide error defense does not encompass "mistakes of law" or "misinterpretations of the requirements of the Act." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 581, 587, 130 S.Ct. 1605, 1611, 1615, 176 L.Ed.2d 519 (2010).

The district court's judgment was reversed and the case remanded.

CASE LAW

FDCPA – Spouse's bankruptcy

CASE NAME: *Parker v. First Step Group of Minnesota LLC*
DATE: *01/15/2016*
CITATION: *United States District Court, D. Arizona. Slip Copy. 2016 WL 192159*

Plaintiff alleged that Defendants violated the FDCPA by attempting to collect a debt that was no longer valid because it was discharged in Plaintiff's ex-wife's bankruptcy.

The Court found that when one spouse files for bankruptcy, the other spouse is not discharged of liability. Although the personal liability of a nondebtor spouse survives the bankruptcy, this liability can only be enforced against separate property, not community property. However, this protection applies only so long as there is community property. Dissolution of the marriage terminates the community, at which point after-acquired community property loses its § 524(a)(3) protection.

Defendants' Motion for Judgment on the Pleadings was granted. The Court did not find that Plaintiff brought the action in bad faith or for the purpose of harassment and therefore did not award attorney's fees.

CASE LAW

Post-modification suit – Fees

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CASE NAME: *Lucero v. Cenlar FSB*
DATE: *01/28/2016*
CITATION: *United States District Court, W.D. Washington, at Seattle. Slip Copy. 2016 WL 337221*

After plaintiff obtained a permanent loan modification, she learned that Cenlar, her mortgage loan servicer, was continuing to report her loan as delinquent. She filed suit alleging that Cenlar had violated its credit reporting obligations and seeking damages related to the way in which Cenlar (and others) had sought to foreclose on her mortgage. Cenlar and the other defendants successfully defended themselves from the original claims. Cenlar sent plaintiff a letter imposing attorney's fees and costs on her mortgage account. Plaintiff contested the charge and requested information regarding the fees and costs. Cenlar did not provide any additional explanation for the disputed charges. Eventually, plaintiff learned that Cenlar was charging her for the attorney's fees and costs incurred in defending the ongoing litigation.

Plaintiff then alleged that Cenlar violated RESPA, breached its contractual and good faith obligations, and committed the tort of outrage.

The Court determined that Cenlar did not adequately respond to the requests for information and therefore violated RESPA.

The Court also found that plaintiff's complaint was filed after Cenlar had abandoned its foreclosure attempts and modified the loan – it in no way delayed the foreclosure process. Cenlar did not explain how demands for compensatory damages and attorney's fees related to alleged statutory violations would "significantly affect" the lender's interest in the property or rights under the Deed. The Deed's attorney's fees provisions, therefore, did not apply.

If Cenlar's decision to charge its litigation expenses to plaintiff's mortgage account in this case was not an outright breach of the Deed of Trust, the Court alternatively found that it was a breach of the implied duty of good faith and fair dealing. Cenlar's discretionary decision to impose unpredictable and enormous fees effectively made the negotiated terms of the loan irrelevant.

The Court noted that the elements of the tort of outrage are "(1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) severe emotional distress on the part of plaintiff. Based on the evidence, Cenlar's message was clear: continue this litigation and we will take your home. The Court found such conduct beyond the bounds of decency and utterly intolerable.

Judgment in favor plaintiff in the amount of $213,888. Plaintiff may file a motion for attorney's fees.

CASE LAW

Bankruptcy – Cramdown

CASE NAME: *In re Manley*
DATE: *02/02/2016*
CITATION: *United States Bankruptcy Court, S.D. West Virginia, at Charleston. Slip Copy. 2016 WL 417322*

Vanderbilt said the home was worth $43,300; the debtors said it was worth $20,000, and attempted to use the "cramdown" provision of § 1325(a)(5)(B). Vanderbilt was the only party to put forth an appraisal in this matter. Mr. Walter Bank, the appraiser, based his work on the National Appraisal System (the "NAS") that works in tandem with the National Automobile Dealers Association's ("NADA") Used Manufactured Home Cost Tool. Courts view the NADA Guide as a "sound valuation base from which to assess the value of a particular manufactured home unit."

Bank had been involved in mobile home financing for around 40 years and a certified appraiser of mobile homes for 10 years who had conducted close to 100 appraisals in West Virginia alone. The Court found Mr. Bank's testimony very persuasive.

In comparison, Debtors stood silent from an evidentiary standpoint. And cross-examination consisted of questions about Mr. Bank's previous experience testifying in bankruptcy cases. The Debtors' only counter to Vanderbilt's valuation was their assertion in their Plan that the property was worth $20,000. The Debtors were not present at the hearing to provide testimony.

The Court accepted the valuation provided in Vanderbilt's Appraisal and found that the value of the Manley's Mobile Home was $43,300. Thus, the Manley's Chapter 13 Plan was not confirmable.

CASE LAW

Bankruptcy – FDCPA

CASE NAME: *Leahy-Fernandez v. Bayview Loan Servicing, LLC*
DATE: *02/03/2016*
CITATION: *United States District Court, M.D. Florida, Tampa Division. --- F.Supp.3d ----. 2016 WL 409633*

A mortgagor brought action against her loan servicer, alleging violations of the Florida Consumer Collections Practices Act (FCCPA) and the FDCPA, based on loan servicer's alleged attempts to collect a debt which had been discharged in bankruptcy. The servicer moved to dismiss.

The Court found that the Bankruptcy Code did not impliedly repeal the FDCPA.

The Court also found that Leahy-Fernandez was no longer personally liable for the debt. Thus, TILA and Regulation Z did not compel Bayview to send a monthly statement. Consequently, TILA did not preclude the FDCPA action by Leahy-Fernandez.

The Court also rejected Bayview's argument that the FCCPA was preempted by the Bankruptcy Code and TILA. The Court found that if a debt collector has violated both the FCCPA and the Bankruptcy Code, a debtor's choice to pursue the remedies provided under the FCCPA does not stand as an obstacle to the objectives of the Bankruptcy Code when the conduct occurs after the bankruptcy proceeding terminates. In addition, because Leahy-Fernandez was no longer personally liable for the debt, TILA and Regulation Z did not compel Bayview to send a monthly statement. And Bayview was able to comply with both Regulation Z and the FCCPA

The Court also determined that the monthly mortgage statements constituted an attempt to collect a debt. Every mortgage statement (1) listed a total amount due, (2) provided a payment coupon, (3) discussed additional

payment options, and (4) provided that a fee would be charged if payment was not received by a certain date. Although some of the mortgage statements contained a one-sentence disclaimer in fine-print on the second page, that was insufficient to shield Bayview from liability at this stage of the litigation.

The Court did agree with Bayview that Leahy-Fernandez's claims of harassment under Section 1629d of the FDCPA and Section 559.72(7) of the FCCPA failed as a matter of law. Bayview sent one piece of mail once a month, used a minimally intrusive means of communication, did not use abusive language, did not threaten Leahy-Fernandez, and did not contact third parties.

However, although the mortgage lien survived the discharge, the debt as against Leahy-Fernandez personally was no longer legitimate and, thus, attempts to collect from her personally did violate Section 559.72(9).

Finally, the Court held that a debtor who has received a discharge in bankruptcy may not seek redress for a putative violation of a discharge injunction through an independent action rather than instituting contempt proceedings in the bankruptcy court.

Motion to dismiss denied in part and granted in part.

CASE LAW

FDCPA – Communication with debtor's attorney

CASE NAME: *Bravo v. Midland Credit Management, Inc.*
DATE: *02/08/2016*
CITATION: *United States Court of Appeals, Seventh Circuit. --- F.3d ----. 2016 WL 476468*

Following settlement of the consumer's first lawsuit against debt collector, debt collector sent two letters to consumer's attorney requesting payment of the debts that were resolved in the settlement. The consumer then filed this second action, alleging that the letters violated the FDCPA. The debt collector moved to dismiss. The United States District Court for the Northern District of Illinois granted the motion, and the consumer appealed.

Bravo argued that since the letters were directed to her, albeit to her attorney's address, Midland was communicating with Bravo after Midland was notified that she was represented by counsel.

The Court found, however, that § 1692c as a whole permits debt collectors to communicate freely with consumers' lawyers. A consumer's name on an envelope does not equate to communication with that consumer when it is sent in "care of" and to the address of an attorney.

Further, whether a debt is pending or discharged is irrelevant. The Court held that with regard to "false, deceptive, or misleading representations" in violation of § 1692e of the FDCPA, since this case involved alleged false representations to a debtor's attorney, the standard was whether a competent attorney, even if he is not a specialist in consumer debt law, would be deceived by two letters requesting payment for debts resolved in a settlement. The court found that a competent attorney would be able to determine whether his client continued to owe a debt after it was settled in full and would therefore not be deceived by the two letters.

Affirmed.

CASE LAW

Bankruptcy – Cramdown

CASE NAME: *Coker v. JPMorgan Chase Bank, N.A.*
DATE: *02/12/2016*
CITATION: *United States Bankruptcy Court, E.D. Kentucky, Lexington Division. Slip Copy. 2016 WL 578969*

Chapter 13 Debtors proposed a reorganization plan that bifurcated the claim of Caliber Home Loans, Inc.

The Debtors owned six contiguous parcels of real property that were consecutively numbered as Lots 15–20 (the "Mildred Estates Property"). Mr. Snowden acquired Lots 15–18 and 20 in April 1998 and acquired Lot 19 from a different seller in August 1998. The Debtors receive separate tax bills for each lot, with each lot assigned a distinct Map Number.

The Debtors' mobile home was primarily situated on Lot 18, but a portion of the home and its septic system was located on Lot 19.

The Snowdens' manufactured home was the subject of an Affidavit of Conversion. Subsequently, Mr. Snowden obtained a loan. The Mortgage securing repayment of the loan only covers Lots 15–18 and 20. Lot 19 is unencumbered by the Mortgage, which was assigned to Caliber.

The Court found that the only significant factor in the record that indicated that the Mortgaged Property was a single parcel used as the Debtors' principal residence was the Affidavit of Conversion, which referenced the entire Mildred Estates Property and provided that the manufactured home became an improvement to that property. But Caliber's predecessor in interest did not take a lien on Lot 19. The Mortgaged Property was only five lots, but all six lots made up land inside Mildred Lane. It was hard to accept that Lots 15–18 and Lot 20 comprised a single parcel without the contiguous Lot 19.

This omission was exacerbated by the placement of a portion of the home, including the septic system, on the unencumbered Lot 19. Lot 19 was an integral part of the entire property and its omission prevented a conclusion that the Mortgaged Property was one parcel for purposes of the anti-modification provision of § 1322(b)(2).

Further, the lots making up the Mildred Estates Property were subdivided, and the lots were, in fact, conveyed separately.

The Court overruled Caliber's Objection to Confirmation of Debtors' Plan in part and modification was allowed.

CASE LAW

Foreclosure – Assignment

CASE NAME: *Yvanova v. New Century Mortg. Corp.*
DATE: *02/18/2016*
CITATION: *Supreme Court of California. --- P.3d ----. 2016 WL 639526*

On February 23, 2016, McGlinchey Stafford's Laura Greco (Albany) and Hassan Elrakabawy (Irvine) published a client alert, "California Supreme Court Sides With Borrower Challenging Authority of Foreclosing Lender in Wrongful Foreclosure Case," which, among other things, provided:

The California Supreme Court ruled unanimously to allow a borrower to challenge a foreclosure based on an allegedly void assignment of their loan, even where he or she is in default on the loan and was not a party to the challenged assignment. The decision means the mortgage industry will need to bolster its procedures for documenting assignments of mortgage loans to respond to newly expanded challenges.

The primary holding was that only a lawful beneficiary of a deed of trust or its lawful assignee can direct a trustee to hold a foreclosure sale, and that, where a borrower alleges a foreclosure is unauthorized due to a void assignment, he or she has alleged prejudice sufficient to confer standing to make such a claim even though the borrower was not a party to the challenged wrongful agreements, and is in default on his or her loan.

The Court reasoned that a borrower owes money not to the world at large, but to a particular person or institution. Thus, if a purported assignment necessary to the chain is void, a foreclosing entity has acted without legal authority by pursing a trustee's sale, constituting prejudice to the borrower.

INSTALLATION

ADOPTED RULE
Georgia
Permits - Decals

Effective 1/24/2016, this rule amends 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 also amends Ga. Comp. R. & Regs. 560-11-9-.-03, 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.

Ga. Comp. R. & Regs. 560-11-9-.09, Appeals, has similarly been amended.

Ga. Comp. R. & Regs. 560-11-9-.11, Penalties, has also been amended to provide that upon conviction for failure to pay ad valorem taxes on time, 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 (formerly, $ 25.00).

However, the amended regulation adds that 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.

FINAL RULE
HUD
On-site completion

24 CFR Parts 3280, 3282 and 3285.

On-Site Completion of Construction of Manufactured Homes, 80 Fed. Reg. 53,712 (Sept. 8, 2015), effective 3/7/2016.

This final rule establishes a procedure whereby construction of new manufactured housing that is substantially completed in the factory can be completed at the installation site, rather than in the plant. Before this rule, a manufacturer would first be required to obtain HUD approval for on-site completion of each of its designs using the alternate construction provisions of HUD's regulations. This final rule simplifies this process by establishing uniform procedures by which manufacturers may complete construction of their homes at the installation site without having to obtain advance approval from HUD. This final rule applies only to the completion of homes subject to the Manufactured Home Construction and Safety Standards, not to the installation of homes subject to the Model Manufactured Home Installation Standards. Moreover, this final rule would not apply when a major section of a manufactured home is to be constructed on-site.

REGULATOR BULLETIN

HUD

Installation in HUD-administered states

HUD-Administered Manufactured Home Installation Program Information Packet Issued 11/13/2015.

The Office of Manufactured Housing Programs with the U.S. Department of Housing and Urban Development (HUD), announced the launch of the Model Manufactured Home Installation Standards Program in HUD-administered states. This program is pursuant to the National Manufactured Housing Construction and Safety Standards Act of 1974, as amended by the Manufactured Housing Improvement Act of 2000 (42 U.S.C. 5401 et seq.).

The following states fall under the HUD-Administered Manufactured Home Installation Program: Alaska; Connecticut; Hawaii; Illinois; Maryland; Massachusetts; Montana; Nebraska; New Jersey; Rhode Island; South Dakota; Vermont; and Wyoming.

Copies of the Manufactured Housing Installation Program Regulations can be found at:

http://www.ecfr.gov/cgi-bin/text-idx?SID=a2c5655a37054c584f7dd6a0ed240fb8&node=pt24.5.3286&rgn=div5

The Manufactured Home Installation Program is being implemented in all 13 HUD-Administered states in 4 phases. The program will be fully implemented in all states by June 2016. Please see below the implementation timeline for all 4 phases, noting important licensing dates and deadlines.

Maryland was the first state to implement the HUD-Administered Manufactured Home Installation Program.

In Maryland, all installers were required to be licensed by November 1, 2015. After this date, local jurisdictions in Maryland cannot issue a certificate of occupancy for a mobile home unless the installer has a HUD Manufactured Home Installer License.

Nebraska was the second state to implement the HUD-Administered Manufactured Home Installation Program.

In Nebraska, all installers were required to be licensed by December 1, 2015. After this date, local jurisdiction's in Nebraska cannot issue a certificate of occupancy for a mobile home if the home was not installed by a HUD Manufactured Home Licensed Installer.

Eastern states were to implement the HUD-Administered Manufactured Home Installation Program beginning on December 1, 2015. All installers must be licensed by May 1, 2016.

Eastern states include: Connecticut; Massachusetts; New Jersey; Rhode Island; and Vermont.

Western states were to implement the HUD-Administered Manufactured Home Installation Program beginning on January 1, 2016. All installers must be licensed by June 1, 2016.

Western states include: Alaska; Hawaii; Illinois; Montana; South Dakota; and Wyoming.

In order to become a licensed manufactured home installer in a HUD-administered state, you must take and pass an approved training course. Approved training courses include a minimum of 12 hours in total duration, with 4 hours focusing on regulation and 8 hours on installation.

All information on installer licensing can be found in 24 CFR 3286 Subpart C – Installer Licensed in HUD-Administered States.

Per 3286.205 – Prerequisites for installation license, additional requirements include meeting minimum experience and/or education standards. The applicant must have one of the following:

1,800 hours of experience in installing manufactured homes;

3,600 hours as a supervisor in the building construction industry;

1,800 hours as an active manufactured home installation inspector; completion of a one-year college educational program in a construction-related field; or a combination of experience and education that equals 3,600 hours of the above.

When completing the application, the applicant must attach proof in one or more of the following forms:

Copies of transcripts or completion certificate from a one-year college educational program in a construction-related field; statements of experience by past or present employers; or self-certification.

24 CFR 3286.205 states that an installer can hold either a surety bond or maintain insurance coverage. HUD has determined that installers can choose to have any one of the following options to meet this requirement: 1. Surety Bond Only; 2. Insurance Only; 3. Irrevocable Letter of Credit Only; 4. Combination of Surety Bond and Insurance; 5. Combination of Irrevocable Letter of Credit and Insurance.

The Manufactured Housing Installation Programs Regulations 24 CFR Chapter XX Part 3286 Section 207 requires that a manufactured home installer, who installs homes in HUD-Administered installation state, must submit a HUD Form 307 to HUD (via SEBA) to apply for an initial or renewed installation license.

The HUD Manufactured Home Installation License is valid for 3 years from the date of issuance. To renew the license, 8 hours of continuing education during the 3-year license period is required, in any particular subject area that may be required by HUD to be covered in order to assure adequate understanding of installation requirements. The request for renewal must be submitted at least 60 days before the license expires.

Individuals who receive a HUD Manufactured Home Installer License will be able to install homes in any other state or territory that has a federally administered program.

Installers must submit the HUD 309 Manufactured Home Inspection Form after having it signed by a qualified inspector.

Installers must retain their copy of HUD 309 along with a copy of other installation paper work per 24 CFR 3286.413 for a minimum of 3 years. If another party has paid for installation work they should also receive a copy of the signed installation certification.

After the licensing and inspection deadline in each state, permitting offices and inspectors cannot issue occupancy permits for homes that have not been installed by a licensed manufactured home installer. This is regardless of when the permit for the home was issued and when the installation started.

Pursuant to HUD's regulations, the issuance of the certificate of occupancy by a local jurisdiction is to occur in connection with the installation of the manufactured home by a licensed installer. Unless properly installed by a licensed manufactured home installer, the manufactured home will not be deemed "installed" in accordance with HUD's regulations.

Installer Training Options -

In order to become a licensed installer, an applicant must take and pass one a course that is federally approved programs. Information on courses can be found in the bulletin.

It is the responsibility of the installer to arrange for an inspection at least 10 days prior to the completion of the installation per 3286.409.

The HUD 309 is used to verify the completion of the inspection by a qualified inspector. All copies of the completed and signed HUD 309 form are to be kept by

the installer, dealer and homeowner in their files for the house set.

Retailers -

Per 24 CFR 3286.113, within 30 days from the time a purchaser or lessee enters into a contract to purchase or lease a manufactured home, the retailer or distributor of the home must provide HUD with the following information:

The home's serial number and manufacturer's certification label number; the name and address of the retailer or distributor that is selling or leasing the home; the state and address where the home is to be located, and, if known, the name of the local jurisdiction; and the name of the purchaser or lessee.

Installation information. Within 30 days from the date of installation, the retailer or distributor of the home must provide HUD with the following information:

The name, address, telephone number, and license number of the licensed installer; the date of installer certification of completion of the installation; the date a qualified inspector verified the installation as being in compliance with the requirements of this part; and the name, address, and telephone number of the qualified inspector who performed the inspection of the installation as required by § 3286.109.

To submit this information, the retailer and distributor must complete and submit a HUD 305 which identifies the home and home purchaser's information and a HUD 306 that identifies the installer's and inspector's information.

Per § 3286.7 (b), prior to the execution of the sales contract to purchase or agreement to lease a manufactured home that will be set in a HUD-Administered state, the retailer must provide the purchaser or lessee with a consumer disclosure.

This disclosure will be created by the retailer and must be in a document separate from the sales or lease agreement.

LENDING

CASE LAW

"Rent-a-bank" – Preemption

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CASE NAME: *Commonwealth of Pennsylvania v. Think Finance, Inc.*
DATE: *01/14/2016*
CITATION: *United States District Court, E.D. Pennsylvania. Slip Copy. 2016 WL 183289*

The Plaintiff, the Office of the Attorney General ("OAG"), alleged that the Defendants violated Pennsylvania and federal laws prohibiting usurious and otherwise illegal lending practices, and that various debt buyers and collectors and affiliated marketing companies participated in this scheme by referring Pennsylvania residents to the Think Defendants' products and by collecting or attempting to collect these loans. These loans allegedly violated the Loan Interest and Protection Law ("LIPL"), which limits the rate of interest for loans under $50,000 issued by unlicensed lenders to six percent per year. In the alleged "rent-a-bank" scheme, the Defendants partnered with First Bank of Delaware ("FBD"), an out-of-state bank. FBD acted as the nominal lender while the non-bank entity was the de facto lender – marketing, funding, and collecting the loan. This partnership took advantage of federal bank preemption doctrines to insulate the Defendants from state regulations. The OAG alleged that the "rent-a-tribe"

scheme similarly avoided state laws by issuing loans in partnership with Native American tribes.

The Court found there was sufficient evidence that the Think Defendants were the true lenders.

The Court also found that even though the complaint contained state usury claims, that there were no claims made against a bank was sufficient to avoid preemption. The complaint alleged that the Defendants, not the bank, were the real parties in interest and the Defendants were not closely tied to the FBD.

The Court rejected the Defendants' attempt to characterize this case as one about mere disagreement about a law. The complaint alleged that the Defendants specifically approached the FBD and the tribes in order to circumvent Pennsylvania law.

Defendants' motions to dismiss denied.

REGULATOR BULLETIN
Texas
Deposits - Down payments

Texas Department of Housing and Community Affairs, Manufactured Housing Division Bulletin. Issued 2/19/2016.

Deposits and Down Payments

When a retailer accepts a deposit they must give the consumer a written statement setting forth:

(1) the amount of such deposit;

(2) a statement of any requirements to obtain or limitations on any such refund; and

(3) the name and business address of the person receiving such deposit.

A retailer must refund a consumer's deposit no later than the 15th day after the date that a written request for the refund is received from the consumer.

A deposit may be retained only if all of the following apply:

(1) the consumer specially orders from the manufacturer a manufactured home that is not in the retailer's inventory;

(2) the home conforms to the specifications of the special order and any representations made to the consumer;

(3) the consumer fails or refuses to accept delivery and installation of the home by the retailer; and

(4) the consumer was given conspicuous written notice of the requirements for retaining the deposit.

A retailer may not retain more than five percent of the estimated cash price of the specially ordered home and must refund any amount that exceeds five percent.

Down Payments:

What is a down payment? A down payment is defined as an amount, including the value of any property used as a trade-in, paid to the retailer to be applied to the purchase price of a manufactured home, including any goods or services that are part of the transaction.

Upon execution of a binding written agreement a deposit becomes a down payment.

A retailer must refund a consumer's down payment in full if the consumer exercises their right of rescission not later than three days after the date the applicable contract is signed. Within this three day right of rescission no portion of the down payment may be retained by the retailer.

FINAL RULE
USDA
Single Family Housing Guaranteed Loan Program

Final rule. 81 Fed. Reg. 6418 (Feb. 8, 2016)

7 CFR Part 3555.

Rural Housing Service, USDA.

Single Family Housing Guaranteed Loan Program

Effective 3/9/2016, the final rule provides that the combination construction and permanent loan feature of the SFHGLP may be utilized for a manufactured home if the builder's contract includes the sum of the cost of the unit and all on-site installation costs. The December 2013 interim final rule prohibited manufactured homes as an eligible loan purpose for this feature at § 3555.105(c).

COMPLIANCE BULLETIN

CFPB

TRID

2013 Integrated Mortgage Disclosures Rule Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z); Correction of Supplementary Information.

On page 79829 of the 2013 Supp. Information, regarding "property insurance premiums, property taxes, homeowner's association dues, condominium fees, and cooperative fees," the phrase "are subject to tolerances" should read "are not subject to tolerances."

SALES

CASE LAW

Option to buy

CASE NAME: *Richard v. Khalif*
DATE: *02/03/2016*
CITATION: *Court of Appeal of Louisiana, Third Circuit. --- So.3d ----. 2016 WL 430161*

Khalif owned property he wished to develop into home sites. Upon disclosure of Nora Robert's son Kenneth Bob's criminal record, Khalif refused to enter into a lease agreement with Bob. However, Khalif and Richard entered into a "Lease with an Option to Purchase" regarding the same property. The written lease agreement expressly prohibited renting, subletting, or granting use or possession of the leased premises without Khalif's written consent.

Soon thereafter, Bob moved onto the property. Khalif claimed to be unaware that Bob, instead of Richard, was occupying the property and Richard paid the monthly fee directly to Khalif.

Richard was served with an eviction notice. Richard requested that the court order Khalif to execute the sale of the property in accordance with the terms of the lease agreement, as all payments had been made. The trial court found that Richard violated the lease agreement, which permitted Khalif to seek dissolution of the agreement, and denied Richard's request for specific performance and/or damages. Richard appealed.

The appeals court found that Bob occupied the premises and, therefore, Richard violated the terms of the lease agreement. Accordingly, Khalif was permitted to seek an eviction. The Court rejected Richard's equitable estoppel argument that Khalif had instructed Bob to allow someone with a clear criminal record to enter into the lease agreement on his behalf, that Bob, in reliance upon Khalif's assent, invested over $18,000 in his mobile home, preparation of the land, and a sewer system, and that Khalif was equitably estopped from seeking an eviction due to his knowledge and acquiescence of Bob's continued presence on the property. The Court found this in direct conflict not only with Khalif's expressed desire to deny tenants with criminal records, but also with the signed lease expressly prohibiting a lessee from granting use or possession of the leased premises without lessor's consent.

Finally, the Court found that but for Richard's deceit, the agreement would not have been effectuated. Because "equity will not aid one who comes into court with unclean hands," the Court found that the trial court properly denied Richard's demand for specific performance and/or damages.

CASE LAW

Option to buy

CASE NAME: *Brown v. Butts*
DATE: *02/12/2016*
CITATION: *Court of Civil Appeals of Alabama. --- So.3d ----. 2016 WL 661173*

The Buttses leased real property and a manufactured home to the Browns for 30 years with an option to buy the property for $85,000, minus any lease payments. Based on the amount of the lease payments, however, the purchase price would be paid long before the term of the lease was up. The Buttses sued to reform the contract, which the trial court granted. The Browns appealed.

The appeals court found that, although the trial court might have questioned the need for a 30–year lease term when the full purchase price would be paid off in under 10 years, those terms were not mutually exclusive. Any lease payments that were not applied to the purchase price remain lease payments in accordance with the terms of the contract itself. Thus, there was no patent ambiguity, which is an ambiguity "that is apparent upon the face of the instrument, arising by reason of inconsistency or uncertainty in the language employed." The discrepancy in the parties' intentions did not create an ambiguity in the contract itself.

Further, based on the circumstances, the Browns could not have known that the Buttses had made a mistake in calculating the purchase price by failing to account for interest.

Because the trial court erred in reforming the contract, which was the result, at best, of a unilateral mistake by the Buttses, the trial court's judgment was reversed and the case remanded.

PENDING LEGISLATION

US

Section 8 vouchers

U.S. House of Representatives Passes Amendment to Support Purchase of Manufactured Homes. From MHI.

The U.S. House of Representatives has approved an amendment by Rep. Peter Welch (D-VT) to increase the flexibility for low income families to use a Section 8 voucher to purchase a manufactured home. The amendment was approved by voice vote. MHI commends Congressman Welch for his leadership in passing this important policy through the U.S. House of Representatives.

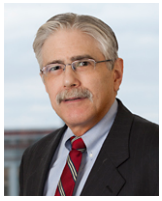
MHI had played a major role in first getting an identical provision passed nine years ago in the 2007 Section 8 reform bill (H.R. 1851) and in Section 8 reform bills in subsequent Congresses. Most recently, last October MHI submitted this policy recommendation to the House Financial Services Committee in response to the Chairman's request for "Ideas on Poverty and Housing Affordability." MHI asked for Congress to allow Section 8 voucher recipients to choose manufactured housing.

Under current law, a Section 8 voucher can be used to pay for some of the costs of living in a manufactured home in a community - such as lot rent, tenant paid utilities, and management charges. But since the law does not allow the housing voucher to be used to pay the actual financing costs of owning the home itself, this authority is seldom used.

This amendment, which was supported by Financial Services Committee Chairman Hensarling (R-TX) and Ranking Member Waters (D-CA), allows vouchers to be used not just for the cost of leasing the land (which is currently permitted) but also for other monthly costs of purchasing a manufactured home loan, including mortgage payments, property tax, and insurance. The

change would allow families that receive a tenant-based Section 8 voucher to help pay for an alternative to renting an apartment - allowing them to actually purchase a home. The amendment does not provide any direct funds or require anyone to use a voucher to live in a manufactured home. However, with this change the approximately 2.1 million Section 8 voucher holders in America will now have the option to use their Section 8 voucher to buy a manufactured home.

The broader bill that now includes this provision, H.R. 3700, the Housing Opportunity through Modernization Act, was passed by the U.S. House of Representatives by a vote of 472-0. It will now be sent to the U.S. Senate for consideration.



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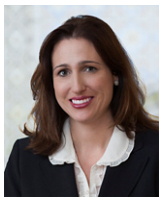

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