McGlinchey Stafford and the Manufactured Housing Institute (MHI) are pleased to bring you the Manufactured Housing Law Update. With content prepared by McGlinchey Stafford's nationally-recognized consumer financial services team, the Update focuses on legal and regulatory actions in the manufactured housing industry. More about MHI and McGlinchey Stafford can be found at the end of the Update.

WELCOME!

Justify won the Kentucky Derby. We hope our readers from the bluegrass state are fully recovered from Derby Week, as we have a wastewater statute they may want to read.

As the state legislative season winds down, we have much to report, including Wisconsin making several amendments to the landlord tenant law, including provisions dealing with service animals.

Wisconsin was not the only state to make changes with respect to service animals. Minnesota enacted provisions that are friendly to the owner of the real estate.

On the finance side, we summarized recent CFPB guidance addressing the servicing of loans and bankruptcy. In addition, there is a growing trend providing for first time home buyer savings accounts. If you are in Alabama, they also apply to "second chance" buyers. There is also guidance in Indiana and New York addressing rent-to-own contracts.

There is so much more that may be of interest. So, read on!

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ARBITRATION

CASE LAW

Warranties

CASE NAME: *DeMidio v. REV Recreation Group, Inc.*
DATE: *04/10/2018*
CITATION: *United States District Court, N.D. Indiana, Fort Wayne Division. Slip Copy. 2018 WL 1744958*

Plaintiffs sued the defendant manufacturer over alleged defects in the RVs they purchased. The Defendant moved to dismiss or stay based on its contention that the Plaintiffs were bound by an arbitration provision contained in the written limited warranty.

The Plaintiffs argued that no valid arbitration agreement was ever formed and so REV could not compel them to participate in that process. The Plaintiffs insisted that the "private arbitration process" in Defendant's warranty was unenforceable because (1) it did not comply with the federal disclosure requirements, (2) Plaintiffs never agreed to arbitrate this matter, and (3) the arbitration clause was illusory and violated public policy.

According to the Plaintiffs, their respective salespersons did not discuss the arbitration clause. In addition, the Owner's Manual, which contained a copy of the REV warranty, was packed inside the RV in a cabinet, and the Plaintiffs did not have access to the RV until after they signed the sales paperwork. Moreover, at no time prior to filing their case in court were the Plaintiffs made aware of any arbitration clause in the warranty.

The Court held that parties cannot be compelled to arbitrate if they did not contract to do so, which in this case they clearly did not. Consumers do not necessarily agree to an arbitration provision simply because it was part and parcel of a broader contract.

Defendant's Motion to Dismiss Plaintiffs' Complaints; or, Alternatively, to Stay the Actions denied.

CASE LAW

Arbitrator

CASE NAME: *Erickson v. Sierra Corporate Management Inc.*
DATE: *04/16/2018*
CITATION: *Court of Appeal, Fourth District, Division 2, California. Not Reported in Cal.Rptr.3d. 2018 WL 1790217*

Marlies Erickson owned a mobile home and leased a space from Sierra Corporate Management, Inc. et al., Hollydale Lowertier Partner, LP and Hollydale Uppertier/Operating, LP at a mobile home park. She signed a written lease agreement for the space. Erickson defaulted on her rent and the parties entered into a forbearance agreement to allow her to stay in the Park. Both agreements contained arbitration clauses. Erickson attempted to sell her mobile home, but the Sierra Defendants refused to approve the potential buyers.

Erickson filed a complaint and the Sierra Defendants filed their petition to compel arbitration pursuant to the two agreements. The trial court initially granted the Petition but then granted Erickson's motion to vacate the Petition once arbitration in front of the American Arbitration Association (AAA) was dismissed due to the Sierra Defendants not paying the arbitration fees. The trial court also denied the Sierra Defendants' motion to have an alternative arbitrator appointed, or in the alternative, have the AAA apply specific rules to the dispute. The Sierra Defendants appealed.

The appeals court found that the Lease provided "Commercial Rules of the American Arbitration Association ('AAA') procedures apply" and the Forbearance Agreement provided "AAA ... Commercial Rules will apply." Once the parties agreed to be bound by the AAA rules, arbitration was required to be conducted in front of that body. Moreover, the Lease and the Forbearance Agreement stated the arbitrator would decide "all aspects of the dispute."

Affirmed.

COMMUNITIES

CASE LAW

Lease of park - Fixtures

CASE NAME: *Glen v. Bubbus*
DATE: *04/18/2018*
CITATION: *Court of Appeals of Arkansas. Not Reported in S.W.3d. 2018 Ark. App. 252*

The parties entered into a ten-year lease agreement which provided that Bubbus would lease a mobile-home park from Glenn. The lease permitted Bubbus to install, at his own expense, furniture, fixtures, and equipment on the premises, and that "such furniture, fixtures, and equipment shall be deemed to be [Bubbus's] trade fixtures and shall not be deemed incorporated into or a part of the Demised Premises provided they can be removed without causing any damage to the structural elements of the Demised Premises." At the conclusion of the term of the lease, the agreement permitted Bubbus to "remove from the Demised Premises all of such trade fixtures and other personal property belonging to Tenant," as long as Bubbus was not in default, and as long as he repaired any damage to the property caused by such removal.

During the term of that lease, Bubbus installed electrical meter boxes, related electrical equipment, and water meters to the individual mobile-home lots on the property.

At the conclusion of the lease term, Bubbus asked whether he could remove the meters and was told he could not. Bubbus filed a complaint in replevin.

The circuit court found: (1) that Glenn breached the parties' contract by not allowing Bubbus to remove items at the end of the lease term; (2) that the items were Bubbus's property and trade fixtures and therefore could be removed at the end of the lease term; (3) that Bubbus be awarded $14,400 as damages for the retention of the property by Glenn; and (4) that Bubbus was entitled to attorney's fees. Glenn appealed.

The Court noted that the Arkansas Supreme Court has announced a three-part test to determine whether an article remains personal property or becomes a fixture: "(1) whether the items are annexed to the realty, (2) whether the items are appropriate and adapted to the use or purpose of that part of the realty to which the items are connected, and (3) whether the party making the annexation intended to make it permanent." In this case, based on the language of the lease and the testimony presented at trial, the meter boxes, poles, and wiring were removable, and the circuit court's decision, which was consistent with the only testimony presented at trial, was not clearly erroneous.

The Court found that the language in the lease agreement itself made clear that the intent of both parties was for the electrical equipment and water meters to be removed at the termination of the lease. The uncontroverted testimony was that the equipment could be removed with no damage to the structural portion of the premises, and with only minor damage to the real estate that could be easily repaired.

Based on the three-prong test, and particularly on the intent prong of the test, the circuit court did not err in finding that Bubbus should have been allowed to remove his electrical equipment. The poles and electrical equipment were installed for the benefit of Bubbus and his tenants, and the parties' intent in the lease reflects that Bubbus would be able to remove the electrical equipment at the termination of the lease.

Affirmed.

CASE LAW

Rent control - Taking

CASE NAME: *Colony Cove Properties, LLC v. City of Carson*
DATE: *04/18/2018*
CITATION: *United States Court of Appeals, Ninth Circuit. --- F.3d ----. 2018 WL 1902419*

The City of Carson adopted a "Mobile Home Space Rent Control Ordinance," listing factors to consider when evaluating a proposed rent increase, the listed factors, however, were neither exclusive nor dispositive.

The City Council adopted Implementation Guidelines in 1998 permitting, but not requiring, a "Gross Profits Maintenance Analysis" ("GPM Analysis"). A GPM Analysis "compares the gross profit level expected from the last rent increase granted to the park prior to the current application ... to the gross profit shown by the current application."

In October 2006, the City amended the Guidelines to also permit a "Maintenance of Net Operating Income Analysis" ("MNOI Analysis"). Changes in debt service expenses were not to be considered in the MNOI Analysis.

On April 4, 2006, Colony Cove Properties, LLC purchased a mobile home park for $23,050,000; $18,000,000 of the purchase price was obtained through a loan. The annual debt service on that loan, $1,224,681, exceeded the prior owner's annual profit of $718,240.

Colony filed applications in 2007 and 2008, seeking rent increases. The Rent Review Board's 2007 GPM Analysis suggested a rent increase of $200.93 per space, driven largely by the post-acquisition debt service. The Board's MNOI Analysis, which did not account for the debt service, suggested a rent increase of only $36.74. The Board adopted the MNOI. In 2008, the Board again conducted both a GPM and an MNOI Analysis, adopted the latter, and granted an increase of $25.02.

Colony sued the City, asserting facial and as-applied takings and due process claims. The facial attack was dismissed as time-barred and the as-applied takings claim as unripe.

Colony also filed a petition for writ of administrative mandate in state court. The petition was denied.

Colony returned to federal court, alleging that the Board decisions were an unconstitutional taking and violated Colony's substantive due process rights. The district court dismissed all of Colony's claims except for an as-applied regulatory takings claim. The jury found that the decisions were regulatory takings and awarded Colony $3,336,056 in damages. The City appealed.

The Court found that the mere loss of some income does not itself establish a taking. Economic impact is determined by comparing the value of the property before and after the government action. Colony presented no evidence about the Property's post-deprivation value. And, even assuming that the lost rental income asserted—$5.7 million—equated to diminution in property value, that reduction would only be 24.8% of the assumed $23 million pre-deprivation value of the Property, far too small to establish a regulatory taking. Further, any losses resulted directly from Colony's decision to incur a large debt when purchasing the property.

Colony argued that, when it acquired the Property, it had an expectation that the Board would use the GPM Analysis and account for debt service in determining rent increases. The Implementation Guidelines, however,—even before the 2006 Amendment allowing MNOI Analysis—plainly stated that "[n]o one factor in the Ordinance is determinative and the facts must be considered together and balanced in light of the purposes of the Ordinance and all the relevant evidence." The Guidelines stressed that the GPM Analysis "is not intended to create any entitlement to any particular rent increase."

Finally, the City's rent control ordinance is a program to "protect[ ] Homeowners from excessive rent increases and allow[ ] a fair return on investment to the Park Owner." The Court found this central purpose counselled against finding a taking.

Reversed and remanded.

LEGISLATION
Delaware
Relocation

2017 DE H 277. Enacted 4/17/2018. Effective immediately.

This bill amends Del. Code Ann. tit. 25, § 7012 to extend the Delaware Manufactured Home Relocation Trust Fund until July 1, 2024 (formerly, 7/1/2019).

LEGISLATION
Kentucky
Fees

2018 KY H 327. Enacted 4/10/2018. Effective 7/1/2019.

This bill amends Ky. Rev. Stat. Ann. § 219.340 to provide that the cabinet shall promulgate administrative regulations to establish a schedule of fees not to exceed administrative costs of the program to the cabinet, that shall be paid for a permit to operate a manufactured or mobile home community.

Formerly, this section provided a schedule of fees dependent on the number of spaces in a community.

The bill also deletes the provision that the cabinet may, by administrative regulation, beginning July 1, 2003, increase the annual fee to operate a manufactured or mobile home community by not more than five percent (5%) per year, not to exceed the maximum fee on the fee schedule.

LEGISLATION
Kentucky
Wastewater treatment

2018 KY H 513. Enacted 4/26/2018. Effective 7/14/2018.

This bill adds new sections to subchapter 73 of Ky. Rev. Stat. Ann. Chapter 224, to provide that "Privately owned small wastewater treatment plant" or "plant" means all or any part of a sewage treatment facility, including the collection system that serves a localized customer base such as neighborhoods, developments, apartment or condominium complexes, businesses, or manufactured housing or mobile home parks.

The bill provides that the cabinet shall promulgate administrative regulations regarding the issuance or the renewal of a discharge permit to an owner of a privately owned small wastewater treatment plant that require a plant's owner to:

(1) Obtain and maintain a contract for insurance, or a financial instrument such as a letter of credit, for:

(a) Fire and extended coverage in an amount deemed sufficient by the cabinet to fully replace the plant or otherwise restore service to the customers served by the plant in the event the plant becomes nonfunctional due to risks such as fire or other natural disasters; and

(b) Commercial general liability coverage and products and completed operations coverage in an amount deemed sufficient by the cabinet to address potential general liabilities or products and completed operations liabilities;

(2) Implement an asset management plan, the requirements of which shall be developed by the cabinet using nationally known or recognized best practices, methodologies, and guidelines;

(3) Maintain adequate revenue to ensure continuity of service and the ability of the owner to:

(a) Operate and maintain the plant in a manner to meet all applicable state and federal laws during operation; and

(b) Implement the asset management plan designated for the plant; and

(4) Conduct a structural analysis of the plant, as necessary.

The bill also provides that the cabinet may seek to have a receiver appointed to assume the management and operation of a privately owned small wastewater treatment plant if the plant:

(a) Presents a threat or likely threat to the public health or the environment;

(b) Is in substantial and recurring noncompliance with its discharge permit as issued by the cabinet; or

(c) The owner is unable or unwilling to operate or to provide for the proper operation of the plant.

LEGISLATION
Maryland
Sale of park – Notice

2018 MD H 1593. Enacted 4/24/2018. Effective 7/1/2018.

This bill amends Md. Code Ann., Real Prop. § 8A-202 to provide that:

(h) A park owner that enters into a contract of sale for a mobile home park shall, within 5 days after entering into the contract:

(1) provide notice of the sale to:

(i) each resident in the mobile home park by hand delivery or certified mail, return receipt requested; and

(ii) the Department of Housing and Community Development by certified mail, return receipt requested; and

(2) post notice of the sale in a public area of the mobile home park.

(i) (1) This subsection applies only to a rental agreement that has a term of not less than 1 year that is offered for renewal for a term of not less than 1 year.

(2) If a park owner intends to offer the renewal of a lease agreement with an increase in rent, the park owner shall provide notice to the resident of the rent increase no later than 60 days before the expiration of the existing rental agreement.

LEGISLATION
Minnesota
Assistance animals - Damages

2017 MN H 3157. Enacted 4/26/2018. Effective 8/1/2018.

This bill adds Minn. Stat. § 604A.302 to provide that an owner of real property is not liable for any injury or damage caused by an assistance animal if:

(1) the owner believes in good faith that the animal is an assistance animal or the individual using the assistance animal represents that the animal is an assistance animal; and

(2) the injury or damage is not caused by the negligence of the owner of the real property and the owner is not liable under section 347.22.

The bill also adds Minn. Stat. § 609.833, MISREPRESENTATION OF SERVICE ANIMAL, to provide that a person may not, directly or indirectly, through statements or conduct, intentionally misrepresent an animal in that person's possession as a service animal in any place of public accommodation to obtain any rights or privileges available to a person who qualifies for a service animal under state or federal law knowing that the person is not entitled to those rights or privileges.

A conspicuous sign may be posted in a location accessible to public view in a place of public accommodation that contains the following, or substantially similar, language:

"NOTICE

Service Animals Welcome. It is illegal for a person to misrepresent an animal in that person's possession as a service animal."

LEGISLATION

Mississippi

Eviction

2018 MS S 2473. Enacted 4/12/2018. Effective 7/1/2018.

This bill amends Miss. Code Ann. § 89-7-27 to provide that a tenant or lessee at will or at sufferance, or for part of a year, or for one or more years, of any houses, lands, or tenements, and the assigns, undertenants, or legal representatives of such tenant or lessee, shall (formerly, may) be removed from the premises by the judge of the county court, any justice of the peace of the county, or by the mayor or police justice of any city, town, or village where the premises, or some part thereof, are situated, in the following cases, to wit:

First. Where such tenant shall hold over and continue in possession of the demised premises, or any part thereof, after the expiration of his term, without the permission of the landlord.

Second. After any default in the payment of the rent pursuant to the agreement under which such premises are held, and when complete satisfaction (adding, complete) of the rent and any late fees due (adding, and any late fees due) cannot be obtained by distress of goods, and three (3) days' notice, in writing, requiring the payment of such rent or the possession of the premises, shall have been served by the person entitled to the rent on the person who owes the rent.

Third (new). If a written agreement between the landlord and tenant exists, any event calling for eviction in the agreement may trigger the eviction process under this section. Notice of default by email or text message is proper if the party has agreed in writing to be notified by that means.

The bill amends Miss. Code Ann. § 89-7-29 to provide that the landlord or lessor, his legal representatives, agents, or assigns, in order to have the benefit of such proceedings, shall present to the court a sworn affidavit that contains the facts (formerly, shall make oath or affirmation of the facts) which, according to Section 89-7-27, require the removal of the tenant, describing in the affidavit the premises claimed and the amount of rent and any late fees due (adding, and any late fees) and when payable, and that the necessary notice has been given to terminate such tenancy. The bill adds, these facts shall be based on the rental agreement signed or agreed to by the landlord or lessor, his legal representatives, agents, or assigns, and the tenant. Upon receipt of the sworn affidavit, the court shall initiate the removal of the tenant for the nonpayment of rent or other event of default contained in any written agreement between the parties, as specified in the affidavit.

The bill amends Miss. Code Ann. § 89-7-39 to add that, in hearings for eviction, no adjournment shall extend the entire hearing beyond forty-five (45) days from the date the eviction action was filed.

The bill amends Miss. Code Ann. § 89-7-45 to provide that if the proceedings be founded upon the nonpayment of rent, the issuance of the warrant for the removal of the tenant shall be stayed if the person owing the rent shall, before the warrant is actually issued, pay the full and complete amount of rent due (adding, the full and complete amount of), including any late fees that have accrued as a result of the nonpayment of rent as provided in the rental agreement (adding, including any late fees that have accrued as a result of the

nonpayment of rent as provided in the rental agreement), and the costs of the proceedings, (deleting, or give such security as shall be satisfactory to the magistrate) to the person entitled to the rent, for the payment thereof and costs in ten (10) days; and if the rent and costs shall not be paid accordingly, the warrant shall then issue as if the proceedings had not been stayed.

The bill amends Miss. Code Ann. § 89-7-49 to provide that if a tenant of lands, being in arrear for rent, shall desert the demised premises and leave the same uncultivated or unoccupied, so that a sufficient distress cannot be had to satisfy the arrears of rent, any constable of the county may, at the request of the landlord, and upon due proof by affidavit that the premises have been deserted, leaving rent in arrear, and not sufficient distress thereon, go upon and view the premises, and upon being satisfied that the premises have been so deserted, he shall affix a notice, in writing, upon a conspicuous part of the premises, stating what day he will return to take a second view thereof, not less than five (5) days nor more than fifteen (15) days thereafter, and requiring the tenant then to appear and pay the rent and any late fees due (adding, and any late fees). At the time specified in the notice the constable shall again view the premises, and if, upon second view, the tenant shall not pay the rent and any late fees due (adding, and any late fees), or there shall not be sufficient distress upon the premises, then the justice court shall immediately or within forty-eight (48) hours put the landlord (formerly, the justice court may put the landlord) in possession of the premises, and the lease thereof to such tenant shall become void. The tenant may appeal to the circuit court from the proceedings of the justice court at any time within thirty (30) days after possession delivered, by serving notice in writing thereof upon the landlord, and by giving bond, with sufficient sureties, to be approved by the justice court, for the payment to the landlord of the costs of appeal, which may be adjudged against the tenant; and thereupon the justice court shall return the proceedings before him to the next term of the circuit court, and the court shall, at the return term, examine the proceedings in a summary way, and may order restitution to be made to the tenant, with costs of appeal, to be paid by the landlord; or in case of affirming the proceedings, shall award costs against the tenant and sureties in his bond.

The definition of “Rent” in Miss. Code Ann. § 89-8-7 has been amended to provide that it means all payments to be made to the landlord under the rental agreement, including any late fees that are required to be paid under the rental agreement by a defaulting tenant (adding, including any late fees that are required to be paid under the rental agreement by a defaulting tenant).

The definition of "Rental agreement" has been amended to mean all agreements, written or oral, except to the extent an agreement under this chapter or Chapter 7, Title 89, Mississippi Code of 1972, must be in writing (adding, except to the extent an agreement under this chapter or Chapter 7, Title 89, Mississippi Code of 1972, must be in writing), and valid rules and regulations adopted under Section 89-8-11 embodying the terms and conditions concerning the use and occupancy of a dwelling unit and premises.

Miss. Code Ann. § 89-8-13 has been amended to provide that (3) The nonbreaching party may deliver a notice (formerly, a written notice) to the party in breach in writing, or by email or text message if the breaching party has agreed in writing to be notified by email or text message (adding, in writing, or by email or text message if the breaching party has agreed in writing to be notified by email or text message), specifying the acts and omissions constituting the breach and that the rental agreement will terminate upon a date not less than fourteen (14) days (formerly, 30 days) after receipt of the notice if the breach is not remedied within a reasonable time not in excess of fourteen (14) days (formerly, 30 days); and the rental agreement shall terminate and the

tenant shall surrender possession as provided in the notice subject to the following:

(a) If the breach is remediable by repairs, the payment of damages, or otherwise, and the breaching party adequately remedies the breach before the date specified in the notice, the rental agreement shall not terminate;

(b) In the absence of a showing of due care by the breaching party, if substantially the same act or omission which constituted a prior noncompliance of which notice was given recurs within six (6) months, the nonbreaching party may terminate the rental agreement upon at least fourteen (14) days' notice in writing, or by email or text message if the breaching party has agreed in writing to be notified by email or text message (adding, in writing, or by email or text message if the breaching party has agreed in writing to be notified by email or text message), specifying the breach and the date of termination of the rental agreement;

(5)(a) If the material noncompliance by the tenant is the nonpayment of rent pursuant to the rental agreement, the landlord shall not be required to deliver fourteen (14) days' (formerly, 30 days) notice (formerly, written notice) as provided by subsection (3) of this section. In such event, the landlord may seek removal of the tenant from the premises in the manner and with the notice prescribed by Chapter 7, Title 89, Mississippi Code of 1972.

(b)(new) Any justice court judge or other judge presiding over a hearing in which a landlord seeks to remove a tenant for the nonpayment of rent shall abide by the provisions of the rental agreement that was signed by the landlord and the defaulting tenant.

ADOPTED RULE

Texas

Submetering

😐

Effective 4/3/2018, this rule amends 16 Tex. Admin. Code § 24.121 and adds 16 Tex. Admin. Code § 24.126 regarding submetering and allocated water and sewer utility services.

The rule provides that the provisions of this subchapter do not limit the authority of an owner, operator, or manager of an apartment house, manufactured home rental community, or multiple use facility to charge, bill for, or collect rent, an assessment, an administrative fee, a fee relating to upkeep or management of chilled water, boiler, heating, ventilation, air conditioning, or other building system, or any other amount that is unrelated to water and server utility service costs.

The rule adds the definition of “Overcharge” as the amount, if any, a tenant is charged for submetered or nonsubmetered master metered utility service to the tenant's dwelling unit after a violation occurred relating to the assessment of a portion of utility costs in excess of the amount the tenant would have been charged under this subchapter. Overcharge and Overbilling have the same meaning.

The rule also defines “Undercharge” as the amount, if any, a tenant is charged for submetered or nonsubmetered master metered utility service to the tenant's dwelling unit less than the amount the tenant would have been charged under this subchapter. Undercharge and Underbilling have the same meaning.

“Utility costs” are defined any amount charged to the owner by a retail public utility for water or wastewater service. Utility Costs and Utility Service Costs have the same meaning.

16 Tex. Admin. Code § 24.126 Complaint Jurisdiction, provides:

(a) Jurisdiction. The commission has exclusive jurisdiction for violations under this subchapter.

(b) Complaints. If an apartment house owner, condominium manager, manufactured home rental community owner, or other multiple use facility owner violates a commission rule regarding utility costs, the person claiming the violation may file a complaint with the commission and may appear remotely for a hearing.

LEGISLATION

Wisconsin

Habitability – Service animals – Background checks – Rental agreements - Termination

2017 WI A 771. Enacted 4/16/2018. Effective 4/18/2018.

This bill adds Wis. Stat. § 66.0104(1)(ah) to provide that "Habitability violation" means any of the following conditions if the condition constitutes an ordinance violation:

1. The rental property or rental unit lacks hot or cold running water.

2. Heating facilities serving the rental property or rental unit are not in safe operating condition or are not capable of maintaining a temperature, in all living areas of the property or unit, of at least 67 degrees Fahrenheit during all seasons of the year in which the property or unit may be occupied. Temperatures in living areas shall be measured at the approximate center of the room, midway between floor and ceiling.

3. The rental property or rental unit is not served by electricity, or the electrical wiring, outlets, fixtures, or other components of the electrical system are not in safe operating condition.

4. Any structural or other conditions in the rental property or rental unit that constitute a substantial hazard to the health or safety of the tenant, or create an unreasonable risk of personal injury as a result of any reasonably foreseeable use of the property or unit other than negligent use or abuse of the property or unit by the tenant.

5. The rental property or rental unit is not served by plumbing facilities in good operating condition.

6. The rental property or rental unit is not served by sewage disposal facilities in good operating condition.

7. The rental property or rental unit lacks working smoke detectors or carbon monoxide detectors.

8. The rental property or rental unit is infested with rodents or insects.

9. The rental property or rental unit contains excessive mold.

The bill also adds Wis. Stat. § 66.0104(2)(e)(1m) to provide that a city, village, town, or county may establish a rental property inspection program under this subdivision. If no habitability violation is discovered during a program inspection or if a habitability violation is discovered during a program inspection and the violation is corrected within a period of not less than 30 days established by the city, village, town, or county, the city, village, town, or county may not perform a program inspection of the property for at least 5 years. If a habitability violation is discovered during a program inspection and the violation is not corrected within the period established by the city, village, town, or county, the city, village, town, or county may require the rental property or unit to be inspected annually under the program. If a habitability violation is discovered during an inspection conducted upon a complaint and the violation is not corrected within a period of not less than 30 days established by the city, village, town, or county, the city, village, town, or county may require the rental property or unit to be inspected annually under the program. No rental property or unit that is less than 8 years old may be inspected under this subdivision. A city, village, town, or county may provide a period of less than 30 days for the correction of a habitability violation under this

subdivision if the violation exposes a tenant to imminent danger.

The bill amends Wis. Stat. § 66.0104(2)(e)(2)(a) to provide that no city, village, town, or county may enact an ordinance that charges a fee for conducting an inspection of a residential rental property unless:

a. The amount of the fee does not exceed $75 for an inspection of a vacant unit under subd. 1m. or an inspection of the exterior and common areas of a property under subd. 1m., $90 for any other initial program inspection under subd. 1m., or $150 for any other 2nd or subsequent program inspection under subd. 1m. No fee may be charged for a program inspection under subd. 1m. if no habitability violation is discovered during the inspection or, if a violation is discovered during the inspection, the violation is corrected within the period established by the city, village, town, or county under subd. 1m. No fee may be charged for an inspection of the exterior and common areas if the property owner voluntarily allows access for the inspection and no habitability violation is discovered during the inspection or, if a violation is discovered during the inspection, the violation is corrected within the period established by the city, village, town, or county under subd. 1m. No fee may be charged for a reinspection that occurs after a habitability violation has been corrected. No fee may be charged to a property owner if a program inspection does not occur because an occupant of the property does not allow access to the property. Annually, a city, village, town, or county may increase the fee amounts under this subd. 2. a. by not more than the percentage change in the U.S. consumer price index for all urban consumers, U.S. city average, as determined by the federal department of labor, for the previous year or 2 percent, whichever is greater.

The bill adds Wis. Stat. § 66.0104(2)(e)(2)(am) to provide that no city, village, town, or county may enact an ordinance that charges a fee for conducting an inspection of a residential rental property unless: the amount of the fee does not exceed $150 for an inspection under s. 66.0119, except that if a habitability violation is discovered during the inspection and the violation is not corrected within a period of not less than 30 days established by the city, village, town, or county, the fee may not exceed $300. No fee may be charged for an inspection under s. 66.0119 if no habitability violation is discovered. Annually, a city, village, town, or county may increase the fee amounts under this subd. 2. am. by not more than the percentage change in the U.S. consumer price index for all urban consumers, U.S. city average, as determined by the federal department of labor, for the previous year or 2 percent, whichever is greater.

The bill adds Wis. Stat. § 66.0104(2)(e)(4) to provide that no city, village, town, or county may enact an ordinance that: Except as provided in this subdivision, requires that a rental property or rental unit be certified, registered, or licensed or requires that a residential rental property owner register or obtain a certification or license related to owning or managing the residential rental property. A city, village, town, or county may require that a rental unit or residential rental property owner be registered if the registration requires only one name of an owner or authorized contact person and an address, telephone number, and, if available, an electronic mail address or other information necessary to receive communications by other electronic means at which the person may be contacted. No city, village, town, or county, except a 1st class city, may charge a fee for registration under this subdivision except a one-time registration fee that reflects the actual costs of operating a registration program, but that does not exceed $10 per building, and a one-time fee for the registration of a change of ownership or management of a building or change of contact information for a building that reflects the actual and direct costs of registration, but that does not exceed $10 per building.

The bill adds Wis. Stat. § 66.0104(2m) to provide that if a city, village, town, or county has in effect an ordinance that authorizes the inspection of a rental property or

rental unit upon a complaint from an inspector or other employee or elected official of the city, village, town, or county, the city, village, town, or county shall maintain for each inspection performed upon a complaint from an employee or official a record of the name of the person making the complaint, the nature of the complaint, and any inspection conducted upon the complaint.

The bill adds Wis. Stat. § 66.0628(2m) to provide that a political subdivision may not impose a fee or charge related to the political subdivision enforcing an ordinance related to noxious weeds, electronic waste, or other building or property maintenance standards unless the political subdivision first notifies the person against whom the fee or charge is to be imposed that the fee or charge may be imposed. If the notice relates to a building that is not owner-occupied, the notice shall be provided to the owner by 1st class mail or electronic mail. If the owner of a property provides an electronic mail address to a political subdivision, the political subdivision may not impose a fee or charge related to the political subdivision enforcing an ordinance related to noxious weeds, electronic waste, or other building or property maintenance standards at that property unless the political subdivision first notifies the owner of the property using the electronic mail address provided. This subsection does not apply to a fee or charge related to the clearing of snow or ice from a sidewalk or to an ordinance violation that creates an immediate danger to public health, safety, or welfare.

The bill adds Wis. Stat. § 106.50(2r)(bg) to provide:

Animals that do work or perform tasks for individuals with disabilities. 1. If an individual has a disability and a disability-related need for an animal that is individually trained to do work or perform tasks for the individual, it is discrimination for a person to refuse to rent or sell housing to the individual, cause the eviction of the individual from housing, require extra compensation from the individual as a condition of continued residence in housing, or engage in the harassment of the individual because he or she keeps such an animal.

2. If an individual keeps or is seeking to keep an animal that is individually trained to do work or perform tasks in housing, an owner, lessor, lessor's agent, owner's agent, or representative of a condominium association may request that the individual submit to the owner, lessor, agent, or representative reliable documentation that the individual has a disability and reliable documentation of the disability-related need for the animal, unless the disability is readily apparent or known. If the disability is readily apparent or known but the disability-related need for the animal is not, the individual may be requested to submit reliable documentation of the disability-related need for the animal.

3. An individual with a disability who keeps an animal that is individually trained to do work or perform tasks in housing shall accept liability for sanitation with respect to, and damage to the premises caused by, the animal.

4. Nothing in this subsection prohibits an owner, lessor, lessor's agent, owner's agent, or representative of a condominium association from denying an individual the ability to keep an animal in housing if any of the following applies:

a. The individual is not disabled, does not have a disability-related need for the animal, or fails to provide the documentation requested under subd 2.

b. Allowing the animal would impose an undue financial and administrative burden or would fundamentally alter the nature of services provided by the lessor, owner, or representative.

c. The specific animal in question poses a direct threat to a person's health or safety that cannot be reduced or eliminated by another reasonable accommodation.

d. The specific animal in question would cause substantial physical damage to a person's property that cannot be reduced or eliminated by another reasonable accommodation.

(br) Emotional support animals. 1. If an individual has a disability and a disability-related need for an emotional support animal, it is discrimination for a person to refuse to rent or sell housing to the individual, cause the eviction of the individual from housing, require extra compensation from the individual as a condition of continued residence in housing, or engage in the harassment of the individual because he or she keeps such an animal.

2. If an individual keeps or is seeking to keep an emotional support animal in housing, an owner, lessor, lessor's agent, owner's agent, or representative of a condominium association may request that the individual submit to the owner, lessor, agent, or representative reliable documentation that the individual has a disability and reliable documentation of the disability-related need for the emotional support animal from a licensed health professional.

3. An individual with a disability who keeps an emotional support animal in housing shall accept liability for sanitation with respect to, and damage to the premises caused by, the animal.

4. Nothing in this subsection prohibits an owner, lessor, lessor's agent, owner's agent, or representative of a condominium association from denying an individual the ability to keep an animal in housing if any of the following applies:

a. The individual is not disabled, does not have a disability-related need for the animal, or fails to provide the documentation requested under subd 2.

b. Allowing the animal would impose an undue financial and administrative burden or would fundamentally alter the nature of services provided by the lessor, owner, or representative.

c. The specific animal in question poses a direct threat to a person's health or safety that cannot be reduced or eliminated by another reasonable accommodation.

d. The specific animal in question would cause substantial physical damage to a person's property that cannot be reduced or eliminated by another reasonable accommodation.

5. An individual shall forfeit not less than $500 if he or she, for the purpose of obtaining housing, intentionally misrepresents that he or she has a disability or misrepresents the need for an emotional support animal to assist with his or her disability.

6. A licensed health professional shall forfeit not less than $500 if he or she, for the purpose of allowing the patient to obtain housing, misrepresents that his or her patient has a disability or misrepresents his or her patient's need for an emotional support animal to assist with his or her patient's disability.

The bill adds Wis. Stat. § 196.643(3), NOTIFICATIONS; ELECTRIC SERVICE, to provide that:

(a) If requested by the owner of a rental dwelling unit and authorized by the tenant residing in the unit as provided in par. (b), all of the following apply to the public utility that provides electric service to the tenant:

1. The public utility shall notify the owner in the same manner as the tenant of any pending disconnection of service to the unit that is due to nonpayment of past due charges.

2. The public utility may provide information about the status of a disconnection described in subd. 1. to the owner by telephone.

(b) A public utility or owner may obtain from a tenant the authorization required under par. (a), except that an owner must obtain the authorization in a separate written document.

The bill adds Wis. Stat. § 196.643(4), RESUMPTION OF SERVICE, to provide that no public utility may require the owner of a rental dwelling unit to provide proof of eviction or other evidence that a tenant has vacated the unit as a condition for providing or resuming public utility

service to the unit if the service is placed and maintained solely in the owner's name.

The bill adds Wis. Stat. § 704.07(3)(a)(1) and (2) to provide that if the premises are damaged, including by an infestation of insects or other pests, due to the acts or inaction of the tenant, the landlord may elect to undertake the remediation, repair, or redecoration, and in such case the tenant must reimburse the landlord for the reasonable cost thereof; the cost to the landlord is presumed reasonable unless proved otherwise by the tenant. Reasonable costs include any of the following:

1. Materials provided or labor performed by the landlord.

2. At a reasonable hourly rate, time the landlord spends doing any of the following:

a. Purchasing or providing materials.

b. Supervising an agent of the landlord.

c. Hiring a 3rd-party contractor.

The bill adds Wis. Stat. § 704.07(5), RESTRICTION OF REGULATION OF ABATEMENT, to provide that an ordinance enacted by a city, town, village, or county regulating abatement of rent shall permit abatement only for conditions that materially affect the health or safety of the tenant or substantially affect the use and occupancy of the premises.

The bill adds Wis. Stat. § 704.085, Credit and background checks, to provide:

(1) (a) Except as provided under par. (b), a landlord may require a prospective tenant to pay the landlord's actual cost, up to $25, to obtain a consumer credit report on the prospective tenant from a consumer credit reporting agency that compiles and maintains files on consumers on a nationwide basis. The landlord shall notify the prospective tenant of the charge before requesting the consumer credit report, and shall provide the prospective tenant with a copy of the report.

(b) A landlord may not require a prospective tenant to pay for a consumer credit report under par. (a) if, before the landlord requests a consumer credit report, the prospective tenant provides the landlord with a consumer credit report, from a consumer credit reporting agency that compiles and maintains files on consumers on a nationwide basis, that is less than 30 days old.

(2) A landlord may require a prospective tenant who is not a resident of this state to pay the landlord's actual cost, up to $25, to obtain a background check on the prospective tenant. The landlord shall notify the prospective tenant of the charge before requesting the background check and shall provide the prospective tenant with a copy of the report.

The bill adds Wis. Stat. § 704.10, Electronic delivery, to provide that a rental agreement may include a provision that permits the landlord to provide and indicate agreement by electronic means any of the following:

(1) A copy of the rental agreement and any document related to the rental agreement.

(2) A security deposit and any documents related to the accounting and disposition of the security deposit and security deposit refund.

(3) A promise made before the initial rental agreement to clean, repair, or otherwise improve any portion of the premises.

(4) Advance notice of entry under s. 704.05 (2).

The bill amends Wis. Stat. § 704.17, Notice terminating tenancies for failure to pay rent or other breach by tenant, (1) Month-to-month and week-to-week tenancies, by adding:

(1g) DEFINITION. In this section, “rent” includes any rent that is past due and any late fees owed for rent that is past due.

The bill also adds subsection (4m), EFFECT OF INCORRECT AMOUNT IN NOTICE, to provide that a notice for failure

to pay rent or any other amount due under the rental agreement that includes an incorrect statement of the amount due is valid unless any of the following applies:

(a) The landlord's statement of the amount due is intentionally incorrect.

(b) The tenant paid or tendered payment of the amount the tenant believes to be due.

The bill adds Wis. Stat. § 799.40(1g), NOTICE TERMINATING TENANCY, to provide that if a landlord gives a notice terminating tenancy under s. 704.16, 704.17, or 704.19 through certified mail in accordance with s. 704.21 (1) (d), proof of certified mailing from the United States post office shall be sufficient to establish that proper notice has been provided for the purpose of filing a complaint or otherwise demonstrating that proper notice has been given in an eviction action, and an affidavit of service may not be requested to establish that proper notice has been provided.

The bill also adds Wis. Stat. § 799.40(1s), NO WAIVER BY LANDLORD OR TENANT, to provide that it shall not be a defense to an action of eviction or a claim for damages that the landlord or tenant has previously waived any violation or breach of any of the terms of the rental agreement including, but not limited to, the acceptance of rent or that a custom or practice occurred or developed between the parties in connection with the rental agreement so as to waive or lessen the right of the landlord or tenant to insist upon strict performance of the terms of the rental agreement.

The bill amends Wis. Stat. § 799.40(4)(a) to provide that the court shall stay the proceedings in a civil action of eviction if the tenant applies for emergency assistance under s. 49.138, except that no stay may be granted under this paragraph after a writ of restitution has been issued in the proceedings. If a stay is granted, the tenant shall inform the court of the outcome of the determination of eligibility for emergency assistance. The stay remains in effect until the tenant's eligibility for emergency assistance is determined and, if the tenant is determined to be eligible, until the tenant receives the emergency assistance, except that the stay may not remain in effect for more than 10 working days, as defined in s. 227.01 (14).

DEFAULT SERVICING

CASE LAW

Foreclosure – Attachment

CASE NAME: *Likely v. 21st Mortgage Corporation*
DATE: *02/01/2018*
CITATION: *United States District Court, N.D. Georgia, Gainesville Division. Slip Copy. 2018 WL 1891575*

Plaintiffs bought a manufactured home and set it on real property owned by plaintiff Ronald Likely. Plaintiffs borrowed $38,143.61 from Defendant 21st Mortgage, and that loan was secured by the two acre tract of land and the manufactured home, as evidenced by a Security Deed. The Security Deed granted 21st Mortgage the power of sale of the property securing the loan. Defendant foreclosed on the property, and the property was sold. 21st Mortgage filed a dispossessory action against Plaintiffs and a writ of possession was issued against them. Plaintiffs removed that dispossessory action to Federal Court and filed a Complaint against Defendant in which they asserted state law claims for wrongful foreclosure, breach of contract and fraud.

The Court found that Plaintiffs did not provide any information in their Complaint concerning the citizenship of the parties. Even if the Court assumed for the sake of discussion that they had shown diversity of citizenship, Plaintiffs failed to satisfy the amount in controversy requirement.

If the District Judge were to reject the recommendation above and conclude that the Court had subject matter jurisdiction, Plaintiffs' Complaint should be dismissed because they failed to state a claim on which relief can

be granted. Plaintiffs alleged that Defendant "foreclosed on two acres of property it had no legal title to" and requested "a declaration that the Defendant foreclosed on the manufactured home only" and "[t]hat title to the land remains with the Likelys."

All of Plaintiffs' claims relied on the underlying assertion that Defendants unlawfully foreclosed on the two acres of land because they "failed to attach the manufactured home to Plaintiffs['] two acres" because they did not comply with O.C.G.A. § 8-2-183.1.

Even if the cited statute affected Defendant's ability to foreclose on the manufactured home by virtue of its alleged failure to file a Certificate of Permanent Location (and it is not clear that it did), that statute did not affect or limit Defendant's power of sale of the two acres of land granted by Plaintiffs in the Security Deed to enforce its security interest in that property. Plaintiffs therefore failed to state a claim for wrongful foreclosure, breach of contract, and fraud where all of those claims rest on Plaintiffs' allegation that Defendant wrongfully foreclosed on the two acres of land because it allegedly failed to follow the procedures set forth in O.C.G.A. § 8-2-183.1 concerning manufactured homes.

Recommended that Plaintiffs' Complaint be dismissed.

CASE LAW

Foreclosure – Statutory violations

CASE NAME: *Flores v. OneWest Bank, F.S.B.*
DATE: *03/23/2018*
CITATION: *United States Court of Appeals, First Circuit. 886 F.3d 160*

The plaintiffs refinanced their home mortgage loan. In 2008, the plaintiffs defaulted on the mortgage.

On April 25, 2012, the plaintiffs applied for a loan modification from Indymac Mortgage Services, a division of OneWest Bank. On May 11, 2012, Indymac denied the plaintiffs' application. OneWest foreclosed and purchased the property at the foreclosure sale.

More than three years later, on November 15, 2015, the plaintiffs brought suit. The defendants moved to dismiss, and the District Court granted the motion. The plaintiffs appealed the dismissal of eight of their nine claims. Three claims sought a judgment declaring that the foreclosure sale was void. A fourth claim was for an action to quiet title. A fifth claim was for breach of the duty of good faith and reasonable diligence. The final three claims were brought under two different consumer protection statutes.

Plaintiffs sought a judgment declaring that the foreclosure sale was void, contending that the sale was void because the defendants violated the thirty-day notification requirement of Mass. Gen. Laws ch. 244, § 15A by notifying the municipal tax-collector of the foreclosure sale approximately eleven months after the sale had occurred. The Court found however, that the Massachusetts Appeals Court has held that a mortgagee's failure to provide notice under the requirements of § 15A does not render the foreclosure sale void under Massachusetts law. *Kiah v. Carpenter*, 89 Mass.App.Ct. 1113, 47 N.E.3d 53 (2016),

The Plaintiffs also alleged that the foreclosure sale was void because it was carried out in violation of Mass. Gen. Laws ch. 244, § 35A, which gives a mortgagor a ninety-day right to cure a payment default before foreclosure proceedings may be commenced, and paragraph twenty-two of the mortgage instrument, which concerns notice to the mortgagor of default, right to cure, and the remedies that are available to the mortgagee.

The claim that the sale was void because it was carried out in violation of § 35A failed because the Massachusetts Supreme Judicial Court ("SJC") held in *U.S. Bank Nat. Ass'n v. Schumacher*, 467 Mass. 421, 5 N.E.3d 882, 891 (2014) that an alleged violation of that statute does not void a foreclosure sale.

With reference to the claim that the sale was void because it was carried out in violation of paragraph twenty-two of the mortgage instrument, the plaintiffs point out that the SJC in *Pinti v. Emigrant Mortg. Co.*, 472 Mass. 226, 33 N.E.3d 1213, 1224 (2015) ruled that a sale carried out in violation of the very same provision of the mortgage instrument is void. But *Pinti* expressly provided that this ruling was to be given prospective effect only, and the foreclosure sale in this case took place before *Pinti*.

Because the Court found that the foreclosure sale was not void, plaintiffs did not have title to the property and, therefore could not bring a quiet title action.

The Court also agreed with the district court that the plaintiffs failed to point to any contract that required defendants to take the affirmative step of considering a loan modification and thus that there was no such duty.

Finally, the Court found that the plaintiffs' statutory consumer protections claims were filed too late to comply with the four-year statute of limitations that applies to such claims.

CASE LAW

Foreclosure – Statute of limitations

CASE NAME: *Lubonty v. U.S. Bank National Association*
DATE: *03/28/2018*
CITATION: *Supreme Court, Appellate Division, Second Department, New York. --- N.Y.S.3d ---- 159 A.D.3d 962. 2018 WL 1514082*

In 2005, the plaintiff obtained a loan from American Home Mortgage Acceptance, Inc. ("AHMA"), which was secured by a mortgage on his real property. The plaintiff defaulted on his mortgage payments, and on June 11, 2007, AHMA commenced an action to foreclose the mortgage. AHMA's action was subsequently dismissed as abandoned.

In May 2011, the mortgage and debt were transferred by assignment to U.S. Bank National Association, which commenced a second foreclosure action on June 9, 2011. The second action was dismissed in October 2014 for lack of personal jurisdiction.

In November 2014, the plaintiff commenced this action pursuant to N.Y. Real Prop. Acts. § 1501(4) to cancel and discharge of record the subject mortgage. The complaint alleged that enforcement of the mortgage was barred by the applicable six-year statute of limitations, which began to run on June 11, 2007, when AHMA accelerated the debt by commencing the first action to foreclose the mortgage. U.S. Bank moved to dismiss, contending that the plaintiff had filed a petition in bankruptcy shortly after the commencement of each foreclosure action, activating automatic stays which tolled the running of the statute of limitations. The trial court granted the motion. The Plaintiff appealed.

The appeals court found that the filing of a petition for protection under the Bankruptcy Code imposes an automatic stay of any mortgage foreclosure actions. N.Y. CPLR § 204(a) provides that "[w]here the commencement of an action has been stayed ... by statutory prohibition, the duration of the stay is not a part of the time within which the action must be commenced."

U.S. Bank submitted copies of the plaintiff's petitions filed in the Bankruptcy Court, together with copies of the orders dismissing the first bankruptcy proceeding and releasing the subject property from the bankruptcy estate in the second bankruptcy proceeding, thereby establishing that, pursuant to CPLR 204(a), the statute of limitations had been tolled for over 4½ years. Therefore, U.S. Bank's right to commence a foreclosure action in this matter was extended until December 2017.

Affirmed.

CASE LAW

Bankruptcy – Reaffirmation

CASE NAME: *In re Woide*
DATE: *04/05/2018*
CITATION: *United States Court of Appeals, Eleventh Circuit. --- Fed.Appx. ----. 2018 WL 1633550*

The Woides first filed a Chapter 13. Their schedules indicated that they intended to surrender their home. The Chapter 13 was converted into a Chapter 7. Although § 521(a)(2) of the Bankruptcy Code requires a Chapter 7 debtor to file a statement of intention indicating whether he or she intends to redeem secured property, reaffirm the debt it secures, or surrender the property, the Woides did not file one after conversion. The Woides left blank Schedules A and D, which relate to their personal property and secured creditors.

After discharge, the Woides did not reaffirm the debt owed to Fannie Mae or redeem the property. Instead, they continued to live in the property without making mortgage payments. Fannie Mae commenced a foreclosure action. The Woides defended the foreclosure action and brought other actions in state and federal court in order to keep the property and invalidate the note and mortgage on their home. Fannie Mae filed this motion to reopen the bankruptcy case to compel surrender of the property. After a hearing, the bankruptcy court granted the motion and issued its order reopening the case.

The Court of Appeals found that, under § 521(a)(2), after the case was converted into a Chapter 7 case, the Federal Rules of Bankruptcy Procedure provide that when a Chapter 13 case has been converted to a Chapter 7 case, "schedules[ ] and statements of financial affairs theretofore filed shall be deemed to be filed in the Chapter 7 case, unless the court directs otherwise." Because the Woides filed a schedule stating the intent to surrender their home in the Chapter 13 case and did not modify it in the amended schedules filed after conversion, the bankruptcy court was within its discretion to hold that the Woides had a duty to surrender the property.

In addition, case law is clear that § 521(a)(2) provides only three options for a debtor who has property that serves as collateral for his debts: redeem the property, reaffirm the debt, or surrender the property. Doing nothing is not an option. The bankruptcy court did not abuse its discretion by reopening the case to afford Fannie Mae relief.

Affirmed.

CASE LAW

Debt buyers – Debt collectors

CASE NAME: *Dorrian v. LVNV Funding, LLC*
DATE: *04/09/2018*
CITATION: *Supreme Judicial Court of Massachusetts, Suffolk. 479 Mass. 265 94 N.E.3d 370*

Two judgment debtors brought separate actions, on behalf of themselves and others similarly situated, against the judgment creditor, a passive debt buyer, seeking declaratory and injunctive relief, and asserting a claim for unjust enrichment. The debtors alleged that the creditor had been operating as a debt collector without a license. The actions were consolidated. The Superior Court certified the cases as a class action and granted summary judgment to debtors. The creditor's application for direct appellate review was granted.

The appeals court concluded that LVNV is not a debt collector under Mass. Gen. Laws ch. 93, § 24.4. The statute contains two separate definitions of "debt collector," neither of which applies to LVNV, a "passive debt buyer," which is a company that buys debt for investment purposes and then hires licensed debt collectors or attorneys to collect the debt on its behalf. The first definition covers entities of which the "principal purpose" is the "collection of a debt." The Court

concluded that this definition does not apply to LVNV because LVNV has no contact with consumers and the Legislature did not intend for these entities to be treated as debt collectors. The second definition covers entities that "regularly collect[ ] or attempt[ ] to collect, directly or indirectly, debts owed or due" to another. This definition does not apply because LVNV deals only with its own debts, not the debts of another. Because LVNV does not meet either definition, it is not a debt collector under Mass. Gen. Laws ch. 93, § 24. The Court therefore vacated the judgment and remanded the matter to the Superior Court for further proceedings consistent with this opinion.

CASE LAW

Foreclosure – FDCPA

CASE NAME: *Bushlow v. MTC Financial*
DATE: *04/11/2018*
CITATION: *United States District Court, N.D. California. Slip Copy. 2018 WL 1745803*

Bushlow and Catherine Hall executed a promissory note and deed of trust to purchase a mobile home. Bushlow claimed that in the years that followed a cast of corporate characters purported to take interests in the deed of trust, but that the various substitutions and assignments were for one reason or another invalid. Some of Bushlow's allegations on this point were general and conclusory: other allegations were more specific.

Bushlow's complaint included a list of twelve separate FDCPA violations allegedly committed by MTC Financial dba Trustee Corps.

Eight violations concerned 15 U.S.C. § 1692e, which prohibits false or misleading representations by debt collectors. Three violations fell under 15 U.S.C. § 1692f(6), which prohibits certain unfair practices by debt collectors engaged in the enforcement of security interests. And one violation fell under 15 U.S.C. § 1692g, which concerns validation of disputed debts. Trustee Corps moved to dismiss.

The Court advised that it could not tell whether the claim was timely, but, in the end, the Court did not need to reach the question because there were other defects in the complaint that were dispositive of Bushlow's remaining claims.

According to the Court, the FDCPA's "general" definition of debt collector does not include the trustee of a deed of trust, but the act's "narrower" definition of debt collector does apply to a trustee when it acts to advance the foreclosure process. As a result, a trustee can be liable under the FDCPA if it acts in violation of § 1692(f), i.e., "there is no present right to possession of the property"; "no present intention to take possession"; or "the property is exempt by law from such dispossession or disablement."

To the extent that Bushlow's claims depended on categorizing Trustee Corps as falling under the "general" definition of debt collector, those claims were dismissed without leave to amend.

The Court also found that Bushlow did not allege enough facts to state a plausible claim that Trustee Corps enforced a security interest in violation of § 1692f(6). For starters, many of his allegations were too conclusory to survive a motion to dismiss. But even the more specific allegations failed to state a claim for relief that was plausible. For instance, Bushlow alleged that a 2012 assignment to Bank of America was void for lack of consideration, but he failed to explain why he believed that to be the case. Similarly, he claimed that a signature on the Bank of America assignment was a forgery, but gave no indication of how he reached that conclusion.

The Court therefore dismissed Bushlow's FDCPA claims concerning the trustee's sale but granted Bushlow leave to amend as to those claims.

CASE LAW

Equitable lien

CASE NAME: *Vanderbilt Mortgage and Finance, Inc. v. Bull*
DATE: *04/11/2018*
CITATION: *Court of Appeals of South Carolina. Not Reported in S.E.2d. 2018 WL 1747954*

Ashton C. Bull and Linda Bull appealed a special referee's order granting a motion for summary judgment, arguing the special referee erred by (1) granting Vanderbilt Mortgage and Finance, Inc. an equitable lien on the subject property when no property was legally attached to the mortgage, (2) finding an equitable mortgage existed when the property had no certificate of title, (3) unlawfully placing a lien on an untitled mobile home, and (4) ruling on the validity of the mortgage prior to a jury trial on the Bulls' counterclaims.

The appeals court affirmed, citing the following authorities:

As to whether the special referee erred in finding an equitable mortgage on the property and whether the special referee unlawfully placed a lien on an untitled mobile home: S.C. Code Ann. § 56-19-210 (2018) ("It shall be unlawful for any person to sell or offer for sale or mortgage in this State any vehicle of a type required to be registered and licensed in this State, or any mobile home, unless a certificate of title has been issued therefor and is currently valid ...."); First Fed. Sav. & Loan Ass'n v. Bailey, 316 S.C. 350, 356, 450 S.E.2d 77, 80 (Ct. App. 1994) ("In equity, to charge property means to impose a burden, duty, obligation or lien; to create a claim against the property."); Walker v. Brooks, 414 S.C. 343, 347, 778 S.E.2d 477, 479 (2015) ("[A]n equitable mortgage is a transaction that has the intent but not the form of a mortgage which a court will enforce in equity to the same extent as a mortgage."); First Fed. Sav. & Loan Ass'n, 316 S.C. at 356, 450 S.E.2d at 80 ("A lien is not property in the thing to which it attaches, but more properly constitutes a charge upon the thing."); id. ("Unlike a mortgage, an 'equitable lien or charge' is neither an estate [n]or property in the thing itself, but is simply a right of a special nature over the thing, which constitutes a charge or encumbrance upon it, so that the very thing itself may be proceeded against in equity for payment of a claim or debt.").

As to whether the special referee erred in ruling on the validity of the mortgage prior to a jury trial on Bull's counterclaims: Goddard v. Fairways Dev. Gen. P'ship, 310 S.C. 408, 417, 426 S.E.2d 828, 833 (Ct. App. 1993) ("[A]n order of reference which deprives a party of a mode of trial to which he is entitled as a matter of right is immediately appealable."); First Union Nat. Bank of S.C. v. Soden, 333 S.C. 554, 565, 511 S.E.2d 372, 377 (Ct. App. 1998) ("The failure to immediately appeal an order affecting the mode of trial effects a waiver of the right to appeal that issue."); see also Edwards v. Timmons, 297 S.C. 314, 316, 377 S.E.2d 97, 97 (1988) (finding appellant could not complain after final order that she was deprived of her right to a jury trial because she did not appeal the order referring the matter to the master in equity); Creed v. Stokes, 285 S.C. 542, 542-43, 331 S.E.2d 351, 352 (1985) (finding appellant could not later complain that he had been entitled to a jury trial when appellant failed to timely appeal an order referring the dispute to a master in equity).

CASE LAW

Bankruptcy – Statement of intention

CASE NAME: *In re Templin*
DATE: *04/17/2018*
CITATION: *United States Bankruptcy Court, D. New Mexico. Slip Copy. 2018 WL 1864928*

Debtor financed the purchase of a mobile home with a loan from 21st Mortgage with a retail installment contract. The contract did not contain an ipso facto clause.

Debtor filed chapter 7 and filed a statement of intent, which contained the following statement about the mobile home and 21st Mortgage's purchase money loan:

"[Debtor will] Retain the property and ... will continue making payments to creditor without reaffirming."

21st Mortgage Corporation moved that the Court order Debtor to comply with his obligations under § 521(a)(2) and (6) of the Bankruptcy Code, and to delay entry of the bankruptcy discharge until he did.

Section 521(a)(2)(A) requires a debtor, within 30 days after his petition date, to file a statement of his intention with respect to the retention or surrender of property and, if applicable, specifying that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property.

Section 521(a)(6) requires that the debtor "not retain" encumbered property securing a purchase money loan unless, within 45 days after the § 341 meeting, the debtor either redeems or reaffirms.

Section 362(h), added by BAPCPA, makes clear that if a debtor violates § 521(a)(2), the automatic stay will be lifted and the subject personal property will be abandoned from the bankruptcy estate.

A second provision added by BAPCPA comes after § 521(a)(7), but is not numbered, lettered, or labeled. This so-called "hanging paragraph" provides that if the debtor fails to so act, the stay under section 362(a) is terminated with respect to the personal property, such property shall no longer be property of the estate, and the creditor may take whatever action as to such property as is permitted by applicable nonbankruptcy law.

Section 521(d) provides that, after the stay has been lifted and the property abandoned from the bankruptcy estate, the secured creditor can enforce an ipso facto clause to the extent enforceable under applicable nonbankruptcy law. Such enforcement would prevent a debtor from successfully opting to "retain and pay" for the collateral. This enforcement mechanism is only available, however, to creditors who have included ipso facto clauses in their security agreements.

Further, based on the language of § 727(a) and Bankruptcy Rule 4004(c), the Court concluded that Debtor's failure to comply with § 521(2)(a) was not grounds to delay entry of the discharge order.

Motion denied.

CASE LAW

Bankruptcy – Bifurcation

CASE NAME: *In re Bennett*
DATE: *04/19/2018*
CITATION: *United States Bankruptcy Appellate Panel of the Eighth Circuit. --- B.R. ----. 2018 WL 1867771*

The Paddock is in the business of installing, renting and selling manufactured homes in a planned neighborhood that it owns. The Bennetts rented a home previously installed by The Paddock. A few years later, The Paddock financed the Bennetts' purchase of that home through an installment sale contract. At the same time the parties entered into a ground lease for the lot underneath the home. Personal property taxes were paid by the Bennetts. The Paddock paid real estate taxes on the land.

The Bennetts filed chapter 13. Their proposed plan treated The Paddock's claim as partially secured and partially unsecured as provided for under 11 U.S.C. § 1322(b)(2). The Paddock objected, arguing that it held a security interest in real property that was the debtor's principal residence and was, therefore, protected from bifurcation of its claim. The bankruptcy court concluded that the Bennetts' home was not real property under Iowa law, overruled The Paddock's objection and confirmed the Bennetts' chapter 13 plan. The Paddock appealed.

According to the Court, in order for the anti-modification provision of 1322(b)(2) to apply, The Paddock's claim had to be both secured only by an interest 'in real property' and further, that the real property must be the 'debtor's principal residence.'

There was no dispute that the manufactured home was the principal residence of the debtors. The only dispute was whether that home was real property or personal property. That was an issue to be determined under the laws of the state of Iowa, which was where the home was located.

Iowa common law recognizes that personal property may become a fixture and be considered real property. Three factors are applied to evaluate whether a property is a fixture: (1) it is actually annexed to the realty or to something appurtenant thereto; (2) it is put to the same use as the realty with which it is connected; and (3) the party making the annexation intends to make a permanent accession to the freehold.

The Bennetts contended that their home was not installed on a permanent foundation. Mr. Bennett testified that there was no cement foundation behind the plastic skirting that surrounded the home. There was a crawl space underneath the home along with piers and blocks that required maintenance to address the sinking and shifting of the home in order to keep it level.

Due to Mr. Bennett's personal knowledge of the home, and the manner in which it was installed, the bankruptcy court specifically found his testimony to be more credible than the testimony of The Paddock's representative. The Court found no reason to disturb that finding.

In addition, the installment sales contract provided that upon full payment of the purchase price a bill of sale (which is how personal property title is passed) would be issued to the Bennetts. The lease agreement stated: "The Home and any other improvements covered under the Financing Documents may not be removed from the Home Site without the prior written permission of the Secured Lender," but that prohibition was limited. Once the secured loan was paid or refinanced, nothing in the documents prohibited removal of the home. Further, while the Paddock points to the length of the lease as evidence of its intent to treat the manufactured home as a fixture of the underlying realty, the lease could be terminated on 60 days' notice. Other than removal while money is owed to The Paddock, the documents contained no other restrictions that pose any impediments to removing the home from the community.

Affirmed.

CASE LAW

Usury – Purchase money

CASE NAME: *Nolden v. Summit Financial Corporation*
DATE: *04/25/2018*
CITATION: *District Court of Appeal of Florida, Fourth District. --- So.3d ----. 2018 WL 1956339*

Nolden sued Summit Financial Corporation and two of its employees and Holcombe, USA, Inc. (d/b/a AutoShow Sales and Service) related to the purchase of a 2004 Pontiac Grand Prix from AutoShow and the repossession of the car in 2013 by Summit. The buyer sued both Summit Financial and AutoShow for criminal usury and for violations under Chapter 772, Florida Statutes (2009), the Civil Remedies for Criminal Practices Act. § 772.101, Fla. Stat. (2009).

The trial court granted Summit Financial's motion for summary judgment. Nolden appealed.

The Court found that the trial court's finding that the contract was a retail installment sales contract was supported by the title of the document, the language of the document, the terms of the document, the characteristics of the parties, and the conduct of the parties. Therefore, the legal rate of interest for this transaction was set forth in the Motor Vehicle Retail Sales Finance Act, Chapter 520, Florida Statutes, rather

than the interest set forth in the usury statute, Chapter 687, Florida Statutes. (Chapter 520 applies to an installment sale of a manufactured home). Under the rules of statutory construction, the more specific statute controls over the general usury statute.

The Court also found that the defendants were also entitled to entry of summary judgment because the transaction in this case was not a "loan" under the usury statute. The usury statute expressly applies only to contracts for the payment of interest upon any loan, advance of money, line of credit, or forbearance to enforce the collection of a debt. Florida courts have repeatedly held that contracts to secure the price of property sold are not governed by general usury laws.

Affirmed.

LEGISLATION

Oklahoma

Convenience fees

2017 OK S 1151. Enacted 4/25/2018. Effective 11/1/2018.

This bill adds Okla. Stat. tit. 14A, § 3-508C to provide that, in addition to loan finance charges, a lender may contract for and receive a convenience fee from any borrower making his or her payment by debit card, electronic funds transfer, electronic check or other electronic means in order to offset the costs incurred by a lender for accepting and processing payments by electronic means, not to exceed the actual cost or 4% of the electronic payment transaction, whichever is less.

Any lender charging a convenience fee pursuant to this section shall notify the customer of the amount of the fee prior to completing an electronic payment transaction, and shall provide the customer an opportunity to cancel the transaction without incurring a fee. A lender shall make available the option to make payments on a loan by check, cash or money order directly to the lender without the imposition of a convenience fee or by various types of electronic payment transactions with any convenience fee fully disclosed either in the loan contract or at the time of the transaction.

The payment of the convenience fee shall not be refundable.

ADOPTED RULE

Oregon

Mortgage servicing

Effective 4/17/2018, this rule adds Or. Admin. R. 441-850-0005, 441-890-0005, 441-890-0010, 441-890-0015, 441-890-0020, 441-890-0025, 441-890-0030, 441- 890-0035, 441-890-0040, 441-890-0045, 441-890-0050, 441-890-0055, 441-890-0060, 441-890-0065, 441-890- 0070 re: the licensing of mortgage loan servicers to set application requirements for obtaining a license, requirements for corporate surety bonds and irrevocable letters of credit, and application and renewal fees, and to clarify which entities are exempt from the licensing requirement.

The rule amends Or. Admin. R. 441-850-0005 to set definitions for mortgage lending and mortgage servicing regulations contained in chapters 850 to 890.

The rule adds the definition of "Contract or agreement for servicing the residential mortgage loan" as used under section 2(12)(b) of 2017 Or Laws ch 636 to mean an agreement for the ongoing servicing of a loan and does not include one-time transfers of funds such as those associated with the origination or closing of a loan.

The rule clarifies the definition of "originates" as it related to the small servicer exemption under the MLSPA as providing a service involved in the creation of a residential mortgage loan, including but not limited to the taking of the loan application, loan processing, the underwriting and funding of the loan, and the processing

and administrative services required to perform these functions. The rule also defines "liquidity," "tangible net worth," and "NMLS call report."

New Or. Admin. R. 441-890-0005 sets application requirements for a mortgage servicer license. The rule requires that license applicants submit loan portfolio data in the form of a mortgage call report.

Or. Admin. R. 441-890-0010 clarifies the biographical information that needs to be included in a license application.

Or. Admin. R. 441-890-0015 sets procedures for handling an incomplete license application.

Or. Admin. R. 441-890-0020 requires that mortgage servicers obtain a license in order to open a branch office.

Or. Admin. R. 441-890-0025 sets procedures for renewing a license.

Or. Admin. R. 441-890-0030 sets liquidity, operating reserves, and tangible net worth requirements.

Or. Admin. R. 441-890-0035 sets requirements for obtaining a corporate surety bond or irrevocable letter of credit.

Or. Admin. R. 441-890-0040 sets license application fees.

Or. Admin. R. 441-890-0045 sets examination charges.

Or. Admin. R. 441-890-0050 sets rules for use of assumed business names

Or. Admin. R. 441-890-0055 sets financial responsibility criteria for individuals.

Or. Admin. R. 441-890-0060 clarifies that a preexisting duty to service a mortgage loan is not affected by a servicer's failure to obtain and maintain a license.

Or. Admin. R. 441-890-0065 exempts certain entities from obtaining a mortgage servicer license. It clarifies how a person may qualify for the small servicer exemption. It also exempts escrow agents operating a collection escrow and money transmitters.

Or. Admin. R. 441-890-0070 provides model language for disclosing that consumer complaints may be submitted to DCBS.

FAQ

CFPB

Mortgage servicing

The questions and answers below pertain to compliance with Regulation X and Regulation Z, effective April 19, 2018. These questions and answers are not a substitute for Regulation X, Regulation Z, or their official interpretations (also known as the commentary). Regulation X, Regulation Z, and their official interpretations are the definitive sources of information regarding their requirements.

Bankruptcy Periodic Statements

NOTE: For certain borrowers in bankruptcy, servicers are exempt from sending periodic statements. For other borrowers in bankruptcy, servicers are not exempt from sending periodic statements, but instead are required to send modified periodic statements. Additionally, in certain circumstances, a servicer may be required to resume sending unmodified periodic statements after a borrower's bankruptcy case has completed. To determine if a servicer is required to send modified periodic statements to a borrower in bankruptcy, please review Regulation Z, §1026.41(e) and (f).

QUESTION 1:

Are payments that came from a trustee included in the transaction activity on the modified periodic statement?

ANSWER (UPDATED 3/20/2018) :

Yes. Regulation Z, §1026.41(f)(3)(iv) requires servicers to disclose in the transaction activity on the modified periodic statement all payments the servicer has received since the last statement. These payments include all pre-petition payments, post-petition payments, and payments of post-petition fees and charges, as well as all post-petition fees and charges the servicer has imposed since the last statement.

There can be a delay between when a trustee receives a payment from a borrower and when the trustee remits that payment to a servicer. Because the transaction activity need include only those payments that a servicer has received, it would not need to include payments a borrower has sent to a trustee but that the servicer has not yet received from the trustee. Additionally, the trustee may allocate payments differently than the servicer, which also may cause the periodic statement to disclose transaction activity that is different than the trustee's records. For this reason, §1026.41(f)(3)(vi)(C) and (D) require disclosures explaining that the periodic statement may not match the trustee's records when a borrower makes payments to a trustee.

For general information about the modifications to the periodic statement when a borrower is in bankruptcy, see section 5.10 of the Mortgage Servicing Small Entity Compliance Guide and Regulation Z, §1026.41(f).

QUESTION 2:

Does a servicer receive a safe harbor under the Bankruptcy Code by sending periodic statements in compliance with the Bureau's rules?

ANSWER (UPDATED 3/20/2018) :

A servicer does not receive a safe harbor under the Bankruptcy Code by sending periodic statements to a borrower in bankruptcy in compliance with Regulation Z, §1026.41(e) and (f). The Bureau does not have authority to create safe harbors under the Bankruptcy Code. However, in crafting the final rule, the Bureau examined bankruptcy case law and engaged in significant outreach with servicers, bankruptcy attorneys, bankruptcy trustees, and consumer advocates regarding when sending a periodic statement would be permissible under the Bankruptcy Code.

Based on this research and outreach, the Bureau does not believe that a servicer is likely to violate the automatic stay by providing a periodic statement in circumstances required by §1026.41(a) and (e) that contains the information required by §1026.41(c) and (d) as modified for bankruptcy by §1026.41(f). Nor does the Bureau believe that an automatic stay violation is likely when a servicer properly uses one of the sample forms in appendices H-30(E) or H-30(F). The Bureau has tailored §1026.41(e)(5) to avoid requiring a servicer to send a periodic statement in circumstances when case law suggests that doing so would violate the automatic stay.

For general information about the modifications to the periodic statement when a borrower is in bankruptcy, see section 5.10 of the Mortgage Servicing Small Entity Compliance Guide and Regulation Z, §1026.41(f).

QUESTION 3:

If a borrower in bankruptcy is represented by counsel, to whom should the periodic statement be sent?

ANSWER (UPDATED 3/20/2018) :

In general, the periodic statement should be sent to the borrower. However, if bankruptcy law or other law prevents the servicer from communicating directly with the borrower, the periodic statement may be sent to borrower's counsel.

Bankruptcy Coupon Books

NOTE: For certain borrowers in bankruptcy, servicers are exempt from sending coupon books. For other borrowers in bankruptcy, servicers that send coupon books in accordance with Regulation Z, §1026.41(e)(3) are required to send modified coupon books. Additionally, in certain circumstances, a servicer may be required to

resume sending unmodified coupon books after a borrower's bankruptcy case has completed. To determine if a servicer is required to send modified coupon books to a borrower in bankruptcy, please review Regulation Z, §1026.41(e) and (f).

QUESTION 1:

Does a servicer have to send a new coupon book immediately upon learning that a borrower enters bankruptcy, or can a servicer continue to send coupon books on its normal schedule (e.g., annually)?

ANSWER (UPDATED 3/20/2018) :

A servicer is not required to change its schedule for sending coupon books due to a borrower's bankruptcy filing. For example, a servicer who ordinarily provides a borrower with a 12-month coupon book in January of each year may continue to send 12-month coupon books in January of each year for the duration of a borrower's bankruptcy case.

A servicer must provide a new coupon book after one of the events listed in §1026.41(e)(5)(iv)(A) occurs only to the extent the servicer has not previously provided the consumer with a coupon book that covers the upcoming billing cycle.

For general information about the modifications to the coupon book when a borrower is in bankruptcy, see section 5.10 of the Mortgage Servicing Small Entity Compliance Guide and Regulation Z, §1026.41(f).

QUESTION 2:

For borrowers in chapter 12 or chapter 13 bankruptcy that are more than 45 days delinquent, does the disclosure statement required due to the delinquency require sending a new coupon book?

ANSWER (UPDATED 3/20/2018) :

A servicer is not required to change its schedule for sending coupon books due to a borrower in chapter 12 or chapter 13 bankruptcy becoming more than 45 days delinquent on post-petition payments. For example, a servicer who ordinarily provides a borrower with a 12-month coupon book in January of each year may continue to send 12-month coupon books in January of each year for the duration of a borrower's chapter 12 or chapter 13 bankruptcy case.

A servicer must provide a new coupon book after one of the events listed in §1026.41(e)(5)(iv)(A) occurs only to the extent the servicer has not previously provided the consumer with a coupon book that covers the upcoming billing cycle.

For general information about the modifications to the coupon book when a borrower is in bankruptcy, see section 5.10 of the Mortgage Servicing Small Entity Compliance Guide and Regulation Z, §1026.41(f).

QUESTION 3:

For borrowers in chapter 12 or chapter 13 bankruptcy, does the coupon book itself need to contain the disclosure statement that is required if the borrower is more than 45 days delinquent on post-petition payments?

ANSWER (UPDATED 3/20/2018) :

Yes, but only if the borrower is 45 days delinquent on post-petition payments when the servicer is providing a new coupon book to the borrower. Regulation Z, §1026.41(f)(5) requires that a coupon book provided under §1026.41(e)(3) must include, among other things, the disclosure described in §1026.41(f)(3)(vi)(E). That provision requires that, if a borrower is more than 45 days delinquent on post-petition payments, the servicer must provide a statement that the servicer has not received all the payments that became due since the consumer filed for bankruptcy.

The servicer may include these disclosures anywhere in the coupon book provided to the borrower or on a separate page enclosed with the coupon book.

For general information about the modifications to the coupon book when a borrower is in bankruptcy, see section 5.10 of the Mortgage Servicing Small Entity Compliance Guide and Regulation Z, §1026.41(f).

Bankruptcy Reaffirmation

QUESTION 1:

Can a borrower's reaffirmation of personal liability for the mortgage loan affect whether a servicer is exempt from the periodic statement requirements?

ANSWER (UPDATED 3/20/2018) :

Yes. Regulation Z, §1026.41(e)(5)(ii) provides that the bankruptcy exemption for providing periodic statements and coupon books ceases to apply if the borrower reaffirms personal liability for the loan. For purposes of the modified periodic statement requirements in §1026.41(f), Comment 41(f)-6 explains that a consumer who has reaffirmed personal liability for the loan is not considered a debtor in bankruptcy.

Regulation Z, Comment 41(e)(5)(ii)-2 explains that, upon a consumer's reaffirmation, the servicer must provide a periodic statement or coupon book but without the bankruptcy-specific modifications described in §1026.41(f).

For general information about the exemption and modifications to the periodic statement or coupon book when a borrower is in bankruptcy, see section 5.10 of the Mortgage Servicing Small Entity Compliance Guide.

Bankruptcy Successors in Interest

QUESTION 1:

Do servicers have a responsibility to know if a confirmed successor in interest is in bankruptcy for purposes of complying with the early intervention and periodic statement requirements?

ANSWER (UPDATED 3/20/2018) :

Yes. Under Regulation X, §1024.30(d) and Regulation Z, §1026.2(a)(11), confirmed successors in interest are considered "borrowers" for purposes of the early intervention requirements and "consumers" for purposes of the periodic statement provisions. Because confirmed successors in interest are considered to be "borrowers" and "consumers" for the relevant parts of Regulation X and Regulation Z, servicers need to know whether confirmed successors in interest are in bankruptcy and may want to include them in any normal checks they utilize to identify borrowers in bankruptcy.

QUESTION 2:

Do the modifications to the periodic statement required for borrowers in bankruptcy apply if the borrower is a confirmed successor in interest in bankruptcy?

ANSWER (UPDATED 3/20/2018) :

Yes. Under Regulation Z, §1026.2(a)(11), confirmed successors in interest are borrowers for purposes of the periodic statement provisions, and so the periodic statement modification requirements for borrowers in bankruptcy in §1026.41(f) would apply to the periodic statements supplied to that confirmed successor in interest in bankruptcy.

For general information about the modifications to the periodic statement or coupon book when a borrower is in bankruptcy, see section 5.10 of the Mortgage Servicing Small Entity Compliance Guide.

Bankruptcy Provisions Effective Date

QUESTION 1:

How does a servicer comply with the new bankruptcy periodic statement rules under Regulation Z, §1026.41(e)(5) and (f) if a borrower became a debtor in bankruptcy prior to April 19, 2018, and a statement is required starting on or after April 19, 2018?

ANSWER (UPDATED 3/20/2018) :

The servicer must send modified periodic statements as required under Regulation Z, §1026.41(f) on or after April 19, 2018 unless, as of April 19, 2018, any exemption applies. Section 1026.41(e)(5) includes new provisions that exempt a servicer from providing a statement to a borrower in bankruptcy. These new requirements and exemption provisions apply to a mortgage loan as of April 19, 2018, irrespective of whether the borrower became a debtor in bankruptcy before or after April 19, 2018. Note that a servicer may begin providing periodic statements to borrowers in bankruptcy prior to April 19, 2018, but as of that date, the servicer must comply with all of the new requirements under the rule. For more information on early compliance, see the Bureau's June 27, 2017 Policy Guidance.

For general information about the modifications to the periodic statement when a borrower is in bankruptcy, see section 5.10 of the Mortgage Servicing Small Entity Compliance Guide and Regulation Z, §1026.41(f).

INSTALLATION

EXECUTIVE ORDER
California
Suspension of regulations

EXECUTIVE ORDER B-50-18. CA A 4 2018. Ordered 4/13/2018. Effective immediately.

This order relates to states of emergency proclaimed for Los Angeles, San Diego, Santa Barbara and Ventura counties.

IT IS HEREBY ORDERED THAT:

1. State statutes, rules, regulations and requirements set forth in the Mobilehome Parks Act (Health and Safety Code section 18200 et seq., and California Code of Regulations, title 25, section 1000 et seq.), and the Special Occupancy Parks Act (Health and Safety Code section 18860 et seq., and California Code of Regulations, title 25, section 2000 et seq.), are suspended, as these laws pertain to disaster survivors in the impacted counties, for three (3) years after the date of this Executive Order in order to quickly provide housing for those displaced by the wildfires and subsequent mud and debris flows.

2. The Department of Housing and Community Development and local enforcement agencies, including those with delegated disaster authority, will jointly develop permitting, operating, and construction standards to maintain reasonable health and safety standards for the disaster survivors, the residents and the surrounding communities in the impacted areas. Such standards shall provide reasonable consistency with appropriate fire, health, flood, and other factors normally considered in the mobilehome or special occupancy park approval process for the construction of a new park or manufactured home installation standards during the three-year suspension authorized by this Executive Order.

3. All fees assessed by the state and local enforcement agencies that are authorized by the Mobilehome Parks Act, as required by Health and Safety Code section 18500 et seq., and the Special Occupancy Parks Act section 18870 et seq., are suspended and shall be waived by the Department of Housing and Community Development for three (3) years after the date of this Executive Order with regard to manufactured home installation and recreational vehicle use for disaster survivors who are owners or occupants of a manufactured home or mobilehome, or recreational vehicle, whose homes were damaged or destroyed as a result of the wildfires and subsequent mud and debris flows located in the impacted counties.

4. All fees assessed by the state and local enforcement agencies that are authorized by the Mobilehome Parks Act as required by Health and Safety Code section 18503 and California Code of Regulations, title 25, section 1020.1, are suspended and shall be waived by the Department of Housing and Community Development,

including fees for any required inspections or plan checking, for any disaster survivor who is an owner or occupant of a manufactured home or mobilehome whose home was damaged or destroyed as a result of the wildfires and subsequent mud and debris flows located in the impacted counties.

5. All fees assessed by the state and local enforcement agencies that are authorized by the Manufactured Housing Act (Health and Safety Code section 18000 et seq., and California Code of Regulations, title 25, section 4000 et seq.), as required by Health and Safety Code section 18031 and California Code of Regulations, title 25, section 4044, are suspended and shall be waived by the Department of Housing and Community Development, including fees for any required inspections or plan checking, for any owner or occupant of a manufactured home or mobilehome whose home was damaged or destroyed as a result of the wildfires and subsequent mud and debris flows located in the impacted counties.

6. All fees assessed by the state and local enforcement agencies that are authorized by the Manufactured Housing Act, as described in Health and Safety Code sections 18075, 18114, and 18116, are suspended and fees shall be waived by the Department of Housing and Community Development, including any fees for the late renewal of registration certificate or certificate of title for a manufactured home or mobilehome, by any owner or occupant that is a disaster survivor and whose home was damaged or destroyed as a result of the wildfires and subsequent mud and debris flows located in the impacted counties.

7. All fees assessed by the state and local enforcement agencies that are authorized by the Manufactured Housing Act, as set forth at Health and Safety Code section 18075 and chapter 5 (commencing with section 5510) of the California Code of Regulations, title 25, related to establishing proof of ownership, are suspended and shall be waived for any mobilehome or manufactured home resident whose home was damaged or destroyed by the identified wildfires and subsequent mud and debris flows located in the impacted counties for three (3) years of the date of this Executive Order. This waiver shall include, but not be limited to, processing fees for duplicate certificates of title or registrations, salvage applications and salvage certificates, the processing fees and costs for establishing registered ownership pursuant to article 3.5 (commencing with section 5535) of the California Code of Regulations, title 25, and other related fees.

8. The planning and zoning requirements in Government Code sections 65852.3 through 65860, sections 65861 and 65862, and sections 65863.4 through 65863.6, as applicable to housing projects in the impacted counties, are suspended for three (3) years after the date of this Executive Order, for recreational vehicles, mobilehomes and manufactured homes and mobilehome and special occupancy parks damaged or destroyed as a result of the wildfires and subsequent mud and debris flows.

9. Any local government zoning and land use ordinances in the impacted counties, as authorized by the state statutes and regulations suspended by paragraphs 1 and 8 of this Executive Order, that would preclude the placement and use of a manufactured home, mobilehome, or recreational vehicle on a private lot outside of a mobilehome park or special occupancy park for use during the reconstruction or repair of a home damaged or destroyed by the wildfires or subsequent floods and debris flows, are suspended for three (3) years after the date of this Executive Order for the individuals impacted by those events. Those individuals placing manufactured homes, mobilehomes, or recreational vehicles on lots pursuant to this paragraph shall obtain permits as described in paragraph 2.

10. The provisions of Penal Code section 396, subdivisions (b) and (c), prohibiting price gouging in time of emergency, will remain in effect until December 4, 2018 in Santa Barbara and Ventura Counties. The time period limitations under these subdivisions are hereby waived.

ADOPTED RULE
Florida
Towing - Length

Effective 4/24/2018, this rule amends Fla. Admin. Code Ann. r. 14-26.012 to increase permitted total length of towed manufactured homes from 108 to 120 feet.

LENDING

LEGISLATION
Alabama
Home buyer savings accounts

2018 AL H 248. Enacted 3/28/2018. Effective immediately.

This bill enacts the "Alabama First-time and Second Chance Home Buyer Savings Account Act."

The bill defines “FIRST-TIME AND SECOND CHANCE HOME BUYER” as an individual who resides in Alabama and has not owned or purchased, either individually or jointly, a single-family residence during a period of ten years prior to the date of the purchase of a single-family residence.

A “FIRST-TIME HOME BUYER SAVINGS ACCOUNT or ACCOUNT” is an account with a financial institution created for the purpose of payment or reimbursement of eligible costs for the purchase of a single-family residence in Alabama by a first-time and second chance home buyer and designated by the financial institution upon its creation as a first-time and second chance home buyer savings account.

“SINGLE-FAMILY RESIDENCE” means a single-family residence owned and occupied by a first-time and second chance home buyer as the first-time and second chance home buyer's principal residence, which may also include a manufactured home, trailer, mobile home, condominium unit, or cooperative.

Beginning January 1, 2019, a first-time and second chance home buyer may open an account with a financial institution designated in its entirety by the financial institution as a first-time and second chance home buyer savings account.

Funds from a first-time and second chance home buyer savings account may be used only to pay a first-time and second chance home buyer's eligible costs for the purchase of a single-family residence in Alabama.

A first-time and second chance home buyer savings account holder shall be entitled to a state tax deduction, subject to the limitations of this section, not to exceed five thousand dollars ($5,000) for an account holder who files an individual tax return or ten thousand dollars ($10,000) for joint account holders who file a joint tax return, for contributions made by the account holder to a first-time and second chance home buyer savings account during the tax year in which the deduction is claimed.

An account holder may claim the deduction and exclusion under this section as follows:

(1) For a period not to exceed five years.

(2) For an aggregate total amount of principal and earnings not to exceed twenty-five thousand dollars ($25,000) for individual accounts and fifty thousand dollars ($50,000) for joint accounts during the five-year period.

(3) Only if the principal and earnings of the account remain in the account until a withdrawal is made for eligible costs related to the purchase of a single-family residence by a first-time and second chance home buyer.

(d) A person other than the account holder who deposits funds in a first-time and second chance home buyer savings account shall not be entitled to the deduction and exclusion provided under this act.

(e) Any funds in a first-time and second chance home buyer savings account not expended on eligible costs by December 31 of the last year of the five-year period beginning with January 1 of the tax year in which a deduction was first claimed under subsection (a) shall thereafter be included in the account holder's taxable income.

The funds in the first-time and second chance home buyer savings account shall not be used to purchase a single-family residence outside of this state.

The provisions of this section shall terminate five years from the effective date of this act for first-time and second chance home buyer savings account holders not currently claiming the deduction and exclusion under this section, unless extended by an act of the Legislature.

LEGISLATION
Iowa
Manufactured housing program fund

2017 IA H 2480. Enacted 4/17/2018. Effective 7/1/2018.

This bill adds Iowa Code § 16.45 to create a manufactured housing program fund. The monies in the fund are to be used for the purpose of providing funding to financial institutions or other lenders to finance the purchase by an individual of a manufactured home that is in compliance with all laws, rules, and standards that are applicable to manufactured homes and manufactured housing. The manufactured housing program fund is designed exclusively for manufactured homes sited on leased land.

The Iowa Finance Authority shall allocate monies available in the manufactured housing program fund to financial institutions or other lenders. The authority may provide funding to financial institutions or other lenders in the form of loans, linked deposits, guarantees, reserve funds, or any other prudent financial instruments.

The authority shall adopt rules pursuant to chapter 17A necessary to implement and administer this section, including but not limited to eligibility requirements for financial institutions or other lenders to receive funding through the manufactured housing program fund.

For purposes of this section, "financial institutions" means the same as defined in section 12C.1, "lender" means a lender as defined in section 537.1301 that is licensed by the Banking Division of the Department of Commerce, and "manufactured home" or "manufactured housing" means the same as the definition of manufactured home in section 435.1.

PRESS RELEASE
New Jersey
Consumer protection

Issued 3/27/2018.

New Jersey Attorney General Gurbir S. Grewal announced that Governor Murphy will nominate Paul R. Rodriguez to serve as the Director of the New Jersey Division of Consumer Affairs, the lead state agency charged with protecting consumers' rights, regulating the securities industry, and overseeing 47 professional boards. Rodriguez's selection highlights the Administration's efforts to fill the void left by the Trump Administration's pullback of the Consumer Financial Protection Bureau (CFPB), fulfilling one of Governor Murphy's promises to create a "state-level CFPB" in New Jersey.

The Division of Consumer Affairs is responsible for enforcing laws designed to ensure the fairness and integrity in New Jersey's commercial and investment marketplaces, and for assisting consumers with complaints or questions about particular professionals, businesses, vendors, or service providers. The Division includes the Office of Consumer Protection, which enforces the Consumer Fraud Act, one of the nation's

strongest consumer protection statutes, and the Bureau of Securities, which regulates the securities industry in New Jersey. The Division oversees numerous state professional licensing boards, including those licensing doctors, nurses, and pharmacies, and houses the state's Prescription Monitoring Program, which maintains records on prescriptions filled in New Jersey for controlled dangerous substances and is a key tool in the state's fight against opioid addiction. In total, the Division is comprised of approximately 530 employees, of which nearly 150 are investigators.

ADOPTED RULE
Oklahoma
Consumer credit

Oklahoma Department Of Consumer Credit

Title 160. Chapter 20.

Changes In Dollar Amounts

Appendix I. Changes In Dollar Amounts - July 1, 2018

Designated Sections	July 1, 2018
2-201(2)(a)(i)	$1,530.00
2-201(2)(a)(ii)	$1530.00 - $5,100.00
2-201(2)(a)(iii)	$5,100.01
2-203(1)(a)	$25.50
2-407(1)	$5,100.00
2-407(1)	$1,020.00
2-413	$5,100.00
3-203(1)(b)	$25.50
3-203(5)	$25.50
3-203.1	$25.50
3-508A(2)(a)(i)	$2,910.00
3-508A(2)(a)(ii)	$2,910.01 - $6,200.00
3-508A(2)(a)(iii)	$6,200.01
3-508B(1)	$1,530.00
3-508B(1)(a)	$152.95
3-508B(1)(a)	$5.10 - $25.50
3-508B(1)(b)	$152.96 - $178.50
3-508B(1)(b)	$15.30
3-508B(1)(c)	$178.51 - $357.00
3-508B(1)(c)	$17.85
3-508B(1)(d)	$357.01 - $510.00
3-508B(1)(d)	$20.40
3-508B(1)(e)	$510.01 - $765.00
3-508B(1)(e)	$22.95
3-508B(1)(f)	$765.01 - $1,530.00
3-508B(1)(f)	$25.50
3-510(1)	$5,100.00
3-511(1)	$5,100.00
3-511(1)(a)	$1,530.00
3-511(1)(b)	$1,530.00
3-514	$5,100.00
5-103(2)	$5,100.00
5-103(3)	$5,100.00
5-103(7)	$5,100.00

LEGISLATION
Oregon
Transfer fees – First time homebuyers

2018 OR H 4007. Enacted 4/13/2018. Effective 6/2/2018.

This bill amends Or. Rev. Stat. § 306.815 to provide that the provision that a city, county, district or other political subdivision or municipal corporation of this state shall not impose, by ordinance or other law, a tax or fee upon the transfer of a fee estate in real property, or measured by the consideration paid or received upon transfer of a fee estate in real property does not apply to any tax or fee that is imposed upon the transfer of a fee estate in real property if the fee that is imposed under ORS 205.323, for the recording or filing of the instrument conveying the real property being transferred, is less than $107 (formerly, $32).

The bill also creates new sections to provide that an individual may create a first-time home buyer savings account with a financial institution to be used to pay or reimburse the account holder's eligible costs related to the purchase of a single family residence by entering into a first-time home buyer savings account agreement with the financial institution.

LEGISLATION
Wisconsin
Escrow accounts – Interest

2017 WI A 822. Enacted 4/16/2018. Effective 4/18/2018.

This bill amends Wis. Stat. § 138.052 **(5)** (am) for provide that: 1. Except as provided in par. (b) and unless the escrow funds are held by a 3rd party in a noninterest-bearing account, a bank, credit union, savings bank, savings and loan association or mortgage banker which originates a loan on or after January 1, 1994, and before the effective date of this subdivision, or a loan subject to subd. 3., and which requires an escrow to assure the payment of taxes or insurance shall pay interest on the outstanding principal balance of the escrow at the variable interest rate established under subd. 2.

ADOPTED RULE
South Carolina
Consumer credit

Department Of Consumer Affairs

Notice Of General Public Interest

Changes In Dollar Amounts

The Administrator of the Department of Consumer Affairs announces changes in dollar amounts pursuant to Sections 37-1-109 and 37-6-104(1)(e). Designated dollar amounts in the Consumer Protection Code are subject to change on July 1 of every even-numbered year based on the changes in the Consumer Price Index for December of the preceding year.

Section 7/1/2018 to 6/30/2020

2.104(1)(e) Consumer Credit Sale - $92,500.00

2.106(1)(b) Consumer Lease - $92,500.00

2.203(1) Delinquency Charge – Sales - $18.50

2.203(2) Minimum Delinquency Charge - $7.40

2.407(1) Security Interest – Sales - $3,700.00

$1,110.00

2.705(1)(a) Delinquency Charge – Rental Purchase - $11.60

2.705(1)(b) Delinquency Charge – Rental Purchase - $5.80

3.104(d) Consumer Loans - $92,500.00

3.203(1) Delinquency Charge – Loans- $18.50

3.203(2) Minimum Delinquency - $7.40

3.510 Land as Security – Supervised Loans - $3,700.00

3.511 Maximum Loan Term - $3,700.00

$1,110.00

3.514 Attorney's Fees – Supervised Loans - $3,700.00

5.103(2), (3) & (4) Deficiency Judgment - $5,550.00

10.103 Prepayment Penalty - $270,000.00

23.80 Prepayment Penalty - $270,000.00

LICENSING

ADOPTED RULE

Idaho

Installers

Effective 3/28/2018, this rule amends Idaho Admin. Code r. 07.03.11.

The rule replaces the Idaho Manufactured Housing Board with the Idaho Factory Built Structures Board.

The rule also provides that an installer license, or the license of a dealer who is also an installer may not be renewed until the licensee has submitted proof satisfactory to the Division that he has, during the three years (formerly, the one year) immediately preceding the renewal of the license, completed at least eight (formerly, four) hours of continuing education.

REGULATOR GUIDANCE

Ohio

Mortgage license transition

If a company engages in consumer lending and does not engage in residential mortgage business, the company must notify the Ohio DFI on or before June 30, 2018 that it does not wish to obtain an RMLA Certificate of Registration.

If the company engages in residential mortgage business, they must request the RMLA Certificate of Registration via the "Transition Process," on or before June 30, 2018. The Transition Process requires the entity to create a new filing on NMLS, requesting an RMLA license.

LEGISLATION

Oklahoma

Sales Finance

2017 OK S 1493. Enacted 4/25/2018. Effective 11/1/2018.

This bill amends Okla. Stat. tit. 14A, § 3-512 to provide that no licensee shall conduct the business of making loans under the Consumer Credit Code under any name, or at any place of business within the state, other than that stated in the license.

The bill adds that a licensee who is authorized to make supervised loans under this Part may sell goods at any location where supervised loans are made upon meeting the following conditions:

1. The Administrator of the Department of Consumer Credit shall be notified in writing of the type and nature of goods to be sold at the location of the licensee;

2. Any sale of goods authorized pursuant to this subsection shall be purchased through a loan with the licensee; and

3. All goods sold by the licensee pursuant to this subsection shall be restricted to purchase loans made only at A-lender rates and terms.

SALES AND WARRANTIES

CASE LAW

Warranties – Statute of limitations

CASE NAME: *Mungle v. Palm Harbor Villages, Inc.*
DATE: *02/05/2018*
CITATION: *United States District Court, W.D. Texas, San Antonio Division. Slip Copy. 2018 WL 1659854*

Plaintiff toured a mobile home, during which a Palm Harbor representative allegedly told Plaintiff that the Home was "new," and that appliances in the Home, including a stainless steel General Electric refrigerator and stove, were included with the purchase.

Six days before executing a contract for the Home, while moving in, Plaintiff noticed that the stainless steel General Electric refrigerator and air conditioning unit were missing, and the stainless steel General Electric stove had been replaced by "a cheaper Hotpoint stove/oven unit."

Mungle signed an earnest money contract with Palm Harbor to purchase the Home. The Contract stated, inter alia, that the Home was "New" and that the make of the furnishings was "H.P." The Contract also included a merger clause, prohibiting any verbal promises made outside the agreement. A special provisions sheet, signed by Plaintiff on the same day the Contract was executed, plainly stated that Plaintiff purchased the Home in "As Is" condition. Additionally, Plaintiff signed a Home Warranty that disclaimed various warranties. One of the disclaimed warranties advised Plaintiff that the Home was a "Display Model."

Plaintiff subsequently filed suit asserting five claims: (1) violations of the Texas Deceptive Trade Practices Act ("TDTPA"); (2) common law fraud; (3) fraud in a real estate transaction; (4) negligent misrepresentation; and (5) breach of contract.

The Court found that all of Plaintiff's claims were barred by the applicable statutes of limitations. Plaintiff's claims accrued when she discovered or should have discovered the home was not "brand new" and had been used as a model unit. Even if a Palm Harbor representative misrepresented the status of the Home during the walk-through, Plaintiff would have been able to discover the true status of the Home while reading and signing the Contract. The Contract contained multiple references to the Home being a "Display Model," and that the Home was being sold "As Is." Plaintiff initialed each page that contained these references. Plaintiff's belated discovery argument—that there was "no way" she could have discovered the Home was a display model—was therefore without merit.

Plaintiff also asserted that Palm Harbor breached the Contract when it (1) failed to construct fencing around the Home; (2) failed to make Plaintiff's dirt driveway into a gravel driveway; and (3) failed to fill the low spots above the septic tank that occurred due to settling. However, Plaintiff did not provide evidence that these promises existed in the Contract.

Defendant's Motion for Summary Judgment granted.

CASE LAW

Appraisal

CASE NAME: *Tindell v. Murphy*
DATE: *04/06/2018*
CITATION: *Court of Appeal, Third District, California. Not Reported in Cal.Rptr.3d. 2018 WL 1663216*

Susanville Real Estate, agent Kari Moore, and real estate broker John Shaw listed a property owned by Murphy for

sale in December 2004. The listing stated the approximate age of the property was 26 years and described the construction as "Manufactured." The Tindells made an offer to purchase the property for $320,000 and the offer was accepted.

The Tindells hired loan broker Kim Keith, who told the Tindells she believed the property was a manufactured home and that they might not be able to obtain financing.

The Tindells also hired appraiser Christine Bradley. Bradley designated it a modular home constructed around 1972. Following the appraisal, Keith told the Tindells she could finance the property.

In 2009, according to the appraisal for a refinancing, the property was a manufactured home and not a modular home. The Tindells were unable to refinance their mortgage.

The Tindells' complaint alleged Murphy and Bradley failed to disclose defects in the property and acted in concert with others in order to conceal these defects and profit from the sale of the property. The trial court sustained Murphy's demurrer without leave to amend and granted Bradley's motion for summary judgment. The Tindells appealed.

The appeals court noted that the Tindells generally alleged Murphy should have known the property was manufactured in 1972 and contained defects. However, the Tindells signed a real estate transfer disclosure statement which stated the property was "a manufactured home with a garage conversion." In addition, the Tindells signed a buyer's inspection advisory. Given these documents and the lack of specific factual allegations, the Tindells could not establish a misrepresentation by Murphy or their reliance on any alleged misrepresentation. Nor did their complaint set forth any resulting damage.

In addition, any vicarious liability on Murphy's part depended on Bradley being found liable. The trial court granted summary judgment in Bradley's favor finding no triable issue of fact as to Bradley's liability in the underlying transaction. Since we find the trial court did not err in granting summary judgment in Bradley's favor, no fiduciary duty supported the Tindells' claim.

Also, the Tindells failed to support their assertion that Murphy was unjustly enriched.

Further, the Tindells' causes of action for negligence and negligent misrepresentation failed for the same reason: a failure to allege a misrepresentation by Murphy, any reliance or any resulting damage.

As to Bradley, the Court found there was privity of contract between Bradley and Plaintiffs, such that their negligence claim failed as a matter of law. As the trial court noted, the appraisal was prepared for the lender, not the Tindells. Bradley did not receive any unjust enrichment at the Tindells' expense.

Affirmed.

LEGISLATION

Alabama

Service contracts

2018 AZ S 1381. Enacted 4/5/2018. Effective 8/3/2018.

This bill amends Ariz. Rev. Stat. Ann. § 20-1095 to amend the definition of "Consumer" to mean a buyer other than for purposes of resale of any consumer product, any person to whom the product is transferred during the duration of an implied or written warranty or service contract applicable to the product and any other person who is entitled by the terms of the warranty or service contract or under applicable federal or state law to enforce against the warrantor or service company the obligations of the warranty or service contract. A

Consumer also means the buyer, OWNER, LESSOR or seller of residential property (adding, owner, lessor).

The bill amends the definition of "Mechanical reimbursement insurance" to mean an insurance policy issued AN OBLIGOR TO EITHER PROVIDE REIMBURSEMENT TO THE OBLIGOR UNDER THE TERMS OF THE INSURED SERVICE CONTRACTS ISSUED OR SOLD BY THE OBLIGOR OR, IN THE EVENT OF THE OBLIGOR'S NONPERFORMANCE, TO PAY ON BEHALF OF THE OBLIGOR ALL COVERED CONTRACTUAL OBLIGATIONS INCURRED BY THE OBLIGOR UNDER THE TERMS OF THE INSURED SERVICE CONTRACTS ISSUED OR SOLD BY THE OBLIGOR.

The bill deletes the definition of "Motor vehicle service contract program" which had meant contractual documents, including service contract forms, claim forms and other forms, used in connection with the sale of service contracts by motor vehicle dealers.

The definition of "Residential property" has been amended to mean a house, townhouse, condominium or other habitable structure THAT is used principally as a residence (formerly, or other habitable structure consisting of no more than four units which is used principally as a residence).

"Service company" OR "OBLIGOR" means any person THAT IS CONTRACTUALLY OBLIGATED TO THE CONTRACT HOLDER UNDER THE TERMS OF THE SERVICE CONTRACT. SERVICE COMPANY DOES NOT INCLUDE A SERVICE CONTRACT ADMINISTRATION OR SELLER IF THE PERSON IS NOT CONTRACTUALLY OBLIGATED TO THE CONTRACT HOLDER UNDER THE TERMS OF THE SERVICE CONTRACT.

"Service contract":

(a) means a written contract OR AGREEMENT FOR A SEPARATELY STATED CONSIDERATION FOR ANY DURATION TO PERFORM THE REPAIR, REPLACEMENT OR MAINTENANCE OF A CONSUMER PRODUCT OR INDEMNIFICATION FOR REPAIR, REPLACEMENT OR MAINTENANCE FOR THE OPERATIONAL OR STRUCTURAL FAILURE OF A CONSUMER PRODUCT DUE TO A DEFECT IN MATERIALS, WORKMANSHIP, ACCIDENTAL DAMAGE FROM HANDLING, A POWER SURGE OR INTERRUPTION OR NORMAL WEAR AND TEAR, WITH OR WITHOUT ADDITIONAL PROVISIONS FOR INCIDENTAL PAYMENT OF INDEMNITY UNDER LIMITED CIRCUMSTANCES, INCLUDING TOWING, RENTAL AND EMERGENCY ROAD SERVICE AND ROAD HAZARD PROTECTION.

(b) INCLUDES A CONTRACT OR AGREEMENT SOLD FOR A SEPARATELY STATED CONSIDERATION FOR ANY DURATION THAT PROVIDES FOR ANY OF THE FOLLOWING:

(i) THE SERVICE, MAINTENANCE OR REPAIR, INCLUDING REPLACEMENT, OF ALL OR ANY PART OF STRUCTURAL COMPONENTS, APPLIANCES, ELECTRICAL, PLUMBING, HEATING, COOLING OR AIR CONDITIONING SYSTEMS OF RESIDENTIAL PROPERTY OR INDEMNIFICATION FOR THE SERVICE, MAINTENANCE, REPAIR OR REPLACEMENT.

(ii) THE REPAIR OR REPLACEMENT OF TIRES OR WHEELS ON A MOTOR VEHICLE DAMAGED AS A RESULT OF COMING INTO CONTACT WITH ROAD HAZARDS INCLUDING POTHOLES, ROCKS, WOOD DEBRIS, METAL PARTS, GLASS, PLASTIC, CURBS OR COMPOSITE SCRAPS.

(iii) THE REMOVAL OF DENTS, DINGS OR CREASES ON A MOTOR VEHICLE THAT CAN BE REPAIRED USING THE PROCESS OF PAINTLESS DENT REMOVAL WITHOUT AFFECTING THE EXISTING PAINT FINISH AND WITHOUT REPLACING VEHICLE BODY PANELS, SANDING, BONDING OR PAINTING.

(iv) THE REPLACEMENT OF A MOTOR VEHICLE KEY OR KEY FOB IN THE EVENT THAT THE KEY OR KEY FOB BECOMES INOPERABLE OR IS LOST OR STOLEN.

(v) OTHER SERVICES OR PRODUCTS APPROVED BY THE DIRECTOR.

"Service contract administrator" means A PERSON WHO IS RESPONSIBLE FOR THE ADMINISTRATION OF THE SERVICE CONTRACTS OR THE SERVICE CONTRACTS PLAN

OR WHO IS RESPONSIBLE FOR ANY SUBMISSION REQUIRED UNDER THIS ARTICLE (formerly, an entity which agrees to provide contract forms, process claims and procure insurance for and on behalf of a motor vehicle dealer in the performance of the obligations pursuant to the motor vehicle service contract but which may not itself perform actual repairs).

The bill amends Ariz. Rev. Stat. Ann. § 20-1095.01, Service companies; permits; rules; application of laws, to provide that:

A. A service company may NOT offer or issue a service contract unless the service company has qualified for and been issued a permit by the director.

B. EXCEPT FOR THE REGISTRATION REQUIREMENTS IN THIS ARTICLE APPLICABLE TO SERVICE COMPANIES, SERVICE COMPANIES AND RELATED SERVICE CONTRACT SELLERS, ADMINISTRATORS AND OTHER PERSONS THAT MARKET, SELL OR OFFER TO SELL SERVICE CONTRACTS ARE EXEMPT FROM ANY LICENSING REQUIREMENTS OF THIS TITLE AS A RESULT OF ACTIVITIES RELATED TO THE MARKETING, SELLING OR OFFERING OF SERVICE CONTRACTS.

C. The director shall adopt rules THAT provide for the application for permit, renewal procedures, fees, refund of the unearned portion of the contract price and approval of forms. Service companies are subject to chapter 1 of this title, EXCEPT SECTION 20-116, and this article.

D. A PROVIDER SHALL PROVIDE A CONSUMER WITH A SPECIMEN COPY OF THE SERVICE CONTRACT TERMS AND CONDITIONS PRIOR TO THE TIME OF SALE UPON A REQUEST BY THE CONSUMER. A PROVIDER MAY COMPLY WITH THIS PROVISION BY PROVIDING THE CONSUMER WITH A COMPLETE SAMPLE COPY OF THE TERMS AND CONDITIONS OR BY DIRECTING THE CONSUMER TO A WEBSITE CONTAINING A COMPLETE SAMPLE OF THE TERMS AND CONDITIONS OF THE SERVICE CONTRACT.

Ariz. Rev. Stat. Ann. § 20-1095.02, Exemptions; definition, has been amended to provide that:

A. This article, except for section 20-1095.09, does not apply to the following:

2. Service contract programs if a motor vehicle manufacturer OR MOTOR VEHICLE DEALER has financial responsibility for performance.

The bill amends Ariz. Rev. Stat. Ann. § 20-1095.04, Filing of surety bond, securities or bonds, to provide that NOTWITHSTANDING SECTIONS 20-116 AND 35-155, A SERVICE COMPANY MAY NOT USE A CASH DEPOSIT TO COMPLY WITH THIS SECTION.

The bill adds Ariz. Rev. Stat. Ann. § 20-1095.06, Required service contract disclosures.

The bill amends Ariz. Rev. Stat. Ann. § 20-1095.07, Sale of unapproved service contract; violation; classification, to provide that a person who sells an unapproved service contract is guilty of a class 2 misdemeanor.

A service contract is not invalid solely by reason of not being approved as required by this article.

Formerly, this section referred only to motor vehicle service contracts.

ADOPTED RULE

Idaho

Trade ins

Effective 3/28/2018, this rule amends Idaho Admin. Code r. 35.01.02.

The rule provides that Manufactured Homes (Mobile Homes), New Park Model Recreational Vehicles, and Modular Buildings. Trade-in allowances are not allowed on the sale of manufactured homes, new park model recreational vehicles, and modular buildings. See IDAPA 35.01.02.048 of these rules.

The rule also provides that when a manufactured home is sold at retail for the first time, it is subject to sales tax on fifty-five percent (55%) of the sales price (formerly, the purchase price). The sales (formerly, purchase) price of a new home shall include all component parts. Set up and transportation fees charged by the dealer shall be included in the sales (formerly, purchase) price. No trade-in allowance is permitted.

ADMINISTRATIVE INTERPRETATION

Indiana

Lease to own

On April 2, 2018, the Indiana Department of Financial Institutions, Consumer Credit Division, released Administrative Interpretation 2018-01, A Purported Lease to Own Transaction Where the Subject Property Deems the Transaction to be a Credit Sale.

Ind. Code § 24-4.5-1-301.5(8) states in pertinent part, "'Consumer credit sale' is a sale of goods, services, or an interest in land. ..."

Further, the IUCCC states, "'Sale of goods' includes any agreement in the form of a bailment or lease of goods if the bailee or lessee agrees to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the goods involved and it Is agreed that the bailee or lessee will become, or for no other or a nominal consideration has the option to become, the owner of the goods upon full compliance with his obligations under the agreement."

The Commentary to Ind. Code § 24-4.5-2-106 derived from the 1968 Uniform Consumer Credit Code states in pertinent part, "Leasing has become a popular alternative to credit sales as a means of distributing goods to consumers and merits inclusion in a comprehensive consumer credit code... If the transaction, though in form a lease, is in substance a sale within the meaning of Section 2.105(4), it is treated as a sale for all purposes in this Act and the provisions on consumer leases are inapplicable."

In addition, Ind. Code § 24-4.5-1-102(5) states, "This article applies to a transaction if the director determines that the transaction:

(a) is in substance a disguised consumer credit transaction; or

(b) involves the application of subterfuge for the purpose of avoiding this article.

A determination by the director under this subsection must be in writing and shall be delivered to all parties to the transaction. 1C 4-21.5-3 applies to a determination made under this subsection."

As a general legal principle, a defining characteristic of a lease is that a lessor may take back and remarket the underlying asset. Further, a consumer must reasonably contemplate that he or she may or will return the property subject to the agreement; a question to be considered is whether the goods are of a kind and type not contemplated by a consumer to be returned to the Lessor. A reasonable legal analysis will consider the substance of the transaction, rather than the transaction's form, i.e., is the agreement denominated as a "lease." An additional indication of a violation of such principle would include the lack of a reasonable standard of wear and tear as to the item in question. The existence (or non-existence) of a reasonable resale market will also be taken into account.

The Department will consider highly consumable consumer goods, with little to no residual value other than emotional or practical value specific to the consumer, to be in substance credit sales when such property is the subject of a purported lease transaction. Further, any portion of a leased cost that has a service, repair, delivery or labor component is considered intangible property that cannot be leased.

During examinations, such transactions will be reviewed for compliance with all IUCCC provisions pertaining to

credit sales. The Department may conform the fees and charges assessed to the limitations under Ind. Code §24-4.5-2. The Department may require refunds of overcharges, impose civil penalties not greater than $10,000 per violation, or take other enforcement actions including but not limited to issuing cease and desist orders.

Lessors should review current practices and make any changes necessary to ensure compliance with Ind. Code §24-4.5 et seq. Lessors may wish to seek the advice of legal counsel regarding their business model.

PRESS RELEASE
New York
Lease to own

Issued 4/16/2018.

The New York State Department of Financial Services (DFS) is investigating whether alternative home purchase agreements, such as rent-to-own, lease-to-own or land installment contracts, being offered in New York constitute unlicensed, predatory mortgage lending. These alternative home purchase agreements often are being marketed to financially distressed consumers, promising a path to homeownership, but putting consumers at risk.

DFS is providing this consumer alert to notify New York residents that lease-to-own, rent-to-own and land installment contracts may violate applicable New York laws and regulations regarding fair lending, mortgage protections, interest rates, habitability, property condition and/or real property disclosures.

Residential leases and mortgage agreements are required to provide basic consumer protections. Some companies, however, claim to offer a hybrid agreement – part mortgage, part lease – that does not need to provide any of the standard consumer protections. Although a lease-to-own or other alternative home purchase agreement appears to offer a path to homeownership, these agreements may impose harsh terms with little or no consumer safeguards. Before entering into one of these agreements, consumers should carefully consider whether a traditional lease is a better option.

The rent-to-own agreements impose all of the obligation to repair the properties, and the substantial cost of the repair work, on the consumer, whereas New York law would impose such obligations on the landlord. And, if the arrangement is similar to homeownership, then the homeowner has protection under New York foreclosure law.

If you currently live in a rent-to-own home or other similar housing, you may have certain legal rights, including in the event of any payment default. In New York, under the common-law doctrine of "equitable mortgage," residents in single-family homes making lease payments while improving the condition of the home, over time, accumulate equity in the home. One consequence of that equity is that the company cannot just evict you if you fall behind on making payments. Rather, you should be entitled to the protections of a foreclosure proceeding, and if you have received an eviction notice, you should speak with your legal counsel about an equitable mortgage defense.

ADOPTED RULE
Rhode Island
Sales and use tax

Effective 3/15/2018, this rule adopts 280-20 R.I. Code R. § 70-9.5 to provide that:

A. "Mobile and manufactured home" means a detached residential unit designed:

1. For a long term occupancy and containing sleeping accommodations, a flush toilet, and a tub or shower bath and kitchen facilities, and having both permanent plumbing and electrical connections for attachment to outside systems;

2. To be transported on its own wheels or on a flatbed or other trailer or detachable wheels; and

3. To be placed on pads, piers, or tied down, at the site where it is to be occupied as a residence complete and ready for occupancy, except for minor and incidental unpacking and assembly operations and connection to utilities systems.

B. Mobile and manufactured homes as defined above are exempt from the sales and use tax. Mobile and manufactured homes contemplated by R.I. Gen. Laws Chapter 31-44 are of the types located in a mobile home and/or manufactured home park and therefore do not include modular homes.

TITLING AND PERFECTION

LEGISLATION

Nebraska

Improperly noted titles – Repossession titles

2017 NE L 909. Enacted 4/11/2018. Effective immediately.

This bill amends Neb. Rev. Stat. § 37-1280 to provide that the Department of Motor Vehicles may remove a lien on a certificate of title when such lien was improperly noted if evidence of the improperly noted lien is submitted to the department and the department finds the evidence sufficient to support removal of the lien. The department shall send notification prior to removal of the lien to the last-known address of the lienholder. The lienholder must respond within thirty days after the date on the notice and provide sufficient evidence to support that the lien should not be removed. If the lienholder fails to respond to the notice, the lien may be removed by the department.

The bill amends Neb. Rev. Stat. § 60-166 to add that, in the event of (i) the transfer of ownership of a vehicle by operation of law as upon inheritance, devise, bequest, order in bankruptcy, insolvency, replevin, or execution sale or as provided in section 30-24,125, sections 52-601.01 to 52-605, sections 60-1901 to 60-1911 and section 3 of Legislative Bill 275, One Hundred Fifth Legislature, Second Session, 2018, and sections 60-2401 to 60-2411, (ii) the engine of a vehicle being replaced by another engine, (iii) a vehicle being sold to satisfy storage or repair charges or under section 76-1607, or (iv) repossession being had upon default in performance of the terms of a chattel mortgage, trust receipt, conditional sales contract, or other like agreement, and upon acceptance of an electronic certificate of title record after repossession, in addition to the title requirements in this section, the county treasurer of any county or the department, upon the surrender of the prior certificate of title or the manufacturer's or importer's certificate, or when that is not possible, upon presentation of satisfactory proof of ownership and right of possession to such vehicle, and upon payment of the appropriate fee and the presentation of an application for certificate of title, may issue to the applicant a certificate of title thereto.

Neb. Rev. Stat. § 60-168 has been amended to add that the department may remove a lien on a certificate of title when such lien was improperly noted if evidence of the improperly noted lien is submitted to the department and the department finds the evidence sufficient to support removal of the lien. The department shall send notification prior to removal of the lien to the last-known address of the lienholder. The lienholder must respond within thirty days after the date on the notice and provide sufficient evidence to support that the lien should not be removed. If the lienholder fails to respond to the notice, the lien may be removed by the department.

ABOUT THE EDITORS

MARC LIFSET is a Member in the firm's business law section, where he advises banks and financial institutions regarding consumer financial services issues, licensing, regulatory compliance, and legislative matters. Marc has carved a place for himself in the manufactured housing lending arena as the primary drafter and proponent of New York's Manufactured Housing Certificate of Title Act. Marc is chairperson of the MHI Finance Lawyers Committee and serves on the Board of Governors of the MHI Financial Services Division. He is the primary draft person of manufactured home titling and perfection legislation in Alaska, Louisiana, Maryland, Missouri, Nebraska, New York, North Dakota, and Tennessee. Marc represents manufactured home lenders, community operators, and retailers throughout the country and is a frequent lecturer at industry conventions.

Find out more about Marc here: https://www.mcglinchey.com/Marc-J-Lifset

JEFFREY BARRINGER is a Member in the firm's consumer financial services practice, where he regularly advises financial institutions, mortgage companies, sales finance companies, and other providers of consumer financial services on compliance with state and federal law, including usury restrictions, preemption, licensing, and other regulatory compliance matters. Jeff's experience includes helping manufactured housing finance companies, retailers, and communities navigate the state and federal regulatory environment to establish and maintain effective finance programs. Jeff is also a frequent lecturer on legal issues facing the industry.

Find out more about Jeff here: https://www.mcglinchey.com/Jeffrey-Barringer

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