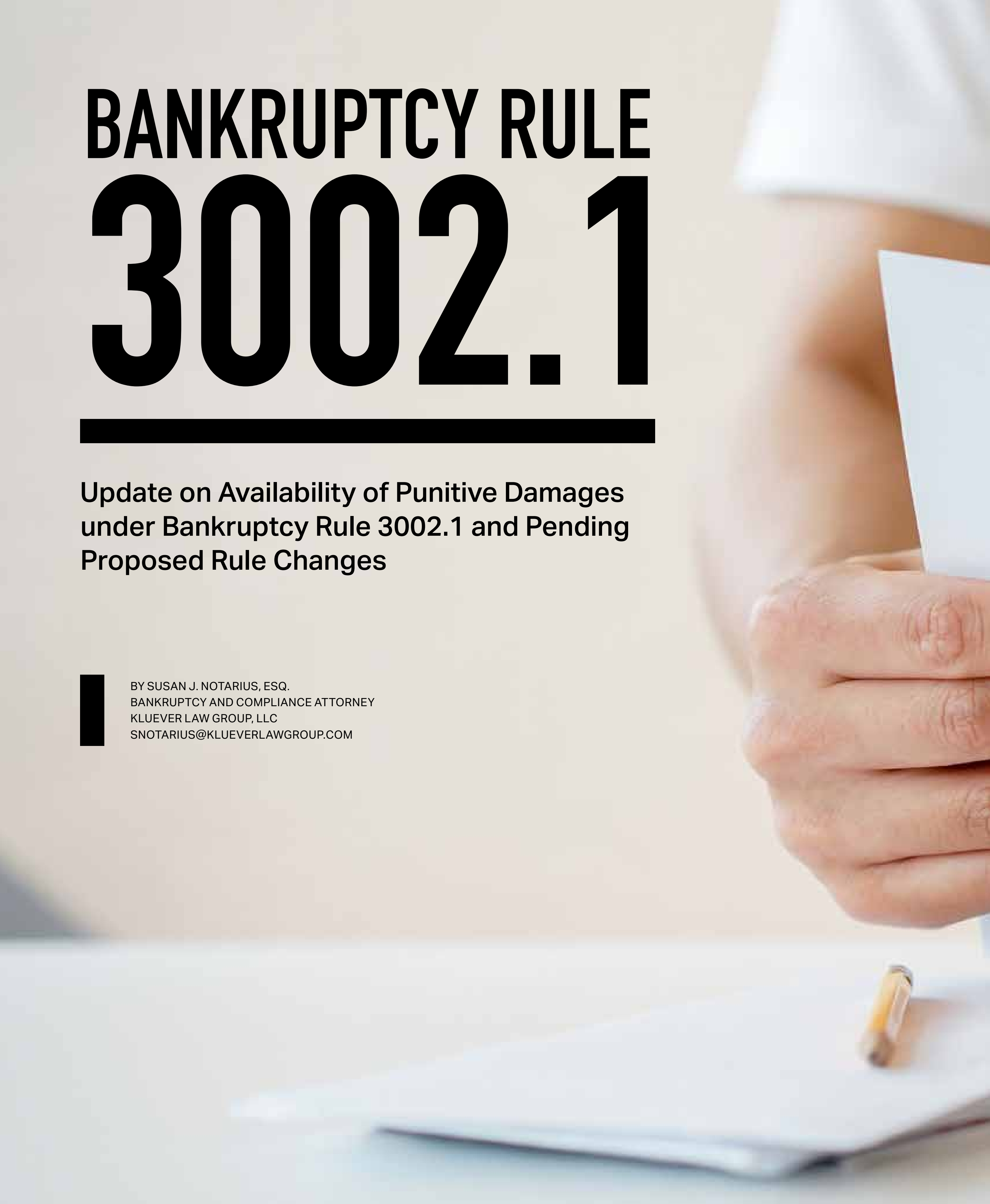

BANKRUPTCY RULE 3002.1

Update on Availability of Punitive Damages under Bankruptcy Rule 3002.1 and Pending Proposed Rule Changes

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INTRODUCTION:

This article provides: (i) an update on the availability of punitive damages for violations of Federal Rule of Bankruptcy Procedure 3002.1, (the "Rule"), since last year's article, *The Expansion of Sanctions under Bankruptcy Rule 3002.1 after In re Gravel*; (ii) background information about the Rule; and (iii) an overview of pending proposed changes to the Rule.

I. UPDATE ON AVAILABILITY OF PUNITIVE DAMAGES UNDER BANKRUPTCY RULE 3002.1

The Rule requires lenders and servicers to file notices of payment changes and additional fees, expenses, and charges assessed to the loan during the life of the Chapter 13 case. The Rule also requires that lenders and servicers file a response to the notice of final cure filed by the Trustee that states whether the servicer agrees or disagrees that the debtor is current at the end of the case. Failure to comply with the Rule may result in an award of punitive damages.

Last year's article provided a detailed discussion of the then-existing case law discussing whether punitive damages are available due to noncompliance with the Rule. No universal binding authority addresses whether punitive damages are available. To date, *In re Gravel*, 6 F.4th 503 (2d Cir. 2021) and *In re Blanco*, 633 B.R. 714 (Bankr. S.D. Tx. 2021) remain the most cited cases on this issue. The courts in these cases took opposite positions.

Since last year, few courts have addressed this issue. The one exception is the latest ruling in *In re Dewitt* from the Bankruptcy Court in the Southern District of Ohio. In 2022, the court in that case decided liability only, leaving the punitive damages question for further proceedings. *See In re Dewitt*, 644 B.R. 385 (Bankr. S.D. Oh. 2022). In 2023, the *Dewitt* court held that punitive damages were appropriate under certain circumstances. The court scheduled an evidentiary hearing on whether punitive damages were appropriate. *See In re Dewitt*, 651 B.R. 215 (Bankr. S.D. Oh. 2023).

One thing is clear; it is expensive to litigate violations of the Rule. Ensuring Rule compliance should be a priority for lenders and servicers.

II. THE RULE; THEN AND NOW

Prior to the Rule's enactment, after a debtor made all payments to the Trustee, the debtor might receive a surprise notice alleging a default under the mortgage. The Rule was designed to prevent this scenario. The Rule was to ensure that the parties in interest were fully informed of payment changes and accruing charges throughout the bankruptcy case. The intent was the debtor would be current or substantially current at the end of the case when the Trustee filed the notice of final cure.

In practice, debtors are often seriously delinquent when the Trustee files the final cure notice. The current Rule does not have a mechanism for parties to determine the mortgage status during the life of the case so if there is a delinquency, the parties are aware and have time to resolve the default while the case is still pending.

PROPOSED CHANGES TO THE RULE AND OFFICIAL FORMS

Proposed 2021 amendments to the Rule never went into effect. On August 15, 2023, the Rules Committee proposed revised amendments which are now in the comment period which expires February 16, 2024. If approved, the changes would be effective December 1, 2025.

A brief outline of the current Rule and proposed amendments and official forms is below, with the full text and committee notes here: https://www.uscourts.gov/sites/default/files/2023_preliminary_draft_final_0.pdf.

3002.1 - CHAPTER 13 CLAIMS CLAIM SECURED BY A SECURITY INTEREST IN THE DEBTOR'S PRINCIPAL RESIDENCE

CURRENT:

(A) IN GENERAL

This rule applies in a Chapter 13 case to claims (1) that are secured by a security interest in the debtor's principal residence, and (2) for which the plan provides that either the trustee or the debtor will make contractual *installment* (emphasis added) payments. Unless the court orders otherwise, the *notice* (emphasis added) requirements of this rule cease to apply when an order terminating or annulling the automatic stay becomes effective with respect to the residence that secures the claim.

PROPOSED:

The words "installment" and *"notice"* would be deleted. The committee notes state: "Subdivision (a), which describes the rule's applicability, would be amended to delete the word "installment" in the phrase "contractual installment payment" in order to clarify the rule's applicability to reverse mortgages, which are not paid in installments." Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Report of the Advisory Committee on Bankruptcy Rules* at Action Item 6 (August 2023). These deletions do not clarify the Rule's applicability to reverse mortgages since there are no payments, installments or otherwise, on a reverse mortgage.

(B)(1) NOTICES OF PAYMENT CHANGE

CURRENT:

Notice is required for all payment changes at least 21 days prior to the change.

PROPOSED:

(B)(2) NOTICE OF A CHANGE IN A HOME-EQUITY LINE OF CREDIT

There is a special provision dealing with HELOCS allowing for an election to file an annual payment change notice with a reconciliation over the past year. In cases where the payment increases or decreases by more than $10, both the 21-day notice and annual notice are required.

(B)(3) EFFECT OF AN UNTIMELY NOTICE.

This proposal clarifies the remedy for failure to comply, which is the current practice. The proposal states that when the payment increases and the notice is late, the payment takes effect on the next due date that is after the 21 days from the late filed notice. If the payment decreases, it takes effect on the next due date after the date of the notice.

(E) DETERMINING FEES, EXPENSES, OR CHARGES.

This proposal allows for a shortened period to determine allowing post-petition mortgage fees, expenses, and charges. This will provide faster certainty to servicers and lenders on the recoverability of post-petition advances. The period to file an objection to the fees is one year after the notice was served *unless a party in requests and the court orders a shorter period.*

(F) MOTION TO DETERMINE STATUS; RESPONSE; COURT DETERMINATION

The 2021 proposal for a mandatory mid-case assessment of the mortgage claim's status never took effect. The comments from Chapter 13 trustees questioned the need for the procedure and further stated that the procedure would be unduly burdensome on Trustees, especially in jurisdictions where the debtor and not the Trustee makes the post-petition mortgage payments. The new proposed Rule 3002.1(f) allows for a voluntary post-filing case process to determine the status of the mortgage. The revised process can occur any time after the date of the order for relief and until the Trustee files the notice of completion of payments to the Trustee. The Accompanying Official forms are: 410C13- M1 - Motion Under Rule 3002.1(f)(1) to Determine the Status of the Mortgage Claim and 410C13-M1R - Response to Motion Under Rule 3002.1(f)(1) to Determine the Status of the Mortgage Claim.

(G) TRUSTEE'S END OF-CASE NOTICE OF PAYMENTS MADE; RESPONSE; COURT DETERMINATION.

This Notice of Final Cure provision requires the Trustee to send notice when the Trustee has paid the mortgage arrears. The proposal changes the timing of the requirement to after the debtor completes payments due to the Trustee. The change uses the term "due to the trustee" as opposed to plan payments to avoid taking a position on whether payments made directly to claimants are plan payments. The Accompanying Official forms are 410C13-N - Trustee's Notice of Payments Made; 410C13-NR - Response to Trustee's Notice of Payments; and 410C13-M2 Motion Under Rule 3002.1(g)(4) to Determine Final Cure and Payment of Mortgage Claim.

(H) CLAIM HOLDER'S FAILURE TO GIVE NOTICE OR RESPOND

Finally, this proposal, which could have solved the punitive damages question, missed the mark, and failed to clarify what remedies are available for failure to comply with the Rule. The proposal says the court may "take any other action authorized by this rule." This is clear as mud. There are no specifics of what any action authorized by the rule means.

III. THE BOTTOM LINE

Remedies for failing to comply with the Rule remain uncertain. Failure to comply with the Rule can hit a company's bottom line hard. Lenders and servicers can avoid reputational and financial risk by making sure payments are correctly applied, required notices are timely filed, amounts not allowed are excluded from statements to borrowers of amounts due, and service transferred account records are reconciled. In addition to compliance with the Rule, "junk fees" are a current target of regulators and class action attorneys. Servicers should be mindful of what fees and costs are claimed in the proof of claim and under the Rule and scrub fees that might be considered "junk fees" that may create exposure beyond Rule 3002.1. a

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OFFICIAL
PUBLICATION
OF THE ALFN
VOL. 11 ISSUE 1

BANKRUPTCY

ISSUES IN 2024

Letter from the Editors

WE ARE GRATEFUL FOR YOUR SUPPORT in helping us achieve many successes in 2023, and enabling us to build new opportunities to bring the most ROI for your membership investment. Your dedication to the ALFN's mission allowed us to continue offering you the best-in-class education, advocacy, networking and leadership that you have come to expect from the ALFN. We have many exciting opportunities lined up for you in 2024 and beyond, that will enable you to showcase your products and services, expand your network of colleagues and clients, advocate for your best interests, and have access to some of the most valuable education in the mortgage services industry.

This issue of the ANGLE addresses many important bankruptcy topics and other legal issues, starting with our first article submission on force-placed insurance and the filed-rate doctrine. Borrowers are now attempting to bypass this well-established body of law by making special defenses (not affirmative claims) in mortgage foreclosures, that the servicer "upcharged" the borrower for forced placed insurance because the "real cost" was less based on rebates, or an alleged kickback scheme. We then transition to our next article that provides an overview of the new FTC Disclosure Rule and how it impacts servicers and law firms. The new Rule takes effect on May 13, 2024, requiring additional disclosures by non-bank financial institutions related to certain data breaches and security events. Up next is a submission dealing with in rem relief in bankruptcy court on debtors in foreclosure. Ultimately, a mortgage creditor seeking to get in rem relief needs a record of bad acts by debtors as well as a sympathetic court willing to listen. Following this is an article that provides some important information regarding several common sense measures for managing information security risk. The good news is that the technology to prevent malicious attacks isn't that expensive or even costly to deploy and maintain. We then shift our focus to MV Reality's recent bankruptcy filing, and the national implications it has across many legal practice areas, some of which include real-estate closings, mortgage foreclosures, and regulatory enforcement actions. Moving on to our next submission, we provide our readers with an update on the availability of punitive damages for violations of Federal Rule of Bankruptcy Procedure 3002.1 (the "Rule"), additional background information about the Rule, and an overview of pending proposed changes to the Rule. Our final feature article provides insight on a case out of the 11th circuit that originated in the Northern District of Alabama, In re Hoggle. The court in Hoggle allowed the debtor to add the amount of the missed payments to the remaining payments in their Chapter Bankruptcy 13 case.

Our state snapshot updates begin with Florida's Fourth DCA, which affirmed a county court's final judgment foreclosing a lien in favor of Deer Run Property Owners' Association (the "Association") awarding over $87,000 for delinquent assessments, interest, late charges, costs, and attorneys' fees. Our next update in Florida contains an overview of relief from the automatic stay in Chapter 13 cases. We then move on to Massachusetts with the "gavel rule" coming under fire. The arguments of the debtors' bar have not focused on the merits of the so-called "gavel rule" per se; instead, reliance has been placed in most circumstances almost exclusively on the findings in In re Mularski. We conclude with New Jersey, where the Board of Judges of the Bankruptcy Court for the Federal District of New Jersey approved a new form of stay relief order that adjusts wording and adds clauses for clarity.

You can count on the leadership team of the ALFN to continue advocating for your best interests each and every day. We appreciate your support and trust. Please let us know how we can assist you further, or how you would like to get more involved this year and beyond.

Natalie A. Grigg

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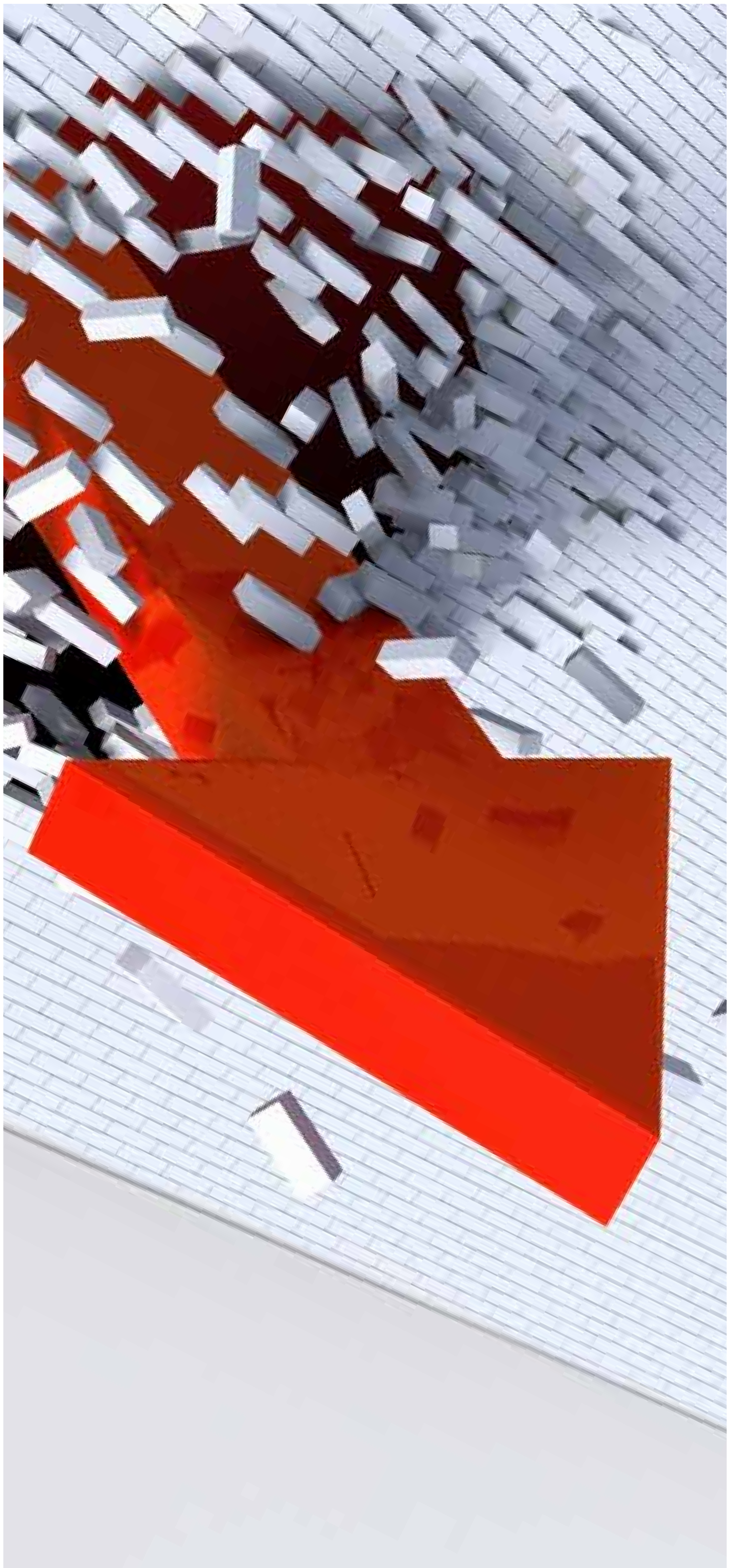

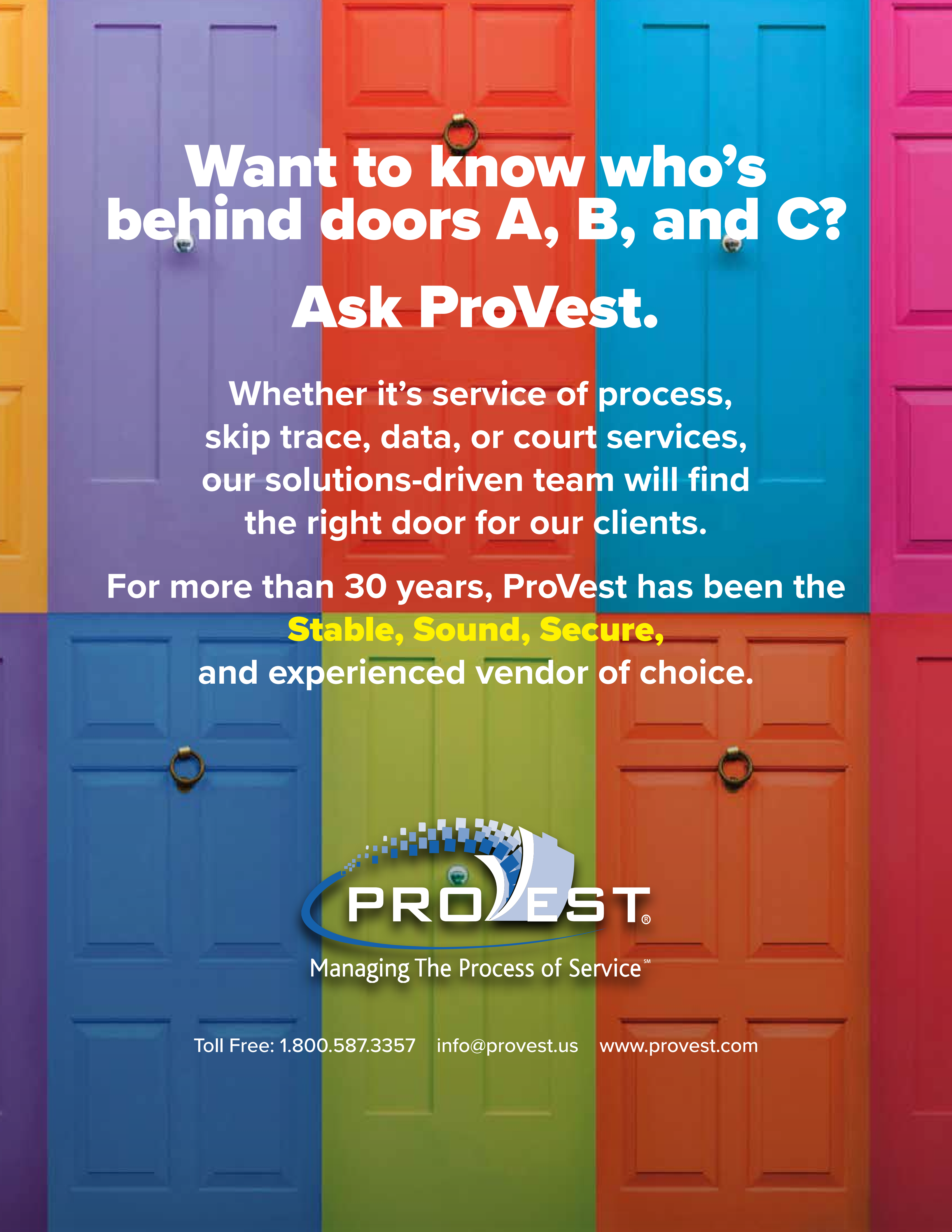
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Foreclosures, Forced-Placed Insurance and The Filed Rate Doctrine

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Servicers routinely place

a mortgaged property on forced-placed insurance when there is no insurance coverage provided by the borrower. Most standard mortgage documents require a borrower to insure a property, and the failure to do so is a breach of contract. To protect the collateral for their loan, the servicer then places the property on a master forced placed policy. All routine we think, until the loan goes into default, a foreclosure is filed, and the borrower alleges he or she is not paying the "real cost" of the insurance based on rebates to the lender or some sort of kickback scheme. A key function of a master policy utilized in a forced-placed context is that it automatically covers a property, even if the lapse in coverage is not immediately discovered. *Patel v. Specialized Loan Servicing LLC*, (11th Cir. 2016).

Borrowers are now attempting to bypass this well-established body of law by making special defenses (not affirmative claims) in mortgage foreclosures, that the servicer "upcharged" the borrower for forced placed insurance because the "real cost" was less based on rebates, or an alleged kickback scheme. When raised in state court, such courts are managing whether the filed rate doctrine is a federal or state law doctrine, and how it applies when used defensively. Some judicial foreclosure states, in theory, could bar a mortgage foreclosure if the "up charge" relates to the default and leaves the lender with unclean hands. Foreclosure counsel are well advised to review the choice of law provisions in their loan documents, since this may have a controlling impact on a state court's review of the filed rate doctrine. Servicers are required under federal law to insure properties in flood zones, regardless of whether the borrower does so, under the National Flood Insurance Act. 42 USCA 4001. Claims by borrowers against servicers and forced-placed insurers are often defeated by the filed rate doctrine. Under the filed rate doctrine, any 'filed rate'—that is, one approved by the governing regulatory agency—is per se reasonable and unassailable in judicial proceedings brought by ratepayers." [1] Other courts likewise have held that the filed rate doctrine bars claims whose theory of damages implicates the reasonableness of the filed rate, even if the plaintiff's "claim does not directly attack the filed rate."[2] Hill v. BellSouth Telecomms., Inc., 364 F.3d 1308, 1315-17 (11th Cir. 2004); see also Carlin v. DairyAmerica, Inc., 705 F.3d 856, 874 (9th Cir. 2012) ("[W]e have made it clear that the doctrine precludes remedies which rely on a court's recalculation of rates which would have been charged, even if the plaintiff is not directly challenging the filed rate."); H.J. Inc. v. Nw. Bell Tel. Co., 954 F.2d 485, 494 (8th Cir. 1992) (affirming dismissal under the filed rate doctrine where the court was "convinced that the . . . class's RICO damages can only be measured by comparing the difference between the rates the Commission originally approved and the rates the Commission should have approved absent the conduct of which the class complains.").

The filed rate doctrine traces back to the Interstate Commerce Act. *See Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 126 (1990). It has been across a spectrum of utilities, *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981), as well as to the insurance

1 *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 18 (2d Cir.1994). The doctrine reaches both federal and state causes of action and protects rates approved by federal or state regulators.

2 Wegoland, 27 F.3d at 20. Indeed, federal courts have consistently dismissed borrower claims against lenders involving challenges to forced-placed insurance rates. Fowler v. Caliber Home Loans, Inc., 277 F. Supp. 3d 1324 (2016) (putative class action dismissed under the filed rate doctrine).

industry, *see Dolan v. Fidelity Nat'l Title Ins. Co.*, 365 F. App'x 271 (2d Cir. 2010) (title insurance); *Curtis*, 2013 WL 5995582, at *3 (applying the doctrine to homeowner's insurance). The filed rate doctrine has been distilled into two concepts: a non-justiciability principle and a non-discrimination principle. The non-justiciability principle is based upon the premise that courts should leave rate-setting to expert agencies. *Sun City Taxpayers' Assoc. v. Citizens Utils. Co.*, 45 F.3d 58, 62 (2d Cir. 1995).This concept makes practical sense. State insurance departments are familiar with claims history, risk and setting the appropriate rates.

Borrowers are now attempting to bypass this well-established body of law by making special defenses (not affirmative claims) in mortgage foreclosures, that the servicer "upcharged" the borrower for forced placed insurance because the "real cost" was less based on rebates, or an alleged kickback scheme.

When special defenses are asserted in a foreclosure, if the mortgage contains both a federal and state choice of law provision, it seems logical that the filed rate doctrine should bar such a defense, because the parties indeed agreed that federal law applies. If the loan documents fail to contain a federal choice of law provision, are state courts obligated to apply the filed rate doctrine? Two state court decisions (not foreclosures) discuss application of the filed rate doctrine to state law. *NC Steel Inc. v. National Council on Comp. Ins.*, 496 S.E. 2d 369, 374 (NC 1998); *In Re Investigation of National Union Fire Insurance Co.*, 609 N.E. 2d 156 (Ohio 1993). In the context of flood insurance, there is some authority that state law claims by a borrower against a flood insurer are subject to federal pre-emption. *Gallup v. Omaha Property and Cas. Ins. Co.*, 434 F. 3d 341 (2005); *Gunter v. Farmers Ins. Co., Inc.*, 736 F. 3d 768 (2013). Do the policy reasons for application of pre-emption apply to a servicer, whether the property is in a flood zone or not? At least one case holds that a federal savings bank may assert federal pre-emption to a borrower claim involving forced placed insurance, based on the provisions of the Home Owners' Loan Act ("HOLA"), 12 USC 1461. *Meyer v. One West Bank, FSB,* 91 F. Supp. 3d 1177 (2015). As one court has noted, principles of federalism warrant a state court not asserting its authority to enforce a cause of action against lenders in the context of the National Flood Insurance Act. *Ellis v. Countrywide Home Loans, Inc.,* 541 F. Supp. 2d 833 (2008). In Nevada, the National Flood Insurance Act has been applied to defeat a state law foreclosure based on federal pre-emption. *Ferrell Street Trust v. Bank of America, N.A.,* 408 P. 3d 574 (2017). So, what about properties not in a flood zone?

The same policy reasons support application of the filed rate doctrine when the property at issue is not in a flood zone. First, mortgage servicers are typically subject to some form of regulation at the federal level, such as CFPB regulations and various other federal law provisions. Second, it is practical, in a period of climate change, surging casualty claims, and the repeated application of the filed rate doctrine by the federal courts, to have uniformity in this area for servicers at the state law level as well. Finally, the policy reasons behind the filed rate doctrine apply with equal force to a defense, which is likely based on the same set of facts as a claim would be. As borrowers continue to assert such defenses, the state courts will be asked to answer these questions within the foreclosure context.

NEW YEAR,
NEW FTC DISCLOSURE RULE

HOW THE NEW DISCLOSURE RULE IMPACTS SERVICERS AND LAW FIRMS

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IN THE EVER-EVOLVING CYBER landscape that we are living in non-bank institutions will find themselves with a new responsibility starting in May of this New Year. The Federal Trade Commission ("FTC") proposed a new rule, which takes effect on May 13, 2024, requiring additional disclosures by non-bank financial institutions related to certain data breaches and security events (the "Rule"). The Rule amends the FTC Safeguards Rule, 16 C.F.R. § 314, under the Graham, Leach, Bliley Act ("GLBA").

The definition of "non-bank financial institution" has historically been murky, with no uniform agreement amongst state or federal regulators. Activities that classify a non-bank company as a financial institution, for purposes of the Rule, are outlined in the Bank Holding Company Act of 1956, 12 U.S.C. 1843(k). Significantly for ALFN members, these include lending money (including mortgage and auto loans), mortgage brokers, financial advisers, and issuing or selling interest in pooled assets that a bank could own directly. Less intuitively, the Rule provides examples such as a career counselor for financial services professionals, printing companies that sell checks, and property appraisers.

Financial institutions are now required to submit notice to the FTC of all incidents involving unauthorized acquisition of unencrypted customer information where at least 500 customers are impacted within 30 days of discovering the event. That notice must be submitted via a form on the FTC's website. The notice shall include the following:

(1) the name and contact information of the reporting financial institution; (2) a description of the types of information that were involved in the notification event; (3) if the information is possible to determine, the date or date range of the notification event; (4) the number of consumers affected; (5) a general description of the notification event; and, if applicable, whether any law enforcement official has provided the financial institution with a written determination that notifying the public of the breach would impede a criminal investigation or cause damage to national security, and a means for the Federal Trade Commission to contact the law enforcement official.

88 FR 77499

The Rule specifies that an event will be treated as "discovered" when it is "known" by the institution. It is "known" by the institution when "any person, other than the person committing the breach, who is the financial institution's employee, officer, or other agent." 88 FR 77499, 77505. The use of the term "other agent" should set off some alarm bells, as it appears to include vendor's.

Section 314.2(m) of the Rule helpfully borrows from the healthcare industry regulations in creating a rebuttable presumption related to access (the opportunity to view the data) vs. acquisition (actually viewing the data). See 16 CFR 318.2(a). Unauthorized access will be presumed to result in unauthorized acquisition unless the impacted financial institution can show evidence that the data was not or could not reasonably have been acquired. This is a useful distinction in some ransomware situations where cyber terrorists have encrypted data that they hold hostage but do not actually view. Law firms that assist financial institutions with reporting requirements often contract with data security firms to provide technical security audits related to the breach and include those results in opinion letters as to whether an incident is reportable.

So, how does this impact mortgage servicers? Most non-bank mortgage servicers already have robust Information Security policies in place due to myriad state laws, investor requirements, and internal policies. This new reporting requirement is not particularly onerous, but it does require revision of the Information Security Policy and Procedures. We also recommend taking a good look at vendor contracts to ensure that there is a reporting requirement for the vendor upon discovery of any breach and a plan in place to action those reports. This could be any vendor that has access to customer data even if that is not its primary purpose. For instance, a print vendor that assists in marketing campaigns, or a private investigation company contracted to assist in locating individuals. The vendor contracts can often be buttressed with an addendum that can be applied to all vendors.

We suggest that leadership in enterprises that have broad affiliate and subsidiary networks review this carefully and consider how it may be applicable to non-lending branches of the company that are not typically subject to this type of regulatory scrutiny.

Law firms that service these financial institutions must ensure that their Information Security policies require immediate and thorough reporting of data breaches. We recommend establishing a clear and direct reporting chain to a designated compliance officer who can assess the situation and report any incidents, establishing themselves as the single point of contact for any subsequent investigations.

Most non-bank mortgage servicers already have robust Information Security policies in place due to myriad state laws, investor requirements, and internal policies. This new reporting requirement is not particularly onerous, but it does require revision of the Information Security Policy and Procedures.

Employees of both financial institutions and law firms should be directed not to discuss, email, or otherwise engage in communication-related to the incident unless they are instructed to by the compliance officer. An event like this often leads to speculation and theories amongst employees that, if communicated, could be discoverable in any subsequent lawsuit or investigation.

With every new rule, comes zealous renewed scrutiny, so we recommend spending the first quarter of 2024 taking stock of policies, procedures, and contracts across the board.

KNOWING WHEN TO SEEK IN REM RELIEF IN BANKRUPTCY COURT ON DEBTORS IN FORECLOSURE

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THE GOAL UNDERLYING BANKRUPTCY LAW is to give debtors a "fresh start" from excessive debt. The U.S. Supreme Court explained that the bankruptcy act "... gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt."[1] A problem arises when a mortgage creditor is dealing with debtors that are acting in a dishonest manner and attempting to abuse the bankruptcy process in order to delay collection activity.

In response to this type of situation, 11 USC § 362(d)(4) was enacted to lift the stay injunction provided for in 11 USC § 362(a) and afford continued relief from stay in subsequent actions known as "in rem" relief. A typical request for *in rem* relief would be initiated by motion from an interested secured creditor of the real property. At hearing, evidence would be provided demonstrating "the filing of the petition was part of a scheme to delay, hinder, and defraud creditors"[2] involving either the transfer of the property or multiple bankruptcy filings. The problem facing creditors is what kind of action or activity would

1 Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934)

2 362(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided by subsection (a) of this section, such as by terminating, annulling, modifying or conditioning such stay …

(4) with respect to a stay of an act against real property under subsection (a), by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, and defraud creditors that involved either

(A) transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or

(B) multiple bankruptcy filings affecting such real property.

Moreover, Debtors' performance in multiple filings including the amount paid into a Chapter 13 Plan and the success of previous bankruptcies would be mitigating factors in deciding to pursue in rem relief.

serve to demonstrate a scheme to delay. As bankruptcy and foreclosure filings begin to increase, creditors will face more decisions on whether to proceed with *in rem* relief. Persuasive evidence of delay can differ in separate districts and even individual judges, so a mortgage creditor would have to weigh multiple types of evidence.

One of the most persuasive arguments put forth in favor of granting *in rem* relief involves timing. Examining the activity of the debtors around the filing of the bankruptcy petition is important. A common timing issue is a bankruptcy filing remarkably close to a pending foreclosure sheriff sale. If a debtor files serial bankruptcies prior to scheduled sheriff sales in a foreclosure case, those multiple filings are good support for an argument of delay. The serial bankruptcies usually take the form of multiple Chapter 13 bankruptcy filings, or a Chapter 7 filing followed by multiple Chapter 13 filings.

Moreover, Debtors' performance in multiple filings including the amount paid into a Chapter 13 Plan and the success of previous bankruptcies would be mitigating factors in deciding to pursue *in rem* relief. If the debtors failed to file bankruptcy schedules during consecutive bankruptcies, it could demonstrate that it was never their intention to work towards a successful outcome. If debtors have made multiple filings, a Court may have granted sanctions against them in a previous case. Pursuant to 11 U.S.C. § 109(g), a Court can grant sanctions against debtors prohibiting the filing of another bankruptcy case for a period of 180 days from the entry of the order. The type of conduct underlying one of these types of sanctions from a Court for failure to prosecute or abide by an order would most likely mean that the Judge on the case is receptive to a request for *in rem* relief.

Whether the debtors are represented by counsel could also demonstrate that debtors understand the consequences of multiple filings. Courts would be more likely to give deference to a bankruptcy which has been reviewed and filed by an attorney knowledgeable of the process and bound by ethics rules. A further factor to consider is the treatment of the collateral. Married debtors can get creative and file multiple individual bankruptcies rather than file jointly as spouses. If the collateral has been subject of multiple bankruptcies and even been transferred between different parties, this scenario could persuade a Court that an effort is occurring to shield the property from collection efforts.

While the above-mentioned factors are a good starting point in deciding to proceed to obtain *in rem* relief, they are not exhaustive. It is important to understand that a Court's approach towards the request can be a strong indicator of success. Some Courts might favor giving the benefit of the doubt to debtors in the hope that they can be successful while conversely, other Courts may be more focused on the abuse of the bankruptcy process by less than truthful debtors. Ultimately, a mortgage creditor seeking to get *in rem* relief needs a record of bad acts by debtors as well as a sympathetic court willing to listen. a

COMMON SENSE

MEASURES FOR MANAGING INFORMATION SECURITY RISK

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RUNNING A CLIENT-FIRST COMPANY, I'm always looking to see how other companies measure up and if they are Client-First. So, what could The Air National Guard, The CFPB, Ransomware, and Process Serving possibly have in common? Well, let me tell you...

In the late 90s, I was a member of a team of professionals that provided information security technology and solutions to the government. One accomplishment I am most proud of is that my team engineered and deployed the first worldwide VPN network for the U.S. Air National Guard (USANG) using commercial Internet. Then, like now, organizations want to have all available bandwidth to enable seamless corporate communication. With advancements in technology, there is also associated "risk." Recently, many in the mortgage default industry have faced this increased risk by experiencing information security breaches and ransomware attacks. And, if your firm isn't exposed to enough risk already, in August of 2023, the CFPB announced they will also be looking at your information security. As a business owner in this industry, I'm thankful for my background in Information Security. However, you don't need to be an Information Security wizard to manage your security risk. You need to ask some basic questions and understand some basic concepts.

Your firm interacts with 100's of defendants a week, representing many high-profile banks, servicers, and other commercial entities. What would it mean to your business if you got hit in a ransomware attack? How long could you be down? Once it became commonly known that you had a security breach, how many clients would you lose? Would the CFPB get involved? What if the Blackhats are smarter this time, and they install ransomware and let it become invasive, infecting your systems and your backups? The good news is that the technology to prevent malicious attacks isn't that expensive or even costly to deploy and maintain. So, where should you start?

First, let's assess your "risk." Your risk profile encompasses all the areas where your firm has an IT presence, like Data Centers, ISPs, and on-premises (PW, email, and other services). Many firms use a hosted case management system that is also integrated with other services that share information. Many of those platforms are hosted in the cloud, too. What is your exposure if one of those services is compromised and your Client's PII data is exposed? If your case management system's nearshore data center in another country gets hit, what is your firm's plan B? I doubt the CFPB will care that you were relying on your vendor's assertions that their data center had the latest and greatest security measures. Who is managing those security procedures? Have they been vetted? How often? Who does the vetting of the vetters?

In the interest of full disclosure, I am not a big fan of "offshoring," nearshoring, or utilizing the cloud for critical applications. Why? "risk". The more vendors involved, the more people, the more "risk". When thinking about Information Security, common sense goes a

long way to help you manage your "risk." I'm not suggesting that we can't utilize those environments, but you do need to fully understand the additional "risk" and plan accordingly. Another essential thing to mention is that in my experience the ONLY reason that any vendor is offshoring anything is to lower their cost. What else are they skimping on if they are pinching pennies on infrastructure or staff? At the end of the day, your firm is going to be on the hook for whatever lapses in security exist for any vendor you use, and you need to be comfortable with assuming that level of "risk." The CFPB has demonstrated on multiple occasions that they won't care what your vendor tells you. When configuring your information security posture, think about building layers of security. Much like an onion, each layer would need to be penetrated before a hacker could exploit the next layer. Utilizing a layered approach also increases the likelihood you will detect any Information Security before much damage can be done to compromise your environment. Let's look at three or four actionable items that you can do right now to help mitigate your risk.

First, you should have application-aware perimeter security. Many companies are offering 4th and 5th-generation application-level firewalls. These firewalls enable security policies to be developed based on the applications that you and your staff use daily. These devices are "smart," meaning they can evaluate network traffic and determine if the communication is safe or suspicious. Many have some AI or machine learning capabilities as well. This market has many players, but my favorite is SonicWall (www.sonicwall.com). They offer a complete line of firewalls and perimeter security devices. My favorite thing about SonicWALL is their support. For those with limited Information Security experience, you can purchase one of their firewalls, and for a small fee, they will configure it for you and get you up and going. They also offer a VPN client that you can install on your laptop or remote office computer to secure your remote office staff and all the services they need to be productive, like email. Without a doubt, email is the most significant risk exposure today.

Email is the source of most phishing attacks, viruses, ransomware, trackers, and other junk. Why? Everyone must have an email address, and yet the solutions for securing email still need to be more robust. So, I self-host our exchange servers in our data center. This requires more technical expertise, but for me, that outweighs the risk of outsourcing my email system. To mitigate email risk further, I paired our self-hosted email with AppRiver's (www.appriver.com) email threat protection. AppRiver is very cost-effective and provides a great deal of flexibility. My favorite feature of AppRiver is the ability to block email based on the country of origin and or geographic region. Emails identified as spam or infected are quarantined and are never relayed to your primary email server. This feature has allowed us to block 99.9% of spam, viruses, etc. You don't have to host your email to use this service, as it works with Office 365 and a few other hosted providers. It's low cost but high value/return. Using a system like AppRiver will stop almost 100% of the attacks.

You should have a backup scheme that utilizes the 3-2-1 backup rule at a minimum. There should be three copies of data on two different media, with 1 of those being offsite.

While the 3,2,1 rule is great, we must add one more requirement – immutable backups. Immutable means that the backup cannot be changed or deleted, which means that its original integrity is maintained. Having an immutable backup has become critical for recovery and fighting ransomware. This is because threat actors now routinely attack backups as well. My vendor of choice here is Veeam. (www.veeam.com). Again, this space has many vendors, but Veeam is my favorite because it is easy to use and configure. If you are using VMware, it comes with native integration that makes it easy to backup and replicate your servers locally or to a private cloud, e.g., instant disaster recovery!

Ok, so you have your firewall installed, email protected, and immutable backups going… what else can you easily do? Virus Protection for your servers and other endpoints! Again, this space has many vendors, but my favorite is Malwarebytes (www.malwarebytes.com). This application allows you to centrally manage virus protection on your endpoints (servers and client workstations). My favorite feature is that you get a weekly report listing any vulnerabilities found and what was done to mitigate them. The software will automatically quarantine whatever it finds. Once installed, the end user can't uninstall the security agent without your approval, so you know all your endpoints are protected. Again, it is easy to configure, install and manage. The support staff are top notch too.

In today's vendorscape many vendors may not prioritize the security of your information. Legal service providers and third-party vendors often focus on their

As a client, make sure you ask questions to assess if the vendor has the knowledge and technology to safeguard your data. Implementing solutions for these areas can significantly reduce the risk of information security incidents.

competitive advantages, such as quick document processing or provided audit results. However, assurances from past security audits may not reflect their most recent status. When was the last time you heard any legal service vendor or a 3rd party vendor mention your information security when they started working with your firm? A typical SOP vendor might list a competitive advantage as how quickly they can serve, e-file, etc., your documents. They might have an audit that attests they are secure and give you a copy of their latest SOC-3 audit results to assure you that everything is awesome, and you are covered. But that SOC-3 Audit was from October; now it's January 2024 – are they still secure? Never mind them, you are the Client. What about your data? Do they have the knowledge and technology to protect your information or secure their connection to you?

As a client, make sure you ask questions to assess if the vendor has the knowledge and technology to safeguard your data. Implementing solutions for these areas can significantly reduce the risk of information security incidents. For instance, most vendors offer some sort of customer portal. What security measures have they implemented to ensure that the system is secure? Is all the information exchanged between your firm and the portal encrypted? Does their system actively scan for viruses and malware in the files that are exchanged between you and the vendor? For larger firms that desire direct integration, do they offer VPN tunnels or other security measures to lock down these connections between your network and a vendor's data center? It's also crucial to integrate information security into your firm's culture. This can be easily accomplished by reviewing recent developments in Information Security during your monthly staff meetings. This is also a great time to remind everyone to NOT click on any hyperlinks or files that you receive by email that you were not expecting.

Every IT environment is different, and the items I discussed are not meant to be an all-inclusive list. There are several other areas that you should address, like passwords and software patches, among other things. However, the ones I introduced are a good start on your quest to increase your security. If you implement solutions that address these areas, you will have come a long way in reducing the risk of an information security incident at your firm.

If your current legal vendor isn't actively engaging with you on information security, it might indicate a lack of internal focus. Consider the competitive landscape and partnering with a vendor that is not only committed to your success but also the security of your data.

MV Realty's Bankruptcy Filing

A NATIONAL IMPACT

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ON SEPTEMBER 22, 2023, MV Realty filed for Chapter 11 bankruptcy protection in the Southern District of Florida.[1] MV Realty is a company that pays homeowners for the exclusive right to sell their homes at a future date.[2] Frequently, consumers in need of money are contacted by MV Realty for a loan.[3] Such loans can be for as little as a few thousand dollars, whereby MV Realty then disperses the loaned funds in exchange for exclusive rights to sell the subject real property over the course of a specified period of time, often for as long as decades after the initial loan.[4] The common business practice for MV Realty involves the consumer signing lengthy paperwork that often contains predatory terms.[5] MV Realty operates via a network of licensed realtors in as many as 33 states across the country.[6] To date, at least 16 states have enacted new laws specifically targeting MV Realty's common business practices.[7] Additionally, MV Realty is currently facing lawsuits in numerous states for allegedly misleading consumers and homeowners.[8]

Further, the fine print on the above-referenced agreements binds the contracts to the land, meaning that even after a homeowner is deceased, their successor(s)/heir(s) will be bound to the terms of the agreement.[9] This has been seen in South Carolina, specifically, with MV Realty filing Memorandums of Agreement Affecting Real Property with the following language included therein, "… the obligation of Property Owner under the Agreement constitute covenants running with the land and shall bind future successors-in-interest to title to the Property."[10] This not only affects the homeowner/heir(s) when attempting to sell the real property but becomes even more complex in the context of judicial foreclosure actions amidst the pending MV Realty bankruptcy action.

Many of the consumers targeted by MV Realty's practices are facing difficult economic situations. These same consumers can, and often do, face mortgage foreclosure as a result of the difficult circumstances. The

1 *See* U.S. Bankruptcy Court for the Southern District of Florida (West Palm Beach) Petition #: 23-17590-EPK.
2 MV REALTY WEBPAGE, (last accessed Dec. 14, 2023), https://www.mvrealtyfl.com/.
3 MV REALTY FILES FOR BANKRUPTCY PROTECTION, ACCUSED IN LAWSUIT OF 'SWINDLING' HOMEOWNERS ACROSS THE COUNTRY, Nov. 17, 2023), https://wsvn.com/news/investigations/mv-realty-files-for-bankruptcy-protection-accused-in-lawsuit-of-swindling-homeowners-across-the-country/.
4 Id.
5 One incident involved a $13,965.00 penalty in exchange for a loan of $1,460.00. Id.
6 Id.
7 OHIO AG EXPLAINS HOW MV REALTY LAWSUIT WILL WORK AMIDST BANKRUPTCY PETITION, (2023), https://www.msn.com/en-us/money/companies/i-team-ohio-ag-explains-how-mv-realty-lawsuit-will-work-amidst-bankruptcy-petition/ar-AA1llNdb.
8 MV REALTY FILES FOR BANKRUPTCY (Sept. 25, 2023), https://www.housingwire.com/articles/mv-realty-files-for-bankruptcy/#:~:text=Right-tolist%20agreement%20firm%20MV%20Realty%20has%20filed%20for,banned% 20from%20operating%20in%2014%20states%20through%20legislation.
9 Id.
10 Id.

agreements that MV Realty records create additional time and expenses for legal professionals, and therefore the consumers themselves, during the foreclosure process. With the above issues in mind, the current bankruptcy action has a massive impact on the states and encumbered properties where MV Realty operates.

The lienholder interest obtained by MV Realty resulting from these agreements means that MV Realty must be named as a party-defendant in any potential foreclosure actions to ensure any interest vested in MV Realty would be released by virtue of the judicial foreclosure sale and foreclosure deed. This would also ensure that clear and marketable title passed to the successful purchaser at the judicial foreclosure sale.

First, as seen with regard to sales transactions or refinances, on November 9, 2023, two "Comfort Orders"[11] were granted by the Bankruptcy Court which specifically authorizes a Debtor-in-Possession to release or subordinate the instruments recorded by MV Realty in various states. In a sales transaction or refinance, if the title work reveals MV Realty claiming an interest, lien, or other right with regard to the subject real property, it needs to be released before proceeding with the sale transaction or refinance. The aforementioned filed Bankruptcy Comfort Orders authorize this release or subordination to occur.[12] However, to date, a similar relief order has not yet been issued for affected real property facing foreclosure.

In conclusion, MV Realty's recent bankruptcy filing has national implications across many legal practice areas, some of which include real-estate closings, mortgage foreclosures, and regulatory enforcement actions.

In the foreclosure context, when the title work reveals that a Memorandum of Agreement Affecting Real Property or other, similar agreement has been recorded, the foreclosure action must stop until relief from the automatic stay is obtained within the Florida bankruptcy case before proceeding with state court remedies.[13] To date, a global order, similar to what has been entered for sales transactions and refinances, lifting the automatic stay for foreclosure proceedings where MV Realty is a party to the action has not yet been filed. Analogous global relief orders have previously occurred in similar high-profile bankruptcy cases involving entities that affect numerous and simultaneous national foreclosure pleadings with regular occurrence.[14]

In conclusion, MV Realty's recent bankruptcy filing has national implications across many legal practice areas, some of which include real-estate closings, mortgage foreclosures, and regulatory enforcement actions. Given that MV Realty filed a Chapter 11 bankruptcy, as opposed to a Chapter 7 action, it is safe to assume, for now at least, that MV Realty's intention is to continue to operate and hold the impacted homeowners to their agreements.

11 NEED SOME COMFORT? COMFORT ORDER IN CHAPTER 13 CASES, (2006), https://www.settlepou.com/uploads/ComfortOrders.pdf.
12 Id.
13 UNITED STATES BANKRUPTCY COURT SOUTH DISTRICT OF FLORIDA, RELIEF FROM THE AUTOMATIC STAY, https://www.flsb.uscourts.gov/local-rule/relief-automatic-stay.
14 *See* previously filed global relief orders by Mortgage servicer Ditech Holding Corp. (Case 19-10412), and Ally Bank/GMAC (12-12020), both occurring the Bankruptcy Court for the Southern District of New York.

The Benefits *of In re Hoggle*

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IN RE HOGGLE *(Hoggle)* is a case out of the 11th circuit that originated in the Northern District of Alabama. In Hoggle, the Court heard a case where a debtor defaulted on ongoing mortgage payments during their Chapter 13 bankruptcy. Before Hoggle, this would require the debtor to make separate payment arrangements with their lender, the Court in Hoggle gave debtors a new option. Instead of making separate payment arrangements with their lender, the court allowed the debtor to add the amount of the missed payments to the remaining payments in their Chapter 13 Bankruptcy case.

The Court did this by holding that 11 U.S.C.C. §§ 1329 and 1322, specifically 1322(b)(3),(5), allowed a Chapter 13 plan to provide the cure for any defaults, regardless of whether they occurred pre or post-petition, and stated that 1329 allowed the debtor to modify the Chapter 13 plan at any time after confirmation. Provided that the plan, as modified, conformed to the requirements of §1322. See Green Tree Acceptance v. Hoggle (In re Hoggle), 12 F.3d 1008. This has resulted in court resolutions for Relief from Stay motions being simplified and more uniform throughout the bankruptcy courts in Alabama. The most common resolution being the addition of missed payments, fees, and other costs to the bankruptcy case. Adding payment amounts to the bankruptcy case in this way comes with a Notice of Default from Future Relief provision if further payments are missed by the debtor. In this article, I will be voicing my opinion on the benefits of this method of resolution.

When it comes to the practice of creditors' rights in bankruptcy, the motion for relief from the automatic stay is one of the most common motions in ongoing cases. In polling attorneys at my firm's statewide offices, I found two main methods for resolving motions for relief by an agreed or consent order.

The first method of resolution is for the debtor to cure the missed payments through direct payments to the creditor over 6 months. These direct payments could include the fees and costs of the motion. This method can lead to significant increases in the monthly payments the debtor is required to make, placing them in danger of becoming non-compliant with their active bankruptcy case and not being able to make their monthly mortgage payments. As an example, say a hypothetical debtor missed payments, fees, and costs totaling $3,000. Paying back that $3000 directly to the creditor over 6 months would be an additional $500 monthly payment. For many debtors in active bankruptcy cases, this is an unfeasible amount for them to be able to pay on top of their other obligations. However, there are scenarios where the direct payment option can be the best way forward. For instance, if the direct monthly payment scenario were to occur close to the end of the bankruptcy case, adding the missed payments, fees, and costs to the bankruptcy payments could lead to a higher monthly payment than that afforded by the direct payment method.

The second method is the one allowed through Hoggle. This method allows the debtor to add the missed payments, fees, and costs to the remaining monthly payments in the bankruptcy case through the filing of a supplemental proof of claim. This method, depending on the amount of time left in the bankruptcy case, can significantly decrease the monthly financial burden on the debtor. Using the same example as above, say the hypothetical missed payments, fees, and costs, total $3000 but, in this example, we use the Hoggle method. The amount owed would be distributed among the remaining 24 monthly payments in the bankruptcy case, leading to an increased monthly payment of $125, instead of the $500 additional monthly payment incurred by the direct payment method. This method, if enough time is left in the bankruptcy case, can help ensure that the debtor is able to pay off their debts.

In conclusion, while both options for resolving Motions for Relief have their merits, In re Hoggle has streamlined the process for Motions for Relief from the Automatic Stay by providing a more structured and affordable approach for debtors, and allows many of the motions on Judges' dockets to be resolved prior to the hearing. In re Hoggle has simplified a complicated process and can lead to more realistic and successful outcomes for both debtors and creditors. ■

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DID RECENT EVENTS THROW YOUR BUSINESS A CURVE?
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NBS
NBS IS STILL ON THE FIELD AND READY TO HELP!

Florida Court Affirms Foreclosure Judgement for HOA & Awards Attorney Fees Including Those Incurred in Bankruptcy Proceedings

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FLORIDA'S FOURTH DCA affirmed a county court's final judgment foreclosing a lien in favor of Deer Run Property Owners' Association (the "Association") awarding over $87,000 for delinquent assessments, interest, late charges, costs, and attorneys' fees. *Belkova v. Deer Run Prop. Owners' Ass'n, Inc.*, No. 4D21-2924, 2023 WL 5419586, at *3 (Fla. 4th DCA August 23, 2023). In *Belkova*, the Association initiated foreclosure proceedings in 2017 due to delinquent assessments totaling $3,857.07.[1] Belkova delayed the proceedings for years by evading service of process, petitioning three times for bankruptcy protection, and moving for multiple continuances based on "numerous physical problems."[2]

Eventually, Belkova filed a pro se answer and affirmative defenses and in March 2021 the matter was set for a summary judgment hearing on April 23, 2021. Belkova sought an extended continuance through June 2021, due to a horseback riding injury, but received a six-day continuance (to April 28, 2021) instead.[3] On the day of the hearing, through newly retained counsel, Belkova moved for a second continuance and filed an amended

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Five factors to be considered when reviewing the denial of a continuance: The length of the requested continuance, whether another attorney could cover the matter, prior requests for continuance, inconvenience to others, and any other unique circumstances.

answer and affirmative defenses without leave of court. The county denied the continuance, found the last-minute filing untimely, and granted summary judgment in favor of the Association. The clerk set a foreclosure sale for October 13, 2021. The day before the sale Belkova appealed the judgment, but the sale proceeded, and a third party purchased the property for $180,100.

On appeal, Belkova argued that the county court lacked jurisdiction to enter a $87,000 judgment due to the monetary limitations[4] on cases filed in county court and lacked the jurisdiction to foreclose a lien on homestead property under the homestead exemption established by the Florida Constitution.[5] The Fourth DCA rejected both arguments. The Court first explained that "the payment of taxes and assessments" was an exception to the homestead exemption which prevented the forced sale of homestead property and that the $15,000 limitation for matters brought in county court was "exclusive of interest, costs, and attorneys' fees."[6] The Court elaborated that even though "a claim of lien for assessments may include reasonable attorney's fees," they are "not part of the 'matter in controversy' under section 34.01(1)(c)."[7]

Interestingly, the Court also found that the county court had jurisdiction to award attorneys' fees "for work performed in bankruptcy court." The Court explained that since the bankruptcy stay was lifted and there was no disposition of the property subject to the Association's lien in the bankruptcy proceedings, the property "remained the appellant's property and returned to the county court's jurisdiction."[8]

Lastly, the Court rejected Belkova's argument that the county court abused its discretion when it denied her second requested continuance of the summary judgment proceedings.[9] The Court acknowledged that when a physical condition prevents a party from fairly and adequately presenting their case denial of a requested continuance usually constitutes reversible error. However, the Court noted reversal was not mandated in "all circumstances" and outlined five factors to be considered when reviewing the denial of a continuance: The length of the requested continuance, whether another attorney could cover the matter, prior requests for continuance, inconvenience to others, and any other unique circumstances.

The Fourth DCA quoted extensively from the county court's findings which demonstrated Belkova's second request for a continuance was intended to delay the proceedings and that Belkova's repeated "dilatory practices" throughout the proceedings prejudiced the Association. The Fourth DCA concluded the county court did not abuse its discretion by denying yet another requested continuance. The Court affirmed all aspects of the final judgment entered in favor of the Association. a

ENDNOTES

1 *Belkova*, at *1.

2 *Belkova*, at *1, *5. The Fourth DCA, quoting the trial court, included a list of the ailments which included "exhaustion caused by exposure to 'microwave radiation from Internet routers and cell phones,' two separate automobile accidents causing a herniated disc and 'significant neck injuries' respectively, muscle cramps from hunching over a desk in front of a computer, unspecified 'serious illnesses,' an unspecified 'catastrophic injury,' and 'chronic mercury and lead poisoning.' "

3 *Belkova*, at *1. Future reference or quotations to this case are to this citation until noted otherwise.

4 The jurisdiction of county courts is limited to those actions at law "in which the matter in controversy does not exceed the sum of $15,000, exclusive of interest, costs, and attorney's fees." *Belkova*, at *3 (quoting § 34.01(1)(c), Florida Statutes) (emphasis omitted).

5 *Belkova*, at *2. Future reference or quotations to this case are to this citation until noted otherwise.

6 *Belkova*, at *2-3. Future reference or quotations to this case are to this citation until noted otherwise.

7 *Belkova*, at *3. Future reference or quotations to this case are to this citation until noted otherwise.

8 *Belkova*, at *4. Future reference or quotations to this case are to this citation until noted otherwise. Notably, the Fourth DCA certified conflict between the Third, Fourth and Fifth districts on this issue.

9 *Belkova*, at *5.

Florida Overview of Relief from the Automatic Stay in Chapter 13 Cases

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THE AUTOMATIC stay is triggered immediately upon filing bankruptcy, and it immediately stops all proceedings and actions against the debtor and the debtor's property[1]. The stay has a broad scope and applies to both secured and unsecured creditors. The stay remains in place until the property is no longer property of the estate or until the debtor is discharged or the case is closed or dismissed[2]. However, the stay may be lifted by the court or upon a motion for relief from the stay.

In Florida, a debtor's Chapter 13 Plan may provide for relief either upon filing of the plan or confirmation of the plan. For example, in the Middle District, if the plan provides for direct payments, surrender of the property, or fails to provide for payments, relief is granted upon filing of the plan[3]. However, the Southern District and the Northern District provide relief upon confirmation.

When the Chapter 13 plan does not provide relief, 11 USC 362(d) provides several grounds under which a creditor can obtain relief from the automatic stay. Under 362 (d)(4) relief may be granted for a period of two years in any future case involving the property if the case was filed as part of a scheme to delay, hinder, and defraud creditors[4]. Generally, a scheme under 362(d)(4) is an intentional or systematic plan of action to delay, hinder, or defraud creditor[5]. In *In Re Civic* the court held that relief under 362(d)(4) was warranted as the debtor filed four bankruptcy cases on the eve of foreclosure sales all of which were subsequently dismissed[6]. Although a scheme to defraud delay or hinder creditors can be inferred from serial filings alone, a court may consider other factors to determine if relief under 362(d)(4) is justified[7]. In a case in the Middle District of Florida, the Court held that two-year relief was not appropriate despite it being the debtor's fifth bankruptcy case when a two-year injunction was previously entered against the debtor, and the creditor failed to finalize its foreclosure action during that previous injunction[8]. Accordingly, whether or not relief will be granted under 362(d)(4) will hinge on the specific facts of the case.

Another basis for relief under 362(d) is relief for cause, including the lack of adequate protection. Because cause is not further defined in the Bankruptcy Code, relief from the stay for cause is a discretionary determination made on a case-by-case basis. "A movant seeking relief from the automatic stay [for cause] under § 362(d)(1) 'must demonstrate a factual and legal right to the relief that it seeks[9]. "The statute specifically provides that 'the lack of adequate protection of an interest in property' is cause to lift a stay. Further,

1 11 USC 362(d)
2 *Id*
3 Administrative Order FLMB- 2023-3
4 11 USC 362(d)(4)
5 In re Fiedler, 6:22-bk-03767-LVV (Bankr. M.D. Fla. March 20, 2023)
6 In re Civic, 2022 Bankr. LEXIS 361
7 In re Fiedler, 6:22-bk-03767-LVV (Bankr. M.D. Fla. March 20, 2023)
8 *Id*.
9 In re Prestwood 3:21-bk-279-JAF ((Bankr. M.D. Fla. May 15, 2022)

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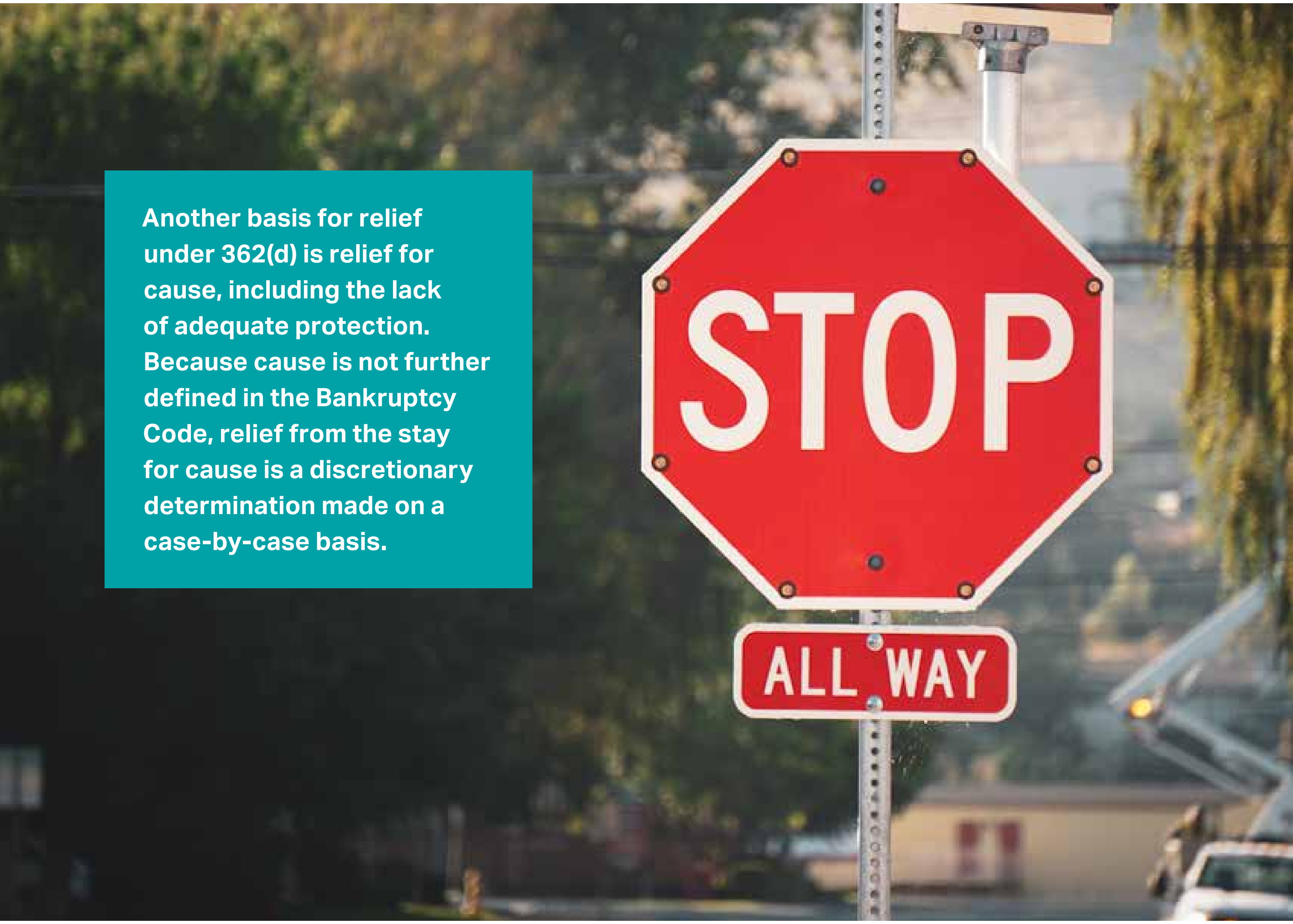

Another basis for relief under 362(d) is relief for cause, including the lack of adequate protection. Because cause is not further defined in the Bankruptcy Code, relief from the stay for cause is a discretionary determination made on a case-by-case basis.

a petition filed in bad faith also justifies relief from a stay[10]. Repeated filings can demonstrate an abuse of the bankruptcy process and an inability or lack of intent to reorganize[11]. A movant seeking relief from the automatic stay under 362(d)(1) must demonstrate a factual and legal right to the relief that it seeks and must establish a prima facie case of cause for relief.[12] For example, if seeking relief due to bad faith, the creditor must present evidence of bad faith; more specifically, evidence that prior cases were dismissed due to failure to make payments or other evidence that the prior cases were filed in bad faith[13].

While a court may not grant relief at the beginning of the case, seeking early relief can create a baseline to establish "cause" justifying relief from the stay. If an initial request for relief is denied, a later request can highlight the debtor's lack of progress during the case, using the first request as a reference point. In conclusion, a creditor's basis for relief is determined on a case-by-case basis.

10 *Id.*
11 In re White, 2014 Bankr. LEXIS 3929
12 In re Elmira Litho, Inc., 174 B.R. at 902.
13 *Id*

Is the "Gavel Rule" Under Fire in Massachusetts?

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IT HAS BEEN A LONG-STANDING precedent in the Commonwealth of Massachusetts that a completed foreclosure terminates a mortgagor's equity of redemption. Outpost Cafe, Inc. v. Fairhaven Savings Bank, 3 Mass. App. Ct. 1 (1975). As Massachusetts is a title theory state, a mortgagor retains only equitable title unless and until a mortgagee's legal title is terminated (e.g. in the event of a loan payoff). In practice, this otherwise means that a mortgagor's equity of redemption is extinguished where a bid at a foreclosure auction is accepted, and a memorandum of sale is subsequently executed. Stated differently, equitable title to subject property is transferred from a mortgagor to a foreclosing lender (or whoever had placed the successful high bid) upon the acceptance of the same and the execution of the memorandum of sale that follows.

Further, the Bankruptcy Court for the District of Massachusetts has historically held that "Section 1322(c)(1) of the Bankruptcy Code allows a debtor to cure his or her default under a mortgage unless the property has been sold at a foreclosure sale which was conducted in accordance with applicable state law." In re Mellino, 333 B.R. 578 (Bankr. Mass. 2005), *citing* In re Crichlow, 322 B.R. 229, 234 (Bankr. Mass. 2004). Furthermore, "numerous district courts and bankruptcy courts (including the bankruptcy courts for the districts of Massachusetts, Rhode Island, and Maine) agree that a 'straightforward reading' of the [relevant foreclosure] statute compels the conclusion that: (1) the phrase, 'sold at a foreclosure sale,' means 'the cut-off point is when the gavel comes down on the last bid at the foreclosure sale'; and (2) the phrase, 'that is conducted in accordance with applicable nonbankruptcy law,' qualifies 'foreclosure sale' and requires the sale to be carried out as provided for by nonbankruptcy law." In re Vertullo, 610 B.R. 399, 410-411 (B.A.P. 1st Cir. 2020), citing In re Crawford, 232 B.R. 92, 96 (Bankr. N.D. Ohio 1999). *See generally* In re Beeman, 235 B. R. 519 (Bankr. N.H. 1999). In Massachusetts, this "applicable state law" is M.G.L. Ch. 244.

A recent influx in post-sale bankruptcy cases filed in the District of Massachusetts by debtor-mortgagors seeking to avoid the results of an otherwise lawful foreclosure auction—in other words, one completed in accordance with governing state law and the statutory power of sale contained in the underlying mortgage instrument—seems to suggest that the debtors' bar feels otherwise. While it was not previously uncommon for a post-foreclosure sale closing to temporarily pause due to a bankruptcy case filed after an auction—for example, while a foreclosing lender sought the comfort of the Bankruptcy Court that its post-foreclosure documents may be recorded and that such sale was otherwise insurable—of late, debtor-mortgagors are taking it several steps further—filing proposed Chapter 13 Plans, and in many cases, initiating adversary proceedings to avoid the result(s) of an auction as a pre-petition transfer of an interest in property pursuant to § 544 of the Bankruptcy Code.

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Remarkably, however, the arguments of the debtors' bar have not focused on the merits of the so-called "gavel rule" *per se*; instead, reliance has been placed in most circumstances almost exclusively on the findings in In re Mularski, 565 B.R. 203 (Bankr. D. Mass. 2017), through which the results of a foreclosure sale by public auction were deemed to have been unperfected because a foreclosure deed and affidavit of sale (although executed) had not been recorded at the time of bankruptcy filing. However, the result of the underlying sale was not explicitly avoided, but rather quite simply, the debtor-mortgagor's equity of redemption at the time of the sale was restored to the Chapter 7 Trustee of the mortgagor's estate, as "a trustee cannot acquire 'any greater rights than he, or any person, would have as a bona fide purchaser or lien creditor under state law.'" Id. at 207. Therefore, the Trustee could not recover legal title to the subject property through an action brought under § 544.

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While the resulting consequences of In re Mularski may seem dire to a foreclosing lender, it is curious as to why the debtors' bar is now clinging to a five-year-old holding (and several similar cases that have since followed) to avoid the valid results of pre-petition foreclosure sales. Notably, on August 7, 2023, the Bankruptcy Court for the District of Massachusetts, in Tran v. Citizens Bank, N.A. (In re Tran) (Case No. 22-40664-CJP, AP No. 22-04019-CJP) examined the decision in In re Mularski and rejected a debtor-mortgagor's attempt to avoid the results of a pre-filing foreclosure sale where an affidavit of sale was recorded in the applicable land records prior to the filing of the case, deeming that such recording provided constructive notice of the results of the foreclosure sale to a hypothetical good faith purchaser (although no deed had yet been recorded). In considering the decision in In re Mularski, where the Court held that constructive notice of a sale of a property was not provided where both an affidavit of sale and foreclosure deed were recorded after the petition date, the Court in In re Tran rejected the debtor-mortgagor's efforts to avoid the results of the underlying sale due to the pre-petition recording of the affidavit of sale.

The recent influx in cases such as In re Tran where debtor-mortgagors are seeking to avoid the results of otherwise lawful foreclosure sales begs a simple question—why, and, why now? If avoiding the results of a foreclosure sale by public auction only operates to reinstate a debtor-mortgagor's equity of redemption (either in the debtor-mortgage him or herself or in the form of a Chapter 7 Trustee), would not a debtor be forced to just immediately proceed to attempt to resell a property him or herself to another third-party under 11 U.S.C. § 363? Is the debtors' bar afraid that their clients are missing out on the realization of the equity in their properties through foreclosure rather than third-party sales significantly enough to wage such a battle? And, in a quasi-judicial foreclosure state such as Massachusetts—where the only in-court proceeding is usually a determination by the Land Court Department of the Trial Court as to whether an owner of a property is subject to the auspices of the Servicemembers Civil Relief Act, 50 U.S.C. c. 50 § 3901 (et seq.)—how can the creditors' bar respond? Is the execution and immediate recording of an affidavit of sale sufficient? In re Tran says "yes." But is that practical? And can creditors adapt to accelerate their timelines for executing post-sale documents to in turn expedite recording? And, more importantly, what will title insurers think? Only time (and the Bankruptcy Court) will tell…

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Updates to the Local Form of Stay Relief Order

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IN NOVEMBER OF 2023, the Board of Judges of the Bankruptcy Court for the Federal District of New Jersey approved a new form of stay relief order that adjusts wording and adds clauses for clarity. The standard form order previously in use had not been updated since 2016, and a few small adjustments were necessary to align with the needs of the parties. The new order adds a clause clarifying the trustee's duties post-stay relief; adds a clause specifically authorizing parties to communicate post-stay relief; and changes the wording to align with Rule 3002.1(a).

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The first change mentioned clarifies that a Chapter 13 Trustee may stop disbursing on a creditor's claim once the order granting relief from stay is entered. Before the update, the Chapter 13 Trustees would frequently file notices of reserve or limited objections to claims of Secured Creditors who had obtained relief from stay. The addition of a clause that specifically relieves the Trustee of the responsibility of further disbursement has resulted in an easier transition following the entry of a stay relief order for both the Trustee and the affected Secured Creditor.

Another change to the local form stay relief order adds a clause that specifically authorizes the Secured Creditor to "reasonably communicate" with the Debtor and Debtor's counsel in order to comply with non-bankruptcy law. The clarity this clause provides should give creditors comfort in sending notices to the Debtor in accordance with local and federal laws, including the Fair Debt Collection Practices Act and Consumer Finance Protection Bureau regulations.

Lastly, the title and verbiage of the local form stay relief order has been updated to mirror the language in the Federal Rules of Bankruptcy Procedure relating to notices of payment change, post-petition fee notices, and responses to notices of final cure. Previously, the New Jersey form stay relief order was titled "Order Vacating Stay." The previous version also included the clause "the automatic stay is vacated." The order is now titled "Order Granting Motion for Relief from Stay," and the language of the order itself has been updated to state that "the motion is granted, and the stay is terminated" as to the subject property.

This seemingly small change now brings the language of the stay relief order squarely in line with the language of Rule 3002.1(a), which states that the notice provisions of the rule "cease to apply when an order terminating or annulling the automatic stay becomes effective." The specific language of Rule 3002.1 has been the subject of litigation in several jurisdictions where creditors did not provide Rule 3002.1 notices after obtaining relief from the automatic stay. A few cases have held that a stay relief order that does not specifically terminate or annul the stay is ineffective in triggering the exceptions to the required notices contained in Rule 3002.1 and ruled against creditors who failed to file responses to notices of final cure, payment change notices, and post-petition fee notices after obtaining relief from stay. The New Jersey form update protects creditors from adverse rulings that may occur in other jurisdictions when Rule 3002.1 notices are not filed post-stay relief.

The three changes to the form of order for stay relief motions went live in November of 2023. Orders that were entered or submitted prior to the updated form could still pose potential problems for creditors, especially with regard to notices required under Rule 3002.1. When in doubt, ask local counsel. Each jurisdiction is different, even within a given state. If there are any questions about what is required based on the form of stay relief order entered, local counsel can provide valuable insight.