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LEGISLATIVE & REGULATORY ISSUES

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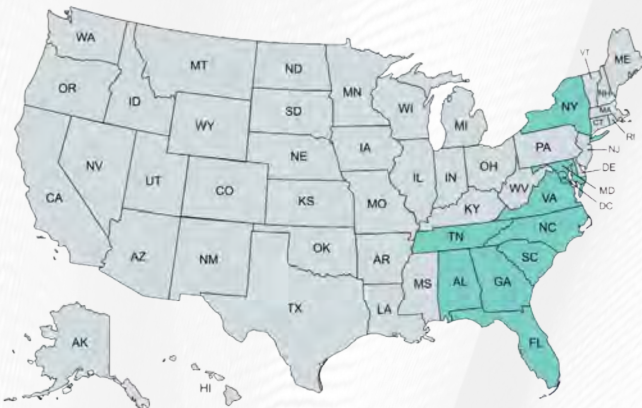

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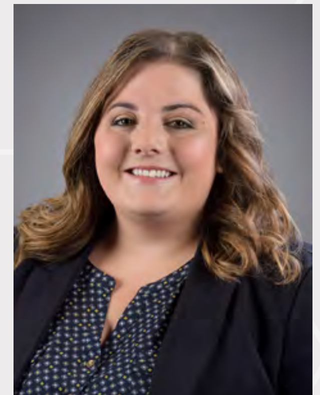

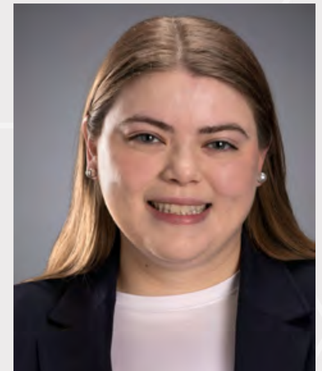

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LIMITING CONTROLLABLE DELAY RELATED TO FEMA AND REGULATION X MORATORIA

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HAT DOES IT MEAN when a foreclosure process for a loan is "on hold", or when there is a "moratorium" in place? Typically, the terms are used when a judicial or non-judicial foreclosure cannot be immediately commenced or continued because a law or rule precludes doing so, at least until a pre-condition to commencement or continuation is satisfied. During the "hold" period, contractual interest accrues and the servicer continues to make advances and disbursements for costs, fees, insurance, and taxes. Two of the most common moratoria-related "holds" are the Federal Emergency Management Agency ("FEMA") "disaster declaration hold" and Consumer Financial Protection Bureau ("CFPB") "loss mitigation hold."

As part of the 1988 Robert T. Stafford Disaster Relief and Emergency Assistance Act, the President of the United States is empowered to declare an area a national disaster due to the severity and magnitude of the damage caused by an extreme weather event. Under such circumstance, a mortgagee for a federally-insured mortgage loan must immediately take steps to mitigate hardship faced by a mortgagor. These steps include implanting the ninety-day "FEMA moratorium", which applies to a "property [that was] directly affected by the disaster" and protects "all mortgagors affected by the moratorium on foreclosures." During the moratorium, a mortgagee cannot initiate a new foreclosure and must suspend all foreclosure activity for at least ninety days. It is axiomatic the statute does not impose these requirements on all mortgagees, just those backed by FHA.

Despite the narrow applicability of the moratorium to directly affected properties and certain loan types, numerous mortgage loan servicers apply the moratorium in an overly broad manner, applying a "hold" on foreclosure activity to all properties within a county or region irrespective of whether the property was actually affected by the disaster. Mortgagors often express astonishment that they received a reprieve from foreclosure based on a disaster that did not affect their property. Additionally, courts in judicial foreclosure jurisdictions – well-aware of the breadth of the moratorium – do not accept mortgagee requests for adjournments, continuations, or extensions unless they adduce proof the mortgaged property subject to foreclosure was "affected by the disaster", particularly when the mortgagor confirms it was not, or the court personnel has a general awareness of the impact of a disaster on the county in which the court is situated. Courts have reacted to unwarranted "FEMA holds" by imposing more stringent deadlines, tolling contractual interest, and dismissing foreclosures for delay and neglect.

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 created the CFPB, which imposed a litany of mortgage loan servicing requirements in 12 C.F.R. §1024. Among the most impactful in the non-judicial and judicial foreclosure contexts is the loss mitigation procedure codified in 12 C.F.R. §1024.41, also known as "Regulation X" of the Real Estate Settlement Procedures Act ("RESPA"). This regulation includes a limited moratorium on commencing or continuing a foreclosure in

Loan servicers should strictly interpret these federal regulations by: (a) confirming the property was "directly affected by the disaster" as contemplated by the express statutory text, and; (b) applying the "dual tracking prohibition" exclusively when the borrower submitted a completed application and only to refrain from completing any of the three identified milestone events.

three respects, which apply only if a mortgagor submits a "completed loss mitigation application" to the servicer at least thirty-seven days prior to a foreclosure sale. If a completed application is received, then the servicer cannot "make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process[1], move for foreclosure judgment or order of sale, or conduct a foreclosure sale[2] until the loss mitigation evaluation and review process is completed in adherence with Regulation X mandates. The regulation specifies time frames by which servicers must take certain steps to notify the mortgagor of the status of the review.[3] Notably, the regulation does not impede a servicer from completing a variety of foreclosure milestone events, including but not limited to serving process, exchanging discovery demands and responses, opposing litigation, or making any motion except for a final judgment.

Despite the unequivocal omission of all but three milestone events from the "dual tracking" component of the regulation, there is often misapplication and misapprehension of Regulation X by servicers. Notwithstanding the clear and unambiguous circumstances when the "dual tracking moratorium" is applicable, servicers often unilaterally apply much lengthier "loss mitigation holds" even though the mortgagor did not submit a completed loss mitigation application or, in the outlier circumstance, *any* application documents but merely verbally expressed interest in reaching a mutually agreeable resolution to the foreclosure. During a self-imposed moratorium that affords far greater protection than legally required, the servicer continues to advance monies for taxes and insurance while contractual interest accrues to the mortgagor's detriment.

After fourteen years of being updated about "loss mitigation holds", courts in judicial foreclosure states are well-aware when the Regulation X moratorium applies and are equally knowledgeable when a servicer is erroneously applying or relying on the regulation as a purported excuse or justification for delay. Although judicial foreclosure courts are often sympathetic to defaulting mortgagors and prefer settlement to litigation, they are intolerant of unwarranted "holds" that elongate the already lengthy judicial foreclosure process and congest court dockets. These delays create an entirely avoidable risk a court will impose a penalty for delaying the disposition of a case.

To minimize the potential for the most draconian outcomes of a judicial foreclosure – dismissal, interest tolling, monetary sanction, or other punitive measures – as well as limit deleterious foreclosure-related advances and expenditures, loan servicers should strictly interpret these federal regulations by: (a) confirming the property was "directly affected by the disaster" as contemplated by the express statutory text, and; (b) applying the "dual tracking prohibition" exclusively when the borrower submitted a completed application and only to refrain from completing any of the three identified milestone events. By doing so, the servicer will limit controllable delay and efficiently prosecute foreclosures in accordance with applicable laws and regulations. ■

1 See 12 C.F.R. §1024.41(f)(2)
2 *See* 12 C.F.R. §1024.41(g).
3 See 12 C.F.R. §§10241.41(c) & (h)

NAVIGATING THE FACE-TO-FACE MEETING REQUIREMENT

COMPLIANCE CHALLENGES AND HUD'S PROPOSED OVERHAUL

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ONE OF THE MOST ONEROUS mandates imposed on servicers of federally insured loans is the face-to-face meeting requirement under 24 CFR § 203.604. In March 2020, the Department of Housing and Urban Development (HUD) enacted a temporary waiver of that requirement in response to the COVID-19 pandemic which permits loan servicers to use alternative communication methods such as phone and video calls to engage mortgagors.[1] After more than four years, HUD's waiver is set to expire May 31, 2024, so loan servicers should be mindful of the regulation's traditional requirements, as well as HUD's recently proposed permanent changes that will completely overhaul it.

1 HUD most recently renewed the waiver on November 3, 2023. *See* https://www.hud.gov/sites/dfiles/OCHCO/documents/Waiver-Face-to-Face-Reg-05312024.pdf.

THE CURRENT RULE

Under 24 CFR § 203.604, a mortgagee must complete the face-to-face interview with the mortgagor (or make a reasonable effort to arrange such a meeting) before three full monthly installments go unpaid. A reasonable effort to arrange the face-to-face meeting requires two things: at least one letter sent to the mortgagor via certified mail and one trip to see the mortgagor at the subject property. No face-to-face meeting is required if: (1) the mortgagor does not reside in the property; (2) the property is not within 200 miles of the mortgagee, its servicer, or a branch office of either; or (3) the mortgagor has clearly indicated that he or she will not cooperate in the interview.

While the face-to-face meeting requirement itself may be burdensome, determining whether a given property is within a 200-mile radius of any branch office of the servicer or mortgagee makes platforming compliance especially difficult for loan servicers. And it matters because Courts almost universally hold that non-compliance with 24 CFR § 203.604 precludes the mortgagee from foreclosure.[2] Given those draconian consequences, loan servicers should take steps to ensure strict adherence to the regulation's requirements when HUD's temporary waiver expires on May 31, 2024.

HUD'S PROPOSED CHANGES TO THE RULE

In July 2023, HUD proposed permanent changes to 24 CFR § 203.604 that would completely overhaul the reg-

2 Although there is a split regarding which party bears the burden to prove compliance or non-compliance and some courts have found that the mandate to complete the face-to-face meeting within three months of default is aspiration, almost all courts hold that a mortgagee cannot foreclose until it complies with the remaining requirements of 24 CFR § 203.604. *See e.g., Wells Fargo Bank, N.A. v. Lorson*, 341 Conn. 430 (2021); *Freedom Mortg. Corp. v. Olivera*, 2021 IL App (2d) 190462; *Wilmington Sav. Fund Soc'y, FSB v. West*, 2019-Ohio-1249; *US Bank Nat. Ass'n v. McMullin*, 47 N.Y.S.3d 882 (N.Y. Sup. Ct. 2017) *Palma v. JPMorgan Chase Bank*, 208 So. 3d 771, (Fla. Dist. Ct. App. 2016); *Wells Fargo Bank, N.A. v. Cook*, 87 Mass. App. Ct. 382 (2015); *Mathews v. PHH Mortg. Corp.*, 283 Va. 723 (2012); *Pfeifer v. Countrywide Home Loans, Inc.*, 211 Cal. App. 4th 1250 (2012); *Lacy-McKinney v. Taylor Bean & Whitaker Mortg. Corp.*, 937 N.E.2d 853 (Ind. Ct. App. 2010).

ulation and effectively eliminate the face-to-face meeting requirement.[3] The proposed revisions mark a shift towards more flexible mortgagor engagement strategies while also alleviating many of the compliance issues that loan servicers face under the current rule.

Originally established in 1976, the face-to-face meeting requirement was set in a different era of mortgage servicing, where operations were predominantly localized. With the advent of national and centralized mortgage servicing centers, the feasibility of in-person meetings dwindled, signaling a need for regulatory adaptation. The proposed rule changes are intended to modernize the regulation by allowing servicers to use various communication methods to fulfill the meeting requirement in lieu of physically visiting the subject property.

Furthermore, HUD recognizes that the mortgage industry has seen a paradigm shift with digital communication tools becoming the norm. Mortgagors now favor remote interactions, a trend accelerated by the COVID-19 pandemic. The proposed rule changes acknowledge this reality and allow the use of electronic and remote communication methods, including phone calls, emails, and live video communications, to fulfill the face-to-face meeting requirement. This flexibility is expected to enhance engagement efficiency and effectiveness, particularly for national servicers facing logistical challenges due to geographical dispersion.

Another significant aspect of the proposed modernized rule is its expansion to include all mortgagors in default, regardless of their residence status or the property's location relative to the mortgagee or its servicer. HUD views this change as critical as it extends protections to:

3 Modernization of Engagement With Mortgagors in Default, 88 FR 49392 (proposed July 31, 2023) (to be codified at 24 CFR 203).

ANOTHER SIGNIFICANT ASPECT OF THE PROPOSED MODERNIZED RULE IS ITS EXPANSION TO INCLUDE ALL MORTGAGORS IN DEFAULT, REGARDLESS OF THEIR RESIDENCE STATUS OR THE PROPERTY'S LOCATION RELATIVE TO THE MORTGAGEE OR ITS SERVICER.

1. NON-RESIDENT MORTGAGORS:

These include mortgagors who have invested in properties they do not occupy. Previously, the face-to-face requirement did not uniformly apply to them, potentially limiting their access to loss mitigation options.

2. DISTANT PROPERTIES:

Mortgagors whose properties are located more than 200 miles from their mortgagee, servicer, or a branch office often faced logistical barriers to face-to-face meetings. The proposed changes ensure these mortgagors are not disadvantaged due to geographical constraints.

Although HUD emphasizes the importance of expanding mortgagors' access to loss mitigation, the increased uniformity under the proposed rule will simplify compliance for the loan servicing industry, which stands to benefit from the ability to use electronic and remote methods for mortgagor engagement in a few other ways:

1. COST REDUCTION:

Servicers will no longer be forced to incur the travel and logistical expenses associated with in-person meetings, allowing for more resource allocation towards effective loss mitigation strategies.

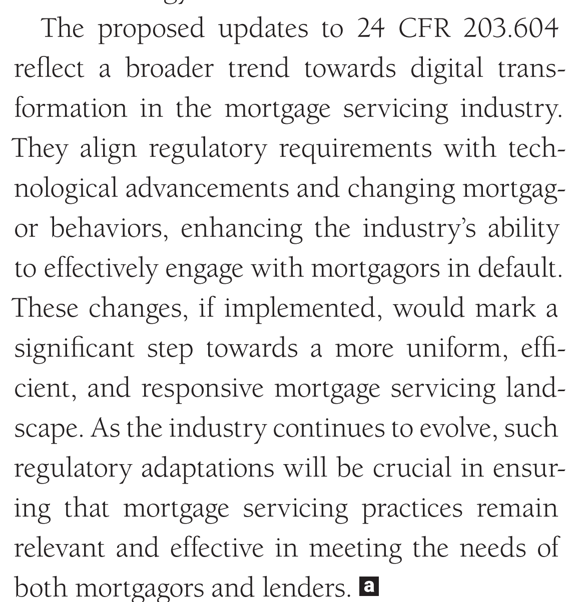
2. EFFICIENCY AND FLEXIBILITY:

Servicers can engage with mortgagors more efficiently, offering flexible communication options that suit diverse mortgagor needs and circumstances.

3. ENHANCED MORTGAGOR ENGAGEMENT:

The inclusion of modern communication methods is likely to lead to higher mortgagor engagement rates, given the preference for digital interactions.

Effectively, the rule changes proposed by HUD signify a regulatory shift that is more attuned to current realities – balancing effective mortgagor engagement with the efficiencies of modern technology.



The proposed updates to 24 CFR 203.604 reflect a broader trend towards digital transformation in the mortgage servicing industry. They align regulatory requirements with technological advancements and changing mortgagor behaviors, enhancing the industry's ability to effectively engage with mortgagors in default. These changes, if implemented, would mark a significant step towards a more uniform, efficient, and responsive mortgage servicing landscape. As the industry continues to evolve, such regulatory adaptations will be crucial in ensuring that mortgage servicing practices remain relevant and effective in meeting the needs of both mortgagors and lenders. ◼

An Overview of Motions to Determine Post-Petition Fee Notices in Alabama Bankruptcy District

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THE RECOVERY OF FEES assessed to a mortgage in Chapter 13 bankruptcy falls under Fed. R. Bankr. Proc. 3002.1(c) – Notice of Fees, Expenses, and Charges. The Rule lays out the process for filing notices of fees and charges that mortgage lenders and servicers assert are recoverable from the debtor. Faithful adherence to this Rule is essential for the recovery of fees billed to debtor borrowers while in a Chapter 13 bankruptcy case. This article will lay out the Rule and discuss its importance in recovering fees. It will also include an overview of the peculiarities in Alabama's three districts in dealing with post-petition fee notices (PPFN).

Rule 3002.1 relates only to Chapter 13 cases and applies to holders of claims secured by mortgages on the debtor's principal residence. Part (c) of the Rule states that "the holder of the claim will serve on the debtor, debtor's counsel, and trustee a notice itemizing all fees, expenses, or charges (1) that were incurred in connection with the claim after the bankruptcy case was filed, and (2) that the holder asserts are recoverable against the debtor or against the debtor's principal residence. The notice shall be served within 180 days after the date on which the fees, expenses, or charges are incurred." This is a hard bar, so PPFNs must be filed within 180 days, or those charges will likely be disallowed. After a PPFN is filed, the debtor and trustee have one year to dispute the fees under Rule 3002.1(e).

Each district in Alabama has its own peculiarities when it comes to PPFNs. A notable place to look to see if fees are recoverable in Alabama is the language in the mortgage. If the mortgage includes provisions for the recovery of attorney fees, the first hurdle has been cleared

STATE SNAPSHOT | ALABAMA

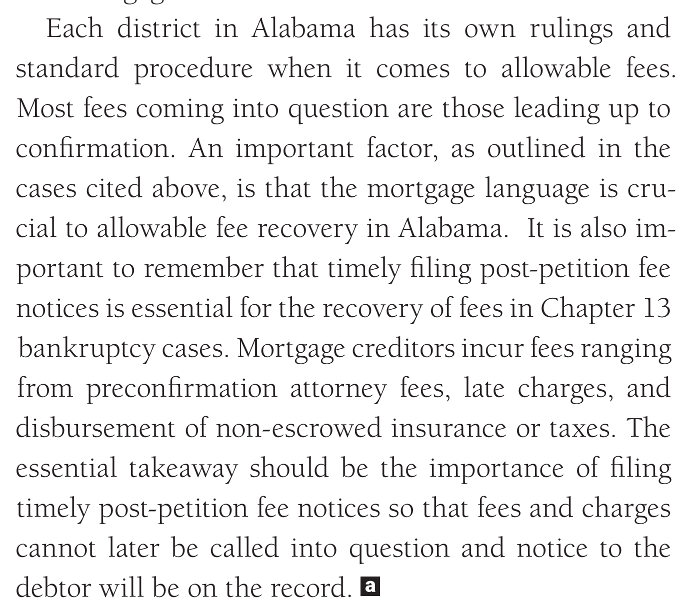
An important factor, as outlined in the cases cited above, is that the mortgage language is crucial to allowable fee recovery in Alabama. It is also important to remember that timely filing post-petition fee notices is essential for the recovery of fees in Chapter 13 bankruptcy cases.

and a fee is recoverable. Each Alabama district has its own approach to recoverability of post-petition fees and the application of Rule 3002.1.

Alabama districts broadly apply two cases that are on point – *In re England* and *In re Ochab*. The first case, *In re England,* addresses whether the underlying mortgage allows for the recovery of fees. *In re England*, 586 B.R. 795 (Bankr. M.D. Ala., 2018). *In re Ochab* deals with whether the amount of a fee is reasonable. *In re Ochab*, 586 B.R. 803 (Bankr. M.D. Ala., 2018). In *Ochab*, the debtor filed a Motion to Determine Fees pursuant to Rule 3002.1(e), and argued that $500 for attorney fees, $400 for proof of claim filing fees, $250 for plan review, and $250 for preparation of the 410A form was unreasonable. The normally allowed amount for these charges in this jurisdiction is a total of $450. *Id*. When presented with an argument that a creditor has assessed fees that are unreasonable, each judge in Alabama has their own range of the amounts of fees they will allow.

The Southern and Middle districts of Alabama have broadly applied the same approach to PPFNs. The Southern District of Alabama has administrative order No. 2022-08, which caps allowable fees for plan review and proof of claim filing. The order states that allowable creditor attorney fees for plan review and preparation of the proof of claim are limited to $225 for either or $450 combined. This is further limited if the language in the mortgage allowing for attorney fees is ambiguous. The Southern and Middle Districts of Alabama follow two cases with the same thought pattern when looking at specific mortgage language – *In re Clark* and *In re Stinson*. Both cases found that provisions in a mortgage permitting fees must be unambiguous or they will be disallowed. See *In re Lisa Marie Clark*, No. 17-1183-JCO, Doc 47 at 3 (Bankr. S.D. Ala.2018), and *In re Luke Robert Stinson*, 18-30155, doc. 59 (Bankr. M.D. Ala. Oct. 30, 2018). Mortgages with fee language referring to amounts "authorized by the secretary" are frequently found to be too vague, and those charges will be disallowed.

The Northern District of Alabama follows the rest of Alabama when it comes to *In re England* and *In re Ochab,* but also has its own rulings breaking down allowable fees, and these are reviewed on a case by case basis. The different judges in the Northern District of Alabama have issued separate rulings on recoverability. Judge Robinson allows only $300 in pre-confirmation fees. See *In re Madeville*, 17-40777, doc 81(Bankr. N.D. Ala. April. 25, 2017). Judges Crawford and Mitchell allow for the recovery of proof of claim preparation (including 410A) and plan review fees up to $800. See *In re Beverly*, 19-02396, doc. 57 (Bankr. N.D. Ala. Jun. 14, 2019). Judge Henderson allows total recovery of pre-confirmation fees in the amount of $650 if the fees are recoverable under the terms of the mortgage.



Each district in Alabama has its own rulings and standard procedure when it comes to allowable fees. Most fees coming into question are those leading up to confirmation. An important factor, as outlined in the cases cited above, is that the mortgage language is crucial to allowable fee recovery in Alabama. It is also important to remember that timely filing post-petition fee notices is essential for the recovery of fees in Chapter 13 bankruptcy cases. Mortgage creditors incur fees ranging from preconfirmation attorney fees, late charges, and disbursement of non-escrowed insurance or taxes. The essential takeaway should be the importance of filing timely post-petition fee notices so that fees and charges cannot later be called into question and notice to the debtor will be on the record.

STATE SNAPSHOT | FLORIDA

Wallace and Allen v. Nationstar Mortgage LLC

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FLORIDA'S SECOND DISTRICT ruled on an appeal by homeowners James Wallace and Alice Allen, holding that the servicer did not use admissible evidence to prove condition precedent. At the bench trial in November 2022, the servicer obtained final judgment by using a field record from the loan's prior servicer as evidence of meeting condition precedent. More specifically, the borrowers were alleging that the foreclosure was improper because the servicer failed to establish a face-to-face meeting with the borrowers, or reasonable effort to do so, which is required to foreclose on an FHA loan. When the servicer introduced the record into evidence, borrowers' counsel objected based on hearsay, lack of foundation and lack of personal knowledge.

The judge ruled that the record was admissible based on the "onboarding process as testified by the witness." The Second District disagreed on the admissibility of the evidence stating for this record to be admissible the servicer's witness needed to have knowledge as to the verification process used by the prior servicer. By their own admission, the witness did not have knowledge of the prior servicer's verification process. The witness only had knowledge as to the current servicer's boarding process. Furthermore, the record of the face-to-face meeting was not even made by the prior servicer, but rather, was made by a third-party vendor of the prior servicer. For this reason, the appellate court reversed the judgment and ruled in favor of the borrowers.

This case differs from other cases in which the court has admitted evidence of prior servicer records based on witness testimony from the current servicer. Here, the servicer was relying on the business records of a third-party record which was made by a fourth party. In cases past, courts have allowed this type of evidence when the party is using it to show a verifiable figure such as an amount due on the loan. In this case, Plaintiff was trying to use the record to prove that an event took place which would satisfy condition precedent. The court was unable to verify the accuracy of the record, and neither could the witness. Accordingly, the final judgment was reversed as the evidence was found to be insufficient to support the judgment.

New Mexico Supreme Court Rescinds HAF Notice Requirements

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ON MARCH 1, 2024, the New Mexico Supreme Court rescinded the requirement for foreclosure plaintiffs to include a Supreme Court-promulgated "Notice to Defendant re: New Mexico Homeowner Assistance Fund (HAF)" and three associated pleading forms as part of the mandatory pre-filing notice in New Mexico.

STATE SNAPSHOT | NEW MEXICO

The New Mexico Supreme Court's pre-filing notice requirements first went into effect on September 7, 2021, and originally required foreclosure plaintiffs to certify at the time of filing a complaint that they had given the defendants notice of: 1) a list and brief descriptions of loss mitigation options and the steps that the defendants would need to take to be evaluated for those options; 2) whether the loan was federally-backed or a government sponsored enterprise loan, and if so, who holds the loan; 3) contact information for the loan servicer; and 4) a Supreme Court-promulgated Homeowner Help Resources list.

The New Mexico Supreme Court revised the pre-filing notice requirements, effective May 23, 2022. In addition to the information previously required, the May, 2022, amendment required foreclosure plaintiffs to certify that they had provided the defendants with the identity of the holder of the loan, regardless of whether the loan was a federally-backed or GSE loan, provide a list of federal or government sponsored enterprise-specific loss mitigation options that might be available, and enclose the Supreme Court-promulgated Notice to Defendant re: New Mexico Homeowner Assistance Fund (HAF). The mandatory HAF notice, in turn, referenced three pleading forms that were required to be enclosed: 1) Defendant's Motion for Homeowner Assistance Fund Stay; 2) a proposed Order on Motion for Homeowner Assistance Fund Stay; and 3) Defendant's Notice of Homeowner Assistance Fund Application Results. The May, 2022, amendment included a Use Note, stating that the HAF enclosures would no longer be required when the New Mexico Supreme Court received notice that New Mexico HAF funds had been exhausted. It was unclear at the time whether the Supreme Court would issue a formal order when it received such notice, or whether it would rely on the Use Note as a self-executing amendment to the mandatory certification.

On December 18, 2023, the New Mexico Supreme Court updated the mandatory HAF notice. While the notice had previously stated that HAF funds could be approved up to $20,000, the Court revised the notice to remove reference to the $20,000 cap, which had been removed in the interim.

On February 26, 2024, the New Mexico Mortgage Finance Authority announced that applications for HAF funds would be closed at end-of-business on March 1, 2024. On March 1, 2024, the New Mexico Supreme Court issued an administrative order, acknowledging that it had received notice that HAF funds had been depleted, and formally rescinding the requirement that foreclosure plaintiffs certify that they have provided the HAF notice to defendants prior to filing a foreclosure complaint. Based on the March 1, 2024, administrative order, lenders and servicers should remove the HAF notice, and its associated pleading forms, from their demand letter and/or pre-filing notice templates as soon as practicable. a

On March 1, 2024, the New Mexico Supreme Court rescinded the requirement for foreclosure plaintiffs to i nclude a Supreme Court-promulgated "Notice to Defendant re: New Mexico Homeowner Assistance Fund (HAF)" and three associated pleading forms as part of the mandatory pre-filing notice in New Mexico.

The "Anti-Kessler" Bill - The New York Legislature's Most Recent Attempt to Punish Lenders

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ON MARCH 17, 2023, the New York Assembly introduced Senate Bill S5829A (the "Anti-Kessler" bill).[1] If this legislation eventually passes and is signed into law, it will send shockwaves through the mortgage industry, and result in massive financial loss for lenders and creditors doing business in New York.

On its surface, the bill may seem benign. Its stated purpose is to overturn the Court of Appeals decision in *Bank of America N.A. v. Kessler* [2] as it pertains to the content of pre-foreclosure notices required under RPAPL § 1304.[3] In *Kessler*, the Court of Appeals held that it was acceptable for a 90-day pre-foreclosure notice to include additional information beyond the statutorily-prescribed language under RPAPL § 1304 if the additional language or information is helpful to the borrower.[4] The Anti-Kessler bill makes it clear that inclusion of any additional language violates RPAPL § 1304, even if clearly beneficial to the borrower. [5] Thus, under the Anti-Kessler bill, any 90-day notices that contained the industry-standard Fair Debt Collection Practices Act (FDCPA) and bankruptcy warnings would all be defective.

What is buried within the proposed legislation and the sponsor's memo is what makes the legislation particularly harmful to creditors. The proposed legislation states that it is set to take effect "immediately," without any grace period.[6] Even more egregious, the legislators' sponsor memo indicates their intent for the law to apply ***retroactively*** to any pending foreclosure action.[7] This is significant because compliance with RPAPL § 1304 is a condition precedent to foreclosure in New York, and failure to comply typically results in the dismissal of the action.[8] Further, the proposed legislation prohibits the use of vendors or law firms from mailing the notices.[9] However, many loan servicers utilize vendors and law firms for the mailing of the notices. These notices would also be non-compliant. In simple terms, if this legislation is enacted, it will result in the dismissal of numerous foreclosure actions.

One may ask, "what's the big deal?" Mortgagees and loan servicers can simply change their mailing procedures for the notices and recommence any foreclosure actions that are dismissed. Unfortunately, an interplay exists between the Anti-Kessler bill and the recently enacted Foreclosure Abuse Prevention Act ("FAPA") that may prevent recommencement of these actions that were dismissed and result in significant loss for creditors.

FAPA amended and revised various laws pertaining to the statute of limitations in New York, all to the favor of borrowers.[10] Of particular import was the newly enacted CPLR § 205-a. CPLR § 205-a's predecessor, CPLR § 205(a), provided a mechanism for a plaintiff to

1 NY State Senate Bill 2023-S5829A (publically available at https://www.nysenate.gov/legislation/bills/2023/S5829/amendment/A)
2 *Bank of Am., N.A. v. Kessler*, 39 N.Y.3d 317, 206 N.E.3d 1228, 186 N.Y.S.3d 85 (2023)
3 NY State Senate Bill 2023-S5829A
4 *Kessler*, 39 N.Y.3d 317, 328.
5 NY State Senate Bill 2023-S5829A
6 Id.
7 Id.
8 See e.g. *Citibank, N.A. v. Conti-Scheurer*, 172 A.D.3d 17, 20 (2d Dept. 2019)
9 NY State Senate Bill 2023-S5829A
10 *See* Foreclosure Abuse Prevention Act [L 2022, ch 821]

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recommence an action dismissed after expiration of the six-year statute of limitations.[11] However, under FAPA, the newly enacted CPLR § 205-a codifies that only the *original plaintiff* may recommence a new action.[12] The reality remains that loans get sold and transferred all the time after commencement of a foreclosure action. Additionally, a contested foreclosure action in New York typically takes several years to complete and often runs up against the six-year statute of limitations.[13] In this all-too-common scenario, a foreclosure action dismissed as a result of the Anti-Kessler bill will result in the loan being barred by the statute of limitations under FAPA.

It is important to note that this legislation is still in its infancy as the Senate has not yet voted on it. Moreover, this bill will not impact investment loans or business purpose loans where a 90-day notice is not required.[14] Further, this bill would not impact uncontested foreclosures, as the RPAPL § 1304 defense is not a jurisdictional defense.[15] Finally, if a loan has not been sold by the original commencing plaintiff, there is no concern with bringing a future action in reliance on CPLR § 205-a (if all other conditions under CPLR § 205-a are satisfied).

Although the legislature's stated purpose in passing the Anti-Kessler bill is to bridge the gap in communication between the borrower and lender prior to foreclosure and to undo the impact of the ***Kessler*** decision,[16] the items added to the bill clearly evidence the true purpose behind this legislation -- to punish the mortgage industry and award homeowners free houses. The mortgage industry must immediately act and lobby the Senate to ensure that this destructive legislation does not pass. ■

11 See former N.Y. C.P.L.R. 205(a) (McKinney)
12 See N.Y. C.P.L.R. 205-a (McKinney)
13 See N.Y. C.P.L.R. 213(4)
14 *HSBC Bank USA, Nat. Ass'n. v.* Ozcan, 154 A.D.3d 822, 825 (2d Dept. 2017)
15 U.S. Bank Nat. Ass'n v. Carey, 137 A.D.3d 894, 896 (2d Dept. 2016)
16 NY State Senate Bill 2023-S5829A

Shaking Up Sheriffs' Sales

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ON JANUARY 12, 2024, the New Jersey legislature passed Assembly Bill Number 5664 after its prior iteration had been vetoed by Governor Phil Murphy, establishing the Community Wealth Preservation Program.[1] The program is touted as a means of providing New Jerseyans access to affordable housing, and in some instances a second chance at homeownership.[2]

The bill seeks to accomplish this lofty goal through the creative use of rights of refusal. A right of first refusal is granted to foreclosed upon defendants, their next of kin, and tenants (hereinafter "First Refusal Class").[3] The right of first refusal affords a member of the First Refusal Class the option to purchase the property for the upset price or the final upset price, whichever is less.[4] The bill defines upset price as "the minimum amount that a foreclosed upon property shall be sold for in a Sheriff's sale as determined by the foreclosing plaintiff.[5] Contemplating the carrying costs that foreclosing plaintiffs are often burdened with, the foreclosing lender notices a good faith estimate of the upset price, and this amount can increase by up to three (3) percent without requiring a renewed noticing.[6] If this right of first refusal is exercised, the party exercising the right would pay a three

1 H.R. A5664 (NJ 2024) (enacted).
2 *See* Ashley Balcerzak, Here's How NJ Homeowners Facing Foreclosure Can Get a Second Shot Under New Law. (Jan. 12, 2024, at 6:06pm) (https://www.northjersey.com/story/news/2024/01/12/nj-homeowners-foreclosure-second-shot-new-law/72208670007/).
3 H.R. A5664 (NJ 2024) (enacted).
4 *Id.*
5 *Id.*
6 *Id.*

and half percent (3.5%) deposit and thereafter, must remit the balance within ninety (90) business days.[7]

A right of second refusal is extended to nonprofit community development corporations (hereinafter "NCDC") where members of the First Refusal Class opt to not exercise their right or do not enter an agreement with the NCDC.[8] NCDCs may enter into agreements with a member of the First Refusal Class to purchase the properties, whereby the member has the ability to reside in the property for an agreed upon amount of time, as well as providing the party with an option to purchase the property from the NCDC.[9]

Unfortunately, the bill leaves many questions regarding implementation and effect unanswered. For example, the exercise of the right of first or second refusal will quash the competitive bidding process. Consider a situation where junior lienholders are excluded from the bidding process and title to the property remains with a foreclosed upon defendant through the exercise of the right of first refusal, junior liens will more than likely remain an encumbrance to marketable title. Another potential looming issue is the bill's silence as to who qualifies as a "next of kin" of the foreclosed upon defendant.

On the other hand, there are several new clear procedural requirements most of which Sheriffs' offices were not prepared for because of the bill's mandate that it take immediate effect. Amongst some of these significant changes are the notice requirements. Foreclosing lenders are now required to send notices to both the primary address of the foreclosed upon defendant, as well as to the address of the foreclosed upon residential property.[10] Further, a good faith estimate of the upset price must be included on the notice.[11] Additionally, Sheriff's must advertise the good faith estimate upset price four weeks prior to the sale and post the same on the website of the Sheriff's office.[12]

Ultimately, the new legislation leaves many unanswered questions and looming potential issues. Each will need their way through the courts over time, or possibly require remedial legislation. a

7 H.R. A5664 (NJ 2024) (enacted).
8 *Id.*
9 *Id.*
10 H.R. A5664 (NJ 2024) (enacted).
11 *Id.*
12 *Id.*

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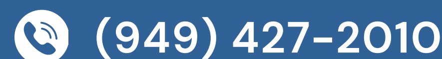

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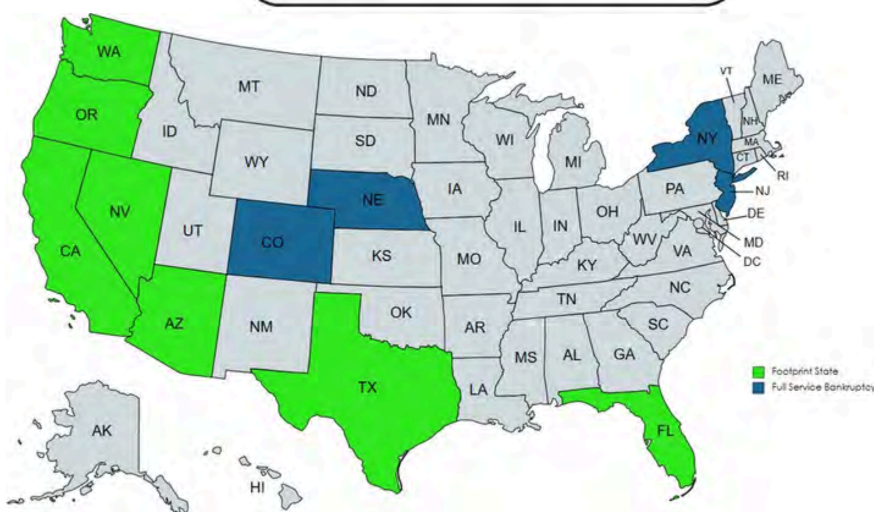

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