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

## WELCOME!

We are in the midst of the Games of the Thirty-First Olympiad and hopefully you are enjoying watching the Games. Unlike Rio, we have no reports of body parts washing up on shore. However, in the spirit of the Games, we do have victories to report, as well as some defeats.

Congress took home the gold this month by passing legislation allowing Section 8 vouchers to be used for the purchase of manufactured homes. The silver and bronze are too close to call, but Nebraska did amend its unclaimed property statute in a favorable way. In addition, there were positive case developments regarding the valuation of manufactured homes in bankruptcy.

Other developments this month include Illinois amending its retailer licensing laws and Missouri amending its laws relating to security deposits and imposing carpet cleaning costs on tenants. In addition, case law from Oregon provides warning regarding the need to make sure that a security interest in a manufactured home is properly perfected.

So, if you want to be a great champion like Michael Phelps or Simone Biles, keep reading!

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# ARBITRATION

## CASE LAW

**Arbitrability**

*CASE NAME: Sandquist v. Lebo Automotive, Inc.*
*DATE: 07/28/2016*
*CITATION: Supreme Court of California. --- P.3d ----. 2016 WL 4045008*

A former employee filed a class action discrimination complaint against his former employer, alleging violations of the Fair Employment and Housing Act and Unfair Competition Law. The Superior Court, Los Angeles County, entered orders granting a motion to compel arbitration and dismissing the class claims with prejudice. The employee appealed. The Court of Appeal reversed in part, determining that the question of whether the parties agreed to arbitration of class claims was for the arbitrator to decide. The employer petitioned for review. The Supreme Court of California granted review, superseding the opinion of the Court of Appeal.

The question for the Court was who decides whether the agreement permits or prohibits classwide arbitration, a court or the arbitrator?

The Court concluded no universal rule allocates this decision in all cases to either arbitrators or courts. Rather, who decides is in the first instance a matter of agreement, with the parties' agreement subject to interpretation under state contract law.

Here, the Court found that under state law, these parties' arbitration agreement allocated the decision to the arbitrator. Under federal arbitration law, no contrary presumption requires a different result, so the issue remained one for the arbitrator.

Affirmed.

# COMMUNITIES

## CASE LAW

**Sale of home – Tenant approval**

*CASE NAME: Ortega v. Ridgewood Estates LLC*
*DATE: 06/23/2016*
*CITATION: Court of Appeals of Utah. --- P.3d ----. 2016 WL 3545983*

Ortega purchased two mobile homes, located at spaces 47 and 62 inside Ridgewood Estates Mobile Home Park. Ortega notified Ridgewood of his purchase and submitted residency applications, which Ridgewood denied. Although there was no lease or other agreement, Ortega paid, and Ridgewood accepted, rental payments for the spaces until February 2012, but paid no late fees or security deposit. Both homes remained unoccupied at the Park.

On January 4, 2012, in accordance with Utah's Unlawful Detainer statute, Ridgewood served Ortega with a Landlord's Notice of Trespass and a Five–Day Notice to Terminate Tenancy at Will for both mobile homes. Ridgewood's property manager, Staci Williams, and Ridgewood's owner, Franz Fischer, notified Ortega that he would not be permitted to remove the mobile homes from the Park until he paid all outstanding late fees and service charges, including those accrued by the homes' prior owners. The police also served Ortega with a trespass warning stating that he would not be allowed on the property. Despite Ridgewood's prohibition, Ortega attempted to remove the homes. At Fischer's direction, Ortega was prevented from moving the homes. A Layton police officer and Williams told Ortega to leave the property due to the trespass warning. Ridgewood posted a Five–Day Notice to Terminate Tenancy at Will on each mobile home at the direction of Fischer. Ortega did not respond.

Ridgewood then mailed Ortega a letter claiming title to both mobile homes. Four days later, Williams applied


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with the Utah Division of Motor Vehicles for titles to both mobile homes on behalf of Ridgewood's parent corporation, Housing Financial Services, asserting that the homes had been sold contrary to applicable Ridgewood policies, that the homes were abandoned, and that unpaid rent was due. The Division of Motor Vehicles issued a Certificate of Title for Home 47 but took no action on Home 62.

Ortega sued for quiet title to both homes and requested damages. Ridgewood counterclaimed for unlawful detainer and unjust enrichment. The district court dismissed Ridgewood's unlawful detainer claim, reasoning that because Ortega had paid rent for the homes, he was entitled to receive a 15–day notice to quit under Utah's Mobile Home Park Residency Act.

The trial court also ruled that Ortega owned the mobile homes, that Ridgewood had converted the homes, and that Ridgewood had prevented Ortega from removing them. The court found the Defendants liable for conversion and slander of title and ruled both that attorney fees were recoverable as special damages in a slander of title case and that Ortega's attorney fees were reasonable. But it also ruled that lost profits, not lost rental income, represented the proper measure of damages for Ridgewood's conversion. No evidence of lost profits had been presented at trial.

The district court quieted title to both mobile homes in Ortega, directed the Utah Division of Motor Vehicles to issue Ortega title to Home 47, and ordered Ortega to remove both homes from the Park. The court also awarded Ortega $30,375 in attorney fees as special damages for slander of title and $1,000 in punitive damages against HFS and Fischer. And the court awarded Ortega, as the "prevailing party," attorney fees in the amount of $11,100 against Ridgewood under the Mobile Home Act and the Unlawful Detainer statute. Both parties appealed.

The appeals court found that the district court properly applied the Mobile Home Act instead of the Unlawful Detainer statute, noting that the distinction mattered because Defendants served Ortega with a 5–day notice to quit, which complied with the Unlawful Detainer statute but not with the Mobile Home Act.

The Mobile Home Act defines "resident" as "an individual who leases or rents space in a mobile home park." The definition does not require physical occupation of the mobile home.

Moreover, the Court said, the Defendants did not accuse Ortega of failure to pay rent, late fees, or security deposits. Rather, they asserted he purchased the mobile homes without pre-registering as required by the Mobile Home Act.

Nor did Defendants' assertion that their restrictive endorsement of Ortega's checks (stating "accepting this payment does not imply residency into the park") refute the conclusion that Ortega qualified as a resident under the Mobile Home Act.

The Court also found that Defendants failed to preserve or failed to address certain of their claims of the district court's errors.

The Court found no flaw in the court's slander of title findings. HFS sought to acquire title to the two mobile homes on the ground that they had been abandoned. There was no evidence that either mobile home was abandoned and therefore neither Ridgewood Estates nor [HFS] had a claim of title to the mobile homes based upon abandonment. Ridgewood Estates knew of and acknowledged plaintiff's purchase of the mobile homes, dealt with plaintiff as an owner in negotiations concerning the mobile homes, and accepted rental payments from him through February 2012. Ridgewood effectively prevented the mobile homes from being occupied during the relevant time frame. Contrary to Defendants' contention, the district court entered ample


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findings showing that HFS had falsely claimed the mobile homes had been abandoned.

The Court also affirmed the award of Ortega's attorney's fees and rejected Ortega's cross-appeals.

### LEGISLATION
**Missouri**
**Forcible Entry - Unlawful Detainer; Security Deposits**

**2016 MO H 1862**. Enacted 7/14/2016. Effective 8/28/2016.

This bill amends Mo. Rev. Stat. § 534.350, relating to Forcible Entry and Unlawful Detainer to provide that execution for the purpose of restoring possession shall be issued no sooner than ten days after the judgment. However, the execution for purposes of restoring possession shall be stayed pending an appeal if the losing party posts an appeal bond.

The bill also deletes Mo. Rev. Stat. § 534.360, Execution, when defendant is about to abscond, which provided that, if it shall appear to the officer having charge of the execution that the defendant therein is about to remove, conceal or dispose of his property, so as to hinder or delay the levy, the rents and profits, damages and costs may be levied before the expiration of the time allowed for taking an appeal.

The bill amends Mo. Rev. Stat. § 535.300, under Landlord-Tenant Actions, to provide that all security deposits shall be held by the landlord for the tenant, who is a party to the rental agreement, in a bank, credit union, or depository institution which is insured by an agency of the federal government. Security deposits shall not be commingled with other funds of the landlord. All security deposits shall be held in a trust established by the landlord and deposited in a bank, credit union, or depository institution account in the name of the trustee. Any interest earned on a security deposit shall be the property of the landlord. A landlord licensed under and subject to the requirements of chapter 339 (Real Estate Agents, Brokers, Appraisers and Escrow Agents), in lieu of complying with this subsection, shall maintain all tenant security deposits in a bank, credit union, financial or depository institution account, and shall not commingle such security deposits with other funds of the landlord except as provided in section 339.105.

The bill also provides that a landlord and tenant are not precluded from agreeing, in the rental agreement between them, upon amounts or fees to be charged for cleaning of the carpet, and such amounts actually expended for carpet cleaning can be withheld from the security deposit, so long as the rental agreement also includes a provision notifying the tenant that he or she may be liable for actual costs for carpet cleaning that exceed ordinary wear and tear, which may also be withheld from the security deposit. Within thirty days of the end of the tenancy, the landlord shall provide the tenant a receipt for the actual carpet cleaning costs.

The bill further provides that if the landlord wrongfully withholds all or any portion of the security deposit in violation of this section, the tenant shall recover as damages twice the amount wrongfully withheld (formerly, not more than twice the amount).

### LEGISLATION
**Nebraska**
**Unclaimed property**

**2015 NE L 1075**. Enacted 4/7/2016. Effective 7/21/2016.

This bill amends Neb. Rev. Stat. § 69-2304 to provide that, if appropriate, a written notice to a former tenant regarding the disposition of unclaimed personal property include the statement: "Because this property is believed to be worth less than two (formerly, one) thousand dollars, it may be kept, sold, or destroyed without further notice if you fail to reclaim it within the time indicated in this notice."


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The bill amends Neb. Rev. Stat. § 69-2308(1) to provide that if the personal property is not released pursuant to section 69-2307, it shall be sold at public sale by competitive bidding, except that if the landlord reasonably believes that the total resale value of the property not released is less than two (formerly, one) thousand dollars, he or she may retain such property for his or her own use or dispose of it in any manner he or she chooses.

## DEFAULT SERVICING

### CASE LAW

**Charge off – Form 1099-C**

*CASE NAME:* *Verdini v. First Nat. Bank*
*DATE:* *03/03/2016*
*CITATION:* *Superior Court of Pennsylvania. 135 A.3d 616. 2016 PA Super 56*

The Verdinis alleged that they obtained a second non-purchase money mortgage and later defaulted on the debt. On or about December 31, 2012, the bank issued Anthony Verdini a 1099–C form. In 2013, the Verdinis requested the debt be marked satisfied so that their property could be sold and the bank refused to do so until $37,744.73 was paid. The Verdinis paid the amount requested. As a result of their payment of the debt, which they assert the bank had cancelled months prior, the Verdinis raised several claims: (1) breach of contract; (2) violation of the Fair Credit Extension Uniformity Act; (3) violation of the Unfair Trade Practices and Consumer Protection Law; and (4) unjust enrichment.

The trial court granted the bank's motion for summary judgment on the basis that "charging off the debt ... did not cancel the debt. Similarly, the issuance of a 1099–C form is not an admission that the debt has been cancelled and the issuance of the form does not discharge [the Verdinis] from further liability." The Verdinis appealed.

The appeals court found that the bank sent the Verdinis a notice of charge-off months before it ultimately occurred. The notice advised: "You are aware the charged off balance is your responsibility. It is legally enforceable and collectable[.]" The Court concluded that the trial court did not err when it found that Appellee's charge-off of the debt did not cancel their responsibility to pay it.

Further, form 1099–C is a creditor's required means of satisfying reporting obligation to IRS; not a means of accomplishing an actual discharge of debt, nor is it required only where an actual discharge has already occurred. This is consistent with the plain meaning of 26 C.F.R. § 1.6050P–1, its interpretation by the IRS itself, and the majority of courts in the United States.

Affirmed.

### CASE LAW

**Foreclosure – Holder of note**

*CASE NAME:* *Cruz v. JPMorgan Chase Bank, NA*
*DATE:* *06/15/2016*
*CITATION:* *District Court of Appeal of Florida, Fourth District. --- So.3d ----. 2016 WL 3342651*

Mortgagors appealed after the trial court granted a judgment of foreclosure.

The appeals court found that JPMorgan alleged that it was the note holder, but failed to prove its holder status at trial. JPMorgan did not attach the note to the complaint. It introduced a copy of the note at trial, which contained an attached allonge indicating a blank endorsement from "JP Morgan Chase Bank, NA Successor in Interest by Purchaser from the FDIC as receiver of Washington Mutual Bank F/K/A Washington Mutual Bank, FA." However, PennyMac Loan Services' witness did not testify to when the allonge was attached to the note or when the endorsement occurred. No other record evidence indicated when it occurred or when JPMorgan became the note holder.


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According to the Court, to prove its standing to foreclose, JPMorgan would have to prove it was "[a] person not in possession of the instrument who is entitled to enforce the instrument pursuant to s[ection] 673.3091 or s[ection] 673.4181(4)." § 673.3011(3), Fla. Stat. Nothing in section 673.3011 allows an "owner" to enforce the note without possession, except where the instrument is lost or destroyed. Therefore, JPMorgan would have to prove: (1) it was the owner, and (2) reestablishment of the lost note under section 673.3091.

Here, there was no proof that JPMorgan had possession of the note at the time it filed the complaint. JPMorgan acknowledged that the note was lost and not in its custody or control. Because the original note was never filed with the court and there was no other evidence of possession, no competent substantial evidence existed of possession. And there was no competent substantial evidence of ownership. There was no record evidence that the FDIC transferred the note to JPMorgan before the complaint was filed.

The final judgment of foreclosure was reversed based on JPMorgan's failure to prove standing and the case remanded for entry of an involuntary dismissal of the foreclosure complaint.

**CASE LAW**

**Bankruptcy – Value of collateral**

*CASE NAME:* *In re Hardy*
*DATE:* *06/21/2016*
*CITATION:* *United States Bankruptcy Court, E.D. North Carolina, Greenville Division. Slip Copy. 2016 WL 3549078*

Hardy filed a chapter 13 and listed as an asset a Manufactured Home which was collateral for a Consumer Loan Note, Security Agreement, and Disclosure Statement.

The home was delivered to its location and "set up." Its wheels were removed and its underpinnings were anchored to real property. However, the home was not permanently affixed, and remained personal property. The Debtor did not own the real estate under the home. Consequently, the Creditor's lien against the Manufactured Home was properly perfected by the DMV Certificate of Title. The Creditor did not file a UCC financing statement, which is necessary under state law to perfect a lien in personal property of the Debtor other than the Manufactured Home and its permanently attached constituent parts.

Because the collateral of the Creditor was not a security interest in real estate, the amount of the Creditor's secured lien was limited to the value of the Manufactured Home as of the Petition Date. The Creditor filed a proof of claim for $50,644.02 as fully secured. The Debtor's plan listed the value of the home as of the Petition Date as $27,092.49.

The Creditor timely objected to the proposed plan and the court conducted an evidentiary hearing to determine the correct value of the Manufactured Home for purposes of "cram down" under 11 U.S.C. § 1325(a)(5)(B).

The Creditor presented a written appraisal of the Manufactured Home prepared by Joseph P. Cordoni. The Debtor stipulated to Cordoni as an expert, and he testified as to the value of the Manufactured Home and the present condition of the Manufactured Home and the cost of needed repairs. The Appraisal proposed a $33,100.00 value for the home.

The Court noted that the NADA Value of the home was admitted into evidence without objection, but the suggestion from the NADA Guide provided baseline evidence that was not binding or conclusive.

The Court found that Cordoni's testimony and report did not substantially deviate from the NADA Value. His base price was increased and decreased with line-by-line considerations of problems, additions and upgrades to the Manufactured Home and its components.


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Nonetheless, the Appraisal did not take into account the cost of minor repairs; and it assumed that all fixtures and items located next to (rather than in) the Manufactured Home were part of the Creditor's collateral package as well. The DMV Certificate of Title did not perfect a lien in assets of the Debtor either located outside of the Manufactured Home, or easily removed from and not permanently attached to it. Finally, the Appraisal included a few items that were part of the Manufactured Home when sold, and therefore should be included in the baseline price rather than tacked on as upgrades.

Reducing the Creditor Value accordingly left $31,060.00, which amount was found by the court to be the value of the Manufactured Home at the time the petition was filed, and therefore the correct amount to be used for case plan and secured creditor valuation purposes.

**CASE LAW**

**Bankruptcy – Value of collateral**

*CASE NAME:* *In re Jude*
*DATE:* *06/24/2016*
*CITATION:* *United States Bankruptcy Court, E.D. Kentucky, Ashland Division. Slip Copy. 2016 WL 3582133*

Debtor’s chapter 13 plan proposed to value Vanderbilt's claim secured by the Debtor's mobile home at $18,468.77.

The Court found that weight of the Debtor's evidence was diminished by his experts' lack of knowledge of the model number of the mobile home and overruled the Debtor’s objection to what he deemed the hearsay evidence of the creditor’s expert in contacting the manufacturer to determine the model of the home for the purpose of a NADA valuation.

The Court gave no weight to the Debtor’s own opinion of the value of the home. The Debtor agreed that he was not an expert and had no training or familiarity with the NADA appraisal system. The Debtor testified he only used the NADA online tool because he had heard it was a reliable way to determine mobile home values.

The Court found that the cost-approach method employed by Vanderbilt's appraiser, Banks, was the more reliable valuation method under the facts and circumstances of this case and a better estimate of the mobile home's replacement value. Banks performed his appraisal using a cost approach based on mobile-home values compiled by NADA. Banks ultimately valued the Debtor's mobile home at $40,100.00 after first determining a base value and then applying numerous adjustments to account for the home's age, condition, accessories, and installed components.

The Debtor’s experts, Prichard and Hensley, used a sales-comparison approach to value the mobile home at $27,900.00 and $25,000.00, respectively. The court noted that there is no reason that a sales-comparison approach could not provide a fair valuation if the testimony shows the value is reliable. But the characteristics of the comparable sales identified by Prichard and Hensley differed materially from those of the subject property, making their conclusions less reliable than the valuation from Banks.

Also, Banks determined the Debtor's mobile home was in “Good” condition using a point system as part of the NADA appraisal form based on his personal inspection of the property. The Debtor attempted to cast doubt on this conclusion by testifying to specific problems affecting the mobile home but failed to provide evidence regarding the cost of necessary repairs. In addition, Banks considered several of the problems identified by the Debtor in his valuation of the mobile home.

The Court found the value of the Debtor's mobile home to be $40,100.00.


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## CASE LAW

### FDCPA – Bankruptcy

*CASE NAME:* *Freeman v. Ocwen Loan Servicing, Inc.*
*DATE:* *06/27/2016*
*CITATION:* *United States District Court, N.D. Illinois, Eastern Division. Slip Copy. 2016 WL 3476681*

After Freeman obtained a bankruptcy discharge of her personal debt, including the mortgage loan on her home, she continued to live in her home. According to Freeman, Ocwen obtained servicing rights on the discharged mortgage loan and then repeatedly called Freeman on her cell phone and sent her a series of documents that it characterized as statements and Freeman characterized as bills. Freeman contended that these communications were illegal efforts to collect a discharged debt that violated the TCPA, the FDCPA, and the Illinois Consumer Fraud and Deceptive Practices Act. Ocwen denied that it attempted to collect the discharged debt and asserted that Freeman should have known that it was communicating information about the amounts she could pay to prevent foreclosure based on the security interest it retained in Freeman's home despite the discharge. Ocwen moved to dismiss Freeman's FDCPA and ICFA counts.

Ocwen argued that it was not a "debt collector" because the debt was not in default when it was acquired by American Home Mortgage in 2004, and Ocwen became the owner of the debt by merger, as opposed to by assignment. The Court, however, denied without prejudice Ocwen's motion to dismiss based on its alleged merger, as established in an SEC filing, as procedurally improper.

The Court also found that Freeman's allegation that Ocwen's 1,200+ telephone calls made to her cellular phone easily supported an FDCPA claim. Given the barrage of phone calls, the contents of letters, and Freeman's contention that they were allegedly hand-delivered to her home (as opposed to by mail or a delivery service), also supported an inference of oppressiveness.

Similarly, Freeman did not need to provide a summary of each conversation in her complaint to state an actionable FDCPA claim. She provided an illustrative summary of a call in which she alleged that she spent 40 minutes on the phone with an Ocwen representative who rejected her position about her bankruptcy discharge and insisted that Ocwen's collection efforts were proper.

In addition, the Court declined to find, as a matter of law, that all of Ocwen's communications were informational and not made in connection with the collection of a debt. This required a "commonsense inquiry" to consider whether the communication contained a demand for payment, the nature of the parties' relationship, and the purpose and context of the communications between the parties. This inquiry was inherently fact-specific.

Further, the Court could not simply accept Ocwen's assertion that its communications were covered by § 524(j) of the bankruptcy code; the contents of the written communications and the purpose and content of the calls must be explored in discovery. Thus, Ocwen's citation to the bankruptcy code's safe harbor provision for certain holders of a security interest in real property did not warrant dismissal of Freeman's FDCPA claim.

The Court also found that Ocwen did not show that it would be impossible to comply with the ICFA and the bankruptcy code, nor did it explain how the ICFA's prohibition against unfair collection practices undercut the narrow remedy of seeking a contempt order based on an alleged violation of the discharge injunction.

Ocwen's motion to dismiss denied in its entirety.


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**CASE LAW**

**Foreclosure – Deficiency**

*CASE NAME:* *Old Second Nat. Bank v. Jafry*
*DATE:* *06/29/2016*
*CITATION:* *Appellate Court of Illinois, Second District. --- N.E.3d ----. 2016 IL App (2d) 150825. 2016 WL 3522784*

Defendants were guarantors on a real estate loan extended by Old Second National Bank. After a loan default, the Bank obtained a judgment of foreclosure on the property. At the sheriff's sale, the Bank purchased the property for $900,000. The trial court approved the sale and entered a deficiency judgment of $577,876. Four months later, the Bank sold the property for $1,320,000. The Bank thereafter initiated enforcement proceedings against defendants, seeking the full deficiency judgment of $577,876, plus interest. Defendants responded with a petition for setoff, arguing that allowing the Bank to obtain a substantial profit from the resale of the property as well as the full deficiency judgment would constitute an improper double recovery. The trial court disagreed and dismissed defendants' petition.

The appeals court held that when a mortgagee obtains a deficiency judgment against the mortgagor in a foreclosure action, purchases the property at a judicial sale, and then resells it to a third party for an amount that exceeds the price paid at the judicial sale, the mortgagor is not entitled to a setoff in the mortgagee's enforcement proceedings to recover the deficiency judgment, because the foreclosure terminates the mortgagor-mortgagee relationship.

According to the Court, if the mortgagor fears that the mortgagee will obtain a windfall in purchasing the property at a judicial sale, the mortgagor may attempt to sell the property himself before foreclosure or challenge the confirmation of sale under the Mortgage Foreclosure Law.

Here, defendants neither attempted to sell the property nor appealed their unsuccessful challenge to the confirmation of sale. Affirmed.

**CASE LAW**

**Deficiency – Statute of Limitations**

*CASE NAME:* *Coastal Federal Credit Union v. Brown*
*DATE:* *06/30/2016*
*CITATION:* *Court of Appeals of South Carolina. --- S.E.2d ----. 2016 WL 3944729*

On May 4, 2008, Brown entered into a retail installment sales contract with Johnny's Subaru Isuzu, LLC to purchase a vehicle. Brown financed the purchase, and the contract gave the dealership a security interest in the vehicle. The dealership immediately assigned the contract to CFCU, and Brown's certificate of title listed CFCU as first lienholder. In October 2009, CFCU repossessed the vehicle. On November 19, 2009, CFCU sold the vehicle at auction, leaving an outstanding balance under the contract. On November 24, 2009, CFCU sent Brown a letter notifying her of the sale and resulting deficiency. On October 21, 2013, CFCU filed the summons and complaint in the current action seeking to collect Brown's debt.

The circuit court found CFCU's action was one for the collection of a defaulted debt; therefore, the three-year statute of limitations applied and barred the action because it was initiated more than three years after CFCU repossessed the vehicle. It also ruled that the South Carolina Consumer Protection Code and the FDCPA applied to the case. The circuit court granted Brown's motion for summary judgment. This appeal followed.

The appeals court found that the circuit court did not rely on either the SCCPC or the FDCPA in reaching its decisions to grant summary judgment to Brown and deny summary judgment to CFCU. Because the ruling was unnecessary to the circuit court's disposition of the


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motions, it was improper and the Court vacated that ruling.

The Court also found that although CFCU exercised its right to repossess the vehicle under SCUCC Article 9, as assignee to the sales contract, CFCU gained the dealership's rights thereunder, including the right to sue Brown for a breach of the contract. In the Court's view, CFCU was entitled to exercise its rights under both Articles 2 and 9 simultaneously, so long as it did not obtain double recovery, and repossessing and selling the vehicle did not extinguish CFCU's rights under the sales contract, including the right to recover interest from Brown at the agreed-upon rate and collection costs.

Had the transaction between Brown and the dealership been simply a contract for the sale of goods unaccompanied by the creation of a security agreement, there was no question that CFCU, as the dealership's assignee, would be entitled to sue Brown for a breach of the contract, and the applicable statute of limitations would be that of SCUCC Article 2. The Court found no reason why this right should be taken away merely because a security interest in the vehicle was created concomitantly with its sale.

Because CFCU's action was filed within the six-year statute of limitations in S.C. Code Ann. § 36-2-725, the circuit court's grant of summary judgment to Brown was reversed.

**CASE LAW**
**Bankruptcy – Foreclosure**

*CASE NAME:* *Deutsche Bank Natl. Trust Co. v. Holden*
*DATE:* *07/01/2016*
*CITATION:* *Supreme Court of Ohio. --- N.E.3d ---. 2016 WL 3554450*

The Holdens refinanced their mortgage. Glenn Holden executed a promissory note in favor of Novastar Mortgage, Inc., and both Holdens signed a mortgage identifying MERS as mortgagee, as nominee for Novastar and its successors and assigns.

Deutsche Bank purchased the debt in its capacity as trustee for Soundview Home Loan Trust 2005–4, Asset–Backed Certificates, Series 2005–4, and JPMorgan Chase Bank, N.A., the loan servicer, received physical possession of the original note, indorsed in blank, on behalf of Deutsche Bank. Thereafter, the Holdens defaulted. Unable to modify the loan, they filed Chapter 7 and the bankruptcy court discharged their obligations on the note.

Deutsche Bank received an assignment of the mortgage from MERS and recorded it.

Deutsche Bank filed a foreclosure action, attaching copies of the promissory note, the mortgage, and the assignment of the mortgage. However, the copy of the promissory note attached to the complaint was not indorsed by Novastar. The Holdens filed an answer and counterclaims for violations of the FDCPA and the Ohio Consumer Sales Practices Act as well as claims for fraud and invasion of privacy, all premised on allegations that Deutsche Bank did not own the promissory note or the mortgage at the time it commenced the foreclosure action.

The trial court granted summary judgment to Deutsche Bank, finding that the bank was the holder of the note and the assignee of the mortgage prior to the commencement of the action and therefore had standing to foreclose.

The court of appeals reversed, concluding that genuine issues of material fact existed regarding whether Deutsche Bank owned the note when it commenced the action, because the note attached to the complaint lacked an indorsement and "Deutsche Bank has failed to explain why Chase would have an unendorsed copy of the note in its possession since it was only the servicer for Deutsche Bank and not for MERS or Novastar."


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The appeals court found that an action on a promissory note is different from an action on a mortgage securing the note and that the two actions are separate and distinct remedies to collect a debt. While the party entitled to enforce the note has standing to seek a personal judgment against the maker on that obligation, the mortgagee—or its successors and assigns—has standing to foreclose a mortgage and pursue a judicial sale to recover any amounts owed under the mortgage, as evidenced by the deficiency on the note.

Because the bank owned the mortgage at the time that it commenced the foreclosure action, it had standing to foreclose on the property and the right to collect the deficiency on the note from the proceeds of the foreclosure sale.

Reversed and remanded.

## CASE LAW

**Foreclosure – Changing locks**

*CASE NAME:* *Jordan v. Nationstar Mortgage, LLC*
*DATE:* *07/07/2016*
*CITATION:* *Supreme Court of Washington, En Banc. --- P.3d ----. 2016 WL 3748978*

Borrower brought a class action against her lender's servicer for trespass, breach of contract, and violations of the Washington Consumer Protection Act and the Fair Debt Collection Practices Act, arising out of the servicer's entry onto borrower's property upon borrower's default and changing the lock on the front entry door. Upon removal, the United States District Court for the Eastern District of Washington certified two questions.

The Supreme Court of Washington held that:

1. The provision of the deed of trust that authorized lender to enter the property to change the locks upon borrower's default contravened Washington law prohibiting the lender from taking possession of property prior to foreclosure, and

2. As matter of first impression, the appointment of a receiver to manage borrower's property was not the exclusive remedy for the lender to gain access to the property in order to preserve its interest prior to foreclosure.

Certified questions answered.

## CASE LAW

**Foreclosure – Affixation**

*CASE NAME:* *Wells Fargo Bank, NA v. Haas*
*DATE:* *07/7/2016*
*CITATION:* *Court of Appeals of Oregon. --- P.3d ----. 2016 WL 3675621*

Defendants received a loan to purchase real property, executing a promissory note, secured by a deed of trust, providing a security interest in the real property. The deed of trust specified that the secured property included "all the improvements now or hereafter erected on the property, and all * * * fixtures now or hereafter a part of the property," but made no mention of the manufactured dwelling that was on the property at the time of the transaction.

Defendants subsequently filed a Chapter 7. In "Schedule A—Real Property," defendants listed the street address of the property as their "residence." They did not list the manufactured dwelling in the petition on "Schedule B—Personal Property." Defendants designated plaintiff as a creditor holding a secured claim in their "residence." The bankruptcy court granted plaintiff relief from the automatic stay and released and also granted defendants a discharge of their debts.

Plaintiff then sought to foreclose on both the land and the manufactured dwelling. Defendants argued that plaintiff had no interest in the manufactured dwelling because it was not "legally attached to the land" or to the deed of trust.


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Plaintiff did not argue that they were entitled to foreclose on the manufactured dwelling because the parties had intended it to be collateral for the loan. Instead, they asserted that defendants were judicially estopped from denying that their manufactured dwelling was subject to plaintiff's lien, because defendants represented to the bankruptcy court that it was part of the real property in which plaintiff held a security interest. The trial court granted plaintiff's motion for summary judgment and issued a judgment of foreclosure in which it included the manufactured home.

The appeals court found that the deed of trust did not mention the manufactured dwelling. The legal description of the secured property made no mention of any structures. The deed did provide that "all the improvements now or hereafter erected on the property, and all * * * fixtures now or hereafter a part of the property" were collateral for the loan. However, those terms could be plausibly interpreted not to include the manufactured dwelling because the dwelling may not be affixed to the land sufficiently to be categorized as real property. Accordingly, the deed of trust did not unambiguously grant plaintiff a security interest in the manufactured dwelling.

Also, putting aside whether plaintiff could obtain, through judicial estoppel, a security interest in the manufactured dwelling to which it was not otherwise entitled, the Court concluded that plaintiff had not shown that the elements of the doctrine were met. Although the discharge of their debts in bankruptcy might have generally benefited defendants, plaintiff did not articulate, and the Court did not discern, any causal relationship between the allegedly inconsistent position—characterizing the manufactured dwelling as real rather than personal property—and the purported benefit—the bankruptcy court's decision to discharge defendants' debt.

Reversed and remanded.

## CASE LAW

**Force-placed insurance – Filed-rates**

*CASE NAME:* *Fowler v. Caliber Home Loans, Inc.*
*DATE:* *07/08/2016*
*CITATION:* *United States District Court, S.D. Florida, Miami Division. --- F.Supp.3d ----. 2016 WL 3746668*

In this case, the United States Magistrate Judge determined that he was required to predict how the Eleventh Circuit Court of Appeals would rule on a critical, case-dispositive issue raised in the motions to dismiss the class action lawsuit filed against an insurer (American Security Insurance Company) and a mortgage servicing firm (Caliber Home Loans, Inc.) in a force-placed insurance lawsuit.

The judge noted that, not only was there no Eleventh Circuit case on point, but the two federal appellate courts which had considered the issue appear to have adopted two diametrically opposed views.

Based on his review of the Eleventh Circuit's opinions in other cases not involving lender-placed insurance in which the filed-rate doctrine was asserted, the judge found that the appellate court had firmly embraced the filed-rate doctrine and does not hesitate to invoke it when circumstances are appropriate. In fact, the Eleventh Circuit has noted that the doctrine is applied "strictly" to "prevent a plaintiff from bringing a cause of action even in the face of apparent inequities[.]"

Plaintiffs alleged that Caliber colluded with its LPI insurer, American Security Insurance Company ("ASIC"), to charge them inflated LPI premiums that included "kickbacks" paid to Caliber and its affiliates. Plaintiffs' theory was that the alleged "kickbacks" provided Caliber with a "rebate on the cost of the force-placed insurance" which Caliber "do[es] not pass on ... to the borrower." Plaintiffs repeatedly complained about amounts included in their LPI premiums, and sought damages exactly equal


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to the portions of their LPI premiums they contended comprise the alleged "kickbacks." Plaintiffs did not dispute they were charged only the exact LPI premiums authorized by state-approved rates.

The Court found that it is the impact a civil action will have on agency procedures and rate determinations, rather than the defendant's underlying conduct, that controls whether the filed-rate doctrine applies.

Since, at bottom, all of their "kickback scheme" claims were premised on the allegation that the LPI premiums were "inflated" or excessive, all of their claims were barred by the filed-rate doctrine regardless of how they attempt to frame them.

In addition, as the Eleventh Circuit has cautioned, "even if a claim does not directly attack the filed-rate, an award of damages to the customer that would, in effect, result in a judicial determination of the reasonableness of that rate is prohibited under the filed-rate doctrine."

Defendants' motion to dismiss granted, with prejudice.

## CASE LAW
**Late charges**

*CASE NAME:* *Williams v. Lendmark Financial Services, Inc.*
*DATE:* *07/08/2016*
*CITATION:* *United States Court of Appeals, Fourth Circuit. --- F.3d ----. 2016 WL 3648467*

Williams contended that Lendmark violated Maryland's Credit Grantor Closed End Credit Provisions and the promissory note by applying her monthly payments first to late charges, then to interest, and finally to principal; by imposing late charges on timely payments when it applied her monthly payments to satisfy earlier late fees; and by prematurely "assessing" late charges by posting them after the close of business on the fifth day of the five-day grace period, rather than on the following day.

The United States District Court granted summary judgment to the creditor. Debtor appealed.

The appeals court found that CLEC expressly allows a creditor to impose late charges, but limits the manner in which such late charges may be imposed.

Here, under the note and consistent with CLEC, Williams satisfied her obligation to Lendmark simply by paying $102.23 by the first day of each month or within the grace period. And Lendmark would satisfy its obligation to Williams by applying each payment first to late charges, then to accrued interest, and finally to principal. Accordingly, if Williams' payment were late or were made in an amount less than $102.23, she would incur a late charge, which would be paid from the next payment. In that case, however, the principal would not be fully repaid after 36 monthly payments, and Williams would have to continue making payments until she paid the principal in full. Indeed, the note so provide. And Williams did continue making payments beyond the 36 months, eventually repaying the note in full.

The Court concluded that Lendmark's practice of applying payments first to late charges was legal, both under CLEC and under the terms of the note.

However, the Court found that Lendmark's practice of charging late fees solely because payments were applied first to earlier late fees constituted an improper collection of late fees, both because the note did not require monthly payments of amounts in excess of $102.23 and because the charging of late fees based on application of an otherwise conforming payment to prior late fees amounted to the collection of multiple late fees for a single installment, in violation of both CLEC and the note.

Finally, the note simply provided that Lendmark could charge Williams a late fee if she did not pay "any installment within 5 days after its scheduled or deferred due date." When Lendmark booked or assessed such a late charge on its internal accounting records was


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irrelevant to the issue of whether it properly charged Williams for being late. The conditions of the note for the imposition of a late fee were therefore satisfied in each case where a late fee was charged .

Affirmed in part, reversed in part, and remanded.

## CASE LAW
**Bankruptcy – Time-barred debt**

*CASE NAME:* *Nelson v. Midland Credit Management, Inc.*
*DATE:* *07/11/2016*
*CITATION:* *United States Court of Appeals, Eighth Circuit. --- F.3d ----. 2016 WL 367207362*

After the bankruptcy court disallowed as untimely the proof of claim filed by a debt collector in the debtor's Chapter 13 bankruptcy proceeding, the debtor brought an action against the debt collector, alleging the collector violated the FDCPA by filing the proof of claim on a time-barred debt. The United States District Court for the Eastern District of Missouri dismissed for failure to state a claim, holding that the FDCPA is not implicated by a debt collector filing an accurate and complete claim on a time-barred debt . The debtor appealed.

Referring to *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014), in which the Eleventh Circuit extended to bankruptcy claims the rule against actual or threatened litigation on time-barred debts, the appeals court found that that decision ignored the differences between a bankruptcy claim and actual or threatened litigation.

Instead, the Court, relying on its own decision in *Freyermuth v. Credit Bureau Servs., Inc.*, 248 F.3d 767, 771 (8th Cir. 2001), found that a defendant's FDCPA liability turns on whether an unsophisticated consumer would be harassed, misled or deceived by the debt collector's acts. According to the Court, the bankruptcy process protects against such harassment and deception. Unlike defendants facing a collection lawsuit, a bankruptcy debtor is aided by trustees who owe fiduciary duties to all parties and have a statutory obligation to object to unenforceable claims.

Affirmed.

## CASE LAW
**FCRA - Verification**

*CASE NAME:* *Hinkle v. Midland Credit Management, Inc.*
*DATE:* *07/11/2016*
*CITATION:* *United States Court of Appeals, Eleventh Circuit. --- F.3d ----. 2016 WL 3672112*

Hinkle filed suit against the buyer of charged-off consumer debts and its debt collector alleging they erroneously attributed debts to her, improperly reported debts to credit reporting agencies, and failed to verify debts when the consumer disputed their validity in violation of the FDCPA and FCRA. The United States District Court granted the debt buyer and collector summary judgment. Hinkle appealed.

The appeals court noted that 15 U.S.C. § 1681s–2(b)(1)(E) contemplates three potential ending points to reinvestigation: verification of accuracy, a determination of inaccuracy or incompleteness, or a determination that the information "cannot be verified." The Court found that that the records Midland possessed were insufficient to verify the accounts and that, absent additional proof, Midland should have reported the results of its reinvestigation as "cannot be verified," and that Midland was not entitled to summary judgment under § 1681s–2(b) on the facts of this case.

However, the Court also noted that § 1681s–2(b) does not require the furnisher to cease dunning or otherwise attempting to collect the debt. The requirement to delete or modify the offending information is limited to the credit-reporting context.


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The Court reversed and remanded as to § 1681s–2(b) but affirmed dismissal of all other claims.

## CASE LAW

**FDCPA – Initial communication**

*CASE NAME:* *Hernandez v. Williams, Zinman, & Parham PC*
*DATE:* *07/20/2016*
*CITATION:* *United States Court of Appeals, Ninth Circuit. --- F.3d ----. 2016 WL 3913445*

Following Thunderbird Collection Specialists, Inc.'s unsuccessful attempt to collect Hernandez's debt, Thunderbird retained the law firm Williams, Zinman & Parham PC ("WZP") to assist in its collection efforts. WZP sent Hernandez a collection letter, which was its initial communication with her. The letter notified Hernandez that WZP, a debt collector, represented Thunderbird regarding a debt incurred by Hernandez with the original creditor. While it informed Hernandez that she could dispute the debt or request additional information about the original creditor, it did not tell her that she could do so only in writing.

Hernandez filed suit against WZP as a putative class action, alleging that WZP violated the FDCPA by sending a debt collection letter that lacked the disclosures required under § 1692g(a) of the FDCPA.

The district court granted summary judgment in favor of WZP, holding that Thunderbird's letter to Hernandez was the "initial communication" sent to Hernandez with respect to the debt at issue and therefore the sole communication triggering § 1692g(a)'s requirements. Hernandez appealed.

The appeals court found that although the sentence in § 1692g(a) in which the phrase "the initial communication" appears is ambiguous when read in isolation, when the sentence is read in the context of the FDCPA as a whole and in light of the statute's remedial purpose, it is clear that the validation notice requirement applies to each debt collector that attempts to collect a debt.

This interpretation avoids creating substantial loopholes around both § 1692g(a)'s validation notice requirement and § 1692g(b)'s debt verification requirement—loopholes that otherwise would undermine the very protections the statute provides.

Reversed and remanded.

## CASE LAW

**Assignment – Notice**

*CASE NAME:* *Deutsche Bank Nat. Trust Co. v. Hagstrom*
*DATE:* *07/20/2016*
*CITATION:* *District Court of Appeal of Florida, Second District. --- So.3d ----. 2016 WL 3926852*

Deutsche Bank filed the underlying action seeking to foreclose the Hagstroms' mortgage and enforce the terms of the note. The original lender was Wilmington Finance, Inc. Attached to the complaint was an allonge with indorsement in blank from Wilmington Finance dated September 26, 2006, the same day the note and mortgage were executed. The mortgage named MERS as the mortgagee acting as nominee for Wilmington Finance. Deutsche Bank also filed a corporate assignment of mortgage from MERS to Deutsche Bank dated July 26, 2011.

The Hagstroms filed a motion for summary judgment alleging that Deutsche Bank was "not the original creditor yet failed to give [the Hagstroms] written notice of the assignment of the debt, as required by" Fla. Stat. § 559.715.

The trial court granted summary judgment to the Hagstroms due to Deutsche Bank's failure to comply with § 559.715. The bank appealed.

The appeals court found that § 559.715 applies only to assignees of the right to bill and collect a consumer debt


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not to assignees of the debt itself; it in no way impacts or limits the right of the note holder to file a foreclosure lawsuit. According to the Court, the note at issue here was a negotiable instrument governed by chapter 673, Florida's Uniform Commercial Code. Deutsche Bank was entitled to enforce the note, not because it was an assignee of the right to bill and collect, but because it met the statutory definition of the holder of the note. Fla. Stat. § 671.201 defines "holder" as "[t]he person in possession of a [note] that is payable either to bearer or to an identified person that is the person in possession."

Further, Fla. Stat. § 701.01 provides that "[a]ny mortgagee may assign and transfer any mortgage made to her or him" and that the assignee or transferee "may lawfully have, take and pursue the same means and remedies which the mortgagee may lawfully have, take or pursue for the foreclosure of a mortgage and for the recovery of the money secured thereby." Title XL of the Florida Statutes has no notice requirement with regard to assignments of mortgages. Moreover, § 701.02(4) specifically states that chapters 670–680 of the UCC "govern the attachment and perfection of a security interest in a mortgage upon real property and in a promissory note or other right to payment or performance secured by that mortgage."

Reversed and remanded.

**CASE LAW**

**FDCPA – Attorney debt collector**

*CASE NAME:* *Jones v. Dufek*
*DATE:* *07/26/2016*
*CITATION:* *United States Court of Appeals, District of Columbia Circuit. --- F.3d ----. 2016 WL 3996712*

CACH, LLC hired the Law Office of David Sean Dufek to collect a debt owed by Jones. Dufek sent Jones a letter regarding the debt which included the disclaimer: "Please be advised that we are acting in our capacity as a debt collector and at this time, no attorney with our law firm has personally reviewed the particular circumstances of your account."

Jones alleged that the letter was deceptive and violated the FDCPA, the District of Columbia Consumer Protection Procedures Act, and the District of Columbia Debt Collection Law. Jones's basic argument was that, by using the title "attorney" in the letterhead and signature block, the letter falsely implied both that Dufek was meaningfully involved with the case as an attorney and that the creditor was threatening to bring a lawsuit to collect the debt.

The trial court granted judgment on the pleadings in favor of defendants. Jones appealed.

The appeals court found that Dufek included a conspicuous disclaimer describing his involvement in the matter. The letter did not threaten any legal action that could not legally be taken or that was not intended to be taken. The letter made no reference to legal action. The letter did not give any indication about what the creditor might do if Jones failed to pay the debt. It simply said that Jones owed a debt and that she should send her payment to Dufek's office. The only future consequence the letter discussed was the statutorily required disclosure that if Jones did not dispute the debt's validity within thirty days, Dufek's office would presume that it was valid.

The Court noted that lawyers do more than just file lawsuits. Sometimes, they try to collect debts, and the FDCPA does not prohibit them from doing so. The fact that an attorney was involved in collecting Jones's debt did not mean that the collection attempt constituted a threat to take legal action.

According to Jones, by stating that no attorney had reviewed the case "at this time," the letter implied that at some future time, an attorney might review the case and file a lawsuit. The Court, however, found that the federal act prohibits only threats to take legal action;

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merely leaving open the possibility of attorney review that could lead to legal action does not fit the bill.

The Court disposed of the claims under the District of Columbia statutes on similar grounds.

Affirmed.

LEGISLATION

**Rhode Island**

**Homestead exemption**

**2015 RI H 7674**. Enacted 7/26/2016. Effective immediately.

This bill amends R.I. Gen. Laws § 9-26-4.1 to provide that a homestead exemption applies to personal property that the owner uses as a residence.

The bill adds that an estate of homestead shall be subordinate to a mortgage encumbering the home which was signed by all the owners of the home at the time of execution of said mortgage. A mortgage executed by fewer than all of the owners of a home that is subject to an estate of homestead shall be superior only to the homestead estate of the owners who are parties to the mortgage and their non-titled spouses and minor children, if any.

The bill also adds that, for purposes of this chapter, a mortgage shall include an instrument granting a security interest in a manufactured home or cooperative housing unit. The subordination shall not require the signature of a spouse who is not an owner. No statement that a homestead estate shall be subordinate to the mortgage shall be required in the mortgage instrument and nothing contained in a mortgage or any document executed in connection with the mortgage shall affect or be construed to create, modify, or terminate a homestead estate, other than to subordinate it to the mortgage as aforesaid. A mortgage lender shall not require or record a release of homestead in connection with the making and recording of a mortgage.

## INSTALLATION

LEGISLATION

**Illinois**

**Inspection**

**2015 IL S 3079**. Enacted 8/5/2016. Effective immediately.

This bill amends the Manufactured Home Quality Assurance Act.

The bill amends the definition of "manufactured home" in 430 Ill. Comp. Stat. 117/10 by including "mobile home" in the definition and provides that it includes manufactured homes or mobile home designed to be used as a dwelling with or without a permanent foundation.

The bill amends 430 Ill. Comp. Stat. 117/25 to provide that all manufactured homes shall be installed under the immediate onsite supervision of a licensed manufactured home installer (adding, "immediate").

The bill provides that a fee of $50 (formerly, $25) shall be paid by the licensed installer responsible for the installation for each manufactured home installed as evidenced by the installers affixing of a Department-issued seal to the home and filing of an installation certificate with the Department (adding, "as evidenced by the installers affixing of a Department-issued seal to the home and filing of an installation certificate with the Department").

The bill also adds that when the Illinois Department of Public Health is required to inspect the installation of a manufactured home, a fee of $395 shall be paid to the Department by the installer for each inspection made. When a Department-approved third party inspects the


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installation of a manufactured home, the installer shall pay an inspection fee not to exceed $395 to the person performing the inspection. A report of the installation inspection shall be made in a manner prescribed by the Department. The Department shall by rule establish the qualifications and manner in which third parties may be approved to inspect manufactured housing inspections.

The bill amends 430 Ill. Comp. Stat. 117/60 the provide that the Department may adopt all rules necessary to implement this Act. Such rules shall provide for the Department to inspect manufactured home installations, require correction of violations, and perform other duties mandated by the United States Department of Housing and Urban Development pursuant to Section 3286.803 of Title 24 of the Code of Federal Regulations, 24 C.F.R. 3286.803. The Department may require and approve non-governmental inspectors or inspection agencies, provided the Department shall at all times exercise supervisory control over such inspectors or agencies to insure effective and uniform enforcement consistent with the rules adopted by the Department.

Finally, the bill amends 430 Ill. Comp. Stat. 117/65. Formerly this section provided that the Act does not apply to home rule municipalities with a population in excess of 1,000,000. The amendment adds, "so long as exempt municipalities adopt rules to inspect manufactured home installations, require correction of violations, and perform other duties mandated by the United States Department of Housing and Urban Development pursuant to Section 3286.803 of Title 24 of the Code of Federal Regulations, 24 C.F.R. 3286.803. Exempt municipalities may require and approve non-governmental inspectors or inspection agencies, provided the exempt municipalities shall at all times exercise supervisory control over such inspectors or agencies to insure effective and uniform enforcement consistent with the rules adopted by the exempt municipalities."

### PROPOSED RULE

**Mississippi**

**Bonding – Licensing – Installation standards**

Published 7/18/2016.

To be effective 10/1/2016, the Mississippi Department of Insurance proposed rules that would amend 19-7 Miss. Code R. Chapters 4 and 5, relating to bonding, licensing and installation standards. The purpose of the rule is to modernize and clarify existing requirements.

## LENDING

### CASE LAW

**Usury – Preemption**

*CASE NAME:* *CashCall, Inc. v. Maryland Com'r of Financial Regulation*
*DATE:* *06/23/2016*
*CITATION:* *Court of Appeals of Maryland. --- A.3d ---. 2016 WL 3443971*

The Commissioner of Financial Regulation brought an administrative enforcement action against CashCall, Inc., a California corporation, and the corporation's president and owner, for violating various Maryland consumer protection laws, including the Maryland Credit Services Business Act.

The Court found that, under Maryland law, a credit services is prohibited from assisting "a consumer to obtain an extension of credit at a rate of interest which, except for federal preemption of State law" would exceed the maximum annual percentage rates under Maryland law. Although federal law allows federally insured banks to charge out-of-state consumers the same interest rate permitted by the bank's home state, a credit services business may not, under the MCSBA, assist a consumer in obtaining a loan at an interest rate prohibited by Maryland law.


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CashCall offered loans to consumers at three different interest rates: 59%, 89%, or 96%. Maryland law caps the interest rate at 33% on all loans below $6,000.

According to the Court, consumers filled out an online loan application and CashCall forwarded the application to an out-of-state bank that was exempt from Maryland's usury laws. Upon approval, the bank would place, in the consumer's bank account, the requested loan amount less a $75 fee designated as an "origination fee." In the case of a $2,600 loan, the consumer received $2,525, the principal amount less the $75 origination fee. The consumer was required to pay the holder of the loan $2,600, plus interest.

CashCall was required to purchase a loan three days after the loan was originated and the funds dispersed to the consumer. CashCall paid the bank the full value of the loan, plus the three days of interest that had accrued on the loan. The banks also paid CashCall a "royalty" fee of $5 to $72.22 per loan. Upon CashCall's purchase of the loan, all of the bank's rights and interests in the loan were assigned, without recourse, to CashCall. This gave CashCall the right to enforce the terms provided in the loan documents, including the right to collect payments of the principal, interest and other fees.

CashCall argued that it does not meet the definition of a "credit services business" because it did not receive any direct payments from consumers for the assistance it provided to consumers to obtain loans.

The Court found, however, that in exchange for CashCall's role in assisting consumers to obtain the aforementioned loans, CashCall received, through contracts with the banks, the exclusive right to collect all payments of principal, interest and fees, including the origination fee. Although the lending bank originally charged the origination fee, the bank never received payment of that fee from the consumer but CashCall did.

Because CashCall provided the consumer with "advice or assistance" in the obtention of an "extension of credit by others," and was compensated for doing so, the Court concluded that CashCall engaged in a credit services business.

Affirmed.

**PRESS RELEASE**
**FDIC**
**Third-party lending**

Issued 7/29/2016.

FDIC Seeking Comment on Proposed Guidance for Third-Party Lending.

The FDIC is seeking comment on proposed Guidance for Third-Party Lending to set forth safety and soundness and consumer compliance measures FDIC-supervised institutions should follow when lending through a business relationship with a third party. The proposed guidance is intended to supplement the FDIC's existing Guidance for Managing Third-Party Risk, which is applicable to any of an institution's third-party arrangements, including lending through a third party.

The proposed guidance defines third-party lending as an arrangement that relies on a third party to perform a significant aspect of the lending process. Categories include (but are not limited to): institutions originating loans for third parties; institutions originating loans through third parties or jointly with third parties; and institutions originating loans using platforms developed by third parties.


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## LICENSING

**PROPOSED RULE**
**Arkansas**
**Retailers**

Published 6/27/2016.

This rule would amend 066-00-16 Ark. Code R. § 302, Certification of Retailers, to provide that an application must include:

(f) A list of all directors, officers, limited and general partners, or controlling shareholders if the application is made on behalf of a corporation or partnership or a list of all principal owner(s) of the retail location on a form provided by the Agency;

(g) A general business / employment history for each person identified on the application form, including a sworn statement that none of the directors, officers, partners, shareholders or owners of the applicant have:

(i) been found guilty, pleaded guilty or entered a plea of nolo contendere or suffered a judgment in a civil action in this state or any other jurisdiction for forgery, embezzlement, obtaining funds under false pretenses, extortion, conspiracy to defraud, bribery, fraud, misrepresentation or moral turpitude; or

(ii) had a license, permit or certification suspended or revoked by any government agency in this state or any other jurisdiction for violation of Federal or state laws or regulations;

(h) Evidence of a net worth of at least $100,000;

(i) A financial statement compiled or reviewed by an independent, third-party accounting firm, prepared within six (6) months of the application date for:

(i) each owner or partner, if the applicant is a sole proprietor or partnership, or

(ii) the business, if the applicant is a corporation, LLC, or LLP; and

(j) Evidence of having at least two (2) years' experience as a licensed retailer or salesperson, working for a licensed retailer, in this state or any other jurisdiction. Applicants purchasing a retail location currently licensed by the Commission will be exempt from the experience requirement.

**LEGISLATION**
**Illinois**
**Dealers**

**2015 IL H 1056**. Enacted 7/22/2016.

Effective immediately, this bill adds 625 Ill. Comp. Stat. 5/5-101.2, Manufactured home dealers; licensing.

The bill defines "Manufactured home dealer" as an individual or entity that engages in the business of acquiring or disposing of a manufactured home or park model, either a new manufactured home or park model, pursuant to a franchise agreement with a manufacturer, or used manufactured homes or park models, and who has an established place of business that is not in a residential community-based setting.

"Community-based manufactured home dealer" means an individual or entity that operates a tract of land or 2 or more contiguous tracts of land which contain sites with the necessary utilities for 5 or more independent manufactured homes for permanent habitation, either free of charge or for revenue purposes, and shall include any building, structure, vehicle, or enclosure used or intended for use as a part of the equipment of the manufactured home park who may, incidental to the operation of the manufactured home community, sell, trade, or buy a manufactured home or park model that is located within the manufactured home community or is located in a different manufactured home community


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that is owned or managed by the community-based manufactured home dealer.

"Supplemental license" means a license that a community-based manufactured home dealer receives and displays at locations in which the licensee is authorized to sell, buy, barter, display, exchange, or deal in, on consignment or otherwise, manufactured homes or park models, but is not the established place of business of the licensee.

The bill provides that no person shall engage in Illinois in the business of selling or dealing in, on consignment or otherwise, manufactured homes or park models of any make, or act as an intermediary, agent, or broker for any manufactured home or park model purchaser, other than as a salesperson or to represent or advertise that he or she is so engaged, or intends to so engage, in the business, unless licensed to do so by the Secretary of State under the provisions of this Section.

An application for:

(A) a manufactured home dealer's license, when the applicant is selling new manufactured homes or park models on behalf of a manufacturer of manufactured homes or park models, or 5 or more used manufactured homes or park models during the calendar year, shall be accompanied by a $1,000 license fee for the applicant's established place of business, and $100 for each additional place of business, if any, to which the application pertains. If the application is made after June 15 in any year, the license fee shall be $500 for the applicant's established place of business, and $50 for each additional place of business, if any, to which the application pertains. License fees shall be returnable only in the event that the application is denied by the Secretary of State; or

(B) a community-based manufactured home dealer's license, when the applicant is selling 5 or more manufactured homes during the calendar year not on behalf of a manufacturer of manufactured homes, but within a community setting, shall be accompanied by a license fee of $500 for the applicant's established place of business, and $50 for each additional place of business, if any to which the application pertains. If the application is made after June 15 in any year, the license fee shall be $250 for the applicant's established place of business, and $50 for each additional place of business, if any, to which the application pertains. License fees shall be returnable only in the event that the application is denied by the Secretary of State.

The application requires a bond or certificate of deposit in the amount of $20,000 for each license holder applicant intending to act as a manufactured home dealer or community-based manufactured home dealer.

All persons licensed as a manufactured home dealer or a community-based manufactured home dealer are required to furnish each purchaser of a manufactured home or park model:

(1) in the case of a new manufactured home or park model, a manufacturer's statement of origin, and in the case of a previously owned manufactured home or park model, a certificate of title, in either case properly assigned to the purchaser;

(2) a statement verified under oath that all identifying numbers on the vehicle match the identifying numbers on the certificate of title or manufacturer's statement of origin;

(3) a bill of sale properly executed on behalf of the purchaser;

(4) a copy of the Uniform Invoice-transaction reporting return form referred to in Section 5-402; and

(5) for a new manufactured home or park model, a warranty, and in the case of a manufactured home or park model for which the warranty has been reinstated, a copy of the warranty; if no warranty is provided, a disclosure or statement that the manufactured home or park model is being sold "AS IS".


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This Section shall not apply to a (i) seller who privately owns his or her manufactured home or park model as his or her main residence and is selling the manufactured home or park model to another individual or to a licensee;

(ii) a retailer or entity licensed under either Section 5-101 (new vehicle dealers) or 5-102 (used vehicle dealers) of this Code; or

(iii) an individual or entity licensed to sell truck campers, travel trailers, motor homes, or mini motor homes as defined by this Code. Any vehicle not covered by this Section that requires an individual or entity to obtain a license to sell 5 or more vehicles must obtain a license under the relevant provisions of this Code.

This Section shall not apply to any person licensed under the Real Estate License Act of 2000.

**PROPOSED RULE**
**North Carolina**
**Set-up contractors**

Published 7/15/2016.

This rule would amend 11 N.C. Admin. Code 08 .0904.

Currently, the rules provide for the requirements for an application for license as a manufactured housing manufacturer, dealer, and set-up contractor.

The proposed rule would provide for separate requirements for a manufactured set-up contractor, although the requirements themselves remain the same as those for a manufacturer or dealer.

## SALES

**LEGISLATION**
**United States**
**Manufactured housing vouchers**

**2015 US H 3700**. Enacted 7/29/2016. The Secretary of Housing and Urban Development shall issue notice to implement the amendments made by subsection (a) and such amendments shall take effect upon such issuance.

This bill enacts the "Housing Opportunity Through Modernization Act of 2016" and increases the flexibility for low income families to use a Section 8 voucher to purchase a manufactured home.

The bill amends Section 8(o)(12) of the United States Housing Act of 1937 (42 U.S.C. 1437f (o)(12)), Use Of Vouchers For Manufactured Housing, Assistance for Rental of Manufactured Housing, to provide that a public housing agency may make assistance payments in accordance with this subsection on behalf of a family that utilizes a manufactured home as a principal place of residence and rents the real property on which the manufactured home owned by any such family is located.

Formerly, this subsection provided: A public housing agency may make assistance payments in accordance with this subsection on behalf of a family that utilizes a manufactured home as a principal place of residence. Such payments may be made only for the rental of the real property on which the manufactured home owned by any such family is located.

The bill also provides that for assistance pursuant to this paragraph, rent shall mean the sum of the monthly payments made by a family assisted under this paragraph to amortize the cost of purchasing the manufactured home, including any required insurance and property taxes, the monthly amount allowed for tenant-paid utilities, and the monthly rent charged for the real property on which the manufactured home is located,


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including monthly management and maintenance charges.

Formerly, this clause, (i) of subsection (B), provided: For assistance pursuant to this paragraph, the rent for the space on which a manufactured home is located and with respect to which assistance payments are to be made shall include maintenance and management charges and tenant-paid utilities.

The bill deletes subsection (B)(ii), which provided that the public housing agency shall establish a payment standard for the purpose of determining the monthly assistance that may be paid for any family under this paragraph. The payment standard may not exceed an amount approved or established by the Secretary.

The bill also amends clause (iii) by redesignating it clause (ii) and providing that the monthly assistance payment for a family assisted under this paragraph shall be determined in accordance with paragraph (2). If the amount of the monthly assistance payment for a family exceeds the monthly rent charged for the real property on which the manufactured home is located, including monthly management and maintenance charges, a public housing agency may pay the remainder to the family, lender or utility company, or may choose to make a single payment to the family for the entire monthly assistance amount.

Formerly, the clause provided that the monthly assistance payment for a family assisted under this paragraph shall be determined in accordance with paragraph (2).


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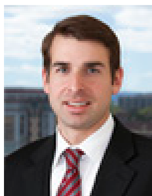

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