McGLINCHEY STAFFORD

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

WELCOME!

September was a month filled with water system and plumbing legislation, so if you are interested in all things H20, this month's report will keep you mentally hydrated.

If water is not your thing—maybe you prefer sports drinks or something a little stronger—we have information for you too. For example, a manufactured home retailer that did not install or have anything to do with the installation of a consumer's stairs was not liable as a result of injuries incurred when the consumer fell from those stairs. That just seems like a reasonable outcome.

There were two cases decided under New York's statutes requiring a satisfaction piece be recorded and whether a consumer had standing to sue post-*Spokeo* when a satisfaction piece is not timely recorded. Not surprisingly, one court said "yes" and one court said "no."

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We also summarize several fair housing developments, including HUD's guidance on dealing with LEP consumers and HUD's final Fair Housing rules addressing quid pro quo and hostile environment harassment under the Fair Housing Act.

That's not all. Keep reading to quench your thirst.

ARBITRATION

CASE LAW

Unconscionability

☹

CASE NAME: *Penilla v. Westmont Corporation*
DATE: *09/09/2016*
CITATION: *Court of Appeal, Second District, Division 4, California. --- Cal.Rptr.3d ----. 2016 WL 4709888*

Plaintiffs were primarily low-income mobilehome owners who rented land from Westmont Corporation, dba Wildwood Mobile Home Country Club. Plaintiffs filed suit, asserting contract, tort and statutory claims, including two causes of action under the Fair Employment and Housing Act ("FEHA"). Defendants/appellants moved for an order compelling arbitration.

The trial court denied the motion because the arbitration provision in the mobilehome rental agreements was procedurally and substantively unconscionable. Defendants appealed.

The appeals court noted that arbitration provision was drafted by Westmont, and respondents could neither reject nor negotiate its terms. Respondents were also under severe pressure to sign. Respondents signed the rental agreements after they had paid for their mobilehomes or deposited a large amount of money toward the purchase of a mobilehome. Respondents could not afford other housing options. Further, signing the rental agreements with the arbitration provisions was a requirement to completing the purchase of these primary residences.

And, although Westmont knew many respondents were not proficient in English, it never explained the arbitration provision in Spanish or provided a Spanish-language copy.

Moreover, the arbitration provision was confusing and sometimes contradictory. It stated that "class action claims" were subject to arbitration, but also provided that "[n]o dispute shall be consolidated with any other dispute." While "injunctive relief" was excluded, the provision stated that the arbitrator may impose any remedies allowed by the Mobilehome Residency Law, which includes injunctive relief.

Also, appellants failed to draw respondents' attention to the arbitration provision or explain it. Appellants failed to explain that respondents would be required to advance half the costs of arbitration - even for disputes involving small amounts of money - that their share of those costs would be between $2,500 and $5,000 per day per arbitrator, that there would be no arbitral fee waivers, and that failure to advance half the fees would result in the entry of a default judgment on their claims.

In sum, there was a significant degree of procedural unconscionability.

The Court also concluded that the arbitration provision was substantively unconscionable, as it imposed unreasonably high arbitration costs that would significantly deter, if not effectively preclude, respondents from asserting their claims. This was further supported by restrictions on the time in which respondents may bring their claims and the remedies available in arbitration. Far from providing an alternative forum in which to resolve their disputes, enforcement of the arbitration provision would effectively deprive respondents of any venue for adjudicating their claims.

In addition, the FEHA claims were not exempted from the unique costs of arbitration.

Other terms that raised concerns of substantive unconscionability, not addressed by the trial court, included: the one-year limitations period was significantly shorter than those for most of the claims in the complaint; It precluded an award of "punitive damages [if more than two percent of owner equity in

the park or if in addition to any statutory penalty in any sum].”

Finally, the Court declined to sever the arbitration agreement, finding it contained more than one unlawful provision and severance would require the court to augment the agreement with additional terms.

Affirmed.

COMMUNITIES

LEGISLATION
California
Unlawful Detainer

2015 CA A 2819. Enacted 9/13/2016. Effective 1/1/2017.

This bill amends Cal. Civ. Code § 1161.2.

Under existing law, a tenant of real property, for a term less than life, or the executor or administrator or his or her estate, is guilty of unlawful detainer when he or she continues in possession, in person or by subtenant, of the property or any part of the property, after the expiration of the term for which it is let to him or her, except as specified. Under existing law, access to limited civil case records filed in an unlawful detainer action is restricted to (1) parties to the action, (2) certain people who provide the court clerk with specified information about the parties to the action, (3) any person by order of the court on a showing of good cause, and (4) any other person 60 days after the complaint has been filed, unless the defendant prevails in the action within 60 days after the filing of the complaint, in which case access is limited to the other parties allowed access, as described above.

This bill instead provides that access to limited civil case records filed in an unlawful detainer action is restricted, for purposes of (4), as described above, (1) to any person by order of the court if judgment is entered for the plaintiff after trial more than 60 days since the filing of the complaint, and (2) to any other person 60 days after the complaint has been filed if the plaintiff prevails in the action within 60 days of the filing of the complaint. The bill provides that if a default or default judgment is set aside more than 60 days after the complaint was filed, the court file access restrictions, as described above, shall apply as if the complaint had been filed on the date the default or the default judgment is set aside. The bill authorizes the court to bar access to court records in the action if the parties so stipulate.

The bill also adds Cal. Civ. Code § 1167.1.

Existing law requires a complaint filed in an unlawful detainer proceeding to include certain information and requires a defendant to answer the complaint, as specified, within 5 days of being served with a summons and the complaint, unless the court orders otherwise for good cause shown. Existing law also requires proof of service of a summons to be filed in a civil action, including in an unlawful detainer proceeding.

This bill permits a court to dismiss an unlawful detainer proceeding without prejudice if proof of service of the summons has not been filed within 60 days of the complaint's filing.

LEGISLATION
California
Rental agreements

2015 CA A 587. Enacted 9/21/2016. Effective 1/1/2017.

This bill revises the contents of the notice to be included in a rental agreement for a tenancy required by the Mobilehome Residency Law in Cal. Civ. Code § 798.15.

Beginning January 1, 2020, the bill makes it unlawful for any person to use for occupancy any manufactured home or mobilehome that does not conform to the

registration requirements of the department, if the department provides notice to the occupant of the registration requirements and any registration fees due.

LEGISLATION
California
Bedbugs

2015 CA A 551. Enacted 9/25/2016. Effective 1/1/2017.

This bill amends Cal. Civ. Code § 1942.5, amends and renumbers Cal. Civ. Code § 1954.1 and adds Cal. Civ. Code Chapter 2.8 (commencing with Section 1954.600), relating to tenancy.

Existing law imposes various obligations on landlords who rent out residential dwelling units, including the general requirement that the building be in a fit condition for human occupation. Among other responsibilities, existing law requires a landlord of a residential dwelling unit to provide each new tenant who occupies the unit with a copy of the notice provided by a registered structural pest control company, as specified, if a contract for periodic pest control service has been executed.

This bill prescribes the duties of landlords and tenants with regard to the treatment and control of bed bugs. The bill requires a landlord to provide a prospective tenant, on and after July 1, 2017, and to all other tenants by January 1, 2018, information about bed bugs, as specified. The bill requires that the landlord provide notice to the tenants of those units inspected by the pest control operator of the pest control operator's findings within 2 business days, as specified. The bill prohibits a landlord from showing, renting, or leasing a vacant dwelling unit that the landlord knows has a bed bug infestation, as specified.

LEGISLATION
California
Warehouse liens – Discrimination - Loans

2015 CA S 944. Enacted 9/27/2016. Effective 1/1/2017.

This bill amends Cal. Civ. Code §§ 798.56a and 798.61 and Cal. Health & Safety Code § 18080.5.

The Mobilehome Residency Law governs tenancies in mobilehome parks and, among other things, authorizes the management of a mobilehome park, under specified circumstances, to either remove the mobilehome from the premises and place it in storage or store the mobilehome on its site. Existing law provides the management with a warehouse lien for these costs and imposes various duties on the management to enforce this lien, including requiring the management to file a notice with the county tax collector of the management's intent to apply to have the mobilehome designated for disposal after a warehouse lien sale and a notice of disposal with the Department of Housing and Community Development no less than 10 days after the date of sale to enforce the lien against the mobilehome in order to dispose of a mobilehome after a warehouse lien sale, as specified.

This bill instead requires the management to file a notice of intent to apply to have a mobilehome designated for disposal with the tax collector and a notice of disposal with the department no less than 30 days after the date of sale to enforce the lien against the mobilehome.

Existing law also establishes procedures by which the management may dispose of an abandoned mobilehome, including requiring that the management file a notice of disposal with the department, and to post and mail a notice of intent to dispose of the abandoned mobilehome, as specified. The Manufactured Housing Act of 1980 requires the department to enforce various laws pertaining to manufactured housing, mobilehomes,

park trailers, commercial coaches, special purpose commercial coaches, and recreational vehicles.

This bill requires the management to post and mail the notice of intent to dispose of the abandoned mobilehome within 10 days following a judgment of abandonment and requires management to file a notice of disposal with the department within 30 days following a judgment of abandonment, as specified. This bill authorizes the department to adopt guidelines related to procedures and forms to implement the above-described disposal procedures for mobilehomes after a warehouse lien sale and for abandoned mobilehomes until regulations are adopted by the department to replace those guidelines.

The bill also amends Cal. Gov't Code § 12955.9.

Under the California Fair Employment and Housing Act, the owner of a housing accommodation is prohibited from discriminating against or harassing any person on the basis of certain personal characteristics, including familial status. The act provides that its provisions relating to discrimination based on familial status do not apply to housing for older persons, defined to include, among others, mobilehome parks that meet the standards for "housing for older persons" contained in the federal Fair Housing Amendments Act of 1988.

This bill instead requires, for this purpose, mobilehome parks to meet the standards for "housing for older persons" contained in the federal Fair Housing Act, as amended by Public Law 104-76.

The bill also amends Cal. Health & Safety Code § 50784.7.

Existing law authorizes the Department of Housing and Community Development to make loans from the Mobilehome Park Rehabilitation and Purchase Fund, a continuously appropriated fund, to, among other things, make loans to resident organizations or qualified nonprofit sponsors for the purpose of assisting lower income households in making needed repairs or accessibility-related upgrades to their mobilehomes, if specified criteria are met.

This bill additionally authorizes loans to these entities to assist lower income households in replacing their mobilehomes. By authorizing the expenditure of moneys in a continuously appropriated fund for a new purpose, this bill makes an appropriation.

LEGISLATION

California

Water systems

2015 CA S 552. Enacted 9/28/2016. Effective 1/1/2017.

This bill amends Cal. Health & Safety Code §§ 116681 and 116682 and adds § 116686, relating to water.

Existing law, the California Safe Drinking Water Act, provides for the operation of public water systems and imposes on the State Water Resources Control Board various responsibilities and duties. The act authorizes the state board to order consolidation with a receiving water system where a public water system, or a state small water system within a disadvantaged community, consistently fails to provide an adequate supply of safe drinking water. The act authorizes the state board to order the extension of service to an area that does not have access to an adequate supply of safe drinking water so long as the extension of service is an interim extension of service in preparation for consolidation. Existing law, for these purposes, defines "disadvantaged community" to mean a disadvantaged community that is in an unincorporated area or is served by a mutual water company.

This bill authorizes the state board to order consolidation where a public water system or a state small water system is serving, rather than within, a disadvantaged community, and limits the authority of the state board to order consolidation or extension of service to provide that authority only with regard to a disadvantaged

community. This bill makes a community disadvantaged for these purposes if the community is in a mobilehome park, even if it is not in an unincorporated area or served by a mutual water company.

The act requires the state board, upon ordering the consolidation or extension of service, to adequately compensate the owners of a privately owned subsumed water system for the fair market value of the system as determined by the Public Utilities Commission for water corporations subject to the commission's jurisdiction or the state board for all other systems. The act prohibits a consolidated water system from increasing charges on existing customers of the receiving water system solely as a consequence of the consolidation or extension of service unless the customer receives a corresponding benefit.

ADOPTED REGULATION
Delaware
Wells

Effective 9/11/2016, this rule amends 7-7000-7301 Del. Admin. Code §§ 1 et seq., Regulations Governing The Construction And Use Of Wells.

The rule amends rules to add new water well types, technology changes, incorporation of on-line permit application and related electronic options, aligning with related regulations, clarification of special permit requirements such as for emergencies, updating regulatory language to meet several legislative bills regarding advertising and issuance of well permits within water service areas (Certificates of Public Convenience and Necessity), and incorporation of guidelines and policies to account for industry modernization and practices.

The rule adds definitions, including:

"Public Water System (PWS)" means a water supply system for the provision to the public of water for human consumption through pipes or other constructed conveyances either directly from the user's free flowing outlet or indirectly by the water being used to manufacture ice, foods and beverages or that supplies water for potable or domestic purposes for consumption in more than three dwelling units, or furnishes water for potable or domestic purposes to employees, tenants, members, guests or the public at large in commercial offices, industrial areas, multiple dwellings or semi-public buildings including, but without limitation, rooming and boarding houses, motels, tourist cabins, mobile home parks, restaurants, hospitals and other institutions, or offers any water for sale for potable domestic purposes. Public water systems are classified as follows; and

"Community Water System (CWS)" means a public water system that serves at least 15 service connections used by year round residents or regularly serves at least 25 year-round residents.

The amendments provide that certain subsections regarding the withholding of a permit from a potable well do not apply to an existing mobile home community.

EMERGENCY REGULATION
Louisiana
Plumbing

Re-adoption of emergency rule. Effective 9/12/2016. Expires 1/10/2017.

This rule amends La. Admin. Code Tile 17:I of the Department of Public Safety/State Uniform Construction Code Council, to provide for maintenance and installation of plumbing systems.

The rule adds La. Admin. Code tit. 17, § 1601 et seq., Travel Trailer and Mobile/Manufactured Home Parks to apply specifically to all new travel trailer and mobile/manufactured home parks, and to additions to existing parks, and are to provide minimum standards for sanitation and plumbing installation within these parks,

for the accommodations, use and parking of travel trailers and/or mobile/manufactured homes.

The rule provides that travel trailers or mobile/manufactured homes shall not be parked in any park unless they are provided plumbing and sanitation facilities installed and maintained in conformity with the code. Every travel trailer and mobile/manufactured home shall provide a gastight and watertight connection for sewage disposal which shall be connected to an underground sewage collection system discharging into a community sewerage system, a commercial treatment facility, or an individual sewerage system which has been approved by the state health officer.

PROPOSED REGULATION
New Jersey
Office of Landlord-Tenant Information

This rule would amend N.J. Admin. Code §§ 5:24-1.4, 2.2, 2.9; 5:25-2.2, 2.5, 2.8; and 5:29-1.2.

The proposed amendments delete references to the Office of Landlord-Tenant Information, as that office was eliminated in 2011. The proposed amendments also otherwise update the requirements contained in the rules, deleting references to obsolete, incorrect, or unused terms and practices.

The rule includes amendments to N.J. Admin. Code § 5:24-1.4 to delete the requirement to include a copy of the subchapter or any statement of tenants' rights in relation to conversion subsequently approved for this purpose by the Department of Community Affairs with a notice of intent to convert a multiple dwelling, a rooming or boarding house or a mobile home park into a condominium or cooperative, or to fee simple ownership of units or park sites.

Also amended is N.J. Admin. Code § 5:29-1.2, One and two-unit dwelling registration form, to delete the provision that copies of the form of the certificate of registration to be filed with the municipal clerk and distributed to tenants by owners of non-owner occupied one- and two-unit dwellings may be obtained from the Office of Landlord Tenant Information.

FINAL RULE
HUD
Fair Housing - Harassment

81 Fed. Reg. 63054-63075 (September 14, 2016).

Effective 10/14/2016, this final rule amends 24 CFR Part 100.

This final rule amends HUD's fair housing regulations to formalize standards for use in investigations and adjudications involving allegations of harassment on the basis of race, color, religion, national origin, sex, familial status, or disability. The rule specifies how HUD will evaluate complaints of quid pro quo ("this for that") harassment and hostile environment harassment under the Fair Housing Act. It will also provide for uniform treatment of Fair Housing Act claims raising allegations of quid pro quo and hostile environment harassment in judicial and administrative forums. This rule defines "quid pro quo" and "hostile environment harassment," as prohibited under the Fair Housing Act, and provides illustrations of discriminatory housing practices that constitute such harassment. In addition, this rule clarifies the operation of traditional principles of direct and vicarious liability in the Fair Housing Act context.

In response to public comment and upon further consideration by HUD of the issues presented in this rulemaking, HUD makes the following changes at this final rule stage:

• Re-words proposed § 100.7(a)(1)(iii) to avoid confusing the substantive obligation to comply with the Fair Housing Act with the standard of liability for discriminatory third-party conduct. Proposed § 100.7(a)(1)(iii) stated that a person is directly liable for

"failing to fulfill a duty to take prompt action to correct and end a discriminatory housing practice by a third-party, where the person knew or should have known of the discriminatory conduct. The duty to take prompt action to correct and end a discriminatory housing practice by a third-party derives from an obligation to the aggrieved person created by contract or lease (including bylaws or other rules of a homeowner's association, condominium or cooperative), or by federal, state or local law." Section 100.7(a)(1)(iii) of this final rule provides that a person is directly liable for "failing to take prompt action to correct and end a discriminatory housing practice by a third-party, where the person knew or should have known of the discriminatory conduct and had the power to correct it. The power to take prompt action to correct a discriminatory housing practice by a third-party depends upon the extent of control or any other legal responsibility the person may have with respect to the conduct of such third-party."

• Adds to § 100.400 a new paragraph (c)(6) specifying as an example of a discriminatory housing practice retaliation because a person reported a discriminatory housing practice, including quid pro quo or hostile environment harassment.

• Adds to § 100.600(a)(2)(i), "Totality of the circumstances," a new paragraph (C) that explains the reasonable person standard under which hostile environment harassment is assessed "Whether unwelcome conduct is sufficiently severe or pervasive as to create a hostile environment is evaluated from the perspective of a reasonable person in the aggrieved person's position."

• Re-words proposed § 100.600(a)(2)(i)(B) to clarify that proof of hostile environment would not require demonstrating psychological or physical harm to avoid any confusion on that point. Proposed § 100.600(a)(2)(i)(B) stated "Evidence of psychological or physical harm is relevant in determining whether a hostile environment was created, as well as the amount of damages to which an aggrieved person may be entitled. Neither psychological nor physical harm, however, must be demonstrated to prove that a hostile environment exists." Section 100.600(a)(2)(i)(B) in this final rule provides: "Neither psychological nor physical harm must be demonstrated to prove that a hostile environment exists. Evidence of psychological or physical harm may, however, be relevant in determining whether a hostile environment existed and, if so, the amount of damages to which an aggrieved person may be entitled."

• Re-words proposed § 100.600(c) to clarify that a single incident may constitute either quid pro quo or hostile environment harassment if the incident meets the standard for either type of harassment under § 100.600(a)(1) or (a)(2). Proposed § 100.600(c) provided "A single incident of harassment because of race, color, religion, sex, familial status, national origin, or handicap may constitute a discriminatory housing practice, where the incident is severe, or evidences a quid pro quo." Section 100.600(c) in this final rule provides "A single incident of harassment because of race, color, religion, sex, familial status, national origin, or handicap may constitute a discriminatory housing practice, where the incident is sufficiently severe to create a hostile environment, or evidences a quid pro quo."

• Corrects the illustration in proposed § 100.65(b)(7) to fix a typographical error in the proposed rule. In the final rule, the word "service" is corrected and made plural.

BULLETIN

HUD

Fair Housing – Limited English Proficiency

Issued 9/15/2016.

Office of General Counsel Guidance on Fair Housing Act Protections for Persons with Limited English Proficiency.

This guidance discusses how the Fair Housing Act applies to a housing provider's consideration of a person's limited ability to read, write, speak or understand

English. Specifically, this guidance addresses how the disparate treatment and discriminatory effects methods of proof apply in Fair Housing Act cases in which a housing provider bases an adverse housing action – such as a refusal to rent or renew a lease – on an individual's limited ability to read, write, speak or understand English. Because of the close nexus between limited English Proficiency ("LEP") and national origin, the distinctions between intent and effects claims involving LEP and national origin are often subtle and can be difficult to discern.

A housing provider violates the Fair Housing Act if the provider uses a person's LEP to discriminate intentionally because of race, national origin, or another protected characteristic. Selectively enforcing a language-related restriction based on a person's protected class violates the Act, as does using LEP as a pretext for intentional discrimination. In such cases, the use of the language-related criteria is analyzed under the Act the same as is the use of any other potentially discriminatory criteria. In an LEP case, as in any Fair Housing Act case, intentional discrimination can be established through direct or circumstantial evidence.

Suspect practices include advertisements containing blanket statements such as "all tenants must speak English," or turning away all applicants who are not fluent in English. If the housing provider or resident can access free or low-cost language assistance services, any cost-based justifications for refusing to deal with LEP persons would also be immediately suspect. In addition, the languages residents speak amongst themselves or to their guests do not affect the housing provider or neighbors in any legitimate way. Thus, bans on tenants speaking non-English languages on the property or statements disparaging tenants for speaking non-English languages have no cognizable justification under the Act.

Aside from restrictions against all persons whose primary language is not English, the Act also may be violated by policies or practices that discriminate against persons based on their particular primary language, whether facially or through selective enforcement. For example, if a housing provider has a policy of not selling, renting or lending to persons who speak a certain language, but will conduct those same transactions with persons who speak other languages, intentional discrimination is the likely reason.

Because a person's primary language generally derives from his or her national origin, singling out persons for disparate treatment because they speak a certain language is typically national origin discrimination. Furthermore, the Act's prohibitions include making statements with respect to the sale or rental of a dwelling indicating "any preference, limitation, or discrimination" based on national origin, evaluated according to the perceptions of a reasonable person.

A housing provider violates the Fair Housing Act when the provider's policy or practice has an unjustified discriminatory effect, even when the provider had no intent to discriminate. Under this standard, a facially-neutral policy or practice that has a discriminatory effect because of race, national origin, or another protected characteristic violates the Act if it is not supported by a legally sufficient justification. Thus, where a policy or practice that restricts access to housing on the basis of LEP has a discriminatory effect based on national origin, race, or other protected characteristic, such policy or practice violates the Act if it is not necessary to serve a substantial, legitimate, nondiscriminatory interest of the housing provider, or if such interest could be served by another practice that has a less discriminatory effect. Discriminatory effects liability is assessed under a three-step burden-shifting standard requiring a fact-specific analysis.

In the first step of the analysis, the plaintiff (or HUD in an administrative proceeding) must prove that the defendant's policy or practice concerning LEP persons has a discriminatory effect, that is, that the policy results in a disparate impact on a group of persons because of

the group's national origin, race, or other protected characteristic.

In the second step of the discriminatory effects analysis, the burden shifts to the housing provider to prove that the challenged policy or practice is justified – that is, that it is necessary to achieve a substantial, legitimate, nondiscriminatory interest of the provider.

The third step of the discriminatory effects analysis is applicable only if a housing provider successfully proves that its language-related policy or practice is necessary to achieve its substantial, legitimate, nondiscriminatory interest. In the third step, the burden shifts back to the plaintiff (or HUD in an administrative proceeding) to prove that such interest could be served by another practice that has a less discriminatory effect.

PRESS RELEASE
Department of Justice
SCRA - Evictions

The Justice Department announced that Lincoln Military Housing, which owns and operates dozens of on-base and off-base military housing communities throughout Southern California, has agreed to pay $200,000 to resolve allegations that it unlawfully evicted active-duty servicemembers and their families by obtaining default judgments against them, in violation of the Servicemembers Civil Relief Act (SCRA). This is the first case that the Justice Department has filed alleging the unlawful eviction of servicemembers from their homes.

Under the SCRA, if a tenant who is on active duty is sued for eviction and does not make an appearance in the case for any reason, the landlord must file an affidavit with the court stating whether the tenant is in military service, showing necessary facts to support the affidavit. To evict a tenant in California, a landlord must first obtain a court order. The complaint alleges that Lincoln Military Housing requested default judgments against servicemembers without filing the affidavits required by the SCRA to alert the court of the tenants' military status. As a result, servicemembers were put at risk of being evicted without having an opportunity to participate in the case and without having an attorney assigned to represent them.

Despite the fact that the servicemembers who are receiving compensation under the settlement were all in military service at the time of their evictions, Lincoln Military Housing filed affidavits stating that no defendants were in military service.

Under the consent order, which is still subject to approval by U.S. District Court for the Southern District of California, Lincoln Military Housing must pay each aggrieved servicemember $35,000, vacate the eviction judgment, forgive any deficiency balance and ask the credit bureaus to remove the evictions from their credit reports. In addition to compensating the servicemembers, Lincoln Military Housing must pay a civil penalty of $60,000 to the United States.

The settlement also requires Lincoln Military Housing to make systemic changes to its business practices, including providing SCRA training to its employees and developing new policies and procedures consistent with the SCRA. The policies and procedures will require Lincoln Military Housing and its agents to review the Department of Defense Manpower Data Center (DMDC) database and file a proper affidavit of military service before seeking a default judgment against a tenant in an eviction action.

DEFAULT SERVICING

CASE LAW

Foreclosure – Park's lien

CASE NAME: *Ninety Gayle Avenue Trust v. S-2 Properties*
DATE: *07/15/2016*
CITATION: *Superior Court of Pennsylvania. Not Reported in A.3d. 2016 WL 4917561*

Ninety Gayle Avenue Trust acquired title to a mobile home. The mobile home was located in a mobile home park owned by S-2 Properties. The home had been occupied by Shari Cox, so Ninety Gayle instituted an action to eject her. The ejectment complaint was not served in that the mobile home already was vacant.

Ninety Gayle went to the mobile home and discovered that it was posted with a court order indicating that it could not be entered because S-2 had obtained a judgment for unpaid lot rent and the court had issued an order of possession in favor of S-2.

Ninety Gayle filed a petition seeking issuance of a rule to show cause directed to S-2 as to why Ninety Gayle was not entitled to immediate possession of the mobile home.

The trial court found that S-2 was entitled to payment for unsatisfied rental fees before Ninety Gayle could remove the home. Ninety Gayle appealed.

The appeals court first found that, although Ninety Gayle filed a petition for rule to show cause, because Ninety Gayle was seeking to establish its title to the mobile home, the case was in the nature of a replevin action.

The Court also found that the trial court incorrectly concluded that S-2 had a possessory lien in the mobile home pursuant to 72 Pa. Stat. § 5971i which provides that a tax sale does not discharge a ground rent lien. S-2 did not obtain title to the mobile home through a tax sale and S-2 was not owed ground rent. In Pennsylvania ground rent is a "perpetual rent reserved to himself and his heirs, by the grantor of land in fee-simple, out of the land conveyed." Here, S-2 did not sell the lot in fee reserving for itself a rent service fee. Instead, it owned the land and leased it for purposes of parking a mobile home on it.

Despite this finding, the Court found that S-2 obtained a possessory lien against the mobile home, that S-2 obtained a judgment for unpaid rent against the former occupant, and that S-2 obtained an order for possession.

Because the mobile home was vacant, S-2 did not have to proceed with eviction. The money judgment was not satisfied when Ms. Cox voluntarily abandoned the premises. Since the money judgment was not satisfied at any point and since the matter did not proceed to eviction, the language in the order of possession was never implicated, and the order of possession remained undisturbed. Additionally, Ninety Gayle's claim that S-2 took no further action to take possession of the mobile home was misguided. S-2 already had possession of the mobile home since it was located on its land. S-2 also posted the trailer with a court order stating that it could not be entered. As there was record support for the trial court's determination that S-2 had a possessory lien with respect to the mobile home, the trial court did not abuse its discretion in so concluding.

Finally, the Court found that Ninety Gayle was fully aware that the mobile home was located on land owned by S-2, but did not make any effort to ascertain whether Ms. Cox was satisfying her rental obligations. Thus, the trial court did not abuse its discretion in holding that Ninety Gayle would be unjustly enriched if it were permitted to remove the trailer from S-2's land without paying the rent due and owing for the period that Ninety Gayle owned the mobile home and it was located on S-2's property.

Affirmed.

CASE LAW

Bankruptcy – Exemption

CASE NAME: *In re Wanish*
DATE: *08/26/2016*
CITATION: *United States Bankruptcy Court, E.D. Pennsylvania. --- B.R. ----. 2016 WL 4540049*

The Debtor and his non-debtor spouse owned a mobile home located in New Jersey and valued at $100,000. The Debtor sought to exempt the full value of the home pursuant to § 522(b)(3)(B) and applicable New Jersey law.

The Chapter 7 Trustee initially objected to the Debtor's exemption of the Mobile Home because: (1) the Debtor was prohibited from claiming a New Jersey state exemption because his bankruptcy case was filed in Pennsylvania; (2) the Debtor shared an undivided interest in the Mobile Home with his non-debtor spouse as a tenant by the entirety that was not exempt from process under applicable New Jersey law and, therefore, the Debtor could not exempt such interest in bankruptcy; and (3) the Trustee had the right to sell the Debtor's interest, as well as his spouse's interest, in the Mobile Home pursuant to § 363(h), to the extent that the benefit to the Debtor's estate from such sale outweighed any detriment to the Debtor's spouse.

The Trustee withdrew his first argument regarding Debtor's inability to claim an exemption of the Mobile Home under New Jersey law because the Debtor filed his bankruptcy case in Pennsylvania. The Trustee continued to argue, however, that New Jersey law permits creditors of one spouse to levy and sell real and personal property held as tenants by the entirety. The Trustee also continued to argue that he was permitted to sell the Mobile Home under § 363(h) because the Debtor's interest in the Mobile Home was not exempt.

The Court found N.J. Stat. §§ 46:3–17.2 through 46:3-17.4 permits personal property to be held as tenants by the entirety, and specifically prohibits creditors of one spouse from levying or selling personal property purchased by spouses as tenants by the entirety without both spouses' consent, and, therefore, the Debtor's interest in the Mobile Home was exempt under § 522(b)(3)(B).

Trustee's objection denied.

CASE LAW

Foreclosure – Super-priority lien

CASE NAME: *Select Portfolio Servicing, Inc. v. Saddlebrook West Utility Company, LLC*
DATE: *08/31/2016*
CITATION: *Court of Special Appeals of Maryland. --- A.3d ----. 2016 WL 4538522*

Saddlebrook West, LLC ("Saddlebrook") purchased 187 lots on which single family homes would be built. Saddlebrook executed a "Declaration of Deferred Water and Sewer Charges" in favor of Saddlebrook West Utility Company, LLC ("Utility"), its wholly owned subsidiary. The Declaration imposes an annual Water and Sewer Charge on the owner of each lot in the Subdivision, to be paid by the lot owner to Utility.

Saddlebrook sold the lots to Maryland Homes, LLC. A copy of the Declaration was attached to the Lot Purchase Agreement and "incorporated [t]herein by reference." Maryland Homes agreed to disclose the existence of an "annual deferred water and sewer benefit charge" to any purchaser of a developed lot.

One of the lots was sold to Charles Bradley, whose deeds states it was made "Subject to all easements, covenants, and restrictions of record." Bradley did not pay the annual Water and Sewer Charges.

Tidewater Property Management, Inc., acting as Utility's agent, recorded "Statements of Lien" against the Property for the unpaid Water and Sewer Charges.

Bradley conveyed the Property to Sherrylyn Mitchell. The deed did not include a "subject to all easements, covenants, and restrictions of record" clause, and made no reference to the Declaration. In the deed, the record includes a form document entitled "NOTICE TO PURCHASER OF DEFERRED WATER AND SEWER CHARGES," acknowledging that the Property is subject to the annual Water and Sewer Charge. Mitchell's signature is on the document.

Mitchell decided to refinance with Long Beach Mortgage Company, which ordered a two-party title search that did not reveal the Declaration. Also, the title search did not find the recorded Statements of Lien. The Statements of Lien were not paid, cleared, and released at closing.

Utility filed an order to docket, seeking to foreclose on its lien for non-payment of the Water and Sewer Charges. Long Beach had sold Mitchell's loan to JP Morgan Chase Bank, N.A. Chase filed a motion to stay and dismiss. That same day, it filed the declaratory judgment action that gave rise to this appeal. Utility canceled the foreclosure sale and voluntarily dismissed the foreclosure case.

The trial court ruled that the Declaration "is a valid, enforceable first-priority lien encumbering the [P]roperty ...." After filing its appeal, Chase sold its interest to Select Portfolio.

The appeals court first found that the lien provision of the Declaration did not violate the rule against perpetuities.

Also, Saddlebrook and Utility undertook to install the facilities, to the benefit of the land, that benefit continued beyond the time the facilities originally were installed and there was vertical privity when the person presently claiming the benefit, or being subjected to the burden, is a successor to the estate of the original person so benefitted or burdened. Therefore, the Declaration was binding not only on the original lot owners, but on their downstream purchasers.

The Court further found that the Declaration created a lien against the Property and that it was a lien instrument. Accordingly, Saddlebrook and Utility did not have to create a lien against the Property when Mr. Bradley failed to pay the annual Water and Sewer Charges. The lien already was in existence. Consequently, the priority of their lien was not determined by the recording date of a statement of lien. Instead, it was determined by the recording date of the lien itself, i.e., the Declaration.

Affirmed.

CASE LAW

Foreclosure – Injunction

CASE NAME: *Lucioni v. Bank of America, N.A.*
DATE: *09/07/2016*
CITATION: *Court of Appeal, Second District, Division 5, California. --- Cal.Rptr.3d ----3 Cal.App.5th 150. 2016 WL 4655762*

A borrower on a home loan sued seeking an injunction to prevent a foreclosure. The trial court sustained the lenders' demurrers and entered a judgment of dismissal. The primary question raised on appeal was whether the 2013 Homeowner's Bill of Rights (HBOR) provides a cause of action for injunctive relief for a violation of its provision that requires an entity initiating a foreclosure be legally entitled to do so.

The appeals court held that the availability of injunctive relief under the HBOR is governed exclusively by its two provisions—Cal. Civ. Code §§ 2924.12(a)(1), subdivision (a)(1) and 2924.19(a)(1)—in which the Legislature authorized the courts to interpose such relief into the nonjudicial foreclosure scheme. Neither provision imposes a pre-foreclosure duty on foreclosing entities to demonstrate that they have a right to foreclose. Thus, no

injunctive relief is available for a violation of that section. The Court affirmed for that reason, and because the borrower failed to show a reasonable possibility of amending his complaint to plead any of the grounds for injunctive relief that the HBOR authorizes. The Court also affirmed the trial court's order sustaining without leave to amend a demurrer to a separate breach of contract cause of action, finding that check receipts did not convert oral home loan modification contract into a written contract, and thus two-year statute of limitations for breach of oral contract applied.

CASE LAW

Commercially reasonable – Equitable transfer

CASE NAME: *In re Godfrey*
DATE: *09/12/2016*
CITATION: *United States Bankruptcy Court, N.D. West Virginia. --- B.R. ----. 2016 WL 4821436*

Morgantown Excavators, Inc. executed multiple promissory notes, personally guaranteed by Shirley Godfrey, to The Huntington National Bank. MEI granted HNB a security interest in multiple categories of collateral, including its equipment. MEI failed to make payments on the notes, and HNB made plans to sell MEI's equipment.

On February 27, 2012, HNB and Myron Bowling entered into an Asset Purchase Agreement. The Agreement provided that Myron Bowling would pay HNB for MEI's collateral: a 25% deposit upon execution of the contract and the remaining 75% upon Purchaser's removal of the equipment from its location and HNB providing title. Furthermore, Myron Bowling was to take possession of the property no later than March 15, 2012.

On March 5, 2012, Myron Bowling took possession of MEI's equipment. Then, on March 22, 2012, HNB sent a notice of private disposition to the Plaintiffs. This notice stated that HNB would sell MEI's equipment by private disposition "sometime after April 9, 2012." The next day, March 23, 2012, Myron Bowling paid HNB the full purchase price of MEI's equipment. Sometime before April 6, 2012, Myron Bowling began to advertise for a public auction of MEI's equipment to be held on April 20, 2012. On April 18, 2012, HNB delivered a Bill of Sale and executed titles for the equipment in favor of Myron Bowling. Myron Bowling then sold the equipment at a public auction on April 20, 2012.

Plaintiffs sued, arguing that HNB failed to provide commercially reasonable notice to the Plaintiffs that HNB was disposing of MEI's collateral. In response, HNB argued that it and Myron Bowling contracted to transfer title in a commercially reasonable manner pursuant to the UCC, that the Plaintiffs sought to impose upon the parties to the Agreement intentions that they lacked, and that the Agreement did not pass equitable title to Myron Bowling. Moreover, HNB argued that a transfer of equitable title is not a disposition of property under West Virginia law.

The Court found that a transfer of equitable title amounts to a disposition under the UCC. Therefore, HNB disposed of MEI's equipment no later than March 23, 2012, the date upon which Myron Bowling paid the full purchase price for the equipment. As HNB sent its notice only one day before it disposed of MEI's equipment, the disposition was not reasonably noticed, and was therefore in violation of W.Va. Code § 46–9–611. Furthermore, the notice sent to the Plaintiffs indicated that HNB would sell the equipment no earlier than April 9, 2012. As the disposition occurred on or before March 23, 2012, this notice was inadequate. Moreover, because W.Va Code § 46–9–610 requires all aspects of a disposition to be reasonable, and HNB's notice was unreasonable, the disposition also violated that provision.

The Court granted summary judgment in favor of the Plaintiffs regarding the HNB's liability under W.Va. Code §§ 46–9–610 and 611. As the Plaintiffs motion requested

judgment only as to liability, the remaining issues were preserved for trial.

CASE LAW

FDCPA – Bona fide error

CASE NAME: *Robert L. Arnold vs. Bayview Loan Servicing, LLC*
DATE: *09/13/2016*
CITATION: *United States Court of Appeals, Eleventh Circuit. --- F. App'x ----. 2016 WL 4750211*

Arnold's complaint alleged in relevant part that Bayview, the servicer of Arnold's mortgage loan, sent Arnold two mortgage statements a year after Arnold had received a Chapter 7 bankruptcy discharge and several weeks after the property had been foreclosed, violating the FDCPA.

The district court granted summary judgment to Bayview on the ground that there was no genuine question of fact that "the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1692k(c). Arnold appealed.

According to the appeals court, the first prong of the bona fide error defense is that Bayview must show that its violation of the act "was not intentional."

Bayview put forward ample evidence to show that the December statements were sent to Arnold due to what can only be described as a mistake, triggered by an employee performing a routine pre-foreclosure review of the computerized record of Arnold's loan and accidentally changing one letter in one field such that the computerized system began sending out statements automatically. This occurred despite the fact that Arnold's loan had previously been specifically coded not to receive statements as a result of the foreclosure.

The second prong of the bona fide error defense is that Bayview must show that its violation of the act "was a bona fide error." As used in the Act, 'bona fide' means that the error resulting in a violation was 'made in good faith; a genuine mistake, as opposed to a contrived mistake.

The Court found that it was objectively reasonable for Bayview to rely on its coding system to prevent the dispatch of statements in violation of the Act. Bayview had no reason to believe that the code would be changed during the pre-foreclosure review process. That routine process was performed by employees trained in the requirements of the FDCPA and guided by a detailed checklist.

The third prong of the bona fide error defense is that Bayview must show that its violation of the act occurred despite the maintenance of procedures reasonably adapted to avoid such error. Bayview's general training procedures, as well as its specific procedures or pre-foreclosure review, were designed to avoid sending statements like the December 2013 statements. In addition to the coded computerized record system and detailed pre-foreclosure checklist, Bayview's written policies and ongoing training procedures instructed employees about FDCPA prohibitions on false, deceptive, or misleading representations.

Affirmed.

CASE LAW

Standing – Spokeo

CASE NAME: *Bellino v. JPMorgan Chase Bank, N.A.*
DATE: *09/20/2016*
CITATION: *United States District Court, S.D. New York. --- F. Supp. 3d ----. 2016 WL 5173392*

JPMC received a check for the pay-off amount of plaintiff's mortgage on May 14, 2012. A satisfaction of mortgage was delivered to the Westchester County Clerk by Federal Express no later than June 15, 2012.

In this putative class action, Plaintiff alleged that JPMC systematically fails to timely present mortgage satisfaction notices for recording, in violation of Section 275 of the New York Real Property Law ("RPL § 275") and Section 1921 of the New York Real Property Actions and Proceedings Law ("RPAPL § 1921") (collectively, "the statutes"). The statutes impose monetary penalties on mortgagees in the event they fail to arrange to have a certificate of discharge of a mortgage presented to the recording officer of the county where the mortgage is recorded within 30 days of receipt of payment. Plaintiff contends that she is entitled to statutory damages based on JPMC's alleged violations of the statutes.

The Court considered the case in light of the Supreme Court's decision in *Spokeo, Inc. v. Robins*, —— U.S. ——, 136 S.Ct. 1540, 194 L.Ed.2d 635 (2016), which addressed the "injury-in-fact" requirement of Article III standing. JPMC argued that Plaintiff lacked standing because she did not allege she suffered any additional harm beyond a technical violation of the statutes.

The Court found that Plaintiff's suit implicated her personal interests and her statutory rights. The more difficult issue was whether Plaintiff sustained a concrete injury.

According to the Court, the "alleged intangible harm"—a cloud on title—"has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."

Second, the New York State legislature clearly intended to provide a remedy to a homeowner whose satisfaction of mortgage is not timely filed. According to the Court, the legislature created a new right—the right to have a certificate of satisfaction filed within 30 days of paying off a mortgage—and a new injury—not having that certificate timely filed.

That Defendant ultimately filed the certificate after the 30-day deadline and while Plaintiff may not have sustained additional, economic injuries is of no moment. The Supreme Court was clear in Spokeo that a concrete harm need not be tangible. The statutes create a substantive right for Plaintiff to have the satisfaction of mortgage timely filed, and Defendant violated that right. Nothing more is required, here, to demonstrate an injury-in-fact.

JPMC's motion for summary judgment on the issue of standing was denied. JPMC's substantive summary judgment motion will be addressed in due course.

CASE LAW

Standing – Spokeo

CASE NAME: *Zia v. CitiMortgage, Inc.*
DATE: *09/26/2016*
CITATION: *United States District Court, S.D. Florida. ---- F. Supp. 3d ----. 2016 WL 5369316*

On July 30, 2013, Zia satisfied all principal, interest, and other amounts due to the Defendants on his mortgages. The satisfaction-of-mortgage documents for the First Mortgage were recorded in the Westchester County, New York, Clerk's Office on October 3, 2013 (sixty-five days after July 30, 2013). The satisfaction-of-mortgage documents for the Second Mortgage were recorded in the Westchester County Clerk's Office on September 18, 2013 (fifty days after July 30, 2013).

Zia filed this prospective class action, alleging that the Defendants' failure to timely present certificates of discharge for his mortgages violated two provisions of New York statutory law: Real Property Actions and Proceedings Law ("RPAPL") § 1921 and Real Property Law ("RPL") § 275. Zia sought statutory damages under those statutes.

The Court found that Zia did not allege a concrete harm sufficient to establish Article III standing under *Spokeo*.

According to the Court, there were no allegations here of any injury other than bare procedural violations. Zia made no allegation, for example, that there existed a

cloud on the title to his property as a result of the Defendants' failure to timely file these documents or that he was in any other way prohibited or deterred from transferring the property or obtaining any additional lien.

He identified no tangible or intangible harm that he suffered, other than the fact that the delay in recording occurred; and he has identified no "material risk of harm" from the delay—simply the delay itself.

The Court held that the fact that the New York State Legislature created a statutory right to damages did not, on its own, amount to a concrete injury. If a damages provision was all that was required to confer an injury in fact, any legislative body could make an end-run around the strictures of Article III standing by simply including a damages provision in a statute. According to the Court, the Supreme Court would not allow this and neither would this Court.

Defendants' Motion to Dismiss granted.

CASE LAW

Notice of default – Consumer Credit Code

CASE NAME: *Mountain States Adjustment v. Bradley*
DATE: *09/28/2016*
CITATION: *Court of Appeals of Iowa. Slip Copy. 2016 WL 5408323*

The Bradleys entered into a home equity loan, secured by a mortgage on the home, with Bank of the West for $150,000. The Bradleys defaulted and Bank of the West accepted $5,000 from the Bradleys in exchange for a satisfaction of mortgage to facilitate a short sale. Bank of the West attempted to collect the deficiency on the loan, but the Bradleys insisted the $5,000 was a settlement of the full debt. Bank of the West sold and assigned the loan to MSA. MSA mailed a notice of right to cure to each of the Bradleys.

The Bradleys did not cure the default, and MSA initiated a breach-of-contract action. The Bradleys argued that the mortgage and note had been satisfied in full, and MSA's notices of right to cure violated Iowa Code § 537.5111, under the Iowa Consumer Credit Code, and the FDCPA. The district court entered an order holding the Bradleys' $5000 payment only released the mortgage and did not satisfy the note in full, granting the Bradleys' counterclaim as to the violation of § 537.5111, and dismissing the Bradleys' counterclaim as to the FDCPA. The district court dismissed MSA's petition for failure to send compliant notices of right to cure. The court awarded the Bradleys attorney fees for their successful ICCC claim. Both sides appealed.

The appeals court found that, on its face, the satisfaction of mortgage unambiguously released only the Bradleys' mortgage. Even if the satisfaction of mortgage were ambiguous, MSA provided multiple exhibits demonstrating the Bradleys were informed the debt on the note was not released.

The Court also found that there was no provision of the parties' agreement that imposed the application of the ICCC upon them. The transaction involved a promissory note in the amount of $150,000 and a mortgage to secure payment. Iowa Code § 537.1301(12) encompasses a consumer loan within the definition of a "consumer credit transaction." However one of the requirements necessary to establish a "consumer loan" is that the loan not "exceed twenty-five thousand dollars." Here the loan clearly exceeded the maximum amount, and thus, the loan did not constitute a "consumer loan" nor a "consumer credit transaction" under the ICCC. Accordingly, an error of law existed, requiring remand.

Because the award of attorney fees was based upon a violation of the ICCC, the Court also reversed on that issue.

CASE LAW

Notice of sale – Civil remedies

CASE NAME: *Otha Delaney v. First Financial of Charleston, Inc.*
DATE: *09/28/2016*
CITATION: *Court of Appeals of South Carolina. --- S.E.2d ----. 2016 WL 5400500*

Delaney entered into a Retail Installment Contract to purchase a truck. The Contract was assigned to First Financial, making it a secured party under the UCC. After Delaney failed to make payments, First Financial repossessed the vehicle. On May 2, 2008, First Financial sent Delaney a Notice of Sale. On December 15, 2008, First Financial sold the vehicle.

On October 4, 2011, Delaney, as a putative member of a class, filed this class action, alleging (1) the notice of sale was insufficient under the UCC, and (2) he was entitled to relief under section 36-9-625 of the South Carolina Code (2003) (providing remedies for a secured party's failure to comply with the UCC).

The trial court granted First Financial' s motion to dismiss. Delany appealed.

The appeals court found that Delaney did not allege a breach of contract. Rather, Delaney alleged the violation of the notice of sale requirements, and his prayer for relief requested the statutory penalty of the finance charge and ten percent of the principal amount of the obligation under section 36-9-625(c)(2). Thus, the six-year statute of limitations for an action for breach of contract did not apply because Delaney did not allege a breach of contract. Instead, the Court looked to Title 15 governing civil remedies.

Sections 15–3–540 and –570 provide statutes of limitations for actions upon statutes for a penalty. S.C. Code Ann. § 15–3–540(2) provides for a three-year statute of limitations for "[a]n action upon a statute for a penalty or forfeiture"); S.C. Code Ann. § 15–3–570 establishes a one-year statute of limitations for "[a]n action upon a statute for a penalty or forfeiture given, in whole or in part, to any person who will prosecute for it." Therefore, the controlling limitations period was either one or three years, because Delaney sought a statutory penalty.

First Financial sent the notice of sale on May 2, 2008, and sold the vehicle on December 15, 2008. Delaney filed this action in October 2011. Under section 15–3–570, providing a one-year statute of limitations, Delaney's action was clearly barred. Under section 15–3–540(2), providing a three-year statute of limitations, whether the action was barred depended on when the action accrued.

The Court found that the statute of limitations began to run when the secured party sent a noncompliant notice to the debtor, not when the secured party disposed of the collateral. Accordingly, section 15–3–540(2)'s three-year statute of limitations began to run in May 2008 when Delaney received the notice of sale from First Financial.

Affirmed.

LEGISLATION

California

Repossession agencies

2015 CA A 1859. Enacted 9/23/2016. Effective 1/1/2017.

This bill amends Cal. Bus. & Prof. Code §§ 7500.1, 7504, 7507.3, and 7507.13, relating to collateral recovery.

The Collateral Recovery Act provides for the licensure and regulation of repossession agencies by the Bureau of Security and Investigative Services under the supervision and control of the Director of Consumer Affairs. That act defines the term "repossession" as meaning the locating or recovering of collateral by means of an assignment.

That act defines the term "assignment" as any written authorization by the legal owner, lienholder, lessor, lessee, registered owner, or the agent of any of them, to repossess any collateral or any written authorization by an employer to recover any collateral entrusted to an employee or former employee in possession of the collateral. That act provides for the issuance of qualification certificates, required for the management of the places of business of licensed repossession agencies, to applicants who meet certain requirements, including, among others, 2 years of lawful experience in recovering collateral and provides that lawful experience does not include employment performing work other than skip tracing, debt collection, or actual collateral recovery. That act makes a violation of any of its provisions a crime.

This bill removes debt collection from the employment included under lawful experience. The bill changes the definition of assignment to also include any written authorization to skip trace or locate, defines the term "repossession order" as having the same meaning as "assignment," and makes conforming changes. The bill deletes the definition for the term "repossession."

Under the Collateral Recovery Act, licensed repossession agencies are not liable for specified acts or omissions of a legal owner, debtor, lienholder, lessor, lessee, registered owner, or agent of any of them, and are entitled to indemnity from the legal owner, debtor, lienholder, lessor, lessee, or registered owner for losses incurred as a result of those acts or omissions. Under the act, those persons or their agents are not liable for acts or omissions by a licensed repossession agency or its agent in carrying out a repossession order and are entitled to indemnity from the licensed repossession agency for losses incurred as a result of those acts or omissions, as specified.

This bill extends the above-described provisions applicable to a legal owner, debtor, lienholder, lessor, lessee, or registered owner to a debt collector.

LEGISLATION
California
Repossession agencies

2015 CA S 1196. Enacted 9/29/2016. Effective 1/1/2017.

This bill amends Cal. Bus. & Prof. Code § 7508.1.

The Collateral Recovery Act provides for the licensure and regulation of repossession agencies by the Bureau of Security and Investigative Services and prohibits the use of an alias in connection with the official activities of a licensed repossession agency's business.

This bill instead prohibits the use of a business name other than the name of a licensed repossession agency in connection with the official activities of the licensee's business.

The bill also amends Cal. Bus. & Prof. Code §§ 7508.2, 7508.3, 7508.4 and 7508.6 to increase the amount of fines for various offenses by a repossessor.

LEGISLATION
California
Deceased borrowers

2015 CA S 1150. Enacted 9/29/2016. Effective 1/1/2017.

This bill adds Cal. Civ. Code § 2920.7.

The bill, until January 1, 2020, prohibits a mortgage servicer, upon notification that a borrower has died, from recording a notice of default until the mortgage servicer does certain things, including requesting reasonable documentation of the death of the borrower from a claimant, who is someone claiming to be a successor in interest, who is not a party to the loan or promissory note and providing a reasonable period of time for the claimant to present the requested documentation. The bill deems a claimant a successor in

interest, as defined, upon receipt by a mortgage servicer of the reasonable documentation regarding the status of the claimant as a successor in interest and the claimant's ownership interest in the real property.

The bill requires a mortgage servicer, within 10 days of a claimant being deemed a successor in interest, to provide the successor in interest with information about the loan, as specified. The bill requires a mortgage servicer to allow a successor in interest to assume the deceased borrower's loan or to apply for foreclosure prevention alternatives on an assumable loan, as specified. The bill authorizes a mortgage servicer, when there are multiple successors in interest who do not wish to proceed as coborrowers or coapplicants, to require any nonapplicant successor in interest to consent in writing to the application for a loan assumption. The bill provides that a successor in interest, as specified, who assumes an assumable loan and wishes to apply for a foreclosure prevention alternative has the same rights and remedies as a borrower under specified provisions of the California Homeowners' Bill of Rights. The bill authorizes a successor in interest to bring an action for injunctive relief to enjoin a material violation of specified provisions of law and authorizes a court to award a prevailing successor in interest reasonable attorney's fees and costs for the action. The bill defines terms for these purposes and makes various findings and declarations. The bill deems a mortgage servicer, mortgagee, or beneficiary of the deed of trust, or an agent thereof, to be in compliance with the above-described provisions if they comply with specified federal laws. The bill exempts certain depository institutions and persons from these provisions, as specified.

LEGISLATION

California

Debt collectors – Identity theft

2015 CA A 1723. Enacted 9/16/2016. Effective 1/1/2017.

This bill amends Cal. Civ. Code §§ 1785.16.2 and 1788.18.

Existing law requires a debt collector that receives a copy of a police report filed by the debtor alleging that the debtor is the victim of an identity theft crime and a written statement in which the debtor claims to be the victim of identity theft to cease collection activities until completion of a review. Existing law requires the debt collector to review and consider all of the information provided by the debtor and other available information and authorizes the debt collector to recommence debt collection activities only upon making a good faith determination that the information does not establish that the debtor is not responsible for the specific debt in question.

This bill, the Identity Theft Resolution Act, requires the debt collector, upon receipt of the police report and written statement described above, if it furnished adverse information about the debtor to a consumer credit reporting agency, to notify the consumer credit reporting agency that the account is disputed, and initiate a review, as specified, within 10 business days. The bill requires the debt collector to send notice of its determination to the debtor no later than 10 business days after concluding the review. The bill requires a debt collector that does not recommence collection activities under these provisions to notify the creditor, no later than 10 business days after making its determination, and if it furnished adverse information to a consumer credit reporting agency, to notify the agency to delete that information no later than 10 business days after making its determination. The bill also prohibits a creditor from selling a consumer debt to a debt collector

if the creditor has received notice that the debt collector has terminated debt collection activities, as described above.

LEGISLATION
California
Reservists – Payment deferment

2015 CA A 2562. Enacted 9/13/2016. Effective 1/1/2017.

This bill amends Cal. Mil & Vet. Code §§ 800 and 803.

Existing law authorizes a reservist, as defined, who is called to active duty on and after January 1, 2014, to defer payments on mortgages, credit cards, retail installment accounts and contracts, real property taxes and assessments, vehicle leases, and obligations owed to utility companies, for the period of active duty plus 60 calendar days, or 180 days, whichever is the lesser, as specified. Existing law authorizes similar provisions to a reservist who was called to active duty before January 1, 2014, as a part of the Iraq and Afghanistan conflicts.

This bill deletes references to the date a reservist is called to active duty, in both the definition of a reservist and the payment deferral provisions, thereby making the above-described benefits available to any reservist who otherwise meets the definition.

INSTALLATION

CASE LAW
Stairs – Injury

CASE NAME: *Denman v. Palm Harbor Villages, Inc.*
DATE: *08/25/2016*
CITATION: *United States District Court, W.D. Texas, San Antonio Division. Slip Copy. 2016 WL 4487806*

According to Plaintiff, Palm Harbor installed a manufactured home on property she owned. She claimed that, as she was exiting the home, she stepped onto stairs installed by Defendant and was injured because the stairs had no railing and shifted because they were not attached to her home or otherwise anchored to the ground. Plaintiff brought suit, alleging that Palm Harbor was liable for negligent failure to construct and install the stairs in a reasonably safe condition.

Seth Roberts, the General Manager and custodian at Palm Harbor, submitted an affidavit stating that he had a discussion with Plaintiff's husband and daughter prior to purchase of the home to determine whether they would like to purchase stairs for the entrance. According to Roberts, they explicitly declined to purchase stairs from Palm Harbor, indicating that they planned to build a deck after the home was installed.

The Court found that there was no evidence that Palm Harbor installed the stairs, aside from the conclusory allegation in Plaintiff's complaint that she "stepped onto the stairs installed by Defendant." While another party may have installed the stairs, Palm Harbor was under no duty to control the conduct of another, even if it has the practical ability to exercise such control. Plaintiff presented no evidence to indicate that Palm Harbor owed her a duty of care, because she presented no evidence that Palm Harbor installed the stairs on her Home. Absent a duty, there can be no breach of the duty.

Defendant's Motion for Summary Judgment granted.

LEGISLATION
California
"Accessory dwelling units"

2015 CA S 1069. Enacted 9/27/2016. Effective 1/1/2017.

This bill amends Cal. Gov't Code §§ 65582.1, 65583.1, 65589.4, 65852.150, 65852.2, and 66412.2.

The Planning and Zoning Law authorizes the legislative body of a city or county to regulate, among other things, the intensity of land use, and also authorizes a local agency to provide by ordinance for the creation of 2nd units in single-family and multifamily residential zones, as specified. That law makes findings and declarations with respect to the value of 2nd units to California's housing supply.

This bill replaces the term "second unit" with "accessory dwelling unit" throughout the law. The bill additionally finds and declares that, among other things, allowing accessory dwelling units in single-family or multifamily residential zones provides additional rental housing stock, and these units are an essential component of the housing supply in California.

According to Cal. Gov't Code § 65852.2, "accessory dwelling unit" means an attached or a detached residential dwelling unit which provides complete independent living facilities for one or more persons. It shall include permanent provisions for living, sleeping, eating, cooking, and sanitation on the same parcel as the single-family dwelling is situated. An accessory dwelling unit also includes the following:

(A) An efficiency unit, as defined in Section 17958.1 of Health and Safety Code.

(B) A manufactured home, as defined in Section 18007 of the Health and Safety Code.

The Planning and Zoning Law authorizes the ordinance for the creation of 2nd units in single-family and multifamily residential zones to include specified provisions regarding areas where accessory dwelling units may be located, standards, including the imposition of parking standards, and lot density. Existing law, when a local agency has not adopted an ordinance governing 2nd units as so described, requires the local agency to approve or disapprove the application ministerially, as provided.

This bill instead requires the ordinance for the creation of accessory dwelling units to include the provisions described above. The bill prohibits the imposition of parking standards under specified circumstances. The bill revises requirements for the approval or disapproval of an accessory dwelling unit application when a local agency has not adopted an ordinance. The bill also requires the ministerial approval of an application for a building permit to create one accessory dwelling unit within the existing space of a single-family residence or accessory structure, as specified. The bill prohibits a local agency from requiring an applicant for this permit to install a new or separate utility connection directly between the unit and the utility or imposing a related connection fee or capacity charge. The bill authorizes a local agency to impose this requirement for other accessory dwelling units.

LENDING

LEGISLATION

California

Victim protections

2015 CA A 2263. Enacted 9/30/2016. Effective 1/1/2017.

Amends Cal. Gov't Code §§ 6209.5, 6215.10, and 6215.12.

Existing law authorizes victims of domestic violence, sexual assault, or stalking, and reproductive health care services providers, employees, volunteers, and patients, to complete an application to be approved by the Secretary of State for the purposes of enabling state and local agencies to respond to requests for public records without disclosing a program participant's residence address contained in any public record and otherwise provides for confidentiality of identity for that person, subject to specified conditions. Existing law authorizes a program participant to request that state and local

agencies use the address designated by the Secretary of State as his or her address, and requires state and local agencies, when creating, modifying, or maintaining a public record, to accept the address designated by the Secretary of State as a program participant's substitute address, except as specified.

This bill requires the Secretary of State to provide each program participant a notice in clear and conspicuous font that contains specified information, including that the program participant is authorized by law to request to use his or her address designated by the Secretary of State on real property deeds, change of ownership forms, and deeds of trust when purchasing or selling a home.

This bill, with certain exceptions, prohibits a person, business, or association from publicly posting or displaying on the Internet the home address of a program participant who is a reproductive health care services provider, employee, volunteer, or patient and who has made a written demand to not disclose his or her address, and prohibits a person, business, or association from knowingly posting the home address of a program participant, or of the program participant's residing spouse or child, on the Internet knowing that person is a program participant and intending to cause imminent great bodily harm that is likely to occur or threatening to cause imminent great bodily harm to that individual.

ANNOUNCEMENT

CFPB

Interest rates

81 Fed. Reg. 64142 (Sept. 19, 2016).

The Bureau of Consumer Financial Protection (Bureau) announced the availability of a revised methodology statement, entitled the "Methodology for Determining Average Prime Offer Rates." The methodology statement describes the methodology used to calculate average prime offer rates for purposes of Regulation C and Regulation Z. The Bureau removed from the methodology statement the references to the sources of survey data used to calculate average prime offer rates.

The average prime offer rates (APORs) are annual percentage rates derived from average interest rates, points, and other loan pricing terms offered to borrowers by a representative sample of lenders for mortgage loans that have low-risk pricing characteristics. APORs have implications for data reporters under Regulation C and creditors under Regulation Z. Regulation C requires covered financial institutions to report, for certain transactions, the difference between a loan's annual percentage rate (APR) and the APOR for a comparable transaction. Under Regulation Z, a creditor may be subject to certain special provisions if the difference between a loan's APR and the APOR for a comparable transaction exceeds certain thresholds.

The Bureau calculates APORs on a weekly basis according to a methodology statement that is available to the public and posts the APORs. To calculate APORs, survey data on four mortgage products are used and posted on the FFIEC Web site weekly: 30-year fixed rate mortgage, 15-year fixed rate mortgage, five-year variable rate mortgage, and one-year variable rate mortgage. Currently, both the methodology statement and the FFIEC Web page that lists the survey data used to calculate APORs identify the sources of the survey data used to calculate APORs.

The Freddie Mac Primary Mortgage Market Survey® (PMMS) previously provided survey data for all four of the mortgage products that were used to calculate the weekly APORs. Earlier this year, Freddie Mac discontinued publishing the result for the one-year variable rate mortgage product. However, it provided the Bureau with data on the one-year variable rate mortgage product obtained using the same survey and calculation techniques as the PMMS. Beginning on July 7, 2016, the

Bureau started using data provided by a survey conducted by HSH Associates (HSH) for the one-year variable rate mortgage product together with PMMS data on 30-year fixed rate mortgage, 15-year fixed rate mortgage, and five-year variable rate mortgage products to calculate the weekly APORs. The Bureau updated both the methodology statement and the FFIEC Web site to note the change in the source of survey data for the one-year variable rate mortgage product and continued to post the survey data used to calculate APORs on the FFIEC Web site on a weekly basis. The Bureau has learned that, this month, HSH will discontinue collecting mortgage survey data, including data on the one-year variable rate mortgage product. The Bureau has identified a replacement source of survey data on the one-year variable rate product: Data obtained from Freddie Mac using the same survey and calculation techniques as PMMS, although the official PMMS no longer publishes results for the one-year variable rate mortgage product. The Bureau will use this data to calculate APORs beginning on September 22, 2016.

The Bureau will continue to post the survey data used to calculate APORs on the FFIEC Web site every week at and will continue to identify the source of the survey data on that Web page. However, to streamline how the Bureau provides notice of the sources of survey data, the Bureau will no longer revise the methodology statement each time it is necessary to change the source of survey data. Accordingly, the Bureau revised the methodology statement to remove the references to the sources of survey data. In addition to this change to the methodology statement, the Bureau corrected the methodology statement to clarify that the survey data reflect only points and do not include fees. There are no other substantive changes to the methodology statement.

PRESS RELEASE

HUD

Fair Housing Act – Family leave

The U.S. Department of Housing and Urban Development (HUD) announced that it has reached a Conciliation Agreement with Philadelphia-based Citizens Bank of Pennsylvania and Providence, Rhode Island-based Citizens Bank, collectively known as Citizens Bank, settling allegations that the bank violated the Fair Housing Act when it told a female applicant that she would need to return to work before her application for a home equity line of credit could be approved.

The Fair Housing Act makes it unlawful to discriminate in the terms, conditions, or privileges associated with the sale or rental of a dwelling on the basis of familial status, including denying a mortgage loan or mortgage insurance because a woman is pregnant or on family leave.

The case came to HUD's attention when a woman filed a complaint alleging that Citizens Bank discriminated against her based on her familial status when it delayed the processing of her loan application because she was on maternity leave, despite the fact that she was receiving her full pay.

Under the terms of the agreement, Citizens Bank will pay the woman $40,000, provide fair housing training to its staff, and adopt a parental leave policy making it clear that all loan products are to be made available, regardless of an applicant's parental status. Citizens Bank will also make a $75,000 donation to a HUD-approved fair housing or advocacy organization.

LICENSING

BULLETIN

Kansas

SB 369 - Kansas Mortgage Business Act

Earlier this year, the Kansas Legislature passed, and the governor signed into law, legislation to update the Kansas Mortgage Business Act (KMBA) (K.S.A. 9-2201 et seq.). The bill, SB 369, took effect July 1, 2016. Among other provisions, SB 369 places all companies that conduct mortgage business in Kansas under the KMBA for licensing purposes. Companies that currently hold a Supervised Lender license will transition to a Mortgage Company (MC) license later this year. Please note that companies currently holding a MC license with the OSBC will not see any changes to their license or licensing process as a result of this bill. MC license numbers are in the format MC.0009999, for example.

However, SB 369 makes additional changes to mortgage laws in Kansas that will be applicable to all current and future MC licensees. Key changes are highlighted below.

SB 369 added or modified several definitions in K.S.A. 9-2201. In addition, the exemption from licensing for a supervised lender was eliminated.

However, K.S.A. 9-2203- Mortgage licensing -was modified to clarify that no other license is required to conduct non-depository mortgage business in the state other than a KMBA license; no dual license requirement is contemplated for entities engaged solely in mortgage business.

The result of the changes include covering manufactured home lending, including chattel-only lending, under the mortgage license, without the need to also hold a supervised lender license.

BULLETIN

Texas

Fingerprinting

Texas Department of Housing and Community Affairs, Manufactured Housing Division.

Any person applying for a manufacturer's, retailer's, broker's, installer's, or salesperson's license must provide their fingerprints, so that a DPS and FBI criminal history check can be performed. This includes all owners, partners, officers, and related persons listed on the license.

Once fingerprints are on file, a licensee will not need to be fingerprinted for subsequent renewals.

Due to FBI requirements, fingerprints submitted for another state issued license or permit cannot be accept for Manufactured Housing Division licensure. The license applicant must submit new fingerprints.

SALES AND WARRANTIES

CASE LAW

Rescission

CASE NAME: *Bennet v. CMH Homes, Inc.*
DATE: *09/13/2016*
CITATION: *United States Court of Appeals, Sixth Circuit. ---F. App'x ----. 2016 WL 4758435*

As part of the sales agreements, CMH was responsible for "normal delivery and installation" of the new home on the Bennetts' land.

The Bennetts notified CMH of defects before they closed on the house. The defects persisted and the Bennetts filed suit, alleging intentional misrepresentation, breach of contract, and breach of warranty. The district court awarded summary judgment to CMH on the claim for intentional misrepresentation, finding that the

salesperson's statements were instances of "puffery," but denied summary judgment on the breach claims.

The court stated that revocation of acceptance was the most equitable remedy for the breaches and determined that the Bennetts derived a benefit amounting to $1,000 per month by living in the defective house, and set off their $1,400 mortgage payment by the $1,000 benefit to arrive at a rescission-damages total of $400 per month. The court denied any damages for lost wages, "future expenses" or punitive damages. The court awarded prejudgment interest of 10%. Both the Bennetts and CMH appealed.

The appeals court found that the monthly mortgage payments were irrelevant for the purposes of calculating damages for revocation of acceptance. The correct benchmark for damages was the purchase price of the house: $109,597.57. Also, prejudgment interest had to be revisited to be correlated to the time value of the $109,597.57.

Further, while the appeals court did not hold as a matter of law that $1,000/month was too much for the rental of a defective mobile home, the lower court should provide a fuller explanation on remand.

The Court rejected CMH's arguments on appeal, finding the record supported the trial court's finding that the house was not level when installed. Furthermore, that the house was not level is sufficient to find that CMH breached its contract and warranty.

Also, Mr. Bennett told CMH to buy his house back, which could be seen as an affirmative act. The Bennetts also provided CMH with many opportunities to cure the defects, which buyers are required to do before they can avail themselves of the revocation-of-acceptance remedy. Further, there was no evidence suggesting that the Bennetts waited to revoke just so they could unjustly reap the benefits of revocation.

The damages-limitation provision in the sales agreement stated that "[CMH] will not be required to pay the [Bennetts] any incidental or consequential damages." The Court found that such a provision in a form agreement supported the unconscionable nature of the provision.

The Court likewise rejected the Bennetts' other issues on appeal, including the district court's dismissal of the intentional misrepresentation claim.

Furthermore, the Bennetts could not pay for a home, live in that home for a significant period of time, and then get their entire purchase price back.

The Bennetts were also not entitled to an award for the interest they paid on their mortgage, or for Mr. Bennett's lost wages, or future expenses. Nor was there anything in the record showing that the Bennetts suffered from "severe mental injury," which is necessary to recover for mental-anguish damages in breach cases.

The judgment of the district court was affirmed in part, reversed in part, and remanded.

FINAL RULE
United States
E-Warranty Act

81 Fed. Reg. 63663 (09/15/2016).

Effective 10/17/2016, this rule amends 16 CFR Parts 701 and 702, Federal Trade Commission , Disclosure of Written Consumer Product Warranty Terms.

The E-Warranty Act amends the MMWA to allow, under certain circumstances, the posting of warranties on warrantors' Internet Web sites as an alternative method of complying with the Pre-Sale Availability Rule, and to permit sellers to make warranty terms available to consumers pre-sale via electronic means where the warrantor has chosen the online method. E-Warranty

charges the Commission with promulgating consistent changes to the Disclosure Rule and the Pre-Sale Availability Rule within one year of the Act's passage.

To comply with E-Warranty, the Commission revises the Disclosure Rule to specify that, for a warranty posted on an Internet Web site or displayed electronically, disclosures statutorily mandated to appear "on the face of the warranty" must be placed in close proximity to the location where the text of the warranty terms begin.

In accordance with the mandate in E-Warranty, the Commission revises the Pre-Sale Availability Rule to allow warrantors to post warranty terms on Internet Web sites if they also provide a non-Internet based method for consumers to obtain the warranty terms and satisfy certain other conditions, and to allow certain sellers to display warranty terms pre-sale in an electronic format if the warrantor has used the online method of disseminating warranty terms.

The first rule revision alters § 701.1 to add a definition of the term "manufacturer" at § 701.1(g) (defining manufacturer as "any person engaged in the business of making a consumer product"), add that term in the definition of "warrantor," and re-letter the paragraphs in § 701.1 to account for the additional definition. The Commission makes these revisions in light of E-Warranty's use of the term "manufacturer."

The next revision adds a new § 701.1(j)(3) to specify that, in conjunction with warranty terms posted on an Internet Web site or displayed electronically, the phrase "on the face" means in close proximity to the location where the warranty terms begin. Although the Disclosure Rule does not explicitly mention online commerce, it applies to the sale of warranted consumer products online. Commission staff recently updated the .Com Disclosures to provide additional guidance on disclosure obligations in the online context. As stated in the updated .Com Disclosures, warranties disseminated online are no different from paper versions and the same rules apply.

The next revision is to § 702.1(d) to include the manufacturer in the definition of "warrantor." The Commission makes this revision to comport with E-Warranty's use of the term "manufacturer." The next revision adds a new § 702.1(g) to define a "manufacturer," in accordance with the addition of the term "manufacturer" in § 701.1(g), as "any person engaged in the business of making a consumer product."

The revisions to § 702.3(a) allow sellers to provide warranty terms pre-sale through electronic means if the warrantor of the product has chosen the online method. If a seller uses an electronic means of displaying the warranty terms, that seller must still make the warranty text readily available for consumers' examination prior to sale. The changes to § 702.3(b)(1)(i) will remove superfluous instances of the term "and/or" and "and" in that paragraph, as the prefatory language already notes that the warrantor must use one or more of the methods described in that paragraph to provide sellers with the prescribed warranty materials.

The next revision adds a new § 702.3(b)(2) to reflect that, as an alternative method of compliance with the Pre-Sale Availability Rule, a warrantor may refer consumers to an accessible online copy of the warranty by providing to the consumer the Internet address where the specific product's warranty has been posted in a clear and conspicuous manner. To employ this option, the warrantor, among other duties, must supply in the product manual, or on the product or product packaging, the Internet address where the consumer can review and obtain the specific product's warranty terms, as well as the phone number, postal mailing address, or other reasonable non-Internet based means for the consumer or seller to request a free copy of the warranty terms.

Revised § 702.3(b)(2)(iv) requires any warrantor utilizing the online method to provide sufficient information with

the consumer product or on the Internet Web site so that the consumer can readily locate the specific product's warranty terms. The Commission believes that this requirement comports with Congress's directive that online warranties be available to consumers "in a clear and conspicuous manner." Similarly, if a consumer or seller requests via phone, mail, or other reasonable non-Internet-based means, that the warrantor provide a hard copy of the warranty, revised § 702.3(b)(2)(ii) requires the warrantor to provide it promptly and free of charge, which comports with existing pre-sale requirements for catalog and mail order sales.

TITLING AND PERFECTION

CASE LAW

Security interest - Affixation

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CASE NAME: *In re Delando Montez Atchison*
DATE: *09/13/2016*
CITATION: *United States Bankruptcy Court, M.D. Alabama. Slip Copy. 2016 WL 4773126*

The debtor and Lakeisha V. Atchison executed a promissory note in favor of Oakwood Acceptance Corporation, LLC to finance the purchase of a manufactured home, granting Oakwood a security interest in the home.

The debtor and co-debtor also executed a mortgage in favor of Oakwood on realty. The mortgage contained a Manufactured Home and Construction Loan Rider which provided that the manufactured home was affixed and would be conclusively deemed to be real estate regardless of "whether or not the manufacturer's certificate of origin or the certificate of title to the manufactured home has been surrendered or cancelled."

The Alabama Department of Revenue issued certificates of title for the manufactured home notating Oakwood as the first lienholder. The title has not been cancelled or surrendered.

The debtor filed chapter 13. In his proposed amended plan, he endeavored to strip down the lien to the value of the manufactured home and realty.

The loan servicer filed an objection to confirmation of the plan, predicated on its contention that its claim could not be modified pursuant to 11 U.S.C. § 1322(b)(2).

The Court noted that the parties did not dispute that the debtor's manufactured home was his principal residence. Instead, they disputed whether or not the manufactured home was real property.

According to the Court, under Alabama law, a manufactured home is personal property at the time of its sale. In order for the home to become realty: 1) the manufactured home must be affixed to real property, 2) the manufactured home and realty must be owned by the same person or persons, and 3) the certificate of origin or certificate of title must be cancelled.

Here, the first two elements were satisfied. However, the third element was not. The parties stipulated to this fact. Therefore, the Court found that the debtor's manufactured home remained personal property under Alabama law.

The Court rejected servicer's argument that even though the certificate of title had not been cancelled, the manufactured home should be considered realty by virtue of the parties' contract, which provided that the manufactured home "shall be conclusively deemed to be real estate."

The Court found that the language of the parties' agreement not only disregarded but attempted to negate the statutory requisites, thereby contravening established public policy and was not enforceable.

The court found that the debtor's manufactured home was personal property under Alabama law. Accordingly, servicer's objection to the confirmation of the debtor's chapter 13 plan on the ground that its claim is

nonmodifiable pursuant to 11 U.S.C. § 1322(b)(2) was overruled.

LEGISLATION

California

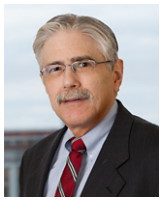
Transfer of registration

2015 CA A 587. Enacted 9/21/2016. Effective 1/1/2017.

This bill amends Cal. Civ. Code § 798.15, Cal. Health & Safety Code §§ 18092.7, 18116.1, and 18550, adds Cal. Health & Safety Code §18550.1, and amends Cal. Rev. & Tax. Code § 5832, relating to mobilehomes.

This bill provides that when a person who is not currently the registered owner of a manufactured home or mobilehome applies to the Department of Housing and Community Development for registration or transfer of registration of the manufactured home or mobilehome prior to December 31, 2019, and meets other specified requirements, the department will waive all outstanding charges assessed by the department prior to the transfer of title of the manufactured home or mobilehome, release any lien imposed with respect to those charges, issue a duplicate or new certificate of title or registration card, and amend the title record of the manufactured home or mobilehome.

The bill requires the department to issue a conditional transfer of title when a person who is not currently the registered owner of a manufactured home or mobilehome subject to local property taxation applies to the department for registration or transfer of registration of the manufactured home or mobilehome prior to December 31, 2019, and meets other specified requirements. The bill would require a county tax collector to issue a tax liability certificate to a person with a conditional transfer of title who applies for the certificate prior to January 1, 2020.



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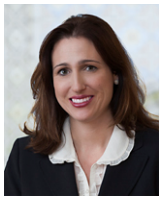

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