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!

If you are still stuffed from all of the turkey you ate last month, we have some bad news. There were few developments impacting manufactured housing last month, which means you will not burn many calories reading this Update.

We do have a case from Indiana that highlights the importance of retailers and community owners engaging in financing to do it right.

If you are lending in South Dakota, you should be aware that the voting public passed a measure putting in place an "all-in," we mean everything, 36% usury cap and effectively prohibiting the collection of attorneys' fees for certain loan products.

Have a wonderful holiday season and New Year!

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COMMUNITIES

CASE LAW

Sales - Contract

CASE NAME: *Community Park Investments, Inc. v. Guess*
DATE: *10/26/2016*
CITATION: *Court of Appeals of Indiana. Slip Copy (Table, Text in WESTLAW), Unpublished Disposition. 2016 WL 6395768*

Jacob Pasternac was the sole owner of CPI, which operated the Springhill Mobile Home Community. CPI entered into a month-to-month lease agreement with Tenants wherein Tenants agreed to pay $550 per month to CPI. Tenants also executed a promissory note to CPI for $9,000 for the purchase of the used mobile home in which they were living. Of the $550 monthly payment, $300 was for lot rental and $250 was for interest on the promissory note. A bill of sale for the used mobile home was presented to and signed by Tenants. Neither Pasternac nor any other person signed the bill of sale on behalf of CPI. Tenants paid Pasternac $5,000 in cash. Pasternac would not give Tenants a receipt for the payment.

Thereafter, Tenants paid CPI $550 per month. Pasternac subsequently demanded $9,000 on the promissory note. Tenants refused. Pasternac told them the cost of the mobile home would now be $12,000. Tenants again refused to pay. Pasternac served Tenants with an eviction notice. Tenants did not make any more rent payments after receiving that notice.

In addition to eviction, CPI sought damages for unpaid lot rental and also sought $9,000 based upon the alleged default of the promissory note. Tenants responded with a counterclaim. The trial court entered an eviction order against Tenants and set a damages hearing. Tenants moved out of the mobile home and off CPI's property.

CPI sought damages against Tenants in the amount of $13,836, which included $9,000 for the cost of the mobile home, $3,300 in unpaid rent ($1,800 in lot rental and $1,500 in interest), and $1,000 for attorney's fees and costs.

The trial court concluded that title to the mobile home was not in CPI's name. Additionally, CPI did not sign the bill of sale which clearly stated "Not valid unless signed and accepted by an officer of the company or an authorized agent," thus making the contract void. And finally, inasmuch as Tenants paid a total of $7,260, the Court awarded CPI nothing. CPI appealed.

The appeals court noted that, although CPI attempted to treat the bill of sale and the promissory note as two separate agreements between the parties, the two documents were executed simultaneously, and the bill of sale specifically referenced and incorporated the promissory note. Therefore, the Court considered the two alleged agreements as one integrated and complete contract, and agreed with the trial court that any agreement between the parties regarding the purchase of the used mobile home was invalid and unenforceable. From the language of the agreement, its validity was specifically contingent upon the signature of the seller or its agent.

Affirmed.

DEFAULT SERVICING

CASE LAW

Acceleration – Statute of Limitations

CASE NAME: *Bartram v. U.S. Bank Nat. Ass'n*
DATE: *11/03/2016*
CITATION: *Supreme Court of Florida. --- So.3d ----. 2016 WL 6538647*

Bartram's Mortgage with U.S. Bank was a standard residential form mortgage and required the lender to give the borrower notice of any default and an

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opportunity to cure before the mortgagee could proceed against the secured property.

In addition to providing optional acceleration and foreclosure as a remedy for default, the Mortgage also granted the borrower a right to reinstate the note and Mortgage after acceleration if certain conditions were met.

Bartram stopped making payments, and the Bank filed a complaint to foreclose the Mortgage. The complaint declared the full amount payable under the note and Mortgage to be due. Nearly five years later, the foreclosure action was involuntarily dismissed after the Bank failed to appear at a case management conference. The Bank did not appeal the dismissal.

After the dismissal of the foreclosure action and almost six years after the Bank filed its foreclosure complaint, Bartram filed a crossclaim against the Bank in a separate foreclosure action on a second mortgage, seeking a declaratory judgment to cancel the Mortgage and to quiet title to the Property, asserting that the statute of limitations barred the Bank from bringing another foreclosure action.

The trial court granted summary judgment to Bartram, quieted title in Bartram, found the Bank had no further ability to enforce its rights under the note and Mortgage, and cancelled the note and Mortgage, releasing the Bank's lien on the Property. The Bank appealed to the Fifth District.

The Fifth District reversed and remanded to the trial court, and certified a question which the Florida Supreme Court rephrased as:

DOES ACCELERATION OF PAYMENTS DUE UNDER A RESIDENTIAL NOTE AND MORTGAGE WITH A REINSTATEMENT PROVISION IN A FORECLOSURE ACTION THAT WAS DISMISSED PURSUANT TO RULE 1.420(B), FLORIDA RULES OF CIVIL PROCEDURE, TRIGGER APPLICATION OF THE STATUTE OF LIMITATIONS TO PREVENT A SUBSEQUENT FORECLOSURE ACTION BY THE MORTGAGEE BASED ON PAYMENT DEFAULTS OCCURRING SUBSEQUENT TO DISMISSAL OF THE FIRST FORECLOSURE SUIT?

The Court found that when a mortgage foreclosure action is involuntarily dismissed pursuant to Rule 1.420(b), either with or without prejudice, the effect of the involuntary dismissal is revocation of the acceleration, which then reinstates the mortgagor's right to continue to make payments on the note, and the right of the mortgagee to seek acceleration and foreclosure based on the mortgagor's subsequent defaults. Accordingly, the statute of limitations does not continue to run on the amount due under the note and mortgage.

Absent a contrary provision in the residential note and mortgage, dismissal of the foreclosure action against the mortgagor has the effect of returning the parties to their pre-foreclosure complaint status, where the mortgage remains an installment loan and the mortgagor has the right to continue to make installment payments without being obligated to pay the entire amount due under the note and mortgage.

CASE LAW

Foreclosure – Mediation

CASE NAME: *Wells Fargo Bank, NA v. Burd*
DATE: *11/10/2016*
CITATION: *Court of Appeals of Ohio, Tenth District, Franklin County. Slip Copy. 2016 WL 6680386*

Burd obtained a loan secured by a mortgage. The Note and mortgage were assigned to Wells Fargo.

On April 22, 2009, Wells Fargo filed its first complaint seeking judgment on the Note and foreclosure of the Mortgage. Wells Fargo and Burd entered into a loan modification agreement and Wells Fargo voluntarily dismissed the first foreclosure complaint with prejudice.

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Wells Fargo subsequently filed a second complaint on February 10, 2012, seeking judgment on the Note and foreclosure of the Mortgage. Wells Fargo and Burd participated in a court-sponsored mediation session, but were unable to resolve the case. The trial court granted summary judgment in favor of Burd, concluding that Wells Fargo failed to satisfy a condition precedent for foreclosure of the mortgage or, in the alternative, that Burd had established an affirmative defense to foreclosure.

On August 18, 2014, Wells Fargo filed a third complaint. The trial court granted summary judgment in favor of Burd, holding that Wells Fargo failed to comply with the face-to-face meeting requirement in 24 C.F.R. 203.604, which it concluded was a condition precedent to foreclosure. Wells Fargo appealed.

The appeals court found that the second and third foreclosure complaints both sought to recover interest from September 1, 2011, and, therefore, appeared to be based on the same default date. Although Wells Fargo and Burd participated in a court-sponsored mediation session after a foreclosure proceeding had been initiated, the new complaint was based on the same alleged default as the second complaint. Thus, Burd had no opportunity to avoid foreclosure arising from that alleged default. The Court concluded that Wells Fargo failed to comply with the requirements of 24 C.F.R. 203.604(b) and Burd was entitled to summary judgment.

However, the trial court's judgment did not contain any separate discussion or analysis of Wells Fargo's claim for judgment on the Note. 24 C.F.R. 203.604 addresses the steps that must be taken “before foreclosure is commenced” and does not address acceleration of a note. Thus, failure to comply with 24 C.F.R. 203.604 did not appear to prohibit Wells Fargo from attempting to recover a personal judgment against Burd under the Note.

The Court also noted that there was a dispute between the parties about the effect of a reaffirmation agreement entered in Burd’s bankruptcy proceeding and the effect of the Loan Modification Agreement on Burd's personal liability under the Note, and found that there were genuine issues of material fact with respect to Wells Fargo's claim for judgment on the Note. Accordingly, the trial court erred by granting summary judgment in favor of Burd on the claim for judgment on the Note.

Judgment affirmed in part, reversed in part; and cause remanded.

CHANGES TO PROPOSED RULE

Nevada

Certificate of ownership– Voluntary surrender

Nev. Admin. Code § 489; 489.416, .750, .760, .775, .780, .785

In the July 2016 McGlinchey Stafford Manufactured Housing Law Update, we reported on proposed amendments to these rules. The Nevada Department of Business and Industry, Manufactured Housing Division has now proposed changes to those amendments.

The proposed changes include those to a new section of Chapter 489 to read as follows:

An application for a certificate of ownership for a mobile home or manufactured home acquired through a voluntary surrender must be accompanied by an affidavit on a form supplied by the Division stating that the mobile home or manufactured home was acquired by the landlord or manager of the mobile home park through a voluntary surrender by the owner of the mobile home or manufactured home.

As initially proposed, this new section provided: Any application for certificate of ownership for a home acquired through voluntary surrender in accordance of

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NRS 489.336 must be accompanied by an Affidavit of Voluntary Surrender on a form provided by the Division.

LEGISLATION

New Jersey

NJ Soldiers' and Sailors' Civil Relief Act – National Guard or Reserves

2016 NJ A 766. Enacted 11/14/2016. Effective immediately.

Adds a new section to N.J. Stat. Ann. 38:23C-1 (New Jersey Soldiers' and Sailors' Civil Relief Act of 1979) to provide that a person domiciled in New Jersey who is mobilized for federal active duty as a member of the National Guard or a Reserve Component of the Armed Forces of the United States may, at the person's discretion, secure, if a request is made during this period of federal active duty service, a deferment of the payment of interest and principal on a mortgage loan that was secured by the person, or the person and another person jointly, before the date on which the person enters federal active duty.

Nothing contained in this section shall affect payments to or from escrow, as required by the loan agreement, for property taxes, special assessments, mortgage insurance, and hazard insurance, nor shall the person's monthly escrow payments following federal active duty service increase as a result of deferment, except commensurate with an increase in the amount for taxes or insurance premiums.

The following charges, incurred prior to the date of entry on active duty, when imposed pursuant to law, shall not increase during the period of deferment, nor shall they accrue as a result of the deferment: late or delinquency charges; attorneys' and collection fees; and recording or filing fees. Interest shall not be compounded as a result of deferment, that is, interest shall not be charged on the deferred interest.

INSTALLATION

PROPOSED RULE

HUD

Floodplain management

81 Fed. Reg. 74967 (Oct. 28, 2016)

Amendments to 24 CFR Parts 50, 55, 58, 200.

This proposed rule would revise HUD's regulations governing floodplain management to require, as part of the decision making process established to ensure compliance with Executive orders on Floodplain Management and Federal Flood Risk Management, that a HUD assisted or financed (including mortgage insurance) project involving new construction or substantial improvement that is situated in an area subject to floods be elevated or floodproofed between 2 and 3 feet above the base flood elevation as determined by best available information.

The proposed rule would also revise HUD's Minimum Property Standards for one-to-four unit housing under HUD mortgage insurance and low-rent public housing programs. Building to the proposed standards will, consistent with the Executive orders, increase resiliency to flooding, reduce the risk of flood loss, minimize the impact of floods on human safety, health, and welfare, and promote sound, sustainable, long-term planning informed by a more accurate evaluation of flood risk that takes into account possible sea level rise and increased development associated with population growth.

This document also proposes to revise a categorical exclusion available when HUD performs the environmental review under the National Environmental Policy Act (NEPA) and related Federal laws by making it consistent with changes to a similar categorical exclusion that is available to HUD grantees or other responsible entities when they perform these environmental reviews. This change will make the review standard

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identical regardless of whether HUD or a grantee is performing the review.

The rule adds the following:

§ 55.2(b) Terminology.

(13) Structure means a walled or roofed building, including a manufactured home and a gas or liquid storage tank that is principally above ground.

§ 200.926d(c)(4) Construction requirements.

(iii) New construction or substantial improvement. (A) In all cases in which a Direct Endorsement (DE) mortgagee or a Lender Insurance (LI) mortgagee seeks to insure a mortgage on a one- to four-family dwelling that is newly constructed or which undergoes a substantial improvement, as defined in § 55.12(b)(10) of this title (including a manufactured home that is newly erected or undergoes a substantial improvement) that was processed by the DE or LI mortgagee, the DE or LI mortgagee must determine whether the property improvements (dwelling and related structures/equipment essential to the value of the property and subject to flood damage) are located on a site that is within a Special Flood Hazard Area, as designated on maps of the Federal Emergency Management Agency. If so, the DE mortgagee, before submitting the application for insurance to HUD, or the LI mortgagee, before submitting all the required data regarding the mortgage to HUD, must obtain:

(1) A final Letter of Map Amendment (LOMA);

(2) A final Letter of Map Revision (LOMR); or

(3) A signed Elevation Certificate documenting that the lowest floor (including basement) of the property improvements is at least two feet above the base flood elevation as determined by FEMA's best available information.

PROPOSED RULE

DOE

Test procedures for Manufactured Housing

81 Fed. Reg. 78733 (Nov. 9, 2016).

10 CFR Part 460

The U.S. Department of Energy (DOE) is publishing a proposed rule to establish test procedures for manufactured housing (MH). This test procedure would support standards DOE is directed to establish by the Energy Independence and Security Act of 2007. DOE proposes to establish test procedures applicable to manufactured homes for determining compliance with the following metrics that were included in a June 17, 2016, notice of proposed rulemaking: The R-value of insulation; the U-factor of windows, skylights, and doors; the solar heat gain coefficient of fenestration; U-factor alternatives to R-value requirements; the air leakage rate of air distribution systems; and mechanical ventilation fan efficacy. DOE will accept comments regarding this proposed rule.

LENDING

LEGISLATION

New York

Mortgage loans - Consummation

2015 NY S 7183. Enacted 11/28/2016. Effective immediately.

This bill adds new subsection (30) to N.Y. Banking Law § 2 to provide that the term "consummation of a mortgage loan" means, for purposes of the act of congress entitled Truth in Lending Act and the regulations thereunder and the Real Estate Settlement Procedures Act of 1974, as amended, and the regulations thereunder, when the

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applicant for the mortgage loan executes the promissory note and mortgage.

LEGISLATION

South Dakota

Interest - Fees

South Dakota Initiated Measure 21.

Approved by a 75.6% to 24.4% margin of South Dakota voters.

Effective November 16, 2016, this measure puts in place a 36% APR all-in cap on loans from all state-licensed money lenders by amending S.D. Codified Laws §§ 54-3-14 and 54-4-44 and adds a new section to chapter 54-4.

According to the Attorney General, licensed lenders make commercial and personal loans, including installment, automobile, short-term consumer, payday and title loans. The measure does not apply to state and national banks, bank holding companies, other federally insured financial institutions, and state chartered trust companies.

S.D. Codified Laws § 54-3-14 is amended to remove from the definition of "regulated lenders" an installment loan licensee under the provisions of chapter 54-4 and 54-6. It should be noted that, as a result of this change, licensed lenders are being removed from the relevant provision of the usury law defining a licensed lender as an exempt entity and attorney's fees are now prohibited.

S.D. Codified Laws § 54-4-44 is amended to add that no licensee may contract for or receive finance changes in excess of an annual rate of thirty-six percent, including all charges for any ancillary product or service and any other charge or fee incident to the extension of credit. A violation of this section is a Class 1 misdemeanor. Any loan made in violation of this section is void and uncollectable as to any principal, fee, interest or charge.

The new section provides that no person may engage in any device, subterfuge, or pretense to evade the requirements of § 54-4-44.

According to guidance from the regulator, all financial institutions in South Dakota that service, acquire, or purchase retail installment contracts are required to comply with these provisions, and the other substantive requirements of S.D. Codified Laws, Chapter 54-4.

The types of services, products, charges, or fees that are to be included in annual rate calculations for purposes of the rate limitations imposed by Initiated Measure 21 are "all charges for any ancillary product or service and any other charge or fee incident to the extension of credit." These services, products, charges, and fees may, depending on the circumstances, include vehicle service and maintenance contracts, official fees and taxes, guaranteed asset protection waivers, sales taxes, title fees, lien registration fees, dealer documentary fees, returned check fees, attorney fees, and credit life or accident and health insurance.

ADOPTED RULE

Texas

Home equity lending

Effective 11/24/2016, this rule amends 7 Tex. Admin. Code §§ 153.5, 153.8, 153.13, 153.14, 153.17 re: Home Equity Lending.

The purpose of the amendments to §153.5 is to add "equity" before "loan" to ensure that the provisions use the term "equity loan," which is defined in §153.1(7).

The purpose of the adopted amendments to §153.13 is to specify how lenders can comply with the preclosing disclosure requirement in Section 50(a)(6)(M)(ii), and to include updated citations to federal rules.

The purpose of the amendments to §153.17 is to specify who is authorized to make a home equity loan, in light of

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recent changes in federal policy and amendments to the licensing provisions of Texas Finance Code, Chapters 156 and 342. Section 50(a)(6)(P) lists the types of lenders that are authorized to make home equity loans, including "a person approved as a mortgagee by the United States government to make federally insured loans," "a person licensed to make regulated loans, as provided by statute of this state," and "a person regulated by this state as a mortgage broker."

In §153.17(2), an adopted amendment removes a reference to "Approved correspondents" and replaces it with "Loan correspondents." In 2010, the Department of Housing and Urban Development ended its program of approving loan correspondents, as described in mortgagee letter 2010-20. As amended by the adoption, §153.17(2) explains that loan correspondents to an approved mortgagee are not authorized lenders unless they qualify under another provision of Section 50(a)(6)(P).

Adopted new §153.17(3) explains that a person who is licensed under Texas Finance Code, Chapter 156 is a person regulated by this state as a mortgage broker for purposes of Section 50(a)(6)(P)(vi).

Adopted new §153.17(4) replaces former paragraphs (3) and (4), and explains that a Chapter 342 licensee is a regulated lender for purposes of the constitution, and that if a person is not described by Section 50(a)(6)(P)(i), (ii), (iv), (v), or (vi), the person must obtain a Chapter 342 license to be authorized to make home equity loans.

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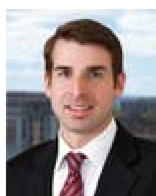

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