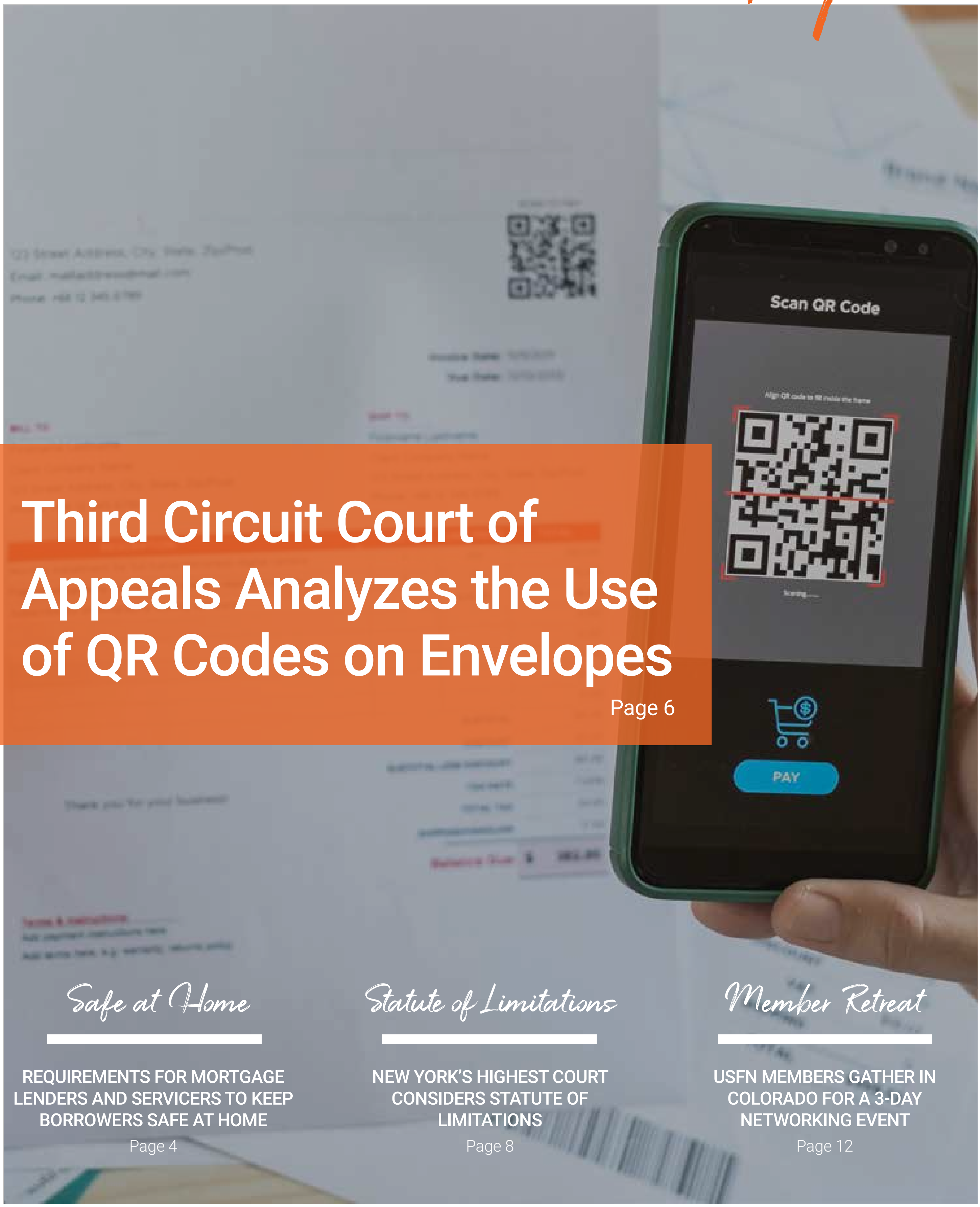
OFFICIAL USFN PUBLICATION
USFN REPORT WINTER 2020

USFN Report



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Upcoming USFN Events

Go to usfnevents.org for details on all USFN events.

February

18 **USFN Briefing**
Legal Issues

23 **MBA National Mortgage Servicing Conference & Expo**
Orlando, FL
February 23-26

March

17 **USFN Briefing**
Bankruptcy

April

7 **USFNstruct**
Philadelphia, PA

22 **REO/Eviction Issues Seminar**
Denver, CO

May

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Legal Issues

June

9 **USFNdustry Forum**
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June 9-11

16 **USFN Briefing**
Bankruptcy

July

17 **Legal Issues Seminar**
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28 **USFN Briefing**
REO/Eviction

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Legal Issues

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8 **USFN Briefing**
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October

21 **USFNstruct**
Charlotte, NC

27 **USFN Briefing**
REO/Eviction

Meeting/Seminar
Online Event

USFN is a resource network serving the mortgage industry and is the largest not-for-profit association of law firms and trustee companies in the nation. More information about USFN is available at www.usfn.org.

USFN Report is published quarterly for members of the mortgage banking and lending community. The USFN Report contains comments from counsel in various states, and the information provided is not intended as legal advice. The comments are solely those of the identified authors and may or may not be the same as other attorneys within USFN. Specific questions should be referred to local counsel who is familiar with the laws, rules, practices and interpretations of the particular jurisdiction. Because of the complexities of the law, and changes in legislation, the summary and discussion contained in the USFN Report should not be relied upon but should be used for facilitating dialog with your counsel, after a careful review of the legislation and cases to which reference is made.

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USFN REPORT
WINTER 2020

In This Issue

From the President

MARTY M. STONE, ESQ.
MCCALLA RAYMER LEIBERT PIERCE, LLC

I hope everyone had a happy and safe holiday season and are excited for a productive 2020.

USFN is continuing its commitment to providing industry-leading education in the new year, with new and expanded programs designed for servicers at all points on their career path. USFNstruct regional servicer training programs are scheduled for Philadelphia in April and Charlotte in October. These one-day, focused educational events are meant to minimize time out of the office while maximizing learning potential for processing and management teams or for cross-training of foreclosure and bankruptcy teams and departments.

Our issues seminars are expanding this year, bringing together mid- and executive level servicing professionals and legal experts to focus on hot topics, current issues, and the latest in regulatory developments. The seminars include a networking dinner or reception and a roundtable luncheon for improved dialogue between the various stakeholders attending each event. Mark your calendar for Bankruptcy Issues in January (Dallas), REO/Eviction Issues in April (Denver), and Legal Issues in July (Chicago).

For online education that can be attended without leaving the office, our popular online USFN Briefings will again be offered monthly. During the complimentary web-based offerings, USFN attorney members cover pressing topics in the REO/Eviction, Bankruptcy and Legal Issues community. The USFN Briefings are open to all USFN members and client organizations, including mortgage servicers, government-sponsored enterprises, banks, lenders and other financial institutions involved in the servicing of defaulted loans.

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Trap For The Unwary

It's a Crime for Mortgage Lenders and Servicers to Not Keep Certified Borrowers "Safe at Home"

BY BRIAN LIEBO, ESQ. & KEVIN DOBIE, ESQ.
USSET, WEINGARDEN & LIEBO, PLLP | USFN MEMBER (MN)

There are an ever-increasing number of people participating in programs across the country that protect the identities of certain borrowers. Unwary mortgage lenders and servicers can find themselves subject to criminal and civil penalties in certain states if they run afoul of the related laws. One such program is Minnesota's "Safe at Home" project.

Minnesota's project, governed by Minnesota Statutes Chapter 5B and Minnesota Rules Chapter 8290, along with approximately 38 other states across the United States, can provide home, work and school address confidentiality for people who fear for their safety for survivors of, among other things, domestic violence, sexual assault, or stalking. In Minnesota alone, there are over 3,000 program participants and the program is administered by the Office of the Minnesota Secretary of State.

When someone enrolls in Safe at Home, the state assigns a post office box address that the participant uses as a legal address for all purposes. Since all Safe at Home participants share the same assigned post office box, the participants are differentiated by a designated "lot number" that is unique to each participant. This lot number is not to be confused with those "lot numbers" typically contained in real property legal descriptions. The participant does not pick up their mail from that post office box. Instead, Safe at Home staff forward the first-class mail to the participant's real residential address.

The state certifies participants for the Safe at Home program in renewable terms of four years. Participants can lose the certification by changing their legal identity without advance notice or by using false information in conjunction with the certification. Also, certification can be lost if the mail forwarded by the Safe at Home office is returned as "undeliverable." This latter issue is often relevant in mortgage default situations where a borrower abandons the home.

Impact of the Safe at Home Program on Mortgage Lenders and Servicers

A participant must disclose the address of the home to mortgage loan originators. The participant will provide the lender with a Safe at Home program form, which will require the lender to conceal the mortgage record and will prohibit the sharing of their location information without signed consent from the participant. The lender must also only use the participant's assigned post office box address for mailed correspondence. For loans other than a home loan, such as vehicle loans or unsecured personal loans, a Safe at Home participant cannot be required to disclose their home address.

It is the responsibility of participating borrowers to affirmatively notify their lenders and servicers of their Safe at Home program participation and provide their assigned Safe at Home post office box address. If a lender or servicer wishes to contact the Safe at Home office to verify a borrower's program participation, they must provide the potential participant's name and lot number or name and date of birth. Thereafter, if a lender or servicer must disclose the name and address of the borrower participant to sell or service-transfer the loan, the lender must obtain the prior written consent of the participant and provide the name and contact information of the transferee to the participant, so that the participant may give the transferee the Safe at Home program notice.

Safe at Home Does Not Protect Property Records Retroactively

This means that if an individual purchases a property and obtains a mortgage without the required Safe at Home program procedures, the Safe at Home program will not apply. The Safe at Home office will not provide the required forms to individuals trying to enter the program after purchasing a home or when trying to refinance a mortgage that was not part of the program.

Once properly notified, the mortgage servicer or lender must accept a participant's Safe at Home address as the person's actual address of residence, school address, and as their address of employment. When mailing to a Safe at Home participant, the sender must always include the participant's name and lot number.

A Safe at Home participant cannot be required to disclose his or her home address for financial account records. Thus, financial institutions must not require a participant to disclose his or her home address in order to be Customer Identification Program (CIP) compliant. For CIP compliance, instead of the participant's home or business address, the financial institution is required to use a non-public, designated street address by the Office of the Minnesota Secretary of State, which can be obtained by calling (651) 201-1399.

If a mortgage servicer must serve a participant with legal process, the Office of the Minnesota Secretary of State acts as the agent for service of process for all program participants. In order for the Safe at Home office to accept service of process on behalf of a participant, the service documents must also include the participant's name and lot number.

Impact of Safe at Home on Nonjudicial Foreclosures & Evictions

This aspect presents an interesting issue for conducting nonjudicial foreclosures in Minnesota. The nonjudicial foreclosure statute in Minnesota requires that all "occupants" of the property be properly served with the foreclosure notices, in contrast to just all "borrowers." Thus, service on the Secretary of State alone may be insufficient. Also, the foreclosure notices that are published and served would need to be limited as well to protect the Safe at Home borrower. Accordingly, it may be wise in such cases to proceed by judicial foreclosure, or carefully consider how the non-judicial foreclosure statutes can be complied with while also meeting the Safe at Home requirements.

Similarly, if a mortgage servicer or REO entity pursues an eviction action following foreclosure proceedings, they will want to ensure Safe at Home borrower or tenant occupants are protected from having their locations disclosed during the pendency of such an action. In various jurisdictions, it may be best to identify the case defendants as "John Doe and Mary Roe," where acceptable to the courts, to maintain the required protections for program participants.

As a reminder, the Safe at Home participant is required to give private companies a special notice they obtain from the Safe at Home office. Receipt of the notice prohibits the private companies from sharing the participant's name and location information with anyone unless the participant provides a prior written consent for a specific disclosure purpose. A violation of any of the provisions of the notice constitutes a misdemeanor punishable by imprisonment with a maximum time of 90 days, a fine up to $1,000, or both.

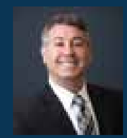
As a practice pointer, it is critical that lenders and servicers have procedures in place to immediately identify Safe at Home participants, conceal and protect the participants' location information system-wide, and ensure all future mailings are sent to the proper Safe at Home address. According to the Minnesota program administrator, a mortgage servicer is prohibited from even disclosing a participating borrower's protected information to the servicer's own agents and contractors.

How Mortgage Servicers Can Comply with Safe at Home

To comply with this legislation, a mortgage servicer should not share both the name and physical address of a program participant together to any third parties, absent written consent. For example, if a mortgage servicer wants a property inspection performed, the mortgage servicer should direct its vendor to inspect the physical address, without providing the name of the protected borrower to the agent conducting the inspection, unless written consent was provided by the Safe at Home participant expressly permitting the specific disclosure.

Finally, lenders and servicers will also want to coordinate with experienced, local counsel to help ensure full compliance with these types of laws through all aspects of servicing the mortgage loan.

THE AUTHORS



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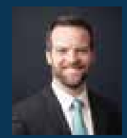

Kevin Dobie, Esq.

Decoding *DiNaples*: The Third Circuit Court of Appeals Analyzes the Use of QR Codes on Envelopes

BY LISA A. LEE, ESQ. | KML LAW GROUP, P.C.
USFN MEMBER (PA, NJ)

Ah, "A Christmas Story." It's a classic. No matter what holiday you celebrate near the end of each year, you've likely seen it. Who can forget Ralphie's epic quest to drink enough Ovaltine to earn his Little Orphan Annie Secret Society decoder pin? His anticipation when it finally arrives? ("Honors and benefits, already at the age of nine!") And the crushing letdown when he finally decodes the message? ("'Be sure to drink your Ovaltine?' A crummy commercial?!?")

Times have certainly changed since Ralphie was growing up in the 1940s. Now "decoding" the information contained in a symbol, such as a quick response ("QR") code, is simple as long as you have a smartphone.

Progress is a wonderful thing, and anyone involved in a business that deals with a high volume of returned mail knows that having an automated system for sorting and routing that mail is important to an efficient operation. However, progress can sometimes come with heightened compliance risk, as was illustrated by the recent opinion of the U.S. Court of Appeals for the Third Circuit in the case of *DiNaples v. MRS BPO, LLC*, 934 F.3d 275 (3d Cir. 2019). Before we get into the facts of *DiNaples*, a little history is in order.

Rewind to 2014, when the Third Circuit was faced with a case in which a debt collector sent a collection letter to a consumer using an envelope with a clear window. The window was large enough to reveal several pieces of information printed on the letter inside, including both the consumer's internal account number with the debt collector, and a QR code that, when scanned, revealed both the account number and the monetary amount of the debt.

The *DiNaples* opinion serves as a reminder that what's on the outside of an envelope is just as important as what's on the inside.

The case was *Douglass v. Convergent Outsourcing*, 765 F.3d 299 (3d Cir. 2014), the holding of which seems axiomatic today. The *Douglass* Court found that revealing the personally identifiable information of the consumer in a way that was visible from the outside of the envelope violated the Fair Debt Collection Practices Act ("FDCPA"), specifically 15 U.S.C. §1692f, which prohibits a debt collector from using any "unfair or unconscionable" means to collect a debt, including:

> [u]sing any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business. 15 U.S.C. §1692f(8).

Notably, the *Douglass* Court declined to affirm the District Court's reasoning that the information revealed by the debt collector met a "benign language exception" to §1692f(8). The benign language exception evolved, and was embraced by the court below, because the plain language of §1692f(8) allows only for the inclusion of the debt collector's address, and possibly its business name (if that name does not signal that debt collection is the nature of the business), on an envelope. Because more information is obviously necessary in order to send the mail at all, an exception for other "benign" language and symbols developed to prevent an absurd result from a literal reading of the statute. *Id.* at 302-303. This exception was meant to capture the use of language and symbols that did not serve to either 1) reveal the purpose of the letter as debt collection, or to 2) "humiliate, threaten or manipulate" the recipient. *Id.* at 301. Other courts of appeals had found such an exception for innocuous language on the face of an envelope, such as the phrase "Priority Letter." See, *Goswami v. American Collections Enterprise, Inc.*, 377 F.3d 488 (5th Cir.2004).

In *Douglass*, however, the Court found that because the consumer's account number was not "benign" as a threshold matter, they would not entertain the larger question whether such an exception was warranted as a general rule. In the Court's eyes, the account number was a piece of information that, when revealed to third parties, could expose the consumer's financial difficulties. Therefore, its revelation violated a core concept of the FDCPA, the prohibition on "invasion of privacy." *Id.* at 303. Interestingly, the plaintiff in *Douglass* had declined to pursue her argument that inclusion of the QR code on the envelope violated the FDCPA. Because this issue had been abandoned, the *Douglass* Court did not address it at all, paving the way for the *DiNaples* case, which was first filed in the U.S. District Court for the Western District of Pennsylvania the following year in 2015.

The facts of the *DiNaples* case are simple. The debt collector sent DiNaples a collection letter in an envelope that contained a QR code printed on the outside. When scanned, the QR code revealed a string of numbers that included DiNaples' internal account number with the debt collector. *DiNaples*, 934 F.3d at 277. DiNaples filed a class action lawsuit alleging that inclusion of the QR code on the envelope violated §1692f(8) of the FDCPA. The District Court granted summary judgment in favor of DiNaples on the issue of liability, and the debt collector appealed.

On appeal, the Third Circuit starts out by confirming that DiNaples had standing to sue because she had suffered a "concrete" injury when the QR code embedded with her internal account number was revealed on the outside of the envelope. The Court notes in its analysis that disclosure of private information embedded in a QR code that "anyone could easily scan and read," raises core invasion of privacy concerns. *Id.* at 280. Therefore, it was not necessary for DiNaples to show anything other than the revelation of her private information in order for her to establish standing to sue. *Id.* at 280.

Moving on, the Court turns to a discussion of the particular conduct of the debt collector, likening it to the conduct of the debt collector in the *Douglass* case. *Id.* at 281. The debt

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New York's Highest Court Considers Statute of Limitations

BY RICHARD P. HABER, ESQ.
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Since the financial crisis, servicers and their counsel have struggled with statute of limitations ("SOL") challenges in New York. Longer timelines, frequently dismissed cases, and tougher proof standards – even in uncontested cases – have created a toxic mix that can lead to total lien loss. Even worse, inconsistent and sometimes contradictory application of the law by different trial and appellate courts has led to confusion and uncertainty.

The same fact pattern might yield different results in Brooklyn than it would a mile away in Manhattan because they are subject to different governing appellate divisions even though both are part of New York City. But, relief may be on the way, or at least perhaps some clarity and consistency, because the Court of Appeals (New York's highest court) has one SOL case before it on the merits and a second case seeking permission to appeal.

The case already pending is *Freedom Mtge. Corp. v. Engel*, 163 A.D.3d 631 (2d Dep't 2018), *lv. app. granted* 103 N.Y.S.3d 12 (APL-2019-00114). At issue in *Engel* is whether a lender who exercises the right to accelerate through the initiation of foreclosure may revoke that election by voluntarily discontinuing the action at a later date. The Appellate Division, Second Department, found that a lender cannot, by discontinuance alone, revoke the election to accelerate a mortgage debt.

Offering no explanation or reasoning, the Second Department held that "the plaintiff's execution of the January 23, 2013 stipulation did not, in itself, constitute an affirmative act to revoke its election to accelerate, since, inter alia, the stipulation was silent on the issue of the revocation of the election to accelerate, and did not otherwise indicate that the plaintiff would accept installment payments from the defendant." 163 A.D.3d at 633.

But, this conclusion is not consistent with precedent from the Court of Appeals that goes back well over a hundred years. Addressing the legal effect of the voluntary discontinuance of a prior foreclosure in *Loeb v. Willis*, 100 N.Y. 231 (1885), the Court of Appeals said "[t]he foreclosure action was discontinued and all the proceedings therein thus annulled...By the discontinuance of the action the further proceedings in the action are arrested not only, but what has been done therein is also annulled, so that the action is as if it never had been." 100 N.Y. at 235.

The legal principle of annulment through discontinuance has been reiterated in subsequent decisions. For example, in *Yonkers Fur Dressing Co. v. Royal Ins. Co.*, 247 N.Y. 435, 444 (1928), the Court of Appeals affirmed that cases that are discontinued are "as if they had never begun." And, in *Brown v. Cleveland Trust Co.*, 233 N.Y. 399, 406 (1922), the Court noted that "no adjudication" in a discontinued action "b[inds] any one."

Given that a significant number of cases with SOL implications involve earlier foreclosures that were voluntarily discontinued, it would go a long way in the industry's battle with the SOL if the Court reverses *Engel* and holds that a voluntary discontinuance annuls a prior election to accelerate.

While *Engel* deals with de-acceleration, there is another case that the Court will potentially consider that deals with whether the mere filing of a foreclosure complaint serves to accelerate the entire debt in the first place. In a trial court decision issued in the Spring of 2017, *Nationstar Mortgage, LLC v. MacPherson*, 56 Misc. 3d 339 (Supreme Court, Suffolk County, April 3, 2017), the Court held that the terms of the mortgage contract govern acceleration, and when the mortgage is drawn on the Freddie/Fannie Uniform Instrument, acceleration could not actually be accomplished until a final judgment of foreclosure is entered. This is because under paragraph 19 of the Freddie/Fannie Uniform Instrument, the borrower retains the right to reinstate the loan until judgment is entered.

The Court held that "the lender bargained away its right to demand payment in full simply upon a default in an installment payment or the commencement of an action and has afforded the borrower greater protections than that set forth in the statutory form of an acceleration clause under Real Property Law § 258 or under the holding [of prior controlling New York law regarding acceleration]."

The Court reasoned that the loan could not be deemed accelerated, so long as the right to reinstate exists and that "the mortgage remains, in essence, an installment contract until a judgment is entered." In other words, the loan could not be deemed accelerated until the right to reinstate was extinguished. "Under the express wording of the mortgage document, plaintiff has no right to reject the borrower's payment of arrears in order to reinstate the mortgage, until a judgment is entered." As a result, "plaintiff does not have a legal right to require payment in full with the simple filing of a foreclosure action."

Because the vast majority of old, dismissed foreclosure cases involve Freddie/Fannie Uniform Mortgage Instruments, with dismissals that occurred pre-judgment, many potential SOL problems could be solved by the MacPherson argument. But, the utility of the case was short-lived – less than two years – because on March 13, 2019, the Appellate Division, Second Department, abrogated the decision in its opinion in *Bank of New York Mellon v. Dieudonne*, 171 A.D.3d 34 (NY App. Div. Second Dept., March 13, 2019).

In *Dieudonne*, the Court determined that the lender's right to accelerate is independent of the borrower's right to reinstate. The Court held that "[c]ontrary to the plaintiff's contention, the reinstatement provision in paragraph 19 of the mortgage did not prevent it from validly accelerating the mortgage debt." Even though "[t]hat provision effectively gives the borrower the contractual option to de-accelerate the mortgage when certain conditions are met" the lapsing of that right is not a condition precedent to acceleration.

Rather, the conditions required for acceleration are all set forth in paragraph 22 of the mortgage and the "reinstatement provision in paragraph 19 of the mortgage was not referenced in, or included among, those conditions listed in paragraph 22." The Court further observed that the reinstatement provision in paragraph 19 does not include any language indicating that it serves as a condition precedent to the plaintiff's right to accelerate the outstanding debt, but instead, "the language of paragraph 19 indicates that the plaintiff's right to accelerate the entire debt may be exercised before

(continued on page 10)

Scanning QR Codes Even Easier Today

As an aside, we note that scanning a QR code is even easier now than it was when the letter in *DiNaples* was sent. Apple obviated the need for a separate app in the iOS 11 update released in September 2017. Now, all you have to do to scan a QR code is open the iPhone's camera and hover over the code to reveal the embedded information. Android has similar functionality.

To illustrate the ease with which this can be done, open your smartphone camera and scan this QR code to go directly to the *DiNaples* opinion:

Decoding *DiNaples* Continued from Page 6

collector in *DiNaples* attempted to argue that *Douglass* was distinguishable because the QR code, unlike the account number at issue in *Douglass*, was "facially neutral" and did not reveal any information unless it was scanned by a third party, in effect arguing that a benign language exception should apply. *Id.* at 282. The *DiNaples* Court was not persuaded, having previously noted that the District Court had found that a QR code could be scanned by "any teenager with a smartphone app," and that use of the code was not materially different than simply printing the account number on the envelope. *Id.* at 282.

The debt collector in *DiNaples* also argued that, even if its conduct violated the FDCPA, it should be able to avail itself of the bona fide error defense contained in 15 U.S.C. §1692k(c). That section provides that a debt collector cannot be held liable for a "violation that was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." *Id.* at §1692k(c). The Court looked to the Supreme Court's holding in *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A.*, 559 U.S. 573, 130 S.Ct. 1605, 176 L.Ed.2d 519 (2010), for the proposition that "the bona fide error defense in §1692k(c) does not apply to a violation of the FDCPA resulting from a debt collector's incorrect interpretation of the requirements of that statute." *Id.* at 604–05, 130 S.Ct. 1605, and went on to find that the conduct in *DiNaples* was not protected as a bona fide error because the debt collector intentionally printed the QR code on the envelope. The facts that the debt collector was well intentioned and did not believe that it was violating the FDCPA did not change the analysis that the conduct resulted from a mistake of law, rather than from a mistake of fact. *Id.* at 282.

The *DiNaples* opinion serves as a cautionary tale, and as a reminder for all who are compliance minded that what's on the outside of an envelope is just as important as what's on the inside.

THE AUTHOR

Lisa A. Lee, Esq.

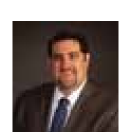
Statute of Limitations Continued from Page 9

the defendant's rights under the reinstatement provision in paragraph 19 are exercised or extinguished."

As a result, the Court concluded that acceleration occurs with the filing of the earlier foreclosure complaint, irrespective of the borrower's right to reinstate until the entry of judgment. In reaching this conclusion, the Court specifically referenced MacPherson, along with four post-MacPherson decisions that followed its logic, and stated: "[t]o the extent that decisional law interpreting the same contractual language holds otherwise, it should not be followed." As a result, the MacPherson argument (that acceleration does not occur until the entry of judgment) is an arrow that has been lost from the industry's SOL quiver – at least for now.

Bank of America (the servicer of the Dieudonne loan) recently filed a motion for permission to appeal with the Court of Appeals. USFN has filed a motion for permission to file an amicus brief in support of Bank of America's petition and hopes that the Court will take the *Dieudonne* case, consider it together with Engel, and provide a decision addressing acceleration, de-acceleration and policy issues involving SOL. Separately, USFN will be moving for permission to file an amicus brief in support of Freedom Mortgage in the Engel case.

THE AUTHOR



Richard P. Haber, Esq.

US USFN EXECUTIVE SERVICER SUMMIT

In October, 95 representatives from USFN member firms and five associate members joined 31 servicers at the The Breakers resort in Palm Beach, Florida for the 2019 Executive Servicer Summit.

General session topics focused on the state of the industry following the Supreme Court's decision in *Obduskey v. McCarthy & Holthus LLP*; the importance of day-to-day relationships and best practices in consumer risks and system management; and the use of technology including artificial intelligence and social media, as well as reputation management. Keynote speaker Kelly McDonald discussed how to improve the workplace environment to avoid conflict between people of different genders, ages, life stages, races, ethnicities and communication preferences.

For information on upcoming USFN events and educational opportunities, visit www.usfnevents.org.

Keynote speaker Kelly McDonald signs copies of her book for attendees.

member retreat

Nestled in the mountains, the Ritz-Carlton, Bachelor Gulch in Avon, Colorado served as the backdrop for the 2019 USFN Member Retreat in November. The three-day event included 56 members from 37 companies taking part in education for CLE credit and networking opportunities.

Author and four-time IRONMAN triathlete Meredith Atwood was the keynote speaker, discussing the experience of a "Year of No Nonsense." Atwood's philosophy is that getting out of your own way can help take charge of your health, happiness and success. The title and subject matter is from her latest book, "The Year of No Nonsense: How to Get Over Yourself and On with Your Life," which was released in December of 2019.

Panel discussions that were available for CLE credit included subjects such as steps to consider when combining or acquiring firms ("Ethical and Legal Considerations of Law Firm Mergers or Acquisitions"); the growing trend of remote technology ("Working in the Modern Age of Technology"); and the various aspects of great leadership ("Building Leaders").

Members also took part in the annual meeting, where they were briefed on USFN's advocacy on behalf of its members, the new educational offerings and schedule for 2020, and the organization's annual financial reports.

The 2020 Member Retreat is scheduled for November 5-7 in Miami, Florida.

Andy Saag (left), USFN's 2019 Member of the Year Award winner, pictured with USFN President Marty Stone

Associations and Receiverships: Will the Mortgagee Be Required to Pay?

JANE E. BOND, ESQ. & MATTHEW MORTON, ESQ. | MCCALLA RAYMER LEIBERT PIERCE, LLC
USFN MEMBER (AL, CA, CT, FL, GA, IL, MS, NV, NJ, NY)

Receivership and homeowners' associations are strange bedfellows. Instead of filing an action to collect assessments, associations are turning towards receivership actions. A receivership action allows a receiver to be appointed to manage and rent the property out with such funds used to recoup expenses and assessments along with an equitable lien for any expenses or assessments not recovered from the rental of the property.

In Florida, this process is authorized by Fla. Stat. §720.3085(1)(e), (8)(a) and (8)(f) and further requires the association to serve and provide the lender with a copy of the petition before obtaining an order granting same if the lender is going to be responsible for any amounts associated with the receivership.

This issue played out in *Fannie Mae v. JKM Servs.*, LLC, 256 So. 3d 961 (Fla. 3d DCA 2018). In *JKM*, the association filed an action for a receiver for units subject to foreclosure actions or soon-to-be-filed foreclosure actions. Id. at 964. The court granted the petition and appointed JKM Services as the receiver on behalf of the association. *Id.* Subsequently, the lender completed their foreclosure action, was the successful bidder at the foreclosure sale and acquired title to a property under this receivership. Id. at 965. The receiver never notified the lenders of the receivership and, even after foreclosure was filed, never asserted its existence in the foreclosure action. *Id.* The lender sought the safe harbor amount due to the association. *Id.* Instead of receiving the safe harbor amount, the lender received an amount from the receiver which included multiple years of past due assessments, receiver's fees and attorneys' fees, among other expenses. *Id.* The lender filed a motion to intervene in the receivership to limit amounts to safe harbor, which was denied. *Id.*

Any attempt to obtain a receivership should be addressed timely to avoid the imposition of a receivership.

In reversing, the court held that the lender was not a party to the initial petition for receivership nor were they noticed of same until such time as they became owner of the property. As such, the court in *JKM* held that the lender did not become liable or responsible for the fees or any amounts beyond the safe harbor amount. *Id.* 969.

In light of the rationale of *JKM*, it is important that any lender served with such a petition take immediate action to oppose and prevent the entry of an order of receivership. The question becomes how should a lender protect its interest?

First, the lender should review whether the mortgage includes a clause regarding the appointment of a receiver or assignment of rents. If either exists, they should be asserted in opposition to any petition. Second, the lender should review the loan and, if appropriate, move forward with foreclosure. Lastly, the lender should review whether the property is vacant or occupied by someone other than the borrowers as Fla. Stat. §702.10 allows a court to order mortgage payments be deposited monthly with the clerk of court until judgment is entered.

If it appears that the court will appoint a receiver, a lender should assert in opposition that any receivership be granted for a limited duration, that any expenses above a specified amount be approved by the court before being incurred and that monthly statements be filed with the court reflecting how monies received are applied.

In summary, receivership actions have become a tool used by associations to try to benefit from those properties, but it only becomes an effective tool if the lender is noticed and fails to take action to address same. As such, any attempt to obtain a receivership should be addressed timely to avoid the imposition of a receivership.

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Report: REO/Eviction

California Governor Signs Statewide Rent Control Bill

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USFN MEMBER (CA)

California has painstaking rent control and eviction control ordinances in cities such as Los Angeles, Santa Monica, San Francisco, Oakland, and Berkeley, to name a few. Historically, however, in reality there have only been a few cities with rent control ordinances. Therefore, for most of California the standard process for post-foreclosure evictions has been used. The California legislature introduced and passed Assembly Bill 1482 designed to establish statewide rent control and despite opposition from landlords and mortgage servicers, the Governor signed the bill, which became effective January 1, 2020.

The primary purpose of this bill was to prevent landlords throughout the state from arbitrarily raising rental amounts. This Bill caps rental increases to 5% plus inflation, or 10%, whichever is lower. The Act will sunset January 1, 2030.

New Civil Code Sections 1946.2 and 1947.12 became effective January 1, 2020. These sections prohibit property owners from terminating a lease of a tenant who has been occupying the property for 12 months, without "just cause" and the "cause" must be stated within the notice. Additionally, there is a new requirement that a notice of violation and opportunity to cure must be served before the notice of termination, for those instances where the violation is curable. Furthermore, a no-fault "just cause" eviction will require relocation assistance of at least the equivalent of one month's rent. If the relocation is not paid, the notice of termination will be declared void. These provisions cannot be waived by the tenant, and if an attempt is made to do so, the waiver of rights provision will be declared void. It is important to note that despite the "statewide" provisions there is nothing to prevent existing local rent control and eviction control ordinances from having a higher level of protection for their tenants.

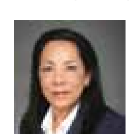
Pursuant to the California Constitution (Cal Const, Art. XI § 7), California rent control and eviction control provisions are a valid exercise of a city's police power within that city's own jurisdiction. More specifically it states that "a county or city may make and enforce within its limits all local, police, sanitary and other ordinances and regulations not in conflict with general laws". The scope of this police power is subject to displacement by general state law where the charter or ordinance purports to regulate a field fully occupied by state law. (*Birkenfeld v. Berkeley*, (1976) 17 Cal. 3d 129).

California has 482 cities and for those cities that do not currently have a rent or eviction control ordinance, they may opt to simply abide by the provisions of the newly enacted statutes. Cities may however, if they want additional requirements, create their own "rent control" ordinance or a "just cause" eviction ordinance. The question remains what existing ordinance(s) will become the template for drafting their ordinance. Property owners can only hope that the majority of cities will either elect to simply follow the limited provisions of Civil Code Sections 1946.2 and 1947.12 or alternatively create uniform but more limited ordinances, as opposed to mirroring the rigorous existing ordinances in Los Angeles, Santa Monica, San Francisco, Oakland, and Berkeley, by way of example.

Servicers should ensure that they have procedures in place to determine who is occupying the property as soon after the foreclosure sale as possible. Furthermore, it is imperative that the eviction attorney be notified if there are tenants in the property, as the type of occupancy will require different notices, as well as a relocation fee in order to remove tenants from the premises.

This article is not intended to be an extensive or exhaustive review of all the nuances of either rent control or just cause eviction control ordinances, but rather an introductory overview of what the new statewide rent control statutes provide and how it affects the ability of a servicer to proceed with a normal post-foreclosure eviction.

THE AUTHOR



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Report: Bankruptcy

Clarifying 'Usual Place of Abode' in SCRA Collection Cases

BY BLAIR GISI, ESQ. | SOUTHLAW, P.C.
USFN MEMBER (IA, KS, MO, NE)

In overturning the default judgment granted against the debtor in *Coastal Credit, LLC v. McNair*, 446 P.3d 495 (Kan. Ct. App. 2019), the Kansas Court of Appeals has recently made an important ruling regarding service of process on active military debtors.

The debtor in *McNair* was in active status in the Army and stationed in Africa when the financing contract he had entered into to purchase a car went into default. After the default, the creditor repossessed the car, sold it, and then filed a limited action against the debtor to pursue the remaining deficiency.

While the debtor was stationed in Africa, his family was living in Manhattan, KS and in February 2014, the process server executed service upon the debtor's family at the "usual place of abode" per the process server's field notes. It was also noted that the debtor was in the military and stationed in Africa until June 2014.

The debtor failed to respond or appear to any of the subsequent pleadings and hearings and after complying with the relevant Service members Civil Relief Act (SCRA) requirements, default judgment was granted against the debtor in August 2015. When the debtor noticed his wages being garnished in October 2017, he sought to set aside the judgment and disgorge the garnished funds.

To support his motion, the debtor argued that the service was ineffective since the debtor was not served at his "usual place of abode" as defined by *Coleman v. Wilson*, 1995 Kan. App. Unpub. LEXIS 932 (Ct. App. Dec. 1, 1995). In that case, this court held that a military service person's usual place of abode is where the person lives, eats, sleeps, and works at the time of the attempted service. However, the district court denied debtor's motion on the grounds that service on the debtor's wife at their Manhattan, Kansas residence as the usual place of abode and that the service was valid. Debtor timely appealed that ruling.

Focusing on the "usual place of abode" argument, which comes from Kan. Stat. Ann. § 61-3003, the Court of Appeals overturned the district court.

The Court of Appeals began its analysis with the legislative intent of K.S.A. 2018 Supp. 77-201 which provides:

> *Usual place of residence' and 'usual place of abode,' when applied to the service of any process or notice, means the place usually occupied by a person. If a person has no family, or does not have family with the person, the person's office or place of business or, if the person has no place of business, the room or place where the person usually sleeps shall be construed to be the person's place of residence or abode.*

The Kansas Court of Appeals stated that a person's usual place of abode may be determined on a case-by-case basis.

Finding that the legislative intent of the statute was clear and unambiguous, the Court of Appeals applied the statute to mean that the debtor's usual place of abode in this situation was "the room or place where he usually slept," which at the time, was in Africa. The Court of Appeals went on to further state that a person's usual place of abode may be determined on a case-by-case basis and had the debtor been on vacation or brief business trip to Africa, for instance, then Manhattan

(continued on page 20)

Member Moves + News

Bendett & McHugh, P.C. (USFN Member – CT, MA, ME, NH, RI, VT) held its 9th Annual Miles for Miracles 5k and Family Fun Walk/Run to benefit Connecticut Children's Medical Center (CCMC) on September 21, 2019. This year the firm was able to raise $15,000 for the hospital and the firm has raised over $60,000 for CCMC since their first race back in 2010. The firm has also named two new partners: **Eva M. Massimino** and **Sonja J. Bowser**.

Lerner, Sampson & Rothfuss (USFN Member – KY, OH) had a fundraiser for October Breast Cancer Awareness and raised $1,300 to benefit the Cris Collinsworth ProScan Fund.

Martin Leigh PC (USFN Member – KS, MO) proudly announces the addition of two new shareholders, **Amy Ryan** and **Greg Todd**. Amy is Martin Leigh's partner in its St. Louis/Clayton office and has been with the firm since 2007. Amy manages the St. Louis office and staff while maintaining her litigation practice for Martin Leigh's clients. Greg, a partner in the Kansas City office, has been with the firm since 2014 and manages the Missouri creditor's rights practice and the firm's bank transactional work.

USFN Members and Associate Members may send possible items for the "Member Moves + News" section to Jeff Loy at jloy@usfn.org.

From the President Continued from Page 3

Information for all of these educational opportunities may be found on our new event website, USFNEvents.org.

USFN also plans to continue to lead the charge on the issues facing the industry in 2020. These include working closely with vendors to maximize the efficiencies and productivity of our member firms, monitoring any legislative changes across the country, advocating and participating in amicus briefs for any high profile pending cases, and participating in regular discussions with the appropriate agencies and GSEs regarding compliance and other key issues.

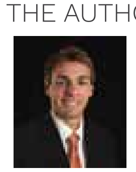
Usual Place of Abode Continued from Page 18

would have constituted his usual place of abode. Here, the active military deployment to Africa for six months was enough to shift his usual place of abode from his family's residence to Africa.

The Court of Appeals also made an interesting distinction between a family's usual place of abode the debtor's usual place of abode in finding that there was ineffective service on the debtor, stating that they are not necessarily the same and that the family's usual place of abode does not control the debtor's usual place of abode.

When attempting service on an active military debtor, the *McNair* case serves as an outline for both the scrutiny the debt collector may face in obtaining a default judgment as well as the additional steps that may be necessary in ensuring the judgment can withstand that scrutiny.

THE AUTHOR



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