TRUSTEE TIMES

ARIZONA TRUSTEE ASSOCIATION
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SPRING | SUMMER 2019 NEWSLETTER

NON-JUDICIAL FORECLOSURE IS NOT DEBT COLLECTION UNDER THE FDCPA

By Michael A. Wrapp | pg 10

BEFUDDLED IN BOWIE

BY PAUL RHODES

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ATA save the date

THE 2019 ATA CONVENTION

The ATA Annual Convention will be at Harrah's Ak-Chin Resort & Casino in Maricopa, Arizona, August 21-23, 2019

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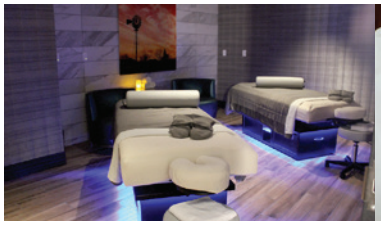

TREAT YOURSELF TO REST AND RELAXING WHILE AT AK-CHIN DURING THE ATA CONFERENCE

Trustee Times is published twice per year by the Arizona Trustee Association.

ATA DISCLAIMER

2019 ATA BOARD MEMBERS

NEWSLETTER COMMITTEE

The ATA is a non-profit corporation devoted to serving the needs of Trustees and related industries. For membership information, contact Tracey Bayne tracey.b@sfsaz.com

For more information on the ATA, please visit arizonatrusteeassociation.com.

President's letter

ATA
Arizona Trustee Association

Dear Fellow Members and Affiliates of the Arizona Trustee Association:

Welcome to another great year with the Arizona Trustee Association. I am honored to be your President this year. I am committed to making positive changes so that you can get more out of your membership. One change so far is a new venue for our monthly educational luncheons. Starting in April, the luncheons will be at Bluewater Grill! Bluewater has a really nice private room for us and excellent plated entrees to choose from. Join us for the next luncheon and try out the great menu. The Board is also planning to try a new venue for the Annual Meeting/ Holiday Party. This year is going to be exciting!

I am also focused on increasing our membership and increasing member participation. I am calling on all current members to please reach out to our industry colleagues and invite them to a luncheon, or the annual convention, or the holiday party. We especially need some young blood in the ATA to carry on the strength and values of the ATA. I am also asking all members to join a committee. The Convention Committee is about to have its first meeting to start organizing this year's annual convention so please contact the Co-Chairs today to volunteer! Brenda Tucson and Tracey (Bayne) Drummond are experts at putting the convention together but they need your help!! Katie TerBush is the Education Chair again this year and has been doing an excellent job, but she could use your help and ideas. Please send her your ideas for speakers and educational topics for lunches and the convention.

Great news on the legislative front! The ATA joined the UTA, CMA and CMBA in filing an amicus brief with the U.S. Supreme Court in the case of Obduskey v. McCarthy Holthus. The circuit courts were divided on the subject of whether non-judicial foreclosures are covered by the Fair Debt Collection Practices Act (FDCPA). In a unanimous decision, SCOTUS held that businesses engaged in non-judicial foreclosure proceedings do NOT qualify as debt collectors under the FDCPA. Your continued support of the ATA allows us to help protect our industry.

This case is a good reminder of one of the reasons the ATA exists. Since its inception, the ATA has been actively involved in Arizona legislation. In fact, ATA members have helped draft most of the current Arizona Deed of Trust statutes and have been instrumental in shooting down proposal legislation that would be bad for our industry. For the past few years, the ATA has retained Triadvocates as our lobbyist. Lauren King has done a great job of keeping our Legislative Committee apprised of new bills that may affect our industry and then advocating for or against those bills depending upon the ATA's best interest. A huge shout out to Lauren, Chris McNichol and the Legislative Committee.

SAVE THE DATE: The Annual Convention will be at Harrah's Ak-Chin Resort and Casino in Maricopa, Arizona, August 21-23, 2019. This a week earlier than usual so please put these dates on your calendar.

Again, thank you for trusting me to lead the ATA this year. We have a terrific Board of Directors this year and I am confident in our ability to make this year the best ever. I am always available to hear your ideas for making the ATA even better than it is (if that is possible), so please call or email me with your thoughts and ideas.

Kim Lepore
President
Arizona Trustee Association 2019

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2019 LUNCHEON MEETINGS

TUESDAY - MAY 14
TUESDAY - JUNE 26 *APLA/ATA LUNCHEON*
TUESDAY - OCTOBER 8
TUESDAY - NOVEMBER 12

HOLIDAY PARTY
TUESDAY - DECEMBER 10th

TOP TEN MARKETING MISTAKES LAWYERS MAKE AND HOW TO AVOID THEM

By Terrie S. Wheeler, MBC

I am convinced that every lawyer is well-intentioned when it comes to having a desire to market and grow their practice. I also know the only way to turn good intentions into success is to act. Over the past 25+ years, I have seen lawyers thrive and grow. I have also seen lawyers with good intentions stagnate into a perpetual state of wheel-spinning. As a result, they get discouraged and convince themselves if they do good work, clients will find them. The proverbial easy button, right? Please consider the top mistakes I see lawyers making, so you can avoid the pain, expense, and frustration of pursuing marketing activities that don't work.

"I'M TOO BUSY TO MARKET" – There is an inherent disincentive to follow up with your contacts or write the article you've been meaning to write if you are working 12-hour days. Remember that if you wait until you have time to market, it will likely be too late. Marketing is something you must weave through the fabric of your practice. Avoid this mindset by doing one small thing every day to build your practice. Update your bio, check LinkedIn, outline a blog, send an email to a contact to plan lunch. Just one thing. Every day. It works!

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BLOCKCHAIN & REAL ESTATE:
WHAT'S IT ALL ABOUT?

By Henry Elder & Paul Monsen, Digital Asset Advisors

Blockchain technology is equal parts derided and full of promise. It offers a revolution on the order of the internet, but like the early internet, the blockchain is poorly understood and can be used by anyone - legitimate business people and criminal elements alike. The technology has the potential to open up borders for international real estate investment, create liquidity for previously illiquid positions, compress transactions from a multi-month process to weeks or days, end the tyranny of wire cutoffs, and offer many other efficiencies. Unfortunately, up until 2017 the blockchain was a largely unregulated place, with many scams, frauds, and crimes utilizing the lack of oversight to flourish.

From 2009 through the end of 2017, the blockchain industry grew to nearly $1 trillion by market cap, then experienced a significant contraction as regulators stepped in and popped the bubble. This bear market in cryptocurrency prices, combined with regulatory scrutiny, has had the welcome effect of "washing out" most of the low-quality projects from the industry, and has allowed regulated services to emerge with practical applications in the field of real estate.

First, a quick explanation of what blockchain is. The internet operates by a network of computers (including yours!) sending data back and forth. The blockchain allows you to send data back and forth that is provably unique. Uniqueness is necessary in order to digitize anything of value. If you purchase a digital certificate entitling you to ownership of Gold Bar #1 in a vault, you need to make sure that the seller of that certificate didn't sell 1,000 other certificates of ownership for Gold Bar #1. With the internet, you need some trusted intermediary to verify that there's only one ownership certificate for Gold Bar #1 in existence. The blockchain does this automatically, by maintaining an auditable, immutable trail of every data transaction that occurs on the network. The transactions are grouped into "blocks". It's this record of transactions that makes up the "blockchain". Some blockchains have been doing this without failure for over a decade, and transfer billions of dollars on a daily basis. This part of blockchain technology is called the "protocol layer".

The protocol layer allows many of the cumbersome, manual, paper-based processes for value transfer to become fully digital. What this further allows for is the creation of software on top of the protocol layer with simple and easy-to-use interfaces and experiences for digital transfer of ownership, including across borders. This opportunity is being applied across various segments of the real estate industry, including title, escrow, residential purchases, commercial investment, investor management, and compliance.

On the residential side, startups have been innovating since 2015. Velox.re implemented one of the first experimental pilots of title on the blockchain, working with the Cook County Recorder's office to test the process of registering a title on the blockchain and effecting a transfer. Propy, another blockchain startup, is building a combined MLS and online transaction platform to streamline more of the residential sales process. Propy picked up where Velox left off, and has been working with three counties in Vermont to register residential titles on the blockchain. Meanwhile, the core Propy transaction platform has facilitated millions of dollars worth of residential real estate transactions, all across the world. HouseHodl is another startup, which is using the value-transfer mechanism of the blockchain to cre¬ate innovative new escrow solutions that could reduce the costs and risks of the escrow process. Brokers such as The Crypto Realty Group have built a foundation of acceptance by buyers and sellers for using cryptocurren¬cies such as bitcoin to purchase homes.

In 2018 we saw the first commercial real estate trans¬actions move onto the blockchain. Slice.market "toke¬nized" one of the first commercial properties in the country, taking a $5 million LP equity position in an NYC ground-up development and legally endowing ownership into blockchain-based tokens. Those tokens were then sold to international investors, which not only paved the way for more international investment into US real estate, but also offered liquidity to the to¬ken holders that a typical LP equity investor wouldn't enjoy. By the end of 2018, tokenization was in full swing, with Elevated Returns tokenizing the St. Regis resort in Aspen, Propellr tokenizing a condo project in NYC, and Harbor tokenizing a student-housing project in South Carolina. Companies such as Open Finance Network are providing blockchain-enabled trading sys¬tems to trade the tokens, creating liquidity in even the driest parts of the real estate capital stack. Each of these projects has broken new ground in terms of removing frictions that are traditionally inherent in the transac¬tion process, creating streamlined new investor-man¬agement systems, and most importantly, refining and perfecting the compliance and secondary-market liquid¬ity tools that will upend how the market perceives real estate liquidity.

As we move further and further from the wild days of 2017 towards regulated, compliant solutions, the prom¬ise of blockchain only grows greater. The pilots of 2015 through 2018 have demonstrated many of the potential efficiencies that blockchain can bring to our industry, and larger deals are coming down the pipeline with ma¬jor institutional players seriously considering the tech¬nology. Ultimately, widespread adoption is a prerequi¬site to realize the full effect of blockchain's benefits. For many in the blockchain field, the focus this year will be on education and outreach to traditional real estate stakeholders. Blockchain is not a threat to most business models - it's a huge opportunity to seize the future by understanding and adopting these innovative tools that are being built. We built solid momentum in 2018. Will 2019 be the year of mainstream blockchain adoption in real estate?

LEGISLATIVE UPDATE

By Lauren King - TriAdvocates

This has been an eventful legislative session at the Capitol, dominated by tax conformity, political games, and an ethics investigation.

- Tax Conformity: The legislative session started off on extremely rocky terms due to the strong disagreement between the Legislature and Gov. Doug Ducey on how to conform with the new federal tax code—whether to tax rates to hold taxpayers harmless or just conform without lowering the rate and thus collecting extra money to be spent on state programs. Back in February – despite very clear opposition from the Governor's Office – two Republican legislators introduced companion bills that conformed to the federal code and also reduced the individual tax rate to make the legislation revenue neutral. Lawmakers double dog dared the governor to veto this plan, thus making him responsible for tax confusion and Arizonans paying more in taxes. Less than 24 hours after passage in both chambers, the governor thumbed his nose at the GOP-controlled Legislature and put his big red veto stamp on the bill. While Arizona taxpayers have less than one week before they must file their federal and state taxes, the issue continues to be the source of heated conflict between the governor and legislators—and can be blamed for the lengthy legislative session, which we expect will last for at least another four to five weeks as budget negotiations slowly progress.

- Political Games: House-versus-Senate power struggles and arm-twisting—just your average day down at the Capitol this session. Much to the chagrin of several members of the Senate, House Speaker Rusty Bowers has decided to kill several divisive bills that came out of the opposite chamber. For the moment, measures concerning charter school reform, new tuition rates for DREAMers and a repeal of last year's controversial car registration fee increase appear to be dead. However, we don't expect these to go down without a fight from Senate leadership, who have already started devising plans to ensure the proposals receive equal treatment. We expect some of these ideas to be revived, amended onto other bills or squeezed into the budget.

- Ethics Investigation: Last week, the Yavapai County Board of Supervisors voted 4-1 to appoint former State Senate President Steve Pierce to the state Legislature. Within hours, he was sworn in to the House of Representatives and immediately got to work voting on bills. Pierce, who comes as a breath of fresh air and brings invaluable institutional knowledge, will fill the seat left vacant by David Stringer, who resigned last week amid an ethics investigation. Pierce is no stranger to the Capitol—he's a well-respected Arizona rancher and well-known politico who served in the Legislature for eight years and as president of the Senate in 2012. Given his extensive experience and value in the art of compromise, he is expected to be one of the most influential members of the Legislature at a time when both parties are struggling to reach the middle ground on most issues. Further, he's not planning to run for the seat in 2020, which will give him more freedom to exercise his role as lawmaker, without the political concerns of facing an election.

In addition to tracking all relevant legislation, TRIADVOCATES has closely monitored and/or actively engaged on behalf of the ATA on the following bills:

- HB 2637 (condominium, homeowners' associations; lien priority): Brought to the sponsor by two constituents, this bill would have established super lien priority for HOAs. Given the extremely concerning consequences of this proposal, TRIADVOCATES immediately engaged. The bill sponsor held the bill in committee and will not be pursuing the issue.

- SB 1216 (uniform receivership act; commercial property): Spearheaded by the Arizona Bankers Association, SB 1216 establishes the Uniform Commercial Real Estate Receivership Act. The bill passed out of the Senate by unanimous vote and currently awaits a vote in the House. The ATA submitted a slip of support in both chambers.

- SB 1030 (remote online notarization; registration): Spearheaded by the title industry, the bill passed the Senate and House by unanimous vote and has been transmitted to the governor for his signature. The ATA submitted a slip of support in both chambers, along with the Arizona Secretary of State's Office, Land Title Association of Arizona, Arizona Association of REALTORS, Arizona Mortgage Lenders Association and Arizona Bankers Association, among other industry groups.

- SB 1309 (renewal of judgments; applicability): Spearheaded by the title industry, SB 1309 passed both chambers by unanimous vote and was signed into law by the governor on March 22. The bill establishes further clarification surrounding legislation passed last session (HB 2240). More specifically, it clarifies that a judgment that had not expired before August 3, 2018 (the effective date of HB 2240), has a life of 10 years (likewise a judgment lien). The Arizona Creditors Bar Association — the group that spearheaded the legislation last year — was supportive; there was no opposition. [Chapter 20] Amends sections 12-1551, 12-1611, 12-1612 and 12-1613, Arizona Revised Statutes; relating to judgments.

LINKS TO MORE INFORMATION FOR ABOVE:

HB 2637: https://www.azleg.gov/legtext/54leg/1R/bills/HB2637P.pdf
SB 1216: https://www.azleg.gov/legtext/54leg/1R/bills/SB1216S.pdf
SB 1030: https://www.azleg.gov/legtext/54leg/1R/bills/SB1030S.pdf
SB 1309: https://www.azleg.gov/legtext/54leg/1R/laws/0020.pdf

SAVINGS CLAUSES IN FORECLOSURE

By Van Ness Attorneys

An overlooked topic in foreclosure law is the effect of savings clauses in loan documents. Notes, mortgages, modifications, and just about any other document affecting the validity or viability of a loan may have a savings clause. Review of loan document templates is necessary because savings clauses may be helpful, but also may not completely solve the issues they were meant to address.

Simply stated, a savings clause is a clause in a contract that provides that the contract will remain intact and enforceable to the extent allowable by law, even if certain portions of the contract are deemed invalid or unenforceable. These clauses can both be general and apply to the contract as a whole or specific and apply to key provisions or subject areas of the contract.

A general savings clause is frequently styled as a "severability" clause because the contract explains that the parties intend for the court to sever any portion of the contract that is legally invalid or unenforceable while maintaining the remainder of the agreement. These clauses are helpful to clarify issues that may be severed. See generally Gessa v. Manor Care of Fla., Inc., 86 So. 3d 484, at passim (Fla. 2011). However, courts may find certain portions of the clause ineffective. For instance, a limitations of remedies provision is not severable, regardless of whether the contract contains a severability clause. Id.at 490-491 & n. 5. Thus, a severability clause may be an attractive addition to a loan document, but it must be understood that there are circumstances under which the provision will, itself, not be enforced.

In the case of mortgage promissory notes, a specific savings clause will usually be focused on interest and the calculation of payments. These clauses may clarify that interest shall not accrue or be charged at any unlawful rate. This type of savings clause can have multiple purposes. First, it can act to attempt to sever any provision that would allow for unlawful interest. Secondly, it can function as evidence of intent.
This second function is helpful in the face of a claim or defense that the loan at issue is usurious. Usury occurs when a loan is intentionally given with an interest rate that exceeds the maximum amount allowable by law. A usurious loan is subject to a setoff against recovery and, in some cases, cancellation of the debt or damages.

Florida law used to provide that a savings clause that expressed a desire for the loan to be nonusurious was sufficient to warrant dismissal of a charge of usury. However, that has changed. InLevine v. United Cos. Life Ins. Co., 638 So. 2d 183, 184 (Fla. 3d DCA 1994), the court examined a mortgage note that "expressly stated that interest was to be charged only at a lawful percentage." The court held that the "inclusion of this language in loan documents has been held to warrant dismissal of a usury claim." Id. (citing Forest Creek Dev. Co. v. Liberty Property Sav. & Loan Ass'n, 531 So. 2d 356, 357 (Fla. 5th DCA 1988)). The opinion in Levine, 638 So. 2d at 184 was later disapproved by the Florida Supreme Court to the extent that it explained, "a savings clause is one factor to be considered in the overall determination of whether the lender intended to exact a usurious interest rate." Levine v. United Cos. Life Ins. Co., 659 So. 2d 265, 267 (Fla. 1995). (Internal quotations omitted.) In other words, the savings clause now presents an issue of fact that is to be weighed in making a determination whether a usurious loan was given.

Savings clauses should be used wisely. They may be helpful in a defensive posture once litigation ensues, both in terms of rescuing the enforceability of an agreement and in expressing the intent of the parties at the time of the agreement. However, it should not be taken as a given that either of these strategies will work in any particular case.

BEFUDDLED IN BOWIE

By Paul Rhodes - Trustee Services of Arizona

I post foreclosure notices on properties for a living. When I tell people what I do, the first words out of their mouth are inevitably, "That sounds dangerous!" I assure them that I have been doing this for over 30 years. Rarely do I have a problem. But this one day…

…I had to post a property in Bowie, AZ. Bowie is a small town located on Interstate 10 about thirty miles from the New Mexico border. Bowie's main claim to fame is that it is the hometown of action icon, "John Rambo" made famous by Sylvester Stallone. The property was an old "motor court" which was made popular in the 1950's. I checked it out on Google Earth before going and knew that it was dilapidated, overgrown and appeared to be abandoned.

Upon arriving, I could see that the old motel rooms were abandoned. Windows were broken and the place was not secure. There was an office building in the front with the address on it. I decided to post my Notice there. I walked up, trying to determine whether the property was occupied or in use. I noticed some relatively new items visible through the windows. It looked like it was being used, by someone.

I posted my Notice, took my photos and began walking toward my car when I heard someone yell. I looked up and saw a guy about sixty years old, poorly dressed with a pony-tail and flip-flops. As I began walking toward him, he started yelling something. I approached him and said, "I am sorry, but I couldn't hear you."

He replied, rather vehemently, "You're trespassing!"
I said, "I'm sorry. Is this your property?"

He yelled, "No! But you are trespassing and I know the owner!"

Thinking it was just a nosy neighbor, I tried to help him out. "Oh, well if you know the owner, please tell them that I had to post this Notice and that they should get in touch with the company on the upper left hand corner of the Notice."

He again yelled, "You're trespassing!" At this point we were 10 feet from the road and my car.

I told him, "No worries," and walked to my car.

He began taking photos with his phone of me, my car, and my license plate. I got in the car and began filling out my Affidavit of Posting. He walked up to my window. I rolled my window down but was also very wary as I remembered one time, a trustor sucker punched me through my open window, but that's a story for another day. I asked how I could help him. He wanted my name and address. When I inquired why, he said "I want to make sure that if you ever come back here again that I can have you arrested for trespassing."

I was not inclined to give the information to him and reiterated that he should have his friend contact the Trustee to discuss the property. I promptly rolled up my window and locked the door. He glared at me, started yelling and then reared back his right arm and tried to drive his fist through my window. To no avail. This isn't what I was expecting from an aging long-hair. Similar to the "print" that happens on your window when a bird strikes it while flying, I had his fist print on my window.

I was thinking, "Ouch! That had to hurt!" Apparently not enough. He reared back again and tried to blow his fist through my window. He failed again. Now I have two fist prints on my window!

At this point, I determined that I was wasting my time. I put the car in drive and quickly whipped a "U" in the intersection. As I was leaving, he launched into a full karate kick to the side of my door. I couldn't believe that just happened!

I drove down the street about ¼ mile and decided that I should check the door for damage. No damage, but now I have his footprint to match his fist prints. So I continued driving down the road.

As I headed toward my next posting, about 40 miles away in Willcox, an old friend from Alabama called me. I told him, "Dude. You are not going to believe what just happened to me!" And I related the story, in detail. We commiserated for a while until I came to my exit.

I drove down the exit road, which turned into a country road. There was a truck behind me, tailgating me. I told my Alabama buddy, "There is no one on this country road. There's a guy tailgating me. I wish he would just pass me. Oh well, I'm gonna sign off. Have a great Thanksgiving!" and ended the conversation.

I came to a major road, Fort Grant Road, where my only options were to go left or right. I make a right. Darn it! The truck also turned right and was still tailgating me. I slowed down, purposely. The truck pulled alongside me and…it was the guy from Bowie! Taking pictures of me!

I kept driving and ignored him. He pulled ahead of me and then, for good measure, hit the accelerator. A huge plume of black smoke came out his exhaust pipe. I guess that was his version of the single digit salute. At that time, I noticed his license plate, a vanity tag, "BURNSOIL!" How appropriate.

He slowed down, so I passed him. He then accelerated, cut in front of me and forced me off the road. This was all happening on a 5 lane highway in broad daylight. I thought, "This is crazy" and dialed 911. Thank God for "hands free" devices, as while I am talking to the 911 operator, I was able to back up and shoot around him, escaping from his roadblock. This happened twice more, all while I was talking to the 911 operator.

Finally he accelerated past me with another black plume "exclamation" from his tailpipe. I came to the dirt road where my next posting was. As my friend from Bowie was well ahead of me, I turned onto the dirt road and told the 911 operator that the crisis was averted. She told me, "If you have another problem, don't hesitate to call us again."

I thanked her and continued a few miles down the dirt road. I located my property but, at this point, I was pretty shaken up. My adrenaline output had definitely spiked. There was no address on the property and even though it was a relatively simple posting, I was double and triple checking that I was in the right location. It took me a little time…

Convinced I was at the proper house, I did the posting, completed my Affidavit and plugged in my next address. I began driving back toward the highway. I got about a half mile down the road when I saw a truck heading in my direction at an alarming rate of speed. I thought, "Could it be? It couldn't…"

I slowed down, wary. He pulled a "Jim Rockford" sliding turn right in front of me. Having watched enough TV and movie chase scenes, I looked for an exit. I accelerated down into a gully, missing his truck by less than an inch. I climbed out of the gully and hit the accelerator! I was doing 70 miles an hour down a dirt road, through raw land and he was chasing me. And catching me! I came to some homes and I didn't want to be driving recklessly through the neighborhood, so I slowed down. Did I mention that I was AGAIN on the phone with 911? And, Cochise County being the danger zone that it is, I was talking to the same operator…

"BURNSOIL" took my slowing down as an opportunity to cut me off again. We were stopped and I am literally stuck, hemmed in by a house, a gully and his truck. I could see him gesturing for me to get out of my car, but I wasn't having any of that. I thought again, "This guy is CRAZY!" I kept talking to 911. She confirmed that I should stay in the vehicle.

He continued gesturing for me to get out, but he never got out of his truck. And thankfully, to reduce my anxiety level a little bit, I realized that he was not brandishing a weapon. I kept shaking my head, "No."

Again, I am hemmed in. I have nowhere to escape. 911 has dispatched a Sheriff to meet me. I realized that one of three things were going to happen: (1) The Sheriff was going to come, (2)The guy was going to get out of his car and I was going to have to respond or (3), I was going to have to escape. Frankly, I didn't know which was going to happen first.

Then, miraculously, he began to back his truck up, which gave me a window of opportunity. As soon as I had some clearance, I slammed the accelerator to the floor and drove the last half mile to the highway, with 911 still on the line. My friend from Bowie still didn't give up and continued to tail me to the highway. The 911 operator set up a meeting point with the Sheriff at a truckstop down the road. Mr. "BURNSOIL" continued to tail me, but not aggressively. Right before the truckstop, "coincidentally" he pulled into a side road.

I pulled into the truckstop, where I was greeted by two Sheriff's Deputies. I related my story to them and it turns out that they both know Mr. "BURNSOIL" pretty well. As you have probably guessed by now, he was indeed the Trustor, with a long history. Apparently, he was a good citizen before he got into drugs. They asked if I wanted to press charges, but I saw no reason for that. The one Sheriff started laughing and then said, "I've got him on the other line…" Wow! I guess he wanted to explain his side of the story. They said that they would pay him a "little visit" and explain what trespassing meant and how fortunate he was that I was not going to press charges.

I contacted my client to let them know to beware of the Trustor, but it turns out that they too also knew he was a problem. He had already called making death threats. I then called my buddy from Alabama, " Mike, you remember that guy I told you about that punched my window and did a full karate kick to my car?..." And then he knew, the rest of the story…

NON-JUDICIAL FORECLOSURE IS NOT DEBT COLLECTION UNDER THE FDCPA

By: Michael A. Wrapp*

The United States Supreme Court recently held that a business engaged in no more than non-judicial foreclosure proceedings is not considered a "debt collector" as that term is generally defined in the Fair Debt Collection Practices Act (the "FDCPA").

The case, Obduskey v. McCarthy & Holthus LLP, involved a non-judicial foreclosure on a Colorado home owned by Dennis Obduskey. Wells Fargo Bank, N.A. hired a law firm to conduct the non-judicial foreclosure in Colorado, and the firm initiated the process by mailing a statutory notice to Mr. Obduskey. Mr. Obduskey initially responded to the notice with a letter invoking the FDCPA's provision requiring a debt collector to verify the debt prior to continuing its collection efforts.

Mr. Obduskey eventually filed a federal lawsuit alleging that the firm had violated the FDCPA by, among other things, failing to properly verify the debt at issue. The United States District Court for the District of Colorado dismissed the lawsuit on the basis that the firm was not a "debt collector" within the meaning of the FDCPA. The Tenth Circuit Court of Appeals affirmed that decision, and Mr. Obduskey filed a petition for a writ of certiorari with the United States Supreme Court. The United States Supreme Court granted certiorari on this somewhat technical issue to resolve a split among circuit courts of appeals regarding whether the FDCPA applies to non-judicial foreclosure proceedings.

Affirming the actions of the District Court and the Tenth Circuit Court of Appeals, the United States Supreme Court highlighted the distinction between the FDCPA's primary and limited-purpose definitions of the term "debt collector." The primary definition of "debt collector" includes "any person . . . in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or asserted to be owed or due another." 15 U.S.C. § 1692a(6). The limited-purpose definition states that, "For the purpose of section 1692f(6) [the] term [debt collector] also includes any person . . . in any business the principal purpose of which is the enforcement of security interests." 15 U.S.C. § 1692a(6).

The limited-purpose definition is significant because its application triggers specific requirements for those enforcing security interests. The subsection of the FDCPA referenced in the limited-purpose definition, 1692f(6), prohibits a "debt collector" from taking or threatening to take any non-judicial action to "effect dispossession or disablement of property" if "(A) there is no present right to possession of the property . . . ; (B) there is no present intention to take possession of the property; or (C) the property is exempt by law from such dispossession or disablement." 15 U.S.C. § 1692f(6). Violation of that prohibition results in civil liability for any actual damage sustained by the affected individual, as well as additional damages—not to exceed $1,000.00—that may be permitted by the court. 15 U.S.C. § 1692k(a)(1)–(2). In the case of a class action lawsuit, each named plaintiff may individually recover damages not exceeding $1,000.00, and the court may allow all class members to recover a maximum of the lesser of $500,000.00 or 1 percent of the debt collector's net worth. 15 U.S.C. § 1692k(a)(2)(B). Individuals or members of a class action lawsuit may also recover their attorneys' fees and costs associated with a successful lawsuit. 15 U.S.C. § 1692k(a)(3).

For three reasons, the Supreme Court concluded that non-judicial foreclosure trustees fall within the FDCPA's limited-purpose definition of "debt collector," but are not included within the primary definition of that term:

- First, the Court noted that the limited-purpose definition states that a debt collector "also includes" a business with the principal purpose of enforcing security interests, indicating that such a business does not fall within the scope of the FDCPA's primary definition.

- Second, the Court reasoned that when drafting the FDCPA, Congress likely chose to treat the enforcement of security interests differently than ordinary debt collection activity in order to avoid conflicts with state laws governing non-judicial foreclosures.

- Third, legislative history suggests that Congress arrived at a compromise under which the prohibitions of subsection 1692f(6) of the FDCPA would apply to those enforcing security interests, while the other "debt collector" provisions would not.

Ultimately, the Court concluded that with the limited exception of subsection 1692f(6), those who engage in only non-judicial foreclosure proceedings are not debt collectors as generally defined in the FDCPA.

In other words, the Court determined that only a limited portion of the FDCPA applies to those whose conduct is limited to non-judicial foreclosure proceedings. While the limited prohibitions of subsection 1692f(6) apply to non-judicial foreclosure trustees, the FDCPA's numerous other requirements governing "debt collectors" do not. It is important to note, however, that the Court specifically declined to determine precisely what conduct by a non-judicial foreclosure trustee would run afoul of subsection 1692f(6). The Court also declined to determine whether those who judicially foreclose may be considered debt collectors as generally defined in the FDCPA. But so long as those who are foreclosing non-judicially limit their conduct to what is required for compliance with a state's non-judicial foreclosure statutes, they need not be concerned about exposing themselves to liability under any portion of the FDCPA other than subsection 1692f(6).

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TOP TEN MARKETING MISTAKES LAWYERS MAKE AND HOW TO AVOID THEM

NOT NETWORKING CONSISTENTLY – It's easy when you have a brief lull in your workload to dive back into networking activities – full throttle. Maybe you can make up for lost time? Probably not. Always remember, the best networking is done consistently over time. Pick one association (not five) that attracts clients or referral sources within which you want to increase your name recognition. Identify your top ten list of prospective referral sources and contacts and reach out to one person per week. In order to succeed in networking, it's more important to be consistent on a smaller scale, than to conquer the world.

FOLLOW UP…OR LACK THEREOF – For some reason, even deadline-driven lawyers with iron-clad tickler systems can struggle with a lack of follow up. If you meet someone when you're networking and offer your assistance in any way, even if it's a referral to a lawn care company, or (especially in Minnesota) a snow plowing service, make good on your offer. The moment you are back in your office, follow up on anything you said you would do, send or email to your contact.

AVOIDING SOCIAL MEDIA – Sometimes it's easier to avoid something you don't know a lot about. Social media is here now and will be here in 10 years. As you may know, social media can be time consuming, but only if you let it be. Pick a site and visit it a few times per week. LinkedIn is a logical choice and should include only people in your real network. Comment on others' posts, and if you are so inspired, write your own post on something you are interested in, or is happening in the news. Make your posts timely, relevant, and personal to your views.

BEING A LATE ADOPTER – Lawyers by nature seem to take a "wait and see" attitude on many things. They want to see how other firms their size are utilizing any given service before taking the plunge themselves. Think about the top challenges you have in running your law practice…the things that are affecting your ability to deliver services to your clients. Ask your friends what systems or services they use. Do a little research, and make the decisions early that will help you maintain and grow your client base.

MANAGING CONTACTS – I've seen it many times. You have lunch with a great prospective referral source who promises to send all their clients to you. You do a publicly acceptable happy dance back to your office and are met with 100 emails and people who need you for just a minute. After a couple of weeks, and no work flowing in from your great contact, the lunch becomes a distant memory. They didn't change their mind – I promise you! They are likely as busy as you are. You must take the lead in managing the contacts with whom you engage. At the end of every great lunch or coffee, agree on action items and next steps with your contact. Add these deadlines to your calendar as you would legal deadlines to ensure you will follow up.

NOT WRITING OR BLOGGING – When I ask the most successful lawyers how they achieved fame and fortune, they say two things: writing and speaking. We'll address speaking next. First, writing blogs and articles is an exceptional way to build and keep your name recognition high. Write articles targeting your key clients in publications they read. See something in the news? Write a blog about it (500–700 words), then post about your writing on social media. The more you write, the more you will be asked to write.

AVOIDING SPEAKING OPPORTUNITIES – As you know, public speaking is many people's greatest fear – even successful, accomplished lawyers. Remember – writing and speaking will make you a sought-after subject matter expert. A caveat: if you really don't want to speak to a group of people, focus on writing. That said, if you are willing to expand your horizons, speaking opportunities (to the right people on the right topic), can catapult your practice to the next level.

NOT HAVING FOCUS – There's nothing harder on your marketing psyche than reflecting on everything you could be doing, and not knowing where to start, or even if the thing makes sense for you. One way to avoid paralysis by analysis is to step back and identify your best clients, the niche you have created, specific targeted groups you can reach. Then identify what you want to accomplish by year-end in terms of referral sources and revenue. Having a basic plan will enable you to only implement activities that directly relate back up to one of your objectives.

FOLLOWING SHINY OBJECTS – I have a client who, before PSM began managing his marketing, had a significant case of FOMO – Fear of Missing Out. He said yes to any and all marketing "opportunities" that came his way— worrying what might happen if he didn't. The key to success is being thoughtful and strategic in your marketing efforts, not being distracted by all the "shiny object" emails you receive from vendors. Don't accept cold calls, and don't say yes to email solicitations. Talk to your friends who are lawyers and get their opinions. Then make an informed decision on marketing activities you choose to pursue.

While there are many mistakes lawyers make, there are also some quick fixes. If you avoid the top ten mistakes lawyers make in marketing, I am confident you will develop a plan that will work for your practice. Why? Because this is the only real path that will lead you to success.

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SPRING | SUMMER 2019