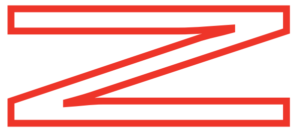

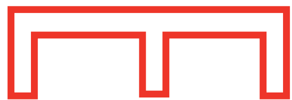

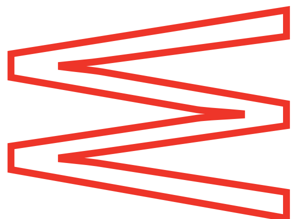

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Summer 2013

This is an advertisement.

See You at The Broadmoor!

We hope to see you July 21 – 24 at the 11th Annual ALFN Leadership Conference at the Broadmoor in Colorado Springs, Colorado. The focus of this year's three-day conference will be regulatory compliance, and will consist of 13 educational sessions in the form of five Member-Only Sessions, five General Sessions and six Roundtable Sessions.

Look for Baker Donelson's own Linda Finley, who is moderating a panel on the morning of Wednesday, July 24, in Broadmoor Hall B, titled "From Coast to Coast: Hot Topics in Litigation." As always, Linda will have her pockets full of Starbucks gift cards and would love to say hello, and tell you about the Firm's Mortgage Industry Service Team and our continued growth in Texas and Florida.

Impasse on CFPB Director Resolved

Jonathan Green, 404.221.6518, jegreen@bakerdonelson.com

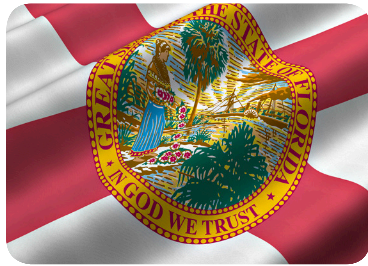
Tracy Starr, 404.221.6511, tstarr@bakerdonelson.com

One of the most unsettled issues facing mortgage servicers and lenders has been the uncertainty regarding the host of new regulatory rules regarding loan servicing and origination set to go into effect on January 10, 2014. This key issue was whether Richard Cordray's recess appointment as Director of the Consumer Financial Protection Bureau (CFPB) was valid after the decision in *Noel Canning v. NLRB*. In that decision, the Court of Appeals for the District of Columbia ruled that three recess appointments made by President Obama on January 4, 2011 were unconstitutional because the recess occurred while the Senate was in a "pro forma" session. The challenged appointees in *Noel Canning* were members of the National Labor Relations Board. However, the same logic applies to the appointment of Richard Cordray, the director of the CFPB, which occurred on the same day. Mr. Cordray's appointment is being explicitly challenged in other cases, including *State National Bank of Big Spring v. Timothy Geithner*, currently pending in the D.C. District Court. On June 24, 2013, the United States Supreme Court accepted certiorari in *Noel Canning v. NLRB*.

On Tuesday, July 16, 2013, the Senate voted to confirm Mr. Cordray as part of a grand compromise to resolve the ongoing filibuster of certain executive branch appointments. The confirmation of Mr. Cordray appears to effectively validate the new mortgage servicing and lending rules, as Mr. Cordray is expected to ratify his prior actions. The confirmation of Mr. Cordray permits mortgage servicers and lenders to focus their efforts on implementing procedures to comply with the rules by January 10, 2014. However, as the CFPB now has full authority to act, it is expected that the CFPB will initiate more enforcement actions in the future.

Recent, Significant Changes in Florida's Law of Foreclosure

by Tara Maloney, 407.367.5429, tmaloney@bakerdonelson.com



On June 7, 2013, Florida Governor Rick Scott signed into law House Bill 87, now known as Chapter 2013-137,[1] which provides for substantial changes in mortgage foreclosures filed in Florida. Although foreclosure defense attorneys are of the opinion that the bill "favors banks,"[2] the bill contains "pro-borrower" provisions, as it shortens the time period to seek a deficiency judgment, and provides for more stringent standing requirements for lenders filing mortgage foreclosure complaints on or after July 1, 2013. Below are a few key points:

[1] The bill may be accessed online at http://laws.flrules.org/2013/137

[2] *See The Florida Bar News, Letters, Foreclosure Legislation*, dated April 15, 2013, available online at http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/cb53c80c8fabd49d85256b5900678f6c/d9c272af13597c7585257b470042644a!OpenDocument&Highlight=0,foreclosure,legislation*

[3] However, a court already has the inherent authority to sanction parties, rendering this provision unnecessary. It is unclear why the legislature did not include a corresponding provision to allow the court to sanction defendants who raise frivolous challenges to standing merely to delay foreclosure action. Regardless, a court does have the authority to sanction defendants pursuant to its inherent authority and Florida Statutes § 57.105. *See Korte v. US Bank Nat'l Assoc. as Trustee for Asset-Backed Pass-Through Certificates Series 2006-WFH3, et al.*, 64 So. 3d 134, 135 (Fla. 4th DCA 2011) (per curiam) (affirmative defenses that are "not supported by the material facts of the case, but are nonetheless asserted for the primary purpose of delaying the entry of a final judgment" are sanctioned.); *JPMorgan Chase Bank, N.A. v. Hernandez*, 2011 WL 2499641, *3 (Fla. 3d DCA 2011). But in reality, this phenomenon has been around a long time – as stated by Judge Letts in a specially concurring opinion:

> At this stage there is little or nothing in the record to reveal whether the borrowers really do have valid defenses or whether they are merely stalling the inevitable. Certainly, the motion to dismiss reveals no valid defenses. For example, the primary thrust of the motion to dismiss is that the allegations in the complaint are "insufficient and defective,"...
>
> I am cognizant of the fact that lenders, ... seldom, if ever, relish foreclosures. Nonpayment on the note is normally the only reason the lender goes to court.
>
> As a consequence, I urge the trial judge not to hesitate to award section 57.105, Florida Statutes (Supp.1986), fees, if the defenses, when presented, reflect a complete absence of a justiciable issue in law or fact. It is true that defaulting borrowers are likely to be without funds; however, I would point to the amended 1986 version of section 57.105 which calls for the reasonable fee "to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney...." (emphasis added).

Connelly v. Glendale Federal Sav. and Loan Ass'n, 508 So. 2d 553, 553-54 (Fla. 4th DCA 1987) (Letts, J., specially concurring) (emphasis in original). *In fact, former 5th DCA judge Pleus, sitting as a senior judge in a foreclosure action, had this to say regarding in the case of Wells Fargo Bank, NA v. Ceus*, 2011 WL 2693114 (Fla.Cir.Ct. 2011) (Pleus, J., Trial Order):

> The Court notes that it has become common practice for mortgage defense firms to file answers with boiler plate affirmative defenses such as the lack of standing, the RICO Act, et cetra. The sole purpose is for delay and everyone knows it. Many of these so called "defenses" are set forth on the internet. Most do not apply or are factually and legally frivolous. Several of the above defenses in this case are in that category.

Continue on next page

Recent, Significant Changes in Florida's Law of Foreclosure, *continued*

Foreclosure Complaints-Standing

The most substantial change for lenders is the creation of Florida Statutes § 702.015, which was created to speed up the foreclosure process, but in actuality, requires more paperwork for lenders. ***A lender who fails to comply with this statute may be subject to sanctions.***[3] The statute applies to a plaintiff filing a complaint, on or after July 1, 2013, seeking to foreclose upon residential real property (one to four family dwellings), and requires the following:[4]

- Affirmative allegations that the plaintiff is the holder of the original note secured by the mortgage ***OR*** specific allegations of the factual basis by which the plaintiff is entitled to enforce the note.[5]

- When a party, such as a loan servicer, has been delegated authority to file a mortgage foreclosure action on behalf of the note holder, the complaint must describe the authority and identify with specificity the document that grants the party to act on behalf of the note holder, such as a power of attorney.[6]

- When the plaintiff possesses the original note, as a condition precedent to and contemporaneously with filing the complaint, the plaintiff must attach copies of the note and all allonges, and certify, *under penalty of perjury*, that it possesses the original note and provide specific details regarding its physical location and plaintiff's verification of same.[7]

- When the plaintiff seeks to enforce a lost, destroyed or stolen note, it must execute an affidavit *under penalty of perjury*, and attach it to the complaint. The affidavit must include the following: (1) a chain of all endorsements, assignments or transfers of the note; (2) facts showing plaintiff is entitled to enforce the note; and (3) exhibits including copies of the note and allonges, audit reports showing *physical receipt* of the original note, or other evidence of acquisition, ownership and possession of the note. The plaintiff must also provide adequate protection as required under Florida Statutes § 673.3091(2) before final judgment.

[4] The statute includes condominiums and cooperatives, but excludes timeshare interests under part III of Florida Statutes Chapter 721.

[5] This is phrased disjunctively.

[6] *See Deutsche Bank Nat'l Trust Co., as Indenture Trustee on Behalf of the Holders of the Accredited Mortgage Loan Trust 2006–1 Asset Backed Notes v. Prevratil*, 2013 WL 845285 (Fla. 2d DCA March 8, 2013)(holding that a loan servicer, with a power of attorney, may verify a complaint on behalf of the investor). Further, the legislature intended that this subsection not modify the law regarding standing or real parties in interest. *See* Florida Statutes § 702.015(3).

[7] This certification appears unnecessary since the bill already requires a plaintiff to make "affirmative allegations" that it "is the holder of the original note secured by the mortgage" or "[a]llege with specificity the factual basis by which the plaintiff is a person entitled to enforce the note" pursuant to Florida Statutes § 673.3011, and prior to the bill, a plaintiff was and still is already required to verify its statements in a complaint, pursuant to Florida Rule of Civil Procedure 1.110(b).

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Recent, Significant Changes in Florida's Law of Foreclosure, *continued*

Deficiency Judgments-Limitations Period and Amount Recoverable

The bill also reduces the statute of limitations period for a lender seeking a deficiency judgment on a note secured by a mortgage on residential property (one to four family dwellings), from five years to one year, for a deficiency action commencing on or after July 1, 2013, regardless of when the cause of action accrued.[8] The bill also limits the amount recoverable, in the case of owner-occupied residential property, to the difference between the judgment amount (or with a short sale, the outstanding debt) and the fair market value of the property on the date of the sale.[9]

Irrevocability of Mortgage Foreclosure Judgments

The new bill also creates Florida Statutes § 702.036, which provides for the finality of mortgage foreclosure judgments. The statute provides that an action to set aside, invalidate or challenge the validity of a final judgment of foreclosure, or to establish or reestablish a lien or encumbrance of property, is limited to monetary damages if all of the following apply: (1) the party seeking relief from the final judgment of foreclosure was properly served in the foreclosure action; (2) the final judgment of foreclosure was entered as to the property; (3) all applicable appeals periods have run and appeals are resolved; and (4) the property has been acquired for value, by a person not affiliated with the foreclosing lender or foreclosed owner, at a time in which no lis pendens regarding the suit to set aside, invalidate or challenge the foreclosure appears in the official records.[10]

The statute also provides that after a mortgage foreclosure based upon the enforcement of a lost, destroyed or stolen note, a person not a party to the foreclosure, but who claims to be the person entitled to enforce the note, has no claim against the property after it is conveyed for valuable consideration to a person not affiliated with the foreclosing lender or foreclosed owner. The rightful note enforcer may still recover adequate protection given pursuant to Florida Statutes.

Orders to Show Cause

The bill makes several revisions to the show cause process in Florida Statutes § 702.10, applicable to pending causes of action, including allowing a condominium, homeowners' or cooperative association with a lien on unpaid property assessments (or those associations that may file a lien against the property subject to the foreclosure), to request an order to show cause for the entry of a final judgment of foreclosure. Previously only the lender had this ability. The summary judgment standard is used, and at the hearing, defendants will need to claim a specific, allowable defense to prevent the foreclosure. The bill exempts owner-occupied residences from an order to show cause why the court should not enter an order requiring the borrower to make payments during the pendency of the foreclosure or enter an order to vacate the premises.

[8] The amended statute is Florida Statutes § 95.11.

[9] The amended statute is Florida Statutes § 702.06. The language in the statute appears to preclude the recovery of reasonable attorneys' fees and costs incurred in obtaining the deficiency judgment.

[10] Essentially, in cases where this statute applies, an "innocent" third party who purchases a foreclosed home cannot be divested of that home if the foreclosure is later found to be fraudulent, since the original owner's recovery is limited to monetary damages.

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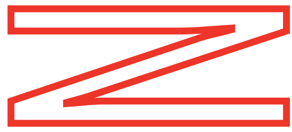
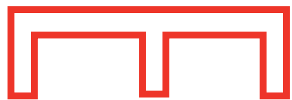
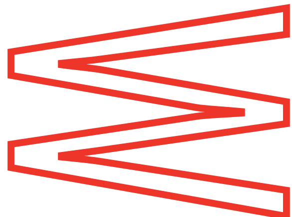

Recent, Significant Changes in Florida's Law of Foreclosure, *continued*

Adequate Protection for Lost, Destroyed, or Stolen Notes

The bill creates a new statute, Florida Statutes § 702.11, applicable to pending causes of action, and provides that a court may find the following as constituting adequate protection for lost, destroyed or stolen notes:[11] (1) a written indemnification agreement by a person reasonably believed sufficiently solvent; (2) surety bond; (3) letter of credit issued by a financial institution; (4) deposit of cash collateral with the clerk of court; or (5) other security that the court deems appropriate under the circumstances. The bill also outlines the liability of a person who wrongly claims to be the holder of a note or entitled to enforce a lost, stolen or destroyed note, and the remedies the actual note holder has against that person.

Magistrate Jurisdiction

Separately, and additionally, the Supreme Court of Florida has recently amended Florida Rule of Civil Procedure 1.490, to help alleviate the residential mortgage foreclosure case backlog. The amendments expand the use of magistrates in residential mortgage foreclosure cases by authorizing referral of those cases to magistrates now based upon implied consent of the parties, while providing an opportunity for the parties to object. Although this amendment was created to alleviate the backlog, it may have the opposite effect, since parties may still file exceptions to the magistrate's report and recommendation, and set same for hearing before a circuit court judge. Therefore, instead of a motion being heard on one occasion before a circuit court judge, two hearings may become common practice: one hearing before the magistrate, and another hearing before the circuit court judge on the exceptions to the magistrate's report.[12]

[11] Adequate protection as required under Florida Statutes § 673.3091.

[12] Further, it appears that a party's failure to file an exception to the magistrate's report does not affect appellate rights, since at least one appellate court has held that when a trial court accepts a magistrate's recommendations and enters an order accordingly, it is not necessary that the losing party have filed an exception to preserve its right to appeal. *See Aspsoft, Inc. v. Webclay*, 983 So. 2d 761, 764 n.1 (Fla. 5th DCA 2008).

Lender Involved Condemnation Part 2: Lender Concerns in Condemnation

by Ivy Cadle, 404.589.0009, icadle@bakerdonelson.com

This is the second installment in a series of articles related to lender-involved condemnations. The first installment provided a basic discussion of eminent domain and condemnation principles. This article focuses on lender concerns regarding eminent domain and condemnation actions. The third and final installment will develop a framework for managing lender risk and cost in these cases.

Due to the unique nature of real estate and the number of variables surrounding a particular loan, each condemnation (i.e., forced acquisition of property) requires a fact-sensitive analysis to determine the best approach to maximize security and minimize risk. It is important to analyze the financial metrics of the loan in the context of the taking while a litigation strategy is developed.

Continue on next page

Lender Involved Condemnation Part 2: Lender Concerns in Condemnation, *continued*

Underwriting Fundamentals Drive Risks

To begin, the holder of a secured interest (Lender) should revisit its initial documentation so it can determine whether sufficient collateral of an acceptable quality will exist after the taking. The Lender should also examine the likelihood that the borrower will enter default, either as a result of the taking or other circumstances. If the Lender determines that sufficient collateral of an acceptable quality exists after the taking, and that the borrower will likely continue to meet its obligations, then involvement in a condemnation action will result in unnecessary legal costs in order to protect the Lender's investment.

On the other hand, if the Lender finds that its collateral was substantially impaired by the condemnation or that the borrower is unlikely to continue to meet its obligations, then the Lender has a strong interest in any compensation available from the condemning authority. This strategy should reduce the risk that condemnation impairs the ability of the collateral to cover the outstanding balance on the loan. Most situations present an intermediate scenario that requires a cost-benefit analysis to determine how much cash the Lender should expend in order to protect its secured interest.

A Timely Response Reduces Risk

Efficient handling of a condemnation action by a Lender requires a rapid response by those with ready access to fundamental information concerning the loan and the borrower. In Georgia, a condemnee has only 30 days to contest the adequacy of the condemnor's deposit. Accordingly, as soon as the Lender is served, counsel for the Lender should file a responsive pleading to protect the Lender from risks related to a failure to respond. It is less risky to file an initial response and later dismiss than to risk missing the deadline, therein waiving its right to participate in a proceeding to contest value.

The Lender's underwriting department's analysis, concerning the Lender's tolerance for impairment to the collateral or if changes in the borrower's circumstance create a risk of default, must be performed within 30 to 60 days from the filing of the answer. Failure to promptly review the loan may result in unnecessary and unrecoverable costs related to discovery and litigation. When the underwriting review is complete, the Lender can decide whether it wants to seek additional compensation, seek a portion of the proceeds in the court registry or simply walk away. The maximum amount of recovery is limited by the fair market value of the property on the date of taking and the outstanding loan balance. Accordingly, the potential benefit from participation in the action can be quantified and compared to the expected expenses incurred by litigation. As part of its business decision, it is important for the Lender to discern the amount of legal and expert fees it will tolerate to recover additional compensation.

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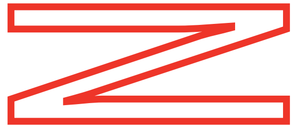
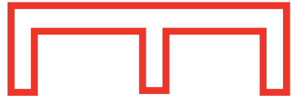
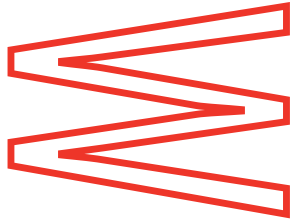
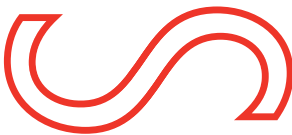

Lender Involved Condemnation Part 2: Lender Concerns in Condemnation, *continued*

Appraisals and the Loan File are Likely Discoverable

If the Lender seeks additional compensation, the ultimate decision is typically made by a jury based on legally sufficient evidence. Lenders are at an advantage over property owners because they have more ready access to appraisals in the loan file and broker price opinions. However, appraisals for the purpose of demonstrating value of secured collateral can be more conservative than appraisals prepared for litigation. Accordingly, the Lender should consider the fact that appraisals created when the loan was originated may be discoverable. A condemnation proceeding may also require an appraisal that follows a certain format; these appraisals are often more costly than standard appraisals because they consider the value of the property before and after the taking. This is especially true when a taking changes the highest and best use of the property remaining after the condemnation. Condemnation cases also involve expenses for engineers, traffic circulation experts and other specialists. Careful consideration of these expenses, in light of the total fair market value at the time of taking, is important.

Working With Borrowers

Borrowers often contest the sufficiency of the compensation paid by the condemning authority and pursue claims for additional compensation. Many borrowers plan to use any proceeds to satisfy any outstanding debts related to the property, but some try to withdraw the funds without considering the obligations set forth in their deed of trust. Accordingly, it is important for the Lender to place the court on notice of its interest. It is also important to pay close attention to the pleadings filed by the borrower to avoid an unapproved withdrawal by a borrower.

If the borrower is seeking additional compensation and cooperating with the Lender, the interests of the Lender and the owner may be aligned. In that instance, the borrower directly bears the costs of litigation. Such a borrower will reduce the need for the Lender to pay costs directly. It will also eliminate the need for the Lender to attempt to seek reimbursement for costs to protect the collateral if such a course of action is allowed by the deed of trust. In all cases, the Lender should protect itself with an independent analysis of the risks and the potential rewards of participating in a condemnation case.

Conclusion

In order to conduct the analysis discussed above, it is beneficial for Lenders to create standard procedures for review of the loan underwriting, current fair market value, and the degree of impairment created by the taking. If designed appropriately, such standard procedures and criteria can aid the Lender by minimizing costs and maximizing the value received for collateral that is faced with a condemnation. The next and final installment provides considerations for preparing these standards and proposes a set of standards that can be implemented to achieve this goal.

Show-Me-The-Note v. Split-the-Note: An Overview of Rulings from the Fifth Circuit Court of Texas

by John P. Barnes, 713.210.7441, jbarnes@bakerdonelson.com

In the case of *Ashley Martins v. BAC Home Loans Servicing, L.P. and Federal National Mortgage Association* (No. 12-20559, 2013 WL 3213633), the Fifth Circuit Court of Texas was first asked to decide whether the "show-me-the-note" theory or the "split-the-note" theory requires a mortgage lender or servicer to produce the original promissory note in order to conduct a non-judicial foreclosure sale pursuant to a deed of trust lien. The "show-me-the-note" theory posits that a party must produce the original note bearing a "wet ink" signature in order to foreclose, and the "split-the-note" theory contends that a foreclosing party must hold both the note and deed of trust in order to exercise the power of sale. Both theories are frequently advanced by borrowers seeking to avoid foreclosure.

The court held that, where the foreclosing party is a mortgage servicer and the mortgage has been properly assigned, the foreclosing party need not possess the note in order to foreclose. This holding resolves a pre-existing conflict among various federal district courts in Texas. In order to reach their holding, the court took note of the fact that Texas foreclosure statutes do not require possession or production of the original note and that Texas precedent permits proof of a note by photocopy and attached affidavit, in lieu of an original instrument. The court further noted that a deed of trust gives both the lender and the beneficiary the right to invoke the power of sale, even though they may be separate entities and therefore cannot both hold the note. As such, the law contemplates that the foreclosing party may not possess the note, and production of the original note is therefore not a prerequisite to foreclosure.

The court was also asked to decide whether Section 51.002 of the Texas Property Code requires that a borrower receive notice of a pending foreclosure sale. The court held that it does not, resting its decision upon Section 51.002(e). This section provides that service is complete when notice is sent via certified mail and that an affidavit of a knowledgeable person that such occurred is *prima facie* evidence of service.

Finally, the court was asked to decide whether an oral promise that the borrower's home would not be foreclosed on if he submitted a HAMP application was sufficient to give rise to a claim of promissory estoppel to bar foreclosure. The court held that the oral promise was not sufficient, as promissory estoppel would require a written agreement in order to satisfy the statute of frauds. Under the Texas statute of frauds, an agreement regarding the transfer of real property or the modification of a loan in excess of $50,000 must be in writing to be enforceable. The mere oral promise to refrain from foreclosing therefore is insufficient to create an enforceable legal or equitable right or obligation.

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Summer 2013

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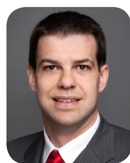
Growing Our Firm for Our Clients

We will soon open an office in south Florida dedicated solely to representing our mortgage servicer clients. Stay tuned for more details!

As an example of our continued dedication to the mortgage industry, we have added team members to our offices. Meet our newest attorneys:



Michael W. Smith joined the Orlando office in February. He is dedicated entirely to the mortgage industry, representing lenders and servicers in litigation arising from allegations of regulatory misconduct, fraud, wrongful foreclosure, title disputes and other issues. Michael understands the intricacies involved in residential mortgage litigation, and has created and implemented multi-state project management systems by incorporating client directives, state and federal law, and court administrative orders. A 2003 graduate of the University of South Carolina School of Law, Michael is licensed in Florida and South Carolina.

John P. Barnes joined our Houston office in April. He brings more than ten years of experience in banking, real estate, construction and business litigation to his residential mortgage industry practice, representing mortgage servicers and lenders in all phases of consumer litigation. John counsels and defends clients in matters related to the Fair Debt Collections Act, RESPA and TILA, as well as Regulation X and Regulation Z.

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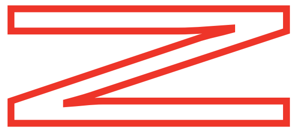
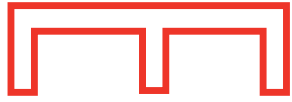
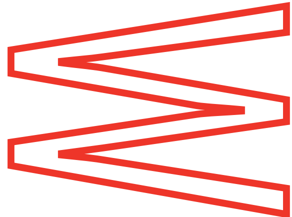
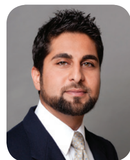




Growing Our Firm for Our Clients, *continued*

Montoya M. Ho-Sang joined the Atlanta office in May. She defends mortgage lenders and servicers in all types of litigation, including liability defense, claims that arise out of contested foreclosures, bankruptcy, eviction and REO. Montoya's deep experience in civil litigation defense is especially helpful in navigating the fastest route to success for her clients. She is a 2007 graduate of Emory University School of Law and is licensed in Tennessee and Georgia.

Adel Meyerov Sander joined the Houston office in May. She handles litigation arising from contested foreclosures, charges of predatory lending, and violations of TILA, RESPA and other regulations. She has experience in general commercial litigation, collection matters, bankruptcy litigation and real estate litigation. She received her J.D. in 2005 from South Texas College of Law, and is fluent in spoken and written Russian.

Landra Raymond joined the Houston office in May. She focuses on residential mortgage litigation cases, defending lenders and servicers in all phases of consumer litigation. With significant experience in case development, case management and heavy litigation dockets, Landra has successfully navigated courts and systems across Texas in the best interests of her clients. Landra is a 2004 graduate of South Texas College of Law.



Shafin A. Remtulla joined the Orlando office in May. He represents residential mortgage lenders and servicers in litigation claims arising out of contested foreclosures, TILA, the Fair Debt Collection Practices Act and other regulatory issues. He also has extensive experience in creditors' rights litigation and has acted as lead attorney on numerous heavily contested motions and foreclosure trials throughout Florida. Shafin holds a 2007 J.D. from Columbia Law School.

Amy L. Hanna joined our Atlanta office in June. She represents only mortgage lenders and servicers in a range of litigation matters that include contested foreclosures, liability charges and eviction. She has experience representing mortgage lenders in lien priority and REO disputes. Amy is licensed in Florida and Georgia, and is a 2010 graduate of the University of Florida.

Joann E. Johnston joined the Atlanta office in June. She defends residential mortgage lender and servicer clients in litigation, including lender liability defense, and counsels on federal and state regulatory compliance and claims involving unfair and deceptive trade practices. She has also counseled national, regional and community banks in collection litigation, foreclosure and receivership matters arising out of commercial notes, guaranties and security deeds. She holds a 2004 J.D. from Emory and is licensed in South Carolina and Georgia.

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