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BWW LAW GROUP, LLC

BWW Law Newsletter

Issue 1 | May 2019

We at the BWW Law Group, LLC are excited to present to you the first installment of our Newsletter. The BWW Law Group, LLC was established in 1996 and represents the mortgage servicing community in Maryland, Virginia and the District of Columbia. Within each jurisdiction we have dedicated and experienced foreclosure, bankruptcy, eviction, title curative, and litigation attorneys and paralegals, who are ready and willing to assist you. Each quarter, through this publication, these attorneys will provide the most current and relevant legal news to the servicing industry. Please feel free to reach out to our offices at any time with any questions.

BWW Law Group, LLC is a Martindale Hubbell AV rated law firm and is a member of the United States Foreclosure Network (USFN), The American Legal & Financial Network (ALFN), The Mortgage Bankers Association (MBA), and REO Managers Association of California (REOMAC).

NO DISMISSAL OF "BARE BONES" BANKRUPTCY CASES WITHOUT A HEARING

Andrew Todd Rich – Managing Attorney (Virginia Bankruptcy)

In *Sarah Hyunsoon No v. Gorman*, 891 F.3d 138 (2018), the Fourth Circuit Court of Appeals ruled that the bankruptcy code requires notice and a hearing before a bankruptcy case can be dismissed. The ruling invalidated a local Virginia bankruptcy rule that allowed for procedural dismissals, and effectively keeps "bare bones" cases active for months. These cases were previously dismissed in a matter of weeks.

In November 2016, Sarah Hyunsoon No filed a petition *pro se* under Chapter 13 in the Alexandria Division of the Eastern District of Virginia. The debtor filed a proposed plan, but failed to attend the meeting of creditors, and also failed to make her first payment to the Chapter 13 trustee. Pursuant to (former) Local Rule 3070-1(C), the trustee certified to the court that the debtor had failed to commence plan payments, and filed a motion to dismiss. The Court dismissed the case four days later, as provided by the local rule.

The debtor appealed, and the District Court affirmed the dismissal. A three-judge panel of the Fourth Circuit, however, found that the local rule was inconsistent with the clear language of the code, and published a ruling on May 24, 2018, reversing the decision. The code states that a bankruptcy court may, "on request of a party in interest. . . . and ***after notice and a hearing***, . . . dismiss a case under this chapter . . . for cause, including . . . failure to commence making timely payments." (emphasis added). Although the trustee set a hearing for his motion to dismiss, the bankruptcy court dismissed the case without ever holding the hearing. On remand, the bankruptcy court held a status hearing on the trustee's motion, and dismissed the case on January 31, 2019.

The net result, particularly for mortgage creditors, is that "bare bones" cases now remain open for a significantly longer period of time before they are ultimately dismissed.

VIRGINIA SUPREME COURT UPDATE – *CROSBY v. ALG TRUSTEE, LLC*
ADEQUACY OF SALE PRICE

Robert Michael – Partner | Kathryn Kellam – Supervising Attorney (Virginia Litigation) | David Ward – Supervising Attorney (Virginia Litigation)

On December 20, 2018, the Virginia Supreme Court released its opinion in *Crosby v. ALG Trustee, LLC*, 822 S.E.2d 185 (2018). Crosby, the borrower under the Deed of Trust, failed to make required payments, and ALG Trustee, LLC, the substitute trustee, sold the property to third party purchasers at a public auction. The property had a tax assessed value of $436,800.00 and was sold for $20,903.77, less than 5% of the assessed value. The Court's opinion implies that the auction was scantily attended and that the winning bid was barely in excess of the total secured debt. The borrower later repurchased the property from the foreclosure sale purchasers for a total of $78,058.63 and settled his claims with all parties, except ALG. The only remaining claim was against ALG for breach of fiduciary duty. The trial court sustained ALG's Demurrer, and Crosby appealed.

THE HOLDING

A Virginia trustee's fiduciary duty requires him to treat a borrower and his lender with perfect fairness and impartiality. This duty requires the trustee "to use every reasonable effort to sell the [property] to the best advantage." A trustee may not "permit the urgency of the creditor to force the sale, under circumstances injurious to the debtor, at an inadequate price." Indeed, a trustee who sells property at a price, the inadequacy of which shocks the conscience, will raise a presumption of fraud (there need not be an actual fraud). The Virginia Supreme Court reversed and remanded the case for further proceedings.

THE LINGERING QUESTIONS

1 *What sale price is presumptively adequate?* A sale price of 80% or more of the tax assessed value is substantially likely to be satisfactory. On the opposite end of the spectrum, a sale price of 5% or less of the tax assessed value is clearly insufficient. Between these extremes, however, the Court provides no guidance.

2 *What additional efforts should a trustee undertake to obtain an adequate price?* The Court infers that the trustee's fiduciary duty requires it to consider the factors influencing the sale price and decide whether additional efforts will likely result in a higher sale price. However, the minimum requirements for Virginia trustees are governed by the Virginia Code and the deed of trust, so it is unclear what additional trustee efforts (and associated costs) will be deemed reasonable in pursuit of an adequate price.

3 *What is a Circuit Court to do where the property simply doesn't garner an adequate price?* When the trustee has made reasonable efforts, but the sale does not result in an adequate price, the trustee is still prohibited from selling and is directed to seek the aid and direction of the Court. However, frustratingly, the Court provides no guidance for the Circuit Court to inform its "aid and direction."

4 *What is the proper measure of damages for a trustee who sells property for an inadequate price?* The Court offers no guidance on this subject, but remands to the trial court to determine what damages ALG should be liable for, if any. The majority opinion was criticized by Justices Mims and Goodwyn, concurring in part and dissenting in part. The concurring/dissenting opinion argues that the Trustee should not face liability for damages where it did "all of the things that the deed of trust required."

THE CONCLUSION

The *Crosby* opinion is a modern reassertion of the uncertainty that accompanies Virginia's non-judicial foreclosure process. An informed trustee must perform its role as it would any other position of trust - with care, individual attention, and always with the goal of maximizing the sale price for the benefit of the borrower and lender. This will sometimes require creativity, especially in remote jurisdictions or for unique properties, but won't always tolerate a trustee who exerts the minimum efforts required by statute or contract in executing the trust.

STAY OF VIRGINIA PROCEEDINGS PURSUANT TO PARTIAL CLOSURE OF FEDERAL GOVERNMENT

Howard Bierman – Member

The Commonwealth of Virginia passed SB 1737 which became effective upon passage on April 3, 2019 and will expire September 30, 2019. SB 1737 provides temporary relief for employees and contractors of the United States government who were furloughed or did not receive wages as a result of the partial closure of the Federal government. Specifically, the bill provides a 30-day stay of eviction and foreclosure proceedings if the furloughed government employee/contractor makes a request and provides written proof of the furlough and/or shows that income was otherwise not received during that period. Please ensure your customer facing teams are aware of VA SB 1737 and understand the requirements of same.

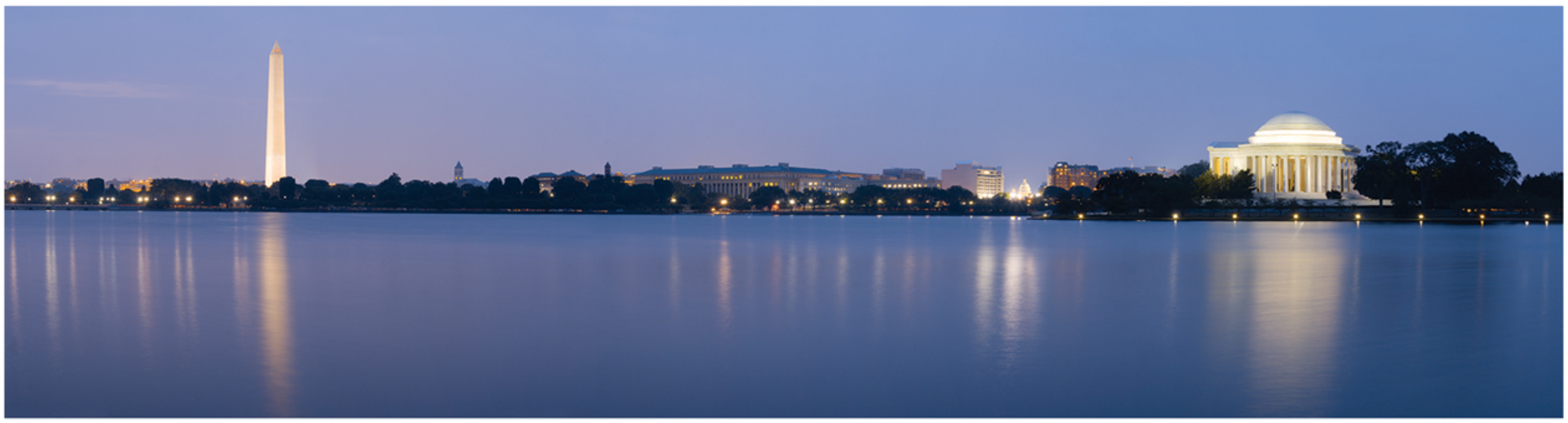
CONDOMINIUM LIENS IN WASHINGTON, D.C.

Adam Kaplan – Supervising Attorney (Maryland and District of Columbia Litigation)

In September 2018, the DC Court of Appeals issued another decision concerning the extinguishment of first priority deeds of trust following condominium super priority foreclosure sales in *4700 Conn 305 Trust v. Capital One, N.A.*, 193 A.3d 762 (2018). In this case, the court held that a condominium foreclosure sale for a period of assessments greater than six (6) months conducted prior to the 2017 amendment of the condominium foreclosure statute extinguished a first priority deed of trust, even if the sale was advertised and conveyed as subject to prior liens. Although the court leaves open the possibility that the condominium foreclosure sale could be invalidated for equitable reasons, it does not address those arguments and instead remands the case back to the trial court for further proceedings.

This case builds upon the court's earlier holdings in *Chase Plaza Condo. Ass'n. v. JP Morgan Chase Bank, N.A.*, 98 A.3d 166 (D.C. 2017) (holding that a condominium foreclosure sale of a six month statutorily created super priority lien extinguished a first priority deed of trust) and *Liu v. U.S. Bank Nat'l Ass'n.*, 179 A.3d 871 (D.C. 2018) (holding that a condominium foreclosure sale for a period of assessments of six months or fewer conducted prior to the 2017 amendment extinguished a first priority deed of trust, despite the language of the advertisement and trustees' deed). When read together, these cases, along with the recent decision in *4700 Conn 305 Trust*, stand for the proposition that any condominium foreclosure sale including the six month super priority lien conducted prior to the 2017 amendment likely extinguished a first priority deed of trust, regardless of the terms of the sale or language of the trustees' deed.

Notably, the instant case also includes a brief discussion of the 2017 amendment in which the court intimates that the amendment may not change the court's view with respect to extinguishment of the first priority liens, but stops short of addressing the issue head on. Given the Court's now consistent view with respect to extinguishment of liens following a condominium foreclosure sale, it is strongly recommended that any lender secured by a first priority position deed of trust pay any past due condominium assessments and charges to avoid a condominium sale that may extinguish their lien.



CHANGES TO MARYLAND FORECLOSED PROPERTY REGISTRATIONS AND THE FORECLOSED PROPERTY REGISTRY

Nicholas Derdock – Attorney (Maryland)

In Maryland, a foreclosure purchaser of residential property is required to submit an initial foreclosure property registration within 30 days after sale[1] and a final registration within 30 days after a deed transferring title to the property has been recorded.[2] Purchasers have historically submitted these registrations through the **Foreclosure Property Registry** (Registry), which was established in connection with the registration process.[3]

As of January 1, 2019, in addition to submitting the initial and final registrations, a foreclosure purchaser must also update the initial registration within twenty-one (21) business days after learning of any change to certain information, including any change to the person authorized to receive service or to the person responsible for maintaining the property.[4] To support this new requirement, and to provide other upgrades to the registration system, all existing foreclosed property registration data began migrating from the Registry to the Maryland **Foreclosure Registration System** (FRS) in late 2018. The data migration was finalized on January 31, 2019, fully integrating the Registry with the FRS.

As of February 1, 2019, the Registry functions have been retired, and all foreclosed property registrations must be completed through the

FRS. All initial registrations have been required to be submitted through the FRS since January 2, 2019, but final registrations were still accepted through the Registry during the data migration.

With the integration complete, final registrations can no longer be submitted to the Registry, but users can import registrations from their Registry accounts to their FRS accounts, as well as transfer registrations between company accounts. Note that a new account is required to use the FRS, even if a user has an account with the Registry, but only one account is required to use all of the FRS functions.[5]

Previously, the only function the FRS supported was the submission of the Notice of Foreclosure Filing, which is handled by the Substitute Trustees.[6] Not only has the FRS retained that function, but the expectation is that in mid-2019 it will also support Maryland Notice of Intent to Foreclose (NOI) submissions.[7] Until then, NOI submissions must still be completed through the existing NOI electronic system. Once the NOI function is released, the FRS will be the single system for completing all three of these foreclosure-related notices and registrations required under Maryland law.

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[1] See **Md. Code Ann., Real Property §14-126.1(d)(1)**
[2] See **Md. Code Ann., Real Property §14-126.1(d)(3)**
[3] See **Md. Code Ann., Real Property §14-126.1(b)**
[4] **Md. Code Ann., Real Property §14-126.1(d)(5)** requires updating the initial registration if any of the following information changes: 1. The name and address of the person, including a substitute purchaser, who is authorized to accept legal service for the foreclosure purchaser; 2. To the best of the foreclosure purchaser's knowledge at the time of registration: A. Whether the residential property is vacant; and B. The name, telephone number, and street address of the person who is responsible for the maintenance of the property; and 3. Whether the foreclosure purchaser has possession of the property.
[5] **The FRS User Guide** provides detailed information on user accounts and use of the FRS.
[6] **Md. Code Ann., Real Property §14–126.2** requires a person authorized to make the sale to submit a notice of foreclosure within seven days of the filing of an order to docket or complaint to foreclose a mortgage or deed of trust on residential property.
[7] **Md. Code Ann., Real Property §7-105.1(c)(3)** requires that a copy of the NOI be sent to the Commissioner of Financial Regulation, and under **COMAR 09.03.12.02(E)**, that is to be done electronically within 5 business days of mailing.