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MUTUAL FIRST, LLP AND FIRST MUTUAL GROUP, LP: Profits through Litigation

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Throughout the history of our civil legal system, there have been individuals, partnerships, corporations, and a multitude of other entities who seek to take advantage of the system and profit through litigation of questionable claims. It is well known that defendants in a lawsuit will often seek an early settlement to avoid the time, effort, and expense of drawn out litigation. This is especially so when attorney's fees for defending lawsuits can approach or exceed six figures if a matter is taken through trial. Settlement of the matter can make good business sense, and the decision to settle is often no more than a financial decision. With this in mind, a plaintiff may make a claim or file a lawsuit with the intent of intimidation and accomplishing nothing more than obtaining a quick settlement. When this tactic is pursued in bulk, through the filing of dozens or even hundreds of claims and lawsuits, the potential profits are considerable.

In the past few years, a group based in Texas has pursued a multitude of claims against appraisers claiming that the appraiser negligently overvalued the property being appraised. They also claim that the appraiser committed a breach of contract by not following the standards set forth in the Uniform Standards of Professional Appraisal Practice ("USPAP") as well as other statutes and standards that may or may not apply to find liability on the part of a real estate appraiser.

The genesis of these actions appears to have its roots in a company called Heritage Pacific Financial. That company was started by brothers Chris Ganter and Ben Ganter, and, in 2008, began buying second-mortgage loans on which borrowers had stopped making payments.[1] Heritage then began suing homeowners, many of whom had already lost their homes, accusing them of fraudulently misstating their incomes.[2] Additionally, Heritage filed a small number of suits against real estate appraisers alleging that they had negligently overvalued properties.[3] Heritage, after being sanctioned by several courts and after becoming the target of a class action lawsuit, filed for bankruptcy and ceased operations.[4] However, those behind Heritage Financial took up their "cause" by shifting their focus from homeowners to pursue a conceivably more reliable and lucrative target – real estate appraisers who are likely insured.[5] They did so by first sending threatening letters to appraisers through an entity called Savant Claims Management, LLC.[6] Then, in 2014, Mutual First, LLC and First Mutual Group, LP began filing a considerable number of federal lawsuits against appraisers.[7] As one might have already surmised, resources indicate that two of the directors of Savant Claims Management, LLC are the sole members of Mutual First, LLC[8] and also state that all of the entities discussed here (Heritage Pacific, Savant, Mutual First, and First Mutual) are owned or controlled by Chris and Ben Ganter.[9]

A review of federal court dockets reveals that Mutual First, LLP and First Mutual Group, LP have filed no less than 113 lawsuits since just May 1, 2014. Those cases are concentrated

primarily in the Middle District of Florida and Southern District of Florida, but there are a number of cases that have been filed in both the Eastern District of Texas and the District Court of New Jersey. The vast majority of these cases, if not all, assert claims against real estate appraisers for overvaluation of property. Virtually all of the appraisals that are the subject of these suits occurred at least 7 years ago. When defending such a claim, this brings up the obvious question, "Shouldn't this case be dismissed as being filed outside the applicable statute of limitations?"

In analyzing application of the statute of limitations, one must first look at whether or not your particular jurisdiction follows the "discovery rule." If so, the time that the statute of limitations begins to run is NOT the date of the appraisal. Rather, the discovery rule tolls the statute of limitations until the time the plaintiff knew or, with reasonable diligence should have known of the existence of a potential claim.[10]

The specific issue of when a plaintiff's claim accrues in an action against a real estate appraiser in a discovery rule jurisdiction has been decided by a relative few number of courts. In Florida, there appears to be one primary case on this question. In *Lehman Brothers Holdings v. Phillips*, 569 Fed.Appx. 814 (11th Cir. 2014), the plaintiff, a purchaser of two mortgage loans related to the same property, brought an action against a real estate appraiser that they alleged had misrepresented and undervalued the property. The facts of the case are that, after purchasing the two loans, Lehman Brothers sold the loans to third parties on the secondary market. Following a complaint by one of the subsequent purchasers, Lehman Brothers conducted internal appraisal reviews. The reviews allegedly resulted in a finding that the property value on the appraisal was considerably low. Lehman Brothers then decided to buy back both of the loans. After repurchase, the second mortgage was completely written off, and the first mortgage was sold at a significant loss. The Northern District of Florida found that Lehman Brothers knew or should have known that it sustained at least some damage as of the date of repurchase of the loans. The Eleventh Circuit Court of Appeals agreed with the lower court ruling.

In the *Phillips* decision, unfortunately, the Eleventh Circuit did not provide much analysis of *why* the plaintiff knew or should have known there was a loss upon repurchase. The court did, however, explain its reasoning behind not accepting Lehman Brothers' argument that the claims did not accrue until the date loss was incurred (when the loan was resold at a loss). The court correctly reasoned that such a decision would place the date of accrual "on an indefinite date entirely within [plaintiff's] control."[11] The court went on to point out that this would defeat "the purpose of the limitations period and subject defendants to unfair surprise, stale claims, destruction of evidence, and the forgetfulness of witnesses."[12] This is, without question, important language to cite when defending these cases on statute of limitations grounds.

In the Mutual First/First Mutual matters, the vast majority of properties involved have either been foreclosed upon or been the subject of a short sale. The *Phillips* case does not deal with a foreclosure or short sale. Therefore, *Phillips* is instructive but not conclusive on the factual scenario being dealt with in the Mutual First/First Mutual cases. Decisions vary widely on what event may begin running of the statute of limitations when the discovery rule is applied. For instance, in *Farmers & Merchants Bank v. Putnam*, No. 1:08-cv-161, 2009 WL 1076198 (N.D. Ind. April 20, 2009), the court placed the accrual date as of the date when plaintiff had filed a separate lawsuit against the borrower that included an allegation that the property was

worth less than the appraised value. In *Capital Bankcorp Limited v. Landheer Appraisal Service*, No. 08-061263-NM, 2010 WL 2793646 (Mich. St. App. July 15, 2010), the court ruled, in part, that the statute of limitations began to run when it was refinanced because the lender could have performed a reappraisal. In *Slavin v. Trout*, 23 Cal. Rptr. 2d 219 (Cal. App. 2d Dist. 1993), the court ruled that date of accrual is *not* the date of default, but, rather, the date the lender acquired the property through foreclosure.

Mutual First/First Mutual argues that they did not discover errors in the appraisal until they conducted a review appraisal after acquiring the loan on the secondary market. The problem with this argument, other than the fact that the appraisals occurred at least 7 years prior, is that they not only take the benefits of the prior owner of the loan, but are also bound by the obligations of the prior owner. Put more succinctly, the court must look at whether somewhere along the line an owner of the loan knew or should have known it had been harmed by the allegedly faulty appraisal. If this event occurred, then that is the date the statute of limitations began to run.

Back, then, to the question of what event(s) would begin the clock ticking? In a foreclosure, is it the date of default, the date the foreclosure action is filed, or the date the property was acquired through foreclosure? In a short sale, is it the date of default, date of the application for approval of the short sale, or the date of the appraisal to approve the short sale (if any)? Is it some other event that would show that the owner of the loan had knowledge it had incurred damage as a result of the allegedly defective appraisal? As noted with the sampling of cases above, courts clearly rule on this issue on a case-by-case basis.

Only a very small number of cases involving First Mutual/Mutual First have decisions on the facts and timing of the case. Most of the First Mutual/Mutual First cases that have been concluded were done so due to technical issues. In several cases, Plaintiff has failed to pay filing fees, failed to obtain timely service, and failed to respond to orders to show cause. Those cases were dismissed without prejudice, but it does not appear any have been refiled. Other cases have been voluntarily dismissed after the defendant filed his or her motion to dismiss. Still others have presumably settled.

In those limited number cases that have received motion decisions, the results have been somewhat of a mixed bag. For instance, in *First Mutual Group, LP v. Firestone*, No. 2:14-CV-00492 (M.D. Fla. Aug. 25, 2014), the court denied defendant's motion to dismiss.[13] But in *First Mutual Group, LP v. Vazirani*, No. 14-CV-6762(SRC) (D.N.J. May 26, 2015), the court granted dismissal based upon the statute of limitations.[14]

Many sources have approached the First Mutual/Mutual First claims as being nothing more than a scam. This characterization, at this point, is somewhat inaccurate. While the majority of these matters have not been pursued beyond the initial letter writing stage or filing of a lawsuit, there are a few cases where the matter has been prosecuted through at least opposition to the motion to dismiss. This goes beyond what most would consider a scam and requires a defense rather than simply ignoring the matter. When defending these cases and arguing for dismissal or summary judgment based upon the statute of limitations, which should be the most successful strategy for defense, one must keep in mind the important point made by the Eleventh Circuit in *Phillips.* A significant waiting period for the limitations period to begin would defeat the purpose of the statute of limitations and "subject defendants to unfair surprise, stale claims,

destruction of evidence, and the forgetfulness of witnesses."[15] If courts were to rule that the statute of limitations began to run on the date Mutual First/First Mutual purchased the loan or conducted their review appraisal, the effect would be the same as if one were to wait until the property was sold after foreclosure. The lender in such a case has control over when and if the loan is sold, so resort to the date of the sale of the loan would be "completely dependent on an indefinite date entirely within [Plaintiff's] control."[16] A more prudent ruling, and one that would preserve the integrity of the statute of limitations, is one finding that the claim accrued upon default, foreclosure, or, when dealing with a short sale, the date of the application for approval of the short sale. Under no circumstances should the court accept the date of Mutual First/First Mutual's purchase of the loan or the date of the review appraisal as the date the claim accrued.

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[1] http://californiawatch.org/money-and-politics/texas-firm-targets-calif-homeowners-foreclosed-2nd-mortgages-16244 .

[2] *See id.*

[3] *See id.*; http://www.appraiserlawblog.com/2014/08/who-are-mutual-first-llc-and-savant.html .

[4] http://www.frea.com/blog/frea-scam-alert-update-%E2%80%93-first-mutual-group-savant-claims-management-and-heritage-pacific .

[5] The letters sent by the Savant group claim that an independent review appraisal revealed several USPAP violations and that Savant's client suffered significant financial damages as a result. The letter goes on to urge the recipient of the letter to notify his or her insurance provider, thus illustrating the likely reason for the shift from suing defaulting homeowners to the real estate appraiser. *See* http://www.frea.com/blog/appraisers-beware-possible-new-scam-discovered-frea .

[6] *See* http://www.frea.com/blog/frea-scam-alert-update-%E2%80%93-first-mutual-group-savant-claims-management-and-heritage-pacific . Savant Claims Management, LLC were also referenced as, depending on the claim, "Savant Legal Group" or "SavantLG." *Id.*

[7] *See id.*

[8] *See* http://www.appraiserlawblog.com/2014/08/who-are-mutual-first-llc-and-savant.html .

[9] *See* http://www.frea.com/blog/frea-scam-alert-update-%E2%80%93-first-mutual-group-savant-claims-management-and-heritage-pacific.

[10] *See Lopez v. Swyer*, 300 A.2d 563, 565-6 (N.J. 1973); *Lynch v. Rubacky*, 424 A.2d 1169, 1171 (N.J. 1981); *Kendall v. Hoffman-La Roche, Inc.*, 36 A3d 541, 552 (N.J. 2012); *Lehman Bros. Holdings, Inc. v. Phillips*, 569 Fed.Appx. 814, 817 (11th Cir. 2014); *Farmers & Merchants Bank v. Putnam*, No. 1:08-cv-161, 2009 WL 1076198 (N.D. Ind. April 20, 2009).

[11] *Phillips*, 569 Fed.Appx. at 818.

[12] *Id.*

[13] It should be noted, however, that defendant's motion to dismiss did not include an argument based upon the statute of limitations. First Mutual did not file a response to the motion to dismiss, but he court nevertheless denied the motion.

[14] In *Vazirani*, the court, without considerable analysis, reasoned that the date of the default was the proper date when First Mutual's predecessor would know or reasonably should have known of the alleged miscalculation of the property's value. This goes against the reasoning in *Slavin*, but it does now provide support for the default date being the proper date of accrual.

[15] *Phillips*, 569 Fed.Appx. at 818.

[16] *Id.*