



Key Legal Distinctions between Manufactured Home Chattel Lending and Real Property Lending

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1 Overview

This Paper is provided in connection with Fannie Mae's January 1, 2018 Duty to Serve ("DTS") Underserved Markets Plan for the Manufactured Housing Market ("MH Plan"). It satisfies (in part) Objective #1 under Regulatory Activity B of the MH Plan relating to manufactured housing titled as personal property (typically termed "chattel"). As the MH Plan notes, the majority of manufactured homes in the United States today are titled as personal property. Fannie Mae is considering whether to develop a chattel loan pilot under its MH Plan. This Paper is limited in scope to the fifty (50) states and to the District of Columbia. Substantial technical assistance in preparing this Paper was provided by the law firm of McGlinchey Stafford PLLC.

This Paper examines key legal distinctions between manufactured home chattel lending and real property lending. These distinctions are most pronounced when considering:

- (1) the scope of the High Cost Mortgage provisions under the Truth in Lending Act ("TILA");
- (2) the requirements for Higher-Priced Mortgages under TILA;
- (3) the benefits and burdens of invoking federal interest rate preemption under the Depository Institutions Deregulation and Monetary Control Act ("DIDA");
- (4) federal and state loan disclosure requirements;
- (5) vicarious liability under the Federal Trade Commission's Preservation of Consumers' Claims and Defenses Rule (the "Holder Rule");
- (6) the manner and method of conveying and encumbering real estate and manufactured homes that are personal property;
- (7) assigning liens; and
- (8) default servicing.

In this Paper, we refer to loans secured only by HUD-certified manufactured homes as "Chattel Loans" and loans secured by a mortgage on real property improved with HUD-certified manufactured homes as "Real Property Loans." In all instances, the manufactured home is assumed to be a borrower's principal residence.

Attached as Exhibit A is a summary of the principal differences between Chattel Loans and Real Property Loans addressed in the body of this Paper.



2 Discussion

2.1 High Cost Mortgages (“HOEPA”)

Under a provision in TILA commonly referred to as “HOEPA”, a “high-cost mortgage” is any consumer credit transaction that is secured by a consumer’s principal dwelling that exceeds either the “Rate Trigger” or the “Points and Fees Trigger.” The Rate Trigger for Chattel Loans of less than \$50,000 is an Annual Percentage Rate (“APR”) greater than 8.5% over the Average Prime Offer Rate (“APOR”). The Rate Trigger for Chattel Loans equal to or greater than \$50,000 and all Real Property Loans is an APR greater than 6.5% over the APOR. In 2018, the Points and Fees Trigger for all loans equal to or less than \$21,032 is the lesser of 8% of total loan amount or \$1052. In 2018, the Points and Fees Trigger for all loans greater than \$21,032 is 5% of total loan amount. Percentages are calculated using “total loan amount” – the amount of credit extended without taking into account any financed points and fees.

The higher Rate Trigger for smaller Chattel Loans is a recognition that the fixed costs of originating and servicing those loans are the same as larger loans, but are a larger proportion of the total loan amount. Industry advocates contend that all of the Triggers for Chattel Loans should be even higher and apply to Chattel Loans of \$75,000 or less. Consumer advocates contend that raising the Triggers or the loan amount threshold will erode important consumer protections.

The HOEPA consumer protections require disclosures warning consumers against the high-cost mortgage and requires pre-loan counseling, certified by an independent HUD-approved counselor. The law also limits late charges to four per cent (4%) of the past due amount of an installment following a fifteen (15) day grace period. Points and fees may not be financed, and deferral and modification fees are prohibited.

It is established Fannie Mae policy not to purchase high-cost/HOEPA loans. Moreover, under the DTS regulation, high-cost mortgages (including Chattel Loans) are ineligible for DTS credit (12 C.F.R. § 1282.37(b)(2)). Accordingly, Fannie Mae will not include loans that constitute high-cost mortgages in any purchases of Chattel Loans it undertakes pursuant to the MH Plan.

2.2 Higher-Priced Mortgages

It is Fannie Mae’s understanding that most Chattel Loans are Higher-Priced Mortgage Loans (“HPMLs”) under TILA by reason of their generally higher APRs. TILA generally requires creditors to establish escrow accounts for HPMLs for the payment of property tax and premiums for mortgage-related insurance, such as property damage insurance. Subject to certain exemptions, discussed below, TILA also requires creditors to obtain appraisals for HPMLs. HPML transactions, unlike HOEPA loans, are eligible for purchase by Fannie Mae.

A. Escrows Generally

Thirty-one (31) states¹ impose a personal property tax on manufactured homes which, if unpaid, becomes a lien that is superior to any secured party’s lien. This risk is mitigated greatly by requiring monthly escrow payments for these taxes. All states impose an *ad valorem* tax on site-built homes. *Ad valorem* taxes on manufactured homes characterized as personal property typically are significantly lower than *ad valorem* taxes on site-built homes.

¹ Arkansas, Arizona, California, Colorado, Florida, Georgia, Iowa, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Montana, North Carolina, North Dakota, Nebraska, New Mexico, Nevada, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Vermont, Washington, Wisconsin, and West Virginia.



B. Appraisals

The HPML appraisal requirements for Chattel Loans and Real Property Loans differ in some respects.

I. General Rule

- A creditor cannot extend a HPML without obtaining, prior to consummation, a written appraisal of the property to serve as collateral.
- The appraisal must be performed by a certified or licensed appraiser who conducts a physical visit to the interior of the property that will secure the transaction.
- The creditor must disclose to the consumer the right to receive a copy of the appraisal within three (3) business days of application.
- The creditor must provide a copy of the appraisal to the consumer no later than three (3) business days prior to consummation or within thirty (30) days after creditor determines the loan will not be consummated.

II. HPML Exemptions Available To Manufactured Home Lenders

- HPML appraisal requirements do not apply to a loan that is also a Qualified Mortgage under TILA. This exemption is available for both Chattel Loans and Real Property Loans.
- Transactions equal to or below a specified threshold, set at \$26,000 for 2018, are exempt from HPML appraisal requirements. While this exemption is available for Real Property Loans, it is particularly applicable to Chattel Loans, many of which are small dollar loans.

III. Transactions Secured Only By Manufactured Homes

In lieu of a traditional appraisal, an HPML Chattel Loan creditor can obtain one of the following and provide a copy to the consumer no later than three (3) business days prior to consummation of the transaction—

- For new manufactured homes only, a manufacturer's invoice, provided that the date of manufacture is no earlier than eighteen (18) months prior to the creditor's receipt of the credit application;
- A cost estimate of the value of the manufactured home obtained from an independent cost service provider; or
- A valuation of the manufactured home performed by a person who has no direct or indirect interest, financial or otherwise, in the property or transaction for which the valuation is performed and has training in valuing manufactured homes. ("Valuation" means an estimate of the value of the consumer's principal dwelling in written or electronic form, other than one produced solely by an automated model or system).

IV. Transactions Secured By Land and a Manufactured Home

A new manufactured home and land (i.e., a Real Property Loan) is exempt from the HPML requirement that the appraiser conduct a physical visit of the interior of the home.

V. Valuations

Note that for all loans, not just HPMLs, the Equal Credit Opportunity Act, through Regulation B, requires both Real Property Loan lenders and Chattel Loan lenders to provide an applicant a copy of all appraisals and other written valuations developed in connection with an application for credit that is to be secured by a first lien on a dwelling. A manufacturers' invoice for a manufactured home qualifies as a valuation for such purposes.



2.3 The Depository Institutions Deregulation and Monetary Control Act

Section 501(a)(1) of the Depository Institutions Deregulation and Monetary Control Act (12 U.S.C. § 1735f-7a) (“DIDA Section 501”) preempts state constitutional and statutory interest rate limits that apply to federally related first lien residential mortgage loans. DIDA allows eligible housing creditors (both Real Property and Chattel) to charge any rate or amount of interest, discount points, finance charges, or other charges with respect to any eligible loan, mortgage, credit sale, or advance made after March 31, 1980. Fourteen (14) states² opted out of DIDA preemption as provided under the act.

However, to obtain DIDA Section 501 preemption, creditors of Chattel Loans must comply with six (6) consumer protection provisions³, all in addition to those imposed by otherwise applicable law. These protections are not required for Real Property Loans.

Failure to comply with DIDA’s requirements will result in the loss of the interest rate preemption and subject the offending creditor and its assignees to state law usury ceilings and penalties.

2.4 Origination Disclosures

A. Cosigner Notices

A Federal Trade Commission (“FTC”) Regulation (16 C.F.R. § 444.3) requires that “cosigners” on Chattel Loans receive a warning notice. This rule does not apply to Real Property Loans. A cosigner is a consumer who is obligated on the debt, but does not have an ownership interest in the manufactured home securing the debt.

B. State Law Disclosure Requirements

Chattel Loans entail significantly fewer state law origination disclosures, such as advance fee disclosures, net tangible benefit disclosures and the availability of homeownership counseling.

C. Affiliated Business Disclosure, Mortgage Servicing Transfer Notices

The Real Estate Settlement Procedures Act (12 U.S.C. § 2601) (“RESPA”) requires Real Property Loan lenders to disclose affiliate⁴ relationships with settlement service providers that may provide services in connection with a loan the lender is making. RESPA also requires real estate lenders to disclose the likelihood that it will transfer servicing of a loan it is making to the consumer. Chattel Loans are not subject to either requirement.

D. Truth in Lending Disclosures

TILA requires disclosure of financial terms before loan closing. In a transaction secured by real property, the creditor must give an applicant for a loan a detailed, multi-page Loan Estimate at the time of application and a detailed multi-page Closing

² Colorado, Georgia, Hawaii, Idaho, Iowa, Kansas, Maine, Massachusetts, Minnesota, Nebraska, Nevada, North Carolina, South Carolina and South Dakota.

³ As detailed in 12 C.F.R. § 190.4, these are: (i) refund of unearned precomputed finance charge on prepayment, (ii) a prohibition on prepayment penalties, (iii) requirements for fully amortizing loans, (iv) limits on late charges, (v) limits on fees for deferring installment payments, and (vi) notices before repossession, foreclosure or acceleration.

⁴ On a related point, note that a recent amendment to TILA excludes specified manufactured home retailers and employees from the definition of “loan originator” based on their conduct with lenders and consumers, provided that, if the retailer has an affiliated relationship with a lender to whom the retailer/employee makes a consumer referral, they also refer the consumer to another non-affiliated potential lender (see Economic Growth, Regulatory Relief, and Consumer Protection Act (Pub. L. 115-174)). While Pub. L. 115-174 changes the definition of loan originator under TILA, it does not amend the definition of “mortgage loan originator” under the Secure and Fair Enforcement for Mortgage Licensing Act (“SAFE Act”). Before engaging in activities now permitted under the new TILA definition, retailers and their employees should consider the limitations that remain under each state’s SAFE Act.



Disclosure at the time of closing. In a Chattel Loan transaction, a disclosure is not required at the time of application and the disclosure at closing is less than a page.

2.5 Conveying and Encumbering

A. Real Estate Generally

Fee Simple interests in real estate are conveyed by a deed in every state. A real estate loan is documented with a note and mortgage, or a deed of trust or a security deed. A mortgage, a deed of trust or a security deed ("Security Instrument") is recorded in the land records of the county or town where the home is located, which gives public notice of the ownership of real property and of liens thereon. The complexity associated with conveying interests in real estate has prompted the development of a title insurance industry to protect owners and creditors against the claims of other persons asserting an interest in the property. There is no corresponding concept for Chattel Loans.

B. Manufactured Homes

I. Chattel Loans

Consumer ownership of manufactured homes is evidenced by varying methods depending on the state. Likewise, methods of perfecting liens also vary ("perfection" refers to legal status that affords a lien priority relative to the claims of other creditors, secured and unsecured). Currently, the vast majority of Chattel Loans are documented by a combined form of promissory note, security agreement and Truth in Lending Disclosure ("Note"). Others are documented using retail installment contracts ("Contracts"). Neither document is recorded in public records. Conveyance and lien perfection are accomplished under the Uniform Commercial Code ("UCC") and state certificate of title acts.

The UCC governs perfection of a security interest in a manufactured home that is characterized as personal property. Under the UCC, if a certificate of title act ("COTA") governs perfection of a security interest in a manufactured home, the UCC defers to the COTA to determine whether perfection occurred.

Currently, in forty-four (44) states⁵, evidence noted on a certificate of title determines ownership of and perfection of a security interest in a manufactured home ("Title States"). In the District of Columbia and six (6) states⁶, filing a UCC-1 financing statement perfects a security interest in a manufactured home ("UCC States"). In four (4) Title States⁷ in transition from "UCC", the method of conveyance and encumbrance depend on the manufactured home's year of manufacture. Finally, Louisiana and Wyoming require both a UCC-1 filing and noting the lien on the certificate of title.

II. UCC Financing Statement

In UCC States, to perfect a security interest in a manufactured home that is personal property, the secured party files a UCC-1 financing statement and "UCC Financing Statement Addendum" ("UCC-1Ad") in the office of the Secretary of State of the state of the debtor's principal residence.

⁵ Alaska, Alabama, Arizona, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin and Wyoming.

⁶ Connecticut, Hawaii, Massachusetts, New Hampshire, Rhode Island and Vermont.

⁷ Alabama, Maine, Mississippi and New York.



The UCC-1Ad allows a secured party to extend the initial effective period for a UCC-1 in a manufactured-home transaction from five (5) to thirty (30) years, eliminating the need for further filings. A “manufactured-home transaction” means (per UCC § 9-102)

a secured transaction (1) that creates a purchase-money security interest in a manufactured home, other than a manufactured home held as inventory; or (2) in which a manufactured home, other than a manufactured home held as inventory, is the primary collateral.

III. Certificate of Title

In Title States, notation of the secured party's lien in compliance with state law on the certificate of title perfects its security interest. In the majority of states⁸, the first noted lienholder is given possession of the original certificate of title; in the other states⁹, the owner of the manufactured home is given possession and the lien holder is sent other proof of lien perfection.

Fourteen (14) states¹⁰ now either offer or require electronic titles in some fashion, which creates additional challenges for maintaining control over the collateral.

IV. Manufactured Homes as Fixtures

A security interest in a manufactured home that is or becomes a fixture (defined in UCC § 9-102 as “goods that have become so related to particular real property that an interest in them arises under real property law”) is perfected by one of three methods: making a “fixture filing”, noting the secured party's lien on the certificate of title to the manufactured home, or recording a mortgage or deed of trust that covers the manufactured home. Whether or not a manufactured home has become so related to particular real property that an interest arises under real property law will be determined by the law of the state where it is located. With respect to goods that are fixtures, a filing only in the office of the Secretary of State will not take priority over real estate lien holders in the collateral (while a fixture filing will take priority over subsequent real property liens). This limiting provision serves to protect the interests of Chattel Loan lienholders from undisclosed actions by the homeowner to convert the personal property to a real property interest.

a) Under the UCC

In UCC States, where manufactured home certificates of title simply do not exist, making a UCC-1 fixture filing perfects a security interest in a manufactured home that is a fixture to the related real estate. A “fixture filing” is the filing, made in the office where a mortgage on the real estate would be recorded, of a UCC-1 financing statement covering goods which are or are to become fixtures together with a description of the related real property. A recorded Security Instrument with appropriate language also perfects a security interest in a manufactured home that is a fixture.

A manufactured home sufficiently affixed to real property so as to lose its character as personal property transforms into a fixture, and the rules governing real property conveyancing and lien perfection apply.

Virtually every state has case law articulating the standard for determining whether goods have become fixtures. Virtually every case makes the factual determination under a “three part test.” In its simplest form, this common law test asks:

- (1) What was the intent of the owner of the goods and the owner of the related real estate?
- (2) How are the goods affixed to the related real estate?

⁸ Alaska, Alabama, Arizona, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Mississippi, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia and Wyoming.

⁹ Kentucky, Maryland, Michigan, Minnesota, Missouri, Montana, New York, Oklahoma and Wisconsin.

¹⁰ Alabama, California, Florida, Georgia, Idaho, Kansas, Louisiana, Maryland, Nebraska, North Carolina, Pennsylvania, South Carolina, South Dakota, Texas and Virginia.



(3) What is the use of the goods?

Intent is the most important factor.

Good lending practices may lead creditors to seek to perfect UCC security interests by filing both a UCC-1 with the Secretary of State and a fixture filing in the land records, unless state law is clear that such precautionary steps are unnecessary.

b) Under COTAs

Because of the uncertainty potentially arising from whether a manufactured home is characterized as real property or personal property, the UCC provides a special rule in UCC § 9-334, granting priority to certain security interests created in a manufactured home as part of a manufactured-home transaction (as defined above). Under this rule, a security interest in a manufactured home that becomes a fixture has priority over a conflicting interest of an encumbrancer or owner of the real property if the security interest is perfected under a COTA. This provision is designed to eliminate lien priority questions arising when manufactured homes subject to COTAs later become fixtures.

Some COTAs, in addition to the provisions of the UCC, expressly recognize a lien noted on the certificate of title as the “exclusive” means of perfecting a security interest in a manufactured home, even if the manufactured home is affixed to the real estate.

V. Manufactured Homes As Real Property

In forty three (43) states¹¹, a manufactured home remains personal property until the manufactured homeowner completes the “Conversion Procedure” -- a formal statutory procedure for electing to convey and encumber a manufactured home as real property. In those states, completing the Conversion Procedure legally converts the manufactured home to real property for all purposes. Thus, absent such a process, a manufactured home will not constitute a “fixture.”

After the manufactured home owner completes the Conversion Procedure, the manufactured home and the land are conveyed by deed and encumbered using a Security Instrument with a fixtures clause and an appropriate description of the manufactured home.

C. Untimely Filings

Because Security Instruments are submitted for recordation in the land records immediately after closing, untimely filings are rare involving Real Property Loans. However, because of the inherent delay in the COTA processes, untimely filings are a significant risk for Chattel Loans. Absent timely perfection of a creditor’s security interest in a manufactured home, intervening creditors, notably bankruptcy trustees, may gain priority over the security interest.

Many states provide a grace period for perfection: if the creditor’s security interest is perfected within a specified number of days of its creation, perfection will relate back to the date of creation. The Bankruptcy Code limits that period to thirty (30) days. Otherwise, perfection occurs on the date the lien is filed. In *Fidelity Financial Services, Inc. v. Fink*, 522 U.S. 211 (1998), the U.S. Supreme Court held that, if a bankruptcy case is filed within ninety (90) days of perfection of the security interest, perfection will only relate back to the lien’s creation date if the title was not delivered within the period of time specified in the Bankruptcy Code, and the creditor’s security interest may be avoided (i.e., disregarded) as a preference.

One of the challenges to timely perfection in first retail sales is the need for possession of the Manufacturer’s Certificate of Origin (“MCO”). It is required to apply for a certificate of title so the creditor’s lien can be noted on the certificate of title to perfect it. However, an inventory lender to the retailer often has possession of the MCO as collateral pending payment of its inventory loan to the retailer and will not relinquish possession until its inventory loan is paid. Similarly, if no inventory

¹¹ Alaska, Alabama, Arizona, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin and Wyoming.



lender is involved, the factory will not release the MCO until it is paid for the manufactured home. If the consumer lender is the source of funds for either of these purposes, delays in release, and the annotation of lien, may ensue.

2.6 Recording Assignments of Lien

Recording assignments of Security Instruments in Real Property Loans is routine. Many Real Property lenders subscribe to the Mortgage Electronic Registration System (commonly called “MERS”), which greatly simplifies the process by eliminating the need to record assignments in the real property records. No similar process exists for assignment of Chattel Loan security interests. However, unlike with Real Property loans, an assigned Chattel Loan security interest may be enforced against a debtor even if it is not recorded.

2.7 Vicarious Liability under the FTC Rule

Assignees of Chattel Loans may be vicariously liable under the FTC’s Preservation of Consumers’ Claims and Defenses Rule (“Holder Rule”) for claims consumers could bring against retailers, including claims under the federal Magnuson-Moss Warranty Act and HUD manufactured housing regulations that impose liability on manufacturers, retailers and installers for manufacturing and installation defects. Real Property lenders do not bear this risk.

A. The Holder Rule

The Holder Rule applies when an investor purchases Contracts or Chattel Loans under the following conditions:

1. A consumer buys goods or services from a “Seller” (e.g., a manufactured home retailer);
2. The purchase is financed by a Contract or a Note; and
3. The entity that first buys the Contract or that makes the Note (“Creditor”) has a “business arrangement” with the Retailer or the Retailer “refers” the consumer to the Creditor.

FTC staff has previously taken the position that merely providing a list of possible creditors (so long as it is not pursuant to an agreement or business arrangement with the creditors) does not constitute a referral under the Holder Rule. The Holder Rule requires specific language to be included in each Contract or Note making the “holder” liable to the consumer for all claims and defenses the consumer could assert against the Retailer receiving the proceeds of the Contract or the Note.

The consumer may assert the claims and defenses against the holder (i) to recover any amounts paid under the Contract or the Note (including down payments); and (ii) to reduce the unpaid balance due on the Contract or the Note. The holder’s vicarious liability for the acts of the Retailer, however, cannot exceed the total of payments originally due on the Contract or the Note.

If state law is more restrictive than the Holder Rule, the state law will not limit the application of the Holder Rule. For example, under Alabama law, a consumer may assert seller-related defenses against assignees, but not raise those claims affirmatively. Alabama consumers nevertheless can use the Holder Rule to bring affirmative claims against assignees.

B. Particular Vicarious Liability Risks

Two federal laws pose particular vicarious liability risk: the HUD Dispute Resolution Program and the Magnuson-Moss Warranty Act.

I. Manufactured Housing Improvement Act of 2000

The Manufactured Housing Improvement Act of 2000 amended the Manufactured Home Construction and Safety Standards Act of 1974 (42 U.S.C. § 5401). It required that by December 27, 2005, HUD and the states promulgate:



- (1) manufactured home installation standards;
- (2) programs for the training and licensing of manufactured home installers;
- (3) requirements for inspection of the installations of manufactured homes; and
- (4) a dispute resolution program for the timely resolution of disputes between manufacturers, retailers, and installers of manufactured homes regarding responsibility, and for the issuance of appropriate orders, for the correction or repair of defects in manufactured homes that are reported during the 1-year period beginning on the date of installation.

II. Dispute Resolution Program

24 C.F.R. Part 3288, effective February 8, 2008, provides for the implementation of the HUD Manufactured Home Dispute Resolution Program, a dispute resolution program for the timely resolution of disputes among manufacturers, retailers and installers regarding the responsibility for correcting or repairing defects reported by the homeowner or others in the 1-year period after the first installation of a home.

A "defect" is any defect in the performance, construction, components or material of a home that renders the home or any part of it not fit for the ordinary use for which it was intended, including but not limited to a defect in the construction, safety or installation of the home.

The HUD Manufactured Home Dispute Resolution Program consists of a six (6) step Mediation and Arbitration Process.

A Part 3288 defect that is not remedied by a manufacturer, retailer or installer can form the basis of a claim asserted by a consumer against a purchase money Chattel Loan lender under the Holder Rule.

III. The Magnuson-Moss Consumer Warranty Protection Act

The Magnuson-Moss Consumer Warranty Protection Act (15 U.S.C. § 2301) ("Warranty Act") establishes standards for written warranties, implied warranties, and service contracts offered to consumers on consumer products. Under the Warranty Act, sellers of consumer products who provide service contracts covering their products are prohibited under the act from disclaiming or limiting implied warranties. Sellers of consumer products that merely sell service contracts as agents of service contract companies can disclaim implied warranties on the products that they sell. The Warranty Act also requires the terms of the service contract to be fully, conspicuously, and completely disclosed.

A consumer prevailing on a Warranty Act claim may recover his or her attorneys' fees.

A Part 3288 defect that is not remedied by a manufacturer, retailer or installer can form the basis of a claim asserted by a consumer against a purchase money lender under the Warranty Act and the Holder Rule.

Many states also have warranty acts expressly applicable to manufactured homes.

2.8 Default Servicing

Enforcement of Real Property Loans is regulated primarily by RESPA and state real property laws. Enforcement of Chattel Loans is regulated primarily by the UCC and in eleven (11) states¹² under the state's version of the Uniform Consumer Credit Code. Violations can result in significant statutory penalties.

¹² Colorado, Hawaii, Idaho, Indiana, Iowa, Kansas, Maine, South Carolina, Utah, West Virginia and Wisconsin.



A. Real Property

RESPA requires Real Property lenders and servicers to comply with a number of servicing requirements that protect consumers, such as (i) requiring lenders to provide a homeownership counseling notice and requiring servicers to implement error resolution procedures, (ii) follow rules governing responses to requests for information, (iii) comply with constraints related to force-placed insurance, (iv) follow early intervention requirements, (v) provide for a single point of contact for loss mitigation, and (vi) perform certain loss mitigation procedures. These requirements do not apply to Chattel Loans.

Real estate foreclosure laws vary from state to state. In states where deeds of trust are used, foreclosure sales are noticed and conducted by the trustee named in the deed of trust, generally without judicial process. In states where mortgages are used, generally, judicial proceedings are required to foreclose. In recent years, many states have enacted procedural protections for consumers in foreclosures. As a result of legislative and judicial decisions relating to the real property crisis of 2008, many states have attenuated the process of real property foreclosure. Time to foreclosure, free from a right of debtor redemption, ranges from 300 to 1,230 days.

B. Chattel Only

The process for repossessing and reselling a manufactured home securing a Chattel Loan differs greatly. It requires sending the debtor (“Debtor”) a notice of default and right to cure (“Notice of Default”); gaining possession of the manufactured home either by voluntary surrender or court order; sending the Debtor a notice of repossession, notice of right to reinstate, notice of right to redeem and notice of private or public sale; re-marketing the manufactured home; conducting the sale; documenting the sale; retitling the manufactured home; and sending the Debtor an Explanation of Calculation of Surplus or Deficiency or a waiver of deficiency. Typically, repossession is resolved within thirty (30) to eighty-one (81) days under state law.

I. Notice of Default

A Notice of Default is required by state law in twenty-one (21) states and the District of Columbia¹³ and by federal law for Chattel Loans made under the authority of DIDA Section 501 and related regulation (12 C.F.R. Part 190). DIDA is available in thirty-six (36)¹⁴ states and the District of Columbia. Virtually all chattel lenders lend under DIDA where it is available. As a result, every state except Hawaii, Idaho, Nevada, and South Dakota requires a Notice of Default before repossession. As a practical matter, virtually all chattel lenders send a Notice of Default in every state.

II. Repossession Sale

The UCC provides a safe harbor form of Notice of Disposition (Notice of Sale) for both private sales and public sales. Use of this form without significant variation affords a presumption of compliance with the notice of sale requirements of the UCC. This presumption is important because the penalty provisions for violating the UCC include payment to the Debtor of an amount equal to the originally scheduled finance charge and ten percent (10%) of the principal financed.

A repossessed manufactured home may be resold either at a public sale or a private sale as long as the sale is conducted in a commercially reasonable manner.

A public sale is an auction open to the public, held at a specified date, time and place. The secured party may bid on the manufactured home, but the price must be the fair market value of the manufactured home.

¹³ California, Colorado, Connecticut, District of Columbia, Georgia, Iowa, Illinois, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, North Carolina, Nebraska, Pennsylvania, Texas, Wisconsin and West Virginia.

¹⁴ Alaska, Alabama, Arkansas, Arizona, California, Connecticut, District Of Columbia, Delaware, Florida, Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, Missouri, Mississippi, Montana, North Dakota, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, Vermont, Washington, Wisconsin, West Virginia and Wyoming.



A private sale is negotiated by the secured party using whatever means it reasonably believes will bring the highest net price for the manufactured home. A private sale does not have to take place at any particular time or place; however, the law requires a reasonable period of time following repossession and notice of sale before the private sale can take place. The secured party may NOT purchase a repossessed manufactured home at a private sale.

III. Re-Marketing a Repossessed Manufactured Home

The secured party may remarket a repossessed manufactured home in a variety of ways. If it has a remarketing department it may advertise and sell the manufactured home itself. Thirty-seven (37) states and the District of Columbia¹⁵ allow the secured party to act as retailer for the sale of its repossessed manufactured homes without a retailer license. If the manufactured home is in a community, a retailer affiliate of the community may assist with the resale. Typically the secured party and the community will enter into a "Park Agreement" whereby the secured party pays site rent, and refurbishes and maintains the manufactured home until it is sold in place. The cost of moving the home can be as high as five thousand dollars (\$5,000). Thus, the secured party has incentive to enter into the Park Agreement. If the manufactured home is located on private land and the secured party does not have a lien on the land, typically the manufactured home is removed to the sales lot of the retailer that originally sold the home, and consigned for resale. In this situation, the secured party cannot avoid the cost of a move and an investor may be reluctant to purchase chattel loans secured by homes on private land. A prudent lender will get a landlord lien waiver when installing a manufactured home on private land. Finally, many secured parties list the manufactured home for resale on www.mhville.com.

Foreclosed homes securing Real Property Loans typically are brokered by real estate agents engaged by the lender.

IV. Penalties for Non-Compliance

a) Commercial Reasonableness

All aspects of a repossession and resale under UCC Article 9 Part 6 must be "commercially reasonable." If not, the secured party will be subject to claims for actual damages and significant statutory penalties and may be barred from collecting a deficiency. The fact that a greater amount could have been obtained at a repossession sale does not determine commercial reasonableness. Commercial reasonableness is determined by analyzing if the sale was in the usual manner in any recognized market, if the price was at or above any recognized market price at the time of disposition, or if the sale was in conformity with reasonable commercial practices.

b) UCC § 9-626 Rebuttable Presumption

A secured party need not prove compliance with the provisions of Article 9 Part 6 relating to collection, enforcement, disposition, or acceptance unless the debtor places the secured party's compliance in issue. If the secured party's compliance is placed in issue, this "rebuttable presumption" shifts and the secured party has the burden of establishing that the collection, enforcement, disposition, or acceptance was conducted in accordance with Article 9 Part 6. The rebuttable presumption is available only in commercial cases. The UCC leaves to the court the determination of the proper rules in consumer transactions. The court may not infer from the rebuttable presumption for non-consumer transactions the nature of the proper rule in consumer transactions and may continue to apply the established approaches —absolute bar or rebuttable presumption.

V. Lien Modifications In Chapter 13 Bankruptcies Are A Significant Cause of Chattel Lender Losses.

The Bankruptcy Code, in 11 U.S.C. § 1322(b)(2), provides that a Chapter 13 plan may "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence,

¹⁵ Alaska, Alabama, Arizona, California, District of Columbia, Delaware, Florida, Georgia, Hawaii, Iowa, Kentucky, Louisiana, Massachusetts, Maryland, Michigan, Missouri, Mississippi, North Carolina, North Dakota, Nebraska, New Hampshire, New Mexico, Nevada, New York, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, Tennessee, Utah, Virginia, Vermont, Washington, Wisconsin and Wyoming.



or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims." Section 1322(b)(2) prevents the modification of a claim secured by real property that is the debtor's principal residence.

However, there is no statutory prohibition on the modification of a lien secured by *personal* property, even if that personal property is a manufactured home that is the debtor's principal residence. State law determines whether a debtor's manufactured home is considered real or personal property. As noted above, the vast majority of loans secured only by manufactured homes are considered to be personal property loans.

Bankruptcy cases construing the bifurcation provisions in 11 U.S.C. §§ 506(b), 1322(b)(2) and 1325(a)(5)(B) speak, variously, of "modification," "lien stripping," "bifurcation" and "cramdown." Each of these terms denotes an alteration of a secured creditor's pre-bankruptcy contract rights in favor of a Chapter 13 debtor.

A Chapter 13 debtor may bifurcate a Chattel Loan secured creditor's claim into secured and unsecured portions if the value of the collateral for the loan at the time the bankruptcy petition is filed is less than the amount of the claim. The portion of claim that is greater than the value of the collateral is unsecured, and the portion up to that value is secured. The secured portion of the claim is then scheduled to be paid in full over the life of the Plan and the unsecured portion normally receives little or no dividend.

Because there are two components to any cramdown – collateral valuation and interest rate on deferred payments – the standard with respect to either will affect the return that the creditor realizes on its secured claim over the life of a Chapter 13 plan.



EXHIBIT "A"
REAL PROPERTY AND PERSONAL PROPERTY COMPARISON CHART

Legal Issue	Real Property	Personal Property
High Cost Mortgage/HOEPA Rate Threshold	The Rate Trigger for all Real Property Loans is an Annual Percentage Rate ("APR") greater than 6.5% over the APOR.	The Rate Trigger for Chattel Loans less than \$50,000 is an APR greater than 8.5% over the Average Prime Offer Rate ("APOR"). The Rate Trigger for Chattel Loans equal to or greater than \$50,000 is an APR greater than 6.5% over the APOR.
Appraisals for Higher-Priced Mortgages	Required	May use a manufacturer's invoice or a cost estimate in lieu of an appraisal; homes built before June 15, 1976 are exempt
Federal Interest Rate Preemption	Applies	Applies, but also requires compliance with consumer protection provisions
Origination Disclosures – Cosigner Notices	Does Not Apply	Applies
Origination Disclosures – State Law Requirements	Applies	Applies, but fewer required
Origination Disclosures - RESPA	Applies	Does Not Apply
Origination Disclosures – Truth in Lending	Requires detailed Loan Estimate at time of application and detailed Closing Disclosure at closing	Requires relatively simple disclosure at closing



Legal Issue	Real Property	Personal Property
Conveying and Encumbering	Conveyed by deed, encumbered using a Security Instrument recorded in the land records	Conveyed either by a certificate of title, a bill of sale or a manufactured home deed, depending on the state; encumbered by noting the lien on title, or filling a UCC-1 Financing Statement with the Secretary of State, depending on the state
Recording Assignments of Lien	Required to enforce lien	Not required to enforce lien
Creditor Vicarious Liability Under the Federal Trade Commission Preservation of Consumers' Claims and Defenses Rule	Does Not Apply	Applies
Manufactured Housing Improvement Act Dispute Resolution Program	Does Not Apply	Applies
Magnuson-Moss Consumer Warranty Protection Act	Does Not Apply	Applies
Default Servicing – RESPA Servicing Requirements	Applies	Does Not Apply
Default Servicing – Uniform Commercial Code	Does Not Apply	Applies; significant liability for non-compliance
Default Servicing – Remarketing	Done using licensed real estate agents	May be done by secured party without licensing in most states
Default Servicing – Lien Modification in Chapter 13 Bankruptcies	Does Not Apply	Applies