

# CASE UPDATE: COMMISSIONER V. BROWN, BROWN & BROWN, P.C. THE COURT OF APPEALS FORECLOSES ON UNLICENSED CREDIT SERVICES BUSINESS ACTIVITIES BY LAW FIRMS

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Ask any number of homeowners who have had their homes foreclosed, and they will tell you it is an agonizing experience. In 2008, during the escalation of the Great Recession there were more than 3.1 million foreclosure filings in the United States.<sup>1</sup> As a result of those filings, a total of 861,664 American families lost their homes to foreclosure that year.<sup>2</sup> In Maryland, foreclosure filings increased by 71% in 2008 with a total of more than 32,000 Marylanders facing foreclosure in that year alone.<sup>3</sup> One homeowner in Capitol Heights, Maryland described her fight to prevent a bank from foreclosing on her home after living in it for over 65 years as an emotional impaling: “I get upset when I talk about it. It’s like somebody took a nail and drove it through your heart.”<sup>4</sup> As a more macabre example of the emotional and mental toll that fear of foreclosure had on families in the years following the 2008 financial crisis, a study by the American Journal of Public Health linked an increase in suicide rates from 2005 to 2010 to an increase in foreclosure rates during that same period.<sup>5</sup>

Like thousands of American families and Marylanders, Miguel and Teresa Batres found themselves facing this economic quagmire in the wake of the 2008 financial crisis. This experience of the Batres family provides the backdrop for the decision by the Court of Appeals of Maryland in the case of *Commissioner of Financial Regulation v. Brown, Brown, & Brown, P.C., et al.*, 449 Md. 345 (2016).

In July 2008, Miguel and Teresa Batres feared losing their Maryland home to foreclosure and were seeking a modification of their mortgage loan to fend off foreclosure. Teresa Batres, a native Spanish speaker who did not read English, responded to a Spanish-language radio advertisement for mortgage analysis and consulting services by a business called Mortgage Analysis & Consulting LLC. This now defunct Virginia-based business advertised in Spanish-language media and accepted fees from homeowners to analyze their mortgage status and refer homeowners in jeopardy of foreclosure to a mortgage loan modification service. After Ms. Batres paid Mortgage Analysis & Consulting \$150 to analyze her mortgage, the business referred her to Brown, Brown & Brown, P.C. to help her obtain a loan modification.<sup>6</sup>

Brown, Brown & Brown, P.C. (“BB&B”) was a small Virginia law firm headed up by managing partner Christopher Brown, an attorney licensed in Virginia and the District of Columbia,

but not licensed in Maryland. BB&B and Mr. Brown employed lawyers licensed to practice in Maryland who consulted with hundreds of Maryland homeowners facing foreclosure. Mortgage Analysis & Consulting referred the vast majority of these homeowners to BB&B, and this referral stream accounted for 90 percent of the homeowners who consulted BB&B during this time period. Ultimately, BB&B entered into at least 57 agreements with homeowners between June 2008 and March 2009. Under each agreement, a homeowner paid BB&B an amount varying from \$2,500 to \$7,500 up front before BB&B had rendered any services. In return, BB&B would agree to attempt to renegotiate the mortgage loan so that the homeowner could avoid foreclosure. In particular, the agreements provided that BB&B would (1) represent the homeowner in negotiations with the homeowner’s lender, foreclosure defense, and possible litigation; (2) engage the appropriate party in discussions to renegotiate the terms of the mortgage loan; and if renegotiation was unsuccessful, (3) “assess the chances of success in state or federal court and costs involved” for an additional fee.<sup>7</sup>

On July 23, 2008, Miguel and Teresa Batres signed an agreement with BB&B and paid \$1,500 of the \$3,000 BB&B requested as an advance payment. Approximately six months after signing with BB&B, Miguel and Teresa Batres received a notice initiating a foreclosure action on their home along with a form notice from the Commissioner of Financial Regulation (the “Commissioner”) advising homeowners in foreclosure of their potential remedies. Miguel and Teresa Batres believed that BB&B had not done anything to obtain a loan modification on their behalf, and they weren’t alone. BB&B had made little effort to actually renegotiate any of the loans, as many homeowners had paid them to do. The Batreses never received a loan modification. In fact, BB&B did not obtain a loan modification for any of the 57 Maryland homeowners with whom it had signed agreements. Miguel and Teresa Batres eventually lost their home to foreclosure.<sup>8</sup>

The Batreses filed a complaint against BB&B with the Commissioner. After investigating BB&B, the Commissioner issued an order requiring BB&B to cease and desist on March 6, 2009, based on what the Commissioner had determined were violations of the Maryland Credit Services Business Act (“MCSBA”), Maryland Code, Commercial Law Article (“CL”), §14-1901 *et seq.*

(continued on Page 17)

## APPELLATE UPDATE...

(continued from page 16)

<sup>3</sup> It would seem that this opinion was destined to be written by the 2015-2016 “Judge of the Year” award winner Judge Glenn Harrell, whose pop culture bona fides have been well-documented. (See., e.g. <http://thedailyrecord.com/2015/04/02/the-resident-humorist-on-the-court-of-appeals/> last visited, December 30, 2016.) Judge Harrell opened this opinion with a reference to “Seinfeld,” asking “What does Petitioner, John T. Mitchell, have in common with “Seinfeld’s” Cosmo Kramer?” recalling the “Seinfeld” episode in which Kramer was erroneously sent vanity plates intended for a proctologist bearing the word “ASSMAN.” (Episode 107 (27 April 1995)). The opinion also contained a George Carlin reference, with Judge Harrell noting that the Court was “mindful” of the risk of “being haunted by the spirit of the late comedian and social commentator George Carlin.”

<sup>4</sup> The Court noted that if Morris had initiated an annulment action on her own behalf prior to her death, appellant, as Katherine’s personal representative, may have been permitted to continue such lawsuit, because Katherine, herself, would have made the initial decision to attack her own marriage.



## CASE UPDATE...

(continued from page 6)

BB&B requested a contested case hearing, and the Commissioner referred the matter to the Office of Administrative Hearings for a hearing and proposed decision by an administrative law judge (“ALJ”). Following an evidentiary hearing, the ALJ issued a proposed decision concluding that BB&B had violated the MCSBA. The ALJ recommended that the Commissioner issue a final cease and desist order and assess a civil monetary penalty in the amount of \$114,000 against BB&B. Finally, the ALJ found that BB&B’s violations of the MCSBA had been willful, and accordingly, recommended that the Commissioner order that BB&B pay treble damages to Miguel and Teresa Batres and the other homeowners who signed agreements with the law firm.<sup>9</sup> On May 5, 2011, the Deputy Commissioner of Financial Regulation issued a proposed order adopting the ALJ’s findings and recommended order, to which BB&B took exceptions. Following an exceptions hearing, the Deputy Commissioner issued a Final Order that (1) concluded that BB&B and its managing partner Christopher Brown had violated MCSBA, (2) declared BB&B’s agreement with the Batreses and all Maryland homeowners void, (3) ordered the law firm to cease and desist from engaging in any credit services business activities with Marylanders, (4) held BB&B and Mr. Brown jointly and severally liable for a civil monetary penalty of \$114,000, and (5) directed BB&B and Mr. Brown to pay a total of \$720,600 as treble damages to the 57 Maryland homeowners, including the Batreses.<sup>10</sup> BB&B filed a petition for judicial review in the Circuit Court for Baltimore City, and argued that the MCSBA did not apply to it and that even if it did apply, BB&B’s violations of the statute were not willful. The Circuit Court reversed the Deputy Commissioner’s decision on the basis that BB&B’s agreements with Maryland homeowners were for legal services, not credit services; therefore, the MCSBA did not apply to BB&B.<sup>11</sup> The Court of Special Appeals affirmed the decision of the Circuit Court in an unreported opinion from which the Commissioner appealed to the Court of Appeals. This case invited the Court of Appeals to articulate whether and to what extent a law firm is required to be licensed as a credit services business under the MCSBA. The Court was asked to consider two questions: (1) Did BB&B’s business activities – evidenced by its agreements with Maryland homeowners – fall within the definition of “credit services business” under the MCSBA?, and, if so, (2) did BB&B qualify for the MCSBA’s attorney exemption? In a unanimous decision, the Court held that the MCSBA requires a law firm to obtain a license to operate as a credit services business, when it engages in credit services business activities “on a regular and continuing basis.”<sup>12</sup> Turning to the statutory framework of the MCSBA, the Court explained that the law places restrictions on individuals and entities who offer, in return for the payment of money, to assist consumers in

(continued on Page 18)

## CASE UPDATE...

(continued from page 17)

obtaining credit. The MCSBA refers to such an individual or entity as a “credit services business.” The law defines a “credit services business” as a person who sells – or represents that such person will provide or perform, in return for payment of money – the service of obtaining an extension of credit for a consumer where the extension includes the right to defer payment of debt primarily for personal, family, or household purposes.<sup>13</sup> The Court reasoned that this definition applied to BB&B’s actions in offering and agreeing to renegotiate the terms of mortgage loans on behalf of homeowners in default. The Court explained that renegotiating the key terms of a mortgage loan in default means seeking to modify terms concerning the principal, interest rate, and length of the loan term. Any modification of such terms of a distressed mortgage loan would inevitably result in a deferral of the original payment terms, and any such deferral amounted to “obtaining an extension of credit” for primarily “personal, family, or household purposes” as defined in the MCSBA.<sup>14</sup> Therefore, when BB&B offered to renegotiate a mortgage loan for a Maryland homeowner facing foreclosure, it was offering to obtain an extension of credit as a credit services business under the MCSBA.<sup>15</sup> The Court also held that BB&B was not entitled to the attorney exemption from the MCSBA’s requirement that it be licensed as a credit services business. The Court explained that to qualify for the attorney exemption, the attorney engaged in a credit services business must (1) be licensed in Maryland, (2) render the services within the course and scope of the individual’s practice as a lawyer, and (3) not engage in the credit services business “on a regular and continuing basis.”<sup>16</sup> Each prong of the attorney exemption test must be met for the exemption to apply.<sup>17</sup> The Court found that there was substantial evidence in the administrative record that BB&B did not satisfy the third prong of the attorney exemption test, because it engaged in a credit services business on a regular and continuing basis. Evidence adduced at the administrative hearing supported the Court’s conclusion: BB&B, a small out-of-state law firm, consulted with hundreds of Maryland homeowners and entered agreements with 57 of them in the nine months between June 2008 and March 2009. These consultations and agreements with Maryland homeowners also constituted a very significant part of BB&B’s business and the work of its Maryland attorneys during this time period.<sup>18</sup> BB&B argued that all Maryland lawyers qualify for the MCSBA attorney exemption. The Court flatly rejected this argument, noting that such a claim would render the third prong of the attorney exemption test superfluous. The Court explained that this prong reflected the General Assembly’s intent to not exempt all practicing Maryland attorneys from the MCSBA’s licensing requirement by imposing an additional limitation that only those who do not regularly engage in credit services business will receive the benefit of the attorney exemption. Therefore, the attorney exemption

did not apply to BB&B because it engaged in credit services business activities during the relevant period on a regular and continuing basis.<sup>19</sup> The Court’s holding in *Brown, Brown, & Brown, P.C.*, requiring law firms like BB&B which regularly engage in credit services business activities with Maryland consumers like Miguel and Teresa Batres to be licensed under the MCSBA, highlights important themes for regulatory, business, and legal communities. This case underscores the need for regulatory safeguards that provide critical protection to society’s most vulnerable citizens when systemic economic and political calamities, like the financial crisis of 2008, expose them to predatory business practices. Importantly, this case also cautions members of the Maryland private bar to take great care to keep in sharp focus the often blurred lines between the practice of law and the business opportunity the practice provides. As *Brown, Brown, & Brown, P.C.*, clearly demonstrates, the Court of Appeals remains unwavering in its charge to hold Maryland lawyers to the highest legal, ethical, and professional standards. We at the bar should take heed.

### Endnotes

<sup>1</sup> [http://money.cnn.com/2009/01/15/real\\_estate/millions\\_in\\_foreclosure/](http://money.cnn.com/2009/01/15/real_estate/millions_in_foreclosure/)

<sup>2</sup> *Id.*

<sup>3</sup> <http://www.realtytrac.com/news/foreclosure-trends/maryland-foreclosure-activity-up-71-percent-in-2008/>

<sup>4</sup> <http://www.nbcwashington.com/investigations/Skyrocketing-Maryland-Foreclosures-Are-Tail-End-of-Housing-Crisis-238656431.html>

<sup>5</sup> Jason N. Houle & Michael T. Light, *The Home Foreclosure Crisis and Rising Suicide Rates, 2005 to 2010*, AM. J. PUB. HEALTH, e1 (2014).

<sup>6</sup> *Brown, Brown, & Brown, P.C.*, 449 Md. at 355.

<sup>7</sup> *Id.* at 353-354.

<sup>8</sup> *Id.* at 355-356.

<sup>9</sup> *Id.* at 356-357.

<sup>10</sup> *Id.* at 357-358.

<sup>11</sup> Having found that the MCSBA did not apply, the Circuit Court did not consider whether any violations by BB&B were willful. The Court of Appeals also declined to consider this issue, but instructed the Circuit Court to do so on remand.

<sup>12</sup> *Id.* at 370.

<sup>13</sup> CL § 14-1901(e)(1)(ii).

<sup>14</sup> *Id.*

<sup>15</sup> *Brown, Brown, & Brown, P.C.*, 449 Md. at 365.

<sup>16</sup> CL § 14-1901(e)(3)(vi).

<sup>17</sup> *Brown, Brown, & Brown, P.C.*, 449 Md. at 365-366.

<sup>18</sup> *Id.* at 366-367.

<sup>19</sup> *Id.* at 367-370.