



AMERICAN
BANKRUPTCY
INSTITUTE

Discharge Violations and Mortgage Claim Issues

Hon. Daniel S. Opperman (Moderator)

U.S. Bankruptcy Court, E.D. Mich.; Bay City

James P. Frego

Frego & Brodsky, PLC; Dearborn Heights, Mich.

John Rao

National Consumer Law Center; Boston

United States Bankruptcy Court

Eastern District of Michigan

Case No. 08- -dof

Chapter 7

In re Debtor(s) (name(s) used by the debtor(s) in the last 8 years, including married, maiden, trade, and address):

Social Security / Individual Taxpayer ID No.:

xxx-xx-

xxx-xx-

Employer Tax ID / Other nos.:

DISCHARGE OF DEBTOR

It appearing that the debtor is entitled to a discharge,

IT IS ORDERED:

The debtor is granted a discharge under section 727 of title 11, United States Code, (the Bankruptcy Code).

BY THE COURT

Dated: 10/7/08

Daniel S. Opperman Flint
United States Bankruptcy Judge

SEE THE BACK OF THIS ORDER FOR IMPORTANT INFORMATION.

EXPLANATION OF BANKRUPTCY DISCHARGE IN A CHAPTER 7 CASE

This court order grants a discharge to the person named as the debtor. It is not a dismissal of the case and it does not determine how much money, if any, the trustee will pay to creditors.

Collection of Discharged Debts Prohibited

The discharge prohibits any attempt to collect from the debtor a debt that has been discharged. For example, a creditor is not permitted to contact a debtor by mail, phone, or otherwise, to file or continue a lawsuit, to attach wages or other property, or to take any other action to collect a discharged debt from the debtor. *[In a case involving community property:* There are also special rules that protect certain community property owned by the debtor's spouse, even if that spouse did not file a bankruptcy case.] A creditor who violates this order can be required to pay damages and attorney's fees to the debtor.

However, a creditor may have the right to enforce a valid lien, such as a mortgage or security interest, against the debtor's property after the bankruptcy, if that lien was not avoided or eliminated in the bankruptcy case. Also, a debtor may voluntarily pay any debt that has been discharged.

Debts That are Discharged

The chapter 7 discharge order eliminates a debtor's legal obligation to pay a debt that is discharged. Most, but not all, types of debts are discharged if the debt existed on the date the bankruptcy case was filed. (If this case was begun under a different chapter of the Bankruptcy Code and converted to chapter 7, the discharge applies to debts owed when the bankruptcy case was converted.)

Debts That are Not Discharged

Some of the common types of debts which are not discharged in a chapter 7 bankruptcy case are:

- a. Debts for most taxes;
- b. Debts incurred to pay nondischargeable taxes (applies to cases filed on or after October 17, 2005);
- c. Debts that are domestic support obligations;
- d. Debts for most student loans;
- e. Debts for most fines, penalties, forfeitures, or criminal restitution obligations;
- f. Debts for personal injuries or death caused by the debtor's operation of a motor vehicle, vessel, or aircraft while intoxicated;
- g. Some debts which were not properly listed by the debtor;
- h. Debts that the bankruptcy court specifically has decided or will decide in this bankruptcy case are not discharged;
- i. Debts for which the debtor has given up the discharge protections by signing a reaffirmation agreement in compliance with the Bankruptcy Code requirements for reaffirmation of debts; and
- j. Debts owed to certain pension, profit sharing, stock bonus, other retirement plans, or to the Thrift Savings Plan for federal employees for certain types of loans from these plans (applies to cases filed on or after October 17, 2005).

This information is only a general summary of the bankruptcy discharge. There are exceptions to these general rules. Because the law is complicated, you may want to consult an attorney to determine the exact effect of the discharge in this case.

UNITED STATES BANKRUPTCY COURT
Eastern District of Michigan

Case No..
Chapter: 13

In Re: (NAME OF DEBTOR(S))

Social Security No.:

Employer's Tax I.D. No.:

ORDER DISCHARGING DEBTOR AFTER COMPLETION OF CHAPTER 13 PLAN

The court finds that the debtor filed a petition under title 11, United States Code, on 7/19/06, that the debtor's plan has been confirmed, that all allowed claims have been paid substantially in accordance with the plan, that with respect to secured claims which continue beyond the term of the plan, any pre-petition or post-petition defaults have been cured and such claims are in all respects current, with no escrow balance, late charges, costs or attorney fees owing, and that the debtor has fulfilled all requirements under the plan.

IT IS ORDERED THAT:

1. Pursuant to 11 U.S.C. Section 1328(a), the debtor is discharged from all debts provided for by the plan or disallowed under 11 U.S.C. Section 502, except any debt:

(a) provided for under 11 U.S.C. Section 1322(b)(5) and on which the last payment is due after the date on which the final payment under the plan was due:

(b) in the nature of alimony to, maintenance for, or support of a spouse, former spouse, or child of the debtor in connection with a separation agreement, divorce decree or other order of a court of record, or property settlement agreement, as specified in 11 U.S.C. Section 523(a)(5);

(c) for a student loan or educational benefit overpayment as specified in 11 U.S.C. Section 523(a)(8);

(d) for a death or personal injury caused by the debtor's unlawful operation of a motor vehicle while intoxicated from using alcohol, a drug, or another substance, as specified in 11 U.S.C. Section 523(a)(9);

(e) for restitution included in a sentence on the debtor's conviction of a crime;

(f) for a fine included in a sentence on the debtor's conviction of a crime, in a case commenced on or after October 22, 1994

2. Pursuant to 11 U.S.C. Section 1328(d), the debtor is not discharged from any debt based on an allowed claim filed under 11 U.S.C. Section 1305(a)(2) if prior approval by the trustee of the debtor's incurring such debt was practicable and was not obtained.

3. Notwithstanding the provisions of title 11, United States Code, the debtor is not discharged from any debt made non-dischargeable by 18 U.S.C. Section 3613(e), by certain provisions of titles 10, 37, 38, 42 and 50 of the United States Code, or by any other applicable provision of law.

4. All creditors are prohibited from attempting to collect any debt that has been discharged in this case.
5. All creditors who held secured claims which were fully paid shall execute and deliver to the debtor a release, termination statement, discharge of mortgage or other appropriate certificate suitable for recording.
6. All creditors who hold secured claims which continue beyond the term of the plan shall take no action inconsistent with the above findings.

Dated: 10/10/08

BY THE COURT

/s/ Marci B McIvor

Marci B McIvor

United States Bankruptcy Judge

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Terilyn M. Dentino
Michelle M. Guzowski
Melvin J. Babi

General Manager

Diane A. Lozon

October 29, 2008

Mr. Herman Munster
Mrs. Lily Munster
1313 Mockingbird Lane
Jackson, MI 48002

Re: Your recent Chapter 7 bankruptcy case, Case No: 08-XXXXX

Dear Mr. & Mrs. Munster:

Congratulations on your recent Chapter 7 Discharge of Debts! As a result of this, your Chapter 7 case with our office has been successfully completed and you have walked away from most or all of the debts you owed when we first filed this case together (with the obvious exception of any debts we discussed during the case which you did NOT intend to walk away from).

Please know that the Chapter 7 Discharge Order is a Federal Court Order, signed by your Bankruptcy Judge, and is a very powerful tool for your future financial well-being. We recommend you keep a copy of this Order in a safe place, in case you need to review it or show it to a creditor in the months and years to come.

Of particular importance is the fact that the Discharge Order prohibits your creditors from calling you, writing you, suing you, garnishing you or taking ANY action to collect on a debt that was a part of this bankruptcy case (again, unless otherwise discussed between you and our office during this case). This prohibition applies not just to the original creditor, but also to any bill collectors or law firms they may employ to chase you for the monies owed.

If you are having a creditor (or their collectors) contact you seeking to get paid on a debt which was included in your bankruptcy case, please give them your bankruptcy case number and our office telephone number (listed above) so that we may verify to them the debt has, in fact, been dealt with already. Please also get the company name of any collector that contacts you more than ONCE, and save this information for our office, as well as the names of the individuals with whom you speak at these companies, in a log with the date of the conversation.

If you find there is any continuing effort to collect on a debt that should have been discharged, please feel free to make an appointment to come into our office and discuss the matter further. There is no charge for this follow-up appointment. Please also bring with you any information you have on this particular creditor and their collection efforts.

Additionally, if there are any other questions or problems you have in the months or years to come, please feel free to schedule a no charge follow-up appointment as well. We want to make certain you are taken care of in the future and get the full benefit of your Chapter 7 Discharge of Debts.

Again, congratulations on the successful completion of your Chapter 7 case! We wish you the best of luck now and in the future as you use this fresh start to chart a course toward financial stability for you and your family.

Sincerely,

FREGO & BRODSKY, P.L.C.

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General Manager

Diane A. Lozon

October 29, 2008

Re: George Jefferson, Case # 05-XXXXX-pjs

To Whom It May Concern:

Mr. George Jefferson filed a Chapter 7 bankruptcy on November 12, 2005. This case has been successfully discharged, as have all debts he owed prior to November 12, 2005. Discharge was granted by the Bankruptcy Court in an Order dated March 1, 2006, and Mr. Jefferson has a copy of that Order.

From time to time we have clients who, for one reason or another, inadvertently fail to list all of their creditors in the bankruptcy proceedings. Often this is accidental and may be traced to one creditor "selling off" the debt to another creditor or a collection agency, or perhaps a creditor's collection arm has a different name. Other times, clients may have genuinely not known that they owed the debt.

Regardless of how the omission occurred, or if ANY omission occurred at all, a successful Chapter 7 discharge in a no-asset case (which Mr. Jefferson's was), generally wipes away all debts. This is the law in the Federal Courts of the 6th Circuit, which includes the states of Michigan, Ohio, Kentucky and Tennessee. The 6th Circuit Court of Appeals made this ruling in the case of In re Madaj, 149 F. 3d 467 (1998).

The purpose of this rule was to help unclog the Bankruptcy Court system, where many debtors kept reopening old cases just to add an omitted creditor. Essentially, the 6th Circuit said this was a waste of time because there could be no dispute that the debtor would walk away from any pre-filing debts added later anyway, so why waste the Bankruptcy Court's time?

Therefore, if there is any question, Mr. Jefferson has been discharged from **ALL** debts which arose before November 12, 2005, whether or not that creditor was specifically included in the bankruptcy at the time of filing. His credit report should reflect this.

Please feel free to contact our office if you have any additional questions.

Sincerely,

FREGO & BRODSKY, PLC

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General Manager

Diane A. Lozon

October 29, 2008

Alberts Furniture
20045 Plymouth
Detroit, MI 48238

RE: Lucille Ricardo
Chapter 7 Bankruptcy Case#: 02-XXXXX SWR

To Whom It May Concern:

Enclosed please find:

- Voluntary Petition showing proof of filing of bankruptcy on 11/28/07
- Copy of Discharge Order dated 3/13/08
- Copy of Schedule F of the Bankruptcy Pleadings

Please be advised that our client Lucille Ricardo filed a Chapter 7 bankruptcy on November 28, 2007 and was granted a discharge on March 13, 2008. You were included in the bankruptcy, but have taken our client's 2007 income tax refund in violation of the Discharge Injunction.

Please return the \$505.00 income tax refund or we will be forced to re-open the bankruptcy case, ask Judge Rhodes to award the monies taken back to Ms. Ricardo, plus ask for our attorney fees/costs and significant sanctions against you for violating the Discharge Injunction issued by Judge Rhodes. The enclosed discharge is highlighted to show that your failure to comply could, in fact, lead to damages and attorney fees being awarded against you by Judge Rhodes.

Please make check payable to: Lucy Ricardo and James P. Frego, and send it to the address listed above. We appreciate your cooperation in this matter.

Should you have counsel to advise you on bankruptcy matters, we recommend you immediately contact them to secure advice on the urgency of this problem.

Yours truly,
Frego & Brodsky, PLC

Dennis A. Brodsky, Esq.

Enclosure.

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION – DETROIT

IN RE:

AL BUNDY
PEGGY BUNDY

CASE NO.: 03-XXXXX MBM
CHAPTER: 13
HON.: MARCI B. McIVOR

DEBTOR(S)
/

MOTION TO ENFORCE ORDER OF DISCHARGE

NOW COMES Al and Peggy Bundy, by and through their attorneys, Frego & Brodsky, PLC, and in support of this Motion to Enforce Order of Discharge as to Select Portfolio Servicing/Deutsche Bank National Trust Company, states as follows:

1. Select Portfolio Servicing is the servicing agent for Deutsche Bank National Trust Company, the holder of the mortgage for Debtors' residence.
2. A Proposed Order is attached hereto as Exhibit A and incorporated herein by reference.
3. On September 23, 2003, the Debtors filed a Chapter 13 Petition in order to become current on their mortgage, which was delinquent at the time of case filing.
4. On July 31, 2007, the Court entered an Order of Discharge in the above-referenced Chapter 13 case. Debtors' Plan remitted a 100% dividend to all filed and allowed unsecured claims, and brought the Debtors current on their mortgage with creditor Deutsche Bank. The Order of Discharge contained a specific finding of fact that the Debtors were current on their mortgage as of the date of the Order (again, July 31).
5. The Debtors' Chapter 13 Plan payments were remitted to their Chapter 13 Trustee through a working wage order with Al Bundy's employer, World Wide Shoe Company.
6. In May 2007, Mr. Bundy's wage order stopped as the Debtors' Chapter 13 Plan payments were complete.
7. Beginning May 2007 and continuing through December 2007, the Debtors made all required

- monthly mortgage payments directly to Select Portfolio Servicing.
8. On December 25, 2007, Select Portfolio sent a letter to Al Bundy stating he was \$8,573.95 in arrears on the mortgage account, covering the period from August 2007 through December 2007. (See Exhibit B, attached hereto and incorporated herein by reference).
 9. The Bundys had, in fact, made all payments required of them from August 2007 up to the point in time when Select Portfolio alleged that they were in default.
 10. In response to the December 25 letter, Peggy Bundy called Select Portfolio directly to explain they were current in their payments. She was told by a representative of Select Portfolio (Ms. Marcie Darcy) that Select Portfolio was holding them in default for the time period of July 2006 through November 2006. The representative acknowledged that although the creditor had received a \$6,000 lump sum from the Chapter 13 Trustee subsequent to that time period, they had not applied the lump sum to the ongoing account so that the mortgage would be current, but instead applied the monies received to “late fees and bankruptcy attorney fees”.
 11. In further conversations, Select Portfolio has told the Bundys that they must enter into a forbearance agreement with an increase in their mortgage payment to prevent foreclosure of their residence, solely based on the allegation that Select Portfolio was not brought current during the Bundy’s Bankruptcy Case. (See Exhibit C, attached hereto and incorporated herein by reference)
 12. The attempts of the mortgage company to collect on an arrearage which allegedly arose during the Debtors’ Discharged Chapter 13 Case are a violation of the July 31, 2007 Order of Discharge pursuant to 11 U.S.C. 1328(a), a violation of Local Bankruptcy Rules 2015-5(a)(3)(B) and (a)(5), and further a violation of Local Bankruptcy Rule 3001-2.
 13. This Court has the authority to grant sanctions pursuant to Rule 9011 of the Federal Rules of Bankruptcy Procedure.

WHEREFORE, Debtors pray this Honorable Court Order Select Portfolio Servicing/Deustche

Bank National Trust Company to cease all attempts to collect from the Debtors any arrearage alleged to be owed prior to the Debtors' Order of Discharge, grant the Debtors \$5,000 in damages, declare that the mortgage be deemed current as of the date of the Court's Order on the instant Motion, and grant the Debtors costs, attorney fees and expenses for the necessity of having to file this Motion.

Respectfully Submitted,

Date: January 16, 2008

/s/ Dennis A. Brodsky
Frego & Brodsky PLC
Dennis A. Brodsky (P44527)
Attorney(s) for Debtor
23843 Joy Road
Dearborn Heights, MI 48127
(313) 565-4252

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION – DETROIT

IN RE:

AL BUNDY
PEGGY BUNDY

CASE NO.: 03-XXXXX MBM
CHAPTER: 13
HON.: MARCI B. McIVOR

DEBTOR(S)
/

AFFIDAVIT OF DEBTOR

NOW COMES Peggy Bundy, the above captioned Debtor, first being duly sworn deposes and states:

1. I am Peggy Bundy, one of the Debtors in this case.
2. In May 2007, my husband's wage order stopped deducting his bankruptcy payment.
3. Beginning in May 2007 and continuing through December 2007 we made all normal monthly mortgage payments required of us.
4. In late December 2007, Select Portfolio sent a letter to my husband stating we were \$8,573.95 in arrears, covering a period from August 2007 through December 2007.
5. In response to the letter, I called Select Portfolio to explain that we were current in our payments.

I was told by representative Marcie Darcy of Select Portfolio that they were holding us in default for the time period of July 2006 through November 2006. The representative acknowledged that though they had received a \$6,000 lump sum from the Trustee subsequent to that time period, they had applied the lump sum to other charges and, as a result, the mortgage was not current.

6. Select Portfolio has since told me that we must enter into a forbearance agreement with an increase in our mortgage payment to prevent foreclosure, due to the fact Select Portfolio was not fully brought current by the end of our bankruptcy case.

Further deponent sayeth not.

Dated : January 14, 2007

/s/
Peggy Bundy, Debtor

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
AMERICAN BANKRUPTCY INSTITUTE

SOUTHERN DIVISION – DETROIT

IN RE:

AL BUNDY
PEGGY BUNDY

CASE NO.: 03-XXXXX mbm
CHAPTER: 13
HON.: MARCI B. McIVOR

DEBTORS
_____ /

**ORDER ENFORCING PREVIOUS ORDER OF DISCHARGE UPON SELECT PORTFOLIO
SERVICING/DEUTSCHE BANK NATIONAL TRUST COMPANY**

A Motion to Enforce Order of Discharge having been filed and no response having been received, and the Court being fully advised;

IT IS HEREBY ORDERED that Select Portfolio Servicing/Deutsche Bank National Trust Company cease and desist all attempts at collection from the Debtors for any alleged arrearages, late charges or costs accrued prior to the Order of Discharge being entered in this case, or face further sanctions from the Court;

IT IS FURTHER ORDERED that Select Portfolio Servicing/Deutsche Bank National Trust Company shall pay to the Law Offices of Frego and Brodsky \$2,000 within 21 days of entry of this Order for costs and attorney fees expended on behalf of the Debtor in this matter, or face further sanctions from this Court;

IT IS FURTHER ORDERED Select Portfolio Servicing/Deutsche Bank National Trust Company shall pay to the Debtors \$5,000 in damages for violation of the Order of Discharge within 21 days of entry of this Order, or face further sanctions from the Court; and,

IT IS ALSO ORDERED that the Debtors' mortgage with Select Portfolio Servicing/Deutsche Bank National Trust Company be deemed current as of the date of this Order, with no arrearage monies owed as of the date of this Order, and the Debtors shall be responsible for their next normal mortgage payment which comes due after the date of this Order.

U.S. BANKRUPTCY JUDGE

**PROPOSED ORDER
EXHIBIT A**

A Fresh Look at Curing Mortgage Defaults in Chapter 13

Written by:

John Rao

*National Consumer Law Center*¹

As more homeowners in foreclosure seek relief in bankruptcy, the time has come to fix the systemic problems in chapter 13 related to curing mortgage defaults. Although cure plans have been part of chapter 13 practice since the Code's enactment, mortgage creditors continue to struggle with the application of payments in a manner which the law requires. This article looks at ways in which interested parties in the bankruptcy system may take steps to encourage compliance with the Code's cure provisions, primarily through plan provisions implementing the new remedy found in § 524(i) created by BAPCPA.²

Problems with Curing Defaults on Home Loans

The effect of a cure in a chapter 13 case is to nullify all consequences of the prebankruptcy default.³ Once the debtor's chapter 13 plan is confirmed in a case involving a long-term mortgage, the debtor's ongoing regular mortgage payments should be applied from the petition date based on the mortgage contract terms and original loan amortization as if no default exists. *See In re Wines*, 239 B.R. 703 (Bankr. D.N.J. 1999); *In re Rathe*, 114 B.R. 253 (Bankr. D. Idaho 1990). All prebankruptcy arrearages are paid separately under the plan as a part of the mortgage servicer's allowed claim. *See Rake v. Wade*, 508 U.S. 464, 473 (1993) (noting that as authorized by § 1322(b)(5), mortgage creditor's claim is effectively "split ... into two separate claims - the underlying debt and the arrearages").

The problem is that mortgage creditors continue to treat timely payments received after the bankruptcy is filed as if they were late. This occurs because of the industry practice outside of bankruptcy of crediting payments received to the oldest outstanding installment due. While servicers attempt to manually override their automated systems, it is unrealistic to expect that this can be done regularly without error every month for the three to five years of the plan.

¹ This article was published in the ABI Journal, February, 2008.

² There have been recent encouraging signs of progress. In addition to court approval of plan provisions implementing § 524(i), the NACTT is also working with several major servicers to develop a set of best practices.

³ The House Report to the Bankruptcy Reform Act of 1994 reaffirms that this is the intent of Congress. *See* H.R. Rep. No. 835, 103d Cong., 2d Sess. 55 (1994) reprinted in 1994 U.S.C.C.A.N. 3340 ("It is the Committee's intention that a cure pursuant to a plan should operate to put the debtor in the same position as if the default had never occurred.")

What this means for consumer debtors is additional costs in the form of unauthorized fees. As payments are deemed late or insufficient, the automated systems treat payments as unapplied and divert them to suspense accounts, impose late fees and additional interest charges, and order property inspections and other default related services. *See In re Nosek*, 363 B.R. 643 (Bankr.D.Mass. 2007)(awarding \$250,000 in actual damages to the debtor for her emotional distress and \$500,000 in punitive damages under § 105(a) for servicer’s violation of § 1322 by diverting plan payments to a suspense account). Legal fees are imposed on debtors for groundless stay relief motions, typically without disclosure to the debtor or court approval.

This breakdown of the servicing system also results in debtors often not being notified of interest rate adjustments on adjustable rate mortgages or payment changes on escrow accounts. It is not uncommon for debtors who successfully complete their chapter 13 plans to receive a bill for thousands of dollars of previously undisclosed improper fees once they emerge from bankruptcy. For example, in *In re Dominique*, 368 B.R. 913 (Bankr.S.D.Fla. 2007), the servicer failed to send escrow account statements during the chapter 13 plan and just before plan completion, provided debtors with an escrow account review showing that a \$6,397 escrow deficiency was owed. *See also In re Jones*, 366 B.R. 584 (Bankr.E.D.La. 2007) (mortgage creditor collected additional \$24,450 in unlawful postpetition fees and interest charges at closing on court-approved refinancing).

Making Use of Section 524(i)

A new and specific cause of action to remedy plan payment application problems was created by BAPCPA. Under § 524(i), a creditor’s willful failure to properly credit payments received under a confirmed plan constitutes a violation of the injunction under § 524(a).⁴ To make use of § 524(i), the debtor’s chapter 13 plan must contain precise language directing how payments are to be applied. In other words, § 524(i) is not self-executing and can only be invoked if the debtor proves that the creditor failed to “credit payments in the manner required by the plan.”

Courts may wish to take a fresh look at model plans, local rules, and plans proposed by debtors to ensure that the intent of Congress in enacting § 524(i) is implemented. While there are many different ways to approach these

⁴ Section 524(i) provides a response to decisions which had questioned whether bankruptcy court authority exists to remedy a creditor’s failure to credit postpetition payments properly. For example, it provides a remedy found missing in *Telfair v. First Union Mortgage Corp.*, 216 F.3d 1333 (11th Cir. 2000).

issues, and several courts have already taken on this task, several sample plan provisions are discussed below.

Section 524(i) Chapter 13 Plan Provisions

Effect of Cure

This first provision specifies how ongoing postpetition payments received by the mortgage creditor are to be applied under the terms of the plan:

- **Postpetition Mortgage Payments.** Payments received by holders and/or servicers of mortgage claims for ongoing postpetition installment payments shall be applied and credited to the debtors' mortgage account as if the account were current and no prepetition default existed on the petition date in the order of priority specified in the note and security agreement and applicable nonbankruptcy law. Postpetition installment payments made in a timely manner under the terms of the note shall be applied and credited without penalty.

Consistent with caselaw interpreting § 1322(b)(5), this provision requires the creditor to override its regular payment application regime of applying payments to the first installment due. *See In re Jones*, 366 B.R. 584 (Bankr.E.D.La. 2007) (confirmation of plan providing for cure “recalibrates” amounts due as of petition date). It also requires the creditor to apply payments in the customary order of priority under the terms of the mortgage,⁵ and recognizes that late fees may be charged only if postpetition payments are not made timely.⁶ A similar plan provision approved in *In re Collins*, 2007 WL 2116416 (Bankr.E.D.Tenn. July 19, 2007), requires the mortgage creditor to “apply the post-petition monthly mortgage payments paid by the trustee or by the Debtors to the month in which each payment was designated to be made under the plan or directly by the Debtors....”

Another approach approved by the court in *In re Jones*, 2007 WL 2480494 (Bankr.E.D.La. Aug 29, 2007), focuses on the bifurcation required by a cure plan and specifies that the debtor's mortgage account shall be “divided into two new, internal administrative accounts.” The first account

⁵ For post-January 2001 Fannie Mae/Freddie Mac uniform instruments, the order of application of payments is 1) interest; 2) principal; 3) escrow; 4) late fees, and 5) any other charges due under the security instrument.

⁶ *See In re Perez*, 339 B.R. 385 (Bankr.S.D.Tex.2006)(finding that Home Mortgage Payment Procedures and Uniform Plan approved in district which limit assessment of postpetition late fees was not impermissible modification of mortgage holder's rights).

consists of the amounts to be disbursed under the plan for the prepetition arrearage. The second account is the principal amount due on the petition date, and includes postpetition interest accrual and escrow expenses.⁷ The plan would then provide that the “debtor's regular monthly note payments will be posted to this [second] account, reducing post-petition interest accrual, post-petition property and tax expenditures, and principal.” *Id.* at *5.

Escrow and ARM Issues

The next provision attempts to avoid the problem of debtors being surprised by large, catch-up bills after emerging from bankruptcy for amounts the creditor was entitled to based on escrow and interest rate changes but which were never disclosed:

- **Postpetition Payment Changes.** Holders and/or servicers of mortgage claims shall make adjustments to the ongoing installment payment amount as required by the note and security agreement and applicable nonbankruptcy law, including changes based on an escrow analysis for amounts required to be deposited in any escrow account or based on an interest rate provision in an adjustable rate mortgage. Holders and/or servicers shall timely notify the debtors, debtors’ attorney and trustee of such payment adjustments and any shortage, deficiency or surplus of funds in any escrow account.

This provision simply requires mortgage creditors to service the loan in the customary manner as they would for homeowners outside of bankruptcy. Based on the Real Estate Settlement Procedures Act, this would mean performing an annual escrow analysis and notifying borrowers of any changes in escrow deposits and balances at least once per year within 30 days of the analysis.⁸ The creditor must also inform the debtor if there are insufficient funds in the escrow account.⁹ For adjustable rate mortgages based on the Truth

⁷ To avoid double payment, the principal amount should be based on the original amortization as if the account were current on the petition date since the arrearage amount typically includes the entire past due installment payments which provide for payment of principal. A similar analysis of the postpetition escrow payments must be done to avoid double payment of prepetition escrow charges. *See In re McCormack*, 203 B.R. 521 (Bankr.D.N.H. 1996)(noting that escrow account must be “zeroed out” post-confirmation to exclude any pre-confirmation amounts being paid under the plan).

⁸ 12 U.S.C. § 2609.

⁹ Several courts have held that a servicer’s failure to notify debtors during the plan of escrow account shortages and deficiencies as required by RESPA amounts to a waiver of the servicer’s right to collect those amounts. *See Chase Manhattan Mortg. Corp. v. Padgett*, 268 B.R. 309 (S.D. Fla. 2001); *In re Dominique*, 368 B.R. 913 (Bankr.S.D.Fla. 2007).

in Lending Act, it would require notification of payment amount changes at least 25 days before the due date for the new payment amount.¹⁰ A similar plan provision was approved by the court in *Collins*, 2007 WL 2116416, *supra* at *18, requiring notice not less than 60 days in advance of the effective date of any payment change.

Compliance with RESPA and TILA during a chapter 13 case promotes successful plan completion and is consistent with § 1322(e), which states that the amount necessary to cure a default in a chapter 13 plan shall be determined in accordance with the “underlying agreement and applicable nonbankruptcy law.” Applicable nonbankruptcy law includes federal non-Code statutes such as TILA and RESPA, and a determination of the cure amount includes consideration of ongoing postpetition payments based on § 1322(b)(5) and its reference to the “maintenance of payments while the case is pending.”

Separate Treatment of Arrearages

The next provision deals with the payment of the prepetition arrearages and compels the mortgage creditor to separately treat these payments:

- **Prepetition Arrearages.** Payments disbursed by the trustee to holders and/or servicers of mortgage claims shall be applied and credited only to the prepetition arrearages necessary to cure the default, which shall consist of amounts listed on the allowed proof of claim and authorized by the note and security agreement and applicable nonbankruptcy law. Holders and/or servicers of mortgage claims shall deem the prepetition arrearages as contractually current upon confirmation of the plan.

A mortgage account being cured in a chapter 13 is not fully reinstated until the prepetition arrearage has been paid. *In re Wilson*, 321 B.R. 222 (Bankr.N.D.Ill.2005). To effectuate a cure plan and avoid the imposition of late fees and other charges, however, it is critical that the mortgage creditor segregate payments being made on the prepetition arrearage and treat the arrearage amounts as if they are not in default. In rejecting an argument that such a plan provision was an impermissible modification under § 1322(b)(2), the court in *Collins* 2007 WL 2116416, *supra* at *14, stated:

[A] provision requiring [creditor] to ‘deem’ the prepetition arrearage amounts contractually ‘current’ as of confirmation is merely procedural and requires only that [creditor] update its accounting procedures to ensure that the Debtors’ account is not subject to any additional charges associated with any prepetition default.

¹⁰ 12 C.F. R. § 226.20(c).

This provision does not take a position on whether certain fees may be properly included in the arrearage amount, such as postpetition, pre-confirmation bankruptcy fees. Some courts have held that the inclusion in a proof of claim of attorney fees incurred in connection with a bankruptcy case which are to be paid from estate property is improper unless the fees have been sought and approved under Federal Rule of Bankruptcy Procedure 2016. *E.g., In re Tate*, 253 B.R. 653 (Bankr. W.D.N.C. 2000). The more widely accepted position as to postpetition, pre-confirmation fees, however, is that a creditor may include such fees in a proof of claim without filing a Rule 2016 application if the claim is sufficiently detailed and provides adequate notice to the debtor. *In re Atwood*, 293 B.R. 227 (B.A.P. 9th Cir. 2003) (proof of claim lacking specific detail fails to meet creditor’s evidentiary burden on reasonableness of fees); *In re Madison*, 337 B.R. 99 (Bankr.N.D. Miss. 2006); *In re Powe*, 281 B.R. 336 (Bankr. S.D. Ala. 2001).

Post-Confirmation Fees

The more significant concern has been with the lack of disclosure of post-confirmation fees.¹¹ The final provision sets up a procedure which mandates disclosure of such fees and provides interested parties with an opportunity to seek a court determination on the allowance of such fees:

- **Mortgage Current upon Discharge.** The holder and/or servicer of a mortgage claim shall provide to the debtors, debtors’ attorney and trustee a notice of any fees, expenses, or charges which have accrued during the bankruptcy case on the mortgage account and which the holder and/or servicer contends are 1) allowed by the note and security agreement and applicable nonbankruptcy law, and 2) recoverable against the debtors or the debtors’ account. The notice shall be sent annually, beginning within 30 days of the date one year after entry of the initial plan confirmation order, and each year thereafter during the pendency of the case, with a final notice sent within 30 days of the filing of the trustee’s final account under Bankruptcy Rule 5009. The failure of a holder and/or servicer to give such notice for any given year of the case’s administration shall be deemed a waiver for all purposes of any claim for fees, expenses or charges accrued during that year, and the holder and/or servicer shall be prohibited from collecting or assessing such fees, expenses or

¹¹ *In re Sanchez*, 372 B.R. 289, 297 (Bankr.S.D.Tex. 2007)(“in order for the bankruptcy system to function-every entity involved in a bankruptcy proceeding must fully disclose all relevant facts”); *In re Jones*, 366 B.R. 584, 602-03 (Bankr.E.D.La.2007)(“Bankruptcy courts can not function if secured lenders are allowed to assess postpetition fees without disclosure and then divert estate funds to their satisfaction without court approval”).

charges for that year against the debtors or the debtors' account during the case or after entry of the order granting a discharge. Unless the Court orders otherwise, an order granting a discharge in this case shall be a determination that all prepetition and postpetition defaults with respect to the debtors' mortgage have been cured, and that the debtors' mortgage account is deemed current and reinstated on the original payment schedule under the note and security agreement as if no default had ever occurred.

Mortgage creditors may argue that this provision amounts to an impermissible modification in violation of § 1322(b)(2), namely with respect to the clause likely to be found in the security agreement permitting the creditor to “do and pay for whatever is reasonable or appropriate to protect Lender’s interest in the Property and rights under this Security Instrument.”¹² However, consistent with the opinion in *Mann v. Chase Manhattan Mortgage Corp.*, 316 F.3d 1 (1st Cir. 2003), this provision does not prohibit the creditor from tracking in its internal bookkeeping fees it believes may be assessed to the debtor’s account. The provision simply requires the creditor to notify the debtor and interested parties if it intends to charge the debtor for such fees and recognizes that any attempt to collect such fees during the case without notification would violate the automatic stay, and after the case would violate the discharge injunction (and § 524(i)) if the debtor successfully completes the case and obtains a discharge. It also makes clear that successful completion of the plan fully reinstates the mortgage account.¹³

For post-confirmation attorneys fees charged to the debtor’s account, some courts may take the view that mere disclosure in this manner is not sufficient and that court approval and compliance with Bankruptcy Rule 2016 is required.¹⁴ Courts may also wish to specify by local rule the type of notice that should be provided and the procedure for affording parties with an opportunity

¹² See, e.g., Fannie Mae/Freddie Mac Uniform Instruments, First Lien Security Instruments, at <http://www.freddiemac.com/uniform/unifsecurity.html>.

¹³ See also *In re McDonald*, 336 B.R. 380, 386 (Bankr.N.D.Ill.2006)(referring to model plan approved in district which provides: “If the debtor pays the cure amount . . . , while timely making all required postpetition payments, the mortgage will be reinstated according to its original terms, extinguishing any right of the mortgagee to recover any amount alleged to have arisen prior to the filing of the petition”).

¹⁴ See *In re Padilla*, 2007 WL 2264714 (Bankr.S.D.Tex. Aug 03, 2007)(finding that court has authority under § 105(a) to order disgorgement of post-confirmation fees charged to debtors without proper Rule 2016 application or in violation of the confirmed plan); *In re Sanchez*, 372 B.R. 289 (Bankr.S.D.Tex. 2007)(holding that creditor’s failure to disclose post-confirmation fees charged to debtor and to file fee application under Rule 2016 violated automatic stay).

to object to any disclosed fees. For example, as an alternative to imposition of punitive damages against a mortgage creditor, the court in *In re Jones, supra* at * 6, 2007 WL 2480494, approved a procedure which would require that an annual notice from the creditor be filed with the court and “contain an itemization describing the charge, amount provisionally incurred, the date incurred, and if relevant, the name of the third party to whom the charge was paid,” and the legal authority for assessing each charge. The procedure in *Jones* also gives the debtor, trustee and interested parties 30 days to object to any fees contained in the notice, and describes various methods for the payment of approved fees.

Another approach adopted by several courts requires the trustee to serve on the mortgage creditor, the debtor, and the debtor's attorney, shortly after the final payment under the plan, a notice stating that the cure amount has been paid and that all prepetition arrearage obligations have been satisfied by the debtor. See *In re Andrews*, 2007 WL 2793401 (Bankr.D.Kan. Sep 26, 2007); *In re Jones, supra*, 2007 WL 2480494; *In re Collins, supra*, 2007 WL 2116416; *In re McDonald, supra*, 336 B.R. 380. If the mortgage creditor does not file a statement itemizing outstanding payment obligations it contends are still owing, the creditor is required to treat the account as reinstated. The primary disadvantage of this method, rather than an annual disclosure requirement, is that the debtor may not have an ability to provide for payment (or plan modification) of any fees and charges which have accumulated by the end of the case if they are ultimately found permissible.

In conclusion, there are certainly different and better ways to address these issues than the sample plan provisions provided here. Importantly, though, a process should begin, if not started already, to formulate plans which avoid the problems which have plagued cure plans for the past thirty years. Courts which have approved model chapter 13 plans should convene local rules committees or working groups to consider modifications which will make cure plans work the way they were intended and carry out the intent of Congress in implementing § 524(i).

Update

Since publication of this article, the First Circuit reversed the decision in *In re Nosek*.¹⁵ The First Circuit held that sanctions could not be imposed on the servicer for misapplication of plan and mortgage payments because the debtor's plan failed to specify how payments were to be applied. The decision provides compelling justification for adoption of § 524(i) plan provisions as discussed in this article. In fact, the First Circuit noted that Congress amended the Code to

¹⁵ *In re Nosek*, 2008 WL 4445707 (1st Cir. Oct 03, 2008).

add § 524(i) in 2005 to address the payment application problems raised in *Nosek*, noting that plan provisions dealing with payment application are necessary:

Notwithstanding these legal conclusions, we are not unsympathetic to Nosek's predicament as a debtor seeking to satisfy the terms of her Chapter 13 Plan and stave off foreclosure of her home. Her circumstances are all too common today. Given their prevalence, it is troubling that Ameriquest had not established a more efficient and accurate way of handling the accounting issues revealed by this case at the time of trial. We fully understand the bankruptcy court's concerns about the practices that it described.

Nevertheless, the bankruptcy court's legitimate concerns did not justify the remedy that it invoked. Nosek did not demonstrate here that Ameriquest's accounting practices caused her any economic harm or threatened her right to cure her pre-petition default. Moreover, even if such a threat had been demonstrated by those practices, there was no language in Nosek's Plan, as it was confirmed, or in § 1322(b), that addressed how Ameriquest was to apply the payments it received from Nosek or from the trustee. Under such circumstances, the Plan would have to be amended to prescribe the accounting practices necessary to protect Nosek's right to cure before Ameriquest could be sanctioned for a violation of an order of the bankruptcy court. In the absence of such specificity, there was no violation of § 1322(b) or the Plan and therefore no basis upon which to award Nosek damages under § 105(a).¹⁶

¹⁶ *In re Nosek*, 2008 WL 4445707, *14 (1st Cir. Oct 03, 2008)(footnotes omitted).

Mortgage Servicer Compliance with RESPA When Borrower is in Bankruptcy or Foreclosure

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Mortgage servicers often argue that compliance with RESPA is not required if the borrower is in bankruptcy or foreclosure, and that no liability exists for violations that occur while these proceedings are pending. Servicers rarely put forth well-reasoned arguments supporting this position and instead simply refer to a non-existent bankruptcy or foreclosure “exemption,” or claim that RESPA is “preempted” by the Bankruptcy Code. To the extent more substantive defenses are raised, this article provides comprehensive analysis of the issues needed for an effective response.

Overview of RESPA Servicing Requirements

The provisions of RESPA which deal with mortgage servicing are generally found in either 12 U.S.C. § 2605 or § 2609. Section 2605, known as the “Servicer Act,” requires servicers to respond to borrower requests for information and correction of account errors (referred to as “qualified written requests”),¹ disclose information relating to the transfer of servicing operations,² and make timely payments out of escrow accounts.³ Section 2609 deals exclusively with escrow accounts and limits the amount servicers can demand for deposit in an escrow account and requires an escrow analysis be conducted to determine the proper escrow payment.⁴ It also requires servicers to provide an annual escrow statement⁵ and a notice of escrow shortages or deficiencies.⁶

The Servicer Act provisions in § 2605 are significant because borrowers are given the right to sue for violations based on the express private right of action found in § 2605(f). Violations of the escrow provisions in § 2609 must be pursued under other legal claims, such as a breach of contract or state UDAP statute violation.

A chart summarizing the various provisions and their statutory citations, limitation periods, remedies and exemptions is provided at the end of this article.

No Bankruptcy or Foreclosure Exemption under Servicer Act or Regulation X

Neither the Servicer Act provisions found in § 2605 nor the applicable sections of RESPA’s implementing regulation, Regulation X, contain any reference to bankruptcy or create an exemption for the servicing of an account in bankruptcy. As discussed below, the Department of Housing and Urban Development (HUD) has recognized that servicers may treat borrowers who are in bankruptcy differently with regard to other provisions of RESPA. HUD’s omission of any special bankruptcy provisions or exemptions in the regulations implementing § 2605 clearly indicates that

¹ 12 U.S.C. § 2605(e).

² 12 U.S.C. §§ 2605(a) and (b).

³ 12 U.S.C. § 2605(g).

⁴ 12 U.S.C. § 2609(a).

⁵ 12 U.S.C. § 2609(c).

⁶ 12 U.S.C. § 2609(b).

HUD intended for there to be full compliance regardless of whether the borrower has filed bankruptcy or is in foreclosure.

Congress's (and HUD's) decision not to limit compliance with the Servicer Act means that servicers have no statutory or regulatory defense based on the borrower's bankruptcy or foreclosure status for violations of the § 2605 requirements, including the failure to provide account information or correct errors as requested in a qualified written request, or to send transfer of servicing notices and apply payments during the 60-day safe harbor transfer period.⁷ Servicers are therefore subject to claims for actual damages (including emotional distress damages), statutory damages (if pattern or practice of noncompliance), costs, and reasonable attorney fees.⁸

Limited Exception for Timely Escrow Disbursements

There is one requirement imposed by § 2605, however, which is not applicable if the borrower is behind on payments. Section 2505(g) requires a servicer to make payments from an escrow account for taxes, insurance and other charges "in a timely manner as such payments become due." Regulation X provides that this obligation to make timely disbursements out of escrow does not apply when the "borrower's payment is more than 30 days overdue."⁹ Though the regulation contains no further explanation of this limitation, it apparently means that a servicer is relieved of the timely disbursement requirements whenever the homeowner's mortgage payment is more than thirty days late at the time the disbursement becomes due, even if there are sufficient funds in the escrow account to cover the disbursement.

The regulation should not, however, provide a defense to a servicer who has wrongly claimed that the borrower was late with payments at the time the disbursement was required, or if the borrower is making timely payments under a forbearance or repayment agreement. This can be significant because if the exemption does not apply, the servicer must pay escrow items such as taxes and insurance in a timely manner even if there are not sufficient funds in the escrow account to cover the items.¹⁰ For example, a servicer cannot obtain force-placed insurance from another carrier in this situation and must instead pay the insurance premium on the borrower's policy when due by advancing its own funds. Any escrow deficiency resulting from the advance is then paid by the borrower through an adjustment to future escrow payments following an escrow account analysis.

Regulation X Escrow Exemptions

Despite the mandatory compliance language found in RESPA § 2609 and the lack of any statutory exemptions, HUD has provided in Regulation X that a servicer need not comply with several of the escrow requirements if the borrower is more than thirty days overdue with payments,

⁷ If a consumer mistakenly sends a payment during the sixty-day period following the effective date of transfer to the old servicer which it receives before the due date under the terms of the note, or if the old servicer fails to send the payment in a timely way to the new servicer, a late fee cannot be imposed nor can the payment be treated as late for any other purposes. 12 U.S.C. § 2605(d); Reg. X, 24 C.F.R. § 3500.21(d)(5). *See* Holland v. GMAC Mortg. Corp., 2006 WL 1133224, *6 (D.Kan. Apr 26, 2006) ("purpose of § 2605(d) is to prohibit lenders or servicers from imposing a fee in the sixty-day window from the time a mortgage loan is transferred from one servicer to another").

⁸ 12 U.S.C. § 2605(f).

⁹ Reg. X, 24 C.F.R. § 3500.17(k)(1), (2).

¹⁰ Reg. X, 24 C.F.R. § 3500.17(k)(2).

or in bankruptcy or foreclosure. While these exemptions are ill-conceived, practitioners should be aware of the limitations in their scope.

Annual Escrow Statements

Regulation X provides that a servicer does not need to provide the borrower with an annual escrow statement if the borrower is more than thirty days overdue at the time the servicer conducts the escrow analysis.¹¹ This exemption also applies when the mortgage account is in foreclosure or when the borrower is in bankruptcy.¹²

If the account is subsequently “reinstated or otherwise becomes current” and the servicer had not been providing annual account statements because of this exemption, the servicer must provide a statement within ninety days of the date the account was brought current, and it must include a history of the account since the last annual statement was provided.¹³ In negotiating forbearance, reinstatement, or deferral agreements to avoid foreclosure, borrowers and their advocates should make clear in the agreement that the account is deemed “reinstated or otherwise current” for purposes of the RESPA servicing requirements and specifically provide that the servicer shall provide annual escrow account statements while the agreement is in effect.

This regulation is inconsistent with both the purpose behind RESPA § 2609 and the policy of promoting home ownership through loss mitigation efforts aimed at avoiding foreclosure. For borrowers who are experiencing temporary financial difficulties and barely more than a month behind in payments, the exemption provides little incentive for them to become current and instead deprives them of critical information about their account, such as the new monthly payment amount, which may ultimately cause them to fall further behind.

The exemption is even less rational in the bankruptcy setting, particularly since HUD failed to distinguish between borrowers who are current with their mortgage payments at the time of the bankruptcy filing and intend to remain current, with those who are in default.¹⁴ Nor does the rule treat differently borrowers who are curing a mortgage default in a chapter 13 bankruptcy. As a borrower could conceivably go three to five years under a chapter 13 plan without receiving annual escrow account statements, the exemption serves only to undermine the potential for successful plan completion and jeopardizes the debtor’s fresh start even if the plan is completed.¹⁵

¹¹ Reg. X, 24 C.F.R. § 3500.17(i)(2). It is interesting to note that during the rulemaking proceeding, HUD received twenty-five comments from the servicing industry requesting an exclusion for loans in foreclosure or that were sixty days or more delinquent. Although the industry actually sought the more reasonable sixty-day period, HUD opted for the shorter period in the final rule. *See* 59 Fed. Reg. 53902 (Oct. 26, 1994).

¹² Reg. X, 24 C.F.R. § 3500.17(i)(2).

¹³ Reg. X, 24 C.F.R. § 3500.17(i)(2).

¹⁴ As evidence that the bankruptcy exemption was not well-reasoned, it is worth noting that § 3500.17(i)(2) did not include any discussion of bankruptcy when first promulgated under the notice and comment rulemaking procedure. Prior to the regulation’s effective date, however, HUD added the bankruptcy exemption as a “technical correction” to the rule language without soliciting comment. *See* 60 Fed. Reg. 8812 (Feb. 15, 1995).

¹⁵ *E.g.*, *In re Dominique*, 368 B.R. 913 (Bankr.S.D.Fla. 2007)(servicer failed to provide statements during the chapter 13 plan and just before plan completion provided debtors with an escrow account review indicating a \$6,397 escrow deficiency); *In re Rizzo-Cheverier*, 364 B.R. 532 (Bankr.S.D.N.Y.

Borrowers who are curing a default in a chapter 13 may argue, however, that the exemption should not apply after their chapter 13 plan is confirmed, because the effect of a cure under § 1322(b)(5) is to nullify all consequences of the pre-petition default,¹⁶ and that plan confirmation requires that the account be treated as if reinstated.¹⁷ Thus, the ongoing postpetition payments made by the debtor in a cure plan, including amounts paid in and out of escrow, should be treated under the terms of the note and mortgage as if no default exists.¹⁸ The borrower may also seek to avoid the exemption by including a provision in the chapter 13 plan requiring the servicer to comply with the RESPA escrow account statement requirements during the life of the plan.¹⁹

Finally, this exemption applies only to the submission of the annual account statement to the borrower and does not excuse the servicer from its obligation to conduct an escrow account analysis at the end of the twelve-month computation year.²⁰ Arguably, a borrower who is more than thirty days overdue or in foreclosure or bankruptcy may attempt to obtain the information provided in the annual escrow statement by sending a qualified written request to the servicer. As mentioned above, there is no default, foreclosure or bankruptcy exemption for servicer compliance with a qualified written request.

Escrow Surpluses

If an escrow analysis indicates that a surplus exists,²¹ the servicer is required to refund to the borrower any surplus equal to or greater than fifty dollars, or if less than fifty dollars, the servicer may provide a refund to the borrower or credit the amount against the next year's escrow payments.²² This rule applies only if the borrower is current with payments at the time the escrow

2007)(servicer allowed deficiency in escrow account to accrue and then, without notice to debtor, applied trustee plan payments for prepetition arrears to postpetition escrow deficiency).

¹⁶ The House Report to the Bankruptcy Reform Act of 1994 reaffirms that this is the intent of Congress. "It is the Committee's intention that a cure pursuant to a plan should operate to put the debtor in the same position as if the default had never occurred." H.R. Rep. No. 103-835, at 55 (1994), reprinted in 1994 U.S.C.C.A.N. 3340. *See also In re Southeast Co.*, 868 F.2d 335 (9th Cir. 1989) (chapter 11 cure); *In re Epps*, 110 B.R. 691 (E.D. Pa. 1990) (debtor did not lose the benefit of HUD forbearance agreement when pre-bankruptcy default on agreement was cured under chapter 13 plan).

¹⁷ *See In re Jones*, 366 B.R. 584 (Bankr.E.D.La. 2007) (plan confirmation "recalibrates" the amounts due as of the petition date); *In re Wines*, 239 B.R. 703 (Bankr. D.N.J. 1999) (post-petition mortgage debt treated like a current mortgage and consists of those payments which come due after the bankruptcy petition is filed).

¹⁸ The Fannie Mae/Freddie Mac Single-Family Uniform Instrument for a mortgage or deed of trust (Section 3, entitled "Funds for Escrow Items"), requires the servicer to maintain the escrow account in compliance with RESPA.

¹⁹ If the provision is incorporated into the chapter 13 plan or confirmation order, the servicer shall be bound by the provision on res judicata grounds.

²⁰ Reg. X, 24 C.F.R. § 3500.17(c)(2) - (3) and (f)(1). *See also In re Laskowski*, 384 B.R. 518 (Bankr.N.D.Ind. 2008)(bankruptcy exemption in Regulation X applies only to sending of annual statement and does not relieve servicer of obligation to conduct annual escrow analysis).

²¹ A "surplus" is defined as an "amount by which the current escrow account balance exceeds the target balance for the account." Reg. X, 24 C.F.R. § 3500.17(b).

²² Reg. X, 24 C.F.R. § 3500.17(f)(2)(i).

analysis is conducted. If the borrower's payment is more than thirty days overdue, the servicer may keep the surplus in the escrow account pursuant to the terms of the mortgage loan documents.²³

Escrow Shortages and Deficiencies

If the escrow analysis indicates that the account has a shortage²⁴ or deficiency,²⁵ Regulation X permits the servicer to respond in various ways, generally by doing nothing and simply allowing the shortage or deficiency to exist, or by requiring the borrower to repay the shortage or deficiency within specified time periods.²⁶

Like the rule governing surpluses, the deficiency rule applies only if the borrower is current with payments at the time the escrow analysis is conducted. If the borrower's payment is more than thirty days overdue, the servicer may collect the deficiency pursuant to the terms of the mortgage loan documents.²⁷

In contrast with the surplus and deficiency provisions, Regulation X does not contain any language limiting the shortage requirements in the event the borrower's payment is more than thirty days overdue at the time of the escrow analysis.²⁸ A servicer should thus be required to comply with the shortage requirements even if the borrower is not current with payments on the account.

Notice of Shortage or Deficiency

An important limitation on the Regulation X annual escrow statement exemption, which can be especially helpful to debtors in bankruptcy, relates to the requirement for notices of escrow shortages and deficiencies. A servicer must notify the borrower at least once during the twelve-month escrow computation year if there is a shortage or deficiency.²⁹ The notice may be included as part of the annual escrow statement or it may be sent as a separate document.³⁰

This notice requirement in Regulation X does not contain an exemption from compliance when the debtor is in default, foreclosure, or bankruptcy.³¹ This has led several courts to conclude that although a servicer may not be required by RESPA to provide annual escrow account statements to chapter 13 debtors in bankruptcy, it must provide debtors with escrow shortage and deficiency notices during the pendency of their chapter 13 plan.³² Enforcement of this requirement will go a

²³ Reg. X, 24 C.F.R. § 3500.17(f)(2)(ii).

²⁴ A "shortage" is defined as an "amount by which a current escrow account balance falls short of the target balance at the time of the escrow analysis." Reg. X, 24 C.F.R. § 3500.17(b).

²⁵ A "deficiency" is defined as the "amount of a negative balance in an escrow account." Reg. X, 24 C.F.R. § 3500.17(b).

²⁶ Reg. X, 24 C.F.R. § 3500.17(f)(3)(i); Reg. X, 24 C.F.R. § 3500.17(f)(4)(i).

²⁷ Reg. X, 24 C.F.R. § 3500.17(f)(4)(iii).

²⁸ See Reg. X, 24 C.F.R. § 3500.17(f)(2)(ii), (4)(iii).

²⁹ Reg. X, 24 C.F.R. § 3500.17(f)(5).

³⁰ Reg. X, 24 C.F.R. § 3500.17(f)(5).

³¹ The exemption contained in § 3500.17(i)(2) explicitly states that it only applies to the provisions of § 3500.17(i)(1) which deal with the furnishing of annual escrow statements.

³² Chase Manhattan Mortg. Corp. v. Padgett, 268 B.R. 309 (S.D. Fla. 2001) (servicer waived right to collect escrow account deficiency because it failed to notify borrowers of deficiencies; no bankruptcy exemption exists for RESPA notice requirement under § 3500.17(f)(5)); *In re Johnson*,

long way in curbing the abuses documented in these cases, by preventing a servicer from blindsiding chapter 13 debtors with a large catch-up bill for several thousand dollars or more after the plan is completed.

No Conflict Between RESPA and Bankruptcy Code

In addition to the Regulation X exemptions, servicers have attempted to rely upon a troubling line of cases which have held that some state consumer protection laws are preempted by the Bankruptcy Code.³³ While these cases are wrongly decided,³⁴ they are of questionable application to the mortgage servicing situation in which the requirements in question are imposed by another federal statute (RESPA), one that is not in conflict with the Bankruptcy Code.³⁵

In addition to the cases involving Bankruptcy Code preemption of state law claims, servicers have relied on some initial decisions which held that a debtor is precluded from pursuing claims under the federal Fair Debt Collection Practices Act (FDCPA) for violations of the bankruptcy discharge injunction.³⁶ As in the debt collection situation, servicers have argued that the requirements of RESPA are “preempted” by the Bankruptcy Code.

384 B.R. 763 (Bankr.E.D.Mich. 2008)(same); *Craig-Likely v. Wells Fargo Home Mortgage (In re Craig-Likely)* 2007 U.S. Dist. LEXIS 29042 (E.D.Mich. Mar. 2, 2007)(same); *In re Dominique*, 368 B.R. 913 (Bankr.S.D.Fla. 2007) (same). The *Padgett* and *Dominique* courts additionally found that the notices were required to be sent by Florida state law. *See* Fla. Stat. § 501.137(2). *See also In re Laskowski*, 384 B.R. 518 (Bankr.N.D.Ind. 2008).

³³ *See Cox v. Zale Del. Inc.*, 239 F.3d 910 (7th Cir. 2001); *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417 (6th Cir. 2000).

³⁴ The Eighth Circuit’s more enlightened analysis of the issue is worth noting. In *Sears, Roebuck & Co. v. O’Brien*, 178 F.3d 962 (8th Cir. 1999), the debtor alleged that a creditor had violated a state “mini-FDCPA” statute, which prohibits creditor contact with a debtor who is represented by counsel, by sending a copy of a letter soliciting a reaffirmation agreement directly to the debtor. In rejecting the creditor’s argument that the state statute was preempted, the Eighth Circuit held that Congress did not intend to “exclusively” regulate the insolvency area so that there could not be “field” preemption, and that the state law requirement did not conflict with the Bankruptcy Code. *See also Greenwood Trust Co. v. Smith*, 212 B.R. 599, 603 (B.A.P. 8th Cir. 1997) (state collection law does not impede creditor’s rights under Bankruptcy Code to negotiate reaffirmation agreements); *Sturm v. Providian Nat’l Bank*, 242 B.R. 599 (S.D. W. Va. 1999) (enforcement of state statute prohibiting direct communications with a debtor represented by counsel “in no way impedes administration of bankruptcy case”).

³⁵ RESPA itself does not generally preempt state law. The general RESPA provision relating to preemption expressly provides that state laws are preempted only to the extent of their inconsistency with federal law. 12 U.S.C. § 2616; Reg. X § 3500.13(a). If the state law provides greater protections and is not in conflict with RESPA, the law is not preempted. The only exception to this general rule under RESPA is for state laws covering transfer of servicing notices. *See* 12 U.S.C. § 2605(h), Reg. X, § 3500.21(h)).

³⁶ These decisions are based in part on the view that a debtor should not be permitted to create a private right of action for a violation of the Code’s discharge injunction, when none exists under the Bankruptcy Code, by using another federal statute, and that the Code provides an exclusive remedy for discharge injunction violations in the form of contempt proceedings. *See, e.g., Walls v. Wells Fargo Bank*, 276 F.3d 502 (9th Cir. 2002) (“To permit a simultaneous claim under the FDCPA would allow through the back door what [the debtor] cannot accomplish through the front door--a private

The Seventh Circuit in *Randolph v. IMBS, Inc.*³⁷ correctly rejected this characterization of the issue when two federal statutes come into play. The *Randolph* court noted that “[o]ne federal statute does not preempt another,” and that the proper question is whether one of the statutes has been expressly or implicitly repealed:

When two federal statutes address the same subject in different ways, the right question is whether one implicitly repeals the other—and repeal by implication is a rare bird indeed. (citations omitted). It takes either irreconcilable conflict between the statutes or a clearly expressed legislative decision that one replace the other.³⁸

Applying this correct analysis, the *Randolph* court held that although there may be some “operational differences” between the FDCPA and the Bankruptcy Code, there is no “irreconcilable conflict” between the two statutes. In fact, the Seventh Circuit found that the two statutes can work together harmoniously, permitting a debtor for example to obtain the more significant remedy of punitive damages when a willful collection action violates both the FDCPA and the bankruptcy automatic stay. Significantly, the *Randolph* court concluded that both statutes can be easily enforced and that debt collectors “can comply with both simultaneously.”³⁹

Similarly, the exercise of substantive RESPA rights requiring the production of information and correction of servicing errors is not an attempt to supplant the Code procedure for adjudication of claims.⁴⁰ On the contrary, the information sought in a qualified written request will assist rather than hinder the bankruptcy court in adjudicating claims if and when a debtor or trustee objects to claim filed by a mortgage servicer.

By expressly exempting servicers from some of RESPA’s requirements when a home owner is in bankruptcy but not others, HUD has also recognized that the two federal statutes can be read in harmony so that both can be given proper effect. Based on the Seventh Circuit’s analysis in *Randolph*, courts should conclude that RESPA and the Bankruptcy Code can both be complied with and enforced simultaneously.

District Court Opinion in *In re Nosek* is Wrongly Decided

right of action.”). However, violations of substantive RESPA requirements, such as the obligation to correct servicing errors, provide transfer of servicing notices, and make timely disbursements out of escrow, are not simply the reformulation of Bankruptcy Code violations as the Code does not provide for these servicer obligations nor does it provide an exclusive remedy for such violations.

³⁷ 368 F.3d. 726 (7th Cir. 2004).

³⁸ *Randolph*, 368 F.3d. at 730. The Supreme Court has stated: “The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.” *Morton v. Mancari*, 417 U.S. 535, 551 (1974). See also *Traynor v. Turnage*, 485 U.S. 535 (1988).

³⁹ *Randolph*, 368 F.3d. at 730. See also *Dougherty v. Wells Fargo Home Loans, Inc.*, 425 F.Supp.2d 599 (E.D.Pa. 2006); *In re Gunter*, 334 B.R. 900 (Bankr.S.D.Ohio 2005).

⁴⁰ *In re Figard*, 382 B.R. 695 (Bankr.W.D.Pa. 2008) (RESPA does not conflict with claims objection procedure set out in the Bankruptcy Code and Bankruptcy Rules).

Although RESPA and the Bankruptcy Code are certainly capable of coexistence, one court has found that the RESPA requirements for compliance with a “qualified demand letter” are in conflict with the Bankruptcy Code.⁴¹ The court’s decision is based in part on a misunderstanding of the potential interplay between § 2605(e) and the bankruptcy claims process set out in 11 U.S.C. § 502 and Federal Bankruptcy Rule of Procedure 3007.

The court in *Nosek* correctly observes that the Bankruptcy Code and Rules set up a “different process [] to determine the propriety of claims and to resolve disputes,” and that the bankruptcy court is given the authority to determine the amount of the claim.⁴² These differences, however, do not equate to an irreconcilable conflict.⁴³ Nothing in RESPA addresses the allowance or disallowance of a claim in bankruptcy or deprives a bankruptcy court of the exclusive authority to make determinations concerning bankruptcy claims. A dispute in a qualified written request simply requests that the servicer correct errors it may have made on the mortgage account, thereby potentially avoiding litigation under the bankruptcy claims process. The bankruptcy judge still remains the final arbiter of any claim dispute that may arise in a bankruptcy case.

Compliance with RESPA also does not ask the servicer to do anything more than it would need to do in a chapter 13 case in order to prepare and file a proof of claim. Certainly the servicer must conduct a reasonable investigation before filing a bankruptcy claim concerning the facts alleged in the claim, including the correct amount owing on the mortgage account.⁴⁴ If an error is found in the course of this investigation, the servicer would need to correct the account and file an accurate claim. This response should be no different than what is expected of a servicer with respect to a borrower-initiated inquiry or dispute contained in a qualified written request.

Rather than conflict with the claims allowance process in bankruptcy, the ability to dispute servicer errors in a qualified written request instead promotes judicial economy by averting unnecessary litigation over an objection to an erroneous proof of claim filed by a servicer. Litigation may also be avoided even when the servicer’s actions are not in error, as the borrower may obtain a sufficient explanation of the dispute in response to a qualified written request and thereafter decide not to file a formal objection to the servicer’s bankruptcy proof of claim. Similarly, the borrower’s ability to obtain account information through a qualified written request can obviate the need under the Federal Rules of Bankruptcy Procedure to file an objection to a proof of claim in order to initiate formal discovery.⁴⁵ To the extent that a servicer does not correct an account error or provide the

⁴¹ *In re Nosek*, 354 B.R. 331 (D.Mass. 2006).

⁴² *Id.* at 339.

⁴³ *In re Holland*, 374 B.R. 409 (Bankr.D.Mass. 2007)(refusing to follow district court opinion in *Nosek* and finding no inherent conflict between Bankruptcy Code and provisions of RESPA). *See also In re Payne*, 387 B.R. 614 (Bankr.D.Kan. 2008); *In re Laskowski*, 384 B.R. 518 (Bankr.N.D.Ind. 2008); *In re Padilla*, 379 B.R. 643, 666-67 (Bankr.S.D.Tex. 2007)(concluding that “[n]othing in the Bankruptcy Code immunizes mortgagees from causes of action based on RESPA.”); *In re Sánchez-Rodríguez*, 377 B.R.1 (Bank. D.P.R.2007)(debtors who filed chapter 13 bankruptcy to save home from foreclosure entitled to seek information about mortgage in qualified written request).

⁴⁴ The failure to do so would subject the servicer to sanctions under Bankruptcy Rule 9011. *See In re Ulmer*, 2007 WL 841371 (Bankr. D.S.C. Jan. 23, 2007); *In re Thompson*, 350 B.R. 842 (Bankr. E.D. Wis. 2006); *In re Rivera*, 342 B.R. 435 (Bankr. D.N.J. 2006); *In re Gorshtein*, 285 B.R. 118 (Bankr. S.D.N.Y. 2002); *In re Kilgore*, 253 B.R. 179 (Bankr. D.S.C. 2000).

⁴⁵ *See Chatman v. Fairbanks Capital Corp.*, 2002 U.S. Dist. LEXIS 10945 (N.D. Ill. June 13, 2002) (compliance with plaintiff’s qualified written request was required after litigation initiated even

requested information, the borrower may then initiate an objection to the servicer's proof of claim and pursue remedies for RESPA violations in the same bankruptcy proceeding. The availability of different and "overlapping" remedies under RESPA and the Bankruptcy Code, especially when these statutes further a common purpose, does not create an inescapable conflict.⁴⁶

The *Nosek* court also expressed concern based on the timeframes for servicer compliance under § 2605(e) and the Bankruptcy Rules. It noted that an objection to a bankruptcy claim must be filed at least 30 days prior to the hearing under Bankruptcy Rule 3007. The court then incorrectly suggests that the servicer has only 20 days to comply with qualified written requests under § 2605(e). In fact the servicer simply needs to acknowledge receipt of the request within 20 days, and has 60 days (excluding holidays, Saturdays, Sundays) to actually respond.⁴⁷ Bankruptcy Rule 3007 on the other hand requires that a claim objection be filed at least 30 days before a hearing on the objection, but does not dictate when the hearing shall occur or how much time the bankruptcy court may take to schedule and conduct the hearing. It is unclear how these procedural timeframes create an unavoidable conflict for servicers. To the extent any "operational differences" exist, as the Seventh Circuit in *Ranolph* would describe them, the bankruptcy court certainly has the authority to set an appropriate timetable for compliance.

As an example of how the "preemption" of RESPA requirements in bankruptcy proceedings would lead to absurd results, surely the requirement that servicers make timely payments out of escrow accounts must be enforceable in chapter 13 cases. Typically chapter 13 cases extend for periods of three to five years. Certainly Congress could not have intended that a debtor's ability to cure a mortgage default in chapter 13 should be frustrated by the complete chaos which would ensue if servicers are permitted to ignore RESPA and not make timely disbursements out of escrow for taxes and insurance while a debtor is in a chapter 13 case.

Compliance with RESPA Not Barred by Automatic Stay

The failure to properly service a mortgage account while the debtor is in bankruptcy cannot be blamed on the automatic stay. Ordinary servicing activities which are in compliance with RESPA, such as providing information or correcting errors at the request of the borrower, making adjustments to payment amounts in accordance with the mortgage contract, or making timely payments out of escrow, is not prohibited by the automatic stay in bankruptcy.⁴⁸

though information requested was available under Federal Rules of Civil Procedure); *In re Payne*, 387 B.R. 614, 634 (Bankr.D.Kan. 2008)(requesting information through discovery under Federal Rules of Civil Procedure and qualified written request "are not necessarily incompatible and may proceed on their parallel paths"); *In re Figard*, 382 B.R. 695 (Bankr.W.D.Pa. 2008)(servicer compliance with qualified written request required even though borrower could obtain information under discovery provisions of Bankruptcy Rules).

⁴⁶ *Randolph v. IMBS, Inc.*, 368 F.3d 726, 731 (7th Cir. 2004) ("overlapping statutes do not repeal one another by implication; as long as people can comply with both, then courts can enforce both").

⁴⁷ See 12 U.S.C. § 2605(e)(1)(A).

⁴⁸ See, e.g., *Chase Manhattan Mortg. Corp. v. Padgett*, 268 B.R. 309 (S.D. Fla. 2001) (Bankruptcy Code § 362(a) does not prevent servicer from merely providing RESPA notice of an escrow advance or deficiency; violation occurs only when servicer "exert[s] pressure" to collect advances); *In re Dominique*, 368 B.R. 913 (Bankr.S.D.Fla. 2007); *In re Connor*, 2007 WL 974342 (Bankr.D.Hawaii Apr 02, 2007); *In re Draper*, 237 B.R. 502 (Bankr. M.D. Fla. 1999); see also *In re Ramirez*, 280 B.R.

***Kokoszka v. Belford* is Not Applicable**

Some servicers have also relied upon the Supreme Court decision in *Kokoszka v. Belford*⁴⁹ in arguing that they need not comply with RESPA. This pre-Bankruptcy Code decision is completely inapposite as it did not involve RESPA or any similar statutory provisions. In *Kokoszka*, the Supreme Court considered the interplay between the Consumer Credit Protection Act's (CCPA) wage garnishment provisions and the former Bankruptcy Act. In finding that Congress did not intend to alter bankruptcy law with the enactment of the CCPA, the Court noted that the CCPA was passed under both the bankruptcy and commerce powers of Congress. RESPA is not one of the statutes passed as part of the CCPA and it was not enacted under the bankruptcy clause of the Constitution.

In addition, the specific issue raised in *Kokoszka* was whether the wage garnishment provisions of the CCPA constrained the trustee's recovery of an income tax refund as property of the debtor's bankruptcy estate. Since the debtor's assertion of the CCPA provisions presented a direct conflict with the Bankruptcy Act's definition of property of the debtor's estate, the Supreme Court found that the Act controls. A debtor's exercise of rights under RESPA, however, does not involve conflicts with Bankruptcy Code provisions as in *Kokoszka*.⁵⁰

Bankruptcy Code Section 1322(e) Compels RESPA Compliance

Finally, to the extent that a RESPA requirement affects the amount of the debtor's post-confirmation, ongoing mortgage payments in a chapter 13 cure plan, such as the RESPA limitations on amounts to be paid into escrow, Code § 1322(e) provides additional support for the view that RESPA is not "preempted." Section 1322(e) states that the amount necessary to cure a default in a chapter 13 plan shall be determined in accordance with the "underlying agreement and applicable nonbankruptcy law." Since applicable nonbankruptcy law includes federal non-Code statutes such as RESPA,⁵¹ and a determination of the cure amount includes consideration of ongoing post-confirmation payments based on § 1322(b)(5) and its reference to the "maintenance of payments while the case is pending," RESPA compliance is compelled.

252 (C.D. Cal. 2002) (mere mailing by a creditor of informational billing statements not a violation of stay).

⁴⁹ 417 U.S. 642 (1974).

⁵⁰ See *Randolph v. IMBS, Inc.*, 368 F.3d 726, 731 (7th Cir. 2004) (criticizing application of *Kokoszka* to interplay between FDCPA and Bankruptcy Code). See also *In re Holland*, 374 B.R. 409 (Bankr.D.Mass. 2007) (no inherent conflict between Bankruptcy Code and provisions of RESPA).

⁵¹ See *Patterson v. Shumate*, 504 U.S. 753, 112 S.Ct. 2242 (1992) (plain meaning of "applicable nonbankruptcy law" includes federal, as well as state, nonbankruptcy law).



**REAL ESTATE SETTLEMENT PROCEDURES ACT (RESPA)
CLAIMS CHART**

CLAIM	CITATIONS	RIGHT OF ACTION	REMEDY ⁵²	STATUTE OF LIMITATIONS	DEFAULT OR BANKRUPTCY EXEMPTION
Pre-Settlement					
Duty to Provide Good Faith Estimate, Information Booklet	Section 5 12 U.S.C. §2604 Reg. X §3500.7; Reg. X §3500.6				
Duty to Provide Servicing Statement	Section 6 12 U.S.C. §2605(a) Reg. X §3500.21(b)	Yes §2605(f) §2614	actual damages, costs and attorney's fees; plus \$1,000 per violation if pattern and practice of non-compliance	3 years §2614	
Duty to Provide "Controlled Business Arrangement" Notice	Section 8 12 U.S.C. §2607 Reg. X §3500.15	Yes §2607(d) §2614	3 times amount paid for settlement service, attorney's fees, and costs	1 year §2614	
Settlement					
Duty to Provide HUD-1 Settlement Statement	Section 4 12 U.S.C. §2603 Reg. X §3500.8				
Duty to Provide Initial Escrow Account Statement	Section 10 12 U.S.C. §2609(c)(1) Reg. X §3500.17(g)				
Prohibition	Section 8	Yes	3 times amount	1 year	

⁵² Where a remedy or right of action is not listed, the failure to comply with a RESPA provision may possibly be pursued as a breach of contract or state UDAP statute violation.

against Kickbacks, Fee Splitting and Unearned Fees	12 U.S.C. §2607 Reg. X §3500.14(b)	§2607(d) §2614	paid for settlement service, attorney's fees, and costs	§2614	
Prohibition against Requiring Purchase of Title Insur. from Particular Title Co.	Section 9 12 U.S.C. §2608 Reg. X §3500.16	Yes §2608(b) §2614	3 times all charges for title insurance	1 year §2614	
Prohibition against Charging Fee for Preparing Escrow and HUD-1 Statements, and TIL Disclosures	Section 12 12 U.S.C. §2610 Reg. X §3500.12				
Post-Settlement					
Duty to Make Timely Payments Out of Escrow	Section 6 12 U.S.C. §2605(g) Reg. X §3500.21(g) and §3500.17(k)	Yes §2605(f) §2614	actual damages, costs and attorney's fees; plus \$1,000 per violation if pattern and practice of non-compliance	3 years §2614	If borrower more than 30 days overdue; Reg. X, §3500.17(k)(1), (2)
Duty to Provide Annual Escrow Statements	Section 10 12 U.S.C. §2609(c)(2) Reg. X §3500.17(i)				If borrower more than 30 days overdue, or in foreclosure or bankruptcy; Reg. X, §3500.17(i)(2)
Duty to Perform Escrow Analysis and Calculate Proper Escrow Payment	Section 10 12 U.S.C. §2609(a) Reg. X §3500.17(c)				No
Requirements for Escrow Surpluses	Reg. X §3500.17(f)				If borrower more than 30 days overdue; Reg. X, §3500.17(f)(2)(ii)

Requirements for Escrow Shortages	Reg. X §3500.17(f)				No
Requirements for Escrow Deficiencies	Reg. X §3500.17(f)				If borrower more than 30 days overdue; Reg. X, §3500.17(f)(4)(iii)
Duty to Provide Notice of Escrow Shortage or Deficiency	Section 10 12 U.S.C. §2609(b) Reg. X, 24 C.F.R. §3500.17(f)(5)				No
Duty to Respond to Qualified Written Request	Section 6 12 U.S.C. §2605(e) Reg. X §3500.21(e)	Yes §2605(f) §2614	actual damages, costs and attorney's fees; plus \$1,000 per violation if pattern and practice of non-compliance	3 years §2614	No
Duty to Provide Transfer of Servicing Statement and 60-day Payment Safe Harbor	Section 6 12 U.S.C. §2605(b)-(d) Reg. X §3500.21(d)	Yes §2605(f) §2614	actual damages, costs and attorney's fees; plus \$1,000 per violation if pattern and practice of non-compliance	3 years §2614	No

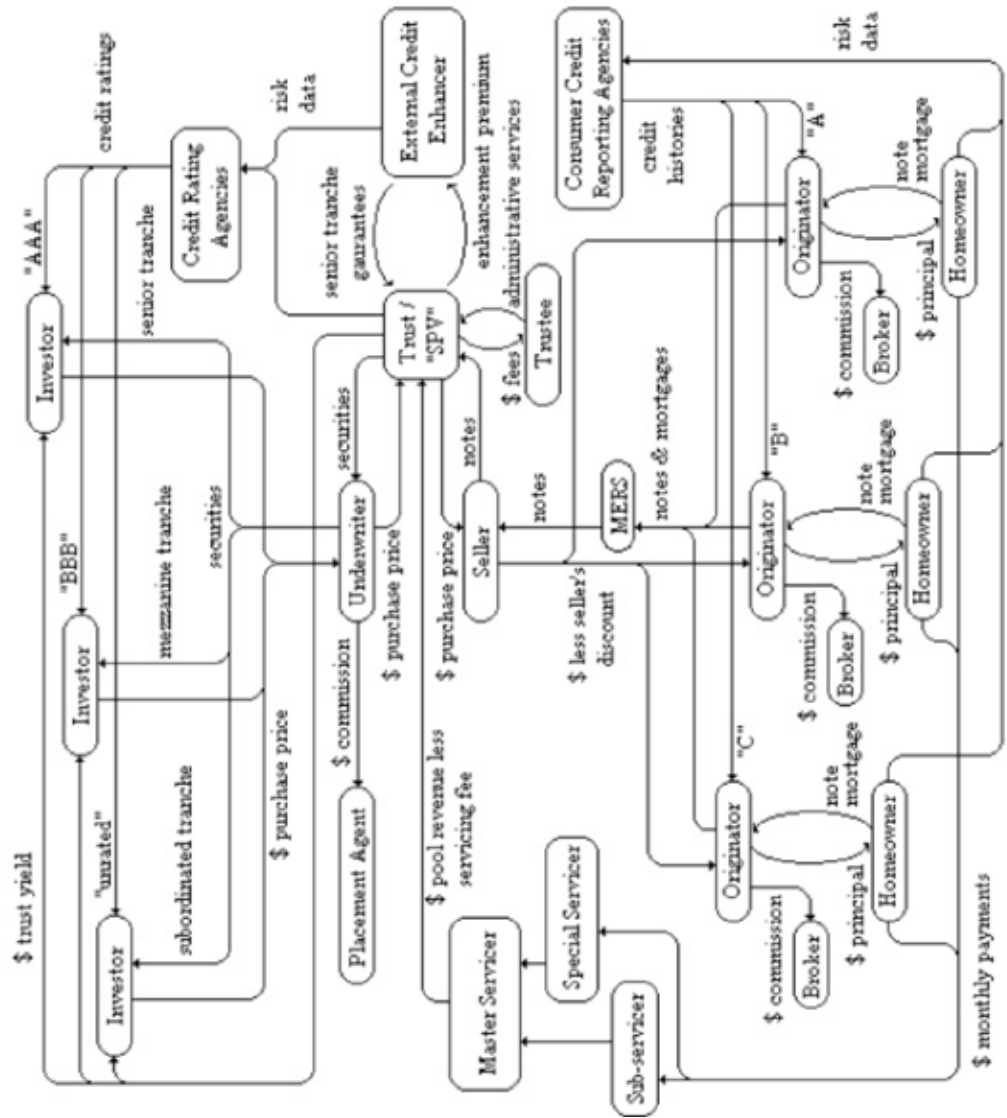
Unraveling Mortgage Claims

John Rao
National Consumer Law Center

Detroit Consumer Bankruptcy Conference
November 11, 2008

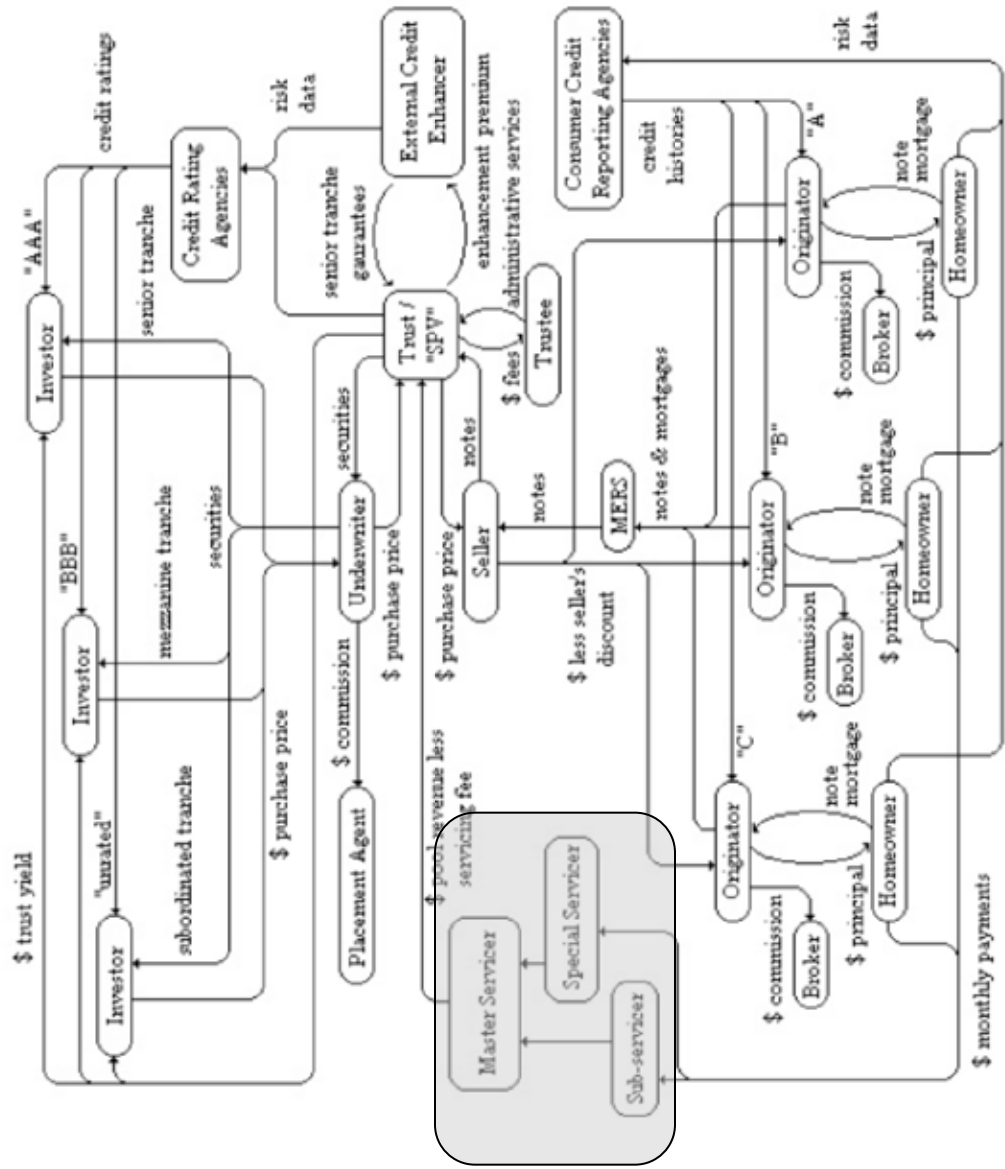
Mysterious Mortgage Debt

Figure A -- Subprime Home Mortgage Securitization Structure

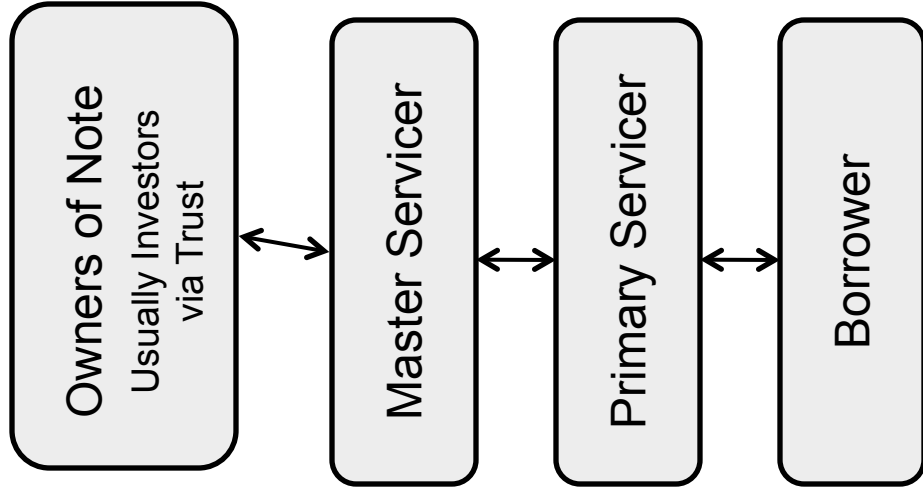


Mysterious Mortgage Debt

Figure A -- Subprime Home Mortgage Securitization Structure



Mysterious Mortgage Debt Servicer of Performing Loans

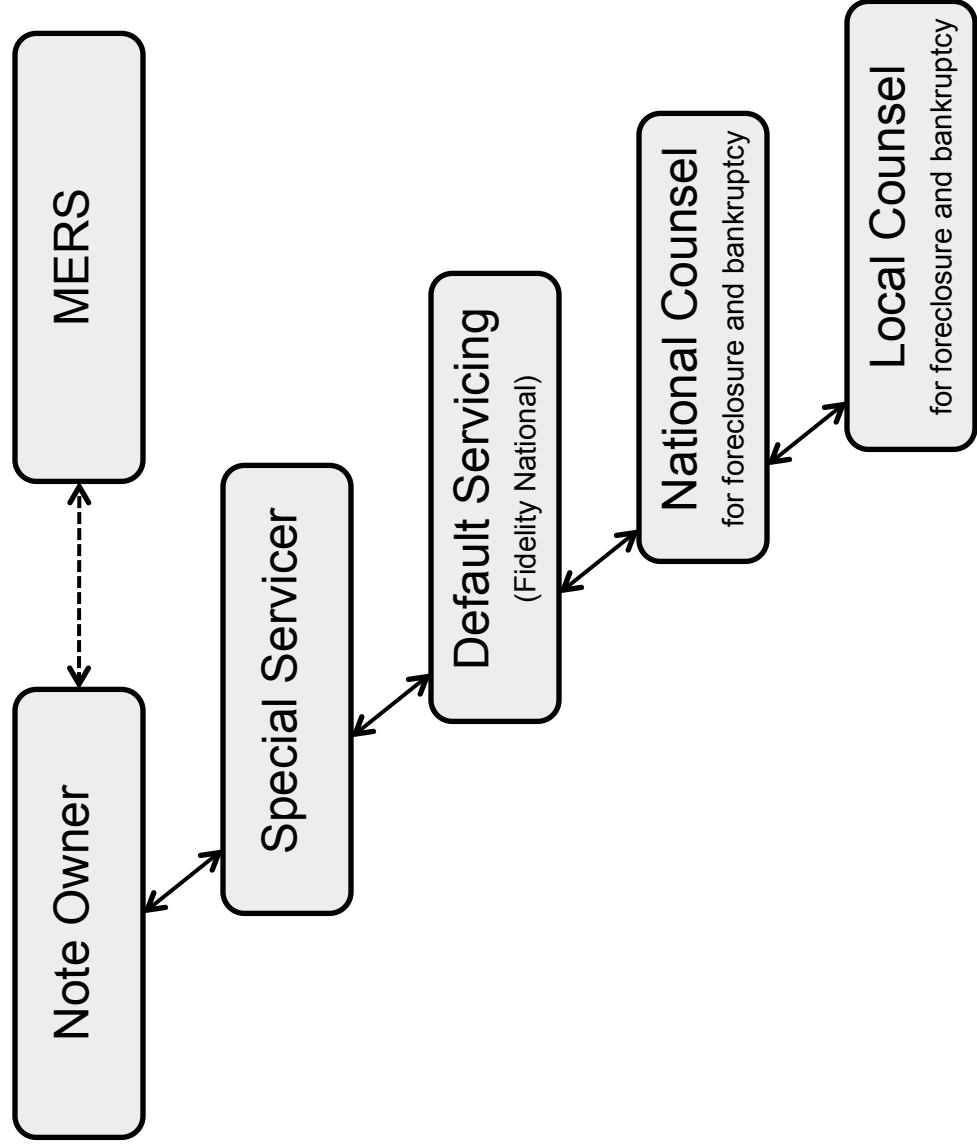


Mysterious Mortgage Debt Servicer as Intermediary



- Servicing Fee
- Float Income
- Ancillary Fees
- In-source Vendors

Mysterious Mortgage Debt Servicing in Foreclosure or Bankruptcy



Mysterious Mortgage Debt Investigation



- Proofs of Claim
- Relief from Stay
- Post Discharge



Mysterious Mortgage Debt Investigation

Real Estate Settlement
Procedures Act
12 U.S.C. § 2605(e)

Regulation X
24 C.F.R. § 3500.21(e)

Mysterious Mortgage Debt Investigation

RESPA requires servicer to respond to “Qualified Written Request” in which borrower may:

- dispute account errors
- seek information on account

Alleged Offenses

General Servicing Issues

- Action taken by party without standing/unable to determine ownership
 - *In re Foreclosure Cases*, 521 F. Supp. 2d 650 (S.D. Ohio. 2007).
 - *In re Hayes*, 393 B.R. 259 (Bankr.D.Mass. 2008).
 - *In re Kang Jin Hwang*, 393 B.R. 701 (Bankr.C.D.Cal. 2008).



UNITED STATES BANKRUPTCY COURT Middle District of Georgia Name of Debtor: Eddie M. Chukes		PROOF OF CLAIM Case Number: 06-70255 Chapter: 13
NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A "request" for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.		
Name of Creditor (The person or other entity to whom the debtor owes money or property): Select Portfolio Servicing, Inc. as servicing agent for Unknown at this time		
Name and address where notices should be sent: Select Portfolio Servicing, Inc. PO Box 65450 Salt Lake City, UT 84185		
Telephone number: 865-247-1722		
Account or other number by which creditor identifies debtor: XXX-XX-1329 / XXXXXX2251 / POC-0105386		
1. Basis for Claim		
<input type="checkbox"/> Goods sold <input type="checkbox"/> Services performed <input checked="" type="checkbox"/> Money loaned <input type="checkbox"/> Personal Injury/wrongful death <input type="checkbox"/> Taxes <input type="checkbox"/> Other _____		
2. Date debt was incurred: 09/15/2001		
3. If court judgment, date obtained: _____		
THIS SPACE IS FOR COURT USE ONLY		



Name of Creditor (The person or other entity to whom the debtor owes money or property): **Select Portfolio Servicing, Inc. as servicing agent for Unknown at this time**

Specify the priority of the claim:

Up to \$2,225* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. § 507(a)(7)

Taxes or penalties owed to a governmental unit - 11 U.S.C. § 507(a)(8)

Other - Specify applicable paragraph of 11 U.S.C. § 507(a)(6).
 *Amounts are subject to adjustment of 1/107 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.

5. Total Amount of Claim at Time Case Filed: \$ 137,430.42 (unsecured) (secured) (priority) (Total)

Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of all interest or additional charges.

6. CREDITS: The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim. **137,430.42** (Total)

7. Supporting Documents: Attach copies of supporting documents, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, mortgages, security agreements, and evidence of perfection of lien. DO NOT SEND ORIGINAL DOCUMENTS. If the documents are not available, explain. If the documents are voluminous, attach a summary.

8. Date-Stamped Copy: To receive an acknowledgement of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim.

Date: **5/17/2006**
 Sign and print the name and title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any):
/s/ Gene R. Clark Miller & Clark, PC, As agents for creditors

Pending for presenting fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

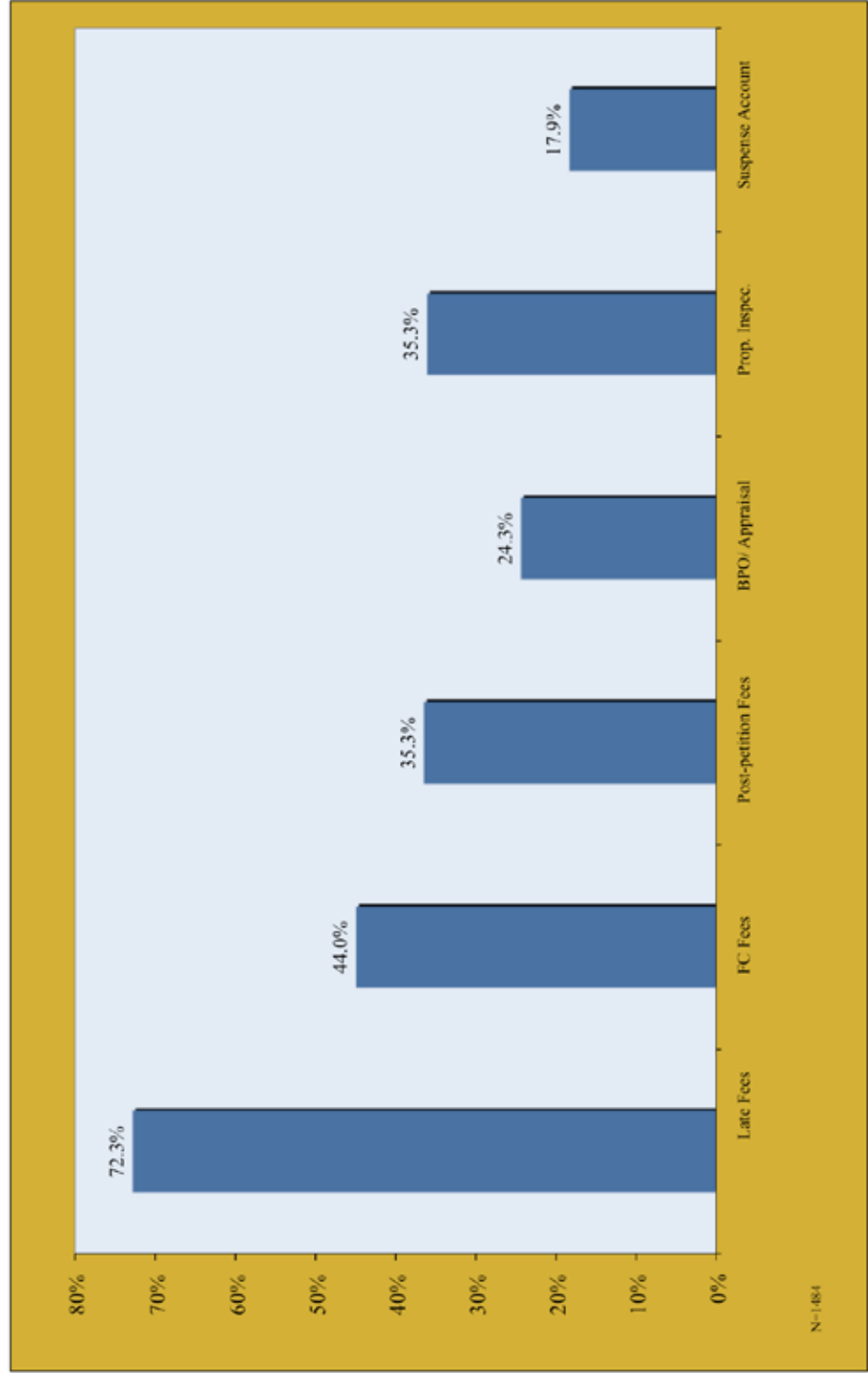
Alleged Offenses

- Undocumented or improper fees
 - *In re Stewart*, 391 B.R. 327 (Bankr. E.D. La. 2008).
 - *In re Parsley*, 384 B.R. 138 (Bankr. S.D. Tex. 2008).



The Usual Suspects

Fees and Charges



LEE PURDUE
WELLS FARGO BANK LOAN NO.: XXXX1533
BANKRUPTCY CASE NO.: 06-01207-TBB-13
PRE-PETITION ARREARAGE

10/05-04/06 (7 x \$637.19)	\$ 4,460.33
Inspections	251.70
Recording fees	7.00
Prior attorney fees -- bankruptcy	500.00
Prior attorney fees -- foreclosure	1,355.00
Previous servicer expense	1,496.16
BPO	450.00
Restructured interest	454.45
Escrow shortage	377.87
Late charges	1,006.20
NSF charges	<u>25.00</u>
	\$10,383.71**

****PLUS INTEREST AT 12.150% AS DETERMINED BY THE TRUSTEE OVER THE LIFE OF THE PLAN.**

LEE PURDUE
 WELLS FARGO BANK LOAN NO.: XXXX1533
 BANKRUPTCY CASE NO.: 06-01207-TBB-13
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Late charges	1,006.20
NSF charges	25.00
	<u>\$10,383.71**</u>



****PLUS INTEREST AT 12.150% AS DETERMINED BY THE TRUSTEE OVER THE LIFE OF THE PLAN.**

Fixed rate note, P&I payment: \$468.08; Late Fee = 5% of P&I = \$23.40; Assessed Late Fees - 43

The Usual Suspects

Fees and Charges

Description	Id. No.	Fee Amount
Attorney's fees	WDVA 4	\$31,273
Bankruptcy fees & costs	NDGA 56	\$2,275
Broker price opinion fee	EDAR 18	\$1,489
Demand fee	DMA 18	\$145
Overnight delivery	EDMI 91	\$137
Payoff statement fee	SDCA 7	\$60
Fax fee	EDVA 21	\$51

Alleged Offenses

- Miscalculation of amount owing
 - *Maxwell v. Fairbanks Capital Corp.*, 281 B.R. 101 (Bankr. D. Mass. 2002).
- Failure to provide homeowner information
 - *Jones v. Wells Fargo*, 366 B.R. 584 (Bankr.E.D.La. 2007), aff'd in part and rev'd in part, *Wells Fargo Bank, N.A. v. Jones*, 391 B.R. 577 (E.D.La. 2008).
 - *In re Thompson*, 350 B.R. 842 (Bankr. E.D. Wisc. 2006).
- Post-discharge actions (despite plan completion)
 - *In re Dominique*, 368 B.R. 913 (Bankr. S.D. Fla. 2007).
 - *Chase Manhattan Mortg. Corp. v. Padgett*, 268 B.R. : (S.D. Fla. 2001).



Alleged Offenses

- Rule 2016 and postpetition attorneys fee
 - *In re Padilla*, 379 B.R. 643 (Bankr.S.D.Tex. 2007).
- Misapplication of plan payments
 - *In re Nosek*, 386 B.R. 374 (Bankr. D. Mass. 2006), rev'd, 2008 WL 4445707 (1st Cir. Oct 03, 2008).
 - *Jones v. Wells Fargo*, 366 B.R. 584 (Bankr. E.D. La. 2007), aff'd in part and rev'd in part, *Wells Fargo Bank, N.A. v. Jones*, 391 B.R. 577 (E.D.La. 2008).
 - *Payne v. MERS, Inc*, 387 B.R. 614 (Bankr. D. Kan. 2008).



Alleged Offenses

- Double-assessment of escrow arrearages
 - *In re Campbell v. Countrywide Home Loans Inc.*, 2008 WL 4542843 (5th Cir. Oct 13, 2008).
- Unsubstantiated/incorrect motions for stay relief
 - *In re Parsley*, 384 B.R. 138 (Bankr. S.D. Tex. 2007).
 - *In re Gorshtein*, 285 B.R. 118 (Bankr. S.D.N.Y. 2002).
 - *In Re Rivera*, 342 B.R. 435 (Bankr. D.N.J. 2006)



LEE PURDUE
 WELLS FARGO BANK LOAN NO.: XXXX1533
 BANKRUPTCY CASE NO.: 06-01207-TBB-13
 PRE-PETITION ARREARAGE

10/05-04/06 (7 x \$637.19)	\$ 4,460.33
Inspections	251.70
Recording fees	7.00
Prior attorney fees -- bankruptcy	500.00
Prior attorney fees -- foreclosure	1,355.00
Previous servicer expense	1,496.16
BPO	450.00
Restructured interest	454.45
Escrow shortage	377.87
Late charges	1,006.20
NSF charges	<u>25.00</u>
	\$10,383.71**



****PLUS INTEREST AT 12.150% AS DETERMINED BY THE TRUSTEE OVER THE LIFE OF THE PLAN.**

Fixed rate note, P&I payment: \$468.08

Solving the Case

- Standing Orders/Local Rules
 - Local Rule 2015-5
- Show Cause Orders
 - Rule 9011
 - Appointment of Accountants/Experts
 - Fed. R. Evid. 706
 - Section 105
- Legally Insufficient Motions



Solving the Case

Inter-jurisdictional Investigations

- US Trustee
- Chapter 13 Trustee
- Debtor's Counsel



Section 524(i)

- New remedy under section 524(i)
 - willful failure to credit payments
 - in manner required by plan
 - violation of discharge injunction
 - if material injury to debtor

Section 524(i) opinions

- *In re Andrews*, 2007 WL 2793401 (Bankr.D.Kan. Sep 26, 2007).
- *In re Collins*, 2007 WL 2116416 (Bankr.E.D.Tenn. July 19, 2007).
- *In re Watson*, 384 B.R. 697 (Bankr.D.Del. 2008).