Concurrent Session

Residential Mortgages: Burning Down the House

Rudy J. Cerone
McGlinchey Stafford, PLLC; New Orleans

Hon. David W. Houston, III
U.S. Bankruptcy Court (N.D. Miss.); Aberdeen

Kathleen A. Leavitt
Chapter 13 Trustee; Las Vegas

Lenard E. Schwartzer
Schwartzer & McPherson Law Firm; Las Vegas

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Educational Materials

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SOUTHWEST BANKRUPTCY CONFERENCE

AMERICAN BANKRUPTCY INSTITUTE

Residential Mortgages: Burning Down the House

Presented By:

Rudy J. Cerone, McGlinchey Stafford, PLLC, New Orleans (Moderator)
Hon. David W. Houston, III, U.S. Bankruptcy Court
Northern District of Mississippi, Aberdeen
Kathleen A. Leavitt, Chapter 13 Trustee, Las Vegas
Lenard E. Schwartzer, Schwartzer & McPherson, Las Vegas

Residential Mortgages: Burning Down the House

Rudy J. Cerone, Esq.
McGlinchey Stafford, PLLC
601 Poydras Street, 12th Floor
New Orleans, Louisiana 70130
Tel: (504) 586-1200
Fax: (504) 596-2800
rcerone@mcglinchey.com

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A. The Screaming Headlines

(1) Foreclosures Investigated

The New York Times, September 28, 2007

"The federal agency monitoring the bankruptcy courts has subpoenaed Countrywide Financial, the nation's largest mortgage lender and loan servicer, to determine whether the company's conduct in two foreclosures in Southern Florida represented abuses of the bankruptcy system."

(2) U.S. Trustees Expand Scrutiny of Home Lenders/Services WSJ, December 3, 2007

"Attorneys from the U.S. Trustee Program, a division of the Justice Department, have taken aim at mortgage lenders, servicers and their lawyers in at least six states, including Georgia, Massachusetts and Pennsylvania… The agency is probing representations made to courts about what homeowners owe and the handling of their payments during bankruptcy, both areas in which consumer advocates say there are pervasive problems."

(3) Judge Slaps Ameriquest Hard for Selling Mortgage, Then Pretending to Still Own It
The Consumerist, June 1, 2009

- "Ameriquest originated a mortgage, securitized it, and sold it. Then pretended it still owned the mortgage to a U.S. Bankruptcy Court judge. Whoops.
- Unamused, Massachusetts U.S. District Court Judge William Young upheld $275,000 in sanctions against Ameriquest and its lawyers (PDF). This quote from the bankruptcy judge speaks volumes: "It is worth repeating as a warning to lenders and services that the rules of this Court apply to them."

B. The Debtors' Side

(1) Abuses Alleged by Debtors

- **Pre-Petition**: ***Lenders misstate or overinflate amounts alleged due in proofs of claim.***
- **Post-Confirmation**: ***Lenders improperly account for the debtor's payments and the Chapter 13 Trustee's payments during the life of the plan.***
  - **Lenders add fees and charges not disclosed or approved by the Bankruptcy Court.**
  - **Lenders do these things continually in numerous cases across the country.**
- **Post-Discharge**: ***Lenders pursue discharged debts not properly reaffirmed.***
- ***Lenders either fail to show (or cannot show) who is the actual holder of the note.***

(2) Adverse Consequences Alleged by Debtors

- ***Lenders file proofs of claim for inflated amounts.***
- ***Lenders file motions for relief from stay when the debtors are not in default, or not in default in amounts claimed.***
- ***Lenders quote inflated payoff amounts and collect amounts not owed.***
- ***Lenders foreclose based on amounts not in default.***

(3) Types of Relief Sought

- ***Objections to Proofs of Claim***
- ***Motions for Restitution of Overpayments***
- ***Motions for Sanctions for creditors' violation of Code sections or Bankruptcy Rule 9011***
- ***Motions for Sanctions under 11 U.S.C. § 105 or the court's inherent authority (abuse of process)***
- ***Motions/Adversary Proceedings for***
  - **Actual damages (including emotional distress)**
  - **Statutory damages**
  - **Punitive damages**
  - **Attorneys' fees**
- ***Injunctive Relief (Prohibitory and Mandatory)***

- ***Violation of Other Federal Statutes***
  - **Fair Debt Collection Practices Act**
  - **RESPA**
  - **HOEPA**
  - **TILA**
  - **Fair Credit Reporting Act**
- ***Violation of State Consumer Protection Laws***

(4) Cases Favoring the Debtor

- ***Failure to Disclose Fees Under § 506(a) and Rule 2016(b) is per se unreasonable***
  - ***In re Sanchez*, 372 B.R. 289 (Bankr. S.D. Tex. 2007)**
  - ***In re Tate*, 253 B.R. 653 (Bankr. W.D.N.C. 2000)**
  - ***In re Hight*, 393 B.R. 484 (Bankr. S.D. Tex. 2008)**
- ***Code provisions create substantive rights for debtors***
  - ***In re NGC Settlement Trust*, 118 F.3d 1056, 1063 (5th Cir. 1997) (discharge injunction is substantive right)**
- ***Court can redress lender abuses of the Bankruptcy Code, including awarding actual damages, punitive damages, disgorgement, attorneys' fees and issuing sanctions and injunctions***
- ***Section 105(a) or court's inherent authority***
  - ***In re Bessette*, 230 F.3d 439 (1st Cir. 2000)**
  - ***In re Terrebonne Fuel and Lube, Inc.*, 108 F.3d 609, 612-13 (5th Cir. 1997) (court can use § 105(a) for contempt of discharge injunction)**
  - ***Chambers v. NASCO*, 501 U.S. 32 (1991)**

11 U.S.C. § 105(a)

"The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process."

- ***Marrama v. Citizens Bank of Massachusetts*, 593 U.S. 365, 375 (2007).**

- **In re Fagan*, 376 B.R. 81 (Bankr. S.D.N.Y. 2007)***
- **In re Wines*, 239 B.R. 703, 709 (Bankr. D.N.J. 1999)***
- **In re Jones*, 2007 WL 2480494 (Bankr. E.D. La. Aug. 29, 2007),* remanded in part on other grounds, *391 B.R. 577 (E.D. La. 2008)***
  - **Court states that award of $67,202.45 in Debtors' costs and legal fees was really de minimus and insufficient to act as a deterrent to future misconduct, noting its view that $2,000,000 sanction imposed against Wells Fargo's predecessor in 2002 was apparently not enough to deter Wells Fargo's "sanctionable actions" which had continued. Court issued an injunction requiring Wells Fargo to change its accounting procedures.**
- **In re McCormick*, 203 B.R. 521 (Bankr. D.N.H 1996)***
  - **Court rejects "computer did it" defense – imposed $10,000 in punitive damages on Chase noting that Chase employees were not "precluded from getting a quill pen and ledger book to keep track of the effects of a chapter 13 plan in progress if indeed it was beyond the powers of mortal men and women to re-program their computer."**

- **Maxwell v. Fairbanks*, 281 B.R. 101 (Bankr. D. Mass. 2002)***
  - **Court found that Fairbanks violated the FDCPA, RESPA and the Massachusetts TILA. Noted that "Fairbanks, in a shocking display of corporate irresponsibility, repeatedly fabricated the amount of the Debtor's obligation to it out of thin air." Case settled for full discharge of mortgage, $50,000 in damages and attorneys fees.**
- **In re Garvida*, 347 B.R. 697 (9th Cir. BAP 2006)***
  - **Adjustment of the mortagee's claim was appropriate when servicer could not provide an accounting after Court ordered it to do so.**
- **In re Gorshtein*, 285 B.R. 118 (Bankr. S.D.N.Y. 2002)***
  - **Rejected "dog ate my homework" defense. In each of three separate cases at issue, the servicer's actions had created a danger that a family would lose its home without just cause and in violation of the bankruptcy code.**

- **In re Sanchez*, 372 B.R. 289 (Bankr. S.D. Tex. 2007)***
  - **Creditor holding a lien on a debtor's homestead may not assess a debtor post-petition charges without giving notice to the debtor and without seeking court approval, whether or not those charges are specifically allowed under a pre-petition contract. Court holds that it can use 105(a) to enforce 506, Rule 2016, 362, impose actual and punitive damages, hold lender and firm in contempt and issue injunction.**

- **In re Ryerson*, 2006 WL 3804675 (Bankr. M.D. Fla. Nov. 20, 2006)***
  - **Court denied Chase's summary judgment motion that alleged debtor had no cause of action under Sections 1322(b)(5), 1322(a)(1), 1326, 1327(a) or 105.**

- **In re Padilla*, 379 B.R. 643 (Bankr. S.D. Tex. 2007)***
  - **Section 506 applies pre-confirmation, and Rule 2016(a) applies post-confirmation. The debtors "are not defenseless against alleged abusive charges by their mortgage lenders."**

In re Fagan, *376 B.R. 81 (Bankr. S.D.N.Y. 2007)*

"Motions to lift the stay may be routine and inconsequential to secured creditors and their counsel. But to a debtor and his or her family, such a motion and the consequent loss of the family home may be devastating. Most creditors and counsel are conscientious. But some are callous by design or inadvertence, as exemplified by this motion and two others presented to the Court the same week."

"The danger here is that a debtor who does not have an attorney or the resources of intellect or spirit to defend against a baseless motion may lose his/her home despite being current on post-petition mortgage and plan payments."

In re Jones, *366 B.R. 584 (Bankr. E.D. La. 2007)*

"Wells Fargo avers that it was Debtor's burden to discover that it had clandestinely assessed and paid itself for undisclosed fees and charges otherwise not due. Incredibly, Wells Fargo also argues that it was Debtor's burden to verify that its accounting was correct, even though Wells Fargo failed to disclose the details of that accounting until it was sued."

"The final assault on the Bankruptcy Code is Wells Fargo's position that not only can it secretly assess a debtor's account postpetition, but it can collect payment on these charges without seeking Court permission . . .

Depending on how much and how often the lender siphoned off funds, payable under a confirmed plan for other purposes, a debtor might or might not satisfy the obligations contemplated by his or her plan.

To allow such a practice is to eviscerate the provisions of the automatic stay and this court's power to protect the Debtor and property of the estate."

In re McKain
(Bankr. E.D. La. May 1, 2009)

- *Notwithstanding a settlement between the Debtor and the Lender, the Bankruptcy Court issued a mandatory injunction concerning other cases based on the Lender's "systematic abuse of the claims process and bankruptcy system."*
- *Court cited its "inherent authority" as well as the traditional four-part test for issuance of an injunction.*

C. The Creditors' Side

(1) Lender/Servicer Responses

- ***Bankruptcy Requirements Vary - Often By District and Even By Judge within a District***
- ***Many Questions Unresolved By Code Or By Case law, Which Is Sparse***
- ***Servicing Loans Across Country Is Challenging***
- ***Defaulted Loans Are Particularly Difficult To Service***
  - **Uneven/Untimely Payments - including from chapter 13 trustees**
  - **Third Parties' Invoices**

(2) Creditors' Merits Defenses

- ***Vary depending on claim***
- ***Some courts have agreed with some of the lender's defenses***
  - ***Proof of Claim fees*** **are legal –** ***E.g., Majchrowski v. Norwest Mortgage, Inc.*****, 6 F. Supp.2d 946, 966 (N.D. Ill. 1998);** ***In re Atwood*****, 293 B.R. 227 (9th Cir. BAP 2003);** ***In re Powe,*** **278 B.R. 539, 577 (Bankr. S.D. Ala. 2002).**
  - **Minimal or no additional disclosure requirements**
  - **Cause of action inconsistent with/not violative of Section 1322 –** ***In re Bateman*****, 331 F.3d 821 (11th Cir. 2004);** ***In re Nosek*****, 544 F.3d 34 (1st Cir. 2008)**
  - **No cause of action under 506(b) or 105; no violation of 362**
    - ***In re Henthorn*****, 299 B.R. 351, 356 (E.D. Pa. 2003) (506(b) and 105)**
    - ***Pertuso v. Ford Motor Credit*****, 233 F.3d 417 (6th Cir. 2000) (105);** ***Holloway v. Household Auto. Fin. Corp.*****, 227 B.R. 501, 506 (N.D. Ill. 1998) (105)**
    - ***Mann v. Chase Manhattan Mortgage Corp.*****, 316 F.3d 1 (1st Cir. 2003) (362)**

Additional Merits Defenses

- ***Factual***
  - **Often, what is alleged did not occur**
  - **If it did, it was an exception –**
    - **Bankruptcy often a "manual process"**
    - **Courts actually asking for individualized consideration – humans make mistakes**
  - **Third parties (especially local attorneys) err or do not follow instructions**
- ***Courts or debtors request inconsistent things***
  - **Monthly statements – *Wetzel v. HomEq,* C.A. No. 07-42 (S.D. Ohio 2007)**
- ***Courts or debtors request things not required – Section 524(i)***
- ***"Enact a local rule"* – In re Smith*, Adv. No. 00-3148 (Bankr. W.D.N.C. 2000)***
- ***No Code or Rule authority requires notice of, demand for, or Court approval of postpetition legal expenses of Lender* – In re Padilla*, 389 B.R. 409 (Bankr. E.D. Pa. 2008)***
- ***RESPA authorizes postpetition increase in escrow charges – no stay violation* – In re Rodriguez*, 391 B.R. 723 (Bankr. D.N.J. 2008)***

D. Lenders' Law Firms Held Accountable

Lenders' Law Firms Held Accountable

- ***New Jersey law firm fined for filing 250 court pleadings in which the signature page had been "pre-signed" before review by the servicer.***
  - ***In re Rivera*, 342 B.R. 435 (Bankr. D.N.J. 2006)**
- ***Lender/servicer sanctioned for errors in servicing postpetition.***
  - ***In re Schuessler*, 386 B.R. 458 (Bankr. S.D.N.Y. 2008)**
- ***Judge Bohm issued a show cause order as to why Countrywide and its counsel should not be sanctioned for filing a motion for relief from stay that was allegedly inaccurate. Court later ruled that the U.S. Trustee had standing to appear and be heard on matters raised in show cause orders and had the right to conduct discovery under Rule 2004.***
  - ***In re Parsley*, No. 05-90374 (Bankr. S.D. Tex., Feb. 12, July 17, 2007) (docket sheet); 384 B.R. 138 (Bankr. S.D. Tex. Mar. 5, 2008)**
- ***Creditor's counsel sanctioned for a baseless stay relief motion of $5,000 (emotional distress damages) and reasonable attorney's fees.***
  - ***In re Osborne*, 375 B.R. 216 (Bankr. M.D. La. 2007)**
- ***$275,000 in Rule 9011 Sanctions against loan originator/assignee and its counsel for misrepresenting its continued ownership of the mortgage loan.***
  - ***In re Nosek,* Case No. 08-40095 (D. Mass. May 26, 2009)**

E. Class Actions in Bankruptcy Court

(1) Creditors' Class Defenses

- *No Jurisdiction Over Debtor Class Actions*
- *Comity/Interference Principles*
- *Class Certification Standards Are Not Met*
- *Merits Of Claim*

Jurisdiction

- ***Not within scope of Section 1334(b)***
- ***Implicates property of the estate, and so can only be addressed by "home" court under Section 1334(e)***
- ***Not a "proceeding" in a "referred" case***
- ***Distant court has no jurisdiction to enforce or apply home court's orders***
- ***Suits amount to collateral attack***
- ***Withdrawal of reference if "other laws . . . affecting interstate commerce" (HOLA, RESPA, FBA)***

Comity/Interference

- ***Nationwide class interferes with other courts' cases***
- ***Relief would undermine local procedures, rules, customs, settled expectations – See B.R. 9029***
- ***Nationwide class would interrupt ongoing cases, lead to inconsistent results affecting estates***
- ***Res judicata and collateral attack concerns***
  - **Even where issue could have been litigated**
- ***"Litigation about litigation"***

Class Certification

- ***Common issues do not predominate***
  - **Need to examine what happened in each case**
    - **For example, for claim concerning fees under Section 506(b)**
      - **Contract terms vary**
      - **Work done varies**
      - **Reasonableness of fees varies**
    - **Plan may not request payment of fees – *In re Tomasevic*, 275 B.R. 86 (Bankr. M.D. Fla. 2001); 11 U.S.C. § 1328(a) (court acts only on debts "provided" in plan)**
  - **Debtor consent**

- ***There is no nationwide law of bankruptcy***
  - ***Henry v. Assocs. Home Equity Serv., Inc.*, 272 B.R. 266 (C.D. Cal. 2002)**
- ***Comity/interference/local legal culture***
  - ***In re Powe*, 278 B.R. 539 (Bankr. S.D. Ala. 2002)**
- ***Not a superior or manageable undertaking***
  - **The North Carolina experience – no "holy war"**
  - **The Alabama experience – relief difficult to manage without settlement**

(2) Debtors' Responses to Class Defenses

- ***The District Court has the jurisdiction over bankruptcy matters – there is no "bankruptcy court jurisdiction"***
    - **Such jurisdiction is not limited to protecting the *rem*, but also debtor and his rights**
    - **Such jurisdiction is not exclusive**
- ***District courts certify nationwide classes regarding federal statutes despite fact that other courts rule differently on those statutes***
- ***Conduct under attack is violation of a statute – not a particular court's order***
    - ***In re Bessette*, 230 F.3d 439 (1st Cir. 2000)**
- ***Common issues and facts* do *predominate – lender commits same violation in every case***

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- ***Class actions are only way to really redress the wrong done to debtors, as amounts are small in each case but costs to litigate enormous***
- ***Bankruptcy Rule 7023/FRCP 23***
- ***Class makes it more manageable to address lenders' actions, not less***
    - ***In re Manley*, 273 B.R. 229, 249 (N.D. Ala. 2001)**
- ***Court can define class based on consideration of other similar proceedings to alleviate concerns about comity/ interference***
    - ***In re Noletto*, 244 B.R. 845 (Bankr. S.D. Ala. 2000)**
- ***Huge nationwide class actions already have been certified by bankruptcy courts on these issues***

Bankruptcy Court Has "Jurisdiction" Over Class Actions

- In re Noletto, *244 B.R. 845 (Bankr. S.D. Ala. 2000);*
- Fleet v. U.S. Consumer Council Inc. (In re Fleet), *53 B.R. 833 (Bankr. E.D. Pa. 1985);*
- Powe v. Chrysler Fin. Corp. LLC (In re Powe), *280 B.R. 728 (Bankr. S.D. Ala. 2002),* appeal dismissed sub nom. Chrysler Fin. Corp. v. Powe, *312 F.3d 1241 (11th Cir. 2002);*
- Sheffield v. Homeside Lending, Inc. (In re Sheffield), *281 B.R. 24 (Bankr. S.D. Ala. 2000);*
- In re Harris, *280 B.R. 876 (Bankr. S.D. Ala. 2001),* app. dism, Chrysler v. Financial Corp. v. Powe, *312 F.3d 1241 (11th Cir. 2002);*
- In re Slick, *2002 Bankr. LEXIS 772 (Bankr. S.D. Ala. May 10, 2002);*
- Bank United v. Manley, *273 B.R. 229 (N.D. Ala. 2001);*
- In re Sims, *278 B.R. 457 (Bankr. E.D. Tenn. 2002);*
- Harris v. Washington Mut. Home Loans (In re Harris), *297 B.R. 61 (Bankr. N.D. Miss. 2003),* aff'd Harris v. Washington Mut. Home Loans, Inc. (In re Harris), *312 B.R. 591 (N.D. Miss 2004);*
- Patrick v. Dell, *344 B.R. 56 (Bankr. M.D. Pa. 2005);*
- Aiello v. Providian Fin. Corp. (In re Aiello), *231 B.R. 693 (Bankr. N.D. Ill. 1999).*

Bankruptcy Court Does Not *Have "Jurisdiction" Over Class Actions*

- **Fisher v. Fed. Nat'l Mortgage Ass'n (In re Fisher)*, 151 B.R. 895, 897 (Bankr. N. D. Ill. 1993);***
- **Nelson v. Providian Nat'l. Bank*, 234 B.R. 528, 538 (Bankr. M.D. Fla. 1999);***
- **Knox v. Sunstar Acceptance Corp.*, 237 B.R. 687, 693 (Bankr. N.D. Ill. 1999);***
- **Lenior v. GE Capital Corp., (In re Lenior)*, 231 B.R. 662, 667-668 (Bankr. N.D. Ill. 1999);***
- **Simmons v. Ford Motor Credit Co. (In re Simmons)*, 237 B.R. 672, 676 (Bankr. N.D. Ill. 1999);***
- **Cline v. First Nationwide Mtg. Corp.*, 282 B.R. 686, 689 (W.D. Wash. 2002);***
- **Beck v. Gold Key Leasing, Inc. (In re Beck)*, 283 B.R. 163, 175 n. 18 (Bankr. E.D. Pa. 2002);***
- **Singleton v. Wells Fargo Bank, N.A. (In re Singleton), *284 B.R. 322, 325 (D.R.I. 2002);***
- **Henry v. Associates Home Equity Servs. Inc.*, 272 B.R. 266 (C.D. Cal. 2002);***
- **Bessette v. Avco Fin. Servs., Inc.*, 279 B.R. 442 (D.R.I. 2002);***
- **Montano v. First Light Fed. Credit Union (In re Montano)*, 2007 WL 2688606 (Bankr. D.N.M. Sept. 10, 2007).***

Courts That Have Certified Class Actions on Bankruptcy Issues

- **Conley v. Sears, Roebuck & Co.,** ***No. 97-11149 (D. Mass.),*** **Conley v. Sears, Roebuck & Co.,** ***222 B.R. 181, 185-86 (D. Mass. 1998) and*** **Brioso v. Sears, Roebuck & Co.,** ***Adv. Proc. No. 97-1222 (Bankr. D. Mass.) (settlement returned 150% of debt collected pursuant to invalid reaffirmations to approximately 190,000 debtors);***
- **In re Coggin,** ***155 B.R. 934 (Bankr. E.D. N. C. 1993) (Court certified nationwide class concerning Sears reaffirmation agreements);***
- **In re General Electric Capital Corp. Consumer Bankruptcy Debtor Class Action Litigation,** ***MDL No. 1192 (N.D. Ill.) ($100 million settlement; 100,000 class members [approximate]);***
- **Mazola v. May Dept. Stores Co.,** ***No. 97-10872 (D. Mass.) ($20 million settlement, 40,000 class members [approximate]);***
- **Hurst v. Federated Dept. Stores Co.,** ***No. 11479 (D. Mass.) ($5 million settlement, 12,000 class members [approximate]);***
- **Lafromboise v. Greenwood Trust Co.,** ***No. 97-30091 (D. Mass.) ($4 million settlement, 23,000 class members [approximate]).***

- ***Mobile Proof of Claim Fees Cases:***
  - ***In re Noletto*, 280 B.R. 868 (Bankr. S.D. Ala. 2001);**
  - ***In re Powe*, 278 B.R. 539 (Bankr. S.D. Ala. 2002) and 280 B.R. 728 (Bankr. S.D. Ala. 2001);**
  - ***In re Sheffield*, 281 B.R. 24 (Bankr. S.D. Ala. 2002);**
  - ***In re Harris*, 280 B.R. 876 (Bankr. S.D. Ala. 2001), app. dism, *Chrysler v. Financial Corp. v. Powe*, 312 F.3d 1241;**
  - ***In re Slick*, Case No. 98-14378-MAM, Adv. No. 99-1136, 2002 Bankr. LEXIS 772 (Bankr. S.D. Ala. May 10, 2002) (Wells Fargo sanctioned $2 million)**
- **Lau v. Arrow Fin. Servs.*, LLC, 245 F.R.D. 620 (N.D. Ill. 2007) (district court certifies FDCPA class against creditor alleged to be collecting discharged debts);***
- **Tate v. Nationsbanc Mortgage Corp. (In re Tate)*, 253 B.R. 653, 663 (Bankr. W.D. N.C. 2000) (court certifies district-wide case on unapproved fees in proofs of claim);***
- **Harris v. Washington Mut. Home Loans (In re Harris)*, 297 B.R. 61 (Bankr. N.D. Miss. 2003), aff'd* Harris v. Washington Mut. Home Loans, Inc. (In re Harris)*, 312 B.R. 591 (N.D. Miss 2004) (after district court affirmed lower court's ruling that it had jurisdiction over nationwide class, at least two defendants settled on class-wide basis);***
- **In re Sims*, 278 B.R. 457 (Bankr. E.D. Tenn. 2002) (class settlement);***
- **In re Morrow*, C.A. No. 99-70087, slip opinion (Bankr. N.D. Ala. 2003) (in materials) (court certifies district-wide class).***

F. Additional Authorities

(1) Other Significant Cases

- In re Sanchez*, 2008 WL 4467207 (Bankr. S.D. Fla. Oct. 2, 2008) (US Attorney, not UST, has standing to seek sanctions and 105 injunction not appropriate to require lender to "obey the law").*
- In re Telfair, *216 F.3d 1333 (11th Cir. 2000) (no stay violation to collect post-confirmation attorney's fees from monthly maintenance payments).*
- In re Watson, *384 B.R. 697 (Bankr. D.Del. 2008) (524(i) requirements can be incorporated into standard form chapter 13 plans).*
- In re Dominique, *368 B.R. 913 (Bankr. S.D.Fla. 2007) (lender must comply with RESPA post-confirmation).*
- In re Berghoff, *2006 WL 1716299 (Bankr. N.D. Ohio Jan. 20, 2006) (mortgagee's cannot collect pre-petition attorney's fees under Ohio law unless they are negotiated).*

- In re Foreclosure Cases, *521 F. Supp. 2d 650 (S.D. Oh. 2007) (whether servicers have standing to prosecute foreclosure actions for mortgagees).*
- In re Conde-Dedonato*, 391 B.R. 247 (Bankr. E.D.N.Y. 2008) (servicers have standing to file proofs of claim).*
- In re Ocwen Federal Bank, FSB Mortgage Servicing Litigation, *MDL No. 1604, re: 04-cv-2714, USDC, N.D. Ill. (over 60 consolidated lawsuits involving over 90 mortgage loans; various claims under RESPA, FDCPA, Bankruptcy Code, state deceptive trade practices and common law regarding alleged improper loan servicing).*
- In re Laskowski, *384 B.R. 518 (Bankr. N.D. Ind. 2008) (chapter 13 Trustee has standing to submit a RESPA qualified written request on the debtor's mortgage loan account).*
- In re McKain, *Case No. 08-10411 (USBC, E.D. La. May 1, 2009) (mandatory injunction regarding accounting procedures vs. Ocwen Loan Servicing, LLC).*

(2) Other Authorities, Articles, Treatises

- *Corrine Ball & Micelle J. Meises, Current Trends in Consumer Class Actions in the Bankruptcy Arena, 56 Bus. Law 1245 (May 2001)*
- *Elizabeth Warren and Jay Westbrook, Class Actions for Post-Petition Wrongs: National Relief Against National Creditors, 22 –2 ABIJ (March 2003)*
- *Robert P. Wasson, Article: Remedying Violations of the Discharge Injunction Under Bankruptcy Code 524, Federal and Non-Bankruptcy Law and State-Law Comports with Congressional Intent, Federalism and Supreme Court Jurisprudence for Identifying the Existence of an Implied Right of Action, 20 Bankr. Dev. J. 77 (2003)*
- *1 Collier Pamphlet Ed. Overview 1334, Mathew Bender & Co., Inc., 2006, p. 6-7*
- *Katherine Porter, Abstract, Misbehavior and Mistake in Bankruptcy Mortgage Claims, 2008, University of Iowa, available at http://ssrn.com/abstract=1027961*
- *NACTT Mortgage Committee "Best Practices for Trustees and Mortgage Servicers in Chapter 13"*

(3) Local Rules, Procedures and Forms

- *United States Bankruptcy Court for the Northern District of Illinois Model Plan (rev. 9/1/2006) (available at www.ilnb.uscourts.gov/Forms/Chapter_13/ch13_Plan_calculating.pdf)*
- *Chapter 13 Trustee Procedures for Administration of Home Mortgage Payments Adopted by the Court on September 29, 2005 (Amended December 20, 2007) (available at www.txsb.uscourts.gov/bankruptcy/rulesformsproc/mort_proc.pdf)*
- *Uniform Plan and Motion for Valuation of Collateral (available at www.txsb.uscourts.gov/bankruptcy/rulesformsproc/ch13forms/ch13plan.pdf)*

- *United States Bankruptcy Court, Northern District of Mississippi,* Standing Order Delineating Certain Post Confirmation Practices in Chapter 13 Bankruptcy Cases *(available at www.msnb.uscourts.gov/pdfs/SO/SO_CH13PostConfirmation.pdf)*
- In re Hubbard, *U.S.B.C., N.D. Miss., Case No. 04-17864, Trustee's Notice and Motion for Order Declaring 1322(b)(5) Claim of Chase Home Finance Current and Defaults Cured, dated March 4, 2008 [Doc. No. 33], and Order Finding that Long Term Debt Treated Per 1322(b)(5) of Chase Home Finance Current and Defaults are Cured, dated March 27, 2008 [Doc. No. 34]*

G. *Judicial Responses to Upturn in Foreclosures*

Court decisions becoming more strict regarding requirements of foreclosure

- In re Foreclosure Cases, *2007 WL 3232430, *2 (N.D. Ohio October 31, 2007) (the "Judge Boykin Decision")*

  The United States District Court for the Northern District of Ohio dismissed 14 foreclosure actions filed by Deutsche Bank National Trust Company ("DB"), as Trustee for certain asset-backed pooled mortgage facilities because the DB failed to establish diversity jurisdiction and standing.

Court decisions becoming more strict regarding requirements of foreclosure continued

- ***In the foreclosure actions, Judge Christopher Boykin issued an Order requiring DB to prove that it was the holder and owner of the underlying notes and mortgages that were the basis for each of the foreclosure actions. DB was required to file a copy of the executed Assignment demonstrating that DB was the holder and owner of the Note and Mortgage as of the date the Complaint was filed. The original lender was reflected as the mortgagee and no assignment to DB was reflected in the chain of title. Under Ohio law, assignments of mortgages are subject to recording requirements. Therefore, in addition to execution of a mortgage assignment, recording may also be required to establish standing.***

Court decisions becoming more strict regarding requirements of foreclosure continued

- ***DB produced Mortgage Assignments dated after the date of the original foreclosure complaint. These Mortgage Assignments were attached to pleadings in support of DB's that the Mortgage Assignments were sufficient to establish standing to prosecute the foreclosure actions, even though such Mortgage Assignments were entered into after the commencement of the foreclosure actions***

Court decisions becoming more strict regarding requirements of foreclosure continued

- ***The Court disagreed and found that DB was not the holder of the notes when the complains were filed, and dismissed all 14 foreclosure actions. The dismissals were without prejudice to re-file at a later date.***

Bankruptcy Real Party in Interest and Standing Cases

- ***In re Hayes,*** **393 B.R. 259 (Bankr. D. Mass. 2008) (collecting cases)**
  - **Loan servicers *ARE* real parties in interest with standing by virtue of their pecuniary interests in collecting loan payments**
- ***In re Jacobson,*** **402 B.R. 359 (Bankr. W.D. Wash. 2009)**
  - **Loan servicers *ARE NOT* real parties in interest and have no standing to prosecute stay relief motions**

Bankruptcy Real Party in Interest and Standing Cases continued

- *In re Mitchell,* 2009 WL 1044368 (Bankr. D. Nev., Mar. 31, 2009) and *In re Sheridan,* 2009 WL 631355 (Bankr. D. Idaho, Mar. 12, 2009)
  - MERS is not a real party in interest and lacks standing to prosecute stay relief motions.
- *In re Hwang,* 396 B.R. 757 (Bankr. C.D. Cal. 2008)
  - Bank was holder of a note it sold and had standing but was not a real party in interest; therefore, owner of the note must be joined as a mover in a stay relief motion.
- *In re Wells,* 2009 WL 1740675 (Bankr. S.D. Ohio, June 19, 2009)
  - Proof of claim disallowed because PSA Trustee failed to prove standing to file same

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