

Mortgage Documentation Mess

Concurrent Session

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

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American Bankruptcy Institute

Memphis Consumer Bankruptcy Conference

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1. *In re Jones*, Case No. 03-11065-DWH, Adv Pro. No. 08-1068-DWH.

A motion to dismiss was filed pursuant to Rule 12(b)(6) by the defendants as well as a motion to compel arbitration and stay adversary proceeding. As a part of a building contract, the plaintiff/debtor, executed a promissory note and deed of trust in favor of Jim Walter Homes, Inc., which was secured by her residential real property. The debtor filed a voluntary petition for relief pursuant to Chapter 13 of the Bankruptcy Code. The debtor's Chapter 13 plan was confirmed by an order of the court. According to the Chapter 13 Trustee's Final Report and Account, the debtor paid the debt owed to Walter Mortgage through her Chapter 13 plan in conformity with the amounts set forth on the proof of claim filed in the name of Mid-State Homes. After the debtor's plan was confirmed, Walter Mortgage acquired "force placed" hazard insurance covering the debtor's property and assessed her account for the premiums related to this coverage over the period that the plan was being administered in the total sum of \$4,524.00. No one, not the debtor, debtor's counsel or the case trustee was notified of this fact. The court was never petitioned pursuant to the bankruptcy rules to have these charges approved. The proof of claim was never amended to reflect these additional expenses. The trustee filed a motion styled "Trustee's Motion for an Order Declaring 1322(b)(5) Claim of Mid-State Homes Current and Defaults Cured." This motion was noticed to Mid-State Homes and its attorney on the same date, but no response or objection was filed. An order was entered by this court finding that the long-term debt of Mid-State Homes was current and that all defaults were cured. The debtor received her Chapter 13 discharge. Thereafter, Walter Mortgage notified the debtor that her account was delinquent in the sum of \$4,677.58, as a result of the "force placed" insurance coverage plus accrued interest. Walter Mortgage demanded that this amount be paid by a date certain.

The court held that the wording in the motion and notice utilized by the Trustee could not be clearer. Both plainly stated that they were seeking a determination that the long-term debt was current and that all defaults were cured. The purpose of the proceeding was to prevent debtors, who are about to emerge from a protracted Chapter 13 bankruptcy proceeding, from being "blind sided" by a creditor who has surreptitiously added fees and expenses to the debtor's account during the administration of the case. The court was of the opinion that the complaint sufficiently stated a cause of action existing in favor of the debtor, and, therefore, the Rule 12(b)(6) motion to dismiss was not well taken.

As to the arbitration agreement, the court held that the cause of action sought a determination of whether the defendants complied with the Bankruptcy Code, the Bankruptcy Rules, and the order of this court. Because the issues set forth in the debtor's complaint were more appropriately suited for resolution in a bankruptcy forum, the court was of the opinion that the defendants' motion to compel arbitration was not well taken. The court based its opinion on current Fifth Circuit authority which allows a bankruptcy court to deny arbitration when the complaint was more appropriately suited for resolution in the bankruptcy forum.

2. *In re Jones*, 400 B.R. 525(Bankr. N.D. Miss. 2009).

Before the court was debtor's Motion to Amend Class Action Complaint and Motion for Class Certification. The debtor filed for relief pursuant to Chapter 13 of the Bankruptcy Code. Her plan was confirmed, and, according to the trustee, she paid the debt owed to defendant's through her Chapter 13 plan in conformity with the amounts set forth in the proof of claim. After

plan confirmation, defendant acquired hazard insurance covering debtor's property and assessed her account for premiums related to the coverage over the period of the plan totaling \$4524.00. Defendants never notified bankruptcy counsel for the debtor, the trustee, or the court of these charges. Defendants never petitioned the court pursuant to Rule 2016(a), Federal Rules of Bankruptcy Procedure, to have the charges approved.

The Chapter 13 Trustee filed her "Trustee's Motion for an Order Declaring 1322(b)(5) Claim of Mid-State Homes Current and Defaults Cured" which was noticed to Mid-State Homes and its attorney, but no response or objection was filed. An Order was subsequently entered by the court finding that the long term debt of Mid-State Homes was current and all defaults cured. The debtor received a discharge, and post-discharge the defendant notified the debtor that her account was delinquent in the sum of \$4,677.58 as a result of the insurance premiums plus accrued interest. As a result of the demand for the insurance premiums, the adversary proceeding was filed.

The debtor alleged in her complaint that defendants charged unauthorized fees and expenses to her account in violation of FRBP 2016(a), as well as, that the defendants violated several sections of the bankruptcy code and the court's order declaring the claim of Mid-State Homes current and all defaults cured.

The court held the debtor's discharge and §524(a)(2) did not apply to this cause of action. This was a contractually permissible post-confirmation claim that was part of a long term indebtedness. As a result, the court concluded that the Motion to Amend and the Motion for Class certification were not well taken. The court went on to note that debtor's complaint did set forth the following viable causes of action: 1) the failure of the defendants to comply with FRBP 2016(a); and 2) the failure of the defendants to recognize the courts Order declaring the claim current and all defaults cured.

3. *In re Jones*, 422 B.R. 58 (Bankr. N.D. Miss. 2009).

The discharged debtor brought an adversary proceeding against Walter Mortgage Company; Mid-State Homes, Inc.; and Best Insurors, Inc.; after the defendants allegedly sought to collect post-plan confirmation premiums for forced placed hazard insurance and charged unauthorized fees and expenses to her account in violation of the Bankruptcy Code, Bankruptcy Rules, and orders of the court. The defendants moved for summary judgment. The court determined that there were no material factual issues that remained in dispute. The court held that the defendants ignored the trustee's §1322(b)(5) motion to determine that the long term debt was current and that all defaults were cured and disregarded the court's §1322(b)(5) order. The §1322(b)(5) proceeding has an obvious purpose, that is, to "flush out" all undisclosed charges and assessments that might have arisen during the administration of the Chapter 13 case. For failure to acknowledge the motion and order without justification, the court imposed sanctions for the intentional misconduct in the amount of \$2500.00 which was offset as a credit against the principal amount of insurance premiums that the debtor owed to the defendants.

4. *In re Evans*, 421 B.R. 217 (Bankr. N.D. Miss. 2009).

The Chapter 13 trustee filed a motion for entry of order declaring mortgage debt current pursuant to §1322(b)(5) and all defaults cured upon completion of debtor's payments under the Chapter 13 plan. A response to this motion was filed by Mid-State Homes opposing the relief based on the fact that the debtors had not paid for hazard insurance that had been force placed on their property during the life of the Chapter 13 plan. During the pendency of the case Best Insurors, Inc., notified the debtors each year that the insurance was being acquired, as well as, the debtor's bankruptcy attorney concerning this coverage on two separate occasions. Best Insurors, Inc., or Mid-State Homes never notified the Chapter 13 trustee or the court of any of the premium charges and never petitioned the court pursuant to Rule 2016(a), Federal Rules of Bankruptcy Procedure, to have these charges approved. The proof of claim was also never amended to reflect these additional expenses. The court discussed the requirements of Rule 2016(a). The court held that Mid-State Homes did not comply with either the letter or spirit of Rule 2016(a) in regard to the hazard insurance premiums, but it also stated that the debtors were not completely blameless. The court reached an equitable solution which required the debtors to repay Mid-State Homes the total amount of the insurance premiums over a five year period at a market rate of interest.

5. *In re Burks*, 421 BR 762 (Bankr. N.D. Miss. 2009).

Debtor brought an adversary proceeding for a determination of the validity of a first deed of trust in favor of BAC and of a subordinate deed of trust in favor of the Department of Housing and Urban Development for a disbursement that it had made to cure an arrearage on the first deed of trust. The court held under Mississippi law that the first deed of trust that was given to secure a purchase money obligation, the proceeds of which were used to acquire a homestead for the debtor and his wife, was valid even without the signature of the wife. However, the debtor's use of proceeds that he received from HUD, in order to cure an arrearage on the HUD insured first deed of trust, did not make the subordinate deed of trust lien that he granted to HUD a purchase money security interest. The subordinate deed of trust was a non-purchase money security instrument that encumbered the homestead property, and, since it was not signed by debtor's wife, it was invalid. The court cited the Mississippi Supreme Court case of *Jarvis v. Armstrong*, 94 Miss. 145, 48 So.1 (1909), which held that a deed of trust given to secure a purchase money obligation for a homestead was valid without the signature of the wife. *See also*, Miss. Code Ann. §89-1-45.

6. *In re Burks*, 2010 WL 146 2073 (Bankr. N.D. Miss. 2010).

Debtor filed a petition for relief pursuant to Chapter 13 of the Bankruptcy Code. The debtor filed the subject adversary proceeding against Countrywide, now known as BAC, and the United States Department of Housing and Urban Development. The debtor executed a promissory note and deed of trust to purchase his residence. The original beneficiary in the deed of trust was Mortgage Electronic Registration Systems, Inc. The underlying loan was currently

being serviced by BAC, as the successor to Countrywide. The primary note and deed of trust was insured by HUD. The debtor fell behind on his payments on the primary note and HUD paid Countrywide on the debtor's behalf the amount necessary to catch up the arrearage under HUD's partial claim program. As security for this indebtedness the debtor executed a subordinate note and deed of trust in favor of HUD encumbering the residence. The debtor contended in the adversary that the deeds of trust were not valid liens against the homestead because they lack the debtor's spouse's signature. A motion for partial summary judgment was filed by BAC on the debtor's claims that BAC and its predecessor, Countrywide, charged improper and unauthorized fees in violation of §506 of the Bankruptcy Code and Rule 2016, Federal Rules of Bankruptcy Procedure. The debtor objected to BAC's proof of claim and additionally asserted that BAC and/or Countrywide committed violations of the automatic stay. The court held that the adversary proceeding was replete with material factual issues in dispute and denied the motion for partial summary judgment.

7. *In re Hardaway*, 421 B.R. 226 (Bankr. N.D. Miss. 2010).

The Chapter 13 trustees in the Northern District of Mississippi filed a class action complaint in an adversary proceeding against Homecomings Financial, LLC and GMAC Mortgage, LLC. The trustees sought recovery of overpayments allegedly made to these lenders based on proofs of claims which, in effect, sought payment of the same escrow shortages twice. The lenders moved to dismiss. The court held as follows: (1) the claim seeking the recovery of alleged overpayments was properly filed as an adversary proceeding; (2) the trustees could include their objections to the lenders' proofs of claims and their claims seeking reconsideration of the allowance of lenders' claims in adversary proceedings; (3) the trustees stated claims for sanctions; and (4) the trustees stated claims for recovery or turnover of alleged overpayments. The court also expressed its concerns with the structure of the trustees' complaint which sought certification of a nationwide class presumably of Chapter 13 trustees who had encountered similar experiences with the named defendants. The court noted that while the overall effect of the defendants' conduct appears to be similar, the court could not discern within a reasonable degree of certainty whether their methodologies were substantially the same. The court pointed out the potential administrative nightmare of proceeding as a class action with two separate defendants who may or may not have identical common threads in practice even though the two entities were affiliated and had a common ownership. The defendants' motion to dismiss was overruled.

8. *In re Dotson*, 2010 WL 2024102 (Bankr. N.D. Miss. 2010).

The debtor filed a voluntary petition for relief pursuant to Chapter 13 of the Bankruptcy Code, and subsequently an adversary complaint against BAC. The debtor had executed a promissory note and deed of trust that was subsequently assigned to BAC as servicer of the loan for Wells Fargo Bank, N.A. The debtor subsequently executed a loan modification agreement following the death of her husband. BAC filed a proof of claim and an amended proof of claim. This proof of claim reflected a substantial arrearage. The debtor asserted in the adversary

proceeding that BAC had breached the loan contract by charging unauthorized fees in violation of §506 of the Bankruptcy Code and Rule 2016, Federal Rules of Bankruptcy Procedure. The debtor also objected to BAC's proof of claim, as well as, asserted a violation of the automatic stay. In deciding BAC's motion for summary judgment, the court found that there were numerous factual issues remaining in dispute and overruled the motion.

9. *In re George and Patricia Hines*
In re Mary Elizabeth Pryor, 2009 WL 1111117 (Bankr. N.D. Miss. 2009).

The Chapter 13 Trustee filed motions for orders declaring the 1322(b)(5) claims current and all defaults cured. Mid-States Homes and the debtors filed responses to the Trustee's motions. Mid-State Homes alleged that the debtors failed to pay hazard insurance premiums during the life of their Chapter 13 bankruptcy cases. The debtors filed responses requesting strict proof of payment of the insurance premiums and asserting their mortgages were current. The Hines maintained hazard insurance throughout the pendency of their bankruptcy case, but did not list Mid-State Homes as the loss-payee on the policy. Pryor did not maintain her own insurance.

The issue was whether FRBP 2016(a) precluded the allowance of the hazard insurance premiums as part of the Mid-State Homes claim in each case. The court held that because Mid-State Homes chose to ignore the easily understandable language of Rule 2016(a), its efforts to collect from the debtors was unreasonable and was disallowed. The court cited to the case of *In re Padilla*, 379 B.R. 643, 657 (Bankr. S.D. Tex. 2007) in support of its decision.

10. *In re George and Patricia Hines*
In re Mary Elizabeth Pryor, 2009 WL 1726371 (Bankr. N.D. Miss. 2009).

This was an opinion based on Mid-States Homes Motion for Re-Consideration of the court's earlier opinion discussed immediately hereinabove.

In support of its motion for reconsideration, Mid-State Homes made the following arguments:

1. Rule 2016(a) applies to obligations such as professional fees or other charges that might be assessed against a debtor in bankruptcy, but not to charges such as hazard insurance premiums.
2. The court applied Rule 2016(a) to Mid-State Homes in a novel way without notice or warning.
3. The Hines should have informed Mid-State Homes that they had their own insurance coverage.

As to argument No. 1 the court reviewed the deeds of trust at issue and determined that it was obvious that the professional who drafted the documents for use by Jim Walter Homes and Mid-State Homes saw no distinction between collection costs, including attorney's fees, and the responsibility to maintain hazard insurance coverage. Therefore, the court saw no distinction

between professional fees and hazard insurance premiums insofar as FRBP 2016(a) was concerned.

As to argument No. 2, the court pointed out that Rule 2016(a) has remained unchanged for all practical purposes for 26 years and only recently was the court called upon to apply FRBP 2016(a) to a procedure that Mid-State Homes had been doing with impunity for years.

As to argument No. 3. The court found it ironic that Mid-State Homes was attempting to blame the Hines in the dispute when they actually obtained insurance on their own. Both the building contract and the deed of trust required that debtors to maintain hazard insurance on the property. Mid-State could have eliminated the entire dispute with minimal effort by filing FRBP Rule 2016(a) motions. The motion for reconsideration was overruled.

11. *In re Fondern*, 398 B.R. 553 (Bankr. N.D. Miss. 2008).

The bank in this case was an oversecured creditor that objected to debtor's proposed Chapter 13 plan on the basis that it failed to provide the bank with the appropriate oversecured interest rate. The court discussed the recent decision of the Fifth Circuit in *Drive Financial Services, L.P. v. Jordan*, 521 F.3d 343 (5th Cir. 2008). The court held that the limited holding in *Drive Financial* indicated that the 5th Circuit's earlier decision in *Green Tree Fin. Servicing Corp. V. Smithwick*, 121 F.3d 211 (5th Cir. 1997) was still binding precedent insofar as the payment of interest on oversecured claims in Chapter 13 cases. Debtors in a chapter 13 are required to pay an oversecured creditor the contract rate of interest.

12. *In re McGregor*, 398 B.R. 561 (Bankr. N.D. Miss. 2008).

Debtors brought adversary proceeding against creditor that filed proof of claim and amended proof of claim which were barred by the applicable statute of limitations. The debtors sought actual and punitive damages by way of their complaint. The creditor admitted that the claim was barred by the applicable statute of limitations, and the court disallowed the claim. The court also held that the creditor did not violate the automatic stay by filing the original and amended proofs of claim , and that there is no cause of action under the bankruptcy code for filing a proof of claim that is statutorily barred by a period of limitations.

13. *In re Burt*, Case No. 07-14617-DWH.

Creditor filed a motion to abandon property and lift the automatic stay. The question for the court was the interest rate to be paid to the creditor after the Fifth Circuit Court of Appeals decision in *Drive Financial Services, L.P. v. Jordan*, 2008 WL 651547 (5th Cir., March 12, 2008). The court held in the Fifth Circuit, the *Till* prime-plus interest rate would be applicable to practically all conceivable Chapter 13 repayment scenarios. The prime rate of interest at the time

was approximately 5.25% per annum. The court was of the opinion that a 4.25% risk factor should be added to the prime rate for an effective repayment interest rate of 9.5% per annum for Chapter 13 purposes.

14. *In re Eddins*, Case No. 02-17545-DWH, Adv. Pro. No. 08-1058-DWH.

A motion to dismiss the adversary proceeding pursuant to Rule 12(b)(6) was filed by the defendant. The plaintiffs filed a voluntary Chapter 13 bankruptcy case. The creditor filed a proof of claim evidencing a debt secured by the plaintiffs' residential real property. The debtors proposed to cure the arrearage and make the regular monthly payment under the plan. The plan was confirmed. The Chapter 13 trustee filed a motion for a determination that the claim of the creditor was current and that all defaults were cured. An order was entered by the court determining that the long-term debt was current and that all defaults were cured. The debtors then received a discharge. The bankruptcy case was reopened, and the adversary proceeding was filed against the creditor alleging that the creditor wrongfully assessed and collected charges and fees from them that were not owed or approved by the bankruptcy court. In addition, they assert that the creditor wrongfully failed to credit their payments to the loan's principal balance. The court's order, which determines that the long-term debt is current and that all defaults are cured, is an additional mechanism to prevent Chapter 13 debtors from being "blind sided" by creditors who demand otherwise unknown fees and charges immediately after debtors emerge from bankruptcy protection. Clearly, if there are legitimate charges which should have survived the plaintiffs' Chapter 13 discharge, there will be no violation of the §524(a)(2) discharge injunction. The court was concerned only with whether the amended complaint stated causes of action upon which relief could be granted. The court was of the opinion that the Rule 12(b)(6) motion to dismiss was not well taken as to the plaintiffs' amended complaint regarding the following:

1. The alleged violations of §362(a).
2. The alleged violations of the discharge injunction set forth in §524(a)(2).
3. The alleged violation of the court's order declaring the long-term debt of the creditor current and all defaults cured.

The plaintiffs claims pursuant to §506(b) and Rule 2016(a), Federal Rules of Bankruptcy Procedure, appeared to be merged into their claims for relief pursuant to §362(a) and §524(a)(2), as well as, the alleged violation of this court's order.

15. *In re: Anthony*, Adv. Proc. No. 02-1105.

The Chapter 13 trustee filed an adversary proceeding against creditor for alleged predatory lending practices. Creditor filed a motion for summary judgment on its request to compel arbitration of trustee's claims.

The court held that the arbitration agreements executed by the borrowers in connection with mortgage loans were not substantively unconscionable; the trustee stood in the shoes of the debtor - borrowers and was bound by the arbitration agreement; and the trustee's claims were not

core proceedings and, therefore, the court had no discretion to refuse to compel arbitration. The court ordered the cases to be submitted to arbitration.

16. *In re Thompson*, Adv. Proc. No. 03-1153.

The plaintiff filed a motion for class certification with an objection filed by the defendant. In her adversary proceeding, the plaintiff alleged that subsequent to her bankruptcy filing, defendant improperly posted to her account and impermissibly collected from her certain fees and expenses which were not approved by the bankruptcy court. Plaintiff contended that defendant's conduct was so pervasive that her cause of action should be certified as a nationwide class action pursuant to Rule 23(a) and (b). The mere act of posting charges or corporate advances to an account for record keeping purposes, standing alone, does not run afoul of the provisions of the Bankruptcy Code. The class definition proposed by the plaintiff was defective as a matter of law because it did not address an action necessarily prohibited by the Bankruptcy Code.

The plaintiff could satisfy the numerosity requirement and she and her attorneys could adequately protect the interest of the proposed class, but could not meet the commonality and typicality provisions of Rule 23.

17. *In the Matter of Wilborn*, 609 F.3d 748 (5th Cir. 2010).

Four Chapter 13 debtors filed an adversary proceeding on behalf of a putative debtor class against Wells Fargo Bank, NA, the mortgage holder/servicer, alleging that Wells Fargo charged and collected unreasonable and unapproved post-petition professional fees and costs during the pendency of the debtors' bankruptcy cases, as well as, that Wells Fargo's pattern and practice of charging such fees avoided court oversight and was contrary to the Bankruptcy Code and the Bankruptcy Rules. The Bankruptcy Court for the Southern District of Texas granted the debtors' motion for class certification. Subsequently, the class certification order was certified for a direct appeal to the Fifth Circuit, and Wells Fargo's petition for permission to appeal was granted.

In summary, the Court of Appeals held as follows:

1. The bankruptcy court had authority to certify the debtors' class action.
2. Questions of law and fact common to the class members did not predominate.
3. Injunctive and declaratory relief were not appropriate for the class as a whole.

The reasoning behind the court's decision to overrule the class certification is expressed in the following comments.

The bankruptcy court certifying this class action recognized that differing events had occurred within each individual debtor's bankruptcy case, but the court held that because all plaintiffs had fees and costs charged to their accounts by Wells Fargo during the pendency of the bankruptcies, common issues of law or fact predominate over individual issues. But this ignores how and why certain fees were charged or paid. The circumstances surrounding the charging of fees require an individual assessment of the claims. It appears that some debtors, like Wilborn, may have agreed to certain fees as an inducement to Wells Fargo for a loan modification and provided additional consideration for the modification. In other cases at least partial fees were approved for some debtors. Such varying circumstances will require the court to examine each individual bankruptcy case. The bankruptcy court cannot require Wells Fargo to simply disgorge all fees that were not previously approved because it is evident that there has been a wide "array of charges tailored" to each individual debtor. *See Maldonado*, 493 F.3d at 525-26.

In some cases it may be appropriate to require Wells Fargo to disgorge fees, but we think that is for the bankruptcy court to decide. The differing circumstances of the debtors render the reasonableness of the individual charges a fact-specific inquiry rather than a class-oriented decision. *See Maldonado*, 493 F.3d at 526. In some instances, it may also be necessary to determine whether fees were actually imposed on the debtors or merely recorded on internal records. *See In re Padilla*, 379 B.R. 643, 662 (Bankr. S.D. Tex. 2007) ("The Bankruptcy Code does not prohibit [creditors] from maintaining internal records of costs incurred."). Furthermore, where fees have been imposed Wells Fargo may have viable defenses to some plaintiffs' claims, such as waiver or estoppel. *See In re Monumental Life Ins. Co.* Finally, the rulings of different bankruptcy judges during their cases may affect the computation of allowable charges by Wells Fargo. In short, the myriad issues that may arise in each case as to whether and how fees and costs were imposed preclude a class-wide disposition of the case under Rule 23(b)(3).

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI**

**REVISED STANDING ORDER DELINEATING CERTAIN POST CONFIRMATION
PRACTICES IN CHAPTER 13 BANKRUPTCY CASES**

In order to enable Chapter 13 debtors and secured creditors and/or mortgage servicers to better ascertain an accurate amount owed on the indebtedness prior to the entry of the Chapter 13 discharge, the secured creditors/mortgage servicers shall undertake the following practices and procedures subsequent to the confirmation of the debtors' Chapter 13 plan, to-wit:

1. Secured creditors/mortgage servicers should carefully monitor post-petition payments made in a Chapter 13 case. If the underlying indebtedness is paid current post-petition, then the secured creditors/mortgage servicers should not seek to recover late fees. No late fees should be recovered or demanded for systemic delay, but should be limited only to actual defaults, for example, when the debtor fails to remit the payment due to the Chapter 13 trustee. *See, In re Lee*, 167 B.R. 417 (Bankr. S.D. Miss. 1992), *aff'd*, 168 B.R. 319 (S.D. Miss. 1993), *aff'd*, 22 F.3d 1094 (5th Cir. 1994).

2. Payments made on the pre-petition/pre-confirmation arrearage claim should be exclusively applied to the arrearage claim. Regular monthly mortgage payments that are paid post-confirmation are to be applied to the monthly installment due in the month that the payment was made to the Chapter 13 trustee.

3. Secured creditors/mortgage servicers should file a notice and reason for any payment change with the court and provide a copy to the Chapter 13 trustee, the Chapter 13 debtors, and the debtors' attorney of record. This specifically applies to payment changes resulting from an adjustable interest rate, as well as, any changes resulting from a loss or reduction in an interest credit.

4. Secured creditors/mortgage servicers are required to file a notice with the court, the Chapter 13 trustee, the Chapter 13 debtors, and the debtors' attorney of record, as to any protective advances made in reference to a secured claim, such as, "force placed" insurance premiums or property taxes.

Entered 11-7-08 at 10:45 A.M.
 United States Bankruptcy Court
 Northern District of Mississippi
 David J. Perdue *JW*

Should the secured creditors/mortgage servicers elect, this notice may be filed and disseminated in the form of an amended proof of claim.

5. Secured creditors/mortgage servicers should not collect or attempt to collect from the Chapter 13 debtors any post-confirmation/pre-discharge fees, including attorney fees, unless approved by the Bankruptcy Court. An application to approve such fees may be made pursuant to Rule 2016, Federal Rules of Bankruptcy Procedures, or pursuant to an amended proof of claim which must be filed with the court and the Chapter 13 trustee, as well as, noticed to the Chapter 13 debtors and the debtors' attorney of record. This provision does not prohibit creditors or servicers from assessing fees or charges to the debtors' accounts for record keeping purposes only. *See, In re Thompson*, 351 B.R. 402 (Bankr. N.D. Miss, 2006). However, in keeping with the intent of this order which is to assist in determining an accurate amount of the indebtedness owed by Chapter 13 debtors, the better practice would be for the creditors or servicers to have all such assessments approved, even if for record keeping purposes only, as set forth in this provision.

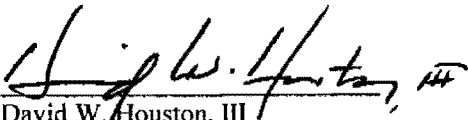
6. Secured creditors/mortgage servicers should be mindful of the provisions of §524 (i) of the Bankruptcy Code which became effective October 17, 2005, as result of the enactment of the Bankruptcy Abuse Prevention Consumer Protection Act of 2005 (BAPCPA).

Failure to comply with the provisions of this Standing Order may subject the offending party to sanctions, including, but not limited to, the disallowance of all or any part of the secured claim, actual and exemplary damages, costs, and attorney fees.

This Revised Standing Order replaces that certain Standing Order entered by the court on the 15th day of July, 2008.

This Revised Standing Order shall be applicable to cases filed on or after December 1, 2008.

So Ordered, this the 6th day November, 2008.


David W. Houston, III
United States Bankruptcy Judge

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required filing of a statement of the amount necessary to cure a prepetition default.

The discussion of subdivision (c)(2)(D) was expanded to clarify that failure to provide required documentation, by itself, is not a ground for disallowance of a claim and that the court has several options in responding to a creditor's failure to provide information required by subdivision (c).

Other changes. Stylistic changes were made to the rule and the Committee Note.

Rule 3002.1. Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence

- 1 (a) IN GENERAL. This rule applies in a chapter 13
2 case to claims that are (1) secured by a security interest in the
3 debtor's principal residence, and (2) provided for under
4 § 1322(b)(5) of the Code in the debtor's plan.
- 5 (b) NOTICE OF PAYMENT CHANGES. The
6 holder of the claim shall file and serve on the debtor, debtor's
7 counsel, and the trustee a notice of any change in the payment

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8 amount, including any change that results from an interest rate
9 or escrow account adjustment, no later than 21 days before a
10 payment in the new amount is due.

11 (c) NOTICE OF FEES, EXPENSES, AND
12 CHARGES. The holder of the claim shall file and serve on
13 the debtor, debtor's counsel, and the trustee a notice itemizing
14 all fees, expenses, or charges (i) that were incurred in
15 connection with the claim after the bankruptcy case was filed,
16 and (ii) that the holder asserts are recoverable against the
17 debtor or against the debtor's principal residence. The notice
18 shall be served within 180 days after the date on which the
19 fees, expenses, or charges are incurred.

20 (d) FORM AND CONTENT. A notice filed and
21 served under subdivision (b) or (c) of this rule shall be
22 prepared as prescribed by the appropriate Official Form, and

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23 filed as a supplement to the holder's proof of claim. The
24 notice is not subject to Rule 3001(f).

25 (e) DETERMINATION OF FEES, EXPENSES, OR
26 CHARGES. On motion of the debtor or trustee filed within
27 one year after service of a notice under subdivision (c) of this
28 rule, the court shall, after notice and hearing, determine
29 whether payment of any claimed fee, expense, or charge is
30 required by the underlying agreement and applicable
31 nonbankruptcy law to cure a default or maintain payments in
32 accordance with § 1322(b)(5) of the Code.

33 (f) NOTICE OF FINAL CURE PAYMENT. Within
34 30 days after the debtor completes all payments under the
35 plan, the trustee shall file and serve on the holder of the claim,
36 the debtor, and debtor's counsel a notice stating that the
37 debtor has paid in full the amount required to cure any default
38 on the claim. The notice shall also inform the holder of its

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39 obligation to file and serve a response under subdivision (g).
40 If the debtor contends that final cure payment has been made
41 and all plan payments have been completed, and the trustee
42 does not timely file and serve the notice required by this
43 subdivision, the debtor may file and serve the notice.

44 (g) RESPONSE TO NOTICE OF FINAL CURE
45 PAYMENT. Within 21 days after service of the notice under
46 subdivision (f) of this rule, the holder shall file and serve on
47 the debtor, debtor's counsel, and the trustee a statement
48 indicating (1) whether it agrees that the debtor has paid in full
49 the amount required to cure the default on the claim, and (2)
50 whether the debtor is otherwise current on all payments
51 consistent with § 1322(b)(5) of the Code. The statement shall
52 itemize the required cure or postpetition amounts, if any, that
53 the holder contends remain unpaid as of the date of the
54 statement. The statement shall be filed as a supplement to the
55 holder's proof of claim and is not subject to Rule 3001(f).

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56 (h) DETERMINATION OF FINAL CURE AND
57 PAYMENT. On motion of the debtor or trustee filed within
58 21 days after service of the statement under subdivision (g) of
59 this rule, the court shall, after notice and hearing, determine
60 whether the debtor has cured the default and paid all required
61 postpetition amounts.

62 (i) FAILURE TO NOTIFY. If the holder of a claim
63 fails to provide any information as required by subdivision
64 (b), (c), or (g) of this rule, the court may, after notice and
65 hearing, take either or both of the following actions:

66 (1) preclude the holder from presenting the
67 omitted information, in any form, as evidence in any
68 contested matter or adversary proceeding in the case, unless
69 the court determines that the failure was substantially justified
70 or is harmless; or

71 (2) award other appropriate relief, including
72 reasonable expenses and attorney's fees caused by the failure.

Foreclosure flaws present uncertainties for lenders, borrowers

In September, GMAC Mortgage imposed a moratorium on foreclosures in 23 states. Bank of America, JP Morgan Chase, and PNC followed shortly thereafter with similar actions. The foreclosure suspensions were imposed after the public learned that a GMAC employee admitted signing false affidavits in foreclosure cases. The employee engaged in a practice known as “robo-signing,” which involves signing affidavits without verifying the information contained in them or examining the exhibits attached to them.

“Robo-signing is only one of a number of alleged deficiencies in foreclosure practices,” Professor Katherine Porter told the Congressional Oversight Panel at an Oct. 27 hearing. Porter, a visiting professor at Harvard Law School, said irregularities in foreclosure cases include the imposition and collection of improper fees, a lack of standing to foreclose, the pursuit of foreclosure without rights in the note and mortgage, and mortgage origination fraud. “The key point is that the vast majority of the alleged problems cannot accurately be described as ‘technicalities.’ The flaws in the foreclosure systems go well beyond improper affidavits.”

Porter said issues with how mortgages were assigned may represent the largest problem with the foreclosure process. If the transfers were done incorrectly, homeowners may be making payments to the wrong party, foreclosing creditors may not have standing to sue, and banks may be exposed to investor lawsuits.

Extent of problem unknown

“The major unanswered question at this time is the extent and severity of any foreclosure deficiencies,” Porter said. While James Dimon, president of JP Morgan Chase, may believe that no one has been “evicted out a home who shouldn’t have been,” Porter said, “there seems to be near universal agreement that at least some homeowners have lost their homes without adherence to legal procedures, that the validity of many pending foreclosures is in question, and that servicers may face much more extensive examination of their grounds for future foreclosures.”

Porter stressed the importance of determining the extent of wrongful or problematic foreclosures because the lack of knowledge is turning the situation into a crisis. With no understanding of how many loans or foreclosures are defective and the nature of those defects, we are left with pure speculation that breeds worst case

scenarios on the one hand and allows for implausible denials of responsibility on the other.

“The immediate need is to know the extent to which the problems in mortgage servicing occur sporadically or are endemic. As a preliminary matter, I note that it is simply not credible to believe that the lenders have made no errors in their foreclosure procedure. Because they are being allowed to control the definition of error and are being allowed to audit themselves, we cannot have confidence in such reports. The question then is whether the rate of troubled loans is nearly 100 percent, as some have alleged, or rather is a smaller fraction of loans, such as 5 percent,” Porter said.

Problems with servicing, such as robo-signing, may prove easier to fix than problems with the loans themselves. Problems with the chain of title can be complex, and fixing those problems will require grappling with uncertain and complicated legal issues. One such issue that occurs on a regular basis in bankruptcy cases is the legal effect of an assignment in blank of a mortgage.

“Most scholars think this is an invalid document that cannot serve as a conveyance of real estate. How should that conclusion be harmonized with case law that emphasizes that the ‘mortgage follows the note,’ suggesting that it is ownership of the note, not the mortgage that is crucial for transfer? How does the revision of Uniform Commercial Code Article 9 affect this analysis?” Porter asked.

Flawed foreclosures spawn litigation

The defects in the process will encourage homeowners to contest either the foreclosure paperwork or the plaintiff’s standing to foreclose. Porter said the direct litigation costs for lenders could reach \$4 billion and the cost of delayed foreclosure could add another \$6 billion in costs.

“The second type of lawsuit that seems certain to follow the exposure of the flawed foreclosure procedure is a claim by investors that problems at loan origination, including a lack of paperwork to support a valid foreclosure, or mortgage servicing mishaps have increased their losses. These suits most obviously will seek to force the banks to ‘buy back’ or ‘repurchase’ loans that were improperly placed into a particular trust for securitization or were improperly originated. Investors could also argue for money damages for lost revenue stream or breach of fiduciary duty by the trust or the servicer to exercise good judgment in favor of investors’ interests. These suits could be incredibly expensive for banks, requiring the payments of large claims to make investors whole and to satisfy the plaintiffs’ attorneys who will bring such cases,” Porter said. ■

Your Client's Securitized Mortgage: A Basic Roadmap.

The Parties and Their Roles

The first issue in reviewing a structured residential mortgage transaction is to differentiate between a private deal and an "Agency" (or "GSE") deal. An Agency (or GSE) deal is one involving Fannie Mae, Freddie Mac, or Ginnie Mae, the three Government Sponsored Enterprises (also known as the GSEs). This paper will review the parties, documents, and laws involved in a typical private securitization. We also address frequently-occurring practical considerations for counsel dealing with securitized mortgage loans that are applicable across-the-board to mortgages into both private and Agency securitizations.

The parties, in the order of their appearance are:

Originator. The "originator" is the lender that provided the funds to the borrower at the loan closing or close of escrow. The originator probably borrowed the funds on a line of credit from a short-term revolving warehouse credit facility (commonly referred to as a "warehouse lender"); nevertheless the money used to close the loan were technically and legally the originator's funds. Warehouse lenders are either "wet" funders or "dry" funders. A wet funder will advance the funds to close the loan upon the receipt of an electronic request from the originator. A dry funder, on the other hand, will not advance funds until it actually receives the original loan documents duly executed by the borrower. Usually the originator is the lender named as "Lender" in the mortgage Note. Many originators securitize loans; many do not. The decision not to securitize loans may be due to lack of access to Wall Street capital markets, or this may simply reflect a business decision not to run the risks associated with future performance that necessarily go with sponsoring a securitization.

Sponsor. The Sponsor is the lender that securitizes the pool of mortgage loans. This means that it was the final aggregator of the loan pool and then sold the loans directly to the Depositor, which it then sold them to the securitization Trust. In order to obtain the desired ratings from the ratings agencies such as Moody's, Fitch and S&P, the Sponsor normally is required to retain some exposure to the future value and performance of the loans in the form of purchase of the most deeply subordinated classes of the securities issued by the Trust, i.e. the classes last in line for distributions and first in line to absorb losses (commonly referred to as the "first loss pieces" of the deal).

Depositor. The Depositor exists for the sole purpose of enabling the transaction to have the key elements that make it a securitization in the first place: a "true sale" of the mortgage loans to a "bankruptcy-remote" and "FDIC-remote" purchaser. The Depositor purchases the loans from the Sponsor, sells the loans to the Trustee of the securitization Trust, and uses the proceeds received from the Trust to pay the Sponsor for the Depositor's own purchase of the loans. It all happens simultaneously, or as nearly so as theoretically possible. The length of time that the Depositor owns the loans has been described as "one nanosecond". The Depositor has no other functions, so it needs no more than a handful of employees and officers. Nevertheless, it is essential for the "true sale" and "bankruptcy-remote"/ "FDIC-remote" analysis that the Depositor maintains its own corporate existence separate from the Sponsor and the Trust and observes the formalities of this corporate separateness at all times. The "Elephant in the Room" in all structured financial transactions is the mandatory requirement to create at least two "true sales" of the notes and mortgages between the Originator and the Trustee for the Trust so as to make the assets of the Trust both "bankruptcy" and "FDIC" remote from the originator. And, these "true sales" will be documented by representations and attestations signed by the parties; by attorney opinion letters; by asset purchase and sale agreements; by proof of adequate and reasonably equivalent consideration for each purchase; by "true sale" reports from the three major "Rating Agencies," and by transfer and delivery receipts for mortgage notes endorsed in blank.

Trustee. The Trustee is the owner of the loans at the end of the securitization transaction process. Like any trust, the Trustee's powers, rights, and duties are defined by the terms of the transactional documents that create the trust, and are subject to the terms of the trust laws of some particular state, as specified by the "Governing Law" provisions of the transaction document that created the trust. The vast majority of the residential mortgage backed securitized trust are subject to the applicable trust laws of Delaware or New York. The "Pooling and Servicing Agreement" is the legal document that creates these common law trusts and the rights and legal authority granted to the Trustee is no greater than the rights and duties specified in this Agreement.

Indenture Trustee and Owner Trustee. Most private securitizations are structured to meet the Internal Revenue Code requirements for tax treatment as a "Real Estate Mortgage Investment Conduit ("REMIC"). However some securitizations (both private and

GSE) have a different, non-REMIC structure usually called an “Owner Trust.” In an Owner Trust structure the Trustee roles are divided between an Owner Trustee and an Indenture Trustee. As the names suggest, the Owner Trustee owns the loans; the Indenture Trustee has the responsibility of making sure that all of the funds received by the Trust are properly disbursed to the investors (bond holders) and all other parties who have a financial interest in the securitized structure.

The Primary Servicer. The Primary Servicer services the loans of behalf of the Trust. Its rights and obligations are defined by a loan servicing contract, usually located in the Pooling and Servicing Agreement in a private (non-GSE) deal. The trust may have more than one servicer servicing portions of the total pool, or there may be “Secondary Servicers,” “Default Servicers,” and/or “Sub-Servicers” that service loans in particular categories (e.g., loans in default). Any or all of the Primary, Secondary, or Sub-Servicers may be a division or affiliate of the Sponsor; however under the servicing contract the Servicer is solely responsible to the Trust and the Master Servicer (see next paragraph). The Servicers are the legal entities that do all the day-to-day “heavy lifting” for the Trustee such as sending monthly bills to borrowers, collecting payments, keeping records of payments, liquidating assets for the Trustee, and remitting net payments to the Trustee. The Servicers are normally paid based on the type of loans in the Trust. For example, a typical servicing fee structure may be: 25 basis points for a prime mortgage; ; 35 basis points for an Alt-A or Option ARM; and 50 basis points for a subprime loan. The points are multiplied by the principal balance as of a specified day each month to compute the fee. For example, a subprime loan with an average balance over a given year of \$120,000 would generate a servicing fee of \$600.00 for that year. The Servicers are normally permitted to retain all “ancillary fees” such as late charges, check by phone fees, and the interest earned from investing all funds on hand in overnight US Treasury certificates (normally referred to as “interest earned on the float”).

Master Servicer. The Master Servicer is the Trustee’s representative for assuring that the Servicer(s) abide by the terms of the servicing contracts. For trusts with more than one servicer, the Master Servicer has an important administrative role in consolidating the monthly reports and remittances of funds from the individual servicers into a single data package for the Trustee. If a Servicer fails to perform or goes out of business or suffers a major downgrade in its servicer rating, then the Master Servicer must step in, find a replacement and assure that no interruption of essential servicing

functions occurs. Like all servicers, the Master Servicer may be a division or affiliate of the Sponsor but is solely responsible to the Trustee. The Master Servicer receives a fee, 100 basis points per year in many cases, based on the average balance of all loans in the Trust.

Custodian. The Master Document Custodian takes and maintains physical possession of the original hard-copy Mortgage Notes, Mortgages, Deeds of Trust and certain other “key loan documents” that the parties deem essential for the enforcement of the mortgage loan in the event of default. This is done for safekeeping and also to accomplish the transfer and due negotiation of possession of the Notes that is essential under the Uniform Commercial Code for a valid transfer to the Trustee to occur. Like the Master Servicer, the Master Document Custodian is responsible by contract solely to the Trustee (e.g., the Master Document Custodial Agreement). However unlike the Master Servicer, the Master Document Custodian is an institution wholly independent from the Servicer and the Sponsor. There are exceptions to this rule in the world of Fannie Mae/ Freddie Mac (“GSE”) securitizations. The GSE’s may allow selected large originators with great secure storage capabilities (in other words, large banks) to act as their own Master Document Custodians. But even in those cases, contracts make clear that the GSE Trustee, not the originator, is the owner of the Note and the mortgage loan. The Master Document Custodian must also review all original documents submitted into its custody for full compliance with the conveyancing rules of the trust (normally set-forth in Section 2.01 of the Pooling and Servicing Agreement) and file numerous compliance and exception reports with the Trustee. One of the most important functions of the Custodian is to confirm that for each loan in the Trust there is a “complete and unbroken chain of transfers and assignments of the Notes and Mortgages,” although this function is often undercut by wording in the Master Document Custodial Agreement (often, by defining an ingenious term, “Last Endorsee”) designed to excuse the parties from providing endorsements and assignment from the Sponsor to the Depositor, and from the Depositor to the Trustee for the Trust. In many private securitizations a single institution fulfills all of the functions related to document custody for the entire pool of loans. In these cases, the institution might be referred to simply as the “Custodian” and the governing document as the “Custodial Agreement.”

Typical transaction steps and documents (in private, non-GSE securitizations)

- 1.** The Originator sells loans (one-by-one or in bundles) to the Securitizer (a/k/a the Sponsor) pursuant to a **Mortgage Loan Purchase and Sale Agreement** (MLPSA) or similarly-named document. The purpose of the MLPSA is to sell all right, title, claims, legal, equitable and any and all other interest in the loans to the Securitizer-Sponsor. For Notes endorsed in "blank" which are bearer instruments under the UCC, the MLPSA normally requires acceptance and delivery receipts for all such Notes in order to fully document the "true sale." Frequently a form is prescribed for the acceptance and delivery receipt and attached as an exhibit to the MLPSA. The MLPSA will contain representations, attestations and warranties as to the enforceability and marketability of each loan, and specify the purchaser's remedies for a breach of any "rep" or "warrant." The primary remedy is the purchaser's right to require the seller to repurchase any loan materially and adversely affected by a breach. Among the defects and events covered by "reps" and "warrants" are "Early Payment Defaults," commonly referred to as "EPD's." An EDP occurs if a loan becomes seriously (usually, 60 or more days) delinquent within a specified period of time after it has been sold to the Trust. The EDP covenants are always limited in time and normally only cover EDPs that occur with 12 to 18 months of the original sale. If an EDP occurs, then the Trust can force the originator to repurchase the EPD note and replace it with a note of similar static qualities (amount, term, type, etc.).
- 2.** The Securitizer-Sponsor sells the loans to the Depositor. This takes place in another MLPSA very similar to the first one and the same documents are created and exchange with the same or similar terms.
- 3.** Depositor, Trustee, Master Servicer and Servicer enter into a **Pooling and Servicing Agreement** ("PSA") in which:

 - the Depositor sells all right, title, legal, equitable and any other interest in the mortgage loans to the Trustee, with requirements for acceptance and delivery receipts, often including the prescribed form as an exhibit, in similar fashion to the MLPSA's;
 - the PSA enables the Trustee to create the trust and defines the classes of securities (often called "Certificates") that the trust will issue to investors and establishes the order of priority between classes of

Certificates as to distributions of cash collected and losses realized with respect to the underlying loans (the highest rated certificates are paid first and the lowest rated certificates suffer the first losses-thus the basis for the term "structured finance"); and

--- the Servicer, Master Servicer and Trustee establish the Servicer's rights and duties, including limits and extent of Servicer's right to deal with default, foreclosure, and Note modifications. Some of PSA's include detailed loss mitigation or modification rules, and others limit any substantive modifications (such as changing the interest rate, reducing the principal debt, waiving default debt, extending the repayment term, etc.).

4. All parties including the Custodian enter into the **Custodial Agreement in which:**

--- the Depositor agrees to cause the Notes and other specified key loan documents (usually including an unrecorded, recordable Assignment "in blank")(NB that several recent courts have raised serious legal questions about the assignment of a real estate instrument in blank under such theories as the statute of frauds and whether or not an assignment in blank is in fact a "recordable" legal real estate document) to be delivered to the Custodian (with the Securitizer to do the actual physical shipment);

--- the Custodian agrees to inspect the Notes and other documents and to certify in designated written documents to the Trustee that the documents meet the required specifications and are in the Custodian's possession; and

---establishes a (supposedly exclusive) procedure and specified forms whereby the Servicer can obtain possession of any Note, Mortgage, Deed of Trust or other custodial document for foreclosure or payoff purposes.

Finding Documents on the S.E.C.'s website (the EDGAR filing system):

If you know the name of the Depositor and the name of the Trust (e.g. "Time Bomb Mortgage Trust 2006-2") that contains the loan in question, then the PSA and Custodial Agreement probably can be found on the SEC's website (www.sec.gov). On the SEC home page look for a link to "Search for Company Filings" and then choose to search by "Company Name," using the name of the Depositor.

Hopefully, this will enable you to find the Trust in question. If so, the PSA and the Custodial Agreement should be available as **attachments** to one or more of the earliest-filed Forms (normally the 8-K) shown on the list of available documents. Sometimes the PSA is listed as a named document but other times you just look for the largest document in terms of megabytes filed with the 8-K form. The available documents also should include the **Prospectus** and/or **Prospectus Supplement and the Free Writing Prospectus ("FWP")**. The latter documents (at least the sections written in English, as opposed to the many tables of financial data) can be very helpful in providing a concise and straightforward description of the parties, documents, and transaction steps and detailed transactional graphs and charts in the particular deal. And because these are SEC documents, the information serves as highly credible evidence on these points, and the Court can take judicial notice of any document filed with the SEC.

Also, it is important to note that for securitized trusts created after January 1, 2006, Regulation AB of the SEC rules requires the parties to file along with the other EDGAR filings a considerable amount of detailed information about the individual loans included in the Trust. This information may be filed as an Exhibit to the PSA or to a Form 8-K. This loan-level data typically includes loan numbers and property addresses and thus can be very useful in proving that a particular loan is in a particular securitized Trust.

Dealing with Notes and Assignments:

There are two basic documents involved in a residential mortgage loan: the promissory note and the mortgage (or deed of trust). For brevity's sake these are referred to simply as the Note and the Mortgage.

A Note is: a contract to repay borrowed money. It is a negotiable instrument governed by the Article 3 of the Uniform Commercial Code (UCC). The Note, by itself, is an unsecured debt. Notes are personal property. Notes are negotiated by endorsement or by transfer and delivery as provided for by the UCC. Notes are separate legal documents from the real estate instruments that secure the loans evidenced by the Notes by liens on real property.

A Mortgage is: a lien on, and an interest in, real estate. It is a security agreement. It creates a lien on the real estate as collateral for a debt, but it does not create the debt itself. The rights created by a Mortgage are classified as real property and these instruments are

governed by local real estate law in each jurisdiction. The UCC has nothing to do with the creation, drafting, recording or assignment of these real estate instruments.

A Note can only be transferred by: an "Endorsement" if the Note is payable to a particular party; or by transfer of possession of the Note, if the Note is endorsed "in blank." Endorsements must be written or stamped on the face of the Note or on a piece of paper physically attached to the Note (the Allonge). See UCC §3-210 through §3-205. The UCC does not recognize an Assignment as a valid means of transferring a Note such that the transferee becomes a "holder", which is what the owners of securitized mortgage notes universally claim to be.

In most states, an Allonge cannot be used to endorse a note if there is sufficient room at the "foot of the note" for such endorsements. The "foot of the note" refers to the space immediately below the signatures of the borrowers. Also, if an Allonge is properly used, then it must describe the terms of the note and most importantly must be "permanently affixed" to the Note. Most jurisdictions hold that "staples" and "tape" do not constitute a "permanent" attachment. And, the Master Document Custodial Agreement will almost always specify when an Allonge can be used and how it must be attached to the original Note. .

Mortgage rights can only be transferred by: an Assignment recorded in the local land records. Mortgage rights are "estates in land" and therefore governed by the state's real property laws. These vary from state to state but in general Mortgage rights can only be transferred by a recorded instrument (the Assignment) in order to be effective against third parties without notice. When individuals talk about sales, transfers or assignments of "a mortgage loan" it is time to look out, because there is a high likelihood that confusion is on the way. Frequently the first question is, has there been a valid transfer from Party A to Party B? And the second question is, to prove that a valid transfer has occurred, what documents does Party B need to produce- proof of transfer of the Note per the UCC (endorsement and/or proper transfer by delivery of possession)? An Assignment? Both? The short answer is it depends on what Party B is trying to do. **Is Party B simply trying to prove that "true sales" occurred at each step of the securitization process, as required by the PSA and as represented in the Prospectus Supplement?:** This is answered under the UCC and by examining the securitization documents- the MLPAs, the transfer and delivery receipts, the cash receipt and disbursement reports, the funds transfer records, the

conveyancing rules of the PSA, and Master Document Custodial Agreement, the Compliance and Exception Reports provided by the Custodian to the Trustee, the "true sale" Legal Opinion letters, the reports filed by the ratings agencies (Fitch, Moody's and Standard & Poor's) and, through discovery if necessary, determining whether or not the documents, money and records that the securitization documents say were supposed to change hands did in fact change hands in the manner and within the time frames specified in the documents. **Frequently the only endorsement on the Note is from the Securitizer-Sponsor "in blank" and the only Assignment that exists, pre-foreclosure, is from the Securitizer-Sponsor "in blank" (in other words, the name of the transferee is not inserted in the instrument and this space is blank).** The concept generally accepted in the securitization world (the issuers and ratings agencies, and the law firms advising them) is that this form of documentation was sufficient for a valid and unbroken chain of transfers of the Note and assignments of the Mortgages as long as everything was done consistently with the terms of the securitization documents. This article is not intended to validate or defend either this concept or this practice, nor is it intended to represent in any way that the terms of the securitization documents were actually followed to the letter in every real-world case. In fact, and unfortunately for the certificate holders and the securitized mortgage markets, there are many instances in many reported cases where these mandatory rules of the securitization documents have not been followed and in fact, completely ignored.

Answer for issue 2: Is the Party we are talking about claiming to have standing to foreclose or to appear in court with the rights of a secured creditor under the Bankruptcy Code? OK, granted the UCC (§3-301) does provide that a negotiable instrument can be enforced either by "(i) the holder of the instrument, [or] (ii) a non-holder in possession of the instrument who has the rights of a holder." Servicers and foreclosure counsel have been known to contend that this is the end of the story and that the servicer can therefore do anything that the holder of the Note could do, anywhere, anytime. The Fannie Mae and Freddie Mac Guides contain many sections that appear to lend superficial support to this contention and frequently will be cited by Servicers and foreclosure counsel as though the Guides have the force of law, which of course they do not. There are many serious problems with this legal position, as recognized by an increasing number of reported court decisions. Servicers and foreclosure firms are either wrong, or at least not being cautious, if they attempt to foreclose, or appear in court, without having a valid pre-complaint or pre-motion Assignment of the Mortgage. Yet at the

same time, Servicers and note holders place themselves at risk of preference and avoidable transfer issues in bankruptcy cases if, for example, endorsements and Assignments that they rely upon to support claims to secured status are occur or are recorded after or soon before bankruptcy filing.

In addition any Servicer, Lender, or Securitization Trustee is either wrong, or at least not being cautious, if it ever: (1) claims in any communications to a consumer or to the Court in a judicial proceeding that it is the Note holder unless they are, at the relevant point in time, actually the holder and owner of the Note as determined under UCC law; or (2) undertakes to enforce rights under a Mortgage without having and recording a valid Assignment.

In support of those generalizations consider the following points:

---The UCC deals only with enforcing the Note. Enforcing the Mortgage on the other hand is governed by the state's real property and foreclosure laws, which generally contain crucial provisions regarding actions required to be taken by the "note holder" or "beneficiary." State law may or may not authorize particular actions to be taken by servicers or agents of the holder of the Note.

---For the Servicer to have "the rights of the holder" under the UCC it must be acting in accordance with its contract. For example, if the Servicer claims to have possession of the Note, did it follow the procedures contained in the "Release of Documents" section of the Custodial Agreement in obtaining possession? Does the Servicer really have "constitutional" standing under either Federal or State law to enforce the Note even if it is a "holder" if it does not have any "pecuniary" or economic interest in the Note? In short, the concept of constitutional standing involves some injury in fact and it is hard to see how a mere "place-holder" or "Nominee" could ever overcome such a hurdle unless it actually owned the Note or some real interest in the same.

---The Servicer should have the burden of explaining the legal reasons supporting its standing and authority to act. Sometimes Servicers have difficulty maintaining a consistent story in this regard. Is the Servicer claiming to be the actual holder, or the holder and the owner, or merely an authorized agent of the true holder? If it is claiming some agency, what proof does it have to support such a claim? What proof is required? Sometimes this is just academic legal hair-splitting but many times it involves serious issues of fact. For example, what if the attorney for the Servicer asserts to the court that

his or her client actually owns the Note, but the Fannie Mae website reports that Fannie is the owner? What if the MERS website reports that the Plaintiff is just the "Servicer?" What if the pre-complaint correspondence to the borrower names some entirely different party as the holder and indicated that the current plaintiff is only the Servicer?

--Finally, the Servicer always has an obligation to be factually accurate in borrower communications and legal proceedings, and to supervise employees and vendors and attorneys to assure that Note endorsements, Assignments of Mortgage, and affidavits are executed by persons with valid corporate authority, and not falsified nor offered for any improper purpose. The focus of the default servicing industry must move from "how fast we can get things done" to "how honestly and accurately can we be in presenting the proper documentation to the courts and to the borrowers". Judicial proceedings are not like NASCAR races where the fastest lawyer always wins. Judicial proceedings are all about finding the truth no matter how long it takes and regardless of the time and difficulties involved.

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