



## Today's Chapter 13

**Hon. G. Harvey Boswell, Moderator**  
U.S. Bankruptcy Court (W.D. Tenn.); Jackson

**Mary Beth Ausbrooks**  
Rothschild & Ausbrooks, PLLC; Nashville

**Sylvia Ford Brown**  
Chapter 13 Trustee; Memphis

**Henry E. Hildebrand, III**  
Chapter 12 and Chapter 13 Trustee  
Nashville





**Today's Chapter 13**

Mary Beth Ausbrooks  
Sylvia Brown  
Hank Hildebrand  
Judge Harvey Boswell

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**SCOTUS and Circuits**

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### The Big Developments

- ▶ Timing – Five years to mature a case to get to SCOTUS
- ▶ Who are fighting the issues?
  - ▶ Trustees
  - ▶ National Creditors
  - ▶ NACBA
  - ▶ The Max Factor

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### *Milovitz*

- ▶ **The Setup**
  - ▶ In 2005, Congress was concerned with lawyers telling their clients to incur debt
  - ▶ Made a new class of advocates – **Debt Relief Agents**
  - ▶ Law prohibited DRAs from advising debtors to incur more debt in contemplation of filing Bankruptcy

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**▶ The Argument:**

- ▶ Lawyers ARE Debt Relief Agents
- ▶ Prohibition of advising clients from incurring debt is limited to debts that would be fraudulent.
- ▶ So it would be permissible for a DRA to advise a client to incur debt if the debt would not be fraudulent.
  - ▶ Pay tax, child support, buy a new car

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**▶ The Result:**

- ▶ Attorneys cannot escape the obligations imposed upon a DRA. Congress has the power to regulate them.
- ▶ The ability to maneuver the system survives!

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## *Lanning*

▶ **Setup:**

- ▶ All debtors must contribute “projected disposable income” to pay to unsecured creditors over the applicable commitment period
- ▶ For below median debtors, PDI is income minus reasonable expenses.
- ▶ For above median debtors, PDI is income minus expenses as defined in the IRS Standards

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▶ **The Argument:**

- ▶ Income is supposed to be the debtor’s Current Monthly Income – the average of the debtor’s income over the 6 months prior to the filing of the case
- ▶ Ms. Lanning got a substantial severance payment from her former employer that was included in her CMI. That income was gone when she filed.
- ▶ Trustee objected because her CMI – Expenses was higher than she proposed to pay.

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**▶ The Result:**

- ▶ A court is permitted to consider changes in the debtors income and expenses that have actually occurred or are reasonably certain to occur.
- ▶ Thus, Ms. Lannings adjusted Projected Disposable Income is actually less than calculated and she is not required to pay more than she can afford.
- ▶ The Trustee loses.

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**▶ The Impact:**

- ▶ Trustees can once again police debtors' income, fighting against the obvious gamesmanship that results when timing can affect what the creditors will receive.
- ▶ The court again has discretion to determine what changes are "actual" or "reasonably certain" to occur.

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## **Ransom**

- ▶ **The Setup:**
  - ▶ For Above Median Debtors, the expense allowances that they are to take off of their adjusted income are dictated by the Code – which refers to the IRS Financial Collection Standards.
  - ▶ The Standards prescribe an “ownership allowance” of \$496.
  - ▶ For the IRS, the amount is a cap. No debt, no allowance. Many courts disagreed in bankruptcy.

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- ▶ **The Argument:**
  - ▶ The Ransoms owned cars which had no debt. The debtor’s took the allowance prescribed by the IRS because the Code says that the “ownership” allowance “shall” be the applicable amounts in the Financial Standards.
  - ▶ An unsecured creditor objected, arguing that in bankruptcy, like with the IRS, the debtor should only get the allowance if the debtor has the expense – it is “applicable”.

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**► The Result:**

- Since Congress passed BAPCPA with the intent of having debtors pay what they can afford to pay, the interpretation should be done in that light.
- It does not make sense to permit a debtor to take an “ownership allowance” which is intended by the IRS to govern car payments when the debtor has no car payments.

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**► The Impact:**

- The net swing in cases going forward is about \$30,000 per case, per car.
- The economic Impact of *Ransom* is substantial.
- The next step is whether a debtor can take the allowance if the monthly payment is less than the allowance

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## ***Espinosa***

- ▶ **The Setup:**
  - ▶ A court may permit the discharge of a student loan where the debtor files an Adversary Proceeding and demonstrates that paying the loan will work an undue hardship
  - ▶ A confirmed chapter 13 plan is binding upon all parties – whether they agree to or reject the plan

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- ▶ **The Argument:**
  - ▶ Mr. Espinosa proposed a chapter 13 plan that would pay his student loan in full but would not pay interest or collection costs.
  - ▶ The Student Loan Creditor received a copy of the plan, filed a proof of claim, was paid the full amount of its claim, and Espinosa got a discharge
  - ▶ When the creditor later (much later) sought to collect the unpaid amount, Espinosa requested the bankruptcy court enforce the discharge.

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**▶ The Result:**

- ▶ The Court unanimously held that the creditor, having received notice of the plan, was bound by the terms – even though Espinosa had not filed an adversary proceeding as required by the rules.
- ▶ In order to preserve the integrity of the system, the finality of the confirmation order must be preserved

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**▶ The Impact:**

- ▶ Creditors **MUST** read the terms of a debtor’s proposed chapter 13 plan and take action if they do not agree with the terms.
- ▶ Judges have a responsibility to make certain that “illegal” provisions will not wind up in chapter 13 plans which they approve
  - ▶ That means trustees will have that responsibility
- ▶ Creditors **MUST** take early action to combat plan provisions that they do not like

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**Baud, Tennyson**

- ▶ **The Setup:**
  - ▶ The code requires a chapter 13 debtor to pay to unsecured creditors the projected disposable income to be received over the Applicable Commitment Period
  - ▶ Above Median ACP is 60 months
  - ▶ Below Median ACP is 36 months

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**The Argument:**

- ▶ The 9<sup>th</sup> Circuit has held that if a debtor has NO disposable income, the debtor need not propose a plan that lasts as long as the ACP
- ▶ The debtors in the 6<sup>th</sup> and 11<sup>th</sup> Circuits calculated their disposable income at zero (or less) so proposed plans that would terminate before the ACP
- ▶ The trustee/creditors objected to the plan

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**▶ The Result:**

- ▶ The Applicable Commitment Period is “temporal” rather than a multiplier.
- ▶ It does not matter whether the debtor has no disposable income – the court cannot confirm a plan that proposes payments shorter than the ACP

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**The Impact**

- ▶ The Next Fights in Disposable Income
  - ▶ Is the IRS “allowance” a cap?
  - ▶ Is the Internal Revenue Manual now part of the Code?
- ▶ Who will bring the fight?

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# The Claim Conundrum

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## Filing Claims

- ▶ Rule 3001 requires creditors to file claims
- ▶ Even if a claim is not filed, as long as the plan provides for the claim, the debt is subject to discharge
- ▶ A claim that is filed is an “allowed” claim – but it is up to the debtor or the trustee to challenge the claim

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## Disallowing Claims

- ▶ The Code provides grounds to disallow a claim:
  - ▶ If it contains unmatured (unearned) interest
  - ▶ If it is not timely filed
- ▶ A proof of claim can be filed by a “creditor”
  - ▶ A “creditor” is an entity that has a claim against the debtor
  - ▶ Does an agent have a claim against the debtor?

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## Claims Litigation

- ▶ Avoid Personal Identifying Information – Rule 9037
  - ▶ *Bad News*: Filing a proof of claim with PII is a violation of the law and the court can impose a remedy – *Dixon v. Bay Fin., Inc. (In re Dixon)*, 2010 WL 501547 (Bankr. S.D. Miss. Feb 5, 2010)
  - ▶ *Good News*: Violation of Rule 9037 does not create a private cause of action – *Matthys v. Green Tree Servicing*, 2010 WL 2176086 (Bankr. S.D. Ind. May 26, 2010)

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## Claims Litigation

- ▶ You cannot assume that you can amend a timely filed claim
- ▶ Amendments are subject to equitable defenses
  - ▶ *In re Gonzales*, 2010 WL 3123127 (Bankr. S.D. Fla. Aug 4, 2010)
  - ▶ Secured Creditors need to be careful of what they file at the start of the case

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## Claims Litigation

- ▶ Good News for debt buyers and servicers!
  - ▶ *In re Wingerter*, 594 F.3d 931 (6<sup>th</sup> Cir. 2010)  
[representations from seller of u/s claim insulated B-Line from liability without documentation]
  - ▶ *In re Minbatiwalla*, 424 B.R. 104 (Bankr. S.D. N.Y. 2010)  
[Assignee of mortgage has standing to file a POC without attaching assignment]

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## Claims Litigation

- ▶ **Bad News for Mortgage Claimants**
  - ▶ *Hernandes v. Argent Sec., Inc.* 2009 WL 4639645 (Bankr. S.D. Tex. Dec. 2009) [In order to assert a claim, claimant must establish basic right to enforce the debt – with a note]
- ▶ **Some Good News**
  - ▶ A lack of documentation can remove the *prima facie* validity of the claim, but debtor has the burden of challenging the claim



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## New Rule 3001(c)

- ▶ **Additional Information required on a POC:**
  - ▶ Itemization of interest, fees, expenses
  - ▶ Amount needed to cure default for secured claim
  - ▶ If not in compliance, court may preclude the creditor from presenting any proof in support of claim
  - ▶ Court may award attorneys' fees for noncompliance
- ▶ **Effective (if Congress lets it go in effect) December 1, 2011**

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### **Additional Information Required On a POC**

- ▶ An itemized statement of the interest, fees expenses or charges shall be filed with the POC.
- ▶ How do you determine whether the claim contains interest? When is an acquired debt not considered as principal?
- ▶ If a security interest is claimed, must include "cure" amount.
- ▶ If a house, must include escrow.

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### **Failure to Comply**

- ▶ Creditor shall be precluded from presenting the omitted information in any hearing.
- ▶ Court may impose other appropriate relief including expenses and attorneys fees

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## The Statute of Limitations Problem

- ▶ A claim barred by the statute of limitations is disallowed under section 502(b)(1) – *In re McGregor*, 398 B.R. 561 (Bankr. N.D. 2008), *In re Andrews*, 394 B.R. 384 (Bankr. E.D.N.C. 2008)
- ▶ Court called for a rule that “requires an assignee that files a proof of claim to disclose whether the claim violates a statute of limitations”

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## Mortgage Issues

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AMERICAN  
BANKRUPTCY  
INSTITUTE



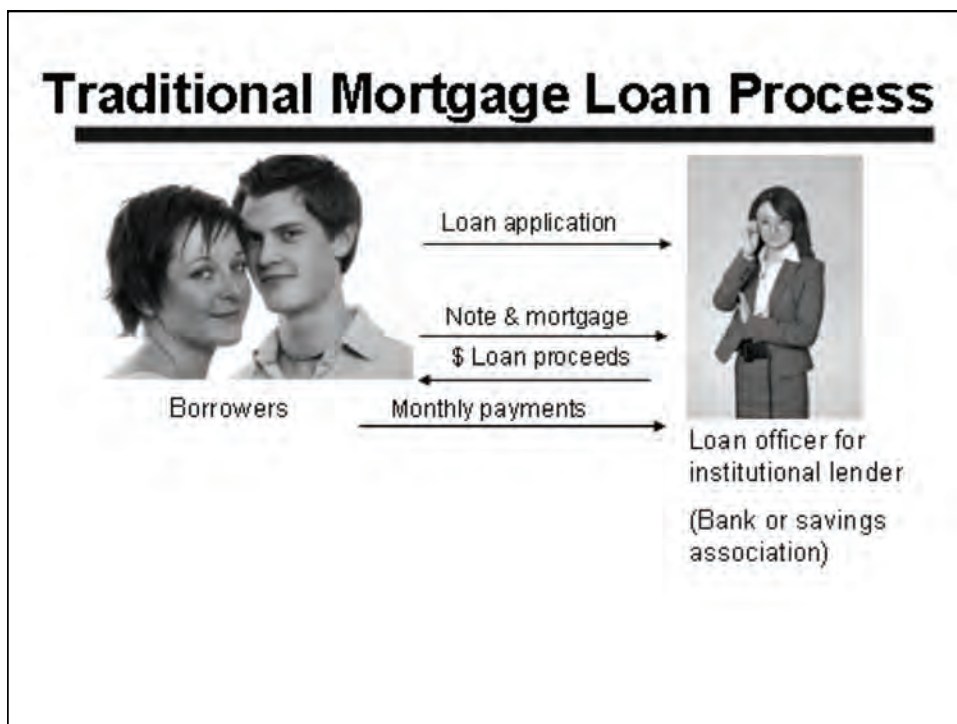
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BANKRUPTCY CONFERENCE

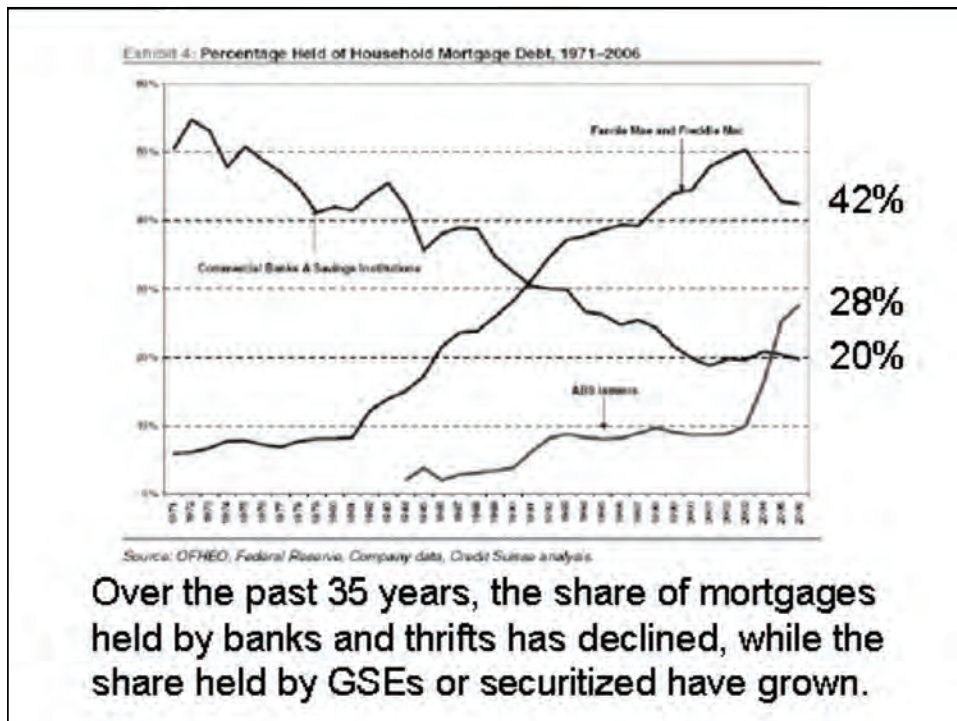
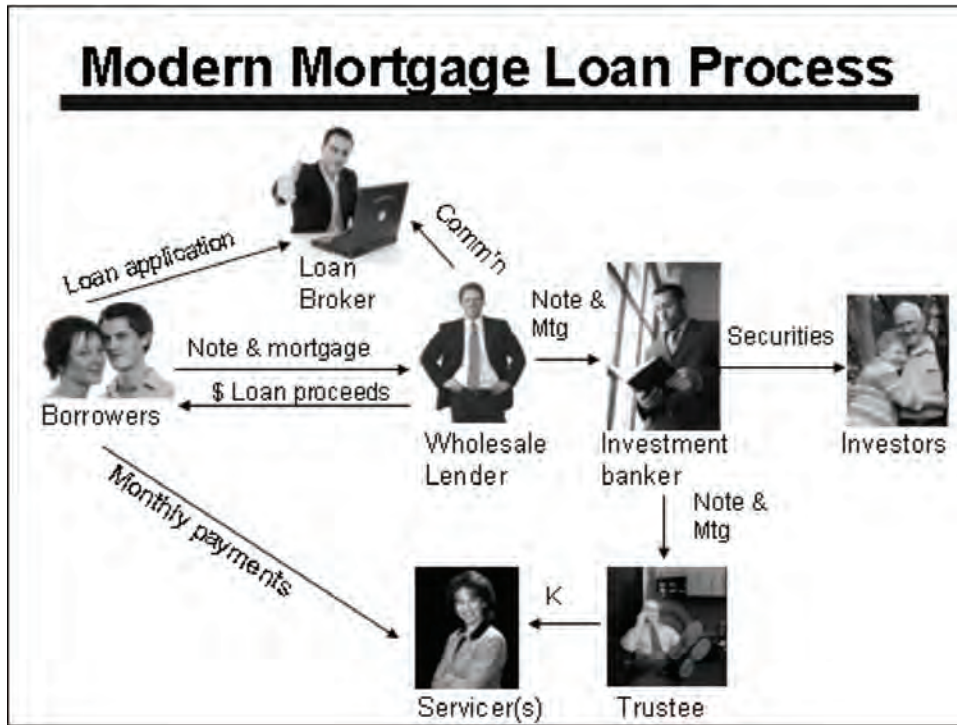
## Mortgage Servicing



- ▶ Mortgages have special status in bankruptcy
- ▶ Chapter 7 – no reaffirmation needed; certain exceptions to the discharge injunction
- ▶ Safety in *Dewsnup*
- ▶ Chapter 13 – not subject to modification, long term debt excepted from discharge

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## Robo Signers and Other Problems

- ▶ “Robo-signing’ is a term defining the current practice of servicers who sign an exorbitant amount of legal documents without confirming the legitimacy of the information contained therein”
- ▶ *In re Stewart*, 391 B.R. 327 (Bankr E.D.La.2008) – [Court assessed \$10K in damages and \$12,350 in attorneys fees for “the abusive imposition of unwarranted fees and charges, improper calculation of fees and costs]

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## The Mortgage Lien Loss

- ▶ Claims that are subject to disallowance can trigger the loss of a lien:
  - ▶ §506(d): “to the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void”
- ▶ The Totally Unsecured Junior Lien
  - ▶ *In re Lantzy*, 2010 WL 6259984 (9<sup>th</sup> Cir. BAP 2010)
- ▶ The Disallowed Claim
  - ▶ *In re Monk*, 2011 WL 212831 (Bankr. D.Or. 2011)

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## Accounting for Mortgages

- ▶ The growth of the ABS and the model for securitization has eroded confidence in the documentation
- ▶ The reliance on MERS and electronic transfers has limited ability to assert a claim
- ▶ Who verifies the documents and reviews the charges?

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## Wait a Minute. What is MERS?

And why should I care?

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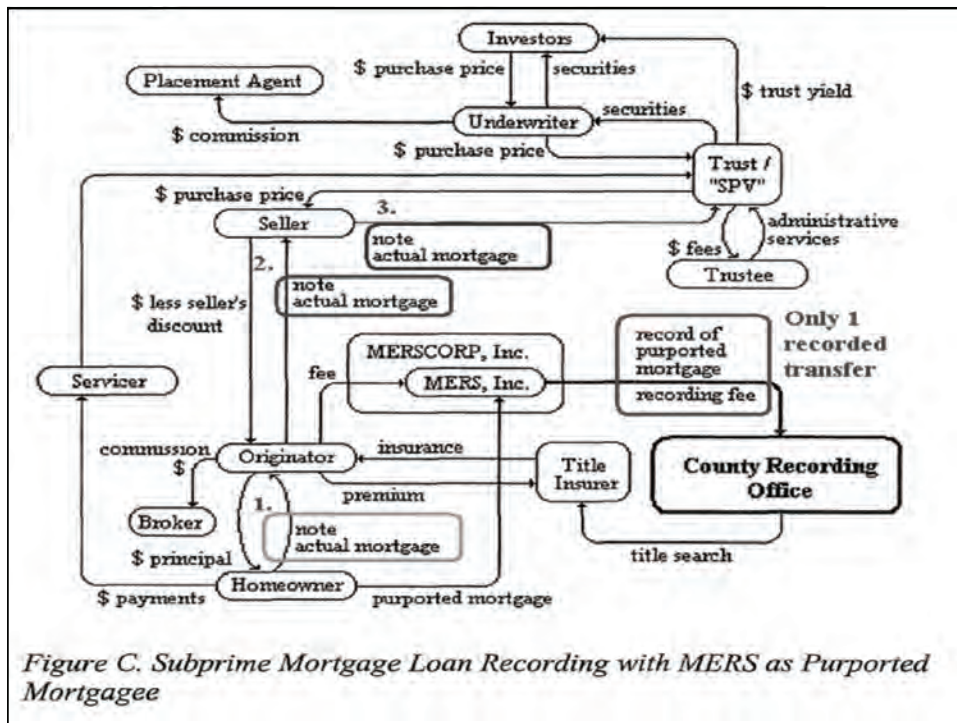
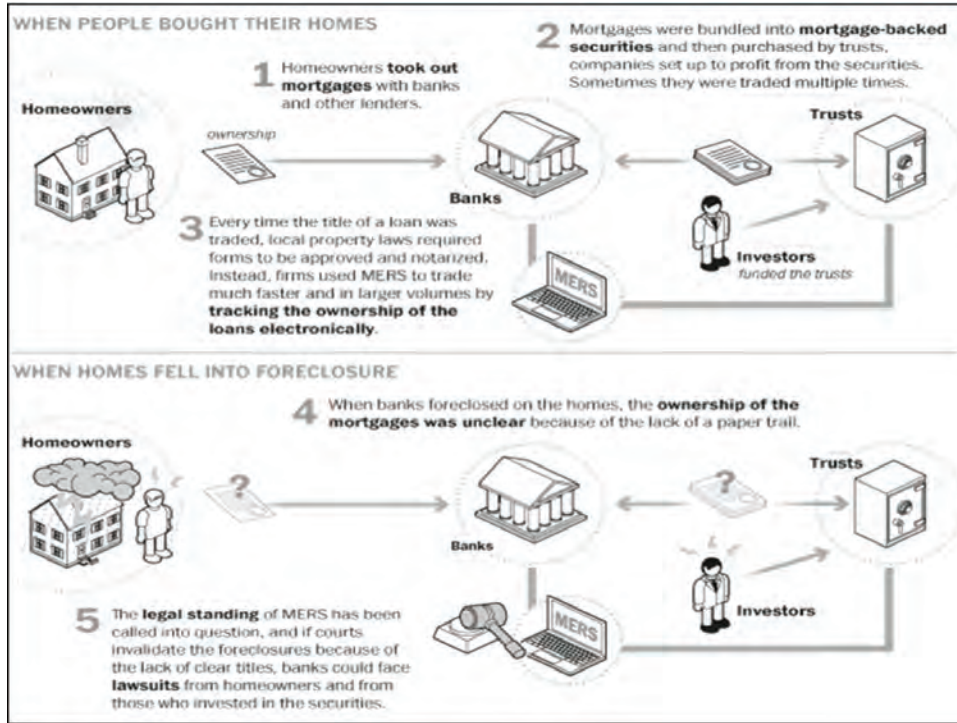




Figure C. Subprime Mortgage Loan Recording with MERS as Purported Mortgagee





### **Proposed Rule 3002.1**

- ▶ New Rule to deal with mortgages during a chapter 13 plan
- ▶ Notice of payment changes no later than 30 days prior to changes taking effect (resulting from interest rate or escrow adjustments)
- ▶ “Supplement to the holder’s proof of claim”
- ▶ Notice of fees, expenses incurred after filing

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### **Proposed Rule 3002.1**

- ▶ Notice filed within 180 days of incurring the expense
- ▶ Served on the debtor, debtor’s counsel and the trustee
- ▶ “supplement to a proof of claim”
- ▶ Notice of “final cure”
- ▶ Consequences of failure to notify


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**Thank you for Listening**

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## Recent Changes

### Debtor IDs

All emails sent to [debtorid@ch13sfb.com](mailto:debtorid@ch13sfb.com) or [debtorid2@ch13sfb.com](mailto:debtorid2@ch13sfb.com) will be read by a new email reading program in the 13Software. These documents will automatically be indexed to the case and an automated reply message will be sent to the debtor's attorney stating that we have received the documents and he/she will be notified if any documents are missing. When the documents are reviewed, a paralegal will email the debtor's attorney notifying them if any documents are missing or if all documents have been received.

### Orders

All orders should now be emailed to [orders@ch13sfb.com](mailto:orders@ch13sfb.com). These emails will be read by the new email program. After emailing the order to us, you will receive a automated reply message indicating either the order is being processed or that an error occurred that requires attention. The attachment should be in **PDF format with a filename less than 60 characters that does not include symbols or punctuation. Underlines or periods ( \_ . ) are acceptable.** The subject line of the email should include **only the case number.**

### ADDITIONAL CONSIDERATIONS:

IRS objections preclude Trustee's recommendation of Confirmation

Debtors are required to forward to the Trustee half of all tax refunds received during the pendency of the case which exceed \$2,500.00.

EFT available to attorneys and creditors

Bank of America Notices

Added language to the plan specifically notifying parties that those not specifically mentioned in the plan will, absent objection, be treated as unsecured

Trustee websites

Sylvia Ford Brown [www.ch13sfb.com](http://www.ch13sfb.com)

George W. Stevenson [www.ch13gws.com](http://www.ch13gws.com)

Tim Ivy [www.ch13jax.com](http://www.ch13jax.com)