

Consumer Track

Update on Mortgage
Issues: Late Fees, Escrow
Accounts, MERS, Standing,
Loss-Mitigation Programs,
Claim Issues, UST Issues,
Relief from Stay

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CONSUMER TRACK:

UPDATE ON MORTGAGE ISSUES

Panel:

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This presentation summarizes certain cases and developments, and is for educational purposes only. It is not, and should not be attributed as, the views of the author, of the panel members, of their court or respective firms or of their respective clients.

AUTOMATIC STAY

In re Jacks, 642 F.3d 1323 (11th Cir. 2011)

(lender's mere recordation of postpetition fees in its internal accounting records was not an act in violation of section 362(a)(3), (a)(5) or (a)(6); and lender's failure to include these fees on its proof of claim vitiated debtor's claim objection)

In re Rodriguez, 629 F.3d 136 (3^d Cir. 2010)

(an attempt to collect a prepetition escrow shortage through increased postpetition monthly maintenance payments violated the stay)

In re Knowles, 442 B.R. 150 (1st Cir. BAP 2011)

(a postpetition annual tax statement was informational only and did not violate the stay)

In re Agard, 444 B.R. 231 (Bankr. E.D. N.Y., 2011)

(*Rooker-Feldman* doctrine compelled the court to enforce a prepetition state court foreclosure judgment recognizing servicer's status as a second creditor, thereby granting the servicer's stay relief motion; advisory opinion/dicta finding that, absent the state court judgment, the MERS assignment of the mortgage would have been ineffective to transfer same to the assignee)

In re Guevara, 2010 WL 4102274 (Bankr. N.D. Tex. Oct. 12, 2010)

(postpetition bookkeeping entries do not violate the stay)

CHAPTER 20 LIEN STRIPPING

In re Fisette, 2011 WL 3795138 (8th Cir. BAP Aug. 29, 2011)

(chapter 20 strip off of a wholly unsecured lien effective upon completion of the debtor's obligations under the plan and is not contingent on debtor's receipt of a chapter 13 discharge)

In re Picht, 428 B.R. 885 (10th Cir. BAP 2010)

(a partially secured lien may be released only upon plan payment of the § 506(a) value)

In re Frazier, 448 B.R. 803 (Bankr. E.D. Calif. 2011)

(a chapter 20 strip off is permitted if the secured claim is valued at zero)

In re Gerardin, 447 B.R. 342 (Bankr. S.D. Fla. 2011)

(a chapter 20 strip off of a wholly unsecured mortgage is not permitted because it cannot occur before the earlier of payment of the mortgage debt in full or the discharge of the chapter 13 debtor)

In re Woolsey, 438 B.R. 432 (Bankr. D. Utah 2010)

(a wholly unsecured lien may be avoided upon receipt of a discharge at plan completion)

In re Tran, 431 B.R. 230 (Bankr. N.D. Calif. 2010)

(a chapter 20 strip off of a wholly unsecured lien is permitted)

In re Girther, 427 B.R. 450 (Bankr. N.D. Ill. 2010)
(an adversary proceeding is required to strip a wholly unsecured mortgage)

CLASS ACTIONS

In re Wilborn, 609 F.3d 748 (5th Cir. 2010)
(certification of a class was vacated because it did not satisfy the predominance and superiority requirements of Rule 23(b)(3) and the injunctive or declaratory standards of Rule 23(b)(2))

In re Circuit City Stores, Inc., 439 B.R. 652 (Bankr. E.D. Va. 2010), *affirmed*, 439 B.R. 652 (E.D. Va. 2010), *appeal pending*, Case No. 10-2418 (4th Cir.)
(class proofs of claim disallowed as to all unnamed claimants)

In re Rodriguez, 432 B.R. 671 (Bankr. S.D. Tex. 2010)
(a class was certified under Rule 23(b)(2) for injunctive relief only, not for damage claims)

In re Sandlin, 2010 WL 4260030 (Bankr. N.D. Ala. Oct. 21, 2010)
(class certification was denied under Rule 23(a)(3) for lack of typicality and lack of adequacy of debtors as class representatives)

ESCROW

In re Rodriguez, 629 F.3d 136 (3^d Cir. 2010)
(an attempt to collect a prepetition escrow shortage through increased postpetition monthly maintenance payments violated the stay)

In re Beaudet, 2011 WL 1402868 (Bankr. M.D. Tenn., Apr. 13, 2011)
(prepetition escrow shortages are part of the arrearage claim and cannot be included in postpetition monthly maintenance payments)

ESTOPPEL

In re Oparaji, 2010 WL 5462456 (Bankr. S.D. Tex. Dec. 29, 2010)
(a mortgage lender was judicially estopped on arrearage amount claimed in a proof of claim by the amount of arrearage set forth in a proof of claim filed in a prior bankruptcy case)

JURISDICTION

In re Stewart, 647 F.3d 553 (5th Cir. 2011)
(bankruptcy court lacked jurisdiction to enter an injunction against a mortgage creditor when the injunction affected only the creditor's claims in cases other than the debtor's case)

Ocwen Loan Servicing, LLC v. McKain (In re McKain), 2011 WL _____, Case No. 09-3662, Slip Op., ECF 15 (E.D. La. Aug. 15, 2011)

Ocwen Loan Servicing, LLC v. Batiste (In re Batiste), 2011 WL _____, Case No. 09-5454, Slip Op., ECF 12 (E.D. La. Aug. 15, 2011)

(applying *Stewart*, the district court reversed two *sua sponte* injunctions which the bankruptcy court based on its “inherent authority,” that required a servicer to institute specific accounting procedures for all future bankruptcy cases and to issue specific post-discharge statements to debtors in all cases in which it was involved)

LOCAL RULES

Standing Order Regarding Chapter 13 Claims Secured by a Security Interest in Debtor’s Principal Residence, U.S.B.C., S.D. Miss. (Sep. 20, 2011)

In re Teran, 2010 WL 1655892 (Bankr. E.D. Wis. Apr. 23, 2010)

(a local rule requires mortgage creditors to itemize postpetition charges)

LOSS MITIGATION PROGRAMS

Hon. Cecelia G. Morris and Mary K. Guccion, *The Loss Mitigation Program Procedures for the United States Bankruptcy Court for the Southern District of New York*, 19 Am. Bankr. Inst. L. Rev. 1 (2011)

MODIFICATION OF MORTGAGE DEBT

In re Wofford, 449 B.R. 362 (Bankr. W.D. Wis. 2011)

(a postconfirmation loan modification agreement between debtor and lender did not have to be approved by the bankruptcy court)

In re Zaldivar, 441 B.R. 389 (Bankr. S.D. Fla. 2011)

(a mortgage securing both a debtor’s residence and a rental property was subject to modification under § 1322(b)(2))

In re Moore, 441 B.R. 732 (Bankr. N.D. N.Y. 2010)

(a mortgage on property which secures the debtor’s residence and a rental property was subject to modification)

In re Davis, 439 B.R. 863 (Bankr. N.D. Ill. 2010)

(Section 1325(b) does not apply to a postconfirmation modification)

In re King, 439 B.R. 129 (Bankr. S.D. Ill. 2010)

(Section 1325(b) does not apply to a postconfirmation modification)

In re Mullin, 433 B.R. 1 (Bankr. S.D. Tex. 2010)

(violation by the debtor of a due on sale clause which is valid under state law is an impermissible mortgage modification in violation of § 1322(b)(2))

In re Lopez, 2010 WL 4875884 (Bankr. N.D. Calif. Nov. 24, 2010)
(a mortgage which includes easements is not subject to modification under § 1322(b)(2))

In re Russell, 2010 WL 2671496 (Bankr. E.D. Va. Jan. 30, 2010)
(a modified mortgage must be paid in full under the plan)

NEW BANKRUPTCY RULES

In re Carlton, 437 B.R. 412 (Bankr. N.D. Ala. 2010)
(selected provisions of the mortgage were inappropriately included in the chapter 13 plan; new Rules 3001 and 3002.1 will address many of the concerns expressed by the debtor)

PLAN PROVISIONS

Pierrotti v. IRS, 645 F.3d 277 (5th Cir. 2011)
(Section 1322(b)(5)) cure and maintain provisions apply only to debts which provide, by their original prepetition terms, that the final payment is not due until after the end of the plan's term; a plan proposing to maintain payments on a secured claim for unpaid income taxes could not be confirmed because the taxes were fully matured and payable prepetition)

Countrywide Home Loans, Inc. v. Stewart (In re Stewart), 2011 WL 1899820 (E.D. La. May 13, 2011)
(where the deadline for filing claims falls after the deadline for objecting to a chapter 13 plan, the failure of a creditor to object to a plan on the grounds that the plan misstated the amount of the claim cannot, consistent with due process, bind the creditor with respect to the amount which the creditor is required to identify no earlier than the deadline for filing proofs of claim; *Espinosa* does not apply in this situation)

Colonial Mortgage & Loan Corp. v. Ellzey (In re Ellzey), 445 B.R. 674 (E.D. La. 2011)
(a chapter 13 plan may not substitute for an objection to a secured creditor's proof of claim which, if no objection is filed, is deemed allowed and must be paid under the plan)

In re Herrera, 422 B.R. 698 (9th Cir. BAP 2010)
(plan terms that require creditors to provide monthly statements, to give debtors mortgage payment information upon reasonable written notice and to give notice of payment increases did not violate § 1322(b)(2) or RESPA)

In re Carlton, 437 B.R. 412 (Bankr. N.D. Ala. 2010)
(selected provisions of the mortgage were inappropriately included in the chapter 13 plan; new Rules 3001 and 3002.1 will address many of the concerns expressed by the debtor)

PROOFS OF CLAIM

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(lender's mere recordation of postpetition fees in its internal accounting records was not an act in violation of section 362(a)(3), (a)(5) or (a)(6); and lender's failure to include these fees on its proof of claim vitiated debtor's claim objection)

Deutsche Bank National Trust Co. v. Tucker (In re Tucker), 621 F.3d 460 (6th Cir. 2010)

(Section 1322(e) entitles an undersecured mortgage creditor to payment of fees, expenses and escrow advances if they are payable under the note, mortgage and nonbankruptcy law)

In re Wingerter, 594 F.3d 931 (6th Cir. 2010)

(a creditor did not violate Rule 9011 by filing a proof of claim without documents supporting the debt)

In re Circuit City Stores, Inc., 439 B.R. 652 (Bankr. E.D. Va. 2010), *affirmed*, 439 B.R. 652 (E.D. Va. 2010), *appeal pending*, Case No. 10-2418 (4th Cir.)
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(a mortgage lender was judicially estopped on arrearage amount claimed in a proof of claim by the amount of arrearage set forth in a proof of claim filed in prior bankruptcy case)

In re Brown, 431 B.R. 309 (Bankr. D. Mass. 2010)

(after the loan servicer filed a proof of claim without attaching copies of the note and mortgage, the creditor filed a stay relief motion, and then was granted leave to amend the proof of claim provided the servicer paid the debtor's attorneys fees related to the claim objection and a related adversary proceeding)

REVERSE MORTGAGES

In re Boudreaux, 2010 WL 724355 (Bankr. E.D. La. Feb. 24, 2010)

(reverse mortgage on debtor's residence was capable of being cured, especially when it provided for reinstatement after default)

SANCTIONS AND DEBTOR CLAIMS AGAINST CREDITORS

In re Taylor, 2011 WL 3692440 (3^d Cir. Aug. 24, 2011)

(attorneys failed to make a reasonable inquiry into misleading statements in their stay relief motion as would support sanctions and bankruptcy court's *sua sponte* order provided attorneys with particularized notice of specific conduct alleged to be sanctionable)

In re Keahey, 414 Fed. Appx. 919 (9th Cir. Jan 31, 2011)

(a creditor committed the tort of outrage in its prepetition foreclosure and collection efforts)

Simmons v. Roundup Funding, LLC, 622 F.3d 93 (2^d Cir. 2010)

(no FDCPA claim exists for errors in the filing of a proof of claim)

In re Nosek, 609 F.3d 6 (1st Cir. 2010)

(a Rule 9011 sanction imposed upon a mortgage servicer, for filing documents stating it was the holder of the note, when it was not, was reduced from \$250,000 to \$5,000)

In re Wingerter, 594 F.3d 931 (6th Cir. 2010)

(a creditor did not violate Rule 9011 by filing a proof of claim without documents supporting the debt)

In re Cruz, 2011 WL 3583115 (Bankr. S.D. Calif. Aug 11, 2011)

(borrower stated claim against MERS, as initial named beneficiary of record, for violation by ultimate beneficiary of California statute requiring foreclosure beneficiary's interest to be a record at the time of nonjudicial foreclosure sale)

In re Mattox, 2011 WL 3626762 (Bankr. E.D. Ky. Aug. 17, 2011)

(on motion for summary judgment, court dismisses nine of eleven counts of an adversary proceeding by a debtor against a servicer for alleged misapplication of postpetition payments and inadequate or missing responses to QWRs and TILA requests; stay violation and TILA violation counts survive)

In re Wilson, 2011 WL 1337240 (Bankr. E.D. La. Apr. 7, 2011)

(LPS perpetuated a fraud on the court when it submitted a false affidavit in support of a creditor's stay relief motion; amount of sanctions deferred until a later hearing)

In re Woodruff, 2010 WL 386209 (Bankr. M.D. Al. Jan. 27, 2010)

(debtor stated a cause of action against a mortgage creditor in a complaint alleging that the creditor had a practice of filing false affidavits in support of stay relief motions which, if proven, would be a fraud on the court)

SECTION 1322(e)

Deutsche Bank National Trust Co. v. Tucker (In re Tucker), 621 F.3d 460 (6th Cir. 2010)

(Section 1322(e) entitles an undersecured mortgage creditor to payment of fees, expenses

and escrow advances if they are payable under the note, mortgage and nonbankruptcy law)

STANDING OF CREDITORS/SERVICERS/NOMINEES

MERS

Cervantes v. Countrywide Home Loans, Inc., 2011 WL 3911031 (9th Cir. Sep. 7, 2011)
(plaintiffs failed to state a cause of action for wrongful foreclosure when alleging that use of MERS as the named beneficiary caused a split between the deed of trust and the note)

In re Lippold, 2011 WL _____ Case No. 11-12300, Slip Op., ECF 19 (Bankr. S.D.N.Y. Sep. 6, 2011)
(because MERS could not assign the note and the assignee failed to prove it received physical delivery or possession of the note, stay relief denied for lack of standing)

In re Cruz, 2011 WL 3583115 (Bankr. S.D. Calif. Aug 11, 2011)
(assignee's failure to record its interest as deed of trust beneficiary rendered void its nonjudicial foreclosure on debtor's property)

In re Marron, 2011 WL 2600543 (Bankr. D. Mass. June 29, 2011)
(the assignee of assignment executed by MERS had standing to seek stay relief)

In re Agard, 444 B.R. 231 (Bankr. E.D. N.Y. 2011)
(*Rooker-Feldman* doctrine compelled the court to enforce a prepetition state court foreclosure judgment recognizing servicer's status as a second creditor, thereby granting the servicer's stay relief motion; advisory opinion/dicta finding that, absent the state court judgment, the MERS assignment of the mortgage would have been ineffective to transfer same to the assignee)

Proofs of Claim

In re Kemp, 440 B.R. 624 (Bankr. D. N.J. 2010)
(an objection to a proof of claim was sustained because the servicer did not prove it was entitled to enforce the note)

In re Wilson, 442 B.R. 10 (Bankr. D. Mass. 2010)
(mortgage trustee was the holder and owner of the note even if the endorsement was made after it filed its proof of claim and, even if the assignment of the mortgage violates the PSA, it is still valid)

Stay Relief

In re Veal, 450 B.R. 897 (9th Cir. BAP 2011)
(stay relief was denied because the creditor did not prove it was entitled to enforce the note)

In re Escobar, 2011 WL 3667550 (Bankr. E.D.N.Y. Aug. 22, 2011) (given the summary and expedited nature of stay litigation, and its nonpreclusive effect, the evidence necessary to establish standing to seek stay relief to commence or continue a foreclosure action should include a demonstration that the movant has the right under applicable state law to enforce the mortgage; however, standing should not require evidence which would be necessary to prevail over a claim objection or to prevail in an adversary proceeding asserting that the claimant does not hold a valid, perfected and enforceable lien)

In re Schwartz, 2011 WL 3667494 (Bankr. D. Mass. Aug. 22, 2011)
(foreclosure sale was null when mortgage was not assigned properly from MERS to the current holder of the note)

In re Bryant, 452 B.R. 876 (Bankr. S.D. Ga. 2011)
(alleged assignee of debtor's mortgage loan did not have to produce a written assignment of mortgage to have standing to move for stay relief, testimony of assignee's employee, was sufficient to establish assignee's claim)

In re Jackson, 451 B.R. 24 (Bankr. E.D. Calif. 2011)
(stay relief was denied because the assignee did not prove it was entitled to enforce the note)

In re Densmore, 445 B.R. 307 (Bankr. D. Vt. 2011)
(court found issue of fact remained on whether creditor was holder of note at commencement of bankruptcy case, and whether the original lender indorsed the note in blank)

In re Shapoval, 441 B.R. 392 (Bankr. D. Mass. 2010)
(creditor had standing to seek stay relief if the endorsement is made on an allonge which is affixed to the note)

In re Ebersole, 440 B.R. 690 (Bankr. W.D. Va. 2010)
(a note holder was granted stay relief by producing the original note with an attached allonge endorsed to the order of its predecessor by merger)

In re Tarantola, 2010 WL 3022038 (Bankr. D. Ariz., July 29, 2010)
(stay relief was denied because a mortgage trustee did not prove it was entitled to enforce the note; no attached allonge/endorsement)

In re Box, 2010 WL 2228289 (Bankr. W.D. Mo., June 3, 2010)
(stay relief was denied because the creditor did not prove it was entitled to enforce the note)

In re Canellas, 2010 WL 571808 (Bankr. M.D. Fla. Feb. 9, 2010) (court denied stay relief for lack of standing because mortgagee trustee presented no records or testimony that it was holder of note)