

# Consumer Track

## Who Should Police the Mortgage Servicers?

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**AMERICAN BANKRUPTCY INSTITUTE  
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**Consumer Track**

**WHO SHOULD POLICE THE MORTGAGE SERVICERS?**

**(ADDITIONAL UPDATES TO BE PROVIDED ON SITE)**

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## WHO SHOULD POLICE THE MORTGAGE SERVICERS?

### I. Introduction

This paper focuses on recent developments in bankruptcy law that have an impact on mortgage lenders and their borrowers, as an introduction to the regulatory issues that are the ultimate focus of our panel. We have attempted to present this material in roughly the order in which the issues arise in the progress of a bankruptcy case. Appendix A sets forth a paper on recent regulatory actions, prepared by the FDIC. Additional updates will be presented on site.

### II. Automatic Stay Issues

The first thing that many creditors must confront upon the filing of a bankruptcy is the so-called "automatic stay," imposed upon commencement of the case by section 362(a). It is also important for a borrower, before filing a bankruptcy case to reorganize by modifying a dividing the loan into secured and unsecured pieces to understand and plan for what the automatic stay does and does not do. Generally, the "automatic stay" is akin to a preliminary injunction, in that it operates to enjoin all creditors, and all entities with real or perceived claims against the debtor from taking *any* action to create or perfect a lien against a debtor's assets, collect, assess or recover an unpaid, delinquent obligation from the debtor, or take any action to obtain possession of property belonging the debtor. 11 U.S.C. § 362 (a). There are literally thousands of reported cases (sometimes conflicting) finding violations of the automatic stay, so any creditor who does not want to wait for a bankruptcy case to run its course, should consider the merits and timing of a motion for relief from the stay. Recent cases indicate that a lenders actions to update its internal records is not a violation of the automatic stay.

**Mortgage creditor did not violate § 362(a) (3) by posting of charges.** Although § 362 (a) (3) of the Bankruptcy Code prohibits any act to obtain possession or control over property of the bankruptcy estate, posting of postpetition charges and mailing a default notice did not violate the automatic stay, when there was no actual collection activity. Postpetition bookkeeping entries that do not result in charges collected from the debtor do not violate § 362(a) (3). *Guevara v. Wells Fargo Bank, N.A. (In re Guevara)*, 2010 WL 4102274 (Bankr. S.D. Tex. Oct. 12, 2010) (slip opinion).

**The Eleventh Circuit agrees.** In *Jacks v. Wells Fargo Bank, N.A. (In re Jacks)*, \_\_\_ F.3d \_\_\_, 2011 WL 2183979 (11th Cir., June 7, 2011), the Court of Appeals held that a lender's mere recordation of fees on its internal records was not an "act" (to obtain possession of property of the estate, to create, perfect, or enforce against property of the debtor any lien, to collect, assess, or recover a claim against the debtor that arose prepetition) in violation of section 362(a)(3), (5) or (6). See the further discussion of the Jacks case as it relates to class actions, below.

**Standing for stay relief explored.** The Ninth Circuit Bankruptcy Appellate Panel has reviewed the requirements for standing to file a motion for stay relief, as well as for filing a

proof of claim, remanding for the bankruptcy court to make findings about the standing of an assignee and servicer of a mortgage. The assignee had presented proof only of the mortgage assignment, but not of the underlying note, and did not show that it had possession of the note. The panel examined constitutional and prudential standing, as well as real party in interest status, in light of Articles 3 and 9 of the Uniform Commercial Code, concluding that an assignee and servicer of a mortgage, which were not initial payees of the note, must demonstrate facts to support standing, and that proof may be different for a servicer and an assignee. The assignee was required to show that it had some interest in the note, either as holder, a party entitled to enforce the note, or with some ownership or other interest in the note, and an assignment of the mortgage was not sufficient, under applicable state law (Article 9) to show that the assignee had an interest in the note. The mortgage servicer failed to show that it had standing to file a proof of claim, when it did not demonstrate that it was the agent of the mortgage assignee. *In re Veal*, \_\_\_ B.R. \_\_\_, 2011 WL 2304200 (BAP 9th Cir. June 10, 2011). See also *In re Alcide*, \_\_\_ B.R. \_\_\_, 2011 WL 2162912 (Bankr. E.D. Pa. May 27, 2011), reviewing case authority on standing to file stay relief motion, authority of servicer and of MERS to file for relief, as well as the creditor's rights as holder and non-holder of note under Article 3 of UCC. The *Alcide* court held that the mortgage servicer failed to establish that it had authority from the party with the right to enforce the mortgage to file a motion—the mere label as servicer was not enough to grant authority. A mortgage servicer must demonstrate that the stay relief motion was initiated within the scope of authority delegated to the servicer by a principal and that the principal is a party in interest, with the right to enforce the mortgage. See also *In re Martinez*, 444 B.R. 192 (Bankr. D. Kan. 2011), where the court examined the relationship of MERS, as nominee on the deed of trust, with the note holder, finding that an agency relationship existed and that MERS was acting as agent of, and under direction of, the note holder, giving MERS authority to file a stay relief motion.

**Holder of recorded trustee's deed had standing to seek stay relief.** Affirming the bankruptcy court, the Ninth Circuit Bankruptcy Appellate Panel discussed prudential standing and real party in interest for purposes of who may move for stay relief, holding that Wells Fargo's recorded trustee's deed and its unlawful detainer judgment gave it sufficient property interest to have a "colorable claim" required for standing to move for stay relief. As the purchaser at a foreclosure sale, Wells Fargo also was entitled to stay relief. *In re Edwards*, 454 B.R. 100 (BAP 9th Cir. 2011). Compare *In re Deamicis*, \_\_\_ B.R. \_\_\_, 2011 WL 3443072 (Bankr. E.D. Cal. July 26, 2011), where the purchaser at a prepetition foreclosure sale failed to prove that it was the real party in interest for purposes of stay relief, because of defects and discrepancies in the name of the moving party.

**Creditor's attorney violated Rule 9011(b) by relying on computer-generated information.** Reinstating the bankruptcy court's findings and non-monetary sanctions, at 407 B.R. 618 (Bankr. E.D. Pa. 2009), and reversing the district court, at 2010 WL 624909 (E.D. Pa. 2010), the Third Circuit explored an attorney's reliance on information provided by the client and a third-party provider in Rule 9011(b) context. The attorney for HSBC Mortgage had admitted to the bankruptcy court that the law firm had no direct access to its client, having been assigned to file a stay relief motion and response to the debtors' claim objection by NewTrak, a computer information system generated by Lender Processing Services, Inc. (LPS). The attorney only proof-read the motion and response, failing to make reasonable inquiry into accuracy of

information, resulting in false statements being made in the pleadings and representations in open court. “This case is an unfortunate example of the ways in which overreliance on computerized processes in a high-volume practice, as well as a failure on the part of clients and lawyers alike to take responsibility for accurate knowledge of a case, can lead to attorney misconduct before a court. . . . [A]n attorney must, in her independent professional judgment, make a reasonable effort to determine what facts are likely to be relevant to a particular court filing and to seek those facts from the client. She cannot simply settle for the information her client determines in advance—by means of an automatic system, no less—that she should be provided with. . . . Rule 11 requires more than a rubber-stamping of the results of an automated process by a person who happens to be a lawyer. Where a lawyer systematically fails to take any responsibility for seeking adequate information from her client, makes representations without any factual basis because they are included in a ‘form pleading’ she has been trained to fill out, and ignores obvious indications that her information may be incorrect, she cannot be said to have made reasonable inquiry.” *In re Taylor*, \_\_\_ F.3d \_\_\_, 2011 WL 3692440 (3d Cir. Aug. 24, 2011).

### III. Claims

Pursuant to 11 U.S.C. § 501(a) any creditor *may* file a proof of claim. Section 103 (a) of the Bankruptcy Code (“Code”) makes section 501 applicable to cases filed under chapters 7, 11, 12 and 13 of the Code. Rule 3001 of the Federal Rules of Bankruptcy Procedure (“FRBP”) dictates the form which must be used for a proof of claim. FRBP 3002 states the time and place for filing a proof of claim. FRBP 3003 governs proofs of claim in Chapter 11 cases. FRBP 1019 (2) provides for filing periods for cases converted from either Chapter 11, Chapter 12 or Chapter 13 to a Chapter 7 case. Early in any bankruptcy case creditors must prepare and file a Proof of Claim to protect their right to a distribution from the estate. The filing of a Proof of Claim is basic to determining a lender’s right to be paid and whether or not the obligation is secured.

This requirement and procedure has produced an enormous amount of difficulty in the past few years. This was due in part to the volume of mortgage loans that defaulted in The Great Recession, revealing documentation problems in the origination, re-packaging and serving of the loans. It was also a function of a high volume of bankruptcy filings, particularly by consumers, which revealed the underlying problems and created a new layer of problems in the claims process itself. A seemingly minor and insubstantial error in the preparation and filing of a proof of claim can be fatal to the underlying claim in the event that the debtor is discharged. In 2011, the bankruptcy courts anticipate new rules to deal with many of these issues.

#### A. Claim Objections and Counterclaims

Many other issues involving claims have appeared in cases arising in the recent financial unpleasantness. The following are selected decisions with implications for creditors.

**Even though a debtor's compulsory counterclaim is designated as a "core proceeding," the Bankruptcy Court may not have authority to enter a final judgment.** Counterclaims asserted by a debtor against a creditor in bankruptcy cases are core proceedings

under §157(b) (2) (C), which provides “that counterclaims by the estate against persons filing claims against the estate” are core. However, the United States Supreme Court held that the Bankruptcy Court lacked authority to enter a final judgment on the Debtor’s counterclaim, a state-based counterclaim, even though the counterclaim (for tortuous interference with an expected inheritance) was in fact a “core proceeding” under the plain text of section 157(b)(2)(C). *Stern v. Marshall*, 564 U.S. 2594 (2011). Notwithstanding the bankruptcy court's statutory authority to enter a judgment on the debtor’s counterclaim, it lacked the constitutional authority to do so because bankruptcy judges are not Article III judges. In the words of Justice Roberts for the Court, "Although we conclude that § 157(b)(2)(C) permits the bankruptcy court to enter final judgment on Vickie’s counterclaim, Article III of the Constitution does not."

Stern has already prompted significant responses from the lower courts, suggesting that it will be a watershed in bankruptcy procedure and will give creditors and other defendants in bankruptcy cases a new card to play. For example, in *Samson v. Blixseth (In re Blixseth)*, 2011 WL 3274042 (Bankr. D. Mont. Aug. 1, 2011), the Court held that it could not constitutionally hear fraudulent conveyance claims as a core proceeding and that it did not have statutory authority to hear them as a non-core proceeding, so that it could in no case hear such claims. The Court gave the parties two weeks to file a motion with District Court, requesting withdrawal of the reference of all or part of the Adversary Proceeding, declaring that if such a motion were not made, the defendant's Rule 12(b)(6) motion to dismiss as to the fraudulent conveyance claims would be granted. *Id.* at \*12. In *In re BearingPoint, Inc.*, \_\_\_ B.R. \_\_\_, 2011 WL 2709295 (Bankr. S.D.N.Y. July 11, 2011), a liquidating trustee under a confirmed Chapter 11 plan sought relief from language in the plan requiring that certain claims be prosecuted exclusively in bankruptcy or federal district court. The Bankruptcy Court held that such relief was warranted, on the "mistake" theory, under Rule 60, governing motions for relief from judgment or 11 U.S.C. § 105, authorizing the court to enter “necessary or appropriate” orders, based on a "fear that, if litigated here, this action would be bogged down in procedural complications, aggravated by the Supreme Court's recent decision in *Stern v. Marshall*." *Id.* at \*1. On the other hand, in *In re Okwonna-Felix*, 2011 WL 3421561 (Bankr. S.D. Tex. Aug. 3, 2011), the court held that determining whether to approve a proposed settlement was "inextricably tied to the bankruptcy scheme" and involved "the adjudication of rights created by the Bankruptcy Code," because a key issue to be settled involved a dispute over whether or not property of the estate was exempt. "The right to exempt property from the bankruptcy estate is established by the Bankruptcy Code and is central to the public bankruptcy scheme, as it relates to both the exercise of exclusive jurisdiction over the debtor's property (because before property is deemed exempt, it is property of the estate) and the equitable distribution of that property among the debtor's creditors. *Id.* at \*5.

**Proofs of claim errors do not supply FDCPA cause of action.** Adding to the bankruptcy courts holding that errors in the filing of proofs of claim do not support Fair Debt Collection Practices Act violations, the Second Circuit held that the creditor’s inflation of its proof of claim did not form a basis for a claim under the FDCPA. In a putative class action, debtors had sued Roundup Funding, LLC and its attorneys for filing inflated proofs of claim, and the district court had granted the defendants’ dismissal motion. The Second Circuit commented that “[t]he FDCPA is designed to protect defenseless debtors and to give them remedies against abuse by creditors. There is no need to protect debtors who are already under the protection of

the bankruptcy court, and there is no need to supplement the remedies afforded by bankruptcy itself.” The Circuit vacated an award of attorney fees to the defendants, because the question of law had been undecided in the Second Circuit prior to this opinion, but noted that the debtors were “careless” in pursuing the district court action; as a result, the Circuit court awarded reasonable costs of the appeal in favor of the defendants. *Simmons v. Roundup Funding, LLC*, 622 F.3d 93 (2d Cir. 2010). See also *Kline v. Mortgage Elec. Security System*, 2010 WL 3786584 (S.D. Ohio, Sept. 28, 2010) (slip opinion) (holding that actions under FDCPA, TILA and Ohio’s Consumer Sales Protection Act were pre-empted by Bankruptcy Code, when debtor’s causes of action arose from creditor’s filing of proof of claim); *In re McMillen*, 440 B.R. 907 (Bankr. N.D. Ga. 2010) (filing duplicative proof of claim not abusive collection practice actionable under FDCPA, applying rationale of *Simmons v. Roundup Funding, LLC*).

**Claim may now "arise" in the Third Circuit, even if it has not fully "accrued."** The Court of Appeals for the Third Circuit was the only court of appeals to hold that the claim must be fully accrued under applicable law before it arises. The principal case on this point was *Matter of M. Frenville Co., Inc.*, 744 F.2d 332 (3d Cir. 1984) and it was widely criticized and has now been overruled. *Frenville* was sharply criticized by courts and commentators alike. The Third Circuit has now overruled *Frenville* in an environmental case. *Jeld-Wen, Inc. v. Gordon Van Brunt (In re Grossman's Inc.)*, 607 F.3d 114 (3d Cir. 2010). In *Grossman's*, the successor-in-interest to reorganized Chapter 11 debtors brought an adversary proceeding to enjoin prosecution of asbestos-related injury and breach of warranty claims against it, as well as for determination that its liability on these claims arguing that the claim had been discharged. Sitting en banc, the Third Circuit held that, for purposes of the Bankruptcy Code, a “claim” arises when an individual is exposed prepetition to a product or other conduct giving rise to an injury, which underlies a “right to payment” under the Code, expressly overruling *Frenville*, so the claimants' tort claims arose prepetition, when the debtors' product allegedly exposed the claimant to asbestos, even though her injury manifested itself postpetition. The Court left open the question of whether the discharge of the claimants' tort claims would comport with due process and remanded that issue for decision by the district court.

**Mortgagee held prepetition claim for unpaid escrow cushion.** As permitted by RESPA, 12 U.S.C. § 2601 et seq., when the mortgagee had required the borrower to pay into escrow an amount in excess of what was actually needed to cover currently due insurance and taxes, the mortgagee held a claim under § 101(5) for the unpaid cushion when the debtors filed Chapter 13. Applying *Johnson v. Home State Bank*, 501 U.S. 78 (1991), a claim is an enforceable obligation, and under the terms of the mortgage at issue, the borrowers’ obligation to pay into the escrow account was an enforceable obligation, giving the lender a prepetition claim for the escrow shortfall. The Third Circuit found the analysis of the Fifth Circuit in *Campbell v. Countrywide Home Loans, Inc.*, 545 F.3d 348 (5th Cir. 2008), persuasive, rejecting the lender’s argument that the escrow shortfall was not a debt. A contingency in the obligation did not relieve it from being a claim in the bankruptcy case. The real issue was whether Countrywide had violated the automatic stay by recalculating the postpetition escrow payments and taking into account the prepetition shortage. Since the lower courts had held that the escrow shortage was not a prepetition claim, the Circuit remanded for determination of whether Countrywide willfully violated the automatic stay. *In re Rodriguez*, 629 F.3d 136 (3d Cir. 2010).

**Debtors lacked standing to dispute noncompliance with pooling and service agreement.** The mortgage named MERS as nominee for the lender, its successors and assigns, and the lender endorsed and transferred the note and mortgage, which were then pooled under a servicing agreement. The debtors attempted to attack the validity of the pooling and servicing agreement, but the bankruptcy court properly held that the debtors lacked standing. The debtors were not parties to that contract, nor were they third-party beneficiaries. *In re Correia*, 452 B.R. 319 (BAP 1st Cir. 2011).

**Objector must come forward with proof to rebut.** When the debtor fails to come forward with evidence to rebut, the prima facie validity of the proof of claim prevails. *In re Stewart*, 2010 WL 1258213 (9th Cir. Apr. 1, 2010) (unpublished).

**A review of authority on documentation.** The bankruptcy court provided a thorough review of authority on documentation of proofs of claim for prima facie validity purposes, and the shifting burden of proof. *In re Pursley*, 451 B.R. 213 (Bankr. M.D. Ga. 2011) .

**Equitable estoppel applied to proof of claim in serial bankruptcy cases.** The debtor filed two successive Chapter 13 cases. Wells Fargo Bank filed a proof of claim in the first Chapter 13 case, and filed a second claim in the debtor's second Chapter 13 case. Its proof of claim in the second case was inconsistent in that it added charges not included in the first POC. The court applied judicial estoppel to the first proof of claim, preventing Wells Fargo from asserting charges that could have been included in the first claim. Estoppel did not apply to any charges accruing after the first proof of claim was filed, but arrearages and charges that could have been include in the prior claim were barred. *In re Oparaji*, 2010 WL 5462456 (Bankr. S.D. Tex. Dec. 29, 2010) (slip opinion). The opinion reviews the requirements for applying judicial estoppel: the two proofs of claim were clearly inconsistent; the court had accepted the first proof of claim when it approved a plan modification based on that claim's arrearages; and Wells Fargo's "inconsistency was not inadvertent." The fact that the first case was dismissed did not prevent application of judicial estoppels. Section 349 restores property rights but "does not erase all history. . . .[N]othing in § 349 prevents the invocation of judicial estoppels with respect to positions taken in a dismissed bankruptcy."

**Debtor's schedules included debt, overcoming technical failures by assignee.** When the Chapter 13 debtor scheduled the original creditor, a pending state court suit and the creditor's attorney, the admissions of the debt overcame the debtor's objections to the proof of claim filed by an assignee. Although the proof of claim did not technically comply with Rules 3001(c) and (f), and even if the proof of claim lacked prima facie validity, the objection did not state grounds for disallowance under § 502(b). In the face of the sworn statements in schedule F and statement of financial affairs, the court questioned the debtor's good faith and "counsel's judgment as guided by Rule 9011." *In re Willis*, 2010 WL 5463066 (Bankr. N.D. Ga. Dec. 26, 2010).

**Assignee unable to rely of Bankruptcy Rule to support prima facie validity.** The Chapter 13 debtor objected to a proof of claim filed by the assignee of credit card debt, based on lack of documentation to support the validity and amount of the debt, as well as the assignee's status. Discussing the issues that typically arise in contests concerning proofs of claims filed by assignees, the court held that to satisfy Rule 3001(c) and enjoy prima facie validity, a proof of

claim filed by an assignee must have an attached “written assignment or set forth a summary of the assignment,” and this proof of claim had neither. The court then discussed conflicting authority on whether there are ways, other than compliance with Rule 3001, to obtain prima facie validity, concluding “that compliance with Rule 3001(f) is not the sole vehicle for a proof of claim to achieve prima facie status.” The issue is whether the “non-conforming” proof of claim shifts the burden of production to the objecting party, on which a case-by-case determination is required, considering, for example, the debtor’s schedules and whether the debt is listed in the same approximate amount as the proof of claim. Although these debtors’ schedules did include this debt in an amount correlating to the proof of claim, there was nothing in the record to support the assignee status of the claimant, and the proof of claim was disallowed. *In re O’Brien*, 440 B.R. 654 (Bankr. E.D. Pa. 2010).

**Arbitration denied in dispute over amount of claim.** The creditor’s motion to compel arbitration was denied, when the dispute involved the amount of the proof of claim, with the court holding that an inherent conflict existed between enforcing the parties’ arbitration agreement and the remedies and purposes of the Bankruptcy Code. *Yarbrough v. Green Tree Servicing, LLC (In re Yarbrough)*, 2010 WL 3885046 (Bankr. M.D. Ala. Sept. 29, 2010) (slip opinion). See also *Rushing v. Green Tree Servicing, LLC (In re Rushing)*, 2010 WL 3943962 (Bankr. E.D. Tex. Oct. 6, 2010) (slip opinion) (discussing arbitration in an adversary proceeding and not compelling it when the dispute involved automatic stay violations and damages). However, if an arbitration has been concluded, it is likely that a bankruptcy court will treat the award as preclusive. See, e.g. *Bergemann v. Brion & Higgins*, 2010 WL 2516164 (D. Or. June 22, 2011).

**Relation-back doctrine discussed.** When the second mortgage creditor filed a fully-secured proof of claim that was relied on by the debtors and other creditors, the creditor’s attempt to file an unsecured claim, following the first mortgage foreclosure, was denied. The creditor waited over a year after the claims bar date and confirmation, and the court held that the new claim was untimely and did not relate back to the original secured claim. *In re George*, 426 B.R. 895 (Bankr. M.D. Fla. 2010).

**State fails to support objection to proof of claim filed on its behalf by debtor.** When the State of Michigan failed to file a timely proof of claim for prepetition taxes, the debtor filed a timely claim on behalf of the State under § 501(c). The State objected, but “[d]isallowance of a proof of claim filed by a debtor under § 501(c) of the Bankruptcy Code depends solely on whether one of the nine enumerated grounds for disallowance under § 502(b) can be shown by the objecting party.” The debtor’s 2008 taxes, although not finally payable until April 15, 2009, were nevertheless prepetition taxes, with the court adopting the view that § 1305(a)(1)’s phrase “becomes payable” does not define a claim. When the debtors had earned their 2008 income before filing bankruptcy and had self-assessed their 2008 state income taxes by filing their State return before bankruptcy, there was a prepetition debtor/creditor relationship between the debtors and State. The court rejected the State’s argument that the taxes were postpetition and that the debtors were not authorized to file a claim on its behalf under § 1305. *In re Senczyszyn*, 426 B.R. 250 (Bankr. E.D. Mich. 2010).

**Burden of proof on § 507(a) (1) claims.** Discussing the difference in priority claims under §§ 507(a)(1)(A) and (B), when the state department of family services did not prove that its assigned claims was for the purpose of collection or how much was owed to the state directly, it failed to prove that its claim was entitled to full payment priority under § 507(a)(1)(A), permitting the § 507(a)(1)(B) claim to be paid less than 100% in a Chapter 13 plan under § 1322(a)(4). Notwithstanding § 1322(a) (4), the unpaid amount of the claim was still excepted from discharge. *In re Penaran*, 424 B.R. 868 (Bankr. D. Kan. 2010). See also *In re Sosa*, 2010 WL 318484 (Bankr. E.D. Va. Jan. 21, 2010) (slip opinion) (discussing adequate notice to governmental agency of how its § 507(a) (1) claim would be treated); *In re Wheeler*, 2010 WL 503112 (Bankr. N.D. Ala. Feb. 5, 2010) (slip opinion) (discussing nondischargeability of § 507(a) (1) (B) claims paid less than 100%).

**Claim filed by fax too late.** A proof of claim filed by fax 43 minutes after a deadline was too late when an order required the filing of the original proof of claim by the deadline. The fax was not an original, and Rule 5005(c) did not apply, since it only gave the court discretion when the document was delivered to the incorrect person. *In re marchFIRST*, 573 F.3d 414 (7th Cir. 2009).

**Claims bar date reset upon reinstatement of dismissed case.** Acknowledging that "Rule 9006(b) (3) appears to unambiguously preclude any equitable discretion on the part of a bankruptcy court to extend or toll [the Rule 3002(c)] deadlines," the court applied rationale from its Fifth Circuit authority under Rules 4004 and 4007, to "nullify original case deadlines and recalculate them when there has been the extenuating circumstance of disruption of a case....This court holds that *where a case is disrupted*, such as through a stay or dismissal, and a proof of claim deadline runs prior to the reinstatement of the case, a court has the power to nullify the original proof of claim deadline and recalculate it." *In re Gulley*, 400 B.R. 529 (Bankr. N.D. Tex. 2009) (citing *Coston v. Bank of Malvern*, 987 F.2d 1096 (5th Cir. 1992) (approving nullification and resetting of deadlines under Rules 4004 and 4007) and *State Bank & Trust, N.A. v. Dunlap (In re Dunlap)*, 217 F.3d 311 (5th Cir. 2000) (approving resetting of § 341 meeting and resulting Rule 4007 deadline when case was dismissed in error).

**Creditors may have standing to object to other creditor's claims.** The Chapter 7 debtor typically lacks standing to object to creditors' claims, but creditors have a pecuniary interest, giving standing to object as parties in interest, if there either is no trustee appointed or the trustee refuses to act. *In re Ulz*, 401 B.R. 321 (Bankr. N.D. Ill. 2009).

**Creditor not required to file another proof of claim after conversion.** Creditors filing timely proofs of claim in Chapter 7 case are not required to refile those claims after the case is converted to Chapter 13. The debtor sought disallowance of claims not filed in the Chapter 13 case, but, although a new claims bar date was set by the clerk upon conversion, requiring the filing of new claims would be "nothing but redundancy." The bankruptcy rules do not address this issue. *Jasinski v. Monongalia General Hospital, et al. (In re Jasinski)*, 406 B.R. 653 (Bankr. W.D. Pa. 2009).

## B. UCC Article 9 and Real Estate

**Real estate transactions are outside the scope of Article 9.** A secured party that held a security interest in both the intangible and tangible assets of a bar had no secured interest in the former owner's leasehold interest in the premises because UCC § 9-109(d)(11) expressly leaves interests in real estate, including leaseholds, outside the scope of security agreements provided for in Article 9. *Bischoff v. LCG Blue, Inc.*, 2009 WL 148519 at \*5 (Cal. App. 2009).

**But: Security interest in hotel revenues was interest in personalty.** A hotel's revenues from room occupancy, food and beverage sales, catering, gift shop purchases, and spa and related hotel services were determined to be “accounts” or “payments intangible” as those terms were defined in Article 9, by the Bankruptcy Court, applying New Jersey law, *In re Ocean Place Development, LLC*, 2011 WL 119594374 (Bankr. D.N.J. 2011). Accordingly, a security interest in the hotel revenues was an interest in personalty, not an interest in realty, and was therefore required to be perfected and enforced pursuant to Article 9. Documents executed with a loan agreement between a bank and the hotel included an assignment of rents and leases and broadly defined “rents” as all revenues collected from guest rooms, restaurants, food and beverage retail sales, and various other sources, and Article 9 excluded from its scope the creation or transfer of any interest in real property, including a lease or rents thereunder. The occupants of the hotel, however, were not tenants who possessed an interest in real property. They were merely licensees. Further, the parties' designation of the hotel revenues as “rents” did not establish that the hotel revenues could appropriately be treated as if the revenues are leasehold interests, because to do so for that reason alone would directly contravene New Jersey statutes on “hotels,” “landlords,” and “tenants,” Article 9's provisions, and relevant case law.

### Are manufactured homes real estate?

In *Textron Financial Corp. v. New Horizon Home Sales, Inc.*, 2011 WL 901844 (N.D.W. Va. 2011), the court, applying West Virginia law, held that a lender's purchase-money security interest in a mobile home that was later affixed to real property owned by the debtor had priority over a deed of trust filed by the vendor of the real property that encumbered the property and any after-acquired or after-constructed buildings, structures, improvements, and fixtures, even though the deed of trust was filed before the lender's fixture filing. The lender's security interest in the mobile home arose, and was perfected by the fixture filing, before the mobile home became a fixture.

In *In re Starks*, 2011 WL 248521 (Bankr. E.D. Ky. 2011), the court, applying Kentucky law, held that even if a manufactured home located on two mortgagors' real property was a fixture to which the mortgage referred, the mortgagee could not perfect a security interest in the manufactured home through Article 9's provision so that a perfected security interest in a manufactured home by a fixture filing would have priority over a conflicting interest of an encumbrancer or owner of the real property. The manufactured home, which had never been converted to real estate, had an active certificate of title. Accordingly, the perfection of the security interest in the manufactured home was by notation on the certificate of title, as specifically required by a motor-vehicle statute governing the creation and perfection of a security interest in a titled manufactured home.

In *In re Akers*, 427 B.R. 408 (Bankr. W.D. Ky. 2010), the court held that a mortgagee held a valid first, prior, and superior lien on real property that included a manufactured home. The Chapter 7 debtors and another debtor consensually granted the mortgagee a lien on the manufactured home. The documents of record established that their clear intent was to make the manufactured home part of the real estate. Although they had agreed to surrender the certificate of title, they failed to do so, despite the mortgagee's efforts to obtain it. Under Kentucky law, a grant of a mortgage or security interest is binding between the parties, regardless as to whether or not it is perfected. Kentucky recognizes equitable liens that attach upon the advancement of money. Such a lien is effective as against the mortgagor and anyone dealing with the property with actual knowledge of it.

In *In re Ritchie (Palmer v. Washington Mutual Bank)*, 416 B.R. 638 (B.A.P. 6th Cir. 2009), the Court affirmed the bankruptcy court's holding that a bank's security interest in a manufactured home was unperfected under Kentucky law, because its security interest had not been noted on the certificate of title. The bank's security interest could therefore be avoided by the bankruptcy trustee. The home remained personal property because the debtor had not taken the steps required under the Kentucky law to convert it to real property, so the only way to perfect the bank's security interest was by notation of the lien on the certificate of title. The bank made several unsuccessful arguments: (1) the home was not real property, so the bank's *lis pendens* filed in a previous state court action was not effective under state law. (2) Similarly, any constructive notice that may have been provided by the *lis pendens* would not have protected the bank from the trustee's strong arm powers as a hypothetical lien creditor as to personal property, even if it may have provided constructive notice to the trustee as a hypothetical bona fide purchaser of real property. (3) The bankruptcy court's ruling was not inconsistent with the state court's previous enforcement of an "equitable lien." An "equitable lien" is essentially an unperfected security interest in the Sixth Circuit and, as such, would still be avoidable by the trustee.

**No fixture priority over other real property claimants without a fixture filing.** An energy guard fell within the definition of consumer goods, as well as within the definition of a fixture, held the court in *In re Troutt*, 2009 WL 2905923 (Bankr. S.D. Ill. 2009). The UCC defines fixtures as goods that have become so related to particular real property that an interest in them arises under real property law and the term is usually applied to articles that were once tangible personal property but which have been physically attached to the real estate so that they become a legally inseparable part of the real property to which they are affixed. In determining whether an item is a fixture or personal property, Illinois courts look at three factors: (1) the nature of the attachment to the real estate, (2) the item's adaptation to and necessity for the purpose for which the premises are devoted and (3) whether it was intended that the item be part of the realty. Intent to permanently improve the real estate, *vel non*, is the crucial factor. This energy guard was an insulation blanket installed in an attic by conforming it to the size of the attic, cutting it to fit around roof support beams, and stapling it into place. If removed, it would have no utility for any other attic, and also damage to the underlying ceiling would occur. These facts made the energy guard a fixture and the creditor was unsecured because there was no fixture filing.

A group of debtors' mortgage lenders had a valid and perfected security interest in the debtors' fixtures attached to encumbered real property under Hawaii law. *In re Hawaiian Telcom Communications, Inc.*, 2009 WL 2575663 (Bankr. D. Haw. 2009). The amended mortgage specifically included fixtures affixed to or located on the encumbered real property as collateral subject to security interests in favor of the collateral agent. The amended mortgage was properly recorded in the Hawai'i Bureau of Conveyances and was therefore a valid fixture filing.

## C. Assignment Issues

### 1. General

**The UCC again:** Section 9-203(g) of the UCC provides that “[t]he attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien.” Section 9-607(b) of the UCC provides that a secured party may record a copy of the security agreement transferring an interest in the note. However, as a matter of state real estate law, without a recorded mortgage assignment, a party may not be able to enforce the mortgage.

**Perfection of interests in notes and mortgages:** A company that provided funding to a lender, who was in the business of making short-term subprime loans to consumers to cover the cost of constructing modular homes, had an unperfected security interest in notes secured by mortgages, where, notwithstanding the requirements of the credit and security agreements, the lender retained possession of the notes at issue, and the lender could not possess the notes on the company's behalf. *Prime Financial Services LLC v. Vinton*, 279 Mich. App. 245, 761 N.W.2d 694 (2008).

**Doesn't the “mortgage follow the note”?** The recent Massachusetts Supreme Court decision in *U.S. Bank National Association v. Ibanez*, 941 N.E. 2d 40 (Mass. 2011), dealt with issues raised by inaccurate recording of a mortgage assignment. Lenders each filed actions in the Massachusetts Land Court for declarations of clear title after each foreclosed on residential mortgages and purchased the property at the foreclosure sale. In both cases, the Massachusetts Supreme Court held that the lenders lacked the authority to exercise the power of sale because they were not the assignees of the mortgages at the time of the notice of sale and subsequent foreclosure sale. However, in *Musselman v. Deutsche Bank Trust Company Americas (In re Balderrama)*, \_\_\_ B.R. \_\_\_, 2011 WL 1750679 (Bankr. M.D. Fla. May 4, 2011), a Chapter 7 trustee brought an adversary proceeding to quiet title and to value at zero dollars a bank's alleged interest in the debtor's non-homestead real property. The trustee moved to compel the bank to produce discovery related to its purchase of promissory note and mortgage on property. The Bankruptcy Court, held that the bank had to respond to the trustee's interrogatory and requests for production of documents related to determining whether bank was holder of properly endorsed promissory note, but the bank would not be compelled to respond to trustee's additional discovery requests. Under Florida law, proof of a creditor's status as the holder of a note secured by a mortgage is proof of creditor's purchase of the debt, supporting application of the general rule that the mortgage, even without written assignment, may travel equitably to holder of underlying debt.

**Mortgage note not properly endorsed to transferee and not in transferee's possession did not support proof of claim.** Defects in the assignment and transfer of a mortgage note made the note unenforceable under New Jersey's UCC, and the debtor's objection to the proof of claim was sustained. The opinion discusses "holder" and "nonholder," both "in possession" and "not in possession." *In re Kemp*, 2010 WL 4777625 (Bankr. D.N.J. Nov. 16, 2010) (slip opinion).

**A review of documentation issues on assigned claims.** The bankruptcy court provided a review of other judicial authority on the standing of assignee creditors to file proofs of claim and the extent to which documentation of the claim is required under Rule 3001 and for prima facie validity. The opinion contains a review of documentation for both assigned credit card and mortgage debts, concluding that although lack of documentation is not a stated reason for disallowance under § 502(b), when there is inadequate documentation, the proof of claim may be insufficient to permit the objecting party to concede its validity. The court concluded that when a claim lacks sufficient documentation, the debtor or other party may demand additional documentation, and the claimant has an obligation to provide it within two weeks; if not provided, the debtor or trustee may then file an objection to the claim. *In re Minbatiwalla*, 424 B.R. 104 (Bankr. S.D.N.Y. 2010).

**Be careful how you describe the subject of the assignment in Article 9 terms.** In an action by a purchaser of certain accounts from a bank, including a debtor's deficient account, to recover a deficiency balance it claimed was owed by the debtor, it was held that the purchaser failed to prove that it was entitled to collect on the debt evidenced by a note and security agreement between the debtor and the bank. The purchaser neither alleged nor showed that it was the assignee of the bank's promissory notes or security agreements. Rather, it showed only that it had purchased and was the assignee of certain bank accounts, including the debtor's account. Pursuant to the definition of "account" under both Kentucky's and Ohio's UCC, an "account" does not include rights to payment evidenced by instruments, such as promissory notes. Thus, even if the purchaser bought the debtor's account from the bank, that did not necessarily include the purchase of the right to collect payment on the note, absent evidence that the purchaser also bought the note, the court concluded. *Harrington v. Asset Acceptance, LLC*, 2008 WL 4531376 (Ky. App. 2008).

The transfer in *321 Henderson Receivables Origination LLC v. Sioteco*, 2009 WL 1219366 (Cal. App. 2009), was to a factoring company in exchange for lump-sum payments. The structured settlement payments were considered general intangibles. Under California's UCC, once a claim arising in tort has been settled and reduced to a contractual obligation to pay (as in, but not limited to, a structured settlement) the right to payment becomes an intangible and ceases to be a claim arising in tort. Moreover, § 9-408 applied to sales of structured settlement payments because, unlike the model UCC, the California UCC did not contain the uniform provision excluding annuities from its reach. The court concluded that § 9-408, as adopted in California, evidenced a public policy against anti-assignment provisions in general and that the state insurance code evidenced a public policy in favor of court-approved factoring transactions. Thus public policy favored the legal conclusion that anti-assignment provisions did not bar court-approved transfers of structured settlement payments. Therefore, the court concluded,

where no interested parties objected to the transfer of structured settlement payment rights, the anti-assignment provisions in the annuity contract, settlement agreement, or other related contracts did not bar the factoring transaction at issue.

### **Revisions of Article 9 in 2010, effective 2013**

Changes to Article 9 of the UCC were proposed in 2010, including revisions made in the commentary and statutory amendments sent to the states for adoption, effective July 1, 2013. Where the collateral is a note secured by a mortgage, sometimes the parties do not record an assignment of the mortgage. There is a provision, UCC § 9-607(b), which says that, if the secured party is the holder of the note but is not the mortgagee of record, then in the case of a non-judicial foreclosure sale, it can file a sworn statement with the local real estate office, saying that it is entitled to enforce the note, and that a default has occurred. One of the things that the amendments seek to do is to clarify that the reference to a default having occurred is a reference to a default by the mortgagor. One could construe the language to mean a default by the seller, as "debtor" and not by the mortgagor. This has larger implications in the context of the economic crisis that began before 2010. Article 9 attempts to permit the secured party to hold the note, to have an interest in the note and to have a security interest in the mortgage securing the note and not be the mortgagee of record, but to rely on section 9-607(b), as further clarified, in order to become the mortgagee of record, to conduct a non-judicial foreclosure sale.

Another revision addresses a security interest in a payment right that has some limitation on transfer. Sections 9-406 and 9-408, and their pre-2001 counterparts, have long contained a set of anti-assignment override provisions that became more complex in 2001, with section 9-406 being a broader set of override rules, in the case of a security interest in a payment right.<sup>1</sup> However, if there has been a sale of that payment right, does the sale move the transaction over to section 9-408, which is more restrictive and applies more clearly to sales of promissory notes? The drafters in 2010 attempted to make clear that the foreclosure sale of the note would remain under section 9-406.<sup>2</sup> This may also be seen as an attempt to assist with the difficulties

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<sup>1</sup> UCC §§ 9-406 through 9-409 override contractual, statutory and other legal limitations on a person's ability to create an Article 9 interest in what would otherwise be nonassignable property. These pro-assignment rules are not limited merely to restrictions that say the assignment is prohibited, but also override restrictions that say the assignment is permitted but only with the consent of the third-party obligor or restrictions that simply declare that assignment will constitute a default, so that the party who wishes to take a right to payment, either to secure a debt or as a purchase of a right to payment, may do despite such a restriction in the underlying transaction. UCC § 9-406(d) & (f). However, these rules do not apply to contractual restrictions on outright sales of payment intangibles or promissory notes or on security interests (both outright sales and to secure an obligation) in health-care-insurance receivables or general intangibles. UCC §§ 9-406(e) & (i) & 9-408(a). There are special rules for these excluded transactions so that the obligor (e.g., a franchisor) is not forced to deal with the assignee or with someone to whom the secured party might sell the rights. Caution: This broad override of anti-assignment provisions in agreements and statutes was a controversial part of the 2001 law and some states modified the uniform language, particularly as it might allow assignment of lottery winnings or structured settlement payments.

<sup>2</sup> UCC (2013) § 9-406(e).

encountered in the foreclosure process, after the 2008 financial crisis, which preceded the drafting of these changes.

**Assignee's documentation in support of bankruptcy claim:** Citing *In re Kinkaid*, 388 B.R. 610 (Bankr. E.D. Pa. 2008), one court holds that all Bankruptcy Rule 3001 requires is a writing to show the claimant acquired the claim, not that the claimant have proof beyond question that it holds the claim. *In re Cleveland*, 396 B.R. 83 (Bankr. N.D. Okla. 2008). Compare *In re Samson*, 392 B.R. 724 (Bankr. N.D. Ohio 2008) (adopting *B-Line, LLC v. Kirkland (In re Kirkland)*, 379 B.R. 341 (B.A.P. 10th Cir. 2007) and finding sufficient documentation for prima facie validity); *B-Real, LLC v. Melillo (In re Melillo)*, 392 B.R. 1 (B.A.P. 1st Cir. 2008) (assignee's documentation insufficient); *Stauder v. eCast Settlement Corp. (In re Stauder)*, 396 B.R. 609 (Bankr. M.D. Pa. 2008) (finding documentation insufficient to establish prima facie validity); and see *In re Andrews*, 394 B.R. 384 (Bankr. E.D. N.C. 2008) (Judge Small suggests need for local and national rules addressing claim documentation). The Tenth Circuit reversed its BAP's decision in *In re Kirkland*, holding that a creditor did not satisfy its burden of proof when it filed a proof of claim without supporting documentation and the creditor failed to present evidence in the face of the trustee's objection. The burden cannot be shifted to the trustee to disprove the claim lacking documentation. *Caplan v. B-Line, LLC (In re Kirkland)*, 572 F.3d 838 (10th Cir. 2009).

When the assignee attached unendorsed copies of mortgage note to its proof of claim, the assignee failed to show that it was actually the holder of the note, with the right to enforce the note. *In re Wells*, 407 B.R. 873 (Bankr. N.D. Ohio June 19, 2009).

Another court rejects the assignee's amendment of its proof of claim on the day of the objection hearing, also holding that Texas law requires a creditor to produce evidence of an enforceable contract; therefore, insufficient documentation of ownership of the claim results in disallowance. *In re Gilbreath*, 395 B.R. 356 (Bankr. S.D. Tex. 2008). Compare *In re Fleming*, 2008 WL 4736269 (Bankr. E.D. Va. Oct. 15, 2008) (amended claim had sufficient documentation to show assignment).

## 2. MERS<sup>3</sup>

The 2008 Recession has produced a great deal of litigation and regulatory action addressing the nature and role of the Mortgage Electronic Registration System ("MERS"). Created "in order to streamline the mortgage process by using electronic commerce to eliminate paper."<sup>4</sup> MERS' principal owners are the Mortgage Bankers Association ("MBA"), the Federal National Mortgage Association ("Fannie Mae"), the Federal Home Loan Mortgage Corporation ("Freddie Mac"), Bank of America, Chase, HSBC, CitiMortgage, GMAC, American Land Title

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<sup>3</sup> Thanks to Reid Manley, Burr & Forman LLP for his group's compilation of the cases and other materials describing MERS in this section, as well as many more cases, contained in Burr & Forman's MERS database and made available for this section of these materials.

<sup>4</sup> About Us - Overview, MERS, available at <http://www.mersinc.org/about/index.aspx> (last visited Mar. 7, 2011).

Association, and Wells Fargo.<sup>5</sup> "MERS acts as nominee in the county land records for the lender and servicer. Any loan registered on the MERS System is inoculated against future assignments because MERS remains the nominal mortgagee no matter how many times servicing is traded. MERS as original mortgagee ("MOM") is approved by Fannie Mae, Freddie Mac, Ginnie Mae, FHA and VA, California and Utah Housing Finance Agencies, as well as all of the major Wall Street rating agencies."<sup>6</sup> When MERS serves as mortgagee of record, it purports to serve as a common agent for all MERS members. MERS' status as mortgagee and nominee of the lender, and its successors and assigns, is to be approved by the borrower in the mortgage documents. MERS' status, as set forth in the mortgage documents, is to be recorded in the land records. Additional information on MERS is available on its website.<sup>7</sup>

Allegations of MERS impropriety have spawned federal and state court lawsuits. The arguments asserted by borrowers, either offensively or defensively, have evolved; however, the basic charge of these lawsuits remains the same: the MERS system is fatally flawed and does not, or should not, give transferees of mortgages through the MERS system the authority to enforce remedies under the mortgages they have obtained. Finding that MERS transfers are invalid could have a dramatic effect, as estimates are that MERS holds mortgages on nearly sixty million American homes, or sixty percent of the nation's residential mortgages.<sup>8</sup> MERS has been subjected to attacks by defaulting borrowers and consumer advocates who are attempting to avoid valid mortgage debts. These attacks have come on a variety of fronts, but the following issues have become most common: whether MERS has standing to conduct foreclosures in its own name; whether naming MERS as mortgagee improperly splits the note and mortgage, thus invalidating the mortgage; whether MERS is a party in interest entitled to seek relief from an automatic stay in bankruptcy; whether MERS is a necessary party, entitled to receive notice of proceedings related to the property; and whether the entire MERS system is fraudulent.

Numerous courts have sustained the positions of MERS on at least some of these issues:

- *Mortensen v. MERS*, 2010 WL 5376332 (S.D. Ala. Dec. 23, 2010) (recognizing assignment from MERS to purchaser as valid)
- *Crum v. LaSalle Bank, N.A.*, 2009 WL 2986655 (Ala. Civ. App. Sept. 18, 2009) (concluding that MERS had power to make assignment to foreclosing assignee and that mortgage documents expressly authorized MERS to assign its right to foreclosing party).
- In *Cervantes v. Countrywide Home Loans, Inc.*, 2009 WL 3157160 (D. Ariz. Sept. 24, 2009), the plaintiffs made two attacks on the MERS system: (1) MERS is never really a beneficiary under the deed of trust because it never acquires a true beneficial interest; and

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<sup>5</sup> Testimony of R.K. Arnold, President and CEO of MERSCORP, Inc., Before the Subcomm. on Housing and Community Opportunity, House Financial Services Comm., 111th Cong. 5 (2010).

<sup>6</sup> Id.

<sup>7</sup> <http://www.mersinc.org/>. (last visited August 1, 2011).

<sup>8</sup> McIntire, Mike, Tracking Homes Through a Firm that Holds Millions, THE NEW YORK TIMES, available at <http://www.nytimes.com/2009/04/24/business/24mers.html> (Apr. 23, 2009); see also Kate Berry, Foreclosures Turn Up Heat on MERS, AM. BANKER, July 10, 2007, at 1.

(2) the MERS system is a means of circumventing the public recording system.” The court denied the relief, concluding, “Plaintiff’s allegations would foreclose the very splitting of a promissory note from a deed of trust. Such an approach, of course, would intrude into the realm of third-party beneficiary contracts, as well as assignments and delegations.” The court went on: “The fact that MERS does not obtain such rights as to collect mortgage payments or obtain legal title to the property in the event of non-payment does not transform MERS’ status into a ‘sham.’” Finally, the court stated, “Plaintiffs’ second objection to the MERS system similarly has no effect upon their status as borrowers . . . . Any lack of notice in the public records, however, to future buyers of Plaintiffs’ mortgages does not alter Plaintiffs’ obligations under the mortgages . . . .”

- *In re MERS Litigation*, 2011 WL 251453 (D. Ariz. Jan. 25, 2011), involved claims that MERS and others conspired to commit fraud and conspiracy to commit wrongful foreclosure through the creation, operation and use of the MERS system. The court rejected the argument.
- See also *Jones v. Wells Fargo Bank*, 2011 WL 683887 (D. Ariz. Feb. 18, 2011) (rejecting the plaintiffs’ argument that MERS could not assign the deed of trust to purchaser of note, concluding that plaintiffs had consented to MERS’ designation as beneficiary and nominee under the deed of trust)
- *In re Madison*, 2010 WL 3941858 (Bankr. D. Ariz. Oct. 4, 2010) (concluding that MERS system is “not a sham and does not perpetrate a fraud upon the borrower” and that “MERS, as the named beneficiary, also has the power to appoint a trustee or successor trustee under Arizona’s non-judicial foreclosure statute”)
- *Peace v. MERS*, 2010 WL 2384263 (E.D. Ark. June 11, 2010) (MERS’ assignment to Note purchaser was valid and properly gave purchaser standing to appoint an agent to initiate a non-judicial foreclosure)
- *Johnson v. MERS*, 252 Fed. Appx. 293 (11th Cir. 2007) (stating that MERS held the Security Deed as “nominee” for lender)
- *In re Jessup*, 2010 WL 2926050 (Bankr. E.D. Ky. July 22, 2010) (concluding that the language in the deed of trust is sufficient to create a nominee status in favor of MERS and that MERS may grant signing authority via a Corporate Resolution to permit individuals to assign mortgages)
- *Vazquez v. Aurora Loan Services*, 2009 WL 1076807 (D. Nev. 2009) (granting MERS’ motion to dismiss claims of wrongful foreclosure, negligence and quiet title as land records “sufficiently demonstrate[d] standing by Defendants with respect to the loan and the foreclosure conducted pursuant to applicable law and the Nevada foreclosure statutes.”)
- *U.S. Bank, N.A. v. Flynn*, 897 N.Y.S.2d 855 (N.Y. Sup. Ct. 2010) (“This court finds that where, as here, an entity such as MERS is identified in the mortgage indenture as the nominee of the lender and as the mortgagee of record and the mortgage indenture confers upon such nominee all of the powers of such lender, its successors and assigns, a written assignment of the note and mortgage by MERS, in its capacity as nominee, confers good title to the assignee and is not defective for lack of an ownership interest in the note at the time of the assignment.”)
- *Ward v. Security Atlantic Mortgage*, 2011 WL 474560 (E.D.N.C. Feb. 4, 2011) (dismissing plaintiff’s blanket claims that MERS lacked standing as nominee)

- *Deutsche Bank Natl. Trust Co. v. Traxler*, 2010 Ohio 3940 (Ohio Ct. App. 2010) (holding that because the Mortgage follows the Note, even without an assignment from MERS the transfer of the Note operated as an equitable assignment of the Mortgage to the purchaser; also recognized MERS authority to assign Mortgage when designated as both a nominee and mortgagee)
- *MERS v. Mosley*, 2010 WL 2541245 (Ohio Ct. App. June 24, 2010) (finding that MERS had authority to foreclose on the property because it was named as the lender's nominee in the Mortgage, despite the fact that it had no beneficial interest in the Note)
- *Burgett v. MERS*, 2010 WL 4282105 (D. Or. Oct. 20, 2010) (recognizing that the MERS system does not, in and of itself, violate Oregon law, but providing that any and all assignments would have to be recorded prior to commencing foreclosure)
- *Stewart v. MERS*, 2010 WL 1055131 (D. Or. Feb. 9, 2010) (granting MERS' motion to dismiss, finding that U.S. Bank was a real party in interest because the assignment from MERS to U.S. Bank was proper under Oregon law)
- *MERS v. Ralich*, 982 A.2d 77 (Pa. Super. Ct. 2009) (affirming the trial court's determination that the mortgage vested MERS with the authority to enforce the loan)
- *Santarose v. Aurora Bank FSB*, 2010 WL 3064047 (S.D. Tex. Aug. 3, 2010) (relying on language in deed of trust to establish that MERS, as nominee, had the right to foreclose)
- *King v. American Mortgage Network, et al.*, 2010 WL 3516475 (D. Utah Sept. 2, 2010) (interpreting the language of the deed of trust, held that MERS had the authority to initiate foreclosure proceedings, appoint a trustee, and to foreclose and sell the property)
- *Commonwealth Property Advocates, LLC v. CitiMortgage*, 2011 WL 98491 (D. Utah Jan. 12, 2011) ("Plaintiff offers no evidence or legal argument that MERS cannot contract for the right and power of foreclosure regardless of who holds the note, or the beneficial interest under the trust deed. Nor does Plaintiff demonstrate that such rights are actually 'lost by the transfer of the debt.'")
- *King v. American Mortg. Network, Inc.*, 2010 WL 3516475 (D. Utah Sept. 2, 2010) (dismissing plaintiff's "split the note" argument)
- *McGinnis v. GMAC Mortgage Corp.*, 2010 WL 3418204 (D. Utah Aug. 27, 2010) (dismissing plaintiff's claim that MERS lacked standing to conduct foreclosure)
- *Rhodes v. Aurora Loan Services*, 2010 WL 3219310 (D. Utah Aug. 13, 2010) ("Although MERS does not own the note, it is given authority to foreclose on the note by the note's owner through the language in the trust deed. Courts have consistently held that MERS has the authority to foreclose in behalf of the lender and that MERS need not possess the note in order to appoint a trustee in behalf of the lender who does hold the note.")
- *Ramirez-Alvarez v. Aurora Loan Services, LLC*, 2010 WL 2934473 (E.D. Va. July 21, 2010) ("MERS had the authority and ability to enforce the terms of the security instruments.")
- *In re Relka*, 2009 WL 5149262 (Bankr. D. Wyo. Dec. 22, 2009) (finding that MERS had properly assigned the mortgage to the note purchaser and validating foreclosure).

Other decisions have not been favorable to the parties relying on the positions of MERS:

- *MERS v. Southwest Homes of Arkansas*, 301 S.W.3d 1 (Ark. 2009). There, in an action by MERS to set aside a decree of foreclosure where MERS had not been served with process. The circuit court denied MERS' motion, concluding that MERS, as mere agent of the lender, was not a necessary party that was entitled to receive service of process.

"We specifically reject the notion that MERS may act on its own, independent of the direction of the specific lender who holds the repayment interest in the security instrument at the time MERS purports to act. "[A]n agent is authorized to do, and to do only, what it is reasonable for him to infer that the principal desires him to do in the light of the principal's manifestation and the facts as he knows or should know them at the time he acts."

- *In re Sheridan*, 2009 WL 631355 (Bankr. D. Idaho Mar. 12, 2009) (discussing "serial assignments" of mortgages that have "complicated what was previously a generally straight-forward standing analysis," and denying request for stay relief on basis that there was no proof that trustee on whose behalf MERS was purporting to act had any interest in note or deed of trust).
- In *Landmark National Bank v. Kesler*, 216 P. 3d 158 (Kan. 2009), MERS asserted the position of mortgagee as nominee for the owner of the junior mortgage loan. The first mortgagee foreclosed, but did not notify MERS even though MERS was the recorded mortgagee. Without notice, MERS failed to defend, and a default judgment was entered extinguishing the second mortgage. The property was sold to a third party. MERS moved to vacate the default, arguing that it had not received notice of the foreclosure. The Court denied MERS's motion, but did not address whether MERS was entitled to notice. Instead, the Court simply stated that, even if MERS would have been entitled to notice, MERS would not have had a meritorious defense to the action.
- In *MERS v. Saunders*, 2 A.3d 289 (Me. Aug. 12, 2010), the Court concluded that MERS is not a "mortgagee" within the meaning of Maine's foreclosure statute, 14 M.R.S. §§ 6321-6325 and, therefore, had no standing to foreclose. The court concluded, however, that real party in interest was Deutsche Bank and that the lower court did not err by substituting the lender for MERS.
- In *Bellistri v. Ocwen Loan Servicing, LLC*, 284 S.W.3d 619 (Mo. Ct. App. 2009), the court held that because "MERS never held the promissory note ... its assignment of the deed of trust separate from the note had no force," thus prohibiting the assignee of the deed of trust from foreclosing.
- In *In re Agard*, 444 B.R. 231 (Bankr. E.D.N.Y. 2011), a mortgage servicer for a bank serving as trustee under a mortgage loan trust moved for relief from the automatic stay to permit it to foreclose on a Chapter 7 debtor's real property. The debtor opposed the motion, challenging servicer's standing. The Bankruptcy Court held that the servicer failed to show that bank was holder of note and the mortgage did not authorize the mortgage electronic registration system (MERS), named as "nominee" to make an assignment of the mortgage and no agency relationship existed between MERS and its members to support such and assignment on behalf of and to members under New York law. However, the trustee's filing of a no-asset report did not act to abandon the real property, which remained estate property subject to automatic stay. The *Rooker-Feldman* doctrine and *res judicata* were applied to bar the debtor's standing challenge. "However, in all future cases which involve MERS, the moving party must show that it validly holds both the mortgage and the underlying note in order to prove standing before this Court."

During the fourth quarter of 2010, the four primary federal regulators of financial institutions in the United States (the Federal Reserve, OCC, FDIC and OTS) all conducted on-site reviews of the foreclosure process at 14 federally-regulated banks with large concentrations

of mortgage-servicing and foreclosure processing activities, plus several non-bank servicers like MERS. The regulators issued simultaneous releases on April 13, 2011, disclosing their enforcement actions against all of the subjects of the examinations, including MERS and its parent company, MERSCORP, Inc.<sup>9</sup> The agencies' joint report stated that "[t]he reviews found critical weaknesses in servicers' foreclosure governance processes, foreclosure document preparation processes, and oversight and monitoring of third-party vendors, including foreclosure attorneys."<sup>10</sup>

#### IV. Reorganization Issues

##### A. Modification and Cure in Chapter 13 and Individual Chapter 11 Cases

**Sixth Circuit adopts pro-creditor rule of interpretation under BAPCPA.** In a decision dealing with a variety of Chapter 13 plan issues, *Baud v. Carroll*, 634 F.3d 327 (6th Cir. 2011), the Sixth Circuit interpreted the impact of two Supreme Court opinions applying the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). *Hamilton v. Lanning*, 130 S.Ct. 2464 (2010); *Ransom v. FIA Card Services, N.A.*, 131 S.Ct. 716 (2011). The Sixth Circuit then announced a rule of interpretation of issues arising under the 2005 amendments: "[I]t is now clear that, where each competing interpretation of a Code provision amended by BAPCPA is consistent with the plain language of the statute, we must, as the Supreme Court did in *Lanning* and *Ransom*, apply the interpretation that has the best chance of fulfilling BAPCPA's purpose of maximizing creditor recoveries." 634 F.3d at 356.

**Lack of standing and jurisdiction prevent bankruptcy court from issuing injunctive relief.** The Fifth Circuit held that a debtor lacked standing and the bankruptcy court was without jurisdiction to issue broad injunctive relief, including requiring Wells Fargo to audit each proof of claim filed in Chapter 13 cases in the district. In the only case before the bankruptcy court, there "was no demonstrated likelihood that Ms. Stewart will ever again be subject to an incorrect proof of claim filed by Wells Fargo." There was no class action involved. "The injunctive relief ordering the content of filing in other bankruptcy cases cannot find its jurisdictional basis in Ms. Stewart's objection to the bank's claim in her case." The debtor's injuries were fully remedied without injunctive relief outside of the one case, and any other need for remedies can be addressed in other cases. *In re Stewart*, 647 F.3d 553 (5th Cir. 2011).

**U.S. Trustee's motion for Rule 2004 examination granted.** In an analysis of Rule 2004 examination of a mortgage lender, the U.S. Trustee's request for examination was not mooted by a settlement of the debtor's claims that the lender violated the stay in reference

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<sup>9</sup> "OCC Takes Enforcement Action Against Eight Servicers for Unsafe and Unsound Foreclosure Practices," <http://www.occ.treas.gov/news-issuances/news-releases/2011/nr-occ-2011-47.html> (last visited June 26, 2011).

<sup>10</sup> Attachment, Id.

postpetition charges. The U.S. Trustee had standing for examination, which was not overly burdensome, since restricted to information about this debtor's account. The court rejected the argument that the U.S. Trustee was usurping the Chapter 13 trustee's duty. *In re Davis*, \_\_\_ B.R. \_\_\_, 2011 WL 3204680 (Bankr. E.D. Mich. July 27, 2011). See also *In re Sheetz*, \_\_\_ B.R. \_\_\_, 2011 WL 3204320 (Bankr. N.D. Ind. June 28, 2011), granting Chapter 13 trustee's motion for Rule 2004 examination of mortgage servicer, finding cause in trustee's receipt of conflicting information about the mortgage claim, arrearages and charges; *In re Underwood*, \_\_\_ B.R. \_\_\_, 2011 WL 4376042 (Bankr. S.D. Ohio Sept. 8, 2011), recognizing U.S. Trustee's standing for Rule 2004 examination of mortgage creditor, even though U.S. Trustee had no pecuniary interest at stake, but examination was limited to debtor's loan history and related matters, and the examination could not reach into policies and procedures of the creditor related to other loan servicers; *In re DeShetler*, 453 B.R. 295 (Bankr. S.D. Ohio 2011), finding good cause for U.S. Trustee to conduct Rule 2004 examination concerning mortgage assignee's standing to file proof of claim, with the scope of the examination limited to the original note, the assignment, and the assignee's position as holder of the note.

**Mortgage partially securing rental property subject to modification.** The court discusses the split of authority on modification of a mortgage securing in part the debtor's residence and in part rental property. Rejecting a bright-line rule in favor of totality-of-circumstances, the court looked to the substance of the bargain at the time of the mortgage transaction, and where the mortgage documents did not require the debtor to occupy the property as a residence, the "predominate character" of the transaction was a commercial loan, permitting the mortgage to be stripped down under § 1322(b) (2). *In re Zaldivar*, 441 B.R. 389 (Bankr. S.D. Fla. 2011).

**Security interest in "easements" did not destroy anti-modification protection.** A mortgage including "all improvements. . . , and all easements" was protected from modification by § 1322(b)(2), concluding that under California law an easement is an interest in real property and not a personal property interest. *In re Lopez*, 2010 WL 4875884 (Bankr. N.D. Cal. Nov. 24, 2010) (slip opinion).

**Plan must provide that wholly unsecured lien is retained until full payment of discharge.** The court concluded that "allowed secured claim" as used in § 1325(a) (5) must be interpreted the same way as the Supreme Court did for purposes of § 506(d) in *Dewsnup v. Timm*, 502 U.S. 410, 416, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992). In order for § 1322(b)(2) and § 1325(a)(5) "to be sensibly read. . . , the 'secured claim' referenced in § 1322 relates to § 506(a), which focuses on the term 'secured;' and the 'allowed secured claim' referenced in § 1325 is similar to that of § 506(d), which focuses on the term 'allowed' as utilized under § 502. . . Thus, a claim must receive the treatment required under § 1325(a) (5) if it has been allowed under § 502 and is 'secured by a lien with recourse to underlying collateral.' *Dewsnup*, 502 U.S. at 415, 112 S.Ct. 773." Because the mortgage creditor had filed a proof of claim, to which no objection was filed, the claim was allowed under § 502, and the allowed secured claim must conform to § 1325(a) (5)'s requirement that the lien be retrained until the debtor either made full payment or received a discharge. The plan must contain such language, but the wholly unsecured lien may be avoided "upon receipt of a discharge at the completion of the plan." *In re Woolsey*, 438 B.R. 432 (Bankr. D. Utah). See also *In re Trujillo*, 2010 WL 4669095 (Bankr. M.D. Fla. Nov. 10,

2010) (slip opinion) (Debtor ineligible for discharge was unable to strip down mortgage permanently.). Contrast *In re Hill*, 440 B.R. 176 (Bankr. S.D. Cal. 2010) (Concluding that § 1325(a) (5)'s lien retention does not apply to wholly unsecured mortgages stripped off in the plan; debt is unsecured. Whether debtor is entitled to discharge or not, wholly unsecured mortgage can be stripped and lien avoided.).

**"Lien stripping" in Chapter 13 cases.**

Section 506 (a) of the Bankruptcy Code provides:

An allowed claim of a creditor secured by a lien on property in which the estate has an interest... is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property...and is an unsecured claim to the extent that the value of such creditor's interest...is less than the amount of such allowed claim ... .

Section 1322 (b) (2) of the Code provides that a chapter 13 plan may modify the rights of secured creditors, "...other than the claim secured only by a security interest in real property that is the debtor's principal residence ... ."

**Debtor ineligible for discharge may strip wholly unsecured junior mortgage, unless bad faith is found.** Notwithstanding the limitation of § 1322 (b) (2), a chapter 13 debtor may utilize § 506 (a) and (d) to strip off a lien on the debtor's principal residence, if the lien is completely unsecured based upon the value of the residence and the amount of any senior liens. *In re Tran*, 431 B.R. 230 (Bankr. N.D. Cal. 2010). However, there are limitations. Although debtors who were ineligible for discharge may strip off a wholly unsecured junior mortgage in some jurisdictions, if the only reason for filing Chapter 13 is to strip off the lien that was not avoidable in a prior Chapter 7 case, the Chapter 13 filing would be in bad faith. *In re Tran*, 431 B.R. 230 (Bankr. N.D. Cal. 2010). If, however, the debtor's filing is in good faith, and the debtor obtains confirmation of, and performs under a chapter 13 plan that meets all of the statutory requirements, the debtor might have the right to strip off a wholly unsecured junior lien. *Id.*, at 235.

**Debtor ineligible for discharge cannot strip wholly-unsecured junior mortgage.** In *In re Fenn*, 428 B.R. 494 (Bankr. N.D. Ill. 2010), a junior mortgagee objected to confirmation of debtors' proposed Chapter 13 plan, as improperly providing for strip-off of its lien, in a case filed by debtors who had recently received a Chapter 7 discharge and were statutorily ineligible for discharge in their current Chapter 13 case. The Bankruptcy Court held that the secured claim of the junior mortgagee, whose lien was wholly unsupported by any equity in the property over and above amount of the senior mortgage debt, could be valued at zero for plan confirmation purposes. Any strip-off of a junior mortgage lien cannot occur before the earlier of the payment of the junior mortgage debt in full or the discharge of Chapter 13 debtors, something which, in case of debtors who had recently received a Chapter 7 discharge and were statutorily ineligible for discharge in their current Chapter 13 case, could not occur. Accord *In re Gerardin*, 2011 WL 672050 (Bankr. S.D. Fla. Feb. 9, 2011) (en banc)

**Stripping wholly unsecured liens when discharge not available continues to divide courts.** The Eighth Circuit Bankruptcy Appellate Panel adopted the view that a debtor ineligible for Chapter 13 discharge because of § 1328(f) could nevertheless strip off a wholly unsecured junior lien upon completion of a plan, holding that § 1325(a)(5)(B)(i)(I)(bb)'s lien retention clause related to discharge doesn't apply, since the wholly unsecured lien is not an "allowed secured claim" under § 1325(a)(5). After application of § 506(a), the lien is wholly unsecured, and § 1322(b)(2) doesn't protect the lien. *In re Fisette*, \_\_\_ B.R. \_\_\_, 2011 WL 3795138 (BAP 8th Cir. Aug. 29, 2011). The Eighth Circuit BAP has become the second appellate court to address the issue, joining the district court, *In re Fair*, 2011 WL 1486021 (E.D. Wis. Apr. 19, 2011), in holding that § 1328(f) doesn't prevent strip off. See also *In re Jennings*, 454 B.R. 252 (Bankr. N.D. Ga. July 11, 2011) (holding that a debtor ineligible for discharge may strip off a wholly unsecured lien at completion of a plan, provided the plan was in good faith, and the plan must treat the stripped lien as unsecured).

In contrast, the bankruptcy court in *In re Victorio*, \_\_\_ B.R. \_\_\_, 2011 WL 2746054 (Bankr. S.D. Cal. July 8, 2011), held that the stripoff of a wholly unsecured lien would not be permanent when the debtor is ineligible for discharge—without a discharge, the debtor must pay the underlying debt completely. The *Victorio* court analyzed old Supreme Court authority to support its conclusion. See also *In re Orkwis*, \_\_\_ B.R. \_\_\_, 2011 WL 4368414 (Bankr. E.D. N.Y. Sept. 19, 2011), holding that plan completion was not enough, and the wholly unsecured lien could not be stripped until debtor received discharge. The lien was not stripped by default in adversary proceeding.

**Loan subject to modification could not be paid for longer term than plan.** Although a loan was not protected by § 1322(b) (2) from modification, it may not be crammed down and also paid over a period extending beyond the plan's term. A modified mortgage must be paid within the life of the plan. *In re Valdes*, 2010 WL 3956814 (Bankr. S.D. Fla. Oct. 4, 2010) (slip opinion).

**Debtors not entitled to discharge may not satisfy in rem lien on home for less than 100%.** Construing § 1325(a)(5) (B)(i)'s lien retention, debtors ineligible for Chapter 13 discharge because of recent Chapter 7 discharge could not confirm a plan providing for less payment of the underlying in rem debt than nonbankruptcy law would require. The plan proposed to pay \$15,000 in return for release of an in rem lien, but the prior Chapter 7 discharge did not strip the lien to its actual value; rather, the in rem lien survived the discharge. The bank "would be entitled under nonbankruptcy law to enforce its in rem judgment against whatever value exists in the residence after completion of the plan and closing of the case." The debtors may propose a plan paying the § 506(a) current value, but the plan may not require release of the lien without paying the full in rem claim. "Because the lien release provision of the plan violates the Bank's right to retain its lien under § 1325(a)(5)(B)(i)(I) until the debt to the Bank is paid or the lien is otherwise extinguished under nonbankruptcy law, the plan should not have been confirmed." *Bank of the Prairie v. Picht (In re Picht)*, 428 B.R. 885 (BAP 10th Cir. 2010).

**Mortgage may be modified when it only required debtor's residency for one year.** A mortgage requiring that the debtor use the condominium as a residence for at least one year was not protected from modification, when the debtor had ceased using it as his residence before

filing bankruptcy. The anti-modification protection was limited “to, at most, one year (and arguably was not entitled to anti-modification protection at all).” *In re Roemer*, 421 B.R. 23 (Bankr. D. D.C. 2009).

**Real property tax purchaser bound by plan’s interest rate.** Although the plan provided for an interest rate on property taxes less than would be required under § 511, the plan was not ambiguous and clearly provided the treatment of secured claims, and the plan provided for a Till formula rate, plus 1.5% risk factor. The creditor was bound by the plan’s interest rate, when the creditor did not object to confirmation. “The filing of a proof of claim which sets forth an interest rate that is different than that provided by the plan does not trump the rate set forth in the plan absent a timely-file objection to the plan.” The proof of claim was not treated as a constructive objection to confirmation. *In re McLemore*, 426 B.R. 728 (Bankr. S.D. Ohio 2010).

**Section 1325(b) does not apply to post-confirmation modification.** Citing and discussing authority on both sides of the issue, the bankruptcy court concluded that “the only relevant requirements for approval of a [debtor’s] motion to modify [a confirmed plan] are set out in § 1325(a),” and § 1325(b) does not apply. The trustee had objected to the debtor’s motion to modify to reduce monthly payments and reduce the plan term from 60 to 36 months. The debtor had lost income and separated from her husband, and the court found three reasons why § 1325(b) does not come into play: (1) § 1325(b)’s language provides it applies only when a party objects to confirmation, and there is only one confirmation—a modification is not a separate confirmation; (2) § 1329 includes § 1325(a) requirements in a post confirmation modification consideration, but it does not mention § 1325(b); and (3) there is no absurd result from not applying § 1325(b) to such modifications—here the court stressed that good faith remains a factor to protect from abusive modifications. *In re Davis*, 439 B.R. 863 (Bankr. N.D. Ill. 2010). Contrast *In re King*, 439 B.R. 129 (Bankr. S.D. Ill. 2010) (holding that § 1329(b) does apply to a post-confirmation modification).

**Mortgage securing property partially rental is subject to modification.** Reviewing reported authority, the court adopted the position that the date of the mortgage transaction controls for § 1322(b) (2) purposes. Here, the evidence established that at the time of the mortgage, the debtors lived on one portion of the property but rented the other portion (the two portions had different addresses). The property had never been solely the debtors’ principal residence within the meaning of § 1322(b) (2), having always included some income-producing rental property. During the closing process on the mortgage, the lender became aware of the two parcels and their different status, but the loan was closed. The debtors could modify the unprotected mortgage. *In re Moore*, 2010 WL 4791833 (Bankr. N.D. N.Y. Nov. 18, 2010) (slip opinion).

**Violation of due on sale clause, enforceable under state law, would be impermissible modification of mortgage.** Due on sale clauses in mortgages are enforceable under Texas law. To allow the debtor to retain property in violation of such a clause would be an impermissible mortgage modification, in violation of § 1322(b) (2). *In re Mullin*, 433 B.R. 1 (Bankr. S.D. Tex. 2010).

**Modified mortgage must be paid within plan term.** When the debtor proposed to modify a nonresidential mortgage, splitting the claim into secured and unsecured portions, and lowering the interest rate, under § 1322(d) the debtor must pay the modified mortgage in full within the 5-year plan life. A modified mortgage may not be reamortized over a longer term. *In re Russell*, 2010 WL 2671496 (Bankr. E.D. Va. June 30, 2010) (slip opinion).

**Stripping of prior wholly unsecured mortgage does not move third mortgage into secured position.** When the wholly unsecured second mortgage was stripped, that action did not move the third mortgage into a secured position, with the court holding that the wholly unsecured third mortgage was void under § 506(d) as a matter of law, since no value existed to support it. *In re Rosas*, 2010 WL 1610123 (Bankr. N.D. Cal. Apr. 20, 2010) (slip opinion).

**Stripping wholly unsecured junior mortgage requires adversary proceeding.** Acknowledging a split of authority, the court held that an adversary proceeding is required under Rule 7001(2) to avoid a wholly unsecured mortgage. The creditor may waive that requirement by failure to object to the debtor's avoidance motion, but in the face of objection, the debtor must file an adversary proceeding. *In re Ginther*, 427 B.R. 450 (Bankr. N.D. Ill. 2010).

**Local rule requires mortgage creditor to itemize postpetition charges.** Court's local rule 3002 requires mortgage creditor to provide itemized statement of unpaid postpetition charges within 28 days of the debtor's demand. Notwithstanding this rule putting burden on debtor, proposed plan provision requiring creditor to give annual notice of charges during pendency of case is confirmed, as not "too great a burden" for creditor. *In re Teran*, 2010 WL 1655892 (Bankr. E.D. Wis. Apr. 23, 2010) (slip opinion).

**Only allowed secured claims are protected by § 1325.** In *In re Frazier*, 2011 WL 96836 (Bankr. E.D. Cal. Jan. 10, 2011), Chapter 13 debtors in a "Chapter 20" case moved to value a creditor's secured claim and the creditor objected to confirmation of debtors' proposed plan. The Bankruptcy Court held that granting or denying of a Chapter 13 discharge is not a basis for the court to deny a motion to value creditor's secured claim. However, the value of the creditor's secured claim was \$0.00, precluding its assertion of rights under provision of plan confirmation statute addressing treatment of secured claims. The court concluded that the plan was proposed in good faith and could be confirmed.

**Homeowners' association's lien is subject to stripping.** If the value of property is not sufficient to support lien of homeowners' association, it is subject to being stripped, with the association treated as unsecured. If the association is secured, the debtor's plan proposal to surrender the property would satisfy the secured claim under § 1325(a) (5) (C). *In re Heflin*, 2010 WL 1417776 (Bankr. E.D. Va. Apr. 1, 2010) (slip opinion)

**Plan provisions do not violate § 1322(b) (2) or RESPA.** On appeal from plans containing terms that regulate duties of mortgage creditors in Chapter 13, the BAP held that it could not "ban" the local plan forms that had been approved by bankruptcy judges in the Central District of California. The plan terms requiring creditors to provide monthly statements, to give the debtors mortgage payment information upon reasonable written notice, to give the debtor, debtor's attorney and trustee notice of payment increases, did not violate § 1322(b) (2)'s anti-

modification. The plan terms did not violate RESPA requirements, nor did RESPA preempt the plan provisions. An appendix to the opinion contains the plan language at issue. *In re Herrera*, 422 B.R. 698 (BAP 9th Cir. 2010).

**Reverse mortgage is subject to curing under § 1322(c) (2).** Finding no distinction under the Code concerning reverse mortgages, the court held that a reverse mortgage on the debtor’s residence was capable of being cured under § 1322(c) (2), especially when the contract provided for reinstatement after default. *In re Boudreaux*, 2010 WL 724355 (Bankr. E.D. La. Feb. 24, 2010) (slip opinion).

**Section 1322(e) applied to undersecured creditor to allow fees and expenses.** An undersecured mortgage creditor is entitled to payment of its fees, expenses and escrow advances that are permitted under the note, mortgage and applicable nonbankruptcy law, with the Sixth Circuit applying the plain language of § 1322(e), which includes “notwithstanding. . .section 506(b).” *Deutsche Bank National Trust Co. v. Tucker*, 621 F.3d 460 (6th Cir. 2010).

**Mortgage provisions not appropriately included in plan.** In an analysis of eight paragraphs of mortgage provisions that the debtor proposed to include in a plan, the court found some inappropriate and some inconsistent with the Bankruptcy Code. Provisions that restate §§ 1322(b) (2) and (5) curing and hypothetically deeming the mortgage current are unnecessary, and if they do not accurately restate the Code, those provisions are inconsistent with the Code. Requiring the mortgage creditor to perform an annual escrow analysis was consistent with RESPA, but going beyond the creditor’s duties of RESPA is inappropriate - the debtor has available remedies under RESPA, adversary proceeding or contested matter if the debtor needs information from the creditor during the case. A provision suggesting that plan payment shortfalls would be suffered by non-mortgage creditors violates Code provisions for other secured and adequate protection creditors. Requiring the creditor to file notice with the court before making protective advances, such as for taxes and insurance, was inappropriate, if it resulted in taking away the secured creditor’s rights under the contract. Under Eleventh Circuit authority, a secured creditor is not required to file a proof of claim to preserve its security interest in property of the bankruptcy estate, and requiring the filing of an annual notice of postpetition fees and costs is tantamount to a proof of claim. A provision that a discharge is a determination that all pre- and postpetition defaults have been cured and that the mortgage is current is an improper expansion of the discharge resulting in Chapter 13—such declaratory relief would require an adversary proceeding. Allowing each debtor to formulate plan provisions for mortgage creditors would encourage non-uniformity. The court noted that proposed amended Bankruptcy Rule 3001 and new Rule 3002.1 address many of the concerns that this debtor expressed, and adoption of those Rules would foster uniformity in practice. The opinion quotes the debtor’s proposed eight provisions, as well as the “best practices” encouraged by the NACTT and other organizations. *In re Carlton*, 437 B.R. 412 (Bankr. N.D. Ala. 2010).

The text of amended Rule 3001(c) and new Rule 3002.1 is set forth in Appendices B and C to this paper and a chart summarizing their application appear at Appendix D.

## B. Other Chapter 11 Issues

**Does the “Absolute Priority Rule” survive The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) in individual chapter 11 cases?** As amended in 2005, § 1129 (b) (2) (B) allows confirmation notwithstanding the dissent of one or more impaired classes that have not accepted the plan if:

(B) (i) the plan provides that each holder of a claim of such class receive or retain on account of such junior claim or interest any property *except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115...* (Italics added).

Section 1115, in pertinent part states:

(a) In a case where the debtor is an individual, property of the estate includes, in addition to the property specified in section 541—

- (1) All property of the kind specified in section 541 that debtor acquires after the commencement of the case but before the case is closed, dismissed or converted to a case under chapter 7, 12 or 13, whichever occurs first; and
- (2) Earnings from service performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12 or 13, whichever occurs first...

The earliest cases decided that Congress intended to entirely abrogate the absolute priority rule in individual cases. *See, e.g., In re Shat*, 424 B.R.834 (Bankr. D. Nev. 2010); *In re Tegeder*, 369 B.R. 477 (Bankr. Neb. 2007); and *In re Roedemeier*, 374 B.R. 264 (Bankr. D. Kan. 2007). These cases held that § 1129 (b) (2) (B) no longer applies to individual cases after the BAPCPA amendment.

Later cases—with the exception of *In re Shat*—which, in number at least, make a majority of courts, hold that BAPCPA only modified, and did not fully abrogate, the absolute priority rule as it applies to individual chapter 11 debtors. *See, e.g. In re Gbadebo*, 431 B.R. 222 (Bankr. N.D. Cal. 2010; *In re Karolovich*, 2010 WL 5418872 (Bankr. S.D. Cal. 2010); *In re Mullins*, 43 B.R. 352 (Bankr. W.D. Va. 2010); and *In re Kamell*, 2011 WL 1760282 (Bankr. C.D. Cal. 2011).

**Secured creditor's right to credit bid may be trumped by cramdown.** Section 363 (b) of the Code allows a trustee (which includes a debtor-in-possession) to sell assets of a bankruptcy estate after a hearing. Although most asset sales during a bankruptcy case are held pursuant to § 363 (k) of the Code—which expressly allows credit bidding by secured creditors, unless the court for cause orders otherwise—a debtor can also sell its assets as part of a reorganization plan under § 1129 (b) (2) (A) of the Code. The Third Circuit has held that a secured creditor does not have a statutory right to credit bid its claim in an asset sale under a proposed plan of reorganization and that the secured creditor's right to credit bid may be trumped

by the cramdown provisions of section 1129 in confirming a liquidating plan. In *In re Philadelphia Newspapers, LLC*, 599 F.3d 298 (3d Cir. 2010), Chapter 11 debtors in possession moved for approval of bid procedures for an auction sale of the debtors' assets as part of a liquidating Chapter 11 plan. The Bankruptcy Court denied the motion but, on appeal, the District Court and the Court of Appeals held that section 1129(b) permitted the debtors to satisfy the lenders' liens against assets of the bankruptcy estate by conducting a sale of collateral free and clear of liens and providing secured lenders with “indubitable equivalent” of their secured claims, and the “indubitable equivalent” subsection unambiguously excluded lenders' right to credit bid at asset sale.

The debtor in the *Philadelphia Newspapers* Chapter 11 case was a limited liability company that owned and operated the *Philadelphia Inquirer* and *Philadelphia Daily News* and an online publication. The debtor did not need to rely on postpetition debtor-in-possession (“DIP”) financing through cash collateral orders because the investor group contributed cash to support the Debtor’s daily operations. This distinguishes *Philadelphia Newspapers* from the vast majority of Chapter 11 cases, in which the debtor must rely on DIP financing from the prepetition lenders to pay the post-filing operating costs. Therefore, this case will have a limited impact on bankruptcy sales. Also, the *Philadelphia Newspapers* decision has been both distinguished and disagreed with by other courts. See, e.g. *River Road Hotel Partners, LLC v. Amalgamated Bank (In re River Road Hotel Partners, LLC)*, \_\_\_ F.3d \_\_\_, 2011 WL 2547615 (7th Cir. 2011); *In re Givens*, 2010 WL 5092980 Bankr. D. Del. 2010) and *In re Mayslake Village-Plainfield Campus, Inc.*, 441 B.R. 309,323 (Bankr. N.D. Ill. 2010). The Seventh Circuit held that the debtor could not preclude credit bidding by using section 1129 (b) (2) (A) (iii)—which states simply that a plan is “fair and equitable” if it provides for the realization by the secured creditor of the “indubitable equivalent” of its claim—and that the debtor must comply with the specific provisions of section 1129 (b) (2) (A) (ii)—which states that a sale free and clear of liens must allow credit bidding as required by section 363 (k) of the Code.

**Cramdown Interest Rate.** Section 1129 (b) of the Code does not provide any guidance for calculating the cramdown interest rate required to be paid to confirm a plan of reorganization over a dissenting class of secured claims or unsecured claims. In 2005, the Sixth Circuit held that “the market rate should be applied in Chapter 11 cases where there exists an efficient market ... .” *Bank of Montreal v. Official Committee of Unsecured Creditors (In re American HomePatient, Inc.* 420 F.3d 559 (6<sup>th</sup> Cir. 2005). However, in that case the Court also held that where no efficient market exists for a Chapter 11 debtor, then the Bankruptcy Court should employ the formula approach endorsed by the plurality in *Till v. SCS Credit Corp.*, 541 U.S. 465, 124 S. Ct. 1951 (United States Sup. Ct 2004). The formula approach starts with the national “prime rate” which the bankruptcy court must then adjust upward to compensate for added risk factors such as circumstances of the estate, the nature of the security, and the duration and feasibility of the reorganization plan, plus addition factors such as the debt service coverage ratio, the loan-to-value ratio, and the quality of any guarantors. The “coerced loan” approach has been rejected by the Supreme Court in *Till*, and both *Till* and *American HomePatient* embrace the use of generally applicable interest rates rather than loan-specific interest rates, the United States Bankruptcy Appellate Panel for the Sixth Circuit has endorsed the following criteria for evaluating a proposed efficient market rate: the priority of the lien securing the loan; whether there exists an open well-developed market for loans of the kind between the debtor and the

secured creditor; the type of collateral involved; the quality, age and life expectancy of the collateral; short or long term nature of the proposed term of the loan; and the amount financed. *In re Brice Road Developments, L.L.C.*, 392 B.R. (BAP 6<sup>th</sup> Cir. 2008).

**Collection Injunctions.** Section 105 (a) of the Code allows a bankruptcy court to issue any order...necessary or appropriate to carry out the provisions of the Code. Debtors-in-Possession often will ask the Bankruptcy Court to impose a preliminary injunction under Section 105 of the Code to prevent the creditor from pursuing principals or investors in the debtor who have guaranteed the debt and have not filed their own separate bankruptcy cases. The standards for imposition of a preliminary injunction under section 105 (a) are set forth in *Solidus Networks, Inc. v. Excel Communications, Inc. (In re Excel Innovations, Inc.)*, 502 F.3d. 1086, 1094-95 (9<sup>th</sup> Cir. 2007). Those standards are; a strong likelihood of success on the merits—which in a bankruptcy case requires a showing that the debtor has a reasonable likelihood of a successful reorganization—to ensure that a stay under Section 105 is not imprudently granted; the possibility of irreparable injury to plaintiff if preliminary relief is not granted; a balance of hardships favoring the debtor; and advancement of the public interest (in certain cases). Bankruptcy courts issue Section 105 injunctions only in “unusual” circumstances where the failure to issue an injunction will have a substantial and adverse impact on the debtor’s continuing existence ; and the burden is on the debtor...to establish with persuasive evidence that the extraordinary remedy is warranted. *Harder v. Premierwest Bank, et al (In re Harder)* 413 B.R. 827 (Bankr. D. Oregon 2009) citing *Gathering Rest., Inc. v. First Nat’l Bank (In re Gathering Rest., Inc.* 79 B.R. 992, 999 (Bankr. N.D. Ind. 1986).

**Mootness doctrine applied to 363(h) sales of co-owner’ interests.** When the bankruptcy court permitted retirement home operators in Chapter 11 to sell, under § 363(h), the tenant-in-common interests (TICs) in seven entities that were co-owned with thirty nondebtors, the sale closed while an appeal was pending. When the basis for the sales is under § 362(b) or (c), the sale is subject to the mootness provision of § 363(m), and the Sixth Circuit held that the sales of the TICs were ultimately conducted under § 363(b), even though that subsection is not mentioned in § 363(h). *Official Committee of Unsecured Creditors v. Anderson Senior Living Property, LLC (In re Nashville Senior Living, LLC)*, 620 F.3d 584 (6th Cir. 2010).

## V. "Lender Liability" and Other Sources of Mortgage Lenders' Bankruptcy Exposure

### A. Lien Avoidance

**Upstream mortgages and guarantees challenged as fraudulent and preferential transfers.** In 2009, the Bankruptcy Court in the TOUSA homebuilder bankruptcy in the Southern District of Florida issued a fraudulent transfer opinion that received attention in both bankruptcy and lending circles. *Committee of Unsecured Creditors of Touse, Inc. v. Citicorp North America, Inc. (In re TOUSA, Inc.)*, 422 B.R. 783 (Bankr. S.D. Fla. 2009). The Court, finding that liens were fraudulent conveyances, not only avoided the "upstream" liens from subsidiaries to a parent company's secured lenders as fraudulent transfers, but also ordered the disgorgement of all funds received by senior lenders plus nine percent in prejudgment interest.

The bankruptcy judge was critical of the valuation experts' opinions, focusing especially on their (contingent) fees as well as other aspects of their testimony.<sup>11</sup> In a harsh reversal of the Bankruptcy Court's decision, the District Court held that a transaction in which subsidiaries encumbered all of their assets to secure a loan that enabled their parent company to pay its debt was not a fraudulent conveyance as to the parties paid with the loan proceeds. *3V Capital Master Fund Ltd. v. Committee (In re TOUSA, Inc.)*, 2011 WL 522008 (S.D. Fla. 2011). The District Court held that "reasonably equivalent value," as a part of the defense to the fraudulent transfer claim, could consist of indirect, intangible benefits (e.g., when the loan strengthens the corporate group as a whole).<sup>12</sup>

**Another attempt to avoid a security interest as a fraudulent transfer.** In *In re Propex, Inc.*, 415 B.R. 321 (Bankr. E.D. Tenn. 2009), a committee of unsecured creditors sought to avoid a loan amendment that allegedly imposed unrealistic covenants. The committee also asserted a claim for "deepening insolvency" and alleged that reperfecting of a security interest was a fraudulent conveyance and that the lender's security agreement did not extend to environmental permits. The bankruptcy court dismissed the fraudulent conveyance and deepening insolvency claims (holding that Tennessee would not recognize a claim for deepening insolvency), but held that the debtor had no underlying interest in the environmental permits to which the lender's security interest could attach.

## B. Subordination

**Subordination: Mortgage loan on luxury second-home project left the project "too thinly capitalized to survive" and was subordinated.** Another interesting set of facts suggesting that "lender liability" practice is back can be found in *Credit Suisse v. Committee (In re Yellowstone Mountain Club, LLC)*, 2009 WL 3094930 (Bankr. D. Mont. 2009). In that case, the Bankruptcy Court subordinated for purposes of distribution the claim of a secured creditor, under 11 U.S.C. § 510(c). The Bankruptcy Court analyzed the transaction's structure, especially looking at the fees charges, and found that the lender had offered owners of a luxury second-home development an opportunity to take profits up front by mortgaging the project "to the hilt" and would lend "the money on a non-recourse basis, earn a substantial fee, and sell off most of the credit to loan participants." The owners took most of the loan proceeds out of the development as a dividend, leaving the development "saddled with enormous debt" and bearing "all the risk of loss." According to the opinion, the creditor left the project "too thinly capitalized

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<sup>11</sup> The Bankruptcy Court also ruled in sweeping language that the "savings clauses" in the loan documents (which provide that the obligations and liens are deemed to be reduced to the extent necessary to prevent the insolvency of each obligor) were not effective to save the lenders. In the Court's view, such clauses violate various sections of the Bankruptcy Code, and "are, in short, entirely too cute to be enforced."

<sup>12</sup> The District Court also strongly disapproved of the Bankruptcy Judge's findings that were based on those submitted by a party and adopted "practically verbatim" by the trial court. The opinion cites 5th and 11th Cir. authority and quotes a Supreme Court opinion that says the practice has been "denounced." The Court used this as a basis for "relaxing" the "clearly erroneous" standard of review of the factual question of value.

to survive" and its "actions in the case were so far overreaching and self-serving that they shocked the conscience of the Court" and left the project "doomed to failure once [it] received their loans." The Court found that 94 percent of the loan proceeds of a \$375 million loan was utilized for purposes unrelated to the business of the borrower, and had gone directly to the principal for his personal use, and that the lender's due diligence efforts were virtually nonexistent. The Court subordinated the lender's first lien position to compensate the other creditors for the lender's overreaching and predatory lending practices.

### C. Sanctions

**Sanction for Rule 9011 violation reduced.** The First Circuit reduced the monetary sanction against Ameriquest from \$250,000 to \$5,000, when the sanction was for the mortgage servicer filing documents stating that it was the holder of the note, but it was not. Although the mortgage servicer had a history of questionable practices in bankruptcy, the incorrect filings were not intentional and provided no advantage to Ameriquest. The sanction was limited to actions occurring in the present case, rather than for a pattern in all cases. *Ameriquest Mortgage Co. v. Nosek (In re Nosek)*, 609 F.3d 6 (1st Cir. 2010).

**Creditor did not violate Rule 9011 by filing proof of claim without documentation.** In an unusual decision involving whether the appeal was moot, the Sixth Circuit approved a procedure used by B-Line's purchase of claims and filing its proof of claim without copies of original documents to support the debt. The bankruptcy court had threatened sanctions but did not impose any, with the BAP holding that the appeal was moot since no monetary sanctions were imposed. The majority of the Circuit panel held that the appeal was not moot and then held that B-Line acted reasonably when it relied on the warranties of the selling creditor that the debt was supported by legal and valid obligation of the debtor, and B-Line would not be subject to Rule 9011(b) sanctions for its proof of claim practice. *B-Line, LLC v. Wingeter (In re Wingeter)*, 594 F.3d 931 (6th Cir. 2010).

**Fraud on Court: Motion for stay relief, based on defective affidavit of default, led to sanctions awarded against attorney and liability for sanctions against servicer.** On the U.S. trustee's motion for sanctions against Option One Mortgage, Fidelity National Foreclosure Services, known as Lender Processing Services (LPS) and the attorney for the creditor, the Bankruptcy Court for the Eastern District of Louisiana found that a motion for stay relief filed by Option One had been based on a defective affidavit of default and concluded that it was a fraud on the court, with sanctions awarded against the attorney and liability for sanctions determined as to LPS, with an evidentiary hearing to be held on specific sanctions. *In re Wilson*, 2011 WL 1337240 (Bankr. E.D. La., April 7, 2011) (slip copy). The opinion sets forth in detail the history of this case and several others involving the same servicer, constituting the pieces of "the puzzle of loan administration" and leading to Bankruptcy Judge Magner's decision to impose sanctions.

**Fraud on court discussed.** Examining prior authorities for factors to find fraud on the court, the bankruptcy court found that a cause of action was stated when the debtor's complaint alleged that the mortgage creditor had a practice of filing false affidavits in support of stay relief motions, and that such a practice, if proven, would be fraud on the court. Among the relevant factors for such a cause of action were "(1) large numbers of motions for relief from the

automatic stay are filed; (2) there is only a short period of time to dispose of these motions; (3) there is a huge economic disparity between the resources available to the parties; (4) the subject matter is critical to the debtor's survival; (5) these matters are only rarely litigated to a final order after a hearing on evidence." *In re Woodruff*, 2010 WL 386209 (Bankr. M.D. Ala. Jan. 27, 2010) (slip opinion).

**Remedies for violation of Rule 9037.** Bankruptcy Rule 9037 requires redacted filings when the filing contains an individual's social security number, taxpayer identification number or birth date and certain other private information. FRBP 9037 (a). One court held that the proper remedy for the creditor's violation of Rule 9037 was striking the proof of claim and prohibiting access to it, while allowing the creditor to file an amended proof of claim that complied with the Rule's prohibition against personal identifying information. Code § 502(b) does not include violation of Rule 9037 as grounds for disallowance. *In re Chubb*, 426 B.R. 695, 2010 WL 931863 (Bankr. E.D. Mich. 2010). Another court found that debtors stated a cause of action for violation of the tort of invasion of privacy under Mississippi's common law in an adversary proceeding about the creditor's violation of Rule 9037, and whether or not the debtors have a private right of action under that Rule, the court may use § 105(a) to remedy the violation. *In re McKenzie*, 2010 WL 917262 (Bankr. S.D. Miss. Mar. 10, 2010) (slip opinion).

**Debtor failed to establish harm to support violation of Rule 9037.** The debtor must demonstrate standing to pursue an adversary proceeding alleging that a creditor filed its proof of claim containing personal identifier information in violation of Rule 9037, but the debtor did not plead any harm. The debtor had not had personal information accessed by a third party and his identity had not been stolen. Pleading the creditor's disrespect for the court's orders and Bankruptcy Rules did not give the debtor standing. Neither § 105(a) nor Gramm-Leach-Bliley Act grants a private right of action for violation of Rule 9037. *Davis v. Eagle Legacy Credit Union (In re Davis)*, 430 B.R. 902 (Bankr. D. Colo. 2010).

**Creditor's failure to update proof of claim required reference to U.S. Attorney.** Rejecting the argument that Rule 9011 does not apply to a proof of claim, the bankruptcy court held that a mortgage creditor's continued advocacy of an erroneous claim to the detriment of other creditors, and the creditor's failure to timely amend the claim, required reference to the United States Attorney to determine if there was a violation of 18 U.S.C. § 152(4)—“a person who knowingly and fraudulently presents any false claim for proof against the estate of a debtor, or uses any such claim in any case under title 11, in a personal capacity or as or through an agent, proxy or attorney... shall be fined under this title, imprisoned not more than 5 years, or both.”, and the court *sua sponte* initiated a hearing as to whether the creditor should be sanctioned under Rule 9011(c)(1)(B). *Hannon v. Countrywide Home Loans, Inc. (In re Hannon)*, 2009 WL 5103305 (Bankr. M.D. Pa. Dec. 18, 2009) (slip opinion).

## **D. Class Actions**

**Fifth Circuit deals blow to class actions.** Taking a direct appeal from the bankruptcy court, the Fifth Circuit vacated class action certification in Chapter 13 cases where debtors had sued Wells Fargo for charging and/or collecting unauthorized and unreasonable postpetition fees and costs. The disputed charges included attorney fees, recording fees, notification fees, title

fees, document fees and property inspection fees. The bankruptcy court certified a class only for the Southern District of Texas, but the Fifth Circuit held that, although the bankruptcy court had jurisdiction to certify a class action, the certification did not satisfy Rule 23(b)(3)'s predominance and superiority requirements nor Rule 23(b)(2)'s injunctive or declaratory standards. "Plaintiff's claims here fail under the predominance and superiority inquiries because individual issues for each class member, particularly with respect to damages, override class concerns when we consider how the case must be tried." The court noted that there was disagreement among bankruptcy courts on the "scope of the requirement under § 506(b) and Rule 2016 for lenders to obtain court approval before assessing contractually allowed fees." The circumstances of fees charged by Wells Fargo vary from debtor to debtor, requiring "an individual assessment of the claims. . . .The differing circumstances of the debtors render the reasonableness of the individual charges a fact-specific inquiry rather than a class-oriented decision. . . .Finally, the rulings of different bankruptcy judges during their cases may affect the computation of allowable charges by Wells Fargo." *Wilborn v. Wells Fargo Bank, N.A. (In re Wilborn)*, 609 F.3d 748 (5th Cir. 2010).

**Class certified for injunctive relief only.** Applying *Wilborn v. Wells Fargo Bank, N.A. (In re Wilborn)*, 609 F.3d 748 (5th Cir. 2010), class was not certified for damage issues, under Fed. R. Civ. P. 23(b) (3), when "individualized issues begin to predominate as the Court must consider the harm suffered by each class member on a case-by-case basis," but the class was certified under Fed. R. Civ. P. 23(b) (2) for injunctive relief. Issue involved Countrywide Home Loans' fee collection practices in bankruptcy cases. *Rodriguez v. Countrywide Home Loans, Inc. (In re Rodriguez)*, 432 B.R. 671 (Bankr. S.D. Tex. 2010).

**Class action certification denied for lack of typicality and lack of adequacy of representation.** Class certification in a proceeding involving non-disclosure of postpetition fees and expenses by a mortgage creditor was denied, with the court finding that the typicality requirement of Rule 23(a)(3) was not satisfied, and debtors' counsel failed to prove adequacy of counsel; while prior class experience of the attorney was argued, there was no evidence to support it. Moreover, the particular debtors did not establish adequacy as class representatives. There was also expert testimony in the hearing concerning lack of uniformity in procedures concerning disclosure of postpetition fees and expenses. *Sandlin v. Ameriquest Mortgage Co., Inc. (In re Sandlin)*, 2010 WL 4260030 (Bankr. N.D. Ala. Oct. 21, 2010) (slip opinion).

**The Eleventh Circuit avoids the issue.** In *Jacks v. Wells Fargo Bank, N.A. (In re Jacks)*, \_\_\_ F.3d \_\_\_, 2011 WL 2183979 (11th Cir., June 7, 2011), Chapter 13 debtors brought purported class action against a mortgage lender, alleging that it violated various provisions of the Bankruptcy Code and rules by failing to disclose bankruptcy-related fees on its proof of claim. On appeal from the Bankruptcy Court's summary judgment in favor of the lender, the Court of Appeals held that a lender's mere recordation of fees on its internal records was not an "act" (to obtain possession of property of the estate, to create, perfect, or enforce against property of the debtor any lien, to collect, assess, or recover a claim against the debtor that arose prepetition) in violation of section 362(a)(3), (5) or (6). Neither section 506(b) (addressing determination of secured status), nor Rule 2016 (governing applications for compensation or reimbursement), is violated when a creditor merely records costs it has incurred in association with a debtor's bankruptcy for internal bookkeeping purposes and makes no attempt to collect the

fees or otherwise add them to the balance due on the debtor's mortgage. The lender's failure to include the subject fees on the proof of claim did not provide a valid basis for an objection. To the extent that the debtors' claims were based on events that might take place in the future, such claims were not ripe for adjudication.

## **Appendix A**

### **Supervisory Insights Special Foreclosure Edition**

#### **Federal Deposit Insurance Corporation Division of Risk Management Supervision**

**May, 2011**

This Special Foreclosure Edition describes lessons learned from an interagency review of foreclosure practices at the 14 largest residential mortgage servicers and includes examples of effective mortgage servicing practices derived from these lessons.

### **Regulatory Actions Related to Foreclosure Activities by Large Servicers and Practical Implications for Community Banks**

#### **Introduction**

Residential mortgage foreclosure starts have increased dramatically since 2006 and are expected to continue at a brisk pace through 2011 and beyond. Most federally insured depository institutions that owned or serviced residential real estate loans during this time have been affected by this dramatic increase, but the delinquency rates on loans originated by community banks have been far lower than at the nation's largest institutions. In fact, the top fourteen servicers were responsible for processing the vast majority of foreclosures. Servicing problems also have been more common at large institutions. The volume of foreclosures and the failure to properly manage the servicing process led to numerous unsafe or unsound practices and resulted in a self-imposed moratorium on foreclosures by some of the largest servicers in the fall of 2010.

In response, in fourth quarter 2010, the federal banking agencies commenced simultaneous (or "horizontal") reviews of the foreclosure practices at these top fourteen servicers. The reviews were conducted for each of these servicers by its primary federal regulator with full and active assistance of the Federal Deposit Insurance Corporation (FDIC) in its statutory role as "back-up" regulator. In addition, the agencies jointly conducted examinations of two thirdparty service providers.

All fourteen servicers and both service providers recently entered into Consent Orders designed to remedy the numerous matters requiring attention, including unsafe or unsound practices identified during the examinations. These concerns included lax foreclosure documentation, ineffective controls over foreclosure procedures, and deficient loss mitigation procedures and controls. Many institutions failed to commit resources sufficient to manage responsibly the rapidly growing volume of mortgage loans in default or at risk of default. Weak governance and controls increased legal, reputational, operational, and financial risks while creating unnecessary confusion for borrowers.

Community banks fared far better than larger institutions in terms of delinquency rates on residential mortgage loans and have undertaken far fewer foreclosures. Nevertheless, community banks should be aware of the lessons learned from the horizontal review when assessing their servicing practices.

## Findings from Interagency Horizontal Review of Top Fourteen Servicers

The servicers examined were:

- Eight national banks regulated by the Office of the Comptroller of the Currency (Bank of America, Citibank, HSBC, JPMorgan Chase, MetLife, PNC, US Bank, and Wells Fargo);
- Two institutions regulated by the Board of Governors of the Federal Reserve System (GMAC Mortgage, LLC, an affiliate of FDIC-regulated Ally Bank, and SunTrust); and
- Four thrifts regulated by the Office of Thrift Supervision (Aurora Bank, OneWest Bank, Sovereign Bank, and EverBank).

The federal banking agencies, including the FDIC in its role as back-up regulator for all insured depository institutions, reviewed servicing and foreclosure processes to determine their impact on the banking industry and consumers.

To ensure consistency with the scope of the review, the examiners from the participating federal banking agencies followed a standardized work program that covered the following areas: policies and procedures, organizational structure and staffing, management of third-party service providers, quality control and internal audits, compliance with applicable laws, loss mitigation, critical document control, and risk management. Servicer employees involved in the foreclosure process were interviewed, and approximately 2,800 foreclosure files, involving both judicial and nonjudicial foreclosure jurisdictions, were reviewed.

The reviews led to the identification of significant weaknesses, as described by the primary federal regulators of these institutions in the *Interagency Review of Foreclosure Policies and Practices*:

**Foreclosure process governance.** Foreclosure governance processes of the servicers were underdeveloped and insufficient to manage and control operational, compliance, legal, and reputational risk associated with an increasing volume of foreclosures. Weaknesses included:

- inadequate policies, procedures, and independent control infrastructure covering all aspects of the foreclosure process;
- inadequate monitoring and controls to oversee foreclosure activities conducted on behalf of servicers by external law firms or other thirdparty vendors;

- lack of sufficient audit trails to show how information set out in the affidavits (amount of indebtedness, fees, penalties, etc.) was linked to the servicers' internal records at the time the affidavits were executed;
- inadequate quality control and audit reviews to ensure compliance with legal requirements, policies and procedures, as well as the maintenance of sound operating environments; and
- inadequate identification of financial, reputational, and legal risks, and absence of internal communication about those risks among boards of directors and senior management.

**Organizational structure and availability of staffing.** Examiners found inadequate organization and staffing of foreclosure units to address the increased volumes of foreclosures.

**Affidavit and notarization practices.** Individuals who signed foreclosure affidavits often did not personally check the documents for accuracy or possess the level of knowledge of the information they attested to in those affidavits. In addition, some foreclosure documents indicated they were executed under oath, when no oath was administered. Examiners also found that the majority of the servicers had improper notary practices which failed to conform to state legal requirements. These determinations were based primarily on servicers' selfassessments of their foreclosure processes and examiners' interviews of servicer staff involved in the preparation of foreclosure documents.

**Documentation practices.** Examiners found some — but not widespread — errors between actual fees charged and what the servicers' internal records indicated, with servicers undercharging fees as frequently as overcharging them. The dollar amount of overcharged fees compared with the servicers' internal records was generally small.

**Third-party vendor management.** Examiners generally found adequate evidence of physical control and possession of original notes and mortgages. Examiners also found, with limited exceptions, that notes appeared to be properly endorsed and mortgages and deeds of trust appeared properly assigned. The review did find, in some cases, that the third-party law firms hired by the servicers were nonetheless filing mortgage foreclosure complaints or lostnote affidavits even though proper documentation existed.

**Quality control and audit.** Examiners found weaknesses in quality control and internal auditing procedures at all servicers included in the review.<sup>13</sup>

These inadequate management practices led, in turn, to widespread unsafe or unsound operational practices, including missing documents, execution of documents by unauthorized persons, failure to notarize documents in accordance with local law, inaccurate affidavits, and

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<sup>13</sup> Interagency Review of Foreclosure Policies and Practices, Federal Reserve System, Office of the Comptroller of the Currency, and Office of Thrift Supervision, pages 3-4.

affidavits signed by persons lacking sufficient knowledge of the underlying mortgage loan transaction. Consent Orders were issued to all fourteen servicers by their primary regulators.

The interagency horizontal review and resulting Consent Orders did not encompass issues beyond the foreclosure process. As a result, the review did not review allegations of improper servicing or loss mitigation, such as misapplied payments, unreasonable fees, inappropriate force-placing of insurance, failure to consider adequately a borrower for a loan modification, or requiring a borrower to be delinquent to qualify for a loan modification.<sup>14</sup> The Orders require the servicers to undertake a comprehensive third-party review of risk in servicing operations and reimburse borrowers injured by servicer errors. Furthermore, investigations by state and federal law enforcement agencies related to these allegations are ongoing.

### **Findings from Interagency Examinations of the Third-Party Service Providers**

The federal banking agencies additionally examined the Mortgage Electronic Registration Systems, Inc. (“MERS”) (as well as its parent company MERSCORP, Inc.) (together, the “MERS Entities”), and Lender Processing Services, Inc. (“LPS”). MERS acts as the nominee of original lenders on mortgages and the lenders’ successors, and MERSCORP tracks electronically which institution owns residential loans and which institution owns the servicing rights. LPS provides a variety of services, including foreclosure document services, to foreclosing servicers.

The review at both service providers led to the execution of Consent Orders based on their engaging in unsafe or unsound practices that exposed the member institutions to unacceptable operational, compliance, legal, and reputational risks. The MERS Entities failed to devote adequate financial, staffing, training, and legal resources to ensure proper administration and delivery of services to MERSCORP’s members and failed to establish and maintain adequate internal controls, policies and procedures, compliance risk management, and internal audit and reporting requirements with respect to the administration and delivery of services to member institutions. Similarly, LPS failed to establish and maintain adequate internal controls, policies and procedures, compliance risk management, and internal audit and reporting requirements. In addition, LPS executed and recorded numerous affidavits, assignments of mortgages, and other mortgage-related documents that contained inaccurate information or were not properly notarized or based on personal knowledge.

### **Findings from FDIC Examinations of State Nonmember Banks**

In its role as the primary federal regulator of a large number of state nonmember banks, which collectively service less than four percent of residential mortgages, the FDIC has been reviewing and conducting targeted exams to determine whether any of these institutions have engaged in the types of practices identified at the major servicers. To date, the review has not

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<sup>14</sup> Ibid. See also “Problems in Mortgage Servicing from Modification to Foreclosure,” November 16, 2010 hearing at the U.S. Senate Committee on Banking, Housing, and Urban Affairs.

identified “robo-signing” or any other deficiencies that would warrant formal enforcement actions. The FDIC will continue to monitor these servicers, as well as the performance of institutions servicing loans through FDIC securitizations or resolution programs.

## **Best Practices for State Nonmember Banks**

Though the FDIC has not identified serious industry wide problems among state nonmember banks, the wellpublicized problems of large servicers, combined with growing litigation over “robo-signing” and other processing deficiencies have created heightened public and judicial scrutiny of servicing and foreclosure practices. This context indicates that community banks should promptly review their servicing practices to guard against intensifying reputation and legal risk in the servicing of residential mortgages.<sup>15</sup>

## **Loss Mitigation Activities and Communication Efforts**

As we have stated in previous guidance, institutions should avoid unnecessary foreclosures and consider mortgage loan modifications or other workout strategies that are affordable and sustainable.<sup>16</sup> When a borrower is at risk of default, early and frequent customer contact may increase the likelihood of successful foreclosure mitigation. Loan modifications should be pursued when the borrower’s ability to make modified payments is reasonably assured and the net present value of those payments exceed the expected recovery that would result from a foreclosure. For larger banks where multiple divisions may be involved in handling the loan, a single point of contact should be named to manage the bank’s relationship and communications with the borrower. This single point of contact should be referenced on all communications to borrowers related to collections, loss mitigation, or foreclosure.

## **Staffing and Training**

Staff assigned to collections, loss mitigation, collateral management, and foreclosure activity should be sufficient to ensure compliance with state and federal laws, regulations, policies, and servicing guidelines. Front-line employees working with borrowers, especially

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<sup>15</sup> Guidance previously issued by the FDIC also provides useful information. Part 365, Appendix A of the FDIC Rules and Regulations, Interagency Guidelines for Real Estate Lending Policies, may be found at <http://www.fdic.gov/regulations/laws/rules/2000-8700.html#fdic2000appendixatopart365>. FDIC rules also require institutions to identify problem assets and prevent further deterioration in those assets. Appendix A to Part 364 <http://www.fdic.gov/regulations/laws/rules/2000-8630.html#fdic2000appendixatopart364>; FIL-62-2008 <http://www.fdic.gov/news/news/financial/2008/fil08062.html>. Management of vendor relationships should reflect consideration of the guidance issued through FIL-44-2008, Guidance for Managing Third-Party Risk <http://www.fdic.gov/news/news/financial/2008/fil08044.html>.

<sup>16</sup> FIL-35-2007, Working With Residential Borrowers: FDIC Encourages Institutions to Consider Workout Arrangements for Borrowers Unable to Make Mortgage Payments, <http://www.fdic.gov/news/news/financial/2007/fil07035.html>; FIL-76-2007, Servicing for Mortgage Loans: Loss Mitigation Strategies <http://www.fdic.gov/news/news/financial/2007/fil07076.html>.

those who are candidates for modification, should receive sufficient training to ensure communications with borrowers are accurate and consistent. In particular, banks participating in the Home Affordable Modification Program (HAMP) should maintain systems, processes, and training to ensure adherence to program guidelines and directives.

### **Administration of Third-Party Relationships**

Many community bank servicers engage in third-party relationships with data processing and other service providers to carry out their mortgage lending activities. These institutions should maintain adequate oversight of third-party activities and adequate quality control over those products and services provided through thirdparty arrangements to minimize the exposure to potential significant financial loss, reputation damage, and supervisory action. The FDIC evaluates activities conducted through third-party relationships as though the activities were performed by the institution itself. Institutions should conduct meaningful due diligence before engaging vendors rather than relying exclusively on lists of vendors approved by government-sponsored entities. It is incumbent upon financial institutions to analyze the ability of subservicers to fulfill their contractual obligations, and manage the risks associated with obtaining services from, or outsourcing processing to, subservicers. For instance, banks should make sure that third- party software programs allocate payments in compliance with legal and contractual requirements. In addition, if banks use third-party law firms to conduct their foreclosures, they should always retain copies of foreclosure documentation and monitor third-party management of the foreclosure process as described below.

### **Compliance with Servicemembers Civil Relief Act**

Financial institutions' quality control and other programs must ensure full compliance with all laws and regulations related to mortgage foreclosures. In particular, it is essential for institutions, including mortgage servicers and third-party vendors, to have systems and controls in place to identify borrowers protected by the Servicemembers Civil Relief Act ("SCRA") to preclude overcharging or improper foreclosure.<sup>17</sup> Written confirmation of SCRA status checks with the Department of Defense should be obtained before initiating a foreclosure action.<sup>18</sup> Borrowers denied SCRA protection should be able to request an independent review of the decision.

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<sup>17</sup> SCRA extends rights and safeguards to military personnel, including a six percent reduced interest rate for mortgages and deeds of trust that continues throughout the term of military service and for an additional year thereafter; and stays judicial procedures, such as foreclosures, during military service and for nine months thereafter. The nine-month stay is slated to expire on December 31, 2012; after that date, the stay period is to revert to the SCRA's original ninety days.

<sup>18</sup> To obtain certificates of service or non-service under SCRA, institutions may access this Web site: <https://www.dmdc.osd.mil/appj/scra/scraHome.do>.

## Foreclosure Practices

Foreclosures of defaulted loans should be consistent with all applicable laws and follow best practices, including the following items:<sup>19</sup>

- Foreclosures should be brought in the name of the holder of the note or the party entitled to enforce the note.
- A foreclosing entity should have possession of the original note and either a recorded mortgage or a recorded valid assignment of the mortgage before initiating the foreclosure process.
- Lost-note affidavits should be used only after a good faith effort to locate the note, should attach a copy of the note, and should comply with Uniform Commercial Code § 3-309.
- The attestations in a foreclosure affidavit should comply with applicable local substantive, evidentiary, and procedural law and should contain: (a) facts explaining the basis for the personal knowledge of the affiant (e.g., job title, job position, job duties, how an affiant became familiar with the facts in the affidavit, etc.); and (b) assurances the affiant has reviewed supporting documents and records to ensure all necessary and proper documents for foreclosure in that jurisdiction are included.
- A complaint and foreclosure affidavit should address the following subjects: (a) the specific amount due under the note, including an itemization of all fees and penalties; (b) the payment history sufficient to demonstrate servicing of the loan (a best practice would be to provide the complete payment history whenever available); (c) a description of the applicable quality control procedures governing the foreclosure process that are operative and effective as of the date the loan became more than 30-days delinquent; and (d) where applicable, the authorization under which the mortgage is validly assigned to the foreclosing note-holder. Documents that support the statements in an affidavit should be attached as exhibits.
- To the extent an institution has a practice of paying law firms, servicers, and employees bonus incentives to process high volumes of foreclosures, the practice should be discontinued.

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<sup>19</sup> Most of these practices are applicable directly to foreclosures in the twenty-three judicial foreclosure states. In non-judicial foreclosure jurisdictions, these practices should be followed to the extent applicable and in the event the borrower seeks judicial intervention.

## Appendix B

### Amendment to Rule 3001(c) (Effective December 1, 2011)

(c) SUPPORTING INFORMATION.

(1) *Claim Based on Writing.* When a claim, or an interest in property of the debtor securing the claim, is based on a writing, the original or a duplicate shall be filed with the proof of claim. If the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim.

(2) *Additional Requirements in an Individual Debtor Case; Sanctions for Failure to Comply.* In a case in which the debtor is an individual:

(A) If, in addition to its principal amount, a claim includes interest, fees, expenses, or other charges incurred before the petition was filed, an itemized statement of the interest, fees, expenses, or charges shall be filed with the proof of claim.

(B) If a security interest is claimed in the debtor's property, a statement of the amount necessary to cure any default as of the date of the petition shall be filed with the proof of claim.

(C) If a security interest is claimed in property that is the debtor's principal residence, the attachment prescribed by the appropriate Official Form shall be filed with the proof of claim. If an escrow account has been established in connection with the claim, an escrow account statement prepared as of the date the petition was filed and in a form consistent with applicable nonbankruptcy law shall be filed with the attachment to the proof of claim.

(D) If the holder of a claim fails to provide any information required by this subdivision (c), the court may, after notice and hearing, take either of both of the following actions:

(i) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless.

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

## Appendix C

### New Rule 3002.1 (Effective December 1, 2011)

#### RULE 3002.1. NOTICE RELATING TO CLAIMS SECURED BY SECURITY INTEREST IN THE DEBTOR'S PRINCIPAL RESIDENCE

(a) **IN GENERAL:** This Rule applies in a chapter 13 case to claims that are (1) secured by a security interest in the debtor's principal residence, and (2) provided for under § 1322(b)(5) of the Code in the debtor's plan.

(b) **NOTICE OF PAYMENT CHANGES.** The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice of any change in the payment amount, including any change that results from an interest rate or escrow account adjustment, no later than 21 days before a payment in the new amount is due.

(c) **NOTICE OF FEES, EXPENSES, AND CHARGES.** The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice itemizing all fees, expenses, or charges (1) that were incurred in connection with the claim after the bankruptcy case was filed, and (2) that the holder asserts are recoverable against the debtor or against the debtor's principal residence. The notice shall be served within 180 days after the date on which the fees, expenses or charges are incurred.

(d) **FORM AND CONTENT.** A notice filed and served under subdivision (b) or (c) of this rule shall be prepared as prescribed by the appropriate Official Form, and filed as a supplement to the holder's proof of claim. The notice is not subject to Rule 3001(f).

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

(f) **NOTICE OF FINAL CURE PAYMENT.** Within 30 days after the debtor completes all payments under the plan, the trustee shall file and serve on the holder of the claim, the debtor, and debtor's counsel a notice stating that the debtor has paid in full the amount required to cure any default on the claim. The notice shall also inform the holder of its obligation to file and serve a response under subdivision (g). If the debtor contends that final cure payment has been made and all plan payments have been completed, and the trustee does not timely file and serve the notice required by this subdivision, the debtor may file and serve the notice.

(g) **RESPONSE TO NOTICE OF FINAL CURE PAYMENT.** Within 21 days after service of the notice under subdivision (f) of this rule, the holder shall file and serve on the debtor, debtor's counsel, and the trustee a statement indicating (1) whether it agrees that the debtor has paid in full the amount required to cure the default on the claim, and (2) whether the

debtor is otherwise current on all payments consistent with § 1322(b) (5) of the Code. The statement shall itemize the required cure or postpetition amounts, if any, that the holder contends remain unpaid as of the date of the statement. The statement shall be filed as a supplement to the holder's proof of claim and is not subject to Rule 3001(f).

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

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

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

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

**Appendix D**

**Chart Summarizing Amendment to Rule 3001(c) and New Rule 3002.1  
(Effective December 1, 2011)**

The table below summarizes the new rules contained in amended Rule 3001 and new Rule 3002.1. The text of the rules appears in Appendices B and C.

**Summary of Amended Rule 3001(c) and New Rule 3002.1**

<b>Applicable to Claims/Chapters:</b>	<b>Requirements:</b>			<b>Penalties for failure:</b>
	<b>What?</b>	<b>When?</b>	<b>Citation</b>	
<b>All Claims, All Chapters if Claim, or Interest in Property of Debtor Securing Claim, is Based on Writing</b>	Original or duplicate. If writing lost or destroyed, statement of circumstances of loss or destruction	Filed with claim	3001(c)(1)	Court may, after notice and hearing, take either or both of following actions: (i) preclude holder from presenting omitted information, in any form, as evidence in any contested matter or adversary proceeding in case, unless court determines that failure was substantially justified or is harmless (ii) award other appropriate relief, including reasonable expenses and attorney's fees caused by failure: 3001(c)(2)(D)
<b>Individual Cases (Chapter 7, 11, 12 or 13) and ...</b>				
<i>... claim includes interest, fees, expenses or other prepetition charges</i>	Itemized statement of interest, fees, expenses, or charges		3001(c)(2)(A)	
<i>... security interest is claimed in debtor's property</i>	Statement of amount necessary to cure any default as of petition date		3001(c)(2)(B)	
<i>... security interest is claimed in debtor's principal residence</i>	Attachment prescribed by Official Form		3001(c)(2)(C)	
<i>... escrow account has been established in connection with claim</i>	Escrow account statement prepared as of petition date and in form consistent with applicable nonbankruptcy law			

<p><b>Only Chapter 13 and Only Claims: Secured by Principal Residence and Provided for under §1322(b)(5) in Debtor's Plan</b></p>	<p>Holder of claim shall file and serve on debtor, debtor's counsel, and trustee notice of any change in payment amount, including any change that results from interest rate or escrow account adjustment</p>	<p>Filed no later than 21 days before payment in new amount is due</p>	<p>3002.1(b)</p>	<p>Same penalties: 3002.1(i)</p>
	<p>Holder of claim shall file and serve on debtor, debtor's counsel, and trustee notice itemizing all postpetition fees, expenses, or charges that holder asserts are recoverable against debtor or against debtor's principal residence</p>	<p>Served within 180 days after date on which fees, expenses or charges are incurred</p>	<p>3002.1(c)</p>	
	<p>Notice filed and served under 3002.1(b) or (c) shall be prepared as prescribed by Official Form, and filed as supplement to holder's proof of claim</p>		<p>3002.1(d) Notice is not subject to 3001(f)</p>	<p>No penalty specified</p>
	<p>On motion of debtor or trustee , court shall, after notice and hearing, determine whether payment of any claimed fee, expense, or charge is required by underlying agreement and applicable nonbankruptcy law to cure default or maintain payments in accordance with §1322(b)(5)</p>	<p>Filed within one year after service of notice under 3002.1(c)</p>	<p>3002.1(e)</p>	

	<p>Trustee shall file and serve on holder of claim, debtor, and debtor's counsel: notice stating that debtor has paid in full amount required to cure any default on claim. Notice shall also inform holder of its obligation to file and serve response under 3002.1(g).</p>	<p>Filed and served within 30 days after debtor completes all payments under plan</p>	<p>3002.1(f)</p>	
	<p>If debtor contends that final cure payment has been made and all plan payments have been completed, and trustee does not timely file and serve notice required by 3002.1(f), debtor may file and serve notice</p>	<p>No new deadline after trustee's failure</p>		
	<p>Holder shall file and serve statement on debtor, debtor's counsel, and trustee indicating (1) whether it agrees that debtor has paid full amount required to cure default on claim, and (2) whether debtor is otherwise current on all payments consistent with §1322(b)(5). Statement shall itemize required cure or postpetition</p>	<p>Filed and served within 21 days after service of notice under 3002.1(f)</p>	<p>3002.1(g); Statement is not subject to 3001(f)</p>	<p>Same penalties: 3002.1(i)</p>

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	amounts, if any, that holder contends remain unpaid as of date of statement. Statement shall be filed as supplement to holder's proof of claim			
	On motion of debtor or trustee, court shall, after notice and hearing, determine whether debtor has cured default and paid all required postpetition amounts	Filed within 21 days after service of statement under 3002.1(g)	3002.1(h)	No penalty specified

**TO BE PUBLISHED IN UPCOMING ABI JOURNAL**

**\$25 BILLION MORTGAGE SERVICER SETTLEMENT –  
IMPLICATIONS FOR THE UNITED STATES TRUSTEE PROGRAM  
AND THE BANKRUPTCY SYSTEM**

*Written by:*

*Clifford J. White III, Director, and  
Ramona D. Elliott, Deputy Director/General Counsel  
Executive Office for United States Trustees*

On February 9, 2012, the Attorney General announced that the federal government and 49 state attorneys general had reached a settlement agreement with the nation’s five largest mortgage servicers – Bank of America Corporation, JP Morgan Chase & Co., Wells Fargo & Company, Citigroup Inc., and Ally Financial Inc. (formerly GMAC)(collectively, “the servicers”) – to address mortgage servicing, foreclosure, and bankruptcy abuses. In the agreement, the United States Trustee Program (“USTP” or “Program”) settled claims for the servicers’ violations of bankruptcy requirements that protect debtors and ensure the integrity of the bankruptcy process. Under the settlement, the servicers will pay \$25 billion in penalties and assistance to homeowners; adhere to a uniform and comprehensive set of mortgage servicing standards, including provisions specific to bankruptcy; and subject themselves to three and a half years of compliance review by an independent monitor.

The comprehensive settlement reflects unprecedented cooperation among federal and state enforcement and regulatory agencies, and represents a critical step forward in addressing the problems that have plagued the mortgage servicing industry. In his announcement of the settlement, Attorney General Holder praised the work of Associate Attorney General Thomas Perrelli who led the negotiations and also singled out the USTP, stating

In particular, I want to recognize the outstanding work of the Justice Department’s United States Trustees Program, and our United States Attorneys’ Offices.

The U.S. Trustees Program, which serves as the watchdog of all bankruptcy court operations, was one of the first federal agencies to investigate mortgage servicer abuse of homeowners in financial distress. As part of their investigation, Trustees reviewed more than 37,000 documents filed by major mortgage servicers in federal bankruptcy court – and took discovery in more than 175 cases across the country. These efforts were advanced by several United States Attorneys . . . They have worked tirelessly to seek justice for homeowners who were treated unfairly and taxpayers who footed the bill. And the information and evidence that these teams compiled – and the expertise they provided – was essential in reaching this historic settlement.

USTP History of Addressing Mortgage Servicer Misconduct

The settlement agreement is the culmination of several years of intensive investigation and litigation by United States Trustee offices throughout the country. Even before the mortgage meltdown, allegations arose in the bankruptcy system that mortgage servicers were filing inflated and inaccurate proofs of claim and motions for relief from stay based upon faulty accounting and misrepresentations to the bankruptcy courts. In some cases, these allegations extended to the mortgage servicer's attorneys, as well as the third party vendors they retained to provide services with respect to borrowers in bankruptcy.

Beginning in late 2006, the USTP launched its initial review of the mortgage industry's practices in bankruptcy. The fruits of that resource-intensive project grew over time, and the USTP was successful in obtaining court decisions against mortgage servicers, their attorneys, and their agents. Significantly, in 2010, the USTP and the Federal Trade Commission reached a \$108 million settlement with Countrywide Home Loans, Inc., and its affiliate BAC Home Loans Servicing, LP, for improper default servicing practices. That settlement resolved an FTC complaint and the USTP's litigation in bankruptcy courts across the country concerning Countrywide's mortgage servicing practices, including charges that Countrywide inflated mortgage claims made against homeowners in bankruptcy, failed to properly credit homeowners with payments made, and failed to notify homeowners of extra charges added to their mortgage bill.

Just months later, the robo-signing scandal broke in the media, which focused national attention on the larger issue of the servicers' practices in servicing loans of homeowners in default.<sup>1/</sup> The Department of Justice, through Associate Attorney General Thomas Perrelli, convened federal regulatory and enforcement agencies to coordinate an investigation into the extent of the servicers' misconduct. The prudential banking regulators, including the Office of the Comptroller of the Currency and the Federal Reserve, participated and, with technical assistance from the USTP and others, undertook a review of the servicers' general mortgage loan servicing and foreclosure processing to determine compliance with state and federal laws.

As part of the DOJ-led enforcement effort, the USTP stepped up its investigation of select servicers in certain jurisdictions across the country by reviewing mortgage-related proofs of claim and contested motions for relief from the automatic stay. For several years, the USTP had been satisfied when servicers corrected their mistakes in the case at bar, but the mistakes continued and they were not confined by geographic districts or by servicer. It was clear that

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<sup>1/</sup> Robo-signing is a term used to describe the practice of servicer employees, or the employees of vendors acting on behalf of the servicers, approving and signing large quantities of documents and affidavits without proper review or verification of the information contained therein and, in many instances, without complying with requirements of state notarization laws.

there was a protracted, widespread, and national problem, so the USTP changed its strategy. If a filing was determined to be “facially deficient,” the USTP sought discovery. As reported in the New York Times and elsewhere, the Program identified facial deficiencies such as the following:

- A servicer filed a proof of claim asserting an arrearage of \$52,042.58. After the debtor objected, the servicer amended the claim to reduce the arrearage to \$3,156.02; however, it failed to provide the required itemization. The servicer then filed a third claim in the corrected amount and with the required itemization.
- After a debtor made all chapter 13 plan payments, satisfied all chapter 13 requirements, and received a discharge, the servicer rejected the debtor’s ongoing mortgage payments and threatened the debtor with foreclosure.
- A servicer obtained force-placed insurance even though the debtors had their own insurance. The servicer then sought relief from the stay, asserting an arrearage based on the erroneous insurance charges.
- A servicer filed a \$30,000 arrearage claim primarily for missed payments. The servicer amended its claim twice and both times calculated the missed payments differently than it had originally. In addition, the supporting documentation attached to the first amended claim was for a property in Massachusetts that was not owned by the debtors.
- In three cases, a servicer filed proofs of claim requesting payment for “prior servicer fees” for amounts ranging from \$3,178 to \$10,260, but failed to provide supporting documentation, itemization, or other explanation. After the United States Trustee objected to the claims, the servicer agreed to amend the claims to eliminate the requests for these substantial fees.

### Mortgage Servicer Challenges to the USTP

The initial response of the mortgage industry was that their errors were few in number and were not material. Servicers suggested that the USTP was being hyper-technical in focusing on inconsequential and isolated inaccuracies. In fact, these errors were both large and small, assaulted the integrity of the bankruptcy system, and compromised the ability of chapter 13 debtors to save their homes.

The servicers’ response to the USTP’s actions has been not only to oppose USTP’s discovery into their policies and procedures for the servicing of loans in bankruptcy, but also to attack the standing and authority of the USTP to investigate systemic abuse of the bankruptcy system.<sup>2/</sup> They even questioned the authority of the bankruptcy court to impose remedies.

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<sup>2/</sup> In May 2011, three members of the Senate Judiciary Committee introduced legislation titled “Fighting Fraud in Bankruptcy Act of 2011.” Among other things, the bill clarifies USTP authority to bring actions to remedy creditor abuse and it gives bankruptcy courts express authority to impose fines and enter nationwide injunctive relief.

Incredibly, the top servicers stated in court pleadings that the USTP – the “watchdog of the bankruptcy system” – was charged only with making sure homeowner debtors followed the bankruptcy rules that protect creditors, and was not authorized to police creditor misconduct that might harm debtors. One servicer went so far as to argue in court that the Attorney General, acting through the Director of the Executive Office for United States Trustees, lacked authority to set enforcement priorities and coordinate multi-district investigations that would bind United States Trustees around the country.

During the course of its enforcement efforts, the USTP confronted close to 300 challenges to its discovery requests, including eight cases in which it was forced to file motions to compel, motions for orders to show cause, or motions for sanctions because the servicers simply refused to comply with discovery requests or court orders requiring the servicers to provide discovery. The USTP prevailed in the overwhelming number of adjudicated cases, but then faced motions for reconsideration and appeals. Though each court soundly rejected the servicers’ legal arguments concerning the standing and authority of the United States Trustees to conduct discovery and investigate servicing practices, unsettled questions remain as to the ability of the bankruptcy courts to mete out remedies to address systemic abuse.<sup>3/</sup> Under the settlement, however, failure to abide by the terms of the agreement provide for sanctions without the need for extended or complex litigation.

### Intensive Negotiations

Associate Attorney General Perrelli convened relevant federal agencies and state Attorneys General beginning in early 2011 to discuss various regulatory and enforcement actions that were ongoing or contemplated. Given the head start the USTP had in investigating mortgage servicer practices, the Program was actively engaged in these discussions and was able to identify the most common violations that were occurring both in and out of bankruptcy.

Negotiations with the servicers started shortly thereafter. The negotiations were extremely lengthy because of the breadth of claims under consideration and the scope of relief. Each type of misconduct identified by the USTP is covered in this agreement. Among the bankruptcy claims resolved through the negotiations are those relating to:

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In addition, the bill gives the USTP authority to conduct audits of creditor proofs of claim in a manner similar to current statutory provisions governing audits of debtor schedules and statements of financial affairs. See Fighting Fraud in Bankruptcy Act of 2011, S. 1054, 112th Cong. (2011); see also 157 Cong. Rec. S3276-01 (Daily Ed. May 24, 2011) (statement of Sen. Leahy).

<sup>3/</sup> In *In re Stewart*, 647 F.3d 553, 558 (5th Cir. 2011), the United States Court of Appeals for the Fifth Circuit struck down injunctive relief imposed against the servicer on grounds that, among other things, the debtor in that case had settled her dispute with the servicer. In contrast, in *In re Taylor*, 655 F.3d 274, 288 (3d Cir. 2011), the United States Court of Appeals for the Third Circuit upheld sanctions against the servicer and its law firm by noting that the bankruptcy court properly considered the effect sanctions may have on future conduct.

- deficiencies in servicers' foreclosure practices, including with respect to the preparation and content of documents filed with courts, or otherwise relied upon, as part of the foreclosure process;
- deficiencies relating to the servicers' use and supervision of attorneys and other vendors in connection with the creation and recording of assignments, foreclosure and bankruptcy services, and loss mitigation activities; and last, but certainly not least,
- systemic deficiencies in servicers' bankruptcy practices resulting in inflation of claims, overcharging or improper charging of consumers with respect to default-related fees, misaccounting, payment application issues, documentation issues, and misrepresentations in bankruptcy filings and proceedings.

### Settlement Agreement

The settlement agreement covers a wide range of civil misconduct by servicers. The major provisions of the agreement include:

- The servicers will pay \$25 billion to resolve violations of state and federal law. The majority of the payments (about \$20 billion) will take the form of monetary credits applied towards the servicers' obligations to assist homeowners in financial distress, including through interest rate reductions, principal write-downs, refinancing, forbearance of principal, short sales and transitional assistance, and anti-blight programs. Additionally, about \$1.5 billion will be used to establish a Borrower Payment Fund to provide cash payment to homeowners who meet certain criteria and whose homes were sold or taken in foreclosure. Going forward, servicers must also remediate harm to homeowners, which may include compensation, for failure to comply with new injunctive standards that govern their servicing practices.
- The servicers will adhere to a strict set of new mortgage servicing standards covering accuracy of account information; document preparation and verification; oversight and management of foreclosure and bankruptcy attorneys and other third party providers; quality assurance processes; foreclosure filing practices and processes; loan modification and loss mitigation practices; borrower communication and notification practices; and restrictions on servicing fees.
- The servicers will adhere to special provisions relating to bankruptcy conduct, such as establishing processes to ensure the accuracy of proofs of claim and motions for relief from stay; waiving "hidden fees" that were not disclosed during the chapter 13 case; waiving fees connected to the filing of proofs of claim and motions seeking relief from the automatic stay determined to contain a substantial misstatement of the amount due; providing special access for chapter 13 trustees to knowledgeable employees of the servicer who can respond to trustee inquiries;

ensuring payments in chapter 13 cases are promptly and accurately credited; providing training to employees that specifically addresses the servicing of loans for borrowers in bankruptcy; taking corrective action where deficiencies in claims are identified; and providing remediation to debtors for inaccuracies in account information.

- Servicer conduct will be reviewed for three and a half years by an independent monitor who will oversee a series of prescribed tests of compliance.<sup>4/</sup> Failure to meet established metrics of compliance is subject to remedy by the United States District Court for the District of Columbia, including through monetary penalties and non-monetary equitable relief.

### Lessons Learned

The Program's mortgage servicer investigations and litigation has been the most comprehensive, intensive, and coordinated enforcement project in the USTP's history. Although there is still plenty of work to do in terms of ensuring compliance with the settlement agreement by the servicers, as well as ongoing oversight of mortgage servicers in bankruptcy, it is appropriate for the Program to reflect a bit on its experience and consider lessons learned that will guide future priorities. Initially, at least, the Program will be guided by the following observations:

- The USTP must remain agile and adopt enforcement priorities according to the emerging needs in the bankruptcy system. Traditionally, the USTP has carried out significant consumer protection activities, but the misconduct of the mortgage servicer industry required a reordering of priorities. The Program needs to be attuned to developments in the bankruptcy system and adjust its priorities to address areas where we can add the most value to the system.
- The USTP must attack emerging problems by following the evidence wherever it leads, even if the facts are surprising and contrary to prevailing wisdom. Most of us had no notion that a financial institution's record-keeping could be so chronically and systematically inadequate. Material misstatements by debtors are not acceptable and neither are material misstatements by creditors, including national mortgage servicers.
- The USTP can effectively leverage its field-based operations to coordinate a response to multi-district problems. National problems are best resolved through nationwide solutions. By adopting national priorities and focusing offices throughout the country on common issues, the USTP can efficiently acquire and share information that leads to comprehensive results. This settlement is the

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<sup>4/</sup> Joseph A. Smith, Jr., has been selected as the monitor. Mr. Smith has served as the North Carolina Commissioner of Banks, and is a former chair of the Conference of State Bank Supervisors.

fourth nationwide settlement obtained by the USTP in the past three years, and it suggests that comprehensive settlements may be an advisable approach for future enforcement initiatives.

Conclusion

Not only does this settlement provide relief to homeowners, but importantly it establishes standards to help prevent future misconduct. The USTP is proud of the critical role it played in unraveling the mortgage servicers' abuse of the law and in imposing a new set of uniform practices to be followed. The Program will continue to be vigilant in identifying violations by debtors and creditors alike and will leverage the work of its field offices throughout the country to address systemic violations and to solve industry-wide or multi-district misconduct.

AMERICAN BANKRUPTCY INSTITUTE  
30<sup>th</sup> ANNUAL SPRING MEETING*Saturday, April 21, 2012 ~ 2:15 - 3:45 p.m.*

## WHO SHOULD POLICE THE MORTGAGE SERVICERS?

SELECTED CASE SUMMARIES**I. Proof of Claim Issues**

**A. *Opariji v. Wells Fargo Bank, N.A. (In re Opariji)***, 458 B.R. 881 (S.D. Tex. 2011). The chapter 13 debtor filed an adversary proceeding against mortgage servicer Wells Fargo Bank, N.A. (“Wells Fargo”) alleging that equitable and judicial estoppel barred Wells Fargo from asserting claims for post-petition arrearages that were not previously asserted in the debtor’s prior chapter 13 case. The debtor also sought sanctions against Wells Fargo and its attorneys for presenting false proofs of claim. The bankruptcy court found that Wells Fargo took inconsistent positions with respect to its claims in the debtor’s bankruptcy cases. ***Opariji v. Wells Fargo Bank, N.A. (In re Opariji)***, 454 B.R. 725 (Bankr. S.D. Tex. 2010). The court granted summary judgment for the debtor on the judicial estoppel theory, but denied the equitable estoppel claim as moot, and granted summary judgment for Wells Fargo and its attorneys on the sanctions claim. On appeal, the district court affirmed the bankruptcy court’s application of judicial estoppel to hold Wells Fargo was bound by the proof of claim filed in the debtor’s prior case even though that case had been dismissed.

**B. *In re Stewart***, 391 B.R. 327 (Bankr. E.D. La. 2008), *aff’d*, Case No. 08-3225, 2009 WL 2448054 (Aug. 7, 2009) (E.D. La. Aug. 10, 2009); *vacated in part, Wells Fargo Bank, N.A. v. Stewart (In re Stewart)*, 647 F.3d 553 (5<sup>th</sup> Cir. 2011). The debtor objected to the proof of claims of Wells Fargo Bank, N.A. (“Wells Fargo”), alleging that Wells Fargo improperly claimed certain pre-petition fees and costs and misapplied monthly mortgage payments to these improper fees and charges first, rather than to escrow, principal, and interest. After the debtor objected, the bankruptcy court detailed numerous errors, including: the debtor was only \$154 behind when Wells Fargo placed the loan in foreclosure; improper inspection fees were triggered by charging the debtor late fees without notice, which were then deducted from her payments, resulting in further default; Wells Fargo conducted 44 inspections over 79 months while the debtor was making regular payments, some of which were for an incorrect house; Wells Fargo charged duplicative brokers’ price opinions (nine in the same 79 months), including two that occurred in the aftermath of Hurricane Katrina; and Wells Fargo incorrectly calculated escrow. The bankruptcy court sustained the objection, awarded damages to the debtor, and ordered Wells Fargo to file an amended proof of claim. The bankruptcy court also ordered Wells Fargo to conduct an audit of all proofs of claim filed on its behalf in the Eastern District of Louisiana in cases pending on, or filed after, April 13, 2007, and to provide a loan history on every account and to amend proofs of claim where necessary.

Wells Fargo appealed the bankruptcy court's ruling. The district court in *In re Stewart*, Civil Nos. 08-3225, 08-3669, 08-3852, 08-3853 and 08-4805, 2009 WL 2448054 (E.D. La. Aug. 7, 2009), upheld the bankruptcy court's authority to require Wells Fargo to audit and amend proofs of claim in cases within that judicial district. The court concluded that, because the burden of proof ultimately rests with the claimant, and the claimant's inaccurate and inappropriate filings created a systemic threat, the bankruptcy court's remedy was "well within its authority, inherent and under section 105, to protect and manage its docket." *Id.* at \*12. The district court also ruled that the authority for such a prophylactic remedy could be based in a bankruptcy court's inherent authority, statutory authority under section 105, or as civil contempt under section 105 and Rule 9011. *Id.* Alternatively, it held, even if the remedy were to be construed as injunctive relief, the systemic nature of the problem and the burden on both the court and other debtors satisfied the traditional four-part test for injunctive relief. *Id.* at \*15.

Wells Fargo appealed to the Court of Appeals for the Fifth Circuit, which held that the bankruptcy court exceeded its authority in ordering Wells Fargo to audit all proofs of claim filed on its behalf in the Eastern District of Louisiana to identify possible abuses in other previously filed cases. The circuit court found that there was no case or controversy for the injunctive relief because the debtor would not suffer similar injury in the future and because her injuries had been fully remedied. Additionally, the circuit court ruled that the bankruptcy court could not rely upon its inherent powers to issue the injunction, finding that "[t]his injunction impermissibly aims to treat Wells Fargo's presentation of its claims in other cases from this single case . . . [It] ranges far beyond the dimensions of this case to police a range of cases untested here by the adversary process." *Id.* at 558.

**C. *In re Cothorn***, No. 10-10205, 2010 WL 4235864 (Bankr. N.D. Miss. Aug. 26, 2010). Chapter 13 debtors objected to servicer American Home Mortgage Services, Inc.'s ("AHMSI") proof of claim. AHMSI force placed insurance on debtors' property despite having received notice that the debtors had uninterrupted insurance. As a result, AHMSI did not apply debtors' pre-petition monthly payments to principal and interest, and instead placed the funds in a suspense account and assessed late charges from July 2008 through January 2010. AHMSI eventually refused to accept debtors' payments and sent a notice of foreclosure, prompting the debtors to file for bankruptcy relief. The bankruptcy court sustained the debtors' objection and ordered AHMSI to recalculate debtors' loan account according to the court's instructions. Additionally, the court disallowed all late charges, attorney fees and costs, title costs, inspection fees, and appraisal fees as unreasonable and unnecessary.

**D. *In re Blakely***, No. 09-12735, 2010 WL 2594848 (Bankr. E.D. Va. June 23, 2010). The chapter 13 trustee objected to mortgage holder American Bank's proof of claim because it was filed after the bar date. American Bank argued that it did not receive timely notice of filing of the case because the bank's address, as listed by the debtor on the mailing matrix, had not been used by the bank for over two years. American Bank admitted, however, that it had actual knowledge of the bankruptcy three months before the bar date (it checked PACER before commencing foreclosure proceedings). The bankruptcy court sustained the trustee's objection because the bank had actual notice of the bankruptcy filing.

**E. *In re Shepherd***, No. 09-19185, 2010 WL 2390026 (Bankr. D. Mass. June 10, 2010). Chapter 13 debtors objected to a proof of claim filed by America's Servicing Company on behalf of Deutsche Bank ("ASC"), alleging that the amounts claimed for certain itemized pre-petition arrearages were not supported by adequate documentation as required by Fed. R. Bankr. P. 3001, and were otherwise unreasonable and excessive. The challenged amounts claimed related to various foreclosure legal fees and costs and escrow shortages. After requiring ASC's counsel to submit an itemized application for compensation, the bankruptcy court sustained in part and overruled in part the debtors' objection, finding that: (1) a duplicative charge relating to recording the order of the notice of foreclosure was disallowed; (2) charges relating to continuance of the foreclosure sale were supported and reasonable and, therefore, allowed; (3) the charges relating to preparation for the foreclosure auction should be disallowed because the auctioneer was owned by the law firm and there was no evidence showing what work was done or reasonableness of the fee; (4) fees for a variety of services to the lender that were necessary following initiation of debtor's bankruptcy filing, such as preparing and filing the proof of claim and reviewing the chapter 13 plan for feasibility, were reasonable and allowed; and (5) the escrow shortage charges were allowed because they were reasonable and adequately supported based on the loan history.

**F. *In re Morningstar***, 433 B.R. 714 (Bankr. N.D. Ind. 2010). Mortgage servicer Litton Loan Servicing ("Litton"), as agent for The Bank of New York Mellon, filed a motion for reconsideration of the bankruptcy court's order disallowing its proof of claim. The bankruptcy court had sustained the chapter 13 trustee's objection to the claim, which was based on Litton's failure to respond to the trustee's repeated inquiries for further documentation supporting the claim. The bankruptcy court construed the motion for reconsideration as one filed under Fed. R. Bankr. P. 9024 (which incorporates Fed. R. Civ. P. 60(b)(2)), seeking relief from a final judgment or order based on newly discovered evidence which could not with reasonable diligence have been discovered earlier. The bankruptcy court denied the motion, holding that Litton failed to demonstrate that it was entitled to relief under the rule.

**G. *In re Minbatiwalla***, 424 B.R. 104 (Bankr. S.D.N.Y. 2010). The chapter 13 debtor objected to a proof of claim filed by J.P. Morgan Chase Bank ("Chase") that lacked any supporting documentation. The debtor requested documentation from Chase, but Chase failed to respond to the debtor's request for documentation and the debtor's later objection to the proof of claim, and Chase did not appear at the hearing on the objection. The bankruptcy court held that Chase failed to demonstrate that it had standing to bring the claim or establish the *prima facie* validity of the claim. First, the bankruptcy court held that, for an assignee to establish standing, the creditor must produce a written assignment, the note, and the mortgage, or an affidavit from an individual with personal knowledge establishing facts that would support standing. Second, the bankruptcy court held that although a creditor may initially attach only a summary of its claim in order to obtain *prima facie* validity, it must provide additional documentation upon request of the debtor or be subject to disallowance. Finally, the court held that the fact that a debtor may schedule a debt as undisputed did not deprive the debtor of the right to request that the creditor submit documentation in support of the claim. The court reasoned that the debtor retained the right to verify the ownership and amount of the debt within the proof of claim and object to unsupported aspects of the claim.

**H. *Hannon v. Countrywide Home Loans, Inc. (In re Hannon)*, 421 B.R. 728** (Bankr. M.D. Pa. 2009). Countrywide Home Loans, Inc. (“Countrywide”) filed a proof of claim containing a duplicate claim for a sheriff’s deposit relating to a pre-bankruptcy foreclosure action against the debtor. The debtor served a motion on Countrywide for sanctions under Fed. R. Bankr. P. 9011 (“Rule 9011”), and Countrywide subsequently withdrew the duplicate claim. After the debtor’s chapter 13 plan was confirmed, Countrywide received a partial refund on the deposit but never amended its proof of claim to reduce the amount. The debtor discovered the refund and filed a second motion for sanctions under Rule 9011, 11 U.S.C. § 105(a), and inherent powers, asserting that Countrywide violated its continuing duty to amend the proof of claim. Countrywide raised three arguments in its defense: (1) that Rule 9011 is not applicable to proofs of claim; (2) there is no duty to amend the proof of claim if the claim was accurate when filed; and (3) confirmation of the plan prevents the debtor from challenging the proof of claim.

The bankruptcy court held that Countrywide had a duty of candor to the court and that its failure to amend the proof of claim violated that duty, although the court could not grant the debtor’s second motion for sanctions because she had failed to comply with the safe harbor provisions of Rule 9011. Instead, the court ordered a show cause hearing *sua sponte* regarding whether Countrywide should be sanctioned for misconduct under Rule 9011. The court recognized that section 105(a) and inherent powers may also be applicable, but stayed those claims pending a determination of whether the court’s own Rule 9011 motion would be sufficient to address Countrywide’s misconduct.

**I. *In re Koloch*, 416 B.R. 375** (Bankr. E.D.N.Y. 2009). The debtors challenged the amount of CitiMortgage Inc.’s (“CitiMortgage”) proof of claim. The proof of claim included the calculation of principal and interest, escrow advances, and deficiency expenses incurred in connection with a pre-petition state court foreclosure and related federal proceedings. The bankruptcy court held that, absent specific language in the mortgage documents to the contrary, under the doctrine of merger, CitiMortgage’s claim on the mortgage was limited to amounts allowed in the state court foreclosure judgment, and sustained the debtors’ objection to those amounts not included in the judgment.

**J. *In re Prevo*, 394 B.R. 847** (Bankr. S.D. Tex. 2008). In ruling on a proof of claim objection, the court disallowed foreclosure fees, previously accrued late charges, and broker price opinion fees because the creditor, Citi Residential Lending, Inc. (“Citi”), did not provide supporting documents and the court could not determine whether the fees were reasonable. The court looked to 11 U.S.C. § 506(b), which the court noted is “designed to protect the debtor and other creditors by preventing secured creditors from charging unreasonable fees.” *Id.* at 850-51. When the debtor objects to a proof of claim and the “creditor continues to fail and refuse to provide such documentation or adduce testimony, the court has no choice but to find that the fees and costs are unreasonable and unrecoverable.” *Id.* at 851. Amending proofs of claim to remove objectionable fees and charges when debtors file claim objections is unsatisfactory, as some creditors are trying to “game the system” by requesting undocumented excessive fees and then reducing those fees only when challenged. *Id.* The court issued an order to show cause and set the matter for hearing so the creditor could explain why it should not pay the debtor’s fees incurred in prosecuting the proof of claim objection, or alternatively pay the debtor’s attorney

fees in advance of the hearing. The creditor paid the fees of debtor's counsel (approximately \$3,000) and filed an amended proof of claim in advance of the hearing. Counsel also advised the court that the attorney previously handling the matter had been terminated. The court declined to impose any further sanctions.

## II. Motion for Relief from Stay Issues

**A. *In re Wilson***, No. 07-11862, 2011 WL 1337240 (Bankr. E.D. La. Apr. 7, 2011). The United States Trustee ("UST") moved for sanctions against Lender Processing Systems, Inc. ("LPS"), alleging that LPS made misrepresentations to the bankruptcy court concerning its knowledge of the chapter 13 debtors' unposted payments made to mortgage lender Option One Mortgage Corporation ("Option One"). The motion also alleged that LPS misrepresented its role in the case by claiming it was only a passive software provider, when in fact LPS employees had an active role in managing the litigation file underlying Option One's motion for relief from stay. The bankruptcy court granted the motion for sanctions, finding that LPS should have known that a payment was unaccounted for between Option One and the law firm that filed the motion for relief from stay on behalf of it. The court also called the affidavit that purported to support the stay relief motion a "farce," and found that LPS, and Dory Goebel, the LPS employee who executed the affidavit in support of the stay relief motion, "blindly relied on counsel to account for the loan and all material representations" to the court about the mortgage loan. *Id.* at \*12. In closing, the court noted that "[b]ut for the dogged determination of the UST's office and debtors' counsel, these issues would not come to light and countless debtors would suffer." *Id.*

**B. *In re Schuessler***, 386 B.R. 458 (Bankr. S.D.N.Y. 2008). Chase Home Finance, LLC ("Chase") filed a motion for relief from stay, claiming that the debtors missed two payments and lacked equity in the property. The debtors argued that, while they paid late on occasion, they were not in default, and Chase's local branch had refused their attempt to make a payment. The court denied the motion for relief from stay because the motion alleged erroneous facts (for example, that debtors lacked equity when debtors had as much as \$120,000 in equity) and omitted other facts (such as that the debtors were not in default, or that the local bank refused to accept the debtors' payment). The court also found that Chase's system of handling bankruptcy cases amounted to an abuse of process because it made no effort to obtain appraisals or to determine whether it lacked adequate protection, permitted an analyst to decide whether relief from stay was warranted, and allowed supervisors to sign affidavits prepared by others without independently investigating the asserted facts. The court imposed sanctions against Chase in the amount of the debtors' attorney fees and costs, and other costs and expenses, including time lost from work and travel. The court also provided notice "not just to Chase [ ] and other mortgage servicers, but to all individuals and entities involved in the process, along the line – analysts, supervisors and other personnel employed by mortgage servicers; third-party vendors; regional law firms; and local counsel – that the conduct identified here, in this Court's view, constitutes an abuse of process." *Id.* at 493.

**C. *In re Haque***, 395 B.R. 799 (Bankr. S.D. Fla. 2008). In considering Wells Fargo's motion for relief from stay in a chapter 7 case, the court questioned the "penalty interest" claimed by Wells Fargo in its supporting affidavit. Wells Fargo and its counsel admitted that the "penalty

interest” was an erroneous charge. Based on testimony that a number of filings contained the erroneous charge, the bankruptcy court concluded that the parties “engaged in the systemic process of churning out unrefined and unexamined form pleadings” that resulted in “an abuse of the system.” *Id.* at 805. Invoking its inherent authority and 11 U.S.C. § 105(a), the bankruptcy court sanctioned Wells Fargo and counsel \$95,130.45 (equal to a total of 45 false affidavits multiplied by \$2,114.10, the amount of the erroneous claim in the case at bar), jointly and severally.

**D. *In re Parsley*, 384 B.R. 138 (Bankr. S.D. Tex. 2008).** The bankruptcy court issued several show cause orders which required Countrywide Home Loans, Inc., and its counsel to show cause why they should not be sanctioned for their conduct in prosecuting a motion for relief from stay that contained factual inaccuracies. The court found that both Countrywide and its attorneys acted negligently and failed to correct all mistakes and deficiencies in Countrywide’s original proof of claim or to explain discrepancies in its documents. The court noted the “sloppy practices and training at Countrywide,” and found that “Countrywide does not want to devote any employee time to reviewing the pleadings drafted by its own counsel.” *Id.* at 171. The court applied a clear and convincing standard in determining whether there had been bad faith conduct necessary to sanction the parties. Ultimately, the court declined to sanction Countrywide and one of its law firms, stating that, although it was disheartened by their conduct, “it was unable to say that their conduct transcended from mere negligent bungling to full-blown bad faith.” *Id.* at 183. Although the court found that Countrywide’s other law firm and one of its attorneys did act in bad faith, it did not sanction them because of their curative actions.

**E. *In re Rivera*, 342 B.R. 435 (Bankr. D.N.J. 2006).** This case involved a law firm’s use of certifications of default in support of relief from stay motions previously resolved by stipulation. The court determined that the law firm’s practice of using pre-signed certifications appended to subsequently prepared summaries of mortgage defaults that were never reviewed by the person who signed the certification violated Fed. R. Bankr. P. 9011. During the show cause process, the court discovered that the individual who signed the certificates had not been employed by the mortgage creditor for over a year, during which time the certification was used more than 250 times. The court imposed a sanction of \$125,000 on the law firm and \$500 on the lawyer in the specific case before the court, and entered an injunction prohibiting such conduct in the future. Upon remand after appeal by the mortgage lender, *In re Rivera*, 369 B.R. 193 (D.N.J. 2007), the bankruptcy court approved a permanent injunction prohibiting the mortgage lender from engaging in the pre-signed certification practice and required the lender to develop policies and procedures to prevent such conduct in the future.

### **III. Assessment of Post-Petition Fees and Charges: Section 506(b) and Rule 2016**

**A. *In re Wagner*, No. 06-30919, 2011 WL 2636841 (Bankr. S.D. Tex. July 1, 2011).** The chapter 13 trustee moved for an order deeming the debtor’s mortgage current. Lender Nationstar Mortgage, LLC (“Nationstar”) opposed the motion, arguing that it was entitled to reimbursement of hazard insurance premiums it paid on the debtor’s property for the five years covered by the debtor’s plan. The bankruptcy court denied the trustee’s motion, holding that Nationstar was entitled to reimbursement for advanced insurance premiums, but only for those

premiums that arose during the time period for which the trustee had failed to file and serve periodic reports required by local rule itemizing the date and amount of each contractual mortgage payment made by the trustee and identifying the relevant months for which each contractual payment is applied. Under the local rule, the creditor has sixty days after receipt of the trustee's report to assert any claim against the estate or debtor that arose within the reporting period. Here, the trustee failed to file a report for 2009. The bankruptcy court, therefore, held that the debtor owed Nationstar for advanced insurance premiums paid during the period covered by the missing report.

**B. *Patterson v. Homecomings Financial, LLC (In re Patterson)***, 444 B.R. 564 (Bankr. E.D. Wis. Feb. 23, 2011). Chapter 13 debtors brought adversary proceeding against servicer Homecomings Financial, LLC ("Homecomings"), alleging that Homecomings' collection, without disclosure to the court, of a \$350 post-petition, pre-confirmation attorney fee in connection with a refinance of the mortgage violated the automatic stay and Fed. R. Bankr. P. 2016(a). Homecomings moved to dismiss for failure to state a claim. The bankruptcy court denied the motion, holding that because the fee was collected from the property of the estate in the form of refinancing proceeds, and the fee was never disclosed to the court, plaintiffs stated claims for relief for willful violation of the automatic stay and Fed. R. 2016(a).

**C. *Childs v. HSBC Mortg. Serv., Inc.***, No. 3:10-cv-0242, 2010 WL 3063724 (M.D. Tenn. Aug. 3, 2010). Former chapter 13 debtors filed a complaint in district court against mortgage lender HSBC Mortgage Services, Inc. ("HSBC") alleging fraud, intentional infliction of emotional distress, wrongful foreclosure, and a claim under the Tennessee Consumer Protection Act ("TCPA"). The debtors became delinquent post-discharge, but claimed they were assessed impermissible charges and that HSBC refused to accept payments that would have cured the arrearages. In support of their claims, the debtors relied upon an HSBC loan statement and a letter that were dated one day apart and which contained different payoff amounts. The district court granted HSBC's motion to dismiss the debtors' claims for intentional infliction of emotional distress, but denied the motion as to the TCPA and wrongful foreclosure claims.

**D. *Sandlin v. Ameriquist Mortg. Co. (In re Sandlin)***, No. 08-191, 2010 WL 1416699 (Bankr. N.D. Ala. Apr. 8, 2010). Chapter 13 debtors sued Ameriquist Mortgage Company ("Ameriquist") and AMC Mortgage Services, LLC, asserting a violation of the automatic stay and alleging that Ameriquist attempted to charge and collect previously undisclosed post-petition, pre-confirmation fees and charges, which the debtor discovered on the payoff statement from Ameriquist in connection with the sale of their home. The debtors alleged that Ameriquist: (1) improperly assessed the fees without first obtaining approval from the bankruptcy court under 11 U.S.C. § 506(b); (2) applied payments from the chapter 13 trustee to the fees instead of the pre-petition arrears pursuant to the repayment plan; and (3) collected the fees out of the proceeds from the sale of the home. Ameriquist moved for summary judgment, arguing that: (1) it had no duty to disclose the fees; and (2) there was no violation of the stay because the hidden assessment and application of payments were not acts to collect pre-petition debt from the estate and, prior to receiving the proceeds from the sale, it had obtained stay relief to satisfy the mortgage balance. The bankruptcy court denied Ameriquist's motion, holding that, although there was no violation of the stay, Ameriquist had an obligation under section 506(b) to

disclose the fees in order to allow the debtors to object to the reasonableness of the fees or satisfy the fees within their right under 11 U.S.C. § 1322(b)(5) to cure arrears. Accordingly, the court held that the fees were discharged because Ameriquest failed to provide the debtors with adequate notice of the fees prior to confirmation of the repayment plan.

**E. *In re Sullivan***, 367 B.R. 54 (Bankr. N.D.N.Y. 2007). Washington Mutual filed a proof of claim that did not include any attorney fees, although the attorney who filed the proof of claim billed Washington Mutual \$500. The debtor, who had made almost 30 years of payments on his residence, sold it post-petition. In the payoff letter, Washington Mutual included a line item for attorney fees of \$500. The debtor alleged that the law firm refused to release the abstract of title or otherwise delayed the closing because of the legal fee issue and, ultimately, the debtor had to escrow the \$500 for the closing to take place. The attorney testified that \$150 was for pre-confirmation services and \$350 was post-confirmation. The court found that: (1) the \$500 fee was billed at confirmation and, therefore, subject to 11 U.S.C. § 506(b); (2) Washington Mutual failed to include the fee in the proof of claim and, therefore, could not charge it; and (3) attempts to collect the fee by sending a payoff letter, which was more than merely “informational” in nature since it was designed to collect the fee and acted more as a condition precedent to closing the real estate sale, violated 11 U.S.C. § 362(a)(3)’s stay of actions to obtain property from the estate. The court further found that the violation was willful under the pre-BAPCPA version of section 362(h) (currently enacted at 11 U.S.C. § 362(k)), and awarded \$1,000 as damages for emotional distress, plus attorney fees.

**F. *In re Hight***, 393 B.R. 484 (Bankr. S.D. Tex. 2008). In ruling on an objection to a proof of claim, and based on the facts presented, the court allowed the creditor’s claim for principal and arrearage, late charges, property preservation and inspection fees, plus a portion of claimed attorney fees. The court disallowed the creditor’s claim as to an alleged escrow arrearage shortage and a portion of claimed pre-petition attorney fees. The court further found that because the creditor failed to comply with the Fed. R. Bankr. P. 2016 disclosure requirements, it cannot collect post-petition attorney fees.

#### **IV. Violations of the Automatic Stay and Discharge Injunction**

**A. *Canning v. Beneficial Me., Inc. (In re Canning)***, 442 B.R. 165 (Bankr. D. Me. 2011). Chapter 7 debtors sought sanctions against lender HSBC Mortgage Services, Inc. (“HSBC”) for violating the discharge injunction when it: (1) demanded payment from the debtors post-discharge and insisted their obligation to pay was unaffected by their bankruptcy discharge; and (2) refused to foreclose upon or release its mortgage at the debtors’ request. The bankruptcy court held that HSBC’s post-discharge attempt to collect violated the discharge injunction, but its refusal to act upon the mortgage did not. The bankruptcy court imposed \$7,000 in sanctions, which HSBC appealed and the bankruptcy appellate affirmed. ***Canning v. Beneficial Me., Inc. (In re Canning)***, No. EP-11-034, 2011 WL 6181206 (B.A.P. 1<sup>st</sup> Cir. Dec. 12, 2011).

**B. *Burch v. Bank of America, N.A. (In re Burch)***, No. 09–07802, Adv. No. 11-80030, 2011 WL 3207083 (Bankr. D.S.C. July 26, 2011). The chapter 7 debtor filed an adversary proceeding alleging that Bank of America (“BoA”) willfully violated the automatic

stay and the discharge injunction when it repeatedly made phone calls and sent letters to the debtor seeking to collect payment both during the case and after the debtor received his discharge. Post-discharge, BoA also force-placed insurance on the property. BoA failed to defend through answer or appearance at a hearing on the default motion. The court concluded that BoA willfully violated the automatic stay because: (1) it had notice of the bankruptcy case and ignored that notice; and (2) BoA's repeated calls and letters harassed the debtor and interfered with the fresh start such that he was entitled to relief under section 362(k)(1). The bankruptcy court also concluded that BoA violated the discharge injunction by repeatedly attempting to collect on discharged debt, and that the debtor suffered harm as a result of BoA's actions. The court ordered BoA to pay the debtor \$5,105.05 in compensatory damages and \$12,000.00 in punitive damages.

**C.** *Monk v. Litton Loan Servicing, LP (In re Monk)*, No. 04-60712, Adv. No. 10-6067, 2011 WL 212831 (Bankr. D. Or. Jan. 21, 2011). Former chapter 13 debtors reopened their case and filed an adversary proceeding against Litton Loan Servicing ("Litton"), alleging that Litton had: (1) attempted to collect on previously discharged debt; (2) threatened to accelerate the mortgage loan if debtors failed to pay arrearages; and (3) instituted foreclosure proceedings. Litton also offered to modify the debtors' loan, to which the debtors agreed in order to avoid losing their home. Debtors sought, among other things, contempt sanctions for violation of the discharge injunction. Litton moved to dismiss, arguing that the debtors were asserting an impermissible private right of action for violation of the discharge injunction. The court denied the motion to dismiss, finding that the debtors, in requesting that the court hold Litton in contempt for violation of the discharge injunction, were not asserting a private right of action.

**D.** *In re Estrada*, 439 B.R. 227 (Bankr. S.D. Fla. 2010). Chapter 7 debtor sought to hold lender PNC Bank, N.A. ("PNC"), f/k/a National City Mortgage, in contempt for violation of the automatic stay. The debtor alleged that PNC sent a post-petition letter threatening to suspend credit bureau reporting if she refused to reaffirm the debt. The bankruptcy court held that although a creditor may send a post-petition letter to a debtor proposing a reaffirmation agreement, PNC violated the automatic stay by threatening a negative consequence if the debtor did not agree to reaffirm the debt. The threat appeared coercive in light of a proffer that the debtor was never in default. The court nonetheless declined to hold PNC in contempt because there was no intent on its part to threaten or coerce the debtor, and because PNC had since revised the language used in its reaffirmation letters to debtors. The court also noted that lenders are not obligated to report the discharge of a borrower's personal liability to credit bureaus.

**E.** *Stoker v. Aurora Loan Serv., Inc. (In re Stoker)*, No. 09-ap-03349, 2010 WL 958030 (Bankr. S.D. Tex. Mar. 10, 2010). The chapter 13 debtor filed a complaint against Aurora Loan Services, Inc. ("Aurora") alleging a violation of the automatic stay. Pre-petition, the debtor executed a mortgage in the name of her elderly mother pursuant to a valid power of attorney, but the debtor was the only occupant of the property and was financially responsible for all mortgage payments. After the debtor defaulted on the mortgage, Aurora moved to foreclose on the property. Post-petition, the debtor directly informed Aurora's counsel that the debtor had filed for chapter 13 bankruptcy relief and claimed an interest in the property. Counsel left the decision on whether to foreclose to Aurora, which decided to proceed with the foreclosure based

upon the opinion of a paralegal that failed to investigate the debtor's claim. The bankruptcy court held that Aurora violated the automatic stay, finding that Aurora's decision was "shocking" and expressed concern "that a licensed Texas attorney would proceed with a stayed foreclosure based on the decision of an out-of-state paralegal."

**F. *Woodruff v. Chase Home Fin., LLC (In re Woodruff)***, No. 02-81159, Adv. No. 09-8014, 2010 WL 386209 (Bankr. M.D. Ala. Jan. 27, 2010). Chapter 13 debtors brought a complaint against their mortgage servicer, Chase Home Finance ("Chase"), alleging that Chase and its attorneys were engaging in a fraud upon the court when Chase filed a motion for relief from the automatic stay, an affidavit, and an account history that contained inconsistent post-confirmation payment histories and showed that Chase was improperly applying payments in violation of the terms of the chapter 13 plan. Furthermore, the affidavit – signed on May 12, 2003 – stated that the last payment had been received on May 19, 2003. The bankruptcy court refused to dismiss the complaint, holding that: (1) independent actions have historically been available in equity to grant relief based on a fraud upon the court; and (2) 11 U.S.C. § 105(a) could be used to provide relief to protect the integrity of the Bankruptcy Code, reasoning "[t]here would be no point in filing a Chapter 13 bankruptcy if a mortgage lender could deny its benefits without being held accountable. Chapter 13 plans and orders confirming them would become hollow and useless." *Id.* at \*9.

**G. *Noland v. Wells Fargo Bank (In re Noland)***, No. 07-ap-70055, 2009 WL 4758651 (Bankr. N.D. Ala. Dec. 7, 2009). The debtors filed a motion alleging that Wells Fargo Bank, as trustee for the lender Option One, willfully violated the automatic stay when it initiated foreclosure proceedings in contravention of the bankruptcy court's order automatically lifting the stay if the debtors failed to timely render their payments. Upon receiving notice of the intent to foreclose, the debtors faxed copies of payment receipts confirming that all payments were current, but Wells Fargo nevertheless pursued its foreclosure action and filed a notice of default in the bankruptcy court. The debtors moved for sanctions, and the bankruptcy court agreed. The court imposed sanctions on Wells Fargo totaling \$7,000, including compensatory damages for emotional distress of \$6,000 and punitive damages of \$1,000, plus attorney fees, describing its litigation conduct and disregard for the evidence as "reprehensible."

**H. *Kline v. Deutsche Bank Nat'l Trust Co. (In re Kline)***, 420 B.R. 541 (Bankr. D.N.M. 2009). The debtor sued Deutsche Bank National Trust Company ("Deutsche Bank") for a willful violation of the automatic stay when it served the debtor with a notice of foreclosure without seeking relief from the stay. Deutsche Bank moved for summary judgment, arguing that it had no knowledge of the stay because the notice of bankruptcy had been sent to Ocwen Federal Bank FSB ("Ocwen"), its servicing agent, and because the state court had rejected the debtor's claims in the foreclosure action. The bankruptcy court denied summary judgment, holding that the principles of agency law governing imputation of knowledge apply to the mortgage servicing relationship, and that Deutsche Bank had failed to provide any evidence that Ocwen did not have knowledge of the bankruptcy or that the debtor had asserted a claim for a violation of the automatic stay in the state foreclosure action.

**I. *Clawson v. IndyMac Bank (In re Clawson)***, 414 B.R. 655 (Bankr. N.D. Cal. 2009). The debtors brought an adversary proceeding alleging that IndyMac Federal Bank FSB (“IndyMac”) improperly reset the monthly payment on the debtors’ mortgage and willfully violated the automatic stay. After IndyMac failed to appear at a continued status conference at which debtors’ counsel advised that the parties had reached a settlement to modify the mortgage, the bankruptcy court ordered IndyMac to file an executed settlement agreement. After a number of continued hearings and status reports, the court ordered IndyMac to appear and show cause why it should not be further sanctioned for failing to consummate the long-acknowledged settlement with the debtors. Prior to that hearing, IndyMac’s counsel forwarded to the debtors a proposed settlement draft containing a clause stating that each party had the authority to enter into the agreement, which the debtors signed. IndyMac refused to execute the agreement, and its counsel later argued that it had not been approved by an individual with settlement authority. The bankruptcy court rejected this argument, holding that IndyMac was bound by its obvious representations to the contrary and that the agreement was summarily enforceable as a matter of judicial estoppel. Furthermore, the court sanctioned IndyMac for its willful misconduct in not consummating the settlement, finding that Fed. R. Bankr. P. 9011 was “not up to the task” and reimbursing the debtors for their attorney fees.

**V. Chapter 13 Confirmation and Post-Discharge Issues**

**A. *In re Wright***, 461 B.R. 757 (Bankr. N. D. Iowa 2011). Chapter 13 debtors moved for sanctions against mortgage servicer American Home Mortgage Servicing, Inc. (“AHMSI”), alleging that AHMSI violated the terms of the confirmed plan by failing to notify debtors and their attorney about monthly payment increases. The debtors alleged that the failure to notify led to defaults and two motions for relief from stay over a two year period. The bankruptcy court held that AHMSI violated the plan terms by failing to notify the trustee, debtors, and debtors’ attorney of changes in the plan payments. The bankruptcy court also found that AHMSI failed to respond to the debtors’ requests for payment information despite having an obligation to do so. Finding AHMSI’s conduct willful and “indefensible,” the court sanctioned AHMSI and awarded the debtors \$10,000 in actual damages, \$40,000 in punitive damages, and reasonable attorney fees.

**B. *In re Bean***, No. 09-15419, Adv. No. 09-1205, 2011 WL 482825 (Bankr. N.D. Miss. Feb. 7, 2011). The chapter 13 trustee filed an adversary proceeding objecting to Ocwen Servicing, LLC’s (“Ocwen”) proof of claim and alleging that Ocwen was impermissibly seeking to collect unauthorized charges that should have been precluded because of the court’s prior order which deemed the mortgage current and all defaults cured. The trustee also alleged that most of the assessed charges were previously discharged. The trustee contended that Ocwen was in violation of that order, as well as section 506 and Fed. R. Bankr. P. 2016(c). The trustee also sought contempt sanctions for Ocwen’s misconduct. The bankruptcy court denied Ocwen’s motion for summary judgment because the following material factual issues remained in dispute: (1) the manner in which Ocwen calculated the charges assessed to debtors’ account; (2) its application of plan payments; (3) the propriety of the charges; and (4) the dates the charges actually accrued.

C. **McKey v. Ocwen Loan Servicing, LLC (In re McKey)**, No. 03-10154, Adv. No. 09-1155, 2011 WL 353246 (Bankr. N.D. Miss. Feb. 2, 2011). After receiving their discharge, the chapter 13 debtors reopened their bankruptcy case and brought an adversary proceeding against Ocwen Loan Servicing, LLC (“Ocwen”), alleging violations of the automatic stay, sections 105 and 506, and Fed. R. Bankr. P. 2016. The debtors contended that Ocwen charged undisclosed and unlawful fees and costs totaling approximately \$1,860, none of which were approved or authorized by the bankruptcy court. The debtors also alleged that Ocwen had misapplied plan payments. The bankruptcy court denied Ocwen’s motion for summary judgment, finding a number of material factual issues in dispute that involved the debtors’ loan history, Ocwen’s methodology for application of plan payments, and the assessment of fees and costs to the debtors’ account.

D. **In re Adams**, No. 04-003875, 2010 WL 2721205 (Bankr. E.D.N.C. July 7, 2010). Chapter 13 debtors sought contempt sanctions against mortgage servicer Ocwen Loan Servicing, LLC (“Ocwen”) for violating the court’s previous order which deemed all mortgage payments due from the debtors to Ocwen current as of the date of the order and enjoined Ocwen from any action to collect any discharged amounts. After entry of the order, debtors refinanced their property with a new lender; Ocwen then sent an erroneous payoff statement and loan history to the new lender. The loan history showed that the debtors’ home was in foreclosure when, in fact, the home had never been in foreclosure. Ocwen claimed to be unaware of the debtors’ discharge, yet when presented with proof of same from debtors’ counsel, failed to change the reported foreclosure status of the home. The bankruptcy court held that Ocwen knowingly, willfully, and flagrantly violated the court’s order as well as the discharge injunction by continuing to assess discharged principal, fees, and costs. The court held Ocwen in contempt and ordered it to pay attorney fees and expenses to both debtors’ counsel and the chapter 13 trustee, \$2,500 in compensatory damages to the debtors, and \$66,300 in punitive damages to the debtors.

E. **In re Cross**, 442 B.R. 681 (Bankr. N.D. Ind. 2010). The bankruptcy court entered an order to show cause why lender HSBC Mortgage Service’s (“HSBC”) motion for relief from stay should either be stricken or denied based on its failure to comply with the local rules applicable to stay motions. According to the court, HSBC’s motion was deficient in several respects. Those deficiencies included: (1) the failure to state the balance due; (2) the failure to state the date and amount of any post-petition payment; (3) the failure to provide a post-petition payment history; (4) the failure to state the claimed value of the property, even though HSBC alleged there was no equity in the property; (5) the failure to itemize any fees, expenses, or penalties claimed due; and (6) the failure to provide information about any post-petition payments or how they were applied even though the motion was based upon a post-petition default. HSBC offered no excuse for the filing deficiencies; instead, it filed an amended motion which complied with the local rule. The court struck the amended motion *sua sponte*, explaining that to ignore the defects in the original motion and proceed on the amended motion would encourage careless motions practice and encourage others to ignore a rule designed to bring order and efficiency to the litigation process. *Id.* at 683.

F. **De La Fuente v. Wells Fargo Bank, N.A. (In re De La Fuente)**, 430 B.R. 764 (Bankr. S.D. Tex. 2010). Chapter 13 debtors filed a motion to hold mortgage lender Wells Fargo

Bank, N.A. (“Wells Fargo”) in contempt of court for violation of the confirmation order and the settlement agreement between the debtors and Wells Fargo, alleging that Wells Fargo failed to comply with the agreement requiring it to correct inaccuracies on the debtors’ account resulting from misapplication of payments. The court rejected Wells Fargo’s “mistakes happen” defense, stating “when mistakes happen not once, not twice, but repeatedly, and when actions are not taken to correct these mistakes within a reasonable period of time . . . the excuse of ‘mistakes happen’ has no credence.” The court ordered: (1) a daily fine of \$2,500 until Wells Fargo comes into compliance with the settlement agreement; (2) compensatory damages in the amount of the overages that the debtors paid in order to comply with Wells Fargo’s improper requests for additional payments; and (3) attorney fees and costs.

**G. *Rodriguez v. Countrywide Home Loans (In re Rodriguez)***, 421 B.R. 356 (Bankr. S.D. Tex. 2009). Debtors brought claims alleging that Countrywide Home Loans, Inc. (“Countrywide”) violated the automatic stay, discharge injunction, Fed. R. Bankr. P. 2016, and the terms of the plan and confirmation order by improperly assessing and collecting undisclosed post-petition fees, misapplying payments under the confirmed plan, and improperly declaring a default after the debtors completed their payments under the plan. Countrywide moved for summary judgment on the claims. The bankruptcy court granted summary judgment for Countrywide on the claims relating to the automatic stay, holding that the misapplication of payments from the debtors was not actionable because the payments were not considered property of the estate. The court also granted summary judgment on the claims relating to the discharge injunction, holding that, because long-term residential mortgage debt was not discharged at the conclusion of the plan, the injunction did not apply. The bankruptcy court denied summary judgment on the Rule 2016 claim, holding that the bankruptcy court had the power to prevent Countrywide from circumventing the rule by waiting until after a debtor emerges from bankruptcy to collect improperly assessed fees. The court also denied summary judgment as to the claims relating to the plan and confirmation orders, holding that a genuine question of material fact existed as to whether Countrywide’s conduct violated these orders.

**H. *Beal Bank, SSB v. Prince (In re Prince)***, 414 B.R. 285 (Bankr. M.D. Tenn. 2009). Debtors filed complaint against Countrywide Home Loans, Inc. (“Countrywide”) seeking damages for the misapplication of payments under their chapter 13 plan and for instituting foreclosure proceedings despite the fact that the debtors were not in default. Countrywide filed a motion for partial summary judgment. The bankruptcy court granted the motion, ruling that the debtors had not established the essential elements of their various tort claims or that the defendants had violated RESPA. At trial on the remaining claim – violation of 11 U.S.C. § 524 – Countrywide admitted misapplying payments, and that the misapplication led to the wrongful foreclosure and subsequent eviction of the debtors. The court found that, based on this admission, the debtors were entitled to reinstatement of the mortgage, forgiveness of rent, and an additional \$2,000 for their time and inconvenience dealing with the Countrywide’s mistakes. *Beal Bank, SSB v. Prince (In re Prince)*, Adv. Nos. 108-0146 and 108-0164, 2009 WL 2584769 (Bankr. M.D. Tenn. Aug. 20, 2009)

**I. *Myles v. Wells Fargo Bank, N.A. (In re Myles)***, 395 B.R. 599 (Bankr. M.D. La. 2008). Debtors alleged that Wells Fargo Bank, N.A. (“Wells Fargo”) did not comply with the

terms of the confirmed plan by continuing to treat their mortgage debt as in default instead of current on the petition date, by improperly applying payments to charges generated because the mortgage was treated as in default, and by improperly holding post-petition payments in a suspense account. On Wells Fargo's motion for judgment on the pleadings, the court let stand the debtors' claims for breach of contract and violation of the automatic stay. The debtors stated a claim under 11 U.S.C. § 362(k) by alleging that Wells Fargo billed and collected amount not due as a result of payment misapplications which were, the court reasoned, more than mere "bookkeeping entries."

**J. *Winslow v. Salem Five Mtg. Co., LLC (In re Winslow)***, 391 B.R. 212 (Bankr. D. Me. 2008). The debtor alleged that Salem Five Mortgage Company, LLC ("Salem") published an inaccurate credit report and issued improper default notices relating to a mortgage for which the debtor's personal liability was discharged in chapter 7. Years after the discharge, the debtor became aware that the mortgage company was still reporting the mortgage loan as an open account, and had sent default notices with the debtor's name on them. Salem did not correct the report despite the debtor's requests. The court found that Salem's ongoing refusal to correct the credit report was coercive, as was Salem's insistence that the debtor still owned the house in question and Salem had a legally binding contract. The court found that, under the "objectively coercive" standard from *Pratt v. Gen. Motors Acceptance Corp. (In re Pratt)*, 462 F.3d 14, 20 (1<sup>st</sup> Cir. 2006), Salem's conduct amounted to a violation of the discharge injunction under 11 U.S.C. § 524(a)(2). The court further found that the default notices were threatening to the debtor and demonstrated an intent to violate the discharge injunction. While the debtor did not offer any evidence of damages beyond attorney fees, the court awarded the debtor fees and costs in the amount of \$39,384 for Salem's violations of the discharge injunction.

**K. *Payne v. Mortgage Electronic Registration Systems, Inc. (In re Payne)***, 387 B.R. 614 (Bankr. D. Kan. 2008). Chapter 13 debtors filed an adversary complaint against mortgage servicer Everhome Mortgage Co. f/k/a Alliance Mortgage Co. ("Everhome"), alleging a violation of the automatic stay after Everhome accused them of a post-petition default. The bankruptcy court found that Everhome misapplied the trustee's disbursements under the plan, admitting that its "computer system does not allow debtors who make all their payments in a timely manner to exit bankruptcy current on their mortgage obligation." *Id.* at 627. As a result, Everhome assessed excessive interest charges and incorrectly accused the debtors of a post-petition default. The bankruptcy court also found that Everhome failed to apply three payments and then charged late fees, held the plan payments in suspense for months, applied payments to late fees before insurance and taxes as required by the loan documents, assessed post-petition inspection fees and other charges without cause or notice, and failed to notify debtors of escrow deficiencies. The bankruptcy court held that Everhome violated the confirmation order and the automatic stay, and assessed actual damages and additional amounts for emotional distress and out-of-pocket expenses.

**L. *Moffitt v. America's Servicing Co. (In re Moffitt)***, 390 B.R. 368 (Bankr. E.D. Ark. 2008). Chapter 13 debtors reopened their bankruptcy case and commenced an adversary proceeding against America's Servicing Company ("ASC"), a servicing division of Wells Fargo Home Mortgage ("Wells Fargo"), for its alleged violation of the automatic stay, discharge

injunction, and the terms of the confirmed plan, following ASC's attempt to collect from the debtors based on an alleged post-discharge default. The debtors sought an injunction against ASC to enjoin it from calling the debtors and to only send them regular and accurate monthly statements. ASC asserted that debtors were delinquent in their mortgage obligation, despite the fact that the mortgage arrearage had been cured under the plan, and that debtors had made all regular post-petition mortgage payments and paid an additional \$10,000 from proceeds of the debtor-wife's personal injury claim in order to reduce the loan's principal balance. The court granted the injunction, finding that ASC misapplied the additional principal payment and, when it attempted to correct its records, it misapplied the trustee's disbursements under the plan and lost a portion of one payment, which caused the account to be one month behind for the next 18 months. The court also found that ASC made no effort to investigate its mistake and took six months to audit the file.

**M.** *In re Sanchez*, 372 B.R. 289 (Bankr. S.D. Tex. 2007). Chapter 13 debtors sought damages for violation of the automatic stay and the plan confirmation order against Ameriquet Mortgage Company ("Ameriquet") for its application of plan payments received from the chapter 13 trustee to satisfy post-petition attorney fees, costs, and property inspection fees it unilaterally assessed in the chapter 13 case. The court concluded that the satisfaction of post-petition charges with plan payments based on the debtors' post-petition earnings violated 11 U.S.C. § 362(a)(3) by taking property of the estate without court approval. The court further determined that the debtors could recover damages under the pre-BAPCPA version of section 362(h) (currently enacted at 11 U.S.C. § 362(k)). Finally, the court determined that, in soliciting a forbearance agreement signed by the debtors post-confirmation, the creditor illegally modified the amended plan in violation of 11 U.S.C. § 1329, and invalidated the forbearance agreement. The court set for trial additional issues to determine the amount of all unreasonable charges assessed by the creditor that the debtors would be allowed to recover, and ordered Ameriquet to file an amended proof of claim describing in detail what the debtors owed.

## **VI. Standing Issues**

**A.** *Edwards v. Wells Fargo Bank, N.A. (In re Edwards)*, 454 B.R. 100 (B.A.P. 9<sup>th</sup> Cir. 2011). The chapter 7 debtor appealed the bankruptcy court's order granting Wells Fargo Bank, N.A.'s ("Wells Fargo") motion for relief from the stay, and alleged that Wells Fargo lacked standing to prosecute the motion. The bankruptcy appellate panel affirmed the bankruptcy court's holding that Wells Fargo had standing. According to the panel, in order to satisfy prudential "party in interest" standing sufficient to seek stay relief, the movant "need only establish that it has a colorable claim to enforce a right against property of the estate." *Id.* at 105. A party has a colorable claim sufficient to confer standing to prosecute a stay motion if it either: (a) holds the note secured by the debtor's (or the estate's) property; or (b) is a "person entitled to enforce" the note under applicable state law. Here, Wells Fargo had a recorded deed as a result of the pre-petition foreclosure sale, which established that, under California law, Wells Fargo presumptively held title to the property and, therefore, had standing to prosecute the stay motion.

**B.** *Bryant v. HSBC Mortgage Servs., Inc. (In re Bryant)*, 452 B.R. 876 (Bankr. S.D. Ga. 2011). The chapter 13 debtor filed a complaint against HSBC Mortgage Services, Inc.

(“HSBC”), as alleged assignee of mortgage, seeking a determination of HSBC’s standing to seek relief from the stay and secured status. HSBC moved for relief from the automatic stay. The bankruptcy court held that HSBC, as the assignee of the debtor’s mortgage loan, did not have to produce a written assignment of the mortgage in order to have standing to move for relief from the stay. Under South Carolina law, the mortgage follows the note even without a written assignment. Here, the original lender indorsed the note in blank and HSBC produced the original note and mortgage at a hearing. The court also held that: (1) the post-petition assignment of a mortgage that had been perfected pre-petition did not violate the automatic stay; and (2) even if HSBC failed to provide sufficient documentation to support its proof of claim, its employee’s credible and uncontroverted testimony was sufficient to establish HSBC’s claim.

**C. *Veal v. American Home Mortg. Servicing, Inc. (In re Veal)*, 450 B.R. 897 (B.A.P. 9<sup>th</sup> Cir. 2011).** Chapter 13 debtors appealed the bankruptcy court’s orders that: (1) granted Wells Fargo Bank, N.A.’s (“Wells Fargo”) motion for relief from stay; and (2) overruled the debtors’ objection to American Home Mortgage Servicing, Inc.’s (“AHMSI”) proof of claim relating to the same obligation as that underlying Wells Fargo’s stay motion. The issue was whether the appellees established standing as a real party in interest to pursue the respective relief requested. With respect to Wells Fargo’s request for relief from the automatic stay, the Bankruptcy Appellate Panel (“BAP”) held that the record did not support the bankruptcy court’s finding that Wells Fargo had standing and reversed the relief from stay order. The BAP concluded that Wells Fargo, the alleged assignee of the debtors’ mortgage, failed to establish that it was either a holder of the note or a “person entitled to enforce” the note under Article 3 of the Uniform Commercial Code (“UCC”). Wells Fargo did not present any evidence of the underlying note; neither did it show that it or its agent had possession of the note. Evidence of the mortgage assignment was insufficient under Article 9 of the UCC to support a conclusion that Wells Fargo held any interest in the note.

Regarding AHMSI’s proof of claim, the BAP held that a party has standing to prosecute a proof of claim involving a negotiable promissory note secured by real property if it is a “person entitled to enforce the note” as defined by the UCC. The BAP found nothing in the record to establish AHMSI’s standing to file the proof of claim. AHMSI presented no evidence showing any agency or other relationship with Wells Fargo, and there was no evidence showing that either AHMSI or Wells Fargo was a “person entitled to enforce” the note. The BAP vacated the claim objection order and remanded to the bankruptcy court for further proceedings on the disputed factual issues.

**D. *Densmore v. Litton Loan Servicing, L.P. (In re Densmore)*, 445 B.R. 307 (Bankr. D. Vt. 2011).** Chapter 13 debtor brought an adversary proceeding in which he objected to the claim of servicer Litton Loan Servicing, L.P. (“Litton”), filed on behalf of Wells Fargo Bank, N.A. (“Wells Fargo”). The debtor alleged that Litton lacked standing to enforce the note because the note was never transferred to Wells Fargo, even though Litton possessed the note and it was indorsed in blank by the original lender. There was a pre-petition assignment of the mortgage to Wells Fargo. The bankruptcy court denied Litton’s motion for summary judgment, holding that there was a genuine issue of material fact about when the note was indorsed. Under

Vermont law, the timing of the indorsement would be determinative of Litton's standing to enforce the note.

**E.** *In re Agard*, 444 B.R. 231 (Bankr. E.D.N.Y. 2011). Select Portfolio Servicing, Inc. ("Select Portfolio"), as servicer for U.S. Bank National Association ("U.S. Bank"), moved for relief from the automatic stay as to the debtor's residence. The debtor opposed the motion, contesting the servicer's standing to seek relief from the stay. The debtor argued that the only interest U.S. Bank held in the underlying mortgage was received by way of an assignment from the Mortgage Electronic Registration Systems, Inc. ("MERS"), as a "nominee" for the original lender, and that U.S. Bank held no interest in the note. Select Portfolio argued that U.S. Bank had standing to seek relief from stay by virtue of a prior state court judgment of foreclosure and sale entered in its favor, and that debtor's objection was barred under *the Rooker-Feldman* doctrine and *res judicata*. The bankruptcy court held that application of either the *Rooker-Feldman* doctrine or *res judicata* required the court to accept the state court foreclosure judgment as evidence of U.S. Bank's status as a secured creditor, and that such status was sufficient to entitle U.S. Bank to relief from the automatic stay. The court held that in all future cases involving an assignment of the mortgage by MERS, the party seeking relief from the stay must demonstrate that it validly holds both the mortgage and note in order to prove standing. MERS has appealed to the district court.

**F.** *In re Alcide*, 450 B.R. 526 (Bankr. E.D. Pa. 2011). Loan servicer, Everhome Mortgage Company ("Everhome"), purportedly acting on behalf of its principal, Everbank, moved for relief from the automatic stay. The debtor asserted that Everhome did not establish standing to enforce the mortgage. Everhome argued that the mortgage was held by Everbank and that Everhome, as the servicer of the mortgage, had the authority to file a motion for relief from the automatic stay. The bankruptcy court denied Everhome's motion without prejudice. According to the court, a servicer's financial interest in the debtor's unpaid stream of mortgage payments satisfied the initial and most fundamental requirement for "party in interest" status, but a servicer must also demonstrate that it was acting within the scope of its authority as the mortgage holder's agent in order to be entitled to prosecute a stay relief motion. Here, the court ruled that Everhome did not present sufficient evidence to permit a finding that it was either: (1) the holder of the mortgage, with the right to enforce it under Pennsylvania law; or (2) an agent authorized by the mortgage holder to initiate court proceedings to enforce the mortgage on the holder's behalf. There was no evidence that Everbank had appointed Everhome as its agent for the purpose of initiating legal proceedings to enforce the mortgage, and the court was unwilling to assume that being a "servicer" included the authority to file a legal action on Everbank's behalf.

**G.** *Harris v. HSBC Bank USA, N.A.*, No. 09-30215, 2010 WL 3860603 (D. Mass. Sept. 28, 2010). The *pro se* debtor appealed the bankruptcy court's denial of his motion to reconsider an earlier order dismissing his adversary proceeding against HSBC and lifting the automatic stay. The debtor specifically challenged HSBC's standing to obtain relief from the stay and foreclose on his home. HSBC filed two lift stay motions, one claiming that MERS had assigned the note to HSBC and the other failing to allege any assignment of the note. On appeal, HSBC argued that HSBC acquired the note when it was "securitized and pooled along with

numerous other loans and held in trust” by HSBC. According to the district court, the record contained scant evidence of any assignment of the note, and HSBC failed to prove how it acquired the note. Without such evidence, HSBC could not demonstrate a colorable claim in the property and, therefore, could not demonstrate standing under state law to foreclose. The district court reversed and remanded, so the bankruptcy court could directly address whether HSBC had standing to enforce the note. HSBC subsequently withdrew its motion for relief.

**H. *In re Mims*, No. 10-14030, 2010 WL 4260041 (Bankr. S.D.N.Y. Oct. 27, 2010).**

Wells Fargo filed a motion for relief from stay to foreclose on the chapter 7 debtor’s real property. Neither debtor’s counsel nor the trustee responded to the motion. The bankruptcy court denied the motion without prejudice, finding that Wells Fargo lacked standing to request relief from the automatic stay because Wells Fargo failed to produce evidence that it owned the note as required by New York law. The note was originally held by Lender America and endorsed to Washington Mutual, but Wells Fargo did not demonstrate that the note was ever transferred or assigned to Wells Fargo.

**I. *Ameriquist Mortg. Co. v. Nosek (In re Nosek)*, 609 F.3d 6 (1<sup>st</sup> Cir. 2010).** The bankruptcy court, *sua sponte*, issued Fed. R. Bankr. P. 9011 sanctions of \$250,000 against Ameriquist Mortgage Company (“Ameriquist”) for misrepresenting that it was the “holder” of the mortgage, when Ameriquist had assigned the mortgage after originating the loan and was only the servicing agent. On appeal, the First Circuit reduced the sanction to \$5,000, holding that the sanctions were excessive. The court reasoned that Ameriquist’s representation that it was the holder of the mortgage was not a deliberate falsehood or intended in any way to mislead court or debtor, or achieve anything for itself; that the agent arguably could have sued “as if” it were the holder of the note; and that the debtor was not prejudiced by the misrepresentation.

**J. *In re Pastran*, No. 06-34728, slip op., 2010 WL 2773243 (Bankr. N.D. Tex. July 13, 2010).** Mortgage servicer American Home Mortgage Servicing, Inc. (“AHMSI”) sought relief from the automatic stay as to the chapter 13 debtor’s residence. The issue before the bankruptcy court was whether, applying Texas law, AHMSI was the owner and holder of the note entitling it to relief under section 362(d)(1). The debtor and AHMSI relied on materially different versions of the note. The debtor’s version contained no endorsement that would demonstrate AHMSI’s ownership or possession of the note. AHMSI’s version, however, contained two endorsements, the second of which was “in blank” and meant the note was payable to the “bearer.” The debtor’s version was received into evidence by the court. AHMSI did not offer its version of the note into evidence during the hearing, so the court declined to admit it. The bankruptcy court found that AHMSI lacked standing to enforce the note and denied its motion for relief without prejudice to refile another motion if the creditor could address the chain of title deficiency.

**K. *Deutsche Bank Nat’l Trust Co. v. Tarantola (In re Tarantola)*, No. 09-09703, 2010 WL 3022038 (Bankr. D. Ariz. July 29, 2010).** Deutsche Bank National Trust Co. (“Deutsche Bank”) filed a motion for relief from the automatic stay as to the chapter 13 debtor’s residence. Deutsche Bank claimed to be the note holder and real party in interest with standing

to enforce the note under section 362(d)(1). The debtor challenged Deutsche Bank's standing. The bankruptcy court held that Deutsche Bank failed to demonstrate that it was a party in interest entitled to relief from the stay. The court found that Deutsche Bank's motion lacked any evidence that it had the requisite standing. Attached to the motion were a note (without endorsements), the deed of trust, and a notarized, but unrecorded, assignment. Deutsche Bank later filed an allonge, which purported to assign the loan from Argent to Deutsche Bank. Witness testimony, however, revealed that the allonge was created after the motion was filed, and was affixed to a copy of the note, not the original. The court found that the allonge was ineffective to transfer the note because it was created after the filing of the motion, contrary to the assertions of the attorneys for Deutsche Bank who falsely represented that it was attached to the original. The allonge was also found to be ineffective because it was not created in connection with an event which was authorized by the underlying loan purchase agreement, such as a repurchase or refinance. Deutsche Bank filed a motion for leave to amend their claim.

**L.** *Arvest Mortg. Co. v. Nail (In re Nail)*, 427 B.R. 495 (Bankr. W.D. Ark. 2010). The chapter 13 debtor challenged the standing of Arvest Mortgage Company ("Arvest") to pursue a non-dischargeability complaint. The bankruptcy court agreed, holding that Arvest did not have standing because it had foreclosed and transferred the property to Fannie Mae. Because the only issue in the proceeding was whether Fannie Mae would absorb a loss, Arvest did not have standing under Fed. R. Bankr. P. 7017 to pursue the complaint through its prior servicing agreement.

## **VII. Other**

**A.** *Cruz v. Hacienda Assoc., LLC (In re Cruz)*, 446 B.R. 1 (Bankr. D. Mass. 2011). The chapter 13 debtor brought an adversary proceeding against residential mortgage lender Wells Fargo Bank, N.A. ("Wells Fargo") for improperly proceeding with foreclosure while debtor's application was pending for a loan modification under the federal government's Home Affordable Modification Program ("HAMP"). Debtor claimed that he was a third party beneficiary of Wells Fargo's obligations under HAMP and that Wells Fargo had violated its obligation of good faith and reasonable diligence under Massachusetts law. The debtor moved for preliminary injunctive relief to halt the foreclosure proceeding. The bankruptcy court determined that the debtor was not a third party beneficiary, but was nonetheless entitled to preliminary injunctive relief based on a reasonable likelihood of success on his state law claim for negligence. The court reasoned that Wells Fargo had a duty under the HAMP guidelines to stop the foreclosure sale while evaluating the debtor's application for a loan modification.

**B.** *Pigg v. BAC Home Loans Servicing, LP (In re Pigg)*, 453 B.R. 728 (Bankr. M.D. Tenn. 2011). The chapter 7 debtor brought an adversary proceeding against Bank of America, N.A. and BAC Home Loans Servicing, LP (collectively "BofA"), as well as her homeowners association ("HOA"), seeking equitable relief to stop the accrual of HOA fees on her flood-damaged condominium unit, which she had vacated and surrendered. She also sought to compel BofA to either accept a deed in lieu of foreclosure or to foreclose in the event the court concluded that her post-petition HOA fees were nondischargeable under 11 U.S.C. § 523(a)(16). BofA argued that despite the fact that the debtor was flooded out of her home, she remained

liable for all post-petition HOA fees, and that there was nothing in the law that required BofA to foreclose. The bankruptcy court determined that the post-petition HOA fees were nondischargeable because the debtor maintained a legal, equitable, or possessory interest in the condominium. Relying upon 11 U.S.C. § 105(a), the court fashioned an equitable remedy to protect the debtor from the further accumulation of HOA fees. The court found that the inaction of BofA and the HOA was tantamount to consent to a sale of the property. The court temporarily vacated the debtor's discharge, and reappointed the chapter 7 trustee for the purpose of selling the property pursuant to 11 U.S.C. § 363(f). The court ordered that the HOA's claim be paid as a first priority claim after payment of the trustee's costs of sale; BofA would receive whatever it would have received had it foreclosed upon the property.

### **VIII. Sanctions Against Attorneys Representing Creditors**

**A.** *In re Taylor*, No. 09-2479, 2010 WL 624909 (E.D. Pa. Feb. 18, 2010), *aff'd in part, rev'd in part, vacated in part sub nom. Udren Law Firm v. HSBC Mortgage Corp.*, 655 F.3d 274 (3<sup>d</sup> Cir. 2011). The bankruptcy court held that HSBC and its local counsel violated Fed. R. Bankr. P. 9011 ("Rule 9011") by filing two erroneous pleadings in which all the information in the pleadings was computer-generated and had been provided to counsel without any human oversight, and about which the law firm made no investigation before filing the pleadings. The bankruptcy court held that their conduct violated Rule 9011 because the attorneys used the data without reasonable inquiry about its accuracy and without otherwise interacting with their client. The bankruptcy court limited its sanction to non-monetary relief, requiring HSBC to circulate a copy of the decision to its other outside counsel, and ordering two senior attorneys at the law firm to obtain ethics and other training.

The law firm and attorneys appealed. The district court reversed the sanctions against all parties, including HSBC which had not appealed, holding that the bankruptcy court abused its discretion in issuing these remedies. The district court determined that the law firm's failure to obtain accurate information and correct the record was an insufficient basis standing alone for imposing sanctions. Further, the district court found that bankruptcy court was more concerned with the practices of attorneys representing mortgage companies in general, rather than limiting its review to the practices involved in this case.

The United States Trustee appealed to the Court of Appeals for the Third Circuit. The Third Circuit reversed the district court, ruling that the bankruptcy court acted properly, and within its discretion, by sanctioning the law firm and the lawyer in charge of the firm's bankruptcy practice under Rule 9011 for relying solely upon data generated by the computer system HSBC employed. It also held that the district court lacked jurisdiction to reverse the sanctions imposed upon HSBC because HSBC did not appeal the order. Finally, the Third Circuit noted that the bankruptcy court properly considered the effect the sanctions would have on the future conduct of other attorneys appearing before that court: "the prime goal [of Rule 11 sanctions] should be deterrence of repetition of improper conduct."

**B.** *In re Rivera*, 342 B.R. 435 (Bankr. D.N.J. 2006) (*Section II, supra*).

- C. *In re Haque*, 395 B.R. 799 (Bankr. S.D. Fla. 2008) (*Section II, supra*).
- D. *In re Parsley*, 384 B.R. 138 (Bankr. S.D. Tex. 2008) (*Section II, supra*).
- E. *Stoker v. Aurora Loan Serv., Inc. (In re Stoker)*, No. 09-3349, 2010 WL 958030 (Bankr. S.D. Tex. Mar. 10, 2010) (*Section II, supra*).