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2017 Midwest Regional Bankruptcy Seminar

Consumer Track

Everything You Always Wanted to Know About Foreclosures (but Were Too Busy to Ask)

Pamela N. Maggied, Moderator

Pamela N. Maggied Co., L.P.A.; Columbus, Ohio

Brian D. Flick

The Dann Law Firm; Cincinnati

Wayne P. Novick

Wayne Novick and Associates; Dayton, Ohio

William L. Purtell

Lerner, Sampson & Rothfuss, LPA; Cincinnati

How to File a Foreclosure Action

Bill L. Purtell, Esq.

Litigation and Compliance Attorney

LERNER | SAMPSON | ROTHFUSS

120 East 4th St. Ste 800

Cincinnati, OH 45202

T: 513-619-6522 (direct)

F: 513-354-6936 (direct)

E: bill.purtell@lsrlaw.com

I. Jurisdiction and Venue

A. Court of General Jurisdiction

Judicial Foreclosures involve large debts, title to real estate, and prayers for equitable relief, which are generally reserved to a state's court of general jurisdiction. In Ohio this is the Common Pleas Court and in Kentucky this is the Circuit Court. Specialty Courts can be created by statute to handle foreclosure on tax liens, municipal liens, or other non-lender claims.¹

B. Location of the Property

Venue is always appropriate in the county where the property is physically located. If the property straddles the line between counties, venue is proper in either county. Under the Fair Debt Collection Practices Act, it is a violation to file a foreclosure in a venue other than the location of the property. 15 USC 1692i.

II. Standing

Standing comes in two varieties: the subject-matter jurisdiction of the court to hear *any* foreclosure action, and the jurisdiction of the court over the *particular* action being challenged. Caselaw has made it clear that the standing of a court to hear any claim

¹ E.g., Municipal Courts can foreclose under Ohio Revised Code 1901.183(B) and 185(B)

is jurisdictional, and cannot be waived, while the standing of any particular case is not jurisdictional, and is waived if not challenged during the foreclosure. *Bank of Am., N.A. v. Kuchta*, 141 Ohio St. 3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, 2014 Ohio LEXIS 2520 (Ohio Oct. 8, 2014).

In order to possess standing, a lender must show some connection to the Note and Mortgage it is foreclosing. This connection must exist at the time the foreclosure is commenced, but does not need to be proven in the initial pleading. *Wells Fargo Bank, N.A. v. Horn*, 142 Ohio St. 3d 416, 2015-Ohio-1484, 31 N.E.3d 637, 2015 Ohio LEXIS 960 (Ohio Apr. 22, 2015). There is no requirement under the UCC to be the ‘owner’ of a debt, as a Note can be enforced by a holder, or a person with the rights of a holder. UCC 3-301.

III. Legal Documents Initiating the Foreclosure

A judicial foreclosure is initiated by the filing of a Complaint with the Court. State law also governs when this Complaint becomes effective notice to third parties, including a hypothetical purchaser or bankruptcy trustee. This could be at the time the Complaint is filed (*see* ORC 2703.26), or when a separate notice is recorded in the public records (*see* KRS 382.440).

Multiple lienholders can file cross-claims or counterclaims for foreclosure inside of the same case. Even a case that began as a non-foreclosure matter can become a foreclosure once a party files a pleading requesting this relief. The caption of a case is not sufficient to indicate whether it is a foreclosure. Review of individual pleadings may be required.

IV. Title Curative and Reformation Counts

A judicial foreclosure may involve all legal and equitable claims that a party possesses. A common supplemental claim in a foreclosure is to cure any title defects, including the reformation of the legal description. Reformation is an equitable remedy, heard by the Court without a jury, to set forth the true intentions of the parties to a contract. *Mason v. Swartz*, 76 Ohio App. 3d 43, 600 N.E.2d 1121, 1991 Ohio App. LEXIS 4111 (Ohio Ct. App., Ottawa County Aug. 30, 1991), *Parkview Fed. Sav. Bank v. Grimm*, 2010-Ohio-5005, 2010 Ohio App. LEXIS 4212, 2010 WL 4018700 (Ohio Ct. App., Cuyahoga County Oct. 14, 2010).

When a count for reformation is included in a foreclosure pleading, it puts the parties on notice of the true property being foreclosed, not just the property originally described in the faulty mortgage. When pled properly, it removes a trustee's ability to act as a bona fide purchaser without notice. *Treinish v. Norwest Bank Minn., N.A. (In re Periandri)*, 266 B.R. 651, 2001 Bankr. LEXIS 1077, 38 Bankr. Ct. Dec. 113, 2001 FED App. 0008P (6th Cir.) (B.A.P. 6th Cir. Sept. 10, 2001).

V. Relief from Automatic Stay

6th Circuit caselaw holds that actions in violation of the automatic stay are voidable, instead of being automatically void. *Easley v. Pettibone Mich. Corp.*, 990 F.2d 905, 1993 U.S. App. LEXIS 7289, 28 Collier Bankr. Cas. 2d (MB) 1002 (6th Cir. Mich. Apr. 8, 1993). This holds open the possibility for annulling the stay in order to preserve a foreclosure action that would otherwise have been voidable. *First Merit Mortg. Corp. v. Kolm*, 2000 Ohio App. LEXIS 4284, 2000 WL 1369980 (Ohio Ct. App., Stark County Sept. 18, 2000).

A. Chapter 13 Cases

Foreclosure attorneys are familiar with these rules of bankruptcy and seek to file Complaints that will be defensible. The most common tactic is to file a motion for relief from stay in a Chapter 13 case. Once stay relief is granted as to that creditor, the foreclosure can be commenced in state court. It is currently debated amongst creditors' attorneys whether the complaint should still ask for *in personam* judgment on a long-term debt, or whether a proof of claim should be filed in the Chapter 13 case once the property is foreclosed and liquidated. The terms of the Chapter 13 plan, or the stay relief order, may dictate how any money judgment is treated in the foreclosure action.

B. Chapter 7 Cases

Creditors have two options in a Chapter 7 case: wait it out, or move for relief and abandonment. Chapter 7 cases generally have a short lifespan, allowing a debtor to file the case, achieve a discharge, and close the case, all within a relatively short time. To save fees, a creditor could wait for the discharge and closing of the case to provide the termination of the automatic stay. This is not an effective strategy if there are other assets or claims to administer by the trustee, since this would delay the final closing of the case.

Many creditors choose to file a motion for relief from stay, coupled with a motion to have the trustee abandon the property. Few creditors wish to include the trustee in the state-based foreclosure, so they will wait for the order abandoning property even if the order for relief from stay is granted first.

The complaint for foreclosure will generally set forth the Chapter 7 discharge to avoid the appearance of trying to collect personally on the discharged debt. If a reaffirmation agreement exists, this too will generally be mentioned in the complaint to avoid the appearance of collecting on a discharged debt.

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DOCUMENTS REQUIRED FOR BANKRUPTCY FILING

****BEFORE FILING BANKRUPTCY YOU ARE REQUIRED TO PARTICPATE IN A PRE-BANKRUPTCY CREDIT COUNSELING PROGRAM****

- | Requested | Provided | N/A | |
|--------------------------|--------------------------|--------------------------|--|
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | State and Federal Tax returns for the preceding 4 years or transcripts of returns. Call (800-829-1040) or go to IRS and request last 4 years of Federal Tax Transcripts for, 2013, 2014, 2015, 2016 . We need State and Federal Tax returns along with supporting documentation such as W2s and 1099 or go to www.irs.gov and download form 4506 or 4506 T and follow the instructions. Please bring any documents you have received from IRS and any other tax authority. Any documents on business tax returns |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | A current credit report . NOT YOUR CREDIT SCORE
You can obtain the credit reports by going to www.annualcreditreport.com or calling 1-877-322-8228 . If you call the number it will take up to ten days to receive them. You can go online and receive a copy in minutes. Please bring copy. Only order ONE credit report. You must print it or save it as a PDF. You can not save it to your computer as a word document. Do not order Do not order any items that cost money. |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | Credit card statements or receipts going back 90 days |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | Pay stubs for the 6 full months prior to the filing of your case and or unemployment records, social security/pension |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | Deeds, Notes, Mortgages & Title reports to real property copy of deed and recorded mortgage and signed note |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | Title and Loan documents to cars, trucks, motorcycles, boats, RV's and campers car titles |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | Bank statements going back 3 months personal and business |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <u>Statements showing balances owed on mortgages, cars, etc.</u> |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | Marital property agreements or decrees for recent divorce |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | Life, homeowners/rental, vehicle and other insurance policies document showing type of policy and who is beneficiary |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | Lawsuits and judgments filed against you |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | Written appraisals for home, valuable personal property, vehicles |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | Documents showing retirement account balances (pension, 401K, 403b, PERS, STERS) |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | Student Loan Documents get information |

2017 MIDWEST REGIONAL BANKRUPTCY SEMINAR

THE LAW OFFICE OF

Wayne P. Novick

2135 Miamisburg-Centerville Road

Centerville, Ohio 45459

Ph: 937-436-2606

Fx: 937-436-4602

www.Gratefullawyer.com

Wayne P. Novick

Attorney at Law

Gratefullawyer@gmail.com

Elizabeth M. Chinault

Attorney at Law

ElizabethChinault@gmail.com

Re: Reaffirmation Agreement

Dear _____ :

This letter is designed to provide you with further help as you decide whether you should sign a Reaffirmation Agreement. It is also to explain why our office may decline to sign.

In general:

1. A Reaffirmation Agreement is a contract between you and the creditor that you will pay all or a portion of the money owed, despite the bankruptcy filing. In return for keeping your property after the bankruptcy, the creditor promises that, as long as payments are made, the creditor will not repossess or take back the property.
2. You will have a cooling-off period in which to cancel the reaffirmation Agreement if you change your mind. If a debtor changes his mind and wishes to terminate or rescind a Reaffirmation Agreement, then the debtor has 60 days to file a rescission agreement after a Chapter 7 reaffirmation is fully executed and filed with the Bankruptcy Clerk's office.
3. Reaffirmation agreements are strictly voluntary. They are not required by the Bankruptcy Code or other state or federal law. A Reaffirmation Agreement must not impose an undue burden or hardship upon you or your family and must be in your best interest. An "undue hardship" causes a debtor a significant, but otherwise avoidable, obstacle to keeping necessary debts, such as utilities, food and clothing, by the debtor or the debtor's dependents.

REMEMBER

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- Signing this agreement results in a waiver of your Chapter 7 discharge as to the property spelled out in the agreement.
- If you stop paying on the asset after a Reaffirmation Agreement is signed and filed, then the asset can be foreclosed upon or repossessed and a deficiency judgment obtained for the difference. It is NOT protected by your bankruptcy discharge.
- A Reaffirmation Agreement is a collection tool that permits a creditor to continue doing business with debtors.
- Be aware that credit unions can have a negative reaction to an unsigned agreement. If debtors do not reaffirm their credit union debts, many credit unions have policies to eliminate non-reaffirming debtors from their membership.

When dealing with mortgages:

There are some advantages to signing a Reaffirmation Agreement on a mortgage.

1. Signing a Reaffirmation Agreement **may** result in the mortgage holder placing your past due payments at the end of the loan. This is something that occurs without predictability. Even if the matter has been discussed with the mortgage company prior to filing a bankruptcy, there is no guarantee that the mortgage company will actually follow through with an offer to renegotiate the loan.
2. Signing a Reaffirmation Agreement on your home will allow you to continue as a member of a credit union or bank.
3. Signing a Reaffirmation Agreement on your home will prevent other problems with other secured loans through the same bank or credit union.
4. Most banks/mortgage holders will then report your payments to the Credit Bureau.

There are disadvantages to signing a Reaffirmation Agreement on a mortgage.

1. Your mortgage is now outside the protection of the bankruptcy court. If you fail to make future payments, your house can be foreclosed on and sold at sheriff sale.
2. Or if you fail to make a payment, all the past due payments that were placed at the end of the loan, may suddenly become due.
3. The court could decide to disallow the Reaffirmation Agreement based on the fact that the loan will cause an undue burden to you and your dependents.

Choosing not to reaffirm on your Mortgage

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1. You are no longer personally responsible on your debt.
2. The lender still has a security agreement on your house (called a mortgage) and if you fail to pay they can foreclose on the house.
3. If you stay current on your home the lender cannot/or generally will not foreclose.
4. The lender may not send you new statements, please retain a coupon and make copies so you can send in more payments.
5. The lender may not report to the credit bureaus that you are making payments. Please keep detailed records of your payments in the future.

Counsel may decline to sign your mortgage Reaffirmation Agreement.

If, after doing a due diligence analysis we cannot determine that the signing of an agreement is in your best interest, we will refuse to sign.

If that is the case, and it is your desire to continue with the agreement, you may do so. This will result in a court hearing **without** our representation where the judge will decide the matter. **The judge will ask questions to determine whether the Reaffirmation Agreement imposes an undue burden on you or your dependants and whether it is in your best interests.**

If you have any further questions regarding the above information, please call the office and schedule an appointment to see your attorney.

Sincerely,

Wayne P. Novick
Elizabeth Chinault
Attorneys at Law

The Law Office of Wayne P. Novick & Associates, a Federal Debt Relief Agency,
have proudly assisted consumers seeking relief under the U.S. Bankruptcy Code for over 30 years.
Members of the National Association of Consumer Bankruptcy Attorneys.

WHEN TO FILE BANKRUPTCY

TO SAVE MY HOME

Wayne Novick

gratefullawyer@gmail.com

Wayne Novick and Associates

2135 Miamisburg-Centerville Rd

Dayton Oh., 45459

My prospective clients have a story to tell me about why they are in the seat across my desk. This story is going to help me determine if bankruptcy is the way to save the clients' homes. This story is going to tell me whether the clients truly want to save their homes and if it is even feasible. I may learn that there are other goals that are more important than the home to my client. I have to learn to listen while looking at all of the details. Bankruptcy lawyers often see that Bankruptcy is the only solution when there maybe be solutions.

1. **THINGS TO LOOK AT:**

The public records is the first place I am going to look to obtain information on what is going on with my client. Is there a foreclosure pending? The first thing I want to look at; Has a foreclosure be filed and have the clients been served. This establishes the time frame in which the client and I have to examine the situation. It may also establish what the options are?

Has the time run to attack the mortgage in state court? If the foreclosure sale has occurred, then bankruptcy cannot undo the sale and save the homes. Once the hammer has come down, it cannot be undone in bankruptcy (Federal Land Bank of Louisville vs Glenn 760 F.2nd 1428 (6th Circuit 1985), Oliver v Bankfirst Fin'l Servs. 407 B.R. 442 (Table), 2009 WL 394435, 2009 Lexis 261, (B.A.P 6th Cir. Feb 17 2009).

The filing of the foreclosure is the start of the gathering of materials for the analysis. The complaint and the title search should produce the mortgage documents, including but limited to the mortgage, the note, the assignments, modifications, additional liens and the legal description. The client may have this material. The courts are making this material available on their websites. The complaint will contain information. It lists the last payment applied and the amount of the payment, including if it includes escrow.

Make sure that all important dates including status are calendared. This is important if you working on non-bankruptcy options but preserving the bankruptcy as a parachute to pull when all other options have failed. Important dates to watch out for are response dates and sales dates. In Ohio we now have to watch for the Sheriff Sale Date, Tax Sale Dates (O.R.C.5721.37) , In Rem Tax Foreclosures, and Private Sale Foreclosures Sale Dates (O.R.C 2329.152 Authorization of private selling officer). It is not just the mortgage holder who can file a foreclosure on the property. Ohio authorizes that an In Re Tax Foreclosure may be requested by

the treasurer, local jurisdiction, a land bank or an individual. An individual can request a foreclosure sale be set through the depositor foreclosure program. A private individual can petition to foreclosure based on delinquent taxes.

Double check the documentation. The county recorders offices contain all recorded material and that should be obtained and reviewed. This should be compared to the information in the complaint. The client should bring closing documents, correspondences, and any other material they may have concerning the mortgage and his home. The recorder's office website will also yield any IRS Liens, mechanics liens and other liens. The IRS lien attaches to the real estate when it is assessed and not when it is recorded. Scary paragraph :

**5.17.2.2.1 (03-27-2012) from the IRS Website and the Legal Reference Guide for revenue Officers:
When and How the Tax Lien Arises**

1. The federal tax lien arises when any "person" liable to pay any federal tax fails to pay the tax after a demand by the Government for payment. IRC § 6321. For federal tax law purposes, a "person" is defined to include individuals, trusts, estates, partnerships, associations, companies, and corporations. IRC § 7701(a)(1). The lien is effective from the date the Government assesses the tax. Thus, if the taxpayer neglects or refuses to pay the assessed tax, then the lien is deemed to relate back to the assessment date. IRC § 6322. The Service is not required to file a NFTL in order for the tax lien to attach. As discussed later in the text, the Service may file a NFTL in order to have priority over the taxpayer's other creditors.

The clients credit report is to be reviewed. The client can obtain a credit report for free at www.annualcreditreport.com or by calling (1-877-322-8228). Most bankruptcy programs contain a link to a program so you can assist your client in getting a credit report for free. Credit Reports changed on July 1, 2017. These changes will result in some negative information dropping from the credit reports. The credit report should provide you with more information as to when the mortgage was taken out, a history of payments, and current status of the mortgage. It can also give you information as to the existence of other mortgages, secured debt and your client's big picture.

The County Auditor and Treasurer sites can provide important information at this point. Current property value is listed but often is the historical value of the property. You can also see prior sales. It generally lists the taxes owed and their annual rates.

The next step is to review the above information against the information the client is providing you. There are a number of important documents that I want to see to get the rest of the story. We provide the client a checklist of items we want review. Copy attached. This information allows me to evaluate the clients story and to help make recommendations.

1. Paystubs and Income information into the household. Bankruptcy Abuse Prevention and Consumer Protection Act's (BAPCPA) definition of income may not be the same as the clients. BAPCPA defines income for the means test (11 USC 101 (10)(A) (current monthly income) and the courts have helped define disposable income (1325(b)(1)(B) and 1325 (b)(2) to fill out I and J.
I am looking for whatever income is available to meet my clients goal of staying in the house. This can include family contributions, social security and even the children's social security.
2. Tax returns for the last four years including all schedules and documentation. This is not for the code this is for the client and I to review what has happened in their lives over the

- last four years. I am looking at the various schedules for income, problems, property and business. It can also reveal transfers. The 1099 mortgage statement should contain escrow, balance and monthly payment information
3. Homeowners Insurance declaration page to see if it is current and its costs. Many clients believe that the mortgage company is taking care of it. It turns out is it forced place insurance and the client know nothing about it.
 4. Monthly statements and letters from the mortgage company.
 5. Car titles and loan documents
 6. Bills

The above is the key information to begin to confirm the clients story and see if the clients' goals are realistic.

THINGS TO BE AWARE OF;

The review has to be aware of a number of traps and pitfalls that can limit the options to the client. First I want to know if the client has filed a prior bankruptcy. A prior bankruptcy can place limits on the options for the client. The ability to obtain discharge is limited by 11 USC 727(a)(8) and (9). A Debtor is ineligible for a discharge until 8 years have passed from the previous Chapter 7 filing date. The debtor is not eligible for a discharge in a Chapter 7 until six years have passed from the filing date of a Chapter 13 unless the debtor has paid 100% of the unsecured or 70% of the unsecured: the plan was proposed in good faith and was the debtor best effort. Then a debtor cannot get a discharge in Chapter13 unless it has been 4 years since the filing of a Chapter 7 11USC 1328 (f)(1) and two years from the filing of a Chapter 13 11 USC 1328(f)(2), Carroll v. Sanders (In re Sanders), 551 F.3d 397 (6th Cir. 2008). The discharge may not be important if trying to save a home.

More Importantly if there was a prior case are the multiple filing relief from stay rules. There are actually three rules that you must be aware of. The rules revolve around how many prior cases were pending in the previous year.

The no prior case filing rule is simple. 11 USC 362 “The automatic stay“ stops the foreclosure sale in its tracks. The debtor must file the bankruptcy case prior to the sale of the property. The sale is void if it takes place after the filing of the bankruptcy. It does not matter if the buyer and seller do not have notice of the bankruptcy at the time of the sale.

The “one case is/was the pending in the year prior” rule This is the debtors second case. This is the complicated one. The statute states that the stay is only in place for 30 days. 11 USC 362(c)(3)(a) states that the stay is only in effect for 30 days unless a party moves to confirm the stay, it automatically terminates.

“the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case; “

Make sure you understand how this rule is applied in your jurisdiction. Follow the local practice on what needs to be filed and when. Caution says file the motion to extend stay in every case. A creditor should file for a comfort order that the stay is not in effect before proceeding. However, the case laws states that the stay is in effect as to property of the estate and the house is property of the estate. The stay is no longer in effect against the debtor. In *Re Murray* 350 B.R. 406 (Bankr. S.D. Ohio 2006), *In re Harris* 342 B.R. 27 (Bankr. N.D. Ohio 2006) see contra *St. Anne’s Credit Union v Ackell* 490 B.R. 141 (D.Mass 2013)

The “two cases or more were pending in the year prior to the filing” rule or this is the third case within a year. The statute specifically states there is no stay in effect.

- a. 11 USC 362 (c)(4)(a) states that there is no stay in effect.
“if a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b), the stay under subsection (a) shall not go into effect upon the filing of the later case.”

The burden is upon the debtor to immediately file a motion to impose the stay upon filing the case. Success for the imposition of stay will depend on circumstance. What has changed to justify the third filing in a year. Potential things to highlight are employment changes, illness and changes in income. Counsel should have all this documented and prepared to proceed prior to the hearing. This is a lot harder form the debtor to win. The creditor may want to immediately file for a comfort order that there is no stay in effect.

The attorney on the new filing must also be aware of the voluntary dismissal rule and the 180 day bar. If a motion for relief from stay is filed by the mortgage creditor and the Debtor then voluntarily dismisses the case, there is a 180 day bar to refiling the case. 11 USC 109 (g)(2). The 6th Circuit has adopted the mandatory approach requiring dismissal of the second case. In *Re Anderssen* 209 B.R. 76 (B.A.P. 6th Cir. 1997), *In Re Steele* 31 B.R. 518 (E.D. Mich 2001).

Finally watch out for 109(g)(1) time bars for violating a previous court order. This is for 180 days.

Modification of the Mortgage. Upon meeting with the clients I try to get them to apply for modification. It requires a similar set of documents as the filing of the bankruptcy. The forms are available on most mortgage company websites. Even if there is a prior modification I have the client apply. The application may stop the foreclosure process. There are in house modification that do not necessarily limit the debtor to one modification. Make sure you submit a letter of authorization so you can speak to the mortgage company on behalf of your client.

3. **THINGS TO LOOK FOR:**

Debtors counsel has to wear several hats at this moment. The lawyer has to look at this from a legal standpoint, a mathematical standpoint, a practical standpoint and the debtors standpoint. The debtor may be able to save the home through the bankruptcy court. The debtor may even be able to afford the home. What are the client's real goals? Defining them and defining them early can save a lot of work.

BUT HERE THE LAWYER MAY NEED TO ASK THE DEBTOR SOME REALLY IMPORTANT QUESTIONS.

1. Is this the house you want to die in?
2. Are you wanting to move in a few years to something different?
3. Does the client really want the house or do they just fear the unknown?
4. Are their problems with the house that make it not worth keeping? Some of the issues I have seen are mold, structural damage, major repair work, no bathrooms and of course bad neighborhoods.
5. Should the clients consider the cost of future repair?

Once the above are answered it is time to evaluate the clients' options. Can the clients actually be able to afford the house payments. If the clients are current can they file a Chapter 7 and discharge all the unsecured debt. This can leave them enough funds to continue to make the mortgage payments.

The debtors maybe behind on their mortgage. This generally eliminates a Chapter 7 from the equation as the mortgage company will file for or continue the foreclosure following the discharge in the 7. Can a Chapter 13 plan be designed that will cure the arrears in 60 months while maintaining the ongoing mortgage payment. Clearly this will not lower the debtors monthly payments. Most courts are allowing the debtor sixty months to cure the arrears. 11 USC 1322 (C) (1) and 11 USC 1322 (b)(5).

The debtors may be able to modify their first mortgage. This can be done even if they are behind. A mortgage can be modified if the final payment comes do during the 60 months of the Chapter 13 or a balloon payment comes due in the 60 months window. 11 USC 1322 (C) (2) and 11 USC 1325 (a)(5). In Re Eubanks, 219 B.R. 468 (B.A.P. 6th Cir. 1998), In Re young 199 B.R.643 (Bankr.E.D.Tenn 1996). The debtors still have to be able to afford the payments.

A mortgage can be modified if it is secured with other collateral (i.e. a car) be weary of 11 USC 101 (27B) which defines incidental property. There is a list of excluded collateral that can be used to allow the debtor to modify the mortgage. Prior to the BAPCPA changes there were case trying to define what is the necessary other collateral allowing a mortgage to be modified.

The Courts in the Southern District of Ohio are using a provision in the District Wide Plan along with a Standardized Motion to avoid wholly unsecured and void mortgages. This procedure used to be done by adversary and now can be done by motion under 11 USC 506. The motion is now a standard fill in the blanks form at the courts website. The debtor may be able to

afford their home if there was only one mortgage on the property. This is only available in Chapter 13.

Has the debtor been unemployed? There is money here under a state program. They may be eligible for the “Hardest Hit Funds” <https://savethedreamohio.gov/>. There is upwards of \$30000.00 available to help the debtors catch up their mortgage and make future payments. In exchange a disappearing mortgage is placed on the property

Have they applied for a modification and has it been granted? Will the underwriter allow a second modification? Not all modifications are recorded. I would suggest helping guide the debtor through this process. It is not easy and many of my clients would give up if we did not stay on top of this.

4. EVALUATING THE OPTIONS

The next step is to go over the options with the client. Make sure the clients fully understand what is involved with trying to keep their home. Most of the time there clients are unsure what each choice is. The client can try to fight this in state court, they may try to salvage this under the umbrella of a bankruptcy or they may just decide to walk away.

The debtor may have state courts defenses against the mortgage need to be responded to. The debtor should still be instructed to save money so that they do not fall further behind.

The debtor can apply for a modification at the same time the state court battle is occurring or a bankruptcy is being processed. Go to the mortgage company website or contact the lawyer for the mortgage company and request to get the modification process going. It is often the same documents that you are going to need to file a bankruptcy. You may be able to get the foreclosure stopped while the modification review is pending. The trial modification will give you an indication of what the actual modification will look like. (Even if you have to file the bankruptcy, starting the modification may save your client in the long run). There are things you need for modification application:

1. Documents (typical documents)
 - a. Written authorization to speak on behalf of the client.
 - b. Last 2 months of bank statements.
 - c. Last 2 months of pay advices (longer for business income), pension documents and proof of government benefits/income.
 - d. IRS request for tax transcripts.
 - e. The application.
 - f. The hardship letter.

The client maybe best served by filing a Chapter 7. The Chapter 7 can be used for delaying purposes. It can stop a foreclosure granting more time to live in the house. The answer to the questions how long can the client stay is who knows. I have had one client go 60 months. The client may only need time to move on. They can also try for the modification at this point.

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The Chapter 7 can also be used to eliminate all the rest of the debt. This can leave the clients with enough money to pay their ongoing mortgage payments. Staying in the house then raises the next questions To Reaffirm of Not to Reaffirm. That is the question. There is no easy answer to this questions from a legal standpoint. It is even harder to explain to the clients. Attached is a sample letter outlining what it means to reaffirming and the pros and cons of reaffirmation.

- a. Pros to reaffirming:
 1. The mortgage company will “allegedly” continue to communicate with the client following the discharge and a letter from debtors counsel.
 2. The mortgage company will “allegedly” continue to report to the credit bureaus the status of the account.
 3. The mortgage company will ‘allegedly” send statements and allow for electronic payments.

- b. Cons to not reaffirming:
 1. Many mortgage companies will not communicate directly with the client.
 2. Many mortgage companies will not report to the credit bureaus.
 3. Many mortgage companies will not send statements or allow for electronic payments.
 4. Your clients will be confused.
 5. Client is personally liable on the note if they reaffirm the mortgage. Will they fall behind again? Will the mortgage company collect from the Debtor if the house forecloses? They have now lost their bankruptcy options for a period of time.

The so called fourth option of “retain and pay” or “ride through” never formally existed in the 6th Circuit but was a common practice. One of the changes that BAPCPA sought to clarify was the elimination of “ride through.” In *Re Rowe* 342 B.R. 341 (Bank. D. Kansas 2006) There are some cases seeking to limit the changes of BAPCPA to just personal property. Thereby, maybe indirectly, approving of the ride through. In these cases, the debtor timely entered into a reaffirmation agreement, the stay did not lift, the court disapproved the reaffirmation agreement and the debtor retained the collateral. *See Coastal Fed. Credit Union v. Hardiman*, 398 B.R. 161, 171 (E.D.N.C. 2008). *See also In re Blakely*, 363 B.R. 225 (Bankr.D. Utah 2007).

There are a series of cases in which the debtor indicated on the statement of intent that they were going to surrender the property but then tried to fight a future foreclosure in state court. The courts held that the debtor had no more interest in the fight. In *Re Fallia* 838 F 3rd 1170 (11th Circuit 2106) contra *In Re Ryan* (560 B.R. 339) and *In Re Gregory Case # c 10-50237-can7* Western District of Missouri decided 6.14.17)

You cannot file a motion to reopen a case for the purposes of filing a reaffirmation agreement. Once the case is discharged it cannot be reopened to file a reaffirmation. The reaffirmation must be filed prior to the discharge. 11 USC 524 (C) (1) (In Re Jon Broecker (S.D. Ohio 2012 Judge Humphrey and In Re Smith (N.D. Ohio 2015 Judge Whipple)

Chapter 13 as a viable option for the client. Chapter 13 is generally the tool for allowing the debtors to keep their home. The debtors can cure the arrears and maintain payments. The Debtors may be able to strip a second mortgage. The debtors may be able to modify and cram down the mortgage on their residence. This becomes a mathematical formula. Can the debtor cure and maintain in the sixty months based on the debtors' disposable income?

The above represents the thought process and the legal issues in deciding if a bankruptcy can help your client stay in their home.

MISCELLANEOUS TOPICS

Failure to Make Post –Petition Mortgage Payments

There are a series of cases appearing now that are denying the debtor there discharge for failure to make and complete post- petition direct payments to the mortgage company or on real estate taxes. These direct payments are considered payments under the plan and failure to make all payments under the plan are grounds to deny the discharge. The debtor has not completed plan. In Re Kessler 655 FD Appx 242, 2016 WL 3667575 (5th Circuit 2016). In Re Barbara Thornton (W.D. Missouri 6.28.17) see opposite In Re Gonzales (S.D. Texas 5/17/17) granting discharge.

Zombie Properties

Zombie properties or can I surrender my useless house back to the mortgage company. In 2013 In Re Rosa (495 B.R. 522 Bank D. Hawaii 2013) came out which stated that a debtor could provide in their plan a provision to surrender the property to the mortgage company 11 USC 1322 (b)(8) “ may provide for the payment of the claim from property of the estate and 11 USC 1322 (b)(9) provide for the vesting of property of the estate in any entity. In Re Rosa confirmed the plan without objection. It is important to make sure notice is proper. Since that time a split has arisen over this issue in the courts. The cases have disagreed over consent. Does the creditor have to consent? The court held no element of consent is necessary In Re Watt 520 B.R. 834 (Bankr. D. Or. 2014, In Re Weller 2016 Bankr. D. Mass Jan 13 2016). In a recent case the bankruptcy court confirmation allowing vesting was reversed. Wells Fargo v Sagendorph 562 B.R. 545 (D. Mass 2017). The court decision turned on the lack of consent. Chapter 13 does not permit forced vesting.

STATE LAW DEFENSES TO FORECLOSURE

- In order to obtain a judgment in foreclosure, a Plaintiff must prove (a) it is entitled to enforce the Promissory Note; (b) it is entitled to enforce the mortgage either as the original mortgagee or through the chain of recorded assignments and transfers; (c) all conditions precedent have been met as contained in the Note and Mortgage; (d) the Mortgage is in default; and (e) the amount of principal and interest due. *Wachovia Bank v. Jackson*, 2011 Ohio 3203 (5th Dist. 2011); see also *Wells Fargo v. Braunskill*, 2015 Ohio 273 (1st Dist. 2015); see also *US Bank, N.A. as Trustee v. George*, 2015 Ohio 4957 (10th Dist. 2015); and see also *Deutsche Bank Nat'l Trust Co. v. Najar*, 2013 Ohio 1657

STATE LAW DEFENSES TO FORECLOSURE

- COMMON AFFIRMATIVE DEFENSES:

- Failure to Send Notice of Default or Notice of Acceleration according to express term of Note and/or Mortgage

- Failure to apply all payments – suspense accounts. Look at the amount due and the date the amount due is from in the prayer for Relief.

- Statute of Limitations

What Bankruptcy Lawyers Should About Post-Foreclosure Judgment Matters



Lessons from the Regulations X and Z Battlefield

Key takeaways

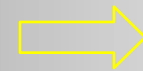
- Most Risk and Opportunity for Bankruptcy Lawyers and clients involves the following types of situations:

- Dual Tracking
- Misapplications of Payments or Escrow Problems
- Implementation of Loan Modification Agreements
- Bankruptcy v. Real World Accounting issues (Rule 3002.1)

**The information that
can be obtained
through the newly
enhanced “Request for
Information” process
can be of immense
help to lawyers
representing clients in:**



Bankruptcy



Foreclosure Actions



or Loan Modifications

**There is simply no
injunctive relief**



However Regulation X's Loss Mitigation Rules Can Delay a Foreclosure Post-Judgment

.If a Borrower Submits an application for loan modification more than 37 days before the sale AND it is their first application since January 10th, 2014 with this servicer, the Sheriff Sale MUST BE POSTPONED.

.For Fannie/Freddie Loans – if it is less than 37 days but more than 7 days before the sale, Sale MUST BE POSTPONED

THE END



Thank you