PROSECUTING AND DEFENDING THE MOTION FOR RELIEF FROM STAY BY A MORTGAGE LENDER

A SERIES OF CAUTIONARY TALES
COMBINED WITH HELPFUL TIPS

Southeastern Bankruptcy Law Institute
Litigation Toolbox-Breakout Session –B

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I. THE LEGAL BASIS FOR A MOTION:

11 USC § 362
(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay--
(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;
(2) with respect to a stay of an act against property under subsection (a) of this section if—
(A) the debtor does not have an equity in such property; and
(B) such property is not necessary to an effective reorganization;

A. The Movant Must Have Standing, That is, The Motion Must Be By A Creditor Holding a Secured Claim; Can the Servicer Move for Relief from Stay?

1. Yes: The Servicer Has Standing, *In re Woodberry*, 383 B.R. 373 (Bankr. S.C. Feb. 4, 2008):

The Issue: The Motion for Relief from Stay in this case was filed by America's servicing company as servicer for US Bank, NA, as Trustee for a secure ties trust. The Debtor's original note was payable to SouthStar Funding, LLC, while the Mortgagee on the Mortgage is the Mortgage Electronic Registration Systems, Inc. ("MERS"). The note itself was endorsed in blank, and there were no recorded assignments of the Mortgage prior to the date of the filing of the Motion for Relief from Stay. The Debtor responded in opposition to the Motion for Relief, contending that ASC lacked standing to seek relief from the Automatic Stay.

What the Court Said: "Is ASC the "real party in interest? Generally, the 'real party in interest' is the one who, under the applicable substantive law, has the legal right which is sought to be enforced or is the party entitled to bring suit." *In re Comcoach Corp.* 698 F 2d. 571, 573 (2nd Cir. 1983)(citations omitted). While *Comcoach* has been criticized as unduly restrictive in the interpretation of "party in interest", its general principal that "party in interest standing does not arise if a party seeks to assert some right that is purely derivative of another party's rights in the bankruptcy proceeding" survives. *In re Refco,* 505 F 3d. 109, 115 fn. 10 (2nd Cir. 2007). Under South Carolina law one finds the general proposition that "[t]he plaintiff in a foreclosure suit should be the real, beneficial owner of the mortgage debt." 27 S.C. Juris. Mortgages § 107. Despite the statement of the general proposition, it appears that foreclosures and motions for relief from the stay are frequently brought by parties other than the beneficial owner. The court and parties have not found a dispositive case under South Carolina law.

"Other jurisdictions tend to favor the view that a loan servicer is a "party in interest" and a "real party in interest." The general rule is that a mortgage servicer has standing by virtue of its pecuniary interest in collecting payments under the terms of the note and mortgage. See *In re Tainan,* 48 B.R. 250, 252 (Bankr. E.D. Pa. 1985)(Mortgage servicer a party in interest for purposes of Fed. R. Civ. P. 17(a) in a relief from stay proceeding.), *Bankers Trust (Delaware) v. 236 Beltway Inv.,* 865 F. Supp. 1186, 1191 (E.D. Va. 1994)(Both lender and servicer have standing to foreclose even if servicer is not the holder of the mortgage.), *In re O'Dell,* 268 B.R. 607, 618 (N.D. Ala. 2001)(A servicer was allowed to defend a proof of claim on behalf of its principal.), aff'd, 305 F.3d 1297, 1302 (11th Cir. 2002)("A servicer is a party in interest in proceedings involving loans which it services."), *In re Miller,* 320 B.R. 203, 206 fn2. (Bankr. N.D. Ala. 2005)(Servicer permitted to litigate motion for relief from stay.) It seems the better view that a loan servicer, with a contractual duty to collect payments and foreclose mortgages in the event of default, has standing to move for relief from stay in the Bankruptcy Court."

What To Take Away From the Case: ASC succeeded in this case because it convinced the Court that, as a matter of law, the loan servicer had a contractual duty to collect the payments; further, because the transfer of the Note to ASC, by endorsement in blank vested in the transferee such rights as the transfer possessed pursuant to § 201(1) of Article 3 of the UCC, ASC qualified as a "creditor" for purposes of the application of the term party in interest.

2. ***Maybe Not:*** *In re Maisel*, 378 B.R. 19 (Bankr. D. Mass. 2007)

The Issue: Wells Fargo Bank filed a Motion for Relief from Stay: the exhibits attached to the Motion indicated that Option One Mortgage Corporation was the holder of the Note and Mortgage. Judge Rosenthal asked the Movant to "justify its position that it had standing to have brought the Motion." The Motion itself cited that the Movant was the current holder of the Note and Mortgage.

What the Court said: "The plain language of section 362 of the Bankruptcy Code requires that one be a "party in interest" to seek relief from stay. 'On request of a party in interest and after notice and a hearing, the court shall grant relief from stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay...' 11 U.S.C. § 362(d). The test for whether one is party in interest in the First Circuit is whether a party has a colorable claim to the property. 'A party seeking relief from the automatic stay to exercise rights as to property must demonstrate at least a colorable claim to the property.' *In re Huggins,* 357 B.R. 180, 185 (Bankr. D. Mass. 2006) (citing *Grella v. Salem Five Cent. Sav. Bank*, 42 F.3d 26 (1st Cir. 1994)). In the case at bar, the Court cannot find from the evidence provided that the Movant had a colorable claim to the property at the time the Motion for Relief was filed.

"Parties seeking relief from stay must be aware that by presenting a motion to the Court, they represent that 'the allegations and other factual contentions have evidentiary support...' Fed. R. Bankr. P. 9011(b)(3). The Movant was unable to provide evidentiary support for its allegations when called upon to do so. It is the claimant's burden to bring

information regarding the relationships between the parties to the Court. *In re Parrish,* 326 B.R. 708, 720 (Bankr. N.D. Ohio 2005)."

What to take away from the case: Any party filing a Motion for Relief from Stay must properly recite its position including whether it is the holder of the Note or simply the servicer for the holder of the Note. If the party is the Servicer for the holder of the Note, the Movant should recite its capacity as Servicer, its contractual rights and duties as Servicer to prosecute a Motion for Relief from Stay, and fully disclose its relationship to the actual holder of the Note.

3. Just Plain Ouch: *In re Jacobson,* Case No. 08-45120, U.S. Bankruptcy Court for the Western District of Washington, March 10, 2009, Judge Brandt (Copy attached); *In re: Sheridan*, Case No. 08-20381, U.S. Bankruptcy Court for the District of Idaho, March 12, 2009 (Copy Attached).

B. A Lack of Adequate Protection or Other Cause: Relief Sought Based on Delinquency or Other Default

In order to prosecute a Motion for Relief from Stay, the Creditor must show either that there is cause, including the lack of adequate protection, or that the Debtor has no equity in the property and the property is not necessary for an effective reorganization of the Debtor. If the Creditor is seeking Relief because the Debtor has failed to make the payments under the Mortgage, this would be typically considered under 362(d)(1), the "for clause" subsection: but this cause may be limited by other factors…..

1. Does a pre-confirmation default on a Mortgage entitle a Creditor to relief from stay in a Chapter 13 case? No: *In re Lemma*, 394 B.R. 315 (Bankr. E.D. N.Y. Sept. 29, 2008):

The Issue: The Debtors, in a repeat filing, were unable to extend the Stay under 362(a), and the Creditors scheduled a Foreclosure Sale for August 26, 2008. Meanwhile, the Debtors confirmed a Plan on July 28, 2008, which provided the Creditor with 100% of the pre-petition arrears over sixty months and its ongoing monthly payments. The Debtors performed under the plan, but the Creditor sought a determination that the automatic stay was no longer in effect.

What the Court said: "After a plan is confirmed, the creditors included in the plan can no longer seek relief from the automatic stay based on any facts which occurred preconfirmation. *Green Tree Financial Corp. v. Garrett (In re Garrett),* 185 B.R. 620, 623 (Bankr. N.D. Ala.. 1995) ("*Garrett*"), citing *Lawson v. Lackey,* 148 B.R. 626, 627 (Bankr. N.D. Ala. 1992)."

What to take away from the case: Because the terms of a confirmed Plan fix the legal rights of the parties, only a post-confirmation default in payments will be sufficient

to constitute cause under 362(d)(1). Creditors must be aware of the status of the Plan, including any modifications thereto, even after obtaining Relief from Stay.

2. *Just how far can a Chapter 13 Plan go in modifying the rights of a secured Creditor? The answer is, it depends.* *In re Collins*, 2007 Bankr. LEIS 2487 (Bankr. E.D. Tenn. July 19, 2007).

The Issue: Whether a model or uniform Plan containing significant, new provisions can alter or amend the terms of an existing mortgage. The Plan proposed in *Collins* proposed an affirmative duty upon the secured Creditor to deem all pre-petition arrearages contractually current and cured upon confirmation; required the secured Creditor to apply payments in a specified manner; and required the Creditor to notify the Debtors, their attorney and the Chapter 13 Trustee in writing of any changes in the interest rate on an adjustable rate Mortgage, with a failure to comply constituting a waiver of the rate increase (a similar provision was included for property taxes and property insurance). The proposed plan also prevented the secured Creditor from paying any pre-petition tax obligations or from assessing any fees or charges, such as legal fees and property inspection fees without obtaining Court approval after the filing of an application for compensation.

What the Court said: the "Home Mortgage Payment Procedures "was adopted to bar mortgagees from using existing, or devising new, internal procedures to assess late charges over the life of the plan and then, at the end of the plan, presenting the debtor with a bill for these charges under the pretext that these assessments have some valid basis under the loan documents." *Perez,* 339 B.R. at 404. And because the foregoing provisions "in no way reduce the amount of the monthly installments due under the note held by the mortgagee nor do they reduce the secured amount of the mortgagee's claim[,]" they do not improperly modify the creditor's rights or the way in which those rights are exercised. *Perez,* 339 B.R. at 405.

"Accordingly, a provision requiring Beneficial to "deem" the prepetition arrearage amounts contractually "current" as of confirmation is merely procedural and requires only that Beneficial update its accounting procedures to ensure that the Debtors' account is not subject to any additional charges associated with any prepetition default. In other words, as of the date of confirmation, as long as the prepetition arrearage is provided for in the plan and payments are made as set forth therein, Beneficial must, pursuant to § 1322(b)(5), divide the Debtors' mortgage into a "current" prepetition balance and a post-petition maintenance balance which, as of the date of confirmation, is, with respect to the arrearage claim, contractually "current." This provision addresses Beneficial's **claims,** not its **rights,** and is not an impermissible modification under § 1322(b)(2)."

What to take away from the case: Increasingly, Courts are developing standardized model or uniform Plans and plan provisions for dealing with Mortgages, particularly adjustable rate Mortgages, in Chapter 13 cases. The Creditor seeking relief from stay in a Chapter 13 case must first confirm that the plan provisions have not altered the rights and obligations of the debtor or otherwise is adjusted the mortgage's provisions to limit or eliminate the grounds

3. ***What About Post Petition Charges?*** *In re Aldrich*, 2008 Bankr. LEXIS 2278 (Bankr. N. D. Iowa Sept. 4, 2008)

The Issue: The Debtors proposed Plan required that the secured Creditor receive "approval" under Rule 2016 after Notice in a Hearing, for any charges added to the Debtors Mortgage account, including legal fees, late fees, and property inspection fees.

What the Court said: "A chapter 13 plan cannot "modify" the rights of the holder of a security interest in a debtor's primary residence. 11 U.S.C. § 1322(b)(2). Generally, such rights arise from mortgage instruments which are enforceable under state law." "The Court has the jurisdiction and authority to determine the reasonableness of the Bank's post-confirmation fees and charges. However, such a review is only appropriate after an actual controversy exists. Debtors seek Court oversight even absent a controversy. Interim oversight is more appropriately the function of the Chapter 13 Trustee. Court oversight is not required under the code and is unnecessary when a determination can be made after controversy arises."

What to take away from the case: The *Aldrich* Court declined to inject itself into a determination regarding every single rate change and charge to a Mortgage account; it preferred to defer to the Chapter 13 Trustee, and address the issues only if the parties could not come to an appropriate resolution on their own. If a debtor seeks to include new provisions in the Plan with regard to charges and expenses added to an account, the Debtor should be prepared to provide proof that such ongoing monitoring is justified from prior abuses by this particular Creditor, or because of the Debtor's particular situation.

See also In re Watson, 384 B.R. 697, 704 (Bankr. D. Del. 2008): Bankruptcy Courts have jurisdiction and authority to hear and decide post-petition claims and charges arising under mortgage documents. *Id"* "Plans containing procedures for timely notice of fees and charges, proper allocation of payments and adjudication by this Court of disputes over assessed fees, costs and charges under a mortgage may be confirmed without running afoul of section 1322(b)(2)...Post-confirmation charges in a Chapter 13 case are not subject to 11 U.S.C. § 506(b) of the Code…The Court, however, still has jurisdiction over a Chapter 13 case after confirmation occurs…Furthermore, a bankruptcy court has "the authority to determine whether post-confirmation fees and charges are reasonable."

C. Chapter 7 vs. 13: What Does the Plan Have to Do With It? Everything.

1. ***Yes, The Plan Controls Everything, Even If You Already Have Relief:*** *In re Lemma,* 394 B.R. 315 (Bankr. E.D. N.Y. Sept. 29, 2008): "there is nothing in the Code to even suggest that once the stay is terminated, Debtors can no longer bind the Bank under a plan which implements the cure and reinstatement provisions provided in the Bankruptcy Code. Furthermore, under the Bankruptcy Code's statutory scheme, the

confirmed plan is a binding agreement which supersedes any prior agreement between the debtor and its creditors. Section 1327(a) of the Code provides that "[t]he provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan." Case law is clear that a confirmation order is *res judicata* as to the amount of a creditor's claim, its treatment under the plan and any other issues that were or could have been decided in the confirmation process."

2. ***Model Plans control Everything Too:****In re Wilson*, 321 B.R. 222 (Bankr N.D. Ill. Feb. 25, 2005).

The Issue: The secured Creditor Objected to Confirmation of the Chapter 13 Plan because it contended that the model Plan adopted by Northern District of Illinois impermissibly modified the rights of the secured Creditor to administer and enforce the terms of its home Mortgage loan. Specifically, the secured Creditor objected to the model plans provisions regarding accounting and reimbursement and the potential waver of assessed post-petition servicing fees and costs.

What the Court said: "Pursuant to *11 U.S.C. § 1322(b)(2)*, a Chapter 13 plan may "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence . . . " . In other words, residential mortgage holders enjoy a position that other secured creditors do not, in that their rights cannot be modified through a Chapter 13 plan. A mortgagee holds certain bargained-for rights under the mortgage, and those rights arc protected from modification under *§ 1322(b)(2). Nobelman v. American Sav. Bank, 508 U.S. 324, 329-330, 124 L. Ed. 2d 228, 113 S. Ct. 2106 (1993)*." The Court held that because the model Plan afforded a mechanism for parties and lenders to achieve certainty regarding the amount and payment of post-petition arrearages, fees and costs of collection. It did not change the original contract terms; rather it directed those disputes to the Bankruptcy Court for resolution.

What to take away from the case: Model Plans approved by a particular Bankruptcy Court are difficult to challenge before that same Bankruptcy Court. If a creditor wants to challenge a model plan, make sure the record is there for an appeal.

3. ***Just How Far Can a Plan Go? At Least as Far as the Scheduled Foreclosure Sale:*** *In re Dunn,* 2009 Bankr. LEXIS 46 (Bankr. W.D. Wash. Jan. 9, 2009)

The Issue: The Debtors proposed plan contained a "Hail Mary" provision allowing the Debtor to attempt to cure a default prior to a scheduled foreclosure sale either by paying the loan in full or a short sale acceptable to the secured creditor. The creditor sought to be excluded from the plan entirely.

What the Court said: "The Plan here neither creates a default, nor does it impermissibly modify U.S. Bank's rights: upon confirmation, it is free to start the foreclosure process. Section 1322(b)(2) does *not* require the maintenance of payments;

rather plans "*may*" so provide (emphasis added); *see In re Lopez,* 372 B.R. 40, 48-49 (9th Cir. BAP 2007), opinion adopted by *In re Lopez*, F.3d , 2008 U.S. App. LEXIS 26384, 2008 WL 5382337 (9th Cir. 24 Dec. 2008) (ongoing mortgage payments need not be paid through the trustee even when the plan provides for cure of a mortgage default). Both *Gavia* and *Proudfoot* can be understood as holding that the proposed cure periods were unreasonable in the absence of ongoing payments -- 6 months in *Gavia*; apparently indefinite in *Proudfoot*."

What to take away from the case: Debtors who are faced with a difficult situation such as an inability to demonstrate to the Court that they can cure an arrearage in order to defeat a Motion for Relief from Stay, may consider the "Hail Mary" pass in *Dunn*: that is, allowing the Creditor to Foreclose, but retaining the right through the terms of a confirmed Plan, to tender funds either to cure the default, pay off the loan, or resolve the situation with the lender. This has the advantage to the Debtor, of keeping the asset in the case and the Plan and subject to further review by the Court, if the "Hail Mary" pass looks like it was caught in bounds.

II. WHAT DOCUMENTS AND EVIDENCE ARE NECESSARY FOR THE MOTION

A. Payment History

1. If You Are Going to File It, Make Sure Its Right: *In re Lucas,* 2007 Bankr. LEXIS 2704 (Bankr. S.C. Aug. 13, 2007):

"The Court relies on the attorneys who practice before it to ensure that the affidavit of default is factually correct as a condition of this expedited process. The Court has no independent knowledge of the facts and must rely on the sworn statement as a condition of entering the order. Unfortunately a number of affidavits of default that contain erroneous statements have come to the attention of this Court. Each month the Court hears several motions to reinstate the stay because of a creditor mistake in filing an affidavit when no default was actually present."

2. Make Sure the Payment History Conforms to the Plan Terms: *In re Collins*, 2007 Bankr. LEIS 2487 (Bankr. E.D. Tenn. July 19, 2007)

"Other courts have also accepted the premise that a mortgage holder may be directed to credit payments by distinguishing between prepetition and post-petition payments, by requiring payments be credited when received or in an otherwise timely manner, and by requiring a creditor show that payments under a plan are current. See generally *Nosek v. Ameriquest Mortgage Co. (In re Nosek),* 363 B.R. 643 (Bankr. D. Mass. Mar. 6, 2007) (awarding $ 250,000.00 in emotional distress damages and $ 500,000.00 in punitive damages pursuant to 11 U.S.C. § 105(a) (2005) for violating § 1322(b) of the Bankruptcy Code)."

3. Just Because the Debtor Doesn't Like it Doesn't Mean it's Wrong: *In re Avery*, 2009 Bankr. LEXIS 154 (Bankr. M.D. Ala. Jan. 27, 2009): "Avery makes much in his brief over the fact that representations as to the amount of delinquency in several Notices of Acceleration were incorrect. However, these inaccuracies were due to the fact that a check tendered by Avery was credited to his account. When the check was subsequently dishonored, the delinquency necessarily increased by the amount of the nonsufficient funds (nsf) check, plus any fee for the nsf check. Thus, the error in the Notice of Acceleration, if such can properly be called an error, was brought about by Avery and not an accounting error made by the Bank."

B. Mortgage and Note Documents along with Assignments: Can You Prove Are the Creditor?

1. How much of the chain of title must be disclosed? Enough to satisfy state law: *In re Woodberry*, 383 B.R. 373 (Bankr. S.C. Feb. 4, 2008):

The Issue: Whether a note endorsed in blank, and in possession of the servicing company for the Secure Ties Trust which held the Note, was sufficient.

What the Court said: "Debtor argues that in order for ASC to be a party in interest it "must both hold the Note and must either be named as the original mortgage holder or possess a valid, recorded assignment of the mortgage as of the time that the creditor seeks relief from stay." We turn to state law to ascertain the status of ASC and ownership of the mortgage. Applicable state law does not require both possession of the note and a written assignment of the mortgage to prove ownership as suggested by Debtor."

"The "Allonge to Note" converts the note at issue to a bearer instrument. *Code of Laws of South Carolina § 36-3-204(2)*(2003). As such, ownership passes with delivery of the instrument and proof of ownership can be made by possession. No written assignment of the mortgage is required under state law."

"Wells Fargo Bank, N.A. d/b/a ASC has possession of the note and mortgage. ASC is servicer and custodian for US Bank National Association pursuant to the Securitization Subservicing Agreement dated September 1, 2005. US Bank National Association is Trustee for the Trust. Since ASC was in possession of the note and mortgage at the time it filed the Motion it has made a *prima facie* case that it owns the note and mortgage, albeit as custodian for the Trust. Debtor has offered no evidence to rebut this evidence of ownership."

What to take away from the case: State law, and specifically Article 3 of the UCC, control when it comes to determining who is the actual holder of the Note. State real property will likewise control with regard to who holds the Mortgage; a Creditor must be prepared to satisfy both of these elements.

2. Be Prepared to Show Your Assignments: *In re Gilbreath,* 395 B.R. 356 (Bankr. S.D. Texas Oct. 14, 2008)

The Issue: How much is required to show not only ownership of the Claim, but also the amount due under the Claim? In *Gilbreath*, a putative holder of an unsecured claim had filed a one page Proof of Claim, asserting that it was the assignee of the claim from a different financial institution. The unsecured Creditor subsequently attempted to amend the Proof of Claim to include additional documentation.

What the Court said: "It is this Court's duty to see that the rules are complied with and that the letter and purpose of the Bankruptcy Code are carried out. This Court will therefore reiterate its message in *Prevo:* the Court will not permit creditors to file proofs of claim without attaching the required documentation, and then hold out until the debtor objects and hearings are held before providing the necessary documents to prove up their claims. Such practices are lazy and waste the time of both the parties and the Court by requiring hearings on matters that could have been resolved if the appropriate documentation had been attached to the original proofs of claim."

What to take away from the case: A prudent Attorney will be prepared to show his client's standing to assert the Claim, through an appropriate paper trail. However, many "paper trails" today are electronic, while many Judges and state law provisions still require a physical writing. Lawyers should be familiar with their local Judges, local rules, and state laws, in order to satisfy these requirements.

C. Evidence of Post-Petition Payment Defaults (or Lack Thereof)

Did You Have to Ask the Court Before You Charged Them? Yes: *In re Jones*, 2009 Bankr. LEXIS 116 (Bankr. N.D. Miss. Jan 12, 2009):

"This proceeding involves the assessment and attempted collection of insurance charges by the defendants which were not approved by the court as contemplated by *Rule 2016(a), Federal Rules of Bankruptcy Procedure*…In addition, it involves the defendants' disregard of this court's order determining that the indebtedness owed to Mid-State Homes was current and that all defaults related to the indebtedness were cured."

"The court would hasten to mention that the plaintiff's original complaint does set forth the following potentially viable causes of action, to-wit: 1. The failure of the defendants to comply with of Rule 2016(a), Federal Rules of Bankruptcy Procedure, which requires an entity seeking reimbursement of necessary expenses from the estate to file an application with the court for approval of said expenses."

III. PLEADINGS

A. Do You Have Standing?

In re Maisel, 378 B.R. 19 (Bankr. D. Mass. 2007): "Today, more and more homeowners turn to the bankruptcy system for protection when facing financial hardship or impending foreclosure. It is this Court's responsibility to ensure that these debtors receive the full protection of the Bankruptcy Code, including the benefit of an automatic

stay, for as long as they are entitled to it. Unfortunately, concomitant with the increase in foreclosures is an increase in lenders who, in their rush to foreclose, haphazardly fail to comply with even the most basic legal requirements of the bankruptcy system. It is the lenders' responsibility to comply, and this Court's responsibility to ensure compliance, with both the substantive and procedural requirements of the Bankruptcy Code. See *In re Foreclosure Cases*, 521 F. Supp. 2d 650, 2007 U.S. Dist. LEXIS 84569, 2007 WL 3232430 (N.D. Ohio 2007). As this Court made clear in its decision in *In re Schwartz,* 366 B.R. 265 (Bankr. D. Mass. 2007), it takes its role in this regard very seriously and will require proof of each element required to obtain relief from stay. The most basic element required to obtain relief from stay is that a movant have standing to bring and prosecute such a motion."

B. Is Your Relief Allowed By the Plan?

In re Collins, 2007 Bankr. LEIS 2487 (Bankr. E.D. Tenn. July 19, 2007): "Accordingly, "'creditors are limited to those rights that they are afforded by the plan, [and] they may not take actions to collect debts that are inconsistent with the method of payment provided for in the plan.'" *United States v. Richman (In re Talbot),* 124 F.3d 1201, 1209 (10th Cir. 1997) (quoting 8 COLLIER ON BANKRUPTCY P 1327.02[1] (Lawrence P. King ed., 15th ed. 1996)). "[A] creditor cannot thereafter assert any other interest than that provided for him in the confirmed plan and that all of the issues of adequate protection, lack of equity, . . . etc., could and should have been raised in objections to confirmation." *Wellman,* 322 B.R. at 301 (quoting *Ford Motor Credit Co. v. Lewis (In re Lewis*), 8 B.R. 132, 137(Bankr. D. Idaho 1981))."

IV. DISCOVERY

A. Immediate Disclosures and Informal discovery

Bankruptcy Rule 9014(c) makes Bankruptcy Rule 7026 applicable to contested matters; and of course a Motion for Relief from Stay is a contested matter. Rule 7026 sets forth the general provisions governing discovery; while this rule is very likely to be modified by local rule from district to district and even from Judge to Judge, its general principles still apply. Rule 7026 incorporates Rule 26 of the Federal Rules of Civil Procedure; under Rule 26(a)(1) a party must, ***without awaiting a discovery request,*** provide to the other parties the following:

a. The name, address and telephone number of each individual likely to have discoverable information that the disclosing party may used to support its claim or defenses;

b. A copy of (or description by category etc.) of all documents, data compilations, and things that are in the possession, custody or control of the party and that the party may use to support its claims or defenses;

c. A computation of the damages sought (this may include, in a motion for Relief with regard to a Mortgage, the amount due on the mortgage, the amount of any delinquency, and any other charges or assessments).

Additionally, a party must disclose to the opposing party the identity of any person who may be used at trial to present evidence under Rule 702, 703 or 705 of the Federal Rules of Evidence (we call these "experts"). Note that an expert under the Federal Rules of Evidence is anyone who possesses specialized knowledge which might assist the truer of fact in understanding the evidence or determining a fact in issue; it does not have to be someone with an advanced degree. Be prepared to disclose the written report of the expert; many courts will not allow an expert to testify, or a percipient witness to offer expert testimony, without a pretrial disclosure of the nature and substance of the testimony.

B. Formal Discovery in Response to Requests

Formal discovery, unless conducted expeditiously, is difficult at best. If you are the debtor, be prepared to file a motion to shorten discovery response times, or be prepared to show why you need the requested information to defend the motion; remember that motions for relief are considered on an expedited basis, and the court can only extend the stay upon a showing of cause.

C. Not Everything is a Trade Secret, Especially if It is a Public Document

In re Woodberry, 383 B.R. 373 (Bankr. S.C. Feb. 4, 2008): "ASC requested a protective order concerning trade secrets, proprietary information, and confidential information allegedly contained in the Securitization Subservicing Agreement. The request was made by counsel based upon ASC's instructions. The testimony was that supervisory personnel instruct employees to insist on a protective order when furnishing the document to counsel for use in litigation. A significant amount of time was spent on testimony to establish the need for a protective order. On cross examination counsel for Debtor suggested that the information should not be protected because it was already publicly available. After a delay to allow counsel the time to retrieve the document from the Internet the motion for protective order was denied because the document is in fact publicly available. Counsel for ASC obviously was not aware of this.

"The Court has *sua sponte* considered some remedy for the time wasted at ASC's insistence. An appropriate remedy might include payment of the expenses of counsel for Debtor in defending against the request for protective order, denial of the motion for relief, or some other equitable relief. No award is made because this litigation was a matter of first impression in this district and because the stay will shortly expire in this no-asset chapter 7 case. Nonetheless ASC's good faith in pursuing an argument for a protective order for a document that it filed with the Securities Exchange Commission is called in question. At minimum this tactic should not be repeated."

2. *In re Fagan*, 376 B.R. 81 (Bankr. S.D. N.Y. Sept. 24, 2007)

"The Post Petition Payment History reveals the following facts. On 10/12/04 [2] the Secured Creditor applied the debtor's payment, $ 2,977, to the mortgage payment due 10/01/04, $ 2,959.83, leaving an "Unused" amount of $ 17.17, which was placed in the "Suspense" account. Similarly, the 11/16/04 payment was applied to the mortgage payment due 11/01/04 with an "Unused" portion which increased the Suspense account to $ 34.34. However, it appears that the required mortgage payment increased effective 12/01/04 to $ 3,161.56. Since the debtor's 12/13/04 payment was only $ 2,977.75, the Secured Creditor applied no portion of this payment to the 12/01/04 mortgage payment due and placed the entire December payment as "Unused" in the Suspense account. At that point the debtor was in "arrears" to the extent of $ 150.22 ($ 2,977 plus $ 34.34 less $ 3,161.56). Thereafter, the Secured Creditor applied the debtor's payments made in January and February to the mortgage payments due in December and January, and this pattern continued through the 10/31/06 payment, which was applied to the mortgage payment due 09/01/06. No payment was recorded as cashed or applied for November 2006, and consequently the 12/04/06 payment was applied to the amount due on 10/01 /06. The 03/30/07 payment of $ 4,208.99 was apparently returned for insufficient funds (NSF) and is so recorded as of 04/06/07. Thus, the payment cashed on 04/12/07 of $ 4,021 was credited to the mortgage payment due 02/01/07, and the payment cashed 04/30/07 in the amount of $ 4,050 was credited to the mortgage payment due 03/01/07.

2 The "Date" column apparently lists the dates when the Secured Creditor cashed and/or credited the debtor's payments, not the dates when the payments were delivered to or received by the Secured Creditor. *See* paragraph 6 of the Linda Fagan affirmation, quoted above.

Let us examine the debtor's payment situation as of June 1, 2007, the date of the Secured Creditor's instant motion to lift the stay. As of April 30, the Secured Creditor had credited the debtor with payments through and including the mortgage payment due on March 1. But as of April 30, the Secured Creditor held in the debtor's Suspense account $ 4,021.30, which was $ 1.27 *in excess* of the mortgage payment which was due as of April 1. Thus, as of April 1, 2007 *the debtor was not in arrears post-petition"*

3. *In re Gilbreath*, 395 B.R. 356 (Bankr. S.D. Texas Oct. 14, 2008)

"Further, Bankruptcy Judges Felsenthal, Houser, and Hale, of the Northern District of Texas, determined that a lack of supporting documentation strips a claim of any *prima facie* validity. *In re Armstrong,* 320 B.R. 97, 104-05 (N.D. Tex. 2005)."

"The *Armstrong* court also determined that a "transferee has an obligation under Bankruptcy Rule 3001 to document its ownership of the claim . . . [by] attach[ing] a signed copy of the assignment and sufficient information to identify the original credit card account." *Id".*

"The language of Bankruptcy Rule 3001(a) and (c) and of Form 10 is not accidental. Indeed, it is purposeful and clear: creditors have the initial burden of coming forward with documentation to support their claims. This Court will not give any party the benefit of the doubt when it comes to their burden of proof."

V. HOW TO INTRODUCE AND HAVE SUCH EVIDENCE ADMITTED INCLUDING THE USE OF WITNESSES

A. What Evidence Is Expected?

In re Gilbreath, 395 B.R. 356 (Bankr. S.D. Texas Oct. 14, 2008): "Moreover, Bankruptcy Rule 3001(c) provides that when a claim is based on a writing (e.g., a credit card agreement), "the original or duplicate shall be filed with the proof of claim," and "[i]f the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim." *Fed. R. Bankr. P. 3001(c)*. This language could not be more clear--creditors must attach documents (or copies thereof) to their proof of claim or explain why they have not."

B. The Evidence Must Be Competent, and In Open Court

In re Sheridan (attached): "disputed factual issues in contested matters may not be resolved through testimony in "affidavits" but rather require testimony in open court. *See* Fed. R. Bankr. P. 9014(d). Under the circumstances, the identity of the holder of the Note certainly appears to be a fact in dispute falling within the ambit of this rule."

C. Selection of Witnesses: It's the Client, Not The Lawyer Who Testifies.

In re Lucas, 2007 Bankr. LEXIS 2704 (Bankr. S.C. Aug. 13, 2007): "Still, the Court is concerned with a growing number of instances that may reflect an indifference to the importance of affidavits. The creditor bar need be conscientious in requiring truthful affidavits of the agents of its clients and forceful in communicating the diligence of inquiry that should precede an affiant putting pen to paper. The Court is concerned with the practice of attorneys serving as the affiant for the fact of a default in payment. Knowledge of the fact is generally in the possession of the client not the attorney."

VII. BURDEN OF PROOF

A. Who has the initial burden?

The Bankruptcy Code is explicit as to who bears the initial burden of proof in connection with a Motion for Relief from Stay: it is, with one exception, the Debtor. The Creditor bears the burden of proof only on the issue of whether or not there is equity in the property.

11 USC § 362
(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section--
(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and
(2) the party opposing such relief has the burden of proof on all other issues.

This does not mean, however, that a Creditor may file a Motion for Relief from Stay asserting simply that it is entitled to Relief from Stay. Any Motion must be property supported, and justified under Rule 9011, particularly given the spade of cases detailed in these materials. When a creditor did attempt to proceed in such a fashion, the result was not very attractive:

In re Simmons, 2008 Bankr. LEXIS 2157 (Bankr. M.D. Ga. July 31, 2008): "Everhome wants stay relief but does not want to be bothered with offering any actual proof it is entitled to such relief. Producing an accurate, current payment history should be a simple matter for any company with a basic, competent record-keeping system. Furthermore, a company that wants to foreclose on property cannot expect permission to do so if it chooses to essentially ignore evidence that its records are wrong….Everhome's failure to keep proper records or to remedy errors in its records is inexcusable. Without accurate records, Everhome cannot make a showing of cause for stay relief based on a default in payments. The problem in this case is compounded by Everhome's insulation from local counsel. Creditors seeking stay relief should not expect to be successful if the attorneys who represent them in court do not have direct contact with them to resolve defenses raised by debtors or to otherwise respond to concerns raised in connection with the motion."

A creditor is well advised to present a *prima facie* case for the Motion for Relief from Stay, supported by admissible evidence, without regard to the issue of the burden of proof.

The Debtor, on the other hand, must be prepared to carry the day, with his own evidence; in responding to any Motion for Relief from Stay, the Debtor's proof must be sufficient to not only carry its burden of proof, but also to rebut the evidence presented by the Creditor.

Remember that the evidentiary standard associated with a Motion for Relief is by a preponderance of the evidence: the elements supporting (or refuting) a Motion must be shown only to be more likely than not to exist. In other words, you have to push the ball to the other side of the 50 yard line to win your motion.

B. When and why does it shift?

While the creditor starts off with the ball on the debtor's 49 yard line, it would do well to try to shift the ball, in its initial motion, as far into the debtor's side of the field as possible, by supporting the motion with readily admissible, and non-controversial, evidence: the creditor's own properly supported proof of claim; the debtor's own sworn statements in the petition, statements and schedules; and the records of the Chapter 13 trustee.

The shifting of the burden of proof in connection with the Motion for Relief from Stay litigation is very closely analogous to the presumptions associated with a Proof of Claim; and litigation over proofs of claim is where evidentiary standards, and presumptions, have generated the most case law. Further, because nearly motion for relief from stay on a home mortgage involves a proof of claim filed by the secured creditor, the proof of claim is the place to start.

A properly supported Proof of Claim is *prima facie* evidence of not only the identity of the creditor but also the amount and validity of the claim. A secured creditor, relying on a properly filed and supported Proof of Claim, in its motion for relief from stay, not only has readily admissible evidence regarding its claim, but also has established its entitlement to relief from Stay. ***The key, however, is that the Proof of Claim must be properly supported.***

1. There Must Be Some Evidence To Support the Claim: *In re Gilbreath*, 395 B.R. 356 (Bankr. S.D. Texas Oct. 14, 2008)

The Issue: At what point does a Proof of Claim lose its *prima facie* valididty, and does the burden shift back to the Creditor to establish that it holds a claim?

What the Court said: "Although incomplete or insufficient proofs of claim are not *prima facie* valid, they are not automatically disallowed. *See In re Armstrong,* 320 B.R. at 106. The debtor, however, "has no evidentiary burden to overcome" in objecting to a claim that is not *prima facie* valid. *In re Tran,* 369 B.R. at 318. Once the debtor objects to a proof of claim, the claim's validity becomes a "contested matter" and the burden shifts back to the creditor to prove the claim is valid by a preponderance of the evidence. See 11 U.S.C. § 502; *In re O'Conner,* 153 F.3d 258, 260-61 (5th Cir. 1998); *In re Fid. Holding Co., Ltd.,* 837 F.2d 696, 698 (5th Cir. 1988). Because the Debtors in the case at bar are objecting to proofs of claim that do not enjoy *prima facie* validity, the Debtors do not have to overcome any evidentiary presumption in making their objections. [3] The Debtors' objections are sufficient to shift the burden back to the Creditor to prove ownership and validity of its claims in accordance with state law."

What to take away from the case: A properly supported Proof of Claim attaches all of the documents evidencing not only the claim itself, but the identity of the Creditor and the origin of the Creditors rights to assert the Claim. This means a complete chain of assignments and endorsements of the Note, and assignments of the Mortgage.

2. Failure on the Front End Means More Work on the Back End: *In re Danna*, 2009 Bankr. Lexis 179 (Bankr S.D. Ohio. Jan. 20, 2009): **"**it is the Bankruptcy Code, rather than any procedural rules or forms, that governs the allowance and disallowance of creditors' claims. *Perron v. eCast Settlement Corp. (In re Perron), 350 B.R. 628*, [published in full-text format at *2006 Bankr. LEXIS 2639*], 2006 WL 2933827, at *4 (B.A.P. 6th Cir. Oct. 13, 2006); *In re Burkett, 329 B.R. 820, 826 (Bankr. S.D. Ohio 2005)*….Thus, absent objection, a claim evidenced through a proof of claim filed with the court is deemed allowed…Many courts, including courts in the Sixth Circuit, have noted that a lack of sufficient documentary evidence attached to a creditor's proof of claim is not one of these bases…In other words, while the lack of documentation attached to a proof of claim, is not, by itself, a basis for disallowing a claim, the omission may raise questions about the claim's enforceability and lead a debtor or trustee to file an appropriate objection pursuant to § 502(b)(1)…When, instead, a proof of claim fails to comply with Rule 3001 and Official Form 10, the claimant cannot, in response to an

objection, rest on its proof of claim and must instead come forward with sufficient evidence of the claim's validity and amount."

"First, if a proof of claim matches a debt listed by the debtor in his or her schedules, this may be sufficient, without further documentary support, to establish the prima facie validity of the proof of claim. Id"

"Because Roundup's original proof of claim is not entitled to the presumption of validity pursuant to Rule 3001(f), Roundup will carry the burden of going forward at the hearing as well as the ultimate burden of proof to establish the validity and amount of the claim."

VIII. ETHICS AND PROFESSIONALISM

A Lawyer's ethical and professional obligation are neither changed nor minimized by the nature of his or her practice: the ethical obligations are the same whether the case is a routine matter, like thousands before it or whether the compensation is hourly or by flat fee. Bankruptcy Courts are increasingly cracking down on Lawyers who cut corners, fail to verify the facts asserted in the Motions, or (even worse) execute Affidavits themselves asserting as true facts which are later proven to be false.

A. Do unto others… Remember this is a family's home.

Many lawyers see dozens, if not hundreds, of cases over the course of a year dealing with the relatively same fact pattern, a borrower files bankruptcy, and is no longer able to maintain the Mortgage payments. Over time, and under pressure to take prompt action from clients, it is all too easy to forget that what is a routine matter for us lawyers, consisting of numbers and words on a computer screen, is of immense importance to the family living in that home.

1. *In re Fagan*, 376 B.R. 81 (Bankr. S.D. N.Y. Sept. 24, 2007):

"Motions to lift the stay may be routine and inconsequential to secured creditors and their counsel. But to a debtor and his or her family, such a motion and the consequent loss of the family home may be devastating. Most creditors and counsel are conscientious. But some are callous by design or inadvertence, as exemplified by this motion and two others presented to the Court the same week. The danger here is that a debtor who does not have an attorney or the resources of intellect or spirit to defend against a baseless motion may lose his/her home despite being current on post-petition mortgage and plan payments.

I know of no way to protect against such an eventuality if no material consequence attaches to the filing of motions based upon false certifications of fact. Secured creditors and their counsel who know that filing a false motion to lift the stay will result in material sanctions if caught will undoubtedly be motivated to a higher standard of care."

2. *In re Gilbreath*, 395 B.R. 356 (Bankr. S.D. Texas Oct. 14, 2008):

"Creditors should not be permitted to file woefully deficient proofs of claim in hopes that the debtor will not object, but then, when the debtor does object, to file

amendments at the eleventh hour and rely on those amendments at the hearing. This is one of the reasons Rule 15 was enacted--to prevent undue prejudice and surprise to litigants and to permit opposing parties time to prepare for trial. *See United States v. Saenz*, 282 F.3d 354, 356 (5th Cir. 2002) (determining that "prejudice to the opposing party," "bad faith," and "repeated failure to cure deficiencies" are considerations under Rule 15)."

B. Can You At Least Be Honest?

In re Jenny Rivera, 342 B.R. 435 (Bankr. D.N.J. 2006): This case involved two motions for relief filed by two mortgage lenders and one certification of default, filed by a third. All of the affidavits in support of the motions and notice of default signed by the same person, and the signature pages on the affidavits were separate from factual allegations. The signatures appeared identical, and the certifications were either undated or dated August 8 or 19, 2005; yet each signature page had a fax header dated December 24, 2003.

The Court issued a show cause order to one mortgage lender, its law firm representing it, and its default servicer. The law firm responded by stating (1) that the certifications are "presigned" but accurate; (2) that the signer worked for their default serving arm; (3) that the default servicing arm was purchased by the present servicer and (4) that the person signing the certifications was terminated more than a year before the certifications were filed with the court. A former attorney for the firm testified that the while she worked at the firm, 95% of the certifications were presigned, and another attorney for the firm testified that the affidavits were once prepared from "presigned" certifications, but are no longer done that way.

The Court determined that after the "affiant" had left the employment of the default servicer, at least 250 motions with her presigned certification were filed with the court. The Court sanctioned the law firm $125,000 and a smaller amount against one if its attorneys, and referred the matters to the Chief Judge.

C. Lawyers Must Know Their Clients!

In re Parsley, 384 B.R. 138 (Bankr. S.D.Tex. 2008), gives a detailed review the high volume motion practice of mortgage lenders. As background: a national law firm for a mortgage lender assigns a case for handling to a local law firm in Texas. As part of the assignment, the local law firm agreed that it was not permitted to contact the mortgage lender. A motion for relief is filed with a pay history attached; this was prepared by the national firm by "cutting and pasting" the mortgage lenders complex pay history into a simplified format, but did not review the pay history with the client.

But the pay history was not accurate; it treated a post petition payment as not being made, when it was. After the debtor's objection, and at the hearing on the motion, the local firm requested that the motion be adjourned since she had just seen the debtor's response and needed to see if it was accurate. At the continued hearing a second attorney appears from the local firm. When questioned by the court on whether the motion contained allegations about the debtor's pay history that were "just flat out wrong", he replied, "From what I have read in our system this morning and what I could tell from

this, *the answer is it was a good motion."* The motion for relief was withdrawn, however, because of the inaccuracies contained in the motion.

The court then issued an order to show cause requesting the creditor and firm Y to appear and explain why they should not be sanctioned for filing a motion with inaccuracies, causing debtor to incur unnecessary legal fees and expenses and then withdraw the motion. The United States Trustee then became involved. After many hearings the court issued a lengthy memorandum opinion outlining its concerns about the conduct of the parties in this and other cases.

Some of the court's concerns were:

1. Why a law firm would contractually obligate itself to be precluded from any and all communication with its actual client?

2. Did the mortgage lender have a written policy against charging debtors for withdrawing stay relief motions? (The lender in this case did not)

3. Why was the local attorney confused as to who his client was? (The attorney stated on three occasions that he believed his firm represented the national firm, and not the lender).

4. The high volume flat fee arrangements in the consumer bankruptcy practice created a corrosive "assembly line" culture of practicing law, and resulted in the poor training of attorneys who appeared before the court, including (a) a failure to question the accuracy of debt figures and other allegations in the pleadings and (b) appearing in court without properly preparing.

C. Bankruptcy Rule 9011: Its Not Just for Petition Preparers Anymore.

There Must Be A Basis For the Motion*: In re Fagan*, 376 B.R. 81 (Bankr. S.D. N.Y. Sept. 24, 2007):

The secured creditor moved to terminate the automatic stay with respect to the debtor's residential real property; its motion recited that as of May 30, 2007 there was an unpaid principal balance, and that the debtor had failed to make 4 post-petition payments for February, 2007 through May, 2007 and has not cured said default. This statement, regarding the default, was false.

"Despite these facts, which are indisputable based upon the Secured Creditor's own records, the Secured Creditor has persisted in this baseless motion through multiple submissions and three Court hearings. Moreover, this is the second motion to vacate the stay against the debtor based on false certifications of default filed by the Secured Creditor. This Court sanctioned the Secured Creditor by order dated May 4, 2006 in the amount of $ 700 on its first baseless motion.

"For the reasons set forth above and in the *Gorshstein* decision, I shall enter an order for sanctions requiring the Secured Creditor to pay an amount sufficient to recompense the debtor's attorney in full for his fees and costs in defending the motion and in the further amount of $ 10,000 payable to the debtor."

IX. TACTICS

A. The Three Best Techniques: Prepare. Prepare. And Prepare.

Know your facts.
Know your law.
Know your judge.
Know your adversary.
Know your witnesses.
Know your documents.

B. Trial Notebook: Always Have One That Contains

1. Each Exhibit, in order, with a method of determining whether that exhibit was admitted into evidence.

2. Stipulations: first rule: get admitted in advance what you can't get admitted a trial.

3. A List of the Elements You Must Prove to Win Your Case

4. Examinations for Each Witness

5. Expert Witness Reports

C. Witness Preparation:

Establish the knowledge and background of your witness. Make sure that your witness can explain any documents, such as a payment history, and knows the codes which are used on the payment history. Be prepared to establish that your witness either has first hand knowledge of the facts, or is relying upon regularly maintained business records.

X. SETTLEMENT

A. When is settlement possible?

The bankruptcy code permits and perhaps even encourages, the settlement of Motions for Relief from Stay; specifically, § 1329 allows a postconfirmation modification; indeed in the Eleventh Circuit, this goes by the short hand of the Seminole case allowing such postconfirmation modification and cure of a post-confirmation default: the ubiquitous *Hoggle* orders.

In re Wilson, 321 B.R. 222 (Bankr N. D. Ill. Feb. 25, 2005): "The majority of courts agree that since § 1322(b)(5) allows the cure of any default, a debtor can modify his plan under § 1329 to cure postconfirmation defaults, so long as the curing is done within a reasonable period of time and while current payments are being maintained. See *Green Tree Acceptance. Inc. v. Hoggle,* 12 F. 3rd 1008 (11th Cir. 1994); *Mendoza v. Temple-Inland Mortaaee Corp.,* 111 F. 3rd 1264, 1268 (5th Cir. 1997) (recognizing a split of authority, and following Hoggle, the only Circuit-level decision); *In re Steele,* 182 B.R. 284 (since a debtor can modify a plan after confirmation to provide for postpetition arrearages, the original plan can contemplate and satisfy some postpetition arrearages). *See also Garcia*, 276 B.R. at 636-637 (footnotes omitted)"

"Based on the foregoing analysis, plan provisions that supply a way to cure post-petition defaults under § 1322(b)(5) do not violate § 1322(b)(2). None of the provisions modify the amount or timing of payments under the loan documents; they simply set up a method of adjudicating the postpetition amounts due under the loan documents if there is a dispute and a method to cure those defaults."

B. Future Use of Strict Compliance Provisions: *Watch Out for Waivers*! *In re McGee*, 2007 Bankr. LEXIS 1367 (Bankr. N.D. Ala. April 17, 2007):

"McGee is much like the proverbial "day-late-and -a-dollar-short" debtor. He was actually four days late and $ 19.74 short of his February 1, 2007 deadline when he sent Green Tree his $ 1000.00 payment on February 5, 2007. Then he made his February payment on February 19, 2007 for $ 501.00, paying 42 cents more than the monthly payment of $ 500.58. Nevertheless, he may have owed a late fee since the payment came 15 days after his 4th of the month due date.

McGee's attorney asserted that Green Tree's acceptance of the late payments constituted a waiver of the foreclosure rights asserted in the February 2, 2007 letter. Waiver is an equitable concept that allows courts to deem that parties have modified a prior written contract by their acceptance of subsequent behavior which is not compliance with the written terms. Bankruptcy courts have applied waiver, or declined to apply waiver, depending on the individual facts and governing non-bankruptcy law in various jurisdictions.

For example, the Bankruptcy Court in *In re Parks,* 193 B.R. 361 (Bankr. N.D. Ala. 1995) held that a mortgagee's acceptance of payments post-foreclosure waived forfeiture and the foreclosure of the mortgage would be set aside (as cited with approval in the later *Hardin v. Kirkland Enterprises, Inc.,* 939 So. 2d 40 (Ala. Civ. App. 2006). However, the court in *In re Mangano*, 253 B.R. 339 (Bankr. D. N.J. 2000) disagreed with *Parks* and found that the mortgagee's acceptance of debtor's payment post-petition was not a waiver of its rights under a prepetition foreclosure under New Jersey law.

In Alabama, the Supreme Court defined waiver long ago in *Barry v. Welch,* 248 Ala. 167, 168, 26 So. 2d 872; 248 Ala. 167, 26 So. 2d 872, 873 (Ala. 1946) by holding that:

... The forfeiture declarable under the strict terms of the contract may be waived by continued recognition and receipt of part payments, after ground of forfeiture (*Gatewood v. Hughes, supra*), and relief from the forfeiture under such conditions may be awarded in equity if it would appear to be just and right.

The court finds that, considering all the facts of the McGee situation, including the debtor's equity in the mobile home and Green Tree's retention of his post-default payments, the equities balance in favor of reimposing the stay pursuant to Section 105(a), conditioned on McGee's timely remission to Green Tree of any principal, interest, insurance or late fees due since the court's November 13, 2006 order.

The court will direct Green Tree to compute this total and, as soon as possible, notify McGee and his attorney of the specific amount of any remaining default. Further, upon this notice, McGee shall pay any deficiency amount directly to Green Tree within 21 days of the notice."