AMERICAN BANKRUPTCY INSTITUTE

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Consumer Track

Debtor Toolbox: How to Effectively Address Mortgage-Servicing Issues

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Debtor Toolbox: How to Effectively Address Mortgage Servicing Issues

Well, here you all are. You and your clients. Fifty-nine months ago you crafted the perfect chapter 13 plan. Your clients followed it diligently with nary an issue lo these years and the case is about to discharge. Job well done, all around!

But before you send your client off, have you verified that that the mortgage Servicer(s) have applied your client's payments correctly? Or that no improper fees have been charged? That escrow was handled correctly? How do you know? The truth is that improper mortgage accounting is extremely common and more so in the context of a chapter 13. If the Servicing has changed hands during the course of the bankruptcy, the likelihood of errors is even higher.

This seminar is designed to give you the basic information as to how you can answer those questions. It will also describe the tools you need to both get information and correct any errors that may have occurred. As you read the material, some terms and acronyms may be unfamiliar. So, lets first set out the vocabulary:

- **Note** – Simply stated, the loan document that sets out the amount borrowed, from whom, by whom, and the terms of repayment.
- **DSD** – The deed to secure debt or security deed. This will have additional terms set forth in what are called Uniform Covenants that, like the Note, govern the rights and obligations of the parties.
- **Escrow** – Escrow refers to the escrow account funded by the mortgagor (debtor) and maintained by the Servicer as a fiduciary. This account can only be used to pay expenses to the real estate, i.e., taxes, insurance, etc. It cannot be used to pay fees to the Servicer and there are regulations that control how much can be maintained in escrow.
- **Suspense Account** – A Suspense account, also referred to in transaction histories as "Unapplied Funds" is actually an accounting function that reflects monies taken in by the Servicer and held prior to application per the "Waterfall."
- **Waterfall** – The Waterfall is a common reference as to how a Servicer must apply payments per the loan documents (the note). The note and security deed should be included with the POC.
- **FNMA –** Fannie Mae. The majority of Notes and DSDs are on Fannie forms.
- **FHA / HUD –** While Fannie comprises the majority of the loans you will see, check the note and DSD. A fair number are FHA / HUD loans and the terms, particularly what fees can be collected by a Servicer, can be quite different than a FNMA loan.
- **Rule 3002.1** – Federal Rule of Bankruptcy Procedure 3002.1. This rule is the most important tool in the box. Rule 3002.1 governs the obligations of a mortgage servicer during the course of the bankruptcy and is set forth in the Appendix 1.

- **NOFC** – Notice of Final Cure. The trustee files this notice as the case comes to a close. See 3002.1(f)
- **Resp to NOFC** – The Servicer is encouraged to respond to the NOFC, but it is not required. If it does not, it may be bound by the trustee's representations in the NOFC. See 3002.1(g)
- **The Plan –** Most districts have gone to the version of the National Form Plan. Some districts adhere to the form as adopted. But some allow for greater flexibility in the form of non-standard provisions. While we don't believe you can insert language here that is contrary to the Code's treatment of mortgages, there are opportunities to create greater clarity for all parties. Be creative. Most important, you must know if your Plan and district adheres to § 1306 or if the property of the debtor reverts to the debtor upon confirmation.
- **11 USC § 362** – The Automatic Stay. But note § 362(a)(3). The relevant portion is reproduced in Appendix 2
- **11 USC §524i** – We all know that mortgages retained are not subject to discharge. See *Dukes v. Suncoast Credit Union***,** No. 16-16513 (11th Cir. 2018). But that does not mean §524 does not belong in the tool box. The relevant portion is reproduced at Appendix 2.
- **RESPA** – The Real Estate Settlement Protection Act. This Act and the enabling Regulations are as boring as the law can get. But three different Regulations, set forth below, need to be in the toolbox.
- **RFI** – A Request For Information. This is provided for under 12 C.F.R. § 1024.36. Basically, it provides that a mortgage servicer is required to produce, within specific time frames, the information you request that is related to the servicing of the mortgage. It is intentionally broad and there are penalties that apply if a Servicer does not comply.
- **LOL** – Life Of Loan. This is the history of the mortgage that you will request that shows every transaction for the mortgage since (insert your own timeframe) until (repeat). This is the document that lets you answer all the questions at the beginning of these materials.
- **NOE** – Notice Of Error. You requested information per 12 C.F.R. § 1024.36; you received and reviewed the LOL and found errors. The Notice of Error is a means by which you can take action to have it corrected.
- **FDCPA** – The Fair Debt Collection Practices Act, 15 USC § 1692, et seq. In particular, see § 1692k.

In these materials you will see evidence from actual cases that demonstrate servicing errors and how you can get them corrected through various causes of action.

Debtor's Toolbox # 1…The docket and the POC

The first tool at you need is already at your disposal. It is the docket itself and the POC(s) filed by the mortgage servicer. First, re-familiarize yourself with the original claim and the loan documents (the note and DSD). There are really only a few provisions of each with which you need to be familiar, so this is not so tedious as it sounds. Check the provision dictating the application of payments or "waterfall".

Debtor's Toolbox # 2…FRBP 3002.1

The primary purpose of Rule 3002.1 is to make sure a debtor does not get to discharge only to find themselves in default as a result of payment changes or charges of which she was not aware. To accomplish this goal the Rule requires the Servicer to file and server written notice of,

- any change in the payment amount, including any change that results from an interest rate or escrow account adjustment, no later than 21 days before a payment in the new amount is due; and

- all fees, expenses, or charges (1) that were incurred in connection with the claim after the bankruptcy case was filed, and (2) that the holder asserts are recoverable against the debtor or against the debtor's principal residence. The notice shall be served within 180 days after the date on which the fees, expenses, or charges are incurred.

See, 3002.1(b)(1) and (c)

The Rule also requires the trustee to file the **NOFC** within 30 days of the final plan payment. This notice advises the parties that the debtor has paid in full the amount required to cure any default on the claim. The notice also advises the Servicer that it is obligated to respond. 3002.1(f)

3002.1(g) sets out the duties of the Servicer once the NOFC has been filed. Within 21 days of that filing the holder/Servicer shall file and serve on the debtor, debtor's counsel, and the trustee a statement indicating (1) whether it agrees that the debtor has paid in full the amount required to cure the default on the claim, and (2) whether the debtor is otherwise current on all payments consistent with § 1322(b)(5) of the Code. The statement shall itemize the required cure or postpetition amounts, if any, that the holder contends remain unpaid as of the date of the statement. The statement shall be filed as a supplement to the holder's proof of claim and is not subject to Rule 3001(f).[1] This is the **Resp to NOFC.**

Finally, 3002.1(h) provides the remedies if a Servicer fails to perform under (b), (c), or (g). In that case the court may, after notice and hearing, take either or both of the following actions:

[1] *Note that this is a declaration by a party as to the factual state of the claim. A subsequent inconsistent position would be open to challenge under judicial estoppel.*

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

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

I would argue that where a creditor fails under the subsection above, the result is *never* harmless. It means the money has come out of your client's pocket (or soon will) and that her mortgage likely became more costly over all. For a nice case on the application of subsections (f) and (g), see *Clark v. Select Portfolio Servicing, Inc*. (In re Clark), Nos. 11-11723-R, 17-01031-R, 2018 Bankr. LEXIS 3728 (Bankr. N.D. Okla. Nov. 26, 2018)

Debtor's Toolbox No.s 3, 4, and 5….Your Plan, 11 USC §§ 362(a)(3), and §524i

If your plan adheres to § 1306, then property the debtor acquires after the commencement of the case is property of the estate.

We are all familiar with the image of a creditor with a pre-petition claim taking action to further that claim post-petition. In the world of mortgages an example would be continuing or threatening foreclosure after the Stay is initiated. But the Code goes further. Section 362(a)(3) provides that the Stay applies to "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate". In a § 1306 district one can see how diminishing the equity that would result from principal reduction or otherwise converting the mortgage payment stream of a debtor to collect improper fees could equate to *an act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.*

Section 524 of the Code sets out the effects of a Discharge. This section gets very little thought in the context of mortgage issues as the mortgage is typically not discharged. But look at § 524(i) which states,

> *The willful failure of a creditor to credit payments received under a plan confirmed under this title*, unless the order confirming the plan is revoked, the plan is in default, or the creditor has not received payments required to be made under the plan in the manner required by the plan (including crediting the amounts required under the plan*), shall constitute a violation of an injunction under subsection (a)(2) if the act of the creditor to collect and failure to credit payments in the manner required by the plan caused material injury to the debtor.* (emphasis added)

In other words, improper servicing that results in harm to the debtor post-discharge, is a discharge violation. See, *Ridley v. M & T Bank* (In re Ridley), 572 B.R. 352 (Bankr. E.D. Okla. 2017)

Tool # 6… Real Estate Settlement Procedures Act (RESPA)

RESPA, along with Regulation X and Regulation Z, [2] is a broad body of law that has been around since 1974. These materials focus on amendments that occurred through the "Dodd-Frank Act" of the 2010. This granted rule-making authority under RESPA to the Consumer Financial Protection Bureau (CFPB). In 2013 the CFPB issued a number of Rules amending an implementing procedures for responding to consumer requests for information, error resolution requests, maintenance of escrow accounts and loss mitigation. It would not be difficult to fill a weekend seminar with nothing but RESPA and Reg Z. Instead, we are going to focus on three sections that you can use in your practice immediately:

- **12 C.F.R. § 1024.36 -- Requests for information**

This section is reproduced in the Appendix materials. The highlights for our purposes are as follows:

- A Borrower is entitled to request information related to the servicing of her federally regulated mortgage;
- The Borrower must submit her request to an address specifically designated by the Servicer and provide, in addition to the request, certain identifying information;
- Within five business days of receiving an information request from a borrower, the servicer shall provide to the borrower a written response acknowledging receipt of the request.
- A servicer must respond to an information request by providing the borrower with the requested information and contact information, including a telephone number, for further assistance in writing not later than 30 business after the servicer receives the information request. (This can be extended by 15 days if Servicer notifies borrower before the 30 day period expires.)

[2] Regulation X is promulgated by the Consumer Finance Protection Board and implements the Real Estate Settlement Procedures Act of 1974. The CFPB also issues commentary that sets forth an official interpretation to the regulation. Regulation Z is the part of the Truth in Lending Act of 1968 that promulgates rules that protect consumers against misleading practices by the lending industry.

This tool is very useful and can be used to obtain virtually any information related to the servicing of the loan. The first thing to request is the Life Of Loan transaction history. (the LOL).

- **§ 1024.35 Error resolution procedures.**

This section is reproduced in the Appendix materials. This Section sets out the means by which a Borrower may notify a Servicer of an error and request correction. It also describes the penalties for failing to The highlights for our purposes are as follows:

- First, the Borrower provides written notice of the error that should include a clear and specific description of the error. This is what we refer to as an "NOE".

- The statute contains a collection of common errors and a catch-all for "any other error relating to the servicing of a borrowers mortgage loan." § 1024.35 (11)

- The Errors you will see most often are those described in the following sub-paragraphs to the statute,

(2) Failure to apply an accepted payment to principal, interest, escrow, or other charges under the terms of the mortgage loan and applicable law;

(5) Imposition of a fee or charge that the servicer lacks a reasonable basis to impose upon the borrower; and

(6) Failure to provide an accurate payoff balance amount upon a borrower's request in violation of section 12 CFR 1026.36(c)(3).

The time frames for responding to a NOE are the same as responding to a an RFI.

The response must either correct the error or errors identified by the borrower and provide the borrower with a written notification of the correction, the effective date of the correction, and contact information, including a telephone number, for further assistance; or, **c**onduct a reasonable investigation of the errors alleged and provide the borrower with written notification that includes a statement that the servicer has determined that no error occurred, a statement of the reason or reasons for this determination, a statement of the borrower's right to request documents relied upon by the servicer in reaching its determination and information as to how the Borrower can request such documents.

Practice Tip: If a Servicer responds to your NOE indicating it did not make the described error, *always* request the documents they reviewed and relied upon.

- **12 U.S. Code § 2609** --Limitation On Requirement Of Advance Deposits In Escrow Accounts

(a) NOTIFICATION OF SHORTAGE IN ESCROW ACCOUNT

*If the terms of any federally related mortgage loan require the borrower to make payments to the servicer (as the term is defined in section 2605(i) of this title) of the loan for deposit into an escrow account for the purpose of assuring payment of taxes, insurance premiums, and other charges with respect to the property**, the servicer shall notify the borrower not less than annually of any shortage of funds in the escrow account.*** (emphasis added).

Section § 2609 does not include a private right of action. But consider a scenario whereby the Servicing rights are transferred to Servicer B during the bankruptcy. At the time of the transfer, the escrow account is running a shortage due to an increase in property taxes. The new Servicer must, per § 2609(b), notify the borrower of the shortage at least annually. If it fails in this, it can easily run afoul of Rule 3002.1(b)(1) and (c) if it later seeks to recover those costs (and it will).

But there is also case law that says that in the context of a Chapter 13, if a Servicer fails to comply with § 2609(b) it has *waived* those costs. See, *Chase Manhattan Mortg. Corp. v. Padgett*, 268 B.R. 309 (S.D. Fla. 2001); *Craig-Likely v. Wells Fargo Home Mortg*. (In re Craig-Likely), No. 06-13665, 2007 U.S. Dist. LEXIS 29042 (E.D. Mich. Mar. 2, 2007).

Tool # 7…The Life Of Loan Transaction Report (LOL)

This is where the rubber meets the road. The LOL you request should show every transaction of every kind in the mortgage account for the period you request. It is important when sending your RFI that you specify that you want the report *as maintained in the system of record.* This is an important part of the request as it should yield the "pure" data as opposed to a spreadsheet created by someone to respond to your request. You can also request more specialized or tailored information. For example,

a) Please produce a report showing all escrow transactions from (date of filing) through the date the report is prepared;

b) Please produce a report showing all corporate advances [3] from {date of filing through the date the report is prepared. As to each, please note which are recoverable from the Borrower and whether the advance has in fact been recovered;

c) Please produce each and every invoice from a third-party vendor, including but not limited to, those for attorney fees, inspection fees, and broker price opinions. For each, please provide corresponding proof of payment.

[3] Corporate Advances are simply funds advanced by the Servicer and can occur for a variety of reasons. Some are recoverable from the Borrower and some are not. And, occasionally, that designation can change and lead to an improper charge.

As you can imagine, a LOL transaction report covering more than 5 years can be somewhat voluminous. Like most things, reviewing these reports becomes easier when you know what to look for. Its also a good idea to develop a relationship with an accountant that has mortgage accounting experience to assist in tracking the funds.

Case Examples

Below are excerpts from various LOL transaction reports that demonstrate various errors:

Case 1 – This case demonstrates errors that can occur through mismanagement of the Borrower's escrow account. In this case the Servicer filed a Response To NOFC on May 1, 2017 agreeing that all pre-petition amounts owed had been paid via the trustee and all post-petition payments had been made. The mortgage was, per the Servicer, contractually current. The case discharged shortly thereafter. Below is an excerpt from the LOL for the date of RNOFC and discharge.

Source	Tran Date	Back Date	Tra Am			Process	Process Desc	Due Paid	Prin Paid	Int Paid	Escrow Paid	Late Paid	Ins Paid	UAF/Susp	Other Paid	Escrow Bal	Prin Bal
MSP	07/17/2017		$0.00	173	Payments	BDB	Automated Bankruptcy Transaction	08/01/17	$366.37	$649.24	$244.89			-$1,250.50		-$2,979.61	$132,253.99
MSP	07/14/2017		$1,250.00	172	Payments	BCC	Automated Lockbox Transaction	08/01/17	$0.00	$0.00				$1,250.00		-$3,224.50	$132,610.36
MSP	06/19/2017		$0.00	173	Payments	BDB	Automated Bankruptcy Transaction	07/01/17	$364.64	$650.97	$244.89			-$1,250.50		-$3,224.50	$132,610.36
MSP	06/16/2017		$1,300.00	172	Payments	BCB	Automated Lockbox Transaction	07/01/17	$0.00	$0.00				$1,300.00		-$3,469.39	$132,965.00
MSP	05/22/2017		$0.00	173	Payments	BDA	Automated Bankruptcy Transaction	06/01/17	$362.91	$652.70	$244.89			-$1,250.50		-$3,469.39	$132,965.00
MSP	05/19/2017		$1,300.00	172	Payments	BCA	Automated Lockbox Transaction	06/01/17	$0.00	$0.00				$1,300.00		-$3,714.28	$133,317.91
MSP	05/03/2017		$0.00	173	Payments	BBV	Manual Bankruptcy Transaction	06/01/17	$0.00	$0.00				$530.21	-$530.21	-$3,714.28	$133,317.91
MSP	04/12/2017		$0.00	173	Payments	BDB	Automated Bankruptcy Transaction	05/01/17	$361.19	$654.42	$244.89			-$1,250.50		-$3,714.28	$133,317.91
MSP	04/11/2017		$1,300.00	172	Payments	BCB	Automated Lockbox Transaction	05/01/17	$0.00	$0.00				$1,300.00		-$3,959.17	$133,669.10
MSP	03/15/2017		$0.00	173	Payments	BDB	Automated Bankruptcy Transaction	04/01/17	$349.48	$666.13	$244.89			-$1,250.50		-$3,959.17	$133,669.10

Note the "escrow balance" as of May 3, 2017, two days after the Resp. to NOFC, is ***-$3,714.28***. The Response to the NOFC stated "current", pre and post-petition. If that is true (and it is now thanks to judicial estoppel), then the deficiency could be the result of one or both of the following: either an increase in escrow expenses that was not relayed to debtor, her counsel, and the trustee. Or a misapplication of payments by the Servicer.

This a "flag" for numerous potential causes of action. Assume the case discharges on May 30, 2017. The debtor makes her first post-discharge payment on June 5th and, in keeping with the note, $244.89 applied to the negative escrow balance. At that point, one, and perhaps all, the following causes of action are likely born….

I. Violation of the FRBP 3002.1;
II. Violation of § 524(i);
III. Violation of 12 C.F.R. §2609(b) (recall there is no private right of action, but you can plead waiver);
IV. Likely an FDCPA violation, 16 U.S.C. § 1692e and f (assuming they are a default servicer);

If you can identify a misapplication of funds as a contributor to the deficiency, you would likely have claims for a violation of § 362(a)(3) and breach of contract.

Case 2 – This case demonstrates the taking of undisclosed and improper fees. The "E-Pay Fees" were levied and charged as a result of the debtor making payments over the phone.

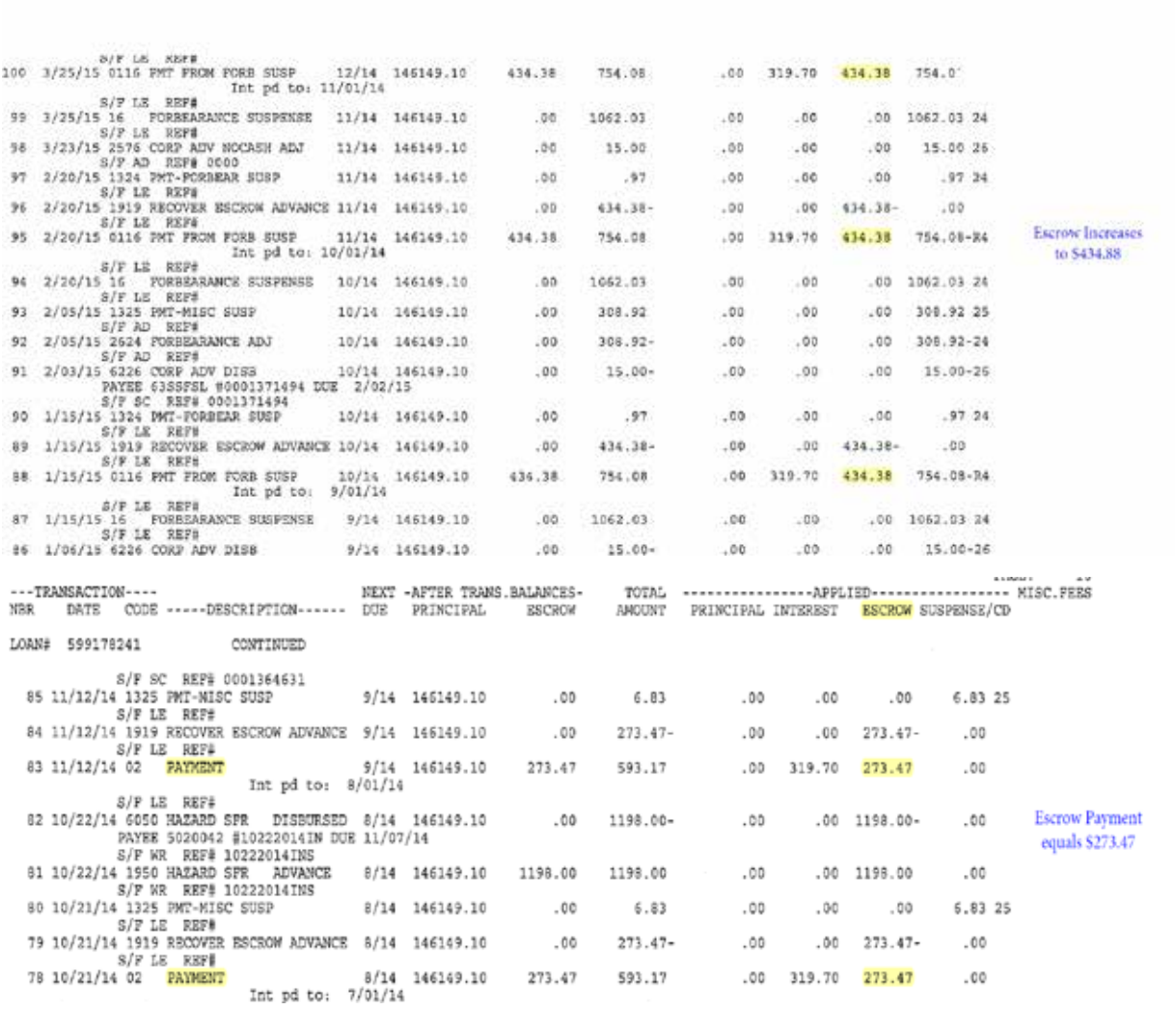
SR497CR-02 [redacted] DETAIL TRANSACTION HISTORY EXHIBIT 1 8/01/18 12:39:19 JOB DT: 8/01/18 PAGE: 12

---TRANSACTION--- NBR	DATE	CODE	-----DESCRIPTION------	NEXT DUE	-AFTER TRANS. BALANCES- PRINCIPAL	ESCROW	TOTAL AMOUNT	----------APPLIED---------- PRINCIPAL	INTEREST	ESCROW	SUSPENSE/CD	MISC.FEES
LOAN# 606548772			CONTINUED									
		S/F C	REF#									
136	8/22/14	1499	ZZZZF-E PAY FEE	9/14	115737.70	162.37	19.00	.00	.00	.00	.00	19.00 08
		S/F	REF#									
135	8/22/14	1919	RECOVER ESCROW ADVANCE	9/14	115737.70	162.37	232.43-	.00	.00	232.43-	.00	
		S/F SP	REF#									
134	8/22/14	02	PAYMENT	9/14	115737.70	394.80	883.13	102.20	386.13	394.80	.00	
			Int pd to: 8/01/14									
		S/F SP	REF#									
133	8/22/14	6031	COUNTY TAX DISBURSED	8/14	115839.90	.00	1660.85-	.00	.00	1660.85-	.00	
			PAYEE 31GA01U #TAR 9650 G DUE 10/03/14									
		S/F WR	REF# TAR 9650 GA									
132	8/22/14	1931	COUNTY TAX ADVANCE	8/14	115839.90	1660.85	232.43	.00	.00	232.43	.00	
		S/F WR	REF# TAR 9650 GA									
131	8/05/14	1325	PMT-MISC SUSP	8/14	115839.90	1428.42	164.00	.00	.00	.00	164.00 25	
		S/F CK	REF#									
130	7/23/14	6226	CORP ADV DISB	8/14	115839.90	1428.42	500.00-	.00	.00	.00	500.00-26	
			[redacted]									
129	7/22/14	2662	LNDR PMI DISBUR NOCASH	8/14	115839.90	1428.42	.00	.00	.00	.00	.00	
		S/F WR	REF#									
128	7/14/14	1408	ZZZZF-E PAY FEE	8/14	115839.90	1428.42	10.00	.00	.00	.00	.00	10.00 08
		S/F C	REF#									
127	7/14/14	1499	ZZZZF-E PAY FEE	8/14	115839.90	1428.42	10.00	.00	.00	.00	.00	10.00 08
		S/F	REF#									
126	7/14/14	02	PAYMENT	8/14	115839.90	1428.42	883.13	101.86	386.47	394.80	.00	
			Int pd to: 7/01/14									
		S/F SP	REF#									
125	7/08/14	1325	PMT-MISC SUSP	7/14	115941.76	1033.62	164.00	.00	.00	.00	164.00 25	
	Effective date: 7/07/14											
		S/F CK	REF#									
124	6/23/14	2662	LNDR PMI DISBUR NOCASH	7/14	115941.76	1033.62	.00	.00	.00	.00	.00	
		S/F WR	REF#									
123	6/06/14	02	PAYMENT	7/14	115941.76	1033.62	883.13	101.52	386.81	394.80	.00	
			Int pd to: 6/01/14									
		S/F SP	REF#									
122	5/30/14	02	PAYMENT	6/14	116043.28	638.82	883.13	101.18	387.15	394.80	.00	
			Int pd to: 5/01/14									
		S/F AD	REF#									
121	5/30/14	2625	MISC ADJ	6/14	116144.46	244.02	162.73-	.00	.00	.00	162.73-25	
		S/F AD	REF#									
120	5/30/14	2625	MISC ADJ	5/14	116144.46	244.02	720.40-	.00	.00	.00	720.40-25	
		S/F AD	REF#									
119	5/22/14	2662	LNDR PMI DISBUR NOCASH	5/14	116144.46	244.02	.00	.00	.00	.00	.00	
		S/F WR	REF#									
118	5/09/14	1408	ZZZZF-E PAY FEE	5/14	116144.46	244.02	15.00	.00	.00	.00	.00	15.00 08
		S/F C	REF#									
117	5/09/14	1499	ZZZZF-E PAY FEE	5/14	116144.46	244.02	15.00	.00	.00	.00	.00	15.00 08
		S/F	REF#									
116	5/09/14	1919	RECOVER ESCROW ADVANCE	5/14	116144.46	244.02	150.78-	.00	.00	150.78-	.00	
		S/F SP	REF#									
115	5/09/14	02	PAYMENT	5/14	116144.46	394.80	883.13	100.85	387.48	394.80	.00	

There were 29 separate similar charges that had been collected from the debtor in this case during the term of the bankruptcy. The Servicer never filed a 3002.1 Notice. The client sent a Notice of Error that did not receive a response. This complaint had five causes of action:

I. 3002.1 violation seeking preclusion of any documents supporting the charges;
II. Violation of § 362(a)(3);
III. Violation of RESPA, 12 C.F.R. § 1024.35;
IV. FDCPA (Default Servicer); and
V. Breach of contract

Case 3 –



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                S/F LE  REF#
100  3/25/15 0116 PMT FROM FORB SUSP      12/14  146149.10     434.38     754.08        .00   319.70   434.38    754.0
                                Int pd to: 11/01/14
                S/F LE  REF#
 99  3/25/15 16   FORBEARANCE SUSPENSE     11/14  146149.10        .00    1062.03        .00      .00      .00  1062.03 24
                S/F LE  REF#
 98  3/23/15 2576 CORP ADV NOCASH ADJ      11/14  146149.10        .00      15.00        .00      .00      .00    15.00 26
                S/F AD  REF# 0000
 97  2/20/15 1324 PMT-FORBEAR SUSP         11/14  146149.10        .00        .97        .00      .00      .00      .97 24
                S/F LE  REF#
 96  2/20/15 1919 RECOVER ESCROW ADVANCE 11/14  146149.10        .00     434.38-       .00      .00   434.38-     .00
                S/F LE  REF#
 95  2/20/15 0116 PMT FROM FORB SUSP      11/14  146149.10     434.38     754.08        .00   319.70   434.38    754.08-R4
                                Int pd to: 10/01/14
                S/F LE  REF#
 94  2/20/15 16   FORBEARANCE SUSPENSE     10/14  146149.10        .00    1062.03        .00      .00      .00  1062.03 24
                S/F LE  REF#
 93  2/05/15 1325 PMT-MISC SUSP            10/14  146149.10        .00     308.92        .00      .00      .00   308.92 25
                S/F AD  REF#
 92  2/05/15 2624 FORBEARANCE ADJ          10/14  146149.10        .00     308.92-       .00      .00      .00   308.92-24
                S/F AD  REF#
 91  2/03/15 6226 CORP ADV DISB            10/14  146149.10        .00      15.00-       .00      .00      .00    15.00-26
               PAYEE 63SSFSL #0001371494 DUE  2/02/15
                S/F SC  REF# 0001371494
 90  1/15/15 1324 PMT-FORBEAR SUSP         10/14  146149.10        .00        .97        .00      .00      .00      .97 24
                S/F LE  REF#
 89  1/15/15 1919 RECOVER ESCROW ADVANCE 10/14  146149.10        .00     434.38-       .00      .00   434.38-     .00
                S/F LE  REF#
 88  1/15/15 0116 PMT FROM FORB SUSP      10/14  146149.10     434.38     754.08        .00   319.70   434.38    754.08-R4
                                Int pd to:  9/01/14
                S/F LE  REF#
 87  1/15/15 16   FORBEARANCE SUSPENSE      9/14  146149.10        .00    1062.03        .00      .00      .00  1062.03 24
                S/F LE  REF#
 86  1/06/15 6226 CORP ADV DISB            9/14  146149.10        .00      15.00-       .00      .00      .00    15.00-26

---TRANSACTION----                          NEXT -AFTER TRANS.BALANCES-     TOTAL  ----------------APPLIED---------------- MISC.FEES
NBR    DATE   CODE -----DESCRIPTION------   DUE   PRINCIPAL     ESCROW     AMOUNT   PRINCIPAL INTEREST   ESCROW SUSPENSE/CD

LOAN#  599178241          CONTINUED

                S/F SC  REF# 0001364631
 85  11/12/14 1325 PMT-MISC SUSP           9/14  146149.10        .00        6.83        .00      .00      .00     6.83 25
                S/F LE  REF#
 84  11/12/14 1919 RECOVER ESCROW ADVANCE  9/14  146149.10        .00     273.47-        .00      .00   273.47-     .00
                S/F LE  REF#
 83  11/12/14 02   PAYMENT                  9/14  146149.10     273.47     593.17        .00   319.70   273.47      .00
                                Int pd to:  8/01/14
                S/F LE  REF#
 82  10/22/14 6050 HAZARD SFR   DISBURSED   8/14  146149.10        .00    1198.00-       .00      .00  1198.00-     .00
               PAYEE 5020042 #10222014IN DUE 11/07/14
                S/F WR  REF# 10222014INS
 81  10/22/14 1950 HAZARD SFR   ADVANCE     8/14  146149.10    1198.00    1198.00        .00      .00  1198.00      .00
                S/F WR  REF# 10222014INS
 80  10/21/14 1325 PMT-MISC SUSP           8/14  146149.10        .00        6.83        .00      .00      .00     6.83 25
                S/F LE  REF#
 79  10/21/14 1919 RECOVER ESCROW ADVANCE  8/14  146149.10        .00     273.47-        .00      .00   273.47-     .00
                S/F LE  REF#
 78  10/21/14 02   PAYMENT                  8/14  146149.10     273.47     593.17        .00   319.70   273.47      .00
                                Int pd to:  7/01/14
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Escrow Increases to $434.88

Escrow Payment equals $273.47

In this matter the servicer increased the escrow payment substantially…almost 60%. It did not serve a notice per Rule 3002.1. Moreover, an increase this high is often indicative of the servicer trying to "catch-up" after failing to audit the escrow account in the previous year. That was what occurred here. The causes of action here include,

I. Violation of 3002.1;
II. Violation of RESPA 12 C.F.R. § 2909(b) and waiver; and
III. Violation of § 362(a)(3)

General Practice Tips For Debtors Counsel:

A. Take the time to learn the underlying law described here and master the facts of your case. In many instances, it will be up to you to educate your opposing counsel. This is an opportunity to move your client's case efficiently;

B. Understand your client's damages. Is this case only about misapplied dollars, or did it generate default notices, foreclosure actions, or other aggravating factors;

C. Educate your client and help set expectations. Prepare them for the possibility that the attorney fees paid by the Servicer may well exceed their recovery;

D. Plead the facts and law of your case with great specificity. It takes a significant amount of time to do this properly, but a lot less than responding to 12b(6) motions or amending;

E. Know your judge. Knowing your judge and his propensity for awarding sanctions will help you value your case; and

F. In my opinion, there is no reason to "keep your cards close" in these cases. They are paper-trail cases. There are occasional exceptions to this philosophy, but generally you want the opposition to have your facts and evidence early.

APPENDIX 1

Rule 3002.1 Notice Relating to Claims Secured by Security Interest in the Debtor

(a) In General. This rule applies in a chapter 13 case to claims (1) that are secured by a security interest in the debtor's principal residence, and (2) for which the plan provides that either the trustee or the debtor will make contractual installment payments. Unless the court orders otherwise, the notice requirements of this rule cease to apply when an order terminating or annulling the automatic stay becomes effective with respect to the residence that secures the claim.

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

(1) Notice. The hold of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice of any change that results in the payment amount, including any change that results from an interest-rate or escrow-account adjustment, not later than 21 days before a payment in the new amount is due. If the claim arises from a home-equity line of credit, this requirement may be modified by court order.

(2) Objection. A party in interest who objects to the payment change may file a motion to determine whether the change is required to maintain payments in accordance with § 1322(b)(5) of the Code. If no motion is filed by the day before the new amount is due, the change goes into effect, unless the court orders otherwise.

(c) Notice of Fees, Expenses, and Charges. The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice itemizing all fees, expenses, or charges (1) that were incurred in connection with the claim after the bankruptcy case was filed, and (2) that the holder asserts are recoverable against the debtor or against the debtor's principal

residence. The notice shall be served within 180 days after the date on which the fees, expenses, or charges are incurred.

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

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

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

(g) Response to Notice of Final Cure Payment. Within 21 days after service of the notice under subdivision (f) of this rule, the holder shall file and serve on the debtor, debtor's counsel, and the trustee a statement indicating (1) whether it agrees that the debtor has paid in full the amount required to cure the default on the claim, and (2) whether the debtor is otherwise current on all payments consistent with § 1322(b)(5) of the Code. The statement shall itemize the required cure or postpetition amounts, if any, that the holder contends remain unpaid as of the date of the statement. The statement shall be filed as a supplement to the holder's proof of claim and is not subject to Rule 3001(f).

(h) Determination of Final Cure and Payment. On motion of the debtor or trustee filed within 21 days after service of the statement under subdivision (g) of this rule, the court shall, after notice and hearing, determine whether the debtor has cured the default and paid all required postpetition amounts.

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

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

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

APPENDIX 2 (portions of Code Sections, emphasis added):

11 USC § 362(a)(3)

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

(3) *any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate*;

11 U.S.C. § 524i

The willful failure of a creditor to credit payments received under a plan confirmed under this title, unless the order confirming the plan is revoked, the plan is in default, or the creditor has not received payments required to be made under the plan in the manner required by the plan (including crediting the amounts required under the plan), *shall constitute a violation of an injunction under subsection (a)(2) if the act of the creditor to collect and failure to credit payments in the manner required by the plan caused material injury to the debtor.*

APPENDIX 3:

12 C.F.R. § 1024.36 Requests for information.

(a) Information request. A servicer shall comply with the requirements of this section for any written request for information from a borrower that includes the name of the borrower, information that enables the servicer to identify the borrower's mortgage loan account, and states the information the borrower is requesting with respect to the borrower's mortgage loan. A request on a payment coupon or other payment form supplied by the servicer need not be treated by the servicer as a request for information. A request for a payoff balance need not be treated by the servicer as a request for information. A qualified written request that requests information relating to the servicing of the mortgage loan is a request for information for purposes of this section, and a servicer must comply with all requirements applicable to a request for information with respect to such qualified written request.

(b) Contact information for borrowers to request information. A servicer may, by written notice provided to a borrower, establish an address that a borrower must use to request information in accordance with the procedures in this section. The notice shall include a statement that the borrower must use the established address to request information. If a servicer designates a specific address for receiving information requests, a servicer shall designate the same address for receiving notices of error pursuant to § 1024.35(c). A servicer shall provide a written notice to a borrower before any change in the address used for receiving an information request. A servicer that designates an address for receipt of information requests must post the designated address on any Web site maintained by the servicer if the Web site lists any contact address for the servicer.

(c) Acknowledgment of receipt. Within five days (excluding legal public holi days, Satur days, and Sun days) of a servicer receiving an information request from a borrower, the servicer shall provide to the borrower a written response acknowledging receipt of the information request.

(d) Response to information request -

(1) Investigation and response requirements. Except as provided in paragraphs (e) and (f) of this section, a servicer must respond to an information request by either:

(i) Providing the borrower with the requested information and contact information, including a telephone number, for further assistance in writing; or

(ii) Conducting a reasonable search for the requested information and providing the borrower with a written notification that states that the servicer has determined that the requested information is not available to the servicer, provides the basis for the servicer's determination, and provides contact information, including a telephone number, for further assistance.

(2) Time limits -

(i) In general. A servicer must comply with the requirements of paragraph (d)(1) of this section:

(A) Not later than 10 days (excluding legal public holidays, Saturdays, and Sundays) after the servicer receives an information request for the identity of, and address or other relevant contact information for, the owner or assignee of a mortgage loan; and

(B) For all other requests for information, not later than 30 days (excluding legal public Holidays, Saturdays, and Sun days) after the servicer receives the information request.

(ii) Extension of time limit. For requests for information governed by the time limit set forth in paragraph (d)(2)(i)(B) of this section, a servicer may extend the time period for responding by an additional 15 days (excluding legal public holi days, Satur days, and Sun days) if, before the end of the 30-day period, the servicer notifies the borrower of the extension and the reasons for the extension in writing. A servicer may not extend the time period for requests for information governed by paragraph (d)(2)(i)(A) of this section.

(3) Omissions in responses to requests. In its response to a request for information, a servicer may omit location and contact information and personal financial information (other than information about the terms, status, and payment history of the mortgage loan) if:

(i) The information pertains to a potential or confirmed successor in interest who is not the requester; or

(ii) The requester is a confirmed successor and the information pertains to any borrower who is not the requester.

(e) Alternative compliance. A servicer is not required to comply with paragraphs (c) and (d) of this section if the servicer provides the borrower with the information requested and contact information, including a telephone number, for further assistance in writing within five days (excluding legal public holidays, Saturdays, and Sundays) of receiving an information request.

(f) Requirements not applicable -

(1) In general. A servicer is not required to comply with the requirements of paragraphs (c) and (d) of this section if the servicer reasonably determines that any of the following apply:

(i) Duplicative information. The information requested is substantially the same as information previously requested by the borrower for which the servicer has previously complied with its obligation to respond pursuant to paragraphs (c) and (d) of this section.

(ii) Confidential, proprietary or privileged information. The information requested is confidential, proprietary or privileged.

(iii) Irrelevant information. The information requested is not directly related to the borrower's mortgage loan account.

(iv) Overbroad or unduly burdensome information request. The information request is overbroad or unduly burdensome. An information request is overbroad if a borrower requests that the servicer provide an unreasonable volume of documents or information to a borrower. An information request is unduly burdensome if a diligent servicer could not respond to the information request without either exceeding the maximum time limit permitted by paragraph (d)(2) of this section or incurring costs (or dedicating resources) that would be unreasonable in light of the circumstances. To the extent a servicer can reasonably identify a valid information request in a submission that is otherwise overbroad or unduly burdensome, the servicer shall comply with the requirements of paragraphs (c) and (d) of this section with respect to that requested information.

(v) Untimely information request. The information request is delivered to a servicer more than one year after:

(A) Servicing for the mortgage loan that is the subject of the information request was transferred from the servicer receiving the request for information to a transferee servicer; or

(B) The mortgage loan is discharged.

(2) Notice to borrower. If a servicer determines that, pursuant to this paragraph (f), the servicer is not required to comply with the requirements of paragraphs (c) and (d) of this section, the servicer shall notify the borrower of its determination in writing not later than five days (excluding legal public holidays, Saturdays, and Sun days) after making such determination. The notice to the borrower shall set forth the basis under paragraph (f)(1) of this section upon which the servicer has made such determination.

(g) Payment requirement limitations -

(1) Fees prohibited. Except as set forth in paragraph (g)(2) of this section, a servicer shall not charge a fee, or require a borrower to make any payment that may be owed on a borrower's account, as a condition of responding to an information request.

(2) Fee permitted. Nothing in this section shall prohibit a servicer from charging a fee for providing a beneficiary notice under applicable State law, if such a fee is not otherwise prohibited by applicable law.

(h) Servicer remedies. Nothing in this section shall prohibit a servicer from furnishing adverse information to any consumer reporting agency or pursuing any of its remedies, including initiating foreclosure or proceeding with a foreclosure sale, allowed by the underlying mortgage loan instruments, during the time period that response to an information request notice is outstanding.

(i) Potential successors in interest.

(1) With respect to any written request from a person that indicates that the person may be a successor in interest and that includes the name of the transferor borrower from whom the person received an ownership interest and information that enables the servicer to identify the mortgage loan account, a servicer shall respond by providing the potential successor in interest with a written description of the documents the servicer reasonably requires to confirm the person's identity and ownership interest in the property and contact information, including a telephone number, for further assistance. With respect to the written request, a servicer shall treat the potential successor in interest as a borrower for purposes of the requirements of paragraphs (c) through (g) of this section.

(2) If a written request under paragraph (i)(1) of this section does not provide sufficient information to enable the servicer to identify the documents the servicer reasonably requires to confirm the person's identity and ownership interest in the property, the servicer may provide a response that includes examples of documents typically accepted to establish identity and ownership interest in a property; indicates that the person may obtain a more individualized description of required documents by providing additional information; specifies what additional information is required to enable the servicer to identify the required documents; and provides contact information, including a telephone number, for further assistance. A servicer's response under this paragraph (i)(2) must otherwise comply with the requirements of paragraph (i)(1). Notwithstanding paragraph (f)(1)(i) of this section, if a potential successor in interest subsequently provides orally or in writing the required information specified by the servicer pursuant to this paragraph (i)(2), the servicer must treat the new information, together with the original request, as a new, non-duplicative request under paragraph (i)(1), received as of the date the required information was received, and must respond accordingly.

(3) In responding to a request under paragraph (i)(1) of this section prior to confirmation, the servicer is not required to provide any information other than the information specified in paragraphs (i)(1) and (2) of this section. In responding to a written request under paragraph

(i)(1) that requests other information, the servicer must indicate that the potential successor in interest may resubmit any request for information once confirmed as a successor in interest.

(4) If a servicer has established an address that a borrower must use to request information pursuant to paragraph (b) of this section, a servicer must comply with the requirements of paragraph (i)(1) of this section only for requests received at the established address.

[78 FR 10876, Feb. 14, 2013, as amended at 78 FR 60437, Oct. 1, 2013; 81 FR 72371, Oct. 19, 2016]

APPENDIX 4

§ 1024.35 Error resolution procedures.

(a)*Notice of error.* A servicer shall comply with the requirements of this section for any written notice from the borrower that asserts an error and that includes the name of the borrower, information that enables the servicer to identify the borrower's mortgage loan account, and the error the borrower believes has occurred. A notice on a payment coupon or other payment form supplied by theservicer need not be treated by the servicer as a notice of error. A qualified written request that asserts an error relating to the servicing of a mortgage loan is a notice of error for purposes of this section, and a servicer must comply with all requirements applicable to a notice of error with respect to such qualified written request.

(b)*Scope of error resolution.* For purposes of this section, the term “error” refers to the following categories of covered errors:

(1) Failure to accept a payment that conforms to the servicer's written requirements for the borrower to follow in making payments.

(2) Failure to apply an accepted payment to principal, interest, escrow, or other charges under the terms of the mortgage loan and applicable law.

(3) Failure to credit a payment to a borrower's mortgage loan account as of the date of receipt in violation of 12 CFR 1026.36(c)(1).

(4) Failure to pay taxes, insurance premiums, or other charges, including charges that the borrower and servicer have voluntarily agreed that the servicer should collect and pay, in a timely manner as required by § 1024.34(a), or to refund an escrow account balance as required by § 1024.34(b).

(5) Imposition of a fee or charge that the servicer lacks a reasonable basis to impose upon the borrower.

(6) Failure to provide an accurate payoff balance amount upon a borrower's request in violation of section 12 CFR 1026.36(c)(3).

(7) Failure to provide accurate information to a borrower regarding loss mitigation options and foreclosure, as required by § 1024.39.

(8) Failure to transfer accurately and timely information relating to the servicing of a borrower's mortgage loan account to a transferee servicer.

(9) Making the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process in violation of § 1024.41(f) or (j).

(10) Moving for foreclosure judgment or order of sale, or conducting a foreclosure sale in violation of § 1024.41(g) or (j).

(11) Any other error relating to the servicing of a borrower's mortgage loan.

(c)*Contact information for borrowers to assert errors.* A servicer may, by written notice provided to a borrower, establish an address that a borrower must use to submit a notice of error in accordance with the procedures in this section. The notice shall include a statement that the borrower must use the established address to assert an error. If a servicer designates a specific address for receiving notices of error, the servicer shall designate the same address for receiving information requests pursuant to § 1024.36(b). A servicer shall provide a written notice to a borrower before any change in the address used for receiving a notice of error. A servicer that designates an address for receipt of notices of error must post the designated address on any Web site maintained by theservicer if the Web site lists any contact address for the servicer.

(d)*Acknowledgment of receipt.* Within five days (excluding legal public holi days, Satur days, and Sun days) of a servicer receiving a notice of error from a borrower, the servicer shall provide to the borrower a written response acknowledging receipt of the notice of error.

(e)*Response to notice of error* -

(1)*Investigation and response requirements* -

(i)*In general.* Except as provided in paragraphs (f) and (g) of this section, a servicer must respond to a notice of error by either:

(A) Correcting the error or errors identified by the borrower and providing the borrower with a written notification of the correction, the effective date of the correction, and contact information, including a telephone number, for further assistance; or

(B) Conducting a reasonable investigation and providing the borrower with a written notification that includes a statement that the servicer has determined that no error occurred, a statement of the reason or reasons for this determination, a statement of the borrower's right to request documents relied upon by the servicer in reaching its determination, information regarding how the borrower can request such documents, and contact information, including a telephone number, for further assistance.

(ii)*Different or additional error.* If during a reasonable investigation of a notice of error, a servicer concludes that errors occurred other than, or in addition to, the error or errors alleged by the borrower, the servicer shall correct all such additional errors and provide the borrower with a written notification that describes the errors the servicer identified, the action taken to correct the errors, the effective date of the correction, and contact information, including a telephone number, for further assistance.

(2)*Requesting information from borrower.* A servicer may request supporting documentation from a borrower in connection with the investigation of an asserted error, but may not:

(i) Require a borrower to provide such information as a condition of investigating an asserted error; or

(ii) Determine that no error occurred because the borrower failed to provide any requested information without conducting a reasonable investigation pursuant to paragraph (e)(1)(i)(B) of this section.

(3)*Time limits* -

(i)*In general.* A servicer must comply with the requirements of paragraph (e)(1) of this section:

(A) Not later than seven days (excluding legal public holi days, Satur days, and Sun days) after the servicer receives the notice of error for errors asserted under paragraph (b)(6) of this section.

(B) Prior to the date of a foreclosure sale or within 30 days (excluding legal public holi days, Satur days, and Sun days) after the servicer receives the notice of error, whichever is earlier, for errors asserted under paragraphs (b)(9) and (10) of this section.

(C) For all other asserted errors, not later than 30 days (excluding legal public holi days, Satur days, and Sun days) after the servicer receives the applicable notice of error.

(ii)*Extension of time limit.* For asserted errors governed by the time limit set forth in paragraph (e)(3)(i)(C) of this section, a servicer may extend the time period for responding by an additional 15 days (excluding legal public holi days, Satur days, and Sun days) if, before the end of the 30-day period, the servicer notifies the borrower of the extension and the reasons for the extension in writing. A servicer may not extend the time period for responding to errors asserted under paragraph (b)(6), (9), or (10) of this section.

(4)*Copies of documentation.* A servicer shall provide to the borrower, at no charge, copies of documents and information relied upon by the servicer in making its determination that no error occurred within 15 days (excluding legal public holi days, Satur days, and Sun days) of receiving the borrower's request for such documents. A servicer is not required to provide documents relied upon that constitute confidential, proprietary or privileged information. If a servicer withholds documents relied upon because it has determined that such documents constitute confidential, proprietary or privileged information, the servicer must notify the

borrower of its determination in writing within 15 days (excluding legal public holi days, Satur days, and Sun days) of receipt of the borrower's request for such documents.

(5)*Omissions in responses to requests for documentation.* In its response to a request for documentation under paragraph (e)(4) of this section, a servicer may omit location and contact information and personal financial information (other than information about the terms, status, and payment history of the mortgage loan) if:

(i) The information pertains to a potential or confirmed successor in interest who is not the requester; or

(ii) The requester is a confirmed successor in interest and the information pertains to any borrower who is not the requester.

(f)*Alternative compliance* -

(1)*Early correction.* A servicer is not required to comply with paragraphs (d) and (e) of this section if the servicer corrects the error or errors asserted by the borrower and notifies the borrower of that correction in writing within five days (excluding legal public holi days, Satur days, and Sun days) of receiving the notice of error.

(2)*Error asserted before foreclosure sale.* A servicer is not required to comply with the requirements of paragraphs (d) and (e) of this section for errors asserted under paragraph (b)(9) or (10) of this section if the servicer receives the applicable notice of an error seven or fewer days before a foreclosure sale. For any such notice of error, a servicer shall make a good faith attempt to respond to the borrower, orally or in writing, and either correct the error or state the reason the servicer has determined that no error has occurred.

(g)*Requirements not applicable* -

(1)*In general.* A servicer is not required to comply with the requirements of paragraphs (d), (e), and (i) of this section if the servicer reasonably determines that any of the following apply:

(i)*Duplicative notice of error.* The asserted error is substantially the same as an error previously asserted by the borrower for which the servicer has previously complied with its obligation to respond pursuant to paragraphs (d) and (e) of this section, unless the borrower provides new and material information to support the asserted error. New and material information means information that was not reviewed by the servicer in connection with investigating a prior notice of the same error and is reasonably likely to change the servicer's prior determination about the error.

(ii)*Overbroad notice of error.* The notice of error is overbroad. A notice of error is overbroad if the servicer cannot reasonably determine from the notice of error the specific error that the borrower asserts has occurred on a borrower's account. To the extent a servicer can reasonably identify a valid assertion of an error in a notice of error that is otherwise overbroad, the servicershall comply with the requirements of paragraphs (d), (e) and (i) of this section with respect to that asserted error.

(iii)*Untimely notice of error.* A notice of error is delivered to the servicer more than one year after:

(A) Servicing for the mortgage loan that is the subject of the asserted error was transferred from the servicer receiving the notice of error to a transferee servicer; or

(B) The mortgage loan is discharged.

(2) *Notice to borrower.* If a servicer determines that, pursuant to this paragraph (g), the servicer is not required to comply with the requirements of paragraphs (d), (e), and (i) of this section, theservicer shall notify the borrower of its determination in writing not later than five days (excluding legal public holidays, Satur days, and Sun days) after making such determination. The notice to the borrower shall set forth the basis under paragraph (g)(1) of this section upon which the servicer has made such determination.

(h) *Payment requirements prohibited.* A servicer shall not charge a fee, or require a borrower to make any payment that may be owed on a borrower's account, as a condition of responding to a notice of error.

(i) *Effect on servicer remedies* -

(1)*Adverse information.* After receipt of a notice of error, a servicer may not, for 60 days, furnish adverse information to any consumer reporting agency regarding any payment that is the subject of the notice of error.

(2) *Remedies permitted.* Except as set forth in this section with respect to an assertion of error under paragraph (b)(9) or (10) of this section, nothing in this section shall limit or restrict a lender or servicer from pursuing any remedy it has under applicable law, including initiating foreclosure or proceeding with a foreclosure sale.

[78 FR 10876, Feb. 14, 2013, as amended at 78 FR 60437, Oct. 1, 2013; 81 FR 72371, Oct. 19, 2016]

LENDER TOOLBOX: UNDERSTANDING THE LENDER'S PERSPECTIVE REGARDING MORTGAGE SERVICING WITHIN THE CONTEXT OF RESPA, TILA, AND FDCPA ACTIONS[1]

If you do not represent mortgage servicers, then you may view the inner workings of a bankruptcy department at a mortgage servicer as a mysterious and secretive process. These materials should assist you with a basic understanding of what happens to a mortgage loan account when a borrower/debtor files bankruptcy. The relationship between borrower/debtor and the mortgage servicer changes in some respects upon the filing of a bankruptcy petition, and that change often creates confusion for anyone unfamiliar with the process.

Understanding what occurs on the mortgage servicer side upon the filing of a bankruptcy petition may assist you, as debtor's counsel, with evaluating: (a) whether there are issues that must be resolved, and (b) the strategy and timing related to addressing an issue that should, from your perspective, be resolved. Should litigation arise alleging claims under RESPA, TILA, and/or the FDCPA, then these materials also address the common legal and factual considerations counsels by counsel for a mortgage servicer.

A Look Inside a Bankruptcy Account

I. "Flagging" an Account Upon Notice of a Bankruptcy Case

Once a debtor files bankruptcy, several bankruptcy "flags" are placed on a debtor's mortgage loan account. The "flags" are intended to preserve the status quo during the bankruptcy case and prohibit any misinformation from being circulated to the debtor.

Once the account is flagged as a bankruptcy account, a debtor may find that:

- he/she can no longer access his/her loan account online;
- he/she has limited information available if the online account is still accessible;
- online or over the phone payments are no longer accepted;
- all outbound correspondence is stopped, including, possibly, mortgage statements; and
- he/she may have to provide an attorney authorization form to allow any communication as between a debtor's lawyer and the mortgage servicer.

II. Mortgage Statements

Prior to April 19, 2018, some mortgage servicers opted to stop sending monthly account statements when a borrower was in a pending bankruptcy out of fear for stay violations or

[1] Written materials prepared with assistance from Tim Colletti, an attorney in Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C. 's Atlanta's office.

confusion as to the terms contained therein. Mortgage statements are now required while a borrower is in bankruptcy with some limited exceptions.

Changes to Regulation Z §1026.41, which is entitled "periodic statements for residential mortgage loans," was amended and went into effect on April 19, 2018. Regulation Z §1026.41(a) sets forth that a servicer is required to provide a consumer, for each billing cycle, a periodic statement, unless certain exemptions apply. The rule also sets forth the required information that must be contained therein and the timing related thereto.

Effective April 19, 2018, the rule, as amended, includes certain exemptions from the general rule. See Regulation Z §1026.41(e). Relating to those debtors in bankruptcy, the rule states:

> **(5) Certain consumers in bankruptcy --**
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> **(i) Exemption.** Except as provided in paragraph (e)(5)(ii) of this section, a servicer is exempt from the requirements of this section with regard to a mortgage loan if:
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> **(A)** Any consumer on the mortgage loan is a debtor in bankruptcy under title 11 of the United States Code or has discharged personal liability for the mortgage loan pursuant to 11 U.S.C. 727, 1141, 1228, or 1328; and
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> **(B)** With regard to any consumer on the mortgage loan:
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> **(1)** The consumer requests in writing that the servicer cease providing a periodic statement or coupon book;
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> **(2)** The consumer's bankruptcy plan provides that the consumer will surrender the dwelling securing the mortgage loan, provides for the avoidance of the lien securing the mortgage loan, or otherwise does not provide for, as applicable, the payment of pre-bankruptcy arrearage or the maintenance of payments due under the mortgage loan;
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> **(3)** A court enters an order in the bankruptcy case providing for the avoidance of the lien securing the mortgage loan, lifting the automatic stay pursuant to 11 U.S.C. 362 with regard to the dwelling securing the mortgage loan, or requiring the servicer to cease providing a periodic statement or coupon book; or

(4) The consumer files with the court overseeing the bankruptcy case a statement of intention pursuant to 11 U.S.C. 521(a) identifying an intent to surrender the dwelling securing the mortgage loan and a consumer has not made any partial or periodic payment on the mortgage loan after the commencement of the consumer's bankruptcy case.

(ii) Reaffirmation or consumer request to receive statement or coupon book. A servicer ceases to qualify for an exemption pursuant to paragraph (e)(5)(i) of this section with respect to a mortgage loan if the consumer reaffirms personal liability for the loan or any consumer on the loan requests in writing that the servicer provide a periodic statement or coupon book, unless a court enters an order in the bankruptcy case requiring the servicer to cease providing a periodic statement or coupon book.
(iii) Exclusive address. A servicer may establish an address that a consumer must use to submit a written request under paragraph (e)(5)(i)(B)(*1*) or (e)(5)(ii) of this section, provided that the servicer notifies the consumer of the address in a manner that is reasonably designed to inform the consumer of the address. If a servicer designates a specific address for requests under paragraph (e)(5)(i)(B)(*1*) or (e)(5)(ii) of this section, the servicer shall designate the same address for purposes of both paragraphs (e)(5)(i)(B)(*1*) and (e)(5)(ii) of this section.

(iv) Timing of compliance following transition —

(A) Triggering events for transitioning to modified and unmodified periodic statements. A servicer transitions to providing a periodic statement or coupon book with the modifications set forth in paragraph (f) of this section or to providing a periodic statement or coupon book without such modifications when one of the following three events occurs:

(1) A mortgage loan becomes subject to the requirements of paragraph (f) of this section;

(2) A mortgage loan ceases to be subject to the requirements of paragraph (f) of this section; or

(3) A servicer ceases to qualify for an exemption pursuant to paragraph (e)(5)(i) of this section with respect to a mortgage loan.

> **(B) Single-statement exemption.** As of the date on which one of the events listed in paragraph (e)(5)(iv)(A) of this section occurs, a servicer is exempt from the requirements of this section with respect to the next periodic statement or coupon book that would otherwise be required but thereafter must provide modified or unmodified periodic statements or coupon books that comply with the requirements of this section.

Regulation Z §1026.41(e)(5).

You are likely asking what qualifies as a "Triggering Event" for purposes of transitioning to a modified or unmodified statement. Regulation Z §1026.41(f) addresses that:

> **(f) Modified periodic statements and coupon books for certain consumers in bankruptcy.** While any consumer on a mortgage loan is a debtor in bankruptcy under title 11 of the United States Code, or if such consumer has discharged personal liability for the mortgage loan pursuant to 11 U.S.C. 727, 1141, 1228, or 1328, the requirements of this section are subject to the following modifications with regard to that mortgage loan:
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> **(1) Requirements not applicable.** The periodic statement may omit the information set forth in paragraphs (d)(1)(ii) and (d)(8)(i), (ii), and (v) of this section. The requirement in paragraph (d)(1)(iii) of this section that the amount due must be shown more prominently than other disclosures on the page shall not apply.
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> **(2) Bankruptcy notices.** The periodic statement must include the following:
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> **(i)** A statement identifying the consumer's status as a debtor in bankruptcy or the discharged status of the mortgage loan; and
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> **(ii)** A statement that the periodic statement is for informational purposes only.
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> **(3) Chapter 12 and chapter 13 consumers.** In addition to any other provisions of this paragraph (f) that may apply, with regard to a mortgage loan for which any consumer with primary liability is a debtor in a chapter 12 or chapter 13 bankruptcy case, the requirements of this section are subject to the following modifications:

(i) Requirements not applicable. In addition to omitting the information set forth in paragraph (f)(1) of this section, the periodic statement may also omit the information set forth in paragraphs (d)(8)(iii), (iv), (vi), and (vii) of this section.
(ii) Amount due. The amount due information set forth in paragraph (d)(1) of this section may be limited to the date and amount of the post-petition payments due and any post-petition fees and charges imposed by the servicer.

(iii) Explanation of amount due. The explanation of amount due information set forth in paragraph (d)(2) of this section may be limited to:

(A) The monthly post-petition payment amount, including a breakdown showing how much, if any, will be applied to principal, interest, and escrow;

(B) The total sum of any post-petition fees or charges imposed since the last statement; and

(C) Any post-petition payment amount past due.

(iv) Transaction activity. The transaction activity information set forth in paragraph (d)(4) of this section must include all payments the servicer has received since the last statement, including all post-petition and pre-petition payments and payments of post-petition fees and charges, and all post-petition fees and charges the servicer has imposed since the last statement. The brief description of the activity need not identify the source of any payments.

(v) Pre-petition arrearage. If applicable, a servicer must disclose, grouped in close proximity to each other and located on the first page of the statement or, alternatively, on a separate page enclosed with the periodic statement or in a separate letter:

(A) The total of all pre-petition payments received since the last statement;

(B) The total of all pre-petition payments received since the beginning of the consumer's bankruptcy case; and

(C) The current balance of the consumer's pre-petition arrearage.

(vi) Additional disclosures. The periodic statement must include, as applicable:

(A) A statement that the amount due includes only post-petition payments and does not include other payments that may be due under the terms of the consumer's bankruptcy plan;

(B) If the consumer's bankruptcy plan requires the consumer to make the post-petition mortgage payments directly to a bankruptcy trustee, a statement that the consumer should send the payment to the trustee and not to the servicer;

(C) A statement that the information disclosed on the periodic statement may not include payments the consumer has made to the trustee and may not be consistent with the trustee's records;

(D) A statement that encourages the consumer to contact the consumer's attorney or the trustee with questions regarding the application of payments; and

(E) If the consumer is more than 45 days delinquent on post-petition payments, a statement that the servicer has not received all the payments that became due since the consumer filed for bankruptcy.

(4) Multiple obligors. If this paragraph (f) applies in connection with a mortgage loan with more than one primary obligor, the servicer may provide the modified statement to any or all of the primary obligors, even if a primary obligor to whom the servicer provides the modified statement is not a debtor in bankruptcy.

(5) Coupon books. A servicer that provides a coupon book instead of a periodic statement under paragraph (e)(3) of this section must include in the coupon book the disclosures set forth in paragraphs (f)(2) and (f)(3)(vi) of this section, as applicable. The servicer may include these disclosures anywhere in the coupon book provided to the consumer or on a separate page enclosed with the coupon book. The servicer must make available upon request to the consumer by telephone, in writing, in person, or electronically, if the consumer consents, the information listed in paragraph (f)(3)(v) of this section, as applicable. The modifications set forth in paragraphs (f)(1) and (f)(3)(i) through (iv) and (vi) of this section apply to a coupon book and other information a

> servicer provides to the consumer under paragraph (e)(3) of this section.

Taken as a whole, and in layman terms, the new rule includes a single-billing cycle exemption from the requirement to provide a periodic statement or coupon book to those in bankruptcy to allow for a mortgage servicer to transition to or from providing bankruptcy specific disclosures.

In my experience, mortgage servicers do not adjust account terms until the conclusion of a case to avoid unnecessary adjustments should the bankruptcy case get dismissed prior to discharge. Given that protocol, mortgage account statements are often identical to the mortgage account statements that were mailed pre-bankruptcy and may give rise to confusion to Debtors who are expecting a monthly account statement with their approved Chapter 13 plan terms. As discussed in more detail below, payments that are tendered during the bankruptcy case may be applied to a suspense account, thereby precluding a reduction in the principal balance identified in each monthly account statement.

By contrast, other servicers may use the modified mortgage statement approach and may limit the information contained therein. For example, the amount due may be limited to the date and amount of the post-petition payments due and any post-petition fees and charged imposed.

Practice Pointer - To avoid confusion, I recommend a discussion at the beginning of a bankruptcy case about what correspondence is likely to be received from a mortgage servicer and what information may be contained therein.

III. The Reconciliation Process

Chapter 13 cases are complicated (for mortgage servicers), and most servicers have departments dedicated to, among other tasks, Chapter 11 and Chapter 13 reconciliations. Mortgage servicers regularly apply arrearage payments paid through a Chapter 13 case as suspense payments if the payments paid through the case do not equate to the regular monthly payment amount.

At the conclusion of the case, the mortgage servicer may assign an individual in the bankruptcy department to reconcile: (a) the regular, ongoing mortgage payments that came due during the case, (b) the regular, ongoing mortgage payments that were paid during the case, (c) the arrearage amount, including fees, and expenses, set forth in the proof of claim, and (d) the arrearage amount paid during the case. The reconciliation process involves the waiver of any fees and expenses not provided for in the proof of claim.

Once the reconciliation is completed, the payments currently in suspense are applied to the loan account, fees and costs posted to the account post-proof of claim and pre-reconciliation are waived, and, hopefully, the loan is marked current.

Practice Pointer - If you request a payment history prior to the completion of the reconciliation process, then you are likely to see late fees and other charges that may not be allowable as part of the bankruptcy case. From a lender's perspective, it's recommended to wait until the Notice of Final Cure is filed and the statutory time period to reply expires before taking issue with the information contained in a payment history since the reconciliation process *should* resolve any issues that you identify pre-reconciliation.

IV. Knowing Your Lender Lawyers

We will address how to approach a litigated matter next, but for those matters that are not at the litigation phase and a debtor's counsel has identified a problem, then sometimes the most efficient way to resolve the issue is reaching out to your known lender's counsel.

Most mortgage servicers have their "escalated" counsel or "outside managing counsel" that oversee what they view as escalated or non-routine matters (e.g. adversary proceedings or contested matters outside the scope of a stay relief motion). I have assisted my clients, debtors, and debtors' lawyers in countless situations, because a debtor's lawyer reached out to me for assistance in escalating an issue within the servicer's bankruptcy department. Informally trying to resolve these issues are occasionally more efficient, less expensive for everyone, and appreciated from the lender's side.

You've Been Sued - Now What?!

I. Lender's Toolbox #1: Know Your Opposing Counsel

This goes without saying, but the first thing that typically occurs upon receiving a complaint from your client, the mortgage servicer, is to look at who represents the debtor. Your strategy and approach to early resolution or a motion to dismiss will likely rely on this information, in part. More specifically, most of my clients are interested in knowing whether opposing counsel routinely files RESPA, TILA, and/or FDCPA lawsuits or whether this lawyer does not routinely these types of actions.

Practice Pointer - If you are unfamiliar with this lawyer or law firm, then I recommend completing a CM/ECF review to see whether the debtor's lawyer regularly litigates this matter. If you identify a case (or several) where the debtor's lawyers has litigated these issues, then I would consider evaluating whether that litigation was resolved before or at the motion to

dismiss phase of a case. I also recommend reviewing the base bankruptcy docket to identify the settlement amount in the Motion to Approve Compromise.

II. Lender's Toolbox #2: Understanding the FDCPA - A General Overview

The Fair Debt Collection Practices Act governs the actions of parties acting as third-party debt collectors for personal debts. The FDCPA includes personal mortgage loans but does not include loans for businesses or for a commercial purpose.

Generally, the FDCPA prohibits the following activities (each of which is prohibited during a bankruptcy case pursuant to 11 U.S.C. §362):

- No calls to a consumer before 8:00 a.m. or after 9:00 p.m.
- No calls to a consumer represented by an attorney which the debt collector has knowledge of or can readily ascertain
- No calls at a consumer's work
- No calls with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector
- No communications that amount to harassment, oppression, or abuse. This includes:
    - Use or threat of use of violence or other criminal means
    - Use of obscene or profane language
    - Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass
    - Placement of telephone calls without meaningful disclosure of the caller's identity
- No use of any false, deceptive, or misleading representation or means in connection with the collection of any debt. *(This is where you are likely to encounter an FDCPA claim in the context of your bankruptcy practice, apart from a stay violation)*
- No use of unfair or unconscionable means to attempt to collect a debt
- Cannot disregard a written request for a consumer to cease further contact

15 U.S.C. § 801 et seq.

The FDCPA has a one year statute of limitations. 15 U.S.C. § 813(d). In addition to recovering any actual damages sustained, statutory damages are limited to $1,000 per case. 15 U.S.C. §1692k(a)(1-2). If the plaintiff prevails, then the costs of the action, together with reasonable attorneys' fees may be awarded. 15 U.S.C. § 1692k(a)(3). Notably, if the court makes a finding that the lawsuit was brought in bad faith and for the purpose of harassment, then the court may award to the defendant costs and reasonable attorneys' fees. Id.

III. Lender's Toolbox #3: FDCPA - Venue Considerations

The FDCPA permits the filing of an action in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction. 15 U.S.C. § 813(d).

If your client is sued in district court for alleged FDCPA violations relating to a proof of claim, then consideration should be given to why the plaintiff selected this forum and whether there is a need to educate the presiding judge on the selected forum. For example, if the FDCPA claim arises out of a disputed amount on a filed proof of claim and a new lawsuit is filed in a district court rather than addressing the issue through a claim objection, then you should be wondering what strategic advantage the plaintiff expects to gain from pursuing the matter in district court as opposed to filing a claim objection.

Additionally, you should consider requesting that the district court take judicial notice of the proceedings in the underlying bankruptcy case. See Colburn v. Odom, 911 F.3d 1110, 1112 n.6 (11th Cir. 2018) ("A court may take judicial notice of its own records and the records of inferior courts.") (quoting United States v. Rey, 811 F.2d 1453, 1457 n.5 (11th Cir. 1987)); Anderson v. FDIC, 918 F.2d 1139, 1141 n.1 (4th Cir. 1990) ("[T]he Bankruptcy Court is considered 'a unit of the district court' under 28 U.S.C. § 151, and we believe a district court should properly take judicial notice of its own records[.]").

IV. Lender's Toolbox #4: FDCPA - Motion to Dismiss Under Fed. R. Civ. P. 12(b)(6)

After Midland Funding, LLC v. Johnson, 137 S. Ct. 1407 (2017), one plausible lender's counsel argument is that the FDCPA should play no role in bankruptcy's claims-allowance and processing scheme. Therefore, if the heart of the FDCPA claim is based on alleged false information contained within a proof of claim or there was an alleged failure to comply with Bankruptcy Rule 3001(c)(3)(B) in not providing additional information about the disputed proof of claim upon request, then there may also be a basis to dismiss the claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Since the Eleventh Circuit's Crawford v. LVNV Funding, LLC, 758 F.3d 1254 (11th Cir. 2014) and Johnson v. Midland Funding, LLC, 823 F.3d 1334, 1338 (11th Cir. 2016) opinions are no longer binding, the Supreme Court's Midland Funding opinion casts doubt on whether the FDCPA has a role in bankruptcy's claims filing and resolution process. In Crawford v. LVNV Funding, LLC, 758 F.3d 1254 (11th Cir. 2014), the Eleventh Circuit held that filing a time-barred proof "violated the FDCPA's plain language," id. at 1262, by "creat[ing] the misleading

impression to the debtor that the debt collector can legally enforce the debt." Id. at 1261. The court in Crawford specifically declined, however, "to weigh in on" the preliminary issue of "[w]hether the Code 'preempts' the FDCPA when creditors misbehave in bankruptcy." Id. at 1262 n.7. However, the Eleventh Circuit in Johnson v. Midland Funding, LLC, 823 F.3d 1334, 1338 (11th Cir. 2016), "answer[ed] the question left open in *Crawford*." The court held that "the Code and the FDCPA can be read together in a coherent way," such that "[t]he Bankruptcy Code does not preclude an FDCPA claim in the context of a Chapter 13 bankruptcy when a debt collector files a proof of claim it knows to be time-barred." Id. at 1338.

The U.S. Supreme Court reversed that decision in Midland Funding, LLC v. Johnson, 137 S. Ct. 1407 (2017). The Supreme Court did not squarely address the preclusion/preemption issue, instead reversing on grounds that clearly render Crawford a dead letter: "[W]e conclude that filing (in a Chapter 13 bankruptcy proceeding) a proof of claim that is obviously time barred is not a false, deceptive, misleading, unfair, or unconscionable debt collection practice within the meaning of the Fair Debt Collection Practices Act." Midland Funding, 137 S. Ct. at 1415–16.

While that holding does not speak directly to whether and how the FDCPA should be applied to bankruptcy's claims-filing and resolution scheme, the Supreme Court's reasoning and dicta in Midland Funding spoke more broadly to why the FDCPA is not sensibly applied in a bankruptcy case:

> *The Act and the Code have different purposes and structural features.* The Act seeks to help consumers, not necessarily by closing what Johnson and the United States characterize as a loophole in the Bankruptcy Code, but by preventing consumer bankruptcies in the first place. See, e.g., 15 U.S.C. § 1692(a) (recognizing the "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices [which] contribute to the number of personal bankruptcies"); see also § 1692(b) ("Existing laws and procedures ... are inadequate to protect consumers"); § 1692(e) (statute seeks to "eliminate abusive debt collection practices"). The Bankruptcy Code, by way of contrast, creates and maintains what we have called the "delicate balance of a debtor's protections and obligations." Kokoszka v. Belford, 417 U.S. 642, 651, 94 S. Ct. 2431, 41 L.Ed.2d 374 (1974).
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> *To find the Fair Debt Collection Practices Act applicable here would upset that "delicate balance." From a substantive perspective it would authorize a new significant bankruptcy-related remedy in the absence of language in the Code providing for it.* Administratively, it would permit postbankruptcy litigation in an ordinary civil court concerning a creditor's state of mind—a matter often hard to determine. See 15 U.S.C. § 1692k(c) (safe harbor for any debt collector who "shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of

> procedures reasonably adapted to avoid any such error"). Procedurally, it would require creditors (who assert a claim) to investigate the merits of an affirmative defense (typically the debtor's job to assert and prove) lest the creditor later be found to have known the claim was untimely. The upshot could well be added complexity, changes in settlement incentives, and a shift from the debtor to the creditor the obligation to investigate the staleness of a claim.

Midland Funding, 137 S. Ct. 1407, 1414–15 (emphasis added).[2]

The Eleventh Circuit eventually vacated its Midland Funding opinion in its entirety, see Johnson v. Midland Funding, LLC, 868 F.3d 1241 (11th Cir. 2017), rendering its original opinion not binding on this Court in any way. See, e.g., United States v. Ellis, 419 F.3d 1189, 1192 (11th Cir. 2005) ("The relevant portion of that opinion, however, was subsequently vacated … and vacated opinions 'are officially gone. They have no legal effect whatever. They are void. [They have no] remaining force and cannot be considered to express the view of this Court.'") (brackets in original) (quoting United States v. Sigma Int'l, Inc., 300 F.3d 1278, 1280 (11th Cir. 2002)).

With the Eleventh Circuit's Midland Funding decision no longer authoritative or binding on any matter, and with Crawford's being supplanted by the Supreme Court's Midland Funding decision, the most current and most authoritative opinion on the interplay of the FDCPA and the Bankruptcy Code is the Supreme Court's Midland Funding decision. And the Supreme Court's language regarding "different purposes and structural features" as well as a clear reluctance to "authorize a new significant bankruptcy-related remedy in the absence of language in the Code providing for it" cannot be squared with the broad FDCPA liability a plaintiff may contend.

A. To the extent the FDCPA has a role in the claims filing and resolution process, then context matters and a least-sophisticated-consumer standard may not apply.

The general rule in the Eleventh Circuit is that for purposes of determining compliance with the FDCPA—specifically, with 15 U.S.C. §§ 1692e and 1692f—a given communication or practice is viewed through the lens of the "least sophisticated consumer." E.g., Bishop v. Ross Earle & Bonan, P.A., 817 F.3d 1268, 1274 (11th Cir. 2016) ("When evaluating a communication under § 1692e, we ask whether the 'least sophisticated consumer' would be deceived or misled by the communication at issue."); Miljkovic v. Shafritz & Dinkin, P.A., 791 F.3d 1291, 1308 (11th Cir. 2015) ("Whether conduct qualifies as unfair or unconscionable is assessed objectively from the point of view of the 'least sophisticated consumer.'")

[2] As lender's counsel, I would invite the presiding court to keep this passage from Midland Funding in mind when construing whether the Complaint states a claim under the FDCPA.

This standard, however, does not apply regardless of the audience and context. The Court of Appeals for the Eleventh Circuit has, at least twice, suggested that a "competent lawyer" standard might apply to most communications to attorneys. See, e.g. Miljkovic v. Shafritz & Dinkin, P.A., 791 F.3d 1291, 1306 n.10, 1308 n.12 (11th Cir. 2015); Bishop v. Ross Earle & Bonan, P.A., 817 F.3d 1268, 1277 n.8 (11th Cir. 2016) (applying the least-sophisticated-consumer standard to a particular communication to an attorney, but "emphasiz[ing] the fact-specific nature of this holding," "emphasiz[ing] that by rejecting the 'competent lawyer' standard on the facts of this case we do not foreclose it entirely," and noting that the "case is limited … to the notice requirements of § 1692g(a)").

The U.S. Supreme Court in Midland Funding, LLC v. Johnson, 137 S. Ct. 1407 (2017), as noted above, held that filing a time-barred proof of claim "is not a false, deceptive, misleading, unfair, or unconscionable debt collection practice within the meaning of the Fair Debt Collection Practices Act." Midland Funding, 137 S. Ct. at 1415–16.

The Supreme Court based its decision, in large part, on the legal sophistication of the "audience" of a Chapter 13 case and on the nature and protections of a Chapter 13 proceeding:

> Indeed, to determine whether a statement is misleading normally "requires consideration of the legal sophistication of its audience." Bates v. State Bar of Ariz., 433 U.S. 350, 383, n. 37, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977). *The audience in Chapter 13 bankruptcy cases includes a trustee, 11 U.S.C. § 1302(a), who must examine proofs of claim and, where appropriate, pose an objection,* §§ 704(a)(5), 1302(b)(1) (including any timeliness objection, §§ 502(b)(1), 558). And that trustee is likely to understand that, as the Code says, a proof of claim is a statement by the creditor that he or she has a right to payment subject to disallowance (including disallowance based upon, and following, the trustee's objection for untimeliness) ….
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> Whether Midland's assertion of an obviously time-barred claim is "unfair" or "unconscionable" (within the terms of the Fair Debt Collection Practices Act) presents a closer question. First, Johnson points out that several lower courts have found or indicated that, in the context of an ordinary civil action to collect a debt, a debt collector's assertion of a claim known to be time barred is "unfair." … The lower courts rested their conclusions upon their concern that a consumer might unwittingly repay a time-barred debt. ….
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> *These considerations have significantly diminished force in the context of a Chapter 13 bankruptcy.* The consumer initiates such a proceeding, see 11 U.S.C. §§ 301, 303(a), and consequently the consumer is not likely to pay a stale claim just to avoid going to court. *A knowledgeable trustee is available.* See § 1302(a). *Procedural bankruptcy rules more directly guide the evaluation of claims.* … And, as the Eighth Circuit Bankruptcy Appellate Panel put it, the claims resolution process is "generally a more streamlined and less unnerving prospect for a

> debtor than facing a collection lawsuit." *In re Gatewood*, 533 B.R. 905, 909 (2015); see also, *e.g.*, 11 U.S.C. § 502 (outlining generally the claims resolution process). These features of a Chapter 13 bankruptcy proceeding make it considerably more likely that an effort to collect upon a stale claim in bankruptcy will be met with resistance, objection, and disallowance.
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> Second, Johnson argues that the practice at least risks harm to the debtor and that there is not "a single legitimate reason" for allowing this kind of behavior. …
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> We are ultimately not persuaded by these arguments. The bankruptcy system, as we have already noted, treats untimeliness as an affirmative defense. *The trustee normally bears the burden of investigating claims* and pointing out that a claim is stale. … *Moreover, protections available in a Chapter 13 bankruptcy proceeding minimize the risk to the debtor.*

Midland Funding, 137 S. Ct. at 1413–14 (emphasis added).

Thus, assuming the FDCPA applies to the Proof of Claim, in determining whether a plaintiff has stated a plausible claim for relief under the FDCPA, the bankruptcy context matters, as does the fact that the "audience" for the Proof of Claim includes a Chapter 13 trustee, as well as Plaintiff's bankruptcy attorney. Lender's counsel may assert that the allegations in the complaint, therefore, should not be considered from the point of view of the least sophisticated consumer but rather from the perspective of relevant bankruptcy professionals, such as the Chapter 13 trustee and Plaintiff's bankruptcy counsel.

B. The FDCPA Allegation may be Rebutted by the Proof of Claim Itself

If the asserted FDCPA claim is based on a discrepancy between the amount of claim, as identified in Question 7 of the Proof of Claim Office Form, and information contained on exhibits attached to the proof of claim, then be sure to review precisely what amounts your clients sought to recover.

Hypothetical: Plaintiff is a Chapter 13 bankruptcy debtor in the U.S. Bankruptcy Court for the Northern District of Georgia. Lender filed a Proof of Claim asserting an unsecured, nonpriority claim of $6,800 for money loaned. Thereafter, Plaintiff filed a complaint in the U.S. District Court for the Northern District of Georgia (while the bankruptcy case was still pending) asserting causes of action under the FDCPA based on various alleged deficiencies with the Proof of Claim. None of the claims or issues were raised in the bankruptcy court, and the Plaintiff did not object to the Proof of Claim.

Count I of the complaint alleges that lender falsely asserted the Proof of Claim does not "include interest or other charges," rendering the Proof of Claim false and misleading under FDCPA §§ 1692e, e(2), and e(10). Question No. 7 on the Proof of Claim Official Form asks "How

much is the claim?" and "Does this amount include interest or other charges?" For the former question, the Proof of Claim asserts a claim of $6,800; for the latter, the "No" box is checked.

Plaintiff contends that lender improperly stated "No" when answering "Does this amount include interest or other charges?" and that the lender and proof of claim "affirmatively declares that it does not include any sums comprised of interest, fees, or other charges." As support, Plaintiff points to a purported discrepancy in a two-page attachment to the Proof of Claim that "indicate[s] that [lender's] affirmative declaration is false and that the claim filed seeks sums that include an 'Origination Fee' of $339.32."

The attachment to the Proof of Claim, titled "Truth In Lending Disclosure Statement," states, in relevant part, as follows:

> **Itemization of amount financed:**
> Amount of Your Loan: $6,800.00
> Origination Fee: $339.32
> Amount Given to You Directly: $6,460.68

Motion to Dismiss Argument: Based on the Truth in Lending Disclosure Statement attached to the Proof of Claim, the amount asserted in the Proof of Claim ($6,800) is the *principal balance* of the loan. Therefore, the lender's answer to Question No. 7 on the Proof of Claim, therefore, is not false, as the amount of the claim does *not* include any amounts other than the principal balance. *See* FED. R. BANKR. P. 3001 ADVISORY COMMITTEE NOTES ON RULES—2011 AMENDMENT I ("Subdivision (c)(2) is added to require additional information to accompany proofs of claim filed in cases in which the debtor is an individual. When the holder of a claim seeks to recover – ***in addition to the principal amount of a debt*** – interest, fees, expenses, or other charges, the proof of claim must be accompanied by a statement itemizing these additional amounts with sufficient specificity to make clear the basis for the claimed amount.") (emphasis added).

Further, to the extent lender's response to Question No. 7 can in any way be considered misleading, lender submits that the response is not misleading *to the relevant audience*—Plaintiff's bankruptcy attorney and Chapter 13 trustee. Lender asks the Court to take judicial notice that neither Plaintiff nor the Chapter 13 trustee objected to the Proof of Claim (or raised any issues at all relating to the Proof of Claim) in Plaintiff's bankruptcy case.

When complaint allegations conflict with exhibits attached to the complaint, the exhibits govern. E.g., Griffin Indus., Inc. v. Irvin, 496 F.3d 1189, 1205–06 (11th Cir. 2007) ("Although Griffin's complaint makes the conclusory allegation that it is similarly situated to American Proteins in all relevant ways, the exhibits attached to the complaint plainly show that this is not the case. Our duty to accept the facts in the complaint as true does not require us to ignore specific factual details of the pleading in favor of general or conclusory allegations. Indeed, when the exhibits contradict the general and conclusory allegations of the pleading, the exhibits govern.").

Plaintiff's allegation that lender's response to Question No. 7 is false and misleading is contradicted by the Proof of Claim itself. Lender's response to Question No. 7 is supported by the attached Truth In Lending Statement. The response shows a claim of $6,800; the Truth In Lending Statement shows a principal balance of $6,800. Accordingly, Plaintiff fails to state a plausible claim for relief under the §§ 1692e, 1692e(2), or 1692e(10) of FDCPA based on the Proof of Claim being false and misleading.

C. The Failure to Produce a Copy of a Writing May Not Be Actionable

If the FDCPA claim is based on the lender's alleged failure to comply with Bankruptcy Rule 3001(c)(3)(B) in not providing additional information about the Proof of Claim upon request, then the plaintiff may assert that such a failure is unjustified and an attempt to obfuscate a lender's right to collect the sums in the proof of claim. Therefore, allegedly constituting an unfair practice under the 15 U.S.C. §1692f.

Hypothetical: Assume the same underlying bankruptcy case and facts above. In addition, Plaintiff alleges Plaintiff's counsel requested, pursuant to Bankruptcy Rule 3001(c)(3)(B), a copy of the writing upon which the Proof of Claim was based, but lender failed to comply. Plaintiff asserts, "[Lender's] failure to provide further information regarding [the Proof of Claim], as required by Fed. R. Bankr. P. 3001(c)(3)(B), was unjustified, was an attempt to obfuscate [Lender's] right to collect the sums in [the Proof of Claim], and constituted an unfair practice under 15 U.S.C. §1692f."

Motion to Dismiss Argument: Plaintiff's conclusory allegation fails to show what is misleading or unfair about lender not producing a copy of the writing upon which the claim is based. More importantly, there is no legal basis for the contention that a failure to produce a copy of the writing upon which a debt is based violates the FDCPA. Such a contention implies that Bankruptcy Rule 3001(c)(1) creates substantive obligations under the FDCPA, and further implies that a failure to comply with Bankruptcy Rule 3001(c)(1) constitutes a *per se* violation of the FDCPA.

The FDCPA itself sets forth the information and documents a debt collector must provide to a consumer, and under what circumstances the information and documents must be provided. The FDCPA *does not* require a debt collector to provide a debtor with a copy of the agreement on which the debt is based, even upon request. See generally 15 U.S.C. § 1692g (debt collector must provide certain notices in writing with or within 5 days of the debt collector's initial communication with the consumer; debt collector must send consumer a copy of a "verification of the debt or a copy of a judgment" if the consumer disputes the debt within 30 days of the initial written notices). See also, e.g., Howard v. Pinnacle Credit Servs., LLC, No. 4:09-CV-85(CDL), 2010 WL 2600753, at *4 (M.D. Ga. June 24, 2010) ("… Plaintiff contends that Defendant failed to produce to Plaintiff the underlying agreement creating the debt. However, the FDCPA does not require Defendant to maintain or obtain a copy of the underlying agreement that created the debt. Rather, the FDCPA merely requires Defendant to verify the

debt by mailing to Plaintiff the name and address of the original creditor or a copy of any judgment that formed the basis of the debt. … Therefore, the Court finds no merit in Plaintiff's contention that Defendant violated 15 U.S.C. § 1692f(1).") (citation omitted).

Plaintiff does not cite or otherwise rely on any asserted violation of 15 U.S.C. § 1692g "initial communication" provisions. Nor can they, in the context of a proof of claim, courts uniformly hold that proofs of claim are exempt from § 1692g requirements. E.g., Townsend v. Quantum3 Grp., LLC, 535 B.R. 415, 420–21 (M.D. Fla. 2015).

Rather, Plaintiff alleges that a failure to comply with Bankruptcy Rule 3001(c), by and in itself, is an unfair practice under § 1692f. But as a matter of law, Bankruptcy Rules do not create substantive rights and obligations under the FDCPA. See 28 U.S.C. § 2075 ("The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under title 11. Such rules shall not abridge, enlarge, or modify any substantive right."); Durango Georgia Paper Co. v. North River, LLC (In re Durango Georgia Paper Co.), No. 02-21669, 2009 WL 5322409, at *3 (Bankr. S.D. Ga. May 8, 2009) ("[I]t is well-established that the Bankruptcy Rules cannot contradict a federal statute. … When a rule comes into conflict with a statute, the statute prevails."). Accordingly, Plaintiff fails to state a claim under the FDCPA for any failure by SST to provide documents in accordance with Bankruptcy Rule 3001(c).

V. Lender's Toolbox #5: FDCPA - Affirmative Defenses

As an initial matter, if your law firm represents a mortgage servicer or investor in a non-judicial foreclosure state and your firm is engaging in nothing more than non-judicial foreclosure proceedings, then the United State Supreme Court recently clarified that your law firm is not a "debt collector" under the FDCPA, except for the limited purposes of 15 U.S.C. § 1692f(6). See Obduskey v. McCarthy & Holthus, 138 S.Ct. 2710 (2018).

If there is no argument to be made regarding your law firm's status or your client's status as to whether it is a "debt collector" under the FDCPA, then be mindful of the "bona fide error" defense. 15 U.S.C. §1692k(c) provides, "A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."

If you are asserting such a defense, then be careful that you can establish that the violation was not due to a mistaken interpretation of the legal requirements under the FDCPA, and your client can establish various procedures to avoid such error. See Daubert v. NRA Group, LLC, 861 F.3d 382 (3d Cir. 2017) (identifying that the defense does not apply to FDCPA violations resulting from a mistaken interpretation of the legal requirements of the FDCPA and FDCPA violations forgivable under § 1692k(c) must result from “clerical or factual mistakes”);

see also Arnold v. Bayview Loan Servicing, LLC, 659 Fed. App. 568 (11th Cir. 2016) (stating, "A debt collector asserting the bona fide error defense must show by a preponderance of the evidence that its violation of the Act: (1) was not intentional; (2) was a bona fide error; and (3) occurred despite the maintenance of procedures reasonably adapted to avoid any such error" and detailed pre-foreclosure checklist, written policies, and ongoing training procedures instructing employees about FDCPA prohibitions constituted adequate procedures under FDCPA).

Lastly, the statute of limitations and standing are additional affirmative defenses to consider. See Rotkiske v. Klemm, 890 F.3d 422 (3rd Cir. 2018) (concluding the FDCPA's one-year limitation period begins to run when the alleged violation of the FDCPA occurs, not when the violation is discovered or should have been discovered); see also Hagy v. Demers & Adams, 882 F.3d 616 (6th Cir. 2018) (holding that while there may have been a technical violation of the FDCPA, the plaintiffs did not suffer an "injury in fact" and thus lacked standing).

Jurisdiction and Constitutional Authority of Bankruptcy Courts[1]

I. Bankruptcy Court Jurisdiction and Authority

a. Statutory Jurisdiction in General

i. Practitioners should be mindful of the jurisdictional authority of the bankruptcy to issue final orders on various federal claims.

ii. District courts "have original and exclusive jurisdiction of all cases under title 11." 28 U.S.C. § 1334(a).

iii. District courts "have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b).

1. 28 U.S.C. § 1334(a) and (b) read together reinforces the fact that, while jurisdiction over the case is exclusively in the federal purview, the jurisdiction of civil proceedings therein are merely original and not necessarily exclusive.

    a. This differentiation of the non-exclusivity of civil proceedings forms the basis of the power of the district court (and thus the bankruptcy courts to which jurisdiction may be referred) to abstain from hearing certain proceedings as provided in 28 U.S.C. § 1334(c).

2. "An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options or freedom of action (either positively or negatively) and [it] in any way impacts upon the handling and administration of the bankruptcy estate." *A.H. Robins Co., Inc. v. Piccinin*, 788 F.2d 994 (1986) (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)).

3. "[T]he 'related to' category is not so broad as to encompass litigation of claims arising under state law or non-bankruptcy Federal law that will not have an effect on the bankruptcy estate, simply because one of the litigants filed a petition in bankruptcy."

[1] Hon. Rebecca B. Connelly and her career law clerk, Caleb Chaplain, prepared these materials.

Gates v. Didonato (In re Gates), Adv. P. No. 04-1240, 2004 WL 3237345 (Bankr. E.D. Va. Oct. 20, 2004).

iv. Pursuant to 28 U.S.C. § 157(a), a district court may refer these proceedings to the bankruptcy court. The bankruptcy court is a unit of the district court. 28 U.S.C. sec 151.

1. Based on these provisions and the ubiquitous referral by the district courts of bankruptcy cases to bankruptcy courts, the bankruptcy court is likely the first arena for claims under federal statutes filed by debtors in bankruptcy.

v. Statutorily, bankruptcy courts may "hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11." 28 U.S.C. § 157(b)(1).

1. Congress's grant of authority to hear certain claims, although statutorily core, may be deemed unconstitutional, as held in *Stern v. Marshall*, 564 U.S. 462 (2011). *See also Exec. Benefits Ins. Agency v. Arkinson*, 573 U.S. 25 (2014); *Wellness Int'l Network Ltd. v. Sharif*, 135 S. Ct. 1932 (2015).

b. Constitutional Jurisdiction

i. Article III

Article III of the U.S. Constitution vests "judicial Power of the United States" in judges of the federal courts who are entitled to hold life tenure and whose compensation shall not be diminished during their tenure. Art. III, sec. 1. These judges hold the power to enter "dispositive judgments" of cases and controversies over which a federal court has jurisdiction. Art III, sec. 2.

ii. Statutory Authority may not confer Constitutional Authority

Congress may not confer power to enter dispositive judgments over these federal cases to judges who do not have the "structural safeguards of Article III," except in narrow circumstances such as cases involving "public rights." *See Wellness* 135 S. Ct. at 1951 (dissent of Chief Justice Roberts).

iii. A *Stern* claim

In *Stern v. Marshall* the Supreme Court addressed the conundrum occurring when the Constitutional safeguards prevent a bankruptcy court from deciding a matter even though Congress has enacted a statutory provision giving the bankruptcy court jurisdiction over such matter. Under 28 U.S.C. section 157, Congress gave statutory jurisdiction to bankruptcy courts to hear and decide, and issue a final judgment, in 16 specific "core" proceedings. In *Stern,* the Supreme Court determined that even though a matter is "core" under section 157, if that matter turned on an adjudication of "private rights" and would have been a matter that would have been otherwise determined by a judge protected by the Article III safeguards, then the bankruptcy judge may not have "Constitutional authority" to issue the final judgment notwithstanding the statutory authority conferred under section 157. Although the Supreme Court found the statute appeared to permit bankruptcy judges to have authority inconsistent with the Constitution, the Court did not invalidate the statute.

A "Stern claim" is one involving non-bankruptcy law, seeks "only" to augment the bankruptcy estate, and would otherwise exist outside the bankruptcy proceeding. *Wellness Intern.Network Ltd. v. Sharif* 135 S. Ct 1932 (2015). In other words, but for the fact that some party to the bankruptcy case happens to have filed bankruptcy, there is no reason the cause of action would appear in a bankruptcy tribunal. When determining if the bankruptcy court has the authority to answer questions of non-bankruptcy law, the question to ask "is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process." *Stern v. Marshall*, 131 S.Ct. 2594, 2618 (2011).

In a non-core proceeding, a bankruptcy court may hear and decide the matter and may issue a final judgment only if the parties consent. 28 U.S.C. sec 157. Without consent, the bankruptcy judge issues proposed findings

of fact and conclusions of law, and the district court will issue the final judgment. *Id.* If the matter is a *Stern* claim and the bankruptcy court does not have Constitutional authority to issue the final judgment, but issued a final order anyway, the district court may consider the bankruptcy court judgment as proposed findings of facts and conclusions of law. *Exec Benefits Ins Agency v. Arkinson*, 573 U.S. 25 ; 134 S. Ct. 2165 (2014); Fed. R. Bank. P. 8018.1 (a district court may treat the order as proposed findings of fact and conclusions of law if the district court determines that the bankruptcy court did not have the constitutional power to issue the final ruling).

If the matter is a *Stern* claim and the parties knowingly and voluntarily consent to the bankruptcy court issuing a final judgment, the bankruptcy court may do so. *Wellness Intern. Network Ltd. v. Sharif* 135 S. Ct. 1932 (2015) (holding Article III permits bankruptcy judges to decide *Stern* claims submitted to them by consent); Fed. R. Bankr. P. 7008 (complaint shall contain a statement that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy court); Fed. R. Bankr. P. 12(b)(a responsive pleading shall include a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge).

iv. Case or Controversy

1. "concrete injury"

Bankruptcy courts as federal courts have jurisdiction over "cases" and "controversies." *See* Art III sec 2. A "controversy" must be real and concrete and not hypothetical. These should be specific disputes with precisely framed issues and arguments, not hypothetical legal questions. *See* Erwin Chemerinsky, FEDERAL JURISDICTION § 2.2, at 49 (5th ed.2007). In the dispute, the interests of the parties must be adverse, otherwise the court's

decision does nothing to change the status quo and the court is not exercising its judicial function (but is merely offering an advisory opinion). *See In re Smith*, 409 B.R. 1, 4 (Bankr. D. N.H. 2009). One of the two generally accepted standards for a case to be justiciable (and not an advisory opinion) is that the case involves an actual dispute between adverse litigants. *Id, citing Muskrat v. *4 United States,* 219 U.S. 346 (1911). The other standard for justiciability is that a federal court decision in one claimant's favor will have some effect. *Smith* at 4, footnote 2, (citing *Hayburn's Case,* 2 U.S. 408 (1792)).

2. Declaratory judgment but not "advisory opinion"

28 U.S.C. sec 2201(a) permits federal courts to issue declaratory judgments if the case presents "an actual controversy within its jurisdiction." *Id*. ("[i]n a case of actual controversy within its jurisdiction . . . any court of the United States may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.") Federal courts may issue declaratory judgments but only if an actual controversy exists, otherwise the court is merely giving an advisory opinion. *See In re Lucas*, (Bankr. W.D. Va. 2007)(Stone, J.)(declining to enter declaratory judgment in the absence of an actual controversy); *In re Ouellette*, 2005 Bankr. LEXIS 126 (court would not issue advisory opinion that real estate was properly abandoned for title insurance purposes when there was no legal or factual dispute for the court to resolve).

v. Inherent power to "police" the court

The Supreme Court has ruled that federal courts have the inherent power to award fees and costs as a sanction for bad faith, vexatious, wanton, or

oppressive litigation. *Chambers v. Nasco*, *Inc*., 501 U.S. 32, 33 (1991) (ruling that three categories exist in which a federal court may invoke its inherent power to award fees in contravention of the "American Rule"). Such inherent power, however, cannot be exercised without notice and the opportunity to contest the finding and the assessment of fees. *Nasser v. WhitePages, Inc*., 2014 WL 1323170, *6 (W.D.Va. April 1, 2014) (citing *Gwtnn v. Walker* (*In re Walker*), 532 F.3d 1304, 1309 (11th Cir. 2008) (citing *Chambers*, 501 U.S. at 49)). Furthermore, the Court must exercise such power with caution and restraint. *Chambers*, 501 U.S. at 50.

In *Chambers*, the Supreme Court noted "the bad-faith exception resembles the third prong of Rule 11's certification requirement, which mandates that a signer of a paper filed with the court warrant that the paper 'is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.'" *Id.* at 46 n.10. Bad faith includes the knowingly or recklessly raising of a frivolous argument; the arguing of a meritorious claim for the purpose of harassment; delaying or disrupting litigation; or hampering the enforcement of a court order. *Nasser*, 2014 WL 1323170 at *6 (analyzing The Advisory Committee Note to the 1993 Amendment of Rule 11, which lists relevant factors to consider in determining whether a litigant should be sanctioned and applying such to help aid in the determination of when to invoke the court's inherent powers to sanction).

c. Alternatives If Jurisdiction Does Not Exist in the Bankruptcy Court

i. Withdrawal of the Reference

1. On motion by a party or on the district court's own motion, it may withdraw the reference to the bankruptcy court for cause shown. 28 U.S.C. § 157(d).

    a. The use of the word "may" in section 157(d) reflects the discretionary nature of such a request, although post-*Stern* it could be argued that the constitutionality of the proceeding

to be withdrawn may compel withdrawal by the district court (absent consent of the parties to have the matter heard by the bankruptcy court).

2. The district court "shall . . . withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce." 28 U.S.C. § 157(d).
3. Federal Rule of Bankruptcy Procedure 5011 governs the procedure for withdrawal.
    a. The motion must be filed with the district court to be heard by the district judge. Fed. R. Bankr. P. 5011(a).
    b. The filing of the motion to withdraw the reference "shall not stay the administration of the case or any proceeding therein before the bankruptcy judge except that the bankruptcy judge may stay, on such terms and conditions as are proper, proceedings pending disposition of the motion." Fed. R. Bankr. P. 5011(c).

ii. Abstention

1. The Supreme Court specifically noted that abstention was an available option for a bankruptcy court to work around the issues that may have been created by its ruling in *Stern v. Marshall*. 564 U.S. 462, 501 (2011) ("[W]e are not convinced that the practical consequences of such limitations on the authority of bankruptcy courts to enter final judgments are as significant as Vickie and the dissent suggest.").
2. Permissive Abstention: With the exception of chapter 15 cases, "nothing in [28 U.S.C. § 1334] prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding

arising under title 11 or arising in or related to a case under title 11." 28 U.S.C. § 1334(c)(1).

3. Mandatory Abstention: "Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction." 28 U.S.C. § 1334(c)(2).
4. Federal Rule of Bankruptcy Procedure 5011 governs the procedure for requesting abstention.
    a. The motion for abstention is governed by Federal Rule of Bankruptcy Procedure 9014 and must be served on all the parties to the proceeding. Fed. R. Bankr. P. 5011(b).
    b. The filing of the motion for abstention "shall not stay the administration of the case or any proceeding therein before the bankruptcy judge except that the bankruptcy judge may stay, on such terms and conditions as are proper, proceedings pending disposition of the motion." Fed. R. Bankr. P. 5011(c).

iii. Issuance of Proposed Findings of Fact and Conclusions of Law

1. If the matter is not core but otherwise related to the bankruptcy case, "the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected." 28 U.S.C. § 157(c)(1).

2. Federal Rule of Bankruptcy Procedure 7016 provides that the bankruptcy court may decide (on its own or at a party's request) "to hear the proceeding and issue proposed findings of fact and conclusions of law." Fed. R. Bankr. P. 7016(b)(2).

iv. Consent

1. "[T]he district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title." 28 U.S.C. § 157(c)(2).
    a. This section had created a conflict among the circuits as to whether this section was constitutional. However, this conflict was resolved by the Supreme Court in *Wellness International Network Ltd. v. Sharif*, 135 S. Ct. 1932 (2015) ("[A]llowing Article I adjudicators to decide claims submitted to them by consent does not offend the separation of powers so long as Article III courts retain supervisory authority over the process.").
2. The pleading rules under the Federal Rules of Bankruptcy Procedure were amended to require statements from the parties in the complaint and any answer or response filed to affirmatively state whether or not such party consents to the entry of a final order by the bankruptcy court.
    a. Federal Rule of Civil procedure 7008 currently provides that "[i]n an adversary proceeding before a bankruptcy court, the complaint, counterclaim, cross-claim, or third-party complaint shall contain a statement that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy court." Fed. R. Bankr. P. 7008(a).
    b. Federal Rule of Civil procedure 7012 currently provides that "[a] responsive pleading shall include a statement that the

party does or does not consent to entry of final orders or judgment by the bankruptcy court." Fed. R. Bankr. P. 7012(b).

d. Authority over Fair Debt Collection Practices Act (FDCPA) Claims

i. In general, bankruptcy courts do not have subject matter jurisdiction over claims under the FDCPA.

ii. Courts have focused the finding of a lack of jurisdiction on the fact that the bankruptcy court could hear an FDCPA claim *only if* the claim "arises in," "arises under," or is "related to" the bankruptcy case. *See, e.g.*, *Wynne v. Aurora Loan Servs., LLC (In re Wynne)*, 422 B.R. 763, 770–71 (Bankr. M.D. Fla. 2010); *Harlan v. Rosenberg & Assocs., LLC (In re Harlan)*, 402 B.R. 703, 711 (Bankr. W.D. Va. 2009).

1. Some courts have drawn the line at whether the claim was property of the estate and thus whether there would be any effect on the bankruptcy estate. *See, e.g.*, *Vienneau v. Saxon Cap., Inc. (In re Vienneau)*, 410 B.R. 329, 334 (Bankr. D. Mass. 2009); *Goldstein v. Marine Midland Bank, N.A. (In re Goldstein)*, 201 B.R. 1, 5 (Bankr. D. Me. 1996); *Harlan*, 402 B.R. at 712–13.

2. Courts generally agree that "[a] factual nexus between the alleged conduct and the Plaintiff's bankruptcy case is insufficient, in and of itself, to confer 'related to' jurisdiction on the Bankruptcy Court to hear a claim under the FDCPA." *Atwood v. GE Money Bank (In re Atwood)*, 452 B.R. 249 (Bankr. D.N.M. 2011).

iii. The bankruptcy court may simply decide to hear the matter and issue proposed findings of fact and conclusions of law for de novo review of the district court. *See Humes v. LVNV Funding, LLC (In re Humes)*, 496 B.R. 557, 565–66 (Bankr E.D. Ark. 2013); *see also* Fed. R. Bankr. P. 7016(b)(2).

e. Authority over Fair Credit Reporting Act (FCRA) Claims

i. Generally, bankruptcy courts do not have subject matter jurisdiction of claims under the FCRA.

ii. If "the proceedings will not affect the bankruptcy estates, they do not fall within the parameters of 'related to' jurisdiction," and accordingly a bankruptcy court will determine that it does not have jurisdiction to issue a final order under the FCRA. *See Torres v. Chase Bank USA, N.A. (In re Torres)*, 367 B.R. 478 (Bankr. S.D.N.Y. 2007); *see also Davis v. Orion Fed. Credit Union (In re Davis)*, 558 B.R. 222, 225 (Bankr. W.D. Tenn. 2015) ("The district court does have bankruptcy jurisdiction over 'related to' claims (see 28 U.S.C. § 1334(b)), but this adversary proceeding is no longer related to any bankruptcy case. Federal bankruptcy jurisdiction has been lost.").

iii. There may be no jurisdiction when the claim arises post-confirmation, post-discharge and has an inadequately close nexus to the bankruptcy estate. *See Kasim v. Equifax Info. Servs., LLC*, Civ. No. 08-627-HA, 2008 WL 4858267, at *4 (D. Ore. Nov. 10, 2008); *Kong v. Kelkris Assocs., Inc. (In re Kong)*, Adv. P. No. 13-5119-SLJ, 2013 WL 6923063, at *3 (Bankr. N.D. Cal. Nov. 15, 2013).

f. Authority over Real Estate Settlement Procedures Act (RESPA) Claims

i. If recovery by the debtor may constitute property of the estate and could have an effect on administration of the estate, a bankruptcy court may determine that it has "related to" jurisdiction over a RESPA claim. *Price v. Am.'s Servicing Co.*, 403 B.R. 772, 779 (Bankr. E.D. Ark. 2009).

1. A bankruptcy court may determine that the RESPA claim, if it is part of the bankruptcy estate, is a core proceeding over which the bankruptcy court has authority. *See Rosa v. Wells Fargo (In re Rosa)*, Adv. P. No. 17-01664, 2018 WL 4352168 (Bankr. D.N.J. Aug. 9, 2018).
2. The RESPA claim may be found to be a non-core claim over which the bankruptcy court retains jurisdiction if the claim is a pre-petition claim of the debtor. *See Sheils v. Wells Fargo Bank, N.A. (In re Fleming)*, 495 B.R. 68, 71 (Bankr. M.D. Pa. 2013).

3. In a chapter 7 case, a prepetition RESPA claim may become property of the estate, but once the trustee abandons the property out of the estate, the bankruptcy court has the discretion to dismiss any pending adversary proceeding for a RESPA claim due to lack of a resulting lack of subject matter jurisdiction. *Okoro v. Wells Fargo Bank, N.A.*, 567 B.R. 267, 273–74 (D. Md. 2017).
4. A RESPA claim in a chapter 13 case may be considered a core claim. *See, e.g.*, *In re Johnson*, 384 B.R. 763, 765 (Bankr. E.D. Mich. 2008).

ii. In absence of a dispute from the parties on jurisdiction, that the bankruptcy court has jurisdiction to rule on a RESPA claim by consent. *See, e.g.*, *Payne v. Mortg. Elec. Registration Sys. (In re Payne)*, 387 B.R. 614, 622 n.3 (Bankr. D. Kan. 2008).
    1. If the parties consent to the entry of a final order by the bankruptcy court, the bankruptcy court may decide to issue a final order. *Lofton v. Beneficial Fin. I, Inc. (In re Lofton)*, 569 B.R. 747, 749–50 (Bankr. W.D. Wis. 2017) ("Despite this matter having been determined to be non-core, the parties have consented to the entry of final orders and judgments by this Court.").

iii. Even if the bankruptcy court has jurisdiction over the RESPA claim, cause may still exist for the district court to withdraw the reference. *See Fitch v. Wells Fargo Bank, N.A.*, 423 B.R. 630, 637–38 (E.D. La. 2010).