Home Loans, Redux

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I. OVERVIEW OF THE CFPB MORTGAGE SERVICING REGULATIONS

Following an extensive notice and comment period, the Consumer Financial Protection Bureau (CFPB) issued new mortgage servicing regulations affecting a wide variety of servicer duties. These regulations, incorporated into Regulation Z for the Truth in Lending Act and Regulation X for Real Estate Settlement Procedures Act, became effective on January 10, 2014. All of the servicer obligations discussed here (excluding the continuity of contact requirement) are privately enforceable through the respective statute's remedy provision.[1] These statutes generally provide for recovery of the borrower's actual damages, costs and attorney's fees, as well as statutory damages for certain claims.

A. Periodic Mortgage Statements

Mortgage servicers typically have provided consumers with either monthly statements or preprinted coupon books containing payment information. However, federal law has never required such statements or regulated their content. Even when servicers had provided statements, they often stopped providing them when the borrower was in default or in a bankruptcy proceeding, times when the information is potentially most needed.[2] Servicers are now required under federal law to send periodic statements to borrowers on most residential mortgages.[3]

Periodic statements that are prepared under the new regulation give homeowners significant information about their mortgage accounts. The disclosures provided on the statements should assist in determining whether an account is actually in default and whether a servicer has properly applied payments or improperly charged unauthorized fees. The regulation requires that the statements contain information in the following categories: amount due for the billing period, explanation of amount due on the account including fees imposed, past payment breakdown, transaction activity, partial payment information, contact and account information, and delinquency information if applicable. Several of these categories include disclosure of a partial payment that is sent to a suspense or unapplied funds account.

If the consumer is more than forty-five days delinquent, the statement must include additional information, such as an account history for the previous six months or the period since the last time the account was current showing the amount remaining past due from each billing cycle and the total payment amount needed to bring the account current.

The regulation does not require that periodic statements be provided if the mortgage is a fixed rate loan and the servicer gives the borrower a coupon book that contains information

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[1] 12 U.S.C. § 2605(f)(RESPA) and 15 U.S.C. § 1640(a)(TILA).
[2] *See In re* Monroy, 650 F.3d 1300 (9th Cir.2011)(approving local form plan language requiring secured creditors to continue sending periodic statements).
[3] 15 U.S.C. § 1638(f); Reg. Z, 12 C.F.R. § 1026.41.

substantially similar to that required by the regulation. Even if this coupon book exclusion otherwise applies, if the borrower is more than forty-five days delinquent, the servicer must still provide the required delinquency information separately in writing, including an account history for the delinquency period.

Servicers are also not required to provide periodic statements to borrowers with reverse mortgages, and timeshare plans. The regulation applies only to closed-end mortgage loans, so open-end home loans such as HELOCs are exempted from coverage of the regulation. In addition, mortgage loans that are serviced by small servicers (servicers that service 5,000 or fewer mortgage loans) and state housing finance agencies are exempt from the periodic statement requirements.

The CFPB initially took the position that the rule should apply to borrowers in bankruptcy. However, an Interim Final Rule, effective January 10, 2014, created a broad exemption for consumers who are debtors in a bankruptcy proceeding or for any portion of a mortgage debt that is discharged in bankruptcy.[4] Section 1026.41(e)(5) provides that a servicer is exempt from the periodic statement requirements for a mortgage loan while the borrower is a debtor in a bankruptcy case.[5] The CFPB's Official Interpretations for this section provide that the exemption applies for any portion of the mortgage debt that is discharged in bankruptcy.[6]

In addition, the CFPB's Official Interpretations provide that if there are joint obligors on a mortgage, the exemption applies if any of the borrowers is in bankruptcy. An example is given of a husband and wife who jointly own a home, stating that if "the husband files for bankruptcy, the servicer is exempt from providing periodic statements to both the husband and the wife."[7]

The CFPB has proposed a final rule that would revise the exemption.[8] If the consumer is a debtor in a bankruptcy case, the consumer is a primary obligor on a mortgage for which another primary obligor is a debtor in a chapter 12 or 13 case, or the consumer has discharged personal liability for the mortgage loan, periodic statements must be provided unless one of the following conditions applies:

- The consumer requests in writing that the servicer cease providing periodic statements or coupon books;
- The consumer's confirmed plan provides that the consumer will surrender the dwelling, provides for the avoidance of the lien securing the mortgage, or otherwise does not

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[4] Reg. Z, 12 C.F.R. § 1026.41(e)(5).
[5] 12 C.F.R. § 1026.41(e)(5).
[6] *See* Official Interpretations, Supplement 1 to Part 1026, ¶ 41(e)(5) - 2(ii).
[7] *See* Official Interpretations, Supplement 1 to Part 1026, ¶ 41(e)(5) - 3.
[8] *See* Amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), Docket No. CFPB-2014-0033, 79 Fed. Reg. 74176 (Dec. 15, 2014).

provide for payment of prepetition arrearage or maintenance of payments due under the mortgage loan;

- The bankruptcy court enters an order providing for the avoidance of the lien securing the mortgage loan, lifting the automatic stay with respect to the mortgage, or requiring the servicer to cease providing periodic statements or coupon books; or
- The consumer files with the bankruptcy court a Statement of Intention identifying an intent to surrender the dwelling securing the mortgage loan.

B. Payment Change Notices

Many of the borrowers caught up in the foreclosure crisis had adjustable rate mortgages (ARM). Often these loans included initial "teaser" interest rates set lower than market rates, and elaborate and incomprehensible payment option terms. The Dodd-Frank Act sought to address a variety of problems related to these loans, including consumers' misapprehension of the risks associated with the payment change features of these loans. The Act amended TILA to require that notice be provided six months before the initial rate reset on a hybrid, closed-end ARM, and gave the CFPB authority to adopt further disclosures for other ARM products.[9]

Under the final rule issued by the CFPB, a consumer with an ARM must be provided with a notice between 210 and 240 days before the first payment is due after the first rate adjustment.[10] Notice also must be sent between 60 and 120 days before payment at a new amount is due when the payment change is caused by a rate adjustment.

Comments submitted to the CFPB suggested that there should be a complete exemption for borrowers in bankruptcy, because the TILA notice would conflict with the 21 day advance notice requirement for payment changes under Bankruptcy Rule 3002.1(b). In declining to use its exception authority, the CFPB noted that ARMs have been subject to the current FRB rule and this has not resulted in a conflict with bankruptcy law or rendered the separate notifications redundant. Moreover, the CFPB concluded that sending the TILA notice earlier than required under bankruptcy law "enhances consumer protection by providing these consumers with additional time to adjust to an increase in their mortgage payments."[11]

C. Prompt Crediting of Payments

Mortgage servicers are typically responsible for collecting and processing mortgage payments from borrowers. Servicers' delays in processing payments can result in unwarranted late fees and unjustified claims of borrower default. Complaints about slow payment processing led the Federal Reserve Board in 2008 to promulgate a rule that requires mortgage servicers to

[9] 15 U.S.C. § 1638a.
[10] Reg. Z, 12 C.F.R. § 1026.20(c).
[11] *See* Section-by-Section Analysis, § 1026.20(c)(1)(ii), 78 Fed. Reg. 10923 (Feb. 14, 2013).

credit payments to consumers' accounts as of the date of receipt.[12] The Dodd-Frank Act essentially codified the FRB rule,[13] and the CFPB final regulation implements this provision of the Act.[14]

A servicer must credit a "periodic payment" received from the borrower as of the date of receipt, except when a delay in crediting the payment will not result in a charge to the borrower or negative credit reporting. A "periodic payment" is defined as the "amount sufficient to cover principal, interest, and escrow (if applicable) for a given billing cycle."[15]

If a servicer receives a payment that is less than a full periodic payment, this partial payment may be held in a suspense account. However, funds must be applied to the account from the suspense account when the amount in suspense is equal to or greater than a periodic payment.[16] If the servicer elects to hold funds in suspense rather than crediting the partial payment or returning it to the consumer, the servicer must disclose the amount of funds held in suspense on the periodic statement, if such a statement is required.[17] Finally, suspense accounts may be used only if authorized by the contract and permitted by state law.[18]

Non-conforming payments are payments that have been accepted by the servicer and are distinguished from partial payments that are placed in suspense, which are considered not to have been accepted.[19] Any non-conforming payment must be credited within five days of receipt. The servicer may specify reasonable requirements for making payments in writing.[20] Failure to comply with these written payment instructions may result in a non-conforming payment.

The CFPB received several comments requesting a bankruptcy exemption from the prompt crediting rule. Once again, the CFPB took the position that debtors should not be treated differently than consumers outside bankruptcy, and that the separate treatment of cure amounts in a chapter 13 case was not an insurmountable barrier to prompt payment crediting. In particular, the CFPB stated that "[w]hile the Bureau understands the requirement that the pre-petition and post-petition accounts must be kept separate during a bankruptcy, the Bureau

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[12] Reg. Z, 12 C.F.R. § 1026.36(c)(1)(i) [§ 226.36(c)(1)(i)]; 73 Fed. Reg. 44,522, 44,604 (July 30, 2008).
[13] 15 U.S.C. § 1639f, *as amended by* Pub. L. N. 111-203, § 1464, 124 Stat. 1376 (July 21, 2010).
[14] Reg. Z, 12 C.F. R. § 1026.36(c)(1).
[15] *Id*.
[16] Reg. Z, 12 C.F.R. § 1026.36(c)(1)(ii)(B); Official Interpretations § 1026.36(c)(1)(ii)-1(iii); 78 Fed. Reg. 10,902, 11,019 (Feb. 14, 2013).
[17] Reg. Z, 12 C.F.R. §§ 1026.36(c)(1)(ii)(A), 1026.41(d)(3)(i), (ii); Official Interpretations § 1026.36(c)(1)(ii)-1(iii), 1026.41(d)(3)-1; 78 Fed. Reg. 10,902, 11,019-20 (Feb. 14, 2013).
[18] Official Interpretations § 1026.36(c)(1)(ii)-1; 78 Fed. Reg. 10,902, 11,019 (Feb. 14, 2013).
[19] *See* 78 Fed. Reg. 10,902, 10,956 (Feb. 14, 2013).
[20] Official Interpretations § 1026.36(c)(1)(iii); 78 Fed. Reg. 10,902, 11,019 (Feb. 14, 2013).

believes that if sufficient funds accrue in either account to make a periodic payment due, those funds should be applied."[21]

D. Request for Information and Notice of Error

In 1990, Congress amended RESPA to create a mechanism for borrowers to obtain answers from loan servicers to questions they have about their accounts and to obtain corrections to their accounts where appropriate.[22] A written inquiry is referred to in RESPA as a "qualified written request." The new RESPA regulations now refer to these written inquiries as a "request for information" and a "notice of error."[23] Although there are separate procedures that apply to each of these forms of written inquiry, both a notice of error and a request for information can be combined in the same letter.

A servicer must acknowledge a request for information or notice of error within five business days of receipt. Within thirty business days of receipt, the servicer must conduct a reasonable investigation if the borrower claims an error; provide the information requested, if available; make any necessary correction to the account; and, inform the consumer of its actions. A servicer may extend the thirty-day period for responding by an additional fifteen business days if the servicer notifies the borrower in writing of the extension before the end of the thirty-day period. During the sixty-day period after a notice of error has been sent, the servicer cannot give any information to a credit reporting agency if a payment related to the inquiry is overdue.[24]

There is a different response timeline for a request for information that seeks the identity, address or other relevant contact information for the owner or assignee of a mortgage loan, as discussed more fully below. A servicer is required to respond to such a request within ten business days of receipt.[25]

The Dodd-Frank Act amended RESPA to clarify that a servicer shall not charge a fee for responding to a "valid qualified written request."[26] This provision has been implemented by Regulation X for notices of error and requests for information.[27] A servicer is prohibited from charging a fee, or requiring 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 or request for information.

[21] *See* Section-by-Section Analysis, § 1026. 36(c)(1)(ii), 78 Fed. Reg. 10956 (Feb. 14, 2013).
[22] 12 U.S.C. § 2605(f).
[23] Reg. X, 12 C.F.R. § 1024.35 and § 1024.36.
[24] 12 U.S.C. § 2605(e); Reg. X, 12 C.F.R. § 1024.35(i).
[25] Reg. X, 12 C.F.R. § 1024.36(d)(2)(i)(A).
[26] Pub. L. No. 111-203, 124 Stat. 1376, tit. XIV, § 1463(a) (July 21, 2010).
[27] Reg. X, 12 C.F.R. § 1024.35(h) and § 1024.36(g).

As under the previous HUD regulations, the CFPB did not include any default or bankruptcy exemptions from compliance with the request for information or notice of error requirements.

E. Request for Identity of Mortgage Owner

A judgment or order stripping off a lien is only as good as the process that was used to serve the mortgage holder in the bankruptcy proceeding. In other words a lot of effort and expense may be wasted if it turns out that the order is ineffective because the wrong party was named or proper service was never made. Fortunately there are several tools available to help identify the owner of a mortgage or deed of trust. Several of these tools are derived from consumer protection statutes. A written request sent under the new RESPA regulation should provide the quickest and most effective method for getting this information.

A written inquiry that seeks information with respect to the borrower's mortgage loan will now be referred to as "request for information," rather than a qualified written request. If the borrower or borrower's agent sends a written request seeking the identity, address or other relevant contact information for the owner or assignee of a mortgage loan, the servicer must respond within 10 business days.[28] Moreover, a servicer is not permitted to extend the time period for responding to such a request by an additional 15 days, as can be done for other requests for information.

There is no bankruptcy exemption from compliance with the request for the owner or assignee of a mortgage loan.

F. Early Intervention and Continuity of Contact Requirements

The early intervention regulation requires a servicer to provide a borrower by the 45th day of delinquency a written notice containing information about available loss mitigation options.[29] If the borrower responds and seeks loss mitigation assistance, the servicer is to maintain for the borrower a "continuity of contact" with the servicer.[30] Servicers are required to have procedures to ensure that personnel are assigned to a delinquent borrower, and that these personnel are accessible by phone to assist the borrower with loss mitigation options.[31] The personnel should be able to advise the borrower on the status of any loss mitigation application and applicable timelines, and be able to retrieve all written information provided by the borrower on the application and a complete record of the borrower's payment history.[32] A servicer is

[28] Reg. X, 12 C.F.R. § 1024.36(d)(2)(i)(A).
[29] 12 CFR § 1024.39(b).
[30] Reg. X, 12 C.F.R. § 1024.40.
[31] Reg. X, 12 C.F.R. § 1024.40(a).
[32] Reg. X, 12 C.F.R. § 1024.40(b).

given discretion to determine whether to assign a single person or a team of personnel to respond to a delinquent borrower.[33]

Section 1024.39(d)(1) provides that a servicer is exempt from the early intervention requirements for a mortgage loan while the borrower is a debtor in a bankruptcy case.[34] The Official Bureau Interpretation for this section provides that the exemption applies for any portion of the mortgage debt that is discharged in bankruptcy.[35] The bankruptcy exemption to the early intervention requirement was added by an Interim Final Rule just prior to the January 10, 2014 effective date. As with the periodic statement exemption, this bankruptcy exemption is still under review by the CFPB has issued a proposed final rule that retains the exemption with some modifications.

The Official Bureau Interpretation to Regulation X further explains that if the continuity of contact requirement would otherwise apply to a borrower who has filed bankruptcy, a servicer may assign personnel with specialized knowledge in bankruptcy law to assist the borrower.[36] A servicer is given discretion to assign a single person or a team of personnel, and they may be "single-purpose or multi-purpose personnel."[37] Thus, the rule may be complied with even if a servicer transfers the borrower's file to a separate bankruptcy unit with personnel who are not part of the servicer's loss mitigation unit or to outside bankruptcy counsel.[38]

G. Loss Mitigation Procedures

As part of the CFPB's broad grant of authority to carry out the consumer protection purposes of RESPA and to implement foreclosure avoidance strategies, the final rule contains a number of procedural requirements related to loss mitigation. The rules are designed to compel proper access by borrowers to such programs when they exist. The requirements apply only to a mortgage loan that is secured by a property that is the debtor's principal residence.[39] In general, servicers generally must identify and provide accurate information on all options the borrower may be eligible for, provide prompt access to documents, identify and notify borrower of documents needed to complete an application, and evaluate the borrower for all available loss mitigation options once a complete application is received.[40]

Section 1024.41(b)(2) imposes distinct obligations upon a servicer to respond to an incomplete application.[41] These obligations extend over the post-default period up to forty-five

[33] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 40(a)–2.
[34] 12 C.F.R. § 1024.39(d)(1).
[35] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 39(d)(1) - 2(ii).
[36] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 40(a)–2.
[37] *Id*.
[38] *See* Section-by-Section Analysis, § 1024.39(b), 78 Fed. Reg. 10811 (Feb. 14, 2013).
[39] Reg. X, 12 CFR § 1024.30(c)(2).
[40] Reg. X, 12 CFR § 1024.41.
[41] Reg. X, 12 C.F.R. § 1024.41(b)(2).

days before a scheduled foreclosure sale date.[42] If the servicer deems the application to be "incomplete" for any reason, the servicer must act affirmatively to complete the application. The servicer must exercise "reasonable diligence" to obtain any documents and information it claims to require to complete the application.[43] Second, the servicer must provide a written notice to the borrower describing the documents and information needed to complete the application.[44] If an application is received forty-five days or more before a scheduled foreclosure sale date, the servicer must send the notice within five business days of receipt of an application it deems incomplete.[45]

Significantly greater rights accrue to a borrower whose submission constitutes a "complete" loss mitigation application. If the servicer receives an application its deems complete, it must acknowledge the application as "complete" by sending the borrower written notice within the five-day period.[46] In addition to acknowledging the application as "complete," the servicer's immediate responsibility is to evaluate it. Section 1024.41(c)(1)(i) sets a strict time frame for this evaluation provided that the complete application is received by the servicer more than thirty-seven days before a foreclosure sale.[47] The evaluation of the borrower for all loss mitigation options must be completed within thirty days of receipt of a complete application.[48] By this time deadline the servicer is also required to provide the borrower with a written notice stating the servicer's determination of which loss mitigation options, if any, are being offered to the borrower.[49]

If the servicer is denying any loan modification options, the notice must state specific reasons for the denial of each modification option.[50] If the reason for denial was a requirement set by an owner or assignee of the loan, the notice must identify the owner or assignee and the specific requirement that was the basis for the denial. A mere statement that a loan modification option is denied based on an investor requirement, without additional information specifically identifying the relevant investor or guarantor and the specific applicable requirement, is insufficient.[51] If the servicer denies any loan modification option because of a net present value calculation, the notice must state this reason and include the inputs used for the calculation.[52] The denial notice must also describe the borrower's right to appeal the denial, the deadline to

[42] Reg. X, 12 C.F.R. § 1024.41(b)(2)(i).
[43] Reg. X, 12 C.F.R. § 1024.41(b)(1).
[44] Reg. X, 12 C.F.R. § 1024.41(b)(2)(i)(B).
[45] Reg. X, 12 C.F.R. § 1024.41(b)(2)(i)(B).
[46] Reg. X, 12 C.F.R. § 1024.41(b)(2)(i)(B).
[47] Reg. X, 12 C.F.R. § 1024.41(c)(1)(i).
[48] Reg. X, 12 C.F.R. § 1024.41(c)(1)(i).
[49] Reg. X, 12 C.F.R. § 1024.41(c)(1)(ii).
[50] Reg. X, 12 C.F.R. § 1024.41(d).
[51] *Id*.
[52] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 41(d)(1)-2.

make an appeal, and any requirements for making an appeal.[53] Borrowers may generally exercise appeal rights so long as the complete application was submitted at least ninety days before a scheduled foreclosure sale.[54]

Regulation X's loss mitigation rule limits mortgage servicers' "dual tracking" practices. Dual tracking refers to a common servicer practice of proceeding with foreclosure while evaluating a borrower for loss mitigation options. The CFPB's rules apply restrictions to dual tracking during two distinct stages. During the initial 120 days of a delinquency, a borrower should be insulated from foreclosure activity.[55] Servicers are prohibited from taking the first step to initiate foreclosure proceedings under state law during this time period.[56] This regulation preempts state foreclosure timelines to the extent that they allow an earlier commencement of foreclosure.[57] The "first notice" includes "a foreclosure complaint, a notice of default, a notice of election or demand, or any other notice that is required by applicable law in order to pursue acceleration of a mortgage loan obligation or sale of a property securing a mortgage loan obligation."[58]

The final regulation also requires the servicer to stop the foreclosure process in certain situations, depending upon when a complete loss mitigation application is received.[59] If a borrower who has never had a complete loss mitigation application evaluated submits a complete application thirty-seven days or more before a scheduled foreclosure sale, the servicer must not conduct a sale or move for a foreclosure judgment or order of sale until the application has been evaluated and notice of decision given.[60]

There are no bankruptcy exemptions from compliance with the loss mitigation requirements.

I. Force-Placed Insurance

In response to numerous problems with insurance obtained by a servicer when a borrower's policy lapses or is canceled, Congress created in the Dodd-Frank Act new restrictions on "force-placed insurance" (FPI).[61] In addition to implementing the Act's notice requirements, a significant consumer protection was added by the CFPB to the final rule. Servicers are prohibited from obtaining FPI, and instead must pay the borrower's existing insurance policy, if

[53] Reg. X, 12 C.F.R. § 1024.41(d)(2) (effective Jan. 10, 2014).
[54] Reg. X, 12 C.F.R. § 1024.41(h)(1) (effective Jan. 10, 2014).
[55] *See* Section-by-Section Analysis, § 1024.41(f), 78 Fed. Reg. 10,833 (Feb. 14, 2013).
[56] Reg. X, 12 C.F.R. § 1024.41(f)(1).
[57] *See* Section-by-Section Analysis, § 1024.41(f), 78 Fed. Reg. 10,833 (Feb. 14, 2013).
[58] *Id.*
[59] Reg. X, 12 CFR §§ 1024.41(f)(2) and (g).
[60] Reg. X, 12 C.F.R. § 1024.41(g).
[61] 12 U.S.C. § 2605(l) and (m).

there is an escrow account on the mortgage.[62] This duty to disburse funds from the escrow account to pay the borrower's policy exists even if there are not sufficient funds in the account, except if the servicer has a reasonable basis to believe that the borrowers' insurance is being canceled for reasons other than nonpayment or the property is vacant.[63] The servicer may seek repayment from the borrower for any of its own funds that are advanced to pay the borrower's policy.

The CFPB's final rule also requires that before charging a borrower for FPI, the servicer must send two notices to the borrower indicating that the servicer does not have evidence of hazard insurance coverage, specifying the procedures by which the borrower may demonstrate coverage, and advising the borrower that insurance may be force-placed if proof of coverage is not provided.[64] The first notice must be sent at least 45 days before charging the borrower, and a second reminder notice must be sent no earlier than 30 days after the first notice and at least 15 days before charging the borrower. Servicers must terminate FPI coverage within 15 days of receiving evidence of coverage and any premiums charged for periods when both policies were in effect must be refunded.[65] All charges related to FPI, other than charges subject to state regulation, must be for a service that was actually performed and have a reasonable relationship to the cost of providing the service.[66] The force-placed insurance requirements do not apply to flood insurance.

The CFPB was asked during the rulemaking comment period to exempt from coverage certain borrowers who might be "unresponsive" to the force-placed insurance notices, such as borrowers in bankruptcy, borrowers whom the servicer has referred to foreclosure, or borrowers who have made no payment for more than six months and the servicer has determined have vacated the property.[67] The CFPB concluded that this would be inconsistent with the intent of Congress, and no bankruptcy, default or foreclosure exemptions were included in the final force-placed insurance rule.

A partial exemption has been provided to small servicers from the duty to disburse funds from escrow to pay premiums on existing borrower insurance policies.[68] Small servicers are exempted from this requirement only if any force-placed insurance that is purchased by the small servicer and charged to the borrower is less than the amount the small servicer would need to

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[62] Reg. X, 12 CFR § 1024.17(k)(5),
[63] Reg. X, 12 CFR § 1024.17(k)(5)(ii),
[64] Reg. X, 12 CFR § 1024.37(c),
[65] Reg. X, 12 CFR § 1024.37(g),
[66] Reg. X, 12 CFR § 1024.37(h),
[67] *See* Section-by-Section Analysis, § 1024. 37(c)(1), 78 Fed. Reg. 10767 (Feb. 14, 2013).
[68] This provision uses the definition of small servicer provided in Regulation Z. A small servicer is a servicer that either (1) services less than 5000 mortgage loans and these mortgage loans are all owned or originated by the servicer or an affiliate or (2) is a Housing Finance Agency, as defined in 24 C.F.R. 266.5. *See* 12 C.F.R. § 1026.41(e)(4).

disburse out of the borrower's escrow account to ensure that the borrower's hazard insurance premium charges were paid in a timely manner. Small servicers are required to comply the notice requirements.

J. Payoff Statements

The Dodd-Frank Act amended TILA to require that accurate payoff statements be provided to consumers.[69] For any loan secured by the consumer's dwelling, the creditor, assignee or servicer must provide an accurate statement of the total outstanding balance required to pay the obligation in full if a request is made in writing by the consumer or someone acting on behalf of the consumer.[70] The statement must provide the payoff amount as of a specified date. Subject to several limited exceptions, the payoff statement must be provided within a reasonable time, but no later than seven business days after receiving a written request from the consumer or the consumer's agent.

The Dodd-Frank Act amendment provides that the requirement is applicable to all "home loans," a term not defined by the Act that is presumably broader than "residential mortgage loans."[71] The final regulation implements the statutory language by providing that the requirement applies to any consumer credit transaction secured by a "consumer's dwelling."[72] Thus, the rule applies to open-end, home-secured loans such as HELOCs. By not limiting application to mortgage loans on the consumer's principal dwelling, the rule also covers loans secured by vacation homes.

The failure to provide an accurate payoff statement based on a TILA request is subject to error resolution under RESPA (discussed below). If the borrower sends a notice of error disputing the accuracy of a payoff statement, the servicer must respond within seven business days, rather than the longer thirty day response period for other error notices.[73]

Numerous industry commenters stated that they needed more time than seven days to provide payoff statements for loans in delinquency status, foreclosure, or bankruptcy. The CFPB refused to create a blanket exemption but agreed that it may not be feasible in some situations for servicers to prepare the statement within seven days.[74] The final rule thus provides that when a servicer is unable to provide a payoff statement within seven days because a loan is in

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[69] 15 U.S.C. § 1639g, as amended by Pub. L. No. 111-203, § 1464,
124 Stat. 1376 (July 21, 2010).
[70] Reg. Z, 12 C.F. R. § 1026.36(c)(3).
[71] *See* 15 U.S.C. § 1602(cc)(5), as amended by Dodd-Frank (defining "residential mortgage loan" to exclude open-end, home-secured credit).
[72] 12 C.F. R. § 1026.36(c)(3).
[73] 12 C.F.R. 1024.35(e)(3)(a).
[74] *See* Section-by-Section Analysis, § 1026. 36(c)(3), 78 Fed. Reg. 10957 (Feb. 14, 2013).

bankruptcy or foreclosure, or because the loan is a reverse mortgage, or because of natural disasters, the payoff statement must be provided within a reasonable time.[75] No definition of "reasonable time" is provided. Unlike many other servicing requirements, the CFPB did not include in the final rule an exemption for community banks, credit unions, and small servicers.

II. MORTGAGE LOSS MITIGATION PROGRAMS - PRACTICE UPDATES

A. Loss Mitigation Concerns

An important foreclosure provision covered in the CFPB's proposal is related to the loss mitigation section, 12 CFR 1024.41, which contains the prohibition on obtaining a judgment or order of sale, or actually conducting the sale, when the borrower has a complete loss mitigation application pending. In the proposed revision to the official commentary in section 12 CFR 1024.41(g), when a servicer or its counsel fails to take reasonable steps to avoid the ruling on a dispositive motion or issuance or an order of sale, the CFPB would like to force the servicer to dismiss the foreclosure proceeding (if necessary) to avoid the sale.

In the proposed amendment titled "interaction with foreclosure counsel," the CFPB intends to clarify that a servicer is liable for violation of the rules, if the "foreclosure counsel's actions or inaction caused a violation." It goes on to require that the servicer "must properly instruct counsel not to make a dispositive motion for foreclosure judgment or order of sale; [and] to take reasonable steps where such a motion is pending to avoid a ruling on the motion or issuance of the order of sale." Examples given of reasonable instructions include: asking counsel to move for a continuance for the deadline to file a dispositive motion; to move or request that the sale be stayed, otherwise delayed, or removed from the docket; or that the foreclosure proceeding be placed in any administrative status that stays the sale.

In the proposed amendment titled "conducting a sale," the CFPB identifies reasonable steps for the servicer (or its counsel) to take, including: requesting that a court (or the official conducting the sale) reschedule or delay the sale, removed the sale from the docket, or place the foreclosure proceeding in any administrative status that stays the sale. Again, if the servicer or counsel fails to take reasonable steps to delay the sale, or if the servicer fails to instruct counsel to take reasonable steps, the servicer must dismiss the foreclosure proceeding.

The CFPB is doing this because it has learned in its evaluations of mortgage servicer practices that some servicers did not properly structure and manage third-party vendor relationships, which resulted in harm to borrowers, and imposed "unwarranted fees on borrowers" related to dual tracking. It cites that one of the clearest harms of servicers pursuing loss mitigation and foreclosure procedures concurrently is the loss of the borrower's house when a complete application review is pending.

[75] Reg. Z, 12 C.F. R. § 1026.36(c)(3).

The Bureau has received reports that foreclosure counsel does not always have accurate information about the completion of the borrower's loss mitigation application and, "in extreme cases," foreclosure counsel many not accurately represent the status of the loss mitigation application to the court. It goes on to suggest that foreclosure counsel fails to impress upon the courts, the significance of 1024.41(g)'s prohibition when counsel is taking steps to avoid a judgment or sale. The CFPB thinks that a lack of express commentary requiring the servicers to take affirmative steps has caused services to fail to instruct foreclosure counsel appropriately, and has resulted in courts discounting servicer obligations under the rule, which has harmed borrowers and deprived them of important protections in 12 CFR 1024.41.

There are several concerns with the underlying premise outlined in the background leading up to the proposals. The CFPB seems to imply that the servicer is the party causing the dual-tracking issues. By demanding and providing a borrower with a right to a post-foreclosure referral loss mitigation review in 12 CFR 1024.41, the Bureau has intensified the issue by placing obligations on parties outside of the CFPB's scope of authority to regulate.

The real-life scenario seems to be this: servicer's counsel is confronted with an underfunded court system and has been dealing with a borrower and a case for many months (possibly years). In the final stretches before the case is finally going to judgment and a sale might be moving forward, a borrower surfaces with a loss mitigation application; the servicer is scrambling to carry on with that process, and to keep its foreclosure counsel in the loop. It is no wonder that a last-minute plea to stop the process in its tracks is denied by the court. In the early days of the loss mitigation rules, there were reports of judges (after extensive briefing on the issue of the importance of the rules) declaring that they are not bound by the CFPB rules and, accordingly, determining that the matter will proceed.

B. Attorney-Client Privilege & Other Potential Issues

Concerns about the interaction with the foreclosure section raise significant issues, including whether requiring this type of communication would compromise the attorney-client relationship between foreclosure attorneys and their servicing clients. To prove that there was a violation for which the servicer would be liable under 1024.41 (and for which there is a private right of action for a borrower to enforce against a servicer), the borrower would need access to communications that would be protected by the attorney-client privilege. The rule does not consider the impact of this likely possibility on the relationship between servicers and their counsel.

Additionally, the proposal discusses the Bureau's concern with courts that are trying to clear overloaded dockets and, in the process, might not be acting judiciously with the request to borrowers' rights. Through this proposal and commentary, the CFPB is hoping to "educate" the judiciary on the consumer impact of the courts' actions. In the process however, it appears that the servicer and its counsel are being sandwiched between state court justice systems that are dealing with their own practical realities and the Bureau. The CFPB appears to take the position that a servicer in a foreclosure case – in civil procedure terminology: a plaintiff in a lawsuit – has ultimate control over the court, the case (and whether it can be dismissed), and the sale (and whether it can be called off).

Finally, there could be an issue if the proposal is enacted, and the revision to the comments regarding "interactions with counsel" goes into effect. It is a concern that foreclosure counsel is more likely to be sued when the borrower believes he or she has not been afforded proper treatment under the rules. The CFPB is demanding a certain outcome in the court systems, where servicers and their counsel have little say as to how the courts control their own dockets.

III. LIEN-STRIPPING UPDATES[76]

A. Bank of America, N.A. v. Toledo-Cardona, 135 S.Ct. 677 (Nov. 17, 2014) and Bank of America, N.A. v. Caulkett, 135 S.Ct. 674 (Nov. 17, 2014).

The Supreme Court granted certiorari from two decisions of the Eleventh Circuit, In re Caulkett, 566 Fed. Appx. 879 (11th Cir. 2014) and In re Toledo-Cardona, 556 Fed. Appx. 911 (11th Cir. 2014), to consider whether a Chapter 7 debtor may "strip off" a junior mortgage lien in its entirety, when the outstanding debt owed to a senior lienholder exceeds the value of the collateral, under § 506(d), which provides that "[t]o the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void." Following Dewsnup v. Timm, 502 U.S. 410, 112 S. Ct. 773, 116 L. Ed. 2d 903 (1992), which held that a Chapter 7 debtor could not "strip down" a creditor's lien on real property that is partially secured (i.e., where the value of the property is less than what is due to be paid to the creditor), the Fourth, Sixth and Seventh Circuits have concluded that § 506(d) also prohibits a Chapter 7 debtor's strip-off of a junior lien that is entirely underwater.

B. Wells Fargo Bank, N.A. v. Scantling (In re Scantling), 754 F.3d 1323 (11th Cir. 2014).

"Chapter 20" debtor ineligible for discharge because of prior Chapter 7 discharge can "strip off" wholly unsecured junior residential mortgage liens; Chapter 13 debtor need not be eligible for discharge to exercise powers in § 1322(b) to strip liens.

C. Minnesota Housing Finance Agency v. Schmidt (In re Schmidt), 765 F.3d 877 (8th Cir. 2014).

[76] Section III of this outline was prepared with the assistance of William Houston Brown, Brown & Ahern.

Agreeing with other circuit decisions, the Eighth Circuit held that a wholly unsecured third mortgage on the debtor's principal residence could be modified and stripped. Section 506(a)(1) determines the extent to which a lien is secured, and § 1322(b)(2) does not prevent modification when there is no value to support the mortgage lien. The court quoted In re Lane, 280 F.3d 663, 668 (6th Cir. 2002), in saying that Nobelman dealt with partially secured liens, and "the dividing line drawn by § 1322(b)(2) runs between the lienholder whose security interest in the homestead property has some 'value,' see § 506(a), and the lienholder whose security interest is valueless."

D. Fisette v. Keller (In re Fisette), 695 F.3d 803 (8th Cir. 2012).

The bankruptcy appellate panel's order sustaining the strip off of a wholly unsecured junior mortgage lien, when debtor was not eligible for discharge, but remanding for consideration of other confirmation issues, was held to be interlocutory because further judicial activity by the bankruptcy court was likely to affect the merits of the controversy.

E. Woolsey v. Citibank, N.A. (In re Woolsey), 696 F.3d 1266 (10th Cir. 2012).

The Tenth Circuit rejected the Chapter 13 debtors' reliance on § 506(d)'s voiding language as a means to strip a wholly unsecured junior mortgage. Noting that the debtors may have had a valid lien stripping method under § 1322(b)(2), joined with § 506(a), the debtors "repudiated the only possible winning argument they may have had," by specifically declining the panel's invitation to use that approach. In supplemental briefing requested by the panel, the debtors "announced '[t]here is no Code provision other than 11 U.S.C. § 506(d) that declares void a wholly unsecured lien.'" The panel, therefore, held that it was bound by Dewsnup v. Timm, 502 U.S. 410 (1992), because the Dewsnup Court, although in a Chapter 7 case, held that § 506(d)'s term "allowed secured claim" includes a lien that is valid under applicable state law, without regard to whether there is value to support the lien. The mortgage at issue before the Tenth Circuit was valid under Utah law and was an allowed claim. Section 506(d) applies in Chapter 13, as well as Chapter 7, and, although the Circuit panel acknowledged that it was difficult to justify the Supreme Court's reasoning, it was bound by Dewsnup. It seems clear that the panel would have followed other appellate authority in recognizing that a wholly unsecured lien may be stripped by use of §§ 506(a) and 1322(b)(2), commenting "that Dewsnup has lost every away game it has played: its definition of 'secured claim' has been rejected time after time elsewhere in the code and seems to hold sway only in § 506(d)."

F. Alvarez v. Grigsby (In re Alvarez), 733 F.3d 136 (4th Cir. 2013).

A Chapter 13 filed by only one spouse, the debtor could not strip off a lien with no value, on property owned as tenants by entirety. The bankruptcy court lacked jurisdiction to modify a lienholder's rights as to the non-debtor's property interest.

G. Branigan v. Davis (In re Davis), 716 F.3d 331 (4th Cir. 2013).

The first circuit court opinion to directly address the issue, a Chapter 20 debtor ineligible for discharge, because of section 1328(f), could strip off valueless liens pursuant to § 1322(b)(2). The court's reasoning was that lien stripping affects in rem liability, while discharge addresses in personam liability. Compare Colbourne v. Ocwen (In re Colbourne), 550 Fed. Appx. 687 (11th Cir. 2013) (unpublished) (distinguishing decisions in which Chapter 13 debtors ineligible for discharge could strip off wholly unsecured junior liens and holding debtor who was ineligible for Chapter 13 discharge could not strip down undersecured first-priority liens). See also In re Wapshare, 492 B.R. 211 (Bankr. S.D.N.Y. 2013) (holding debtor ineligible for discharge can strip wholly unsecured lien, with § 1325(a)(5)(B) inapplicable.).

H. Shelton v. Citimortgage, Inc. (In re Shelton), 735 F.3d 747 (8th Cir. 2013).

A secured creditor's lien was not void solely because the creditor filed an untimely proof of claim in the Chapter 13 case. The debtors had not challenged the substantive validity of lien, relying solely on section 506(d).

I. Palomar v. First American Bank, 722 F.3d 992 (7th Cir. 2013).

A no-asset Chapter 7 case, the junior lienholder did not file a proof of claim and the debtors were unable to strip off the lien, applying Dewsnup v. Timm, 502 U.S. 410 (1992). The debtors' argument that lien stripping is available in Chapter 13 carried no weight, the court reasoning that if they wanted that relief they should have filed under Chapter 13.

J. Ryan v. United States (In re Ryan), 725 F.3d 623 (7th Cir. 2013).

The Seventh Circuit (agreeing with In re Woolsey, 696 F.3d 1266 (10th Cir. 2012)) held that § 506(d) applies in Chapter 13, preventing the debtor from using § 506(d) as a means to void a partially secured IRS tax lien. The court reasoned that Dewsnup v. Timm, 502 U.S. 410 (1992), did not distinguish between Chapter 7 and 13 cases. The court noted that Chapter 13 provides alternative means of avoiding liens. See also Briseno v. Mutual Federal Savings and Loan Assoc. (In re Briseno), 496 B.R. 509 (Bankr. N.D. Ill. 2013) (holding, when debtors did not object to claim of junior lienholder, claim was allowed and § 506(d) did not provide basis to strip down lien to value of property; however, lien on multi-use property was not protected from modification by § 1322(b)(2), provided that plan was otherwise confirmable).

K. In re Fesq, 153 F.3d 113 (3d Cir. 1998).

Under prior circuit authority, the Third Circuit held that fraud is the only ground in section 1330 for revocation of confirmation orders, and the bank could not use Rule 60 to challenge the plan's lien strip. In re Rodriquez, 521 Fed. Appx.87 (3d Cir. 2013). The bank argued that a "computer glitch" prevented the trustee from knowing about its objection to confirmation, and the bank's attorney inadvertently failed to attend the confirmation hearing. Espinosa did not limit the Fesq holding, and granting the bank Rule 60 relief would have impermissibly disturbed the confirmation order. "TD Bank could have attended the [confirmation] hearing, at which point, computer glitch or not, it could have raised its objection and provided proof that it had in fact objected previously."

L. Bullard v. Hyde Park Savings Bank (In re Bullard), 494 B.R. 92 (BAP 1st Cir. 2013).

Section 1322(b)(2) must be read in conjunction with other Code sections, and § 1325(a) "imposes requirements for treatment of secured claims as conditions for confirmation." The debtor's plan proposed to bifurcate the bank's secured claim, paying the secured portion on terms extending beyond the plan's life—a so-called "hybrid" plan. Absent the creditor's consent, the five-year limit imposed by § 1322(d)(1) applies to maintenance payments. "In effect, § 1325(a)(1) establishes that as long as a plan employs § 1322(b)(5), it can only be confirmed over the creditor's objection via § 1325(a)(5)(B)(i)(I)(aa). And, since that section states the debt, as determined by nonbankruptcy law, must be paid, a debtor may not use it and bifurcate the applicable claim via § 506(a). To do so would render § 1325(a)(5)(B)(i)(I) ineffective." See also In Hurd, 494 B.R. 189 (Bankr. W.D.N.Y. 2013) (holding hybrid plan proposing to surrender one parcel and pay value of remaining parcel over time could not be confirmed, absent creditor's consent.).

M. In re Hubbell, 496 B.R. 784 (Bankr. E.D.N.C. 2013).

Section 1322(c)(2) carves out exception to the antimodification protection; for mortgage loans with the last payment contractually due before the last plan payment, the interest rate may be modified, provided that § 1325(a)(5) is satisfied. Witt v. United Companies Lending Corp. (In re Witt), 113 F.3d 508 (4th Cir. 1997), established that § 1322(c)(2) was not a means to bifurcate an undersecured claim into secured and unsecured components, but Witt does not prevent modification of interest rate or other terms of the short-term mortgages covered by § 1322(c)(2).

N. Rogers v. Eastern Savings Bank (In re Rogers), 489 B.R. 327 (D. Conn. 2013).

Although the mortgage was on multiple-residential property, the debtor did not argue that § 1322(b)(2)'s protection was lost because of that fact. Rather, the mortgage was partially secured and thus protected from modification by the holding of Nobelman v. American Savings Bank. The district court commented that a debtor's inability to obtain a discharge did not per se prevent lien stripping.

IV. INDIVIDUAL DEBTOR'S ABILITY TO DISPOSE OF BURDENSOME PROPERTY – VARIOUS APPROACHES AND SIGNIFICANT CONSUMER BANKRUPTCY CASES[77]

A. Requiring lender/secured creditor to accept title under §§1322(b)(9) and 1325(a)(5)(C)

11 U.S.C. § 1325(a)(5)(C) provides:
(a) Except as provided in subsection (b), the court shall confirm a plan if—
(5) with respect to each allowed secured claim provided for by the plan—
(C) the debtor surrenders the property securing such claim to such holder;

11 U.S.C. § 1322(b)(9) provides:

(b) Subject to subsections (a) and (c) of this section, the plan may—
(9) provide for the vesting of property of the estate, on confirmation of the plan or at a later time, in the debtor or in any other entity;

But 11 U.S.C § 1322(b)(2) provides that a plan may only

> (2) modify the rights of holders of secured claims, <u>other than a claim secured only by a security interest in real property that is the debtor's principal residence</u> (emphasis added),

and 11 U.S. C. § 1325(a)(5), specifying permitted treatment of secured claims

- *In re Rosa*, 495 B.R. 522 (Bankr. D. Haw. 2013) (finding proper notice being given and because the first mortgagee did not object, court confirmed Chapter 13 plan invoking §§1322(b)(9) and 1325(a)(5)(C), which provided that title to certain real property shall be vested in the first mortgagee)
    - Ms. Rosa's plan places the first and second mortgage claims in Class 3, which means that she will "surrender" the property to the secured creditors. This treatment is one of the ways in which a chapter 13 plan can deal with a secured claim. 11 U.S.C. § 1325(a)(5)(C). It does not solve the entire problem, however, because surrender does not transfer ownership of the surrendered property. Rather, "surrender" means only that the debtor will make the collateral available so the secured creditor can, if it chooses to do so, exercise its state law rights in the collateral. *Pratt v. General Motors Acceptance Corp*. (*In re Pratt*), 462 F.3d 14, 18-19 (1st Cir. 2006); *In re Gollnitz*, 456 B.R. 733, 736 (Bankr. W.D.N.Y. 2011) ("Authorization for

[77] This outline was prepared with the assistance of Rosemary DiSalvo, Law Clerk to Judge Robert Drain.

surrender does not consitute a transfer of title. Rather, transfer requires both the surrender of an interest and its acceptance.") Therefore, surrender alone does not cut off the debtor's liability for association fees.
Id. at 523 (footnote omitted).

- It is true that "surrender" does not transfer title to the property. But Congress spoke of "vesting," not "surrender," in section 1322(b)(9). Under familiar rules of statutory interpretation, courts presume that, when Congress uses different words, it means different things. The plain meaning of "vesting" includes a present transfer of ownership. Thus, section 1322(b)(9) permits inclusion of this nonstandard provision.
Id. at 524.
- Finding adequate notice, the court determined that "its failure to object means that it has accepted the plan."
Id. at 525.
- See also *In re Cormier*, 434 B.R. 222 (Bankr. D. Mass 2010)(Court denies debtors' motion to surcharge creditor that refuses to take title to surrendered residence)

- *In re Watt*, 520 B.R. 834, 837-41 (Bankr. D. Or. 2014) (Court confirmed Chapter 13 plan including §§1322(b)(9) and 1325(a)(5)(C), which provided that debtors surrender real property and vest title in the secured lender over secured lender's objection)
  a. The *Watt* court disagreed with *Rose* (discussed below) and *Rosa* decisions stating:

  > The *Rosa* and *Rose* courts both took the position that § 1322(b)(9) could not be used to compel a lender to accept title to its collateral without its consent. However, nothing in the language of § 1322(b)(9) requires such consent. In the absence of such language, I find that a plan which provides for vesting of property in a secured lender at time of confirmation may be confirmed over the lender's objection. However, such a plan must still comply with the provisions of section 1325(a)(5) with respect to payment of secured claims. *Id. at 839.*

B. Transferring title through surrender in Chapter 13 cases and state law through acquiescence as acceptance

- In *In re Rose*, 512 B.R. 790 (Bankr. W.D.N.C. 2014) the debtors sought permission to quitclaim the deed of real property to their secured lender, following a year past confirmation of the debtors' chapter 13 plan during which time the secured lender took no action. The *Rose* court concluded that neither Bankruptcy law nor Florida law permitted it to force a creditor to foreclose or accept a quitclaim deed. Specifically, the *Rose* court determined that

a. … "although 'surrender' envisions a debtor relinquishing his or her rights in the collateral, there is no corresponding requirement that the lender to do anything with the property. *See Pratt v. Gen. Motors Acceptance Corp*. (*In re Pratt*), 462 F.3d 14, 18–19 (1st Cir.2006); *Canning v. Beneficial Maine, Inc. et al*. (*In re Canning*), 442 B.R. 165 (D.Me.2011); *In re Arsenault*, 456 B.R. 627 (Bankr.D.Ga.2011)."*Id*. at 793-94;

b. Section 1322(b)(9) "does not state such relief can be imposed on a third party at the debtor's election." Thus, *Rose* declined to adopt the *Rosa* interpretation of §1322(b)(9). *Id*. at 795.

- Nonetheless, the *Rose* court determined that while the secured lender

  "cannot be compelled to accept title to the Roses' property; however, under state conveyance law, the Roses still might be able to achieve their goal of transferring the Residence to the SBA provided that SBA does not object. To that end, this Court grants the Debtors permission to tender the deed to SBA for its consideration." *Id*. at 796-97.

- In questioning what constitutes acceptance of a deed under state law, the *Rose* court states that "[c]ertainly, physical acceptance works. However, under some circumstances, acceptance can also be presumed." *Id*. at 797. However, the *Rose* opinion does not refer not to any specific Florida statute, but cites to various Florida and North Carolina cases (which themselves do not refer to specific statutes), finding (1) such presumption in cases where (a) a deed is for the benefit of the grantee and imposes no burdens or (b) the grantor causes the deed conferring substantial benefits to be recorded, and, (2) assent and ratification of acceptance of a deed may be inferred from the grantee's conduct. *Id*.(citations omitted)

- 23 Am. Jur. 2d Deeds § 151 provides:

  The acceptance of a deed by the grantee presupposes an antecedent delivery or tender thereof to him. The requisites of acceptance are the grantee's knowledge of delivery or tender of the deed, an intention to take the legal title to the property which the deed purports to convey, and the manifestation of such intention by some act, conduct, or declaration. Where the deed itself

> specifies the time or manner of acceptance, the grantee must comply therewith.
>
> Acceptance is primarily a matter of the grantee's intention; hence, the significant inquiry is as to the grantee's intention as manifested by the grantee's words and acts. Express words and positive acts are not necessary; intention to accept may be inferred from such conduct as conveying or mortgaging the property, recording the deed, or otherwise exercising the rights of an owner provided the grantee had, at the time of such action, knowledge of the conveyance. Subsequent assent by a grantee to a conveyance made without such grantee's knowledge is sufficient to constitute an acceptance, at least where there has been a physical delivery of the deed, without reservation, by the grantor to a third party. Where the issue of acceptance is disputed, testimony as to the grantee's declarations is admissible to show intent.
>
> Acceptance of a confirmation deed may be shown by the acts of the grantee clearly indicating an intent to accept.

23 Am. Jur. 2d Deeds § 151 (footnotes omitted)

- The *Rose* opinion cites to 2 cases in the Eastern District of North Carolina which permitted Chapter 13 debtors to surrender by quitclaim deed to a secured creditor without consent, but noted that these were unpublished decisions that provided no legal basis for their holdings:
    a. *In re Perry*, 2012 Bankr. LEXIS 4731 (Bankr. E.D. N.C. 2012)(directing foreclosure within 60 days and, in failing commencement of foreclosure proceedings within the requisite period, authorizing conveyance by delivery and recording of a quitclaim deed)
    b. *In re Williams*, Case No. 10-06243-8-SWH (Bankr E.D.N.C. 2014)(order directing delivery of a duly recorded quitclaim deed to lender and allowing 10 days for lender to object and assert its non-acceptance)

- American Bankruptcy Institute Journal, Vol. XXXIV, No. 1, January 2015 at page 31; *Silence is Golden? Rose and Its focus on real Property Surrendered in Chapter 13*, Kathleen G. Furr and Brett A. Switzer (Most courts generally agree that a "plan cannot require a secured creditor to accept a surrender of property or take possession of or title to it" and that title "cannot be vested in an unwilling third party through confirmation." However, one important lesson recognized by *Rose* decision is that "[l]enders cannot sit idly while a debtor files pleadings or tenders conveyance documents for a lender's review.")(footnotes and citation omitted).

C. Refusal of request to release lien as violation of discharge injunction

- *Pratt v. GMAC* (*In re Pratt*), 462 F.3d 14, 20 (1st Cir. 2006) (Chapter 13 case converted to Chapter 7) (The court in *Pratt* concluded that the lienholder's "refusal to release its valueless lien so that the vehicle could be junked - though presumably not made in bad faith - was 'coercive' in its effect, and thus willfully violated the discharge injunction, " entitling the debtors "to establish and recover their compensatory damages, together with other appropriate relief under Bankruptcy Code § 105(a).")

- While the debtors in *In re Canning*, 706 F.3d 64 (1st Cir. 2013) (Chapter 7) attempted to expand the holding in *Pratt* to cover the Cannings' attempt to find a discharge injunction violation because of the secured creditor's objection to the debtors' "foreclose or release" demand with respect to real property, the court in *In re* Canning found no coercion and affirmed the Bankruptcy Appellate Panel 's affirmance of the bankruptcy court's ruling that there was no discharge injunction violation. *Id*. at 73

    a. The First Circuit in *In re Canning* reasoned that

    [f]irst, the record contains no evidence to support the inference the Cannings urge us to draw.n11 Second, their reading of *Pratt* is overly broad. Under the Cannings' reading, we would have to find a discharge injunction violation every time a secured creditor opposes a debtor's "foreclose or release" demand based on the business determination that repossession is not cost effective. But, on one hand, *Pratt* unequivocally held that the applicable inquiry revolves around the particular facts of each case, with the value of the underlying collateral being only one of several factors to be considered. On the other, *Pratt* sought to strike a balance between the competing state-law rights of secured creditors and the bankruptcy rights of debtors, and the reading the Cannings advance improperly skews that balance against secured creditors.

    FOOTNOTES

    n11 To support their inference, the Cannings refer us to evidence that is not part of the record on appeal, and "[i]t is elementary that evidence cannot be submitted for the first time on appeal." *United States v. Rosario-Peralta*, 175 F.3d 48, 56 (1st Cir. 1999). In any event, were we to draw the Cannings' proposed inference, our decision would remain unchanged for the reasons discussed below.

    Third, and perhaps most importantly, *Pratt* does not support the conception that the Cannings appear to have of the Bankruptcy Code's "fresh start." The

> debtors in *Pratt* sought to disentangle themselves from an unduly burdensome situation by following a legally feasible alternative, without improperly burdening others. The Cannings, in contrast, invoke the "fresh start" to indirectly validate the decision to abandon their residence. They do so without providing any evidence showing that the residence posed an undue burden upon them after their bankruptcy discharge. The Cannings also fail to advance any legal authority, and we are not aware of any, to support the proposition that a homeowner may walk away, with no strings attached, from their legally owned residence. But even worse, in vacating their residence, the Cannings placed many of the burdens of dealing with an abandoned property on their neighbors, their town, and their city -- in other words, on everyone but them. The "fresh start" does not countenance that result. *Cf. In re Hermoyian*, 435 B.R. 456, 466 (Bankr. E.D. Mich. 2010) ("A fresh start does not mean debtors are free from all of the consequence of every decision that they have made, which in hindsight, might have been ill-advised."). Nor does it generally "discharge the ongoing burdens of owning property," as the bankruptcy court aptly noted. *See In re Canning*, 442 B.R. at 172; *cf. River Place E. Hous. Corp. v. Rosenfeld* (*In re Rosenfeld*), 23 F.3d 833, 837 (4th Cir. 1994)(finding an obligation to pay postpetition assessments nondischargable because it arose from the debtor's continuing ownership of property, not from a prepetition obligation).

Id. at 72-73.

- See also, *Arsenault v. JP Morgan Chase Bank, N.A.*, 2012 U.S. Dist. LEXIS 128412 (S.D. Ga. 2011) (accord); *In re Fristoe*, 2012 Bankr. LEXIS 4518 (Bankr. D. Utah Sept. 26, 2012) (accord).

D. Abandonment under §554 in Chapter 7 as well as Chapter 13

- *Maspeth Fed. Sav. & Loan Ass'n v. 47-78 Douglass St. LLC* (*In re 47-78 Douglass St. LLC*), 2011 Bankr. LEXIS 2469, *3 (Bankr. S.D.N.Y. June 27, 2011) ("Since property of the estate may only be abandoned to someone with a pre-petition possessory interest in the subject property, the Notice of Abandonment was not effective as a matter of law because Maspeth did not have a possessory interest in the Property at the time of the filing.") On the other hand, certain mortgages give a lender the right to peaceful possession, which debtors arguably may confer.

E. The Sale Approach

- *In re Grossman*, Case No. 13-22130 (RDD) (Chapter 13) (short sale approved free and clear under 11 U.S.C. § 363(f) with noticed right to credit bid, over secured creditor's objection).
- *In re Waldman*, Case No. 10-23283 (RDD) (Chapter 11) (sale approved free and clear under 11 U.S.C. § § 363(f) and 1123, upon secured creditor's credit bit and over secured creditor's objection).

In each case, the Court found, consistent with the Chapter 11 cases of *In re Boston Generating, LLC*, 440 B.R. 302 (Bankr. S.D.N.Y. 2010) and *In re Beker Industries Corp*., 63 B.R. 474 (Bankr. S.D.N.Y. 1986), that exceptional circumstances warranted the short sales over the secured creditors' objections (provided they had the right to credit bid under 11 U.S.C. § 363(k)). The debtors would have difficulty performing their plans if they had to continue paying the carrying costs of these properties and each case involved a motion proposing a short sale at arms-length to a third party for a fair price, subject to the secured creditor's right to bid higher if it truly believed the property was worth more than the third-party sale price. In *Grossman*, the property was sold to the third-party. In *Waldman*, the creditor made a successful credit bid.

- See also *In re Pigg*, 453 B.R. 728 (Bankr. M.D. Tenn. 2011) (Chapter 7 debtor motion granted directing Chapter 7 trustee to sell (short sale) abandoned real property under 11 U.S.C. § 363(f) because of continuing accruing nondischargeable (11 U.S.C. §523 (a)(16)) home owner's association fees' adverse effect on debtor. Court relies on general estoppel powers, citing Aristotle, among other authorities. Lender had changed the locks on the property but not foreclosed.).