

# “I DECLARE BANKRUPTCY!!!”

(Discharge Injunction & Automatic Stay Litigation)

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# Bankruptcy Misapplication

- A client comes to you with the following facts:
  - Client has been in a Chapter 13 bankruptcy.
  - Client has made all Chapter 13 payments.
  - Client has made all post-petition mortgage payments outside of the plan.
  - Mortgage company responds to the Notice of Final Cure and states that client has paid all pre-petition arrearages but is past due 3 payments post-petition.

# Bankruptcy Misapplication

- CLIENT FINISHES CHAPTER 13 AND ENDS UP BACK IN FORECLOSURE
- Most likely payments were improperly credited in violation of confirmation of plan and automatic stay
- Also assessed fees and costs that should have been paid in prepetition claim violates discharge injunction
- Biggest expense is attorney fees, not collectable through 13
- Stay on loan in restricted corporate advance
- Finish 13 try to collect from client

# BK Misapplication cont.

- Raise payment based upon prepetition escrow shortage that is in proof of claim
- Causes client to fall behind post-petition and end up failing out of bankruptcy
- Violates automatic stay
  - *Rodriguez v. Countrywide Home Loans, Inc.*, Case No. 11-40056 (5<sup>th</sup> Cir. 2012)
  - *Campbell v. Countrywide Home Loans, Inc.*, Case No. 07-20499 (5<sup>th</sup> Cir. 2008)
- Also does not send notice of payment change, waiver of ability to collect those payments
- Reinstate BK also unclean hands to allow foreclosure to go through

# MISAPPLICATION VIOLATES STAY

- 11 USC sec 362 (a)(3)
  - Attempt to exercise control over property of the estate
- Moore v. Caliber, 2015WL5162482 (S.D. OH 2015)
- In Re Mocella, 522 B.R. 706 (Bank. N.D. Oh 2016)
- In Re Jones, 366 B.R. 745 (Bank E.D. La 2007) (Lender willfully violated automatic stay by assessing and paying undisclosed charges from estate property following confirmation)

# FIRST STEP-NOE/RFI

- FIRST THING IS TO SEND NOTICE OF ERROR/REQUEST FOR INFORMATION (FORMERLY QUALIFIED WRITTEN REQUEST)
- DISPUTE APPLICATION OF PAYMENTS, FORCED PLACED INSURANCE, INCREASE IN ESCROW/MONTHLY PAYMENT, CHARGES AFTER BANKRUPTCY ETC
- ASK FOR HOLDER OF LOAN UNDER TILA
- ASK FOR LIFE OF LOAN HISTORY, ALL ESCROW ANALYSIS, ALL FEES AND COSTS ASSESSED IN ANY ACCOUNT ON THE LOAN
- ALL AVAILABLE LOSS MITIGATION OPTIONS AND SERVICING FILE

# NOE/RFI(cont)

- Provides basis for affirmative case or counterclaim
- Servicer typically provides life of loan without actual investigation as required by RESPA
- This information supports additional claims under FDCPA.
- Plus failure to properly respond provides statutory damages for \$2000.00 for acknowledgment and \$2000.00 for improper response(including failure to investigate)
- Plus all actual damages, including noneconomic, and attorneys fees and costs
- *Wright v. Litton Loan*, Case no. 2:2005-cv-02611 (E.D. Pa. 2005)- \$25,000.00 noneconomic damages and attorneys fees for refusal to correct monthly statements

# BEST WAY TO DETERMINE MISAPPLICATIONS

- Start from petition date and total the amount of principal and interest due up to whatever month the loan is on the amortization schedule
  - Can verify from the promissory note and amortization schedule
- Determine what was owed out of escrow, taxes, insurance, premiums
  - Verify with homeowners insurance policy, tax records, and loan docs
- Get proof of all payments from client bank statements
- Also may be able to use the life of loan history if don't have statements
- Compare total amount of money tendered and total amount that should have been paid



# OTHER VIOLATIONS OF STAY IN MORTGAGE CONTEXT

- Uniform Covenant 1: Mortgage contract requires payment in suspense to be refunded or applied to principal once foreclosure begins
- Uniform Covenant 1: interest required if not applied to scheduled due date. Misapplication to fees and costs
- Retain refunds that were provided by the foreclosure court

# Loan Modification Misapplication

- Loan Modification
  - Check new money being added to loan
  - Check amortization schedule and proof of claim
- Escrow account not funded properly
  - Payment then goes up postpetition – violates stay under *Moore, Rodriguez, and Campbell*

Post modification credit reporting

In Re Sommersdorf, 139 B.R. 700 (Bank. S.D. Oh 1991); Pittman v. Experian, 901 F.3d 619 (6<sup>th</sup> Cir 2018).

# POST DISCHARGE VIOLATIONS

- Failure to update tradelines
- Refusal to respond to Credit Bureaus dispute
- Failure to list the debt as disputed
  - Credit score masking
- 524(a) violation as well
- Forward flow agreements prove notice-debt pools purchases as chapter 7/13 receivable

# SELLER OF DISCHARGED DEBT LIABLE

- The Original Creditor is liable for a discharge injunction violation if :
  - Received actual notice of discharge
    - BNC
  - Sold the debt with knowledge that it would be collected upon
  - Didn't notate that the debt was discharged
    - Buyer and Seller agreements are vague to allow for finger pointing if they get caught
  - *In Re Lafferty* (Akron), *In Re Irizarry* (Y-Town)

# DISCHARGE DECEPTIVE ACTS

- WE WEREN'T LISTED YOU STILL OWE

- AACER
- BANKO
- FORWARD FLOW AGREEMENTS
- DOUBLE LOCK OUTS

RELEND THEM MONEY PAY OFF THE DISCHARGED BALANCE AND THEN  
SECURITIZE IT ALL OVER AGAIN

TRICK WITH WILL REESTABLISH CREDIT

# OTHER STATUTORY VIOLATIONS

- FCRA
- TCPA
- INVASION OF PRIVACY
- FDCPA
- RESPA
- ECOA
- CRIMINAL STATUTES PROVIDE BASIS FOR CIVIL CLAIM 2307.60

# PITFALLS: JUDICIAL ESTOPPEL/MITIGATION

- MUST LIST CLAIMS ON SCHEDULES
  - Amend as soon as you know or even suspect to be safe
- Notice, Notice, Notice
  - Mitigation arguments not only defeat damages but liability
  - Put them to their proof that notice would have stopped the conduct
  - Consumer complaint departments
  - Prior lawsuits, complaints list in the complaint
  - Quality control audits,
  - Training, job aids, discipline,

# Effect of *Taggart*

- *In re Sepeda*, 2019 WL 2385800 (Bank N.D. Oh 2019)
  - Revocation of debtors discharge for failure to comply with turnover
  - Same elements as Civil Contempt
    - Knowledge of the order
    - Did in fact violate the order
    - Order violated must have been specific and definite
    - Taggart does not change these elements
    - Order be definite and specific



P.O. Box 619063  
Dallas, TX 75261-9063  
RETURN SERVICE ONLY  
Please do not send mail to this address

9-750-96390-0036264-008-1-000-010-000-000



## Mortgage Statement

Account Number 0051325983  
Payment Due Date 01/01/15  
**Amount Due \$55,625.77**  
If payment received after 08/16/15, \$17.48 late fee will be charged

### Contact Us

General Customer Service: 1-800-724-2224  
Property Tax: 1-866-409-0949  
Property Insurance: 1-888-882-1847



Correspondence Address: Lending Services, Customer Support  
P.O. Box 1286  
Buffalo, NY 14240-1286  
Payment Mailing Address: P.O. Box 62162  
Baltimore, MD 21264-2162



www.mtb.com/mymortgageinfo

Statement Date: 07/16/15

### Account Information

Property Address 508 W 24TH ST  
LORAIN OH 44052  
Interest Rate 7.500%  
Maturity Date 10/2037  
Outstanding Principal\* \$44,257.52  
Escrow Balance \$288.66

\* This is NOT a payoff figure. To obtain the full amount required to pay off your loan, please call us at 1-800-724-2224 or fax your request to 1-866-409-2653.

### Explanation of Amount Due

Principal  
Interest  
Tax/Insurance  
MIP/PMI  
Overage / Shortage  
Amount Billed this Statement \$640.56  
Amount Unpaid from Prior Statement +\$3,773.56  
Unpaid Late Charge(s) +\$124.63  
Return Item/Other Fee(s) +\$224.00  
Recoverable Corporate Advance\*\* +\$50,963.02  
**Total Amount Due 08/01/15 \$55,625.77**  
\*\* Including any fees/charges imposed since last statement totaling \$50963.02

Recoverable Corporate Advance (i.e.)  
Attorney Fees \$50,963.02

### Important Messages

If you are in bankruptcy or received a bankruptcy discharge of debt, this communication is not an attempt to collect a debt against you personally, but strictly for informational purposes only.

Our records indicate that your account is currently in foreclosure. The amount reflected above is not necessarily the amount that is required to reinstate your loan. Prior to sending any funds/payments please contact the attorney firm handling your foreclosure to obtain the current reinstatement or payoff amount. A letter was previously sent to you with this contact information. If you are unsure what attorney firm is handling the foreclosure, please contact a Foreclosure Specialist at 1-800-724-1633.

### Past Payments Breakdown

	Paid Since Last Statement	Paid Year-to-Date
Principal	\$0.00	\$508.33
Interest	\$0.00	\$834.36
Escrow (Taxes & Insurance)	\$0.00	\$588.55
Fees	\$0.00	\$0.00
Partial Payment (Unapplied)	\$0.00	\$0.00
<b>Total</b>	<b>\$0.00</b>	<b>\$1,911.24</b>

### Transaction Activity

Transaction Date	Due Date	Description	Total Received	Principal	Interest	Escrow	Optional Products	Subsidy	Unapplied Funds	Fees
06/18/15		Property Inspection								-\$14.00
06/18/15		Forecl. Attny Cost								-\$350.00
06/18/15		Forecl. Attny Cost								-\$180.00
06/23/15		Forecl. Attny Fee								-\$203.00
06/23/15		Forecl. Attny Fee								-\$29.00
06/23/15		Forecl. Attny Fee								-\$464.00
06/23/15		Forecl. Attny Fee								-\$1,073.00
06/23/15		Forecl. Attny Fee								-\$435.00
06/23/15		Forecl. Attny Fee								-\$640.00

(Continued on next page.)

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AMOUNT DUE

- *Davis v Creditors Interchange*
- The company's procedure manuals and training are relevant to whether the defendants acted with “hatred, ill will or a spirit of revenge” toward the plaintiffs. See [\*id.\*](#) If the persons contacting the plaintiffs disregarded the company's prescribed procedures or training, such evidence would be material to plaintiffs' claim for punitive damages. The plaintiffs may therefore discover these materials. 585 F.supp.2d 968 978(ND Oh 2008)

- *Brock v. Pressler*, 30 F.Supp 3d 283, 290 (D NJ 2014)
  - Each day, Gulko goes through the electronic “feed” of all the complaints prepared by the Summons and Complaint team. (*Id.* at ¶ 27). On average, he reviews 300 to 400 complaints per day; some days, he has reviewed as many as 1,000. (Deposition Testimony of Ralph Gulko Esq. at 92:24 to 94:5, Ex. P-9 to Declaration of Phillip D. Stern, Esq. [ECF No. 34-3] ). *Via* the feed, each draft complaint appears on one of Gulko's two computer monitors...
  - On October 20, 2011, Gulko's review and approval of the complaint against Bock occupied **a total of four seconds**. Computer records disclose that that was the period of time for which the electronic file containing the complaint against Bock and the previously-culled data (described *supra* ) were open. (Gulko Aff. at ¶ 12). Gulko reviewed 673 complaints that day, approving 663 and rejecting 10. (*Id.*).

- SHOW NOTICE/ PATTERN AND PRACTICE
- *Valenzuela v. Equifax*, 13-2259 (D Az 2015)
- Before the Court is the parties' joint statement of discovery dispute. (Doc. 105.) At issue is Plaintiff Martin Valenzuela's request for production number 15, in which he seeks:
  - [C]opies of any and all complaints (including administrative complaints filed with the FTC, litigation filed in any state or federal court, or complaints you are aware that were filed by any consumer with the Better Business Bureau) against Equifax in the last 5 years alleging that Equifax did not maintain reasonable procedures to assure maximum possible accuracy in violation of 15 U.S.C. § 1681(e) or failed to properly investigate a consumer's dispute(s) and/or violated 15 U.S.C. § 1681i regardless whether such sections are cited therein

- Ruling:
  - Because other similar consumer complaints might reasonably lead to the discovery of admissible ...the Court will require Equifax to produce copies of any and all complaints (including administrative complaints filed with the FTC, litigation filed in any state or federal court, or complaints it is aware of that were filed by any consumer with the Better Business Bureau) against it in the last 5 years raising claims under the FCRA, generally.

- Forced Placed Insurance case
  - Didn't pay insurance-house burned down-then forced placed and defaulted the loan
    - Q. Do you think that was a sufficient amount of 2 people to handle the volume?
      - 3 A. Not for the work.
      - 4 Q. Why not?
        - 5 A. Because there was piles and piles, and the
        - 6 lady -- the one lady who did the mail would get four
        - 7 buckets of mail in the morning, then another three
        - 8 after lunch.

- Q. Were there times when renewals were misplaced?

A. Yes.

1 Q. Can you tell me about that?

2 A. In the stacks, overlooking them.

3 Q. What would happen when a renewal was

4 misplaced?

5 A. Forced place insurance would go in effect

- Entry level employees can be subject to notice instead of subpoena
- *Calderon v. Experian*, 287 FRD 629 (D Idaho 2012)
  - employees of service's Chilean “sister corporation” were “managing agents” subject to deposition via notice;
  - Chilean “sister corporation's” non-party status did not pose barrier to conducting depositions via notice of its employees;
  - even if employees were “entry level,” they were employees who were charged with handling consumer's disputes, they were therefore only people who might have had information about what was actually done, as opposed to simply what service's policies and procedures theoretically require
- Did have to go to Chile to take depo



- *Davis v Creditors Interchange*, 585 F.supp.2d 968 978(ND Oh 2008)
  - “In light of the foregoing, I conclude that the plaintiffs are entitled to conduct discovery directed to uncovering the identities and contact information of current and former employees who contacted the plaintiffs and others in the course of seeking to collect the debt putatively owed by plaintiffs. It would also appear appropriate to enable plaintiffs to have the same information for other current and former debt collectors employed by the defendant. This could lead to admissible information about the company's practices under [Fed.R.Evid. 404\(b\)](#)”

- *Great Am. Ins. Co v Vegas Const. Co.* 251 F.R.D. 534, 542 (D. Nev 2008)
- Unknowledgeable witness: “no more present for deposition than would be a deponent who physically appears for the deposition but sleeps through it.”