USFN® Report

Updates on Mortgage Industry Trends

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BK: That Proverbial Target

Well, It's Taken Some Hits

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For the past couple of years, the annual bankruptcy edition of the *USFN Report* has addressed the "target" seemingly centered on creditors and their attorneys. In 2011, we can dismiss the target reference and start addressing the direct hits scored through amended Federal Rules of Bankruptcy Procedure, assorted consent orders, continued

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Amended Bankruptcy Rules

Prepare Now

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On December 1, 2011, assuming Congress acts in time, dramatic changes to the Federal Rules of Bankruptcy Procedure will go into effect. These changes will significantly increase the amount of work for mortgage servicers during the course of a bankruptcy case (including pending cases filed before December 1, 2011), as well as the amount of paperwork that must be filed with the bankruptcy court. Furthermore, in addition to establishing requirements and deadlines for

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scrutiny from the U.S. Trustee program, as well as repeated "chain of title" challenges. Substantial changes in the servicing of loans in bankruptcy are rapidly approaching, and the articles in this edition illustrate the additional duties and responsibilities soon to be required of servicers and lawyers.

Mike McCormick's feature, *Amended Bankruptcy Rules,* provides an in-depth review of the amendments to Bankruptcy Rule 3001 (governing the filing of a proof of claim) and the new Bankruptcy Rule 3002.1 (dealing with notice requirements and additional procedures to address claim status at discharge). As the Rules are slated to go into effect on December 1, 2011, servicers and attorneys must be prepared to incorporate the additional requirements into existing procedures, including new national standard forms for proofs of claim. Rule 3001 requires extensive itemization, an escrow statement prepared as of the petition date if the subject property is the debtor's principal residence, and provides consequences for non-compliance. Rule 3002.1 establishes procedures for the disclosure of payment changes as well as fees, charges, and expenses incurred post-petition. Rule 3002.1 also creates a process to address loan status at discharge through a "Final Cure Notice" filed by the chapter 13 trustee. The procedure provides a final opportunity for the parties to examine the current status of the loan.

Ideally, the detailed disclosures that Rule 3001 requires on the proof of claim, the requirements of 3002.1 regarding the disclosure of all charges to the account during the pendency of the bankruptcy case, and a final review will work in concert. Past experience tends to suggest, however, that servicers and attorneys will face some unintended consequences when these new rules are implemented. Please become familiar with the details discussed in *Amended Bankruptcy Rules* to help in successfully navigating these changes.

Next up is Marcy Ford's discussion of some *Recent Trends in Bankruptcy.* The spectacular popping of the real estate bubble has devalued real estate nationally, and her feature talks about some new opportunities being pursued by various parties, including debtors and chapter 7 trustees. Read her article to learn more about a growing tendency to see property surrenders by debtors in bankruptcy, as well as something called "short redemptions" in states where there is both a specified bid at a foreclosure sale and a redemption period. Continuing in this vein, the feature *Cramdowns and Lien Stripping, A Refresher on Some Basics* authored by John Schlotter illustrates how falling values have resulted in large-scale attempts to strip wholly unsecured liens in bankruptcy and provides strategies and suggestions for mounting a convincing defense to lien avoidance or cramdown attempts. His article succinctly lays out the current case law governing the issue of lien stripping in chapters 7, 11, and 13; the effect of a discharge; and the best methods to prevent lien avoidance.

In another feature, *Tearing Down Invisible Walls,* authors Amy Ryan and David Freed discuss substantive consolidation in chapter 11 cases. Since 2008, with the bankruptcy filing of Lehman Brothers Holdings (the largest bankruptcy case in history), we have seen increased corporate bankruptcy filings. As the article points out, the substantive consolidation of cases can affect the rights and interests of creditors. This comprehensive article provides important history on the topic, as well as discusses various tests employed by the courts in determining consolidation issues.

Turning to this edition's Bankruptcy Update column, Deanna Westfall reviews the U.S. Supreme Court opinion in *Stern v. Marshall* (commonly referred to as the "Anna Nicole Smith" case). Her article, *Bankruptcy Court Jurisdiction Redefined,* discusses how the decision may be interpreted to significantly limit the authority of bankruptcy courts to issue a final judgment in non-core matters and explores possible ramifications.

Finally, in the Legal Issues Update column written by Amy Ryan, an important proposed local bankruptcy rule is discussed. This proposed rule addresses the standing of claimants, and it is currently being considered by the U.S. Bankruptcy Court for the Eastern District of Missouri.

Bankruptcy has probably not been the most provocative segment of default servicing, but the challenges and changes over the past half decade have placed our issues and concerns front and center. A federal court forum for borrowers and government entities to contest standing, challenge accounting accuracy and methodology, and address perceived systematic deficiencies has made the bankruptcy practice of paramount importance. The USFN Bankruptcy Committee will continue working to ensure that servicer-clients stay ahead of the curve and are prepared for the inevitable future challenges in this practice arena. ■

One-Day USFN Seminar
January 24, 2012
Dallas, Texas
Learn about the
Amended Federal Rules
of Bankruptcy Procedure.