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## "Bankruptcy Boot Camp" Report

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In early May 2007, I attended Max Gardner's Bankruptcy Boot Camp, located on Gardner's 164-acre farm in the mountains of western North Carolina. The boot camp is a four-day marathon session (roughly 12 hours each day) where Max presents campers (nearly all are debtors' counsel) with his "Bankruptcy Litigation Model." What follows in this column are some preliminary reflections on the boot camp experience and, hopefully, some useful information that will help prevent readers from making some common and costly mistakes.

A theme that was repeated throughout all four days of the camp was "notice, notice, notice." Boot campers are admonished to provide notice of everything they do in a bankruptcy case to the creditors and their attorneys, whether or not notice is actually required, such as in a formal pleading. The theory being that creditors will not be able to walk into court and use the "I didn't know" defense. Additionally, by providing the court with copies of all of the notices sent to the servicer, debtors' attorneys may argue that they are not just going after the servicer for a technical violation of the automatic stay or discharge injunction. The obvious point here is that everything received by debtors' attorneys should be reviewed carefully by both the servicer and its local counsel when determining how or if to respond to the document/pleading.

### **QWRs/Discovery Requests**

Servicers, be prepared to respond to "qualified written requests" (QWRs) if you intend to escrow a loan that was originally a non-escrowed loan. Additionally, be on the lookout for discovery in the form of requests for production and interrogatories that also incorporate the provisions of the Real Estate Settlement Procedures Act (12 USC § 2605(e) and Reg. X § 3500.21(e) (1)).

Among other things, the QUR/discovery that you receive will request a payoff figure. If the loan is in bankruptcy be sure to review the payoff figure to ensure that it does not contain any fees that have not been awarded by the bankruptcy court. It is important to keep a hard copy of the payoff for future reference because it is likely that there will be several requests for payoff figures over the life of the bankruptcy case. The theory here is that fees and costs that are being tracked by the servicer will, due to the servicer's software program, be automatically included in the payoff figure, giving rise to either an adversary proceeding or a motion for sanctions against the servicer. As mentioned, if these same fees and costs continue to show up on subsequent payoff quotes, not only will it drive up settlement costs, but it may also be used to establish a "pattern and practice" argument that could later be raised against the servicer.

Campers are also instructed, as part of their standard discovery requests, to include demands for copies of the pooling and servicing agreements (PSAs) that involve the debtor's mortgage loan. Many servicers may want to reject this request outright; however, the secret is out – most if not all of these agreements are available on the SEC's Internet website. So why are campers asking for copies of the PSAs? Simple, these agreements contain, among other things, default workout provisions that are supposed to apply to loans contained within the pool of loans governed by the agreement.

Debtors' attorneys will attempt to use the workout provisions in the PSAs against servicers to try to negotiate better loan terms (i.e., ARMs to fixed rates, less interest, etc.) for their clients while attempting to settle a contested bankruptcy matter, or if no settlement is reached, then in court (arguing to the judge that servicers are not following their own rules).

### **Leave with This ...**

There are two simple and practical conclusions that can be reached for the purpose of this discussion. First, attorneys should encourage servicer/lender clients to expend a greater effort to ensure that their bankruptcy-related servicing actions comply with the code, even if it means significant manual review, as opposed to relying on automated systems. Second, carefully responding to various discovery requests, and maintaining copies of those responses are more important than ever, as it is likely that service/lenders will receive multiple requests for this same information during the bankruptcy case and inconsistent responses could lead to large recoveries against them.