

**MORTGAGE ISSUES ARISING IN AND  
RELATED TO CONSUMER BANKRUPTCY**

**Theodore “Thad” O. Bartholow III**

Kellett & Bartholow PLLC  
11300 N. Central Expy. Suite 30`  
Dallas, TX 75243  
(214) 696-9000  
[thad@kblawtx.com](mailto:thad@kblawtx.com)

2018 Northern District of Texas  
Bankruptcy Bench/Bar Conference  
Friday, June 8, 2018  
Dallas, TX

# 1) Introduction

This paper outlines a process for reviewing clients' and prospective clients' mortgage loans to identify and understand servicing errors and other issues potentially giving rise to legal claims by the borrower against the mortgage servicer and/or the owner of the loan. This process begins with the client interview, continues with information gathering, followed by good faith efforts to informally resolve mortgage servicing errors and other concerns, before litigation, if necessary.

As part of the process, practitioners will need to gather a variety of documents regarding the borrower, the loan, insurance, taxes, etc., etc. This paper therefore attempts to offer a non-exhaustive checklist of common documents and other sources of evidence that are necessary and/or useful. Moreover, while knowing what evidence and information is useful, knowing how to obtain the useful evidence and information is key. So, this paper offers some suggestions regarding how to obtain important information that you will require to understand and resolve your client's mortgage servicing issues.

Armed with the knowledge of the nature of the mortgage servicing or other mortgage-related issue, error, or dispute, this paper argues that practitioners should attempt in good faith to resolve borrowers' mortgage servicing and other related disputes, only pursuing litigation as a last resort.

Also, because there is significant variety in the ways that mortgage loan and mortgage servicing disputes can arise, this paper will attempt to isolate certain fact patterns that are frequently associated with cases in which there are valid borrower claims, as well as other facts common in cases and issues that should be avoided. Finally, having vetted the client, gathered the information, identified the problem, and attempted without success to resolve the issue informally, litigation can be an appropriate option for resolving the dispute. This paper provides a very basic overview of statutory and other causes of action that are often included in mortgage loan and mortgage servicing litigation, especially in the consumer bankruptcy context.

## 2) Client interview

Client selection is the first, and arguably the most important, decision you make in any case you undertake. This is especially true in litigation. Use the client interview to evaluate whether the client is someone you can represent, establish and begin to manage client expectations, begin building a damages model and identifying how and the extent to which your client has been harmed, identifying potential witnesses, and spotting open questions that must be resolved before you can make a call about the viability of the client's potential claims.

Questions one should consider asking prospective mortgage servicing litigation clients in an initial interview should seek to evaluate (a) client compliance and reasonableness of expectations, (b) available records and quality of client's record-keeping, (c) the history and source(s) of the dispute, (d) disqualifications, exclusions, potentially dispositive defenses, (e) interested third parties, material witnesses, behind-the-scenes decisionmakers, and (f) initial exploration of basis for damages claims. For example:

1. What's the foreclosure status? When is it scheduled? When did it occur?
2. What's the problem?
3. What would a satisfactory solution to the problem look like?
4. Is your loan current or in default? If current, has it always been current? If previously in default, what happened to get you behind and how did you get caught back up?
5. If not current, when did you first get behind? What happened that got you behind?
6. Do you agree that you are required to pay your mortgage for your home?
7. If it wasn't for the current issue with the mortgage, would you be able to afford to pay for your home? How? / Why do you think so?
8. How are you currently employed? How long have you held the position / been with the same employer?
9. Have you ever hired or consulted with any other attorney about this issue?

10. How were you referred to me?
11. How many times have you filed bankruptcy?
12. How many lawsuits have you been involved with?
13. What were the results of your prior bankruptcies and prior litigation?
14. What company is servicing your loan? (Who do you pay each month?)
15. What kind of loan is it? Purchase money? Home equity? Refinance?
16. Who else (if anyone) is liable on the loan or named on the mortgage / deed of trust?
17. Is this your home? If not, whose home is it?
18. When did you acquire the property? What was the loan term? 30 year? 20? 15? 10?
19. Who else lives there?
20. Is there anyone (relative, spouse, former spouse, investor, etc.) you would have to consult with before resolving your mortgage dispute? If so, what role will they have in dealing with the issue that brought you here?
21. Is the loan escrowed? Is the property insured? Are property taxes current?
22. Do you understand that if you have claims under a fee shifting statute, that means if you prevail, the other side will have to pay your fees? (i.e. you will not have to pay me out of your own pocket)
23. Do you understand that unless a court makes the other side pay or the other side agrees to pay my fees, you are responsible to pay my fees?
24. Do you understand that it is possible that my fees could significantly exceed your recovery and that they do not really have anything to do with the amount you will personally receive in the event of a successful lawsuit?
25. Do you understand that if you are in bankruptcy, I cannot ask you for payment directly, that I will have to get employed by the bankruptcy court to act on your behalf, and that I will have to apply to the bankruptcy court and obtain approval of my fees before I can be paid for representing you in this matter?
26. Have you always had the same servicer? If not, when did it change, what was the loan's status when servicing was transferred (e.g. current or in default, modified or original terms)?

27. How do you keep your mortgage records?
28. What mortgage records do you have? Monthly statements? Annual escrow statements? Default, acceleration, and/or foreclosure correspondence? Loan modification documents (applications, proposals for trial payments, denials, final modification paperwork)?
29. Who has observed you as you have gone through this process?
30. Who have you talked to about how this issue is affecting you?
31. Do you have any medical condition that requires medication or regular treatment from a physician? Has that changed since you started having this problem? What have you told your doctors about the mortgage issue?
32. Other than the problem with the mortgage, what else has been going on in your life that has been stressful or upsetting?
33. How many times have you applied for credit in the last 3 years? Did you get approved? Did you get denial letters? What were the terms of your loans? Have you applied for credit since the problem started?
34. How many times have you pulled your credit report in the last 3 years? Do you have those reports? What service do you use to get or monitor your credit report? Do you receive alerts? In what format? Save those.
35. Have you communicated by telephone or in writing with the mortgage servicer? Can you identify when that happened? What number did you use for the telephonic communications? Have you taken handwritten notes?
36. Do you keep a journal or diary?
37. How has this affected your daily life? Sleep changes? Eating / drinking. Changes? Physical stress symptoms? Relationships affected? Work affected?

### 3) Stuff to get in order to understand your client's situation

Here's a non-exhaustive "checklist" of documents that can be useful in understanding and resolving mortgage servicing disputes, divided according to whether the source of the document(s) is the borrower, the mortgage servicer, or a third party:

a) Documents to get from client/borrower:

(1) **Note and Deed of Trust and other related closing documents:** Use these documents to determine whether (among other things): the loan is a purchase money loan, refinance, home equity loan, reverse mortgage, or other loan product; when the loan will mature; whether the interest is calculated as daily interest or on a scheduled payment basis; the payment application provisions setting forth the order in which funds are required to be applied; whether escrow was initially required; whether the property is in a flood zone and thus requires flood insurance.

(2) **All mortgage modifications offered, applied-for, proposed, accepted, rejected, and all related correspondence both from borrower and from servicer:** This information can be useful to evaluate your client's budget figures, and it also can contain representations by your client regarding his or her financial status that could become relevant in developing damages and assessing the consistency of your client's claims about "what happened."

(3) **Payment records:** Copies of checks that have cleared the borrower's bank and bank statements showing the payments were made from accounts containing sufficient funds (or not), going back to the last payment before the loan went into an uncured default. The important thing is to get an accurate understanding of the payment history. Encourage the client to own up to missed payments, NSF payments, partial payments, etc.

(4) **Monthly billing statements:** Get these from the client, going as far back as you can get, but minimally, statements going back to before current uncured default, if any, or going back to before the known or perceived issue that the client identifies as problematic. You ought to be able to obtain (and should also request) copies of these directly from the mortgage servicer through direct requests. However,

this is a good initial assessment of the quality of your client's record-keeping ability, and your ability to review these with the client present will help develop the narrative of how the issue(s) evolved into the current dispute.

(5) **Annual escrow statements (and any intervening escrow re-analyses):** Get these as far back as you can get, but minimally, statements going back to a year prior to current uncured default, if any, or going back to a year before client's current dispute with servicer. These statements will allow you to identify changes in your client's monthly mortgage payments over time, which is important as you match up payments made with payments due.

(6) **Phone logs / recordings / phone bills reflecting telephone communications w/ servicer:** Even if your client has not recorded conversations with the servicer, chances are extremely high (i.e. near certain) that the client's conversations with the servicer have been recorded by the servicer. Most servicers have data destruction policies that call for the deletion of data after a period of years, usually not less than three. So, if you have concerns about the availability of recordings, consider sending an "ESI" Letter (ESI=Electronically Stored Information) to the servicer on the front end of your engagement, which puts the servicer on notice of its duty to preserve relevant electronic data, including recordings of communications with your client. You may also find it necessary or appropriate to obtain telephone records directly from your client's or the mortgage servicer's telephone service provider in order to identify calls made to or from your client.

(7) **Credit reports:** Especially if you can get reports reflecting credit status before and after the dispute arose. **Do not rely on third-party credit report aggregator services. Aggregators' reports are (multiple) hearsay and likely cannot be admitted into evidence under any exception to the hearsay rule.** While reports obtained directly from the major credit reporting agencies are still hearsay as to what the servicers told the credit reporting agencies, there is less of a barrier to getting these into evidence, as they at least constitute statements by the credit reporting agencies of what their own systems reflect. Go to [www.annualcreditreport.com](http://www.annualcreditreport.com), which is the U.S. Government-approved website for obtaining reports directly from the three major credit bureaus, Experian, Transunion, and Equifax. Everyone is entitled to

one free credit report per year through this website. A credit score is not included in the free report. Depending on your client's circumstances, it may be desirable to get a credit score from each of the three major bureaus in order to evaluate / demonstrate / preserve evidence of the impact of the mortgage servicer's conduct on your client's credit. However, what is most important is getting the credit reports to determine what your client's mortgage servicer has been reporting regarding your client's payment history and loan status. For example: sometimes mortgage servicers hold borrower payments in suspense, even when they're sufficient to cover outstanding payments. When they do this, one consequence is that the unapplied payments do not appear in the payment history. In some instances, the suspense balance can include several months' payments that have not been applied. These payments would not appear on the credit report, and your client's account would therefore appear to be delinquent (or more delinquent) than it really is. Another example is where accounts of borrowers emerging from Chapter 13 are reported as discharged when the loan in question was cured and/or maintained under § 1322(b)(5) of the Code. As a result, borrowers do not get credit for making payments each month. On the other hand, sometimes mortgage servicers continue to report accounts as active and delinquent for borrowers whose loans *have* been discharged in bankruptcy, which is also undesirable, for obvious reasons.

(8) **All other written and recorded communications related to mortgage loan:** letters, faxes, emails, texts, recordings with debtor, servicer, taxing authorities, homeowners' insurer, credit denial and approval letters, door hangers, notes, etc. Especially pay histories, if available.

(9) **Document every dime spent because of the mortgage dispute: postage and mailing costs, mileage records, printing costs, parking, doctors' appointments, medical instructions, prescriptions, receipts for medications.** Many causes of action that are applicable to mortgage servicing disputes have been held to require proof of actual damages as a prerequisite to a finding of liability. It is critical to start building a damages model for the client's case from the outset. Too often, practitioners pursue litigation without evaluating and properly pleading damages claims. Lack of preparation in this area can be grounds for Rule 12(b)(6) dismissal with respect to counts that are not supported by appropriate damages allegations, but it can also be a source of significant conflict between attorneys and their clients when clients fail to



appreciate – from the beginning – that damages must be proved with evidence, and/or where attorneys fail to really appreciate the extent of the impact of the mortgage dispute on their clients’ mental health, well-being, and daily functioning.

(10) **Form 1098 Mortgage interest statements:** These statements ought to align with the payment history. Often they don’t. Sometimes, although these statements do align with the payment history, they reflect excessive or insufficient allocation of borrower funds to mortgage interest, which is a direct impact on the borrower’s tax liability, e.g. actual damages in the form of over- or under-payment of personal income taxes and the risk of penalties and interest and burden/expense of having to amend inaccurate tax returns as a result of mortgage servicers’ misapplication of payments.

(11) **Personal income taxes from last several years.**

(12) **Homeowners’ insurance policy, appraisals, valuations in insurance policy schedules:** Make sure that the client’s valuation of insured personal property is consistent with what they have asserted in their bankruptcy schedules, and make sure the property has been insured. If there have been lapses, identify when policies lapsed and were reinstated, and add them to the timeline of events for the case. Make sure the servicer has been listed as a named insured at all times. Evaluate whether the cost of insurance policies has been affected by negative credit reporting by the mortgage servicer.

(13) **Prior and current bankruptcy documents:** including plan, schedules, agreed orders, mortgage proof of claim, and trustee payment records from prior cases. Cross-reference these documents with mortgage loan payment histories, monthly mortgage statements, annual escrow analyses and the borrowers’ payment records.

(14) **Limited authorization from client to communicate directly with mortgage servicer:** with specific instruction for the servicer to continue sending monthly mortgage statements directly to borrower (copies to counsel are ok, but borrower needs to keep getting statements).

(15) **Signed litigation-specific representation agreement with retainer (to the extent getting a retainer is not prohibited by the Code & Rules):** The reality of this area of practice is that counsel ordinarily do not accept consumer mortgage litigation cases for borrowers in or emerging from bankruptcy

in anticipation that the borrower will be a traditional paying client. Occasionally cases like that will come along, but they are very rare. However, it is important for consumer clients to understand and appreciate that this type of litigation is not free and that it is not (generally) the type of work that can be done on a contingency or flat fee basis, as the amount of quantifiable harm involved is frequently dwarfed by the amount of time and effort (and thus fees and costs) required of counsel to get the client's mortgage problem(s) solved. Where possible and appropriate (pre-petition, post-discharge, but not during an active Chapter 13 case, unless you get court approval), counsel should obtain a modest cash retainer for pre-litigation work, including efforts to resolve the matter without the need for litigation. If counsel is able to fix the problem without litigation, then clients are generally pleased and will not (and should not) regret paying a modest fee, and if the mortgage servicer fails to correct its errors, fees the client paid to counsel for attempting to resolve the matter without litigation constitute actual damages, which should be pled and are generally recoverable under the most common consumer causes of action, which are discussed briefly below. For a borrower in an active Chapter 13 case, as an alternative to a cash retainer, file a fee application after performing your initial investigation into the issue with the mortgage servicer and obtain a court order allowing your fees, which establishes additional actual damages.

b) Documents to get from lender/servicer:

- (1) **Note and Deed of Trust and other loan closing documents:** The servicer's copy may look different than the borrower's copy. The Note frequently will contain one or more indorsements negotiating the instrument from the loan originator to another entity or in blank. Sometimes the signatures on the documents are not the same. The loan documents in the servicer's collateral file may include one or more assignment documents purporting to convey the loan to one or more other parties. The servicer may have closing statements, riders and other agreements that are incorporated into the loan terms or other insurance-related documentation that can be useful in understanding your client's issues and the servicer's perspective.
- (2) **All modifications offered, applied-for, proposed, accepted, rejected, and all related correspondence both from borrower and from servicer.**

(3) **Payoff quote:** It is useful to obtain a payoff quote *pre-petition* whenever possible. Under Reg. Z, 12 C.F.R. § 1026.36(c)(3), servicers are required to provide a payoff statement within seven business days of a request by the borrower or the borrower's authorized agent. This timing requirement is less rigid for borrowers in bankruptcy, in which case, the payoff statement must be provided "within a reasonable time." *Id.* Nevertheless, it is worthwhile to obtain a payoff statement both before and after the petition date, before the proof of claim is filed. Similarly, periodic requests for payoff statements during the life of a Chapter 13 case can provide additional information regarding the servicer's performance while the borrower is in bankruptcy. NOTE: Sometimes, servicers provide payoff quotes to borrowers that exclude fees and charges that have been added to the account, only to provide "updated" payoff quotes at the time of sale/closing that include these additional amounts. Similarly, in the proof of claim context in Chapter 13 bankruptcy, sometimes servicers will include fees and charges that were not disclosed to the borrower in a pre-petition (or post-petition) payoff quote.

(4) **Reinstatement quote:** A reinstatement quote, especially if obtained immediately pre-petition, provides useful information about the amount the debtor should expect the servicer's proof of claim to seek, and it can be helpful in formulating a Chapter 13 plan. NOTE: Sometimes, servicers' proofs of claims do not match the amount included in the reinstatement quote. It is often worthwhile to find out what is causing the discrepancy, especially when the reinstatement quote is lower than the claim amount.

(5) **"Life of loan" transaction history directly from servicing system of record:** This is the "raw data." Every mortgage servicer has a system of record – a program that pulls data from a database in a readable (readable - with practice) format regarding the loans it services. These programs all have the capability of producing loan transaction histories for the loans being serviced, but most do not have the ability to pull entire loan histories going back more than a few years. Instead, servicers archive loan histories on a year-by-year basis in a format that can be easily reproduced, assuming the loan has been serviced by the same loan servicer from inception. In many cases, however, loan servicing has been transferred one or more times since origination. Where servicing has been transferred between servicers that use different servicing systems, all of the loan's historical data may not be updated into the new servicer's system of

record. In these cases, most servicers will at least retain screen shots or other imaged data reflecting the prior servicer's records for the loan going back to origination, but this is not a certainty. Counsel for borrowers should be especially alert with respect to situations in which servicing rights are transferred with respect to loans in default status. Frequently these loans will have accrued fees and charges prior to the servicing transfer, and sometimes servicers will use borrower funds to recover advances made on borrowers' loans before handing off servicing rights. Similarly, in some cases, servicers obtain portfolios of loans that appear to include "recoverable advances" for fees and other charges assessed to the loan prior to the servicing transfer. Sometimes, these transferred "recoverable" fees and charges were incurred during the borrower's Chapter 13 bankruptcy, although no Rule 3002.1 notice of post-petition fees and charges was filed to disclose them. Life of loan transaction histories directly from the current and previous servicers' systems of record offer a reliable way to identify such fees and charges.

(6) **Manual spreadsheet transaction history:** Mortgage servicers frequently produce a printout of a spreadsheet in .xls (Excel) format containing various columns and rows for transactions on a borrower's loan. These transaction histories are worth requesting because they represent a statement by the mortgage servicer regarding its perception of the status of the mortgage loan and how the borrowers' payments have been applied. However, these spreadsheets take many forms, with servicers having the ability to control and limit the amount of information available, and they are therefore frequently less useful than they appear. The principal utility of these spreadsheets is their ease of use. However, they should be cross-checked against the servicing system of record, as they are manually created and often omit critical data or otherwise contain errors/"errors."

(7) **Servicing notes from date of last uncured default to date of response:** Frequently servicers will claim that these notes are confidential and/or proprietary. They are neither. They are notes by the servicer's personnel that track any processes that the servicer undertakes with respect to loan servicing. To be fair, sometimes these notes will contain communications or records of communications between servicer personnel and their attorneys, and those are appropriately characterized as privileged attorney-client

communications, which servicers are entitled to redact. Otherwise, these notes should not be withheld by servicers (though they frequently are – at first).

(8) **Statement of all recoverable fees and charges due and owing on the loan and statement of all non-recoverable fees and charges assessed to the loan:** Generally speaking, servicers classify amounts charged to mortgage loans in one of four categories: fees, recoverable corporate advances, non-recoverable corporate advances, and third-party recoverable corporate advances. Fees and recoverable corporate advances are amounts that the servicer considers the borrower’s responsibility under the terms of the note and deed of trust. Non-recoverable corporate advances are amounts the servicer has incurred in connection with the servicing of the loan that the servicer has determined cannot be recovered from an outside source. Third-party recoverable fees and charges are amounts the servicer has incurred that it believes it can recoup, ordinarily from the trust or owner of the loan under the terms of the servicing agreement. NOTE: Servicers have the ability to change the classification of fees and charges from recoverable to non-recoverable and vice-versa. Sometimes, fees are reclassified after servicing transfers and prior to closing / payoff. Practitioners should be alert to these practices and request statements of fees and charges, as well as detailed payoff statements and reinstatement quotes that include all amounts the servicer considers due and owing on the loan. In the event the servicer later seeks to recover previously non-recoverable amounts, the servicer’s prior representations about the amounts and classification of such corporate advances can be used to encourage servicers to reconsider whether such amounts can be obtained from the borrower.

c) Documents to get from third parties:

- (1) **Property tax information:** Property tax information can be found online through services like DCAD.org (Dallas County Central Appraisal District) and the Dallas County Tax Office Website: [http://216.110.79.98/act\\_webdev/dallas/index.jsp](http://216.110.79.98/act_webdev/dallas/index.jsp)
- (2) **Claims register and all other applicable BK information not produced by client**
- (3) **Hazard insurance information from insurer**
- (4) **Appraisals**
- (5) **Loan amortization table**

- (6) **Servicer’s financial information from SEC’s Edgar website**
- (7) **Loan owner’s loan modification parameters from filings on SEC website**
- (8) **Credit reporting records:** UDFs (Universal Data Form) and ACDVs (Automated Consumer Dispute Verification forms) – these are the records the servicer uses to “furnish” information to the credit reporting agencies (UDFs) and to respond to borrowers’ disputes (ACDVs) about their credit reporting.

#### **4) How to get the stuff**

a) **Request new credit reports:** [www.annualcreditreport.com](http://www.annualcreditreport.com) is the government-authorized website for free annual reports from the three major credit reporting agencies. NOTE: if you pull the credit reports online, you are consenting to arbitration of claims with the credit reporting agencies. So, if you think your client may have claims against the credit reporting agencies, and you would prefer not to have them resolved in arbitration, send your requests in writing. The [www.annualcreditreport.com](http://www.annualcreditreport.com) website has forms and instructions available for sending credit report requests by mail.

b) **Send RESPA Requests for Information (RFIs)**

i) The Real Estate Settlement Procedures Act authorizes borrowers and their representatives to request information regarding the servicing of the mortgage loan, 12 U.S.C. § 2605(e), Reg. X, Subpart C 12 C.F.R. § 1024.35 (includes a private right of action in the event the servicer fails to comply, which authorizes actual damages and attorneys’ fees, as well as \$2,000 per violation if borrower can demonstrate a pattern and practice of non-compliance. 12 U.S.C. § 2605(f) and § 2614.).

ii) Be sure to send to servicer’s designated address for RESPA correspondence. NOTE: At least one servicer has recently been providing borrowers with information in their correspondence that misleadingly indicates that the Texas Department of Savings and Mortgage Lending is the appropriate address for sending RESPA request for information (RFI) correspondence to the servicer.

- iii) It is a good practice to send separate letters for each general issue that is the subject of information requests, with an explanation for why the particular information is being requested. By keeping the requests focused on specific issues and explaining the reason(s) for the request, servicers are more likely to respond meaningfully and/or will have fewer excuses in the event they fail to comply. Assume that the letter could eventually be read by the judge and/or jury, so make it understandable and reasonable.
- iv) Many form “templates” for over-reaching requests for information letters have proliferated on the internet, and they have been used by a substantial number of pro se litigants and a handful of less than entirely reputable “foreclosure defense” attorneys with little or no success. Don’t do that. Know what you want, know why you want it, and explain it to the servicer in your RFI.
- v) Always attach appropriate client authorization.
- c) **Informal requests to bankruptcy counsel for mortgage servicer:** One of the benefits of our consumer bar in the Northern District of Texas is that we generally get along well with one another, so we can reach out to our colleagues who represent our adversaries and try to work things out informally. So, it can’t hurt to ask for pay histories and servicing notes and escrow analyses, loan modification waterfall reports, receipts and invoices for fees and charges, etc. NOTE: when your friendly colleague representing a mortgage servicer starts pushing back on getting you information, it may be an indicator that it is time to explore more direct methods.
- d) **Rule 2004 Examination:** One such more direct method is requesting an examination pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure. Note that a Rule 2004 Examination is not permitted in connection with contested matters – so if you have an active claim objection, a contested motion for relief from stay, or a mortgage creditor is objecting to confirmation of your plan, Rule 2004 is not an option; you have to press forward with traditional formal discovery. So, what this means is that one should consider early in a Chapter 13 case whether to pursue a Rule 2004 Examination. Rule 2004 Exams are often compared to depositions, except that Rule 2004 Exams are considered to be much more wide-ranging in scope, as they can explore

virtually any matter that can affect the administration of the estate. In the Northern District of Texas, the Local Rules require that Rule 2004 Examinations be authorized by motion and order of the Bankruptcy Court, and a prior meet-and-confer with opposing counsel is required in advance of filing the motion.

e) **Formal and/or informal discovery in connection with motions for relief from stay, objections to confirmation, objections to claims:** Sample Interrogatories, Requests for Production, and Requests for Admissions for mortgage servicing litigation are attached.

f) **Motion to compel production:** After requests for information and notices of error have not resulted in progress on understanding or resolving your client's issues, after informal document and information requests with local counsel for the mortgage servicer has failed to generate the information you require, and after your formal discovery has been formally rejected by the mortgage servicer, it may be necessary and appropriate to seek judicial intervention. Motions to compel are discouraged. Most judges do not like them. Try to work out your differences with opposing counsel. You must meet-and-confer with opposing counsel in good faith before filing a motion to compel. That means literally going over every disputed request and response with opposing counsel, even if you know what they're going to say about your requests. Once you've established that the other side is not producing what you're seeking, then it is appropriate to file a motion to compel. However: come to the hearing prepared to explain why you need what you're requesting, how it relates to you claims and/or defenses, and why you cannot get the information you are requesting through other means.

g) **Send complaints to governmental agencies:**

**Texas:**

The Department of Savings and Mortgage Lending  
2601 North Lamar Blvd  
Suite 201  
Austin, TX 78705

**Federal:**

Consumer Financial Protection Bureau: <https://www.consumerfinance.gov/complaint/>



## 5) Try to resolve the issue informally

- a) Dispute first / FCRA?
- b) Have client call. Recording? Notes?
- c) Send RESPA Notice of Error 12 U.S.C. § 2605(e), Reg. X, Subpart C 12 C.F.R. § 1024.36
  - i) Send to servicer's designated address for RESPA correspondence/NOEs
  - ii) Separate letters for each error: helps isolate servicer's efforts to address with regard to a discrete, particular error
  - iii) Attach supporting documents and explain them in the letter: you want the problem solved ASAP, as it is causing your client to incur legal expenses and to become increasingly impacted the longer the issue remains unresolved
- d) Send informal notice to bankruptcy counsel for mortgage servicer
- e) Send appropriate disputes to credit reporting agencies
- f) Resolve in connection with §362 motion for relief from stay
- g) Resolve in connection with confirmation order
- h) Resolve in connection with proof of claim allowance

## 6) Bankruptcy Cases Authorizing Damages for Creditor Misconduct

*In re Marino*, 577 B.R. 772 (9<sup>th</sup> Cir. BAP Dec. 22, 2017)(Upholding bankruptcy court's judgement against mortgage servicer (Ocwen) awarding damages of \$1,000 per communication in violation of the discharge injunction).

*In re Sundquist*, 566 B.R. 563 (Bankr. E.D. Ca. 2017)(Awarding \$45,000,000 in punitive damages against mortgage servicer for egregious violations of the automatic stay).

*In re Charity*, 2017 WL 3580173 (Bankr. E.D. Va. 2017)(Awarding punitive damages of \$100,000 per debtor against sophisticated creditor who systematically violated automatic stay).

*In re Rhodes*, 563 B.R. 380 (Bankr. M.D. Florida 2017)(Awarding damages of \$25,000 plus \$250 per month after entry of order violated by mortgage servicer (Nationstar)).

*In re Sinclair*, 2017 WL 5952160 (Bankr. E.D. California 2017)(Bankruptcy court awards treble damages under RICO).

*In re Mocella*, 552 B.R. 706 (Bankr. N.D. Ohio 2016)(Awarding punitive damages of \$250,000 against secured creditor for filing false transfer of proof of claim).

*In re Fauser*, 545 B.R. 907 (Bankr. S.D. Tex. 2016)(Awarding damages of \$500 per violation for violations of discharge injunction by mortgage servicer (Green Tree)).

*In re Bruner-Halteman*, 2016 WL 1427085 (Bankr. N.D. Tex. 2016)(Awarding damages of \$2,000 per instance for creditor's 37 violations of automatic stay by garnishing post-petition wages).

*In re Biery*, 534 B.R. 267 (Bankr. E.D. Kentucky 2015) (Certifying class of discharged debtors that sought to award damages to class members on a per-instance basis).

*In re Hebner*, 2015 WL 128137 (Bankr. D. Neb. 2015)(Sanctioning Wells Fargo \$10,000 for violation of discharge injunction).

*In re Bourke*, 534 B.R. 657 (Bankr. D. Montana 2015)(Awarding damages of \$200-500 per letter for violations of automatic stay).

*In re Diaz*, 526 B.R. 685 (Bankr. S.D. Tex. 2015)(Awarding sanctions of \$500-1500 per communication with debtor in violation of discharge injunction).

*In re Brannan*, 485 B.R. 443 (Bankr. S.D. Alabama 2013)(Certifying class action against Wells Fargo based on alleged practice of filing false affidavits in Bankruptcy).

*In re Jones*, 2012 WL 115715 (Bankr. E.D. Louisiana 2012)(Awarding more than \$3 million in punitive damages against Wells Fargo for conduct that constitutes abuse of the bankruptcy process).

*In re Adams*, 2010 WL 2721205 (Bankr. E.D. N.C. 2010)(Awarding damages against mortgage servicer (Ocwen) in the amount of \$100 per day after consumer's filing of motion to show cause through date of entry of Court's order on motion to show cause).

*In re Coats*, 435 B.R. 915 (Bankr. E.D. N.C. 2010)(Fraudulent conduct that violates requirements of the Bankruptcy Code and thwarts administration of bankruptcy process warranted \$10,000 in punitive damages).

*In re White*, 410 B.R. 322 (Bankr. M.D. Florida 2009)(Awarding damages of \$100 per violation for violations of the automatic stay) .

*In re Wassem*, 456 B.R. 566 (Bankr. M.D. Florida 2009) (Awarding damages of \$100 per-call for violations of discharge injunction).

*In re Mounce*, 390 B.R. 233 (Bankr. W.D. Tex. 2008)(Certifying state-wide class against Wells Fargo alleging that Wells Fargo charged excessive attorneys' fees for motions filed in bankruptcy court).

*In re Stewart*, 391 B.R. 327 (Bankr. E.D. Louisiana 2008)(Awarding \$2500-10,000 per-instance sanctions for abuse of the bankruptcy process against Wells Fargo).

*In re Haque*, 395 B.R. 799 (Bankr. S.D. Florida 2008)(Awarding over \$2,000 per instance of creditor's filing of false affidavits that included charges borrowers did not owe).

*In re Ulmer*, 363 B.R. 777 (Bankr. D. S.C. 2007)(Awarding sanctions of \$500 per instance of creditor's filing of false affidavits).

*In re Workman*, 392 B.R. 189 (Bankr. D. S.C. 2007)(Awarding sanctions of \$100 per day for every day after entry of prior order that was violated by creditor's subsequent conduct).

*In re Hildreth*, 357 B.R. 650 (Bankr. M.D. Alabama 2006)(Awarding damages of \$100 per call and \$1,000 per letter against mortgage servicer for violations of automatic stay, and doubling this amount as additional punitive damages).

*In re Bivens*, 324 BR. 39 (Bankr. N.D. Ohio 2004)(Awarding \$1,000 in punitive damages against mortgage servicer for single violation of automatic stay, despite the fact that the mortgage servicer took immediate remedial action upon receiving notice of violation).

*Slick v. Norwest Mortgage, Inc.*, 2002 Bankr. Lexis 772 (Bankr. S.D. Ala. 2002) (In class case v. Wells Fargo, issuing injunction, ordering refunds and disgorgement, and awarding \$2,000,000 in punitive damages).

*In re Riddick*, 231 B.R. 265 (Bankr. N.D. Ohio 1999)(Awarding damages of \$500 per violation for creditor's violations of the automatic stay).

*In re Lafferty*, 229 B.R. 707 (Bankr. N.D. Ohio 1998)(Awarding damages of \$1,000 per instance against creditor and its collector for violation of discharge injunction).

## **7) Fact patterns to watch for / Cases to avoid**

### **a) Fact patterns to identify**

- (1) 3002.1 Payment Change Notice / Notice of Post-Petition Fees and Charges issues
- (2) Escrow issues.
  - (a) Turning non-escrowed accounts into escrowed ones and vice-versa.
  - (b) Escrow double-dips – pre-petition shortage included in post-petition monthly mortgage payment.
  - (c) Charging for insurance that is not actually purchased.
  - (d) Cancelling escrow for property taxes without prior notice.
  - (e) Suspicious escrow refunds
- (3) Violations of Tex. Const. Art XVI 50(a)(6) home equity lending requirements.
- (4) Prior discharge/discharge violations.
- (5) Reporting current loans as discharged post-Ch13.
- (6) Mailing notices later than the notices are actually dated.
- (7) Changing the due date.

- (8) Credit reporting errors.
- (9) Loan modification bugaloo.
- (10) Payment misapplication.
- (11) Holding funds in a suspense account that are sufficient to pay one or more contractual payment, reporting to credit bureaus that loan is delinquent (or more delinquent) than it should be, as a result of servicer's failure to credit the account
- (12) Crediting multiple payments from funds held in suspense account and reporting to the credit bureaus as one large payment, even though funds were paid timely by the borrowers.
- (13) Crediting payments in amounts that differ from the amounts provided in annual escrow statements.
- (14) Failure to comply with final cure order / deem current order.
- (15) Servicing transfers, especially when client was in default and especially when prior and current servicers did not use the same servicing system of record
  - (a) Failure to recognize modification with prior servicers.
  - (b) Attempted collection of prior servicer's fees not disclosed pursuant to 3002.1.
- (16) Force-placed insurance policy.
- (17) Motion for Relief from Automatic Stay in conduit jurisdictions – administrative delay.
- (18) Proof of Claim issues.
- (19) “Stealth” modifications during bankruptcy – attempting to put borrowers into mortgage loan modifications that they did not request or know about.
- (20) Misleading and inaccurate billing statements.
- (21) Escrow refunds.
- (22) Dual-tracking.
- (23) Retaining insurance intended for repairs.

(24) Threatening to lift the stay if borrower does not accept unfavorable loan modification terms, even where borrower is not actually delinquent post-petition.

**b) Cases to avoid**

- (1) Unreasonable expectations.
- (2) Frequent flyers in mortgage litigation, especially prior pro se dabbling.
- (3) Conspiracy theorists / internet chat board aficionados.
- (4) Do they have a “mortgage fraud audit”?
- (5) Even if you get them a current loan, will they ever really be able to pay?  
(Financially hopeless)
- (6) Fired previous counsel.
- (7) Previously litigious, especially if previously successful in consumer or personal injury litigation.
- (8) Show me the note/mortgage securitization results in lien avoidance theories.