Home Foreclosure Defense Strategies – and What Happens to Mortgage Debts After Bankruptcy Discharge?

In law, things are not always what one might think they should be.

Foxboro Consulting Group, Inc. (FCGI) has had successes, and has made significant headway over the last eighteen (18) months averting home foreclosure of our client's homes, as well as stopping an attempted auction of our clients' homes located in Massachusetts and Indiana.

One of our clients was faced with a home auction scheduled for Friday, January 13, 2017 (of all dates – Friday the 13th), and possible subsequent eviction from their home, and FCGI got involved literally two (2) weeks before the scheduled auction date, and FCGI was able to stop the auction by submitting to the pretender lender (aka the "interloper") a "Qualified Written Request" (QWR) for mortgage related information, for which the pretender lender was required to respond prior to any house auction. In this particular case, the house auction was stopped dead in its tracks, and was subsequently cancelled entirely. It is now Thursday, August 31, 2017 and our client remains in their home.

Another one of our clients was being intimidated, threatened with home foreclosure, lied to, harassed, as well as psychologically terrorized by a so-called pretender lender.

After getting involved, Foxboro Consulting Group, Inc. was able to deploy our forensic foreclosure defense weapons & tools, and we were able to determine the following:

1. The pretender lender was not a "**Real Party of Interest**",

2. The pretender lender had "**no standing**" to enforce the promissory note, backed by the mortgage loan agreement (judicial state)/ or deed of trust (judicial states),

3. The pretender lender did not have possession of the **original/ genuine** "**wet ink**" promissory note, they were not a "**holder**" of the note,

4. The pretender lender did not suffer any financial nor economic damages, and

5. The pretender lender had "**no cause of action**" in the foreclosure matter violating Amendment VI of the U.S. Constitution,

6. The pretender lender's evidence was comprised of fabricated, and or "**self-manufactured**" assignments of mortgage, signed by people who did not work as officers/ nor employees of the pretender lenders, as well as counterfeit endorsements done with laser printers, etched on copies of promissory notes.

7. The names of these so-called endorsers were individuals who were not officers/ nor employees of the pretender lenders, nor had any authorization to endorse neither checks nor promissory notes on behalf of the so-called lending institutions.

8. Last but not least, we found through our financial forensic work, that many of the original so-called mortgage lenders were in reality merely loan brokers, and or loan originators, working on behalf of the real source of the funds – typically Wall Street Warehouse Funds, or what are called "**Dark Pools**" ("Pools"). They did not lend any of their own money to the borrowers. Funds in these Pools were raised by "**selling forward**" Real Estate Mortgage Investment Conduit Trusts ("**REMICs**") securities/units in the stock market.

   The proceeds from this fund raising activity were then placed into these **Warehouse Funds** and **Dark Pools** for distribution to the lending institutions (via an "**Assignment & Assumption Agreement**") to be placed into home mortgages and business lines of credit agreements.

   The lending institutions did not lend any of their own money to the borrowers, because any mortgages & business lines of credit agreements that were subsequently originated, were already owned by the REMICS through the Assignment & Assumption Agreements.

   In other words, let me repeat, "**none of these so-called pretender lenders lent any of their own funds to the borrower**" - they have "**no skin in the game**." In other words, let me repeat, none of these so-called pretender lenders lent any of their own funds to the borrower.

   Now these pretender lenders want to be repaid monthly principal and interest payments, and if there is a subsequent default on payment, they want to seize the borrower's home, and kick the borrower and his family to the curb-side

through a fraudulent, counterfeit document foreclosure process. As a direct result of FCGI's efforts, our 58 year old, single mom client, remains in her home today.

To non-attorneys, it sometimes must seem like what Alice (of Wonderland fame) as "***seen through the looking glass***".

Some people might respond "***If the borrower missed monthly payments and defaulted on the mortgage loan, then they should be removed from their homes. After all, I'm making my own mortgage payments***." "What you see, and what seems is but a dream within a dream" – A Dream within a Dream by Edgar Alan Poe.

I would respond, "A borrower, according to the terms of the Mortgage Loan Agreement, which is a contract, the borrower is entitled to know that they are paying the **correct and true lender**, and that they have not been defrauded under any of the circumstances outlined in items 1-8 above. **Remember, since your pretender-lender is just a loan servicer, they do not own your promissory note,** nor do they have possession of the genuine/ original **wet ink** promissory note.

They do not have the right to enforce the promissory note, unless they have a specific **written contract** to do so, and authorized by the owner of the promissory note and mortgage loan agreement. They can only act as a servicing agent (they collect the interest and principal payments, as well as escrow real estate taxes and homeowner's insurance for periodic disbursements to municipalities, cities & towns for real estate taxes, and insurance companies for homeowner's insurance).

How May a Borrower Challenge a Foreclosure in Massachusetts?

A borrower may challenge a foreclosure proceeding in an independent action against the lender filed in the superior court, land court, or housing court, which may include a request for a preliminary injunction. [from "*28 Massachusetts Practice Series: Real Estate Law with Forms (4th ed. 2004 & Supp. 2009-2010) by William V. Hovey, Michael Pill & Darren Baird – October 22, 2010 – Chapter 10. Mortgage-Foreclosure*"]

Since Massachusetts foreclosures are non-judicial (except for the Servicemembers' Civil Relief Act filing), borrowers who seek to challenge a foreclosure must file an action seeking equitable relief in **superior court** under G.L. c. 214, § 1, **land court** under G.L. c. 185, § 1(k), or housing court under G.L. c. 185C, § 3, If the claims for relief include G.L. c. 93 A, the action must be brought in the housing court or

superior court. If the claims for relief include declaratory judgment, G.L. c. 231A, § 1 refers only to the land court and superior court. [7]

Such an action should be filed as early in the process as possible, to allow time for at least initiating discovery before one must seek a preliminary injunction to stop a mortgage foreclosure sale. Document production requests should demand production of all assignments of the mortgage and promissory note, and inspection of the "**wet ink genuine/ original promissory note**".

2(a) Foreclosing lenders must have physical possession of the "**wet ink genuine original promissory note"**. The lender may try to rely on a purported certified or attested copy of the promissory note, but the Massachusetts Uniform Commercial Code (UCC) requires that "holder" of a mortgage must also be in possession of the 'original promissory note", and therefore, is able to produce it for visual inspection.

[FN8] The Massachusetts Uniform Commercial Code (UCC) makes it clear at G.L. c. 106, § 1201(20) that a "**holder**" must be in **physical possession** of the promissory note, in these words: "'**Holder**' with respect to a negotiable instrument, means the person in possession if the instrument is **payable to bearer** or, in the case of an instrument payable to an identified person, if the identified person is in possession." This is consistent with prior Massachusetts case law. *Geffen v. Palatz,* 312 Mass. 48, 54-55, 43 N.E.2d 133,138 (1942) ("The intestate never had possession of the $40,000 note, and, consequently, is not a 'Holder' or 'Bearer' of it within the definitions contained in G.L.(Ter.Ed.) c. 107, § 18."). [8]

Consistent with the UCC definition of a holder is the UCC requirement that a valid assignment requires physical transfer of the promissory note. [9]

[FN9] The governing statutes were summarized this way in a First Circuit bankruptcy case, *In re Gavin,* 319 B.R. 27, 31 (1st Cir. B.A.P. 2004):

> Under Massachusetts law, Article 3 of the Uniform Commercial Code is used to determine questions of title to negotiable instruments. Under the U.C.C., a negotiable instrument is:
>
> > (a) [...] an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it:
> >
> > > (1) is payable to bearer or to order at the time it is issued or first comes into possession of a holder.
>
> Mass. Gen. Laws ch. 106, § 3-104. Here, the instrument is a promissory note which contains the Debtor's unconditional promise to pay $50,000 to Fleet. App. at 186. As

> such, the Note is a negotiable instrument, and any transfer of its ownership is subject to the requirements prescribed in Article 3. *See* Mass. Gen. Laws ch. 106, § 3-104.
>
> Article 3 provides that where a negotiable instrument is payable to an identified person, transfer of ownership of the instrument requires endorsement by the holder, and transfer of possession of the instrument. Mass. Gen. Laws ch. 106, § 3-201. Article 3 also provides that an instrument is "transferred" when it is delivered by the holder for the purpose of giving the recipient the right to enforce the instrument. Mass. Gen. Laws ch. 106, § 3-203(a). Proper transfer of the instrument vests in the recipient any right of the transferor to enforce the instrument, Mass. Gen. Laws ch. 106, § 3-203(b), and a transferor cannot transfer greater enforcement rights than it holds. *See id.*

2(b) There must be a **complete chain of assignments** of the promissory note.

In addition to physical possession of the original promissory note, a purported holder also must be able to produce a complete chain of assignments. Physical transfer of the promissory note must be accompanied by a proper assignment. [10] Any missing link in the chain of assignments will defeat the alleged holder's claim. [11]

[FN11] ***In re Gavin,* 319 B.R. 27, 32 (1st Cir. B.A.P. 2004)**, where the court stated the rule this way:

> Here, Premier has produced the original Note as executed with Fleet, and the assignment of the Note by Sovereign to Premier, but failed to produce any evidence of an assignment of the Note by Fleet to Sovereign. Moreover, Premier failed to produce either evidence of the **endorsements** required to establish its ownership of the Note or substitute evidence permitted under applicable state law. **To the contrary, Premier admitted at trial and at oral argument that it had no direct evidence of an assignment of the Mortgage Loan Agreement and Promissory Note from Fleet to Sovereign.** Absent such evidence, Premier has failed to establish title to the Note, and thus has no enforceable obligation against the Debtor. Without an enforceable obligation Premier has no claim, and therefore is not a creditor for purposes of Bankruptcy Rule 4007(a). Accordingly, it has no standing to bring a § 523(a)(2)(A) action against the Debtor.

2(f) **The foreclosing lender must produce a complete chain of title for assignments of the mortgage.**

This requirement is stated as follows in In Re Samuels, 415 B.R. 8, 20 (Bankruptcy. D.Mass. 2009):

> A mortgage is an interest in real property, and the statute of frauds accordingly requires that an assignment of a mortgage be in writing. Warden v. Adams, 15 Mass. 233 (1818) ("By force of our statutes regulating the transfer of real estates and for preventing frauds, no interest passes by a mere delivery of a mortgage deed, without an assignment in writing and by deed."). Deutsche Bank has adduced evidence of an agreement pursuant to which Argent agreed to transfer mortgage loans to Ameriquest, but it has adduced no writing evidencing the assignment of the Samuels Mortgage from Argent to Ameriquest.

The assignment must be by **Deed of Trust** (judicial states)/ or **mortgage loan agreement** (non-judicial states – like Massachusetts) because in a title theory state like Massachusetts, a mortgage is a deed, which conveys legal title to the property, and an assignment deed is required to convey that interest to another mortgagee. [16]

Beware of a foreclosing lender which attempts to rely on a purported assignment or series of assignments establishing anything less than a complete chain of title. For example, **if the original lender Bank A assigned the mortgage to Bank B, which in turn assigned the mortgage to Bank C, one cannot rely upon a purported assignment from A to C, skipping B**. The chain of title must be complete with each link in the chain of title documented by a separate mortgage assignment deed. [17]

Beware also of a purported "**Confirmatory Assignment**," perhaps backed by a conclusory affidavit claiming that it replaces an original document lost through inadvertence or mistake; the lender must produce supporting facts based on personal knowledge explaining specifically what happened to the original assignment deed. [18]

A blank mortgage assignment is invalid. [19] Similarly, **erasing the name of an assignee and inserting another name conveys no title.** [20]

2(g) A preliminary injunction may be needed to stop a foreclosure sale while the case is pending. If a foreclosure sale is held, borrowers will suffer irreparable harm by losing their home. As a matter of fundamental fairness, any request for an interim order to preserve the status quo by literally keeping the roof over someone's head is entitled to serious judicial consideration.

Real estate is unique; its loss cannot be compensated by turning over foreclosure sale proceeds; **this is especially true where the real estate at issue is one's own home.** [21]

Federal cases expressly hold that in the context of preliminary injunctive relief, evicting a family from their home constitutes irreparable harm. [23]

This rule has been specifically applied to mortgage foreclosure sales. [24]

The presence of such irreparable harm reduces the "likelihood of success on the merits" showing required for a preliminary in junction. Without a preliminary injunction, there is a virtual certainty of irreparable harm to borrowers faced with loss of their home. With an injunction in effect, there is no irreparable harm to the mortgage lender, who stands to lose only money. Under these circumstances, "a substantial possibility of success on the merits warrants issuing the injunction." Packaging Industries Group, Inc. v. Cheney, 380 Mass. 609, 617 n. 12, 405 N.E.2d 106, 112 n. 5 (1980). [25]

The meaning of the phrase "substantial possibility of success on the merits" is explained by a federal case cited in Packaging Industries Group, Inc. v. Cheney, supra. [26]

ONE CAN SEEK BANKRUPTCY PROTECTION AND OPPOSE THE FORECLOSING PARTY'S MOTION FOR RELIEF FROM THE AUTOMATIC STAY.

A bankruptcy filing creates an automatic stay of actions to collect debts. 11 U.S.C. 362(a). A foreclosing lender generally responds with a motion filed in the bankruptcy court seeking relief from the stay. In order to obtain relief from the automatic stay, the mortgagee must prove it has standing as the current holder of the mortgage. [27]

While a mortgage assignment need not be recorded to be valid, it must be executed prior to commencement of foreclosure proceedings; otherwise the foreclosure is invalid, and a motion for relief from the automatic stay will be denied. [28]

In a case where a motion for relief from the automatic stay was filed by a purported mortgage holder, but an assignment of the mortgage was dated "four days after the filing of the Motion for Relief," the bankruptcy court expressed concern about "lenders who, in their rush to foreclose, haphazardly fail to comply with even the most basic legal requirements of the bankruptcy system," and warned that "lenders

must take care in their haste to obtain relief from stay to ensure that the factual statements they make in their motions are true, have evidentiary support and support their claims." In re Maisel, 378 B.R. 19, 20- 22 (Bankruptcy D.Mass. 2007).

The bankruptcy court may impose sanctions (including substantial monetary fines) upon mortgage lenders and their attorneys for misrepresentations concerning the holder's identity. [29]

A borrower must demand production of complete and original Documentation for all representations made by lenders and their attorneys. A borrower simply cannot accept at face value what the lender says, even in writing in an affidavit or over an attorney's signature.

Such assertions may prove inaccurate, or may omit significant facts, or both.

A common source of confusion among my bankruptcy clients relates to what happens to secured debts that have liens against property owned by the debtor filing bankruptcy after a "**discharge of debts**" is granted.

Mortgage Debts are Dischargeable in Bankruptcy…but…..Mortgage and Other Secured Debts Will be Discharged

A while back it was discussed which debts are dischargeable in bankruptcy.

Mortgage debts, and other secured debts–such as those on vehicles–are also dischargeable in bankruptcy in most cases. This means that the obligation to pay on the underlying mortgage (or other secured) debt is extinguished if you receive a discharge in bankruptcy.

"What?" you say. "Does this mean I don't have to pay my mortgage or car payments anymore?"

You Must Keep Making Payments if You Want to Keep Your House or Other Secured Assets

Well, you don't have to pay them if you don't want to keep the asset (home, car, etc.), but if you do want to keep the asset, you must stay current with payments (and, in the case of certain vehicle lenders, you may need to enter into a reaffirmation agreement to prevent repossession). Reaffirmations remove the debt from bankruptcy and make it non-dischargeable.

A Lien is Not a Debt and a Debt is Not a Lien

The reason people get confused by this is a misunderstanding (or lack of awareness of) the difference between a debt and a lien. They are very different animals.

For example, **a mortgage is a lien which is secured by collateral** (usually the property on which the mortgage loan was given) for the amount owed on the loan (debt). Similarly with vehicles, for example: **The debt owed to the vehicle lender is usually secured by the vehicle, thereby creating a lien.**

Discharges Eliminate Debts, Not Liens

Here's the legal explanation: From a purely legal standpoint (and there's just no way to make this simpler), a bankruptcy discharge removes the ability of creditors to seek to collect against the debtor individually (known as *in personam* liability). Liens, on the other hand, are *in rem* meaning they are rights against property.

There are ways to remove certain types of liens in bankruptcy, but they are NOT automatic and are limited.

For example:

- In Chapter 11 and 13 cases, voluntary (meaning, you agreed to it) junior mortgage liens can be removed if the value of the property is less than that owed to senior liens. See more on **Consensual Mortgage Lien Avoidance**
- Judgment liens can be removed if they impair an exemption to which the debtor is entitled on the date the case is filed. See more on **Bankruptcy Judgement Lien Avoidance**

Thus, in a typical case, debts owed to mortgages and vehicles will be discharged. What this means is that in the event you stop making payments and the creditor forecloses or repossesses its collateral, or it is otherwise sold, you will owe nothing further. But as long as you remain current with required payments, you can retain use of the collateral (again with the limited exception of the vehicles listed above). So, when you understand how liens work, it makes more sense and less like the Mad Hatter himself was writing the laws.

Contributors:

Glenn F. Russell, Jr., Glenn F. Russell, Jr. & Associates, P.C. Foreclosure Defense Attorney, 38 Rock Street, Suite 12, Fall River, MA 02720; Office telephone #: **(888) 400-9318**; or on the web at **www.foreclosureinmass.com** .

Provided Content for This Article:

About the Authors: Mark Markus - What Happens to Mortgage Debts After Bankruptcy Discharge**?** *Board Certified Specialist in Bankruptcy Law:* **1-818-509-1173 Contact Mark Now!** Attorney Mark Markus has been practicing exclusively bankruptcy law in Los Angeles, California since 1991. He is a Certified Specialist in Bankruptcy Law by the State Bar of California Board of Legal Specialization, AV-Rated by martindale.com, and A+ rated by the Better Business Bureau. See Mark's web-site at : **www.bklaw.com**

28 Massachusetts Practice Series: Real Estate Law with Forms (4th ed. 2004 & Supp. 2009-2010)
by William V. Hovey, Michael Pill & Darren Baird
– October 22, 2010 – Chapter 10. Mortgage Foreclosure

Presented by **Foxboro Consulting Group, Inc.**
Office: (774) 719-2236 or Mobile: (508) 878-8390
Ronald J. Adams, CPA, CVA, ABV, CBA, BCA, CFF, FVS, CGMA can be contacted at:
E-mail: **adams.r@foxboro-consulting.com**

www.consumerdefenseprograms.com **Copyright © 2010. All Rights Reserved.**