MEMORANDUM

TO: Attorneys with consumer cases filed in the Northern District of Ohio

FROM: Pat E. Morgenstern-Clarren, Chief Bankruptcy Judge

DATE: 20 August 2014

RE: Materials Addressing Current Mortgage Issues

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The Federal Judicial Center recently sponsored a seminar for bankruptcy judges that all eight of the N.D. Ohio judges attended. I want to share with you the materials from a breakout session titled "Mortgage Issues: the View from the Industry." Moderated by the Hon. Margaret Mahoney (S.D. Ala.), the panelists were Michael Bates (Senior Counsel, Wells Fargo), John Crane (Aldridge Connors LLP), and John Rao (National Consumer Law Center). They covered a number of topics that I thought might be of interest to the bar and so, with the permission of Messrs. Bates and Rao, the materials they provided are attached. Attorneys who have faced problems with proper service in connection with motions to strip liens may be particularly interested in the article by John Rao on that issue.

These are just summaries and references. Please remember that the primary documents should always be consulted for a clear understanding of these topics.

I close with the hope that everyone will enjoy the remaining days of summer.

Federal Judicial Center – Bankruptcy Workshop
Boston, MA
August 14, 2014

National Mortgage Settlement – Bankruptcy Provisions

1. Duty of Servicer to Amend Proofs of Claim Containing Inaccurate Information

Servicer shall not file a POC in a bankruptcy proceeding which, when filed, contained materially inaccurate information. In cases in which such a POC may have been filed, Servicer shall not rely on such POC and shall (a) in active cases, at Servicer's expense, take appropriate action, consistent with state and federal law and court procedure, to substitute such POC with an amended POC as promptly as reasonably practicable (and, in any event, not more than 30 days) after acquiring actual knowledge of such material inaccuracy and provide appropriate written notice to the borrower or borrower's counsel; and (b) in other cases, at Servicer's expense, take appropriate action after acquiring actual knowledge of such material inaccuracy. *NMS 1.A.15*

2. Chapter 13 Specific Requirements

In active chapter 13 cases, Servicer shall ensure that:
a. prompt and proper application of payments is made on account of (a) pre-petition arrearage amounts and (b) postpetition payment amounts and posting thereof as of the successful consummation of the effective confirmed plan;

b. the debtor is treated as being current so long as the debtor is making payments in accordance with the terms of the then effective confirmed plan and any later effective payment change notices; and

c. as of the date of dismissal of a debtor's bankruptcy case, entry of an order granting Servicer relief from the stay, or entry of an order granting the debtor a discharge, there is a reconciliation of payments received with respect to the debtor's obligations during the case and appropriately update the Servicer's systems of record. In connection with such reconciliation, Servicer shall reflect the waiver of any fee, expense or charge pursuant to paragraphs III.B.1.c.i or III.B.1.d.

NMS I.B.11

3. Proof of Claim Requirements

Servicer shall ensure that POCs filed on behalf of Servicer are documented in accordance with the United States Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and any applicable local rule or order ("bankruptcy law"). Unless not permitted by statute or rule, Servicer shall ensure that each POC is documented by attaching:

a. The original or a duplicate of the note, including all indorsements; a copy of any mortgage or deed of trust securing the notes (including, if applicable, evidence of recordation in the applicable land records); and copies of any assignments of mortgage or deed of trust required to demonstrate the right to foreclose on the borrower's note under applicable state law (collectively, "Loan Documents"). If the note has been lost or destroyed, a lost note affidavit shall be submitted.

b. If, in addition to its principal amount, a claim includes interest, fees, expenses, or other charges incurred before the petition was filed, an itemized statement of the interest, fees, expenses, or charges shall be filed with the proof of claim (including any expenses or charges based on an escrow analysis as of the date of filing) at least in the detail specified in the current draft of Official Form B 10 (effective December 2011) ("Official Form B 10") Attachment A.

c. A statement of the amount necessary to cure any default as of the date of the petition shall be filed with the proof of claim.

d. If a security interest is claimed in property that is the debtor's principal residence, the attachment prescribed by the appropriate Official Form shall be filed with the proof of claim.

e. Servicer shall include a statement in a POC setting forth the basis for asserting that the applicable party has the right to foreclose.

f. The POC shall be signed (either by hand or by appropriate electronic signature) by the responsible person under penalty of perjury after reasonable investigation, stating that the information set forth in the POC is true and correct to the best of such responsible person's knowledge,

information, and reasonable belief, and clearly identify the responsible person's employer and position or title with the employer.

NMS I.D.1

4. Motion for Relief Requirements

Motions for Relief from Stay ("MRS"). Unless not permitted by bankruptcy law, Servicer shall ensure that each MRS in a chapter 13 proceeding is documented by attaching:

a. To the extent not previously submitted with a POC, a copy of the Loan Documents; if such documents were previously submitted with a POC, a statement to that effect. If the promissory note has been lost or destroyed, a lost note affidavit shall be submitted;

b. To the extent not previously submitted with a POC, Servicer shall include a statement in an MRS setting forth the basis for asserting that the applicable party has the right to foreclose.

c. An affidavit, sworn statement or Declaration made by Servicer or based on information provided by Servicer ("MRS affidavit" (which term includes, without limitation, any facts provided by Servicer that are included in any attachment and submitted to establish the truth of such facts) setting forth:

i. whether there has been a default in paying prepetition arrearage or post-petition amounts (an "MRS delinquency");

ii. if there has been such a default, (a) the unpaid principal balance, (b) a description of any default with respect to the pre-petition arrearage, (c) a description of any default with respect to the postpetition amount (including, if applicable, any escrow shortage), (d) the amount of the pre-petition arrearage (if applicable), (e) the post-petition payment amount , (f) for the period since the date of the first post-petition or pre-petition default that is continuing and has not been cured, the date and amount of each payment made (including escrow payments) and the application of each such payment, and (g) the amount, date and description

of each fee or charge applied to such pre-petition amount or post-petition amount since the later of the date of the petition or the preceding statement pursuant to paragraph III.B.1.a; and
iii. all amounts claimed, including a statement of the amount necessary to cure any default on or about the date of the MRS.

d. All other attachments prescribed by statute, rule, or law.

e. Servicer shall ensure that any MRS discloses the terms of any trial period or permanent loan modification plan pending at the time of filing of a MRS or whether the debtor is being evaluated for a loss mitigation option.

NMS I.D.2

5. Third-Party Provider Oversight

Servicer shall conduct periodic reviews of Third-Party Providers. These reviews shall include:

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An assessment of whether bankruptcy attorneys comply with the best practice of determining whether a borrower has made a payment curing any MRS delinquency within two business days of the scheduled hearing date of the related MRS. *NMS 2.A.6.f*

***6.* Post-Petition Fee Requirements – Chapter 13 Cases**

1. In any chapter 13 case, Servicer shall ensure that:
a. So long as the debtor is in a chapter 13 case, within 180 days after the date on which the fees, expenses, or charges are incurred, file and serve on the debtor, debtor's counsel, and the trustee a notice in a form consistent with Official Form B10 (Supplement 2) itemizing fees, expenses, or charges (1) that were incurred in connection with the claim after the bankruptcy case was filed, (2) that the holder asserts are recoverable against the debtor or against the debtor's principal residence, and (3) that the holder intends to collect from the debtor.

b. Servicer replies within time periods established under bankruptcy law to any notice that the debtor has completed all payments under the plan or otherwise paid in full the

amount required to cure any pre-petition default.

c. If the Servicer fails to provide information as required by paragraph III.B.1.a with respect to a fee, expense or charge within 180 days of the incurrence of such fee, expense, or charge, then,
i. Except for independent charges ("Independent charge") paid by the Servicer that is either (A) specifically authorized by the borrower or (B) consists of amounts advanced by Servicer in respect of taxes, homeowners association fees, liens or insurance, such fee, expense or charge shall be deemed waived and may not be collected from the borrower.
ii. In the case of an Independent charge, the court may, after notice and hearing, take either or both of the following actions:
(a) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or
(b) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

d. If the Servicer fails to provide information as required by paragraphs III.B.1.a or III.B.1.b and bankruptcy law with respect to a fee, expense or charge (other than an Independent Charge) incurred more than 45 days before the date of the reply referred to in paragraph III.B.1.b, then such fee, expense or charge shall be deemed waived and may not be collected from the borrower.

e. Servicer shall file and serve on the debtor, debtor's counsel, and the trustee a notice in a form consistent with the current draft of Official Form B10 (Supplement 1) (effective December 2011) of any change in the payment amount, including any change that results from an interest rate or escrow account adjustment, no later than 21 days before a payment in the new amount is due. Servicer shall waive and not collect any late charge or other fees imposed solely as a result of the failure of the borrower timely to make a payment attributable to the failure of Servicer to give such notice timely.

NMS *III.B*

7. Loss Mitigation Requirements Specific to Bankruptcy

1. Servicer may not deny any loss mitigation option to eligible borrowers on the basis that the borrower is a debtor in bankruptcy so long as borrower and any trustee cooperates in obtaining any appropriate approvals or consents.

2. Servicer shall, to the extent reasonable, extend trial period loan modification plans as necessary to accommodate delays in obtaining bankruptcy court approvals or receiving full remittance of debtor's trial period payments that have been made to a chapter 13 trustee. In the event of a trial period extension, the debtor must make a trial period payment for each month of the trial period, including any extension month.

3. When the debtor is in compliance with a trial period or permanent loan modification plan, Servicer will not object to confirmation of the debtor's chapter 13 plan, move to dismiss the pending bankruptcy case, or file a MRS solely on the basis that the debtor paid only the amounts due under the trial period or permanent loan modification plan, as opposed to the non-modified mortgage payments.

NMS *II.A.6.f*

Getting Proper Service on the Right Party for Lien Stripping

by John Rao
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A judgment or order stripping off a lien is only as good as the process that was used to serve the mortgage holder in the bankruptcy proceeding. In other words a lot of effort and expense may be wasted if it turns out that the order is ineffective because the wrong party was named or proper service was never made. Fortunately there are a number of inexpensive tools available to attorneys to help identify the owner of a mortgage or deed of trust. Several of these tools are derived from consumer protection statutes. A written request sent under a new regulation that went into effect on January 10, 2014 should provide the quickest and most effective method for getting this information. A sample request is provided in Part C below.

Once the proper party is identified, care must be taken to comply with the service requirements under Bankruptcy Rule 7004. Compliance with Rule 7004 is discussed in Part B below.

A. Finding the Right Party

1. Send a "Request for Information" under RESPA

The party most often known to your client is the servicer of the mortgage. This is the party that deals most regularly with the client, by requesting and accepting payments and providing mortgage and escrow statements.[1] As agent for the mortgage owner, the servicer is also the party that should have accurate information about the entity that owns and holds the mortgage. Thus, several federal statutes require the servicer to identify the mortgage owner if a proper request is made.

Sending a "qualified written request" under the Real Estate Settlement Procedures Act (RESPA) has been one method used to compel disclosure of this information from a servicer.[2] The problem with this approach, however, had been that RESPA gave servicers almost three months to comply - the servicer had 20 business days to acknowledge receipt of the request, and 60 business days to provide the information.[3] RESPA regulations that went into effect on January 10, 2014, create a new procedure for information requests and significantly reduce the response period to 10 business days for a request for the mortgage owner.

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[1] The borrower must be notified if servicing of the loan is transferred from one entity to another. 12 U.S.C. § 2605(b).
[2] 12 U.S.C. § 2605(e).
[3] 12 U.S.C. § 2605(e)(2).

A written inquiry that seeks information with respect to the borrower's mortgage loan will now be referred to as "request for information," rather than a qualified written request.[4] For most requests for information that do not seek information about the mortgage owner, a servicer will need to acknowledge the request within 5 business days of receipt, and respond within 30 business days of receipt.[5] If the borrower or borrower's agent sends a written request seeking the identity, address or other relevant contact information for the owner or assignee of a mortgage loan, the servicer must respond within 10 business days.[6] Moreover, a servicer is not permitted to extend the time period for responding to such a request by an additional 15 days, as can be done for other requests for information.

The Commentary to Regulation X instructs that a servicer complies with a request for the owner or assignee of a mortgage loan by identifying the person on whose behalf the servicer receives payments from the borrower.[7] To assist in compliance, the CFPB Commentary provides the following examples:

- A servicer services a mortgage loan that is owned by the servicer or its affiliate in portfolio. The servicer therefore receives the borrower's payments on behalf of itself or its affiliate. A servicer complies by responding to a borrower's request with the name, address, and appropriate contact information for the servicer or the affiliate, as applicable;

- A servicer services a mortgage loan that has been securitized. In general, a special purpose vehicle such as a trust is the owner or assignee of a mortgage loan in a securitization transaction, and the servicer receives the borrower's payments on behalf of the trust. If a securitization transaction is structured such that a trust is the owner or assignee of a mortgage loan and the trust is administered by an appointed trustee, a servicer complies with a borrower's request by providing the name of the trust and the name, address, and appropriate contact information for the trustee. If a mortgage loan is owned by "Mortgage Loan Trust, Series ABC-1," for which "XYZ Trust Company" is the trustee, the servicer should respond by identifying the owner as "Mortgage Loan Trust, Series ABC-1," and providing the name, address, and appropriate contact information for "XYZ Trust Company" as the trustee.[8]

With respect to investors or guarantors, such as Fannie Mae, Freddie Mac and Ginnie Mae, the Commentary further notes that although these entities might be exposed to some risk related to mortgage loans held in a trust, either in connection with their role

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[4] For a detailed discussion of the RESPA requirements for requests for information, see § 9.2.2 of NCLC's *Foreclosures* (4th ed. and 2013 Supp.).
[5] Reg. X, 12 C.F.R. § 1024.36(c) and (d) (effective Jan. 10, 2014).
[6] Reg. X, 12 C.F.R. § 1024.36(d)(2)(i)(A) (effective Jan. 10, 2014).
[7] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 36(a)-2 (effective Jan. 10, 2014).
[8] *Id.*

as an investor in securities issued by the trust or as guarantor to the trust, they are not the owners or assignees of the mortgage loans solely as a result of their roles as investors or guarantors. Rather than name Fannie Mae as the owner or assignee of a mortgage held in a securitized trust in which Fannie Mae is a guarantor but does not serve as the trustee for the trust, the Commentary would therefore suggest that the servicer should identify the trustee of the trust as the owner or assignee of the mortgage. However, the Commentary also recognizes that a party such as a guarantor may in certain circumstances assume multiple roles for a securitization transaction. For example, a mortgage loan subject to a request may be held in a trust as part of a securitization transaction in which Fannie Mae serves as trustee, master servicer, and guarantor. Because Fannie Mae is the trustee of the trust that owns the mortgage loan, a servicer complies with the regulation in responding to a borrower's request by providing the name of the trust, and the name, address, and appropriate contact information for Fannie Mae as the trustee.

A servicer that fails to comply with a request for information is subject to a cause of action for recovery of the borrower's actual damages, costs and attorney's fees, as well as statutory damages up to $2,000 in the case of a pattern and practice of noncompliance.[9]

2. Send a TILA § 1641(f)(2) Request to the Servicer

Similar to RESPA, the Truth in Lending Act contains a provision that requires the loan servicer to tell the borrower who is the actual holder of the mortgage.[10] Upon written request from the borrower, the servicer must state the name, address, and telephone number of the owner of the obligation or the master servicer of the obligation.[11]

One problem with enforcement of this provision had been the lack of a clear remedy. However, a 2009 amendment to TILA explicitly provides that violations of this disclosure requirement may be remedied by TILA's private right of action found in section 1640(a), which includes recovery of actual damages, statutory damages, costs and attorney fees.[12] Still, because section 1640(a) refers to "any creditor who fails to comply," some courts have held that there is no remedy against a servicer who fails to comply if the servicer is neither the original creditor nor an assignee. Arguments supporting the view that servicers are liable in this situation are set out in § 11.6.9.4 of NCLC's *Truth in Lending* (8th ed. and Supp.).

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[9] 12 U.S.C. § 2605(f).

[10] 15 U.S.C. § 1641(f). The provision also should require disclosure to the borrower's advocate with a properly signed release form.

[11] If the servicer provides information about the master servicer, a follow-up request should be made to the master servicer to provide the name, address, and telephone number of the owner of the obligation.

[12] *See* 15 U.S.C. § 1640(a).

Another problem with the TILA provision is that it does not specify how long the servicer has to respond to the request. To be consistent with the virtually identical requirement under RESPA, courts may conclude that a reasonable response time should not exceed 10 business days after receipt.

3. Review Transfer of Ownership Notices

TILA also requires that whenever ownership of a mortgage loan securing a consumer's principal dwelling is transferred, the creditor that is the new owner or assignee must notify the borrower in writing, within 30 days after the loan is sold or assigned, of the following information:

- the new creditor's name, address, and telephone number;
- the date of transfer;
- location where the transfer of ownership is recorded;
- the name, address, and telephone number for the agent or other party having authority to receive a rescission notice and resolve issues concerning loan payments; and
- any other relevant information regarding the new owner.[13]

This law applies to any transfers made after May 20, 2009. Attorneys should request that clients provide copies of any transfer ownership notices they have received under this law. Assuming that there has been compliance with the statute and the client has kept the notices, the attorney may be able to piece together a chain of title as to ownership of the mortgage loan (for transfers after May 20, 2009) and determine the current owner of the mortgage. Failure to comply with the disclosure requirement gives rise to a private right of action against the creditor/new owner that failed to notify the borrower.[14]

4. Check Fannie and Freddie's Web Portals

Both Fannie Mae and Freddie Mac have implemented procedures to help borrowers to determine if Fannie Mae or Freddie Mac owns their loan. Borrowers and advocates can either call a toll-free number[15] or enter a street address, unit, city, state, and ZIP code for the property location on a website set up to provide the ownership information.[16] The website information, however, may in some cases refer to Fannie Mae or Freddie Mac as "owners" when in fact their participation may have been as the

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[13] *See* 15 U.S.C. § 1641(g)(1)(A) - (E). For a detailed discussion of mortgage transfer of ownership notices, *see* § 11.2.5 of NCLC's *Foreclosures* (4th ed. and 2013 Supp.).
[14] *See* 15 U.S.C. § 1640(a).
[15] For Fannie Mae call 1-800-7FANNIE (8 a.m. to 8 p.m. EST); Freddie Mac call 1-800-FREDDIE (8 a.m. to 8 p.m. EST).
[16] Fannie Mae Loan Lookup, at https://knowyouroptions.com/loanlookup; Freddie Mac Self-Service Lookup, at https://ww3.freddiemac.com/corporate.

party that had initially purchased the loans on the secondary market and later arranged for their securitization and transfer to a trust entity which ultimately holds the loan.

5. Check the Local Registry of Deeds

Checking the local registry where deeds and assignments are recorded is another way to identify the actual owner. However, attorneys should not rely solely on the registry of deeds to identify the current holder of the obligation, as many assignments are not recorded. In fact, if the Mortgage Electronic Registration System (MERS) is named as the mortgagee, typically as "nominee" for the lender and its assigns, then assignments of the mortgage will not be recorded in the local registry of deeds. A call to MERS will not be helpful as MERS will only disclose the name of the servicer and not the owner.[17] In addition, some assignments may be solely for the administrative convenience of the servicer, in which case the servicer is the owner of the mortgage loan.

B. Complying with the Requirements under Bankruptcy Rule 7004

The first part of this article provided tips for attorneys on how to identify the proper party to name as the respondent in a bankruptcy lien stripping proceeding. Once the proper party or parties have been identified, the next step is to properly serve them with the applicable motion, adversary proceeding or chapter 13 plan, depending upon your local practice. This second part of the article will focus on getting proper servicer and complying with the requirements under Bankruptcy Rule 7004.

Rule 7004(h) requires that service of process on an insured depository institution in a contested matter or adversary proceeding be made by certified mail addressed to an officer of the institution. If the party to be served is a corporation or partnership but not an insured depository institution, service must be made pursuant to Rule 7004(b)(3), which provides that first-class mail may be used and addressed "to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service ...."

A judgment or order obtained in a contested matter or adversary proceeding may be declared invalid for failure to comply with these requirements, even if the affected party received actual notice.[18] The following are steps a debtor's attorney should take to avoid defective service issues.

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[17] The telephone number for the automated system is 888-679-6377. When calling MERS to obtain information on a loan, you must supply MERS with the MIN number, property address, or borrower's name and Social Security number. The MIN number should appear on the face of the mortgage. You may also search with this information by using MERS's on-line search tool at https://www.mers-servicerid.org/sis/index.jsp.

[18] *See, e.g.*, Jacobo v. BAC Home Loans Servicing, LP, 477 B.R. 533 (D. N.J. 2012); PNC Mortgage v. Rhiel, 2011 WL 1043949 (S.D. Ohio Mar. 18, 2011)(notice in compliance with 7004(h) is required even where the bank actually received the summons and complaint); *In re* Jackson, 2007 WL 4893519 (Bankr. N.D. Ind. Dec. 6, 2007)(actual

1. Determine if the Named Party is an Insured Depository Institution

Unlike the definition of an insured depository institution found in the Bankruptcy Code, which includes an insured credit union,[19] Bankruptcy Rule 7004(h) applies only to an insured depository institution "as defined in section 3 of the Federal Deposit Insurance Act."[20] Thus, the institution must have deposits that are insured by the FDIC under the Federal Deposit Insurance Act.

To confirm whether a party is an insured depository institution for purposes of Rule 7004(h), the attorney should use the BankFind program on the FDIC's website at http://research.fdic.gov/bankfind/. In most cases all that is needed to be entered in the program is the name of the institution. Care should be taken to enter the precise name as many financial institutions have subsidiary or affiliated corporations with similar names. For example, entering simply "Citibank" will provide 25 different insured depository institutions that use "Citibank" in some way in the corporate name. In some cases the entity that has been identified as the mortgage holder may not be an insured depository institution even though there may be other similarly named, separate entities that are insured depository institutions.

2. Obtain the Name of an Officer of the Institution

Courts have wrestled with whether the requirement in Rule 7004(h) that service should be "addressed to an officer of the institution" means that a specific officer must be named, or that service can simply be sent in care of "Officer" or a specific office like "President." Some courts suggest that it is easy to find the names of bank officers through online searches, and use that to justify requiring named officers for service of process.[21] Even courts that have acknowledged that finding names of officers may not be such an easy task may conclude that general service to an "officer" is not sufficient. For example, in *In re* Eimers,[22] despite an affidavit from the debtor's attorney that both he and his assistant had searched but were unable to find the names of officers, the court

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notice does not remedy inadequate service). *But see In re* Anderton, 2000 WL 33716970 (Bankr. D. Idaho Jan. 11, 2000)(motion to set aside default judgment denied where service was improper under Rule 7004(h), but bank actually received service and could not state how proper service would have made a difference) .

[19] 11 U.S.C. § 101(35).

[20] Fed. R. Bankr. P. 7004(h). *See also In re* Cornejo, 2010 WL 7892449 (Bankr. D. Alaska Aug. 2, 2010)(Rule 7004(h) does not apply to a federal credit union). *But see In re* Fisher, 2008 WL 4280388 (Bankr. N.D.Ala. Sep 12, 2008)(applying definition in 11 U.S.C. § 101(35)(B) and concluding that term "insured depository institution" for purposes of Rule 7004(h) includes an insured credit union).

[21] *See, e.g.*, *In re* Cornejo, 2010 WL 7892449 (Bankr. D. Alaska Aug. 2, 2010); *In re* McCumber, 2012 WL 893061 (Bankr. D. Alaska Mar. 7, 2012).

[22] 2013 WL 1739645 (Bankr. D. Alaska Apr. 23, 2013).

held that service addressed to "Bank Officer" at the proper address was inadequate because it should have been addressed to a specific office, such as "President."

In construing the similar though arguably less stringent requirement in Rule 7004(b)(3), the Ninth Circuit B.A.P. in *In re* Villar[23] held that sending notice simply to a post office box number, without specifying either a person or an office, is not sufficient.[24] Courts have also held that while service upon a registered agent may satisfy the requirements of Rule 7004(b)(3) with respect to an entity, service upon a registered agent is not service upon an "officer of the institution" for purposes of Rule 7004(h).[25] In general, most courts have required that a specific officer of the institution be named.[26]

Given the unsettled law on this issue, attorneys should attempt to serve a specific named officer of an institution. Unfortunately the BankFind search program on the FDIC's website does not provide the names of officers of insured depository institutions, and it sometimes lists addresses where officers are not located. To get this information, internet search tools and websites should be used. As with the FDIC BankFind search, it is important that the precise name of the institution be used to avoid searches directed at subsidiaries, affiliated entities or similarly named entities that are not the proper party.

The corporate website for the institution should be checked as it may list the officers and addresses, or that information may be contained in annual reports that may be available on the website. These corporate websites may also provide access to filings made by the institution with the U.S. Securities and Exchange Commission which contain the names and addresses of officers. The SEC's website also provides access to these

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[23] 317 B.R. 88 (B.A.P. 9th Cir. 2004).

[24] *See also In re* Smith, 2012 WL 8436265 (Bankr. E.D. Cal. Aug. 17, 2012)(attempted service on a post office box is insufficient); *In re* Miller, 428 B.R. 791, 794-95 (Bankr. S.D. Ohio 2010)(service sent by regular mail, not addressed to any individual, officer or department, and to varying addresses, was inadequate); *In re* Carlo, 392 B.R. 920, 921-22 (Bankr. S.D. Fla. 2008)(discussing split of authority on Rule 7007(b)(3) requirement and deciding that a named officer must be served).

[25] *E.g., In re* Stewart, 408 B.R. 215, 217-18 (Bankr. N.D. Ind. 2009).

[26] *See In re* Field, 2012 WL 1655602 (Bankr. D. Alaska May 10, 2012)(service not sent by certified mail and addressed only to "Manager or General Agent" was inadequate); *In re* Franchi, 451 B.R. 604, 607 (Bankr. S.D. Fla. 2011)(addressing service "c/o Any Officer Authorized to Accept Service" is inadequate); *In re* Stassi, 2009 WL 3785570 (Bankr. C.D. Ill. Nov. 12, 2009); *In re* Faulknor, 2005 WL 102970 (Bankr. N.D. Ga. Jan. 18, 2005)(addressing service to "Attn: President" is inadequate). *See also In re* Gambill, 477 B.R. 753, 761-62 (Bankr. E.D. Ark. 2012)(service was proper where it was addressed to a named CEO and sent by certified mail, even though the named individual was temporarily not serving as CEO, because the state public records still listed him as an officer).

filings using the EDGAR search engine.[27] Finally, information about public and private companies, including the names of corporate officers, can be obtained using the search engine on the Bloomberg BusinessWeek website.[28]

3. Determine if the Exception for Attorney Appearance is Applicable

An exception to the service requirements under Rule 7004(h) applies if there has been an appearance by an attorney for the institution. Rule 7004(h)(1) provides that if "the institution has appeared by its attorney," service may be made on the attorney by first class mail rather than upon an officer of the institution by certified mail.[29] Courts are not in agreement as to what constitutes as an "appearance" by the attorney.

In *In re* Hildreth,[30] the bank argued that an attorney retained to file a motion in a bankruptcy case had not "appeared" for the purposes of Rule 7004(h)(1). The court disagreed, saying that a formal appearance was not necessary where an attorney filed multiple motions on the bank's behalf in the case.[31] Similarly, the court in *In re* Baron[32] found that there was no need for an appearance in the subject adversary proceeding as long as the attorney had appeared at some stage in the bankruptcy case.

On the other hand, a bank in *In re* Kennedy[33] succeeded in arguing that service to an attorney was inadequate where that attorney had only appeared in the state court litigation leading up the bankruptcy, but not in the bankruptcy case itself. Most courts agree with this view that the exception does not apply if the attorney has not made some appearance in the bankruptcy case or subject proceeding, even if the attorney has represented the entity in the past in other matters.[34] Even the filing of a proof of claim and a request for special notice on behalf of the institution in the bankruptcy case by the attorney may not be sufficient to establish an appearance by the attorney for purposes of Rule 7004(h)(1).[35]

If an attorney for the institution has made some form of appearance in the bankruptcy case, notice should be provided to that attorney. In general, however, it is not advisable to rely solely upon this method of service. Without some clear statement from the attorney or the institution indicating that the institution has appeared by its attorney in

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[27] All companies are required to file registration statements, periodic reports, and other forms electronically through EDGAR. Anyone can access and download this information for free at: http://www.sec.gov/edgar.shtml.

[28] http://investing.businessweek.com/research/common/symbollookup/symbollookup.asp

[29] Fed. R. Bankr. P. 7004(h)(1).

[30] 362 B.R. 523, 525-26 (Bankr. M.D. Ala. 2007).

[31] 362 B.R. at 525-26.

[32] *In re* Baron, 2010 WL 2354341 (C.D. Cal. June 8, 2010).

[33] 403 B.R. 363, 366 (Bankr. D.S.C. 2009).

[34] *In re* Archer, 2012 WL 5205823 (Bankr. N.D. Ga. Oct. 1, 2012).

[35] *In re* Gordon, 2013 WL 1163773 (Bankr. D. Nev. Mar. 20, 2013).

the matter or proceeding and that the attorney shall accept service, it is advisable to serve the institution directly in accordance with Rule 7004.

C. Sample Request for Information under RESPA to Obtain Identity of Mortgage Owner

The form written request copied below can be used to obtain from the servicer of the debtor's mortgage information about the owner of the mortgage. This information is particularly useful in determining the proper party in foreclosure proceedings, for exercising rescission rights, for naming the proper party in bankruptcy lien strip off and claim objection proceedings, and for effectuating service of process on the mortgage owner in litigation matters.

For a detailed discussion of the RESPA requirements for requests for information, see § 9.2.2 of NCLC's *Foreclosures* (4th ed. and 2013 Supp.).

Advocates should check that the address they use in preparing the sample form is one given by the servicer for requests for information, and not assume that the address used by the client to send monthly payments is the proper designated address.[36] If the request is sent by an attorney on behalf of a client, it should include a written authorization from the client similar to that provided below.[37] Appropriate alterations based on the clients' situation must be made before sending the following sample request:

[*date*]

[*Mortgage servicer*]
[*Address*]
Attn: Borrower Inquiry Department

Re: [*Borrowers' name, address, account number*]

To Whom it May Concern:

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[36] Borrower written inquiries (including notices of error) under the RESPA must be sent to the "designated" address for receipt and processing of such inquiries, if the servicer has properly designated such an address. *See* Reg. X, 12 C.F.R. § 1024.35(c); § 9.2.2.3 of NCLC's Foreclosures (4th ed. and 2013 Supp.). The servicer's website should be checked for the designated address.

[37] A servicer is required to respond to a request for information that is sent by the borrower or the borrower's agent. 12 U.S.C. § 2605(e)(1)(A). However, a servicer may require that the borrower or agent provide documentation, such as an authorization, that the agent has authority to act on the borrower's behalf. *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 36(a)-1 (effective Jan. 10, 2014); § 9.2.2.4 of NCLC's Foreclosures (4th ed. and 2013 Supp.).

Please be advised that I represent [*borrowers*] with respect to the mortgage loan you are servicing on the property located at [*address*]. My clients have authorized me to send this request on their behalf (see Authorization below). As servicer of my client's mortgage loan, please treat this as a "request for information" pursuant to the Real Estate Settlement Procedures Act, subject to the response period set out in Regulation X, 12 C.F.R.§ 1024.36(d)(2)((i)(A), and a request under § 1641(f)(2) of the Truth in Lending Act.[38]

Please provide the following information:

1. The name of the owner or assignee of my clients' mortgage loan;

2. The address and telephone number for the owner or assignee of my clients' mortgage loan;

3. The name, position and address of an officer of the entity that is the owner or assignee of my clients' mortgage loan;[39] and

4. Any other relevant contact information for the owner or assignee of my clients' mortgage loan.

Thank you for taking the time to respond to this request.

Very truly yours,

_____

[*attorney*]

Authorization to Release Information

To: [*servicer*]
Re: Borrowers: [*name of borrowers*]

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[38] A similar right exists under TILA. *See* 15 U.S.C. § 1641(f)(2); National Consumer Law Center, Truth in Lending § 5.15.11 (8th ed. 2012 and Supp.). The primary advantage to sending a RESPA information request over a TILA request is the fixed ten business day response period, whereas no specific deadline is provided under TILA or Regulation Z. Both provisions are privately enforceable, though the availability of statutory damages is subject to different requirements under the RESPA and TILA remedy provisions. For statutory damages under TILA, the borrower does not need to prove a pattern and practice of noncompliance by the servicer. See NCLC, Truth in Lending § 5.15.11.4 (8th ed. 2012 and Supp.).

[39] For bankruptcy purposes, this information is useful for complying with Bankruptcy Rule 7004(h).

Account No: [account no.]
Property Address: [*address*]

We are represented by the law office of [*name of firm*] and attorney [*name of attorney*] concerning the mortgage on our home located at [*address*]. We hereby authorize you to release any and all information concerning our mortgage loan account to the law office of [*name of firm*] and attorney [*name of attorney*] at their request. We also authorize you to discuss our case with the law office of [*name of firm*] and attorney [*name of attorney*].

Thank you for your cooperation.

Very truly yours,

_____
[*debtor 1*]

_____
[*debtor 2*]

Bankruptcy Provisions of HAMP Handbook

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The following are the bankruptcy provisions of the Making Home Affordable Program: Handbook for Servicers of Non-GSE Mortgages v. 4.4 (Mar. 3, 2014), which is available at: https://www.hmpadmin.com/portal/programs/guidance.jsp

1. Eligibility

Chapter II, Section 1.2 provides:

Borrowers in active Chapter 7 or Chapter 13 bankruptcy cases are eligible for HAMP at the servicer's discretion in accordance with investor guidelines, but servicers are not required to solicit these borrowers proactively for HAMP. Notwithstanding the foregoing, such borrowers must be considered for HAMP if the borrower, borrower's counsel or bankruptcy trustee submits a request to the servicer. However, if the borrower is also unemployed, the servicer must evaluate the borrower for UP, subject to any required bankruptcy court approvals, before evaluating the borrower for HAMP.

2. Prior Chapter 7 Discharge

Chapter II, Section 1.2 provides:

Borrowers who have received a Chapter 7 bankruptcy discharge in a case involving the first lien mortgage who did not reaffirm the mortgage debt under applicable law are eligible for HAMP.

Chapter II, Section 10.1 provides:

If the borrower previously received a Chapter 7 bankruptcy discharge but did not reaffirm the mortgage debt under applicable law, the following language must be inserted in Section 1 of the Trial Period Plan and Section 1 of the Agreement:

> **"I was discharged in a Chapter 7 bankruptcy proceeding subsequent to the execution of the Loan Documents. Based on this representation, Lender agrees that I will not have personal liability on the debt pursuant to this Agreement."**

3. Trial Payment Plans

Chapter II, Section 8.5 provides:

Borrowers who are currently in a TPP and subsequently file for bankruptcy may not be denied a permanent modification on the basis of the bankruptcy filing.

The servicer and its counsel must work with the borrower or borrower's counsel to obtain any court and/or trustee approvals required in accordance with local court rules and procedures. Servicers should extend the TPP as necessary to accommodate delays in obtaining court approvals or receiving a full remittance of the borrower's trial period payments when they are made to a trustee, but they are not required to extend the trial period beyond two months, resulting in a total five-month trial period. In the event of a trial period extension, the borrower shall make a trial period payment for each month of the trial period including any extension month.

4. Trial Payment Plans

Chapter II, Section 8.6 provides:

At the discretion of the servicer, borrowers in an active Chapter 13 bankruptcy who are determined to be eligible for HAMP may be converted to a permanent modification without completing a TPP if:

- The borrower makes all post-petition payments on his or her first lien mortgage loan due prior to the effective date of the Home Affordable Modification Agreement (Modification Agreement), and at least three of those payments are equal to or greater than the proposed modified payment;
- The modification is approved by the bankruptcy court, if required; and
- The TPP waiver is permitted by the applicable investor guidelines.

If payments under a bankruptcy plan are used in lieu of a trial period in accordance with these guidelines, the servicer and borrower are eligible to accrue "pay for success" and "pay for performance" incentives for the length of a standard HAMP trial period.

Servicers will report the bankruptcy in lieu of trial payments (at least three) on the trial set-up record using the Trial Plan Type Code to identify the loan as a Bankruptcy in Lieu of Trial.

When a borrower in an active Chapter 13 bankruptcy is in a trial period plan and the borrower has made post-petition payments on the first lien mortgage in the amount required by the TPP, a servicer must not object to confirmation of a borrower's Chapter 13 plan, move for relief from the automatic bankruptcy stay, or move for dismissal of the Chapter 13 case on the basis that the borrower paid only the amounts due under the trial period plan, as opposed to the non-modified mortgage payments.

5. Substitution of Evaluation Documents

Chapter II, Section 5.2 provides:

When a borrower is in an active Chapter 7 or Chapter 13 bankruptcy, the servicer may accept copies of the bankruptcy schedules and tax returns (if returns are required to be filed) in lieu of the RMA and, if applicable, Form 4506T-EZ, and may use this information to determine borrower eligibility (with the income documentation). Servicers should request the schedules and tax returns from the borrower, borrower's counsel or bankruptcy court. If the bankruptcy schedules are greater than 90 days old as of the date that such schedules are received by the servicer, the borrower must provide updated evidence of income to determine HAMP eligibility. Additionally, either directly or through counsel, borrowers must provide a completed and executed Hardship Affidavit (or RMA).