

**DRAFTING MOTIONS FOR RELIEF FROM STAY IN CHAPTER 13
CASES: ANTICIPATING DEBTOR'S CHALLENGES AND WITHSTANDING
LITIGATION**

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Drafting Motions For Relief in Chapter 13 Cases: Anticipating Debtor's Challenges and Withstanding Litigation (by Deidre Keady and John McNicholas)

Most countries build strong military machines to deter attacks by foreign enemies in the first instance and then, only if an attack materializes, to engage in battle. Likewise, attorneys for secured creditors should strive to draft pleadings that deter rather than invite litigation. A due diligence roadmap follows.

A. *Conform your pleadings to the Local Rules.* The minimum requirements for a motion for relief from stay are set forth in MLBR 4001-1. Failure to conform your pleading to the Local Rules may result in the summary denial of your motion. Translation: you or your firm will be absorbing a \$150.00 filing fee.

- Remember to include a statement as to whether or not your title examination revealed a recorded declaration of homestead by the debtor or by another equity-owner;
- Remember to list other recorded encumbrances in addition to your client's lien in order of descending priority and with an attendant dollar amount obtained either from the recorded lien itself or from the Debtor's Schedule D.

- Remember to serve the Debtor, the Debtor's attorney, the Trustee, the Tax Collector, all junior lienors, all co-obligors , all co-owners and all other parties who have requested notice under Bankr. Rule 2002.

B. *Review the History and Present Status of the Case*

1. Has a plan been filed? If not you may have established another factor to support a finding of sufficient cause under Section 362(d)(1) of the Code.
2. If a plan has been filed examine and understand the treatment proposed for your client's claim under the plan.
 - Has your client filed a timely objection to the plan and, if so, is the objection still pending?
 - Has the plan been confirmed? If so the terms of the confirmed plan are binding on both creditors and the debtor(s).
 - Has your client inadvertently made a referral the subject of which is a junior mortgage that has been stripped off in its entirety due to the lack of any equity above and beyond the total of all senior lien balances (regardless of whether or not the mortgage encumbers a multifamily dwelling or a single family residence)? *See In re Mann*, 249 B.R. 831

(B.A.P 1st Cir. 2000); *In re Peloso*, Case No. 07-16820

(Bankr.D.Mass.2008).

- Have the terms of the note and mortgage been modified pursuant to 11 U.S.C. Section 1322(b)(2) and 11 U.S.C. Section 1325(a)(5)? If so payments will no longer be made directly to your client in accordance with the provisions of the loan documents. Instead, payments will be made to the Chapter 13 Trustee who will then make disbursements to your client in accordance with the provisions of the confirmed plan. Sufficient “cause” may exist to move for relief from stay even if the loan has been modified under the terms of a confirmed plan if (a) the Debtor is delinquent in his plan payments to the Trustee; (b) the Debtor has failed to maintain post-petition real estate taxes or property insurance on the property; or (c) the Debtor has committed waste.
- Have you consulted the trustee’s website to ascertain the debtor’s payment status with the Trustee.
- In the case of Adjustable Rate Loans where the Debtor’s payment has been increased in accordance with the index specified in the Note, has the Debtor’s Schedules I and J been amended to reflect a sufficient

increase in income to accommodate the increased monthly payment amount?

C. *Does the Debtor have a pending Motion to Sell or Refinance your client's Collateral Pending Before the Court?*

- Is the sale dependent on your client's approval of a "short-sale"?
- Is the motion accompanied by a signed purchase and sale agreement?
- Has the Court entertained and allowed a motion to employ a real estate *broker*?
- Is the motion accompanied by a commitment letter from the Debtor's prospective refinancing mortgagee or by the prospective buyer's mortgagee?
- Does the Motion contain an itemization of all anticipated disbursements from the sale/refinance proceeds including all closing costs, broker's commissions, delinquent real estate taxes, condominium dues, etc.
- Does the Motion specify that your client's lien will be paid in full? *See 11 U.S.C. Section 363(f).*

D. *Debt History – Documenting Prepetition and Post-Petition Defaults*

1. Payment Histories: computer-generated history of the loan
 - often not user friendly

- transaction codes are used; CPI histories are the most common – to decipher you need a menu of transaction codes
 - useful and sometimes necessary as a primary source but generally not appropriate as a first option in motion practice
2. Payment Ledgers: Prepetition or Post-Petition Payment History is manually input on an excel spreadsheet; in most instances the information is confined to (a) date of transaction; (b) amount of the payment tendered; (c) check no. if available of the payment tendered; (c) the due date to which the payment was applied; (d) running suspense balance. The set-up will look something like this:

| Transaction Date | Amount | Check/Money Order No. | Applied To: | +/- Suspense – Suspense Balance |
|------------------|-----------|-----------------------|------------------------|---------------------------------|
| 12/5/08 | \$1500.00 | 101 | 12/1/08 (\$1478.20) | \$22.80/\$22.80 |
| 01/7/09 | \$1500.00 | 126 | 01/1/09 | \$22.80/\$45.60 |

Information fields can be expanded in appropriate instances to reflect principal/interest/escrow allocation of each payment, late charge accrual and payment; accrual of inspection fees, property valuation fees, etc.

- Payment Ledgers are much more user friendly and in most instances will expedite resolution of payment disputes with the Debtor

3. Schedule of Deposits To and Disbursements From Escrow:

Proofs of Claim, Payoff Statement and Reinstatement Calculations filed/furnished by lenders will often use the terms “escrow advance” and “escrow shortage”. Though obviously related the phrases do not refer to the same thing:

(a) Escrow Advance: refers to the total dollar amount disbursed by the lender for real estate taxes, hazard insurance and, if applicable, private mortgage insurance that as of the petition filing date or date of the payoff/reinstatement quote have not been reimbursed to the lender.

E. Escrow Shortage: refers to that portion of the Escrow Advance that will remain outstanding even after all monthly payments that were overdue as of the filing date of the petition or issuance date of the reinstatement

quote have been paid. For example, assume that the Debtor is nine (9) months delinquent on a first mortgage as of the filing date of his chapter 13 petition. His monthly payments during this nine month period were \$1500.00/mo, \$1200.00 of which represents principal and interest and \$300.00 is applied to escrow. Assume further that as of the filing date of the petition the lender has made \$3100.00 in disbursements for real estate taxes and hazard insurance premiums that has not been reimbursed to the lender. If all nine payments are paid through the plan, \$2700.00 of the total \$3100.00 escrow advance will be reimbursed to the lender. Accordingly, the proof of claim should appropriately contain a separate line item in the arrearage calculation for an “escrow shortage” of \$400.00.

F. *Loan Documentation*

1. Note: may or may not contain one or more endorsements to subsequent transferees; last endorsement may well be an endorsement in blank. Such endorsement in blank renders the Note a bearer instrument negotiable by transfer of possession alone. M.G.L. c. 106:3-205(b) and 3-109(a)(2).

2. Allonge to the Note: a separate addendum or attachment to the Note containing additional endorsements for which there may not be sufficient space on the Note itself.
3. Mortgage: this should be a copy of the mortgage as recorded with the county registry of deeds bearing the date and applicable recording information.
4. Assignments of Mortgage: a copy of each assignment tracing ownership of the note and mortgage from the original mortgagee to the party designated as the movant in the motion for relief should be annexed to the motion. There is no requirement that an assignment be recorded although recording the assignment may be preferable for a variety of reasons. *See Lamson v. Abrams*, 305 Mass. 238 (1940), and *Montague v. Dawes*, 94 Mass. 397 (1866).
5. Corporate Votes Establishing Authority of Signatory: generally not required for instrument to be binding on the subject entity if instrument is executed on behalf of such entity by a person purporting to be a president, vice president, clerk, secretary, cashier, loan representative “or other officer, agent, asset manager . . .” of such entity. M.G.L. Chapter 183, Section 54B.

6. Powers of Attorney: document evidencing authority of one entity, most often the loan servicer, to act on behalf of the holder of the note and mortgage.

7. Anatomy of Loan Securitizations: hopefully, if your other documentation is in proper order – Note, Mortgage, and complete chain of Assignments – you will not have to delve into the complexities of the securitization process, i.e., *See Judge Feeney’s decision of August 19, 2008, in the case of In re Robin Hayes, Case No. 07-13967.* If you get this far, however, here are some of the documents you may need to secure:

(a) Here is a concise summary of the securitization process as borrowed from Deutsche Bank’s *Response to Order of Show Cause* filed in the *Hayes* case:

“Securitization involves the sale of the loan by the lender to a new owner – the issuer- who then sells securities to investors. Those investors are buying ‘bonds’ that entitle them to a share of the cash paid by the borrowers on the mortgages in the pool. Another party – the trustee – holds legal title to the mortgage loans for the benefit of the pool investors. Yet another party – a servicer – collects the

payments, distributes them and pursues delinquencies when necessary.”

(b) Pooling and Servicing Agreement: a document typically consisting of several hundred pages defining the various rights and responsibilities of the various parties to the Agreement such as the “Depositer”(or “Issuer”); the Trustee (one of any number of national banks such as Deutsche Bank National Trust Company, Wells Fargo Bank, N.A., LaSalle Bank National Association, N.A.); the multiple classes or tiers of bond holders; a “Master Servicer” and one or more “Sub-Servicers”.

- (i) Where can you access the “PSA”? Most often from the loan servicer or on-line via the Securities and Exchange Commission’s on-line search engine called “Edgar”.
Edgar is not what most would classify as user-friendly.
In addition, I have found that the loan schedules are not always on file with the SEC.
- (ii) Ordering an attested copy of the PSA from the SEC is really only beneficial if the loan schedules have been filed along with the main document. Otherwise, you are

still going to be left with having to resort to extrinsic sources, an affidavit or live testimony from the pool trustee, to establish that a given loan was deposited into the pool. If the schedules have been filed with the PSA you can expect to receive a document consisting of one thousand pages or more.

(c) Mortgage Loan Purchase Agreement: the document by which the Depositor/Issuer acquires mortgage loans from the various loan “Originators” designated in the PSA. Again, this should be accompanied by the schedule of loans included in the purchase.

(d) Subsequent Mortgage Loan Purchase Agreement: “subsequent” several months or years after the inception of the PSA. Once again, the SMLPA will memorialize the purchase of this subsequent bundle of loans by the Depositor from the Originators designated in the PSA. Similar to the initial MLPA, the SMPLA will be accompanied by a schedule of loans included in the purchase.

(e) Subsequent Transfer Certificate: a document evidencing the transfer of a bundle of loans acquired by the Depositor by virtue of an SMLPA to the pool Trustee.

8. Original Collateral File:

- (a) Contents: Transmittal letter from Originator to Pool Trustee or Custodian; original Note with endorsements; any Allonge(s) to the Note; original Mortgage; one or more original assignments the last often endorsed in blank; title policy.
- (b) Retrieval: via the loan servicer and, as authorized by the loan servicer, transmitted by the Pool Trustee/Custodian to you as counsel.
- (c) Establishing Ownership (and thus “party-in-interest” status) of the Note through possession: *See In re Woodberry*, 383 B.R. 373 (Bankr.S.C. 2008)(Loan Servicer can be a party-in-interest).

G. *Documenting a Transfer of Servicing Rights*

- 1. So-called “Hello” and “Good-Bye” letters required under the Real Estate Settlement Procedures Act upon transfer of servicing.
- 2. Transfer of Claim

H. *Valuation*

1. Movant has burden of proof on issue of valuation:

“The burden of proof on a motion to lift or modify the automatic stay is a shifting one. Section 362(d)(1) requires an initial showing of cause by the movant, while Section 362(g) places the burden of proof on the debtor for all issues other than ‘the debtor’s equity in property’. 11 U.S.C. Section 362(g)(1). See 2 Collier on Bankruptcy, paragraph 362.10, at 362-76. If the movant fails to make an initial showing of cause, however, the court should deny relief without requiring any showing from the debtor that it is entitled to continued protection.” *In re Schuessler*, 2008 WL 174935, 34 (Bankr. S.D.N.Y. 2008).

I. *Obtaining Relief from The Co-Debtor Stay (11 U.S.C. Section 1301(c))*

1. If anyone other than the Debtor(s) executed either the Note or the Mortgage, or both, then you need to move for relief from the co-debtor stay under Section 1301(c) in addition to requesting relief from the automatic under Section 362(d). A sample motion requesting and a

sample order granting both forms of relief are attached to these materials.

2. Remember to serve the co-debtor with the motion for relief and all subsequent pleadings (hearing notices, stipulations, etc) in connection with the motion.
3. The co-debtor who may or may not be represented by counsel to the debtor should be a signatory to any stipulation disposing of the motion for relief. See Judge Deasy's Order of September 17, 2008, entered in the case of *In re Mark J. Houle, 07-11691-JMD (Bankr.D.NH 2008)*.

J. *Moving for In Rem Relief*

1. In rem Order issued pursuant to 11 U.S.C. Section 362(d)(4) is effective for two (2) years from date of issuance where the creditor is able to show that filing of the case was part of scheme "to delay, hinder *and (emphasis added)* defraud creditors. This Section requires an attested copy of the order to be recorded with the registry of deeds for the county in which the Property is situated.
2. It may be possible for a creditor to move for and obtain in rem relief for a lesser period without necessarily establishing a scheme to defraud

creditors. These motions necessarily require more detail than an ordinary motion for relief and might include (a) life-of-loan payment performance of the debtor on the obligation; (b) analysis of debtor's performance in prior bankruptcy cases; i.e., were plan and schedules ever filed?; were plan payments made ever made?; were post-petition mortgage payments made to your client?; did the debtor fail to appear at the 341 meeting?: were there any irregularities or inconsistencies in the Debtor's schedules?; (c) for non-escrowed loans, has the debtor failed to maintain real estate taxes or hazard insurance premiums on the Property? No one factor is likely to be dispositive. Rather, the approach will be to review the totality of the circumstances.