

**PAPERLESS PIPEDREAM?**

**Rule 9011 and Standing Issues in the E-Bankruptcy World**

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## INTRODUCTION

The technological advancements of the last decade have greatly enhanced the use of electronic information and data transmission. Electronic registration servicers such as Mortgage Electronic Registration Systems (“MERS”) promised to streamline mortgage transactions and cut costs by obviating recording requirements. All of this increased the speed at which we do business. These tools have made it easier for banks to transfer funds, buy and sell notes, create securitized mortgage pools, and more. Most of it without ever leaving a paper trail to follow. At what price does this increased efficiency and convenience come? Unfortunately, overly relying on these new tools can lead to poor recordkeeping. Add a dash of sloppy lawyering and a series of unrecorded transfers or transfers to parties outside the servicer’s system, and the problems can become unresolvable for creditors who wish to enforce their mortgages.

As more debtors are forced into filing bankruptcy because of the current economic climate, courts are taking notice of the systemic problems that poor record keeping, fast and loose dealings, and the lack of a paper trail are creating in bankruptcy settings. In the past, assuming a promissory note is both owned by the creditor who purports to own it and enforceable was likely much safer than it is today. Recently though, many debtors, trustees, and courts are increasingly demanding to see the paper trail for notes before allowing lenders to file claims, seek relief from automatic stay, or foreclose on real property. Increasingly, courts describe these failures as “gross recklessness, extraordinary incompetence, [or] systemic abuse” and offer that the behavior evidences a prioritization on the part of lawyers of

efficiency in processing requests from creditors over insuring the accuracy of such documents and averments submitted to the court.<sup>1</sup> As required by the Constitution, courts must confirm that a lender actually has standing and will benefit from the court granting the prayed for relief before the court can entertain the action. Additionally, Rule 9011 requires attorneys to make a reasonable and independent inquiry to verify the “allegations and other factual contentions” in the document have evidentiary support. Failing to document transactions such as note transfers, servicing arrangements, or negotiation adequately can complicate the standing question and leave lawyers scrambling to prove up the documents after the fact. This paper will discuss some of the issues facing bankruptcy courts in the wake of the recent real estate market crash in an effort to highlight how courts have handled these problems and discuss the potential for additional solutions.

### WHAT IS MERS?

MERS stands for Mortgage Electronic Registration Systems. The MERS website states: “MERS was created by the mortgage banking industry to streamline the mortgage process by using electronic commerce to eliminate paper.”<sup>2</sup> Additionally, “MERS acts as nominee in the county land records for the lender and servicer. Any loan registered on the MERS® System is inoculated against future assignments because MERS remains the nominal mortgagee no matter how many times servicing is traded.”<sup>3</sup> MERS registers a given loan to a particular MERS member who agrees to electronically register and track all ownership interests in MERS registered loans.<sup>4</sup> The member also agrees to appoint MERS as a nominee

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<sup>1</sup> O. Max Gardner III, *Show Me the Original Note and I Will Show You the Money*, <http://www.creditslips.org/creditslips/2009/08/show-me-the-original-note-and-i-will-show-you-themoney.html#more> (August 17, 2009).

<sup>2</sup> MERS, Inc., *About MERS*, <http://www.mersinc.org/about/index.aspx>.

<sup>3</sup> *Id.*

<sup>4</sup> *In re Mitchell*, 2009 WL 1044368 at \*\*1-2 (Bankr. D. Nev. 2009).

and to name MERS a lienholder of record for all security instruments registered in the MERS system.<sup>5</sup> When loans are conveyed between MERS members, the conveyances are tracked on the MERS system.<sup>6</sup> Through this arrangement, MERS claims that it can remain the nominee/beneficiary so long as the owners of the notes trade them within the MERS system.<sup>7</sup>

### STANDING

Standing has both constitutional and prudential (i.e. self-imposed) requirements. The real party in interest question is the prudential component of the overall standing analysis, while injury-in-fact is a constitutional requirement, and the moving party must meet both requirements before a court can grant relief from the automatic stay. In addition, a party also has standing to seek relief if it has the authority to act on behalf of an entity that has standing. Therefore, a nominee or agent will have to prove both (1) it is an agent with the authority to act on behalf of the principal, and (2) the principal has both constitutional standing and prudential standing. However, even if a party has standing in its own right, the agent or nominee must prosecute the action in the name of the real party in interest and not in its own name.

The standing requirement is “an essential and unchanging part of the case-or-controversy requirement of Article III.”<sup>8</sup> This constitutional doctrine requires that a claimant must present an actual or imminent injury that is fairly traceable to the defendant’s conduct and redressable by a favorable ruling.<sup>9</sup> The standing question is a threshold issue, required before a court may entertain a suit.<sup>10</sup> Thus, if a litigant cannot prove standing, the court has no authority to hear the case and it must dismiss the action.

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Lujan v. Defenders of Wildlife*, 504 US 555, 560 (1992).

<sup>9</sup> *Davis v. Fed. Election Commn*, 128 S.Ct. 2759 (2008).

<sup>10</sup> *Warth v. Seldin*, 422 U.S. 490, 495 (1975).

Rule 17 of the Federal Rules of Civil Procedure (“FRCP”) requires “[a]n action must be prosecuted in the name of the real party in interest.”<sup>11</sup> The purpose is to ensure the party bringing forth the action is the party who “possesses the substantive right being asserted under the applicable law.”<sup>12</sup> “The real party in interest . . . is whoever is entitled to enforce the obligation sought to be enforced.”<sup>13</sup> This reflects the fact that the federal judiciary also adheres to certain prudential principles concerning standing.<sup>14</sup> The real party in interest inquiry is one of the prudential considerations the judiciary self-imposes to limit the role of courts in democratic society.<sup>15</sup> Because FRCP 17 applies to contested matters, parties must adhere to FRCP 17 in order to seek relief from automatic stay.<sup>16</sup>

### **CONSTITUTIONAL STANDING VERSUS REAL PARTY IN INTEREST**

*In re Hwang* is a somewhat recent Chapter 7 case that highlights the differences between constitutional standing and the real party in interest question. The court in *Hwang* found itself in the rare situation where even though the movant had standing, it was not the real party in interest.<sup>17</sup> In *Hwang*, court was reconsidering its denial of IndyMac Federal Bank’s (“IndyMac Bank”) motion for relief from automatic stay.<sup>18</sup> The issue is that IndyMac Bank transferred ownership of the note to an unknown party, but never transferred possession of the note.<sup>19</sup> The court found that despite IndyMac Bank being entitled to enforce the note by virtue of the fact that it was in possession, it was not the real party in interest because it was not the owner of the note, who is ultimately entitled to payment, denying the motion.<sup>20</sup>

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<sup>11</sup> Fed. R. Civ. P. 17.

<sup>12</sup> Wright, Miller & Kane, *Federal Practice and Procedure* vol. 6A, § 1541 (available at 6A FPP § 1541) (Westlaw current through 2009 update).

<sup>13</sup> *In re Sheridan*, 2009 WL 631355 (Bankr. D. Idaho 2009).

<sup>14</sup> *Bennett v. Spear*, 520 U.S. 154, 162 (1997).

<sup>15</sup> *See, e.g., In re Village Rathskeller*, 147 B.R. 665, 668 (Bankr. S.D.N.Y. 1992).

<sup>16</sup> *In re Hwang*, 396 B.R. 757, 766 (Bankr. C.D. Cal. 2008).

<sup>17</sup> *Id.* at 757.

<sup>18</sup> *Id.* at 760.

<sup>19</sup> *Id.*

The original payee and beneficiary of the deed was Mortgageit, Inc. (“Mortgageit”).<sup>21</sup> However, Mortgageit later transferred it to IndyMac Bank.<sup>22</sup> Mortgageit was a MERS member, but MERS lost any rights when the deed passed to IndyMac Bank.<sup>23</sup> After this, IndyMac Bank sold the note to “unidentified ‘investors’ through Freddie Mac” while retaining physical possession of the note.<sup>24</sup> IndyMac Bank argued it was the authorized servicing agent for the new owner.<sup>25</sup> The court rejected this since IndyMac Bank admitted it did not know who the owner was and submitted no evidence of any such agreement.<sup>26</sup> However, the court found that IndyMac Bank was entitled to enforce the note on another ground. The promissory note in this case is a negotiable instrument; therefore, the court looked to California law stating an instrument is enforceable by the holder of the note.<sup>27</sup>

Additionally, for any instrument payable to a particular person the holder is required to both (1) be in possession of the instrument, and (2) the instrument must be payable to that person.<sup>28</sup> Here, IndyMac Bank can enforce the note because it has possession of the note which is payable to IndyMac Bank.<sup>29</sup> This is because “[a] fundamental feature of negotiable instruments is that they are transferred by delivery of possession, not by contract or assignment.”<sup>30</sup> Since IndyMac Bank never delivered the note to the new owner, the right to enforce the note never passed and IndyMac Bank remains the holder of the note, retaining the right to enforce it.<sup>31</sup>

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<sup>20</sup> *Id.* at 766-67.

<sup>21</sup> *Id.* at 760.

<sup>22</sup> *Id.* at 761.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 761-62.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 762-63.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

This was not the end of the inquiry. In order to prosecute the action in its own name, IndyMac Bank must also be the real party in interest.<sup>32</sup> This is because a party may have constitutional standing, but still not be the real party in interest (i.e. have prudential standing) if the substantive right belongs to someone else.<sup>33</sup> Here, even though the conveyance of the note to the unknown party did not transfer the right to enforce the note, it did transfer the ownership interests to the extent that the new owner is the real party in interest because it is the party ultimately entitled to the rights under the note, not IndyMac Bank.<sup>34</sup> In this case, the court could not determine the identity of the real party in interest, but the court suspects that the transferee conveyed it into a securitized trust.<sup>35</sup> If the note were securitized, the real party in interest would be the trustee of the securitized trust.<sup>36</sup> As mentioned, this finding was irrelevant to the ultimate disposition though since there was no evidence of who the transferee actually was.<sup>37</sup>

Even if IndyMac Bank had proved up its claim that it was the servicing agent for the owner of the note, it must bring the action in the real party in interest's name rather than its own name or join that party to the action to satisfy FRCP 19.<sup>38</sup> The purpose of FRCP 19 is to join "all persons whose joinder would be desirable for a just adjudication of the matter."<sup>39</sup> In this case, joinder is required because "as a practical matter [failure to join will] impair . . . the person's ability to protect the interest."<sup>40</sup> Here, adjudicating the motion without joining the

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<sup>31</sup> *Id.* at 763-65.

<sup>32</sup> *Id.* at 766.

<sup>33</sup> *Id.* at 767-68.

<sup>34</sup> *Id.* at 764-65.

<sup>35</sup> *Id.* at 767.

<sup>36</sup> *Id.* at 766.

<sup>37</sup> *Id.* at 767.

<sup>38</sup> *Id.* at 770-71.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 771.

owner jeopardizes the owner's ability to protect its interest.<sup>41</sup> Therefore, IndyMac Bank is required to join the new owner or have it ratify the action before it can proceed.<sup>42</sup> Since the court gave IndyMac Bank more than two months to join the new owner, the court ultimately denied the motion for relief from automatic stay.<sup>43</sup>

### ELECTRONIC TRANSFER AND RECORDING

The next few cases deal more specifically with issues that arise from creditors utilizing the electronic mortgage recording service, MERS. MERS often argues it is a beneficiary and thus claims it has standing in its own right to pursue a motion to seek relief from automatic stay. If a court accepts this argument, theoretically, it does not matter who actually owns the note and the MERS system can keep humming along, or so they hope. However, courts have begun scrutinizing this argument and increasingly rejecting it. They also question whether, even if a court finds MERS to be a beneficiary due to the circumstances of a particular case, the real party in interest standard would be satisfied. Whether MERS is specifically used is irrelevant; the practice of electronic mortgage transfer and recordation is what creates these issues. How the creditor's attorneys handle the issues when called upon to file the motion for relief from stay has also compounded this problem and frustrated debtor's attorneys as well as courts. Crafty lawyering will not help most clients who are unable to prove standing and it just might earn the lawyer an admonition or even sanctions from a judge who is unlikely to appreciate the mental gymnastics required to rationalize such creative lawyering into compliance with Rule 9011.

The case of *In re Jacobson* is a prime example of how this reckless behavior can lead

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 772.

to a creditor having to wait until completion of the bankruptcy process before being able to proceed with foreclosure. The creditor must also then hope that the state court will be more forgiving in its evaluation of whether the creditor can proceed with foreclosure. The court here denied the motion for relief from automatic stay because the moving party, UBS AG, could not show it had standing or authority to act for anyone that does.<sup>44</sup> To the court's apparent chagrin, UBS AG attempts to prove up their ownership of the note by putting forth a conclusory affidavit from a "bankruptcy specialist" claiming to have seen the documents evidencing UBS AG's ownership.<sup>45</sup> UBS AG purported to represent ACT Properties, LLC ("ACT") as servicer of the note.<sup>46</sup> The court cited *Hwang*, noting that even if the moving party is the noteholder's agent, it does not make the agent a real party in interest.<sup>47</sup> Thus, the requirement to litigate in the name of the real party in interest remains unmet.<sup>48</sup> In order to have standing to prosecute the motion in the name of the real party in interest, UBS AG must show it has authority to act on the noteholder's behalf.<sup>49</sup> Since UBS AG made no such showing and it was not the real party in interest, the court denied the motion.<sup>50</sup>

Execution of the original note was on behalf of Castle Point Mortgage ("Castle Point") and listed MERS as a beneficiary "solely as nominee for lender and lender's successors and assigns."<sup>51</sup> Castle Point later sold the note to ACT in an unrecorded transaction.<sup>52</sup> However, UBS AG admits the note is currently in the possession of Wells Fargo.<sup>53</sup> This leads the court to question, as the court in *Hwang* did, whether ACT itself would even qualify as the holder

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<sup>44</sup> *In re Jacobson*, 402 B.R. 359, 369 (Bankr. W.D. Wash. 2009).

<sup>45</sup> *Id.* at 368-69.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 366.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 367.

<sup>50</sup> *Id.* at 770.

<sup>51</sup> *Id.* at 362.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 363.

given that someone endorsed it in blank and it is in the possession of another.<sup>54</sup> Thus, the court speculates that Wells Fargo might be the holder of the note rather than ACT.<sup>55</sup>

As both an admonition and suggestion to MERS, Judge Brandt instructs that it is possible to prove the identity of the various holders and servicers by putting forth evidence and that some courts require such evidence to be admissible before considering it.<sup>56</sup> The evidence put forth by UBS AG did not meet any standards of admissibility, however the court still comments on its ineffectiveness.<sup>57</sup> UBS AG submitted a conclusory declaration by a “bankruptcy specialist” stating he is a custodian of the records, knows them to be a true copy of the originals made at the time of the events in the ordinary course of business.<sup>58</sup> Although no business records were submitted, the court opines that the “bare assertion that one works for the company and is familiar with its recordkeeping procedures is not sufficient . . . to establish the person is sufficiently knowledgeable about the subject of the testimony.”<sup>59</sup> The testimony needs to express information warranting the conclusion that the records presented are what they purport to be.<sup>60</sup>

Unlike *Hwang*, the movant here is not asserting it is the holder of the note, rather it is saying it is the servicer of the note acting on behalf of the holder.<sup>61</sup> In addition, neither UBS AG nor ACT has actual possession of the note and thus neither appears to have any right to enforce it.<sup>62</sup> While establishing that UBS AG is the agent rather than the noteholder seems like it might be an easier standard to meet, it must still show it is the agent of ACT.<sup>63</sup> Even if

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<sup>54</sup> *Id.* at 369.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 367.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 368.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 365.

<sup>62</sup> *Id.* at 370.

it could, it must also show ACT is the real party in interest and join ACT as a party or litigate in its name instead of its own name.<sup>64</sup> Because UBS AG was not the real party in interest nor could it show it was acting on behalf of the real party in interest, the court denied the motion.<sup>65</sup>

In this next case, *In re Sheridan*, the court considers a stay relief motion in a Chapter 13 bankruptcy brought by MERS as nominee for HSBC Bank USA (“HSBC”).<sup>66</sup> MERS not only asserted it was nominee, but also characterized itself as a “secured creditor and Claimant.”<sup>67</sup> MERS was designated a beneficiary on the Deed of Trust and as nominee for the noteholder at the time of execution.<sup>68</sup> The court still found this insufficient, as there was no showing made as to who the current noteholder was and the court held MERS was not an actual beneficiary despite the Deed naming it one since no actual economic benefit accrued to it.<sup>69</sup>

The Promissory Note and Deed of Trust identified the lender as Fieldstone Mortgage Company (“Fieldstone”) while the Deed also identified MERS as nominee and beneficiary for the noteholder and all its successors and assigns.<sup>70</sup> The Promissory Note also stated, “anyone who takes this Note by transfer and who is entitled to receive payments . . . is called the Note Holder.”<sup>71</sup> MERS argued that it had authority to act for the current noteholder, whoever that was, since it was named as a beneficiary and nominee for all successors and assigns.<sup>72</sup> Even if the court agreed, there is still the issue of the Note not indicating any transfer to other

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *In re Sheridan*, 2009 WL 631355 at \*1 (Bankr. D. Idaho 2009).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at \*6.

<sup>69</sup> *Id.* at \*4.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at \*1.

<sup>72</sup> *Id.* at \*4.

standing.<sup>91</sup> MERS withdrew the motions to lift stay in all but four of the cases and the court issued orders in two of the cases in this opinion.<sup>92</sup> Like *Sheridan*, this court denies the motions in both cases because in order to have standing a party must be the noteholder or have the authority to act on behalf of one who is the noteholder and MERS was not able to show it was either.<sup>93</sup>

In this case, similar to *Sheridan*, MERS argued it has standing because the deeds of trust name it as a beneficiary or that it is the nominee of the beneficiary.<sup>94</sup> The court notes that merely naming MERS a beneficiary does not give it any rights to enforce the note.<sup>95</sup> The court finds that since MERS has no rights to any payments, servicing rights, or any rights to secured properties it is not a beneficiary.<sup>96</sup> The court also finds similar ambiguities in the language of the deeds of trust and in MERS brief regarding whether MERS is arguing it has standing in its own right, or it is the nominee, or both.<sup>97</sup> The court goes on to say that, even if MERS could prove it was a beneficiary of the note, that alone would be insufficient to confer standing.<sup>98</sup> In order to have foreclosure rights, possession of the note and a validly assigned deed of trust are required since only the holder of the security has the right to foreclose.<sup>99</sup> Therefore, in order for MERS to foreclose it must show that it has possession of the note and the deed of trust or it has authority to act as agent for the entity that does.<sup>100</sup> Because MERS was not the beneficiary or the holder of the deed of trust, and because there was no evidence the principal it purported to act on behalf of were either of these, the court denied the motions for relief

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<sup>91</sup> *Id.* at \*1.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at \*4.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at \*3.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at \*4.

parties.<sup>73</sup> Therefore, Fieldstone appears to be the current noteholder and MERS did not purport to represent Fieldstone at any time.<sup>74</sup> The court denied the motion for two reasons: (1) it found the “titular designation” of MERS as “beneficiary” on the Deed insufficient to establish it as such, and (2) there was no evidence or explanation presented showing whether HSBC had any current interest in the note.<sup>75</sup> The court further explained that stay relief motions “must be brought by one who has a pecuniary interest in the case and, in connection with secured debts, by the entity entitled to payment from the debtor and to enforce the security for such payment.”<sup>76</sup>

Merely naming a party as a beneficiary of an instrument is not sufficient to make it one.<sup>77</sup> The court looked to Idaho Code § 45-1502(1), which defines a beneficiary for purposes of the trust deed statute as “the person for whose benefit a trust deed is given.”<sup>78</sup> Therefore, MERS is not a beneficiary under Idaho Code because the trust deed benefits the noteholder, which appears to be Fieldstone in this case.<sup>79</sup> In addition, the language used in the Deed of Trust is confusing as it also states that MERS will act “solely as nominee for Lender and Lender’s successors and assigns.”<sup>80</sup> On the one hand, it claims to be a beneficiary, while paradoxically on the other, it claims it is solely a nominee. In any case, Chief Judge Meyers found that since MERS is not a beneficiary under Idaho Code and the language of the Deed is ambiguous, MERS is not a real party in interest and cannot bring the motion in its own name.<sup>81</sup>

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<sup>73</sup> *Id.* at \*5.

<sup>74</sup> *Id.* at \*4.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

The court goes on to say that even if MERS was properly acting as the agent of the real party in interest there was no showing that HSBC or even Fieldstone had any current interest in the note.<sup>82</sup> If there had been, the action must still be brought in the real party in interest's own name, not its agent's.<sup>83</sup> Later, MERS submitted a "supplemental affidavit" stating that it had obtained an original copy of the Note, which now indicated an endorsement.<sup>84</sup> (I can just imagine the colloquy after the attorney exclaims, "Judge, you won't believe this, but we *FOUND* it!") However, the court found the affidavit improper for several reasons.<sup>85</sup> Even had the court been able to consider it, the affidavit would not have assisted MERS since there was neither a date nor any indication of who the transferor or the transferee was.<sup>86</sup> Even if Fieldstone had endorsed the note in blank it would not have established HSBC or Fieldstone as the noteholder since Idaho Code provides it "may be negotiated by transfer of possession alone until specially indorsed."<sup>87</sup> The court held, "the only entity that MERS could conceivably represent as agent/nominee would be [Fieldstone]. But MERS does not represent [Fieldstone] . . . and, in fact, . . . conten[ds] that [Fieldstone] is no longer a party in interest."<sup>88</sup> Because MERS was unable to establish that it was a real party in interest with standing, or even that it represented such, the court denied the motion.<sup>89</sup>

*In re Mitchell* is the lead case for a number of motions to lift stay filed in MERS' own name or filed in the name of MERS as nominee for another.<sup>90</sup> The court handled the motions in a joint hearing because each of the cases had substantially similar issues regarding MERS's

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at \*5.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at \*6.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Mitchell*, 2009 WL 1044368.

from stay.<sup>101</sup>

In another recent decision, *In re Wilhelm*, Chief Judge Meyers expanded on the requirements he set forth in *In re Sheridan* for lenders to demonstrate standing when seeking relief from the automatic stay.<sup>102</sup> The court consolidated five cases and held that the movants in each case lacked standing since none of the movants were named on the notes at issue and the notes were not indorsed in blank nor to any specific person or entity.<sup>103</sup> The movants also failed to prove that they held the notes.<sup>104</sup>

Additionally, the movants argued that MERS had assigned the notes to them, but the court noted that while the notes named MERS as a beneficiary they also stated MERS is acting “solely as nominee” which means it would have no right to assign the notes.<sup>105</sup> The court stated, “there are two threshold questions in each of these motions: (1) Have Movants established an interest in the notes? (2) Are Movants entitled to enforce the notes?”<sup>106</sup> The movants in these cases did not provide any admissible proof to either question, and the notes attached to several declarations were contradictory to the information contained in the declarations.<sup>107</sup> The court then admonished, “[i]n general, counsel should gather the appropriate documents and factual data before filing the motions (as required by Rule 9011 in any event), rather than attempting to cure patently defective motions with serial supplemental filings.”<sup>108</sup>

The court also noted that the trustees in each of the five cases did not uniformly

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<sup>101</sup> *Id.* at \*6.

<sup>102</sup> *In re Wilhelm*, 407 B.R. 392 (Bankr. D. Idaho 2009).

<sup>103</sup> *Id.* at 397.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 398.

<sup>107</sup> *Id.* at 400.

<sup>108</sup> *Id.* at 403.

respond to the motions for relief from automatic stay.<sup>109</sup> In two of the cases one trustee objected to the motions, one stipulated to stay relief, one filed a notice of non-opposition, and one remained silent.<sup>110</sup> The court points out that it cannot simply grant relief even in the face of non-opposition or stipulation, and that it must satisfy for itself that the relief is proper under the circumstances of each case.<sup>111</sup>

The court also addresses some specific arguments made by Bank of America/HSBC (“BofA/HSBC”) that merit discussion. BofA/HSBC argued that it can file a stay relief motion without being a real party in interest under FRCP 17 and that they do not have the burden of proof in showing standing before obtaining stay relief.<sup>112</sup>

As to the real party in interest argument, the court reminds BofA/HSBC that FRCP 17 applies to stay relief motions via Rule 9014, which is relevant to stay relief motions as stated in Rule 4001(a)(1).<sup>113</sup> Rule 9014 incorporates certain other Bankruptcy Rules, one of which is Rule 7017, which also incorporates FRCP 17.<sup>114</sup> Thus, FRCP 17 does apply to stay relief motions and BofA/HSBC presented no persuasive evidence to the contrary.<sup>115</sup>

BofA/HSBC also argued they did not have the burden of proof to show standing and they could establish standing merely by making such allegations in their motion.<sup>116</sup> Also, they argued that if a party challenges standing, the burden of proof falls on the party challenging standing to disprove it.<sup>117</sup> Chief Judge Meyers, citing *Lujan*, points out that “a party seeking to invoke a federal court’s jurisdiction must prove its standing.”<sup>118</sup> This allows a court to raise

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<sup>109</sup> *Id.* at 394.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 399.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

standing issues *sua sponte*.<sup>119</sup> This is because standing is not merely a pleading requirement, but rather it is an indispensable requirement of the plaintiff's case.<sup>120</sup> Additionally, the declarations BofA/HSBC submitted in support of their motions, did not cure any standing issues since they failed to comport with basic evidentiary rules.<sup>121</sup> Apparently, a party does not have standing merely by saying they do. The court explains further that at the initial pleading stage a movant may rely on the allegations in their complaint, provided the motion itself does not indicate a lack of standing, however once an objection to the stay relief motion is made, the movant must show evidence of standing to the court's satisfaction.<sup>122</sup> This is true even if the moving party does not bear the ultimate burden of persuasion, it will still be required to establish a *prima facie* case for relief before the respondent is then obligated to show any evidence.<sup>123</sup>

#### **WHAT IS REQUIRED TO SEEK RELIEF FROM STAY?**

The cases discussed represent some of the potential issues that can result when courts rudely awaken creditors from their fantasy of an automated, effortless, paperless, electronic mortgage tracking system. The standing requirements are both constitutionally and prudentially sound. Therefore, attorneys practicing in bankruptcy should be familiar with them to avoid similar issues. The way courts and scholars discuss standing and real party in interest issues can be confusing. Many use the terms interchangeably. This is because despite their distinctions, the two concepts are closely related. As pointed out by the *Hwang* court, the real party in interest question is really the prudential component of the overall standing

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<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 399-400.

<sup>121</sup> *Id.* at 400.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

analysis. Injury-in-fact is a constitutional requirement and the real party in interest requirement is a prudential requirement.

In order to bring a motion in a party's name that party must have constitutional and prudential standing. In these contexts, a party can demonstrate standing by showing the named party is both the beneficiary of the note (the one entitled to receive payment) and is the holder of the deed of trust (the one entitled to foreclose). It can be confusing if, for example, a party might have constitutional standing, but lack prudential standing. This situation arose in *Hwang* because one party possessed the note while another had ownership rights. In any case, the party or parties bringing the action are required to have both constitutional and prudential standing to proceed.

A party can also have standing if it has the authority to act on behalf of an entity that has standing. Therefore, a nominee or agent will have to prove both (1) it is an agent with the authority to act on behalf of the principal, and (2) the principal has the required standing. However, even if a party has standing, the agent must prosecute the action in the name of the real party in interest and not in its own name.

These concepts are simple, but the recent trends in today's mortgage industry can sometimes muddle the issues into unresolvable problems for creditors who later try to assert their rights when things go poorly. These cases stand as warnings to creditor's attorneys who should educate their clients on the importance of good record keeping and demand their loan servicers do the same. In addition, attorneys should take note of how courts regard conclusory affidavits in support of these motions as well as the potential for Rule 9011 land mines when taking a client's averments regarding the ownership of a note or deed at face value without making a reasonable and independent inquiry before submitting such statements to a court.

## HOW DO THESE SYSTEMS ACTUALLY WORK?

In the recent case of *In re Taylor*, Judge Diane Weiss Sigmund draws back the curtain to examine the nuts and bolts of these electronic systems and lets us see precisely how these issues arise and the context within which the parties and their attorneys deal with them.<sup>124</sup> Although *Taylor* is not specifically a MERS case, and does not actually involve standing questions, it is valuable to the issue of how these paperless systems have affected bankruptcy proceedings such as relief from stay motion practice. It is also rare to see a judge explore these systems as deeply as Judge Sigmund has. After issuing an order to show cause after some questionable practices by HSBC Mortgage Corp. (“HSBC”), the court held four lengthy evidentiary hearings on the matter and invited the United States Trustee (“UST”) to participate.<sup>125</sup>

Lender Processing Services, Inc. (“LPS”) acted as an intermediary between HSBC and HSBC’s attorneys, Moss Codilis, LLP (the “Moss Firm”) and the Udren Law Office (the “Udren Firm”).<sup>126</sup> The court ultimately found that the practices and procedures of HSBC, LPS, and HSBC’s attorneys created an environment where the integrity of the proceedings, as well as the attorneys’ Rule 9011 duties, were “subordinated to efficiency and cost-savings so as to require sanctions.”<sup>127</sup> LPS is a mortgage default services provider. From the LPS website:

Lender Processing Services (LPS) is the nation's leading provider of mortgage processing services, settlement services, mortgage performance analytics and default solutions. The company's high-performance technology, data and services empower lenders and servicers

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<sup>124</sup> *In re Taylor*, 407 B.R. 618 (Bankr. E.D. Pa. 2009).

<sup>125</sup> *Id.* at 621-22.

<sup>126</sup> *Id.* at 622.

<sup>127</sup> *Id.*

by providing them with the solutions they need to achieve their business goals and succeed in today's competitive marketplace.<sup>128</sup> They also claim to provide such services to the majority of the 50 largest U.S. banks.<sup>129</sup>

The LPS system “NewTrak” identifies what bankruptcy work needs doing using preprogrammed conditions, such as automatically requesting a stay relief motion be filed if a debtor in bankruptcy is more than 60 days past due.<sup>130</sup> It then prepares the boilerplate forms and forwards the work to local attorneys to process and file the motions.<sup>131</sup> In this case, the Moss Firm processed the proof of claim and the Udren Firm prepared the motion for relief from stay as well as appearing in court on HSBC’s behalf.<sup>132</sup> LPS associated firms are required to sign a 51 page Default Service Agreement (“DSA”) which the UST argued granted LPS “oversight and direction of the bankruptcy process.”<sup>133</sup> The UST thus claimed that LPS was improperly directing legal action such as “participating in the preparation of the proof of claim of HSBC, accounting for payments of Debtors, imposition of fees and costs on Debtors, [] preparing the stay relief motion of HSBC, [and] interfer[ing] with communications between counsel and clients.”<sup>134</sup> There is also no interaction between the client, HSBC, and any of the local firms.<sup>135</sup> LPS expects the firms to file the motions with the provided information.<sup>136</sup> Additionally, there is no interaction between the firm that prepares the proof of claim, in this case the Moss Firm, and the firm filing the motion for relief from stay, the Udren Firm.<sup>137</sup>

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<sup>128</sup> Lender Processing Services, Inc., *Transforming How Mortgage Lenders and Servicers Do Business*, <http://www.lpsvcs.com/Pages/default.aspx> .

<sup>129</sup> *Id.*

<sup>130</sup> *Taylor*, 407 B.R. at 626-27.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 624.

<sup>134</sup> *Id.* at 622.

<sup>135</sup> *Id.* at 626-27.

<sup>136</sup> *Id.*

The Moss Firm was in charge of preparing the proof of claim filed in this case.<sup>138</sup> The Moss Firm has a document production team for each servicer it works with.<sup>139</sup> Each team has one group that sets up the form, one to process the claims, and a small group for quality assurance.<sup>140</sup> Shockingly, none of these personnel are lawyers or even paralegals.<sup>141</sup> A claims processor retrieves the data directly from the system and then completes the proof of claim form.<sup>142</sup> The claims processor then affixes the signature of the "Compliance Director," whose position was described as being "analogous to general counsel," to the proof of claim and e-files it.<sup>143</sup> The "Compliance Director" only reviews a sample of about 10% of such claims as a quality control measure.<sup>144</sup> The client, HSBC, also does not review the proof of claim before filing.<sup>145</sup> It comes as no surprise that an error as egregious as attaching the wrong note to the proof of claim slips through this system. Indeed, it is somewhat startling to think that if LPS's claim that a majority of the top 50 U.S. banks use their system for default mortgage services is true, how frequently similar errors slip through. The "Compliance Director" testified that the error of attaching the wrong note was an "e-filing error for which there is no review."<sup>146</sup> Yet, an attorney still allowed use of his signature on the document, fully aware of Rule 9011. Had the attorney complied with Rule 9011 and actually reviewed the document before submitting it to the court, the attorney could have identified the error and responded appropriately.

The Udren Firm filed an erroneous motion for relief from stay as instructed by

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<sup>137</sup> *Id.* at 626.

<sup>138</sup> *Id.* at 625.

<sup>139</sup> *Id.* at 626.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

NewTrak, and as they are bound to do contractually by the DSA.<sup>147</sup> NewTrak also later instructs the Udren Firm to defend the claim objection despite the fact that they did not file the proof of claim and never consulted with the Moss Firm who did.<sup>148</sup> Thus, when the court questions the local counsel from the Udren Firm about inconsistencies in the proof of claim, the attorney does not actually know the answers, because the Udren Firm has no access to the information used to prepare the proof of claim.<sup>149</sup> Despite this, the attorney contended to the court that the stay relief motion was accurate as filed.<sup>150</sup> Even if the attorney suspects something is wrong and wants additional information, the only recourse is to file an “issue” with NewTrak and request the information again, which will likely only include a copy of the erroneous information already contained in the proof of claim.<sup>151</sup> Clearly, the court wasted much time and effort in doing the job of the parties and attorneys in question in figuring out the errors on the proof of claim and in the motion for relief from stay. In the words of Judge Sigmund:

When an attorney appears in a matter, it is assumed he or she brings not only substantive knowledge of the law but judgment. The competition for business cannot be an impediment to the use of these capabilities. The attorney, as opposed to a processor, knows when a contest does not fit the cookie cutter forms employed by paralegals. At that juncture, the use of technology and automated queries must yield to hand-carried justice. The client must be advised, questioned and consulted. Young lawyers must be trained to make those judgments as opposed to merely following the form manual. Until they are capable of doing so, they should be supported and not left to sink or swim alone in an effort for the firm to be more profitable by leveraging the cheapest labor.

At issue in these cases are the homes of poor and unfortunate debtors, more and more of whom are threatened with foreclosure due to the historic job loss and housing crisis in this country. Congress, in its wisdom, has fashioned a bankruptcy law which balances the rights and duties of debtors and creditors. Chapter 13 is a rehabilitative process with a goal of saving the family home. The thoughtless mechanical employment of computer-driven models and

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 627-31.

<sup>150</sup> *Id.* at 628.

<sup>151</sup> *Id.* at 630-31.

communications to inexpensively traverse the path to foreclosure offends the integrity of our American bankruptcy system. It is for those involved in the process to step back and assess how they can fulfill their professional obligations and responsibly reap the benefits of technology. Nothing less should be tolerated.<sup>152</sup>

The system between HSBC, LPS, and the local counsel in *Taylor* seems doomed to failure, in both practical and ethical terms. It is frightening to think that this is likely a reflection of how these high volume bankruptcy firms and mortgage servicing outfits conduct their day-to-day business. It completely removes any substantive review by attorneys. Rule 9011 requires an attorney to have reviewed all documents submitted to a court. It is essential that documents prepared by an automated software program be as well. However, in this "assembly line" approach to lawyering, where non-lawyers and non-paralegals, who are likely evaluated by how many documents they process in a given shift, are essentially preparing proof of claims and motions for relief from stay (without even consulting the client no less), it is no wonder that these issues arise.

Judge Sigmund identified three specific Rule 9011 violations.<sup>153</sup> The first violation was the misleading stay relief motion based on admissions known to be untrue.<sup>154</sup> The second was the signature of an erroneous proof of claim without any review.<sup>155</sup> Finally, the third was the failure to make a reasonable inquiry before signing a stay relief motion, which the court discovered later to be untrue and using "form" answers to respond to a claim objection, which were later found to be untrue.<sup>156</sup> For this, the court ordered the attorney to obtain three extra continuing legal education credits in professional responsibility or ethics.<sup>157</sup> The court ordered

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<sup>152</sup> *Id.* at 651.

<sup>153</sup> *Id.* at 646-650.

<sup>154</sup> *Id.* at 646.

<sup>155</sup> *Id.* at 647.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 648.

Mr. Udren, the head of the Udren Firm, to obtain training in NewTrak and to spend a day observing his employees as they handled referrals because of his apparent lack in depth of knowledge regarding the operation he was running.<sup>158</sup> The court also ordered him to provide additional training to members of the firm's bankruptcy department.<sup>159</sup> Although deeply concerned by the behavior of the Moss Firm, that firm not does not and did not appear before Judge Sigmund, thus would not have an opportunity to respond to an order of sanctions.<sup>160</sup> She left any potential recourse to whatever the investigation by UST's office would ultimately mete out.<sup>161</sup> There was also a little known, and rarely if ever used, "escalation policy" that would allow local counsel to contact HSBC directly instead of submitting an issue through NewTrak.<sup>162</sup> This led the court to order HSBC to send its network of law firms a letter explaining the existence of, and encouraging the use of, this procedure so counsel could make better use of this option for direct contact as opposed to electronic means.<sup>163</sup> The court found that sanctions against LPS were unwarranted because ultimately, how the Udren Firm responded to the referral is what resulted in the violations, and the evidence did not support a conclusion that LPS inappropriately imposed restrictions on the Udren Firm.<sup>164</sup>

Fortunately for those sanctioned in *In re Taylor*, the sanctions and the order to HSBC directing it to send copies of the Bankruptcy Court's Opinion to all of the attorneys it had retained were reversed.<sup>165</sup> The Appellate Court found that the sanctions in *Taylor* were an abuse of discretion, as the Bankruptcy Court already had determined that the stay motion did not merit

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<sup>158</sup> *Id.* at 648-49.

<sup>159</sup> *Id.* at 649.

<sup>160</sup> *Id.* at 649.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 649-50.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 650.

<sup>165</sup> *In re Taylor*, 2010 WL 624909 (E.D. Pa. 2010).

sanctions, and Mr. Fitzgibbons' (the young lawyer of the Udren firm) failure to obtain the accounting was an insufficient basis for the imposition of sanctions against the appellants.<sup>166</sup>

The Appellate Judge was persuaded that the Bankruptcy Court objected to general practices in bankruptcy mortgage disputes, rather than specific conduct of the appellants.<sup>167</sup>

### WHAT SHOULD BE DONE ABOUT THIS?

After *Taylor*, the question then becomes, is that enough? Is it enough for the courts issue sanctions, which usually boil down to not much more than admonitions, or are later reversed, or as seen in the cases mentioned earlier, a denial of the motion for relief from stay to institute reform? This behavior is unacceptable, and despite the clear displeasure and disapproval by courts regarding such practices, most courts seem very reluctant to impose any substantial sanctions on attorneys or parties who violate Rule 9011 in these contexts. The mortgage servicing, default services, and electronic registration industries are rife with examples similar to *Taylor* involving systemic abuse of these systems such as filing motions with canned pleadings with no review, failures to conform to local pleading rules, adding unsubstantiated fees to debtors' obligations, or filing erroneous proofs of claim.<sup>168</sup>

The combination of these two consequences, Rule 9011 sanctions for attorneys and denial of a motion to seek relief from stay for parties, might be enough to turn the tide. That is, if enough courts become as intolerant as Chief Judge Meyers or Judge Sigmund, and enough appellate courts uphold the sanctions, and enough trustees start looking more closely at creditors, and enough debtors' attorneys turn their attentions to actually fighting back and advocating for their clients instead of seeking the fastest route to discharge or plan confirmation.

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<sup>166</sup> *Id.* at \*4.

<sup>167</sup> *Id.* at \*3.

<sup>168</sup> See generally, Katherine M. Porter, *Mistake and Misbehavior in Bankruptcy Mortgage Claims*, 87 Tex. L. Rev. 121 (2008).

Are there any other tools besides Rule 9011? Some bankruptcy courts have tried to use 28 U.S.C.A. § 1927, which allows a court to sanction an attorney who “unreasonably and vexatiously” multiplies the proceedings of a case by ordering the attorney to pay for the expenses and attorneys' fees resulting from such conduct.<sup>169</sup> However, the balance of authority has found that a bankruptcy court is not a “court of the United States,” thus lacking jurisdiction to impose sanctions under the statute.<sup>170</sup> While the language of this statute is broader than Rule 9011, and thus gives bankruptcy judges more flexibility in issuing sanctions, there are few circumstances in this context under which a court would not be able to rely on Rule 9011 to impose sanctions. Given this fact, and its dubious legal footing, it is not likely to be an effective tool for reform.

The Supreme Court of the United States may have recently given courts another tool in the fight against sloppy proofs of claim and defective motions for relief from stay. Since 1957, the standard for whether a motion to dismiss would prevail was the holding in *Conley v. Gibson*.<sup>171</sup> The *Conley* Court held, “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”<sup>172</sup> In the context of antitrust cases, the Court overruled this “no set of facts” standard in *Bell Atlantic Corp. v. Twombly*, favoring a stricter requirement that a complaint must state enough facts to make the allegations in the complaint “plausible.”<sup>173</sup> However, in *Ashcroft v. Iqbal* decided this last May, the Court applied the *Conley* standards to a context outside the realm of antitrust pleadings.<sup>174</sup> The ruling left some observers to conclude,

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<sup>169</sup> See generally, *In re Schaefer Salt Recovery, Inc.*, 542 F.3d 90 (3d Cir. 2008); *Knepper v. Skekloff*, 154 B.R. 75 (Bankr. N.D.Ind. 1993).

<sup>170</sup> See generally, *In re Courtesy Inns, Ltd., Inc.*, 40 F.3d 1084 (10th Cir. 1994); *Matter of Volpert*, 110 F.3d 494 (7<sup>th</sup> Cir. 1997); *Matter of Richardson*, 52 B.R. 527 (Bankr. Mo. 1985); *In re Westin Capital Markets, Inc.*, 184 B.R. 109 (Bankr. D. Or. 1995).

<sup>171</sup> Harvard Law Review, *Pleading Standards*, 123 Harv. L. Review 252 (2009).

<sup>172</sup> *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

<sup>173</sup> *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

“the standard applies broadly, presumably to pleadings in all types of litigation in federal court.”<sup>175</sup>

The standard extended by *Iqbal* essentially requires that “[f]actual allegations must . . . raise a right to relief above the speculative level.”<sup>176</sup> Additionally, the “complaint [will not] suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’ ”<sup>177</sup> Thus, “[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’ ”<sup>178</sup> This fits right in line with what Chief Judge Meyers said in *Wilhelm*, when he held that a moving party bears the initial burden of proof in establishing a *prima facie* case for relief.

The question then, is whether the *Iqbal* pleading standards apply to bankruptcy proceedings, such as a stay relief motions. If so, courts could use this as a way of closing the courthouse doors to parties whose pleadings are patently defective, such as if the moving party is apparently not the holder of the note. Presumably, courts would not waste their time digging to the bottom of issues that attorneys failed to identify before filing. Additionally, making the bar lower for dismissal would mean parties and their attorneys would better prepare in the knowledge that if there are significant shortcomings in their motion, it might be subject to immediate dismissal.

Unfortunately, for courts looking use this standard, it may be more complicated than just citing *Iqbal* and showing the offending party the door. *Iqbal* is the Court’s current interpretation of the requirement of FRCP 8(a)(2) that a pleading must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>179</sup> Thus, a bankruptcy court can only use

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<sup>174</sup> *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949-53 (2009).

<sup>175</sup> Don Zupanec, *Complaint--Pleading Standards--Plausible Right to Relief*, 24 No. 7 Federal Litigator 2 (2009).

<sup>176</sup> *Twombly*, 550 U.S. at 555.

<sup>177</sup> *Iqbal*, 129 S.Ct. at 1949.

<sup>178</sup> *Id.*

the *Iqbal* standard if FRCP 8 applies to stay relief motions. Rule 4001 provides that “A motion for relief from an automatic stay . . . shall be made in accordance with Rule 9014.” Rule 9014 governs contested matters, which makes a relief from stay motion a contested matter, not an adversary proceeding. Rule 9014(c) lists the Part VII Rules, which normally apply to adversary proceedings, that also apply in contested matters. Unfortunately, Rule 7008, which incorporates FRCP 8, is not among them. Therefore, *Iqbal* would not directly apply to stay relief motions since its holding is an interpretation of FRCP 8(a)(2), which does not apply to contested matters. However, there might be a way around this for courts that want the higher *Iqbal* standard to apply in their court. Rule 9014(c) provides that the other Part VII Rules, the ones *not* listed, do not apply “unless the court directs otherwise.” Presumably, a court could institute local rules that specifically incorporate Rule 7008 to contested matters. A more comprehensive solution would be to have Congress change Rule 9014 so that it also incorporates Rule 7008. This would make the filing standards consistent throughout all bankruptcy courts.

Of course, there are also other potential legislative solutions. As mentioned, Congress could make Rule 7008 applicable to contested matters, which would lower the bar of dismissal somewhat for courts faced with insufficient stay relief motions. Additionally, Congress could mandate fines or sanctions for parties who do not comply with local filing rules, such as failing to attach a note or payment history to a claim as required. Large creditors or firms that file hundreds or even thousands of proofs of claims and stay relief motions every year might start cleaning up their act if they are constantly paying \$20 here or \$50 there for oversights.

Ultimately, the best way to institute any sweeping change in creditors’ attitudes is to hit them where it hurts, in the pocketbook. More and more, this is happening. Courts are raising these issues *sua sponte*, trustees are looking more closely at proofs of claim, and debtors are

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<sup>179</sup> 129 S.Ct. at 1949.

demanding that creditors “show me the note.” Legislation that makes this easier and establishes uniform rules would be beneficial. Unfortunately, any legislative solution from Congress would leave state courts dealing with foreclosure outside of bankruptcy facing the same issues.

### **CONCLUSION**

The electronic, paper-free world, for now at least, is a pipedream. When we increase the speed at which we do business beyond the capacity of humans to keep up, it appears that even lawyers will frequently start taking shortcuts instead of demanding the system slow down so they can do what they know they are obligated to. In many ways, these tools have made it easier for the business world. Businesses should and can utilize them to not only increase efficiency, but accuracy as well. The motivation to increase efficiency comes easy, more money. However, the motivation to increase accuracy will not come so easy. It will likely only come from stern judges, no-nonsense trustees, and keen-eyed debtor’s attorneys who, case after case, chip away at the incentive to keep doing sloppy work.

By demanding to see the paper trail, sanctioning attorneys who play fast and loose with Rule 9011, and denying motions for relief from stay, collectively the system can incentivize the parties, their agents, and their attorneys into keeping better records and being honest and forthright with the court. The question then becomes what have we wrought in allowing this to go on for so long? The profession of lawyering is a self-regulated profession, how long will those who care about the public perception of lawyers and the integrity of the bankruptcy system allow this to go on? How long will creditors who hold the keys to taking away a family’s most valuable asset, their home, be allowed to do so without being held to the same standards as any other party who comes into court seeking relief? How long will judges continue to treat firms like the Udren firm with kid gloves? Judges need to do more than just admonish or require additional CLEs, they need to lay the hammer down with large monetary

sanctions. That will not only get the firm's immediate attention, but the attention of other creditors and other firms. Even if an appellate court overturns the award on appeal, the fact that they were levied in the first place, their impact on the firm's reputation, and that the firm had to continue to fight and spend money in appealing the award, will mandate that they and others take notice. This impact will be far greater than any admonitions, which in all likelihood have little or no substantive impact on the system. Even though Congress could provide better tools, it is ultimately up to bankruptcy judges to draw a line in the sand and make it clear to parties in their words, actions, and orders that they will not tolerate such conduct in their courtroom.