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Case Law Updates & Hot Topics

Tuesday, March 23, 2021

12:00-1:15 PM Central Time

Attendee Questions

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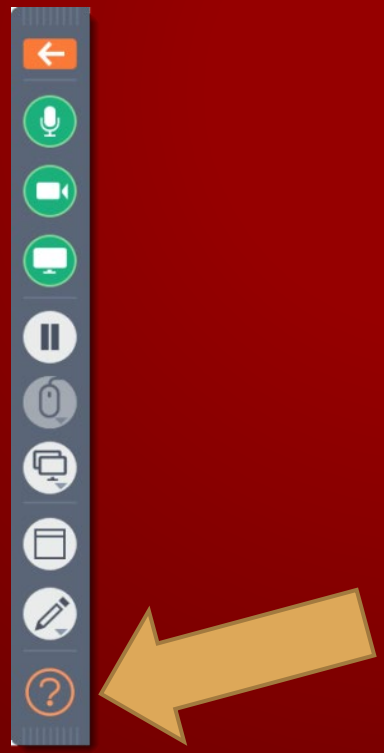

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Session Overview

This seminar will discuss some of the recent significant cases in bankruptcy.

- How might the Supreme Court's decision in City of Chicago v Fulton impact the automatic stay with respect to residential mortgages.

- There is also increasing pressure coming in Congress to afford relief to student loan borrowers. Will a bankruptcy filing be required to obtain forgiveness of student loan debt, and if so, how does this affect other categories of debt, including mortgages.

- The panel will also discuss case law surrounding the CARES Act and the Consolidated Appropriations Act. And with many borrowers receiving mortgage forbearances over the last twelve months, consideration must be given to how the borrower repays the forbearance arrears. If the loan is modified, how is lien priority affected?

Polling Question:

Does the CARES Act provide a private right of action for enforcement & allow monetary damages for violations of its provisions?

a) No

b) Yes

c) It permits an aggrieved party to seek a declaration of rights under the Act, but does not authorize damages.

d) We don't know yet!

CARES Act Cases

Standing to Sue

Reed v. Pingora Loan Servicing, LLC, U.S. District Court for Western District of Texas, Austin Division, Case No. 1:20-CV-1035-LY-SH, 2021 U.S. Dist. LEXIS 4544; 2021 WL 84354, January 11, 2021

- Daughter of deceased borrower requests CARES forbearance before scheduled foreclosure sale; Pingora does not respond and does not cancel sale.
- Daughter, claiming to be administrator for estate, brings action in state court for violation of CARES Act, 15 U.S.C. § 9056(b).
- Pingora removes case on basis of federal question jurisdiction, moves to dismiss for failure to state claim and lack of standing, and seeks attorney's fees & costs.

CARES Act Cases

Standing to Sue

Reed v. Pingora Loan Servicing, LLC, C'td.

- Pingora argues daughter lacks standing because she is not the borrower on the loan; court agrees that while CARES does not define "borrower," courts have held the term to apply only to a person who signed the promissory note or assumed the loan (applying RESPA).
- Daughter also failed to show documentation that she is administrator of estate; unless she was duly appointed as executor or administrator of estate, she has no authority to challenge foreclosure of her father's property.
- Attorneys fees & costs denied because daughter has no contractual agreement with Pingora.

TAKEAWAY: Unless requesting party is proper successor-in-interest, it is permissible to deny forbearance request made by non-borrower.

CARES Act Cases

Forbearances: the Dos and the Don'ts

Fisher v. Dovenmuehle, U.S. District Court for Eastern District of CA, 2:20-cv-01222-TLN-KJN, filed June 17, 2020.

- After written request for forbearance from DMI, plaintiff alleges she was offered a 90-day "forbearance plan," subject to her execution of an "Approved Forbearance Agreement" drafted by DMI which required her to certify that she was in "imminent danger of not making the [next] monthly payment."
- Alleges DMI violated the letter and spirit of CARES Act by unilaterally restricting the forbearance period from 180 days to 90, refusing to grant the requested 180 day extension, and requiring her to execute the extraneous 'Approved Forbearance Agreement' and certifications therein.
- Seeks declaration under CARES Act at 28 U.S.C. §§ 2201, 2202 that DMI's policy violates § 4022; asserts claims under CA's Consumers Legal Remedies Act & Unfair Competition Law.

CARES Act Cases

Forbearances: the Dos and the Don'ts

Fisher v. Dovenmuehle, C'td.

TAKEAWAY:

- ***Do not unilaterally offer shorter forbearance term than requested for a federally backed loan when Act allows up to 180 days.***
- ***Do not require borrowers to provide documentation proving COVID19-related inability to make payments.***
- ***Do not refuse to extend up to additional 180 days after initial 180 day forbearance.***

CARES Act Cases

Forbearances: the Dos and the Don'ts

Wells Fargo Class Actions in Virginia

- Forsburg v. Wells Fargo & Co., U.S. District Court for Western District of VA, Harrisonburg Division, Case No. 5:20-CV-00046, 10/30/20, 2020 U.S. Dist. LEXIS 213775

- Harlow v. Wells Fargo & Co., U.S. District Court for Western District of VA, Harrisonburg Division, Case No. 7:20-mc-00030; 5:20-cv-00046, 3/9/21, 2021 U.S. Dist. LEXIS 44926

CARES Act Cases

Forbearances: the Dos and the Don'ts

Wells Fargo Class Actions in California

- Urista v. Wells Fargo & Co., U.S. District Court for the Southern District of CA, Case No.: 20-cv-01689-H-AHG, 12/16/20, 2020 U.S. Dist. LEXIS 236733; 2020 WL 7385847

- Healy v. Wells Fargo Bank, N.A., U.S. District Court for Southern District of CA, Case No. 20-cv-01838-H-AHG, 12/3/20, 2020 U.S. Dist. LEXIS 227461; 2020 WL 7074939

CARES Act Cases

Forbearances: the Dos and the Don'ts

Wells Fargo Class Actions

TAKEAWAY:

- ***Do not unilaterally place loans on forbearance.***
- ***Do not refuse payments made during forbearance.***
- ***Do not refuse requests to extend up to additional 180 days after initial 180 day forbearance.***

CARES Act Cases

COVID-19 Discharge

In re McCollum, U.S. Bankruptcy Court for District of SC, Case No. 15-03502-JW, 2/4/21, 2021 Bankr. LEXIS 343; __ B.R. __; 2021 WL 465425

- Mortgage creditor's response to NOFC indicates debtors have not made direct postpetition payments required under confirmed plan; also indicates that vast majority of missed payments were result of forbearance agreement for April, May, & June 2020.
- When factoring in payments included in the forbearance, remaining portion listed in response is less than one full mortgage payment.
- As it appears to be result of material financial hardship related to covid-19, debtors should not be precluded from receiving standard discharge.
- 1328(i) requirements satisfied, and debtors are entitled to standard discharge under 1328(a).

CARES Act Cases

COVID-19 Discharge

In re Campbell, U.S. Bankruptcy Court for District of SC, Case No. 15-06738-JW, 2/9/21, 2021 Bankr. LEXIS 332; __ B.R. __; 2021 WL 465423

- While Nationstar's 362 motion for failure to pay postpetition force-placed insurance is pending, trustee files NOFC.
- Debtor & Nationstar resolve 362 by settlement order to pay arrearage over 12 monthly cure payments; Nationstar files disagree response to NOFC based on outstanding insurance payments.
- Court accepts 362 settlement order as indication of Nationstar's agreement to postpone the amounts being cured in the agreement; timing of order should not preclude debtor from receiving discharge under 1328(a).
- Notes that settlement order is similar in nature to forbearance agreement; this outcome is supported by recent enactment of covid-19 discharge.

CARES Act Cases

COVID-19 Discharge

In re Ritter, US Bankruptcy Court for Central District of CA, San Fernando Valley Division, Case No.: 1:19-bk-11838-MT, 3/5/21, 2021 Bankr. LEXIS 526

- Tests application of new discharge provision passed 12/27/20, raising question whether Covid-19 Discharge differs substantially from usual hardship discharge.
- Court focuses on discretionary nature of both discharges; concludes that 1328(i) permits consideration of discharge provisions §§ 1328(a) through (h), and that incomplete personal residence mortgage payments or forbearance do not preclude covid-19 discharge.
- Here, stipulation to suspend payments based on decrease in income related to pandemic is not itself sufficient to demonstrate that entry of covid-19 discharge is appropriate; debtors' motion for immediate discharge under 1328(i) is denied and they may move to modify their plan.

Polling Question:

When a lender & a borrower enter into a loan mod., does the modified loan maintain the lien priority held by the original mortgage?

a) Yes

b) No

c) I have no idea

Loan Modifications and Lien Priority

Hamilton v. Pennsylvania Housing Finance Agency, 614 B.R. 48 (U.S.D.C. ED PA March 2020)

- Appeal from the Bankruptcy Court
- Timeline
  - Original Mortgage – December 2004
  - PHFA Mortgage – November 2010
  - Mortgage loan modification 1 – September 2013
  - Mortgage loan modification 2 – July 2015
- Debtors filed an adversary action to strip the PHFA Mortgage.
- Bankr. Ct. – rules in favor of debtors, PHFA Mortgage was unsecured.
- USDC affirmed
  - Looked to decisions in other jurisdictions and then disregarded them.
  - Declined to adopt the Reinstatement of Property law and ruled that equitable subordination does not apply to a modified senior mortgage.
  - Very specific grounds when this can occur based on Pennsylvania law.

Loan Modifications and Lien Priority (Cont'd)

Fraction v. Jacklily, LLC (In re Fraction), 622 B.R. 642 (Bankr. Ct. E.D. PA. November 2020)

- Appeal from the Bankruptcy Court
- Timeline
  - Original Mortgage – November 2006
  - Mortgage loan modification 1 – June 2012
  - Second Mortgage – April 2016
  - Mortgage loan modification 2 – June 2017
- Debtors filed an adversary action to strip the Jacklily Mortgage.
- Bankr. Ct. – grants summary judgment in favor of Debtor and rules Jacklily mortgage unsecured.
  - Looked to Pennsylvania statute, as well as the Reinstatement of Property, and came to same ruling as *Hamilton.*
  - Loan modifications were not new advances, but recapitalized interest and costs that were already owed.
  - Both modifications had the benefit of reducing amount of Debtors' indebtedness over time.

Loan Modifications and Lien Priority (Cont'd)

Other Jurisdictions:

- Missouri – *Burney v. McLaughlin* (2001) – equitable subrogation applies
- New York - *Shultis v. Woodstock Land Dev. Assoc.* (1993) – equitable subrogation applies
- California – *Lennar Ne. Partners v. Buice* (1996) – equitable subrogation applies.
- Ohio – *Citizens Fed. Sav. V. Dainco* (1978) – the language of the mortgage.
- New Jersey – *Rosenthal & Rosental v. Benun* (2016) – optional v. mandatory
- Connecticut – *Deutsche Bank Nat'l Trust Co. v. Belizaire* (2011) – follows equitable subrogation doctrine.

“Garbage” Fees

Challenges to Attorney’s Fees

String of fee challenge cases from 2019

- Culminating in the following
  - *In re Mandeville*, 596 B.R. 750 (Bankr. N.D. Ala. 2019)
  - *In re Snow*, 603 B.R. 114 (Bankr. W.D. Okla. 2019)

Next round of challenges to fees – necessary and reasonable

- *In re Longhurst*, 607 B.R. 822
- *In re Moore*, WDNY 18-12444
- *In re Adams,* DCC 19-00458

City of Chicago v. Fulton (U.S. Supreme Court case)

Facts

- The city of Chicago impounded vehicles of several individuals for failure to pay fines for motor vehicle infractions
- The individuals file a Chapter 13 bankruptcy petition and request that the City return his or her vehicle—the City refuses, and in each case a bankruptcy court holds that the City's refusal violates the automatic stay
- The Court of Appeals affirms all of the judgments in a consolidated opinion, concluding that "by retaining possession of the debtors' vehicles after they declared bankruptcy," the City has acted "to exercise control over" respondents' property in violation of §362(a)(3)
- The Supreme Court granted certiorari to resolve a split in the Courts of Appeals over whether an entity that retains possession of the property of a bankruptcy estate violates §362(a)(3).

City of Chicago v. Fulton (U.S. Supreme Court case)

Ruling

- The Supreme Court vacated the judgment of the Court of Appeals
- The language used in § 362(a)(3) (*i.e.*, "exercise control over property of the estate") suggests that merely retaining possession of estate property does not violate the automatic stay.
- Any ambiguity in the text of § 362(a)(3) is resolved decidedly in the City's favor by the existence of a separate provision, § 542, that expressly governs the turnover of estate property.
- Had Congress wanted to make § 362(a)(3) an enforcement arm of sorts for § 542(a), the least one would expect would be a cross-reference to the latter provision, but no such cross-reference exists.

City of Chicago v. Fulton (U.S. Supreme Court case)

What the Court Did Not Decide

- The Supreme Court did not decide how the turnover obligation in §542 operates
- The Court did not settle the meaning of other subsections of §362(a).

Policy Solutions

- It is up to the Advisory Committee on Rules of Bankruptcy Procedure to consider amendments to the Rules that ensure prompt resolution of debtors' requests for turnover under §542(a), especially where debtors' vehicles are concerned
- Congress, too, could offer a statutory fix, either by ensuring that expedited review is available for §542(a) proceedings seeking turnover of a vehicle or by enacting entirely new statutory mechanisms that require creditors to return cars to debtors in a timely manner.

Student Loans Discharged in Bankruptcy

- *Brunner* Test
- *Rosenberg v. N.Y. State Higher Educ. Servs*. Corp. 610 B.R. 454
- *Hutsell v. Navient* 620 B.R. 604
- *Clavell v. United States Dep't of Educ*. 611 B.R. 504

Loans reduced or eliminated by Executive Order?

Amendments to Bankruptcy code create a new standard for discharge of student loans?

Polling Question:

What do you think is the most likely resolution to the Student Loan "Crisis"?

a) New standard softens or replaces the Brunner Test

b) Executive Order eliminates some portion of outstanding student loan debt

c) The Bankruptcy Code is amended to allow for discharge of student loans

d) Some combination of the above

Webinar Wrap-Up

Questions

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Legislative Updates Part Two
Thursday, March 25, 2021
12:00-1:15 PM Central Time (10:00-11:15 AM Pacific, 11:00-12:15 PM Mountain, 1:00-2:15 PM Eastern)

New Rule Changes & Where is the CFPB Going Under the New Administration
Tuesday, March 30, 2021
12:00-1:15 PM Central Time (10:00-11:15 AM Pacific, 11:00-12:15 PM Mountain, 1:00-2:15 PM Eastern)

Chapter 13 Best Practices (Including PPFN, Notice of Final Cure & POC)
Wednesday, April 7, 2021
12-1:15 Central Time (10-11:15 Pacific, 11-12:15 Mountain, 1-2:15 Eastern)

Chapter 11 Basics for the Mortgage Lender
Friday, April 9, 2021
12:00-1:15 PM Central Time (10:00-11:15 AM Pacific, 11:00-12:15 PM Mountain, 1:00-2:15 PM Eastern)

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