

After putting all of their eggs in one basket and losing all their money in the largest Ponzi scheme in Tennessee history, Mike and Carrie Fisher file a Chapter 13 case to repay the arrears on the two (2) mortgages against their home in Brentwood, Tennessee.

### The First Mortgage

Upon receiving notice of the bankruptcy filing, Middle Tennessee Servicing (MTS), which services the Fishers' first mortgage, properly cancels its foreclosure sale and sends a referral to the law firm of Fast, Fast, and EvenFaster (a.k.a., The Fast Law Firm) for the purpose of reviewing the plan and preparing a proof of claim. The Fast Law Firm has won numerous awards from SOS, a national default outsourcer, for consistently being the fastest law firm in Tennessee when it comes to foreclosure and bankruptcy.

The proof of claim referral for MTS indicates the Fishers were six (6) regular payments behind at the time of their bankruptcy filing. However, there is no payment history to support this arrearage amount. In addition, since the Fishers allowed their property insurance to lapse several years ago, resulting in MTS obtaining lender placed insurance, and since the Fishers are delinquent in regular payments, resulting in a shortage in their escrow account, there is an escrow advance balance that needs to be included in the claim. Finally, the claim includes eleven (11) inspection fees (\$16.25 each), two (2) BPOs (\$90 each), \$500 in accrued late charges, foreclosure fees (\$500) and costs (\$1000). The referral package sent to the Fast Law Firm does not include any invoices to support any of the fees and costs, and there is no escrow history or escrow analyses to support the escrow advance balance or the new post-petition payment. However, the referral package does include copies of the Note and Deed of Trust as they existed at loan origination, and three assignments of mortgage (i.e., the loan has transferred at least three times since loan origination).

When preparing the proof of claim for MTS, the paralegal at the Fast Law Firm assigned to prepare the proof of claim discovers that the Deed of Trust has actually transferred five times. The transferor for one of the missing assignments is no longer in business, but since MTS has a power of attorney for the transferor, she creates an assignment and back dates it so that the effective date pre dates the next transfer of the Deed of Trust. Unfortunately, the date the paralegal chooses is actually a date prior to the existence of the mortgage pool. For the other missing assignment, the paralegal does not back date the assignment, but the date of the assignment is after the closing date of the mortgage pool. Moreover, as explained below, the assignment does not get signed until after the proof of claim is filed with the bankruptcy court.

On the bar date for filing proofs of claim, the proof of claim for MTS has been fully prepared, but no additional documentation has been requested by the paralegal at the Fast Law Firm to support the arrears, fees, costs and escrow advances. Only one of the missing assignments has been received back (the back dated assignment), and to complicate matters, the attorney who ordinarily signs proofs of claim is out of the office attending an ABI conference in Memphis. But since the Fast Law Firm's policy is to only have 10% of claims actually reviewed and signed by an attorney (one of the ways the Fast Law Firm ensures that it always files claims faster than its competitors), the paralegal

proceeds to file the claim instead of having the claim reviewed by another attorney in the office. The MTS proof of claim is therefore filed with six (6) months of arrears, plus all the fees, costs, and escrow advances list in the referral. The paralegal does not attach any invoices or escrow documents to the proof of claim.

### The Second Mortgage

Upon receiving notice of the bankruptcy filing, Broadway Avenue Servicing (BAS), which services the Fishers' second mortgage, sends a referral to the law firm of Slow, Right, and Prudent (a.k.a., The Better Law Firm) for the purpose of reviewing the plan and preparing a proof of claim. The Better Law Firm occasionally receives referrals from SOS, but is less concerned about awards than it is with doing things correctly. In fact, the Better Law Firm has lost several clients and business recently for adopting a more conservative approach to filing proofs of claim and motions for relief from the automatic stay.

The proof of claim referral for BAS also indicates the Fishers were six (6) regular payments behind at the time of their bankruptcy filing. However, there is no payment history to support this arrearage. The proof of claim referral also includes three (3) inspection fees (\$10.00 each), two (2) BPOs (\$90 each), and \$100 in accrued late charges. The referral package sent to the Better Law Firm does not include any invoices to support any of these fees and costs. However, the referral package does include copies of the Note and Deed of Trust as they existed at loan origination.

When preparing the proof of claim for BAS, the paralegal at the Better Law Firm assigned to prepare the proof of claim requests a payment history to support the arrearage figures. In addition, she requests copies of invoices to support the fees and costs that need to be added to the proof of claim, as well as a late charge history. Finally, the paralegal requests a copy of original Note and any and all endorsements, a copy of the original Deed of Trust, and any assignments.

Several weeks pass, and although the paralegal has received a payment history and copies of the original loan documents, no invoices to support the fees and costs have been received. The paralegal's review of the payment history shows that the Fishers were only four (4) payments behind at the time they filed their Chapter 13 case. In addition, after reviewing the Fishers' Chapter 13 plan, the paralegal discovers the debtors intend to put the first two (2) post-petition payments for both mortgages into the plan.

On the bar date for filing proofs of claim, the proof of claim for BAS has been fully prepared. The paralegal has included four (4) prepetition payments, two (2) post-petition payments, and all the fees and costs contained in the referral, even though the only invoices received are for one (1) inspection and one (1) BPO. There are no assignments of the Deed of Trust since the loan originated in and remains registered in MERS. However, the Note has been endorsed in blank, as required by MERS.

To complicate matters, all the attorneys of the firm are out of the office speaking at the ABI conference in Memphis. Since the Better Law Firm's policy is to require every claim and pleading to be reviewed and signed by an attorney before it is filed, the paralegal is required to hold the file until an attorney returns to the office. When an attorney reviews the plan, schedules, loan documents and proof of claim, he requests the claim be altered to include only the fees and costs for which there are invoices. He requests the paralegal advise the client that the claim can be amended later to include the additional fees and costs if and when supporting documentation is provided. After the paralegal makes the requested changes, the proof of claim is filed, along with a copy of the original Note and original Deed of Trust, and the invoices currently available.

### The Objections

After reviewing both mortgage claims, the attorney representing the Fishers files an objection to both the MTS proof of claim and the BAS proof of claim. In his objection to the MTS proof of claim, the Fishers' attorney says MTS lacks standing to file a proof of claim because:

- i) there are no endorsements on the copy of the Note attached to the proof of claim, and therefore, no evidence that the Note has been properly negotiated or otherwise transferred to the current holder of the Note;
- ii) the back dated assignment constitutes a fraud on the court;
- iii) since the missing assignment was not executed (or recorded) until after the proof of claim was filed, MTS did not have standing when the proof of claim was filed;
- iv) since the missing assignment was executed after the closing date for the mortgage pool, the transfer violated the rules of the pool and was therefore ineffective; and
- v) there is no documentation to substantiate any of the figures included in the proof of claim.

In addition, the Fishers' attorney discovers that there was a sixth transfer of the MTS loan prior to the filing of the MTS proof of claim, and not only does MTS no longer service the loan, the purported holder of the loan no longer owns or holds the Note. So when the assistant United States Trustee contacts the Fishers' attorney about the debtors' objection and hears that MTS may no longer service the loan in question, he decides to file a motion for 2004 exam, and requests an examination of a representative of both MTS and the Fast Law Firm regarding their proof of claim practices.

In his objection to the BAS proof of claim, the Fishers' attorney says BAS lacks standing to file a proof of claim because:

- i) MERS lacks standing and does not have the authority to transfer a mortgage or deed of trust;
- ii) Since there were no assignments of the Deed of Trust, the Note and Deed of Trust transferred along separate paths and became separated from each other. Therefore, the loan serviced by BAS is now unsecured;

- iii) there is no evidence that BAS or the entity for which it is servicing for currently holds the Note. Therefore BAS should be required to produce an affidavit that it or the investor holds the Note or produce the original Note in court; and
- iv) since the claim was filed after the bar date, it should be disallowed.

The hearing will be presided over by Bankruptcy Judge Blisgur.

Questions:

- 1) How should the court rule on the Fishers' objection to the claim of MTS? What arguments should MTS raise defending the objection?
- 2) How should the court rule on the Fishers' objection to the claim of BAS? What arguments should BAS raise defending the objection?
- 3) What additional objections should the Fishers' attorney raise to the proof of claim filed by MTS?
- 4) What additional objection should the Fishers' attorney raise to the proof of claim filed by BAS?
- 5) What changes would you recommend to the Fast Law Firm's policies and procedures?
- 6) What changes would you recommend to the Better Law Firm's policies and procedures?
- 7) Should the United States Trustee be permitted to examine both MTS and the Fast Law Firm about their policies and procedures in general? Or should the scope of the 2004 exams be limited to this particular case?