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**THE TRUSTEE'S STRONG-ARM POWERS—MORTGAGE CHALLENGES,
CLAIMS AND DEFENSES**

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A. Introduction

Recent Massachusetts bankruptcy court decisions¹ should serve as pointed reminders that it is imperative for mortgagees to use extreme caution to insure that their mortgages are executed with the proper formalities and that the mortgages are recorded in strict compliance with Massachusetts recording statutes. Otherwise, if the mortgagor files for bankruptcy protection, the mortgagee stands to lose its status as a secured party, leaving the mortgagor with an unsecured claim. The bankruptcy trustee may accomplish this by using his or her strong-arm powers to either avoid the mortgage or invalidate the mortgage and prevent the

¹ See *Agin v. Mortgage Electronic Registration Systems, Inc. and Countrywide Home Loans, Inc. (In re Giroux)*, No. 08-1261, 2009 WL 1458173 (Bankr. D. Mass. May 21, 2009); *Agin v. South Point, Inc. (In re Kurak)*, No. 08-1404, 2009 WL 2171094 (Bankr. D. Mass. July 15, 2009).

mortgagee from reforming the defective instrument. The mortgage will then be preserved for the benefit of the bankruptcy estate for an equitable distribution to the unsecured creditors on a pro rata basis.

B. The Trustee's Strong-Arm Power as a Bona Fide Purchaser

Section 544(a)(3) of the Bankruptcy Code grants strong-arm powers to the trustee to avoid certain liens as a hypothetical bona fide purchaser of real property as of the commencement of the bankruptcy case.² The trustee holds the real estate, not as the debtor held the real estate, but with the rights and powers of a bona fide purchaser who bought the real estate from the debtor.³ The bankruptcy court must look to state law to determine property rights under § 544(a).⁴ A bona fide purchaser has been defined in Massachusetts as “[o]ne who buys something for value without notice of another’s claim to the property and *without actual or constructive notice* of any defects in or infirmities, claims, or equities against the seller’s title....”⁵ While Massachusetts law states that one cannot be a bona fide purchaser if he had actual notice,⁶ under 11 U.S.C. § 544(a) the trustee takes as a bona fide purchaser regardless of any actual knowledge of the trustee.⁷ However, the trustee is still

² 11 U.S.C. § 544

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by –

...
...

(3) A bona fide purchaser of real property, other than fixtures, from the debtor against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

³ *Gray v. Burke (In re Coletta Bros. of North Quincy, Inc.)*, 172 B.R. 159, 162 (Bankr. D. Mass. 1994).

⁴ *Butner v. United States*, 440 U.S. 48, 54 (1979); *Stern v. Continental Assurance Co. (In re Ryan)*, 80 B.R. 264, 266 (D. Mass. 1987), *aff’d* 851 F.2d 502 (1st Cir. 1988).

⁵ *See Terrill v. Planning Bd. of Upton*, 71 Mass.App.Ct. 171, 175 n.10 (2008) (quoting BLACK’S LAW DICTIONARY 1271 (8th ed. 2004))(emphasis added).

⁶ “A conveyance ... shall not be valid as against any person, except the grantor or lessor, his heirs and devisees and persons having actual notice of it....” MASS. GEN. LAWS ch. 183, § 4 (2003).

⁷ 11 U.S.C. § 544(a).

subject to constructive notice under Massachusetts law.⁸ A party is charged with having constructive notice as a matter of law if the instrument has been properly recorded.⁹ Thus, the trustee takes the debtor's real estate on the date of the bankruptcy filing as a bona fide purchaser, subject to all of the properly recorded liens and encumbrances and subject to the debtor's exemption in any equity.

In some circumstances, a mortgage may be recorded under the Massachusetts statutes, but may be invalid for some other reason. Under typical non-bankruptcy circumstances, a mortgagee could reform its mortgage and record it at the registry of deeds.¹⁰ Once a bankruptcy has been filed, however, the trustee may file an adversary proceeding seeking a declaration that the mortgage is invalid. Then the trustee's strong-arm powers under § 544(a) will prevent the mortgagee from reforming the mortgage,¹¹ leading to the same result—the mortgagee loses the security of the mortgage and the creditors of the bankruptcy estate will yield the benefits.

The two recent Massachusetts bankruptcy cases discussed below demonstrate the importance of using strict formalities in the execution and acknowledgement of mortgages. Due to errors in the execution of the loan documents, the mortgagees in these cases lost their secured status to the bankruptcy trustee, allowing the bankruptcy estate to reap the benefits. On the other hand, if the mortgagees had insured proper execution and recording of their mortgages, they would have retained their secured positions.

C. The Recent Massachusetts Bankruptcy Court Decisions

⁸ *Gray*, 172 B.R. at 163.

⁹ *See id.*

¹⁰ *Beach Associates, Inc. v. Fauser*, 9 Mass.App.Ct. 386, 394-95 (1980).

¹¹ *See Tomsic v. Beaulac (In re Beaulac)*, 298 B.R. 31, 35 (Bankr. D. Mass. 2003)(quoting *Gen. Builders Supply Co. v. Arlington Coop. Bank*, 359 Mass. 691, 694 (1971)).

(1) Mortgage Avoidance - *Agin v. Mortgage Electronic Registration Systems, Inc. and Countrywide Home Loans, Inc. (In re Giroux)*¹²

On June 28, 2008, Matthew H. Giroux (“Giroux”) filed a chapter 7 bankruptcy petition and schedules, which listed his real property subject to two mortgages held by Countrywide.¹³ Countrywide filed a motion in the bankruptcy court for relief from automatic stay to foreclose on the first mortgage.¹⁴ In response, the trustee filed a complaint to avoid the mortgage pursuant to 11 U.S.C. § 544.¹⁵ The trustee argued that the mortgage contained a material defect and therefore could be avoided by him.¹⁶

The alleged defect was that the acknowledgement clause of the mortgage in question did not specifically refer to Giroux as the person who appeared before the notary public.¹⁷ Giroux signed the mortgage in the presence of a witness who was the same person as the notary public.¹⁸ However, the acknowledgement did not specifically state that Giroux signed and acknowledged the mortgage as his free act and deed; rather the clause left a blank line where Giroux’s name should have been.¹⁹

In support of his claim, the trustee relied on MASS. GEN. LAWS ch. 183, § 30, which provides that a deed or other instrument requires an acknowledgement by one or more grantor or the attorney executing it, and MASS. GEN. LAWS ch. 183, § 29, which states that a deed shall not be recorded without an acknowledgement or proof of its due execution.²⁰ The purpose for requiring an acknowledgement is that it provides evidence of the legitimacy of

¹² *Agin v. Mortgage Electronic Registration Systems, Inc. and Countrywide Home Loans, Inc. (In re Giroux)*, No. 08-1261, 2009 WL 1458173 (Bankr. D. Mass. May 21, 2009).

¹³ *Id.* at *1.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at *1-*2.

the execution of the instrument when it is offered for recording.²¹ Without the requisite acknowledgment, the trustee argued that the instrument contained a material defect and should not have been recorded.²² Because the materially defective mortgage in this case was recorded improperly, it did not provide constructive notice to the trustee who stood in the position as a hypothetical bona fide purchaser at the commencement of Giroux's bankruptcy case.²³ Thus, the trustee asserted his right to prevent Countrywide from curing the defect and avoid the mortgage under the strong-arm provision.²⁴

On the other hand, Countrywide argued that the mortgage was not defective because the document identified Giroux as the mortgagor and, although the clause left a blank, the language in the clause indicated that the signer acted of his own free act and deed.²⁵ Countrywide, therefore, argued that the mortgage complied with the law and should not be avoided.²⁶

The court determined that the mortgage was defective because applicable law requires a notary public to recite both the evidence relied upon to establish the identity of the signer, and that the signer executed the mortgage as his free act and deed.²⁷ Although defective, the court next considered whether the mortgage was *materially* defective so as to be incapable of providing constructive notice to the bona fide purchaser—the trustee.

²¹ *Id.* at *2 (citing *McOuatt v. McOuatt*, 320 Mass. 410, 413-14 (1946)); *Gordon v. Gordon*, 8 Mass.App.Ct. 860, 862 (1979).

²² *Agin v. Mortgage Electronic Registration Systems, Inc. and Countrywide Home Loans, Inc. (In re Giroux)*, No. 08-1261, 2009 WL 1458173, at *2 (Bankr. D. Mass. May 21, 2009).

²³ *Id.*

²⁴ *Id.* at *3.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at *4.

Persuaded by Sixth Circuit case law,²⁸ the court found that the mortgage was, in fact, materially defective.²⁹

Adopting the Sixth Circuit's reasoning, the court recognized that the policy behind the requirement of a recorded and valid acknowledgement is to substantiate the identity of the instrument's signer, which is necessary for a "fraud-free system" to enable a "free market."³⁰ The requirement instills confidence in buyers and sellers of real property.³¹ Absent such an acknowledgement, others cannot be certain who, if anyone, acknowledged the instrument or whether the instrument was signed as a free act and deed.³²

Although the name of the mortgagor may have been set forth elsewhere in the instrument, and therefore logically should have been the name listed in place of the blank in the acknowledgement clause, this was insufficient to *confirm* the signature.³³ The court, therefore, rejected the notion that substantial compliance with relevant law could cure the deficient acknowledgement or eliminate the requirement.³⁴ The court also rejected the idea that the acknowledgement requirement could be overcome by the mortgagor's intent.³⁵ Since intent is specific to the person who is acknowledging, if that person is not named in the

²⁸ *Id.* (citing *Burden v. CIT Group/Consumer Fin., Inc., et al (In re Wilson)*, No. 07-6447, 2009 WL 723197 (6th Cir. Mar. 19, 2009); *Gregory v. Ocwen Fed. Bank (In re Biggs)*, 377 F.3d 515 (6th Cir. 2004); *Countrywide Home Loans, Inc. v. Gardner (In re Henson)*, 391 B.R. 210 (B.A.P. 6th Cir. 2009); *Select Portfolio Servs., Inc., et al. v. Burden (In re Trujillo)*, 378 B.R. 526, 537 (B.A.P. 6th Cir. 2007); *MG Investments et al. v. Johnson (In re Cocanougher)*, 378 B.R. 518 (B.A.P. 6th Cir. 2007); *Greenpoint Credit, LLC v. Gigandet (In re Chandler)*, No. 3:05-1564, 2005 WL 3263331 (M.D. Term. Nov. 30, 2005); *Drown v. Countrywide Home Loans, Inc. (In re Peed)*, 403 B.R. 525 (Bankr. S.D. Ohio Mar. 27, 2009); *Sensenich v. Countrywide Home Loans, Inc. (In re Willis)*, No. 07-1008, 2008 WL 444547, at *7 (Bankr. D. Vt. Feb. 15, 2008)).

²⁹ *Agin v. Mortgage Electronic Registration Systems, Inc. and Countrywide Home Loans, Inc. (In re Giroux)*, No. 08-1261, 2009 WL 1458173, at *6 (Bankr. D. Mass. May 21, 2009).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* at *7 (emphasis added).

³⁴ *Id.*

³⁵ *Id.*

acknowledgement, it is impossible to substantiate his or her intent.³⁶ Consequently, the court held that the mortgage was both materially and patently defective, and should not have been accepted for recording.³⁷

Pursuant to 11 U.S.C. § 544(a)(3), the trustee has the rights and powers of a bona fide purchaser as defined by state law,³⁸ and under Massachusetts law, a mortgage that is defective when recorded does not provide constructive notice to a bona fide purchaser for value.³⁹ An unrecorded deed is valid only against the grantor, his heirs and devisees, and persons having actual knowledge pursuant to MASS. GEN. LAWS ch. 183, § 4.⁴⁰ While Countrywide did claim that the trustee had actual knowledge of the mortgage's validity,⁴¹ the court stated that any personal knowledge of the mortgage's validity would not be imputed to the bankruptcy estate because, according to 11 U.S.C. § 544(a), the trustee is bestowed the strong-arm power without regard to actual knowledge.⁴² Therefore, the court concluded that the trustee could avoid the mortgage pursuant to 11 U.S.C. § 544(a)(3), recover and preserve for the benefit of the estate the value of the mortgage lien pursuant to 11 U.S.C. §§ 550(a) and 551.⁴³

(2) Declaring the Mortgage Invalid and Preventing of Reformation - *Agin v. South Point, Inc. (In re Kurak)*⁴⁴

On May 21, 2008, Debra A. Kurak ("Kurak") filed for chapter 7 bankruptcy protection.⁴⁵ She listed ownership of real estate that was subject to a lien for which she had

³⁶ *Id.*

³⁷ *Id.* at *9.

³⁸ *Id.* at *10.

³⁹ *Id.* (citing *Graves v. Graves*, 72 Mass. (1 Gray) 391 (1856)).

⁴⁰ *Id.* at *11.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Agin v. South Point, Inc. (In re Kurak)*, No. 08-1404, 2009 WL 2171094 (Bankr. D. Mass. July 15, 2009).

⁴⁵ *Id.* at *1.

no contractual liability.⁴⁶ South Point, Inc. (“South Point”) filed a motion for relief from automatic stay to enforce its rights under the note and first mortgage.⁴⁷ In turn, the trustee filed an adversary proceeding against South Point challenging the validity of the mortgage as pertaining to Kurak and seeking a determination that South Point could not reform the mortgage in light of the trustee's strong-arm powers under 11 U.S.C. § 544(a).⁴⁸

The trustee’s challenge to the validity of the mortgage focused on Kurak’s execution of the mortgage.⁴⁹ Some of the pertinent facts are as follows. The real estate closing occurred at Kurak's home, which she co-owned with Manuel Lopes (“Lopes”), who did not file for bankruptcy.⁵⁰ The closing attorney took the signed mortgage back to his office and made three copies.⁵¹ It is undisputed that Kurak signed the mortgage in the presence of a notary public and initialed each page, as did Lopes.⁵²

Questions occurred when two different versions of the same mortgage came to light. In one version (hereinafter the “First Version”), the first page of the mortgage did not list Kurak as a borrower; only Lopes was listed as a borrower in the First Version.⁵³ The signature page of the First Version was executed by Kurak above the word "witness," that was typed in separately and the word "borrower" was crossed out.⁵⁴ Lopes executed as a borrower.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at *2.

⁵¹ *Id.*

⁵² *Id.* at *3.

⁵³ *Id.* at *1. The term “borrower” was defined as a mortgagor in the security instrument. *Id.*

⁵⁴ *Id.*

A second version of the mortgage was recorded with the registry of deeds (hereinafter the “Second Version”).⁵⁵ The first page of the Second Version identified both Lopes and Kurak as the borrowers, but Kurak’s name appeared in a different typeface than Lopes’ name.⁵⁶ On the signature page, both Lopes and Kurak signed over the word “borrower.”⁵⁷ Apparently after the closing, the attorney's assistant faxed a signed copy of the mortgage to South Point, which asked that Kurak’s name be added to the first page as a “borrower.”⁵⁸ The closing attorney guessed that South Point’s office crossed out the word “borrower” and typed in the word “witness” on the signature page of the First Version of the mortgage because that did not appear on the recorded mortgage or the copy that was at the attorney’s office.⁵⁹

Even though Kurak signed the mortgage in the presence of a notary public and initialed each page, the predicament in this case is that, when Kurak signed the mortgage, she was not a defined borrower.⁶⁰ The court analyzed the issue of whether the alteration of the mortgage after its execution, to add Kurak’s name as a borrower, was a material alteration.⁶¹

The trustee argued that the mortgage was invalid as to Kurak because the attorney’s office altered the document after its execution.⁶² A mortgage is a contract, and to determine the terms of the contract one must look at its four corners, absent extrinsic evidence.⁶³ Therefore, the trustee argued that, at the time of the mortgage’s execution, it was simply a

⁵⁵ *Id.* at *2.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at *3.

⁵⁹ *Id.*

⁶⁰ *Id.* at *4.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

mortgage from Lopes to South Point—not a mortgage from Lopes and Kurak.⁶⁴ Adding Kurak to the first page as a “borrower” after she signed the mortgage could not expand the scope of the mortgage to something it was not.⁶⁵

It is a well-established policy that “titles to real estate should not be held hostage to disputes over the parties’ intention.”⁶⁶ It is vital that society has confidence that instruments are not binding until they have been formally executed and, once executed, they will not be altered or controlled by parol evidence.⁶⁷ Of significant importance, the court found that Kurak’s name did not precede the granting language in the mortgage.⁶⁸ Rather, her name was added without her authority, and the attorney did not obtain and acknowledge her signature after the mortgage was altered.⁶⁹ According to common law, an unauthorized alteration of a written instrument by a party or holder voids the instrument, and the person who altered it cannot recover upon it as altered.⁷⁰ Therefore, the court held that the mortgage was ineffective to divest property rights from Kurak to South Point and accordingly invalid.⁷¹ Due to the trustee’s position as a bona fide purchaser, South Point was prevented from reforming the mortgage.

D. Massachusetts Recording Laws—Other Potential Pitfalls for Mortgagees

(1) Additional Acknowledgment Traps

The above cases do not represent the only problems that may lead to deficient acknowledgements. Provided below are some Massachusetts laws and examples of acknowledgement pitfalls that might result in avoidance of a mortgage by the trustee. In

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at *7.

⁶⁷ *Id.* (quoting *Burns v. Lynde*, 88 Mass. (1 Allen) 305, 312 (1863)).

⁶⁸ *Id.* at *6.

⁶⁹ *Id.*

⁷⁰ *Id.* at *7.

considering the examples below, first and foremost, recall that pursuant to Massachusetts law, a deed⁷² shall not be recorded without an acknowledgment or proof of its due execution either endorsed upon or annexed to the deed.⁷³ Failure to adhere to this law will result in lack of constructive notice to a bona fide purchaser and, as a result, the conveyance will not be valid against the bona fide purchaser.

MASS. GEN. LAWS ch. 183, § 30 prescribes the authorized methods for making acknowledgements and the officers before whom acknowledgements may be made. In Massachusetts, a grantor's acknowledgement may be made before a notary public or justice of the peace.⁷⁴ An acknowledgment made outside of the Commonwealth of Massachusetts, but within the United States or any of its states, territories, or districts, may be made in the presence of a justice of the peace, notary public, magistrate, or commissioner appointed by the governor of this Commonwealth.⁷⁵ However, if taken by any *other* officer who is legally authorized to take an acknowledgment, a certificate of authority must be attached to the instrument in the form prescribed by MASS. GEN. LAWS ch. 183, § 33.⁷⁶ The certificate of authority must have attached to it either a certificate of the secretary of state where the officer resides or a certificate of a clerk of court where the officer resides or where the acknowledgment was made; both certificates must be made under seal.⁷⁷ The certificate of authority must state: (i) that said officer is duly authorized to take an acknowledgment in that

⁷¹ *Id.* at *8.

⁷² “[I]n Massachusetts, the granting of a mortgage vests title in the mortgagee to the land placed as security for the underlying debt. The mortgage splits the title into two parts: the legal title, which becomes the mortgagee’s, and equitable title which the mortgagor retains.” *Maglione v. BancBoston Mortg. Corp.*, 29 Mass.App.Ct. 88, 89 (1990). In other words, when a mortgagor grants a mortgage, it is actually granting the mortgagee legal title. Therefore, the terms deed and mortgage may be used interchangeably.

⁷³ MASS. GEN. LAWS ch. 183, § 29.

⁷⁴ MASS. GEN. LAWS ch. 183, § 30(a).

⁷⁵ MASS. GEN. LAWS ch. 183, § 30(b).

⁷⁶ *Id.* (emphasis added).

⁷⁷ MASS. GEN. LAWS ch. 183, § 33.

state, (ii) that the secretary of state or clerk of court is well acquainted with the grantor's handwriting, and (iii) that the officer believes the grantor's signature to be genuine.⁷⁸ Massachusetts law is also specific as to which officers may take an acknowledgement outside of the United States, its territories and districts.⁷⁹ Finally, those who sign an instrument under their powers of attorney must also comply with the acknowledgement and recording laws discussed herein.⁸⁰

The foregoing acknowledgement statutes provide ample opportunity for a lax mortgagee to make a serious error which could lead to the trustee avoiding the mortgage in the bankruptcy court. Here are some examples of errors that could potentially lead a mortgagee to disaster:

- The notary public's commission has expired.
- The acknowledgement is made in the presence of an officer who was not specifically prescribed by the statutes.
- The power of attorney has expired or is otherwise invalid.
- A certificate of authority is required and omits the seal.
- A certificate of authority is required and omits a statement that the secretary of state or clerk of court is well-acquainted with the grantor's signature and that it is believed to be genuine.

Although there does not appear to be any reported case law in Massachusetts in which a recorded instrument was invalidated for the above reasons, given the strong public policy in favor of strict adherence to the execution and acknowledgement formalities, it is quite

⁷⁸ *Id.*

⁷⁹ MASS. GEN. LAWS ch. 183, § 30(c).

⁸⁰ MASS. GEN. LAWS ch. 183, § 32.

possible that any of the above errors could lead to avoidance of a mortgage by the trustee as a bona fide purchaser.

(2) Mortgagee Name Errors

Outside of the realm of acknowledgements, there are other opportunities, however, which could result in mortgage avoidance. The following errors are less likely to occur, but are possible. For example, the mortgage may mistakenly omit reference to the mortgagee or list the wrong mortgagee altogether. In Massachusetts, a deed may not be accepted for recording unless it contains the grantee's full name and address, pursuant to MASS. GEN. LAWS ch. 183, § 6.⁸¹ A deed that totally omits the name of the grantee is invalid.⁸² Furthermore, if the incorrect grantee is inadvertently named, the court will not allow parol evidence, absent a latent defect.⁸³ This statute states that the validity of the deed shall not be affected by failure to comply.⁸⁴ While it may be true that validity will not be affected as between the mortgagee and the mortgagor, a bona fide purchaser, such as the trustee, cannot be charged with constructive notice if the incorrect party is named as a mortgagee or the name is omitted altogether.⁸⁵

(3) Defective Descriptions

The same argument can be made for a deed that is defective by reason of its property description. According to Massachusetts law, a deed shall not be accepted for recording

⁸¹ MASS. GEN. LAWS ch. 183 § 6.

⁸² *Flavin v. Morrissey*, 327 Mass. 217, 219 (1951); *Macurda v. Fuller*, 225 Mass. 341, 344 (1916).

⁸³ *Crawford v. Spencer*, 62 Mass. (1 Cush.) 418, 419-20 (1851)(an example of a latent defect is if a father and son had the exact same name and there was question as to which was the grantee).

⁸⁴ M.G.L. ch. 183, § 6.

⁸⁵ In recent Massachusetts bankruptcy decisions, self-proclaimed mortgage holders have been denied relief from automatic stay to foreclose on real estate because they failed to establish standing through "submission of an accurate history of the chain of ownership of the mortgage." *In re Hayes*, 393 B.R. 259, 269 (Bankr. D. Mass. 2008). Parties who do not hold or service the mortgage do not have standing to pursue relief from stay. See *In re Nosek*, 386 B.R. 374, 380 (Bankr. D. Mass. 2008), *reversed on other grounds*, 406 B.R. 434 (D. Mass. 2009).

unless it contains an adequate description of the land being conveyed.⁸⁶ The “adequate description” standard is easily met. However, it is possible that the mortgage’s property description might accidentally be omitted in its entirety, describe the wrong property,⁸⁷ and/or fail to reference the property by incorporation. Under these circumstances, the trustee will not be on constructive notice and the mortgagee will lose its secured position if the trustee exercises his or her strong-arm powers.

(4) Obsolete Mortgage

Under the obsolete mortgage statute, if a mortgage is unsatisfied 35 years after the date of its recording (if no term is stated therein) or after 5 years of the stated term, before the expiration of the 35 years or 5 years, as the case may be, a mortgagee must record an extension of the mortgage or affidavit stating that the mortgage is still unsatisfied.⁸⁸ If the mortgagee fails to take these steps, the mortgage is automatically considered discharged, and the mortgagee may not enter and foreclose upon the real estate.⁸⁹ In a bankruptcy setting, the mortgagee might seek approval of relief from automatic stay to foreclose on an unsatisfied mortgage. If the trustee is paying attention and notices that the mortgage has expired by the terms of this statute, the trustee may seek a determination that the mortgage is discharged and therefore not valid, if such action stands to benefit the bankruptcy estate. This particular statute does not seem to implicate the trustee’s strong-arm powers as a bona fide purchaser because it is unnecessary to avoid a mortgage that has been automatically discharged as a matter of law. Note that recording an extension or affidavit to preserve the mortgage during

⁸⁶ MASS. GEN. LAWS ch. 183, § 6A; *Suga v. Maum*, 29 Mass.App.Ct. 733, 737 (1991)(stating that a “description may be complete in itself, or it may incorporate other documents by reference”).

⁸⁷ See *Headwall Recovery Corp. v. Adams Bldg. Corp.*, 66 Mass.App.Ct. 1118 (2006)(invalidating a foreclosure sale and deed because they described a parcel rather than the correct lot).

⁸⁸ MASS. GEN. LAWS ch. 260, § 33. The extension and affidavit expire after 5 years. *Id.*

⁸⁹ M.G.L. ch. 260, § 33.

the bankruptcy process does not constitute a violation of the automatic stay and is not avoidable by the trustee under § 544, as such an act merely preserves status quo of a valid mortgage and is not a transfer of property.⁹⁰

E. Implications of Invalidated or Avoided Mortgage

The all-important question is: What happens when a mortgage is declared invalid or avoided by the efforts of the trustee using his strong-arm powers? As a practical matter, the trustee will not avoid or seek to invalidate the mortgage unless the bankruptcy estate stands to benefit. If the second or third mortgage is avoided, for example, and there is no equity in the real estate due to a valid first mortgage, the estate would not benefit. Conversely, if a fair amount of equity in the real estate would remain after the mortgage is avoided, then the trustee will likely pursue the matter to enable a distribution to creditors of the estate. The next question is logically this: Why is a debtor, who has duly recorded a declaration of homestead, not entitled to the equity? The case of *In re Jule A. Guido* amply addressed this question and held that the declaration of homestead is subordinated to a mortgage which has been preserved for the benefit of the estate.⁹¹

(1) Declaration of Homestead Subordinated to Avoided Mortgage - *In re Jule A. Guido*

⁹⁰ In the case of *In re 201 Forest Street, LLC et al.*, 404 B.R. 6, 10 (Bankr. D. Mass. 2009) the mortgagee argued that the mortgagor knew that the mortgagee had been attempting to exercise its power of sale for years, but the mortgagor filed for bankruptcy protection preventing the mortgagee from recording an extension/affidavit, thus the mortgagor should not benefit from the statute. The court held that the mortgage was discharged by operation of law. *Id.* at 17. Note, however, that the court in *Shamus Holdings, LLC v. LBM Fin., LLC (In re Shamus Holdings, LLC)* held that recording an extension to prevent automatic discharge under obsolete mortgage statute would not be a violation of the automatic stay or a transfer of property that could be avoided under § 544, as it is merely continuing the status quo of a duly perfected mortgage. 2009 WL 2407664, at *11 (Bankr. D. Mass. Aug. 5, 2009).

⁹¹ *In re Guido*, 344 B.R. 193, 200 (Bankr. D. Mass. 2006).

Jule A. Guido (“Guido”) purchased residential real estate on March 18, 1994.⁹² She financed the purchase and granted a first mortgage to Milford Federal Savings Bank and Loan.⁹³ Then, on March 31, 1997, Guido granted Diversified Coolidge Realty Corporation (“Diversified”) a second mortgage to secure an additional loan.⁹⁴ Diversified, however, failed to record the second mortgage at that time.⁹⁵ Some time later, Diversified sued Guido in state court and obtained a judgment as a result of Guido’s defaulted loan payments.⁹⁶ Diversified levied on the real estate by recording the execution at the registry of deeds, which prompted Guido to file a declaration of homestead on July 1, 2004.⁹⁷ Finally, on November 10, 2004, Diversified recorded its second mortgage at the registry of deeds.⁹⁸

Guido filed for chapter 7 bankruptcy protection on February 7, 2005.⁹⁹ As a result, the trustee in bankruptcy filed an adversary proceeding against Diversified to avoid the second mortgage, as it was preferential under 11 U.S.C. § 547(b) (i.e., the mortgage was recorded within 90 days of the bankruptcy filing).¹⁰⁰ The trustee successfully preserved a portion of the value of the second mortgage for the bankruptcy estate through settlement.¹⁰¹ Apparently hoping to preserve her own equity in the real property, Guido filed a motion to compel the trustee to abandon the second mortgage.¹⁰² She argued that the second mortgage was subordinated in right to her homestead, because the homestead was recorded before the

⁹² *Id.* at 194.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 195.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

second mortgage.¹⁰³ Furthermore, she argued that any equity that resulted in the avoided mortgage was insignificant and burdensome to the estate, and should thus be abandoned by the trustee.¹⁰⁴

The court considered which claim took priority: the second mortgage that was signed on March 31, 1997 (not recorded until November 10, 2004) or the declaration of homestead recorded on July 1, 2004. The court held that the second mortgage was unhampered by § 522(c), and under Massachusetts law, had priority over the declaration of homestead (regardless of the fact that the homestead was recorded before the second mortgage).¹⁰⁵ The court stated that it is well-settled that, while the trustee assumes the secured position formerly held by the mortgagee, 11 U.S.C. § 551 does not elevate the priority of the avoided transfer.¹⁰⁶ The mortgage has only the priority it would have held under applicable state law.¹⁰⁷ In this case, the homestead was on record prior to the second mortgage.¹⁰⁸

Notwithstanding the order of recording, based on precedent and supporting Massachusetts law, the court held that a previously recorded declaration of homestead is subordinate to a subsequently recorded mortgage.¹⁰⁹ This holds true even if the mortgage does not include a provision that expressly releases or subordinates the homestead, provided however that the mortgage contains words of grant and standard mortgage covenants.¹¹⁰ The court found that second mortgage in question did contain the requisite mortgage covenants

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 195-96.

¹⁰⁵ *Id.* at 198.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 198-99.

¹¹⁰ *Id.* at 199 (citing *In re Desroches*, 314 B.R. 19, 22 (Bankr. D. Mass. 2004); *Atlantic Savings Bank v. Metropolitan Bank and Trust*, 9 Mass.App.Ct. 286 (1980)).

under Massachusetts law.¹¹¹ Thus, the court ruled that as between Guido and the trustee, the trustee held the second mortgage pursuant to 11 U.S.C. § 551, and the second mortgage enjoyed priority over the declaration of homestead.¹¹² Guido's motion to compel the trustee to abandon the second mortgage was consequently denied, as the second mortgage held value to the bankruptcy estate.

(2) Preservation of the Mortgage for the Benefit of the Estate

After the trustee avoids a mortgage, 11 U.S.C. § 551¹¹³ automatically preserves the mortgage in the same secured position it had prior to avoidance so that a junior mortgage does not gain priority over it to the detriment of the bankruptcy estate. Otherwise, the trustee would first have to pay off all the junior liens before the trustee could realize any benefit of equity for the estate. The trustee stands in the shoes of the creditor whose mortgage was avoided. The avoided mortgage's priority is not superior over senior mortgages. Once the trustee successfully avoids the mortgage, the mortgage is preserved for the bankruptcy estate, and the mortgagee is left holding an unsecured debt—a very undesirable situation for the mortgagee.

F. Application in the Bankruptcy Context

(1) Pre-Bankruptcy Considerations

Although in vogue right now, the attacking of the validity of a mortgage as a valid secured claim is not new to this District and in Western Massachusetts in particular. In 1988, a bankruptcy trustee was able to set aside a mortgage held by a lender on real estate in Vermont when the debtor's signature (a Massachusetts resident who filed a chapter 7

¹¹¹ *Id.* at 199-200

¹¹² *Id.* at 200.

¹¹³ "Any transfer avoided under ... 544 ... of this title ... is preserved for the benefit of the estate but only with respect to property of the estate." 11 U.S.C. § 551.

proceeding in Massachusetts) on a mortgage deed was only witnessed by one person instead of the Vermont statutory requirement of two witnesses. *Stern v. Continental Assurance Company (In re Ryan)*, 851 F.2d 502 (1st Cir. 1988). With the advent of viewing the Massachusetts' registry of deeds images on the internet, it is imperative that debtor's counsel review the **actual** deeds, homesteads, mortgages and liens of the client for their validity (or lack thereof) to insure that a client is properly counseled as to possible issues **prior** to the bankruptcy petition being filed. Counsel should also insure that the instruments are recorded in the proper registry department as an instrument recorded in the regular registry is not valid for the registered land court department and vice-versa. If a defective mortgage can be avoided in chapter 7 bankruptcy filing, the debtor and counsel may consider other options such as a work-out or a chapter 11 or 13 filing.

Specifically, a chapter 7 trustee will be interested in liquidating an avoidable mortgage as soon as possible which could be contrary to the debtor's main goal of preserving the residence. A fixed thirty (30) year mortgage may be avoided and the debtor will be in the unenviable position of attempting to find financing (especially in today's market) to make a lump sum or short term payment plan to the trustee. If a chapter 7 petition is filed, this is a prime area of negotiation for the debtor, lender and trustee . The lender whose claim is about to be unsecured could be the new lender so that it may be able to minimize its loss from an avoided mortgage. At the onset of the case, both the trustee and the debtor may be in best position from an economic situation to settle the matter as opposed to later in the case when attorney's fees and costs have been incurred on both sides.

If a chapter 11 or 13 petition is filed and the mortgage is avoided, the debtor might then be required to pay off a significant unsecured claim over the life of the plan. These

options may be very good financial options for a client, but the client must have the capital or income to consummate any plan. As such, the debtor and counsel must consider other options such as a refinance or rectifying the defect to insure the debtor's main goal of preserving the residence; especially if it is unclear whether a defect actually exists. In addition, counsel should make sure that the debtor has a valid declaration of homestead prior to the bankruptcy filing so all of the debtor's possible exemption options are available.

(2) Chapter 7 v. Chapters 11 and 13

The interplay between a chapter 7 and a chapter 11 or 13 filing is that in a chapter 7 bankruptcy proceeding, the avoidance of the lien is for the benefit of the creditors by the chapter 7 trustee and the trustee controls the litigation and not the debtor. When a debtor is surrendering or abandoning the property, this distinction is of less importance. However, when the target for avoidance is a mortgage on a residence that the debtor is attempting to retain, then counsel should consider with the client, what type of bankruptcy proceeding should be filed. This should include counsel's review of the lending documents on any outstanding mortgage for the issues discussed herein that could be subject to avoidance in bankruptcy.

(3) Does a Chapter 13 Debtor have Standing to Use the Powers under § 544 of the Bankruptcy Code

The First Circuit has not rendered a decision as to whether a chapter 13 debtor can maintain an adversary proceeding under §544 of the Bankruptcy Code. Other circuits are split as to whether a chapter 13 debtor has standing to bring an adversary action to avoid a security interest. In addition, how the claim or claims are brought may make a difference as to whether a debtor has standing to bring an action against a mortgagee.

As starting point, the term “debtor in possession” is a term of art applicable to chapter 11 proceedings only. See 11 U.S.C. § 1101(1) and *Jackson v. Martlette*, (*In re Jackson*), 317 B.R. 573, 578 (Bankr. D. Mass. 2004) (J. Feeney). §1302 of the Bankruptcy Code appoints the standing trustee the power to act as the trustee in all chapter 13 proceedings unless the United States trustee appoints another person. §1303¹¹⁴ gives exclusive rights to the chapter 13 debtor as it pertains to the use, sale or lease of property under §363 of the Bankruptcy Code.¹¹⁵ In addition, the legislative history from §1303 states that “the section does not imply that the debtor does not also possess other powers concurrently with the Trustee,” such as debtor has the power to sue and be sued.¹¹⁶ §522 gives all debtors limited rights to recover property that the debtor could have exempted had the transfer not occurred.¹¹⁷ In a Massachusetts decision, Judge Hillman stated in the context of a preference action under §547 (§544 and §547 are both covered under 522(h)) brought by a chapter 13 debtor that:

¹¹⁴ All section references apply to the Bankruptcy Code 11 U.S.C. 101 *et. seq.*

¹¹⁵ 11 U.S.C. § 1303 states: “Subject to any limitation on a trustee under this chapter, the debtor shall have, exclusive of the trustee, the rights and power of a trustee under sections 363(b), 363(d), 363(e), 363(f) and 363(l) of this title.”

¹¹⁶ The legislative section under the 1978 acts states: “Section 1303 of the House amendment specifies rights and powers that the debtor has exclusive of the trustees. The section does not imply that the debtor does not also possess other powers concurrently with the trustee. For example, although section 1323 is not specified in section 1303, certainly it is intended that the debtor has the power to sue and be sued.”

¹¹⁷ 11 U.S.C. § 522(g) & (h) state as follows:

(g) Notwithstanding sections 550 and 551 of this title, the debtor may exempt under subsection (b) of this section property that the trustee recovers under section 510(c)(2), 542, 543, 550, 551, or 553 of this title, to the extent that the debtor could have exempted such property under subsection (b) of this section if such property had not been transferred, if –

(1)(A) such transfer was not a voluntary transfer of such property by the debtor; and

(B) the debtor did conceal such property; or

(2) the debtor could have avoided such transfer under subsection (f)(1)(B) of this section

(h) The debtor may avoid a transfer of property of the debtor or recover a setoff to the extent that the debtor could have exempted such property under sub-section (g)(1) of this section if the trustee had avoided such transfer, if –

(1) such transfer is avoidable by the trustee under section 544, 545, 547, 548, 549, or 724(a) of this title or recoverable by the trustee section 553 of this title; and

(2) the trustee does not attempt to avoid such transfer.

This subsection [§1303] permits a Chapter 13 debtor to bring an avoidance action if: (1) the trustee could have brought such an action; (2) the trustee did not bring the action; (3) the transfer was involuntary and the debtor did not conceal the property or the debtor could have avoided the transfer under § 522(f)(2); (4) and the debtor could have exempted such property had the trustee actually avoided the transfer.

Callanan v. International Fidelity Ins. Co. (In re Callanan), (Bankr. D. Mass. 1995) quoted in *Miller v. Brotherhood Credit Union (In re Miller)*, 251 B.R. 770 (Bankr. D. Mass. 2000).¹¹⁸

In *Miller*, Judge Hillman ruled that the preference payment was **voluntary** (the debtor had made the payment to the credit union). Therefore, as § 522(h) did not apply, the debtors could not bring an avoidance action independent of § 522(h).

In the context of §544, other districts and circuits have ruled that a chapter 13 debtor does not have standing to file a complaint to avoid a mortgage or consensual lien. In *Hansen v. Hansen (In re Hansen)*, 332 B.R. 8 (B.A.P. 10th Cir. 2005), the appellate panel dismissed the debtors' §544 action to attempt to avoid the creditor's lien on their mobile home when the UCC lien had lapsed at the local county clerk's office on the basis that the debtors did not have standing, and therefore, the bankruptcy court lacked subject matter jurisdiction. Similarly, a bankruptcy court held that a chapter 13 debtor could not avoid a mistakenly released mortgage under §544 (a)(3) as the debtor did not have standing as the original granting of the mortgage was voluntary. *Gilliam v. Bank of America Mortgage, L.L.C. (In re Gilliam)*, 2004 Bankr. Lexis 1653 (Bankr. D. Kansas 2004).

However, the 9th Circuit Bankruptcy Appellate Panel, took the opposite approach by holding that chapter 13 debtors had standing to prosecute an action under §544. *Houston et. al. v. Eiler et. al (In re Cohen)*, 305 B.R. 886 (B.A.P. 9th Cir.2004). In *Cohen*, the debtors

¹¹⁸ These decisions were prior to the 2005 Bankruptcy Reform Act, but there were no substantive changes to these Code sections.

sought to avoid a security interest in the settlement proceeds of a personal injury action under §544 as the creditors had not filed a financing statement to secure their interest. The court took a “holistic” construction of the Bankruptcy Code,¹¹⁹ and indicated that the subject statutes were ambiguous and that chapter 13 is to be construed broadly.¹²⁰ The *Cohen* court also looked at the structure of the chapter 13 system in which the debtor retained possession of the property of the estate, including proceeds of avoiding actions, and was unable to use such property of the estate without court approval. The court held that the construction of §1303 most consistent with the bankruptcy code was that by listing powers held exclusive to the chapter 13 trustee, it left the chapter 13 debtor with other powers that may be exercised concurrently with the chapter 13 trustee.

At least one Massachusetts Bankruptcy Court has identified the problem if a chapter 13 debtor did not have standing to prosecute an avoidance action. In *Jackson*, the court stated that:

In this district, each standing chapter 13 trustee has tens of thousands of active chapter 13 cases at any one time. Among those cases are dozens, if not hundreds, of causes of action. To require that the trustee be a party to all litigation on behalf of the chapter 13 estates would subject the trustee to an impossible responsibility.¹²¹

As a practical matter, it may be what causes of actions that the debtor may have which may control whether the debtor has standing in an adversary proceeding. If the debtor

¹¹⁹ *Id.* at 899.

¹²⁰ *Id.* at 900.

¹²¹ *Jackson*, at 579, the rest of the footnote 3 states as follows: There are practical reasons why the debtor alone should control, and be responsible for, litigation. If the standing chapter 13 trustee were the representative of the estate for litigation purposes it would impose a huge, additional administrative burden. After all, one cannot be a party to litigation without assuming responsibility for its prosecution. The trustee would have to investigate the existence of potential litigation, assess its merits, and make a cost benefit analysis of pursuing the claim. See *Gardner*, 218 B.R. at 342. If litigation was determined to be prudent, the trustee would have to select and retain counsel and might need expert witnesses and investigators. The trustee would incur expenses for filing fees, transcripts and other costs of litigation and would need to be involved in formulating litigation strategy, discovery and negotiating settlement. Eventually the trustee would be involved in trial and possibly

has a claim strictly under §544 as opposed to numerous predatory lending claims with a §544 claim, it would appear that debtor would be in a better position to prosecute the actions in chapter 13.

- (4) As a Practical Matter, Debtor's Counsel may have No Option, but filing a Chapter 13 Case when he is Confronted by Predatory Lending Issues, as Chapter 7 may not be a Viable Option

From this writer's perspective, a large percentage of bankruptcy filers who own real property come to counsel when their property is about to be foreclosed, they are behind on their mortgage, a lien has been placed on their home or they have been sued. It is also a safe bet that the majority of the loans that are in default that bankruptcy counsel are dealing with are sub-prime loans that may be subject to attack as a predatory loan. However, based on a cursory review of the matter, the debtor will be in default and that will leave counsel with the choice of filing a chapter 13 petition to cure the arrears. Also, it will probably require counsel's review of the documents and specific questioning of the client to ascertain whether a cause of action even exists. Again, a chapter 7 trustee's main concern is to liquidate the estate so the trustee may not be interested in pursuing difficult, complex predatory lending claims. The debtor's financial situation may probably lead counsel to recommend other options than chapter 7. On the other hand, if the debtor has the financial ability, the debtor may be able to make a settlement with the trustee that is better than a long term obligation with its current lender.

In *Cohen*, the chapter 13 debtor and trustee had executed an assignment of the avoidance claims without court approval.¹²² The court must approve such a transaction, and

appeal. Inevitably disputes would arise between the trustee and the debtor concerning decisions made, and actions taken or not taken by the trustee.

¹²² *Cohen*, 305 B.R. at 891.

therefore, the *Cohen* court voided the transaction. As such, court approval of an assignment by the chapter 13 trustee may be an alternative. In *Cohen*, the debtors also had language in their plan that the debtors were going to file an adversary proceeding to avoid the secured creditors' liens and treat them as unsecured in the plan.¹²³ The Bankruptcy Court for the Western District of Massachusetts follows the "law of the case" doctrine which prevents reconsideration of issues which have been decided either expressly or by necessary implication through final judgments and orders of the court. *McDonough v. Plaistow Cooperative Bank (In re McDonough)*, 166 B.R. 9, (Bankr. D. Mass. 1994). In *McDonough*, the court ruled that lien stripping was available to chapter 13 debtors and that it should be done in the context of the plan. Therefore, there is some credence to the argument that if your cause of action is conspicuously placed in a plan that the debtor will be filing an adversary proceeding, and the plan is approved that the debtor would have standing to proceed with the avoidance action in the adversary proceeding. However, this also assumes that the plan has already been approved by the court before the debtor commences the adversary proceeding, which as set forth below, may not be realistic. However, the safer course would be to get agreement from the chapter 13 trustee and then bankruptcy approval.

Alternatively, if the debtor cannot wait or get court approval, a debtor could also file a chapter 11 proceeding. However, with the additional filing fees and other significant expenses, counsel should advise the client of these risks so that the client is aware of the possible additional costs prior to when the bankruptcy case is filed.

G. Defenses once the Bankruptcy Case is Filed

Assuming the debtor has standing, debtor's counsel cannot take a cavalier attitude that counsel will address contested issues as to the validity and the avoidance of a mortgage

¹²³ *Id.* at 890.

at later stage in a bankruptcy case. If counsel does so, counsel runs the risk of losing an appropriate remedy for the client. Typically in a bankruptcy case, questions of the validity of mortgages and amounts owed on a mortgage come up in the context of a motion for relief from stay filed by the alleged mortgagee. Perhaps, the client will have questions about the application of payments or increase in monthly payments due to a rate interest increase and counsel might be looking carefully at the loan documents closely for the first time. **Counsel should avoid falling into this trap.**

The rule in the First Circuit is that a hearing on a motion to lift the automatic stay is not a proceeding for determining the merits for underlying substantive claims or defenses, but it is analogous to a preliminary injunction hearing, requiring a speedy and necessarily cursory determination of the reasonable likelihood that creditor has a legitimate claim or lien as to debtor's property. *Grella v. Salem Five Cent Savings Bank*, 42 F.3d. 26 (1st Cir. 1994). *Grella* was a case involving allegations involving preferences between a secured creditor and a chapter 7 trustee. A case applying the predatory loan issues in the sub-prime melt-down era is *In re Noyes*, 382 B.R. 561 (Bankr. D. Mass. 2008) (Judge Feeney). A copy of the decision is attached.

In *Noyes*, the debtor at the time of the case was 82 years old and unsophisticated in financial matters.¹²⁴ The loan in question called for an initial payment of \$5,052.55 per month in which the debtor only made 2 payments before defaulting.¹²⁵ The debtor, while in a chapter 13 bankruptcy, filed a state court action against the mortgagee, the servicer, the mortgage broker and the broker's company alleging basically that there was a M.G.L. c. 93A

¹²⁴ *Id.* at 563-64.

¹²⁵ *Id.* at 566.

claim as a result of violations of RESPA.¹²⁶ The complaint did not include various other claims under specific statutory federal and state law or a separate claim to avoid the subject note and mortgage under a theory of unconscionability under state law or that the debtor lacked capacity to enter into the contract.¹²⁷ At the evidentiary hearing, the closing attorney on behalf of the lender indicated that despite having conducted approximately 500 real estate refinances in 2005, that he distinctively remembered the subject closing because it was a, “sub, sub, sub, subprime [loan]”.¹²⁸ In addition, after testimony, the court seriously questioned whether the debtor had the mental capacity to enter into the loan transaction.¹²⁹

Despite the fact that the court “possibly could find that she [debtor] was the target of a predatory lending scheme,” the court on the basis of the *Grella* mandate, granted the mortgagee relief from the automatic stay. The court stated:

All too often counsel rely upon the tragedy of a situation to circumvent the diligence required to actually prove, or in this case demonstrate a reasonable likelihood of proving, violations of the myriad federal and state consumer protection statutes whose remedies do not necessarily overlap or afford much relief to debtors unable to rescind and tender under TILA, unable to obtain a determination of unenforceability under the Massachusetts Predatory Home Loan Practices Act, Mass. Gen. Laws ch. 183C, §3, or unable to make out clear violations of specific statutory provisions as was the case in *In re Maxwell*, 281 B.R. 101 (Bankr. D. Mass. 2002). *Id.* at 581.

¹²⁶ *Id.* at 567-69. Specifically, the debtor alleged eight counts as follows: violation of the Massachusetts Mortgage Brokers Act; Breach of Fiduciary Duty and Undue Influence; Rescission and Damages under Massachusetts Consumer Protection Act; Injunctive Relief under the Massachusetts Consumer protection Act: Fraud; Breach of Contract; Emotional Distress; and Civil Conspiracy.

¹²⁷ The Court stated, “Notably, the Borrowers did not set forth any specific causes of action under the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692o (West 1998) (“FDCPA”); the Truth in Lending Act, 15 U.S.C. § 1601-1667e (West 1998)(“TILA”) or the Massachusetts Consumer Credit Cost Disclosure Act, Mass. Gen. Laws. Ann. ch. 140D, §§ 1-34 (West 1991 & Supp. 2001) (“MCCDDA”). Similarly, although the borrowers referenced “RESPA” in their complaint, and the debtor referenced it in her brief, their counsel did not cite any specific sections of RESPA or its implementing regulation, Regulation X, 24 C.F.R. 3500 *et seq.* . . . and they did not assert that the provisions of the Massachusetts Predatory Home Loan Practices Act, Mass. Gen. Laws. ch. 183, §§ 1-19, applied to their loan.” *Id.* at 568

¹²⁸ *Id.* at 574-75.

¹²⁹ *Id.* at 580.

The court indicated that the debtor could still pursue her state court action to recover her damages.¹³⁰ However, this decision might not have been advantageous to the debtor's main goal of preserving her residence, upon which relief had been granted for the creditor to foreclose.

H. Considerations for Settlement

If counsel, whether representing the trustee, debtor, debtor-in-possession or the creditor, is confronted with similar issues, counsel should review the proof of claims filed in the case.¹³¹ If a mortgagee's secured claim is the subject of an avoidance action, it will probably be the largest creditor in the case. A review of the claims filed can give counsel a good indication as to what a 100% dividend will be and can counsel the client as to what may be in the client's financial best interest so as to settle early on in litigation as opposed to litigating the matter and incurring additional expenses.

I. Conclusion

Simple mistakes, such as the omission of the mortgagor's name in the acknowledgement clause and insertion of the mortgagor's name on the front page of a mortgage, were fatal to the mortgagees discussed above. The point lenders and practitioners should take away from this is that they must familiarize themselves with the applicable Massachusetts statutes and exercise extreme care to adhere to them. Counsel for the debtor should review the client's documents closely **prior** to filing bankruptcy, and if there is a potential claim, counsel should advise the client of the possible issues that may arise if a bankruptcy case is filed. If counsel and the client do determine that the bankruptcy court is the best forum for the debtor's claims, counsel must take a proactive approach in asserting

¹³⁰ *Id.* at 581.

the client's claims in the bankruptcy court to avoid the consequences of an adverse determination during a motion for relief from stay hearing such as in *In re Noyes*. During a time when bankruptcy filings are increasing, and debtors, both inside and outside of bankruptcy, are facing foreclosure on their homes more frequently, competent and well-prepared counsel are needed to determine each party's claims and defenses both inside and outside of the bankruptcy court.

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¹³¹ If the case is a chapter 7 proceeding and no claims bar date has been set, counsel should make sure that the chapter 7 trustee does so as soon as possible so the parties are not negotiating in a vacuum.