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CONSUMER BANKRUPTCY

Defending Motions to Lift the Stay

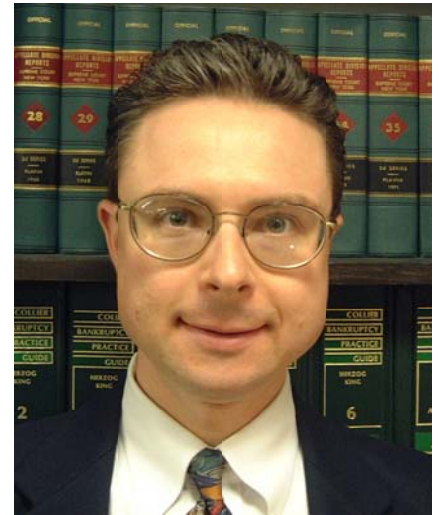
by Craig D. Robins, Esq.

Motions to lift the stay must comply with the various rules. The most common type of motion in consumer bankruptcy practice is a motion to lift the stay. Such motions are typically brought by a secured creditor, such as a mortgagee or auto lender, because the debtor has fallen behind with his or her payment obligations.

Almost all creditors' attorneys now bring "lift-stay" motions by filing and serving a "notice of presentment of a proposed order lifting the stay," as this type of application alleviates the need to make a court appearance unless opposition is filed. However, the judges in this district have strict chamber's rules pertaining to how such applications can be brought, which are in addition to Bankruptcy Code and local rule requirements. The various court rules seek to protect a debtor by requiring that various due process requirements be satisfactorily addressed.

Lift-stay motions often contain fatal mistakes. Most lift-stay motions are prepared by secretaries and paralegals. A large percentage of these applications are not sufficiently reviewed by supervising attorneys and do not meet all of the court's requirements. Consequently, it is often possible to spot a fatal procedural flaw, which, if brought to the attention of the court, could end up buying your client more time in their home. A former law clerk estimated that as many as one-fourth of all lift-stay motions are initially defective.

Reviewing a lift-stay motion for errors can help your client. Even in situations where there is a low likelihood of the debtor ultimately saving the subject premises, you may be able to extend the debtor's time in the house by bringing these fatal flaws to the attention of the court. No matter how solid a creditor's position is, the creditor still has an absolute



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obligation to make sure that its motion papers are properly prepared and conform to the Bankruptcy Code as well as local rules and chamber's rules.

I have focused the following discussion primarily on lift-stay motions brought by mortgagees (as opposed to other secured creditors like car loan lenders), as efforts undertaken by a foreclosing mortgagee will probably affect your client the most. However, the same principals apply to all lift-stay motions.

Were the motion papers properly served? Make sure that service of the motion was proper. The moving party must file with the court an affidavit of service or certificate of mailing indicating that

all proper parties were served. This includes the debtor, debtor's counsel, and the bankruptcy trustee, all of whom are indispensable parties who must be joined. In addition, notices of presentment must have a time period of at least 20 days from the date of service to the date of presentment.

Did the motion include the necessary supporting documents? A motion to lift the stay must include a copy of the mortgage note and mortgage, and these documents must show the date of recording. In addition, the debtor must be a party to the note or mortgage. All exhibits must be legible. This is important as exhibits are often generated from microfiche where the legibility may be poor.

Did the moving party establish standing? Mortgages are frequently assigned. If the moving creditor is not the same entity as the creditor set forth in the mortgage and note, then there must be a recital in the motion papers explaining that either the mortgage was assigned or that the movant is a servicing agent. If the mortgage was assigned, a copy of the recorded instrument of assignment must be attached to the motion papers. If the movant is the servicing agent, then the motion papers must contain a copy of the servicing agreement or power of attorney authorizing the servicing agent to take legal action to enforce the mortgage.

Is there a supporting affidavit from the loan representative? It is elementary law that all motions must be supported by an affidavit from someone who has actual knowledge of the relevant facts. Accordingly, there must be a notarized and executed affidavit from a loan representative. This affidavit must set forth the post-petition payment defaults and the total amount of the mortgage

indebtedness.

In addition, the affidavit must either indicate that the stay should be lifted for cause, in which event the specific cause should be set forth, or the stay should be lifted because the mortgage indebtedness exceeds the value of the property. Finally, the affidavit must correctly identify the address of the subject property.

Has the mortgagee properly demonstrated the value of the property? When the mortgagee asserts that the ground for lifting the stay is that the mortgage indebtedness exceeds the value of the property, then the mortgagee must include a valuation report such as an appraisal or broker's price opinion letter as an exhibit to the motion. The valuation report must be current, which generally means that it must have been made within the preceding 90 days, or within 90 days of the petition date. Anything older than that can be considered obsolete.

The valuation report must be signed and must also contain language in the form of an affidavit that the person who prepared the report attests that he or she is disinterested and is not a broker or selling agent under a listing agreement and does not anticipate acting as the broker or listing agent for any party in interest. The person who signs the valuation report must include a statement of his or her professional qualifications.

The report must contain a suitable description of comparable values of properties that have been recently sold. If the moving party is taking the position that the mortgagee lacks adequate protection, then the moving papers cannot contain any inconsistent statements which indicate that the mortgagee is fully secured. In lieu of providing a valuation report, the

mortgagee can rely on the debtor's admission of the value of the property as indicated in the debtor's bankruptcy schedules. In such an event, the creditor must include a legible copy of the debtor's schedule "A" or "D" as an exhibit.

Is the motion seeking proper relief? Generally, a motion to lift the stay, when brought by notice of presentment, may not seek any type of equitable relief other than an unadorned vacating or modifying of the stay to permit the mortgagee to enforce its state law remedies. Accordingly, a proposed order cannot seek payment of costs and attorney's fees as this creates an inconsistency between section 362 (a)(d)(2) and section 506 (b).

What happens if you demonstrate a fatal error? The mortgagee must usually start the entire motion process all over again. This means that the mortgagee must take the necessary time to correct and amend its motion.

The mortgagee must then re-serve all necessary parties, and begin the twenty-day time period all over again. This can get your client an extra four to six weeks or more in their home. Keep in mind that this article focused on utilizing procedural errors as a defense. There are numerous substantive issues that you can raise as well.

*Editor's Note (revised 2008):
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