

## PANEL ONE

*Moderated by The Honorable Paul Bonapfel\**

*Kevin Spainhour:* I want to now introduce you to the moderator for today's event, and that is the Honorable Paul Bonapfel. I don't think that he really needs a lengthy introduction, as Mr. Camp mentioned to me this morning, he has lost many cases before Judge Bonapfel, so I'm sure many of you know him.

Judge Bonapfel was a graduate of Florida State University. He received his law degree from the University of Georgia, and he sat on the bench beginning in 2002. Judge Bonapfel is the former chairperson of the bankruptcy section of the State Bar of Georgia and the bankruptcy section of the Atlanta Bar Association, and he is also a director, former president, of the Southeastern Bankruptcy Law Institute. Judge Bonapfel.

*Judge Bonapfel:* Thank you, Kevin, and good morning. We're glad to see all of ya'll here. We're going to be starting the program will be our consumer portion, and we're going to be focusing on residential real estate mortgages, something of some interest to both creditor and debtor community. And we got two main themes out of this: One, how does a debtor come out of Chapter 13 with a cured and reinstated mortgage and second, how does a lender maintain its rights not to have its claim modified and to collect what is owed. And the non-modification provision, of course, is 1322 (b)(2). With me on the panel, and actually they'll be doing all the work, I'll have the questions, and they'll have the answers.

First of all, on our right, is Howard Rothbloom, who is an Atlanta lawyer, maybe a Marietta lawyer. Received his bachelors and JD degrees from the University of Georgia. His practice emphasis is consumer representation in bankruptcy and in state and federal courts. Howard has had a number of representations of consumers in class actions, which have gained national

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\* Paul W. Bonapfel has been a United States Bankruptcy Judge for the Northern District of Georgia since 2002. Prior to his appointment, he practiced law in Atlanta, Georgia, with the law firm of Lamberth, Bonapfel, Cifelli & Stokes, P.A., now known as Lamberth, Cifelli, Stokes, Ellis & Nason, P.A. Judge Bonapfel received his B.A. *cum laude* in government from Florida State University in 1972 and his J.D. *magna cum laude* from the University of Georgia School of Law in 1975, where he was Notes Editor of the *Georgia Law Review*. He was a judicial law clerk for United States District Judge Wilbur D. Owens, Jr., in Macon, Georgia.

attention, and he has been successful in that regard. Most importantly for me, because I have one son, Howard is an Eagle Scout.

Also with us from Memphis is Frank Childress, who is a shareholder in the law firm of Baker Donelson in Memphis. He received his undergraduate degree from the University of Tennessee at Martin and his JD cum laude from the Cumberland School of Law at Stanford. He has a quite impressive resume. He has been an assistant U.S. attorney. He has been a United States Trustee in a couple of regions and finally decided to get a real job with a law firm. He has been the past chair of the bankruptcy section of the Tennessee State Bar. He's been listed in the best lawyers of America since 2001 and is a frequent lecturer on bankruptcy issues. So, we're pleased to have both of these fine lawyers with us here today.

You should have in your materials a hypothetical, and we're going to use that hypothetical as the base for our discussion today. Just by way of background, I mentioned earlier Section 1322 (b)(2). That is the provision of Chapter 13 that says that a plan cannot modify a claim secured by a security interest only in real estate that is the debtors' principle residence. The other part of our Chapter 13 puzzle here is 1322 (b)(5), which provides that a debtor may cure defaults and maintain regular installment payments in an at least an implied provision—implied promise of this provision is that upon entering and exiting Chapter 13, the debtor will be able to have a cured and reinstated mortgage. And what we're going to be talking about in this part of the program is exploring the issue of what can go wrong with regard to a home mortgage during the course of a Chapter 13. So, with that, let me start with the hypothetical, and we're going to take it in parts. So, here we go.

To finance the purchase of their home in 2004, Donald and Darlene Debtor executed a promissory note in the original amount of \$200,000 to ABC Home Loan, Inc. The Debtors executed a security deed on the residence to secure repayment of the note. The note calls for monthly installment payments of \$1500 with an interest rate of 6%. The monthly installment payment includes an allocation for the escrow of real estate taxes and insurance. The documents contain the following provisions:

In the event a borrower fails to perform the covenants and agreements in the security instrument or if there is a legal proceeding, such as a bankruptcy, bunch of other stuff. The lender can recover, things including, but not limited to, the sums secured by a lien which has priority, payoff prior liens, the cost of appearing in court, and paying reasonable attorneys' fees to protect its interest

in the property and/or rights under this security instrument, including its secured position in a bankruptcy proceeding.

In 2006, Darlene Debtor lost her job. As a result, the Debtors fell behind on payments to creditors, including ABC Home Loan. In December 2006, the Debtors were notified of the commencement of foreclosure proceedings. They filed a petition for relief under Chapter 13 on January 2, 2007. At the time of filing, the Debtors anticipated an arrearage claim of \$8,500, representing five monthly payments of \$1500 each, and \$1000 of late fees and foreclosure costs. The Debtors plan provides for payments of \$600 a month to the trustee, which includes a set payment of \$300 per month to ABC Home Loan to cure the pre-petition arrears. The Debtors' plan also provides for post-petition payments to ABC Home Loan to be made by the Debtors directly.

On February 2nd, National Servicing Company, as servicer for ABC Home Loan, files for proof of claim. The proof of claim reflects a principal balance of \$203,000, and an arrearage claim of \$10,750, itemized as follows:

Five months of installment payments, \$7500; five months of late fees of \$50 for a total of \$250; accrued late fees of \$800; inspection fees of \$300; foreclosure fees of \$600; foreclosure costs of \$300, and other unpaid fees and corporate advances of \$1000.

In addition, the proof of claim states: Please be advised that additional fees and costs have been incurred for the post-petition preparation and filing of this proof of claim. These fees and costs have not been included in the proof of claim. If the debtors want these fees and costs included in the proof of claim so that the subject loan is current upon completion of the bankruptcy plan, please contact the lender's attorney.

So, Howard, let's start with you. Is there anything wrong with this proof of claim?

HOWARD ROTHBLOOM: Well, Judge, in my more than 20 years of practicing bankruptcy law, I have yet to see a client who didn't anticipate that the arrearage on their home mortgage would be less than what the proof of claim was filed for. So these claims also seem to come in for significantly more than the debtors anticipate. I would look at the claim—the proof of claim form first, and I would analyze it from a factual standpoint. I'd look at it and see whether the number of months that our claim to be in arrears and what the client anticipated, look at the late fees and see if they are consistent with the number of months that are in arrears.

In this scenario, what captures my eye are the other unpaid fees and the corporate advances. From a factual standpoint, I try to discern what those are for, and I might not be able to do that by talking to the client. I might have to ultimately object to this claim and do a little discovery. Second, I would analyze the arrearage claim from a contractual standpoint. I'd take a look at the loan documents, if I was concerned about this claim, and I would see whether the charges that are in the claim are consistent with what the lender is allowed to charge based on those loan documents. And, third, I'd analyze the arrearage claim according to the state law and according to bankruptcy law. For example, can the lender claim these amounts under the bankruptcy code? In this scenario, I have concerns with the post-petition, pre-confirmation charges in this proof of claim. Section 506B provides four requirements for the recovery of the post-petition, pre-confirmation fees for over secured creditors, and those are: (1) that the claim must be an allowed secured claim; (2) the claimant must be over secured; (3) the underlying agreement must provide for recovery of fees and expenses; and (4) the fees and expenses must be reasonable. The courts are divided as to how a creditor can assert an entitlement for the post-petition, pre-confirmation fees under Section 506B. Some courts say that these types of fees are anticipated; these are charges for preparing and filing proof of claim pretty much. They are included in the proof of claim, some courts say that these fees can just be included in the claim and other courts say that an application has to be made by the creditor in order to get these fees.

Substantive challenges to these fees typically are based on the reasonableness of the fees, so when an attorneys challenge these claims—these proofs of claim—that's what they would focus on as the reasonableness of the claim. Whereas in this case, the lender has assessed post-petition, pre-confirmation of fees but has failed to disclose those fees at all. At least one court has held that the charges are, per se, unreasonable cause if you will note what is here in this proof of claim is a statement that the lender's going to charge some additional fees and if the debtor wants to know what they are, the debtor needs to contact the lender's attorney.

So, I think that in this case, if one were to object, the court would probably say that the provision's proof of claim is, per se, unreasonable.

JUDGE BONAPFEL: Frank, what's the lender's view of all this?

FRANK CHILDRESS: Judge, if I could be so kind, let me deviate a second. I do want to thank you for allowing me to be here today. I appreciate the

invitation. I can't help, but with the dean's opening comments, I got to make one sort of response to his comments knowing he's from Australia. A few years back, when I was serving as the chairman of the Attorney General's Advisory Committee U.S. Trustees. I was invited to the Australian Embassy in Washington to discuss bankruptcy law or insolvency law. They were considering changes in their insolvency laws. And the meeting was at 10 o'clock in the morning, and I walked in and the first thing they did was break open a bottle of single malt Scotch and said, "We got to have a drink." I didn't see the Judge break out a bottle this morning, and I don't think I can handle it. I don't know if that's common in Australia but they had a different view. And I got to tell you, after a few drinks of single malt Scotch, I had a different view of insolvency and bankruptcy laws too. Maybe it would help us all sometimes. But I do appreciate the opportunity to be here.

In considering the proof of claim, like Howard, I guess, from a creditor's standpoint, I don't think I would let this claim be filed, with particularly the concept of unpaid fees and corporate advances. I'd want to set out exactly what those were, be specific. Again, under 1322 (b)(2), the default can be cured and under 1322 (b), you got to look at the underlying agreement and applicable non-bankruptcy law in deciding what is necessary to cure default. So, I wouldn't say, per se, that the claim would be objectionable, if the fees were clearly disclosed, they were provided for under the agreement and applicable state law will allow you to collect those fees. But I'd have some concerns in filing—allowing for unpaid fees and corporate advances. The question that Howard writes about the post-confirmation fees incurred and how you handle that. That, of course, that's a subject of much litigation or there have been a number of decisions on it, and the courts are split. Do you have to file an application to get those fees or is it good enough just to put them in a proof of claim? Again, I would have some concept. I don't think—I would probably set out, if I were going to attempt to collect them by way of the proof of claim, I think I would go ahead and set out what they were and try to be as specific as possible what the fees were incurred for, and I don't think I would ever state that they were incurred just for filing a proof of claim. Hopefully there was a review of the loan documentation determining what the manner of the arrearage claim should be. It's more than just an ad ministerial act. So I would have, I guess, some concerns. But the question as to whether or not—I guess the only thing I would differ with Howard on the question of whether these fees are truly undisclosed because, basically, the debtor's been put on notice there are post-confirmation fees. So, I guess you get in to what the practice in what the local district is as to whether or not there's going to be a

requirement that you file a fee application, or two, can a claim be, once the fees are determined, can an amended claim be filed and three, if the debtor wants to include in the cure of arrearage.

JUDGE BONAPFEL: Thank you. If there's an objection ahead of time, as there is in this case, a disagreement about the amount due, does that objection have to be filed prior to confirmation of the claim, Frank?

FRANK CHILDRESS: I don't think the objection would have to be filed prior to confirmation, but I do think that it would be extremely important from the debtor's standpoint to know what that claim is, what that arrearage claim is that's got to be cured or otherwise if the claim's determined to be allowed in the amount that it's filed in and the debtor's propose an insufficient amount to cure that default, to cure that arrearage claim over the life of the plan, at the end of the case, the arrearage might not be cured and you got basically a loan that is not cured, the default's not cured. You got the plan ending and the debtor's immediately in default.

I know one of the cases discussed in the 11th Circuit—I think it's on Page 24 in the material, the Bateman case—talks about what happens if you don't really get that objection to the claim resolved. In that particular case, I think there was no objection to the claim. I think there was plan provision. There was later a motion to dismiss saying that the confirmed plan didn't cure the arrearage. The court comes down and says, one, you didn't object to confirmation. You're bound by the terms of the plan. But the fact that the arrearage is not cured, that's the debtor's problem.

JUDGE BONAPFEL: Howard, anything to add on that issue?

HOWARD ROTHBLOOM: Well, oftentimes the plan confirmation occurs prior to the deadline for the creditors to file claims, so you can't oftentimes object to the proof of claim prior to the confirmation. I do want to just say that it's a lot of work to object to a proof of claim and really proceed with regard to that matter, and I actually enjoy doing it.

JUDGE BONAPFEL: Really?

HOWARD ROTHBLOOM: When I see something—yeah, yeah—I see Mike Cormick with McCotter Raymer out there. I know every morning he probably wakes up and wonders whether he's going to get some discovery from me. But when I see something outrageous, even on one line of the proof of claim, then I usually feel that if I dig down deep I'm going to find some interesting

problems in my client's mortgages, and I like reading notes and security deeds, and all, so I'll object usually and send out my discovery and see what, if anything, comes back. Sometimes nothing comes back, surprisingly. And, in fact, sometimes lenders can't find very, very basic documentation to support their claim. But it's very important that the debtor monitor, or debtor's counsel monitor these proofs of claim.

JUDGE BONAPFEL: Okay. Let's continue on with the hypothetical. Assume that any claim objection is resolved by the parties resulting in disallowance of the accrued late fees, inspection fees, other unpaid fees, reducing the arrearage claim to \$8,650, and the Debtors amend their Chapter 13 plan to pay the arrearage in full. The plan contains the following additional provisions:

1. The Debtors shall cure the pre-petition arrears owed to ABC Home Loan in the Chapter 13 plan. The Trustee shall disburse \$300 per month to ABC in payment of its arrearage claim. The arrears shall consist of the following items: Unpaid pre-petition installment payments, unpaid pre-petition late fees, unpaid pre-petition attorney's fee, unpaid pre-petition fees for services performed in connection with the debtor's pre-petition default or for the purpose of protecting ABC Home Loan's interest in the note and security agreement, any pre-petition unpaid escrow shortage, and any unpaid attorney fees and costs incurred post-petition but prior to confirmation.

2. The Debtors shall pay ongoing post-petition mortgage payments to ABC Home Loan directly beginning with the payment due on February 1, 2007. If the post-petition installment payments are made in a timely manner, they shall be applied without penalty.

3. No other fees, costs, or amounts incurred by ABC Home Loan during this Chapter 13 case and asserted to be due on the Debtor's mortgage account may be collected or charged to the Debtors during the case or after entry of discharge except as permitted by the plan and no payments received by ABC Home Loan from the Debtors or the Trustees shall be applied and credited except as directed and required by this plan.

ABC Home Loan files an objection to confirmation of the plan on the grounds that the Debtors plan provisions constitute an impermissible modification in violation of 1322 (b)(2). So, the question, Frank, is this plan confirmable?

FRANK CHILDRESS: I would argue that the way it's written, that it's not confirmable at this point. In determining whether to file an objection, again, in

looking at Number 1, and what the Debtor states in its plan, is to be paid as the arrears to cure default, I would examine that against the proof of claim we filed and see does it pay everything that's provided for in my proof of claim. Here, based upon the assumption that the claim objection been resolved, it would appear that that is covered, including the Debtors now propose to pay those attorney fees and costs per post-petition and prior to confirmation. The second—really don't have a problem with the second provision of the plan either. It says that the ongoing post-petition mortgage payments are going to be made directly and if they're received, paid in a timely manner, they will be applied without penalty. I—again I don't think that's a violation. Most notes will say, if you receive it by the 5th, whatever date it is, they'll be no late fee incurred or other charge. So, I don't have a problem with that. The third provision, though, I would have a problem with. I believe it's objectionable, because that would appear to be an attempt to modify the pre-petition loan documents. It talks about—it's saying that no fees, costs, or amounts incurred during the case may be collected or charged. Now, collected may be a totally separate issue, but charged or assessed, I believe to be a different issue for consideration because this is attempting to modify the loan documents. It talks about permitted by the plan and would appear this plan doesn't permit any post-petition collection or charge of fees incurred after confirmation of the plan. Likewise, this plan proposes to direct how payments are going to be applied and credited. Again, most notes say, specifically most of these trust and mortgages state how payments are to be applied in accordance with the loan documents. Normally, first to fees, expenses, there's always a litany of how things get applied under the loan documentation, so I don't think from that standpoint this would be an impermissible modification of the loan documents.

Jumping back just a second, to the second one in the post-petition payments, I think here, in this district, you got to make post-confirmation payment directly. I know in the districts that I practice in Tennessee, it's been a long standing procedure that if there's a pre-petition default in the mortgage, then the post-confirmation payments, or ongoing payments as we refer to them, are going to be made by the Trustee. And there's normally Trustees, I think it's been a historical practice that Trustees don't charge a percentage fee on those ongoing payments, so it doesn't increase the debtors, basically the debtors' administrative costs, because they're paying more under their plan than they normally would. But one issue that's always been a problem with lenders, in having represented lenders over the year, normally the trustee has a specific date, which will make their plan disbursement, and it's usually not the

first of the month. It may be at the end of the month, the middle of the month, whatever, but there's always been an issue of whether or not late fees are incurred post-petition because really the payment is not being made at the time the note requires it. And there was a little litigation at first, I'm thinking 20 years or so back, but now most lenders, again, accept the proposition that they're very comfortable. They feel it's more of an insurance that the Trustees collect ongoing payments and they'll be less likely a default or motion for relief, in fact, that would have to be required post-confirmation, so they're willing to accept a provision in a plan that says that the trustees making a payment on a monthly basis then there won't be a late fee charged.

JUDGE BONAPFEL: Let me just mention the Chapter 13 trustee fee issue, I think Tennessee is more or less grandfathered. I don't think that's a common practice anywhere else, because they had started doing it a long time ago and somehow or another Hank Hildebrand convinced the U.S. Trustee not to make them charge that fee.

FRANK CHILDRESS: Judge Bonapfel, remember Judge Kelly, who was a friend of both of ours, and I was in on the meeting when the big guys from Washington came down convinced that the fee was going to be charged and Judge Kelly invited everybody to watch and every time the director of the program would try to bring up the subject, for example, when he started to bring it up, Judge Kelly said, "Let's have soup." He started to bring it up again and, of course, he come back and we're eating and Judge Kelly makes his pitch about why this is important and why that fee shouldn't be charged and why it works for everybody, the creditors, the debtors, everybody, and the director would try to bring it up again, and Judge Kelly would say, "Let's have salad," so everybody get up. So by the time we got to the main course, he had the director convinced. That's where the provision came from.

JUDGE BONAPFEL: Howard, what about it? What's your response to the confirmation objections?

HOWARD ROTHBLOOM: I kind of like that plan, so I really didn't have a problem with it. I'll go with Frank's comments.

JUDGE BONAPFEL: Okay. Is there any other language the Debtors could include in their plan with regard to payment of pre-petition and post-petition amounts?

HOWARD ROTHBLOOM: Yes, there is. Most districts have a model plan language that is used, and most lawyers that do Chapter 13 work use that plan

language and, pretty much, stick with it. It's generally not altered to any significant degree. Unfortunately, we don't have plan language in the Northern District of Georgia that directs on how the lender is going—the mortgage lender is going to apportion payments received during the course of the Chapter 13 case. And, also, we don't have plan language that provides a mechanism prior to discharge for the determination that the debtors cure all arrearages within the meaning of 1322 (b) (5). So there is nothing to summarize in the plan—in the model plan that says this is what the lender is going to do with the payments when they come in and this is how we're going to know when the case is—has reached its conclusion that the arrearage is cured. For example, we need to make sure—debtor's lawyer needs to make sure that the trustee funds are applied to the pre-petition arrearages, including the pre-petition expenses, and what I call junk fees, and that the debtors' monthly payments are applied to—direct payments are applied to the ongoing contractual monthly mortgage payments that come due pre-petition. So, I have started to put in all my Chapter 13s, language that comes out of the case that's sighted in the material—*In re Collins*, it's on Page 47 in my material—but I think mine are a little bit different. It's in a footnote 96. Interestingly enough, I have not gotten any opposition to that plan language. I would hope that other debtors' counsel will start to use that language.

I have a case, actually, that I filed last summer where what my debtor received a discharge in December of '06, and the debtor received an acceleration notice in February of '07, and the debtor maintains that the debtor was not in arrears at the time that the debtor received the discharge. And the arrearage that was claimed was about \$14000, which was really quite substantial, so what I suspected in that case is that either payments that were made by the debtor directly were not applied properly or payments that were made by the trustee were not applied properly. So I hired a forensic accountant to take a look at the transaction history and did confirm that that's exactly what happened. And I think if the *In re Collins* language was in that plan then I probably would not have the problem that I wound up having in this case. So I wound up filing an adversary proceeding and the creditor's lawyer agreed to enter an order for an adjunction to stay the foreclosure until we could resolve the adversary.

JUDGE BONAPFEL: Okay. What—suppose that this plan is confirmed without objection, Frank, because your client didn't hire you to do anything about it, what's the effect of the confirmation?

FRANK CHILDRESS: I guess, preliminary, I can tell you that happens. Over my career, that's happens too often. The creditor's a large mortgage company and something happens. A plan gets confirmed on a quick basis and there was no objection filed. I spoke about the Bateman issue a while ago. I'm going to jump the gun a little bit. But that case actually talks about what happens on confirmation when there was no objection filed. And in that particular case, again starting on 23, it talks about the mortgage company there filed a proof of claim for mortgage arrears in the amount of forty-nine thousand. The debtor's plan provided for payment of arrears of only twenty-one thousand. The debtor didn't object to the claim prior to confirmation and Universal didn't object to confirmation of debtor's plan. In that particular case, the lower courts found that that plan provided an objection to the claim but it got up to the circuit level and the court found a few things about what happens on confirmation and the effect of confirmation. First, the court concluded the plan provision can't constitute a claim objection by reason of a plan's notation that the debt's disputed. Second, the court ruled that if a mortgage creditor's lien is unimpaired by 1322 (b)(2), and if lien on a mortgage survives the res judicata effect of the confirmed plan, then so must the arrearage claim. Thus the creditor would be barred from recovering the amount not provided for in the plan. So that's where you get the situation at the end of the case. The case is over, and the debtor's immediately in default under their loan documentation, but what the Bateman decision also says is the plan—or the confirmation of the plan—didn't determine the amount of the arrearage claim. Again, the lender retains the claim, but in this particular case, the lender filed a motion to dismiss the case because the arrearage was not being cured under 1322 (b)(2). And the court said, "Nope, you're bound by the confirmed plan. You're going to have to ride the plan out." If they're making their plan payments, if they're making their ongoing payments, you're going to be bound by the plan and the term of the plan. So, it's a real mixed case there, you know, from a creditor's standpoint, the loan on their books is still in the default status. The arrearage is not going to get cured. They're going to have to wait. From the debtor's standpoint, I think it's a real concern because they basically put themselves in a situation that they're going to comply with their plan, but at the end of the plan they're going to be in default under the mortgage. I guess the other real concern I would have here is, again, those provisions I would have objected to in Paragraph 3 of the fact scenario, the fact that, you know, what is the res judicata effect of that? Am I bound—am I now going to be prohibited from collecting or assessing or accruing fees, costs, actual costs post-confirmation,

and what's going to happen to those, so, if I try to collect them after the case is over.

JUDGE BONAPFEL: Okay, Howard?

HOWARD ROTHBLOOM: I'd be interested in Frank's comments, but my conclusion is that if you successfully object to the proof of claim, then all you've really succeeded in doing is affected the amount that's going to be paid out through the trustee. And as Frank was saying, there are still some issues that will remain for after the debtor receives the discharge. In other words, if it turns out that you were successful with your objection to proof of claim, then the court may, perhaps, reduce the amount that's going to be paid under the proof of claim, but that doesn't necessarily get rid of that charge or those disputed charges that were in the proof of claim that are still on the debtor's account. So I always, always, always file objections to proof of claim with adversary proceedings, so that ultimately I can get a final resolution of what the accurate loan balance is; then the debtor won't have a problem and won't see these disputed charges that were the subject of the objection to proof of claim again post-discharge.

FRANK CHILDRESS: Howard, if I can ask going back for just a moment on the plan provision you were talking about, how do you handle at the end of the case, again, verifying, confirming that that arrearage, basically on the creditor's books, that they show it's cured, so when you send the debtor out, when you say goodbye to them, whatever the last time, you can feel—you can rest assured that they've got a mortgage that's secured and basically if they make their ongoing payments, they're going to be in the house. Particularly, what do you do at the end of the case?

HOWARD ROTHBLOOM: Well, pre BAPCPA, I never did anything to ensure that the mortgage was—mortgage arrearage was cured, and actually I never had a problem in any BAPCPA cases until the problem that arose last summer, so that was never a problem. And with this *In re Collins* language, really the burden is somewhat shifted to the creditor to file certain documentation to show whether or not there have been additional charges included in the debtor's account during the pendency of the Chapter 13 plan, and then there can be some litigation in bankruptcy court regarding the reasonableness of those fees and there can be a resolution as to whether or not those fees are proper prior to the debtor receiving a discharge.

FRANK CHILDRESS: And if they're proper, do you then amend your plan to keep the plan going to cure those, to pay those?

HOWARD ROTHBLOOM: That's exactly correct. That language has provisions to further amend.

FRANK CHILDRESS: I guess the only difference we have in practice, at least two of our trustees actually file, basically, a motion to show cause when they think the arrearage is cured, to have the creditor show cause why the mortgage shouldn't be considered to be current. And, basically, it's a negative notice, so if the creditor does not file a response then the order goes down, basically, finding that the mortgage is current.

HOWARD ROTHBLOOM: That Collins case is out of the Eastern District of Tennessee, and it's Judge Stare.

FRANK CHILDRESS: Yeah, in the other two districts, though, in the Western and Middle, that's the way they do it to show cause.

JUDGE BONAPFEL: Okay. Let's move on to the next part of the hypothetical, and now we're going to talk about post-petition defaults. During the pendency of their case, the Debtors default on their directly paid post-petition mortgage payments. In January 2008, ABC Home Loan files a motion for relief from stay alleging a post-petition default of two payments. Prior to a hearing, the Debtors bring the loan current post-petition and ABC Home Loan withdraws the motion. In January 2009 (you have to have a little imagination here), ABC Home Loan files a second motion for relief from stay based on a post-petition default. The parties agree to a consent order whereby the debtors will make additional payments for six months to cure the delinquency and will pay \$500 in attorney's fees for the filing of the motion. The Debtors make all payments and bring the loan current post-petition.

In December 2009, the Debtors complete all payments under the plan and receive a discharge. Two months after their discharge, they receive a notice of intent to commence foreclosure proceedings by ABC Home Loan based upon an alleged default in the amount of \$5,880. Upon closer inspection, the Debtors discover that the \$5,880 consists of: \$3,600 for 36 late fees; \$360 for miscellaneous bankruptcy fees; \$720 for inspection fees; and \$1,200 for bankruptcy attorney fees. The Debtors file a motion to reopen their bankruptcy case to file an adversary proceeding against ABC Home Loan. The Debtors assert that they did not receive notice of these charges and that the bankruptcy court should hold ABC Home Loan in contempt of court for its post-discharge

collection activity. During the course of discovery, the Debtors discover that ABC Home Loan did not differentiate between payments made for pre-petition debt and post-petition debt and applied all payments to the oldest debt first.

Howard, can the bankruptcy court hear in determining this adversary proceeding? What's the jurisdictional basis?

HOWARD ROTHBLOOM: Well, Judge, I had a little bit of trouble with this, but I'll give it my best shot. You might wonder what's the deal with all these fees. And there's a good explanation for this. In this day and age, we have mortgages that are securitized, they're bundled, and they are the basis for securities that are sold on Wall Street to investors. And my understanding is pretty much the trust, they get a certain amount of interest from these mortgages, but there are servicers, I guess you can analogize into apartment managers, who manage these accounts, and these servicers are agents, and my understanding is that the way they make their money is off all these fees that are charged and these fees ultimately are not, I understand, typically paid to the trust under the circumstances ultimately not I understand typical paid to the trust. The trust just get at least part of the interest yield, so there's a real incentive for these servicers to be charging these fee and that's really what brings us here to this program today. My answer, Judge, is that 28 U.S.C. Section 1334, says the court has continuing jurisdiction over a Chapter 13 after confirmation, so that's the best answer I can give. Whether it's correct or not, I'm not entirely sure. In the case of *Miller versus Countrywide*—that is mentioned in the materials, on my Page 31—the court reopened the case and concluded that Countrywide was barred by res judicata from asserting an arrearage claim in excess of the amount paid in the completed Chapter 13 case.

Courts have sanctioned creditors from the collection of undisclosed and unapproved fees and charges often by finding that the collection activity is done in violation of the automatic stay or in violation of the terms of the confirmation order, thus subjecting a creditor to a finding of contempt. So that's usually how these matters are attacked.

JUDGE BONAPFEL: Frank, are there jurisdictional issues from a creditor's standpoint?

FRANK CHILDRESS: You know, in looking at the facts, I'm going to try to find a jurisdictional issue. But, I think if you got one it would be the argument that these post-confirmation payments, the question would be—I think one of the first questions you'd have to look at is what's the affect of the confirmation

order. Does it vest property of the estate back in the debtor? And, if so, the property of the state vested back in the debtor, the question would be whether the bankruptcy court has jurisdiction to consider these post-petition payments that were made by the debtor that led to these fees that would appear to be the genesis of the fees that were charged. If they were post-confirmation and it was not property of the estate, the question would be does the bankruptcy court have jurisdiction to consider that issue, I think.

JUDGE BONAPFEL: All right. Can a lender assess these fees and costs during the bankruptcy case? And what about notice to the debtors or the court?

FRANK CHILDRESS: Assuming that we go back to our fact scenario, assuming that I got that provision of the fees knocked out, that Paragraph 3, as far as if the fees, again, are provided under the note, the underlying state court law allows such fees, it would be my position that they can be assessed. Again, I think one of the issues is notice and what kind of notice the debtor would get and it would be to me, in some of the case law supports, is that the type notice—what kind of notice is given. Forget about the bankruptcy. If this were just a fee incurred, how's the debtor notified? When you get into the bankruptcy case, and I've advised some lenders, if there's going to be an assessment of fee, you not only get—you might not attempt to collect it, but you provide notice to the debtor. Basically make clear to that debtor in the notice the notice is not an attempt at this point to collect that fee, but only provided for notice purposes. You send a copy of that to the debtor's attorney and also the Chapter 13 trustee so, basically, as best you can, you're giving notice to the world. Now, again, the bankruptcy attorney's fees, again, were post-confirmation, but it goes back to if I want to collect those, am I going to be required to file an application with the bankruptcy court while the court still has jurisdiction to get those fees approved under 2016, or how do I provide notice because, again, we're in a situation, cause I know exactly what's going to happen. We're going to be a month or two after the case is over with and suddenly we're going to get a referral to start foreclosure because there's a post-petition default. Again, the payments have been applied, which we'll talk about in just a moment, but the payments most likely been applied the way the note says to apply them, first to fees, costs, and expenses and then next to the payment.

JUDGE BONAPFEL: So, there have been attorney's fees that haven't been part of the proof of claim; they've been incurred. Payments have come in from somewhere and the lender has applied those to the attorney's fees?

FRANK CHILDRESS: In accordance with the note.

JUDGE BONAPFEL: Instead of to the payments due under the plan resulting in the late fees and any other problems?

FRANK CHILDRESS: I would—little bit of speculation here—but jumping into the fee issue, if you look at—there are 36 late fees there. In the finding in our scenario, the debtor didn't differentiate between payments for pre-petition debt and post-petition debt and applied all payments to the other debts first. Well—Howard can probably speak to it—there's been a number of pieces of litigation talking about that where, basically, what's the creditor's done, they applied the payments the way the note says to apply them, not really what the plan says, but where the note says to apply them. So each payment that came in, they applied it to that oldest amount. For example, if they got a thousand dollar ongoing payment, and they got that \$300 arrearage payment, and it's \$1,300 to apply, so they applied to the oldest amount, so, hence, there was a late charge on the current monthly payment because none of that money ever got applied to the ongoing payment. Is that what happened, Howard, in the cases where you see?

HOWARD ROTHBLOOM: Yeah.

JUDGE BONAPFEL: Howard, can they do that?

HOWARD ROTHBLOOM: Let me just elaborate, though, a little bit. There's a case—*Mann versus Chase Manhattan Mortgage*—and in that case, it's in the materials, what was happening was, the lender was just adding charges to the debtor's account but never collecting those charges during the pendency of the case. And typically what would happen there is just all the payments that came in were being applied to the amounts that were claimed in the proof of claim or to the post-petition amounts that came due under that contract and what the court said was that just because the lender is accruing these charges in the debtor's account, doesn't mean that the lender is collecting them. Even though there is collateral here that those charges might attach to, there's no collection. So just because the amounts are accrued, doesn't mean that there's any sort of violation or abuse there. The unique cases where there is an abuse are like the following: Last week the U.S. Trustee brought an action against Countrywide in one of my cases. And what happened there was that my client, during the

pendency of his Chapter 13 case, sold his home, so at the point that the home was sold, Countrywide collected the assessed fees and that's where the abuse occurred. So I just want to emphasize it's not—if you see a case where there's been an assessment of fees, according to the case law, nothing improper has happened. It's rare you see that there is an assessment and a collection. Well, how might there be a collection? The debtor sold his home during the pendency of the case. The debtor refinanced; something like that. But I have studied a number of pay histories. It's rare that you actually see the debtor's payments applied to the improper fees because there are enough proper fees to apply the debtor's payments to. They just wait to collect the improper fees post discharge. Why collect it during the pendency of the case? In the Jones case in the materials, is an excellent example of where the court said the fees were assessed and collected during the pendency of the case, and that resulted in a very, very good opinion against Wells Fargo.

JUDGE BONAPFEL: Wells Fargo might not have thought so. Frank, did you have anything to add on that?

FRANK CHILDRESS: No, no, no, not really. In our fact scenario, again, I was just speculating that would be—that may be the source of why there were late fees. The inspection fees, that's always a source of objection. Howard's probably dealt with that. I remember in litigating one where I had to depose one of the inspectors, and he had it set up where he basically left at 8 o'clock in the morning and hit a house every 15 minutes. He had a pretty good deal. You know, and I asked him what he did as far as inspection and he basically said I slow down from 30 to 15 miles an hour, so those fees got thrown out. But, you know, again, the plan's confirm the post-confirmation fees is truly a source that, I think, if you ask a creditor, they're not in the business to foreclose on homes. There are too many homes out there empty now. The thing most creditors—they want a case to complete and they want to have the debtor “rehabilitated” and going forward and completing their loan payments timely. But there's a real issue as to how you resolve the fees assessed post-confirmation so you don't have a situation where the case ends in the next month or so and the case is basically sent to foreclosure.

JUDGE BONAPFEL: Let's talk about potential remedies, Howard. What does the debtor have—what can the debtor seek to get the court to do? Contempt of court, is that a possibility or claim under 524 (i)?

HOWARD ROTHBLOOM: Contempt of court is something that the debtor, as I mentioned a moment ago, would assert for violation of the discharge or the

confirmation order because, perhaps, the creditor was applying payments improperly or the debtor could assert violation of the automatic stay. Section 524 (i) is a new code provision under BAPCPA and, correct me if I'm wrong, Frank, but what that code section provides is if the mortgage lender has failed to apply payments as set forth in the plan then there is a cause of action post discharge, and for that reason it is important now to make certain that you have plan language which specifically sets out how the payments are to be applied and also how there's going to be an accounting at the end of the case, so you can proceed under 524 (i).

FRANK CHILDRESS: The only thing I would add, again, the requirement of 524 (i), the way it's written, it requires a willful violation and that's been equated to the willful and malicious injury under 523 (h)(6), in the dischargability provisions of the case, and willful means intentional. And that's going to put a pretty big burden on a debtor to show misapplication was "intentional." If it's computer error or something like that, I don't think there's been a lot of litigation on that but I think that's going to put a big burden on the debtor if they're going to try to proceed under 524 (i), and the discharge issue to show that the action of the creditor was willful.

HOWARD ROTHBLOOM: I do want to follow up on something Frank said a minute ago. Those of you who are debtors' lawyers are probably thinking, well, who's going to pay for all this litigation? And I have to really say this that there are little golden nuggets in some of these cases. There are some good potential claims, and what I wanted to emphasize is, if I can toot my own horn for a minute, I've collected in a few class actions about 20 million dollars for Georgia homeowners from lenders who didn't want to take the borrowers' houses. It's interesting to explore what's going on in these cases. You learn a lot about how these lenders conduct their business. And you might find a very good, a very clean, simple little claim in there. But if you assert it in a big way, might have a very positive effect on homeowners, usually, low income homeowners in the state. In those cases, those class actions that I filed, all resulted in the termination of the abusive practices statewide and in some cases nationwide. So it's interesting to explore what's going on here.

FRANK CHILDRESS: The only thing I might respond to that, just from the creditor's side, in what Howard's talking about class actions and where he's been successful. We have been successful so far in Mississippi, defeating the class action aspect of the type action that Howard's talking about. We attack the class certification at the outset and, in two cases in the Northern District of

Mississippi, we've been successful in defeating, at that point, saying there might be an issue in this one debtor's case, but all debtors' cases are not— basically the similarity of the problem, we've been able to defeat it at that point. And we had a situation a couple of years ago, where the tort law changed in Mississippi and all of a sudden Mississippi tort lawyers were looking for another source of business, so they got in the bankruptcy arena and started filing a bunch of class actions, and we have been successful to date, not to say it's always going to happen, but defeating that type of action saying a bankruptcy case or in a Chapter 13 because of the unique status of a plan or particular debtor's loans that the class should not be certified.

HOWARD ROTHBLOOM: I've never done a bankruptcy class action.

FRANK CHILDRESS: You've gone to district courts to bankruptcy courts?

HOWARD ROTHBLOOM: State court.

FRANK CHILDRESS: Okay.

HOWARD ROTHBLOOM: I try to avoid district court. But I haven't done one in bankruptcy court yet.

FRANK CHILDRESS: Don't come to Mississippi or Tennessee. Just kidding.

JUDGE BONAPFEL: We don't want you to come to Atlanta either. We are out of time. There are materials that have been written by my law clerk, Beth Anne Harrill. They are very good materials on these issues, so I recommend those to you and I want to acknowledge Beth Anne and her very hard work for putting those together. They're very good, neutral, so I recommend them to you. Thank you all for your attention. Thank our panelists for being here and for helping us out on these issues. We'll break and be back at, we started a little late; we'll see if we can catch up and be back at about 10:15.

