

NON-PRIME TIMES

NATIONAL AUTOMOTIVE FINANCE ASSOCIATION • 7250 Parkway Drive, Suite 510 • Hanover, MD 21076
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WINTER, 2008

BANKRUPTCY LAW UPDATE

Douglas D. Koltavy, Esq.

PART 1: STEERING CLEAR OF MORTGAGE PROBLEMS



A recent *New York Times*¹ article discussed questionable mortgage lending and servicing practices while borrowers were in bankruptcy. An analysis found the following problems:

- Inadequate proof of the current paper holder;
- Incorrect calculation of the amount owed;
- Unlawful charges added after the bankruptcy was filed.

¹ Dubious Fees Hit Borrowers in Foreclosure, *New York Times* (November 6, 2007)

This study, performed by a law school professor, was presented to the United States Trustee (the branch of the Justice department overseeing the bankruptcy system) in July, 2007. The U.S. Trustee has now announced plans to move against servicers who file false or inaccurate claims. The study was then presented to the National Conference of Bankruptcy Judges in October, 2007. We can rest assured that bankruptcy procedures will be modified in response. Presumably, such modifications will apply to the auto finance industry as well. We might as well be proactive, review our policies, and make any changes in advance of the

mortgage industry. Here are several simple solutions:

Proof of Current Paper Holder. Retail installment contracts (RIC) are purchased and sold like any other commodity. The auto finance industry uses servicers as well. All instruments, starting with the RIC and lien noting title, ought to be available to your bankruptcy department. This includes powers of attorney and subsequent documents which trace the ownership of the RIC to its current holder. A simple protocol would be to attach copies to your proof of claim.

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PART 2: STREAMLINE YOUR RELIEF FROM STAY MOTIONS

I recently attended a luncheon with the Colorado bankruptcy judges and the topic of relief from stay motions came up. The judges noted that courts will be moving towards an increased level of disclosure in relief from stay motions. This change is due to a lax approach in creditor motions and their contents. Several problem areas, including imprecision as to current holder and the amount owed, were discussed in Part 1 of this article. Part 2 of this article will suggest how to update your relief from stay motion referral packets to meet the anticipated changes. The goal is to streamline your bankruptcy department processing

and reduce the time spent handling each account. A well constructed relief from stay referral process ought to result in an order in approximately 30 days. Here's how to keep the paper flowing.

The judges noted that relief from stay motions will soon require **verification**. Traditionally, this means the attorney drafts the motion, sends it to the client for notarized signature, who then sends it back to the lawyer. What if the verification could be accomplished with the initial attorney referral? Several steps would be reduced to one. Therefore, a well crafted referral pack-

et to counsel ought to contain a complying affidavit. A proper affidavit would include:

Clear VIN. I can't tell you the number of times we have held an office vote on whether the second generation fax contains the letter O or the number 0. Help your attorney...please.

Outstanding Balance on Filing. This number is important to determine equity. The lack of equity chases away snoopy trustees, which is always a good thing.

Existing Delinquency on Filing.

CONTINUED ON PAGE 5

EXECUTIVE DIRECTOR'S MESSAGE



Happy New Year! As you can see while reading through the newsletter, there is a lot going on at the start of 2008.

The annual conference will return to Fort Worth June 4 to 6, 2008, and the committee is busy confirming speakers and collecting information on the presentations. You will find information on page 3, and check the website frequently for program updates and to register for the conference.

The conference planning committee is made up of members, people who work in non-prime auto finance. Topics and speakers are selected to present relevant, useful information. All members are encouraged to make suggestions.

BLC Associates has completed the operations survey. We are grateful to the members who participated. The information in this private survey is available to NAF Association members only. Copies will be distributed at no cost to our members. Please feel free to share the information with other people in your company., but we ask that you do not share it with anyone outside your company.

We appreciate the participation of members in the operations survey and would like to hear of areas you would like to see covered in future surveys.

It is just about time for the annual financing survey to get underway. I would like to urge all finance company members to participate in this important project.

It takes time and effort to respond to these surveys, but your thoughtful answers to the questions provide improved knowledge and understanding of the industry, and that benefits all of us. The next time you receive a questionnaire, please respond.

As you will see on page 5, the NAF Association website has undergone some design changes that give it a fresh, new look. You will find the same ease of navigation and the important information on the Association and its programs.

The NAF Association is managed by its members. It is truly your Association. Is there something you would like to learn? contribute? Contact me at 800-463-8955 or jtracey@nafassociation.com.

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The National Automotive Finance Association presents

12th Annual Non-Prime Auto Financing Conference

June 4 to 6, 2008

Renaissance Worthington Hotel, Fort Worth

Plan to attend the NAF Association's 12th Annual Non-Prime Auto Financing Conference, **where the industry goes for solutions.** Join industry experts, representatives from the major finance companies, auto dealers, attorney specialists for the conference that is expressly designed for the non-prime auto industry. Individual presenters and panels of experts share their knowledge and welcome your questions. Exhibits show the latest product and service innovations. Make valuable new contacts at receptions, breaks and meals.

Topics include:

- **Developments in behavioral scoring, artificial intelligence & other credit scoring solutions**
- **Collections technology**
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- **Significant legal developments**
- **Rating agency perspective**
- **Used car market & remarketing trends**
- **Keynote, Dr. Bernard L. Weinstein, Institute of Applied Economics University of North Texas**



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As registration information and program details become available, they will be posted on:

www.nafassociation.com

NAF Association is grateful to sponsors and exhibitors. Their support makes the conference possible.

DRIVERSSELECT HONORED



Steve Hall, President
driversselect

Dallas Business Journal named driversselect among the Dallas 100 as one of 2007's fastest growing private companies in that metropolitan area. The announcement featured company president, Steve Hall, in a recent issue.

Annual revenue of \$88 million earned the company the number three spot on the list.

driversselect, a member of NAF Association, helps its non-prime customers navigate the credit process while providing top notch customer

service. Education is an important focus in customer service and in marketing programs, such as a recent contest awarding cars to 12 Dallas area teachers. driversselect offers a quality product: low mileage, late model cars purchased at auctions.

Hall was NAF Association president in 2004, the same year he moved from Easterns Automotive to found driversselect.

Visit www.driversselect.com to learn more about the company.

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NAF ASSOCIATION WEBSITE GETS NEW LOOK

The NAF Association website www.nafassociation.com has a new look. Fresh design and more photos have updated the site.

The simple layout makes it easy to get from one section to the other when looking for information on the association, its activities and mem-

bers. You can download the standards of financial reporting, order a copy of the annual survey, visit members' websites, read recent news releases and newsletters.

At this time of year, most visitors to the website are checking out the events section for conference updates,

on-line registration and a link hotel reservations. You will have easy access to all this and more on the newly designed website.

www.nafassociation.com

PART 1 ... FROM PAGE 1

Incorrect Calculation of Amount Owed. This is the single biggest error that my clients make. The correct date for determining the amount owed is the date the debtor filed bankruptcy! It doesn't matter that you are processing the proof of claim one month later. If necessary, and especially for Chapter 13 purposes, you divide your claim into two parts. The prepetition component is the amount owed up to the date of bankruptcy. Everything after that date is known as postpetition amount. These amounts are treated differently in bankruptcy, especially if a debtor

wants to keep the car. Courts will increasingly insist on getting this right.

Post Petition Added Charges. These charges, however necessary, need bankruptcy court application and approval. Like many circumstances in life, it's the smallest problem that rises up and bites the unwary in that sensitive unprotected area. Fax charges, telephone payment charges, late charges are but three examples. You are taking unnecessary risk to unilaterally tack these charges on an account in bankruptcy.

Large mortgage lenders are originating fewer loans these days which

means servicing revenues comprise a bigger slice of earnings. Mortgage industry testimony before Congress suggests 2 million families might lose their homes during the current foreclosure crisis. The bankruptcy courts will respond and increase vigilance of all collection standards. Now is the time to review your bankruptcy procedures and servicing agreements.

PART 2 ... FROM PAGE 1

Whether a default existed on the date of filing is important.

Existing Delinquency After Filing. Post petition arrearage is especially important in chapter 13 cases where the debtor wants to keep the car.

Insurance Status. This would be a box to check yes or no by your BK department. Lack of insurance is always a winner in relief from stay litigation.

Fair Market Value. I recommend attaching an NADA report in your packet and insert the number(s) in your affidavit.

I also recommend including a pay-

ment history in your referral packet. This can be attached to the relief from stay motion as an exhibit. You should be aware that as of December 1, 2007, a new rule (Bankruptcy Rule 9037) went into effect which requires redaction of social security numbers in court filed documents. So make sure your payment history does not contain this information.

Finally, the proof of current holder issues discussed in Part 1 of this article apply to relief from stay motions. Those documents must be included in your relief from stay referral packet as well.

I have created a form affidavit that you can use as a template which is

available on my website, www.ColoradoCreditorLaw.com or just email me and I'll send one to you. This type of precision will become mandatory in the near future. Why not be ready?

*Douglas D. Koktavy, P.C. is located in Denver, Colorado and provides creditor representation to the automobile finance industry. Mr. Koktavy is a member of the NAF Association and sits on the Legal Affairs Subcommittee. Direct email to Doug@ColoradoCreditorLaw.com *

Make plans now to attend:

**NAF Association's
12th Annual Non-Prime
Auto Financing Conference**

June 4 to 6, 2008

Renaissance Worthington Hotel, Fort Worth

See page 3 for more details.

NEW MEMBERS

The NAF Association welcomes new members:

Peak5

www.peak5.com

Global Debt Exchange

www.gdexauto.com

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JOIN THE NAF ASSOCIATION

The National Automotive Finance Association is the only trade association exclusively serving the non-prime auto financing industry. It supports its members and the industry with education, research and information. The Annual Non-Prime Auto Financing Conference is the industry's premier conference, bringing together creditors and dealers. The annual Non-Prime Auto Financing Survey gathers comprehensive information and reports industry trends and shifts.

Go to www.nafassociation.com for information and on-line registration form or call 800-463-8955.

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If you would like to contribute a newsletter article, contact us for details.

