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FROM THE PRESIDENT

A Path to a Better Result



by **Richard M. Rothfuss**
Lerner, Sampson & Rothfuss
USFN Member (KY, OH)
President, Board of Directors

Early in my career I observed a well-respected senior attorney in the office counseling a client and, to my amazement, the client decided not to follow the advice given. It surprised me because (1) the advice was very sound, and (2) why would someone pay an attorney an hourly fee for counsel and not follow it. Upon my questioning, the senior attorney calmly explained that one of the privileges a client receives by paying for legal advice is the right to ignore it.

Over the years, I am sure that clients have exercised that privilege numerous times with advice I provided. Sometimes it troubles me, and sometimes it doesn't. Mostly, I appreciate having clients ask for advice and making well-informed decisions, whatever the matter might be.

The world of mortgage banking is now more complex than ever. The stakes are high and failure is not an option. Important decisions are being made daily that may have a profound and lasting impact on borrowers, investors, servicers, law firms, vendors, and the nation's housing market. How can we ensure that the correct decisions are made and the right advice followed?

In his book, *The Wisdom of Crowds*, James Surowiecki posits the notion that the likelihood of a successful decision is substantially increased by including input from numerous parties. The book presents a series of interesting stories and studies, forming the basis for the title. Among the common notions dispelled are that committees are inefficient,

and that one bright and informed individual is a better decision maker than the group. The book inescapably leads the reader to the value of collective wisdom. The broader the information gathering is before a decision is made, the better that decision.

We can probably all agree that the primary focus right now in all sectors of housing is on home retention and loss mitigation. Everyone in the industry is seeking the best ways to achieve stability. Our collective success is measured by this.

Representative members of USFN have met with Senators, Members of Congress, GSEs, HUD, the VA, and Department of Treasury personnel to explore ways to accomplish this goal. Most recently USFN's executive committee was invited to assist, and did assist, a broad range of other industry associates in a working group to provide input into how we can collaboratively improve the success of HAMP and other home retention initiatives. While it is likely that some ideas and advice may be discarded, the "collective wisdom" approach will hopefully promote the best results. On a personal level, I can say that it is very rewarding to have a voice in efforts to help diminish or resolve the existing housing crisis. Only time will tell the success of these efforts, but the sooner the better.

see President's Message on page 21

Coming Next Issue

Our next edition will focus on **Post-Foreclosure**. Features will include:

- PTFA: One year later
- New REO Owners: Cities and Nonprofits
- Vacant Properties: Successes and Challenges

trustee shall file and serve upon the claim holder, the debtor, and debtor's counsel, a notice stating that the amount required to cure pre-petition arrears has been paid in full. In the event the trustee fails to do so, the debtor may file the notice.

The holder of the claim will have a 21-day period in which to file a response. The proposed rule requires the holder to file a response even if the loan is current. If the loan is not contractually current, the holder must file an objection to the notice and set forth an itemized list of all amounts that remain owing, both pre- and post-petition. If a lender fails to respond or fails to provide adequate information regarding the amounts

allegedly owing, any remaining claim for pre-petition arrears or post-petition payments, expenses, and fees is waived. The court may, in appropriate circumstances, hold that the claim is not waived, if it finds that the "failure was substantially justified or is harmless."

Conclusion

The proposed rules are intended to provide the debtor with a fresh start at discharge. The rules shift additional burdens to the secured creditors, specifically those with liens on the debtor's principal residence. Creditors will need to timely document every aspect of the claim. In addition, creditors must monitor Chapter 13 cases closely, and provide updated information to the court, debtor, and

trustee every six months if there are any changes under the note and security interest.

The sanction provisions are the most unnerving, as they seem to move from the historical position that a secured lien passes through bankruptcy unaffected (*Dewsnup v. Timm*, 502 U.S. 410, 116 L. Ed 2d 903, 112 S. Ct. 773 (1992)) to a new harsh provision allowing involuntary waivers of rights based on technical defects in filing and prosecuting claims.

If the proposed rules pass, these issues will lead to litigation over the extent to which the rules can change creditors' substantive rights. ■

Members Moves & News *continued from page 4*

New Associate Members	New Faces
HEART Financial Services, LLC (Northbrook, IL)	Tiffany & Bosco – Arizona Darren Case, David Case, Daryl Dorsey, and Todd Lenczycki
Quality Claims Management Corporation (San Diego, CA)	Northwest Trustee Services – California, Oregon Janet Block (FC Operations Manager)
Sterling Home Retention Services (Altamonte Springs, FL)	South & Associates, P.C. – Kansas, Missouri Judd Davis, Jennifer Stoehr
	Orlans Associates – Michigan Justin Carter, Brian Henry, and Danielle Jackson
	Trott & Trott – Michigan Thomas Balinski, Ryan Barr, Tomika Horne, Scott Monto, Jeffery Sattler, Bree Stocker, and Dana Zurvalec

President's Message *continued from page 2*

Without reservation, I believe the inclusion of individual USFN members or the organization as a whole in any industry decision will improve the chances of a better result. As a 20-year member of USFN, I have had the pleasure of watching this not-for-profit organization evolve into one of the most respected voices of leadership and innovation in mortgage banking. I have greatly admired its focus as a national industry resource and a premier provider of educational programs and publications. The individual members are broadly committed to the betterment of mortgage banking and, like most attorneys, quick with advice.

At the end of the day, you have nothing to lose by asking for the advice of counsel because you always have the right to ignore the advice ... if you choose to do so. ■