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Strategic choice of forum helps client protect mortgage during bankruptcy

When mortgages are attacked in bankruptcy court – almost always – Trustee wins, Bank loses.

So, when the “good guys” come out on top, there’s reason to take note.

We recently defended a bank’s mortgage that a Trustee claimed was defective. It was. The mortgage was improperly written indicating the spouse/half owner was merely conveying her dower, not her half interest. This is typically a 100-percent losing scenario for a secured lender under Ohio law.

The property was in foreclosure in state court. The key strategic move was to move the litigation to Bankruptcy court, and out of state court. The forum victory was as important as the merits. Technical issues brought before a judge who is most competent to handle them have the greatest chance of success.

This Bankruptcy was a Chapter 13 (which involves a plan to pay off debts over time), not a Chapter 7 (which involves selling assets to pay off debts and discharge anything left over).

Our Case involved a Chapter 13 plan and a highly technical and unique issue – whether the mortgage could be attacked after the plan was “confirmed” (i.e. approved by the Court). This issue could go either way because of its novelty.

Instead of dealing with the validity of the mortgage or a difficult bankruptcy issue, the court – relying on our technical arguments – held that the Trustee could not change the Plan after it was confirmed/approved. And because the Plan treated the mortgage as fully secured, the Trustee could not now argue otherwise.

In short, it was too late for the Trustee to attack the mortgage after the Chapter 13 Plan confirmation. Technical procedural arguments provide opportunities for victories against Bankruptcy Trustees.

A full copy of the decision in re Crum Case No. 09-64460 Judge Hoffman Adv. Pro. No. 11-2146 U.S. Bankruptcy Court, Southern District, Eastern Division is available at www.HavensLimited.com.