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Learning the Art of Bankruptcy Warfare

Intensive boot camp trains consumers? lawyers to do battle with lenders

By Mary Pat Gallagher
New Jersey Law Journal
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Bankruptcy boot camp is not your typical continuing legal education seminar. It is a four-day, high-intensity program at a mountain hideaway that is turning out a phalanx of consumer-side bankruptcy lawyers trained in spotting and fighting abuses by lenders.

Boot camp “survivors,” armed with what they learned at camp and bolstered by ongoing networking with each other, say they are achieving improved results for their clients, including loan modifications and legal fees.

The setting, O. Max Gardner’s 160-acre Lizmere Farm amid the South Mountains of western North Carolina, is idyllic. Campers sleep in riverside cabins and dine on five-course gourmet meals cooked by Gardner’s wife, Victoria.

But, as the name signals, boot camp is anything but restful. Campers, 10 per session, arrive on Thursday night and spend roughly 10 hours a day in class for the next four days. The cost: \$7,775.

The lesson plan covers such topics pre-petition violations of consumer protection law,



Happy Campers - Max Gardner, fourth from left in back row, amidst boot campers at Lizmere Farm

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automatic stay violations, mortgage securitization, servicing and accounting, discharge violations and the Fair Debt Collection Practices, Fair Credit Reporting and Truth in Lending Acts.

Students learn how to obtain SEC filings using EDGAR and how to scrub metadata before sending out documents.

Gardner, who practices consumer bankruptcy law in Shelby, N.C., is the main instructor, assisted by North Carolina Superior Court Judge F. Donald Bridges, on evidentiary issues, and Kevin Byers, a forensic accountant from Atlanta, on mortgage servicing practices.

Perhaps the most useful part of the boot camp is what happens afterwards. Campers go home with a CD containing more than 2,000 pages of forms, letters pleadings and articles to use in their own practice. They also have access to a database of documents on a network server and a private listserv where they can pool their knowledge, share war stories and seek advice from each other and Gardner, who monitors it daily.

Gardner is known for more than the boot camp. As a litigator, he helped recover more than \$2 million in 2004 from the officers and directors of Shelby Yarn in a Chapter 7 adversary action by former employees over medical-insurance payments and back pay. His grandfather, also O. Max Gardner, was a North Carolina governor, a U.S. senator and ambassador to Great Britain during the Truman administration.

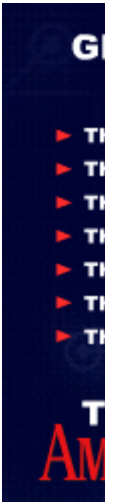
Gardner sees himself as a man on a mission, training lawyers who will go out and teach others in an effort to aid consumers and help level the playing field. Most bankruptcy lawyers are solos or work in small firms, with resources that are no match for the firms that tend to serve creditors, he says.

With the training, documents and listserv, "it's not just you any more against Citibank and their 20-lawyer law firm," he says. "It's you and everybody who's been through the boot camp."

Much of the camp focuses on the securitization of consumer debt, not just mortgages but credit card debt, car loans and other debt, and the practices of the companies that service the debt.

He teaches what documents to obtain from lenders/servicers and how to scrutinize those documents to see what fees were charged and how the money was applied. He also teaches how to read the computer codes to get at the content.

His approach is to look at the origination and servicing for "every possible legal attack



you can make on a mortgage,” under various federal and state laws and the terms of the loan itself.

He is creating a database of “pattern and practice” evidence he hopes will enable recovery of punitive damages by showing willful misconduct, thus eliminating excuses like mistake, inadvertence and computer error.

Gardner encourages suing under consumer protection laws which provide for legal fees, saying money is the only thing creditors understand and “once the price gets too high, they’ll change.”

More than 200 lawyers from over 40 states have been through the boot camp since its inception in 2006.

Woodbury solo William Mackin, one of the 10 from New Jersey, saw Gardner conduct a mini boot camp at a bar event last October and made it a point to go to the next camp session, held in December.

Some of what Mackin says he learned:

- Before the bankruptcy is even filed, demand that creditors who have been harassing your clients cease direct contact with them or face suit under consumer protection or federal debt collecting laws. “It’s something I can do for the clients when they’re getting ready to file. I always told them they had to suffer through it. I was wrong.”
- List the credit reporting agencies as creditors on the schedules so they get notice of the client’s bankruptcy and eventual discharge.
- After discharge, have clients write to the reporting agencies saying “here’s a copy of the bankruptcy discharge, which you already have, and here is a list of unsecured creditors who were discharged in my case” and “if any creditor is reporting a balance due, I dispute it and want you to make inquiry.” If the debts creep back onto the credit report, you can sue creditors under the Fair Credit Reporting Act.

He also learned how to ferret out and fight mortgage defaults and service fees.

Mackin sums up the model as “helping the client all the way through the process and after helping obtain maximum relief, obtaining a maximum discharge and in the process making sure those efforts are paid for by the creditors.”

Mackin says he’s already recouped the nearly \$9,000 cost of the camp, including airfare, with two recent fee recoveries. One of the claims, for violating a discharge

injunction, was straight from Gardner's playbook. Mackin had help from Gardner on the other, a claim against a debt settlement company that Mackin says is novel and he will share on the listserve.

Another happy camper, Virginia Fortunato, of Goldman & Fortunato in East Orange, calls herself as a member of "Max's army."

She describes a case where she convinced U.S. Bankruptcy Judge Novalyn Winfield to order a servicing company representative to come to court and explain discrepant mortgage numbers. The lender then offered to settle and she contacted Gardner for advice on what to ask for besides legal fees. An adjusted mortgage, he advised, and that's what she got. An adjustable rate mortgage at 9.75 percent is now a fixed 5.75 percent, she says.

Fortunato is compiling her own "pattern and practice" evidence of repeated adjournment requests by lenders on motions that are ultimately denied. She hopes that she can use it to convince judges to award legal fees.

Another New Jersey camper, William Penkethman, of Northwest Legal Services, attended in April, using the free spot reserved each session for legal aid attorneys. He describes the course as "basically how to make money going after servicing abuses in bankruptcy court."

Penkethman says Gardner's approach is to take Chapter 13 cases without charging clients a fee, then file a lot of adversary actions and obtain compensation under the plan.

Several New Jersey lawyers who represent mortgage lenders and servicers did not return a call seeking comment about the boot camp.

But Joseph Vonnegut of North Carolina, one of several creditors' lawyers who have been allowed to attend, says it has given him "a leg up" and he recommends that other creditors' lawyers follow his example.

Vonnegut, of Hutchens Senter & Britton, in Fayetteville, represents mortgage servicing companies, the target of many boot-camp lessons. His reason for going was the same as everyone else, he says, to better serve his clients.

Having faced Gardner in court for a decade, there was "not a lot on pleading and practicing I hadn't seen before," says Vonnegut. But he says he did get "a better understanding of where Max and his graduates are coming from with their requests and some of the laws they cite in the middle of a case."

One lesson he learned facing off against Gardner is his emphasis on providing notice of everything “to paint my clients into a corner so they can’t come back and say I didn’t know.”

Vonnegut accepts that he cannot have access to the listserv like other campers, saying there would be “a serious ethical problem if you let a creditor loose on that, with debtors’ attorneys talking about their clients.”

Other creditors’ lawyers are curious about his experience and “a lot of folks I’ve encountered have found it amazing that Max would allow us to come in,” but it is not surprising, he says. “It’s not some big nefarious conspiracy; Max has always been up front.”

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