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BUILDING BEYOND THE STATUS QUO

With GSE reform a hot topic, *DS News* explores the strengths and weaknesses of the current system of housing finance, and how it could be reinforced going forward.

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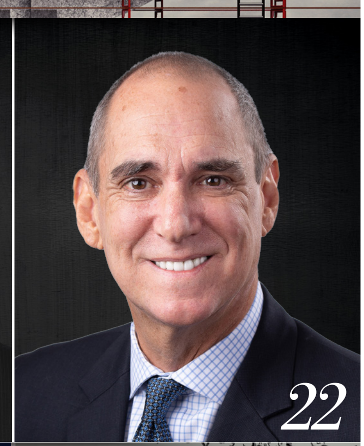
This Month



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INDUSTRY INSIGHT / SETH J. GREENHILL

A court of appeals has ruled on a case that could have implications for creditors in Chapter 13 bankruptcy cases—and it all comes down to defining the term "provided for."

The term "provided for" has been a long-standing concept within the context of Chapter 13 bankruptcy—especially when it pertains to mortgage arrears. In fact, there have seldom been cases from appellate courts that fully analyze its meaning. However, on December 6, 2018, the Eleventh Circuit Court of Appeals in *Dukes v. Suncoast Credit Union* (*In re Dukes*), 909 F.3d 1306 (11th Cir. 2018) , a case of first impression, finally gave meaning to the phrase "provided for" in Section 1328(a) of the Bankruptcy Code.

On February 18, 2009, Mildred Dukes filed for Chapter 13 Bankruptcy. In her plan, she stated that no money would be paid to Suncoast Credit Union (the first mortgage holder on her primary residence) and that any money paid would be paid directly to Suncoast and not through the bankruptcy trustee. Suncoast did not object to the plan and the court issued an order confirming the plan in May of 2010.

Dukes made all of her required payments to the trustee and, upon completion, the bankruptcy court issued a discharge pursuant to 11 U.S.C. §1328(a). During the interim, Dukes defaulted on her obligation to Suncoast and Suncoast subsequently foreclosed and sought a deficiency judgment against her. In 2014, Suncoast moved to reopen the bankruptcy and seek a determination as to whether or not Dukes' personal liability had been discharged. The bankruptcy court found that Suncoast's mortgage was not "provided for" by the plan, as it was paid outside and, thus, not discharged. Dukes appealed to the district court, which affirmed the bankruptcy court's ruling. Dukes ultimately appealed to the Eleventh Circuit.

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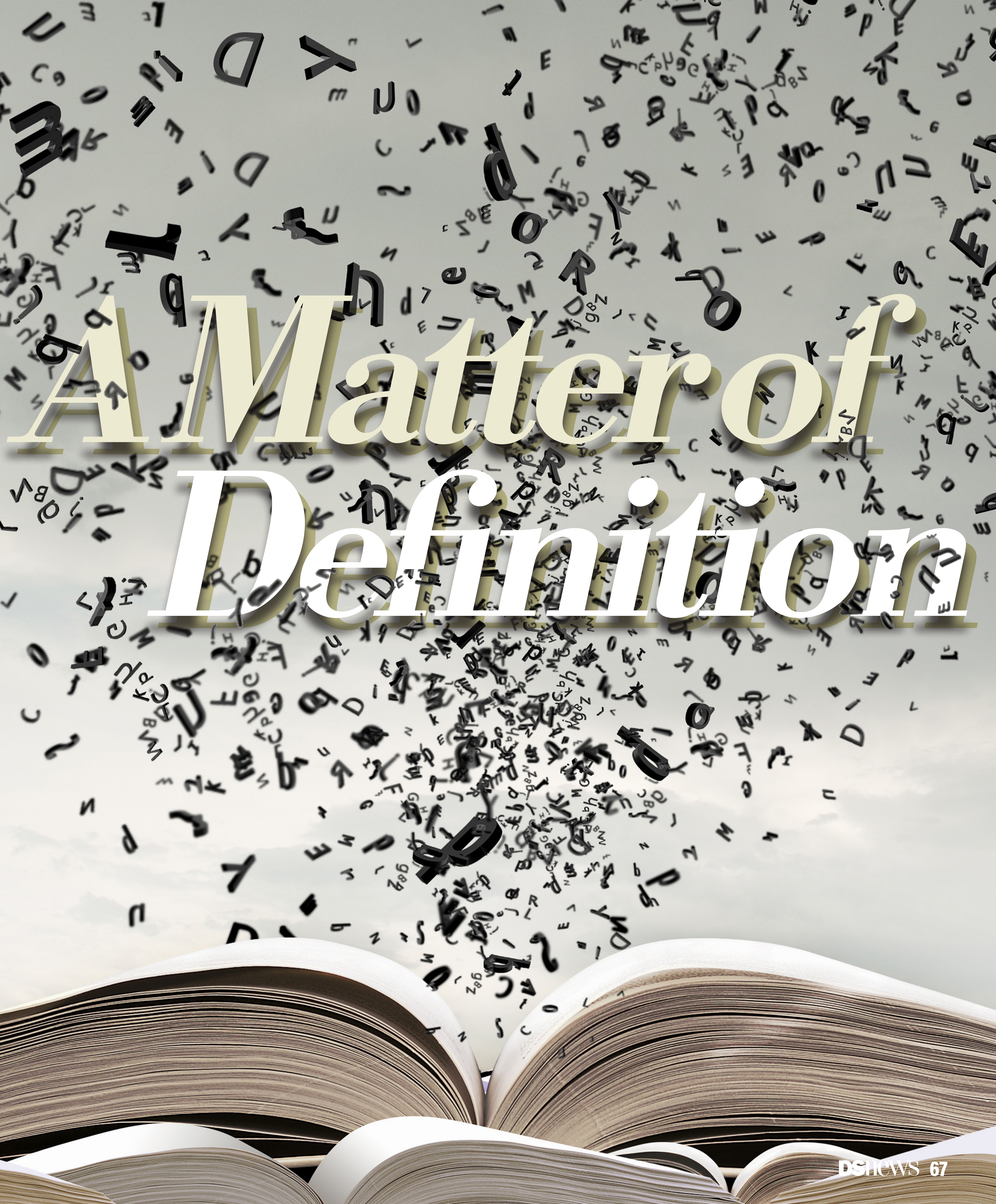
In determining the meaning of "provided for," the Eleventh Circuit looked to a previous Supreme Court decision, in *Rake v. Wade,* 508 U.S. 464, 113 S.Ct. 2187, 124 L.Ed.2d 424 (1993), in which the Supreme Court determined that "[t]he most natural reading of the phrase to 'provid[e] for by the plan' is to 'make a provision for' or 'stipulate to' something in a plan." The Eleventh Circuit found that the debtor's plan, by stating that Suncoast would be

A Matter of Definition



The bankruptcy court for the District of Colorado found that a Chapter 13 plan that called for the ongoing mortgage payments to be made outside the plan while the arrears were cured inside the plan did not discharge the debtor's obligation on the ongoing contractual payments since said payments were not "provided for."

paid outside, did not set forth a repayment and consequently, did not "provide for" Suncoast.

The Eleventh Circuit rejected the debtor's broad reading of *Rake*, in which the debtor argued that a mere reference to the mortgage is sufficient for the plan to "provide for" it. In so doing, the Eleventh Circuit found that *Rake* stands for the proposition that a claim is "provided for" where the plan supplies the terms that will govern the repayment of the claim.

In *Mayflower Capital Company v. Huyck* (*In re Huyck*) 252 B.R. 509, 515 (Bankr. D. Colo. 2000), the bankruptcy court for the District of Colorado found that a Chapter 13 plan that called for the ongoing mortgage payments to be made outside the plan while the arrears were cured inside the plan did not discharge the debtor's obligation on the ongoing contractual payments since said payments were not "provided for."

Similarly, the bankruptcy court for the Eastern District of North Carolina came to the same conclusion based on analog facts in *In re Hunt,* No. 14-02212-5 DMW, WL 128048 (Bankr. E.D.N.C. Jan. 7, 2015).

By the same token, the district court for the Southern District of Florida found that by stating that the mortgage would "be paid directly," the plan did not provide for the mortgage and it was not subject to the discharge [*Bank of America, N.A. v. Dominguez* (*In re Dominguez*) No. 1:12-CV-24074—RSR (S.D. Fla. Sept 24, 2013)].

Nonetheless, the only case that lends any support to the debtor's argument is out of the Ninth Circuit [*Matter of Gregory,* 705 F.2d 1118 (9th Cir. 1983)]. In *Gregory,* which predated *Rake,* the Ninth Circuit found that Chapter 13 plan that specifically stated that it would pay zero dollars to unsecured creditors effectively "provided for" that claim in order to make it subject to the discharge. In distinguishing *Gregory,* the Eleventh Circuit found that, unlike the proposed plan by Mildred Dukes, the plan in *Gregory* did stipulate to terms for the unsecured creditors (i.e. it proposed to pay zero dollars). Contrast that with Dukes' plan that stated that the loan would be paid direct and outside.

As if often the case, when a debtor proposes to cramdown (i.e. value) a loan inside the plan, either the Chapter 13 plan, confirmation order, or cramdown order is silent with regard to payment of taxes and insurance or states that it is to be treated outside the plan. In either case, the loan is de-escrowed and the debtor is responsible for the payment of taxes and insurance.

Not surprisingly, debtors often fail to pay the taxes and insurance when due and either the lender or servicer is forced to advance these in order to protect its collateral. The question boils down to whether or not these escrow advances are "provided for" and subject to the discharge under §1325(a)? A reading of *Dukes* suggests otherwise.

Based on this, it is imperative that steps be taken prior to recording a release of lien or satisfaction of mortgage in order to recoup any escrow advances made on behalf of the debtor. While the below provide some examples of how to do this, it is important to consult with experienced bankruptcy counsel since each jurisdiction has different requirements. In other words, what is suitable in one jurisdiction may not be suitable in the other.

If the jurisdiction follows the Federal Rules of Bankruptcy Procedure, it is recommended to file a Post-Petition Fee Notice. For instance, Fed. R. Bankr. P. 3002.1(c) provides in part "the holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice itemizing all fees, expenses, or charges (1) that were incurred in connection with the claim after the bankruptcy case was filed, and (2) that the holder asserts are recoverable against the debtor or against the debtor's principal residence" (emphasis added). Thus, even if the cramdown is not a primary residence [which is typically not unless the anti-modification provision of §1322(c)(2) applies], the amount disbursed is recoverable against the debtor since it is not "provided for" and thus, not subject to the discharge.

Another option to be considered is to file a Motion to Compel Modified Plan for Escrow. The argument here is that the escrow advances are to be treated as an administrative expense pursuant to §503(b). In fact, said section defines administrative expense to include "the actual, necessary costs and expenses of preserving the estate."

Other options to be considered are the filing of a Motion for Relief from Stay (due to lack of adequate protection) as well as a Motion to Dismiss pursuant to §1307(c). It may also be a wise idea to file a Motion for Determination of Non-Dischargability. Doing this will result in a comfort order stating that said amounts (i.e. the escrow disbursements) are not discharged. This will provide a shield to any potential action for violation of discharge injunction down the road.

Accordingly, it is imperative that action is taken to either recoup escrow advances prior to satisfaction of mortgage or release of lien being recorded. In addition, based on a reading of the *Dukes* case, as well as the other cases cited within, it appears that other jurisdictions have reached the same result regarding the "provided for" language in §1328(a). We are hopeful that this will continue to remain the majority view and provide an avenue for creditors to recoup escrow advances. DS