AMERICAN PREDATORY LENDING AND THE GLOBAL FINANCIAL CRISIS

ORAL HISTORY PROJECT

Interview with

O. Max Gardner III

Bass Connections

Duke University

2020

PREFACE

The following Oral History is the result of a recorded interview with Max Gardner conducted by Patrick Rochelle on October 25, 2020. This interview is part of the Bass Connections American Predatory Lending and the Global Financial Crisis Project.

Readers are asked to bear in mind that they are reading a transcript of spoken word, rather than written prose. The transcript has been reviewed and approved by the interviewee.

Transcriber: Sean Nguyen	Session: 1
Interviewee: Max Gardner	Location: By Zoom
Interviewer: Patrick Rochelle	Date: October 25, 2020

Patrick Rochelle: I'm Patrick Rochelle, a graduate student at Duke University's Sanford School of Public Policy and a member of the Bass Connections American Predatory Lending and the Global Financial Crisis Team. It's Sunday, October 25th, 2020. I'm speaking virtually with Mr. Max Gardner, who's joined us today over Zoom. Thank you for joining me today, Mr. Gardner.

Max Gardner: Thank you. Good to be here.

Patrick Rochelle: So I'd like to start by establishing a bit about your background. I believe that you grew up in Shelby, North Carolina and went to UNC Chapel Hill for college. Is that right?

Max Gardner: Yes, [I was born on] October 6th, 1945, right in Shelby. And went to the public schools here, graduated from Shelby High School in 1964, and then went to [UNC] Chapel Hill. [I] graduated from UNC in '69. [I then] worked for about a year and a half and went back to law school and graduated in 1974 from UNC School of Law.

Patrick Rochelle: I wanted to talk a little bit about your early career. Could you briefly tell me about your early legal career? And really in the context of your work life, when did you first get involved in consumer bankruptcy cases?

Max Gardner: Well, to kind of go back to the first part of your question. I worked as a summer intern with McNeil Smith's law firm in Greensboro between my second and third year [of law school]. And then that law firm gave job offers to certain summer clerks that third year. And I accepted a position there with that firm, [Smith Moore Smith Schell & Hunter]. Probably in July of that year [as] I was studying for the bar exam and [after I had] graduated from law school, [North Carolina Supreme Court] Chief Justice William Bobbitt called me up and wanted to know if I would agree to clerk for him, as a law clerk. He was going to serve – because of his age – they had mandatory retirement – he was going to serve through December of that year. And, I remember telling him, well, Judge Bobbitt, I've got a job in Greensboro, I need to check with McNeil Smith. And he said, don't worry, I've already checked with him.

So I got the message and understood and accepted the job and worked with him for six months, a great part of my career. He was just an outstanding person, lawyer, jurist. [I also] got to work with the next Chief Justice [of North Carolina] Susie Sharp during that same period of time. When I was getting ready to leave in January, Judge Bobbitt's replacement, William Copeland, did not know that you had to have a law clerk. So, when he came to the court, they asked me if I would serve as his law clerk, at least until July [of that year]. And of course, the

Smith Moore Smith Schell & Hunter law firm in Greensboro agreed to that. And it was a totally different experience. Judge Copeland was more of a trial judge. And not somebody who would sit down and write an opinion of any consequence, not to take anything away from him, but it was a totally different experience.

And then I went to Greensboro. We were doing defense work for insurance companies. I worked – my senior partner I worked with was “Rip” Richmond Bernhardt. And the great thing about that experience for me is we did a lot of trial work, a lot of depositions and Rip – that's what we called him – Rip Bernhardt let me get involved from the very beginning, with you know going to court [and] taking depositions. We had some major products liability cases we were involved in, [and one related to] a serious accident involving a ski lift and a grip on a cable. [We] went all over the country taking depositions. So I was there about four or five years. And then my uncle who was an attorney here in Shelby became seriously ill. And I had to come back to Shelby. That was probably around 1979, started doing practice here in Shelby. And I was – [it was] a general [type of] practice.

I still worked on probably seven cases that Smith Moore wanted me to stay on, so that was the majority of what I did the first two years here [in Shelby]. And I was doing a general practice – everything: divorce, civil, personal injury cases, criminal, all the way up to felony murder, defense cases. I was on the list of appointed attorneys for criminal cases, speeding cases. And I started doing a few bankruptcy cases under the old Bankruptcy Act. And then in October of ‘79, we had a brand-new Bankruptcy Code, and nobody knew anything about it. It just kind of happened. It had been in the works for a while, so that's when I really kind of got into consumer bankruptcy work. And I was doing that along with everything else.

And it was probably, Patrick, I think maybe ‘84, ‘85. My wife said, you're going to seven calendar calls every Monday, seven different courtrooms, sometimes having to go to Charlotte, sometimes having to go to Asheville for federal bankruptcy court. And she said, why don't you just start doing bankruptcy work? And I finally made that decision I think around ‘85 or ‘86. My advantage I think in bankruptcy – it was not really a litigation practice back then and it really isn't to some extent today. But I came in with [experience in] I think over a hundred jury trials. I had done the final verdict and many more we had started and resolved the cases before a final verdict. I had taken 500 or 600 depositions and the bankruptcy lawyers just – on both sides, whether they [were] representing creditors or debtors, had never been involved in that kind of practice. And, that gave me a real advantage, there’s no question about that. And it turned into a very good decision by my wife to get me to limit my practice to bankruptcy. And I developed a litigation practice, and we were pursuing every consumer claim we could identify, [including] Pre-petition, post-petition, discharge violations. And I think that was the thing that made me a little different than other consumer bankruptcy lawyers.

Patrick Rochelle: When did you first become involved with residential mortgages within that bankruptcy –

Max Gardner: Well, at the very beginning, a lot of consumers then, and today, we have so many [loan] modification programs, forbearance programs that are in effect right now because of COVID-19. You've had the HAMP [Home Affordable Modification Program] program that started after the 2008-09 Financial Crisis. But back then we didn't have anything like that. We had consumers that needed to file bankruptcy to save their homes. You can file Chapter 13. The automatic stay would stop any foreclosure that was pending or to be filed, and we could put the amount in default in the Chapter 13 plan [and the debtors could then] resume making the regular payments. I think it was that point, I started – a creditor would have to file a proof of claim, a proof of the debt, and part of that claim for a mortgage servicer. I think when I first started doing this, I didn't really understand the difference between a mortgage servicer and who actually owned the note. And I learned pretty quick there was a big difference between the two. I did not know much about securitization, probably nothing when I first started and got involved in that.

But the first thing I started seeing was, you know, kind of strange fees and charges that would appear on pre-petition arrearages. And back then, they did not have to get any [post-petition fees approved by the Court or even notice out the amount of such fees]. So somebody would get a discharge, and then all of the sudden you would see three months later a bill saying you're $4,800 behind. Those were the things that really got me involved in the mortgage servicing things to start with – What are these fees? What are these charges? What were they for? Why are you charging a late fee every month when my debtor is in a Chapter 13 plan that's confirmed? What are these property inspections you say you're doing? Why are you inspecting the property?

The debtor is making the Chapter 13 payments. They're making their mortgage payments. There's no reason to think the property has been abandoned, so why are you charging $15 a month for a property inspection? And I remember the first real case I had the debtor was, I think he was a CPA [certified public accountant] and he reviewed his monthly statements pretty closely, and he would see these $15 property inspection fees every 32 days, and actually [he called] the servicer up, which I think was Crestar Bank, which is no longer with us. And they finally told him that that was a [legal] fee they had to pay me. That I probably forgot to tell him about that fee, but when a consumer filed bankruptcy and had a mortgage, the mortgage company had to pay the consumer's lawyer $15 a month. Then Gerald – I remember his first name – he was not happy with that information and came to me. And of course that was something that was not true, of course. And I was upset myself. So that's kind of really the first real litigation I had [and that case was] Gerald Stark versus Crestar Bank and Fannie Mae. And that's what really kind of got me started.

Patrick Rochelle: And what year was that again, Mr. Gardner?

Max Gardner: Oh, gosh, that was probably, '91, '92, somewhere in there. And the court, bankruptcy court, we had a full-blown hearing on that. I won't go into the legal defenses they raised, but the final result was that Judge [Marvin R. Wooten], the bankruptcy judge at that time, held that those fees were illegal, improper. There was no reasonable basis for them and that was an automatic stay violation, [a] violation of the bankruptcy automatic stay that went into effect when the case was filed to try to charge those fees to the debtor. If I'd known [then what I know now] I would have had other claims against Crestar at the time. But it was a big result, and it was the first case I think in the country that a bankruptcy court had addressed property inspection fees and held there was an automatic stay violation. I remember all of the mortgage publications and [the] Mortgage Bankers Association reported [Stark v Crestar] as a case that raised concern on their part.

Patrick Rochelle: You mentioned this a little bit earlier and you started to talk about it. But how is mortgage debt typically treated under bankruptcy?

Max Gardner: Well, you've got two types of mortgage claims. You have a first mortgage, and you have a second mortgage. And, in Chapter 13 and based on Supreme Court decisions, we cannot cram down the value of a first mortgage. [I'll] give an example. Let's say there's no question that a home is worth $150,000. And the first mortgage, the unpaid principal balance, is $200,000. I cannot cram that value down to $150,000. That's something that – I remember President Obama, in his first term, that was one of the things he was going to try to amend the bankruptcy code to allow that. That was part of his three-part approach to the financial crisis problem when he was first elected in 2009 – 2008, sworn in in 2009. But it did not pass the Senate. I think it passed the House and did not pass the Senate.[1]

So what we can do with the first mortgage is put the arrears in the plan and then have the debtor resume making the regular contractual payment. If there's a second mortgage or a home equity line of credit is second -- and [in] my example, you would have a value of $150,000 on the home and $200,000 owed on the [first mortgage on the home], so there would be no equity in the home to cover any amount [owed on] the second mortgage. In that situation, we can avoid the second mortgage [as a secured claim] and turn it into an unsecured claim, and then if the debtor completes the Chapter 13 plan and gets the discharge, that second mortgage would be canceled of record. And the third, fourth, if there was a third and fourth. We can do something with those based on [the] value [of the home] and what's owed on the first; but we cannot really do anything with the first [mortgage]. Now, obviously there are programs now that deal with first mortgages, all kinds of modification programs out there. But, back in the '80s and '90s there weren't any. So, now we have in our bankruptcy court a loan modification program where you can get into it, as part of the bankruptcy administered by the bankruptcy court and we can see if the

[1] "Obama proposes bankruptcy changes." The New York Times. July 8, 2008. https://www.nytimes.com/2008/07/08/world/americas/08iht-campaign.4.14335546.html

borrower qualifies for a modification on the first mortgage, based on who owns the note and what programs they have available.

Patrick Rochelle: You mentioned a word I'm not familiar with a few minutes ago. It's the arrears. Can you explain what that is?

Max Gardner: The arrears would be the [total] amount the debtor is behind when they file for bankruptcy. So if you were 10 months behind, you also had late fees each month and preservation and property inspection fees, and maybe legal fees had been incurred because a foreclosure may have been started, or a notice of default may have been sent by a law firm before they file. Those recoverable fees and expenses would be part of the arrears. So if you were 10 months behind when you filed Chapter 13, you would put those 10 months plus any recoverable fees and charges like late fees, property inspection fees, legal fees in the plan, and that will be paid over the term of the plan. Then the debtor would resume making the regular contractual payments on the first mortgage, the first month after they file.

Patrick Rochelle: How was [the] mortgage market structured when you first became involved in consumer bankruptcy cases?

Max Gardner: Well, when I first became involved, I really didn't understand the financial aspects of it. I did not understand much about securitization [and] how it worked. I did not know or appreciate the difference between the government sponsored entities like Fannie Mae, Freddie Mac, and Ginnie Mae – how they operate in the markets versus the non-government sponsored entities, so private deals. And they're two different models. But basically, Wells Fargo Bank originates a note, a mortgage loan. They're going to immediately, if it qualifies for Fannie and Freddie underwriting rules, they would immediately put that in a Fannie and Freddie trust. And then they would retain the rights to service that mortgage loan. And servicing means collecting. That's the entity the borrower really interfaces with all the time. And that's really who they think they owe the mortgage debt to; they think that's the party that owns their debt. Ginnie Mae would be like FHA [Federal Housing Administration] VA [Veterans Affairs] Rural Housing, USDA [United States Department of Agriculture].

Any of those loans would be owned by Ginnie Mae and that's a part of the United States government, for sure. Fannie and Freddie have been public. President Johnson – they were part of the government [before Johnson]. He made them public [stock companies] in the late '60s. And then the, when the financial crisis hit in 2008 and 2009, Congress passed legislation that put them in federal conservatorship. So FHFA [Federal Housing Finance Agency] actually is the conservator still for Fannie and Freddie. And although they weren't part of the government, they were publicly traded on the New York Stock Exchange, everybody always thought that if Fannie and Freddie ran into trouble, the [United States] Treasury would come in and back them up, and that's what happened.

Now the way the securitization works is the loans are sold to, whether it's Fannie and Freddie or Ginnie Mae or a private label deal, and then they issue, based on the loans that were pulled together, bonds or certificates of investment to qualified investors. It could be life insurance companies, retirement plans, 401-K plans, hedge funds, you name it. And they buy the bonds and the bonds are rated based on what rating agencies give. Anywhere from -- a simple thing would be a double A, triple A bond would have a lower return than a C bond, but it would not be an investment grade bond.

The A bonds are the least return [in terms of interest], but the less risk. The farther down the tranche you go, the C bonds give you a higher return in terms of interest, but the risk factors are greater. And when a mortgage securitized trust fails, the lowest grade bonds are wiped out first. So it's a very complex thing, but it's – a big issue during the financial crisis was who really owned the note and did they have a proper chain of title? Did you, could you see the actual sales that took place in the securitization process, especially with the private label deals?

Patrick Rochelle: You mentioned earlier that when you were first starting in these kind of consumer bankruptcy cases, you didn't know a lot about securitization. When did things start to make a little bit more sense to you? When did you start to kind of understand or get a sense of what was happening in the mortgage market?

Max Gardner: I think probably that Crestar case was the case that really kind of got me digging into it because [of] one of their arguments they made. Fannie Mae actually owned the note in that case. Crestar Bank originated the loan and sold it to Fannie Mae. And they were trying to make, one argument was that Fannie Mae's Single Family Servicing Guides, that are written publications that are online, you can go to them right now and see them. That somehow they had the authority of a federal regulation or federal law, and that they were just following the Fannie Mae Servicing Guide in charging these property inspection fees each month. That really kind of got me involved in trying to get up with some experts. I got with a guy from Atlanta, Kevin Byers, who is a CPA and Kevin over the years has been a major player with all the government initiatives that have been taken, the actions that were taken by DOJ [Department of Justice], the 49 state Attorney General settlement, Kevin was the CPA for that.

But I got up with Kevin [Byers] probably around '91, '92. And Kevin had been with Legal Aid of Atlanta and the Atlanta Home Saving Project. Before that, I think he had been in Blacksburg, Virginia, with the same type of effort. But Kevin knew more about how the mortgage market operated and worked and the really granular details of private label deals and government deals and who the players were and what documents were required. And how the chain of title worked. The bonds, how they were rated, how they were issued. And Kevin was really the person that educated me. I spent a lot of time with Kevin. He was an expert in many of my cases, expert witness. And a non-testifying expert in many other cases. But I [have] got to give him credit; he's the one who kind of opened my eyes. It was not a process where you read a couple of books over the weekend. This was a long-term learning curve and process. And, the more I learned, the more I realized that I needed to know a whole lot more about what was going on.

Patrick Rochelle: What did you find most confusing about what was going on that Kevin was able to point you to? What were some questions you had about the mortgage market that just didn't make sense...?

Max Gardner: Well, the things that we were seeing in the late '90s and then 2001-02 were – they would take the bonds like the non-investment grade bonds in a primary deal, I'm talking about the C and D bonds, and you would get those bonds from five or six deals together, and they would re-securitize those again into another securitized trust. And the assets of that trust would not be the mortgage notes, but they would be the bonds from the original securitization deal that owned the notes. So, I thought that was a little risky proposition, but then we started to see the bonds in that second deal, and these would be the lowest grade bonds that would then be the assets in another deal. And you would see this done three times in [odd and even incongruous deals]. It was a bizarre system to me and the risk of loss every time you re-securitize these deals over and over. It was kind of like, re-securitizing air in effect to me, because if the primary trust, the trust that really owned the notes, if that trust started to have high default rates, then that's going to impact two or three or four other securitized trusts down the line because the hard assets, the notes themselves were owned by that trust. So the re-securitization of bonds, and then the re-re-securitization after doing it three, four, five times – that was the thing that seemed very problematic to me from a risk point of view.

Patrick Rochelle: So who is your typical client in these kind of cases? You described the Crestar [Mortgage] case earlier, but typically speaking in the late '90s, early 2000s, who was your typical client?

Max Gardner: I would say it would be a middle income to low-income consumer. Back in those days, it'd be pretty rare to see a high-income wage earner, professional person that would come in and see [me for] a Chapter 13. And usually, the debt limits on Chapter 13 – they've changed over the years – is a limit on the amount of secured debt you can owe and the amount of unsecured debt you can owe to qualify through a Chapter 13, and you have to have a regular source of income. So, that was a typical consumer that we were seeing. Of course, things have changed over the years, so that typical consumer isn't the same one you see today, but average income earners to low-income earners, that's who we were seeing. ...They [their creditors] had a way they would do things back there that they don't do it as much today. Like Avco Financial is one that is no longer with us.

[And another one is] Associates Financial. They had a program and a scheme where they would loan somebody say $2,000 at a very high interest rate, highest rate they could. And then, when they got ready to pay that off, they would put them into a $5,000 debt that would take back a non-purchase money lien on all their household goods. The washer, the dryer, the TV, the sofa, everything they had in their home. And then they would, if they got ready to pay it off, then they would want to get – the next time around, the third time – they'd want to get liens on their motor vehicles. And then that would turn into a second mortgage on their home. And these are all what I would call sub-prime loans. And then the, from the second mortgage on the home they'd want to go into – let's get a first and just take everything out with a very bad, say daily interest first mortgage, which are very nasty consumer products. If you're in a daily interest mortgage loan, as opposed to a scheduled payment mortgage loan. That's the kind, that's what I was seeing back then.

Patrick Rochelle: How did you decide to take on certain cases? Was there any protocol you used?

Max Gardner: Well, the – my system was I wanted to pursue every consumer claim that I possibly could. And one of the big problems we were having back then were discharge violations. We still are. In other words, somebody trying to collect the debt after the debtor finished the Chapter 13 or 7 case and got their discharge – a fresh start in bankruptcy. If the debt is discharged, the credit reporting agencies, Equifax, TransUnion, Experian, they're supposed to change that debt, unsecured debt, to a zero balance. Obviously, that's going to help somebody rebuild their credit. If you have a zero balance on a trade line versus a charge off, or some balance that is allegedly in default and still owed. And we were seeing debt buyers that were buying – they still are, by the way – there are debt buyers that buy debt they know has been discharged in bankruptcy to try to collect.

So what I would be looking for was somebody I felt like would be able to work with me because the consumer is really going to be the eyes and ears. I can tell them what to look for, what to watch out for, what they're supposed to do, what they have to do to help me to litigate the case. Either a pre-bankruptcy violation that I would find. I would see that a debt collector, a debt buyer, somebody subject to the North Carolina Unfair and Deceptive Practice Act, or the Federal Fair Debt Collection practice law, had violated that, we would list those claims and pursue them, and then, automatic stay violations during the bankruptcy and discharge. I wanted to make sure that [the potential debtor] was somebody that I felt like could work with me. And somebody that was going to be completely candid, nice, and I wasn't going to have to pull information out of them. I think that was the criteria I would use because I just assumed that person was going to be my client for a very, very long time. And I wanted to be comfortable with that relationship from the very beginning.

Patrick Rochelle: You've alluded to the fact that things changed over the years and evolved. Between 1999 and 2007 in the years leading up to the crisis, what changes did you observe among your clients?

Max Gardner: Well, yeah. I don't know that there were any dramatic changes among the clients. We were getting more people that had higher income levels than we'd seen before. The main thing that I was seeing, and I started noticing this in '98, '99, 2000, 2001 is, I would have a consumer that would come in and they had – their mortgage loan was just seven months old. It had been seven months or a year since they had gotten that loan. It had been a refi [re-financed loan]. And then I would see they had done five refis in the last seven years. Each one, a little more debt, and they might get a teaser, get a $5,000 cash out on it. And the terms of each loan would be a little more abusive than the one they had before.

And we started to see more adjustable-rate mortgage loans, where the interest rate was the teaser rate going in, but it was only good for the first six months. And then you had stepped up rates. So after 36 months or 60 months, what you thought was a 2% loan is all the sudden a 12%, 13%, 14% loan. We were seeing these option ARMs, where a consumer could pick that I won't make a payment this month – they had an option to do that. And those were some Washington Mutual, Countrywide type loans that were bizarre loans that made no sense to me. And there was little transparency, I think, [in disclosing these terms] to the borrowers. Most borrowers did not understand those products that were being offered to them.

They were sold on the monthly payments going to be X, but they weren't told after three years, the monthly payments going to be Z, which was going to be an unaffordable payment. And the underwriting, the appraisals, really didn't make any sense to me. Somebody would come in and they had re-financed their mortgage five times in the last seven years, each time they would have an appraisal at closing, or that was done with the new loan, and it would be the house is appreciated 25% value. How did that happen? I was familiar with property values in this area, and I knew my home was not going [up] 25% a year. And none of the others were. So that's the stuff I was seeing. I'd say in the late '90s, 2001, 2002, 2004, 2005 that were signs that just weren't good.

I started doing my consumer bootcamps in 2006. And the reason I started doing them was I wanted to train other bankruptcy lawyers to be able to identify not just the claims that were there in a typical Chapter 13 case, but to really understand how the mortgage markets really worked and what they were doing and what they needed to look for and what kind of questions they needed to ask. If you were going into litigation with a mortgage servicer or whoever owned that note that they were servicing, what do you need to look for? And I really kind of got into their systems of record. How did their systems of record work? What kind of software did they use? Who developed it, who markets it, who supports it, what's their relationship with the mortgage servicer? Now everyone started digging deep into that aspect of it.

Patrick Rochelle: I'd like to come back in a little bit to the bootcamps. I have a few other questions about that. But going back just one step, were the issues [that] the lenders and mortgage servicers were bringing against your clients different than they had been earlier in your career? Did the issues change that they were –

Max Gardner: Yeah, the issues changed in that the mortgage products, notes, that they were signing and offering to them were – it's not – a scheduled payment mortgage is for a fixed rate of interest and you're going to pay that same amount of money every month for 30 years, if it's a fixed-rate 30-year mortgage. That was the kind of product I was seeing, except for the Avco's and Associates kind of deal I mentioned before. And that started changing. We were getting all these bizarre products. An adjustable-rate mortgage – I wouldn't call that necessarily a bizarre product. It's not one that I would necessarily recommend to a middle to low-income consumer, but it can be beneficial. I'm not saying all ARMs are bad, but we were starting to see ARMs with all kind of bizarre terms.

And when you see one that you know it's a teaser rate going in. It's like car dealers that sell cars. They're selling the monthly payment. The consumers rarely look at the retail installment contract, or what is the interest rate, or how much am I going to have to pay back? They're looking at that monthly payment. How much is that going to be per month? And that's the way they were selling these products. To refinance your mortgage, we can give you $5,000 cash out because the value of your property has gone up [by] $10,000 [since your last refinance], and you'll get that [$5,000 in cash] at closing. You just have to sign these documents. We were seeing that, and then what I call the bogus fees and charges that were added to the mortgage every month. We started seeing those much more often than we were before.

Fees that made no sense. Fees for services maybe that never had been actually implemented. Marking up fees like maybe you really did a property inspection, and that's where somebody, a vendor, third party, not the servicer, rides by the property and from the street maybe takes anywhere from five to eight photographs, and then does a one-page report. The purpose of that is to make sure that the home is still occupied. And it makes sense if somebody is six or seven months behind on their payment. If I'm the servicer, I want to know are they still in the home or not? But if somebody is making their payments through a Chapter 13 plan or a loan modification or any other way, they're going to be in the home if they're making the payment so that there's no reasonable basis or justification to do a property inspection every month or every 32 days.

Patrick Rochelle: With some of these cases, how would you describe your legal strategy?

Max Gardner: Well, when the Consumer Financial Protection Bureau was formed pursuant to the Dodd-Frank Act, that was during President Obama's term, that was a big, big deal. And they enacted mortgage servicing regulations under RESPA, the Real Estate Settlement Procedures Act. And Reg X [RESPA] really gave us the ability to get information from mortgage servicers as a matter of right and federal regulation. Before that, it was – I would have to file an objection to a proof of claim or file what's called an adversary proceeding in bankruptcy court and get that same information through discovery like you would in any other case [through] depositions, interrogatories, [a] request to produce, that type thing. With Reg X, it's been around for nine years or so now, we can actually send a request to the mortgage servicer under Reg X for information. For example, I can ask them for an itemized payoff statement, and they have seven business days to produce that. I can ask them to identify who owns that note and that is a very critical thing these days, especially with the modification programs around, who is the actual owner of the note and they have 10 days to do that. And then I can ask them for any other information, data, records, screenshots, mortgage histories, like loan histories under Reg X and they have 30 business days to give me that information. And that's just a written request. It doesn't have to be a lawsuit pending, and it can be done by the attorney with authorization. It can be done by the borrower themselves. So, Reg X allows us to go from getting that information through a contested case or litigation to being able to get it just simply by using the written request procedures of Reg X. I wish I'd had Reg X starting in ‘95 or so. It would have been extremely helpful.

And the current CFPB, under President Trump has not been helpful. They rolled back a lot of the consumer protections and enforcement actions. And I think all consumer lawyers are not happy with the current CFPB and [Kathy] Kraninger who's the current confirmed Director. Mick Mulvaney was acting director for a long time and did a lot to undermine the objectives and goals of the CFPB. Kraninger has not done anything to change what Mulvaney started. Richard [Cordray], who was the Ohio attorney general, was the first CFPB Director and really made some major consumer initiatives that have been very, very helpful to the extent they hadn't been undermined by the Trump administration.

Patrick Rochelle: Can you describe a little bit before Reg X, before the Consumer Financial Protection Bureau, what sort of burdens did it place on you before these additional regulations to help your clients? What sort of hoops did you have to jump through in order to –

Max Gardner: If a proof of claim was filed, which had to be filed to collect any money through the Chapter 13 process, you would want to make sure that was filed, the debtor has the right to file a proof of claim for any creditor. If they don't file within the time period they're allowed, there are certain limits on time when a debtor can do that. But, if we're contesting any kind of issue before Reg X, we would have to create a litigation case, whether it was a contested case, like an objection to a claim or an actual lawsuit in bankruptcy, which is called an adversary proceeding, and then go through what's called traditional civil discovery. You have to get it through a request to produce documents, or you have to go take depositions of certain management employees. You can identify [for depositions] management level or people who have authority to do things or a corporate representative. Send them written questions to answer under oath, requests for physical inspections of the premises – it was all litigation oriented, and it’s expensive, time consuming for the average consumer attorney, that's doing bankruptcy work for consumers. That's certainly something that is going to take a lot of time out of their weekly schedule or monthly schedule to do that.

And I think the mortgage servicers, the mortgage bankers, they knew that. They understood that this was going to be an extremely difficult financial burden and time burden to put on most consumer debtor attorneys to do this. And they're not going to be many that do it. And, I always look at the creditors. They're always making a bottom-line decision on anything they do. … [H]ow much … are we going to make doing this? And how much is it going to cost us if we're caught? How often are we going to get caught? Kind of a bottom-line analysis of it.

It was difficult before Reg X to get that kind of information. You still have to know what to ask for. Reg X doesn't create a magic empowerment device. If you don't know what to ask for, what documents and records you really need, how they're stored, the name or nomenclature that that servicer uses to describe those documents, how their system works so you know what divisions or departments to get into – Reg X is not going to help you that much. So you still have to have knowledge of – I like to say during my bootcamps that one of our objectives is that you, when you finish the bootcamp, you know more about how the creditor, whoever it is, operates than their own attorney does. To really dig inside the business model for business operations of the other side. And that's always been my goal and my objective is to try to understand exactly how every, whether it's a debt buyer, debt collector, mortgage servicer, credit card company, to understand how they function and operate, how they're organized, how their software systems work, what kind of software they use, what system of record they have, and what kind of production they can get out of that system of record. Can they produce really granular reports or not? And if so, what do they call those reports? So I can ask for them.

Patrick Rochelle: Can you describe a little bit for the uninitiated, describe your curriculum a little bit with the bootcamps. What does it look like for people who take part in it?

Max Gardner: Well, it's a four and a half day pretty intensive – I wouldn't call it a seminar really. It's not just like listening to me. We have speakers that come in. Back in 2008 or 2009, Saxon Mortgage was a pretty big subprime mortgage originator, and just before the financial crisis, Morgan Stanley bought out Saxon. If it'd been six months later, it wouldn't have happened, but they did. And their general counsel, Dick Shepherd – they fired everybody that was with Saxon, their whole staff and operations and integrated it into their own operations. So Dick Shepherd, who was the general counsel of Saxon, didn't have a job, and I don't remember how I ran up with Dick. I think he had joined the National Association of Consumer Bankruptcy Attorneys and made a post [on their national listserv]. And I recognized his name because I had litigation with Saxon.

So I got up with Dick. And then Dick was the speaker at my bootcamps from 2009 until he, Dick died of Lou Gehrig's disease around 2017. But, Dick was involved in every aspect of the business. He was an extremely valuable asset to me and everybody that went to bootcamp. What we start off with is, I'm not trying to teach attorneys how to file bankruptcy. That's kind of an introductory course. We're assuming that attorneys that come to the bootcamp – we do introductory things now because – we have basic how to do a Chapter 7, how to do a Chapter 13. But back then, you had to have a bankruptcy practice and know how to do the basic stuff. And then we were trying to teach attorneys how to identify claims, how to pursue claims both pre-petition, during the case, and then discharge violations and really to understand the mortgage system and how it operated and the programs and software programs that different servicers use, and to understand how they operated, how their legal network worked, how they communicated with their attorneys, how work was assigned, who did it, what third party vendors were involved and what was their role in the whole foreclosure or bankruptcy operations and mortgage servicers. So it's a deep dive into everything I had found out.

I felt like in 2005, I was not the only one that felt like we were going to have a very serious recession, and that's really what led me to start the bootcamps. What I was seeing with the securitization market and the type of mortgage products that were being offered, and the way they were rolling these things over with refinancing every year or six months. The normal thing I – if I explained to a consumer, for example, do you understand that this 2% loan in five years is going to be a 14% loan? Most of them, the vast majority didn't. The one's that did, what the mortgage broker that sold them that loan would say is, look, don't worry about it. When it hits that first reset, we'll just refinance you into a new ARM, and then it'll be another 2% starting out. And then when that one hits, we'll just do it again. And the very few that understood what they were getting into, if they ask questions about it, that's what they were told. Oh yeah, that's no problem. It resets in a year or two years, and it does go up, but here's my card, and I'm going to put a tickler record in my system, and I'll contact you 30 days before that, and we'll refinance it and you'll be back into another 2%. And you might get a cash out of $5,000 or $10,000 because the value [of your home] would have gone up.

Patrick Rochelle: What techniques, best practices, do you hope the lawyers who come to your bootcamp come away with, if you had to name just a couple of them?

Max Gardner: Well, the main thing I'm wanting them to do is to be able to identify issues, to identify legal issues and then when they identify them to know what they need to do to litigate that issue or get that issue resolved. So it's [a] two-part thing: What are you looking for? What are the issues that are out there that would put red flags up for you? And then once you see those red flags and identify them, then what is the process to getting those resolved in a way that is favorable to the consumer borrower, the party you're representing? And to you also, where you're going to get paid for doing that work and not have the consumer pay you, but have the creditor, servicer, debt buyer, whoever it may be, pay you. That was our main objective.

Patrick Rochelle: How is North Carolina's consumer bankruptcy process similar or different from other states?

Max Gardner: Well, we have a uniform bankruptcy code that applies to every jurisdiction in the country. The thing about bankruptcy practice is it's local, even though we have a uniform bankruptcy code and a set of federal bankruptcy rules of procedure, every district is different. Every Chapter 13 trustee, for example, has their own set of procedures and rules. For example, a Chapter 13 case here in the Western District of North Carolina, where I practice, would be totally different than the way Chapter 13's are done in the Middle District, in Greensboro and Winston, for example, and then the way things are done in the Eastern District in Wilmington, Raleigh, Durham, that's a different thing altogether. And then the trustees in the Western district, we have three standing Chapter 13 trustees, they all have their little different quirks and rules and the way they operate.

So there's nothing really uniform about consumer bankruptcy law. The Code is certainly there … the [Bankruptcy] rules, federal rules, but you have local rules. And then you have local practices by each individual Chapter 13 trustee. So it's something where you have to know your local culture and how things operate and especially how that Chapter 13 trustee, if that's what you're doing, operates. In Chapter 7, you don't really know who the chapter 7 trustee is going to be when you file. There may be 10 standing Chapter 7 trustees appointed by the court and they assign them on a random basis. So you can't really pick and choose who your chapter 7 trustee is going to be, but you do know who your Chapter 13 trustee is going to be. And that's based on where the debtor is, their primary residence or domicile, what County they live in. It's divided up by counties.

Patrick Rochelle: Would you say this benefits your clients or mortgage servicers and lenders? This sort of patchwork of bankruptcy rules and that sort of thing.

Max Gardner: The key document I guess in Chapter 13 cases is the Chapter 13 plan [which is] the document that determines how the debtor is going to resolve their debt issues through a Chapter 13 plan and reorganization. And the debtor gets to file the plan. Several years ago, there was an effort to get a national form plan. And that was, I think the biggest concern of the creditors is that every jurisdiction in the country had their own Chapter 13 plan that they liked. And some of them were very detailed and specific. Some were not. Some were very granular in terms of what mortgage servicers had to do with the payments and how they had to apply the payments. And so there was a big push to get a uniform plan. A uniform plan was adopted by the Rules committee, and there was tremendous objection mainly from the bankruptcy judges that did not want a uniform plan.

So, we have a uniform form [plan now], but each jurisdiction has the right to put in their [own] nonstandard local provisions. So the plan that we have that's our form plan here in the Western District is certainly different from the plan in the Middle District and the uniform plan in the Eastern District. So they sought uniformity, [but] they didn't get [it]. They got a uniform form, and you know where to look now. It's organized in terms of structure and design, but that's the extent of the uniformity. Then you start looking at the non-standard provisions in there, and I guess we have 11 major ones in the Western District as part of our mandatory plan. And then the debtor can add non-standard provisions that you may want to add to your plan based on the type [of] debts in your case. The idea of uniformity of a plan was sort of lost when they decided each jurisdiction can opt out. To use the form, that's what you got to do, but you can [add] your own provisions in there. That's the key document in Chapter 13, in my opinion, is that plan.

Patrick Rochelle: Did different bankruptcy judges you worked with approach these consumer cases differently?

Max Gardner: I think every judge approaches most everything differently. Knowing your judge is certainly a key to any kind of case you're involved in, whether you're in state court or federal district court or bankruptcy court. Even the judges within a certain district have their own kind of process and procedure and the way they approach and deal with certain issues, legal issues, factual issues. They may have their own process about – do they want to hear things maybe just by affidavit or declarations? Or [do] they want live witnesses? And of course with COVID-19, the world's been turned on its head so the way we deal with things is totally different. One thing in the Western District that we've had for probably seven years is when you file a bankruptcy case, a [Chapter] 7 or 13, your first court appearance is called the first meeting of creditors.

And that's in a Chapter 13 case where the trustee and any creditors can appear and go over the plan and the trustee can approve it or not approve it. We've been doing that virtually for about seven or eight years in the Western District. So when COVID-19 hit and everything went virtual, whether it was by Zoom or WebEx, or just telephone hearings, it wasn't a big problem for us. And then to move into non-contested or not seriously contested motion hearings or practice to be able to do that by WebEx or virtually by phone-in hearings, it was not a big leap forward for us. I think an actual trial by say Zoom with witnesses and documents is a serious challenge for everybody these days. But we had kind of a head start by having virtual hearings, first meetings for many years before COVID-19.

Patrick Rochelle: Turning back to the Financial Crisis of '08-'09, did cases begin to sort of tail off at some point, perhaps because of programs like the Home Affordable Modification Program that you mentioned earlier? Did you start to see less of them as the federal government intervened?

Max Gardner: Well, the biggest thing that happened was the 2005 Bankruptcy Reform Act and that was something that had been pushed by creditors for 10 years. It created pre-filing credit counseling, post-filing credit education courses, which were no big deal, really. The pre-filing credit counseling really made no sense to me, but the post-filing education courses I felt were very good, but such things as the means test, whether somebody could file a Chapter 7, the mandatory application [of expenses for above-median debtors] in Chapter 13, as far as how much you had to pay back, what they did with certain motor vehicle claims, whether you could cram down the value of the car to the current value – [whether] you had to pay the current contract rate [or a lower rate]. The different duties and obligations put on debtors attorneys in terms of all kind of additional paperwork, disclosures, notices, forms that we had to do. The whole purpose of that act was to make it more expensive to file bankruptcy and more difficult to file.

And we saw the biggest filings in bankruptcy that happened before October 17th, 2005, that was the date the bankruptcy so called reform act and the only thing it reformed was it made it more difficult for consumers to file and more expensive. [We] had a major run-up of cases. People filing before that date, the effective date of the 2005 Act because I think a lot of consumers felt like maybe they couldn't file, or they're going to end bankruptcy, or it's going to be more difficult to file, more expensive to file. And then after that, there was a big drop-off in filings, and since the Financial Crisis the number of consumer filings have really gone down. I think you can attribute that to a lot of the modification programs that are out there with COVID-19. Everything's in forbearance now from mortgages to car payments to credit card payments. Every creditor's offering some kind of a forbearance plan, which is not a forgiveness plan. At the end of the forbearance, you've got to resolve those payments you haven't made. And I think 2021 is going to be a major year for consumer bankruptcy filings, but really consumer bankruptcy filings, and the Financial Crisis have not correlated with each other. You haven't seen consumer bankruptcy filings go up because of the Financial Crisis. They went up in 2005 because people wanted to file before this so-called reform act was effective. But since then, I don't think we've had -- it's worked. In other words, it's depressed filings and the financial crisis did not increase filings.

Patrick Rochelle: Were there ways around that that you found during, that you had clients during the Financial Crisis that needed to file but were struggling to because of the Bankruptcy Reform Act that you mentioned? And how did that impact your clients?

Max Gardner: I think it impacted the clients in that it quadrupled the amount of paperwork and documentation work that you had to do. The means test is, for example, very complicated. If somebody was in an income bracket where the means test would apply, just going through those forms was like doing a very complicated 1040 tax return almost. And then the verification, the documentation, the means test required consumers that were above median income debtors to use the IRS standards or the local national standards for their living expenses. And those would be fixed in there. So it was a challenge in terms of the documentation you had to get, the time you had to spend with a debtor and the expense of it.

And I think that was probably one of the biggest factors. A consumer would say, well, if I've got X amount of dollars to pay you to do the bankruptcy, I don't need to file the bankruptcy. Or I don't have that much money to file. If I had the amount needed to file bankruptcy and pay the credit counseling and the filing fee and your legal fee, then I wouldn't be here. I wouldn't need to see you. Some studies were done in the last couple of years about the amount of available cash money the average consumer has access to. They just absolutely had to have a thousand dollars and they couldn't go to their granddaddy or grandmother or brother, sister, they just had to have it for a mandatory emergency. The number that actually could come up with it was pretty drastically low.

And I think that's kind of been the problem. I don't really think we've ever recovered from the Great Recession or whatever you want to call it. And we're certainly in one now – it's worse than 2008, 2009. I think it's going to get much worse. I don't know who's going to be president January 20th of 2021, but they are going to have an extremely difficult challenge, whether it's Joe Biden or Donald Trump, to deal with and it's going to be one of the biggest challenges we've ever had in this country in terms of the economy and consumers, paying mortgages and paying rents, and just having [the] ability to buy food and put food on the table. I really foresee something that is going to be like the Great Recession '29, '33 that really didn't end until the end of World War Two. I think we've got 20 or 30 years to get back. I think it's going to take that long. Things are that bad. I think things are that bad right now.

Patrick Rochelle: … Over the last decade, we've seen a number of different narratives emerge about the Financial Crisis, as we've talked about today. How do you understand what caused that crisis [of] 2007-2009?

Max Gardner: I just think there was a great deal of financial irresponsibility done by the banks. They blame the consumers that people got loans, mortgage loans, they couldn't pay for, but they were sold a bill of goods that they didn't understand, and there was no transparency in what was going on. And it had this kind of obsessive demand for these securitized bonds and re-securitized bonds. And at some point, you can kick the trash cans down the road for pretty good length of yardage. But at some point, the kicking stops and there's a lot of garbage to pick up and that's pretty much what happened. I think there was a lack of regulation. Nobody was – with the FDIC, federal banking system. Nobody was really watching what was going on or if they were, they were just turning their head the other way.

And it was something that, like I said, in 2005, I felt like – and by that time, I was really watching and looking in the securitization markets. A lot of these deals are public deals, even though – of course the Fannie [Mae], Freddie [Mac], and Ginnie Mae are all public deals. But the securitized trusts that were non-government backed deals, they had to file reports with the SEC so you could go into the SEC and get the granular details of any deal. And once I learned how to do that I was looking at those and I was also looking – everything's securitized in this country that produces a regular stream of income, from cars on retail installment contracts to leases, to four-wheelers, to motorcycles, to boats, trailers, mobile homes. All those products are securitized.

And by that, I mean, the original lender is going to sell that note or that contract in the securitization market, it going to be cashed out. And their risk may be gone when they do that. There are some safeguards [that] were put into place by the CFPB – the ability to pay rule and things like that, that the CFPB is trying to wind back and roll back. But I think that was the biggest problem that I was seeing is the lack of accountability and the ability to sell the risk off. If you could securitize a consumer contract of any type, or lease – even the places that rent furniture, I won't mention any names, but you know who they are. They securitized those lease agreements on furniture, the rent-to-own deals or the rent to buy. The only thing that's probably not securitized is the mom-and-pop guy that owns a car lot and they finance the car purchase of the 10-year old cars they sell. They don't securitize those agreement[s], but that may be it. I think that was the major problem. And I feel we're kind of back to that same point.

What worries me more than anything right now is the amount of money the Federal Reserve bank has put into the system. This started back in September of last year [2019]. I follow what the Fed is doing, especially the Federal Reserve Bank of New York and what they call the repo market. It used to be an overnight market, where a bank could go in and get money, they needed cash money to meet the requirements the next day. And the repo markets turned into a 90-day loan and they roll the loans every month and there's trillions and trillions of dollars that the Federal Reserve has put into the economy since then.

I do predictions every January 1 for all my bootcamp graduates. And I predicted a major recession [in] the third quarter of this year because of what I was seeing in the financial markets. And I knew nothing about COVID-19, January 1, 2020, that did not factor into my thinking at all. And you put COVID-19 on top of that and everything that's happened since then. We're in for a serious, serious, hard time in this country, I'm afraid. I hope I'm wrong, but my gut tells me I'm not.

Patrick Rochelle: Going back to the repo market conversation you were just speaking about, is it that there are too many institutions, financial and otherwise, that have access to it today?

Max Gardner: Yeah. They've expanded the number of entities that can borrow money. I'm concerned about the quality of assets. They claim they, the Federal Reserve Bank of New York, that they get assets for these loans, but they don't really underwrite them or evaluate them or qualify them. I don't even think they have a custodian that holds the assets, so it's kind of like a handshake deal. And they're loaning money at 25 basis points, which is a quarter of 1% interest. So, I can borrow a trillion dollars at a quarter percent interest and make it work. And I'm not a financial genius. But the way the Fed loans money is that they don't go to the Treasury and ask them to print more dollars. They just create it on, type it in their computer system, $5 trillion and then transfer that electronically to whoever they're lending the money to. So they're creating money out of thin air and just the amount of money they put in the system. Since then, I don't know what happened September of last year [2019] that caused this massive amount of money to start going into the financial system from the Fed.

But something happened that we don't know about. And then when the stock market crashed and went down I guess in March of this year [2020], I don't think that had anything to do with COVID-19. I think we had another major financial crisis that happened and the Fed stepped in again and somehow solved the problems. I don't know if the financial markets froze up, that's what happened in 2008 and 2009. Lehman [Brothers] went down and they had all these – it's hard to explain all these counter party and third party obligations they have. It's kind of like when one domino falls and you've got them all lined up and you've got a thousand dominoes lined up and the first one falls, and they all finally go down.

I think that's, something like that may have happened in March and that's why the markets went down and the Fed stepped in and now the stock market has been going back up. I think the same thing may have happened last September, but at some point, you got to pay the piper and you just can't keep putting trillions and trillions of dollars in the system. I tell people now [at] my seminars, the CARES Act – they're talking about $3 trillion like that, that's a lot of money. A trillion dollars is a lot of money. $3 trillion was certainly a big thing for Congress. They're talking about a $2 trillion stimulus bill now, but that's really a small amount of money compared to what the Fed has put into the system. And they keep adding to the list of qualified borrowers that can go to the Fed [discount] window and borrow money. And it's no longer an overnight loan. It's a 30, 60, 90-day loan. We can roll it when it becomes due. So it's a big, big problem.

Patrick Rochelle: Mr. Gardner, thank you so much for your time.

[END OF SESSION]