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Lawyers Weekly is again conducting its survey of the state's largest law firms. If your firm had 36 or more lawyers on Jan. 1, 2008, be sure to request our Large Firm Survey questionnaire by emailing [david.blackwell@nc.lawyersweekly.com](mailto:david.blackwell@nc.lawyersweekly.com).

## Comp benefits rejected for man who denied having prior injury

### Appeals court adopts new test

By GUY LORANGER

Staff Writer

A claimant who lied on his job application by saying he had no prior back injuries could not recover

workers' compensation benefits for a back injury he later suffered on the job, the Court of Appeals has ruled.

The 2-1 decision marked the first time that a North Carolina appellate court recognized intentional misrep-

resentation as a defense in a workers' compensation action and adopted the three-part "Larson test," based on a well-known treatise on the subject.

By lying about his physical condition, the claimant prevented a valid employer-employee contract from

■ See FREEMAN, page 25

## BANKRUPTCY BOOT CAMP

O. Max Gardner drills lawyers from around U.S. on strategies of foreclosure combat



By DIANA SMITH

Staff Writer

Consumer bankruptcy attorney O. Max Gardner is marshaling an army.

With the rate of home foreclosures escalating nationwide, the Shelby lawyer is recruiting attorneys to join the fight for clients who are in danger of losing their homes. He's bringing

■ See BOOT CAMP, page 28

## NCBA kills move to give paralegals vote on board

From STAFF REPORTS

A committee of the N.C. Bar Association has voted down a proposal by NCBA president Janet Ward Black to give paralegals a vote on the board of governors.

In a Feb. 29 meeting in Greensboro, the strategic planning committee decided, however, that paralegals will have more access to three committees charged with conducting the NCBA's day-to-day business. That includes voting power on one, the strategic

planning committee.

In October, Black said she would push for the NCBA's growing Legal Assistants Division to have a voting representative on the board. Such a move would have been a first for U.S. bar associations.

Currently, the LAD's chair sits on the board but has no vote.

"There was a lot of rationale [for the decision]," said Allan Head, the NCBA's executive director. "We feel like they're

■ See VOTE, page 26

## Lack of consent negates negligent entrustment suit

From STAFF REPORTS

A child could not prove negligent entrustment against the owners of a car that hit her because the owners had not given the driver permission to use it, the Court of Appeals has ruled.

The unanimous March 4 decision is an apparent first-impression ruling on whether a lack of consent negates a negligent entrustment claim.

The child was injured in a head-on collision in Johnston County in January 2001.

Her family sued not only the driver but also the New Bern-

INSIDE

For more details on the facts and holding of *Hill v. West*, please see opinion digest, page 23.

based construction company that owned the car and the family that operated the company: the driver's husband and his parents.

A Johnston County court granted summary judgment to the company, husband and parents in September 2006.

■ See HILL, page 25



Photo courtesy of O. Max Gardner

O. Max Gardner teaches the finer points of bankruptcy law at his 'boot camp' in the mountains of western North Carolina. He gives his participants four 10-hour days of intensive training.

### THE WEEK'S OPINIONS, see page 9.

#### Civil Practice

★ Even if plaintiffs aren't served with subpoenas directed to defense experts, plaintiffs can be taxed with those experts' witness fees. **Greene v. Hoekstra**. See page 17.

#### Civil Practice

★ Language in the trial court's default judgment compensated for plaintiff's failure to obtain an entry of default before seeking the default judgment. **Ruiz v. Mecklenburg Utilities, Inc.** See page 18.

#### Insurance

★ Since the insurance company didn't cause the mold infestation in the house, the company's slow response to the homeowner's claim didn't damage the homeowner. **Burrell v. Sparkkies Reconstruction Co.** See page 22.

How to market law practices during an economic downturn

See Commentary, page 3

Word about NCBA'S 4ALL service day hits the streets

See Around the State, page 5

All-female firms give rise to fresh, family-friendly workplace culture

See Inside News, page 2



# BOOT CAMP: Since 2006, 252 lawyers from 46 states have graduated

■ From page 1

them to Bankruptcy Boot Camp.

Gardner created the boot camp in 2006, when he noticed an increasing trend among homeowners entering foreclosure: Many had been charged unnecessary and unlawful fees by loan servicing companies.

The most common bogus fee: A servicer's delayed crediting of monthly payments to a homeowner's account, resulting in a late charge.

"If just one late charge rings up and the servicer continues to hold that money in an unapplied account, then that's going to trigger all sorts of ancillary charges, which can be anywhere from \$10 to \$25 or \$35 a month," said Gardner. "Then, if they don't post or apply the payment that came in that first month, when the second payment comes in, the system is going to show the first payment hasn't been made, and that second payment will be put in an unapplied expense fund."

Homeowners also incur costs for drive-by inspections — also called broker price opinions — that occur when lenders want to check on the condition of homes at risk of foreclosure. Such inspections can cost as much as \$350 apiece, said Gardner.

Other fees are hidden behind ambiguous names or numeric codes, making it difficult for attorneys to trace their origins.

According to Gardner, about 60 percent of current mortgage services use what are called MSP Generic Transaction Codes to describe fees or servicing activities on a homeowner's account. For example, MSP transaction code "1 52" means that a late charge was assessed.

But when attorneys examine their clients' payment histories, they may only see the code with no definition of the charge. Also, 16 of the 96 MSP codes share the same name, "Other Taxes Disbursement," which adds to the confusion.

"What I was seeing was that lawyers were either not aware of these issues or if they were, they didn't know how to litigate the issues," said Gardner, who has practiced bankruptcy law for 34 years. "They [the servicers] do certainly make it very hard to identify the payment history on these things by making it very complex — putting all



John Cantrell



Adrian Lapas



Showell Blades

some of this stuff."

The drills are so vigorous that the campers don't even need to break for meals. Victoria, who along with her husband ran a successful bed-and-breakfast in Shelby for several years, cooks gourmet meals for the trainees.

"We can discuss boot camp during breakfast, lunch and supper," Gardner said.

And that's exactly what happens, said Charlotte attorney Andrea Bebbler.

"It's the most draining thing I've done since the bar exam," she said. "Even when you leave the classroom, it doesn't stop because you're always talking about the work and thinking about the work."

## OUT INTO COMBAT

So far, 252 attorneys from 46 states have attended Gardner's boot camps.

Once they're discharged, graduates return to their firms and to the courts. But what goes on in boot camp doesn't stay there — each attorney is armed with a CD containing more than 2,000 documents and access to a members-only listserv that Gardner maintains.

Past attendee Showell Blades IV of Rock Hill, S.C., has received 7,982 e-mails from the listserv since he went to boot camp one year ago.

"It's a fountain of information," he said. "The camp really does a lot in terms of consciousness-raising. I think all of debtors' attorneys had a sense that something wasn't right. Boot camp proved that our suspicions were correct."

In South Carolina, Blades and Cantrell are increasingly handling cases in which creditors apply to bankruptcy courts for motions of relief, alleging that clients are not current with their mortgage payments. Upon investigation, however, the attorneys found that payments were made — just not credited — to the homeowner's account.

"It seems like they're 'losing' payments with more and more frequency," said Blades.

Agreed, said Adrian Lapas, a Goldsboro, N.C., attorney. He is currently filing an adversary proceeding for a client whose creditor claims she has missed her mortgage payments, even though she has the receipt from every money order she sent.

Gardner's listserv also enables boot camp alumni to conduct undercover operations.

"It allows us to keep tabs on particular servicers and see how many times one particular bad act shows up," he said. "It helps prove in court that it didn't just happen one time — that it can't be the 'oops' factor. We can show that it's something that's been done repeatedly for the past two or three years, and we have the cases to prove it. That support network is very important."

No doubt there — the nation's housing crisis is worsening. A mortgage research company recently reported that foreclosure filings in the United States climbed 57 percent in January as compared to the same time last year. In North Carolina, the rate increased 14.11 percent over the same period. South Carolina's rate was smaller but still significant, with a 7.62 percent increase in foreclosure activity.

That means that lawyers will likely encounter more questionable fees, said Gardner.

Predictions like that make boot campers thankful that they paid the \$7,775 fee to attend. It's a hefty amount, but Blades has known lawyers who have recouped that money from judgments or settlements within a month of graduating.

But even with those wins, the bankruptcy landscape looks pretty bleak. Gardner finds improper fees and the misapplication of payments in 90 percent

the transactions in reverse order or using codes instead of words or descriptive phrases. It's a bit of an overpowering thing to try to look at it and see what's what."

As the mortgage meltdown deepened in 2006, Gardner began receiving requests from law firms to speak about litigating cases with mortgage servicers.

But as he conducted seminars in law offices across the country, he found it difficult to cover the material when large amounts of time were spent simply coordinating logistical details, such as where to eat meals.

He needed intensity. He needed immersion. In short, he needed boot camp.

## FINDING THE BARRACKS

Affirmative: There would be a boot camp. Gardner just needed to find a base of operations.

That's when his wife, Victoria, suggested using the family's 160-acre farm in the mountains of western North Carolina. The property includes the main house, which has three guest bedrooms; a six-bedroom guest house; and a two-bedroom cabin. That means that during any one boot camp, Gardner can hold up to 10 lawyers "captive."

Basic training takes place in 10-hour sessions over four days. The time is devoted to instructing lawyers how to apply the principles of Gardner's self-designed "Bankruptcy Litigation Model." Through the dissection of various documents, articles and pleadings, the attorneys are trained that bankruptcy is a situation not to be approached passively.

"Before you list all your client's debts and work out a repayment plan, really look at all those debts," Gardner advises them. "Ask yourself, 'Did this creditor violate the truth-in-lending law when they originated this debt? Is there anything unfair or unconscionable about the way this mortgage loan was sold? Was it a bait-and-switch loan, where someone thought they had one loan and then when they closed the loan ... it turned out to be something else?'"

Boot camp is intense, even grueling, said John R. Cantrell Jr., an attorney from Goose Creek, S.C. But he said that it changed the way he practices law.

"There are two types of bankruptcy lawyers: the filers and the litigators," said Cantrell. "For 16 years, I was a filer, because that's all I knew. But after boot camp, I realized that I really could fight

## IF YOU'RE GOING

**What:** Max Gardner's Bankruptcy Boot Camp

**Where:** Lizmere Farm, 60 miles west of Charlotte

**When:** The next scheduled boot camp is April 4. At least seven more camps are planned for 2008.

**Cost:** \$7,775 per person. Some discounts are available. See Web site for details.

**Web site:** [www.maxbankruptcybootcamp.com](http://www.maxbankruptcybootcamp.com)

of the 225 cases that his firm handles each year.

"Sadly, I see that things are exactly as they are conveyed in boot camp," said Lapas, who attended in May 2007.

When asked how many of his bankruptcy cases involved unlawful fees, he said, "This week? Most of them."

## MORE REASONS TO FIGHT

Another concern is that there is no incentive for mortgage servicers to perform better, added Gardner. Historically, loans were originated and serviced by the same lender. Now, mortgage loans are sold at the whim of the lender.

"Whoever buys that loan on Wall Street picks the servicer," said Gardner. "[Consumers] have nothing to do with it, and whether the servicer does a good job or a bad job, [they] don't have the right to switch to another one."

Refinancing might not even help the homeowner, he added. The loan could end up with the same servicer again.

And because many people cannot afford to buy homes in the plummeting mortgage market, very few lenders are originating loans. The loss of origination income puts more pressure on the servicing end of the mortgage industry to generate profit.

Also, servicers are generally allowed to keep the earnings from late fees and various other charges. That means that those undetected charges — which can be as small as \$9 per month — can become big sources of income.

"The primary thing for a servicer, quite frankly, is to put a loan into default because they can triple or quadruple their servicing income by doing that," said Gardner.

It's also not uncommon for Gardner to complete a Chapter 13 bankruptcy case, in which the client has completed payments and is discharged, only to receive a statement from the servicer three months later asking for as much as \$15,000 for charges incurred in bankruptcy.

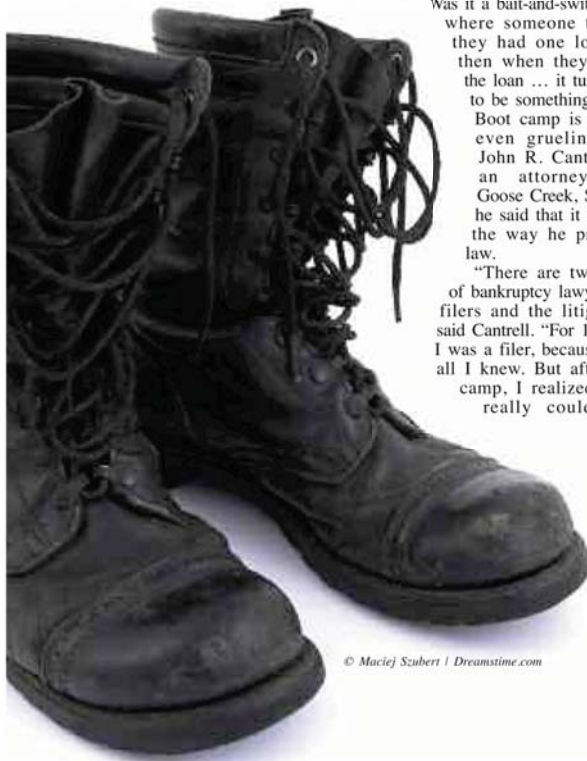
"Of course, nobody knew anything about the fees during the case. They never applied to the court to have them approved," said Gardner. "That's the problem here. There's no transparency in the system. I don't know how you can say there's any kind of due process involved in a system that secretly charges money and then waits until somebody is out of the protection of the bankruptcy court to send them a bill."

"What I try to tell the attorneys at boot camps is how to identify, deal with and eliminate these fees during the course of a bankruptcy. When the bankruptcy court is over and the judge finds that the loan is current as of the conclusion of that case, then if they try to charge those fees, we're going to have them back in bankruptcy court in contempt of court orders and debt collection violations and unfair debt practices and everything else we can think of."

It's the only way to rectify these situations, said Lapas.

"You can call it scamming or you can call it the cost of doing business, but the truth is that there are real people out there," said Blades. "Real people who are losing their homes."

— Questions or comments may be directed to [diana.smith@nc.lawyersweekly.com](mailto:diana.smith@nc.lawyersweekly.com).



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