Survey of Real Estate Issues in Consumer Bankruptcy Cases

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In many instances the filing of a bankruptcy petition is used to halt a foreclosure proceeding or otherwise deal with a default related to real property. This paper will survey some current real estate issues in consumer bankruptcy cases.

I. Homeowner association obligations

Homeowner association fees are intended to pay for, among other things, maintenance and repairs to community facilities within a covenanted community. These fees can be significant. How those fees and assessments are treated in bankruptcy depends in part upon whether the fees are incurred prepetition or postpetition.[1]

A debtor may pay prepetition homeowner association fees through a chapter 13 plan. Treatment of postpetition claims, however, is not that simple. Although postpetition claims may be permitted in a Chapter 13 case pursuant to 11 U.S.C. §1305, consideration must be given to how §1305 interacts with the automatic stay following plan confirmation and the vesting effect of §1327(b) on property of the bankruptcy estate.[2] The relevant question for a homeowners' association is whether relief from the automatic stay is required to pursue a debtor for postpetition unpaid obligations. Whether property remains part of the bankruptcy estate is integral to this analysis.

A. Four views as to how §1327(b) affects property of the estate at confirmation

There are four basic views of the effect of §1327(b) on property of the estate at confirmation.

1. Confirmation order controls

Under the first approach, all existing property and property obtained during the case remains part of the bankruptcy estate. The confirmation order controls over the vesting effect of §1327(b). In this circumstance, a creditor must obtain relief from the automatic stay in order to pursue a debtor for postpetition unpaid obligations.[3] For example, in *In re Clark,*[4] the Internal Revenue Service exerted a postpetition levy against debtor-husband's wages in an effort to collect postpetition taxes due. The Court determined that debtor's wages remained property of

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[1] It is always important to review the homeowners' association agreement. The agreements may provide for claims to be made against the property only, and may not provide for personal liability against the individual.
[2] *See generally* Keith M. Lundin & William H. Brown, Chapter 13 Bankruptcy, 4th Edition, §245.1 at ¶1, et seq. Sec. Rev. June 8, 2004, www.Ch13online.com.
[3] *Id.* at ¶5.
[4] *Clark v. United States (In re Clark)*, 207 B.R. 559 (Bankr. S.D. Ohio 1997).

the bankruptcy estate under the clear language included in the plan and confirmation order and, accordingly, the postpetition levy was deemed a violation of the automatic stay. In so holding, the Court focused on the plain language of §1327(b), which states, "*Except as otherwise provided in the plan or the order confirming the plan*, the confirmation of a plan vests all of the property of the estate in the debtor" (emphasis added).[5]

2. Court interprets §1327(b) to leave the bankruptcy estate intact where the plan and confirmation order are silent

A second view on the vesting effect of §1327(b) is that the Court may interpret §1327(b) to leave the estate preserved and intact where both the plan and confirmation order are silent. In this instance, the postpetition claimholder must obtain relief from the automatic stay prior to attempting to collect its claim.

3. Court interprets §1327(b) to vest property of the estate in the debtor where the plan and confirmation order are silent

A third view is that the Court may interpret §1327(b) to vest property of the estate in the debtor where both the plan and confirmation order are silent. The postpetition claimholder would not need to obtain relief from the automatic stay prior to attempting to collect its claim from any existing or after-acquired property of the debtor.[6]

4. §1327(b) is interpreted to terminate the estate except with respect to property necessary to debtor's performance under the plan

The fourth view of the vesting effect of §1327(b) is where the court interprets §1327 to terminate the bankruptcy estate except as to property necessary to the debtor's performance under the plan. In these instances, there is no clear answer for the postpetition claimholder. The

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[5] *Id.* at 2. See 11 U.S.C. §1327, Effect of Confirmation, which provides:

(a) The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan.

[6] "If the vesting effect in §1327(b) permanently terminates the Chapter 13 estate, then postpetition claim holders are in the strongest position to risk proceeding against property of the debtor without requesting relief from the stay." Keith M. Lundin & William H. Brown, Chapter 13 Bankruptcy, 4th Edition, §245.1 at ¶7. Sec. Rev. June 8, 2004, www.Ch13online.com. *See In re Henline*, 242 B.R. 459 (Bankr. D. Minn. 1999)(plan did not provide for payment of postpetition claims; confirmation vested property of the estate in the debtor).

most prudent course of action is to seek an order determining that no stay is in effect as to the specific property against which collection is to be sought.

The views above of §1327(b) must be reconciled with §1305.[7] In the case of homeowner association obligations, these claims can be viewed to be postpetition claims pursuant to §1305(a)(2) or can be seen as postpetition defaults on a prepetition claim.[8] In *In re Reynard,*[9] debtors were members of a homeowners' association. Debtors filed a chapter 13 petition and the homeowners' association brought an adversary proceeding seeking relief from the stay to permit it to engage in postconfirmation collection against debtors for postpetition assessments, late charges, interest, attorneys' fees and collection costs. The question presented to the Court was whether the homeowners' association was prohibited by the automatic stay from postconfirmation collection of postpetition assessments and, if not, whether relief from the stay was necessary to garnish debtors' postpetition wages to satisfy a state court judgment for those assessments.[10] Analyzing 11 U.S.C. §362, the Court noted that the automatic stay "does not prevent the commencement of a lawsuit to collect a post-petition debt" and "homeowner association fees assessed after the filing of a voluntary petition in bankruptcy are post-petition debts, not prepetition debts."[11] In so finding, the Court determined that the association did not need relief from the stay to either demand payment of the postpetition obligations or to file suit to collect the amounts due. Executing on debtors' assets, however, is limited:

> a post-petition creditor who has the right to initiate a suit against a debtor and obtain a judgment for a post-petition debt without violating the automatic stay may not have recourse to execute on all assets that would have been, but for the

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[7] 11 U.S.C. §1305 provides:

(a) A proof of claim may be filed by any entity that holds a claim against the debtor –
  (1) for taxes that become payable to a governmental unit while the case is pending; or
  (2) that is a consumer debt, that arises after the date of the order for relief under this chapter, and that is for property or services necessary for the debtor's performance under the plan.

(b) Except as provided in subsection (c) of this section, a claim filed under subsection (a) of this section shall be allowed or disallowed under section 502of this title, but shall be determined as of the date such claim arises, and shall be allowed under section 502(a), 502(b), or 502(c) of this title, or disallowed under section 502(d) or 502(e) of this title, the same as if such claim had arisen before the date of the filing of the petition.

(c) A claim filed under subsection (a)(2) of this section shall be disallowed if the holder of such claim knew or should have known that prior approval by the trustee of the debtor's incurring the obligation was practicable and was not obtained.

[8] Keith M. Lundin & William H. Brown, Chapter 13 Bankruptcy, 4th Edition, §245.1 at ¶24. Sec. Rev. June 8, 2004, www.Ch13online.com.

[9] *Montclair Property Owners Ass'n, Inc. v. Reynard (In re Reynard)*, 250 B.R. 241 (Bankr. E.D. Va. 2000).

[10] *Id.* at 233-234.

[11] *Id.* at 234.

> filing of a chapter 13 petition, property of the debtor. Recourse is limited to property that is not property of the estate.[12]

The Court considered the relationship of §1306(a) and §1327 to the postconfirmation period, noting that §1306(a) "extends until the case is closed, dismissed or converted."[13] Citing *In re Leavell*,[14]

> to determine that §1327(b) to mean that there is no property of the estate after confirmation would render §1306(a) superfluous. This is necessarily so because Congress intended to protect earnings and property that are acquired by the debtor post-petition and necessary to implement the plan. Without §1306(a), any property that the debtor acquires postconfirmation can be seized without regards to the Chapter 13 process. Congress did not say in §1306(a) that earnings and properties acquired post-petition are property of the estate until the Chapter 13 plan is confirmed. Rather, it said that such property and earnings are property of the estate until the case is closed, dismissed, or converted.[15]

To give meaning and effect to §1306(a), the Court determined that "§1327(b) cannot be read so expansively as to terminate the then-present chapter 13 estate assets without depriving §1306(a) of all meaning"[16]and

> [t]he only manner in which the two provisions can be read in harmony is if the assets of the chapter 13 estate as of the date of the confirmation of the chapter 13 plan vest in the debtor, the estate continues and assets set out in §1306(a) acquired after confirmation become property of the chapter 13 estate when acquired. The after-acquired assets cease to be property of the estate at the same time and in the same manner as in a chapter 7 or chapter 11 case or as provided in §1307(a). Property ceases to be property of the estate if it is abandoned (§554), exempted (§522) or sold or used (§363).[17]

Following the cases finding that all post confirmation earnings are property of the chapter 13 estate and are protected by the automatic stay,[18] the *Reynard* Court determined that relief from the stay is necessary to pursue collection. In light of the fact that the homeowners' association had not yet obtained a judgment pursuant to state law upon which it could execute,

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[12]*Id.* at 245. See also discussion at Section A. Four views as to how §1327(b) affects property of the estate at confirmation, *supra*.
[13]*Id.* at 246.
[14]*In re Leavell,* 190 B.R. 536 (Bankr.E.D. Va. 1995).
[15]*In re Reynard*, 250 B.R. at 246 (*citing In re Leavell,* 190 B.R. 536 (Bankr.E.D. Va. 1995).)
[16]*In re Reynard*, 250 B.R. at 246.
[17]*In re Reynard*, 250 B.R. at 246-247 (citation omitted).
[18]*Id.* at 247. *See, e.g., City of Chicago v. Fisher (In re Fisher)*, 203 B.R. 958, 964 (Bankr. N.D. Ill. 1997); *In re Rangel*, 233 B.R. 191, 194 (Bankr. D. Mass 1999); *Holden v. United States (In re Holden),* 236 B.R. 156, 161 (Bankr. D. Vt. 1999).

the Court determined that the association's motion for relief from the stay to permit execution on estate property was premature.[19]

B. Discharging post-petition association dues

Debtors who file bankruptcy with the intention of surrendering their homes are often surprised when met with the continuing collection efforts of their homeowner associations. This is due in part to a delay in the foreclosure process and the backlog of foreclosure proceedings across the country and may frustrate a debtor's attempt to obtain a fresh start.

In the Chapter 7 context,

> [w]ith the real estate collapse, lenders, who otherwise have the right to do so, are choosing not to foreclose on their collateral leaving homeowners in limbo. In the case of a chapter 7 debtor who has surrendered her home in bankruptcy and been relieved of any personal liability on the mortgage, she cannot truly be given a fresh start because HOA fees are still accumulating until a lender chooses to foreclose.[20]

11 U.S.C. §523(a)(16)[21] places a limit on the dischargeability of post-petition homeowner association assessments:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt-
> …
> (16) for a fee or assessment that becomes due and payable after the order for relief to a membership association with respect to the debtor's interest in a unit that has condominium ownership, in a share of a cooperative corporation, or in a lot in a homeowners association, for as long as the debtor or the trustee has a legal, equitable, or possessory ownership interest in such unit, such corporation, or such lot, but nothing in this paragraph shall except from discharge the debt of a debtor for a membership association fee or assessment for a period arising before entry of the order for relief in a pending or subsequent bankruptcy case[.]

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[19] *In re Reynard*, 250 B.R. at 250.

[20] *Pigg v. BAC Home Loans Servicing, LP (In re Pigg),* 453 B.R. 726, 733 (Bankr. M.D.Tenn. 2011); *see* Mark C. Leffler, "Discharging Post-Petition Association Dues" (July 15, 2012) www.considerchapter13.org.

[21] Section 523(a)(16) was added to the Code in 1994 in an attempt to resolve a split in caselaw regarding the dischargeability of postpetition association dues. Section 523 was amended in 2005 to add homeowners' association dues. *See* Mark C. Leffler, "Discharging Post-Petition Association Dues" (July 15, 2012) www.considerchapter13.org.

Section 1328(a)[22]is not addressed in §523(a)(16), leaving open the question of the effect of a discharge under §1328(a). In *In re Colon,*[23] a homeowners association moved for relief from the automatic stay, or, in the alternative, for a determination that the stay did not apply to the associations' postpetition assessments against debtors.[24] The association argued that postpetition assessments could not be "provided for" under §1328(a) in a plan, as the assessments were not in existence at the time of filing. Alternatively, the association argued that the assessments were covenants running with the land and therefore not subject to the Bankruptcy Code.[25] Debtors argued that the assessments were "debt" as defined in 11 U.S.C. §101(12) and a "claim" under 11 U.S.C. §101(5) and, accordingly, could be provided for in a plan and discharged. In *Colon*, the debtors vacated the property prior to the bankruptcy filing and surrendered the property to the secured creditor. The Court granted relief from the stay to the creditor to foreclose.[26] Finding that §523(a)(16) does not apply to §1328(a) discharges, the Court declined to overrule *In re Turner,*[27] which held that homeowner postpetition assessments were "merely the period maturing of [the HOA's] prepetition claim and debtor's prepetition obligation."[28] The Court was not compelled by the associations' argument that the amendments to §523(a)(16) overruled *In re Turner's* holding that postpetition assessments are "claims" under the Code subject to discharge. In so finding, the Court concluded that "claims" can be provided for in a chapter 13 plan, as debtors did here in including postpetition HOA dues in their plan.

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[22]11 U.S.C. §1328(a) Discharge, provides:

(a) Subject to subsection (d), as soon as practicable after completion by the debtor of all payments under the plan, and in the case of a debtor who is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, after such debtor certifies that all amounts payable under such order or such statute that are due on or before the date of the certification (including amounts due before the petition was filed, but only to the extent provided for by the plan) have been paid, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt –

(1) provided for under section 1322(b)(5);

(2) of the kind specified in section 507(a)(8)(C) or in paragraph (1)(B), (1)(C), (2), (3), (4), (5), (8), or (9) of section 523(a).

[23]*In re Colon*, 465 B.R. 657 (Bankr. D. Utah 2011)(distinguishing *Foster v. Double R Ranch Ass'n (In re Foster),* 435 B.R. 650 (B.A.P. 9th Cir. July 9, 2010).

[24]*Id.* at 657-658.

[25]This alternative argument was made in reliance on the Ninth Circuit Bankruptcy Appellate Panel's decision in *Foster v. Double R Ranch Ass'n (In re Foster),* 435 B.R. 650 (9th Cir. B.A.P. 2010), which applied Washington state law. The Court in *Foster* determined that the covenant to pay the association dues runs with the land and may not be discharged in bankruptcy.

[26]*In re Colon*, 465 B.R. 657, 661.

[27]*In re Turner*, 101 B.R. 751, 754 (Bankr. D. Utah 1989).

[28]*Id.*

Distinguishing *Colon* factually from *In re Foster,*[29] the Court noted the following facts: debtors in *Colon* had vacated the property more than one year prior to the filing of the petition; debtors surrendered all rights to the property to the secured creditor, and the Court granted relief from the stay to the secured creditor.[30] But for the delay of the secured lender in foreclosing, the association would not be prejudiced. In determining that the postpetition assessments were dischargeable, the Court was persuaded by the fact that the debtors were not enjoying the benefits of the association, and to find them liable in such circumstances would be inequitable.[31] In *Foster*, the debtors sought to discharge pre- and postpetition assessments while remaining in the home, and the BAP stated:

> In essence, the 'running' covenant rule in this case boils down to one of 'you stay, you pay' since debtor's confirmed plan indicates he will stay in his home by curing his prepetition default on his mortgage and maintain on-going payments through his confirmed chapter 13 plan.[32]

The *Colon* court did not address whether the covenant runs with the land under Utah state law, as it concluded that the debtors retained "no consequential interest in the Property that measures up to rights to exercise ownership interests and control."[33]

In *In re Schechter,*[34] the Bankruptcy Court for the Eastern District of Virginia considered the dischargeability of postpetition condominium fees under 11 U.S.C. §1328(a). In *Schechter*, the condominium association moved for relief from the stay to recover unpaid postpetition assessments and disrepair to the condominium unit. The Court focused its inquiry on whether the dues assessed after the bankruptcy filing were pre-or postpetition debts. Referencing federal law to determine when a claim arises for bankruptcy purposes, the Court determined, consistent with the Fourth Circuit Court of Appeals in *In re Rosenfeld*[35] that "post-petition assessments are incidents running with the land, and thus are post-petition debts."[36] The *Schechter* Court further relied on *Rosenfeld's* conclusion that:

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[29] *See* footnote 24.
[30] *In re Colon*, 465 B.R. at 662.
[31] *Id.*
[32] *In re Foster*, 435 B.R. at 661.
[33] *In re Colon*, 465 B.R. at 662.
[34] *In re Schechter*, 2012 WL 3555414 (Bankr. E.D. Va. 2012).
[35] *Rosenfeld v. River Place East Housing Corp.* (*In re Rosenfeld)*, 23 F.3d 833, 836-37 (4th Cir. 1994) *cert. denied*, 513 U.S. 874 (1994).
[36] *Id.* at 836-837.

> [t]he debtor's obligation to pay assessments continues as long as he remains record owner, for "even if the debtor has not exercised the benefits of ownership, as title holder he has the legal right to do so." Accordingly, "[i]n order to terminate his responsibility for assessments, [the debtor] must transfer title to the property, if necessary by a deed in lieu of foreclosure."[37]

The parties in *Schechter* had previously stipulated that the Debtor had not transferred title and remained the record owner. Accordingly, the Court found that the postpetition assessments constituted postpetition debt to which the provisions of §1328(a) do not apply. Applying the analysis in *Reynard, supra,* the Virginia Court determined that the motion for relief from stay by the association was premature, as a final judgment had not yet been obtained in state court. Therefore, in order to execute against property of the estate, relief from the stay would be required. The court held that the association "does not require relief from the stay imposed by 11 U.S.C. §362 to collect post-petition condominium association assessments from property that is not property of the estate".[38] However, "collection activities may only be directed to property of the debtors, not property of the estate, and all post-confirmation earnings [of the Debtor] are property of the estate."[39]

II. Short sales

Increased numbers of homeowners facing foreclosure of a distressed property are turning to short sales. In many instances, the homeowners have applied for and have been denied a permanent loan modification and the properties have negative equity. The decision to sell the property via a short sale is often seen as the first step towards financial recovery.

There are benefits to short sales, but there are drawbacks as well. A short sale presents one manner in which to hasten the homeowner's desired departure from the home. A short sale may provide for a more discreet and smooth transition from a distressed property where the homeowners find themselves unable to meet the ongoing financial obligations associated with home ownership. Foreclosure may be seen as a more public, slow-moving process, whereas a short sale can generally be accomplished quickly with the bank's consent.

Outside of bankruptcy, homeowners may contract to sell the property and, with bank approval and consent, a closing may occur in due course. In the bankruptcy context, a short sale

[37] *In re Schechter*, 2012 WL 3555414, at *6 (*citing In re Rosenfeld*, 23 F.3d 833, 838).
[38] *In re Schechter*, 2012 WL 3555414, at *6 (*citing In re Reynard*, 250 B.R. at 250).
[39] *Id.*

can similarly be accomplished; however, the best practice is to ensure that a motion is brought on notice and an order entered approving the sale with the mortgagee's consent.

As the bank loses money in the transaction, the loss is routinely reported to the Internal Revenue Service (IRS) as income on Form 1099-A or 1099-C. The loss (cancellation of debt forgiveness or "COD") is reported as income on the homeowner's tax return.[40] This reporting only applies where there has been a reduction in the principal amount owed on the loan. In some instances, this COD income may not be taxable. It is important to consult with a certified public accountant regarding COD income. Tax returns reporting this type of income are likely to draw increased scrutiny where a homeowner is attempting to avoid taxation on the COD income.

As a result of the ongoing mortgage crisis affecting residential homeowners, the federal government enacted the Mortgage Forgiveness Debt Relief Act of 2007 ("MFDRA").[41] This act "generally allows taxpayers to exclude income from the discharge of debt on their principal residence. Debt reduced through mortgage restructuring, as well as mortgage debt forgiven in connection with a foreclosure, qualifies for the relief."[42] The MFDRA, as originally enacted, applied to debt forgiven through 2009. Thereafter, legislation extended the forgiveness period through December 31, 2012. It is important to note that the MFDRA permits exclusion of up to two million dollars (one million dollars if married but filing a separate return) of COD income for *debt incurred to buy, build, renovate, or refinance debt* for those reasons. Refinanced debt used to consolidate other debt, debt forgiven on second homes, rental property, business property, credit cards or car loans does not qualify for the tax-relief provision.

Debt eliminated through bankruptcy is not taxable.[43] If, however, an individual does not file a petition under Title 11, debt may be cancelled to the extent that the individual was insolvent immediately before the cancellation.[44] Form 982, "Reduction of Tax Attributes Due to Discharge of Indebtedness," must be completed with the amount of debt forgiven and must be attached to the submitted tax return. Because each individual's situation is unique and the nature of the debt may not always be clear, it is important to consult with a tax professional.

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[40] 26 U.S.C. §61(a)(16).
[41] H.R. 3648 Mortgage Forgiveness Debt Relief Act (Dec. 20, 2007) (110th Congress).
[42] "The Mortgage Forgiveness Debt Relief Act and Debt Cancellation" (http://www.irs.gov/Individuals/The-Mortgage-Forgiveness-Debt-Relief-Act-and-Debt-Cancellation). See also IR-2008-17, Feb. 12, 2008 and Publication 4681, "Canceled Debts, Foreclosures, Repossessions, and Abandonments".
[43] IRS Publication 4681, "Canceled Debts, Foreclosures, Repossessions, and Abandonments" at page 4.
[44] An Insolvency Worksheet is included in IRS Publication 4681.

As a part of the compromise regarding the fiscal cliff, the MFDRA, which was set to expire on December 31, 2012, was extended through December 31, 2013.[45]

III. Loan modifications

The *New York Times* reported on August 19, 2012 the following statistics related to the 4.3 million applications submitted for government-sponsored mortgage modifications: 0.8 million resulted in permanent, successful modifications; 0.2 million applications resulting in modification plans were cancelled; 2.1 million did not receive government modifications; and approximately 1.1 million fell into foreclosure, bankruptcy, or a short sale.[46] New permanent modifications were found to have quickly dropped off in mid-2010, as home prices continued to fall and foreclosure rates remained high.[47]

Questions remain regarding the success rates of the varying forms of mortgage relief available to consumers, including government sponsored programs, informal or direct loan modification programs, and through the approximately $26 billion mortgage settlement with the nation's largest mortgage servicers.[48] Many borrowers have expressed frustration with the loan modification process as well as the ability to keep up with their home mortgage payments.[49] According to the Consumer Financial Protection Bureau (CFPB), of the more than 79,200 consumer complaints received between July 21, 2011 and September 30, 2012, 36,300 related to mortgages.[50] The CFPB report summarized the mortgage complaints as follows:

> The most common type of mortgage complaint is about problems consumers have when they are unable to pay, such as issues related to loan modifications, collection or foreclosure. For example, consumer confusion persists around the process and requirements for obtaining loan modifications and refinancing, especially regarding document submission timeframes, payment trial periods, allocation of

[45] http://www.gpo.gov/fdsys/pkg/BILLS-112hr8enr/pdf/BILLS-112hr8enr.pdf

[46] http://www.nytimes.com/interactive/2012/08/20/business/economy/what-happened-to-mortgage-modifications.html (August 19, 2012)

[47] *Id.*

[48] http://nationalmortgagesettlement.com/;In February 2012, 49 state attorneys general and the federal government reached a joint state-federal settlement with the country's five largest servicers: Ally/GMAC, Bank of America, Citi, JP Morgan Chase, and Wells Fargo. The key provision of the settlement included (1) immediate aid to homeowners needing loan modifications, including first and second lien principal reduction (approx. $17 billion); immediate aid to borrowers who are current, but whose mortgages exceed their home's value (up to $3 billion); and payments to borrowers who lost their homes to foreclosure (approx. $1.5 billion).

[49] http://www.bankrate.com/financing/mortgages/frustrated-borrowers-speak-up/ (September 11, 2012); "Consumer Response: A Snapshot of Complaints Received", http://www.consumerfinance.gov/reports/consumer-response-a-snapshot-of-complaints-received/ (October 9, 2012).

[50] "Consumer Response: A Snapshot of Complaints Received", http://www.consumerfinance.gov/reports/consumer-response-a-snapshot-of-complaints-received/ (October 9, 2012) at 4.

payments, treatment of income in eligibility calculations, and credit bureau reporting during the evaluation period. The shelf life of documents provided as part of the loan modification process is of particular concern to consumers. Though consumers must provide documents within short time periods and income documentation generally remains valid for up to 60 days, lengthy evaluation periods can result in consumers having to resubmit documentation – sometimes more than once. This seems to contribute to consumer fatigue and frustration with these processes.

Other common types of mortgage complaints are those about making payments, such as issues related to loan servicing, payments, or escrow accounts. For example, consumers express confusion about whether making timely trial period payments will guarantee placement into a permanent modification. Issues related to applying for the loan, such as the application, the originator, or the mortgage broker, are also among the most common type of mortgage complaints.

Consumers filing complaints about problems when they are unable to pay generally appear to be driven by a desire to seek agreement with their companies on foreclosure alternatives.

Approximately 31,300 (86 percent) of mortgage complaints have been sent by Consumer Response to companies for review and response. The remaining mortgage complaints have been referred to other regulatory agencies (9 percent), found to be incomplete (3 percent), or are pending with the consumer or the CFPB (3 percent). Companies have already responded to approximately 29,000 complaints or 93 percent of the complaints sent to them for response. The median amount of monetary relief reported was approximately $415 for the approximately 1,200 mortgage complaints where companies reported relief. Consumers have disputed approximately 6,300 company responses (23 percent) to mortgage complaints.[51]

More than one-half of delinquent borrowers who received mortgage modifications were in default again after eighteen months.[52] Despite this statistic, however, TransUnion reports that borrowers who received mortgage modifications were more likely to continue paying other debt, including credit cards and automobile loans obtained following a modification default.[53]

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[51] *Id.* at 5-6.

[52] http://newsroom.transunion.com/press-releases/transunion-consumers-with-mortgage-mods-outperfor-0901679 (June 21, 2012).

[53] *Id.*; *see also* Ann Carns, "Many Borrowers Fall Behind Again After Mortgage Modifications", http://bucks.blogs.nytimes.com/2012/06/21/many-borrowers-fall-behind-again-after-mortgage-modifications/ (June 21, 2012)("Borrowers who are willing to make the effort to get a loan modification are trying to get their finances together and move forward, rather than writing off the situation … an indication the consumer is trying to right their ship").

Modification of mortgages secured or partially secured by a debtor's principal residence is not permitted under the Bankruptcy Code.[54] If, however, there is a wholly unsecured residential mortgage, it may be avoided in a Chapter 13 bankruptcy case pursuant to 11 U.S.C. §§506 and 1322(b)(2). This inquiry involves an analysis as to whether the secured creditor actually holds a secured claim under §506(a).[55] If the claim is determined to be secured or partially secured by the debtor's principal residence, the secured lender's claim is protected from avoidance under §1322(b)(2). If, however, no equity exists to support the secured status of the claim, it can be "stripped" and reclassified to unsecured status.[56]

Despite the antimodification provision of §1322(b), there is a trend toward modification of residential mortgages by consent during bankruptcy cases. The most common modifications involve an agreed change to the term, amortization, or interest rate of the mortgage loan. This may involve adding accrued interest and charges in the modified loan. In these instances, a motion to approve the modification disclosing the terms of the proposed modified loan should be made and an order entered. This ensures that there has been active involvement by debtor counsel, and it provides greater assurance that the debtor has reviewed (and understood) the terms of the modification with a third party (other than the servicer).[57]

IV. Standing

The issue of standing most often arises in the bankruptcy context when a secured lender files a motion seeking relief from the automatic stay under 11 U.S.C. §362 to foreclose. Critical

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[54] 11 U.S.C. §1322(b)(2); See *Nobelman v. American Savings Bank*, 508 U.S. 324, 113 S.Ct. 2106, 124 L.Ed.2d 228 (1993)(debtor cannot strip a partially secured mortgage on debtor's principal residence).

[55] The Supreme Court in *Nobelman v. American Savings Bank*, 508 U.S. 324, 113 S.Ct. 2106, 124 L.Ed.2d 228 (1993) did not address the proposed stripping of a wholly unsecured lien.

[56] *Lane v. Western Interstate Bancorp (In re Lane),* 280 F.3d 663 (6th Cir. 2002); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Pond v. Farm Specialist Realty (In re Pond)*, 252 F.3d 122(2d Cir. 2001); *Tanner v. FirstPlus Fin., Inc. (In re Tanner),* 217 F.3d 1357 (11th Cir. 2000); *Bartee v. Tara Colony Homeowners Ass'n (In re Bartee)*, 212 F.3d 277 (5th Cir. 2000); *McDonald v. Master Fin., Inc. (In re McDonald)*, 205 F.3d 606 (3d Cir. 2000); *Domestic Bank v. Mann (In re Mann)*, 249 B.R. 831 (1st Cir. BAP 2000); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 26 (9th Cir. BAP 1997).

[57] Federal Rule of Bankruptcy Procedure 7001(2) provides that an adversary proceeding is required to determine the validity, priority, or extent of the lien. Fed. R. Bankr. P. 7001(2) Courts are split, however, as to whether an adversary proceeding is required where debtor seeks to strip a lien. This split turns on valuation versus validity. For example, Judge Robert E. Littlefield, in *In re Robert*, 313 B.R. 545 (Bankr. N.D.N.Y. 2004), analyzed the relationship between the Bankruptcy Code and the Bankruptcy Rules in determining whether a motion or adversary proceeding is required where debtor seeks to strip off part of the secured claim. The Court considered whether the strip off constituted a §506(a) valuation process, which may be addressed by motion under Rule 3012 or whether the strip off was a "proceeding to determine the validity, priority or extent of a lien" requiring an adversary proceeding under Fed. R. Bankr. P. 7001(2) . *Id.* at 548. These contested matters generally require the retention of expert witnesses to testify as to the valuation of the property. The antimodification provision of 11 U.S.C. §1322(b)(2) does not extend to non-residential real property.

to the review of any 362 motion is a review of the documentation indicating the movant's interest in the subject property. A true copy of the recorded note and mortgage should be attached to the motion as an exhibit. Many times the loan has been sold, transferred, or is being serviced by an entity other than the original lender. Any assignments or transfer documents must be attached to the motion as an exhibit as well, so one may ensure that the chain of title is complete and uninterrupted, i.e. the original lender is linked to the movant. Requirements for attachments to motions for relief from the stay are many times governed by not only the Federal Rules of Bankruptcy Procedure, but also local bankruptcy rules.[58]

Many of the issues scrutinized when reviewing a motion for relief from the stay are the same issues that arise in foreclosure defense. Among those issues are "procedural" defects, including affidavits being submitted without personal knowledge (commonly referred to as "robosigning"), lost note affidavits for notes that are not lost, fees for either unnecessary work or work never done ("junk fees"), complaints that fail to include the note, and counterfeit and altered documents and notary fraud.[59] According to Adam Levitin, Associate Professor of Law at the Georgetown University Law Center, Before the Senate Committee on Banking, Housing, and Urban Affairs on November 16, 2010:

> The extent and distribution of these irregularities is not yet known. No one has compiled a complete typology of procedural defects in foreclosures; there are, to use Donald Rumsfeld's phrase, certainly "known unknowns" and well as "unknown unknowns."[60]

Standing to foreclose may also be impacted by chain of title defects, most often occurring during the mortgage securitization process. Professor Levitin notes:

> Recently, arguments have been raised in foreclosure litigation about whether the notes and mortgages were in fact properly transferred to the securitization trusts. This is a critical issue because the trust has standing to foreclose if, and only if it is the mortgagee. If the notes and mortgages were not transferred to the trust, then

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[58]For an example, *see* Appendix A attached hereto. Copy of Local Bankruptcy Rule 4001-1, Relief From the Automatic Stay, and accompanying Certification of Payment History on the Note and Mortgage Dated ____ and Related Information and Amended General Order M-346 of the United States Bankruptcy Court for the Southern District of New York with accompanying Relief from Stay – Real Estate and Cooperative Apartments Worksheet.

[59]Written Testimony of Adam J. Levitin, Associate Professor of Law, Georgetown University Law Center, Before the Senate Committee on Banking, Housing, and Urban Affairs, "Problems in Mortgage Servicing from Modification to Foreclosure" (November 16, 2010), available at http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=1c7f57c0-a25e-4c04-80cc-9ad8e65e0bea . ("Levitin Testimony"); *see also* Katherine M. Porter, Mortgage Misbehavior, 87 TEX. L. REV. 121, 162 (2008).

[60]Levitin Testimony, *supra*, at 13.

> the trust lacks standing to foreclose...The key questions for evaluating chain of title are what method of transferring notes and mortgages is actually supposed to be used in securitization and whether that method is legally sufficient both as a generic matter and as applied. There is a surprising degree of legal uncertainty over these issues, even among banks' attorneys; different arguments appear indifferent litigation. The following section outlines the potential methods of transfer and some of the issues that arise regarding specific methods. It is critical to emphasize that the law is not settled on most of the issues regarding securitization transfers; instead, these issues are just starting to be litigated.[61]

As a result of the mortgage crisis, ever increasing scrutiny is being used in reviewing pleading involving mortgages and their payment histories. It is for this reason that more Courts are moving toward the use of required certifications to accompany motions for relief addressing not only the payment history, but also the history of ownership of the note and mortgage.[62] In addition, some Courts have or are considering the implementation of Loss Mitigation programs.[63] John Rao, of the National Consumer Law Center, has found that the "results of bankruptcy court [loss mitigation programs] have been promising thus far; approximately thirty-five percent resulting in successful, approved loan modifications in Rhode Island and New York for cases in which loss-mitigation requests were filed from November 1, 2009, through December 31, 2010." The number of modifications attained should not be the only goal of the [loss mitigation programs … Providing for a fair and transparent process, judicial efficiency and speedy outcomes are other measures of success.'"[64]

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[61] *Id.* at 19-20.
[62] *See* Appendix A hereto.
[63] *See* Appendix B hereto. *See also* Douglas Buckley, "Loss mitigation in Bankruptcy: Judge-Made Programs that Need More Support" (June 2012). http://www.abiworld.org/committees/newsletters/consumer/vol10num4/loss.html
[64] John Rao, "Bankruptcy Courts Respond to Foreclosure Crisis With Loss-Mitigation Programs", available at http://journal.abi.org/sites/default/files/2011/January/ConsumerCorner.pdf.

APPENDIX A

RULE 4001-1 RELIEF FROM THE AUTOMATIC STAY

(a) **Motion Contents Generally.** A motion for relief from the automatic stay shall include the following information to the extent applicable:

(1) The factual grounds that establish standing to bring the motion;

(2) The specific statutory basis and factual grounds for relief sought, including with specificity the contractual default of the debtor;

(3) The specific description of the collateral, including, where appropriate, the vehicle identification number (VIN), make, model, serial number, street address, and recording information (including the Clerk's office volume/page number);

(4) The names and purported interests of all parties known or, discovered after reasonable investigation, who claim to have an interest in the property;

(5) The amount of the outstanding indebtedness on each lien, admissible evidence as to value of the collateral, and the basis for the valuation;

(6) Legible and complete copies of movant's note, recorded mortgage, security agreement, modification(s), and assignment(s), if any; and

(7) Evidence of perfection of the movant's lien or interest.

(b) **Motions Involving Real Property in Cases Where the Debtor is an Individual.** If the movant seeks stay relief with respect to a mortgage on real property and the basis for the motion is a payment default, the movant shall file, as an exhibit to the motion, a completed copy of Certification of Payment History on the Note and Mortgage Dated ___ and Related Information.

(c) **Objections.** A debtor objecting to the secured creditor's motion shall, to the extent applicable:

(1) State with specificity those allegations of the secured creditor that the debtor disputes;

(2) Articulate the debtor's legal and factual basis for asserting that the secured creditor is not entitled to relief from stay; and

(3) Include copies of records showing proof of any payments that the secured creditor has not acknowledged as having been received on the obligation or include an explanation as to why those records are not appended and the date they will be

filed. If the motion is based upon a lack of equity in the property, then the debtor shall be required to include admissible evidence of value in the response.

(d) **Grounds for Denial.** Upon the request of a party in interest, the Court may deny without prejudice a motion for relief from stay involving encumbered real or personal property that fails to include the items recited in paragraph (a) of this Rule and/or that fails to include a completed copy of the form required under paragraph (b) of this Rule.

(e) **Failure to Support Opposition.** The debtor's failure to meet the requirements set forth in paragraph (c) of this Rule constitutes cause for the Court to deny the debtor's request for additional time to produce records and grant the motion as unopposed.

(f) **Surplus Monies.** Movant shall include in the proposed order granting a motion for relief from the stay a decretal paragraph that requires movant provide a report of sale to the trustee and turnover of any surplus proceeds.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re

Debtor

Case No.
Chapter

Employer's Tax Identification No(s). [if any]
Last four digits of Social Security No(s):

CERTIFICATION OF PAYMENT HISTORY ON THE NOTE AND MORTGAGE DATED_____ AND RELATED INFORMATION

_____, of full age, employed as _____ by _____, hereby certifies the following information:

Mortgage Recorded on: _____, in _____ County, in Book ____ at Page ____

Property Address:

Mortgage Holder:

Movant's relationship to Mortgage Holder:

Mortgagor(s)/Debtor(s):

Bankruptcy Petition filed on:

First Post-Petition Mortgage Payment Due:

POST-PETITION PAYMENT HISTORY:

	Amount Due	Date Payment Was Due	How Payment was Applied (Mo./Yr.)	Amount Received	Date Payment Received	Check or Money Order Number
1.						
2.						
3.						
4.						
5.						
6.						
7.						
8.						

9.						
10.						
11.						
12.						
13.						
14.						
15.						
16.						
17.						
18.						
19.						
20.						
21.						
22.						
23.						
24.						
TOTAL						

MONTHLY POST-PETITION PAYMENTS PAST DUE:

[Number of Payments Past Due] _____ multiplied by [Monthly Payment Amount, Exclusive of

Late Charges and Other Charges] _____ = _____ Due as of _____.

Itemize Past-Due Late Charges and Other Additional Charges Below. Attach a separate sheet, if necessary.

Type of Charge	Date Incurred	Relative to Payment Due On	Amount
Total Additional Charges Amount Due			

EACH CURRENT MONTHLY PAYMENT IS COMPRISED OF:

Principal..... _____
Interest..... _____
R.E. Taxes..... _____
Insurance..... _____
Late Charge..... _____

Other..... _____ (Specify)
TOTAL..... _____

If the monthly payment has changed during the pendency of the case, please explain (attach a separate sheet, if necessary):

MONTHLY PRE-PETITION PAYMENTS PAST DUE:

[Number of Payments Past Due] [From Date] [To Date] multiplied by [Monthly Payment Amount Inclusive of Late Charges and Other Charges]

_____ = _____ Due as of _____.

REQUIRED ATTACHMENTS TO MOTION

Please attach the following documents to your motion and indicate the exhibit number associated with the documents.

(1) Copies of documents that indicate Movant's interest in the subject property. For purposes of example only, a complete and legible copy of the promissory note or other debt instrument together with the complete and legible copy of the mortgage and any assignments of the note and mortgage in the chain of title from the original mortgagee to the current moving party. (Exhibit _____.)

(2) Copies of documents establishing that Movant's interest in the real property or cooperative apartment was perfected. For the purposes of example only, a complete and legible copy of the Financing Statement (UCC-1) filed with either the Clerk's Office of the Register of the county the property or cooperative apartment is located in. (Exhibit _____.)

CERTIFICATION FOR BUSINESS RECORDS

I CERTIFY THAT THE INFORMATION PROVIDED IN THIS FORM AND/OR ANY EXHIBITS ATTACHED TO THIS FORM (OTHER THAN THE TRANSACTIONAL DOCUMENTS ATTACHED AS REQUIRED BY PARAGRAPHS 1 AND 2 IMMEDIATELY ABOVE) IS DERIVED FROM RECORDS KEPT IN THE COURSE OF REGULARLY CONDUCTED ACTIVITY, MADE AT OR NEAR THE TIME OF THE OCCURRENCE OF THE MATTERS SET FORTH BY OR FROM INFORMATION TRANSMITTED BY, A PERSON WITH KNOWLEDGE OF THOSE MATTERS, AND WERE MADE BY REGULARLY CONDUCTED ACTIVITYAS REGULAR PRACTICE.

I FURTHER CERTIFY THAT THE COPIES OF ANY TRANSACTIONAL DOCUMENTS ATTACHED TO THE MOTION AS REQUIRED BY PARAGRAPHS 1 AND 2 IMMEDIATELY ABOVE, ARE TRUE AND ACCURATE COPIES OF THE ORIGINAL

DOCUMENTS THAT ARE IN THE POSSESSION OF THE MOVANT, EXCEPT AS FOLLOWS: _____.

I,_____<NAME AND TITLE> OF _____ <NAME OF MOVANT>, DECLARE (OR CERTIFY, VERIFY, OR STATE) UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

EXECUTED AT _____ <CITY/TOWN>, ____ <STATE> ON THIS ____

DAY OF _____, 20_____.

_____

[Print Name, Title, Name of Movant, Movant's Street Address, City, State, and Zip Code Below}

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

---------- x

In re:

Adoption of *Relief from Stay/ Worksheet for Real Estate and Cooperative Apartments*

AMENDED
GENERAL ORDER M-346

M - 347

---------- x

By resolution of the Board of Judges for the Southern District of New York, it is hereby

ORDERED that all motions filed on or after February 7, 2008, in the United States Bankruptcy Court for the Southern District of New York seeking relief from the automatic stay pursuant to 11 U.S.C. § 362 in cases filed by individuals concerning real property and cooperative apartments shall include, as an exhibit to the motion, a completed copy of the annexed *Relief from Stay – Real Estate and Cooperative Apartments* (the "Worksheet"); and it is further

ORDERED that the submission of a properly completed Worksheet shall constitute compliance with Local Bankruptcy Rule 4001-1 and 4001-2; and it is further

ORDERED that any judge of the Court may direct the submission of the Worksheet in connection with other motions, including motions for adequate protection.

Dated: New York, New York
January 23, 2008

/s/ Stuart M. Bernstein
STUART M. BERNSTEIN
Chief Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

<CASE CAPTION> CASE NO.___-____(____)

----------X

RELIEF FROM STAY – REAL ESTATE AND
COOPERATIVE APARTMENTS

I _____ <NAME AND TITLE> OF _____ <NAME OF ORGANIZATION/CORPORATION/MOVING PARTY> (HEREINAFTER, "MOVANT") HEREBY DECLARE (OR CERTIFY, VERIFY, OR STATE):

BACKGROUND INFORMATION

1. REAL PROPERTY OR COOPERATIVE APARTMENT ADDRESS WHICH IS THE SUBJECT OF THIS MOTION:_____

_____

2. LENDER NAME: _____

3. DATE OF MORTGAGE <MM/DD/YYYY>: _____

_____

4. POST-PETITION PAYMENT ADDRESS:

_____

_____

DEBT/VALUE REPRESENTATIONS

5. TOTAL PRE-PETITION AND POST-PETITION INDEBTEDNESS OF DEBTOR(S) TO MOVANT AT THE TIME OF FILING THE MOTION: $_____
(Note: this amount may not to be relied on as a "payoff" quotation.)

6. MOVANT'S ESTIMATED MARKET VALUE OF THE REAL PROPERTY OR COOPERATIVE APARTMENT: $_____

7. SOURCE OF ESTIMATED VALUATION:

_____

STATUS OF DEBT AS OF THE PETITION DATE

8. TOTAL PRE-PETITION INDEBTEDNESS OF DEBTOR(S) TO MOVANT AS OF PETITION FILING DATE: $_____

A. AMOUNT OF PRINCIPAL: $_____

B. AMOUNT OF INTEREST: $_____

C. AMOUNT OF ESCROW (taxes and insurance): $_____

D. AMOUNT OF FORCED PLACED INSURANCE EXPENDED BY MOVANT:

$_____

E. AMOUNT OF ATTORNEYS' FEES BILLED TO DEBTOR(S) PRE-PETITION:

$_____

F. AMOUNT OF PRE-PETITION LATE FEES, IF ANY, BILLED TO DEBTOR(S):

$_____

9. CONTRACTUAL INTEREST RATE: _____ (If interest rate is (or was) adjustable, please list the rate(s) and date(s) the rate(s) was/were in effect on a separate sheet and attach the sheet as an exhibit to this form; please list the exhibit number here:____.)

10. PLEASE EXPLAIN ANY ADDITIONAL PRE-PETITION FEES, CHARGES OR AMOUNTS CHARGED TO DEBTOR'S/DEBTORS' ACCOUNT AND NOT LISTED ABOVE:

_____

(If additional space is needed, please list the amounts on a separate sheet and attach the sheet as an exhibit to this form; please list the exhibit number here: _____.)

AMOUNT OF ALLEGED POST-PETITION DEFAULT (AS OF _____<MM/DD/YYYY>)

11. DATE LAST PAYMENT WAS RECEIVED: _____
<MM/DD/YYYY>

12. ALLEGED TOTAL NUMBER OF PAYMENTS DUE POST-PETITION FROM FILING OF PETITION THROUGH PAYMENT DUE ON _____<mm/dd/yyyy>: _____.

13. PLEASE LIST ALL POST-PETITION PAYMENTS ALLEGED TO BE IN DEFAULT:

ALLEGED PAYMENT DUE DATE	ALLEGED AMOUNT DUE	AMOUNT RECEIVED	AMOUNT APPLIED TO PRINCIPAL	AMOUNT APPLIED TO INTEREST	AMOUNT APPLIED TO ESCROW	LATE FEE CHARGED (IF ANY)
TOTALS:	$	$	$	$	$	$

14. AMOUNT OF MOVANT'S ATTORNEYS FEES BILLED TO DEBTOR FOR THE PREPARATION, FILING AND PROSECUTION OF THIS MOTION: $_____

15. AMOUNT OF MOVANT'S FILING FEE FOR THIS MOTION: $_____

16. OTHER ATTORNEYS' FEES BILLED TO DEBTOR POST-PETITION: $_____

17. AMOUNT OF MOVANT'S POST-PETITION- INSPECTION FEES: $_____

18. AMOUNT OF MOVANT'S POST-PETITION APPRAISAL/BROKER'S PRICE OPINION: $_____

19. AMOUNT OF FORCED PLACED INSURANCE OR INSURANCE PROVIDED BY THE MOVANT POST-PETITION: $ _____

20. SUM HELD IN SUSPENSE BY MOVANT IN CONNECTION WITH THIS CONTRACT, IF APPLICABLE: $ _____

21. AMOUNT OF OTHER POST-PETITION ADVANCES OR CHARGES, FOR EXAMPLE TAXES, INSURANCE INCURRED BY DEBTOR ETC.: $_____

REQUIRED ATTACHMENTS TO MOTION

Please attach the following documents to this motion and indicate the exhibit number associated with the documents.

(1) Copies of documents that indicate Movant's interest in the subject property. For purposes of example only, a complete and legible copy of the promissory note or other debt instrument together with a complete and legible copy of the mortgage and any assignments in the chain from the original mortgagee to the current moving party. (Exhibit _____.)

(2) Copies of documents establishing proof of standing to bring this Motion. (Exhibit _____.)

(3) Copies of documents establishing that Movant's interest in the real property or cooperative apartment was perfected. For the purposes of example only, a complete and legible copy of the Financing Statement (UCC-1) filed with either the Clerk's Office or the Register of the county the property or cooperative apartment is located in. (Exhibit _____.)

CERTIFICATION FOR BUSINESS RECORDS

I CERTIFY THAT THE INFORMATION PROVIDED IN THIS WORKSHEET AND/OR ANY EXHIBITS ATTACHED TO THIS WORKSHEET (OTHER THAN THE TRANSACTIONAL DOCUMENTS ATTACHED AS REQUIRED BY PARAGRAPHS 1, 2 AND 3, IMMEDIATELY ABOVE) IS DERIVED FROM RECORDS THAT WERE MADE AT OR NEAR THE TIME OF THE OCCURRENCE OF THE MATTERS SET FORTH BY, OR FROM INFORMATION TRANSMITTED BY, A PERSON WITH KNOWLEDGE OF THOSE MATTERS, WERE KEPT IN THE COURSE OF THE REGULARLY CONDUCTED ACTIVITY; AND WERE MADE BY THE REGULARLY CONDUCTED ACTIVITY AS A REGULAR PRACTICE.

I FURTHER CERTIFY THAT COPIES OF ANY TRANSACTIONAL DOCUMENTS ATTACHED TO THIS WORKSHEET AS REQUIRED BY PARAGRAPHS 1 ,2 AND 3, IMMEDIATELY ABOVE, ARE TRUE AND ACCURATE COPIES OF THE ORIGINAL DOCUMENTS.

DECLARATION

I _____ <NAME AND TITLE> OF _____ <NAME OF MOVANT> HEREBY DECLARE (OR CERTIFY, VERIFY, OR STATE) PURSUANT 28 U.S.C. SECTION 1746 UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT BASED ON PERSONAL KNOWLEDGE OF THE MOVANT'S BOOKS AND BUSINESS RECORDS.

EXECUTED AT _____<CITY/TOWN>, _____ <STATE> ON THIS ____ DAY OF <MONTH>, 20___ <YEAR>.

_____

<PRINT NAME>
<TITLE>
<MOVANT>
<STREET ADDRESS>
<CITY, STATE AND ZIP CODE>

APPENDIX B

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	
	:	Amending General Order M-364
Adoption of Modified Loss Mitigation	:	
Program Procedures	:	M - 413
	:	

By resolution of the Board of Judges of the United States Bankruptcy Court for the Southern District of New York, General Order M-364, dated December 18, 2008, instituted a uniform, comprehensive, court-supervised loss mitigation program in order to facilitate consensual resolutions for individual debtors whose residential real property is at risk of loss to foreclosure. The loss mitigation program has helped avoid the need for various types of bankruptcy litigation, reduced costs to debtors and secured creditors, and enabled debtors to reorganize or otherwise address their most significant debts and assets under the United States Bankruptcy Code. Accordingly, the "Loss Mitigation Program Procedures" were adopted, pursuant to 11 U.S.C. § 105(a). General Order M-364 also provided that the Court may modify the Loss Mitigation Program Procedures from time to time by duly adopted General Order.

Accordingly, after further review of the loss mitigation program, the Board of Judges has agreed to certain modifications to the procedures and forms,

NOW, THEREFORE, IT IS ORDERED that the revised Loss Mitigation Program Procedures and forms are adopted, effective December 30, 2010, and shall be available in the clerk's office and on the Court's web site.

Dated: New York, New York
December 29, 2010

/s/ Arthur J. Gonzalez
Chief United States Bankruptcy Judge

SOUTHERN DISTRICT OF NEW YORK
LOSS MITIGATION PROGRAM PROCEDURES

I. PURPOSE

The Loss Mitigation Program is designed to function as a forum for debtors and lenders to reach consensual resolution whenever a debtor's residential property is at risk of foreclosure. The Loss Mitigation Program aims to facilitate resolution by opening the lines of communication between the debtors' and lenders' decision-makers. While the Loss Mitigation Program stays certain bankruptcy deadlines that might interfere with the negotiations or increase costs to the Loss Mitigation parties, the Loss Mitigation Program also encourages the parties to finalize any agreement under bankruptcy court protection, instead of seeking dismissal of the bankruptcy case.

II. LOSS MITIGATION DEFINED

The term "Loss Mitigation" is intended to describe the full range of solutions that may avert either the loss of a debtor's property to foreclosure, increased costs to the lender, or both. Loss mitigation commonly consists of the following general types of agreements, or a combination of them: loan modification, loan refinance, forbearance, short sale, or surrender of the property in full satisfaction. The terms of a Loss Mitigation solution will vary in each case according to the particular needs and goals of the parties.

III. ELIGIBILITY

The following definitions are used to describe the types of parties, properties and loans that are eligible for participation in the Loss Mitigation Program:

A. DEBTOR

The term "Debtor" means any individual debtor in a case filed under Chapter 7, 11, 12 or 13 of the Bankruptcy Code, including joint debtors.

B. PROPERTY

The term "Property" means any real property or cooperative apartment used as a principal residence in which an eligible Debtor holds an interest.

C. LOAN

The term "Loan" means any mortgage, lien or extension of money or credit secured by eligible Property or stock shares in a residential cooperative, regardless of whether or not the Loan (1) is considered to be "subprime" or "non-traditional," (2) was in foreclosure prior to the bankruptcy filing, (3) is the first or junior mortgage or lien on the Property, or (4) has been "pooled," "securitized," or assigned to a servicer or to a trustee.

D. CREDITOR

The term "Creditor" refers to any holder, mortgage servicer or trustee of an eligible Loan.

IV. ADDITIONAL PARTIES

A. OTHER CREDITORS

Where it may be necessary or desirable to obtain a global resolution, any party may request, or the bankruptcy court may direct, that multiple Creditors participate in Loss Mitigation.

B. CO-DEBTORS AND THIRD PARTIES

Where the participation of a co-debtor or other third party may be necessary or desirable, any party may request, or the bankruptcy court may direct, that such party participate in Loss Mitigation, to the extent that the bankruptcy court has jurisdiction over the party, or if the party consents to participation in Loss Mitigation.

C. CHAPTER 13 TRUSTEE

The Chapter 13 Trustee has the duty in Section 1302(b)(4) of the Bankruptcy Code to "advise, other than on legal matters, and assist the debtor in performance under the plan." Any party may request, or the bankruptcy court may direct, the Chapter 13 Trustee to participate in Loss Mitigation to the extent that such participation would be consistent with the Chapter 13 Trustee's duty under the Bankruptcy Code.

D. MEDIATOR

At any time, a Debtor or Creditor participating in the Loss Mitigation Program may request, or the bankruptcy court may order, the appointment of an independent mediator from the United States Bankruptcy Court for the Southern District of New York's Register of Mediators, which may be viewed at http://www.nysb.uscourts.gov/mediators.html. A mediator will assist in Loss Mitigation in accordance with these Procedures and with the United States Bankruptcy Court of the Southern District of New York Amended General Order for the Adoption of Procedures Governing Mediation of Matters in Bankruptcy Cases and Adversary Proceedings dated January 17, 1995 (General Order M-143), as amended on October 20, 1999 (General Order M-211); and December 1, 2009 (General Order M-390).

V. COMMENCEMENT OF LOSS MITIGATION

Parties are encouraged to request Loss Mitigation as early in the case as possible, but Loss Mitigation may be initiated at any time, by any of the following methods:

A. BY THE DEBTOR

1. In Section C of the Model Chapter 13 Plan, a Chapter 13 Debtor may indicate an interest in discussing Loss Mitigation with a particular Creditor. Upon requesting same in the Chapter 13 Plan, the Debtor must serve said plan on the Creditor and file proof of same on the Electronic Case Filing System ("ECF"). If the Creditor fails to object within 21 days of service

of the plan the Debtor shall submit a Loss Mitigation Order and the bankruptcy court may enter the order (the "Loss Mitigation Order").

2. A Debtor may file a request for Loss Mitigation with a particular Creditor. The Creditor shall have 14 days to object. If no objection is filed, the Debtor shall submit a Loss Mitigation Order and the bankruptcy court may enter the Loss Mitigation Order.

3. Upon entry of the Loss Mitigation Order, the Debtor must serve same upon the appropriate Creditor and file proof of service on ECF.

4. If a Creditor has filed a motion requesting relief from the automatic stay pursuant to Section 362 of the Bankruptcy Code (a "Lift-Stay Motion"), at any time prior to the conclusion of the hearing on the Lift-Stay Motion, the Debtor may file a request for Loss Mitigation. The Debtor and Creditor shall appear at the scheduled hearing on the Lift-Stay Motion, and the bankruptcy court will consider the Loss Mitigation request and any opposition by the Creditor.

B. BY A CREDITOR

A Creditor may file a request for Loss Mitigation. The Creditor must serve said request on the Debtor and Debtor's counsel and file proof of service on ECF. The Debtor shall have 7 days after service of the request to object. If no objection is filed, the Creditor shall submit a Loss Mitigation Order and the bankruptcy court may enter the Loss Mitigation Order. Upon entry of the Order, the Creditor is to serve same upon Debtor and Debtor's counsel and file proof of same on ECF.

C. BY THE BANKRUPTCY COURT

The bankruptcy court may enter a Loss Mitigation Order at any time, provided that the parties that will be bound by the Loss Mitigation Order (the "Loss Mitigation Parties") have had notice and an opportunity to object.

D. OPPORTUNITY TO OBJECT

Where any party files an objection, a Loss Mitigation Order shall not be entered until the bankruptcy court has held a hearing to consider the objection. At the hearing, a party objecting to Loss Mitigation must present specific reasons why it believes that Loss Mitigation would not be successful. If a party objects on the grounds that Loss Mitigation has been requested in bad faith, the assertion must be supported by objective reasons.

VI. LOSS MITIGATION ORDER

A. ORDER

A separate order shall be submitted for each party listed in the Loss Mitigation Request.

B. DEADLINES

A Loss Mitigation Order shall contain set time frames for all of the following:

1. The date by which the Loss Mitigation Parties shall designate contact persons and disclose contact information, if this information has not been previously provided.

2. The date by which each Creditor must transmit any information request to the Debtor.

3. The date by which the Debtor must transmit any information request to each Creditor.

4. The date by which a written report must be filed or the date and time set for a status conference at which a verbal report must be provided. Whenever possible, in a Chapter 13 case the status conference will coincide with the first date set for confirmation of the Chapter 13 plan, or an adjourned confirmation hearing. Where a written report is required, it should generally be filed not later than 7 days after the conclusion of the initial Loss Mitigation session.

C. EFFECT

Whenever a Loss Mitigation Order is entered, the following shall apply to the Loss Mitigation Parties:

1. All communications between the parties shall be made through the designated contacts unless the Court rules otherwise.

2. Except where necessary to prevent irreparable injury, loss or damage, a Creditor shall not file a Lift-Stay Motion during the Loss Mitigation Period. Any Lift-Stay Motion filed by the Creditor prior to the entry of the Loss Mitigation Order shall be adjourned to a date after the last day of the Loss Mitigation Period, and the stay shall be extended pursuant to Section 362(e) of the Bankruptcy Code.

3. In a Chapter 13 case, the deadline by which a Creditor must object to confirmation of the Chapter 13 plan shall be extended to permit the Creditor an additional 14 days after the termination of Loss Mitigation, including any extension of the Loss Mitigation Period.

4. All communications and information exchanged by the Loss Mitigation Parties during Loss Mitigation will be inadmissible in any subsequent proceeding pursuant to Federal Rule of Evidence 408.

VII. DUTIES UPON COMMENCEMENT OF LOSS MITIGATION

Upon entry of a Loss Mitigation Order, the Loss Mitigation Parties shall have the following duties:

A. GOOD FAITH

The Loss Mitigation Parties shall negotiate in good faith. A party that fails to participate in Loss Mitigation in good faith may be subject to sanctions.

B. CONTACT INFORMATION

1. The Debtor: Unless the Debtor has already done so in the Chapter 13 plan or as part of a request for Loss Mitigation, the Debtor shall provide written notice to each Creditor, indicating the manner in which the Creditor should contact the Debtor.

2. The Creditor: Unless a Creditor has already done so as part of a request for Loss Mitigation, each Creditor shall provide written notice to the Debtor, identifying the name, address and direct telephone number of the contact person who has full settlement authority.

C. DOCUMENT EXCHANGE

1. The Creditor shall serve upon the Debtor and Debtor's attorney a request for information using the *"Creditor Loss Mitigation Affidavit"* form within 7 days of service of the Order. The Creditor shall file same on ECF.

2. The Debtor shall serve upon the Creditor a response to Creditor's request for information using the "*Debtor Loss Mitigation Affidavit*" form within 21 days of service of the Creditor Loss Mitigation Affidavit. The Debtor shall file only the *Debtor Loss Mitigation Affidavit* on ECF.

D. STATUS REPORT

The Loss Mitigation Parties shall provide either a written or verbal report to the bankruptcy court regarding the status of Loss Mitigation within the time set by the bankruptcy court in the Loss Mitigation Order. The status report shall state whether one or more Loss Mitigation sessions have been conducted, whether a resolution was reached, and whether one or more of the Loss Mitigation Parties believe that additional Loss Mitigation sessions would be likely to result in either a partial or complete resolution. A status report may include a request for an extension of the Loss Mitigation Period.

E. BANKRUPTCY COURT APPROVAL

The Loss Mitigation Parties shall seek bankruptcy court approval of any resolution or settlement reached during Loss Mitigation.

VIII. LOSS MITIGATION PROCESS

A. INITIAL CONTACT

Following entry of a Loss Mitigation order, the contact person designated by each Creditor shall contact the Debtor's designated contact person and any other Loss Mitigation Party within the time set by the bankruptcy court. The Debtor through its designated contact person may contact any other Loss Mitigation Party at any time. The purpose of the initial contact is to create a framework for the discussion at the Loss Mitigation session and to ensure that each of the Loss Mitigation Parties will be prepared to participate in the Loss Mitigation session – it is not intended to limit additional issues or proposals that may arise during the session. During the initial contact phase, the Loss Mitigation Parties should discuss the following:

1. The time and method for conducting the Loss Mitigation sessions.

2. The types of Loss Mitigation solutions under consideration by each party.

3. A plan for the exchange of required information prior to the Loss Mitigation session, including the due date for the Debtor to complete and return any information request or other Loss Mitigation paperwork that each Creditor may require.

B. LOSS MITIGATION SESSIONS

Loss mitigation sessions may be conducted in person, telephonically or via video conference. At the conclusion of each Loss Mitigation session, the Loss Mitigation Parties should discuss whether additional sessions are necessary and set the time and method for conducting any additional sessions, including a schedule for the exchange of any further information or documentation that may be required.

C. BANKRUPTCY COURT ASSISTANCE

At any time during the loss-mitigation period, a Loss Mitigation Party may request a settlement conference or status conference with the bankruptcy court.

D. SETTLEMENT AUTHORITY

Each Loss Mitigation Party must have a person with full settlement authority present during a Loss Mitigation session. During a status conference or settlement conference with the bankruptcy court, the person with full settlement authority must either attend the conference in person or be available by telephone or video conference beginning 30 minutes prior to the start of the conference.

IX. DURATION, EXTENSION AND EARLY TERMINATION

A. INITIAL PERIOD

The initial Loss Mitigation Period shall be set by the bankruptcy court in the Loss Mitigation Order.

B. EXTENSION

1. Agreement: The Loss Mitigation Parties may agree to an extension of the Loss Mitigation Period. The Loss Mitigation Parties shall request an extension in writing, filed on the docket in the main bankruptcy case and served on all parties in interest, who shall have three days to object to a request for extension of the Loss Mitigation Period. The bankruptcy court may grant a request for extension of the Loss Mitigation Period for cause.

2. No Agreement: Where a Loss Mitigation Party does not consent to the request for an extension of the Loss Mitigation Period, the bankruptcy court shall schedule a hearing to consider whether further Loss Mitigation sessions are likely to be successful. The bankruptcy court may order a reasonable extension if it appears that (1) a further Loss Mitigation session is likely to result in a complete or partial resolution that will provide a substantial benefit to a Loss Mitigation Party, (2) the party opposing the extension has not participated in good faith or has failed in a material way to comply with these Procedures, or (3) the party opposing the extension would not be prejudiced.

C. EARLY TERMINATION

1. Upon Request of a Loss Mitigation Party: A Loss Mitigation Party may request that the Loss Mitigation Period be terminated and shall state the reasons for the request. Except where immediate termination is necessary to prevent irreparable injury, loss or damage, the request

shall be made on notice to all other Loss Mitigation Parties, and the bankruptcy court may schedule a hearing to consider the termination request.

2. Dismissal of the Bankruptcy Case:

a. Other than at the request of a Chapter 13 Debtor, or the motion of the United States Trustee or Trustee for failure to comply with requirements under the Bankruptcy Code: Except where a Chapter 13 Debtor requests voluntary dismissal, or upon motion, a case shall not be dismissed during the Loss Mitigation Period unless the Loss Mitigation Parties have provided the bankruptcy court with a status report that is satisfactory to the court. The bankruptcy court may schedule a further status conference with the Loss Mitigation Parties prior to dismissal of the case.

b. Upon the request of a Chapter 13 Debtor: **A Debtor is not required to request dismissal of the bankruptcy case as part of any resolution or settlement that is offered or agreed to during the Loss Mitigation Period.** Where a Chapter 13 Debtor requests voluntary dismissal of the bankruptcy case during the Loss Mitigation Period, the Debtor's dismissal request shall indicate whether the Debtor agreed to any settlement or resolution from a Loss Mitigation Party during the Loss Mitigation Period or intends to accept an offer of settlement made by a Loss Mitigation Party during the Loss Mitigation Period.

X. SETTLEMENT

The bankruptcy court will consider any agreement or resolution reached during Loss Mitigation (a "Settlement") and may approve the Settlement, subject to the following provisions:

1. Implementation: A Settlement may be noticed and implemented in any manner permitted by the Bankruptcy Code and Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules"), including, but not limited to, a stipulation, sale, plan of reorganization or amended plan of reorganization; and a Motion to Approve Loan Modification and Terminate Loss Mitigation.

2. Fees, Costs or Charges: If a Settlement provides for a Creditor to receive payment or reimbursement of any fee, cost or charge that arose from Loss Mitigation, such fees, costs or charges shall be disclosed to the Debtor and to the bankruptcy court prior to approval of the Settlement.

3. Signatures: Consent to the Settlement shall be acknowledged in writing by (1) the Creditor representative who participated in Loss Mitigation, (2) the Debtor, and (3) the Debtor's attorney, if applicable.

4. Hearing: Where a Debtor is represented by counsel, a Settlement may be approved by the bankruptcy court without further notice, or upon such notice as the bankruptcy court directs, unless additional notice or a hearing is required by the Bankruptcy Code or Bankruptcy Rules. Where a Debtor is not represented by counsel, a Settlement shall not be approved until after the bankruptcy court has conducted a hearing at which the Debtor shall appear in person.

5. Dismissal Not Required: **A Debtor is not required to request dismissal of the bankruptcy case in order to effectuate a Settlement.** In order to ensure that the Settlement is enforceable, the Loss Mitigation Parties should seek bankruptcy court approval of the Settlement. Where the Debtor requests or consents to dismissal of the bankruptcy case as part of

the Settlement, the bankruptcy court may approve the Settlement as a "structured dismissal," if such relief complies with the Bankruptcy Code and Bankruptcy Rules.

6. Any Order or Stipulation settling Loss Mitigation shall have the Agreement attached as an exhibit.

XI. LOSS MITIGATION FINAL REPORT

Debtor's counsel – or the Debtor, if the Debtor is proceeding without attorney representation – shall file with the Court a ***Loss Mitigation Final Report*** – using the current local (SDNY) form – no later than 14 days after termination of the Loss Mitigation Period. Termination occurs:

1. when the Court enters an order – after a motion is made by one of the parties to Loss Mitigation (for example, a motion asking the Court to approve a settlement) – where such order brings to a close the Loss Mitigation;

2. when the Court approves a stipulated agreement that has been presented to the Court, which provides for settlement or resolution of the Loss Mitigation; or

3. upon expiration of the Loss Mitigation Period or by Court order providing for early termination.

Where a case has two or more requests for Loss Mitigation, a separate ***Loss Mitigation Final Report*** must be filed for each request.

The Clerk's Office may revise the local (SDNY) form, ***Loss Mitigation Final Report***, from time to time without the need to update these procedures.

XII. COORDINATION WITH OTHER PROGRAMS

[Provision may be added in the future to provide for coordination with other Loss Mitigation programs, including programs in the New York State Unified Court System.]