Court News and Views

THE UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF ALABAMA

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Clerk's Corner

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Hello everyone! I hope this finds all of you doing well! Welcome to the 22nd edition of our newsletter.

Practice tips: this edition is loaded with practice tips—starting with Judge Chris Hawkins' article regarding mortgage loss mitigation, to tips from the Chapter 13 Trustee, to various tips from our office staff. Please read these, ask us questions, and give us feedback.

Review of local rules: one of the main focal points of our court this year has been a complete scrub of our local rules. Please see the short article on page 6 for more information and please check our website early next year for the rules to be released for public comment. A big thank you to the attorneys who agreed to participate on the local rules committee.

Federal bankruptcy rule and form changes: as is always the case this time of year, please don't forget to take a look at the rule and form changes that will become effective on December 1st of this year. You can find them on our webpage under News and Announcements.

NextGen upgrade: we will be shutting down our CM/ECF server for a weekend early next year for a major system update. We will work to minimize the downtime to the shortest time possible. Please keep checking our webpage for exact dates and times.

CM/ECF training: speaking of CM/ECF, even though we have not done much training since COVID, we continue to have office-tailored CM/ECF training available for you and your staffs. While this training is especially helpful for new attorneys and staff, it can also be used for refresher training for everyone. Please call our office to schedule a training session.

Filing numbers update: while the bankruptcy filing numbers in the Middle District are up from last year (up about 14% year-to-date), we are still down significantly from 2019 and earlier (pre-COVID)—down about 37% year-to-date. Additionally, bankruptcy filings continue to be down across the country, even from last year—down about 11% year-to-date. While we all expect the filing numbers to come back up, we do not know when that will happen.

Feedback: please continue to reach out to us with any questions or feedback you have. You can call us directly at 334 954-3800 or email us at feedback@almb.uscourts.gov.

All the best to you and yours during the upcoming holiday season!

Mortgage Loss Mitigation

Christopher Hawkins, U.S. Bankruptcy Judge

The Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act") was signed into law on March 27, 2020, in response to the COVID-19 pandemic, and it provided at least some form of financial assistance to nearly all participants in the American economy. The Consolidated Appropriations Act (the "CAA") was signed into law on December 27, 2020, and it supplemented many of the programs established under CARES Act. The COVID-19 Bankruptcy Relief Extension Act (the "Extension Act") was signed into law on March 27, 2021, and it extended certain bankruptcy-related provisions of the CARES Act and CAA to March 27, 2022.

To provide relief to homeowners, the CARES Act, CAA, and Extension Act (together, the "COVID Relief Acts") imposed a moratorium on foreclosures with respect to federally backed mortgage loans and permitted a forbearance for up to 18 months, provided that the borrowers attested that COVID-19 had caused a financial hardship. Under a forbearance, the mortgage lender or servicer allows a borrower to pause mortgage payments. The COVID Relief Acts provided that during the forbearance period, the borrower would not incur fees, penalties, or additional interest (beyond the scheduled amounts). There were no bankruptcy-related restrictions with respect to forbearances under the COVID Relief Acts.

While these forbearances under the COVID Relief Acts provided borrowers a breathing spell, the underlying payments were not forgiven or otherwise addressed. These forbearances, in essence, were simply "kicking the can down the road," leaving the corresponding payment default to be dealt with later. From a bankruptcy perspective, the COVID Relief Acts permitted mortgage lenders and servicers to supplement their proofs of claim to account for the post-petition delinquencies caused by the forbearances and permitted borrowers to extend the terms of their confirmed plans to account for interruptions in payments during the pandemic.

The COVID Relief Acts have expired, and borrowers that took advantage of forbearances related to COVID-19 face significant challenges in addressing the payment gaps related to their mortgages. Given that Chapter 13 debtors generally must cure mortgage defaults prior to the expiration of their plan's applicable commitment period, bankruptcy alone might not provide a sufficient framework for dealing with these payment gaps. Fortunately, not all hope is lost, as applicable non-bankruptcy law provides borrowers with a mechanism for exploring options to get their mortgage loans back on track.

Loss Mitigation under Regulation X

Regulation X, which implements the Real Estate Settlement Procedures Act, was overhauled by the Consumer Financial Protection Bureau (the "CFPB") in connection with the Dodd-Frank Wall Street Reform and Consumer Protection Act. The requirements in Regulation X addressing a mortgage servicer's handling of loss mitigation applications took effect on January 10, 2014, and, apart from certain adjustments related to COVID-19, remain largely unchanged. (With respect to the loss mitigation provisions, *see* Regulation X, Section 1024.41).

Regulation X defines "loss mitigation option" as any alternative to foreclosure that a servicer can offer on behalf of the owner or assignee of the loan, which may include refinancing, trial or permanent loan modifications, repayment of the amount owed over an extended period, forbearances, short sales, and deeds-in-lieu of foreclosure. Notably, any time a borrower verbally, or in writing, requests an alternative to foreclosure and provides any information that the servicer could evaluate, the servicer is considered to have received a loss-mitigation application.

Upon receipt of an application, a servicer must evaluate the documents and information provided by the borrower and, within five business days, send the borrower an acknowledgment letter stating whether the borrower's application is complete or incomplete. If the application is determined to be incomplete, the acknowledgment letter must contain the information or documents needed to complete the application and a reasonable date by which the borrower should submit what is missing.

Mortgage Loss Mitigation Cont'd

If a complete application is received more than 37 days before a scheduled foreclosure sale, or when no sale is scheduled, the servicer must, within 30 days, evaluate the application for all loss-mitigation options that are available to that borrower and send a written notice stating the options, if any, it is able to offer. The determination notice must also contain a deadline for accepting or rejecting any offered options and specific reasons for the denial of any loan modification options.

If the application was made complete 90 days or more before a scheduled foreclosure sale, or if no sale was scheduled at that time, the servicer must give the borrower at least 14 days to appeal the denial of any loan-modification options. If the borrower does appeal, the servicer must have different personnel re-evaluate the loss-mitigation application. Within 30 days of the borrower's appeal, the servicer must complete the re-evaluation and provide the borrower notice of its new determination.

Regulation X provides a framework for homeowners to explore possible alternatives to foreclosure, including additional forbearances. Moreover, the CFPB continues to issue directives and guidance to servicers with respect to adequate staffing of the servicers' loss mitigation departments and procedural safeguards associated with the loss mitigation application process. The fact that a borrower is a debtor in a bankruptcy case does not prevent that borrower from applying for loss mitigation assistance, and it does not alter the timelines and requirements imposed on mortgage servicers.

Interplay with the Bankruptcy Code and Local Practice

If a borrower is in bankruptcy and has applied for loss mitigation assistance pre-confirmation, it may be worthwhile to incorporate any servicer-approved loss mitigation option into the proposed plan, which should ease the administrative burden on all parties involved. If the borrower has applied for loss mitigation assistance post-confirmation, the next step will vary based on the nature of the loss mitigation option offered by the servicer. For a deed in lieu of foreclosure, a motion to approve an agreement related to relief from stay may be the best procedural approach. For short sale, a motion to sell likely would be appropriate. If the servicer has approved a loan modification, our preference would be for the parties to file a Motion to Approve Mortgage Modification. Each of these motions currently may be filed on negative notice pursuant to our Local Bankruptcy Rule 9007-1. (Note: pursuant to Administrative Order No. 2022-07, the Court has appointed a Committee to review and make recommendations with respect to the Court's local rules, which might impact Local Bankruptcy Rule 9007-1 at some point in the future).

Conclusion

Homeowners, having been provided helpful but temporary tools during the height of the pandemic, now face significant challenges in bringing their mortgage loans current. The tools provided by the COVID Relief Acts no longer are available, and the provisions of the Bankruptcy Code may, in and of themselves, be limited in their effectiveness in terms of curing substantial payment shortfalls resulting from forbearances. We encourage borrowers and their counsel to work with mortgage servicers and their counsel to explore loss mitigation options pursuant to the procedures set forth in Regulation X. To the extent the parties can agree on a loss mitigation option, we will be happy to consider such options in accordance with the Bankruptcy Code and our local rules.

Chapter 13 Trustee's Tips

Sabrina L. McKinney, Chapter 13 and Chapter 12 Trustee

Hope you all are doing well. I know filings are down and times are tough. If there is anything we can do at the Trustee's Office to assist you, please do not hesitate to let me know.

As you are all aware, the presumptive fee for Chapter 13 cases increased to $4500 effective October 1, 2022. When we have had an increase in fees in the past, there has been a flurry of incorrect plan filings while attorneys were waiting on the software to catch up with the change. Because of this, I wanted to take the time to remind you all how we deal with fee changes at the Trustee's Office. The fee on the plan must match the fee on the Rule 2016 Fee Disclosure statement. If the fee does not match, the Trustee's Office will load the lower of the two fees listed until one or the other is amended to make them match.

We have had a few inquiries on how we calculate feasibility on PlanCalc1 on the 13network. We have uploaded onto our website www.ch13mdal.com a set of instructions on how we use the program for feasibility calculations. If you have any questions, feel free to reach out to us.

In addition to the feasibility calculation update to our website, we have also updated the website to include instructions to filers on how to file applications to employ, applications to approve fees and expense, and motions to approve settlement for personal injury settlements. If you have additional questions on how to file those documents, reach out to the debtors' bankruptcy counsel for assistance. The presumptive fee Order provides that one of the things they are being compensated for with their fee is to assist special counsel with these filings.

Finally, I would like to encourage not only creditors and debtors, but also debtors' counsel to sign up for the services provided by the National Data Center at www.NDC.org. There are several reporting options available to debtors' counsel that aren't available on any other platform.

As always, we are looking for ways to assist our colleagues and to enhance the efficiency and effectiveness of the services provide by the Chapter 13 Trustee's Office. If there is ever anything I can do to assist you, please reach out to my office.

Regards,

Sabrina L. McKinney

Bankruptcy Administrator's Practice Tip: Save Time, Paper, and Postage!

The Bankruptcy Administrator is a party in interest in all bankruptcy cases pending in the Middle District and receives electronic notice of all pleadings. Accordingly, paper copies of pleadings are not required to be sent to the Bankruptcy Administrator. Save time, paper, and postage and take the Bankruptcy Administrator off your list of parties to serve in paper. Paper copies that come to the office simply end up in the recycling bin.

Dismissals and Defaults in Adversary Proceedings

Brian Suckman, Information Systems Manager

More than any other process in bankruptcy, adversary procedures use the Federal Rules of Civil Procedure to govern the process, from initial filing through final orders. In bankruptcy practice, there are two rules that are very important for the practitioner to know and use to process cases more efficiently.

Dismissals

Dismissals in this context are governed by Rule 7041, Federal Rules of Bankruptcy Procedure.

If the defendant has filed no answer or motion for summary judgment, Rule 7041(a)(1)(A)(i) allows the plaintiff to file a notice of dismissal of the adversary proceeding. If the defendant filed an answer or a motion for summary judgment, the parties may jointly dismiss the case under rule 7041(a)(1)(A)(ii). All parties joining in the joint stipulation must sign it.

If the requirements for dismissal under Rule 7041 have been met, the clerk acknowledges the notice. If there all defendants in the proceeding are dismissed, acknowledging the dismissal will end the adversary proceeding and close the case. Otherwise, the defendants named in the notice of dismissal will be dismissed, and the case will stay open with the remaining defendants.

Defaults

Federal Rule of Bankruptcy Procedure 7055 governs defaults. If a defendant fails to appear or answer, under Rule 7055(a), the plaintiff must first ask the clerk to enter default against the party. After the clerk enters default, the plaintiff may file a motion for default judgment under Rule 7055(b)(2).

A request for default must be accompanied by an affidavit or other statement showing the defendant has failed to plead or defend. Before the clerk will enter default, the filed summons will be closely examined to make sure service of process was completed according to Rule 7004. This includes making sure corporations and depository institutions were properly served. If 7004 was not followed, the clerk will contact you to withdraw the request for default and give you an opportunity to serve the complaint again. After default enters, the plaintiff may file a motion for default judgment.

Audio Recordings of Bench Rulings

The judges for the Middle District have asked the clerk's office to begin posting audio recordings of certain bench rulings to the PACER docket. The docket entry states that the entry has a PDF with an attached audio file, and there is a small speaker icon at the start of the entry. The audio recordings are embedded in PDF documents with blue buttons showing where the user should click to activate the audio file.

The parties involved in the ruling will get one free download of the PDF file just like any other document filed in a case. Other interested parties may access the file through PACER by paying a $2.40 fee for each audio file download. This fee is set by PACER, not the court.

The judges will decide which rulings will be added to a docket. The audio files are provided as a courtesy and are not a substitute for requesting an official transcript of a proceeding. Any party can request an audio file or transcript of any proceeding by visiting our website, https://www.almb.uscourts.gov/transcripts.

Local Rules Review

The Court is in the process of reviewing and substantially revising our local rules. The judges appointed a committee of stakeholders representing debtors, creditors, trustees, and the clerk's office to examine all of the rules and local forms the Court uses. The committee started its work in July and soon will be presenting its findings to the Court for review. The rules will then be available on our website for public comment before being submitted to the 11th Circuit Judicial Conference for final approval.

The members of the committee are:

Sabrina McKinney – Chair	Andrew Poston	Brian Suckman	Brian Walding
Danielle Greco	Leigh Carr	Marsha Mason	Paul Esco

Be on the lookout for the public comment period in early 2023. We look forward to your input.

Helpful Tips from the Clerk's Office

From the Case Administrators

- Please visit the court's website (https://www.almb.uscourts.gov/) for detailed instructions on how to file a motion to redact. Look under Attorneys Resources > Procedures for Attorneys > Procedure for Attorneys Filing Redactions. The fee must be paid before the motion can be processed.
- When you redact a document, don't use a sharpie; it doesn't always completely cover the information.
- When you file a Rule 9007 motion, be sure you use the Rule 9007 docketing event to ensure the 21-day deadline is set.
- When you file an amended 9007 motion, use the 9007 docket event, but be sure you remove the 9007 negative notice language from the amended document.
- When you file an amended petition, please remember to add in parenthesis what is changing or will need to be updated on the petition. This will help the case administrator make any changes needed on the bankruptcy case. Example: Amended Petition (amended the last 4 digits of the joint debtor's social security number).
- When you file a notice of appearance, please make sure the information listed on the notice matches what is entered into CM/ECF. This includes creditors' and attorneys' information (mailing address, phone number, email address, law office, etc.).
- When you file a new case, make sure the name on the income records matches one of the names listed for the debtor on the case.

From the Courtroom Deputies

- When you file a suggestion of death, be sure to attach a death certificate so the motion can be processed in a timely manner. Include in the motion if an order dismissing the deceased debtor is needed or if it is being filed for informational purposes only.
- When you file a motion to lift co-debtor stay, be sure the name of the co-debtor can be found within the body of the motion. In addition, be sure the co-debtor is served a copy of the motion and is listed on the certificate of service. Doing these things will eliminate the need for a submission error and will ensure the motion is scheduled for a hearing in a timely manner.