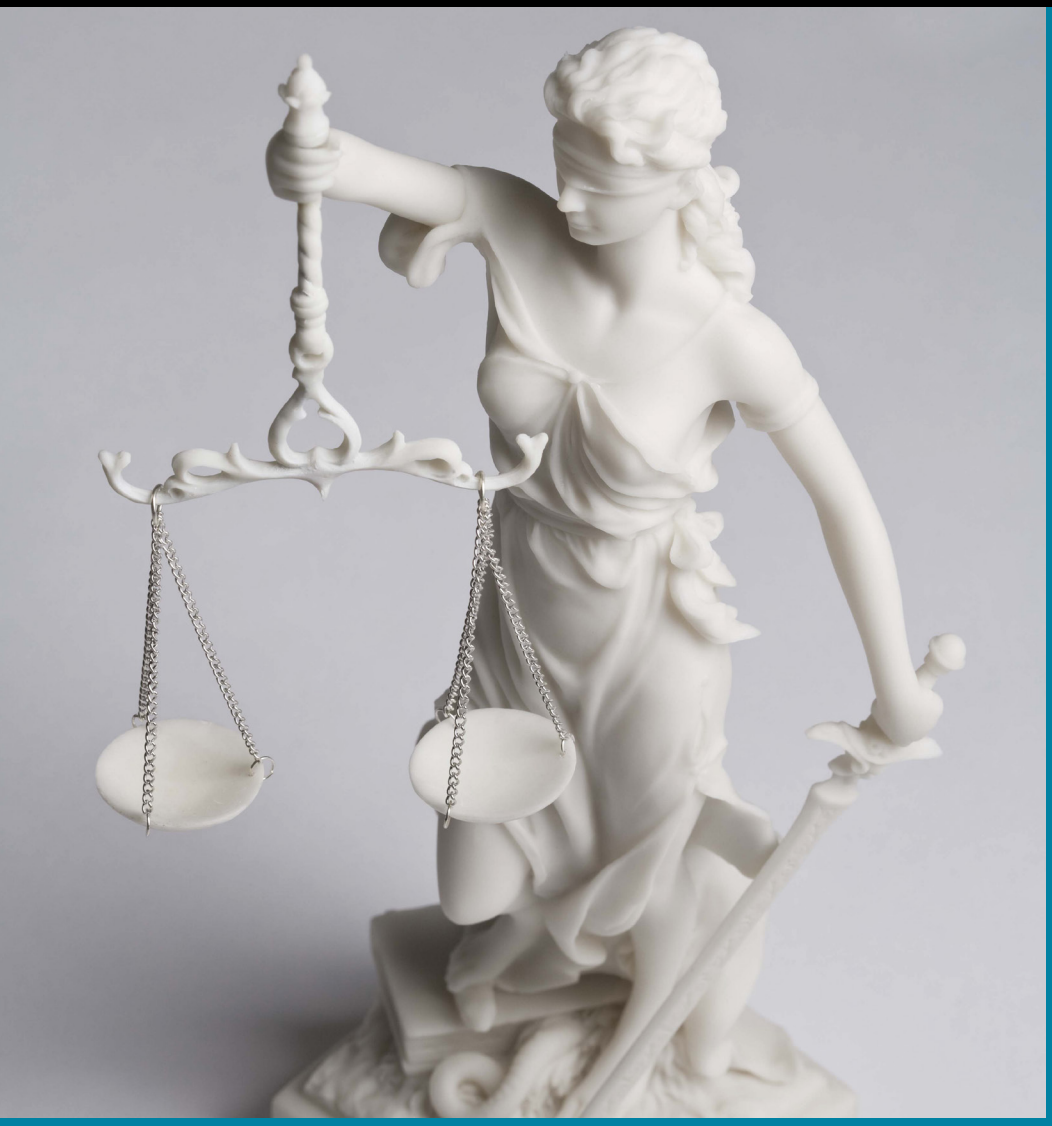
NEW YORK STATE BAR ASSOCIATION



WORKSHOP M.

Moving Towards Civil Gideon

2014 Legal Assistance Partnership Conference

Hosted by:
The New York State Bar Association
and The Committee on Legal Aid

NYSBA

NEW YORK STATE BAR ASSOCIATION
2014 PARTNERSHIP CONFERENCE

M. AVOID FORECLOSURES THROUGH CHAPTER 13 BANKRUPTCY PLANS

AGENDA

September 11, 2014
11:45 a.m. – 1:15 p.m.

1.5 Transitional CLE Credits in Professional Practice.
Under New York's MCLE rule, this program has been approved for all attorneys, including newly admitted.

Panelists:
Peter M. Frank, Esq., Senior Staff Attorney, Legal Services of the Hudson Valley
Kirsten E. Keefe, Esq., Senior Staff Attorney, Empire Justice Center
Hon. Robert E. Littlefield, Jr., Chief Judge, United States Bankruptcy Court, Northern District of New York (NDNY)
Mark H. Wattenberg, Esq., Attorney, Legal Assistance of Western New York, Inc.

I. Bankruptcy 101 **11:45 am – 11:50 am**

II. Categories of Consumer Bankruptcy **11:50 am – 12:10 pm**
a. Chapter 7
b. Chapter 13
c. Chapter 11

III. Avoiding Foreclosure Through Chapter 13 **12:10 pm – 12:15 pm**

IV. Loss Mitigation Procedures in Bankruptcy Court **12:15 pm – 12:40 pm**
a. Bankruptcy Code Limitations
b. HAMP rules
c. Standard Features of Bankruptcy Court Loss Mitigation Programs
d. Advantages of Combining Bankruptcy Relief with a Mortgage Modification Application
e. Bankruptcy Exemptions

V. Bankruptcy Practice **12:40 pm – 1:05 pm**
a. Bankruptcy Court Jurisdiction
b. 28 USC 1334
c. Claims

VI. Conclusion **1:05 pm – 1:15 pm**
a. Resources
b. Additional Questions

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Substantive Outline

M. AVOID FORECLOSURES THROUGH CHAPTER 13 BANKRUPTCY PLANS

OUTLINE

I. BANKRUPTCY 101

A. Bankruptcy Basics

1. Bankruptcy is a federal court process designed to help debtors obtain a "fresh start" by canceling or repaying their debts under the protection of the bankruptcy court. (Bankruptcy Code, 11 U.S.C. §§ 101-1532)

B. Why do people file for bankruptcy protection?

1. To stop creditor harassment and collection activities---for example, a bankruptcy stays collection agency's telephone calls, wage garnishments, as well as foreclosures and repossessions.
2. To obtain a "fresh start."
3. To address and deal with overwhelming debt incurred from various sources, including medical debt, credit card debt, debt incurred as a result of a loss of employment, a failed business, or a divorce.
4. To eliminate certain kinds of liens.
5. To reject leases or executory contracts.
6. To save homes by curing mortgage arrears over time through a Chapter 13 plan.

II. CATEGORIES OF CONSUMER BANKRUPTCY

A. Chapter 7 – "Liquidation" (11 U.S.C. §§ 701-784)

1. Chapter 7 contemplates an orderly, court-supervised procedure by which a Chapter 7 trustee may liquidate the assets of the debtor's estate and make distributions to creditors, subject to the debtor's right to retain certain exempt property and the rights of secured creditors. Because there is usually little or no nonexempt property in most Chapter 7 cases, there may not be an actual liquidation of the debtor's assets. These cases are called "no-asset cases." A creditor holding an unsecured claim will receive a distribution from the bankruptcy estate only if the case is an "asset case," and the creditor files a proof of claim with the bankruptcy court. In most chapter 7 cases, if the debtor is an individual, he or she receives a discharge that releases him or her from personal liability for dischargeable debts.[1]
2. Overview
    a. Typically lasts three to six months.
    b. Chapter 7 trustee conducts a meeting of creditors (11 U.S.C. §341) at which the debtor is questioned under oath about his financial affairs and property.
    c. **The debtor's nonexempt property may be sold by the Chapter 7 trustee to pay creditors**.
    d. Most or all of the debtor's unsecured debts will be discharged.

[1] Source: http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics.aspx

e. The debtor may exempt and retain certain property under either the Bankruptcy Code (11 U.S.C. § 522) or New York law (NY Debt. & Cred. Law §§ 282-283; NYCPLR §§ 5205-5206; NY Ins. Law § 3212).

i. Examples of exempt property include:

a) Equity in debtor's home – limited

b) Insurance – certain types

c) Retirement plans

d) Personal property such as household goods, wedding ring, appliances, clothing

e) Vehicle – limited

f) Public benefits, such as social security

g) Tools of debtor's trade – limited

f. Secured debt may be addressed through a reaffirmation agreement, (11 U.S.C. § 524), continued payments, surrender of collateral, or redemption--payment of a lump sum equal to the value of the collateral (11 U.S.C. § 722).

3. Eligibility requirements (11 U.S.C. §109)

a. If the debtor has sufficient income to repay some or all of his/her debts, Chapter 7 is not an option.

b. Under the 2005 Bankruptcy Abuse Prevention and Consumer Prevention Act (BAPCPA), when an individual's debts are primarily consumer debts, there are clear criteria that dictate who will be allowed to seek relief under Chapter 7 of the Bankruptcy Code---and who will be required to seek relief under Chapter 13. Certain exceptions apply if the debtor is a disabled veteran, on active duty, or performing homeland defense activity. (11 U.S.C. §707(b)(2)(D))

c. Eligibility is based on a mechanical test that measures a debtor's "current monthly income" against the median income for a family of the same size in a debtor's state. "Current monthly income" is the average income over the last six months before filing. If that income is less than or equal to the median, the debtor can file under Chapter 7. If the income is greater than the median, the debtor must pass the "Means Test" to qualify for relief under Chapter 7.

i. The Means Test (11 U.S.C. § 707(b))

a) Purpose - to determine whether a debtor has enough disposable income, after subtracting certain allowed expenses and required debt payments, to repay at least a portion of his/her unsecured debts over a five-year repayment period.

b) A debtor is not eligible for a Chapter 7 discharge if the debtor received a discharge of debts in a Chapter 7 case commenced within the last eight years, or in a Chapter 13 case commenced within the last six years. (11 U.S.C. § 727(a) (8), (9))

B. <u>Chapter 13 – "Reorganization" for Individuals (11 U.S.C. §§ 1301-1330)</u>

1. Chapter 13, entitled Adjustment of Debts of an Individual with Regular Income, is designed for an individual debtor who has a regular source of income. Chapter 13 is

often preferable to Chapter 7 because it enables the debtor to retain assets, such as a house, and it allows the debtor to propose a "plan" to repay creditors over time---usually three to five years. (11 U.S.C. §1322) Chapter 13 is also used by consumer debtors who do not qualify for Chapter 7 relief under the Means Test. At a confirmation hearing, the court either approves or disapproves the debtor's repayment plan, depending on whether it meets the Bankruptcy Code's requirements for confirmation. (11 U.S.C. §1325) Chapter 13 is very different from Chapter 7 since the Chapter 13 debtor usually remains in possession of the property of the estate and makes payments to creditors, through the trustee, based on the debtor's anticipated income over the life of the plan. Unlike Chapter 7, the debtor does not receive an immediate discharge of debts. The debtor must complete the payments required under the plan before the discharge is received. The debtor is protected from lawsuits, garnishments, and other creditor actions while the plan is in effect. The discharge is broader (i.e., more debts are eliminated) under Chapter 13 (11 U.S.C. §1328) than the discharge under Chapter 7 (11 U.S.C. § 727). [2]

2. Overview
    a. Lasts three to five years.
    b. Chapter 13 trustee conducts a meeting of creditors (11 U.S.C. §341) at which the debtor is questioned under oath about his financial affairs and property.
    c. Debtor files a repayment plan with the bankruptcy court to pay back all or a portion of his/her debts over time. Some debts are paid in full; others may be repaid only partially or not at all, depending on debtor's disposable income.
    d. The amount repaid depends on how much a debtor earns, the amount and types of debt owed, and the value of the debtor's assets.
    e. In most cases, the debtor may retain nonexempt property because a debtor will fund a Chapter 13 plan that will pay unsecured creditors what they would have received if the debtor had filed for relief under Chapter 7.
    f. In a Chapter 13 case, unlike a Chapter 7, a debtor may have to pay back some portion of his/her unsecured debts. However, any balance of any unsecured debts that remains once the debtor's Chapter 13 plan is complete will be discharged.
    g. Drawbacks of Chapter 13 include the risk that the debtor will not complete the Chapter 13 a plan, thereby losing the benefit of a discharge.
3. Eligibility Requirements (11 U.S.C. § 109)
    a. The debtor must be an individual with regular income (a business entity cannot file a Chapter 13). An individual business-related owner, however, may file Chapter 13 and include business-related debt.
    b. The debtor must have sufficient disposable income to fund a three to five year bankruptcy plan.
4. The Plan and Confirmation Process (11 U.S.C. §§ 1321-1327)

[2] Source: http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics.aspx

a. Debtor must file a repayment plan for court approval. The plan must provide for payments of fixed amounts to the trustee on a regular basis, typically biweekly or monthly. The trustee then distributes the funds to creditors according to the terms of the plan.

b. Claims are proposed to be paid through the plan.

i. Three types of claims:

a) Priority – claims given special status under the Bankruptcy Code (11 U.S.C. §507), including most taxes, domestic support obligations, some wages, and the costs of the bankruptcy proceeding.

1) Must be paid in full unless otherwise agreed.

b) Secured – claims for which the creditor holds a lien against property of the debtor that the creditor has the right to take possession of if the debtor does not pay the underlying debt.

1) Must be paid the value of the collateral or the full claim if debt was incurred within a certain period prior to the filing (e.g., car).

2) Arrears may be paid through the plan with regular ongoing payments being made directly to the creditor.

c) Unsecured – claims for which the creditor has no rights to collect against particular property owned by the debtor.

1) The plan need not pay unsecured claims in full as long the plan provides that the debtor will pay all projected "disposable income" over an "applicable commitment period," and as long as unsecured creditors receive at least as much under the plan as they would have received if the debtor filed a Chapter 7 case ("Liquidation Test").

ii. Applicable commitment period

a) Depends on the debtor's current monthly income.

1) The applicable commitment period must be three years if the debtor's current monthly income is less than the state median income for a family of the same size, and five years if the current monthly income is greater than the state median income of a family of the same size.

2) Plan may be less than the applicable commitment period (three or five years) only if unsecured debt is paid in full over a shorter period.

iii. Debtor begins to make plan payments to the trustee within 30 days after filing the bankruptcy case.

iv. The confirmation hearing must be held no later than 45 days after the meeting of creditors.

a) At the confirmation hearing, the bankruptcy court determines whether the plan is feasible and meets the standards for confirmation set forth in the Bankruptcy Code. Creditors receive notification of the confirmation hearing and may object.

b) If the court confirms the plan, the Chapter 13 trustee will distribute funds received under the plan.

c) The provisions of a confirmed plan bind the debtor and each creditor.

1) A plan may be modified post-confirmation on notice to creditors if there is a change in circumstances during the plan term which would qualify the plan for modification. (11 U.S.C. §1329)

d) A debtor is entitled to a discharge once the plan is successfully completed. (*See* Discharge, below)

5. Reasons for filing Chapter 13

a. Depending upon the filer's situation, Chapter 13, as opposed to Chapter 7, might be a wiser choice. For example, in Chapter 13, a debtor may make up missed mortgage payments over time by paying them through a Chapter 13 plan. In Chapter 7, the missed payments must be cured immediately.

b. Debtor cannot file a Chapter 7 because:

i. Debtor's current monthly income over the six months prior to the filing date is more than the median income for a household of debtor's size in debtor's state as determined by certain guidelines established by the government.

ii. Debtor's disposable income, after subtracting certain expenses and monthly payments for debts debtor would have to repay in Chapter 13, exceeds certain limits set by law, i.e. the "Means Test." (*See* Means Test, above).

c. Debtor is behind on mortgage or car loan payments.

i. Chapter 13 permits a debtor to make up the missed payments over time and reinstate the original agreement. This cannot be done in Chapter 7 bankruptcy. Missed payments can only be made up in a Chapter 13 case.

d. Debtor has a tax obligation, student loan, or other debt that cannot be discharged in Chapter 7. These debts can be repaid through a Chapter 13 plan over time.

e. Debtor has nonexempt property that debtor wishes to retain.

i. In a Chapter 7 bankruptcy, debtors may retain only exempt property (property that is protected from creditors under state or federal law). In a Chapter 7, debtors must turn over nonexempt property to the bankruptcy trustee, who can sell it and distribute the proceeds to debtor's creditors.

f. If there is a codebtor on a personal debt, Chapter 13 provides an option whereby a debtor may protect the codebtor from the reach of creditors by paying the debt in full through a Chapter 13 plan.

i. In a Chapter 7 bankruptcy, the codebtor will still be liable, and the creditor will likely pursue the codebtor for payment.

g. A wholly unsecured mortgage may be avoided in a chapter 13 case. *In re Pond*, 252 F.3d 122 (2d Cir. 2001).

C. Chapter 11 – "Reorganization" (11 U.S.C. §§ 1101–1174)

1. Chapter 11 is typically used to reorganize a business, which may be a corporation, sole proprietorship, or partnership. A corporation exists separate and apart from its owners, the stockholders. Thus, the Chapter 11 bankruptcy case of a corporation (corporation as debtor) does not put the personal assets of the stockholders at risk other than the value of their investment in the company's stock. A sole proprietorship (owner as debtor), on the other hand, does not have an identity separate and distinct from its owner. Accordingly, a bankruptcy case involving a sole proprietorship includes both the business and personal assets of the owners-debtors. Like a corporation, a partnership exists separate and apart from its partners. In a partnership bankruptcy case (partnership as debtor), however, the partners' personal assets may, in some cases, be used to pay creditors in the bankruptcy case or the partners, themselves, may be forced to file for bankruptcy protection.[3]

2. Overview

a. Debtor-in-Possession (11 U.S.C. § 1107)

i. Generally, upon the filing of a voluntary petition, the debtor assumes the role of debtor-in-possession. The debtor-in-possession will continue to operate its business and keep control and possession of its assets while undergoing a reorganization.

b. Appointment of a Trustee (11 U.S.C. § 1104)

i. In a small number of cases, the appointment of a trustee occurs.

c. Disclosure Statement and Plan (11 U.S.C. §§ 1121-1129)

i. A written disclosure statement and plan are filed with the court. The disclosure statement must contain information about the assets, liabilities, and business affairs of the debtor so that creditors can make an informed decision about the debtor's plan of reorganization. The plan must include a classification of creditors and disclose how each class will be treated. Creditors whose claims are "impaired" (rights are to be modified) vote on the plan by ballot. After the court approves the disclosure statement and ballots are counted, the court conducts a confirmation hearing to determine whether the plan should be confirmed.

d. Confirmation (11 U.S.C. §§ 1141-1143)

[3]Source: http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics.aspx

i. Once a plan is confirmed, the debtor is required to make payments as set forth in the plan and is bound by the provisions of the plan. The confirmed plan creates new contractual rights that replace and supersede pre-bankruptcy contracts between the debtor and its creditors.

D. <u>The Automatic Stay (11 U.S.C. § 362)</u>

1. When a bankruptcy is filed, an "automatic stay" goes into effect. This stay prohibits most creditors from taking any action to collect the debts owed to them unless the bankruptcy court grants specific permission to do so, or there's an exception.

a. Partial Thirty-Day Stay

i. If a Chapter 7, 12 or 13 case is filed by an individual debtor and if the debtor had a case pending within the preceding 1-year period that was dismissed, the stay is only in place with respect to any action taken with respect to a debt or property securing such debt for 30 days after the filing, unless extended by the court upon motion on notice. (11 U.S.C. §362(c)(3))

b. No Stay

i. If a case is filed by an individual debtor under the Bankruptcy Code and if the debtor had two or more cases pending within the preceding 1-year period that were dismissed, there is no stay unless on request of a party in interest made within 30 days of the filing of the later case, the court orders the stay to take effect. (11 U.S.C. §362(c)(4))

E. <u>Discharge (11 U.S.C. §§ 727, 1141, 1228, 1328)</u>

1. A discharge releases the debtor from personal liability for certain specified types of debts. The discharge is a permanent order prohibiting the creditors of the debtor from taking any form of collection action on discharged debts, including, legal action and communications with the debtor, such as telephone calls, letters, and personal contact.

2. Valid liens that have not been avoided or made unenforceable in the bankruptcy case will remain after the bankruptcy case. Accordingly, a secured creditor may enforce its lien to recover the property secured by the lien, however, the discharge covers the debtor's personal liability.

3. In an individual Chapter 7 case the discharge occurs approximately four months after the date the debtor files the petition. In a Chapter 13 case, the court generally grants the discharge as soon as practicable after the debtor completes all payments under the plan, typically three to five years.

4. The court may deny an individual debtor's discharge in a Chapter 7 or 13 case if the debtor fails to complete "an instructional course concerning financial management."

a. The Bankruptcy Code provides limited exceptions to the "financial management" requirement if the U.S. trustee or bankruptcy administrator determines there are inadequate educational programs available, or if the debtor is disabled or incapacitated or on active military duty in a combat zone.

5. A discharge is usually automatic unless there is an adversary proceeding pending objecting to the debtor's discharge (11 U.S.C. §727). A copy of the order of discharge is provided to all creditors, the U.S. trustee, and the case trustee.

6. Not all debts are discharged in bankruptcy (11 U.S.C. § 523)

a. Certain debts cannot be discharged in bankruptcy, such as student loans, alimony, maintenance or support, and certain tax obligations.

b. Other debts may be found nondischargeable by the court, however, a creditor must commence a timely adversary proceeding objecting to the dischargeability of its debt.

c. A slightly broader discharge of debts is available to a debtor in a Chapter 13 case than in a Chapter 7 case. Debts dischargeable in a Chapter 13, but not in Chapter 7, include debts for willful and malicious injury to property, debts incurred to pay non-dischargeable tax obligations, and debts arising from property settlements in divorce or separation proceedings.

III. AVOIDING FORECLOSURE THROUGH CHAPTER 13

A. Introduction

1. Homeowners facing foreclosure and seeking bankruptcy relief now have more options to also seek a modification of their mortgage. This is due to the adoption by most of the Bankruptcy Courts in New York State of loss mitigation procedures.

2. Combining a mortgage modification with bankruptcy relief may offer many advantages to a homeowner seeking to avoid foreclosure. Bankruptcy offers comprehensive financial relief. Upon filing, the debtor is protected by the automatic stay, which immediately halts collection activity, until further rulings of the bankruptcy court. Bankruptcy is also a means to cancel judgments against the homeowner. Chapter 13 offers the possibility of reducing used car loan payments and also cancelling wholly unsecured second mortgages. Finally, bankruptcy may be a vehicle for challenging excessive foreclosure fees and raising consumer defenses.

B. Chapter 7

1. As described in "Bankruptcy 101", there are two categories of consumer bankruptcy. The most familiar is a Chapter 7 "straight" bankruptcy. This involves cancellation of most consumer debts. Non-exempt property of significant value is ordinarily turned over to the Chapter 7 trustee for distribution to creditors. The debtor's mortgage is typically reaffirmed, either expressly or implicitly, or the debtor abandons the home and get off to a fresh financial start. The duration of Chapter 7 is about four months. (Should a Chapter 7 debtor reaffirm the mortgage? *See* discussion in *Appendix A*)

C. Traditional Chapter 13 Plans

1. As also described in "Bankruptcy 101," a Chapter 13 plan lasts three to five years. In a traditional Chapter 13 plan, the mortgage is not modified. If the debtor is behind in the mortgage, the traditional Chapter 13 plan provides for paying off the mortgage arrears, in regular monthly installments, during the three to five-year period. Within a

month of filing the Chapter 13, the debtor resumes on-going monthly mortgage payments.

2. Thus a traditional Chapter 13 is well suited to a homeowner with a regular source of income who is not too far behind in the mortgage. If the debtor is employed, a wage order provides for regular payments to the Chapter 13 Trustee who makes the monthly payment of arrears to the mortgage servicer. The debtor makes the on-going mortgage payments directly.

3. The Chapter 13 plan also pays a percentage of the amount due to unsecured creditors, such as credit card companies and medical bill creditors. (This may be as low as 5% – 10% for lower income debtors.) The Chapter 13 plan may include used car loan payments for loans over 910 days old, which are typically paid at a reduced rate. The wage order also funds payment by the Chapter 13 Trustee of these debts. (A sample traditional Chapter 13 Plan is attached as *Appendix B*)

IV. THE NEW BANKRUPTCY COURT LOSS MITIGATION PROCEDURES

A. Overview

1. This traditional approach to Chapter 13 plans has changed in the era of mortgage modification programs. Under the terms of most federally-related mortgage modification programs (e.g. HAMP), a debtor in both Chapter 7 and Chapter 13 can seek a mortgage modification. This process of simultaneously filing a bankruptcy proceeding and seeking a mortgage modification is handled with a new set of rules in the bankruptcy courts for the Northern District and Southern District of New York. In the Eastern District of New York, many of the U.S. Bankruptcy Court judges have adopted similar rules. The Bankruptcy Court of the Western District of New York is currently reviewing the adoption of special loss mitigation rules.

    a. The new procedures in the Northern District of New York will be the subject of the presentation of the Hon. Robert E. Littlefield, Jr, Chief Judge of the U.S. Bankruptcy Court of the North District of New York. Peter Frank, Esq., an experienced bankruptcy litigator who practices in the Southern District of New York, will discuss loss mitigation procedures there as well as the filing of adversary proceedings to challenge mortgage terms or claims

B. Bankruptcy Code Limitations on the Modification of Mortgages

1. Under most circumstances, the Bankruptcy Code prohibits the Bankruptcy Court from directly ordering a lender to modify the terms of a mortgage of the debtor's home. The statutory limitation is contained in a section describing the scope of a Chapter 13 Plan:

    a. [The Chapter 13 Plan may]: "modify the rights of holders of secured claims, **other than a claim secured only by a security interest in real property that is the debtor's principal residence,** or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims" 11 USC §1322(b)(2)

2. This means a bankruptcy judge faces some of the same limitations as a state court judge. The bankruptcy court can oversee a process for the debtor to seek a modification

of the mortgage. However, the bankruptcy court cannot order a mortgage to be modified, other than mortgages that fall within narrow exceptions, such as mobile homes and multi-family homes. (Exceptions discussed in *Appendix C*)

C. <u>Under HAMP, Mortgage Servicers Must Process Modification Applications for Debtors in Bankruptcy</u>

1. HAMP rules require servicers to consider modification requests of debtors in bankruptcy:

a. Non-GSE Mortgages

i. Additional Factors Impacting HAMP Eligibility

a) "Borrowers in active Chapter 7 or Chapter 13 bankruptcy cases are eligible for HAMP at the servicer's discretion in accordance with investor guidelines, but servicers are not required to solicit these borrowers proactively for HAMP. Notwithstanding the foregoing, such borrowers must be considered for HAMP if the borrower, borrower's counsel or bankruptcy trustee submits a request to the servicer. . . ."

Making Home Affordable Program Handbook for Servicers of Non-GSE Mortgages, (3/3/14), Vol. 4.4, Chapter II, Section 1.2, p. 79

ii. Borrowers in Active Bankruptcy-Substitution of Evaluation Documents

a) "When a borrower is in an active Chapter 7 or Chapter 13 bankruptcy, the servicer may accept copies of the bankruptcy schedules and tax returns (if returns are required to be filed) in lieu of the RMA and, if applicable, Form 4506T-EZ, and may use this information to determine borrower eligibility (with the income documentation)". *Ibid*., Section 5.2, p. 106

iii. Borrower in Bankruptcy—Waiver of Trial Period Plan

a) "When a borrower in an active Chapter 13 bankruptcy is in a trial period plan and the borrower has made post-petition payments on the first lien mortgage in the amount required by the TPP, a servicer must not object to confirmation of a borrower's Chapter 13 plan, move for relief from the automatic bankruptcy stay, or move for dismissal of the Chapter 13 case on the basis that the borrower paid only the amounts due under the trial period plan, as opposed to the non-modified mortgage payments." *Ibid*., Section 8.6, p. 128

b. GSE and Federal Agency-Insured Mortgages

i. Similar provisions apply to FHA-HAMP - *see* HUD Mortgagee Letter 2008-32, "Use of FHA Loss Mitigation During Bankruptcy," (10/17/08); Fannie Mae mortgages - *see* 2012 Fannie Mae Single Family

Servicing Guide (3/14/12), pp. 705-22-24; and Freddie Mac mortgages, *see* Freddie Mac Servicing Guide (4/15/13), § C65.7.1.

ii. Typical is the following Fannie Mae directive:

a) The particular foreclosure prevention alternative to be utilized in a given bankruptcy case will depend upon, among other things, the type of bankruptcy case, the stage of the bankruptcy case, local practices and procedures, and the particular circumstances of the borrower and the property.

b) A servicer's bankruptcy monitoring process must include procedures for identifying foreclosure prevention opportunities, and the servicer and the bankruptcy attorney must work together to pursue these opportunities during all phases of the bankruptcy process.

Fannie Mae 2012 Single Family Servicing Guide, (3/14/12) - pp. 705-22-23;

iii. (Selected bankruptcy guidelines for servicers are set forth in *Appendix D*)

D. <u>Standard Features of Bankruptcy Court Loss Mitigation Programs</u>

1. Standard features of Bankruptcy Loss Mitigation Programs include the entry of a scheduling order for exchanging information and documents, and provision for status conferences between the parties and settlement conferences with the Court. The parties are required to negotiate in good faith.

2. Before the adoption by the Bankruptcy Courts of loss mitigation procedures, a servicer who objected to a Chapter 13 Plan would routinely make a motion before the Bankruptcy Court for permission to continue the foreclosure process. This is called a motion to lift the automatic stay, or for short, a "lift stay" motion.

3. During the loss mitigation process, the mortgage servicer may not make a motion to lift the automatic stay. This key provision provides the homeowner in bankruptcy sufficient time to work through the modification process.

4. The authority of bankruptcy judges to issue loss mitigation procedures was upheld in In *re Sosa*, 443 B.R. 263, 267 (Bankr. D.R.I. 2011). Supportive articles have also been written by John Rao, Bankruptcy Courts Respond to Foreclosure Crisis with Loss Mitigation Programs, 30-MAR Am. Bankr. Inst. J, March 2011, p. 14; and Hon. Cecelia G. Morris, U.S. Bankruptcy Judge, Loss Mitigation Program Procedures for the U.S. Bk Court, SDNY, 19 Am.Bankr. Ins. L. Rev. 1, 4 (2011).

5. The loss mitigation programs in the Bankruptcy Courts of the Northern, Southern, and Eastern Districts, are available on the respective websites of these courts. The implementing orders and procedures are as follows:

a. On June, 21, 2013, the Hon. Robert E. Littlefiled, Jr., Chief Judge of the Bankruptcy Court for the Northern District of New York, signed Administrative Order # 13-05, establishing a Loss Mitigation Program. (*Appendix E*)

b. On August 1, 2013, a revised loss mitigation program in Bankruptcy Court in the Southern District of New York was implemented by Local Rule 9019-2, August 1, 2013, "Loss Mitigation for Individual Debtors with Residential Real Property at Risk of Foreclosure." (*Appendix F*)

c. On September 9, 2011, a loss mitigation program in Bankruptcy Court in the Eastern District of New York was adopted by four Bankruptcy Judges by General Order # 582. (*Appendix G*)

E. <u>Advantages of Combining Bankruptcy Relief with a Mortgage Modification Application</u>

1. Bankruptcy may provide comprehensive relief to homeowners in financial distress, who are also seeking a mortgage modification. This relief may include removal of garnishments, stopping court proceedings to collect on debts, and stopping creditor harassment. 11 USC § 362(a).

2. Several special areas of relief include the following:

a. Used car loans

i. Used car loans obtained at least 910 days before filing (approximately 2 ½ years) may be "crammed down" pursuant to 11 U.S.C. § 1325(a)(5)(B)(ii) and 11 USC 1325(a)(9). This means the used car loan can be bifurcated into two parts: (1) a secured claim consisting of the value of the vehicle – to be paid at 100% but with an interest rate consisting of the prime rate plus a risk factor, *Till v. SCS Credit Corp.*, 541 U.S. 465, 124 S.Ct. 1951, 158 L.Ed.2d 787 (2004) and (2) an unsecured claim paid at the approved Chapter 13 rate for unsecured claims, often 5 – 10% for low income debtors.

ii. For example, assume a loan at 25% interest rate for a 2005 Ford and that as the date of filing the Chapter 13, the Ford is worth $10,000 and $15,000 is due on the loan. Assume the loan is at least 910 days as of the date of filing. The finance company's claim based on the loan can be bifurcated. The $10,000 value of the Ford is placed in the "secured claim" pot, which will be paid off over 5 years, at a *Till* interest rate of prime, plus a risk factor – often this interest rate is less than 5%. The balance of $5,000 goes into the unsecured pot, of which only 10% will be paid, if that is the rate for unsecured claims approved for the Chapter 13 Plan. The result is a reduction in monthly payments.

b. Wholly unsecured second mortgages

i. Under In *re Pond*, 252 F.3d 122 (2d Cir. 2001), if a second mortgage is unsecured in the sense that the first mortgage exceeds the value of the property, the second mortgage may be classified as an "unsecured" claim, and paid off at the Chapter 13 unsecured rate.

ii. For example, assume a home valued at $50,000 and a first mortgage for which $60,000 is due and a second mortgage for $25,000. Since the first mortgage leaves the homeowner without any equity, the second

mortgage can be classified as unsecured. In bankruptcy parlance, the second mortgage is "stripped off."

iii. The analysis is that the statutory prohibition against modification does not apply to a holder of a wholly unsecured lien under 11 U.S.C. § 506, because such a lien is not "secured" by a residential property within the meaning of 11 U.S.C. § 1322(b)(2). *In re Pond*, *supra*, at 124. This is an all or nothing proposition. If the first mortgage claim leaves even a dollar of equity in the home, the second mortgage is classified as secured.

c. Cancellation of judgment liens

i. A common problem facing homeowners in financial distress seeking a mortgage modification is a demand by the bank the judgment liens be "subordinated" as a condition for mortgage modification. In a Chapter 7 or Chapter 13 bankruptcy proceeding, judgment liens can be cancelled by a motion under 11 USC § 522(f)(1)(A) The affidavit in support of the motion lists the value of the home and alleges that such liens impair the homestead exemption and therefore may be cancelled.

F. <u>Bankruptcy Exemptions</u>

1. A popular myth about the bankruptcy is the debtor loses everything. In fact, bankruptcy exemptions protect most of the assets of low income debtors.

2. Debtors have a choice of either federal exemptions, 11 USC § 522, or New York State exemptions, CPLR §§5205, 5206, Debtor and Creditor Law §§ 282 and 283.

3. In deciding whether bankruptcy is a good alternative for a homeowner in foreclosure knowledge of exemptions is essential. In a Chapter 7 proceeding, if property does not qualify for an exemption, it may have to be turned over the Chapter 7 trustee. In Chapter 13, non-exempt property may result in additional payments to creditors through the Chapter 13 Plan, as the debtor must pay the value of such property over the course of the Plan.

4. Both federal and state exemptions protect basic household goods. Both exempt about $4,000 in the equity of a car. 11 USC § 522(d)(2) and CPLR § 5205(a)(8) However, they differ significantly as to the debtor's home. The federal exemption for a home is only $22,975, 11 USC § 522(d)(1). The New York exemption is $75,000 (western and central New York) and rising to $125,000 (upstate) and $150,000 (downstate), according to the specific county. CPLR § 5206(a). (The exemptions double if the property is jointly held.)

5. Debtors who claim federal exemptions and have a limited equity in their homes may qualify for a "wildcard" exemption of up to $12,725 of any unused homestead exemption. 11 USC § 522(d)(5) By contrast, the CPLR has no wildcard exemption for debtors claiming the homestead exemption. This leaves such debtors to face claims by the Chapter 7 trustee, on behalf of the creditors, against income tax refunds and bank accounts.

a. A chart comparing federal and state exemptions is attached as *Appendix H*

G. Sources of Bankruptcy Law

1. Bankruptcies are governed by a federal statute, the "Bankruptcy Code." 11 USC §§101-1532. The Bankruptcy Code is implemented by the Federal Rules of Bankruptcy Procedure, Fed. R. Bankr. P. 1001-9037. These rules are supplemented by local bankruptcy rules issued by the Bankruptcy Courts in each of the federal court districts. In addition to local rules, Bankruptcy Courts typically issue general procedural orders which affect local practice.

2. Decisions by U.S. Bankruptcy Courts are collected in the Bankruptcy Reporter, available on Westlaw. The websites for each of the bankruptcy court federal districts, also list decisions by each of the bankruptcy judges. Decision can be appealed to the U.S. District Court, 28 USC §158(a) and to the Federal Courts of Appeals. 28 USC §158(d)(1).

3. The National Consumer Law Center publishes an essential two-volume manual on bankruptcy practice, Henry Somer and John Rao, Consumer Bankruptcy Law and Practice.

H. Bankruptcy 101

1. In legal services offices, there is an urgent need for more attorneys to specialize in bankruptcy. At the very least, legal services attorneys practicing in the foreclosure area should have a basic knowledge of bankruptcy practice.

V. BANKRUPTCY PRACTICE

A. Bankruptcy Court Jurisdiction:

1. Bankruptcy reform acts of 1978, 1984 and 2005:
    a. Expanded jurisdiction:
        i. Property damage claims
        ii. Unfair trade practices
        iii. TILA
        iv. Recision actions
    b. Advantages of Bankruptcy Court litigation:
        i. Judges more sympathetic to debtors: Judges see debtor problems all the time and are more familiar with unfair debtor practices. They are more familiar with commercial and consumer law than State Court Judges.
        ii. Federal Rules and better discovery
        iii. Automatic Stay under 11 USC 362(a).
        iv. Nationwide Service of Process: No "long arm" problems. Service by First Class Mail.
        v. Electronic filing: Check "Related Matters" on Docket for litigations and Claim objections

B. 28 USC 1334: US Federal District Court has:

1. Original and exclusive jurisdiction over all Title 11 (Bankruptcy Code) cases;
    a. Original but not exclusive jurisdiction over proceedings arising in or "related to" cases under Title 11; and

b. Exclusive jurisdiction over all property of the bankruptcy case estate.

2. "Related to cases under Title 11":

a. "whether the outcome of the proceeding could conceivably have any effect on the administration of the bankruptcy case." *Pacor v. Higgins*, 743 F2d 984 (3rd Cir 1984).

3. US Bankruptcy Court is a "unit" of the Federal District Court. 28 USC 151. Bankruptcy Judge is similar to a Magistrate Judge.

4. US Federal District can retain jurisdiction or transfer to the bankruptcy court; There is no assurance that once a bankruptcy case is in the Bankruptcy Court that it will stay there, although in practice, once transferred or assigned, unlikely to be transferred back.

C. <u>The Bankruptcy Case:</u>

1. Filed in Bankruptcy Court where debtor resides, has property or a business, or in another court, for the "convenience of the parties". 28 USC 1412.

2. Bankruptcy Court may make all orders necessary for relief under Chapters 7, 9, 11, 12 and 13.

3. A "proceeding" is a litigated controversy in connection with the bankruptcy case, either a **"contested matter"** governed by Bankruptcy Rule 9014 or an **"adversary proceeding"** under Bankruptcy Rules 7001-7087.

4. An **"adversary proceeding"** is a law suit within the bankruptcy case and is governed by the Federal Rules of Civil Procedure ("FRCP").

a. commenced by filing a **complaint**

b. BR 7001 specifies types of proceedings that must be brought as "adversary proceedings"

c. complaint must state whether it is a "core" or "non-core" proceeding.

5. A "**contested matter"** is treated as a motion under BR 9014.

6. "Core" vs. "Non-core" proceedings:

a. A Bankruptcy Judge may enter judgments and orders in any core proceeding under 28 USC 157(b) (2). Generally, a "core" proceeding is any action relating to the administration of the bankruptcy estate, any proceeding asserting a right created by the Bankruptcy Code or which could only arise in bankruptcy, including, but not limited to:

i. allowance or disallowance of claims
ii. counterclaims
iii. orders respecting credit
iv. property turnover orders
v. preferences
vi. automatic stay
vii. fraudulent conveyances
viii. dischargeability of debts
ix. determination of debts and validity of liens
x. confirmation of plans
xi. orders regarding use and or lease of property and cash collateral.

b. "Non-core". "related" proceedings: Bankruptcy Court may only issue Findings of Fact and Conclusions of Law for the US District Court unless the parties consent to the Bankruptcy Court's jurisdiction.

c. "*Rooker-Feldman*" doctrine [400 US 462 (1983)]:

i. Federal courts lack jurisdiction to consider issues that are "inextricably intertwined" with a state court decision. Issues previously decided in State Court cannot be retried in Bankruptcy Court. Counsel may try to show the Bankruptcy Court that the issues before it are different than those in State Court.

ii. The mere fact that a proceeding involves an issue of state law does not make it a non-core proceeding. Bankruptcy Courts regularly consider State law issues.

iii. Abstention and the *Pullman* doctrine: If a decision of an unclear State law question is clearly important to the debtor's successful bankruptcy case, the District Court may take the case if it is important to the debtor's successful bankruptcy case. 28 USC 1334(3)(1).

d. If the proceeding is based on state or federal non bankruptcy law, if it is brought as a counterclaim or otherwise against a creditor of the debtor, the proceeding is a "core" proceeding. 28 USC 157(b)(2)(c). If not, such as brought against a non creditor third party, it is generally a "non core" proceeding.

7. Equitable Relief:

a. 28 USC 105 generally gives the Bankruptcy Court power to issue orders, process and judgments "necessary and appropriate" to carry out the Bankruptcy Code. Recently, this power and authority has been used by Bankruptcy Judges to call secured creditors to Court to justify fees and other charges sought in 'lift stay' motions.

8. Personal Injury and Wrongful Death Claims can only be tried in the US District Court.

9. Jury Trials are permissible: 7th Amendment

10. "Sovereign Immunity": Because bankruptcy proceedings are in rem proceedings, the bankruptcy case is not a suit against the state and the discharge of a debt to the state is not barred by the Eleventh Amendment. 541 US 440 (2004).

11. Contempt Proceedings: Bankruptcy courts have civil but not criminal contempt powers. *See* BR 9014.

12. Bars to litigation based on expiration of the Statute of Limitations;

a. In *re Coxson*, 43 F3d 189 (5th Cir 1995): A TILA claim can be raised defensively by way of an adversary proceeding objecting to a proof of claim in a chapter 13 case even though the statute of limitations has passed.

b. Recission by recoupment not allowed except when consistent with State law in a foreclosure case. *Beach v. Ocwen Fed Sav Bank*, 523 US 410 (1998).

13. Avoiding Mandatory Arbitration: As to "core" proceedings, a Bankruptcy Judge may refuse to enforce an arbitration agreement and may stay the arbitration pending the

outcome of the bankruptcy case. In *re US Lines Inc.*, 197 F3rd631 (2nd Cir 1999). In *re First Alliance Mortgage Co.*, 280 BR 246 (CD Cal 2002), the Court stayed the arbitration because the arbitration of TILA and UDAP claims against debtor mortgage lender would deplete estate assets and negatively impact creditors.

14. Legal Claims and Potential Causes of Action against Third Parties:

a. They are property of the debtor and must be scheduled as assets of the debtor's bankruptcy estate and listed on the appropriate schedule to the petition. 11 USC 541(a) (1).

b. Failure to list claim may result in the debtor being deprived of standing to pursue the claim or may be judicially estopped from pursuing the claim after bankruptcy. Likewise, all claims that are disputed must be objected to in the bankruptcy case or the debtor will be precluded from asserting the claim after the bankruptcy case.

c. Judicial estoppel may not be applied in cases of mistake or inadvertance or no 'bad faith'. *Browning v. Levy*, 283 F3d 761 (6th 2002); *Eubanks v. CBSK Fin Group Inc.*, 385 F3d 761 (6th Cir 2004).

d. In a Chapter 7 case the claim may be administered by the Chapter 7 Trustee. Trustee can abandon the claim at the request of the debtor or a third party upon notice and hearing or when the case is closed. If the debtor wants to pursue the claim, it must be brought in the debtor's and the trustee's name.

e. In a Chapter 13 case, the debtor has the right to control the litigation because the debtor remains in control of his property in this chapter. 11 USC 1303.

D. <u>Claims; Objecting to Claims:</u>

Brought on by motion with supporting affidavit or affirmation and filed and served on creditor.

1. <u>Removal</u> of case pending in another court. 28 USC 1452. The US District Court has removal jurisdiction from any other district court or state to the bankruptcy court in which the proceeding is pending. But not tax cases or criminal cases.

a. Rule 9027 provides procedure: Notice must be filed with clerk of the bankruptcy court for the district in which the action is pending. Must state "core" or "non core" status.

b. Must be filed within 90 days of filing bankruptcy case.

2. <u>Litigating Claims</u>: No notice to the Debtor is required for the filing of claims in a bankruptcy case. You must check the Claims Docket to find out what claims have been filed.

a. Objection to Claim in Chapter 13 cases: 11 USC 502

i. failure of the claim to be timely filed

ii. failure of the claim to comply with the Rules. BR 3001

a) In *re Sims*, 278 BR 457 (ED Tenn 2002) overpayment and inflated claims

b) In *re Chain*, 255 BR 278 (D Conn 2000) failure to attach documents

iii. disputed claim

iv. Debtor may file a claim if the creditor does not file the claim in order for the Debtor to protect himself by bringing the matter before the Court. Creditor may not file the claim if Debtor has defenses, offsets or counterclaims. Must be filed before the claim deadline expires. BR 3004. Alternatively, Debtor may seek declaratory judgment regarding a claim.

b. Failure to file by "bar date": "Bar date" is generally ninety (90) days from the date first set for the 341 Creditors Meeting. BR 3002(c); but 180 days for governmental units after initial order entered (filing date). 11 USC 502(b)(9).

c. Claims Not Enforceable Against the Debtor: 11 USC 502(b)(1). The Debtor may assert as an objection to a claim any defenses or set offs the debtor may have with respect to that claim.

d. If the objections relate to matters such as the extent or validity of a lien, they must be filed by way of complaint. BR 3007. All other objections are "contested matters". BR 9014.

e. Burden of Proof: A properly filed proof of claim is considered prima facie valid. However, once some evidence is produced in support of an objection, the burden of proof is on the creditor to substantiate its claim. (Exception are tax claims where the burden in on the taxpayer).

f. Willful filing of false claim is subject to sanctions by the Court. BR 9011 and may be a deceptive practice as well. Attorneys' fees and costs may be sought.

g. Res judicata and Collateral Estoppel rules apply to judgments.

h. Time limit for objections to Claims: No deadline set in law or Rules. Generally set by local court order. In NY Southern District: thirty (30) days after 341 Creditors meeting is concluded.

i. Expunge Claims: 11 USC 502 and BR 3007 and 11 USC 1325(a) and (b).

3. Litigating Mortgage Claims:

a. Overcharges:

i. Minimizing the cost of reinstatement of the mortgage thru the Chapter 13 Plan. Debtor counsel must review claim to prevent overcharges. Made easier by local court rules in NY Southern District Worksheet requirement.

ii. Scrutinize the Mortgage Claim for overcharges, interest overcharges, miscalculation, and unauthorized fees.

iii. For intentional abuse or failure to correct claim after notice, Counsel to Debtor can seek relief under UDAP, FCDCA, RESPA and Rule 9011;

iv. After notice under RESPA, sanctions available for failure to comply.

v. If the objection to a claim raises issues about the extent of the lien and goes beyond issues of property valuation, and adversary proceeding should be commenced.

b. Escrow Overcharges: Payments for taxes and insurance under typical mortgage agreements. Some lenders include other charges in escrow accounts in order to recover these charges from the borrower.

i. double counting: claims listed as arrearages and as escrow deficiencies

ii. check by multiplying insurance and tax payments by months debtor is in arrears to get an idea if there is double or triple counting. Notify creditor and object to claim.

c. Interest Overcharges: claims for unmatured interest are not allowed. 11 USC 502(b)(2)

d. Late Charges: Some creditors continue to treat timely payments received post-petition as if they were late. This is improper and those charges must be objected to. In *re Schuessler*, Case No. 078-35608, NY Southern District, Poughkeepsie Division, Judge Cecilia Morris presiding.

i. It is extremely common for illegal charges to be added to a mortgage after a bankruptcy is complete; sometimes they are only discovered when the debtor receives a payoff statement. You must keep in touch with your client to make certain this does not happen; if it does, it is a violation of the "discharge order" in the case. This can be brought before the Bankruptcy Court through a contempt proceeding and attorneys' fees are available.

a) 11 USC 524(i): A creditor's willful failure to credit payments received under a confirmed plan constitutes a violation of the injunction of section 11 USC 524(a).

e. "Monitoring fees": These are fees charged under the mortgage contract and are ambiguous at best. They probably violate 11 USC 362(a) (3) Automatic Stay and are probably void for vagueness.

f. Inadequate Claim Documentation: BR 3001(a) requires that when a claim is based on a writing, an original or duplicate of the writing must be filed with the proof of claim. Must also include an itemized statement of charges and interest. This is a mandatory rule and must be complied with or the Court will deny the creditor relief in a lift stay or objection to confirmation. The debtor can object to the claim and it will be stricken for failure to comply.

g. TILA Claims of the Debtor:

i. A claim under TILA should be brought as an adversary proceeding by complaint seeking recision and money damages. 15 USC 1640. In *re McCausland*, 63 BR 665 (ED Pa 1986).

ii. Claim can reduce amount to be paid to secured creditor and pay debtor's attorneys' fees. Rescission may void creditor's lien completely and leave creditor with an unsecured claim.

iii. Statute of Limitations: One year. 15 USC 1640(e). If the debtor is barred in Federal Court, the Debtor may not be barred in State Court and the Debtor should consider lifting the Automatic Stay to proceed in State court in the foreclosure action.

h. UDAP litigation: Similarly, UDAP and other State law defenses should be pursued by adversary proceedings in Bankruptcy Court by objection to the claim and filing an adversary proceeding on the basis of the asserted claims and or legal defenses.

i. Litigation fees and costs can be waived. 28 USC 1915(a). Filing fees to commence a case must be paid.

VI. CONCLUSION

A. Resources for Information on Consumer Bankruptcy Law

1. **Bankruptcy Court Northern District of New York** www.nynb.uscourts.gov
2. **The NACTT Academy for Consumer Bankruptcy Education**

www.ConsiderChapter13.org

The website includes articles on current cases, bankruptcy ethics, the mortgage crisis, trustee, debtor, creditor and court perspectives on current issues, pending legislation and other areas of interest.

3. **National Association of Chapter 13 Trustees** www.nactt.com

Membership consists of trustees, bankruptcy judges, lawyers for debtors and creditors, certified public accountants and other insolvency related professionals. This organization is dedicated to the education related to Chapter 13 bankruptcy.

4. **American Bankruptcy Institute** www.abiworld.org

Website provides information regarding current bankruptcy news and issues, including legislation. Information regarding CLE programs and seminars is also provided.

5. **American Bar Association** www.americanbar.org

The Section of Business Law has several committees dedicated to areas of commercial and business practice, including consumer and business bankruptcy. Of particular interest: Consumer Bankruptcy Committee, Business Bankruptcy Committee, Consumer Financial Services Committee. The General Practice, Solo and Law Firm Division also has several committees dedicated to this area of practice.

6. **National Conference of Bankruptcy Judges** www.ncbj.org

Association of the Bankruptcy Judges of the United States which has several purposes: to provide continuing legal education to judges, lawyers and other involved professionals, to promote cooperation among the Bankruptcy Judges, to secure a greater degree of quality and uniformity in the administration of the Bankruptcy system and to improve the practice of law in the Bankruptcy Courts of the United States.

7. **National Association of Consumer Bankruptcy Attorneys** www.nacba.com

National organization dedicated to serving the needs of consumer bankruptcy attorneys and protecting the rights of consumer debtors in bankruptcy.

8. **National Bankruptcy Conference** www.nationalbankruptcyconference.org

NBC was formed from a nucleus of the nation's leading bankruptcy scholars and practitioners, who gathered informally in the 1930s at the request of Congress to assist in the drafting of major Depression-era bankruptcy law amendments, ultimately resulting in the Chandler Act of 1938. The NBC was formalized in the 1940s and has been a resource

to Congress on every significant piece of bankruptcy legislation since that time. Members of the NBC formed the core of the Commission on the Bankruptcy Laws of the United States, which in 1973 proposed the overhaul of our bankruptcy laws that led to enactment of the Bankruptcy Code in 1978, and were heavily involved in the work of the National Bankruptcy Review Commission (NBRC), whose 1997 report initiated the process that led to significant amendments to the Bankruptcy Code in 2005.

9. **BankruptcyProf Blog** www.lawprofessors.typepad.com/bankruptcyprof_blog/
Website/blog maintained by M. Jonathan Hayes, Adjunct Faculty Member of the University of West Los Angeles School of Law which provides case law updates and legislative updates and other information of interest to the bankruptcy practitioner. Website is updated daily.

10. **Consumer Bankers Association** www.cbanet.org
Website dedicated to retail banking issues.

11. **CARE Program** www.careprogram.us
CARE is a free financial literacy initiative that makes experienced members of the Bankruptcy Community available to teach the importance of financial education. These presentations are offered at schools or to larger student groups, including senior assemblies. CARE's primary target is high school seniors and college freshmen.

12. **THOMAS** http://Thomas.loc.gov/
Legislative information on the web provided by the Library of Congress.

13. **Bankruptcy Code online – Legal Information Institute of Cornell Law School**
http://www.law.cornell.edu/wex/Bankruptcy
Bankruptcy Code on the internet.

14. **Commercial Law League of America** www.clla.org
Website dedicated to attorneys and credit professionals engaged in the fields of commercial law, bankruptcy and insolvency.

15. **National Conference of Bankruptcy Trustees** www.nabt.org
Non-profit organization created to "address the needs of the bankruptcy trustees throughout the country and to promote the effectiveness of the bankruptcy system as a whole." Site contains information about their organization, news of upcoming seminars, links to legislative information about bankruptcy, and a listserv and library for members only.

AVOIDING FORCLOSURE THROUGH CHAPTER 13

and

THE NEW BANKRUPTCY COURT LOSS MITIGATION PROCEDURES

NYSBA 2014 Partnership conference

REAFFIRMATION OF THE MORTGAGE IN CHAPTER 7

Appendix A to Materials

Submitted by Mark H. Wattenberg

APPENDIX "A" - REAFFIRMATION IN CHAPTER 7

A debtor in Chapter 7 who seeks to keep the home, may "reaffirm" the mortgage. This will involve the debtor signing a "reaffirmation" agreement to honor the terms of the mortgage. 11 USC § 524(c). The agreement must be signed before the Bankruptcy Court issues its discharge order. The Bankruptcy Court must approve the agreement if the debtor is not represented by an attorney.

Some bankruptcy courts have refused to approve reaffirmation agreements of mortgages where the debtor has become current on the payments A recent decision offers the following analysis:

> An individual chapter 7 debtor receives a discharge from all debts save those specified in 11 U.S.C. § 727(a)[2], those within the scope of § 523(a), and those subject to an agreement for reaffirmation pursuant to § 524(c). The discharge of debt is the foundation for a debtor's fresh start. Exceptions to discharge are narrowly construed.

The court further states:

> Debtors who are current with payments on debts secured by real property are not limited to the options of surrender, reaffirmation, or redemption found in § 521(a)(2), but may also choose to continue with the payments and retain possession of the property. This option,[is] commonly known as [the] "ride-through,". . . .

In re Waller, 394 B.R. 111, 113 (Bankr. D.S.C. 2008); See also In re Caraballo, 386 B.R. 398, 402 (Bankr. D. Conn. 2008)

The National Consumer Law Center (NCLC) cautions against recommending that debtors sign reaffirmation agreements. NCLC, Consumer Bankruptcy Law and Practice, Vol. 1, Section 15.5.2.7, p. 527. NCLC points out that if a debtor continues payments to the creditor, foreclosure or repossession is unlikely to occur. The advantage of not reaffirming is that the

debtor can no longer be sued over the mortgage loan for a deficiency judgment, because the loan will have been discharged in the Chapter 7 bankruptcy.

Under HAMP rules, modifications must be processed for homeowners who previously filed a Chapter 7, even if the mortgage was not reaffirmed. The HAMP Handbook states:

> Borrowers who have received a Chapter 7 bankruptcy discharge in a case involving the first lien mortgage who did not reaffirm the mortgage debt under applicable law are eligible for HAMP.

MHA Handbook, Vol. 4.4, Chapter II, p. 79

HUD has a rule for FHA mortgages, that loss mitigation opportunities may not be conditioned on reaffirmation:

> Effective immediately, mortgagees must, upon receipt of notice of a bankruptcy filing, send information to debtor's counsel indicating that loss mitigation may be available, and provide instruction sufficient to facilitate workout discussions including documentation requirements, timeframes and servicer contact information. Working through debtor's counsel, mortgagees may offer appropriate loss mitigation options prior to discharge or dismissal, without requiring relief from the automatic stay and in the case of a Chapter 7 bankruptcy, without requiring re-affirmation of the debt.

HUD Mortgagee Letter 2008-32 (10/17/08)

However, some practitioners are concerned that a Chapter 7 debtor who does not reaffirm the mortgage takes unnecessary risks. A debtor who has not reaffirmed the mortgage and develops financial problems after a Chapter 7 bankruptcy and is seeking to modify the mortgage, may face difficulties negotiating with the lender in the future – particularly if the mortgage does not qualify for HAMP or other federally related programs.

AVOIDING FORCLOSURE THROUGH CHAPTER 13

and

THE NEW BANKRUPTCY COURT LOSS MITIGATION PROCEDURES

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SAMPLE CHAPTER 13 PLAN

Appendix B to Materials

Submitted by Mark H. Wattenberg

CHAPTER 13 PLAN

1. Debtor has filed this Chapter 13 Proceeding in order to save her home from foreclosure. Debtor proposes a 5 year plan with 10% payment of unsecured debts and to include payment of mortgage arrears and fees. The proposed payments to the Trustee are $478.72 per month. Debtor will make her on-going mortgage escrow payments outside of the Chapter 13 Plan.

2. Mortgage Company XYZ claims to hold Debtor's mortgage.

3. Mortgage Company XYZ has started a foreclosure proceeding

4. The mortgage was modified on August 11, 2010. The modification provided for a principal balance of $54,916.51 at 9.44% interest with monthly payments of $755.53.

5. Property taxes and insurance are included.

6. Debtor has $ 1,029.38 in priority unsecured debt.

7. Debtor has $ 11,912.19 in additional unsecured debt

Proposed payment to the trustee - $ 478.72/month – 60 months

- SECURED DEBT

1.	Mortgage arrears	$20,596.14
	Amortized at 6% interest	$398.19

- UNSECURED DEBT

2.	Unsecured debts (priority)	$1,029.38
	Unsecured debt (non-priority)	$11,912.19
	10%	$1,191.21
	TOTAL	$2,220.59
	Amortized – no interest	$ 37.01
3.	Secured debt	$ 398.19
	Unsecured debt	$ 37.01
	TOTAL	$ 435.20
4.	Trustee's Commission – 10%	$ 43.52
5.	Monthly payment =	$ 478.72

6. Debtor, consents to entry of a wage order with Employer 123, the employer of debtor, for payment to the trustee. Debtor requests that payment be taken on a pro-rated basis out of each bi-weekly check.

7. Debtors' Duties - In addition to the duties and obligations imposed upon Debtors by the Bankruptcy Code and Rules, Local Rules, and the Order of Confirmation, this plan imposes the following requirements on Debtors:

a. Transfers of Property and New Debt. Debtor are prohibited from transferring, encumbering, selling, or otherwise disposing of any personal or real property with a value of $1,000 or more other than in the regular course of Debtor' business affairs, without first obtaining court authorization. Except as provided in 11 U.S.C. §364 and §1304, Debtor shall not incur aggregate new debt of $500 or more without prior approval of the Trustee or the Court, except such debt as may be necessary for emergency medical care, unless such prior approval can not reasonably be obtained.

b. Insurance. Debtor shall maintain insurance as required by any law, contract, or security agreement.

c. Support Payments. Debtor shall maintain child or spousal payments directly to the recipient pursuant to a separation agreement, divorce decree, the applicable child support collection unit, or other court order.

d. Compliance with Non-Bankruptcy Law. Debtor shall comply with applicable non-bankruptcy law in the conduct of his/her financial and business affairs. This includes the timely filing of tax returns and payment of taxes.

e. Periodic Reports. Upon the Trustee's request, Debtor shall provide the Trustee with a copy of any tax return, W-2 or 1099 form, filed or received while the case is pending.

8. Debtor reserves the right to amend this Chapter 13 Plan if debtor qualifies for a modification program offered by Mortgage Company XYZ.

9. Payments by the Chapter 13 trustee to Mortgage Company XYZ are conditioned on Mortgage Company XYZ proving its ownership interest in the mortgage and mortgage note.

Dated: /s/ Debtor

Debtor

AVOIDING FORCLOSURE THROUGH CHAPTER 13

and

THE NEW BANKRUPTCY COURT LOSS MITIGATION PROCEDURES

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THE CHAPTER 13 ANTIMODIFICATION STATUTE 11 USC §1322(b)(2)

Appendix C to Materials

Submitted by Mark H. Wattenberg

THE CHAPTER 13 ANTIMODIFICATION STATUTE
11 USC §1322(b)(2)

WHERE IT DOES NOT APPLY

A Chapter 13 plan may not modify the terms of a mortgage if it is secured "only" by "*real property that is the debtor's principal residence.*" 11 U.S.C. § 1322(b)(2) However, this section does not apply to mobile homes which are portable. Many Bankruptcy Courts have also held it does not apply to multi-family homes, or dwellings in which is a portion is for commercial use, Further in the case of FHA mortgages, in which the mortgage incorporates HUD loss mitigation regulations, this statute should not prevent a Bankruptcy Court from ordering an FHA modification if the debtor can establish eligibility.

Mobile Homes

Mobile homes may be "crammed down" by the Bankruptcy Court because they are not considered real property. A bankruptcy appellate panel of the Second Circuit summarized a case before it as follows:

> Debtor proposes to pay Green Tree a total of $12,051.91 over 39 months, based on a claim of $10,000 (the stated value of the mobile home) at 9% per annum. Green Tree's proof of claim shows that it is owed $14,756.88. Not only does Green Tree contend that the mobile home is worth more than Debtor claims, it also contends that in any event, Debtor may not "cram down" its claim to the value of the collateral due to the prohibition set forth in § 1322(b)(2).

In re Thompson, 217 B.R. 375, 377 (B.A.P. 2d Cir. 1998)

The bankruptcy panel noted,

> "Cram down" is bankruptcy jargon that describes what a debtor can do to a creditor in a plan of reorganization. It reduces an undersecured creditor's secured claim to the value of its collateral.

Ibid., 217 B.R. 375, 377, n. 4.

The court concluded that since mobile home were classified as personal property by New York State and the mobile home at issue was capable of being moved, that the terms of the loan could be modified by the Chapter 13 Plan by a "cram down" to its actual value.

Multi-Family Residences

If the security for the mortgage is a duplex or a combination residence and business building, the mortgage can potentially be modified by the Bankruptcy Court. The argument is that unless the mortgage is secured solely by the debtor's residence, the anti-modification statute does not apply. The Third Circuit Court of Appeals, in a case involving a duplex in which the homeowner lived below and rented the apartment above, held that the mortgage could be modified:

> We conclude that a mortgage secured by property that includes, in addition to the debtor's principal residence, other income-producing rental property is secured by real property *other than* the debtor's principal residence and, thus, that modification of the mortgage is permitted.

In re Scarborough, 461 F.3d 406, 408 (3d Cir. 2006);

There is conflicting case law in the Second Circuit. For instance, a Bankruptcy Court for the Northern District, (Hon. Robert E. Littlefield, Jr., presiding) granted the application of a homeowner in a multi-residence unit and reduced the amount of the mortgage lien to reflect the current market value of the collateral real property. The mortgage servicer appealed and the district court reversed and remanded. The district court, quoting from In re Brunson, 201 B.R. 351, 354 (Bankr W.D.N.Y. 1996), imposed as a test, the intent of the parties when the mortgage was obtained:

> [i]f the transaction was predominantly viewed by the parties as a loan transaction to provide the borrower with a residence, then the antimodification provision will apply. If, on the other hand, the transaction was viewed by the parties as predominantly a commercial loan transaction, then stripdown will be available.

Litton Loan Servicing, LP v. Beamon, 298 B.R. 508, 511 (N.D.N.Y. 2003)

A more recent decision by U.S. Bankruptcy Judge Diane Davis, notes the lack of clear precedent in the Second Circuit, and indicated it would confirm a Chapter 13 Plan, which provided a "cram down" for a mortgage on mixed commercial and residential property. The Bankruptcy Court, after summarizing conflicting decisions on the issue, including conflicting approaches in the Northern District, found:

> In the instant case, the Property has never been solely Debtor's principal residence within the meaning of § 1322(b)(2) because it has historically, and at the time of the mortgage transaction, included income-producing rental property.

In re Moore, 441 B.R. 732, 741 (Bankr. N.D.N.Y. 2010)

FHA Mortgages

Mortgages insured by the Federal Housing Administration (FHA) present another type of issue about the Bankruptcy Court's authority in cases in which the debtor is seeking loss mitigation options. This stems from the distinctive terms of FHA mortgages and mortgages notes. Paragraph 9(d) of the standard FHA mortgage and paragraph 6(B) of the standard FHA mortgage note, provide that a lender may not accelerate and foreclose upon the loan except in compliance with HUD regulations. Paragraph 9(d) states:

> Regulations of HUD Secretary. In many circumstances *regulations issued by the Secretary will limit [the l]ender's rights,* in the case of payment defaults, to require immediate payment in full and foreclose if not paid. *This Security Instrument does not authorize acceleration or foreclosure if not permitted by the regulations of the Secretary.*

The HUD regulations provide:

> It is the intent of the Department that no mortgagee shall commence foreclosure or acquire title to a property until the requirements of this subpart have been followed.

24 C.F.R. § 203.500

A wide range of loss mitigation options must be considered:

> Mortgagees must consider the comparative effects of their elective servicing actions, and must take those appropriate actions which can reasonably be expected to generate the smallest financial loss to the Department. Such actions include, but are not limited to, deeds in lieu of foreclosure under § 203.357, pre-foreclosure sales under § 203.370, partial claims under § 203.414, assumptions under § 203.512, special forbearance under §§ 203.471 and 203.614, and recasting of mortgages under § 203.616. HUD may prescribe conditions and requirements for the appropriate use of these loss mitigation actions, concerning such matters as owner-occupancy, extent of previous defaults, prior use of loss mitigation, and evaluation of the mortgagor's income, credit and property.

24 C.F.R. § 203.501

The courts are split on whether these terms result in the incorporation of HUD loss mitigation regulations and whether borrowers have standing to enforce such terms. See Steven Sharpe, Strategies for Defending Foreclosures of FHA-Insured Mortgages, 46 Clearinghouse Review, March-April, 2013, p. 484. Lenders argue that only HUD has standing to enforce loss mitigation options. Many of the cases involve the requirement of a face-to-face meeting before foreclosure is commenced. 24 CFR § 203.604(b). But the analysis may also apply to the borrower's contractual right to FHA loss mitigation options.

The Virginia Supreme Court, in a case involving the lack of a pre-foreclosure face-to-face meeting, held that a homeowner may raise as a defense the lack of compliance with FHA loss mitigation regulations:

> These words "are clear and unambiguous" and we will construe them according to their plain meaning. . . . They express the intent of the parties that the rights of acceleration and foreclosure do not accrue under the Deed of Trust unless permitted by HUD's regulations.

Mathews v. PHH Mortgage Corp., 283 Va. 723, 734, 724 S.E.2d 196, 201 (2012)

As noted in another decision:

> The lenders voluntarily agreed to purchase these FHA loans in exchange for the government's backing against default. Thus, as the [California] Attorney General stresses, they voluntarily subjected themselves to the additional requirements designed to avoid the necessity for foreclosure.

Pfeifer v. Countrywide Home Loans, Inc., 211 Cal. App. 4th 1250, 1272, 150 Cal. Rptr. 3d 673, 690 (2012), review denied (Feb. 20, 2013)

Another recent decision summarizes the conflicting case law and concludes:

> The Court agrees with the majority view that compliance with the HUD regulations is a condition which must occur prior to the lender being able to accelerate and foreclose the debt and that the borrower may use any failure to comply with the regulations "as a shield in the subsequent foreclosure case. . . .."

Christenson v. Citimortgage, Inc., 2013 WL 5291947 (D. Colo. Sept. 18, 2013)

A bankruptcy debtor who has invoked the Bankruptcy Court loss mitigation process may be able to raise as a "good faith" issue, any lack of compliance with HUD loss mitigation programs. Alternatively, the bankruptcy debtor may be able to file an adversary proceeding alleging such failure violates the terms of the mortgage due to the incorporation of HUD regulations and seek an order requiring compliance.

AVOIDING FORCLOSURE THROUGH CHAPTER 13

and

THE NEW BANKRUPTCY COURT LOSS MITIGATION PROCEDURES

NYSBA 2014 Partnership conference

FEDERALLY-RELATED SERVICER GUIDELINES ON BANKRUPTCY AND LOSS MITIGATION

Appendix D to Materials

Submitted by Mark H. Wattenberg

EXCERPTS FROM FEDERALLY-RELATED SERVICER GUIDELINES ON BANKRUPTCY AND LOSS MITIGATION

Most federally-related mortgage modifications programs, such as HAMP, require servicers to consider mortgage modification requests of debtors in bankruptcy. The following are excerpts from requirements in the handbooks and directives that apply to such servicers.

HAMP Non-GSE mortgages

Additional Factors Impacting HAMP Eligibility

> Borrowers in active Chapter 7 or Chapter 13 bankruptcy cases are eligible for HAMP at the servicer's discretion in accordance with investor guidelines, but servicers are not required to solicit these borrowers proactively for HAMP. Notwithstanding the foregoing, such borrowers must be considered for HAMP if the borrower, borrower's counsel or bankruptcy trustee submits a request to the servicer. . . .

HAMP Manual, 4.4, Chapter II, Section 1.2, p. 78

Borrowers in Active Bankruptcy-Substitution of Evaluation Documents

> When a borrower is in an active Chapter 7 or Chapter 13 bankruptcy, the servicer may accept copies of the bankruptcy schedules and tax returns (if returns are required to be filed) in lieu of the RMA and, if applicable, Form 4506T-EZ, and may use this information to determine borrower eligibility (with the income documentation).

Section 5.2, p. 106

Borrower in Bankruptcy—Waiver of Trial Period Plan

> When a borrower in an active Chapter 13 bankruptcy is in a trial period plan and the borrower has made post-petition payments on the first lien mortgage in the amount required by the TPP, a servicer must not object to confirmation of a borrower's Chapter 13 plan, move for relief from the Chapter II: HAMP MHA Handbook v4.4 129 automatic bankruptcy stay, or move for dismissal of the Chapter 13 case on the basis that the borrower paid only the amounts due under the trial period plan, as opposed to the non-modified mortgage payments.

Ibid., Section 8.6, p. 128

FHA Mortgages

Effective immediately, mortgagees must, upon receipt of notice of a bankruptcy filing, send information to debtor's counsel indicating that loss mitigation may be available, and provide instruction sufficient to facilitate workout discussions including documentation requirements, timeframes and servicer contact information. Working through debtor's counsel, mortgagees may offer appropriate loss mitigation options prior to discharge or dismissal, without requiring relief from the automatic stay and in the case of a Chapter 7 bankruptcy, without requiring re-affirmation of the debt. It is strongly recommended that the bankruptcy trustee be copied on all such communications. All loss mitigation actions must be approved by the Bankruptcy Court prior to final execution.

Nothing in this mortgagee letter requires that mortgagees make direct contact with any borrower under bankruptcy protection. However, the information required to file a bankruptcy petition (now a matter of public record) will often include sufficient financial information for the mortgagee to properly evaluate the borrower's eligibility for loss mitigation. Using this financial information, many mortgagees have been able to complete the loss mitigation evaluation before the bankruptcy plan is confirmed and have offered a pre-approved loan modification agreement. For those mortgagors that sought bankruptcy protection solely to avoid foreclosure of their homes, this solution allowed the mortgagor to have the bankruptcy dismissed and begin fresh with a mortgage obligation that is both current and with payments that the mortgagor can afford. For those mortgagors with other financial problems, the resolution of the mortgage problem will put them in a better position to resolve the remaining financial issues.

HUD Mortgagee Letter 2008-32 (10/17/08)

FANNIE MAE Mortgages

The particular foreclosure prevention alternative to be utilized in a given bankruptcy case will depend upon, among other things, the type of bankruptcy case, the stage of the bankruptcy case, local practices and procedures, and the particular circumstances of the borrower and the property. When required, Fannie Mae approval for a foreclosure prevention alternative may be sought through HSSN. Trustee and Bankruptcy Court approval must also be obtained when required.

A servicer's bankruptcy monitoring process must include procedures for identifying foreclosure prevention opportunities, and the servicer and the bankruptcy attorney must work together to pursue these opportunities during all phases of the bankruptcy process. The servicer must ask the bankruptcy attorney to send it a monthly report about the foreclosure prevention efforts that are pursued during the handling of a specific bankruptcy case.

Delinquency Management and Default Prevention - Bankruptcy Proceedings
Fannie Mae Single Family
2012 Servicing Guide
March 14, 2012 - pp. 705-22-24

FREDDIE MAC Mortgages

Foreclosure actions and Borrowers in bankruptcy

> (b) Borrowers in bankruptcy Borrowers in active Chapter 7 or Chapter 13 bankruptcy cases must be considered for HAMP if the Borrower, Borrower's counsel or bankruptcy trustee submits a request to the Servicer. With the Borrower's written permission that is provided to the Servicer, a bankruptcy trustee may contact the Servicer to request a HAMP modification. Servicers are not required to solicit these Borrowers proactively for HAMP.

Freddie Mac Servicing Guide, (4/15/13) Section C65.7.1

AVOIDING FORCLOSURE THROUGH CHAPTER 13

and

THE NEW BANKRUPTCY COURT LOSS MITIGATION PROCEDURES

NYSBA 2014 Partnership conference

BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF NEW YORK LOSS MITIGATION PROGRAM

Appendix E to Materials

Submitted by Mark H. Wattenberg

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re:
Adoption of Loss Mitigation Program Procedures

ADMINISTRATIVE
ORDER # 13-05

WHEREAS a uniform, comprehensive, court-supervised loss mitigation program may facilitate consensual resolutions for individual debtors whose residential real property is at risk of loss to foreclosure (the "Loss Mitigation Program" or "Loss Mitigation"); and

WHEREAS the Loss Mitigation Program may avoid the need for various types of bankruptcy litigation, reduce costs to debtors and secured creditors, and enable debtors to reorganize or otherwise address their most significant debts and assets under the United States Bankruptcy Code;

Now, therefore, it is hereby

ORDERED that the "Loss Mitigation Program Procedures" annexed to this Administrative Order and the Loss Mitigation Program described therein are adopted, pursuant to 11 U.S.C. § 105(a); and it is further

ORDERED that effective July 1, 2013, the Loss Mitigation Program Procedures shall apply in all individual cases filed under chapter 7, 11, 12, or 13 of the Bankruptcy Code, within the United States Bankruptcy Court for the Northern District of New York; and it is further

ORDERED that the Loss Mitigation Program Procedures and related forms, including the Loss Mitigation Request by Debtor(s) and Certificate of Service, shall be available on the court's website. The court may modify the Loss Mitigation Program Procedures from time to time by Administrative Order, and in that event shall make the revised Loss Mitigation Program Procedures available immediately on the court's website.

Dated: June 21, 2013
Albany, New York

Robert E. Littlefield, Jr.
Chief United States Bankruptcy Judge

LOSS MITIGATION PROGRAM PROCEDURES

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

LOSS MITIGATION PROGRAM PROCEDURES
Adopted by Administrative Order # 13-05

Effective July 1, 2013

LOSS MITIGATION PROGRAM PROCEDURES
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LOSS MITIGATION PROGRAM PROCEDURES[1]

Current as of January 30, 2014

I. PURPOSE

The Loss Mitigation Program is designed to function as a forum in individual bankruptcy cases for debtors and lenders to reach consensual resolution whenever a debtor's principal residence is at risk of foreclosure. The Loss Mitigation Program aims to facilitate resolution by opening the lines of communication between debtors' and lenders' decision-makers. While the Loss Mitigation Program stays certain bankruptcy deadlines that might interfere with negotiations or increase costs to the parties, the Loss Mitigation Program also encourages the parties to finalize any Settlement (as defined below) 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 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 resolution will vary in each case according to the particular needs, interests, and goals of the parties.

III. OTHER DEFINITIONS

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, in the Northern District of New York.

B. PROPERTY

The term "Property" means any real property, including condominiums or cooperative apartments, used as the Debtor's principal residence, in which the Debtor holds an interest.

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[1] Text appearing in Blue denotes a Loss Mitigation Program Form. The Loss Mitigation Program Forms, which are listed in section XII, are required under these Loss Mitigation Program Procedures and are available on the court's website at www.nynb.uscourts.gov.

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 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 trustee.

D. CREDITOR

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

E. LOSS MITIGATION PARTY

The term "Loss Mitigation Party" means any party participating in the Loss Mitigation Program as named in the Loss Mitigation Order. In a chapter 12 or 13 case, the chapter trustee, although a participant in the Loss Mitigation Program, is not a Loss Mitigation Party.

IV. ADDITIONAL PARTIES

A. OTHER CREDITORS

Any Loss Mitigation Party may request or the court may direct, after notice and a hearing, more than one Creditor to participate in the Loss Mitigation Program if it may be of assistance to obtain a global resolution.

B. NON-FILING CO-DEBTORS AND THIRD PARTIES

Any Loss Mitigation Party may request or the court may direct, after notice and a hearing, a non-filing co-debtor or other third party to participate in the Loss Mitigation Program if the participation of such party may be of assistance and if the court has jurisdiction over the party or the party consents.

C. CHAPTER 12 & CHAPTER 13 TRUSTEES

In a chapter 12 or 13 case, the chapter trustee may participate in the Loss Mitigation Program to the extent that such participation is consistent with the trustee's duties under, respectively, 11 U.S.C. § 1202(b) or 11 U.S.C. § 1302(b)(4).

A Loss Mitigation Order shall provide that, in a chapter 12 or 13 case, the chapter trustee may participate in Loss Mitigation, including—but not necessarily limited to—appearing at the Status Conference and filing a response, if any, to a Loss Mitigation Party's motion to extend or terminate Loss Mitigation made pursuant to section IX of these Procedures. The chapter 12 or chapter 13 trustee need not make a specific request in order to participate in Loss Mitigation.

V. COMMENCEMENT OF LOSS MITIGATION

Generally, a request for Loss Mitigation may be made at any time during the pendency of the case. However, when there is a pending motion pursuant to 11 U.S.C. § 362(d) for relief from the automatic stay ("Motion for Relief from Stay") as to the Property, a request may be presented to the court only as provided in subsections (A)(2) and (B)(2). Parties are encouraged to request to enter into the Loss Mitigation Program as early in the case as possible.

A. BY WRITTEN REQUEST OF THE DEBTOR

1. Generally

Except as provided in subsection (A)(2), a Debtor may file a completed Loss Mitigation Request by Debtor(s) and Certificate of Service to enter into the Loss Mitigation Program with one or more named Creditors at any time during the pendency of the case. The Debtor shall serve the Loss Mitigation Request by Debtor(s) and Certificate of Service on the case trustee and the named Creditor(s) pursuant to Rule 7004 of the Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules") and, if a proof of claim has been filed, on the individual who signed the proof of claim by first class mail.

The Creditor(s) shall have 14 days to file and serve an Objection to Loss Mitigation Request and a Notice of Hearing on Objection to Loss Mitigation Request and Certificate of Service on the Debtor, Debtor's attorney, and the case trustee. If an Objection to Loss Mitigation Request and a Notice of Hearing on Objection to Loss Mitigation Request and Certificate of Service are not filed, the court may enter a Loss Mitigation Order.

2. When a Motion for Relief from the Stay is Pending as to the Property

The Debtor may include a Loss Mitigation Request by Debtor(s) and Certificate of Service as part of a timely response to a Motion for Relief from Stay in the manner provided below:

a. The Debtor shall state in the response to the Motion for Relief from Stay that the Debtor wishes to enter Loss Mitigation with the Creditor and that a completed Loss Mitigation Request by Debtor(s) and Certificate of Service has been attached as an exhibit thereto for the court's consideration; **and**

b. The Debtor shall allege in the response facts sufficient to support the conclusion that the Debtor can and will proceed in Loss Mitigation in good faith; **and**

c. The Debtor shall attach a copy of the completed Loss Mitigation Request by Debtor(s) and Certificate of Service as an exhibit to Debtor's response.

A request for Loss Mitigation is not, in itself, a defense to a Motion for Relief from Stay. Therefore, the Debtor should still advance any other legal or factual defenses to the Motion for Relief from Stay in Debtor's response. The court will treat the Debtor's request for Loss Mitigation as an application for permission to file the Loss Mitigation Request by Debtor(s) and Certificate of Service, and will consider the Debtor's request and any opposition by the Creditor at the hearing on the Motion for Relief from Stay.

In the event the court grants the Debtor leave to file a request for Loss Mitigation, the Debtor shall file the Loss Mitigation Request by Debtor(s) and Certificate of Service within three (3) days after the hearing on the Motion for Relief from Stay, and shall serve the Loss Mitigation Request by Debtor(s) and Certificate of Service in accordance with subsection (A)(1). The court will treat the Debtor's request for Loss Mitigation as if it had been made pursuant to subsection (A)(1), and will proceed on the request pursuant to these Procedures as if the request had been so made.

B. BY WRITTEN REQUEST OF A CREDITOR

1. Generally

Except as provided in subsection (B)(2), a Creditor may file a completed Loss Mitigation Request by Creditor and Certificate of Service to enter into the Loss Mitigation Program with the Debtor at any time during the pendency of the case. The Creditor shall serve the Loss Mitigation Request by Creditor and Certificate of Service on the case trustee and Debtor's counsel by a notice of electronic filing (NEF) via the CM/ECF system and on the Debtor by first class mail.

The Debtor shall have 14 days to file and serve an Objection to Loss Mitigation Request and a Notice of Hearing on Objection to Loss Mitigation Request and Certificate of Service on the Creditor and case trustee. If an Objection to Loss Mitigation Request and a Notice of Hearing on Objection to Loss Mitigation Request and Certificate of Service are not filed, the court may enter a Loss Mitigation Order.

2. When a Motion for Relief from the Stay is Pending as to the Property

The Creditor may serve and file a Loss Mitigation Request by Creditor and Certificate of Service as a reply to any opposition received to a Motion for Relief from Stay that was filed by the Creditor in the manner provided below:

a. The Loss Mitigation Request by Creditor and Certificate of Service shall be filed not later than three (3) days prior to the return date of the Motion for Relief from Stay, and shall be served in accordance with subsection (B)(1); **and**

b. The Creditor shall adjourn the hearing on its Motion for Relief from Stay pursuant to Local Bankruptcy Rule ("L.B.R.") 9013-1(i) and (j) to a date that is at least 20 but no more than 60 days from the date of the hearing on its Motion for Relief from Stay.

The court will treat the Creditor's request for Loss Mitigation as if it had been made pursuant to subsection (B)(1), and will proceed on the request pursuant to these Procedures as if the request had been so made.

C. HEARING ON AN OPPOSED REQUEST FOR LOSS MITIGATION

If a party files an Objection to Loss Mitigation Request and a Notice of Hearing on Objection to Loss Mitigation Request and Certificate of Service, the court shall hold a hearing on the request for Loss Mitigation, and shall not enter a Loss Mitigation Order until the parties have had an opportunity to be heard. In a chapter 12 or 13 case, the chapter trustee may attend and participate in the hearing without making a request to appear.

D. SERVICE OF THE ORDER ON THE REQUEST FOR LOSS MITIGATION

Within three (3) days after entry of a Loss Mitigation Order or an Order Denying Loss Mitigation Request, the party that requested Loss Mitigation shall serve the order on (i) all parties named in the request for Loss Mitigation, (ii) the case trustee, and (iii) any party not named in the request for Loss Mitigation but designated a Loss Mitigation Party in the Loss Mitigation Order, and shall file a certificate of service.

VI. LOSS MITIGATION ORDER

A. DEADLINES

A Loss Mitigation Order shall contain:

1. The date by which contact persons and telephone, facsimile and email contact information shall be provided by the Loss Mitigation Parties.

2. The date by which the Debtor and each Creditor shall transmit any request for information or documents to other Loss Mitigation Parties, and shall file the appropriate Loss Mitigation Affidavit (Debtor(s) / Creditor) itemizing the information and/or documents requested.

3. The date by which the Debtor and each Creditor shall respond to any request for information or documents, and shall file the appropriate Loss Mitigation Affidavit (Debtor(s) / Creditor) itemizing the information and/or documents provided.

4. The date by which the initial Loss Mitigation Session shall be conducted.

5. The date and time of the Status Conference with the court and a requirement that the Loss Mitigation Party that requested Loss Mitigation file with the court a Loss Mitigation Status Report not later than seven (7) days prior to the Status Conference.

6. The date when the Loss Mitigation process shall terminate, unless extended (the "Loss Mitigation Period").

7. The date by which the Loss Mitigation Party that requested Loss Mitigation shall file a Loss Mitigation Program Final Report.

B. EFFECT

During the Loss Mitigation Period:

1. A Creditor that is a Loss Mitigation Party may not file a Motion for Relief from Stay regarding Property that is subject to Loss Mitigation. A pending Motion for Relief from Stay by a Creditor that is a Loss Mitigation Party filed before the entry of the Loss Mitigation Order shall be adjourned by the Creditor pursuant to L.B.R. 9013-1(i) and (j) to the date of the Status Conference, and the stay shall be extended pursuant to 11 U.S.C. § 362(e).

A Loss Mitigation Party that wishes to file a Motion for Relief from Stay or to restore a pending Motion for Relief from Stay to the court's calendar must first make a motion requesting early termination of the Loss Mitigation Period pursuant to section IX(C) of these procedures. A Loss Mitigation Party that wishes to restore a pending Motion for Relief from Stay to the court's calendar may request that relief as ancillary to its motion requesting early termination of the Loss Mitigation Period.

2. The time for each Creditor that is a Loss Mitigation Party to file an objection to an unconfirmed plan of reorganization in Debtor's case shall be extended until fourteen (14) days after the termination of the Loss Mitigation Period, including any extension thereof.

3. Federal Rule of Evidence 408 shall apply to communications, information and documents exchanged by the Loss Mitigation Parties in connection with the Loss Mitigation Program.

4. In a chapter 7 case, the entry of a Loss Mitigation Order does not serve to automatically delay the entry of an order discharging the Debtor. Any request to delay discharge must be made by separate application to the court.

VII. DUTIES UPON COMMENCEMENT OF LOSS MITIGATION

A. GOOD FAITH

The Loss Mitigation Parties shall negotiate in good faith. A party that does not participate in the Loss Mitigation Program in good faith may be subject to sanctions.

B. ADJOURN OTHER PROCEEDINGS

Other proceedings (*e.g.* motions or applications) that are currently pending between the Loss Mitigation Parties shall be adjourned by the party who commenced such proceeding pursuant to L.B.R. 9013-1(i) and (j) to the date of the Status Conference as indicated in the Loss Mitigation Order to the extent that those proceedings concern (1) relief from the automatic stay; (2) objection to the allowance of a proof of claim; (3) reduction, reclassification or avoidance of a lien; or (4) valuation of a lien or the Property.

C. CONTACT INFORMATION

1. The Debtor

If the Debtor is represented by counsel in the underlying bankruptcy case, the Debtor shall be represented during all phases of the Loss Mitigation Program. Debtor's counsel shall provide the name, address, direct telephone number, facsimile number and email of the attorney(s) with authority to act on the Debtor's behalf to each Loss Mitigation Party. If the Debtor is *pro se*, the Debtor shall provide written notice to each Loss Mitigation Party of the manner in which the Creditor shall contact the Debtor. This information may be conveyed in the Loss Mitigation Request by Debtor(s) and Certificate of Service.

2. The Creditor

Each Creditor shall provide written notice to the Debtor's attorney or the Debtor, if *pro se*, of the name, address, direct telephone number, facsimile number and email of the contact person with authority to act on the Creditor's behalf. This may be done in the Loss Mitigation Request by Creditor and Certificate of Service.

D. STATUS REPORT

Unless the court orders otherwise in the Loss Mitigation Order, the party that requested Loss Mitigation shall file and serve upon all other Loss Mitigation Parties and, in a chapter 12 or 13 case, the chapter trustee a Loss Mitigation Status Report as provided in section VIII(C) of these procedures. The date on which the Loss Mitigation Status Report is due shall be governed by the Loss Mitigation Order.

E. BANKRUPTCY COURT APPROVAL

The Loss Mitigation Parties shall seek court approval of any Settlement reached during the Loss Mitigation Period.

F. FILE FINAL REPORT UPON RESOLUTION OF LOSS MITIGATION

Upon expiration or termination of Loss Mitigation, whether by dismissal of the case or otherwise, a Loss Mitigation Program Final Report shall be filed by the party that requested Loss Mitigation, unless the court directs otherwise in the Loss Mitigation Order.

VIII. LOSS MITIGATION PROCESS AFTER LOSS MITIGATION IS ORDERED

A. INITIAL CONTACT PERIOD

The purpose of the initial contact period is to create a framework for the Loss Mitigation Sessions and to ensure that the Loss Mitigation Parties are prepared. The initial contact period is not intended to limit the issues or proposals that may arise during the Loss Mitigation Sessions.

1. Within fourteen (14) days after the entry of the Loss Mitigation Order, the following shall occur:

   a. Each Loss Mitigation Party shall designate contact persons and disclose contact information, unless this information was previously provided.

   b. Each Creditor that is a Loss Mitigation Party shall contact the Debtor's attorney or the Debtor, if *pro se*.

   c. Each Loss Mitigation Party shall make its request for information and documents, if any, and file the appropriate Loss Mitigation Affidavit (Debtor(s) / Creditor) itemizing the information and/or documents requested.

2. Within thirty-five (35) days after the entry of the Loss Mitigation Order and at least seven (7) days prior to the initial Loss Mitigation Session, each Loss Mitigation Party shall respond to any request for information and documents, and shall file the appropriate Loss Mitigation Affidavit (Debtor(s) / Creditor) identifying the information and/or documents provided.

3. Within forty-five (45) days after the entry of the Loss Mitigation Order, the Loss Mitigation Parties shall conduct the initial Loss Mitigation Session.

B. LOSS MITIGATION SESSIONS

Loss Mitigation Sessions may be conducted in person, by telephone, or by video conference. At the conclusion of each Loss Mitigation Session, the Loss Mitigation Parties shall discuss whether and when to hold a further session and whether any additional information or documents should be exchanged.

C. STATUS CONFERENCE / ADDITIONAL CONFERENCES

Pursuant to the Loss Mitigation Order, the court shall conduct a Status Conference at which the Loss Mitigation Parties shall appear. The Loss Mitigation Parties shall appear through counsel unless unrepresented, in which case, the party shall appear. In its discretion, the court may order that the Loss Mitigation Parties appear with their counsel. In a chapter 12 or 13 case, the chapter trustee may attend and participate in the Status Conference without making a request to appear.

Seven (7) days prior to the Status Conference or any adjournments thereof by the court, the party that requested Loss Mitigation shall file and serve upon all Loss Mitigation Parties and, in a chapter 12 or 13 case, the chapter trustee a Loss Mitigation Status Report.

At any time during the Loss Mitigation Period, a Loss Mitigation Party may request additional conferences with the court by filing a Request for Additional Loss Mitigation Conference and Certificate of Service on notice to the other Loss Mitigation Parties and, in a chapter 12 or 13 case, the chapter trustee.

D. PERSONS WITH SETTLEMENT AUTHORITY

At both a Loss Mitigation Session and a Status Conference with the court, each Loss Mitigation Party shall have a person with full settlement authority present or immediately available by telephone. If a Loss Mitigation Party is appearing at a Status Conference by telephone or video conference, that party shall be available beginning thirty minutes before the conference.

IX. DURATION, EXTENSION, AND RESOLUTION

A. INITIAL PERIOD

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

B. EXTENSION

1. By Agreement

The Loss Mitigation Parties may agree to extend the Loss Mitigation Period for up to ninety (90) days beyond the initial Loss Mitigation Period by Stipulation and Order Extending Loss Mitigation Period signed by the Loss Mitigation Parties[2] and filed not later than three (3) business days before the termination of the initial Loss Mitigation Period, to be so ordered by the court. Once executed by the parties, the Stipulation and Order Extending Loss Mitigation Period shall be presented to the court by uploading the document via the court's E-Order system.

If the parties desire an extension of the Loss Mitigation Period for a period beyond ninety (90) days from the initial termination date provided in the Loss Mitigation Order, a joint motion shall be filed and heard prior to the termination of the Loss Mitigation Period. The motion shall set forth the original termination date of the Loss Mitigation Period, any previous extensions granted, the current extension desired, and the reason for the request. In the court's discretion, a joint oral motion may be considered at the Status Conference. If such oral motion is granted, the parties shall execute and present to the court, as described above, a Stipulation and Order Extending Loss Mitigation Period.

2. In the Absence of Agreement

A Loss Mitigation Party may request to extend the Loss Mitigation Period in the absence of agreement by motion filed and heard prior to the termination of the initial Loss Mitigation Period. The motion shall set forth the original termination date of the Loss Mitigation Period, any previous extensions granted, the current extension desired, the reason for the request, and that no agreement can be reached. A certificate of service shall be filed not later than seven (7) days prior to the return date of the motion. The certificate of service shall evidence service of the motion on the other Loss Mitigation Parties and, in a chapter 12 or 13 case, the chapter trustee.

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[2] The parties are reminded to comply with L.B.R. 9011-3(g).

In determining whether to grant an extension of the Loss Mitigation Period, the court shall consider whether: (1) an extension of the Loss Mitigation Period may result in a complete or partial resolution that provides a substantial benefit to a Loss Mitigation Party; (2) the Loss Mitigation Party opposed to the extension has participated in good faith and has complied with the Loss Mitigation Program Procedures; and (3) the Loss Mitigation Party opposed to the extension will be prejudiced.

C. EARLY TERMINATION

1. By Agreement

The Loss Mitigation Parties may agree to early termination of the Loss Mitigation Period by Stipulation and Order Terminating Loss Mitigation Period signed by the Loss Mitigation Parties[3] and filed at any time during the Loss Mitigation Period, to be so ordered by the court. Once executed by the parties, the Stipulation and Order Terminating Loss Mitigation Period shall be presented to the court by uploading the document via the court's E-Order system.

2. In the Absence of Agreement

A Loss Mitigation Party may request early termination of the Loss Mitigation Period in the absence of agreement by filing and serving a motion requesting early termination on the other Loss Mitigation Parties and, in a chapter 12 or 13 case, the chapter trustee. The motion shall set forth the reason for the request and that no agreement can be reached. A certificate of service shall be filed not later than seven (7) days prior to the return date of the motion.

In determining whether to grant early termination of the Loss Mitigation Period, the court shall consider whether: (1) early termination of the Loss Mitigation Period is appropriate; (2) the Loss Mitigation Party seeking early termination has participated in good faith and has complied with the Loss Mitigation Program Procedures; and (3) the Loss Mitigation Party opposed to the early termination will be prejudiced.

[3] The parties are reminded to comply with L.B.R. 9011-3(g).

3. Early Termination by Dismissal of the Bankruptcy Case

If the Debtor's case is dismissed during the Loss Mitigation Period, the Loss Mitigation shall terminate on the date the dismissal order is entered. If the dismissal is the result of a chapter 12 or chapter 13 debtor requesting voluntary dismissal of the bankruptcy case pursuant to 11 U.S.C. § 1208(b) or § 1307(a) respectively, the Debtor shall indicate in the request for dismissal whether the Debtor agreed to or intends to enter into a Settlement with a Loss Mitigation Party.

X. SETTLEMENT

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

A. IMPLEMENTATION

A Settlement may be noticed and implemented in any manner permitted by the Bankruptcy Code and Bankruptcy Rules, including, but not limited to, a stipulation, sale, or chapter 11, 12, or 13 plan of reorganization.

B. FEES, COSTS, OR CHARGES

If a Settlement provides for a Creditor to receive payment or reimbursement of any expense arising from the Creditor's participation in the Loss Mitigation Program, that expense shall be disclosed to the Debtor and the court before the Settlement is approved.

C. SIGNATURES

Consent to the Settlement shall be acknowledged in writing by the Creditor's representative who participated in the Loss Mitigation Session(s), the Debtor, Debtor's counsel, if applicable, and, in a chapter 12 or 13 case, the chapter trustee.

D. HEARING

Where a Debtor is represented by an attorney, a Settlement may be approved by the court without further notice, or upon such notice as the 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, the Creditor shall file a motion to approve the Settlement. The Settlement shall not be approved until the court conducts a hearing at which the *pro se* Debtor shall appear in person. In a chapter 12 or 13 case, the chapter trustee may attend and participate in the hearing without making a request to appear.

E. DISMISSAL NOT REQUIRED

A Debtor shall not be required to request dismissal of the bankruptcy case in order to effectuate a Settlement.

XI. DEBTOR'S COUNSEL FEES WHEN UTILIZING LOSS MITIGATION PROGRAM

A. ALLOWANCE AND PAYMENT OF PORTION OF FEE BEFORE CONFIRMATION OF CHAPTER 13 PLAN

The Loss Mitigation Order shall provide that in a chapter 13 case where Debtor's counsel is to receive a portion of fees through the plan, in the month following entry of the Loss Mitigation Order or the first month after the initial 11 U.S.C. § 341 Meeting of Creditors, whichever is later, the chapter 13 trustee shall disburse payment to Debtor's counsel of the requested attorney fee—up to a maximum of $1,500.00—with said amount to be paid in the manner prescribed in the Debtor's proposed plan. The amount disbursed shall be deemed allowed immediately. This amount shall be exclusive of any amounts received by counsel prior to the filing of the petition. The balance of the attorney fee shall only be allowed and paid pursuant to a Confirmation Order or further order of the court.

B. ALLOWANCE AND PAYMENT OF ADDITIONAL FEE FOR LOSS MITIGATION UPON CONCLUSION OF LOSS MITIGATION PROGRAM

Upon completion of the Loss Mitigation Program, Debtor's counsel may file an Ex Parte Application and Certification in Support of Approval and Payment of Attorney Fees for Loss Mitigation. Concurrently therewith, Debtor's counsel shall upload via the court's E-Order system a proposed Order Approving Attorney Fees for Loss Mitigation and Authorizing Payment (chapter 7 or 11 / chapter 12 or 13). The court may thereafter enter the proposed order and, in a chapter 12 or 13 case, may direct the chapter trustee to pay approved fees as an administrative expense through the Debtor's plan.

Except as otherwise ordered by the court, a fee in the sum of $1,000.00 shall be presumed reasonable for services rendered in connection with the Loss Mitigation Program without further documentation. The award of this fee is without prejudice to the rights of counsel to request approval of additional fees by filing and serving a Notice of Hearing and an Application for Compensation under 11 U.S.C. § 331. Any such Application for Compensation shall be accompanied by an appropriate narrative of services rendered and contemporaneous time records.

XII. LOSS MITIGATION PROGRAM REQUIRED FORMS

The following forms are available on the court's website and shall be used, as indicated above, by the Loss Mitigation Parties:

- Loss Mitigation Request by Debtor(s) and Certificate of Service
- Loss Mitigation Request by Creditor and Certificate of Service
- Objection to Loss Mitigation Request
- Notice of Hearing on Objection to Loss Mitigation Request and Certificate of Service
- Loss Mitigation Order
- Order Denying Loss Mitigation Request
- Loss Mitigation Affidavit of Debtor(s) and Certificate of Service
- Loss Mitigation Affidavit of Creditor and Certificate of Service
- Loss Mitigation Status Report
- Request for Additional Loss Mitigation Conference and Certificate of Service
- Stipulation and Order Extending Loss Mitigation Period
- Stipulation and Order Terminating Loss Mitigation Period
- Loss Mitigation Program Final Report
- Ex Parte Application and Certification in Support of Approval and Payment of Attorney Fees for Loss Mitigation
- Order Approving Attorney Fees for Loss Mitigation and Authorizing Payment – chapter 7 or 11
- Order Approving Attorney Fees for Loss Mitigation and Authorizing Payment – chapter 12 or 13

CM/ECF Filing Instructions for each prescribed form are available on the court's website. Please visit the link entitled "Loss Mitigation Filing Event Codes in CM/ECF."

AVOIDING FORCLOSURE THROUGH CHAPTER 13

and

THE NEW BANKRUPTCY COURT LOSS MITIGATION PROCEDURES

NYSBA 2014 Partnership conference

BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK LOSS MITIGATION PROGRAM

Appendix F to Materials

Submitted by Mark H. Wattenberg

UNITED STATES BANKRUPTCY COURT
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 secured creditor whether it be are the holder, mortgage servicer or trustee of an eligible Loan. If the Creditor participating in Loss Mitigation is not the direct holder of the loan, the Creditor is deemed to have full consent to act on behalf of the holder. If such consent has not been given, the Creditor must object to the Loss Mitigation Request and provide the name of the holder, trustee, or other entity that has the ability to participate in Loss Mitigation.

E. LOSS MITIGATION PARTIES

The term "Loss Mitigation Parties" refers to the Debtor and the Creditor bound by a Loss Mitigation Order to participate in Loss Mitigation.

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 Local Rule 9019-1.

V. COMMENCEMENT OF LOSS MITIGATION

Parties are encouraged to request Loss Mitigation as early in a case as possible, but Loss Mitigation may be initiated at any time prior to the entry of a discharge order, 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 fourteen(14) days of service of the plan the Debtor shall submit an order approving the Loss Mitigation Request (the *"Loss Mitigation Order"*[1]) and the Bankruptcy Court may enter the order. A copy of the Southern District of New York's *"Model Chapter 13 Plan"* can be found on the Bankruptcy Court's website under "Chapter 13 Forms." The Debtor may request Loss Mitigation in the plan for one Loan without regard for whether the Loan is a first or second mortgage loan. In order to request Loss Mitigation on a second Loan, the Debtor must file a separate Loss Mitigation Request.

2. A Debtor may file a request for Loss Mitigation ("Loss Mitigation Request") with a particular Creditor. The Creditor shall have fourteen (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."* A copy of the *"Loss Mitigation Request-By the Debtor"*[2] and the *"Loss Mitigation Order"* can be found on the Bankruptcy Court's website under the "Loss Mitigation" tab.

3. Upon entry of the *"Loss Mitigation Order,"* the Debtor must serve same upon the appropriate Creditor and file proof of service on ECF. If the Creditor is a domestic or foreign corporation, partnership, or other unincorporated association, service must be made by mailing a copy of the plan to a physical address and to the attention of an officer. A copy of the *"Loss Mitigation Order"* can be found on the Bankruptcy Court's website.

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 Loss Mitigation Request. 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 Loss Mitigation Request. The Creditor must serve said request on the Debtor and Debtor's counsel and file proof of service on ECF. The Debtor shall have seven (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 Loss Mitigation Order, the Creditor is to serve same upon Debtor and Debtor's counsel and file proof of same on ECF. The form *"Loss Mitigation Request-By the Creditor"* can be found on the Bankruptcy Court's website.

C. BY THE BANKRUPTCY COURT

The Bankruptcy Court may enter a *"Loss Mitigation Order"* at any time, provided that the Loss Mitigation Parties that will be bound by the *"Loss Mitigation Order"* have had notice and an opportunity to object.

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[1] Italicized words in quotations indicate that there is a form by the same name on the Bankruptcy Court's website. These forms should be used whenever applicable.

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 evidence.

VI. LOSS MITIGATION ORDER

A. ORDER

A separate *"Loss Mitigation Order"* shall be submitted for each Loss Mitigation Request, regardless of the method used for making the 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.
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 status report must be filed and the date and time set for a status conference at which a verbal report must be provided. Where a written report is required, it should generally be filed not later than seven (7) days before the initial Loss Mitigation status conference ("Initial Status Conference").

C. EFFECT

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

1. Unless otherwise ordered by the Bankruptcy Court, all communications between the Loss Mitigation Parties shall be made through the designated contacts' attorneys.
2. Except where necessary to prevent irreparable injury, loss or damage, a Creditor shall not file a Lift-Stay Motion while Loss Mitigation is pending.
3. 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 *"Order Terminating Loss Mitigation and Final Report,"* and the stay shall be extended pursuant to section 362(e) of the Bankruptcy Code.
4. 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 fourteen (14) days after the filing of the *"Order Terminating Loss Mitigation and Final Report."*
5. 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.
6. Unless otherwise ordered by the Bankruptcy Court, in a Chapter 7 case, the entry of the *"Loss Mitigation Order"* defers the entry of an order granting the Debtor's discharge until one day after an "Order Terminating Loss Mitigation and Final Report" is filed, pursuant to Federal Rule of Bankruptcy Procedure 4004(c)(2). The time to object to the Debtor's discharge or the dischargeability of a debt is NOT extended by this Order

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 Loss Mitigation Request, the Debtor shall file and serve a written notice on 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 Loss Mitigation Request, each Creditor shall provide written notice to the Debtor by filing and serving its Creditor Affidavit on the Debtor in which it identifies: 1) the name, address and direct telephone number of the contact person who has full settlement authority; and 2) the attorney representing it in the Loss Mitigation.

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 seven (7) days of service of the *"Loss Mitigation Order."* The Creditor shall file same on ECF. The *"Creditor Loss Mitigation Affidavit"* can be found on the Bankruptcy Court's website.

2. The Debtor shall serve upon the Creditor a response to Creditor's request for information using the *"Debtor Loss Mitigation Affidavit"* form within fourteen (14) days of service of the Creditor Loss Mitigation Affidavit. The Debtor shall file only the *Debtor Loss Mitigation Affidavit* on ECF. A copy of the *"Debtor Loss Mitigation Affidavit"* can be found on the Bankruptcy Court's website.

D. STATUS REPORT

The Loss Mitigation Parties shall provide a written report to the Bankruptcy Court regarding the status of Loss Mitigation within the timeframe 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.

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 timeframe provided in the *"Loss Mitigation Order."* 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 discussion at the Loss Mitigation sessions 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 hold a telephone conference to discuss the following:

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

2. 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 BETWEEN THE PARTIES

Loss Mitigation sessions between the parties 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. STATUS CONFERENCES WITH THE BANKRUPTCY COURT

The Initial Status Conference shall be set by the Bankruptcy Court in the *"Loss Mitigation Order"* and may be adjourned at the discretion of the Bankruptcy Court. At any time during the pendency of Loss Mitigation, 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 at every Loss Mitigation status conference. 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 thirty (30) minutes prior to the start of the conference.

IX. DURATION AND TERMINATION

A. DURATION

Once a *"Loss Mitigation Order"* has been entered by the Bankruptcy Court, it shall remain in effect until an *"Order Terminating Loss Mitigation and Final Report"* is filed.

B. EARLY TERMINATION

1. Upon Request of a Loss Mitigation Party: A Loss Mitigation Party may request that Loss Mitigation be terminated by filing the form *"Request for Termination of Loss Mitigation"* which can be found on our website stating 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. *Sua Sponte* Termination of Loss Mitigation: The Bankruptcy Court may terminate Loss

Mitigation *sua sponte* at any time for failure to comply with the Loss Mitigation Program Procedures.

3. 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 Loss Mitigation unless the Loss Mitigation Parties have provided the Bankruptcy Court with a status report that is satisfactory to the Bankruptcy 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 Loss Mitigation.** Where a Chapter 13 Debtor requests voluntary dismissal of the bankruptcy case during a pending Loss Mitigation , the Debtor's dismissal request shall indicate whether the Debtor agreed to any settlement or resolution from a Loss Mitigation Party during Loss Mitigation or intends to accept an offer of settlement made by a Loss Mitigation Party during Loss Mitigation.

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.

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 Creditor's attorney, (3) the Debtor, and (4) 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.

6. Any Settlement provided to the Bankruptcy Court for its approval shall have the Agreement attached as an exhibit.

XI. ORDER TERMINATING LOSS MITIGATION AND FINAL REPORT

The Loss Mitigation Parties shall file with the Bankruptcy Court an "*Order Terminating Loss Mitigation and Final Report*":

1. when the Bankruptcy 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 Bankruptcy Court approves a Settlement that has been presented to the Court, which provides resolution of the Loss Mitigation; or
3. when a Loss Mitigation's request for termination has been granted upon the record of a Loss Mitigation hearing.

Loss Mitigation is not "terminated" unless an *"Order Terminating Loss Mitigation and Final Report"* is entered by the Bankruptcy Court. Where a case has two or more requests for Loss Mitigation, a separate *"Order Terminating Loss Mitigation and Final Report"* must be filed for each request.

XII. FORMS

All of the Loss Mitigation forms may be found on the Bankruptcy Court's website under the "Loss Mitigation" tab. These forms must be used. The Bankruptcy Court may revise the forms from time to time without the need to update the Loss Mitigation Program Procedures.

XIII. COORDINATION WITH OTHER PROGRAMS

[Provisions 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.]

AVOIDING FORCLOSURE THROUGH CHAPTER 13

and

THE NEW BANKRUPTCY COURT LOSS MITIGATION PROCEDURES

NYSBA 2014 Partnership conference

BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF NEW YORK LOSS MITIGATION PROGRAM

Appendix G to Materials

Submitted by Mark H. Wattenberg

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

In re:	
Adoption of Modified Loss Mitigation Program Procedures	General Order #582 Amending General Order #543

WHEREAS, by resolution of the Board of Judges of the United States Bankruptcy Court for the Eastern District of New York, General Order #543, dated December 8, 2009, 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; and

WHEREAS, 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; and

WHEREAS, the Loss Mitigation Program Procedures were adopted, pursuant to 11 U.S.C. § 105(a), and shall apply in all individual cases assigned under Chapter 7, 11, 12 or 13 of the Bankruptcy Code, to Chief Judge Carla E. Craig, Judge Dorothy T. Eisenberg, Judge Elizabeth S. Stong and Judge Joel B. Rosenthal, and any other Judge of this Court who may elect to participate in the Loss Mitigation Program; and

WHEREAS, General Order #543 also provided that the Court may modify the Loss Mitigation Program Procedures from time to time by duly adopted General Order; and

WHEREAS, after further review of the Loss Mitigation Program, the Board of Judges has agreed to certain modifications to the procedures and forms; now therefor,

IT IS HEREBY ORDERED that the revised Loss Mitigation Program Procedures and forms are adopted effective immediately and shall be available in the Clerk's office and on the Court's web site.

Dated: Brooklyn, New York
September 9, 2011

/s/Carla E. Craig
Carla E. Craig,
Chief United States Bankruptcy Judge

LOSS MITIGATION PROGRAM PROCEDURES

I. PURPOSE

The Loss Mitigation Program is designed to function as a forum in individual bankruptcy cases 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 Settlement (as defined below) 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 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, interests, 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, whose case is assigned to Chief Judge Carla E. Craig, Judge Dorothy T. Eisenberg, Judge Elizabeth S. Stong, or Judge Joel B. Rosenthal, or any other judge who elects to participate in the Loss Mitigation Program.

B. PROPERTY

The term "Property" means any real property, including condominiums or cooperative apartments, used as the Debtor's principal residence, in which the 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 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" means any holder, mortgage servicer, or trustee of an eligible Loan.

IV. ADDITIONAL PARTIES

A. OTHER CREDITORS

Any party may request, or the bankruptcy court may direct, more than one Creditor to participate in the Loss Mitigation Program, where it may be of assistance to obtain a global resolution.

B. CO-DEBTORS AND THIRD PARTIES

Any party may request, or the bankruptcy court may direct, a co-debtor or other third party to participate in the Loss Mitigation Program, where the participation of such party may be of assistance, to the extent that the bankruptcy court has jurisdiction over the party or the party consents.

C. CHAPTER 13 TRUSTEE

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

D. MEDIATOR

Any party may request, or the bankruptcy court may direct, a mediator from the Mediation Register maintained by the United States Bankruptcy Court for the Eastern District of New York to participate in the Loss Mitigation Program.

V. COMMENCEMENT OF LOSS MITIGATION

Parties are encouraged to request to enter into the Loss Mitigation Program as early in the case as possible, but a request may be made at any time as follows.

A. BY THE DEBTOR (click here for printable form)

1. In a case under Chapter 13, the Debtor may request to enter into the Loss Mitigation Program with a particular Creditor in the Chapter 13 plan, and shall note the making of the request in the docket entry for the plan. The Creditor shall have 21 days to object. If no objection is filed, the bankruptcy court may enter an order referring the parties to the Loss Mitigation Program (a "Loss Mitigation Order").

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

3. If a Creditor has filed a motion for relief from the automatic stay pursuant to Bankruptcy Code Section 362 (a "Lift-Stay Motion"), the Debtor may serve and file a request to enter into the Loss Mitigation Program at any time before the conclusion of the hearing on the Lift-Stay Motion. The bankruptcy court will consider the Debtor's request and any opposition by the Creditor at the hearing on the Lift-Stay Motion.

B. BY A CREDITOR (click here for printable form)

A Creditor may serve and file a request to enter into the Loss Mitigation Program. The Debtor shall have 14 days to object. If no objection is filed, the bankruptcy court may enter a Loss Mitigation Order.

C. BY THE BANKRUPTCY COURT

The bankruptcy court may enter a Loss Mitigation Order at any time after notice to the parties to be bound (the "Loss Mitigation Parties") and an opportunity to object.

D. HEARING ON OBJECTION

If any party files an objection, the bankruptcy court shall hold a hearing on the request to enter the Loss Mitigation Program and the objection, and shall not enter a Loss Mitigation Order until the objection has been heard.

VI. LOSS MITIGATION ORDER (click here for printable form)

A. DEADLINES

A Loss Mitigation Order shall contain:

1. The date by which contact persons and telephone contact information shall be provided by the Loss Mitigation Parties.

2. The date by which each Creditor shall initially contact the Debtor.

3. The date by which each Creditor shall transmit any request for information or documents to the Debtor.

4. The date by which the Debtor shall transmit any request for information or documents to each Creditor.

5. The date by which a written status report shall be filed, or the date and time for a status conference and oral status report (whether written or oral, a "Status Report"). In a Chapter 13 case, the status conference shall coincide, if possible, with a hearing on confirmation of the Chapter 13 plan. A date to file a written report shall be, if possible, not later than 7 days after the initial loss mitigation session.

6. The date when the loss mitigation process (the "Loss Mitigation Period") shall terminate, unless extended.

B. EFFECT

During the Loss Mitigation Period:

1. A Creditor may contact the Debtor directly, and it shall be presumed that such contact does not violate the automatic stay.

2. A Creditor may not file a Lift-Stay Motion, except where necessary to prevent irreparable injury. A Lift-Stay Motion filed by the Creditor before the entry of the Loss Mitigation Order shall be adjourned to a date following the Loss Mitigation Period, and the stay shall be extended pursuant to Bankruptcy Code Section 362(e).

3. In a Chapter 13 case, the date by which a Creditor must object to confirmation of the Chapter 13 plan shall be extended to a date that is at least 14 days following the Loss Mitigation Period.

4. Federal Rule of Evidence 408 shall apply to communications, information and documents exchanged by the Loss Mitigation Parties in connection with the Loss Mitigation Program.

VII. DUTIES UPON COMMENCEMENT OF LOSS MITIGATION

A. GOOD FAITH

The Loss Mitigation Parties shall negotiate in good faith. A party that does not participate in the Loss Mitigation Program in good faith may be subject to sanctions.

B. CONTACT INFORMATION

1. The Debtor: The Debtor shall provide written notice to each Loss Mitigation Party of the manner in which the Creditor shall contact the Debtor or the Debtor's attorney. This may be done in the request to enter the Loss Mitigation Program.

2. The Creditor: Each Creditor shall provide written notice to the Debtor of the name, address and direct telephone number of the contact person with authority to act on the Creditor's behalf. This may be done in the request to enter the Loss Mitigation Program.

C. STATUS REPORT

The Loss Mitigation Parties shall provide a written or oral Status Report to the bankruptcy court within the period set in the Loss Mitigation Order. The Status Report shall indicate how many loss mitigation sessions have occurred, whether a resolution has been reached, and whether a Loss Mitigation Party believes that additional sessions may result in partial or complete resolution. A Status Report may include a request for an extension of the Loss Mitigation Period.

D. BANKRUPTCY COURT APPROVAL

The Loss Mitigation Parties shall seek bankruptcy court approval of any 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 and any other Loss Mitigation Party within the time set by the bankruptcy court. The Debtor may contact any Loss Mitigation Party at any time. The purpose of the initial contact is to create a framework for the loss mitigation session and to ensure that the Loss Mitigation Parties are prepared. The initial contact is not intended to limit the issues or proposals that may arise during the loss mitigation session.

During the initial contact, the Loss Mitigation Parties shall discuss:

1. The time and method for conducting the loss mitigation sessions.

2. The loss mitigation alternatives that each party is considering.

3. The exchange of information and documents before the loss mitigation session, including the date by when the Creditor shall request information and documents from the Debtor and the date by when the Debtor shall respond. All information and documents shall be provided at least seven days before the first loss mitigation session.

B. LOSS MITIGATION SESSIONS

Loss mitigation sessions may be conducted in person, by telephone, or by video conference. At the conclusion of each loss mitigation session, the Loss Mitigation Parties shall discuss whether and when to hold a further session, and whether any additional information or documents should be exchanged.

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 judge.

D. SETTLEMENT AUTHORITY

At a loss mitigation session, each Loss Mitigation Party shall have a person with full settlement authority present. At a status conference or settlement conference with the bankruptcy court, each Loss Mitigation Party shall have a person with full settlement authority present. If a Loss Mitigation Party is appearing by telephone or video conference, that party shall be available beginning thirty minutes before 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. By Agreement: The Loss Mitigation Parties may agree to extend the Loss Mitigation Period by stipulation to be filed not less than one business day before the Loss Mitigation Period ends.

2. In the Absence of Agreement: A Loss Mitigation Party may request to extend the Loss Mitigation Period in the absence of agreement by filing and serving a request to extend the Loss Mitigation Period on the other Loss Mitigation Parties, who shall have seven days to object. If the request to extend the Loss Mitigation Period is opposed, then the bankruptcy court shall schedule a hearing on the request. The bankruptcy court may consider whether (1) an extension of the Loss Mitigation Period may result in a complete or partial resolution that provides a substantial benefit to a Loss Mitigation Party; (2) the party opposing the extension has participated in good faith and complied with these Loss Mitigation Procedures; and (3) the party opposing the extension will be prejudiced.

C. EARLY TERMINATION

1. Upon Request of a Loss Mitigation Party: A Loss Mitigation Party may request to terminate the Loss Mitigation Period by filing and serving a request to terminate the Loss Mitigation Period on the other Loss Mitigation Parties, who shall have seven days to object. If the request to terminate the Loss Mitigation Period is opposed, then the bankruptcy court shall schedule a hearing on the request. Notice may be modified for cause if necessary to prevent irreparable injury.

2. Dismissal of the Bankruptcy Case: A Chapter 13 bankruptcy case shall not be dismissed during the pendency of a Loss Mitigation Period, except (1) upon motion of the Chapter 13 Trustee or the United States Trustee for failure to comply with the requirements of the Bankruptcy Code; or (2) upon the voluntary request of the Chapter 13 Debtor. **A Chapter 13 Debtor may not be required to request dismissal of the bankruptcy case as part of a Settlement during the Loss Mitigation Period.** If a Chapter 13 Debtor requests voluntary dismissal during the Loss Mitigation Period, the Debtor shall indicate whether the Debtor agreed or intends to enter into a Settlement with a Loss Mitigation Party.

D. DISCHARGE

The Clerk of the Court shall not enter a discharge during the pendency of a Loss Mitigation Period.

X. SETTLEMENT

The bankruptcy court shall consider any agreement or resolution (a "Settlement") reached during loss mitigation 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 (the "Bankruptcy Rules"), including but not limited to a stipulation, sale, Chapter 11 plan of reorganization, or Chapter 13 plan.

2. Fees, Costs, or Charges: If a Settlement provides for a Creditor to receive payment or reimbursement of any expense arising from the Creditor's participation in the Loss Mitigation Program, that expense shall be disclosed to the Debtor and the bankruptcy court before the Settlement is approved.

3. Signatures: Consent to the Settlement shall be acknowledged in writing by the Creditor representative who participated in the loss mitigation session, the Debtor, and the Debtor's attorney, if applicable.

4. Hearing: Where a Debtor is represented by an attorney, 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 the bankruptcy court conducts a hearing at which the Debtor shall appear in person.

5. Dismissal Not Required: **A Debtor shall not be 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 shall 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.

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. The form of Loss Mitigation Final Report is on the Court's website (**click here for printable form**). The Loss Mitigation Final Report shall be filed no later than 14 days after termination of the Loss Mitigation Period. Termination occurs:

1. when the Court enters an order terminating the Loss Mitigation Period;

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.

Where two or more requests for Loss Mitigation have been made in a case, for different properties or different mortgages on a property, a separate Loss Mitigation Final Report must be filed with respect to each request.

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.]

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK
----------X
In Re: Chapter

Case No.

Debtor(s)
----------X

LOSS MITIGATION REQUEST - BY DEBTOR

I am a Debtor in this case. I hereby request to enter into the Loss Mitigation Program with respect to *[Identify the property, loan and creditor(s) for which you are requesting loss mitigation]*:

_____

[Identify the Property]

_____

[Loan Number]

_____

[Creditor's Name and Address]

SIGNATURE

I understand that if the Court orders loss mitigation in this case, I will be expected to comply with the Loss Mitigation Procedures. I agree to comply with the Loss Mitigation Procedures, and I will participate in the Loss Mitigation Program in good faith. I understand that loss mitigation is voluntary for all parties, and that I am not required to enter into any agreement or settlement with any other party as part of entry into the Loss Mitigation Program. I also understand that no other party is required to enter into any agreement or settlement with me. I understand that **I am not required to request dismissal of this case** as part of any resolution or settlement that is offered or agreed to during the Loss Mitigation Period.

Sign: _____ Date: _____, 20_____

Print Name: _____

[First and Last Name]

Telephone Number: _____

[i.e. 999-999-9999]

E-mail Address [if any]: _____

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK
----------X
In Re: Chapter

Case No.

Debtor(s)
----------X

LOSS MITIGATION REQUEST - BY A CREDITOR

I am a Creditor (including a holder, servicer or trustee of a mortgage or lien secured by property used by the Debtor as a principal residence) of the Debtor in this case. I hereby request to enter into the Loss Mitigation Program with respect to ***[Identify the property, loan and creditor(s) for which you are requesting loss mitigation]***:

_____

[Identify the Property]

_____

[Loan Number]

_____

[Creditor's Name and Address]

SIGNATURE

I understand that if the Court orders loss mitigation in this case, I will be expected to comply with the Loss Mitigation Procedures. I agree to comply with the Loss Mitigation Procedures, and I will participate in the Loss Mitigation Program in good faith. I understand that loss mitigation is voluntary for all parties, and that I am not required to enter into any agreement or settlement with any other party as part of entry into the Loss Mitigation Program. I also understand that no other party is required to enter into any agreement or settlement with me. I understand that **I am not required to request dismissal of this case** as part of any resolution or settlement that is offered or agreed to during the Loss Mitigation Period.

Sign: _____ Date: _____, 20_____

Print Name: _____

[First and Last Name]

Telephone Number: _____

[i.e. 999-999-9999]

E-mail Address [if any]: _____

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

----------x

In re: Chapter

Case No.

Debtor(s)

----------x

LOSS-MITIGATION ORDER

☐ A Loss Mitigation Request was filed by the debtor on *[Date]* _____, 20____.

☐ A Loss Mitigation Request was filed by a creditor on *[Date]* _____, 20____.

☐ The Court raised the possibility of loss mitigation, and the parties have had notice and an opportunity to object.

Upon the foregoing, it is hereby

ORDERED, that the following parties (the "Loss Mitigation Parties") are directed to participate in the Loss Mitigation Program:

1. The Debtor

2. _____, the Creditor with respect to _____ *[describe Loan and/or Property]*.

3. *[Additional parties, if any]* _____

It is further **ORDERED,** that the Loss Mitigation Parties shall comply with the Loss Mitigation Procedures annexed to this Order; and it is further

ORDERED, that the Loss Mitigation Parties shall observe the following deadlines:

1. Each Loss Mitigation Party shall designate contact persons and disclose contact information by *[suggested time is 7 days]*, unless this information has been previously provided. As part of this obligation, **a Creditor shall furnish each Loss Mitigation Party with written notice of the name, address and direct telephone number of the person who has full settlement authority.**

2. Each Creditor that is a Loss Mitigation Party shall contact the Debtor within **14 days of the date of this Order.**

---

1. All capitalized terms have the meaning defined in the Loss Mitigation Procedures

3. Each Loss Mitigation Party shall make its request for information and documents, if any, within **14 days of the date of this Order.**

4. Each Loss Mitigation Party shall respond to a request for information and documents within **14 days after a request is made, or 7 days prior to the Loss Mitigation Session, whichever is earlier.**

5. The Loss Mitigation Session shall be scheduled not later than _____ *[suggested time is within 35 days of the date of the order].*

6. The Loss Mitigation Period shall terminate on _____ [suggested time is within 42 days of the date of the date of the order], unless extended as provided in the Loss Mitigation Procedures.

It is further **ORDERED**, that a status conference will be held in this case on _____ *[suggested time is within 42 days of the date of the order]* (the "Status Conference"). The Loss Mitigation Parties shall appear at the Status Conference and provide the Court with an oral Status Report unless a written Status Report that is satisfactory to the Court has been filed not later than 7 days prior to the date of the Status Conference and requests that the Status Conference be adjourned or cancelled; and it is further

ORDERED, that at the Status Conference, the Court may consider a Settlement reached by the Loss Mitigation Parties, or may adjourn the Status Conference if necessary to allow for adequate notice of a request for approval of a Settlement; and it is further

ORDERED, that any matters that are currently pending between the Loss Mitigation Parties (such as motions or applications, and any objection, opposition or response thereto) are hereby adjourned to the date of the Status Conference to the extent those matters concern (1) relief from the automatic stay, (2) objection to the allowance of a proof of claim, (3) reduction, reclassification or avoidance of a lien, (4) valuation of a Loan or Property, or (5) objection to confirmation of a plan of reorganization; and it is further.

ORDERED, that the time for each Creditor that is a Loss Mitigation Party in this case to file an objection to a plan of reorganization in this case shall be extended until 14 days after the termination of the Loss Mitigation Period, including any extension of the Loss Mitigation Period.

Dated:

BY THE COURT

_____

United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

----------x

In re:

Case No.
Chapter

Debtor(s)

----------x

LOSS MITIGATION FINAL REPORT

Name of Lender: _____

Property Address: _____

Last Four Digits of Account Number of Loan: _____

File Date of Request for Loss Mitigation: ____/____/_____

Date of Entry of Order Granting Loss Mitigation: _____

Date of Entry of Order Approving Settlement *(if any):* _____

Other Requests for Loss Mitigation in this Case: _____Yes _____No

The use of the Court's Loss Mitigation Procedures has resulted in the following (please check the appropriate box below):

☐ Loan modification.

☐ Loan refinance.

☐ Forbearance.

☐ Short sale.

☐ Surrender of property.

☐ No agreement has been reached.

☐ Other: _____
_____
_____
_____

Dated: _____ Signature: _____

AVOIDING FORCLOSURE THROUGH CHAPTER 13

and

THE NEW BANKRUPTCY COURT LOSS MITIGATION PROCEDURES

NYSBA 2014 Partnership conference

FEDERAL EXEMPTIONS v. STATE EXEMPTIONS

Appendix H to Materials

Submitted by Mark H. Wattenberg

Exemption Description	New York	Federal
Real Property	$75,000 CPLR 5206(a)	$21,625 11 U.S.C. § 522(d)(1)
Personal Property	CPLR §5205(a)	
*Stoves and home heating equipment	$500 CPLR§5205(a)	
*Religious texts, family pictures, and portraits	CPLR §5205(a)	
*pew		
*domestic animals	$1,000 CPLR§5205(a)	
*apparel, furniture, refrigerator, radio, television, computer, cellphone, and cookware, prescribed health aids	CPLR§5205(a)	$550 per item and $11,525 in total in furnishings, household goods, apparel, appliances, books, animals, crops, or musical instruments for personal, family, or household use. 11 U.S.C § 522(d)(3) Professionally prescribed health aids 11 U.S.C § 522(d)(9)
*wedding ring, jewelry and art $1,000 in value	$1,000 CPLR §5205(a)	$1,450 in jewelry for personal, family, or household use 11 U.S.C § 522(d)(4)
*tools needed for profession, up to $3,000 in value	$3,000 CPLR§5205(a)	$2,175 in any implements, professional books, or tools of the trade 11 U.S.C § 522(d)(6)
*one vehicle not exceeding $4,000 in value	$4,000 CPLR §5205(a)	$3,450 11 U.S.C. §522(d)(2)
earnings - 90 %earned within 60 days of or after execution delivered to Sheriff	CPLR §5205(d)(2)	
trust fund income – 90%	CPLR §5205(d)(1)	
trusts	CPLR §5205(c)	
payments from matrimonial awards	CPLR §5205(d)(3)	
security deposit	CPLR §5205(g)	
guide dog	CPLR §5205(h)(2)	

NYS college choice tuition savings program trust fund payment monies	CPLR §5205(j)	
cause of action and damages for talking or injuring exempt personal property	CPLR 5205(b)	
cash	$5,000 D§C 283(2)	
Wildcard **if no homestead exemption, $1,000 in personal property, bank account, or cash*	$1,000 D&C § 28	Wildcard *$1,150 plus up to $10,825 of any unused amount of homestead exemption.* *11 U.S.C § 522(d)(5)*
Life insurance	Insurance Law §3212(c) D&C §282	Life insurance 11 U.S.C. §522(d)(11)(c) 11 U.S.C. §522(d)(7)
Payments under stock bonus, pension, profit sharing, 401k and IRA	D&C Law §282(2)	11 U.S.C §522(d)(10)(E)
Right to receive benefits	D&C Law§282(2)	11 U.S.C §522(d)(10)
Crime victim's reparation law, wrongful death, loss of future earnings	D&C Law§282(3)	11 U.S.C §522(d)(11)
Personal injury	$7,500 D&C Law§282(3)	Personal injury to $21,625 11 U.S.C §522(d)(11)(D)

SAMPLE ADVERSARY PROCEEDING SUMMONS AND COMPLAINT IN MORTGAGE FORECLOSURE IN BANKRUPTCY COURT

UNITED STATES BANKRUPTCY COURT
Southern District of New York

In re:

Bankruptcy Case No.:

Plaintiff(s),

–against–

Adversary Proceeding No.

Defendant(s)

COPY

SUMMONS AND NOTICE OF PRETRIAL CONFERENCE IN AN ADVERSARY PROCEEDING

YOU ARE SUMMONED and required to submit a motion or answer to the complaint which is attached to this summons to the clerk of the bankruptcy court within 30 days after the date of issuance of this summons, except that the United States and its offices and agencies shall submit a motion or answer to the complaint within 35 days, to:

Address of Clerk:	**Clerk of the Court** **United States Bankruptcy Court** **Southern District of New York** **355 Main Street** **Poughkeepsie, NY 12601**

At the same time, you must also serve a copy of the motion or answer upon the plaintiff's attorney.

Name and Address of Plaintiff's Attorney:	

If you make a motion, your time to answer is governed by Bankruptcy Rule 7012.

YOU ARE NOTIFIED that a pretrial conference of the proceeding commenced by the filing of the complaint will be held at the following time and place:

United States Bankruptcy Court Southern District of New York 355 Main Street Poughkeepsie, NY 12601	Room: Poughkeepsie Office, 355 Main Street, Poughkeepsie, NY 12601 Date and Time:

IF YOU FAIL TO RESPOND TO THIS SUMMONS, YOUR FAILURE WILL BE DEEMED TO BE YOUR CONSENT TO ENTRY OF A JUDGMENT BY THE BANKRUPTCY COURT AND JUDGMENT BY DEFAULT MAY BE TAKEN AGAINST YOU FOR THE RELIEF DEMANDED IN THE COMPLAINT.

Dated:

Vito Genna

Clerk of the Court

By: /s/ Jennifer LaChappelle

Deputy Clerk

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

COPY

----------X

IN RE:

Case No.:
(Chapter 13)

Debtor.

----------X

M, individually and as alleged sole managing member of
e, LLC

Plaintiff,

v.

ADVERSARY PROCEEDING NO.

A/K/A

COMPLAINT

).

Z.

Defendants.

----------X

, by and through his attorneys, LEGAL SERVICES OF THE HUDSON VALLEY, as and for his complaint, respectfully alleges as follows:

INTRODUCTION

1. This action arises out of a fraudulent mortgage and deed transfer dated , 2006 with Defendant , Financial, LLC (" "). In August 2006, Defendant intentionally and knowingly induced Plaintiff and his wife gham to refinance their mortgage at a highly inflated loan amount with grossly unaffordable terms in the name of , LLC (the "LLC"), a sham limited liability company

created solely for this loan transaction. Defendant s, through its agents, tricked Plaintiff and his wife into refinancing their property in order to skim their home equity with little benefit to them.

2. Plaintiff requests that the entire transaction with Defendants be set aside. This action seeks to set aside the deed dated August 3, 2006 as null and void because this deed purportedly transferred title and ownership of a certain parcel of real property designated by the street address Newburgh, NY 12550 (the "Premises") from Plaintiff and his wife to the LLC. On August 3, 2006, Defendants defrauded Plaintiff and his wife to unknowingly sign over their home to the LLC. Plaintiff was designated as the sole manager of the LLC, unbeknownst to him, and had no idea of its existence until early 2009, when Defendants' conduct came to light. This action also seeks to vacate the mortgage dated August 3, 2006, between e, LLC and Defendant , which allegedly encumbers the property.

3. In the alternative, if this Court does not find the deed and mortgage to be void, this action seeks a declaration that the mortgage dated August 3, 2006 is an equitable mortgage between and Defendant s and thus subject to all relevant claims under federal and state consumer protection laws.

4. Plaintiff seeks relief against Defendants based on violations of federal law, including The Truth In Lending Act, Home Ownership and Protection Act, Real Estate Settlement Procedures Act, Fair Housing Act, Civil Rights Act, and Racketeering Influenced and Corrupt Organizations Act. Plaintiff also seeks relief against Defendants based on violations of New York state law, including The Deceptive Practices Act, and Anti-Predatory Lending Law, Real Property Law, as well as the common law doctrines of equitable estoppel, fraud, conspiracy to commit fraud, and unconscionability.

JURISDICTION AND VENUE

5. This Court has federal question jurisdiction over Plaintiff's federal claims pursuant to 28 U.S.C. §§ 1331 and 1343.

6. This Court has supplemental jurisdiction over Plaintiff's pendent state law claims pursuant to 28 U.S.C. § 1367.

7. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b) because the subject property is located in the Southern District of New York and a substantial portion of the events giving rise to this complaint occurred within the Southern District of New York.

PARTIES

8. Plaintiff Phillip C[illegible] is an elderly 71-year-old Jamaican-born, Afro-Caribbean man who resides with his wife, age 72, at [illegible] Avenue, [illegible], New York. They purchased their home in 2003 from The City of Newburgh for approximately $20,000.00 in cash, held title free and clear of any mortgages, and did not have a mortgage payment.

9. Defendant [illegible] is an Alaskan corporation, whose registered office is located at [illegible], AK 99801 and principal place of business is located at [illegible] Florida 33496. On August 2, 2006, Defendant [illegible] set up a sham limited liability company in New York known as [illegible], LLC. The next day, Defendant [illegible] tricked Plaintiff and his wife into signing the deed to their home over to the LLC and taking out a $165,750.00 mortgage with [illegible] in the LLC's name and currently holds the note to this mortgage. Upon information and belief, Defendant [illegible] regularly does mortgage transactions in New York State, has entered into at least 60 mortgage transactions in New York State since it began its mortgage business. Defendant [illegible] is not registered with the New York State Department of State

("NYSDOS"), never obtained a certification from the NYSDOS to do business in New York, and never obtained approval from the New York State Banking Department to use "Financial" in its name, as required under NY Banking Law. In 2007 and 2008, commenced ten (10) foreclosure actions against LLCs that bear street names in Bronx, Dutchess, Kings, Orange, Queens, Nassau, Suffolk and Westchester County Supreme Courts.

10. Defendant a/k/a Albert a/k/a Albert is a managing member, principal, and officer of Defendant and is in all respects indistinguishable from the corporate entity. Upon information and belief, Defendant Al participated in this mortgage transaction with Plaintiff on behalf of Defendant

11. Defendant , Esq. a/k/a Douglas a/k/a Doug ("") is an attorney licensed to practice law in New York State. He maintains two (2) law offices at 5, New York, NY 10007 and t, NY 10538. He acted as Defendant ' closing agent in the subject mortgage transaction, signed the Articles of Incorporation for the LLC and filed them with the NYSDOS on August 2, 2006, the day before the closing, and listed his firm's address as the address to which the NYDOS will mail process on the LLC's behalf. Upon information and belief, Defendant received approximately $50,000 at the closing with Plaintiff. Since 2007, he and his law firm have represented n at least four (4) foreclosure actions in New York against other LLCs that bear street names. Upon information and belief, Defendant regularly does business on Defendant ' behalf throughout New York State.

12. Defendant Candice is an employee of Defendant nd sent correspondence to Plaintiff on behalf.

13. Defendant Gene i, upon information and belief, is a mortgage broker who worked on Defendant ' behalf on refinancing ' loans and resides at -5734.

14. Defendant Catherine upon information and belief, conducted business as a mortgage broker out of Brooklyn, New York on behalf of Defendant

15. Defendant is a contractor who upon information and belief lives at 50-6817, introduced Plaintiff to Defendant drove Plaintiff to the closing with and received approximately $20,000 of the funds released at the closing.

FACTS COMMON TO ALL CLAIMS

16. Upon information and belief, Plaintiff and his wife "The s") are elderly, Jamaican-born, Afro-Caribbean homeowners who reside on the second floor of their home located at e in Newburgh, New York. Plaintiff has only a middle school education. His wife completed high school, but she never went to college. The re not sophisticated in financial or legal matters. Upon information and belief, the residential lending laws and customs in Jamaica make it much more difficult for borrowers to obtain secured loans and The were unfamiliar with the dangers of high risk predatory lending when they entered the loan transaction with Defendant

17. In 2003, The purchased their home in 2003 from the City of Newburgh for approximately $20,000 in cash and held title free and clear of any mortgages. In early spring 2005, they decided to do some necessary renovations, including plumbing and electric work, and asked some local acquaintances about obtaining a loan.

18. Upon information and belief, sometime before June, 2005, Plaintiff asked a local man named "Walter" about obtaining a residential mortgage loan. Upon information and belief, Walter arranged for Plaintiff to get a $60,000 interest-only loan from a private lender named [redacted]. Upon information and belief Walter inspected Plaintiff's home, but never gave Plaintiff or his wife a written loan application, verified their income, or even asked about their monthly income or expenses. Walter told Plaintiff before the closing that Plaintiff would receive approximately $18,000 in cash at the closing. On or about June, 2005, Mr. [redacted] directed Walter to forward the closing documents to his closing attorney, have Plaintiff sign them, and then return them to him. Walter told Plaintiff that $30,000 would be released at the closing, $12,000 would be deducted for closing costs, and the monthly mortgage payment would be $800 for eighteen (18) months. Walter again told Plaintiff that Plaintiff would receive $18,000 at this closing.

19. On June 30, 2005, Walter drove Plaintiff and his wife to this closing. Upon information and belief, no one reviewed the closing documents or loan terms with [redacted] including but not limited to the $60,000 loan's adjustable 16% interest rate, the monthly $800 *interest-only* payments for the eighteen (18) month loan term, the $60,800 balloon payment due at the end of this loan term, of which $60,000 would be applied to the principal and $800 would be for interest, and that one year of mortgage payments would be prepaid into an escrow account on the closing date. Upon information and belief, Plaintiff and his wife signed loan documents and entered a loan agreement with Mr. [redacted] under these terms ("[redacted] Loan"). Upon information and belief, at this closing, $60,000 of The [redacted]' home equity was converted into cash, approximately $20,000 was allegedly pre-paid to contractors for performing renovations on Plaintiff's home, approximately $10,400 was pre-paid to Mr. [redacted] for one (1) year of mortgage payments, and only

$15,000 in cash was paid to Plaintiff, not $18,000 as promised. Approximately $14,600 of the loan proceeds remain unaccounted for. The were not represented by an attorney at this closing and never received a copy of the settlement statement. The Loan, which cost The approximately $74,400 in order to borrow and repay $15,000 in only eighteen (18) months, was predatory and doomed to fail from its inception.

20. Less than seven (7) months later, Mr. sent Plaintiff a letter threatening foreclosure. The were desperate to avoid losing their home, so Plaintiff asked Mr. refinance the loan. Upon information and belief, Mr. declined and told Plaintiff to apply for a second loan instead.

21. Driven by reluctance to enter another loan agreement with Mr. Z, Plaintiff asked a local acquaintance named "Jimmy" about obtaining a new loan. Upon information and belief, Jimmy introduced Plaintiff to Defendant H, who contacted Defendant and inquired about obtaining a loan for Plaintiff. Upon information and belief, Defendant I assured Plaintiff by phone that she could get him a loan and then arranged for him to get a loan with Defendant . Upon information and belief, Defendant I never gave Plaintiff or his wife a written loan application and never their income. On or about late July, 2006, Defendant offered to lend Plaintiff and his wife $165,750.00 in order to refinance the Premises, pay off the $60,000 Loan, and other outstanding obligations, including real estate taxes. Attached as **Exhibit A** is a copy of a letter faxed from Defendant Candice to Defendant describing the offer.

22. On August 3, 2006, Jimmy drove Plaintiff and his wife to close on a loan with Defendant in Long Island, New York ("Closing"). Upon information and belief, Plaintiff and his wife met with Defendant and Defendant who obtained payoff

information from Mr. Z at the closing. Attached as **Exhibit B** is a copy of a communication Mr. Z sent to Defendant Inniss with payment information on August 3, 2008. Upon information and belief, at the Closing, The s were not represented by an attorney, no one reviewed the loan terms with them, and they allegedly signed loan documents and entered a refinance agreement with for a seven (7) year $165,750.00 loan with an adjustable 15% interest rate and monthly payments of $2,002.81 for the first month and $2,071.87 thereafter, and gave Defendant a mortgage on their home located at y Avenue, Newburgh, New York ("Loan"). Attached as **Exhibit C** is a copy of the Adjustable Rate Note ("Note") from the s Loan. Attached as **Exhibit D** is a copy of the Mortgage ("Mortgage") from the Loan. The adjustable interest rate on this loan was initially 15%, well above the amount allowed under consumer protection laws.

23. Upon information and belief, the day immediately before the closing, Defendant K who acted as A closing attorney, prepared, signed, and filed Articles of Organization on behalf of the fictitious e, LLC with the NYSDOS in Albany, NY on August 2, 2006, the day before the Closing, without Plaintiff's knowledge or consent. Defendant K listed his law firm's nt address, not Plaintiff's, as the LLC's agent upon which process against it may be served. Attached as **Exhibit E** is a copy of the Articles of Organization. Attached as **Exhibit F** is a copy of the record for , LLC from the NYSDOS Division of Corporations' website. Defendant K ailed to inform Plaintiff or his wife that he set up this LLC before the closing.

24. At the Aries Closing, Defendant K also failed to review any terms or conditions in the loan documents with Plaintiff or his wife and tricked them into agreeing to:

a. Adopting a Member Resolution designating Plaintiff as the "Resident Agent" for the LLC. Attached as **Exhibit G** is a copy of the Member Resolution for the LLC.

b. Transferring the deed to their home to the LLC. Attached as **Exhibit H** is a copy of an indenture agreement transferring the deed to the Premises from Plaintiff and his wife to the LLC, witnessed by Defendant K

c. Permitting to unlawfully enter the property and "change the locks" if the LLC does not keep its promises in the agreement. See Section 9 of Note in **Exhibit C**.

d. The variable interest rate. See Note in **Exhibit C**.

e. An arbitration ride. See ; Note in **Exhibit C**.

f. The term that varied the 15% interest rate and monthly payments automatically according to a pre-determined adjustment schedule, regardless of standard market interest rate fluctuations. Section 4 of the Note in **Exhibit C**.

g. Authorizing one (1) year of mortgage payments, or $26,865.25, to be placed into an escrow account at US Bank Corporate Trust on the date of the Closing ("Prepayment Agreement") and permitting Defendant to make interest-only payments on the loan to itself during the first year of the loan term. Attached as **Exhibit I** is a copy of the Prepayment Agreement and a letter from a representative at U.S. Bank Corporate Trust confirming "U.S. Bank is holding the money for the first year's mortgage payments."

h. Authorizing $25,000 to be placed into an escrow account to pay for renovation costs ("Construction Agreement"). Upon information and belief, Defendant K also tricked Plaintiff into signing this Agreement by promising him that paying for

construction costs using an escrow account is "a useful first step toward improving" Plaintiff's credit score. Attached as **Exhibit J** is a copy of the Construction Agreement.

i. Directing an unnamed "Escrow Agent", who upon information and belief is Defendant K , to transfer the monthly mortgage payments from the escrow account to Defendant A ("Declaration"). Attached as **Exhibit K** is a copy of the "Declaration" signed by Defendant Al , as A ' "Recipient Representative".

j. Authorizing Defendant to correct any "errors" on the closing documents. Attached as **Exhibit L** is a copy of an Errors and Omissions Agreement.

25. Despite this, Defendant A still referred to Plaintiff as "owner of the LLC". Attached as **Exhibit M** is a fax from Defendant Al with wiring instructions.

26. Upon information and belief, Defendant K tricked Plaintiff and his wife into conveying the deed to their home to this LLC in order to shield Defendants from Federal and New York State consumer protection laws, including the Federal Truth in Lending Act, the Real Estate Settlement Procedures Act, the Fair Housing Act, the Deceptive Practices Act, and New York State Anti-Predatory Lending Law.

27. Defendants failed to inform Plaintiff and his wife that they were signing documents that would transfer the deed to their home to the LLC, taking out the loan in the LLC's name, and avoiding any claims Plaintiff and his wife may have against Defendants under consumer protection laws. Upon information and belief, Defendants were aware that Plaintiff would not be able to read and understand the complex mortgage and deed transfer documents and kept him in the dark about this transaction's abusive nature.

28. Upon information and belief, Defendant knew Plaintiff and his wife could not afford this loan from its inception so Defendant guaranteed it would receive one (1) year of loan payments by converting The ' home equity into cash at the closing,

placing the cash into an escrow account, and pay itself mortgage payments from the funds in the escrow account each month until the these funds were depleted after only (1) year. This conduct provided no benefit to the borrower and goes against standard business practices.

29. Upon information and belief, Defendant K. never explained to Plaintiff or his wife why he set up this escrow account on behalf and never even told Plaintiff or his wife that he was doing it in the first place, yet the loan documents state that doing this would improve Plaintiff's credit. Section 4 of the Prepayment Agreement states Plaintiff acknowledges that he is "anxious to achieve an improved credit rating and believe that a Borrower's escrow to make all necessary Mortgage payments for the first year would be a useful step toward improving Borrower's and Managing Member's credit scores." See **Exhibit I.**

30. Upon information and belief, nothing about the Loan or the Prepayment Agreement improved Plaintiff's credit score and Plaintiff received no benefit from the Loan.

31. The settlement statement from the Closing ("Settlement Statement") states the following payments were made from the $165,750.00 loan proceeds:

FEE AMOUNT	RECIPIENT	PURPOSE
$76,533.46	Morris	pay off first mortgage
$4,972.50	unnamed "broker 1"	commission
$2,900.63		unknown
$1,345.00	unspecified	unknown "Closing Legal & LLC"
$450	unspecified	document preparation
$7,704.91	re Title	Title Insurance
$300	Abstract	municipal searches
$950.00	Defendant Catherine	Appraisal
$450	unnamed "Title Closer"	unknown
$24,862.44	unnamed "Escrow Agent"	unknown
$500.00	unnamed	escrow fees
$2,002.81	unnamed	escrow interest to 1st of September
$2,640.00		alleged Second Mortgage
$12,088.25	apital	unknown
$25,000.00	Defendant Doug	escrow agent
$3,000.00		cash released to homeowner

Attached as **Exhibit O** is a copy of the Settlement Statement from the Closing.

32. The sum of these payments is only $165,700.00, not $165,750.00. At least $50 of these funds remains unaccounted for.

33. Upon information and belief, the fee paid to Morris was incorrect, inflated and made in bad faith because the actual balance of the loan with Mr. was no greater than $60,000 as of the date of this closing and approximately $11,200 was already paid to Mr. Z directly from the escrow account set up at the closing for the loan with Mr. Z and applied to interest. Despite this, Defendant paid $76,533.46 to Mr. Z at this closing and upon information and belief overpaid Mr. Z $16,533.46 from the loan proceeds in bad faith.

34. Upon information and belief, all fees paid from the Closing were made in bad faith.

35. Upon information and belief, as of the date of the closing, there was no "second mortgage" on the Premises.

36. Upon information and belief, Defendant K is the unnamed Escrow Agent and received almost $50,000.00 at this closing, as both the named and unnamed escrow agent, in bad faith.

37. Plaintiff and his wife were not represented by an attorney in this transaction and upon information and belief they never received any of the written disclosures required by federal and state law, including the Truth in Lending Act.

38. Upon information and belief, Plaintiff was surprised by the excessive fee paid to Mr. Z at the Closing. About one (1) month after the closing, Plaintiff asked Mr. Z to break down this fee and release the remaining funds held in the escrow account from the closing for the loan with Mr. Z Upon information and belief, Mr.

Z[illegible] ignored him, never broke down his inflated fee, and never gave Plaintiff any of the remaining funds.

39. Only one (1) week after the closing, Defendant K[illegible] sent Defendant [illegible] $5,000 check "for [illegible] Newburgh". Attached as **Exhibit P** is a copy of a letter dated August 10, 2006 from Defendant K[illegible] to Defendant H[illegible] with a copy of check number 1158 from Defendant K[illegible] s trust account made out to Defendant H[illegible]

40. Less than two (2) months after the closing, Defendant K[illegible] sent Defendant H[illegible] a $7,500 check "for [illegible] y Avenue Newburgh". Attached as **Exhibit Q** is a copy of check number 1347 from Defendant K[illegible] attorney trust account made out to Defendant He[illegible]. Upon information and belief, on or about August 22, 2006 Defendant [illegible] also sent Defendant [illegible] $7,500. See handwritten note in **Exhibit Q**.

41. Less than three (3) months after the closing, Defendant Al[illegible] notified Plaintiff that he is must "make monthly interest payments beginning October 1, 2007, [and] continuing monthly until the loan has been refinanced." Attached as **Exhibit R** is a copy of this letter from Defendant Al[illegible] dated October 12, 2007. Upon information and belief, Defendant [illegible] offered Plaintiff this loan with the intent to refinance it from its inception in bad faith.

42. Upon information and belief, Defendant K[illegible] authorized himself to release $3,500 to Defendant H[illegible] almost five (5) months after the closing. Two (2) months later then he authorized himself to release $1,000 to Plaintiff. Attached as **Exhibit S** are copies of two authorizations, check number 2085 from Defendant K[illegible] attorney trust account made out to Defendant H[illegible] and check number 1084 from Defendant [illegible]'s

attorney trust account made out to Plaintiff. Upon information and belief, Defendant K executed these authorizations without Plaintiff's knowledge or consent.

43. Over one (1) year after the Closing, Defendant Candice advised Plaintiff that the money held in the escrow account for Avenue would "soon be exhausted", that he must begin paying $2,210.00 "interest payments" each month beginning on October 1, 2007, that he "may be eligible for a lower interest rate", and that it would be "in his best interest to contact a mortgage broker". She then directed Plaintiff to contact Defendant who "is working with on refinancing" s' loans. Attached as **Exhibit T** is a copy of a letter dated August 23, 2007 from Defendant Candice n to Plaintiff.

44. Only approximately one (1) month later, Defendant Al threatened Plaintiff with foreclosure unless Plaintiff began making monthly interest payments in less than one (1) week. Defendant Al also stated Plaintiff's failure to do so would put him in immediate default and increase the interest rate "a default rate of 18%". Attached as **Exhibit U** is a copy of a letter dated September 26, 2007 from Defendant Al to Plaintiff. However, the loan agreement does not recite any special "default" interest rate or increase. See Note in **Exhibit C**. Upon information and belief, Defendant Al fabricated and threatened Plaintiff with this fictitious "default" interest rate increase in order to intimidate and pressure Plaintiff into refinancing again with Upon information and belief, Defendant planned to pressure Plaintiff into refinancing the loan from its inception in order to slowly skim equity from Plaintiff's home.

45. Over the course of the loan, Defendant received almost $29,000 from the escrow funds. Attached as **Exhibit V** is a letter dated November 20, 2007 from Defendant

Al I ...n to Joe ... confirming Defendant ... received these funds. Upon information and belief, Joe ... is a current or former principal, employee, and/or agent of ... Group, Inc. and conducted business as an unlicensed mortgage broker on behalf of Defendant ... in New York State. In addition, Plaintiff also made a $2,071.38 payment to Defendant ... See paragraph 2 of letter in **Exhibit R.**

46. On or about October 23, 2007, Defendant Candice ... told Plaintiff "there have been a lot of changes in the lending industry in the past year", that "some banks that used to do loans like yours have stopped", that he might not be able to refinance with another lender after the escrow funds are depleted, that "there are now strict, lending rules for banks", and that he should "start looking for a new mortgage NOW" by calling the broker who brought him to ... or by calling ... s directly. She then reminded him the 14th payment of $2,210 was due in less than one (1) month and directed him to have his broker contact ... for payoff information. Attached as **Exhibit W** is a copy of a letter from Defendant Candice ... to Plaintiff.

47. On or about October 31, 2007, Defendant Al I ... faxed a payoff letter stating the payoff figure for the ...oan was $162,000, only $3,750 less than the principal loan amount, over one (1) year after the ... Closing. See **Exhibit M.** Upon information and belief, at this time, over $30,000 was already paid to Defendant ... n the ... Loan. Of these funds, approximately $26,300 was applied to interest and only approximately $3,700 was applied to principal.

48. Less than one (1) month after the escrow funds were depleted, on or about November 19, 2007, Defendant Al I ... ...ent Plaintiff simultaneous default and acceleration notices

and demanded $172,619.50 by December 20, 2007. Attached as **Exhibit X** is a copy of the default and acceleration notice Defendant Al n sent to Plaintiff.

49. Upon information and belief, Defendant sent these simultaneous notices in violation of the Loan agreement, Section 6 (C) of the Aries Note states:

> If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal which has not been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is mailed to me or delivered by other means.

See s Note in **Exhibit C**. Defendant Aries breached the terms of this agreement by sending Plaintiff default and acceleration notices simultaneously, instead of at least 30 days apart, as required by the agreement. See s Note in **Exhibit C**.

50. On or about November 20, 2007, Defendant stated the payoff and per diem figures as of November 1, 2007 were $162,000 and $73.66, respectively. Attached as **Exhibit Y** is a copy of a payoff letter from Defendant Al n to Joe sta. A few months later, then stated the payoff and per diem figures as of January 24, 2008 were $175,671.80 and $85.29, respectively. The latter payoff figure included nearly $10,000 in fees. Attached as **Exhibit Z** is a copy of the latter payoff letter from Defendant Al n to "Cathy".

51. Upon information and belief, Defendant Al sent these payoff letters to mortgage brokers Joe and "Cathy", or Defendant in preparation of refinancing again with Plaintiff through these mortgage brokers in New York.

52. The loan agreement states the interest rate between November 20, 2007 and December 24, 2007 was fixed at 16%, yet somehow ysteriously increased the per diem figure from $73.66 to $85.29. See Note in **Exhibit C**. Upon information and belief, Defendant arbitrarily increased the per diem figure in bad faith.

53. Upon information and belief, the A ; Loan was doomed from its inception and Plaintiff received only $3,000 in cash in exchange for losing $165,750 of his home's equity to Defendant Aries.

54. Public records show Florida addresses for Defendant Candice , Defendant Al ..n, Defendant .. .., and Mr. .. within 11 miles of one another.

55. Upon information and belief, .. continues to conduct business regularly throughout New York State and has commenced at least eleven (11) foreclosure actions against homeowners in southern New York since 2007. Attached as **Exhibit AA** is a list of NY foreclosure actions ; has filed since 2007. Aries commenced a foreclosure action against ' LLC in Orange County Supreme Court on September 26, See **Exhibit AA**. See also a copy of Summons and Complaint attached as **Exhibit BB**.

56. Faced with the threat of losing his home again, on or about November, 2008, Plaintiff asked local acquaintances about stopping the foreclosure against his home. Defendant ....., who put Plaintiff in touch with , initially, drove Plaintiff to meet with ..k of "..s" in Clifton, New Jersey. In early December, 2008, Plaintiff paid Mr. .. : $1300 to stop the foreclosure. Attached as **Exhibit CC** are copies of the three money orders Plaintiff paid to Mr. and two (2) flyers Plaintiff received from . On or about December 1, 2008 Mr .. filed an Answer on Plaintiff's behalf in Orange County Supreme Court. Attached as **Exhibit DD** is a copy of this Answer. Mr. , not an attorney and ..ns is not licensed to do business in New York. On July 29, 2009, Plaintiff met with of the U.S. Trustee's office and reported his interaction with Mr. J

57. The Mortgage states the borrower's monthly payments will include a portion for "escrow funds" which are to be applied toward taxes. See Covenant 3(a) of the Mortgage in **Exhibit D**. Upon information and belief, Defendant received these tax funds from the equity converted from The home at the Closing, but did not pay the City of Newburgh taxes until April 30, 2009, well after the City of Newburgh commenced a tax lien foreclosure against The ' home, and less than one (1) month before the deed to their home was scheduled to be transferred to the City of Newburgh on for the unpaid taxes. In October, 2008, Plaintiff contacted Legal Services of the Hudson Valley ("LSHV") seeking help with both the foreclosure actions against his home. On or about late January, 2009, Plaintiff met with LSHV in Newburgh, New York and first learned that his home's deed had been transferred to the LLC, that it was no longer in his or his wife's name, that took escrow funds and never paid the back taxes, and that his home was now threatened to be taken by the City of Newburgh.

DEFENDANTS' CONCERTED ACTIONS

58. When conducting business in New York, Defendant worked exclusively with a small group of people conducting business as mortgage brokers, closing agents, and a contractor.

59. Upon information and belief, the transaction with Plaintiff and his wife was part of a scheme among Defendants Al , Candice , K and H and J when Defendants acted in concert with each other and their agents to utilize lists of distressed borrowers in minority neighborhoods and assist Defendant with identifying and locating distressed homeowners in these neighborhoods to whom they would extend predatory loans.

60. Upon information and belief, it was part of Defendants' scheme to lead a distressed homeowner to believe would offer them a loan with favorable terms but instead offer

the distressed homeowner a predatory loan from Defendant . As part of the scheme, Defendant would share the proceeds of these transactions with others in the form of exorbitant fees and commissions.

61. Upon information and belief, Defendant has engaged in 43 mortgage transactions in New York City alone, all in which the property was deeded from a person to an LLC that bore the name of the address of that property and listed the homeowner as the sole managing member. In every instance, Defendant counsel created the LLC before the transaction. In most or all of these cases, the LLC took out a mortgage with with interest rates ranging between 14% and 16%. Thirty-six (36) of these forty-three (43) properties are located in New York City neighborhoods with mostly black and Latino residents. Also, approximately three-fifths of these Thirty-six (36) New York City properties are located in areas with populations that are greater than 80% black and Latino, and the other approximately two-fifths have populations that range between 50% and 80% black and Latino.

62. Upon information and belief, Defendant loan files explicitly indicate that its brokers were targeting minority neighborhoods and minority borrowers.

FIRST CAUSE OF ACTION

Against Financial, LLC, Al , and Douglas

NEW YORK REAL PROPERTY LAW § 320

63. Plaintiff repeats and realleges the foregoing as though fully set forth therein.

64. The deed transfer from Plaintiff and his wife to LLC, although a conveyance of property on its terms, must be considered a mortgage as a matter of law. Under New York State common law and New York Real Property Law § 320, "[a] deed

conveying real property, which by any other instrument, appears to be intended only as a security in the nature of a mortgage, although an absolute conveyance in terms, must be considered as a mortgage."

65. The deed from Plaintiff and his wife to the LLC was never meant to transfer any type of ownership of the property. The LLC is a single member liability company and Plaintiff is its sole managing member. He has the same ownership interest in the property whether he owns it or is a single member of the LLC that owns it. Upon information and belief, Defendants orchestrated the LLC's formation and the deed transfer from The this LLC so that they could give Plaintiff and his wife a mortgage with more onerous and ambiguous terms than those permitted by federal and state consumer protection laws, which would have otherwise applied if Plaintiff and his wife took out this mortgage as natural persons.

66. Defendant K filed the Articles of Organization for , LLC the day before the closing before he ever met or spoke with Plaintiff or his wife. The first met Defendant K the closing on August 3, 2006, where they unwittingly signed many documents, including the Operating Agreement and Member Resolution for the LLC. Neither Plaintiff nor his wife was aware of the LLC's existence. They did not know Plaintiff was the LLC's sole managing member. They believed they were entering a consumer loan transaction. Upon information and belief, the LLC has been completely inactive since August 3, 2006.

67. To establish that a deed conveyance was meant as a security, oral testimony bearing on the parties' intent must be examined. The surrounding circumstances and parties' acts must also be considered. Defendants' acts show how they intended to take a mortgage in Plaintiff's home and use a dummy LLC to shield themselves against consumer protection

laws. Plaintiff's home is his and his wife's major asset. They derived no benefit from transferring ownership to an inoperative LLC. The only effect of doing this was to deprive them of claims under consumer protection law so that Defendants could underhandedly get more money from them.

68. Accordingly, the Court should issue a judgment finding that the August 3, 2006 deed transfer to LLC and corresponding mortgage is an equitable mortgage between The and Defendant and entitling Plaintiff to all rights and remedies afforded to consumers under state and federal laws.

SECOND CAUSE OF ACTION

Against Financial, LLC, Al n, and Douglas J

TRUTH IN LENDING ACT

69. Plaintiff repeats and realleges the foregoing as though fully set forth therein.

70. At the time of the subject transaction, Defendant , through its principal Defendant Al and closing agent Defendant K acted as a creditor who engaged in the making of mortgage loans payable by agreement in more than four (4) installments or for which the payment of a finance charge is or may be required whether in connection with the loans, sale of property or services, or otherwise. Therefore, Defendant subject to the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.*, and its implementing regulations, Federal Reserve Board Regulation Z, 12 C.F.R. § 226.7.

71. As a result of the transactions that occurred at the Closing, Defendant acquired a security interest in Plaintiff's home that secures payment or performance of an obligation. Therefore, was required to follow the requirements of TILA and Regulation Z in these

transactions. However, upon information and belief, Defendant . violated the disclosure and rescission requirements of TILA and Regulation Z in the following and other respects:

a. By failing to provide the required disclosures prior to the consummation of August 3, 2006 transaction in violation of 15 U.S.C. § 1638(b) and Regulation Z § 226.17(b).

b. By failing to make required disclosures clearly and conspicuously in writing in violation of 15 U.S.C. § 1632(a) and Regulation Z § 226.17(a)

c. By failing to disclose properly and accurately the "amount financed", in violation of 15 U.S.C. § 1638(a)(2) and 12 C.F.R. § 226.18(b);

d. By failing to disclose properly and accurately the "finance charge" fees payable to third parties that were not bona fide or reasonable in amount, as required by 15 U.S.C. § 1638(a)(3) and 12 C.F.R. §§ 226.18(d) & 226.4;

e. By failing to provide the "annual percentage rate" in violation of 15 U.S.C. § 1638(a)(4) and 12 C.F.R. § 226.18(e);

f. By failing to provide the "total of payments" in violation of 15 U.S.C. § 1638(a)(5) and 12 C.F.R. § 226.18(h);

g. By failing to provide the number, amount, and due dates or period of payments scheduled to repay the obligation in violation of 15 U.S.C. § 1638(a)(6) and 12 C.F.R. § 226.18(g);

h. By failing to provide two copies of the notice of the right to rescind and an accurate date for the expiration of the rescission period, in violation of 15 U.S.C. § 1635 and 12 C.F.R. § 226.23(b).

72. These TILA violations give Plaintiff an extended right to rescind the loan held by Defendant . pursuant to 15 U.S.C. §§ 1635 & 1641(d)(1) and 12 C.F.R. § 226.23.

73. As a result of these violations of TILA and Regulation Z, Defendant is liable to Plaintiff for: rescission of the loan and termination of Defendant security interest in the property; actual damages; statutory damages as provided by 15 U.S.C. § 1640; and costs and disbursements.

THIRD CAUSE OF ACTION

Against Financial, LLC

HOME OWNERSHIP AND PROTECTION ACT

74. Plaintiff repeats and realleges the foregoing as though fully set forth therein.

75. The Home Ownership and Protection Act ("HOEPA"),15 USC §1639, is an amendment to the TILA. It offers further protections for high rate mortgages, as defined by 15 USC §1602 (aa)(1)(B), Federal Reserve Board Regulation Z, 12 C.F.R. § 226.32.

76. The Loan is a high rate mortgage and covered under HOEPA because it is a consumer credit transaction secured by Plaintiff's principal dwelling and the annual percentage rate ("APR") for the loan at consummation exceeded the yield on the relevant treasury securities having comparable maturity periods by more than 8%. 15 USC §1602 (aa)(1)(A); 12 C.F.R. § 226.32(a)(1)(i).

77. In this case, the yield on treasury securities having comparable periods of maturity ranges between 4.777% and 4.89%. The Loan's variable interest rate was initially 15%. Therefore the Loan's APR was at least 15%. The APR exceeded the applicable yield on treasury securities by over 8%.

78. Loans covered under HOEPA are subject to additional disclosure requirements. The consumer must be given special "advance look" HOEPA disclosures at least three (3) days prior to consummation to assure that the consumer has time to reflect. The disclosures must include the APR, the amount of regular monthly payments for fixed rate loans and both the regular and maximum possible monthly payment for variable rate loans plus a statement that the interest rate and the monthly payment may increase, the amount of any balloon payment, and the total amount the consumer will borrow.

79. Defendant violated HOEPA and Regulation Z by:

a. Failing to provide Plaintiff with the disclosures required under HOEPA at least three (3) business days prior to the consummation of the transaction, in violation of 15 U.S.C. §1639(a) and (b) and 12 C.F.R. § 226.32(c);

b. Requiring more than two (2) periodic payments to be paid in advance from the loan proceeds, in violation of 15 U.S.C. §1639(g) and 12 C.F.R. § 226.32(d)(3); and

c. Engaging in a pattern or practice of extending credit which is subject to HOEPA and Regulation Z based on the value of the collateral, or Plaintiff and his wife's home, without regard to their ability to repay the debt and without verifying and documenting their repayment ability, in violation of 15 U.S.C. §1639(h) and 12 C.F.R. § 226.34(a)(4).

80. Plaintiff and his wife's right to rescind the transaction was extended by Defendant failure to provide them with the material disclosures required under HOEPA and Regulation Z. 15 U.S.C. §1635 and §1639(j) and 12 C.F.R. § 226.23.

81. As a result of these violations of HOEPA and Regulation A, Defendant is liable to Plaintiff pursuant to 15 USC §1640 for:

a. Rescission of the mortgage loan transaction, termination of any interest created under the transaction, and return any money or property given by Defendant to anyone in connection with this transaction;

b. Actual damages in an amount to be determined at trial;

c. Statutory damages as provided by 15 U.S.C. § 1640 plus an amount equal to the sum of all finance charges and fees paid by Plaintiff; and

d. Costs and disbursements.

FOURTH CAUSE OF ACTION

Against Financial, LLC and Al

REAL ESTATE SETTLEMENT PROCEDURES ACT

82. Plaintiff repeats and realleges the foregoing as though fully set forth herein.

83. The Loan is a refinance loan secured by a one-family residential property, the proceeds of which were used to pay off Plaintiff's prior mortgage with Morris

84. Upon information and belief, Defendant has entered over 50 mortgage transactions in New York and is a creditor who makes or invests in mortgage loans aggregating more than $1,000,000 per year.

85. Upon information and belief, the Loan is a "federally related mortgage loan" as defined in 12 U.S.C. § 2602(1), and therefore is subject to the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. §§ 2601 *et seq.*

86. Defendant , through its principal Defendant Al , violated RESPA with respect to the loan transaction with Plaintiff and his wife by:

a. Failing to provide a good faith estimate of settlement costs and a HUD-1 settlement statement at closing, in violation of 12 U.S.C. § 2603 and Regulation X § 3500.7; and

b. Giving a portion, split, or percentage of charges made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed, in violation of 12 U.S.C. § 2607(a) and 24 C.F.R. § 3500.14(c).

87. Accordingly, Defendants are liable to Plaintiff for: actual damages, trebled under 12 U.S.C. § 2607(d)(2); and costs and disbursements.

FIFTH CAUSE OF ACTION

Against Financial, LLC, Al l , and Douglas J

FEDERAL FAIR HOUSING ACT, 42 U.S.C. § 3605

88. Plaintiff repeats and realleges the foregoing as though fully set forth herein.

89. Defendant through Defendant Al a and Defendant , discriminated against Plaintiff and his wife, who are both black, on the basis of their race in a residential real-estate transaction in violation of the Federal Fair Housing Act, 42 U.S.C. § 3605.

90. Defendants targeted minority neighborhoods throughout southern New York, particularly in Brooklyn, Queens, and Newburgh, and made substantial profits by deceiving minority homeowners into entering predatory mortgage transactions that stripped valuable equity from their homes and dispossessed them of all rights afforded by consumer protection laws.

91. Plaintiff and his wife were eligible for a residential mortgage and Defendant xtended a mortgage to them with grossly unfavorable terms. These actions were taken deliberately and with discriminatory intent, and with reckless disregard for Plaintiff's rights.

92. Defendants engaged in a pattern of discriminatory practices related to residential real estate transactions that had a disparate impact on non-white homeowners in and around New York State.

93. As a proximate result of Defendants' discriminatory practices related to residential real estate transactions, Plaintiff has suffered economic loss, mental anguish, deprivation of civil rights, and the prospective loss of housing.

94. Accordingly, this Court should declare the August 3, 2006 deed and mortgage as null and void; enjoin Defendants from claiming a lien on the property in conjunction with the subject deed and mortgage; and enjoin Defendants from engaging in similar discriminatory acts and practices, pursuant to 42 U.S.C. § 3613(c). Defendants are also liable for actual and punitive damages, as well as costs and disbursements, pursuant to 42 U.S.C. § 3613(c) and (d).

SIXTH CAUSE OF ACTION

Against Financial, LLC, Al , and Douglas

DEPRIVATION OF CIVIL RIGHTS IN VIOLATION OF

42 U.S.C. §§ 1981, 1982, and 1985(3)

95. Plaintiff repeats and realleges the foregoing as though fully set forth herein.

96. Defendant , through its Defendant Al , and Defendant , acted in concert to target minority neighborhoods and seek out borrowers who would unwittingly transfer the deeds to their homes to shell LLCs and agree to mortgage loans on unreasonable terms. Defendants took these actions deliberately and with discriminatory intent and reckless disregard for Plaintiff's civil rights.

97. Defendant Aries' discriminatory acts and conduct denied Plaintiff the same rights to make and enforce contracts, and to enjoy the full and equal benefit of the laws, as enjoyed by white citizens of the United States, in violation of 42 U.S.C. § 1981. Defendants' acts and conduct denied Plaintiff the same rights to inherit, purchase, lease, sell, hold and convey

real property, as are enjoyed by white citizens of the United States, in violation of 42 U.S.C. § 1982.

98. In addition, Defendant , through Defendant Al and Defendant , actively communicated with each other and acted in concert and with discriminatory animus to deprive Plaintiff, his wife, and other minority borrowers in New York State of their civil rights as citizens of the United States in violation of 42 U.S.C. § 1985(3).

99. As a proximate result of Defendants' discriminatory actions, Plaintiff has suffered economic loss, mental anguish, deprivation of civil rights, and the prospective loss of housing.

100. As a result of Defendants' violations of 42 U.S.C. §§ 1981, 1982, and 1985(3) this Court should declare the August 3, 2006 mortgage and deed as null and void; enjoin Defendants from claiming a lien on the property in conjunction with the August 3, 2009 deed; enjoin Defendants from engaging in similar discriminatory acts and practices; and award Plaintiff actual and punitive damages, as well as costs and disbursements.

SEVENTH CAUSE OF ACTION

Against Financial, LLC, Al n, and Douglas

EQUITABLE ESTOPPEL

101. Plaintiff repeats and realleges the foregoing as though fully set forth herein.

102. Plaintiff never intended to form a LLC and act as its sole managing agent. Defendants allege they designed this transaction in order to improve Plaintiff's credit, however, taking out a mortgage in the LLC's name provided no tangible benefit to Plaintiff. It did not improve his credit and only allowed for more abusive loan terms which stripped Plaintiff and his wife of their rights under Federal and New York State consumer protection laws.

103. Plaintiff and his wife will suffer serious injury if this Court denies Plaintiff's equitable estoppel claim and allows the mortgage to remain in the LLC's name because Plaintiff will have no opportunity to bring claims under consumer protection laws.

104. Accordingly, Defendants should be estopped from claiming that the subject mortgage was between Defendant , and the LLC so that Defendants are subject to state and federal consumer protection laws.

EIGHTH CAUSE OF ACTION

Against Financial, LLC and Douglas

FRAUD

105. Plaintiff repeats and realleges the foregoing as though fully set forth herein.

106. Defendants made the following misrepresentations and omissions of material facts to Plaintiff and his wife, including but not limited to:

a. Concealing the terms of the mortgage by failing to disclose the estimated settlement charges and financial terms of the mortgage prior to the closing, in violation of federal statutes and regulations;

b. Failing to disclose that the Loan would require Plaintiff and his wife to transfer title to their home to an LLC;

c. Providing Plaintiff and his wife with misleading, inaccurate and inconsistent loan documents at the closing, which concealed and confused the terms and long term implications of the loan; and

d. Rushing Plaintiff and his wife to sign a series of documents containing material terms without being able to carefully examine the documents such as the mortgage, the adjustable rate note and various closing documents.

107. Defendants made these representations and omissions knowing that they were false and misleading at the time they were made.

108. Plaintiff had a reasonable right to rely, and in fact relied, on Defendants' representations and omissions of material facts in agreeing to refinance his home.

109. This fraud renders the August 3, 2008 mortgage and deed transactions with Defendant void and unenforceable.

110. Defendants are liable to Plaintiff for: actual damages in an amount to be determined at trial; punitive damages; and costs and disbursements.

NINTH CAUSE OF ACTION

Against Financial, LLC, Al l ı, Douglas ı, Candice ' ı, Gene ' Catherine ' and Willie '

CIVIL CONSPIRACY TO COMMIT FRAUD

111. Plaintiff repeats and realleges the foregoing as though fully set forth herein.

112. Defendants knowingly entered into an agreement to fraudulently induce Plaintiff and his wife to enter this mortgage transaction and transfer title to their home to the sham LLC.

113. Defendants intentionally, knowingly and willfully participated in this scheme by committing overt acts and making misrepresentations and/or failing to provide material information, in furtherance of the agreement, including but not limited to those misrepresentations and failures to disclose, as described above.

114. Through Defendants' unlawful conduct constituting a civil conspiracy to defraud vulnerable, elderly, unsophisticated homeowners, Defendants acts were malicious, willful, wanton, oppressive, and in reckless disregard of Plaintiff's rights.

115. Plaintiff suffered serious injury as the proximate result of his reliance on Defendants' misrepresentations and failures to disclose.

116. As a result of this conspiracy to commit fraud, the Court should declare the deed transfer to the LLC and the mortgage transaction as void, and the security interest created under the transaction should be terminated. In addition, Defendants are liable to Plaintiff for actual damages; punitive damages; and costs and disbursements.

TENTH CAUSE OF ACTION

Against Financial, LLC, Al , Douglas , Candice Gene , Catherine and Willie

RACKETEERING INFLUENCED AND CORRUPT ORGANIZATIONS ACT VIOLATION OF 18 U.S.C. § 1962(c)

117. Plaintiff repeats and realleges the foregoing as though fully set forth herein.

118. Defendants engaged in a pattern of racketeering activity in violation of the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961.

119. Defendants are a group of individuals associated in fact although not a legal entity and therefore are an "enterprise" within the meaning of RICO, 18 U.S.C. § 1961(4).

120. Defendants used their positions as a lender, a contractor, a broker, and a closing agent and made ongoing associations with two or more parties for the purpose of executing essential aspects of a residential mortgage fraud scheme. Defendants formed ongoing associations with one another in order to commit the predicate acts set forth below.

121. Defendants could not successfully conduct this residential mortgage fraud scheme without the associations that formed this enterprise.

122. Defendants operated and managed the enterprise comprised of Defendants Al[illegible] Douglas [illegible], Candice [illegible] Gene [illegible] Catherine [illegible] and Willie [illegible] Defendant Al[illegible], who is [illegible]' managing member, principal, and officer and is in all respects indistinguishable from the corporate entity, sent Plaintiff correspondence by regular mail and facsimile. Defendant Douglas is an attorney licensed to practice law in New York State who acted as [illegible] closing agent and created the LLC without Plaintiff's knowledge or consent before he even met Plaintiff. Defendant Candice [illegible] is an [illegible] employee who mailed Plaintiff letters urging him to refinance [illegible]' loans.. Defendant Gene [illegible] worked on behalf of Defendant [illegible] to refinance [illegible] loans. Defendant Catherine [illegible] worked on behalf of Defendant [illegible] to locate homeowners to enter loan agreements with Defendant Defendant Willie [illegible] z sought homeowners to enter fraudulent transactions with Aries and received a fee for his work. Together, Defendants initiated and carried out a residential mortgage fraud scheme for the enterprise. They directed the activities and managed the flow of information within the enterprise for the purpose of advancing their scheme.

123. The enterprise regularly used the mail and telephone lines to communicate and transmit documents and money across state lines and therefore was engaged in interstate commerce.

124. Defendants conducted or participated directly or indirectly in the affairs of the enterprise through an ongoing pattern of racketeering activity in violation of 18 U.S.C. § 1962(c).

THE RACKETEERING ACTS

125. In order to perpetuate a mortgage fraud scheme, Defendants knowingly and willfully committed the following predicate offenses under Section 1961(1)(B) of the RICO, 18 U.S.C. § 1961(1)(B): mail fraud in violation of 18 U.S.C. § 1341 and wire fraud in violation of 18 U.S.C. § 1343.

VIOLATION OF 18 U.S.C. § 1341: MAIL FRAUD

126. Defendants knowingly and willfully committed multiple predicate acts of mail fraud in violation of 18 U.S.C. §1341 by devising a residential mortgage fraud scheme for obtaining Plaintiff's money and property by means of false or fraudulent representations and promises.

127. Upon information and belief, Defendants mailed letters to one another, to outside parties, and also to Plaintiff for the purpose of executing their scheme. The following list provides examples of such mailings:

DATE	TYPE	SENDER	RECIPIENT
08/10/2006	Letter	Defendant	Defendant
08/23/2007	Letter	Defendant	Plaintiff
09/26/2007	Letter	Defendant	Plaintiff
10/12/2007	Letter	Defendant	Plaintiff
10/23/2007	Letter	Defendant	Plaintiff
11/19/2007	Letter	Defendant	Plaintiff
11/20/2007	Letter	Defendant	Joe T
11/20/2007	Letter	Defendant	Joe T a
12/24/2007	Letter	Defendant	Cathy

See **Exhibits P, T, U, R, W, X, V, Y,** and **Z.**

128. These acts of mail fraud in violation of 18 U.S.C. §1341 constitute "racketeering activity" as defined by RICO, 18 U.S.C. §1961(1).

VIOLATION OF 18 U.S.C. § 1343: WIRE FRAUD

129. Defendants knowingly and willfully devised a scheme to defraud Plaintiff and to obtain money from Plaintiff through false or fraudulent pretenses, representations, or promises, as described above. The money Defendants obtained from Plaintiff was the monthly interest-only loan payments paid to itself each month from the cash that onverted from Plaintiff's home equity at the closing, through its closing agent Defendant K

130. Upon information and belief, Defendants knowingly and willfully transmitted correspondence among each other and others by facsimile, accepted wire money transfers, and used telephones to communicate with each other and others with the intent of executing and furthering this fraudulent scheme, in violation of 18 U.S.C. §1343. The following list provides examples of such facsimile communication:

DATE	CONTENT	FROM	TO
07/28/2006	Loan Offer	Defendant (Jon	Defendant S
08/03/2006	Proof of Payment	Morris	Defendant I
10/31/2007	Payoff Figures	Defendant Al L	Unknown

See **Exhibits A, B,** and **M.**

131. Upon information and belief, Defendants used wire money transmissions to pay , from the escrow funds held by U.S. Bank Corporate Trust Services. See **Exhibit I.** Upon information and belief, Defendant received wire money transfers in its account in e, Florida. See wiring instructions in **Exhibits M, N, Y,** and **Z.**

132. Upon information and belief, Defendants also communicated with one another by phone in order to execute their scheme and on or about August 10, 2006, Defendant spoke with Plaintiff on the phone. See written notes in **Exhibit EE.**

133. Defendants committed multiple predicate acts of wire fraud in violation of 18 U.S.C. §1343 by communicating with one another and with Plaintiff by facsimile and by phone for the purpose of executing their scheme. These acts of wire fraud in violation of 18 U.S.C. §1343 also constitute "racketeering activity" as defined by RICO, 18 U.S.C. §1961(1).

VIOLATION OF 18 U.S.C. § 1962(d)

134. Upon information and belief, Defendants knowingly agreed, combined and conspired with and among themselves and others to conduct and participate, directly or indirectly, in the affairs of the enterprise through an ongoing pattern of racketeering activity in violation of 18 U.S.C. § 1962(d).

135. Upon information and belief, Defendants adopted the goal of furthering, facilitating and providing support for their residential mortgage fraud scheme and pattern of racketeering activity described above.

136. Upon information and belief, Defendants knew or should have known that they were committing some or all of the predicate acts.

137. Upon information and belief, Defendants had authority to require its agents, such as its unlicensed mortgage brokers, contractors, and a closing attorney, cease commission of the pattern of racketeering activity. Nonetheless, Defendants failed to exercise this authority.

138. Upon information and belief, Defendants knowingly increased their profits by furthering their residential mortgage fraud schemes.

139. Upon information and belief, Defendants paid its agents, brokers, contractors, and closing attorney inflated fees as a result of the agents assisting them find desperate homeowners who would be willing to enter predatory loan agreements with

140. Upon information and belief, Defendants' local agents targeted minority neighborhoods in southern New York in search of minority homeowners willing to enter such a transaction with Aries. According to public records, Aries has entered 43 mortgage transactions in New York City alone. In each transaction, the property was deeded from a person to an LLC that bore the name of the property's address, and the owner was appointed as the LLC's sole managing member. In each transaction, [illegible] ttorney created the LLC before the transaction. In nearly each case, the LLC entered a 14% to 16% interest loan agreement with [illegible] 36 of these properties are in neighborhoods with mostly black and Latino residents. About three-fifths of these 36 properties are in areas with populations that are more than 80% black and Latino. The other two-fifths have populations that range between 50-80% black and Latino.

141. Defendants also conspired with others to further their residential mortgage fraud scheme against other minority homeowners including but not limited to Brooklyn residents [illegible] n, age 73, and [illegible] ritt, age 59, and Queens resident [illegible] ams, age 48 year. [illegible] n, Mr. [illegible], and Ms. [illegible] s have all commenced mortgage fraud actions against [illegible] Financial, LLC and its agents in the Eastern District of New York. Defendant [illegible] is named as a defendant in Mr. [illegible] s lawsuit and both Defendants Al [illegible] and [illegible] are named as Defendants in Ms. [illegible] s' suit.

142. The information provided above demonstrate that Defendants conspired to violate the RICO, in violation of 18 U.S.C. §1962(d).

ELEVENTH CAUSE OF ACTION

Against [illegible] inancial, LLC

UNCONSCIONABILITY

143. Plaintiff repeats and realleges the foregoing as though fully set forth herein.

144. Before and at the Closing, an enormous disparity in bargaining power existed between Plaintiff and Defendants. Plaintiff is an unsophisticated consumer with little or no understanding of mortgage transactions, consumer legal protections, property law, and LLC law. Plaintiff only has a middle school reading level. He lacks knowledge about financial and legal terms associated with mortgage lending and refinancing. Also, Plaintiff and his wife were afraid of losing their home to Mr. [redacted] and were desperate to find a way to keep their home. They were confused by Defendant' scheme and had no legal representation at the Closing.

145. In contrast, Defendant is a sophisticated lender who sought to profit directly from this disparity in bargaining power. Upon information and belief, Defendant also targeted and defrauded other similarly unsophisticated New York homeowners using the same scheme.

146. Defendant took advantage of Plaintiff and his wife's confusion, lack of legal representation, and fear and desperation about losing their home to deceive them into signing deed and mortgage papers that they did not understand. Defendant sought to profit from this disparity in bargaining power and sophistication by deliberately misinforming Plaintiff and his wife about this transaction's abusive nature and inducing them into unconscionable, highly unaffordable, abusive mortgage and deed transactions that are subjects of this proceeding.

147. In addition, the Loan and deed transactions' terms and nature clearly and overwhelmingly favored Defendant By creating a sham LLC, deceiving Plaintiff and his wife into transferring their home to the LLC, and inducing Plaintiff and his wife into taking out a highly unaffordable mortgage in the LLC's name without their

knowledge, Defendant sought to evade the consumer protections laws and deprive Plaintiff and his wife of their rights under these laws. Further, the Loan contains unconscionable terms favoring Defendant including, but not limited to:

a. Requiring repayment of the loan's entire principal plus any other outstanding fees and charges on the mortgage only seven (7) years after the closing date;

b. Requiring Plaintiff and his wife place one (1) year's worth of monthly mortgage payments into an escrow account and deducting money from the account each month throughout the first year of the loan in order to pay itself interest; and

c. Applying these automatic monthly payments to interest only, and never to principal;

148. These loan terms are so one-sided and abusive that they are clearly unconscionable. Upon information and belief from the loan, Defendants knew that Plaintiff and his wife would not receive a substantial benefit and that Plaintiff and his wife would likely not be able to repay it. Defendants exploited this disparity in bargaining power by convincing Plaintiff and his wife that the loan was affordable and would enable them to save their home and improve their credit. These loan terms coupled with this great disparity in bargaining power render the subject mortgage and deed transactions unconscionable.

149. Defendants were unjustly enriched by this transaction because they stripped Plaintiff and his wife of their home equity of approximately $165,750.

150. Accordingly, this Court should enter a judgment declaring the deed transfer to 9 y LLC and the August 3, 2006 mortgage as void and unenforceable and awarding plaintiff actual and punitive damages, as well as costs and disbursements.

TWELFTH CAUSE OF ACTION

Against Financial, LLC

NEW YORK STATE GENERAL BUSINESS LAW § 349

("THE DECEPTIVE PRACTICES ACT")

151. Plaintiff repeats and realleges the foregoing as though fully set forth herein.

152. Upon information and belief, Defendant conducted a business" and "furnished a service" as those terms are defined in New York State General Business Law § 349 ("The Deceptive Practices Act").

153. Defendant violated The Deceptive Practices Act by engaging in acts and practices that were misleading in a material way, unfair, deceptive, and also contrary to public policy and contrary to generally recognized standards of business, including but not limited to:

a. Deceiving Plaintiff and his wife into entering into a mortgage that provided them no tangible benefit and stripped valuable equity from their home by taking advantage of their lack of education and financial sophistication, fear and desperation about losing their home, and isolation from professional legal advice or guidance from a friend or relative, thus exploiting a gross disparity in bargaining power;

b. Taking advantage of Plaintiff and his wife by giving them a grossly unaffordable $165,750 mortgage at a high variable interest rate, in exchange for paying off only approximately $76,000 in outstanding mortgage debts and giving Plaintiff only $3,000, and profiting approximately $89,750 dollars;

c. Misrepresenting to Plaintiff and his wife the abusive nature of the loan documents that they were signing;

d. Misrepresenting to Plaintiff and his wife at the time of the loan transaction that they, not a sham LLC, were taking out the loan;

e. Tricking Plaintiff and his wife into signing documents that transferred their home to the LLC so that Defendants could shield themselves against consumer protection laws; and

f. Failing to provide a loan application;

g. Failing to provide a "good faith estimate" of settlement costs within three (3) business days after any loan application, in violation of 12 U.S.C. § 2603 and Regulation Z § 3500.7;

h. Hiding the cost of credit of the mortgage by failing to deliver the federally required disclosures to Plaintiff or his wife;

i. Failing to provide Plaintiff or his wife with an itemization of the amount financed, as required by federal law; and

j. Failing to disclose to Plaintiff or his wife that Defendant organized the LLC the day before the closing and named Plaintiff as the sole managing member and 100% owner; and

k. Failing to disclose to Plaintiff and his wife that they were transferring title to their home to the LLC at the closing.

154. In the course of extending an equitable mortgage to Plaintiff and his wife, Defendants violated The Deceptive Practices Act by misrepresenting numerous other critical and material aspects of the financing transactions described above.

155. Upon information and belief, Defendant and its agents have perpetrated similar schemes against many other homeowners in addition to Plaintiff and his wife, primarily in non-white neighborhoods.

156. Defendants' practices were directed at consumers and have had a broad impact on consumers throughout New York State.

157. Plaintiff has suffered serious injury as a proximate result of Defendants' deceptive practice.

158. Thus, this Court should enter a judgment declaring the fraudulent August 3, 2006 deed and mortgage as null and void and awarding Plaintiff actual damages, costs, and disbursements.

THIRTEENTH CAUSE OF ACTION

Against Financial, LLC

NEW YORK STATE BANKING LAW § 6-L

("ANTI-PREDATORY LENDING LAW")

159. Plaintiff repeats and realleges the foregoing as though fully set forth herein.

160. The Loan is a "high cost loan" as defined in New York State Anti-Predatory Lending Law, NYS Banking Law §6-l ("NYS Banking Law §6-l").

161. Plaintiff and his wife incurred this debt for personal, family, or household purposes. The loan is secured by a first mortgage on real estate located in New York and occupied by Plaintiff and his wife as their principal dwelling. Defendant knowingly and fraudulently concealed from Plaintiff and his wife that the loan would be taken out in the LLC's name, rather than Plaintiff and/or his wife's name, in a bad faith ploy to avoid the application of consumer protection laws.

162. On or around August 3, 2006, the applicable yield on treasury securities having comparable periods of maturity fluctuated between 4.77% and 4.89%. The APR on Loan is at least 15%, which clearly exceeds the applicable yield on treasury securities by at least 8%.

163. In the course of extending the this loan to Plaintiff and his wife, Defendant violated NYS Banking Law §6-l in several ways, including but not limited to:

a. Requiring a balloon payment of the entire principal plus interest and other charges due on August 3, 2013, in violation of subsection 2(b) of NYS Banking Law §6-l;

b. Mandating that a full year of payments under the loan be consolidated and paid in advance from the loan proceeds, in violation of subsection 2(e) of NYS Banking Law §6-l;

c. Upon information and belief, requiring Plaintiff and his wife to sign an oppressive mandatory arbitration agreement which includes a provision waiving the right to a jury trial in the event the arbitration agreement is found unenforceable, in violations of subsection 2(g) of NYS Banking Law §6-l;

d. Originating the subject loan without due regard to Plaintiff or his wife's repayment ability, in violation of subsection 2(k) of NYS Banking Law §6-l;

e. Failing to provide the requisite counseling disclosure and list of counselors, in violation of subsection 2(l) of NYS Banking Law §6-l;

f. Filing to include the requisite legend on top of the mortgage stating the mortgage is a "high-cost home loan", as required by subsection 2-a(a) of NYS Banking Law §6-l;

164. Defendant ntentionally made this high cost home loan in violation of NYS Banking Law §6-l.

165. Accordingly, the Court should enter a judgment:

a. Declaring the deed transfer and mortgage dated August 3, 2006 to be null and void pursuant to subsection 9 of NYS Banking Law §6-l;

b. Declaring Defendant has no right to collect, receive, or retain any principal, interest, or other charges whatsoever with respect to the loan amount and that Plaintiff

and his wife shall recover any payments made under the mortgage pursuant to subsection 10 of NYS Banking Law §6-l;

c. Rescinding the mortgage dated August 3, 2006 pursuant to subsection 11 of NYS Banking Law §6-l; and

d. Awarding actual and statutory damages pursuant to subsections 7(a),(b) of NYS Banking Law §6-l.

IN THE ALTERNATIVE, AND FOR A FOURTEENTH CAUSE OF ACTION

Against Financial, LLC

NEW YORK REAL PROPERTY ACTIONS AND PROCEEDINGS LAW, ARTICLE 15

166. Plaintiff repeats and realleges the foregoing as though fully set forth herein.

167. Plaintiff brings this claim pursuant to Article 15 of the New York State Real Property Actions and Proceedings Law to compel the determination of any claims adverse to those of Plaintiff in the premises known as h, NY 12550, Section 7

168. Through this action, Plaintiff seeks quiet title to the subject property by having the fraudulent deed transfer from Plaintiff and his wife to the LLC and mortgage declared as void. Plaintiff and his wife are the sole owners of the subject property and initially acquired their interest in 2003.

169. According to public records, the LLC may claim an interest in the subject property, but its purported interest, and the documents upon which it rests, are void because they were obtained through a conspiratorial and fraudulent scheme that tricked Plaintiff and his wife into conveying ownership of their home to the LLC without their knowledge. Because this transfer was fraudulent and is therefore void, the LLC had no valid interest in the property to mortgage to Defendant Therefore, the mortgage held by Defendant , is also void.

170. As the architect of this fraudulent scheme, Defendant clearly had notice of Plaintiff and his wife's interest in the property and of the fraudulent title transfer. Therefore, Defendant does not have a bona fide encumbrance on the property.

171. Upon information and belief, no party who is or should be a Defendant in this action is an infant, mentally retarded, mentally ill or an alcohol abuser.

172. Upon information and belief, the judgment to be entered in this action will not affect a person or persons not in being or ascertained at the commencement of this action, who by any contingency contained in a devise or grant or otherwise, could afterward become entitled to a beneficial estate or interest in the property; moreover, every person in being who would have been entitled to such interest in the property if such contingency happened immediately prior to the commencement of this action are parties hereto.

173. Accordingly, the Court should issue

a. A judgment pursuant to R.P.A.P.L. § 1515 declaring that Plaintiff and his wife are the lawful sole owners of the property and are entitled to lawful, peaceful, and uninterrupted possession thereof as against all Defendants herein, and as against anyone claiming under them;

b. An injunction prohibiting all defendants, and every person claiming under them, from claiming an estate or interest in, or lien or encumbrance on, the property;

c. A judgment declaring the fraudulent deed to [illegible] LLC and the mortgage claimed by Defendant [illegible] against the property as void; and

d. Any other relief that this Court deems just and proper.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff [illegible] respectfully requests that this Court issue a judgment:

174. Rescinding the underlying mortgage loan transaction and terminating any security interest in the subject property created under the transaction;

175. Enjoining enforcement of the August 3, 2006 mortgage and note and declaring the August 3, 2008 mortgage and note unenforceable;

176. Declaring the fraudulent deed dated August 3, 2006 as void and declaring Plaintiff and his wife the lawful sole owners of the subject property;

177. Awarding Plaintiff:

a. actual damages in an amount to be determined at trial;

b. statutory damages;

c. punitive damages in an amount to be determined at trial;

d. liquidated damages;

e. reasonable costs and reimbursements; and

f. such other and further relief as this Court deems just and proper.

DATED:

Respectfully submitted,

Legal Services of the Hudson Valley
Attorneys for Plaintiff

SAMPLE BANKRUPTCY RULE 9019 MOTION TO CONFIRM SETTLEMENT IN MORTGAGE FORECLOSURE IN BANKRUPTCY COURT

Peter M. Frank, Senior Staff Attorney
Legal Services of ther Hudson valley'
101 Hurley Avenue
Kingston, New York 12401
(845) 331-9373 x 503
Attorneys for the Debtor Debtor

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

In re:

Chapter 13

DEBTOR,

Case No. 09-36606 (CGM)

Debtor.

----------X

DEBTOR, individually and as
Alleged sole managing member of
_____, LLC,

Plaintiff,

v.

Adversary Proceeding
No.

FINANCIAL, LLC,
AL,
ESQ.,
,
,
,

Defendants.

_____/

MOTION PURSUANT TO BACKRUPTCY RULE 9019 FOR AN ORDER APPROVING PARTIAL SETTLEMENT OF ADVERSARY PROCEEDING AS AGAINST FINANICAL, LLC, ALBERT, CANDICE AND DOUGLAS ESQ.

The Debtor, Debtor, by his attorney, Peter M. Frank Senior Staff Attorney, Legal Services of the Hudson Valley, brings this motion, pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure, to approve a partial settlement of Adversary proceeding No. , pending before the Hon. Chief Judge Cecelia G. Morris, as against defendants Financial, LLC ("----------"), Al, a/k/a A ("Mr."), Candice ("Mrs.") and Douglas Esq. (''), as follows:

1. On _____, the Debtor filed a Chapter 13 Bankruptcy Case No_____, principally to save his home, which case is pending in this Court before the Hon. Cecelia G. Morris, being Case No. _____.

2. On _____, the Debtor commenced an Adversary Proceeding in this Court, Case No_____ (the "Adversary Proceeding"), against, among others, ----------, a secured creditor in the Debtor's Bankruptcy case, Mr._____, a member and employee, respectively, of ----------, and other defendants, principally to determine the validity of a mortgage issued by ---------- to a limited liability company, ---------- LLC (the "LLC"), in regard to the Debtor's home located at ----------, Newburgh, NY 12550 (the "Debtor's Home"). It is alleged that the Debtor is the managing member and sole owner of the LLC, which was allegedly formed by ---------- in connection with the mortgage transaction. The Adversary Proceeding is scheduled for a final pretrial conference on _____ and a trial date is expected to be set for shortly thereafter.

3. The Adversary Proceeding contained allegations against ----------, Mr. _____in regard to its/their involvement in the mortgage transaction. After discovery, mediation and settlement negotiations, the Debtor has determined that it is in his best interest, and in the best interests of his Bankruptcy Estate, to enter into a settlement agreement with ----------, Mr. _____.

4. The terms of the settlement agreement with ----------, Mr. _____(annexed hereto as Exhibit "A") are, *inter alia*, as follows:

   a. ---------- will pay to Debtor the sum of $_____which Debtor shall use as set forth in paragraph 5 below.
   b. The existing first mortgage against the Debtor's Home held by ---------- shall remain in effect as a perfected, first lien on the Debtor's Home, but the promissory note given by the LLC dated ----------shall be amended and modified as set forth in the annexed settlement agreement and as noted below.
   c. The amended and modified principal amount of the note shall be _____; the new term of the note shall be _____ ("__") years beginning on the first date that this settlement is approved by the Court; the new, amended and modified interest rate upon the unpaid principal shall be _____ % and shall be fixed throughout the term of the loan.
   d. The mortgagor, ----------, LLC, shall pay to ---------- the amended and modified monthly sum of $_____per month as an interest only payment on the modified loan.
   e. The Debtor must make all past due and current payments for real estate and school taxes, charges, interest and penalties as are required and as

agreed to with the City of Newburgh as evidenced in the schedule submitted to this Court as Exhibit "B" annexed hereto as amended from time to time with the consent of the City of Newburgh.

f. The mortgagor shall maintain homeowners insurance upon the premises and such policy shall name ---------- as an additional insured and provide proof of proper coverage.

g. Both the Debtor and the mortgagor shall release ----------, , as set forth in Exhibit "A", and Debtor shall dismiss with prejudice from the Adversary Proceeding all claims against ----------, Mr without further cost.

5. Upon approval of this settlement by the Court and the exchange of releases _____ esq will pay to Debtor the sum of $_____ w in consideration of which the Debtor shall release _____, as set forth in Exhibit "B", and Debtor shall dismiss with prejudice from the Adversary Proceeding all claims against _____ without further cost.

6. The Debtor is voluntarily entering into the annexed settlement agreements and fully understands the terms and conditions set forth therein and believes that it is in his best interests to do so.

WHEREFORE, it is respectfully requested that the Court enter an Order approving the Settlement Agreement with ----------, Mr. _____and Mrs. _____ and _____ as annexed hereto, and that the Debtor be granted such other and further relief as to the Court may seem just and proper.

Dated: _____, 2013
Kingston, New York

Peter M. Frank, Esq., Senior Staff Attorney
Legal Services of the Hudson Valley
Attorney for the Debtor

By: _____
Peter M. Frank, Esq.

SAMPLE ADVERSARY PROCEEDING PRE TRIAL ORDER

IN MORTGAGE FORECLOSURE IN BANKRUPTCY COURT

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

IN RE:

PHILLIP ----------,

Debtor.

Chapter 13

Case No.:

----------X

PHILLIP ----------,
individually and as alleged sole managing member of ----------, LLC

Plaintiff,

ADVERSARY PROCEEDING NO.

v.

---------- FINANCIAL, LLC.,
AL ---------- A/K/A ALBERT ---------- A/K/A ALBERT O. ----------,
DOUGLAS ---------- A/KA DOUGLAS ---------- ESQ. A/K/A DOUG ----------,
CANDICE ----------,
---------- FUNDING CORP.,
---------- CAPITAL,
---------- GROUP A/K/A ---------- INVESTMENTS,
GENE ---------- A/K/A EUGENE ----------,
CATHERINE ----------S, AND WILLIE ----------.

Defendants.

----------X

JOINT PRETRIAL ORDER

The parties having conferred among themselves and with the Court pursuant to Bankruptcy Rule 7016, now therefore the following statements, directions and agreements are adopted as the Pretrial Order herein:

(1) JURISDICTION-VENUE:

It is Plaintiff's contention that this Court has jurisdiction over this proceeding pursuant to 28 USC Section 1334, and that this adversary proceeding is a "core" proceeding with the meaning of 28 USC Section 157. The Defendants do not agree that this is a "core" proceeding. The Plaintiff-Debtor resides at ----------, Newburgh, New York (the "Premises"). The Plaintiff's causes of action arise out of transactions that occurred in 2006 regarding his real property, which is an asset of his bankruptcy estate. The causes of action affect the value and therefore the administration of his bankruptcy estate. On or about January 21, 2010, Defendant Al ---------- filed a proof of claim in Plaintiff-Debtor's bankruptcy proceeding on behalf of ---------- Financial LLC in regard to ownership of the said Premises. Venue is proper in this Court pursuant to 28 USC Section 1409.

Plaintiff-Debtor seeks relief against Defendants based on violations of federal law, including The Truth in Lending Act, Home Ownership and Protection Act, Real Estate Settlement Procedures Act, Fair Housing Act, Civil Rights Act, and Racketeering Influenced and Corrupt Organizations Act, and violations of New York state law, including Deceptive Practices Act, Anti-Predatory Lending Law, Real Property Law and common law doctrines of equitable estoppel, fraud, conspiracy to commit fraud and unconscionability.

(2) AMENDMENTS - DISMISSALS:

Plaintiff-Debtor may amend the Complaint to claim the value of the Premises to Plaintiff-Debtor to reflect the fact that the Premises may be foreclosed upon by the County of Orange for failure to pay real estate taxes due to the County.

(3) RELIEF PRAYED:

Plaintiff-Debtor seeks return of the deed to the Premises from Defendants free and clear of any lien or encumbrance, and actual, statutory, liquidated and punitive damages together with interest, costs and legal fees. In view of the fact that the Premises may be foreclosed upon by the County of Orange, Plaintiff-Debtor will seek no less than $_____ plus interest, costs and legal fees from Defendants plus statutory, liquidated and punitive damages.

(4) STATEMENT OF PARTIES AND RELIEF REQUESTED:

This Adversary Proceeding commenced on _____ (the "AP"), Bankruptcy Case No. _____ was commenced by Phillip ---------- individually and as the so-called "Managing Member" of "---------- LLC" (the "LLC")("Plaintiff") .

Plaintiff seeks injunctive relief and declaratory judgment and money damages as follows:
1. Declaring the transfer of the property located at ----------, Newburgh, New York (the "Premises") from Plaintiff to LLC a fraudulent transfer and recovery and transfer of the Deed to the Premises back into Plaintiff's name.

2. Release and Recission of the ---------- Financial LLC ("----------") Mortgage on the Premises (the "Mortgage") and cancellation of ---------- Security Interest in and to the Premises.

3. Recovery of money damages against Defendants ----------, Al and Candice ----------, ----------, ---------- Funding, ---------- Capital and ---------- Croup (hereinafter sometimes referred to as "Defendants") including costs and expenses and reasonable attorneys fees.

Parties:

A. Plaintiff is a 73 year old Jamaican-born US Citizen who resides with his wife,_____, age 74, at ----------, Newbury, New York a/k/a the Premises.

B. Defendant ----------, is an Alaska corporation, with a principal office in Florida.. ---------- caused the LLC to be created and extended a $165,750 mortgage loan to an LLC owned by Plaintiff (the "Loan").

C. Defendant Al ---------- is or was a managing member, principal and officer of ---------- and resides in Florida. Defendant Candice ---------- was an ---------- employee.

D. Defendant Douglas ---------- Esq., an New York attorney with offices in New York, created the LLC, attended the closing of the Loan as ---------- attorney and received a fee from the Loan proceeds.

E. Defendant Gene ---------- worked on ---------- behalf to close the Loan. He is or was the CEO of Defendant ---------- Croup and a Principal in Defendant ---------- Capital. He received $17,060 from the Loan proceeds.

F. Defendant ---------- Funding Corporation is a New York mortgage broker with offices in NY.

G. Defendant Willie ---------- is a contractor in Newburgh NY who introduced Plaintiff to Defendants ----------s and received $23,500 from the Loan proceeds in periodic payments for construction work purportedly performed upon the premises. .

(5) PLAINTIFF'S CONTENTIONS OF FACTS:

Plaintiff and his wife have middle school and high school educations and are not sophisticated in financial matters. They purchased the Premises in 2003 from the City of Newburgh for approximately $20,000 in cash. There were no liens on the Premises and they had no mortgage until 2006 when they borrowed $60,000 from a third party with interest at 16% and a term of 18 months to make improvements to the Premises. Out of that borrowing, Plaintiff received

approximately $15,000, with all other proceeds going to prepaid mortgage payments and $20,000 allegedly paid to contractors. This loan went into default and Plaintiff looked for a new loan to save the Premises. In July 2006, ---------- offered to lend Plaintiff and his wife $165, 750. The ---------- Loan was for a term of 7 years at an average of 15% interest rate for the first 3 years and 8% for the remaining 4 years with a monthly mortgage payment of approximately $2,000 per month. Plaintiff was not represented by an attorney at any time during the Loan transaction. The ----------s allege that ---------- acted as ---------- attorney and as their attorney at the Closing, advised them to sign documents they did not understand and held the proceeds from the loan and disbursed some or all of the funds without their prior authorization and or consent. Prior to executing the Loan documents, the Premises were transferred to the LLC created by ---------- and its agents and attorneys.

The closing of the ---------- proposed mortgage and deed transaction was held on August 3, 2006 (the "Closing"), at which time ---------- and its agents refinanced Plaintiff's interest in the Premises then owned by Plaintiff Phillip ---------- and his wife, ----------, by transferring the ownership of the Premises to the LLC, a limited liability company created for this loan transaction by Defendants, at an inflated loan amount and with grossly unaffordable terms. Plaintiff will prove that the transaction was fraudulent from inception and was intended by Defendants to skim Plaintiff's equity from the value of his home. Defendants paid themselves and their agents approximately $50,000 out of the Loan proceeds.

Plaintiff retains equitable ownership of the Premises where he currently resides with his wife. Plaintiff never had income sufficient to pay the mortgage payments on the Loan. Plaintiff received less than $5,000 directly from the proceeds of the Loan and only incomplete repairs were ever done to the Premises from the Loan proceeds.

Plaintiff filed the Bankruptcy Case to prevent foreclosure on the Premises

(6) DEFENDANTS' CONTENTIONS OF FACTS:

Defendants ----------' and ----------'s Contentions:

Generally: ---------- is a private "hard-money" lender based in Boca Raton, Florida. It is, and has always been, a "mom and pop" type company run by two retired businessmen and neighbors, defendant ---------- and Larry _____. It had two employees, Mr. ----------'s daughter Candice and another woman Carol _____, and now has one. All work was performed from home offices. In 2004 and 2005, ---------- and _____ were looking for an investment vehicle that might offer a reasonable rate of return. Each had already been quite successful in the business world. They were introduced to the concept of making private money, commercial loans by an attorney in New York who previously had been involved in similar transactions. After researching licensing requirements and various models, ---------- began issuing loans in 2005 and continued through 2007. ---------- loans typically were made to those in dire financial distress, most often applicants in active foreclosure proceedings or close enough. ----

---------- was a lender of last resort, for those needing financing who had been turned down by all other conventional sources due to poor credit history. ---------- loans did not compete with other residential loan products. ---------- received far more applications for loans than it approved and financed. ---------- made about 90 loans to borrowers, primarily in the tri-state area. More than two-thirds of the loans were to borrowers refinancing existing loans. Approximately half of the loans made by ---------- were for the purpose of bailing out the borrower from active foreclosure. A majority of ---------- loans were repaid in full and have been discharged.

The principal criteria used by ---------- (and other hard money lenders) to determine the viability of its private loans was the loan to value ("LTV") ratio on the property at issue: ---------- usually extended financing to potential borrowers so long as the amount of the loan represented no more than 65% of the appraised value of the property at issue. For business and legal reasons, ---------- determined that it would make loans solely to corporations or limited liability companies **which were owned in whole by the individual borrowers; ---------- would not make loans to individual borrowers.** This model was not hidden from the brokers with whom ---------- worked: it was contained on a fact sheet provided to them, along with other relevant terms. Thus, prior to any closing of a loan, ---------- would usually arrange, through its closing agents, for creation of an LLC which bore the name of the property at issue. The individual borrower was named as sole shareholder and managing member of the LLC. The individual borrower was told that in order to obtain this financing, they would be required to place ownership of the property into the LLC, and that ---------- would extend the loan to the LLC, not the individual. The LLC, not the individual borrower, would be obligated to pay the loan back. This benefitted the borrower in the sense that if it defaulted, the sole remedy of ---------- was to foreclose against the collateral held; it could not seek a deficiency judgment against the individual. Also as a condition of making the loan, due to the borrowers proven track history of failure to make required mortgage payments -- the very reason they had been introduced to ---------- in the first place – the LLC was obligated to place a full year's worth of interest payments into an escrow account set up at closing from which monthly mortgage payments would be made. The LLC owned by the individual borrower would receive monthly statements from the bank showing the payments made, the balance remaining and accounting for interest earned (which was paid to the LLC). ---------- loans were interest-only, non-amortizing loans, typically with a seven year term with fixed rates which adjusted or changed in a given year. In contrast to "teaser rates" which then spiked higher after the passage of a short period of time, ---------- interest rate for the first two years was high, usually 16 or 15 percent, but then went down to 8 percent in the third year and continued to be fixed there for the life of the loan.

---------- did not engage in direct sales or marketing. Indeed, prior to a closing date, ---------- had no contact whatsoever with any borrower. Instead, ---------- offered its program through a handful of mortgage brokers. As such, ---------- was one of any number of lenders with whom these brokers may have attempted to place a loan, usually the final place they attempted to go.

About 35% of ----------' loans were made to white borrowers, 40% to black borrowers and 20% to Hispanic borrowers. 50 of ----------' loans have been made to borrowers between the ages of 35-50. 33 of ----------' loans were to borrowers between the ages of 51-62. 3 of the loans were to borrowers under the age of 35. Finally, 3 of the loans were to borrowers over the age of 62.

22 of ----------' loans relate to property in Kings County, 18 in Queens County, 4 in Staten Island, 3 in Bronx County, 6 in Nassau County, 10 in Suffolk County, 1 in New York County, 9 in other counties in the State of New York, and 16 in various locations in New Jersey, Connecticut, Illinois and Florida.

The Loan at Issue: Mr. ---------- was a man in his mid to late 60's when he applied for the ---------- loan. He and his wife were the owners of the commercial property at issue herein. The property has ground floor and basement retail space from which the ----------'s operate a grocery type store. The property also has at least one rental unit which provides ---------- with additional income. And ---------- was looking for part of the loan proceeds to fund additional construction work to be performed upon the premises.

---------- had terrible credit. More significantly, however, ---------- had previously secured a private, hard money loan from a prior lender, Morris ---------- – the very type of loan that he complains in this case was forced upon him. This loan from ---------- was an interest only, $60,000 loan, purportedly for a term of some 18 months. The ---------- loan had an adjustable interest rate of 16% and called for a balloon payment of $60,800 to be paid at the conclusion of its term. Like the ----------' loan, the ---------- loan also required that ---------- keep in escrow one year's worth of mortgage payments. Apparently, after the escrowed payments had run their course, ---------- failed to make required payments and was threatened by ---------- with foreclosure. Through a series of intermedi----------, including at least two brokers, ---------- was introduced to ----------.

The refinancing proposed by ---------- allowed ---------- to pay-off his existing private money mortgage with ---------- -- ---------- was paid $_____ at closing -- and end his threat of foreclosure, pay other outstanding liabilities on the property, and in an effort to improve his credit standing, avoid the obligation of making payments under the new loan for a period of one year – a concept ---------- was quite familiar with from his loan with ----------. In this regard, the first years' worth of interest only payments would be escrowed following closing and paid over to ---------- during this time. In order to receive financing from ----------, ---------- was requested to transfer title to the property from himself personally to a limited liability company ("LLC") that had been set up for which he, ----------, would serve as sole shareholder and managing member. This company would in turn be the party to whom the new financing was extended and it, not ----------, would provide_____ with a mortgage, note and other security interest to ensure payment. The mortgage provided for a prepayment penalty in the event that it was paid off in less than one year. Significantly, the documents also provided that plaintiff would be responsible to continue to pay his real estate taxes as he had done until then.

---------- and its attorney, defendant Douglas ---------- ("----------"), prepared the standard package of documents it used in connection with its loans. At the time of closing in August 2006, ---------- was provided with, reviewed and executed all of the various corporate, escrow and loan documents pertaining to the refinancing and executed each of the documents on behalf of _____, LLC. ---------- was also given a copy of all of these documents, and the checks paid at closing and signed off on a list of these items provided to him.

From August 2006 until August 2007, pursuant to the terms of the loan and an escrow agreement, 90 Gidney was not required to make any mortgage payments. Notably, it received monthly statements from the escrow bank.

After the escrowed payments finished, plaintiff made two further payments on the ---------- mortgage. Plaintiff then stopped paying and has not paid anything further to date. ---------- moved for foreclosure in New York state court. Plaintiff then instituted this action.

---------- has never once made a payment towards his real estate taxes. Instead, through 2009, in order to preserve their interest in the loan, ---------- has paid more than $24,000 in real estate taxes. The property is in the midst of a tax foreclosure proceeding due to ----------'s continued failure to pay his taxes.

Defendant ----------'s Contentions:

This was a commercial loan for commercial property and construction. The premises used as collateral are a grocery store/luncheonette on the ground floor and apartments upstairs. Defendant ---------- issued the loan. ---------- was never an employee, partner, owner, member or managing member of Defendant ----------. ---------- was never involved in the formation, implementation and/or sale of the ---------- loan program. ---------- was not involved in any decision-making of Defendant ----------. ---------- was not involved in the decision to grant a loan to any prospective borrower, including debtor.

---------- acted as the settlement agent for Defendant ----------. ---------- disbursed the proceeds of the loan including payoff amounts and construction funds. ---------- did not negotiate any of the terms of the loan, including, but not limited to, the amount to be loaned, the interest rate of the loan, the length in years of the loan, the cost of the loan and/or the amount of the fee's for the loan.

The documents to be executed at the closing were prepared by the lender. ---------- simply made copies of the documents and handed them to the borrower for signatures. ---------- disbursed the proceeds of the loan according to the requests and at the direction of the lender, the Title Company, the payoff banks, payoff attorneys and the borrower. ---------- did not make any decisions regarding the loan and/or payments made at the closing. At the direction and request of Defendant ----------, prior to closing, ---------- simply filled in the blanks on the Articles of Organization and then faxed it to the Department of State for filing.

Mr. ---------- was provided with a full set of all the documents he reviewed and signed at the closing. He was given a copy of all checks paid at the closing as well as copies of all transfer and title documents. ---------- answered all questions Mr. ---------- had regarding the documents and the borrower had as much time as he wanted to review the documents and ask any questions he desired prior to and after signing them. ---------- did not rush the ---------- 's nor did he deceive, mislead or confuse them in any way. Nothing was concealed from the ---------'s before, during or after the closing.

Mr. ---------- had his outstanding debts paid out of the proceeds of the loan. The borrower received a substantial benefit from the closing and continues to benefit today. He was very happy at the end of the closing. His prior loan was paid. He would no longer be in arrears or facing foreclosure, he would be able to complete necessary repairs to the building, his bills would be paid and he would not have to make any mortgage payments for one year. In essence, no one would be after him anymore and he would be able to concentrate on his business.

---------- was directed to hold money in escrow from the proceeds of the loan because a portion of the proceeds was earmarked for construction. ---------- inspected the construction work on the property numerous times and made progress payments accordingly. The payments were made in accordance with the contract between Mr. ---------- and defendant Willie ----------. ---------- was not a party to the construction contract. The escrowed funds were not exhausted during the construction and the remaining proceeds were turned over to Mr. ----------. Any additional work was Mr. ----------'s responsibility.

---------- did nothing wrong as the settlement agent for Defendant ----------. Mr. ---------- was given all the time he needed to review the documents and he signed all the necessary documents. Mr. ---------- knowingly and voluntarily executed the documents. He understood exactly what he was doing. Mr. ---------- received the benefit of the loan and was very grateful at the conclusion of the closing.

---------- does not have any responsibility/liability in the case herein. ---------- did not negotiate any terms and simply received a reasonable payment for the service of being the settlement agent.

(7) ISSUES OF LAW:

The AP states causes of action for, in or under the:

a. Whether Defendants violated the Truth in Lending Act ("TILA") for mortgage fraud ,
b. Whether Defendants violated the Home Ownership and Equity Protection Act ("HOEPA"),
c. Whether Defendants violated the Real Estate Settlement Procedures Act ("RESPA"),
d. Whether Defendants violated the Fair Housing Act ("FHA"),
e. Whether Defendants violated the Civil Rights Act ("CRA"),

f. Whether Defendants violated Racketeering Influenced and Corrupt Organizations Act ("RICO"),
g. Whether Defendants violated New York state law including The Deceptive Practices Act, Anti-Predatory Lending Law, Real Property Law; and
h. Whether Defendants violated NY Common Law doctrines of equitable estoppel, fraud, conspiracy to commit fraud and unconscionability.
i. Whether ---------- has legal standing to issue and or to sue on and or under the mortgage and note based on its failure to register with the New York State Banking Department.
j. Whether ---------- and ---------- procured the ----------s' signatures to the mortgage, note, LLC and other legal documents without the ----------'s knowledge of the true contents of those documents and, if so, that is 'fraud in fact' rendering the mortgage and note void under the doctrine set forth in **In re Davis,169** BR 285 (ED 1994).
k. Whether ---------- and ---------- knowingly sought to avoid the ----------s' rights to consumer statutory protections by deeding the subject property to an LLC.
l. Whether ---------- had a legal obligation to pay the real estate taxes on the subject property under the mortgage and note.

Defendants Issues of Law:

A. Whether or not this is a "core" proceeding.

Whether, as a commercial property, ---------- may assert his federal causes of action under the Truth in Lending Act, Home Ownership and equity Protection Act, Real Estate Settlement Procedures Act, Fair Housing Act, Civil Rights Act, Racketeering Influenced and Corrupt Practices Act, New York State Anti-Predatory Lending Law, Real Property and Procedures Law and any other cause of action asserted premised upon the property at issue being residential property?

Whether, since the ---------- loan was made to an LLC, rather than to an individual borrower, ---------- may assert his federal causes of action under the Truth in Lending Act, Home Ownership and equity Protection Act, Real Estate Settlement Procedures Act, Fair Housing Act, Civil Rights Act, Racketeering Influenced and Corrupt Practices Act, New York State Anti-Predatory Lending Law, Real Property and Procedures Law and any other cause of action asserted premised upon the loan at issue being a consumer loan?

Whether the statute of limitations acts as a bar to plaintiff's assertion of one or more of his claims?

(8) PREVIOUS SUBSTANTIVE MOTIONS: **None**

(9) WITNESSES:

Phillip and V ----------

Lawrence is a managing member of ---------- Financial, LLC. He would be expected to testify, in substance, to the matters detailed above under the section entitled "Defendants Contentions of Fact," including ----------' business plan and purpose generally, the process by which it evaluated ----------'s loan application and the requirements for a loan to close with ----------. Ramaekers would also be expected to testify that the ----------'s existing private money loan was paid off at the time of the ---------- closing and that ----------'s contractor was to be paid from the loan proceeds only after an inspection of his work progress was made. Finally, Ramakers would testify to plaintiff's default and the efforts made to avoid litigation with plaintiff.

All Defendants and their officers and employees.

A representative of_____ Appraisal Company
_____, Vice President of ---------- Funding Corporation (possibly)

(10) EXPERTS:

NONE

(11) EXHIBITS:
Exhibits attached to Complaint
---------- Short Form Loan Application
Property Appraisal
All documents executed at the Loan Closing (to be marked)
Copies of all checks paid at closing and to ---------- (front and back)
---------- proposals
Correspondence Received by ---------- from Morris ----------
Foreclosure Summons and Complaint
Appraisal
Orange County Tax Assessment and Tax Bills
---------- Financial Correspondence with ----------

(12) REQUESTED EVIDENTIARY RULINGS

To Be Submitted if Needed

(13) TRIAL COUNSEL

For Plaintiff-Debtor Phillip ----------:

_____, Senior Staff Attorney, Legal Services of the Hudson Valley

For Defendants:

---------- Financial, Al ---------- and Candice ----------, Frederick L. Sosinsky, Esq.

Douglas ----------, Esq., Pro Se

Gene ----------, Pro Se

---------- Group a/k/a ---------- Investments, Pro Se

---------- Capital, Pro Se

Catherine ----------s, Pro Se

Willie ----------, Pro Se

(14) ESTIMATES OF TRIAL TIME: 3 Days

(15) TRIAL DATE(S):

June

(16) TRIAL BRIEFS:

(17) MODIFICATION OF ORDER:

To prevent manifest injustice or for good cause shown, upon application of a party or upon motion of the Court, the Court may modify this Pretrial Order.

Dated: Kingston, New York
May , 2013

STIPULATED AND AGREED AS TO FORM AND SUBSTANCE:

_____, Senior Staff Attorney
Legal Services of the Hudson Valley

_____
Attorney for Plaintiff Phillip ----------

_____
_____, Esq.
Attorney for Defendant(s)
---------- Financial LLC, Al and Candice ----------

_____
Douglas ---------- Esq.
Defendant(s) Pro Se

SO ORDERED:

_____
----------, Judge
United States Bankruptcy Court for the Southern District of New York

Dated: Poughkeepsie, New York
_____ , 2013

Biographies

Peter M. Frank Esq., graduated from Harvard Law School in 1971, and began the practice of law with Cleary, Gottlieb, Steen & Hamilton in New York City. He left that Firm to become an entertainment lawyer and entrepreneur in the music business. During this time he managed several music groups including The Manhattan Transfer and produced and or directed live concert films and music videos. Mr. Frank joined Legal Services of the Hudson Valley in 2000 as a housing attorney. He is now Senior Staff Attorney concentrating his practice in the areas of defense against foreclosure, housing homelessness prevention, bankruptcy representation and consumer protection working out of the Kingston, County of Ulster, New York office.

Kirsten E. Keefe is a Senior Attorney with the Consumer Finance and Housing Unit of Empire Justice Center and Director of its Anchor Partner program for the NYS Office of the Attorney General's Homeownership Protection Program (HOPP), funded through the National Mortgage Settlement. In addition to managing statewide grants to non-profit organizations providing direct assistance to homeowners, Kirsten works on policy issues regarding mortgage lending, foreclosures and financial consumer issues. Kirsten has focused on subprime lending and foreclosure since 1998, having started in direct services at Community Legal Services, Inc. in Philadelphia, PA. In 2009, Kirsten was appointed to and served a three-year term on the Board of Governors of the Federal Reserve System's Consumer Advisory Council. She is Co-Chair the Board of Directors for the National Association of Consumer Advocates, a steering committee member of New Yorkers for Responsible Lending (NYRL), and part of the HomeSave Coalition of the Capital Region. She also serves on lending committees of the Community Loan Fund of the Capital Region. Kirsten has taught consumer law at Temple University Beasley School of Law, and has lectured at Albany Law School and other local universities. Kirsten received a B.A. from the College of the Holy Cross and a J.D. from Beasley School of Law at Temple University. Prior to law school, Kirsten served as a U.S. Peace Corps volunteer in Thailand.

Hon. Robert E. Littlefield, Jr. is the Chief United States Bankruptcy Judge for the Northern District of New York. Prior to his appointment to the bench in 1995, Judge Littlefield served as a Chapter 12 and Chapter 13 Standing Trustee in the Northern District of New York, as well as a former Chapter 7 and Chapter 11 Trustee. Judge Littlefield is a past president and former advisory board member of the National Association of Chapter 13 Trustees ("NACTT") and a former member of the National Conference of Bankruptcy Judge's Liaison Panel to the NACTT. He is also a founding/organizing member of the Capital Region Bankruptcy Bar Association.

Judge Littlefield was a member of the Bankruptcy Appellate Panel for the Second Circuit and, by special designation, has adjudicated cases in the Bankruptcy Court for the District of Vermont. He received his B.A. degree from the University of Denver and his J.D. from Albany Law School.

Mark H. Wattenberg is a graduate of Columbia Law School. Almost his entire career has been spent with Legal Assistance of Western New York, Inc., though he had a 10-year stint in private

practice in Olean, NY. He is an attorney at the Bath office of Legal Assistance of Western New York, Inc. He has an active bankruptcy practice, including Chapter 7 and Chapter 13 proceedings. He has represented clients in a variety of cases in bankruptcy court, including cases involving mortgage foreclosure, Truth in Lending Act violations, land contract issues, utility terminations, and evictions.