

The Good, The Bad, The Ugly



∞ A Discussion of Mortgage Servicers, Loss Mitigation, Modifications & Claims in Consumer Bankruptcy

Loan Modifications and The Great Recession



- ☞ Since 2009 when HAMP was implemented by President Obama more than 2 million borrowers have been assisted with HAMP modifications
- ☞ Another 2 million borrowers have been assisted with non-HAMP modifications
- ☞ Treasury announced new campaign ads to encourage millions of borrowers to seek assistance that are still struggling with their mortgage

Programs across the Country



- 🌀 New York: Southern*, Northern & Eastern Districts
- 🌀 Florida: all Districts
- 🌀 New Jersey
- 🌀 Rhode Island
- 🌀 Vermont
- 🌀 Wisconsin: Eastern & Western District
- 🌀 Pennsylvania: Western District
- 🌀 Indiana: Northern & Southern District
- 🌀 South Carolina
- 🌀 Michigan: Northern & Eastern
- 🌀 Nevada
- 🌀 California Northern District



*First in the land by The Honorable Judge Cecelia Morris

Is it working?



œ Programs are running at 40-60% success rate at obtaining and accepting a mortgage modification!

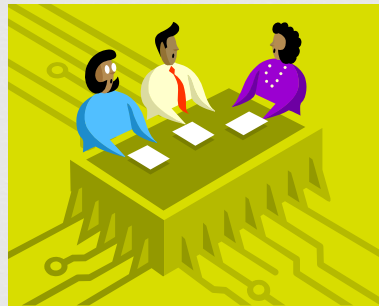
How its done



MEDIATION

OR

LOSS MITIGATION WITH STATUS CONFERENCES



What do established programs have in common?



- Bankruptcy has unique element of Good Faith
- Work under Orders that have strict timelines
- Higher level of service from lender representatives in bankruptcy departments



Order Timelines



- 
- File Motion for Referral
 - Varies from 3 days post filing to entire case

- 
- Submit documents-Varies from 7 days from order to 35 days
 - Lender Review-10 days to 14 days

- 
- Completion of Process
 - Varies from 120 days to 150 days

Good Faith Element in Bankruptcy



- ⌘ All loss mitigation/mediation orders have provisions that all parties must act in good faith
- ⌘ This makes a difference in the process
- ⌘ Holds *all* parties accountable

Better communication and exchange of document



DMM PORTAL

Majority of courts are using DMM portal
One place for everyone to view and ask and answer
questions about documents

Or

EMAILING CREDITOR COUNSEL

Benefits to Parties



☞ Feasible Plans

☞ Cash flow for Lenders

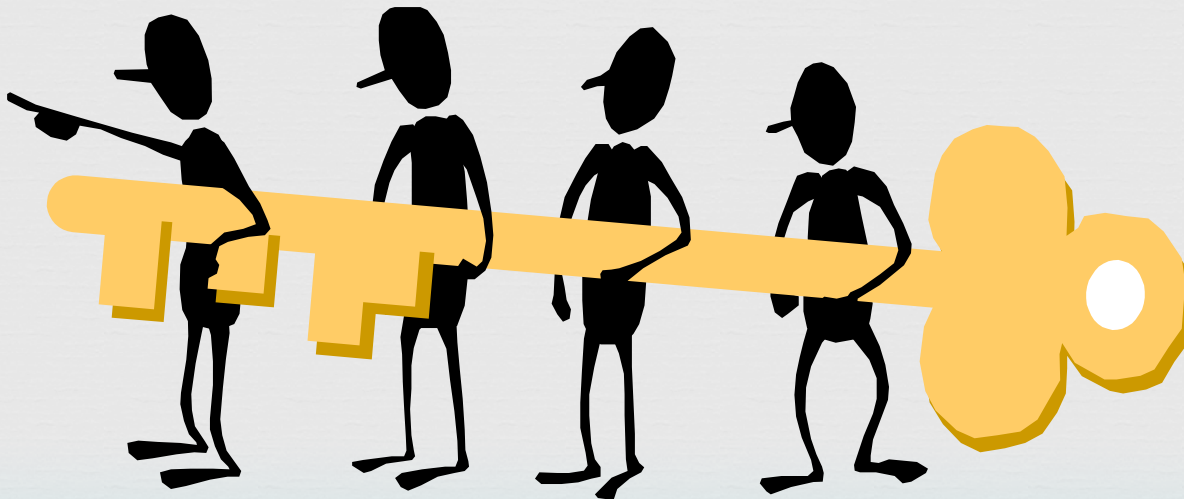
☞ Comply with HAMP and numerous settlements

Lender Concerns



☞ Uniformity

☞ Florida has uniformed statewide procedures



Chapter 13 Plan's



- ∞ Makes plans feasible
- ∞ Clearly identify debtor is seeking modification
- ∞ Clearly explaining how AP was calculated if required

No LOOK Fees



☞ Fees:

☞ Debtor attorneys: Range from 1500.00 to \$2500.00 plus costs

☞ (Programs encourage filings)

Court Approvals



∞ Lender requires Court approval of loan modification

∞ Resolving secondary liens, title issues

∞ Second Mortgages

∞ HOA liens

∞ IRS liens

∞ Judgments

Many courts are finding the junior liens & IRS Liens subordinate to loan modification (outside of bankruptcy borrowers lose the loan modification if subordinations not obtained)

Do's and Don'ts



Debtor Perspective

- Complete packages
- Analyzing qualification
- Know the programs

Creditor Perspective

- Understand order duties and timelines
- Keep up with program changes

Trustee's Perspective

- Calculate adequate protection correctly
- Approve deals
- Change addresses if by through plan & Trial Payment address different than POC
- Do loan mods, numbers are up where programs are in place



SECTION II: National Plan

National Plan-*what's the buzz?*



- ∞ **FORM OF CHAPTER 13 PLAN.** Each District may mandate the use of a chapter 13 plan that conforms with this Rule (a “Conforming Plan”).
- ∞ If a District does not mandate the use of a single Conforming Plan, then only Official Form 113 may be utilized to propose a chapter 13 plan. Provisions not otherwise included in the Conforming Plan or in Official Form 113 or that deviate from the Conforming Plan or Official Form 113 are effective only if they are included in a section designated for nonstandard provisions and are also identified in accordance with any other requirements of the Conforming Plan or Official Form 113.

REQUIREMENTS FOR A LOCAL RULE ADOPTING A CONFORMING PLAN



- ∞ A Conforming Plan must be adopted pursuant to a local rule or Order that:
1. Requires that the Conforming Plan must be used for all proposed chapter 13 plans in the District.
 2. Prohibits alteration of the Conforming Plan.
 3. Mandates that all non-standard provisions be contained only in the final paragraph of the Conforming Plan in a paragraph labeled “**Non Standard Provisions.**”
 4. Mandates that each proposed Conforming Plan contain a certification by the debtors and their lawyer that no changes had been made to the Conforming Plan (other than the possible inclusion of Non Standard Provisions in the final paragraph of the Conforming Plan) and that the Debtor does not seek confirmation of any provision that has been deemed not to be effective under these Rules.
 5. Is available as part of Local Rule 3015 or is posted on the Court’s website.

CONSPICUOUS LABELING



- ❧ Each paragraph of a Conforming Plan must be labeled, in bold, with a title setting for the general subject matter of the paragraph.
- ❧ Examples are "**Payments Made to Chapter 13 Trustee**", "**Treatment of Secured Claims**", "**Executory Contracts**", etc.

PROCEDURE FOR ADOPTING A CONFORMING PLAN



- ☞ A District electing to adopt a Conforming Plan must do so only after public notice and opportunity for public comment. If a District determines that exigent circumstances require an amendment to the Conforming Plan without full notice and opportunity for public comment, the amendment must be subject to reconsideration following notice and opportunity for public comment.

REQUIREMENT OF INFORMATIONAL STATEMENT



- ❧ The Informational Statement must indicate whether the Plan:
 1. Contains any Non Standard provisions.
 2. Limits the amount of any secured claim based on a valuation of the collateral for the claim.
 3. Avoids any security interest or lien.
 4. Cures defaults and/or maintains payments on a claim that is secured by property that is/ the Debtor's principal residence.
 5. Provides for the treatment of a Domestic Support Obligation.
 6. Provides for a treatment of the type described in the final paragraph of § 1325(a) of the Bankruptcy Code.
- ❧ The Informational Statement must substantially conform to Official Form 113A.

PROPERTY THAT IS SURRENDERED UNDER A CONFIRMED PLAN



- ✧ If a confirmed plan provides for the surrender of property, the stays arising under § 362 and § 1301 of the Bankruptcy Code terminate with respect to the surrendered property on the effective date of the plan without the requirement of any further order. The termination of the stays does not authorize actions to impose personal liability or to collect the debt from any property that is not surrendered. A plan that provides for the surrender of property will constitute a request by the Debtor for relief from the co-debtor stay to the extent provided in this subsection.

DETERMINING AMOUNTS OF CLAIMS AND AMOUNTS OF MONTHLY MORTGAGE PAYMENTS



Subject to Rule 3015(g), a provision in a confirmed plan that purports to reduce the aggregate amount of a claim is ineffective. A provision in a plan that purports to alter the amount of a contractual mortgage payment on a claim secured only by a security interest in real property that is the debtor's principal residence is ineffective unless (i) the claim is of the type described in § 1322(c)(2) of the Bankruptcy Code; (ii) the holder of the claim has agreed in writing to the alteration; or (iii) the alteration is subject to the approval of the holder of the claim.

DETERMINING WHETHER TO AVOID A LIEN



- ⌘ A Conforming Plan may include a provision that provides for the avoidance of a lien in a manner consistent with these Rules. A Conforming Plan is not required to include such a provision.

DETERMINING VALUE OF COLLATERAL



- ∞ A Conforming Plan may include a provision that values collateral. A Conforming Plan is not required to include such a provision

DISTRICT OPTION



⌘ Notwithstanding Rule 3015(c)(ii)(1), a District that has mandated the use of a Conforming Plan may (i) require a debtor to file only the Conforming Plan; or (ii) allow a debtor to file either the Conforming Plan or Official Form 113.

OFFICIAL FORM 113A

INFORMATIONAL STATEMENT TO BE INCLUDED AT BEGINNING OF EVERY CHAPTER 13 PLAN



Answer “Yes” or “No” for each statement:

Yes No This Plan contains non-standard provisions in [identify part/paragraph/section number].

Yes No This Plan limits the amount of secured claims in [identify part/paragraph/section number] based on a valuation of the collateral for the claim.

Yes No This Plan avoids a security interest or lien in [identify part/paragraph/section number].

Yes No This Plan cures or maintains a loan secured by the Debtor’s principal residence in [identify part/paragraph/section number].

Yes No This Plan provides for the treatment of a Domestic Support Obligation in [identify part/paragraph/section number].

Yes No This plan includes a claim that was either: (1) incurred within 910 days before the petition date and secured by a purchase money security interest in a motor vehicle acquired for the personal use of the debtor(s); or (2) incurred within 1 year of the petition date and secured by a purchase money security interest in any other thing of value.

SECTION III: Proofs of Claim and 3002.1 Notices



Proof of Claim Issues



❧ *Problems with Proofs of Claim:*

❧ *No Claim Filed by Bar Date:* When a claim is not timely filed it creates a speculative situation which in turn raises accuracy issues in accurately formulating a plan and associated payments.

❧ *Escrow Issues:* When escrows are not properly listed mathematical computational errors occur.

❧ *Insufficient Documentation:* Notes and security instruments are often not attached.

3002.1 Notices



- ❧ ***Incorrect application:*** Rule is currently being applied to rental properties however it is supposed to only apply to homestead properties. However, Debtors do need to know when there are changes to their non-homestead mortgage payments.
- ❧ ***Notices are not being filed timely:*** Notices are not being filed timely by creditors (outside 180 days).
- ❧ ***Escrow Issue:*** When a change is to happen proper notice should be given to all applicable parties.
- ❧ ***Cramdown Problems:*** Creditors are filing notices based upon original contractual amount instead of the cramdown amount. This creates ambiguity with Chapter 13 Trustee on how they should react to a payment change if in a conduit district. On the flipside what if debtor doesn't complete the plan?

Notice to Cure & Model Form

- ❧ *Trustee Not Always Filing Notice to Cure:* The rule calls for the trustee to file the notice and if they do not then debtors counsel can do this.
- ❧ *Model PCN Form:* The model PCN form appears to contemplate that it will be filed when a loan modification agreement effects a change in the debtor's monthly payment amount. However, procedural delays in executing and approving loan modifications often make it difficult, if not impossible, to comply with Rule 3002.1's requirement that the PCN be filed at least 21 days before the effective date of the payment change. Some Courts abate all changes to payments if formal loss mitigation program is in place.

Issues Applicable to Creditors



- ❧ ***Clarification on Whether Rule Applies Once Relief of Stay Has Been Given?*** Should Rule 3002.1 continue to apply after relief from stay has been granted to foreclose on the property? Given that debtors and trustees will generally cease making payments on a mortgage loan once relief from stay to foreclose has been granted, there would appear to be no practical need for a creditor to continue to file any PCNs, because the claim is no longer provided for under Section 1322(b)(5) of the Bankruptcy Code. This rationale is similar to where a debtor has surrendered the property as part of the bankruptcy.
- ❧ ***Do you think 1322(b)(5) should be removed?*** Because of conflicting interpretations, should reference to Section 1322(b)(5) be removed from section (a) of rule 3002.1.
- ❧ ***Difficulty in Calculating Timely Payment Amounts for Daily Simple Interest (DSI) Accounts and Home Equity Lines of Credit (HELOCs) and Burden of Filing Notices for Frequent Payment Changes:*** Creditors have struggled with how to timely notify courts where payment changes arise from the computation of interest on a daily simple basis. Rule 3002.1 makes no exceptions for DSI accounts or HELOCs, where often monthly payment amounts vary month-to-month depending on a number of factors, such as the day of the month in which the debtor made his most recent payment and the amount of that payment. For this reason, creditors often are unable to calculate the payment change amount on DSI accounts at least 21 days before the effective date of the change.
- ❧