

# The National Mortgage Settlement: What Every Bankruptcy Lawyer Needs To Know About It

Presented by:

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# National Mortgage Settlement

- Parties to the Deal
  - Government: US DOJ (including US Trustee Program), HUD, US Treasury, Attorneys General (except OK)
- 5 Servicers:
  - Bank of America
  - Wells Fargo
  - JPMorgan Chase
  - Citibank
  - GMAC (aka Ally)

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# National Mortgage Settlement

- **Timing of Settlement Relief**
  - March 1: Loan modifications can receive credit
  - October 3: All servicing standards must be implemented
- **Four types of relief**
  - Restitution – claim forms being mailed out now
  - Principal reductions - ongoing
  - Refinance – mandatory solicitations being mailed out now
  - Servicing standards – full implementation as of October 3, 2012

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# Servicing Standards for Bankruptcy

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# Accuracy of Filed Documents

- All pleadings, proofs of claim, affidavits, sworn statements, and declarations filed in judicial foreclosure or bankruptcy cases, and in notices of default or sale in non-judicial foreclosures, must be:
  - **“accurate and complete and are supported by competent and reliable evidence”**
- Does this impose a stricter standard than Bankruptcy Rule 9011?

# Accuracy of Filed Documents

- If proof of claim or stay relief motion in case pending before Settlement contains materially inaccurate information, servicer must:
  - file an amended claim or motion, at servicer's expense, within 30 days of acquiring knowledge of the inaccuracy
  - not collect any attorney fees or other charges for preparation or submission of proof of claim or motion for relief that is later withdrawn or denied as a result of a “substantial misstatement” as to the amount due

# Proofs of Claim

- Servicers required to attach to proof of claim the “Loan Documents,” which include:
  - original or duplicate of note, including all indorsements;
  - a copy of any mortgage or deed of trust (including, if applicable, evidence of recordation in applicable land records); and
  - copies of any assignments of mortgage or deed of trust required to demonstrate the right to enforce the borrower’s note under applicable state law



# Proofs of Claim

- Servicers must also attach to proof of claim:
  - affidavit if note has been lost or destroyed
  - statement setting forth basis for asserting that applicable party has right to foreclose
    - must have procedures to ensure servicer or foreclosing entity has “documented enforceable interest” in note and mortgage under state law, or is otherwise a proper party to the foreclosure action
  - Official Form 10 (Attachment A) as required by Bankruptcy Rule 3001(c)(2)(C)
    - must comply with all other requirements in Rule 3001

# Bankruptcy Mortgage Rules

- Settlement imposes sanction separate from that available under Bankruptcy Rule 3002.1(i)
  - if servicer fails to provide **payment change notice** as required by Rule 3002.1(b), servicer shall waive and not collect any late charge or other fees imposed solely as a result of the borrower's failure to timely make the changed payment
  - If servicer fails to timely provide **notice of fees**, as required by 3002.1(c) and Rule 3002.1(g), the fees are deemed waived and may not be collected from the borrower except for "independent charges."

# Stay Relief Motions

The motion papers must:

- Include “Loan Documents” or state that they are attached to a filed proof of claim
- State the basis for the moving party’s right to foreclose
- Disclose whether debtor is being evaluated for a loss mitigation option
- Disclose terms of any trial period or permanent loan modification plan pending at time of motion

# Stay Relief Motions

- Motion shall have attached an affidavit, sworn statement or declaration setting forth:
  - whether there are any prepetition or post-petition defaults
  - if default, a description of any default, and a detailed itemization of all amounts owed, the prepetition and post-petition arrearages, and each fee or charge applied to such pre-petition amount or post-petition amount; and
  - an up-to-date statement of all amounts claimed and the amount necessary to cure any default

# Payment Application in Ch. 13 Cases

- Servicers must ensure prompt and proper application of payments made on prepetition arrearage and post-petition payment amounts
- Debtor is to be treated as being current so long as making payments in accordance with confirmed plan and any later effective payment change notices
- Throughout the case, servicer is required to update its records to reflect payments made during case and waiver of any fee as required under Settlement

# Payment Application in Ch. 13 Cases

- Proof of claim (Supp. 1) form B10 – Notice of Mortgage Payment Change

B 10 (Supplement 1) (12/11)

UNITED STATES BANKRUPTCY COURT

\_\_\_\_\_ District of \_\_\_\_\_

In re \_\_\_\_\_, Case No. \_\_\_\_\_  
Debtor Chapter 13

**Notice of Mortgage Payment Change**

If you file a claim secured by a security interest in the debtor's principal residence provided for under the debtor's plan pursuant to § 1322(b)(5), you must use this form to give notice of any changes in the installment payment amount. File this form as a supplement to your proof of claim at least 21 days before the new payment amount is due. See Bankruptcy Rule 3002.1.

Name of creditor: \_\_\_\_\_ Court claim no. (if known): \_\_\_\_\_

Last four digits of any number you use to identify the debtor's account: \_\_\_\_\_

Date of payment change: \_\_\_\_\_  
Must be at least 21 days after date of this notice

New total payment: \$ \_\_\_\_\_  
Principal, interest, and escrow, if any

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# Loan Modifications for Bankruptcy Debtors

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# Principal Reduction Eligibility Criteria

- In default or imminent risk of default at time of Settlement
- Underwater
- Ownership of loan
  - No Fannie/Freddie or FHA/VA
  - Wells Fargo, Citi, & GMAC
    - servicer-owned loan
  - Bank of America & Chase
    - servicer-owned loans
    - investor-owned loans with delegated authority



# First Lien Principal Reductions

- Bank of America
  - Mandatory solicitation of certain group of borrowers (60 days default as of 1/31/12, and other criteria)
  - Borrowers in bankruptcy will be solicited through their counsel if they are represented
    - Watch for these solicitations and notify your clients
- Wells Fargo, Chase, Citi, and Ally/GMAC
  - Not subject to same solicitation requirements as Bank of America
  - Policies on soliciting borrowers in bankruptcy not yet disclosed.

# Second Lien Principal Reductions

- Bank of America
  - Sending solicitations to eligible borrowers
    - Complete forgiveness of loan
    - Opt-out offers with 30-day window
  - Borrowers in bankruptcy are being solicited, including:
    - Debtors with confirmed plans to strip off second liens
    - Debtors with entered discharge orders
- Chase – may be sending solicitations
- Wells Fargo, Citi, and Ally/GMAC
  - Second lien modification programs vary but primarily occur when a first lien is modified under Settlement by them or another settlement bank

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# Refinance Program

- Mandatory solicitation refinance program for servicer-owned first liens of CURRENT underwater borrowers.
- Refinance is really streamlined modification to reduce interest rate.
- Borrowers who are currently in bankruptcy or who have been in bankruptcy during the last 24 months are NOT eligible for this program and cannot apply.

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# Enforcement

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# Enforceable by Private Parties?

- Not directly enforceable by borrowers/debtors
- Failure to comply with the standards may provide additional support for request by debtors for:
  - sanctions in addition to those available under Bankruptcy Rules 3001(c)(2)(D) and Rule 3002.1(i)
  - denial of stay relief for failure to show “cause” under section 363(d)(1)
  - disallowance of claim under section 502(b)(1)

# Enforceable by Private Parties?

- Violations support claims that non-complying servicers are violating a clear industry standard, giving rise to claims based on:
  - state UDAP laws
  - duty of good faith and fair dealing
  - *See Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir. 2012); *In re Hinson*, 2012 WL 1354807 (Bankr. E.D.N.C. Apr 17, 2012)
- Courts may apply equitable principles to deny relief requested by servicers that relates to violations of standards

# Enforcement: Metrics

- Metrics measure compliance with servicing standards
- Translate servicing standards into defined activities that will be measured or tested
  - Each metric has an acceptable error rate (often 5%) to determine if penalty can be imposed
- Banks' Internal Review Group does initial work on servicing; audited by professional firm hired by National Monitor
- Penalties of \$1 million for first violation

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# Enforcement: Credits

- Credits measure dollars toward \$17 billion loan modification and consumer relief commitments
- Different amounts of credit for different activities
  - Principal reductions
  - Refinances
  - Short sales
  - Anti-blight measures
  - And many more
- Different credit amounts for different activities
  - Example 1: first lien principal reduction of servicer-owned loan is \$1 = \$1 credit but if investor-owned \$1 = \$0.40.
  - Example 2: \$0.10 on the dollar credit for forgiving second liens that are over 180 days delinquent

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# Where to Report Problems

- Email the California Monitor Program:

[CAMonitor@doj.ca.gov](mailto:CAMonitor@doj.ca.gov)

- We review complaints and inquiries from homeowners who have mortgages with any of the five servicers that agreed to the Settlement.

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