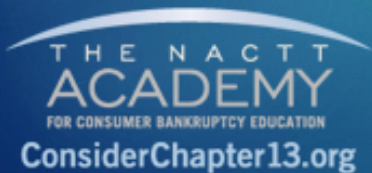


COVID-19, the CARES* Act and Mortgages

WHAT YOU NEED TO KNOW



*Coronavirus Aid, Relief, and Economic Security Act

1

Speaker

- ▶ **Alice Whitten, Esq. is** Managing Counsel - Senior Vice President in the Wells Fargo Legal Department in their Irving, TX office. She leads a team that provides guidance and support for consumer bankruptcy operations across the Wells Fargo enterprise, including mortgage, automobile, credit cards and student lending and supports default functions within Home Lending, including collections, foreclosure, property preservation and REO. She has been with Wells Fargo since 2014.



2

Speaker

- ▶ **Jackson E. Duncan, III, Esq.** is a senior attorney with McCalla Raymer Leibert Pierce, LLC. Jack has represented creditors exclusively for 20 years throughout Alabama and the Southeast. He has appeared on behalf of secured creditors, trustees and other non-debtor parties in Chapter 7, 9, 11, 12 and 13 proceedings. His clients in bankruptcy matters include banks, mortgage servicers, financial institutions, landlords, manufacturers, and Trustees. He has also represented financial institutions in both consumer and commercial transactions from loan origination and closings to loan workouts, foreclosure, liquidation, guarantor collection and counterclaim defense.



3

Moderator

- ▶ **Debra L. Miller, Esq.** was appointed the Standing Chapter 13 Bankruptcy Trustee for the Northern District of Indiana, Fort Wayne and South Bend Divisions on July 1, 2000. She is active in the National Association of Chapter Thirteen Trustees, is a former President of the NACTT and active on the NACTT Mortgage Committee.



4

Today we will discuss...

- ▶ What is the CARES Act?
- ▶ What does it require in regard to mortgages?
- ▶ What is the difference between a forbearance and a deferral?
- ▶ Are Debtors in Chapter 13 eligible for this relief?
- ▶ What must the Debtor do to receive this relief?
- ▶ Once the relief is given, what does the servicer file to advise the Trustee and Court of the agreement?
- ▶ What happens at the end of the forbearance agreement?
- ▶ How to best “workout” the payments due after completion of the forbearance?
- ▶ What happens if the payments in the forbearance are still not paid at the end of the bankruptcy?

5

The CARES Act provides:

- ▶ Section 4022(b)
 - ▶ A borrower of a Federally backed mortgage loan on single residence and multifamily real estate;
 - ▶ That experiences a financial hardship due, directly or indirectly, to the COVID-19 emergency;
 - ▶ Regardless of delinquency status;
 - ▶ May request a forbearance by:
 - ▶ Submitting a request to borrower's servicer **and**
 - ▶ Affirming that borrower is experiencing a financial hardship during the emergency.



6

What is a Federally backed mortgage loan?

CARES § 4022(a)(2)

- ▶ Loans which are secured by a first or subordinate loan on residential real property that is:
 - ▶ Insured by FHA
 - ▶ Guaranteed under Housing & Community Development Act
 - ▶ Guaranteed or insured by VA
 - ▶ Guaranteed, insured, or made by Department of Agriculture, or
 - ▶ Purchased or securitized by FHLMC or FNMA

7

What is a forbearance?

A forbearance arrangement is an agreement made between a mortgage lender and a borrower in which lender agrees to not exercise its legal right to foreclose on a mortgage even if the regular payments are not received during the forbearance period. Sometimes it is referred to as a payment suspension.

Borrower must resume the regular payment at the end of the forbearance period, plus pay an additional amount to get current on the missed payments, including principal, interest, taxes, and insurance.

8

What is a deferment or deferral?

A deferral arrangement or deferment is an agreement made between a lender and a borrower in which lender agrees to postpone payment requirements to some point in the future – generally at the end of the current debt term.

Borrower must resume **only** the regular payment at the end of the deferment period.

The deferred amount may be paid in the usual monthly amount over the same period of time or as a balloon payment at the end of debt term.

9

What will a forbearance do for the Debtor?

- ▶ A forbearance is intended to give immediate short-term payment relief to the Debtor.
- ▶ It is the starting point for conversation regarding long-term solution for the payments that are suspended as a result of COVID impacts.
- ▶ Depending on investor, there are different long-term options/solutions.

10

What does the Debtor have to provide to the servicer to get the forbearance?

- ▶ Submit a request to borrower's servicer **and**
- ▶ Affirm that borrower is experiencing a financial hardship during the COVID19 emergency.
- ▶ Servicer shall provide the forbearance with "no additional documentation required" other than the affirmation.
- ▶ While there are no documentation requirements to receive a forbearance from servicer, there are no prohibitions on Trustees to ask for documentation to submit a plan modification.

11

What is the duration of the forbearance under CARES Act?

- ▶ At the request of borrower, forbearance shall be granted for up to 180 days;
- ▶ At the request of borrower, forbearance shall be extended for an additional period of up to 180 days; and
- ▶ At the request of borrower, the initial or extended period of forbearance may be shortened.



12

Can debtor be charged extra fees or interest for the forbearance?

- ▶ No - during the period of forbearance, no fees, penalties or interest beyond what would be due if the borrower\Debtor had made all payments timely can accrue on the account.



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13

Forbearance Affirmation

What does it need to state?

Should/Must it be in writing?

Where should it be sent?

To avoid automatic stay issues in Chapter 13, may the debtor's attorney provide the information?

For debtors in bankruptcy, is there a different method or place to send or make the affirmation?

14

Does the forbearance change the Debtor's monthly mortgage payment?

No.
Forbearance allows Debtor to "suspend" making payments for a number of months.



For example:

- Debtor's monthly mortgage payment is \$500 a month
- Forbearance granted for 4 months from March to June 2020
- Debtor still owes the \$500 a month for March to June 2020 (a total of \$2000)
- During or shortly after the forbearance, agreement must be reached as to how that \$2000 will be repaid.
- If Debtors are given 10 months to repay the \$2000, they would be making their ongoing monthly payment starting in July 2020 PLUS \$200 a month to repay the 4 months of payments that were in the forbearance.

15

What needs to be filed regarding the forbearance agreement?

Generic Notice on Docket

Must be filed by attorney who has an appearance on file.

In most courts, there is nothing to "link" the Notice to.

Court does not know what action to take.

Some courts will show cause filer to discourage this type of filings.

Generic Notice on Claims Register

Does not have to be filed by an attorney.

Most courts do not have an action code allowing a Notice to be filed on the Claims Register

Using FRBP 3002.1 NOPC action code to file the Notice will cause issues for the Court as the Notice is not on the official 410S1 form

NOPC with disclaimer language

While forbearance does NOT change the payment amount for the month, it simply suspends the payment.

Distinction can be given in an attachment filed with NOPC Form.

While a 21 days notice is generally required under the Rule, CARES Act requires servicers to sometimes provide a retroactive start date for forbearance agreement. Disclaimer language should resolve that issue.

Attachment can make clear suspended payment will need to be resolved prior to the end of the forbearance period.

16

What happens at the end of the forbearance?

After forbearance, CARES Act mandates lender/servicer *"work with the borrower on a permanent plan to help maintain or reduce monthly payment amounts as necessary, including a loan modification."*

Some debtors have advised that their servicer indicated the suspended payments would need to be made up within 90 days of the end of the forbearance.

In conduit jurisdictions, Trustee may have to set up a "post petition forbearance" claim for those payments, and then begin paying post forbearance mortgage payments in a different claim.

17

What about currently filed foreclosures?

- ▶ For federally backed mortgages other than vacant or abandoned properties;
 - ▶ A servicer may not initiate:
 - ▶ a judicial or non-judicial foreclosure process
 - ▶ Move for a foreclosure judgment or order of sale
 - ▶ Execute a foreclosure related eviction or foreclosure sale for not less than 60 days beginning March 18, 2020
- ▶ States have also imposed additional moratoriums on foreclosure and evictions.



18

If Debtor fails to repay forborne payments prior to the end of the bankruptcy, are they entitled to a discharge?

- ▶ Right now, this is up in the air, but answer is probably - No.
- ▶ Debtors are required to be post petition current on mortgage and cure pre-petition arrearage to be entitled to discharge.
- ▶ There is some case law that might provide some relief in these cases, BUT the best solution is to work with servicer to modify mortgage PRIOR to the end of the case so missed payments are resolved before discharge is an issue.

19

“The Debtor
won’t ever be
able to make
up these
payments.”

Options?

- ▶ Instead of forbearance, Debtors concerned about making up forborne payments should consider asking for mortgage payment **deferral**.
- ▶ **Deferral** takes the payments that would be due during a specific time frame and “defers” them to the end of the mortgage.
- ▶ Payment can either be required as a lump sum at the end of the mortgage, or the term of the mortgage can be extended for the number of months deferred.

20

CARES Act allows forbearance but not deferral



- ▶ Requirements regarding deferrals are set by each investor.
- ▶ Generally, required documents are same as if a loan modification was requested, including:
 - ▶ Mortgage Assistance Application (including hardship affidavit)
 - ▶ Second mortgage, car loan, and student loan balance
 - ▶ Current paystubs
 - ▶ Quarterly P&L if self-employed
 - ▶ Recent bank and investment statements
 - ▶ Most recent tax returns

21

A forbearance is NOT a plan modification.

- ▶ Remember that in order to modify a plan, Debtor (or Trustee) must comply with requirements of 11 USC § 1329
- ▶ Even though a forbearance or deferral is granted by servicer, it does NOT mean that the Debtor's plan is modified.



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22

After the financial crisis is over for the Debtor...

- ▶ Debtor and Debtor's counsel should work with the Trustee to:
 - ▶ Modify confirmed plan to meet best interests and disposable income requirements
 - ▶ Provide any tax refunds not turned over
- ▶ Debtor or their attorneys should work with mortgage company and it's counsel to determine what longer term relief options are available. This could include:
 - ▶ Deferments
 - ▶ Deferments with extensions
 - ▶ Loan modifications
 - ▶ Repayment plans



23

If the forbearance period is modified, does additional notice need to be provided?

- Yes
- Using the same form as the original notice

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24

What if Debtor can't modify plan and pay required amounts within 60 months?

CARES allows debtor to request modification of plan under § 1329(d)(1)(A) if debtor is/has experienced a material financial hardship due, directly or indirectly, to COVID-19

Debtors may extend plan payments under the plan for up to **seven years** after initial plan payment was due

Changes apply to any case for which a plan was confirmed before enactment of CARES - March 27, 2020

This provision goes away **one year** from enactment

Modifications need to be timely

25

CARES ACT – Mortgage Issues

Q & A

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26

COVID-19, the CARES Act and Mortgages

THIS AND OTHER RESOURCES CAN
BE FOUND AT
CONSIDERCHAPTER13.ORG

