

The Consumer Provisions of the CARES ACT and Local Court Responses to the Pandemic

AMERICAN BANKRUPTCY INSTITUTE

CONSUMER BANKRUPTCY COMMITTEE



Panelists



David P. Leibowitz

Moderator

- Lakelaw
- Chicago, IL



Hon. Tracey N. Wise

**U.S. Bankruptcy Court
Eastern Dist. of Kentucky
Lexington, KY**



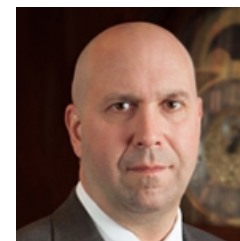
Michael J. McCormick

**McCalla Raymer
Atlanta, GA**



Robert M. Lawless

**University of Illinois
Reporter
ABI Consumer Commission
Champaign, IL**



Eric Goering

**Law Office of
Goering & Goering, LLC
Cincinnati, OH**

Summary of Presentation

- CARES Act amendments to chapter 13
- Student loans
- Mortgages
- COVID stimulus payments in chapter 7 and chapter 13
- Paycheck Protection Program

CARES Act Amendments

- § 101(10A) – “current monthly income”
- § 1325 – disposable income
- § 1329 – plan modification

Strong lobbying effort by consumer groups such as NACBA had an impact upon CARES

Stimulus Payment Exclusion from CMI

§ 101. Definitions

The term “current monthly income” excludes –

. . . .

(V) Payments made under Federal law relating to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the coronavirus disease 2019 (COVID–19).

Stimulus Payment Exclusion from CMI

§ 1325(b)(2). Confirmation of Plan

[T]he term “disposable income” means current monthly income received by the debtor (other than payments made under Federal law relating to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the coronavirus disease 2019 (COVID–19) . . .)

Stimulus Payment Exclusion from CMI

- Exclusion from current monthly income
 - § 707(b) means test
 - § 1325(b) disposable income calculation (*such a good idea they did it twice*)
- Still can be property of the estate – exempt under many state laws and federal wild card
- Treated as a refundable tax credit
- Applies to cases filed before or after enactment

Seven-Year Plan Modifications

§ 1329. Modification of Plan After Confirmation.

(d)(1) Subject to paragraph (3), for a plan confirmed prior to the date of enactment of this subsection, the plan may be modified upon the request of the debtor if—

(A) the debtor is experiencing or has experienced a material financial hardship due, directly or indirectly, to the coronavirus disease 2019 (COVID–19) pandemic; and

(B) the modification is approved after notice and a hearing.

Seven-Year Plan Modifications

§ 1329. Modification of Plan After Confirmation.

(2) A plan modified under paragraph (1) may not provide for payments over a period that expires more than 7 years after the time that the first payment under the original confirmed plan was due.

Seven-Year Plan Modifications

§ 1329. Modification of Plan After Confirmation.

(3) Sections 1322(a), 1322(b), 1323(c), and the requirements of section 1325(a) shall apply to any modification under paragraph (1).

Seven Year Plan Modifications

- Applies only to cases confirmed before the date of enactment (3/27/20)
- “Direct or indirect”
- Effect on other efforts, *e.g.*, payment suspensions?

Sunset

- All provisions sunset after one year
- Complete removal from Bankruptcy Code
- Complications
 - Modifications of 7-year plans after sunset?
 - Authorization for 7-year plans?
 - Stimulus payments in later-filed & converted cases

New Chapter 13 Cases (Post 3/27/2020)

- Eligibility issues? “Only an individual with regular income” Section 109(e)
- Amended definition of “disposable income” (excluding COVID-19 payments)—significantly reduce payments to chapter 13 trustee?
 - More Debtors will qualify for chapter 7? (Easier to pass the means test?)
 - Commitment period adjusted (reduced?) due to decline in income. Unemployment?
 - Should court consider COVID-19 payments when ruling on an IFP application (request to waive filing fee)?

Suspension of Payments/Modification of Plans Confirmed Prior to 3/27/2020

1329(d)(1) allows modification of Confirmed Plan - If currently or in the past have experienced material financial hardship due, **DIRECTLY OR INDIRECTLY** to COVID- 19

1. How does the Debtor quantify the hardship?
2. Roommate, children renters not paying?
3. Do you need an affidavit?
4. Notice and a hearing? How about negative notice?
5. Effect on payroll deduction orders? ACH?

Plan Confirmed Prior to 3/27/2020

1. Is it bad faith to keep plan at 5 years and lower percentage paid?
2. But, 7 years may be necessary to retain other confirmation requirements; e.g., liquidation test, feasibility
3. If there is an extension to increase term, can the chapter 13 Trustee monitor Debtors' income and require increased payments if income increases?
4. Can an amended plan modify a prior plan that provided for debts (tax & Student Loans) that were to survive now get paid in full since you can add 2 years?
5. Impact on requests for hardship discharges? Section 1328(b)(3)?

Suspension of Plan Payments – Conduit Mortgage Plans

1. Can the Debtor suspend the non conduit portion?
2. Do you add the amount onto the end of the plan?
3. Can the Debtor suspend the full payment? Can courts compel the mortgage company to add the mortgage payments onto the end?
4. FHA, HUD, USDA, VA, Freddie Mac & Fannie Mae loans. Effective immediately for borrowers with a financial hardship that makes them unable to pay their mortgage due to the COVID-19 National Emergency, mortgage servicers must extend deferred or reduced mortgage payment options – called forbearance – for up to six months, and must provide an additional six months of forbearance if requested by the borrower.
 - a. Do you need to apply through your lender? OR
 - b. Can the Debtor just request the deferment through the forbearance?
 - c. Don't assume that forbearances are automatic and that all mortgages are eligible

Suspension of Plan Payments – Cure and Maintain Plans

- Post-petition arrearage when paying post petition payments outside plan. Request suspension directly from Lender (or loan mod)? Add post-petition payments into plan modification?
- Mortgage arrearage to be cured within plan can be extended within plan, but must still cure w/in reasonable time Section 1322(b)(5)

You Want To Be Paid?

- No look fees/presumptively reasonable fees—what law applies in your jurisdiction?
- Fee only plans?
- Chapter 7 – Covid-19 payments exempt? Use to pay fees?

Student Loans & the CARES Act

- Suspension of pmts. & no interest accrual until 9/30/20
- Applies only to loans held by the Department of Education
- Does not apply to
 - Private student loans
 - Privately held Federal Family Education Loans (FFEL)
 - Perkins Loans

Student Loans & the CARES Act

- Suspended payments treated as paid for:
 - “Any loan forgiveness program or loan rehabilitation program”
 - Credit reporting
- Any collection activity on a suspended loan is stopped
- Borrowers get 6 notices of collection restart
- Suspended student loans in chapter 13 plans?

Stimulus Payments in Chap. 7 and Chap. 13

- Refundable credits
- Not CMI for any purpose
- Exemptions under state law as welfare benefits or federal wild-card?
- Will trustees administer?
- Steps to be taken by debtors' counsel

Mortgages in the Wake of COVID-19

- CARES Act Relief from Foreclosure: [CARES Act § 4022](#) provides foreclosure relief for "federally-backed loans," which means loans (for 1–4 family properties) purchased, securitized, owned, insured, or guaranteed by Fannie Mae or Freddie Mac, or owned, insured, or guaranteed by FHA, VA, or USDA. See [§ 4022\(a\)\(2\)](#).
- The majority of loans are federally-backed

Mortgages in the Wake of COVID-19

To determine if a mortgage is federally backed, the borrower can contact the servicer or go to:

- Fannie Mae Loan Lookup:
<https://www.knowyouroptions.com/loanlookup#>
- Freddie Mac Loan Lookup:
<https://ww3.freddiemac.com/loanlookup/>
- FHA: call HUD's National Servicing Center at (877) 622-8525

Mortgages in the Wake of COVID-19

- A servicer of federally backed mortgage loan may not: initiate any judicial or nonjudicial foreclosure process, move for a foreclosure judgment, order a sale, or execute a foreclosure-related eviction or foreclosure sale. The provision lasts for not less than the sixty-day period beginning on March 18, 2020. This provision is not limited to borrowers with a COVID-19 related hardship. See [§ 4022\(c\)\(2\)](#).

Mortgages in the Wake of COVID-19

- Many banks are offering 90-day forbearance
- Forbearance requires payment in full on day 91
- Banks are scrambling to figure out loan modification options including capitalization of forbearance payments or adding them to tail of loan.
- Impact on existing chapter 13 plans is unclear

Mortgages in the Wake of COVID-19

- Under the CARES Act, homeowners with federally backed mortgage loans affected by COVID-19 can request and obtain forbearance from mortgage payments for up to 180 days, and then request and obtain additional forbearance for up to another 180 days. During a period of forbearance, no fees, penalties, or interest shall accrue on the borrower's account beyond the amounts scheduled or calculated as if the borrower made all contractual payments on time and in full under the terms of the mortgage contract. The covered period appears to be during the emergency or until December 31, 2020, whichever is earlier. See [§ 4022\(b\), \(c\)\(1\)](#).

Mortgages in the Wake of COVID-19

Bankruptcy Considerations – What's different for mortgage servicers?

- Motions to suspend payments
- Requests for forbearances – notice or court approval?
- Impact of forbearances on future payment changes (i.e., escrow)
- Motions for relief from stay not automatically stopped

Paycheck Protection Program

- Definition of “Payroll Expense” is highly ambiguous
 - \$100,000 limitation but application is unclear
- “Final Interim Rule” on SBA website is still unclear
- Accountants and bankers still debating its meaning
- Bank portals to connect to SBA seem not ready for influx of applications
- Independent Contractors covered but that’s next week!

Paycheck Protection Program

- Businesses with fewer than 500 employees
- Must keep on existing employees
- Employees making <\$100,000
- 2 ½ months of "Payroll Expense"
- Deal with your existing bank

Paycheck Protection Program - Documents

- Payroll Records for 2019 and year to date
 - W2, W3, 941
- Tax returns – 2019 if filed, or 2018 plus YTD financials
- Organization documents for corporation or LLC plus certificate of good standing
 - By Laws or Operating Agreement
- Drivers License or State ID of principal
- Firm Employer Identity Number

Questions?



THANKS!

Do you have other questions?

After the webinar, contact us with further questions.
The ABI Consumer Bankruptcy Committee will respond.

