

Compliance Chrestomathy

Notes from the Compliance Cutting Room Floor

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JDSUPRA

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Loan Statements to Consumers in Bankruptcy

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Recently, I had a conversation with an attorney whose clients are in bankruptcy. Knowing that we have an entire group devoted to servicing compliance, he wanted to know why his clients were receiving loan statements again. It made no sense to him, since there was a time when borrowers in bankruptcy stopped receiving loan statements.

Actually, withholding of loan statements stems from confusion by courts. But I'll get to that in a moment.

The fact is that, if you've represented borrowers in bankruptcy, you may remember a time when they received periodic residential loan statements from their mortgage servicer, much like they did before filing for bankruptcy protection. But you might also remember a time when the delivery of these loan statements to debtors suddenly ceased, with no explanation.

So, under the circumstances, my interlocutor certainly had a right to be confused.

The practice of withholding statements when a borrower files bankruptcy emerged out of confusion by courts, debtors, creditors, and the financial industry over whether sending statements was a violation of the automatic stay.

Case law was the culprit. For instance, in *Garske v. Arcadia Financial, Ltd.* (287 B.R. 537 (9th Cir. B.A.P. 2002) and *Ramirez v. General Motors Acceptance Corporation* (273 B.R. 620; Bankr. C.D. Cal. 2002), the bottom line is that there was no violation of the automatic stay or discharge injunction if the debtor intends to keep the property. Furthermore, *In re Ennis* (Case No. 14-02188-5-SWH; Bankr. E.D. N.C 2015) held that a motion for sanctions was denied because the court did not find that the debtor was damaged by erroneously generated post-petition statements, although the court deemed the generation of statements a willful violation of automatic stay. I

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know; I know. Kind of a distinction without a difference. Finding it too risky to be dragged into court, the financial industry veered hard right and took the most extreme approach and stopped sending statements to borrowers who had filed bankruptcy until the automatic stay was modified by the courts.

Confused yet?

Not yet? Good. So, let's move on.

The confusion was heightened by subsequent actions taken by the Consumer Financial Protection Bureau (CFPB). In 2014, the CFPB proposed new mortgage loan servicing requirements to section 1026.41 of Regulation Z that included guidance on the delivery of loan statements. The proposed amendments at that time *required* mortgage servicers to send a borrower the periodic statement showing information about the mortgage. However, the proposal was criticized on the basis that the requirement would conflict with the bankruptcy automatic stay provision prohibiting creditors from collecting a debt from a consumer in bankruptcy. As a result of this criticism, the CFPB changed its stance and exempted mortgage servicers, in most situations, from sending borrowers in bankruptcy a periodic statement. [See *12 C.F.R. § 1026.41(e)(5) (2014)*]

Then, in 2016, the CFPB went back to its original position, to wit, that loan statements must contain necessary information for delinquent borrowers. Thus, CFPB's stronger stance now was a kind of declaration that sending loan statements to borrowers in bankruptcy who intended to retain their residences is not contrary to the bankruptcy automatic stay provisions. As such, effective April 19, 2018, the CFPB eliminated the prior Regulation Z exemption, and financial institutions would once again be mandated to provide borrowers with residential loan statements, in a modified form. [See the CFPB's *Amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z)* at 8. You can download it [HERE](#).]

By the way, in addition to periodic statements, early intervention efforts via written communication to borrowers in bankruptcy is now required. [12 C.F.R. § 1024.39(c) (2016)]

By hardening its position, the CFPB has once again endorsed the view that the lack of a monthly statement can create problems for a debtor who wishes to retain and continue payments on a residence after filing bankruptcy.



So, these are a few “new rules” I outlined to my caller with respect to periodic mortgage statements, as they relate to borrowers in bankruptcy, which include the following:

(1) Mortgage servicers must generally provide a modified residential mortgage loan statement to borrowers in bankruptcies who intend to keep their home. Borrowers who intend to surrender their home are not required to receive statements.

(2) Consumers in bankruptcy may either opt in or opt out of these rules, ultimately giving them the authority to determine whether statements are beneficial for them.

(3) The modified content of the statements will vary, depending on whether the consumer is a debtor in a Chapter 7 or 11 bankruptcy case, or a Chapter 12 or 13 bankruptcy case. The CFPB created sample forms to ensure compliance.

The new rules also clarify certain periodic statement disclosure requirements relating to mortgage loans that have been accelerated, have been permanently modified, or are in temporary loss mitigation programs.

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