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Using the Portal to Strike Gold

Hon. John E. Waites
Columbia, SC

Eric S. Reed
Columbia, SC

Jason D. Wyman
Columbia, SC

USING THE PORTAL TO STRIKE GOLD

THE HONORABLE JOHN E. WAITES

ERIC REED

JASON WYMAN

JUDICIAL PERSPECTIVE

- Voluntary program facilitating loan modification discussions.
- Key features include the Portal, clear communication and a complete record.
- Court oversight includes reasonable deadlines, good faith negotiations and mediations.
- Goal is to provide quick determinations that benefit both parties.

DEBTOR/BORROWER'S PERSPECTIVE

- Initial Discussion with Debtor/Borrower Client
- Compiling Documents
- Commencing the Portal Case
- Tips and Tricks
- Reviewing the Modification Offer
- Why do this?

CREDITOR/LENDER'S PERSPECTIVE

- Educating Mortgage Creditor of Guidelines
- Monitoring Communications
- Resolving LM/MM Disputes
- Preparing for Mediation/Contested Hearings
- Overseeing the Trial Plan/Permanent Modification Process

Using the Portal to Strike Gold:

Developments of the Mortgage Modification/Loss Mitigation/Mediation Program of the US Bankruptcy Court for the District of South Carolina

Hon. John E. Waites, Columbia

Eric S. Reed, Columbia

Jason D. Wyman, Columbia

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*** These written materials describe the Loss Mitigation/Mortgage Modification procedures followed in cases before Judge John. E. Waites. The discussion at the S.C. Bar Convention will include reference to the other procedures followed by other judges at the Bankruptcy Court for the District of South Carolina. ***

Judicial Perspective of the Loss Mitigation/Mortgage Modification Program

WHY HAVE A PROGRAM?

- There is a close connection between bankruptcy and loss mitigation.
 - Mortgage debt is generally the largest debt in a consumer bankruptcy case and is often the cause for a debtor to file for bankruptcy.
 - There are long-term benefits with loss mitigation/mortgage modification (“LM/MM”) that go beyond the five years provided for in a Chapter 13 bankruptcy case.
 - Bankruptcy cases provide for the automatic stay, which places debt collections on pause to allow for negotiations.
 - Similar to a loss mitigation review, bankruptcy cases require an examination of all of the debtor’s financial affairs.
 - Bankruptcy cases have the central goal of achieving a fresh start for the Debtor.
- As counsel is generally involved in a bankruptcy case, counsel can provide advice and assistance during the loss mitigation review process.
- The program helps the court avoid difficult disputes and can reduce the court’s and the parties’ costs by reducing litigation.

WHAT IS THE PROGRAM?

- Court guidelines and procedures provide a structure to facilitate good faith discussions of LM/MM during a bankruptcy case.
 - The Program is voluntary for debtors.
 - The Program does not require mortgage creditors to modify the loans, but it facilitates a review for loan modifications under the mortgage creditor’s established procedures as well as other authorities like the Consumer Financial Protection Bureau’s regulations, HAMP guidelines, and the Supreme Court of South Carolina’s Administrative Orders.

WHAT ARE THE KEY FEATURES?

- The LM/MM Program uses technology, including the DMM Portal, to expedite communication between the parties and to maintain a permanent record of the communication and documentation shared between the parties.
 - Helps to avoid the “he said/she said” disputes that are common with LM/MM.
- The court sets reasonable deadlines for the parties to submit documentation, to reply to submissions and to conclude the review.
 - Typical reviews conclude within 90 to 120 days.

- A court-appointed mediator oversees the review process and assists in resolving disputes between the parties that may occur during the review.
 - As needed, the mediator holds up to 2 one-hour telephonic sessions, attended by the debtor, debtor's counsel, a representative from the mortgage creditor with settlement authority, and counsel for the mortgage creditor.
 - The cost is \$300 per mediation session, split between the parties.
 - The mediator reports to the Court of the results of the LM/MM review.
- The Program provides court oversight to the LM/MM process.
- Attorneys may be paid fees for assisting in the LM/MM Process.
 - Court approval of a "no-look" fee of \$1,500 for cases involving individual debtors and \$1,800 for cases involving self-employed/small business debtors.
 - Supplemental "no-look" fees allowed for handling additional contested matters in the LM/MM process.
 - Counsel and debtor may also reach their own agreement for fees associated with LM/MM if paid directly to counsel by the debtor.

WHAT ARE THE PROCEDURES?

- An early case order is entered in every new Chapter 13 case to grant relief from the automatic stay to allow parties to pursue LM/MM negotiations. This order also requires parties to report to the court of any LM/MM negotiations. In addition, mortgage creditors are required to make initial disclosures about the debtor's eligibility, which prevents the debtor from incurring unnecessary cost of pursuing LM/MM when it is otherwise unavailable.
- Chamber Guidelines includes standard Chapter 13 plan language, which provides for LM/MM efforts.
- The Program commences through the debtor's notice and motion, which provides mortgage creditors an opportunity to object to LM/MM. If an objection is filed, a hearing is held to determine if LM/MM should proceed.
- After consideration, the court may enter an Order Requiring LM/MM, which sets the requirements and deadlines for the parties.
- Requirement of Good Faith: Parties are required to act in good faith during the negotiations. Parties may file Motions to Enforce LM/MM alleging a party is not acting in good faith, and the court will set a hearing requiring attendance by the debtor, a representative from the mortgage creditor and the parties' counsel.
 - Sanctions may result if a party does not act in good faith.
- The Program also covers a mortgage creditor's transfer of the loan during the LM/MM review process. The prior mortgage creditor is required to update the new mortgage creditor of the

status of the review and notify the court and debtor of the transfer to prevent a delay in the review.

- The court holds a status hearing if necessary to provide a back stop to the process to ensure that reviews and any approved modifications are concluded in a timely fashion.

WHAT IS THE PROGRESS OF THE PROGRAM?

- Success of the Program:
 - Since start of 2014, it is estimated that 60% of loans reviewed in the Program have resulted in a trial period plan or permanent loan modification.
 - Nearly 70% of the most recent loans submitted for review have resulted in trial period plans or permanent loan modifications.
 - Loan modifications approved outside the program have also increased since the start of the Program.
- The Program has increased bankruptcy case filings and provided additional options to debtors to propose for their reorganization.
- The Program has received support from both the debtor's bar and the consumer creditor's bar.
- Expanded Interest in the Program:
 - South Carolina state court foreclosure judges are reviewing the program for possible adoption of a similar program.

Debtor's Attorneys Tips for Loss Mitigation/Mortgage Modification

- Determine if client is a good candidate for a loan modification. (mortgage company, date loan taken, current income, hardship, current payment, interest rate and delinquency)
- Find out and build rapport with mortgage company's attorney. Typically, you will obtain faster results.
- Follow-up or provide document requests to mortgage company within 48 hours.
- Prepare client for numerous document requests, mainly updating paystubs, profit and loss statements and bank statements.
- Make certain that clients understand that faster and better results rely on the client responding quickly.
- Be sure to obtain documents for all parties on the mortgage. Client needs to understand that the mortgage cannot be modified without all parties' consent or, in the case of a divorce situation, will need a Quit Claim Deed or specific Divorce Decree.
- Follow up with the mortgage company weekly. Request a status update and if none received, file a Motion to Compel.
- Check behind the mortgage company. Occasionally they will miss a document already submitted. Do not let their mistake delay the application.
- Check for mortgage company mistakes regarding new payment. Determine if 31% of income was used and if they have escrow listed correctly.
- Update the mortgage company of changes in circumstances (i.e., job change, hardship, death of co-borrower/spouse).
- Make certain that documents that are being submitted have pertinent information. For example, pay stubs should contain year-to-date earnings, tax returns need signatures and traditional bank statements are preferred over transaction history reports.
- Keep all communication through the portal.
- Check tax returns and bank statements for all income. If income no longer received, provide a letter of explanation. (i.e. - business closed, retirement withdrawal).
- Serve early administrative order and LM/MM Motion according to Chambers Guidelines and to all parties. Check proof of claims and Notices to ensure correct service.
- Mortgage company should immediately advise court and debtor of any policies and procedures that would make the debtor ineligible for a modification for reasons unrelated to finances. (i.e. - investor guidelines, too many previous modifications)
- Portal provides a list of all servicers currently registered with the portal. If servicer is not registered, it has 7 days from the date of the Order Requiring LM/MM to register.
- If contesting any aspect of the portal review in court, bring in copies of the communication with you.

Creditor's Attorneys Tips for Loss Mitigation/Mortgage Modification

- In the vast majority of cases, we will be alerted that the Debtor is interested in pursuing loss mitigation via the DMM Portal (the "Portal") via the language in their Chapter 13 Plan.
 - Review the Plan to confirm that the language conforms to Chamber's Guidelines.
- Next, we alert the client to the loss mitigation treatment and take the time to educate the client on the DMM Portal Procedure, Chamber's Guidelines, and the Loss Mitigation Order entered at the outset of the case.
 - Need to request confirmation that the file is eligible for review.
- Monitor the case for the filing of the loss mitigation motion, alert the client and determine whether an objection may be necessary.
 - If an objection is necessary, it is best to be as detailed as possible in explaining why a loss mitigation/mortgage modification review should not go forward. Also, it is recommended that any relevant exhibits should be included with the objection.
 - It may be necessary for a client representative to attend and be prepared to testify at the hearing on the objection.
- Once the loan is in the Portal, counsel should monitor all communications between the Creditor and Debtor's counsel.
 - Be leery of potential miscommunications and try to head those issues off at the pass to avoid unnecessary litigation.
 - Also, remember the Portal is a public sphere. Do not use the Portal to communicate directly with the client.
- With mediation, we must alert the client of the mediation session and ensure a representative is familiar with the case and available for the mediation session. In addition, counsel must attend and participate in the mediation session.
- Once a decision has been reached, we convey the same to Debtor's counsel. Depending on the outcome, we will either monitor the file to ensure that Debtor's counsel takes the appropriate steps to secure court approval of the Trial Plan/Loan Modification or file a Mortgage Modification Report outlining the reasons for the denial.

Any Port(al) in a Storm (of Foreclosure)

Refining Loss Mitigation Through Technology

By Hon. John E. Waites and Andrew A. Powell

Introduction

The Loss Mitigation/Mortgage Modification Mediation Program (LM/MM Program) was developed for certain cases in the U.S. Bankruptcy Court for the District of South Carolina to assist borrowers and mortgage creditors in resolving loan defaults through the facilitation of good-faith communication regarding loss mitigation and mortgage modifications. This article explores the origination, development and success of the LM/MM Program in the South Carolina Bankruptcy Court.

What is loss mitigation?

As a result of the 2008 mortgage crisis, loss mitigation became a part of the national policy as a means of addressing the significant increase in mortgage loan defaults.¹ Loss mitigation is the negotiations between a mortgage creditor and a borrower to avoid foreclosure after the borrower has

missed mortgage payments. While there are several forms of loss mitigation,² the most significant is a consensual permanent loan modification. With modifications, mortgage creditors will reconsider the terms of the loan, which can include extending the length of the loan, lowering the borrower's interest rate, and forgiving or delaying outstanding arrearage. These modifications typically reinstate the loan as current and reduce the borrower's ongoing regular monthly payments. In turn, mortgage creditors benefit as they avoid the costs of foreclosure and increase the likelihood that they will receive ongoing monthly payments.

For the majority of consumer mortgage loans, the servicer of the loan has an obligation to review the borrower for loss mitigation eligibility. The servicer is a separate company that serves as the mortgage creditor's agent to collect on the loans, including collecting pay-

ments, bringing foreclosure actions and conducting loss mitigation reviews. Most new U.S. mortgage loans are either guaranteed or backed by Fannie Mae, Freddie Mac, the Federal Housing Administration or the Department of Veteran Affairs (GSE Loans)³ and are obligated by those entities' requirements to consider loss mitigation.⁴ In addition, in 2009, President Obama's administration and the U.S. Treasury established the Home Affordable Modification Program (HAMP), which allows for modification of many non-GSE Loans.⁵ Currently, 78 mortgage servicers, including most major servicers, participate in HAMP.⁶ Because of these guidelines and modification programs, loss mitigation consideration has become the norm rather than the exception.

Issues in loss mitigation

As the participation in loss mitigation negotiations increased,

issues involving loss mitigation also rose. Traditionally, to commence a loss mitigation review, borrowers are required to provide several documents evidencing their current financial situation and hardship to the creditor.⁷ This exchange of documentation and communication between the borrower and the mortgage creditor typically occurs through mailings and telephone calls. Further, most borrowers participate in loss mitigation without the assistance of experienced counsel. However, as loss mitigation reviews require borrowers to complete lengthy forms about their financial situation and compile several documents for consideration under time deadlines, borrowers acting without counsel can be at a disadvantage due to their unfamiliarity with the process.

While many borrowers successfully obtain loan modifications through this approach, it is not uncommon for issues to develop during the loss mitigation review. For example, loss mitigation reviews can be protracted if the initial documentation submitted is incorrect or incomplete and requires additional documentation to be submitted. Further, if a document is not reviewed in a timely fashion, the document can become “stale” and require further submissions, which also delays the process. As documentation is generally mailed, disputes can occur about whether the borrower in fact submitted the documents and whether the mortgage creditor received them.⁸

Confusion can also be created by the servicer who conducts the loss mitigation review on behalf of the mortgage creditor. Many servicers are divided into different departments including separate foreclosure, bankruptcy and loss mitigation departments. These departments can be located in offices in different states, increasing the likelihood of miscommunication. This internal disconnect can cause mixed messages to be sent to the borrower regarding the status of loss mitigation.⁹ Also, it is not uncommon for the loan to change

servicers during the loss mitigation review. If the borrower is not adequately advised of the change in servicer, the borrower may not be aware to continue communications with the new servicer. Further, due to employee turnover at the servicer, borrowers may have multiple loss mitigation representatives with whom they are communicating, some of whom may not be familiar with the complete history of the loan or the prior communication made to the borrower.

It is also not uncommon for communication to break down because a party becomes nonresponsive or because of a miscommunication between the parties.¹⁰ To complicate these issues, many times the parties have not kept clear or readily-available records of their communications and “he said, she said” disputes develop. These issues can spill over into court proceedings, which increases costs to the parties and makes it difficult for courts to properly adjudicate such disputes.¹¹ With the traditional methods of loss mitigation, there is a lack of efficiency, which can be fatal to the process.

Efforts to guide loss mitigation

In response to the issues associated with the traditional loss mitigation process, several measures have been put in place. Nationally, the Consumer Financial Protection Bureau (CFPB) enacted loss mitigation regulations that are applicable to the majority of mortgage servicers. For example, CFPB regulations set deadlines for the mortgage creditor to respond to a borrower’s loss mitigation request as well as limit when a mortgage creditor can proceed with a foreclosure action when a loss mitigation review is pending.¹²

In our state, the Supreme Court of South Carolina has issued two administrative orders regarding loss mitigation. On May 22, 2009, the Court issued an administrative order regarding HAMP, which included a requirement for plaintiffs in a foreclosure action to report in their complaint whether

the loan was subject to HAMP and the results of the HAMP review when commencing a foreclosure.¹³ Thereafter, the Court issued an administrative order on May 2, 2011 (better known as Foreclosure Intervention), which requires plaintiffs in certain mortgage foreclosure actions to certify that the borrower was denied or did not participate in loss mitigation before a hearing may be held in the case.¹⁴ While these efforts have assisted parties in foreclosure actions, many defendants in foreclosure actions either do not answer the plaintiff’s complaint and are held to be in default or are at a significant disadvantage as they represent themselves without counsel. As a result, many foreclosure actions continue to proceed to sale, which, in turn, motivates borrowers to file for relief in bankruptcy to save their homes.

Bankruptcy and loss mitigation

Bankruptcy cases have close connections to loss mitigation and foreclosures. The automatic stay under 11 U.S.C. § 362 enjoins all collection actions, including a pending foreclosure action, upon the filing of a bankruptcy case, and therefore can be a central motivation for borrowers to file for bankruptcy relief. In addition, under the reorganization chapters of the Bankruptcy Code, debtors are provided the opportunity to catch up pre-bankruptcy arrearage and cure mortgage defaults as a means for debtors to retain their homes.¹⁵ By providing borrowers a second chance on their mortgage debt, loan modifications go hand in hand with the overarching goal of bankruptcy of achieving a fresh start for debtors while providing a procedure of paying their debts. In addition, most debtors in a bankruptcy case are represented by counsel who are familiar with the debtor’s entire financial condition and can actively assist in the loss mitigation process. As such, creative counsel began incorporating loss mitigation as an additional means to address mortgage

defaults in bankruptcy cases, and several bankruptcy courts throughout the country implemented loss mitigation programs.¹⁶

Following the lead of the Supreme Court of South Carolina and the programs used in other bankruptcy courts, the Loss Mitigation/Mortgage Modification Program was implemented in 2014 for the bankruptcy cases assigned to Judge John E. Waites. Providing an opportunity and procedure for good-faith negotiation and mediation, the LM/MM Program utilizes technology, court-set deadlines and court oversight to address the common issues that arise in loss mitigation reviews and assists parties in facilitating these negotiations.

Success of the LM/MM Program

Since the start of the LM/MM Program in Judge Waites' chapter 13 cases, the program has averaged nearly 30 loss mitigation submissions per month. The ultimate goal of the program is merely to facilitate loss mitigation communica-

tions that are otherwise required or encouraged by other authorities. To measure this success, the LM/MM Program relies on the rate of loss mitigation submissions that result in a loan modification either on a trial or permanent basis. In the program's first year, **55 percent** of the completed reviews resulted in either trial or permanent loan modifications. However, as attorneys have become more familiar with the LM/MM Program, the success rate of debtors obtaining modifications has increased. In the most recent six-month period, nearly **70 percent** of the completed reviews resulted in either trial or permanent loan modifications. In comparison, national statistics indicate that **44.5 percent** of loss mitigation reviews result in a loan modification.¹⁷ It appears that part of the success of the LM/MM Program is attributed to its structure and tools, which help to facilitate transparent, secure and timely communication between the parties and reduce many of the com-

mon loss mitigation issues.

The LM/MM Program's structure and tools

In Judge Waites' cases, the court issues an order early in the case establishing the procedures for loss mitigation, including the requirement that the mortgage creditor and its servicer advise debtors if they are not eligible for loss mitigation. In most cases, the process begins with a debtor filing a motion requesting loss mitigation, which is served on the mortgage creditor's servicer and provides for 14 days for any objection to the request.¹⁸ If an objection is filed, the court will hold a hearing to determine if a loss mitigation review should proceed. If no objection is filed, the court will enter, without a hearing, an Order Requiring Loss Mitigation/Mortgage Modification, which outlines the time deadlines for action, the requirement for good-faith negotiation, and the procedures for low-cost mediation and further hearings if necessary.

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(*LaRue v. DeWolff, Boberg & Associates*, 128 S. Ct. 1020 (2008))

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The LM/MM Program encourages the use of two internet-based third-party-created software programs to assist the parties, which are viable at a minimal cost to the debtor.¹⁹ The first program is docUmods, which assists borrowers in compiling, completing and submitting the initial financial information required by the applicable mortgage creditor to consider all loss mitigation options. Using the information inputted by the debtor, docUmods completes the loss mitigation application by customizing the debtor's information to the particular forms required by the mortgage creditor. In addition, the software prevents the submission of incomplete forms as the software will not produce the forms until the debtor completes all the required questions.

Once the loss mitigation forms are produced through docUmods, the debtor transmits the forms to the servicer through the second software program, the Default Mitigation Management Portal

(Portal). The Portal is a secure website through which mortgage servicers and debtors electronically exchange all documentation and communication regarding loss mitigation. The Portal utilizes a messaging system similar to email for immediate communication between the parties and a drop box function that allows for the electronic transmission of documentation. One of the key benefits of the Portal is that it keeps a secure permanent record of all the documents and communications exchanged during the process, which in turn minimizes the number of "he said, she said" conflicts that arise in loss mitigation reviews. The Portal is widely used by over 300 mortgage servicers.

In addition to the software, the LM/MM Program sets reasonable deadlines, by court order, for the parties to complete certain steps in the loss mitigation process. These deadlines are in line with the deadlines required of most servicers by the CFPB and assist in reaching a

timely conclusion of the review. Each party is required to monitor for the other's compliance with these deadlines and report to the court of any failure to meet these deadlines. The program also requires that mortgage creditors and their servicers report any transfers of the loan to a new servicer. Further, the requirement to act in good faith ensures that a fair and complete review is conducted. Failure to adhere to this good faith requirement can result in a hearing before the court.

If a dispute arises between the parties during the loss mitigation process, a party may request, or the court may appoint *sua sponte*, a mediator to the loss mitigation review. The mediator will host up to two one-hour telephonic mediation sessions attended by the debtor, debtor's counsel, a representative from the mortgage servicer with settlement authority and counsel for the servicer. The mediation process has proven to be very successful as it provides fur-

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ther clarity to the parties and frequently results in additional review after a denial has been indicated. While many jurisdictions appoint a mediator in every case, the LM/MM Program, in order to lower costs, only appoints a mediator in cases where a dispute requires it.

Finally, the LM/MM Program also sets deadlines for the entry of a modified note or mortgage agreement and requires the parties to report the final outcome of the loss mitigation review to the court, which provides a firm conclusion of the process. This final reporting may include a Consent Order Allowing Loan Modification, which provides the details and terms of the loan modification agreement, or a Final Mortgage Report, which includes a detailed explanation regarding the mortgage creditor's denial of loss mitigation.

Use of the LM/MM Program and other developments

In the two years since the inception of the LM/MM Program, it has become an integral part of the chapter 13 cases that are assigned to Judge Waites. The LM/MM Program encourages the use of counsel to assist in the loss mitigation process and provides for several methods for the payment of attorney's fees for assisting with the process.²⁰

With the growth of the LM/MM Program, the other judges of the Bankruptcy Court for the District of South Carolina have similarly established procedures allowing loss mitigation during bankruptcy cases and compensating counsel for assistance in the process.²¹

Conclusion

By all measures, the Loss Mitigation/Mortgage Modification Mediation Program has been a successful use of technology to aid the communication between borrowers and mortgage creditors and in increasing the number of successful modifications. While the LM/MM Program does not compel a mortgage creditor to modify a mortgage loan, it creates the

opportunity for expedited, transparent and fair loss mitigation negotiations, which may benefit both mortgage creditors and debtors alike.

Hon. John E. Waites is a bankruptcy judge on the U.S. Bankruptcy Court for the District of South Carolina. Andrew A. Powell is a law clerk for the U.S. Bankruptcy Court.

Endnotes

¹ For example, in 2009, President Obama introduced the Making Home Affordable Program, which includes a loan modification program, with the intention of helping "to stabilize the housing market and help struggling homeowners get relief and avoid foreclosure." See Making Home Affordable Program, *Making Home Affordable Program: Handbook for Servicers of Non-GSE Mortgages 1* (ver. 5.1, 2016), available at www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_51.pdf [hereinafter MHA Handbook].

² For a good summary of the different types of loss mitigation options, see Daria Kelly Uhlig, *Home Guides: Loss Mitigation Options*, S.F. CHRON., <http://homeguides.sfgate.com/loss-mitigation-options-7531.html>.

³ See Jesse Eisinger, *We've Nationalized the Home Mortgage Market. Now What?*, PRO PUBLICA, Dec. 18, 2012, www.propublica.org/article/weve-nationalized-the-home-mortgage-market-now-what (reporting that in 2012, 90% of all new loans in the U.S. were either guaranteed or backed by FNMA, FHLMC, FHA or VA);

⁴ The servicing guidelines, which provide the loss mitigation guidance of each of these loan types, are available at the following: Fannie Mae: www.fanniemae.com/content/guide/servicing/index.html; Freddie Mac: www.freddie.com/singlefamily/guide/;

FHA: <http://portal.hud.gov/hudportal/documents/huddoc?id=40001HSGH.pdf>; VA.: www.benefits.va.gov/homeloans/documents/docs/va_servicer_guide.pdf

⁵ MHA Handbook, *supra* note 1 at 1.

⁶ For a complete list of all the servicers participating in HAMP, please see www.makinghomeaffordable.gov/get-answers/pages/get-answers-how-contact-mortgage-company.aspx.

⁷ For example, as part of the initial package HAMP such documents as tax forms, evidence of income and a Request for Mortgage Assistance Form, which "provides the [creditor] with borrower financial information, including the cause of the borrower's hardship." MHA Handbook, *supra* note 1, at 90.

⁸ See Consumer Financial Protection Bureau, *Monthly Complaint Report Vol. 3 12* (September 2015), available at http://files.consumerfinance.gov/f/201509_cfpb_monthly-complaint-report-vol-3.pdf [hereinafter CFPB Report] ("Complaints

where [borrowers] assert that they sent documents but [lenders] report never having received them are common.").

⁹ According to reports from State Court, the lack of communication between the servicer's foreclosure department and its loss mitigation department may cause a failure to timely advise its foreclosure counsel and the court that the loan has been modified.

¹⁰ See CFPB Report *supra* note 8 at 12.

("[Borrowers] consistently describe trouble communicating with their servicer. . . . [Borrowers] say that attempts to follow up on these issues typically result in the company requesting that the [borrower] re-send the documents or forms in question.").

¹¹ For a case involving these types of loss mitigation disputes, see *In re Pierce*, C/A No. 10-4163-JW, slip op. (Bankr. D.S.C. Nov. 19, 2014).

¹² 12 C.F.R. § 1024.41 (2016).

¹³ *In re Mortgage Foreclosures and the Home Affordable Modification (HMP)*, Admin. Or. 2009-05-22-01 (S.C. May 22, 2009).

¹⁴ *In re Mortgage Foreclosure Actions*, 396 S.C. 209, 720 S.E.2d 908 (May 2, 2011).

¹⁵ 11 U.S.C. § 1322(b)(3) & (b)(5).

¹⁶ Bankruptcy courts in over twenty different districts have established loss mitigation mediation programs including all three districts in Florida, the District of New Jersey and the Southern District of New York.

¹⁷ See Brena Swanson, *SIGTARP report reveals massive failure of HAMP*, HOUSING WIRE (July 29, 2015, 12:01 A.M.), www.housingwire.com/articles/34609-sigtarp-report-reveals-massive-failure-of-hamp; Making Home Affordable, *Program Performance Report through the First Quarter of 2015* (June 5, 2015) www.treasury.gov/initiatives/financial-stability/reports/Documents/1Q15_Quarterly_MHA_Report_Final.pdf.

¹⁸ The guidelines of the LM/MM Program are available at www.scb.uscourts.gov/ChambersJW.htm.

¹⁹ The most commonly used software programs in the LM/MM Program is the Default Mitigation Management LLC's docUmods and portal; however, there are other similar programs available to assist in the loss mitigation process; which the parties may utilize in the LM/MM Program.

²⁰ Currently, the attorney's fees for assisting the debtor with the loss mitigation process is set at \$1,500 per loss mitigation review. These fees can be paid either directly to the attorney or through the chapter 13 plan.

²¹ The loss mitigation guidelines for Judge Duncan and Judge Burris of the South Carolina Bankruptcy Court can be found under their Chamber Guidelines, which are available at www.scb.uscourts.gov/chambers_guidelines.html. At the present time, these alternative procedures provide form orders authorizing loss mitigation and evidencing the entry of a loan modification but do not provide guidance on the use of the Portal or docUmods and do not establish procedures for mediation or deadlines for the loss mitigation review.

LOSS MITIGATION/MORTGAGE MODIFICATION AND MEDIATION PROGRAM

To be effective, all loss mitigation/mortgage modification (“LM/MM”) occurring during a bankruptcy case must be approved by the Court¹ using the following procedures.² While nothing herein requires a mortgage creditor to agree to LM/MM, the procedures set forth below are intended to facilitate LM/MM discussions which may be otherwise required under applicable non-bankruptcy law or generally offered by the mortgage creditor (“Mortgage Creditor”).³

I. Order Regarding Procedures for Loss Mitigation/Mortgage Modification

- a. **General LM/MM Procedures.** Shortly after the commencement of any Chapter 13 case assigned to Judge Waites, the Court enters an Order Regarding Procedures for Loss Mitigation/Mortgage Modification, which outlines required LM/MM procedures for the Debtor(s) and Mortgage Creditor. Such general procedures and requirements include, but are not limited to, the granting of limited relief from the automatic stay to initiate and respond to communications regarding LM/MM, the requirement to report to the Court the commencement of any LM/MM communications and the Mortgage Creditor’s obligation to advise Debtor(s) and the Court of its particular LM/MM requirements in certain cases.
- b. **Service of Order.** Debtor(s)’ Counsel or Debtor(s) (if proceeding without the assistance of counsel) shall serve a copy of the Order Regarding Procedures for Loss Mitigation/Mortgage Modification on all applicable Mortgage Creditors within 5 days from the entry of the Order and file a certificate of service within 3 days thereafter.

II. LM/MM via the Portal (Preferred Method)

- a. **LM/MM Portal.** The Portal is a secure web platform operated by Default Mitigation Management LLC (“DMM”), available at <https://www.dclmwp.com>.⁴ The Portal is preferred because it allows Court oversight and reduces disputes by enabling parties interested in LM/MM to more quickly communicate and exchange all necessary documentation in a secure and transparent online

¹ **References herein to the Court shall mean Judge Waites only.**

² The deadlines and requirements set forth herein are not intended to supersede or extend any deadlines or requirements set forth by applicable non-bankruptcy law, including but not limited to regulations promulgated by the Consumer Financial Protection Bureau (“CFPB”).

³ **Other than the requirement that the Court approve the final LM/MM by Order, these procedures are not applicable to debtor accepted Streamlined Modifications, which by definition are offers from mortgage lenders or servicers without the need for the Debtor(s) to submit any documentation or financial information to obtain approval.** Streamlined Modifications include but are not limited to FNMA Streamlined Modifications, FHLMC Streamlined Modifications, Streamlined HAMP modifications, and other similar federally sponsored programs/initiatives. A Streamlined Modification may be approved by the Court through the submission of a proposed ***Consent Order Approving Mortgage Modification*** using the form attached as Exhibit R, using the CM/ECF event, ***Proposed Consent Order Approving LM/MM***.

⁴ DMM is identified as the Portal provider due to its experience and reasonable cost (\$40 for each Debtor(s)’ Prepared Package and \$40 for the portal submission by the Debtor(s)). Registration for portal use can be completed online at <https://www.dclmwp.com> or by contacting DMM at 1-800-481-1013. The Court may, upon application and review, approve other service providers, in which event such providers will be listed on the Court’s website.

environment while preserving the record of communication and documents exchanged and establishing deadlines for completion of the review.

b. LM/MM Mediation. In Portal cases, upon the entry of an Order Requiring Loss Mitigation/Mortgage Modification, the Court appoints a mediator to oversee the LM/MM process and facilitate discussions between the parties through mediation sessions.⁵

c. LM/MM Portal Procedures.

- (1) Debtor(s) are encouraged to participate in LM/MM via the Portal with the assistance Debtor(s)' Counsel.⁶ Debtors who seek to represent themselves *pro se* for purposes of pursuing LM/MM assume all risks.⁷ At the beginning of the Debtor(s)' bankruptcy case and/or before initiating the LM/MM process, Debtor(s)' Counsel should determine whether the Mortgage Creditor provides applicable LM/MM programs that may benefit the Debtor(s) and whether LM/MM is feasible, and review LM/MM requirements with the Debtor(s).
- (2) If the Debtor(s) intend to seek LM/MM during the first 12 months of the case, the Debtor(s) must include the appropriate nonstandard plan language (set forth below in Paragraph e (1) or (2)) in the Plan.⁸
- (3) If the Debtor(s) do not intend to seek LM/MM during the first 12 months of the case, but wish to reserve their rights to later pursue LM/MM after confirmation of the Plan, the Debtor(s) must include nonstandard reservation of rights language in the Plan (see Paragraph e (3)).⁹

⁵ The mediation is designed to have a limited focus and be low cost. However, parties may request an exemption from the appointment of an LM/MM mediator by filing a separate motion seeking such relief. Any motion requesting an exemption from the appointment of an LM/MM mediator must be supported by good cause, and the cost of the mediator alone shall not constitute sufficient good cause. Upon the Court's determination that a motion is sufficiently supported, a definite hearing on the request for an exemption from the appointment of an LM/MM mediator will be scheduled.

⁶ Counsel filing the Debtor(s)' case shall be presumed to be counsel for LM/MM efforts unless special counsel with expertise in LM/MM is employed by the Debtor(s) with notice to the Court using the ***Limited Notice of Appearance, Request for Notice, and Disclosure of Compensation*** form attached as **Exhibit M**. The ***Limited Notice of Appearance, Request for Notice and Disclosure of Compensation*** should be filed using the CM/ECF event, *Limited Notice of Appearance for LM/MM & Request for Notice*. In the event that the no-look fee for LM/MM purposes is to be paid to separate counsel from the attorney representing the Debtor(s) in the filing and administration of the bankruptcy case, the attorneys' fees to each shall be paid in equal amounts in each distribution from the Trustee, unless otherwise agreed by counsel.

⁷ For an additional fee, DMM may offer document preparation and LM/MM facilitation services for debtors who are otherwise unrepresented in using the Portal.

⁸ If the Debtor(s) intend to pursue LM/MM while concurrently treating the Mortgage Creditor's secured claim under 11 U.S.C. § 1322(b)(5), Debtor(s) should propose the following non-standard language in the Chapter 13 plan in lieu of the language in paragraphs e (1) or e (2):

*In addition to the treatment of **NAME OF MORTGAGE CREDITOR**'s secured claim under 11 U.S.C. § 1322(b)(5), Debtor(s) will also seek loss mitigation and a consensual mortgage modification via the Portal process set forth in Chamber's Guidelines.*

⁹ The LM/MM process should be commenced before discharge of the Debtor(s) and in time to allow completion of the procedures before the case is closed.

Failure to include such language may preclude subsequent court approval of any LM/MM agreement.

- (4) To commence the LM/MM Portal process, Debtor(s)' Counsel shall file a ***Notice and Motion for Loss Mitigation/Mortgage Modification*** and proposed ***Order Requiring Loss Mitigation/Mortgage Modification ("LM/MM Order")***,¹⁰ using the forms attached as Exhibits J and K, and serve on the applicable Mortgage Creditor, co-borrowers or obligors on the loan, and their counsel, if known.¹¹
- a. The affected Mortgage Creditor, co-borrowers, and other obligors shall have 14 days from the date of service of the Motion to object to the Motion. Any objection must state specific reasons verified as accurate by counsel for the objecting party, including an explanation of any LM/MM options for which Debtor(s) are inelligible. Upon timely objection, a hearing shall be held on the date identified in the Notice and all applicable parties and counsel shall attend. In the absence of an objection, the Court may grant, without a hearing, the Motion and enter the ***LM/MM Order***.
- (5) Upon entry of the ***LM/MM Order***, Debtor(s)' Counsel shall immediately register on the Portal. **Once the *LM/MM Order* is issued, all communication between the parties regarding LM/MM shall be through the Portal and the parties must comply with the deadlines and requirements set forth in the *LM/MM Order*.** Debtor(s)' Counsel and counsel for the Mortgage Creditor may communicate orally about the LM/MM process; however, counsel must document all significant communication between the attorneys within the Portal shortly after the communication occurs. Failure of counsel to document significant communication made outside the Portal may result in the Court not considering such communication at a future contested hearing and/or sanctions.
- (6) Unless the parties are otherwise exempted by a court order, an Order Appointing LM/MM Mediator will be entered shortly after the entry of the LM/MM Order. Debtor(s) Counsel or Debtor(s) (if not assisted by counsel) shall serve the Order Appointing LM/MM Mediator on

¹⁰ The ***Notice and Motion for Loss Mitigation/Mortgage Modification*** and proposed ***LM/MM Order*** should be filed using the *Loss Mitigation/Mediation* CM/ECF event.

As an alternative to filing a Notice and Motion for Loss Mitigation/Mortgage Modification, Debtor and Mortgage Creditor may agree to commence the LM/MM process by submitting a proposed Consent Order Requiring Loss Mitigation/Mortgage Modification,¹⁰ using the form attached as Exhibit K with the following modifications:¹⁰

1. Change title of order to "Consent Order Requiring Loss Mitigation/Mortgage Modification."
2. Replace the first paragraph of the order with the following: "This matter comes before the Court upon the agreement of the Debtor(s) and [Creditor Name] to participate in the Loss Mitigation/Mortgage Modification Portal Program. With the consent of the parties, it is hereby"
3. Include consent signatures at the end of the order.

The proposed order should be filed using the *Proposed Consent Order Requiring LM/MM (no motion filed)* CM/ECF event.

If a motion for relief from the § 362 stay is resolved by including a provision that the parties will participate in a LM/MM Portal review, the parties should submit a proposed Consent Order Requiring Loss Mitigation/Mortgage Modification at the same time that the proposed § 362 settlement agreement is submitted to the Court.

¹¹ In order to ensure timely responses to inquiries from the Court, the Mortgage Creditor's designated counsel shall be deemed to be the attorney who files the most recent pleading in the case on behalf of the Mortgage Creditor.

the appointed mediator (“Mediator”) and the Mortgage Creditor within three days of the entry of the Order. No later than three days after service of the Order Appointing LM/MM Mediator, the Mediator shall review the case for conflicts of interest. If there is a conflict, the Mediator shall immediately report to the Court by correspondence that the Mediator is unable to serve and that a new Mediator must be appointed.

- (7) Within 7 days after entry of the **LM/MM Order** or within any other applicable deadline set by non-bankruptcy law (including CFPB requirements), if shorter, the Mortgage Creditor shall advise its counsel of entry of the **LM/MM Order**, register to use the Portal (if not previously registered), assign to the Portal the Mortgage Creditor’s designated counsel, and ensure that the Portal provider has been provided with any and all application forms and documentation requirements necessary for current and immediate consideration of all available types of LM/MM. Debtor(s)’ Counsel shall report, by correspondence filed on the Court’s docket, any failure to timely register to use the Portal.
- i. **Loan Transfer during LM/MM Process.** The Mortgage Creditor, via counsel, is ordered to inform the Court, the Debtor(s), Debtor(s)’ Counsel, the Trustee, the Mediator, and any participating co-borrower or obligor if the applicable loan is sold or securitized to another company during the LM/MM process within 7 days of the transfer. **The transferee or new servicer of the loan shall be advised of these requirements by the original Mortgage Creditor and shall be bound by all prior orders, agreements, forms, and documentation.** The transferee or servicer shall register for the Portal within 7 days and the Mortgage Creditor shall transfer the Portal account to the transferee so that the transferee may review all previously submitted transmissions and continue with the process.
- (8) Within 14 days after entry of the **LM/MM Order**, unless exempted,¹² the Court’s approved online document preparation program (the “Document Preparation Program”) must be used to complete the standard LM/MM forms (the “Debtor(s)’ Prepared Package”) and upload the Debtor(s)’ Prepared Package to the Portal. Use of the Document Preparation Program, provided at www.documods.com,¹³ is required to expedite the exchange of information between the Debtor(s) and the Mortgage Creditor and ensure greater accuracy in the preparation of the required documentation. Upon uploading the Debtor(s)’ Prepared Package to the Portal, Debtor(s)’ Counsel shall assign the Mediator to the account in the Portal (unless otherwise ordered by the Court).
- (9) Within 7 days after submission of the Debtor(s)’ Prepared Package and any other necessary documentation on the Portal, the Mortgage Creditor shall:
- i. Acknowledge receipt of the information on the Portal;
- ii. Provide on the Portal all contact information of the representative in charge of the Debtor(s)’ account; and

¹² Debtor(s)’ Counsel who are experienced with LM/MM and with the use of the Portal may request by motion, stating grounds with specificity, to be exempted from using the Document Preparation Program. **Pro se Debtors must use the Document Preparation Program.**

¹³ Enter **scbkdocs40** for the \$40.00 rate. DMM also offers a DocuPrep program through which it directly assists the Debtor(s) in completing the Debtor(s)’ Prepared Package (for a fee charge of approximately \$200.00).

- iii. Notify Debtor(s)' Counsel of any additional or updated information required to process the application.
- (10) Unless ordered otherwise, the Mediator shall conduct a mediation session ("Initial Mediation Session") **no later than 30 days** after the entry of the LM/MM Order. The Initial Mediation Session shall be conducted via telephone conference call on a date set by the Mediator, attended by Debtor(s), Debtor(s)' Counsel, a representative from the Mortgage Creditor with settlement authority and counsel for the Mortgage Creditor, and last no longer than an hour. Debtor's Counsel shall publish the phone number for the conference call on the Portal no later than 3 days before the scheduled mediation.
- i. The cost of the Mediator shall be **\$300** for up to a one-hour Initial Mediation Session, divided equally between Debtor and the Mortgage Creditor and shall be paid to the Mediator **no later than 5 days before the scheduled date of the Initial Mediation Session**.
- (11) After the conclusion of the Initial Mediation Session, the parties and Mediator shall schedule a second one-hour mediation session ("Second Mediation Session") to assist in facilitating the resolution of LM/MM efforts. If, prior to the scheduled Second Mediation Session, the parties have reached an LM/MM Agreement or are near completion of the LM/MM review to the satisfaction of all the parties, the parties may jointly request, no later than seven days prior to the scheduled session, the Mediator cancel the Second Mediation Session. Upon a request, the Mediator may cancel the Second Mediation Session in his or her discretion. The Second Mediation Session shall be conducted via telephone conference call on a date set by the Mediator, attended by Debtor(s), Debtor(s)' Counsel, a representative from the Mortgage Creditor with settlement authority and counsel for the Mortgage Creditor. Debtor's Counsel shall publish the phone number for the conference call on the Portal no later than 3 days before the scheduled mediation.
- i. The Mediator's fees and costs for up to a one-hour Second Mediation Session shall total **\$300.00**, and should be equally divided by the parties and **paid no later than 5 days** prior to the scheduled date of the Second Mediation Session, unless otherwise ordered by the Court.
 - ii. After the conclusion of the Second Mediation Session, if a further mediation session is needed to facilitate the resolution of a LM/MM dispute or issue, the parties, with the approval of the Mediator, may agree to an additional one-hour mediation session, which will be held on a date set by the Mediator. The Mediator shall report the additional mediation session and the arrangements of the Mediator's additional compensation to the Court.
- (12) Unless a shorter time is set by applicable law, rules or regulations (such as the CFPB), the Mortgage Creditor shall have a total of 90 days from entry of the **LM/MM Order** ("Loss Mitigation Period") to conclude its consideration and provide a final response to the Loss Mitigation request by advising on all means of LM/MM, or verify a denial by filing a **Mortgage Loan Modification Report**, using the form attached as Exhibit L.¹⁴ **Any denial shall state specific reasons for the denial.**

¹⁴

The **Mortgage Loan Modification Report** should be filed using the CM/ECF event of the same name.

- i. Upon the parties' failure to reach an agreement regarding LM/MM within the 90-day Loss Mitigation Period, the Mediator may extend LM/MM for a period up to 60 days. Any request to extend the Loss Mitigation period beyond 150 days must be made by filing a Motion to Extend the Loss Mitigation Period and Proposed Order Extending the Loss Mitigation Period.¹⁵
- (13) Upon acceptance of the Debtor in a Trial Period Plan and before the first trial period payment is due, Debtor(s)' Counsel shall submit a proposed ***Order Approving Trial Period Plan*** using the form attached as Exhibit N for consideration and approval by the Court.¹⁶ If a copy of the trial period agreement is attached to the proposed order, **any private information must be redacted** according to Federal Rule of Bankruptcy Procedure 9037.
- (14) Any final agreement for LM/MM shall be submitted for approval by the Court by way of ***Consent Order Approving Loss Mitigation/Mortgage Modification***, using the form attached as Exhibit O.¹⁷ If a copy of the LM/MM agreement is attached to the proposed order, **any private information must be redacted** according to Federal Rule of Bankruptcy Procedure 9037.
- i. If the modification to the mortgage involves an extension of new funds or credit, a motion to incur debt or obtain credit should also be filed and properly noticed to all creditors and parties in interest.
 - ii. Dismissal of the bankruptcy case, relief from the automatic stay as to the affected property, or reaffirmation of the debt shall not be a prerequisite of an agreement for loss mitigation, including modification of mortgage loan, unless allowed by the Court after consideration at a hearing.
- (15) The Mediator must submit a Mortgage Modification Report, using the form attached as Exhibit L, prior to the expiration of the Loss Mitigation period and at the conclusion of the LM/MM review.
- (16) In order to ensure the timely completion of LM/MM and unless a final report concluding LM/MM has been filed, the Mediator shall notify the Court if the LM/MM efforts are not concluded by the expiration of the Loss Mitigation period or any extensions thereof. The Court will set a status hearing on the LM/MM efforts within 150 days from the entry of the ***LM/MM Order***.
- i. The Mediator may also request at any time during the LM/MM process for the Court to hold a status hearing on the LM/MM review.
 - ii. The Debtor(s), Debtor(s)' Counsel, the representative of the Mortgage Creditor with the most knowledge regarding the LM/MM efforts made in the case and counsel for the affected

¹⁵ The expiration of the 90-day Loss Mitigation period or any extension thereof does not dissolve the LM/MM Order or conclude the LM/MM process. All parties remain obligated to act in good faith and to continue the LM/MM review until its final conclusion after the expiration of the Loss Mitigation period.

¹⁶ The proposed ***Order Approving Trial Period Plan*** should be filed using the CM/ECF event, *Proposed Order Approving Trial Period Plan*.

¹⁷ The proposed ***Consent Order Approving Loss Mitigation/Mortgage Modification*** should be filed using the CM/ECF event, *Proposed Consent Order Approving LM/MM*.

Mortgage Creditor **shall appear in person at all scheduled status hearings.** In the event the LM/MM process is completed, approved or denied prior to the scheduled status hearing, parties via counsel may file a report to that effect and a calendar removal request.

- (17) No later than 60 days after entry of the ***Consent Order Approving Loss Mitigation/ Mortgage Modification***, the Mortgage Creditor shall deliver all documents necessary to complete the permanent modification to Debtor(s)' Counsel and the parties shall execute all necessary documents to finalize the modification. Upon the Mortgage Creditor's failure to timely deliver the necessary documents, the Debtor(s) may file a Motion to Compel and seek attorney's fees incurred as a result of unreasonable delay.

- d. Good Faith Requirement.** All parties are required to act in good faith throughout the LM/MM process. The Mediator shall immediately report to the Court the other party's failure to timely comply with any of the LM/MM procedures or deadlines or failure to otherwise act in good faith by filing correspondence on the Court's docket. Failure to act in good faith may result in sanctions.
- i. If the Debtor(s), Mortgage Creditor, or any other interested party seeks specific relief based upon an assertion that the other party made a demonstrable error in review, is not acting in good faith during the LM/MM review, has not timely complied with the deadlines of the LM/MM Order, or other specific grounds of noncompliance with the LM/MM Order or these guidelines may file a Motion to Enforce the LM/MM Order. A Motion to Enforce the LM/MM Order should state its allegations with particularity. Upon a determination of cause, the Court may set a hearing on the motion and require attendance of the debtor and a representative of the mortgage who is most knowledgeable on Debtor(s)' LM/MM request and any other relevant party, along with their counsel.

- e. **Chapter 13 Plan Language.** The following nonstandard language has been approved for inclusion in the Chapter 13 plan to indicate the Debtor(s) intention to pursue LM/MM, subject to objection by affected parties.

(1) Option One (The Debtor(s) are capable of making regular contract payments or adequate protection payments)

The Debtor(s) shall seek loss mitigation or consensual mortgage modification of the mortgage loan secured by the following property via the Portal process set forth in Chamber's Guidelines:

[Real Property Description]

Beginning on [date], the Debtor(s) will pay either ☐ regular contract payments or ☐ adequate protection payments in the amount of \$ _____ directly to [Mortgage Creditor]. The Debtor(s) will also be responsible for payment of any arrearage directly to [Mortgage Creditor] if not relieved through a loss mitigation or loan modification process. No payment will be made by the Trustee on this secured claim.

(2) Option Two (The Debtor(s) are unable to make present payments)

The Debtor(s)' plan relies upon loss mitigation or a consensual mortgage loan modification of the mortgage loan secured by the following property:

[Real Property Description]

If the mortgage loan modification is approved, the Debtor(s) shall directly pay [Mortgage Creditor]'s allowed mortgage claim, including any prepetition and post petition amounts. No payment will be made by the Trustee on this secured claim.

In the event that (1) the request for mortgage loan modification (and any necessary documentation) is not submitted or is denied (after appeal) or (2) the Debtor(s) fail to timely make any required Trial Period Plan Payments, the Mortgage Creditor may, after 14 days' written notice to the Debtor(s), Debtor(s)' Counsel, and the Trustee, submit an affidavit and proposed order seeking relief from the stay. However, the Mortgage Creditor may not obtain relief until its final consideration of loss mitigation or mortgage modification is concluded and reported to the Debtor(s) and Debtor(s)' Counsel.

(3) Option Three (Reservation of Rights Language)

The Debtor(s) reserve the right to seek loss mitigation or modification of the mortgage loan using the Loss Mitigation/Mortgage Modification Portal procedures described in Chambers Guidelines during the bankruptcy case, which may be effective upon subsequent approval by order of the Court

f. **Attorney's Fees for LM/MM via the Portal.** Counsel assisting the Debtor(s) with LM/MM via the Portal shall be permitted to charge an attorney's fee for LM/MM related services. In Chapter 13 cases, a **\$1500** no-look fee shall be allowed (in addition to the no-look fee established under the Guidelines for compensation for professionals) for consumer cases. In self-employed/small business Chapter 13 cases, an **\$1800** no-look fee shall be allowed. The no-look fee may be paid directly by the Debtor from post petition income or exempt assets or through the confirmed Plan, with **\$1000** of that fee allowed to be distributed in the initial distribution by the Trustee. The manner of payment of the no-look fee for loss mitigation/mortgage modification must be addressed in the **LM/MM Order**. See Exhibit K. In the alternative The fee provides additional compensation for all services through the completion of the LM/MM process and includes:

- a. Filing of the **Notice and Motion for Loss Mitigation/Mortgage Modification** and proposed **LM/MM Order**;
- b. Assembling and submitting Debtor(s)' Prepared Package;
- c. Filing of other required pleadings and preparation of proposed orders, as applicable;
- d. Communicating with the Mortgage Creditor, co-borrower or obligor, and the Mediator, if appointed;
- e. Filing of the proposed **Order Approving Trial Period Plan**, if applicable; **Consent Order Approving Loss Mitigation/Mortgage Modification**, or a **Mortgage Loan Modification Report**; and
- f. Appearing at hearings relating to LM/MM, but not including hearings on Debtor(s)' motion to enforce LM/MM guidelines or mediation of LM/MM as ordered by the Court (see below for additional supplemental no-look fees for such matters).
- g. Attending the Initial Mediation Session.

\$1000 of the no-look fee shall be deemed earned and payable after the filing of an Attorney Fee Disclosure Statement and upon completion of the submission of all documents necessary for consideration of loss mitigation/mortgage modification. The remaining portion of the no-look fee shall be deemed earned and payable upon submission of a proposed **Order Approving Trial Period Plan**, **Consent Order Approving Loss Mitigation/Mortgage Modification**, or **Mortgage Loan Modification Report**. Additional fees for LM/MM efforts may be allowed in the event of extraordinary circumstances or if LM/MM mediation is ordered upon motion specifying cause and further order.

As an alternative to the no-look fee, Debtor(s)' counsel and Debtor(s) may agree upon a different fee amount to be paid by the Debtor(s) directly to counsel upon the completion of the Application for Supplemental Fees procedures listed in S.C. L.B.R. 2016-1(b)(2).

An additional supplemental no-look fee for LM/MM shall be allowed for representation of Debtor(s) and the filing of related pleadings for the following matters:

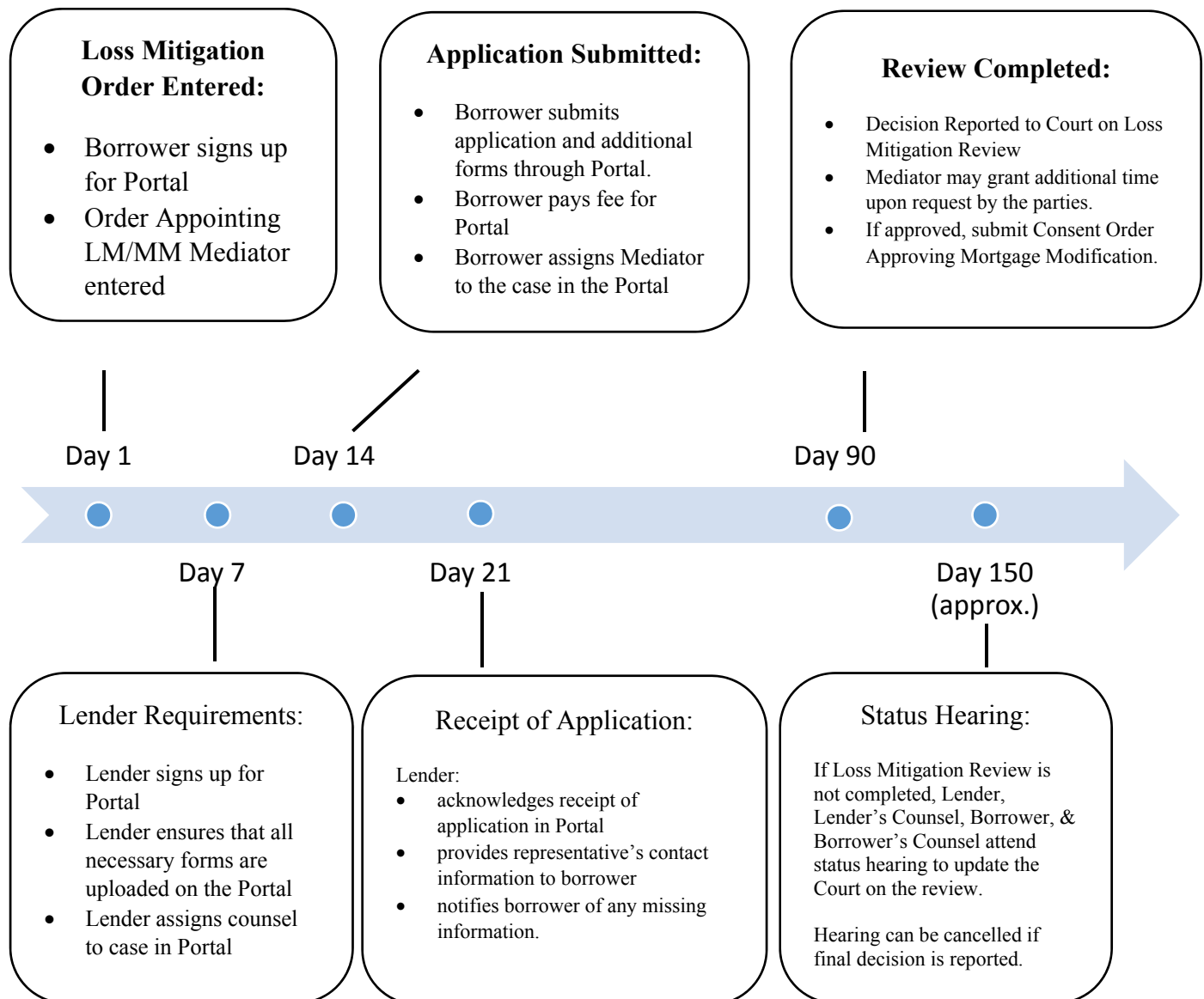
1. **\$500** – A Contested Hearing, involving testimony, on Debtor(s)' motion to enforce LM/MM guidelines.¹⁸
2. **\$500** – Second Mediation Session.¹⁹

¹⁸ The \$500 supplemental no-look fee for the Contested Hearing on Debtor(s)' motion to enforce LM/MM guidelines should be requested by Debtor(s)' attorney at the conclusion of the hearing on that matter.

¹⁹ The \$500 supplemental no-look fee for the Second Mediation Session will be allowed upon the Mediator's reporting in the Mediation Report that Debtor(s)' attorney was active and effective during the mediation session in the Mediator's judgment.

The additional supplemental no-look fees set forth above may be requested at the hearing by oral motion and authorized by the Court, or in the event of mediation, the fees may be authorized upon the mediator's submission of a mediation report indicating that Debtor(s)' attorney actively participated in the mediation.

Timeline for Loss Mitigation Review:



These deadlines are supplemental to and do not supersede the deadlines required in other legal mandates, including the National Mortgage Settlement and the CFPB.

III. Non-Portal LM/MM

- a. **Duty to Report Non-Portal LM/MM Efforts for Approval.** Non-Portal LM/MM efforts must be reported to the Court via the filing of correspondence by Debtor(s)' Counsel, counsel for the Mortgage Creditor or the parties *pro se* or by submission of an order seeking approval.²⁰ Failure to timely notify the Court of such efforts may result in adverse rulings.
- b. **Approval of Non-Portal Trial Period Plan.** Upon acceptance of the Debtor in a Trial Period Plan and before the first trial period payment is due, Debtor(s)' Counsel shall submit a ***Consent Order Approving Trial Period Plan (Non-Portal)*** using the form attached as Exhibit P. If a copy of the trial period agreement is attached to the proposed order, **any private information must be redacted** according to Federal Rule of Bankruptcy Procedure 9037.
- c. **Approval of Non-Portal Final Agreement for Loss Mitigation/Mortgage Modification.** Any final agreement for LM/MM shall be submitted for approval by the Court by way of a proposed ***Consent Order Approving Loss Mitigation/Mortgage Modification (Non-Portal)***, using the form attached as Exhibit Q. If a copy of the LM/MM agreement is attached to the proposed order, **any private information must be redacted** according to Federal Rule of Bankruptcy Procedure 9037.
- i. If the modification to the mortgage involves an extension of new funds or credit, a motion to incur debt or obtain credit should also be filed and properly noticed to all creditors and parties in interest.
 - ii. Dismissal of the bankruptcy case or reaffirmation of the debt shall not be a prerequisite of an agreement for loss mitigation, including modification of mortgage loan, unless ordered by the Court after consideration at a hearing.
 - iii. If not provided in a previously confirmed plan, an amended plan which provides that all mortgage payments shall be made directly by Debtor(s) to the Mortgage Creditor shall be filed prior to the approval of the final agreement for LM/MM.
 - iv. Upon approval of the final agreement for LM/MM, the Court will grant relief from the automatic stay for the benefit of the Mortgage Creditor upon submission of a proposed order from the Mortgage Creditor via counsel.²¹ Unless otherwise ordered, the automatic stay shall remain effective as to all other lienholders.
- d. **Attorney's Fees for Non-Portal LM/MM.** No additional no-look attorney's fee is authorized for Non-Portal LM/MM efforts. Debtor(s)' Counsel may seek attorney's fees in an amount of up to \$300 for efforts to obtain Court approval by filing an application for supplemental fees in accordance with SC LBR 2016-1.
- e. **Pursuing LM/MM without Assistance of Counsel.** Debtors who elect to represent themselves *pro se* for purposes of pursuing LM/MM assume all risks, and if unsuccessful, a further opportunity to seek LM/MM during the bankruptcy case will not be approved.

²⁰ Unrepresented Mortgage Creditors may submit correspondence to chambers by e-mail to jwaites_prose@scb.uscourts.gov, with copy provided to Debtor(s)' Counsel and the Trustee.

²¹ The proposed order should be titled "Order Granting Relief from Stay as to [Mortgage Creditor Name] Only" and should be filed using the CM/ECF event, *Proposed Order*.

EXHIBIT K

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA**

IN RE:

[Debtor Name],

Debtor(s).

C/A No. _____

Chapter ____

**ORDER REQUIRING
LOSS MITIGATION/MORTGAGE
MODIFICATION**

A Motion for Loss Mitigation/Mortgage Modification was filed by [Debtor Name] (“Debtor(s)”) on [Date] _____, 20__ and the parties have had notice and an opportunity to object. It appearing that no objections were filed or that any objections filed have been withdrawn or otherwise ruled upon or that the applicable parties now consent, it is hereby

ORDERED that the Debtor(s), acting through counsel, and _____ (“Mortgage Creditor”) [and additional parties, if any] are directed to participate in the Loss Mitigation/Mortgage Modification Portal Program; it is further

ORDERED that the Debtor(s), Debtor(s)’ counsel, the Mortgage Creditor and its counsel, and any participating co-borrower or obligor shall comply with the Loss Mitigation/Mortgage Modification Procedures set forth in Judge Waites’ Chambers Guidelines (available at www.scb.uscourts.gov/ChambersJW.htm) and engage in the Loss Mitigation/Mortgage Modification (“LM/MM”) process in good faith, and that failure to do so may result in the scheduling of a hearing to consider sanctions or other relief; and it is further

ORDERED that the Debtor(s), Debtor(s)’ Counsel, and the Mortgage Creditor and its counsel shall observe the following deadlines:

- (1) Upon entry of this Order, Debtor(s)’ Counsel shall immediately register on the Portal.¹ Once registered, all communication between the parties regarding the loss mitigation review shall be sent through the Portal. Communication and negotiation by the Debtor shall be through Debtor(s)’ Counsel unless otherwise allowed by the Court.
- (2) Within 7 days after entry of this Order, the Mortgage Creditor shall advise its counsel of entry of the Order, register to use the Portal (if not previously registered), assign to the Portal the Mortgage Creditor’s designated counsel, and ensure that the Portal provider has been provided with any and all application forms and documentation requirements necessary for consideration of all available types of LM/MM. Debtor(s)’ Counsel shall report, by correspondence filed on the Court’s docket, any failure to timely register to use the Portal.
- (3) Within 14 days after entry of this Order, Debtor(s)’ Counsel shall upload the standard LM/MM forms (the "Debtor(s)’ Prepared Package") to the Portal and assign the Loss Mitigation Mediator to the account in the Portal. Unless exempted by the Court, the Court's

¹ The Portal is available at <https://www.dclmwp.com>.

approved online document preparation program (the “Document Preparation Program”), provided at www.documods.com, must be used to complete the Debtor(s)’ Prepared Package.

- (4) Within 7 days after submission of the Debtor(s)’ Prepared Package and any additional documentation on the Portal, the Mortgage Creditor shall:
- i. Acknowledge receipt of the information on the Portal;
 - ii. Provide on the Portal all contact information of the representative in charge of the Debtor(s)’ account; and
 - iii. Notify Debtor(s)’ Counsel of any additional or updated information required to process the application.
- (5) **Unless a shorter time is set by applicable law, rules or regulations**, the Mortgage Creditor shall have a total of 90 days from entry of this Order (“Loss Mitigation Period”) to conclude its consideration and provide a final response to the Loss Mitigation request by advising on all means of Loss Mitigation, including mortgage modification, or verify a denial by filing a Mortgage Loan Modification Report. Any denial shall state specific reasons for the denial. Upon the failure to reach a final disposition regarding LM/MM within the 90-day Loss Mitigation Period, any party may request by motion that the Loss Mitigation Period be extended.
- (6) Upon acceptance of the Debtor(s) in any Trial Period Plan and before the first trial period payment is due, Debtor(s)’ Counsel shall submit a proposed Order Approving Trial Period Plan for consideration and approval by the Court.
- (7) **Other requirements set forth in Chambers Guidelines, which may include additional required steps and deadlines, are incorporated herein and shall be effective. Failure to adhere to the Order and Chambers Guidelines may subject parties and counsel to sanctions or other relief.**

It is further **ORDERED** that the parties must submit and seek Court approval of any final agreement providing for any loss mitigation/mortgage modification using forms and procedures outlined in Judge Waites’ Chambers Guidelines referenced above. Dismissal of the bankruptcy case, relief from the automatic stay as to the affected property, or reaffirmation of the debt shall not be a condition of loss mitigation, including modification of mortgage loan, unless allowed by the Court after consideration at a hearing; and it is further

ORDERED that, absent entry of a Consent Order Approving Loss Mitigation/Mortgage Modification, a final report must be submitted within thirty (30) days of the expiration of the Loss Mitigation efforts; and it is further

ORDERED that the Mortgage Creditor, via counsel, is ordered to inform the Court, the Debtor(s), Debtor(s)’ Counsel, the Trustee, and any participating co-borrower or obligor if the applicable loan is sold or securitized to another company during the LM/MM process within 7 days of the transfer. The transferee or new servicer of the loan shall be advised of these requirements by the original Mortgage Creditor and shall be bound by all prior orders, agreements, forms, and documentation. The transferee or servicer shall register for the Portal within 7 days and the Mortgage Creditor shall transfer the Portal account to the transferee so that the transferee may review all previously submitted transmissions and continue with the process.

ORDERED that Debtor(s)' Counsel, in consideration for assisting the Debtor(s) with the LM/MM process and in addition to any other fees charged in connection with the case, shall be permitted to charge an additional attorney's fee of \$1,500. Said fee shall be paid in a manner described below and reflected in a fee disclosure [select applicable provision and include only that provision in the order]:

- ☐ The Debtor(s) shall pay \$1,500 directly to Debtor(s)' Counsel outside of the bankruptcy in accordance with a separate fee or retainer agreement. If Debtor(s) fail to make such payment, Debtor(s)' Counsel is authorized to file a request for supplemental fees to seek payment through the Chapter 13 Plan;
- ☐ Debtor has or shall pay a partial payment of \$___ directly to Debtor(s)' Counsel outside of the bankruptcy, leaving a balance of \$___ to be paid from the Chapter 13 Plan. Debtor(s)' Counsel shall either (a) in the event that a plan has previously been confirmed, file a supplemental fee application under the expedited fee procedure in which case the Trustee shall apply any monthly distributions that would previously have been allocated for mortgage arrearage toward the attorney's fees,² or (b) in the event that the loan modification process has or will begin prior to confirmation of Debtor(s)' plan, increase the fees that are being paid through the plan by said remaining balance, with an increased initial disbursement of up to \$2,000 rather than the normal initial disbursement of \$1,000;³
- ☐ The entire fee of \$1,500 shall be paid to Debtor(s)' Counsel from the Chapter 13 Plan. Debtor(s)' Counsel shall either (a) in the event that a plan has previously been confirmed, file a supplemental fee application under the expedited fee procedure in which case the Trustee shall apply any monthly distributions that would previously have been allocated for mortgage arrearage toward the attorney's fees, or (b) in the event that the LM/MM process has or will begin prior to confirmation of Debtor(s)' plan, increase the fees that are being paid through the plan by said remaining balance, with an increased initial disbursement of up to \$2,000 rather than the normal initial disbursement of \$1,000;⁴
- ☐ In a Chapter 13 plan, the Debtor(s) shall propose resuming regular monthly mortgage payments to be paid directly by the Debtor(s) beginning in the month of _____, 20__, during which time Debtor(s) shall pay installments of \$___ per month directly to Debtor(s)' Counsel beginning on _____, 20__.
- ☐ Other: (to be completed by Debtor(s)' counsel and subject to Court approval)

² The Trustee will only be required to pay attorney's fees out of the payments allocated to the Mortgage Creditor at the time the Trustee ceases to make such payments to the Mortgage Creditor, which would normally be at the time of entry of the final order for loss mitigation/mortgage modification or at the time of relief from the automatic stay.

³ The increased initial disbursement of anything more than \$1,000 shall only apply in cases in which the plan payment is \$750 per month or higher. The Debtor(s) must provide notice that this relief is sought in Motion for Loss Mitigation/Mortgage Modification or by separate motion served upon the affected Mortgage Creditor. An order providing this manner of payment must include the consent of the Chapter 13 Trustee.

⁴ The Trustee will only be required to pay attorney's fees out of the mortgage arrearage allocation at the time the Trustee ceases to make such payments to the Mortgage Creditor, which would normally be at the time of entry of the final order for loss mitigation/mortgage modification or at the time of relief from the automatic stay. Debtor(s) must provide notice that this relief is sought in Motion for Loss Mitigation/Mortgage Modification or by separate motion served upon the affected Mortgage Creditor. An order providing this manner of payment must include the consent of the Chapter 13 Trustee.

IT IS FURTHER ORDERED that should the Debtor(s) at any time fail to meet a payment obligation as described above, regardless of whether it is a direct payment to the attorney or a plan payment to the Trustee, Debtor(s)' counsel shall report that failure to the Court by correspondence and is under no obligation to continue to assist the Debtor(s) with the mortgage modification or loss mitigation process.

AND IT IS SO ORDERED.

EXHIBIT N

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA**

IN RE:

[Debtor Name],

Debtor(s).

C/A No. _____

Chapter ____

**ORDER GRANTING APPROVAL OF
TRIAL PERIOD PLAN
(PORTAL)**

This matter comes before the Court upon the Debtor(s)' Request to Approve Trial Period Plan with _____ ("the Mortgage Creditor"), and this Court having considered the matter
ORDERS AS FOLLOWS:

- a. The request is granted.
- b. The Trial Period Plan with the Mortgage Creditor is hereby approved and the parties are ordered to comply with the terms of the Trial Period Plan:
☐ The Trial Period Plan is described in the attachments hereto (**with private information redacted**) or
☐ The terms are as follows:
 - i. The Trial Period Plan Payments are in the amount of \$_____, representing principal, interest, taxes and insurance beginning _____, 20_____.
 - ii. The payments will be sent to: [insert address]

Debtor(s)' counsel shall timely submit for Court approval any final loss mitigation or mortgage modification agreement after the Trial Period Plan Payments are made.

AND IT IS SO ORDERED.

APPROVAL REQUESTED BY:

Attorney Name & Fed. ID #

Address

Email



**South
Carolina
Bar**

**Consumer Law Topics from a
One-Man Bandit**

David A. Maxfield
Columbia, SC

CONSUMER LAW TOPICS FROM A ONE-MAN BAND(IT)

Dave Maxfield

dave@consumerlawsc.com

- I. **Introduction and Editorial Rant:** If memory serves, this is the 10th or so time that I've been fortunate enough to speak at the South Carolina Bar Convention. If you're reading this, you're here too. And you know it's a great time to see friends from "both sides of the Plaintiff / Defendant aisle" as it were. Although I have represented consumers for over 20 years many of my closest friends are the guys and gals who represent the banks, insurance companies, and credit reporting agencies whom I often sue. We all have our part to play and we all understand the rules of the game. Likewise, I have friends on all sides of the political spectrum, whose opinions I respect and value. That's the American way.

Equally American is the idea of accountability. There's a set of rules which, if you violate and hurt someone, you're accountable. In an adversary system, accountability comes from impartial judgment and transparency. The prospect of being judged by someone (or ideally a group of people) over whom neither you (nor your adversary) has undue influence, in a public forum. Whether you're talking about civil or criminal proceedings it's this prospect that, when basic morality fails, keeps people (and corporations) accountable.

While over the last 20 years I've seen (and handled) some weak or marginal cases, I've also seen in the last few years the incredible damage done to clients and communities by "respected" banks and other entities that preyed upon our most financially vulnerable people, and walked away without a scratch. We've also seen civil justice split into two systems: a public system in which (in virtually any consumer transaction at least) corporations can drag debtors into the courts, and a private arbitration system to hide behind. Why some courts, including the highest, have bought into the idea that the "right" to contract "freely" trumps every other right (including express statutory consumer protections) I can't understand. Maybe I'll be more thankful for arbitration if the Supreme Court's decision in Spokeo (below) becomes co-opted, extended, or creatively interpreted to deprive consumers of their basic right to sue for violations of federal statutes. Even and especially ones that expressly provide for statutory penalties for "any violation."

So. There's my rant. Obviously, it's in my self-interest for consumers to continue to have access to a public justice system. But it's in yours too. Because no matter what side of the aisle you are on, you have a credit report. You have a bank account. You own a car, and you hopefully own a home (complete with mortgage). You're a consumer. And the only thing standing between you and financial ruin, are those pesky "rules and regulations" that some politicians would like to be rid of.

II. **Spokeo Case.** In 2016 the Supreme Court heard Spokeo v. Robins. Robins sued people search website Spokeo under the FCRA for publishing false (although not defamatory) information about him concerning his education. In order to invoke the jurisdiction of federal courts under Article III, a plaintiff must have "standing" to sue. Spokeo argued on appeal that the case should be dismissed because the Plaintiff did not prove that the publication of inaccurate personal information in violation of the Fair Credit Reporting Act was a concrete "injury" under Article III. The Supreme Court agreed in part, remanding the case for determination as to whether the Plaintiff had adequately alleged a "concrete and particularized" injury sufficient to satisfy standing requirements for Article III.

1. SIGNIFICANCE: While Spokeo did not change existing law, by throwing into the mix the paradoxically ambiguous idea of "concreteness" the Court gave defendants the ability to argue that Plaintiff's alleged injuries are not sufficiently concrete and thus, Plaintiff has no standing to bring claims before the federal court – even when a federal statute has been admittedly violated.
2. Take Home Lesson: On any of the claims below, avoid bringing Technical Violation cases where there is no arguable injury. And where there are injuries PLEAD THEM SPECIFICALLY.

Against this backdrop, let's revisit some of the federal statutes potentially affected by Spokeo.

III. Federal Claims:

1. Fair Debt Collection Practices Act (FDCPA) 15 U.S.C. § 1692

- a) News: FDCPA cases are on the rise. <http://www.acainternational.org/news-uptick-in-year-to-date-fdcpa-consumer-litigation-cases-continues-36604.aspx>. See document(s): news-uptick-in-year-to-date-fdcpa-consumer-litigation-cases-continues-36604.aspx
- b) The FDCPA requires that a "mini Miranda" be included on communications from debt collectors, provides a mechanism for validating a debt, and prohibits abusive debt collection practices. I categorize FDCPA cases as (1) the "technical" things that happen (or are supposed to happen) initially of a debt collection, and (2) Everything Else.
 - A. Technical / Beginning Things. These are the claims / violations that result potentially from defective initial debt collection notices, faulty mini-Miranda's, bad validations, and requests to cease contact.
 - (1) Notable recent 4th Cir. case: *Clark v. Absolute Collection*.
<http://www.insidearm.com/daily/debt-collection-news/debt-collection/fourth-circuit-says-fdcpa-allows-verbal-disputes-in-letter->

[class-action/](#). In *Clark*, the 4th Cir. Appeared to hold that consumer disputes of debts, under certain circumstances, could be verbal.

(2) Everything Else. As my friend Minnesota Attorney Peter Barry is fond of saying, FDCPA Violations come down to conduct that is:

- (a) Undignified
- (b) Untrue
- (c) Unfair, or
- (d) Disrespectful

c) While the FDCPA encompasses additional violations related to notice (1692g) and validation of debts, the most tangible and damaging violations relate to the above four categories. Where the debtor is protected by the automatic stay (or discharge injunction) and likely represented by counsel, almost any contact made by the collector to the debtor is actionable, and almost any representation made by the collector which indicates discharged debt is owed is actionable. The FDCPA also specifically prohibits collection practices that violate other state or federal laws. *Picht v. Jon R. Hawks, Ltd.*, 236 F.3d 446, 448 (8th Cir. 2001); *Gaetano v. Payco*, 774 F. Supp. 1404, 1414 15 (D. Conn. 1990) (although see claim preclusion issues, below).

d) Preliminary Considerations:

A. Is the defendant a debt collector? 15 U.S.C. § 1692a(6) defines the term “debt collector” as any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.”

(1) Lawyers are debt collectors. See *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373, 378 (4th Cir. 2006).

(2) Loan servicers that acquired the loans before they were in default are not debt collectors under the FDCPA. 15 U.S.C. § 1692(a)(6)(F); see *Roth v. CitiMortgage Inc.*, 756 F.3d 178 (2d Cir. 2014); *Glazer v. Chase Home Finance LLC*, 704 F.3d 453 (6th Cir. 2013). If acquired in default or after, however, the opposite is true.

(3) Creditors collecting their own debts are not debt collectors and not subject to the FDCPA. 15 U.S.C. § 1692a(6). See *Scott v. Wells Fargo Home Mortg.*, 326 F. Supp. 2d 709, 718 (E.D.Va.2003); accord *Brown v. Wachovia Bank*, NO. 8:10-CV-1816-HMH-JDA 2011 WL 5024297,

at *3 (D.S.C. Sep 30, 2011) (explaining that creditors are not “debt collectors” if they lend money and are collecting their own debts).

- B. Is the debt a commercial debt not subject to the FDCPA? The FDCPA only covers consumer debts, not commercial debts. “Consumer debt” is defined as “any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.” 15 U.S.C. § 1692a(5). Consumer debts are personal, family and household debts such as credit cards, personal loans and medical bills. They also include real estate foreclosures, homeowner's association debts, and promissory notes to individuals. The question to ask is whether the debt is a consumer debt or a business debt at the time of the transaction.
- C. Can the defendant assert the bona fide error or good faith defense? 15 U.S.C. § 1692k(c) provides that a debt collector may not be held liable under the FDCPA if the debt collector shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.
 - (1) However, in *Jerman v. Carlisle*, 130 S. Ct. 1605 (2010), the U.S. Supreme Court held that the “bona fide error” defense does not apply to a violation resulting from a debt collector's mistaken interpretation of the legal requirements of the FDCPA.
 - (2) The defense applies primarily to clerical errors, and is not valid against alleged harassment or abuse.
- e) Damages: The FDCPA allows for recovery of actual damages (including emotional distress), statutory damages of up to \$1,000.00 (inclusive of all violations) attorney's fees, and injunctive relief. 15 U.S.C. Section 1692k(a).
 - A. Important: **Actual Damages includes Emotional Distress** which, frequently is the biggest (and sometimes only) non-statutory damage . See, <http://www.calejl.com/forum/viewtopic.php?f=116&t=993>. Law Firm Collector hit with 250k emotional distress verdict. *McCollough v. Johnson, Rodenburg & Lauinger, LLC*, ___ F.3d ___, 2011 WL 746892 (9th Cir., Montana, Mar. 4, 2011). Jury charge from that case (aff'd on appeal by panel including Sandra Day O'Connor): "Actual damages include damages for personal humiliation, embarrassment, mental anguish and emotional distress. There is no fixed standard or measure in the case of intangible items such as humiliation, embarrassment, mental anguish or emotional

distress. Mental and emotional suffering and distress pass under various names such as mental anguish, nervous shock and the like. It includes all highly unpleasant mental reactions such as fright or grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry and nausea. The law does not set a definite standard by which to calculate compensation for mental and emotional suffering and distress. Neither is there any requirement that any witness express an opinion about the amount of compensation that is appropriate for the kind of law."

- B. See also, *Goodin v. Bank of America* where, in opening paragraph of his opinion, trial judge asks: "*What do you do when your bank repeatedly tries to collect a debt that is not due, you repeatedly try to tell them that they are making a mistake but they just won't listen, and then they file a foreclosure action on your home? Ronald and Deborah Goodin, sued, alleging that Bank of America violated the federal Fair Debt Collection Practices Act. ("FDCPA") and the related Florida Consumer Collection Practices Act ("FCCPA").* *Goodin v. Bank of America*, N.A. CASE NO. 3:13-CV-102-J-32JRK.
 - C. And last but not least, \$84 million dollar verdict against Portfolio Recovery by Kansas City woman... <http://kcur.org/post/jury-awards-kc-woman-83-million-debt-collection-case#stream/0>
- f) A word about "Crawford Claims."
- A. *Crawford v. LVNV* (In Re Crawford) 758 F.2d 1254 (11th Cir. 2014). In one of the most-controversial debt collections and bankruptcy decisions of the past few years, the 11th Circuit ruled that filing a proof of claim by a debt collector for a time-barred debt could constitute an unfair, unconscionable, deceptive and misleading means of debt collection under the FDCPA. 15 U.S.C. § 1692 et seq.
 - (1) Facts: Debtor filed Chapter 13 bankruptcy in 2008; included in filing was a debt owed to Furniture Company from 2001, on which statute of limitations for enforcement expired in 2004. LVNV funding acquired the debt, and filed a proof of claim in the bankruptcy. Crawford filed adversary proceeding alleging that filing constituted violation of FDCPA.
 - (2) 11th Circuit discussed the "deluge" that had "swept through the U.S. bankruptcy courts," of consumer debt buyers filing proofs of claim on debts deemed unenforceable under state statutes of limitation.
 - (3) U.S. Supreme Court denied cert on April 20, 2015. However, there remains much confusion about what conduct may constitute FDCPA

violation (and whether the "mere filing" of Proof of Claim without other conduct may trigger liability. The 4th Circuit's Covert opinion dismissed such a suit, but on Res Judicata grounds only (see below)

- (a) Note: there is also a split in circuits about whether the Bankruptcy Code "precludes" the FDCPA generally, such that debtor cannot seek relief under both federal statutes when they intersect

B. Utility of Crawford claims in 4th Cir. *Covert v. LVNV Funding, LLC*, 2015 U.S. App. LEXIS 3278, *5-16 (4th Cir. Mar. 3, 2015).

- (1) Facts: Debtors brought "Crawford" claim in District Court against LVNV for filing proofs of claim on time-barred debt as violative of FDCPA and two Maryland collection statutes.
- (2) District Court dismissed case on grounds that "mere filing" of proof of claim is not collection activity for purposes of statutes. Debtors appealed.
- (3) Fourth Circuit affirmed dismissal BUT not on the grounds that the "mere filing" could not violate the statutes. Rather, court held that confirmed Chapter 13 plan operated as res judicata, precluding claims which could have been brought in the bankruptcy proceeding.
- (4) Take Home Lesson: "Mere filing" question would appear to be open in the Fourth Circuit but MUCH MORE IMPORTANTLY: actionable or allegedly actionable conduct which relates to the bankruptcy proceeding must be raised within that proceeding.

C. Bankruptcy District of South Carolina: *In Re Mazyck*, 521 B.R. 726 (D.S.C. 2014)

- (1) Facts: Debtors filed Chapter 13. Cavalry, collecting debts formerly due to Navy Federal, filed 5 proofs of claim on debts allegedly owed. None were included in Debtors' schedules.
- (2) Debtors objected to claims on grounds they were barred by S.C.'s 3 year statute of limitations. Bankruptcy Court found that:
 - (a) The statute of limitations, while an "affirmative defense" may serve as grounds to disallow a creditor's claim.

(b) Debtors' affidavit that payment had not been made in more than three years was sufficient basis to support objection, in light of Cavalry's lack of documentation in support of its claim.

(c) BUT, the Court found that filing a proof of claim "in accordance with Rule 3001 and Section 501" cannot serve as basis for asserting violation of the automatic stay.

(3) Take Home Lessons: "Mere filing" in the DSC may not constitute stay violation IF done according to rules. Possibly open question whether same conduct can constitute FDCPA violation BUT, better (and safer) not to bring such claims without other conduct.

2. FCRA (credit r(a) Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681.

- a) The FCRA regulates the collection, dissemination, and use of consumer credit information. It governs almost all issues related to credit reporting, including accuracy, completeness, reinvestigation obligations, and permissible purposes for obtaining reports. It is generally the "Only Game in Town" for Credit Reporting Claims preempting libel, slander, and other common law remedies.
- b) Basis for claims/determining potential liability
 - A. The defendants: Creditors who make reporting to credit reporting agencies (Furnishers), or credit reporting agencies (CRA).
 - B. CRA's are subject to these provisions, among others: 15 U.S.C. § 1681e(b): failure to maintain reasonable procedure to ensure maximum accuracy of credit reporting; and § 1681i: failure to correct reporting after a dispute.
 - C. Furnishers. Claims against creditors and debt collectors - particularly for violation of 1681b (permissible purpose, below).
- c) The 2 types of FCRA claims often brought against creditors and collectors are brought under 1681s-2(b) and 1681b.
 - A. 1681s-2(b) Parties that furnish information to credit reporting agencies must reinvestigate the "sufficiency and accuracy" of reported information upon receipt of a notice of dispute from a credit reporting agency. *Johnson v. MBNA Am. Bank, NA*, 357 F.3d 426, 431 (4th Cir. 2004)

(1) Creditors must make a real "Reinvestigation" of a Consumer's Dispute. b) NOTE: No claim exists without a dispute TO THE CREDIT REPORTING AGENCY and RECEIPT of that dispute by the furnisher.

B. Creditors and Collectors often violate 1681b by pulling "Account Review" reports on discharged debt. Since the debt is no longer collectible, and (assuming no other transaction between the parties) the party pulling the report is not obtaining it for any permissible purpose. This can continue, repeatedly, for years because of the design of the creditor's automated systems, and is acute in Chapter 7 cases involving surrendered real estate.

(1) Note also: Collectors often "park" debts on consumer files to collect them. See, *In Re Russell*, 378 B.R. 735 (Bankr. EDNY 2007). 2) 1681b. Under 15 U.S.C. § 1681b(f), [a] person shall not use or obtain a consumer report for any purpose unless . . . (1) the consumer report is obtained for a purpose for which the consumer report is authorized to be furnished under this section; and (2) the purpose is certified in accordance with section 1681e of this title by a prospective user of the report through a general or specific certification."

d) Defenses The FCRA is not a strict liability statute. A debtor seeking to recover under the FCRA must plead and prove either a negligent or willful violation.

A. Negligent Violation: duty, breach, damages causation. 15 U.S.C. § 1681o

B. Willful violation: knowledge that the information reported is false, and an intentional act to report it. 15 U.S.C. §1681n.

C. Regarding the types of claims brought against collectors and furnishers, the consumer generally must show he disputed the debt with the credit reporting agencies – and not just the collector / furnisher. See *Downs v. Clayton Homes, Inc.*, 88 Fed. Appx. 851 (6th Cir. 2004) (Debtors had no claim against creditors under FCRA for their alleged false reporting to credit reporting agency that debtors failed to make required mortgage payments while in bankruptcy, absent debtors' assertion they filed dispute with credit reporting agency). See *Drew v. Equifax Information Services, LLC*, 690 F.3d 1100 (9th Cir. 2012) (Consumer's direct complaint to furnisher of credit information triggered no duty to investigate, rectify past misreporting by informing CRAs of problem if investigation found problem with previously reported information, or to prevent future misreporting by modifying, deleting, or blocking inaccurate item since it had not been accompanied by

notification from credit reporting agency (CRA) that includes "all relevant information" regarding dispute. 15 U.S.C.A. § 1681s-2(b).) See *Peasley v. Verizon Wireless (VAW) LLC*, NO. 04-CV_533, 2005 WL 831102 (S.D. Cal. April 4, 2005); (For the duty imposed by the section FCRA requiring a furnisher of credit information to investigate disputed information to be triggered, the furnisher of information must have received notice of the dispute from a consumer reporting agency, not from the consumer).

e) Damages.

- A. Actual damages may include economic damages, and damages for humiliation and mental distress. *Sloane v. Equifax Info. Servs.*, 510 F.3d 495, 500 (4th Cir. 2007).
- B. Punitive Damages. The FCRA expressly provides for punitive damages against "any person who willfully fails to comply with any [of its] requirements." The Supreme Court has defined "willfulness" under the FCRA as encompassing both knowing and reckless violations of the statute. *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 59-60, 127 S. Ct. 2201, 167 L. Ed. 2d 1045 (2007). Addressing "recklessness" within the context of the FCRA, the Supreme Court adopted that term's common legal definition: conduct that violates "an objective standard" by entailing "an unjustifiably high risk of harm that is either known or so obvious that it should be known." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 68, 127 S. Ct. 2201, 167 L. Ed. 2d 1045 (2007) (quoting *Farmer v. Brennan*, 511 U.S. 825, 836, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994)).
- C. Statutory Damages - \$100 - \$1,000.00
- D. Attorney's Fees "for any successful action."

3. Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227, et seq.

a) Basis for claims/determining liability

- A. The TCPA restricts how businesses communicate with consumers through residential telephones, cell phones, text messages, and faxes. It requires consent from a consumer before a business may contact the consumer using automated dialing systems, prerecorded messages, or artificial voices, and the consent needed depends on the mode of contact and content of the message.
- B. Violations can lead to statutory penalties of \$500 per call and \$1,500 per call if the court finds the defendant acted willfully or knowingly. 47 U.S.C. §

227(b)(3). Apart from the willfulness requirement, however, the TCPA is a strict liability statute.

b) Considerations and Defenses

A. Was the proper consent required for the method of contact obtained?

- (1) Telemarketing calls to residential lines using prerecorded voices: prior express written consent.
- (2) Telemarketing calls or texts to cell phones: prior express written consent.
- (3) Non-telemarketing calls or texts to cell phones: prior express consent.
- (4) Revocation: Consent can be given and can be revoked at any time, and may be oral. The 2015 FCC ruling held that consent could be revoked by “any reasonable means.” Defendants must keep adequate business records to demonstrate consent or revocation of consent.

B. Was an auto dialer used?

- (1) Calls made by a human without an auto dialer are not subject to the TCPA. But note – after FCC determination in July of 2015, nearly everything is an autodialer.....
- (2) Instead, the TCPA only restricts calls and text messages to cell phones when the calls are made using an “automatic telephone dialing system” or “autodialer.” Whether the platform used to make the calls or texts is an autodialer is central to a Debtor’s claim under the TCPA. In 2015, the FCC adopted a very broad definition, ruling that dialing equipment that simply can store or produce and dial random or sequential numbers meets the TCPA’s definition of “autodialer.”

c) Was the person called the “called party?”

- A. The TCPA requires that a business have the consent of the “Called Party,” and in recent years, there has been much debate on whether that means the subscriber of the cell phone or the intended recipient of the call.

- B. In a 2015 ruling, the FCC clarified that consent may come not only from the subscriber, but also from the “non-subscriber customary user of a telephone number included in a family or business calling plan.” So, consent can come from someone other than the Debtor, if the cell phone is shared.
- C. Conversely, callers may be liable for “reassigned” numbers wherein calls are received by a party who did not consent, even though the prior owner of the number gave consent.
- d) Damages: There is no good faith error defense or safe harbor under the TCPA, but a statutory penalty per call from \$500 to \$1,500.00, dependent on determination of willfulness for the statute.

IV. State Claims.

1. South Carolina Code 37-5-108. Part of the South Carolina Consumer Protection Code, prohibits “unconscionable conduct” in the collection of a debt. Many of the conduct prohibitions as contained in the statute are similar to the FDCPA. The main differences are:

- a) There are no “notice”, mini-Miranda, or validation provisions;
- b) An action may be maintained against an original creditor collecting its own debt, not merely a debt collector.
- c) At least 30 days prior to suing, a complaint must be made to the South Carolina Department of Consumer Affairs.
- d) The statute of limitations is two years, rather than one.

2. Common Law Claims

- a) Intentional Infliction of Emotional Distress
- b) Negligent Misrepresentation
- c) Negligence
- d) Malicious Prosecution
- e) Abuse of Process
- f) Conversion

V. Statutes of Limitations

- a) FCRA: 2 years from discovery, or 6 years after the date on which the violation that is the basis for liability occurs. 15 U.S.C. § 1681p.
- b) FDCPA: 1 year from the date the violation occurs; 15 U.S.C. § 1692k(d)
- c) TCPA: 4 years after the cause of action accrues; 28 U.S.C. § 1658(a)
- d) 37-5-108: 2 years from date of violation.
- e) Common Law Claims: 3 years from date of violation; discovery rule applies.

Dave Maxfield
Dave Maxfield, Attorney, LLC
Columbia, SC 29206
dave@consumerlawsc.com
803-509-6800



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**Know the Weather Before You
Start the Oregon Trail**

Marilyn E.L. Gartley
Columbia, SC

Michael V. Pratt
Charleston, SC



**South
Carolina
Bar**

**Ethics & Technology
(Bit by Bit)**

Jack Pringle
Columbia, SC