

## RESOLUTION 07-01-2010

### DIGEST

#### Bankruptcy: Loss Mitigation Form

Provides for each of the California bankruptcy courts to adopt a loss mitigation form, permitting a debtor in bankruptcy to modify a home mortgage loan with the lender.

### RESOLUTIONS COMMITTEE RECOMMENDATION

#### DISAPPROVE

#### History

No similar resolutions found.

#### Reasons

This resolution provides for each of the California bankruptcy courts to adopt a loss mitigation form, permitting a debtor in bankruptcy to modify a home mortgage loan with the lender. This resolution should be disapproved because it lacks the necessary structure for a court-supervised program for facilitating consensual resolution of real property at risk of loss to foreclosure without further disadvantage to the debtor.

Many homeowners file for bankruptcy because of the heavy financial burden of a home mortgage payment. After filing, many borrowers desire to work with their mortgage lender to modify their mortgage loans. Toward this end, the resolution proposes a loss mitigation form, but does not include any associated procedural structure to provide guidance for the parties in loss mitigation in bankruptcy.

By way of comparison, a loss mitigation program was implemented in January 2009 in the Bankruptcy Court for the Southern District of New York. (<http://www.nysb.uscourts.gov/>). Both the Eastern District of New York and the District of Rhode Island have subsequently enacted loss mitigation programs, patterned on the S.D.N.Y. bankruptcy program. In each of those bankruptcy courts, loss mitigation program procedures and instructions have been enacted to provide structure for the debtor and creditors. In the absence of such procedures, the California debtor is left without any guidance, and given the complexity of modern mortgage transactions, the unrepresented debtor is vulnerable.

Some New York debtors' attorneys fear the program will not be successful, as lenders' participation in loss mitigation is purely voluntary. In the first year in which the loss mitigation program in New York was in effect, of 808 bankrupt homeowners who applied for the program, just 452 were granted access and fewer than 10 have obtained permanent mortgage modifications, according to statistics from the clerk's office of the Bankruptcy Court for the Southern District of New York.

[http://www.nypost.com/p/news/business/left\\_at\\_the\\_alter\\_7dq194jGLw9iWuciR7Qg8O#ixzz0qxvw74b7](http://www.nypost.com/p/news/business/left_at_the_alter_7dq194jGLw9iWuciR7Qg8O#ixzz0qxvw74b7)

### TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that the Bankruptcy Courts in the state of California implement a new form entitled Request for Loss

Mitigation to be used in all Chapter 7 and 13 bankruptcy cases. The proposed form is annexed to this resolution as Appendix A.

**PROPONENT:** Orange County Bar Association

## **STATEMENT OF REASONS**

Existing Law: No form currently exists in California, and the problem addressed by the proposed Form is endemic.

This Resolution: Creates a new form ("Form") that provides a single platform for (1) a debtor's explicit request to engage in Loss Mitigation;<sup>1</sup> (2) a vehicle for the debtor to demonstrate his or her attorney's consent to the Loss Mitigation Request; and (3) if the debtor is unable to obtain counsel's consent to the Loss Mitigation Request, the Form provides that the Court may enter an order both allowing the debtor to communicate with the lender in the absence of attorney consent, and providing that the lender's communication with the debtor/borrower will not be construed as a violation of the automatic stay imposed by 11 U.S.C. § 362. Simply, the Form aims to facilitate the loan modification process by opening the lines of communication between debtors and lenders.

The Problem: Many individuals that file for bankruptcy protection do so because of the heavy financial burden of a home mortgage payment. After filing for bankruptcy, many borrowers seek to work with their mortgage loan lender to modify their mortgage loan. On many occasions the lender is willing to work with the debtor/borrower to modify the loan. Before a debtor may speak with his or her lender to discuss the potential modification of the loan at issue, however, two events must occur. First, to communicate with a lender, the debtor must obtain the explicit permission of his attorney, if any, to do so. Frequently, however, debtors report that they are unable to obtain the required attorney consent as many attorneys scope of representation of the debtor is sharply limited and counsel may be simply unwilling to further communicate with the debtor. Therefore, even if a debtor/borrower and lender are both willing to negotiate and pursue modification the debtor's loan, this process stalls by the lack of attorney consent. Second, many lenders require an order from the Bankruptcy Court in which the debtor's case is pending before they will communicate with a debtor/borrower.

## **IMPACT STATEMENT**

The proposed new Form does not alter or amended any existing law.

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**RESPONSIBLE FLOOR DELEGATE:** John T. Madden

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<sup>1</sup> The term "Loss Mitigation," as used here, and within in the resolution, is intended to describe the full range of solutions that may avert either the loss of a debtor's property to foreclosure, increased costs to the lender, or both. Loss mitigation commonly consists of: loan modification, loan refinance, forbearance, short sale, or surrender of the property in full satisfaction of the debt.

APPENDIX A

Form - \_\_\_\_\_ Title (3/10)

|  |                       |
|--|-----------------------|
| <b>UNITED STATES BANKRUPTCY COURT<br/>CENTRAL DISTRICT OF CALIFORNIA</b> | FOR COURT USE ONLY    |
| In re:   |                       |
| Debtor(s).   |                       |
|  | CHAPTER:<br>CASE NO.: |
| <b>REQUEST FOR LOSS MITIGATION</b>                                       |                       |

**PART A: DEBTOR'S REQUEST FOR LOSS MITIGATION**

I am the debtor in this case. I request that the Bankruptcy Court authorize me to communicate directly with the lender(s) below to explore the full range of solutions that may prevent either the loss of my property to foreclosure, increased costs to the lender, or both ("Loss Mitigation"). Potential solutions may include loan modification, loan refinance, forbearance, short sale, or surrender of the property in full satisfaction of the debt. I also ask the Bankruptcy Court authorize the Lender(s) below to communicate directly with me on the above-mentioned issues.

Property:

Loan Number(s):

Lender(s):

There is a co-borrower(s) on this loan(s). (If there is a co-borrower, sign below and proceed to Part B.)

There is a joint debtor in this bankruptcy case. (If there is a joint debtor, sign below and proceed to Part C.)

I understand that I am expected to participate in the discussions with the above-referenced Lender(s) in good faith. I understand that discussion is voluntary for all parties, and that I am not required to enter into any agreement or settlement with any other party as part of the discussions. I also understand that no other party is required to enter into any agreement or settlement with me. I understand that I am not required to request dismissal of my bankruptcy case as part of any resolution or settlement that is offered or agreed to.

Date: \_\_\_\_\_

Signed: \_\_\_\_\_  
(Debtor)

**PART B: CO-BORROWER AUTHORIZATION**

By my signature below I hereby give my written consent for the above-captioned debtor to participate in Loss Mitigation discussions with respect to the Property, Loan(s) and Lender(s) listed in Part A.

Date: \_\_\_\_\_

Signature: \_\_\_\_\_

Printed Name: \_\_\_\_\_

**(Use additional pages if consent of multiple co-borrowers is required.)**

|            |              |
|------------|--------------|
| In re:     | CHAPTER      |
| Debtor(s). | CASE NUMBER: |

**PART C: JOINT DEBTOR AUTHORIZATION**

By my signature below I hereby give my written consent for the above-captioned debtor to participate in Loss Mitigation discussions with respect to the Property, Loan(s) and Lender(s) listed in Part A.

Date: \_\_\_\_\_

Signature: \_\_\_\_\_

Printed Name: \_\_\_\_\_

**PART D: CONSENT OF DEBTOR'S ATTORNEY (IF ANY)**

- I am not represented by an attorney in this bankruptcy case.
- I am represented by an attorney in this bankruptcy case but have been unable to obtain my attorney's consent to communicate with the Lender(s) listed in Part A.
- I am represented by an attorney in this bankruptcy case, whose consent appears below:

I am the attorney for the debtor in this case. By my signature below I give my full and voluntary consent for the Debtor to communicate with the Lender(s) listed on Part A of this Form in furtherance the Debtor's Request for Loss Mitigation. My signature below does not confer my sanction of, or in any way obligate me to assist in, any or all agreements the Debtor may or may not reach with the respect to the Lender(s) listed in Part A.

Date: \_\_\_\_\_

Signature: \_\_\_\_\_  
(Debtor's Attorney)

Printed Name: \_\_\_\_\_

**INSTRUCTIONS FOR DEBTOR'S ATTORNEY**

The Debtor in this case has requested Loss Mitigation ("Request"). Pursuant to Local Bankruptcy Rule 9013-1(o)(1), if you object to the Debtor's Request you must file and serve a written objection and request for hearing ("Objection") within 14 days of the date of service of this Form. Notice of your objection must also be served on the Debtor, and if applicable, any joint debtor by First Class mail on the same date your Objection is filed with the Bankruptcy Court. If you fail to file a written Objection within 14 days of the date of service of this Form, the Court may treat such failure as a waiver of your right to oppose the Request and may grant the requested relief.

**INSTRUCTIONS FOR SERVICE OF FORM**

Instructions to Debtors without an Attorney: You must complete this Form and file it with the Bankruptcy Court.

Instructions to Debtors with Attorneys: You must file this Form with the Bankruptcy Court, whether or not you obtained the signature of your attorney in Part D. You must serve all pages of this Form on your attorney by first class mail on the same day the Form is filed with the Bankruptcy Court. You must read, sign, and date the paragraph below.

|            |              |
|------------|--------------|
| In re:     | CHAPTER      |
| Debtor(s). | CASE NUMBER: |

**PROOF OF SERVICE**

By my signature below, I attest that on \_\_\_\_ / \_\_\_\_ / \_\_\_\_ (mm/dd/year) I served all pages of this Form by first class mail on my attorney at the following address:

Name: \_\_\_\_\_

Address: \_\_\_\_\_

City, State, and Zip Code: \_\_\_\_\_

I understand that if I do not serve my attorney, my Request for Loss Mitigation may be denied. I further understand that my attorney may object to my request to my Request for Loss Mitigation. If my attorney objects, the Court may hold a hearing to resolve my attorney's objection, and I understand that I may have to personally attend this hearing.

Date: \_\_\_\_\_

Signed: \_\_\_\_\_

**FOR COURT USE ONLY. DO NOT WRITE BELOW THIS LINE.**

**ORDER ON DEBTOR'S REQUEST FOR LOSS MITIGATION DISCUSSIONS**

1.  The Debtor's Request to communicate directly with the Lender(s) listed in Part A of this Form is GRANTED. This Order lifts the automatic stay imposed by 11 U.S.C. § 362 for the sole and limited purpose of Loss Mitigation discussions and settlement between the Debtor and the Lender(s) listed in Part A of this Form.
2.  The Request is DENIED.
3.  Additional provisions (if any):
  - a.  See attached continuation page.
  - b.  Insert provisions here:

DATE: \_\_\_\_\_

UNITED STATES BANKRUPTCY JUDGE \_\_\_\_\_