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Hi Mr. Stern,

Thanks again for speaking with me last week – my story went up on our website today; see below.

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Chapter 13 bankruptcy implications of mortgage mess

By Correy E. Stephenson
Staff writer
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With the announcements that several national banks are halting home foreclosures and 50 state attorneys general and the District of Columbia have launched an investigation into falsified signatures and other paperwork improprieties, the mortgage industry can officially be declared a mess.

But what does that mean for bankruptcy practitioners trying to help clients navigate through the Chapter 13 process?

For some, it could mean a reprieve, said Marc Stern, a sole bankruptcy practitioner in Seattle, Wash.

“An awful lot of people file Chapter 13 just to try to save their house,” he said, and the halt of foreclosures could have a “fairly large impact” where consumers are able to stave off bankruptcy.

For others, it could mean greater uncertainty, as the moratorium will have different impacts in each state and for each client, said Henry Sommer, former President of the National Association of

Consumer Bankruptcy Attorneys and Head of Consumer Law Project at Community Legal Services in Philadelphia.

“Some banks have halted the litigation process, but others have stopped just the foreclosure sale itself while the process continues,” he said. “It’s unclear what the moratorium really means,” and lawyers should be careful to find out how it applies to each client’s case, he advised.

Verify if possible

On Oct. 8, Bank of America announced that it was halting foreclosures and the sale of foreclosed homes nationwide. JP Morgan Chase and Ally Financial – previously known as GMAC Mortgage – announced that they were halting foreclosures in 23 states, a decision that expanded to a review of documents in all 50 states. Other companies, like Wells Fargo & Co. and PNC, said they would be reviewing their documents, although not halting foreclosures yet.

Facing an unprecedented number of homes in foreclosure, mortgage companies and note holders often signed documents without reviewing them in order to expedite the process – what is now being referring to as “robo-signing.”

In addition to the nationwide investigation, several states have already taken action. In New York, Attorney General Andrew Cuomo called on companies that used robo-signers to suspend all foreclosure actions in the state, while Ohio Attorney General Richard Cordray filed a lawsuit against Ally.

In the ever-changing, tumultuous climate of the mortgage industry, the most important thing bankruptcy practitioners can do: verify the amounts and documentation of a client’s mortgage as best they can.

“Certainly don’t take what the mortgage company says at face value, because most often it’s wrong,” Sommer warned.

Stern agreed.

“My experience has been that there will be lots of fees and other charges that the banks can’t substantiate,” Stern said, such as late fees or fees “in suspense” for no apparent reason.

“I have a case right now where a client missed one mortgage payment, and the bank has been assessing a late charge for each succeeding payment, even though they were made on time,” he said.

However, verifying amounts is easier said than done, he noted, as most clients don’t keep detailed records and often shred documents out of fear of identity theft. “It can be very difficult to prove that payments were actually made,” Stern said.

Bank statements showing the exact amount withdrawn at the same time each month might help, but unless an electronic transfer occurred, the date a payment was received could still be disputed by the bank.

“It can be a laborious process,” Sommer said, but attorneys can potentially decrease the amount the mortgage holder claims it is owed, increasing a debtor’s chance at success by disputing fees and other charges.

Lawyers should also try to verify and document the chain of title. Getting affidavits that transfers took place can be very complicated, Sommer said, and lawyers should always ask for the actual, underlying documentation and originals where possible, in addition to the actual note.

Stern said he also advises his clients not to move out of their home during the foreclosure process until the sheriff shows up and forces them out.

Banks are increasingly failing to finish the foreclosure process, he said, and then the house sits empty.

"A lot of the houses are so underwater [in value] that the banks aren't finishing the foreclosure process," Stern said.

In addition, moving will have an effect on the means test for a client in Chapter 13, he added.

What happens next?

The AG investigations and the fact that the mortgage companies have acknowledged problems with the system probably won't help individual bankruptcy filers in court, Stern said.

He said he typically has better luck with smaller, local banks than national ones.

"At the smaller bank, you can find someone to talk to who can make a decision," said Stern. "I can't count the number of cases where we are working with the loss mitigation department on a modification while the foreclosure department is churning ahead."

While the moratorium leaves practitioners and clients uncertain what happens next, it provides little help for debtors who already agreed to a Chapter 13 plan.

Courts have held that if the mortgage holder's claim was incorporated into the plan, the debtor is bound by the amount already agreed to, Sommer said.

"If there was fraud involved, there might possibly be grounds for taking another look, but it's a tough standard," he said.

Questions or comments can be directed to the writer at: correy.stephenson@lawyersusaonline.com