

Bankruptcy and Foreclosure Practice Under COVID-19 and the Coronavirus CARES Act - Important Updates on Bankruptcy and Foreclosure Matters

By **Craig D. Robins**

We are all grappling with how to comprehend the impact of COVID-19, which will likely transform the way we conduct our practices for the next few years. Consumer bankruptcy and foreclosure defense practitioners returning to work after being sidelined by the coronavirus pandemic will see an impact on all aspects of their practice.

With the virus raging on, large sectors of the workforce have been laid off and many businesses have been paralyzed. Facing the

highest unemployment rates since the Great Depression, a tremendous number of consumers and businesses will be unable to pay their debts. Mortgage payments will not be made. It is certain that we will see a dramatic uptick in the number of bankruptcy filings and foreclosures.

Considering that before the pandemic many Long Island households only had modest savings, not to mention thousands of dollars of credit card debt,



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the lack of income, combined with various expenses caused by COVID-19, will wipe out many families' savings, placing many in a situation in which bankruptcy is the only answer to get a fresh new start. Job loss will also thrust many into foreclosure.

CARES Act

On March 27, 2020, the CARES Act was signed into law. This is the \$2.2 trillion stimulus package, formally titled the Coronavirus

Aid, Relief and Economic Security Act. The act aims to provide emergency assistance for individuals, families and businesses affected by the 2020 coronavirus pandemic. Although its most publicized measures consist of financial relief for businesses and individuals, buried within its 880 pages are also some important changes to various provisions of the Bankruptcy Code.

Bankruptcy means test changes

Previously, with some limited exceptions,

(Continued on page 22)

Consumer Bankruptcy (Continued From Page 6)

all income a debtor received during the six-month period prior to filing had to be included in the income calculation for Chapter 7 eligibility purposes or Chapter 13 disposable income calculations. The CARES Act excludes any government coronavirus payments from being treated as income for the means test.

Existing Chapter 13 Cases

Many debtors in existing Chapter 13 cases will fall behind with their monthly plan payments and post-petition mortgage payments. Previously, when debtors fell behind because of some short-term financial setback or decrease in income, they were able to bring a motion to modify their plan post-confirmation to either increase the remaining payments to incorporate the missed payments, or if the situation permitted it, to decrease their remaining payments. However, under no circumstance was a debtor permitted to extend the plan past the maximum five-year period.

The CARES Act explicitly permits existing debtors to modify confirmed plans based on a material financial hardship related to the coronavirus pandemic and also permits them to extend payments for up to seven years after the initial payment was due. The additional two years will enable many existing Chapter 13 debtors to soften the blow of being out of work for a period of time. It is anticipated that the court and trustees will develop a process to make post-petition modifications as easy as possible for those who need them.

Chapter 11 cases for small business debtors

On Feb. 19, 2020, the Small Business Reorganization Act became effective. This created a brand new type of bankruptcy,

Subchapter V (or 5), which was enacted to reduce the cost and expense for small businesses who sought to reorganize. It was limited to those debtors whose debts did not exceed \$2.7 million. (This was the topic of last month's column.) Subchapter V debtors are able to take advantage of special streamlined reorganization procedures and simpler confirmation standards.

The big news is that the CARES Act greatly expands Subchapter V eligibility by increasing the debt limit to \$7.5 million for a period of one year. This should enable a much greater number of businesses and individuals to avoid the more costly and more involved standard Chapter 11 proceeding. We should therefore expect to see a flood of these new cases.

The new Subchapter V eliminates some of the more involved procedures required by traditional Chapter 11 filings, such as disclosure statements, and provides some of the expedited procedures utilized by consumers in Chapter 13 cases, which are centered around a payment plan.

Foreclosures

The CARES Act prohibits most foreclosure activity on federally backed mortgage loans for a 60-day period beginning March 18, 2020. Mortgage servicers may not initiate any judicial or nonjudicial foreclosure process, move for a foreclosure judgment, order a sale, or execute a foreclosure-related eviction or foreclosure sale.

In addition, the Act provides up to one year of forbearance for borrowers under federally backed mortgages who have experienced financial hardship related to the COVID-19 pandemic. During a period of forbearance, no fees, penalties, or interest shall accrue on the borrower's account beyond the amounts

scheduled or calculated as if the borrower made all contractual payments on time and in full under the terms of the mortgage contract.

These provisions only apply to federally backed mortgages which cover about two-thirds of all mortgages. Federally backed mortgages include those purchased or securitized by Fannie Mae or Freddie Mac; or insured by the Federal Housing Administration or the U.S. Department of Veterans Affairs.

It should be noted that during the week of March 16, 2020, which predated the signing of the CARES Act, the District Administrative Judge for each New York state county, including Nassau and Suffolk, issued an Administrative Order which indicated that until rescinded, no foreclosure auctions shall be held. A few days later, on March 20, 2020, Gov. Andrew Cuomo issued Executive Order 202.8 which mandated that there shall be no "foreclosure of any residential or commercial property for a period of ninety days."

In addition, on March 22, 2020, the New York Office of Court Administrator's Order No. 78 directed court clerks not to accept filings in non-essential cases "until further order." Since foreclosure cases are deemed non-essential cases, this means that lenders may not file any new foreclosure cases until the Court Administrator rescinds that order.

Accordingly, based on how devastating coronavirus is affecting New York right now, it is highly likely that there will not be any foreclosure activity of any kind for a good number of months.

Mortgage forbearance

The CARES Act permits borrowers with federally backed residential mortgage loans to request a forbearance from making payments for up to 180 days, with the ability to request an extension for an additional 180-day period. It is also anticipated that all major lenders will eventually offer various programs to enable their borrowers suffering from COVID-19 financial hardship to work out arrangements to satisfy mortgage arrears.

In addition, on March 24, 2020, the New York State Department of Financial Services issued an emergency law (New Part 119 to 3 NYCRR — Emergency Relief for New Yorkers Who Can Demonstrate Financial Hardship As a Result of Covid-19), effective to April 20, 2020 and any subsequent renewal period. This law establishes a "COVID-19 Relief Program." Regulated entities must make "widely available" to New York borrowers demonstrating financial hardship caused by COVID-19, a forbearance of 90 days. Federally guaranteed and GSE loans are exempted. The law requires that within 10 business days, regulated institutions must provide an application process for borrowers. Regulated institution means any New York regulated banking organization as defined under New York Banking Law and any New York regulated mortgage servicer entity subject to the authority of the department.

Student loans

The Act also provides relief to individuals with student loans by giving them a six-month payment holiday.

Staying up to date with bankruptcy court procedures

As the pandemic initially swarmed New York in mid-March, our courts and the Office

of the U.S. Trustee began posting COVID-19 guidelines, protocols, emergency procedures and administrative orders which, for a period of time, changed almost daily as the situation worsened. All Bankruptcy Court hearings, if they were not already automatically adjourned, were to be held telephonically as the courts closed to almost all visitors and attorneys. Hearings on motions, which are ordinarily required, were dispensed with unless a party insisted. Almost any motion could be adjourned upon request by any party.

The Bankruptcy Court for the Eastern District of New York website (nyeb.uscourts.gov) contains up-to-date details of emergency COVID-19 protocols. Each bankruptcy judge has his or her own COVID-19 emergency procedures. Counsel should check the website regularly to see if there are any new updates. The court has also been sending email updates to ECF registered attorneys.

Staying up to date with Supreme Court procedures

The New York Unified Court System website (nycourts.gov) also contains current updates regarding the state courts' COVID-19 policies and procedures.

Trustees and 341 Hearings

Michael Macco, one of the two Chapter 13 standing trustees in our district, and his significant other, Lynn, were both hospitalized with coronavirus. On behalf of the bankruptcy bar, we wish them a speedy recovery.

On March 17, 2020, the U.S. Trustee issued a notice that all 341 hearings scheduled through April 10, 2020, would be automatically adjourned to a future date not yet determined. Based on the grim current state of the pandemic in New York, it is highly likely that the U.S. Trustee will extend the adjournments to all hearings through at least the end of April.

It is anticipated that the U.S. Trustee will develop new protocols and procedures to enable trustees to conduct meetings of creditors with little or no actual face-to-face contact. In the past, trustees permitted some hospitalized, incarcerated or homebound debtors to appear telephonically. Perhaps such telephonic hearings or video conferencing will replace in-person appearances at the courthouse for section 341 hearings until the coronavirus situation is under control.

We are all in this together. The court's various emergency procedures are all designed to keep people safe and prevent the spread of the virus. At some point we will return to normalcy; however, this may take some time. Those who are bankruptcy and foreclosure defense attorneys have the ability to help many Long Islanders overcome some of the tragic consequences of coronavirus and get a fresh new financial start or prevent foreclosure.

Note: Craig D. Robins, a regular columnist, is a Long Island bankruptcy and foreclosure defense lawyer who has represented thousands of consumer and business clients during the past 33 years. He has offices in Melville, Coram, and Valley Stream. (516) 496-0800. He can be reached at CraigR@CraigRobinsLaw.com. Please visit his Bankruptcy Website: www.BankruptcyCanHelp.com and his Bankruptcy Blog: www.LongIslandBankruptcyBlog.com.

