

Pratt's Journal of Bankruptcy Law

LEXISNEXIS® A.S. PRATT®

OCTOBER 2024

EDITOR'S NOTE: COURTS DECIDE, AGENCIES RULE

Victoria Prussen Spears

NEW YORK BANKRUPTCY COURT REJECTS SETTLEMENT "LOCKUP" PROVISION

Debora Hoehne, Michael H. Goldstein and Kimberly Pageau

SOUTHERN DISTRICT OF TEXAS BANKRUPTCY COURT FINDS LME TRANSACTIONS VIOLATED CREDIT AGREEMENT, BUT LIMITS RECOVERY TO POTENTIAL CLAIM IN ROBERTSHAW LITIGATION

Douglas S. Mintz, Peter J. Amend and Robert D. Brown

U.S. SUPREME COURT BLOCKS PURDUE PHARMA PLAN IN BLOW TO THIRD-PARTY RELEASES IN BANKRUPTCY RESTRUCTURING

Ryan Hibbard and Alexandria A. Lundberg

AGENCIES ADOPT FINAL GUIDANCE FOR RESOLUTION PLANS OF DOMESTIC AND FOREIGN TRIENNIAL FULL FILERS

Derek M. Bush, Lisa M. Schweitzer, Lauren E. Semrad, Hugh C. Conroy, Jr., Brandon M. Hammer, Deborah North, Patrick Fuller, Richard C. Minott and Sean Kim Kwon

CONSUMER FINANCIAL PROTECTION BUREAU PROPOSES NEW RESTRICTIONS ON MORTGAGE SERVICERS BEFORE COMMENCING FORECLOSURES

Leonard A. Bernstein, Bob Jaworski, Kwamina Thomas Williford, Brian J. Goodrich and Rolland A. Hampton

CREDITOR PROTECTIONS IN LIABILITY MANAGEMENT TRANSACTIONS

Gareth Eagles, Will Stoner, James Greene and Mina Nazim

***IN RE WEINSTEIN AND MALLINCKRODT*: IMPLICATIONS FOR ROYALTY FINANCINGS, M&A EARN-OUTS, AND OTHER TRANSACTIONS INVOLVING FUTURE PAYMENT OBLIGATIONS**

Richard G. Gervase, Jr., Eric R. Blythe and William W. Kannel



LexisNexis

Pratt's Journal of Bankruptcy Law

VOLUME 20

NUMBER 7

October 2024

Editor's Note: Courts Decide, Agencies Rule Victoria Prussen Spears	279
New York Bankruptcy Court Rejects Settlement "Lockup" Provision Debora Hoehne, Michael H. Goldstein and Kimberly Pageau	282
Southern District of Texas Bankruptcy Court Finds LME Transactions Violated Credit Agreement, But Limits Recovery to Potential Claim in <i>Robertshaw</i> Litigation Douglas S. Mintz, Peter J. Amend and Robert D. Brown	289
U.S. Supreme Court Blocks Purdue Pharma Plan in Blow to Third-Party Releases in Bankruptcy Restructuring Ryan Hibbard and Alexandria A. Lundberg	294
Agencies Adopt Final Guidance for Resolution Plans of Domestic and Foreign Triennial Full Filers Derek M. Bush, Lisa M. Schweitzer, Lauren E. Semrad, Hugh C. Conroy, Jr., Brandon M. Hammer, Deborah North, Patrick Fuller, Richard C. Minott and Sean Kim Kwon	297
Consumer Financial Protection Bureau Proposes New Restrictions on Mortgage Servicers Before Commencing Foreclosures Leonard A. Bernstein, Bob Jaworski, Kwamina Thomas Williford, Brian J. Goodrich and Rolland A. Hampton	304
Creditor Protections in Liability Management Transactions Gareth Eagles, Will Stoner, James Greene and Mina Nazim	311
<i>In re Weinstein and Mallinckrodt</i>: Implications for Royalty Financings, M&A Earn-Outs, and Other Transactions Involving Future Payment Obligations Richard G. Gervase, Jr., Eric R. Blythe and William W. Kannel	315

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call or email:

Ryan D. Kearns, J.D., at 513.257.9021
Email: ryan.kearns@lexisnexis.com

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at (800) 833-9844
Outside the United States and Canada, please call (518) 487-3385
Fax Number (800) 828-8341
Customer Service Website <http://www.lexisnexis.com/custserv/>
For information on other Matthew Bender publications, please call

Your account manager or (800) 223-1940
Outside the United States and Canada, please call (937) 247-0293

Library of Congress Card Number: 80-68780

ISBN: 978-0-7698-7846-1 (print)

ISBN: 978-0-7698-7988-8 (eBook)

ISSN: 1931-6992

Cite this publication as:

[author name], [*article title*], [vol. no.] PRATT’S JOURNAL OF BANKRUPTCY LAW [page number] ([year])

Example: Patrick E. Mears, *The Winds of Change Intensify over Europe: Recent European Union Actions Firmly Embrace the “Rescue and Recovery” Culture for Business Recovery*, 10 PRATT’S JOURNAL OF BANKRUPTCY LAW 349 (2014)

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. Matthew Bender, the Matthew Bender Flame Design, and A.S. Pratt are registered trademarks of Matthew Bender Properties Inc. Copyright © 2024 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved.

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

MATTHEW  BENDER

Editor-in-Chief, Editor & Board of Editors

EDITOR-IN-CHIEF

STEVEN A. MEYEROWITZ

President, Meyerowitz Communications Inc.

EDITOR

VICTORIA PRUSSEN SPEARS

Senior Vice President, Meyerowitz Communications Inc.

BOARD OF EDITORS

SCOTT L. BAENA

Bilzin Sumberg Baena Price & Axelrod LLP

ANDREW P. BROZMAN

Clifford Chance US LLP

MICHAEL L. COOK

Schulte Roth & Zabel LLP

MARK G. DOUGLAS

Jones Day

MARK J. FRIEDMAN

DLA Piper

STUART I. GORDON

Rivkin Radler LLP

FRANCISCO JAVIER GARIBAY GÜÉMEZ

Mayer Brown México, S.C.

PATRICK E. MEARS

Barnes & Thornburg LLP

Pratt's Journal of Bankruptcy Law is published eight times a year by Matthew Bender & Company, Inc. Copyright © 2024 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact LexisNexis Matthew Bender, 9443 Springboro Pike, Miamisburg, OH 45342 or call Customer Support at 1-800-833-9844. Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, smeyerowitz@meyerowitzcommunications.com, 631.291.5541. Material for publication is welcomed—articles, decisions, or other items of interest to lawyers and law firms, in-house counsel, government lawyers, senior business executives, and anyone interested in privacy and cybersecurity related issues and legal developments. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to *Pratt's Journal of Bankruptcy Law*, LexisNexis Matthew Bender, 230 Park Ave. 7th Floor, New York NY 10169.

Consumer Financial Protection Bureau Proposes New Restrictions on Mortgage Servicers Before Commencing Foreclosures

*By Leonard A. Bernstein, Bob Jaworski, Kwamina Thomas Williford,
Brian J. Goodrich and Rolland A. Hampton**

In this article, the authors review a rule proposed by the Consumer Financial Protection Bureau that would require mortgage servicers to exhaust all possible loss mitigation avenues before being permitted to commence foreclosures.

The Consumer Financial Protection Bureau (CFPB) has announced¹ a proposed rule² that would require servicers to more intently assist borrowers throughout a “loss mitigation review cycle” before being permitted to commence foreclosures. In a significant departure from existing requirements, the proposed rule requires a servicer to exhaust all possible loss mitigation avenues. The rule would add foreclosure procedural safeguards that begin as soon as a borrower requests loss mitigation assistance. The rule would prohibit dual tracking, a process that permitted servicers to foreclose on borrower property while the borrower participated in the loss mitigation review process, along with limit the fees a servicer can charge while the servicer is reviewing options to help the borrower and require increased disclosure requirements. Servicers would also be required to provide borrowers with more tailored notices explaining their options to avoid foreclosure, as well as give them the opportunity to request mortgage assistance communications in languages other than English.

The CFPB requested comments and feedback from the industry on this proposed rule, including impact on the utilization of borrower credit data, how servicers furnish tradeline data and whether a special code should be used to flag mortgage undergoing loss mitigation review for borrowers undergoing review for assistance. Written comments on the proposed rule were due by September 9, 2024.

* The authors, attorneys with Holland & Knight LLP, may be contacted at leonard.bernstein@hkllaw.com, robert.jaworski@hkllaw.com, kwamina.williford@hkllaw.com, brian.goodrich@hkllaw.com and rolland.hampton@hkllaw.com, respectively.

¹ <https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-rules-to-help-homeowners-avoid-foreclosure/>.

² https://files.consumerfinance.gov/f/documents/cfpb_mortgage-servicing-nprm-proposed-rule_2024-07.pdf.

BACKGROUND

The proposed rule recognizes the success of streamlined loan modifications during the COVID-19 pandemic and now seeks to make them permanent.

In response to the 2006-2014 foreclosure crisis, the CFPB promulgated the 2013 Mortgage Servicing Rules to implement the Real Estate Settlement Procedures Act (RESPA) and the rules in Regulation X. Regulation X requires that a servicer obtain a “complete” loss mitigation application from a borrower prior to making a determination as to what loss mitigation option or options, if any, it may offer to the borrower. The rules require servicers to evaluate borrowers for all available loss mitigation options within a reasonable timeframe – provided that the servicer receives a complete loss mitigation application more than 37 days prior to the foreclosure.

During the COVID-19 pandemic, mortgage delinquencies increased to levels not seen since the foreclosure crisis. In response, on June 30, 2020, the CFPB issued a mortgage servicing interim final rule³ to amend Regulation X that temporarily allowed servicers to offer borrowers loss mitigation options without requiring an evaluation of a “complete” loss mitigation application. On April 9, 2021, the CFPB proposed, and then finalized with changes, another rule⁴ to extend access to additional COVID-19-related loss mitigation options. As a result of these changes, mortgage servicers could enroll borrowers in certain streamlined loan modifications more quickly and offer additional loss mitigation options without a borrower’s submission – and a servicer’s evaluation of – a complete application.

THE PROPOSED RULE FURTHER EXPANDS REQUIREMENTS FOR MORTGAGE SERVICERS FORECLOSING ON BORROWERS IN DISTRESS

The proposed rule would amend regulations issued in 2013 by streamlining and revising existing requirements when borrowers seek assistance in times of distress. Under the proposed framework, once a borrower makes a request for loss mitigation assistance, the loss mitigation review cycle would begin, and a servicer would need to ensure that one of the following procedural safeguards is met before beginning or advancing the foreclosure process or charging certain

³ <https://www.federalregister.gov/documents/2020/06/30/2020-13853/treatment-of-certain-covid-19-related-loss-mitigation-options-under-the-real-estate-settlement>.

⁴ <https://www.federalregister.gov/documents/2021/04/09/2021-07236/protections-for-borrowers-affected-by-the-covid-19-emergency-under-the-real-estate-settlement>.

fees: (1) the servicer has evaluated and confirmed that the borrower does not qualify for any available loss mitigation options, or (2) the borrower has not communicated with the servicer for at least 90 days despite the servicer having regularly taken steps to communicate with the borrower regarding their loss mitigation review. The proposed rule would also require a servicer to review a borrower for loss mitigation options sequentially, instead of simultaneously, which could elongate the process.

Notably, foreclosure and fee protections would remain throughout the loss mitigation review cycle – until the borrower has come current or unless one of the procedural safeguards applies. The proposed framework is intended to ensure that borrowers have a meaningful opportunity to be reviewed for loss mitigation without unnecessary delay. The CFPB preliminarily determined that stopping the advancement of foreclosure and the accumulation of certain fees on the borrower's account throughout the loss mitigation review cycle will provide strong incentives for servicers to complete loss mitigation reviews quickly and accurately.

The proposed rule would remove most of the application-based framework from 12 C.F.R. § 1024.41. Under the new framework that the CFPB is proposing, all borrowers would receive foreclosure protections as soon as they “request loss mitigation assistance” as discussed below – as opposed to the current protections, which are triggered only after the servicer receives a completed application.

THE RULE CLARIFIES AND EXPANDS SERVICERS' REQUIRED FORECLOSURE FORBEARANCE PERIOD

The CFPB proposes a new definition, “loss mitigation review cycle,” in 12 C.F.R. § 1024.31 to describe the period of time that the proposed procedural safeguards in 12 C.F.R. § 1024.41(f)(2)(i)-(ii) and (f)(3) would be in effect. Loss mitigation review cycle would mean a continuous period of time beginning when the borrower requests loss mitigation assistance, provided the request is made more than 37 days before a foreclosure sale. A loss mitigation review cycle would end when a servicer implements a loss mitigation solution for the borrower so that the borrower's loan is brought current or when one of the procedural safeguards in paragraphs (f)(2)(i) or (ii) are met. A loss mitigation review cycle would continue while a borrower is in a temporary or trial loss mitigation period (such as a forbearance or loan modification trial payment plan) and the loan has not yet been brought current. The loss mitigation review cycle would continue during forbearance. Borrowers in forbearance would typically need additional loss mitigation assistance to become current. The cycle would also continue during a trial payment plan to

provide the borrower an adequate opportunity to perform on the plan and become current. If the trial is unsuccessful and the borrower is not brought current, the servicer must ensure that one of the procedural safeguards in paragraphs (f)(2)(i) or (ii) is met before the cycle ends and the servicer can begin or advance foreclosure.

THE RULE EXPANDS THE TYPE OF COMMUNICATIONS THAT QUALIFY AS REQUESTS FOR LOSS MITIGATION ASSISTANCE

The CFPB proposes a new definition, “request for loss mitigation assistance,” in 12 C.F.R. § 1024.31 to mean any oral or written communication, occurring through any usual and customary channel for mortgage servicing communications, whereby a borrower asks a servicer for mortgage relief. The CFPB intends for the definition of request for mortgage relief to be construed broadly. A borrower does not need to use a specific form or any specific language to submit a request for loss mitigation assistance that triggers the proposed foreclosure procedural safeguards in 12 C.F.R. § 1024.41(f)(2). Additionally, the CFPB stated that under the proposed rule, a servicer should presume that a borrower who experiences a delinquency as defined in 12 C.F.R. § 1024.31 has made a request for loss mitigation assistance when they contact the servicer unless they clearly express some other intention.

The proposed rule provides three examples of communications that would be considered requests for loss mitigation assistance while also clarifying that these examples are not exhaustive:

- The first proposed example provides that a request for loss mitigation assistance includes any communication in which a borrower expresses an interest in pursuing a loss mitigation option, as defined in existing 12 C.F.R. § 1024.31. Thus, a request for loss mitigation assistance would include any request from a borrower for temporary or long-term relief such as, without limitation, refinancing, trial or permanent modification, repayment of the amount owed over an extended period of time, forbearance of future payments, short sale, deed-in-lieu of foreclosure and loss mitigation programs sponsored by a locality, state or the federal government.
- The second proposed example provides that a request for loss mitigation assistance includes situations in which a borrower indicates that they have experienced a hardship and asks the servicer for assistance with making payments, retaining their home or avoiding foreclosure.
- The third proposed example provides that a request for loss mitigation assistance includes any communication in which, in response to a

servicer's unsolicited offer of a loss mitigation option, a borrower expresses an interest in pursuing the loss mitigation option offered or any other loss mitigation option. The CFPB stated that it intends this example to clarify that an unsolicited offer of a loss mitigation option from a servicer would be considered a request for loss mitigation assistance if, in response to the offer, the borrower expressed any interest in exploring an alternative to foreclosure.

PROHIBITION OF DUAL TRACKING

Under the existing rule, if a loan is more than 120 days delinquent and the borrower has yet to submit a complete loss mitigation application, a servicer may foreclose on borrower property while the borrower participates in the loss mitigation review process, a practice known as "dual tracking." The proposed rule curtails dual tracking by establishing procedural safeguards against foreclosure that begin as soon as the borrower makes a request for loss mitigation assistance and that continue for the entire loss mitigation review cycle.

PROHIBITION OF ADDITIONAL FEES

With the exception of late fees, the CFPB's proposed fee provision would provide that during a loss mitigation review cycle no additional fees, penalties or interest 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 shall accrue on the borrower's account. Notably, this broad prohibition may result in servicers making payments to third-party companies for delinquency-related services such as tax and property insurance liabilities and property inspections that servicers may not be able to recoup.

ADDITIONAL CONTENT REQUIRED TO BE IN INTERVENTION NOTICES

The CFPB proposes to require a servicer to include additional information in the written early intervention notices to more fully inform the borrower about loss mitigation options that may be available from the owner or assignee of the borrower's loan. Under these proposed requirements, a servicer would provide contact information for borrowers to access a list of such loss mitigation options, the name of the investor (i.e., owner or assignee of the borrower's loan) and additional descriptive information about each type of loss mitigation options that are generally available from that investor.

LANGUAGE REQUIREMENTS

In general, the proposed rule would require servicers to provide Spanish-language translations of certain written communications to all borrowers, make certain written and oral communications available in multiple languages and provide those translated or interpreted communications upon borrower request. The proposed rule would require servicers to include brief translated statements in certain written communications that notify borrowers of the availability of the translations and interpretations and how they can be requested. It also would require that borrowers who received marketing for a loan in a language other than English receive specific early intervention and loss mitigation communications in that same language upon the borrower's request.

EXCEPTION FOR SMALL SERVICERS

The proposed rule would not apply to small servicers, defined in accordance with 12 C.F.R. § 1026.41(e)(4) as a servicer that (1) services, together with any affiliates, 5,000 or fewer mortgage loans, for all of which the servicer (or an affiliate) is the creditor or assignee; (2) is a housing finance agency, as defined in 24 C.F.R. 266.5; or (3) is a nonprofit entity that services 5,000 or fewer mortgage loans, including any mortgage loans serviced on behalf of associated nonprofit entities, for all of which the servicer or an associated nonprofit entity is the creditor.

IN SUMMARY

- The CFPB has announced a proposed rule to amend the 2013 Mortgage Servicing Rules to require additional support for defaulting borrowers.
- The proposed rule would add additional requirements for servicers before they foreclose on the property of defaulted borrowers and require servicers to comply with enhanced protections previously made available during the COVID-19 pandemic.
- Under the proposed rule, servicers would no longer be required to collect a “complete application” prior to offering loss mitigation options. The loss mitigation review cycle would begin as soon as the borrower requests mortgage relief. Thereafter, “dual tracking” would be prohibited, and borrowers would be protected against the accrual of certain fees.
- The rule seeks to reduce paperwork requirements for servicers and

improve communication with homeowners.

CONCLUSION

The proposed rule, if enacted, would require servicers to intently assist struggling borrowers upon a request for loss mitigation assistance and throughout the loss mitigation review cycle, as the CFPB newly defines, before servicers commence the foreclosure process. Only after a servicer has exhausted all possible loss mitigation avenues would the servicer then be entitled to move forward with foreclosure as a last resort. The proposed rule would increase disclosure obligations. The cost to servicers of the proposed rule would be the value of lost fees servicers would otherwise charge to borrowers. There is speculation that substantial delay in initiating foreclosure could hinder enforcement.