Consumer Track

The National Mortgage Settlement: How Will It Affect Consumer Bankruptcy Cases?

CONCURRENT SESSION

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Moderator: Professor Katherine M. Porter, University of California, Irvine, School of Law

Panelists: Ramona D. Elliott, Executive Office for U.S. Trustees
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Reference Materials

1. Clifford J. White III & Ramona D. Elliott, *$25 Billion Mortgage Servicer Settlement: Implications for the U.S. Trustee Program and the Bankruptcy System*, ABI Journal (Mar. 2012).
2. U.S. Trustee Program, *The National Mortgage Settlement Frequently Asked Questions (FAQs) for Borrowers in Bankruptcy and Case Trustees.*

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$25 Billion Mortgage Servicer Settlement: Implications for USTP and Bankruptcy System

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On Our Watch

On Feb. 9, 2012, U.S. Attorney General Eric Holder announced that the federal government and 49 state attorneys general had reached a settlement agreement with the nation's five largest mortgage servicers—Bank of America Corp., JPMorgan Chase & Co., Wells Fargo & Company, Citigroup Inc. and Ally Financial Inc. (formerly GMAC) (collectively, "the servicers")—to address mortgage servicing, foreclosure and bankruptcy abuses. In the agreement, the U.S. Trustee Program (USTP) settled claims for the servicers' violations of bankruptcy requirements that protect debtors and ensure the integrity of the bankruptcy process. The servicers will pay $25 billion in cash and financial relief to homeowners; adhere to a uniform and comprehensive set of mortgage-servicing standards, including provisions specific to bankruptcy; and subject themselves to three and a half years of compliance review by an independent monitor.

Clifford J. White III

The comprehensive settlement reflects unprecedented cooperation among federal and state enforcement and regulatory agencies, and represents a critical step forward in addressing the problems that have plagued the mortgage servicing industry. In his announcement of the settlement, Holder praised the work of Associate Attorney General Thomas Perrelli, who led the negotiations and also singled out the USTP, stating:

> The U.S. Trustees Program...was one of the first federal agencies to investigate mortgage servicer abuse of homeowners in financial distress. As part of their investigation, Trustees reviewed more than 37,000 documents filed by major mortgage servicers in federal bankruptcy court—and took discovery in more than 175 cases across the country. These efforts were advanced by several United States Attorney... They have worked tirelessly to seek justice for homeowners who were treated unfairly and taxpayers who footed the bill. And the information and evidence that these teams compiled—and the expertise they provided—was essential in reaching this historic settlement.

USTP History of Addressing Mortgage Servicer Misconduct

The settlement agreement is the culmination of several years of intensive investigation and litigation by USTP offices throughout the country. Even before the mortgage meltdown, allegations arose in the bankruptcy system that mortgage servicers were filing inflated and inaccurate proofs of claim and motions for relief from stay based on faulty accounting and misrepresentations to the bankruptcy courts. In some cases, these allegations extended to the mortgage servicers' attorneys, as well as the third-party vendors they retained to provide services with respect to borrowers in bankruptcy.

Ramona D. Elliott

Beginning in late 2006, the USTP launched its initial review of the mortgage industry's practices in bankruptcy. The fruits of that resource-intensive project grew over time, and the USTP was successful in obtaining court decisions against mortgage servicers, their attorneys and their agents. Significantly, in 2010, the USTP and the Federal Trade Commission (FTC) reached a $108 million settlement with Countrywide Home Loans Inc. and its affiliate BAC Home Loans Servicing LP for improper default servicing practices. That settlement resolved an FTC complaint and the USTP's litigation in bankruptcy courts nationwide concerning Countrywide's mortgage-servicing practices, including charges that Countrywide inflated mortgage claims made against homeowners in bankruptcy, failed to properly credit homeowners with payments made and failed to notify homeowners of extra charges added to their mortgage bills.

Just months later, the robo-signing scandal broke in the media, which focused national attention on the larger issue of the servicers' practices in ser-

vicing loans of homeowners in default.[1] The U.S. Department of Justice (DOJ), through Perrelli, convened federal regulatory and enforcement agencies to coordinate an investigation into the extent of the servicers' misconduct. The prudential banking regulators, including the Office of the Comptroller of the Currency and the Federal Reserve, participated and, with technical assistance from the USTP and others, undertook a review of the servicers' general mortgage loan servicing and foreclosure processing to determine compliance with state and federal laws.

As part of the DOJ-led enforcement effort, the USTP stepped up its investigation of select servicers in certain jurisdictions across the country by reviewing mortgage-related proofs of claim and contested motions for relief from the automatic stay. For several years, the USTP had been satisfied when servicers corrected their mistakes in the case at bar, but the mistakes continued and they were not confined by geographic districts or by servicer. It was clear that there was a protracted, widespread and national problem, so the USTP changed its strategy. If a filing was determined to be "facially deficient," the USTP sought discovery. As reported in the *New York Times* and elsewhere, the USTP identified facial deficiencies such as the following:

- A servicer filed a proof of claim asserting an arrearage of $52,042.58. After the debtor objected, the servicer amended the claim to reduce the arrearage to $3,156.02; it failed, however, to provide the required itemization. The servicer then filed a third claim in the corrected amount and with the required itemization.
- After a debtor made all chapter 13 plan payments, satisfied all chapter 13 requirements and received a discharge, the servicer rejected the debtor's ongoing mortgage payments and threatened foreclosure.
- A servicer obtained force-placed insurance even though the debtors had their own insurance. The servicer then sought relief from the stay, asserting an arrearage based on the erroneous insurance charges.
- A servicer filed a $30,000 arrearage claim primarily for missed payments. The servicer amended its claim twice and both times calculated the missed payments differently than it had originally. In addition, the supporting documentation attached to the first amended claim was for a property in Massachusetts that was not owned by the debtors.
- In three cases, a servicer filed proofs of claim requesting payment for "prior servicer fees" for amounts ranging from $3,178 to $10,260, but failed to provide supporting documentation, itemization, or other explanation. After the U.S. Trustee objected to the claims, the servicer agreed to amend the claims to eliminate the requests for these substantial fees.

Mortgage Servicer Challenges to the USTP

The initial response of the mortgage industry was that their errors were few in number and were not material. Servicers suggested that the USTP was being hyper-technical in focusing on inconsequential and isolated inaccuracies. In fact, these errors were both large and small, assaulted the integrity of the bankruptcy system and compromised the ability of chapter 13 debtors to save their homes.

The servicers' response to the USTP's actions has been not only to oppose the USTP's discovery into their policies and procedures for the servicing of loans in bankruptcy, but also to attack the standing and authority of the USTP to investigate systemic abuse of the bankruptcy system.[2] They even questioned the authority of the bankruptcy court to impose remedies.

Incredibly, the top servicers stated in court pleadings that the USTP—the "watchdog of the bankruptcy system"—was charged only with making sure that homeowner debtors followed the bankruptcy rules that protect creditors, and was not authorized to police creditor misconduct that might harm debtors. One servicer went so far as to argue in court that the Attorney General, acting through the director of the Executive Office for U.S. Trustees, lacked authority to set enforcement priorities and coordinate multidistrict investigations that would bind U.S. Trustees around the country.

During the course of its enforcement efforts, the USTP confronted close to 300 challenges to its discovery requests, including eight cases in which it was forced to file motions to compel, motions for orders to show cause or motions for sanctions because the servicers simply refused to comply with discovery requests or court orders requiring the servicers to provide discovery. The USTP prevailed in the overwhelming number of adjudicated cases, but then faced motions for reconsideration and appeals. Although each court soundly rejected the servicers' legal arguments concerning the standing and authority of the U.S. Trustees to conduct discovery and investigate servicing practices, unsettled questions remained as to the ability of the bankruptcy courts to mete out remedies to address systemic abuse.[3] Under the settlement, however, failure to abide by the terms of the agreement may result in sanctions without the need for extended or complex litigation.

Intensive Negotiations

Perrelli convened relevant federal agencies and state attorneys general beginning in early 2011 to discuss various regulatory and enforcement actions that were ongoing or contemplated. Given the head start that the USTP had in investigating mortgage servicer practices, the USTP was actively engaged in these discussions and was able to identify the most common violations that were occurring both in and out of bankruptcy.

Negotiations with the servicers started shortly thereafter. The negotiations were extremely lengthy because of the breadth of claims under consideration and the scope of relief. Each type of misconduct identified by the USTP is covered in this agreement. Among the bankruptcy claims resolved through the negotiations are those relating to:

- deficiencies in servicers' foreclosure practices, including with respect to the preparation and content of documents filed with courts, or otherwise relied upon, as part of the foreclosure process;
- deficiencies relating to the servicers' use and supervision of attor-

1 "Robo-signing" is a term used to describe the practice of servicer employees or the employees of vendors acting on behalf of the servicers, approving and signing large quantities of documents and affidavits without proper review or verification of the information contained therein and, in many instances, without complying with the requirements of state notarization laws.

2 In May 2011, three members of the Senate Judiciary Committee introduced legislation titled "Fighting Fraud in Bankruptcy Act of 2011." Among other things, the bill clarifies USTP authority to bring actions to remedy creditor abuse and gives bankruptcy courts express authority to impose fines and enter nationwide injunctive relief. In addition, the bill gives the USTP authority to conduct audits of creditor proofs of claim in a manner similar to current statutory provisions governing audits of debtor schedules and statements of financial affairs. *See* Fighting Fraud in Bankruptcy Act of 2011, S. 1054, 112th Cong. (2011); *see also* 157 Cong. Rec. S3276-01 (daily ed. May 24, 2011) (statement of Sen. Leahy).

3 In *In re Stewart*, 647 F.3d 553, 558 (5th Cir. 2011), the U.S. Court of Appeals for the Fifth Circuit struck down injunctive relief imposed against the servicer on grounds that, among other things, the debtor in that case had settled her dispute with the servicer. In contrast, in *In re Taylor*, 655 F.3d 274, 288 (3d Cir. 2011), the U.S. Court of Appeals for the Third Circuit upheld sanctions against the servicer and its law firm by noting that the bankruptcy court properly considered the effect sanctions may have on future conduct.

neys and other vendors in connection with the creation and recording of assignments, foreclosure and bankruptcy services and loss-mitigation activities; and

• systemic deficiencies in servicers' bankruptcy practices resulting in inflation of claims, overcharging or improper charging of consumers with respect to default-related fees, misaccounting, payment application issues, documentation issues and misrepresentations in bankruptcy filings and proceedings.

Settlement Agreement

The settlement agreement covers a wide range of civil misconduct by servicers. The major provisions of the agreement include the following points.

1. The servicers will pay $25 billion to resolve violations of state and federal law. The majority of the payments (about $20 billion) will take the form of monetary credits applied toward the servicers' obligations to assist homeowners in financial distress, including through interest rate reductions, principal write-downs, refinancing, forbearance of principal, short sales and transitional assistance, and anti-blight programs. Additionally, about $1.5 billion will be used to establish a Borrower Payment Fund to provide cash payment to homeowners who meet certain criteria and whose homes were sold or taken in foreclosure. Going forward, servicers must also remediate harm to homeowners, which may include compensation, for failure to comply with new injunctive standards that govern their servicing practices.

2. The servicers will adhere to a strict set of new mortgage-servicing standards covering accuracy of account information; document preparation and verification; oversight and management of foreclosure and bankruptcy attorneys and other third-party providers; quality assurance processes; foreclosure filing practices and processes; loan modification and loss-mitigation practices; borrower communication and notification practices; and restrictions on servicing fees.

3. The servicers will adhere to special provisions relating to bankruptcy conduct, such as establishing processes to ensure the accuracy of proofs of claim and motions for relief from stay; waiving "hidden fees" that were not disclosed during the chapter 13 case; waiving fees for the filing of proofs of claim and motions seeking relief from the automatic stay determined to contain a substantial misstatement of the amount due; providing special access for chapter 13 trustees to knowledgeable employees of the servicer who can respond to trustee inquiries; ensuring that payments in chapter 13 cases are promptly and accurately credited; providing training to employees that specifically addresses the servicing of loans for borrowers in bankruptcy; taking corrective action where deficiencies in claims are identified; and providing remediation to debtors for inaccuracies in account information.

Not only does this settlement provide relief to homeowners, but importantly it establishes standards to help prevent future misconduct.

4. Servicer conduct will be reviewed for three-and-a-half years by an independent monitor who will oversee a series of prescribed tests of compliance.[4] Failure to meet established metrics of compliance is subject to remedy by the U.S. District Court for the District of Columbia, including through monetary penalties and non-monetary equitable relief.

Lessons Learned

The USTP's mortgage servicer investigations and litigation has been the most comprehensive, intensive and coordinated enforcement project in the USTP's history. Although there is still plenty of work to do in terms of ensuring compliance with the settlement agreement by the servicers, as well as ongoing oversight of mortgage servicers in bankruptcy, it is appropriate for the USTP to reflect a bit on its experience and consider lessons learned that will guide future priorities. Initially, at least, the USTP will be guided by the following observations:

1. The USTP must remain agile and adopt enforcement priorities according to the emerging needs in the bankruptcy system. Traditionally, the USTP has carried out significant consumer-protection activities, but the misconduct of the mortgage-servicer industry required a reordering of priorities. The USTP needs to be attuned to developments in the bankruptcy system and adjust its priorities to address areas where we can add the most value to the system.

2. The USTP must attack emerging problems by following the evidence wherever it leads, even if the facts are surprising and contrary to prevailing wisdom. Most of us had no notion that a financial institution's record-keeping could be so chronically and systematically inadequate. Material misstatements by debtors are not acceptable and neither are material misstatements by creditors, including national mortgage servicers.

3. The USTP can effectively leverage its field-based operations to coordinate a response to multi-district problems. National problems are best resolved through nationwide solutions. By adopting national priorities and focusing offices throughout the country on common issues, the USTP can efficiently acquire and share information that leads to comprehensive results. This settlement is the fourth nationwide settlement obtained by the USTP in the past three years and it suggests that comprehensive settlements may be an advisable approach for future enforcement initiatives.

Conclusion

Not only does this settlement provide relief to homeowners, but importantly it establishes standards to help prevent future misconduct. The USTP is proud of the critical role it played in unraveling mortgage servicers' abuse of the law and in imposing a new set of uniform practices to be followed. The USTP will continue to be vigilant in identifying violations by debtors and creditors alike and will leverage the work of its field offices throughout the country to address systemic violations and to solve industry-wide or multidistrict misconduct. ■

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[4] Joseph A. Smith, Jr., has been selected as the monitor. Mr. Smith has served as the North Carolina Commissioner of Banks and is a former chair of the Conference of State Banks Supervisors.

The National Mortgage Settlement Frequently Asked Questions (FAQs) for Borrowers in Bankruptcy and Case Trustees

The National Mortgage Settlement (the "Settlement") is an agreement among the federal government, 49 states, and the five largest mortgage servicers and their affiliates (the "Banks").

The Banks are:

Ally Financial, Inc. (formerly GMAC)

Bank of America Corporation

Citigroup, Inc.

J.P. Morgan Chase & Co.

Wells Fargo & Company

The Settlement provides benefits to borrowers, **including borrowers in bankruptcy,** whose residential mortgage loans are serviced by the Banks.

Information concerning the Settlement and its impact on borrowers in bankruptcy can be found at a dedicated page on the United States Trustee Program's website at www.justice.gov/ust/eo/public_affairs/consumer_info/nms

In addition, the website www.nationalmortgagesettlement.com provides resources about the Settlement, including a copy of the Settlement, an executive summary of the Settlement, a fact sheet, and FAQs. The FAQs on that website discuss general issues, including:

- What Bank conduct is covered by the Settlement?

- What loans are covered by the Settlement?
- What are the financial provisions of the Settlement?
- How will the Settlement be enforced?

Finally, the Settlement requires the appointment of an independent monitor to oversee the Banks' compliance with the Settlement. The website for the monitor is: www.mortgageoversight.com.

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Question 1: What do these FAQs cover?

The United States Trustee Program, the component of the Department of Justice responsible for overseeing the administration of bankruptcy cases and private trustees, has prepared these FAQs primarily for borrowers in bankruptcy or borrowers who are considering filing bankruptcy, including those who have lost their homes in foreclosure. These FAQs also address questions that trustees who administer bankruptcy cases may have.

These FAQs are provided as a basic resource and should not be considered legal advice. **The United States Trustee Program is prohibited from providing legal advice. If you have any questions, you should consult an attorney.**

Question 2: What bankruptcy issues did the Settlement address?

The Settlement addresses misconduct by the Banks in bankruptcy cases, including:

- Inflated or inaccurate claims.

Some of the Banks filed inflated or inaccurate documents in bankruptcy courts. When a borrower files for bankruptcy relief, the Bank may file a proof of claim or motion for relief from the automatic stay. These documents tell a bankruptcy court how much the Bank claims the borrower owes the Bank. The proof of claim also governs what a borrower in bankruptcy must pay through a chapter 13 repayment plan, and the motion for relief can determine whether the Bank may seek to commence to foreclose upon a home even if the borrower is in bankruptcy.

The accuracy of these documents is crucial. A number of parties, including the borrower in bankruptcy, the bankruptcy court, the trustee administering the case, the United States Trustee, and other creditors, rely on these documents.

When a Bank inflates or misstates what a borrower in bankruptcy owes in these documents, the consequences can be severe. For example, the Bank may be paid too much and other creditors may not receive amounts they are owed. At worst, the borrower in bankruptcy is unable to propose a repayment plan that can be approved and the bankruptcy case is dismissed, or the Bank improperly obtains relief from the automatic stay and is permitted to foreclose on the borrower's home. As a result, the borrower in bankruptcy loses the ability to keep the home and obtain a fresh start in bankruptcy.

- Improper accounting of mortgage payments made by borrowers in bankruptcy.

Some of the Banks misapplied payments made by borrowers in bankruptcy. When a Bank does this, it appears on the Bank's books as if the borrower has failed to make regular monthly payments and the Bank can file a motion seeking relief from the automatic stay to foreclose upon the borrower's home. This misapplication of payments also results in the Bank improperly asserting that the borrower is behind on mortgage payments and can lead to the Bank imposing loan default fees and other charges.

- Adding improper fees and charges to the mortgage accounts of borrowers in bankruptcy.

Some of the Banks charged borrowers in bankruptcy for services not warranted, or in amounts not allowed. For example, some of the Banks sought to recover escrow payments twice, and conducted unnecessary or excessive property inspections and appraisals.

- Charging "hidden fees" to the mortgage accounts of borrowers in bankruptcy.

Some of the Banks also imposed "hidden fees" – fees that are assessed during the bankruptcy case but are not disclosed until after a borrower in bankruptcy receives a discharge. This can result in borrowers believing they are

current on their mortgages, only to have a Bank claim the borrowers owe additional amounts. This deprives borrowers in bankruptcy of the "fresh start" promised by the bankruptcy discharge. These hidden fees also often violate bankruptcy court orders finding that borrowers are current on their mortgages.

- Seeking relief from stay to foreclose while borrowers in bankruptcy have pending applications for loan modifications.

Some of the Banks separated their bankruptcy operations from other aspects of their mortgage servicing business, so they did not have a clear picture of the status of a borrower in bankruptcy's mortgage.

For example, the Banks sometimes provided borrowers in bankruptcy the opportunity to modify the terms of their home loans. Modification has benefits for both the Bank, which continues to receive payments, and the borrower, who receives a more manageable monthly payment.

However, while applications for loan modifications were being processed by on group of the Bank, its bankruptcy operations might move forward with requests for relief from the automatic stay so the Bank could commence foreclosure.

Question 3: Will the Settlement impact borrowers in bankruptcy?

Yes. The Settlement requires the Banks to collectively dedicate approximately $20 billion toward various forms of financial relief for borrowers including principal reduction, forbearance of principal for unemployed borrowers, short sales and transitional assistance, and specific benefits for service members.

The Banks must also make payments to state and federal authorities exceeding $5 billion. Of this amount, $1.5 billion will be allocated to provide payments to eligible borrowers, including borrowers in bankruptcy, who lost their homes to foreclosure.

Much of this relief will be available to borrowers in bankruptcy. A borrower should contact the appropriate Bank (see question 4) to determine eligibility for relief.

Additionally, the Banks must implement extensive new mortgage servicing standards, **including provisions specific to borrowers in bankruptcy**. These

standards address what occurs when borrowers fall behind on their mortgage payments, including when borrowers file for bankruptcy relief. As explained in these FAQs (see questions 7 through 11), the servicing standards require, among other things:

- A single point of contact at each Bank for borrowers in bankruptcy, who want information or assistance when they fall behind on their mortgage payments;
- New processes to ensure that the Banks provide accurate information about the amount that borrowers in bankruptcy owe on their mortgages;
- Better dispute resolution processes;
- Clear itemization of the principal, interest, fees, expenses and other charges incurred prior to bankruptcy that the Banks claim in bankruptcy cases;
- Prompt posting of payments and proper designation of pre-and post-petition payments and charges;
- Timely disclosure of fees, expenses, and charges incurred after a ` borrower files for chapter 13 bankruptcy.

Question 4: How will borrowers in bankruptcy know if they are eligible for financial assistance under the Settlement?

The Banks may directly contact borrowers, **including borrowers in bankruptcy**. **<u>However, borrowers should not wait to be contacted</u>.** To determine eligibility, a borrower or their attorney should contact the appropriate Bank:

Ally/GMAC: 800-766-4622

Bank of America: 877-488-7814
(Available Monday – Friday, 7am to 9pm CT, and Saturdays, 8am CT to 5pm CT)

Citi: 866-272-4749

J.P. Morgan Chase: 866-372-6901

Wells Fargo: 800-288-3212
(Available Monday – Friday, 7am to 7pm CT)

Question 5: What if a borrower in bankruptcy already has a claim against a Bank?

The Settlement includes a release of liability by the federal government and the participating states for certain conduct by the Banks that occurred prior to the Settlement. **The Settlement does not release claims a borrower, including a borrower in bankruptcy, may have under state or federal law, and a borrower does not need to choose between accepting relief under the Settlement and pursuing those claims.**

Question 6: Can borrowers in bankruptcy participate in the Settlement and receive financial assistance from other sources?

Yes. Borrowers, **including borrowers in bankruptcy**, may participate in the programs offered under the Settlement and other programs. For example, borrowers may be eligible for a separate restitution process administered by the federal banking regulators, including the Office of the Comptroller of the Currency (the "OCC"). For more information about the federal banking regulator claims process, please visit www.independentforeclosurereview.com or call 1-888-952-9105.

Question 7: Is there someone at the Banks whom borrowers in bankruptcy can contact with questions concerning their mortgage?

Yes. Each Bank must have a single point of contact for borrowers (a "SPOC"), **including borrowers in bankruptcy**, who want information or assistance when they fall behind on their mortgage payments. The SPOCs for borrowers in bankruptcy must be knowledgeable about bankruptcy issues. Also, the Banks must have adequate staff to handle the calls. Further information concerning the SPOCs for each Bank will be provided as the Banks establish them.

Question 8: How does the Settlement address the Banks' filings in bankruptcy courts going forward?

The Settlement imposes new standards on the Banks to ensure the accuracy of information they provide to bankruptcy courts. These standards are designed to ensure that the Banks provide accurate information about the amount that borrowers in bankruptcy owe on their mortgages.

Moreover, under the new servicing standards, the Banks must implement better dispute resolution processes. If a Bank files inaccurate or misleading documents in a bankruptcy case, a borrower can use these new procedures and make a complaint with the Bank.

In addition, with respect to proofs of claim and certain affidavits attached to documents filed in bankruptcy courts, the Banks must correct any significant inaccuracies promptly and also provide notice of the correction to the affected borrower or counsel to the borrower.

Question 9: What kind of information must the Banks provide concerning a mortgage when a borrower files for bankruptcy?

For a borrower in a chapter 13 (repayment) case, if a Bank files a proof of claim, the Bank must include an accurate and clear statement of exactly what the Bank claims the borrower owes. That statement must itemize the principal, interest, fees, expenses, and other charges that the Bank claims is owed as of the filing of the bankruptcy case.

Question 10: How does the Settlement affect how the Banks apply mortgage payments made by borrowers in bankruptcy or a trustee?

The Banks must promptly post payments received from a borrower or trustee while a borrower is in bankruptcy and accurately designate payments between any arrearage owed before the bankruptcy filing and what is owed for regular mortgage payments after the filing. The Banks must also reconcile accounts, including funds held in suspense accounts, at the end of each bankruptcy case and update their records so they are consistent with the account reconciliation.

Question 11: How does the Settlement affect what the Banks charge after a borrower files for bankruptcy?

The Banks must timely disclose fees, expenses, and charges incurred after a borrower files a chapter 13 bankruptcy case. A Bank waives fees, expenses, and charges of which the Bank has not given timely notice to the Borrower. The Banks must also timely give notice to a borrower of any changes in payments the borrower will have to make due to, for example, interest rate adjustments or changes in the escrow amount.

Question 12: Should a trustee administering the case of a borrower in bankruptcy seek to recover funds received by the borrower under the Settlement?

Eligible borrowers in bankruptcy may receive payments from the Banks as a part of the Settlement. A trustee should consider all relevant circumstances when deciding whether to seek turnover of the payments in a particular case. Factors to consider include:

- The payment amount and any interest of a non-debtor spouse or other person in the payment;
- The cost of recovering and administering the payment, including litigation with a borrower in bankruptcy who may seek a judicial determination regarding whether the funds are subject to administration;
- The extent to which recovering the payment will enable creditors to receive a meaningful distribution; and
- The applicability of state and federal exemptions.

The United States Trustee Program will not seek to compel a trustee to recover payments that the trustee, in the exercise of discretion, decides not to recover.

Question 13: How does the Settlement affect the trustees' review of the Banks' proofs of claim?

Generally, the Settlement will not alter a trustee's review of claims filed by the Banks. Importantly, however, the United States Trustees Program insisted that each Bank create a toll-free hotline, staffed by employees with special training in bankruptcy, that chapter 13 trustees can use to resolve issues related to the Banks' claims. More information on these hotlines will be provided as the Banks establish them.

If a trustee concludes, based on a review of a Bank's bankruptcy filings, that a Bank violated the Settlement, the trustee should contact the United States Trustee's office in the jurisdiction in which the case was filed.