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# We Really Do CARES: Mortgages, Moratoriums, Modifications and *In re Kinney*


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# We Really Do CARES: Mortgages, Moratoriums, Modifications and In Re Kinney

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## 1. Much Ado about In Re Kinney

a. Relevant Applicable Cases:

1. *In re Kinney*, 5 F.4th 1136 (10th Cir. 2021), petition for cert filed October 26, 2021

The debtor was current on her mortgage payments when she filed her Chapter 13 case. At the end of her 60-month plan she was delinquent 2 post-petition mortgage payments. The mortgage company filed a motion to dismiss the case. The debtor then became current on her mortgage. Nonetheless, the bankruptcy court granted the motion, determining it was a material default that could not be cured after the plan term had ended, and the debtor could not be granted a discharge.

The 10th Circuit, on a direct appeal, affirmed the decision. The Circuit Court decided that once the plan term expired, there was no plan under which payments could be made to cure the default.

The question was framed as to whether to treat the late payment as a "cure" instead of an impermissible "modification."

The panel was split in its decision. The majority found that the Bankruptcy Code was ambiguous but that the language and legislative history supported the concept that the late payments could not be a default cure. The concurrence found no ambiguity in the statute, and agreed only in the judgment.

In deciphering the ambiguity, the majority looked at the phrase "completion … of all payments under the plan" to determine if payments could come after the plan's expiration.

While § 1307(c)(6) says the court "may" dismiss or convert the case if there is a material default, § 1328(a) says the court "shall" grant a discharge to debtors who have completed payments under the plan.

With that, the focus was the term "under." After analyzing Supreme Court decisions involving the term, the court decided that "the statutory

term 'under' suggests that the payments would permit a discharge only if they had been made during the existence of the plan." *Id*. at 1143. The court also looked at § 1322(d) and § 1329 and found that a plan as well as modified plan cannot commit to longer than five years.

Looking at "under the plan" further, the court noted additional ambiguity in that "there's no code provision that expressly allows or prohibits a discharge when the debtor has not completed the plan payments by the end of the five-year period." *Id*. at 1145.

From there the court looked to the legislative history, which it also labeled ambiguous. The analysis looked at the 1977 House Judiciary Committee Report, to BAPCPA in 2005, and more recently the Consolidated Appropriations Act, 2021 ("CAA").

Ultimately, the court found that the CAA "suggests that (1) Congress realizes that unexpected calamities prevent many Chapter 13 debtors, like Ms. Kinney, from timely paying their mortgages and (2) Congress tried to soften the blow without disturbing the code's other limitations." *Id*. at 1147.

The Circuit Court rejected the idea that dismissal is discretionary and was being erased by its interpretation. It observed that the bankruptcy court also has discretion to deal with material defaults, such as permitting plan modifications before the end of the plan as well as granting a hardship discharge.

Concluding, the Circuit Court said if the debtor "wanted to avoid a material default, she needed a plan modification. But the court couldn't permit Ms. Kinney to cure her default once the plan's five-year period ended." *Id.*

2. *In re Albert*, 2021 WL 4994413 (Bankr. D. Colo. October 27, 2021)

After *Kinney* was entered, the bankruptcy court was presented with an uncontested case where the debtor made his final payment to the trustee in the amount of $436, but it was received approximately 23 days after the five-year term expired. The debtor was requesting a discharge, and alternatively, a plan modification to extend the plan up to 62 months, based upon the CARES Act modifications to § 1329(d).

The court determined there were several "difficult legal issues" and *sua sponte* scheduled the matter for briefing. The issues considered include when the five-year period begins and whether under *Kinney* the court has authority to grant a discharge.

The court decided to first review the modification request and then the discharge request. Ultimately, the court found that since the debtor had completed the plan under the terms of the modification and met the other § 1329 requirements, it would be approved. With that, the debtor was entitled to a discharge and the court did not need to weigh in on the "start date controversy" and *Kinney*'s application. The court decided that *Kinney* "does not foreclose modification (and extension of the payment period) under 11 U.S.C. § 1329(d)." *Id.* at *2.

The court explored the payment start date analysis, citing a 4th Circuit opinion adopting the confirmation date as the start date, and the more prevalent approach of calculating when the plan payments are scheduled to start under § 1326(a)(1). The court looked to *In re Humes*, 579 B.R. 557 (Bankr. D. Colo. 2018), the precursor to *Kinney*, as solid precedence on the start date analysis, which followed the § 1326(a)(1) approach.

The court then left the start date issue to the side, and looked to whether it could grant a § 1328(a) discharge if the plan was not completed within the 5-year period. The court recognized that courts have provided a grace period at the end of the plan to complete it. However, *Humes* rejected that approach. *Albert*, supra, at *6.

The court spoke loud and clear: "The message of *Kinney* is unequivocal: Chapter 13 debtors must complete all payments under their Chapter 13 plans within the five-year limit. To emphasize the point again, practitioners and Chapter 13 debtors now are on notice that Chapter 13 debtors must complete all payments under their Chapter 13 plans *within the five-year limit* in order to secure a Section 1328(a) discharge." *Id.* (emphasis in original)

In determining whether to grant the modification, the court looked to a timing issue as well as a materiality issue. It was concerned with the "equitable tension;" the "deep mystery" of why the 10th Circuit continued to refer to a "material default;" and that the debtor was just 23 days late on his final payment. *Id.* at 7.

The court reviewed the § 1329(d) addition under the CARES Act. It found that the debtor's modification request of extending the plan from 60 months to 62 months met the standards under § 1329(a) and (d). The court noted that other courts have found that there is no statutory requirement that the motion to modify the plan has to be filed prior to the end of the original five-year plan term, nor that the debtor has to prove the modification was needed solely or exclusively because of COVID-19 hardships. *Id.* at 9.

Prior to granting the discharge, the court issued a "fair warning to bankruptcy practitioners, the Court observes that motions to modify

under Section 1329(d) must be accompanied by factual allegations (or better still, an affidavit) providing sufficient details to enable the Court to determine whether or not a particular debtor actually suffered 'material financial hardship' due to the COVID-19 pandemic. Furthermore, prudence dictates that any request for modification should be submitted promptly after the circumstances justifying modification arise." *Id.* at 10.

3. *In re Humes*, 579 B.R. 557 (Bankr. D. Colo. 2018)

The matter was presented to the court as an unopposed motion to approve a stipulation to cure a plan term default seven months after the sixty-month plan expired. The court concluded that a debtor could not cure a default after the term ended.

The court analyzed the differences in opinions on when to begin calculating the start date of payments. Looking at §§ 1322(d), 1325(b)(4), and 1329(c) and case law, the court concluded that the starting date begins with the first payment due date.

The court noted that under § 1326(a)(1), the debtor has no later than 30 days after the order for relief or filing of a plan to begin payments. For example, if the petition is filed March 1, then the first payment is due March 31. However, if the plan specifies March 20 as the first payment date, then that earlier date starts the plan's term. *Id.* at 561.

In calculating the end date, the court gave the following example: in a sixty-month plan, if the first payment was due January 27, 2012, with payments due the 27th of each month, then the final payment to the trustee would be due December 27, 2016. However, the five-year term expires on January 26, 2017. So, if the debtor also has post-petition mortgage payments due the 1st of each month, then the January 1, 2017 payment must also be made as it falls within the five-year period of the plan.

b. Practical Implications

1. Courts are not in agreement on the definition of the beginning date of the plan payment and thus different interpretations and dates will arise between jurisdictions and even different judges in the same jurisdiction.

2. Bankruptcy practitioners are going to have to be proactive and diligently follow the end dates/payment history of their Chapter 13 clients otherwise there could be potential liability at the end of the plan if Debtors claim they were not made aware that final payments are due.

3. When is the final payment considered received? When received by the Trustee? When put in the mailbox? When the funds have been cleared and deposited into the Trustee's trust account?

4. When in doubt, instruct clients to pay a few weeks ahead of the last payment due date (whenever that is…)

c. Potential Remedies

1. Hardship Discharge Under § 1328(b)

a. Must not have completed all plan payments, so there is an issue if you are at the end of the plan, made all payments but the last payment simply came in late.

b. There must be no ability in practicality modify the Chapter 13 Plan.

2. Modification of the Chapter 13 Plan under the CARES ACT §1329(d)(1)

a. Chapter 13 Debtors with a confirmed Plan may amend, after notice and court approval, their plans by alleging a material financial hardship associated with the Covid-13 emergency.

b. Chapter 13 Plan modifications extend the plan payment term from a five-year plan term limitation up to seven years from the first payment due under the original plan.

c. Covid-19 Bankruptcy Relief Extension Act extended sunset date from March 27, 2021, to March 27, 2022, so there is limited time available for this remedy.

3. Conversion to Chapter 7 Bankruptcy

a. Must be eligible and have no prior Chapter 7 in the last 8 years.

b. At least in Colorado if the Debtor(s) has real estate is there post-filing appreciation in equity in the property that could be subject to liquidation by the Chapter 7 Trustee.

## 2. Dealing with Mortgage Payment Issues at the end of Chapter 13 Plan

a. CARES Act (Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (March 27, 2020))
1. Originally slated for sunset on 3-27-21.

2. The Covid-19 Bankruptcy Relief Extension Act of 2021 (Pub. L. 117-5, 135 Stat. 249 (March 27, 2021) extended this provision to 3-27-22).

3. Plan Modifications §1329 (d) added

    a. Applicable to Plans confirmed prior to 3-27-2020

    b. After notice and a hearing

    c. Plan can be modified to extend up to 7 years from when the 1st payment was due under originally confirmed plan

    d. If the Debtor can establish a "material financial hardship due, directly or indirectly, to the coronavirus disease 2019 (Covid-19) pandemic.

    e. Like other plan modifications, it must satisfy the requirements of §§1322(a), 1322(b), and 1325(a)

4. Interpretations:

    a. *In re Albert,* 2021 WL 4994413 (Bankr. D. Colo. October 27, 2021) (see above)

    b. *In re Fowler*, 2020 WL 6701366 (Bankr. M.D. Ala. 2020) (Modification approved where delinquency was prior to Covid pandemic

    c. *In re Gilbert*, 2020 WL 5939097 (Bankr. E.D. La. 2020) (Pandemic did not need to be the sole basis for the material financial hardship

    d. *In re Winnegrad*, 2021 WL 219519 (Bankr. D. N.J. 2021) (Modification denied under § 1325(a)(3) and (6) where debtor proposed $0 plan payments for two years)

    e. Cases not confirmed prior to the enactment of the CARES Act not entitled to use the statute to extend beyond 60 months: *In re Robinson*, 2020 WL 7234031 (Bankr. E.D. Wis. 2020); *In re Roebuck*, 2020 WL 5249597 (Bankr. E.D. Pa. 2020); *In re Drews*, 2020 WL 4382071 (Bankr. E.D. Mich. 2020); *In re Bridges*, 2020 WL 6927557 (Bankr. S.D. Ill. 2020)

b. <u>Consolidated Appropriations Act, 2021 (CAA) (Pub. L. No. 116-260, 134 Stat. 1182 (December 27, 2020)); SUNSET on 12-27-2021</u>

1. Addressing certain post-petition mortgage delinquencies with plan modifications:

    a. Added § 501(f), which provides that in situations where there are federally backed mortgages and federally backed multifamily mortgages that received post-petition CARES Act forbearances, the creditor can file supplemental proofs of claim for the missed payments.

    b. Added § 1329(e)(1), providing that the debtor can modify the plan to provide for the § 501(f) supplemental claim. If the debtor does not seek to modify the plan within 30 days of the claim's filing, § 1329(e)(2) allows the court, UST, trustee, bankruptcy administrator, or any party-in-interest to file the plan modification.

2. Discharge

    a. A debtor is required to be current on their principal residential mortgage at the end of their case. A negative result from the Rule 3002.1 Final Cure Notice and Response could result in the debtor not receiving the completion discharge under § 1328(a).

    b. Section 1328(i) was added to provide for qualified changes that give the court discretion to grant a discharge with the strength of § 1328(a) after notice and a hearing:

        i. In situations where the debtor has not completed payments to the trustee or a creditor holding a security interest in the Debtor's principal residence.

            a. See In re Ritter, 2021 WL 8640092 (Bankr. C.D. Cal, 2021) (Early discharge denied where debtors who obtained loan modification, still had 45 monthly plan payments left to pay, and showed a temporary Covid hardship.).

        ii. The discharge under § 1328(i) can occur under two circumstances involving situations where debtor has a residential mortgage provided for under § 1322(b)(5)'s cure and maintain:

            a. Default on not more than 3 monthly payments due no or after 3-13-2020 caused by a material financial hardship due directly or indirectly by the Covid-19 pandemic.
            b. The debtor has entered into a forbearance agreement or loan agreement with the creditor or servicer, as defined by RESPA.

c. CARES Act and Response to Notice of Final Cure

1. F.R.B.P. 3002.1(g) provides that a Response to a Notice of Final Cure Payment may be filed by the creditor within 21 days of the date of service of the Notice of Final Cure Mortgage Payment served by the Trustee.

2. The response is filed to provide a statement indicating: 1) whether the creditor agrees that the debtor paid the full amount required to cure the pre-petition default, and 2) whether the debtor is otherwise current on all post-petition payments.

3. The CARES Act affects Responses because any case with a forbearance will have a post-petition arrearage.

4. Most mortgage lenders will not oppose discharge, but the Chapter Trustee will likely argue that the debtor is in violation of the Plan if the plan end date is after the forbearance end date.

5. This is because in most conventional forbearance agreements, all missed payments are due as a lump sum at the end of the forbearance.

6. Example: Debtors finished Chapter 13 Plan and made all payments to Trustee. Three forbearance agreements rendered them technically in arrears per 3002.1. A disagree response was filed on 11/30/20 stating they were over $7,000 in arrears and due for 8/20/20. Because the forbearance ended after the 60th month of the plan, there was no bar to discharge. However, if the forbearance ended before the 60th month, the entire default would technically be due, and the Trustee could object to discharge.

7. Remedies:

   a. Modification request to extend term of repayment under CARES Act Modification provision – sunsets 3/27/2022

   b. Hardship discharge – cannot do if plan payments are already completed

   c. Conversion to Chapter 7 – beware of increased equity

## 3. To forebear or Not forebear: Implications with Covid-19 forbearance relief options and bankruptcy

a. Forbearance Agreements

1. The CARES Act provides a mortgage payment forbearance option for all FHA/VA borrowers who, either directly or indirectly suffer a financial hardship due to the COVID-19 national emergency.

2. A temporary postponement or reduction of mortgage payments. It is not payment forgiveness. Borrowers are entitled to an initial forbearance period of up to 180 days, with another 180-day extension, upon request. The deadline of June 20, 2021, has passed.

3. If the forbearance started before June 30, 2020, two additional 3-month extensions could be requested.

4. Mortgage servicers can file a Supplemental Proof of Claim for missed payments pursuant to CARES Act forbearance within 120 days of the expiration of the forbearance period.

5. Any party in standing, including a mortgage servicer, can file a motion to modify a Chapter 13 plan to provide for payment for a CARES Act Supplemental Proof of Claim.

b. Practical Implication

1. If debtors are filing a case while there is a forbearance, there could be a feasibility issue if the mortgage lender does not allow a loan modification and files a proof of claim for the entire past-due amount on forbearance concluding.

2. If debtor has a forbearance agreement that ends and they are then approved for a loan modification prior to confirmation, will the court hold the confirmation in abeyance pending outcome, or does Debtor have to be able to show ability to pay whole forbearance arrearage prior to confirmation in the even the loan modification is ultimately denied.

3. Some lenders are seeking relief from stay if a Debtor cannot qualify for a loan modification after forbearance. Some lenders are willing to do stipulations to resolve the Motion for Relief but in Colorado there is a judge who will require proof of ability to pay increased stipulation payments and possibly a modification of the plan.

4. Practically, lenders have seemed willing to allow Debtors to modify to include post-petition arrears delayed under a forbearance agreement.

5. Conduit vs. Non-Conduit Chapter 13 Cases

   a. Conduit States: Chapter 13 Trustee pays both the pre-petition arrears and the ongoing mortgage payments.

   b. Non-conduit States: Chapter 13 Trustee pays the pre-petition arrears only. Debtor is responsible for the ongoing mortgage payments.

## 4. New Movements in Foreclosure/Eviction practices and procedures Post-Covid-19

a. There has not been much movement in the foreclosures in Colorado picking back up. Legally lenders can initiate the foreclosure process but in practice, most lenders have offered Debtors either continued forbearance past what is required under the CARES ACT or will at least consider them for loss mitigation options.

b. If a Debtor is being considered for loss mitigation option, then lenders are prohibited from engaging in "dual tracking", whereby they cannot seek to foreclose when a borrower is pursuing a loss mitigation option. (Colo. Rev. Stat. § 38-38-103.1)

c. Whereas foreclosures have not seemed to pick back up, evictions (most commonly in commercial leases) have started to be initiated again.

   1. Most leases that are standard boiler-plate format may not have an "Act of God" or force majeure clause allowing tenants to get out of them due to the Covid-19 impact.

   2. Chapter 13 or Chapter 11 are option to consider for becoming current on a residential or commercial lease and avoiding eviction.

# Faculty

**Elizabeth German** is the lead attorney for the Robinson & Henry, P.C.'s Bankruptcy and Debt Problems practice in Castle Rock, Colo. She has extensive knowledge and experience regarding consumer rights protection in the areas of credit repair, Fair Debt Collection Practices Act violations and foreclosure defense. Ms. German has litigated matters in federal and state court, and has reached successful outcomes in multiple adversary cases within the bankruptcy court protecting the rights of debtors against their creditors. She received her B.A. from Indiana University Bloomington and her J.D. from the University of Illinois Chicago John Marshall Law School.

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