American Bankruptcy Institute

Balloons, Bargains (Cramdowns) and Bewares: Hot Issues and Best Practices in Chapter 13

Carolyn A. Bankowski
Office of the Chapter 13 Trustee; Boston

Catherine V. Eastwood
Partridge, Snow & Hahn, LLP; Providence, R.I.

Joseph P. Foley
Joseph P. Foley LLC; Boston

Nicholas F. Ortiz
Law Office of Nicholas Ortiz, P.C.; Boston

Post Petition Plan Defaults

Carolyn A. Bankowski
Chapter 13 Trustee
Boston, Mass.

I. Types of Defaults

A. **Non-Monetary Defaults**

i. failure to file tax returns (pre and post petition)

ii. feasibility issues - failure to review and object to claims

B. **Monetary Defaults**

i. failure to make plan payments

ii. failure to pay post-petition taxes

iii. failure to maintain payments on secured claims

II. Possible Remedies

A. **Amended Plans**

i. extend term of plan if possible

ii. roll plan arrears into plan

iii. include post-petition claims in plan

iv. amend plan to include all claims filed to resolve feasibility issues

v. modify treatment of secured claims to sell or surrender collateral

B. **Agreed Orders**

i. negotiate an agreement to cure the arrears with the Chapter 13 Trustee, the secured creditor or the taxing authority

ii. file the outstanding tax returns

iii. for prepetition taxes, review 11 U.S.C. sec. 1308 and

make sure the appropriate procedures are followed, i.e., requesting that the Section 341 meeting be held open and/or filing the appropriate motion with the court

C. **Sale of Assets**

i. if debtor is no longer able to maintain payments, review sale options

ii. make sure an application to employ any professional who is going to assist with the sale is filed with the court immediately upon retention pursuant to 11 U.S.C. sec. 327

D. **Motion to Suspend Plan Payments**

i. if the debtor is temporarily unable to meet payments, the debtor may move to suspend payments

ii. motion to suspend must state how the debtor is going to cure the suspended payments. Possible ways to cure suspended payments are:

a. filing an amended plan to extend term or roll payments over the remaining term of the plan;

b. providing a payment proposal to cure the payments over a reasonable period of time

E. **Conversion to Chapter 7**

i. if debtor is no longer able to make payments, Chapter 7 may provide the Debtor with the fresh start needed

ii. 11 U.S.C. sec. 1307(a) provides that a debtor may convert a case

to a case under Chapter 7 at any time

F. **Dismissal of Case**

i. the debtor may choose to dismiss the case and attempt to work with creditors outside of bankruptcy

ii. 11 U.S.C. sec. 1307(b) provides that the court shall dismiss the case upon the debtor's request at any time if the case has not been converted

iii. 11 U.S.C. sec. 109(g)(2) provides that no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay under 11 U.S.C. sec. 362

note: the prohibition does not apply if the case was involuntarily dismissed, i.e., Trustee's Motion or other creditor's Motion

G. **Hardship Discharge**

i. 11 U.S.C. sec. 1328(b) provides that debtor may receive a discharge that has not completed payments

ii. in order to receive a hardship discharge the debtor must satisfy the following conditions:

a. the plan has to have been confirmed;

b. the debtor's failure to complete plan payments has to be due to circumstances for which the debtor should not

justly be held accountable

c. the value of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the debtor's estate had been liquidated under Chapter 7; and

d. modification of the plan is not possible

Chapter 13 Means Test Form
What the Chapter 13 Trustee Looks For

Carolyn A. Bankowski
Chapter 13 Trustee
Boston, Mass.

I. Report Of Income And Determination of Actual Anticipated Income For Plan

i. review Schedule I and pay advices and compare to B22C Part I

ii. make sure the debtor is properly including all income on Schedule I and the B22C

iii. ask debtor at 341 meeting to explain the reason for any inconsistencies

iv. if there is a material difference between B22C and debtor's actual anticipated income, trustee will use the actual anticipated income for determining whether the debtor's plan satisfies the best efforts test set forth in 11 U.S.C. sec. 1325(b)(1)(B)

See In re Kibbe, 361 B.R. 302 (1st Cir. 2007). While Kibbe is a below median income debtor case, Kibbe's holding (the income component of "projected disposable income" as set forth in sec. 1325(b)(1)(B) is the anticipated actual income of the debtor, subject to the Income Exclusions, during the plan commitment period) can be applied to both above and below median income debtors. See Kibbe at 314.

II. Calculation Of Commitment Period

i. check annualized current monthly income to determine if debtor is above median income

ii. compare household size with debtor's tax return and Schedule I

iii. make sure if household member is claimed and has income that such household member's contribution is accounted for under the Report of Income under the B22C

III. Calculation Of Deductions

i. make sure correct standardized deductions are listed

ii. 25B.b. make sure any mortgage expenses claimed on line 47 are listed on line 25B.b.

iii. lines 27 – 29 - make sure vehicle deductions claimed are consistent with the number of vehicles owned on Schedule B and that debt payments are properly deducted on lines 28.b. and 29.b.

iv. line 30 – compare deduction claimed with Schedule I, pay advices and tax return and make adjustment for any increase or decrease in deduction due to actual anticipated income adjustment

v. lines 34 – 35 – compare amounts claimed with Schedule J expenses

vi. line 36 – compare with Schedule J and make sure debtor has properly deducted the amount already deducted on line 24B

vii. line 39 – compare with Schedule I and pay advices

viii. line 47 – compare payments claimed with Schedule D and Schedule J and check if debtor is including claims which are no longer paying under plan, i.e., avoided mortgages and liens, automobile claims which are being paid through the plan, payments on secured claims for property being surrendered

ix. line 48, 49 and 50 – make sure the amount claimed is consistent with the amounts set forth in the Plan

x. line 55 – compare with pay advices and Schedule I

xi. review and obtain documentation of any special circumstances deductions and additional expense claims

xii. multiply line 59 by 60 months and make sure that sum is being paid towards the holders of general unsecured claims

Mortgage Modifications: Cramdowns in Chapter 13 Cases

Authors:
Patricia Antonelli, Esquire
Catherine V. Eastwood, Esquire
Partridge Snow & Hahn, LLP
180 South Main Street
Providence, RI 02903

The topic of modifying home mortgages in bankruptcy is at the forefront of discussion today. Currently, the rights of secured creditors may be modified in Chapter 13 cases in that a debtor can propose a plan to cure arrearages by paying them over the course of a Chapter 13 plan. However, the right to modify loan documents is prohibited when it comes to mortgages that secure real estate that is the borrower's principal residence. At the same time, the current Bankruptcy Code does provide that mortgages on vacation homes and rental properties may be modified – restructured and reamortized; likewise mortgages on commercial property may be modified; security interests in vehicles and equipment may be modified; and security interests in inventory and accounts may be modified.

These materials include an overview of topics important in mortgage cramdowns. While the existing law does not allow bankruptcy courts to modify the terms of home mortgages, substantial caselaw exists from the past 20 years on the mortgage modification topic (otherwise known as a "cramdown", a "bifurcation of liens" or "lienstripping"). Current economic turmoil has brought forth renewed interest in amending the Code to allow bankruptcy courts to modify home mortgages. Thus, understanding the topic is increasingly important. To understand the concept of "cramdown", it is important to contemplate the concept of the "allowed secured claim".

The "Allowed Secured Claim"

A key concept involves the "allowed secured claim". An "allowed secured claim" is defined in Section 506(a) of the Bankruptcy Code[1] whereby every claim filed which is secured by a lien on property, or subject to a setoff, is an allowed secured claim to the extent of the creditor's interest in the estate's interest in such property or in the amount subject to setoff. To the extent that the creditor's interest is less than the total amount of the claim, the claim is an "allowed secured claim". For example, a creditor who is owed $500,000 on a claim secured by a mortgage on real estate has an allowed secured claim when the value of the real estate exceeds $500,000. Thus, where the property is worth $600,000, and the creditor is owed $500,000, the creditor has an allowed secured claim of $500,000. But when the creditor is owed more than the value of the collateral, the creditor has an undersecured claim which "bifurcated" into two parts: (1) an allowed secured claim for the value of the collateral and (2) an allowed unsecured claim for any excess amount over and above the value of the collateral. This concept is known as "bifurcation of claims".

Under the 2005 amendments to the Code in The Bankruptcy Abuse and Prevention and Consumer Protection Act of 2005 ("BAPCPA")[2], a new provision of Section 1325(a)(5) was added that requires installments must be in equal monthly amounts where Chapter 13 plans provide for payment of "allowed secured claims" in periodic payments. Prior to BAPCPA, a Chapter 13 debtor could confirm a plan that proposed to pay the allowed secured claim in full with present value interest, treating the balance of the debt as an unsecured claim. As will be discussed later in these materials, on the issue of balloon payments, the equal periodic payment provisions of BAPCPA have muddied the waters with respect to pre-BAPCPA cramdown rights.

Prior to BAPCPA there was controversy as to whether a confirmed Chapter 13 plan could require the release of a mortgage when the allowed secured claim was paid in full if the debtor

[1] All references hereinafter to "Code" and "Section" refer to the United States Bankruptcy Code, 11 U.S.C. Section 101, et seq.
[2] Pub. L. No. 109-8, 119 Stat. 23 (2005).

had not completed his payments under the plan. New Section 1325(a)(5)(B)(i)(II), as amended by BAPCPA, resolves that issue by providing that the holders of each allowed secured claim retains their lien until the earlier of payment of the underlying debt determined by nonbankruptcy law or discharge under Section 1328 (plan completion).

Dewsnup v. Timm and Chapter 7 Cases

An important restriction on the bifurcation concept is found in the Supreme Court case of Dewsnup v. Timm, 502 U.S. 410, 112 S.Ct. 773 (1992). In Dewsnup, the Court held that a Chapter 7 debtor could not have a lien declared void on the basis of Section 506(d), even though the lien did not secure a claim that was an allowed secured claim under Section 506(a). The Court limited its holding to the situation where a Chapter 7 debtor was relying solely on Section 506(d) to void a lien.[3]

Dewsnup could be read broadly to eliminate lienstripping in Chapter 13 cases. One year after Dewsnup, however, the Supreme Court addressed lienstripping in Chapter 13 cases in Nobelman v. American Savings Bank[4], discussed later in these materials.

The "strip down" of liens concept is described in Associates Commercial Corp. v. Rash, 520 U.S. 953, 227 S.Ct. 1879, 138 L.Ed. 2d 148 (1997), wherein the Supreme Court explicitly recognized that most liens could be reduced to the value of their collateral. Specifically, Rash involves the amount which a Chapter 13 debtor can strip down the lien of a secured creditor with respect to a vehicle. Note that changes in the Code after BAPCPA may render Rash inapplicable to real property cases as new Section 506(a)(2) gives guidance on valuation limited to personal property. Thus, because the BAPCPA amendment speaks specifically to personal property valuation, there is an argument that Congress intended a different standard applies for valuation of real estate collateral.

Strip Off by Plan, Motion or Adversary Proceeding?

What is the procedure for bifurcating or stripping down a secured creditor's lien? The dispute may arise in the context of a claim filed by a secured creditor and an objection to claim filed by the debtor. The debtor may attempt to strip off the lien by declaring the claim bifurcated in his Chapter 13 plan (and creditors should scrutinize their treatment in Chapter 13 plans to ensure that they are able to present their positions in the event a debtor does attempt bifurcation). Debtors can also object to the validity and/or extent of a creditor's lien by motion or adversary proceeding complaint. If the only issue regarding the claim is valuation of the collateral, a motion is the way to bring the matter before the court.

Some courts permit the plan confirmation proceeding to be the proceeding in which the valuation determination is made and do not require a separate proceeding for that purpose. If adequate notice is given to the creditor that this will occur, nothing in the Code appears to preclude this procedure.[5]

---

[3] Note that Chapter 7 debtors are able to avoid or strip off unsecured non-consensual judgment liens when they impair the debtor's exemption under Section 522(f)(2).

[4] 508 U.S. 324, 113 S.Ct. 2106, 124 L.Ed. 2d 228 (1993).

[5] *In re* Fili, 257 B.R. 370 (B.A.P. 1st Cir. 2001) (secured claim filed before bar date but after confirmation hearing disallowed when creditor given fair notice that its claim would be disallowed under chapter 13 plan and creditor ignored the confirmation process); *In re* Wolf, 162 B.R. 98 (Bankr. D.N.J. 1993); *In re* Tucker, 35 B.R. 35 (Bankr. M.D. Tenn. 1983); *In re* Russell, 29 B.R. 332 (Bankr. E.D.N.Y. 1983) (both cases holding that a confirmed plan may determine the status of a claim filed by a secured creditor).

Although some courts determine the allowed secured claims as part of the plan confirmation process, many courts have taken the position that if the court does not affirmatively decide the claim is not allowable, the claim may be allowed as filed, notwithstanding the contrary statements in the debtor's plan. [6]

Valuation of Collateral

Unless the parties can settle on an agreed valuation for the secured creditor's collateral, an evidentiary hearing will be necessary so that the court can determine the amount of the allowed secured claim. Such a hearing is similar to the type of valuation hearing conducted in the motion for relief context, where the parties will obtain their own appraisals or valuations, and be prepared to provide the appraisals as evidence and put on live testimony of their appraisers.

A proof of claim is prima facie evidence of the claim amount owed, but the court in In re Fidelity Holding Co.,[7] found that the creditor must bear the ultimate burden of proof on its claim once the debtor objecting to the claim has provided contrary evidence under Section 502(a).

The date on which value of property is determined is a key factor in determination of allowed secured claims. There is no guidance in the Code as to what date is proper for the valuation of real estate. BAPCPA amendments to Section 506(a)(2) give guidance as to the correct date of valuation of non-real property collateral – the date of the bankruptcy petition is the correct valuation date for personal property; but for personal property acquired for personal, family or household purposes, the correct time for valuation is "at the time the value is determined" – thus valuation can be accomplished at a later date than the petition date.

For real estate, some courts had chosen the filing date of the petition or the plan as the valuation date in all cases, on the theory that the parties' rights are frozen as of the petition date for other bankruptcy purposes.[8] Still other cases found that the operative date for valuation of collateral should be the date of the confirmation hearing,[9] and other courts have set the operative date as the date of the valuation hearing.[10]

For real estate collateral, the parties should obtain appraisals from appraisers that agree to provide live testimony and will meet the standards for qualification as expert witnesses. Note that there is caselaw that interprets the Federal Rules of Evidence as allowing the debtor as a

---

[6] Cen-Pen Corp. v. Hanson, 58 F.3d 89 (4th Cir. 1995) (secured claim was not affected by chapter 13 case, notwithstanding provision of confirmed plan stating that lien of creditor was void, because no separate adversary proceeding had been filed to determine rights of creditor); *In re* Simmons, 765 F.2d 547 (5th Cir. 1985) (secured claim allowed as filed when debtor did not object, notwithstanding contrary provisions in confirmed chapter 13 plan); *see also In re* Bateman, 331 F.3d 821 (11th Cir. 2003) (although mortgage creditor's claim for arrearages had to be disallowed to extent it exceeded amount provided for in confirmed plan, the arrearages disallowed would remain owing after the case because plan could not modify mortgage creditor's secured claim); *In re* Tarnow, 749 F.2d 464 (7th Cir. 1984) (when secured claim was not filed timely and determined, a lien remained valid and was not affected by chapter 11 plan).

[7] 837 F.2d 696 (5th Cir. 1988)

[8] *In re* Willis, 6 B.R. 555 (Bankr. N.D. Ill. 1980).

[9] *In re* Bernardes, 267 B.R. 690 (Bankr. D.N.J. 2001) (when purpose of valuation under section 506(a) is plan confirmation, holder of crammed down mortgage not entitled to reconsideration of its claim based on post-confirmation increase in home value); *In re* Kennedy, 177 B.R. 967 (Bankr. S.D. Ala. 1995) (includes a survey of holdings).

[10] *In re* Weaver, 5 B.R. 522 (Bankr. N.D. Ga. 1980); *In re* Miller, 4 B.R. 392 (Bankr. S.D. Cal. 1980); *In re* Crockett, 3 B.R. 365 (Bankr. N.D. Ill. 1980).

witness to testify as to the value of his own property because the debtor can testify as to any problems with the property which can decrease the property's value.[11]

Modification of Secured Creditors' Rights in Claims Not Secured Only by Real Estate That Is the Debtor's Principal Residence – the "Cramdown"

Bankruptcy Code Section 1322(b)(2) provides that the debtor's plan may modify the rights of holders of most secured claims, other than some claims secured only by a security interest in real property that is the debtor's principal residence. In addition, section 1322(b)(3) and (b)(5) provide that as to any claim, including a claim secured only by the debtor's principal residence, the plan may provide for the curing of default over a reasonable period of time.

The term "modify" which appears in section 1322(b)(2), is not defined by the Code. Courts give the term "modify" its broadest possible meaning such that any term of the contract is subject to change. Thus, except as limited by other Code provisions, the debtor might propose to pay a lower total amount than originally agreed, to lower the amount of payments, to pay the claim over the longer period of time, to defer payments until after other debts are paid, to eliminate certain terms, or even to eliminate totally the creditor's lien.

Limitations on Modifying Certain Debts Secured Only by Real Estate That Is Debtor's Principal Residence

The debtor's rights to modify a mortgage are subject to several limitations. In effect, using a Chapter 13 plan to cure arrearages is a "modification" of the note and mortgage because the terms of the contracts that require monthly payments to be made on certain dates, are being modified or changed when a debtor borrower is allowed to confirm a Chapter 13 plan that allows the debtor to cure the arrearages over a reasonable period of time. This type of a modification is permissible, even for mortgages on real estate that is the debtor's principal residence. But the right to modify does not extend to certain debts secured only by a security interest in real property that is the debtor's principal residence.[12] If a debt falls within the exception, set forth in Code section 1322(b)(2), and the debt is not subject to one of several exceptions to the exception discussed below, the plan may not alter the interest rate, payment amount or other terms of the mortgage.

In Nobelman,[13] the Supreme Court interpreted Section 1322(b)(2) and held that creditors whose claims are not subject to modification are also protected from having their liens stripped down to the value of the collateral pursuant to Code section 506. The Court held that even if a plan modified only the unsecured portion of a protected claim, the plan would still violate section 1322(b)(2), because it would modify the rights of a creditor holding an allowed secured claim secured solely by real estate that is the debtor's principal residence.

---

[11] Joe T. Dehmer Distributors, Inc. v. Temple, 826 F.2d 1463 (5th Cir. 1987); Bingham v. Bridges, 613 F.2d 794 (10th Cir. 1980); Kinter v. United States, 156 F.2d 5 (3d Cir. 1946).

[12] The determination of whether a property is the debtor's principal residence is made as of the date of the bankruptcy filing. *In re* Wetherbee, 164 B.R. 212 (Bankr. D.N.H. 1994) (debtor who no longer resided at property could modify mortgage on that property).

[13] 508 U.S. 324, 113 S. Ct. 2106, 124 L. Ed. 2d 228 (1993).

The Nobelman debtors' Chapter 13 plan sought to reduce an undersecured homestead mortgage to the fair market value of the collateral (a residence) pursuant to Section 506(a). Upon the creditor's and the trustee's objection, the bankruptcy court denied confirmation of the plan (on appeal, both the district court and the appellate court affirmed). The Supreme Court held that Section 1322(b)(2) barred modification of the creditor's rights as mortgageholder. Section 1322(b)(2) allows a plan to modify the rights of holders of secured claims, other than a claim secured only by an interest in real property, that is the debtor's principal residence.

Security Interests in Homes that are NOT Protected by Section 1322(b)(2) – Wholly Unsecured Mortgages Get Stripped Off

Many courts have held that the Nobleman holding does not apply in cases where a junior mortgage is totally undersecured due to the fact that senior mortgages and liens equal or exceed the value of the property (i.e., there is no equity for the junior lien to attach to). The Nobleman Court made its holding on the fact the creditor, after bifurcation of its claim under section 506(a), had a secured claim as well as an unsecured claim, and therefore was a "holder of a secured claim." When the creditor, after bifurcation, holds only an unsecured claim, it is not a "holder of secured claim" and does not come within the reach of section 1322(b)(2). In the 1st Circuit B.A.P. decision, In re Mann[14], the debtors' Chapter 13 plan treated a second mortgage on the debtor's residence as a wholly unsecured and stripped off the second mortgage. On appeal to the 1st Circuit B.A.P., confirmation of the plan was affirmed, and thus a wholly unsecured junior mortgage is not entitled to the protection of Section 1322(b)(2) and may be stripped off. [15]

Short term mortgages, mortgages that are almost complete and balloon payment mortgages that are due to mature before the end of the plan

Note that in spite of Nobelman, Section 1322(c)(2) provides that notwithstanding section 1322(b)(2), in a case in which the last payment on the original payment schedule for a claim secured only by a mortgage on the debtor's principal residence is due before the due date of the final plan payment, the plan may modify the creditor's rights pursuant to Section 1325(a)(5). Section 1325(a)(5) generally permits a debtor to pay only the allowed secured claim of a creditor, to modify payment terms and interest rates, and to treat the unsecured portion of an undersecured claim as an unsecured claim in the Chapter 13 plan. Thus, debtors are permitted to modify many short term mortgages, mortgages on which the debtor's payments are nearly complete, and mortgages with balloon payments falling due before the end of the Chapter 13 plan.[16]

Why would Congress have excepted these types of mortgages from those which could not be modified? Short-term mortgages and those with balloon payments are not usually

---

[14] In re Mann, 249 B.R. 831 (B.A.P. 1st Cir. 2000); *see also In re* Woodhouse, 172 B.R. 1 (Bankr. D.R.I. 1994); *But see* In Fraize v. Beneficial Mtg. Corp. of New Hampshire, 208 B.R. 311 (Bankr. D.N.H. 1997).

[15] *See* In re Pelosi, 382 B.R. 582 (Bankr. D. Mass. 2008) (citing majority view as permitting the avoiding of a wholly unsecured lien); *In re* Cardinale, 142 B.R. 42 (Bankr. D.R.I. 1992).

[16] *In re* Paschen, 296 F.3d 1203 (11th Cir. 2002); *In re* Young, 199 B.R. 643 (Bankr. E.D. Tenn. 1996) (debtors could strip down mortgage if last payment was due before final scheduled plan payment); *In re* Sarkese, 189 B.R. 531 (Bankr. M.D. Fla. 1995) (debtors could pay off mortgage which had ballooned prior to bankruptcy using the cramdown provisions of section 1325(a)(5)).

purchase money mortgages, which section 1322(b)(2) was originally and primarily drafted to protect.

Home mortgages are modifiable when there is "other security" for the mortgage

The limitation on modification in section 1322(b)(2) also does not apply if the creditor has other security besides the mortgage on the residence. In Lomas Mortgage v. Louis, the First Circuit affirmed the order allowing the debtors' motion to bifurcate their multi-family home because part of the creditor's collateral was income-producing, rather than residential, and the bankruptcy antimodification provisions do not extend to income-producing property.[17]

There are claims secured by real estate that are also secured by household goods, or even the possible refund of proceeds from credit insurance. In the case of In re Bouvier, the creditor's claim, in addition to being secured by the debtors' principal residence, was also secured by collateral pledged by a corporation controlled by the debtors.[18] The court found compliance with Section 1322(b)(2), even though the additional security was given by a non-borrower corporation. In other cases, the lender has also taken a security interest in other real estate, such as the rental units owned by the debtor in the Lomas case.[19] In the case of In re Marenaro, the debtor was unable to cramdown the creditor's mortgage because the additional security the debtor relied upon was property that was designated as three separate lots, but it had never been divided for a use other than as a principal residence.[20]

Many banks have, either by law or by way of a deposit agreement, the right of setoff against a debtor's bank account in relation to the mortgage on a debtor's home, and such right of setoff can be determined as "additional security" to remove the mortgage from the antimodification protections.[21] In re Groff, the court found that the fact that the debtor surrendered the other property securing the debt after the petition is filed did not prevent him from being allowed to modify the claim ; the key issue is whether the other collateral existed on the date the petition was filed.[22]

---

[17] 82 F.3d 1 (1st Cir. 1996); *In re* French, 174 B.R. 1 (Bankr. D. Mass. 1994) (mortgage not protected from modification because of assignment of rents, commercial documents were used and documentation exists that evidences parties contemplated property was not principal residence); *In re* Lebrun, 185 B.R. 665 (Bankr. D. Mass. 1995) (mortgage on real property that was used by debtor as a residence at the time or loan origination, but that is now used to generate rental income is not protected from modification); *In re* McGregor, 172 B.R. 718 (Bankr. D. Mass 1994) (Section 1322(b)(2) does not prohibit modification of a mortgage secured by a 4-unit apartment complex, notwithstanding the fact that the debtors live in one unit); *In re* Legowski, 167 B.R. 711 (Bankr. D. Mass. 1994) (Claim secured by 2-family dwelling, where one side is used by debtor and the other side is rented, is not protected from modification).

[18] 160 B.R. 24 (Bankr. D.R.I. 1993).

[19] *In re* Scarborough, 2006 WL 2466859 (3d Cir. Aug. 28, 2006) (anti-modification provision does not apply to claim secured by both debtor's principal residence and other rental property); *In re* McVay, 150 B.R. 254 (Bankr. D. Or. 1993) (property is a "bed and breakfast" in addition to being principal residence of debtor); *In re* Foster, 61 B.R. 492 (Bankr. N.D. Ind. 1986) (farm on which residence was located).

[20] 217 B.R. 358 (B.A.P. 1st Cir. 1998)

[21] *In re* Libby, 200 B.R. 562 (Bankr. D.N.J. 1996) (security interest in all money, securities and property in bank's possession, even if no such property was held by bank, constituted additional security); *In re* Crystian, 197 B.R. 803 (Bankr. W.D. Pa. 1996) (escrow funds and right to setoff against checking account constituted additional security).

[22] 131 B.R. 703 (Bankr. E.D. Wis. 1991).

In the 1st Circuit case of Eastern Savings Bank v. LaFata[23], the debtor mistakenly built a house on the property line between two lots owned by the debtor's ex-wife, a fact that was discovered after a creditor granted a mortgage on the property. The debtor claimed both lots as assets in his bankruptcy, and sought to bifurcate the creditor's claim. The bankruptcy court overruled the creditor's objection finding that even some nominal encroachment by the debtor's principal residence did not trigger the antimodification provision of Section 1322(b)(2). The 1st Cir. B.A.P. and the 1st Circuit Court of Appeals agreed.

BAPCPA's 2005 amendments to the Code have limited what might be considered as additional collateral for purposes of cramdowns, by defining "debtor's principal residence" to include "incidental property" which is separately defined.[24] Thus, creditors may argue that some of the additional collateral that put a home mortgage outside of the protection of Section 1322(b)(2), are now considered "incidental property" under Section 101. "Incidental property" is defined as "property commonly conveyed with a principal residence in the area where the property is located, all easements, rights, appurtenances, fixtures, rents, royalties, mineral rights, oil or gas rights, profits, water rights, escrow funds, or insurance proceeds," as well as all replacements or additions. Courts had found many of these items insufficient to create additional collateral for purposes of section 1322(b)(2), but even with the 2005 amendments, if a debtor is challenged by the creditor on a plan to modify the home mortgage because the additional security is "incidental property" (and therefore part of the principal residence), the debtor can still argue that the inclusion incidental property in the collateral does not change the fact that the obligation is not secured only by real property that is the debtor's principal residence.

Section 1322(b)(2) is not applicable to liens that are not security interests in real estate such as when the property that is the debtor's principal residence is not real property, as in the case of a mobile home which is not considered to be real estate under state law.[25] Only if a mobile home or cooperative is real property under applicable nonbankruptcy law would the limitations on modification apply.

Compliance With Section 1325(a)(5)

To accomplish a cramdown in Chapter 13 in the form of a confirmed plan, the plan must not only comply with Section 1322(b)(2)'s antimodification protections, it must provide adequate protection for the secured creditor's rights, and must comply with Section 1325(a)(5). Section 1325(a) provides that the court shall approve a plan if certain standards are met. Section 1325(a)(5) states that as to each allowed secured claim provided for by the plan one of the following conditions should be met:

(A) The holder of the claim has accepted the plan; or

---

[23] 483 F.3d 13 (1st Cir. 2007).
[24] 11 U.S.C. § 101(13A), (27B).
[25] *In re* Thompson, 217 B.R. 375 (B.A.P. 2d Cir. 1998) (mobile home is personalty under New York law and thus secured creditor's claim is modifiable); *see also In re* Johnson, 269 B.R. 246 (Bankr. M.D. Ala. 2001) (creditor with mortgage on real estate where mobile home was situated, but not on mobile home, did not have lien on debtor's principal residence).

(B) (i) The plan provides that the holder of the claim retain the lien securing such claim until the earlier of payment of the underlying debt or chapter 13 discharge, with the lien retained to extent recognized under nonbankruptcy law if case is dismissed or converted;

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; and

(iii) property distributed to the secured creditor be in equal monthly payments sufficient, if the property is personal property, to provide adequate protection; or

(C) The debtor surrenders the property securing such claim to such holder.

If the creditor consents to modification of its rights, by negotiated settlement in the form of a stipulation or consent order, bankruptcy courts will typically approve such agreements. Creditors beware that a number of courts have held that a secured creditor who does not object to a plan may be deemed to have accepted it.[26]

Section 1325(b)(5)(B) can be problematic in how it deals with the debtor retaining the property when the creditor does not consent to the plan. To meet this standard, the plan must specifically provide that the creditor retains its priority lien after confirmation (keeping in mind that the creditor is unable to foreclose). The creditor has to have the ability to preserve the creditor's rights in the property if the plan ends in failure before the creditor receives the amount to which it is entitled on its allowed secured claim. For the plan to be confirmed, it must provide that the lien is retained until either the full underlying debt is paid or the debtor receives a discharge. The BAPCPA amendments to the Code require that liens be retained until full payment for a discharge, so that pre-BAPCPA cases under the prior language that required elimination of the creditor's lien when the allowed secured claim had been paid are overruled.[27]

To meet the requirements of Section 1325(a)(5), the plan must also provide that the present value of the payments to be made to the creditor under the plan equals the amount of the allowed secured claim. This means that, if payments are to be made over time, the creditor must receive interest on the amount of the allowed secured claim so that the amount it ultimately receives is equivalent economically to what it would have received if the allowed secured claim had been immediately paid in cash.

Payments in Equal Periodic Amounts and Balloon Payment Plans

Section 1325(a)(5)(B)(iii), as added by BAPCPA, adds two additional requirements for confirmation of plans. First, if property is to be distributed in periodic payments, the payments must be in equal monthly amounts. There are questions about whether this provision refers to the distributions to the holder of the allowed secured claim and not to the debtor's plan payments. There is an argument that as long as the plan provides that the trustee's distributions to the holder of the allowed secured claim be made in equal monthly amounts, the debtor's plan payments need not be. The equal periodic payment provision is important in that prior to the BAPCPA, debtors frequently proposed and confirmed cramdown plans that provided for monthly payments in an amount the debtor could afford, and a balloon payment in the last

[26] *In re* Andrews, 49 F.3d 1404, 1409 (9th Cir. 1995); *In re* Szostek, 886 F.2d 1405 (3d Cir. 1989).
[27] *E.g., In re* Campbell, 180 B.R. 686 (M.D. Fla. 1995); *In re* Lee, 162 B.R. 217 (D. Minn. 1993).

month. Without the ability to propose a balloon payment to pay the final payment on the creditor's allowed secured claim, many debtors will be unable to confirm feasible plans.

The equal monthly installments requirement raises several questions: "How many payments are required before the payments become 'periodic'"? Does "equal monthly amounts" mean that the payments have to be monthly? Is a once-a-year payment periodic? How can a once-a-year payment be made in equal monthly amounts? If the promissory note or other loan document does not require monthly payments, does the equal payment requirement mandate monthly payments? Does a pure refinance or a balloon payment plan violate the equal payment requirement? These issues raised by the BAPCPA amendments are beginning to reach appellate panels.

In In re Davis,[28] the court found the equal payment requirement did not apply when a long-term mortgage is being cured under Section 1322(b)(5). On the other hand there is the case of In re Schultz,[29] where the court disagrees with Davis finding that Section 1325(a)(5)(B)(iii) does apply to plans that cure mortgage defaults. In Schultz, even though the proposed plan violated the equal periodic payment provision of the Code, the creditor did not object to the plan. The Schultz court deemed the creditor's silence was acceptance, and the plan was confirmed.

Bankruptcy Judge Feeney in In re Lemieux,[30] found the debtors proposed a plan with unequal monthly payments that cannot be confirmed because of the plain language of the statute. In the case of In re Carman,[31] where a debtor proposed lowering interest rates, making interest only payments for the life of his Chapter 13 plan followed by a balloon payment in the last month of his plan, Bankruptcy Judge Rosenthal found such modification impermissible under the Section 1325(a)(5)(B)(iii)(I) requirement that periodic payments be in equal monthly amounts. The court wrote that once periodic payments commence, the subsequent balloon payment would be unequal to those payments that preceded it.[32]

As of the writing of these materials, the issue of whether equal periodic payments are required in Chapter 13 cases and how those payments must be made is on appeal in a number of consolidated cases pending before the 1st Circuit Bankruptcy Appellate Panel, scheduled for oral argument on December 18, 2008.[33]

---

[28] 343 B.R. 326 (Bankr. M.D. Fla. 2006).
[29] 363 B.R. 902 (Bankr. E.D. Wis. 2007).
[30] 347 B.R. 460 (Bankr. D. Mass. 2006).
[31] 200 Bankr. LEXIS 2082 (Bankr. D. Mass. 2008).
[32] *See* In re Wallace, 2007 Bankr. LEXIS 4191 (Bankr. N.D.N.C 2007) (plan that provides for a balloon payment to a secured creditor is not confirmable; In re Luckett, 2007 Bankr. LEXIS 3638 (Bankr. E.D. Wis. 2007); In re Denton, 370 B.R. 441 (Bankr. S.D. Ga. 2007) (secured creditors must begin receiving payments in equal monthly amount beginning with the first payment after confirmation); In re Newberry, 2007 Bankr. LEXIS 2351 (Bankr. D. Vt. 2007) (a combination of monthly payments and a balloon payment categorically violates the directive for equal monthly payments).
[33] In re Melillo, M.B. 08-034, In re Flynn, M.B. 08-033, In re Wilson, M.B. 08-044, In re Hamilton, M.B. 08-046, and In re Bell, M.B. 08-052 (in addition, there are other appeals before the 1st Circuit B.A.P. with similar equal payment issues unresolved, action has been stayed, pending a decision on the appeals that are being hearing on December 18, 2008).

One of the cases on appeal to the 1st Circuit B.A.P. is the bankruptcy court case of In re Melillo,[34] where the debtor proposed to make nominal periodic payments over a 36-month plan, followed by a larger balloon payment. The secured creditor did not object to the plan. Judge Hillman sua sponte rejected the plan based on Section 1325(a)(5)(B)(iii)(I), finding the provision prohibits all balloon payments, even though the secured creditor did not object to the balloon payment. So in spite of there being alternative grounds for confirmation, the court wrote that a creditor had "a reasonable expectation that I will not approve treatment which violates the Bankruptcy Code" even in the absence of an objection.

There also is no requirement that the equal monthly amounts extend throughout the plan. A debtor may, for example, provide for equal monthly amounts to be distributed to a particular secured creditor for the first twenty-four months of a thirty-six-month plan or, if the requirement of providing adequate protection is met, the last twenty-four months of a thirty-six-month plan. In In re DeSardi,[35] the court found that property distributed to secured creditors under a Chapter 13 plan must be in equal monthly amounts once they commence, but there is no requirement that such payments begin on the effective date of the plan. Theoretically this provision requires that when a debtor makes a lump sum payment to the trustee, the trustee would have to defer the payments to a secured creditor into at least two equal monthly payments, but it is hard to imagine a creditor objecting to a plan that provided for payment of the entire lump sum in the first month.

In the event Congress chooses to remove the prohibition on modifying home mortgages, the BAPCPA provision that requires equal periodic payments will be a serious bar to homeowners who will want to use the Code's cramdown provisions to rewrite their mortgages and keep their homes. One should expect changes to this provision.

Determining the Cramdown Interest Rate – Till v. SCS Credit Corp.

In seeking appropriate interest rate for payment of their allowed secured claims, creditors would typically seek the contract rate or a higher interest rate, while debtors attempted to secure lower rates, such as the legal rate of interest provided by state law.

Massachusetts bankruptcy courts adopted the market rate as the starting point for coming up with the appropriate interest rate. In In re Chang,[36] the court found that an oversecured tax lien is entitled to the cramdown interest rate of "market rate plus": annual rate of interest for a 30-year fixed rate mortgage at the time of confirmation plus a 1% risk factor based on the debtor's history of defaults.

The Supreme Court resolved the dispute of the proper method to calculate a cramdown interest rate in Till v. SCS Credit Corp.[37] In Till, the Court held that a formula method is to be used, with the prime rate of interest as the starting point, adjusted by a factor for risk (a "prime-

[34] 385 B.R. 476 (Bankr. D. Mass. 2008).
[35] 340 B.R. 790 (Bankr. S.D. Tex. 2006).
[36] 274 B.R. 295 (Bankr. D. Mass. 2002); *See also* In re St. Cloud, 209 B.R. 801 (Bankr. D. Mass. 1997) (Cramdown interest rate should be the "current market rate for a loan similar to the original loan that is now available to a reliable borrower with a good credit rating as of the date of confirmation with adjustments to the base rate for the creditor's risk); *In re* Galvao, 183 B.R. 23 (Bankr. D. Mass. 1995) (A case-by-case approach is the only fair and equitable way to proceed to set a rate of interest for Chapter 13 cramdown plans).
[37] 541 U.S. 465, 124 S. Ct. 1951, 158 L. Ed. 2d 787 (2004).

plus" outcome). Although not setting any amount for the risk factor, the Court cited cases adding one to three percent to the interest rate. The amount added for risk should not be large and may be close to zero. If the creditor is significantly over-secured, the equity cushion will provide protection against risk. In other cases, assuming that risks of loss by fire or other damage are covered by insurance, as they typically are, the only real risk the creditor usually faces under a bankruptcy plan is the risk of a little delay in payments. If the debtor falls more than a little behind in payments, the chapter 13 plan will normally fail. In that event, the plan will be inoperative and the contract terms will be restored, including the interest rates and late charge provisions set forth therein, which would typically compensate the creditor for any delay.

The Court held that an objecting creditor has the burden of going forward with evidence that the interest rate proposed by the debtor is inadequate. It has been held that the Chapter 13 trustee, as representative of the unsecured creditors, does not have standing to object to the alleged inadequacy of provisions dealing with secured creditors in the plan.[38]

Long-Term Mortgage Debts

There are certain claims that the debtor can not pay within the time period of the proposed plan, which can never exceed five years,[39] simply because they are large long-term obligations that have many years of payments remaining before they are due to be fully satisfied. Section 1322(b)(5) allows the debtor to cure a default on such an obligation within a reasonable period of time without having to pay the entire debt balance within the time period of the plan. This provision can be utilized to cure both prepetition and postpetition defaults.[40]

Although a few early cases held otherwise, it is now well established that defaults on long-term debts such as mortgages may be cured under this section even if there has already been an acceleration and/or judgment which caused the entire balance to become due.[41] The 1994 amendments to the Code codified those cases permitting cure after acceleration and judgment, in the form of Section 1322(c)(1). That subsection provides that a default with respect to a lien on the debtor's principal residence may be cured under paragraph 1322(b)(3) or (b)(5) until such residence is sold at a foreclosure sale conducted in accordance with applicable nonbankruptcy law.

This statutory language suggests that a cure may be effectuated under Chapter 13 as long as the sale has not been completed under state law as of the time of the bankruptcy petition. Thus, if any step in the sale remains to be taken, such as an order confirming the sale of delivery of a deed, the debt giving rise to the foreclosure may be cured pursuant to section 1322(b)(3) or (b)(5).

---

[38] *In re* Brown, 108 B.R. 740 (Bankr. C.D. Cal. 1989).

[39] Section 1322(c).

[40] *In re* Mendoza, 111 F.3d 1264 (5th Cir. 1997) (debtor could modify plan to cure post-confirmation default; *see also In re* Carvalho, 335 F.3d 45 (1st Cir. 2003) (lifting of stay did not stop debtors from seeking to cure postpetition default and obtain bifurcation of creditor's claim when creditor delayed initiating foreclosure proceedings for a long period after stay lifted and debtors continued to make plan payments).

[41] *In re* Thompson, 894 F.2d 1227 (10th Cir. 1990); *In re* Metz, 820 F.2d 1495 (9th Cir. 1987); *In re* Terry, 780 F.2d 894 (11th Cir. 1986); *In re* Clark, 738 F.2d 869 (7th Cir. 1984); Grubbs v. Houston First Am. Sav. Ass'n, 730 F.2d 236 (5th Cir. 1984) (enbanc); *In re* Taddeo, 685 F.2d 24 (2d Cir. 1982) (to deprive debtors of the right to cure after an acceleration would undermine the purpose of the cure provisions).

Cure of Mortgages That Mature Before the Bankruptcy Plan is Completed or Before the End of the Plan

Section 1322(c) also makes clear that the time period for cure under section 1322(b)(3) may extend beyond the last scheduled payment date on the mortgage, as many courts had held,[42] and overrules the result of those courts that had held otherwise.[43] Notwithstanding the limitations of section 1322(b)(5), section 1322(c)(1) clearly permits cure of home mortgages under section 1322(b)(3) as well as under section 1322(b)(5), and section 1322(c)(2) permits modification of mortgages that mature before the end of the plan. Therefore, a debtor may cure a mortgage with a balloon payment that has already fallen due, or that will fall due during the plan, by paying the balance over the course of a Chapter 13 plan.[44]

Cure Permitted Even If Debtor Has No Personal Liability

In the case of Johnson v. Home State Bank, the Supreme Court found a cure may also be accomplished under Section 1322(b)(5) despite the fact that the debtor has no personal liability on the underlying obligation due to its discharge in a prior Chapter 7 bankruptcy case, as the creditor continues to have a claim in the subsequent Chapter 13 that the debtor files.[45]

Method of Maintaining Current Payments on Debts Being Cured

Most courts permit current payments on long-term obligations that are being cured to be paid outside the plan.[46] And, as the payments on long-term obligations are often higher than on any others, it is a common practice to make them outside the plan to avoid adding the substantial cost of the trustee's percentage fees and expenses (up to ten percent).

Effect of Cure – How the Secured Creditor Applies Payments

Section 1322(b)(5) allows for the curing of any default within a reasonable time and maintenance of payments for secured and unsecured claims where the last payment is due after the end date for the plan. Thus, in a typical Chapter 13 case, the debtor would make payments on his long-term mortgage and be returned to the original amortization schedule once the default has been cured. The cure provisions are particularly useful in a case in which the debtor is behind on a mortgage and the creditor refuses to allow the debtor to bring the payments up to date gradually. In essence, they provide a method of forcing the creditor to be reasonable, by giving the debtor a right to cure over a reasonable time, at least when the creditor has adequate protection and can not obtain relief from the automatic stay.

---

[42] Grubbs v. Houston First Am. Sav. Ass'n, 730 F.2d 236 (5th Cir. 1984); *In re* Spader, 66 B.R. 618 (W.D. Mo. 1986) (residential mortgage maturing prepetition could be cured in chapter 13).

[43] *In re* Harlan, 783 F.2d 839 (9th Cir. 1986); *In re* Seidel, 752 F.2d 1382 (9th Cir. 1985); *In re* Fontaine, 27 B.R. 614 (B.A.P. 9th Cir. 1982) (chapter 13 debtor may not cure prepetition balloon payment default).

[44] *In re* Change, 185 B.R. 50 (Bankr. N.D. Ill. 1995); *see also In re* Jefferson, 263 B.R. 231 (Bankr. N.D. Ill. 2001) (Section 1322(c)(1) permitted cure of lien obtained by condominium association on debtor's home if lien had not yet been foreclosed upon).

[45] 501 U.S. 78, 111 S. Ct. 2150, 115 L. Ed. 2d 66 (1991).

[46] Payments outside the plan are not made through the trustee.

What happens in a cramdown situation? Many reported decisions that have addressed the issue of what happens when a debtor who cures a mortgage default in Chapter 13, but has a remaining balance on a stripped down lien, by finding that the debtor may not change the monthly payment amount or the interest rate so that the only relief the debtor gets is having the mortgage paid off sooner than it would have before it was stripped down.[47] For example, in the case of Federal National Mortgage Association. v. Ferreira[48], the court found the debtor may cure arrearages and maintain regular payments to address the secured portion of the bifurcated claim. Even if regular payments are maintained, the creditor must change its bookkeeping on the modified loan by replacing the origination amortization setup with a hybrid of the original note term – keeping the original monthly payment and interest rate, but the term of payments recalculates to a shorter term (than the term in the note) after the loan is modified.

When the promissory note provides for an adjustable interest rate, curing default, maintaining payments and allocating principal and interest become complicated. "Maintenance of payments" probably includes the possibility that an adjustable rate mortgage changes the payment amount periodically.

In the case of In re DaCosta, the debtors modified an undersecured mortgage by bifurcating the creditor's secured claim, and then they cured the defaults and maintained payments. The loan was not reamortized based on the reduced secured claim; rather, the allowed secured claim is the value of the collateral, and the regular monthly payment under the original mortgage is maintained and credited against the new smaller principal amount.[49] In In re Kheng, the debtor's proposal to pay a mortgage after bifurcation at the same interest rate and the same monthly payments is maintenance of payments as required by Section 1322(b)(5).[50]

What if the promissory note and mortgage provide for an adjustable interest rate? In this instance, maintenance of payments likely includes the possibility that an adjustable rate mortgage will change the monthly payment periodically during the term of the plan. While a creditor may argue that the maintenance of payment requirement is not fulfilled if the new principal amount is used to calculate mortgage payments after the interest rate adjusts, the fight may not be worth the trouble as it seems clear that the payments before the interest rate adjusted as well as after the adjustment, must be credited against the new reduced principal balance.

New Legislation May Remove Cramdown Protection for Home Mortgages

As the mortgage crisis worsens, government seeks ways to keep homeowners in their homes. Despite a turnaround by the mortgage industry, forsaking foreclosures and replacing them with increased attempts to do forbearance plan, repayment plans and other loan

---

[47] *In re* Bellamy, 962 F.2d 176 (2d Cir. 1992); *In re* Murphy, 175 B.R. 134 (Bankr. D. Mass. 1994) (after bifurcation, debtor can not amortize allowed secured claim over balance of the term of the mortgage); *In re* Brown, 175 B.R. 129 (Bankr. D. Mass. 1994) (arrearage portion of allowed claim can not be assigned to the unsecured claim and discharged after bifurcation); *In re* Session, 128 B.R. 147 (Bankr. E.D. Tex. 1991); *In re* Franklin, 126 B.R. 702 (Bankr. N.D. Miss. 1991); *In re* Hayes, 111 B.R. 924 (Bankr. D. Or. 1990).plan).

[48] 223 B.R. 258 (Bankr. D.R.I. 1998).

[49] 204 B.R. 1 (Bankr, D. Mass. 1996).

[50] 202 B.R. 538 (Bankr. D. R.I. 1996); *see also In re* Murphy, 175 B.R. 134 (Bankr. D. Mass. 1994); *In re* Brown, 175 B.R. 129 (Bankr. D. Mass. 1994); *In re* McGregor, 172 B.R. 718 (Bankr. D. Mass. 1994)

modifications, many believe that principal reduction is necessary for the majority of distressed homeowners to maintain their mortgages and keep their homes. Five pieces of legislation that proposed removal of the Code's protection from modification for home mortgages were unsuccessful in early 2008, and in November and December 2008, new bankruptcy modification legislation proposals are starting to surface. On November 19, 2008, Senator Richard Durbin (D-Ill.), a proponent of similar bankruptcy modification legislation last year, proposed S. 3690, "The Homeowner Assistance and Taxpayer Protection Act" on November 19, 2008. In the House, Representative William Delahant (D-Mass.) and Representative Paul Hodes (D-NH) co-sponsored H.R. 7307, "The Homeowner Assistance and Taxpayer Protection Act" on December 5, 2008. Senator Durbin has announced that he will introduce his "Helping Families Save Their Homes in Bankruptcy" legislation on the first day of the 111th Congress in 2009, and that he will push for the legislation to be included in the economic stimulus package that will be considered in the first weeks of the new Congress. It should be abundantly clear to bankruptcy practitioners that the cramdown topic will continue to be a hot topic.

1024816_1

PROCEDURES AND TECHNIQUES IN DEALING WITH WHOLLY UNDERSECURED MORTGAGES IN A CHAPTER 13 BANKRUPTCY PROCEEDING

ATTY. JOSEPH P. FOLEY
LAW OFFICE OF JOSEPH P. FOLEY
BOSTON, MASSACHUSETTS

VALIDITY vs VALUE

Presently, in this mortgage meltdown dilemma, bankruptcy attorneys are regularly confronted with situations wherein their Debtors have purchased residential property in the relatively recent past employing methods similar to the prevalent 80/20 financing that has been a major contributing factor in the undersecured mortgage morass. In evaluating these particular problems during client intake interviews, it is usually discovered that because of the drastic dimunition of real estate values in the recent past, these 20% second mortgages are now wholly undersecured. In properly advising their clients, bankruptcy attorneys need to be aware of the differing procedures and techniques in dealing with the cram down and/or avoidance of wholly undersecured mortgages. Indeed, the various federal jurisdictions have varying procedures and requirements when it comes to avoiding or cramming down a wholly undersecured second mortgage.

In June of 2008, the United States Courts of Appeals for the Third Circuit found that the only method for avoiding a wholly undersecured mortgage was by adversary proceeding. In re Janica Mansaray-Ruffin, 530 F.3d 230 3rd Cir. (2008). However, it should be noted, that the Mansaray-Ruffin Court was presented with an issue attacking the validity of the mortgage rather than an argument pertaining to the value

of collateral. In Mansaray-Ruffin, the Debtors contended that a series of Truth In Lending Act violations invalidated the mortgage. Although the Chapter 13 Plan filed in the Mansaray-Ruffin case indicated that the Debtors would file an adversary proceeding to avoid the junior mortgage, no such adversary proceeding was ever filed. Since the validity of the mortgage rather than the value of the collateral was the issue presented to the Mansaray-Ruffin court, the court proceeded pursuant to Federal Rules of Bankruptcy 7001(2) which dictates that "a proceeding to determine the validity, priority, or extent of a lien or other interest in property, other than a proceeding under Rule 4003 (d) requires an adversary proceeding." See also, In re Kemp, 391 B.R. 262 (Bankr. D. N.J. 2008)

The court, in Mansaray-Ruffin, noted at the outset of the case that "it must be noted that bankruptcy has traditionally afforded special status to liens, allowing them to pass through bankruptcy unaffected". In Re: Long v. Bullard, 111 U.S. 617, (1886).

IN PERSONAM vs. IN REM

The Mansaray-Ruffin court further opined "the general rule is that liens passed through bankruptcy unaffected. A bankruptcy discharge extinguishes only "in personam" claims against the Debtor, but generally has no effect on an "in rem" claim against the Debtor's property. For a Debtor to extinguish or modify a lien during the bankruptcy process, some affirmative step must be taken towards that end. Unless the Debtor takes appropriate affirmative action to avoid a security interest in property of the estate, that property will remain subject to the security interest following confirmation. In Re: Cen-Pen Corp. v. Hanson, 58 F.3d 89 (4TH cir. 1995).

While Bankruptcy Rule 4003 (d) allows **judicial lien avoidance** by motion, since it deals with a Debtor's claim to exemptions and is a judicial lien rather than a consensual lien. However, Bankruptcy Rule 7001 (2) requires that **consensual liens** such as a mortgage can only be avoided by adversary proceeding, noting that proper notification, via a complaint and summons, is required so that a lien holder may be a apprised of such avoidance action as it affects the lien status. "We can not defer to a Chapter 13 Confirmation Order on Res Judicata grounds if it would result in a denial of due process in violation of the 5th Amendment of the United States Constitution". In re Linkous, 990 F.2d 160, "4th Cir. (1993). Thus, the Mansaray-Ruffin court opined that the basic fundamental notions of procedural due process can not lead to a situation where a creditor/claimant, who has had no sufficient notice of a bankruptcy proceeding or reorganization can not and should not have their claim extinguished in a "settlement thereto". Further, the fact that a creditor possessed actual knowledge of a pending bankruptcy proceeding in which its rights may be affected does not substitute the requirement that an adversary proceeding be conducted with a complaint and summons served upon the creditor, thus providing sufficient knowledge and the due process requirement.

Similar due process arguments have been made in other circuit court opinions regarding controversial tactics used by Chapter 13 Debtors dealing with their student loans. Where some Debtors have attempted to have either the entire amount or a portion of their student loans discharged by providing for such treatment in their Chapter 13 Plan and then later arguing, after discharge, that the proper serving of the Plan on the student loan creditor was sufficient notice to the creditor and that the

ensuing discharge is a binding determination by the bankruptcy court that said student loan had in fact been "discharged by declaration". However, the Court in In re Banks, 299 F.3d 296 (4th Cir. 2002) held that "the Debtor's failure to initiate an Adversary Proceeding, complete with complaint, summons, and service of process required by rules 7003 and 7004 overrode § 1327's finality provision. The court explained, we agree a bankruptcy court confirmation order generally is afforded a preclusive effect but we can not defer to such an order if it would result in a denial of due process in violation of the 5th Amendment to the United States Constitution."

Within the Massachusetts jurisdiction, in a recent case decided by Judge Feeney, In re Pelosi, 382 T. R. 582, decided on February 21, 2008, Judge Feeney held that in seeking to avoid a wholly unsecured lien, the Court held that a **motion** was the proper pleading and that a majority of courts have addressed this issue and concluded that avoidance can be accomplished through a Chapter 13 Plan or by motion. See also In re Yekel, No. 305L47107-TMB13, 2006 WL 2662849, *3 (Bankr. D. Or. Sept. 14, 2006).

In the Mansaray-Ruffin case, the dissenting opinion noted that even though the rules of Bankruptcy procedure had been violated, in that the plaintiff did not seek to avoid the lien through an adversary proceeding process, the dissenters felt that due process had been met given the proper notice of the Chapter 13 Plan of Reorganization and motions served on the creditor.

Thus, the careful Chapter 13 practitioner should carefully analyze the issue at hand. Are we attempting to avoid a junior mortgage because there is no value of collateral or are we seeking to rescind a mortgage alleging that it is statutorily defective? Regarding the

former, the practitioner may proceed by motion, however, regarding the latter, Federal Bankruptcy Rule 7001 (2) requires an adversary proceeding complete with a complaint and service by summons.

PRACTICAL TIPS FOR AN EFFECTIVE PRACTICE

In order to avoid future problems regarding your client, title to the subject property and future complications at the Registry of Deeds, some simple rules to follow should eliminate these particular problems.

1. Accepting that wholly unsecured mortgages may be avoided by motion, the attorney should be particularly careful regarding the parties to be served. When dealing with corporations, local rules require that the president and or treasurer of the corporation receive notice of the motion to avoid lien.
2. In order to overcome any later challenges to the validity of service, the careful practitioner should serve all interested parties by certified mail, return receipt requested. This will provide the file with adequate backup regarding an accusation of defective service.
3. Regarding the procedure with which to effectively avoid a wholly unsecured mortgage under 11 U.S.C. § 506 and 11 U.S.C. § 1322(b) (2), the practitioner should draft a plan that is "idiot proof". The plan should articulate in great detail the Debtor's intention to avoid the wholly unsecured mortgage in its entirety. The plan should articulate by book and page the recording information pertinent to the wholly unsecured mortgage that is being avoided. Further, verbiage to the effect that the successful completion of the Chapter 13 Plan and the entry of discharge regarding the Debtor will be sufficient to avoid the wholly unsecured mortgage. (See Example 1 included)

4. The careful practitioner should not create a plan or incorporate in its motion to avoid a wholly unsecured mortgage, language that would require the mortgagee to provide the recordable documents upon completion of the Chapter 13 Plan. In light of the current situation regarding mortgage lenders, the practitioner should avoid having to rely upon third parties for recordable documents at the conclusion of the case.
5. A better approach to this problem is to articulate clearly in the Chapter 13 Plan, and also request that the Chapter 13 Trustee incorporate appropriate language into the confirmation order, verbiage to the effect that the successful completion of the Chapter 13 Plan and the entry of a discharge, along with a clerk's certificate attesting to the same, shall be sufficient for recording at the Registry of Deeds. (See example 2 included)

MODIFYING MORTGAGES

A homestead mortgage in a single family residence, secured only by the single family residence, is not a modifiable mortgage under § 1322 (b) (2). However, if the homestead mortgage entails other collateral, with real value, this will be enough to remove the protections of 11 U.S.C. § 1322 (b) (2). Homestead mortgages on multiunit buildings in which the Debtor has a residence are also modifiable mortgages not subject to the protection of 11 U.S.C. § 1322(b) (2). Topically, junior mortgages without real collateral are not subject to the protections of § 1322 (b) (2) and are able to be avoided in their entirety. The theory being that a mortgage must have "some security interest" in order to defeat the status of a wholly unsecured mortgage. One of the leading cases in this jurisdiction, and a case containing a well written analysis of mortgage modification pursuant to 11 U.S.C. § 1322 (b) (2) is Judge Boroff's decision, written for the Bankruptcy Appellate Panel, in the case of In re Mann, 249 B.R. 831 (1st Cir. BAP 2000). Indeed, Judge Feeney in the Pelosi case decided on February 21, 2008, In Re Pelosi, 382 B.R. 582 (2008) referred to the Mann case as most illustrative regarding the issue of 11 U.S.C. § 1322 (b) (2) and 11 U.S.C. § 506(a). In the Pelosi decision, quoting from the Mann case, Judge Feeney writes:

"We agree with the Third and Fifth Circuit Courts Appeals, the Ninth Circuit Bankruptcy Appellate Panel, and the several bankruptcy and districts [sic] courts making up the majority view. Pursuant to § 506(a) and § 1322(b) (2), and notwithstanding the

antimodification provision in the latter, Chapter 13 plans may void residential real property liens that are wholly unsecured. We believe that a literal reading of § 1322(b) (2) and § 506(a) mandates this result and that our view is congruent with the Nobelman decision which relegated the role of the antimodification provision of § 1322 (b) (2) to claims first made subject to § 506(a) treatment. We decline to read Nobelman as mandating better rights for unsecured creditors holding a document purporting to be residential real property mortgage than for unsecured creditors without. We find unwarranted the argument that the burden of asset appraisal or the risk of bankruptcy abuse are beyond a court's ability to carry out its responsibilities. Neither concern justifies elevating one group of unsecured creditors over another or denying to Debtors a remedy intended by Congress for Chapter 13 Debtors.
Any interpretation of the Bankruptcy Code which relies on a suspension of reality deserves to be subjected to a significant level of skepticism. Here, the bankruptcy judge was unable to find any collateral value for the Bank's mortgage lien. Accordingly, he ruled that the Bank enjoyed only the rights of a holder of an unsecured claim. Our reading of the Bankruptcy Code supports the bankruptcy judge's ruling. And we do not believe that the Congress intended otherwise."
In re Mann, 249 B.R. 831 (1st Cir. BAP 2000)

Again, quoting from Judge Feeney in Pelosi …, "Since the decision in Mann, the Second, Sixth, Ninth and Eleventh Circuits have joined the Third and Fifth Circuits and the Ninth Circuit Bankruptcy Appellate Panel in adopting the majority position. See Zimmer v. PSB Lending Corp. (In re Zimmer), 313 F. 3d 1220 (9th Cir.2002);

Lane v. Western Interstate Bancorp (In re Lane) 280 F. 3d 663 (6th Cir. 2002); Pond v. Farm Specialist Realty (In re Pond), 252 F.3d 122 (2nd Circuit. 2001) Tanner v. FirstPlus. Inc. (In, re Tanner), 217 F. 3d 1357 (11th Cir. 2000). But see Am. Gen. Fin., Inc. v. Dickerson (In re Dickerson), 222 F.3d 924, 926 (11th Cir. 2000) (following Tanner because the panel bound by it but stating: "[W] ere we to decide this issue on a clean slate, we would not so hold."). Moreover, the United States Court of Appeals for the First Circuit, in dicta cited Mann with approval in Eastern Savings Bank v. LaFata (In re La Fata), 483 F. 3d 13(1st Cir. 2007), a case in which the issue was "whether the bankruptcy Code's protection of mortgage lenders against modification of claims secured by a principal residence applies when the residence in fact lies mostly on a lot abutting the mortgaged property. "Id. At 15. The case arose out of a "bizarre set of facts," namely that the Debtor, and his current spouse "mistakenly built a house on the property line between two lots owned by the Debtor's ex wife, a fact which was not discovered until after a mortgage on the lot believed to include the house had already been granted."

PROCEDURE

The prevailing practice in Massachusetts is to require the Debtor to file a motion pursuant to 11 U.S.C. § 506 to determine the value of the real estate. After determination by the court as to the present value of the real estate, with the subsequent determination that the junior mortgage is, in fact, wholly unsecured, the Debtor may then treat the junior mortgage as an unsecured creditor in the Chapter 13 Plan. If, after the 506 value determination made by the court, it is concluded that the junior mortgage is partially unsecured but not wholly unsecured, the provisions of 11 U.S.C. § 1325 (a)

(5) (B) (iii) (I) shall apply requiring the Debtor to pay the entire secured portion of the claim in equal monthly installments over the life of the plan, assuming that the collateral is of a nature that is modifiable under § 1322 (b) (2), i.e., multi-unit or cross collateralized, etc. This section does not permit the use of balloon payments at the conclusion of the plan, however, a single balloon payment may possibly be viewed as a single equal payment.

INTEREST RATE MODIFICATION

Again, the modification of a secured claim's interest rate can not be achieved in a case where the claim is secured only by a security interests in the Debtor's principal residence. However, should a secured claim be determined to be modifiable pursuant to 11 U.S.C. § 1322(b) (2), then certain guidelines will allow the modification of the interest rate. Where the interest rate is modifiable pursuant to 11 U.S.C § 1322(b) (2) than such modification must be "reasonable and fair". See, In re Carman, Case No. 07-44271-JBR (Bankr. Mass. 7/25/2008)

Generally, an interest rate modification should be done through the use of a formula. Such formula should take into account, the risk factor added to the prime rate. the burden of showing the appropriate risk factor falls upon a creditor. See, Till v. SCS Credit Corp., 541 U.S. 465 (2004).

LOOKING INTO THE FUTURE

THE DEATH OF DEWSNUP

Presently, the United States finds itself in the deepest recession since World War II. Of the leading contributors to this recession, none exceeds the dilemma caused by the subprime mortgage disaster. As the mortgage defaults rose steadily through late 2006

and 2007, the mortgage meltdown became a self fulfilling formula. The mortgage defaults that occurred led to even more mortgage foreclosures which in turn led to a steep diminution in the value of real estate throughout the country. The declining values of real estate caused even more people to abandon real estate that was "underwater". As Congress wrestles with different ideas and remedies and a new administration readies itself for the presidential office in January of 2009, some experts indicate that a change in the Bankruptcy Code may be appropriate. Specifically, Congress would give the authority to bankruptcy judges to conduct valuation hearings in an effort to determine the true secured status of a homestead mortgage on a single family residence. Up until now, the decision in In re Dewsnup v. Timm, 502 U.S. 410, (1992) has prevented any tinkering with the first mortgage market as it pertains to a single family residence. The theory, as cited in Mann, "the creditor's rights, enforceable under state law and bargained for by the mortgagor and the mortgagee, were those which Congress chose to protect." It is the sanctity of the first mortgage market that makes such a proposition so difficult. Generally, it is felt that in order for americans to finance the purchase of homes, there must be a constancy and dependability for those institutions that invest in these mortgage securities. To allow bankruptcy courts to modify the "value" of these mortgages is a most complex and difficult problem, However, given the depth and difficulties of the present financial crisis in the United States a new administration may just craft just such a solution.

EXAMPLE 1

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF
MASSACHUSETTS

CHAPTER 13 PLAN

DOCKET #08-00000-JNF

Debtor: **David Debtor** **SS # xxx-xx-1234**

TERM OF THE PLAN: **SIXTY (60)** Months

MONTHLY PLAN PAYMENT: $333.00

I. **SECURED CLAIMS:**

A. CLAIMS TO BE PAID THROUGH THE PLAN (INCLUDING ARREARS):

Creditor	Description of claim (pre-petition arrears, purchase money, etc.)	Amount of claim
NONE		NONE
Total of secured claims to be paid through the Plan		NONE

B. CLAIMS TO BE PAID DIRECTLY TO CREDITORS (Not through Plan):

Creditor	Description of claim
Bank of America	Regular monthly post-petition mortgage payments on a first mortgage on the debtor's residence at Unit 31-1 Beacon Hill Condominium, 31 Beacon Street, Boston, MA 02110
Beacon Hill Condo Trust	Regular monthly post petition condominium common area payments for Unit 31-1, Beacon Hill Condominium, 31 Beacon Street, Boston, MA. 02110

II. PRIORITY CLAIMS

Creditor	Description of claim	Amount of claim
NONE		NONE
Total of priority claims to be paid through the Plan		NONE

III. ADMINISTRATIVE CLAIMS

A.	Attorney fees (to be paid through the Plan)	$ 1,500.00
B.	Miscellaneous fees:	NONE

C. The Chapter 13 Trustee's fee is determined by order of the United States Attorney General. The calculation of the Plan payment set forth below utilizes a 10% trustee's commission. In the event that the trustee's commission is less than 10%, the additional funds collected by the trustee shall be disbursed to unsecured creditors up to 100% of the allowed claims.

IV. UNSECURED CLAIMS

The general unsecured creditors shall receive a dividend of 30% of their claims.

A.	General unsecured claims:	$ 20,530.00
B.	Undersecured claims arising after lien avoidance/cramdown:	
	Household Finance Corporation II	$ 23,865.25
	CitiFinancial Services, Inc.	$ 8,700.00
Total of A + B general unsecured claims:		$ 53,095.25
C.	Total allocated for unsecured/undersecured claims	$ 15,928.58
D.	Separately classified unsecured claims :	NONE

V. OTHER PROVISIONS

A. Liquidation of assets to be used to fund Plan: NOT APPLICABLE
B. Modification of Secured Claims:

CLAIM DUE HOUSEHOLD FINANCE CORPORATION II

The debtor's residence located at Unit 31-1 Beacon Hill Condominium, 31 Beacon Street, Boston, MA 02110 ("debtor's residence") has a present value of $150,000.00. The debtor's residence is subject to a first mortgage to Bank of America ("BOA"). The balance due BOA as of the date of the filing of the petition for relief was $155,675.25. Household Finance Corporation II ("HFC") is the holder of a second mortgage in the face amount of $25,000.00 that was recorded with the Suffolk Registry of Deeds on September 5, 2006 in Book 29715, Page 185. The amount due HFC at the time of the filing of the petition for relief was $23,865.25

Pursuant to 11 USC §1322(b)(2) this plan provides to modify the claim due HFC and treat such claim as an unsecured claim in its entirety.

The Order of Discharge to be entered in this case under 11 USC§1328(a) shall constitute a discharge of the mortgage held by HFC and described hereinabove.

CLAIM DUE CITIFINANCIAL SERVICES, INC.

CitiFinancial Services, Inc. is the holder of a judicial lien on the debtor's residence by virtue of an attachment recorded on May 22, 2008 in Book 36511, Page 203 and a levy recorded on August 7, 2008 in Book 37352, Page 71. The amount due CitiFinancial Services, Inc. ("CitiFinancial") is $8,700.00.

The debtor has claimed exemptions under 11 USC§ 522(b) (2). Prior to the filing of the petition for relief the debtor filed a Homestead Declaration with the Suffolk Registry of Deeds in Book 29715, Page 205. The debtor has claimed an exemption under Massachusetts General Laws, Chapter 188, Section 1 in the amount of $500,000.00. As there is less than $500,000.00 in equity behind BOA's first mortgage and HFC's second mortgage with an aggregate balance at the time of the filing of the petition for relief of $179,540.50 by virtue of 11 USC §522(f) and the application of the formula set forth in 11 USC § 522 (f)(2)(A) the judicial liens can be wholly avoid as it fully impairs the exemption claimed by the debtor under the Massachusetts General Laws, Chapter 188, Section 1.

Pursuant to 11 USC §1322(b)(2) this plan provides to modify the secured claim held by CitiFinancial and treats such claim as an unsecured claim in its entirety.

The Order of Discharge to be issued in this case under 11 USC§1328(a) shall constitute a discharge of the judicial liens held by CitiFinancial and described hereinabove..

C. Miscellaneous provisions:

MONTHLY MORTGAGE STATEMENTS

Bank of America ("BOA") is the holder or the servicing agent for the present holder of a first mortgage on the debtor's residence at Condominium Unit 31-1, Beacon Hill Condominium,31 Beacon Street, Boston, MA 02110. The first mortgage is dated December 30, 2004 and is recorded with the Suffolk Registry of Deeds in Book 23283, Page 96. The debtor is not delinquent on this mortgage. This plan specifically mandates that BOA shall submit regular monthly post-petition payment invoices directly to the debtor. The debtor hereby waives any claim that the submission of monthly post-petition invoices constitute a violation of 11 USC § 362. The debtor requests that the confirmation order to be issued in this case contain a provision requiring BOA (or any party that may hereinafter be a holder or servicer of such mortgage) to submit regular monthly post-petition invoices to the debtor.

VI. CALCULATION OF PLAN PAYMENT

A.	Secured claims	$ NONE
B.	Priority claims	$ NONE
C.	Administrative claims	$ 1,500.00
D.	General unsecured claims	$ 15,928.58
E.	Separately classified unsecured claims	$ NONE
F.	To be disbursed by Trustee to claimants above	$ 17,428..58
G.	Total cost of Plan including Trustee's fee	$ 19,365.09
	(This represents the total amount to be paid into the Chapter 13 Plan)	
H.	Term of Plan SIXTY (60) months	

I. AMOUNT OF MONTHLY PAYMENT $333.00

LIQUIDATION ANALYSIS

I.	Real Estate:	Fair Market Value	Recorded Liens (Schedule D)
	Condo Unit 31-1 Beacon Hill Condo 31 Beacon Street Boston, MA 02110	$ 150,000.00	$188,240.50*

* This amount includes the claims due HFC and CitiFinancial.

TOTAL Net Equity for Real Property:	$ NONE
Less Exemptions (Schedule C):	$ 500,000.00
Available Chapter 7:	$ NONE

II. Automobile (Describe year, make and model): NONE

III. All Other Assets (All remaining items on Schedule B: (itemize as necessary)

Total value of all other assets on Schedule B:

Value:	$4,450.00
Less Exemptions (Schedule C):	$4,450.00
Available Chapter 7:	$ NONE

SUMMARY (total amount available under Chapter 7):

Net Equity (I and II) Plus Other Assets (III) less all claimed exemption: $ NONE

Dated this 15th day of November, 2008.

Joseph P. Foley, Esq.
Counsel for the debtor
98 North Washington St.
Boston, MA. 02114
(617) 437-7774
jfoley@conversent.net (e-mail)

I, David Debtor, hereby acknowledge that the statements contained in the foregoing chapter 13 plan are true, accurate, and correct.

Signed under the pains and penalties of perjury this 15th day of November, 2008.

David Debtor
Unit 31-1 Beacon Hill Condominium
31 Beacon Street
Boston, MA 02110

EXAMPLE 2

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF
MASSACHUSETTS

**********	CHAPTER 13 CASE
In Re: *	NO. 08-00000-JNF
DAVID DEBTOR *	**CLERK'S**
*	**CERTIFICATE**
Debtor *	
**********	

I, James M. Lynch, Clerk at the United States Bankruptcy Court for the District of Massachusetts, hereby certify as follows:

1. On November 1, 2008 the debtor, David Debtor (hereinafter referred to as the "debtor") of 31 Beacon Street, Boston, MA 02110 filed a petition for relief under Chapter 13 of the Bankruptcy Code (Title 11 of the United States Code and hereinafter referred to as the "Code").

2. Pursuant to Section 521 of the Code, the debtor filed Schedules of Assets and Liabilities and a Statement of Affairs.

3. The debtor listed on the Schedule of Asset filed with the United States Bankruptcy Court an interest in real estate located at Condominium Unit 31-1 Beacon Hill Condominium, 31 Beacon Street, Boston, MA 02110 (the "debtor's residence").

4. Pursuant to Section 1321 of the Code, the debtor filed a plan (docket entry #10).

Mail to: David Debtor
31 Beacon Street
Boston, MA 02110

5. The plan was confirmed in accordance with Section 1325 of the Code on January 11, 2009 (docket entry #18). The plan specifically provides, in part,

(i) **to modify the claim of Household Finance Corporation II ("HFC") secured by a mortgage recorded in the Suffolk Registry of Deeds on September 5, 2006 in Book 29715, Page 185 pursuant to 11 USC§ 1322(b)(2) and to treat such claim as an unsecured claim in its entirety.**

The Order of Discharge to be entered in this case under 11 USC§1328(a) shall constitute a discharge of the Mortgage held by HFC and described hereinabove.

(ii) **to modify the claim of CitiFinancial Services, Inc. ("CitiFinancial") secured by judicial liens recorded in the Suffolk Registry of Deeds on May 22, 2008 in Book 36511, Page 203 and on August 7, 2008 in Book 37352, Page 71 pursuant to 11 USC§1322(b)(2) and 11 USC§522(f) and to treat such claim as an unsecured claim in its entirety.**

The Order of Discharge to be issued in this case under 11 USC§1328(a) shall constitute a discharge of the judicial liens held by CitiFinancial and described hereinabove.

6. The debtor completed all payments under the plan and on May 19, 2014, the Chapter 13 Trustee filed a Report and Accounting indicating that the debtor had completed payments on the plan and requesting the entry of an Order of Discharge pursuant to Section 1328(a) of the Code (docket entry #25).

7. On May 21, 2014 an Order of Discharge under Section 1328(a) of the Code was issued (docket entry #26). A certified copy of the Order of Discharge is attached hereto.

Dated at Boston, MA this day of June, 2014.

James M. Lynch, Clerk
By: Mary Murray, Deputy Clerk
U.S. Bankruptcy Court
District of Massachusetts
1101 Thomas P. O'Neill, Jr. FOB
10 Causeway Street
Boston, MA 02222

B22C Form

B22C (Official Form 22C) (Chapter 13) (01/08)

In re: _____ Debtor(s)

Case Number: _____ (If known)

According to the calculations required by this statement:
- ☐ **The applicable commitment period is 3 years.**
- ☐ **The applicable commitment period is 5 years.**
- ☐ **Disposable income is determined under § 1325(b)(3).**
- ☐ **Disposable income is not determined under § 1325(b)(3).**

(Check the boxes as directed in Lines 17 and 23 of this statement.)

CHAPTER 13 STATEMENT OF CURRENT MONTHLY INCOME AND CALCULATION OF COMMITMENT PERIOD AND DISPOSABLE INCOME

In addition to Schedules I and J, this statement must be completed by every individual Chapter 13 debtor, whether or not filing jointly. Joint debtors may complete one statement only.

Part I. REPORT OF INCOME

		Column A Debtor's Income	Column B Spouse's Income
1	**Marital/filing status.** Check the box that applies and complete the balance of this part of this statement as directed. a. ☐ Unmarried. **Complete only Column A ("Debtor's Income") for Lines 2-10.** b. ☐ Married. **Complete both Column A ("Debtor's Income") and Column B ("Spouse's Income") for Lines 2-10.** All figures must reflect average monthly income received from all sources, derived during the six calendar months prior to filing the bankruptcy case, ending on the last day of the month before the filing. If the amount of monthly income varied during the six months, you must divide the six-month total by six, and enter the result on the appropriate line.		
2	**Gross wages, salary, tips, bonuses, overtime, commissions.**	$	$
3	**Income from the operation of a business, profession, or farm.** Subtract Line b from Line a and enter the difference in the appropriate column(s) of Line 3. If you operate more than one business, profession or farm, enter aggregate numbers and provide details on an attachment. Do not enter a number less than zero. **Do not include any part of the business expenses entered on Line b as a deduction in Part IV.** a. Gross receipts $ b. Ordinary and necessary operating expenses $ c. Business income — Subtract Line b from Line a	$	$
4	**Rent and other real property income.** Subtract Line b from Line a and enter the difference in the appropriate column(s) of Line 4. Do not enter a number less than zero. **Do not include any part of the operating expenses entered on Line b as a deduction in Part IV.** a. Gross receipts $ b. Ordinary and necessary operating expenses $ c. Rent and other real property income — Subtract Line b from Line a	$	$
5	**Interest, dividends, and royalties.**	$	$
6	**Pension and retirement income.**	$	$
7	**Any amounts paid by another person or entity, on a regular basis, for the household expenses of the debtor or the debtor's dependents, including child support paid for that purpose.** Do not include alimony or separate maintenance payments or amounts paid by the debtor's spouse.	$	$

8	**Unemployment compensation.** Enter the amount in the appropriate column(s) of Line 8. However, if you contend that unemployment compensation received by you or your spouse was a benefit under the Social Security Act, do not list the amount of such compensation in Column A or B, but instead state the amount in the space below: Unemployment compensation claimed to be a benefit under the Social Security Act — Debtor $ _____ — Spouse $ _____	$	$
9	**Income from all other sources.** Specify source and amount. If necessary, list additional sources on a separate page. Total and enter on Line 9. **Do not include alimony or separate maintenance payments paid by your spouse, but include all other payments of alimony or separate maintenance.** Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, crime against humanity, or as a victim of international or domestic terrorism. a. $ b. $	$	$
10	**Subtotal.** Add Lines 2 thru 9 in Column A, and, if Column B is completed, add Lines 2 through 9 in Column B. Enter the total(s).	$	$
11	**Total.** If Column B has been completed, add Line 10, Column A to Line 10, Column B, and enter the total. If Column B has not been completed, enter the amount from Line 10, Column A.	$	

Part II. CALCULATION OF § 1325(b)(4) COMMITMENT PERIOD

12	**Enter the amount from Line 11.**	$
13	**Marital Adjustment.** If you are married, but are not filing jointly with your spouse, AND if you contend that calculation of the commitment period under § 1325(b)(4) does not require inclusion of the income of your spouse, enter the amount of the income listed in Line 10, Column B that was NOT paid on a regular basis for the household expenses of you or your dependents. Otherwise, enter zero. a. $ b. $ c. $ Total and enter on Line 13.	$
14	**Subtract Line 13 from Line 12 and enter the result.**	$
15	**Annualized current monthly income for § 1325(b)(4).** Multiply the amount from Line 14 by the number 12 and enter the result.	$
16	**Applicable median family income.** Enter the median family income for the applicable state and household size. (This information is available by family size at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) a. Enter debtor's state of residence: _____ b. Enter debtor's household size: ____	$
17	**Application of § 1325(b)(4).** Check the applicable box and proceed as directed. ☐ **The amount on Line 15 is less than the amount on Line 16.** Check the box for "The applicable commitment period is 3 years" at the top of page 1 of this statement and continue with this statement. ☐ **The amount on Line 15 is not less than the amount on Line 16.** Check the box for "The applicable commitment period is 5 years" at the top of page 1 of this statement and continue with this statement.	

Part III. APPLICATION OF § 1325(b)(3) FOR DETERMINING DISPOSABLE INCOME

18	**Enter the amount from Line 11.**	$

B22C (Official Form 22C) (Chapter 13) (01/08)

19	**Marital adjustment.** If you are married, but are not filing jointly with your spouse, enter on Line 19 the total of any income listed in Line 10, Column B that was NOT paid on a regular basis for the household expenses of the debtor or the debtor's dependents. Specify in the lines below the basis for excluding the Column B income (such as payment of the spouse's tax liability or the spouse's support of persons other than the debtor or the debtor's dependents) and the amount of income devoted to each purpose. If necessary, list additional adjustments on a separate page. If the conditions for entering this adjustment do not apply, enter zero. a. $ ____ b. $ ____ c. $ ____ Total and enter on Line 19.	$
20	**Current monthly income for § 1325(b)(3).** Subtract Line 19 from Line 18 and enter the result.	$
21	**Annualized current monthly income for § 1325(b)(3).** Multiply the amount from Line 20 by the number 12 and enter the result.	$
22	**Applicable median family income.** Enter the amount from Line 16.	$
23	**Application of § 1325(b)(3).** Check the applicable box and proceed as directed. ☐ **The amount on Line 21 is more than the amount on Line 22.** Check the box for "Disposable income is determined under § 1325(b)(3)" at the top of page 1 of this statement and complete the remaining parts of this statement. ☐ **The amount on Line 21 is not more than the amount on Line 22.** Check the box for "Disposable income is not determined under § 1325(b)(3)" at the top of page 1 of this statement and complete Part VII of this statement. **Do not complete Parts IV, V, or VI.**	

Part IV. CALCULATION OF DEDUCTIONS ALLOWED UNDER § 707(b)(2)

Subpart A: Deductions under Standards of the Internal Revenue Service (IRS)

24A	**National Standards: food, apparel and services, housekeeping supplies, personal care, and miscellaneous.** Enter in Line 24A the "Total" amount from IRS National Standards for Allowable Living Expenses for the applicable household size. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	$
24B	**National Standards: health care.** Enter in Line a1 below the amount from IRS National Standards for Out-of-Pocket Health Care for persons under 65 years of age, and in Line a2 the IRS National Standards for Out-of-Pocket Health Care for persons 65 years of age or older. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) Enter in Line b1 the number of members of your household who are under 65 years of age, and enter in Line b2 the number of members of your household who are 65 years of age or older. (The total number of household members must be the same as the number stated in Line 16b.) Multiply Line a1 by Line b1 to obtain a total amount for household members under 65, and enter the result in Line c1. Multiply Line a2 by Line b2 to obtain a total amount for household members 65 and older, and enter the result in Line c2. Add Lines c1 and c2 to obtain a total health care amount, and enter the result in Line 24B. **Household members under 65 years of age** a1. Allowance per member ____ b1. Number of members ____ c1. Subtotal ____ **Household members 65 years of age or older** a2. Allowance per member ____ b2. Number of members ____ c2. Subtotal ____	$
25A	**Local Standards: housing and utilities; non-mortgage expenses.** Enter the amount of the IRS Housing and Utilities Standards; non-mortgage expenses for the applicable county and household size. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court).	$

25B — **Local Standards: housing and utilities; mortgage/rent expense.** Enter, in Line a below, the amount of the IRS Housing and Utilities Standards; mortgage/rent expense for your county and household size (this information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter on Line b the total of the Average Monthly Payments for any debts secured by your home, as stated in Line 47; subtract Line b from Line a and enter the result in Line 25B. **Do not enter an amount less than zero.**

a.	IRS Housing and Utilities Standards; mortgage/rental expense	$
b.	Average Monthly Payment for any debts secured by your home, if any, as stated in Line 47	$
c.	Net mortgage/rental expense	Subtract Line b from Line a

$

26 — **Local Standards: housing and utilities; adjustment.** If you contend that the process set out in Lines 25A and 25B does not accurately compute the allowance to which you are entitled under the IRS Housing and Utilities Standards, enter any additional amount to which you contend you are entitled, and state the basis for your contention in the space below:

$

27A — **Local Standards: transportation; vehicle operation/public transportation expense.** You are entitled to an expense allowance in this category regardless of whether you pay the expenses of operating a vehicle and regardless of whether you use public transportation.

Check the number of vehicles for which you pay the operating expenses or for which the operating expenses are included as a contribution to your household expenses in Line 7.

☐ 0 ☐ 1 ☐ 2 or more.

If you checked 0, enter on Line 27A the "Public Transportation" amount from IRS Local Standards: Transportation. If you checked 1 or 2 or more, enter on Line 27A the "Operating Costs" amount from IRS Local Standards: Transportation for the applicable number of vehicles in the applicable Metropolitan Statistical Area or Census Region. (These amounts are available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)

$

27B — **Local Standards: transportation; additional public transportation expense.** If you pay the operating expenses for a vehicle and also use public transportation, and you contend that you are entitled to an additional deduction for your public transportation expenses, enter on Line 27B the "Public Transportation" amount from IRS Local Standards: Transportation. (This amount is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)

$

28 — **Local Standards: transportation ownership/lease expense; Vehicle 1.** Check the number of vehicles for which you claim an ownership/lease expense. (You may not claim an ownership/lease expense for more than two vehicles.)

☐ 1 ☐ 2 or more.

Enter, in Line a below, the "Ownership Costs" for "One Car" from the IRS Local Standards: Transportation (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 1, as stated in Line 47; subtract Line b from Line a and enter the result in Line 28. **Do not enter an amount less than zero.**

a.	IRS Transportation Standards, Ownership Costs	$
b.	Average Monthly Payment for any debts secured by Vehicle 1, as stated in Line 47	$
c.	Net ownership/lease expense for Vehicle 1	Subtract Line b from Line a

$

29	**Local Standards: transportation ownership/lease expense; Vehicle 2.** Complete this Line only if you checked the "2 or more" Box in Line 28. Enter, in Line a below, the "Ownership Costs" for "One Car" from the IRS Local Standards: Transportation (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 2, as stated in Line 47; subtract Line b from Line a and enter the result in Line 29. **Do not enter an amount less than zero.** a. IRS Transportation Standards, Ownership Costs — $ b. Average Monthly Payment for any debts secured by Vehicle 2, as stated in Line 47 — $ c. Net ownership/lease expense for Vehicle 2 — Subtract Line b from Line a	$
30	**Other Necessary Expenses: taxes.** Enter the total average monthly expense that you actually incur for all federal, state, and local taxes, other than real estate and sales taxes, such as income taxes, self-employment taxes, social-security taxes, and Medicare taxes. **Do not include real estate or sales taxes.**	$
31	**Other Necessary Expenses: involuntary deductions for employment.** Enter the total average monthly deductions that are required for your employment, such as mandatory retirement contributions, union dues, and uniform costs. **Do not include discretionary amounts, such as voluntary 401(k) contributions.**	$
32	**Other Necessary Expenses: life insurance.** Enter total average monthly premiums that you actually pay for term life insurance for yourself. **Do not include premiums for insurance on your dependents, for whole life or for any other form of insurance.**	$
33	**Other Necessary Expenses: court-ordered payments.** Enter the total monthly amount that you are required to pay pursuant to the order of a court or administrative agency, such as spousal or child support payments. **Do not include payments on past due obligations included in Line 49.**	$
34	**Other Necessary Expenses: education for employment or for a physically or mentally challenged child.** Enter the total average monthly amount that you actually expend for education that is a condition of employment and for education that is required for a physically or mentally challenged dependent child for whom no public education providing similar services is available.	$
35	**Other Necessary Expenses: childcare.** Enter the total average monthly amount that you actually expend on childcare—such as baby-sitting, day care, nursery and preschool. **Do not include other educational payments.**	$
36	**Other Necessary Expenses: health care.** Enter the total average monthly amount that you actually expend on health care that is required for the health and welfare of yourself or your dependents, that is not reimbursed by insurance or paid by a health savings account, and that is in excess of the amount entered in Line 24B. **Do not include payments for health insurance or health savings accounts listed in Line 39.**	$
37	**Other Necessary Expenses: telecommunication services.** Enter the total average monthly amount that you actually pay for telecommunication services other than your basic home telephone and cell phone service—such as pagers, call waiting, caller id, special long distance, or internet service—to the extent necessary for your health and welfare or that of your dependents. **Do not include any amount previously deducted.**	$
38	**Total Expenses Allowed under IRS Standards.** Enter the total of Lines 24 through 37.	$

Subpart B: Additional Expense Deductions under § 707(b) Note: Do not include any expenses that you have listed in Lines 24-37		
39	**Health Insurance, Disability Insurance, and Health Savings Account Expenses.** List the monthly expenses in the categories set out in lines a-c below that are reasonably necessary for yourself, your spouse, or your dependents. a. Health Insurance $ b. Disability Insurance $ c. Health Savings Account $ Total and enter on Line 39 **If you do not actually expend this total amount,** state your actual total average monthly expenditures in the space below: $ _____	$
40	**Continued contributions to the care of household or family members.** Enter the total average actual monthly expenses that you will continue to pay for the reasonable and necessary care and support of an elderly, chronically ill, or disabled member of your household or member of your immediate family who is unable to pay for such expenses. **Do not include payments listed in Line 34.**	$
41	**Protection against family violence.** Enter the total average reasonably necessary monthly expenses that you actually incur to maintain the safety of your family under the Family Violence Prevention and Services Act or other applicable federal law. The nature of these expenses is required to be kept confidential by the court.	$
42	**Home energy costs.** Enter the total average monthly amount, in excess of the allowance specified by IRS Local Standards for Housing and Utilities, that you actually expend for home energy costs. **You must provide your case trustee with documentation of your actual expenses, and you must demonstrate that the additional amount claimed is reasonable and necessary.**	$
43	**Education expenses for dependent children under 18.** Enter the total average monthly expenses that you actually incur, not to exceed $137.50 per child, for attendance at a private or public elementary or secondary school by your dependent children less than 18 years of age. **You must provide your case trustee with documentation of your actual expenses, and you must explain why the amount claimed is reasonable and necessary and not already accounted for in the IRS Standards.**	$
44	**Additional food and clothing expense.** Enter the total average monthly amount by which your food and clothing expenses exceed the combined allowances for food and clothing (apparel and services) in the IRS National Standards, not to exceed 5% of those combined allowances. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) **You must demonstrate that the additional amount claimed is reasonable and necessary.**	$
45	**Charitable contributions.** Enter the amount reasonably necessary for you to expend each month on charitable contributions in the form of cash or financial instruments to a charitable organization as defined in 26 U.S.C. § 170(c)(1)-(2). **Do not include any amount in excess of 15% of your gross monthly income.**	$
46	**Total Additional Expense Deductions under § 707(b).** Enter the total of Lines 39 through 45.	$

B22C (Official Form 22C) (Chapter 13) (01/08)

Subpart C: Deductions for Debt Payment

47 **Future payments on secured claims.** For each of your debts that is secured by an interest in property that you own, list the name of the creditor, identify the property securing the debt, state the Average Monthly Payment, and check whether the payment includes taxes or insurance. The Average Monthly Payment is the total of all amounts scheduled as contractually due to each Secured Creditor in the 60 months following the filing of the bankruptcy case, divided by 60. If necessary, list additional entries on a separate page. Enter the total of the Average Monthly Payments on Line 47.

	Name of Creditor	Property Securing the Debt	Average Monthly Payment	Does payment include taxes or insurance?
a.			$	☐ yes ☐ no
b.			$	☐ yes ☐ no
c.			$	☐ yes ☐ no
		Total: Add lines a, b and c.		

$

48 **Other payments on secured claims.** If any of debts listed in Line 47 are secured by your primary residence, a motor vehicle, or other property necessary for your support or the support of your dependents, you may include in your deduction 1/60th of any amount (the "cure amount") that you must pay the creditor in addition to the payments listed in Line 47, in order to maintain possession of the property. The cure amount would include any sums in default that must be paid in order to avoid repossession or foreclosure. List and total any such amounts in the following chart. If necessary, list additional entries on a separate page.

	Name of Creditor	Property Securing the Debt	1/60th of the Cure Amount
a.			$
b.			$
c.			$
		Total: Add lines a, b and c.	

$

49 **Payments on prepetition priority claims.** Enter the total amount, divided by 60, of all priority claims, such as priority tax, child support and alimony claims, for which you were liable at the time of your bankruptcy filing. **Do not include current obligations, such as those set out in Line 33.** $

50 **Chapter 13 administrative expenses.** Multiply the amount in Line a by the amount in Line b, and enter the resulting administrative expense.

a.	Projected average monthly Chapter 13 plan payment.	$
b.	Current multiplier for your district as determined under schedules issued by the Executive Office for United States Trustees. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	X
c.	Average monthly administrative expense of Chapter 13 case	Total: Multiply Lines a and b

$

51 **Total Deductions for Debt Payment.** Enter the total of Lines 47 through 50. $

Subpart D: Total Deductions from Income

52 **Total of all deductions from income.** Enter the total of Lines 38, 46, and 51. $

Part V. DETERMINATION OF DISPOSABLE INCOME UNDER § 1325(b)(2)

53	**Total current monthly income.** Enter the amount from Line 20.	$
54	**Support income.** Enter the monthly average of any child support payments, foster care payments, or disability payments for a dependent child, reported in Part I, that you received in accordance with applicable nonbankruptcy law, to the extent reasonably necessary to be expended for such child.	$
55	**Qualified retirement deductions.** Enter the monthly total of (a) all amounts withheld by your employer from wages as contributions for qualified retirement plans, as specified in § 541(b)(7) and (b) all required repayments of loans from retirement plans, as specified in § 362(b)(19).	$
56	**Total of all deductions allowed under § 707(b)(2).** Enter the amount from Line 52.	$
57	**Deduction for special circumstances.** If there are special circumstances that justify additional expenses for which there is no reasonable alternative, describe the special circumstances and the resulting expenses in lines a-c below. If necessary, list additional entries on a separate page. Total the expenses and enter the total in Line 57. You must provide your case trustee with documentation of these expenses and you must provide a detailed explanation of the special circumstances that make such expenses necessary and reasonable.	

	Nature of special circumstances	Amount of expense
a.		$
b.		$
c.		$
	Total: Add Lines a, b, and c	$

58	**Total adjustments to determine disposable income.** Add the amounts on Lines 54, 55, 56, and 57 and enter the result.	$
59	**Monthly Disposable Income Under § 1325(b)(2).** Subtract Line 58 from Line 53 and enter the result.	$

Part VI. ADDITIONAL EXPENSE CLAIMS

60 **Other Expenses.** List and describe any monthly expenses, not otherwise stated in this form, that are required for the health and welfare of you and your family and that you contend should be an additional deduction from your current monthly income under § 707(b)(2)(A)(ii)(I). If necessary, list additional sources on a separate page. All figures should reflect your average monthly expense for each item. Total the expenses.

	Expense Description	Monthly Amount
a.		$
b.		$
c.		$
	Total: Add Lines a, b and c	$

Part VII. VERIFICATION

61 I declare under penalty of perjury that the information provided in this statement is true and correct. *(If this a joint case, both debtors must sign.)*

Date: _____ Signature: _____
(Debtor)

Date: _____ Signature: _____
(Joint Debtor, if any)

Chapter 13 Means Test Case Summaries

Carolyn A. Bankowski
Chapter 13 Trustee
Boston, Mass.

Nicholas F. Ortiz
Boston, Mass.

LOCAL CASES

In re Kibbe, 361 B.R. 302 (1st Cir. B.A.P. 2007)

In Kibbe, the debtor obtained a higher paying job just prior to the petition date under Chapter 13. Therefore, the debtor's current monthly income on the B22C was significantly lower than the income listed on Schedule I. The debtor proposed a chapter 13 plan on the current monthly income listed on the B22C as opposed to the income listed on Schedule I. The Chapter 13 Trustee objected to the Plan.

The Bankruptcy Appellate Panel held that the income component of projected disposable income is the anticipated actual income of the debtor, subject to the income exclusions, during the plan commitment period. Kibbe at 314. The court in Kibbe recognized that Congress excluded certain categories of income when it defined "disposable income". Therefore, the court determined that the following types of income are not to be included in the income determination under Chapter 13:

1. benefits received under the Social Security Act, payments to victims of war crimes or crimes against humanity and payments to victims of terrorism;

2. child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child.

As guidance for determining projected disposable income, the Court stated "in the event that a debtor's 'current monthly income' as set forth by Form B22C is substantially the same as the actual current income at the time of confirmation of the plan, less the Income Exclusions, the inquiry begins and ends with Form B22C. But where, as here, the 'current monthly income' amount is not true to the debtor's actual current income, courts should assume that Congress intended that they rely on what a debtor can realistically pay to creditors through his or her plan and not on any artificial measure." Kibbe at 312. The BAP further determined "rigid adherence to a debtor's prepetition income history would commonly produce results at odds with both congressional purpose and common sense. If a debtor's prepetition averaged income was significantly higher than the debtor's income at plan confirmation, statutory indifference to the change at confirmation would doom any chapter 13 plan. Conversely, if, as here, a debtor's prepetition averaged income was significantly lower than his or her income at plan confirmation, the debtor would be granted a windfall." Kibbe at 314.

In re Phillips, 382 B.R. 153 (Bankr.D.Mass. 2008)

In Phillips, the debtor was an above median income debtor. According to the B22C, the debtor's monthly disposable income was $212.40. However, according to

Schedule J, the debtor's net monthly income totaled $861.00. The Trustee objected to the debtor's Chapter 13 Plan asserting that the plan did not satisfy the best efforts test set forth in 11 U.S.C. sec. 1325(b)(1)(B) because the debtor was not devoting all projected disposable income to unsecured creditors under the plan.

In Phillips, the Court concluded that the standardized expenses under Sec. 1325(b)(3) were applicable with exception. The Court adopted the conclusion in the case of In re Briscoe, 374 B.R. 1 (Bankr.D.D.C. 2007). Phillips at 172. The Briscoe court concluded that section 1325(b)(3) created "a mechanical, objective test" for determining expenses. The court, however, fashioned an exception: "an above-median income debtor's plan that proposes to pay the debtor's disposable income employing the National and Local Standards in computing expenses in accordance with sec. 1325(b)(3) might still be objectionable in *extraordinary circumstances* under sec. 1325(a)(3) on the basis of lack of good faith. See Phillips at 165. In Phillips, the Massachusetts Bankruptcy Court, concluded that "Briscoe strikes the right balance between interpreting the statute as written, while carving out an exception for those instances where a party in interest can demonstrate a change in circumstances giving rise to the applicable expense. Phillips at 172.

In re Mati, 390 B.R. 11 (Bankr.D.Mass. 2008)

In Mati, the Trustee objected to the Debtor's Plan for a number of reasons including the fact that the debtor claimed a transportation ownership/lease expense of

$471 per month even though there was no lien on his automobile. The Court concluded that the debtor was entitled to the ownership deduction of $471.00. Mati at 23. The court determined that its ruling was consistent with its ruling in Phillips wherein the court aligned itself with those courts that construe "applicable expense amounts" differently than "actual monthly expenses" that may be deducted. Mati at 23.

In re Young, 392 B.R. 6 (Bankr.D.Mass. 2008)

In Young, an unsecured creditor, eCAST, objected to the debtor's chapter 13 plan asserting that the debtor understated his projected disposable income by claiming expense deductions on the B22C to which he was not entitled. The debtor claimed an ownership expense for 2 vehicles. The Debtor owned 2 vehicles, a 1997 Ford F-150 Pickup truck and a 2006 Harley Motorcycle. However, there was no lien against the Ford F-150. In addition, the debtor claimed the full rental deduction on the B22C when his actual rent was less than the local standard.

The Court determined that the line of cases construing the Local Standards as fixed allowances to be persuasive. Young at 22. The Court noted that "ownership expense" is not shorthand for a vehicle loan or lease payment. Ownership expenses encompass a number of costs associated with owing a vehicle which do not include loan or lease payments. However, the court recognized that not all vehicles have ownership costs. While all operating vehicles incur some costs, a non-operational vehicle with no possibility of repair, due either to mechanical issues or the debtor's lack of will, does not.

To be entitled to an ownership expense deduction, a debtor must first demonstrate that he does have some ownership costs. Young at 22. With respect to eCAST's assertion that the expenses must be reasonably necessary the Court cited Phillips and held that it would not further examine expenses expressly allowed under the means test absent extraordinary circumstances. Young at 22.

In re Lane, 394 B.R. 248 (Bankr.D.Mass. 2008)

In Lane, an unsecured creditor, eCAST, objected to the debtor's chapter 13 plan asserting that the debtor understated his projected disposable income by claiming an expense deduction for a vehicle on the B22C to which he was not entitled and misstating the debtor's current monthly income. The court overruled eCAST's objection and followed its decision in Young. The Court determined that the debtor was entitled to the vehicle ownership deduction.

CIRCUIT CASES

The Ninth Circuit was the first United States Court of Appeals to tackle the projected disposable income question. In re Kagenveama, 541 F.3d 868 (9th Cir.2008). Kagenveama involved an above-median income debtor with a surplus on his Schedule I and J but negative disposable income on his B22C. The Ninth Circuit held that the mechanical test governed and that the debtor need not pay more than what was required by the B22C over the life of his plan. Due to the negative projected disposable income,

the debtor was also allowed to successfully propose a plan of less than 60 months despite being "above median" income.

Next, the Eight Circuit took up the question and disagreed. See In re Frederickson, 545 F.3d 652 (8th Cir. 2008). Like in Kagenveama, Frederickson involved an above-median income Chapter 13 debtor proposing to commit to less than a 60 month plan. The debtor also had negative disposable income on his B22C and positive disposable income on his Schedules I and J. The Eight Circuit, citing Kibbe and other cases, held that projected disposable income was all but completely unconnected to the B22C, even in cases of above-median debtors. The court used language that B22C was the "starting point" for determining projected disposable income, but allowed deviation in cases of (1) changes in circumstances and (2) differences between B22C and Schedules I and J not based on any changes in circumstances. The Eight Circuit focused on what it deemed to be Congressional intent--to ensure that debtors paid all that they could afford--and less on the incorporation of the Section 707 expenses into Chapter 13 for above-median income debtors.

Finally[1], the Tenth Circuit weighed in on the issue, siding more with Frederickson than with Kagenveama. See In re Lanning, --- F.3d ----, 2008 WL 4879134 (10th Cir. 2008). Lanning concerned another above-median Chapter 13 debtor. This time, the debtor had a greater surplus on her B22C than on her Schedules I and J. This was due to a one-time payment from her employer during the time period used to calculate her current monthly income. The Chapter 13 trustee objected to confirmation of the debtor's plan, which was

[1] As of this date, December 1, 2008.

based on the smaller Schedules I and J surplus. The Lanning court sided with the debtor, also citing Kibbe and others in support of a flexible, "forward-looking" approach to projected disposable income. However, Lanning did not go as far as Frederickson and suggest that Schedule J could replace the B22C expenses for above-median income debtors. It merely sided with the body of case law allowing bankruptcy courts discretion to depart from the CMI calculation in cases when there had been a substantial change in circumstances accounting for a difference between the B22C and Schedules I and J.