Home Mortgage Update

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2009
Educational Materials

Loan Modifications in Chapter 13

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To combat the increase mortgage default rates, President Obama started a federal program as part of the stimulus package called "Making Homes Affordable." This program provides incentives to servicers to modify residential mortgage loans to a monthly payment that the homeowner can afford. The details of the "Obama plan," officially named the "Home Affordable Modification Program" are what follow in this program.

In order to understand the complexities of the system that these modifications are affecting, a little background is necessary.

I. Background on securitization

Mortgage Backed Securities (MBS)

Most mortgages in this country have been turned into securities that were sold on the stock market. A mortgage lender would originate a loan and sell then it on the secondary market. These loans were lumped into pools with titles such as "Mortgage Loan Trust Pass Certificates, Series 2005-7." The Series would sell ownership of a particular segment of one group of thousands of mortgages. Which aspect of the loan that the particular Series offered was limited only by the imagination of the person packaging the security. "In one particular MBS …there may be an investor who only receives the interest payments on loans with credit scores over 700. Others may only receive the principal repayment. Still other only receive the pre-payment penalty fee on loans where the credit score was below 620. Finally, some investors only receive money if the mortgage is foreclosed upon and the house sold." Negotiating Loan Modifications," Michael W. vanZalingen, p. 2-3, NHS of Chicago, Inc. & Attorneys Title Guaranty Fund, Inc, 2009. The different aspects of the loans that are divided into these pools are called "tranches." Id. These owners are more likely a group of individuals who own shares of the pool. Investors in these pools hire a trustee to manage the pool of loans. Government entities such as Fannie Mae, Freddie Mac and the FHA are also involved in the secondary mortgage market.

Investors on the open market are not able to manage all these loans and all these different interest, so they hire a servicing company to manage the loan – accept the payments, field information requests, make demand for payments where necessary. The servicing company may be the same or a related entity to the mortgage company that originated the loan in the first place. In that case, to the homeowner, the "face" of her mortgage company remains the same. The governmental entities hire servicing companies as the private sector mortgage backed securities do. Id. at 4. It is the servicers who are the contacts for loan modifications.

II. Home Affordable Modification Program (HAMP)

The goal of the modification is to prevent defaults by reducing the monthly mortgage payment to an affordable level - this is determined to be 31% of gross monthly income without going under. The program will expire on December 31, 2012 and only applies to mortgages that originated prior to January 1, 2009. As of August 4, 2009, "more than 400,000 modification offers have been extended and more than 230,000 trial modifications have begun." Making Home Affordable, Gov Press Release August 4, 2009.

A. Requirements to qualify for a FNMA HAMP Loan Modification

There are many requirements for the homeowner to qualify. The following are the guidelines Fannie Mae requires its servicers to use in evaluating loans determine if they qualify for a HAMP loan modification.

The monthly mortgage payment has to be more than 31% of the borrower's gross monthly income. The program only applies to first mortgages. There is another program for second liens, which is discussed below. The program is only available to the borrower's residence, and only applies to one to four unit buildings where the borrower resides in one of the units, so a bigger building even when the owner is in residence will not qualify for this program at all. There is a ceiling of debt in order to qualify – for one unit residences, the maximum amount the mortgage can be is $729,750, for two units it is $934,200, three units is $1,129,250 and four units is $1,403,400. Single family houses, one to four unit buildings, condominiums and cooperative units are eligible for the program, as are manufactured homes. The building cannot be vacant or condemned. The borrower must consent to an escrow being imposed for the payment of real estate taxes and insurance.

The loan has to be delinquent or that a default is reasonable foreseeable. The borrowers must have suffered a hardship that has prevented them from being able to afford the monthly payments. Loans in foreclosure are eligible, and loans in bankruptcy are eligible at the servicer's discretion. If the borrower has received a Chapter 7 discharge and did not reaffirm the debt, the loan may still qualify for HAMP.

The borrower must provide financial documentation of their income and expenses. Borrower must also submit or allow a credit report to the servicer. Fannie Mae and Freddie Mac have their own form. Other servicers may have their own form to fill out as well that collects the same information. If there is any false information on the application, that is a basis for the servicer to deny the application.

Monthly mortgage payment for the purposes of the modification includes principal, interest, property taxes, insurance, association fees and any shortage amounts if there are any on the loan at the time of the application. The monthly mortgage payment does **not** include mortgage insurance or any payments to a second lien (or any other subordinate or judgment lien).

What is a hardship?

- Loss or reduction in household income or a change in financial circumstances of the household (such as additional expenses, birth, death, disabilities, illness);
- An increase in mortgage payment amount or increase in other expenses (an upcoming increase is considered a reasonably foreseeable hardship);
-"Excessive monthly debts or other commitments" including the overextension on credit; and
- Other hardships that do not fall into these broad categories may qualify on a case by case basis. A mere decrease in home value is not a hardship. Even if the mortgage may now be more than the residence is valued, unless there is a reduction of income or an increase in debts, then there is no reasonably foreseeable default or hardship.

Imminent or foreseeable default

This program is for borrowers who are in default or are at risk of imminent default. Borrowers in this situation are current but will probably fall into default soon. Borrowers can ask for HAMP consideration when they are current BUT servicers cannot solicit current loans for the HAMP.

The borrower's debt coverage ratio has to be less than 1.20. "Debt coverage ratio" is the monthly disposable net income divided by the borrower's current monthly principal and interest payment on the first lien.

What is income?

Like the IRS, Fannie Mae considers "income" wages and salaries from all sources. Social Security payments count, as does pension and annuity income, as well as unemployment and disability benefits. If there is a contribution from someone else and the borrower can provide documentation that the income can reasonably rely on that income, then it can be included. The borrower must document the income by providing tax returns or year-to-date paystubs. Alimony and child support income qualifies as well. Self employed borrowers can use federal tax returns and the most recent quarterly or year-to-date profit and loss statement.

Monthly disposable income is gross income minus payroll deductions, real estate taxes and insurance, association fees, all other credit payments (car note, plasma TV, jewelry), all other reasonable living expenses, and any other net monthly expenses. A mortgage loan payment on investment property is specifically mentioned as an allowable expense.

If the ratio of indebtedness is more than 55%, the borrowers must create a plan with a HUD approved housing counselor to decrease indebtedness. The borrower must state in writing that he or she will obtain the counseling as part of the application process.

All signatories of the mortgage need to sign the HAMP documents except in cases of death, divorce or mental incapacity. Borrowers may add persons to the mortgage during this process.

Net Present Value (NPV)

The servicer must make a determination regarding the Net Present Value of the property. The servicer must determine what the net present value of the proceeds expected from a potential foreclosure sale, including the time it would take to foreclose and sell that property. If the modified loan will pay more than that amount, then the servicer may modify the loan.

B. The Available Modifications

Once the borrower and her residence have qualified for HAMP, what are the changes that can be made?

Since the goal is to get the borrower's monthly mortgage payment to be as close as possible to 31% of her gross income without going under that, the servicer will make the following changes to the loan in order and will stop changing the terms as soon as the 31% is achieved. This called the "standard modification waterfall". Servicers need to get prior permission from Fannie Mae to deviate from this program.

Changes to all mortgages that become part of the program:

All loans will become fixed, fully amortizing loans - no interest only, no Adjustable Rate Mortgages. All loans in the program will be escrowed for real estate taxes. All loans will have a due-on-sale clause.

After making the initial changes listed above, then the servicer will first:

1. Capitalize the Interest. The servicer will capitalize any accrued interest and escrow advances. Late fees must be waived. If state law prevents the capitalization of past due interest, then the servicer can put the borrower on a 60 month repayment plan. Servicers may "encourage" borrowers to repay an escrow shortage upfront. However, upfront payments cannot be required (other than the trial period payments which are a requirement).

If this reduces the monthly mortgage payment to 31% of gross monthly income, then that's the modification that will be offered. Please note that this first step will rarely be the last. If that's still too much, then the servicers can then:

2. Reduce the Interest Rate. Starting at the note rate, the servicer can reduce the interest rate in increments of .125% to down to 31% of the borrower's gross monthly earnings. The lowest the interest rate can be is 2.0%.

Changes to the Interest Rate over time

If the servicer lowers the interest rate below the market rate (as of the date the modification), then the interest rate will be fixed at that rate for five years, and then increase one

percent per year until it reaches the market rate for the date as of the modification. If the interest rate is set above the market rate for that week, then that new interest rate is the new fixed interest rate. Market Rate is determined by Freddie Mac's weekly survey.

How will that affect the payments on the interest only loans? Those will probably be the ones with the lower interest rate under the program as the loan needs to be reamortized. If lowering the interest rate to 2.0%, recapitalizing the past due interest and escrow, and waiving all late charges still does not create a mortgage payment that is 31% of the borrower's monthly income, the servicer can then:

3. Extend the life of the loan. The servicer can reamortize the loan to up to 480 months after the initial trial period (a new 40 year mortgage). However, the servicer cannot calculate a negative amortization to create the "correct" monthly payments.

If all of that fails, then the servicer can:

4. Create a non interest charging balloon payment. The servicer can arrange a principal forbearance which will result in a balloon payment at the end of the new maturity rate of the mortgage. This will be non-interest bearing to the servicer. It will be a portion of the loan that will be taken out of the amortization schedule. If the value of the property is less than the debt, the modified interest bearing balance must create a current mark-to-market loan to value ratio of at least 100 percent. Fannie Mae prohibits principal reductions, so all this must keep the same unpaid principal balance.

Example 1:

This is a joint loan where Borrower 1 has left her job and had a baby. This qualifies as a hardship. The gross household income is now $56,000, which is a $4,667 monthly. The monthly mortgage payment with taxes, insurance and association dues is 49% of the household income. The current interest rate of the loan is 5%. The monthly payment breaks down into the following components: monthly principal and interest is $1417.21, real estate taxes are $4250 per year, RESPA cushion is $850, and the homeowner's insurance premium is $2000. The total monthly escrow amount is $591.70. Association dues are $285 per month. The total monthly mortgage payment without mortgage insurance is $2293.81.

31% of the borrower's monthly income of $4667 is $1446.77. The association dues and escrow is $591.70, so the mortgage payment needs to be $855.07. An unpaid principal balance of $247,568.86 is assumed. Dropping the interest rate on this loan to 2% will only reduce the payment to $1015.76. The servicer will need to extend the life of the loan to 395 months after the date of the modification in order to bring the payment to $856.04, which is as close to 31% without going under that amount.

The modification date of this loan is 10/12/09. The three month trial period will be until 1/12/10. The interest rate 10/12/09 through 10/11/14 is set at 2.0%. The market rate as of 10/12/09 is assumed to be 5%.

Payment changes

The interest rate will step up one percent on 10/12/14 to 3%. The monthly principal and interest payment will be $983.44. Assuming that the real estate taxes do not change (which is unlikely); the total payment will be $1575.14 until 10/11/15. On 10/12/15, the interest rate will step up again to 4%. Assuming again that taxes do not increase at all, the monthly mortgage payment including escrow for taxes and insurance but not including mortgage insurance will be $1708.69. Any increase in real estate taxes that does occur will increase the total payment by that amount. The final interest rate change will be on 10/12/15 to 5%. This is the final fixed rate. Assuming no increase in escrow requirements, the monthly payment will be $1847.38 for the remainder of the loan (without mortgage insurance but including association dues). These calculations do not include the incentive payment for keeping the loan current that are paid annual to reduce the principal further.

Example 2:

The Borrower has had a reduction in his income (is a general contractor). His income is $100,000. The unpaid principal balance on his first mortgage is $356,197.26 and he has a second lien of $75,000. The mortgages were originated on the second date 18 months ago. The monthly payment on his first lien is $2290.45 and on the second lien is $758.51and his total escrow is $441.68, for a total monthly mortgage payment on the first lien of $2732.13. This is 32.79% of the borrower's gross monthly income. The borrower is in foreclosure, and has $2452.90 of accrued unpaid interest, and owes $1100 in foreclosure attorney's fees and $1984.00 in foreclosure attorney costs. There are $916.18 in late fees on the loan.

The servicer will first waive the $916.18 in late fees. The servicer will then capitalize the outstanding interest and fees, making the new unpaid principal balance on the first lien $361,734.16. This will increase the mortgage payment to $2767.73, which is 33.2% of the borrower's gross monthly income. The goal for the monthly mortgage payment on this loan is $2583.34, including the escrow. In order to reach that goal without going under 31%, the interest rate needs to be reduced to 5.75%. With the assumption that this rate is greater than the Freddie Mac market rate, this loan's interest rate will remain fixed at 5.75%. This will only affect the amount of the first lien; however, there is a related program for second liens, which is discussed below.

C. Requirements for the lender

Once a lender signs up for the program, then the lender must consider all defaulted loans for the program (except those that are exempted such as prior modifications or bankruptcy – which is under the servicers' discretion).

Current servicers include most of the national servicing companies, including: American Home Mortgage Servicing, Inc., Aurora Loan Services, LLC, Bank of America, N.A., EMC Mortgage Corp., HomEq Servicing, Home Loans Services, Inc., J.P. Morgan Chase Bank, Litton Loan Servicing, Inc., Ocwen Financial Corporation, Inc., OneWest Bank, Saxon Mortgage Services, Select Portfolio Servicing, Wachovia Mortgage, FSB, Wells Fargo Bank, NA and Wilshire Credit Corporation. Makinghomeaffordable.gov, September 6, 2009. There is a screen on the makinghomeaffordable.gov website in which borrowers can determine whether their loan is covered. The Treasury Department is evaluating the servicers' modification activity on a monthly basis. In August, Bank of America modified four percent of its eligible loans, whereas Saxon Mortgage Services modified 25 percent of the eligible loans. "Treasury hits BofA, Wells on mortgage modifications," by Patrick Rucker and Al Yoon, Reuters.com, August 4, 2009.

When a HAMP trial modification period begins, the servicer must also evaluate the loan for the Hope for Homeowners refinancing program as well. The servicer must offer a refinance option as well as the modification. Servicers will receive incentives for Hope for Homeowners refinancing of $2,500 upon the refinance and $1,000 per year for three years, as long as the refinanced loan remains current.

The modification must be recorded if:

-The property is in NY or Cuyahoga County, OH;

-The local law requires it;

- If the amount capitalized is more than $20,000;

- If the old maturity date is less than ten years away and the new maturity date is more than ten years from the old maturity date (Example - the original loan matured April 1, 2012 and the new maturity date is August 1, 2024).

The servicer must obtain subordination agreements with any second lienholders if the amount capitalized is more than $20,000 or if the old maturity date is less than ten years away and the new maturity date is more than ten years from the old maturity date.

D. Incentives for both servicers and borrowers

Servicers receive $1000 for each HAMP modification. If the loan was current at the time of the modification, then servicers get another $500. This amount will be paid to the servicer after the trial period. In order to get this one time incentive, the monthly payment must be modified by at least 6%. If the mortgage payment (including escrow and association fees but not mortgage insurance) is reduced at least 6%, then both the borrowers and the servicers get either: 1) $1000 a year or 2) half of the reduction amount, whichever is less. These payments will be paid only while the account remains in good standing. The servicer will get this incentive for three years and the borrower will get it for five years. The borrower doesn't actually get any cash; the incentive is applied as a reduction in the principal. The incentive accrues monthly, but is paid annually. The servicer does receive the incentive in cash. Fannie Mae will pay the fees incurred by the servicer for "allowable" out of pocket costs associated with modifications - title costs, property valuations, etc.

E. Defaults on the Modified Loans

There is only one HAMP modification per loan. Once the borrower falls more than three months into default, the loan will not be in good standing - even if the default is cured. Once the loan is not in good standing, the borrower nor the servicer will receive any incentives or reimbursements. However, all prior or traditional loss mitigation options may apply.

F. FHA Guidelines

The FHA guidelines for HAMP are a little different than those of Fannie Mae. The goal making the payment the closest it can be to 31% of the borrower's gross monthly income is the same, as are the incentives to both the borrower and the servicers. However, if the loan is insured by the FHA, the HAMP application process will be considered after all other traditional loss mitigation options have failed. The FHA's guidelines specifically state that if the borrower has intentionally defaulted on the loan that the loan will be rejected from the HAMP program. The FHA does not require appraisals.

Is court approval required to complete the modification? At this time, it is still a question as to whether a court order is necessary to approve a loan modification agreement and if so, under what circumstances.

1) No order is required

In In re Smith, the court determined that it did not have jurisdiction to approve the loan modification between BAC Home Loans and the Debtors. There was no dispute, and the Court considered that it was being asked for an advisory opinion. In re Smith, 409 B.R. 1, 2009 WL 2194268 (Bkrtcy. D.N.H.)

In this district, Judge Cox has ruled that an agreement between the Debtor and the mortgage lender to modify the terms of the mortgage loan is not a matter in controversy that would confer subject matter jurisdiction between adverse litigants. The Court stated that any opinion the Court entered would be advisory. This case cites Smith. In the context of a resolution for a motion for relief or in the context of a plan modification, then such a loan modification could be ruled upon. In re McPherson, J. Cox, 07-23135.

Under these two cases, it appears that the debtor could bring a §1329 motion to modify the plan and the court may approve the loan modification agreement as the basis for the plan modification. This method may be preferable, since the effect of the loan modification on the plan can be worked through at that time. This would require an additional notice period and an additional cost to serve all creditors, as well as the drafting of the amended plan and will require debtor's counsel to bring all motions since secured creditors do not have standing to file a motion under §1329.

2) An order is required

For cases where the property remains property of the estate and where there is any increase in the total debt owed (such as a recapitalization), then that increase is a new debt that is owed to the lender and impairs the property of the estate. Allowing the loan modification in a court order may resolve the issue of the violation of the automatic stay for the recording of the modification documents while the case is pending. Under section 362(a)(4), "any act to "...perfect any lien against the property of the estate" is a violation of the stay, so an order will be needed to allow for the recording of the new mortgage.

III. HomeSaver Forbearance prevention option

Not all loans will be eligible for the above modification program. For example, a mortgage payment may not be more than 31% of the borrower's current income, but they were some of the few lucky ones who have recently gotten a job after being unemployed for months. In that case, the mortgage is in significant default, but does not qualify for HAMP. Fannie Mae loans that are not eligible for HAMP may qualify for the HomeSaver forbearance program. In this program, the borrowers will pay what they can afford, but at least half of their monthly mortgage payment for six months while other loss mitigation options are explored. Servicers will receive an incentive of $200 for each HomeSaver plan. This is not a permanent modification of the loan, but merely a time where the borrower can explore their other options.

IV. Help for Second Liens

As mentioned, HAMP itself is only available for modifications on the first lien. However, the government has also instituted a program for second liens as well. When a first lien is modified in HAMP, the second lien will be reviewed as well. The provisions for the second lien modification are:

1. Reduce the interest rate on a second lien to 1%. For interest only loans, the interest rate may be lowered to 2%;
2. The term of the second lien will be increased to match the maturity date of the first lien;
3. If the modification of the first lien includes forbearance on the principal, then the same proportion of the principal of the second lien will be forborne as well;

4. After five years, the interest rate on the second lien will step up to the interest rate of the first lien (which is determined by the current Freddie Mac Survey Cap);
5. Then the second lien will re-amortize the loan over the new interest rate.

There is an incentive payment to the servicers to modify the second liens of half the difference of the interest rate on the first lien as modified and one percent (subject to a floor). There are also similar success incentive payments to servicers and borrowers on second liens. Servicers receive $500 upon modification and $250 per year for three years, as long as the modified **first** lien remains current. Borrowers receive success incentive payments of $250 per year for five years. These payments will be applied to the principal of the **first** lien.

To refer to example number 2, above:

The interest rate of the second lien was 8% with a term of 180 months and a principal balance of $75,000. The borrower's second lien will be modified to 2% (it was an interest only loan) and modified to be fully amortizing. The term will be extended from 162 remaining months to 313 remaining months. This will change the payments from $758.01 to $307.72 for the first five years, and then will increase to 5% thereafter. The final payment amount will be $407.19. In this case, the interest rate of the first lien was changed .75%, which makes for an incentive of .125%. The borrower will receive a credit of $250 yearly for five years on his first lien if he stays current on the modified payments on the first lien.

V. Issues Impacting the Investors

These modifications, HAMP and otherwise, are not without their issues. While the servicer is the entity that is modifying the terms of the loans, it is the investors are also affected. While overall, a mortgage loan is most profitable when the loan is paid back according to its original terms, a tranche of the investors may be negatively affected by the modification of the loan. For example, a tranche might be entitled to the late fees of the loan. These are the fees that are waived upon the modification. In that case, these investors' interests are being negatively impacted.

As part of the settlement with several states Attorney Generals, Countrywide agreed to modify the terms of thousands of loans. Two groups of investors sued Countrywide (now owned

by Bank of America), claiming that the modifications violated the contractual rights of the investors. Greenwich Financial Services Distressed Mortgage Fund 3, LLC and QED, LLC v. Countrywide Financial Corporation, 08-CV-11343, (S.D.N.Y., J. Holwell, August 18, 2009). Part of those contractual rights was that Countrywide would buy back the defaulted loans. Bank of America removed the case to federal court, arguing that the requirement to repurchase the loans was voided by the federal legislation as part of the Helping Families Save Their Homes Act of 2009. The Court remanded the case back to state court, holding that the protections contained in the Act did not prevent the investors from asserting their rights under the contracts.

VI. Stripping off a wholly unsecured second lien

With the decline in home values, many second liens are now wholly unsecured by the value of the home. §506(a)(1) states that a claim is secured "to the extent of the value of such creditor's interest...and is an unsecured claim to the extent of the value of such creditor's interest." 11 U.S.C. §506(a)(1). Under the Supreme Court case of Nobleman, the antimodification provisions of §1322(b) (2) apply to mortgages if there is any secured value attached to that claim. Nobleman v. American Savings Bank, 508 U.S. 324 (1993). The case did not address the rights of a wholly unsecured junior lien. "That means that the approach, post Nobleman is all or nothing." "Chapter 13 Strip-off of Junior Mortgages: Not Whether, but How under Current Law," David Lloyd and Ariane Holtschlag, ABI Journal, p. 12, July/August 2009. A wholly unsecured junior lien can be stripped of its secured status and paid as an unsecured claim. This is called a "strip off" of the lien. The procedure of how to accomplish this strip off is currently at issue at to whether an adversary complaint is required or if language in the plan providing for the strip off is sufficient.

A. Is an Adversary Case Required?

There is no controlling authority in this district at this time as to whether an adversary proceeding is required in order to strip a wholly unsecured second lien. There is a tension between the due process and notice rights of the secured whose lien is being stripped off and the need for a quick, cheap and efficient Chapter 13 confirmation process. "Are Adversary Proceeding Necessary to Strip Mortgagee's Liens in Chapter 13?," Elizabeth M. Abood-Caroll, ABI Journal, p. 14, July/August 2009.

The rights of the creditor to due process

The author in the article quoted above drew a corollary from lien stripping to discharge of student loans in the case of Espinosa v. United Student Aid Funds, Inc., in which the debtor's student loans were discharged in the plan. Id. Years after the debtor received a discharge, the student loan creditor garnished the former debtor's wages. "While the student loan cases differ from the lien-stripping cases...both discharge by declaration and lien-stripping make a drastic impact on creditors who normally are afforded certain protections.... To diverge from the adversary path is to take a leap of faith that a court in the future may or may not accept that the notices provided [in the plan] provided sufficient due process 'under all circumstances.'" Id., citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-5 (1950).

In re Hanson is a Seventh Circuit case, which also based on a discharge of student loan debt. In re Hanson, 397 F.3d 482 (7th cir. 2005). In this case, the debtor had no other debt. The debtor received an order of discharge, thus discharging his student loan debt. The student loan creditor moved to vacate the order of discharge, which was granted. There was no special language in the debtor's plan about the discharge of his student loan debts. The District Court and the Seventh Circuit affirmed. The Court held that the order of discharge was "void as having been entered in derogation of [the creditor's] due process rights." However, the Seventh Circuit specifically stated that their holding was "a narrow one. We do not hold that the due process clause requires the service of a summons and adversary proceeding prior to the discharge of student loan debt. Rather 'we merely confirm that where the Bankruptcy Code and Bankruptcy Rules require a heightened degree of notice, due process entitles a party to receive such notice before an order binding the party will be afforded preclusive effect.'" Id. at 487.

B. Language in the plan is enough

"Those courts that do not require adversaries say Rule 7001(2) does not apply because lien-stripping raises a question of the collateral's value rather than the validity, priority or extent of the lien itself." "Are Adversary Proceeding Necessary to Strip Mortgagee's Liens in Chapter 13?," Elizabeth M. Abood-Caroll, citing In re Bennett, 312 B.R. 843, 847 (Bankr. W.D. Ky. 2004). Clear language in the plan is sufficient. Id., citing In re Wolf, 162 B.R. 98, 106 (Bankr. N.J. 1993). What is clear language? Whose responsibility is it to monitor that the notice

requirements are met when the plan is filed shortly before the confirmation date and the plan provides for a strip off? "The burden is on the debtor to ensure proper notice." "Chapter 13 Strip-off of Junior Mortgages: Not Whether, but How under Current Law," David Lloyd and Ariane Holtschlag, ABI Journal, p. 12, July/August 2009.

What language in the plan provides sufficient notice?
Example 1) The second lien to City Bank will be stripped off and not paid upon the filing of an adversary complaint or upon confirmation of the plan.

Example 2) The second lien held by City Bank in the principal amount of $56,237 is wholly unsecured. This lien is hereby stripped off and shall be treated as a general unsecured claim. It shall be paid accordingly by the Trustee. Notice of this plan has been sent to City Bank's registered agent in the state of Illinois, CIT Group, as well as the notice address listed on the secured proof of claim.

Example 3) Web Bank Loan in the amount of $24,202 which is a second mortgage on the property located at Chicago is to be paid as part of the unsecured non-priority debts. If plan approved, Debtor plans on filing a complaint to strip off this lien if allowed and/or required by the court.

Following this page are:

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Panel 1: **WASHINGTON WHIRL, PARTS 1 & 2 – WHAT'S HERE, WHAT'S COMING AND WHAT TO DO ABOUT IT – RULES, STATUTES AND MORE**

Moderator: **Hon. Eugene R. Wedoff**

Panelists: **Henry E. Hildebrand, III**
John Rao, Esq.
Richardo I. Kilpatrick

I. S 61 and HR 1106

a. Senate Bill 61: "Helping Families Save Their Homes in Bankruptcy Act of 2009" (included in appendix)

b. Redline of Code provisions that would have been changed by the legislation: 11 U.S.C. §§ 109, 502, 1322, 1325, 1328 (included in appendix).

II. Reaffirmations

a. Reaffirmation Agreements Generally

i. Section 524 as amended requires compliance with §524(c), which was largely left unaltered. §524(c) provides the general requirements that must be met for a reaffirmation agreement to be enforceable.

1. §524(c)(1): the Reaffirmation Agreement must be made prior to discharge
   The plain language of U.S.C. §524 (c)(1) provides that in order for a reaffirmation agreement to be valid, it must be made before the granting of discharge. There is a debate among the courts as to if "made" refers to entering into the agreements and signing the document or actually filing the document with the Court.

ii. Section 524(c)(2): the debtor received the disclosures described in subsection §524(k) at or before the time at which the debtor signed the agreement

1. §524(c)(2) prior to BAPCPA mandated the disclosures for reaffirmation agreements.

2. Under §524(c), the question remains whether a debtor not represented by counsel throughout the negotiation of a reaffirmation agreement at the time it was entered into had the advantage of an arms length negotiation of the agreement.

iii. Section 524(c)(3): Reaffirmation Agreement must have been filed with the court and, accompanied by a declaration or an affidavit of the attorney that represented the debtor during the course of negotiating an agreement under this subsection, which states that (a) such agreement represents a fully informed and voluntary agreement by the debtor; (b) such agreement does not impose an undue hardship on the debtor or a dependent of the debtor; and (c) the attorney fully advised the debtor of the legal effect and consequences of (i) an agreement of the kind specified in this subsection; and (ii) any default under such an agreement.

1. §524(c)(3) requires debtor's attorney to certify that the agreement does not impose an undue hardship on the debtor and that the debtor is fully advised of the legal consequences of the agreement for the reaffirmation agreement to be enforceable.

iv. Section 524(c)(4): the debtor has not rescinded such agreement at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim.

1. §524(c) gives a debtor the right to rescind a reaffirmation agreement prior to discharge or within sixty days after filing the agreement, whichever is later.

v. Section 524(c)(5): Requires compliance with subsection (d)

vi. Section 524(c)(6): (A) in a case concerning an individual who was not represented by an attorney during the course of negotiating an agreement under this subsection, the court approves such agreement as

1. not imposing an undue hardship on the debtor or a dependent of the debtor; and

2. in the best interest of the debtor.

(B) Subparagraph (A) shall not apply to the extent that such debt is a consumer debt secured by real property.

Agreement Must Be Made Prior To Discharge

b. Discharge Hearings

i. For a reaffirmation agreement to be enforceable, §524(d) provides that if the debtor is not represented by counsel during the negotiation of the agreement, the court must hold a discharge hearing. This section also indicates that a discharge hearing is an option unless the reaffirmation agreement entered into is one under §524(d) and/or the debtor was not represented by counsel during the negotiation of the agreement.

ii. *In re Cottrill*, No. 06-00819, 2007 Bankr. LEXIS 2009 (Bankr. N.D. W.Va. June 19, 2007) The debtors filed statement of intention reflecting their intent to reaffirm the debts secured by two vehicles however they failed to execute a reaffirmation agreement. Subsequent to entry of their discharge, the debtors sought to file reaffirmation agreements for both debts. The debtors requested that the court find that §524(c) is subject to waiver since they agreed to reaffirm the debts or in the alternative, set

aside the discharge so that the agreements could be filed. The court found that pursuant to 28 U.S.C.§1334(b), it did not have jurisdiction in civil proceeding arising under title 11 or arising in related to cases under title 11. The court went on to state that untimely filed reaffirmation agreements and the request to waive §524(c)(1) do not "arise under", "arise in" and are not "related to" the debtor's bankruptcy proceeding. §524(c)(1) creates strict time requirements for filing reaffirmation agreements. Failure to abide by §524(a)(1) renders §524(c) inapplicable to the proceeding. A reaffirmation agreement is valid only if all elements of the statute are satisfied and they cannot be waived or extended after discharge otherwise §524(c)(1) would not protect a debtor from bad judgment or making ill-advised decisions after the debt has been discharged.

See also:

iii. *In re Young*, No. 06-06056-DD, 2007 Bankr. LEXIS 4027 (Bankr. D.S.C. 2007) (after a discharge has been granted a court no longer has power to validate a reaffirmation agreement).

iv. *In re Stewart*, 355 B.R. 636 (Bankr. N.D. Ohio 2006) (discharge cannot be set aside for the purpose of filing a reaffirmation agreement entered into after discharge).

v. *In re Carrillo*, No. 07-20423, 2007 Bankr. LEXIS 2786 (Bankr. D. Utah July 25, 2007) (debtor must enter into reaffirmation agreement prior to discharge; once discharge has been granted, it cannot be set aside for the entry of a reaffirmation agreement).

vi. *In re Herrera*, 380 B.R. 446 (Bankr. W.D. Tex 2007) in which the court set aside the Debtor's discharge for the limited purpose of allowing the filing of a reaffirmation agreement but disallowed the reaffirmation agreement because the agreement was signed after the discharge had been entered. The court indicated that the deadline for making the agreement is a hard deadline that cannot be altered even by setting aside the discharge to enter into the agreement.

vii. *In re Wilhelm*, 369 B.R. 882 (Bankr. M.D.N.C. 2007) (a reaffirmation agreement must be made prior to the entry of the order of discharge to be enforceable and an agreement entered into after the granting of a debtor's discharge has no legal significance).

***In re Simonin*, 360 B.R. 627 (Bankr. N.D. Ohio 2006)**

Creditor drafted a reaffirmation agreement that erroneously listed the amount that the debtors were to reaffirm as $12,000.00 less than the actual amount owed. The agreement was signed by all parties and was filed with the court. After discovering the discrepancy, the creditor sought to

rescind the agreement. The court allowed the rescission of the agreement as the discrepancy in the amount owed was so great that it would not normally exist in the absence of a mistake. The Court utilized normal contract rescission theories.

c. Mandatory Disclosures

i. §524(k)(2) states that the "disclosures made shall be made clearly and conspicuously and in writing." It further provides that the terms "Amount Reaffirmed" and "Annual Percentage Rate" shall be disclosed more conspicuously than other terms. The requisite disclosure must also contain language that states "before agreeing to reaffirm a debt, review these important disclosures."

ii. Under Summary of Reaffirmation Agreement, the agreement must state "this summary is made pursuant to the requirements of the Bankruptcy Code."

iii. §524(k)(3) requires that Reaffirmation Agreements:

1. Outline the rights of the debtor

2. Specify the amount of the debt being reaffirmed

    a. The agreement must contain the term "amount reaffirmed" and must state "this amount is the total amount of the debt you have agreed to reaffirm by entering into this agreement . . . your credit agreement may obligate you to pay additional amounts which may come due after the date of this disclosure. Consult your credit agreement."

3. Specify additional charges or costs imposed upon the debtor

4. Specify the annual percentage rate, and simple interest rate. As stated previously, this term must be more conspicuous than the other terms of the agreement.

5. Provide a statement of the repayment schedule, if elected by the creditor

6. Provide a description of the property to which the lien is attached in the case of a secured debt

7. Specify the original purchase price of the items

8. Provide a statement that the debtor has the right to consult an attorney

9. Provide a statement that the reaffirmation agreement must be filed with the court before it becomes effective

10. Provide a statement that the debtor has the right to rescind the reaffirmation within 60 days of filing

Cases Mandating Disclosures

***In re Reardon*, No. 06-10348-JMD, 2006 Bankr. LEXIS 1238 (Bankr. D. N.H. May 24, 2006)**

The debtor signed a reaffirmation agreement with Allen Mello Dodge for a vehicle. For such an agreement to be enforceable, it must be entered into before discharge is granted under §727, and §524(k) disclosures must have been made at or before the time the agreement is signed by the debtor. The agreement must be filed with the court, and the court must determine that the agreement does not impose an undue hardship on the debtor. The agreement in this case did not comply with §524(k)(3) because it failed to identify the creditor to whom notice of rescission should be given or any address to which the debtor should mail such notice. Additionally, the court held that the agreement failed as the agreement was not "accompanied by the best available evidence of the claim and, as appropriate, copies of the underlying contractual agreement" as set forth in AO 4008-1(b)(2). The agreement was filed with the Installment Contract, which was not an agreement between the debtor and the lienholder but between the debtor and the dealer. The court held that there was not enough evidence supporting any claim or agreement between the parties. The court held that the agreement was improperly completed and "too vague, uncertain, and contradictory to constitute an enforceable agreement." The court disapproved the reaffirmation agreement.

***In re Lee*, 356 B.R. 177 (Bankr. N.D. W. Va. 2006)**

The debtor signed a reaffirmation agreement to reaffirm a debt secured by a vehicle. The reaffirmation agreement consisted of two pages that failed to disclose the amount reaffirmed and annual percentage rate more conspicuously than the other terms as required by §524(k)(3)(A). The agreement also failed to contain a summary of the reaffirmation agreement as required by §524(k)(3)(B) as well as the total fees and costs accrued as of the date of the disclosure pursuant to §524(k)(3)(C). The court deemed the reaffirmation agreement unenforceable and "pervasively defective". The court acknowledged that the debtor may have entered into the reaffirmation agreement even if they were aware of all necessary disclosures.

d. Certification of Debtor's Attorney

i. §524(k)(5)(A) requires the debtor's attorney to certify the following in reaffirmation agreements:

1. He/she is the attorney for the Debtor and represented this Debtor during the course of negotiating this Reaffirmation Agreement;

2. That the agreement represents a fully informed and voluntary agreement by the Debtor and does not impose an undue hardship on the Debtor or any dependent of the Debtor;

3. He/She has fully advised the Debtor of the legal effect and consequences of this Reaffirmation Agreement including but not limited to a default under such agreement

ii. §524(k)(5)(B)

1. If a presumption of undue hardship has been established the certification shall state that in the opinion of the attorney the debtor is able to make the payment

   a. The presumption can be avoided if schedules I and J and the debtor's Statement in Support of the Reaffirmation Agreement clearly displays the debtor's ability to make the payments required in the reaffirmation agreement

2. Must also include signature of Debtor's attorney and the date signed

***In re Mendoza*, 347 B.R. 34 (Bankr. W.D. Tex. 2006)**

The debtors executed a reaffirmation agreement. Throughout the negotiation of the agreement, the debtors were represented by counsel. Debtor's counsel executed the declaration portion of the reaffirmation agreement however the attorney failed to check the box certifying that he had made the requisite disclosures to the client; specifically, the agreement does not represent an undue hardship, the agreement was voluntary on the part of the debtors or the box stating that even though the agreement is an undue hardship, the attorney is of the opinion that the debtor can make the monthly payments required under the agreement. The court found that even though the attorney signed the reaffirmation agreement, the signature does not certify anything as the boxes were not checked.

***In re Isom*, No. 07-31469-KRH, 2007 WL 2110318 (Bankr. E.D. Va. July 17, 2007)**

The Debtor was represented by counsel during her chapter 7 bankruptcy case, however counsel refused to execute an affidavit or declaration to accompany the reaffirmation agreement stating that the court, not attorneys should determine whether an undue hardship was established. The court held that the debtor was represented by counsel and without the attorney's certification the reaffirmation agreement was unenforceable. The court noted that reaffirmation agreements are an integral part of a Chapter 7 case and debtor's counsel cannot abandon the client for that portion of the case.

***In re Smith*, No. 07-10900, 2007 Bankr. LEXIS 3021 (Bankr. S.D. Ohio July 18, 2007)**

The court found that Debtor's counsel acted properly by not certifying that her clients would suffer an undue hardship if they reaffirmed personal property and refused to sign a declaration or affidavit stating such. The court found that it is debtor attorney's duty to fully inform their clients of the consequences of reaffirming a debt however if they chose not to sign Part C when an undue hardship exists, the court will review the agreement and determine if Debtor or Debtor counsel presence is necessary.

Debtor not represented by Counsel

***In re Jackson*, 360 B.R. 32 (Bankr. D. Conn. 2007)**

The court approved the reaffirmation agreement of a pro se debtor who stated to the court that she fully understood the consequences of entering into the reaffirmation agreement and that she wanted to retain the vehicle, the court determined that the agreement did not impose an undue hardship on the debtor or her dependents.

***In re Donald*, 343 B.R. 524 (Bankr. E.D.N.C. 2006)**

The debtor was not represented by counsel during negotiations of the reaffirmation agreement. The court, after reviewing the reaffirmation agreement and conducting a hearing, approved the reaffirmation agreement in which debtor's counsel failed to file an attorney certification and the debtor did not file a motion to approve the agreement. The court found that the reaffirmation agreement did not impose an undue hardship on the debtor.

e. Debtor's Statement in Support of the Reaffirmation Agreement

i. §524(k)(6)(A) requires the following statement by the debtor:

I believe this reaffirmation agreement is in my best interest and will not impose an undue hardship on my dependents or me. I can afford to make the payments on the reaffirmed debt because my monthly income (take home pay plus any other income received is $_____, and my actual current monthly expenses including monthly payments on post-bankruptcy debt and other reaffirmation agreements total $_____, leaving $_____ to make the required payments on this reaffirmed debt. I understand that if my income less my monthly expenses does not leave enough to make the payments, this reaffirmation agreement is presumed to be an undue hardship and must be reviewed by the court. However, this presumption may be overcome if I explain to the satisfaction of the court how I can afford to make payments here:

_____
_____
_____
_____
_____
_____.

I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement.

ii. If the debtor is not represented by an attorney in the negotiation of the reaffirmation agreement, *524(k)(7)* requires that the debtor file a Motion for Court Approval.

iii. The Motion must state:

I am not represented by an attorney in connection with this reaffirmation agreement.

I believe this reaffirmation agreement is in my best interest based on the income and expenses I have disclosed in my Statement of Support of this affirmation agreement.

Therefore, I ask the court for an order approving this reaffirmation agreement.

iv. If the Court grants the debtor's motion and approves the reaffirmation agreement, the court order must state the following:

The Court grants the debtor's motion and approves the reaffirmation agreement described above.

v. §524(l) states that "notwithstanding any other provision of this title, the following shall apply:"

1. A creditor may accept payments from the debtor before and after the filing of an agreement of the kind specified in subsection (c) with the court;

2. A creditor may accept payments from a debtor under such agreement that the creditor believes in good faith to be effective;

3. The requirements in subsections (c)(2) and (k) shall be satisfied if the disclosures required under those subsections are given in good faith.

f. Presumption of Undue Hardship

i. Pursuant to §524(m)(1), a reaffirmation agreement is presumed to be an undue hardship on the debtor, until 60 days after it is filed with the court, if the debtor's monthly income less the debtor's monthly expenses as shown on the debtor's Statement in Support of the agreement is less than the scheduled payments on the reaffirmed debt.

ii. This presumption may be rebutted in writing by the debtor if the debtor's statement contains an explanation that identifies additional sources of funds to make the scheduled reaffirmation payments.

iii. If the presumption is not rebutted to the court's satisfaction, then the court ***may*** disapprove the reaffirmation agreement.

iv. However, no reaffirmation agreement will be disapproved without notice and a hearing and this section mandates the conclusion of this hearing before the entry of the debtor's discharge.

***In re Payton*, 338 B.R. 899 (Bankr. D.N.M. 2006)**

On December 27, 2005, the debtors filed a petition under Chapter 7 of the Bankruptcy Code. They filed a reaffirmation agreement with Wells Fargo for a Chevrolet truck. The debtors' Schedules I and J indicated a monthly deficit of approximately $400, while the income and expense figures in the reaffirmation agreement displayed a surplus of $752. The Schedules also stated that both debtors were employed and they had four minor children. The title to the truck, attached to the reaffirmation agreement had an odometer reading of 8 miles. Schedule B/25 indicated the mileage at 44,000. The debtors' Statement of Intention indicated that the debtors would reaffirm their motor home debt but retain and continue to pay on their vehicles rather than reaffirm. They then sought to reaffirm the truck debt.

The court held that there is a presumption of undue hardship if the monthly income and expenses listed in the reaffirmation agreement indicate a deficit and the inability to make the reaffirmation payments. The debtor may rebut the presumption through other sources or additional income.

The court held that it is not required to rely solely on the expenses and income listed in the Debtor's Statement in Support of the reaffirmation agreement in deciding whether to approve or disapprove the agreement. The court is not required explicitly to approve a reaffirmation agreement. The court found that the agreement was an undue hardship on the debtors, because the payments would cause them to continue "going underwater each month by $314", ultimately resulting in a default and deficiency judgment, snowballing into "a disaster for the Debtors and their children." However, the debtors would not necessarily lose the truck; they could still agree to make voluntary payments to Wells Fargo for the use of the truck, and Wells Fargo could repossess it at any time, but could not seek payment of the deficiency or make any other collections efforts.

The court held that it was not required to notify Wells Fargo of the hearing, because such notice is only required if the budget indicates a deficit. In this case, the Statement in Support indicated a $752 surplus. The court held that the income and expenses on Schedules I and J are irrelevant for notice purposes.

In *In re Laynas*, 345 B.R. 505 (Bankr. E.D. Pa. 2006)

The debtor's schedules disclosed monthly income of $2,324 and monthly expenses of $3,075. The reaffirmation agreement with the motor vehicle creditor stated that the debtor's income was $2,800, while expenses were $2,600. Prior to BAPCPA, reaffirmation agreements were only subject to judicial scrutiny if the debtor's attorney did not file an affidavit or declaration that the debtor was fully informed and could make the payments, or if the debtor was unrepresented. In these cases, the court would ascertain whether the agreement imposed an undue hardship on the debtor and whether it was in the debtor's best interest. BAPCPA changed the requirements and made them more stringent. Not only are the agreement and the declaration by debtor's counsel required, but also a Statement in Support of the reaffirmation agreement signed by the debtor and, if court approval is necessary, a motion and order for approval. The Debtor's Statement in Support of the reaffirmation agreement must disclose monthly expenses and income. If the difference between the expenses and income is less than the monthly payment under the agreement, a presumption of undue hardship arises, and court review is required regardless of whether the debtor's attorney executed a declaration or affidavit. The presumption may be rebutted in the Debtor's Statement, but if the court is not satisfied with the Debtor's Statement, the court may disapprove the reaffirmation agreement after notice and a hearing.

In this case, the debtor's Schedules I and J indicated different numbers from those in the Debtor's Statement and according to the schedules, the debtor could not afford the payment. Even though the numbers in the Debtor's Statement did not create the presumption of undue hardship, the court evaluated the accuracy of the information in the Debtor's Statement by reviewing other indicators of financial condition. The debtor did not provide an explanation for the differences between the Debtor's Statement and the schedules. The court found that courts should also consider other factors regarding "the debtor's best interest", such as whether the debtor needs the vehicle or whether the debtor would actually lose the vehicle without the agreement (ride through). The court disapproved the agreement.

In re Stillwell, 348 B.R. 578 (Bankr. N.D. Okla. 2006) (the court found that a presumption of an undue hardship arose when the debtors' schedules indicated they could not afford the reaffirmation agreement payments, even though the debtors speculated that overtime would allow them to make the payments).

In re Riggs, No. 06-60346, 2006 Bankr. LEXIS 2732 (Bankr. W.D. Mo. Oct. 12, 2006) (the court declined to approve a reaffirmation agreement when the debtor would take two years to repay a loan on an older model vehicle that may not continue to run).

In re Wilson, 363 B.R. 220 (Bankr. D.N.M. 2007) (pursuant to § 524(k), the court need only look to Part D of the reaffirmation agreement to determine if there is an

undue hardship; that the Schedules I and J contain numbers different from Part D is irrelevant).

Applicable Federal Rule of Bankruptcy Procedure:

FRBP 4008, creates a deadline for holding discharge hearings and reaffirmation hearings and establishes the minimum time for notice to be given of the hearing date. Rule 4008 also provides that in order to obtain approval of the reaffirmation agreement by the court, a written motion must be filed before or at the time of the hearing.

Post-BAPCPA, FRBP 4008 also provides that the debtor's statement under 11 U.S.C § 524(k) shall be accompanied by a statement of total income and expense amounts as stated on Schedules I and J. If there is a difference between the income and expense amounts as stated on the schedules and the § 524(k) statement, the statement should include an explanation as to the difference.

g. 11 U.S.C. § 524(c)(6)(B)

i. *In re Clark*, 401 B.R. 75 (Bankr. D. Conn. 2009) (noting, in dicta, that court action may not be required when the affirmed debt is a consumer debt fully secured by real property, but noting qualifications).

ii. *In re Roth*, 38 B.R. 531 (Bankr. N.D. Ill. 1984), *aff'd*, 43 B.R. 484 (D. Ill. 1984). (holding that the exception in section 524(c)(6)(B) only applies to reaffirmation of a consumer debt *fully secured* by real property).

iii. *In re Phelan*, 257 B.R. 776 (Bankr. E.D. Va. 2000) (holding that "Congress chose to require only court advice, but not court approval, for mortgage reaffirmations by pro se debtors" (quoting *In re Bauer*, No. 97-13034-SSM, 1997 WL 752652, *2 (Bankr. E.D. Va. Nov. 12, 1997))).

iv. *In re Hart*, 402 B.R. 78 (Bankr. D. Del. 2009) ("Unlike [other provisions, including section 524(c)(6)], section 524(m) applies to consumer debts secured by real property. Section 524(m) does not contain, however, a provision allowing or requiring the Court to review a reaffirmation agreement for a debt secured by real property on the basis of whether it is in the debtor's best interest. Thus, under section 524(m), the Court's sole function and power in connection with an agreement reaffirming a consumer debt secured by real property is, when the presumption of undue hardship arises, to determine whether it has been rebutted to the satisfaction of the Court." The court also noted: "Several cases have declined to approve a reaffirmation agreement for a debt secured by real property, finding that since a debtor is entitled to retain the real property while remaining current on the payments, it is not in the best interest of

the debtor to enter into a reaffirmation agreement. *See* [*In re Waller*, 394 B.R. 111, 114 (Bankr. D.S.C. 2008)] (refusing to approve reaffirmation agreements as not in the debtors' best interest since the debtors could retain the property without reaffirming the debt); *In re Caraballo*, 386 B.R. 398, 402 (Bankr. D. Conn. 2008)] (same); [*In re Bennet*, 2006 WL 1540842, *1 (Bankr. M.D.N.C. 2006)] (same). Based upon this Court's analysis, however, the best interest test is not applicable to agreement reaffirming consumer debts secured by real property.").

h. 11 U.S.C. § 524(j)

i. *In re Rios*, No. 07-51263, 2007 WL 2409547 (Bankr. W.D. Tex. Aug. 20, 2007) ("Section 524(j) expressly provides that the bankruptcy discharge does not enjoin a creditor holding a secured claim on the debtor's residence from engaging in ordinary course of business activity with respect to seeking or obtaining periodic payments associated with the debt in lieu of pursuit of *in rem* relief to enforce the lien. See 11 U.S.C. § 524(j)(1)-(3). A reaffirmation of a nonrecourse *in rem* claim is thus expressly unnecessary as a matter of bankruptcy law.").

ii. *In re Freeman*, 352 B.R. 628 (Bankr. N.D. W. Va. 2006) (noting, as dictum, that "newly enacted § 524(j) of the Bankruptcy Code allows a secured creditor in the debtor's principal residence to seek or obtain periodic payments from the debtor in the parties' ordinary course of business").

i. Home Affordable Modification Program and Reaffirmations

i. Home Affordable Modification Program, Supplemental Directive 09-01, at 2, 16 ("Borrowers who have received a Chapter 7 bankruptcy discharge in a case involving the first lien mortgage who did not reaffirm the mortgage debt under applicable law are eligible [for the Home Affordable Modification Program], provided . . . the following language must be inserted in Section 1 of the Trial Period Plan and Section 1 of the Agreement: 'I was discharged in a Chapter 7 bankruptcy proceeding subsequent to the execution of the Loan Documents. Based on this representation, Lender agrees that I will not have personal liability on the debt pursuant to this Agreement.'").

III. Voluntary Mortgage Modifications

a. Home Affordable Modification Program, Supplemental Directive 09-01, at 2 ("A borrower actively involved in a bankruptcy proceeding is eligible for the HMP at the servicer's discretion.").

b. Helping Families Save Their Homes Act of 2009 (included in appendix)

i. Section 201: Servicer Safe Harbor for Mortgage Loan Modifications (included in appendix).

ii. Section 404: Notification of sale or transfer of mortgage loans (included in appendix).

c. Detailed guidelines (included in appendix):

i. Home Affordable Modification Program, Supplemental Directive 09-01, Introduction of the Home Affordable Modification Program, Apr. 6, 2009, *available at* http://www.hmpadmin.com/docs/Supplemental_Directive_09-01.pdf.

ii. Home Affordable Modification Program, Base Net Present Value (NPV Model Specifications, *available at* http://www.hmpadmin.com/docs/NPV%20Overview.pdf.

iii. Making Home Affordable, Program Update, Apr. 28, 2009 (second lien program), *available at* http://www.financialstability.gov/docs/042809SecondLienFactSheet.pdf.

iv. Making Home Affordable, Update: Foreclosure Alternatives and Home Price Decline Protection Incentives, May 14, 2009, *available at* http://www.treas.gov/press/releases/docs/05142009FactSheet-MakingHomesAffordable.pdf.

v. Making Home Affordable, Progress Report, May 14, 2009, *available at* http://www.treas.gov/press/releases/docs/05142009ProgressReport.pdf.

vi. Making Home Affordable, Updated Detailed Program Description, Mar. 4, 2009, *available at* http://www.ci.antioch.ca.us/CitySvcs/CDBGdocs/HUD-Making-Home-Affordable-Fact-Sheet.pdf.

vii. Home Affordable Mortgage Program Guidelines, Mar. 4, 2009, *available at* http://www.treas.gov/press/releases/reports/modification_program_guidelines.pdf; *see also* Home Affordable Mortgage Program Summary of Guidelines, Mar. 4, 2009, *available at* http://www.treas.gov/press/releases/reports/guidelines_summary.pdf.

viii. FDIC Loan Modification Program Guide ("Mod in a Box"), *available at* http://www.fdic.gov/consumers/loans/loanmod/loanmodguide.html.

ix. American Securitization Forum, Statement of Principles, Recommendations and Guidelines for the Modification of Securitized Subprime Residential Mortgage Loans, June 2007, *available at* http://www.americansecuritization.com/uploadedFiles/ASF%20Subprime%20Loan%20Modification%20Principles_060107.pdf.

d. Fannie Mae Streamlined Refinance Products. *See* Announcement 08-03, Mar 5, 2009 (included in appendix)

i. The borrower must not be currently involved in a bankruptcy proceeding.

ii. Borrowers who have received a Chapter 7 bankruptcy discharge in a case involving the first lien mortgage are eligible, but if the borrower did not reaffirm the mortgage debt under applicable law, the following language must be inserted in Section 1 of the SMP Agreement: "I represent that I was discharged in a Chapter 7 bankruptcy proceeding subsequent to the execution of the Loan Documents. Based on this representation, Lender agrees that I will not have personal liability on the debt pursuant to this Agreement."

e. Use of FHA Loss Mitigation During Bankruptcy. *See* U.S. Department of Housing and Urban Development, Mortgagee Letter 2008-32 (included in appendix).

IV. Bankruptcy Procedures for Mortgage Modifications

See generally NCLC Reports, Bankruptcy and Foreclosures Edition, Special Issue on Mortgage Modifications in Bankruptcy, Vol. 27, Nov./Dec. 2008 (included in appendix).

a. Lien Stripping

i. For cases holding lien-stripping permissible, 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 Cir. 2001); *Tanner v. FirstPlus Fin., Inc. (In re Tanner)*, 217 F.3d 1357 (11th Cir. 2000); *Bartee v. Tara Colony Homeowners Ass'n (In re Bartee)*, 212 F.3d 277 (5th Cir. 2000); *McDonald v. Master Fin., Inc. (In re McDonald)*, 205 F.3d 606 (3rd Cir. 2000); *Griffey v. U.S. Bank (In re Griffey)*, 335 B.R. 166 (B.A.P. 10th Cir. 2005); *Domestic Bank v. Mann (In re Mann)*, 249 B.R. 831 (B.A.P. 1st Cir. 2000); *Waters v. The Money Store (In re Waters)*, 276 B.R. 879 (Bankr. N.D. Ill. 2002) (cited in NCLC Reports, Bankruptcy and Foreclosures Edition, Special Issue on Mortgage Modifications in Bankruptcy, Vol. 27, Nov./Dec. 2008).

ii. *In re Blosser*, 2009 WL 1064455 (Bankr. E.D. Wis. Apr. 15, 2009) (relying on *In re Jarvis*, 390 B.R. 600 (Bankr. C.D. Cal. 2008), court held Debtor ineligible for discharge cannot strip lien, whether through adversary proceeding or not).

iii. *In re Hughes*, 402 B.R. 325 (Bankr. D. Minn. 2009) (rejecting strip off of wholly unsecured junior mortgage).

iv. *Young v. Camelot Homes (In re Young)*, 390 B.R. 480 (Bankr. D. Me. 2008) (value determined as of petition date) (LUNDIN § 107.1).

v. *In re Serda*, 395 B.R. 450 (Bankr. E.D. Cal. 2008) (proper standard for determining collateral value is fair market value rather than liquidation value); *In re Pereira*, 394 B.R. 501 (Bankr. S.D. Cal. 2008) (LUNDIN § 128.1).

vi. *In re Kemp*, 391 B.R. 262 (Bankr. D.N.J. 2008) (plan may reclassify junior mortgage from secured to unsecured without filing an adversary proceeding) (LUNDIN § 128.1).

b. Debts secured by property in addition to principal residence

i. *In re Picht*, 396 B.R. 76 (Bankr. D. Kan. 2008) (loan originally secured by additional collateral is modifiable, even if the only remaining collateral is the home) (LUNDIN §§ 121.2, 127.1, 447.1).

ii. *In re Baker*, 398 B.R. 198 (Bankr. N.D. Ohio 2008) (date of petition controls, so if mortgage included only residential property at petition date, it is not modifiable based on additional collateral) (LUNDIN § 121.2).

iii. *In re Scarborough*, 461 F.3d 406 (3rd Cir. 2006) (antimodification provision does not prevent modification of mortgage on multi-unit property that includes debtor's residence with investment property); *Lomas Mortgage v. Louis*, 82 F.3d 1 (1st Cir. 1996) (same) (cited in NCLC Reports, Bankruptcy and Foreclosures Edition, Special Issue on Mortgage Modifications in Bankruptcy, Vol. 27, Nov./Dec. 2008). *But see Litton Loan Servicing, LP v. Beamon*, 298 B.R. 508 (N.D.N.Y. 2003) (holding that the antimodification provision requires a "case-by-case determination of whether the parties intended the mortgage in question to be primarily residential versus primarily commercial in nature").

c. Final Payment Due During Plan

i. *Am. Gen. Fin., Inc. v. Paschen (In re Paschen)*, 296 F.3d 1203 (11th Cir. 2002) (section 1322(c)(2) permits bifurcation of claim secured by security interest in debtor's principal residence when the mortgage matures prior to the completion of the plan); *First Union Mortgage Corp. v. Eubanks (In re Eubanks)*, 219 B.R. 468 (B.A.P. 6th Cir. 1998) (same) (cited in NCLC Reports, Bankruptcy and Foreclosures Edition, Special Issue on Mortgage Modifications in Bankruptcy, Vol. 27, Nov./Dec. 2008); *see also In re Latimer*, 395 B.R. 304 (Bankr. W.D.N.Y. 2008) (adopting analysis of *In re Paschen*) (LUNDIN § 143.1). *But see Witt v. United Cos. Lending Corp. (In re Witt)*, 113 F.3d 508 (4th Cir. 1997) ("[Section] 1322(c)(2) does not trump § 1322(b)(2) (and Nobelman) to allow bifurcation of an undersecured home mortgage note.").

d. Mobile Homes

i. *In re Reinhardt*, No. 08-3309, 2009 WL 1139295 (6th Cir. 2009) (holding that the antimodification provision of 1322(b)(2) does not apply to a mobile home unless the mobile home is also real property); *Ennis v. Green Tree Servicing, LLC (In re Ennis)*, 558 F.3d 343 (4th Cir. 2009) (same); *Green Tree Servicing, LLC v. Coleman (In re Coleman)*, 392 B.R. 767 (B.A.P. 8th Cir. 2008) (same) (LUNDIN § 454.1).

V. Impact of change in calculating time; proposed changes to Rules 3001 and 3002.1

a. House of Representatives Bill No. 1626: "Statutory Time-Periods Technical Amendments Act of 2009" (included in appendix)

b. Proposed Rules 3001(c) and 3002.1 (included in appendix)

VI. Controlling Servicer Conduct

a. *Collins* and *Collins*-like language

i. Proposed local rule provision, Middle District of Tennessee (similar to the *Collins* language) (included in appendix)

ii. *In re Collins*, No. 07-30454, 2007 WL 2116416 (Bankr. E.D. Tenn. July 19, 2007) (considering various plan provisions designed to control mortgage servicer conduct during the plan). For cases considering similar language, see LUNDIN § 118.1: *In re Patton*, Nos. 08-23038, 08-24709, 07-28262, 2008 WL 5130096 (Bankr. E.D. Wis. Nov. 19, 2008); *In re Hudak*, No. 08-10478-SBB, 2008 WL 4850196 (Bankr. D. Colo. Oct. 24, 2008); *Armstrong v. Lasalle Bank Nat'l Ass'n (In re Armstrong)*, 394 B.R. 794 (Bankr. W.D. Pa. 2008); *In re Aldrich*, Nos. 08-00520, 08-00743, 2008 WL 4185989 (Bankr. N.D. Iowa Sept. 4, 2008); *In re Emery*, 387 B.R. 721 (Bankr. E.D. Ky. 2008); *In re Anderson*, 382 B.R. 496 (Bankr. D. Or. 2008).

iii. *In re Segura*, No. 08-14280 MER, 2009 WL 416847 (Bankr. D. Colo. Jan. 9, 2009) (approving a *Collins*-like notice requirement; court would have accepted a requirement that the lender apply post-petition mortgage payments differently than cure payments, but rejected the actual provision proposed because it would have required the lender to treat all post-petition payments as current, even if the post-petition payments were delinquent; court also rejected provision requiring the lender to "deem" the mortgage contractually "current" and a provision requiring the lender to obtain approval of fees).

iv. *In re Watson*, 384 B.R. 697 (Bankr. D. Del. 2008) (approving, in principle, plan provisions that establish (1) procedure for providing notice of charges and fees, (2) mechanisms for handling disputes, and (3) requirements for allocation of payments; however, to implement the provisions, the court adopted the procedures from *Jones v. Wells Fargo Home Mortgage (In re Jones)*, 366 B.R. 584 (Bankr. E.D. La. 2007)).

v. *In re Booth*, 399 B.R. 316 (Bankr. E.D. Ark. 2009) (rejecting provision that would have required mortgage holder to obtain court approval before charging or assessing any post-petition fees; accepting provisions requiring the mortgage holder to deem the prepetition arrearage current, to apply arrearage payments only to arrearages, and to apply mortgage payments during the plan to the months in which the payments were made (or designated to be made) under the plan; rejecting as ambiguous a requirement that the mortgage holder "post all payments made in accord with the promissory note [and] mortgage"; rejecting a provision requiring notice of any changes in interest rate, taxes, or insurance; rejecting a requirement that the mortgage holder comply with section 524(i)).

vi. *In re Maupin*, 384 B.R. 421 (Bankr. W.D. Va. 2007) (rejecting as unnecessary a requirement that arrearage payments be applied toward arrearages; rejecting a requirement that the mortgage creditor post payments to the month in which they are made as an attempt to reform the original contract; rejecting notice requirements as unnecessary; rejecting a provision requiring compliance with section 524(i) as unnecessary; and rejecting various other provisions, including a requirement that within 30 days of the entry of a discharge order, the creditor execute a release of its security interest and deliver the title to the debtor).

vii. *In re Coover*, 2006 WL 4491439 (Bankr. D. Kan. Sept. 28, 2006) (accepting, with some modifications, language requiring the arrearage amounts specified in the confirmation order to control and stating that the mortgage must be reinstated on its original terms once the arrearage and required post-petition payments have been made).

viii. *In re Phillips*, 380 B.R. 493 (Bankr. N.D. Ohio 2008) (providing relief from order deeming mortgage current based on denial of due process; debtors failed to serve assignee of mortgage with motion to determine mortgage current) (LUNDIN § 129.1).

ix. *Miller v. Laskowski (In re Laskowski)*, 384 B.R. 518 (Bankr. N.D. Ind. 2008) (mortgagee bound by plan terms requiring it to notify debtor of changes in escrow payments) (LUNDIN § 229.1).

x. *In re Payne*, 387 B.R. 614 (Bankr. D. Kan. 2008) (Standing order required notice of post-petition charges; court noted that Rule 2016(a) should have facilitated disclosure).

xi. *In re Price*, No. 06-15813, 2009 WL 873992 (Bankr. E.D. Ark. Mar. 20, 2009) (holding that default judgment not appropriate on claims that mortgage creditor violated § 506 and Rule 2016 by assessing fees not approved by the court because the only remedy for the claims would have been disgorgement and there was no evidence that the fees were actually paid).

b. Post-Petition Claims

i. *Craig-Likely v. Wells Fargo Home Mortgage (In re Craig-Likely)*, No. 06-13665, 2007 WL 5185289 (E.D. Mich. Mar. 2, 2007) (mortgagee waived recovery of post-petition arrearages by failing to give notice of escrow shortages as required by RESPA) (LUNDIN § 302.1).

c. Post-Petition Charges and Fees

i. *In re Sanchez*, 372 B.R. 289 (Bankr. S.D. Tex. 2007) ("[T]he Court still has jurisdiction over a Chapter 13 case after confirmation and the authority to determine whether post-confirmation fees and charges are reasonable. For post-confirmation charges, state law governs whether the fees charged pursuant to the Loan Agreement are reasonable.").

ii. *In re Harris*, 297 B.R. 61 (Bankr. N.D. Miss. 2003) (denying motion to dismiss complaint regarding post-petition late fees, suggesting that late fees would be improper if debtors made plan payments on a timely basis even if trustee's disbursement schedule resulted in untimely payments under the promissory note).

iii. *Perry v. EMC Mortgage Corp. (In re Perry)*, 388 B.R. 330 (Bankr. E.D. Tenn. 2008) (granting motion to dismiss post-discharge adversary proceeding that alleged violation of the discharge injunction and a violation of a court order declaring the mortgage current; court held that the discharge injunction was inapplicable because the debt at issue was a long term debt and, therefore, not discharged; court held that it had no basis for finding contempt under section 105(a) because creditor had not violated any section of the Bankruptcy Code).

iv. *McDonald v. Bank Financial (In re McDonald)*, 336 B.R. 380 (Bankr. N.D. Ill. 2006) (holding that creditor violated discharge order by failing to reinstate loan upon payment of mortgage arrearage and post-petition payments stated in confirmed plan, as required by confirmation order; but court noted that the effect of the case was only to decelerate any plan

default because the plan did not have language fixing, limiting, or reducing the total debt in any way).

v. *Jones v. Wells Fargo Home Mortgage (In re Jones)*, 366 B.R. 584 (Bankr. E.D. La. 2007) (finding violation of the automatic stay when Wells Fargo applied payments made through the plan to payment of fees and costs that were not disclosed or approved); *In re Stewart*, 391 B.R. 327 (Bankr. E.D. La. 2008) (failure to comply with the *In re Jones* ruling) (LUNDIN § 138.1).

vi. *Padilla v. Wells Fargo Home Mortgage, Inc. (In re Padilla)*, 379 B.R. 643 (Bankr. S.D. Tex. 2007) (Rule 2016 applies to fees chargeable by mortgage lenders) (LUNDIN § 118.1).

vii. *In re Aldrich*, Nos. 08-00520, 08-00743, 2008 WL 4185989 (Bankr. N.D. Iowa Sept. 4, 2008) (plan cannot require mortgage creditor to apply for compensation or reimbursement of expenses under Rule 2016(a) because rule does not apply to post-petition charges) (LUNDIN § 304.1).

viii. *In re Placidi*, No. 5:07-bk-51657 RNO, 2008 WL 474239 (Bankr. M.D. Pa. Feb. 21, 2008) (requiring secured creditors to file Rule 2016 applications for post-petition fees and expenses is overly restrictive) (LUNDIN § 304.1).

ix. *Rodriguez v. Countrywide Home Loans, Inc. (In re Rodriguez)*, 396 B.R. 436 (Bankr. S. D. Tex. 2008) (charging fees without approval under Rule 2016 violates confirmation order and section 105 provides authority for damages) (LUNDIN §§ 138.1, 308.2, 357.1).

d. 11 U.S.C. § 524(i)

i. Applicability pre-discharge

1. *In re Myles*, 395 B.R. 599 (Bankr. M.D. La. 2008) (holding that 524(i) does not apply pre-discharge).

VII. Post discharge; motions to deem current

a. Motions to deem current

i. *Jones v. Walter Mortgage Co. (In re Jones)*, Nos. 03-11065-DWH, 08-1068-DWH, 2008 WL 4905473 (Bankr. N.D. Miss. Oct. 1, 2008) (denying defendant mortgage holder's motion to compel arbitration based on arbitration agreement when issue was whether post-discharge attempt to collect force-placed insurance premiums violated discharge order, Rule 2016(a), or court order deeming claim current and cured).

ii. *Cox v. Countrywide Home Loans Servicing, LP (In re Cox)*, No. 08-1060-DWH, 2008 WL 4900552 (Bankr. N.D. Miss. Sept. 19, 2008) (cause of action stated under § 524 for assessing charges during case without disclosure and assessing unpaid fees after discharge order that stated mortgage was current) (LUNDIN § 357.1).

iii. *Workman v. GMAC Mortgage LLC (In re Workman)*, 329 B.R. 189 (Bankr. D.S.C. 2007) (civil contempt for violating discharge order for attempting to collect fees after discharge order determined mortgage was current) (LUNDIN § 357.1).

b. Miscellaneous post-discharge

i. *Eddins v. GMAC Mortgage Co. (In re Eddins)*, No. 08-1058-DWH, 2008 WL 4905477 (Bankr. N.D. Miss. Oct. 20, 2008) (when discharge order provided that mortgage was current, complaint alleging wrongful assessment and collection of charges survives dismissal) (LUNDIN §§ 351.1, 357.1).

ii. *Padilla v. GMAC Mortgage Corp. (In re Padilla)*, 389 B.R. 409 (Bankr. E.D. Pa. 2008) (long term debt not dischargeable, so misapplication of mortgage payments cannot violate discharge injunction, but claim stated under § 105) (LUNDIN § 351.1).

iii. *United States v. Davis*, No. 5:08CV00021 JMM, 2008 WL 1930546 (E.D. Ark. Apr. 28, 2008) (mortgage lien survived discharge even though bankruptcy court sustained debtor's objection to claim and bifurcated secured claim; § 1322(b)(2) prohibited modification of mortgage lien on debtor's residence) (LUNDIN § 118.1).