Mortgage Modifications and Loss Mitigation

CONCURRENT SESSION

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I. Introduction

The housing United States' housing boom experienced during the first four years of the 21st century came to an abrupt halt in 2006 and home prices dropped rapidly. Unconventional mortgage products offered during the boom, such as those that optimistically increased payments over time, moved forward while values declined and by 2007 the economy was in a full blown housing/foreclosure crisis. Borrowers who entered into the unconventional products intending to refinance into more stable loans in the future were not able to do so with declining home values. Congress first responde with the Housing and Economic Recovery Act of 2008 which contained programs intended to encourage lenders to voluntarily modify distressed loans into more conventional loans. When that was less than effective, the Obama Administration implemented the Making Homes Affordable (MHA) plan. The MHA programs, while technically still voluntary, required lender participation in return for bail-out funds.

The materials that follow will describe some of the fundamentals of the MHA program offerings. Unfortunately, the MHA relief has not been as successful, depending on how you define "success", as was intended. Some argue that the lack of success is due to inherent substantive flaws and others argue that procedural requirements inhibit the program from reaching its full potential. Busy bankruptcy courts have attempted to address the procedural woes by introducing model procedures into motion practice. Most seem to agree that using an electronic portal for document compilation is effective and some districts have required specific portals. Other districts have required the use of *a* portal without specifying *a particular* portal. The Eastern District of Michigan Northern Division has begun using a model motion that requests a scheduling order and mandatory non-binding mediation (among other things) to insure that all parties progress through the process at an efficient pace and in good faith. The court orders being entered on these motions continue to

help define a process that works for all parties. The Eastern District of Michigan Southern Division has a committee that continues to work diligently on various ways to address the loan modification process within the court system. Panel discussion accompanying these materials will provide an update on the initiatives this committee is considering, including potential changes to the local rules of procedure, motion practice and potential sanctions (or other "teeth") for bad faith negotiation.

While voluntary loan modification procedures are being fine tuned within the existing bankruptcy system, efforts are moving forward to change substantive law to address the same goal. Some members of Congress continue to push bills that would amend Section 1322(b) of the bankruptcy code to force modifications through "cram down" provisions. Other more radical approaches have suggested using the power of eminent domain to allow local governments to seize underwater mortgages and restructure them on terms more favorable to the borrower. This material will educate on what programs currently exist. It will not attempt to judge the success or failure thereof as doing so is nearly impossible without a uniform definition of success. It will show how today's bankruptcy practioner is addressing the issue procedurally and how perhaps that may change in the future.. Finally, it will discuss what we can expect by way of legislative response to the issue.

II. Loan Modification Options

A. Preliminary Procedure

There are three preliminary questions that must be answered in order to point a borrower in the right direction for loan modification purposes. The debtor must know who owns his loan, the date the note and mortgage were obtained and whether the loan is in default. As Debtors' counsel can attest, some times clients do not even know that they do not know the answers to these three questions. For example, many times new clients advise that they are "current" on their loan when

in fact they are not, simply because the mortgage company works with them routinely regardless of a contractual default. It is not at all uncommon for a client to advise that their mortgage is ten years old, when in fact it has been refinanced within the past 18 months. As a general rule counsel should already have the information necessary to at least begin this evaluation if they represent the debtor in an existing case or plan to file a bankruptcy on their behalf. The most recently recorded mortgage will show the lender and the date of note and perfection. A recent credit report and/or billing statement will generally show any defaults and the current servicer.

The debtor should first find out if Freddie Mac or Fannie Mae owns their loan. Freddie Mac can be checked by going to www.freddiemac.com/mymortgage and Fannie Mae maintains a database at www.knowyouroptions.com/loanlookup. If neither of these giants own the loan, the mortgage servicer can usually provide the information. Knowing who owns the loan narrows down which options are available for loan modification. Many "non-Freddie/Fannie" lenders also work with the MHA ("Making Homes Affordable") program.

B. MHA "Making Home Affordable" (Government) Programs

This program was created by the Financial Stability Act of 2009. If the loan is owned by Fannie Mae or Freddie Mac, the debtor may be eligible for one of many MHA programs that will reduce monthly payments and/or lower interest rates. Only first lien mortgages obtained before Jan 1, 2009 are eligible to be modified under most of these programs. There are special programs that address junior liens only if the first lien is successfully modified.

Modification

If the debtor is employed but still having trouble making his mortgage payments most agree that the starting point is the Home Affordable Modification Program (HAMP) which is designed to lower monthly payments over the long term. This program used to be available only if the property

was the borrower's primary residence, however on June 1, 2012 the Obama Administration expanded the program to apply to homeowners who rent or intend to rent the property. The requirement is also expanded for displaced military families. Generally, a group of experts from the U.S. Treasury, Fannie Mae, Freddie Mac, the FDIC and the FHA developed a formula called the "HAMP Net Present Value" that attempts to predict whether the lender will make or lose money on a modification. Assuming the loan is otherwise eligible, if the lender will profit from entering into a modification (i.e. a "positive HAMP NPV"), the lender must offer the modification and cease all foreclosure efforts. Conversely if the lender will lose money by entering into a loan modification (i.e., a "negative HAMP NPV"), the lender may foreclosure.

In very general terms, HAMP is designed to lower payments to 31% of a debtor's household income in three steps. The lender is expected to absorb the cost of getting the payment down to 38% and the government "eats" 50% of the cost to get it to 31%. This happens first by lowering interest rates to as low as 2%. If Debtor's total housing expense is still over 31% the second step is to extend the loan term, month by month, up to forty years. Finally, a forbearance with a balloon at maturity may be needed.

To be HAMP eligible, the loan's balance can not be higher than $729,750 unless it is an owner-occupied 2-4 unit building. The current total housing expense (including principal, interest, property taxes and homeowner's insurance) must currently cost the borrower over 31% of his gross monthly household income. Income must be documented, an IRS 4506T must be signed and an affidavit of financial hardship must be provided. The debtor does not have to be delinquent in his payments but if a default does not exist, one must be imminent. Finally, the debtor must not have been convicted of felony larceny, theft, fraud, forgery, money laundering or tax evasion in relation to a mortgage transaction within 10 years of applying. The Federal Housing Administration (FHA

HAMP), Veteran's Administration (VA HAMP) and U.S. Department of Agriculture all offer HAMP based programs designed to reign monthly mortgage payments to within the 31% debt to income ratio. Therefore, it is important to evaluate Debtor's loan to see if it falls within one of these specific programs.

"Under-Water" Loans

Next the borrower's property value must be compared to the principal balance because there are programs specifically designed to lower payments when a home loan is "under-water". If the borrower is current on payments but has been unable to refinance due to declining property values the Home Affordable Refinance Program (HARP) may help pave the way for a refinance. HARP is not available if a debtor is in default and one does not need to be imminent. The program was meant to address the secondary problem of the housing bubble burst – where homeowners witnessed a decline in their property values due to neighboring foreclosures. This program, unlike HAMP, actually leads to a new more stable mortgage for the borrower and therefore require a loan application, refinance fees and underwriting. Because of this it makes sense to counsel the debtor to compare the benefits of this program, if available, to other mortgage products available in the private market. Lenders traditionally require less than an 80% equity cushion to qualify for refinancing without private mortgage insurance. The additional requirement of PMI could make a refinance ineffective. This program expanded the ratio first to 120%, then to 125% and in December of 2011 to an unlimited ratio. Lenders may add requirements, but at a minium the government requirements to be HARP eligible are: the loan must have been acquired by Freddie Mac or Fannie Mae prior to May 31, 2009, the borrower must not have a single default within six months and may only have one default within the past year, the loan-to-value ratio must be over 80% (making traditional refinance impossible), there must be a provable benefit to the debtor (e.g. a more stable

product such as a fixed interest rate or lower monthly payments) and he must not have had a previous HARP refinance, unless it was a Fannie Mae loan during March - May of 2009.

Another program is available for those with under-water loans that are not FHA backed. The FHA Short Refinance program is designed to get homeowners to refinance *into* FHA insured loans. Like HARP the program not only modifies principal and term, but may also alter interest rates. The current lender would have to agree to reduce borrower's principal balance to no more than 97.75% of the property's current value and participation by the lender is voluntary. To be eligible the mortgage must not be guaranteed by Freddie, Fannie, the FHA, USDA or VA; the loan must be under-water; the payments must be current; the home must be debtor's primary residence; he must meet current FHA underwriting requirements; his total debt can not exceed 55% of his monthly gross income and he must not have been convicted of any of the enumerated felonies.

The Principal Reduction Alternative is a similar program (PRA). Under the umbrella of HAMP, this program provides the same benefit for "under-water" loans as the FHA Short Refinance program but does not require the refinance to be into an FHA insured loan. The debt to income ratio is 31% under PRA. More than 100 servicers, including Bank of America, Citimortgage, Chase and Wells Fargo participate in PRA.

Finally, if none of the above products work to obtain a refinance the U.S. Department of Treasury has established the Hardest Hit Fund (HHF) to provide aid to debtors in States "hardest hit" by the housing crisis. Michigan is a "hardest hit" state and received a total of $498.6 million to operate its HHF through the Michigan State Housing Development Authority. More detailed information can be found at www.stepforwardmichigan.org. A program called the Principal Curtailment Program address under-water loans through the HHF. It operates on a match basis with a maximum program contribution of $10,000 that must be matched 1:1 by the lender for a total of

$20,000 to be applied toward principal reduction. This is intended to put the in a better position to modify a more stable value-to-debt property.

Junior Liens

If the borrower is able to permanently modify under HAMP, and he has a second mortgage on the same property, counsel should evaluate eligibility for the Second Lien Modification Program (2MP). This program will only work *with a successful* HAMP modification. The second lien will only be eligible for 2MP if the debtor has not missed three consecutive payments on his primary HAMP modification. The balance on the junior lien must be over $5000 and the note must have been obtained after January 1, 2009. This program may reduce an amortizing junior lien by 1%, reduce interest-only junior liens by 2%, stretch the loan out up to 40 years, and/or transfer forbearance granted on the first lien to the second lien, principal and monthly payments on the second in an attempt to increase the success of the over-all modification package. Seventeen of the largest mortgage lenders participate in the program including: Bank of America, Wells Fargo Bank, PNC Mortgage, OneWest Bank, JPMorgan Chase Bank, GMAC Mortgage, GreenTree Servicing and Citimortgage.

If the first mortgage was refinanced under the FHA Short Refinance Program, any second mortgage on that same property may be eligible for the FHA Second Lien Program (FHA2LP). At least twelve large mortgage lenders have agreed to participate in this program when the mortgagor successfully refinances under the FHA Short Refinance Program. It is obviously wise to analyze junior liens if a borrower is successful in modifying or refinancing his first mortgage under a HAMP or FHA program. The benefits could extend further putting the debtor in an even better position for success.

Special Products

All of the above products assume that the mortgagor is employed. Unemployed or under-employed borrowers have fewer options but some programs do exist that are worth evaluating. The Home Affordable Unemployment Program (UP) may reduce mortgage payments to 31% of household income or suspend payments altogether for up to a year. This program is intended to bridge a gap for unemployed debtors who are seeking traditional HAMP modifications but can not prove employment (it is up to the lender whether they require proof of steady unemployment benefits prior to application). Caution should be given that while payments are in forbearance under this program they are not forgiven unless forgiveness is a term included in the eventual successful HAMP modification – which is not guaranteed. The HHF program discussed above may also assist unemployed mortgagors. Michigan's HHF program for example can pay half (up to $1000) of the borrower's monthly payments directly to the lender for a year if the debtor pays the other half. Michigan requires that the borrower or his spouse be receiving State of Michigan unemployment benefits at the time of application.

Michigan's HHF program has two programs that may be able to assist when a debtor is in default. The Michigan HHF Mortgage Loan Rescue Program offers assistance by paying lenders directly in order to reinstate a defaulted loan when the mortgagor can sustain the mortgage in the future. The HHF Modification Plan Program does generally the same thing when the borrower *can not* sustain the loan in the future but would likely be eligible to modify under HAMP if the loan was current.

Most of the above programs assumed that the property is owner-occupied. However military service members who are currently not occupying the property in question may still be eligible for MHA modification. Special provisions of HAMP apply to service members who are displaced due

to job transfers if they were occupying the property as a primary residence, intend to return at some point and do not own any other single family housing.

C. Private "In-House" Solutions

Most lenders process requests for loan modifications in a waterfall fashion by first examining eligibility under one of the MHA programs described above. If an MHA solution does not exist lenders then internally analyze "proprietary modification" – or "private programs". Some call these HOPE NOW programs. HOPE NOW is a coalition of mortgage lenders and housing counselors set up to expedite mitigation and modification and the name should not be confused with the governments "Hope for Homeowners" group. Many studies report that proprietary programs are outperforming MHA modifications by two to one. However, the measure of performance changes as we define success (e.g. short term approval for modification compared to long term payment on the modified loan without default may show an entirely different story). According to testimony before the House Committee for Oversight and Government Reform somewhere between 70 and 80 percent of HAMP failures are resulting in successful proprietary programs upon redirection.

Not long ago in-house solutions were limited to capitalizing arrearages and increasing payments over the life of the loan. This often prolonged the inevitable because borrowers who could not meet their original contractual obligations were not likely going to be able to make the higher payments. It is easy to imagine that private in-house initiatives improved perhaps when lenders received TARP funds and the forced HAMP participation that accompanied them, out of self-preservation. The new proprietary programs are developed by individual lenders and can therefore take any form the lender creates. Many argue that these internal programs proceed quicker and more efficiently. This could be due to the HOPE NOW portal for document compilation or it may be because all of the information has already been compiled for HAMP evaluation purposes. These in-

house programs do not attempt to pigeon hole every situation into any one-size-fits-all solution as some have suggested MHA government initiatives do. The government programs *come close to achieving uniformity* – arguably an admirable way to minimize transaction costs and thereby increase efficiency. The government programs also *come close to achieving uniformity* – arguably an impossible fantasy when addressing loans that have to be underwritten, costs that someone has to bear and financial risks that vary with every case. A sampling of proprietary programs can be easily obtained by reviewing any mortgage lender's website.

D. Waving the White Flag

It is unfortunately more common than ever in private practice to meet debtors who have exhausted all available remedies and find themselves in a position of having to transition to more affordable housing. More often than not these debtors need help addressing staggering debt that includes but is *not limited to* a mortgage note. When that happens filing a Chapter 7 (assuming the debtors are otherwise eligible for a Chapter 7) allows them to surrender the home back to the mortgage lender with relative ease. However, some debtors would not need bankruptcy relief *but for the problematic home loans* or have tried MHA programs and failed. When this happens the Home Affordable Foreclosure Alternative (HAFA) may provide a vehicle for the debtors to surrender to foreclosure, or sell the property at short-sale, without the burden of a deficiency balance and with "cash for keys" relocation assistance. The program incentive to lenders is to allegedly reduce the cost of foreclosing or minimize the loss at short sale by using specially trained realtors. To be eligible for HAFA the debtor must also be eligible (not necessarily qualified) for MHA programs.

III. The Model Motion – Eastern District of Michigan (Bay City & Flint)

Chapter 13 Trustee Thomas McDonald, Jr. from Bay City, with input from the debtor and

creditor bar, drafted a Motion and Proposed Order for Mortgage Modification Request. The purpose was to address debtors' frustration that lenders may not be acting genuinely and in good faith when reviewing loans for mitigation. The chief complaints were that debtors were being advised repeatedly to provide the same documentation only to be told it was either improperly submitted or lost, that lenders were not communicating and that when they were the communication was futile because there was no representative with final authority available. The motion itself is very straightforward. The proposed Order is attached as EXHIBIT '1'. The Order would require the parties to use Default Mitigation Management (DMM) as a portal to facilitate the process. This would insure that the debtors provide every document requested by the creditor and confirm that the creditor received the information in a timely manner. The proposed Order would also require the lender to file a report with the Court stating whether the modification was granted, listing the programs that were evaluated and if denied stating the reasons for denial. The proposed Order would require action and reaction by the parties within set time limits in order to keep things moving forward. The Order would require that the lender provide a certificate identifying a representative that has authority to modify the loan. Failure to abide by the imposed time limits, document production, use of the DMM portal, assignment of an authorized representative or filing of reports could result in forced mediation, a Show Cause hearing for violation of the Order, sanctions and/or costs. Proponents agree that this addresses all of the concerns voiced by debtors.

The reaction from the creditors' bar has varied. Generally most agree that the time restrictions in the motion are unrealistic and nearly impossible for their clients to meet due to the size and structure of most mortgage companies. Many mortgage companies object to the use of the DMM Portal and would prefer to use their own in-house document compilation systems. Almost all object to the risks involved with identifying a specific individual within their organization with settlement

authority. The objections appear to be broadly based on what creditors perceive as an encroachment upon 1322(b)'s prohibition against modifying the terms of a mortgage. Lenders argue that the relief sought is not supported by bankruptcy law. A standard objection has been included as EXHIBIT '2'.

Chapter 13 Trustee, Carl L. Bekofske (Flint) has filed responsive pleadings that advocate in favor of granting the proposed Order (EXHIBIT '3'). His response argues that the relief sought by debtors does not attempt to modify the terms of a mortgage; it merely seeks assistance from the court in protecting debtors' existing rights and to move procedure along at an optimal pace. Mr. Bekofske points out that lenders are required to review loans for modification pursuant to the Consent Judgment entered in United States of America, et al., v. Bank of America Corp. et al., United States Bankruptcy Court, District of Columbia 12-0301 (the "National Mortgage Settlement Agreement"). The trustee argues that mandating use of the DMM Portal is within the court's authority under Section 105 and comports with the National Mortgage Settlement Agreement which requires lenders to contract with a third party to establish information portals. Finally, Mr. Bekofske argues that the proposed Order's time limitations are actually more liberal than those required under the National Mortgage Settlement Agreement and that setting time limitations is within the Court's authority as necessary to expeditiously administer cases.

Many objections have been amicably resolved with Stipulations that meet in the middle. (EXHIBIT '4'). The Court has not yet required the use of a specific portal, though it has required the use of "a mechanism as delineated by the Creditor unless the parties mutually agree to the use of another portal or third party vendor system". The Court has required lenders provide a "point of contact" as opposed to any certificate of settlement authority. The Court has set status conferences and required prior written reports. An example of one of the Court's Orders is attached as EXHIBIT '5'. The Eastern District has a committee established to continue developing standard practices that

meet the goals of all parties with eye toward equal risk distribution. A report from that committee is expected at panel discussions.

IV. Underwater Mortgage Modification - Other Initiatives

Corelogic reported that 23.7% of all residential properties with a mortgage had negative equity at the end of March 2012. As discussed above, the federal government has responded to this crisis with a number of specific programs designed to enable mortgage modification outside of bankruptcy. This section discusses two additional proposed solutions to the problem that are more controversial: (1) amendment of the Bankruptcy Code to allow the forced modification of mortgages in chapter 13 cases, and (2) local governmental proposals to use the power of eminent domain to force mortgage modification.

A. Proposals to Amend the Bankruptcy Code

Since 2007, members of Congress have proposed amending the Bankruptcy Code to allow borrowers to use chapter 13 to force the modification of residential mortgages on unwilling lenders. These legislative initiatives propose amending § 1322(b)(2) to delete the current prohibition on modification of mortgages that secure a consumer debtor's principal residence, allowing the cramdown of home mortgages. A proposed amendment to the Code was nearly enacted in 2009, after a bill passed the House of Representatives in March of 2009. After intense lobbying by the mortgage banking industry, the 2009 legislation was ultimately defeated in the Senate on a vote of 45 to 51. Similar bills are currently pending before the 112th Congress, but are given little chance of success, despite continued analysis and advocacy supporting their passage.

1. Current Treatment of Residential Mortgages in Chapter 13

Section 506(a) provides that a creditor's claim secured by a lien on property "in which the estate has an interest" is a secured claim to the extent that there is value in the collateral to secure it, but an unsecured claim to the extent that the amount owed exceeds the value of the collateral. As a result of § 506(a), many types of undersecured bankruptcy claims are bifurcated into two claims: a secured claim corresponding to the value of the collateral and an unsecured claim corresponding to the remaining value owed. Section 506(d) completes the picture by providing that a creditor's lien is void in bankruptcy to the extent that it secures a claim that is "not an allowed secured claim."

Section 1325(a)(5)(B) allows a chapter 13 plan to be confirmed over a secured creditor's objection if the plan provides that the secured creditor will retain its lien and receive payments equal to the present value of the secured claim on the effective date of the plan. Read in conjunction with § 506(a), the provision permits a chapter 13 debtor to bifurcate an undersecured claim into two claims: a secured claim equal to the value of the collateral and an unsecured claim equal to the resulting deficiency. The bifurcation of undersecured claims in chapter 13 over the creditor's objection is known as "cramdown."

Section 1322(b)(2) allows a chapter 13 plan to "modify the rights of holders of secured claims, *other* than a claim secured only by a security interest in real property that is the debtor's principal residence." This language prevents bankruptcy debtors from using the chapter 13 cramdown provisions to modify most residential mortgages. It does not, however, prevent bankruptcy debtors from modifying all mortgages. Because it applies to claims that are secured "only" by a consumer debtor's principal residence, the § 1332(b)(2) exclusion does not apply to any commercial mortgage, any mortgage securing a second or vacation home, or to any claim that is jointly secured by the debtor's principal residence and some other form of

collateral.

2. Proposed Amendments to the Bankruptcy Code

As early as 2007, members of Congress spotted the possibility that the Bankruptcy Code could be a useful tool to keep Americans in their homes during the foreclosure crisis. Three separate bills introduced in the 110th Congress proposed amending § 1322(b)(2) to limit or eliminate the prohibition on mortgage cramdown in chapter 13. These initiatives were opposed by the Bush Administration, and the 110th Congress adjourned in December of 2008 without taking action on them.

When the 111th Congress resumed business in 2009, the Congressional backers of mortgage modification quickly reintroduced this legislation, this time with the backing of the Obama administration. The legislation received an early boost when Citigroup, the recipient of nearly $300 billion in government assistance, agreed not to oppose legislation that applied only to existing mortgages. Despite this promising start, and the addition of limiting terms added to address specific creditor concerns, the bills quickly ran into stiff and sustained opposition from other players in the banking industry and ultimately failed.

Two similar bills were introduced in the 112th Congress and are presently stalled in committee. On April 15, 2011, Representatives Conyers, Nadler, Cohen, and Miller introduced H.R. 1587, the "Home Foreclosure Reduction Act of 2011." H.R. 1587 was immediately referred to the House Committee on the Judiciary where no action has been taken. H.R. 4058, the "Bankruptcy Equity Act of 2012," introduced on February 16, 2012 and sponsored by Representative Blumenauer, was likewise immediately referred to the House Committees on Financial Services, the Judiciary, and Veteran's Affairs.

The current bills are modeled on the 2009 legislation. They do not repeal the §

1322(b)(2) exclusion; instead they propose adding a new time-limited § 1322(b)(11) that would allow the modification of loans originated before the effective date of the new law (effectively a built-in sunset provision). For these loans, cramdown would be allowed as to the debtor's principal residence, but only if the residence is the subject of a notice that a foreclosure may be commenced.

For loans falling within these restrictions, the bills allow the following forms of modification to an undersecured mortgage:

- Cramdown of the creditor's allowed secured claim to the value of the property as allowed by § 506(a);

- The prohibition, reduction, or delay of adjustments to the rate of interest on adjustable rate loans;

- Extension of the repayment period to a maximum of 40 years, reduced by the period for which the loan has been outstanding; and

- Conversion of the post-filing interest rate to a fixed annual rate equal to the average prime rate "plus a reasonable premium for risk."

The legislation would also add a new subsection (g) to § 1322 that allows the lender to recapture value if the debtor sells appreciated property after confirmation of the chapter 13 plan, and a new subsection (h) that requires a debtor seeking mortgage cramdown to seek voluntary loan modification from the creditor or show that a foreclosure sale was scheduled shortly following the filing of the bankruptcy petition.

B. Eminent Domain Proposals

In June of 2012, San Bernardino County, California, proposed using its power of eminent domain to seize underwater mortgages held by private investor pools and rewrite them by reducing the principal amount to the market value of the underlying property. After restructuring the mortgages to provide relief to the homeowners, the County would then

repackage the mortgages into new pools and sell them on the secondary market. Similar proposals have since been discussed in other municipalities, including Las Vegas, Chicago, Detroit, Suffolk County, New York, and the California communities of Sacramento, Elk Grove, and Berkeley.

1. Structure of the Eminent Domain Proposals

The leading academic proponent of the eminent domain strategy is Professor Robert Hockett of Cornell Law School. In a paper released in June of 2012, Professor Hockett argues that "municipalities, in partnership with investors, can condemn underwater mortgage notes, pay mortgagees fair market value for the same, and systematically write down principal." The proposals under consideration around the country track the model sketched by Professor Hockett.

The municipalities considering eminent domain are proposing to work in partnership with a private investment group, Mortgage Resolution Partners LLP (MRP). Under the proposed plan, MRP would provide financing to fund the seizure of the mortgages and would facilitate the securitization of the restructured loans. MRP would pay "75-80 percent of the current value of a property to mortgage investors, and then refinance those loans to earn 107 percent of property value," ensuring a profit to its own investors. To enhance the attractiveness of the end product to secondary-market investors, all of the seized mortgages would be performing mortgages held by private-label securitization trusts.

The municipalities' proposals to use eminent domain to seize intangible financial products drew immediate criticism from the financial services industry. On August 9, 2012, the Federal Housing Finance Agency (FHFA), the agency overseeing Fannie Mae and Freddie Mac while they are operating in conservatorship, published a notice requesting comments on

the proposed use of eminent domain in this area. The FHFA's notice expresses "significant concerns about the use of eminent domain to revise existing financial contracts and the alteration of the value of . . . securities holdings." It also questions and asks for comment on the constitutionality of this use.

On September 7, 2012, the Securities Industry and Financial Markets Association (SIFMA) and 25 other financial trade associations submitted a letter to the FHFA's general counsel opposing the proposals. SIFMA expressed three primary areas of concern: (1) the negative impact of eminent domain plans on mortgage lending, mortgage finance markets, and mortgage investors; (2) concerns about valuation of the underlying properties and the profit motivation inherent in the plan; and (3) legal considerations including the likelihood that the plans will ultimately be found unconstitutional.

Another level of opposition to the proposals appeared on September 13, 2012, when Representative John Campbell of California introduced H.R. 6397, a bill that would penalize municipalities that use eminent domain to seize residential mortgages. The bill, titled the "Defending American Taxpayers from Abusive Government Takings Act of 2012," prohibits Fannie Mae and Freddie Mac from purchasing, the FHA from insuring, and the Department of Veterans Affairs from guaranteeing, making, or insuring, any mortgage secured by a residence located in a county in which eminent domain has been used to take a residential mortgage. The bill has been referred to committee, but has won the approval of the Mortgage Bankers Association.

2. Constitutional Implications of Eminent Domain Proposals

Eminent domain proposals implicate a number of constitutional provisions, including the Contracts Clause and the Tenth Amendment. The primary issue, however, comes from the

Takings Clause of the Fifth Amendment, which provides "nor shall private property be taken for public use, without just compensation." The Takings Clause recognizes the power of state and local governments to use the power of eminent domain to take private property, imposing two conditions on this authority: the taking must be for a "public use" and "just compensation" must be paid to the owner.

The Supreme Court has interpreted this power very generously. Most recently, in *Kelo v. City of New London*, the Court held that state and local governments may use eminent domain to transfer property from one private party to another, so long as the transfer is related to a public purpose. In *Kelo*, an economic development plan was held to satisfy the constitutional "public use" requirement. The power of eminent domain extends to intangible property, for example, the interest on a lawyer's trust account. And, as in *Kelo*, the Court has made it clear that the "public *use*" requirement is satisfied if the taking is related to some "public *purpose*" like economic development or the provision of legal services to the needy. In *Hawaii Housing Authority v. Midkiff*, the Court noted that the Contracts Clause of the Constitution does not protect against the power of eminent domain.

In addition, a municipality's exercise of eminent domain is subject to the deferential standard of rational basis review. Under this standard, a compensated taking will generally be upheld if the exercise of eminent domain is "rationally related to a conceivable public purpose." The application of the rational basis standard, together with the Court's broad construction of the public use requirement, make it very plausible that the power of state and local governments to use their eminent domain power to seize underwater mortgages will be upheld.

Finally, Representative Campbell's bill proposing to withdraw federal mortgage market

benefits from municipalities that exercise eminent domain raises serious federalism issues. The Constitution reserves the power of eminent domain to state and local governments, not to Congress. Congress possibly violates the Tenth Amendment if it oversteps this boundary by attempting to coerce municipalities to use their powers in particular ways. This danger is heightened here, because the eminent domain proposals primarily impact private-label securization trusts that hold mortgages not directly backed by government-sponsored entities.

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I. Introduction

The United States' housing boom experienced during the first four years of the 21st century came to an abrupt halt in 2006 and home prices dropped rapidly. Unconventional mortgage products offered during the boom, such as those that optimistically increased payments over time, moved forward while values declined and by 2007 the economy was in a full blown housing/foreclosure crisis. Borrowers who entered into the unconventional products intending to refinance into more stable loans in the future were not able to do so with declining home values. Congress responded with the Housing and Economic Recovery Act of 2008 which contained programs intended to encourage lenders to voluntarily modify distressed loans into more conventional loans. When that was less than effective, the Obama Administration implemented the Making Homes Affordable (MHA) plan. The MHA programs, while technically still voluntary, required lender participation in return for bail-out funds.

The materials that follow will describe some of the fundamentals of the MHA program offerings. Unfortunately, the MHA relief has not been as successful as intended. Some argue that the lack of success is due to inherent substantive flaws and others argue that procedural requirements inhibit the program from reaching its full potential. Busy bankruptcy courts have attempted to address the procedural woes by introducing model procedures into motion practice. Most seem to agree that using an electronic portal for document compilation is effective and some districts have required specific portals. Other districts have required the use of *a* portal without specifying *a particular* portal. The Eastern District of Michigan Northern Division has begun using a model motion that requests a scheduling order and mandatory non-binding mediation to insure that all parties progress through the process at an efficient pace and in good faith. The court orders being entered on these motions continue to help define a process that works for all parties. The Eastern

District of Michigan Southern Division has a committee that continues to work diligently on various ways to address the loan modification process within the court system. Panel discussion accompanying these materials will provide an update on the initiatives this committee is considering, including potential changes to the local rules of procedure, motion practice and potential sanctions for bad faith negotiation.

While voluntary loan modification procedures are being fine tuned within the existing bankruptcy system, efforts are moving forward to change substantive law to address the same goal. Some members of Congress continue to push bills that would amend Section 1322(b) of the bankruptcy code to force modifications through "cram down" provisions. Other more radical approaches have suggested using the power of eminent domain to allow local governments to seize underwater mortgages and restructure them on terms more favorable to the borrower. This material will educate on what programs currently exist. It will not attempt to judge the success or failure thereof as doing so is nearly impossible without a uniform definition of success. It will show how today's bankruptcy practioner is addressing the issue procedurally and how perhaps that may change in the future.. Finally, it will discuss what we can expect by way of legislative response to the issue.

II. Loan Modification Options

A. Preliminary Procedure

There are three preliminary questions that must be answered in order to point a borrower in the right direction for loan modification purposes. The debtor must know who owns his loan, the date the note and mortgage were obtained and whether the loan is in default. As Debtors' counsel can attest, some times clients do not even know that they do not know the answers to these three questions. For example, many times new clients advise that they are "current" on their loan when

in fact they are not, simply because the mortgage company works with them routinely regardless of a contractual default. It is not at all uncommon for a client to advise that their mortgage is ten years old, when in fact it has been refinanced within the past 18 months. Counsel should already have the information necessary to at least begin this evaluation if they represent the debtor in an existing case or plan to file a bankruptcy on their behalf. The most recently recorded mortgage will show the lender and the date of note and perfection. A recent credit report and/or billing statement will generally show any defaults and the current servicer.

The debtor should find out if Freddie Mac or Fannie Mae owns their loan. Freddie Mac can be checked by going to www.freddiemac.com/mymortgage and Fannie Mae maintains a database at www.knowyouroptions.com/loanlookup. If neither of these giants own the loan, the mortgage servicer can usually provide the information. Knowing who owns the loan narrows down which options are available for loan modification. Many "non-Freddie/Fannie" lenders also work with the MHA ("Making Homes Affordable") program.

B. MHA "Making Home Affordable" (Government) Programs

This program was created by the Financial Stability Act of 2009. If the loan is owned by Fannie Mae or Freddie Mac, the debtor may be eligible for one of many MHA programs that will reduce monthly payments and/or lower interest rates. Only first lien mortgages obtained before Jan 1, 2009 are eligible to be modified under most of these programs. There are special programs that address junior liens only if the first lien is successfully modified.

Modification

If the debtor is employed but still having trouble making payments the starting point is the Home Affordable Modification Program (HAMP) which is designed to lower monthly payments over the long term. This program was only available for borrower's primary residence, However on

June 1, 2012 the Obama Administration expanded the program to apply to homeowners who rent or intend to rent the property. The requirement is expanded for displaced military families as well. Generally, a group of experts from the U.S. Treasury, Fannie Mae, Freddie Mac, the FDIC and the FHA developed a formula called the "HAMP Net Present Value" that attempts to predict whether the lender will make or lose money on a modification. As long as the debtor is otherwise eligible, if the lender will profit from entering into a modification ("positive HAMP NPV") one be must be offered foreclosure efforts must stop. Conversely if the lender will lose money by entering into a loan modification ("negative HAMP NPV"), the lender may foreclosure.

HAMP is designed to lower payments to 31% of a debtor's household income in three steps. The lender is expected to absorb the cost of getting the payment down to 38% and the government absorbs 50% of the cost to get it to 31%. This happens first by lowering interest rates to as low as 2%. If Debtor's total housing expense is still over 31% the second step is to extend the loan term, month by month, for up to forty years. Ultimately forbearance with a balloon at maturity may be needed.

To be HAMP eligible, the loan's balance cannot be higher than $729,750 unless it is an owner-occupied 2-4 unit building. The current total housing expense (including principal, interest, property taxes and homeowner's insurance) must currently cost the borrower over 31% of his gross monthly household income. Income has to be documented, an IRS 4506T has to be signed and an affidavit of financial hardship must be provided. The debtor does not have to be delinquent in his payments but if a default does not exist one must be imminent. Finally, the debtor must not have been convicted of felony larceny, theft, fraud, forgery, money laundering or tax evasion in relation to a mortgage transaction within 10 years of applying. The Federal Housing Administration (FHA), Veteran's Administration (VA) and U.S. Department of Agriculture (USDA) all offer HAMP

based programs designed to reign monthly mortgage payments to within the 31% debt to income ratio. Therefore it is important to evaluate Debtor's loan to see if it falls within one of these specific programs.

"Under-Water" Loans

Next the borrower's property value must be compared to the principal balance because there are programs specifically designed to lower payments when a home loan is "under-water". If the borrower is current on payments but has not been able to refinance due to declining property values the Home Affordable Refinance Program (HARP) may help pave the way for a refinance. HARP is not available if a debtor is in default nor does one have to be imminent. This program, unlike HAMP, actually leads to a new more stable mortgage and therefore requires a loan application, refinance fees and underwriting. Because of this the debtor must compare the benefits of this program, if available, to other mortgage products available in the private market. Lenders traditionally require an 80% equity cushion to qualify for refinancing without private mortgage insurance. This program expanded the ratio first to 120%, then to 125% and in December of 2011 to an unlimited ratio. Lenders may add requirements, but at a minium the government requirements to be HARP eligible are that: (1) the loan must have been acquired by Freddie Mac or Fannie Mae prior to May 31, 2009, (2) the borrower must not have a single default within six months and may only have one default within the past year, (3) the loan-to-value ratio must be over 80% (making traditional refinance impossible), (4) there must be a provable benefit to the debtor (e.g. a more stable product such as a fixed interest rate or lower monthly payments) and (5) there must not have been a previous HARP refinance, unless it was a Fannie Mae loan during March - May of 2009.

There is another program available for those with under-water loans that are not FHA backed. The FHA Short Refinance program is designed to get homeowners to refinance *into* FHA

insured loans. Like HARP the program not only modifies principal and term, but may also alter interest rates. The current lender would have to agree to reduce borrower's principal balance to no more than 97.75% of the property's current value and participation by the lender is voluntary. To be eligible the mortgage must not be guaranteed by Freddie, Fannie, the FHA, USDA or VA; the loan must be under-water; the payments must be current; the home must be debtor's primary residence; current FHA underwriting requirement must be met; total debt can not exceed 55% of monthly gross income and the borrower must not have been convicted of one of the enumerated felonies.

The Principal Reduction Alternative (PRA) is a similar program. Under the umbrella of HAMP, this program provides the same benefit for "under-water" loans as the FHA Short Refinance program but does not require the refinance to be into an FHA insured loan. The debt to income ratio is 31% under the PRA. More than 100 servicers, including Bank of America, Citimortgage, Chase and Wells Fargo participate in PRA.

Finally, if none of the above products lead to a refinance the U.S. Department of Treasury has established the Hardest Hit Fund (HHF) to provide aid to debtors in States hardest hit by the housing crisis. Michigan has received a total of $498.6 million to operate its HHF through the Michigan State Housing Development Authority. More detailed information can be found at www.stepforwardmichigan.org. The Principal Curtailment Program address under-water loans through the HHF. It operates on a match basis with a maximum program contribution of $10,000 that must be matched 1:1 by the lender for a total of $20,000 to be applied toward principal reduction.

Junior Liens

If the borrower is able to permanently modify under HAMP, and has a second mortgage on

the same property, eligibility for the Second Lien Modification Program (2MP) should be reviewed. This program will only work *with a successful* HAMP modification. The second lien will only be eligible for 2MP if the debtor has not missed three consecutive payments on the primary HAMP modification. The balance on the junior lien must be over $5000 and the note must have been obtained after January 1, 2009. This program may reduce an amortizing junior lien by 1%, reduce interest-only junior liens by 2%, stretch the loan up to 40 years, and/or transfer forbearance granted on the first lien to the second. Seventeen of the largest mortgage lenders participate in the program.

If the first mortgage was refinanced under the FHA Short Refinance Program, any junior lien the property may be eligible for the FHA Second Lien Program (FHA2LP). At least twelve large mortgage lenders have agreed to participate in this program when the mortgagor successfully refinances under the FHA Short Refinance Program. It is obviously wise to analyze junior liens if a borrower is successful in modifying or refinancing his first mortgage under a HAMP or FHA program. The benefits could extend further putting the debtor in an even better position for success.

Special Products

All of the above products assume that the mortgagor is employed. Unemployed or under-employed borrowers have fewer options but some programs do exist that are worth evaluating. The Home Affordable Unemployment Program (UP) may reduce mortgage payments to 31% of household income or suspend payments altogether for up to a year. This program is intended to bridge a gap for unemployed debtors who are seeking traditional HAMP modifications but can not prove employment (it is up to the lender whether they require proof of steady unemployment benefits prior to application). Caution should be given that while payments are in forbearance under this program they are not forgiven unless forgiveness is a term included in the eventual successful HAMP modification – which is not guaranteed. The HHF program discussed above may also assist

unemployed mortgagors. Michigan's HHF program for example can pay half (up to $1000) of the borrower's monthly payments directly to the lender for a year if the debtor pays the other half. Michigan requires that the borrower or his spouse be receiving State of Michigan unemployment benefits at the time of application.

Michigan's HHF program has two programs that may be able to assist when a debtor is in default. The Michigan HHF Mortgage Loan Rescue Program offers assistance by paying lenders directly in order to reinstate a defaulted loan when the mortgagor can sustain the mortgage in the future. The HHF Modification Plan Program does generally the same thing when the borrower *can not* sustain the loan in the future but would likely be eligible to modify under HAMP if the loan was current.

Most of the above programs assumed that the property is owner-occupied. However military service members who are currently not occupying the property in question may still be eligible for MHA modification. Special provisions of HAMP apply to service members who are displaced due to job transfers if they were occupying the property as a primary residence, intend to return at some point and do not own any other single family housing.

C. Private "In-House" Solutions

Most lenders process requests for loan modifications in a waterfall manner by first examining eligibility under one of the MHA programs described above. If an MHA solution does not exist lenders then internally analyze "proprietary modification" – or – "private programs". Many studies report that proprietary programs are outperforming MHA modifications by two to one. However, the measure of performance changes with the definition of success (e.g. short term approval for modification compared to long term payment on the modified loan without default may show an entirely different story). According to testimony before the House Committee for

Oversight and Government Reform somewhere between 70 and 80 percent of HAMP failures are resulting in successful proprietary programs upon redirection.

Not long ago in-house solutions were limited to capitalizing arrearage and increasing payments over the life of the loan. This often prolonged the inevitable because borrowers who could not meet their original contractual obligations were not likely going to be able to make the higher payments. It is easy to imagine that private in-house initiatives improved out of self preservation when lenders received TARP funds and the forced HAMP participation that accompanied them. The new proprietary programs are developed by individual lenders and can therefore take any form the lender creates. Many argue that these internal programs proceed quicker and more efficiently. This could be due to various portals used for document compilation or it may be because all of the information has already been compiled for HAMP evaluation. In-house programs do not attempt to pigeon hole every situation into any one-size-fits-all solution as some have suggested MHA government initiatives do. The government programs come close to achieving uniformity which is arguably an admirable way to minimize transaction costs and thereby increase efficiency. However it is impossible to uniformly confront loans that have to be underwritten, costs that someone has to bear and financial risks that vary with every case.

D. Waving the White Flag

It is unfortunately more common than ever in private practice to meet debtors who have exhausted all available remedies and find themselves in a position of having to transition into more affordable housing. More often than not these debtors need help addressing staggering debt that includes but is *not limited to* a mortgage note. When that happens filing a Chapter 7 (assuming the debtors are otherwise eligible for a Chapter 7) allows them to surrender the home back to the mortgage lender with relative ease. However, some debtors would not need bankruptcy relief *but for*

the problematic home loans and/or have tried MHA programs and failed. When this happens the Home Affordable Foreclosure Alternative (HAFA) may provide a vehicle for the debtors to surrender to foreclosure, or sell the property at short-sal,e without the burden of a deficiency balance. It also provides "cash for keys" relocation assistance. The program incentive to lenders is to allegedly reduce the cost of foreclosing or minimize the loss at short sale by using specially trained realtors. To be eligible for HAFA the debtor must also be eligible for MHA programs.

III. The Model Motion – Eastern District of Michigan (Bay City & Flint)

Chapter 13 Trustee Thomas McDonald, Jr. from Bay City, with input from the debtor and creditor bar, drafted a Motion and Proposed Order for Mortgage Modification Request. The purpose was to address debtors' frustration that lenders may not be acting genuinely and in good faith when reviewing loans for mitigation. The chief complaints were that debtors were being advised repeatedly to provide the same documentation only to be told it was either improperly submitted or lost, that lenders were not communicating and that when they were the communication was futile because there was no representative with final authority available. The motion itself is very straightforward. The proposed Order is attached as EXHIBIT '1'. The Order would require the parties to use Default Mitigation Management (DMM) as a portal to facilitate the process. This would insure that the debtors provide every document requested by the creditor and confirm that the creditor received the information in a timely manner. The proposed Order would also require the lender to file a report with the Court stating whether the modification was granted, listing the programs that were evaluated and reasons for any denial. The proposed Order would require action and reaction by the parties within set time limits in order to keep things moving forward. The Order would require that the lender provide a certificate identifying a representative that has authority to

modify the loan. Failure to abide by the imposed time limits, document production, use of the DMM portal, assignment of an authorized representative or filing of reports could result in forced mediation, a Show Cause hearing for violation of the Order, sanctions and/or costs. Proponents agree that this addresses all of the concerns voiced by debtors.

The reaction from the creditors' bar has varied. Generally most agree that the time restrictions in the motion are unrealistic and nearly impossible for their clients to meet due to the size and structure of most mortgage companies. Many mortgage companies object to the use of the DMM Portal and would prefer to use their own in-house document compilation systems. Almost all object to the risks involved with identifying a specific individual within their organization with settlement authority. The objections appear to be broadly based on what creditors perceive as an encroachment upon 1322(b)'s prohibition against modifying the terms of a mortgage. Lenders argue that the relief sought is not supported by bankruptcy law. A standard objection has been included as EXHIBIT '2'.

Chapter 13 Trustee, Carl L. Bekofske (Flint) has filed responsive pleadings that advocate in favor of granting the proposed Order (EXHIBIT '3'). His response argues that the relief sought by debtors does not attempt to modify the terms of a mortgage; it merely seeks assistance from the court in protecting debtors' existing rights and to move procedure along at an optimal pace. Mr. Bekofske points out that lenders are required to review loans for modification pursuant to the Consent Judgment entered in United States of America, et al., v. Bank of America Corp. et al., United States Bankruptcy Court, District of Columbia 12-0301 (the "National Mortgage Settlement Agreement"). The trustee argues that mandating use of the DMM Portal is within the court's authority under Section 105 and comports with the National Mortgage Settlement Agreement which requires lenders to contract with a third party to establish information portals. Finally, Mr. Bekofske argues that the proposed Order's time limitations are actually more liberal than those required under the National

Mortgage Settlement Agreement and that setting time limitations is within the Court's authority as necessary to expeditiously administer cases.

Many objections have been amicably resolved with Stipulations that meet in the middle. (EXHIBIT '4'). The Court has not yet required the use of a specific portal, though it has required the use of "a mechanism as delineated by the Creditor unless the parties mutually agree to the use of another portal or third party vendor system". The Court has required lenders to provide a "point of contact" as opposed to any certificate of settlement authority. The Court has set status conferences and required prior written reports. An example of one of the Court's Orders is attached as EXHIBIT '5'. The Eastern District has a committee established to continue developing standard practices that meet the goals of all parties with an eye toward equal risk distribution. A report from that committee is expected at panel discussions.

IV. Underwater Mortgage Modification - Other Initiatives[1]

Corelogic reported that 23.7% of all residential properties with a mortgage had negative equity at the end of March 2012.[2] As discussed above, the federal government has responded to this crisis with a number of specific programs designed to enable mortgage modification outside of bankruptcy.[3] This section discusses two additional proposed solutions to the problem that are more controversial: (1) amendment of the Bankruptcy Code to allow the forced modification of mortgages in chapter 13 cases, and (2) local governmental proposals to use the power of eminent domain to force mortgage modification.

A. Proposals to Amend the Bankruptcy Code

Since 2007, members of Congress have proposed amending the Bankruptcy Code to allow borrowers to use chapter 13 to force the modification of residential mortgages on unwilling lenders. These legislative initiatives propose amending § 1322(b)(2) to delete the current prohibition on modification of mortgages that secure a consumer debtor's principal residence, allowing the cramdown of home mortgages. A proposed amendment to the Code was nearly enacted in 2009, after a bill passed the House of Representatives in March of 2009. After intense lobbying by the mortgage banking industry, the 2009 legislation was ultimately defeated in the Senate on a vote of 45 to 51.[4] Similar bills are currently pending before the 112th Congress, but

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[1] Susan E. Hauser, ABI Resident Scholar and Associate Professor, North Carolina Central University School of Law. Thanks are owed to Diane Carter and Marisa N. Grant, North Carolina Central University School of Law, Class of 2013, for their assistance with this portion of the paper.

[2] *CoreLogic Reports Negative Equity Decreases in First Quarter of 2012* (Press Release, July 12, 2012), *available at* http://www.corelogic.com/about-us/researchtrends/asset_upload_file912_15196.pdf. This percentage figure represents 11.4 million properties and reflects a decrease from the fourth quarter of 2011, when 25.2% of home mortgages were upside down.

[3] These are covered in parts II and III of this manuscript.

[4] *See, e.g.,* Alex Ulam, *Why a Mortgage Cramdown Bill is Still the Best Bet to Save the Economy*, The Nation, Oct. 20, 2011 (reporting the history of mortgage cramdown legislation).

are given little chance of success, despite continued analysis and advocacy supporting their passage.[5]

1. Current Treatment of Residential Mortgages in Chapter 13

Section 506(a) provides that a creditor's claim secured by a lien on property "in which the estate has an interest" is a secured claim to the extent that there is value in the collateral to secure it, but an unsecured claim to the extent that the amount owed exceeds the value of the collateral. As a result of § 506(a), many types of undersecured bankruptcy claims are bifurcated into two claims: a secured claim corresponding to the value of the collateral and an unsecured claim corresponding to the remaining value owed. Section 506(d) completes the picture by providing that a creditor's lien is void in bankruptcy to the extent that it secures a claim that is "not an allowed secured claim."

Section 1325(a)(5)(B) allows a chapter 13 plan to be confirmed over a secured creditor's objection if the plan provides that the secured creditor will retain its lien and receive payments equal to the present value of the secured claim on the effective date of the plan. Read in conjunction with § 506(a), the provision permits a chapter 13 debtor to bifurcate an undersecured claim into two claims: a secured claim equal to the value of the collateral and an unsecured claim equal to the resulting deficiency. The bifurcation of undersecured claims in chapter 13 over the creditor's objection is known as "cramdown."

Section 1322(b)(2) allows a chapter 13 plan to "modify the rights of holders of secured claims, *other* than a claim secured only by a security interest in real property that is the debtor's principal residence." This language prevents bankruptcy debtors from using the chapter 13

[5] *See, e.g.*, Binyamin Appelbaum, *Cautious Moves on Foreclosures Haunting Obama*, N.Y. Times, Aug. 19, 2012. ("The administration made just one mistake, [former Congressman Jim Marshall] said in a recent interview: it failed to rewrite the bankruptcy code." Noting that "Mr. Obama sponsored cramdown legislation as a senator, endorsed it as a presidential candidate and called on Congress to pass it" but failed to obtain passage of the legislation.)

cramdown provisions to modify most residential mortgages. It does not, however, prevent bankruptcy debtors from modifying all mortgages. Because it applies to claims that are secured "only" by a consumer debtor's principal residence, the § 1332(b)(2) exclusion does not apply to any commercial mortgage, any mortgage securing a second or vacation home, or to any claim that is jointly secured by the debtor's principal residence and some other form of collateral.[6]

2. Proposed Amendments to the Bankruptcy Code

As early as 2007, members of Congress spotted the possibility that the Bankruptcy Code could be a useful tool to keep Americans in their homes during the foreclosure crisis. Three separate bills introduced in the 110th Congress proposed amending § 1322(b)(2) to limit or eliminate the prohibition on mortgage cramdown in chapter 13. These initiatives were opposed by the Bush Administration, and the 110th Congress adjourned in December of 2008 without taking action on them.

When the 111th Congress resumed business in 2009, the Congressional backers of mortgage modification quickly reintroduced this legislation, this time with the backing of the Obama administration. The legislation received an early boost when Citigroup, the recipient of nearly $300 billion in government assistance, agreed not to oppose legislation that applied only to existing mortgages. Despite this promising start, and the addition of limiting terms added to address specific creditor concerns, the bills quickly ran into stiff and sustained opposition from other players in the banking industry and ultimately failed.[7]

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[6] Chapter 13 debtors are also able to benefit from a judicially created rule that allows a junior mortgage that is wholly unsecured under § 506 to be stripped to an unsecured claim despite the anti-modification language in § 1322(b)(2). These cases reason that the anti-modification language applies only when there is a "secured claim." If the first mortgage consumes all available equity – leaving no unencumbered equity to protect the junior lien – the junior mortgagee has no secured claim and may be treated as entirely unsecured in the context of the debtor's chapter 13 plan. *See, e.g.*, Lane v. Western Interstate Bancorp (*In re* Lane), 280 F.3d 663 (6th Cir. 2002).

[7] For a more detailed discussion of residential mortgage cramdown legislation, *see* Susan E. Hauser, *Cutting the Gordian Knot: The Case for Allowing Modification of Home Mortgages in Bankruptcy*, 5 J. Bus. & Tech. L. 207 (2010).

Two similar bills were introduced in the 112th Congress and are presently stalled in committee. On April 15, 2011, Representatives Conyers, Nadler, Cohen, and Miller introduced H.R. 1587, the "Home Foreclosure Reduction Act of 2011." H.R. 1587 was immediately referred to the House Committee on the Judiciary where no action has been taken. H.R. 4058, the "Bankruptcy Equity Act of 2012," introduced on February 16, 2012 and sponsored by Representative Blumenauer, was likewise immediately referred to the House Committees on Financial Services, the Judiciary, and Veteran's Affairs.

The current bills are modeled on the 2009 legislation. They do not repeal the § 1322(b)(2) exclusion; instead they propose adding a new time-limited § 1322(b)(11) that would allow the modification of loans originated before the effective date of the new law (effectively a built-in sunset provision). For these loans, cramdown would be allowed as to the debtor's principal residence, but only if the residence is the subject of a notice that a foreclosure may be commenced.

For loans falling within these restrictions, the bills allow the following forms of modification to an undersecured mortgage:

- Cramdown of the creditor's allowed secured claim to the value of the property as allowed by § 506(a);
- The prohibition, reduction, or delay of adjustments to the rate of interest on adjustable rate loans;
- Extension of the repayment period to a maximum of 40 years, reduced by the period for which the loan has been outstanding; and
- Conversion of the post-filing interest rate to a fixed annual rate equal to the average prime rate "plus a reasonable premium for risk."

The legislation would also add a new subsection (g) to § 1322 that allows the lender to recapture value if the debtor sells appreciated property after confirmation of the chapter 13 plan, and a new subsection (h) that requires a debtor seeking mortgage cramdown to seek voluntary loan modification from the creditor or show that a foreclosure sale was scheduled shortly following the filing of the bankruptcy petition.

B. Eminent Domain Proposals

In June of 2012, San Bernardino County, California, proposed using its power of eminent domain to seize underwater mortgages held by private investor pools and rewrite them by reducing the principal amount to the market value of the underlying property. After restructuring the mortgages to provide relief to the homeowners, the County would then repackage the mortgages into new pools and sell them on the secondary market. Similar proposals have since been discussed in other municipalities, including Las Vegas, Chicago, Detroit, Suffolk County, New York, and the California communities of Sacramento, Elk Grove, and Berkeley.[8]

1. Structure of the Eminent Domain Proposals

The leading academic proponent of the eminent domain strategy is Professor Robert Hockett of Cornell Law School. In a paper released in June of 2012, Professor Hockett argues that "municipalities, in partnership with investors, can condemn underwater mortgage notes, pay mortgagees fair market value for the same, and systematically write down principal."[9] The proposals under consideration around the country track the model sketched by Professor Hockett.

The municipalities considering eminent domain are proposing to work in partnership with a private investment group, Mortgage Resolution Partners LLP (MRP). Under the proposed plan, MRP would provide financing to fund the seizure of the mortgages and would facilitate the securitization of the restructured loans.[10] MRP would pay "75-80 percent of the current value of a

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[8] These are all markets with high percentages of underwater mortgages. *See*, *e.g.*, Jon Prior, *Chicago Considers Eminent Domain to Seize Underwater Mortgages*, HousingWire, Aug, 10, 2012, *available at* http://housingwire.com/print/news/chicago-considers-eminent-domain-seize-underwater-mortgages. ("More than 44% of the homes in surrounding Cook County back are worth less than the mortgage. According to the city, local homeowners lost more than $37 billion in equity since the housing market crashed.)

[9] Robert Hockett, *It Takes a Village: Municipal Condemnation Proceedings and Public/Private Partnerships for Mortgage Loan Modification, Value Preservation, and Economic Recovery*, Cornell Legal Studies Paper No. 12-12 (abstract) (June 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2038029.

[10] O'Melveny & Myers LLP Memorandum to Securities Industry and Financial Markets Association at 1 (July 16, 2012), *available at* http://www.sigman.org/news/news.aspx?id=8589940215.

property to mortgage investors, and then refinance those loans to earn 107 percent of property value," ensuring a profit to its own investors.[11] To enhance the attractiveness of the end product to secondary-market investors, all of the seized mortgages would be performing mortgages held by private-label securitization trusts.[12]

The municipalities' proposals to use eminent domain to seize intangible financial products drew immediate criticism from the financial services industry.[13] On August 9, 2012, the Federal Housing Finance Agency (FHFA), the agency overseeing Fannie Mae and Freddie Mac while they are operating in conservatorship, published a notice requesting comments on the proposed use of eminent domain in this area. [14] The FHFA's notice expresses "significant concerns about the use of eminent domain to revise existing financial contracts and the alteration of the value of . . . securities holdings." It also questions and asks for comment on the constitutionality of this use.

On September 7, 2012, the Securities Industry and Financial Markets Association (SIFMA) and 25 other financial trade associations submitted a letter to the FHFA's general counsel opposing the proposals. SIFMA expressed three primary areas of concern: (1) the negative impact of eminent domain plans on mortgage lending, mortgage finance markets, and mortgage investors; (2) concerns about valuation of the underlying properties and the profit motivation

[11] Tom Gilroy, *California County's Eminent Domain Plan on Underwater Mortgages Seen as Bad Policy*, Bloomberg BNA (July 19, 2012).
[12] Chris Bruce & Stephen Joyce, *Mortgage Group Warns About Redlining as Trade Groups Oppose Eminent Domain*, Bloomberg BNA (Sept. 12, 2012). (Reporting that MRP may respond to criticism of this approach by expanding its plans to include non-performing loans.)
[13] *Gilroy*, *supra* note 10 (reporting critical reaction of the American Securitization Forum); Stephen Joyce, *Financial Industry Highly Critical of Plan to Seize Mortgages by Eminent Domain*, Bloomberg BNA (July 26, 2012); Chris Bruce, *FHFA Slams Bids to Use Eminent Domain to Restructure Still-Performing Mortgages*, Bloomberg BNA (Aug. 16, 2012).
[14] Federal Housing Finance Agency, *Use of Eminent Domain to Restructure Performing Loans*, No. 2012-N-11, 77 Fed. Reg. 154 (Aug. 9, 2012) p. 47652.

inherent in the plan; and (3) legal considerations including the likelihood that the plans will ultimately be found unconstitutional.[15]

Another level of opposition to the proposals appeared on September 13, 2012, when Representative John Campbell of California introduced H.R. 6397, a bill that would penalize municipalities that use eminent domain to seize residential mortgages. The bill, titled the "Defending American Taxpayers from Abusive Government Takings Act of 2012," prohibits Fannie Mae and Freddie Mac from purchasing, the FHA from insuring, and the Department of Veterans Affairs from guaranteeing, making, or insuring, any mortgage secured by a residence located in a county in which eminent domain has been used to take a residential mortgage. The bill has been referred to committee, but has won the approval of the Mortgage Bankers Association.

2. Constitutional Implications of Eminent Domain Proposals

Eminent domain proposals implicate a number of constitutional provisions, including the Contracts Clause and the Tenth Amendment. The primary issue, however, comes from the Takings Clause of the Fifth Amendment, which provides "nor shall private property be taken for public use, without just compensation." The Takings Clause recognizes the power of state and local governments to use the power of eminent domain to take private property, imposing two conditions on this authority: the taking must be for a "public use" and "just compensation" must be paid to the owner.

The Supreme Court has interpreted this power very generously. Most recently, in *Kelo v. City of New London*, the Court held that state and local governments may use eminent domain to transfer property from one private party to another, so long as the transfer is related to a public

[15] SIFMA's letter was supported by an attached memorandum from O'Melveny & Myers LLP analyzing the plans and concluding that they are unlikely to survive a judicial challenge.

purpose.[16] In *Kelo*, an economic development plan was held to satisfy the constitutional "public use" requirement. The power of eminent domain extends to intangible property, for example, the interest on a lawyer's trust account.[17] And, as in *Kelo*, the Court has made it clear that the "public *use*" requirement is satisfied if the taking is related to some "public *purpose*" like economic development or the provision of legal services to the needy. In *Hawaii Housing Authority v. Midkiff*, the Court noted that the Contracts Clause of the Constitution does not protect against the power of eminent domain.[18]

In addition, a municipality's exercise of eminent domain is subject to the deferential standard of rational basis review. Under this standard, a compensated taking will generally be upheld if the exercise of eminent domain is "rationally related to a conceivable public purpose."[19] The application of the rational basis standard, together with the Court's broad construction of the public use requirement, make it very plausible that the power of state and local governments to use their eminent domain power to seize underwater mortgages will be upheld.

Finally, Representative Campbell's bill proposing to withdraw federal mortgage market benefits from municipalities that exercise eminent domain raises serious federalism issues. The Constitution reserves the power of eminent domain to state and local governments, not to Congress. Congress possibly violates the Tenth Amendment if it oversteps this boundary by attempting to coerce municipalities to use their powers in particular ways. This danger is heightened here, because the eminent domain proposals primarily impact private-label securization trusts that hold mortgages not directly backed by government-sponsored entities.

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[16] 545 U.S. 469 (2005).
[17] Brown v. Legal Foundation of Washington, 538 U.S. 216 (2003).
[18] 467 U.S. 229 (1984).
[19] *Id*. at 2329.

Exhibit 1

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN -NORTHERN DIVISION

In the Matter of:

Debtor(s)
_____/

Chapter 13 Proceeding
Case Number:
Honorable: Daniel S. Opperman

MORTGAGE MODIFICATION REQUEST ORDER

_____This case was considered by the Court on the debtor(s)' Motion for Mortgage Modification Request (Doc. No. __). Finding that the debtor(s) desire to retain their primary residence and have stated that they have sufficient income to justify modification with the goal of modifying the current mortgage(s) encumbering their primary residence, it is:

ORDERED:

1. Creditor Registration on the DMM Loss Mitigation Web Portal. Within 14 days of the entry of this Order, the creditor, if not already registered to use the DMM Loss Mitigation Web Portal (www.dclmwp.com), shall register to use the DMM Loss Mitigation Web Portal and shall post creditor's loan modification package and requirements ("Creditor's Required Loan Modification Package") thereon. Questions about registration or posting of the Creditors Required Loan Modification Package can be direct to the Chapter 13 Trustee or DMM Support at 1-800-481-1013.

2. Mortgage Modification Report within 60 Days. Within 60 days from the date of this Order, the mortgage creditor shall file a report with the court, stating whether the mortgage modification request was granted or denied and list, in detail, the programs for which debtor(s) were reviewed. If denied, the report shall state the reasons for the denial. Said report shall include a printout of the transactional history from the DMM Loss Mitigation Web Portal.

3. DMM Loss Mitigation Web Portal Requirement to file Documents. All filing of documents between debtor and creditor for purposes of this Mortgage Modification Request shall be accomplished by using the DMM Loss Mitigation Web Portal. The Chapter 13 Trustee is authorized to pay the $25.00 Web Portal fee from the debtor's funds on hand. Questions by any party on the use of the DMM Loss Mitigation Web Portal can be directed to the Chapter 13 Trustee.

4. Debtor(s)' Financial Documents. Counsel for debtor(s) or, if unrepresented, the debtor(s) shall, within 28 days after entry of this order, provide to creditor Creditor's Required Loan Modification Package by filing it via the DMM Loss Mitigation Web Portal. Creditor's Required Loan Modification Package may be downloaded from the DMM Loss Mitigation Web Portal. Questions about downloading the Creditor's Required Loan Modification Package or filing it via the DMM Loss Mitigation Web Portal can be directed to the Chapter 13 Trustee or DMM Support at 1-800-481-1013.

5. Creditor Request for Additional or Updated Documents. At least 14 days prior to the scheduled mortgage modification report due date, creditor(s) and its counsel shall review the debtor(s)' filed Creditor's Required Loan Modification Package and notify the debtor(s) of any additional or updated

financial records they must supply to the creditor(s). Debtor(s) shall provide creditor(s)' and its counsel all reasonably requested additional financial records within 72 hours of such notification. If there is a non-filing co-borrower, creditor(s) may request financial information from the non-filing co-borrower if the filing debtor intends to use the non-filing co-borrower's income to qualify for a modification. Upon receipt of all documents, creditor(s); counsel shall timely submit the documents to underwriting at least 10 days in advance of the mortgage modification report due date. The filing of documents per this provision shall be accomplished via the DMM Loss Mitigation Web Portal.

6. Identification of Mortgage Modification Participates with Settlement Authority. At least 21 days prior to the scheduled mortgage modification report due date, counsel for the creditor(s) must provide a completed Certificate of Settlement Authority identifying the creditor(s)' representative(s) who will be acting upon the mortgage modification request, and to debtor(s)' counsel along with the case number of the action and contact information for all of the parties. The contact information must include the last known mailing address, phone number, and email address for each party. **At least one of the creditor(s)' representatives designated in the Certificate of Settlement Authority must sign the mortgage modification report pursuant to this Order.** Creditor(s) may amend the Certificate of Settlement Authority to change the designed creditor(s)' representative provided they supply the amended Certificate of Settlement Authority to the debtor's counsel no later than 5 days prior to the mortgage modification report due date. Creditor shall also identify the designated creditor representative on the DMM Loss Mitigation Web Portal.

7. Parties Must Participate in the Mortgage Modification Process. The trustee of a securitized loan or its fully authorized designee with complete and master servicer settlement authority (to settle within the guidelines of any third party, or subject to any third party investor approval) or a specialist from the creditor(s)' mortgage modification department with complete and master servicer authority to settle must continuously participate in the entire mortgage modification request process.

8. Court Approval of Mortgage Modification. Parties are directed to promptly seek any necessary court approval for the mortgage modification and to formalize the modification in any needed legal documents.

9. Creditor Fee. Counsel for the creditor(s) is entitled to receive a reasonable fee for all worked involved in connection with the mortgage modification, including requesting and reviewing documents, and will clearly delineate such fee in the completed agreement or by amended proof of claim.

10. Debtor(s) counsel's fee. Counsel for the debtor(s) is entitled to receive reasonable compensation for all work involved in connection with the mortgage modification and shall file an application for allowance of attorney fees and costs for allowance by the Court, or alternatively accept a "no look" fee in the amount of $750.00 to be paid as an administrative expense.

11. Remedies. If a mortgage modification does not occur because the mortgage creditor(s) fails to designate a representative with settlement authority; fails to file the Certificate of Settlement Authority when due; fails to register on the DMM Loss Mitigation Web Portal; failed to provide Creditor's Required Loan Modification Package; fails to file the Mortgage Modification Report when due; or otherwise does not engage in the mortgage modification in good faith, then the Court may order a representative from the mortgage creditor(s) to physically appear before the court for a show cause hearing; order the mortgage creditor(s) and debtor(s) to engage in mediation to modify the mortgage; and impose such other sanctions as the court deems appropriate including, but not

limited to, an award of actual costs and attorney fees to the aggrieved party.

12. Privileged Communications. All statements made by the parties, attorneys, and other participants associated with the mortgage modification request are privileged and not reported, recorded, or placed into evidence, made known to the Court, or construed for any purposes as an admission.

13. Stay Lifted to Allow Loan Modification. The automatic stay is modified, to the extent necessary, to facilitate the mortgage creditor(s)' loan modification terms pursuant to this Order. The parties shall timely submit any agreed loan modifications to the Court for approval.

14. All parties are directed to comply with this Order and to engage in the mortgage modification in good faith. Failure to do so may result in the imposition of damages and sanctions.

IT IS SO ORDERED.

Exhibit 2

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

In re: Chapter 13 No.

Hon. Daniel S. Opperman

Debtors.
_____/

CREDITOR'S OBJECTION TO MOTION REQUESTING MORTGAGE MODIFICATION

NOW COMES

by and through its attorneys, and hereby Objects to Debtors' Motion for Mortgage Modification with respect to real property located at 330 S. Maple St., Hemlock, MI 48626 as follows:

1. That Debtors' Motion Requesting Mortgage Modification filed on August 31, 2012 includes an order that seeks to impermissibly modify this Creditor's rights as provided for in the mortgage in violation of 11 U.S.C. §1322(b)(2) and the submission of this proposed order to the Court for entry is unsupported by any provisions of the Bankruptcy Code, Federal Rules of Bankruptcy Procedure, Federal or State law, or local Court Rules;

2. That 11 U.S.C. §1322(b)(2) specifically prohibits the modification of the rights of holders of claims secured by an interest in real property that is the Debtors' principal residence;

3. That Debtors may request loss mitigation and Creditor may review the Debtor's eligibility for a loan modification or any other type of loss mitigation as provided for by appropriate servicer or investor procedures and processes;

4. That Debtors have failed to provide any legal or statutory authority for the proposed terms and conditions included within their proposed order, specifically:

   a. attempting to force the Creditor to register for and use a third party vendor system (referred to as DMM Loss Mitigation Web Portal) in its loss mitigation efforts;

b. providing arbitrary, unrealistic deadlines for Creditor's review of or creation of documentation, notifications to be made to Debtor's counsel or any other party;

c. dictating the requirement that the Creditor sign or produce any "certifications", "reports", or to compel the identification of any specific person or trustee with any specific qualifications as a representative and/or requiring specific contact information;

d. dictating any damages, sanctions or remedies that should be imposed upon any party for any perceived or created "failures" assigned by the Debtor to the Creditor;

WHEREFORE, Creditor prays that Debtors' Motion Requesting Mortgage Modification be denied.

Respectfully Submitted,

Dated: September 10, 2012

Exhibit 3

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION-FLINT

In Re:

CHAPTER 13
Hon. Daniel S. Opperman

Steven Rachwal & Sandra L. Rachwal
John & Christine Summers
Deanne Cole
Harrell Milhouse
_____/

TRUSTEE'S REPLY TO CREDITOR'S OBJECTION TO MOTION REQUESTING MORTAGE MODIFICATION

In response to the Debtor(s) motion to for mortgage modification request, creditors in the aforementioned cases have filed objections to the relief requested. Now comes the Chapter 13 Trustee in reply to the objections in each of those cases. The Trustee supports the debtor's request for court monitored mortgage modification proceedings for the following reasons:

1. The creditor's first argument is that the debtors proposed order seeks to impermissibly modify the rights of the parties ad provided for in the mortgage in violation of 11 U.S.C. 1322(b)(2) and the submission of the proposed order to the Court is unsupported by any provision of the Bankruptcy Code, Federal Rules of Bankruptcy Procedure, Federal or State law, or local Court Rules. Trustee denies the allegations on the grounds that they are untrue. The proposed order does not in any way modify the rights of the parties provided for in the mortgage agreement. The order does not modify the terms of the repayment of the indebtedness, the principal balance, delinquent amounts, interest rates, term or payment. The order merely seeks the court's assistance in the protection of the debtor's rights and for the establishment of mutually agreed deadlines for performance. The proposed order does not seek to alter the rights of the creditors, but only monitors procedures that the creditors have already voluntarily agreed to undertake:

a. Each of the creditors in the above matters is already required to review the debtor's eligibility for a loan modification pursuant to the terms of the Home Affordable Modification Program (HAMP).

b. Ally Bank/GMAC, Bank of America, Citi, JPMorgan Chase, and Wells Fargo are signatories to a Consent Judgment, dated February 9, 2012, in the matter of *United States of America, et al., v. Bank of America Corp. et al., United States Bankruptcy Court, District of Columbia, Case no. 12-0301,* (hereinafter, National Mortgage

Settlement Agreement) are required to comply with certain enumerated Servicing Standards. Those standards are set out in a Settlement Term Sheet, in Exhibit A of that judgment. (See, Exhibit A – Settlement Term Sheet) The creditors in the *Rachwal*, *Summers*, and *Milhouse* matters, are signatories to that agreement. Pursuant to the Settlement Term Sheet, eligible debtors are entitled to receive unsolicited loan modification offers, they are entitled to notice of the settlement, and are authorized to request and receive information on their account, copies of notes and security agreements related to the indebtedness. These creditors are required to consider the debtor's for eligibility for a loan modification pursuant to the terms of that agreement. Such consideration may be merited notwithstanding the fact that the debtor may have been previously found to be qualified for a loan modification but failed to make payments. Debtors who have been determined to be ineligible are entitled to an appeal procedure. Creditors are prohibited from seeking to proceed to foreclosure if the debtor has received a loan modification and completed a trial payment period, or where a deed in lieu of foreclosure has been agreed to. **(See Exhibit A – Settlement Term Sheet)**

2. The Creditor's object that the proposed order is unsupported by Bankruptcy law. The Trustee denies the allegation as untrue.

a. The bankruptcy court has broad powers under 11 U.S.C. 105 to (a) to issue any order that is necessary or appropriate to carry out the provision of the bankruptcy code. 11 U.S.C. 105(a) including, the right to schedule status conferences. 11 U.S.C. 105(d)(1) and may prescribe conditions and limitations as the court deems necessary to ensure the case is handled expeditiously and economically. 11 U.S.C. 105(a)(d)(2).

b. The Trustee notes that chapter 13 cases are routinely delayed while debtors seek loan modifications. Often such delays are due to the a failure of the parties to submit, acknowledge and review necessary documentation, to make a decision and implement a trial payment plan, or to finalize a final permanent modification following the trail payment period. The establishment of formal but flexible procedures and deadlines for each parties compliance advances the expeditious and economical administration of the bankruptcy case. In fact, other bankruptcy courts, notably those in the Southern District of New York, New Jersey, and District of

Rhode Island, have established formal mortgage mediation programs, whose provisions are far more comprehensive that the terms promoted by the debtor. The Trustee points to and incorporates into his argument, the decision of the District of Rhode Island Bankruptcy Court in the matter *In re: Alberto B. Sosa,* Bk. No. 10-11702, which overruled creditor challenges to that Court's formal Loan Modification Program. **(See, Exhibit B, Decision and Order Overruling Creditor's Objection to Loss Mitigation.)** In the *Sosa* case, Judge Votolato states" even without a formal loss mitigation program in place, there is ample authority and precedent for the Court to regulate the administration of cases pending before it. Such authority is in the Bankruptcy Code, the Bankruptcy Rules and in particular Fed. R. Bankr. P. 7016, which incorporates Fed. R. Civ. P. 16, and 9014."

c. Bankruptcy Court involvement is necessary to protect the rights of debtors. Creditors, who are signatories to the National Mortgage Settlement, are required to solicit eligible debtors for loan modification consideration. However, pursuant to Part IV. Loss Mitigation section of the Settlement Term Sheet, creditors are not required to solicit debtors who are in a pending bankruptcy. Accordingly, in order to provide the debtor in bankruptcy with the same opportunity to be considered for a loan modification in the same way that non-bankruptcy debtors are.

3. The creditors allege either that the debtors are required to submit to the creditor's own modification procedures or that the debtor has already been considered for a modification and has been determined to be ineligible. The Trustee denies the allegation as untrue.

a. The creditor has submitted no support for the argument that the debtor must follow the creditor's guidelines.

b. As observed by Judge Votolato, in *In re Alberto G. Sosa, Supra,* "lender's responses [are] virtually impossible to come by, despite multiple request made to the mortgage holder or servicer." This Court has a valid role in the process of loan modification consideration, because, in many cases, the confirmation of the debtor's plans are dependent upon a loan modification decision and the Court must be able to ensure that such activities are promptly and correctly conducted.

c. Furthermore, the creditors have not established that they have, themselves, complied with either their own guidelines, or those required by either HAMP or the

National Mortgage Settlement, nor have they established that the debtors have been considered for such a modification and it is entirely within the authority of the Court through mediation, or status conferences, to determine whether and to what extent the creditor has complied with the terms of either HAMP, or the National Mortgage Settlement.

d. Furthermore, and as stated in paragraph 1 above, the creditors are required to comply with the requirements and timelines established by HAMP and/or by the creditor's agreement in the National Mortgage Settlement. There is no support for the argument that the debtor's may not be re-considered for HAMP eligibility based upon a change in circumstances.

4. The creditors allege that the court has no authority to require the creditor to use a third party system for the purpose of administration of the loan modification process, including the submission of loan modification requests, acknowledgement of receipts of the application and supporting documentation. The allegation is denied as untrue.

a. The Court's has broad powers under 11 U.S.C. 105 to require the creditor and debtor to engage in this process. It naturally follows that the Court has the power to require the use of a third party system to monitor compliance with the Court's orders and timelines.

b. Furthermore, the signatories to the National Mortgage Settlement are specifically required to develop or contract with a third party vendor to develop an online portal linked to the Servicer's primary servicing system where borrowers can check, at no cost, the status of their first lien loan modifications. **(See, Exhibit A, Settlement Term Sheet, page A-25, paragraph E.)**

c. The Creditors may already participate with the DMM portal. Pursuant to the DMM website, https://www.dclmwp.com/user_homeowner_description.php the following servicers currently subscribe to the DMM Portal:

   i. 21st Mortgage Corporation
   ii. America's Servicing Company
   iii. Bank of America (but only if you are in an active bankruptcy)
   iv. JP Morgan Chase / EMC
   v. Ocwen Loan Servicing, LLC / Litton Loan Servicing

vi. Resurgent Capital Services
vii. Saxon
viii. Select Portfolio Servicing
ix. Washington Mutual
x. Wells Fargo Home Mortgage

5. The Creditors allege that the Court lacks authority to set "arbitrary" deadlines. The allegation is denied as untrue.

a. The Court has sufficient authorization under 11 U.S.C. 105(a) and (d) to establish timelines to ensure that the confirmation process is not delayed and to ensure compliance with its orders. 11 U.S.C. 105(d)(2) provides that "the Court may set conditions as the court deems appropriate to ensure that the case is handled expeditiously...." . It is difficult to imagine how the court may ensure the case is handled "expeditiously" if it is prohibited from setting deadlines on the parties before it.

b. The Trustee refers to and incorporates the attached correspondence of Igor Rothburg, Chief Operating Officer of Default Mitigation Management, LLC. **(See, Exhibit C, Correspondence of DMM)** DMM, LLC is the third party portal vendor that is requested by the debtor. Pursuant to that correspondence, the court should note that the timelines, proposed by the debtor are more generous than the timelines imposed upon the creditors by either HAMP or the National Settlement Agreement, and accordingly, the timelines requested in the proposed order are reasonable and not arbitrary.

i. The Model Order provides 14 days for the creditor to register on the DMM portal. There are no specific deadlines established by HAMP or National Mortgage Settlement, but the timeline is not unreasonable.

ii. The Model Order requires the creditor to render a decision within 60 days of the debtor's submissions. HAMP allows the creditor 32 days to issue a report, provided the debtor takes the full 28 days allowed him to submit his documentation. The National Mortgage Settlement requires a decision within 30 days of the receipt of the debtor's submission.

iii. The Model Order requires the creditor to acknowledge and review documents and report any deficiencies to the debtor within 46 days. HAMP requires such a response within 10 business days, and the National Mortgage Settlement requires the response within 3 business days of the debtor's submission.

6. The creditors allege that the court has no authority to require the designation of a single point of contact. The Trustee denies the allegation as untrue. For the reasons stated in paragraph, the court has ample authorization under 11 U.S.C. 105(d)(2). Furthermore, the signatories to the National Mortgage Settlement are specifically required to establish an easily accessible and reliable single point of contact (SPOC) for first lien mortgage borrowers. **(See, Exhibit A, Settlement Term Sheet, page A-21, paragraph C.)**

7. The creditors allege that the court has no authority to impose penalties if a party before it fails to comply with the Order. The Trustee denies the allegation as untrue. The Trustee agrees that the court lacks authority to impose a modification of the terms of a creditor whose claim is secured by a security interest in property that is the debtor's residence, but the court certainly has the authority require the parties to negotiate, confer and mediate upon the possibility of a loan modification, particularly where state or federal law, or agreement requires the creditor to consider the debtor for a loan modification. Certainly the court has authority to require that such consideration take place within a reasonable time table and may enter orders to implement a timetable and to ensure compliance with the court's orders.

8. Wherefore, the Chapter 13 Trustee requests that the creditor's objections to the debtor's proposed motion for mortgage modification be overruled and the relief requested be granted

Dated: June 1, 2012

/s/Carl L. Bekofske/mb
Carl L. Bekofske (P10645)
By Mark Bredow (P49744)
Chapter 13 Trustee
400 N. Saginaw St., Ste. 331
Flint, MI 48502
810.238.4675
ECF@flint13.com

Exhibit 4

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION - BAY CITY

In re:

Debtors

Chapter 13
Case No.
Honorable Daniel S. Opperman

/

STIPULATION RESOLVING DEBTORS' MOTION REQUESTING MORTGAGE MODIFICATION REVIEW

NOW COMES the Debtors, , by and through their attorney having filed a Motion Requesting Mortgage Modification Review, and Creditor,

by and through its attorney, filed a Response with respect to the subject property at , and the, and the parties having reached a resolution:

THE PARTIES HEREBY STIPULATE TO THE FOLLOWING:

1. Notice of Applicable Programs. Within 14 days of the entry of this Order, the Creditor shall supply and notify the Debtors of the Creditor's Required Loan Modification Package.

2. Debtors' Financial Documents. Within 28 days after entry of this Order, the Debtors shall submit to Creditor a fully complete Loan Modification Package with all timely supporting documentation. Such exchange of information shall be through the DMM Portal. Questions about registration or posting of the Creditors Required Loan Modification Package can be directed to the Chapter 13 Trustee or DMM Support at 1-800-481-1013. The Chapter 13 Trustee is authorized to pay any fees assessed for the use of such a mutually agreed upon third party vendor from the Debtors' funds on hand.

shall review the Loan Modification Package submitted by Debtors and notify the Debtors and their Counsel of any additional or updated financial records that must be supplied to Creditor. Debtors shall provide Creditor all reasonably requested additional financial records within 7 days.

4. Point of Contact. Creditor shall designate a point of contact for loss mitigation/loan modification purposes including phone number and/or email address within 14 days of Debtors submission of the Loan Modification Package.

5. Status of Review. Any document(s) or exchanges of information, not otherwise protected by any privilege, exchanged between the Debtors, Creditor, and/or Creditor's representative counsel (as applicable) may be presented to the Court for purposes of providing a status of the loan modification review by either party. The parties may agree to time frames for filing a mutually prepared status report or the Court may, if requested or otherwise, set status conferences at reasonable intervals to allow the parties to provide the Court with updates as to the process.

6. Lack of Prosecution. In the event that this case is converted under any other chapter of the Bankruptcy Code, the Debtors fail to pursue the modification with appropriate submission of the package within the above stated time frames, or if the Debtors decline an offered modification, unless otherwise extended by the Court, this Order shall become null and void.

7. Court Approval of Mortgage Modification. The parties may seek any necessary Court approval to formalize any fully executed and completed modification.

8. Creditor Fee. If applicable, any fees and costs incurred by Creditor for all work involved in connection with the mortgage modification may be recoverable from the borrower if allowed by statute or previous agreement of the parties.

9. Debtors' Counsel's Fee. Counsel for the Debtors is entitled to receive reasonable

compensation for all work involved in connection with the mortgage modification and shall file an application for allowance of attorney fees and costs for allowance by the Court, or alternatively accept a "no look" fee in the amount of $750.00 to be paid as an administrative expense.

10. Privileged Communications. All statements made by the parties, attorneys, and other participants associated with the mortgage modification request are privileged and may not be construed for any purposes as an admission.

11. Stay Modified to Allow Loan Modification. The automatic stay is modified, to the extent necessary, to facilitate the terms pursuant to this Order.

12. Compliance. All parties are directed to comply with this Order and to engage in the mortgage modification in good faith. Failure to do so may result in the imposition of damages and sanctions.

Exhibit 5

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION - FLINT

IN RE:

Debtor.

Case No.
Chapter 13 Proceeding
Hon. Daniel S. Opperman

_____/

ORDER GRANTING DEBTOR'S MOTION
REQUESTING MORTGAGE MODIFICATION REVIEW

This matter having come before the Court on Debtor's Motion Requesting Mortgage Modification Review:

NOW, THEREFORE, IT IS HEREBY ORDERED that:

1. Notice of Applicable Programs. Within 14 days of the entry of this Order, the Creditor shall supply and notify the Debtor of the Creditor's Required Loan Modification Package.

2. Debtor's Financial Documents. Within 28 days after entry of this Order, the Debtor shall submit to Creditor a fully complete Loan Modification Package with all timely supporting documentation. Such exchange of information shall be through the mechanism as delineated by the Creditor unless the parties mutually agree to the use of another portal or third party vendor system. The Chapter 13 Trustee is authorized to pay any fees assessed for the use of such a mutually agreed upon third party vendor from the Debtor's funds on hand.

3. Creditor Request for Additional or Updated Documents. Creditor and/or its counsel shall review the Loan Modification Package submitted by Debtor and notify the

Debtor and their Counsel of any additional or updated financial records that must be supplied to Creditor. Debtor shall provide Creditor all reasonably requested additional financial records within 7 days.

4. Point of Contact. Creditor shall designate a point of contact for loss mitigation/loan modification purposes including phone number and/or email address.

5. Status of Review. Any document(s) or exchanges of information, not otherwise protected by any privilege, exchanged between the Debtor, Creditor, and/or Creditor's representative counsel (as applicable) may be presented to the Court for purposes of providing a status of the loan modification review by either party. The parties may agree to time frames for filing a mutually prepared status report or the Court may, if requested or otherwise, set status conferences at reasonable intervals to allow the parties to provide the Court with updates as to the process. The first status conference set by the Court is ***Monday, October 22, 2012, at 4:00 pm.*** Counsel for the Debtor and the Creditor shall appear by telephone. Counsel for the Debtor and the Creditor shall file a report with the Court by October 18, 2012, detailing the status of this process.

6. Lack of Prosecution. In the event that this case is converted under any other chapter of the Bankruptcy Code, the Debtor fails to pursue the modification with appropriate submission of the package within the above stated time frames, or if the Debtor declines an offered modification, unless otherwise extended by the Court, this Order shall become null and void.

7. Court Approval of Mortgage Modification. The parties may seek any necessary Court approval to formalize any fully executed and completed modification.

8. Creditor Fee. If applicable, any fees and costs incurred by Creditor for all work involved in connection with the mortgage modification may be recoverable from the borrower if allowed by statute or previous agreement of the parties.

9. Debtor's Counsel's Fee. Counsel for the Debtor is entitled to receive reasonable compensation for all work involved in connection with the mortgage modification and shall file an application for allowance of attorney fees and costs for allowance by the Court, or alternatively accept a "no look" fee in the amount of $750.00 to be paid as an administrative expense.

10. Privileged Communications. All statements made by the parties, attorneys, and other participants associated with the mortgage modification request are privileged and may not be construed for any purposes as an admission.

11. Stay Modified to Allow Loan Modification. The automatic stay is modified, to the extent necessary, to facilitate the terms pursuant to this Order.

12. Compliance. All parties are directed to comply with this Order and to engage in the mortgage modification in good faith. Failure to do so may result in the imposition of damages and sanctions.

Signed on August 06, 2012

/s/ Daniel S. Opperman
Daniel S. Opperman
United States Bankruptcy Judge