"FOAMING THE RUNWAY"[1] FOR HOMEOWNERS: U.S. BANKRUPTCY COURTS "PRESERVING HOMEOWNERSHIP"[2] IN THE WAKE OF THE HOME AFFORDABLE MODIFICATION PROGRAM

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"Most of our most precious rights and freedoms are a series of exceptions to an overall moral and legal framework that suggests we shouldn't really have them in the first place."[3]

INTRODUCTION

Since 2008, Congress has enacted manifold legislation[4] aimed at reversing the effects of a housing crisis, but each law has ultimately inured to the benefit of banks and financial institutions.[5] Homeowners have rarely, if at all, experienced benefits of the legislation and often have experienced greater harm.[6] In fact, banks and financial institutions have systematically leveraged their bailouts to pressure individual homeowners to continue paying in full mortgages on properties that no

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[1] NEIL BAROFSKY, BAILOUT: AN INSIDE ACCOUNT OF HOW WASHINGTON ABANDONED MAIN STREET WHILE RESCUING WALL STREET 156–57 (2012). Discussed in detail below. The phrase is from aviation practice referring to a procedure limiting the impact of a crash landing. Neil Barofsky served as Special Inspector General in Charge of Oversight of TARP. In response to Barofsky's questions about Home Affordable Modification Plan during an oversight meeting, Timothy Geithner stated, "This program will help foam the runway for them."

[2] Emergency Economic Stabilization Act of 2008, 12 U.S.C. § 5201 (2012). Section 5201, "Purposes," provides:

> The purposes of this chapter are—(1) to immediately provide authority and facilities that the Secretary of the Treasury can use to restore liquidity and stability to the financial system of the United States; and (2) to ensure that such authority and such facilities are used in a manner that— (A) protects home values, college funds, retirement accounts, and life savings; (B) preserves homeownership and promotes jobs and economic growth; (C) maximizes overall returns to the taxpayers of the United States; and (D) provides public accountability for the exercise of such authority.

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[3] DAVID GRAEBER, DEBT: THE FIRST 5,000 YEARS 210 (2012).

[4] *See, e.g.*, Emergency Economic Stabilization Act of 2008, H.R. 1424, 110th Cong. (2008).

[5] *See* BOB IVRY, THE SEVEN SINS OF WALL STREET: BIG BANKS, THEIR WASHINGTON LACKEYS, AND THE NEXT FINANCIAL CRISIS (2014).

[6] *See* BAROFSKY, *supra* note 1, at 193–99 (discussing how the government's failure to protect homeowners through its bailout programs left many at risk once the government programs expired and failed to help as many people as intended).

longer hold value.[7] These results evidence the failure of the Home Affordable Modification Program ("HAMP") and other federal programs, but bankruptcy courts in the United States offer homeowners an alternative remedy: a forum in which banks must negotiate with homeowners in good faith and a mechanism for permanent modification of home mortgages.[8]

The impacts of the 2008 mortgage crisis have been amplified by the disproportionate protection of banks at the expense of homeowners through the U.S. Treasury's bailout programs under the Emergency Economic Stabilization Act of 2008 ("EESA").[9] Homeowners experiencing the impacts of the crisis have turned to bankruptcy courts for protection from high interest rates, onerous mortgage payments and impending foreclosures.[10] In response, bankruptcy courts and laws have assumed their historic role of providing a forum for individuals to stabilize their financial lives in times of crises.[11] Through various formal mortgage modification mediation processes and other informal mortgage modification procedures,[12] bankruptcy courts ease the impact of the 2008 mortgage crash on homeowners (i.e., "foaming the runway")[13] to counteract the preferential protection provided by the U.S. Treasury Department to large banks.

This Article discusses the ineffective assistance provided to individual homeowners under the Home Affordable Modification Program.[14] Part II of this

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[7] Brent T. White, *Underwater and Not Walking Away: Shame, Fear, and the Social Management of the Housing Crisis*, 45 WAKE FOREST L. REV. 971, 971–72, 998–1001 (2010) (describing the social and institutional pressure that homeowners must continue to pay their mortgage even though they are underwater).

[8] *See* Cecelia G. Morris & Mary K. Guccion, *The Loss Mitigation Program Procedures for the United States Bankruptcy Court for the Southern District of New York*, 19 AM. BANKR. INST. L. REV. 1, 4, 68 (2011) (remarking "the court finds success in every case in which the parties participate in good faith" and stating the purpose of the program is to "achieve a consensual resolution of issues regarding the home loan").

[9] *See* 12 U.S.C. § 5201 (2008); *see also supra* note 2.

[10] *See* John Eggum, Katherine Porter & Tara Twomey, *Saving Homes in Bankruptcy: Housing Affordability and Loan Modification*, 2008 UTAH L. REV. 1123, 1126–28 (2008) (discussing how filing for bankruptcy, in contrast to a non-bankruptcy option, can help families avoid foreclosure).

[11] *See* Linda E. Coco, Beyond Failure and Forgiveness: The Debtors Place in American Fiscal Identity, Bankruptcy and Capitalism 44–54 (Fall 2011) (Ph.D. dissertation, University of California, Berkeley), *available at* http://escholarship.org/uc/item/8np0h1ch [hereinafter Coco Ph.D. dissertation] (generally on the history of bankruptcy). Historical precedent exists for turning to the bankruptcy courts to assist individuals in a financial crisis. Throughout U.S. history, the shifting unstable currents of capitalism result in recurrent economic crises: 1791, 1837, 1857, 1893, 1928, and 2008. Each of these crisis periods required several forms of social and legal action to prevent economic disaster. Often proposals for bankruptcy legislation or legislative reform of existing bankruptcy law were central to economic and financial recovery.

[12] *See generally infra* Parts IV–V. This Article discusses formal bankruptcy court loss mitigation programs and mortgage modification mediation programs and informal mortgage mediation processes embedded in other court procedures, such as relief from stay motions and chapter 13 confirmation hearings.

[13] *See* BAROFSKY, *supra* note 1, at 156. The phrase is from aviation practice referring to a process done to limit the impacts of a crash landing.

[14] The Home Affordable Modification Program is a program established by the federal government to assist eligible homeowners with overly burdensome home mortgages. It outlines a payment structure for lenders and borrowers to consider in a modification process. *See Home Affordable Modification Program*,

Article argues that the unequal protection provided by the bailout legal structures and the manner by which these programs entrench an emergent economic and political structure result from the neoliberal economic project. Part III of this Article describes how homeowners turned to the U.S. bankruptcy courts for alternatives to mortgage foreclosure in state court. Part IV discusses the authority under the Bankruptcy Code and bankruptcy rules for the implementation of formal mortgage modification programs. Part V describes how various courts address mortgage modification through existing practices. Part VI discusses, as a detailed example, the Middle District of Florida's residential mortgage modification mediation program. Finally, this Article considers whether bankruptcy court is an effective forum for mortgage modification.

I. FAILURE OF HAMP: THE TREASURY DEPARTMENT'S FAVORITISM

A Typical "Great Recession" Homeowner Experience:[15] Tina Kimmel, an epidemiologist, experienced a pay decrease under California Governor Schwarzenegger's balanced budget cuts.[16] This pay reduction made it difficult for her to afford her mortgage with Citi Mortgage.[17] In June 2009, Ms. Kimmel, after submitting numerous documents to Citi, qualified for a mortgage modification under the Home Affordable Modification Program ("HAMP").[18] Citi placed Ms. Kimmel in a trial modification (October to December 2009) to transition to a permanent modification pending further document submission.[19] Ms. Kimmel continued to pay $1,350 a month into 2010 upon Citi's instruction.[20] In April 2010, Citi mailed Ms. Kimmel a default notice and a demand for $13,000 in late payments that Citi said she incurred during the seven months she was in HAMP.[21] Citi claimed that Ms. Kimmel had not submitted the proper documents, she had rejected the modification agreement, and that her credit was poor, thus making her ineligible for a mortgage modification.[22] Citi then sold the mortgage paper secured by Ms. Kimmel's home to Carrington Mortgage Services who informed Ms. Kimmel that it had not received any modification paperwork, and that she was "past due" more

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MAKINGHOMEAFFORDABLE.GOV, http://www.makinghomeaffordable.gov/programs/lower-payments/Pages/hamp.aspx (last updated Aug. 28, 2014, 5:29 PM).

[15] *See* David Dayen, *Portrait of HAMP Failure: How HAMP Connects to Foreclosure Fraud*, FDL NEWS DESK (Oct. 12, 2010, 1:02 PM), http://news.firedoglake.com/2010/10/12/portrait-of-hamp-failure-how-hamp-connects-to-foreclosure-fraud/ (describing a real-life reader story to illustrate how problems with the HAMP program are connected to foreclosure fraud). The website provides an archive of HAMP related stories.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

than $16,000.[23] Carrington initiated a foreclosure proceeding in state court against Ms. Kimmel demanding she pay the past due amount in full. Ms. Kimmel was able to borrow $16,000 from friends and family to pay the past due amount and keep her home.[24] Although Ms. Kimmel complied with the requirements of the temporary modification agreement, both Citi and Carrington, at different times, instituted a foreclosure proceeding against Ms. Kimmel.[25]

Tina Kimmel's story illustrates the typical experience of homeowners in the modification process when banks[26] received Troubled Asset Relief Program ("TARP") funds.[27] Banks gave homeowners a temporary modification for ninety days, sent them modification packets and required that the homeowners produce documentation to support oral representations of income and expenses.[28] Homeowners sent banks monthly payments and supporting documents only to be told months later that they were in default and owed thousands in late payments.[29] Many homeowners faced foreclosure because banks incompetently handled homeowner documents, dumped paper work, and made claims of incomplete documentation when homeowners had submitted documents multiple times.[30] Recent litigation reveals that these claims of incomplete documentation and other problems resulting in homeowner HAMP ineligibility and ultimate foreclosure were part of internal financial institutional policies and practices.[31] Not only did banks, such as Bank of America, mishandle homeowner paper work in the modification process, they often intentionally destroyed and discarded paperwork.[32]

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[23] *Id.*

[24] *Id.*

[25] *See id.*

[26] In this Article the identifier of bank includes lender and servicer. The author of this Article recognizes that servicers are a different legal category, and yet, throughout the mortgage crisis, servicers have stood in the shoes of banks.

[27] Emergency Economic Stabilization Act of 2008, H.R. 1424, 110th Cong. Div. A, tit. 1 (2008) [hereinafter TARP].

[28] *In re* Bank of America Home Affordable Modification Program (HAMP) Contract Litig., No. 10-md-02193-RWZ, 2011 WL 2637222, at *1 (D. Mass. July 6, 2011) (asserting that if borrower complied with terms of Trial Period Plan, modification would become permanent at the end of three-month period).

[29] *See id.* at *2 (explaining how borrowers made all the required trial payments but did not receive either a permanent loan modification or a written denial of eligibility).

[30] Class Complaint at 16–20, Brooking v. Bank of America, N.A., No. 2010MD2193, 2012 WL 9083218 (D. Mass Apr. 20, 2012) (disregarding HAMP's purpose to preserve homeownership, Bank of America foreclosed on borrowers who submitted necessary documents and made required payments).

[31] *E.g.*, *In re Bank of America*, 2011 WL 2637222, at *1. Employees of Bank of America filed suit against Bank of America addressing internal bank policies and practices in relation to the federal HAMP program. *See id.*

[32] Declaration of Steven Cupples, Declaration of Theresa Terrelonge, Declaration of William E. Wilson, and Declaration of Bert Sheeks, *In re* Bank of America Home Affordable Modification Program (HAMP) Contract Litig., No. 1:10-md-02193 (D. Mass. June 7, 2013), ECF No. 210. *See also* Barry Fagan, *CLASS ACTION COMPLAINT Re: Bank of America & Urban Lending Sued for Racketeering (RICO) on Fraudulent "Modification" Program*, JD SUPRA BUSINESS ADVISOR (July 11, 2013), http://www.jdsupra.com/legalnews/class-action-complaint-re-boa-urban-le-26208/ (claiming Bank of America became a "black hole" for documents sent by homeowners).

According to former United States Special Inspector General of TARP[33] Neil Barofsky, this "current economic malaise can be traced directly to [the U.S. Treasury Department's] betrayal of its promise to use TARP [funds] to 'preserve homeownership.'"[34] Neil Barofsky explains that Treasury Secretary Geithner failed to achieve the primary goals set by Congress under the EESA to put in place programs that would protect "home values . . . preserve[] homeownership and promote[] jobs and economic growth."[35] Programs, such as HAMP, established by the Treasury Department with TARP funds did not create credit flow into the economy, the programs did not end the Too-Big-To-Fail structure of finance banking, and, most importantly, the programs, including HAMP, did not ease the foreclosure crisis.[36] As noted by Barofsky, HAMP was a "colossal failure" for homeowners.[37]

In 2008, the U.S. Congress passed the EESA to restore "liquidity and stability to the financial system of the United States."[38] EESA specifically charges the Secretary of the Treasury with the responsibility of protecting consumer home values, "college funds, retirement accounts, and life savings . . . [and] preserv[ing] homeownership and promot[ing] jobs and economic growth."[39] EESA also established a fund entitled the Troubled Asset Relief Program,[40] which was funded with 700 billion taxpayer dollars to provide the Secretary of the Treasury the financial wherewithal to fulfill the mandates of EESA.[41] Soon after EESA's enactment and the creation of the TARP fund, Treasury Secretary Geithner announced the Making Home Affordable ("MHA") program to implement the Congressional mandate in EESA of preserving homeownership.[42]

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[33] *See* SIGTARP, INITIAL REPORT TO THE UNITED STATES CONGRESS 3 (Feb. 6, 2009). The Office of the Special Inspector General for the Troubled Asset Relief was created by EESA and it has the duty "to conduct, supervise, and coordinate audits and investigations of the purchase management and sale of assets under TARP." *Id.*

[34] *See* BAROFSKY, *supra* note 1, at 226.

[35] 12 U.S.C. § 5201(a), (b) (2008).

[36] Stephen Gandel, *Former TARP Official on TARP: A Big Fat Failure, Mostly*, TIME MAG. (Mar. 30, 2011), http://business.time.com/2011/03/30/former-tarp-official-on-tarp-a-big-fat-failure-mostly/; *see also* SIGTARP, FACTORS AFFECTING IMPLEMENTATION OF THE HOME AFFORDABLE MODIFICATION PROGRAM 29–33 (Mar. 25, 2010), *available at* http://www.sigtarp.gov/Audit%20Reports/Factors_Affecting_Implementation_of_the_Home_Affordable_Modification_Program.pdf [hereinafter SIGTARP MARCH 25, 2010 REPORT] (concluding HAMP failed in providing aide to enough people facing foreclosures and will also likely not provide long term relief because its design leaves many people "vulnerable to re-defaults").

[37] Gandel, *supra* note 36.

[38] 12 U.S.C. § 5201(1).

[39] *Id.* § 5201(2)(A)–(B).

[40] *See id.* § 5211.

[41] Gandel, *supra* note 36 (stating Congress approved giving $700 billion to the Treasury Department to save the economy).

[42] *See* SIGTARP MARCH 25, 2010 REPORT, *supra* note 36, at 18 (discussing Treasury's desire to get "HAMP running rapidly"); *see also* BAROFSKY, *supra* note 1, at 123 (describing planned government initiatives to be implemented as a part of TARP).

The Making Home Affordable program includes HAMP.[43] HAMP, funded primarily by taxpayer TARP funds,[44] is a program established to provide bailout dollars to banks and their servicers[45] to enable them to modify individual homeowners' privately-owned mortgage debts.[46] At HAMP's inception, Treasury Secretary Geithner stated that the goal of HAMP was to offer three to four million borrowers *permanent* mortgage modifications.[47] As of April 2013, HAMP had resulted in approximately 865,000 permanent mortgage modifications for individual borrowers.[48] This significantly lower than projected number of permanent mortgage modifications is what Neil Barofsky warned would result if the U.S. Treasury did not ensure that the banks and their servicers had the necessary infrastructure to support a massive mortgage modification process for millions of homeowners.[49]

When the Treasury Department unveiled HAMP, the program lacked a clear plan, uniform structure, and coherent procedures for implementation.[50] The Treasury Department failed to create systematic oversight and did not impose penalties for bank servicer mismanagement or malfeasance.[51] It did not even provide banks and their servicers clear criteria for homeowner eligibility[52] for

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[43] SIGTARP MARCH 25, 2010 REPORT, *supra* note 36, at 1; *see also* BAROFSKY, *supra* note 1, at 123 (mentioning Secretary Geithner's promise of a $50 billion housing program, which would become known as HAMP).

[44] *See* SIGTARP MARCH 25, 2010 REPORT, *supra* note 36, at 1. HAMP is a $75 billion program that includes $50 billion from TARP for the modification of mortgages.

[45] *Id.* at 10. The category of bank and servicers are used throughout this Article to denote the financial entities that received funds from the federal government under the HAMP program. Large banks have servicing divisions that create and perform mortgage modification procedures. The Treasury department provided TARP funds to 110 mortgages servicers/banks (covering eighty-nine percent of eligible outstanding mortgage debt) with a signed agreement to modify mortgages.

[46] *Id.* at 2. HAMP was designed to encourage loan servicers to modify eligible mortgages so that monthly payments of homeowners would be reduced.

[47] *See id.* at 8–9 (noting discrepancy between stated goal of HAMP and the Treasury's statements regarding the program's goal).

[48] SIGTARP, RISING REDEFAULTS OF HAMP MORTGAGE MODIFICATIONS HURT HOMEOWNERS, COMMUNITIES, AND TAXPAYERS 7 (July 24, 2013), *available at* http://www.sigtarp.gov/Audit%20Reports/Rising_Redefaults_of_HAMP_Mortgage_Modifications.pdf.

[49] *See* BAROFSKY, *supra* note 1, at 133 (noting the Treasury was ill-equipped to carry out the program effectively because their "business models were built around processing mortgage payments and implementing foreclosures, not modifying mortgages").

[50] *See* Jann Swanson, *Report: Treasury, Freddie Mac Flubbed HAMP Oversight*, MORTGAGE NEWS DAILY (Nov. 9, 2012, 9:05 AM), http://www.mortgagenewsdaily.com/11092012_hamp_servicers.asp ("The actual oversight was contracted to Freddie Mac . . . . Its first reviews were rejected by Treasury as inadequate because they were 'inconsistent and incomplete' and its staff was 'unqualified.' . . . Treasury didn't dispute the fact that no major audits of the biggest banks were completed until well after HAMP's launch but claimed they had begun 'unprecedented reviews of servicers compliance with program directives within the first months of program implementation.'").

[51] *See* BAROFSKY, *supra* note 1, at 133–35 (noting HAMP harmed many homeowners when it refused to heed warnings from Barofsky).

[52] *See* SIGTARP MARCH 25, 2010 REPORT, *supra* note 36, at 3–4. Initial HAMP eligibility requirements: mortgage must have originated on or before January 1, 2009; borrower must be in default or risk of default with first lien holder; owner occupied single family residence; and borrower must meet the requirements of "net present value test." *Id.*

modification, and when the Treasury did provide "guidance" it consistently changed.[53] Banks and their servicers were left to develop their own internal criteria and procedures for homeowner mortgage modifications. As a result of the Treasury Department's failure to systematically and effectively oversee implementation of HAMP, approximately 800,000 homeowners experienced unnecessary foreclosures because of noncompliant and abusive bank mortgage modification practices.[54]

These failures of HAMP are not inadvertent. Barofsky writes, using an aviation safety procedure metaphor, that HAMP's creation was more about "foaming the runway" for the banks than providing relief to homeowners.[55] Treasury Secretary Geithner described HAMP as a program to mitigate and extend the impacts of the mortgage crisis on banks to prevent simultaneous and widespread mortgage foreclosure that could cause insolvency for large banks.[56] Geithner was only tangentially "concerned" about homeowners with unworkable mortgage payments and interest rates.[57] Examined closely, it is clear that HAMP is a series of choices favorable to large banks that undermine the stated goal of Congress to "preserve homeownership." In effect, the Treasury Department, working in tandem with the Federal Reserve Bank, transformed trillions of private bank debt into a public obligation.[58] This structure ensured that banks remained profitable after the crisis while the American people bore the losses.[59] Barofsky concludes that HAMP and TARP "did a very good job of bailing out the big banks and recreating the massive money machine that is Wall Street."[60]

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[53] *See* BAROFSKY, *supra* note 1, at 134 (arguing Net Present Value (NPV) test, which was supposed to indicate whether modification of loan or foreclosure made best economic sense, did not work because Treasury could not determine right formula for test).

[54] *See* Sumit Agarwal, et al., *Policy Intervention in Debt Renegotiation: Evidence from the Home Affordable Modification Program* 27 (Fisher College of Business, Working Paper No. 2012-03-020, 2013), *available at* http://ssrn.com/abstract=2138314. The authors perform a study to measure the impact of HAMP. "We end this section by doing a naive counterfactual computation: we compute what the effect of the program would be if the low-experience servicers were to renegotiate the loans at the same rate as their high-experience counterparts. Since 75% of the loans are serviced by low-experience servicers, our estimates imply that HAMP would have induced about 70% more permanent HAMP modifications, if the loans by low-experience servicers were renegotiated at the same rate as their high-experience counterparts . . . . This would translate into about 800,000 fewer foreclosures in the treatment group over the duration of the program (i.e., December 2012)." *Id.* at 27, 18. In other words, if larger banks perform at a rate similar to smaller banks, HAMP's effectiveness would increase.

[55] *See* BAROFSKY, *supra* note 1, at 156 (stating Treasury was more concerned with helping banks, not homeowners).

[56] *Id.* (discussing conversation with Secretary Geithner, during which he stated how program will help banks).

[57] *See id.* at 157 (indicating despite the high risk of borrowers defaulting, HAMP made sense if the goal was to save banks).

[58] *See* IVRY, *supra* note 5, at 42 (affirming how Federal Reserve reshaped American finances, converting private debt into public obligations, while reserving profits for bankers).

[59] *See id.* (criticizing unnecessary bailouts which were paid with taxpayer dollars without any accountability for those responsible).

[60] Gandel, *supra* note 36 (analyzing Barofsky's NY Times Op-Ed article assessing unwise expenditure of funds by Treasury Department benefitting banks and Wall Street).

As of 2013, the top five bank holding companies—JP Morgan Chase & Co., Bank of America Corporation, Citigroup Inc., Wells Fargo & Company, and The Goldman Sachs Group, Inc.[61]—are approximately 24% larger (with a value of $8,828 billion)[62] than they were before the mortgage crisis in 2007 (having a total value of $6,921 billion). In June 2013, the six largest banks in the United States recorded their highest profits ever,[63] with a profit margin of 19.1%.[64] The combined assets of these six banks equaled 93% of U.S. Gross Domestic Product in 2012.[65] Furthermore, these banks continue to pay, with Treasury Department approval, excessive salaries, bonuses and other forms of extravagant compensation to their executives.[66] These record profits, assets and executive salaries are shocking when contrasted with the current unemployment rate in the United States, which exceeded 8% from February 2009 through August 2012.[67]

This unequal bearing of economic risk and failure produced by the bailout legal structures and programs is a manifestation of larger political, economic, and social structures and divisions in the United States.[68] In other words, the Treasury Department's legal structures under EESA and the programs they established in response to the 2008 economic crisis reflect particular cultural and social beliefs and values in creditor capitalism.[69] Legal structures and their manifestations, as British legal historian E. P. Thompson explains, not only convey information, but also express and reflect social divisions and inequalities.[70] Economic policy is not separate from social policy. The crash and the bailout viewed through this lens reflects social division. As London School of Economics Anthropologist, David Graeber, writes: the great crash of 2008 can be seen in light of an "outcome of years

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[61] A bank holding company is an entity that is comprised of more than one bank. *All Institution Types Defined*, NAT'L INFO. CENTER, http://www.ffiec.gov/nicpubweb/content/help/institution%20type%20description.htm (last visited Sept. 19, 2014).

[62] *U.S. Top Tier Bank Holding Companies (BHCs) as of June 30, 2013*, FEDERAL RESERVE OF CHICAGO 1 (June 30, 2013), http://www.chicagofed.org/digital_assets/others/banking/financial_institution_reports/TopBanksBHCs_20130630.pdf.

[63] ANDREW ROSS, CREDITOCRACY AND THE CASE FOR DEBT REFUSAL 1 (2013).

[64] *Grip of Giant Banks on the Economy Stronger Than Ever*, SYSTEMATIC DISORDER (Jan. 22, 2014) http://systemicdisorder.wordpress.com/2014/01/22/banks-bigger-stronger/ (critiquing growing profit margins of banks even after self-inflicted crash).

[65] ROSS, *supra* note 63, at 1.

[66] *See generally* SIGTARP, TREASURY CONTINUES APPROVING EXCESSIVE PAY FOR TOP EXECUTIVES AT BAILOUT COMPANIES (Jan. 28, 2013), *available at* http://www.sigtarp.gov/Misc/2013_SIGTARP_Bailout_Pay_Report.pdf (finding Treasury failed to rein in excessive pay in 2012).

[67] *See Labor Force Statistics from the Current Population Survey*, BUREAU OF LABOR STAT. DATA, http://data.bls.gov/timeseries/LNS14000000.

[68] Linda Coco, *Debtor's Prison in the Neoliberal State: "Debtfare" and the Cultural Logics of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 49 CAL. W.L. REV. 1, 1 (2012) (commenting BAPCPA marks a shift from "'embedded liberalism' to free market 'neoliberalism'").

[69] *See* ROSS, *supra* note 63, at 10.

[70] *See* E. P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 191 (1st Am. ed., 1975) (discussing social, political and economic processes that define what is considered "crime" and "offender").

of political tussles between creditors and debtors, rich and poor. True, on a certain level, it was . . . a scam, an incredibly sophisticated Ponzi scheme designed to collapse in the full knowledge that the perpetrators would be able to force the victims to bail them out."[71] But ultimately, the crash reflects the shift away from the "Keynesian Era"[72] and a movement toward the emergent neoliberal forms.

As discussed by this Author,[73] a new political-economic form identified as the "neoliberal" or "free market" model emerged over the last forty years throughout world governments.[74] This neoliberal state emphasizes a liberalization of markets, a privatization of resources, and wealth accumulation and consolidation.[75] This neoliberal state displays opposite visages at the two ends of the class structure.[76] On one hand, neoliberal state institutions are liberating and uplifting for the upper classes in that these institutions act to leverage the resources and expand the life options of holders of economic and cultural capital.[77] On the other hand, those at the opposite end of the class continuum have experienced liberalization very differently and distinctly. As a result of these political and economic shifts, the impact of the 2008 mortgage crisis was greatest on the middle and lower classes. They experienced a decrease in total wealth in terms of assets: equity value in homes decreased by 43% and total retirement value decreased by $2 trillion.[78]

Over the past six years of the economic crisis, the risks of financial creditor capitalism shifted from large institutions, such as banks, onto the backs of American workers and their families.[79] Intrinsic in this divergent experience of the neoliberal market credit practices is a "great risk shift" between lenders and borrowers.[80] As

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[71] GRAEBER, *supra* note 3, at 373.

[72] *Id.* ("[T]he white working class of the North Atlantic countries, from the United States to West Germany, were offered a deal. If they agreed to set aside any fantasies of fundamentally changing the nature of the system, then they would be allowed to keep their unions, enjoy a wide variety of social benefits (pensions, vacations, health care . . .) . . . . One key element in all this was a tacit guarantee that increases in workers' productivity would be met by increases in wages: a guarantee that held good until the late 1970's . . . . Economists call this the 'Keynesian Era.'").

[73] *See generally* Coco, *supra* note 68.

[74] *See* DAVID HARVEY, THE ENIGMA OF CAPITAL AND THE CRISES OF CAPITALISM 1–10 (2010) (discussing recent economic collapse and effect on financial markets).

[75] *See* Coco, *supra* note 68, at 14–15 (2012) (discussing wealth redistribution in neoliberal state).

[76] *See* HARVEY, *supra* note 74, at 2 (in 2008, following the market crash, "[t]he losses of those at the bottom of the social pyramid roughly matched the extraordinary gains of the financiers at the top" which included Wall Street bonuses adding up to $32 billion).

[77] *See id*. at 12 (emphasizing upper class has experienced wealth growth through neoliberal state, while, "[f]or the first time in US history, working people have failed to share in any of the gains from rising productivity" due to wage repression).

[78] *See* JACOB S. HACKER, BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS 222 (Katherine Porter ed., 2012).

[79] *See id*. ("Rather than enjoying the protections of insurance that pools risks broadly, Americans are increasingly facing economic risks on their own" due to new, institutional plans which provide no inherent protection against asset or longevity risks).

[80] *See id*. (explaining essence of Great Risk Shift is that "as private and public economic support has eroded, workers and their families have been forced to bear a greater burden").

large banks are "too big to fail"[81] after the 2008 mortgage crisis, individual consumer borrowers are financially failing at ever increasing rates.[82] Over seven million homeowners have lost their homes since the crisis began.[83] The mortgage crisis reduced the net worth of the middle and lower classes and transferred that wealth to the upper classes that represent a small percentage of the population.[84] Thus, the bailout programs of the U.S. government further reify and effectuate the risk shift by implementing policies and practices that protect large financial institutions with public money and provide little or no protection for individuals.

II. BANKRUPTCY COURT'S NECESSARY RESPONSE: A FORUM FOR RESTRUCTURING MORTGAGE INDEBTEDNESS IN THE WAKE OF THE 2008 CRISIS

Due to the failures of the U.S. Treasury Department to create a clear plan, uniform structure and coherent procedures for implementation of HAMP,[85] homeowners were left with few options when burdened with high interest rates and over-encumbered homes.[86] In an attempt to save their homes from continued default and foreclosure, homeowners petitioned bankruptcy courts for relief as a last resort.[87] Homeowners sought to use the power of the bankruptcy process to restructure otherwise destined-to-fail mortgage obligations through some form of loan modification: reducing interest rates, reducing principal, stripping an unsecured second mortgage, curing arrearage payments through a chapter 13 plan, or a combination.[88]

Bankruptcy courts responded by stepping in to address poor lender and servicer behavior under the existing HAMP structures. Bankruptcy courts assumed the role of helping homeowners through formal and informal mortgage modification programs. The bankruptcy courts' modification programs assist troubled

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[81] A popular phrase to describe certain financial institutions which are so large and interconnected that their failure would destroy entire economic system. *See generally* ANDREW ROSS SORKIN, TOO BIG TO FAIL: THE INSIDE STORY OF HOW WALL STREET AND WASHINGTON FOUGHT TO SAVE THE FINANCIAL SYSTEM—AND THEMSELVES (Mti. Upd. Ed., 2010).

[82] *See generally* HACKER, *supra* note 78, at 218–34.

[83] *See* IVRY, *supra* note 5, at xiv.

[84] *See* HACKER, *supra* note 78, at 214–34 (observing due to financial crisis, "more than half of middle-class families have no net financial assets (excluding home equity), and nearly four in five middle-class families do not have sufficient assets" while upper class profits from overall economic productivity which has risen handsomely, causing "incomes at the very top of the economic ladder" to shoot upward and median incomes to grow slowly since the 1970s).

[85] *See supra* Part II.

[86] *See* John Rao, *Bankruptcy Courts Respond to Foreclosure Crisis With Loss-Mitigation Programs*, 30 AM. BANKR. INST. J. Mar. 2011 at 14, 71 (discussing impediments debtors experience during loan modifications).

[87] *See id.* at 14 (highlighting many homeowners are resorting to bankruptcy courts).

[88] *See id.* at 71 (enumerating various ways bankruptcy courts can assist troubled homeowners).

homeowners in several ways: requiring lenders to speak with debtors,[89] ending the confounding bank practices, setting clear timelines for the modification process, eliminating lender and servicer denial of payment receipt, requiring a final decision under HAMP and approving a final modification agreement.[90] To be sure, the automatic stay and lien stripping provisions within the traditional bankruptcy process further assisted troubled homeowners.

A primary problem facing homeowners under non-bankruptcy HAMP modification structures is lender and servicer unresponsiveness and lack of communication.[91] Homeowners testified in bankruptcy courts that they were unable to speak with bank and servicer personnel to discuss available mortgage modification options under federal programs (e.g., HAMP).[92] The court in *Clawson v. Indymac Bank*[93] describes the experience of debtors:

> At each weekly calendar of relief from stay motions, debtors plead with the court for assistance in obtaining a loan modification. Sometimes they have been unable to penetrate the lenders' impenetrable phone tree to talk to a live person; or having reached someone at the other end of the line, they are unable to obtain answers to their inquiries after weeks or months of trying; or they have submitted paperwork to the lender, only to be told more papers are required, or that the papers they've already submitted have been lost.[94]

Routinely, homeowners sought to communicate with their lenders about a pending mortgage modification application.[95] But many were unsuccessful in their attempts to get lenders and servicers to respond outside of bankruptcy.[96] In an interview with Bloomberg Law, U.S. Bankruptcy Chief Judge Cecelia G. Morris describes these problems and that the purpose of loss mitigation and mortgage modification mediation programs are to insist "that the secured [mortgage] lender speak with the

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[89] *See id.* at 14, 71 (explaining loan modification programs designate contact persons to each debtor); *see also* Morris, *supra* note 8, at 4–5 (acknowledging Loss Mitigation Program establishes means of communications between parties).

[90] *See* Morris, *supra* note 8, at 4–5 (discussing premise of the Loss Mitigation Program).

[91] *See id.* at 32 (remarking on difficulties debtors have with contacting their creditors and inquiring about loan modifications).

[92] *See id.* (commenting on unresponsiveness of creditors).

[93] *In re* Clawson, 414 B.R. 655 (Bankr. N.D. Cal. 2009).

[94] *Id.* at 661.

[95] *See In re* Sosa, 443 B.R. 263, 265 (Bankr. D.R.I. 2011) (discussing homeowners' difficulty in obtaining responses from their lenders about a pending mortgage modification application); *see also* Morris, *supra* note 8, at 2 (indicating debtors were "desperate" to prevent foreclosure but had trouble "getting through" to someone with authority to make decisions).

[96] *See In re Sosa*, 443 B.R. at 265; *see also* Morris, *supra* note 8, at 2 (commenting as more people filed for bankruptcy to avoid foreclosure, there was an "explosion of bankruptcy litigation").

[consumer] debtor."[97] Through these programs, she explains, bankruptcy courts are able to open lines of communication between creditor banks and debtor homeowners.[98]

As with Ms. Kimmel's case above, outside of bankruptcy, homeowners encounter numerous bureaucratic barriers in attempting to obtain a decision on their HAMP loan modification application.[99] In several cases, bankruptcy courts discuss the complex structures of lenders, servicers, investors and lawyers and the manner in which these structures confuse, delay, and impede potentially simple processes of modification.[100] Judge Morris explained that in her interactions with banks and servicers she encountered practices that are obfuscating and intentionally confusing for homeowners.[101] Therefore, the resolution of mortgage disputes is difficult and ultimately impossible for the individual to achieve acting alone.[102] Formal mortgage modification mediation and loss mitigation programs put an end to these confusing creditor practices by requiring the debtor and the lender or servicer designate a contact person for information exchange and decision making authority throughout the modification process.[103] Another issue facing homeowners outside of bankruptcy is the lack of an imposed mortgage modification timeline guiding lenders and servicers in their review of the modification application and rendering of a final decision.[104] Bankruptcy courts found a way to alleviate this problem. Mortgage modification mediation and loss mitigation court orders impose a strict timeline for the mortgage modification mediation process.[105] The modification mediation court order specifies deadlines for information production, initial mediation, continued mediations, and final resolution.[106] If any of these deadlines

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[97] Interview by Lee Pacchia with the Hon. Cecilia G. Morris, Chief Judge, Bankruptcy Court for the Southern District of New York, in Washington, DC. (Apr. 26, 2012), *available at* https://www.youtube.com/watch?v=AbuVR-J22_c.

[98] *See* Morris, *supra* note 8, at 4.

[99] *See supra* Part II.

[100] *See In re Sosa*, 443 B.R. at 265 (describing homeowners' difficulty in obtaining responses from lenders about loan modification and the resulting waste of time and expense); Morris, *supra* note 8, at 32.

[101] *See* Morris, *supra* note 8, at 32 (discussing the "complex structure of investors and servicers that was unresponsive to the debtors and their counsel").

[102] *Id.* at 2–4 ("These debtors were desperate. They wanted very much to talk to someone at 'the bank' to see if something could be done to prevent foreclosure, but they had trouble 'getting through' to someone with authority . . . . The debtors described a bewildering creditor structure of investors, servicers, bank branches, internal departments, processors, and law firms, which did not seem to effectively communicate with each other.").

[103] *See* United States Bankruptcy Court for the Middle District of Florida, Orlando Division, Mortgage Modification Mediation Order [hereinafter Mortgage Modification Mediation Order], *available at* http://www.mortgagemodsummit.com/docs/orl/Mortg%20Mod%20Med%20Order.pdf (requiring creditors to designate a representative to "attend and continuously participate in the entire mediation session").

[104] *See* Rao, *supra* note 86, at 70 (noting applications without judicial supervision "linger for months").

[105] *See id.* ("The loss mitigation order contains a set of deadlines, including a designation of a loss-mitigation period and dates for the filing status and final reports.").

[106] *Id.*; *see* Mortgage Modification Mediation Order, *supra* note 103 (listing timetable and deadlines for submitting documents, mediation proceeding, and selection of mediator and representatives).

are breached, the party to the mediation can seek intervention from the bankruptcy court to enforce a deadline.[107]

Outside of bankruptcy, lenders and servicers often denied receipt of the homeowner's mortgage payments, and they used this denial as a basis for initiating a state foreclosure action against a homeowner.[108] In several cases, bankruptcy judges caught lenders and their attorneys misrepresenting to the court knowledge of payment change notices[109] and found that lenders were not applying post-petition mortgage payments to homeowners' accounts.[110] The bankruptcy courts curtail these practices through the mortgage modification process.[111] During the mediation process and after a final agreement is reached, a record of mortgage payment is maintained by the chapter 13 trustee rather than by the lender or servicer. Payment from the debtor is deemed received when the chapter 13 trustee receives it, not when the lender or servicer receives the payment. This bankruptcy court oversight prevents the lender or servicer from claiming a payment default and wrongfully filing a foreclosure action against the homeowner.

In addition to the difficulties of proving timely payment, homeowners have experienced significant difficulty reaching modification agreements with banks at all.[112] As with Ms. Kimmel's experience, outside of bankruptcy homeowners struggle to obtain a final decision on HAMP applications, and final agreements with lenders.[113] Under loan modification mediation and other programs, a timeline is set for a review and reaching a final agreement.[114] If a final agreement is reached during the course of mediation, that agreement is reviewed by debtor's counsel and the chapter 13 trustee to determine if the debtor was properly evaluated under HAMP guidelines.[115] Then, the bankruptcy court conducts a final review to

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[107] *See* Rao, *supra* note 86, at 70 ("[D]ebtor may seek court enforcement of the loss mitigation order."); *see also* Mortgage Modification Mediation Order, *supra* note 103 (stating failure to comply with Order "may result in the imposition of damages and sanctions").

[108] *See* Morris, *supra* note 8, at 2 ("Some debtors . . . had been contacted by organizations that promised to negotiate a loan modification . . . but after paying thousands of dollars, the individuals would find that the foreclosure process had not stopped . . . ."); *see also* Dayen, *supra* note 15 (recounting how individual was dropped from the modification without notification and forced into foreclosure proceedings).

[109] *See In re* Hill, 437 B.R. 503, 534 (Bankr. W.D. Pa. 2010) (noting inconsistencies in attorney's statements regarding their knowledge of whether payment change letters were ever sent to debtor's attorney).

[110] *Cf.* Ameriquest Mortg. Co. v. Nosek (*In re* Nosek), 544 F.3d 34, 49 (1st Cir. 2008) (finding no language in plan addressing how to apply post-petition payments and commenting a more "efficient and accurate way of handling the accounting" should have been established).

[111] *See generally* Morris, *supra* note 8, at 4 (detailing Loss Mitigation program enacted in Southern District of New York).

[112] *Id.* at 2 (detailing debtors' attempts to speak to bank to prevent foreclosure).

[113] *See supra* Part II.

[114] *See In re* Sosa, 443 B.R. 263, 268 (Bankr. D.R.I. 2011) ("The [Loss Mitigation Program] requires parties to *negotiate* within specific deadlines . . . .").

[115] *Cf.* Bean v. Bank of New York Mellon, No. 12-10930-JCB, 2012 WL 4103913, at *8 (D. Mass. Sept. 18, 2012) (finding plaintiff successfully plead violation of HAMP where defendant lender did not provide written certification to foreclosure attorney or trustee).

determine whether the modification agreement is in the best interest of a debtor.[116] Another protection given to a bankruptcy debtor that is unavailable to a homeowner outside of bankruptcy is the automatic stay.[117] As an element of the fresh start, the automatic stay prevents creditors from taking any further collection, foreclosure, or repossession actions against the debtor or any of the debtor's property.[118] This cessation maintains the status quo and gives a debtor time to address foreclosures and repossessions, and to develop a financial plan of repayment without the stress of creditor state court actions.[119] Most importantly, the automatic stay also preserves the debtor's assets for all creditors from the collection actions of any individual creditor.[120] This stay is not available to a distressed homeowner attempting to modify a mortgage outside bankruptcy.

Also in bankruptcy, a debtor will experience a significant drop in total debt load as a result of the bankruptcy discharge. This factor makes it easier for a debtor to formulate a viable mortgage payment and stay current with that payment to the lender. Another significant advantage that is not afforded a non-debtor homeowner is the ability of a bankruptcy debtor to eliminate a junior lien holder on the property that is unsecured due to a drop in the home's market value.[121] The second mortgage payment is eliminated from a debtor's total debt load through the lien stripping process in bankruptcy.[122] Furthermore, a debtor in bankruptcy is able to significantly reduce unsecured credit card debt.[123] Unsecured credit card debt is paid at a pro rata rate equal to the level of a debtor's disposable income and the best

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[116] *See In re* Morales, 506 B.R. 213, 217 (Bankr. S.D.N.Y. 2014) ("Once an agreement is reached in Loss Mitigation, the Procedures allow parties to obtain court approval of the agreement . . . .").

[117] *See* 11 U.S.C. § 362(a) (2012) ("Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities . . . .").

[118] *See id.* § 362(a)(1)–(8); H.R. REP. NO. 95-595, at 174 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6135 ("For the consumer, the stay ceases all harassment by bill collectors; for the ailing business, the stay gives the business a breathing spell and time to work constructively with its creditors, or in the case of a liquidation, prevents some creditors from obtaining preferential treatment by quick action.").

[119] *See id.* at 340.

[120] *See id*.

[121] 11 U.S.C. § 506(d). A lien against property is void to the extent that a lien secures "a claim against the debtor that is not an allowed secured claim[.]" Under this subsection an underwater lien is voidable. *See* Nobelman v. Am. Sav. Bank, 508 U.S. 324, 328 (1993) (concluding "to the extent the claim exceeds the value of the property, it 'is an unsecured claim'"); Dewsnup v. Timm, 502 U.S. 410, 414 (1992) (stating "a claim is secured only to the extent of the judicially determined value of the real property on which the lien is fixed"); *see also* Michael Myers, Dewsnup *Strikes Again: Lien-Stripping of Junior Mortgages in Chapter 7 and Chapter 13*, 53 ARIZ. L. REV. 1333, 1343, 1351–53 (2011) (discussing courts that have allowed strip off in chapter 7).

[122] *See In re* Lavelle, No. 09-72389-478, 2009 WL 4043089, at *4 (Bankr. E.D.N.Y. Nov. 19, 2009), *as amended* (Nov. 25, 2009) (holding second mortgage was not an allowed secured claim and granting debtor's motion to void the second mortgage under section 506 of the Code); *see generally Nobelman*, 508 U.S. at 326, 328; *Dewsnup*, 502 U.S. at 414; Myers, *supra* note 121, at 1358–60 (discussing implications of allowing strip off in chapter 7 and chapter 13).

[123] A. Mechele Dickerson, *Bankruptcy and Mortgage Lending: The Homeowner Dilemma*, 38 J. MARSHALL L. REV. 19, 53 (2004) ("[U]nsecured credit card debt remains presumptively dischargeable.").

interest of the creditors test.[124] Finally, a car loan's interest rate is capped in bankruptcy at market rate plus one and a half percent.[125]

III. AUTHORITY UNDER THE BANKRUPTCY CODE AND BANKRUPTCY RULES FOR FORMAL BANKRUPTCY COURT MORTGAGE MODIFICATION MEDIATION PROGRAMS

Although the U.S. Bankruptcy Code and rules do not provide direct statutory authority or a procedure to authorize and implement mortgage modification mediation and loss mitigation programs, bankruptcy courts have creatively used available tools to craft mortgage modification mediation processes, loss mitigation programs, and other mechanisms to facilitate mortgage loan modifications to ameliorate the impacts of the 2008 mortgage crisis.[126] Drawing together disparate Bankruptcy Code provisions and Bankruptcy Procedural Rules to invoke broad authority to regulate the administration of a case passing through the bankruptcy process, bankruptcy courts use a mixture of Code and rules to assert jurisdiction to require a secured creditor to participate in mediations, conferences, hearings, and request court approval to modify a mortgage.

A. Authority of Mortgage Modification Mediation Programs in Non-Contested Matters

Whether the bankruptcy court has jurisdiction to require participation in mortgage modification mediation and loss mitigation programs without a pending

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[124] 11 U.S.C. § 707(b)*; see* Official Bankruptcy Form B 22C, Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income (Apr. 2013), http://www.id.uscourts.gov/forms-bk/B_22C_1210.pdf.

[125] *See* Till v. SCS Credit Corp., 541 U.S. 465, 479–80 (2004).

[126] In fact, the Code specifically prohibits modification of a mortgage in a chapter 13 reorganization. *See* 11 U.S.C. § 1322(b)(2) (2012). ("[T]he plan may . . . 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 . . . ."). For a full discussion, see Morris, *supra* note 8. A formal loss mitigation program loosely modeled on state court loss mitigation programs, Loss Mitigation Programs ("LMP") address the numerous and potentially unmanageable home foreclosure filings across the country. LMPs establish a flexible mediation process for the creation of agreements that offer: short sales, surrender of property, loan modification and refinance. Many of these programs coincided with various federal government programs for negotiating loan modifications and refinances, i.e., Home Affordable Refinance Program ("HARP"), and Home Affordable Modification Program ("HAMP"). *See Mandatory Mediation Programs: Can Bankruptcy Courts Help End the Foreclosure Crisis?: Hearing on S. 111-916 Before the Subcomm. on Admin. Oversight and the Courts of the Comm. on the Judiciary*, 111th Cong. 13–14 (2010) [hereinafter Hearing on S. 111-916] (statement of Hon. Martin Glenn, United States Bankruptcy Court for the Southern District of New York) ("[O]ur adoption of the Loss Mitigation Program coincided with U.S. Treasury's creation of the HAMP program . . . ."). In the federal court structure, bankruptcy judges developed the structure and process for the loss mitigation program. *See id.* ("In adopting our Loss Mitigation Program, we were among the first bankruptcy courts to develop a formal program . . . .").

contested matter before the court is an issue that has arisen.[127] Although the bankruptcy court is denied full Article III powers,[128] it is part of the Article III District Court and thus a "case" or "controversy" must exist for the court to have jurisdiction.[129] This restriction on the power of federal courts limits the bankruptcy court's exercise of power.[130] Through *In re Sosa*, the Rhode Island Bankruptcy Court addressed the issue of jurisdiction.[131]

In *Sosa*, the court explained that although there is a not an all-encompassing list of Code sections and rule provisions to support its loss mitigation and other mortgage modification processes, Bankruptcy Code section 105 and Bankruptcy Rule 9014 and 7016 provide general authority: "(1) to encourage and facilitate home mortgage modifications, and thereby reduce foreclosures; and (2) to alleviate Court congestion and delay."[132] The court explained that it has general authority to create mediation programs under section 105 on "its own motion."[133] According to the *Sosa* court, Bankruptcy Rule 9014 and 7016 assist the "court[] in determining early on: (1) whether a loan modification is likely; or (2) if the mediation has little or no chance of success, to terminate the loss mitigation and schedule a prompt hearing on relief from stay."[134] Creditors are also afforded an opportunity to show the court that a modification is not feasible and can request an early termination of the mediation process.[135]

The *Sosa* court clarified that use of section 105 and Rule 9014 and 7016 do not expand protections of debtors or interfere with any existing rights of creditors.[136] The court reasoned that its mortgage modification program is simply one of its many case management tools.[137] The mediation program affords parties the

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[127] John McNicholas, *Rhode Island's Experiment with Loss Mitigation – A Creditor's Quagmire*, MORTGAGE MODIFICATIONS OR SURRENDER: ARE THEY GETTING CLIENTS RELIEF?, AMERICAN BANKRUPTCY INSTITUTE NORTHEAST BANKR. CONF 490 (2011), http://www.abiworld.org/committees/newsletters/realestate/vol8num5/modifications.pdf.

[128] *See* Linda Coco, *Stigma, Prestige and the Cultural Context of Debt: A Critical Analysis of the Bankruptcy Judge's Non-Article III Status*, 16 MICH. J. RACE & L. 181, 184 (2011) ("Congress has never taken advantage of its opportunity to create an autonomous and fully empowered bankruptcy court.").

[129] U.S. CONST. art. II, § 1, cl. 3 ("The judicial Power shall extend to all *Cases*, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all *Cases* affecting Ambassadors, other public Ministers and Consuls;—to all *Cases* of admiralty and maritime Jurisdiction;—to *Controversies* to which the United States will be a party;—to *Controversies* between two or more States . . . between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.") (emphasis added).

[130] *See* McNicholas, *supra* note 127, at 490.

[131] *See In re* Sosa, 443 B.R. 263, 266–67 (Bankr. D.R.I. 2011) (discussing authority and precedent granting bankruptcy court the jurisdiction to require party participation in loss mitigation programs).

[132] *Id.* at 267.

[133] *Id.*

[134] *Id.*

[135] *See id.* ("[R]equests for early termination are granted upon request where it is shown that a loan modification is not feasible, and that further discussions would be futile.").

[136] *See id.*

[137] *See id.*

opportunity to meaningfully and successfully advance their relationship beyond the current impasses that arise in the bankruptcy process.[138] Additionally, communication in mediation between the parties helps resolve pending bankruptcy matters such as relief from stay motions and litigation over the note, and it removes them from the court's calendar.[139]

B. Section 105, Subdivisions (a) and (d)[140]

The inherent powers found in section 105 provide the bankruptcy court with broad authority in title 11 cases. Subdivisions (a) and (d) provide the bankruptcy court general authority to require case management conferences, mediation programs, and other case management procedures.[141] These provisions give the bankruptcy court the power to take whatever action is "appropriate or necessary in the aid of the exercise of its jurisdiction" under title 11.[142] Subdivision (a) is traditionally read as granting the bankruptcy court authority to issue any other process or judgment necessary or appropriate to carrying out Code provisions.[143] This grant of power includes the ability to alter debtor-creditor relationships through mortgage modification programs.[144] The authority of subdivision (a) is only limited by the Code in that the bankruptcy court cannot disregard a specific provision of the Code in creating and implementing a program or making a

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[138] *See id*.

[139] *See id.* at 265, 267 (discussing how lack of communication between parties repeatedly resulted in multiple postponements, thereby crowding court calendars, yet when mediation was successful "the resolved matter is removed from the Court's calendar").

[140] 11 U.S.C. § 105 (2012) ("(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title . . . . (d) The court, on its own motion or on the request of a party in interest— (1) shall hold such status conferences as are necessary to further expeditious and economical resolution of the case . . . .").

[141] *See In re Sosa*, 443 B.R. at 267 (noting Bankruptcy Code as source of authority for administration of cases); *see also* Morris, *supra* note 8, at 47–48 ("Bankruptcy courts have broad authority to manage their dockets[.]").

[142] 1 COLLIER PAMPHLET EDITION 2014, 63, at 65 (Alan N. Resnick & Henry J. Sommer eds., 2014) (highlighting court's broad power under section 105 to resolve title 11 cases).

[143] *See In re* Fesco Plastics Corp., 996 F.2d 152, 154 (7th Cir. 1993) (indicating that a bankruptcy court can only use its equitable power to fulfill specific Bankruptcy Code provisions).

[144] *See* United States v. Energy Res. Co., 495 U.S. 545, 549 (1990) (noting Bankruptcy Code's directives are consistent with traditional understanding that bankruptcy courts have broad power to modify creditor-debtor relationships).

decision.[145] For example, the bankruptcy court cannot use its equity powers to achieve a result counter to the Code or a result not contemplated by the Code.[146]

Subdivision (d) provides direct support for the bankruptcy court's power to create and implement mortgage modification programs.[147] Similar to other forms of mandatory and non-binding mediation in federal courts, the bankruptcy court, pursuant to section 105(d), can enter modification orders requiring parties to mediate.[148] Subdivision (d) states: "[t]he court, on its own motion or on request of a party in interest— (1) shall hold such status conferences as are necessary to further the expeditious and economic resolution of the case[.]"[149]

Bankruptcy courts routinely hold scheduling conferences in chapter 11 cases and require parties to adversary proceedings mediate. Similarly, loss mitigation and other mortgage modification mediation programs are authorized by the inherent power of section 105.[150] Courts interpret these subdivisions as part of the bankruptcy court's inherent managerial powers[151] and control over its docket.[152] As appellate courts have noted, the bankruptcy court exercises its subdivision (a) and (d) powers at its discretion.[153]

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[145] *See In re* Stewart, No. 08-3225, 2009 WL 2448054, at *12 (E.D. La. Aug. 7, 2009), *vacated in part*, 647 F.3d 553 (5th Cir. 2011) ("Bankruptcy courts, both through their inherent powers as courts and through the general grant of power in section 105, are able to police their dockets and afford appropriate relief. So long as the exercise of the Bankruptcy Court's equitable authority under Section 105 does not subvert other provisions of the Bankruptcy Code, Section 105 authority is interpreted liberally.") (citations omitted); *see also In re Fesco Plastics Corp.*, 996 F.2d at 154 (noting when the Code addresses an issue, a bankruptcy court cannot use its equitable powers to subvert the result).

[146] *See* Bessette v. Avco Fin. Servs., Inc., 230 F.3d 439, 444–45 (1st Cir. 2000) (indicating bankruptcy courts' broad equitable powers are not unlimited); *see also In re Fesco Plastics*, 996 F.2d at 154 (stating that when the Code provides a solution, it should not be displaced).

[147] *See* 11 U.S.C. § 105(d) (2012) (allowing court on its own motion to hold status conferences and set conditions in order for case to be treated in an efficient manner).

[148] *See id.*

[149] *Id.*; *see In re Stewart*, 2009 WL 2448054, at *12 ("Congress, in enacting the Bankruptcy Abuse Prevention and Consumer Prevention Act and amending section 11 U.S.C. § 105(d) implicitly recognized two specific goals for bankruptcy courts: that a case be resolved expeditiously and economically.").

[150] Morris, *supra* note 8, at 48–50 (discussing procedure, implementation, and impact of loss mitigation programs in Southern District of New York).

[151] *See In re* First Magnus Fin. Corp., 403 B.R. 659, 663 (D. Ariz. 2009) ("[B]ankruptcy courts have 'an inherent duty and the power to dismiss a case *sua sponte* to preserve its integrity, to ensure that the legislation administered by the court will accomplish its legislative purpose, or to control its docket.' This 'power is based upon the court's inherent duty to ensure the orderly administration of the debtors' estates.'") (citations omitted); *see also* Link v. Wabash R.R. Co., 370 U.S 626, 629–31 (1962) (discussing notion of inherent power of courts to control their dockets).

[152] *See In re Stewart*, 2009 WL 2448054, at *12 (finding bankruptcy courts possess inherent managerial powers pursuant to section 105(d) to control its own docket); *Wabash R.R. Co.*, 370 U.S. at 629–31.

[153] *See* Perkins Coie v. Sadkin (*In re* Sadkin), 36 F.3d 473, 478–79 (5th Cir. 1994) ("Section 105(a) provides equitable powers for the bankruptcy court to use at its discretion."); *In re* Atl. Pipe Corp., 304 F.3d 135, 140 (1st Cir. 2002) (stating four sources of judicial authority to order non-binding mediation); *see also Wabash R.R. Co.*, 370 U.S at 629–31 (discussing traditional and uncontested power of courts to control their own dockets).

C. Bankruptcy Rule 9014

Bankruptcy courts also look to the rules for authority for a mortgage modification program or process. The provisions found in Part IX of the Bankruptcy Rules of Procedure establish general practice for contested matters within a pending bankruptcy case. This part of the bankruptcy rules incorporates several of the Federal Rules of Civil Procedure, provides guidance for motion practice in the pending case, makes the Federal Rules of Evidence applicable to bankruptcy proceedings, addresses unique aspects of bankruptcy practice, and requires the use of the official bankruptcy forms. Rule 9014 is used as authority for the creation and implementation of loss mitigation and mortgage modification programs.[154]

It provides that certain bankruptcy rules governing adversary proceedings[155] apply in contested matters[156] within a pending bankruptcy case by permitting "[t]he court . . . at any stage in a particular matter [to] direct that one or more of the other rules in Part VII shall apply."[157]

Part VII of the bankruptcy rules addresses procedures for an adversary proceeding[158] that is separate from a pending bankruptcy case. *In re Sosa* used Bankruptcy Rule 9014 to invoke Rule 7016 (adopting Federal Rule of Civil Procedure 16) as authority to require mortgage modification mediations as a tool for regulating the administration of a bankruptcy case.[159] Rule 7016 addresses pre-trial conferences stating: "the court may order . . . pre-trial conferences for such purposes as . . . (5) facilitating settlement."[160]

D. Criticisms of Residential Mortgage Modification Programs

As federal districts across the country consider adopting formal mortgage modification mediation structures, the existing programs face substantive and

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[154] *See, e.g., In re* Sosa, 443 B.R. at 267 (stating bankruptcy court created loss mitigation programs have ample backing from Federal Rules of Civil Procedure and Federal Rules of Bankruptcy Procedure); FED. R. BANKR. P. 9014(c) (providing general guidelines and procedures for contested matters in bankruptcy proceedings); Morris, *supra* note 8, at 48 n.292 (discussing statutory authority afforded to bankruptcy courts in creating and implementing loss mitigation programs).

[155] An adversary proceeding is a separate lawsuit outside a pending bankruptcy case. *See* FED. R. BANKR. P. 7001 discussed below.

[156] A contested matter is an issue that arises for litigation within a pending bankruptcy case.

[157] FED. R. BANKR. P. 9014(c).

[158] FED. R. BANKR. P. 7001. Lawsuits that are classified as adversary proceedings include: a suit to recover money or property; a suit to determine the validity, priority, and extent of a lien; a suit to obtain court approval for the sale of both the interest of the estate and of a co-owner in property; a suit to object to or revoke a discharge; a suit to revoke an order of plan confirmation; a suit to determine dischargeability of a debt; a suit to obtain an injunction; a suit to subordinate any allowed claim; a suit to obtain a declaratory judgment; and a suit to determine a claim or cause of action removed under the venue provisions.

[159] *See In re Sosa*, 443 B.R. at 267.

[160] *Id.*

procedural challenges.[161] Creditors question whether the bankruptcy court has authority to require their participation in the mediation process in the absence of a pending proceeding.[162] Bankruptcy court jurisdiction extends to all cases and proceedings arising under title 11 or related to a title 11 case.[163] The United States Constitution permits exercise of this jurisdiction only when a controversy exists.[164] After all, the primary role of a federal judge is to resolve legal questions arising from an actual controversy between litigants.

In a mortgage mediation context, an individual debtor files a request for mediation with any lender or servicer of a mortgage loan against a principal residence the debtor owns.[165] A debtor may file this request at any time during the pendency of a chapter 7, 11, or 13 proceeding.[166] A relief from stay motion need not be pending for the court to refer the parties to mediation. As mentioned above, the bankruptcy court uses its case administration authority to grant a debtor's request for mortgage mediation outside a pending contested matter or adversary proceeding. Once the court grants a debtor's motion and enters an order, the creditor is required to participate in mediation.[167] The lien creditor is precluded from any state court foreclosure actions by the automatic stay.[168] In essence, the creditor is locked into a mortgage mediation process, and the question arises as to whether the bankruptcy court judge has the authority to force the creditor to engage in the mediation process.

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[161] *See generally* McNicholas, *supra* note 127, at 489–500 (discussing whether in absence of contested matter or adversary proceeding, there is a case or controversy conferring jurisdiction on a bankruptcy court to provide a forum for Loss Mitigation).

[162] *Id.* at 490 ("A threshold question arises as to whether a bankruptcy court has jurisdiction to require a secured creditor to participate in the LMP or similar program in instances where there is no contested matter or adversary proceeding pending that involves the debtor and the secured creditor with whom mitigation is sought.").

[163] 28 U.S.C. § 1334 (2012). This section grants in the United States district court original and exclusive jurisdiction over all cases under title 11. Cases and proceedings are referred by the district court to the bankruptcy court by 28 U.S.C. § 157.

[164] U.S. CONST. art. III, § 2. Federal courts do not have the authority to resolve legal questions that do not arise out of actual controversy between litigants. Federal courts are not empowered to give advisory opinions. *See* Hayburn's Case, 2 U.S. 409 (1792) (addressing whether court could issue non-binding opinions).

[165] *See* McNicholas, *supra* note 127, at 489–90.

[166] *Id.* at 490.

[167] *See* Christian Conte, *Chapter 13 + Foreclosure Mediation Saves Homes*, JACKSONVILLE BUS. J. (Oct. 26, 2012, 6:00 AM), http://www.bizjournals.com/jacksonville/print-edition/2012/10/26/chapter-13-saves-homes.html?page=all (discussing mortgage mediation program in Florida).

[168] *See* 11 U.S.C. § 362(a)(1) (2012) (filing a bankruptcy petition stays "all entities, of . . . the commencement or continuation of . . . a judicial, administrative, or other action or proceeding against the debtor").

E. Limitations of Chapter 13 Consumer Reorganization Plans Under the 1978 Bankruptcy Code

Chapter 13 of the 1978 Bankruptcy Code[169] codified changes to Chapter XIII of the 1938 Chandler Act[170] to more adequately address individuals experiencing burdensome debt in the changing 1960s and 1970s consumer credit market.[171] The 1978 Code as enacted contained provisions to address the powerful practices of consumer credit industry: overly broad security interests on all of a consumer's household and personal goods, creditors obtaining reaffirmation of debt obligations post-petition, limited state exemption laws to protect the debtor's fresh start, and litigation over dischargeability of certain debts in the bankruptcy process.[172]

Chapter 13 was developed and adopted for human individuals with a regular income[173] who owe less than a statutorily determined debt limit for both secured and unsecured obligations.[174] The chapter provides these individuals with the ability to retain their property and to restructure and pay existing secured and unsecured creditors according to a payment plan.[175] The chapter 13 plan allows individuals to pay creditors according to their ability, and as part of a creditor classification and priority structure. A chapter 13 plan allows individuals to restructure most secured obligations with the exception of a single-family primary residence secured debt.[176] Section 1322(b)(2) of the Bankruptcy Code prohibits a chapter 13 plan from modifying the rights of holders of secured claims for "a claim secured only by a security interest in real property that is the debtor's principal residence."[177] This provision is identified as the anti-strip down[178] or anti-cram down[179] provision for the primary mortgage holder. Legislative history explains that this provision is

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[169] Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978).

[170] *See, e.g.*, DAVID A. SKEEL JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 98–99 (2001) (noting chapter XIII of Chandler Act was "precursor" to current chapter 13).

[171] *See id.* at 154–57, 210–11 (discussing different options for debtors considering chapter 7 and chapter 13).

[172] *See* H.R. REP. NO. 95-595, at 116–17 (1995) (emphasizing the need for consumer debtor protection).

[173] *See Bankruptcy Reform Act of 1978, Hearings on S. 2266 and H.R. 8200 Before the Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary*, 95th Cong. 714 (1977) [hereinafter *Bankruptcy Reform Act of 1978, Hearings on S. 2266 and H.R. 8200*] (prepared statement of Edward J. Kulik, Senior Vice President of the Real Estate Division, Mass Mutual Life Insurance).

[174] 11 U.S.C. § 109(e) (2012).

[175] *See* H.R. REP. NO. 95-595, at 116–17 ("However, under the current law [Bankruptcy Act of 1898], the resort to bankruptcy has not always provided an effective remedy . . . . The Bankruptcy Act has not kept pace with the modern consumer credit society. Creditors have developed techniques that enable them to avoid the effects of a debtor's bankruptcy[.]").

[176] 11 U.S.C. § 1322(b)(2).

[177] *Id.*

[178] *See generally* Adam J. Levitin, *Resolving the Foreclosure Crisis: Modification of Mortgages in Bankruptcy*, 2009 WIS. L. REV. 565, 579–80 (2009) ("Strip down bifurcates an undersecured lender's claims into a secured claim for the value of the collateral and a general unsecured claim for the deficiency.").

[179] *See Bankruptcy Reform Act of 1978, Hearings on S. 2266 and H.R. 8200*, *supra* note 173, at 703 (discussing "cram down" provisions under chapter X and XII of Bankruptcy Code).

based on a policy assumption about the nature and flow of consumer lending practices.[180]

During the 1977 hearings of Senate Subcommittee on Improvements in Judicial Machinery, the prohibition on the modification of a single-family residence mortgage was discussed as part of proposed revisions of the bankruptcy laws in the Senate and House Bankruptcy Reform Act bills S. 2266[181] and H.R. 8200.[182] During the hearings, testimony was presented on the policy implications of allowing modification of secured obligations,[183] particularly in the area of consumer lending for a primary residence. Allowing such modification of secured debt, a representative from the Mortgage Bankers Association of America and National Association of Mutual Savings Banks testified, would result in a constriction in the availability and flow of mortgage credit for consumers.[184]

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[180] Levitin, *supra* note 178, at 575 (acknowledging Code's assumption that, mortgage markets are affected by bankruptcy-modification risk).

[181] S. 2266, 95th Cong. (1st Sess. 1977) (preceding the Bankruptcy Reform Act of 1978).

[182] *See Bankruptcy Reform Act of 1978, Hearings on S. 2266 and H.R. 8200*, *supra* note 173 (noting limitations to applicability of "cram-downs" should be stated carefully in the new legislation)*; see also* H.R. 8200, 95th Cong. (1st Sess. 1977) (preceding the Bankruptcy Reform Act of 1978).

[183] *See Bankruptcy Reform Act of 1978, Hearings on S. 2266 and H.R. 8200*, *supra* note 173, at 703–15.

[184] *Id.* at 703–16. Experts from the hearing provide insight into the anti-cram down mortgage modification provisions found in 11 U.S.C. § 1322. Testimony presented by Edward J. Kulik and responses from Senator DeConcini:

> Mr. Kulik: I am very familiar with the effect of bankruptcy law and decisions on the real estate and mortgage lending industries . . . . I should like to call the Subcommittee's attention in a more general way to the areas of the Bills of crucial interest and concern to those of us in the real estate and lending industry . . . . [T]here are a number of areas dealt with in S. 2266 and H.R. 8200 about which secured real estate lenders are greatly concerned. One of those areas is the so call "cram-down" . . . . Under the "cram-down" provisions, a secured creditor's legal rights can be altered and modified, despite the fact that the creditor has not assented to the proposed plan . . . . [As a result of cram-down provisions in chapter 13 for individual wage earners], the holder of a mortgage on real estate may be forced to give up its specific security . . . . These provisions may cause residential mortgage lenders to be extraordinarily conservative in making loans where the general financial resources of the individual borrower are not particularly strong . . . . [T]his matter of the greatest interest and concern to the real estate and lending industry which greatly needs relief from the existing bankruptcy laws before it is forced to consider alternative investments with its funds.
>
> Senator DeConcini: What other investments would a savings and loan look to?
>
> Mr. Kulik: In order to avoid the "cram-down," we have, on occasion, gone back to the executive committee of our Board, which has to approve any forebearance on existing mortgages. Invariably the question has been raised by Board members that if we can not enforce our first lien and if it really does not mean anything under existing bankruptcy laws, then why do we continue to make mortgages.
>
> Senator DeConcini: If it did not change, you do not really suggest that savings and loans and mortgage bankers will stop lending money, do you? . . . . [T]here have been times that savings and loan associations in Arizona have really been anxious to loan money, not withstanding the present law. That happens to be the case right now. That has not always been the case. So, I wonder what really detrimental effect there is. The

Ultimately, these policy arguments prevailed, and the modification of a first mortgage on a single-family primary residence through a chapter 13 plan is prohibited.[185]

This prohibition on mortgage modification for a single-family residence was further protected by the U.S. Supreme Court in *Nobelman v. American Savings Bank*,[186] holding that 11 U.S.C. section 1322 bars a chapter 13 debtor from bifurcating the secured debt into secured and unsecured portions.[187] In response to *Nobelman*, Congress added a new subsection to section 1322.[188] Section 1322(c)(2) permits chapter 13 debtors to modify the terms of a mortgage if the last payment on the under-secured loan is due before the final plan payment.[189] This section created a carve-out to the anti-modification protection found in section 1322(b)(2) by authorizing a form of claim splitting between the first lien holder on a primary residence and any subsequent short-term lien holders on the primary residence.[190] Since the enactment of section 1322(c)(2), courts have held that if a creditor's security interest in a debtor's primary residence is unsecured, a chapter 13 debtor

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> last part of your statement left me with the indication that this is so severe that if we do not do something, it will severely strangle the home loan mortgage business. I realize the severity of your problem. Your statement is excellent, but I challenge the fact that it is as severe as you left me with on the last closing statement that you made.
>
> Mr. O'Malley, Counsel for Mr. Kulik: With respect to savings and loans, in particular, and the future prospects for loans to individuals under the proposed bills, there is really only one basic problem. That is, the provision in both bills that provides for modification of the rights of the secured creditor on residential mortgages, a provision that is not contained in the present law. I think the answer to your question is that, of course, savings and loans will continue to make loans to individual homeowners, but they will tend to be, I believe, extraordinarily conservative and more conservative than they are now in the flow of credit.

[185] 11 U.S.C. § 1322(b)(2) (2012) ("[T]he plan . . . may 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.").

[186] 508 U.S. 324 (1993).

[187] *Id.* at 332. *See* 11 U.S.C. § 506(a). This section of the Bankruptcy Code allows a debtor to determine the secured portion and the unsecured portion of an existing creditor's interest in property of the estate.

[188] *See* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994) (adding subsection (c)).

[189] *See* 11 U.S.C. § 1322(c)(2) ("Notwithstanding subsection (b)(2) and applicable nonbankruptcy law— . . . (2) in a case in which the last payment on the original payment schedule for a claim secured only by a security interest in real property that is the debtor's principal residence is due before the date on which the final payment under the plan is due, the plan may provide for the payment of the claim as modified pursuant to section 1325(a)(5) of this title.").

[190] *See* Zimmer v. PSB Lending Corp. (*In re* Zimmer), 313 F.3d 1220, 1221 (9th Cir 2002) (holding antimodification provision only available to holders of secured claims); *accord* Lane v. Western Interstate Bancorp (*In re* Lane), 280 F.3d 663, 665 (6th Cir. 2002) ("[M]odification of the rights of a totally unsecured homestead mortgagee is permitted by § 1322(b)(2)."); Tanner v. FirstPlus Fin., Inc. (*In re* Tanner), 217 F.3d 1357, 1357 (11th Cir. 2000) (concluding protection against modification for secured homestead lenders does not extend to "wholly unsecured homestead lenders").

may strip off a junior mortgagee's unsecured lien portion.[191]

As the first waves of foreclosures resulting from the 2008 mortgage securities crisis spread over the country, Congress again considered allowing for the modification of a first mortgage against a primary residence. It proposed amending section 1322(a) to allow for a bifurcation of an undersecured first mortgage on a primary residence for the consumer borrower.[192] In essence, Congress' legislation would have amended the Bankruptcy Code to address systemic foreclosures by allowing a "cram down" of mortgage balances against creditors contrary to existing statutory language.[193] These proposals failed, leaving the bankruptcy courts with the job of cobbling together existing statutory language and procedural practices to deal with the mortgage foreclosure crisis.

IV. INFORMAL MORTGAGE MODIFICATION: LOCAL GUIDELINES, RULES, AND ORDERS FACILITATING FORMS OF MORTGAGE MODIFICATION IN OTHER BANKRUPTCY COURT PROCEDURES

Several bankruptcy courts did not develop a formal mortgage modification mediation or loss mitigation program in the wake of the 2008 crisis. Instead, these courts crafted mortgage modification options through existing practices by adopting local rules and standing orders. These different approaches to mortgage modification are part of particular Code sections and have established court procedures as part of motions for relief from the automatic stay,[194] in the review and approval of the chapter 13 plan by the chapter 13 trustee,[195] and via final approval by the bankruptcy court in the plan confirmation process.[196] In each instance, the bankruptcy courts adopted standing orders, guidelines, and local rules addressing mortgage modification and loss mitigation.

The Bankruptcy Court for the Northern District of California, San Francisco and San Jose Divisions adopted "Guidelines Regarding Residential Loan Modifications on Relief From Stay Motions in Chapter 11 and Chapter 13 Plans."[197]

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[191] *See In re Zimmer*, 313 F.3d at 1221; *accord In re Lane*, 280 F.3d at 665; *In re Tanner*, 217 F.3d at 1357.

[192] *See* Zachariah Larson, *Understanding Senate Bill 61, Helping Families Save Their Homes in Bankruptcy Act of 2009*, 17 Nev. L.J. 20 (discussing the proposed Helping Families Save Their Homes in Bankruptcy Act of 2009).

[193] *See* Helping Families Save Their Homes in Bankruptcy Act of 2009, S. 61, 111th Cong. (2009) (amending federal bankruptcy law governing a chapter 13 debtor, including section 502, allowing of claims or interests and section 1322, contents of a plan); H.R. 200, 111th Cong. (2009).

[194] FED. R. BANKR. P. 4001.

[195] *See* 28 U.S.C. § 586(a)(3)(C) (2012) (stating trustee is responsible for monitoring chapter 13 plans).

[196] *See* 11 U.S.C. § 1325(a) (2012) (describing circumstances when court shall confirm plan).

[197] Guidelines Regarding Residential Loan Modifications on Relief From Stay Motions and in Chapter 11 and Chapter 13 Plans, U.S. BANKR. CT. R. N.D. CAL., LOAN MOD GUIDES, *available at* http://www.canb.uscourts.gov/print/8221 (providing guidelines for creditors seeking relief from stay and debtors hoping to modify principal residence first lien mortgage loans).

The guidelines instruct a lender to address within its motion for relief from the automatic stay a debtor's attempt for mortgage modification, the status of a pending request by a debtor, and whether a debtor has provided for a modified mortgage payment in a chapter 13 plan.[198] The guidelines also indicate that a debtor must inform the chapter 13 trustee of any attempts for mortgage modification.[199]

Other informal approaches to home mortgage modification require court or trustee approval of mortgage modification agreements. In the Bankruptcy Court for the Oregon District, a local rule allows for a lender to communicate with a debtor without violating the automatic stay, but the court requires the chapter 13 trustee to approve of any mortgage modification agreement.[200] In the District of New Jersey Bankruptcy Court, a general order requires parties to file a motion for approval of a loan modification agreement before the modification is consummated.[201] A general

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[198] *Id.* at ¶¶ 1–3 ("1. Creditors must state on the cover sheet accompanying their motion whether or not debtor(s) have requested a loan modification prior to bankruptcy and/or prior to the date the motion is filed. 2. If debtor(s) have made such a request, the creditor must also indicate on the cover sheet the status of the request (e.g., request pending, no decision yet; modification in trial period; denied in writing (attaching a copy of the denial), etc.). 3. If debtor(s) have not made a request for a loan modification prior to the date of filing the motion for relief from stay, but intend to do so, or have done so after that date and the creditor has not so indicated in its motion for relief from stay, then they should advise the court accordingly at the hearing on the motion for relief from stay. As one form of adequate protection, the court may set a deadline for the debtor(s) to file and serve on the creditor (and in Chapter 13, on the trustee) a declaration stating under penalty of perjury: (1) the date of such a request, to whom it was sent (attaching a true copy of any transmittal letter or cover sheet, without exhibits); (2) if known, the status of the request (e.g., request pending but no decision yet; modification in trial period; denied in writing, etc.); and (3) the amount that is 31% of the debtor(s)' monthly gross income as shown on Schedule I.")

[199] *See id.* at ¶ 7 ("If the debtor(s)' Chapter 13 plan is premised upon a modification of a first mortgage loan secured by the principal residence, no later than the § 341 meeting of creditors debtor(s) must file and serve on the Chapter 13 trustee a declaration stating under penalty of perjury: the date of such a request, to whom it was sent (attaching a true copy of any transmittal letter or cover sheet, without exhibits); (2) if known, the status of the request (e.g., request pending but no decision yet; modification in trial period; denied in writing, etc.); and (3) the present (unmodified) balances and total monthly payments on all claims secured by the debtor(s)' principal residence.").

[200] *See* BANKR. D. OR. R. 4008-2 ("**(a) Chapter 7 Cases.** A mortgage creditor may negotiate a modification of its secured claim with the debtor and the debtor's attorney at any time during the pendency of a Chapter 7 case. A modification is voluntary on the part of the secured creditor and the debtor . . . . The court will not consider a mortgage creditor's contact with the debtor or the debtor's attorney and any negotiation to effect a modification, by themselves, to violate the automatic stay of 11 U.S.C. § 362. No modification can become effective until the trustee abandons the encumbered real property. **(b) Chapter 13 Cases.** A mortgage creditor may negotiate a modification of its secured claim with the debtor and the debtor's attorney at any time during the pendency of a Chapter 13 case. A modification is voluntary on the part of the secured creditor and the debtor. The court will not consider a mortgage creditor's contact with the debtor and the debtor's attorney and any negotiation to effect a modification, by themselves, to violate the automatic stay of 11 U.S.C. § 362. No modification can become effective until the trustee consents in writing or the court approves the modification.").

[201] *See* Amended General Order Regarding Negotiations Between Debtor(s) and Mortgage Servicer(s) to Consider Loan Modifications, U.S. BANKR. CT. R., D.N.J. Mtg. Negotiations, *available at* http://www.njb.uscourts.gov/sites/default/files/local_rules/August_1_2012_LR_Package.pdf ("[I[t is hereby; **ORDERED**, that communications and/or negotiations between debtors and mortgagees/mortgage servicers about loan modification shall not be deemed as a violation of the automatic stay; **IT IS FURTHER ORDERED**, that any such communication or negotiation shall not be used by either party against the other

order in the Southern District of Georgia Bankruptcy Court allows the debtor to motion the court for approval of a mortgage modification, and the order allows the chapter 13 trustee to approve any agreement to modification.[202] An administrative order in the District of Nevada Bankruptcy Court details procedures for a motion to obtain approval from the court for a modification agreement.[203]

These bankruptcy courts, through a creative application of the Bankruptcy Code and bankruptcy rules, found informal ways to effectively do what several of the mortgage modification mediation and loss mitigation programs do for homeowners. These courts, similar to courts with the formal programs, are providing procedural avenues for bankruptcy courts to address the failure of the federal loan modification programs.

V. RESIDENTIAL MORTGAGE MODIFICATION MEDIATION: AN EXAMPLE FROM THE MIDDLE DISTRICT OF FLORIDA BANKRUPTCY COURT

> The mortgage modification story of Mr. and Mrs. Miranda. Mr. Miranda is a retired law enforcement officer from New York and a disabled veteran receiving social security disability. In 2010, Mr. Miranda's father was diagnosed with cancer. The Mirandas cared for [him] and assisted him with . . . medical costs. During the same time the Miranda's children were laid off. [And as a result,] the children and grandchildren moved into the house. These additional expenses caused the Mirandas to fall behind on their mortgage payments and homeowners dues [on the property]. Their mortgage payments were $1956.00 per month. When the Mirandas filed the chapter 13 petition [they] were approximately $34,000.00 in

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in any subsequent litigation; **IT IS FURTHER ORDERED**, that prior to consummation of a loan modification agreement, the agreement must be presented for approval to the Court by motion . . . **IT IS FURTHER ORDERED**, that if a loan modification approved by the Court impacts on the provisions of a Chapter 13 plan, a modified plan must be filed.").

[202] *See* Order Permitting Chapter 13 Trustee to Approve Real Estate Loan Modification and the Incurring of Debt, U.S. BANKR. CT. R. S.D. Ga., Gen. Order No. 2010-2, *available at* http://www.gasb.uscourts.gov/usbcGenOrders.htm ("The Court recognizes that after the filing of a petition under chapter 13 of the bankruptcy code it may be necessary for a debtor to enter into agreements with creditors to modify security interests in real property of the debtor or to incur consumer debt to obtain goods or services necessary to the debtor's performance under a chapter 13 plan. As set forth in 11 U. S. C. § 1305(c), where prior approval of the trustee is practicable to obtain, **IT IS HEREBY ORDERED** that the case trustee is authorized, without further order of this Court, to grant permission to the debtor to enter into agreements to modify a security interest in the debtor's real property or to incur debt as set forth in 11 U. S. C. § 1305. Nothing in this General Order is to prevent the trustee from denying a request from the debtor to so modify or to incur debt, or prevent the debtor from filing a motion seeking Court approval of a debtor's request to so modify or to incur debt. Applications depicting the approval of the chapter 13 trustee to so modify or to incur debt may be filed with the Clerk 's office in accordance with the Court's filing procedures.").

[203] *See* In re: Loan Modifications in Las Vegas in Chapter 13 Cases, U.S. BANKR. CT. R. D. NEV., Admin. Order 2010-03 (referring to U.S. DIST. CT. R. D. Nev., Part III).

> arrears, and their delinquent homeowners association dues had mushroomed into $12,600.00 with legal fees and court costs. The Mirandas filed chapter 13 in 2011 to stay a foreclosure proceeding by the homeowners association. In the chapter 13 case, the Mirandas . . . applied for the mortgage mediation program with Ocwen Bank. Ocwen approved the request and reduced the mortgage payments from [$]1956.00 per month to [$]931.04. Ocwen also forgave a portion of the mortgage balance by over $236,000.00, taking the $485,000.00 balance down to roughly $249,000.00. At the time of the loan modification application, the Mirandas' gross income was $8,000.00, dividing their gross income by the modified payment of $931.00 their DTI (debt to income) ratio was approximately 11%, 20% lower than the Making Homes Affordable Program.[204]

Formal mortgage modification mediation and loss mitigation programs were developed to encourage communication between debtors and lenders, allowing direct contact with one another without violating the automatic stay[205] and resolving mortgage disputes. The Middle District of Florida Bankruptcy Court developed its residential mortgage modification mediation program in 2010 under the guidance of local bankruptcy judges.[206] The creation of its program was a collaborative effort between judges, the chapter 13 trustee, creditor attorneys, and debtor attorneys.[207]

A. Success Rate

Since the implementation of the Middle District of Florida's program, more than 2,000 mediations have been requested.[208] According to data collected by the chapter 13 Trustee for the Middle District, as of January 2013, the Orlando Bankruptcy Division has a mortgage modification success rate of 76.5%,[209] which increased

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[204] Interview with Robert Branson, Managing Partner, and Tammy Branson, Senior Paralegal, BransonLaw, PLLC, in Orlando, Fla. (May 12, 2014) [hereinafter Branson Interview] (discussing mortgage modification mediation process and interviewee's successful cases).

[205] Morris, *supra* note 8, at 3–4 (discussing purpose of loss mitigation is to provide line of communication between debtor creditor with supervision by court).

[206] *See* Branson Interview, *supra* note 204 (discussing firm's practice in relation to chapter 13 cases and DOJ settlements coupled federal law around 2012).

[207] *Id.*

[208] Laurie K. Weatherford, Chapter 13 Trustee Presenter, *Mortgage Modification Education*, Orlando Fla. (Aug. 26, 2013), *available at* www.mortgagemodificationeducation.com.

[209] Chapter 13 Trustee's Office, *2013 Year-End Mediation Report*, Number of mediation held: 1,748. Modified 757, Continued 759, and impasse 232. Banks with the most modified mortgages: Bank of America, Wells Fargo, Chase, and Ocwen Loans.

from 73% in 2012.[210] This rate of success is dramatic compared with the 3.6% success rate of residential mortgage modifications achieved through Florida state court proceedings.[211]

Due to having the highest national residential foreclosure rate, the Florida Supreme Court issued an administrative order resulting in the creation of the Task Force on Residential Mortgage Foreclosure Crisis to study the foreclosure crisis in Florida.[212] In 2009, the task force recommended the development of a statewide mortgage mediation program.[213] By 2010, the program was established and requirements clarified.[214] The program focused on the need for open communication between the parties, judicially imposed time limits on the mediation process, procedural flexibility for crafting a result, voluntariness by the participants, full disclosure of information, and confidentiality.[215] Irrespective of these goals, the effectiveness and success rate of the program has been extremely low.[216]

The statewide-implemented mediation program confronted several structural and enforcement challenges resulting in an impasse in a majority of cases.[217] Initially, the program was not well publicized as a court-created and referred program, and as a result homeowners were hesitant to opt in.[218] Lenders and servicers did not provide representatives with full settlement authority at mediations, and they did not offer a wide range of settlement options to

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[210] Weatherford, *supra* note 208 (elaborating on data collected by the Middle and Southern Districts of Florida).

[211] Kim Miller, *Foreclosure Mediation Program's Low Rate of Success Leaves its Future in Doubt*, PALMBEACHPOST.COM (Sept. 20, 2011 10:14 PM), http://www.palmbeachpost.com/news/news/real-estate/foreclosure-mediation-programs-low-rate-of-success/nLyBn/ (discussing poor success rate of state sponsored mediation program over course of existence). The statewide foreclosure mediation program was so unsuccessful that it was terminated in December 2011. Mortgage modification is currently left to each county to draft and implement. The program is identified as the Residential Foreclosure Mediation Program. *See* RESIDENTIAL MORTG. FORECLOSURE MEDIATION PROGRAM, http://www.rmfmp.com/ (last visited Sept. 2, 2014) (providing information, by Florida county, to debtors attempting to enter mediation).

[212] In re: Task Force on Residential Mortg. Foreclosure Cases, Fla. Admin. Or. AOSC09-8, at 2 (Mar. 27, 2009), *available at* www.floridasupremecourt.org/clerk/adminorders/2009/AOSC09-8.pdf

[213] FLA. SUP. CT. TASK FORCE ON RESIDENTIAL MORTG. FORECLOSURE CASES, FINAL REPORT AND RECOMMENDATIONS ON RESIDENTIAL MORTGAGE FORECLOSURE CASES 8 (Aug. 17, 2009), *available at* www.floridasupremecourt.org/pub_info/documents/Filed_08-17-2009_Foreclosure_Final_Report.pdf [hereinafter Final Report].

[214] *See id.* at 30 (introducing proposed statewide mediation program which task force believed to be viable solution to Florida's residential bankruptcy crisis); In re: Guidance Concerning Managed Mediation Programs for Residential Mortg. Foreclosure Cases, Fla. Admin. Or. AOSC10-57, at 2–3 (Nov. 5, 2010), *available at* http://www.floridasupremecourt.org/clerk/adminorders/2010/AOSC10-57.pdf (outlining state-wide, county-managed, bankruptcy mediation program's rules, stipulations, regulations and what debtors need to qualify).

[215] *See* Final Report, *supra* note 213, at 30–31 (emphasizing that statewide model for managed mediation will open communication).

[216] *See* Letter from William D. Palmer, Chair of Assessment Workgroup for the Managed Mediation Program for Residential Mortgage Foreclosure Cases, to Charles T. Canady, Supreme Court Justice, Florida Supreme Court (Oct. 21, 2011) [hereinafter Palmer Letter].

[217] *See id.* at 3–5 (listing factors that affected success rate of program).

[218] *Id.* at 4.

homeowners.[219] Another challenge to the success of the statewide program was the problem of negative financial incentives.[220] Servicers and lenders had an economic incentive to keep foreclosure cases in limbo and not settle.[221] These challenges proved insurmountable.[222] On December 19, 2011, the Supreme Court of Florida terminated the statewide-implemented mediation program and permitted circuit courts to opt into a revised model mediation approach on a case-by-case basis.[223]

A crucial hindrance to the implementation and success of the Florida state court residential mortgage mediation program was the state law entitled the Mediation Confidentiality and Privilege Act.[224] The Act limits a Florida state court's ability to oversee mediation and require mediation in good faith because: "All mediation communications occurring as a result of the Court's Administrative Order . . . shall be confidential and inadmissible in any subsequent legal proceeding."[225] Thus, the confidentiality mandate precludes the enforcement of any requirement of the parties to mediate in good faith. In contrast, the Local Rules of the Bankruptcy Court for the Middle District of Florida encourages parties to "participate in the mediation in a good faith attempt to resolve the issues between them[,]" and in practice this is treated as a requirement.[226] A general consideration of the Middle District of Florida's mortgage modification program illustrates important differences.

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[219] *Id.*

[220] *See* David Dayen, *A Housing Relief Program with Policies that 'Throw People into the Grinder': One of the Biggest Housing Relief Programs Under the Obama Administration has Failed Desperate Homeowners in Huge Ways*, THE GUARDIAN (Jan. 19, 2014, 8:00 AM), http://www.theguardian.com/money/2014/jan/19/home-relief-program-florida-mortgage-foreclosure. Participation in a state mortgage modification program does not dismiss a foreclosure case, it merely pauses it. Banks often restart foreclosure proceedings after receiving a year's worth of payments from the fund. Banks participate, accept the funds, and then wait until the funds are exhausted to foreclose. *See* Palmer Letter, *supra* note 216, at 4 (noting servicers had incentives to not settle).

[221] *See* Dayen, *supra* note 220; Palmer Letter, *supra* note 216, at 4.

[222] *See* Palmer Letter, *supra* note 216, at 2 ("After consideration of the available program data, public comments, chief judge input and other information, the workgroup voted to: (1) eliminate the mandate for a statewide managed mediation program; and (2) allow circuits to opt in to a new, revised uniform model administrative order, either as an exclusive approach or in addition to referral of cases to mediation on a case-by-case basis under relevant court rules and statutes.").

[223] In re: Managed Mediation Program for Residential Mortgage Foreclosure Cases, Fla. Admin. Or. No. AOSC11-44 (Dec. 19, 2011), *available at* www.floridasupremecourt.org/pub_info/documents/foreclosure_orders/12-19-2011_Order_Managed_Mediation.pdf.

[224] Fla. Stat. § 44.405(1) (2011) (requiring, except as otherwise provided, mediation communications be confidential).

[225] *Florida's Residential Mortgage Foreclosure Mediation (RMFM) Program - Pre-Suit Foreclosure Mediation Procedures*, FLORIDA AMERICAN ARBITRATION ASSOCIATION: RESIDENTIAL MORTGAGE FORECLOSURE MEDIATION PROGRAM 2, http://www.mortgagemediation.org/media/107741/revised%20rmfm%20presuit%20procedures.pdf (last visited Sept. 3, 2014) [hereinafter RMFM Program].

[226] Bankr. M.D. Fla. R. 9019-2(k) (requiring all parties to mediation to attend mediation in person and encouraging parties to mediate in good faith to resolve issues).

B. Residential Mortgage Modification Structure and Process in the Middle District of Florida Bankruptcy Court

Invoking general case administration powers, the Middle District of Florida Bankruptcy Court residential mortgage modification mediation programs are described as a procedural mechanism established to "save time and cost."[227] The judicial authority to require parties to engage in a mortgage modification mediation program is codified in a local rule for alternative dispute resolution and mediation.[228] Generally, the local rule allows the court to refer to mediation any "pending case, proceeding, or contested matter."[229] Specifically, the local rule addresses mortgage modification mediation stating that the court shall "establish procedures, policies and necessary orders to deal with the mediation of emerging bankruptcy trends, such as residential mortgage modifications."[230] This rule empowers the bankruptcy judge to require that the parties engage in mediation outside the purview of the court, but it does not require parties to reach a final agreement. In effect, this program is a mechanism for case administration, and ultimately bypasses litigation over whether the servicer or lien holder actually holds a valid lien against the debtor's real estate.[231]

The modification process includes acts that must be performed before, during, and after mediation. Initially, the debtor and the debtor's counsel must determine if a modification of the mortgage is feasible—a numeric calculation determining the mortgage monthly payment.[232] After a positive feasibility determination, the debtor files the Motion Requesting Mortgage Mediation.[233] If there is no opposition, the court enters an order granting mediation.

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[227] ORLANDO DIVISION BANKRUPTCY MORTGAGE MODIFICATION MEDIATION PROGRAM (2011), *available at* http://www.flmb.uscourts.gov/orlando/mortgage/mortgage_article.pdf (last visited Sept. 3, 2014) [hereinafter Orlando Mortgage Program] ("The new program allows for parties to discuss mortgage modification in an informal setting as well as to provide a "fast track" for both the debtors and lenders."); *see also* Bankr. M.D. Fla. R. 9019-2(b) ("***Purpose.*** Mediation is intended as an alternative method to resolve civil cases, saving time and cost without sacrificing the quality of justice to be rendered or the right of the litigants to a full trial in the event that mediation does not resolve the dispute.").

[228] *See* Bankr. M.D. Fla. R. 9019-2.

[229] Bankr. M.D. Fla. R. 9019-2(i) ("***Referral to Mediation.*** Any pending case, proceeding, or contested matter may be referred to mediation by the Court at such time as the Court may determine to be in the interests of justice. The parties may request the Court to submit any pending case, proceeding, or contested matter to mediation at any time.").

[230] Bankr. M.D. Fla R. 9019-2(j).

[231] Branson Interview, *supra* note 204 (stating on one occasion a judge stripped a creditor's lien off a property where creditor was not acting in good faith).

[232] Lenders require that debtors devote 31% of their gross income for the mortgage payment. This number should include both interest and principal. If debtors do not earn a sufficient amount of income, mediation is usually not considered possible. *See* Orlando Mortgage Program, s*upra* note 220.

[233] *Id.* ("Chapter 13 debtors who would like to use this program simply file a motion. The Bankruptcy Court then enters an order without a hearing requiring the parties mediate within 60 days.").

Differing from state court mortgage foreclosure mediation,[234] the Middle District of Florida's residential mortgage mediation order requires "all parties . . . to engage in the mediation process in good faith."[235] The good faith requirement is essential to the mortgage mediation program in the bankruptcy court. A local bankruptcy rule instructs the mediator to report to the court the "willful failure to attend the mediation conference or to participate in the mediation process in good faith, which failure may result in the imposition of sanctions by the Court."[236] This requirement forces creditor accountability and requires the parties to participate in the process until the mediation is complete. If a party refuses to mediate in good faith, the court can impose sanctions.[237]

Within a bankruptcy case, the automatic stay prevents a mortgage creditor from contacting and speaking with a debtor about a mortgage modification. In the Middle District of Florida, the Mortgage Modification Mediation Order issued by the court specially lifts the stay to allow a mortgage creditor to attempt modification with a debtor while a case is pending.[238] The order states that the "automatic stay is modified, to the extent necessary, to facilitate the mortgage creditor[s]' loan modification terms pursuant to this Order."[239] The order further directs that the modification process will reenter the bankruptcy case when the parties have reached an agreement, and the agreement is submitted for court approval.[240] The limited scope of lifting the stay through the court order protects both parties as they engage in mediation.[241]

After entry of the Mortgage Modification Mediation Order, the process unfolds as a separate proceeding under the guidance of a trained mortgage modification mediator.[242] The mediator is either selected by both parties from a list of court-approved mediators or if the parties are unable to agree on a mediator within twenty-eight days of the mediation order, the court will appoint a mediator.[243] The mediator is paid to conduct and report on the mediation process to ensure compliance with local mediation guidelines.[244] At mediation, the mediator takes rolls, confirms that parties with decision-making authority are present, and ensures

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[234] Florida's Residential Mortgage Foreclosure Mediation ("RMFM") does not contain a requirement that parties mediate in good faith. *See* RMFM Program, *supra* note 218.

[235] Mortgage Modification Mediation Order, *supra* note 103, at ¶ 18 ("All parties are directed to comply with this Order and to engage in the mediation process in good faith. Failure to do so may result in the imposition of damages and sanctions.").

[236] Bankr. S.D. Fla. R. 9019-2(C)(4).

[237] *Id.*; *see also* Branson Interview, *supra* note 204 (discussing varied sanctions seen in bankruptcy court including, court fees, attorney fees, damages, and even lien stripping).

[238] *See* Mortgage Modification Mediation Order, *supra* note 103, at ¶ 17.

[239] *Id.* (alteration in original).

[240] *See id.*

[241] *See id.*

[242] *Id.* at ¶¶ 3–4.

[243] *Id.* at ¶¶ 4–5.

[244] *See id.* at ¶¶ 11, 12, 15.

that the parties act in good faith during the mediation process.[245] The mediator ensures that the parties, in order to meet this standard, appear at the mediation, timely produce the required documents, attempt to reach a settlement, and comply with the structure and process of the mediation.[246] At the conclusion of the mediation, the mediator files a written report with the bankruptcy court indicating whether an agreement on the mortgage modification was reached.[247]

The mortgage mediation orders have strict filing-time requirements and deadlines to prevent a case from languishing in the court system.[248] The parties are ordered to attend mediation within sixty days of the date the order was entered.[249] Debtor's counsel must provide creditor's counsel the debtor's financial information twenty-eight days after entry of the mediation order.[250] This financial information includes all supporting documentation for debtor's income, expenses, and tax returns, current paycheck stubs, and information supporting statements in the bankruptcy petition.[251] The lender must receive any supplemental information twenty-eight days before the scheduled mediation.[252] Creditor's counsel must provide a certificate of settlement authority identifying the creditor's representative at the mediation at least twenty-one days before the scheduled mediation.[253] Within seven days of the conclusion of mediation, the mediator files a report with the bankruptcy court indicating whether an agreement for modification of the mortgage was reached.[254] If additional documents are needed from a debtor or the parties need additional time, mediation may be continued, which in practice is often for thirty days, though this continuation cannot be extended indefinitely.[255]

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[245] *See id*. at ¶ 15.

[246] *See id*. at ¶¶ 9, 11, 15.

[247] *Id.* at ¶ 11.

[248] Hearing on S. 111-916, *supra* note 126, at 13–16 (statement of Hon. Martin Glenn, U.S. Bankruptcy Court for the Southern District of New York).

[249] Mortgage Modification Mediation Order, *supra* note 103, at ¶ 3.

[250] *Id*. at ¶ 6 ("Debtor's Financial Documents. a. HAMP RMA Financial Disclosure; b. Lender Specific Modification Form; c. Last 2 months of pay stubs for all non-self-employed borrowers; d. 6 month profit/loss statement from self-employed borrowers, typed, signed and dated on business letterhead; e. Benefit Statements (Social Security, Disability, Unemployment, Welfare, Pension Award Letter, etc.); f. Lease agreement (if claiming rental income), or contribution letter; g. Last 2 months of bank statements (all pages), personal and business, if applicable; h. Last 2 years of signed Tax Returns, personal and business, if applicable; i. IRS Form 4506-T; j. Current utility bill (with debtor[s]' name on it and property address); k. Homeowners' insurance quote/policy; l. Current tax assessment for property; m. Proof of HOA Dues; n. Hardship Letter, signed and dated; o. Schedule I ;p. Schedule J; q. Chapter 13 Plan; r. Consent to Escrow, signed and dated; s. Dodd-Frank Form; and t. Any additional documents requested by creditor.").

[251] *Id*.

[252] *Id.* at ¶¶ 2, 6.

[253] *Id*. at ¶ 8; *see also* Branson Interview, *supra* note 204 (mentioning although certificate of settlement authority is required, creditors often do not provide such certificate in practice).

[254] *See* Mortgage Modification Mediation Order, *supra* note 103, at ¶ 11.

[255] *Id.* at ¶ 7. The mediation process can take up to a year depending on whether the loan is transferred or sold to another lender or servicer. If this happens, the mediation process must restart. Branson Interview, *supra* note 204.

The mediation is typically conducted at the debtor's counsel's office.[256] The parties at the mediation include: a mediator, creditor's counsel, debtor's counsel, and the debtor. Mediation begins by the mediator describing the mediation process to the participants. The mediator then calls roll and introduces the participants. The mediator proceeds by describing the confidential nature of the proceedings and instructing the participants to maintain that confidentiality. The mediator cautions the participants that they must mediate in good faith. Particularly, the mediator reestablishes and ensures that the lender representative has decision-making authority. Next, the mediator asks the lender if it has all required documents from the debtor and inquires if any other documents are needed. If the underwriting division of the bank needs additional documents, a date is set for the debtor to send them to the lender.

After the initial statements and questions, the mediator begins the mortgage mediation conversation between the participants. Mediation usually begins with a debtor requesting a reduced payment. A request for a reduced payment is often paired with a principal reduction to the balance due under the loan or an interest rate reduction. A principal reduction can drop as low as the market value of the home. A request for an interest rate reduction request is usually pegged to the market rate or a few points below. Considering these different options, the parties discuss the possible payment amounts based on a percentage of the debtor's monthly income.[257] Often, these mediations result in a viable and feasible final agreement.[258] A final agreement between the parties could provide a number of possible results: a lower interest rate, a longer or shorter repayment term, a principal reduction, or a surrender of the property.[259]

The chapter 13 trustee and the bankruptcy court must approve any mortgage modification agreement.[260] Once approved, the debtor can complete the bankruptcy process—confirm a chapter 13 plan, achieve a discharge in chapter 7, or surrender the property.[261] Although this process is mandatory once the bankruptcy court

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[256] The following description of a typical mediation is based on the Author's observations from mediation proceedings. Specifically, these observations were preserved in the Author's field notes, taken at mediation proceedings at the law offices of Robert Branson, Orlando, Florida. The follow description is based on mediations that took place on September 9, 2013, October 7, 2013, and October 8, 2013.

[257] *See* Morris, *supra* note 8, at 18 ("[T]he chapter 13 statutory scheme is oriented toward the payment of creditors from projected future earnings of debtors who have regular income.") (quoting *In re* Trumbas, 245 B.R. 764, 767 (Bankr. D. Mass. 2000)).

[258] *See, e.g*., *id*. at 61 (discussing successes of the Loss Mitigation Program for both debtors and creditors).

[259] What is requested by the debtor or offered by the bank will vary depending on the debtor and the creditor. *See* Morris, *supra* note 8, at 4 (noting mediation programs allow debtors and creditors to reach numerous solutions).

[260] *See* Orlando Mortgage Program, *supra* note 220 ("Any signed agreement reached at mediation still must be approved by the Bankruptcy Court before it is binding and enforceable.").

[261] *See* Mortgage Modification Mediation Order, *supra* note 103, at ¶ 17 (requiring parties to submit any agreed upon loan modification to the court for approval); *see also* Morris, *supra* note 8, at 4 (asserting the Loss Mitigation Program allows the debtor and creditor "to get a decision . . . so that the debtor can take the

enters the mediation order, the mortgage modification mediation program in the Middle District of Florida does not compel any kind of result.[262] The parties are only required to mediate in good faith.[263] This mediation process proceeds in a similar manner across federal districts.[264]

CONCLUSION

Historically and in the current moment, bankruptcy laws and legal processes prove essential to economic recovery after a national financial crisis.[265] The bankruptcy courts and laws function as an economic safety valve for a release of pressure resulting from the limitations in the structures of contemporary capitalism.[266] Federal bankruptcy law has been utilized since the 1800s to rebalance a volatile economic system in the boom and bust cycles of capitalism.[267]

In the 2008 crisis, bankruptcy courts have assumed their historic role of providing a forum for individuals to stabilize their financial lives in times of crises.[268] As homeowners experienced the impacts of the 2008 mortgage crisis across the U.S., they turned to bankruptcy courts for protection from high interest rates, onerous mortgage payments and impending foreclosures. With the limited effectiveness of the federal government's HAMP program under the Emergency Economic Stabilization Act of 2008,[269] homeowners had no other place to turn. In establishing formal and informal approaches to mortgage modification across the

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next step in the bankruptcy, whether it is confirming a chapter 13, three to five year, plan, or seeking an immediate discharge in chapter 7").

[262] *See* Bankr. M.D. Fla. R. 9019-2; Mortgage Modification Mediation Order, *supra* note 103; *see also* Morris, *supra* note 8, at 5 (noting "[b]ankruptcy courts may not compel a modification of a debtor's home loan").

[263] *See* Mortgage Modification Mediation Order, *supra* note 103; *see also* Morris, *supra* note 8, at 25 (discussing bankruptcy court's ability to sanction a party if it does not participate in good faith).

[264] For example, bankruptcy courts in the District of Delaware, Southern and Eastern Districts of New York, Middle and Southern Districts of Florida, District of Vermont, Eastern District of Wisconsin, Northern District of Indiana, and District of New Jersey.

[265] Coco, Ph.D. dissertation, *supra* note 11, at 41. Historical precedent exists for calling on the bankruptcy courts to facilitate economic recovery after a financial crisis. Throughout U.S. history, the credit-based economy has created the perfect milieu for cycling economic and financial instability. The shifting and inconsistent currents marking this instability have resulted in recurrent economic crisis: 1791, 1837, 1857, 1893, 1928, and 2008. Each of these crisis periods required several forms of social and legal action to prevent economic disaster. Often proposals for bankruptcy legislation or legislative reform of existing bankruptcy law were central to economic and financial recovery (rebalancing).

[266] 2009 REPORT OF STATISTICS REQUIRED BY THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005 10, 32 (2009), *available at* http://www.uscourts.gov/Statistics/BankruptcyStatistics/bapcpa-report-archives/2009-bapcpa-report.aspx. Bankruptcy courts annually determine status of over $200 million in real property assets and over $300 million in liabilities. *See id.*

[267] *See* Coco Ph.D. dissertation, *supra* note 11, at 38–49 (discussing generally the history of bankruptcy).

[268] *Id.*

[269] *See* Emergency Economic Stabilization Act of 2008, 12 U.S.C. § 5201 (2012).

country, U.S. bankruptcy courts have taken a leading role in addressing mortgage crisis and consumer indebtedness.[270]

Finally, the question remains as to whether it is appropriate for the federal bankruptcy courts to assume this role. Many programs are implemented by court order, and therefore the lenders are forced to participate in the modification process rather than allowed to decline. As a result, mortgage lenders were initially resistant to these formal and informal approaches to mortgage modification in the bankruptcy court.[271] As the success rate for modifications and resolution of foreclosure issues in the bankruptcy court continues to increase, the lenders are less resistant and are beginning to adopt the modification processes without court order. Thus, bankruptcy courts are again leading the way for a stable economic recovery.

[270] *See also* THE FINANCIAL CRISIS INQUIRY REPORT, FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES 7 (Jan., 2011) ("Overall mortgage indebtedness in the United States climbed from $5.3 trillion in 2001 to $10.5 trillion in 2007. The mortgage debt of American household rose almost as much in the six years from 2001 to 2007 as it had over the course of the country's more than 200-year history.").

[271] *See* Branson Interview, *supra* note 204.