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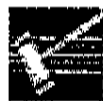
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## National Conference of Bankruptcy Judges.

January 14, 2009

The Hon. Richard Durbin  
Senate Majority Whip  
U.S. Senate  
309 Hart Senate Office Bldg  
Washington, D.C. 20510

The Hon. John Conyers, Jr.  
Chairman, Committee on the  
Judiciary  
U.S. House of Representatives  
2318 Rayburn House Office Bldg  
Washington, D.C. 20515

Dear Senator Durbin and Congressman Conyers:

We are writing to you on behalf of the National Conference of Bankruptcy Judges. We appreciate the opportunity to comment on the "Helping Families Save Their Homes in Bankruptcy Act of 2009," introduced as S. 61 and H.R. 200 and currently being considered by Congress (the "Act"). We have identified some issues that could have a substantial impact on bankruptcy administration, and we would like to assist Congress in avoiding unintended adverse consequences from passage of such important legislation. Our questions and suggestions for clarification are intended to reduce litigation that often follows the enactment of new legislation. We are acutely aware of the role that the housing market has played in our current national economic difficulties, and we want to be sure that we have identified for you the questions that might be answered by Congress now rather than through expensive litigation in the bankruptcy and appellate courts later. We hope that our comments, questions and suggestions are helpful.

Finality--Is court modification of a residential security interest under a confirmed plan intended to be permanent? The Act does not make clear what happens to a security interest in the debtor's principal residence that is modified in a confirmed chapter 13 plan if the debtor is later unsuccessful in making all required plan payments and the case gets dismissed. Does Congress intend for the modification to be permanent, or does it intend for the security interest to revert back to its original terms if the debtor loses his or her job and fails to make plan payments, resulting in dismissal of the case? Unfortunately, a number of chapter 13 cases do fail because payment plans typically last between three and five years, and job loss or illness can interrupt plan payments. If Congress's intent is for security interest modifications to be permanent, then it would be very helpful to make that intent clear in the Act. One way to do this would be to provide in the Act that, "The terms of a residential security interest

modified pursuant to Section 1322(b)(11) in a final, nonappealable order are binding, even if the subject chapter 13 bankruptcy case is dismissed prior to completion of all plan payments." If this is not Congress's intent, Congress and the public should be aware of the accounting nightmares and difficulties that will be involved for all interested parties if a modified residential security interest reverts back to its original terms.

Cases affected by the Act. The language of Section 8(b) of the Act states that it applies to all chapter 13 bankruptcy cases filed "before, on, or after the date of enactment of this Act." Does this mean that the Act would allow a bankruptcy court to modify a confirmed plan in a pending chapter 13 case to allow the debtor to modify a security interest in his or her principal residence? If that is Congress's intent, and in order to avoid litigation over the debtor's ability to modify a confirmed plan in a pending case to accomplish such a mortgage modification, it would be helpful if language was added, perhaps to the end of Section 8(b), to make this intent clear. The following language could be added after the word "act" at the end of Section 8(b): "including with respect to modifications of confirmed chapter 13 plans under Section 1329."

Chapter 13 Eligibility. In Section 2 of the Act, the eligibility requirements in 11 U.S.C. § 109(e) are modified to delete from the secured and unsecured debt limit calculations, debts secured by the debtor's principal residence "if the current value of that residence is less than the secured debt limit." We think that it would be helpful to make clear that the current value of the residence is to be determined as of a specific date, presumably the date of the debtor's bankruptcy filing. Otherwise, people will litigate over what "current" means, running up costs and causing delay. Also, we wonder if including the phrase "if the current value of such real property is less than the secured debt limit" in Section 2's amendment to 11 U.S.C. § 109(e)(2) regarding residences "sold in foreclosure or...surrendered to the creditor" is necessary. If the debtor's interest in the residence has been foreclosed or is being surrendered, it will not be administered in the debtor's chapter 13 case.

Credit Counseling. The modification to 11 U.S.C. § 109(h) in the Act is very helpful. We suggest a change in the wording of the proposed certification to support a waiver request, as follows: The waiver would apply where the debtor has received notice "from the holder of a claim secured by the debtor's principal residence that the debtor's loan is in default and that the holder may commence a foreclosure or is foreclosing" on the debtor's principal residence. Particularly with respect to nonjudicial foreclosure sales, as conducted in many states, the first written notice the debtor receives after default may commence the foreclosure process.

11 U.S.C. § 1322(b)(11) Security Interest Modifications. In Section 4 of the Act in the opening text to the new 11 U.S.C. § 1322(b)(11), we would suggest substituting the phrase "a foreclosure has not been completed under applicable nonbankruptcy law" for the phrase "a notice that a foreclosure may be commenced." As noted above, the first written notice that a debtor receives after a default may commence the foreclosure process.

The amended 11 U.S.C. § 1322(b)(11)(C)(ii) allows for adjustment of the interest rate to a defined base rate "plus a reasonable premium for risk." In order to limit costs and litigation, we suggest that Congress consider fixing the amount of the "risk premium" in the Act. If the risk

premium is not fixed in the Act, it places an expensive burden on interested parties to obtain expert witness testimony and other supporting evidence to establish an appropriate premium for risk.

We assume that modification of a creditor's claim secured by the debtor's principal residence pursuant to the Act and 11 U.S.C. § 506(a) would result in a) a secured claim that would be paid as contemplated in the Act, and b) an unsecured claim that would be paid consistent with the provisions of the debtor's confirmed chapter 13 plan. If that is Congress's intent, it would be helpful to have that intent stated clearly.

Combating Excessive Fees. In Section 5 of the Act, it would be beneficial to clarify in new 11 U.S.C. § 1322(c)(3)(A) that the notice of any such fees, costs or charges would not only need to be filed with the court, but also served contemporaneously on the debtor, any debtor's counsel and the chapter 13 trustee. This will insure that even pro se debtors receive the notice.

The language setting a deadline for a creditor to file a notice of fees is problematic for creditors to the extent it is tied to 60 days before the closing of the case. This is because the date of closing of a chapter 13 case is not fixed until it occurs. The one year deadline "after such fee, cost, or charge is incurred" set forth in proposed 11 U.S.C. § 1322(c)(3)(A)(i) can work so long as there is some room left for rule-making to deal with the moving target of case closure.

Discharge. The amendments to 11 U.S.C. § 1328(a) and (a)(1) provided for in Section 7 of the Act appear to make clear that a secured claim modified pursuant to 11 U.S.C. § 1322(b)(11) is not discharged to the extent that the last payment of such modified secured claim is due after the date on which the final chapter 13 plan payment is due. Since 11 U.S.C. § 1322(c) deals solely with unsecured debts, we wonder whether the exception for "the unpaid portion of an allowed secured claim, provided for in section 1322(b)(11)" provided for in Section 7(2) of the Act is necessary.

Thank you for the opportunity to comment on these matters. The National Conference of Bankruptcy Judges would be happy to provide any further assistance that would be helpful to you in connection with your consideration of this, or other, legislation affecting the Bankruptcy Code.

Respectfully yours,

*Gregg Zive*

Gregg W. Zive  
President, National Conference  
Of Bankruptcy Judges

*Barbara Houser*

Barbara J. Houser  
President Elect, National  
Conference of Bankruptcy  
Judges

cc: Susan Jensen-Lachmann  
Brad McConnell  
Dan Swanson