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# Chapter 13 Consumer Reorganizations

By: Kelley Skehen, Standing Chapter 13 Trustee and Gerald R. Velarde



A client is in your office seeking legal advice to address his financial problems. The client advises you of the following: (a) he is behind on his mortgage payments and the mortgage company is beginning a foreclosure action; (b) the client owes approximately \$15,000 in income taxes for tax year 2008; (c) the client has two financed vehicles: one purchased 3 years ago with a balance considerably more than the vehicle is worth and a second purchased within the last year and financed at 14% APR; (d) the client has credit card debt totaling \$47,000; and (e) the client owns a vacant lot in Rio Rancho free and clear valued at \$10,000. The client further advises you that his annual income is \$65,000 and that he lives alone. What are his bankruptcy options?

The client may be able to file a Chapter 7 bankruptcy case and discharge his credit card debt. However, the client's income may preclude his filing for Chapter 7 relief. Alternatively, the client may consider filing for relief under Chapter 13 and reorganizing his finances.

Chapter 13 provides a mechanism for a consumer debtor to reorganize his or her finances under bankruptcy court oversight. Essentially, Chapter 13 requires that a debtor pay "projected disposable income" to his/her unsecured creditors over a period of three to five years. Projected disposable income is determined pursuant to a "means test" set forth in 11 U.S.C. §707. The means test also determines whether a consumer debtor is eligible for relief under Chapter 7.

The means test is a two-part test. The first part is used to determine "current monthly income." Current monthly income is the average of all income received by the debtor during the six-month period ending on the last day of the month preceding the month during which the bankruptcy case is filed. Current monthly income includes salaries, income from operating a business (after deduction for business expenses), rental income, VA disability, unemployment benefits and pension income, but it does not include social security benefits. Current monthly income is annualized and compared to a family the same size as the debtor's family in the state where the debtor lives. Currently, the average annualized income for a family of one in New Mexico is \$34,585. If the debtor's income is less than the average, the debtor qualifies for relief under Chapter 7.

Part two of the means test deducts from current monthly income certain allowed expenses, of which there are two types. First, standardized expenses based on IRS guidelines for housing and transportation are subtracted. The standardized expenses are dependent on the county in which the debtor lives. Second, 11 U.S.C. §707 allows debtors to subtract from current monthly income other expenses including taxes paid, health and disability insurance premiums paid and regular payments on secured debt which the debtor is required to pay over the subsequent five years. After all expenses are deducted, if the amount remaining is less than \$166.67, generally the debtor qualifies for relief under Chapter 7. If the amount remaining is greater than \$166.67, the debtor must file for relief under Chapter 13 and must pay to unsecured creditors the amount remaining times 60 over a period of five years. For example, if the amount remaining is \$200, the debtor must pay unsecured creditors \$200 x 60 or \$12,000 over a period of 5 years (in addition to anything else being paid through the Chapter 13 plan such as mortgage arrears).

Even if the client qualifies for relief under Chapter 7, he or she may seek relief under Chapter 13 because of certain benefits provided by that chapter. For example, Chapter 13 allows the client described in the introduction to this article to: (a) cure the mortgage arrears over a period of three to five years while maintaining all post-petition mortgage payments; (b) pay priority tax debt (taxes that were assessed within three years of the filing of the bankruptcy) over three to five years without accruing additional interest and penalties; (c) refinance vehicles that were originally financed more than 910 days before date of filing by paying the creditor the equivalent of the current value of the vehicle over three to five with interest

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# Home Mortgage CRAMDOWNS: *How Bad Could They Be?*

By Donald R. Fenstermacher and Judge James S. Starzynski



This article discusses home mortgage “cramdown” from Lender’s perspective with some questions and comments thrown in by a Skeptical Reader.

“Cramdown” is a term of bankruptcy art which usually means forcing a creditor to accept treatment in a plan it does not want. In this case, bills pending in Congress (HR 225 and S 61, comfortably titled “Helping Families Save Their Homes in Bankruptcy Act of 2009”), would allow bankruptcy judges to approve plans in Chapter 13 cases that reduce the amount of the claim to the value of the house, extend the term out to as much as 40 years, and replace an adjustable rate mortgage with a fixed (and usually lower) rate.

**SR:** We do this all the time with vehicles. Why not with houses?

**Lender:** Vehicles are essentially commodities with vast numbers of similar items sold in open markets and vast amounts of reporting of the transactions. With a home, there is a significant difference in both the nature of the asset and the quality and availability of value data. Even objectively similar tract homes in a neighborhood can vary significantly in value based on various factors including hard factors (e.g., the finish level and materials) and subtle factors (e.g., whether the sun hits the driveway or backyard).

**SR:** We also do this with real estate that is not someone’s home—raw land, commercial buildings, etc.

**Lender:** I’m not saying that valuing a home is unduly difficult. Buyers, sellers and courts do it all the time. The point is that home valuation is significantly more complex, and less certain, than valuing a vehicle. Any of us with an Internet connection and time, and without significant expertise, can obtain a fairly precise value for a given vehicle from at least three sources. This does not hold true for

homes. The publicly available valuation sources for homes are sale listings and tax valuations, neither of which reliably reflects value.

**SR:** True. None of us really rely on tax valuations. It takes a study of what buyers and sellers are doing, usually in the form of an appraisal, which is rather like how the “Blue Book” and other vehicle valuations are assembled.

**Lender:** Besides, as a lawyer who has represented lenders for years, I know that even the ready availability of standardized value data for vehicles does not result in vehicle cramdown being the academic process it should be. As often as not, proposed values seem to have no basis in reality. Values are commonly proposed based on what will “work” in the context of the plan and available funds, instead of objective information.

**SR:** And this is bad? Why? The lender can always refuse to compromise and take the vehicle back. That’s what you need, right? More vehicles instead of cash coming in?

**Lender:** That process applied to homes will result in significant additional costs for debtors, lenders, and the courts. Good faith proposal of realistic values is only one aspect of the home valuation issue. Even good faith home valuations by competent persons vary much more significantly than those for vehicles. Parsing out the details in the differences will refine this somewhat, but ultimately the “science” of determining a home’s cramdown value will be a costly, time-consuming trial process for the bankruptcy court and the parties.

**SR:** No question that valuations of real property take much more trial time than vehicle valuations. One thing that bankruptcy judges in hard-hit states like California, Nevada, Arizona, Texas, Florida, and Michigan are doing is telling their legislators that if they pass this legislation, they had better come up with the judicial resources to handle the surge in cases.

**Lender:** Right. This “opportunity” to restructure a mortgage loan will drive a market for bankruptcy filings motivated primarily by the ability to rewrite the mortgage.

**SR:** I’m not sure it will be a big deal in New Mexico. Our home values have not fallen as much as other places, and as with refinancing a mortgage to get a lower interest rate, the debtor has to figure the up front cost of getting the relief—attorney fees, appraisal fees, etc. Let’s remember that most debtors file precisely because they don’t have a lot of ready cash lying around, especially compared to the average bank or credit union.



**Lender:** An overriding concern for the mortgage lending business is the costs of allowing cramdown, both direct financial costs as well as costs in time and uncertainty. For better or worse, the mortgage lending market is a highly structured and analyzed system. Interest rates and availability of mortgage loans are directly related to the market's analysis of the costs and risks of that lending. Allowing cramdown essentially converts the home mortgage lending business into the business of making non-recourse loans. Consumer lending is based on the ability, willingness and motivation of the borrower to repay the loan, with the lender taking the collateral only as a last resort. Changing the dynamics of mortgage lending to convert loans which must be paid in Chapter 13 to loans which are optionally convertible to non-recourse loans will increase the costs and decrease the availability of home mortgage loans. Conventional wisdom is that much of the current "mortgage crisis" resulted from a push to make mortgage loans more easily available to more people. This solution will have the opposite effect, to the long-term detriment of consumers.

**SR:** Thank goodness the lenders' primary motive is taking care of consumers. That said, I might add that Ken Klee, one of those who literally was there at the creation of the 1978 Code, recently said in an interview that before the Code, home mortgages could be modified (<http://blogs.wsj.com/bankruptcy/2009/03/26/a-conversation-with-kenneth-klee/>). The home mortgage industry at that time persuaded Congress that the industry was so carefully regulated and stable that Congress should not let judges mess it up. (Turns out they did just fine messing it up themselves, of course.) So I am a bit skeptical (that's my name) about the "highly structured and analyzed" argument.

**Lender:** Another concern is proposals to allow lenders who experience cramdown to re-capture any loss suffered from the cramdown if the home is later sold for a greater amount. This ameliorates some concerns that cramdown would let the debtor unfairly benefit from the eventual upturn in the market. In that aspect it is a desirable and necessary part of the proposals. However, this may also complicate the debtors' lives down the road when they sell the home and need a payoff balance. The amount necessary to satisfy the mortgage will no longer be only a mathematical calculation but may instead require an analysis of the cramdown amount and time compared to the current value at the time of the later sale. Will a debtor who improves or maintains the property lose the benefit of those investments in the property

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# The Making of the Local Rules-2009

By James C. Jacobsen



The *Local Rules for the U.S. Bankruptcy Court for the District of New Mexico* were last extensively revised in 1996. The Local Rules Advisory Committee was working on revisions when Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection

Act of 2005 (BAPCPA), extensively revising the nation's bankruptcy laws. This brought the committee's efforts to a halt while courts and practitioners sought to come to grips with the statutory changes.

New Mexico's local rules were amended piecemeal after BAPCPA's enactment while the Supreme Court prepared comprehensive amendments to the Federal Rules of Bankruptcy Procedure. In light of the then-forthcoming changes, on Feb. 6, 2008, Chief Judge Mark B. McFeeley reconstituted the advisory committee<sup>1</sup>, and charged it with proposing new local rules by Feb. 1, 2009.

The committee reviewed existing post-BAPCPA rules from across the country. Where existing rules were adequate, the subcommittees avoided rewrites; but where they were lacking, the committee adapted methods used in other jurisdictions to New Mexico's practice. The committee presented its proposals to Judge McFeeley on Jan. 30, 2009.

The Revised Proposed Local Rules were published April 1 and are currently subject to a 45-day public comment period (deadline for **comments is May 16**). A copy is available at the Clerk's Office or on the court's Web site <http://www.nmcourt.fed.us/usbc/local-rules-proposed>. The court prefers to receive comments via the online survey. After any changes due to comments, the court will submit the rules to the 10<sup>th</sup> Circuit, which has final approval authority.

## Summary of Revised Proposed Local Rules

In large part, the proposed rules codify existing practice. Changes of note include:

- Time periods are given in increments of a week, e.g., rather than a 20-day notice period, it is a 21-day notice period;
- Rule 1009-1 requires the filing of amended schedules with all information required by that schedule, not merely the item added or deleted. The debtor is further required to file a notice identifying the change;
- Rule 2015-2 prohibits debtors in possession from compensating owners and officers unless the amount of the intended compensation and their actual compensation during the two-year period prior to filing are disclosed;

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# The Basics of Chapter 11

By James Askew and Robert H. Jacobvitz



Although a case filed under Chapter 11 of the U.S. Bankruptcy Code is frequently called a “reorganization” bankruptcy, individuals and companies may file Chapter 11 cases to: liquidate business assets and/or to reorganize, protect guarantors while the business pays the guaranteed debts, or to deal with individual consumer debts.

## The Debtor in Possession

The Chapter 11 debtor is a debtor in possession prior to plan confirmation absent appointment of a Chapter 11 trustee (which is unusual). A debtor in possession keeps possession and control of its assets and business operations and typically has the right to operate the business in the ordinary course without a court order.

## First-Day Motions

The debtor typically files certain “first-day” motions when the bankruptcy case begins. These motions generally include motions to retain professionals, to use cash collateral, and to keep utilities in place. Other first-day motions may include:

- financing motions,
- motions to honor pre-petition wages,
- cash management motions (so all pre-petition bank accounts need not be immediately closed),
- critical vendor motions (to pay certain pre-petition trade debt), and
- motions to honor pre-petition customer deposits and warranties.

A debtor cannot use pledged cash (known as cash collateral) without a court order. Cash collateral motions typically are heard on an

emergency basis at the outset of the case. A creditor secured by inventory, receivables, or accounts has cash collateral and should pay close attention to notices it receives early in the case. It is up to the creditor to object to protect its interests.

In most New Mexico Chapter 11 cases, instead of seeking post-petition financing, the debtor relies on not paying unsecured debts, and paying secured creditors (either nothing or a reduced amount) after plan confirmation.

## Other Common Motions

Before plan confirmation, other debtor motions include motions to sell assets (known as a “363 motion”) and motions to assume or reject unexpired leases.

It is increasingly more common for debtors to file Chapter 11 cases for the purpose of selling substantially all of the business assets by a motion filed soon after the case is commenced. Buyers often require the protections of a bankruptcy court sale order to purchase assets of a distressed company.

Lessors of real and personal property have special protections and duties built into the bankruptcy code. Landlords in particular should pay close attention to the progress of the case and seek legal counsel.

Creditors have the right to seek dismissal of a Chapter 11 case or appointment of a trustee. Secured creditors may request relief from the automatic stay to recover collateral. Certain unsecured creditors, such as plaintiffs in personal injury cases, may seek stay relief to establish liability for insurance purposes. Creditors should pay close attention to all notices received. It is up to a creditor to object to the debtor’s proposed action.

## Confirmation of a Plan

Unless the debtor’s goal is to sell substantially all of the business assets by motion, confirmation and implementation of a plan is at the heart of a Chapter 11 case. Creditors as well as debtors may file plans if and after “exclusivity” has expired.

In a plan, generally a debtor may modify notes, mortgages, and security agreements, including modification of maturity dates and interest rates. A debtor proceeds to plan confirmation only after court approval of a written disclosure statement containing adequate information about the debtor’s assets, liabilities, and business affairs.

The plan must classify most pre-petition claims and must specify how each class of claims and each unclassified claim will be treated. The requirements for confirmation of a Chapter 11 plan are detailed and can be complex. The more often litigated confirmation requirements include the best interest of creditors test (each creditor must receive at least as much as the creditor would have received if the debtor were liquidated in a Chapter 7 case); feasibility (the debtor must show that it likely will perform its obligations under the plan and confirmation will not result in a liquidation of assets not contemplated by the plan); and cramdown.

Cramdown refers to approval of the treatment of a class of impaired claims that has voted to reject the plan. Under cramdown a secured claim may be paid over a reasonable period at a market interest rate if the creditor's collateral position is adequately protected over the life of the plan. If a class of unsecured claims votes to reject the plan and the debtor is not an individual, it is hard for the debtor to confirm the plan unless the unsecured claims are paid in full over time with interest or all pre-petition equity interests are wiped out (which often occurs in publicly traded cases to satisfy the cramdown requirement). The estimated liquidation value can motivate an unsecured creditor to vote for a plan if equity is not wiped out, particularly in closely held businesses where the owners are critical to future business operations.

A creditor who fails to object will be bound by a confirmed plan even if it contains provisions that would not be approved over an objection.

### Discharge

Confirmation of a plan discharges a debtor that is not an individual from debts that arose before the date of confirmation. Plan obligations replace pre-confirmation obligations. An individual debtor generally receives a discharge only after completion of the plan.

### Proofs of Claim

A Chapter 11 case does not have a claims bar date established at the start of the case. If a proof of claim bar date is set, a separate notice is sent.

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# The Basics of Automatic Stay

*Thomas D. Walker and Michelle K. Ostrye*



**T**he automatic stay is a statutory injunction that automatically stops a broad range of actions against the debtor the moment a bankruptcy petition is filed. 11 U.S.C. § 362. The stay arises by operation of law, requires no judicial action, and is one of the primary benefits to the debtor of filing bankruptcy. It also protects creditors by stopping the race to dismantle the debtor.

### Acts that are Stayed

Commencement or continuation of pre-petition claims; acts to collect, assess or recover on a pre-petition claim; enforcement of pre-bankruptcy judgments against the debtor; obtaining possession of bankruptcy estate property; acts to create, perfect or enforce liens against estate property; and setting off any pre-petition debt owed to the debtor against any claim against the debtor.

### Acts that are Not Stayed

The list of acts not stayed is much longer than the list of stayed acts and includes: criminal actions against the debtor; civil actions to enforce domestic support obligations; continuation of pre-petition residential eviction; residential eviction in cases of endangerment to property or illegal use of controlled substances; actions by lessors of non-residential real property to take possession of property where the lease expired before or during the bankruptcy case; actions to enforce *in rem* liens or security interests; creating or perfecting liens for property taxes that come due after the case filing; actions to enforce liens or security interests in real property if the debtor is ineligible to file under §109(g); and setting off a pre-petition income tax refund against a pre-petition income tax liability.

### Duration of the Stay

The stay of an act against estate property continues until the property is no longer property of the estate. The stay of any other act continues until the case is closed or dismissed or until a discharge is granted or denied. The stay also can be terminated upon motion.

### Effect of Prior Filings on the Stay

The protection afforded by the stay to a debtor is greatly restricted when the debtor was previously a bankruptcy debtor within the year prior to the filing of the present case. If the prior case was dismissed, the stay in the subsequent case generally terminates on

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# Mortgage Lien Stripping in Bankruptcy – Is President Obama’s Plan Something New?

By Ron Holmes



The code treats property serving as the debtor’s principal residence differently from personal property in Chapter 13 cases. Section 1322(b)(2) provides in relevant part:

“...the [Chapter 13 ] plan may – (2) 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...” See 11 U.S.C. section 1322(b)(2).

The *Nobelman* court used this language to preclude debtors from bifurcating or cramming down a mortgage claim and to prohibit debtors from splitting the claim into its secured and unsecured portions. The court reasoned that even the slightest value would allow a secured creditor, whether in first position or otherwise, to retain its secured status. However, the *Nobelman* court

On Feb. 18 the White House issued a news release entitled the “Homeowner Affordability and Stability Plan.” President Barack Obama’s plan was to include, among other things, provisions in the Bankruptcy Code to allow judicial modifications of home mortgages during bankruptcy for borrowers who have run out of options. Proposals like this may sound encouraging for current homeowners who find themselves upside down in their home mortgages, but is it really something new? Many non-bankruptcy practitioners may be surprised to find that what President Obama is suggesting has been available on a limited basis in New Mexico since June 2003.

The Honorable Mark B. McFeeley, U.S. Bankruptcy Court for the District of New Mexico, ruled in June 2003 that a Chapter 13 debtor could avoid and “strip off” some wholly unsecured mortgages provided certain circumstances exist. See *In re Samala*, 295 B.R. 380 (Bankr. D.N.M. 2003). The *Samala* decision reversed a long-standing precedent in New Mexico prohibiting mortgage stripping. See *In re Bauler*, 215 B.R. 628 (Bankr. D.N.M. 1997) and *Nobelman v. American Sav. Bank*, 508 U.S. 324 (1993). Like the majority of courts, Judge McFeeley reached his decision by distinguishing *Nobelman* from cases wherein the junior mortgage holder was completely unsecured with respect to value.

Stripping or avoiding liens on personal property in bankruptcy is widely used as a tool for equalizing the often large discrepancies between value and debt. This process, also known as “cramdown,” is used to write down the value of the underlying collateral to its fair market value regardless of the outstanding debt. The practice is commonplace and designed to promote equity between what the creditor should be entitled to receive versus what the debtor should be required to pay.

did not specifically address whether a wholly unsecured mortgage falls within the anti-modification provisions of section 1322(b). As a result, a split of authority arose with some courts following a strict reading of *Nobelman* (including New Mexico courts) and others allowing modification in wholly unsecured mortgage situations. Until *Samala*, debtors’ principal residences in New Mexico were universally immune from cramdown notwithstanding that the debtor could be grossly upside down when factoring in junior mortgage(s). Following *Samala*, a new order of business for bankruptcy practitioners involves analyzing whether junior lien holders are wholly unsecured.

Although the remedy may be available, it is not simple. First, the debtor must file a Chapter 13 reorganization, make all payments under the plan, comply with the requirements of Chapter 13, and receive a discharge before the avoidance of wholly unsecured mortgages has any lasting effect. The process is further complicated because it requires the debtor to prove the first mortgage holder is undersecured, which generally requires that the debtor hire an appraiser to establish value—a process that can backfire. If the junior mortgagee can establish any value above the first mortgage claim, the junior claim will be allowed in its entirety as a secured claim and be immune from modification. But under facts like those in *Samala*, the remedy is viable. The *Samala* debtors had four outstanding mortgages against their principal residence. The first and second mortgages totaled \$206,000 against the property valued at \$190,000. The debtors’ third and fourth mortgages were without any value in the property in which the liens could attach. Because the liens were wholly unsecured, the modification was allowed notwithstanding the apparent prohibition contained in section 1322(b)(2).

Considering the deepening recession and the resulting impact the housing market has experienced, it would not be uncommon for property values to see a greater than 20 percent drop in value. Any loan that was originally financed on an 80/20 basis would be a candidate for a lien strip in Chapter 13. Desperate debtors may turn to Chapter 13 as a remedy to solve an otherwise impossible situation created by being upside down in a house and being unable to make the junior mortgage payments.

It is unclear whether President Obama's proposal would include possible cramdown against first mortgage holders. The language is too vague and the outcome of any "proposed" legislation is completely unpredictable and overly speculative. However, if the language is broad enough, the legislation could effectively overrule *Nobelman* and give even more stripping power to debtors. This would be true in connection to first and subsequent mortgages. One thing is certain; in this economy and housing market, lien stripping could be used more frequently against junior lienholders even without any new legislation.

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## Chapter 13 *continued from page 3*

at 1%– 3% over the prime rate; (d) for vehicles financed less than 910 days prior to the date of filing, refinance the balance owed on the loan on the date of filing over three to five with interest at 1% and 3% over the prime rate; and (e) allow the debtor to keep non-exempt assets that would otherwise be sold in a Chapter 7 liquidation by paying to unsecured creditors the amount they would have received in a Chapter 7 case over three to five years.

Because your client has noncontingent, liquidated, unsecured debt of less than \$336,900 and noncontingent, liquidated, secured debts of less than \$1,010,650, he/she will qualify for relief under Chapter 13.

Chapter 13 offers relief to consumers suffering financial distress not available under other provisions of the Bankruptcy Code. Any client whose mortgage is about to be foreclosed or owing tax debt without a viable means of paying the tax debt should consider seeking bankruptcy relief under Chapter 13.

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## Automatic Stay *continued from page 7*

the 30<sup>th</sup> day after filing the petition. If the debtor was a debtor in two cases within the prior year, the stay does not arise at all, but a party in interest can ask that the stay be put into effect.

### Relief from the Automatic Stay

The Bankruptcy Court may grant relief from the stay, including termination, annulling, modifying, or conditioning the stay. Grounds for stay relief include "for cause," including the lack of adequate protection of an interest in property. Adequate protection may be provided in the form of cash payments to the creditor, an additional or replacement lien, or by proof of substantial equity in the collateral. A creditor also may get stay relief if the debtor has no equity in the property and the property is not necessary to an effective reorganization.

### Stay Litigation

All but individual creditors must hire counsel to prosecute a motion for relief from stay. The burden of proof as to the debtor's equity is on the movant but the party opposing relief has the burden on all other issues. Bankruptcy courts must hear stay relief motions on an expedited basis. The stay automatically terminates if the bankruptcy court does not quickly issue a decision unless the stay is extended by agreement of all parties or by the court for a specific period if good cause exists.

### Violations of the Stay

Individual debtors injured by willful stay violations may recover actual damages, attorney fees and costs, and punitive damages.

### Single Asset Real Estate.

Special rules apply in single asset real estate cases. The court may grant relief from the stay in such cases unless, within 90 days of the petition, the debtor has proposed a plan that has a reasonable chance of being confirmed within a reasonable time or the debtor has commenced making monthly interest payments.

### Co-Debtors.

Generally, a Chapter 7 or Chapter 11 bankruptcy petition operates as a stay for the benefit of only the debtor. The filing of a petition does not stay proceedings against co-debtors, guarantors, co-defendants, partners, or the debtor's partnership. In Chapter 12 and Chapter 13, a creditor may not collect against any individual liable with the debtor on a consumer debt unless the co-debtor incurred the liability in the ordinary course of business, or the case is closed, dismissed, or converted. In these cases, the co-debtor stay terminates automatically 20 days after filing of a motion for relief unless an objection is filed. In rare circumstances, bankruptcy courts have granted injunctions under 11 U.S.C. §105 to stay actions against non-debtor parties when the relationship is such that the debtor may be said to be the real party defendant and that a judgment against the defendant will in effect be a judgment or finding against the debtor.

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*Michelle K. Ostrye practices in Albuquerque with Sutin, Thayer & Browne and primarily represents creditors.*

# Home Mortgage Cramdowns

*continued from page 5*

because they will go to the lender? Or will a debtor be motivated not to maintain or improve the property because doing so will only benefit the lender?

**SR:** First, my understanding is that there might be a provision that allows the lender to split the increase in equity down the road rather than it all going to the lender. As to complicating the debtor's life at closing, two thoughts: one, figuring out what the cramdown number was a few years ago and subtracting that from the sale price and dividing by two is not exactly higher mathematics, and two, your reiterated concern for the poor debtor is touching. In any event, Ken Klee points out all the times that the credit industry predicted dire consequences from changes in the Code they opposed, none of which have ever come to pass.

Besides, I have this nagging suspicion that lenders' concerns are not unlike concerns about having "toxic assets" on the books. The fear is that the cramdown process will disclose the real current market value of a home, which may be less than the loan, and therefore decrease the value of the lender's balance sheet, possibly requiring a reserve to be set aside, etc. So a lender will of course want to carry the higher value until the time when home prices rise and the higher value on the books becomes accurate. Of course, the Financial Accounting Standards Board (*New York Times*, page C1, April 2, 2009; Banks Get New Leeway in Valuing Their Assets) recently ruled that strict "mark to market" would not be required, so maybe things would not be so bad for lenders.

*Donald R. Fenstermacher is in-house attorney for New Mexico Educators Federal Credit Union. He has practiced for over 24 years in the areas of creditors' rights and bankruptcy and commercial and financial litigation.*

*The Honorable James S. Starzynski is a judge in the United States Bankruptcy Court for the District of New Mexico.*

## Local Rules-2009 *continued from page 5*

- Rule 2083-1.2 requires Chapter 13 debtors to review filed claims and take appropriate actions;
- Rule 2090-1.1 requires debtor's counsel residing out-of-state to associate with local counsel;
- Rule 2090-1.2 eliminates the unbundling of legal services to debtors by counsel;
- Rule 4001-1.1 sets out requirements and procedures for continuing or imposing the automatic stay in an individual's second or subsequent cases;
- Rule 4001-1.3 requires movants for relief from the stay to describe their collateral and its value, to specify the amount secured, charges and *per diem* accruals, to identify other interest holders and to set forth the grounds constituting cause for relief;
- Rule 4001-2 requires debtors requesting use of cash collateral or permission to obtain credit to state their relationship to creditors holding interests in cash collateral, the nature of the collateral, the estimated amount of collateral to be used, cash flow projections, and a budget;
- Rule 4002-1.1 requires debtors to respond within 10 days to requests for information from trustees or the US Trustee;
- Rule 4002-1.2 requires the debtor to provide the required documentation of a debtor's income, previous year's state tax return, and proof of insurance coverage to the case trustee not less than seven days before the 341 meeting;
- Rule 4002-1.3 requires the debtor to file all pre-petition tax returns at least one day before the 341 meeting, or explain their absence;
- Rule 4003-1.1 requires that debtors describe their claims of exemption for personal property with the categories of schedule B, that they set out a dollar value for the amount of property claimed exempt, and limits the exemption to that dollar value, unless the property may be exempted in its entirety;
- Rule 5011-2 establishes time periods in which motions to abstain will be deemed timely;
- Rule 6004-1 requires motions seeking authority to sell (and notices thereof) to provide information on the sale, including the terms, the purchaser's identity, any relationship of the purchaser to the debtor, a description of the property to be conveyed, and any known valuations of that property;
- Rule 9011-1.1 makes *A Creed of Professionalism of the New Mexico Bench and Bar* applicable to all proceedings.

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### Endnotes

<sup>1</sup> James Askew, Dennis Banning, Jennie Behles, James Jacobsen (chair), Michael Lash, Manuel Lucero, Shay Meagle, George Moore, Doug Vadnais, Assistant US Trustee Ronald Andazola, Bankruptcy Court Staff Attorney James Burke, Chapter 13 Trustee Kelley Skehen, Chief Deputy Clerk Margaret Gay, and Clerk Sharon Kologie.

*Jim Jacobsen is an assistant New Mexico attorney general. His practice is mostly devoted to representing the Taxation and Revenue Department in bankruptcy matters.*

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