

The Hanging Paragraph

Bankruptcy eNewsletter by Attorney Gregory A. Holbus

December 2009

Crunch Time



this issue

Crunch Time
Namesake

Supreme Court Means Test Case
Wisconsin's New Exemptions
Mortgage Cramdown Revival

January through April is the busy season for those providing financial assistance.

Bankruptcy attorneys are gearing up for what promises to be an extremely busy first quarter. Traditionally, the first few months of the year is always busy for those of us who work in debt relief. People begin to receive their post-holiday credit card bills. Income and property taxes, along with many annual membership fees come due this time of year. Many seasonal employees, particularly those in construction, are laid off during these winter months. Medical bills tend to rack up from weather related injuries and illnesses. Heating bills skyrocket, culminating in a number of emergency filings prior to the April 15 end of the winter moratorium on utility disconnections.

Couple the usual trends with an overall increase in bankruptcy filings of 34.5% from fiscal year 2008 to fiscal year 2009, continued rise in foreclosure case filings, and a 10% national unemployment rate – most bankruptcy attorneys are preparing for a busier than usual winter season this year. Very few are optimistic of any substantial economic progress within the next twelve months.

Namesake

As this is the first issue of this newsletter, I thought it would be appropriate to explain where the name "The Hanging Paragraph" comes from.

This is a reference to an ambiguous paragraph in section 1325 of the bankruptcy code concerning the split of a debt secured by a vehicle (where the market value is less than the balance owed) into a secured and unsecured claim.

The ambiguity arises from the lack of traditional conjunctions and numbering surrounding the paragraph, which have lead judges to disagree as to which subsections the hanging paragraph refers to.

This has become a long-standing joke among bankruptcy attorneys as an example of how poorly the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005 was written. To this day, we are all still searching for the consumer protection provisions.



Supreme Court grants *certiorari* in Lanning.

The U.S. Supreme Court will decide whether the Means Test, Form B22C, is intended to be the sole determining factor in calculating projected disposable income in what is generally a five-year Chapter 13 Plan. The Means Test, which calculates income based on the debtor's receipts during the six months prior to filing for bankruptcy, has yielded bizarre results for debtors who experience a change in income or expenses in the months immediately preceding the filing of their bankruptcy petition.

At present, there are two major decisions in the Eastern District of Wisconsin regarding whether debtors must use the mechanical approach to calculate disposable income (Form B22C only) or whether other evidence could be considered (forward-looking approach).

Judge Susan V. Kelley took the mechanical approach, *In re: Guzman*, and Chief Judge Margaret D. McGarity took the forward-looking approach *In re: Hilton* (which I was lead counsel on). It should be noted that Guzman dealt with a discrepancy in expenses while Hilton dealt with a decrease in income – both results favored the debtors. In the Western District of Wisconsin, Judge Thomas S. Utschig also adopted the forward-looking approach *In re: Mancl*, but was reversed by the District Court on appeal. Other courts across the country have been equally as split over this issue.

Cert. was granted in the case of *Hamilton v. Lanning* on November 2, 2009.

The Law Office of Gregory A. Holbus LLC

926 Willard Dr., Ste. 126 • Green Bay, Wisconsin 54304
(920) 490-6160 • <http://www.holbuslaw.com/>

Stop foreclosure & repossession.
Stop wage garnishment & utility shut-off.
Stop creditor harassment.

We can help!

Call now for a **free** bankruptcy consultation.

We are a debt relief agency. We help people file for relief under the bankruptcy code.

Wisconsin's New Exemptions

Governor Jim Doyle signed SB 259 on December 2, creating 2009 Act 80, increasing several of the exemptions available for bankruptcy filers in Wisconsin. Exemptions allow a debtor to protect a limited amount of real estate and personal property from being liquidated (sold for the benefit of creditors) by a bankruptcy trustee.

The most notable change was the homestead exemption, which used to be \$40,000 – whether you filed individually or joint with your spouse. The new exemption is \$75,000, and each spouse may now claim a separate exemption, potentially protecting \$150,000 in equity.

The federal homestead exemption is \$20,200 per spouse.

Several other exemptions were increased. Debtors may now protect \$4,000 per vehicle as opposed to the old standard of \$1,200 (federal counterpart is \$3,225). The depository account exemption rose from \$1,000 to \$5,000. The consumer goods exemption rose from \$5,000 to \$12,000 (federal counterpart is \$10,775). The business tools / inventory exemption doubled to \$15,000 and the personal injury claim exemption doubled to \$50,000.

Debtors must choose between using state and federal exemptions. Until now, most attorneys recommended federal exemptions because they were more generous than state exemptions (with the exception of individual filers with between \$20,200 and \$40,000 equity in their home. Now, the Wisconsin exemptions exceed almost all of their federal counterparts, however, there remains no state exemption to protect tax refunds.



Stop the Bleeding Project

The Law Office of Gregory A. Holbus will resume its offer of free monthly budget management seminars as part of its Stop the Bleeding Project. The STBP is designed to help improved financial literacy and to equip individuals with the tools to help avoid having to file bankruptcy.

The next seminar will be held at the Harmony Café on Mason St. in Green Bay, Wisconsin. The program will run on January 20, 2010, from 7:00 p.m. to 9:00 p.m. Those who wish to attend are asked to call Atty. Holbus' office at (920) 490-6160 to reserve a space, or an e-mail can be sent to info@holbuslaw.com. Space is limited to 40 individuals.

The seminar does not satisfy the credit counseling course required to file for bankruptcy, nor the financial management course required to obtain a bankruptcy discharge.

Topics to be covered during the seminar include: preparing a budget, saving money, making smarter purchases, debunking credit score myths, and recognizing marketing gimmicks.



Mortgage Cram-down Legislation Revival?

A provision which would allow judges to make modifications on mortgages in Chapter 13 Bankruptcy could find its way back for consideration in Congress via the Wall Street Reform and Consumer Protection Act. Such "mortgage cram-down" provisions have been introduced several times in the past few years, failing each time – most recently in the United States Senate this past spring.

Currently, the bankruptcy code allows Chapter 13 debtors to split certain secured debts into a secured claim and an unsecured claim, provided that the replacement value of the collateral is less than the balance of the loan. In the Eastern District of Wisconsin, unsecured claims are paid 0% interest, and depending on the debtor's income to debt ratio as well as other factors, the principal balance paid on unsecured debts is usually just a fraction of what is contractually owed.

These splits, also referred to as "cram-downs", are allowed on PMSI vehicle loans, provided that the loan was secured more than 910 days before the bankruptcy petition was filed. Any other secured debt need only be 365 days old. However, the practice of cram-down excludes any loan secured by the debtor's principal residence.

Bankruptcy attorneys and consumer advocates have long been lobbying for such a provision to give judges discretion to modify loans that exceed the fair market value of homes, as well as sub-prime loans whose adjustable interest rates have risen to obscene levels, causing homeowners to be unable to afford their monthly mortgage payment, contributing to the rise in foreclosure filings.