

The Hanging Paragraph

Bankruptcy eNewsletter by Attorney Gregory A. Holbus

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How Congress Stole Christmas ... again!



this issue

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Mortgage Cram-Down Legislation Defeated Again

Once again, Congress has rejected an amendment to the Bankruptcy code which would have allowed bankruptcy judges to modify the terms of mortgages secured by the debtor's principal residence. The amendment, defeated December 11, 2009, was proposed as part of the Wall Street Reform and Consumer Protection Act.

Under current law, Bankruptcy judges are allowed to modify the terms of every other kind of secured debt, except principal residence mortgages, provided certain conditions are met. This includes loans on vehicles, loans on other personal property, and loans on non-residence real estate.

Though it is understandable why Congress, as a matter of public policy, might not want to allow cram-downs in general, it boggles the mind that they allow it but have carved out an exception for principal residences. It's particularly absurd since it's these very same over-financed, sub-prime/adjustable rate home loans which were a major contributing factor to the current economic recession.

It's like saying we're going to pull all toys containing lead off the store shelves except the ones produced in China.

Michelle Denil

The Law Office of Gregory A. Holbus, L.L.C. is pleased to announce that Michelle Denil will be joining its staff in January 2010. Ms. Denil has worked with Atty. Holbus for three of the last five years that she has been employed as an administrative assistant in other bankruptcy law offices.

Ms. Denil provides exceptional customer service, and brings excellent communication and management skills with her. She is welcomed as an invaluable member of the team, and I hope existing clientele will make her feel equally as welcome in her new, well-deserved position as this firm's office manager.

I feel fortunate that Michelle has been so patient while the workload of this new law firm grew to the point where her full-time presence would be justifiable.



Interpreting the Means Test: Tunnel Vision or the Big Picture?

With the U.S. Supreme Court tackling this issue *In re: Lanning*, I thought it might be appropriate to discuss the pros and cons to the two main schools of thought on interpreting the Means Test: the strict mechanical approach and the forward-looking approach.

The issue arises primarily when calculating disposable monthly income for purposes of Chapter 13 Plan payments to unsecured creditors under Form B22C. Although the statutes allow for post-confirmation changes based on changes in financial circumstances, many debtors struggle to get their case confirmed because their projected budget is different from their recent historical income, just prior to filing for bankruptcy. Many people need to file for bankruptcy immediately following a drastic loss of income or spike in expenses.

Neither approach is inherently pro-debtor or pro-creditor, as different fact scenarios under either analysis will produce different results. For example, the strict mechanical allows debtors to take a deduction for secured loans they intend to surrender because the payments are contractually due at the time of filing (see *In re: Nockerts* and *In re: Dionne*, Eastern District of Wisconsin) – a decidedly pro-debtor result. However, a debtor experiencing a sudden drop in income just prior to filing will have his Means Test result skewed by his past income – a pro-creditor result. In contrast, the forward-looking approach would cut the debtor some slack in the lost income scenario (*In re: Hilton*, Eastern District of Wisconsin), but wouldn't afford him the debt repayment deduction if he intended to surrender the collateral back to the bank.

Clearly, the mechanical approach can easily produce very absurd results. The forward-looking approach seems more just, provided the judge can correctly ascertain the predicted change in financial circumstances. But judges are charged with interpreting the law, not making it. The statutes are ambiguous in defining "projected disposable income". And considering the political environment in which the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 was passed, it was most likely Congress' intent to eliminate judicial discretion and have a strict mechanical approach for the Means Test, no matter how ridiculous it may be. Although I'm hoping the U.S. Supreme Court will rule in favor of the forward-looking approach, I'd wager my money that they'll rule in favor of the strict mechanical approach.

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