

# The Hanging Paragraph **P**

A newsletter published by the Section Council of the Consumer Bankruptcy Section

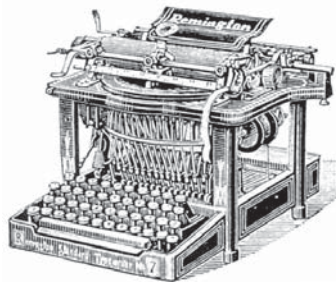
Jeff Nesson, *Editor*  
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## Editor's Welcome

**V**olume 1, Issue 2 and they said we could not do it. Well, the Consumer Bankruptcy Section is very excited to publish this issue. Once again, there are a number of very useful articles from a number of our members without whom this newsletter does not happen. This past few months have been exciting and fun for the section. Under the tutelage of Mark Scurti, former chairperson of this section, we sponsored the first post MICPEL program which was an outstanding success. And the always talented Candy Thompson hosted a wonderful party at her home where a number of members were able to have a few laughs as well as a few drinks along with some wonderful food. Our section has been a major force behind the success of the Debtor Assistance Project which was recognized by the Court at a reception in Greenbelt on April 15.



Our brown bag lunches continue to be successful with no vacancies at the Baltimore branch. Bud Tayman is feverishly working with his crew to prepare an outstanding presentation for the Annual Meeting in a few days. We are working on increasing membership and funding to allow us the flexibility of providing more programming and information for you. You know how the economy is doing. Unfortunately for many, our practice continues to be a growth industry. BAPCPA continues to befuddle and confound. Each of us has many war stories that could fill a complete bar examination booklet. This section continues to be a super computing machine where collegiality and collaboration have made all of us more effective advocates for our clients, both debtor and creditor. I do want to take this opportunity to thank Mary Park McLean for her leadership this past year. It is now time **for you** to start working on

Volume 2. We continue to encourage anyone who wants to tackle an issue to be a part of this project. I am not sure if enjoy is the right word, but I do hope that after perusing this that you are a little smarter.

*Jeff Nesson*  
Editor

**POSTSCRIPT** – as may be expected with the vagaries of life, our good news is tempered with sadness. Alex Gordon, our incoming vice chair, recently passed away. Alex was always giving of his time. Among his many interests was the status of continuing legal education in our State post MICPEL. His last thoughts on this subject are included here.

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# After MICPEL: The History and Future of Maryland Continuing Legal Education

By Alexander Gordon, IV

**Background:** Formed over 34 years ago, powered by the enthusiasm of recent law school graduate, Robert H. Dyer, Jr., together with some influential help from law professors, practitioners, specialty bar associations, and his many personal friends, ("partners," a morganatic marriage which included the Maryland State Bar Association (hereinafter referred to as "MSBA"), the University of Maryland School of Law and the University of Baltimore School of Law) the Maryland Institute for the Continuing Education of Lawyers (hereinafter referred to as "MICPEL") went on to educate an estimated thirty thousand Maryland lawyers. MICPEL offered an extraordinary line-up of both scholarly and pragmatic materials and programs at a fair price. MICPEL's motto: "lawyers serving lawyers," and so it was. Hundreds of lawyers volunteered tens of thousands of hours to these projects. Now, sadly, MICPEL has left us. What went wrong? More importantly, what is next? This article first reviews the 34 year MICPEL history and then offers some ideas for things to come. In the preparation of this summary I received input from several fine practitioners, some long retired, and I would like to discreetly thank all of them. You know who you are.

**My Introduction to MICPEL:** Over thirty years ago, while an Associate at Niles, Barton & Wilmer, I quietly had an unsolicited manuscript hand delivered to Bob Dyer at MICPEL: my first, rather modest, 189 typed pages draft foreclosure manuscript. I learned shortly by telephone that four live programs are routine. (at age 29 I was *two decades younger* than most of the attendees). Bob Dyer, *primus inter pares*, laughingly explained that MICPEL paid **no compensation** for materials nor lectures and that books were sold via **live** presentations from **four locations**. Hmm....

Most of 2010's top lawyers were then in eighth grade or less. From those inauspicious beginnings with a staff of four mostly part time or under paid people, MICPEL went on to occupy one of the best commercial suites high above the big-ticket Candler Building, later in the heart of the historic MSBA Building. All course materials were, at first, in three ring notes books or "perfect bound," a sort of pamphlet, designed, I thought, to prevent easy

copying and re-distribution. By the end, MICPEL's publications rivaled and topped most publications by West, Lawyers Co-Op, or Michie. Many MICPEL publications included an index, triple checked citations, table of contents, legal proof readers, and typeset quality publications and bindings, forms and even forms on disc, as well as audio-cassettes and then even DVD's.

**The Golden Years for MICPEL:** The MICPEL organization became a multi-million dollar not-for-profit enterprise governed by a large and politically, geographically and culturally diverse Board of Trustees, an Executive Committee, dozens of committees, panels, and, in time, an impressive (though often out-of-date) internet web site, vast inventory of current publications (and more than a few obsolete), digital forms, CD's and program DVD's. MICPEL was no small player. Speaker and Author costs were kept low: speakers and authors were not paid, but over- all costs to simply break-even were enormous. Millions of dollars each year.

**Law Libraries:** When it all began thirty four years ago, there were huge law libraries in every law firm, books: endless shelves of reported decisions in books. There was no PowerPoint, Word, WordPerfect, laptop computers, FastCase, digital cell phones, "streaming video," internet, email, etc. MICPEL began in the pre-computer era: mass second-class mailings of brochures (some of which hibernated in bags in the post office until after the programs). Many of us had just bought our first color television. (After all, the original CBS's weekly "Perry Mason" had nine years of Black & White shows and one final color telecast.) Think of it: *pre-internet*. It was the just the beginning of Beta v. VHS; pagers, *analog* bag phones, few fax machines, neither Word or WordPerfect: Vydec and Dictaphone Dual Display. No hard disc drives. DOS operating systems. Huge floppy discs with a mere 256,000 memory and tiny programs that crashed all the time. A word processing machine required a daisy wheel printer and a big room for the Star Trek style console and captain's chair. Cost: \$16,000-\$50,000 in constant dollars. Moving forward into the internet age was risky, tricky, non-intuitive, risky, expensive, and uncertain. As a start, MICPEL took over the MSBA small red binders of educational materials. Executive Committees would debate into the night the correct directions and objectives. While there was not always agreement, the disagreements were *entirely sincere*. It was never personal nor about personal financial gain. It was concern over MICPEL's education programs. There were no simple answers and no easy "business plan." People really did care.

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Statements or opinions expressed herein are those of the authors and do not necessarily reflect those of the Maryland State Bar Association, its officers, Board of Governors, the Editorial Board or the Consumer Bankruptcy Section Council. The Editors makes every effort to check the accuracy of the articles submitted, but does not warrant accuracy.

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## After MICPEL...

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**Cost Accounting:** During most of these years, at various points, MICPEL had a variety of positions: "Executive Director," "Programs Director" and a "Publications Director." Cost accountants tried to attribute profitable book sales in some ratio to the two departments: Publications and Programs, never an easy job. Always a quiet back room feud.

**The Work of MICPEL:** Technology and personalities were a moving target. The work of the Executive Director and Publications Director were beyond belief: endless meetings with MSBA Sections to plan new and, significantly, reschedule important recurring programs, authors who would not meet deadlines. Then, too, there was the endless competition from out-of-state for-profit groups that seemed to read the mind of MICPEL planners and unexpectedly swoop in, sending out slick brochures for a program that would up-stage a MICPEL program. These were huge logistical challenges. How many locations should a program be offered at? Eastern Shore: no? No money. Western Maryland: Maybe. Need we supply rooms for speakers the night before? Would the "Best of" repetitions cause speakers to quit. Should a program be every year or every five years? Reviewing thousands of audience feedback surveys had to be done. The hard decisions: should we cancel a location due to low turnout. Big program hits were more memorable than legion, but to my mind comes the Foreclosure Defense Program (suggested two years ago by Court of Appeals Chief Judge Robert Bell), ten years ago the new Rules of Maryland Evidence Programs and materials, the Advanced Real Estate, Tax and Bankruptcy Programs, Practice and Procedures books, Domestic Law and Mediation, Pattern Jury Instructions, Pleading & Practice Manuals, Alan Gibber's timeless Wills, Estates & Trusts, Pattern Jury Instructions, DWI, Maryland Taxes, the new BACPA programs. The list goes on and on: so many more. "ABIG" program might generate \$300,000 profit. A low turnout program could lose \$15,000. Alas, all this cost millions of dollars every year. As MICPEL Treasurer for at least four years I was amazed that so much money balanced out so nicely every year: but generating any cash reserve, well, that was elusive. Under the then President of the MSBA, I was appointed representative of the MSBA to the MICPEL, and later became Chair of the Publications Committee for five difficult years. We met every two months for an eternity with Publications Executive Don Kinsley. Don followed Sarah Applegate who followed Tim Crawford. All worked diligently on my books. Unfortunately, Don moved on with little notice and the changes we had labored over two years simply vanished with Don's departure. Fairly recently, Executive Director Brent Burry moved on and finding a new Executive Director apparently proved very difficult, if not impossible.

**The future:** It is tempting to say that out-of-state groups might fill the education vacuum, together with MSBA Section programs and materials, but it is very unlikely. MICPEL offered an amaz-

ing structure that had never existed before: a large full time crew of dedicated educational professionals planning, distributing, editing and publishing. That sort of planning far exceeds any existing network of sections, brown bag lunches, MSBA Ocean City Programs, or local bar initiatives. The work involved is far greater than most people realize. Just as the host or hostess at a successful party makes it all seem effortless, so it was with MICPEL. Make no mistake, the MSBA Programs are exceptionally good, but the nuts and bolts of ordinary systematic education is a huge challenge. Out of modesty, one suspects, MICPEL operated invisibly and with neither self-serving publicity nor financial transparency. *Public* support of mandatory CLE, for good reason, was to be avoided.

**Technology:** Any successor educational *system* that starts well into the computer age must include studio generated and content edited streaming audio and sometimes video, including PowerPoint, PDF materials, and piracy and re-distribution copyright protections. Recent experiments with Legalspan, Book purchases via Pay Pal Shopping carts, Gore Reporting streaming video of sections and the MSBA C all show great technological and fiscal promise. It is the distribution of education that must move from 1975 to 2010, now, a quantum leap of nearly **two generations of technology**. Hopefully, it will be a far less expensive to produce and far more inviting to the busy practitioner. Gone will be the reserved room, lectern, soft drinks, coffee, lunch, boxes and hand trucks of heavy materials to bind and lug to the site, mindless announcements about breaks, bathrooms, evaluations, and the rest.

**Education:** Losing MICPEL is a huge loss to the legal community, but it offers an opportunity to start anew. It also, alas, offers yet another opportunity to fail altogether, not having learned hard lessons from the past. As the process becomes less oriented to driving and parking, it will be more time, gas, and user-friendly and, who knows, just maybe compulsory education will be both acceptable and not oppressive. MICPEL will never truly die. It affected thousands of Maryland lawyers for decades. Its library is extensive and remains very useful. Thanks to ubiquitous high speed internet what will die is the large "Paper Chase" classroom of the 1970's. We do not need class rooms, conference rooms, chairs and hard cover materials. We need education. ***The job of MICPEL was education, nothing more.***

**Mandatory Education:** Having worked with DC Central Casting, the University of Maryland Adult Learning Center, Washington College Graduate School, WCEI-FM in Cleveland, Ohio, Washington Public Access TV, MICPEL, numerous out-of-town education groups, and having robotically personally (and effortlessly) burned and printed nearly ten thousand CD's for my bankruptcy clients, I submit that the MICPEL successor needs: one dedicated properly illuminated production room and

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# Modifications of Chapter 13 Plans Under BAPCPA

By Gerard R. Vetter

Chapter 13 Trustee, Baltimore, MD

## I. THE DISPOSABLE INCOME TEST UNDER BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005 ("BAPCPA")

### A. The "Means Test"

1. Since the effective date of BAPCPA, a number of courts, including some within the Fourth Circuit, have concluded that, when the Form B22C "means test" calculation now incorporated in Section 1325(b) of the Bankruptcy Code shows that above-median debtors have no disposable income, "debtors with no disposable income under the new law have no projected disposable income." In re Alexander, 344 B.R. 742, 750 (Bankr. E.D.N.C. 2006). Because "the Debtor does not have disposable income under Section 1325(b), the Debtor's plan will be confirmed even though the plan does not provide for payment to unsecured creditors." In re Barr, 341 B.R. 181, 186 (Bankr. M.D.N.C. 2006).

2. To the contrary is In re Edmunds, 350 B.R. 636 (Bankr. D.S.C. 2006). See also, In re Jass, 340 B.R. 411 ("disposable income" is not a definition for the term "projected disposable income", but only a presumption regarding the meaning of that term); accord, In re Watson, 366 B.R. 523 (Bankr. D.Md. 2007).

### B. New Section 521(f)

1. BAPCPA, however, added not only the "means test", but also new Section 521(f), which provides that, at the request of the court, the United States Trustee, or any party in interest (including an unsecured creditor), a Chapter 13 debtor shall file annually with the court a copy of each filed Federal income tax return while the case is pending and also "a statement, under penalty of perjury, of the income and expenditures of the debtor during the tax year of the debtor most recently concluded before such statement is filed."

2. As noted by more than one court, this provision "may open the door for trustees and unsecured creditors to propose modifications when there may be a substantial and unanticipated change in the debtor's post-confirmation financial condition, i.e. an unanticipated large salary increase." In re Musselman, 379 B.R. 583, 594 (Bankr. E.D.N.C. 2007); accord, In re Kagenveama, 527 F.3d 990, 997, 999 (9th Cir. 2008) and In re Rotunda, 349 B.R. 324, 331 (Bankr. N.D.N.Y. 2006).

## II. THE REQUIREMENTS OF SECTION 1329

A. Motion to Modify Must Be Filed Before Completion of Payments Required by the Confirmed Plan.

B. Motion to Modify May Be Filed by Debtor, Chapter 13 Trustee, or Holder of Allowed Unsecured Claim.

C. Modified Plan May Increase or Reduce Amount of Payments on Claims of a Particular Class Provided for by the Plan.

D. Modified Plan May Extend or Reduce Time for Plan Payments.

E. Modified Plan May Alter in Amount the Distribution to a Creditor to Account for Any Payment Received by That Creditor Outside the Plan.

## III. ADDITIONAL REQUIREMENTS IN THE FOURTH CIRCUIT

### A. Unanticipated, Substantial Changes in the Debtor's Financial Condition.

1. The "doctrine of res judicata bars an increase in the amount of the monthly payments" pursuant to a proposed modified plan "where there have been no unanticipated, substantial changes in the debtor's financial condition." In re Arnold, 869 F.2d 240, 243 (4th Cir. 1989).

2. In the Arnold case, the debtor's annual income had increased by \$120,000 (from \$80,000 to \$200,000) in the two years since the plan was confirmed. Undoubtedly, this increase of 150% was "substantial". The Fourth Circuit also found that, "Although it was reasonable to expect Arnold's income to fluctuate from year to year because it relied so heavily on sales commissions, Weast [the unsecured creditor that filed the motion to modify] should not be expected to have anticipated a \$120,000 jump in his income in only two years." Arnold, 869 F.2d at 243. Accordingly, the Fourth Circuit upheld the granting of the creditor's motion to modify.

### B. Sale or Refinance of Debtor's Real Estate.

1. Sale. In the case of In re Murphy, 474 F.3d 143 (4th Cir. 2007), the Court found that a 51.6 percent increase in

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## Modifications of Chapter 13...

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the value of the debtor's real property in only 11 months was "substantial". "Murphy, by selling his condominium, received a substantial amount of readily available cash without any debt." *Id.* at 152. Noting that the increase in the Housing Price Index in the relevant geographic region for the two years preceding plan confirmation had ranged from ten to thirteen percent per year, the Court also found that "a 51.6 percent increase certainly is an unanticipated change given the current market trends." *Id.* The Fourth Circuit affirmed the granting of the Trustee's motion to modify Mr. Murphy's plan.

2. Refinance. In the same reported decision, the Fourth Circuit also considered the case of Mr. and Mrs. Goralski, who cashed out over \$64,000 from a refinance loan secured by their real property, which also had "appreciated significantly in value" since the time of confirmation. *Murphy*, 474 F.3d at 146. Here, however, Mr. Goralski had suffered an approximate 50% reduction in income and "[a]ll the Goralskis did was to eliminate a portion of their equity in the property for cash in exchange for a corresponding amount of debt." *Id.* at 150. The Court found, therefore, that there had been "no substantial change to the Goralskis' financial condition" and that "the cash-out refinancing cannot provide a basis for modifying the Goralskis' confirmed plan." *Id.*

3. Res Judicata. In the *Murphy* decision, the Fourth Circuit reaffirmed the *res judicata* principle first articulated in *Arnold*, stating, "This doctrine, . . . , ensures that confirmation orders will be accorded the necessary degree of finality, preventing parties from seeking to modify plans when minor and anticipated changes in the debtor's financial condition take place." *Murphy*, at 149. As the Court explained further, "If the change in the debtor's financial condition was either insubstantial or anticipated, or both, the doctrine of res judicata will prevent the modification of the confirmed plan." *Id.* at 150.

### C. Decisions in Other Circuits.

1. Other decisions that also require at least some change in circumstances, even if that change is not "substantial", as a prerequisite to filing a motion to modify include *In re Hoggle*, 12 F.3d 1008 (11th Cir. 1994) and *In re Furgeson*, 263 B.R. 28 (Bankr. N.D.N.Y. 2001) (stating therein that this is the view throughout the Second Circuit and citing the decisions of other bankruptcy courts within that Circuit).

2. Some courts in other Circuits, however, disagree ex-

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## After MICPEL...

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studio, 10 foot by 10 foot, a chroma key background (\$50) for super-imposition of PowerPoint, video, graphs, and images (like the weather person on TV), a video and audio editing and mixing console (\$2,000), one full time technician (\$55,000/year), an Executive Director (\$60,000/year) three digital color cameras (\$3,000), an unmanned robotic 100 disc automatic CD/DVD burner and printer (\$3,500) and streaming video as with Gore Reporting last summer, and an inventory of PDF documents created by each Council. Total cost: \$140,000 a year, *not* \$2,000,000 a year. Program access by PayPal or credit card purchase, self-supporting at, say, \$95 per five hour program, no compensation to speakers and authors. CLE credit available upon completion. Download limited to once per person. Absent at-risk funding of \$400,000 or more, major book publication is no longer an option: lawyers, proof readers, digital media experts, cost a fortune, and the literate perfectionists are difficult to find and keep.

**Conclusion:** My personal estimated yearly additional basic overhead cost per MSBA member (yes, increased dues) for limited

electronic class rooms via the internet: about \$6.00 and course charges at only \$95 per internet course. This is less expensive to the MSBA compared to re-financing or, worse yet, attempting to rebuild the failed MICPEL. Each Section has an Executive Committee and each Section Chairs should *immediately* set up an education committee with an initial commitment to produce, record and electronically deliver not less than *eight* finished programs by March 1, 2011 and annually thereafter. Live programs should be left to the out-of-town for-profit groups. The program chairs for each Section will take over MICPEL planning functions: mailings, getting speakers, setting deadlines, putting together materials. In short, a \$2,000,000 MICPEL organization team replaced by unpaid Section Volunteers, via the internet, reasonable course fees, and strengthened MSBA Section support. The opinions expressed herein are solely my own, as always.

**Alexander Gordon, IV**

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# Modifications of Chapter 13...

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pressly with the Fourth Circuit, holding that “Congress did not intend the common law doctrine of res judicata to apply to Section 1329 modifications.” In re Witkowski, 16 F.3d 739, 745 (7th Cir. 1994). Accord, Barbosa v. Soloman, 235 F.3d 31, 41 (1st Cir. 2000), In re Meza, 467 F.3d 874, 878 (5th Cir. 2006), In re Brown, 219 B.R. 191 (BAP 6th Cir. 1998) and In re Than, 215 B.R. 430 (BAP 9th Cir. 1997). Presumably, in these Circuits, it will be easier for the Chapter 13 Trustee or unsecured creditors to seek and obtain a plan modification.

## IV. CIRCUMSTANCES THAT MAY JUSTIFY MODIFICATION

### A. Increase in Value of Real Estate.

1. A Chapter 13 Trustee did not prevail on her motion to modify, seeking to increase the Plan base to yield a 100% payout to unsecured creditors by retaining \$23,155 of the \$80,369 cash-out proceeds from a post-confirmation refinancing (even though the new refinance loan was in the amount of \$120,000 when the order approving the refinance transaction had approved a \$78,000 loan). In re Fiddler, 2007 WL 4510308 (Bankr. N.D.W.Va. 2007).

2. The Fiddler Court noted that the Chapter 13 Trustee had not met her burden to show that the 82% increase in value of the debtors’ real property over 32 months (approximately 25% per year) was unanticipated. Based upon independent research undertaken by the Court, including a review of the House Price Index available at the web site of the Office of Federal Housing Enterprise Oversight, the Court determined that real property values in the applicable geographic region had increased by 24.01% in the one-year period preceding the petition date. Before referring to this independent research, the Court stated “it is generally known” that “from 2003-2005 real estate prices were sharply rising in the Eastern Panhandle of West Virginia”.

### B. Change in Debtors’ Income (BAPCPA Cases).

1. Debtors who suffered a post-confirmation decrease in net monthly income of 18.6% were allowed to modify their plan to decrease the payout to unsecured creditors from 100% to 19%. In re Ireland, 366 B.R. 27 (Bankr. W.D. Ark. 2007).

2. The Ireland Court rejected the Chapter 13 Trustee’s contention that “the Debtors are bound by the results of the calculation of Form B22C as a minimum payment to unsecured creditors regardless of any change in actual income after the Debtors filed their petition.” Id. at 29. The Court stated that there was no “clear statutory command that 1325(b) applies to modifications”. Id. at 34.

3. The Ireland Court also noted, “To avoid the preclusive

effect of the principle of res judicata, the modification should be necessitated by an unanticipated substantial change in circumstances affecting the debtors’ ability to pay.” Id. at 33. Although the Court noted that the decrease in income was “substantial”, it did not discuss how the decrease was “unanticipated”.

4. The Ireland case was cited with approval by In re White, 411 B.R. 268 (Bankr. W.D.N.C. 2008). In the White case, the court allowed the debtor to modify the Plan term to fewer than 60 months even though the debtor’s post-confirmation change in financial circumstances did not change his status as an above-median income debtor. The White Court noted that Section 1329 does not make reference to the applicable commitment period of Section 1325(b). Id. at 272. Significantly, although the debtor sought through the modification to remove both the secured claim of his mortgage lender, which had obtained relief from the stay post-confirmation, and the claim of his automobile lender, which had received the insurance proceeds after the debtor’s vehicle was totaled in an accident, he was not seeking to reduce the dividend that his unsecured creditors were receiving under the original confirmed plan. Id. at 272, 275.

### C. Change in Debtors’ Income (Pre-BAPCPA Case).

1. Although the Debtor “made a threshold showing of a substantial and unanticipated decrease in income sufficient to justify the filing of a modified plan based on changed financial circumstances”, the court denied the motion to modify. In re Van Dyke, 2007 WL 1094369 (Bankr. E.D. Va. 2007).

2. The Amended Schedules I and J filed with the proposed modified plan showed a 66% reduction in surplus disposable income. That reduction, however, did not justify reducing the plan term from 60 months to 54 months. It also did not justify proposing a new plan payment that was \$283 per month less than the monthly surplus shown on the Amended Schedules I and J. “The modified plan, in short, fails to reflect a serious effort by the debtor to repay creditors to the best of his ability in light of his current reduced financial circumstances.”

### D. Change in Expenses.

1. Although the Court found that Section 1329 does not incorporate Section 1325(b), it denied the debtor’s proposed plan modification that was based primarily upon a purported change in a domestic support obligation expense. In re Hill, 386 B.R. 670 (Bankr. S.D. Ohio 2008).

2. The Hill Court found that the Debtor had provided the

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Court with insufficient facts to support the modification request. The Court noted, “if a debtor could always modify his plan to incorporate his actual income and expenses post-confirmation, regardless of the narrowness of the reason asserted, the means test formula would have limited effect in Chapter 13.” *Id.* at 677.

### E. Retirement.

1. Chapter 13 debtors who both “retired from their jobs not long after their plan was confirmed” were permitted to modify their plan to reduce the plan term from 60 to 36 months, to reduce the amount of their monthly plan payments, and to reduce the amount paid to general unsecured creditors. *In re Ewers*, 366 B.R. 139, 140 (Bankr. D.Nev. 2007).

2. In so ruling, the *Ewers* Court cited *In re Sunahara*, 326 B.R. 768 (BAP 9th Cir. 2005), which held that Section 1325(b) does not apply to modified plans.

### F. Divorce

1. An above-median debtor was permitted to modify her confirmed plan to reduce the monthly plan payment and to reduce the term from 60 months to 36 months after she became divorced and her income as a single person put her below the median income. *In re Hall*, 2008 WL 2388628 (Bankr. N.D.Ohio 2008).

2. The *Hall* Court held that Section 1329 permits the Debtor to “reduce the time for her payments unimpeded by the applicable commitment period calculations” of Section 1325(b)(4).

### G. Early Payoff.

1. The Ninth Circuit Bankruptcy Appellate Panel affirmed the bankruptcy court’s decision to deny the debtors’ motion for entry of discharge when the debtors sought to prepay their 36-month Plan in month 14. *In re Fridley*, 380 B.R. 538 (9th Cir. BAP 2007).

2. The BAP held that the “applicable commitment period” of Section 1325(b)(1) operates as a “temporal requirement”. *Id.* at 544. The Court also ruled that a “debtor desiring to prepay a chapter 13 plan and obtain an early discharge without paying allowed unsecured claims in full” must comply with Section 1329 of the Bankruptcy Code and Bankruptcy Rule 3015(g). *Id.* As the Court explained, “part of the statutory bargain inherent in chapter 13 is that the debtors, must, for the prescribed life of the plan, run the gauntlet of exposure to trustee or creditor requests to increase payments.” *Id.*

### H. Inheritance (Pre-BAPCPA Case).

1. Chapter 13 debtors who received an inheritance two years after the Chapter 13 case was filed could not pay plan base balance and receive a discharge, but had to pay all allowed claims in full, pursuant to the Chapter 13 trustee’s motion to modify. *In re Gengengach*, 2008 Bankr. LEXIS 1246 (Bankr. D.Neb. 2008).

2. The *Gengenbach* court held, “Because these debtors cannot in good faith pay only \$2,800 to complete their confirmed plan and discharge the remaining unsecured debt [\$155,699] while keeping the balance of \$468,000 for themselves, their motion to modify the plan must be denied.” *Id.*

## IN MEMORIUM

During the past year, we have lost 3 members of our family.

Lawrence T. “Larry” Robinson

February 2, 2010

Richard E. “Rick” Sigler

April 6, 2010

Alexander Gordon, IV

May 10, 2010

*REST IN PEACE*

# Exemption Analysis

By Bud Stephen Tayman

## I. Basis of applicable exemptions.

A. Exemptions are based on domicile of Debtor, not residence.

## II. Debtor must elect bankruptcy code section under which to claim exemption, if domiciliary state allows the election.

A. Debtor must elect between exemptions contained in §522(b)(2) or §522(b)(3).

B. Joint Debtors (husband and wife) must elect same section.

1. If Joint Debtors cannot agree on the section to use, they will be deemed to have elected §522(b)(2), if the election is permitted under the law of the state where the bankruptcy case was filed.

## III. Exemptions available under §522(b)(2).

A. This consists of the federal bankruptcy exemptions found at §522(d).

B. This section is available for use by a Debtor unless the applicable state specifically does not allow the Debtor to elect to use the federal bankruptcy exemptions.

1. Which state is applicable?

a. The applicable state is the same state that will be applicable to the Debtor under §522(b)(3).

## IV. Exemptions available under §522(b)(3).

A. §522(b)(3)(A). Federal nonbankruptcy exemptions, i.e. federal exemptions not found at §522(d), and state and local law exemptions of the applicable state,

B. §522(b)(3)(B). An interest in property held by the Debtor immediately before the filing of the bankruptcy case as tenant by the entirety or joint tenant to the extent that such interest is exempt from process under applicable nonbankruptcy law, and

C. §522(b)(3)(C). Retirement funds to the extent held in a fund or account which is exempt from taxation under sections 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code.

## V. Determining the applicable state for purposes of §522(b)(3)(A).

A. The applicable state is the state where the Debtor's domicile has been located for the 730 days (2 years) immediately preceding the filing of the bankruptcy case, or,

B. if domicile has not been located in a single state for the entire 730 day period, then the applicable state is the state in which the Debtor's domicile was located for the 180 day

period immediately preceding the 730 day period or for the longer portion of such 180 day period (91 days) than the domicile was in any other place.

1. Step One: Count back 730 days from the date the bankruptcy case was filed.

a. If the Debtor's domicile has been located in the same state continuously for each day of the 730 day period, that state is the applicable state and the analysis is finished.

b. However, if the Debtor's domicile has not been located in one state for the entire 730 day period, proceed to Step Two.

2. Step Two: Again, count back 730 days from the date the bankruptcy case was filed. (You already did this in Step One). Then count back an additional 180 days.

a. Determine if there is one state in which the Debtor's domicile was located during that entire 180 day period, or

b. for the greater part of that 180 day period (91 days) if the Debtor's domicile was not located in any one state for the entire 180 day period.

i. If yes, that state is the applicable state for purposes of §522(b)(3)(A), and the analysis is finished.

ii. If no, proceed to Step Three.

a. Note that the 91 day period may fall anywhere it fits within the 180 day period.

i. For example, Debtor's domicile was located in Nevada for the first 50 days, then in New Mexico for the next 92 days, then in Idaho for the next 38 days. The applicable state is New Mexico. Therefore New Mexico exemption law applies.

3. Step Three: If the effect of the domicile calculation is that no one state applies, then the Debtor may elect to claim the federal bankruptcy exemption under §522(d).

a. If the law of the applicable state does not allow non domiciliaries and non residents to use that state's exemptions laws, the Debtor may elect to claim the federal bankruptcy exemptions under §522(d).

b. Note that this may result in the debtor becoming entitled to use the federal bankruptcy exemptions even though the exemptions laws of the state in which the petition is filed provide that the state has opted out of the federal bankruptcy exemptions, i.e. use of the federal bankruptcy exemptions is not permitted under the law of the state in which the petition is filed.

4. The bankruptcy code authority for the Debtor to claim the federal bankruptcy exemptions is found in an un-numbered paragraph known as a "hanging paragraph" located immediately under §522(b)(3)(C).

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## Exemption Analysis...

(Continued from page 8)

VI. Exemption limits under BAPCPA in regard to certain assets claimed under §522(b)(3)(A).

A. Section 522(n) limits the value which may be exempted in a traditional or Roth individual retirement account to the amount of \$1,171,650.00 in any case filed by an individual debtor.

1. The exemption limitation contained in §522(n) may be increased by the bankruptcy court if the interests of justice so require.

a. In accordance with §104(a), the exemption limitation will be increased periodically, every three years commencing from April 1, 1998, to reflect the changes in the Consumer Price Index for All Urban Consumers published by the U.S. Department of Labor. The latest adjustment was made on April 1, 2010.

B. Section 522(o) reduces the value of certain assets to the extent such value is attributable to any portion of any property that the Debtor disposed of within the 10 year period ending on the petition date in which the Debtor intended to hinder, delay, or defraud a creditor and which the Debtor could not have exempted under §522(b) if the debtor had held the property so disposed.

1. The assets which value may be limited are:

- i. real or personal property used as a residence by the Debtor or by a dependent of the Debtor,
- ii. a cooperative that owns property used as a residence by the Debtor or by a dependent of the Debtor,
- iii. a burial plot for the Debtor or for a dependent of the Debtor, or
- iv. real or personal property claimed as a by the Debtor or by a dependent of the Debtor,

C. Section 522(p) contains a cap on the exemptible value of the above categories of assets. The cap operates to exclude the amount of any equity in excess of \$146,450.00 acquired by the Debtor within the 1,215 day period preceding the petition date (3 years, 4 months) from the amount of the Debtor's allowable exemption.

1. There are 2 exceptions to this cap on the allowable amount of the exemption, as follows:

- i. under §522(p)(2)(A), the cap does not apply to an ex-

emption claimed under §522(b)(3)(A) by a family farmer for the farmer's principal residence, and

ii. under §522(p)(2)(B), the value of equity in excess of the \$146,450.00 cap is exempt to the extent it consists of equity which had been rolled over from the Debtor's previous principal residence into the value of the Debtor's current principal residence.

a. as long as the Debtor's previous and principal residences are in the same state, and

b. as long as the previous principal residence been acquired prior to the start of the aforesaid 1,215 day period.

2. In accordance with §104(a), the exemption limitation will be increased periodically, every three years commencing from April 1, 1998, to reflect the changes in Consumer Price Index for All Urban Consumers published by the U.S. Department of Labor. The latest adjustment was made on April 1, 2010.

D. Section 522(q)(1) contains an additional \$146,450.00 cap on the on exemptible value of the above categories of assets if:

1. under §522(q)(1)(A), the bankruptcy court determines that the Debtor has been convicted of a felony as defined by title 18, §3156, which demonstrates that the filing of the bankruptcy case was an abuse of the bankruptcy code, or

2. under §522(q)(1)(B), the Debtor owes a debt arising from:

- i. any violation of federal or state securities laws or any regulation or issued under state or federal security laws;
- ii. fraud, deceit, or manipulation in a fiduciary capacity or in connection with the purchase or sale of any security;
- iii. any civil remedy under title 18, §1964; or
- iv. any crime, intentional tort, or willful or reckless misconduct causing physical injury or death within the preceding 5 years.

3. This cap does not apply to the extent that the property is reasonably necessary for the support of the Debtor and any dependent of the Debtor.

4. In accordance with §104(a), the exemption limitation will be increased periodically, every three years commencing from April 1, 1998, to reflect the changes in Consumer Price Index for All Urban Consumers published by the U.S. Department of Labor. The latest adjustment was made on April 1, 2010.



## Bankruptcy Tips



The Consumer Bankruptcy Section is looking for practice tips and advice on any practice or procedure in the Bankruptcy Court. Share your experience!! Send any tips to [neslaw@aol.com](mailto:neslaw@aol.com) for inclusion in an upcoming newsletter.

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# Tales From the List

By Stanton J. Levinson

This second installment of Tales will focus on just one question from last fall that sparked a spirited debate<sup>1</sup>. It has to do with the so-called “cramdown” procedure in use in our court to modify the rights of secured creditors and was submitted by Thaddeus Holmquist on November 14, 2009<sup>2</sup>. If you manage to read to the end of this screed, you probably will see more of this question than you wanted to, which in fact is the reason that only one question is being dealt with in this column.

**Question: Can anyone provide a case number for a case in which was filed one of those “Marc Kivitz” motions to cramdown just the interest rate on a vehicle loan? (It was purchased too recently to cramdown to value.) If you could provide a case number, I would like to take a look at the motion.**

This seemingly innocent question generated a straightforward response from Dan Press to the effect that it was unnecessary to file a motion to accomplish a cramdown of interest rate only, that this could simply be done with a plan provision. And that response started the debate, as two of our Chapter 13 trustees weighed in on the other side of the question, asserting that a motion was indeed necessary in the absence of creditor consent, that attempting to cram down the interest rate only without first filing a motion would generate an objection to confirmation. Others then argued for both sides. The trustees vehemently denied that the rate cramdown could be accomplished merely by inserting a provision in the plan. And from the somewhat heated exchanges that followed, several authorities were cited to support the idea of a cramdown via the plan alone, while the position taken by the trustees that a plan was not enough was put forth more as a matter of the practice in use here, which the well-advised attorney would follow if he or her hopes to get a plan confirmed, though no specific authority was cited to support that position.

It appeared that the consensus among participants in the debate was that the Chapter 13 trustees are right insofar as the practice usually followed in our court is concerned. Whether or not that position is correct, or that procedure is really necessary, however, is a much more complex and difficult question on a theoretical level. There are a number of examples in the case law involving the confirmation of a plan which changed the interest rate where the procedural setting for the decision was an objection to confirmation, without any reference to a preliminary motion<sup>3</sup>. Indeed there is no mention of any such separate proceeding in the Supreme Court’s decision in *Till v. SCS Credit Corporation*, 541 U.S. 465, 124 S.Ct. 1951, 158 L.Ed2d 787 (2004), which apparently was decided at the plan confirmation stage.

A closer look at the overall cramdown issue shows that there are significant differences in how the due process issues related to cramdown are handled from circuit to circuit, so authorities

from other jurisdictions must be cited with caution, with some circuits content that the plan confirmation process provides all of the procedural process that is due, while others require claims objections to be prosecuted in addition to plan confirmation, and still others take a middle ground, requiring only that reasonable opportunity be given for notice and a hearing; *see generally* Richards, Eric S., *Due Process Limitations on the Modification of Liens through Bankruptcy Reorganization*, 71 Am.Bankr.L.J. 43 (1997). Analogy of Chapter 13 cramdown scenarios to Chapter 11 is sometime made, but such comparisons are often stated to be problematical, because there are significant differences in the plan approval processes used in the two chapters which impact the requirements of due process. This is not a simple issue.

Obviously, for a Chapter 13 plan to have *res judicata* effect, the creditors must be afforded due process. One commentator on this question has suggest that this is the reason for the separate procedure argued for by the trustees. Yet neither the Code nor the rules (local or national) contains any provision specifying a separate procedure to determine the interest rate. Prior case law defining the necessity of a separate procedure to modify the rights of secured creditors has usually relied on the fact that such a procedure had a statutory basis or was set forth in the rules and not primarily or entirely on the concept that due process requires such procedures. By way of illustration, in *Cen-Pen Corporation v. Hansen*, 58 F.3d 89 (4<sup>th</sup> Cir. 1995), the Fourth Circuit considered a case in which a debtor had boldly (or baldly) attempted a weird kind of stripoff in a Chapter 13 case relying on a plan which simply said that all claims, to be valid, must be allowed and which treated a claim as disallowed if no proof of claim was filed within certain time limits, without any separate proceeding to affect the creditor’s lien status. *Cen-Pen*, a secured creditor, did not object to the plan, which was confirmed and evidently did not file a proof of claim (or, it attempted to file a claim, but the claim was not received). *Cen-Pen* subsequently filed an adversary proceeding for a determination of its lien status, arguing that its lien could not be eliminated without proper procedures being followed. The Fourth Circuit agreed, holding that a separate adversary proceeding was necessary to wipe out the lien and that the plan was deficient because it did not provide for payment of the lien, which in its view had “sailed through” unaffected by the bankruptcy.<sup>4</sup> Because of this, the Fourth Circuit held, confirmation of the plan had had no effect on *Cen-Pen*’s lien status.

Some authorities have cited *Cen-Pen* for the proposition that any modification of a lien requires an adversary proceeding, but this reads the case too broadly. Subsequent decisions of lower courts have made clear that an adversary procedure under the 7000 rules is not always required, holding that, for certain modifications, what

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## Tales From the List...

(Continued from page 10)

is required is a contested matter governed by Rule 9014. Thus, a valuation hearing is a contested matter specifically provided for in Bankruptcy Rule 3012 and 3012-2, in contrast with a determination of lien status, which requires an adversary proceeding. This requirement is harmonious with *Cen-Pen*<sup>5</sup>.

If a valuation cramdown requires a separate proceeding, why would this not also be the case with respect to an interest rate cramdown? The simple answer appears to be that there is nothing in the statute or rules which prescribes such a proceeding. Is there some constitutional requirement, though?

Arguably, in *Cen-Pen* the Fourth Circuit effectively elevated a procedural requirement, i.e., the requirement that a determination of lien status requires the filing of an adversary proceeding, to the level of a constitutional due process requirement by adhering to a line of case law holding that plan confirmation is not *res judicata* as to matters that must be raised by adversary proceeding<sup>6</sup>. A case just decided by the Supreme Court, however, casts considerable doubt on that proposition. Let us leave aside for the moment the fact that the Bankruptcy Rules do not provide any procedure for the determination of an appropriate interest rate other than the hearing on confirmation itself. It now appears that, even where a specific procedure is provided, the failure to follow that procedure does not necessarily rise to the level of a constitution violation. In *United Student Aid Funds, Inc. v. Espinosa*, 176 L.Ed.2d 158 (March 23, 2010), the Supreme Court considered a case in which a bankruptcy court had confirmed a plan which provided for the discharge of postpetition interest on a student loan. The Fourth Circuit had ruled that the failure to file an adversary proceeding to make this determination violated due process, so that the creditor was not bound by *res judicata* and was entitled to have the judgment vacated under Rule 60(b), F.R.Civ.P. The Supreme Court reversed, however, holding that the failure to follow the correct procedure might have been wrong but did not rise to the level of a due process violation justifying relief from *res judicata*. This being the case, it would appear that the failure to hold a separate hearing on interest rates – something for which no requirement appears in the rules or code – likewise would not violate due process.

A recent unpublished decision notes that, where the plan provisions themselves are clear, and where the code and rules do not prescribe any special procedure with respect to a proposed lien modification, the due process concerns expressed in *Linkous* and implied by *Cen-Pen* do not apply; cf. *In re Huddle*, 2007 Bankr. LEXIS 2770 (Bankr. E.D. Va. 2007).

If due process does not require any special procedure other than clear notice in the plan that the interest rate will be modified, and given that there is nothing in the bankruptcy rules or even in the local rules which provides for such a procedure, and particularly in light of the *Espinosa* decision, it is difficult to

see any force for the future in a requirement to proceed first by motion in order to eventually obtain confirmation of a plan which changes the rate, other than the force of custom and practice. Perhaps this practice is based on the practicality of keeping the confirmation hearings relatively short in duration. It is clear, though, that the Supreme Court in *Till* had in mind that the determination of an interest rate in a Chapter 13 case should be a relatively simple and abbreviated matter, not involving an in-depth analysis of the market, not involving expert witnesses, and simply calling for the Court to determine what was fair based on an analysis of certain risk factors. It is hard to see how such considerations would require an entirely separate motion and hearing or why it would ever be necessary to hold such a hearing in the absence of objection by the secured creditor; since creditors so often don't bother to act, a mandatory requirement for a separate hearing only adds to the burden.

Possibly this is an issue which the powers that be should revisit.

### Footnotes:

<sup>1</sup>There were some 28 postings on this question over a period of roughly 1-1/2 days. And absolutely nothing was finally resolved.

<sup>2</sup>For those of you who are interested in such things, the term "cramdown" or "cram down" seems to have originated with a 1935 amendment to §77 of the Bankruptcy Act of 1898 which allowed a reorganization plan to be confirmed when the plan had been rejected by a secured creditor. The earliest reported use of the term in this circuit seems to be the case of *In re Norris*, 1 B.R. 724 (Bankr. E.D. Va. 1979), in which "cram-down" was described as a "vulgar" usage. The specific question in *Norris* was whether or not a Chapter XII plan could be confirmed over the rejection of the plan by two secured creditors. Those of you who are not interested should ignore this footnote.

<sup>3</sup>See, e.g., *Drive Financial Services, L.P. v. Jordan*, 521 F.3d 343 (5<sup>th</sup> Cir. 2008); *In re Brooks*, 344 B.R. 417 (Bankr. E.D. N.C. 2006); and *In re Prevo*, 393 B.R. 464 (Bankr. S. D. Tex. 2008).

<sup>4</sup>The actual procedure in use for valuation is a motion, however. Determination of secured status falls within the ambit of the 7000 (adversary proceeding) bankruptcy rules.

<sup>5</sup>See, e.g., *Snow v. Countrywide Home Loans*, 270 B.R. 38 (D. Md. 2001)(a contested matter is the appropriate way to determine the amount of a claim or the value of a lien).

<sup>6</sup>See also *Piedmont Trust Bank v. Linkous (In re Linkous)*, 990 F.2d 160 (4<sup>th</sup> Cir. 1993)(bifurcation of a secured claim under §506 requires more than disclosure in the plan; the creditor must be put more clearly on notice that a hearing is going to be held which may affect his rights). But the idea expressed in *Linkous* that notice was substantively insufficient invites *ad hoc* determinations based on the facts presented rather than on the broader idea that a particular proceeding is required. *Cen-Pen* took the concept further.

# THE BALTIMORE BROWN BAG LUNCH PROGRAM

The *Baltimore Brown Bag Lunch Program* was started on August 20, 2009, in order to provide Baltimore area residents with the same kind of discussion opportunities that was occurring in the Rockville area. It was not mandated by the Consumer Bankruptcy Section and was voluntarily begun to address the need.



The purpose of the Brown Bag Lunch Program, at least in Baltimore, was not to replace MICPEL and does not provide the in depth coverage of topics that MICPEL did. It is more of a round table discussion of issues and, hopefully, answers to general questions. The program is informal and many times may not even have a specific topic.

The topics that have been addressed so far have included lien avoidance, cramdowns and loan modifications. The attendance has been very popular for those topics. Other topics being considered include, means test issues, federal tax and tax liens, Maryland tax and tax liens, reaffirmations, student loans, adversary proceeding document and evidence requirements, adversary proceeding procedure, and fraud issues in bankruptcy. If anyone has ideas for topics that they would like to bring up for discussion or you would like to moderate a specific topic, please send your idea to [meyerlawaaa@comcast.net](mailto:meyerlawaaa@comcast.net).

Despite the name of the program, lunches are not served, hence the "brown bag" designation.

Since the demise of MICPEL, the brown bag lunches are likely to be very popular until a reasonable alternative is created for MICPEL. The programs are held monthly at Mark Scurti's office or Gerard Vetter's office. They switch off every other month to allow attorneys in the City and the County to attend without a great deal of travel. Not all topics are held at both locations.

Marc Scurti's location and information is: Mark F. Scurti, Esquire, Hodes, Pessin, & Katz, P.A., 901 Dulaney Valley Road, Suite 400, Towson, MD 21204, 410-938-8718, [mscurti@hpklegal.com](mailto:mscurti@hpklegal.com).

Gerard Vetter's location and information is: Gerard R. Vetter, Chapter 13 Trustee, 100 S. Charles Street, Suite 501, Tower II, Baltimore, Maryland 21201-2721, 410-400-1333, [gerardv@grvch13.com](mailto:gerardv@grvch13.com).

The conference room at Gerard Vetter's office is a little smaller than at Marc Scurti's office and the attendance appears to be greater when a specific topic has been billed. Gerard asks that those planning to attend the program of a specific topic, when it is scheduled at his office, please notify him that you plan to attend. Some attendance had to be restricted because of room size, so make sure that you get your request in early.

It is a lucky situation when a moderator actually brings materials to the lunch. Every effort is made to make sure that those who could not attend receive a PDF copy when they request one. A report of the lunch is written regarding attendance and topics and is published on the Section list serve. Requests have been made to have materials available at every luncheon event, however the moderators are all volunteering their time and requiring materials, in addition, goes beyond the purpose of the brown bag lunch program.

*Glenn H. Meyer*

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# When Bad Facts Make Bad Law- *Chicago Title Ins. Co. v. Mary B.*

By Maria Ellena Chavez Ruark

We have all heard the saying “bad facts make bad law”, but no case illustrates this more clearly than *Chicago Title Ins. Co. v. Mary B.*, 988 A.2d 1044, 190 Md. App. 305 (2010), decided by the Court of Special Appeals on January 4, 2010. *Mary B.* was decided under a law enacted when no one could possibly have imagined the facts of the *Mary B.* case. The application of the statute at issue and, more importantly, the ultimate holding of the case leaves one with a feeling of shock, frustration and profound disappointment.

## **Factual and Procedural Background**

When Mary B. (“Mary”) was 12 years old, her mother became mentally ill and could no longer care for Mary. Mary moved in with her aunt and her aunt’s boyfriend, Charles Lee Petr (“Petr”). Soon thereafter, Petr began to sexually assault and rape Mary. By the time Mary was 14 years old, the abuse had resulted in two pregnancies; one ended in a miscarriage and the other in the birth of a son. After enduring four years of abuse, Mary reported Petr’s abuse to a school counselor, eventually leading to Petr’s conviction for second-degree rape and a 20-year prison sentence.

The local department of social services removed Mary and her son from the home and placed them in foster care. In the ensuing Child in Need of Assistance (CINA) proceeding, Mary’s lawyer advised her that she might be able to sue Petr for civil battery and recover damages. The CINA lawyer searched the land records and found no recorded deed of trust with respect to Petr’s Baltimore County residence. The CINA lawyer referred Mary to another lawyer, who again confirmed there was no recorded lien instrument in the land records and commenced a civil battery action as Mary’s next friend in the Circuit Court for Baltimore County. Several times throughout the litigation, Mary’s lawyer re-checked the land records and confirmed that the property was owned free and clear of liens.

The trial court entered a verdict in favor of Mary and entered a judgment in her favor in the amount of \$2,000,000. Mary obtained a writ of execution and directed the sheriff to levy upon Petr’s residence. The property was scheduled and advertised for sale.

One week before the sale was to occur, Chicago Title Insurance Company (“Chicago Title”), for its own use and the use of Aegis Funding Corporation (“Aegis”), filed suit against Mary and Petr seeking to enjoin the sheriff’s sale and to obtain a judgment declaring that Chicago Title had a lien against Petr’s residence that took priority over Mary’s judgment lien. In its suit, Chicago

Title argued that Aegis held a deed of trust against the property securing a \$150,000 loan that Aegis made to Petr more than two years earlier. For reasons unknown, Aegis did not record the deed of trust in the land records until after Mary advertised the sheriff’s sale.

The court entered a temporary restraining order halting the sheriff’s sale. Then, by agreement of the parties, the court issued a preliminary injunction delaying the sale until after adjudication of the parties’ rights with respect to Petr’s residence. Mary filed a third-party complaint against Aegis, asserting that she had brought her battery action against Petr after examining the land records and determining that there were no liens against Petr’s property. Shortly after, Aegis became a debtor in a Chapter 11 bankruptcy proceeding, Aegis assigned its deed of trust to U.S. Bank National Association (“U.S. Bank”), and U.S. Bank was substituted as a party in place of Aegis.

The key dates in the dispute are as follows:

July 15, 2005: Aegis made a \$150,000 loan to Petr, who executed a promissory note in that amount and a deed of trust with respect to his Baltimore County residence.

May 11, 2007: Mary obtained a judgment against Petr for \$2,000,000 in the Circuit Court for Baltimore County, thereby creating a lien against Petr’s Baltimore County residence.

October 9, 2007: Aegis recorded its deed of trust in the Land Records for Baltimore County.

The issue before the court was whether Mary’s judgment lien or U.S. Bank’s deed of trust took priority. The trial court concluded that Mary’s lien had priority and granted summary judgment in her favor.

Both Chicago Title and Mary appealed. On appeal, Chicago Title argued that it had priority under Maryland law and in accordance with the doctrine of equitable conversion and equitable subrogation. Mary’s arguments on appeal are beyond the scope of the issues discussed in this article.

## **Effective Date of Deed of Trust**

Section 3-201 of the Real Property Article of the Annotated Code of Maryland provides:

*(continued on page 14)*

## When Bad Facts...

(Continued from page 13)

The effective date of a deed is the date of delivery, and the date of delivery is presumed to be the date of the last acknowledgement, if any, or the date stated on the deed, whichever is later. Every deed, when recorded, takes effect from its effective date as against the grantor, his personal representatives, every purchaser with notice of the deed, and every creditor of the grantor with or without notice.

It is easier to understand the statute and its application if the statute is broken down into three components. First, the statute dictates that the effective date of a deed (the definition of which includes a deed of trust) is the date of delivery, which is presumed to be the later of the date of the last acknowledgement or the date on the deed. Here, the effective date of Aegis' deed of trust (and the date of delivery) is July 15, 2005, the date stated on the face of the deed of trust.

Second, once the deed of trust is recorded, it takes effect as of the effective date. Here, although Aegis did not record the deed of trust until October 9, 2007, the deed of trust became effective on the effective date, *i.e.*, July 15, 2005. Thus, the recording of the deed of trust allowed the effectiveness of the deed of trust to relate back more than two years.

Finally, this statute applies to three categories of people. The statute applies to the grantor and his personal representatives which, of course, makes complete sense. If a grantor executes a deed (or deed of trust), it should be effective against him and his personal representatives even if it is not recorded until a later date. The statute also applies to any purchaser of the property with notice of the deed. Again, this is both fair and reasonable. A person who purchases the property knowing that the property was already deeded to another person should not be able to leap-frog ahead of the first purchaser. Lastly, the statute applies to any creditor of the grantor regardless whether the creditor has notice of the deed and regardless of the nature of the creditor's claim. As described below, this is where the statute takes a wrong turn, and Mary suffers the unfortunate consequences.

### Ruling of Court of Special Appeals

The Court of Special Appeals concluded that the U.S. Bank deed of trust had priority over Mary's judgment lien and reversed the trial court's decision. On appeal, Mary's counsel argued that a judgment lienholder is not a "creditor" within the meaning of the statute and that the two terms should be interpreted differently. The Court disagreed and held that the statute applies to every creditor, regardless of the events that led to the person or entity becoming a creditor. The Court declined to read any limitation of the term "creditor" into the statute and relied on the definition of "creditor" in Black's Law Dictionary – "one to whom a debt is owed".

In reaching its conclusion, the Court relied on *Angelos v.*

*Maryland Cas. Co.*, 380 A.2d 646, 38 Md. App. 265 (1977), and *Knell v. The Green Street Bldg. Ass'n*, 34 Md. 67 (1871), but the creditors' claims in those cases are significantly different than Mary's claim. The judgment creditor at issue in the *Angelos* case was a company that obtained a judgment for indemnification of amounts it paid under a bonding agreement, and the judgment creditor at issue in the *Knell* case loaned funds to the judgment debtor and obtained a judgment when the obligor failed to repay the loan. The judgment creditors in *Angelos* and *Knell* willingly conducted business with the judgment debtor and willingly incurred the risk of becoming creditors. Mary did not.

### Certiorari to Court of Appeals?

Mary filed a petition for certiorari with the Court of Appeals in March 2010, but the Court has not yet issued a decision. In her petition, Mary makes a compelling argument for review. She argues that a judgment creditor, like a secured lender, has both *in rem* and *in personam* rights. When a borrower executes a promissory note in favor of a bank and a deed of trust with regard to the borrower's real property, the bank may bring two separate causes of action: a foreclosure action, which is an action *in rem*, and a suit for nonpayment of the note, which is an action *in personam*. Mary argues that she also has separate and distinct rights, one as a lienholder, which is an *in rem* right, and one as a general creditor of Petr, which is an *in personam* right.

In perhaps the most emotionally compelling (though not necessarily legally compelling) argument, Mary argues that the Court of Special Appeals' holding is contrary to public policy underlying Maryland's race notice statutes because Mary relied on the absence of the deed of trust in the public records in proceeding with her suit and bearing the emotional discomfort of testifying about intimate details of the sex acts forced upon her by Petr. Mary argues that application of the rules of statutory interpretation lead to only one conclusion – that the statute and the Court of Special Appeals' holding are neither reasonable nor rational when applied to the specific facts of the *Mary B.* case.

### Conclusion

One can question whether it is fair that a judgment creditor's rights can be cut off by a previously executed but subsequently recorded deed or deed of trust, but *Mary B.* makes one thing clear – the statute, when applied under these particular facts, leads to unfair and unjust outcome for the judgment creditor. Mary was not a willing creditor. She did not voluntarily extend an unsecured loan to Petr. She did not willingly sell goods or services to Petr. She did not willingly incur the risk of nonpayment for a debt. She was

(continued on page 17)

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# Supreme Court Spotlight - Recent Developments in Consumer Bankruptcy Cases

By Antonio Aquia, Esq.

The Supreme Court recently decided two bankruptcy issues of noteworthy interest. To me, anytime the Supreme Court hears a bankruptcy issue it is a noteworthy event. By this article, I summarize the two most recent decisions impacting the consumer bankruptcy practice. Although reading the decisions can be interesting, even more fascinating is reading the transcripts of the oral arguments regarding these appeals. Most notably, contained below is an excerpt from the transcript of the oral argument heard on November 3, 2009, in the case of *Schwab v. Reilly*, 534 F.3d 173, cert. granted, 129 S. Ct. 2049 (Mem) U.S. (2009), a decision is still pending. You have to love the frankness and candor of Supreme Court Justice Breyer, when he tries to understand the process of when a Chapter 7 Trustee is required to file an objection to debtor's claim of exemptions and whom might know the answer.

JUSTICE BREYER: Do you have any sense of how it works in practice? I'm a little worried by Justice Kennedy's question, because the government says in practice what's been happening is that in most places, trustees don't -- they don't object to these kinds of valuations problems, and now suddenly when the rule has changed in some circuit, they do object as a matter of form, which is unnecessary paperwork.

The impression I had from reading Collier, and it was -- the opposite was so, that normally when you have the creditors' meeting, things would appear, what was a problem or what wasn't, and the creditor would then file an -- or the trustee would then file an objection. Well, what is the case? How does the practice work? I'm -- I'm pretty uncertain. I'm not a bankruptcy expert.

MR. BRUNSTAD: Yes, Justice Breyer, there has not been an avalanche of pro forma objections being filed in these cases.

JUSTICE BREYER: Yes, but how did it work normally for years and years? You'd go into a committee meeting of creditors. They'd get into an argument about the valuation. I'm sure that happened.

MR. BRUNSTAD: Yes.

JUSTICE BREYER: And when that happened, did trustees file objections within 30 days or didn't they?

MR. BRUNSTAD: Yes, Justice Breyer.

JUSTICE BREYER: How do we know that? I mean, I was

impressed by Ambro. Isn't he the judge here?

MR. BRUNSTAD: In the court of appeals, yes, Your Honor. He's a former bankruptcy judge.

JUSTICE BREYER: He had been a bankruptcy judge, so maybe he knows.

MR. BRUNSTAD: Certainly --

JUSTICE BREYER: Now, I don't know who knows, because I'm worried the government has looked into this, and somebody's telling them who knows it's the opposite.

## CASE SUMMARIES

### *Milavetz, Gallop & Milavetz, P.A. v U. S., 2010 WL 757616 (2010)*

Debt Relief Agencies: Bankruptcy attorneys are included in the definition "debt relief agency" and are prohibited from advising clients to incur more debt when the "impelling reason" for the advice is to "load up" on debt then discharge it through the bankruptcy proceeding. Being debt relief agents, the imposition of the Code's advertising disclosure is reasonably related to the Government's interest in preventing consumer deception and fraud and, therefore, Constitutional.

Opinion By: Sotomayor (joined by Roberts, Stevens, Kennedy, Ginsburg, Breyer and Alito) (Scalia joined except for n. 3 and Thomas joined except for Part III-C. Scalia and Thomas filed opinions concurring in part and concurring in the judgment)

The Plaintiffs in this litigation, the law firm of Milavetz, Gallop & Milavetz, P.A.; the firm's president, Robert J. Milavetz; a bankruptcy attorney at the firm, Barbara Nilva Nevin, and two of the firm's clients, filed a preenforcement suit in Federal District Court seeking declaratory Relief with respect to the Bankruptcy Abuse Prevention and Consumer Protection Act's ("BAPCPA") debt relief agency provisions found in " 101 (12A), 526 (a)(4), and 528. Plaintiff's asked the Court to rule that these debt relief provisions do not apply to attorneys practicing bankruptcy law. At the District Court level, the Court agreed that the definition of debt relief agency did not include attorneys, thus, the remaining requirements did not apply to attorneys.

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# Supreme Court Spotlight...

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The Court of Appeals for the Eighth Circuit affirmed in part and reversed in part. The Court relying upon the Act's plain language unanimously rejected the District Court's ruling that attorneys are not debt relief agents. The Court of Appeals also disagreed that ' 528 was unconstitutional concluding that the disclosures are intended to prevent consumer deception and are reasonably related to that interest. The Court did agree that ' 526 (a)(4) was overly broad, prohibiting a debt relief agent from advising an assisted person to incur any additional debt when that assisted person is contemplating bankruptcy. The majority of the Court held that ' 526(a)(4) could not withstand either strict or intermediate scrutiny.

The Supreme Court granted certiorari and affirmed in part, reversed in part, and remanded.

The Court agreed that with the Eighth Circuit Court that the definition of debt relief agency under ' 101(12A) includes attorneys that provide bankruptcy assistance to assisted persons. The Supreme Court, however, disagreed with the Eighth Circuit that ' 526(a)(4) was substantially overbroad in restricting content-based attorney-client communications. The Court held that the only advice prohibited by the statute is advice to incur more debt "because the debtor is filing in bankruptcy." The Court stated that the type of advice that would be prohibited would be advice to "load up" on debt with the expectation of discharging that debt in a bankruptcy. The Court did add that advice to refinance at a lower mortgage interest rate or buy a reliable car would be permissible because the promise of enhanced financial prospects is the "impelling reason". Lastly, the Court held that ' 528, requiring attorneys that qualify as debt relief agents identify themselves as such in their advertisements, was reasonably related to the government's interest in preventing consumer deception and not a violation of an attorney's First Amendment interest in not providing this information. The Supreme Court reasoned that any restriction on this type of commercial speech is minimal.

## 2. *United Student Aid Funds, Inc. v. Espinosa*, 2010 WL 1027825 (2010)

Effect of Order Confirming Plan: Although a discharge of a student loan debt requires an adversary proceeding and a finding of "undue hardship" by the Bankruptcy Court, confirmation effect of Debtor's plan seeking to discharge accrued interest, but pay back the principal owed, was a final judgment binding upon United Student Aid Funds, Inc. and could not be disturbed.

Opinion By: Thomas (delivered the opinion for a unanimous Court)

In 1992, Francisco Espinosa filed a Chapter 13 Bankruptcy Case. The Debtor's Chapter 13 Plan included a provision by which the student loan creditor, United Student Aid Funds, Inc. ("United"), would only be paid the principal Debtor owed, but its remaining accrued interest would be discharged once the

Debtor repaid the principal. Debtor's only specific indebtedness was this student loan obligation owed to United. Debtor's Plan was served upon United along with the Notice of Case outlining deadlines for proof of claim filings and the like. In response, United filed a proof of claim evidencing the total amount of the indebtedness including accrued interest in the total amount of \$17, 832.15. United did not object to Debtor's Plan, nor to the treatment of its claim.

Although in order to discharge a portion of the student loan indebtedness the Debtor could only do so, if failure to discharge that debt would impose an "undue hardship" on the Debtor and his dependents. " 523(a)(8); 1328. This "undue hardship" determination must be made by the Bankruptcy Court, but only after the Debtor initiates an adversary proceeding by serving a summons and complaint upon his adversary, see Federal Rules Bankruptcy Procedure 7001 (6), 7003, 7004, 7008. The Debtor never

initiated such an adversary proceeding, nor was there ever a determination of "undue hardship" made by the Bankruptcy Court. Even though these deficiencies existed, the Bankruptcy Court confirmed the Debtor's Plan. After confirmation, the Chapter 13 trustee mailed notice to United informing United that the amount claimed in its proof of claim differed from the amount listed in Debtor's Plan. That notice also instructed United that if it disputed the treatment of its claim, that it had 30 days to notify the trustee. United did nothing after receiving this notice. Once the Debtor paid his student loan principal in full, the Court issued an order discharging the accrued interest owed to United.

Several years later, however, United sought to collect that unpaid accrued interest. In response to this action, the Debtor filed a motion to enforce the confirmation order by directing United to cease and desist all collection activities. United opposed the motion and filed a cross motion under Federal Rules

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## Supreme Court Spotlight...

(Continued from page 16)

of Civil Procedure 60(b)(4), seeking to set aside as void the confirmation order. United argued that the provision in Debtor's Plan discharging the accrued interest was inconsistent with the Bankruptcy Code and Rules, and also because United's due process rights were violated when the Debtor failed to serve it with the required adversary proceeding. Rejecting United's arguments, the Bankruptcy Court granted the Debtor's motion and denied the cross motion. On appeal, the District Court reversed, holding that United was denied its due process rights when the confirmation order was issued without the required service. The Ninth Circuit ultimately reversed, concluding that by confirming Espinosa's Plan without a determination of undue hardship made in connection with an adversary proceeding, the Bankruptcy Court at most committed a legal error that United may have successfully appealed, but that such an error was not a basis upon which to set aside an order as void under Rule 60(b)(4). The Ninth Circuit also held that failure to serve United was not a basis upon which to declare the judgment void because United did receive actual notice of the Debtor's Plan and failed to object to that Plan.

Ultimately, the question before the Supreme Court was whether the Bankruptcy Court's order confirming the Debtor's plan was void for the purpose of Federal Rules of Civil Procedure 60(b)(4). The Supreme Court held that because United had actual notice of the Court's error and failed to object to the plan or file a timely appeal to the confirmation order, then

the confirmation order remained enforceable. The Court found that two separate notices received by United satisfied United's due process rights as those notices were reasonable calculated to apprise United of the pending treatment of its claim and afforded United the opportunity to object. The Court also ruled that a Chapter 13 Plan that proposes to discharge a portion of a student loan without the required undue hardship determination violates " 1328 (a)(2) and 528(a)(8). Although the Bankruptcy Court committed a legal error in confirming Espinosa's plan, this type of error did not amount to one concerning the Bankruptcy Court's jurisdictional or statutory authority, thus Federal Rules of Civil Procedure 60(b)(4) was inapplicable and could not be expanded to set aside the Bankruptcy Court's confirmation order. This ruling preserves the finality of court orders. The Court did note that Chapter 13 Plans with this type of provision should not be confirmed unless all of the other statutory requirements are met. The opinion acknowledges the potential for bad faith efforts by debtors and their counsel in attempting to have plans confirmed with these type of "non legal" provisions. The Court believes that the penalty scheme as delineated in Rule 9011 is sufficient to deter such actions in the future.

There are currently two more cases pending at the Supreme Court regarding consumer bankruptcy issues. Once decisions are rendered, I hope to also be able to report those opinions to the consumer bankruptcy bar at large.

Visit [www.msba.org/sec\\_comm/sections/consumerbankruptcy/](http://www.msba.org/sec_comm/sections/consumerbankruptcy/)

Check out the Section's  
Annual Meeting Program:

*Top 10 Mistakes Lawyers Make With  
Bankruptcy Cases and  
Legislative Update*



June 11, 2010  
8:30 a.m.- 10:30 a.m.

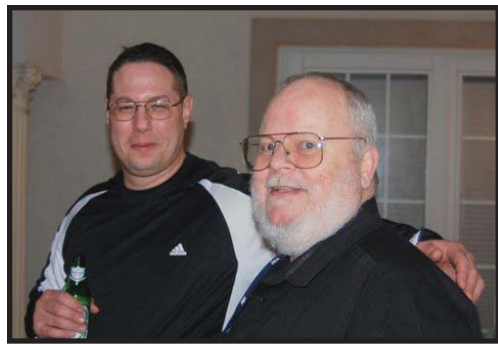
### When Bad Facts...

(Continued from page 14)

a victim, an unwilling participant in the events that led to the judgment, yet she is barred from recovery by a statute that governs the rights of a person who deeds his property to more than one person, purchases property with knowledge that the property was already deeded to someone else, or voluntarily becomes a creditor. Is this what the General Assembly envisioned for the statute? Will the General Assembly revise the statute so that it applies only to creditors with notice or excepts certain creditors? Will the Court of Appeals find the statute ambiguous and peel away the layers to determine the legislative intent behind the statute? Will Mary finally receive justice? Stay tuned. The parties expect a decision on Mary's petition for certiorari any day.

# Spring Party

On March 12, 2010, Candy Thompson (and her husband Richard Shapiro) hosted a Spring Party at their beautiful home in Ellicott City. This was a great opportunity for members to spend some time eating good food, enjoying some drinks, and toasting marshmallows. This was a great time to relax and get to know each other which will be continued.

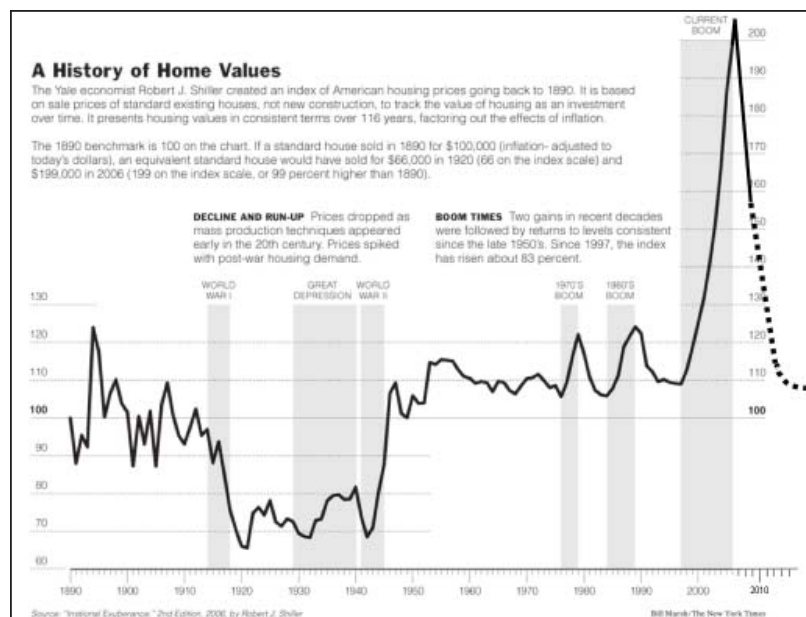


# The Move to Prevent Cramdowns will Haunt this Economy for Years to Come.

By Behzad Gohari

Since BAPCBA was passed in 2005, there have been various efforts to give bankruptcy judges the power to cram down mortgages, and allow a homeowner who resides in a property that is upside down – with a mortgage value higher than the value of the property – to be able to seek the protection of the bankruptcy court and to lower the face value of the mortgage.

reasons in the economy, a vast real estate bubble began to develop that would make a rather bland post 2001 economic expansion feel much more robust to the average American. This vast real estate bubble created what became known as the home ATM, where owners would continually refinance their properties and strip every last dollar of available equity, as well the trend to purchase homes with very little down payment, leading to people who were basically renting from the bank. These scenarios, when combined with the low interest rates, and lax lending standards, primed the real estate market for a massive downfall.

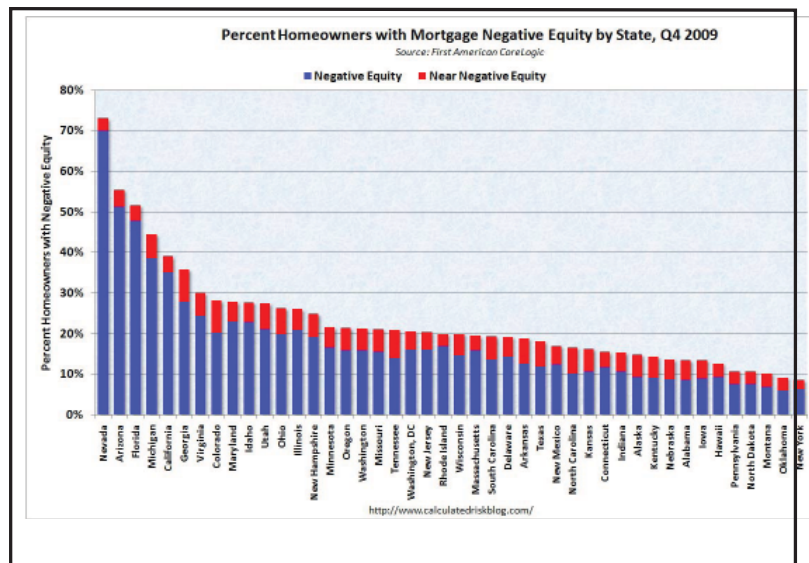


Now, some three years after the beginning of this slow motion train wreck, we are faced with massive numbers of homeowners with negative equity. These individuals are faced with the prospect of being perpetually indebted to their mortgage lender(s) for years to come. If the above trend is correct, and barring any severe inflationary event that will destroy the value of the Dollar, in order to inflate property values, these homeowners will not be able to see any benefit from their home ownership. Below is a graph of homeowners with negative equity. It is worth noting that Maryland has the distinction of being ranked 9<sup>th</sup>, with almost 30% of its homeowners at or near negative equity.

These efforts gained steam, and much political support in the wake of the rather loud bursting of the real estate bubble in 2007. However, by the end of the 2009, in the wake of the rapidly spreading financial crisis, most banks lobbied against cramdowns, and won the battle to quell this nascent movement. Unfortunately for homeowner, the real estate market, and the banks, this was a misguided move that will simply exacerbate an already depressed real estate market.

Since homeowners do not have the option of simply mailing *(continued on page 20)*

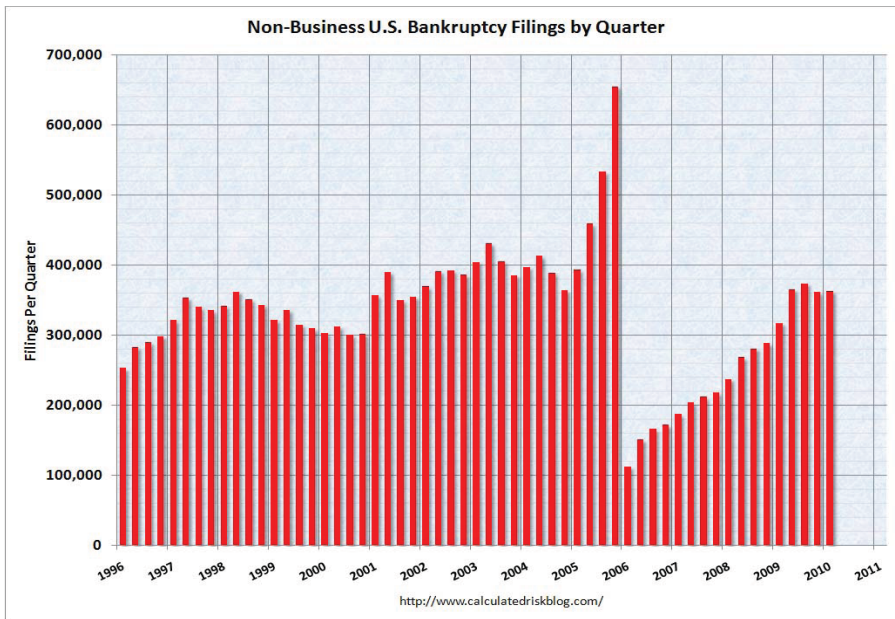
It is worthwhile to briefly study the well known history of this rather large bubble. According to Robert Shiller, professor of economics at Yale, and the man behind the Case-Shiller index of real estate, property values in America – when adjusted for inflation as well as square footage – stagnated from the 1800's to the late 1900. Essentially, a \$100 worth of real estate in the 1890's was worth \$100 in by the late 1990's. Not a very good investment, in spite of the popular mythology.



Starting in the late 1990's, for a variety of structural

# The Move to Prevent Cramdowns...

(Continued from page 19)



back their keys and moving out of their homes, they are faced with essentially two choices: 1- years of indentured servitude to their mortgage lender, where they will continually pay for a mortgage that provides them with not just zero benefit, but the possible eventuality of paying the mortgage company when their house is sold, or 2- file for bankruptcy. It is the second choice that brings us to cramdowns.

Since 2005, the number of bankruptcy filings dropped dramatically, and experienced a similarly dramatic rise in the last two years. In fact, for the past year, quarterly bankruptcy filings have been at pre-2005 levels, and all data suggest that this will continue to be the case until unemployment drops to natural levels – hovering around 6%.

This dramatic increase in bankruptcy filings has two root causes: 1- the recession – which was the worst this country has seen since the Great Depression, and 2- the rapid and sudden collapse of the real estate market. Consider that since the Great Depression, America had not experience year over year price declines in the real estate market. Focusing on the second root cause, quickly leads one to the startling foreclosure statistics. The graph below aptly demonstrates the direct correlation between the rise in bankruptcy filings and foreclosures. In a market where practically 1 in 10 prime loans is in foreclosure, the result is a prolonged catastrophe that will bleed the economy of the nation for as long as homeowners face negative equity.

In essence, homeowners who face foreclosure have no incentive to keep their residence. In fact, in at least a plurality of the cases, these owners may simply opt to abandon their homes and file for a chapter 7, wiping the negative equity clean; and leaving the mortgage lender as the new owner of the property. Banks, who have no desire to be long term home owners, will seek an exit, and perpetuate the downward spiral of home prices.

The simplest solution to this problem is to give judges the power to cram down mortgages, and encourage homeowners facing negative equity to file for a Chapter 13; where they would maintain their residence, restructure the debt load and not sell their property in a hasty manner. If the banking industry would realize the truth that

property prices are not going to increase back to 2005 levels for at least a decade, maybe they will be encouraged to support cram downs, and develop a pragmatic method to bring down the value of the mortgages to something that would encourage homeowners to remain in their homes.

As members of the bar, we hold a unique position wherein we have the ability to educate our clients, colleagues and other professionals on this crucial issue. Allowing cram downs will, in the long term, provide for a more stable real estate market, and help our economic recovery.

