



the rights of the holders of those secured claims. This article explores the recent case law surrounding these issues.

a. When you can: The wholly unsecured second mortgage.

In In re Pelosi<sup>2</sup>, the Massachusetts Bankruptcy Court was called upon to determine whether a debtor may “modify the rights of the [second mortgagee] who holds a lien against the [p]roperty but has an ‘unsecured claim’ under 11 U.S.C. § 506(a) because there is no value to its interest in the [p]roperty.”<sup>3</sup> The debtor’s principal residence was valued at \$370,000 which was supported by an appraisal.<sup>4</sup> The first mortgage was valued at \$375,201.20 and the balance on the second mortgage was listed as \$94,843.14. Debtor filed a Motion to Determine Secured Status under § 506(a) of the Second Mortgagee, along with her Chapter 13 plan.<sup>5</sup>

Under Nobleman and § 1322(b)(2), the debtor was unable to “cram down” the first mortgage. Instead, the debtor proposed to “cram down” the second mortgage and treat the claim as unsecured.<sup>6</sup>

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<sup>2</sup> 382 B.R. 582 (Bankr.D.Mass.2008).

<sup>3</sup> Id., at 583.

<sup>4</sup> Id. The case originally commenced in chapter 7, but was later converted to chapter 13. In the original Schedule A, the debtor valued the property at \$480,000. However, after conversion, the debtor’s amended Schedule a reflected a value of \$370,000. This new valuation was supported by the appraisal.

<sup>5</sup> Id. The second mortgagee never responded to the motion or filed an objection to confirmation of the Chapter 13 plan. By the time of the ruling on the motion, the mortgagee had not yet filed a proof of claim (although the objection deadline had not passed). The Bankruptcy Court found that the respondent had adequate and proper notice.

<sup>6</sup> In re Pelosi, 382 B.R. 582, 583 (Bankr.D.Mass. 2008).

In the analysis that followed, the Court examined the First Circuit Bankruptcy Appellate Panel's decision in In re Mann<sup>7</sup>, and noted that while there was a split in the courts, Mann had adopted the view of the Third and Fifth Circuit Courts of Appeals, along with that of the Ninth Circuit Bankruptcy Appellate Panel's view that a chapter 13 debtor may void a residential real property lien that is wholly unsecured.<sup>8</sup> Since In re Mann, "the Second, Sixth, Ninth and Eleventh Circuits have joined the Third and Fifth Circuits and the Ninth Circuit Bankruptcy Appellate Panel in adopting the majority position."<sup>9</sup>

The Pelosi court noted that the First Circuit cited Mann in the 2007 case of Eastern Savings Bank v. LaFata.<sup>10</sup> The dispute in that case arose from a "bizarre set of facts" where the debtor's principal residence actually straddled the property line between two lots, only one of which was the mortgaged property.<sup>11</sup>

In discussing section 1322(b)(2) and Nobelman, the First Circuit stated:

We and other courts have interpreted § 1322(b)(2) narrowly, even after the Nobelman decision. See, e.g., Scarborough v. Chase Manhattan Mortgage Corp. (In re Scarborough), 461 F.3d 406, 411

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<sup>7</sup> In re Mann, 249 B.R. 831, 840 (1st Cir.BAP, 2000) ("Any interpretation of the Bankruptcy Code which relies on a suspension of reality deserves to be subjected to a significant level of skepticism.")

<sup>8</sup> In re Pelosi, 382 B.R. at 584. See also Bartee v. Tara Colony Homeowners Ass'n (In re Bartee), 212 F.3d 277 (5th Cir.2000); McDonald v. Master Fin., Inc. (In re McDonald), 205 F.3d 606 (3rd Cir.2000); and Lam v. Investors Thrift (In re Lam), 211 B.R. 36 (9th Cir. BAP 1997).

<sup>9</sup> See Zimmer v. PSB Lending Corp. (In re Zimmer), 313 F.3d 1220 (9th Cir.2002); Lane v. Western Interstate Bancorp (In re Lane), 280 F.3d 663 (6th Cir.2002); Pond v. Farm Specialist Realty (In re Pond), 252 F.3d 122 (2nd Cir.2001); Tanner v. FirstPlus Fin., Inc. (In re Tanner), 217 F.3d 1357 (11th Cir.2000). But see Am. Gen. Fin., Inc. v. Dickerson (In re Dickerson), 222 F.3d 924, 926 (11th Cir.2000) (following Tanner because the panel was bound by it but stating: "[W]ere we to decide this issue on a clean slate, we would not so hold."). In re Pelosi, 382 B.R. at 584-5.

<sup>10</sup> 483 F.3d 13 (1<sup>st</sup> Cir. 2007).

<sup>11</sup> 483 F.3d at 15.

(3d Cir.2006) (§ 1322(b)(2) does not bar modification where claim secured by multifamily dwelling, and noting policy of reading § 1322(b)(2) “literally and narrowly”); Zimmer v. PSB Lending Corp. (In re Zimmer), 313 F.3d 1220, 1226-27 (9th Cir.2002) (§ 1322(b)(2) does not bar modification where claim is wholly unsecured because of prior lien on primary residence); In re Mann, 249 B.R. 831, 835-37 (1st Cir. BAP 2000) (same, and collecting cases); Lomas [Mortg. Inc. v. Louis], 82 F.3d at 4. The policy of encouraging mortgage lending does not require § 1322(b)(2) to be interpreted expansively.

In re Pelosi, 382 B.R. 582, 585 [quoting In re Mann, 483 F.3d at 20].

Following this line of cases, a wholly unsecured mortgagee is not protected by § 1322(b)(2).

- b. “Only by security interest in real property that is debtor’s principal residence”

The protections afforded creditors by § 1322(b)(2) apply in cases where the security interest is the debtor’s principal residence. However, if the debtor’s real property “includes the debtor’s principal residence as well as other income-producing rental property”, § 1322(b)(2) does not apply.<sup>12</sup>

The limitation is based on plain language of the statute itself. As the Third Circuit noted in In re Scarborough:

By using the word “is” in the phrase “real property that *is* the debtor’s principal residence,” Congress equated the terms “real property” and “principal residence.” Put differently, the use of “is”

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<sup>12</sup>Some courts have held that a mobile home, or any other personal property that is not real property but nevertheless serves as the “debtor’s principal residence” as contemplated by § 101 (13A), does not alter the requirement of § 1322(b)(2) that the property be real property. See, e.g. In re Shepherd, 381 B.R. 675, 678 (E.D.Tenn. 2008) [and citations therein] (finding that § 1322(b)(2) did not extend to cover property that was the debtor’s residence but was not real property); see also In re Oliveira, 378 B.R. 789 (Bankr.E.D.Tex. 2007). This article however focuses on only on modifying security interests in real estate.

means that the real property that secures the mortgage must *be only* the debtor's principal residence in order for the anti-modification provision to apply.<sup>13</sup>

The property in question was a “two story semi detached residence that was converted to a multi-unit dwelling prior to Scarborough’s purchase, with one apartment on the first floor and one apartment on the second floor.”<sup>14</sup>

Scarborough resided in one of the units.<sup>15</sup>

In short, the court found that “[a] claim secured by real property that is, even in part, not the debtor’s principal residence does not fall under the terms of § 1322(b)(2).”<sup>16</sup> Unless 1322(b)(2) is amended, the hands of consumer debtors who seek to modify mortgages secured only by single family residences will be tied to the extent that the property value secures the note.<sup>17</sup>

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<sup>13</sup> In re Scarborough, 461 F.3d 406, 411 (3<sup>rd</sup> Cir. 2006); see also In re Adebajo, 15 B.R. 98, 104 (Bankr.D.Conn. 1994); In re Maddaloni, 225 B.R. 277, 280 (D.Conn 1998); In re McGregor, 172 B.R. 718, 720 (Bankr.D.Mass 1994).

<sup>14</sup> Id., 461 F.3d at 409.

<sup>15</sup> Id.

<sup>16</sup> In re Scarborough, 461 F.3d at 411; see also Lomas Mortg., Inc. v. Louis, 82 F.3d 1 (1<sup>st</sup> Cir. 1996)

<sup>17</sup> The Scarborough court addressed a concern that “a debtor could easily sidestep the ... home mortgage exception by adding a second living unit to the property on the even of the commencement of [the] Chapter 13 proceeding.” In re Scarborough, 461 F.3d at 412 [citing In re Bulson, 327 B.R. 830, 846 (Bankr.W.D.Mich.2005) and In re Guilbert 176 B.R. 302, 305 (D.R.I. 1995)]. Before debtors start considering building that in-law apartment, or converting the attic above the garage into fashionable studio space, they should be mindful that “for the purposes of § 1322(b)(2), the critical moment” is when the underwriting decision is ultimately made. “[I]t is therefore at that point in time that the lender must know whether the loan it is making may be subject to modification in a Chapter 13 proceeding at some later date.” Id., [citing In re Bulson, 327 B.R. at 846].

c. Determining Value

If modification is desired, it is important to remember that if the junior lien(s) have even a scintilla of value, it will be considered a secured claim and the lienholder's rights cannot be modified by a chapter 13 plan.<sup>18</sup> Perhaps an indication of the existence of a secured-to-value interest can be found by contemplating what would happen outside of bankruptcy. As noted in Mann:

Outside of bankruptcy, a lien with no collateral value cannot deliver any funds to the lienholder upon foreclosure. Such a lien should not deliver better rights in the bankruptcy court.

In re Mann, 249 B.R. 831, 838 [citing In re McCarron, 242 B.R. 479 at 484 (Bankr.W.D.Mo. 2000); In re Johnson, 266 BR 367 at 369 (Bankr.N.D.Ohio 2000)].

Bankruptcy Rule 3012 provides the procedural mechanism to determine value: “[t]he court may determine the value of a claim secured by a lien on property in which the estate has an interest on motion of any party in interest and after a hearing on notice to the holder of the secured claim and any other entity as the court may direct.”

Notwithstanding the available procedural tools, there has been some reluctance to impose the duty to value real estate on the courts, when the result could be the substantial modification of the lenders rights. As the 11<sup>th</sup> Circuit opined in In re Dickerson:

...[P]roviding “anti-modification” protection to junior mortgagees where the value of the mortgaged property exceeds the senior mortgagee's claim by at least one cent, as prescribed by the

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<sup>18</sup> See e.g. In re Grimes, 376 B.R. 811, 813 (Bankr.W.D.Ky. 2007) [citing In re Lane, 280 F.3d. 663, 663 (6<sup>th</sup> Cir. 2002)].

Supreme Court's decision in [Nobelman] but denying that same protection to junior mortgagees who lack that penny of equity, places too much weight upon the valuation process. As we have noted “[v]aluation outside the actual market place is inherently inexact.” Rushton v. Commissioner of Internal Revenue, 498 F.2d 88, 95 (5th Cir.1974). Given the unavoidable imprecision and uncertainty of the valuation process, we think that choosing to draw a bright line at this point is akin to attempting to draw a bright line in the fog.

In re Dickerson, 222 F.3d 924, 926 (11<sup>th</sup> Cir. 2000)(Holding that precedent required finding that § 1322(b)(2) protects only those mortgages that are secured by existing equity in the debtor’s principal residence. See In re Tanner, 217 F.3d 1357 (11<sup>th</sup> Cir. 2000).

The Mann court entertained a similar argument where the appellants expressed concerns that court decisions might end up being made on what could “very well be a swing of \$1.00 in value.”

With the collateral worth \$1.00 to the junior mortgagee, Nobelman teaches that the lien may not be avoided. With the collateral worth \$1.00 less, the junior lien would be voided in full. That distinction, they say, would be unfair; and judges, they feel, do not have a level of valuation expertise that would justify distinctions that finely made. In answer, we respond that bankruptcy judges make distinctions of similar import in a variety of other contexts. As the McDonald<sup>19</sup> court aptly noted:

Bright-line rules that use a seemingly arbitrary cut-off point are common in the law. A day beyond the statute of limitations and the plaintiff must lose, even if the claim was otherwise unquestionably a winning one. If the evidence is just over a preponderance, the plaintiff wins full damages; just under, the plaintiff gets nothing. In bankruptcy law a Chapter 7 trustee cannot contest the validity of a debtor's claimed exemption when the 30-day period for objecting has expired and the trustee failed to obtain an extension; and this is true even if the debtor has no colorable basis for claiming the exemption..... What these examples show is that line drawing is often required in the law and, at the boundary, the appearance of unfairness is unavoidable.

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<sup>19</sup> In re McDonald, 205 F3d at 611-612.

Simply pointing out that some arbitrariness occurs is not a compelling objection.

In re Mann, 249 B.R. 831, 839.

Assuming the value of the subject real estate cannot be stipulated, interested parties must turn to the courts for a determination of the value of the real estate. Practitioners are encouraged to be mindful of the concerns courts have expressed of its role in that process.

d. Plan Language: Are debtors modifying the rights without really modifying the rights?

More and more case law is emerging over chapter 13 plans that contain added terms that seek to delineate the rights and obligations of the parties. Perhaps more succinctly stated: debtors are including miscellaneous plan provisions that seek to spell out certain rights, duties and obligations of parties in chapter 13 cases, and in some cases, lenders are not happy about it.

The case law varies by court and by district, and there is no bright line rule. There are however, issues, concerns and potential remedies that debtors, lenders and trustees have.

In an April 7, 2008 decision, the US Bankruptcy Court for the District of Delaware was called upon to determine two separate issues in the case of In re Watson.<sup>20</sup> The first was whether a chapter 13 plan could be confirmed if it included “provisions governing application of mortgage payments and requiring a home mortgage lender to provide timely notice of post-petition fees and charges

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<sup>20</sup> 2008 WL 934771 (Bankr.D.Del. April 7, 2008). The case citation involves four consolidated chapter 13 cases.

assessed pursuant to the relevant loan and security documents.” The second was “whether an order ...awarding a mortgage lender its fees, costs or other charges in a set amount operates as a bar to the lender’s ability to recover fees and costs in excess of what is allowed by the Court.” These issues were raised by language included in the plans.<sup>21</sup>

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<sup>21</sup> The District of Delaware’s model Chapter 13 plan did not contain terms that addressed the debtors’ concerns. The Watson debtors proposed plan language:

(1a) Long term or mortgage debt-ARREARAGE ONLY to be paid to [mortgage holder] on the mortgage in the amount of \$-. Regular monthly payment to be made directly by Debtor beginning [date]. Debtor(s) reserves the right to contest the amount of arrears filed by creditor on the proof of claim. Confirmation of the plan shall impose an affirmative duty on the holders and/or servicers of any claims secured by the liens, mortgages and/or deeds of trust and/or note on the principal residence of the Debtor(s) to do all of the following:

- (a) To apply the payments received from the trustee on the pre-petition arrearages, if any, only to such arrearages. For the purposes of this plan, the “pre-petition” arrearages shall include all sums included in the “allowed” proof of claim and shall have a “0” balance upon entry of the Discharge Order in this case.
- (b) To deem the pre-petition arrearages as contractually current upon confirmation of the plan, thereby precluding imposition of late payment charges or other default-related fees and services based solely on the pre-petition default or defaults.
- (c) To apply the direct post-petition monthly mortgage payments paid by the trustee or by the Debtor(s) to the month in which each payment was designated to be made under the plan or directly by the Debtor(s), whether or not such payments are immediately applied by the creditor to the outstanding loan balance or are placed into some type of suspense, forbearance or similar account.
- (d) To notify the trustee, the Debtor(s), and the attorney for the Debtor(s) in writing of any changes in the interest rate for any non-fixed rate or any adjustable rate mortgages and the effective date of any such adjustment or adjustments, not less than 60 days in advance of such change or at such time as the change becomes known to the holder if the change is to be implemented in less than 60 days.
- (e) To notify the trustee, the Debtor(s) and the attorney for the Debtor(s) in writing of any changes in the property taxes and/or property insurance premiums that would either increase or reduce the escrow portion, if any, of the monthly mortgage payments and the effective date of any such adjustment or adjustments no less than 60 days in advance of such change or at such time as the change becomes known to the holder if the change is to be implemented in less than 60 days.

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(f) MODIFICATIONS. The holders of the claims secured by a mortgage on real property of the Debtor(s), proposed to be cured in section 1(a) above of this plan shall adhere to and shall be governed by the following:

(i) Pre-petition Defaults. If the Debtor(s) pay the cure amount specified in section (1a) above, or in such amount as may be established by the creditor's proof of claim, while timely making all required post-petition payments, the mortgage will be reinstated according to its original terms, extinguishing any right of the holder to recover any amount alleged to have arisen prior to the filing of the petition.

(ii) Post-petition defaults. Within 30 days of issuing the final payment of the cure amount specified in section (1a) above, the trustee shall serve upon the holder, the Debtor, and the Debtor's attorney a notice stating that (1) the cure amount has been paid, satisfying all pre-petition arrearage obligations of the Debtor(s); (2) the holder is required to treat the mortgage as reinstated and fully current unless the Debtor failed to make timely payments of post-petition obligations; (3) if the Debtor failed to make timely payments of post-petition obligations, within 60 days after the trustee's notice, the holder is required to file a Statement of Outstanding Obligations, consisting of an itemization of all outstanding payment obligations which it contends are due as of the date of its statement, with service on the trustee, the Debtor(s), and the Debtor'(s) attorney; (4) if the holder fails to file and serve a Statement of Outstanding Obligations within the required time, the holder is required to treat the mortgage as reinstated according to its original terms and fully current as of the date of the trustee's notice; and (5) if the holder does serve a Statement of Outstanding Obligations within the required time, the Debtor(s) may (i) within 30 days of service of the Statement, challenge the accuracy thereof by motion filed with the Court, to be served upon the holder and the trustee, or (ii) propose a modified plan to provide for payment of the additional amounts that the Debtor acknowledges or the court determines to be due. To the extent that amounts set forth on a timely filed Statement of Obligations are not determined by the court to be invalid or are not paid by the Debtor through a modified plan, the right of the holder to collect these amounts will be unaffected. No liability shall result from any nonwillful failure of the trustee to serve the notice required by this subparagraph.

(iii) Costs of collection. Costs of collection including attorneys' fees incurred by the holder after the filing of this bankruptcy case shall be claimed pursuant to section 1(a)(6)(B) above.

(iv) In the event of a default on the regular monthly payment by Debtor after all pre-petition arrears have been paid by the trustee, and after the time set for the Statement of Obligations, the holder must submit a Statement of further Obligations within 30 days of the date in which said fees/costs were incurred for further fees and/or costs with notice to the trustee, Debtor and Debtor's attorney. (1) If the holder fails to file and serve a Statement of further Outstanding Obligations within the required time, the holder is required to treat the mortgage as reinstated according to its original terms and fully current; and (2) if the holder does serve a Statement of further Outstanding Obligations within the required time, the Debtor may (i) within 30 days of service of the Statement, challenge the accuracy thereof my motion filed with the Court, to be served upon the holder and the trustee, or (ii) propose a modified plan to provide for payment of the additional amounts that the Debtor acknowledges or the court determines to be due. To the extent that amounts set forth on a timely filed Statement of Obligations are not determined by the court to be invalid or are not paid by the

The Watson court noted one axiom about § 1322(b)(2): the Bankruptcy Code does not define the term “rights;” rather, court and parties need to turn to state law.<sup>22</sup>

The use of state law to determine property rights is not limited to ownership interests. It applies equally to security interests, including the interest of a mortgagee. In this case, therefore, the Mortgage Lenders' rights arise from the mortgage instruments, which are enforceable under state law. The rights of a mortgage lender generally include the right to repayment of the principal in monthly installments over a fixed term at specified adjustable rates of interest, the right to retain the lien until the debt is paid off, the right to accelerate the loan upon default and to proceed against petitioners' residence by foreclosure and public sale, and the right to bring an action to recover any deficiency remaining after foreclosure. Presumably, these are the sort of substantive economic rights Congress sought to protect when it enacted § 1322(b)(2). Allowing plans to modify such rights may potentially increase the risk borne by mortgage lenders and perhaps decrease the incentives in the financial marketplace to lend to potential home buyers.

Id., [citing Butner v. United States 440 U.S. 48, 54-55, 99 S.Ct. 914, 59 L. Ed.2d 136 (1979)].<sup>23</sup>

The debtors' proposed plans required lenders to give notice of any fees or charges to be assessed. If the lender failed to provide notice, the fees or

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Debtor through a modified plan, the right of the holder to collect these amounts will be unaffected.

Appendix A, In re Watson, 2008 WL 934771 (Bankr.D.Del. 2008)

<sup>22</sup> Id., [citing Nobelman v. American Sav. Bank, 508 U.S. 324, at 329] and see also Butner v. United States 440 U.S. 48, 54-55, 99 S.Ct. 914, 59 L. Ed.2d 136 (1979).

<sup>23</sup> See, e.g., In re Scarborough, 461 F.3d 406, 409-410 (3<sup>rd</sup> Circuit 2006) where the security instrument also included an assignment of rents to amend and supplement the mortgage. Debtor argued that the loan was subject to modification because the security interest extended beyond the “principal residence” and to the rents. Citing 21 Pa. Stat. Ann. § 3, the court noted that “under Pennsylvania law, real property is defined to include rents.” Modification was not permitted on that basis. However, because the claim was secured by the debtors principal residence as well as other income producing property, the creditor did not receive protection from the modification provisions of § 1322(b)(2).

charges would be disallowed or forfeited. The reason: it was necessary to ensure that at upon successful completion of the plan and receipt of the discharge, the debtors would not be saddled with a substantial amount of fees and costs accrued during the plan period. Notice, the debtors contended, would give the court an opportunity to rule on the fees and costs.

Lenders conceded that the “‘mere notice’ requirements were likely permissible” but argued that the disallowance or forfeiture of the fees and costs would amount to an impermissible modification of their contractual rights in violation of § 1322(b)(2). They also contended that the “‘rights’ which cannot be modified under § 1322(b)(2), survive to permit full recovery or collection after the Chapter 13 case is closed.” The Delaware Bankruptcy Court responded:

This cannot be. There is not a single reported decision from any court, anywhere, to support this remarkable proposition. Mortgage Lenders' argument rests on a flawed interpretation of the term “rights” as used in § 1322(b)(2). Those “rights” are determined according to state law and the contract terms. See Nobelman v. American Sav. Bank, 508 U.S. 324, 329, 113 S.Ct. 2106, 124 L.Ed.2d 228 (1993). When the Court, applying these principles, disallows a requested fee or charge, that is a determination that applicable law, or the mortgage contract, do not afford the Mortgage Lender a “right” to payment. At bottom, acknowledgment of the Court's exercise of its authority to rule conclusively upon asserted claims and charges is simply not an impermissible modification of the Mortgage Lenders' rights.

Id., [citing In re Wilson, 321 B.R. 222, 226 (Bankr.N.D.Ill.2005) (“While a court order may not be a prerequisite to the enforcement of a valid contract provisions allowing for attorneys' fees, ... neither is a court prohibited from fixing the amount of attorneys' fees even when a contractual agreement provides for the recovery of such fees.”)].

With that argument dispatched, the court faced the premise behind the plan terms. Relying on cases from Massachusetts, Illinois and Oregon, the court

found that “[p]lans containing procedures for timely notice of fees and charges, proper allocation of payments and adjudication by [the court] of disputes over assessed fees, costs and charges under a mortgage may be confirmed without running afoul of § 1322 (b)(2).” The... ‘language in a Chapter 13 plan burdening mortgagees with procedural obligations over the life of the plan does not, per se, violate § 1322 (b)(2)’s anti-modification provision and is permissible and even desirable.’”<sup>24</sup>

However, a word of caution: “the means [should not] unnecessarily confuse the process.”<sup>25</sup> It may be a commendable (if not entirely appropriate) goal to include plan provisions in an effort to ensure that debtors are not unpleasantly surprised when they have successfully completed their plan.<sup>26</sup> There are publications-a-plenty that suggest plan language that might be worthy of inclusion in a chapter 13 plan. However, such verbatim “borrowing” may lead to unwelcome results.<sup>27</sup>

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<sup>24</sup> *Id.*, [citing *In re Collins*, 2007 WL 2116416 (Bankr.E.D.Tenn. July 19, 2007)] [emphasis added]. See also, *Nosek v. Ameriquet Mortgage Co.*, 363 B.R. 643 (Bankr.D.Mass.2007). A reading of the *Nosek* cases reveals why, in the absence of local rules or orders on certain mortgage servicing issues, such provisions might be “permissible and even desirable.” In that case, Ameriquet argued that there was nothing in Chapter 13 that required it to change its accounting practices simply because one of its customers filed for bankruptcy protection. In fact, it argued that if it were required to apply payments “in a manner different from the underlying contracts, Ameriquet...would be forced to constantly monitor each debtor’s bankruptcy case, readjust their accounting methodologies, and continually recalculate how payment should be applied.” *Id.*, 363 B.R. at 649 [citing Ameriquet’s Reply Brief at p. 13]. Yet “[t]hat’s exactly the point; [the lender] must adjust its accounting practices because of [the debtor’s] bankruptcy. The Bankruptcy Code is not a cafeteria; lenders do not decide which of its provisions apply to them.” *Id.*

<sup>25</sup> *In re Anderson*, 382 B.R. 496, 509 (Bankr.D.Or. 2008).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*, 382 B.R. at 503 (fn 12)(court ultimately sustained the objections to confirmation and ordered the debtors to amend the plan, but made specific mention that the “contested paragraphs are borrowed virtually verbatim from sample paragraphs suggested in the article Challenging

Certain districts have adopted model plans, rules or orders reflecting provisions addressing some of these issues,<sup>28</sup> while other districts are appointing committees to adopt plans to “ensure uniformity in Chapter 13 practice.”<sup>29</sup> In districts where there is no uniformity, there seem to be only cases to litigate which leads courts to suggest or order what might be an appropriate plan provision for inclusion in a confirmable chapter 13 plan. As the Anderson court stated:

The court would be remiss if it did not give some guidance as to what might be “appropriate” plan provisions to ensure no surprises at plan's end. [Local order] already provides a set of procedures. However, its scope is limited. A plan provision expanding that scope, such as: “The procedures set out in [the Local Order], shall apply to *all* arrearage amounts (pre and post-petition), including *all* fees and costs, claimed by [the lenders],” would likely be “appropriate.” However, the court thinks it fair to alert the parties that this District's Local Bankruptcy Rules are currently being revised ... \* \* \* The court further notes that the following language has been approved in other Chapter 13 plans in this district[.]

Post-petition mortgage payments to secured creditor shall be applied to the first post-petition payment due under the terms of the contract.

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Mortgage Servicer “Junk” Fees and Plan Payment Misapplication: Making Use of New Section 542(i), 25 NCLC Reports: Bankruptcy and Foreclosures Ed., Nov./Dec.2006)).

<sup>28</sup> See, e.g., In re Anderson, 382 B.R. 496, 501-502 (Bankr.D.Or. 2008)(Referring to the Bankruptcy Court for the District of Oregon's General Order 97-1 as amended by General Order 98-1.); see also In re Wilson., 321 B.R. 222, 228 (Bankr.N.D.Ill 2005)(“The Chapter 13 Model Plan affords a mechanism for debtors and lenders to achieve certainty regarding the amount and payment of postpetition arrearages, fees, and costs of collection. It does not change the original contract terms of the loan, the timing, or the amount of payments but directs disputes about these issues to be resolve in the bankruptcy court. Moreover, since the Code allows Chapter 13 plans to cure any default, even if the Model Plan's provisions ‘affected’ a debtors obligations to a home lender, the effect is nothing more than the permissible curing of postpetition defaults.”)

<sup>29</sup> In re Watson, 2008 WL 934771 (Bankr.D.Del)(Bankruptcy court directed the appointment of a Special Committee for the purpose of amending the Chapter 13 plan and “modifying such other of our Local Rules relating to consumer bankruptcy practice as may be necessary and appropriate.”)

Payments from the trustee to secured creditor shall be applied to its pre-petition loan arrears claim. As long as debtor timely pays all post-petition payments, secured creditor shall not assess any fees or other charges on the basis that a post-petition payment is late.

Lender shall send such billing statements, coupons and statements regarding post-petition advances and/or charges on the loan directly to the debtor as it customarily sends when no bankruptcy has been filed.<sup>30</sup>

e. The Outlook

The line between impermissible plan modification under § 1322(b)(2) and helpful plan provisions to further proper administration is not entirely clear from district to district (or from court to court). Unless and until there is uniformity in practice, either through statutory change or court rules and orders, these issues will continue to be litigated in the months and years ahead.

The only sure thing is that a debtor whose principal residence is a single family home or condo will not be able to modify any mortgage that is secured by even the smallest amount. As property prices and values continue their downward trend, it is possible that those junior mortgagees might find themselves wholly unsecured, and subject to modification. Unless and until Congress amends § 1322(b)(2), the best that future chapter 13 debtors can hope for is a further decline in property values as that will be the gauge for determining whether a mortgagee has anything secured.

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<sup>30</sup> In re Anderson, 382 B.R. at 509 (fn 21).