

Analysis of “The Helping Families Save Their Homes Act”

By Mark S. Scarberry

Professor of Law, Pepperdine University School of Law

Robert M. Zinman Scholar in Residence, American Bankruptcy Institute

Sen. Richard J. Durbin (D-Ill.) plans to introduce a bill that would make important changes in the treatment of home mortgages in consumer bankruptcy cases. Because it has not yet been introduced, the draft bill—entitled the “Helping Families Save Their Homes Act of 2007”—does not have a bill number. Its text may, of course, be changed before it is introduced.

The bill would provide debtors aged 55 or older with a minimum \$75,000 homestead exemption in any equity they might have in their homes. It also would provide for a mortgage to be forfeited—eliminated both as a personal liability of the debtor and as a lien on the home—if the holder of the mortgage failed to comply with any of several sections of the Truth in Lending Act or “any provision of applicable State constitution, law, or regulation that was in force at the time at which such debt was incurred.”

The bill would make substantive changes in treatment of mortgages in chapter 13. It would eliminate the special protection against modification of home mortgages now found in §1322(b)(2). It would allow the lien of a home mortgage to be stripped down to the value of the home in a chapter 13 case, and would allow the chapter 13 debtor to pay the stripped-down mortgage over thirty years at a court-determined interest rate. It would limit—to claims secured solely by personal property—the requirement that equal monthly payments be made on secured claims in chapter 13, thus making clear that a chapter 13 plan may provide for a balloon payment of a mortgage at the end of the plan pursuant to an anticipated refinancing. It also would limit the fees that could be added to a home mortgage due to occurrences during the chapter 13 case; only fees approved by the bankruptcy court could be added, and then only to the extent that the mortgagee was oversecured.

In chapter 7 cases, the bill would expand the §722 redemption provision to include the debtor’s principal residence. The home could be redeemed by a lump sum payment of the lesser of the secured claim or the home’s liquidation value (net of costs of sale, according to the draft section-by-section summary). That may allow some debtors to redeem by refinancing.

In chapter 11 cases in which the debtor holds consumer credit claims, the bill would ensure that transfers of those claims pursuant to a chapter 11 plan or a court order accompanying the plan would not cut off consumers’ claims or defenses to any greater extent than would a sale under nonbankruptcy law. This will provide consumers the same protection when such transfers take place that they already are provided, under §363(o), when consumer credit claims are sold under §363.

The draft bill also includes several provisions not limited to mortgages or to any particular chapter of the Code. With respect to consumer debtor cases, arbitration agreements would be unenforceable in civil proceedings arising under the Code or arising in or related to the bankruptcy case. Failure to schedule a claim held by the debtor as an asset of the estate would not result in dismissal of an action later brought by the debtor on that claim; instead, the trustee could request to be joined or to substituted as the real party in interest, absent which the debtor could proceed as the real party in interest. The debtor's certification that a mortgagee has initiated a judicial or nonjudicial foreclosure on the debtor's principal residence would trigger a waiver of the §109(h) credit counseling requirement, so that the debtor could seek bankruptcy relief without delay.