

This is the twenty-fifth in my series of newsletters. Due to your great interest, I plan to continue this quarterly report for my clients.

CURRENT STATUS OF BANKRUPTCY REFORM

Too many of my clients do not seem to realize the implications of what Congress is attempting to do in reforming the current bankruptcy law. In December 2000, Congress passed the dramatic reforms that were discussed in the June, 2000 newsletter. However, former President Clinton vetoed the pending legislation in December, 2000. However, there is no sign that the new Congress will let up on this draconian legislation.

In the January 11, 2001 Philadelphia Inquirer, an article reported that MBNA Corporation reported record earnings of 1.3 billion in profits. In spite of the huge profits, MBNA has been extremely active in bankruptcy reform legislation and donated generously in the 2000 election campaign to candidates who supported its position on bankruptcy legislation.

In summary, the credit card companies will continue to push for draconian bankruptcy reform as follows:

- 1) Means Testing;
- 2) Mandatory pre-bankruptcy debt counseling;
- 3) Post bankruptcy financial management instructions;
- 4) Strict prohibitions on refiling;
- 5) Restrictions on discharging debts;
- 6) Extreme limitation on cram downs on secured collateral;
- 7) Requirement of adequate protection payments plus trustee payments;

These are only a few of the draconian changes that the credit card lobby is trying to enact. I urge you to write your Congressman and Senators since these issues are not going to vanish.

THIRD CIRCUIT ALLOWS CRAM DOWN OF UNDERSECURED MORTGAGES

In previous newsletters I advised you that you could only cram down a junior mortgage if the Mortgage Company took additional collateral such as doors, windows, etc. However, the Third Circuit Court of Appeals in In Re McDonald, held 205F 3d 606 (3d cir 2000) that the anti-modification clause in 11 USC 1322 (b)(2) does not apply to a second or junior mortgage if the mortgage is wholly unsecured by any remaining value in the residence.

In McDonald, the value of the home was \$126,400 and the balance on the first mortgage was \$127,633.33 and the balance on the second mortgage was \$4,6846.42. In it's analysis the Third circuit looked at 11 USC 506(a) and 11 USC 1322 (b), which provides that a Chapter 13 Plan may "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real estate that is the debtor's principal residence."

In reviewing Nobleman v American Savings Bank, 508 US 324, 113 S. CT 2106 (1993), the Third Circuit reconciled Nobleman by stating that the anti-modification clause of 11 USC 1322 (d)(2) uses “claim” rather than secured claim and applies to both secured and unsecured parts of a mortgage; however the anti-modification language still states that the claim must be “secured only by a security interest, in the debtor’s principal residence.” Thus, if a mortgage is wholly unsecured then the junior mortgage has a wholly unsecured claim and the anti-modification clause would not apply 205 F 3d at 612.

Based on this analysis, in a case like McDonald where there is absolutely no equity in the second mortgage, you can cram down the second or junior mortgage. The last issue is that in order to cram down the second or junior mortgage, you may have to bring expert testimony to establish valuation since if there is one dollar in value, you would lose in cramming down the junior mortgage.

If you’re home is totally encumbered and your home is totally undersecured feel free to contact me. PLEASE NOTE THE HOUSE AND SENATE BILLS SEEK TO ELIMINATE CRAM DOWNS.

PENSION LOANS AND BANKRUPTCY

Many of my clients who file Chapter 13 attempt to discharge all their general unsecured debts but have a pension loan deducted from their paycheck bi-monthly.

After they appear at the creditors meeting they get an objection from the trustee that it is improper to allow the pension loan deduction and the trustee wants this added back into their disposable income.

The Third Circuit Court of Appeals in In re Ames, 195 F. 3d 177 (3rd Cir. 1999) held that it is improper for a debtor to use his disposable income for repayment of respective retirement systems without full satisfaction of other unsecured creditors. 195 F.3d at 181

In it’s analysis, the Court looked to 11 USC 1325 (b)(1)B which requires that “The plan provides that all of the debtor’s projected disposable income to be received in the three-year period beginning on the date the first payment is due under the plan will be applied to make payments under the plan.”

The Court concluded that disposable income is income not reasonably necessary to be expended for the maintenance or support of the debtor or dependant.” Id.at180. Since voluntary contributions are not reasonably necessary for the maintenance or support, they must be made from disposable income. Id. at 181. Thus, since the debtors have used their disposable income for repayment of their respective retirement plans without full satisfaction of unsecured creditors, the plan was rejected under section 1325 (b)(1)(B). Id.

In addition, the Third Circuit rejected the debtors’ contention that the doctrine of recoupment applied and refused to allow pension plans to deduct loan payments from their paychecks postpetition. Id. at 181-182.

Finally, the Court also held that pension plans could not make postpetition deductions of loan payments from debtors’ paychecks on the ground of setoff. Id. at 183. What does this mean? If you have a pension loan coming out of your

paycheck the trustee will add this into your disposable income and you will have to use that payment towards unsecured creditor.

If you have any questions concerning this matter, always feel free to contact me.

LET ME ANSWER ALL YOUR QUESTIONS

As my law practice continues to grow, I hope to help you in all areas of the law where I have helped my other clients. Remember, even if I am not familiar with a specific area of the law, I work with other lawyers who are well qualified to handle these matters. Therefore, if you have any question on any legal matter whatsoever, please ask me about it.

IF YOU LIKE MY WORK, SPREAD THE WORD.

I appreciate the confidence my clients show by referring new business to me. Such referrals are my largest and best source of new clients. Please let me know if you have a friend or relative who needs legal assistance or who would like to receive one of my quarterly newsletters.

I sincerely appreciate all the referrals from so many of you over the past several years. Thank you for your continued confidence and good will.

If you would like me to speak at your organization or place of worship, feel free to contact me.